

# EXHIBIT

APPENDIX A

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

## **INMATE GRIEVANCE FORM**

## STEP 1

INMATE NAME: <u>Kevin Herrist</u>	AUG 01 2018 SC	OFFICE USE ONLY
SCDC NUMBER: <u>313962</u>	Grievance No. <u>BRCL 0593-18</u>	
INSTITUTION: <u>Lee Correctional Institution Broad River CI</u>	Code: General <u>MA/MC</u>	
HOUSING UNIT: <u>F#36 North</u>	Policy _____	
WORK ASSIGNMENT: <u>N/A</u>	Disc. Hear. _____	
	Class. _____	
	PREA _____	
	Date Received <u>8/1/18</u>	
	IGC Initials <u>pt</u>	

**STATEMENT OF GRIEVANCE** (Indicate the date of incident, and if the grievance is a challenge to SCDC Policy, specify which policy. Include supporting documentation and attach answered RTSM or Kiosk reference number.) to mail room

On the week of the 18<sup>th</sup> - 25<sup>th</sup> of May, 2018. I had sent a RTSM alleging that other inmates were writing the courts on my behalf without my consent. On the week of the 22<sup>nd</sup> day of June, 2018 I made an call to SCDC Police Agency (star 22) about not having the opportunity to file my appeal due to someone else filed it without my consent. On June 21, 2018 I received a letter by Chief Justice Beatty alleging that I have filed a notice of appeal with the agency of the Supreme Court of South Carolina. Nevertheless, the dates I attempted to file those documents were sent back to the sender on (06-16-2018, 06-27-2018). I've recently sent out two letters on the 18<sup>th</sup>, and 19<sup>th</sup> day of July along with Inmate debit form (SCDC Form 10-14). The debit form usually takes one day for postage deduction and sent back to the sender, but it did not show after four to five days still when I wrote the mail room they never responded back to me. I recently <sup>had</sup> received another letter by mail room the Supreme Court Justice Beatty allowing me to file when they found out of the letters I was talking about. Send me a new date in which I have until August 07<sup>th</sup>, 2018 to respond to a court deadline. AG Office

07-02-2018 From 06-13-18

07-28-18 Date

Grievant Signature

I am writing this grievance because I have of yet not received notice that the courts received my documents and the mail room have not processed my mail. I've witnessed officers giving my mail to other inmates and I will be following up with this issue and concern. Also, these 10-14 forms were deducted out my mail cap.

**ACTION REQUESTED:**

SECTION REQUESTED:  
Don't interfere with my court deadlines and have the mailroom personnel  
to start picking up ~~our~~ new mail and deliver by hand delivery. It's policy.

**ACTION TAKEN BY IGC:**  **PROCESSED**  **UNPROCESSED**  **OTHER** *Comments*

See FCC Response on Back.

 8/9/15  
IGC Signature Date

**(CONTINUE ON REVERSE SIDE)**

## WARDEN'S DECISION AND REASON:

BRCI-0593-18

You have exceeded all time frames for filing a grievance on this issue. Per Policy GA-01.12 Inmate Grievance System, you had (8) days from date of incident to file grievance. In your grievance you stated that the incident occurred in the month of May, 2018. You didn't file a grievance until 07/28/18. Therefore, this grievance is returned unprocessed.

8/9/18 pr.

Warden Signature

Date

I accept the Warden's decision and consider the matter closed.  
 I do not accept the Warden's decision and wish to appeal.



Grievant Signature

Date

IGC Signature

Date

## INSTRUCTIONS FOR COMPLETING STEP 1 GRIEVANCE FORM

1. An informal resolution shall be attempted prior to the filing of Step 1 by sending an Inmate Request to Staff Member (RTSM) form or Kiosk reference number to the appropriate supervisor. A copy of the answered RTSM must be attached to the grievance when the grievance is filed.
2. Complete each section in its entirety writing only in the space provided for inmate use. No additional pages will be permitted.
3. Only one (1) issue is to be addressed on each form.
4. Submit the completed form by placing it in the Grievance Box at your institution within eight (8) working days of the date on the RTSM response; policy grievances can be filed at any time. Disciplinary and Classification Review appeals must be submitted within five (5) working days of the hearing/review. Do not write in the space provided for the Warden's response.
5. If you are not satisfied with the Warden's decision, you may appeal to the appropriate responsible official within five (5) days of your receipt of the Warden's decision, by placing your Step 2 appeal form in the Grievance Box at your institution.

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# The Supreme Court of South Carolina

Kevin E. Herriott, Petitioner,

v.

State of South Carolina, Respondent.

Appellate Case No. 2018-001122

Lower Court Case No. 2018CP1000600

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## ORDER

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Petitioner has filed a notice of appeal from a conditional order of dismissal. The notice of appeal is dismissed without prejudice because the order is not an appealable order. *Lewis v. State*, 368 S.C. 630, 630 S.E.2d 464 (2006). The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.



FOR THE COURT

C.J.

Columbia, South Carolina  
June 21, 2018

cc: Megan Harrigan Jameson, Esquire  
Mr. Kevin E. Herriott

# EXHIBIT

APPENDIX B

## SOUTH CAROLINA DEPARTMENT OF CORRECTIONS

## INMATE GRIEVANCE FORM

STEP 1

11/13/19

INMATE NAME: <u>Kevin E. Herriott</u>	OFFICE USE ONLY
SCDC NUMBER: <u>313862</u>	Grievance No. <u>Lee C.I. 0773-19</u>
INSTITUTION: <u>Lee C.I.</u>	Code: General <u>MAIL</u>
HOUSING UNIT: <u>F7-cell #77</u>	Policy _____
WORK ASSIGNMENT: <u>None</u>	Disc. Hear. _____
	Class. _____
	PREA _____
	Date Received <u>9/12/19</u>
	IGC Initials <u>jeo</u>

STATEMENT OF GRIEVANCE (Indicate the date of incident, and if the grievance is a challenge to SCDC Policy, specify which policy. Include supporting documentation and attach answered RTSM or Kiosk reference number.)

Grievant Herriott is writing to reference number 19-01364948, addressing the Mailing Procedures at Lee Corr. Inst. in which such actions or omissions are in violation of SCDC Policy PS-10.08, sections 2.3 and 2.4. The Grievant has suffered irreparable harm by respectfully handing legal mailing correspondence to former night shift ofc. Borkaw who had warned the Grievant that he (ofc. Borkaw) was placing the legal mailing correspondences inside the roll-around cart; however, the following evening the mailing correspondences were returned unprocessed with a note indicating to submit a 10-14 SCDC Form. For the Grievant always submits a(a) 10-14 SCDC Form with mailing contents and on this day has recorded the substance; nevertheless, see RE.No. 19-01364937, for the Grievant is asking for the reasonableness of Warden Nelsen to take corrective action to necessitate that an inmate is secured from theft, sabotage, interferences, and/or any other unlawful intent. The Grievant admits to receive grievance on September 10, 2019 and ask that 8 days start upon notice of response by Mrs./Ms. Atc E/Keer.

J. Herriott Sept. 10, 2019

Grievant Signature

Date

ACTION REQUESTED: To take corrective action to protect the inmate of a(n) constitutional protected right and the officials who are not justified in the procedure and/or practice in the government interests. Prevent

ACTION TAKEN BY IGC:  PROCESSED  UNPROCESSED  OTHER

J. B. Prince 9/18/19

IGC Signature

Date

(CONTINUE ON REVERSE SIDE)

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT  
1100 East Main Street, Suite 501  
Richmond, Virginia 23219-3517  
[www.ca4.uscourts.gov](http://www.ca4.uscourts.gov)

June 12, 2020

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NOTICE

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No. 19-6646, Kevin Herriott v. Aaron Joyner  
6:19-cv-00626-DCN-KFM

TO: Kevin Herriott

In response to your inquiry regarding documents sent to this office and returned to you, enclosed is a copy of the docket report.

Cathy Tyree Herb, Deputy Clerk  
804-916-2724

individual and official capacity; MITCHELL, Mailroom Official, individual and official capacity; MATA, Officer, individual and official capacity; LEVELS, Sergeant, individual and official capacity; VELA, Lieutenant, individual and official capacity; MCCABE, Acting Warden for Kershaw, individual and official capacity; FORD, Associate Warden, individual and official capacity; CANTY, Associate Warden, individual and official capacity; SMITH, Major, individual and official capacity; DAVIS, Captain, individual and official capacity; DANLEY, Lieutenant, individual and official capacity; BLACKWELL, Sergeant, individual and official capacity; GASKINS, Officer, individual and official capacity; BASKINS, Officer, individual and official capacity; CAMPBELL, Sergeant, individual and official capacity; JONES, Sergeant, individual and official capacity; AMERISON, Mailroom Official, individual and official capacity; BRAD, Food Service Director, individual and official capacity; ROBINS, Head Nurse, individual and official capacity

Defendants

05/02/2019 1 Case docketed. Originating case number: 6:19-cv-00626-DCN-KFM. Case manager: CathyHerb. [19-6646] CT [Entered: 05/02/2019 11:41 AM]

05/02/2019 2 ASSEMBLED ELECTRONIC RECORD docketed. Originating case number: 6:19-cv-00626-DCN-KFM. Record in folder? Yes. Record reviewed? Yes. PSR included? N/A. [19-6646] CT [Entered: 05/02/2019 11:58 AM]

05/02/2019 3 PLRA NOTICE issued to [ Kevin Herriott ]. Fee due to District Court or PLRA application due to Court of Appeals within 15 days. Mailed to: K. Herriott. [19-6646] CT [Entered: 05/02/2019 12:07 PM]

05/02/2019 4 INFORMAL BRIEFING ORDER filed. Mailed to: M. Herriott. Informal Opening Brief due 05/28/2019. Informal response brief, if any: 14 days after informal opening brief served. [19-6646] CT [Entered: 05/02/2019 12:10 PM]

05/22/2019 5 PLRA-APPLICATION (court access only) by Kevin Herriott. Consent to Payment Form: Yes; Trust Account Statement: No. [19-6646] CT [Entered: 05/23/2019 01:29 PM]

05/22/2019 6 INFORMAL OPENING BRIEF by Kevin Herriott. [19-6646] CT [Entered: 05/23/2019 01:31 PM]

05/23/2019 7 ORDER filed [1000518218] granting Motion for leave to proceed PLRA [5] Fee Amount: \$505.00. Name and Prisoner Number: Kevin Herriott, #313862. Copies to all parties. Mailed to: K. Herriott. [19-6646] CT [Entered: 05/23/2019 01:35 PM]

07/19/2019 8 UNPUBLISHED PER CURIAM OPINION filed. Originating case number: 6:19-cv-00626-DCN-KFM. Copies to all parties and the district court. [1000550430]. Mailed to: Kevin Herriott. [19-6646] TW [Entered: 07/19/2019 09:18 AM]

07/19/2019 9 JUDGMENT ORDER filed. Decision: Dismissed. Originating case number: 6:19-cv-00626-DCN-KFM. Entered on Docket Date: 07/19/2019. [1000550431] Copies to all parties and the district court. Mailed to: Kevin Herriott. [19-6646] TW [Entered: 07/19/2019 09:19 AM]

08/12/2019 10 Mandate issued. Referencing: [9] Judgment order, [8] unpublished per curiam Opinion. Originating case number: 6:19-cv-00626-DCN-KFM. Mailed to: K. Herriott. [19-6646] CT [Entered: 08/12/2019 09:23 AM]

09/16/2019 11 DOCUMENT referencing [9] Judgment order , [8] unpublished per curiam Opinion by Kevin Herriott. [1000589623] [19-6646] CT [Entered: 09/17/2019 05:12 PM]

09/17/2019 12 NOTICE ISSUED re: document received in error re:[11] document (petition for writ of cert). Returned to: appellant. Mailed to: K. Herriott. [19-6646] CT [Entered: 09/17/2019 05:14 PM]

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# EXHIBIT

APPENDIX A

U.S. District Court

District of South Carolina  
Notice of Electronic Filing

The following transaction was entered on 9/19/2019 at 10:39 AM EDT and filed on 9/19/2019

Case Name: Herriott v. Joyner et al  
Case Number: 6:19-cv-00626-DCN-KFM  
Filer:  
Document Number: 65

Docket Text:

ORDER affirming [57] Report and Recommendation. Details set forth in order. Signed by Honorable David C Norton on 9/19/2019.(eric, )

6:19-cv-00626-DCN-KFM Notice has been electronically mailed to:

6:19-cv-00626-DCN-KFM Notice will not be electronically mailed to:

Kevin Herriott 313862  
Lee Correctional Institution  
F7-77  
990 Wisacky Highway  
Bishopville, SC 29010

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp\_ID=1091130295 [Date=9/19/2019] [FileNumber=9267716-0  
] [44104eeeca4ffc07451250dfd035327511e53ba1dbaad008b42c9b7a00632af4b62e  
ad125e411cdaadd92716669b8bdac47b3189ef2ede1408e547b87c458a1e]]

U.S. District Court

District of South Carolina  
Notice of Electronic Filing

The following transaction was entered on 7/13/2020 at 2:57 PM EDT and filed on 7/13/2020

Case Name: Herriott v. Joyner et al

Case Number: 6:19-cv-00626-DCN

Filer:

Document Number: 153

Docket Text:

ORDER RULING ON REPORT AND RECOMMENDATION for [134] Motion for Sanctions,, Motion to Strike, filed by Kevin Herriott, [147] Report and Recommendation, [140] Report and Recommendation, [127] Motion for Summary Judgment,, filed by NFN Greene, Aaron Joyner, NFN Tisdale, NFN Commander, NFN Ray, [132] Motion for Default Judgment, filed by Kevin Herriott. The court ADOPTS the R&Rs, DENIES Herriott's motions, and GRANTS defendants' motion for summary judgment. Signed by Honorable David C Norton on 7/13/2020. (jbry, )

6:19-cv-00626-DCN Notice has been electronically mailed to:

Andrew F Lindemann [andrew@ldh-law.com](mailto:andrew@ldh-law.com), [jennifer@ldh-law.com](mailto:jennifer@ldh-law.com)

6:19-cv-00626-DCN Notice will not be electronically mailed to:

Kevin Herriott 313862  
Kirkland Correctional Institution  
57-RHU  
4344 Broad River Road  
Columbia, SC 29210

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:n/a

Electronic document Stamp:

[STAMP dcecfStamp\_ID=1091130295 [Date=7/13/2020] [FileNumber=9708451-0  
] [a2e6e36842a0e747eb365385492a53ec69e8d21c369a5c42ea85d4e782c76a62081  
f31e4b40af59ad4dd9d6ad235abe93f193a42e4d4bffd091bde293a66baae]]

**UNPUBLISHED**

**UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

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**No. 20-7098**

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KEVIN HERRIOTT,

Plaintiff - Appellant,

v.

AARON JOYNER, Individual and official capacity; MR. TISDALE, Associate Warden for security, Individual and official capacity; MAJOR RAY, Major for Security, individual and official capacity; LT. COMMANDER, Captain, individual and official capacity; OFFICER GREENE, Lieutenant, individual and official capacity,

Defendants - Appellees,

and

ALFAS, Officer, individual and official capacity; OFFICER MINOR, Officer, individual and official capacity; COXUM, Sergeant, individual and official capacity; GREGG; MICHAEL STEPHEN, Warden for Broad River, individual and official capacity; JOHN DOE, Associate Warden for Security, individual and official capacity; MAJOR PARRISH, Major, individual and official capacity; CPT CARTER, Captain, individual and official capacity; WILL, Lieutenant, individual and official capacity; OFFICER DUNN, Officer, individual and official capacity; MALNADO, Officer, individual and official capacity; MR. MITCHELL, Mailroom Official, individual and official capacity; MATA, Officer, individual and official capacity; LEVELS, Sergeant, individual and official capacity; VELA, Lieutenant, individual and official capacity; ASSOCIATE WARDEN MCCABE, Acting Warden for Kershaw, individual and official capacity; FORD, Associate Warden, individual and official capacity; OFFICER CANTY, Associate Warden, individual and official capacity; MAJOR SMITH, Major, individual and official capacity; CAPTAIN DAVIS, Captain, individual and official capacity; DANLEY, Lieutenant, individual and official capacity; SERGEANT BLACKWELL, Sergeant, individual and official capacity; LIEUTENANT GASKINS, Officer, individual and official capacity; BASKINS, Officer, individual and official capacity; SERGEANT

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CAMPBELL, Sergeant, individual and official capacity; JONES, Sergeant, individual and official capacity; AMERISON, Mailroom Official, individual and official capacity; BRAD, Food Service Director, individual and official capacity; ROBINS, Head Nurse, individual and official capacity; SHARPE, Associate Warden, Individual and official capacity; JOHN DOE 1; JOHN DOE 2,

Defendants.

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Appeal from the United States District Court for the District of South Carolina, at Greenville. David C. Norton, District Judge. (6:19-cv-00626-DCN)

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Submitted: November 19, 2020

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Decided: November 24, 2020

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Before WILKINSON, KING, and QUATTLEBAUM, Circuit Judges.

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Affirmed by unpublished per curiam opinion.

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Kevin Herriott, Appellant Pro Se. Andrew Lindemann, LINDEMANN, DAVIS & HUGHES, PA, Columbia, South Carolina, for Appellees.

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Unpublished opinions are not binding precedent in this circuit.

UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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No. 20-7098  
(6:19-cv-00626-DCN)

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KEVIN HERRIOTT

Plaintiff - Appellant

v.

AARON JOYNER, Individual and official capacity; MR. TISDALE, Associate Warden for security, Individual and official capacity; MAJOR RAY, Major for Security, individual and official capacity; LT. COMMANDER, Captain, individual and official capacity; OFFICER GREENE, Lieutenant, individual and official capacity

Defendants - Appellees

and

ALFAS, Officer, individual and official capacity; OFFICER MINOR, Officer, individual and official capacity; COXUM, Sergeant, individual and official capacity; GREGG; MICHAEL STEPHEN, Warden for Broad River, individual and official capacity; JOHN DOE, Associate Warden for Security, individual and official capacity; MAJOR PARRISH, Major, individual and official capacity; CPT CARTER, Captain, individual and official capacity; WILL, Lieutenant, individual and official capacity; OFFICER DUNN, Officer, individual and official capacity; MALNADO, Officer, individual and official capacity; MR. MITCHELL, Mailroom Official, individual and official capacity; MATA, Officer, individual and official capacity; LEVELS, Sergeant, individual and official capacity; VELA, Lieutenant, individual and official capacity; ASSOCIATE WARDEN MCCABE, Acting Warden for Kershaw, individual and official

capacity; FORD, Associate Warden, individual and official capacity; OFFICER CANTY, Associate Warden, individual and official capacity; MAJOR SMITH, Major, individual and official capacity; CAPTAIN DAVIS, Captain, individual and official capacity; DANLEY, Lieutenant, individual and official capacity; SERGEANT BLACKWELL, Sergeant, individual and official capacity; LIEUTENANT GASKINS, Officer, individual and official capacity; BASKINS, Officer, individual and official capacity; SERGEANT CAMPBELL, Sergeant, individual and official capacity; JONES, Sergeant, individual and official capacity; AMERISON, Mailroom Official, individual and official capacity; BRAD, Food Service Director, individual and official capacity; ROBINS, Head Nurse, individual and official capacity; SHARPE, Associate Warden, Individual and official capacity; JOHN DOE 1; JOHN DOE 2

Defendants

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M A N D A T E

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The judgment of this court, entered , takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

PER CURIAM:

Kevin Herriott appeals the district court's order accepting the magistrate judge's recommendation and granting summary judgment to Defendants on Herriott's 42 U.S.C. § 1983 complaint. On appeal, we confine our review to the issues raised in the informal brief. *See* 4th Cir. R. 34(b). Because Herriott's informal brief does not challenge the basis for the district court's disposition, Herriott has forfeited appellate review of the court's order. *See Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014) ("The informal brief is an important document; under Fourth Circuit rules, our review is limited to issues preserved in that brief."). In addition, we reject Herriott's contention that the district court lacked subject matter jurisdiction.

Accordingly, we affirm the district court's judgment. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION

This matter is before the court on United States Magistrate Judge Kevin McDonald's report and recommendation ("R&R") recommending that the court deny plaintiff Kevin Herriott's ("Herriott") motion for default judgment, request for entry of default, and motion for sanctions/motion to strike defendants' motion for summary judgment, ECF No. 140, and Magistrate Judge McDonald's R&R recommending that the court grant defendants Aaron Joyner, NFN Tisdale, NFN Ray, NFN Commander, and NFN Greene's (collectively, "defendants") motion for summary judgment, ECF No. 147. For the reasons set forth below, the court adopts the R&Rs, denies Herriott's motions, and grants defendants' motion for summary judgment.

## **I. BACKGROUND**

Herriott is an inmate within the South Carolina Department of Corrections (“SCDC”). In this action, Herriott alleges that defendants violated his Eighth and Fourteenth Amendment rights while he was housed in Lee Correctional Institution’s Restricted Housing Unit by denying him indoor and outdoor recreation and exercise, fresh air, and sunlight exposure. Herriott filed this action on March 4, 2019. Defendants

filed a motion for summary judgment on March 10, 2020, ECF No. 127. On March 18, 2020, Herriott filed a motion for default judgment and a request for entry of default, ECF Nos. 132–33, and on March 27, 2020, Herriott filed a motion for sanctions asking the court to strike defendants' motion for summary judgment or to stay the proceedings until defendants produce the requested discovery. ECF No. 134. Defendants responded to the motion for sanctions on April 10, 2020, ECF No. 135, and to the motion for default judgment on April 22, 2020, ECF No. 138. Herriott filed a reply to his motion for sanctions on April 17, 2020, ECF No. 137. On April 27, 2020, the magistrate judge issued an R&R recommending that Herriott's motion for default judgment, request for entry of default, and motion for sanctions be denied. ECF No. 140. Herriott filed a reply to his motion for default that was docketed on April 30, 2020, three days after the R&R had been filed. ECF No. 142.<sup>1</sup> Herriott then filed an objection to this R&R on May 11, 2020, ECF No. 143, and defendants replied on May 26, 2020, ECF No. 145. Herriott filed an unauthorized sur-reply on June 3, 2020, ECF No. 149.

The magistrate judge entered another R&R on May 28, 2020 recommending that defendants' motion for summary judgment be granted. ECF No. 147. Herriott filed objections on June 8, 2020, ECF No. 150, and defendants replied on June 22, 2020, ECF No. 152. Therefore, the objections to both R&Rs are ripe and ready for review.

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<sup>1</sup>The deadline for Herriott's reply brief was April 29, 2020, and SCDC mailroom received Herriott's reply on April 28, 2020, ECF No. 142-1, meaning that the reply brief was timely filed. However, the R&R was issued prior to the court's receipt of the reply brief on April 30, meaning that the R&R did not consider the reply. Herriott did not object to this; nevertheless, the court reviewed the reply and finds that its substance does not dictate a different outcome than the one discussed below.

## II. STANDARD

The magistrate judge makes only a recommendation to the court. Mathews v. Weber, 423 U.S. 261, 270 (1976). The recommendation carries no presumptive weight, and the responsibility to make a final determination remains with the court. Id. at 270-71. The court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge . . . or recommit the matter to the magistrate judge with instructions.” 28 U.S.C. § 636(b)(1). The court is charged with making a de novo determination of any portion of the R&R to which a specific objection is made. Id. However, de novo review is unnecessary when a party makes general and conclusory objections without directing a court’s attention to a specific error in the magistrate judge’s proposed findings. Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982).

## III. DISCUSSION

The court begins with the first R&R recommending that Herriott’s motions for default judgment and sanctions be denied and then turns to the second R&R recommending that the court grant defendants’ motion for summary judgment. Upon review of Herriott’s objections, the court overrules them and adopts the R&Rs.

### **A. Motion for Default Judgment and Motion for Sanctions**

Herriott filed motions for default judgment and for sanctions, arguing that defendants failed to file an answer, respond to discovery requests, and file a dispositive motion by the appropriate deadline. The R&R recommended denying these motions, finding that defendants did file answers, <sup>\*</sup> Herriott did not serve any discovery requests on

defendants, and defendants filed their motion for summary judgment on March 10, 2020, which was the deadline provided for in the text order found at ECF No. 121.

Herriott first objects to the portion of the R&R that states that “[t]he only remaining claims in this action are those against defendants Warden Joyner, Associate Warden Tisdale, Major Ray, Captain Commander, and Lieutenant Greene for denial of access to outside recreation, fresh air, and sunlight at Broad River Correctional Institution.” ECF No. 140 at 1 (emphasis added). Herriott argues that those defendants are former and present employees at Lee Correctional Institution, not at Broad River. The R&R did misstate Herriott’s allegation—he alleges denial of access to outside recreation, fresh air, and sunlight at Lee Correctional Institution, as recognized in a previous R&R in this case. ECF No. 57 at 2. Therefore, the court now clarifies that Herriott alleges that he was deprived of access to outside recreation, fresh air, and sunlight at Lee Correctional Institution. However, this misstatement has no bearing on the outcome of the motions. Next, Herriott “objects to the U.S. Magistrate[’s] admission that is contrary to Herriott v. Stephen, 6:19-cv-750-DCN-KFM.” ECF No. 143 at 2. This objection is too vague for the court afford it any meaningful review; therefore, the court overrules the objection.

Finally, Herriott explains that he mailed a petition for certiorari to the United States Supreme Court on September 26, 2019 in order to appeal the Fourth Circuit’s decision on an interlocutory appeal in this case. Herriott filed a motion for a preliminary injunction on March 21, 2019, ECF No. 12, which the court denied on April 11, 2019, ECF No. 24. Herriott appealed that order to the Fourth Circuit, and the magistrate judge stayed the case pending the appeal. The Fourth Circuit dismissed the appeal on July 19,

2019 and issued its mandate on August 12, 2019. Herriott now argues that this court does not have jurisdiction over this case while his petition for certiorari is pending. In response, defendants argue that there is no record of a filed petition for certiorari, defendants were never served with or received notice of a petition, Herriott never filed a motion to stay the Fourth Circuit's mandate or a motion to stay proceedings in this court, and that the subject of the interlocutory appeal has no bearing on the merits of the issues currently before the court.

Herriott submitted a response in reply to defendants' reply. Although this filing is procedurally improper, the court will briefly recount Herriott's argument. Herriott explains that on September 26, 2019, he gave instructions to Lieutenant Jackson, a Restricted Housing Unit officer of Lieber Correctional Institution, to mail his certiorari petition to the Supreme Court. Herriott states that he did not find out until January 8, 2020 that the Supreme Court never received his petition, and that he did not file a motion to stay because he thought the Supreme Court had received his petition, making it unnecessary to file a motion to stay.

Herriott's argument that this court has no jurisdiction to consider these motions due to his appeal has no merit. To be sure, “[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). However, that is only true when filing an appeal with the court of appeals. There is no equivalent rule divesting

a district court of jurisdiction when a petition for certiorari is filed with the Supreme Court.

Moreover, Herriott appealed the court's denial of a preliminary injunction, meaning that it was deprived of jurisdiction only over the "aspects of the case involved in the appeal." Id. The issues currently before the court are unrelated to the preliminary injunction. In addition, the Fourth Circuit issued its mandate on August 12, 2019, ECF No. 52, which reinstated this court's jurisdiction. Therefore, the court has jurisdiction over this matter and can decide the issues currently before it.

The court acknowledges that Herriott was surprised to learn that the Supreme Court did not receive his petition for certiorari and that Herriott did all that he could to file his petition by providing it to a correctional officer to be mailed. However, even if Herriott's petition had been received by the Supreme Court, the district court still retains jurisdiction of the case while the petition is pending, and a stay in the lower court proceedings is not automatic when a party files a petition for certiorari. Instead, the party who filed the petition must file a motion to stay and convince the court that (1) the balance of hardships is in the party's favor and (2) four Supreme Court justices would likely vote to grant a writ of certiorari. New York Times Co. v. Jascalevich, 439 U.S. 1304, 1304 (1978). In other words, Herriott is not entitled to an automatic stay if he files a petition for certiorari. As such, the court overrules Herriott's objections, adopts the R&R, and denies plaintiffs' motions, ECF No. 132–134.

#### **B. Motion for Summary Judgment**

Defendants filed a motion for summary judgment, which the R&R recommends that the court grant based on Herriott's failure to exhaust his administrative remedies.

Defendants submitted the affidavit of Sherman Anderson (“Anderson”), the Branch Chief for the Inmate Grievance Branch, in which Anderson attests that the only grievance filed by Herriott that raises an issue with denial of outdoor exercise was filed after Herriott had commenced this lawsuit. ECF No. 127-3, ¶ 13. Herriott first objects by arguing that the motion for summary judgment is inappropriate, immaterial, and improper at this time and that Herriott “has submitted on May 29, 2020, that U.S. Magistrate, Honorable McDonald have [sic] outrightly reviewed this case and previous cases ruled upon by Honorable McDonald are erroneous in ruling.” ECF No. 150 at 1–2. Herriott argued in his motion for sanctions that defendants’ motion for summary judgment should be stricken. ECF No. 134 at 1. As discussed above, the magistrate judge recommending denying that motion, and the court agrees with that recommendation. The court is uncertain to what Herriott is referring when he discusses something that he submitted on May 29, 2020; however, any argument that prior rulings by the magistrate judge are erroneous have no bearing on the present matter.

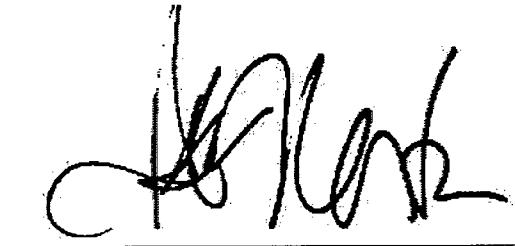
Next, Herriott argues that this court is without jurisdiction to adjudicate this matter due to the appeal of the preliminary injunction order to the Supreme Court. As explained above, even if Herriott’s petition of certiorari had reached the Court, his statement of law is incorrect. Finally, Herriott argues that “[t]he evidence that the defendants have proffered in bad faith is immaterial and has not provided the truth nor disclose to the Plaintiff any and all his production for discovery including any and all requests to staff members and grievances.” ECF No. 150 at 2. Again, that argument was addressed in the prior R&R, the magistrate judge found it to be unconvincing, and the court agrees. Moreover, Herriot submits no evidence to doubt the veracity of Anderson’s

affidavit. As such, the court overrules Herriott's objections, adopts the R&R, and grants defendants' motion for summary judgment.

**IV. CONCLUSION**

For the foregoing reasons the court **ADOPTS** the R&Rs, **DENIES** Herriott's motions, and **GRANTS** defendants' motion for summary judgment.

**AND IT IS SO ORDERED.**

A handwritten signature in black ink, appearing to read "DAVID C. NORTON", is written over a horizontal line.

**DAVID C. NORTON**  
**UNITED STATES DISTRICT JUDGE**

**July 13, 2020**  
**Charleston, South Carolina**

IN THE DISTRICT COURT OF THE UNITED STATES  
FOR THE DISTRICT OF SOUTH CAROLINA  
GREENVILLE DIVISION

Kevin Herriott, ) Civil Action No. 6:19-626-DCN-KFM  
Plaintiff, )  
vs. ) **REPORT OF MAGISTRATE JUDGE**  
Aaron Joyner, NFN Tisdale, NFN Ray, )  
NFN Commander, and NFN Greene, )  
Defendants. )

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This matter is before the court on the defendants' motion for summary judgment (doc. 127). The plaintiff, a state prisoner proceeding *pro se*, seeks relief pursuant to Title 42, United States Code, Section 1983. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d)(D.S.C.), this magistrate judge is authorized to review all pretrial matters in cases filed under Section 1983 and submit findings and recommendations to the district court.

**BACKGROUND**

The plaintiff is an inmate at the South Carolina Department of Corrections ("SCDC"), and over the last two years, he has been housed at different prisons within SCDC, including Lee Correctional Institution ("Lee"). On March 4, 2019, he filed a complaint against various officers and employees at three SCDC prisons (see C.A. No. 6:19-cv-626, doc. 1). By order dated March 12, 2019, the initial case was severed into three separate actions, each pertaining to the claims related to a particular prison, including this case involving claims arising at Lee (doc. 1). The plaintiff filed a second amended complaint on May 17, 2019 (doc. 45). After the plaintiff's unsuccessful interlocutory appeal (docs. 27, 52), the Honorable David C. Norton, United States District Judge, dismissed

some of the original defendants and some of the plaintiff's claims (doc. 65). Accordingly, the only remaining claims in this action are those against the defendants Warden Joyner, Associate Warden Tisdale, Major Ray, Captain Commander, and Lieutenant Greene for denial of access to outside recreation, fresh air, and sunlight at Lee.

The plaintiff alleges in his second amended complaint that between April and July, 2018, the defendants violated his Eighth and Fourteenth Amendments rights by subjecting him to unconstitutional conditions of confinement while he was in Lee's Restricted Housing Unit ("RHU"), by denying him indoor and outdoor recreation and exercise, fresh air, and sunlight exposure (doc. 45, pp. 8-12). He further alleges that he filed an unsuccessful grievance while at Lee concerning these deprivations and that he "completed" the grievance appeal process (*id.*, p. 16). He alleges that as a result of these conditions and the defendants' indifference and inaction to them, he suffered physical and mental injuries, and he seeks actual and punitive damages (*id.*, p. 13).

On December 12, 2019, the defendants filed an answer denying that they violated the plaintiff's rights and raising the affirmative defense of the plaintiff's failure to exhaust his administrative remedies (doc. 86). The plaintiff filed a reply on January 13, 2020, claiming that he "had notified the responsible officials by way of a(n) grievance(s) filed that simply vanished on several accounts" (doc. 101, p. 5).

On March 10, 2020, the defendants filed their motion for summary judgment (doc. 127). By order filed March 11, 2020, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), the plaintiff was advised of the summary judgment procedure and the possible consequences if he failed to respond adequately and timely to the motion (doc. 128). The plaintiff filed a motion to strike the defendants' motion on March 27, 2020 (doc. 134), to which the defendants filed a response in opposition on April 10, 2020 (doc. 135). On April 27, 2020, the undersigned filed a report and recommendation that the plaintiff's

motion to strike be denied<sup>1</sup> (doc. 140). On March 11, 2020, the plaintiff's deadline for filing a response to the defendants' motion for summary judgment was set for April 13, 2020 (doc. 128). Thereafter, this court issued a standing order that extended all deadlines in civil cases by 21 days from the current deadline set (doc. 130).<sup>2</sup> Accordingly, the plaintiff's deadline to file a response to the motion for summary judgment was extended until May 4, 2020. The plaintiff has failed to file a response.

In support of their motion for summary judgment, the defendants argue that the plaintiff failed to exhaust his administrative remedies. They provide the affidavit of Sherman Anderson, Chief of the Inmate Grievance Branch of SCDC's Office of General Counsel, who attests that SCDC records show that the plaintiff was housed at Lee from October 31, 2017, through July 27, 2018, when he was then transferred to SCDC's Broad River Correctional Institution and then later transferred to SCDC's Kershaw Correctional Institution ("Kershaw") on November 13, 2018. However, he failed to file any grievance regarding the lack of recreation, fresh air, and sunlight until March 28, 2019, while he was housed in Kershaw (doc. 127-3, Anderson aff. ¶¶ 12, 13). In that grievance, the plaintiff writes that he has not had recreation since March 2018, which dates back to the time he was housed in Lee (doc. 127-3, p. 22). The grievance was processed and returned as untimely. Mr. Anderson further testifies that the plaintiff's official grievance records do not show that he filed any grievance on this or any other issue during the period that he was housed at Lee (doc. 127-3, Anderson aff. ¶¶ 14-15).

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<sup>1</sup>This motion is pending.

<sup>2</sup> The standing order was in response to the spread of COVID-19 (doc. 130).

### **APPLICABLE LAW AND ANALYSIS**

#### ***Summary Judgment Standard***

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As to the first of these determinations, a fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

### ***Exhaustion***

The Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 42 U.S.C. § 1997e(a) (1996)), mandates, among other things, that prisoners exhaust their administrative remedies prior to filing civil actions concerning prison conditions under Section 1983 or any other federal law. See *Jones v. Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court"). "[T]he PLRA's exhaustion requirement is mandatory," *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 677 (4th Cir. 2005), and "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle*, 534 U.S. 516, 532 (2002)

The PLRA requires "proper exhaustion" of available administrative remedies prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). As the Supreme Court noted, "[a]ggrieved parties may prefer not to exhaust administrative remedies for a variety of reasons," whether it be concerns about efficiency or "bad faith." *Id.* at 89-90. This is especially true in a prison context. *Id.* at 90 n.1. Nevertheless, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91.

"[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008). Thus, an administrative remedy is considered unavailable when: (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) "prison administrators thwart

inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 136 S. Ct. 1850, 1859-60 (2016).

SCDC's administrative remedies process for prisoners is outlined in SCDC Policy GA-01.12. This court may take judicial notice of this policy. *Al-Haqq v. Bryant*, No. 2:14-cv-0008-TMC-MGB, 2016 WL 769121, at \*2 (D.S.C. Feb. 8, 2016) (citing *Malik v. Ward*, No. 9:08-cv-01886, 2010 WL 936777, at \*2 n.4 (D.S.C. Mar. 16, 2010)). The policy provides in relevant part:

13.2 Inmates must make an effort to informally resolve a grievance by submitting a Request to Staff Member Form to the appropriate supervisor/staff within eight (8) working days of the incident. However, in certain cases, informal resolution may not be appropriate or possible.... If informal resolution is not possible, the grievant will complete Form 10-5, Step 1, which is located in common areas, i.e., living areas, libraries, etc. and will place the form in a designated grievance drop box within five (5) working days of the alleged incident. . . . All information must be placed on SCDC Form 10-5, " Inmate Grievance Form." An inmate will submit a grievance within the time frames established in the policy. . . .

The grievance form must contain information about how, with whom, and when attempts were made to resolve the problem informally within eight (8) working days of the appropriate supervisor's signature date on the SCDC Form 19-11, " Inmate Request To Staff Member" (RTSM). . . .

13.3 All grievances will be picked up on a daily basis, during normal working hours, by an employee designated by the Warden (not the IGC). All grievances will be numbered and entered into the automated system (regardless of whether the issue is grievable or non-grievable) within three (3) working days by an employee designated by the Warden (not the IGC). The employee designated by the Warden will give the grievances to the IGC after the grievance has been entered into the automated system. Upon receipt of a grievance, the IGC will, within three (3) working days, complete the additional text for the grievance into the CRT screen and enter the grievance information in the grievance log book. The time frame for responding to the grievance will begin once the text for the grievance has been entered into the OMS system. . . .

13.5 The Warden will respond to the grievant in writing (in the space provided on SCDC Form 10-5, Step 1) indicating in detail the rationale for the decision rendered and any recommended remedies. The grievant will also be informed of his/her rights to appeal to the next level. The Warden will respond to the grievant no later than 45 days from the date the grievance was formally entered into the OMS system by the IGC. . . .

13.7 Appeal Process: The grievant may appeal by completing the SCDC Form 10-5a, Step 2 to the IGC within five (5) calendar days of the receipt of the response by the grievant. . . . The Inmate Grievance Branch will confirm receipt to the appeal, conduct any further investigation necessary, prepare a report, and present all available information to the responsible official. The responsible official will render the final decision on the grievance within 90 days from the date that the IGC received the appeal of the Warden's decision. . . .

SCDC Policy/Procedure, Inmate Grievance System, GA-01.12 §§ 13.2, 13.3, 13.5, 13.7 (May 12, 2014) available at <http://www.doc.sc.gov/policy/policy.html>.

The plaintiff clearly has not exhausted his administrative remedies. The evidence before the court shows that he failed to file any administrative grievances for lack of recreation and exercise, fresh air, and sunlight exposure at Lee until March 28, 2019, approximately eight months after he was transferred from Lee. Moreover, after this lone grievance was denied, the plaintiff failed to appeal it in accordance with SCDC's grievance policy. In any event, the plaintiff filed his initial complaint here on March 4, 2019, more than three weeks before he filed his grievance, well in violation of the PLRA's pre-suit filing requirements.

In his reply, the plaintiff appears to allege that he filed grievance(s) while at Lee, but they "vanished," suggesting that his exhaustion efforts were stymied by the defendants (doc. 101, p. 5). However, this allegation is wholly unsupported by the evidence of record and is in direct contradiction to his earlier allegation in his second amended complaint that his grievances at Lee were in fact denied and that he thereafter "completed" the appeal process (doc. 45, p. 16). As the plaintiff's own allegations on

exhaustion are inconsistent, and as the defendants' uncontradicted evidence establishes that no genuine issue of material fact remains on the plaintiff's failure to exhaust his administrative remedies, summary judgment should be granted.

**CONCLUSION AND RECOMMENDATION**

Now, therefore, based upon the foregoing,

IT IS HEREBY RECOMMENDED that the defendants' motion for summary judgment (doc. 127) be granted.

s/ Kevin F. McDonald  
United States Magistrate Judge

May 28, 2020  
Greenville, South Carolina

***The attention of the parties is directed to the important notice on the following page.***

**Notice of Right to File Objections to Report and Recommendation**

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk  
United States District Court  
300 East Washington Street  
Greenville, South Carolina 29601

**Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation.** 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).