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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2017-000967

Steven L. Barnes, Appellant,

v.

South Carolina Department of Corrections, Respondent.

RESPONDENT'S INITIAL BRIEF

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The Appellant in the instant matter, Steven L. Barnes [“Barnes”] appeals orders issued by the South Carolina Administrative Law Court [“ALC”], on November 5, 2015 and March 29, 2017. (R. pp. ___ - ___ and pp. ___ - ___).

STATEMENT OF ISSUES ON APPEAL

In his brief,¹ Barnes identified only three (3) issues on appeal. Accordingly, the Respondent, the South Carolina Department of Corrections [“the Department”], respectfully presents the same three (3) issues on appeal, albeit with warranted modifications:

- I. Did the ALC err by not remanding to the Department for further fact finding the Department’s recommendation for Barnes to be classified as a Safekeeper?
- II. Did the ALC err by not reversing the Department’s decision to deny Barnes a specific publication?
- III. Did the ALC err when it determined that Barnes had not established that S.C. Code Ann. § 24-3-80 had been unconstitutionally applied?

STATEMENT OF THE FACTS

Barnes provided the following accounting of the events by which he entered the Department’s custody for safekeeping in the first paragraph of the section of his brief entitled “STATEMENT OF THE FACTS:²”

Beginning February 7, 2014 through April 28, 2015,³ [Barnes] was housed as a pre-trial detainee at the following county jails: Aiken; Laurens; and Greenwood. On or about April 20, 2015, Edgefield County Sheriff Adell Doby petitioned the [Department’s Office of General Counsel] to classify

¹ See Barnes’ Brief, p. 1.

² *Id.*, p. 3. Barnes provide the same accounting verbatim, including the same footnote, in the first section of his “Initial Brief” to the ALC filed January 17, 2017. (R. p. ___).

³ In the footnote associated with this passage (*Id.*, p. 3, n. 1), Barnes added the following:

Barnes had previously been incarcerated within SCDC pursuant to a murder conviction and death sentence; however, his case was reversed in January 2014, [*State v. Barnes*, 753 S.E.2d 545 (2014)], and he was remanded on February 7, 2014, by SCDC to the custody of the Edgefield County jail for re-trial. The Edgefield Sheriff then asked other county jails to house Barnes.

[Barnes] as a “Safekeeper” and transfer him [into the Department’s custody]. **On or about April 28, 2015, [Barnes] was approved by [the Department] as a “Safekeeper.” The Governor then issued an Executive Order on April 28, 2015, also approving [Barnes]’ designation as a “Safekeeper.”** On the same day, [April 28, 2015], [Barnes] was removed from a county jail and transferred to the [Department’s custody] as a Safekeeper (assigned SK #5290). [emphasis supplied].

Barnes’ assertions in the above-quoted paragraph that the Department “approved” him as a Safekeeper represents a key factual error, and, by its March 29, 2017 Order, one of the two (2) orders from which Barnes appeals, the ALC correctly described the Department’s action regarding the petition submitted by the Edgefield County Sheriff (R. p. ____):

The Department **recommended** that [Barnes] 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. [emphasis supplied].

In the footnote associated with the above-quoted passage, the ALC observed as follows (R. p. ____):

There was a question about whether this Court has jurisdiction over the Governor in this matter. However, ... , 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.

For clarity’s sake, at no point during the litigation of the instant matter before the ALC was the Office of the Governor added as a party.

Barnes omitted from his “STATEMENT OF THE FACTS” the fulsome accounting of Barnes’ behavior to which the Edgefield County Sheriff attested in his “Affidavit for Safekeeping” dated April 20, 2015 (R. p. ____ - ____):⁵

⁴ Barnes articulated the identical erroneous assertions in his January 17, 2017 Brief to the ALC. (R. p. ____).

⁵ In its March 29, 2017 Order (R. p. ____), the ALC quoted these passages from the Edgefield County Sheriff’s April 20, 2015 affidavit nearly verbatim.

[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. On three occasions, Barnes was charged and convicted (once) of throwing bodily fluids on correctional officers.**

Once convicted of throwing bodily fluids, Barnes was sent to Lieber 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 incarcerated at Ware State Prison in Georgia convicted of armed robbery, kidnapping, burglary, terroristic threats and pandering prostitution, and was sentenced to life plus 45 years in Georgia. While there, Barnes was cited nine times for failing to follow instructions. While being held pre-trial on these charges, Barnes was held 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.**

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 supplied].**

Barnes devoted the remainder of the section of his brief entitled "STATEMENT OF THE FACTS" towards summarizing the correspondence between his counsel and the Department's Office of General Counsel, initial filings by the parties with the ALC, the ALC's November 5,

2015 order, and the parties' activities regarding the claims Barnes subsequently filed with the Department in 2016.⁶

In the final paragraph of the section of his brief entitled "STATEMENT OF THE FACTS," Barnes stated as follows:⁷

On September 7, 2016, [Barnes] filed a Motion for Miscellaneous Relief. On October 17, 2016, the [ALC] issued an ["Order on Motion for Miscellaneous Relief and Order Governing Procedure"]. The Order set forth a timetable and filing deadlines for the parties in this matter. The parties submitted briefs, the [ALC] decided the matter based on the briefs and without a hearing, and issued its final order denying all of [Barnes'] claims on March 29, 2017. This appeal followed.

STATEMENT OF THE CASE

I. BARNES "STATEMENT OF THE CASE"

Barnes articulated the following in his "STATEMENT OF THE CASE:⁸"

On or about April 20, 2015[, the Edgefield County Sheriff] sought to have [Barnes] classified as a [S]afekeeper and have the [Department] take custody of [Barnes]. [ALC's March 29, 2017 Order, p. 1]. The [Governor issued an Executive Order] to transfer custody of [Barnes] to [the Department] on April 28, 2015. As a result of [the Governor's Executive Order, Barnes] was removed from the county jail and transferred to [the Department as a Safekeeper] on April 28, 2015. [ALC's March 29, 2017 Order, p. 1]. Barnes became subject to the same "security measures" as the other inmates who were held in the same area at [the Department] for disciplinary reasons. [Barnes] objected to this classification and, eventually, properly filed [Step 2] grievances of which fifteen (15) of the sixteen (16) grievances were denied.⁹ [Barnes] then filed his initial brief in the [ALC] on January 17, 2017. [The Department] filed its brief on February 24, 2017. On March 29, 2017[, the ALC] issued an order denying relief on all fifteen (15) of [Barnes'] claims with prejudice.

⁶ See Barnes' Brief, pp. 3 – 4. Barnes included the same accounting in his Initial Brief to the ALC filed January 17, 2017. (R. p. ____).

⁷ *Id.*, p. 4.

⁸ *Id.*, p. 2.

⁹ As the ALC observed in its March 29, 2017 Order (R. p. ____), Barnes did not appeal the Department's denial of one of his 16 grievances, "because the Department remedied that grievance by repairing the lighting" in his cell after he filed the Step 2 grievance in which he complained of his cell's lighting.

II. APPLICABLE AUTHORITIES

A. S.C. CODE ANN. § 24-3-80

In its entirety, S.C. Code Ann. § 24-3-80 (Supp. 2010), which is entitled “Detention of prisoner when authorized by Governor,” provides as follows:

The director of the prison system shall admit and detain in [the Department] for safekeeping any prisoner tendered by any law enforcement officer in this State by commitment duly authorized by the Governor, provided, a warrant in due form for the arrest of the person so committed shall be issued within forty-eight hours after such commitment and detention. No person so committed and detained shall have a right or cause of action against the State or any of its officers or servants by reason of having been committed and detained in the state prison system. [emphasis supplied].

B. EXECUTIVE ORDER NO. 2000-11

On February 16, 2000, South Carolina’s Governor issued Executive Order No. 2000-11, the introductory provisions of which read as follows:

WHEREAS, an individual held in a pretrial confinement facility may be transferred to the custody of the [Department] for safekeeping by commitment duly authorized by the Governor pursuant to § 24-3-80; and

...

NOW, THEREFORE, I hereby establish the following criteria and procedures for approval for the admission and detention in an institution of the [Department] for safekeeping of a prisoner tendered by a law enforcement officer of this State and rescind the previous safekeeping procedures set forth in Executive Order #76-15:

Section 1 of Executive Order No. 2000-11 provides as follows:

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.¹⁰ [emphasis supplied].

¹⁰ The ALC quoted this standard both in its November 5, 2015 and March 29, 2017 orders (R. p. ___ and p. ___).

The second part of the above-quoted three-part standard from Section 1 of Executive Order No. 2000-11 only requires that the individual *exhibit* extremely violent and uncontrollable behavior for entry into the Department's custody as a Safekeeper. The individual need not have been criminally convicted of offenses involving extreme violence and uncontrollable behavior. Likewise, the individual need not have been cited and/or administratively adjudicated of having committing acts involving extreme violence and uncontrollable behavior.

C. POLICIES PROMULGATED BY THE DEPARTMENT

1. SK-22.02

The policies and procedures concerning such prisoners detained in and by the Department for safekeeping are reflected by Policy Number SK-22.02. According to the paragraph entitled "Purpose," SK-22.02 addresses the Department's management of "unsentenced individuals who are awaiting trial and detained by [the Department] at the request of a county and when ordered by the Governor, pursuant to [§ 24-3-80], and [Executive Order No. 2000-11]."

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 [Policy Number 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].

2. OP-22.12

The first sentence of the paragraph entitled “Policy Statement,” which appears at the outset of Policy Number OP-22.12, provides as follows:

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.” Two (2) “Levels” are defined in paragraph 30: 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, the level at which Barnes is classified as a Safekeeper, “refers to a broadened status in security detention intended for inmates who have demonstrated cooperative behavior and gained a broader range of privileges.

III. BARNES’ LEGITIMATE ENTRY INTO THE DEPARTMENT’S CUSTODY AS A SAFEKEEPER

By orders duly issued by our state’s Governor, under § 24-3-80 and Executive Order No. 2000-11, Barnes legitimately and lawfully entered the Department’s custody in late April 2015 for safekeeping. As such, Barnes is legitimately and lawfully classified as a Safekeeper, and the Department’s management of him falls under both SK-22.02 and OP-22.12.

As a Safekeeper, Barnes is treated as a Level II inmate, and, consequentially, he inherently enjoys a “broader range of privileges” than those inmates classified as Level I inmates by the Department. Barnes did not assert in his brief to this Court or in his January 17, 2017

brief to the ALC, and the record does not reflect that the Department has classified him as a Level I inmate since he entered its custody in April 2015.

Succinctly stated, Barnes *exhibited* sufficient “extremely violent and uncontrollable behavior” by which his entry into the Department’s custody as a Safekeeper, under an order duly issued by our state’s Governor, was warranted, and the Department respectfully urges this Court to affirm the order issued November 5, 2015 by the ALC and the order it issued March 29, 2017.

STANDARD OF REVIEW

ALC Rule of Procedure 65 states that “[j]udicial review of any decision of the [ALC] shall be as provided in S.C. Code Ann. § 1-23-610 (2005) (as amended).” *See also S.C. Dep’t of Corr. v. Mitchell*, 659 S.E.2d 233, 234 (S.C. Ct. App. 2008) (“Section 1-23-610 ... sets forth the standard of review when the court of appeals is sitting in review of a decision by the ALC on an appeal from an administrative agency.”).

Thus, the provisions of § 1-23-610, specifically § 1-23-610(B), establish the standard of review applicable to this Court’s consideration of Barnes’ challenge of the ALC’s orders. In its entirety, § 1-23-610(B) reads as follows:

The review of the administrative law judge’s order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact.¹¹ The court of appeals may affirm the decision or remand the case for further proceedings; or it may reverse or modify the decision if substantial rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;

¹¹ *See generally Mitchell*, 659 S.E.2d at 235 (The ALC must apply the standard articulated in § 1-23-380(5) when reviewing, on appeal, an administrative agency’s decision.). The standards of review set forth in §§ 1-23-380(5) and 1-23-610(B) are identical if not nearly identical.

- (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.

Pursuant to § 1-23-610(B), this Court “may reverse or modify the [ALC’s] decision **only** if [Barnes proves his] substantive rights [have] been prejudiced because the decision is clearly erroneous in light of the reliable and substantial evidence on the whole record, arbitrary or otherwise characterized by an abuse of discretion, or affected by other error of law.” *Mitchell*, 659 S.E.2d at 234 [emphasis supplied] (reversing the ALC’s order because the “order [was] devoid of any finding of evidence adduced by [Barnes] warranting the ALC’s reversal of the Department.”). Moreover, Barnes must “distinctly and specifically direct the court’s attention to the errors or abuses allegedly committed by the [ALC]. [Barnes] must include all that is necessary to enable [this Court] to decide whether the [ALC] made an erroneous or unsubstantiated ruling. A mere expression of dissatisfaction with the ruling is not sufficient.” *Al-Shabazz v. State*, 527 S.E.2d 742, 755 (S.C. 2000) (citations omitted).

Critically, Barnes has the burden of proving convincingly that the ALC’s decision to uphold SCDC’s decision is unsupported by substantial evidence. *Mitchell*, 659 S.E.2d at 235. Substantial evidence is relevant evidence “when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the ALC arrived at in justifying its decision.” *S.C. Coastal Conservation League v. S.C. Dep’t of Health & Envtl. Control*, 669 S.E.2d 899, 905 (S.C. Ct. App. 2008).

Barnes also has the burden of proving the ALC’s decision is arbitrary and otherwise characterized by an abuse of discretion. *Mitchell*, 659 S.E.2d at 234. A decision is arbitrary if no rational basis for the conclusion exists, or when it is based on one’s will and not upon any course of reasoning and exercise of judgment. A decision may also be arbitrary if it is made at

pleasure without adequate determining principles or is governed by no fixed rules or standards. *Converse Power Corp. v. S.C. Dep't of Health & Env'tl. Control*, 564 S.E.2d 341, 345 (S.C. Ct. App. 2002). An “abuse of discretion occurs when the judge’s ruling is based upon an error of law, such as application of the wrong legal principle; or, when based upon factual conclusions, the ruling is without evidentiary support; or, when the judge is vested with discretion, but the ruling reveals no discretion was exercised; or when the ruling does not fall within the range of permissible decisions applicable in a particular case.” *Ex parte Capital U-Drive-It, Inc.*, 630 S.E.2d 464, 467 (S.C. 2006).

ARGUMENT

The Department respectfully addresses the issues and supporting argument offered by Barnes in his brief in an order different than the order in which Barnes presented them. In doing so, the Department begins with Barnes’ second issue, in which he asserted that the ALC erred by not reversing the Department’s decision to deny him books and canteen access.¹²

I. BARNES ABANDONED HIS CLAIM THAT THE ALC ERRED IN ITS MARCH 29, 2017 ORDER BY NOT REVERSING THE DEPARTMENT’S DECISION TO DENY HIM CANTEEN ACCESS

In the second issue on appeal he identified in his brief, Barnes asserted that the ALC erred in not reversing the Department’s decision to deny him canteen access.¹³

However, Barnes offered no argument whatsoever in his brief to support his assertion,¹⁴ and, consequentially, Barnes abandoned his claim that the ALC erred in not reversing the Department’s decision to deny him canteen access. *See Wright v. Craft*, 640 S.E.2d 486, 497 (S.C. Ct. App. 2006) (“In addition, Craft identified the denial of the JNOV motion in his

¹² See Barnes’ Brief, pp. 9 – 11.

¹³ *Id.*, pp. “i” (Table of Contents), 1, and 9.

¹⁴ *Id.*, pp. 9 – 11.

statement of issues on appeal but failed to address it in his brief. ‘An issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court.’ [*Fields v. Melrose Ltd. P’ship*, 439 S.E.2d 283, 284 (S.C. Ct. App. 1993); *Bell v. Bennett*, 414 S.E.2d 786, 791 (S.C. Ct. App. 1992)].” [emphasis supplied].) See also *Buist v. Buist*, 730 S.E.2d 879, 885 (S.C. Ct. App. 2012) (citing *Wright*).

II. BARNES ABANDONED ALL BUT THREE (3) OF HIS CLAIMS

Barnes submitted 16 claims to the Department via Step 2 grievance forms, but, as the Department resolved one of his claims after he filed his Step 2s,¹⁵ he appealed the Department’s denial of 15 of his claims to the ALC. (R. pp. ___ - ___).

In his January 17, 2017 brief to the ALC, Barnes organized his 15 remaining claims into five (5) groups. (R. p. ___).

Claims II, VII, and XII comprised the first group of Barnes’ claims. (R. pp. ___ - ___). At the outset of the argument he offered to the ALC in support of his first group of claims (R. pp. ___ - ___), Barnes asserted that he “is denied numerous routine privileges, as well as specific constitutional rights, which are afforded to other general population, non-disciplinary inmates.”

Claims X, XI, XIII, XIV, XV, and XVI comprised the second group of Barnes’ claims. (R. pp. ___ - ___). Concerning his second group of claims (R. pp. ___ - ___), Barnes asserted to the ALC that he “is denied [access] to standard legal materials and requests, which on information and belief, [is] afforded to all other general population, non-disciplinary inmates.” (R. p. ___).

¹⁵ See note 9 above. Barnes designated the claim resolved by the Department as Claim VI, but, given the action taken by the Department to resolve it, no materials regarding this claim (i.e. Step 2 grievance form and Notice of Appeal) appear in the Record on Appeal before this Court.

Claims IV and V comprised Barnes' third group of claims. (R. pp. ___ - ___). Concerning his third group of claims (R. p. ___), Barnes asserted to the ALC that SCDC denied him "adequate medical care and treatment."

Claims VIII and IX comprised Barnes' fourth group of claims. (R. pp. ___ - ___). Concerning his fourth group of claims (R. p. ___), Barnes asserted to the ALC that, "in his cell he is subjected to improper ventilation, constant and persistent blowing of dust, pernicious and noxious smell of human waste," and he also asserted that he "has requested adequate cleaning supplies with which to clean his own cell due to the unsanitary and unhealthy forced living environment, but has been denied."

Claims I and III comprised the fifth and final group of Barnes claims. (R. pp. ___ - ___). Concerning his fifth and final group of claims (R. p. ___), Barnes argued to the ALC that he objected "to the constitutionality in the Safekeeper statute itself, how it has been applied to [him] specifically, and as a violation of due process."

By the first and third issues on appeal he identified in his brief to this Court, Barnes preserved Claims I and III for review (R. pp. ___ and ___), and the Department addresses Barnes' arguments in support of these issues further below.

Barnes' claim that the ALC erred by upholding the Department's denial of books to him comprised Claim II(d) (R. p. ___), and, by both identifying it as part of the second issue on appeal and offering argument in support of it in his brief to this Court, Barnes preserved it for review.

Barnes' claim for canteen access encompassed Claims II(a) and XVI (R. pp. ___ and ___), and, as persuasively argued above, Barnes, despite identifying the ALC's purported error in upholding the Department's denial of the claim within the second issue on appeal to this

Court, abandoned Claims II(a) and XVI by offering no argument whatsoever in support of them in his brief to this Court.

By failing to either identify them as issues on appeal or otherwise failing to address them anywhere in his brief to this Court, the Department, for the sake of clarity, respectfully asserts that Barnes also abandoned the following claims:

Claim	Record	Claim	Record	Claim	Record
II(b)	R. p. ____	VII	R. p. ____	XII	R. p. ____
II(c)	R. p. ____	VIII	R. p. ____	XIII	R. p. ____
II(e)	R. p. ____	IX	R. p. ____	XIV	R. p. ____
IV	R. p. ____	X	R. p. ____	XV	R. p. ____
V	R. p. ____	XI	R. p. ____		

III. THE ALC PROPERLY UPHELD THE DEPARTMENT’S DENIAL OF BARNES’ DEMAND FOR ACCESS TO A SPECIFIC PUBLICATION

As the second issue on appeal he identified in his brief to this Court,¹⁶ Barnes asserted that the ALC erred by upholding the Department’s denial of books to him.

A. BARNES’ CLAIM II(d)

As explained immediately above, Barnes first animated the second issue on appeal by raising it as Claim II(d) amongst the Step 2s he filed with the Department. (R. p. ____). In Claim II(d), Barnes asserted to the Department that he “is treated as a disciplinary inmate” and that he was “not allowed to receive any books or publications, including legal books or law publications, directly mailed from the publisher,” “even though he is a pre-trial detainee, and not a disciplinary detainee.” (R. p. ____).

B. THE RULING FROM THE ALC’S MARCH 29, 2017 ORDER REGARDING CLAIM II(d)

In considering Barnes’ appeal of the Department’s denial of Claim II(d), the ALC, in its March 29, 2017 Order framed the issue as follows (R. p. ____):

¹⁶ See Barnes’ Brief, p. 9.

[Barnes] 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 [Barnes] has not committed any disciplinary infraction.” Specifically, [Barnes] 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 [Barnes] 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 [Barnes’] legal cases and self-representation.” [Barnes] 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.” [Barnes] 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. [emphasis supplied].

The ALC then observed as follows (R. pp. ___ - ___):

The Record reflects that the Department returned an item that had been mailed to [Barnes] 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[.]”

The ALC finally ruled as follows (R. p. ___):

In this case, [Barnes] 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 [Barnes’] claim. And since there is no state-created liberty interest involved with respect to the publications issue, this Court must dismiss it. [*See Slezak v. S.C. Dep’t of*

Corr., 605 S.E.2d 506, 508 (S.C. 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 (2005), and *Skipper v. S.C. Dep’t of Corr.*, 633 S.E.2d 910 (S.C. Ct. App. 2006) (finding dismissal of inmate’s appeal appropriate because his grievance did not implicate a state-created liberty interest).]

C. BARNES’ ARGUMENT TO THIS COURT REGARDING THE ALC’S DECISION ON CLAIM II(d)

In his brief to this Court, Barnes articulated the following argument in support of his second issue on appeal, which address the ALC’s decision on Claim II(d):¹⁷

The Department refused to allow Appellant to receive a book called the “Prisoner’s Self-Help Litigation Manual” directly from the publisher, Prison Legal News. [R. p. ___ - ___]. In *Beard v. Banks*, the United States Supreme Court held that 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. [*Beard*, 548 U.S. 521(2006)]. Mere imprisonment does not automatically deprive a prisoner of all constitutional protection. [*Id.*, 548 U.S. at 529].

After invoking the United States Supreme Court’s decision in *Turner v. Safley*, 482 U.S. 78, 89 (1987) (“When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.”), Barnes offered the following four-part test from *Fontroy v. Beard*, 559 F.3d 173, 177 – 189 (3rd Cir. 2009):¹⁸

In order to determine whether a restraint 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.”

¹⁷ See Barnes’ Brief, p. 9.

¹⁸ *Id.*, p. 10.

Barnes then argued as follows:¹⁹

In this case, the regulation is not reasonably related to legitimate penological interests. First, the Department says that inmates are only allowed to have a Qu'ran or a Bible and are not allowed to have other books. The stated purpose of this rule is to prevent inmates subject to these measures from having places to hide contraband. There is a rational connection between allowing a single book per cell in order to limit the ability to hide items or burn paper but there is not a rational connection between the Qu'ran and the Bible and this purpose. Any book would be reasonably related to this purpose. Second, the alternative means of exercising the right to possession of a legal book in the cell would be to store it in the library. [The Department] has refused to allow this for unstated reasons. Thirdly, the burden on prison resources would be *de minimis*, it would not be difficult for a correctional officer to swap out a book for an inmate at his cell or to store it on a shelf for the library. Clearly, there the aforementioned alternatives maintain valid penological objectives and cost very little, if anything, to implement.

Barnes then asserted that contrary to the ALC's ruling, the Department, by specifically denying him access to the book called the "Prisoner's Self-Help Litigation Manual" directly from the publisher, prejudiced his ability to prepare his defense for either the charges he faces in Georgia or the charges he faces in our state:²⁰

The ability to prepare a defense is a substantial right of the accused. In this case that right was prejudiced by [the Department] and the determination to deny [Barnes] a book regarding *pro se* defense preparation and this determination was characterized by an abuse of discretion. The obvious solution would be to allow [Barnes] to trade his [Qu'ran] for the legal book as needed. This would maintain security and allow [Barnes] to prepare his legal defense in his pending cases, thus protecting [Barnes'] constitutional right to freedom of religion and to prepare a defense.

The decision to deny [Barnes] the legal book which was sent straight from the publisher affected a substantial right of [Barnes] and prejudiced him because he has been hindered in his ability to prepare a defense. This denial was controlled by an error of law initiated by SCDC and endorsed by the [ALC], namely, that the institutional policy trumped a constitutional right to prepare a defense. [emphasis supplied].

¹⁹ See Barnes' Brief, pp. 10 – 11.

²⁰ *Id.*, p. 11.

Finally, Barnes argued that the Department punished him by specifically denying him access to the “Prisoner’s Self-Help Litigation Manual” directly from the publisher.²¹

Moreover, the denial of the book is punishment. There is no rational relationship to a legitimate non-punitive governmental purpose and the denial of this book being the single book allowed in [Barnes’] cell. The legitimate purpose may be that [the Department] limits books to one per cell in order to limit hiding places or to minimize flammable material within the cell. However, *which* book, is not rationally related to this purpose. [italicized emphasis supplied by Barnes].

D. THE ALC DID NOT ERR IN ITS DECISION

Barnes did not assert, complain, or otherwise suggest in Claim II(d) (R. p. ___) that the Department’s denial of the publication prejudiced his ability to defend himself.

In his January 17, 2017 brief to the ALC, Barnes did not include Claim II, and, specifically, Claim II(d) in his second group of claims, the group of claims associated with Barnes’ purported denial of access “to standard legal materials and requests.”²² Instead, Barnes included Claim II, and Claim II(d), in his first group of claims, the group of claims associated with his purported denial of “numerous routine privileges, as well as specific constitutional rights, which are afforded to other general population, non-disciplinary inmates.”²³

Therefore, Barnes’ assertion that the Department’s denial of the “Prisoner’s Self-Help Litigation Manual” prejudiced his ability to defend himself against the criminal charges pending against him is not preserved for review by this Court. *See Gatewood v. S.C. Dep’t of Corr.*, 785 S.E.2d 600, 611 – 12 (S.C. Ct. App. 2016), *cert. denied* (May 31, 2017) (“An issue that is not raised to an administrative agency is not preserved for appellate review by the ALC.”)

²¹ See Barnes’ Brief, p. 11.

²² See page 12 above.

²³ See page 11 above.

In its March 29, 2017 order, the ALC more than adequately negated Barnes' assertion that the Department's policy which prevented him from receiving the "Prisoner's Self-Help Litigation Manual" deprived him of his ability to defend himself against the charges pending against him in Georgia and South Carolina (R. p. ___):

Even if the Court had jurisdiction, [Barnes] has failed to demonstrate substantial prejudice. As to his pending criminal actions in Georgia, [Barnes] 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 **[Barnes] had used the library more than sixteen (16) separate times**. The IGC also noted that [Barnes] has access to the Law Library by requesting books. [R. p. ___]. [Barnes] has provided no evidence to refute these statements from the Department.

As to [his] pending criminal action in South Carolina, [Barnes] currently has counsel and has access to the prison library; thus, he is not presently prejudiced.

[bold-face emphasis provided by ALC].

Barnes' reliance upon the Third Circuit's decision in *Fontroy*, like his reliance upon *Beard*, is misplaced. At the outset of its decision in *Fontroy*, 559 F.3d at 174, the Third Circuit stated as follows:

In 2002, the Pennsylvania Department of Corrections ("DOC") implemented a new prison mail policy. This policy required attorneys and courts to affix "Control Numbers" to mail sent to inmates before those communications would be separated from regular mail, and opened and inspected for the first time in the addressee inmate's presence. Appellees Derrick Dale Fontroy, Theodore B. Savage, and Aaron Christopher Wheeler (the "Inmates") successfully challenged the constitutionality of this policy on First Amendment grounds in the District Court. Officials from the DOC have appealed. We are mindful that important First

Amendment interests are at stake. **But because we conclude that the new policy is “reasonably related to legitimate penological interests,” [Turner, 482 U.S. at 89], it passes constitutional muster, and we will reverse the District Court. [emphasis supplied].**

After declaring that it does not “require prisons to use the least restrictive means possible to further legitimate penological interests,” the Third Circuit in *Fontroy*, 559 F.3d at 178, offered the following analysis relevant to Barnes’ argument on this issue:

Under *Turner*’s first step, we must determine whether the record supports a rational connection between improving the means of verifying the source of **legal mail** through the use of Control Numbers and the safety and security problems posed by inmates using the **legal mail system** to smuggle contraband.

We conclude that the DOC Officials have established the necessary rational connection here. First, the record provides ample support for the DOC’s belief that its old legal mail policy was being abused. Beard testified at his deposition that “over the years we have had ongoing concerns about the privileged mail that was coming into our institutions.” Ulisny, a mailroom supervisor with twenty-seven years of mailroom experience, testified at her deposition that she encountered instances where mail bearing return addresses from attorneys and courts contained contraband. The Escape Report stated that there was “[s]ubstantial evidence show[ing] that [an escaped inmate] was able to introduce contraband in the institution through ‘legal mail.’” This included the materials suspected to have aided in the inmate’s escape. The September Report included a random sample of about fifteen instances between 1986 to 1999 where the DOC recovered contraband from mail that appeared from its return address to be legal mail.

[emphasis supplied].

The Third Circuit in *Fontroy*, 559 F.3d at 183, also offered the following analysis directly relevant to Barnes’ suggested alternative methods by which the Department should accommodate his receipt and/or possession of the publication he desires:

Although application of *Turner*’s two-step test is sufficient by itself to satisfy us that the DOC’s new mail policy is constitutional, we find additional support for our holding in language of the Supreme Court in [*Wolff v. McDonnell*, 418 U.S. 539 (1974)]. In *Wolff*, the Court addressed the issue of “whether letters determined or found to be from attorneys may

be opened by prison authorities in the presence of the inmate or whether such mail must be delivered unopened if normal detection techniques fail to indicate contraband.” [418 U.S. at 575]. As part of its decision, the Court addressed the Court of Appeals’ statement that “[i]f there was doubt that a letter was actually from an attorney, ‘a simple telephone call should be enough to settle the matter.’” [*Id.* at 575] (citation omitted). In the Court’s view, this “impl[ie]d that officials might have to go beyond the face of the envelope, and the ‘privileged’ label, in ascertaining what kind of communication was involved.” *Id.*

The Court rejected the Court of Appeals’ approach as unworkable. [*Id.* at 576]. The Court pointed out that “[i]f prison officials had to check in each case whether a communication was from an attorney before opening it for inspection, a near impossible task of administration would be imposed.” *Id.*

[emphasis supplied].

The Third Circuit concluded its decision in *Fontroy*, 559 F.3d at 184, as follows:

... , to persuade us that the DOC’s new mail policy is constitutional, **the DOC Officials need only show that it is “reasonably related to legitimate penological concerns.”** [*Turner*, 482 U.S. at 89]. Here, they have done so, and we will reverse. [emphasis supplied].

As observed by the ALC observed (R. p. ___), a federal court in our state upheld the restrictions imposed by the Department upon Safekeepers in the Department’s custody receiving publications in the mail directly from publishers. *See Wiles v. Ozmint*, 2006 WL 2260136, *8 (D.S.C. 2006).

The warden of the institution at which the plaintiff in *Wiles* was housed submitted an affidavit in which he stated that the plaintiff had been “able to continue to receive any periodical subscriptions paid for prior to his admission to the MSU until the subscription expired, but that he [had] not been allowed to renew any subscription while in the MSU.” 2006 WL 2260136 at *4. The warden also provided a reason for the restrictions upon the plaintiffs’ receipt of books and publications, 2006 WL 2260136 at *4:

... one reason for the limitations on books and publications is that inmates in the MSU have limited places to hide weapons and contraband, and that

by limiting the opportunity for inmates to hide weapons and contraband, the [Department] can provide a more secure and safe environment for other inmates and staff. Further, books and publications represent a fire hazard in a prison environment, especially in a lock up unit like an MSU.

The *Wiles* court, 2006 WL 2260136 at *10, observed the following:

With respect to Plaintiffs complaints about the receipt of publications through the mail ... , the Defendants' evidence reflects the motivations and rationale behind these policies, and Defendants again point out that these specific policies have already been upheld by the courts of this District and Circuit. [See *Corey v. Reich*, 2004 WL 3090234, aff'd, 2004 WL 1730327 (4th Cir. 2004), cert. denied, 544 U.S. 924 (2005)]; *Incumaa v. Ozmint*, C/A No. 0:03-2776-22BD; *Strong v. Ozmint*, C/A No. 2:03-2256-24AJ, 106 Fed.Appx. 836 (4th Cir. Aug. 11,2004). [other citations omitted and emphasis supplied).

Under *Fontroy*, as well as *Beard*, *Turner*, and *Wiles*, the Department has clearly shown, and Barnes has failed to negate, that it's policy regarding Barnes' receipt of the "Prisoner's Self-Help Litigation Manual" directly from the publisher is "reasonably related to legitimate penological concerns," and, accordingly, the Department's policy does not constitute punishment.

This Court should, therefore, affirm the ALC's decision on the second issue on appeal identified by Barnes, because the ALC did not err when it upheld the Department's decision to deny Barnes the publication.

IV. THE ALC PROPERLY RULED ON BARNES' CLAIMS I AND III, WHICH CONSTITUTE BARNES' FIRST AND THIRD ISSUES ON APPEAL

As the ALC jointly addressed Barnes' arguments regarding Claims I and III in its March 29, 2017 Order, and the ALC's decisions on these claims constitute Barnes' first and third issues on appeal to this Court, the Department respectfully combines its argument regarding Barnes' first and third issues on appeal into the instant section of its brief.

A. BARNES CHALLENGED THE ALC'S DECISION ON CLAIM I

As the first issue on appeal he identified in his brief to this Court, Barnes asserted that the ALC erred by not remanding to the Department “for further fact finding regarding [its] recommendation for [him] to be classified as a [S]afekeeper.”²⁴

Barnes first animated the first issue on appeal by raising it as Claim I amongst the Step 2s he filed with the Department. (R. p. ____). In Claim I, Barnes objected “to his Safekeeper classification and status,” and he further asserted as follows (R. p. ____):

The classification was retaliatory in nature based upon [Barnes] filing of written grievances within the county jail. [Barnes] had not engaged in any behavior warranting disciplinary action. The Safekeeper classification in this instance is a violation of [§ 24-3-80]; Executive Order 2000-11; the U.S. Const. Amend. 5, 6, 8, and 14; S.C. Const. Art. I §§ 3, 14 and 15. Thus, [Barnes] is being unlawfully and unconstitutionally held as a Safekeeper within the Department.

B. BARNES' CHALLENGED THE ALC'S DECISION ON CLAIM III

As the third issue on appeal he identified in his Brief to this Court, Barnes asserted that the ALC erred by determining the he “did not establish he had a state-created liberty interest in classification as a [S]afekeeper.”²⁵

Barnes first animated the first issue on appeal by raising it as Claim III amongst the Step 2s he filed with the Department. (R. p. ____). In Claim III, Barnes asserted as follows (R. p. ____):

[Barnes] objects to the constitutionality of the Safekeeper statute, [§ 24-3-80], on its face, and in this instance as applied, and as a violation of due process. U.S. Const. Amend. 5, 6, 8, and 14; S.C. Const. Art. I §§ 3, 14 and 15. [See also *State v. Dyke*, 744 S.E.2d 505 (S.C. 2013)] (statute mandating lifetime satellite monitoring of convicted sell offender failed the rational-relationship test so that it violated due process).

²⁴ See Barnes' Brief, p. 6.

²⁵ *Id.*, p. 12.

C. THE RULINGS FROM THE ALC'S MARCH 29, 2017 ORDER ON CLAIMS I AND III

In considering Barnes' appeal of the Department's denial of Claims I and III, the ALC, in its March 29, 2017 Order framed the issues as follows (R. p. ___ - ___):

[Barnes] challenges his classification as a Safekeeper pretrial detainee (Claim I) and challenges the constitutionality, both facially and as applied, of the Safekeeper statute – [§ 24-3-80] (Claim III). As an initial matter, because [Barnes'] 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 [§ 24-3-80 in Claim III] separately.

.. concerning [Barnes'] 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*, 705 S.E.2d 28, 38-39 (S.C. 2011)]. However, this Court "is empowered to hear as applied challenges to statutes regulations." [*Id.*, 705 S.E.2d at 39]. But as the Court also stated in its November 5, 2015 Order, [Barnes] 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 [Barnes'] classification set forth in the Edgefield County Sheriff's affidavit.²⁶

[emphasis supplied].

The ALC continued its ruling on Claims I and III as follows (R. p. ___):

In his brief, "[Barnes] 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, [Barnes'] argument that "[t]here is no rational basis for this rule for security reasons, separate housing requirements, disciplinary purposes (since [Barnes] is not a disciplinary inmate), or for the regular management and order of the institution" is contradicted by [Barnes'] prior actions leading to his designation as Safekeeper. According to the Edgefield County Sheriff's affidavit, [Barnes'] 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.

²⁶ See page 3 above.

Furthermore, [Barnes], on multiple occasions, was cited for assault and possession of a weapon, as well as for refusal to cooperate with correctional officers.

The ALC then offered its conclusion (R. p. ___ - ___):

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 [Barnes], it was wholly reasonable for the Department to segregate [Barnes] and restrict his privileges and rights. [See *Hoover v. Watson*, 886 F. Supp. 410, 418 (D. Del. 1995)] (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 v. Wolfish*, 441 U.S. at 540]); [see also *Union County Jail Inmates v. Di Buono*, 713 F.2d 984, 993 (3rd 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).

D. BARNES’ ARGUMENTS TO THIS COURT REGARDING THE ALC’S DECISIONS ON CLAIMS I AND III

1. First Issue on Appeal (Claim I)

After reciting the provisions of Executive Order No. 2000-11, reviewing our Governor’s responsibilities under our state’s constitution, and the ALC’s authority to reverse or modify a judgment rendered by the Department, Barnes asserted as follows in his Brief to this Court:²⁷

In this case, [the Department] recommended [Barnes] be classified as a [S]afekeeper and the Governor approved [Barnes’] [S]afekeeper classification based on information received via affidavit from [the Edgefield County Sheriff] and the recommendation [by the Department]. The [ALC] failed to properly analyze the affidavit and therefore (1) was in violation of statutory decisions and/or (2) the decision was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

²⁷ See Barnes’ Brief, pp. 6 – 7.

In asserting that the ALC's purported failure to properly analyze the April 20, 2015 affidavit violated "statutory decisions,"²⁸ Barnes argued as follows:

In this case the recommendation to the Governor that [Barnes] be classified as a Safekeeper was in violation of the executive order which governs classification of Safekeepers: Executive Order 2000-11. This executive order mandates that detainees fit into one of three categories before they may be committed as [S]afekeepers. It cannot be ascertained from the bare bones assertions of [the Edgefield County Sheriff] regarding allegations of "failure to obey," "assault," and "possession of a weapon" squarely place [Barnes] within the category of "exhibiting extremely violent behavior and uncontrollable conduct." It may be that [Barnes'] conduct was extremely violent and uncontrollable but such cannot be determined from the allegations.

In asserting that the ALC's purported failure to properly analyze the April 20, 2015 affidavit constituted an "arbitrary and capricious" decision,²⁹ Barnes argued as follows:

Nowhere in [the Sheriff's] affidavit does it state that Barnes had been extremely violent and uncontrollable (which was the basis for [Barnes'] classification as a [S]afekeeper). Nor do the words used to describe allegations against [Barnes] rise to the level of extremely violent and uncontrollable behavior. [footnote omitted].

Because there is no evidence in the record that supports the finding that [Barnes] exhibited "extremely violent and uncontrollable behavior" the [ALC] erred in not either not remanding for further proceedings to determine the level of [Barnes'] misconduct or reversing the Department's finding that Barnes should be classified as a [S]afekeeper. The [ALC] could have remanded the issue to the Department for further fact finding regarding the allegations against the [Barnes], including, but not limited to: whether [Barnes] had exhibited any extremely violent and uncontrollable behaviors such as aggravated assault and battery, what types of weapons the [Barnes] was alleged to have had and whether they actually may have belonged to a cell-mate, what were the circumstances surrounding the allegations of "failure to obey a command" and did they arise while [Barnes] was exhibiting extremely violent behavior? Without more information regarding the severity of misbehavior that [Barnes] is alleged to have done or exhibited the [ALC] was simply not equipped to decide whether the determination that the Department's recommendation

²⁸ See Barnes' Brief, pp. 7 – 8.

²⁹ *Id.*, pp. 8 – 9.

that [Barnes] be classified as a Safekeeper was arbitrary and capricious or controlled by an error of law.

2. Third Issue on Appeal (Claim III)

In his Brief to this Court, Barnes articulated the following argument in support of his third issue on appeal:³⁰

A state created liberty interest arises when a state's policies or regulations create a liberty interest for an inmate and the inmate has a right to due process when that interest is harmed by disciplinary actions. [*Wolff*]; [*Wilkinson v. Austin*, 545 U.S. 209 (2005) (adding the requirement that the interest needs to arise from state policies or regulations)].

In this case, Executive Order 2000-11 creates a liberty interest in being free from classification as a [S]afekeeper unless one of three conditions are met. If and when a detainee is found to fit within the requirements of the executive order the detainee is then subject to the same restrictive policies as inmates who have been confined within the Department under disciplinary procedures which provided due process to those inmates. Logically, [Barnes] should be given the same process. Additionally, SCDC inmates who are serving time because they have been convicted of crimes are housed in these units and have the opportunity to leave by serving the disciplinary time or proving their good behavior. Barnes can do neither and must stay in segregation indefinitely despite his good behavior while classified as a Safekeeper.

E. THE ALC DID NOT ERR IN ITS DECISION

Contrary to Barnes' above-quoted assertion, Executive Order 2000-11 does not create a liberty interest in being from classification as a Safekeeper unless one of three conditions are met. Executive Order 2000-11 derives its authority from § 24-3-80, and Executive Order 2000-11 establishes criteria and procedures by which our state's Governor may transfer an individual held in a pretrial confinement facility, like Barnes, to the Department's custody.

Moreover, and again contrary to Barnes' above-quoted assertion, Executive Order 2000-11 does not bestow upon Barnes any process different that the process afforded him under § 24-3-80. The final sentence of § 24-3-80 provides that no person committed and detained as a

³⁰ See Barnes' Brief, p. 12.

Safekeeper “shall have a right or cause of action against the State or any of its officers or servants by reason of having been committed and detained in the state prison system.”³¹

After having been thwarted by the ALC’s decision regarding Claims I and III, Barnes has attempted to fashion a liberty interest from whole cloth by assailing the Department’s *recommendation*, upon a valid and legitimate application by the Edgefield County Sheriff, to the Governor that Barnes enter the Department’s custody as a Safekeeper.

Barnes’ contortions represent nothing more than a continuance of the facial challenge to the constitutionality of § 24-3-80, which he began in Claim III. As discussed above, the ALC relied upon *Travelscape* in denying Barnes’ facial challenge to § 24-3-80’s constitutionality.

In *Travelscape*, 705 S.E.2d at 38, our Supreme Court recognized as follows:

Initially, we take this opportunity to clarify our law regarding the power of an ALC to determine the constitutionality of a statute.³² It is well settled in this State that ALCs, as part of the executive branch, **are without power to pass on the constitutional validity of a statute or regulation.** [*Video Gaming Consultants, Inc. v. S.C. Dep’t of Revenue*, 535 S.E.2d 642, 644 (S.C. 2000)]. In *Video Gaming Consultants*, we said those challenges present an exception to our preservation rules and should be raised for the first time on appeal to the circuit court. [*Id.*, 535 S.E.2d at 345]. However, the legislature has since amended the process for appeals from the ALC, providing for a direct appeal to the court of appeals instead of the circuit court. [§ 1-23-610(A)]. This procedural change results in a conundrum for litigants bringing “as-applied” constitutional challenges to a statute or regulation: they must first bring an inherently factual issue before a tribunal generally not suited to make factual determinations. While we have not addressed this issue, the court of appeals, in a case arising before the change in the governing statutes, said, “While it is true that AL[C]s cannot rule on a facial challenge to the constitutionality of a regulation or a statute, AL[C]s can rule on whether a law as applied violates constitutional rights.” [*Dorman v. Dep’t of Health*

³¹ See page 5 above.

³² In the footnote associated with this passage, our Supreme Court recognized the follow, 705 S.E.2d at 38, n. 10:

Because the resolution of this issue concerns the ALC’s subject matter jurisdiction with respect to *Travelscape*’s Dormant Commerce Clause challenge, we raise it *sua sponte*. [See *S.C. Tax Comm’n v. S.C. Tax Bd. of Review*, 299 S.E.2d 489, 491–92 (S.c. 1983) (stating ALCs are without jurisdiction to hear constitutional challenges)].

& Envtl. Control, 565 S.E.2d 119, 126 (S.C. Ct. App. 2002) (citing *Ward v. State*, 538 S.E.2d 245, 247 (S.C. 2000)]. [emphasis supplied].

Of great import to Barnes' argument, our Supreme Court continued its analysis and ruling in *Travelscape* as follows, 705 S.E.2d at 38 – 39:

We find the principle enunciated in *Dorman* and *Ward* to be sound and hold that ALCs are empowered to hear as applied challenges to statutes and regulations. ALCs are better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision. **We wish to reiterate that our decision today does not affect the ALC's inability to decide facial challenges to a statute or regulation; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court.** [emphasis supplied].

The ALC first relied upon *Travelscape* in the following footnote from its March 29, 2017

Order as follows (R. p. ___):

As the Court concluded in its November 5, 2015 Order, **the Court has no subject matter jurisdiction to consider the validity of [Barnes'] 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* 705 S.E.2d at 38 – 39)]; and **[Barnes] 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 [Barnes'] classification set forth in the Edgefield County Sheriff's affidavit.** [emphasis supplied].

Regarding the Edgefield County Sheriff's affidavit, the ALC observed as follows (R. p.

___):

... [Barnes] 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.

Thus, under *Travelscape*, Barnes’ facial challenge to § 24-3-80 fails again, and, contrary to the argument he offered in support of his third issue on appeal, the ALC did not err when it determined that Barnes failed to establish that § 24-3-80 had been unconstitutionally applied.

Moreover, the ALC, contrary to the argument he offered in support of his first issue on appeal, did not need to remand to the Department for further fact finding its recommendation for Barnes to be classified as a Safekeeper. No such process is attributable to Barnes concerning the Department’s role under § 24-3-80 and Executive Order 2000-11.

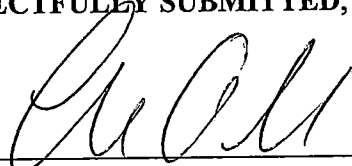
This Court should, therefore, affirm the ALC’s decision on the first and third issues on appeal identified by Barnes, because (1) the ALC properly declined to remand the Department’s recommendation for Barnes’ classification as a Safekeeper back to the Department for further fact finding and (2) the ALC properly determined that Barnes had not established that § 24-3-80 had been unconstitutionally applied to him.

CONCLUSION

For the foregoing reasons, the Department respectfully urges this Court to affirm both the November 5, 2015 and March 29, 2017 orders issued by the ALC in the instant matter.

RESPECTFULLY SUBMITTED,

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Columbia, South Carolina
September 18, 2017

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administrative Law Judge

Appellate Case No. 2017-000967

Steven L. Barnes, Appellant,

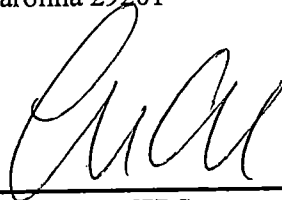
v.

South Carolina Department of Corrections, Respondent.

RESPONDENT'S INITIAL BRIEF

I certify that I have served the **RESPONDENT'S INITIAL BRIEF** on the above-named Appellant by mailing a copy of the same to his counsel of record at the following address:

Shane Goranson, Esquire
Attorney, Capital Trial Division
1330 Lady Street, Suite 401
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September 18, 2017