STATE OF SOUTH CAROLINA COUNTY OF RICHLAND T.R., P.R., K.W. and A.M., *et al.*, ☐ Plaintiffs, v. South Carolina Department of Corrections; *et al.*, ☒ Defendants.	)	IN THE COURT OF COMMON PLEAS Civil Action No. 2005-CP-40-2925 **MOTION & ORDER INFORMATION FORM COVER SHEET**

2014 JAN 21 PM 4:02

Plaintiffs' Counsel:	***Defense Counsel/Moving Party:***
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☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: **Notice of Motion and Motion to Alter or Amend Order Pursuant to Rule 52(b), and Rule 59(e), SCRCP *(To Be Heard by Judge Baxley)***

Estimated Time Needed: **2 hours** Court Reporter Needed: ☒ **Yes** / ☐ No

SECTION II: Motion/Order Type

☒ **Written motion attached**
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Counsel for Defendants

January 21, 2014
Date Submitted

Motion & Order Information Form Cover Sheet
Civil Action No. 2005-CP-40-2925

SECTION III: Motion Fee

☒ **PAID - AMOUNT: $25.00**

☐ EXEMPT: (check reason)
- ☐ Rule to Show Cause in Child or Spousal Support
- ☐ Domestic Abuse or Abuse and Neglect
- ☐ Indigent Status ☐ State Agency v. Indigent Party
- ☐ Sexually Violent Predator Act ☐ Post Conviction Relief
- ☐ Motion for Stay in Bankruptcy
- ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
- ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter:
- ☐ Other:

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ DATE: _____

CLERK'S VERIFICATION

Collected by: _____ Date Filed: _____

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED - AMOUNT DUE: _____

STATE OF SOUTH CAROLINA **COUNTY OF RICHLAND**	)	**IN THE COURT OF COMMON PLEAS**
T.R., P.R., and K.W., on behalf of themselves and others similarly situated; and Protection and Advocacy for People with Disabilities, Inc., Plaintiffs, v. South Carolina Department of Corrections; and William R. Byars, Jr., as Agency Director of the South Carolina Department of Corrections, Defendants.	)	Civil Action No. 2005-CP-40-2925 **NOTICE OF MOTION AND MOTION TO ALTER OR AMEND ORDER PURSUANT TO RULE 52(b), AND RULE 59(e), SCRCP**

TO: THE HONORABLE J. MICHAEL BAXLEY

DANIEL J. WESTBROOK, ESQUIRE, AND STUART M. ANDREWS, JR., ESQUIRE, COUNSEL FOR PLAINTIFFS

YOU WILL PLEASE TAKE NOTICE that the undersigned attorneys for the Defendants will move before the Honorable J. Michael Baxley, at such time and place as the Court may direct, pursuant to Rule 52(b) and Rule 59(e), SCRCP, for an Order altering or amending the Order Granting Judgment in Favor of Plaintiffs, filed January 8, 2014. The Order was received electronically from Plaintiff's counsel on January 8, 2014.

The grounds for this motion are as follows:

1. The Order did not address or adjudicate the following defenses and legal arguments made by Defendants, as set out in the attached letter from the Defendants' counsel to Judge Baxley dated November 11, 2013, and attached as Exhibit 1 hereto:

(a) The failure of the Plaintiffs to sustain their burden of proving standing under applicable South Carolina law and the decision of the United States Supreme Court in *Lewis v. Casey*, 518 U.S. 343 (1996).

(b) The failure of the Plaintiff Protection and Advocacy for People with Disabilities, Inc. to sustain its burden of proving associational standing.

(c) 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).

(d) The application of the separation of powers doctrine, including specifically the application of the law of this case as established by this Court's unappealed and now final rulings dismissing the South Carolina General Assembly as a party-defendant in this litigation.

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

(f) 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.

(g) 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.

(h) The Court's failure to apply the directive of the South Carolina Supreme Court that the Cruel and Unusual Punishment Clause of Article I, § 15 of the South Carolina Constitution should be construed and applied under the same analysis as applied to the Eighth Amendment of the United States 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"). As a result, Article I, § 15 should be construed and applied in accordance with the federal law that actually governs the South Carolina Department of Corrections 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, including by way of example the decision of the Fourth Circuit in *Williams v. Branker*, 2012 WL 165035 (4th Cir. 2012), which address issues related to the provision of mental health care in prisons. 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 adopting case law from other federal circuits in conflict thereof, this Court's decision creates inconsistency and establishes two differing standards for SCDC to follow under the State and Federal Constitutions. The same policy or conduct by the Department of Corrections should not be deemed constitutional under the Eighth Amendment per federal case law and yet unconstitutional under Article I, § 15 per the decision of this Court.

The issues set forth above have been previously raised and discussed in briefs or legal memoranda filed by the Defendants during the course of this litigation, as well as during arguments during the trial of this case. Each of these issues was also discussed at length during the closing arguments held at the end of the trial,[1] and with respect to the issue of standing, the Court required the parties to submit further briefing post trial. However, the Court has not ruled on any of these issues in its Order Granting Judgment in Favor of Plaintiffs, filed January 8, 2014.

Citing Rules 52(b) and 59(e), the South Carolina Supreme Court has explained that "[i]f the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). Furthermore, in *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate

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[1] The Defendants incorporate by reference the detailed legal arguments contained in the transcript of the closing arguments at trial as well as the notebook of federal cases submitted to the Court which includes numerous cases where the same issues have been adjudicated in the Defendants' favor by the federal courts.

review only when they are raised to *and ruled on* by the lower court." 602 S.E.2d at 779-780. (Emphasis added).

Therefore, in order to ensure that these issues and arguments are properly preserved for appellate review, the Defendants again request that the Court adjudicate each and every one of these issues and defenses. By letter dated November 11, 2013, the Defendants' counsel requested this very relief – that the Court address these issues and defenses; yet, the Court continues to decline to do so without providing any explanation therefor. The Court's continued refusal to address these legal defenses, which importantly include issues of subject matter jurisdiction such as the Plaintiffs' lack of standing to proceed and other issues related to whether a "case or controversy" exists, results in a denial of the Defendants' due process rights. Importantly, the Court's actions deprive the Defendants of fundamental fairness by ruling on the Plaintiffs' allegations but refusing to rule on the Defendants' defenses, including important jurisdictional, justiciability, and other constitutional issues.

Instead of including a discussion of the legal defenses and issues raised by the Defendants in the Order as required, the Court sent the Defendants' counsel an email dated January 8, 2014 (which is the same date as the Order was filed), which states: "From reading the proposed order, you will notice that Judge Baxley did not include the issues you suggested given his preliminary rulings throughout the progress of the case." *See*, Email dated January 8, 2014 (attached as Exhibit 2). However, Judge Baxley did not make "preliminary rulings" on a majority of the defenses and issues cited herein; instead, those defenses and issues have been completely disregarded. Furthermore, with respect to any defenses or issues in which "preliminary rulings" may have been made during trial, the Court is well aware that *final rulings in writing* are required to be made. *See*, *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. Ap.. 2010) (case where appeal was dismissed after Judge Baxley failed to

memorialize oral rulings in a written order). In fact, on the jurisdictional issue of standing, the Court provided what Judge Baxley called a "preliminary determin[ation]" by way of a July 27, 2012 letter wherein the Court made clear that the letter was issued "without making any final decisions and thus declining to issue any partial or final Order at this time." *See*, Letter dated July 27, 2012 (attached as Exhibit 3). That letter also did not include any legal citations or detailed discussion of the issue of standing, and most importantly, the Court did not explain how any finding of standing for Plaintiff T.R. is consistent with or in accord with the seminal decision of the United States Supreme Court in *Lewis v. Casey*, 518 U.S. 343 (1996).

By way of this motion filed pursuant to Rules 52(b) and 59(e), the Defendants respectfully request again that the Court adjudicate the defenses and issues raised by the Defendants and for which no final written order has been issued. The Defendants further request that based thereon the Court dismiss the Plaintiff's remaining claim and enter judgment for the Defendants.

2. The Court's Order failed to include or make note of the dismissal of the Plaintiffs P.R. and K.W. as party-plaintiffs when the evidence clearly reflected and the Court acknowledged that P.R. and K.W. are no longer incarcerated and may no longer serve as class representatives. Furthermore, the Plaintiffs presented no evidence regarding P.R. or K.W. at trial.

3. The Order incorrectly reviewed the evidence based on the "minimally adequate" standard that the Court concluded was embodied in Article XII, § 2. This is shown by the fact that the Court's letter dated August 23, 2013, announcing its decision and requesting that Plaintiffs' counsel prepare a proposed order, stated that the six *Ruiz* factors "would serve as benchmarks for determining whether SCDC provided *minimally adequate* mental health services." *See*, Letter dated August 23, 2013, p. 3 (attached as Exhibit 4). (Emphasis added).

The Plaintiffs' counsel reminded the Court in an e-mail dated August 26, 2013 (contained in Exhibit 5) that the Plaintiffs had voluntarily dismissed their Article XII, § 2 "minimally adequate" claim. 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 the Court's August 27, 2013 e-mail (contained in Exhibit 5), the parties were advised that "the evidence in the two constitutional claims is substantially similar." This latter assertion conflicts with the prior positions of the Court on this issue, as well as conflicts with the positions of both parties on the point.

4. The Order likewise did not acknowledge that the standard for establishing a cruel and unusual punishment claim is that "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), which holds 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.

5. The Order is without specific legal support, as shown by the fact that it contains no discussion at all of the specific facts of any decided case, state or federal, that would serve as a comparison with the specific facts of the present case. For instance, the Order does not discuss

Williams v. Branker, 2012 WL 165035 (4th Cir. 2012), a case in which the Fourth Circuit held that conditions similar to some of the conditions in the present case did not violate the Eighth Amendment. The Order, in fact, cites no federal case law that has adjudicated similar claims brought by inmates under the Eighth Amendment against SCDC and its employees, including the many cases provided by the Defendants' counsel to the Court.

6. The Order was in error in relying exclusively on either the opinions of Plaintiffs' experts or on American Correctional Association Standards, or both. However, the United States Supreme Court held more than 30 years ago that ACA 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).

7. Even if the Plaintiffs have presented some evidence of systemic constitutional violations, which the Defendants deny, the extensive remedies ordered by the Court are far in excess of what might be necessary to remedy any alleged violations. Court-ordered remedies in federal cases in the 1970s, 1980s and 1990s that were similarly too broad led Congress to enact 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).[2]

While the PLRA is not binding in this state court litigation, it provides guidance for a properly limited role of courts and in deciding how systemwide 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 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).[3]

8. The Court also erred in holding that because "it is the action of a circuit court that triggers the placement of an inmate into the custody of SCDC, under Court authority" then "the Court has the inherent power – and responsibility – to see that the imprisonment of that inmate complies with constitutional mandates." No such inherent authority exists under South Carolina law. In fact, 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

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[2] *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.

[3] It is noted that this Court's Order does not rely on – let alone even cite 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*.

instance, *matters of executive rather than judicial 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*]."

CONCLUSION

For the foregoing reasons, the Defendants respectfully request that the Court alter or amend its Order filed on January 8, 2014, as requested herein, and enter judgment in favor of the Defendants.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

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Counsel for Defendants South Carolina Department of Corrections and William R. Byars, Jr.

Columbia, South Carolina

January 21, 2014

Exhibit 1

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

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Andrew F. Lindemann*
James M. Davis, Jr.†
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Of Counsel
Kenneth P. Woodington

November 11, 2013

Via Email Only
The Honorable J. Michael Baxley
Presiding Circuit Court Judge
531 East Carolina Avenue
Hartsville, South Carolina 29550-4311

RE: T.R., P.R., K.W. and A.M., et al. v. South Carolina Department of Corrections; et al.
Civil Action Number: 2005-CP-40-2925
Our File Number: 340.6875

Dear Judge Baxley:

Please accept this letter as the comments that the Court has allowed from the Defendants with respect to the proposed Final Order submitted by Plaintiffs. Thank you for the opportunity to offer some comments before you finalize your decision.

In your August 23, 2013 letter, you directed as follows: "Attorneys for Defendants are not asked to agree or consent to this Order, but are requested to review it for mistake of fact or misstatement of their party's position." Given those directions regarding "mistake of fact," we are uncertain what the Court is specifically looking for. Suffice it to say, the Defendants disagree with the Court's findings of fact on the whole. We believe that the vast majority of the factual findings are unsupported by the evidence that was properly admitted in the record, and thus, would constitute "mistake of fact." Likewise, the Defendants do not waive the evidentiary objections made during the trial of the case. However, our response would be lengthy if the Court is asking us to comment on whether the findings of fact are erroneous. If that is the type of commentary that the Court is seeking at this juncture, please advise and we can gladly offer that discussion.

As for the "misstatement of the party's position," we would point out, with all due respect, that the proposed Final Order includes no discussion of critical legal issues and defenses. As the Court is well aware, this Court's preliminary rulings on issues of justiciability and subject matter jurisdiction as well as denials of pre-trial motions to dismiss on various defenses are not binding or final rulings. In such cases as *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379

(1994) and *McLendon v. South Carolina Department of Highways and Public Transportation*, 313 S.C. 525, 443 S.E.2d 539 (1994), the South Carolina Supreme Court has explained that a trial court's preliminary rulings in denying a motion to dismiss or a motion for summary judgment do not establish the law of the case and those issues or defenses must be re-asserted at trial in order for a final binding decision to be rendered. Therefore, as the Defendants' counsel argued during closing argument to this Court, the issues of justiciability and the defenses raised by the Defendants must be addressed in this Court's Final Order.

The proposed Final Order forwarded by the Plaintiffs' counsel fails to address any of those critical and, in our judgment, dispositive legal issues. Therefore, in an attempt to avoid a Rule 52(b) motion to preserve these issues for appeal, the Defendants would respectfully request that the Court address each of the legal issues and defenses argued in the Defendants' motion for involuntary non-suit at the close of the Plaintiffs' case-in-chief and re-asserted at the close of the case. Those issues include the following:

(a) The failure of the Plaintiffs to sustain their burden of proving standing under applicable South Carolina law and the decision of the United States Supreme Court in *Lewis v. Casey*, 518 U.S. 343 (1996).

(b) The failure of the Plaintiff Protection and Advocacy for People with Disabilities, Inc. to sustain its burden of proving associational standing.

(c) 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).

(d) The application of the separation of powers doctrine, including specifically the application of the law of this case as established by this Court's unappealed and now final rulings dismissing the South Carolina General Assembly as a party-defendant in this litigation.

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

(f) 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.

(g) The Plaintiff's 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.

(h) The Court's failure to apply the directive of the South Carolina Supreme Court that the Cruel and Unusual Punishment Clause of Article I, § 15 of the South Carolina Constitution should be construed and applied under the same analysis as applied to the Eighth Amendment of the United States 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"). As a result, Article I, § 15 should be construed and applied in accordance with the federal law that actually governs the South Carolina Department of Corrections 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, including by way of example the decision of the Fourth Circuit in *Williams v. Branker*, 2012 WL 165035 (4th Cir. 2012), which address issues related to the provision of mental health care in prisons. 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 adopting case law from other federal circuits in conflict thereof, this Court's decision will create inconsistency and will establish two differing standards for SCDC to follow under the State and Federal Constitutions. The same policy or conduct by the Department of Corrections should not be deemed constitutional under the Eighth Amendment per federal case law and yet unconstitutional under Article I, § 15 per the decision of this Court.

The foregoing are all issues of justiciability, public policy, and defenses that the Defendants raised during the trial and at the close of the evidence. The Defendants therefore

respectfully request that the Court fully consider, adjudicate, and address these issues in its Final Order.

Thank you again for the opportunity to make these comments before the issuance of the Final Order. If you have any questions or require any further briefing or discussion of any of these issues, please let us know.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

William H. Davidson, II

Andrew F. Lindemann

AFL/

cc: Daniel J. Westbrook, Esquire *(Via Email Only)*
Stuart M. Andrews, Jr., Esquire *(Via Email Only)*

Exhibit 2

Andrew Lindemann

From: Baxley, J. Michael Law Clerk (James H. Scruggs, III) <JBaxleyLC@sccourts.org>
Sent: Wednesday, January 08, 2014 3:23 PM
To: Andrew Lindemann
Cc: William H. Davidson II
Subject: SCDC Final Order

Mr. Lindemann,

I hope this email finds you well. I was hoping to reach you by telephone but was unsuccessful, and wanted to send you a brief note on behalf of Judge Baxley thanking you for your comments submitted in connection with the Final Order. From reading the proposed Order, you will notice that Judge Baxley did not include the issues you suggested given his preliminary rulings throughout the progress of this case. We appreciate the professional manner in which you argued these points and look forward to continuing to work with you.

Sincerely,
Jamie Scruggs

James H. Scruggs, III
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Circuit Court of the Fourth Judicial Circuit
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Exhibit 3

State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL
BAXLEY
JUDGE

531 EAST CAROLINA AVENUE
HARTSVILLE, SOUTH CAROLINA 29550
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July 27, 2012

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Re: T.R., P.R., and K.W. et. al. v. SCDC
C/A No: 2005-CP-40-02925

Gentlemen:

Thank you for the information and memoranda you provided in response to our request for additional briefing on Defendant's closing argument for dismissal on the issue of standing, and Plaintiffs' subsequent motion for intervention by new representative parties. After review of the arguments made by both sides, as is more fully explained below, the Court has preliminarily determined that the plaintiff class, including SCP&A and T.R., has standing to pursue their claims and, at the same time, the Court declines to allow a post-trial substitution of intervenors to replace current class representatives for whom no evidence was adduced at trial.

On the issue of standing, at the time of trial, T.R. was the only named Plaintiff remaining in the custody of SCDC. Although T.R. himself never testified, Plaintiffs presented evidence at trial of systemic deficiencies in SCDC's mental health program that expose every inmate with serious mental illness—including specific

reference to T.R.—to a substantial risk of serious future harm. Under this Court's Order on Constitutional Standards dated September 29, 2010, injury in an Eighth Amendment case alleging systemic deficiencies may be established by evidence of a substantial risk of serious future harm. Therefore, under this constitutional standard governing this case and the evidence presented at trial, T.R. and, by extension, the entire plaintiff class have standing to pursue their claims.

As to Plaintiffs' proposed intervention of six different individuals as class representatives, the Court finds that the motion to intervene is untimely. More than two years before this case was tried, in October 2009, Plaintiffs were aware that T.R. was the sole remaining class representative still within SCDC custody. Therefore, Plaintiffs have known for at least that long that the claims made by the other named class representatives were moot. Moreover, allowing intervention at this late date would greatly prejudice Defendants, who conducted discovery and tried the case without any indication that the proposed intervenors would be asked to be treated as class representatives. For these reasons, the Court declines to allow the proposed intervention.

Based upon the above, without making any final decisions and thus declining to issue any partial or final Order at this time, the Court is of the opinion that the Plaintiffs' class has sufficiently survived the trial process for this Court to conduct an additional hearing solely on the issue of remedy, so that a final decision may be made in this case. Because there was evidence concerning damages and remedies set forth at trial, the Court does not wish to open the record for new witnesses, but rather to receive arguments from counsel, based on the existing record, as to the specifics of the remedies requested, the physical plant costs associated therewith for construction and operation, the additional personnel necessary to accommodate such remedies and the resulting personnel costs, as well as what ongoing oversight (if any) the Plaintiffs propose to administer such remedies. Stated differently, the Court asks the Plaintiffs to propose a reasonable and specific overall final remedy plan, divulge such plan to the Defendants at least thirty (30) days prior to the remedy hearing, and the Court will schedule mutually agreeable and sufficient court time to conclude the matter.

In conducting the hearing, it is not the Court's intention to call witnesses, but for counsel to argue from the record that has already been made, and present such exhibits as are necessary to assist the parties and the Court in focusing solely on the issue of remedy. Also at the hearing, the Court will be prepared to hear arguments on Defendant's post-trial motion to enforce the protective order in this case, or in the alternative for the issuance of a rule to show cause. Finally, after the hearing on the remedy, we will also be prepared to accept and hear any motions at the close of all the evidence. The parties are asked to confer among themselves as to the date of the hearing and court time necessary therefor, and a timetable for the preparation and sharing of plans and proposed exhibits, and you are further

requested to advise the Court within fifteen (15) days of the date of this letter what agreement you have been able to reach. Please be aware that, as of today's date, Mason King is no longer working in this office and has move to private practice. Please address your responses to judicial assistant Jamie Capell (jbaxleysc@sccourts.org) until September 1, by which time we will have law clerk Jamie Scruggs on board and up to speed on this case.

Please be advised that the import of this letter is not to advise that the Plaintiffs have won the case at the trial level and will receive a verdict in their favor. This determination is yet to be made. The Court has merely determined that there exists sufficient evidence in this record for the Court to consider the remedial phase of the case. Obviously, as in many equitable cases, even if the Plaintiff does meet the burden of proof, the practicality and plausibility of the remedy requested may ultimately drive the decision in the case. Again, thank you for the information you provided the Court as well as your patience while the decision in this case remains under advisement.

Sincerely,

J. Michael Baxley
JMB/mwk

Exhibit 4

State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL
BAXLEY
JUDGE

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Re: T.R., P.R., K.W., et al. v. South Carolina Department of Corrections, et al.
C/A No.: 2005-CP-40-02925

NOTICE: THIS LETTER ANNOUNCING THE COURT'S DECISION IS NOT A COURT ORDER AND IS NOT TO BE CONSIDERED A FINAL DECISION WITH REGARD TO ANY ISSUE ADDRESSED HEREIN. THE COURT RESERVES THE RIGHT TO ALTER, AMEND, DELETE, OR ADD TO ANY PORTION OF THE DECISION OUTLINED HEREIN, AND NO PART OF THE DECISION IS FINAL UNTIL AN ORDER IS ISSUED.

Counsel:

It has been the privilege of this writer to serve the State of South Carolina as a general jurisdiction judge for fourteen years. At the time this case was heard, Court Administration reported there were more than 5,000 new case filings per year for each of our state's circuit court judges. Thus, over 70,000 cases of every imaginable sort have come to this Court over the years. This case, far above all others, is the most troubling.

The evidence in this case has proved that inmates are dying in the South Carolina Department of Corrections for lack of basic mental health care. As a society, and as citizen jurors and judges make decisions that send people to prison, we have the reasonable expectation that those in prison—even though it is prison—will have their basic health needs met by the state that imprisons them. And this includes mental health. The evidence in this case has shown that expectation to be misplaced.

Economic downturn and financial pressures have brought great change to our country. One of these is that the various state Departments of Corrections are now more than ever the collection place of the seriously mentally ill among the citizenry. The incidence of serious mental illness within the general population is less than one percent. In the typical Department of Corrections, it is between 15 and 20%. In South Carolina, the evidence in this case shows it to be approximately 17%, in spite of the Department's claim that it is 12.9%. If 17% of the prison population had advanced cancer, and there was inadequate and in some cases nonexistent treatment for cancer in prison, the public would be outraged. Yet this is the case for serious mental illness.

This litigation does not occur in a vacuum. What happens at the Department of Corrections impacts all of us, whether it be from the discharge of untreated seriously mentally ill individuals from prison into the general population, or tremendously increased costs for treatment and care that might have been prevented, or the needless increase in human suffering when use of force replaces medical care. The decisions of our Courts reflect the values of our society. To that end, our state can no longer tolerate a mental health system at the South Carolina Department of Corrections that has broken down due to lack of finances and focus.

While the Court finds the inadequacy of the mental health system at SCDC has not occurred by design, but instead by default, the Court further finds this decision in favor of Plaintiffs should not come as a shock to SCDC. Previous internal and external reviews of the SCDC mental health system have found multiple inadequacies and failures. The Court recognizes that the Department is underfunded and understaffed in many particulars, not just mental health services delivery. The operation of any state agency is a matter of competing priorities, and the General Assembly, as keeper of the public purse, is not in a position to excessively fund any entity. Thus, this decision will ultimately require an increase in priority for mental health services commensurate with the level of serious mental illness within the prison population.

DECISION

In its prior Order Setting Forth Applicable Constitutional Standards ("Order"), the Court delineated the standards of liability and burdens of proof applicable to Plaintiffs' constitutional claims under Article I, § 15 and Article XII, § 2 of the South Carolina Constitution. To prevail on the claim under Article I, § 15, the Court stated that Plaintiffs must prove that Defendant acted with "deliberate indifference to serious medical needs of prisoners." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). This deliberate indifference standard contains both an objective and subjective component. *See Farmer v. Brennan*, 511 U.S. 825, 834-37 (1994). To satisfy the objective component, Plaintiffs must demonstrate that the risk of harm to which they are subjected is sufficiently serious. *Id.* The subjective component is met by proof that a defendant "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* As to Plaintiffs' claim under Article XII, § 2, the Court held that the issue was whether the South Carolina Department of Corrections' ("SCDC") program for delivering mental health services is minimally adequate.

The Court stressed the different analyses applicable to each constitutional claim, and also noted the need for guideposts in ruling on Plaintiffs' claims. Accordingly, within these legal frameworks, the Court identified and articulated six factors[1] that would serve as benchmarks for determining whether SCDC provided minimally adequate mental health services. Stated succinctly, the evidence at trial should establish whether the SCDC mental health services system contained the following adequately functional components:

1. A systematic program for screening and evaluating inmates to identify those in need of mental health care;

2. A treatment program that involves more than segregation and close supervision of mentally ill inmates;

3. Employment of a sufficient number of trained mental health professionals;

4. Maintenance of accurate, complete, and confidential mental health treatment records;

5. Administration of psychotropic medication only with appropriate supervision and periodic evaluation; and

6. A basic program to identify, treat, and supervise inmates at risk for suicide.

---

[1] *See Ruiz v. Estelle*, 503 F. Supp. 1265, 1339 (S.D. Tex. 1980).

Employing these factors in the context of the analytical frameworks applicable to each of Plaintiffs' constitutional claims, the Court finds by a preponderance of the evidence that the Plaintiffs have met the burden of proof with respect to each of their constitutional claims against the Defendant SCDC only. All other remaining Defendants are dismissed based upon the lack of evidence put forth against that particular party. Any remaining pending motions are hereby dismissed as moot. With regard to Plaintiffs' claims against SCDC, the Court makes the following threshold findings.

First, the mental health program at SCDC is severely understaffed, particularly with respect to mental health professionals, to such a degree as to impede the proper administration of mental health services. This deficiency has a substantial impact on every aspect of the mental health program, beginning at Reception and Evaluation, continuing into the treatment programs for mentally ill inmates, and ending with deficient discharge planning for seriously mentally ill inmates being returned to the general public.

Second, seriously mentally ill inmates are exposed to a disproportionate use of force and segregation when compared with non-mentally ill inmates. Segregation is often used in lieu of a treatment plan, an action that has severe consequences for inmates suffering from mental illness, particularly those in crisis, including concomitant behavioral issues that place all inmates and corrections officers at risk; disturbance in eating and sleeping cycles, disruption of medication administration, and deepening mental illness that has caused the death of multiple inmates; and, the stigmatization of mental illness as opposed to treatment that prevents many mentally ill inmates from participating in the mental health system.

Third, mental health services at SCDC lack a sufficiently systematic program that maintains an accurate and complete record to chart a mentally ill inmate's treatment, progress, or regression.

Last, SCDC's current policies concerning suicide prevention are inadequate and have resulted in the unnecessary loss of life among seriously mentally ill inmates.

As a result of the above findings, the Court grants judgment in favor of the Plaintiffs on both constitutional claims.

Below, the Court has separated the remainder of this letter into two sections. The first Section articulates the factual findings and conclusions underlying the Court's decision by examining each of the six *Ruiz* factors listed above. The findings made therein are by a preponderance of the evidence. Section Two then goes on to address the remedy the Court will grant in this case and the mechanism used to achieve it.

With regard to the factual findings and conclusions mentioned below in Section One, there are several references to individual circumstances involving specific inmates. The Department argued at trial that references to individual inmates and their particular situation was anecdotal and not indicative of the general administration of mental health services. Moreover, counsel for SCDC

essentially argued that some of the specific inmate situations were "outliers" in that such was a constellation of unique events and circumstances that brought about an unfortunate result. The Court specifically rejects that argument. While no system involving thousands of inmates is expected to be perfect, the Court finds that the individual circumstances referred to below are the result of a system that is inherently flawed in many respects, understaffed, underfunded, and minimally inadequate.

I. FACTUAL FINDINGS/DISCUSSION

A. A systematic program for screening and evaluating inmates to identify those in need of medical care.

As of 2011, 12 to 13% of the SCDC inmate population had been diagnosed by SCDC with a mental illness and were on the Department's mental health caseload. Based on that data, with a total inmate population at the time of trial of 23,306, a 12.9% fraction yields an approximate figure of 3,006 inmates that have been diagnosed as seriously mentally ill.[2] Based on universally accepted national statistics, evidence presented to the Court at trial strongly indicates this percentage should be much higher. Multiple studies conducted nationwide suggest that a more accurate percentage of inmates with a serious mental illness should be somewhere in the range of 15 to 20%. In addition, Dr. Raymond F. Patterson, M.D. testified that after detailed analysis his approximate figure for SCDC was 17%, and the Court finds the bases of his analysis to be credible. The Court further finds this low acknowledged percentage of mentally ill inmates at SCDC troubling because it indicates a high likelihood that there are hundreds of inmates with a serious mental illness at SCDC who are not receiving any treatment due to deficiencies in the process used to identify and classify those with a serious mental illness. This low identification of mentally ill inmates has a synergistic impact on the mentally ill population, as it leads to a reduction in mental health professionals, the further disproportionate cutting of costs in difficult economic times within the mental health system because of a perceived lack of need for services, and a skewed analysis as to the efficacy of the existing mental health system. Reception and Evaluation ("R&E") serves as the intake facility for inmates entering into SCDC. If inmates with mental illnesses are not identified and appropriately classified at R&E, the Court finds that these inmates face a substantial risk of serious harm.

In addition to the concerns mentioned above, there was also evidence presented to the Court of regular violations of SCDC mental health policy, two of which are particularly relevant to the Court as they relate to the screening and evaluation process at R&E. First, SCDC policy requires that inmates be seen within forty-eight hours after being assigned to a mental health counselor by intake personnel. At trial, there was evidence submitted to the Court of regular and persistent violations of this policy. Second, inmates are not being seen by a

[2] Exact numbers fluctuate due to the constant intake and release of inmates.

psychiatrist within thirty days of the initial assessment by that mental health counselor when a need for psychiatric treatment is indicated. Consequently, this results in inmates who are referred to a psychiatrist, but are transferred to the general population prior to assessment by a psychiatrist, creating a risk of harm for all inmates.

The Court finds, due to the concerns listed above, that the program used by SCDC for screening and evaluation fails to adequately identify and classify those inmates suffering from serious mental illness.

B. <u>A treatment program that involves more than segregation and close supervision of mentally ill inmates.</u>

The treatment program at SCDC places heavy reliance on segregation and use of physical force against seriously mentally ill inmates.

Mentally ill inmates are substantially overrepresented in Special Management Units ("SMU") within SCDC. As of 2011, the percentage of inmates diagnosed with a serious mental illness in the SMU's were as follows: 27% at Lee Correctional Institute; 42% at Lieber Correctional Institute; and 40% at Perry Correctional Institute. Dr. Janet Woolery estimated that approximately 40 to 50% of the inmates she sees from the SMU's are demonstrating active psychotic symptoms. Rather than placing mentally ill inmates into treatment programs, it appears that they are merely placed in SMU's. This heavy reliance on SMU's raises serious concerns for the Court. Risk factors and suicide rates increase while an inmate is in SMU. It is not uncommon for an inmate in SMU to develop depression and experience a disturbance in eating and sleeping cycles. Moreover, evidence in the case shows that the conditions of confinement in SMU's fall below what is acceptable for a twenty-first century correctional institute, with inmates "stripped out" for their own protection, naked and without blankets, in cells both extremely cold and inordinately filthy.

Not only are mentally ill inmates overrepresented in SMU's, they also spend long periods of time in the SMU's, and in some instances this period of isolation in SMU has lasted several years. The evidence revealed that inmate Rowland Dowling was confined in SMU for 2,565 consecutive days, from February 2001 to February 2008.

Mentally ill inmates also suffer from a disproportionate use of force. The Use of Force Chart from January 1, 2008 lists the thirty inmates who are most frequently subjected to the use of force. Twenty-six of the thirty inmates on the Use of Force Chart are on the mental health caseload. As to use of force events, there were 602 such events for the twenty-six mentally ill inmates compared with 68 events for the remaining four inmates. Lastly, inmates on crisis intervention ("CI") are not being assessed daily for mental health purposes. As of the date of trial, SCDC policy only required that inmates in CI be seen Monday through Friday, excluding holidays, and this policy is often violated.

A substantial contributing factor to the lack of an effective treatment program is the limited involvement by psychiatrists in creating and administering treatment plans for mentally ill inmates. Psychiatrists at SCDC have no administrative or policy-making duties, and there was evidence that they did not attend meetings to create and develop treatment plans. As the lead mental health professionals in the mental health program, the Court finds psychiatrists must be more directly involved in creating and developing treatment plans. Furthermore, deposition testimony of some psychiatrists revealed an alarming lack of knowledge of policies and procedures at SCDC, the levels of care and criteria for referral to a particular level of care, and the role of the counselor in the mental illness treatment process. Dr. Poiletman did not know what the terms SMU and CI stood for – meaning Special Management Unit and Crisis Intervention, terms inextricably tied to mentally ill inmates at SCDC. Likewise, Dr. Crawford could not describe the distinction between an Intermediate Care services patient and an area patient. The Court finds these examples both illuminating and disturbing. For psychiatrists and other mental health staff at SCDC to provide effective services, they must have a more intimate knowledge of the processes and procedures vital to the mental health services system they are expected to direct.

This Court finds that SCDC employees' excessive use of force against mentally ill inmates and segregation of mentally ill inmates in crisis as opposed to treatment creates a serious risk of harm to seriously mentally ill inmates.

C. Employment of a sufficient number of trained mental health professionals.

The Court finds that the mental health program at SCDC is substantially understaffed. This has a causal effect for many insufficient aspects of the mental health program and greatly inhibits SCDC's responsibility to provide effective services to its mentally ill inmate population.

At the time of this trial, psychiatric staff at SCDC was limited to 5.5 FTE. At Gilliam Psychiatric Hospital, there was 1.2 FTE for 62 patients, a 1:52 ratio. Dr. Patterson testified that a more appropriate ratio for an inpatient setting would be 1:20. Likewise, the ratio for counselors at area mental health centers as of February 2011 is also problematic: 1:45 at Graham Correctional Institute; 1:54 at Lee Correctional Institute; 1:75 at Lieber Correctional Institute; and 1:75 at Perry Correctional Institute. In response to this information, Dr. Patterson indicated that a more appropriate ratio for counselors at the area mental health centers is 1:40. In total, Dr. Patterson recommended that SCDC employ an additional twenty (20) counselors and fourteen and one half (14.5) psychiatrists. The Court accords great weight to Dr. Patterson's recommendations for staffing.

The Court finds that inadequate mental health staffing at all levels within SCDC represents a serious risk of harm to mentally ill inmates.

D. Maintenance of accurate, complete, and confidential mental health treatment records.

A treatment plan is intended to be a dynamic and fluid process that continues on a regularly scheduled basis, supplemented by constant updates and revisions. In order for such to be effective, treatment plans must be accurate, complete, readily accessible to professional staff, and confidential. During the trial, evidence was presented to the Court indicating that documentation and maintenance of these records is poor. The treatment plans and automated medical records ("AMR") do not clearly state problems, objectives, goals, or even the staff responsible.

The importance of maintaining accurate and complete treatment records is vital to any medical services delivery system. For mentally ill inmates in particular, treatment plans and AMR's are critical for assessing progress as well as the effect of medication and therapy. The evidence in this case shows that the record keeping system for SCDC is outmoded, poorly maintained, and not readily accessible to all staff.

The Court finds that SCDC's failure to maintain accurate and complete mental health treatment records represents a serious risk of harm to mentally ill inmates.

E. Administration of psychotropic medication only with appropriate supervision and periodic evaluation.

In evaluating this factor, some of the same concerns overlap with those of the previous factor – maintenance of accurate, complete, and confidential mental health treatment plans. The Court, however, will note two further instances that raise concerns. First, in the medical records of mentally ill inmates, nurses are required to sign their initials to confirm that medication was provided and administered. At trial, various medical records were introduced indicating the absence of those initials and absence of any record that medications were provided at all. This indicates that either the medication was not provided or that the nurses failed to maintain accurate records. The second instance concerns the suicide of Robert Hamburg. Mr. Hamburg's morning medications had expired – specifically his anti-psychotic medicine, Geoden, which he was supposed to receive twice a day. Nevertheless, his counselor was still recording that he was compliant with his medication – that he was receiving it in the mornings and evenings. Thus, Mr. Hamburg was only receiving half of his prescribed dosage of anti-psychotic medication. Mr. Hamburg committed suicide on June 9, 2010 at Perry Correctional Institute.

Pill lines at many institutions occur at 4:00 a.m., and mentally ill inmates are often left to their own devices to timely awake, stand in line, and then take their

medication. The timing, press of business, and lack of individual attention at the pill line lends itself to inmates failing to take psychotropic medications.

This Court finds that the failure to appropriately supervise, evaluate, and dispense psychotropic medications creates a serious risk of harm to mentally ill inmates.

F. A basic program to identify, treat, and supervise inmates at risk for suicide.

At trial, Dr. Patterson identified seven inmates at SCDC whose suicide deaths from 2008 to 2011 were both foreseeable and preventable. In his opinion, two common factors contributed to these deaths. First, CI cells are located in segregation units, not in a medical setting, and thus lack sufficient medical interaction and treatment. Inmates in CI cells spend the entire day in those cells, and are held for long periods of time – typically one to two weeks, but sometimes longer. As stated previously, the CI cells are cold and unsanitary, the inmates are stripped out, and often not given a mattress. In addition, most inmates in CI do not see a psychiatrist, and interaction with a counselor is brief, limited, and not confidential. Inmates in CI are not allowed to have group or individual therapy. Second, SCDC's policy does not require constant observation; rather, inmates in CI cells are checked on fifteen minute intervals. The evidence before the Court contained proven instances of fabricated observation logs. These practices create a substantial risk of serious medical harm to mentally ill inmates.

II. REMEDY TO ADDRESS CONSTITUTIONAL VIOLATIONS

In devising a remedy for the constitutional deficiencies at SCDC, the Court is required to balance two competing interests. First, it is not the role of this Court to micromanage the daily administration of the mental health program at SCDC. Second, under the separation of powers doctrine, this Court should be constrained and not usurp the authority and responsibility of other branches of government. Moreover, this decision comes in a time of economic recession and heavy scrutiny of governmental expenditures. However, the Court is bound to uphold the South Carolina Constitution and protect the rights of the mentally ill inmates at SCDC. *See Brown v. Plata*, 131 S. Ct. 1910, 1928-29 (2011). Finally, the Court is convinced that to view the evidence put forth in this case and then do nothing would be a great miscarriage of justice.

To address the constitutional deficiencies in the mental health system at SCDC, Plaintiffs have proposed a remedial plan comprised of three components. First, SCDC would be required to submit a written plan for remedying the systemic deficiencies identified by the Court. Second, in creating this plan, SCDC must rely upon factors and guidelines identified by the Court, which the Court will then review and either approve or disapprove. Third, the Court will retain jurisdiction of this case and appoint expert monitors and/or a special master who will report

periodically to the Court. SCDC has raised objections to this plan, arguing that it constitutes an impermissible burden shift and is violative of the separation of powers doctrine.

The Court denies SCDC's objections. It would be highly impractical for Plaintiffs to identify and create a plan to implement changes to the mental health system at SCDC. Rather, once the Court has ruled, SCDC is in the best position to propose steps and changes to its existing system. *See Alexander S. v. Boyd*, 876 F. Supp. 773, 804-04 (D.S.C. 1995). As a result, the Court adopts Plaintiffs' proposals and requires SCDC to submit a written plan to the Court within one hundred eighty (180) days of the date of the final Order in this case. In executing this remedial plan to be submitted by SCDC, the Court will retain jurisdiction, but also intends to appoint a monitor who will report periodically to the Court. The Court will provide the parties, through motions, an opportunity to suggest the appropriate appointee(s) to oversee this process.

In formulating specific factors and guidelines for SCDC's remedial plan, the Court will again utilize the *Ruiz* factors above, along with additional sub-factors and components listed thereunder. In devising a plan to remedy the constitutional deficiencies identified by the Court, SCDC shall be directed in the Order to prepare a written plan that includes, at a minimum, the following:

A. **The development of a systematic program for screening and evaluating inmates to more accurately identify those in need of mental health care.**

   i. Develop and implement screening parameters and modalities that will more accurately diagnose serious mental illness among incoming inmates at R & E with the stated goal of increasing the number of inmates recognized as mentally ill and being admitted to the mental health program by a minimum of two percentage points (14.9 % of the inmate population);
   ii. The implementation of a formal quality management program under which mental health screening practices are reviewed and deficiencies identified in ongoing SCDC audits of R&E counselors are corrected;
   iii. Enforcement of SCDC policies relating to the timeliness of assessment and treatment once an incoming inmate at R&E is determined to be mentally ill; and,
   iv. Development of a program that regularly assesses inmates within the general population for evidence of developing mental illness and provides timely access to mental health care.

B. **The development of a comprehensive mental health treatment program that prohibits inappropriate segregation of inmates in mental health crisis, generally requires improved treatment of**

mentally ill inmates, and substantially improves/increases mental health care facilities within SCDC.

1. Easier Access to Higher Levels of Care.
   i. Significantly increase the number of area mental health inmates vis-a-vis outpatient mental health inmates and provide sufficient facilities therefor;
   ii. Significantly increase the number of male and female inmates receiving intermediate care services and provide sufficient facilities therefor;
   iii. Significantly increase the number of male and female inmates receiving inpatient psychiatric services, requiring the substantial renovation and upgrade of Gilliam Psychiatric Hospital, or its demolition for construction of a new facility;
   iv. Significantly increase clinical staffing at all levels to provide more mental health services at all levels of care; and,
   v. The implementation of a formal quality management program under which denial of access to higher levels of mental care is reviewed.

2. Segregation.
   i. Provide access for segregated inmates to group and individual therapy services;
   ii. Provide more out-of-cell time for segregated mentally ill inmates;
   iii. Document timeliness of sessions for segregated inmates with psychiatrists, psychiatric nurse practitioners, and mental health counselors and timely review of such documentation;
   iv. Provide access for segregated inmates to higher levels of mental health services when needed;
   v. The collection of data and issuance of quarterly reports identifying the percentage of mentally ill and non-mentally ill inmates in segregation compared to the percentage of each group in the total prison population with the stated goal of substantially decreasing segregation of mentally ill inmates and substantially decreasing the average length of stay in segregation for mentally ill inmates.
   vi. Undertake significant, documented improvement in the cleanliness and temperature of segregation cells; and,
   vii. The implementation of a formal quality management program under which segregation practices and conditions are reviewed.

3. Use of Force Factors and Guidelines

i. Development and implementation of a master plan to eliminate the disproportionate use of force, including pepper spray and the restraint chair, against inmates with mental illness;
ii. The plan will further require that all instruments of force, (e.g, chemical agents and restraint chairs) be employed in a manner fully consistent with manufacturer's instructions, and track such use in a way to enforce such compliance;
iii. Prohibit the use of restraints in the crucifix or other positions that do not conform to generally accepted correctional standards and enforce compliance;
iv. Prohibit use of restraints for pre-determined periods of time and for longer than necessary to gain control, and track such use to enforce compliance;
v. The collection of data and issuance of quarterly reports identifying the length of time and mental health status of inmates placed in restraint chairs;
vi. Prohibit the use of crowd control canisters, such as MK-9, in individual cells;
vii. Notification to clinical counselors prior to the use of planned force to request assistance in avoiding the necessity of such force and managing the conduct of inmates with mental illness;
viii. Collection of data and issuance of quarterly reports concerning the use of force incidents against mentally ill and non-mentally ill inmates; and
ix. The development of a formal quality management program under which use of force incidents involving mentally ill inmates are reviewed.

C. **Employment of a sufficient number of trained mental health professionals.**

i. Increase clinical staffing ratios at all levels to be more consistent with guidelines recommended by the American Psychiatric Association, the American Correctional Association, and/or the court-appointed monitor;
ii. Increase the involvement of appropriate SCDC mental health clinicians in treatment planning and treatment teams;
iii. Develop a plan to decrease vacancy rates of clinical staff positions which may include the hiring of a recruiter, increase in pay grades to more competitive rates, and decreased workloads;

iv. Require appropriate credentialing of mental health counselors;
v. Develop a remedial program with provisions for dismissal of clinical staff who repetitively fail audits; and,
vi. Implement a formal quality management program under which clinical staff are reviewed.

D. **Maintenance of accurate, complete, and confidential mental health treatment records.**

i. Develop a program that dramatically improves SCDC's ability to store and retrieve, on a reasonably expedited basis:
   a. Names of FTE clinicians who provide mental health services;
   b. Inmates transferred for ICS and inpatient services;
   c. Segregation and crisis intervention logs;
   d. Records related to any mental health program or unit (including behavior management or self-injurious behavior programs);
   e. Use of force documentation and videotapes;
   f. Quarterly reports reflecting total use of force incidents against mentally ill and non-mentally ill inmates by institution;
   g. Quarterly reports reflecting total and average lengths of stay in segregation and CI for mentally ill and non-mentally ill inmates by segregation status and by institution;
   h. Quality management documents; and,
   i. Medical, medication administration, and disciplinary records.

ii. The development of a formal quality management program under which the mental health management information system is annually reviewed and upgraded as needed.

E. **Administration of psychotropic medication only with appropriate supervision and periodic evaluation.**

i. Improve the quality of AMR documentation;
ii. Require a higher degree of accountability for clinicians responsible for completing and monitoring AMR's;
iii. Review the reasonableness of times scheduled for pill lines; and,
iv. Develop a formal quality management program under which medication administration records are reviewed.

F. **A basic program to identify, treat, and supervise inmates at risk for suicide.**

i. Locate all CI cells in a healthcare setting;
ii. Prohibit any use for CI purposes of alternative spaces such as shower stalls, rec cages, holding cells, and interview booths;
iii. Implement the practice of continuous observation of suicidal inmates;
iv. Provide clean, suicide-resistant clothing, blankets, and mattresses to inmates in CI;
v. Increase access to showers for CI inmates;
vi. Provide access to confidential meetings with mental health counselors, psychiatrists, and psychiatric nurse practitioners for CI inmates; and,
vii. Implement a formal quality management program under which crisis intervention practices are reviewed.

INSTRUCTIONS FOR PREPARATION OF ORDER

Attorney Andrews is requested to prepare an Order within sixty (60) days of the date of this letter detailing the decision stated herein and forward the same to opposing counsel. If additional time is needed, please advise this office. Attorneys for Defendant are not asked to agree or consent to this Order, but are requested to review it for mistake of fact or misstatement of their party's position. Thereafter, Attorney Andrews is asked to forward the finalized Order via email (JBaxleylc@sccourts.org) in Microsoft Word format to my office for signature, which will then be finalized, signed, and returned to him for filing and formal service on the parties.

The specific items contained in Section Two to be included in the remedial plan are not intended to be an exhaustive list. Plaintiffs' counsel may add any items referred to in the evidence and the Court will subsequently review such inclusions before the final Order is signed.

While not contained in detail in this letter, Plaintiffs' counsel is further requested to discuss within the Order the Court's authority to direct an agency of the Executive branch of government to take any particular action and the Court's prerogatives under the Separation of Powers doctrine.

For purposes of illustration, Plaintiffs' counsel is also requested to include within the Order ten (10) specific examples from the evidence of this case where a seriously mentally ill inmate has suffered mistreatment, substantial injury, or death due to deficiencies in the SCDC mental health services system.

Due to the complexity of the requested proposed order, it is anticipated that counsel will need further communications and perhaps guidance from the Court as the Order is prepared. In that event, counsel is requested to put such

communications in writing and copy opposing counsel to avoid ex-parte communications.

This has been a complex case, both factually and legally, and I am grateful for the professionalism of all attorneys in advocating for their clients. It has been my pleasure to be associated with such capable and learned counsel.

Sincerely yours,

J. Michael Baxley
JMB/jhs

cc: Honorable Jeanette W. McBride (for filing)

Exhibit 5

Adam J. Bruyere

From: Baxley, J. Michael Law Clerk (James H. Scruggs, III) <JBaxleyLC@sccourts.org>
Sent: Tuesday, August 27, 2013 5:18 PM
To: Dan Westbrook; Daniel C. Plyler; stokes.harry@doc.state.sc.us; Andrew Lindemann; William H. Davidson II; Kenneth P. Woodington; Adam J. Bruyere
Cc: Stuart Andrews; Tammie Pope
Subject: RE: Mental health prison litigation

Counsel,

It has been brought to our attention that in their Fifth Amended Complaint, the Plaintiffs dropped their claim under Article 12, § 2. Therefore, to that extent, the Court's decision letter is amended to delete those references to the Plaintiff's prior claim under Article 12, § 2. The Court's decision as to Plaintiff's claim under Article I, § 15 is unaffected. Plaintiffs are still requested to provide an Order within sixty (60) days of the date of the decision letter which details the decision of the Court, excepting those portions, however, that refer solely to the Plaintiffs' previous claim under Article 12, § 2. We are aware that the evidence in the two constitutional claims is substantially similar. If I can be of any further assistance, please do not hesitate to contact me.

Best regards,
Jamie Scruggs

James H. Scruggs, III
Law Clerk to the Honorable J. Michael Baxley
Circuit Court of the Fourth Judicial Circuit
531 E. Carolina Avenue
Hartsville, South Carolina 29550
Telephone: 843.383.4114
Fax: 843.383.4116
jbaxleylc@sccourts.org

From: Dan Westbrook [mailto:dan.westbrook@nelsonmullins.com]
Sent: Tuesday, August 27, 2013 1:50 PM
To: Baxley, J. Michael Law Clerk (James H. Scruggs, III); dplyler@dml-law.com; stokes.harry@doc.state.sc.us
Cc: Stuart Andrews; Tammie Pope
Subject: RE: Mental health prison litigation

Jamie, here's another one I mistakenly sent directly to the judge.

From: Dan Westbrook
Sent: Monday, August 26, 2013 11:13 AM
To: 'Baxley, J. Michael'; 'dplyler@dml-law.com'; 'stokes.harry@doc.state.sc.us'
Cc: Stuart Andrews; Tammie Pope
Subject: RE: Mental health prison litigation

Jamie, I forgot to add something to my previous note below. It appears from the decision letter that Judge Baxley ruled in Plaintiffs' favor on our minimally adequate (Article 12, section 2) claim, as well as on our cruel and unusual punishment (Article 1, section 15) claim. In our 5th Amended Complaint, however, we dropped the Article 12, section 2 claim, so I wanted to call that to the judge's attention.

From: Dan Westbrook
Sent: Monday, August 26, 2013 10:51 AM
To: 'Baxley, J. Michael'; dplyler@dml-law.com; stokes.harry@doc.state.sc.us
Subject: RE: Mental health prison litigation

Jamie, can you tell us the status of the trial transcript? It would be useful to have in preparing the final order. Thanks, Dan

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From: Baxley, J. Michael [mailto:JBaxleyJ@sccourts.org]
Sent: Friday, August 23, 2013 5:04 PM
To: Dan Westbrook; dplyler@dml-law.com; stokes.harry@doc.state.sc.us; esmith@scag.gov
Subject: Mental health prison litigation

Gentlemen:

Attached please find an electronic copy of the decision letter in the T.R., P.R., et al v. South Carolina Department of Corrections case. The original letter will be sent via U.S. mail today. This communication is not intended to effect service upon you and is provided solely for your information. Thank you for your patience while this case has been under advisement.

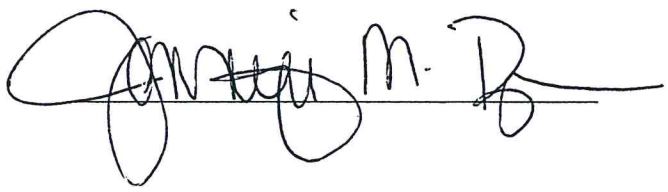
Mike Baxley

STATE OF SOUTH CAROLINA	)	
	)	**IN THE COURT OF COMMON PLEAS**
COUNTY OF RICHLAND	)	
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.,	)	Civil Action No. 2005-CP-40-02925
Plaintiffs,	)	
v.	)	**CERTIFICATE OF SERVICE**
South Carolina Department of Corrections; and William R. Byars, Jr., as Director of the South Carolina Department of Corrections,	)	
Defendants.	)	

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Defendants, does hereby certify that service of the **Notice of Motion and Motion to Alter or Amend Order Pursuant to Rule 52(b), and Rule 59(e), SCRCP** in the above-captioned matter was made upon the Honorable J. Michael Baxley and all counsel of record by email and by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 21st day of January 2014:

The Honorable J. Michael Baxley
Circuit Court Judge
531 East Carolina Avenue
Hartsville, South Carolina 29550-4311
Email: JBaxleyJ@sccourts.org; JBaxleyLC@sccourts.org

Daniel J. Westbrook, Esquire
Stuart M. Andrews, Jr., Esquire
Nelson, Mullins, Riley & Scarborough, LLP
Post Office Box 11070
Columbia, South Carolina 29211
Email: dan.westbrook@nelsonmullins.com
Email: stuart.andrews@nelsonmullins.com



Richland County Common Pleas

Clerk : Jeanette W. McBride
Richland County Judicial Center
Columbia, SC 29201
(803) 576-1999

Received From: Lindemann, Andrew F.
PO Box 8568
Columbia, SC 292028568

Paying for: T R P R K W & A M,
Transaction Type: Payment
Payment Type: Check $25.00

Total Paid: $25.00

Date: 1/21/2014
Receipt #: 172237
Clerk: COCMETTS

Reference #:25012
Comment:

Non-Refundable

Case #	Caption	Previous Balance	Amount Paid	Balance Due
2005CP4002925	T R P R K W & A M , plaintiff, et al vs State Of South Carolina , defendant, et al	**$25.00**	**$25.00**	**$0.00**
Total Cases:	**1**	**$25.00**	**$25.00**	**$0.00**