

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

Steven L. Barnes,)
)
Appellant,)
)
vs.)
)
South Carolina Department of Corrections,)
)
Respondent.)
_____)

Case No. 15-ALJ-30-0318-AP

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APR 18 2017

ORDER

SC Court of Appeals

This matter is before the South Carolina Administrative Law Court (Court or ALC) on an appeal filed by Steven L. Barnes (Appellant), a pretrial detainee housed with the South Carolina Department of Corrections (SCDC or Department). Appellant appeals the Department's denial of fifteen (15) of the sixteen (16) Step-2 Grievances that he separately filed in this matter.¹

FACTS/PROCEDURAL HISTORY

Appellant was held as a pre-trial detainee in the county jails of Aiken, Laurens, and Greenwood between February 7, 2014 and April 28, 2015. On or about April 20, 2015, the Edgefield County Sheriff sought to have Appellant classified as a Safekeeper and transferred to the custody of SCDC while he awaits trial. The Department recommended that Appellant be designated as a Safekeeper, and the Governor issued an Executive Order on April 28, 2015 approving that designation, which was renewed on August 12, 2015.² As a result of the Governor's Order, Appellant was removed from a county jail and transferred to SCDC as a Safekeeper on April 28, 2015.

On April 30, 2015, Appellant, through his attorney, filed a written objection to his Safekeeper status within SCDC on constitutional and statutory grounds. In a letter dated July 2,

¹ As Appellant notes in his Initial Brief, he did not appeal one of his claims (regarding lighting in his cell) because the Department remedied that grievance by repairing the lighting after Appellant filed the Step-2 Grievance.

² There was a question about whether this Court has jurisdiction over the Governor in this matter. However, at the hearing, the parties agreed with the Court that this question was premature because the Office of the Governor had not been added as a party in this case.

FILED

March 29, 2017

SC ADMIN. LAW COURT

2015, the Department denied Appellant's objections and explained the reasons for his transfer to SCDC and classification as a Safekeeper. On July 6, 2015, Appellant filed an action in this Court seeking injunctive relief.³ On August 28, 2015, the Department filed a Memorandum of Law in Support of Dismissal of the Petition.

On November 5, 2015, the Court issued an order granting the Department's motion for dismissal as to Appellant's classification as a Safekeeper and transfer to SCDC, and remanding the case to the Department to allow Appellant to file Step-2 Grievances for the Department's consideration.⁴ On April 5, 2016, Appellant filed sixteen (16) separate Step-2 Grievances. The Department filed a response to each grievance on July 21, 2016, and remedied one of the grievances. On August 22, 2016, Appellant filed this appeal as to the remaining fifteen (15) claims.

On September 7, 2016, Appellant filed a Motion for Miscellaneous Relief. On October 17, 2016, the Court issued an Order On Motion For Miscellaneous Relief and Order Governing Procedure setting forth a timetable and filing deadlines for the parties in this case. On January 17, 2017, Appellant filed his Initial Brief. The Court granted the Department's two motions to extend the filing deadline for its brief, filed February 2, 2017 and February 15, 2017, respectively. On February 24, 2017, the Department filed its brief. Appellant declined to file a Reply Brief.

STANDARD OF REVIEW

Though this case does not involve an inmate who is being incarcerated based on a conviction and sentencing, this Court, in its Order dated November 5, 2015, nevertheless concluded that it had subject matter jurisdiction, pursuant to *Al-Shabazz v. State*, 338 S.C. 354, 527 S.E.2d 742 (2000), to consider the conditions of Appellant's confinement as a Safekeeper. Appellant appears to believe that the Court's jurisdiction to consider the condition of confinement are much broader than the Court intended. However, the Court's determination of jurisdiction was made in the limited context of the facts of that decision, and the Court's jurisdiction is much narrower than asserted by Appellant. The Court hereby clarifies that its jurisdiction is limited to

³ Appellant styled his filing as a "Request for Contested Case Hearing." However, this Court labeled this action "Request for Injunctive Relief" in its Notice of Assignment because it involves requests for injunctive and declaratory relief, though neither term is expressly stated.

⁴ The Department stated at the hearing that it accelerates the review procedure for Safekeepers due to their brief incarceration with the Department, which is why the process began with a Step 2 Grievance instead of a Step 1 Grievance. Thus, since there was no Step 1 hearing, there is no testimonial record.

whether the conditions of confinement impose an “atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin v. Conner*, 515 U.S. 472, 484, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418 (1995); *Sullivan v. S.C. Dep’t of Corr.*, 355 S.C. 437, 445 n.5, 586 S.E.2d 124, 128 n.5 (2003). Moreover, that determination would be made only in the context of reviewing the Department’s determination of whether an inmate’s custody status implicates **state-created** liberty interest. *Sullivan*, 55 S.C. at 445 n.5, 586 S.E.2d at 128 n.5.

Furthermore, when reviewing the Department’s decisions, the ALC sits in an appellate capacity. *Al-Shabazz*, 338 S.C. at 377; 527 S.E.2d at 754; *see also* S.C. Code Ann. § 1-23-600(E) (Supp. 2016) (directing administrative law judges to conduct appellate review in the same manner prescribed in § 1-23-380). Section 1-23-380(A)(5) states:

The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (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. § 1-23-380(5) (Supp. 2016).

Consequently, an Administrative Law Judge may not substitute his judgment for that of an agency “as to the weight of the evidence on questions of fact.” *Id.* Furthermore, an Administrative Law Judge may not reverse or modify an agency’s decision unless the Record reflects that substantial rights of the appellant have been prejudiced because the decision is clearly erroneous in view of the substantial evidence, arbitrary, or affected by an error of law. *Id.*; *see also Marietta Garage, Inc. v. S.C. Dep’t of Pub. Safety*, 337 S.C. 133, 137, 522 S.E.2d 605, 607 (Ct. App. 1999); *S.C. Dep’t of Labor, Licensing and Regulation v. Girgis*, 332 S.C. 162, 166, 503 S.E.2d 490, 492 (Ct. App. 1998). “‘Substantial evidence’ is not a mere scintilla of evidence nor the evidence viewed blindly from one side of the case, but is evidence which, considering the Record as a whole,

would allow reasonable minds to reach the conclusion that the administrative agency reached or must have reached in order to justify its action.” *Lark v. Bi-Lo*, 276 S.C. 130, 135, 276 S.E.2d 304, 306 (1981) (quoting *Law v. Richland Cty. Sch. Dist. No. 1*, 270 S.C. 492, 495-96, 243 S.E.2d 192, 193 (1978)). Accordingly, the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency’s finding from being supported by substantial evidence. *Grant v. S.C. Coastal Council*, 319 S.C. 348, 353, 461 S.E.2d 388, 391 (1995).

Additionally, in *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 455-456, 105 S.Ct. 2768 (1985), the U.S. Supreme Court held that “the relevant question is whether there is any evidence in the record that could support the conclusion reached by the disciplinary board.”

DISCUSSION

As an initial matter, since Appellant has divided his fifteen (15) claims/grievances into five (5) groups and the Department addressed his claims/grievances in the same order, the Court will likewise address each of Appellant’s claims/grievances in the manner in which Appellant has presented them in his Initial Brief.

A. Routine Privileges, and Certain Constitutional Rights, Afforded to All Other Prisoners But denied to Appellant (Claims II, VII, and XII)

Appellant argues, as a preface to his individual arguments addressing Claims II, VII, and XII, that he is being denied routine privileges and certain constitutional rights that “are afforded to other general population, non-disciplinary inmates.” Appellant is currently housed at Lee Correctional Institution (Lee). He contends that he is a “non-disciplinary inmate” and that he is being denied his “rights and privileges simply because of *where* he is housed as a Safekeeper, and not because of anything attributable to him at all.” Appellant further argues that “[t]here is no rational basis for this rule for security reasons, separate housing requirements, disciplinary purposes (since Appellant is not a disciplinary inmate), or for the regular management and order of the institution.”

Before addressing Appellant’s individual claims/grievances, the Court will first address Appellant’s prefatory arguments. As explained above, this Court has limited jurisdiction to review whether there is a state-created liberty interest concerning the conditions of confinement in custody status. However, even if the condition of Appellant’s confinement gives rise to a state created liberty interest, the United States Supreme Court has held that “[i]n evaluating the constitutionality

of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, . . . the proper inquiry is whether those conditions amount to punishment of the detainee.” See *Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The Court added that “the determination [of] whether these restrictions and practices constitute punishment in the constitutional sense depends on whether they are rationally related to a legitimate nonpunitive governmental purpose and whether they appear excessive in relation to that purpose.” *Id.* at 561. The Court also noted that “[r]estraints that are reasonably related to the institution’s interest in maintaining jail security do not, without more, constitute unconstitutional punishment, even if they are discomforting and are restrictions that the detainee would not have experienced had he been released while awaiting trial.” *Id.* at 540.

The United States Supreme Court has subsequently stated very plainly that “when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). In determining whether a prison’s regulation is reasonably related to legitimate penological interests, a court must consider: (1) “whether there is a valid, rational connection between the prison regulation and the legitimate interest put forth to justify it”; (2) “whether inmates have an alternative means of exercising the right”; (3) “the burden on prison resources that would be imposed by accommodating the right”; and (4) “whether there are alternatives to the regulation that fully accommodate the inmate’s rights at de minimis cost to valid penological objectives.” *Fontroy v. Beard*, 559 F.3d 173, 177–78 (3d Cir. 2009) (internal quotation marks omitted). Throughout the analysis, “[the Court must] afford substantial deference to the DOC’s professional judgment.” *Id.* (internal quotation marks omitted). Indeed, the burden is on the detainee to disprove the validity of the prison regulations at issue. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003).

The standards set forth in *Bell* and *Turner* have been applied to Safekeepers in other jurisdictions as well as in South Carolina. See, e.g., *Laster v. Duckworth*, 554 F. Supp. 1184 (N.D. Ind. 1983) (applying *Bell* and affirming a Safekeeper’s assignment to a unit “where conditions were and are admittedly more restrictive than those imposed on the prison’s general population” because the assignment was rationally justified based on the prison officials’ knowledge of the Safekeeper’s past behavior that was the basis for his transfer); *Hoover v. Watson*, 886 F. Supp.

410, 418 (D. Del. 1995) (applying *Bell* and affirming the assignment of pretrial detainees to a segregated detention area of the prison due to violations of prison rules, noting that “in addition to the essential objective of insuring the detainee's presence at trial, the government has legitimate interests which stem from its need to maintain institutional security and order and to manage the facility in which the individual is detained”) (internal citation and quotation marks omitted); and *Wiles v. Ozmint*, 2006 WL 2260136, *8 (D.S.C. 2006) (applying *Turner* and affirming the assignment of a pretrial detainee to a maximum security unit based on his escape history notwithstanding his inability to receive pictures of his family and friends, visits from family members under the age of eighteen (18), and religious, educational, or recreational publications in the mail from publishers).

On February 16, 2000, the Governor issued Executive Order No. 2000-11, Section 1 of which provides the following:

An individual held in a county pretrial confinement facility may be transferred to the custody of the [Department] by commitment duly authorized by the Governor pursuant to § 24-3-80, if the individual: (1) is a high escape risk; (2) **exhibits extremely violent and uncontrollable behavior**; and/or (3) must be removed from the county facility to protect the individual from the general population or from other detainees.

(Emphasis added). A pretrial detainee in South Carolina thus need only satisfy one of the three categories to qualify for Safekeeper status. Therefore, since the detainee need only to “exhibit” extremely violent and uncontrollable behavior, he/she need not have been criminally convicted of, cited, and/or administratively adjudicated for such behavior to qualify for Safekeeper status.

In this case, the Governor of South Carolina approved the assignment of Safekeeper status to Appellant. This assignment was based on an “Affidavit for Safekeeping” dated April 20, 2015 from the sheriff of Edgefield County, which included the grounds for which he was seeking Appellant’s Safekeeper classification. These grounds are set forth in pertinent part as follows:

[Barnes] was charged with murder and kidnapping on November 13, 2010 and housed at the Edgefield County Detention Center pre-trial. Barnes was convicted of those charges, and [sentenced] to death which was overturned. **During that time, Barnes was written up for 20 jail infractions including throwing bodily fluids at correctional officers and other inmates, possession of contraband materials and refusing to follow instructions to name a few. Barnes was housed alone in the most secure cell that the Edgefield County Detention Center has and still managed to cause disruptions. Food service to inmates**

was severely delayed on several occasions due to Barnes throwing bodily fluids on food trays and carts.

* * *

Barnes was [later] sent to Liber Correctional Institution. **While [at Lieber], Barnes was written up for assault and possession of a weapon.**

Prior to coming to [the] Edgefield County Detention Center, Barnes was . . . held pre-trial on . . . charges [in Georgia] . . . at the Richmond County Detention Center[,] where **he was cited for refusing to cooperate with correctional officers as well as assault and possession of a weapon.**[Following his conviction and sentencing on these charges, Barnes was incarcerated at Ware State Prison in Georgia, where **he was cited nine times for failing to follow instructions.**]

Barnes has also been housed at the county detention center in both Aiken and Laurens. **Representatives from both of these agencies have written expressing their concern of housing Barnes for the same reasons listed above.** Aiken [County] logged in one hundred plus grievances, and reports in approximately one year. Laurens County after several complaints in three months, asked us to come get him, because of his actions. Greenwood [County] Detention Center has agreed to house him at this time for one week.

(Emphasis added). Once Appellant was assigned Safekeeper status, he became subject to the Department's Safekeeper policies. One such policy is SK-2202. Paragraph 1 of SK-22.02 incorporates the three (3) part standard articulated in Executive Order No. 2000-11, and Paragraph 5.1 of SK-22.02 provides as follows:

Safekeepers will be housed in a Special Management Unit (SMU) and will be managed in accordance with SCDC Policy/Procedure OP-22.12, 'Special Management Unit Operations,' with the following exceptions:

5.1.1 Safekeepers will be segregated from other SCDC inmates in the SMU. They will be showered separately, have visitation privileges separately, and be recreated separately.

5.1.2 Safekeepers are assigned to SD Level II when they are admitted. If they commit disciplinary infractions, their SD Level may be decreased pursuant to procedures in [Policy OP-22.12].

SCDC Policy/Procedure OP-22.12 begins with the following Policy Statement:

In order to maintain the safety and security of the general population, the staff, and the Agency, the [Department] will house those inmates requiring more intense levels of supervision and monitoring in separated areas herein referred to as Special Management Units (SMU) apart from the general population.

The term “Levels” is defined in paragraph 30 of OP-22.12, and it refers “to a series of two (2) degrees of control applied to the management of inmates housed in the SMU.” The two degrees of control are defined in paragraph 30 as Level I and Level II. Level I encompasses “the strictest degree of custody and control,” and, “[w]hile in this status, inmates will be managed with extreme caution and afforded only essential accommodations.” Level II “refers to a broadened status in security detention intended for inmates who have demonstrated cooperative behavior and gained a broader range of privileges.” Therefore, as a Safekeeper being treated as a Level II inmate, Appellant enjoys a “broader range of privileges” than those inmates classified as Level I inmates.⁵

Turning to Appellant’s prefatory arguments, he first asserts that he is denied routine privileges and certain constitutional rights that “are afforded to **other** general population, non-disciplinary inmates.” (emphasis added). Appellant thus implies that he is included amongst the non-disciplinary inmates; he even refers to himself as a “non-disciplinary inmate.” Following that premise, Appellant points out that he has not had a disciplinary infraction while at the facility currently housing him and that the restrictions imposed on him are “not because of anything attributable to him.” However, Appellant is **not** a “non-disciplinary inmate,” nor is he being confined in the SMU based on whether he has committed any infractions in the facility currently housing him. Rather, he is a pretrial detainee who is being held in safekeeping with SCDC for his prior behavior in several detention centers that purportedly included recurring instances of throwing bodily fluids at correctional officers and other inmates; refusal to cooperate with correctional officers; possession of contraband; and assault and possession of a weapon. It was these very actions that landed Appellant in the custody of SCDC with Safekeeper status.⁶ Thus,

⁵ According to the Record, the entry custody level of Safekeepers is Level II, though this level can be changed based on a detainee’s behavior. Because there is nothing in the Record to indicate that Appellant was moved to Level I, Appellant is presumably still at the Level II level of custody.

⁶ As the Court concluded in its November 5, 2015 Order, the Court has no subject matter jurisdiction to consider the validity of Appellant’s classification and transfer as a Safekeeper. The reasons for this is that the Court cannot consider facial challenges to the constitutionality of the Safekeeper statute (*Travelscape v. S.C. Dep’t of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38-39 (2011)); and Appellant failed to establish how the statute was unconstitutionally applied, i.e. that he had a state-created liberty interest in his mere classification as a Safekeeper or in the location in which he is housed while he awaits trial. There was also a question as to whether this Court has jurisdiction over the Governor in this matter, a question which both parties, at the hearing held in 2015 in this matter, agreed was premature because the Governor had not been added as a party in this case. Therefore, the Court must assume the validity of the reasons for Appellant’s classification set forth in the Edgefield County Sheriff’s affidavit. The Court will address this issue again in the final section above, *infra*.

the restrictions imposed on Appellant have nothing to do with **where** he is housed, but instead are based on **why** he is housed in SMU as a Safekeeper.

As to Appellant's argument that "[t]here is no rational basis for this rule for security reasons, separate housing requirements, disciplinary purposes (since Appellant is not a disciplinary inmate), or for the regular management and order of the institution," this assertion is contradicted by Appellant's prior actions leading to his designation as Safekeeper. According to the Edgefield County Sheriff's affidavit, Appellant's actions (cited above) caused numerous "disruptions" to the regular management and order of the detention centers at which they occurred. They also threatened the health of other inmates. Furthermore, on multiple occasions, Appellant was cited for assault, for possession of a weapon, and for refusal to cooperate with correctional officers. Because Lee and other SCDC prison have a "legitimate nonpunitive governmental purpose" in managing and/or preventing the type of dangerous and disruptive behavior that had previously threatened the order and security of the detention centers that had previously housed Appellant, it was wholly reasonable to segregate Appellant and to restrict his privileges and rights. *See Hoover*, 886 F. Supp. at 418 (the government has legitimate interests which stem from its need to maintain institutional security and order and 'to manage the facility in which the individual is detained') (quoting *Bell*, 441 U.S. at 540); *see also Union Cty. Jail Inmates v. Di Buono*, 713 F.2d 984, 993 (3d Cir. 1983) ("It is plain that there is a legitimate governmental interest in effective management of a detention facility."); *cert. denied*, 465 U.S. 1102 (1984).

The Court now turns to the specific claims/grievances that Appellant filed under Group A. First, the Court notes that before discussing his specific grievances under Group A, Appellant alleges due process violations and violations of his First, Fifth, and Sixth Amendment rights through the Fourteenth Amendment to the United States Constitution, and violations of S.C. Const. art. I §§ 2, 3, and 14. Appellant also cites to two cases: *Johnson v. Avery*, 393 U.S. 483 (1969) and *Beard v. Banks*, 548 U.S. 521 (2006). However, Appellant does not explain how these authorities apply to his claims except with respect to his alleged deprivation of books, magazines, and publications from any publishers. Given that these claims involve constitutional rights arising from conditions of confinement, which are not static but involve very fact-specific analysis to make a determination, a mere citation to cases without discussing them or applying them to the facts of the instant case deprive them of instructive value. *See generally Rhodes v. Chapman*, 452

U.S. 337, 346 (1981) (“No static ‘test’ can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”) (quotation marks and citation omitted).⁷ On this ground alone, the Court can dismiss the unsupported arguments as abandoned on appeal. *See D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012) (noting that while the appellants cited a case to support a claim, the argument was nevertheless considered “largely conclusory” and still considered abandoned on appeal); *see also State v. Hill*, 394 S.C. 280, 297, 715 S.E.2d 368, 377 (Ct. App. 2011) (considering a citation to a case “without any analysis whatsoever as to how or why [it] applies” insufficient to preserve an issue on appeal, and thus rendering that issue abandoned on appeal).

1. Restrictions on Canteen Privileges, Recreation and Shower Times, and Books or Magazines (Claim II)

Appellant argues that he is being “denied any access whatsoever to the prison ‘canteen.’” Accordingly, Appellant argues that he cannot “buy soap, toothpaste, socks, underwear, and other toiletries and necessities, nor any other ‘amenities (like soup packets) which are afforded to non-disciplinary inmates in the general population.” Appellant also points to p. 214 of the Record on Appeal (Record or ROA) to support his argument that he was not afforded these necessities because he did not make any purchases of such items from the canteen between 04/28/15 and 01/03/17.

Pursuant to SCDC Policy/Procedure SK-22.02(7), “Safekeepers in SD Level II will be allowed access to the canteen only for the purpose of purchasing a walkman radio and batteries for the walkman radio.” It also appears that Appellant did not purchase any items from the canteen during the time mentioned above. However, because the Department does not allow anyone in Level II of SMU to purchase anything other than a walkman radio and batteries, the State has not created a liberty interest in access to the canteen for any other types of purchases. Therefore, this Court has no jurisdiction to consider a challenge to the policy of disallowing Level II SMU prisoners access to the canteen for purchases of toiletries and other necessities, and would therefore

⁷ As will be discussed *infra*, because this case involves a pretrial detainee, the Eighth Amendment does not apply. However, the same standards applied in Eighth Amendment cases do apply to cases involving pretrial detainees through the Due Process Clause of the Fourteenth Amendment.

still have to dismiss this issue.⁸ See *Slezak v. S.C. Dep't of Corr.*, 361 S.C. 327, 331, 605 S.E.2d 506, 508 (2004) (explaining that while the ALC has jurisdiction over properly filed inmate grievance appeals, summary dismissal is appropriate “where the inmate's grievance does not implicate a state-created liberty or property interest.”), *cert. denied*, 544 U.S. 1033, 125 S.Ct. 2266, 161 L.E.2d 1060 (2005). See also *Skipper v. S.C. Dep't of Corr.*, 370 S.C. 267, 633 S.E.2d 910 (Ct. App. 2006) (finding dismissal of inmate’s appeal appropriate because his grievance did not implicate a state-created liberty interest).

Appellant also argues that since he has been at Lee, some weeks he was provided no recreation or showers and other weeks only received one shower and no recreation. In response, the Department cites several authorities to support its argument that the Department can place restrictions on a pretrial detainee’s outdoor recreation. The Department also cites, in footnote 56 of its brief, to the first paragraph of Attachment A to OP-22.12 regarding the Department’s “In-Cell Exercise Program” for “inmates who are required to stay in their cell most of the time.” The Department further points out that Appellant, on at least eleven (11) different occasions, refused recreation. Curiously, the Department mentions, but does not discuss, Appellant’s argument with respect to showers.

⁸ Even if the Court had jurisdiction, the Court finds no unconstitutional deprivation based on Appellant’s conditions of confinement. The U.S. Supreme Court, in *Wilson v. Seiter*, 501 U.S. 294 (1991), set forth the following standard for analyzing Eighth Amendment violations based on conditions of confinement: a plaintiff must prove that prison officials acted with “deliberate indifference” and that the prisoner was deprived of “the minimal civilized measure of life's necessities.” *Wilson*, 501 U.S. at 298, 303. Though pretrial detainees are not entitled to protection under the Eighth Amendment (*Boring v. Kozakiewicz*, 833 F.2d 468, 471 (3d Cir. 1987), *cert. denied*, 485 U.S. 991 (1988)), this Court agrees with several courts of appeal in other federal circuit that have held that the standard set forth in *Wilson* applies to pretrial detainees through the Due Process Clause of the Fourteenth Amendment. See *Kost v. Kozakiewicz*, 1 F.3d 176, 188 (3d Cir. 1993) (applying the *Wilson* standard to pretrial detainees); see also *Whitnack v. Douglas Cty.*, 16 F.3d 954, 957 (8th Cir. 1994) (same).

In this case, the Department’s policy, set forth in a note at the beginning OP-22.12(22), provides that “the commissary will issue essential and other authorized clothing, hygiene items, and writing supplies to indigent inmates in SMU according to guidelines established in [Policy ADM-16.08], ‘Commissary Operations.’” The toiletries and necessities that Appellant claims to have been denied access to are also listed among the property items that “ALL inmates in SMU may have” according to OP-22.12(24.1). Thus, the fact that Appellant has not **purchased** these items from the canteen is insufficient to establish that Appellant was not **provided** with them, and Appellant has failed to present an affidavit or other evidence reflecting that he was not provided with them, let alone that any deprivation was due to deliberate indifference by the prison officials. It is also noteworthy that this Court mentioned in its November 5, 2015 Order that the Department had asserted at the hearing that a matter regarding denial of Dove soap to Appellant, which SCDC’s medical unit had approved for his skin condition, had been resolved. Hence, it appears that Appellant was receiving soap from the Department.

Deficiency of the Record on Appeal

Before discussing recreation and showers, the Court must address the deficiency of portions of the Record that both Appellant and the Department rely upon in making their arguments, specifically, Cell Check Logs located within pp. 52-213 of the Record. For each week between the weeks of 4/26/15 and 12/5/16, there are two Cell Check Log pages. The first page contains a column for each day of the week for a given week. Those columns are subdivided into three (3) other columns with the headings "C" for "Code," "Init." for "Initial," and "Time." Each time that the responsible officer on duty records Appellant's activities, he or she must enter the time of the observation, his or her initials, and the "Activity Code" under the respective columns. The "Activity Codes" are listed at the bottom of the page, and they are numbered 1 through 5. Each of these codes corresponds to a different activity as follows: 1. Lying Down; 2. Sitting; 3. Standing; 4. Out of Cell; and 5. Eating. On the second page of the Cell Check Log, there is a column under each day of the week listing "Bkfst" for "Breakfast," "Lunch," "Dinner," "Shower," and "Rec" for "Recreation." The responsible officer on duty is to place either a "Y" for "Yes," a "N" for "No," an "R" for "Refuse," or an "I" for "Ineligible" beside the applicable categories for each day.

However, the Cell Check Logs in this case are patently incomplete and thus unreliable. Appellant relies on the fact that the categories "Shower" and "Rec" were left unmarked on the second page of several Cell Check Logs to argue that Appellant went days and sometimes weeks without a shower and/or recreation time. For instance, Appellant argues that he was provided no recreation or showers for the week of April 26, 2015, and this is based on the fact that on second page of the Call Log for the week of April 26, 2015 (i.e., ROA p. 53), the categories for "Shower" and "Rec" are unmarked for the whole week. Nevertheless, this is misleading. First, the instructions at the top of this page of the Cell Check Log for that week, and on the second page of the log for every week, provides as follows: "**Please answer in the spaces provided with Y (Yes) N (No) R (Refuse) or I (Ineligible)**" (emphasis added). Thus, every space should have been marked with one of the applicable letters, which collectively covered Appellant's activity with respect to breakfast, lunch, dinner, a shower, and recreation. The Court certainly cannot infer that an unmarked blank that was required to be filled in means "No," especially where, as here, there existed three alternative responses to "Yes": "No," "Refuse," and "Ineligible."

Second, not only are spaces for recreation and showers left blank on most of the logs, but so are the spaces for breakfast, lunch, and dinner. If these logs were to be accepted as a complete record of Appellant's activities, as Appellant would have the Court believe with respect to showers and recreation, then that would also mean, for instance, that Appellant did not eat at all from lunch on Thursday, June 11, 2015 until lunch on Monday, June 22, 2015 (ROA pp. 64-68) or, in an even greater stretch, from breakfast on Tuesday, February 16, 2016 until lunch on Friday, March 4, 2016 (ROA, pp. 130-35) (and 2016 was a leap year, meaning that there was an extra day in February), and astonishingly from breakfast on Monday, November 2, 2015 until breakfast on Tuesday, February 9, 2016 (ROA pp. 106-29).⁹ The Court is unaware of any complaints from Appellant about being starved by the Department.

But even if the Court were to assume that for some reason SCDC did not on a regular basis use the "breakfast," "lunch," and "dinner" categories on the second pages of the logs to record Appellant's eating (though they certainly recorded "Yes" by some of these categories during certain weeks, such as that of November 21, 2016 (ROA p. 208)) and instead recorded it on the first pages, then Appellant apparently did not eat from lunch on August 25, 2016 until October 7, 2016. (ROA pp. 182-94).¹⁰

Yet another problem with the credibility of the Cell Check Logs is that there are periodic inconsistencies between the two pages for given weeks. For instance, during the week of August 22, 2016, the Department marked a "Yes" beside "Rec" on Friday, August 26, 2016, yet on the first page, there is no record of an activity code marked "4" for that day to indicate that Appellant was "Out of Cell" (ROA pp. 182-83). The same is true for Thursday, September 20, 2016 and Tuesday, October 14, 2016 (ROA pp. 190-91; 196-97). The Department was certainly capable of recording a "4" in one of the spaces on the first pages of the logs because it did so on several of them, such as the log for the week of August 24, 2015, in which a "4" appears in the column for Monday, August 24, 2015; Wednesday, August 26, 2015; Sunday, August 30, 2015; and even twice under Friday, August 28, 2015 (ROA, p. 86), as well as in many other places throughout the logs.

⁹ The logs for November 9-15, 2015 are either out of order or missing from the Record.

¹⁰ The Court will give Appellant the benefit of the doubt as to the Activity Code number used for the activity recorded for 12:42 p.m. that day; one could also argue that the number recorded is a "3" (ROA p. 182). Otherwise, the above date range would start after 4:24 p.m. on August 19, 2016 (ROA p. 180).

In short, the Court finds the Cell Check Logs in the Record to be without probative value and utterly unreliable on their face, and considers them to be insufficient to support any arguments by either of the parties. Thus, Appellant failed to carry his burden of proving a “restraint which . . . imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life” (*Sullivan*, 355 S.C. at 445 n.5, 586 at 128 n.5 (quoting *Sandin*, 515 U.S. at 484)), and the Court therefore finds no unconstitutional deprivations.

Recreation Argument

Turning to Appellant’s recreation argument, Appellant does have a constitutional right to a basic minimum of exercise, though this Court could only consider an alleged deprivation of that right if it was so substantial as to constitute a “restraint which . . . imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sullivan*, 355 S.C. at 445 n.5, 586 at 128 n.5 (quoting *Sandin*, 515 U.S. at 484). In *Harris v. Fleming*, the Seventh Circuit Court of Appeals discussed this issue as follows:

In *French* we stated that lack of exercise could rise to a constitutional violation “[w]here movement is denied and muscles are allowed to atrophy, [and] the health of the individual is threatened.” 777 F.2d at 1255. Nothing of that consequence was claimed to have been reached in this case even though it was not a desirable situation. If exercise is what Harris desperately wanted he could have improvised temporarily with jogging in place, aerobics, or pushups. He retained the ability to move about in the unit. This was a short-term situation, lasting only four weeks. Where there is a general policy limitation on exercise some courts have endeavored to set minimums, but in this case we need not reach that issue. *Campbell v. Cauthron*, 623 F.2d 503, 507-08 (8th Cir.1980); *Hutchings v. Corum*, 501 F.Supp. 1276, 1294 (W.D.Mo.1980). Harris claims only to have been deprived of yard or recreation time, not all exercise. In modern prisons the denial of recreation time may deprive inmates of many desirable, entertaining diversions the lack of which would not raise a constitutional issue.

839 F.2d 1232, 1236 (7th Cir. 1988). In the instant case, Appellant has not even established that he was denied recreation time. He relies upon the shoddy records of the Department, which this Court has already determined to be unreliable and not probative; and Appellant has provided no affidavits or other evidence to support his allegations.

Yet even with what the Department has managed to record regarding Appellant’s activities, and even if it is accurate, the Department has recorded at least eleven (11) times in which Appellant has refused recreation time. One cannot refuse that which was not offered. If Appellant has refused recreation at least eleven (11) times over the last year, then that means that he has been

afforded such opportunities. Therefore, there is no credible evidence that the Department has never offered Appellant recreation time or so scarcely that it would prove detrimental to his health, while offering similarly situated detainees sufficient recreation time. At most, the first paragraph of Attachment A to OP-22.12 suggests that some inmates and detainees may be “required to remain in their cells **most of the time**. . . .” In addition, even if Appellant has not engaged in outdoor recreation, either by the prison’s practice or his own choice, Attachment A provides for in-cell exercise activity to allow for movement and to prevent atrophy, and Appellant has not alleged any specific threat to his health or injury sustained as a result of this policy. Therefore, the Court finds no constitutional deprivation of a liberty interest based on the conditions of Appellant’s confinement with respect to recreation time.

Deprivation of Showers

Turning to Appellant’s argument regarding his alleged deprivation of showers, the Court again points out that the Cell Check Logs in the Record upon which Appellant relies to argue a deprivation are unreliable for the reasons stated above, and Appellant has provided no other evidence to support his allegation. But even setting that aside, Appellant has failed to demonstrate how he even has a constitutional right to a particular form of bathing. The Constitution doubtless requires that those housed in prisons be granted certain hygienic necessities. *Kaufman v. Litscher*, 2000 WL 34236015 *9 (W.D. Wis. Nov. 14, 2000) (citing *Harris*, 839 F.2d at 1235). And OP-22.12(24.1) and (22) allow anyone incarcerated in SMU to have deodorant, soap, a toothbrush, toothpaste, toilet paper, a washcloth, and a towel (as well as clothing items and writing supplies), and these items are provided to indigent inmates. In addition, because items such as soap, a toothbrush, and a washcloth are provided, it is reasonable to infer that the cells in SMU are equipped with sinks with which Appellant would have the ability to clean himself if he chose to do so. Thus, Appellant has been provided with a means of maintaining the “the minimal civilized measure of life’s necessities,” or at least he has failed to establish by affidavit or other evidence that he was not given these items, and he has therefore failed to establish a “restraint which . . . imposes atypical or significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sullivan*, 355 S.C. at 445 n.5, 586 at 128 n.5 (quoting *Sandin*, 515 U.S. at 484). Appellant may not prefer the means of bathing that has been afforded him (assuming that the faulty Cell Check Logs accurately record the lack of showers he has taken), but he has no constitutional right

to a particular form of bathing, absent a medical necessity (which Appellant has not alleged). Otherwise, an inmate could argue, for example, that he has a right to a bath instead of a shower or to a particular level of water pressure from his showerhead. Therefore, because there was a reasonable alternative available to Appellant for cleaning himself aside from a shower, he was not deprived a state-created liberty interest.

Receipt of Books or Magazines

Appellant next argues that unlike other general population inmates, he is not allowed to receive books or magazines from a regular publisher, and this is unconstitutional. He contends that he “should not be subject to any of the disciplinary measures that are imposed on the other inmates for their conduct because Appellant has not committed any disciplinary infraction.” Specifically, Appellant argues that he was denied a legal book delivered by U.S. Mail from a publisher, Prisoner Legal News, entitled “Prisoners Self-Help Litigation Manual” because the Department “has determined that Appellant can receive NO magazines or books from any publisher.” He asserts that “the Department cannot deny [him] access to magazines and books that are otherwise permissible within the prison, both on First and Sixth Amendment grounds, especially when such books are of a legal nature essential to Appellant’s legal cases and self-representation.” Appellant cites to *Beard v. Banks*, 548 U.S. 521 (2006) for the proposition that though “a prison may institute some punitive measures for inmates subject to *disciplinary* procedures, even such inmates are still entitled to religious and law-related books and materials.” Appellant then mentions that he is presently proceeding *pro se* in pending criminal actions in Georgia and that even though he is presently represented by counsel in his pending criminal trial in South Carolina, he has the right to represent himself in that trial at some point in the future if he so chooses.

The Record reflects that the Department returned an item that had been mailed to Appellant from Prison Legal News based on the following reason: “No Publications Allowed in [SMU]”; and this was pursuant to SCDC Policy PS-10.08 (R. p. 215). OP-22.12(20) – “Correspondence Privileges” states: “All inmates assigned to the SMU will be allowed to send and receive mail in accordance with SCDC Policy/Procedure PS-10.08, ‘Inmate Correspondence Privileges.’” The Note within Paragraph 9.1 of PS-10.08 states: “[i]nmates in . . . SMU may not receive any

publications, to include newspapers and magazines, while they are housed in . . . SMU, per SCDC Policy OP-22.12[.]”

In this case, Appellant is being housed in SMU because of his prior behavior in several detention centers. Therefore, the restrictions imposed upon him are justified based on his own actions, as discussed earlier. Because PS-10.08 applies to everyone in SMU, prisoners in that unit have not been given a state-created liberty interest in publications of any kind, and thus this Court is without jurisdiction to decide Appellant’s claim. And since there is no state-created liberty interest involved with respect to the publications issue, this Court must dismiss it. *See Slezak, supra* and *Skipper, supra*.¹¹

Therefore, the Court must dismiss Appellant’s Claim II with respect to deprivation of canteen purchases/privileges, recreation time, and showers based on issue abandonment on appeal. *See D.R. Horton, Inc., supra* and *Hill, supra*. Also, the Court must dismiss Appellant’s Claim II with respect to publications based on a lack of a state-created liberty interest involved. *See Slezak, supra* and *Skipper, supra*.

2. Denial of Religious Items (Claim VII)

Appellant further argues that he has been denied religious items afforded to general population, non-disciplinary inmates. His specific request is for Muslim Prayer Oil, which he asserts is “a sacrament relevant to his religious affiliation” and “which is allowed for other general population, non-disciplinary inmates.” First, as stated earlier, Appellant is not a general population, non-disciplinary inmate, and he is being held in the SMU unit because of his prior behavior in several other detention facilities. In addition, SCDC Policy OP-22.12(24.1) affords all officially recognized Muslim inmates in SMU a Qura’n, kufi, and prayer rug but not prayer oil.

¹¹ Even if the Court had jurisdiction, Appellant has failed to demonstrate substantial prejudice. As to his pending criminal actions in Georgia, Appellant has not established any denial of access to legal materials within the prison library that he may use to assist in his defense. This provides a distinction from *Beard* in that that Court never addressed whether a prisoner had a constitutional right to receive legal materials in the mail given that he had access to legal material provided by the prison’s library. In fact, though *Beard* did involve depriving inmates in the most severe level of a “Restricted Housing Unit” of access to newspapers, magazines, and photographs, that deprivation was actually **upheld** in that case. *See Beard*, 548 U.S. at 535. In addition, as noted in the Step 2 Grievance, the IGC stated that the Law Library logs reflected that **Appellant had used the library more than sixteen (16) separate times**. The IGC also noted that Appellant has access to the Law Library by requesting books. (ROA p. 38). Appellant has provided no evidence to refute these statements from the Department.

As to Appellant’s pending criminal action in South Carolina, Appellant currently has counsel and has access to the prison library; thus, he is not presently prejudiced.

Because the Department does not offer prayer oil to Muslim inmates, it is not a state-created liberty interest and therefore is not within the jurisdiction of this Court. Consequently, the Court must dismiss Appellant's Claim VII regarding deprivation of Muslim prayer oil. *See Slezak, supra* and *Skipper, supra*.

3. Denial of, and Interference with, Legal Mail (Claim XII)

Appellant filed a Step 2 Grievance regarding this issue but did not address the claim in the corresponding section of his brief. To the extent that Appellant's Claim XII is addressed in Section (B), *infra* regarding the denial or hindrance of his legal work, the Court directs attention thereto. Otherwise, because Appellant failed to specifically address Claim XII in his brief, the Court dismisses this issue as abandoned on appeal. *See Wright v. Craft*, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006) ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.") (citations omitted).

B. Denial of Appellant's Ability to Conduct Constitutionally Protected Legal Work (Claims X, XI, XIII, XIV, XV, and XVI)

Appellant argues that he is being denied an opportunity to conduct constitutionally protected legal work for several reasons. First, Appellant asserts that he "is not allowed to have his box of legal materials in his cell, in that he is limited to a 'one box at a time' rule." He also asserts he "is not provided access to make telephone calls to his attorneys on a regular basis," but rather is only allowed to make one or two phone calls to his attorney each month. Appellant further alleges that he "is denied the ability to be provided copies of his *pro se* legal materials," as well as "adequate access to a prison law library." He further asserts that his "legal mail is improperly delayed[,] both outgoing and incoming." Finally, he alleges that he "is denied adequate access to supplies including paper, pens, and other materials [with] which to prepare his *pro se* legal pleadings and communicate with his attorneys."

As an initial matter, the Court again points out that Appellant has not preserved these issues on appeal. Appellant blanket cites "U.S. Constitution, Amend[s]. 1, 5, 6, and 14; S.C. Const. [a]rt. I §§[]2, 3, and 14; *Johnson v. Avery, supra*; *Beard v. Banks, supra*" at the end of his arguments addressing this group of claims. Appellant prefaced these string citations with the phrase "Appellant incorporates the argument and legal foundation for this claim as set forth above and herein." However, no analysis was provided as to why or how these authorities apply to each of

the arguments presented for Appellant's claims, either earlier in the brief or in this section, except perhaps as to access to publications in Claim II. As such, these issues, like the previous issues are deemed abandoned on appeal. See *D.R. Horton, Inc.*, *supra* and *Hill*, *supra*.

Nevertheless, Appellant's claim regarding his inability to have more than one box of legal materials in his cell at a time (Claim X), the Department has a policy that imposes this restriction on all of the prisoners in SMU. OP-22.12(17), "Legal Materials" states in pertinent part:

Inmates will have access to legal materials and to available legal reference material. Refer to SCDC Policy/Procedure GA-01.03, "Inmate Access to the Courts," for additional information. Each SMU inmate will be allowed to retain the amount of legal material that would fit into an 15" x 12" x 10" box. Any excess legal materials beyond an 15" x 12" x 10" box will be put into another box(es) (any size box may be used). . . The box(es) containing the excess legal materials will be stored in the property room. No legal materials will be disposed of. When the inmate needs to use the legal materials stored in the excess legal materials box, he will complete an SCDC Form 19-11, "Request to Staff Member." The inmate must identify the number of the box he requires and the amount of time that he will need the box. In general, the inmate may be allowed to keep the box for five calendar days, however the box may be removed from the cell sooner if security or safety needs dictate. The box will be provided to the inmate in a timely manner upon receipt of his SCDC Form 19-11. The inmate is allowed to remove material from the box stored in his cell and exchange it with materials stored in the excess legal materials box. When the inmate is finished with the excess legal materials box, it will be re-sealed in the inmate's presence and returned to the property room.

Because this policy restricting the number of boxes of legal materials within a cell to one is applied to all of prisoners in SMU, there is no state-created liberty interest in more than one box of legal material at a time in each cell. Accordingly, this Court is without authority to decide this claim. See *Slezak*, *supra* and *Skipper*, *supra*.¹²

¹² Even if the Court had jurisdiction, Appellant has not demonstrated any prejudice from the policy, as none of his legal materials have been destroyed but are stored, he can substitute documents from other boxes to his box, and can request any of the other boxes by filling out the appropriate form. Therefore, Appellant has access to all of his legal documents and has not provided evidence to the contrary. Indeed, in response to his Step 2 Grievance, the IGC denied Appellant's grievance on the grounds that "[t]here [was] no evidence of [Appellant] requesting an additional box and/or [him] complaining about the legal box interfering with assisting [his] attorney." (ROA p. 26). See *Hendricks*, 385 S.C. at 629-30, 686 S.E.2d at 193 ("Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. . . "Insofar as the right vindicated by *Bounds* is concerned . . . the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.") (quoting *Lewis*, 518 U.S. at 351) (internal quotation marks omitted).

As to Appellant's claim that he is not allowed to make phone calls to his attorney on a regular basis but has been limited to only one or two calls a month (Claim XI), he has not alleged a state-created liberty interest in the opportunity to call his attorney at any time he wishes. The Department's policy governing prisoners' legal phone calls is found in OP-22.12(21.2), which states:

All inmates will be allowed to place verified telephone calls to their legal counsel. For purposes of these procedures, "legal counsel" may consist of the inmate's attorney of record and/or paralegal(s). Inmate requests for attorney calls require 24 hours advance notice to allow for staff verification. Telephone calls will be scheduled and approved by the Captain, Lieutenant, or SMU Supervisor. Inmates must be able to demonstrate, and SMU staff will be responsible for verifying, that communication with the attorney by correspondence or visiting is not adequate, i.e., court deadline or other legal deadline. Attorney calls will be dialed by an Officer. Once verified, the call will not be monitored. Any deviation from this procedure will be documented in the inmate's record.

Under this policy, no prisoners in SMU are allowed to call their counsel whenever they wish.¹³ Rather, they are allowed to make a request at least twenty-four (24) hours in advance of when they would like to talk to their attorneys, after which the calls will be scheduled upon verification. And to be allowed to call their attorneys, inmates must "demonstrate . . . that communication with the attorney[s] by correspondence or visiting is not adequate." Thus, although prisoners have a constitutional right to contact their attorneys and assist in their defense, the State has not created a right for prisoners that entitles them to the format, frequency, and time of their choosing when it comes to contact with their attorneys. Because there is no state-created liberty interest involved

¹³ Appellant, following his arguments in this section of his brief, included a request for relief with respect to telephone calls to his attorney. Specifically, Appellant requests that he be "allowed to make telephone calls to his attorneys when requested, during regular office hours of 9:00a.m. – 5:00p.m. on Monday through Friday, including but not limited to one per week." First, though Appellant complained in his Step 2 Grievance about only being allowed an opportunity to make phone calls to his attorneys after 7:00 p.m., and thus after hours, Appellant did not renew this part of his argument in the argument section of his brief even though it was inferred in the relief that he requests. Nevertheless, because this part of his argument was not included in the arguments section of his brief, and was, at best, merely included in a request for relief, the Court must consider it abandoned on appeal. *See Wright*, 372 S.C. at 20, 640 S.E.2d at 497 ("An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court."). Even still, as discussed above, this argument was not supported by analysis and application of a legal authority, and would have been considered abandoned on appeal anyhow. And even further still, had the issue not been abandoned on appeal, it would not involve a state-created liberty interest for which this Court can provide a remedy and would thus still be dismissed.

with this claim, the Court has no jurisdiction to decide it, even had the Court decided that it had not been abandoned on appeal. *See Slezak, supra* and *Skipper, supra*.¹⁴

Regarding Appellant's assertion that he "is denied the ability to be provided copies of his *pro se* legal materials," as well as "adequate access to a prison law library" (Claims XIII and XIV, respectively), Appellant has provided no evidence to substantiate his assertions with respect to either of these claims. Because Appellant has failed to establish an actual injury, the Court dismisses both of these claims pursuant to *Bounds, supra*, *Lewis, supra*, and *Hendricks, supra*, as well as on preservation grounds due to a lack of analysis and application of legal authorities, as discussed above.¹⁵

As to Appellant claims concerning an improper delay of his incoming and outgoing mail, and the alleged denial of adequate access of supplies and materials necessary to prepare legal documents and correspondence with his attorneys (Claims XV and XVI, respectively), in addition to a lack of application of legal authority to support his assertions of constitutional violations, Appellant again points to no evidence in the Record to substantiate these claims.

¹⁴ The Court also agrees with the Department's position that Appellant has failed to demonstrate any interference or real possibility of interference with his communication with his attorney that has inhibited his or his attorney's ability to effectively represent him in his pending criminal matters, i.e., he has established no actual injury. Appellant's claim would thus still fail under *Bounds, supra*, *Lewis, supra*, and *Hendricks, supra*.

¹⁵ With respect to Appellant's argument concerning adequate access to a prison law library, in his brief, Appellant inserts the adjective "adequate" to modify "access to a prison law library." However, in Appellant's Step 2 Grievance, Appellant "object[ed] to the [Department's] **failure to allow him access to a law library**. . . ." (Emphasis added). Thus, Appellant's original grievance was over an alleged lack of access to a law library, not to just "adequate access," which would necessarily imply that access had been granted but was insufficient. This is tantamount to introducing an entirely new issue. Because Appellant did not reassert in his brief the argument that he made in his grievance, I find that argument abandoned on appeal. I also find that Appellant cannot now assert his new issue for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [factfinder] to be preserved for appellate review."). For the same reason, Appellant's additional assertion, that "when he is granted access [to the law library,] the library computer for research is inoperable], which was added in a parenthetical to Appellant's other assertion in his brief "that he is regularly denied access to the law library," is not preserved for appellate review.

Moreover, even had this issue been preserved, Appellant has provided no evidence to establish either a denial of access to the law library or that the library research computer is inoperable every time he is granted access. In fact, the IGC, in responding to and denying Appellant's Step 2 Grievance, pointed out that Appellant had visited the prison law library more than sixteen (16) separate times. (ROA p. 38). Also, according to the entries for Appellant in the "Law Computer Room Log" for Appellant, of the four (4) times that Appellant used the computer between 11/29/16 and 12/23/16, the computer parts were checked off as operable after his use in least the first three occasions (the entry for his last visit is illegible). (ROA pp. 338-39). Therefore, the law computer was certainly not, as Appellant suggests, inoperable every time he used it.

Moreover, as to Appellant's alleged excessive delays in ingoing and outgoing mail (Claim XV), the Court first notes that though Appellant objects in his brief to alleged delays in both outgoing and incoming mail, citing to page 40 of the Record, Appellant's Step 2 Grievance indicates that he objected to allegedly excessive delays in **only** his outgoing legal mail to his attorney, that "[o]n average, it takes more than ten (10) days for [his] outgoing legal mail to be processed and approved at the Institution's mail room before going out . . . for regular delivery to [his] attorney." Therefore, the Court will not consider his claim with regards incoming mail, only outgoing mail. *See Wilder*, 330 S.C. at 76, 497 S.E.2d at 733 ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [factfinder] to be preserved for appellate review."). In response to Appellant's mail claim, the IGC, relying upon the Mailroom Director, a Ms. Whitney, averred:

[M]ail is picked up at least once every other day. Usually, the mail is picked up every day from the roll around cart in F7 Unit. If the mail was in the box, it would go out on the same day or the day after it was picked up. It does not take 10 days to process the mail at the institution as [Appellant] ha[s] alleged.

Appellant has provided no evidence to refute these statements from the Department. As such, even had this issue not been abandoned on appeal due to a lack of application of legal authority, the Court would have found unrefuted substantial evidence in the record to support the Department's decision to deny Appellant's claim.

Finally, as to Appellant's alleged denial of his request for legal supplies (Claim XVI), SCDC Policy PS-10.08(4.2.1) and (4.2.2) provide:

4.2.1 All indigent inmates, regardless of custody status, will be provided with one (1) pencil (which will be exchanged for a new pencil when it wears out), eight (8) sheets of paper, and two (2) date-stamped envelopes on a monthly basis to be used for sending mail not weighing more than one (1) ounce per envelope. Indigent inmates will be allowed to exchange a current date-stamped envelope for postage to be placed on another envelope (i.e., a greeting card provided by the Chaplain). The inmate's account will not be debited for these supplies.

4.2.2 The materials will be a part of a hygiene pack that will be issued to authorized indigent inmates on a monthly basis. An indigent inmate's account will not be debited for the postage affixed to the date-stamped envelope.

According to the IGC's response denying Appellant's claim, he reviewed Appellant's Agreement to Debit E.H. Cooper Account dated September 29, 2015 and found that on September 30, 2016, Appellant was issued five (5) envelopes and twenty (20) sheets of paper, which actually exceeds

the monthly allotment of materials that can be used for legal pleadings or correspondence. Appellant has no state-created liberty interest in more than what the State has provided pursuant to PS-10.08(4.2.1), and Appellant has not demonstrated that he was given less. Therefore, even if the Court did not deem this issue abandoned on appeal for failure to apply legal authority to support his conclusory argument, the Court would nevertheless find that Appellant has failed to carry his burden of proving that he was deprived of a state-created liberty interest, and that there is substantial evidence in the Record to support the Department's decision to deny Appellant's claim.

C. Inadequate Medical Care (Claims IV and V)

As an initial matter, because Appellant's Claim IV (failure to prescribe proper medication to treat Appellant's various medical ailments) is reiterated by Appellant as part of his Claim V, the Court will address both claims collectively.¹⁶ Appellant argues that he was denied adequate medical treatment for his sundry maladies and was not given follow-up examinations for other medical conditions.

First, Appellant again cites collectively to the same string of authorities at the end of his conclusory arguments and attempts to "incorporate[] the argument and legal foundation for this claim set forth above and herein." However, the Court, as noted throughout this Order, finds this want of specific application and legal analysis inadequate to preserve this issue on appeal and must, therefore, consider the issues abandoned. *See D.R. Horton, Inc., supra* and *Hill, supra*.

As to Appellant's allegation that he has not received adequate medical treatment, he has not demonstrated that this implicates a **state-created** liberty interest. Therefore, the Court must dismiss it pursuant to *Slezak, supra* and *Skipper, supra*; *see also, e.g., S.C. Dep't of Corr. v. Mitchell*, 377 S.C. 256, 260, 659 S.E.2d 233, 236 (Ct. App. 2008) (observing that a request for medically recommended support shoes "undeniably" implicated no state-created liberty interest).¹⁷

¹⁶ Appellant made a motion in footnote 14 of his brief to place pages 278-315 and 340-45 of the Record under seal because they contained Appellant's medical records and information. The Court granted this motion in its Order on Motion to Supplement the Record and Seal a Portion of the Record on Appeal filed February 6, 2017.

¹⁷ Even if the Court had jurisdiction, though Appellant cites to pages 278-315, 340-45 of the Record generally to support his allegation, he has failed to specify how Appellant's treatment was inadequate, let alone any deliberate indifference on the part of SCDC's medical staff as to his treatment for any serious medical conditions. *See Belcher v. Oliver*, 898 F.2d 32, 34 (4th Cir. 1990) ("[t]he Fourteenth Amendment, like the Eighth Amendment right of convicted prisoners, requires that government officials not be deliberately indifferent to any serious medical needs of [a] pretrial detainee."). Moreover, the Department provided Appellant prescription medication and refills on numerous occasions. (ROA, pp. 279-80; 287-88; 289-98; 343-45). Likewise, regarding Appellant's contention that he was denied "follow-up exams, laboratory tests, or other standard of care procedures," the Record reflects that he

D. Day-to-Day Conditions in Appellant's Cell (Claims VIII and IX)

Appellant asserts that he is “subjected to improper ventilation, constant and persistent blowing of dust, [and] pernicious and noxious smell of human waste” (Claim VIII).¹⁸ Appellant also alleges that the Department denied his requests for adequate cleaning supplies with which to clean his “unsanitary and unhealthy” cell (Claim IX).

First, Appellant again cites collectively to the same string of authorities at the end of his conclusory arguments and incorporates “the argument and legal foundation for this claim set forth above and herein.” However, the Court, as noted throughout this Order, finds the lack of specific application and legal analysis fails to preserve this issue on appeal and, therefore, the issues are abandoned. *See D.R. Horton, Inc., supra* and *Hill, supra*.

Furthermore, Appellant has not demonstrated that this claim implicates a **state-created** liberty interest. Therefore, the Court must dismiss it pursuant to *Slezak, supra* and *Skipper, supra*.¹⁹

E. Safekeeper Statute (Claims I and III)

Appellant challenges his classification as a Safekeeper pretrial detainee (Claim I) and challenges the constitutionality, both facially and as applied, of the Safekeeper statute – S.C. Code Ann. § 24-3-80 (Claim III). As an initial matter, because Appellant's Claim I is intertwined with his as-applied challenge in Claim III, the Court will address those two together and will address the facial challenge to Claim III separately.

First, Appellant again cites collectively to the same string of authorities at the end of his conclusory arguments and incorporates “the argument and legal foundation for this claim set forth above and herein.” However, the Court, as noted throughout this Order, finds that the lack of

was given physical examinations, though there were also other times when Appellant could not be seen because of security issues. (ROA, pp. 278; 279-80; 286-87; 302-03, 340-41).

¹⁸ It is quizzical that a man who was transferred to SCDC's SMU for safekeeping for, among other reasons, throwing bodily fluid at prison officials and other inmates is now complaining about the “pernicious and noxious smell of human waste.”

¹⁹ Even if the Court did not deem Appellant's Claims VIII and IX abandoned on appeal, and even if the Court had jurisdiction to hear this claim based on its implication of a state-created liberty interest, the Court would find no unconstitutional conditions of confinement and would find substantial evidence in the Record to support the Department's decisions to dismiss both of Appellant's claims.

specific application of legal analysis fails to preserve this issue on appeal and, therefore, the issues are abandoned. *See D.R. Horton, Inc., supra* and *Hill, supra*.

Second, concerning Appellant's facial challenge of the Safekeeper statute, the Court reiterates what it already stated in its November 5, 2015 Order: this Court lacks jurisdiction to consider facial challenges to the constitutionality of a statute or regulation. *See Travelscape v. S.C. Dep't of Revenue*, 391 S.C. 89, 109, 705 S.E.2d 28, 38-39 (2011). However, this Court "is empowered to hear as applied challenges to statutes regulations." *Id.* at 109, 705 S.E.2d at 39. But as the Court also stated in its November 5, 2015 Order, Appellant failed to establish how the statute was unconstitutionally applied, i.e. that he had a state-created liberty interest in his mere classification as a Safekeeper or in the location in which he is housed while he awaits trial. Therefore, the Court must assume the validity of the reasons for Appellant's classification set forth in the Edgefield County Sheriff's affidavit.

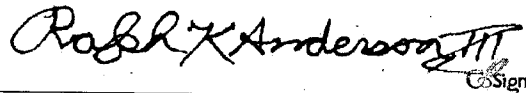
In his brief, "Appellant relies on his previously submitted arguments to the Court, as well as the citations in his Step-2 grievance form and notice of appeal on th[is] issue[]." As noted above, Appellant's argument that "[t]here is no rational basis for this rule for security reasons, separate housing requirements, disciplinary purposes (since Appellant is not a disciplinary inmate), or for the regular management and order of the institution" is contradicted by Appellant's prior actions leading to his designation as Safekeeper. According to the Edgefield County Sheriff's affidavit, Appellant's actions caused "disruptions" and that "[f]ood service to inmates was severely delayed on several occasions due to Barnes throwing bodily fluids on food trays and carts." These actions, which were recurring, disrupted the regular management and order of the detention centers at which they occurred. They also threatened the health of other inmates. Furthermore, Appellant, on multiple occasions, was cited for assault and possession of a weapon, as well as for refusal to cooperate with correctional officers. Because Lee and any other SCDC prison has a "legitimate nonpunitive governmental purpose" in managing and/or preventing the type of dangerous and disruptive behavior that had previously threatened the order and security of the detention centers that had previously housed Appellant, it was wholly reasonable for the Department to segregate Appellant and restrict his privileges and rights. *See Hoover*, 886 F. Supp. at 418 (the government has legitimate interests which stem from its need to maintain institutional security and order and "to manage the facility in which the individual is detained") (quoting *Bell*, 441 U.S. at 540); *see*

also *Union Cty. Jail Inmates*, 713 F.2d 984, 993 (3d Cir. 1983) (“It is plain that there is a legitimate governmental interest in effective management of a detention facility.”), *cert. denied*, 465 U.S. 1102 (1984).

ORDER

IT IS THEREFORE ORDERED that Appellant’s appeal is **DISMISSED WITH PREJUDICE**.

AND IT IS SO ORDERED.

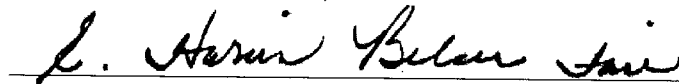
A handwritten signature in black ink that reads "Ralph King Anderson, III". To the right of the signature is a small, circular logo with the word "eSign" inside.

Ralph King Anderson, III
Chief Administrative Law Judge

March 29, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).



E. Harvin Belser Fair
Judicial Law Clerk

March 29, 2017
Columbia, South Carolina

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