THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT
Department of Corrections

Shirley C. Robinson, ALC Judge

#2012-206946

Mekiel Mitchell #232904 ..... Appellant,

vs.

South Carolina Department of
Corrections ..... Respondents.

APPELLANT'S FINAL BRIEF

Mekiel Mitchell #232904
Lee Correctional Institution
990 Wisacky Highway
Bishopville, South Carolina
29010-1775

PRO SE APPELLANT

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STATEMENT OF THE FACTS

Mekiel Mitchell #232904 ("Appellant"), is an inmate within the custody and control of the South Carolina Department of Corrections ("Respondents"). Appellant is convicted of the offense of Murder and has been sentenced to a term of Life Without Parole. This confinement has been continuing since May 22,1996, and this conviction has no relevance to this present matter.

On February 9,2010, Appellant served a Request To Staff Staff Member ("RTSM") Form upon, Ms. Bratton, Education Department Supervisor, Perry Correctional Institution ("PCI"), attempting to informally resolve the issue of denial of publications and reading materials that were educationally and intellectually stimulating. At the time of this attempt to resolve, please take notice that Appellant was assigned to the Segregative Management Unit ("SMU")(or lock-up).

On April 14,2010, Appellant served a RTSM Form upon, Michael McCall, Warden for PCI, attempting to resolve the issue of denial to reading materials that were not penologically restricted, and are available to inmates within the general population, without regard to censorship or propaganda observances.

On April 26,2010, Appellant initiated a Step-One grievance, challenging the denial of educational materials and publications, i.e. U.S. mailed magazines, newspaper, books, dictionaries, and educational correspondence courses, where such have the propensity of rehabilitative purposes. This Step-One grievance raised matters relevant to the protections found within the First Amendment of the United States Constitution.

On May 25,2010, Warden McCall responded to the alleged First Amendment violations, within the Step-One grievance, by stating: "All agency policies comply with applicable state, federal and local statutes and with case law ... Therefore, your grievance must be denied at this level." A copy of this response was served upon Appellant, June10,2010.

On June 11,2010, Appellant filed a Step-Two appeal, stating the reasons for objecting to the Warden's denial in the Step-One arena. On October 10,2011, David M. Tatarsky, Esquire, Chief General Counsel for Respondents, issued a purported "final agency decision". It was Respondents position that: "Since filing this grievance, you are no longer housed at PerryCI, nor are you confined in SMU. Therefore, I consider this matter resolved." A copy of this was served upon Appellant, October 14,2011.

On November 7,2011, Appellant served a Notice of Appeal with the Administrative Law Court ("ALC"), seeking appellate review of Respondent's "final agency decision." The matters

challenged for appellate review were: (1) Did SCDC and PerryCI violate Appellant's First and Fourteenth Amendment rights to the U.S. Constitution when it denied Appellate the right to purchase & receive thru mail, magazines, books and newspapers of Appellant's choice?; (2) Does SCDC's absolute prohibition on pre-paid mail ordered subscription magazines, newspapers, and books applied to administratively segregated inmate violates the Appellant's 1st and 14th Amendments of the United States Constitution?; and (3) Does Appellant's release from Administrative Segregation or relocation to another prison within SCDC, other than the prison which complaint was originally experienced and grieved rendered Appellant's complaint and grievance moot?

On November 16,2011, the Clerk of Court for the ALC served a notice of assignment sheet, demonstrating a docket number, assigning an ALC Judge, and a list of procedural rules. A copy was served upon Appellant, November 23,2011.

On November 16,2011, the exact date that the assignment sheet was mailed, the Honorable Shirley C. Robinson, ALC Judge, executed an Order of Dismissal, summarily dismissing this matter, holding that "the grievance appeal does not implicate a state-created liberty or property interest, the ALC may summarily dismiss the appeal at it's discretion." **Citing** Furtick v. South Carolina Department of Corrections, 374 S.C. 334, 649 S.E.2d 35 (2007). A copy of this Order of Dismissal was served upon

Appellant, November 28,2011.

On December 6,2011, Appellant served a motion For Reconsideration upon the ALC Judge, with attached Exhibits. This was an attempt to have the ALC Judge revisit her decision, in light of the fact that the First Amendment is protected by the Fifth and Fourteenth Amendments to the United States Constitution, and the issue to be brought before this ALC Judge had merit and warranted relief. On December 7,2011, the ALC Clerk clocked this motion in, and stamped on the cover letter: "Motion for Reconsideration are Prohibited. See ALC Rule 65." A copy of this was served upon Appellant, December 12,2011.

On January 9,2012, Appellant served a Notice of Appeal with the South Carolina Court of Appeals seeking appellate review of the denial to entertain the motion for reconsideration and Order of Dismissal.

On February 3,2012, the Clerk of Court for this Court of Appeals, executed a formal directive explaining the need to order the transcript, assigning a new tracking number, and instructing how to caption the briefs that would be forthcoming.

On February 23,2012, Appellant served a formal correspondence informing this Court of Appeals that this matter had been summarily dismissed, without benefit of an evidentiary hearing or briefing.

On February 27,2012, this Court of Appeals, via the Clerk of Court, served a formal directive upon Appellant, stating

that more than thirty (30) days had passed since the filing of the Notice of Appeal, and further, informing Appellant that in order to have this Court entertain a brief and designation of matter, out of time, required a motion to reinstate the appeal.

On March 5,2012, Appellant filed: (1) Motion to Reinstate Appeal; and (2) Motion for Extension of Time. Appellant seeks to have this matter restored to this Court's docket so that Appellant may enjoy his right to appellate review upon the issues and matters inclusive therein. Furthermore, the motion to extend the time for filing is necessary to ensure that Appellant does not exceed any more deadlines.

On April 30,2012, Appellant served and filed his Initial Brief; Designation of Matter to be Included in Record on Appeal; and Certificate of Designation of Matter to be Included in the Record on Appeal; and Proof of Service.

On June 15,2012, Appellant served and filed the Record on Appeal; Certificate of Counsel; and Certificate of Service.

On August 21,2012, Jenny Abbott Kitchings, Clerk of Court for this Court, issued an Order summarily dismissing this Appellant's appeal due to a failure to provide a proof of service, pursuant to Rule 210, of the South Carolina Appellate Court Rules, SCACR. This Order was served upon Appellant, August 24,2012, via Institutional Legal Mail Services.

On September 1,2012, Appellant served and filed: (1) Notice of Motion and Motion to Reinstate Appeal; and (2) Proof

of Service.

On October 1,2012, V. Claire Allen, Deputy Clerk for this Court issued an Order of this Court, rescinding the Order of Dismissal issued August 21,2012 and reinstating the appeal. Further, providing twenty (20) days in which the Final Brief must be served and filed. This Order was served upon Appellant, on October 4,2012, via Institutional Legal Mail Services.

DOES THE COMPLETE DENIAL OF RECONSIDERATION, UNDER RULE 65, ALCR, CONSTITUTE A DEPRIVATION TO DUE PROCESS PRINCIPLES AND PROTECTIONS?

Rule 65, of the Administrative Law Court, ACLR, provides: "The administrative law judge shall render a decision in a written order which shall be served on all parties and filed with the clerk of court. The administrative law judge may affirm any ruling, order, or judgment upon any ground(s) appearing in the Record and need not address a point which is manifestly without merit. The decision of the administrative law judge is a final decision and **motions for reconsideration will not be considered.** Judicial review of any decision of the Court shall be provided in S.C. Code Ann. §1-23-610 (2005)(as amended)(emphasis added).

Rule 29(D), ALCR, provides in pertinent part: "Any party may move for reconsideration of a final agency decision of an administrative law judge in a contested case to alter or amend the final decision, subject to the grounds for relief set forth in Rule 59(e), SCRCP, as follows: (1) within ten (10) days after notice of the order concluding the matter before the administrative law judge, a party may move for reconsideration of the decision, provided that a notice of appeal from the decision has not been filed."

Rule 59, of the South Carolina Rules of Civil Procedure, SCRCP, provides in pertinent part: "(a). **GROUNDS.** a new trial may be granted to all or any parties and on all or part of the issues ... (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of this State ... (e). **MOTION TO ALTER OR AMEND A JUDGMENT.** A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."

In Elam v. South Carolina Department of Transportation, 361 S.C. 9, 602 S.E.2d 772 (2004), the Court in examining the use of the 59(e) motion held, "it is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court 'alter or amend the judgment', but also as a vehicle to seek 'reconsideration' of issues and arguments. A motion under Rule 59(e) long has been viewed as a 'motion for reconsideration' despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. **See, e.g.,** Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992)("purpose of Rule 59(e), SCRCP, to alter or amend judgment is to request the judge to reconsider matters properly encompassed in a decision on the merits"); Curcio v. Caterpilar, Inc. 355 S.C. 316, 585 S.E.2d 272 (2003)(an example of the many cases in which trial and appellate courts describe

a Rule 59(e) motion as a "motion to reconsider" or "motion for reconsideration"); James Flanagan, **South Carolina Civil Procedure**, 474-75 (2nd ed. 1996). There is nothing inherently unfair in allowing a party one final chance not only to call the Court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity."

In fact, the United States Supreme Court explicitly has described a motion under Rule 59(e) as one which "involves reconsideration of matters properly encompassed in a decision on the merits." Osterneck v. Ernst & Whinney, 489 U.S. 169, 174, 109 S.Ct. 987, 990, 103 L.Ed.2d 146, 154 (1989)(a request relating to discretionary prejudgment interest is a part of the plaintiff's compensation and thus a part of the decision on the merits, which means a Rule 59(e) motion raising prejudgment interest tolled the time for appeal; Court cited precedent in which Rule 59(e) motions relating to attorney fees and case costs are deemed collateral issues, thus such motions did not toll the time for appeal). The Court explained it's decision furthered the goals of avoiding piecemeal appeals and fostering informed appellate review. Osterneck, 489 U.S. at 177-78, 109 S.Ct. at 992, 103 L.Ed.2d at 156. Furthermore, commentators have explained the approach taken in today's rules where a motion for reconsideration is sought, addressing the merits of the case at hand originated in the common law.

"It is absolutely necessary to justice, that there should, upon many occasions, be opportunities of **reconsidering** the case by a new trial." 11 Wright, Miller & Kane §2801 (quoting a 1757 opinion written by an English judge)(emphasis in original); 12 Moore's Federal Practice §59 App. 102 (even before 1946 amendment adding subdivision (e) to Rule 59, courts routinely found that motions seeking relief as rehearing or reconsideration were proper under Rule 59, although motions were not literally or technically motions for new trial). "[T]he wisdom of giving district courts the opportunity promptly to correct their own alleged errors is all the justification needed" for the practice of freely allowing a motion for reconsideration. Blair v. Equifax Check Services, Inc., 181 F.3d 832, 837 (7th Cir. 1999)(Rule 4(a)(4), FRAP, restates long-accepted practice of considering motions for reconsideration a practice independent of any appellate rule); **see also** 12 Moore's Federal Practice §5930[2][a] and [7]; 11 Wright, Miller & Kane §2801.1; 20 Moore's Federal Practice §§304.13[2] and 304.13[4][b] (3rd. ed. 2003).

Secondly, a great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for it's consideration. Issues and arguments are preserved for

appellate review only when they are raised to and rules on by the lower court. E.G., 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 judge to be preserved for appellate review"); Long v. Dunlap, 87 S.C. 8, 68 S.E. 801 (1910)(Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); Gaffney v. Peeler, 21 S.C. 55 (1884)(question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), of the South Carolina Appellate Court Rules, SCACR, (record on appeal shall not include matter which was not presented to lower court). WHen recently clarifying the law on the presentation and use of additional sustaining grounds in an appeal, our courts have emphasized that they did not "mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." I'ON, L.L.C. v. Town of Mount Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000).

In I'ON, the Court discussed the need for Rule 59(e), and explained, "[t]he losing party must first try to convince the lower court it has ruled wrongly and then, if that effort

fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present their issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments. If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review ... imposing this preservation requirement on the Appellant is meant to enable the lower court to rule properly after it has considered all relevant facts, law and arguments. The requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hopes that an appellate court will accept that ace card, and via a reversal, give them an opportunity to prove their case. Id., 338 S.C. at 422, 526 S.E.2d at 724; **see also** Jean Hoefer Toal, et al., **Appellate Practice in South Carolina** 55-60 (2002).

Thirdly, the rules contemplate two basic situations in which a party should consider filing a reconsideration motion. A party may wish to file such a motion when they believe the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file

such a motion when an issue or argument has been raised, but not rule on, in order to preserve it for appellate review.

Also, South Carolinas appellate courts do not recognize the "plain error rule", under which a court in certain circumstances is allowed to consider and rectify an error not raised below by the party. Dykema v. Carolina Emergency Physicians, P.C., 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002); Kennedy v. South Carolina Retirement Systems, 349 S.C. 531, 564 S.E.2d 322 (2001). This State's mandatory preservation requirements make it doubly important that litigants generally are freely allowed to file a, first written Rule 59(e) motion without concern that a later appeal will be deemed untimely, civil procedure and appellate rules should not be written or interpreted to create a trap for unwary lawyer or party. **See generally** Gamble v. State, 298 S.C. 176, 379 S.E.2d 118 (1989) (stating rules applicable to post-conviction relief actions should not be construed in a manner which operates as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition); Rule 1, SCRCP (civil procedure rules "shall be construed to secure just, speedy, and inexpensive determination of every action").

Careful consideration of the Order of Dismissal issued by the Honorable Shirley C. Robinson, ALC Judge, demonstrates that this Appellant was in a prime position in which to seek reconsideration of the merits of the matters which were to be

briefed before that Court. First, the Order of Dismissal was issued the same date as the docket assignment sheet. This clearly shows that the merits of this matter were not given proper consideration where Appellant had maintained a consistent position of First Amendment deprivations and impediments. Secondly, the matters relating to First Amendment impediments are fully protected by the Fifth and Fourteenth Amendments to the United States Constitution. Such protections extend to due process protections and warranted further consideration due to the rights in question.

Rule 65, ALCR, acts as a foreclosure to any manner of attempt to save, preserve, or maintain a cause of action, issue or argument that is before the ALC. This position is not one where the ALC judge is faced with a discretionary performance or duty, but, where it is a total ban for someone situated as Appellant, i.e., inmate who is incarcerated, that has a valid claim that is effectively trashed or cut out of the equation. (Rule 65, ALCR, ... motions for reconsideration will not be considered).

The langauge used when promulgating Rule 65, has resulted in a mandatory denial to due process, where prior precedence by this State's Supreme Court and United States Supreme Court permit these types of vehicles and mechanisms for judicial and appellate preservation claims and affording all parties the ends of justice. And being mindful of the fact that "[p]risoners have a constitutional right of access to the courts. Kocaya v. Kocaya, 347 S.C. 26, 552 S.E.2d 765 n.3 (Ct.

App. 2001)(**relying on** Bounds v. Smith, 430 U.S. 817, 821, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1972)); **also** 72 C.J.S. **PRISONS** §106 (1987).

Taking into consideration that, at a minimum, due process requires: (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses. Clear Channel Outdoor v. City of Myrtle Beach, 372 S.C. 230, 235, 642 S.E.2d 565, 567 (2007). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. South Carolina Department of Social Services v. Beeks, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997); Moore v. Moore, Opinion No. #26429 (S.C.Sup.Ct. filed February 11, 2008); Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivisions), 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998); South Carolina Department of Social Services on Behalf of State of Texas v. Holden, 319 S.C. 72, 459 S.E.2d 846 (1995)(same); and Article I, §3, of the South Carolina Constitution ("The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty or property without due process of law, nor shall any person be denied the equal protection of the laws").

Appellant takes the position that a total denial of an ability to have the ALC reconsider, or even where there

has been a total failure to take into consideration the matters that were before the ALC, constitutes a flagrant deprivation to the most minimum of due process. This has a serious impact upon the ability of Appellant to have his issues heard in a competent and constitutional manner. The Order of Dismissal was issued the date the assignment sheet was mailed and does not address any issue raised by this Appellant during the grievance process or to be preserved for appeal. Appellant never had the opportunity in which to brief the matters, and therefore, was deprived his full panoply of rights associated with appellate review. And when faced with the opportunity to correct this deficiency and place the case back before the ALC judge, to attempt to convince the ALC judge that there was error in her judgment ... Rule 65 foreclosed that opportunity completely. It's comparative to having a really good book, then finding that the entire middle section has been ripped out. This Rule 65 does not comport with established standards or applicable circumstances of due process, as relates to the case, **sub judice**, and should be held unconstitutional for due process purposes.

DOES THE POLICIES AND PROCEDURES IMPLEMENTED, OR SET IN PLACE BY RESPONDENT'S, FOR SMU INMATES, CONSTITUTE A DEPRIVATIONS OF FIRST AMENDMENT PROTECTIONS AND PRINCIPLES?

The First Amendment to the United States Constitution provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble; and to petition the Government for redress of grievance."

Prisoners have a liberty interest in the receipt of their subscription mailings sufficient to trigger procedural due process guarantees. Krug v. Lutz, 329 F.3d 692, 696-97 n.4 (9th Cir. 2003). And the issue that was to be presented to the ALC, was one of a total denial and ban to such publications as, newspapers, Prison Legal News magazine, dictionaries, magazines, ethical or educations literature. These types of denials are deemed "shortcuts" by our federal courts, and systematically and arbitrarily utilized to deny inmates their First Amendment rights. Such total bans, without "some form" of justification that is reasonable, is a shortcut that greatly circumscribes the universal reading materials accessible to inmates, and, appears not to be sufficiently related to any

legitimate and neutral penological objective. Shakur v. Selsky, 391 F.3d 106, 115-16 (2nd Cir. 2004)(relying on Thornburg v. Abbott, 490 U.S. 401, 416-17, 109 S.Ct. 1874 (1989).

In Thornburg, the United States Supreme Court held that a ban on all publications was a shortcut that greatly circumscribes the universe of reading materials accessible to inmates and appears not to be sufficiently related to any legitimate or neutral penological objective.

Respondents, as relates to this instant matter, have gone as far as to implement a ban and/or exclusion, to all inmates housed in the Segregative Management Unit ("SMU")(i.e., lock-up), publications such as Prison Legal News magazines, dictionaries, newspapers, etc., for reasons other than it's contents, and federal courts have continuously overturned these exclusions. Prison Legal News v. Lehman, 397 F.3d 692 (9th Cir. 2005); Jacklovich v. Simmons, 392 F.3d 420 (10 Cir. 2004); Prison Legal News v. Cook, 238 F.3d 1145 (9th Cir. 2001); Watermann v. Commandant, U.S. Disciplinary Barracks, 337 F.Supp.2d 1237, 1242-43 (D.Kan. 2004); and Miniken v. Walter, 978 F.Supp. 1356 (E.D.Wash. 1997).

A policy or procedure of an absolute exclusion or ban on all SMU portions of Respondents facilities, is offensive especially where there is no respect to due process concerns within the ambiance of the First Amendment arena. Murphy v. Missouri Department of Corrections, 372 F.3d 979, 986 (8th Cir.

2004); and Hopkins v. Collins, 548 F.2d 503, 504 (4th Cir. 1977). Simply because these Respondents may, at this point raise a issue of concern relating to preventing fires, protecting plumbing, or preventing tier floods is not reasonably sufficient to overcome the protections and safeguards in the setting of the First Amendment rights. Kincaid v. Rusk, 670 F.2d 737, 743-45 (7th Cir. 1982)(ban on pictorial magazines, newspapers, and soft/hard cover books, designed to prevent fires and plumbing problems, violates First Amendment); and Parnell v. Waldrep, 511 F.Supp. 764, 767-68 (W.D.N.C. 1981)(similar to Kincaid). This Court must further be mindful that all tobacco products are contraband, i.e., rolling papers, lighters, matches, etc., within all of Respondents facilities. Although these products of contraband may be accessible, as a whole, mostly to general population, SMU facilities are isolated and maintain heavier security restrictions which severely limit these types of contraband to almost nil status.

The issue now under consideration, as is related to the policy and procedure of a total ban of all publications is "whether the regulation and policies 'still permit a broad range of publications to be sent, received and read.'" Ashkur v. California Department of Corrections, 224 F.Supp.2d 1253, 1259 (N.D.Cal. 2002)(under Turner, "[r]egulations to be viewed with caution include those which categorically prohibit access to a broad range of materials"), aff'd 350 F.3d 917,

932-24 (9th Cir. 2003). Yet, a total ban of magazines, newspapers and publications, as in question in this case, is offensive to First Amendment rights and protections. Green v. Ferrell, 801 F.2d 765, 772 (5th Cir. 1986); Hutchings v. Untreiner, 421 F.Supp. 886, 895 (N.D.Fla. 1976); Manicone v. Corso, 365 F.Supp. 576, 577 (E.D.N.Y. 1973); Powlowski v. Wullich, 81 Misc.2d 895, 366 N.Y.S.2d 584, 590 (N.Y.Sup. 1975); Van Cleave v. United States, 854 F.2d 82, 84 (5th Cir. 1988)(ban on newspapers stated a constitutional claim); **and** Martin v. Tyson, 845 F.2d 1451, 1454 (5th Cir. 1988)(ban on newspapers raised a triable issue). The issues and deprivations within the Step-One, (ROA p. 18, 19 & 20), **and Step-Two grievance(s), (ROA p. 21),** proceedings stated a total denial of these types of protected publications. This alone clearly shows that a grave injustice has occurred, especially where our courts have struck down a practice and policy of a complete ban on all newspapers and magazines as offensive to the First Amendment principles.

In Jacklovich v. Simmons, 548 U.S. 521, 533, 126 S.Ct. 2572 (2006), the United States Supreme Court examined where the Tenth Circuit Court of Appeals had upheld a regulation which banned all publications or communications, but, those of a "Primary religious text" for the first 120 days of detention ... this USSC reversed and remanded stating: "we fail to see how a four-month complete denial of access to constitutionally protected materials (regardless of behavior) furthers management or rehabilitation." **See also** Spellman v. Hopper, 95 F.Supp.2d

1267 (M.D.Ala. 1999)(struck down the ban on newspapers and magazines in administrative segregation).

This Court must take into consideration a matter relevant to this instant case and the issues complained of as impediments to First Amendment protections. On January 10,2012, a case was settled in the District Court for South Carolina, where Prison Legal News had filed a civil rights actions against the Berkeley County Detention Center ("BCDC"), due to a complete ban of publications and religious materials, "other than soft cover Bibles". After extensive briefing and discovery, BCDC settled the matter, and have changed their policies and procedures of banning protected publications. The matter was settled on the issue that a ban of protected materials, i.e., Prison Legal News, magazines, dictionaries, religious materials, was repulsive to First Amendment principles that have a long history within the ambiance of the First Amendment. Prison Legal News v. DeWitt, #2:10-cv-02594-MBS (D.S.C. January 10,2012); **see also** Prison Legal News v. Sacramento County, #2:11-cv-00907 (E.D.Cal. 2012)(same).

Appellant is of the stance that, due to the recent events, as to the settlements concerning this same subject matter, that Appellant is due relief in the fashion that Respondents must alter, change and/or revamp their policies and procedures to reflect that those housed within the SMU portions of their facilities be permitted access to all protected publications; may order at the inmates expense newspapers,

magazines, soft/hardcover books from reputable publishers (or at least, discretionary to Respondents). A total ban of all forms of publications, books, newspapers, magazine, Prison Legal Books, or research manuals, etc., without notification and/or justification or sound reasoning, is offensive to due process concerns; and this blanket ban of all types of protected materials, now at issue, is offensive to the First Amendment protections and principles. Appellant would respectfully demand that relief be granted to him under these circumstances.

CONCLUSION

WHEREFORE, Appellant prays this Court grant relief as sought herein: (1) Rule 65, ALCR, is unconstitutional under due process concerns, as relates to this current circumstance; and (2) that a blanket or total ban of publications, newspapers, Prison Legal News, legal research manuals, books, magazines, etc., is offensive to the First Amendment, and those principles and protections therein, and should be struck down.

October 16th, 2012

Respectfully Submitted,

Mekiel Mitchell

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990 Wisacky Highway
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29010-1775

PRO SE APPELLANT

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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Honorable Shirley C. Robinson, ALC Judge

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vs.

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PROOF OF SERVICE

I certify that I have served the: (1) Motion For Enlargement Of Time To File Appellant's Final Brief Out Of Time; (2) Appellant's Final Brief; and (3) Proof of Service, upon Respondents counsel of record, by depositing a copy of the same in the United States Mail, First Class postage affixed thereon, and addressed as follows:

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
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SOUTH CAROLINA COURT OF APPEALS
OFFICE OF THE CLERK OF COURT
V. Claire Allen, Deputy Clerk
Post Office Box 11629
Columbia, South Carolina
29211-1629.

October 26th, 2012

Respectfully Submitted,
Mekiel Mitchell

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

November 19th, 2012

s/ Mekiel Mitchell

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