New Revised Edition 6.5

How to WIN Prison Disciplinary Hearings

The Only Self Defense Manual for State & Federal Prisoners Offering Proven Methods That Work . . .

By
Allan Parmelee

Dear Readers:

I am sure you may be noticing some content and format changes in this manual compared to others previously shipped. The reason being, I am getting ready to run a larger quantity of manuals at one time so I can ship them quicker.

I will also be adding a complete chapter dealing with the Post *Sandin* issues and court decisions as I have briefly addressed in Chapter 1 of this manual.

Frequent Questions from Readers

Q. If I don't have stamps, cash or a check, can I send you embossed envelopes for payment of the manual? J.L. Ohio

A. Yes, certainly. Due to the high cost of printing an mailing the manuals, I am unable to ship free manuals anymore. Something of value, stamps, cash, etc can be sent. I do wish some of the guys would stop saying in their letter(s) "enclosed $15.00 cash" when they know nothing is enclosed. I send those back notifying the individual that I received nothing.

Q. My manual was rejected or confiscated by the prison, what can I do? A lot of guys have said this.

A. Unless the prison can show a "legitimate penological interest" in its denial or confiscation, the denial of the legal manual is at least a First Amendment Violation. If you want status on pending litigation against the BOP, see *Cort & Parmelee v Benov, et al,* Case # 95-2759-B(AJB) out of the San Diego Federal Court, Southern Division, District of California. In this case, we currently have at least 20 defendants from Janet Reno to the mail room staff. I am sure *Prison Legal News* will keep you updated on its status. If you also wish to litigate the issue, you can send me a copy of the manual rejection, and request to be put on the mailing list for all the complaints, motions, etc as they are filed in the court regarding this case. These will not be sent without a manual rejection notice. I recommend you litigate your own denial at the same time my litigation is going on.

Some of the manuals were getting rejected by the prison, and I would have to pay $1.74 each to get them back from the post office.

Q. Can I send you copies of my disciplinary reports for advice? D.J, Florida.

A. No. I don't have time to answer all the mail I get as it is, much less review every report I get. If you have a valid complaint, the issue is somewhere dealt with in this book.

Q. Can you help in my criminal appeal? D. L. Arizona.

A. No, I am not a lawyer, just a guy who spends hours researching Prisoner Rights issues, and I try to put together information to help in a specific area that I feel is the weakest in source material for the prisoner.

Q. Where do I get the McCaslin Briefs from? M.K., New York.

A. If you had property seized in your case, read *U.S. v McCaslin*, 863 F Supp 1299 (WD Wash 1994). It's Double Jeopardy; Copy of McCaslin's Briefs, Motions and an update that was published in Prison Legal News from the Lawyer who won the case $15.00. Send me $15.00 in stamps, embossed envelopes, cash, checks or money orders. I do not send any free packages of these motions. The motions are a § 2255 filed to get the guys conviction vacated because the government seized his house. He won. I also include any updated information that may have come out on the issue.

Q. Can I write to you about a question I have? M.J. Illinois.

A. If the question is relative to prison disciplinary hearings, and it is not typical, but rather a "special problem", sure. I cannot answer all the letters I get personally. But please make your statement and question as short, simple and to-the-point as possible. I get a lot of mail and try to deal with the important matters only, even though I don't get time to answer all of it. I just don't have the time, and this manual already costs me considerable time and money that the $9.95 doesn't begin to cover. Oh, I figure you are in prison, so don't tell me your in prison, or again your name. I figured that out by the envelope and name & address at the top of the letter.

How to WIN
Prison Disciplinary Hearings

How To Defend Yourself And Keep from Being Treated Unfairly When Prison Staff Regularly Violate Their Own Rules and Your Few Remaining Rights.

Edition 6.5

This edition is the preliminary release to the 7th Edition

How To Defend Yourself And Keep from Being Treated Unfairly When Prison Staff Regularly Violate Their Own Rules and Your Rights.

Edition 6.5

Written by
Allan Parmelee
2802 E. Madison, Box 168
Seattle, WA 98112
(206) 325-2788

This edition is the preliminary release to the 7th Edition

Also Distributed by
CDI/Seattle among other fine self-help legal sources

HOW TO WIN PRISON DISCIPLINARY HEARINGS (6.5 Edition). Copyright © 1994, 1995 1996, by Allan Parmelee. All rights reserved. Printed in the United States of America, because I could's find a cheaper printer elseware. No part of this publication may be reproduced in any form or by any means, electronic or mechanical, including photocopying, without written permission in writing from the author, and by providing a reference in the copy, and supplying this author a copy of the published material. Brief quotations embodidied in critical articles and reviews may be reprinted without permission from the author by mentioning the source and author. If you are a government agency, affiliation or other government facility, state or federal, directly or otherwise, no permission is granted under any circumstances, but in fact denied in advance whatsoever to reproduce, copy or use by any means the reproduction in any manner any portion(s) of this book. Any complaints or references about this manual to the author should indicate the Print Run Batch Date so I can refer to the correct version(s) or editions. For information, write to Allan Parmelee or CDI/Seattle, 2802 E. Madison, Suite 168, Seattle Washington, 98112.

Some resemblance to actual individual person's may be coincidental. The writers' name appears in several incident reports used as examples, many of which are true events. This Manual is based mostly on research and current law. If some references offend anyone, please accept my apologies in advance but they really happened as described herein.

Print Run: June 21, 1996

Price: $ 15.00 US

ISBN ___________________

About the Author

Allan Parmelee, is not a litigation book writer, but a believer in all people being treated fairly. Since this is Edition 6.5, the preliminary release to the 7th Edition, any comments you might have would be appreciated. This edition includes updated strategy and case law geared toward state, as well as federal prisoners. This book is compiled from legnthy research, reviews of actual disciplinary reports and actual defenses Parmelee has written and won. The material found inside is nothing more than materials any person, inside or out could find on their own, if they were provided reasonable access to adequate law libraries. Not libraries provided by prisons under order of a court, but libraries interests in the law, regardless of who might benifit from it.

I dedicate this manual to those persons treated unfairly by lying staff who often stoop to the lowest of dirty tricks to intentionally harm those persons whom they are supposed set a good example, but don't.

Allan Parmelee, aka BP-9

I want to personally thank several persons for their assistance in editing, commenting and proof reading the many drafts to the final version of this manual. Without them, this manual would not have been as beneficial as it is to those who really need it, and I again, thank them for it. *Prison Legal News* has been generious by supplying many articles, research materials and input for this books content I may not have found without them.

Paul Wright & Dan Pens, Editors of *Prison Legal News* - Washington State
John Perotti - Lucasville Ohio
Edward Dettinger - Waupun Wisconsin
William Van Poyck - Florida

Introduction

Winning is more than just defending yourself: careful writing, talent, experience and the spark that sometimes leaps between your mind and the defensive picture you are trying to paint.

Most cases are applicable only in the state and federal circuits they are decided in because most prisons have differing regulations and state constitutions. Always research and Shepardize the local state and federal decisions cited here, as well as rapidly changing Circuit and U.S. Supreme Court Rulings.

By focusing on documenting all circumstances and facts surrounding a violation, as well as organizing your defense, alternatives and attitude, is something many prisoners don't do, but is a must in being effective. Often, when prison staff realize you know your rights, and put them in proper form, they'll allow a win at their level to avoid a federal courthouse loss.

This manual should be used in combination with your state administrative regulations, to evaluate possible liberty interests, as many states have started excluding the mandatory language and predicates them.

Overall, I have attempted in this manual to comprehensively cover every aspect necessary to fend off the often petty and arbitrary disciplinary reports that are filed against prisoners by every petty minded guard trying to play "gunslinger" with their pink ink pen. HTW should be used in combination with Dan Manville's Self Help Litigation Manual, both of which are basic survival tools.

Table of Contents

1 - After *Sandin* and its Current Effect on Prisoners 1
New Limitations & Struggles For Prisoners Rights 1
S. CT. Guts Due Process for Prisoners in *Sandin v. Conner* Analysis 1
What *Sandin* Means to You 4
Your Liberty Interest To Not Lose Good Time 5
7th Circuit Discusses Sandin 7

2 - DISCIPLINARY RIGHTS OF PRISONERS 10
Prison Rules & Procedures 10
Conflict in Prison Rules 10

3 - DUE PROCESS 13
Minimum Due Process Requirements 13
When Due Process is Required 13
When *Wolff* is Required 13
Understanding Liberty Interest 14
Elements of a Liberty Interest 16
Location of Hearing - Venue 17
Notice and Time Limitations 17
Delay in Hearing States Claim 18
Harmless Errors 19
Right To Assistance of Counsel 19
Right to an Impartial Hearing Panel 21

4 - WITNESSES 23
Testifying for Yourself & Calling Witnesses 23
Right to Remain Silent and its Effect 23
Compelling Witnesses to Testify 24
Witnesses At a Different Institution 25
Witness Affidavits 25
Right to Cross Examine Witnesses 25
Prisoners Testimony Against You 26
Double Jeopardy 27
A. Your Defense Against Double Jeopardy 27
B. The Prison's Attack On You With Double Jeopardy 28
Necessity of *Miranda* Warnings 29

5 - EVIDENCE 31
Disciplinary Evidence Must be Reliable 31
Access to Evidence 31
Evidence in Drug Tests 32
Sweat Patch Drug Testing 33
Test Result Arguments 33

Chain of Custody 34
Evidence In Urinalysis Drug Tests 34
Legal Arguments to Drug Test Results 35
Positive Drug Test Results 37
Detection Periods for Selected Drugs 38
Providing Urine Samples 39
Evidence In Alcohol Testing 39
Evidence In Polygraph Tests 40
Hearsay Evidence 40
Right to Present Evidence 41
Admissible Evidence 41
Burden Of Proof - "Intent" To Break A Rule 42

6 - STANDARD OF PROOF REQUIREMENTS TO JUSTIFY DECISION . . . 44
Proof Requirements For Findings of Guilt or Innocence 44
Disciplinary Findings Must State Evidence Relied on to Base Finding of Guilt 44
Proof in Drug Tests 46

7 - RIGHT TO WRITTEN DECISION 48
Transcripts or Recorded Record 50

8 - RIGHT TO APPEAL 51
BOP Prisoners Must Exhaust Administrative Remedies 51
Right to Appeal and Court Review of Disciplinary Finding 52
Emergency Appeals and Temporary Conditions 55
Specific Procedures When Infracted (Chapters 8 - 20) 56

9 - EVENTS of INCIDENTS - GATHERING EVIDENCE 56
BP-9's (Administrative Complaints) To Force Evidentiary Disclosure . . 56

10 - INVESTIGATING OFFICER QUESTIONS YOU 58
Investigation Begins Against You 58
Your Rights under the Constitution 60

Consent Searches 60
Use of Evidence Seized in a Search 60

11 - EVALUATING YOUR INCIDENT REPORT 62
Analyze your report 62
Arguments for Your Defense 63
The "I didn't do it" Argument 64
The "I didn't violate any rules or regulations" Argument 64
The "You don't have proof"Argument 65
The "Admit and Plead for Mercy" Argument 66
The "Expired Time Limitations" Argument 66
Presenting Your Defense 66

12 - UNDERSTANDING UDC (Unit Disciplinary Committee) 68

13 - DEFEND YOURSELF AT UDC (Pre Hearing) 69

14 - UDC to YOUR BENEFIT (Pre & Minor Hearings) 71

15 - STAFF REPRESENTATIVES and WITNESSES 72
Staff Representative 72
Witnesses 73

16 - UNDERSTANDING DHO (Disciplinary Hearing Officer) 76

17 - APPEARING BEFORE DHO 77
Attitude 78

18 - WRITING YOUR DEFENSE - SAMPLES 79
Writing Structure 79
Your Written Statement 80
Questions for Witnesses (in Writing) 85
Defenses Samples for Popular Incident Reports 87
Checking Your Written Defense 88
Re-Hearings After Appeal 89

19 - APPEALS to UDC (pre or minor hearings) 91

20 - APPEALS to DHO (major offenses) 92

21- WRITING YOUR STATE DEFENSE OR HEARING APPEAL 93
Good Writing Is Persuasive Writing 93
Appellant's or Petitioner's Opening Brief-Selecting Issues and Order of Presentation 94
Writing a Defense Argument 96
Federal Administrative Appeals 96
Good Writing Rules 96
Simple Appeal 97
Complex Appeal 98

22 - STAFF RETALIATIONS VIOLATION OF LAW 104
Retaliation from Staff 104
Things You Cannot be Infracted For 105
Infraction Illegal When In Retaliation 106
Retaliatory Infraction Illegal When Staff Lied.... Again! 106
Retaliatory Discipline Violates Due Process 107
Retaliatory Infractions Illegal For Filing False Charges 108
Grievance Retaliation Unlawful 109
No Immunity for Retaliatory Discipline 109

Self Help Legal Resources 111

23 - LEGAL BASICS and COURT OPTIONS 112
Why Most Prisoners Lose In Court 112
Bivens (§1983) 112
Elements of a *Bivens* Action 113
Comparisons to a *Bivens* (§1983) 113
Comparing *Bivens* to Federal Tort Claims Act 114
Elements of a Tort 114
Immunity From Suit 114
Necessary Elements to a Lawsuit 115
Claims for Money(§1983) vs Relief From Action (Habeas) 115
Frivolous & Unreasonable Claims 116
Going to Court 116

Prison Litigation Reform Act (PLRA) is now Codified at 28 U.S.C. § 3626 . . . 117
Prisoner Release 118
Preliminary Injunctions Limited by PLRA 118
PLRA Denies Relief 118
PLRA Limits Consent Decrees 119
PLRA Discourages and Denies Special Masters 119
The Civil Rights of Institutionalized Persons Act: (CRIPA) Codified as 42 U.S.C. § 1997 119
PLRA Limits Attorney's Fees and Punishes Lawyers for Representing Prisoners 119
PLRA Limits Recovery for Damages 120
PLRA Limits Prisoner Appearances at Court Hearings 120
PLRA Provides Defendants Need Not Reply to Complaint and No Relief Can be Taken 120
PLRA Limits Filing In Forma Pauperis 120
PLRA Directs Payment of Damage Awards for Restitution Orders 121
PLRA Requires Victim Notification of Damage Awards So They Can Benefit From Your Further Loss 121
PLRA Provides Loss of Earned Time Through An Unfair Provision for Prison Time for Filing a Complaint Deemed Frivolous 121

APPENDIX - A 123
Federal BOP Violations & Sanctions 123
Misc. Allowable Sanctions 123
100 - Series: 125
PROHIBITED ACTS AND DISCIPLINARY SEVERITY SCALE . . . 125
200 - Series 126
300 - Series 127
400 - Series 128
SANCTIONS FOR REPETITION OF PROHIBITED ACTS WITHIN SAME CATEGORY 129

SANCTIONS BY SEVERITY OF PROHIBITED ACT, WITH ELIGIBILITY FOR RESTORATION OF FORFEITED AND WITHHELD STATUTORY GOOD TIME 130

APPENDIX - B 131
Table Of Authorities 131
Cases 131
Constitutional Provisions 131
Regulations 131
Statutes and Laws 131
Rules Of Court Procedure 131
Miscellaneous 131

1 - After *Sandin* and its Current Effect on Prisoners

New Limitations & Struggles For Prisoners Rights

The Supreme Court decided in June 1995 *Sandin v Conner*, 63 L.W. 4601; 115 S.Ct. 2293 (1995). As a Result, drastic new limitations and confusion or excuses in the lower courts understanding of the law will be exhibited in poor examples of justice. It has opened a pandora's box for gross staff abuse of prisoner's rights. Those prisoners who decline for what ever reason, to stand up for their rights are losing rights as fast as I can keep printing these manuals. I hate to keep repeating myself throughout this manual, but the Supreme Court has now decided, you are going to have a "higher burden of proof of established rights" will be required in *Sandin v Conner*, 63 L.W. 4601; 115 S.Ct. 2293 (1995). Reprinted below is ***Prison Legal News***, August 1995 review of the *Sandin* decision.

S. CT. Guts Due Process for Prisoners in *Sandin v. Conner* Analysis

by Paul Wright

[*Reprinted with permission from Prison Legal News*]

On June 20, 1995, the supreme court issued its five to four ruling in *Sandin v. Conner*. The ruling appears to be the most devastating legal setback prisoners have suffered in the Supreme Court since *Turner v. Safley*[1] was decided in 1987. In doing so the court abandoned, without specifically overruling, more than a decade of cases involving state created due process liberty interests affecting prisoners.

The case originally arose when Demont Conner, a Hawaii state prisoner, was infracted for allegedly cursing at a guard during a strip search. He was infracted and the disciplinary hearing committee refused Conner's request for witnesses claiming they were unavailable due to staff shortages and Conner's transfer to another facility within the prison. Conner was found "guilty" and sentenced to 30 days segregation. He administratively appealed and nine months later, after he had already served the 30 days segregation imposed, the infraction was expunged as unsupported by the evidence. Conner filed suit in federal court under 42 U.S.C. § 1983 claiming that his right to procedural due process had been violated.

The district court granted summary judgment in favor of prison officials. The court of appeals reversed and remanded the case at *Conner v. Sakai*, 15 F.3d 1463 (9th Cir. 1993), *PLN*, July, 1994. The appeals court ruled that Conner had a due process liberty interest in remaining free from disciplinary segregation and that there was a disputed question of fact as to whether Conner had received a hearing comporting with the due process requirements of *Wolff v. McDonnell*, 418 US 539 (1974). The appeals court based its ruling on the fact that Hawaii prison regulations instruct disciplinary hearing committees to find prisoners "guilty" only when the charge is supported by "substantial evidence." (The supreme court has held that federal due process only requires "some evidence" in the record to support a finding of guilt in a prison disciplinary hearing.) The appellate court held that the rules in question created a due process liberty interest whereby Conner could not be segregated absent "substantial evidence" of misconduct. It also held Conner was entitled to call witnesses at the hearing. The supreme court has now reversed that ruling.

Chief Justice Rehnquist wrote the majority opinion, joined by justices O'Connor, Scalia, Kennedy and Thomas. Rehnquist begins his opinion discussing *Wolff*, which held that prisoners have no federal due process right credit for good behavior in prison, "but that the statutory provision created a liberty interest in a 'shortened prison sentence' which resulted from good time credits, credits which were revocable only if the prisoner was guilty of serious misconduct." The supreme court held that this liberty interest was one of "real substance" and set forth minimal procedures that must be met before such credits can be revoked. Rehnquist states: "Much of *Wolff's* contribution to the landscape of prisoners' due process derived not from its description of liberty interests, but rather from its intricate balancing of prison management concerns with prisoners' liberty in determining the amount of process due."

[1] *Turner v Safeley*, 482 US 78, 107 S.Ct. 2254, 96 L Ed 2d 64 (1987).

In *Meachum v. Fano*, 427 US 215 (1976) the court ruled that it was permissible to transfer prisoners from one prison to another, even if the conditions of confinement were dramatically worse at the new prison, because the transfer was within the range of custody which the conviction has authorized the state to impose. The court distinguished *Meachum* from *Wolff* because no state law or rule limited the discretion of prison officials in the former, while in the latter a state statute had created a liberty interest in good time credits.

The court discusses subsequent cases, mostly decided in the 1980's, where the court discussed state created liberty interests, *Hewitt v. Helms*[2], *Olim v. Wakinekona*,[3] *Kentucky DOC v. Thompson.*[4] The court has now abandoned that whole approach with the following criticism. "By shifting the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation, the Court encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state conferred privileges. Courts have, in response, and not altogether illogically, drawn negative inferences from mandatory language in the text of prison regulations." Rehnquist states: "Such a conclusion may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public. It is a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison. Not only are such regulations not designed to confer rights on inmates, but the result of the negative implication jurisprudence is not to require the prison officials to follow the negative implication drawn from the regulation, but is instead to attach procedural protections that may be of quite a different nature."

> Without any type of judicial remedy as described in *Sandin*, how is this laudable goal of "exercising discretion" and the institution avoiding the creation of liberty interest supposed to be achieved or enforced? Given the wide body of litigation on this issue it is readily apparent that prison officials often do not follow their own rules, while holding prisoners to them.

In abandoning *Hewitt* the court claims that it had two undesirable effects. First, it created dis-incentives for states to codify prison policies in the interests of uniform treatment (after all, they might have to follow the very rules they have promulgated). The court states that such policies don't only benefit prisoners but also the staff and are designed to instruct employees how to exercise the discretion vested in the prison system. "The approach embraced by *Hewitt* discourages this desirable development: States may avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel." Of course, no evidence is cited to support this rather broad assertion. The court claims that promulgation of policies helps ensure that similar treatment is given in similar situations. However, absent any type of judicial remedy how is this laudable goal supposed to be achieved or enforced? Given the wide body of litigation on this issue it is readily apparent that prison officials often do not follow their own rules, while holding prisoners to them.

"Second, the *Hewitt* approach has led to the involvement of federal courts in the day to day management of prisons, often squandering judicial resources with little offsetting benefit to anyone. In doing so, it has run counter to the view expressed in several of our cases that federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment." [Editor's Note: This ruling was written by chief justice Rehnquist, who also authored the majority opinion in *Hewitt v. Helms.]*

The court held "The time has come to return to the due process principles we believe were correctly established and applied in *Wolf* and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause... But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process

---

[2] *Hewett v Helms*, 459 US 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983).

[3] *Olim v Wakinekona*, 461 US 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983).

[4] *Kentucky DOC v Thompson*, 490 US 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 1989.

Clause of its own force, see, e.g. *Vitek*, 445 US at 493 (transfer to a mental hospital), and *Washington*, 494 US at 221-222 (involuntary administration of psychotropic drugs), nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

The court rejected Conner's argument that any state action taken for punitive purposes encroaches on a liberty interest protected under the due process clause. The court distinguished this situation from other cases holding pretrial detainees and school children cannot be punished without violating the due process clause. "The punishment of incarcerated prisoners,.. . serves different aims than those found invalid in *Bell*[5] and *Ingraham*[6]..... It effectuates prison management and prisoner rehabilitative goals.... Discipline by prison officials in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law." In its haste to strip prisoners of the fourteenth amendment's protection, the court ignored the fact that the purpose of due process protection is not to say prison officials cannot punish prisoners guilty of misconduct, but to provide procedures that allow for a somewhat reliable means of assuring the prisoner punished is in fact guilty of something.

"This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence." While prior supreme court decisions had held, without deciding, that segregated confinement automatically triggers due process protection, it had never been ruled on by the supreme court in an argued case. "We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." This was because disciplinary segregation conditions were identical to those of administrative and protective custody. Rather than conclude that "administrative" and "protective" segregation were punitive the court draws the opposite conclusion to hold that disciplinary segregation is "normal." The court stated that Conner's segregation did not work a significant disruption in his environment.

The court also held the possibility that the Hawaii parole board might consider the infraction in denying Conner parole was too attenuated to require due process. "We hold, therefore, that neither the Hawaii prison regulation in question, nor the Due Process clause itself, afforded Conner a protected liberty interest that would entitle him to the procedural protections set forth in *Wolff*. The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life."

To get a full understanding of the implications of this ruling readers should read the two dissenting opinions. In one, by justices Ginsburg and Stevens, they concluded that Conner had a liberty interest under the constitution and Hawaii prison rules, to avoid disciplinary confinement. Justice Breyer's dissent goes into greater detail of what is wrong with the majority ruling. He makes the obvious observation, noted in prior supreme court decisions, that segregation is a major change in a prisoner's environment. He notes that the majority's ruling is going to create quite a bit of uncertainty in the lower courts as previously settled law is called into question. The new standards are not elaborated nor examples shown to guide the lower courts in applying this new standard.

> Supreme Court Does Not Like The Idea That Prisoners Have State Created Rights.
> *Sandin v Conner*, 63 L.W. 4601; 115 S.Ct. 2293 (1995)

The majority opinion, which is now the law of the land, essentially strips prisoners of due process protections that can be enforced in federal court. There is going to be quite a bit of confusion in the lower courts based on this case. While it does not state that *Wolff is* no longer applicable to those disciplinary hearings that do not involve a loss of good time i.e. extending the sentence to be served in prison, lower courts may interpret it to mean just that. Especially since no prior cases are explicitly overturned. With the existence of *Morales v. California Department of Correction*[7] where the court, in a ruling by Justice Thomas, held

[5] *Bell v. Wolfish*, 441 U. S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

[6] *Ingraham v. Wright*, 430 U. S. 651 (1977).

[7] *Morales v. California Department of Correction*, 57 CrL 2021, April 26, 1995, 1995 WL 236551 (US); also see *Morales v California DOC*, 16 F3d 1001 (9th Cir 1994).

that extending a prisoner's parole eligibility hearings after he is convicted does not violate the ex post facto clause. One of the reasons cited was the desire not to get the federal courts involved in whether increasing punishment after conviction is an ex post facto violation or not. The same concern, to decrease the ability of federal courts to enforce prisoners constitutional rights with a resulting lesser caseload, seems to be the driving force in this case as well.

Old time prisoners have told me of the pre *Wolff* days when prisoners would be summoned to the captain's office and told "you're guilty of misconduct and you're going to the hole for six months," and that was that. Under this ruling, prison officials would be well within their discretion to do just that. See: *Sandin v. Conner*, 63 LW 4601 (1995). Readers will note that due to our lead time and a backlog of cases the next few issues of PLN will be reporting a number of pre-*Sandin* cases dealing with liberty interests and disciplinary hearings. It is too soon to tell how valid these cases are, or will be, in light of this ruling. We will report lower court rulings on the matter as they occur.

[Reprinted with permission from Prison Legal News]

> Quoting *Sandin* at 2300, courts reformulated the working definition of Liberty Interest away from the wording of prison regulations and toward the hardship caused by the prison's challenges action relative to "basic conditions" of life as a prisoner. In that reformulation, the court defined Liberty Interest as "freedom of restraint which ... imposes atypical and significant hardship on an inmate in relation to the ordinary incident of prison life."
>
> *Mitchell v Dupnik*, 95 C.D.O.S. 7572(Calif. App Ct. 1995)

What *Sandin* Means to You

The *Sandin* case starts out with the usual dismissed, reversed and dismissed, reversed and won scenario that all jailhouse lawyers experience at one time or another. (*Conner v Saki*, 15 F3d 1463 (9th Cir 1993). As usual, the government appeals, crying when they lose and sometimes prevails because they can exhaust the other person resources, winning, not on merit, but because endless deep pockets. With Chief Justice Rehnquist who wrote majority opinion, and justices O'Connor, Scalia, Kennedy and Thomas adding their 2 cents. Chief Justice Rehnquist abandoned *Hewitt v Helms*, 459 US 460, 103 S.Ct. 864, 74 L.Ed 2d 675 (1983), who also wrote the majority opinion, granting some prisoners rights.

Demont Conner, a Hawaii state prisoner, was infracted for allegedly cursing at a guard during a strip search. He was infracted and the disciplinary hearing committee refused Conner's request for witnesses claiming they were unavailable due to staff shortages and Conner's transfer to another facility within the prison. Conner was found "guilty" and sentenced to 30 days segregation. He administratively appealed and 9 months later, after he had already served the 30 days segregation imposed, the infraction was expunged as unsupported by the evidence. Conner filed suit in federal court under 42 U.S.C. § 1983 claiming that his right to procedural due process had been violated.

The Supreme court basically placed the burden on the prisoner to find actual state of federal laws that require the prison to provide them with any resemblance of Due Process. It went to further say that prisoners have no "constitutional right to due process in prison." Prisoners only have a due process right, IF statute or policy exists granting that right. Of course, most states are now re-writing their statutes and policies, removing prisoners' most basic rights. Some states have gone on to criminalize repeated disciplinary infractions, many minor offenses such as wasting resources or not informing the warden you want to get married.

In recognizing due process rights of prisoners, the court would otherwise be forced to recognize that the purpose of due process protections was not to say prison officials cannot punish prisoners guilty of misconduct, but to provide procedures requiring a recognizable means of assuring the prisoner punished is actually guilty of something.

To fully understand the case, the dissenting opinions must also be read. Justices Ginsburg and Stevens go into detail on what they thought, and why *Conner* had demonstrated legitimate due process protections. This ruling will create a lot of instability in the lower courts discretionary function. While *Conner* does not state that *Wolff* is no longer applicable to those disciplinary hearings that do not involve a loss of good time i.e. extending the sentence to be served in prison, lower courts may interpret it to

mean just that. Especially since no prior cases are explicitly overturned.

I have not applied *Conner* to this manual, because we still don't know how the lower courts will apply it. Based on new cases I have reviewed, *Sandin* is being applied retroactively by the courts, dismissing prisoner lawsuits. The courts have admitted errors in procedure exist under *Wolff*, but *Sandin* narrowly defines your rights, limiting Wolff extensively. Just be prepared to have this case thrown at you, if you intend on litigating anything relative to due process or disciplinary hearings.

The court held that if you don't have a rule, statute, law or policy to back you up and provide you something, and you didn't or a possible sanction was not the loss of good time, *Sandin* says your screwed. The Supreme court held that the constitution does not specifically describe rights to prisoners in its language. The potential or the loss of good time or the existence of a statute, law or policy providing you something is your only protection from totally getting Sandin'd.

Your only safeguard to the *Sandin v Conner* decision is the many circuit cases that have held that "*IF* the potential sanction involves loss of good time, regardless of if good time is lost or not, *Wolff* protections are required." Loss of good-time credits is a common sanction by prison staff for a prisoner's rules violations.

In the *Ramirez*[8] case, the question was raised as to whether a new statutory plan for awarding good-time credits could be applied, without violating the ex post facto clauses [After the fact, or by an act or fast occurring after some previous act or fact, and relating thereto.] of the state and federal constitutions, to prisoners who committed crimes before the date of enactment of the new plan. The court found no violation since the new plan affected only prisoners committing infractions after the date of its passage and did not affect the punishment for the prisoner's original crime. In reaching this conclusion, the court applied the two-part test in *Weaver*.[9] The *Weaver* tests consisted of (1) for the law to violate the ex post facto provision of the Constitution, (2) it had to be retrospective and had to disadvantage the offender.

> States themselves and policies have not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior.
>
> *Wolff v McDonnell*, 418 US 539 (1974)

The elements of *Wolff*[10] detail a state statute as created providing a right to good-time credits, and that they fall within the "liberty interest" supported by the fourteenth amendment [for state prisoners, and the fifth amendment for federal prisoners] of the U.S. Constitution.[11]

Your Liberty Interest To Not Lose Good Time

The court of appeals for the ninth circuit has ruled that Washington state prisoners retain a state created due process liberty interest in not losing their good time credits unless they are provided with due process at a disciplinary hearing. It also held that § 1983 provides the appropriate means for prisoners to challenge the loss of good time without due process. This is a significant ruling because it is one of the first to address the issues left open by *Sandin v. Conner*.[12]

In Washington state Norman Gotcher, a prisoner, was twice charged with having committed serious infractions. He was found guilty and lost 30 days of good time and was placed in segregation. Gotcher filed suit under 42 U.S.C. § 1983 claiming that his federal right to due process was violated when DOC employees failed to give him 24 hour advance notice of the charges against him and refused to allow him to call witnesses or present documentary evidence in his defense. The district court dismissed the suit on the defendants' motion to dismiss for failure to state a claim upon which

8 *In re Ramirez*, 39 Cal 3d 931, 705 P2d 897, 218 Cal Reptr 324 (1985), *cert denied*, 476 US 1152 (1986).

9 *Weaver v Graham*, 450 US 24 (1981).

10 *Wolff v McDonnell*, 418 US 539 (1974); See also, *Crooks v Warne*, 516 F2d 837 (2d Cir 1975); *Powell v Ward*, 392 F Supp 628 (SDNY 1975), *modified*, 542 F2d 101 (2d Cir 1976); *Martino v Carey*, 563 F Supp 984 (D Or 1983).

11 *Wolff v McDonnell*, 418 US 539, 571, n19 (1974); See also, *Green v Secretary of Public Safety*, 68 Md App 147, 510 A2d 613 (1986), but also compare *Green* to *Ward v Johnson*, 667 F2d 1126 (4th Cir 1981).

12 *Sandin v. Conner*, 115 S.Ct. 2293 (1995).

relief could be granted,[13] holding that Washington state prisoners had no protectable liberty interest in remaining free from disciplinary action.

The appeals court began by rejecting the defendants' argument that *Heck v. Humphrey,* [14] bars prisoners' claims challenging the loss of good time because it will affect the duration of their confinement. "Wood's reliance on *Heck*, however, is misplaced. Gotcher's good conduct time credit is similar to the claim in *Wolff v. McDonnell*.[15] In *Heck*, the Court expressly distinguished *Wolff*, noting that *Wolff* challenged the procedure by which the inmate was denied good-time credits. *Wolff*, like this case, involved a claim for using the wrong procedure, not for reaching the wrong result (i.e. the denial of good time credits)." Relying on *Heck* the court noted that the claim at issue in *Wolff* did not call into question the lawfulness of the prisoner's continuing confinement. "Likewise, Gotcher's case does not call into question the lawfulness of his continuing confinement and is not barred by Heck."

> The state cannot hide or remove that right merely by issuing the disclaimer that it was not its intent to create a liberty interest.
> *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995)

The court discussed Washington's good conduct time credit where prisoners serving Sentence Reform Act (SRA) sentences can get up to 10 days per thirty days served reduced from their sentence (the amount varies based on the type of sentence being served and when the offense was committed). In this Washington State case, the relevant provisions are at WAC 137-28-006 and were developed in response to RCW § 72.09.130 "which provides that the DOC 'shall adopt' a system providing incentives for good conduct." (Check your state for statutes that apply to you.) The appeals court decided thhe lower court erred in applying the due process analysis of *Hewitt v. Helms*, which was abandoned in *Sandin*.

The court went on by saying, "For purposes of our due process analysis, the scheme of the good conduct time credit system in Washington appears to be indistinguishable from Nebraska's good conduct time credit system, which the Supreme Court in *Wolff v. McDonnell* found to confer a liberty interest on inmates... As the Court held in *Wolff* : 'It is true that the Constitution does not guarantee good time credit for satisfactory behavior while in prison. But here the state itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. Nebraska may have the authority to create, or not, a right to a shortened prison sentence through the accumulation of credits for good behavior, and it is true that the Due Process Clause does not require a hearing in 'every conceivable case of government impairment of private interest.' But the state having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the Fourteenth Amendment, Fifth Amendment for Federeal Prisoners, 'liberty' to entitle him to those minimal procedures appropriate under the circumstances and required by the Due Process Clause to insure that state created right is not arbitrarily lost."

Washington State, among 49 other states, have used a "back door method" to attempt to remove any rights from prisoners in various methods of attempting to word "you have nothing coming" which is not true. The court criticized Washington DOC Policy 100.100 which states that the purpose of the DOC in having policies is merely to guide DOC personnel in the performance of their duties and "It is not the intent to grant offenders under the jurisdiction of the Department by policy a state-created liberty interest in addition to those rights guaranteed offenders under the United States Constitution." Fortunately, the court saw through the DOC's smoke screen this time and held "This DOC policy directive, however, is not controlling. As *Wolff* indicates, the focus is whether the state has created a right of 'real substance.' If it has done so, the state cannot then hide or remove that right merely by issuing the disclaimer that it was not its intent to create a liberty interest. Moreover, the disclaimer in a DOC policy statement does not override the provisions of the Washington Administrative Code. And as the WAC states with regard to prison disciplinary procedures, its purpose is to 'provide a standardized system consistent with constitutional due process for ascertaining

---

13 Fed. R. Civ. P. Rule 12(b)(6).

14 *Heck v. Humphrey*, 114 S.Ct. 2364 (1994).

15 *Wolff v. McDonnell*, 418 US 539 (1974)

whether [prisoner] misconduct has occurred. WAC § 137-28-005(1).'"

The court on *Gotcher* went on to say "Thus, with regard to whether Gotcher [the prisoner] possess a liberty interest in accumulating good time credits, this case falls squarely under *Wolff*, which the Supreme Court noted in *Sandin* 'correctly established and applied' due process principles in the prisoner liberty interest context.... Because the district court's ruling conflicts with *Wolff*, we reverse that ruling."

Turning to whether Washington state prisoners have a liberty interest in remaining free from disciplinary segregation, which the court in *Sandin* held they do not unless the segregation imposes an "atypical and significant hardship," the court held the record in this case was insufficient to make that determination. Because this was a Fed. R. Civ. P. Rule 12(b)(6) dismissal the court stated it would not affirm unless it was clear that Gotcher could prove no set of facts entitling him to relief. This claim was also reversed and remanded to the lower court for further proceedings."[16]

This case will be of extreme importance to Washington and other State prisoners. The Washington DOC recently introduced new disciplinary WAC rules in which all serious infractions allow for the loss of good time if a prisoner is found "guilty." A question that is still open after *Sandin* is whether *Wolff* due process protections apply based on the potential sanction that may be imposed, i. e. the loss of good time, or if a court will only look at the matter after the fact as to what sanction was actually imposed to determine what process was due. Several courts have held that due process rights must be determined with regard to the potential sanction rather than retroactively based on the actual sanction imposed in a particular case.[17]

Gotcher appears to directly overrule *Dewyer v. Davis*,[18] which held that Washington State prisoners seeking to challenge the loss of their good time in prison disciplinary hearings must first exhaust their state remedies and proceed in federal court via habeas corpus, and could not use § 1983 to challenge prison disciplinary hearings.

7th Circuit Discusses Sandin

In the Supreme Courts ripping appart prisoners' right to due process in prison disciplinary hearings. *Sandin* opened up more questions than it was supposed to answer and the lower courts are grappling with this ruling, and will for some time and they ultimately determine how far prisoners' due process rights are rolled back. This is the first published circuit ruling to interpret *Sandin* and in it the seventh circuit doesn't do much to resolve the uncertainty created by *Sandin*.

Larry Whitford, an Illinois state prisoner, filed suit after a prison disciplinary committee convicted of him of assault and sentenced him to six months in segregation, six months loss of good time credits and a transfer to a maximum security prison. Whitford claims he only witnessed a fight between two other prisoners and was in no way involved in it. Both prisoners provided affidavits supporting Whitford's claim. Whitford sued the members of the disciplinary committee, investigating officers and their supervisors claiming his due process rights were violated because they did not conduct an impartial investigation, consider the exculpatory affidavits, provide him with an impartial disciplinary committee or provide an adequate explanation of the basis for his conviction. The district court granted summary judgment to the defendants and dismissed the suit on all counts. The appeals court affirmed in part and reversed regarding the claims involving the evidence summary on the infraction report and the use of informant testimony.

In his appeal Whitford contended that the district court had erred when it considered two successive motions for summary judgment by the defendants. The appeals court held that denial of summary judgment has no res judicata [a matter judicially acted upon or decided] effect because its denial is not a final judgment, it is an interlocutory order. The court noted several circumstances where a renewed or successive summary judgment motion is appropriate and held that district courts have discretion as to whether they will consider the motion or not. In this case, the district court did not abuse that discretion in considering the defendants' successive summary judgment motions.

20 Illinois administrative code § 504.60(e) requires that prison investigators submit exculpatory evidence to disciplinary committees. Whitford claimed that he gave the

---

[16] *Gotcher v. Wood*, 66 F.3d 1097 (9th Cir. 1995).

[17] *Alexander v. Ware*, 714 F.2d 416, 419 (5th Cir. 1983), and *McKinnon v. Patterson*, 568 F.2d 930, 939 (2nd Cir. 1977).

[18] *Dewyer v. Davis*, 842 F. Supp. 1304 (WD WA 1993).

exculpatory affidavits to an investigator who did not forward them to the hearing committee. *Sandin* abandoned the whole "state created due process liberty interest" test enunciated in *Hewitt v. Helms*, 459 US 460, 103 S.Ct. 864 (1984) and held that the state does not create a liberty interest enforceable in federal court unless it imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." The court applied *Sandin* to hold that the investigator's failure to submit the affidavits did not impose a "significant hardship" on Whitford and that 20 Ill. Admin. Code. ch. 1 sec. 504.60(e) did not rise to the level of creating a liberty interest. The court noted that Whitford still retained a right to submit the affidavits to the disciplinary committee himself, which he did, so he could not claim that the investigator's failure to follow § 504.60(e) prevented him from presenting his defense. Moreover, prisoners have no federal due process right to a prehearing investigation.

The court noted that "*Sandin* recognizes the possibility that a prisoner may possess a liberty interest in freedom from punishment that 'will inevitably affect the duration of his sentence.'" While the loss of good time credits would affect Whitford's sentence, he later earned them back, rendering that issue moot. Whitford had no due process right not to be transferred to a different prison, so that claim was properly dismissed.

Because *Sandin* held that punishing prisoners by placing them into disciplinary segregation will not always trigger due process protections, the question before it was whether Whitford's six months in segregation required due process or not. In *Rowe v. DeBruyn*, 17 F.3d 1047 (7th Cir. 1994) the court held that federal due process was required before a one year segregation sentence was imposed, because it was outside the normal scope of a prisoner's sentence. However, that ruling is now uncertain, "...even if prisoners are entitled to due process protections before extreme terms of segregation may be imposed, Whitford's sentence of six months was not such an extreme term."

In *Gilbert v. Frazier*, 931 F.2d 1581 (7th Cir. 1991) the court held that Ill.Admin.Code § 504.10 to 504.150 granted Illinois prisoners a federally enforceable liberty interest in not being sentenced to disciplinary segregation without at least minimal due process. The court held that *Sandin* called this ruling into question as well. The court held the record required factual development as to what Whitford's actual conditions of confinement were in segregation and if these imposed an "atypical and significant" hardship on him. This issue was remanded back to the district court for further findings of fact.

Turning to the merits of the claims, the court held that the lower court had properly granted summary judgment on Whitford's claims that he was not given prior notice of the charges against him nor did he have an impartial disciplinary committee.

The court held that Whitford should survive summary judgment on his claim that the disciplinary committee erred in not considering the exculpatory evidence, in its use of informant testimony and in its summary of the evidence used to convict him. The disciplinary committee's decision was based on the investigation report. "However, the investigation report... does not in anyway indicate that Whitford committed the offense." The only evidence linking Whitford to the offense was confidential informant statements, the details of which were not provided in the summary. The court noted that while the summary stated that the informant's testimony supported the investigation report which in turn supported the conviction, "if anything, the text of the only investigation report before us appears to clear Whitford of any involvement in the fight."

Discussing the standards for use of informant testimony in disciplinary hearings, the court noted that while prison disciplinary committees may use anonymous informant testimony, "...a prison disciplinary board must accompany the use of a confidential informant's testimony with an indication that the informant is reliable" in order to assure the prisoner's right to due process. To establish an informant's reliability one of four methods must be used by the committee: (1) the oath of the investigating officer as to the truth of his report containing confidential information and his appearance

---

In *Sandin*, the Supreme Courts holding that prison regulations are nothing more than "empty promises." If that were not bad enough, "such regulations are not designed to confer rights on inmates." The regulations are instead "primarily designed to guide correctional officials in the administration of a prison." Authors Note: Does that mean, prison regulations don't apply to prisoners?

Sandin v Conner, 115 S. Ct. 2293, at 2299 (1995)

---

before the disciplinary committee; (2) corroborating testimony; (3) a statement on the record from the hearing officer that he had firsthand knowledge of the sources of information and considered them reliable on the basis of their past record of reliability; or (4) an in camera review of material documenting the investigator's assessment of the informant's credibility. See: *Mendoza v. Miller*, 779 F.2d 1287 (7th Cir. 1985). The committee did none of these and did not claim to have done so in court, which constituted "an admission that they did not comply with the requirements set forth in *Mendoza*."

Likewise, the court held Whitford had stated a meritorious claim that the committee did not consider the other prisoners' exculpatory affidavits. The affidavits are not referred to in the summary which convicted Whitford of the assault. "The adjustment committee may not arbitrarily refuse to consider exculpatory evidence simply because other evidence in the record suggests guilt. The committee is required to issue a written explanation of its decision in order that 'a reviewing court (or agency) can determine whether the finding of guilt was sufficiently arbitrary so as to be a denial of the inmate's due process rights." *Chavis v. Rowe*, 643 F.2d 1281, 1287 (7th Cir. 1981).

The court held that this case was similar to *Chavis* because the committee's summary gave no reason why it found the informant's testimony more credible than Whitford's testimony and the exculpatory affidavits. While the committee in *Chavis* at least acknowledged the exculpatory evidence the one in this case did not even mention it. "Whitford presented exculpatory evidence to the committee, and under *Viens* and *Chavis* he is entitled to an explanation of why the committee disregarded the exculpatory evidence and refused to find it persuasive."

These portions of the case were remanded to the lower court with instructions that before trial the court must initially determine whether "in light of *Sandin*, Whitford possessed a liberty interest in freedom from disciplinary segregation." See: *Whitford v. Boglino*, 63 F.3d 527 (7th Cir. 1995).

2 - DISCIPLINARY RIGHTS OF PRISONERS

Prison Rules & Procedures

The potential punishment that may be issued is what triggers the protections in *Wolff.*[19] Prison rules must exist in order for even a prisoner to have a reasonable chance of survival in such an oppressive and demoralizing environment. Unique problems exist in prisons that the courts like to remain distant from[20]. Courts have also decided that prison disciplinary hearings are not civil or criminal proceedings so that a person could not state a claim for malicious prosecution[21].

Prisoner's cannot be punished for conduct *unless* they are given advance "fair notice" that action they would be charged with is prohibited.[22] The prohibition must be clear and not too vague. Prisoners should not be made to abided by rules that they have not been informed of. Courts have held that a prisons failure to provide incoming prisoners copies of rules and regulations, and read the rules to illiterate prisoners, violates the due process requirement.[23]

Upon admittance to a prison, the officials are required to provide you with a written copy of the rules and any sanctions imposed if the rules are broken. For persons who are unable to read or speak another language, prison staff is required to explain the rules and provide the appropriate rules in the appropriate languages.[24] When infracted, staff are required to provide you with the specific charge, date, time, and place of the alleged misbehavior along with the supporting evidence. You are also entitled to a written explanation of the procedures to be followed and your rights during the hearing.

Often courts do not insert their involvement in specific prison rules and operations. Since the 1970's, courts have started addressing prisoner complaints on a limited basis. Currently, courts will address your claim, but admittedly, you have a tough struggle to have a chance of winning. Punishments allowed are also in a questionable area. Often prisons ignore the allowable punishment rules and apply their own treatment in violation of obvious written limitations.

The only punishments allowed for federal prisoners 28 CFR § 541.13, also in Appendix A. Many states have their own Minimum Standards for full service jails and prisons, codified in administrative law.

Conflict in Prison Rules

Rules regulating prisoner conduct are sometimes vague, unwritten and often disputable. In *Quick*[25], the courts found that "the disciplinary committee lacked authority to impose restitution on an prisoner where, by state law, restitution required a finding of civil or criminal responsibility." Prisoners cannot be infracted for violating prison rules if those rules

---

19 *Alexander v. Ware, 714 F.2d 416 (5th Cir. 1983); Gaston v Taylor, 918 F.2d 25 (4th Cir. 1990).*

20 *Anderson v Fiedler, 798 F Supp 544 (ED Wis 1992).*

21 *Quick v Jones, 754 F2d 1521 (9th Cir 1985).*

22 *Grayned v City of Rockford, 408 U.S. 104, 108 (1972) "Inmates should not . . . be punished for conduct unless given fair advance notice..."*

23 *Hamilton v Love, 358 F Supp 338 (ED Ark 1973); Gibbs v King, 779 F2d 1040 (5th Cir 1985), cert denied, 476 US 1117 (1986); Sands v Wainwright, 357 F Supp 1062 (MD Fla), vacated 491 F2d 417 (5th Cir 1973); (notice may be fulfilled by posting rules in convenient locations.)*

24 *American Bar Association, Standard*, 23-3.1; *Ramirez* v *In re*, 566 39 3d 931, 705 P2d 897, 218 Cal Reptr 324 (1985), *cert denied* 476 U.S. 1152; 106 S.Ct 2266, 90 L Ed 2d 711 (1986) ; *Collins v Vitek*, 375 F Supp 856 (DNH 1974).

25 *Quick v Jones*, 754 F2d 1521 (9th Cir 1985).

are so vague they can't reasonably be understood to bar that conduct. Basically, this should be argued whenever a written rule you were notified of doesn't prohibit that exact conduct. Your defense at hearings is to say "I don't understand the infraction and it isn't written clearly and ask the hearing officer to explain what it means to you."[26]

Courts have also decided that if a rule is enforced or even distributed and violates the basics of "reasonableness", its content does not matter, it will be considered in violation of prisoners' basic rights. For example, some rules have existed where it was considered a violation of prison policy to: "talk to another convict," "vicious eyeballing," or "use any ill language to an officer" or "sit on a certain bench."[27] Many prison rule books can be thrown out the window. In doing this, you must look at the rule. Is the rule specific, vague, too broad or in violation of some other established actual law? If so, the rule could be considered "unenforceable." In *Procunier v Martinez*[28] the court said that "prison rules must *NOT* offend the normal standards prohibiting vagueness and be too broad."

Evaluating the rule, you must look at several issues; (1) Is the rule specific, (2) Is the rule too vague, (3) Is the rule too broad or (4) Is the rule in violation of some other established law. If so, the rule would be declared "unconstitutional under the "vagueness theory."[29] In *Procunier v Martinez*[30], the court held that "rules must not offend normal standards prohibiting vagueness and be too broad." The "reasonableness" test has now been overruled by the "4 prong reasonableness" test in *Turner*.[31]

In *Turner*[32], the Supreme Court confirmed the appropriateness of a rationally related test for validity of the institutional rules in the context of a regulation prohibiting prisoner marriages. The court indicated that there are four factors which MUST be considered in determining the validity of any regulation:

1. There must be a valid rational connection between the prison regulation and the legitimate governmental interest put forward to justify it (it cannot be arbitrary or irrational and the governmental objective must be legitimate and neutral - it cannot be concerned with the content of expression in First Amendment issues).

2. There must be an alternative means of exercising the right (where the rule limits a constitutionally protected right of the prisoner).

3. There must not be a significant "ripple effect" on fellow prisoners or staff (if the prisoner is permitted to exercise his protected right).

4. Finally, the absence of a ready alternative to the regulation is evidence of its reasonableness. The existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but instead is an "exaggerated response" to prison concerns. It is not a "least restrictive alternative test." [B]ut if a prisoner claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimus* [some asshole judges term for "at minimal"] cost to valid penological interests, a court may consider that as evidence that the

---

26 *Wolfel v Morris*, 972 F.2d 712 (6th Cir. 1992); *Adams v Bunnell*, 729 F.2d 362 (5th Cir. 1984); *Coffman v Trickey*, 884 F.2d 1057 (8th Cir. 1989); *Meis v Gunter*, 906 F.2d 364 (8th Cir. 1990); *Rios v Lane*, 812 F.2d 1032 (7th Cir. 1987).

27 Singer, *Prisoners' Rights Litigation: A Look at the Past Decade and at the Coming Decade*, 44 Fed Probation 3, 5-6 (Dec. 1980); and *American Bar Association, Joint Committee on Legal Status of Prisoners, Commentary to Proposed Standard* 3.1, *reprinted at* 14 Am Crim L Rev 444 (1977).

28 *Procunier v Martinez*, 416 U.S. 396, 94 S Ct. 1800, 40 L Ed 2d 224 (1974).

29 *Wolfel v Morris*, 972 F2d 712 (6th Cir 1992) "rules that are over broad could be considered unenforceable."

30 *Procunier v Martinez*, 416 U.S. 396, 94 S.Ct 1800, 40 L Ed 2d 224 (1974).

31 *Turner v Safley*, 482 U.S. 78, 107 S.Ct 2254, 96 L.Ed 2d 64 (1987).

32 *Turner v Safley*, 482 U.S. 78, 107 S.Ct 2254, 96 L.Ed 2d 64 (1987).

regulation does satisfy the reasonable relation standard."

At least two Appeals courts have held that the courts, in reviewing the validity of regulations, cannot rely on conclusory allegations by the state of a rational relationship between the rule and the accomplishment of legitimate penological interests. Rather, these courts require the state to identify the specific penological interest in question and demonstrate that specific interests advanced are the actual basis for the policies in question. Further, the state must demonstrate that the policies are reasonably related to the furtherance of the interests identified.[33]

In prisons, staff will sometimes infract a person for "having "anything not specifically issued or authorized by prison officials." This is often times "abuse of power and discretion by prison staff". Often, when a prisoner attempts to gather signatures on a petition showing support for some issue, prison staff will infract him. In *Edwards v White*[34], this is not allowed because the prisoners' actions are protected by the First Amendment and therefore the prison rule is invalid. But, I expect you to claim your Constitutional Right that you cannot be infracted[35].

If staff fail to provide an incoming prisoner with an understandable copy of the rules, he cannot be infracted for violating the rules because this violates their due process[36] rights. In *Smith*, the prisoner's claim was that he never received the rules while at another
prison did not hold weight with the courts because the guards showed as evidence that *Smith*[37] had signed a paper showing he had received a copy.

You also have the right to know, in advance what sanctions or punishments you may be subjected to for violation of prison rules[38]. See Appendix A Rules and Discipline for the BOP. State disciplinary rules vary from state to state. Look up your state rules, and become familiar with them.

---

33 *Caldwell v Miller*, 790 F2d 589 (7th Cir 1986); *Walker v Sumner*, 917 F2d 382 (9th Cir 1990)(required blood test was not shown to be related to any legitimate penological interest.)

34 *Edwards v White*, 501 F Supp 8 (MD Pa 1979), affd, 633 F2d 209 (3rd Cir 1980).

35 *Hunyadi v Smith*, 112 Misc 2d 484, 447 NYS 2d 226 (S. Ct. 1982) where a grievance committee could not infract this person for lying because the complaint to the grievance committee was protected under the First Amendment.

36 *Keeves v Pettcox*, 19 F 3d 1060 (5th Cir 1994); *Hamilton v Love*, 358 F Supp 338 (ED Ark 1973) where an alleged litter problem was claimed the reason for not giving out copies of the rules by staff was found "no excuse" by the courts."; *Gibbs v King*, 779 F2d 1040 (5th Cir 1985), *cert denied*, 476 US 1117 (1986); *Sands v Wainwright*, 357 F Supp 1062 (MD Fla), *vacated* 491 F2d 417 (5th Cir 1973).

37 *Smith v Coughlin*, 583 NYS 2D 622 (App Div 1992).

38 *Collins v Vitek*, 375 F. Supp 856 (DNH 1974); *Talley v Stephens*, 247 F Supp 683 (ED Ark 1965); Federal Prisoners - 28 CFR § 541.11, and Dept. of Justice, Federal Standards for Prisoners and Jails, 8.08, 10.01, 10.02 (1980), and for some State Prisoners, N.Y. Corrections Law §138(3) (McKinney's 1987).

3 - DUE PROCESS

Before analyzing *Wolff*, you should first understand Post (After) *Sandin* as discussed in detail in Chapter 1. Since *Wolff*, this was the foundation for minimally accepted procedural requirements for a disciplinary hearing, until *Sandin*. Spring of 1996, the Supreme Court has yet agreed to accept another that happens to be a Washington State prison disciplinary case under similar circumstances as *Sandin*. The 7th Edition will have that analysis. Until then, you should read Prison Legal News, a monthly newsletter, or the Federal Reporter available in most law libraries or other case advance sheets to understand how this may apply to you. Until then, stand strong and unite.

> In the light of *Sandin*, "*IF* a *potential* sanction involves the possibility for loss of good time, regardless if good time is lost or not, *Wolff* protections are required."
> *Alexander v. Ware*, 714 F.2d 416 (5th Cir. 1983); *Gaston v Taylor*, 918 F.2d 25 (4th Cir. 1990)

Minimum Due Process Requirements

You have the right to refuse to attend a disciplinary hearing and waive Due Process. The right to this hearing first must be waived by you and : (1) must be valid (2) the waiver should be knowing, (3) the waiver must be intelligent, and (4) the waiver must be voluntary[39]. If you refuse to cooperate with a hearing, courts have generally found you have refused your Due Process Rights, and have waived them.

A case that may have been argued incorrectly by the prisoner is *Dunn v White*[40]. The court decided that *Dunn* was not entitled to due process when he refused an AIDS (acquired immune deficiency syndrome) test and was infracted and was placed in segregation. The courts determined that since *ALL* prisoners are given this test, he was not entitled to a hearing and waived his due process Rights by refusing the test.

When Due Process is Required

The potential punishment that may be issued is what triggers the protections in *Wolff*.[41] If you have something to lose that you currently have in a prison environment, Due Process is required to take it away or limit your access to it. If Due Process does not apply to a disciplinary matter, than prison staff have a wide range of possibilities available to use in resolving the problem. *Wolff* is the general classic case representing the requirements prison staff must use for disciplinary hearings. However, many other cases exist that also clearly define Due Process within a prison setting.

When *Wolff* is Required

Wolff v McDonnell, 418 U.S. 539 (1974) was decided by the Supreme Court becoming a landmark case of examples for prisoners to prison disciplinary hearings. It involved the loss of good time credits. The court decided that in *Wolff*, loss of good time credits created a "liberty interest" because the

39 *State ex rel Hoover v Gagnon*, 124 Wis 2d 135, 368 NW2d 6576 (1985).

40 *Dunn v White*, 880 F2d 1188 (10th Cir 1989), *cert denied*, 493 U.S. 1059 (1990).

41 *Alexander v. Ware*, 714 F.2d 416 (5th Cir. 1983); *Gaston v Taylor*, 918 F.2d 25 (4th Cir. 1990).

law provided for good time and was supported by the Fourteenth Amendment[42]. The *Wolff* decision required that Due Process was required before any loss of good time credits could be taken away. The Supreme Court in a footnote on page 571 n19 of *Wolff*, also stated that other sanctions also applied such as solitary confinement and existing privileges. In *Green v Secretary of Public Safety* [43], still ore argument exist as to what "privileges" exist requiring Due Process. This is the point that the majority of the courts seem to draw a distinction. They state that they did not intend to suggest that the procedures mandated by the decision would also be required for the imposition of much lesser penalties, such as loss of existing privileges. The court did not define what was a "privilege" and did not suggest what, if any, procedures were constitutionally required when such lesser penalties are imposed.

Aside from the most common "loss of good time credits" penalties applied to prisoners, they also may be placed in segregation (solitary confinement) and withheld or denied existing privileges. Loss of good-time credits is a legally established means to increase a prisoners' sentence. The definition of a "privilege" and your right to it must be considered in each individual case.

For a rare case to argue the other side, it might use *Ort v White* [44] where an prisoner was denied drinking water on a work detail for refusing to work. In cases of only minor sanctions, you should research decisions from your specific district to see how the judges are deciding. In *Castaneda v Henman*[45] the courts decided a very minor sanction required lesser stringent due process requirements.

Understanding Liberty Interest

"Grievous Loss" or more accurately called "Liberty Interest", in which the grievous loss is obsolete because of current legal trends and analysis. Applying the analysis in *Olim*,[46] it is easy to apply the rational and analysis to the application of prison disciplinary rules for your particular state and situation. Several foundation cases define the "liberty interest" issue in detail.[47] If you wish to protect your rights under your set of circumstances, consider the parts of a "Liberty Interest"[48]. One court decided that denial of privileges and solitary confinement, or the reduction of exercise, association with others, or limitations on normal work or educational activities qualified for due process *IF* that status was intended to continue for a period of time, usually more than 8 hours[49]. Other courts have held that recreation periods are important to physical and mental health. If recreation is summarily cancelled for no reason, or for rule infraction, or even with an infraction and done for punishment, it should be severely limited.[50]

---

42 Fifth Amendment for Federal Prisoners. State Prisoners would use the Fourteenth Amendment.

43 *Green v Secretary of Public Safety* 68 Md App 147, 510 A2d 613 (1986) it says *Wolff* does not apply if the punishment in solitary confinement is less than 8-hours. But in *Ward v Johnson*, 667 F2d 1126 (4th Cir 1981) it applied *Wolff* where a prisoner had lost only recreational opportunities, the court said that the *potential* for punishment rather than the actual punishment determines whether due process should be applied. Shepardize this case for the most current material and direction of the courts.

44 *Ort v White*, 813 F2d 318 (11th Cir 1987).

45 *Castaneda v Henman*,. 914 F2d 981 (7th Cir 1990), *cert denied*, 498 U.S. 1124

(continued...)

(...continued)
(1991).

46 *Olim v Wakinekona*, 461 US 238, 103 S Ct 1741 (1983).

47 *Barfield v Brierton*, 843 F2d 923 (11th Cir 1989); *Dudly v Stewart*, 724 F2d 1493 (11th Cir 1984); *Spruytte v Walters*, 753 F2d 498 (6th Cir 1985); *Clark v Brewer*, 776 F2d 226 (7th Cir 1985); *Whitehorn v Harrelson*, 758 F2d 1416 (11th Cir 1985); *Parker v Cook*, 642 F2d 865 (5th Cir 1981); and see *Van Poyck v Dugger*, 779 F. Supp 571 (M.D. Fla 1991), *aff'd*, 977 F2d 598 (11th Cir 1992).

48 *LaBatt v Twomey*, 513 F2d 641 (7th Cir 1975);*Dagle v Helgemore*, 399 F Supp 416 (DNH 1975) ; *Berch v Stahl*, 373 F Supp 412 (WDNC 1974); *Avant v Clifford*, 67 NJ 496, 341 A2d 629 (1975).

49 *LaBatt v Twomey*, 513 F2d 641 (7th Cir 1975).

50 *Toussaint v McCarthy*, 597 F Supp 1388 (N.D. Cal 1984), *aff'd in part rev'd in part*, 801 F2d 1080 (9th Cir 1986), *cert*

(continued...)

In the state laws, statutes, federal code of regulations and other rules have been created for procedural processes. By reading your local rules, regulations and statutes, these already in place for the groundwork for your argument, and the rules of decision making prison staff are required to follow. If prison staff violate those rules, they violate law. For example, in Florida state, Florida Administrative Code 33-22 deals with disciplinary hearings. The words to look for are: "shall," "must," etc. The use of these words in state rules provide and create liberty interest protected by the Fourteenth Amendment, independent of any other constitutional violations.

In *Sandin*, the Supreme Courts holding that prison regulations are nothing more than "empty promises." If that were not bad enough, "such regulations are not designed to confer rights on inmates." The regulations are instead "primarily designed to guide correctional officials in the administration of a prison." Authors Note: Does that mean, prison regulations don't apply to prisoners?
Sandin v Conner, 115 S. Ct. 2293, at 2299 (1995)

Courts have held that if prison officials merely rename or relabel punishment, due process is still required and their attempt to sidestep due process is in violation.[51] A periodic review of persons kept on "privilege denial" status must be reviewed by prison staff on a regular basis or this denies the prisoner his due process rights.[52]

Just a change in custodial status or the loss of "work time"[53] can meet the requirements of a "Liberty Interest."[54] For example, you cannot claim a "loss" if you never had it to begin with. This rule applies to most elements of a "loss" interest. But once you've had "good time," "parole," "recreation," or "not in segregation status." These are all just examples of a "loss" subject to liberty interest if you were to lose one.

Many courts have attempted to define what a "Liberty Interest really is and where it exists." Maybe *Clutchette v Procunier* is a good case to consider along with the *Baxter* case[55] to help your defense positioning. In analyzing "Liberty Interest", your opponents are going to attempt the *Meachum*[56] theory. *Meachum* and the *Montanye*[57] cases are similar. Massachusetts State prison officials wanted to transfer Meachum because he was suspected of starting several serious fires in the prison. Meachum argued that because of the reason of the transfer he should be allowed a hearing and due process as those in disciplinary hearings. The First Circuit court of Appeals agreed with *Meachum*[58].

However, the State appealed and the Supreme Court did not agree. The Supreme court basically said that prisoners were not necessarily expected to receive due process when "any grievous loss upon a person by the State" or "... any change in the condition of confinement having substantial adverse impact on the prisoner involved is sufficient to invoke

(...continued)
denied, 481 U.S. 1069, 107 S.Ct 2462, 95 L Ed 2d 871 (1987), *subsequent order following remand*, 711 F Supp 536, *aff'd in part, rev'd in part*, 926 F2d 800 (9th Cir 1990), *cert denied*, 112 S. Ct 213, 116 L Ed 2d 171 (1991).

51 *Shelly v Dugger*, 833 F2d 1420, 1427 n.8 (11th Cir 1987); *Parker v Cook*, 642 F2d 865, 875 (5th Cir 1981); *Taylor v Clement*, 433 F Supp 585, 687-88 (S.D.N.Y. 1977); *Walker v Johnson*, 544 F Supp 345, 347 (E.D. Mich 1982), *Van Poyck v Dugger*, 582 So2d 108 (Fla 1st DCA 1991); 779 F Supp 571 (MD Fla 1991), aff'd, 977 F2d 598 (11th Cir 1992).

52 *Tyler v Black*, 811 F2d 424 (8th Cir 1987); *Mins v Sharp*, 744 F2d 946 (3rd Cir 1984); *Kelly v Brewer*, 525 F2d 394 (8th Cir 1985).

53 *Avant v Clifford*, 67 NJ 496, 341 A2d 629 (1975).

54 *Daigle V Helgemoe*, 399 F Supp 416 (DNH 1975).

55 *Clutchette v Procunier*, 510 F2d 613 (9th Cir 1975), *rev'd sub nom; Baxter v Palmigiano*, 425 U.S. 308 (1976).

56 *Meachum v Fano*, 427 U.S. 215, (1976) Meachum was transferred to another prison without a hearing. The court decided that since Meachum was a state prisoner in Massachusetts, *Wolff* did not apply.

57 *Meachum v Fano*, 427 U.S. 215, (1976) and *Montanye v Haymes*, 427 U.S. 236 (1976).

58 *Meachum v Fano*, 520 F2d 374 (1st Cir 1975).

the protections of the due process clause."[59] To get around *Meachum*, you need to address several issues: (1) was there any disciplinary actions involved?[60] (2) Are you going to be reclassified, sanctioned or treated differently than you currently are enjoying[61] (if you could call it that).

Elements of a Liberty Interest

State or Federal Law, along with policy statements as long as the policy statements are in themselves do not violate other protected rights could create a liberty interest. Liberty interests are legally defined, but also could be created by rules or even explicit understandings[62]. The *Hewitt v Helms*[63] case is important regarding administrative segregation where it defines traditional liberty interests and how they are created. *Hewitt* goes into the analysis of administrative and disciplinary segregation. In this case, administrative segregation gets *less* protection than the disciplinary hearings do under *Wolff*. It says:

> "An inmate ... receive some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to administrative segregation. Ordinarily a written statement by the inmate will accomplish this purpose, although prison administrators may find it more useful to permit oral presentations in cases where they believe a written statement would be ineffective. So long as this occurs, and the decision maker reviews the charges and then-available evidence against the prisoner, the due process clause is satisfied." A footnote also says that "a hearing must be given within reasonable time."

Delay A Prisoners Statuatory Time Limit For Hearing And They Can Sue, And WIN.....
Soto v. Walker, 44 F.3d 169 (2nd Cir. 1995)

Potential punishment that may be imposed against you, rather than the actual punishment given requires the due process of *Wolff*[64]. Due process was required in Massachusetts by the court of Appeals and required a liberty interest governing a transfer to segregation under *Hewitt*[65].

Often times, written and established procedures for disciplinary actions, transfers, etc., provide procedures for a claim of denial of due process[66]. The *Dowdy* case is often used by defense attorneys to claim "they do not have to follow their own rules." You should rely on

---

59 *Meachum v Fano*, 427 U.S. 215, 224 (1976)(emphasis original).

60 *Bruce v Wade*, 537 F2d 850, 854 n9 (5th Cir 1976); *Blake v Commissioner of Corrections*, 390 Mass 537, 457 NE2d 281 (1983).

61 *Bill v Henderson*, 631 F2d 1287 (6th Cir 1980): Transfer to segregation requires due process; *Tracy v Salamack*, 572 F2d 393, 395 n9 (2d Cir 1978) and *Devaney v Hall*, 509 F Supp 497 (D Mass 1981). These cases basically say that lower courts often refuse to follow *Meachum*, finding that state-created liberty interest exists in the most seemingly insignificant places and circumstances.; *Black v Parker*, 4 F 3d 442 (6th Cir 1992); *Howard v Grinage*, 6 F 3d 410 (6th Cir 1993).

62 *Walker v Hughs*, 558 F2d 1247, 1255 (6th Cir 1977); *Mitchell v Hicks*, 614 F2d 1016 (5th Cir 1980); *Bills v Henderson*, 446 S Supp 967 (ED Tenn 1978) *affd in part rev'd in part*, 631 F2d 1287 (6th Cir 1980); *Kentucky Dept. of Corrections v Thompson*, 490 U.S. 454, 109 S.Ct 1904, 104 L Ed 2d 506 (1989).

63 *Hewitt v Helms*, 459 U.S. 460 (and at 476) (1983); and *Maldonado Santiago v Velazquez Garcia*, 821' F2d 822 (1st Cir 1987).

64 *Drayton v Robinson*, 719 F2d 1214 (3rd Cir 1983): administrative memo created liberty interest in remaining in general population; *Layton v Beyer*, 953 F2d 839 (3rd Cir 1992), Dept. of Corrections regulations created a liberty interest by providing a reasonable expectation that prison inmates would not be placed in restrictive confinement unless one of the three specific criteria was met.

65 *Parenti v Ponte*, 727 F2d 21 (1st Cir 1984).

66 *Dowdy v Johnson*, 510 F Supp. 836 (ED Va 1981). None of the required elements that existed in *U.S. v Cacereys* 440 U.S. 741 (1979), as they did in *Dowdy; Black v Parker*, 4 F 3d 442 (6th Cir 1992); *Howard v Grinage*, 6 F 3d 410 (6th Cir 1993).

United States v Cacereys[67] when against this type of violation of policy using the following guidelines when presenting a question to be brought only in federal court when:

1. The Constitution or Federal Law requires or provides you protections of law for such;
2. An individual has reasonably relied on agency regulations created for his guidance or benefit and has suffered substantially because of their violation by the agency; and/or
3. The violation must arguably amounts to a denial of equal protection.

Without a "state created liberty interest, prisoners have no justifiable expectation that they will be incarcerated in a particular state"or the liberty interest test will be enough to reasonably claim without "some other law or requirement or benefit to remain as is."[68] However, retaliatory transfers are unconstitutional if done in retaliation for the exercise of protected First Amendment Rights.[69]

Location of Hearing - Venue

The issue of the location of your hearing (also known as "Venue") is only relevant if you are or have been transferred to another institution in which the events leading to and claimed in the infraction occurred. In *Bates v Dalsheim*[70], a New York appellate court decided that the hearing should be held where the incidents happened, not where the person was presently confined. If the accused is transferred to another location, witnesses or your being denied the benefit of live testimony could prejudice your disciplinary hearing[71]. In a couple other cases, "security" and "threat" can be the institutions defense of not keeping the hearing at the original location[72]. Before claiming "wrong venue" make sure that the institution is not able to claim "security threat" as their reason for your transfer.

Notice and Time Limitations

In *Wolff*, the court held staff had to give a prisoner a copy of the infraction at least 24 hours prior to a hearing to prepare a defense. Some states require you to sign a receipt showing you were "served." If you refuse to sign, you *may* later claim you were never served a copy of the infraction prior to the hearing. But, if you don't raise the objection during the hearing, that service could be considered completed and/or waived by a court. Of course, a hearing officer could give you a copy, and ask you, "if you want to proceed now, or wait another 24 hours." In some federal institutions, this could mean another two weeks of administrative segregation, waiting for another hearing. Again, your assertion that you are in segregation for an unbased "security threat" should be raised.

Pleading guilty to charges at the hearing doesn't bar a suit challenging the adequacy of the notice or other aspects of the hearing (i.e. notice given, were the rules you're accused of violating is clear, etc.)[73]

Important issues regarding charges against a prisoner is "were you notified of the charges, and in time to prepare a defense or call witnesses, and was the written charges against you sufficient in content to prepare for a hearing?". Written notice is required because it requires the complaint against you to be clear, specific and precise. Just verbally telling you the charges, and not providing written charges is *NOT* considered sufficient notice and prison staff must provide an independent basis for charging you in a disciplinary proceeding[74].

---

67 *United States v Cacereys*, 440 U.S. 741 (1979).

68 *Olim v Wakina*, 461 US 238 (1983); 103 S Ct 1741, 75 L 2d 813 (1983), for post Wakina developments, see: *Lilly & Wright, Interstate Inmate Transfer after Olim v Wakina*, 12 NE J Crim & Civ Confinement 71 (1986).

69 *Adams v Wainwright*, 875 F2d 1536 (11th Cir 1989); *Frazier v Dubois*, 922 F2d 560 (10th Cir 1990); *Pratt v Rowland*, 856 F Supp 565 (N.D. Calif 1994).

70 *Bates v Dalsheim*, 90 AD2d 485, 454 NYS 2D 552 (1982).

71 *Roesch v Wainwright*, 474 So2d 1263 (continued...)

(...continued) (Fla Dist Ct App 1985) (disciplinary hearing must be at the institution where the charges arose.)

72 *Garfield v Davis*, 566 F Supp 1069 (ED Pa 1983); *Irby v Young*, 139 Wis2d 279, 407 NW2d 314 (1987).

73 *Reeves v Pettcox*, *19* F.3d 1060 (5th Cir. 1994).

74 *Tocco v Marquette Prison Warden*, (continued...)

Notice of the charges are required before the hearing.[75]

The single thing that starts the disciplinary process is when you are given the written notice. You must be provided the necessary time to prepare a meaningful defense, and to be present during the hearing[76].

Even with the vague language of many state regulations regarding notice and time limitations for disciplinary hearings, it is held that notice must be given, and in your language if you do not understand English[77]. Without notice of charges against you, due process is certainly lost. Even if you have been given notice of a first hearing, in writing, you must be given written notice of any 2nd or other hearings also.[78] But, if notice is offered, but refused, you cannot raise the claim later that "they never gave you notice." If you were never offered notice, witnesses to this claim, will be helpful in a possible legal proceeding. Start by gathering written statements or affidavits if possible of these witnesses you may want to call on your behalf to testify. The reason "Notice" is required to be served upon you, is to give you the opportunity to gather and prepare the facts to prepare your defense[79].

No maximum time limit exists for providing notice. Without some reasonable reason, you have not been harmed *IF* you were sent notice at least 24 hours before the hearing or within 2 days or even 7 days[80]. Still, in the 90's, prison staff often fail to provide the minimum of 24 hour notice. The burden is on you to put your objection on the record during the hearing, and litigate if you desire and have established grounds. A 20 month delay has been considered prejudicial without good cause[81].

Delay In Hearing States Claim

The court of appeals for the second circuit has reaffirmed thee New York State law that creates a due process liberty interest in its administrative segregation rules. The court held that prisoner's due process rights are violated when they are not afforded a timely hearing as mandated by state law. Anselmo Soto, a New York state prisoner, was placed in ad seg after being infracted for drug use and possession. The disciplinary hearing was not held until two weeks after the misconduct allegedly occurred. New York state law requires that disciplinary hearings be held no later than seven days after the misconduct occurs. Soto was found guilty at the hearing and the finding was upheld on administrative appeal. Soto filed a habeas petition in state court contending the delay violated his due process rights. The state court agreed and ordered the infraction expunged.

Soto then filed suit in federal court pursuant to 42 U.S.C. § 1983 seeking money damages contending that the delay in his hearing violated his federal due process rights. The district court dismissed the complaint for failing to state a claim. The court held that New York

> Delay a Prisoners Statuatory Time Limit For Hearing And They Can Sue And WIN...
> *Soto v. Walker*, 44 F.3d 169 (2nd Cir. 1995)

(...continued)
123 Mich App 395, 333 NW2d 295 (1983).

75 *Benitez v Wolff*, 985 F.2d 662 (2nd Cir. 1993).

76 *Cooper v Sheriff*, 929 F2d 1078 (5th Cir 1991); *Morgan v District of Columbia*, 647 S Supp 694 (DDC 1986); *Giano v Sullivan*, 709 F Supp 1209 (SDNY 1989); *Wolff v McDonnell*, 418 US 539, 563-64 (1974).

77 *Wong v Coughlin*, 138 AD2d 899, 526 NYS2d 640 (1988), *Wolff v McDonnell*, 418 US 539, 563-64 (1974).

78 *Vaughn v Franzen*, 549 F Supp 426 (ND ILL 1982), *Notice* is also discussed in *Wolff v McDonnell*, 418 US 539, 563-64 (1974).

79 *Spellmon-Bey v Lynaugh*, 778 F Supp 338 (ED Tex 1991).

80 *Aviles v Scully*, 154 AD2d 371, 545 NYS2d 847 (1989), and *Allen v State*, 418 NW2d 67 (Iowa 1988), *Murray v State*, 116 Idaho 744, 779 P2d 419 (Ct App 1989).

81 *Vogelsang v Coombe*, 105 AD2d 913, 482 NYS2d 348 (1984), *affd*, 66 NY2d 835, 489 NE2d 251, 498 NYS2d 364 (1985); *Johnson v Vitek*, 205 Neb 745, 290 NW2d 190 (1980); *People ex rel Yoder v Hardy*, 116 ILL App 3d 489, 451 NE2d 965 (1983); *Powell v Ward*, 487 F Supp 931 (1975), *aff'd* 542 F2d 701 (2nd Cir 1976)(7 days); *Pitts v Kee*, 511 F Supp 497 (D. Del 1981)(14 days), meaning you may not be held in "pre-hearing detention" without a written charge, or given a hearing.

code § 251-5. 1(a), mandating the commencement of disciplinary proceedings within seven days, did not create a federal constitutional claim. The court of appeals for the second circuit reversed and remanded.

The appeals court noted that prisoners have no federal constitutional right to remain free from segregation, however in numerous rulings it has held that New York state laws concerning segregation, disciplinary hearings and keep lock create a federal due process liberty interest which can be enforced in federal court. The court examined So Soto's pleadings and held that it was apparent Soto claimed he had not been given any hearing until fifteen days into his administrative segregation. The court noted that even a seven day delay in at least an ad seg hearing violated due process for New York state prisoners. The court held that Soto had stated a claim upon which relief could be granted and remanded the case back to the lower court for further proceedings. See *Soto v. Walker*,44 F.3d 169 (2nd Cir. 1995).

[Reprinted with permission from Prison Legal News]

Harmless Errors

The "Harmless Error Rule" exists here as it does in any court. *IF*, a mistake is made, but the mistake does not harm you in any way, you do not have ground for a complaint. You lose your right to raise the issue of "improper notice or venue" if you fail to raise the issue during the hearing[82]. You may raise the request for a continuance to prepare your defense, and based on your grounds, must be granted. Courts have some limited opinions on whether or not a meaningful defense can be prepared while in solitary confinement[83].

Comparing individual state constitutional laws to federal constitutional laws vary considerably sometimes. A disciplinary requirement in one state may vary along with the case law supporting it. If you bring an action based on a case of one state, it may be dismissed or you could lose, because your state does not have such a legal provision. Check you local state or federal jurisdiction by reading the similar cases as to your complaint before filing. Also compare your area to the Discipline Guidelines in Appendix A (BOP), in the back of this book.

Right To Assistance of Counsel

Some courts have held that being in segregation means you require assistance to prepare for the hearing.[84] Prisoners are not generally entitled to counsel (attorneys) until criminal proceedings have been initiated against them[85]. Just for being placed in segregation prior to such proceedings, does not trigger the right to counsel (attorneys). For more discussion on this, *U.S. v Gouveia*, in footnote discusses the issue in detail. A prisoners' argument being: they don't have the skills or training to reasonably represent their version of a disputed factual incident. See CHAPTER 4, NECESSITY OF MIRANDA WARNINGS.

Even though prisoners are not on a technical trial, if found guilty the prisoner may face severe sanctions such as lengthy solitary confinement, transfer to maximum security, or loss of substantial statutorily created good time credits. Such sanctions against a prisoner are not appropriate unless a full and fair opportunity to present one's side of a defense has been granted. Juveniles have been granted the right to an attorney by the supreme court[86]. Of course, prisons argue that attorneys in disciplinary hearings are more a nuisance than a help, unduly complicating and delaying the proceedings according to prison officials who have a desire to see prisoners punished, even if it is unfair. Prisons also claim attorneys create an adversarial climate at cross purpose to the rehabilitative objectives of the disciplinary proceedings. In *Gault* the supreme court ignored the prison's biased and one-sided argument against assistance to juvenile prisoners by attorneys. Prisons also claim the cost is prohibitive. As most prisoners are indigent, equal protection principals could require the government to provide attorneys to them[87], in which prisons might also claim they need attorneys to represent them and their interests. As if prison officials don't, which they do, already have staff attorneys to assist them in putting together a case against a prisoner.

---

82 *Warren v Irvin*, 584 NYS2d 365 (app Div 1992).

83 *Daigle v Helgemoe*, 399 F Supp 416 (DNH 1975).

84 *Eng v Coughlin*, 858 F.2d 889 (2nd Cir. 1988); *Nix v Evatt*, 850 F. Supp. 455 (D SC 1994).

85 *United States v Gouveia*, 467 US 180 (1984).

86 *In re Gault*, 387 US 1 (1967).

87 *Douglas v California*, 372 US 353 (1963); *Griffin v Illinois*, 351 US 12, (1956).

In *Wolff v McDonnell*[88], the courts came to a compromise in favor of the prison officials under the disguise of "better prison management." It held that "attorneys were not required, and that prisoners had no right to appointed or retained counsel in prison disciplinary hearings."[89] The court went on to say that situations involving illiterate prisoners or issues so complex that convicts would be unable to collect and present the evidence necessary for an adequate understanding of the case, they "should be free to seek the aid of a fellow prisoner, or if that is forbidden, to have adequate substitute aid in the form of help from the staff or from a sufficiently competent prisoner designated by the staff."[90] Some courts, and federal policy for BOP prisoners, require that a prisoner be advised of his limited right to representation[91]. Before a prisoner chooses to accept staff representation, read the chapter, Staff Representatives and Witnesses.

After *Wolff*, the courts have tried to further define the issue of prisoner representation. The courts have held that *IF* an prisoner may be criminally charged, [example: assault on staff, assault on another prisoner, drug possession, etc.], he must be provided the right to an attorney.[92] The reasons the courts were concerned with was not the "assistance which counsel could provide at a disciplinary hearing," but with the "need to protect the prisoner's rights in future criminal prosecutions. The supreme court rejected this exception in *Baxter v Palmigiano*[93].

The American Bar Association flip-flopped regarding the "counsel issue." In the ABA's Standards for Criminal Justice Standard § 23-3.2, at 23-41 (1986)(not reprinted because of the degree of conflict in applicale rules prison follow) they first say prisoners "have the right to representation in disciplinary hearings," then later retract that recommendation and prison officials recommend an "advisor of some sort." The ABA standards for Criminal Justice are not binding on prison officials and therefore prison officials don't abide by them. Prison officials usually do not abide by the rules held in the Constitution, much less an agency who cannot impose its regulations on a prison.

Since the burden rests on the prisoner to show why he/she should be appointed representation their ability to access witnesses, represent themselves and the complexity of the issues are the only arguments[94]. Of course, prison staff favor representation by another staff member to ensure you loose. (See the chapter, Staff Reps & Witnesses) Their usual unfounded, defense of this staff representative is; prison staff would be unlikely to cooperate in spurious (stupid) defenses or prisoners attempts to frustrate the disciplinary proceedings. More realistically, prison staff who actually help prisoners, often are threatened by other staff, and told their job is on the line by their superiors. There clearly is no right to representation of one's choice at a disciplinary hearing, but if a prioner refused to do what is necessary to obtain representation, staff or otherwise, he cannot claim that defect later on appeal[95].

---

88 *Wolff v McDonnell*, 418 US 539 (1974).

89 *Barry v Whalen*, 796 F Supp 885 (ED Va 1992); *Williams v State*, 421 NW2d 890 (Iowa 1990).

90 *Wolff v McDonnell*, 418 US 539 (1974), *Coleman v Turner*, 838 F2d 1004 (8th Cir 1988); *Brown-El v Delo*, 969 F2d 644 (8th Cir 1992); *Balla v Idaho State Bd of Corrections*, 569 F Supp 1558 (D Idaho 1984); *Caudle-El v Peters*, 727 F Supp 1175 (ND ILL 1989).

91 *Stewart v Jozwiak*, 399 F Supp 574 (ED Wis 1975); *Johnakin v Racette*, 111 AD2d 579, 489 NYS2d 643 (1985); 28 CFR § 541.17(b).

92 *Clutchette v Procunier*, 510 F2d 613 (9th Cir 1975), *rev'd sub nom Baxter v Palmigiano*, 425 US 308 (1976); *Palmigiano v Baxter*, 487 F2d 1280 (1st Cir 1973), *rev'd*, 425 US 308 (1976); *Craig v Hocker*, 405 F Supp 656 (D Nev 1975).

93 *Baxter v Palmigiano*, 425 US 308, 96 S.Ct 1551, 47 L Ed 2d 810 (1976).

94 *Stewart v Jozwiak*, 399 F Supp 574 (ED Wis 1975); see also, *Aikins v Lash*, 514 F2d 55 (7th Cir 1975), *vacated*, 425 US 947, *modified on remand*, 547 F2d 372 (7th Cir 1976). *Gagnon v Scarpelli*, 411 US 778, 790 (1973) (addressing when counsel is required in a probation revocation hearing.)

95 *Hendrix v Faulkner*, 525 F Supp 435, 447 (ND Ind 1981), *aff'd in part, vacated in part*, 715 F2d 269 (7th Cir 1983), *cert denied*, 468 US 1217 (1984): *Law v Racette*, 120 AD2d 846, 501 NYS2d 959 (1986); *Dawes v Leonardo*, 167 AD2d 585, 563 NYS2d (1990)(inmate refused to sign the staff

(continued...)

The psychological condition of the prisoner must be considered by the staff when going before a disciplinary committee. In appointing a staff representative, the prisoners psychological state is relevant not only to help devise a defense; rather, the staff representative was to serve as an agent of the prisoner, performing such services as interviewing fellow prisoners designated by the accused and presenting the prisoner's chosen defense in an understandable manner[96].

Failure of a staff representative to adequately represent the prisoner may be a basis for overturning any action of the disciplinary committee[97]. If an prisoner does not object timely to the quality of representation, this may constitute a questionable waiver.

Right to an Impartial Hearing Panel

Your right to an impartial DHO, (disciplinary hearing panel) must be provided or your due process rights have been violated.[98] Unless a prisoner makes his objection on the record during or prior to the hearing, your objection may be considered "waived" in a court proceeding. Just because a disciplinary hearing panel is not a judicial tribunal does not make it not-impartial. In the *Wolff* case, the disciplinary hearing panel was the Associate Warden [in charge], the Correctional Industries Superintendent, and the Reception Center Director. The court found this committee was sufficiently impartial to satisfy due process. The court defined "impartially" in terms of hazards of arbitrary decision making. The point the court was trying to make was, a prison staff's position alone does not disqualify them. An "impartial decision maker" is one who (1) inter alia [amoung other things], (2) does not prejudge the evidence nor assess evidence he or she has not seen.

Unless required by statute or policy, a prison disciplinary panel does not have to be more than one person who hears the case[99].

Many instances exist where prison staff may NOT participate in the disciplinary hearing process. For example, the person who wrote the infraction report or started the disciplinary process may not sit on the disciplinary panel in any way.[100] A similar approach was taken by the court regarding the classification officer responsible for designating whether an offense was major, serious or minor[101]. The same goes for witnesses, investigating officers, and individuals having personal knowledge of material facts or who have a personal interest in the outcome of the hearing are *usually* disqualified from participating in the disciplinary hearing[102].

In *Vines v Howard*[103], a prisoner was denied due process when the hearing examiner was the father of the prison guard who made the accusations, and where the charges rested on whether the guard or the prisoner was more believable. Of course, if a prisoner says "the sky is blue," and a guard say the "sky is pink with yellow and green polka dots," the guard will be more believable regardless of his ridiculous statements. A prisoner must

(...continued)
request two times); *Brown v Coughlin*, 165 AD2d 935, 561 NYS2d 99 (1990).

96 *Ford v Commissioner of Corrections*, 27 Mass App 1127, 537 NE 2d 1265 (1989), *review denied*, 405 Mass 1202, 541 NE2d 344 (1989).

97 *Hilton v Dalsheim*, 81 AD2d 887, 439 NYS2d 157 (1981); *Mallard v Dalsheim*, 97 AD2d 545, 467 NYS2d 903 (1983).

98 *Ramirez v Turner*, 991 F.2d 351 (7th Cir. 1993); *Diercks v Durham*, 959 F.2d 710 (8th Cir. 1992; *Paterson v Coughlin*, 905 F2d 564 (2d Cir 1990); *Sands v Wainwright*, 357 F Supp 1062 (MD Fla), *vacated*, 491 F2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974); *Powell v Ward*, 392 F Supp 628 (SDNY 1975), *modified*, 542 F2d 101 (2d Cir 1976); *Mathews v Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L Ed 2d 18 (1976); *Wolff v McDonnel, supra, Ward v Village of Monroeville*, 409 U.S. 57, 93 S. Ct 80, 34 L Ed 2d 267 (1972).

99 *Myers v Askew*, 338 So 2d 1128 (Fla Dist Ct App 1976); 28 CFR § 541.14; *Langley v Scurr*, 305 NW2d 418 (Iowa 1981).

100 *Gick v Sargent*, 696 F2d 413 (8th Cir 1983).

101 *Gates v Collier*, 454 F Supp 579 (ND Miss 1978),aff'd, 606 F2d 115 (5th Cir 1979).

102 *Merritt v De Los Santos*, 721 F2d 598 (7th Cir 1983); *Adamns v Gunnell*, 729 F2d 362 (5th Cir 1984).

103 *Vines v Howard*, 676 F Supp 608 (ED Pa 1987).

remember that prison staff are prejudiced, just as you are in court once charged with a crime.

Some courts have gone on to further describe who should be excluded from acting on prison disciplinary panels. Those being not only persons intimately involved in the investigations and accusations, but also their immediate subordinates[104]; another court held that a prison official whose primary concern is security is not an appropriate hearing officer when the prisoners action is for threatening the security of the institution[105]. In circumstances where strong personal animosity exists between a prisoner and a prison official, the prison official may not serve on the prisoner's disciplinary committee[106].

Prisoners often feel that a person who sat on previous disciplinary hearings should be excluded from new disciplinary hearings. This is not true. Even if an prisoner has sued the hearing officer, without being able to show "actual prejudice" they will be allowed to sit on the hearing panel[107]. A prisoner should carefully draft his defense of "prejudice" to make sure they have met the elements necessary to state a claim.

In cases where major sanctions may be applied, some courts have required at least one member to come from a non-prison official[108]. As usual with any other due process right. The right to an impartial hearing officer or committee may be waived by failing to raise the issue at the time in the process when appropriate corrective action could have been taken.[109]

---

104 *Collins v Vitek*, 375 F Supp 856 (DNH 1974).

105 *Powel v Ward*, 392 F Supp 628 (SDNY 1975), *modified*, 542 F2d 101 (2d Cir 1976).

106 *Myers v Askew*, 338 So 2d 1128 (Fla Dist Ct App 1976). See also *Malek v Camp*, 822 F2d 812 (8th Cir 1987); *McCans v Armour and Co.*, 254 F2d 903; *Morrisey v Brewer*, 93 S.Ct 2593; *Goldberg v Kelley*, 92 S.Ct 1011 (1972).

107 *Grant v Senkowski*, 146 AD2d 948, 537 NYS2d 323 (1989).

108 *Collins v Hancock*, 354 F Supp 1253 (DNH 1973).

109 *Blackshear v Coughlin*, 586 NYS2d 34 (App Div 1992).

4 - WITNESSES

Testifying for Yourself & Calling Witnesses

You have the right to testify, and appear for yourself in a disciplinary procedure. Looking carefully at your options to appeal, if you lose for any reason, you also must consider how you will handle your defense. Courts have found repeatedly, that if you don't object during a hearing you accept the procedure and cannot bring the issue later on appeal.

Another common complaint by prisoners, is they argue that "staff misquoted them," or "I or they didn't say that". Often prison staff will adjust what you say, to meet their goals of convicting you. So why not present a summary and argument, in writing? When staff ask you if you have anything further to say, say "it is all in my written defense." By not presenting your defense verbally, and only in writing, it forces staff to be a little more realistic about the disciplinary hearings. It also prevents staff from putting in their written decision, things or conclusions you may not have said. If you go to court, everything, even they're incorrect statements as to what you said will become evidence either against you or for you *IF* you only submit your defense in writing. If called to a hearing and you did not bring your written defense, request an extension of time to get your written defense.

Disciplinary hearing officers will sometimes reject your written statement, because they don't want to be limited to a written defense in their abuse of discretion and power. If the disciplinary hearing panel wants to reject your written defense, and insists on an oral presentation, read your written defense, word for word, without adding or leaving anything out. Then later, make a notation that your written defense was rejected and ask that it be put in the record that your written defense was in fact rejected.

You have the right to call witnesses that will testify to subject matter relative to your defense. Some states limit the number of witnesses you may call. So, chose your witnesses carefully. Consider their possible testimony, their ability to sound credible and be understood. If you don't have access to that person prior to the hearing, consider what they may say, with them thinking of what you might want them to say at the hearing. Your witness, in an attempt to "help cover" for you, and your defense is based on truthful facts, could reduce the credibility of your overall defense.

Right to Remain Silent and its Effect

A prisoner should attend every possible hearing if they care about its outcome. If an prisoner refuses to attend a hearing, the court in *Howard* decided he had waived his right to challenge the disciplinary panel's decision[110]. If a prisoner suspects that even a small possibility exists that further criminal proceedings may take place from this disciplinary action, *ANY* comments or statements you make in a hearing may and will be used against you in court.

Of course, if you refuse to testify, your silence could be used against you to suggest guilt, increase the severity of punishment and lesson your chances of winning. A written statement is best if you intend on presenting any testimony in your defense. Written testimony cannot be misinterpreted and rewritten by the disciplinary panel to suggest testimony that actually did not take place in their written report

In *Avant*, the court held a prisoner's silence cannot be used in an adverse way[111]. But

---

110 *Howard v Kelly*, 117 AD2d 1002, 499 NYS2d 547 (1986).

111 *Avant v Clifford*, 67 NJ 496, 341 A2d 629 (1975). See also *Palmigiano v Baxter*, 487 F2d 1280 (1st Cir 1973), rev'd,

(continued...)

in the *Palmigiano* case, the court rejected this position. In considering Baxter, a prisoner's silence can, and in real life will be used as an indication of guilt and against you[112]. The supreme court has affirmed the *Baxter* position of "guilt through silence."[113] The supreme court went further to explain *Baxter*, that *IF* requested, immunity should be granted to the prisoner's testimony and could not be used against them in a possible criminal proceeding. The court continued to say the prisoner "must be offered immunity from self-incrimination protected by the Fifth Amendment, and may not be required to waive such immunity."[114]

Testimony and immunity does not bar the prosecution of further criminal proceedings itself and if your testimony on the stand contradicts testimony in the disciplinary hearing, a prisoner may be impeached by the contradictions[115]. Often, "immunity" is used to gather secondhand information, to file additional charges against you, removing the burden from the government and putting the burden on you to prove them wrong.

My advice, "Don't ***ever*** say anything you don't want repeated before a jury." You can still argue without admitting the charges. If you are going to lie, be consistent and never admit to anyone the truth, regardless how good of a friend they may be. Often, indirect statements can be considered signs of guilt.

Even though disciplinary hearing panels may deny this request, when faced with possible criminal prosecution, request the disciplinary hearing be postponed until after the criminal proceedings.

Compelling Witnesses to Testify

If a prisoner fails to request witnesses for the disciplinary hearing and you do not object at the time, this is considered a waiver of their testimony. The courts have found that you refused your right to confrontation of those witnesses[116].

A disciplinary committee may reject your request to bring witnesses for just reason. Those reasons must be supported either by "security and order" reasons, or they must demonstrate that they tried to provide your requested witnesses. In *Wright v Caspari*,[117] the courts found that the decision by the disciplinary committee to interview the proposed witnesses and, on the basis of those interviews, refused to allow the witnesses to testify at the disciplinary hearing, did not violate *Wright*'s due process rights. Remember that the witnesses requested for your hearing must have something relevant to add to your defense, and not be repetitive of testimony the other witnesses might give.

Federal and State hearings vary in disciplinary hearing procedure. The Supreme Court held that if prison officials refuse to call the witnesses you request, the burden is on them to explain their decision, at least in a limited manner[118]. However, they need not do this at the time of the hearing. The disciplinary committee may come forward with an explanation after you sue them. If they do this, request sanctions against them. Federal and most State laws require that the reasons be documented at the time of the hearing[119].

In *Green v Nelson* and *Homer v Morris*[120], staff should consider obtaining written statements from the prospective

(...continued)
425 US 308 (1976).

112 28 CFR § 541.15(d).

113 *Scott v Kelly*, 962 F2d 145 (2d Cir 1992), See also *McLellen v Superintendent*, 29 Mass App 122, 558 NE2d 5 (1990) (a disciplinary report does not require any corroborating evidence other than adverse inference that can be drawn from a prisoner's silence at a disciplinary hearing.)

114 Also see Uniform Law of Commissioners Model Sentencing Act, § 4-507(a)(4) (1985), "A prisoner, of course, would first be required to establish that a Fifth Amendment interest was at stake." In *Hampson v Satrin*, 319 NW2d 796 (ND 1982), the court held that "required participation in a urine-screening program did not violate the prisoner's rights."

115 *Kastigar v United States*, 406 US 441 (1972).

116 *Gonzales v Lefevre*, 105 AD2d 909, 482 NYS2d 409 (1984).

117 *Wright v Caspari*, 779 F Supp 1025 (ED Mo 1992).

118 *Ponte v Real*, 471 U.S. 491, 495, 105 S.Ct. 2192, 85 L Ed 2d 553 (1985).

119 *People ex rel Vega Smith*, 66 NY2d 130, 485 NE2d 997, 495 NYS2d 332 (1985); *McGinnis v Stevens*, 543 P2d 1221 (Alaska 1975).

120 *Green v Nelson*, 442 F Supp 1047 (D Conn 1977); *Homer v Morris*, 684 P2d 64 (Utah 1984).

witnesses, if the disciplinary committee does not call these persons to testify as you requested, and is sometimes required by state law[121]. In some states, you have the right, or you can waive that right to be present at the interview[122]. If you are excluded from the proceedings, or you are denied access to confidential documents, your lawyer cannot be excluded. In *Wagner v Williford*[123], a prisoner was under investigation by the FBI for allegedly killing a fellow prisoner and the prison staff still denied his attorney access to the information, even though a lower court found the attorney trustworthy, the court said this was wrong and prejudicial.

In Wisconsin, the law requires statements of unidentified witnesses to be "under oath and have to be corroborated, and could not be used unless the disciplinary committee found that requiring the witness to give live testimony would pose a significant risk to bodily harm to the witness." In both federal and some states, a disciplinary committee could exclude a prisoner from a hearing when the prisoner's witnesses were testifying because of probable, not possible disruption or threats[124]. The courts also required the prison staff to document the reasons in the record so the prisoner could evaluate them before filing for administrative appeal[125].

Witnesses At a Different Institution

If a prisoner has been transferred to a different institution and he requests witnesses from the previous institution a telephonic hearing with the witnesses is acceptable with speakerphones and an argument for procedural error will be denied with this method[126]. Telephone interviews and testimony are approved by the courts, and found acceptable to save time, money, convenience and the possible quantity of hearings to take place[127].

Witness Affidavits

Prisoners may, and I recommend, presenting supporting affidavits in their defense if witnesses are not available[128]. See chapter 20 for an affidavit example. In *Wolff*[129] the Supreme Court conditions this with "reasonable." An institution may claim it has a legitimate interest on limiting the accused's access to other prisoners for the purpose of collecting affidavits[130]. In some circumstances, you may request that a staff member assist you in gathering affidavits if staff deny you the opportunity to do so.

Even though "some" limitations of presenting documentary evidence exists, an absolute ban is unconstitutional. In *Massop v Lefevre*[131] it was held that constitutional violation existed when a hearing officer refused to view or listen to an audio/video tape recording of the events at issue.

Right to Cross Examine Witnesses

The right to confront and cross examine witnesses by you directly does not exist in disciplinary hearings. In *Wolff v McDonnell* the court gave many reasons a prisoner could be denied the chance to cross examine witnesses. A prisoner also does not

---

121 *Hilton v Dalsheim*, 81 AD2d 887, 439 NYS2d 157 (1981); *Jackson v Kuhlmann*, 109 Misc 2d 437, 440 NYS2d 154 (S.Ct. 1981).

122 *Lowrance v Coughlin*, 98 AD2d 733, 469 NYS2d 148 (1983).

123 *Wagner v Williford*, 804 F2d 1012 (7th Cir 1986), *appeal after remand*, 902 F2d 578 (7th Cir 1990).

124 *Cortez v Coughlin*, 67 NY2d 907, 492 NE2d 1225, 501 NYS2d 809 (1986).

125 *Jones v Smith*, 116 AD2d 993, 496 NYS2d 712 (1986) (institutional safety and institutional goals must be shown to be jeopardized before an inmate can be excluded when a witness called by inmate testifies.)

126 In re *Plunkett*, 57 Wash App 230, 780 P2d 1090 (1990).

127 *Rodgers v Thomas*, 879 F2d 380 (8th Cir 1989); *Torres v Coughlin*, 161 AD2d 1080, 557 NYS2d 636 (1990).

128 28 CFR § 541.15(c), se also *Bartholomew v Reed*, 477 F Supp 223, 227 (D Or 1979), *modified*, 665 F2d 915 (9th Cir 1982); *Chochrek v Oregon State Penn*, 21 Or App 406, 534 P2d 1175 (1975).

129 *Wolff v McDonnell*, 418 US 539, 566 (1974).

130 *Gonzales v Lefevre*, 105 AD2d 909, 482 NYS2d 409 (1984).

131 *Pace v Oliver*, 634 F2d 302 (5th Cir 1981); *Massop v Lefevre*, 127 Misc 2d 910, 487 NYS2d 925 (S.Ct 1985).

have the right to call adverse witnesses, *IF* they are only being called to be cross examined regarding material already in the incident report or written memo's[132]. Cross examination of previously unknown prisoner accusers carries an obvious risk of reprisal, and could influence other potential informants, (*RATS*) to refuse to come forward or to testify. Use the *American Bar Association's*[133] argument to calling those adverse witnesses and don't rely on the *Wolff* case here. Courts acknowledge that a possible "abuse of discretion" in denying a prisoner the opportunity to cross-examine witnesses exists, and will review each case individually[134]. The lacking of written reasons will significantly complicate the courts review to determine whether the disciplinary committee exercised "reasonable" discretion, or whether it was arbitrary and imposed improperly.

Prisoners Testimony Against You & Their Credibility

When you face a possible snitch in disciplinary hearings, you should consider his/her history and discredit them. History such as; (1) a professional snitch may have special incentives for fabricating stories against you, making his motives and reliability suspect; (2) admitted or a conviction drug use, positive U/A's are things that affect his mental state. This would provide the foundation for an expert such as a psychologist or even yourself, who understands about cocaine and narcotics and its affects of psychosis and organic brain disfunction; (3) dig deep in this rat's reputation if you can. Does he have a reputation on the compound for telling the truth. If a character witness, even through an affidavit cannot testify about the rat's reputation, they may be able to provide an affidavit or testimony of his/her character traits, or lack of truthfulness abilities.

Prison official are not required to provide you with the names of all prisoner witnesses, confidential informants or even the name of the prisoner accuser[135] because they usually claim, falsely of course, "security reasons." The record should include indication that the disciplinary committee made inquiry into reliability of an informant and the concluded informant was reliable.[136] Appellate courts also will not substitute their view for that of a disciplinary board on matters relating to witnesses.[137] Snitch testimony usually needs to be supported by other evidence in order to be found reliable.

An interesting case in *Russell*[138] the disciplinary hearing officer refused to call the informants, and the accuser who claimed *Russell* assaulted him, refused to speak at the hearing. After being convicted the first time, and appealing, he won a new hearing. At the second hearing, same thing as before, and found guilty again. He appealed and won on appeal, and was never tried the third time. *Russell* sued in court claiming the hearing officer failed to independently assess the informant's reliability and credibility, breaching a clearly established due process right.

A big problem prisoners face against the prison officials, is the prison's allegations of the importance of "the prison's function and security" compared to an prisoner's few protected rights. In court, prison officials often use the unbased and often abused excuse that "it threatened the security and orderly running of the facility." You should attack that argument by requesting supporting evidence. The purpose of the disciplinary hearing is supposed to be accurate and fact-finding. Cross examination is supposed to make this easier by exposing faulty

---

132 *Barry v Whalen*, 796 F Supp 885 (ED Va 1992).

133 *American Bar Association*, § 23-3.2(b).

134 *Smith v Massachusetts Dept of Corrections*, 936 F2d 1390 (1st Cir 1991).

135 *Mendoza v Miller*, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986); *Jensen v Satran*, 332 NW2d 222 (ND 1983);

(continued...)

(...continued)

Wells v Israel, 629 F Supp 498 (ED Wis 1986), affd, 854 F2d 995 (7th Cir 1988); but in *Shango v Jurich*, 608 F Supp 931 (ND ILL 1985), the incident report was deficient because the identity of the victim was disclosed, but not the accomplices.

136 *Kyle v Hanberry*, 677 F2d 1386 (11th Cir 1982).

137 *Galimore v Lane*, 635 F Supp 1367 (ND ILL 1986); *Gibson v Roush*, 587 F Supp 504 (WD Miss 1984); but in *Armstead v State*, 714 F2d 360 (5th Cir 1983), the appellate court criticized the magistrate for giving too much deference to findings of disciplinary proceedings, and ordered magistrate to decide case on its merits.

138 *Russell v Scully*, 782 F Supp 876 (S.D.N.Y. 1993), *rev'd* 15 F3d 219 (2nd Cir 1993).

perceptions, misidentification, bias, clouded memory and retaliation. Unfortunately, this hardly ever happens in reality. After the question of *Wolff*, how are these "alleged" goals of fairness achieved without cross-examination? In addition to *Wolff*, the supreme court has held that "if cross examination is to be denied because the disciplinary board does not want the prisoner to learn the identity of the witness (RAT), one method is for the board to call the witness (RAT) before the board in order to understand if the witness is credible, rather than just accepting the informant's (RAT's) unchallenged hearsay statements or document describing what the witness would have said if called to do so[139].

A method used in federal procedure and some states, is to allow the prisoner to present written questions to the hearing officer at the start of the hearing, to ask the witness during the hearing[140]. An informants credibility, along with staff's should be a consideration in every hearing. In *Lamoureux*, the court required the board to investigate and find if the informant's information is reliable[141]. In *Mendoza*, prison staff were ordered by the court that they must document in writing, and include for the hearing officer a statement of reliability of the informant in a confidential report.[142]

Double Jeopardy

A. Your Defense Against Double Jeopardy

Even though other courts since have struck down this theory, Casper Forte won. A prisoner in Massachusetts was charged with assaulting a guard, and the court decided on March 8, 1995 in *Commonwealth v Casper Forte*, No. 97548 [unpublished opinion] the double jeopardy issue. Mr. Forte was charge with assaulting a guard, among other things. He was charged in a disciplinary hearing and later indicted in court for events from the same actions. He was found guilty and sanctioned by the goon (kangaroo) court, and then prosecuted in state court. Mr. Forte moved the court to dismiss based on Double Jeopardy, and *U.S. v Halper*,[143]and won. Since the origional printing of the *Forte* opinion here, several courts have rejected the argument and the case was not published. However, Massachusetts prisoners might be able to use the case.

The supreme court applied the ruling in *Halper* to an administrative sanction in *Kvitka*.[144] New developments in law have forced courts to examine whether prison sanctions may be punishment for the purpose of double jeopardy. **First**, the U.S. Supreme Court and the Supreme Judicial Court clarified in Halper and Kvitka, respectively, that double jeopardy encompasses administrative punishment that is outside the criminal judicial system. **Second**, in the Massachusetts Dept. of Corrections created the DDU with clear indications that the DDU has the continuing purpose of maintaining a safe prison environment and that the DDU has a different, specific purpose: to punish prisoners for misbehavior. The wording and method your argument before the court will probably depend on whether you prevail or not. Be sure to understand the exact definition of your disciplinary makeup and its legal basis.

In *U.S. v Austin*[145], the issue deals with forfeiture of property. But the court held that regardless of the value of property, or the cost to the government, forfeiture was punishment. In analysis, since segregation is constitutionally protected, it would also be considered a "grievous loss" and subject to a double jeopardy argument.

For more information on the Double Jeopardy issue, write to Forfeiture Endangers American Rights, (FEAR), 265 Miller Ave, Mill

---

139 *Wolff v McDonnell*, 418 US 539,590 (1974)(Marshall, J, dissenting); *McGinnis v Stephens*, 543 P2d 1221, 1231 n28(Alaska 1975); *Wilkerson v Oregon State Corr*, 24 Or App 61, 544 P2d 198 (1976); *Casper v Marquette Prison Warden*, 126 Mich App 271,337 NW2d 56, 58 (1983). Also see, *Hensley v Wilson*, 850 F2d 269, 276-277 (6th Cir 1988); *Frietes v Auger*, 837 F 2d 806, 810-11 (8th Cir 1988), *Vasquez v Coughlin*, 726 F Supp 466 (S.D.N.Y. 1989).

140 28 CFR § 541.17(c); *Bonney v Oregon State Penitentiary, Corrections Div.* 16 Or App 509, 519 P2d 383 (1974).

141 *Lamoureux v Superintendent*, 390 Mass 409, 456 NE2d 1117 (1983).

142 *Mendoza v Miller*, 779 F2d 1287 (7th Cir 1985), cert denied, 476 US 1142 (1986).

143 *U.S. v Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed2d 487(1989); *U.S. v Austin*, __ U.S.__. 113 S.Ct 2801, 125 L.Ed2d 488 (1993).

144 *Kvitka v Board of Registration in Medicine*, 407 Mass 140 (1990).

145 *U.S. v Austin*, __ U.S.__. 113 S.Ct 2801, 125 L.Ed2d 488 (1993).

Valley, CA. 94941, (415) 388-8128. The book is $20.00 to victims of Double Jeopardy and prisoners and $40.00 to non-prisoners.

B. The Prison's Attack On You With Double Jeopardy

An infraction doesn't bar a criminal prosecution.[146] You can get infracted and prosecuted in court for events from the same circumstances while in prison. Sure it is "Double Jeopardy." This double jeopardy issue should be considered by every prisoner when considering asking for "immunity" during a hearing. What you say ***with*** immunity in a disciplinary hearing ***can and will*** be used against you in a criminal proceeding.[147] The reasoning supporting your defense against double jeopardy is your "substantial loss," "grievous", or "interest loss." The government abuses their supporting cases in defense of their position to keep pummeling you into the ground and get away with it. Cross reference these cases they quote. Many have been limited and overruled with other cases.

The argument of the government will use is that an administrative finding of guilt and subsequent punishment is purely administrative and does not constitute punishment and a long list of cases support that argument.[148] Specifically, in *Commonwealth v Brooks, supra,* [I]n prison disciplinary hearings, the aim, is not primarily to punish, but to maintain safe, secure, rehabilitative environment.

You want more examples of how prisons have prosecuted prisoners twice for the same actions arising from the same events. I don't have the room to print them all. In *Hayes* [149] the 7th Circuit reaffirmed its holding respecting written reasons in subsequent litigation arising out of the same incident.

The double jeopardy clause protects only against successive criminal trials. A prison disciplinary hearing and civil litigation generally are not "criminal trials" protected under the double jeopardy clause and has been called "administrative." The burden of proof required for a court trial is greater than in a disciplinary hearing[150].

Another unpopular reasoning among prisoners could include successive disciplinary hearings from the same actions. It has been found, that this is not "double jeopardy." The thinking of this, relates to two infraction issues of conduct within the same conduct do not mean double jeopardy.[151]

I find the reasoning of the courts confusing and so vague, sometimes they dance around an issue to present their decision without actually saying anything relative to the prisoner's full available constitutional rights. In *Commonwealth v Brooks*[152], the courts said:

> "If they [prison officials] are required to make a choice between internal discipline and criminal prosecution, they would be unable to maintain necessary order and security of their institutions. Prison officials would be forced to permit conditions to deteriorate, foregoing security, order, safety and rehabilitation in the hope that violent prisoners would be brought to trial, convicted and incarcerated in an institution with greater security. Alternatively, the prison officials could impose internal disciplinary sanctions. However, as here, six months of restricted privileges may be the maximum

---

146. *U.S. v Newby,* 11 F.3d 1143 (3rd Cir. 1993).

147 *U.S. v Duke*, 527 F2d 386 (5th Cir), *cert denied*, 426 US 952 (1976); *U.S. v Stead*, 528 F2d 257 (8th Cir 1975), *cert denied*, 425 US 953 (1976); *Rivera v Toft*, 477 F2d 534 (10th Cir 1973); *Colbeth v Civiletti*, 516 F Supp 73 (SD Ind 1980), and the list goes on.

148 *U.S. v Rising*, 867 F2d 1255, 1259 (10th Cir 1989); *U.S. v Boomer*, 571 F2d 543, 546 (10th Cir 1978); *Gloria v Miller*, 658 F Supp 229 (W.D. Okl 1987); *Commonwealth v Brooks*, 479 A2d 589 (Pa Super 1984).

149 *Hayes v Thompson*, 637 F2d 483 (7th Cir 1980).

150 *Landman v Royster*, 333 F Supp 621 (ED Va 1971); *In re Lamb*, 34 Ohio App 2d 85, 296 NE2d 280 (1973); *U.S. v Newby*, 11 F3d 1143 (3rd Cir 1993) (held that the 3rd, 8th & 10th Circuit have held that disciplinary sanctions imposed by prison officials for prison infractions do not bar a subsequent criminal prosecution.)

151 *Vaughn v Frazen*, 549 F Supp 426 (ND ILL 1982); *Townes v Hewitt*, 84 Pa Commw 151, 478 A2d 548 (1984); also see *Amezquita v Coughlin*, 169 AD2d 857, 564 NYS2d 584 (1991).

152 *Commonwealth v Brooks*, 330 Pa Super 335, 479 A2d 589, 594-95 (1984).

penalty at their disposal. Should such action preclude subsequent criminal prosecution, in many instances, the interest of society as a whole in punishing infractions of criminal law will be left unprotected. We refuse to force such a choice on prison officials."

Even if a criminal trial ends up in acquittal, the prison's burden of proof does not meet the same standard as required in court[153]. Some standards recommend that where the prisoner is convicted of the criminal charge, no further institutional proceedings may be pursued by the prison[154].

Necessity of *Miranda* Warnings in Prison

I should hope I don't need to detail your Fifth Amendment right to keep quiet. In *Miranda*[155] the supreme court held that you "have the right to remain silent without understanding your rights, and you have the right to counsel, private or appointed." In the July, 1994 issue Prison Legal News, an article discusses in detail about "Prisoners Retain Right Against Self-Incrimination", *Phelps v U.S. Federal Government*, 15 F3d 735 (8th Cir 1994). While prisoners retain some *Miranda* rights in prison, it only applies if a prisoner's "liberty" within the prison is further restricted. Courts will review the *Miranda* issue on a case by case basis.[156]

Prison Legal News reported in June 1994, *Garcia v Singeltary*[157]. *Garcia* was a prisoner in Florida and was observed by a guard feeding a fire in his cell with stuffing from his mattress and other things. The guard directed *Garcia* to leave his cell and the guard put out the fire like a dutiful guard is supposed to do. Then, the guard asked *Garcia* why he had set the fire. *Garcia* said "I no get my canteen... I have my rights." *Garcia* didn't get his canteen or his *Miranda* rights and was convicted in state court for First degree arson. He sought relief under federal habeas corpus and it was denied. The appeals court affirmed. In *Mathis v U.S.*, 391 U.S. 1, 88 S.Ct. 1503 (1968), the court applied *Miranda* to prisoners. In this case, the 11th circuit followed the 9th and 4th circuits to conclude that a persons' status as a prisoner does not automatically constitute "in custody" for *Miranda* purposes.

Guess what, *Miranda* doesn't apply specifically to prison disciplinary hearings or generally in a prison setting in the same way as it does in a possible criminal prosecution. In *Baxter*, the *Miranda* does not apply in the same way to interrogations relating to disciplinary proceedings.[158] Prison officials are not required to give a prisoner *Miranda* warnings during an investigation of internal institutional rules violations, since the prisoner is not "in custody" in such circumstances for *Miranda* purposes.[159] In *Bradley* , the court considered the fact that "just because a person is in prison, does not *ipso facto* (by the fact itself; by the mere effect of an act or fact) render an interrogation custodial." *Miranda*, only applies where the government investigation relates to a possible criminal trial, but not where it relates to internal disciplinary hearings.

But, if your "informal, un-*Miranda*'d" statements are later used in a criminal trial, the statements may (meaning "might") not be used against you without a *Miranda* warning at the disciplinary hearing[160]. Some courts have followed rulings from the 9th and 10th Circuit Court of Appeals that *ANY* statements taken from a prisoner who has *NOT* been read their Miranda rights *CAN* be used against them in court.[161]

Probably the best advice I ever got from a lawyer, was, "The ***only*** time *anyone* from the government wants to speak with you, they just want to charge you with something and

153 *Rusher v Arnold*, 550 F2d 896 (3rd Cir 1977), but compare Cal Penal Code § 2657(a) (West 1993).

154 *Pruitt v State*, 274 SC 565, 266 SE2d 779 (1980), *cert denied*, 449 US 1036 (1981).

155 *Miranda v Arizona*, 384 US 436 (1966).

156 *Garcia v Singletary*, 13 F.3d 1487 (11th Cir. 1994).

157 *Garcia v Singeltary*, 13 F3d 1487 (11th Cir 1994).

158 *Baxter v Palmigiano*, 425 US 308, 96 S Ct. 1551, 47 L Ed 2d 810 (1976).

159 *Bradley v State*, 473 NW2d 224 (Iowa Ct App 1991), (the court had to look first, at the total circumstances surrounding the interrogation to determine whether the inmate is subject to more that the usual restraints on his freedom to depart.

160 *Grant v State*, 154 Ga App 758, 270 SE2d 42 (1980), see also, *People v Carr*, 149 Mich App 653, 386 NW2d 631 (1986); *Mathes v United States*, 391 U.S. 1, 88 S Ct. 150, 20 L Ed2d 381 (1968).

161 *Garcia v Singeltary*, 13 F 3d 1487 (11th Cir 1994).

they just want to charge you with something and make it worse." Don't ever say anything, you don't want repeated, twisted and analyzed before a jury. You should already know this. I still get letters from guys, saying "they questioned me for 10-days without giving me my rights, then infracted me."

5 - EVIDENCE

Disciplinary Evidence Must be Reliable
As reported in *Prison Legal News*

Michael Walsh is a New York state prisoner. He was infracted for allegedly exposing himself to and threatening a prison guard. At the disciplinary hearing, Walsh called as a witness another guard who had co-signed the infraction report. The guard testified that she was present on the occasion and did not see Walsh expose himself nor hear him threaten the other guard. Despite this, the hearing officer found Walsh guilty and sentenced him to six months in segregation and a loss of privileges. Walsh administratively appealed the hearing result and it was overturned due to the conflicting evidence at the hearing. Walsh then filed suit in federal court seeking money damages. He claimed that his right to due process was violated when he was found guilty of an infraction when contrary evidence was presented at the hearing.

The defendants moved for summary judgment on all the issues. The district court discussed the relevant standards that courts apply when reviewing prisoners' civil rights claims arising from disciplinary hearings. Courts must only determine if "some" evidence supports the hearing committees finding of guilty, in practice this has come to mean 'any' evidence. Thus, exculpatory evidence is irrelevant because "although it presumably could have allowed the disciplinary board to reach a contrary conclusion, it would not have nullified the evidence of guilt on which the board relied." Once a court determines that the evidence supporting a disciplinary hearing is reliable, its review ends. Reviewing courts are not to determine whether evidence in the record would support a contrary conclusion.

> Prison Staff must provide you with evidence they use against you, but the also are required to provide you with ***any*** evidence they have that would indicate your innocense.
> *Chavis v. Rowe*, 643 F.2d 1287 (7th Cir. 1981)

Applying these principles to the case at bar, the court held that nevertheless, the hearing committees finding of guilty was not supported by the evidence. The guard who had co-signed the infraction undermined its reliability by testifying at the hearing that she did not see Walsh expose himself or threaten the other guard. Thus, Walsh's due process rights were violated by the fact that the hearsay evidence admitted against him (the infraction report) was not reliable. The court denied the defendants summary judgment on this issue.

The court granted the defendants qualified immunity from money damages holding "...the defendant was not placed on notice that any disciplinary finding based on tainted evidence (i.e. an unreliable misbehavior report) constituted a violation of the plaintiff's due process rights." Because neither the supreme court nor the second circuit had held that tainted evidence does not meet the 'some evidence' standard approved by those courts. See: *Walsh v. Finn*, 865 F. Supp. 126 (SD NY 1994).

Access to Evidence

Even if evidence indicates you are innocent of the charges, the disciplinary panel is required to provide you this material.[162] In some situations, evidence or copies of the evidence must be supplied to you to prepare your defense.

---

[162] *Chavis v. Rowe*, 643 F.2d 1287 (7th Cir. 1981) (The DHO must give you copies of any exculpatory evidence for use at the hearing).

Staff is also required to include the specific charge, date, time, and place of the alleged misbehavior along with the supporting evidence. You are also entitled to a written explanation of the procedures to be followed and your rights during the hearing. *In Grillo* the DHO altered evidence during the hearing and using the altered evidence at the hearing violating *Grillo*'s due process rights.[163]

Copies of documents in some hearings are required to be provided to you. In *Scarpa v Ponte*[164], the prisoner was accused of writing a disrespectful and abusive letter to the prison warden. When preparing his defense, *Scarpa* was denied a copy of the alleged letter. His defense could deal with several issues relevant to being able to review the alleged letter as follows:

(1) What is the definition of "disrespectful and abusive" within a prison environment,

(2) Is the letter really "disrespectful and abusive", or are the staff picking at straws,

(3) The letter was not written by *Scarpa*.

During the *Scarpa* disciplinary hearing, due process is violated within the scope of his Constitutional rights by not providing a copy of the letter for review by the prisoner. Another case similar is in *Young*[165] who was accused of writing a threatening letter to his cellmate. The court decided that the prison staff violated *Young* "s due process rights when he was not present at the disciplinary hearing, and the threatening letter was not produced. The court's basis for the denial of due process was: the allegedly "threatening letter" was not produced at the hearing either. The hearing was subjective not objective.

Criminal trials and administrative law or hearings differ from prison disciplinary hearings. You have less rights than any other. You do have the right to disclosure of the evidence used against you. In *Chavis v Rowe*[166] the 7th Circuit has analyzed the issue and found an existence to due process rights and you receiving evidence staff intend on using against you. To better understand the required elements if you were wronged, compare *Brady v Maryland* and *Harris v MacDonald.*[167]

You must object on the record to information or evidence used against you that you have not seen, or did not know of. until the hearing. You must try to get, on the written record that prison staff did not allow you time to prepare a defense against the evidence. You should also request an extension of time, normally 24 hours is all required to be provided, to investigate and prepare a defense. Of course, an investigation is a joke in reality, but it is an issue the courts will examine if brought to court. Try to get every objection, into the written record by asking the hearing officer to note your objection, or follow up with a written list of objections, and ask it be included in the file.

Evidence in Drug Tests

Test results indicating the presence of illegal drugs are often used as "some" evidence in disciplinary hearings. Based on these results, disciplinary hearing committees will often recommend loss of good conduct time, revocation of parol or probation, or loss of your parole date, in addition to usually, maximum allowable segregation time.

Drug tests are divided into five basic types:

(1) Enzyme Multiplied Immunoassay Technique (EMIT), accuracy = 93 - 95 %, being replaced by KIMS because of error rates with other medicines, and contamination.

(2) Radioimmunoassay (RIA), accuracy = minimal % (not used much anymore because of errors).

(3) Florescence Polarization Immunoassay (FPIA) accuracy = ? %

(4) Gas-Chromatography/Mass Spectrophotometer (GC/MS) accuracy = 100%

(5) Thin Layer Chromatography (TLC) accuracy = minimal %

(6) (KIMS), new, and replacing EMIT tests

Some drug tests analyze samples differently. *Specificity* shows how many false positives are given in the specimen result. *Sensitivity* shows how many false negatives are

---

163 *Grillo v Coughlin*, 31 F.3d 53 (2nd Cir. 1994).

164 *Scarpa v Ponte*, 638 F Supp 1019 (D Mass 1986).

165 *Young v Kann*, 926 F2d 1396 (3rd Cir 1991).

166 *Chavis v Rowe*, 643 F2d 1281 (7th Cir), *cert denied*, 555 F Supp 137 (ND ILL 1982) and *Mendoza v Miller*, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986).

167 *Brady v Maryland*, 373 US 83, 83 S Ct 1194, 16 L Ed 215 (1963) compare with *Harris v MacDonald*, 555 F Supp 137 (ND ILL 1982), and *Mendoza v Miller*, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986).

given in the specimen result. When testing, be sure your hands are clean, a small amount of soap that will clean proteins, not detergent, will make a sample untestable.

Sweat Patch Drug Testing

PharmChem has come out with a new testing procedure, currently being used in Michigan called the Sweat Patch. The sewat patch looks like a large band-aid with a serial number that is applied to a persons upper arm or lower midriff to absorb sweat. The patch must be worn for a minimum of 24 hours according to the Pharm Chem brochure. The patch allows small molecules such as water, oxygen and carbon dioxide to pass through. Larger molecules including drugs, are caught on the skin side of the patch in an absorbent pad. The two kinds of sweat are *Insensible perspiration*, passive, uncontrolled loss of sweat from the skin occurring regardless of physical activity. The second type is *Sensible perspiration*, is active sweat, controlled loss of sweat from specific glands in the skin. Typically, people produce 300 - 700 ml of insensible sweat each day.

When sending the patch in for testing, the adhesive is peeled back from the skin, the patch is removed, using tweezers or some sterile method, and placed in a special sealed envelope to avoid contamination. The patch indicates tampering with and is reported to not be affected by bathing. PharmChem reports that clinical studies have shown that drugs and drug metabolites on the pad are stable for days after removing at room temperature and months in a freezer. Once PharmChem receives the patch, any drugs are washed from it into a liquid extraction solvent. The solvent is then tested by assays that are similar to those used for testing urine samples such as Immunoassay (ELISA or RIA) technology. A positive screening test is confirmed by GC/MS (Gas Chromatography/Mass Spectrometry).

The sweat patch can have 3-possible bad reactions: (1) a mechanical reaction such as a band-aid rash; (2) an allergic reaction which the manufacturer says are undocumented and; and (3) burns causing intermittent itching, rashes or blisters. ParmChem says the burns are cause by the cleaning of the area with alcohol and if 60 to 90 seconds drying time is not allowed before the patch is applied, burning can be the result. PharmChem has not admitted that people have reported more serious reactions such as severe rashes and puffiness to severe headaches.

The sweat patch is currently only approved by the Food and Drug Administration (FDA) to test for three drugs: (1) cocain; (2) opiates (including heroin) and; (3) amphetamines (including methaphetamines). As this is written, PharmChem is seeking approval for the testing of marijuana. Not being used currently, they are also working on a detection process that works within 20-30 minutes, and one that detect alcohol use.

Test Result Arguments

When a testing lab or an outside laboratory like Pharm-Chem tests a batch of samples, it sets the urine samples in a large plate, each holding 200 urine samples. A robotic arm, then moves to each sample, withdrawing a couple drops by sucking the urine into a tube, and separating the sample with an air bubble 200 specimens at a time, in a row through the same tube.

An argument not yet used about possible cross contamination is: (1) if an extremely strong sample prior to mine (containing above average amounts of drug residue) was positive, did any of the samples, for example up to ten (10) samples after the extremely strong sample, also test positive for illegal drugs; (2) could or is the proximate cause of the positive drug test after the extremely strong sample be caused by "bleed over or residual cross contamination" of the samples flowing through the same tube. This could be a viable court argument to pose to an expert.

Your Fifth Amendment rights are not violated when a specimen is used against you in a prison disciplinary hearing. The Fifth Amendment also does not bar prison officials from using a prisoner's refusal to provide a urine sample against him. **But, a prisoner cannot be infracted and lose Good Conduct Time, or Good Time if a they cannot produce a urine sample.**[168] If you are nervous about the test that you may test dirty, [for example if the guards are known for tampering with specimens] you cannot lose good time by just taking a refusal to piss shot and argue that at the hearing. The Fifth Amendment only protects a person from being compelled to testify against himself, or from otherwise providing evidence of a testimonial nature[169].

---

168 *Kingsley v Bureau of Prisons*, 937 F 2d 26 (2nd Cir 1991).

169 *Schmerber v California*, 384 US 757, 760-61 (1960).

The court in *Storms*[170], have defined "whether taking of a urine sample was more 'offensive and degrading' than a visual body-cavity searches in *Bell v Wolfish*, 441 US 520 (1979), and thus would require Fourth Amendment protection. The court found that urinalysis was not entitled to a higher standard of scrutiny than body-cavity searches, and prison officials were allowed to obtain urine samples without probable cause or reasonable suspicion, as long as the requests where reasonable and not overly burdensome."

Drug test results are often argued as to their accuracy, and if they are enough evidence for a finding of guilt. The relevant questions are:

(1) whether drug test results are sufficiently reliable to constitute some evidence of drug usage; and

(2) whether the particular testing scheme employed in the particular case was itself sufficient to meet the standard of proof required to be used by the disciplinary committee to solely base its findings.

Chain of Custody

The encompassing issues and procedures that define proper chain of custody are : (1) the collection, handling, storage, testing and disposal of a urine specimen in a manner that ensures that the specimen was correctly matched to the person it was acquired from, and who was required to provide it, and it was not tampered with or substituted in any way, and (2) the documentation that these procedures have been carried out.[171]

When a prisoner (1) is require by policy, statute or some "legal grounds" to provide a urine specimen to (2) an approved prison staff member, and (3) the approved staff member has the proper instruction and training to perform such gathering of urine samples, (4) and the approved trained staff member has documented the custody and safe keeping of the urine sample, and stored it properly for transportation to a testing facility, and (5) can show the sample was not tampered with by its storage and handling procedures, and (6) all seals, locks or other securing devices were in tact, (7) the sample will found to have been handled properly.

[170] *Storms v Coughlin*, 600 F Supp 1214 (S.D.N.Y. 1984).

[171] *Wykoff v Resig*, 613 F.Supp 1504, at 1513 (D.C. Ind. 1985).

Evidence In Urinalysis Drug Tests

Prisoners should remain aware that a new test procedure, not given rigorous court attacks by prisoners where they have lost or created new law, could provide an easy win in court for a prisoner with some research. The EMIT test is old and tested in spite of its high error rate. Many courts required some kind of confirmatory test such as the GC/MS or even a second EMIT test. According to *Corrections Today* , [a pig magazine] April 1995, Legal Traps Remain for the Unwary; Cases based on procedural issues usually did not threaten the drug testing program, but challenges to the test reliability did. This could be your area of litigation focus.

The 2nd, 4th, 6th and 8th circuit courts required the use of at least the double EMIT test result for a finding of guilt in a prison disciplinary hearing.[172] The 8th and 9th circuits have held only one positive test is necessary for a finding of guilt.[173] Generally *Peranzo* and *Spence* approve confirming the EMIT test with another confirmation, usually a different testing method.

There is little established litigation challenging urine testing in a half way house, parole or probation revocation situations. However, a considerable amount of case law exists, using the EMIT test to send you back to prison, and almost no llitigation arguing the EMIT test as adequate.[174]

Most litigation comes from the use of the EMIT[175] test. This test was designed to detect drug use, and the manufacturer themselves admit will indicate a 5%+/- margin of error which is often adequate for a finding of

[172] *Peranzo v Coughlin*, 850 F2d 125 (2nd Cir 1988); *Spence v Farrier*, 807 F2d 753 (8th Cir 1986); *Higgs v Bland*, 888 F2d 443 (6th Cir 1989); and *Thompson v Hall*, 883 F2d 70 (4th Cir 1989).

[173] *In Re Johnston*, 745 P2d 864 (Wash., 1987); *Harrison v Dahm*, 911 F2d 37 (8th Cir 1990).

[174] *State v Johnson*, 527 A2d 250 (Conn App 1987); *Adkins v Martin*, 599 F Supp 1510, 1513 (WD Okla 1988); *Smith v State*, 298 So2d 482 (Ga 1983).

[175] Enzyme Multiplied Immunoassay Technique (EMIT).

"some" evidence[176]. In *Koenig*[177], the courts have maintained that a prisoner does not have the right to challenge the test results with a more accurate method, such as using the GC/MS,[178] even at your own expense. This issue could be argued in other courts, asking the court to be more specific in due process requirements.

Legal Arguments to Drug Test Results

Prisons and their defender attorneys can better prepare for a big class action lawsuit. It is the little well prepared lawsuit that bites them in the butt. Both have potentially serious consequences in overturning the use of the EMIT test as its only testing method. The new and untried testing methods are prime targets for possible litigation, well reasoned.

In a parole revocation hearing in Texas, the defendant claimed he had inhaled cocaine passively from his girlfriends smoke. The probation officer did not have an available expert witness and the probation officer did his best to get a parole revocation. The parole officer said, " the sample was tested using a 300 nanogram cut-off level for identifying purposes to identify a positive test." The judge, remembering testimony from other unidentified cases, "showed a 300 nanogram cut-off level as too high to detect a passive inhalation positive." As a result of this erroneous basis, the judge revoked the probation rejecting the "passive inhalation defense." On appeal the revocation was reversed, not because the judge and probation officer were wrong, but because the basis for their decision

and theory was wrong. The *U.S. v Courtney*[179] case is worth reading.

A prison that wants to stay out of court will provide or request a confirmatory test on a single positive EMIT test, using preferably the GC/MS method. The new slide test system is an area of prison lawyers concern being introduced to prisons as a testing method. Even though the judges reasoning was wrong, two cases discuss this procedure.[180] In both *Ransom v Davies* and *Kimball v Scotts* cases, the judged reasoned that "because the tests before him were a form of immunoassay testing method, he could rely on previous judicial decisions involving the EMIT test." The judges reasoning is wrong because, even though both testing methods (the slide test and EMIT test) are a form of immunoassays, there are significant fundamental differences between the two technologies that make comparing them wrong. The prisons cannot use legal cases that approve the use of an unconfirmed EMIT test because they do not provide legal precedent to support other technologies like the slide test.

In a legal case presented by a pro se prisoner, the action will probably not meet the same standard of scientific review, factual analysis, scientific or legal issues as a case represented by a lawyer. When asking for appointed counsel if going to court, point out your lack of access to scientific and lab testing material for your case to support your claim. This then would be an added appealable issue, if denied. If a legal challenge does not exist to a particular urine testing method or procedure, the courts door is open for a challenge.

In litigation, prison staff may rely on *Works v State*[181] to defend their position on only one EMIT test as being sufficient to meet due process in the application of punishment of "some evidence." Many other cases exist to support the *Works* case. You can argue that a second positive EMIT or a more accurate test method be required before the imposition of punishment ***when the potential for loss of good time exists*** and one test is not an adequate basis for disciplinary action[182]. In *Holms v Coughlin*,[183] the courts required that two (2) positive EMIT tests results sufficiently supported a determination of guilt in a disciplinary hearing, even though the literature concerning the EMIT test had been revised by the manufacturer to advise use of more specific

[176] *Koenig v Vannelli*, 971 F2d 422 (9th Cir 1992).

[177] *Koenig v Vannelli*, 971 F2d 422 (9th Cir 1992).

[178] Gas Liquid Chromatography-Mass Spectrometer Test.

[179] *U.S. v Courtney, 979 F2d 45 (5th Cir 1993).*

[180] *Ransom v Davies, 816 F Supp 681 (D Kan 1993); and Kimball v Scotts, 1993 WL 455266 (D Kan 1993).*

[181] *Works v State*, 575 So 2d 622 (Ala Crim App 1991).

[182] *Bourgeios v Murphy*, 809 P2d 472 (Idaho 1991) (dicta) (reviewing the authority on each side).

[183] *Holms v Coughlin*, 583 NYS2d 703 (App Div 1992).

alternative chemical methods to obtain a confirmed result.

To further the argument, a second positive test result on the same specimen was considered "substantial evidence," in *McGill v Coughlin*[184] during his disciplinary hearing. In cases where the court feels a single (1) EMIT test is *NOT* enough basis for a finding of guilt during a disciplinary hearing, rely on the lacking of "some evidence." Check your local court decisions to discover if you have adequate grounds on this single EMIT test alone. Wisconsin allows you to request a confirmatory test, at your expense.

Let's argue "theory" for a moment. *IF* a single EMIT test is done, without a "confirmatory test" or test to confirm the results of the first test, look at the "probability of drug use." Assuming the EMIT test is 95 % correct, (actually, 70% to 95% accurate), you test positive in a single test. The element of "*probable* guilt could be argued to exist by the institution in court" and is based on "the test result is probabitive and has sufficient acceptance and scientific basis to certainly constitute an element of evidence." **You need to argue, saying,** "this single test in and of itself is *NOT* of sufficient weight to fulfill the 'standard of proof' which due process requires in disciplinary hearings." Of course, with this argument you are walking on thin ice, but be careful in your argument and research the issues in detail. Some courts have held just one EMIT test is sufficient for a finding of guilt using the "some evidence" requirement.

Many states just say "why require evidence in the record to throw the person in solitary confinement[185]." Fortunately, the courts have asserted themselves through good prisoner litigation and held that "rumor or personal, unrelated knowledge about a particular prisoner, is not enough and must be based on evidence in the record."[186] Wisconsin, was the first state to even require a minimal level of investigation before a disciplinary hearing committee can make a "factual determination" enough to meet the requirements as described in the minimum due process requirements in *Wolff*[187].

In *Peranzo v Coughlin*[188], the court refused to grant injunctive relief against the use of urinalysis test results in prison disciplinary hearings. The reason being: given the "reduced liberty interest of prisoners, the scientific reliability of evidence in disciplinary hearings does not have to rise to the level that would be required in criminal proceedings." This theory continues by a prisoner's refusal to submit to an order to take a drug test, however, may be a disciplinary violation.[189]

In the *Higgs*[190] case, it was held by the court that "the reliability of the EMIT test was sufficient to satisfy the due process standards when used as the basis for 'discipline' for drug use." It was also decided that the lab persons' testimony was not required in the disciplinary hearing since the lab person was not the accuser or an adverse witness and had no knowledge of facts surrounding the alleged abuse.[191] The prisoner should have expanded on lab procedures theory. Generally, in a lawsuit situation, the defense is not able to fight single drug test cases as well as a class action case because of the time and resources allowed class cases.

When a single EMIT test indicated that a prisoner had used marijuana, a Thin Layer Chromatography (TLC) test confirming this

---

184 *McGill v Coughlin*, 583 NYS2d 702 (App Div 1992), and in *Sharpe v Coughlin*, 177 AD2d 774, 576 NYS2d 62 (1991) the courts held that two (2) positive EMIT tests were "substantial evidence" that the prisoners had violated the institutions drug rules.

185 Resource Ctr on Correctional Law & Legal Services, Survey of Prison Disciplinary Practices and Procedures, 24 (1974).

186 *Sands v Wainwright*, 357 F Supp 1062 (MD Fla), *vacated*, 491 F2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974); *Landman v Royster*, 333 F Supp 621 (ED Va 1971); *Massop* (continued...)

(...continued) *v Lefevre*, 127 Misc 2d 910, 487 NYS2d 925 (SCt 1985); in re *Lamb*, 34 Ohio App 2d 85, 296 NE2d 280 (1973).

187 State *ex rel Meeks v Gagnon*, 95 Wis 2d 115, 289 NW2d 357 (1980) The *Wolff* case is discussed in more detail in Chapter 2.

188 *Peranzo v Coughlin*, 608 F Supp 1504 (SDNY 1985), see also, *Vasquesz v Coughlin*, 118 AD2d 897, 499 NYS2d 461 (1986).

189 *Tucker v Dickey*, 613 F Supp 1124 (WD Wis 1985).

190 *Higgs v Bland*, 888 F2d 443 (6th Cir 1989).

191 *Wilson v Higgs*, 940 F2d 664 (6th Cir 1991; *Peranzo v Coughlin*, 850 F2d 125 (2d Cir 1988); *Higgs v Bland*, 888 F2d 443 (6th Cir 1989).

result formed sufficient basis to support disciplinary sanctions against the prisoner and no GC/MS test was needed, even at the prisoners' expense because of the penologicial interest of the prison and a possible ripple effect among prisoners.[192] Another court disagreed, and stated that the prison should have been required to show that they had a legitimate penological interest in denying the request of the prisoner, found guilty for ingesting marijuana primarily on the basis of two (2) EMIT tests, to pay at his own expense for a GC-MS test which is 100% accurate rather than 95-98% accurate since that was the only way the prisoner could refute the EMIT test results[193], but overruled in *Koenig*.

In *Wykoff v Resig*[194], the court decided that before results of a prisoner's urine sample could be introduced in a disciplinary proceeding, due process required that the prison establish an adequate chain of custody in *Elkin v Fauver.*[195] But in *Byerly v Ashley*,[196] the court held that a prisoners due process rights have been violated where he was punished for unauthorized use of drugs and alcohol, but where there was no proof of an adequate chain of custody of a urine sample taken from him and tested in the laboratory. The laboratory which tested the sample had not signed it or indicated whether the package and specimen seals were intact when received, and no one from the laboratory had filled out a custody form to indicate who received the sample or who had handled it while it was being tested. The court specifically noted that a prisoner facing disciplinary punishment is not entitled to the same safeguards as a person facing criminal prosecution or parole revocation but, stated that fundamental fairness requires that evidence against a prisoner be reliable. While finding no constitutional violation in this case, the court tried to avoid future litigation, outlined the appropriate procedures to be followed in future cases:

1. The urine sample should be sealed in the presence of the prisoner from whom it is taken.
2. A written record of the location and transportation of the sample always should be kept.
3. The sample, while in possession of correction officials, should be stored in a locked refrigerator with very limited access.
4. The prisoner should be given a duplicate copy of the laboratory test results.

In *Higgs v Wilson*, and; *Nash v Thielke*,[197] the court held holding that a prisoner was entitled to get a copy of an officer's urine report taken on the day of the incident). For a survey of New York decisions which have considered this issue in the context of urinalysis testing, see *Batista v Kuhlmann*,[198] results of urinalysis test inadmissible, absent laying of proper foundation. In *Jennings v Coughlin*,[199] the foundation for introduction of
test for marijuana required before results of test can be admitted. In *Newman v Coughlin*,[200] while proper foundation must be laid for introduction of urinalysis test, prisoner need not be provided with copies of the test prior to the hearing. In *Pella v Adams*,[201] while urinalysis test constitutes strong evidence of drug use, reliability and accuracy or corroborative evidence must also be critically examined.

Positive Drug Test Results

If you know you are guilty, look for areas to cut your losses. Pharm-Chem, the drug lab your urine tests go to in federal institutions, has a report showing their program flaws. Some State prisons have their own staff perform the drug screening tests and analysis. Check their qualifications, chain of custody and secure storage. Pharm-Chem also has sensitivity levels so low, (down to 50ns or lower, with

---

192 *Koenig v Vannelli*, 971 F2d 422 (9th Cir 1992).

193 *Pella v Adams*, 702 F Supp 244 (D Nev 1988), see also, 723 F Supp 1394.

194 *Wykoff v Resig*, 613 F Supp 1504 (ND Ind 1985).

195 *Elkin v Fauver*, 969 F2d 48 (3rd Cir), *cert denied*, 113 S Ct 473 (1992).

196 *Byerly v Ashley*, 825 SW2d 286 (Ky Ct App 1991), *cert denied*, 113 S Ct 364 (1992)

197 *Higgs v Wilson*, 616 F Supp 226 (WD Ky 1985), *vacated*, 793 F2d 1291 (6th Cir 1986); *Nash v Thielke*, 743 F Supp 1301 (ED Wis 1990).

198 *Batista v Kuhlmann*, 90 AD2d 934, 457 NYS2d 931 (1982).

199 *Jennings v Coughlin*, 99 AD2d 635, 472 NYS2d 195 (1984).

200 *Newman v Coughlin*, 110 AD2d 981, 488 NYS2d 273 (1985).

201 *Pella v Adams*, 638 F Supp 94 (D Nev 1986).

general cut off levels above 300ns as a positive test) don't expect to get away with ANYTHING! Keep good medical records and medicine labels. Sometimes the institution might forget you were issued medication, since records do get lost. Once you clear up the incident report problem, probably you will have already completed your D/S time, and obtained whatever sanction was given. A single smoke of marijuana will cause a positive test for up to 30 days depending on your metabolism.

If you tested positive for THC Metabolite (Cannabinoid or Marijuana), and the institution intends on punishing you, a "confirmatory test" is *required* on the urine sample. Often, the institution fails to do this, even though it is offered by the lab when they deliver the preliminary test results. The lab gives the institution normally 24 hours to place the request, before they dispose of the specimen.

The "Confirmatory Test" is directly related to your Procedural Due Process rights as required under the Fifth Amendment [5th Amend. for federal prisoners, and 14th Amend. for state prisoners] of the Constitution in *Soto v Lord.*[202] Here, the courts ruled that "without due process of law ... without adequate procedures," there is no case. In another case, the statement that "Disciplinary confinement clearly implicates a liberty interest requiring due process" - meaning the confirmatory test MUST be done[203].

When the EMIT[204] test is performed, and a confirmatory test is NOT, some courts have decided that your "Due Process" rights to proper procedure, have been violated. If the GC/MS[205] is used, most labs still offer the "confirmatory test" which costs the institution a little more money, but a first THC positive test could be in error with only a single EMIT test method[206].

The chain of custody of the sealed specimen is also important. Watch these things. Most of all, make sure the institution did not blow the time limit to bring action against you.[207] An example below of an Incident Report Written Defense paragraph, in defense of a positive THC test where the confirmatory test was not done: "No follow-up test on the sample was completed to confirm a positive THC Metabolite (Cannabinoid or Marijuana) test. Pharm-Chem, (or whatever is the name of the actual testing lab), offered the confirmation test, but it was not requested by this institution. In this particular chain of evidence, the second test (which is a confirmatory test) is required if sanctions are intended to be applied, *but this was not done.* In a prisoner's case *Soto v. Lord,* 693 F.Supp 8, 693 F Supp 8 (S.D.N.Y. 1988), the second test is required to withstand the Procedural Due Process rights allowed me by the United States Constitution."

Save any labels from any medication you might be taking before you run into a problem. This is just in case you might need to prove later that it was prescribed. Codeine, Morphine, and the Opiates are tough to win, but they are winnable if you have a good defense. If you say, "I take cold medicine," it will only get you laughed at, and D/S time. Eating anything with Poppy Seeds will cause a positive Morphine test. Don't eat poppy seeds, even though they are served at some institutions. Proving you ate poppy seed rolls, while in the hole, is difficult! The "overdose" theory by some BOP Staff is ***not*** true and is easily proven wrong.

Time periods, in which drugs can stay detectable in your urine after the time when the drug was used, will vary depending on the drug and the condition of your body and liver. The following time periods are therefore only estimates, but they also represent the minimum waiting periods between samples upon which disciplinary actions for that drug may be based[208].

Detection Periods for Selected Drugs

3 days Amphetamines*
Methamphetamine
Cocaine*
Cocaine Metabolite

---

202 *Soto v. Lord*, 693 F.Supp 8 (S.D.N.Y 1988).

203 *McCann v. Coughlin*, 698 F.2d 112, 121 (2d Cir.1983);. see also *Frazier v. Coughlin*, 850 F.2d 129, 130 (2d Cir.1988).

204 Enzyme Multiplied Immunoassay Technique (EMIT).

205 Gas Chromatography / Mass Spectrometry test method, (GC/MS).

206 *Peranzo v. Coughlin*, 608 F.Supp 1504, 1512-15 & n. 16 (S.D.N.Y. 1985) the Courts have decided that a single EMIT test has a 25% error rate for a single test. The RIA and the GC/MS tests are highly accurate but more expensive to the institution.

207 See Appendix A, Time Limits (Table 2).

208 See: BOP Program Statement 6060.05 for further information.

5 days Methadone
Methadone Metabolite

6 days Morphine
Codeine
Opiates (includes Morphine)*
Meperidine (Demoral)
Pentazocine (Talwin)
Propoxyphene (Darvon)

11 days Barbiturates
Phencyclidine (PCP)*

14 days Phenobarbital

30 days THC (Marijuana)* (Canabinoids) (61 different components)

* = The only drugs, authorized by the U.S. Government for labs to test for under random conditions.

Providing Urine Samples

It could it be worse than you think when it is your turn for a urine test if you test positive for illegal drugs?[209] Staff of the same sex,[210] must direct the test, and observe the donation of urine into the bottle. Don't offer to piss in the officer's coffee cup even though they deserve it. To assist you, staff must offer you 8 ounces of water at the beginning of the two-hour time period. You are presumed unwilling to provide the urine sample if it is not done within the allotted time. But, you may rebut this during the disciplinary process. You may be given more than 8 ounces of water to drink during the two-hour period **<u>if you request it</u>**, as allowed by the BOP Program Statement # 6060.05 and many State policies regarding Urine Testing Procedures.

If you are unable to supply a urine sample after the two hours,[211] staff should consider, but usually don't, the following possibilities, which you may use in your defense. You may have one of the following conditions:

a) You may be dehydrated (water level of water in your body is low)
b) You may have a "shy" bladder (you can't piss with someone watching). Ask the P.A. for a medical restriction for a shy bladder.
c) You may have a medical or psychological problem (get this documented in your medical records).

You may be placed in a "dry room", if you are still unable to give them a urine test. They will give you a bottle, and tell you to call them when you are able to fill it. This dry room is usually segregation.

The court has said that, although random urinalysis testing for drugs implicates prisoners' Fourth Amendment rights, it was permissible *IF* conducted in a reasonable manner.[212]

Evidence In Alcohol Testing

A reading of .05 or higher will be considered a positive test, IF, after 15 minutes, another test MUST be given and a test result again of higher than .05[213].

The Program Statement also says that the Alco-Sensor must be calibrated at least once a month, and documented in the log. A positive alcohol test, could be wrong. Consider asking for a verified calibration or other evidence it is calibrated and operated fairly if you have reason to suspect the machine is not being operated properly.

You will test positive for alcohol if you have:

a) Just drunk cough syrup within the past 2 to 5 minutes, but will only last for a few minutes.
b) Only eaten salads and/or fruits all day.
c) Stomach problems (which must be documented by a doctor or P.A.)

If any of these are your defense, attempt to make note of any witnesses or evidence, and present this at your hearing.

When testing for alcohol, through using the breath-test, pay attention to what you have been eating. A lot of fruits and salads will cause an alcohol blow test to be positive, if that

---

209 Program Statement # 6060.05 (Urine Surveillance to Detect and Deter Illegal Drug Use)

210 Even though you might like the opposite sex to observe, which they are usually butt ugly and prefer their own sex.

211 Refusal to submit to an order to take a drug test may constitute a disciplinary violation. *Tucker v Dickey*, 613 F Supp 1124 (WD Wis 1985).

212 *Storms v Coughlin*, 600 F Supp 1214 (SDNY 1984).

213 Program Statement #6590.05 (Alcohol Testing).

is all that was eaten that day. If you just finished taking cough syrup, you could also blow a high alcohol positive test. The alcohol only lasts about 2 - 5 minutes, at most, after taking the cough syrup. Be ready to show your bottle of cough syrup if caught at this point.

Evidence In Polygraph Tests

Please guys, and some gals, I don't want to get into this issue in detail. It is beyond the scope of this book. In short, polygraph tests don't hold up in court, and can be used against you in classification and disciplinary hearings as "some evidence".[214] Need I say more, just don't take a polygraph, regardless of your guilt or innocence. Polygraphs are too often wrong, and if you are trying to support your innocence by a polygraph you could end up getting screwed.

The equipment, the operator and his experience and training are very important, regardless if the equipment is current state-of-the-art. A prisoner may lose his right to keep a polygraph test out of a hearing, if he doesn't object to its use timely and on the record. In some cases, prisons may drop the charges against a prisoner for passing a polygraph.[215] The technology is changing and getting better. The polygraph machine operator is usually prison staff who are not trained properly, or experienced, or considered "neutral" parties to any result. Polygraphs are investigative interrogation tools designed to elicit confessions, regardless of weather you are truly guilt or innocent.

Hearsay Evidence

If supported by "some" evidence, hearsay evidence will most likely be allowed, and a prisoner may not object on hearsay, <u>**solely**</u> for that one reason[216]. Of course, I assume you are familiar with Federal Civil Judicial Procedure & Rules (Fed. R. Civ. P.), Rule 803: "... are not excluded by the hearsay rule, even though the declarant is available as a witness." Prisoners may not be given the right to exclude hearsay[217], and hearsay is admissible in disciplinary hearings[218].

Hearsay testimony alone is not enough by itself to support a finding of guilt[219]. Courts generally allow hearsay evidence to be admissible at disciplinary hearings, it is insufficient, without more, to support a finding of guilt[220]. In some instances, courts have required an additional element to hearsay evidence in that it may be admitted if it is sufficiently relevant and probative, saying that it may constitute substantial evidence to support a determination thata prisoner is guilty.[221]

Hearing officers, must consider hearsay testimony and its reliability in the context of a ruling on whether witnesses have given sufficient reasons for refusing to testify at disciplinary hearings. In *Barnes v LeFevre*[222], no basis exists for denying the prisoner's right to call a person as a witness, even if the witnesses refuses, without a good reason submitted to the hearing officer. Vague hearsay statements made by such witnesses is not sufficient to relieve the hearing officer of his **duty** to interview the witness and explore the reasons for the witnesses refusing to testify[223].

---

214 *Lavine v Wright*, 423 F Supp 357 (D Utah 1976); *Varnson v Satran*, 368 NW2d 533 (ND 1985); but in *Bradley v State*, 473 NW 2d 224 (Iowa Ct App 1991), the Iowa court held that polygraph exam evidence should not be used as evidence in a prison disciplinary action unless both parties agree to its use.

215 *Shultz v Satran*, 368 NW2d 531 (ND 1985).

216 *Wolff v McDonnell*, 418 US 539 (1974)(discussion of "hearsay witness confrontation" and cross-examination.) .

217 *Rudd v Sargent*, 866 F2d 260 (8th Cir 1989).

218 *Wolfe v Carlson*, 582 F Supp 977 (SDNY 1984).

219 *Alvardo v Lefevre*, 11 AD2d 475, 488 NYS2d 856 (1985); see also, *Ex parte Floyd*, 457 So 2d 961 (Ala 1984)(violation of due process for a finding of guilt based on "supposition based on supposition, stemming from hearsay.")

220 *Parker v State*, 597 So 2d 753 (Ala Crim App 1992), see also, *Howard v Wilkerson*, 768 F Supp 1002 (SDNY 1991).

221 *Foster v Coughlin*, 156 AD2d 806, 549 NYS2d 223 (1989), *appeal granted*, 75 NY2d 709, 555 NE2d 619, 556 NYS2d 247, affd, 76 NY2d 964, 565 NE2d 477, 563 NYS2d 728 (1990).

222 *Barnes v LeFevre*, 69 NY2d 649, 503 NE2d 1022, 511 NYS2d 591 (1986).

223 *Hylton v Lord*, 148 AD2d 453, 538 NYS2d 951 (1989).

Right to Present Evidence

A prisoner has the right to call witnesses and present evidence at a disciplinary hearing, unless granting the request would be unduly hazardous to the institutional safety or correctional goals. The burden of proving the rationality of the denial is upon the prison officials[224]. Prisoners need to carefully watch this area where prisons' often abuse their discretionary powers to deny evidence and witnesses. In *Brown-El v Delo*[225], the prisoner challenged the disciplinary proceeding. The courts held that he had the right to present evidence, *IF* by doing so, he does not threaten the orderly operation and security of the institution.[226] Prison staff who you feel have abused their discretion by denying you witnesses or the opportunity to present evidence in your defense, need to be questioned about the denial in detail. You need to probe and ask specifically how the "threat to the institution" for their basis for denying your evidentiary presentation by substantiated history, or real issues.

A disciplinary hearing has violated your due process rights by not providing you a meaningful opportunity to present a defense. In *Malik v Tanner*[227], the prisoner was not allowed to attend the hearing, listen to testimony, call witnesses, produce documentary evidence, or testify on his own behalf, and the court said it was in violation of his due process rights. The key part of your defense rights should be your right to present a *meaningful* defense. This is often an abused discretionary power of prison staff.

Admissible Evidence

Since disciplinary hearings are neither civil or criminal, the formal rules of evidence do not apply[228]. The state's Administrative Procedure Act[229] does not apply to prison disciplinary hearings and does not need to conform to the evidentiary requirements.[230] But, the Bureau of Prisons (BOP) is an agency within the meaning of the Federal Administrative Procedures Act[231], at least in its rule making capacity. So to further explain prison disciplinary hearings relative to "evidentiary rules", they are classified as "flexible, governed by neither the evidentiary rules of a civil trial, a criminal trial, nor an administrative hearing. The only limitations seem to be those imposed by (1) due process, (2) a statute, or (3) administrative regulations.

In *Wightman v Superintendent*,[232] "regulation" required the disciplinary board to admit and accord probative value only to evidence on which "reasonable persons accustomed to rely in the conduct of serious affairs." Character witnesses can also be limited and denied along with jury trials and sworn testimony. Sworn testimony is not required because of the "weight of some evidence" rule.

If a prison is going to use "confidential evidence," the hearing officer must tell you why it is confidential and if confidential information is considered against you[233].

Evidence seized in a violation of what a prisoner would call his Fourth Amendment right is admissible since no Fourth Amendment Rights exist in prison. The "exclusionary rule" has had little effect because the supreme court does not want to extend the exclusionary rule to proceedings other than criminal trials,[234] and as

224 *Kingsley v Bureau of Prisons*, 937 F2d 26 (2d Cir 1991).

225 *Brown-El v Delo*, 969 F2d 644 (8th Cir 1992).

226 *Pratt v Rowland*, 770 F Supp 1399 (ND Cal 1991); *Bartholomew v Reed*, 477 F Supp 223, 227 (D Or 1979), *modified*, 665 F2d 915 (9th Cir 1982).

227 *Malik v Tanner*, 697 F Supp 1294 (SDNY 1988).

228 *Flythe v Davis*, 407 F Supp 137 (ED Va 1976); *Kincaide v Coughlin*, 86 AD2d 893, 447 NYS2d 521 (1982).

229 for example, Fla Stat Ann §120.57 (West 1982).

230 *Clardy v Levi*, 545 F2d 1241 (9th Cir 1976); *Hargrove v Dept of Corrections*, 601 So 2d 623 (Fla Dist Ct App 1992).

231 5 U.S.C. § 551 *et seq.*

232 *Wightman v Superintendent, Massachusetts Correctional Inst.*, 19 Mass App Ct 442, 475 NE2d 85 (1985).

233 See for a review of the issue in detail, *Boyde v Coughlin*, 105 AD2d 532, 481 NYS2d 769 (1984) (the court allowed the confidential information as long as they were submitted to the hearing officer for review in consideration of guilt.)

234 *Stone v Powell*, 428 US 465 (1976)(habeas corpus hearing); *U.S. v Calandra*, 414 US 338 (1974)(grand jury

(continued...)

indicated previously, a disciplinary hearing is not considered a criminal trial. Weak, but arguable, is because the prime purpose of the exclusionary rule is to deter governmental violations of constitutional rights, and because prison authorities sometimes have little interest in criminally prosecuting an prisoner who has breached institutional rules, the extension of the exclusionary rule to disciplinary hearings is needed to discourage infringement of a prisoner's narrow and weak Forth Amendment rights, to the extent that they do exist.

If prison staff are attempting to admit irrelevant, prejudicial, immaterial, or if other inappropriate evidence has been introduced at your disciplinary hearing, you are left with two basic approaches: (1st) you may choose to contend that the introduction of the challenged evidence rendered the proceeding so fundamentally unfair as to violate due process[235]. (2nd) you may claim that, discounting the improperly introduced evidence, there was not sufficient substantial evidence to support the disciplinary hearings findings[236]. In a rather unusual court finding in *Morrison v Lefevre*[237],, it was found that prison staff had planted evidence against a jailhouse lawyer in order to provide a basis for disciplining him. The court said, it had "clearly violated his due process rights."

A prisoner by the name of *McIntosh*[238], was accused of writing a note he was infracted for, but was not allowed to view it during a disciplinary hearing. He sued, and the court said this violated his due process rights. In another interesting case, the court said an "unsworn statement from a non expert witness" that *Wightman*[239], possessed "angel dust" was not sufficient to support the disciplinary board's finding of guilt. Some courts have held that without some sort of "expert and sworn statement" regarding if the alleged drugs where actually drugs when Evans[240], was accused of possessing marijuana he could not be found guilty in a disciplinary hearing. The court invalidated *Evans* disciplinary conviction.

Burden Of Proof - "Intent" To Break A Rule

Evidence such as "your intention" of breaking a rule is relevant to a hearing and your defense. Unfortunately, I was not able to find very much case law to directly argue the prison "intentions" argument. But, the "intentions" argument also relates to the Chapter discussing the details of the "Standard of Proof Requirements".

In arguing that you never "intended to break a rule", careful examination must take place to the possibility of winning on these grounds. Intention is defined as:[241]

> Determination to act in a certain way or to do a certain thing. Meaning; will; purpose; design.
>
> "Intention" when used with reference to the filing of an administrative complaint, means the sense of the words contained therein. When used with the reference to civil and criminal responsibility [as this is the case], a person who contemplates any result, as not likely to follow from a deliberate act of his own, may be said to intend that result, whether he desires it or not.
>
> Intent: and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.
>
> General Intent: in criminal law, the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which happened.

(...continued)
proceeding).

235 *Lathrop v Brewer*, 340 F Supp 873 (SD Iowa 1972).

236 *Sands v Wainwright*, 357 F Supp 1062 (MD Fla), *vacated*, 491 F 2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974); *Cambell v Marquette Prison Warden*, 119 Mich App 377, 326 NW2d 516 (1982).

237 *Morrison v Lefevre*, 592 F Supp 1052 (SDNY 1984).

238 *McIntosh v Carter*, 578 F Supp 96 (WD Ky 1983).

239 *Wightman v Superintendent, Massachusetts Correctional Institution*, 19 Mass App 442, 475 NE 2d 85 (1985).

240 *Evans v State*, 485 So 2d 402 (Ala Crim App 1986).

241 *Witters v United States*, 70 U.S. App. D.C. 316, 106 F2d 837, 840; *Reinhard v Lawrence Warehouse Co.*, 41 Cal App2d 741, 107 P2d 501, 504; *State v Grant*, 26 N.C App 554, 217 S.E.2d 3,5; *State v Evans*, 219 Kan 515, 548 P2d 772, 777.

Another argument is in the Four Corners Rule. Under the "four corners rule", intention of parties, especially that of agreeing person, is to be considered from the action as a whole and not from isolated parts thereof.[242]

For example, if you are laying around in a location that has been made off limits at a certain time, but you were not aware of the time the area was made off limits, and charged with "attempted escape", the accusation lacks "intent". The same with other unauthorized areas. If it just became unauthorized for example: at the midnight count and it is now 12:01 am, your argument exists that "intent" is lacking and you could also dispute the actual time of the alleged infraction. The "some evidence" rule still exists at all disciplinary hearings.

Most state prison regulations contain a rule that some indication of "intent to break a rule" must exist, and when a libirty interest exists, supported with a statute or rule, the disciplinary hearing officer must show a finding of "intent".[243]

---

242 *Davis v Andrews*, Tex.Civ.App., 361 S.W.2d 419, 423.

243 *Frietas v Auger*, 837 F2d 806 (8th Cir 1988); *Lewis v Lane*,882 F2d 1171 (7th Cir 1989).

6 - STANDARD OF PROOF REQUIREMENTS TO JUSTIFY DECISION

Proof Requirements For Findings of Guilt or Innocence

Disciplinary Hearing Officers (DHO) must make findings of fact with regards to specific acts of misconduct.[244] They cannot merely find you guilty based on political pressure even though that is the usual procedure accepted among prison staff.

Prison staff rely on *Superintendent v Hill*,[245] where the courts decided in this rather prejudiced case against prisoners' that the proper standard is "some evidence" for a finding of guilt. "Some" could be a staff member with a grudge, pointing his finger at you. Before assuming "some" is correct in your case, read on. A court sided with a prisoner that "some evidence" is not proper, and the "preponderance of the evidence" standard must be used, but later was reversed on the substantive part[246]. The use of the "substantial evidence test" to decide if the finding by the hearing officer is correct is a violation of due process. This assumes that "substantial evidence" is less than a "preponderance of evidence" which is more than is required for due process.[247] Of course, I understand prisons usually use the "not any evidence" rule as their most common practice to support their finding of guilt.

The standard of *Superintendent v. Hill*, 472 US 445, 105 S.Ct. 2768 (1985) is not met in Oswalt because he never left or failed to return to the prison, one of which was required to constitute "escape" under the Illinois Administrative Code (IAC). (Check your local statutes); Secondly, IAC allows for prisoners to be found guilty of conspiracies or attempts ***but not*** conspiracy to make attempts.
Oswalt v. Godinez, 894 F. Supp. 1181 (ND IL 1995)

Disciplinary Findings Must State Evidence Relied on to Base Finding of Guilt

A federal district court in Illinois held that a disciplinary committee's report finding a prisoner guilty of misconduct must state the charges the prisoner was found guilty of and the

244 *Dyson v Kocik*, 689 F.2d 466 (3rd Cir. 1982).

245 *Superintendent v Hill*, 472 US 445 (1985); *Quinlan v Fairman*, 663 F Supp 24 (ND ILL 1987); *Ruckert v Johnson*, 724 F Supp 568 (ND ILL 1989); *Strickland v Delo*, 758 F Supp 1319 (ED Mo 1991); *Rogers v Oestreich*, 736 F Supp 964 (ED Wis 1990).

246 *Goff v Dailey*, 789 F Supp 978 (SD Iowa 1992), *aff'd in part, rev'd in part*, 991 F2d 1437 (8th Cir 1993).

247 *Strickland v Beyer*, 1990 US Dist LEXIS 2510 (DNJ 1990).

evidence supporting each of the charges. Alvin Oswalt, an Illinois state prisoner, filed suit under 42 U.S.C. § 1983 claiming his due process rights were violated by prison officials after he was found guilty of escape, damage to property and conspiracy attempt to escape. The defendants filed a motion to dismiss which the court granted in part, dismissing Oswalt's claims concerning the investigation, the time he spent in segregation during the investigation, the hearing committee's refusal to call his witnesses and to accept his documentary evidence. Illinois prisoners also have no due process right not to be placed in segregation pending investigation.

The court denied the defendants' motion with regards to Oswalt's claim that he was not given a written statement of the reasons for the disciplinary action. In its summary the committee said it relied on Oswalt's admissions, prison records and the credibility of witnesses in finding him guilty. The court noted that a reviewing court must affirm a disciplinary ruling if there is "any evidence" in the record to support the guilty finding. See: *Superintendent v. Hill*, 472 US 445, 105 S.Ct. 2768 (1985). In this case that standard was not met because Oswalt never left or failed to return to the prison, one of which was required to constitute "escape" under the Illinois Administrative Code (IAC). Secondly, IAC allows for prisoners to be found guilty of conspiracies or attempts but not conspiracy to make attempts.

"While the adjustment committee is not required by law to offer a detailed explanation of its reasons for finding plaintiff guilty, mere common sense as well as the most basic rudiments of justice require some accounting of how plaintiff could be guilty of an offense when the evidence in the record would seem to suggest that plaintiff did not meet the requirements necessary to satisfy the charge. While recent decisions have whittled down the constitutional rights enjoyed by prisoners, due process is not yet an entirely hollow phrase when applied to the interests of inmates facing disciplinary proceedings. To ensure that prison hearings do not devolve into sham proceedings, determinations of guilt must find support, at the very least, in the laws of physical possibility. Here there is ample reason to wonder how plaintiff could be guilty of Escape (a charge whose requirements it seems he did not physically meet) or conspiracy to attempt escape (a charge that may not exist)."

The hearing committee did not specify whether Oswalt was being found guilty of one or all three of the charges. The issue in this case was not that the evidence did not support the committees finding of guilt but whether there was reason to support the initial charges against Oswalt. The court held that on the record before it and the fact that the defendants had not rebutted Oswalt's argument, he would not grant their motion to dismiss. The court also appointed counsel to represent Oswalt in further proceedings. See: *Oswalt v. Godinez*, 894 F. Supp. 1181 (ND IL 1995).

In explaining the conflict regarding standards of proof, one court has at least made the attempt. In *Goff*[248] the prisoner was good at attacking the issues before the court. He said, "the prison disciplinary committee violated his due process rights by using "some evidence" as a standard of proof in making a factual determinations." The defendant prison officials resisted as usual on the ground that "some evidence" was the standard to be applied. The court agreed with *Goff* and explained: there is a distinction between the standard of proof to be used by a disciplinary committee in making its decision *ab initio* (from the beginning), and the standard of review that must be used in determining whether there was sufficient evidence to support the result. As a result of the courts own review of several previous decisions[249] considering this question, the court concluded that the proper standard of proof to be used in a disciplinary hearing in the initial instance is a "preponderance of the evidence" and the standard for the court to use in reviewing the findings of the committee is "some evidence."

The federal prison system adopted an odd mixture of requirements with the substantial evidence and preponderance of the evidence standards. The BOP requires a "finding to be based on the greater weight of the evidence and which is supported by substantial evidence in

---

248 *Goff v Dailey*, 789 F Supp 978 (SD Iowa 1992), *aff'd in part, rev'd in part*, 991 F2d 1437 (8th Cir 1993).

249 *Woodby v Immigration & Naturalization Service*, 385 US 276 (1966); *Wolff v McDonnell*, 418 US 539 (1974); *Mathews v Eldridge*, 424 US 319 (1976); *Superintendent v Hill*, 472 US 445 (1985); *Brown v Fauver*, 819 F2d 395 (3rd Cir 1987); *United States ex rel Miller v Twomey*, 479 F2d 701 (7th Cir 1973), *cert denied*, 414 US 1146 (1974); *Engel v Wendl*, 921 F2d 148 (8th Cir 1991).

view of contradicting evidence".[250] To further the confusion, in *Rogers*[251] the court said that tests for determining whether a decision of a prison disciplinary committee is adequately supported by evidence is whether the decision is supported by "some" facts, and not the preponderance of the evidence standard.

Disciplinary hearings are not criminal trials. The traditional standard of proof is not required beyond a reasonable doubt. Some courts have required prison staff to have substantial while most courts only require "some" evidence to support its decision[252]. For the sake of a prison setting, "substantial evidence is defined as "proof which a reasonable mind may accept as adequate to support the conclusion or final facts[253]. Many cases can be found to demonstrate if "substantial evidence" exists. In *Corcoran v Smith*[254] the courts decided that relying on a written misbehavior report prepared by a prison staff member was deemed *NOT* to meet the "substantial evidence" requirement. Warden Smith seemed to like to deny prisoners a fair hearing[255].

Depending on your particular situation, "substantial evidence" can become an area of much debate. Analyze the words, "substantial" and "evidence" in a Legal Dictionary, then combined to support your complaint, if in fact you need to file one. In *Rudd*[256], the courts found that "due process was not violated if 'some' evidence - meaning, *any* evidence in the record - supports the disciplinary decision." When a prison riot broke out in the cafeteria where *Zavaro*[257] just happened to be, the courts found that "some evidence" did *NOT* exist just because *Zavaro* was there, and no one could testify they saw him involved the actual riot at the disciplinary hearing.

Prison staff could use the argument that guilt was indicated and "substantially more probable than innocence." You need to argue with your witness' testimony, written statements and evidence where they are wrong. Very carefully, analyze the disciplinary report, and argue as to its accuracy, completeness and condition of mind of the writing officer should be your approach. Your burden needs to demonstrate with a "reasonable" method, your innocence.

In the state laws, statutes, federal code of regulations and other rules have been created for procedural processes. By reading your local rules, regulations and statutes, these already in place for the groundwork for your argument, and the rules of decision making prison staff are required to follow. If prison staff violate those rules, they violate law. For example, in Florida state, Florida Administrative Code 33-22 deals with disciplinary hearings. The words to look for are: "shall," "must," etc. The use of these words in state rules provide and create liberty interest protected by the Fourteenth Amendment, independent of any other constitutional violations.

Drug tests are one of the most difficult to argue. New case law comes up almost every day on both the side of the prisoners and staff in the area of due process. Much has been written in Chapter 4 of this manual on the subject.

Proof in Drug Tests

"Proof" in drug test results may be argued as to their accuracy, and if they are enough evidence for a finding of guilt. Discussed in more detail in the Evidence Chapter. Two relevant questions exist in drug tests.

(1) Proof in drug tests is whether drug test results are sufficiently reliable to constitute some evidence of drug usage; and

(2) Proof in drug tests is whether the particular testing scheme employed in the particular case was itself sufficient to meet the standard of proof required to be used in the particular case was

---

250 28 CFR § 541.15(f).

251 *Rogers v Oestreich*, 736 F Supp 964 (ED Wis 1990).

252 *Sands v Wainwright*, 357 F Supp 1062 (MD Fla), *vacated*, 491 F2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974); *Landman v Royster*, 333 F Supp 621 (ED Va 1971); *Washington v State* 405 So 2d 62 (Ala Crim App 1981).

253 *Shakur v Coughlin*, 182 AD2d 928, 582 NYS22d 302 (1992).

254 *People ex rel Corcoran v Smith*, 105 AD2d 1142, 482 NYS2d 618 (1984).

255 *People ex rel Bridges v Smith*, 105 AD2d 1142, 482 NYS2d 619 (1984); *Lopez v Smith*, 105 AD2d 1124, 482 NYS2d 583 (1984).

256 *Rudd v Sargent*, 866 F2d 260, 262 (8th Cir 1989).

257 *Zavaro v Coughlin*, 970 F2d 1148 (2d Cir 1992).

itself sufficient to meet the standard of proof required to be used by the disciplinary committee.

Through good prisoner litigation, courts held that "rumor or personal, unrelated knowledge about a particular prisoner, is not enough and must be based on evidence in the record."[258] Wisconsin, was the first state to even require a minimal level of investigation before a disciplinary hearing committee can make a "factual determination" enough to meet the requirements as described in the minimum due process requirements in *Wolff*[259].

---

258 *Sands v Wainwright*, 357 F Supp 1062 (MD Fla), *vacated*, 491 F2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974); *Landman v Royster*, 333 F Supp 621 (ED Va 1971); *Massop v Lefevre*, 127 Misc 2d 910, 487 NYS2d 925 (SupCt 1985); *in re Lamb*, 34 Ohio App 2d 85, 296 NE2d 280 (1973).

259 State *ex rel Meeks v Gagnon*, 95 Wis 2d 115, 289 NW2d 357 (1980) The *Wolff* case is discussed in more detail in Chapter 2.

7 - RIGHT TO WRITTEN DECISION

In *Wolff*,[260] the Court held that in prison disciplinary hearings, due process requires a "written statement by the panel as to the evidence relied on and the reasons for the disciplinary action.[261] The court reviewed the issue of "internal review of the committee's findings", and if internal review is not available, the findings might have significant effects: disciplinary transfer, loss of good time, or affect the parole boards determination.[262] The *Wolff* court held that these punishment considerations should not be based on "understandings of the proceedings." A written statement helps ensure against the possibility of these misunderstandings. Of course, the burden is on you to make sure you have not given the disciplinary panel room to argue "you said ..." and you say "you did not say ...". To protect against this "misunderstanding", always present your defense in writing and try to *NOT* make any verbal statements unless you are sure it cannot be twisted or misunderstood against you. A written record of the disciplinary hearing helps a prisoner in their appeal. The court also stated that a written copy of the basis for the decision and the decision help in the fairness of the disciplinary hearing itself. Obviously, with an opinion like that, the court has never been the subject of a disciplinary hearing.

If a prisoner appeals or requests a review of the record of the basis and finding of a disciplinary hearing, state officials, the public, or the courts might later want to review the record, and the disciplinary committee will want to indicate that a fair hearing was conducted. If you claim you were not given a written copy of the reasons for a finding at a disciplinary hearing, and that is your only basis for a legal action, the court may review the written material and find, again, in favor of prison authorities. It has also been held that prison authorities may "expand" or "amplify" their reasons for their findings, after the hearing has ended.[263]

Of course, the supreme court has taken a "pro-prison approach" and not specified the contents of the required record, other than that it should include evidence relied on and the reasons for the disciplinary action.[264] The courts have also addressed the issue of "safety concerns" for confidential informants, (*aka* RATs) and their statements could be suppressed in the record, but must indicate their existence[265]. Depending which Circuit you are in will affect the disciplinary procedures. Check your local decisions. Some courts have required a degree of particularity to descriptions of evidence relied on[266]. Some courts have held that more than "boilerplate sentences" were required than those that could have applied to every case and were

---

260 *Wolff v McDonnell*, 418 US 539 (1974).

261 *Wolff v McDonnell*, 418 US 539, AT 564 (1974); quoting *Morrissey v Brewer*, 408 US 471, 489 (1972); see also *Brown-El v Delo*, 969 F2d 644 (8th Cir 1992).

262 *Wolff*, 418 US at 565.

263 *Cooper v Lane*, 969 F2d 368 (7th Cir 1992).

264 *Wolff*, 418 US at 564; See also, *King v Wells*, 760 F2d 89 (6th Cir 1985), and *Brooks-Bey v Smith*, 819 F2d 178 (7th Cir 1987).

265 *Wolff*, 418 US at 565; See also, *Mendoza v Miller*, 779 F2d 1287, 1295 (7th Cir 1985) *cert den*, 476 US 1142 (1986) (due process does not require the disciplinary committee to state on public record the factual basis for its determination of confidential informant's reliability).

266 *King v Wells*, 760 F2d 89 (6th Cir 1985); *Hayes v Walker*, 555 Fd 625 (7th Cir), *cert den*, 434 US 959 (1977); *Chavis v Rowe*, 64 F2d 1281 (7th Cir), *cert den*, 454 US 907 (1981).

not appropriate. Disciplinary written decisions do not need to be extensive, and may be brief. However, by merely stating that it "accepted the officer's statement and found you guilty" is not adequate.

You should always assume you will need to sue. Look at certain issues relevant to overcoming a motion to dismiss for "failure to state a claim on which relief can be granted" under Fed R. Civ. P. Rule 12(6)(b). Expect in any litigation a preliminary effort on the government under Rule 12 to dismiss your complaint before discovery is effected. An important possible prisoner claim should include "the prison disciplinary board failed to adequately describe the evidence relied on or the reasons for the sanctions imposed."[267] Other items that should be contained in a written disciplinary finding statement where applicable:[268]

1. Reasons for refusing to call witnesses or not disclosing them[269]
2. Reasons for not allowing confrontation and cross examination
3. Reasons for not permitting substitute aid to the prisoner.

The court in *Franklin*[270] looked carefully at a written report which failed to indicate the witnesses who testified against the prisoner and why their statements were more credible than those of *Franklin* and his witnesses. Confidential reports were also relied upon by the disciplinary committee in its decision, but were not identified in the report[271]. The written report does not need to analyze every issue in detail, nor does it need to describe every particular defense raised by the prisoner.[272]

State laws or statutes may require a statement of reasons justifying the penalty imposed by a disciplinary committee. Some states allow disciplinary committees to change the severity level category in accordance with the guidelines, but the reason must be documented on the record.[273] Some courts require that a prisoner's record at the hearing indicate whether he was or was not advised of his right to assistance, and without this, a N.Y. case was annulled. You need to carefully define your basis for litigation because the prison will defend that your complaint of error was a "harmless error", and "if the error had not been made would not have affected the outcome of the hearing." Not that they would win on those grounds. But expect that arbitrary and capricious attitude in the prisons defense anyway.

The Supreme Court held a general non-definite position regarding contents of a written report in that disciplinary committees may issue conclusionary statements of reasons for a finding of guilt and punishment. As in *Hayes* [274] many courts disapprove[275] of conclusionary statements: "The committee's decision is based on the violation report as written and upon the report by the special investigator which during your absence was made a part of the record."

It has been held that by merely listing the reports and statements relied upon, plus a statement that the prisoner had been assaulted by another prisoner was not sufficient to satisfy *Wolff*. Similarly, a statement of facts underlying or supporting the charge along with the factual finding of a disciplinary committee was also not adequate.[276]

---

267 *Ford v Commissioner of Correction*, 27 Mass App 1127, 537 NE2d 1265 (1989), *review denied*, 405 Mass 1202, 541 NE2d 344 (1989).

268 *Kyle v Hanberry*, 677 F2d 1386 (11th Cir 1982) (record should include indication that the disciplinary committee made inquiry into reliability of an informant and concluded informant was reliable.)

269 *Franklin v Israel*, 558 F Supp 712 (WD Wis 1983).

270 *Franklin v Israel*, 558 F Supp 712 (WD Wis 1983).

271 *Ex parte Hawkins*, 475 So 2d 489 (Ala 1985).

272 *Pino v Dalsheim*, 605 F Supp 1305 (SD NY 1984); *Rushing v State*, 382 NW2d 141 (Iowa 1986).

273 *State ex rel Staples v Department of Health & Social Services*, 130 Wis 2d 308, 387 NW2d 551 (1986).

274 *Hayes v Walker*, 555 F2d 625 (7th Cir), *cert denied*, 434 US 959 (1977).

275 *Finney v Mabry*, 455 F Supp 756 (ED Ark 1978); *Hardwick v Ault*, 447 F Supp 116 (MD Ga 1978), Federal prisoners see also 28 CFR § 541 15(g).

276 *State ex rel Meeks v Gagnon*, 95 Wis 2d 115, 289 NW2d 357 (1980); *Fielding v State*, 409 So 2d 964 (Ala Crim App 1981).

Transcripts or Recorded Record

A clear statement universally required in *Wolff*[277] is "Without written records, the prisoner will be at a severe disadvantage in propounding his own cause or defending himself from others". Federal policy requires a disciplinary committee to give a prisoner a written copy of the decision and disposition.[278] In *Burbank* [279], it was found improper that the written report be given to the prisoner after the punishment was served. In *Collins*[280], the court recommended that a copy of the written report be given prior to the serving of the punishment allowing immediate pursuit of administrative or legal remedies. Several state court cases have held that even though a prisoner is entitled to a written copy of the decision and basis, it does not entitle him to a verbatim recording of the prison disciplinary hearing. If a written record of a disciplinary finding is not provided, a tape recording is permissible, at least if the tape is preserved for some minimum period[281]. But, if adequate written records are not kept by a disciplinary committee, tape recordings may be judicially required.[282]

Several courts have held that no constitutional right exists for a stenographic or other verbatim record of the proceedings[283]. The Alaska constitution requires a verbatim record.[284] Many states, as in New York, have provisions for making transcripts or tape recordings of the hearing[285]. If tapes are made, then the prison disciplinary board should preserve them for review by the court on appeal if necessary[286].

277 *Wolff v McDonnell*, 418 US at 565.

278 28 CFR §541.15(g).

279 *Burbank v Twomey*, 520 F2d 744 (7th Cir 1975).

280 *Collins v Sullivan*, 392 F Supp 621, 625 (MD Ala 1975).

281 *Finney v Mabry*, 455 F Supp 756 (ED Ark 1978).

282 *Ruiz v Estelle*, 679 F2d 1115, 1155-56 (5th Cir), *modified*, 688 F2d 266 (5th Cir 1982), *cert denied*, 460 US 1042 (1983).

283 *Crafton v Luttrel*, 378 F Supp 521 (MD Tenn 1974).

284 *McGinnis v Stevens*, 543 P2d 1221 (Alaska 1975).

285 *Wall v Scully*, 121 Misc 2d 698, 468 NYS2d 984 (1983) (lack of complete transcript violated state rule.); *Jacob v Winch*, 121 AD2d 446, 503 NYS2d 417 (1986) (absence of transcript as required by state law required a new hearing.)

286 *Flowers v Phelps*, 595 So 2d 668 (La Ct App 1991).

8 - RIGHT TO APPEAL

BOP Prisoners Must Exhaust Administrative Remedies

As reported in *Prison Legal News*

Robert Nigro is a federal prisoner who was found guilty of drug use during urinalysis testing at a prison disciplinary hearing. Negro filed an administrative appeal to the warden and regional BOP director challenging the results and sanctions of the disciplinary hearing. He had thirty days in which to file his last appeal to the BOP's general counsel and he was late in doing so, that appeal was denied as being untimely. Negro then sought a writ of habeas corpus in federal court which the court dismissed as being procedurally defaulted because the claims were not presented in a timely manner to the BOP's general counsel. The court of appeals for the ninth circuit affirmed.

The appeals court gives a detailed discussion of the BOP's administrative remedies for disciplinary appeals. The court held that when BOP prisoners fail to exhaust their administrative remedies within the BOP, their habeas petitions challenging the disciplinary proceeding must be dismissed as being procedurally defaulted. Negro argued that he had filed his appeal in a timely manner but the appeals court declined to extend the rule of *Houstin* v. *Lack*, 487 US 266, 108 S Ct. 2379 (1988), which allows for late filing of court documents, to administrative appeals. The court gives an extensive discussion of the various cases concerning the timely filing of court documents and administrative appeals. See: *Nigro v. Sullivan, 40* F.3d 990 (9th Cir. 1994); *Reeves v Pettcox*, 19 F 3d. 1060 (5th Cir 1994).

Readers should note that while habeas corpus petitions require an exhaustion of state judicial remedies (for state prisoners) or administrative remedies for federal prisoners, § 1983 and *Bivens* actions seeking money damages do not. Readers should consider what action they intend to file, and research it, before they begin the administrative appeals process.

If you want to recover your lost GCT, you must exhaust Administrative Remedies. If you only want money damages, you do NOT need to exhaust Administrative Remedies.

Nigro v. Sullivan, 40 F.3d 990 (9th Cir. 1994); *Reeves v Pettcox*, 19 F 3d. 1060 (5th Cir 1994)

But: According o the new 1996 Prisoner Litigation Reform Act, (PLRA), you MUST exhaust ALL administrative remedies or you have waived your right to the courts.

Summarized in the last Chapter in this book

Two possible appeal methods exist. (1) through internal or administrative appeals[287]; (2) through external or state or federal courts. Confinement in segregation pending appeal is permissible[288]. Internal or administrative appeals may exist in policy, some courts have held they are not required by due process. The implied correctness of this position is in *Wolff*[289]

287 28 CFR § 541.17.

288 *Sellers v Roper*, 554 F Supp 202 (ED Va 1982).

289 *Wolff v McDonnell*, 418 US 539 (1974); *Werlinger v State*, 117 Idaho 47, 785 P2d 172 (1990) (a rule requiring the warden respond to a prisoners appeal within 21 days, but failed to due so does not create a liberty interest protected by due process, as long as it is not arbitrary and capricious.); *Garfield v Davis*, 566 F Supp 1069; *Pearson v*

(continued...)

where Nebraska back in 1974, did not provide an administrative review or method to appeal disciplinary decisions. Now, some courts have required prisons to have an internal review process[290]. Where a disciplinary appeal method is provided, a prisoner may not be permitted to seek other methods of review until after exhausting appellate remedies[291].

Disciplinary review persons are not allowed to consider material or issues other than what is contained in the appeal and the disciplinary report as relevant to the incident and may not go outside the record[292]. In *Sands*, all prisoners must have equal access to the appellate process in disciplinary actions, if made to others.

While some states require automatic review of disciplinary action findings[293], most states have placed the burden of appeal on the prisoner. Each prisoner has the right to be informed of their appeal rights and the appeal process. Many courts have found that if a prisoner failed to abide by the prescribed appellate time limits, this was considered a waiver of his right for administrative appeal[294].

If you win a rehearing, you may be sentenced to a more severe penalty[295]. Of course, the ultimate in disciplinary appeals, is taking it to court.

Right to Appeal and Court Review of Disciplinary Finding

Prisoners have the right to appeal to the courts for judicial review of a disciplinary finding[296]. In *Massachusetts Correctional Inst v Hill*, the Massachusetts Supreme Court prefers to deny prisoners access to the court. Of course, expect the courts to give much greater latitude to prison authorities in their decisions[297]. The 7th Circuit Court of Appeals has held that "minimum due process requires that the reviewing court conduct an in camera (informal or in chambers) review of the entire investigatory file, not just of the material relied on to find guilt, in order to determine whether exculpatory (clearing or tending to clear from alleged fault or guilt) information existed which should have been provided to prisoners prior to the prison disciplinary proceeding[298]. But then, how many times do investigating staff look or collect exculpatory evidence even if it obviously existed? If you suspect this area of problem, your legal complaint will need to phrase the language to eliminate just an in camera review. Prisoners also have the right to judicial review where internal disciplinary procedures were not followed[299].

Reversal on administrative appeal doesn't moot a suit for damages as long as you have already been punished, i.e. done all or some of the seg time, etc., before the administrative reversal. Your cause of action accrues when you are denied due process at the hearing.[300]

(...continued)
Townsend, 362 F Supp 207 (DSC 1973).

290 *Bono v Saxbe*, 450 F Supp 934 (ED ILL 1978), *aff'd in part*, 620 F2d 609 (7th Cir 1980); *Burk v Coughlin*, 97 AD2d 862, 469 NYS2d 240 (1983), see also; *Sheppard v LeFevre*, 116 AD2d 867, 498 NYS2d 190 (1986)(mandatory internal review time.)

291 *Adorno v Jones*, 113 AD2d 973, 493 NYS2d 644 (1985); *see Prison Legal News* article at the beginning of this chapter.

292 *Sands v Wainwright*, 357 F Supp 1962 (MD Fla), *vacated*, 491 F2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974); *Landman v Royster*, 333 F Supp 621 (ED Va 1971).

293 Vermont Statute Annotated title 28, §852(c)(1986); *Heimstra v Walter*, 117 Misc 2d 245, 457 NYS2d 704 (1982).

294 *Lane v Hanberry*, 563 F2d 648 (5th Cir 1979).

295 *Bartholomew v Reed*, 477 F Supp 223, 229 (D Or 1979), *modified*, 655 F2d 915 (9th Cir 1982); *Picard v State*, 339 NW2d 368 (Iowa 1983).

296 *Cruz v Beto*, 405 US 319, 321 (1972); *See Massachusetts Correctional Inst v Hill*, 472 US 445 (1985) *In Mass v Hill*, the Supreme Court leaves the possibility in the future that an administrative review that is all that may be constitutionally needed so that access to the courts can be denied.

297 *Bryant v Miller*, 637 F Supp 226 (MD Pa 1984)(prisoners have a right in appropriate cases to judicial review of disciplinary proceedings).

298 *Campbell v Henman*, 931 F2d 1212 (7th Cir 1991).

299 *People ex rel Yoder v Hardy*, 116 ILL App 3d 489, 451 NE2d 965 (1983); *Prock v District Court*, 630 P2d 772 (Okla 1981).

300 *Mays v Mahoney*, 23 F.3d 660 (2nd

(continued...)

In some states, (Michigan, New Jersey, etc.) but not all, state courts review may be available under the State's Administrative Procedure Act[301]. In consideration of appeal consider carefully, the appropriate judicial remedy. In *Clark* [302], a state habeas corpus that challenged the disciplinary proceedings was dismissed for lack of jurisdiction. The court jumped through a loophole and cited alternative remedies including prohibition and mandamus (a type of writ 28 U.S.C.A. § 1361. Another court tragedy and degrading effect on human rights is demonstrated in the *Hanrahan*[303]decision where a guards false testimony and the bringing of a false charge against a prisoner did not necessarily give rise to a federal civil rights claim. Fortunately, a lot of courts have limited *Hanrahan* since then. I wonder if a prisoner killed a guard might be considered a violation. Based on the weight of the evidence and review, the prisoner is the underdog. Then courts have gone on to say: when prisoners seek judicial review, prison officials may not retaliate or harass them for exercising their rights of access to the courts[304].

The right to appeal or challenge a disciplinary hearing may be lost or deemed waived as a result of a prisoner's refusal to appear before the hearing officer. Such a waiver is not generally presumed, absent evidence that the prisoner was aware that the hearing would be conducted in absentia (without you).

The prisoner may also be deemed to have waived his rights to object to matters first raised on appeal where no objection to the issues was raised at the disciplinary proceeding. Prisoners can not object on appeal in this New York case to the hearing officer's viewing of a videotape where no objection was raised at the hearing.[305]

A prisoner who failed to object to the adjournment or extension of a disciplinary hearing, waived any claim on appeal to error in that regard.[306] A prisoner waived any right to object to the introduction of certain evidence at his disciplinary hearing where he failed to object to such introduction of evidence at the time the alleged errors could have been corrected during the hearing.[307] The prisoner' failure to raise the issue of whether his due process rights were denied by his inability to obtain a copy of the autopsy report performed on the stabbing victim was not preserved for review because of the failure to raise the issue at the disciplinary hearing.[308]

Indiana must consider prisoners deserve no right to fairness others are afforded. The Indiana Supreme Court held that neither statutes nor common law rules established a prisoner's right to a judicial review of prison disciplinary actions.[309] Whereas in New York, statutes give authority to review prison disciplinary panel proceedings by the N.Y. Supreme Court, Appellate Division.[310] Many courts do not like to grant a trial *de novo*, (a new trial without consideration of the disciplinary panels findings.) or to substitute their judgements on the merits of a case for that of the disciplinary board.[311] Most courts have held that prison disciplinary proceedings are entitled to a

(...continued)
Cir. 1994); *Walker v Bates*, 23 F.3d 652 (2nd Cir. 1994).

301 *Meadows v Marquette Prison Warden*, 117 Mich App 794, 324 NW2d 507 (1982); *Keenan v Van Ochten*, 136 Mich App 364, 356 NW2d 640 (1984); *Zeltner v New Jersey Dept. of Corr*, 201 NJ Super 195, 492 A2d 1084 (App Div), *cert denied*, 102 NJ 299, 508 A2d 186 (1985).

302 *Clark v Solem*, 336 NW2d 381 (SD 1983).

303 *Hanran v Lane*, 747 F2d 1137 (7th Cir 1984); see also *Gilmore v Lane*, 635 F Supp 1637 (ND ILL 1986).

304 *Smith v Maschner*, 899 F2d 949 (10th Cir 1990).

305 *Gonzales v Coughlin*, 580 NYS2d 587 (App Div 1992).

306 *Barrett v Senkowski*, 580 NYS2d 569 (App Div 1992).

307 *Eleby v Coughlin*, 580 NYS2d 537 (app Div 1992).

308 *Ruiz v Coughlin*, 584 NYS2d 224 (App Div 1992).

309 *Hasty v Broglin*, 531 NE2d 200 (Ind 1988).

310 N.Y. Civ Prac L & R § 7801; quoting *McKinney v Meese*, 831 F2d 728 (7th Cir 1987).

311 *McDonnell v Wolff*, 483 F2d 1059 (8th Cir 1973), *aff'd in part & rev'd in part*, 418 US 539 (1981); *Collins v Vitek*, 375 F Supp 856 (DNH 1974); *Lewis v Israel*, 528 F Supp 960 (ED Wis 1981). See also *Reed v Parratt*, 207 Neb 796 , 301 NW2d 343 (1981).

presumption of regularity.[312] The burden is on the prisoner to establish reversible error and to show and establish where you were wronged and how the finding would have been different if the error was not done.[313]

Appellate courts also will not substitute their view for that of a disciplinary board on matters relating to witnesses.[314] The only method to get the courts to carefully scrutinize a disciplinary hearing is to allege that your constitutional rights were violated.[315] It is often not clear to the courts whether a constitutional claim is at issue unless clearly pled. Even though vindictiveness was evident in a disciplinary charge and not raised in the complaint, the alleged improper disciplinary charge did not state a constitutional claim as pled.[316] Courts will also inquire into whether internal procedural rules were followed. Prisoner's must remember that even if an error has occurred at a hearing, it could be harmless and likely not effected the outcome of the disciplinary hearing finding.[317] In a case where improper statements were admitted at a hearing, the court found no material prejudice because of "other substantial evidence" on which to base a conviction of the charged offense.[318]

The largest difficulty prisoners face, along with the courts is in reviewing disciplinary board proceedings and not knowing precisely what evidence if any, was relied upon in supporting its decision, and the potential for an unreliable record.[319] The Sixth circuit has suggested that it is appropriate for the names of confidential informants, RATs, and all clues to the identity of informants be kept out of the public record and access to the prisoner; but should be preserved for court review.[320] The court has stated that if, because of efforts to protect an informant's anonymity, evidence in support of prison disciplinary actions supplied to the prisoner fails to meet the constitutional minimum of "some evidence," then more detailed evidence, sufficient to meet the constitutional standard, must be placed in a non-public record for the court to review. You need to fight this issue in detail and if evidence is suppressed, request a general description of the evidence relied upon asking the date, quantity and general description of the pages, memos or other evidence.

In 1985, the Supreme Court attempted to resolve the dispute in *Superintendent, Massachusetts Correctional Institution v Hill*[321]. The court held that due process requires that the finding of a prison disciplinary board be supported by "some evidence in the record"[322], rather than the pre 1985 "substantial evidence" rule. Depending on the local circuit affects the general position and their decision pattern on evidential issues. Sometimes prison authorities interfere with the filing of timely appeals. Some courts require that they be convinced by a preponderance of the evidence that prison authorities did in fact interfere. In Pennsylvania, the court held that actions are not subject to court review without the absence of arbitrariness or capriciousness. Being fair was not at issue I guess, but placing the burden on the prisoner to properly plead the necessary elements. Some

---

312 *Kelly v Nix*, 29 NW2d 287 (Iowa 1983).

313 *Thomas v State*, 339 NW2d 166 (Iowa 1983).

314 *Gilmore v Lane*, 635 F Supp 1367 (ND ILL 1986); *Gibson v Roush*, 587 F Supp 504 (WD Miss 1984); but in *Armstead v State*, 714 F2d 360 (5th Cir 1983), the appellate court criticized the magistrate for giving too much deference to findings of disciplinary proceedings, and ordered the magistrate to decide case on its merits.

315 *Campbell v Beto*, 460 F2d 765 (5th Cir 1972; *Kelly v Brewer*, 525 F2d 394 (8th Cir 1975); *Adams v Carlson*, 375 F Supp 1228 (ED ILL 1974), *aff'd in part rev'd in part*, 521 F2d 168 (7th Cir 1975).

316 *Collings v King*, 743 F2d 248 (5th Cir 1984).

317 *Elkin v Fauver*, 969 F2d 48 (3rd Cir 1992).

318 *King v Wells*, 760 F2d 89 (6th Cir 1985); *Williams v Schulte*, 605 F Supp 498 (ED Mo 1984).

319 *Saenz v Young*, 811 F2d 1172 (7th Cir 1987).

320 *Hensley v Wilson*, 850 F2d 269 (6th Cir).

321 *Superintendent, Massachusetts Correctional Institution v Hill*, 472 US 445 (1985).

322 *Toussaint v McCarthy*, 801 F2d 1080 (9th Cir 1986), *cert denied*, 481 US 1069, *subsequent order following remand*, 711 F Supp 536 ND Cal, *aff'd in part, rev'd in part, & vacated in part*, 926 F2d 800 9th Cir, *cert denied*, 112 S Ct 213 (1991); *Cummings v Caspari*, 797 F Supp 747 (ED Mo 1992).

courts do not like to review disciplinary merits at all.[323]

Emergency Appeals and Temporary Conditions

Prior to a disciplinary hearing, a prisoner suspected of a rules infraction may be subjected to a temporary change in status or segregation without due process proceedings, under certain conditions. The unstated assumption is claimed, usually unfairly, but claimed anyway, that the prisoner is a threat to themselves, to others, or to the security of the institution. When a prison throws "everyone" in the hole when given an infraction or pending investigation regardless of the perceived threat , in my opinion should be sued because the presumption is arbitrary[324]. This suggests the need for some sort of pre-detention hearing, however, was rejected by the Supreme Court in *Hewitt*[325]. But, without a state created liberty interest in remaining out of segregation, the right is absent.[326]

Procedural protection may be constitutionally necessary if interests other than remaining in the general prison population are implicated by the detention.[327] The real question exists to be answered is: whether the prison authorities have demonstrated sufficient dangerousness to justify a prehearing detention or reclassification. Since this change in status will be temporary, courts rarely require the same degree of procedural due process as it requires at a disciplinary hearing.[328]

Time for a prehearing or for reclassification may not be excessive.[329] Ten months is clearly excessive[330], as has 33 to 83 days, and one court held that confinement in segregation "pending investigation must not exceed 7 days without unusual circumstances.[331] In *Black*,[332] the court held "inexcusable" for *Black* to be isolated for 12 days out of a 15 day sentence before being informed of charges and to be placed in punitive segregation for 18 months without an opportunity to present a defense. In *Drayton*[333], the court held a delay of 1 week in providing a hearing was unreasonable.[334]

---

323 *Russell v Division of Corrections*, 392 F Supp 476 (WD Va), *aff'd without opinion*, 530 F2d 969 (4th Cir 1975); *Flythe v Davis*, 407 F Supp 137 (ED Va 1976); similar state decisions come from N.Y., Va., Ind., Pa.

324 *Battle v Anderson*, 376 F Supp 402, 422 (ED Okla 1974); *Hughes v Rowe*, 101 US 173, 177 (1980).

325 *Sellers v Roper*, 554 F Supp 202 (ED Va 1982); *Gilliard v Oswald*, 552 F2d 456 (2d Cir 1977); *Hewitt v Helms*, 459 US 460 (1983), *rev'd*, 482 US 755 (1987).

326 *Stokes v Fair*, 795 F2d 235 (1st Cir 1986)(prisoner had, as a result of state regulations, a liberty interest in "awaiting action status" detention.); also see *Hewitt*, id previous.

327 *Morrison v Lefevre*, 592 F Supp 1052 (SDNY 1984) (right of access to courts of prisoner-jailhouse lawyer implicated by segregation.)

328 *Bickham v Cannon*, 516 F2d 885 (7th Cir 1975); *Collins v Bordenkircher*, 403 F Supp 820 (ND Va 1975); see also, *Jones v Marquez*, 526 F Supp 871 (D Kan 1981).

329 *Patterson v Riddle*, 407 F Supp 1035 (ED Va 1976), *aff'd without opinion*, 556 F2d 574 (4th Cir 1977).

330 *id*, previous footnote.

331 *Powell v Ward*, 392 F Supp 628 (SDNY 1975), *modified*, 542 F2d 101 (2nd Cir 1976); but compare *State v Luke*, 382 So 2d 1265 (Fla Dist Ct App 1980) (no due process violation in placing or prisoners in administrative confinement pending disposition of charges, even when there is some prosecutorial delay.)

332 *Black v Brown*, 524 F Supp 856 (ND ILL 1981), rev'd in part & aff'd in part, 688 F2d 841 (7th Cir 1982).

333 *Drayton v Robinson*, 519 F Supp 545 (MD Pa 1981).

334 *Battle v Anderson*, 376 F Supp 402, 422 (ED Ala 1974); see also *King v Hilton*, 525 F Supp 1197 (DNJ 1981); *Jones v Marquez*, 526 F Supp 871 (D Kan 1981)(within 72 hours) ; but also see *White v Booker*, 598 F Supp 984 (ED Va 1984)(within 48 hours.).

Specific Procedures When Infracted (Chapters 8 - 20)

9 - EVENTS of INCIDENTS - GATHERING EVIDENCE

Suddenly, you become aware you are getting a Conduct Report/Incident Report, "Shot," I/R, or whatever your system calls them. Usually the first definite sign is going to the "hole" (segregation). Now is the time to think through what has just happened and get it fixed in your mind, to the last detail. Get it fixed in your mind that this will end up in court. You want to assume the worst. Your Due Process Rights may be violated, intentionally. Your First, Fifth and Eighth Amendment Rights are likely to be violated. Build your case. You are on your own, and this is how it's done.

Doing this is important to preserve the details that could help you in your defense. Accuracy of events as they actually happened and the little details are important. Even a minor comment of another staff could show in a hearing that maybe you really did not do something as you are charged with. If their facts are confused, you can use this in your defense strategy. This can be done in several ways:

a) Write down whatever you can remember: names, descriptions of people whom you don't know by name, room locations and most important, what might have been said by anyone that could be used in your defense. For example; if an officer says he found contraband in your locker, but another unknown staff says it was found somewhere else, - write it down. If you don't know the other staff members name, his description becomes just as important, as well as what he said and they can be called as a witness.

b) Ask other persons, including other prisoners around you, who someone is if you don't know their name as soon as possible.

c) If you go to the hole, get paper and pencil as soon as you get settled in. Then make notes of the events, remarks made, and any other evidence which might be used later. Read the chapters about Assembling the evidence and how to evaluate it.

The purpose is to preserve the evidence in your mind by putting it on paper. You may refer to it later when you prepare your defense for the hearing. The longer you put this off gathering evidence, the more likely you will forget valuable events that could help you WIN your hearing. Even after you receive your I/R, and even if you go to UDC (pre-hearing) knowing you will end up before DHO (major infraction hearing officer) (disciplinary hearing committees in the federal system), continue making notes of little bits of information, so that it can all be refined into a winning final defense.

BP-9's (Administrative Complaints) To Force Evidentiary Disclosure

A BP-9, is a federal Administrative complaint and it goes to the warden. A BP-10 is an administrative appeal that goes to the region. A BP-11, appeals to Washington. Check your local procedures. Whatever the state, use your local administrative complaint procedure here if you have one.

Often, staff deny (lie) about evidence, or circumstances exist which could justify your actions that led to the incident report, and will not even discuss the issue. For example: You test positive for Morphine, a code - 109 violation because the institution is serving poppy seed rolls to you and the other prisoners. You go to DHO(disciplinary hearing officer) explaining the source but staff refuse to help or even admit poppy seed rolls are in the institution.

This is serious, and this actually happened at MCC-Chicago. The staff refused to admit poppy seed rolls were in the institution, and supported by the medical staff, claimed that ONLY "over-dose" quantities could cause a positive test. Staff lied repeatedly, knowing they were lying, with the intention to cause another prisoner to lose his parole date.

You must now take an assumptive role here; You accuse the staff or institution even if they deny the situation exists in an administrative remedy. File a BP-9 (Administrative Remedy)[335], with the assumption the condition exists, by alleging facts, staff and circumstances as best as possible. Your position will not be the inquirer role, but allege the situation exists, and make them disprove it. If you can also get others to file BP-9's also, this will help. They are also in jeopardy of a positive test, and could be punished unfairly. Then try to get a copy of their BP-9 to include in your defense or appeal.

Administrative complaints are good discovery tools and force the institution to address the issue formally. If they still deny the condition exists, the only resort is legal action after exhausting the Administrative Remedies.

When up against obstructive staff, write to the BOP Region or DOC central office asking for an extension in time to respond and explain why, asking for help. They are supposed to forward a copy of your letter to the institution for a response. You can never write too many letters. Sometimes the only effective method is to "bury them in paperwork until they respond."

When filing a BP-9 or an Administrative Complaint, keep it as short and simple as possible. An opening paragraph making the accusation, stating the person(s) involved, the date of the incident and the violation against you. Next, describe in one or two paragraphs the details you allege and supporting facts to your accustaion. Then write a closing paragraph asking for relief describing what you want as a resolution such as "I request this complaint be investigated, and corrected, ...".

---

335 A federal Administrative Remedy (BP-9) must be filed within 20 days after the date of the incident. 28 CFR § 542 (dated Jan 2, 1996). The previous policy only allowed 15 days.

10 - INVESTIGATING OFFICER QUESTIONS YOU

Investigation Begins Against You

Most likely, you have been placed in Segregation by now, under Administrative Detention (A/D). In the federal system the institution normally has 24-hours to give you a reason, called a Detention Order.[336] You can also be placed on Administrative Detention (A/D) "Pending Investigation" for up to 90 days in federal joints. In Wisconsin, (2) 21 day invesitigation periods may be stocked. States vary, so check your local policys. After that, in the federal system, permission must be obtained from the Region or Central Office.[337] If this happens, or you suspect this of happening, write to the Region in your area explaining the situation, asking for intervention, help or justification.[338] Also, write to the Warden, and everyone on down asking for help. Save their responses, or at least copies of what you wrote them in case you have to go to court against them. They will usually claim, "they didn't know." You may beheld in segregation indefinitely if you are pending transfer or you are on writ. You may not be held in Administrative Detention more than 30 days without a formal SIS (BOP) hearing, and must have an informal review every seven days.[339]

The Supreme Court upheld a 30-day limit in *Hutto vs Finny.*[340] ANY time in segregation is considered punitive segregation. The courts have also decided justification is required. Courts usually do not like to make those decisions. If you can prove that you were placed in the hole several times without justification and for malicious reasons, you may be awarded monetary damages by the court.[341]

The incident will be investigated, at which time you may take advantage of the situation for some investigating of your own. You may also want to attempt a "discovery" process at this time of your own:

a) Ask what evidence there is against you. Ask if this is all of it?
b) Ask to read, or have read to you, any supporting memos against you, and find out who wrote them. Ask for copies verbally and in writing by writing a memo to the Captain, your Counselor, and if you think you may have problems, write also to the Warden. If you need to later take legal action, do everything in writing and make everyone aware of the situation so they become liable with their responses.[342]

---

336 28 CFR § 541.11(Table 2) Time Limits in Disciplinary Process, also see Appendix A in the back of this manual.

337 28 CFR § 541.22(a)(6)(i) "... within 90 days ... return to population ..."

338 In *Wolff*, the Supreme Court suggested that due process protections were not necessarily applicable to a mere loss of privileges - seemingly lumping them altogether. Other courts took a more discriminating approach, distinguishing among different types of privileges in *Clutchette vs Procunier*, 510 F2d 613(9th Cir 1975), *rev'd sub nom Baxter vs Palmigiano*, 425 US 308(1976).

339 28 CFR § 541.22(a)(c, 1-3).

340 *Hutto vs Finny*, 437 U.S. 678, 98 S. Ct. 2565 (1978) "... mostly because of the bad conditions. . ."

341 Prisoners Self-Help Litigation Manual, by Daniel Manville, source is in a Chapter 24 for source in footnote.

342 By writing to as many relevant people as possible, if the matter has to go to court in the future, these persons can be

(continued...)

c) Be very careful answering any questions. Staff is not there to help you. This could be the difference between winning and loosing because the staff investigator will write down what he **remembers** you saying, ***but*** in his own version. It doesn't hurt to say ***NOTHING and make them prove their case.*** Loose lips, sink ships.

d) If the Incident Report is a 100-series,[343] it must go to DHO (BOP) for hearing; which is out of the institutions hands, and most 200 series are passed to DHO.[344]

If this Incident Report is the 6th, or more, of a 300-series (BOP)(minor infraction), it will most likely go to DHO (disciplinary hearing officer who handles serious infractions). Generally, 300 and 400 series violations will be heard and dealt with by the UDC. Your disciplinary history and your relationship with staff plays an important role. It is a determining factor whether it will be resolved by the Investigating Officer or at UDC.[345] If you are on good terms, it does not hurt to ask for an informal resolution. If an informal resolution is not probable, watch what else you say. Talking will do you no good in most circumstances. If the Incident Report is a 100 or 200 series, you usually do not benefit yourself by talking - you only benefit them. Sometimes, it might be better to do seven days on Administrative Detention, "pending investigation." You could get 30 or 60 days of Disciplinary Segregation time and a transfer, just because you flapped your jaw needlessly. Often-times, you give them most of the rope by which they, figuratively, hang you.

If you are known for filing complaints against staff, and/or legal actions, often the staff will be much more cautious in the handling of your disciplinary action. Sometimes staff will go all out, by lying, writing false memorandums and seeking assistance to complete the fraudulent action against you. If you documented everything said, testified to and request everything in writing, you build strong groundwork for a successful appeal or a new legal action.

Your 5th Amendment Right against self-incrimination, also applies here. You do NOT have to answer ANY question you feel could incriminate you. So just say so. Don't dig your own hole, expecting to get out of it later.

UDC must hear your Incident Report within three working days (BOP), from the date of the incident, excluding the date on which the incident occurred.[346]

Don't answer questions from pressure by the investigating officer or other staff. It usually means a weakness in their case. Sometimes, without good evidence against you, you will be placed in segregation "pending investigation" hoping someone or even you will admit or tell (rat) on you or another. This often happens in code 201 (fighting) violations.

The violation severity level of the Incident Report, doesn't matter with the time allowed for UDC to hear the allegation. Sometimes, UDC fails to act within the three working days. You can get the incident report expunged on those grounds alone. At UDC, claim that the incident report is "moot, and not heard timely." If the incident report is not heard timely, you should raise the objection, on the record, at the hearing and also state that your defense is prejudiced because of the legnthy time passed. Check your local policy.(see BOP time limits in Appendix A)

Being placed in the hole for protective custody (PC), you have the right to a hearing within two working days. If it is decided that you should stay in the hole, on Administrative Detention, a formal hearing must be held within seven days of your placement in the "hole" for PC.[347]

If you are placed in the hole on holdover status, a hearing shall be held weekly with you for review of this status.[348]

(...continued)
included as defendants who failed to respond and cannot claim "ignorance" as their defense.

[343] In the Federal Prison System, a numbered severity level is assigned to infractions. A 100 series incident report is the greatest severity and a 400 series is the lowest severity. See Appendix A for a complete listing of possible federal (BOP) rules violations.

[344] 28 CFR § 541.15.

[345] 28 CFR § 541.14 (a) UDC is the first level of disciplinary hearing committees in the federal (BOP) system.

[346] 28 CFR § 541.11 (Table 2) Time Limits, also see Appendix A.

[347] 28 CFR § 541.23 (protection custody)

[348] 28 CFR § 541.22 (Administrative
(continued...)

If you are going to be criminally prosecuted by the government for your incident, the investigating, or other staff may NOT question you about ANY of these events leading to a possible new criminal charge. [349]

Your Rights under the Constitution

You have the right, under the United States Constitution to:

1. Freedom of Religion & Speech,
2. Freedom from Self-Incrimination,
3. Right to Due Process of the Law,
4. Freedom from Cruel and Unusual Punishment,
5. Right to Legal Assistance,
6. Freedom of Communication with your Lawyer,
7. Right to Prison Assistance - and more.
8. Limited 4th Amendment rights against unreasonable searches, (mostly mail, U/A's, etc.)

The most popular Due Process case is where a prisoner brought a lawsuit against a Nebraska State prison in *Wolff vs McDonnell*[350]. He was denied "reasonable" evidence presentation and witnesses in defense of prison disciplinary action. The courts found and decided that the prison must grant reasonable Constitutional Rights, which were ***not*** taken when he was convicted of a felony. Which means, you have the right under the United States Constitution to be able to:

1. Present evidence on your own behalf;
2. have access to any evidence to be used against you at a hearing;
3. have reasonable time to prepare your defense.

Some institutions believe, incorrectly, that they don't have to reveal information they intend on using against you. This is often wrong, and you should protest, in writing to everyone possible from the Warden on down. By doing this, you put them on notice, and make them liable if you need to bring court action. Do as much as possible in writing and get as many responses in writing you can. You can sometimes use these later in your defense or appeals.

If you suspect Due Process violations or you were denied witnesses and the right to present evidence on your behalf, read the law. Other legal examples will help you understand in cases found in the Civil Rights book #42 United States Code, section 1983, note 791 - 840 (discipline of prisoners)[351] and in Chapter 22.

Consent Searches

Fourth Amendment rights have long been argued by prisons and prisoners alike. Prisons claim "security" reasons and courts don't like to get in the middle. In *Hudson*[352], the supreme court held prisoners have no Fourth Amendment potection against cell searches. Prisoners only retain rights modest Fourth Amendment protections against body cavity searches. The Supreme Court has not provided a definitive answer about what is a valid waiver of your Fourth Amendment rights. Instead, it has suggested that this be an issue to be figured out after looking at the "totality of the circumstances."[353]

A waiver of your rights against search may not be valid if conditioned on the exercise of another constitutional right. Meaning, one constitutional right cannot be conditioned on the waiver of another.[354] If you can establish an independent constitutional right meaning, a prison official's threat to withhold it unless you agree to give up another right would not be allowed by the court. For example, your mail privileges, including sometimes, the right to contact the courts, could not be limited, waived or conditioned on your agreement to allow your letters to be censored.[355]

Use of Evidence Seized in a Search

Assuming contraband is discovered in a prison search that you claim violates your

(...continued)
Detention) and 28 CFR §541.22(c)(2) (hold-over status)(BOP).

349 28 CFR § 541.14(b)(1)

350 *Wolff v. McDonnell*, 418 US 539, 41 L Ed 2d, 94 S Ct 2963.

351 42 USC § 1983, note 791 - 840 (discipline of prisoners).

352 *Hudson v Palemr*, 468 US 517, 104 S Ct 3194; 82 L Ed 2d 393 (1984).

353 *Schneckloth vs Bustamonte*, 412 US 18(1973).

354 *Garrity v New Jersey*, 385 US 493(1967); *Frost vs Railroad Commn*, 271 US 583(1962).

355 *Palmigiano vs Travisano*, 317 F Supp 776 (DRI 1970).

Fourth Amendment rights is involved? In criminal trials, neither the contraband nor the incriminating evidence gotten from it may be used as direct evidence against you.[356] Some searches that would be unconstitutional in a free society may be considered "reasonable" in prison.[357] No arguable Fourth Amendment requirements exisist relative to property, etc. in prison or must be followed even in disciplinary hearings.[358]

---

356 *Mapp vs Ohio*, 367 US 643 (1961). This so-called exclusionary rule also applies to prisoners in *U.S. vs Lilly*, 576 F2d 1240 (5th Cir 1978).

357 *U.S. vs Vallez*, 653 F2d 403 (9th Cir), *cert denied*, 454 US 904 (1981), the court held that a letter seized during a cell search for escape plans was properly admitted in defendant's trial for murder. The letter was found in a partially sealed envelope and described the murder. The court said that ordinarily a prisoner retains a privacy interest in a sealed letter which is subject to protection under the Fourth Amendment unless the search serves a justifiable purpose of imprisonment or prison security.

358 *U.S. vs Stumes*, 549 Fd 831(8th Cir 1977); *U.S. vs Ready*, 574 F2d 1009 (10th Cir 1978); *Gardner vs Johnson*, 429 F Supp 432 (ED Mich 1977).

11 - EVALUATING YOUR INCIDENT REPORT

There are many arguments you can use in your defense. Get copies of evidence they intend on using against you.[359] What is believable? If you break it down into simple length terms your defense falls into five basic categories discussed later. You may examine the effect of this incident report on your security level by getting a current copy of a form called "Chronological Disciplinary Action Report." This is usually gotten from your counselor or case manager. Then get a copy of the Security & Designation Manual (BOP), normally from the law library. In the back of the Security & Designation Manual, are the forms and formulas for this re-evaluation. Re-figure, if you wish, the effect this incident report will have on your security level, and whether you may be transferred if you lose.

Before evaluating your defense, let us try to understand the significance of the incident report itself. Often incident reports are written wrong, proper procedures were not used correctly, or many other reasons exist which could give you grounds to have it thrown out. Using the examples below, attempt to dissect and break apart the contents of your Incident Report.

Analyze your report

a) How do the facts in the Incident Report compare with what actually happened? Is the allegation *REALLY* a violation? Can they prove their allegation is a violation?

b) If supporting memorandums were written to support the Incident Report, do you know what they say? If not, can you guess what they say? Sometimes you can guess what is written by knowing who wrote the memo. These are used by some institutions so you won't know everything said against you until you are in the hearing and don't have time to prepare a proper defense. Demand to get copies of these in advance from the investigating officer or write to the warden if you have to. If a verbal request won't get them delivered, do it in writing.

c) Are the information boxes (name, number, time, date ... etc.) filled out correctly; or do they have errors and/or contradictions? Especially pay attention to dates, times, and the place of the incident, always looking for conflicting errors.

d) In boxes 9 & 10 - check to see if what is written makes sense with the alleged actions you are charged with. For example, suppose you are charged with Insolence [code 312[360] (BOP) violation]. They state that you looked insolently at the officer, or you said "What are you going to do, write me a shot?" Use the dictionary to define "insolence". The dictionary says: "boldly rude, offensive, insulting or shocking to the moral senses." Since the offense does not fit the definition of "insolence", your grounds (per word definition) to have the incident report expunged are strong.

e) On the I/R, in box 11 - check for sentences structured improperly or words that are misspelled. Check the general sound or understanding of the allegation, sentence by sentence. Do you need to guess at the meaning of

---

[359] *Young v Kann*, 926 F Supp 1396 (3rd Cir 1991) (prison staff must provide evidence to be used against you at least 24 hours before the hearing.)

[360] Code - 312 violation: Insolence towards a staff member. (see: appendix A)(BOP)

what is being said in the sentence describing your infraction of the rules? If you must guess at the meaning or spelling of words, or if sentences, or the whole passage, just does not make sense to you in the way it is written - then, you have a good argument to have it expunged. You *CANNOT* be convicted, based on guessing the meaning of an alleged violation. If you are, your grounds for winning on appeal are strong.

f) In box 11 - does the Incident Report apply to the possible areas of the alleged violation?[361] Meaning, does the charge fit the crime? If not, include that as an argument in your defense strategy. For example, it might be safe to admit, or at least not deny, the alleged actions; but do deny violating any rules, posted or otherwise. If you are charged with a violation, when actually another violation would have been more correct, don't offer to point to the correct violation[362]. UDC or DHO *may* raise, lower, or change violation code. Be careful, sometimes they change it, giving you additional grounds for appeal. You may ask for an extension in time to respond based on the revised allegation.

g) The incident report, in box 11- does it say that the Officer "saw" you do anything? Is your name and number actually calling you the person who committed the action? If not, this is reason to have it expunged. Did the officer *witness* this or is he guessing that you did the deed? Just because the officer *says* you did something without actually having witnessed the event, he cannot say that he saw, or heard, or in any way testify that he did! For example: you are charged with breaking a window. If in the Incident Report or in any written memorandums, there are no witnesses named who actually saw you break the window, then they have no case. How can you be convicted, if no one saw you do anything? This application of "first hand knowledge" is important in WINNING!

h) Is the Institution using Lab Tests against you to prove their charge? You must now consider "Due Process" and the "Timeliness" of the Incident Report. A vital fact is - when was the I/R written, compared to when was the Lab Report received? Lab and alcohol tests and reports can often times be confused, screwed up by the staff, lab and sometimes the prison fails to order what is called a "confirmatory" test as required for THC and some other drugs.[363]

Once the institution receives the lab report, make sure that they wrote the Incident Report against you within the allowable time[364]. There are defenses against many positive drug tests. Few are valid and most are what they appear. DHO (BOP) often see many weak excuses. Even when you have a good defense, it is very hard to win a dirty U/A.[365] But try anyway, you have nothing to loose.

Arguments for Your Defense

There are five (5) possible defense arguments. Again, I stress that you tell the truth. But, there is nothing wrong with presenting a bad situation in an innocent or good light. Take a bad situation and make something good with it. Do this by down playing your offense and make it sound trivial. Many examples described in this manual show you how. For example: if you were seen punching a guy in the nose, by 50 staff, it does no good to say you didn't do it, even with a straight face. On the other hand, one of the following five arguments can be worked into your defense by studying the details and being creative with the approach to your defense. They are as follows:

1) I did not do it!

---

361 28 CFR § 541.13 (Table 3), also in Appendix A.

362 28 CFR § 541.17 (h)(i) UDC or DHO can change a violation to a more appropriate violation if they see a violation that fits the allegation more accurately.

363 See the Evidence chapter for more information on Drug Tests.

364 28 CFR § 541.11 (Table 2) Time limits. also in Appendix A. Staff are allowed normally 3-working days to write the incident report.

365 See the Evidence chapter, for Lab Reports: Drug - Alcohol Testing.

2) I did it, but did not violate any rules or regulations.

3) Say nothing about the alleged infraction about if you did anything or not, but the evidence against you doesn't support anything. (Use when they cannot [366]prove you did anything).

4) I admit the allegation, but under the circumstances, I deserve consideration of reduced sanctions.

5) The Incident Report, or UDC, is untimely and not processed according to policy.[367]

Now let us break down the five possible defenses with some examples, and at the same time argue each point. Relate the arguments to your own incident report.

The "I didn't do it" Argument

When you argue based on "I didn't do it," you need to be able to show a reasonable argument. Some reasons will convince UDC or DHO why your incident report should be expunged. For example, you are charged with a code 307 violation - "Refusing to obey an order[368]." The questions you could argue might be:

a) "He never gave me a verbal order." You would normally need witnesses or evidence that the officer failed to give the order other than your own word against his. If it is your word against his, you will loose every time, unless you have some kind of evidence or witnesses, etc. They are winnable without witnesses, but not very often.

b) "I never heard him give any order." Or, "I did not hear because the TV was loud and others around were laughing." Or, "... a loud jet flew overhead and we were unable to hear." Or, "... His/her voice was so soft, I couldn't hear it over the dishwasher," etc. I do not hear very well[369] and I did not hear anyone speak to me.

c) "The officer never re-stated the order, even after it was obvious I had not heard him." Or, "I didn't understand what he was saying." "I thought he was talking to someone else, not I, and he never did anything to make sure that I knew he was talking to me." "He used someone else's name when he gave the order, not mine." "I'm having PMS."[370]

The "I didn't violate any rules or regulations" Argument

When your argument is based on "I didn't violate any rules or regulations."You may want to call the rules & regulations in your defense. They are in your Admissions & Orientation Handbook, posted on the walls, and told to you almost every waking hour by some officer who hasn't gotten any human nookie lately.[371] The rule the officer may claim exists, in actuality may not truly exist at all. Ask to see a copy if you have a question. Sometimes policy or rules are said to exist, but don't exist and you are being lied to. This is common at some places.

If the rule does not exist, or under "normal" circumstances you would not be expected to have knowledge of that rule, then it wouldn't normally apply to you. For example: You are in the Dining Room, and you drop your tray. Some officer having nothing better to do except show off and he writes you an incident report for a code - 317 violation (BOP) ("Failure to follow safety or sanitation regulations"), or a code 330 violation (". . . being unsanitary or untidy . . . "). Let us look at this from several angles:

---

366 Did they see, hear or have a witness that claims to have seen you?

367 See: Appendix A.

368 See the chapter, Writing Your Defense (Sample Defenses), also Appendix A for other BOP offenses without example defenses shown.

369 Make sure you have a medical restriction if at all possible, at least by the time you go to UDC or DHO in writing. Get Medical Restrictions form the Physicians Assistant or Doctor. You can even get medical restrictions for Shy bladders, sun & U/V exposure limitations and many more.

370 Pre Menstrual Syndrome.

371 The staff person could be just out of high school and is determined to get even for all the times someone took their lunch money and being a prison guard is the best life could offer them.

a) What posted regulation says I can't drop my tray?
b) It was an accident and I did not intentionally drop my tray. No regulation says I can't accidentally drop my tray.
c) The Incident Report and the Admissions & Operations Manual (BOP), along with any posted regulation, say nothing about "NOT dropping your tray." Therefore, I violated NO regulation. You can't show me such a regulation because there is no such one that exists. Ask to see the alleged regulation for the alleged violation before going to UDC or DHO.(BOP)

The "You don't have proof"Argument

If your argument is based on "You don't have proof" and you "dispute the evidence or allegation," then you should, as in a court, have a reasonable idea that they *CANNOT* prove their claim. *ACTUAL* evidence of you violating policy has not been shown in your discovery attempts[372]. Be prepared to call your witnesses and ask for copies of their evidence and show your evidence at the hearing showing you are innocent of the allegations. Sometimes, you can use the evidence that is presented by the Institution in your defense - and it can be used, by you to your advantage against them. If the institution takes photos, often they aren't very good, and don't show much. Call the photos in your defense sometimes to down play the erroneousness of the alleged offense. Look at the photos during the initial investigation and decide if you want to use them.[373]

For example: If you get an x89 or x99 charge - they are usually easy to win. (x = meaning any number like 199, 289, 399, etc.) (BOP).[374] On an x89 or x99 charge, if you dispute that they were obstructed or disrupted in any way, consider calling witnesses; then look to the incident report for any evidence they have might have provided to support their allegation such as: what an *actual*[375] disruption took place other than "NORMAL" activities. This way, you can usually beat these. Actual disruption must exist. Something that has been going on for days, weeks, or months, cannot suddenly be your fault. Most institutions won't use an x89, or x99 charge, because they usually don't work. Again, merely guessing you might cause a disruption is guilt based on guessing. Guessing, which is unsubstantiated, requires the incident to be expunged.

A more difficult code to consider is the code 208 violation ("Possession of an unauthorized locking device or damaging a locking device"). Assume that you were the only person in the room when an officer discovers putty stuck into a lock in the room door. Staff takes pictures, and places you in segregation. You will want to see the pictures during the "Officers' Investigation," and you will want to find out what memorandums were written, if any. Now let us dissect, or tear apart the Incident Report against you:[376]

a) "The putty was in the lock before I got there."

b) Pictures - only show "normal wear & tear"[377] or "improper construction[378]."

---

372 The Supreme Court in *Wolff v McDonnell*, 418 U.S. 539, 94 S.Ct. 296 (1974) have said you have the right to get evidence to be used against you at the hearing, to be disclosed to you in advance so you may prepare your defense.

373 Photographs are usually taken on allegations of Damage to Property, or if you really injured someone in a fight.

374 See Appendix A for BOP violation tables.

375 Is ANY actual evidence of disruption, threat to the security and orderly running of the institution, etc. shown? Just by staff merely making the accusation, is NOT enough for an honest conviction. Without EVIDENCE of a disruption, etc. the allegation is unsupported and should be thrown out.

376 See the chapter, Writing Your Defense (defense examples) for additional methods and ideas to set up your defense structure and to help you plan your defense strategy.

377 Often times, when charged with damage to property, defenses often times could include consideration for what is called "normal wear & tear". If you are driving your car, and the transmission goes out, are you going to be accused of intentionally making the transmission break? This is the thinking pattern you should explore on these types of issues.

378 Was it originally constructed properly. For example: you leave a room, shut the door (rather hard, but we won't mention that), and the glass window breaks.

(continued...)

The material that looks like putty is just tape from the painters when they painted the door and didn't remove all the tape; OR it looks old and has been there for a long time. The officer claims that when he noticed me in the room, "he did a close inspection," thus discovering the putty. Your defense could include, the door merely lacked maintenance. You could be in ANY room and under "close" inspection some maintenance could be discovered that needed to be done any time.

c) Pictures - show nothing wrong with the lock; or with anything,

d) Maintenance of the lock ... etc. - has not been done for a long time or, was not done after the discovery[379], and the door is still being used without any alterations. This can only mean that nothing was actually damaged. If the lock has been repaired, then you might want to call the maintenance man to testify about what exactly he did in his repairs, and what was the suspected cause of damage.

e) No persons saw you do anything, nor does the Incident Report, or any other memorandums say that anyone saw you do anything. Therefore, **no evidence has been presented** you did anything to the door or lock, which becomes a strong argument to request the shot be expunged. Nothing exists which links you "directly" with the allegation, except that you were in the room - which is not enough for any "burden of proof."

f) The dictionary definition of "damage" is: injury or harm that reduces usefulness or value; not being able to enjoy its normal value of usefulness. You should dispute damage by definition of the word "damage."

The "Admit and Plead for Mercy" Argument

"Admit and plead for mercy," one or all the charges, when the sanctions are applied. A double benefit could exist in pleading to a lessor charge and denying a more serious charge. For example, you are charged with a 200-series (BOP) and two 300-series(lessor) charges. You may want to consider admitting the 300-series, or one of them that you know they can prove, while little evidence exists to support the 200-series (the more serious charge). Now believability comes into a strong consideration at the final disciplinary hearing before DHO (BOP). It would be considered that you might at least appear to be honest by admitting your guilt in a beyond the shadow of a doubt charge against you. Then when you deny the charges (with the lessor evidence), you are more believable.

The "Expired Time Limitations" Argument

If the time to serve you your copy of the incident report expired beyond 24 hours, or if three[380] working days has passed (excluding the day of the incident) without a UDC hearing, then the meaning of the Incident Report is moot, and it should be expunged. You MUST point this out. Even if they ignore the issue, go on with you defense as if the time had not expired, and raise the time issue on appeal.[381]

Presenting Your Defense

Go into every disciplinary hearing assuming you will need to and end up litigating an adverse finding by the hearing persons. Make yourself familiar with all the elements you may need to prove in court. Anyone facing a disciplinary hearing should prepare the groundwork for litigation as soon as possible. By not laying the groundwork for litigation, the court could say "you waived your right to raise the issue in court by not raising the issue at the hearing."

You have the right to present your defense, call witnesses and provide documentary evidence. You can even call the writing officer as is allowed by the following: "... The reporting officer and other adverse witnesses need not be called if their knowledge of the incident is adequately summarized in the Incident Report and other investigative materials'..." This means, that if the officer did not include, in his report, information important to your defense, or if he chose to leave out of his report certain events of the situation (events that he knows of and were left out for some obvious reason), then you have the right to call that officer to testify for you at your DHO hearing.

(...continued)
You could allege the glass was installed improperly, and under "normal" usage, it would have eventually broke any way.

379 Call as a witness, the maintenance person who allegedly repaired the lock, etc. if you can word the questions in your favor and get definite answers that will help you. See the chapter on Staff Representatives & Witnesses.

380 See Appendix A , Time Limitations Table

381 You will need to allege that UDC and/or DHO did NOT follow policy in the process of your hearing according to policy. See Appendix A, Time Limitation Table.

The other information is called "additional information," and relates to the incident in a way that is not mentioned in any memo or in the Incident Report itself.

For example, the results of a popular case *Wolff vs McDonnell*[382] requires that you be allowed Due Process, which as a federal prisoner comes under the 5th Amendment Rights, or as a State Prisoner comes under the 14th Amendment Rights. The *Wolff* case is something every prison should familiar with.

Your appearance, conduct, and the way you speak is important when going before a disciplinary committee because it can take away and reduce your credibility. Winning is assisted by your presentation, by sounding and looking honest and believable. Most UDC or DHO don't believe ANYTHING a prisoner says no matter even if you were in another country when the incident occurred. I personally know of one just like that. Keep good records of any improper actions and use them on appeal. Sometimes, you will not win no matter how much proof you provide, or how hard you try. But with a proper defense you have a good foundation to winning both now, or on appeal.[383]

---

382 *Wolff vs McDonnell*: 418 US 539; 559-63 94 S Ct 2963; 342 F.Supp 616; 483 F 2d 1059 (1971-3). Shepardize this case for cases in your District and current law. If you need help, ask the Law Clerk or someone who knows how to Shepardize a case.

383 See specific UDC, DHO or general appeals within the BOP.

12 - UNDERSTANDING UDC (Unit Disciplinary Committee)

UDC (BOP) consists of person(s) who the Warden designates to act as UDC committee members. No UDC committee staff member can be a witness to the incident in question, nor can he/she have a significant part in the charges, unless almost every staff member witnessed the incident[384]. UDC usually consists of three (3) staff members, but one (1) can act as the UDC committee. UDC operates as follows:

a) Staff gives the prisoner a copy of the charges; Ordinarily within 24 hours after the staff becomes aware of the incident.[385]
b) UDC must normally hold your hearing within three (3) working days, excluding the date of the incident, weekends, and holidays.[386]
c) You are entitled to be present at the UDC hearing, but it is not mandatory. You are also entitled to present evidence, make a statement on your own behalf, and present a written defense. You have the right to remain silent - if you choose.
d) UDC may drop or resolve informally a 300 or 400-series violation. They can also apply sanctions as allowed under policy[387], or refer the matter to DHO.
e) UDC must normally provide you with a written copy of their decision by the end of the next work day. They also must prepare a written record of the hearing to be included in your Central File. If the matter is expunged, it will be discarded, and a copy will not go into your Central File. -
f) If UDC refers the matter to DHO, you have the right to request witnesses to[388] be called and a staff representative.

An important factor to remember at UDC, as in any hearing, is that they are NOT trained to be Lawyers or Judges. They may not fully understand standard court procedures that you already know, but this is NOT a court. It is meant to be more informal, and the rules of evidence and burden of proof is much less. UDC is the place for you to beg for mercy, if that is what your defense is going to be. If you have had problems with the institution staff, you may have better luck with DHO, depending on the DHO person and the Institutions' ability to unfairly influence their case against you regardless of actual guilt.

UDC can act as a buffer between DHO and other staff. Sometimes by explaining you have a problem that appears to be happening frequently with a particular staff, they may take this into consideration in recommendations. Sometimes UDC will attempt to slam you as hard as possible, even though policy does not allow what they request from DHO as sanctions. Be aware of this, and know your rights. If UDC asks for 60-days disciplinary segregation on a 300 - series incident report (which is not allowed by policy), you may want to consider this in your defense that not only the incident report is preposterous, but so are the requested sanctions.

Remember, **don't trust them**. No one is there to help you or be your friend. Prison staff have, will and most likely lie in 80% of the time, or more.

384 28 CFR § 541.15.

385 See Appendix A (Time Limitation Tables).

386 See Appendix A (Time Limitation Tables).

387 28 CFR § 541.13 (table 3) also in Appendix A

388 See the chapter, Staff Representatives and Witnesses.

13 - DEFEND YOURSELF AT UDC (Pre Hearing)

UDC hearings can be described as two types of procedures: 1. the 100 - series[389] and 200 - series incident reports, 2. and the 300 and 400 series violations. I am assuming that you have read and understand chapters 1 and 3 of this manual. Now what you need to consider is, "How is UDC going to treat me?" Again, your relationship (how much the staff likes you compared to those they dislike) with the staff is important. Don't expect many breaks if you have been pushing their rules down their throat. But, 'kiss butt' (figuratively speaking), and you can expect a break once in a while. It is called 'Politics'. But, we all know people like that.

A. Going before UDC with a *300 - 400 series* Incident (1st through the 6th time):

1. Write out your statement and present this when called for your hearing as "Your Written Response[390]." When asked questions, if you have decided to provide a written statement rather than talk, let your paper do the talking for you. Don't blow you own case. If you choose to provide an oral statement, make your statements clear and to the point without talking about things that don't matter, which will only confuse the issue. UDC will summarize what you say on their copy of the Incident Report and may quote you wrong or misunderstand what specifically you may intend to be saying. That is why it is better to make any statements in writing so there is not any confusion. It is hard to dispute your verbal statements (as UDC understands them) later if you decide to appeal and then claim, "I never said that."

2. Be Confident. Say only what is necessary to accomplish your goal with confidence. If you sound, or act guilty, it could work against you. Speak with authority.

3. Say as little as possible. When asked a question, remember they are out to get you, not to discover that you could be their friend. Answer them, if you choose, but very carefully. There is not anything wrong with not saying anything, OR in saying "All I have to say is in my written statement." Do not allow yourself to be suckered into answering questions that could only hurt you, unless you are admitting the incident and begging for mercy or just don't care.

4. This is not a friendly chat! If you are on good terms with the staff and have gotten minimal or no shots, it may help to just relax, speak carefully and to the point, and be friendly to the UDC. But - Remember, they are not here to be your friend. You may always request that they refer to your written statement and if it is not in your written statement, no further comment will be given.

B. Going before UDC with *100 - 200 series* Incident (& 6th or more of 300 series):

1. UDC transfers all these[391] to DHO. It is going to DHO, so why waste your breath in a situation where it will not mean anything except, usually, to dig yourself a bigger hole. UDC can recommend the sanctions they wish

[389] (BOP) 100 series, which are the Greatest Severity may not be informally resolved, and MUST be passed to DHO. Usually, all 200 - series incident reports will also go to DHO for resolution.

[390] See the chapter, Writing Your Defense.

[391] UDC (BOP) must pass all 100 - series incident reports to DHO. They usually pass 200, and the 6th or more 300 - series, etc. to DHO.

and DHO will most likely grant what UDC asked for, IF the institution wins against you.

2. Hold Your Real Defense for DHO. Faced with going to DHO with your "shot," if you insist on giving the Institution advance warning and time to prepare their offense, give them a short written defense to summarize your position[392]. It does little good to say very much at UDC when going to DHO. Remember, whatever you say will most likely be used against you.

3. Choose Staff Rep - Prepare List of Witnesses. You will be offered your right to call witnesses and a staff representative by UDC for your DHO hearing[393]. Be prepared to give UDC a list of these names you wish called as witnesses, with a short, half-sentence summary of what they will be called to testify about. You don't have to tell them exactly what the person will be asked in his testimony. For example: information about what the witness saw or heard about the incident. Keep it general and non-specific because you don't want to give a specific direction you may intend on taking with your final defense. If you don't know the persons' name, ask UDC to find out by giving a physical description.

---

392 See the chapter, Writing Your Defense.

393 See the chapter, Staff Representatives and Witnesses.

14 - UDC to YOUR BENEFIT (Pre & Minor Hearings)

Yes, you can work UDC (BOP) to your own benefit. Now that you understand how they work; let's get them to work for you as best as possible[394]. If you know you have "nothing coming," make sure we get what we have coming - and whatever else you can get.

Can you get UDC to do your investigation for you? Can you get them to tell you what their evidence is against you? Really ? ! ? Is it possible for you get them to help you in a reduced sanction? Can you get them to recommend the Incident Report be expunged? The answers to all these questions are definitely "YES!" Otherwise, I would not waste your time. Ways to use UDC:

a) Get the UDC or Investigator to do your investigation for you, by asking them to find the answers to your questions. Do this by a careful evaluation of your Incident Report as described in Chapter 3, and asking only specific questions which you suspect will result in favorable answers. You can ask them to find those answers that you need. Sometimes, send a memo to that staff, asking the question.

b) Read ALL their Evidence. Ask! Get them to tell you ALL the evidence against you by asking. Find out what the written memorandums say and ask for copies. Ask to see the pictures and lab tests, ask for photocopies. Sometimes they will not show them to you. When this happens, make a note of it, because it violates your "Due Process" rights. You can use this in your appeal, if necessary. If you are denied copies of this material, put it in writing memos' to the proper staff, like the Captain, Warden, etc. or even write to the Region, asking for help, saying the institution has refused to provide evidence they intend on using against you. File BP-9's, 10's and 11's (administrative complaints) on the individual issue. As they say, "shit rolls down hill." That's why the guards are always at the bottom of the hill..

c) Get them to help you get a reduced sanction. Talk to the investigating officer, or staff member, Captain, etc. that you may know, explaining the situation. Ask if he can do anything to help you in your discovery process. Also, ask UDC for consideration by their recommending special conditions for a "possible" reduced sanction.

d) Get UDC to recommend that the shot be expunged. It may not happen very often, but it does happen. If you receive a shot with 3-charges, you should ask UDC, based on limited evidence, recommend that one or all charges be expunged at DHO. If your facts are clear, and no evidence exists supporting the Incident Report, request that they recommend the report itself be expunged. Sometimes UDC helps you indirectly, by requesting the maximum or inappropriate sanctions be applied to a non-serious Incident Report which is being sent to DHO with no, or little, supporting evidence. Then, you can use that exaggeration, of sanction application, to show the humor of the Incident Report itself, and that the only reasonable thing to do would be to expunge the I/R.

---

[394] Many times, staff will not do anything to obstruct you every time you attempt to complete your defense, or gather information for your defense. When you suspect this, gather names of staff, and get their responses in writing as if you already know you will have to bring the matter to Court. This is a Civil Rights violation of your Due Process Rights, protected by the Fifth Amendment (State prisoners would claim a Fourteenth Amendment violation) of the Constitution for federal prisoners. See the chapter, LEGAL BASICS & COURT OPTIONS.

15 - STAFF REPRESENTATIVES and WITNESSES

You are going to DHO (BOP) and you must choose your witnesses, and possibly a staff representative. First, let us talk about your staff rep. Things you should know about staff representatives are not always published in a Program Statement or Code of Federal Regulations (CFR).

At the Institution where this manual was written, staff careers have been threatened for helping prisoners too much with a DHO defense. In another Institution (in which I spent sometime "visiting"), staff would be suspended without pay for two days, if they helped an prisoner too much, or if they came between another staff and prisoner on a disciplinary matter. Of course, these are unwritten rules. Why ask for help from someone who may want to help, but could cost them their job security and his pay-check by helping you?

Staff Representative

If you wish a staff person to help you on your DHO hearing, you should understand what their responsibilities are, and what you can do by yourself without their help. I have seen very little of even reasonable representation from a staff member. Most of the time, they just sit, saying little or nothing, while you do your best to present your own case, while thinking they will jump in and actually help any time. Then you wonder why you lost?

In federal prison, you have the right to a staff representative of your choice, assuming the person is available, and that it is not a conflict of roles. In state prisons, you will likely only be given a representative if you cannot read, mentally ill, etc. "The staff representative shall be available to help the prisoner, if the prisoner desires, by speaking to witnesses and by presenting favorable evidence to the DHO on the merits of the charges, or in extenuation or mitigation of the charges[395]." Most staff reps, whom I have seen, know less of the proper procedures contained in this very basic manual. Often they don't understand how to analyze an Incident Report, *OR* they don't have the time, or ability, to research a problem through. Another strong reason for NOT using a staff rep will be discussed shortly. For now, let us look at the positive side.

Take an incident report which alleges you have drug paraphernalia, (a code 109 violation), when what you have are some rolling papers that came in a can or bag of tobacco. You got these from another prisoner, who got it from another institution. It also came through R & D[396] legally. This presents several problems.

Do you want the Staff Rep to recommend DHO change the shot to a 305-violation (Possession of anything not authorized through regular channels), OR to change it to a 400-series violation (Possession of property belonging to another person)? Some would say take the lessor charge. But, what if the prisoner threw the tobacco away and you got it out of the trash can. This would be the best defense. The prisoner who threw the tobacco away, into the garbage can has a property slip for it, showing it went through R & D and is legally in the institution, assuming the institution does not sell tobacco with rolling papers.

Here is where a staff rep could help. They could talk to the other prisoner from whom had the tobacco and threw it away. They could call the institution where the tobacco was sold, and then testify for you that the tobacco and your rolling papers are legal within the institution, because "it was sold in the commissary at the other institution, and the bag or can say that rolling papers are included." When the other prisoner was transferred here, his property came with him through R.& D and was approved to retain by not doing anything to prevent it from being here.

Now you need to make a decision. Do you want to plead guilty to a 300-series violation, or a 400-series violation? Neither! You got the tobacco from the trash; and it didn't

---

395 28 CFR § 541.17(b).

396 Receiving & Departure. Where all prisoners property comes through and is approved to be in your possession at the institution.

belong to anyone then, so that eliminates even the 400 series violation.

Now for the 300-series violation. This charge is not a valid charge either, because what is a "regular channel?" Is there any regulation that says we cannot dig anything from the trash? NO, there is Not! If there is, ask to see it. This Incident Report should only be totally expunged, but a staff representative might recommend a trade off to a lessor violation. You need to take charge! If you do use a staff rep, you can greatly help him by providing him your written statement, such as you would present to the DHO[397], and a list of questions that he should ask the witnesses. But, policy prohibits your staff representative from presenting written questions to DHO to ask witnesses. But, your Staff Representative may ask the witness questions you write out. Unfortunately, they may not ask them ALL or as you have them written. This could ultimately affect the testimony and the outcome of your incident report.

Staff reps can help, if you know how to direct their actions properly. If the staff rep refuses to do it your way, drop him; and either request another staff rep (which you probably won't get), and will cause another delay, or you can go on you own - which is what this manual is all about. At the DHO hearing, you can waive your staff representative after they have done the legwork for you and gathered the evidence you needed.

The <u>advantage of NOT having a staff representative</u>, is freedom. You have a lot more ability to control your defense process by yourself. "The prisoner who has waived staff representation may submit questions for the requested witnesses in writing to the DHO."[398] By submitting written questions to DHO, you control the evidence being presented for you, which protects you from leaving it up to whomever just happens to be around to represent your case[399].

DHO may pass your hearing to another date if the witnesses or your staff representative is unavailable. He may also request written statements from these witnesses regarding your questions, so that their presence may be waived. Or he may refuse to call your witnesses, if he considers their testimony to be redundant, immaterial, or is duplicated in the incident report or written memorandums and therefore repetitious. Be careful DHO does not violate your Due Process rights to call witnesses, as reasonably required. Often the refusal of DHO to call your witnesses is wrong and you should state this in your appeal. It's called, your "Procedural Due Process" rights where violated by DHO by \refusing to call your witnesses without justifiable cause.

By not having a staff rep, you present your case in writing, making a written presentation of you position. Like in UDC, if your statements are NOT in writing, the DHO will summarize your statement. Correct or not, they will make it part of your response on the record. If you appeal, and DHO misunderstood what you said, or did not summarize it correctly, you are stuck. If it is in writing, there is no dispute on what you said, because it was written by you.

I would normally NEVER use a Staff Representative. They are not really on your side. They are there because of some policy that puts them between their own job and you. Staff reps also will not argue with the DHO, even they know full well DHO is wrong in the way the hearing is progressing. Your staff representative will also not want to get involved in your Appeal with a written statement supporting what was actually testified to during the hearing.

Lay out your evidence to be presented in order, and save the confusion of putting staff between you and other staff. You will normally benefit in the end without staff representation because of the obvious impartiality.

Witnesses

If you fail to request any witnesses at UDC, then you have waived your right to call witnesses that may help you win. This consent will be upheld as "consent through not objecting or calling witnesses timely." Call all those you may want or think can help. You may waive their appearance at the actual hearing through not calling them in your Written Questions for DHO to Ask Witnesses. You do NOT have the right to cross-examine witnesses yourself but must ask questions through the DHO officer or a staff representative.

When UDC asks you about any witnesses you may want persons called for you, have an idea beforehand who you might call.[400]

---

397 See the chapter, Writing Your Defense, with some example defenses in the end of the chapter.

398 28 CFR § 541.17(c).

399 See the chapter, Writing Your Defense.

400 *Wolff vs McDonnell*, 418 US 539, 566 (1974). See also *McCann v Coughlin*, (continued...)

Think carefully about what they might say, and how they would present themselves. Ask yourself several questions, such as: Are they believable? When they speak, do they sound like they are pulling some scam? Can they articulate, or speak clearly enough to get the point across without confusing the issue? Will they answer the questions honestly and correctly? How does DHO perceive that person? These are all important considerations and your decisions should be made carefully. Witnesses can sometimes tell the truth, but sound like they are not. This is not the type of representation you want. If you want someone to tell the truth, but they think you want them to cover for you, try to talk with them in advance, or *ONLY* ask in writing through DHO, ***YES*** or ***NO*** questions.

NEVER ask a question you don't already know or have a good idea what the answer will be. Sometimes, you think someone might respond to a question in a particular way, but it could very well turn out just the opposite. If you have contact with your witnesses, tell them to tell the truth, and not cover for you. Then you use the truth to your benefit. Be prepared to impeach a staff witness if the submit a written memo, then testify to something contradictory during the hearing.

It will help you if you can tell the prospective witness what questions will be asked before the hearing, by getting them a copy of your written questions, or just asking them. It will help him be comfortable, knowing what is expected from his testimony.

You have the right to present your defense, call witnesses[401] and provide documentary evidence. You can even call the writing officer as is allowed by the following: "... The reporting officer and other adverse witnesses need not be called if their knowledge of the incident is adequately summarized in the Incident Report and other investigative materials[402]. . . " This means, that if the officer did not include, in his report, information important to your defense, or if he chose to leave out of his report certain events of the situation (events that he knows of which were left out for some obvious reason), then you have the right to call that officer to testify for you at your DHO hearing. The "other" information is called "additional information," and relates to the incident in a way that is not mentioned in any memo or in the Incident Report itself.

Call the writer of the Incident Report,[403] only if you are calling him about something NOT contained in the Incident Report, or in a memorandum. Some DHO don't like to call anyone that might help your case. Be especially careful about this. This is ground for winning on appeal. If the DHO refuses to call your witness (DHO claims the witness is adverse and won't add to your position), write this down and remember the details. Write it down as soon as possible, so that none of the details are forgotten. This is important for your appeal. Some DHO's are reasonable; others are NOT. On appeal you need to allege a Fifth Amendment for federal prisoners, or Fourteenth for State prisoners Violation of your Due Process Rights, by denying you witnesses that could have changed the decision of DHO.

You may also call outside witnesses, from the general public, as professionals, or if they observed something and can contribute to your defense. "Witnesses may be called from outside the institution [404] . . ." They will probably not be interviewed in your presence, but would be interviewed in a different part of

---

(...continued)
698 F2d 112 (2d Cir 1983); *Brown-El v Delo*, 969 F2d 644 (8th Cir 1992) (prisoner has a right to call witnesses and to present documentary evidence at a disciplinary hearing unless to do so would be unduly hazardous to institutional safety or correctional goals).

401 The question whether an prisoner has the right to compel an unwilling witness to testify was raised in *Dalton vs Hutto*, 71 F2d 75 (4th Cir 1983). In *Forbes vs Trigg*, 976 F2d 308 (7th Cir 1992), *cert denied*, 113 S Ct 1362 (1993), the court of appeals held that, generally speaking, due process was violated by an Indiana Dept. of Corrections that allowed prisoners and staff to refuse to testify at a disciplinary hearing without giving an explanation as (continued...)

(...continued)
to why they would not testify. In *Pino vs Dalsheim*, 605 F Supp 1305 (SDNY 1984), the court explained the difference between witnesses who would testify the occurrence of an offense and those of only mitigating circumstances.

402 28 CFR § 541.17 (c)

403 28 CFR § 541.17 (c).

404 28 CFR § 541.17 (c).

the institution. Your written questions could make or break your defense.

Make a mental note, during the DHO meeting, about whether or not the DHO person asked your witnesses all the written questions which you submitted, noting if they were asked the way you wrote them. This also, may be grounds for an appeal if the DHO changes your questions with an unjustifiable reason. DHO may try to cloud their responses by asking inaccurate or vague questions that could open the door to a response that doesn't really help your case. DHO is supposed to stick to you reasonable written questions.

Open all your written questions to your witnesses with a short paragraph reminding them why they are there. For example: "This hearing is about a code 104[405] violation where Inmate Jones[406] was charged by Officer Duffass[407] for possessing a gun in segregation on November 18, 1993, at about 6:30pm.[408] Do you remember this incident?"

By structuring your questions with the sentence structure where the first part would state:

1. Who (noun - person, place, thing, quality, etc.).

2. Did what (predicate - statement of action, expresses action, describes quality or something).

3. Who - How (verb - main element of a predicate and typically expresses action, state, or a relation).

Chapter 18, sample 3 shows an actual defense with questions as they should be structured for your witnesses. You only need to present the following four things as the basis for your defense:

1. Facts
2. Logic
3. Conclusions reached by applying logic to facts.
4. Authority which supports either your logic, your conclusions, or both.

---

405 Insert your violation(s) code number.

406 Insert your name here.

407 Insert the writer's name who wrote you the incident report to help build the background for your defense questions.

408 Insert the date and time, to jog their memory as to where they were and what they were doing at the time. It also qualifies their testimony as being present and/or having direct knowledge thereof.

16 - UNDERSTANDING DHO (Disciplinary Hearing Officer)

DHO (BOP) consists of a person, independent of the Institution assigned by the Region, under the Warden, to conduct hearings and review the evidence the Institution has gathered. This includes facts that could lead to further criminal charges. The DHO team consists of the Hearing officer, an institution assistant, and usually an officer who stands in for security purposes[409]. DHO is simpler in its ways than UDC but more structured in some ways as shown by the following:

a) The DHO officer cannot be a witness, he must be impartial, and he may not play any significant role in the incident which is referred to DHO. If an impartial DHO officer is not available, the warden must request from the Region another trained and qualified person to be the DHO officer.

b) DHO shall conduct hearings, make findings, and impose sanctions for misconduct referred for disposition by UDC as required[410]. DHO may not hear a case that has not been before UDC. Only DHO may impose or suspend sanctions' A through F as allowed[411].

c) You must have received a copy of the Incident Report 24 hours before being heard by DHO[412]. You may ask for an extension of time to prepare your defense, wait for important evidence, or to adequately meet with your staff representative. He may deny your request for an extension, if he believes it is irrelevant and found not necessary. You may appeal, if you feel he denied you enough time to prepare an adequate defense.

DHO does not go by standard rules of court evidence, so don't expect it to. It is informal, and the courts have required at least the basics of due process to be followed, as it is in UDC actions. The receptiveness to your defense depends strongly on how you present it. Remember, when DHO seems unfair, this is politics. Don't tell DHO how much you know about the law or its procedures. It only irritates them even though he may be jerking off to cat pictures, etc as in *Moody v McNamara*, 606 F.2d 621 (5th Cir. 1979). Consequently, he will make you look silly, when he then brings attention to some minor spelling error or missed evidence in your own defense. You can WIN, by doing it carefully and smart.

You may also request or be assigned a different DHO person, other than the usual because of a re-hearing or other prejudice you may allege or has been discovered.[413] If you file a lawsuit or other papers against the DHO officer, you may request, and would normally be granted a new hearing officer. If not, document this, and build grounds for expanding your possible legal action(s) against the institution.

You may file Administrative Remedy's (BP-9's, 10's, etc.) against the DHO person, just as you can UDC persons if you allege things NOT about your conviction issue or attempt to overturn his decision in those specific BP-9's, 10's, etc. If he denied you witnesses, state: "he denied you witnesses as a procedural error and did it intentionally or maliciously." You also need to say that: "this complaint is NOT an Appeal, and is a separate complaint for not following policy." Most states and federal staff will deny you the opportunity to file grievances with claims against disciplinary persons. Their defense is that they claim your complaint is an actual "appeal of the disciplinary findings." But, at least you tried and now have more documentation to support possible legal litigation.

Some DHO persons need to have complaints filed against them because they through out the rule book and only think the rules apply to you and not them. You can show them this is not true by filing a complaint against DHO or UDC persons by starting with a BP-9 (Administrative Remedy).

---

409 28 CFR § 541.16

410 28 CFR § 541.15.

411 28 CFR § 541.13 (Table 3) - Prohibited Acts and Disciplinary Severity Scale, also in Appendix A.

412 See Appendix A, Time Limitation Table 2, (28 CFR § 541.11).

413 28 CFR § 541.16.

17 - APPEARING BEFORE DHO

DHO is simpler than UDC. The process is direct and the staff level is trained for what he is doing, unlike UDC. You need only to be concerned with the issues and the facts used for your case. Don't talk about things that are not important to winning and defending your position.

DHO is supposed to follow the rules presented in the manual[414]. If you want more information on your exact rights and procedures, read this section in the Code of Federal Regulations (CFR) mentioned in the footnote # 1 of this page.

A summary of these regulations follows:

a) List of Charges. You have the right to a list of the charges at least 24 hours before you go to DHO.[415]

b) Staff Rep. You have the right to use your staff representative if you choose to use one[416]. Your staff rep should have met with you before the DHO meeting, to review your case with you, and to speak with any witnesses as needed. Your staff rep will meet you at the DHO meeting. If he/she is unable to be present, you have the right to postpone the hearing until he/she can be present, or to have another staff rep selected. You can also waive staff representation then and go on your own.

c) Written Statement - Witnesses. DHO will read you the Incident Report, and review any documentation regarding evidence that supports the allegation, if asked to do so. He will call your witnesses, if requested, and then ask you if you have any statements to make[417]. If you have not already given him your written statement, do so now. Have DHO refer to your written statement for your version of the incident. OR if you choose not to use a written statement, this is the time to tell him your version. Written statements are best because what you write cannot be confused, omitted, or twisted to their benefit.

d) Evidence for Appeal - Write It Down. If DHO makes any procedural errors like omitting evidence for consideration, or refusing to call witnesses for an unsubstantiated reason, or changes a code violation to something even more absurd then the shot you went in with - write it all down[418]. Remember as much as you can, and make notes so that you may appeal later and win.

e) Decision - Appeal. Within 10 days after the DHO hearing, you should receive a copy of the decision rendered, and the reasons for the decision, through the Institution mail or delivered by staff[419]. It will be dated with the date you receive it, and you have 20 days to file an appeal, including the time to mail it

---

[414] 28 CFR § 541.17.

[415] See: Appendix A, Table - 2, (28 CFR § 541.11).

[416] 28 CFR § 541.17(b).

[417] 28 CFR § 541.17(c).

[418] 28 CFR § 541.19 (a - c).

[419] 28 CFR §541.17 (g).

responsibility to get it to the region in time[420].

Attitude

The method in which you present your defense to DHO makes a difference. If you go in with a bad attitude, it will work against you. You don't say "the officer lied." It won't be believed. You can say that the officer "erred," or "was mistaken." These are all methods of presenting your winning defense. Remember, the method in which you present your defense to DHO does make a difference.[421]

Often times staff lie, fabricate stories and evidence for some reason. By acting professional, and rising above their petty behavior, you may not win your disciplinary hearing, but a negative behavior would work against you if you took your incident to court. By providing prison staff with nothing to point their finger at, and say, "see, he was rude, obnoxious and out of line during the hearing, he is obviously guilty." Even though guilty or not, the perception is an important consideration at all presentations of any kind. Let the prison staff remain kings of the petty things they accuse prisoners of being.

---

420 See the chapter about appeals, (Appeals to DHO, etc) for more information and the chapter, Writing Your Appeal.

421 See the chapter Legal Basics & Court Options, for more specific language when things look like they are really going against you.

18 - WRITING YOUR DEFENSE - SAMPLES

The ability to put your thoughts on paper is easy for some, and very hard for others. If you are one of the "very hard" group, don't worry. When you write your defense rather than speak it, a hearing officer cannot come back in his written decision and say something that was not in your written defense. It is not that you need to write, but with the posture of the courts, you have to have your case clearer than in the recent past.

Read Chapter 21 for more discussion of writing defenses and appeals where more detail is given.

Writing Structure

You only need to present the following 4 things as the basis for your defense:

1. Facts
2. Logic (theory)
3. Conclusions reached by applying logic to facts.
4. Policy, law or rules that support either your logic, your conclusions, or both.

Writing your defense is easier than you might think. Write it out on paper before doing your final copy. Typing your defense is the best method. If you are short on time before going to your hearing, or don't know how to type, it is OK to present a handwritten defense. However, anything handwritten is harder to read, even if your handwriting is beautiful. By presenting a written defense, no one can say you said something which you really didn't say. This happens too, too often. Always keep a carbon copy for yourself if you need to reference it later for an appeal.

Three basic writing rules to follow will lead you down the path to success:

1) Keep your statement short, simple and to the point. In UDC, due process is followed much less in comparison to DHO. Your response can be shorter and more direct. Review your statement after your first drafting to see how it sounds to others. Do your sentences reflect a less dramatic structure, by playing down any actual or inferred violation you are charged with?

2) Keep your defense to One (1) typewritten page, but on extreme circumstances, no more than two (2) pages. I have written a six (6) page defense because I knew I was going to lose, but I wanted the groundwork laid for a pending legal action against the institution for fixing the hearing. The quantity of pages in your defense excludes your written questions to witnesses. Questions to witnesses should be kept to three to six (3 - 6) questions per witness. If you handwrite your defense, one typewritten page is equivalent to two handwritten pages.

3) Keep your sentences clear and precise. Try not to exceed 20 words per sentence. If you are trying to make a point, end the sentence with your point, rather than start the sentence with it. Normally, people remember the end of the sentence rather than the beginning. For example your point is "you did not start the fight" which you are charged with. Remember - Keep all sentences direct, and as clearly stated as possible

DO

After being provoked, I asked him kindly not to start anything. He then jumped, swinging without provocation.

OR

Although it looked like fists were connecting, no actual contact was made and no serious potential existed between us for harm because he was just doing some sort of dance.

DON'T

I didn't start the fight. After he pushed me, I said, "Why did you do that?", and I told him not to do it again. Then the fight started.

I didn't hit him during the fight where it looked like fists were connecting and person were hit.

Here is language on another subject, but has similar importance in its sentence structure:

It is in my possession, but it would not be considered contraband because it was issued at another institution where it is approved. That was issued to me at another institution, and I have a right to have it, because R & D allowed it in.

Another example for a charge of refusing an order that is a popular charge among certain officers:

DO

My failure to obey the officers order was not intentional, because I honestly did not hear him, and he made no indications that I was aware of that I should do something.

DON'T

The officer never gave me an order to do anything.

Stress your point, or objective at the end of your sentence rather than at the beginning. The impression left with the reader is more effective. Don't make your language sound forceful; be polite and non-threatening. The difference, between "telling" someone and "asking" someone, will make a big effect on the influence of your statement when you're the one with the Incident Report.

Your Written Statement - Make It Easy to Understand

These sections match similar lettered sections marked on a sample statement provided at the end of this section.

Section

a) Heading: Put the basic information at the heading of your page. If the page gets lost by UDC or DHO, they will know who it belongs to, and what Incident Report it is connected with. For example, head your page as shown at the top of the sample Statement.

b) Code Violation: Under the heading, you want to state the code number violation and initiate your defense by either "Admit" or "Deny." Sometimes you may want to admit the allegation, but give the special circumstances for the incident. See section b) on the sample Statement.

c) Evidence (optional): List all written evidence you intend on presenting in your defense, and list each item separately. Supply a photocopy of the evidence, clearly marked as "Exhibit 1", 2, etc. Never give up your only copies of evidence. They may disappear. Supply a copy, rather than the only original or copy you have, you staple this evidence to your written defense on the back in order, so the hearing officer can't say "I won't consider this, it's not an issue." By listing your evidence in your written defense, and attaching a copy, you force him to consider it. If he still refuses to consider your evidence, you have grounds for appeal by alleging "Staff Failed to Follow Proper Evidentiary Procedure" when evidence was not considered. This is a Fifth Amendment violation of your protected Constitutional Rights.

d) Defense Statement: Open your written defense with a short paragraph in defense of your plea for "Admit" or "Denied," and point out the holes in the Incident Report. This paragraph should be about three to five sentences. These sentences can be as creative, in style, as you like, but they should also be factual. You can allege something, but it should not be considered FACT in the way you phrase it. For example, you receive a "shot" for a code 206 ("Making a threat or sexual proposal to another") because you told another inmate, "Every dog has his day." Don't laugh, I've seen these shots and seen them stick, and they were lost on appeal because the defense was not presented properly. Assuming 100 people are witnesses to your comment, then write or structure the paragraph in a similar fashion to that on the sample Statement.

e) Issues: Separate your defense issues and address each of them individually in a numbered paragraph, ending the short paragraph with the point you are trying to make. For our example, we will use the code 206 violation in section c), but now listed as points of Defense Issues - on the sample Statement.

f) Summary: Close your written defense with another short summary of the evidence, and the lack of evidence against you. This should be a shorter, simple summary version of your opening paragraph in section c) above. Then you close with your wishes, or request for relief.

g) Names & Witnesses: List your witnesses in a way to clearly identify each and every one. See the short list on your sample Statement, at the very end. Another page will list these witnesses with the questions to be asked of each person. See Figures 1 & 2.

WRITTEN RESPONSE to UDC or (Pre-Hearing)

FROM: John Holms #01 234-567 INCIDENT REPORT DATE: 1/31/92

PAGE: 1

Alleged Violation:
Code 403 ("Smoking where prohibited")
Charge: Denied

STATEMENT:
The incident Report is in error because it fails to describe the important parts of evidence. Your records show that I don't smoke, and I have never smoked. Since it was 10 degrees above Zero outside (where I was at the time), my breath steamed the air, and it could have looked like smoke, which is a mistake.

ISSUES:
1) I don't smoke, and no staff has ever seen me with a cigarette in my hand. This Incident Report does not say that the writer saw any cigarette in my hand or anywhere near me.
2) I have never bought cigarettes from the commissary.
3) I was outside, and it was 10 degrees above Zero at that time. The writer of the incident report was mistaken, for only steam was coming from my mouth. It was very cold.
4) The writer of the Incident Report was in another building, about 50 yards away. He could not have been able to be certain about any of the facts as stated.

SUMMARY:
Since no evidence exists to support the writers claim which is certainly subject to review, he didn't see correctly. He didn't claim to have smelled any smoke upon approaching me. When he approached me, a cigarette butt was on the ground, but the writer never says that he saw me throw it there. I also have never purchased cigarettes, and my medical record show that I choose NOT to smoke. Nor do I have a history of doing so. This Incident Report should be expunged.

Figure 1, Sample of a Basic or Prehearing Defense

WRITTEN RESPONSE to UDC or DHO

FROM:(your name & number) INCIDENT REPORT #:(write in if a # is used)

INCIDENT REPORT DATE: (date ot Incident) PAGE: (number)

Alleged Violation: Code 206 - Denied (or Admit, whatever applies)

RESPONSE to INCIDENT REPORT:

The basis for a "threat" is non-existent and purely distinguishable between mere uttered words of the context of our environment. The officer is wrong when he alleges I made a threat by saying. "every dog has its' day". A communication showing a present determination or intent to injure, presently or in the future is not shown. My language in this incident, was just "normal" prison rhetoric and was said in a "non-threatening" manner. The belief that it does, is guessing and fails to support any violation.

ISSUES:

1) The comment I made to the other inmate was non-threatening and unfounded as a threat and was not in the context of a threat, but mere political argument.

2) The actual violation as it is described in the regulations, supports my position, since it does not describe the actual incident. Therefore, there is no code 206 violation - for no factual basis exists. [see 28 CFR 5 541.13 (table

3) The dictionary defines a "Threat" as: "the declaration of the intention to cause harm; an indication of probable trouble". Speaking words cannot be understood as a threat if the probability of it (trouble) happening to the receiver of the words is NOT mentally unsettled by such language - according to Blacks' Law Dictionary. Therefore, no probability of trouble existed. If no probability existed, then the likelihood of actual harm coming to this person as a result of my comment is unfounded.

4) I never said anything directly, that implied a threat; or said that I would do any-thing that would result in the other person coming to any harm. Making a comment about "ALL of our impending future" is not a threat, nor is it a comment about his puppy.

5) The incident report fails to provide any indication of "intent" to harm

SUMMARY:

No verbal threats of any kind were given by myself No probability was demonstrated in the incident Report, that any harm may or would come to the other person. Even the dictionary supports my position. This incident report should be expunged.

WITNESSES & Written Questions for Witnesses:

1. Lt. Jones
2. Officer Capps (writer of I/R)
3. Inmate - Peter Pan
4. Inmate - Sig Froid

Figure 2, Sample Basic Written Defense to Final Hearing (Add case cites where they apply)

WRITTEN RESPONSE to DHO[422]

Date: February 25, 1994

From: Allan Parmelee, 04239424 Incident Report # 189507-2
Re: Rehearing on DHO decision Incident Date: 11/27/93
0189507. Page 1

Alleged Violation:
Code - # 399 - Deny

Evidence:

Exhibit #	*Description*
1.	Memorandum written by Duffy, dated 11/29/93
2.	Investigation Report (part III), by Camp, dated 11/29/03
3.	Affidavit by Stephen _____, dated 11/17/94, (mental Health companion)
4.	A & 0 Manual for FMC Rochester, See Attachment B
5.	Incident Report written by Duffy on 11/2?/93, delivered Nov.28,1993 by Lt. Moore.
6.	Disciplinary Hearing Officer (DHO) Report #189507 (4-pages).
7.	Regional Administrative Remedy Appeal (BP-10) 2-pages) of decision for #189507
8.	Region's Response to BP-10 Appeal of DHO decision for #189507 (Index #58671)

Response to Incident Report:

Based on the incident report, and on the lack of factual basis, its recent modifications and the evidence provided, NO actual or probable disruption was displayed that supports a violation but shown "NORMAL" conditions and behavior in any segregation unit. The incident report also does not state in any place, where the institution was actually disrupted beyond "normal" conditions. I further state as follows:

1. This new revised incident report for a code - 399 violation, compared to its original incident report (See: Exhibit 5) is contradictory, and shows areas falsely represented. The revised incident report, for a code - 399 violation, delivered on February 20, 1994, says the writer, wrote this on November 27, 1994, at 6:20pm. Exhibit 5, the original incident report was written by the same writer on November 27, 1994 at 7:30pm. So why was this incident report for a code - 399 violation being heard months after the fact, written allegedly ONE hour and ten minutes after the original incident report. See: Exhibit 5.

2. DHO heard Exhibit 5, (the original incident report) according to Exhibit 6, (DHO findings), and a rendered decision. After Parmelee wrote an appeal to DHO decision, showing DHO misfeasance, (See Exhibit 7), the Region ordered a new hearing on the original charge. (See: Exhibit 8). Then on or about February 20, 1994, the writer, Officer Duffy wrote a new incident report changing the violation from the original code - 199 to a code - 399 violation. He then raised a new but moot issue of "most like refusing an order." Duffy back-dated this code - 399 incident report to November 27, 1993, 6:20pm, thus making the incident report fraudulent.

3. Lt. Murphy was also with the fraudulent representation of delivery of the amended incident report for a code - 399 violation by claiming he delivered it to Parmelee as described in box 14. Upon testimony from Lt. Murphy, DHO will discover that actually Officer Johnson delivered the incident report to Parmelee. Exhibit; 2. says Camp delivered the incident report or, Lt. Murphy in Exhibit 5.

4. Exhibit 1, makes no allegations of factual disruption, as the new code - 399 incident report alleges. Actually, Duffy, in the second paragraph says, "I think," claims he thinks ox predicts action of self-harm, etc. might happen but failed to provide any historical evidence to support his unbased theories' Duffy, not even a mental health professional, interjecting his opinion with nothing to back it up, I must object to its consideration. In exhibit 3, a mental health companion states, his eight (8) months of work with Halston clearly disputes Duffy's allegation.

[422] Sample 3: example (Actual Defense, The name have been changed to protect the ."not yet convicted" but the facts are actual)

Date: February 25, 1994
From: Allan Parmelee, 04239424 Incident Report # 189507-2
RE: Rehearing on DHO Decision Incident Date: 11/27/93
written response to DHO. Page 2

5. Based on the face value of the incident report, and if, DHO says it is correct and that the incident report is true and an honest representation of the facts, then why was this incident report written on 11/27/93, 6:20pm, a full hour and ten minutes before exhibit 5, according to the corresponding box 12. This code - 399 charge and its peripheral allegations are moot and untimely pursuant to 28 CFR § 541.11 (Table 2). The 24-hours and 3-days has long expired. Also, the new allegation, being the last sentence, and "(most like refusing an order)" is also moot and untimely filed. It should not be considered in this hearing.
6. The incident report states he heard Parmelee say to Halston, "stand up", "sit down", & etc. So what is unusual about heckling in segregation? Exhibit 1 states Halston heckled, saying things much worse than the writer claims Parmelee said. The writer of the incident report only wrote myself and another Inmates (who the other person was transferred prior to a hearing), an incident report and not Halston. Duffy never did anything or said anything to Halston to quiet him. Neither did Lt. Murphy do anything to quiet Halston as demonstrated by his testimony, if called.
7. Exhibit 3, and a Memorandum written to the investigating officer, Camp, and another Memo written by an assumed Doctor used in the original hearing, calls Halston a mental health patient. Exhibit 3 says Halston acted as described in exhibit 1 for at least eight (8) months during the time he had worked with Halston. So why did Duffy and Lt. Murphy allow him to remain in the General Population if he was so fragile, according to their paperwork generated. Exhibit 2, section 25, states the investigation was suspended pending consultation with attorney per Lt. Murphy. No explanation exists for this hesitation to precede with the matter of exhibit 5, because they know the incident report lacked even the slightest foundation and was seriously questionable from a liability aspect. Exhibit 1, was only written, along with the other memo's after speaking with the institution attorney, and a conference on "how to make the incident report stick." They all had full knowledge and knew its foundation was weak, if not non-existent, and where worried.

In consideration of the facts, the evidence, and policy, this incident report should be expunged since it is based on conjecture & guessing, and "could happen" scenarios. The probability is not shown and only further allegations is based on someone not trained or skilled in mental health patients or circumstances. This person, being a mental health patient & if he was so unstable, first shouldn't be in general population, especially for the extended time he was. But his medical history according to a mental health companion, clearly does not say he would or had harmed himself in any manner. So again, is this incident. report based on guessing and possibilities, or fact as it should have been.

Without any actual events the officer could point his finger at to describe how the "institution was disrupted", he fails to meet the burden of minimum requirements required by Procedural Due Process. The officers memo and the other memos were written several days after the incident report was written because, after speaking with the institution attorney, as described in exhibit 2, they decided to attempt to "cover their butts", and write memos.

Therefore, this incident report should be expunged, because no factual evidence exists to support itself, without of course, guessing and conjecture. The facts I provide and the activity of Parmelee and Halston are nothing but "normal" activity of any prison under the circumstances, and no disruption was demonstrated. Furthermore, the modification of the incident report to "most like refusing an order" is also contradicted by exhibit(s) 1 & 5. The oral correct possibility with this incident report is that it be expunged.

Date: February 25, 1994
From: Allan Parmelee, 04239424
RE: Rehearing on DHO Decision written response to DHO.
Incident Report # 189507-2
Incident Date: 11/27/93
Page 3 (Questions to Witnesses)

Witnesses (as allowed by 28 CFR § 541.17(c))

1. Officer Duffy
2. Lt. Murphy
3. Officer Johnson
4. Steve Whiner
5. Peter Pan
6. Inmate Whitehall
7. Inmate Johns
8. Inmate Davids
9. Inmate Carton

These inmates have already left the institution and because of the long time delay in this hearing, they are unavailable to be present, thus prejudicing Parmelee in his defense. There is not a waiver or a statement from them.

Questions:

1. Murphy, Lieutenant

a) On the date of this incident report on November 27, 1993, in a memo you wrote you claim to have said something to the effect "it takes some type of person to say something like that." What type of person's do you think are in segregation who choose to speak to other inmates?

b) If Parmelee actions were disruptive, why did you not say so, instead of the comment you made?

c) Why did you tell Officer Duffy to write the incident report?

d) Do inmates, under "NORMAL" prison conditions, and even in segregation heckle and/or speak to each other on occasion, using harsh or abusive language to a person unfamiliar with a prison segregation unit?

e) Segregation, where this incident allegedly happened is a general population unit. If you have unstable mental health persons who are really a threat to others and/or himself, why was he not in the mental health seclusion instead of being left in general population for over a week?

f) With Halston calling others around him "hymi spick," "dead body fucker," "killer," "baby fucker," . . . etc, would you not suspect that he would be expected to get some heckling in return?

What evidence do you have that Halston was directly reacting to anything Parmelee might have said to him? Actually, wasn't Halston being quite when you said what you said to Parmelee in paragraph I above?

Questions for Witnesses (in Writing):

If you call witnesses[423], you will have chosen their reliability and what you intend on asking. As previously mentioned, DHO may or may not call the witnesses you request[424]. DHO denial may be justified or it may not which is usually incorrect on DHO part. If you are found guilty and the witness could have cleared you of wrong doing if they had appeared, your due process rights

[423] The chapter, Staff Representatives and Witnesses.

[424] 28 CFR § 541.17 (c).

have been violated. This point needs to be raised on your appeal[425] The legal due process minimums apply, and are covered under a Civil Rights Action if you can prove wrong doing. Usually, DHO will call all the witnesses you request. Just make their testimony help you by the way you phrase your written questions.

You may also call as a witness, the person who wrote the incident report[426] but you must allege you need them to "testify to other information NOT included in the incident report or supporting memorandums."

List your witnesses in order with the brief questions below the appropriate name. Remember, don't ask a question for which you do not already know the answer. For if you do, you may not have an answer for the response that you get. It just might hurt your case.

1. Lt. Jones
   a) This hearing is based on an event that happened on November 18, 1993[427], where John Jones[428], was written an incident report for a Code - 206 violation for Making sexual proposals or threats to another[429]. Do you remember this incident? [430]

   b) Did you hear Inmate Jones say alleged in the Incident Report?

   c) Did it sound sexual or threatening to you?

   d) Did the defendant look angry when the statement was made, "every dog has his day?"

   e) How can those words be taken as a threat, especially when normal rhetorical statements to and from other prisoners could be considered much more harsh?

   f) Would you feel threatened if someone said that to you?

2. Officer Capps (writer of I/R)
   a) This hearing is based on an event that happened on November 18, 1993, where John Jones, was written an incident report for a Code - 206 violation for Making sexual proposals or threats to another. Do you remember this incident?
   b) How was the statement you heard threatening, in anyway (as you wrote in the Incident Report)?
   c) You don't say in the Incident Report, how the statement was sexual?
   d) Since nothing was shown by the defendants' actions as threatening or sexual, is this Incident Report based on conjecture, or fact? Are you guessing, and if not, how can you be sure?

---

425 Also see the chapter, the Last Resort: if this happens frequently, and is done just to prejudice your hearing or the staff doesn't think you deserve adequate representation.

426 28 CFR § 541.17(c) "An inmate has the right to submit names of requested witnesses, have them called, and present documents on the inmate's behalf. The reporting officer and other adverse witnesses need not be called *IF* their knowledge of the events are adequately summarized. DHO may request written statements from some witnesses."

427 Specifically, give the date and approximate time of day.

428 Insert your name.

429 Place what you were charged with here. For example: Code - 312 violation for Refusing an Order.

430 This statement should begin each set questions to each witness explaining why they are present, and to refresh their memory as to the events taken place a month or so ago.

Defenses Samples for Popular Incident Reports

The following are a few examples to give you an idea where to start your defense strategy. Every incident report is different. You will need to expand your idea into a full, written defense.

1. 404 - Using Abusive or Obscene Language:

For example, you get an Incident Report for saying "fuck you." According to the dictionary, "obscene" means that what you said was "offensive to morality or decency; indecent; lewd; or disgusting." "Abusive," means that what you said was "insulting or used insulting language, wrong, improper, etc.". Your defense should list all the terms that are similar to those you have heard from the staff, and others like them. You need to compare your language to "normal" words used in your environment that are considered "normal" in prison. This is important, because the context in which the words you used were merely to be expected under the conditions of any prison environment. This defense is assuming you are admitting making the comment. Usually, a 312 - Incident Report is written for Insolence to Staff.

2. 300 - Indecent Exposure:

You get an Incident Report for "'mooning' an officer when he looked into your window." Defend again with a definition: "indecent" meaning "offensive to good taste or propriety; unbecoming; unseemly." Staff *have* written Incident Reports for this. But, we all have been 'strip searched', 'spread the cheeks', 'lift the sack', and etc. I realize this may appear to be a joke, but it is not. The defense could be: "I was on the toilet, dropped the toilet paper, and scooted across the floor for it"; or "I show him my butt all the time at his request, but since I am trying to abide by the rules, I thought I would save him from asking."

3. 307 - Refusing an Order:

The Officer told you to do something, and for some reason he believes that you didn't. Possible Defenses: a) You did do it, but he just didn't see you. (Be prepared to bring witnesses or show it has been done.) b) You never heard him say anything: your radio was on and when you failed to respond, and he did nothing to make sure you heard him. Thus by failure to make sure you heard him, he indirectly withdrew his order by his lack of action. c) The staff never gave any order. (be prepared to call witnesses). d) The way he gave the order, the language and grammar the staff used to give the order was unclear. (Be prepared to use the Incident Report's description of events or witnesses to support this position), e) I didn't know he was talking to me. (Be ready to give a description of events - why it should be believed that he was talking to someone else, or that he didn't use your name, etc.).

4. 310 - Unexcused Absence from Work or Any Assignment:

You don't show up for an appointment, work, or miss a call-out-work, etc., for some reason. Defense: a) You were not informed of the appointment; b) You went to the wrong place for you appointment because you didn't know where to go, and the staff whom you asked, told you wrong, or didn't know, or you didn't understand him; c) You slept in because you don't have an alarm clock, because you don't have enough money. (Hopefully, you won't have $500.00 on your account at the time). You don't want other prisoners waking you up because you are afraid they might hurt you if they knew how deeply you sleep; or the guard didn't wake you up like he is supposed to, since you were on the wake-up list.

5. 312 - Insolence to Staff: (see: # 1, 404 - Charge)

You get an Incident Report for saying "The police are fucked up." The dictionary defines "Insolence" as "being boldly rude, or saying words that shock the conscience" as distinguished from other "normal" words given the environment and tone of voice they were said in. Defense: a) I was talking to another person about a TV program; b) I was not even aware staff were present. My "First Amendment Rights" of the U.S. Constitution protect my thoughts and conversations with others, since they were not directed at anyone specific, especially the staff, and the staff failed to provide evidence that I was speaking about him or any other

staff in particular; c) The words were merely "normal" talk, not offending the morality of the staff in any way, nor does he claim that I was.

6. 313 - Lying to Staff:

So some angry Staff is with the mistaken understanding you lied to them. The dictionary defines "Lying" as "1- a false statement made with deliberate intent to deceive; or 2- the manner, position, or direction in which something lies, to be situated." Defense: a) The Incident Report does not say which type (dictionary definition) of lying, #1 or #2 is referred to, therefore we don't know (based on the staff's description) whether it is a physical location of something or an intentional attempt of deception. Guilt cannot be decided by guessing. b) They misquoted what my intentions where because I didn't fully understand the question, and they didn't give me a chance to clarify myself if I had misunderstood. c) The question they asked wasn't clear, and I answered what I thought was said. No intention to deceive was demonstrated or shown in the evidence to support this incident.

7. 316 - Being in an Unauthorized Area:

You are charged with being in an area, the main floor, or a section of the compound that is closed. Defense: a) Normally, the floor, section, area is open until 12:00am (or other time), it was 5 minutes before closing, and the TV's were still on. When the floor normally closes, TV's are turned off and an announcement is given that the floor is closed. This was not done according to "normal" expected routine of procedures. b) The Staff continued doing what they were doing until they were done because they realized it was unimportant then c) It wasn't commonly made known to me, or to others, which this was an "unauthorized area," making it an unknown situation to me, and therefore I wasn't out of bounds or an area that wan not plainly marked as out of bounds.

8. 321 - Interfering with Count:

You get the shot for this charge for the second time in a month. The dictionary defines "interfering" as "to disturb; hinder; to enter into, or take part with others to obstruct actions of an opposing player in an illegal way." Defense: a) The staff was not hindered or obstructed in any way definable as described in the Incident Report, because they continued as they were doing without interruption. b) Normally, at the time suggested on the Incident Report, the count is done. Often we are unable to hear if count is clear or not, thus creating confusion by the Staff's inability to definitely let all know the current status of the count. c) I honestly thought the count had cleared and didn't realize it was still in progress. d) I didn't realize what time it was because I am unable to afford a watch (don't have $500.00 in your account), and was delayed by Staff (give name, or description, if known).

9. 203 - Threatening another with bodily harm or any other offense:

You get a "shot" for threatening another person. O.K. guys, bring out the dictionary again. Even Blacks Law Dictionary offers substantial basis for dismissing your incident report. Defense: a) The communicated intent to inflict physical or other harm on any person or on property did not exist based on the statements made. The burden of communication of an effectual or intended threat must be an intention to injure another or his property by some unlawful act. (*State v Schweppe*; 237 N.W.2d 609,615) A "threat" to be effected must have intention or determination to inflict punishment, loss or pain on another, or to injure his property by commission of some unlawful act. (*U.S. v Doulong*, 60 F Supp 235,236) Also, for a "threat" to be intended. a menace of such nature and extent to unsettle the mind of the person on whom the threat is directed, and to take away from his acts that free and voluntary action. Is the alleged "threat" serious, as distinguished from words uttered as mere political argument, idle talk or jest. In determining if the threat was intended, the context and probability must be considered.

Checking Your Written Defense

After your draft is completed, proof the document (proof: a term that means "to read the document to figure out if and what changes are needed"). Look for errors in spelling and grammar; smooth out rough areas making it easy to read and understand; cut out excess words that don't add to the meaning. Then type, or write, it again. Always keep a copy for your own records. Clear and precise sentences and questions will get you better results. Your presentation may be even good

enough to beat the Incident Report without the calling of any witnesses. It does happen sometimes. Remember, Keep It Simple!

Re-Hearings After Appeal

UDC or DHO may send the incident report back for further investigation or to clarify errors shown in the report. Sometimes an incident report is written with additional charges or allegations the second time. The Region or Central Office may also send your incident report back for a re-hearing rather than dismissing the action after you have appealed. Make sure the disciplinary hearing staff hold to the appellate authorities directions, and re-hear the issues that where ordered. Was a re-hearing ordered on the original charge or a new charge? Often, prisons staff will amend the charges and attempt a new attack at you.

In your defense, it would be worth considering using these older or previous incident reports as evidence for yourself:

1. The new issues are moot and cannot be brought up now against you because they are untimely according to the time limitation table in 28 CFR § 541.11[431].
2. If the new incident report is accurate and the old incident report is not, what makes us sure the new version is not the wrong or incorrect version, and the older "more correct?"

In your written defense, attach a copy[432] of the previous incident report properly marked to match the list of Evidence on the front of your written defense.[433] Then make comparisons between the two incident reports trying to reduce the credibility of the writing staff. Supply these in writing and with copies attached to your written defense forcing their admission as evidence. Some hearing officer try to forget about the previous attempts by the staff to complete a simple form, even though they did it wrong but won't admit it.

If you lose the hearing, you have now properly prepared the groundwork for your winning appeal by following these simple procedures. The Region may order a new hearing, giving you a chance to get written statements from others you wish, hopefully while you are NOT in segregation.

Statements you get from other prisoners should be in Affidavit format if possible. Give the new hearing officer photocopies, stapled to your written defense. Otherwise DHO may just say, "I won't consider these," and give them back. Make it a nice package so your Procedural Due Process Rights are clearly in violation when they do this. If you don't have copies, ask staff for copies from your Central Inmate File. You have the right to review your Central Inmate file once every thirty days in the BOP.

Affidavits can be drafted without the need of a notary as long as the meet the requirements in 28 U.S.C. § 1746 where the United States Congress saw a possible problem might exists so they provided for specific language allowing for documents to not be notarized as long as they met the following guidelines:

> Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:
>
> (1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury

431 See: Table - 2, in Appendix A.

432 Attach copies, not originals, just in case you never see the paperwork again. Get photo-copies, and mark them "Exhibit 1", 2,, etc. NEVER GIVE UP YOUR ORIGINAL PAPERWORK.

433 See: Sample Defense # 3, in the chapter Writing Your Defense.

under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)". 28 U.S.C. § 1746.

A Sample Affidavit should look like the following:

STATE OF [insert name of state affiant is in])
) ss AFFIDAVIT of [insert name of person making statement]
COUNTY OF [insert county affiant is in])

I, Allan Parmelee, being duly sworn, deposes and says:

1. That I am an outside recreation worker and was present on the field on 2/14/94,[434] at 3:00pm during what staff called an altercation between two other persons known as ________ and ________.[435]

2. That I witnessed the incident of an alleged fight on this date.

3. The two persons I know were friends and just playing around and didn't hit the other and were not angry at the other.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and I have personal knowledge and can testify if called to my personal knowledge regarding to the enclosed information.

____
Name & Number

Signed this _____day of ____ 199__.[436]
____
Your Printed Name & Signature

[434] Describe the date and time of your presence.

[435] Describe where you where, and who you saw by name, or physical description if you don't know their name.

[436] At this stage, you don't need a notary.

19 - APPEALS to UDC (pre or minor hearings)(BOP)

State procedures vary. Some states only allow 24 hours to file an appeal. In WA, your appeal goes only as high as the warden. N.Y., MI and OH have system hearing officers. You are advised to request an extension of time to file your appeal immediately, at the end if the disciplinary hearing. Check your local state rules, and become familiar with their requirements.

On February 5, 1996, the Federal Bureau of Prisons adopted a new regulations changing the time limits in 28 CFR § 540, 542 and 545 to file appeals, responses and administrative remedies.

Even though these time limits change sometimes from one year to the next, check the current time limitations for your institution. The Federal System allows 20 days, from the date of the UDC action, to file your appeal[437]. Now that 20 days includes the time it takes the counselor to post your appeal written on a BP-9, on Sentry (the computer).[438] You have the right to appeal as is described in[439], and you may seek help from your staff rep, or other prisoners. "... an inmate may obtain assistance in preparation of his complaint or appeal from other inmates or staff."[440]. Sometimes the staff will tell you otherwise (because they like to see you suffer), but they are in error.

If you need an extension of time to file your appeal, you may request, in writing, an extension for that time, from your counselor (or whoever is designated). Be sure to ask for enough time to do all your paperwork, hand it in to your counselor, being sure to allow time enough for him to post it to Sentry. You get BP-9's from your counselor.

If your BP-9 appeal is denied, you may file a BP-10 and have it at the Region within 20-days. If denied, you may file a BP-11 to Washington within 30 days. Extensions for time to file these forms, may also be granted for valid reasons to the appropriate office. Read Chapter 20 for more discussion of writing defenses and appeals where more detail is given.

The 1996 modifications to 28 CFR § 542.15 are especially important to the new deadlines you must meet on filing appeals. If your appeal is rejected by the staff for any reason, be sure to consider appealing that decision as outlined in 28 CFR § 542.15(c).

---

[437] 28 CFR § 542 (Administrative Remedy Procedures & Time Limits)

[438] (BOP) Program Statement 1330.11 will give you more details on that process regarding the requirements of staff when filing a BP-9. Don't just read the Institution Supplement the institution publishes to compliment the Program Statement. Program Statements are from Washington as Institution Supplements are from the institution and may be issued in error (wrong).

[439] 28 CFR § 542.

[440] 28 CFR § 542.13 (b) (last sentence).

20 - APPEALS to DHO (major offenses)(BOP)

When this was written the federal system allowed up to 30 days to file an appeal after you receive your written copy of the disciplinary panels decision. DHO normally has 10 days to give you a copy of their decision and their reasons.[441] Sometimes it takes a little longer than 10 days to get your copy of the disciplinary hearing officers findings. Don't worry about losing your appeal rights, but start complaining, in writing and always be prepared for litigation. Your 30 days does not start until you receive your decision from DHO.[442] It will be dated with the date on which you receive it.

Even though these dates change sometimes from one year to the next, check the current time limitations for your institution.

First, you must request a BP-10 (administrative appeal form) from your counselor, explaining it is for your DHO decision appeal. You do not have to go through a BP-9 (administrative complaint that goes to the warden) as you do with a UDC action, since DHO is designated from the Region or Central Office[443].

If you need an extension of time to file your appeal, write to the Region in time for them to receive it (about 5 days), giving them your reason for the extra time you want. It will be granted, if your reason is valid. I don't mean to say, "I just have not had the time." Your reason must be reasonable and valid. For example; "I have been unable to use the records that I need to prepare my appeal," or "I need to do legal research into procedures used and the law library is only open on a limited basis." This, or something similar, would be acceptable to them. Then ask for enough time. It is better to ask for too much time than too little. If you think you need 15 days more, ask for 25 days. They will most likely give you that, and a little extra for good cause. You can also ask that they tell the institution to give you what you need for your appeal.

Your 20 days, includes mailing time to the Regional office.[444] To be safe, allow about 5 working days for mailing. It is your responsibility to mail it, not your counselors. If you are not happy with the Regions' or Central Offices' decision, then, after receiving the Regions' response, you may appeal that decision within 30 days - to Washington. See the chapter, Writing Your Appeal, for more information on preparing your defense and your reason for an appeal.

Always send your appeals legal mail or certified mail so it is logged as to the date you mailed it if prison authorities claim the time has expired to file an appeal. Failure to appeal could lead to procedurally defaulting your claim in their favor.

Read Chapter 21 for more discussion of writing defenses and appeals where more detail is given.

NOTICE OF CHANGE: As of passing by the BOP into law in the 2 Q 1996, , 28 CFR § 541 has been amended . Also see 60 FR 54922, Final Effective Date 07/00/96

The changes implement revisions provided in the Violent Crime Control and Law Enforcement Act of 1994 which requires inmates sentenced for crimes of violence to "display exemplary compliance" with institution regulations in order to earn good conduct Time. (GCT). When this revision is finally published, we will publish our 7th Edition of this manual.

Based on my review of a preliminary copy, if you are convicted of a crime categorized as a "violent crime" sanctions will be more severe than those convicted of "non-violent crimes. We will be in touch with the ACLU for comment on this issue.

For more information contact: Roy Nanovac, Rules Administrator, Department of Justice, Bureau of Prisons, HOLC Room 754, 320 First St. NW, DC 20534. (202) 514-6655.

---

441 28 CFR § 541.17(g).

442 28 CFR § 541.19.

443 28 CFR § 541.19 and 28 CFR § 542 (Administrative Remedy Procedures).

444 28 CFR § 542.14 (processing time limits).

21- WRITING YOUR STATE DEFENSE OR HEARING APPEAL

Good Writing Is Persuasive Writing

Good writing requires effort at two levels: (1) overall structure and (2) sentences and paragraphs. A written defense or appeal has a formal structure and its nature as a persuasive document. Structure is important as it applies to each part of the written defense or appeal.

This section deals with sentences and paragraphs. Too often, legal writing is to writing as legal reasoning is to reasoning: artificial, strained, and impenetrable to the uninitiated. Everyone who are placed in a position to write a defense, motion or appeal would benefit from reading any one, or more, of a dozen good books on writing.[445] Opinions by careful prose stylists also are worthy of study.[446] Among other writing books such as Shakespeare as an example, these books provide more complete guidance than can be given here.

There are some rules, however. First, get away from the form letter and from the samples and pleadings found in many law books, or even this manual. Drafting a written defense or appeal brief is a bookish undertake that requires translating that outline-or even a mental picture of events-into sentence structure designed to capture past events for a reader and hold that reader's interest.

Second, to quote the best advice in an excellent book on writing, "Omit needless words," according to Wilham Strunk, Jr & Elwynn B. White, *The Elements of Style* (3d ed 1979); Use simple declarative sentences. Experts on language tell us that when meaning is embedded in complex phrasing, the reader or hearer is quickly lost.[447] Consider this sentence: "The officer testified *that* he took a sample *of* the breath *of* the defendant to test for *the presence* of traces *of* fumes of alcohol." Every italicized word identifies a connective word or words that embed, or mask, communication. When a modifier is used with a preposition, instead of being placed with the word modified, the sentence is weakened: "alcohol fumes" instead of "fumes of alcohol." Whenever a connective must be used, strike out its excess baggage: "the presence of," in the example, but also "in terms of," "the fact that," and other offenders. Go through the draft looking for remnants of bad grammar, wordy sentences words only dying lawyers say: "The learned hearing officer ordered and decreed . . ." One verb is enough to power that sentence, particularly if the baggage-word learned is jettisoned or removed quickly.

Third, speak as directly to the audience (the hearing officer) as you are talking to them as a professional co-worker. Often, custom does not permit the defender, in writing a defends or appeal brief, to say "you" and "your" in referring to the intended audience. It is "this court's teaching" in a prior case and not

---

[445] See, e.g, Wilham Strunk, Jr & Elwynn B. White, The Elements of Style (3d ed 1979); Herbert E. Read, English Prose Style (1980); Richard C. Wydisk, Plain English for Lawyers (2d ed 1985).

[446] Among noteworthy stylists are Carolyn King and Patrick Higginbotham of the Fifth Circuit, Stephen Remhardt and Alex Kozmksi of the Ninth Circuit, and Richard Posner of the Seventh Circuit. Other good works on brief writing include *Art of the Appellate Brief*, 72 ABAJ 52 (Jan Albert Tate, Jr, *The Art of Brief-Writing*, What a Judge Wants to Read, ABA Section of Litigation, The Litigation Manual 229 (1983), Christopher H. Hoving, *The* 1986), Eugene Gressman, Winning on Appeal: The Shalls and Shall Nots of Effective Criminal Advocacy, 1 Crim Just 10 (Winter 1987); Harry Pregerson, *The Seven Sins of Appellate Brief Writing and Other Transgressions*, 34 UCLA L Rev 431 (1986) (excellent advice on brief-writing and valuable guide to appellate practice in the Ninth Circuit).

[447] The same issue is raised by police-citizen confrontations. See Michael E. Tigar, *Crime on Camera*, Litig 24 (Fall 1982).

"your teaching." But get as close as good manners will allow. "This court's holding in . . . " is much better than "It was held in...."

Fourth, speak of real people, not of categories. The plaintiff, defendant, the accused and witnesses have names. Use them. A busy hearing officer, appeals review committee, judge or law clerk might forget whether a witness was called by one side or the other, or might even get the accuser(s) and defendant confused in the midst of a densely written argument. One may include an occasional subtle reminder by repeating a phrase such as "the defendant, Mr. Smith." By the way, all people in administrative hearings and judicial proceedings have titles, such as Mr., Ms., and so on; they are not simply surnames such as just "Smith". This is particularly important in showing a human personality in a criminal defendant.

Fifth, avoid the passive voice. Write sentences in which people are doing things. This is a more general statement of rule 3. "It was testified that Inmate Smith failed to inspect the coupling before the day shift reported for work" is twice weakened by "It was testified that." First, the passive phrase does not tell us who testified, which may be important. Second, the sentence may be a missed opportunity to tell the reader something important about Mr. Smith's error. The politically correct term of an inmate is "Prisoner." If a governmental agency investigated and concluded that Mr. Smith erred, the sentence should reflect that. If Mr. Smith is the defending a charge of "failure to perform his job" or contributory negligence is an issue, and if the defender is arguing a staff statement that might read, "Several witnesses testified, and the hearing officer could well conclude, that Mr. Smith failed to inspect the coupling before the day shift reported for work, refusing to perform his job." You will want to turn this around in a written defense or appeal such as: During the normal performance of my duties, I did not notice the defective coupling, that appears to have been that way for months, therefore, reasonable evidence indicating that I refused to perform my job does not exist.

Sixth, get rid of jargon. Most people have cars. They drive to meet people or to keep appointments. Yet when required to write a brief about government agents making an arrest, they insist that the police responded to the scene, exited their vehicles, and effected arrests. Would it be better to write: "On January 14, 1987, John Doe opened his front door. On the steps stood five government agents, armed with everything except a search warrant." By careful editing, every stilted lawyer word can be removed. It sometimes helps to read the draft out loud because most people and lawyers use less jargon in ordinary speech.

Seventh, put away the sugar bowl, the saccharine pills, the purple crayon, the cliche mill, and the metaphor gun. Sickly sweet, sophomoric, cliche-ridden writing, studded with inapt metaphors, is unpersuasive. The quiet force of facts, arrayed in active declarative sentences, will bear the argument along.

Eighth, watch out for humor and sarcasm. The only people entitled to be funny are the hearing officers or judges, and everyone will laugh at their jokes. The advocates' attempt at humor may come off as rough or forced. Be eloquent, polite, but dignified.

Finally, although it has been said before, be accurate. This canon is only partly one of style. The deadliest retort, from opponent or hearing officer, is that a fact is misstated or exaggerated,[448] or that an authority is misquoted or-worse yet-has been overruled. Credibility lost by such carelessness is not easily regained, if at all.

Appellant's or Petitioner's Opening Brief-Selecting Issues and Order of Presentation

Usually, the final selection of issues on appeal is not made until after the issues have been combed and digested and backed up with supporting undisputable facts. In comparison to federal appeals, why should this case be one of the less than 20% to result in reversal? If the you can answer that question in one or two brief, convincing paragraphs, he or she is well on the way to identifying and ordering the issues in the opening written defense or appeal brief.

Unless the you are on your own writing your defense or appeal, an open-ended discussion with another person familiar with the rules is the best means to make these decisions. Even if you are on your own, search out someone with whom to rehearse the issues, perhaps a law clerk or another jail house lawyer.

Defense issues consisting of short single sentences should be written called a memorandum before writing your final defense

---

[448] Another reason for being careful in stating facts is illustrated by *City Natl Bank v United States*, 907 F2d 536 (5th Cir 1990) (court of appeals may, in its discretion, treat statements in briefs as binding judicial admissions).

or appeal, outlining the facts and possible legal theories. The theories should be broken down as: (1) legal errors, (2) factual errors, and (3) procedural errors. The memorandum should note whether any proposed claims of error were not raised and preserved in the disciplinary hearing.

Most people are afraid of cutting down the number of issues presented on an appeal. They are afraid of missing something that may be found to be important later. This is a valid fear, but attempt to make judgments based on legal cases, laws, rules or statutes. It cannot be repeated too often: this written defense or appeal may win or lose the case. You do not enhance the chances of winning by throwing in marginal issues. Stick to the relevant issues.

It is more difficult to gain the needed distance from the hearing process and evaluate the merits and importance of issues for defense when you are the person directly involved. Being in a disciplinary hearing is exhilarating and enervating. Hearing battles that loom largest in memory are those that filled one with a particular sense of triumph or defeat at the time. These will not be the battles that necessarily produce the best issues for appeal, or the ones that replay well-or even interestingly-on the cold record. Too, successful disciplinary defendants cannot survive without huge egos. Wounds to the disciplinary defendants ego are not the stuff of which successful appeals are made. Theoretically, only unjustified wounds to your liberty or pocketbook are fair game in the court of appeals.

One is not free to compromise by raising issues in a kind of laundry list in the written defense or appeal brief, without discussion. An issue abruptly and uninformatively mentioned in a defense is not preserved for appeal, and the review committee or the courts are free to disregard it.[449] Another major theme of discussion must be the increased judicial reliance upon the harmless error rule in administrative, civil and criminal cases. Deference is the watchword of review committee's and appellate judges with busy dockets. Review committees and appellate judges look for a way to find the district judge or hearing officer fundamentally right. They strain to disregard errors that did not deprive a party of a fundamentally fair trial and would not if corrected on remand or retrial reshape the outcome. As noted elsewhere in this manual, this rule of deference yields at times in compelling cases. But it must dominate the discussion of issues for the defense or appellate brief.

The rule of deference looks to the merits. For this reason, one should pay close attention to any issue of fact worthy of defense and appellate consideration. For example, suppose the issues are sufficiency of the evidence, an error of law in the witness questioning or reliability of evidence, and a procedural point concerning "intent to break a rule." While the general rule is that evidence, witnesses, questioning and intent are considered on a whole, every review committee and appellate court knows the importance of properly considering witnesses, evidence and the elements of the claims and defenses involved in the action. A witness or evidence error, if preserved by a proper objection, is therefore a good candidate for top billing before a review committee in the appellate brief.

However, even with such an issue, the sufficiency point should have pride of place if you can, without exaggeration and after careful review of the record, argue persuasively that the decision or judgment is not supported by the evidence, if considered properly. If the sufficiency point is marginal or doubtful, then the legal argument should go first and you should, in the summary of argument and in introducing the sufficiency point, note that the error of law misdirected the trier of fact. The evidence may not be insufficient to support the judgment, but you must argue that the legal error could have made a difference in a factual dispute that was fairly debatable.

A final canon of choice is: give preference to issues that decide the whole case rather than pieces of it. While there is no jurisdictional bar to the court considering an issue that does not result in reversal of the entire decision of judgment, there are strong prudential reasons for leading with the larger issues. First, review committees as do courts of appeals have discretion to refuse review of nondispositive issues under certain circumstances. Second, the attention span of review committees, judges and law clerks is no different, on the average, from that of ordinary mortals. To hold the reader's attention, a written defense or appeal brief must start strong.

---

[449] Judge Posner's remark in *United States v Dunkel*, 927 F2d 955, 956 (7th Cir 1991), *aff'd*, 986 F2d 1425 (7th Cir 1993), that "[J]udges are not like pigs, hunting for truffles buried in briefs." This is worth remembering - for more than one reason.

Writing a Defense Argument

This will be the last important part of the defense or appeal brief you write. If the headings on sections of the defense or appeal brief, which are reproduced in the, are informative, and if the issues presented are well written, then one may ask why the necessity of a summary of argument be presented. You may choose not to bother writing one.

However, if the defense or appeal brief contains one or more long and complex arguments, a summary can be useful and should be included. The summary should be no more than 5 to 7% of the length of the written defense arguments, that is, if the argument portion of the brief consumes 2 pages, the summary should be no more than one or two paragraphs. This is a challenge, not to be avoided by simply repeating the issues presented or the headings in the defense or appeal brief.

The summary of argument represents a unique opportunity to give an overview of the entire action or case and of some or all of the issues.

When appealing a disciplinary hearings written decision, your statement of an issue might be: "Whether the disciplinary being officer's proof, which was at best ambiguous and vague, was insufficient to sustain a verdict of guilty." You should say, "Whether, indulging all inferences favorable to a finding of guilt in this alcohol manufacturing action should not be affirmed, given that no direct evidence that the defendant participated in the manufacture of alcohol and was not associated with the principals in the manufacturing the officers thought they discovered. An interesting illustration, in *United States v Cook*, 783 F2d 1207 (5th Cir), affd on reconsideration, 793 F2d 734 (5th Cir 1986), in which the court of appeals first reversed then changed its mind on rehearing and affirmed a conviction, basing the change upon a very different total view of the evidence.

Federal Administrative Appeals

Check the new rules for federal prisoners under 28 CFR § 542.15-Appeals. Now, they are trying to limit the number of pages you can write your appeal on to the approved appeal form, and one letter size page. But then, they are also stating that if an issues or defense is not raised in a lower appeal, it cannot be raised in a higher appeal. I would remember all the recomendations in this maual, and if you absolutely must make your appeal longer than 1-1/2 pages, than do so. Just don't miss and issue to raise on appeal.

Only 3 reasons exist in the federal system for appealing your UDC or DHO decision. The grounds are similar for state appeals. You must remember these reasons when you are drafting your appeal[450]. They are as follows:

1. UDC/DHO (the disciplinary committee) didn't follow their respective rules governing hearings, as is described in this manual, and in theirs.[451]

2. UDC/DHO (the disciplinary committee) did not base their (respective) decision on the greater weight of the evidence, in the presence of conflicting evidence.

3. The sanctions were extreme and not appropriate for the violation that resulted in a conviction[452]. Good Conduct Time (GCT) is often calculated wrong when given to DHO (the disciplinary committee). For *New Law persons*, the policy says that DHO (the disciplinary committee) can only take what time you have in your physical year; they CANNOT take vested GCT time[453]. Parole or old law persons can get slammed harder by taking unreasonable amounts of good time.

Too often, appeals are written but the basic rules of writing are not followed. I have gone into them in length, in the chapter Writing Your Defense. This area here, is a little different, and a lot the same.

Good Writing Rules:

a) Keep it simple, to the point, and conclusive.

---

450 28 CFR § 541.19.

451 28 CFR § 541.15 & § 541.17.

452 See: sanctions 28 CFR § 541.13 (table 3-6), also in Appendix A, shown only in summary, next to the violation codes. See the CFR for more detail ON federal prisoners rights.

453 See: 28 CFR § 541.13 (table 4)(1)(b.1), also in Appendix A without the additional text shown that is in the CFR.

b) Remain focused on the relevant issues. Don't write about things that will not help your case. Doing that will detract from what you are asking the reader to do for you.

c) Do not dwell on unimportant issues.

d) Try to keep your appeal under 2 pages, not including evidence.

e) Label your evidence, if more than one (1) item exists. Mark the number clearly, on the top right-hand corner: EXHIBIT #___

f) Keep your facts organized. Have the progress of events, flow as they happened, through both your appeal writing and your evidence.

Several ways exist to write an appeal. Here is one method to help keep the issues, and evidence, clear and separated. Start with an opening statement, summarizing how the UDC or DHO erred in the hearing. This should be about 2-3 sentences at the most. An example of such an appeal could be as follows:

Simple Appeal

[caption](name, number, date, etc)

"I asked for several witnesses to be called to my DHO hearing. These witnesses could have changed the weight of the evidence against me, for a code 224 violation. If they had been called, it would have been revealed that I did *not* commit the prohibited act."

Evidence:

1.DHO decision; dated 2/13/92; DHO officer,H.Bullwinkle Exhibit #1
2.Written statements by the witnesses, which were not called
    Exhibits #2 (2 are attached)
3.Medical Reports related to this incident (3 pages attached)
    Exhibit #3

Issues:

1. DHO did not consider all evidence by refusing to call the witnesses requested. They would have testified to the material in the attached statements. (See: Exhibit 2, of 2 pages)
2. DHO did not follow the rules as proscribed by Program Statement 5270.7, "Inmate Discipline and Special Housing," and 28 CFR § 541.17(c) regarding the calling of witnesses, and the "Greater Weight of the Evidence."
3. The sanctions were extreme and more severe, since this is my first Incident Report. The approved sanctions allowed are only 15 days, not the 45 that I received.

Conclusion:

DHO refused to call the witnesses, without having just cause. He failed to review all the evidence put before him. The

sanctions imposed were extreme, and not considered "normal" under the circumstances.

> I request the evidence be reviewed, the witnesses be interviewed, and the written questions (which I submitted) be answered. I also request the sanctions be reduced accordingly, with strong consideration to expunge this Incident Report.

Complex Appeal

Regional Appeal (BP-10)

John Martin(aka J.M.) Date: April 29, 1995
03003-089 Incident Report Date(s): 4/4/95
Alleged Violation(s): 102-A & 329 Pages 1-9

Introduction

On 3/30/95, a Detention Order was written to John Martin based on "pending investigation." On April, 4, 1995, at 1:30pm, an incident report was issued to John Martin ("J.M."), register # 02801-030, for violation(s), pursuant to 28 CFR § 541.13, Table 3, code 102-A; (escape from escort; escape from a secure institution, or administrative institution) "A", attempted, pursuant to 28 CFR § 541.13(b); and on 3/30/95, a second incident report was issued to John Martin for violation pursuant to 28 CFR § 541.13, Table 3, code 329 (destroying or altering or damaging government property or property of another person, valued less than $100.00) out of the same conduct from the April 4, 1994 incident report. Both incident reports were written on April 4, 1995 and delivered that evening to Mr. Martin.

John Martin appeals on the grounds that (1) DHO did not follow their respective rules governing hearings; and, (2) DHO did not base their decision on the greater weight of the evidence, in the presence of conflicting evidence; pursuant to 28 CFR §541.19.

I Argument

Proper notice of the charges or basis of the investigation were not provided Mr. Martin pursuant to the rules in the Administrative Detention Order.

In the Administrative Detention Order, proper notice was not proved as to the content or basis for the pending investigation.

II Argument

In violation of 28 CFR § 541.14(b)(1), prison staff continued questioning Mr. Martin relative to pending allegations of attempted escape knowing the FBI and Marshal's Service were called to question Mr. Martin.

Mr. Martin was questioned by numerous staff prior to being informed of (1) his rights, (2) the reason for the investigation, (3) the possible penalty he faced through the investigation by the government for attempted escape.

III Argument

Pursuant to 28 CFR § 541.11, Table 2 and 28 CFR § 541.15(a), (time limits in the disciplinary process), both incident reports were written more than 24-hours after staff became aware of the alleged rules violation without documenting or with justification being in the record and were thus waived by staff to file the complaints against Mr. Martin.

The code-102-A violation is alleged to have happened on 3/29/95, and staff became aware of the incident on 3/29/95. A disciplinary report was not written until 4/4/95, more than 6 days later. The code-329 violation is alleged to have happened on a date prior to 3/30/95, and staff became aware on of the incident on 3/30/95, but the incident report was not written until 4/4/95, more than 5 days later.

According to the prison rules and regulations incorporated into statutes of the C.F.R.;

> (a) "Staff shall give each inmate charged with violation of Bureau rules a written copy of the charge(s) against the inmate, ordinarily within 24 hours of the time staff became aware of the incident."

In *Wolff*[454], the court held staff had to give a prisoner a copy of the infraction within the time required by statute, regulation or on good cause noted in the record. According to the record, no "good cause" for the delay in providing Mr. Martin the incident report as required by statute.[455] In fact, prison staff adopted a "relaxed attitude" regarding the merits of the allegations and the timely filing of relative paperwork with intentional disregard for Mr. Martins legal rights and established rules and statutes.

IV Argument

The charge for a code 329 violation fails to identify any person in box 11 of doing anything. The term used is "you ...";

In conjunction with an interview with Mr. Bob Harvey, FBI and Mr. Elmer, Visger, USM. John Martin is not identified in the body of the description as to any activities he may or may not have committed. The incident report writer fails to clearly indicate the identity of "you". The burden of the evidence and proper procedural descriptions is lacking and relies on speculation.

V Argument

The minimum requirements of due process in violation of 28 CFR §541.17(c), and 42 U.S.C. §1983 in the DHO hearing by not calling the witnesses as requested on the UDC hearing forms without justification is lacking.

On 4/6/96, John Martin went before UDC for a preliminary hearing. At that time, he requested witnesses, but was unable at that time to provide names or descriptions of prospective witnesses. No further follow up was made by any staff member to obtain names or descriptions of the witnesses. Mr. Martin made an objection at the hearing, but it was ignored by DHO to not calling his requested witnesses. The Supreme Court held that if prison officials refuse to call the requested witnesses, the burden is on them to explain their decision, at least in a limited manner[456]. Statutes may require that the reasons be documented at the time of the hearing[457].

VI Argument

The minimum disclosure of evidence requirements of due process in violation of 42 U.S.C. §1983 was not provided in the referenced documents contained in the DHO report, page 2, (d) as requested by Mr. Martin in memo's written to staff requesting

---

454 *Wolff v McDonnell*, 418 U.S. 539, 94 S Ct. 2963, 41 L Ed 2d 935 (1974).

455 28 CFR § 541.11, Table 2; 28 CFR § 541.15(a).

456 *Ponte v Real*, 471 U.S. 491, 495, 105 S.Ct. 2192, 85 L Ed 2d 553 (1985).

457 *People ex rel Vega Smith*, 66 NY2d 130, 485 NE2d 997, 495 NYS2d 332 (1985); *McGinnis v Stevens*, 543 P2d 1221 (Alaska 1975).

copies of written memoranda intended to be used against Mr. Martin at the DHO hearing.

Copies of documents in hearings are required to be provided to Mr. Martin. In *Scarpa v Ponte*[458], the court agreed that each person has the right to review, in time to prepare for a hearing, normally 24-hours before, access to the evidence unless a "penological" interest is stated on the record. During the *Scarpa* disciplinary hearing, due process is violated within the scope of his Constitutional rights. In *Young*[459] a prisoner was accused of writing a threatening letter to his cellmate. The court decided that the prison staff violated *Young*'s due process rights even though he was not present at the disciplinary hearing, and the threatening letter was not produced.

In *Chavis v Rowe*[460] in the 7th Circuit has analyzed the issue and found an existence to due process rights and the prisoners' receiving evidence staff intend on using against them. The need to understand if a prisoner is wronged, also comparing *Brady v Maryland* and *Harris v MacDonald*.[461]

VII Argument

The minimum requirements of due process in violation of 28 CFR §541.17(f), and 42 U.S.C. §1983 are not met in the DHO finding with the burden of "some evidence" in the presence of contradicting evidence.

Without a confidential informant, comment or other "some evidence" indication of "escape", the finding by DHO is in error.[462] In the DHO report, Sect. V, para 1, the DHO states that "... Lt. Atterbury ... determined that on 3-29-95, J.M. was making plans to escape...." without any cooberating information or supporting evidence other than mere speculation and hypothetical theorizing. In fact, other staff make no mention of a change in behavior, but in fact, on the record indicate "no change in behavior." (DHO Rept. Sect V, para 4).

The foundation is established it is commonly known by staff that inmates will routinely make, modify, repair, and alter clothes within the institution. Since street clothes are allowed on the compound, need for a pair of pants made from a warm wool blanket would also not be considered unusual in the cold winters of Minnesota and the time of year made.

DHO makes note of its "pre-disposed opinion" as to Mr. Martins' guilt. DHO goes on to state that in light of a presumption by Lt Atterbury of an intent to escape, Mr. Martin is required to prove his "proof of innocence". (DHO report, Sect V, para 6, sent 1).

Gloves are given out by persons requesting them from staff, from the landscaping department and with other prisoner connections working in the laundry department for a fee. Common practice among inmates is to trade and distribute "better clothing and accessories" than normally provided through the Bureau channels without any intent or thought of escape.

The statement attached to the DHO report of Bruce Parnin, Correctional Counselor, supports John Martin's claim of innocence.

---

458 *Scarpa v Ponte*, 638 F Supp 1019 (D Mass 1986).

459 *Young v Kann*, 926 F2d 1396 (3rd Cir 1991).

460 *Chavis v Rowe*, 643 F2d 1281 (7th Cir), *cert denied*, 555 F Supp 137 (ND ILL 1982) and *Mendoza v Miller*, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986).

461 *Brady V Maryland*, 373 US 83, 83 S Ct 1194, 16 L Ed 215 (1963) compare with *Harris v MacDonald*, 555 F Supp 137 (ND ILL 1982), and *Mendoza v Miller*, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986).

462 *Wolff v McDonnell*, 418 U.S. 539, 94 S Ct. 2963, 41 L Ed 2d 935 (1974).

(Staff Rep. Statement). The counselor informed DHO that "it was not uncommon, but standard procedure for inmates to have the sewing machine in their room". Mr. Parnin goes on to say, "... it is always in someone's room.". Mr. Parnin also informs DHO that "It's normal for inmates to alter clothing, and it is allowed." He also noted "normal behavior" of Mr Martin, and he thinks escape plans were unrealistic and not being considered.

The evidence relied upon as required by statute has not been met by DHO for a finding of guilt. Courts have held that "proof which a reasonable mind may accept as adequate to support the conclusion or final facts[463] . In *Corcoran v Smith*[464] the courts decided that relying on a written misbehavior report prepared by a prison staff member was deemed *NOT* to meet the "evidentiary" requirement. Lt Atterbury used the argument that "guilt was indicated and substantially more probable than innocence which DHO agreed" and was not supported by any "reasonable evidence".

Using the argument in *Superintendent v Hill*,[465] as a test in this case demonstrates a standard as "some evidence" for an infraction report and finding. Some courts have held "some evidence" is not proper, and the "preponderance of the evidence" standard must be used, but later was reversed on the substantive part[466]. The use of the "substantial evidence test" to decide if the finding by the hearing officer is correct, is a violation of due process. This assumes that "substantial evidence" is less than a "preponderance of evidence" and is more than is required for due process.[467]

Several previous court decisions held that *Goff*[468], was concluded to accept the proper standard of evidence by a disciplinary hearing officer must be the "preponderance of the evidence." and the standard by the court to use in reviewing the findings of the disciplinary hearing officer is "some evidence."[469]

The existence in the record of "some evidence" is not supported without extreme presumptive measures on the part of the prison staff. Existence of "some evidence" is not shown on the record without gross speculation.

VIII Argument

The complaint against Mr. Martin lacks supporting evidence and "intention" of breaking a rule. Intention directly relates to the "Standard of Proof Requirements" to justify a finding by DHO.

In the DHO report or any supplied or inferred evidence to John Martin, existence of any description of "intent" is lacking. Without some "proximate cause or link"between the alleged improper property in Mr. Martin's room, the presumption of escape

463 *Shakur v Coughlin*, 182 AD2d 928, 582 NYS22d 302 (1992).

464 *People ex rel Corcoran v Smith*, 105 AD2d 1142, 482 NYS2d 618 (1984).

465 *Superintendent v Hill*, 472 US 445 (1985).

466 *Goff v Dailey*, 789 F Supp 978 (SD Iowa 1992), *aff'd in part, rev'd in part*, 991 F2d 1437 (8th Cir 1993).

467 *Strickland v Beyer*, 1990 US Dist LEXIS 2510 (DNJ 1990).

468 *id*

469 *Woodby v Immigration Service*, 385 US 276 (1966); *Wolff v McDonnell*, 418 US 539 (1974); *Mathews v Eldridge*, 424 US 319 (1976); *Superintendent v Hill*, 472 US 445 (1985); *Brown v Fauver*, 819 F2d 395 (3rd Cir 1987); *U.S. ex rel Miller v Twomey*, 479 F2d 701 (7th Cir 1973), *cert denied*, 414 US 1146 (1974); *Engel v Wendl*, 921 F2d 148 (8th Cir 1991).

is merely conjecture. In defining "intention" the courts have held a proximate connection must exist as follows:[470]

> Determination to act in a certain way or to do a certain thing. Meaning; will; purpose; design.
> "Intention" when used with reference to the filing of an administrative complaint, means the sense of the words contained therein. When used with the reference to civil and criminal responsible [as this is the case], a person who contemplates any result, as not likely to follow from a deliberate act of his own, may be said to intend that result, whether he desires it or not.
> Intent: and motive should not be confused. Motive is what prompts a person to act, or fail to act. Intent refers only to the state of mind with which the act is done or omitted.
> General Intent: in criminal law, the intent to do that which the law prohibits. It is not necessary for the prosecution to prove that the defendant intended the precise harm or the precise result which happened.

Also, in applying the Four Corners Rule, the intention of parties, especially that of an agreeing person, is to be considered from the action as a whole and not from isolated parts thereof.[471]. The record of the DHO proceeding fails to show or demonstrate *ANY* intention.

IIX Argument

Mr. Martin was issued two incident reports in violation of his double jeopardy rights out of the same conduct (1) escape from escort; escape from a secure institution, or administrative institution - attempted and (2) destroying or altering or damaging government property or property of another person, valued less than $100.00.

The Fifth Amendment of the U.S. Constitution has not been waived even in consideration of Mr. Martin's conviction. In Massachusetts, *Mr. Forte* was being sanctioned for assaulting a guard. The court decided on March 8, 1995 in *Commonwealth v Casper Forte*, No. 97548
[unpublished as this is written]. Mr. Forte was charge with assaulting a guard, among other things. He was charge in a disciplinary hearing and later indicted in court for event from the same actions. He was found guilty and sanctioned by the goon court, and the prosecuted in the state court. Mr. Forte moved the court to dismiss based on Double Jeopardy, and *U.S. v Halper*,[472]and won. The argument of the government is that an administrative finding of guilt and subsequent punishment is purely administrative and does not constitute punishment, but consideration to a "grievous loss" was not considered. In *U.S. v Austin*[473], the issue deals with forfeiture of property and *Austin* prevailed. But the court held that regardless of the value of property, or the cost to the government, forfeiture was punishment. In analysis, since segregation and money damages is

---

470 *Witters v United States*, 70 U.S. App. D.C. 316, 106 F2d 837, 840; *Reinhard v Lawrence Warehouse Co.*, 41 Cal App2d 741, 107 P2d 501, 504; *State v Grant*, 26 N.C App 554, 217 S.E.2d 3,5; *State v Evans*, 219 Kan 515, 548 P2d 772, 777.

471 *Davis v Andrews*, Tex.Civ.App., 361 S.W.2d 419, 423.

472 *U.S. v Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed2d 487(1989); *U.S. v Austin*, __ U.S.__. 113 S.Ct 2801, 125 L.Ed2d 488 (1993).

473 *U.S. v Austin*, __U.S.__. 113 S.Ct 2801, 125 L.Ed2d 488 (1993).

constitutionally protected, it would also be considered a "grievous loss" and subject to a double jeopardy argument and one charge should have been discharged and not considered by DHO.

Conclusion

After a *de novo* review of the DHO decision, and in view of the obvious gross and defective procedures by the staff, and that no evidence exists to support the finding of DHO, the incident reports should be expunged and the record cleared.

Dated:____________________

____

Respectfully Submitted John Martin, # 03003-089

End Appeal Sample

Remember, that appeals can be done in many ways. I only suggest two possible methods. If you remember to keep it concise and to the point, and if you have any chance of winning, you will succeed. Don't be disappointed if the Region, central office, warden or Washington, denies your appeal. You still have the courts. It is easier than you might think, if you will just take the time to do a little reading and research. See: the chapter Legal Options.

22 - STAFF RETALIATIONS VIOLATION OF LAW

Retaliation from Staff:

"Diesel Therapy" is not handed out as easily as many prisoners are lead to believe. Prison staff often threaten and try to intimidate prisoners with baseless threats of transfers, loss of parole dates or disciplinary infractions. When this happens, write up the threat in a memo by summarizing the context of the threat, and send it back to him, asking them to confirm or deny your understanding of the conversation and that it was correct. Keep copies of these memos because if you ever need to go to court, they can be used to withstand a motion to dismiss or in alternative summary judgement for a claim of retaliation.

If you are filing motions and petitions attacking the constitutionality of your conviction or sentence, you will probably not be harassed by prison officials for exercising your right to petition the courts. However, if your legal activities are aimed at improving prison conditions you are in effect challenging the authority of prison officials and you may very well be subject to retaliation. Therefore, if you are serious about being effective, you must consider protecting yourself as you work. This will not only help you avoid needless suffering, but allows you more time to work:

No protection will insure that you will not receive retaliation from the prison officials for your legal activities, but there are several ways to establish minimal protection for yourself. Here are some suggestions of ways to protect yourself:

Try tŏ maintain regular correspondence with legal organizations that are active in prisoners' rights litigation. Let the people at these organizations become familiar with You as a person. Their recognition of you as a jailhouse lawyer itself gives you a minimum amount of protection because the administration will know you are working closely with these people and will know that if you go to the hole for some reason the administration's actions will be closely scrutinized. These organizations may also help you with cases by providing advice and materials that will help you. These organizations usually have ways of providing some additional service to those prisoners who are willing to do a little more about their situation than the average prisoner. In other words, when you get out in front these people will support you all they can.

Guards Get Sued & Lose For Retaliation

Dixon v. *Brown*, 38 F.3d 379 (8th Cir. 1994)

You should keep in constant contact with the news media and let them know what you are doing and why you are doing it. In other words, the media want news and what is happening in prison is news. If you have a working relationship with a couple of reporters the administration will be hesitant to do anything to you that is really bad because they know that you will report their actions against you to the press.

Write members of Congress and state legislators interested in prison conditions regularly. They, like the legal organizations and the pros, will become familiar with you and may support you if the need arises. Their support might be little more than letters to prison officials, but this in itself is a form of protection. Prison officials sometimes have a hard time explaining their actions to these people because most of them are familiar with the law and legal standards. The "justifications" prison officials give for their actions sometimes sound irrational to others.

You should consider writing articles for some prisoner publications (and regular news media as well). This will familiarize the public with your **Work** and you **All** receive a lot of correspondence from in - interested persons who, when the need arises, won't hesitate to write the warden and look into what happened to you. If you have outside support, you have a form of protection.

One of the best ways to start protecting yourself is to try to have all your communication with the administration

on paper. If you have a complaint put it in writing and submit it to the proper official. Draft all correspondence with prison officials formally. Send carbon copies to the legal organization you are working with, to the congress people you have had regular contact with and to the press people that you have come to know. This provides the people outside with a continuing documentary of your life and prison conditions. They can see what you are doing virtually every day and if the administration harasses you they have documented accounts of your activities with which to frame their inquiry.

There are also many political groups that may lend you as much support as they can, and publish some of your articles about prisons. Work with these people.

If you cannot put your communication in writing, always make it a point in dealing with the administration to talk with them in a *professional* way. Conduct yourself as though you were an outside legal assistant working for a law firm. Don't ever let yourself be provoked. Although you may feel very frustrated, anger will never bring the change you want. DON'T GIVE ANYONE THE LEAST BIT OF "JUSTIFICATION" FOR HURTING YOU.

Finally. You and other prisoners interested in doing prisoners' rights litigation concerning the conditions of your confinement should stick together. When it is possible, and you have to talk with the administration. Take one of these people with you to witness whatever happens. Many circumstances will not give you time or opportunity to do this, but many will. Always try to have a witness if there is the slightest possibility you might be retaliated against. Then courts have held when prisoners seek judicial review, prison officials may not retaliate or harass them for exercising their rights of access to the courts[474].

If you conduct yourself in a professional way with the administration they may come to respect your ability to remain calm and rational. If, after they have retaliated against you, you persist in filing suits against their retaliation and you cause a public inquiry of how they treat you, they will respect you even more. They might not want to respect you, but they will. It takes time to build up many of protection but it can be done. There are many organizations and individuals on the outside that are willing to do what they can to assist you. No matter how small others efforts might be, you need to be able to do your own work.

Guard Tries To Set Up Prisoner And Can't Understand Why The Court Won't Protect Him.

Jones v Coughlin, 45 F.3d 677 (2nd Cir. 1995)

Things You Cannot be Infracted For

Often, when a prisoner attempts to gather signatures on a petition showing support for some issue, prison staff will infract him. In *Edwards v White*[475], this is not allowed because the prisoners' actions are protected by the First Amendment and therefore the prison rule is invalid. The court in *Sanchez*[476], held that the prisoner could not be infracted or punished for requesting a superintendent's hearing and his punishment was in violation of the rule prohibiting arbitrary and capricious punishment, or punishment imposed for retaliation or revenge.

The snouts can't infract prisoners for possessing revolutionary, Communist and radical religious literature. While the cases are old (a sign of the times) they are still good case law. See: *Sostre v McGinnis*, 442 F.2d 178 (2nd Cir. 1971); *Morgan v Lavalle*, 526 F.2d 221 (2nd Cir. 1975); *Mukmuk v Commissioner of DOC*, 529 F.2d 272 (2nd Cir.1976); *U.S. Ex Rel Larkins v Oswald*, 510 F.2d 583 (2nd Cir. 1975) and *Sczderbaty v Oswald*, 341 F. Supp. 571 (SD NY 1972).

The snouts can't infract prisoners for exercising their constitutional rights, whether it is their right of access to the courts or the right to petition the government. This includes filing grievances. grievance suits where the plaintiffs won are: *Wildberger v Bracknell*, 869 F.2d 1467 (11th Cir. 1989); *Sprouse v Babcock*, 870 F.2d 450 (8th Cir. 1989); *Johnson-El v Schoemehl*, 878 F.2d 1043 (8th Cir. 1989); *Hines v. Gomez*, 853 F. Supp. 329 (ND CAL 1994). Those cases involved grievances.

---

474 *Smith v Maschner*, 899 F2d 949 (10th Cir 1990).

475 *Edwards v White*, 501 F Supp 8 (MD Pa 1979), affd, 633 F2d 209 (3rd Cir 1980).

476 *Sanchez v Smith*, 115 AD2d 285, 496 NYS2d 152 (1985); see also, *Franco v Kelly*, 854 F2d 584 (2d Cir 1988); *Cain v Lane*, 857 F2d 1139 (7th Cir 1988).

Franco v Kelley, 854 F.2d 584 (2nd Cir. 1988) who was infracted for complaining about brutality to the state IG's office.

The snouts can't infract prisoners for badmouthing them in their outgoing mail. See: *Bressman v Farrier*, 825 F. Supp. 231 (ND IA 1993); *Loggins v Delo*, 999 F.2d 364 (8th Cir. 1993) and *Moody v McNamara*, 606 F.2d 621 (5th Cir. 1979), the snouts were reading the mail to *Moody*'s girlfriend where he claims the guards are fucking cats while reading his mail. The guards infract him. He sued the snouts and won.

The following several articles are reprinted with permission and as reported in *Prison Legal News*.

Infraction Illegal When In Retaliation

Donald Dixon is a Missouri state prisoner. He filed suit under 42 U.S.C. § 1983 after a prison guard filed a retaliatory disciplinary charge against him after he filed a grievance. The district court granted summary judgment in favor of the guard because the disciplinary hearings committee dismissed the infraction and Dixon was not punished. The court held that Dixon could not establish his retaliation claim without showing independent injury. The court of appeals for the eighth circuit reversed and remanded in a brief opinion.

"In *Sprouse v. Babcock*, 870 F.2d 450 (8th Cir. 1989), we recognized the First Amendment right to petition for redress of grievances includes redress under established prison grievance procedures.... Although the filing of a false disciplinary charge is not itself actionable under § 1983, the filing of a disciplinary charge becomes actionable if done in retaliation for the inmate's filing of a grievance.., see: *Franco v. Kelly*, 854 F.2d 584, 589-90 (2nd Cir. 1988) [also see: *Cale v Johnson*, 861 F 2d 584 (2d Cir 1985); *Schere v Engelke*, 948 F2d 921 (6th Cir 1991); *Merioather v Coughlin*, 879 F2d 1037 (2nd Cir 1989); *Wolfel v Bates*, 707 F2d 935 (6th Cir 1983); *Gibbs v Hopkins*, 10 F3d 373 (6th Cir 1993)] Having presented evidence that Brown's disciplinary charge was false and made in retaliation for Dixon's grievance against Brown, Dixon need not show a separate, independent injury as an element of his case. Because the retaliatory filing of a disciplinary charge strikes at the heart of an inmate's constitutional right to seek redress of grievances, the injury to this right inheres in the retaliatory conduct itself.... In short, when retaliatory conduct is involved, there is no independent injury requirement." *See Dixon* v. *Brown*, 38 F.3d 379 (8th Cir. 1994).

Retaliatory Infraction Illegal When Staff Lied.... Again!

The court of appeals for the second circuit reaffirmed that infractions in retaliation for prisoners' exercise of constitutionally protected rights are unlawful. The court also noted that administrative dismissal of such charges do not bar § 1983 actions for damages resulting from punishment imposed at the defective hearing. Darnell Jones, a New York state prisoner, filed an administrative complaint against a prison guard for confiscating and destroying his property. The guard's supervisor threatened to retaliate against Jones. Jones's cell and that of a neighbor were searched and a shank was found in the other prisoner's cell. Jones's complaint alleges that the guards conspired to lie and state that they found the shank in his cell.

Jones was infracted for the weapons possession. At the ensuing disciplinary hearing Jones asked that the prisoners in the neighboring cell be called as witnesses to confirm that the shank was theirs and not his. The hearing officer refused this request and found him guilty of weapons possession and sentenced him to 120 days of segregation and the loss of four months good time. Jones administratively appealed the matter and the appeal was denied. After Jones had served the sanction imposed a Prisoners' Legal Services assistant wrote to the New York DOC official, Donald Selsky, responsible for administrative disciplinary appeals pointing out the procedural defects in the hearing. Selsky reversed his earlier denial of Jones' appeal and expunged the infraction from Jones's record.

Jones filed suit under 42 U.S.C. § 1983 claiming that the retaliatory infraction and conduct of the disciplinary hearing violated his rights to due process. The district court dismissed the suit holding that the due process defects in the hearing were cured by Selsky's eventual dismissal of the infraction, that Selsky was absolutely immune from suit for damages and that the retaliatory infraction claim failed to state a claim upon which relief could be granted. Jones appealed and the court of appeals for the second circuit reversed and remanded.

After the district court dismissed the suit the appeals court decided *Walker v Bates*,

23 F.3d 652 (2nd Cir. 1994), holding that if a prisoner was placed in punitive confinement as a result of a procedurally defective hearing, his eventual success in an administrative appeal did not bat a claim under § 1983 for damages resulting from that confinement. The appeals court also decided *Young v Selsky*, 41 F.3d 47 (2nd Cir. 1994), holding that *Selsky*, in his role as an appellate hearing officer, was not entitled to absolute immunity, though he might be entitled to qualified immunity. In this case the state conceded that these cases were controlling with regards to two of Jones' claims and asked that the appeals court hold this case in abeyance pending resolution of petitions for certiori the state had filed with the U.S. Supreme Court. The appeals court declined to do so, noting that "A decision of a panel of this court is binding unless and until it is overruled by the Court *en banc* or by the Supreme Court."

Snouts Can't Get Away With Retaliating Against Prisoners Who Files Complaints Against Them.
McCorkle v. Walker, 871 F. Supp. 555 (ND NY 1995)

The district court had dismissed Jones's retaliation claim holding that the assertion that false misconduct charges have been filed does not state a claim under *Freeman v Rideout*, 808 F.2d 949 (2nd Cir.1986) and that Jones's retaliation claim was "wholly conclusory." The lower court held that Jones had no factual basis for his retaliation claim "other than an adverse disciplinary ruling decision and its eventual reversal."

The appeals court vacated this ruling as well. In *Freeman* the court held "that a 'prison inmate has no constitutionally guaranteed immunity from being falsely or wrongly accused of conduct which may result in the depravation of a protected liberty interest..' we reasoned that the prisoner's due process rights are protected if he is granted a hearing on the charges and given an opportunity to rebut them." The court noted that as a factual matter this case was distinguishable from *Freeman* because Jones was denied the right to call key witnesses in defense of the charges against him.

Guards Get Slammed By The Court For Trying To Slam Prisoner With An Illegal Infraction.
Payne v. Axelrod, 871 F. Supp. 1551 (ND NY 1995)

"At the doctrinal level, we have held that a prisoner has a substantive due process right not to be subjected to false misconduct charges as retaliation for his exercise of a constitutional right such as petitioning the government for redress of his grievances, and that this right is distinct from the procedural due process claim at issue in *Freeman*. See: *Franco v Kelly*, 854 F.2d 584, 589 (2nd Cir. 1988)."

The appellate court held that the lower court made several errors in disposing of the retaliation claim. The court held that Jones had set forth sufficient facts in his complaint to support his retaliation claim. The lower court's determination was also premature and inappropriate on such a scanty record where, as in this case, no discovery had been conducted. "Even if Jones is unable in discovery to elicit direct admissions, his testimony that Armitage made retaliatory threats, together with evidence of the sequence of events alleged above would easily permit-though obviously not require-a trier of fact to infer that the filing of the false behavior report against Jones was an act of retaliation for his earlier complaint against Lavarnway. The determinations as to whether to credit such testimony and as to what inference to draw from the sequence of events is within the province of the fact finder at trial, not of the court on a motion for summary judgment." The appeals court remanded the case back to the lower court for further proceedings. See: *Jones v Coughlin*, 45 F.3d 677 (2nd Cir. 1995).

Retaliatory Discipline Violates Due Process

A federal district court in New York has held that retaliatory infractions violate due process and that housing an asthmatic prisoner on an upper tier may violate the eighth amendment. Prison officials and detectives are also liable when they interrogate prisoners concerning crimes and do not provide counsel when requested. Cyrus McCorkle filed suit pursuant to 42 U.S.C. § 1983 claiming that New York state prison officials violated his eighth amendment rights by denying him a change of underwear for fifteen days; housed him on an upper tier despite a medical order stating he should be housed on ground floors due to asthma; denied a transfer to another prison despite a Mental Health Office order stating a transfer would reduce his stress and

that he was exposed to TB while working in the prison hospital. He also claimed prison officials violated his due process rights by filing false disciplinary charges against him in retaliation for complaining about misconduct by guards. The defendants moved for summary judgment which the court granted in part and denied in part.

The court held that the denial of a transfer and clean underwear did not state constitutional claims even if true. Likewise, there was no evidence that McCorkle had been exposed to TB while in the prison infirmary. However, the court held that McCorkle had stated a claim with regards to being housed on an upper tier despite defendants' knowledge of his asthma condition. "It is well known that climbing stairs exposes some people to serious medical risks." This claim was set for trial.

McCorkle claimed that a nurse filed false disciplinary charges against him, claiming that he had sought to bribe her to bring drugs into the prison, after he complained to prison officials that she was the nurse on duty when another prisoner almost drowned in the infirmary. He was found guilty at a prison disciplinary hearing and sentenced to a year in segregation. "Under *Freeman v. Rideout*, 808 F.2d 949, 951-53 (2nd Cir. 1986),... the filing of allegedly false disciplinary charges by state officers would not violate an inmate's due process rights as long as he was afforded a fair hearing where he had an opportunity to be heard. *Freeman*, however, does not apply to situations in which there are allegations that an inmate's substantive due process rights were violated despite the fairness of the procedure used. *Grillo v. Coughlin*, 31 F.3d 53, 56 (2nd Cir.1994); *Lowrance v. Achtyl*, 20 F.3d 529, 537 (2nd Cir. 1994); *Franco v. Kelly*, 854 F.2d 584 (2nd Cir. 1988)." The court denied the defendants' motion for summary judgment on this as well.

After the near drowning of the prisoner McCorkle was interrogated by prison officials and a homicide detective. There was no claim of any injury arising from the denial of counsel at the interrogation. However, the court noted that McCorkle had a right to counsel if the interrogation was custodial in nature and even if there was no injury he would be entitled to nominal damages if he prevailed.

The court also refused to dismiss McCorkle's claims that he had been denied his right of access to the courts and been assaulted by a guard. The court dismissed a claim involving the deprivation of property holding that New York state law presented an adequate post deprivation remedy. See: *McCorkle v. Walker*, 871 F. Supp. 555 (ND NY 1995).

Retaliatory Infractions Illegal For Filing False Charges

Prison employees are forbidden from filing false disciplinary charges against prisoners in retaliation for prisoner complaints against other employees. Milton Payne, a New York state prisoner, witnessed a prison guard set a fire in a cell and reported this to prison authorities. Shortly thereafter prison guards searched Payne's cell and claimed to have found a single edge razor blade in his cell. They infracted Payne for weapons possession. He was found guilty at the hearing.

Payne filed suit pursuant to 42 U.S.A. § 1983 claiming that the retaliatory infraction violated his right to due process. He also alleged numerous due process violations arising from the disciplinary hearing itself. The district court dismissed, on the defendants' motion for summary judgment, all the claims arising from the hearing.

The court did not dismiss, and set for trial, the retaliation claims. "Plaintiff's claim that Officer White framed him in retaliation for reporting officer Telesky must survive. Under *Freeman v. Rideout*, 808 F.2d 949, 951 (2nd Cir. 1986), the filing of false charges is normally not actionable under Section 1983. *Franco v. Kelly*, 854 F.2d 584. 589 (2nd Cir. 1988), however, held that a prisoner stated a valid claim against prison guards alleging that the guards falsely accused the prisoner of insubordination in retaliation for the prisoner's cooperation with authorities investigating abuse of inmates. The plaintiff here similarly asserts interference with his right to petition for redress of grievances, and thus states a claim. Furthermore, there is a genuine issue of material fact as to whether CO White did retaliate against plaintiff."

The court held that the defendants were not entitled to qualified immunity on the retaliation claim because *Franco* constituted well established law at the time the events in this case arose. Hence they knew or should have known it was illegal to retaliate against prisoners who complained of guard misconduct. See: *Payne v. Axelrod*, 871 F. Supp. 1551 (ND NY 1995).

Grievance Retaliation Unlawful

A federal district court in Michigan has held that it is unlawful for prison officials to retaliate against prisoners who complain of misconduct by guards and for prison officials to read legal mail sent to prisoners from the courts. Those claims were set for trial and a claim that legal mail was "censored" was dismissed because there were no factual allegations to support it. Jimmie Riley, a Michigan state prisoner filed several complaints against a guard, David Kurtz, who committed various acts of misconduct. Kurtz then fabricated a disciplinary charge against Riley in retaliation for his complaints. Riley filed suit contending that this retaliation violated his first and fourteenth amendment rights. The district court denied Kurtz's motion to dismiss or for summary judgment on the retaliation claim.

The court noted that "Retaliation against the exercise of First Amendment rights is itself a violation of the First Amendment." *Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994). The court rejected Kurtz's claim that retaliation by guards must "shock the conscience" before it is actionable. "....Unless a prison official can demonstrate a legitimate penological justification, he abuses his power if he uses his position to infringe upon the First Amendment rights of inmates, including their right to petition government officials for a redress of grievances." The claim that as long as a prisoner receives procedural due process protection (which is of dubious relevance now given the supreme court's recent ruling in *Sandin v. Conner* his allegations that guards issued retaliatory infractions would fail to state a claim have been rejected in *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988) and *Franco v. Kelley*, 854 F.2d 584 (2nd Cir. 1988). There is some dispute as to the standard established by Cale. In *Williams v. Smith*, 717 F. Supp. 523 (WD MI 1989) the court held that filing disciplinary charges against a prisoner who had earlier filed a grievance does not state a constitutional claim. In that case a different guard infracted the prisoner sixteen days after he filed the grievance. While in this case, like Cale, it was the guard complained about who initiated the disciplinary proceedings.

The court gives an extensive discussion to the roots of fourteenth amendment liberty interests and concluded that "in finding a willful violation by a state actor of the guarantees of the incorporated Bill of Rights, a court need not make a separate finding that such action 'shocks the conscience' or is an 'egregious abuse of governmental power.' Willful violations of enumerated constitutional guarantees are constitutional torts and nothing more need be shown." The court held that Riley's claim that Kurtz used his government position to limit or punish his right to petition the government "lies near the core of the First Amendment." Numerous prison and non-prison retaliation cases are cited which will be useful to anyone litigating this issue.

The court rejected the defendant's claim that before a prisoner can prevail on a retaliatory infraction claim a disciplinary committee must have dismissed the infraction. While such a standard may be appropriate in criminal cases, those proceedings have substantial procedural safeguards which prison disciplinary hearings do not have. The court also expressed concern that such a standard would create unwarranted pressure on hearing officers not to dismiss disciplinary cases. It also noted that federal courts need not defer to the factual findings of DOC hearing officers.

Riley also stated a claim regarding Kurtz reading his incoming legal mail because prisoners have a well established right to exchange confidential mail with the courts. The court denied Kurtz qualified immunity holding that the law was clearly established that retaliation against prisoners was unconstitutional as was reading prisoner's legal mail from the courts. See: *Riley v. Kurtz*, 893 F. Supp. 709 (ED MI 1995).

Prison staff must be sued to learn they cannot retaliate against prisoners and get away with it. But before suing, write letters, memo's and keep prrof you have complained of retaliation if possible.
Woods v. Smith, 60 F.3d 1161 (5th Cir. 1995)

No Immunity for Retaliatory Discipline

The court of appeals for the fifth circuit has reaffirmed that prison officials who retaliate against prisoners who exercise their constitutional rights are not entitled to qualified immunity. The court also held that district court orders refusing to dismiss pendent state law claims are not cognizable on interlocutory appeals. Claude Woods, a Louisiana state prisoner, was pressured by a prison sergeant into becoming an informant. He was told that if he refused "bad things would happen to him."

Woods wrote to a federal judge who was presiding over prison litigation and told him of the threats. He sent a copy of the letter to the prison warden and to a prison lieutenant.

Prison officials infracted Woods for writing the letter, charging him with "defiance." At a disciplinary hearing Woods was found "guilty" and sentenced to segregation and other punishment. Woods then filed suit pursuant to 42 U.S.C. § 1983 claiming that the infraction was in retaliation for his having exercised his right of access to the courts. The defendants moved for summary judgment which the district court granted in part and denied in part. The court denied the defendants qualified immunity for their actions and refused to dismiss Woods' pendent state law claims. The defendants filed an interlocutory appeal.

The court held that in 1990, the events in this case arose, the law was clearly established in the fifth circuit that "a prison official may not retaliate against or harass an inmate for exercising the right of access to the courts, or for complaining to a supervisor about a guard's misconduct." The defendants argued that prisoners cannot proceed on a retaliatory disciplinary suit unless the underlying infraction has been terminated in the prisoner's favor, employing a similar standard as that used in malicious prosecution suit. The court soundly rejected this argument. "Such a requirement would unfairly tempt corrections officers to enrobe themselves and their colleagues in what would be an absolute shield against retaliation claims. This we will not do, for... 'the court with which [the inmate] sought contact, and not his jailer, will determine the merits of his claim.'"

"We emphasize that our concern is whether there was retaliation for the exercise of a constitutional right, separate and apart form the apparent validity of the underlying disciplinary report. An action motivated by retaliation for the exercise of a constitutionally protected right is actionable even if the act, when taken for a different reason, might have been legitimate." The court agreed with the eleventh and seventh circuits which have held that "proceedings that are not otherwise constitutionally deficient may be invalidated by retaliatory animus." The court cites numerous retaliation cases from other circuits which will be helpful to anyone litigating this type of issue. Readers will note this ruling was issued after the supreme court issued its ruling in *Sandin v. Conner* [See Appendix A] which significantly limited prisoner challenges to disciplinary hearings. This can be read to indicate that *Sandin* will have no effect on retaliatory discipline claims, or it could be that the issue wasn't raised by the parties and thus wasn't addressed by the court.

The court cautioned district courts to carefully scrutinize prison retaliation claims. "To state a claim of retaliation an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of incident, such as the filing of disciplinary reports as in the case at bar, would not have occurred. This places a significant burden on the inmate. Mere conclusory allegations of retaliation will not withstand a summary judgment challenge. The inmate must produce direct evidence of motivation or, the more probable scenario, 'allege a chronology of events from which retaliation may plausibly be inferred.' Although we decline to hold as a matter of law that a legitimate prison disciplinary report is an absolute bar to a retaliation claim, the existence of same, properly viewed, is probative and potent summary judgment evidence, as would be evidence of the number, nature, and disposition of prior retaliation complaints by the inmate."

The court held it lacked jurisdiction to hear the defendant's appeal on the lower court's refusal to dismiss the pendent state law claims. The lower court ruling denying defendants qualified immunity was affirmed and the case was remanded to the lower court for trial on the merits. See: *Woods v. Smith*, 60 F.3d 1161 (5th Cir. 1995).

[Reprinted with permission from Prison Legal News]

Self Help Legal Resources

Prison Legal News

Prison Legal News is an exceptional monthly magazine published since 1990 by Washington State prisoners Paul Wright and Dan Pens. *PLN* reports prison related legal issues, reports court decisions and analysis targeted for the politically advanced prisoner. *PLN*'s goal is to assist prisoners and their supporters organize themselves to have a voice, and be a progressive force in developing public policy and debate around issues of crime and punishment. *PLN* is a must for all prisoners who care about what is happening to them. Subscriptions are $12.00 per year from prisoners and $50.00 per year for others. (money or stamps are accepted) Prison Legal News, P.O. Box 1684 Lakeworth, FL 33460.

National Lawyers Guild
Prison Law Project

The NLG publishes a bi-monthly newsletter called Rites of Passage. It seeks to inform and organize jailhouse lawyers and those involved in the criminal justice system. The PLP is in the process of reorganizing itself, publishing a jailhouse lawyer's manual and more. The NLG is a progressive association of lawyers and legal workers. Subscriptions and NLG membership\s are available to jailhouse lawyers for $7.50 per year and $10-40 a year for others. National Lawyers Guild/Prison Law Project, 558 Capp St. San Francisco, CA 94110, (415) 285-5067.

National Prison Project

The NPP is the **American Civil Liberties Union**, (ACLU) prison group that publish the *NPP Journal*. Their quarterly journal reports on case law, litigation strategy and a wide variety of issues relevant to prison struggle. NPP offers a variety of publications and resources. The NPP also conducts major prison litigation which is reported in *Prison Legal News*. Subscriptions are $2.00 per year for prisoners and $30.00 for others. National Prison Project, 1875 Connecticut Ave., N.W. #410, Washington D.C. 20009

Prison News Service

For over 10 years, PNS has provided in depth and regular coverage of prison news and struggle in the U.S. and other countries. PNS focuses on Native and minority issues as well as political prisoner coverage. Despite being a Canadian, the bulk of their coverage is on U.S. prisons. As a 20 page bi-monthly tabloid paper, PNS has extensive articles on a wide variety of issues from an anti-authoritarian perspective. Subscriptions are free to prisoners and $10.00 to others. Prison News Service, P.O. Box 5052 Station A, Toronto, ONT, M5W1W4, Canada.

CURE

Citizens United for Rehabilitation of Errants provides the opportunity to prisoners to use their writing skills and get into print. This encourages self-expression in a positive manner. The newsletter INSIDE-OUTSIDE also provides useful information to prisoners. lobbying for better laws is a primary function of the chapter. Our financial resources are extremely limited. We do not provide legal support or put paralegal in touch with each other. Send stamps, or what ever you can. CURE, P.O. Box 2310, Washington, D.C. 20013-2310 (202) 789-2126.

Families Against Mandatory Minimums

FAMM engages in lobbying as well as extensive media appearances to educate the public about the injustices resulting from mandatory sentencing laws that leave judges no discretion in imposing punishment on defendants. FAMM-Gram in their bi-monthly magazine which is highly informative and educational on current sentencing changes. Send donation to: FAMM, 1001 Pennsylvania Ave., N.W., Suite 200 South, Washington, D.C. 20004 (202) 457-5790.

Raze The Walls

RTW publishes a Prisoner Resource Guide complete with addresses and prices, if any for materials for prisoners Some material is legal, Christian, or just fun. Raze The Walls seeks donations and requests should be directed to P.O. Box 22774, Seattle, WA. 98122-0774

Florida Prison Newsletter

[description currently not available]

23 - LEGAL BASICS and COURT OPTIONS

Why Most Prisoners Lose In Court

The biggest problem in prisoner court litigation, are:

(1) a lack of understandable source material showing the steps in clear detail down to such minor details such as, always include a sufficiently stamped envelope (SASE) for return copies of papers you are filing with the clerks office, regardless if the court fees have been waived or not;

(2) when a violation occurs, a prisoner sometimes only has a couple months to become semi-legal literate, or they may lose out;

(3) prisoners need to understand the elements of overcoming the motions, objections and for example, Rule 12(b) compared to Fed. R. Civ. P. Rule 56 motion to dismiss, and their failure to proceed with discovery and file objections to stays of discovery that affect their litigation;

(4) how to draft a brief, and why they should be attached to every motion (depending on the local court rule)(most local rules require supporting briefs, even on a motion for default judgement). Sometimes, you can file a Request, rather than a Motion, which overcomes the Brief or formality procedures. (check your local rules);

(5) issue of dismissal for lack of or failure to get enough of discovery;

(6) the effect of Fed. R. Civ. P. Rule 36 Admissions filed with Fed. R. Civ. P. Rule 33 - Interrogatories and Fed. R. Civ. P. Rule 34 - Request for Production at the same time, and their use as a tool early in a case for prisoners lawsuits, rather than later as would be a standard procedure for lawyers;

(7) the effect of the plaintiff moving for summary judgement first, compared to the defendants, and the burden of proofs being shifted to the defendants;

(8) the importance of always filing objections to the governments motions, or the staying of your discovery, and describing why discovery is needed to prosecute your case and defend against motions to dismiss and magistrate recommendations for dismissal.

(9) Watch the court clerks, U.S. Marshals, Magistrate Judges, and judges papers. They often make mistakes in filing their papers with the proper places, sending them to the wrong place, or quoting something that is not accurate or correct. Get, these corrected, on the record.

I tell you this only so you can understand the many obstacles you need to be aware of or study up on. These are only a few.

Bivens (§1983)

Not until *Bivens*[477], in 1971, did the courts grant damage remedies by federal employees for constitutional violations such as available in 42 U.S.C. §1983 even though the Supreme Court had the power to grant relief not expressly authorized by statute[478] as well as the power to adjust remedies[479]. *Bivens* gave the courts specific authority to grant relief and money damages for specific constitutional violations by federal employees. Federal prisoners do not have §1983 access without pleading a *Bivens* jurisdiction and under 28 USC § 1331. In *Carlson*[480], the court held that *Bivens* is available to federal prisoners. State prisoners have jurisdiction under §1983 and under 28 USC § 1343.

In *Bivens*, the plaintiff alleged that federal agents arrested him and searched his

---

[477] *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 91 SCt 1999, 29 LE2d 619 (1971).

[478] *Bush v Lucas*, 462 US 367, 103 S.Ct. 2404, 76 LE2d 648 (1983).

[479] *Bell v Hood*, 327 US 678, 66 S.Ct. 773, 90 LE 939 (1946).

[480] *Carlson v Green*, 446 US 14, 100 S.Ct. 1468, 64 L.Ed 2d 15 (1980).

home without a warrant, probable cause and in violation of the Fourth Amendment's ban on unreasonable searches and seizures. The court upheld the sufficiency of the complaint against a motion to dismiss for "failure to state a cause of action" and rejected the defendants' arguments that a state tort action provided adequate and exclusive judicial remedy.

Even though no specific authority before *Bivens* for a civil action was in the Constitution, the Bill of Rights, or any federal statute, the court recognized "judicial remedy" on the basis of historic power of federal courts to redress personal injury through particular remedial methods for money damages. These judicially created causes of action, known as "*Bivens* actions," provide just remedies, not substantive rights.[481] Without a federal statute (law, regulation, etc.) or constitutional basis such as a "cause of action", (fact or facts which give a person a right to judicial relief), the federal courts, in *Bivens*, for an ordinary remedy for the invasion or personal liberty interests led the court to conclude that the plaintiff should be allowed to redress a violation with a monetary (cash) award.

The court main concern in the *Bivens* decision, was the Court's perception that a federal employee, acting unconstitutionally, in the name of the United States, possesses a far greater capacity for harm than an individual exercising no more authority than his or her own.

In the absence of a demonstrable written commitment, such as a statute or law of a constitutional issue to a coordinate political department, the Supreme Court will presume that justifiable constitutional rights are to be enforced through the courts.[482]

Elements of a *Bivens* Action

Bivens actions are not limited to Fourth Amendment violations. The basis for a claim must be "some illegal or inappropriate conduct on the part of a federal employee that violates a clearly established constitutional right.[483] A *Bivens* action may *NOT* be based on a Fourteenth Amendment violations by federal prisoners because that amendment only applies to states and state prisoners. However, procedural and substantive due process claims against federal employees must be based on the Fifth Amendment[484].

In establishing a claim for "conspiracy", a plaintiff must establish an actionable *Bivens* action by showing:

(1) existence of an expresses or implied agreement among the defendants to deprive you of constitutional rights, and;

(2) an actual deprivation of those constitutional rights resulting from the agreement. See: *Ting v United States*, 927 F2d 1504 (9th Cir Cal 1991).

But, a violation of a statute or regulation does not give rise to a *Bivens* action unless the statute or regulation supplies the basis for a claim of a constitutional right. See: *Arcoren v Peters*, 829 F2d 671 (8th Cir SD 1987) *cert den* 485 US 987 (1988); *Cale v Johnson*, 861 F2d 584 (2nd Cir 1988).

Comparisons to a *Bivens* (§1983)

The Supreme Courts treatment of *Bivens* actions is roughly the same as actions provided by statute under 42 U.S.C. § 1983. Some courts have denied *Bivens* actions when relief is available under § 1983. The Supreme Court has noted that constitutional injuries

---

[481] *Jacob v Curt*, 721 F Supp 1536 (D RI 1989), *aff'd* 898 F2d 838 (1st Cir 1990).

[482] *Davis v Passman*, 442 US 228, 99 SCt 2264, 60 LEd2d 846 (1979); and in *Bivens*.

[483] *Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388, 91 S.Ct. 1999, 29 LE2d 619 (1971);

(continued...)

(...continued)

Davis v Passman, 442 US 228, 99 SCt 2264, 60 LE2d 846 (1979).

[484] *Locks v Three Unidentified Customs Service Agents*, 759 F Supp 1131 (ED Pa 1990); *Richardson v Department of Interior*, 740 F Supp 15 (D DC 1990)(dismissing *Bivens* claim based on a Ninth Amendment violation because plaintiff failed to articulate what rights beyond those expressly described in the constitution were violated in connection with an unlawful arrest.)

made actionable by 42 U.S.C. § 1983 are of no greater magnitude than those for which federal officials may be responsible under *Bivens*, because the pressures and uncertainties facing decision makers in the state government are similar to those affecting federal officials.[485] Accordingly, the courts see virtually no difference between 42 U.S.C. § 1983 actions and *Bivens* actions in their application of qualified or absolute immunity[486], and often follow the precedents established in statutory civil rights law, particularly when affirmative defenses and federal civil procedures are at issue.[487]

Comparing *Bivens* to Federal Tort Claims Act

A *Bivens* action is a judicially created cause of action imposing liability against federal officials individually, while an action under Federal Tort Claims Act[488] (FTCA) is a statutorily created action imposing liability directly on the United States. Moreover, *Bivens* actions differ from actions under FTCA in that:

(1) *Bivens* actions serve a more effective deterrent purpose since they are designed to permit damage awards against individuals directly;
(2) Punitive damages can be awarded in *Bivens* actions, but not in actions under FTCA;
(3) A *Bivens* plaintiff is entitled to a trial by jury; and
(4) *Bivens* actions are governed by federal law and consequently by uniform rules, unlike actions under FTCA in which liability is largely subject to state law.

A federal official's conduct may conform with the constitution and the result is no liability under *Bivens*, but violate law of the state in which it occurred and subject the United States to liability under FTCA. The reverse may also be true.[489]

Elements of a Tort

Torts fall under many categories and intents of liability. Some include Constitutional Torts, Intentional Torts, Family Torts, Negligence Torts, and many more. Any legal encyclopedia will guide you in the proper direction such as American Jurisprudence.

"Tort" is a commonly used term for your suffering a loss, physical or figurative and defined in Blacks Law Dictionary as:

> "A private or civil wrong or injury, other than breach of contract, for which the court will provide a remedy in the form of an action for damages. A violation of a duty imposed by general law or otherwise upon all persons occupying the relation to each other which involved in a given transaction." See: *Coleman v California Yearly Meeting of Friends Church*, 27 Cal.App.2d 579, 81 P2d 469, 470.

Three elements must exist to a Tort:

(1) Existence of legal duty from the defendant to plaintiff, (duty to follow a certain standard of care);
(2) breach, refusal or failure to perform that duty, and
(3) damage as a proximate result, actual injury, remote or unpredictable result of a negligent act, proximately caused by a failure to perform that duty. See: *Joseph v Hustad Corp.*, 454 P2d 916, 918.

The Supreme court has held that "duty of care owed by the Bureau of Prisons to federal prisoners is fixed by 18 U.S.C. § 4042 independent of an inconsistent state rule.

Immunity From Suit

When filing a complaint, iclude a paragraph or section generally under the section stating Jurisdiction, and describe why the

---

485 *Butz v Economou*, 438 US 478, 98 SCt 2894, 57 LE2d 895 (1978).

486 id *Butz*; *Scheur v Rhodes*, 416 US 232, 94 SCt 1683, 40 LE2d 90 (1974), *cert den* 435 US 924 (1978).

487 See *id Butz*; *Bivens*; *Joiner v Ridgeland*, 669 F Supp 1362 (SD Miss 1987).

488 28 U.S.C. § 2671 *et seq.*

489 *Ting v United States*, 927 F2d 1504 (9th Cir Cal 1991).

defendants are NOT subject to immunity, qualified or otherwise.

Courts hold the doctrine of qualified immunity attempts to balance the strong policy of encouraging the vindication of federal civil rights by compensating individuals when those rights are violated, with the equally salutary policy of attracting capable public officials and giving them the scope to exercise vigorously the duties with which they are charged, by relieving them from the fear of being sued personally and thereby made subject to monetary liability.[490] The doctrine shields government officials from liability for damages on account of their performance of discretionary official functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. This protection turns on the "'objective legal reasonableness'" of the allegedly unlawful official action "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson*, 483 U.S. at 639 (quoting *Harlow*, 457 U.S. at 818-19).

Necessary Elements to a Lawsuit

In *Monell* the Supreme Court has defined the very language required in a *Bivens* or §1983 action.[491] The language must show a casual relation between the defendant's conduct and the plaintiff's constitutional deprivation. The Seventh Circuit has also defined "cause in fact" relation and that it must be shown to have existed between the defendant's and the proximate cause to the plaintiff.[492]

You must lay out a pattern, showing:

(1) What statute or authority you are claiming was violated for example: 42 USC §1983;

(2) Quote the statute of jurisdiction, for ex: 28 U.S.C. § 1343 (for state prisoners) and 28 U.S.C. § 1331(a)(for federal prisoners) or diversity;

(3) In a short paragraph or two show whey the defendants are not subject to immunity, qualified immunity or quasi-judicial immunity. Quasi-judicial immunity might apply to a disciplinary hearing officer, especially in the State of Michigan.

(4) list the defendants names, their capicity, and describe the defendants actions why they are in the lawsuit only relevant to the issue without any alleegations.

(5) describe in detail how you were harmed only relevant to the issue and how that violates a spefic right, law or provision.

(6) describe what type of relief you want, for ex: injunctive, declaratory, money, etc.

Don't forget to read the section on the Prison Litigation Reform Act of 1996 with the authors version reprinted in this chapter.

An average complaint has 6 components: (1) caption or heading; (2) statement of jurisdiction; (3) statement of facts; (4) cause of action, (what rights were violated) (5) prayer for relief; and (6) signature and verification.

Claims for Money(§1983) vs Relief From Action (Habeas)

In a Habeas Corpus you can only claim relief from action and not money damages. You can file both in some districts, and stay the §1983 action pending the outcome of the habeas corpus. Check your local district for its decisions and local rules. The distinction in Habeas actions requires that the prisoner first exhaust state remedies by presenting his claims to the state court before proceeding to federal court. Habeas does not allow for money damages. In a §1983 action you do not need to exhaust state remedies and only grants remedies such as money damages, injunctive or declaratory relief for constitutional violations.[493]

---

[490] See *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07, 813-14 (1982); see also *Weaver v. Brenner*, 40 F.3d 527, 532 (2d Cir. 1994).

[491] *Monell v Department of Social Services*, 436 US 658 (1978).

[492] *Conner v Reinhard*, 847 F2d 384, 396-97 (7th Cir 1988).

[493] *Preiser v Rodriguez*, 411 US 475; *Cook v Teaxs Dept of Crimm Justice, Planning Dept*, 37 3d 166 (5th Cir 1994).

Frivolous & Unreasonable Claims

I only added this section because I have seen *some* absolutely unbased and frivolous complaints. I have seen substantial complaint lost just because during the suit process, discovery was not pursued hard enough or other factors between the stage of filing the complaint, and the time the court makes a decision on the governments boilerplate motion to dismiss. If you have grounds, by all means, sue the bastards. If you are just complaining about something that could and most likely would be fixed with an administrative complaint, than take the appropriate method. See the new Prisoners Litigation Reform Act as described at the end of this Chapter.

A claim is legally frivolous and may justify an award of fees to the defendant under 42 USC § 1988 if it is clearly contrary to established case law[494]. A lawsuit is not legally frivolous simply because it is unsuccessful, and in determining whether a claim is unreasonable or frivolous, courts will avoid hindsight and judge reasonableness of the action at the time it was filed. Otherwise, plaintiff will be discouraged from bringing anything but "airtight" claims[495]. Thus, the defendant is NOT entitled to fees simply because the plaintiff is unable to present sufficient facts to avoid summary judgement[496].

Sometimes, a suit might be frivolous, but the claim meritorious. A good example, is in *Hudson v Hedge*,[497]. In light of the Supreme Courts holding in *Parrat v Taylor*,[498] sometimes the system is designed to *NOT* work fairly to all.

Going to Court

Your Incident Report was "retaliatory, arbitrary, and capricious." For the sake of argument, the description below is what you will likely be up against. The example poses several possible scenarios. Whether true or not, only you know.

An officer erred (lied), when he wrote the Incident Report without valid supporting evidence (lied to fabricate evidence), and when he sought the advice of other staff (made it a conspiracy), on how to make the Incident Report stick at a hearing (figuratively "fucked you," no matter the cost). DHO refused to call the "adverse" witness (refused to allow clarification of the facts), and through his written report (libeled you), or else the witness erred (lied) in his testimony (slandered you). Staff did this during their official work, and while officially (under "color" of law), when errors (lies) were known to exist (becomes malicious).

Assuming you attempted and completed the appeal process and your appeals were denied, you need to review a few law books. IF you wish to take the matter to court, you have that right. I recommend reading Daniel Manvills' book, "Prisoners Self-Help Litigation Manual[499]." This is the best book (I have seen) which explains legal matters to those of us not born to be lawyers (legal crooks). Your prison law library is required to have other legal books on prisoners rights.

Before jumping, ready to sue, read a few more things[500]. Read the Manville book. It explains almost everything, and is beyond the scope of this manual.

If you are serious, by now you will have read the § 1983, along with (note 791) which refers to "Disciplinary Proceedings." This material can be focused on specific violations of UDC/DHO and the institution. Read the brief examples before proceeding to court, or even before calling your attorney. Get a feel for what is winnable and what is loser material. If you do decide to go to court, it is better to proceed in some situations under a § 1983 action, rather than a Habeas Corpus, as is explained in Manville's book. Some situations

494 *Fellowship Baptist Church v Benton*, 815 F2d 485 (8th Cir Iowa 1987), *on remand* 678 F Supp 213 (SD Iowa 1988).

495 *Coats v Bechtel*, 811 F2d 1045 (7th Cir Wis 1987).

496 *Coats v Bechtel*, 811 F2d 1045 (7th Cir Wis 1987).

497 *Hudson v Hedge*, 27 F3d 274 (7th Cir 1994).

498 *Parrat v Taylor*, 451 U.S. 527, 101 S.Ct. 1908 (1981).

499 **Prisoner's Self-Help Litigation Manual**, 3rd edition revised 1995, 1100 pages by Daniel Manville, Published by Oceana Publications, Inc., 75 Main St., Dobbs Ferry, N.Y. 10522., $29.95 which includes Postage & Handling to prisoners. Also, **Jailhouse Lawyers Handbook** from National Prison Project, 1875 Connecticut Ave., N.W., Washington, D.C. 20009.

500 Civil Rights section in **42 USCA § 1983** (note 791).

both legal avenues are necessary depending on the desired outcome.

This chapter is not to tell you how, but where, to look for the best resources available. Another good book is a legal encyclopedia[501]. This volume, deals with penal institutions. It also can give you a good feel and idea of what to expect from the courts, along with how they think. The courts' position, as seen in this book, could be quite useful to those serious about a court action. These books listed, are some of your best sources.

Make your decision carefully, and be informed by doing some research on the possible obstacles you will face, and your foundation. The reason 90% of all prisoner litigation is dismissed by the courts, is because of either, 1) improper methods used in your court procedures or, 2) an invalid reason. You can motion the court (when you file your complaint) to appoint a lawyer who will best represent your case, which is also in the interest of the court. If you have a valid complaint, by meeting the basic rules, the court may appoint council to smooth the procedures and represent justice[502].

The winds of law - what will it be today or tommorrow, and how will it affect yesterday! We don't know. Laws and how they affect you changs on a daily basis. Read the Federal Reporters to understand the change about to take place.

Prison Litigation Reform Act (PLRA) is now Codified at 28 U.S.C. § 3626

When we thought things might get better, they get worse. The Prison Litigation Reform Act (PLRA) went into law attached as a rider to the budget for the Justice Department. Signed by President Clinton on April 27, 1996, the PLRA is the combined efforts of a lengthy campaign waged by people who hate prisoners including the National Association of the Attorney Generals (NAAG). The goal restricts prisoners' rights of access to the federal courts and to limit the ability of courts to remedy constitutional violations when they are found. A significant part of this campaign has been each state's attorney general posturing before the media with a "Top Ten List of Frivolous Lawsuits" allegedly filed by prisoners. That these lists were often disingenuous, misleading or inaccurate made no difference as no one in the corporate media bothered checking the cases being cited. When they were checked, the reality was often different [See April, 1996, Page 6, Prison Legal News, *Not All Prisoner Lawsuits are Frivolous*, by Judge Jon Newman].

It is no wonder that prisoner litigation has increased, and is largely due to the explosion of the prison population, however, the per capita number of suits by prisoners has

---

501 **American Jurisprudence** (Am Jur) 2d, book 60 (Penal Institutions). *see also:* **Georgetown Law Journal**, Chapter VI, Prisoners' Rights.

502 *Gordon v Lucke*, 574 F 2d 1147 (4th Cir 1978; 28 U.S.C. § 1915(d); *Mosby v Maybry*, 697 F2d 213 (8th Cir 1982).

Additional Sources not found in most Law Libraries from Shepard's, McGraw-Hill, 555 Middle Creek Parkway, P.O. Box 35300, Colorado Springs, CO. 80935-3530 1-800-458-8811: or you can write for a current catalog.

Civil Actions Against United States, Its Agencies, Offices & Employees: 2-volumes of about 550 pages each and comes with update pocket-parts. Hard-cover $190.00 from Shepard's, McGraw-Hill.

Civil Rights and Civil Liberties Litigation: 2-volumes of about 550 pages each and comes with update pocket parts. Hard-cover $195.00, from Shepard's, McGraw-Hill,

Rights of Prisoners: From Pretrial detention to post-conviction relief, this treatise details the law in this controversial and expanding area of litigation. You'll find authoritive discussion of: First Amendment rights, mail, visitation,

(continued...)

(...continued)

communications, religion; Fourth Amendment Rights, privacy and related matters; Fifth and Eighth Amendment issues, cruel & unusual punishment and Due Process rights; Equal Protection clause, discrimination issues; Prison labor, disciplinary proceedings. The text examines Constitutional rights of Federal and State prisoners, setting forth caveats and trends. The issues of prisoner's right to access to the courts and legal assistance, post conviction remedies, and prisoner conduct that discourages court access are detailed. Written 1981, 2-volume, Hd-bound 580 pages each with pocket parts, Updated 1991 with current supplement. $150.00.

actually declined in the last 20 years. Faced with a dramatically increasing prison population, this law is designed to ensure that prisoners can't seek any relief from the courts to relieve overcrowding or other inhumane conditions of confinement. For now this article will inform readers of what the law says and its most immediate impact.

The definitions used in the PLRA are interesting. "Prisoner" includes "any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary programs." It appears "the presumption of innocence" is forgotten. The PLRA specifically states it is intended to apply to all prospective relief judgments whether they were approved or entered on, before or after passage of the PLRA.

Prisoner Release

The 1994 crime bill included a measure, called the "Helms Amendment," designed to limit the ability of federal courts to remedy overcrowding. This was codified at 28 U.S.C. § 3626. The PLRA, in subsection (a)(l) [this section is continuously referred to throughout the PLRA] modifies the Helms Amendment and explicitly limits any prospective relief granted by a federal court to extend no further than necessary to correct the violation of federal rights and such relief must be narrowly drawn. The law states it does not authorize courts to raise taxes or order the construction of new prisons in the exercise of their remedial powers.

Before a court can enter an order requiring the release of prisoners in a civil rights action the court must have previously entered a less intrusive order that failed to remedy the deprivation sought to be remedied by the prisoner release order; the defendant had a reasonable mount of time to comply with previous orders; "a party seeking a prisoner release order in Federal court shall be entered only by a three judge court in accordance with 28 U.S.C. § 2284." Single judges who believe a prisoner release order is required can sua sponte request the convening of a three judge court to consider the order. "The three judge court shall enter a prisoner release order only if the court finds by clear and convincing evidence that: (1) crowding is the primary cause of the violation of a federal right; and (2) no other relief will remedy the violation of the federal right."

The law provides prison officials with standing to intervene in overcrowding litigation where prisoners or detainees might be released a result. It defines the party with standing to intervene, even if they are not a named defendant or party to the underlying action as: "government unit or official who funds, operates or maintains prison facilities, the prosecution or custody of persons who may be released from or not admitted into a prison as a result of a prisoner release order." These officials "shall have standing to oppose the imposition or continuation in effect of such relief, and shall have the right to intervene in any proceeding relating to such relief."

Preliminary Injunctions Limited by PLRA

The PLRA drastically limits the ability of federal courts to enter Preliminary Injunctions (PI) or Temporary Restraining Orders (TRO) by stating such PI' s will automatically expire after 90 days of being entered, unless the court makes the findings required in subsection (a)(1) [see preceding section of this article] of the law, and makes the order final before the end of the 90 day period. This applies only to civil actions with respect to prison conditions.

PLRA Denies Relief

Assuming a prisoner has won a case at trial and achieved injunctive relief the PLRA states that in any civil action involving prison conditions where prospective relief was ordered" the relief (i.e. an injunction) will be terminable upon the motion of any party two years after the court granted the relief; one year after a court has denied a motion for relief under the PLRA and for cases where relief was entered before passage of the PLRA, two years after its enactment into law.

"In any civil action with respect to prison conditions, defendant or intervenor shall be entitled to immediate termination of any prospective relief if the relief was approved or granted in the absence of a finding by the court that the relief is narrowly drawn, extends no further than necessary to correct the violation of the federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation of the federal right." The prospective relief won't terminate if a court makes the written findings based on the written record that prospective relief remains necessary to correct a current or ongoing violation of a federal right, etc.

The PLRA provisions that affect damage claims after they have accrued are of dubious constitutionality. In *Logan v. ZimmermanBrush Company*, 455 US 422, 102 S.Ct. 1148 (1982) the supreme court held that a tort claim is a type of property, which should apply to constitutional claims which are frequently referred to as constitutional torts. Thus, legislation that terminates a damage claim after the fact may violate due process.

PLRA Limits Consent Decrees

The PLRA orders courts not to enter any consent decrees on prison conditions unless it complies with the limitations on relief of subsection (a)(I). The PLRA states it will not affect private settlement agreements that are not subject to court enforcement (i.e. the worthless ones).

PLRA Discourages and Denies Special Masters

In a classic piece of micro-management the PLRA gives detailed instructions of who can be appointed as special masters in prison litigation and the process for appointment The PLRA shifts the burden of paying the special masters from the prison official defendants to the federal judiciary and limits special master payment to that afforded to attorneys in prison litigation ($40 an hour for out of court work; $75 an hour for court appearances). The likely result will be a shortage of people with the necessary expertise willing to serve as special masters. Recent news reports have stated that special masters appointed to implement changes in the Pelican Bay litigation have already suspended their efforts until the matter of their payment is resolved. In essence this shifts the burden of paying masters from the state defendants to the federal judiciary-from funds appropriated to their budget by Congress!

The Civil Rights of Institutionalized Persons Act: (CRIPA) Codified as 42 U.S.C. § 1997

CRIPA allows the attorney general to file suit against jails or prisons which are violating the federal rights of those confined within them. Under a new amendment any such suits must be personally signed by the attorney general, not the assistant US attorney actually filing the suit. Likewise the AG must personally sign any motions to intervene in ongoing prison litigation.

Previously CRIPA set forth criteria for the establishment of grievance systems The PLRA has now modified 42 U.S.C. § 1983 to require the exhaustion of administrative remedies before prisoners can file suit challenging conditions of confinement. Since many suits seek money damages and no state grievance systems we aware of provide money damages, the relief available in administrative forums is limited. The PLRA notes that the failure of a state to institute a grievance system won't be cause for it to be sued. The PLRA states that if a court wants to dismiss a prisoner's suit because it is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief, the court can dismiss the suit without requiring exhaustion of administrative remedies.

PLRA Limits Attorney's Fees and Punishes Lawyers for Representing Prisoners

Anyone doing prison litigation knows that it is extremely difficult to find counsel willing to take on prison civil rights actions That situation is now going to get a lot worse. The PLRA modifies 42 U.S.C. § 1988, which allows the award of attorney fees to civil rights plaintiffs who prevail in their suits. It codifies the existing law that requires the fee award to be directly related to proving the violation of the plaintiff's rights, the fee awarded is proportionate to the relief awarded and the fee was directly and reasonable incurred in enforcing the relief ordered for the violation. Which given the limits on relief won't be much!

Until now courts would award attorney fees to prevailing plaintiffs based on a number of factors such as the experience and skill of the attorney, the prevailing market rate in that area for comparable attorneys, etc. The fee award was paid in its entirety by the losing defendant. That has all changed now. The law states: "Whenever a monetary judgment is awarded in an action described in paragraph (I), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

"(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than the amount authorized under 18 U.S.C.A. § 3006, for

payment of court appointed counsel." The problem with this is that the rates established for court appointed counsel apply to criminal actions, where the government is required to provide counsel. It will remain to be seen how many attorneys will now take prisoner cases when, if they win, they face only the prospect of $40 an hour for their out of court work and $75 an hour for in court appearances. The intended result of this is to make attorneys unwilling to take on prison litigation. This will have a major impact on prison litigation.

Of immediate interest is whether this limitation on attorney fees can be applied to cases that were pending when the law was passed or, at a minimum, to work performed before the passage of the statute. This portion is also vulnerable to challenge as violating both due process and equal protection.

PLRA Limits Recovery for Damages

"No federal civil action may be brought by a prisoner confined in a jail, prison or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." This goes directly against numerous cases which have held that prisoners can recover monetary damages for constitutional violations that result only in fear, mental or emotional injury. This seems to indicate an intent to allow psychological torture or torment with complete impunity by prison officials.

PLRA Limits Prisoner Appearances at Court Hearings

The PLRA requires that any pretrial court hearings be conducted by phone, video conferencing or in the prison itself if possible.

PLRA Provides Defendants Need Not Reply to Complaint and No Relief Can be Taken

"Any defendant may waive the right to reply to any action brought by a prisoner confined in any jail, prison or other correctional facility under. . . 42 U. S.C. § 1983 or any other federal law. Notwithstanding any other law or rule of procedure, such waiver shall not constitute an admission of the allegations contained in the complaint. No relief shall be granted to the plaintiff unless a reply has been filed."

"The court may require any defendant to reply to a complaint brought under this section if it finds that the plaintiff has a reasonable opportunity to prevail on the merits."

PLRA Limits Filing In Forma Pauperis

In 1894 congress enacted 28 U S C. § 1915 to allow poor people access to the courts without requiring prepayment of the filing fee needed to file a lawsuit. Since most prisoners are too poor to pay the current $120 filing fee required in federal court, the bulk of prisoner litigation is filed In Forma Pauperis (or as an indigent) The PLRA extensively modifies the IFP statute and essentially makes indigent prisoner filings a thing of the past. It requires a prisoner seeking to file suit without prepayment of the filing fee to submit an affidavit of their assets and income, and a certified copy of their prison trust account for the six month period immediately preceding the filing of the complaint or the notice of appeal, obtained from the appropriate prison official.

"(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of the filing fee. The court shall assess, and when funds exist, collect, as a partial payment of any court fees required by law, an initial filing fee of 20 percent of the greater of (A) the average monthly deposits to the prisoner's account; or (B) the average monthly balance in the prisoner's account for the six month period immediately preceding the filing of the complaint or notice of appeal.

"(2) After payment of the initial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid."

"(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment

"(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee."

It will be interesting to see how much time is going to spent administering the small

amounts of funds that most prisoners receive. A prisoner earning say $20 a month, if that much, would pay $4 a month for 30 months to pay the $120 filing fee. The amount of time spent administering these funds will likely cost more than the filing fee itself. But the paramount purpose of imposing the filing fee is to limit the number of suits filed by prisoners.

The PLRA also amended the Bankruptcy Code so that prisoners cannot seek relief "for a fee imposed by a court for the filing of a case, motion, complaint, or appeal, or for other such costs and expenses assessed with respect to such filing, regardless of an assertion of poverty by the debtor...." The law also allows for the collection of costs assessed against prisoners pursuant to § 19 1 5 in the same manner as the filing fee.

Less than three weeks after the passage of PLRA, prisoners in California have been inform by the courts of the new fee requirements and asking the prisoners if they want to voluntarily dismiss the action or continue and pay the fee. The wording of the orders make it clear the court would prefer the action be withdrawn. **Readers should note that they can seek reimbursement for any filing fee that is paid under 42 U.S.C. § 1988.** Given the fact that prisoner litigants will be forced to pay the entire filing fee eventually, even if they file in forma pauperis, prisoners may consider paying the filing fee up-front and avoiding IFP status This will ensure the complaint is served on the defendants, removes the pre-screening hurdle, and requires the defendants to respond to the complaint.

The law also limits the number of suits prisoners can file under some circumstances "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." This makes the just the language in an order of frivolousness a requirement to request a reconsideration, etc. It also requires courts to screen IFP complaints before docketing or as soon after docketing as possible if it is an action filed by a prisoner.

PLRA Directs Payment of Damage Awards for Restitution Orders

"Any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison or correctional facility, shall be paid directly to satisfy any outstanding restitution orders pending against the prisoner. The remainder of any such award, after full payment of all pending restitution orders shall be forwarded to the prisoner." Past court rulings have upheld the diversion of damage awards to pay for restitution orders.[503] However, such funds cannot be used to pay for, say, the cost of incarceration or similar kickbacks to prison officials.[504]

PLRA Requires Victim Notification of Damage Awards So They Can Benefit From Your Further Loss

"Prior to a payment of any compensatory damages awarded to a prisoner in connection with a civil action brought against any Federal, State, or local jail, prison, or correctional facility or against any official or agent of such jail, prison, or correctional facility, reasonable efforts shall be made to notify the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of an such compensatory damages."

PLRA Provides Loss of Earned Time Through An Unfair Provision for Prison Time for Filing a Complaint Deemed Frivolous

I would like to see this rule applied to United States Attorneys when they file a frivolous response or lie in an over eager to win. Unfortunately, the government only applies this punishment to those without resources or training to fight back. Federal prisoners who earn a measly 56 days a year in earned time credits face the loss of such credits if they have not yet been earned, if a court finds that the claim was filed for a malicious purpose, to harass the defendant, or if the prisoner testifies falsely or presents false evidence or information to the court. Readers will note this applies only to federal prisoners. More tellingly,

---

503 See: *Beeks v. Hundley*, 34 F.3d 658 (8th Cir. 1994)

504 See: *Hankins v. Finnel*, 964 F.2d 853 (8th Cir. 1992).

no such sanctions are leveled against prison official defendants or their attorneys.

It would probably not be an understatement to say that the PLRA is the biggest development, and a bad one at that, to hit prisoner litigants in the past 30 years As we come up on the 25th anniversary of the Attica uprising this September 1996, prisoners find themselves in essentially the same situation they did then: without adequate recourse to the courts or other forums in which to seek justice and equitable relief. It was the Attica uprising, with its attendant 43 deaths, that marked a turning point in the courts' until then, largely "hands off" attitude towards the constitutional rights of prisoners. To the extent that history repeats itself first as tragedy then as farce, congress appears to have forgotten why the courts got involved in prison conditions to begin with.

Already reports are flowing in telling of prison officials in various states, including South Carolina, Michigan and Iowa, are moving to vacate long-standing consent decrees and injunctions. Since at least 430 prisons in the U.S. are under some form of consent decree or injunction, the impact of the PLRA cannot be overstated. The ACLU's National Prison Project has already considered this to combat the institutional litigation provisions of the PLRA. applies only to the class action aspects of the PRLA, not the IFP or individual litigant portions.] The Anti Terrorism Bill has gutted federal habeas corpus if anyone is watching.

APPENDIX - A

(28 CFR § 541 - Tables)
Federal BOP Violations & Sanctions

The Tables listed below are from The Code of Federal Regulations (CFR), for federal inmates. Refer to the CFR for detailed information about GCT, SCT, phone sanctions etc. Institutions often take phone privileges when the rules specifically say that phone or visiting limitation sanction cannot be applied unless the infraction was related to that privilege.

Check the calculation if you lost GCT (Good Conduct Time). Many times GCT is taken and is excessive and improper to take from you. Check on the actual amount you have coming, and the amount taken.

Misc. Allowable Sanctions

28 CFR § 541.13 (Appendix A, Table 4 - Sanctions)

28 CFR § 540.40 (Visiting Regulations)

28 CFR § 100. (Telephone Regulations for Inmates) § 540.105 (Telephone calls for inmates in admission, holdover, segregation, or pre-trial-status) " . . . Staff may not withhold phone privileges as a disciplinary measure except where the infraction for the disciplinary action is taken involves abuse, or a clear potential for abuse, of the phone privileges."

See also: 28 CFR § 541.13 (Appendix A, Table 4 - sanctions)(g) (loss of privileges) " ... loss of telephone privileges for a specified time for an abuse of the telephone privilege ..." Staff cannot take phone privilages, unless the disciplinary action is telephone related.

28 CFR § 541.13 (Appendix A, Table 4 - Sanctions)(1-a through 1-f) Good Conduct Time and Statutory Good Time withholding guidelines.

NOTICE OF CHANGE: As of passing by the BOP into law in the 2 Q 1996, , 28 CFR § 541 has been amended . Also see 60 FR 54922, Final Effective Date 07/00/96

The changes implement revisions provided in the Violent Crime Control and Law Enforcement Act of 1994 which requires inmates sentenced for crimes of violence to "display exemplary compliance" with institution regulations in order to earn good conduct Time. (GCT). When this revision is finally published, we will publish our 7th Edition of this manual.

Based on my review of a preliminary copy, if you are convicted of a crime categorized as a "violent crime" sanctions will be more severe than those convicted of "non-violent crimes. We will be in touch with the ACLU for comment on this issue.

For more information contact: Roy Nanovac, Rules Administrator, Department of Justice, Bureau of Prisons, HOLC Room 754, 320 First St. NW, DC 20534. (202) 514-6655.

TIME LIMITS IN DISCIPLINARY PROCESS

28 CFR § 541.11 (TABLE - 2)

Staff first becomes aware of your involvement in the incident.

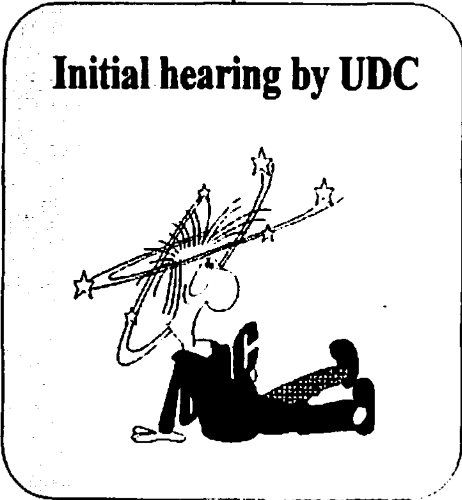
Maximum, ordinarily of 3 work days from the time staff became aware of the person's involvement in the incident.

(Excludes the day the staff became aware of the inmate's involvement, weekends, and legal holidays.)

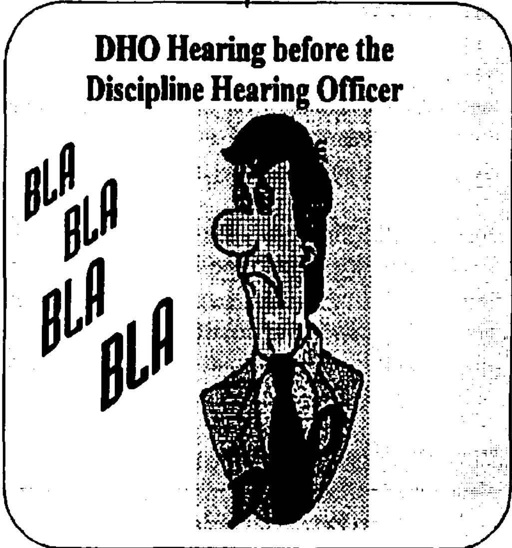
Ordinarily maximum of 24 hours

Staff must give inmate notice of charges by delivering Incident Report. Unless waived, a minimum of 24 hours before DHO may hear your incident report.

Initial hearing by UDC



DHO Hearing before the Discipline Hearing Officer



Note: These time limits are subject to exceptions as provided in the rules, (28 Code of Federal Regulations).

Staff may suspend disciplinary procedings for a period not to exceed two calander weeks while informal resolution is undertaken and accomplished.

If informal resolution is unsuccessful, staff may reinstate disciplinary proceedings at the same stage at which suspended.

The time requirements then begin running again, at the same point at which they were suspended.

The term, "Ordinarily", is NOT an excuse to do anything staff wishes. Any delay beyound what is mentioned must be substantially justified: ex: Fire, Riot, etc.

For Federal Prisoners.
State Prisoners, check your State Rules.

28 CFR § 541.13 - Table - 3 - (Greatest Category)

100 - Series: PROHIBITED ACTS AND DISCIPLINARY SEVERITY SCALE

Code	Prohibited Acts	Sanctions
100	Killing	A. Recommend parole date rescission or retardation. B. Forfeit earned statutory good time (up to 100%) and/or terminate or disallow extra good time (an extra good time sanction may not be suspended), B 1 Disallow ordinarily between 50 and 75% (27-41 days) of good conduct time credit available for year (a good conduct time sanction may not be suspended). C. Disciplinary Transfer (recommend). D Disciplinary segregation (up to 60 days). E. Make monetary restitution. F. Withhold statutory good time (Note-can be in addition to A through E-cannot be the only sanction executed). G. Loss of privileges (Note-can be in addition to A through E-cannot be the only sanction executed),
101	Assaulting any person (includes sexual assault) or an armed assault on the institution's secure perimeter (a charge for assaulting any person at this level is to be used only when serious physical injury has been attempted or carried out by an inmate)	
102	Escape from escort; escape from a secure institution (Security level 2 through 6 and administrative institutions); or escape from a Security level I institution *with* violence	
103	Setting a fire (charged with this act in this category only when found to pose a threat to life or a threat of serious bodily harm or in furtherance of a prohibited act of Greatest Severity, e.g., in furtherance of a riot or escape; otherwise the charge is properly classified Code 218, or 329)	
104	Possession, manufacture, or introduction of a gun, firearm, weapon, sharpened instrument, knife, dangerous chemical, explosive or any ammunition	
105	Rioting	
106	Encouraging others to riot	
107	Taking hostage(s)	
108	Possession, manufacture, or introduction of a hazardous tool (Tools most likely to be used in an escape or escape attempt or to serve as weapons capable of doing serious bodily harm to others; or those hazardous to institutional security or personal safety, e.g., hack-saw blade)	
109	Possession, introduction, or use of any narcotics, marijuana, drugs, or related paraphernalia not prescribed for the individual by the medical staff	
110	Refusing to provide a urine sample or to take part in other drug-abuse testing	
198	Interfering with a staff member in the performance of duties. (Conduct must be of the Greatest Severity nature) This charge is to be used only when another charge of greatest severity is not applicable	
199	Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons. *(Conduct must be of the Greatest Severity nature.) This* charge is to be used only when another charge of greatest severity is not applicable	

28 CFR § 541.13 - Table - 3 - (High Category)

200 - Series: PROHIBITED ACTS AND DISCIPLINARY SEVERITY SCALE

Code	Prohibited Acts	Sanctions
200	Escape from unescorted Community Programs and activities and Open Institutions (Security Level 1) and from outside secure institutions - without violence.	A. Recommend parole date rescission or retardation.
201	Fighting with another person	
202	(Not to be used)	B. FORFEIT earned statutory good time up to 50% or up to 60 days, whichever is less, and/or terminate or disallow extra good time (an extra good time sanction may not be suspended).
203	Threatening another with bodily harm or any other offense	
204	Extortion, blackmail, protection: Demanding or receiving money or anything of value in return for protection against others, to avoid bodily harm, or under threat of informing.	
205	Engaging in sexual acts	
206	Making sexual proposals or threats to another	
207	Wearing a disguise or a mask	
208	Possession of any unauthorized locking device, or lock pick, or tampering with or blocking any lock device (includes 213 keys), or destroying, altering, interfering with, improperly 214 using, or damaging any security device, mechanism, or	B.1 Disallow ordinarily between 25 and 50% (14-27 days) of good conduct time credit available for year (a good conduct time sanction may not be suspended).
209	procedure.	
210	Adulteration of any food or drink.	
211	(Not to be used)	
212	Possessing any officer's or staff clothing	
213	Engaging in, or encouraging a group demonstration Encouraging others to refuse to work, or to participate in a work	
214	stoppage.	C. DISCIPLINARY transfer (recommend).
215	(Not to be used)	
216	Introduction of alcohol into BOP facility. Giving or offering an official or staff member a bribe, or anything	D. Disciplinary segregation (up to 30 days).
217	of value. Giving money to, or receiving money from, any person for purposes of introducing contraband or for any other illegal or	
218	prohibited purposes. Destroying, altering, or damaging government property, or the property of another person, having a value in excess of $100.00 or destroying, altering, or damaging life-safety devices (e.g., fire	E. Make monetary restitution
219	alarm) regardless of financial value. Stealing (theft; this includes data obtained through the unauthorized use of a communications facility, or through the unauthorized access to disks, tapes, or computer printouts or other automated	F. Withhold statutory good time
220	equipment on which data is stored.) Demonstrating, practicing, or using martial arts, boxing (except for use of a punching bag), wrestling, or other forms of physical	G. Loss of privileges: commissary, movies, recreation, etc.
221	encounter, or military exercises or drill. Being in an unauthorized area with a person of the opposite sex	H. Change housing (quarters).
222	without staff permission.	I. Remove from program and/or group activity.
223	Making, possessing, or using intoxicants. Refusing to breathe into a breathalyzer or take part in other testing	
224	for use of alcohol Assaulting any person (charged with this act only when a less serious physical injury or contact has been attempted	J. Loss of job
298	or carried out by an inmate) Interfering with a staff member in the performance of duties *(Conduct must be of the High Severity nature.)* This charge is to be used only when another charge of high	K. Impound inmate's personal property-
299	severity is not applicable Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons *(Conduct must be of the High Severity nature)* This charge is to be used only when another charge of high severity is not applicable	L. Confiscate contraband. M. Restrict to quarters

28 CFR § 541.13 - Table - 3 - (Moderate Category)

300 - Series: PROHIBITED ACTS AND DISCIPLINARY SEVERITY SCALE

Code	Prohibited Acts	Sanctions
300	Indecent exposure	A. Recommend parole date rescission retardation. B. FORFEIT earned statutory good time up to 25% or up to 30 days, whichever is less, and/or terminate or disallow extra good time (an extra good time sanction may not be suspended). B.1 Disallow ordinarily up to 25% (1-14 days) of good conduct time credit available for year (a good conduct time sanction may not be suspended). C. Disciplinary transfer (recommend). D. Disciplinary segregation (up to 15 days). E. Make monetary restitution. F. Withhold statutory good time. G. Loss of privileges: commissary, movies, recreation, etc. H. Change housing (quarters). I. Remove from program and/or group activity. J. Loss of job. K. Impound inmate's personal property. L. Confiscate contraband. M. Restrict to quarters. N. Extra duty.
301	(Not to be used)	
302	Misuse of authorized medication	
303	Possession of money or currency, unless specifically authorized, or in excess of the amount authorized.	
304	Loaning of property or anything of value for profit or increased return.	
305	Possession of anything not authorized for retention or receipt by the inmate, and not issued to him through regular channels.	
306	Refusing to work, or to accept a program assignment.	
307	Refusing to obey an order of any staff member (May be categorized and charged in terms of greater severity, according to the nature of the order being disobeyed; e.g.,failure to obey an order which furthers a riot would be charged as 105, Rioting; refusing to obey an order which furthers a fight would be charged as 201, Fighting; refusing to provide a urine sample when ordered would be charged as Code 110.	
308	Violating a condition of a furlough.	
309	Violating a condition of a community program	
310	Unexcused absence from work or any assignment	
311	Failing to perform work as instructed by the supervisor	
312	Insolence towards a staff member	
313	Lying or providing a false statement to a staff member.	
314	Counterfeiting, forging or unauthorized reproduction of any document, article of identification, money, security, or official paper. (May be categorized in terms of greater severity according to the nature of the item being reproduced, e.g., counterfeiting release papers to effect escape, Code 102 or Code 200).	
315	Participating in an unauthorized meeting or gathering.	
316	Being in an unauthorized area.	
317	Failure to follow safety or sanitation regulations	
318	Using any equipment or machinery which is not specifically authorized.	
319	Using any equipment or machinery contrary to instructions or posted safety standards.	
320	Failing to stand count.	
321	Interfering with the taking of count.	
322	(Not to be used)	
323	(Not to be used)	
324	Gambling	
325	Preparing or conducting a gambling pool	
326	Possession of gambling paraphernalia	
327	Unauthorized contacts with the public	
328	Giving money or anything of value to, or accepting money or anything of value from: another inmate, or any other person without staff authorization.	
329	Destroying, altering, or damaging government property, or the property of another person, having a value of $100.00 or less.	
330	Being unsanitary or untidy; failing to keep one's person and one's quarters in accordance with posted standards.	
331	Possession, manufacture, or introduction of a non-hazardous tool or other non-hazardous contraband (Tool not likely to be used in an escape or escape attempt, or to serve as a weapon capable of doing serious bodily harm to others, or not hazardous to institutional security or personal safety; Other non-hazardous contraband includes such items as food or cosmetics)	
398	Interfering with a staff member in the performance of duties. *(Conduct must be of the Moderate Severity nature.) This* charge is to be used only when another charge of moderate severity is not applicable.	
399	Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons. *(Conduct must be of the Moderate Severity nature). This* charge is to be used only when another charge of moderate severity is not applicable.	

28 CFR § 541.13 - Table - 3 - (Low Moderate Category)

400 - Series: PROHIBITED ACTS AND DISCIPLINARY SEVERITY SCALE

Code	Prohibited Acts	Sanctions
400	Possession of property belong to another person.	B.1 Disallow ordinarily up to 12.5% (1-7 days) of good conduct time credit available for year (to be used only where inmate found to have committed a second violation of the same prohibited act within 6 months); Disallow ordinarily up to 25% (1-14 days) of good conduct time credit available for year (to be used only where inmate found to have committed a third violation of the same prohibited act within 6 months) (a good conduct time sanction may not be suspended). E. Make monetary restitution. F. Withhold statutory good time. G. Loss of privileges: commissary, movies, recreation, etc. H. Change housing (quarters). I. Remove from program and/or group activity. J. Loss of job. K. Impound inmate's personal property. L. Confiscate contraband. M. Restrict to quarters N. Extra duty. O. Reprimand. P. Warning.
401	Possessing unauthorized amount of otherwise authorized clothing.	
402	Malingering, feigning illness.	
403	Smoking where prohibited	
404	Using abusive or obscene language	
405	Tattooing or self-mutilation	
406	Unauthorized use of mail or telephone (Restriction, or loss for a specific period of time, of these privileges may often be an appropriate sanction G) (May be categorized and charged in terms of greater severity, according to the nature of the unauthorized use; e.g., the telephone is used for planning, facilitating, committing an armed assault on the institution's secure perimeter, would be charged as Code 101, Assault)	
407	Conduct with a visitor in violation of Bureau regulations (Restriction, or loss for a specific period of time, of these privileges may often be an appropriate sanction G)	
408	Conducting a business	
409	Unauthorized physical contact (e.g., kissing, embracing)	
498	Interfering with a staff member in the performance of duties *(Conduct must be of the Low Moderate Severity nature.)* This charge is to be used only when another charge of low moderate severity is not applicable.	
499	Conduct which disrupts or interferes with the security or orderly running of the institution or the Bureau of Prisons *(Conduct must be of the Low Moderate Severity nature.)* This charge is to be used only when another charge of low moderate severity is not applicable	

Note: Aiding another person to commit any of these offenses, attempting to commit any of these offenses, and making plans to commit any of these offenses, in all categories of severity, shall be considered the same as a commission of the offense itself.

28 CFR § 541.13 - Table - 5

SANCTIONS FOR REPETITION OF PROHIBITED ACTS WITHIN SAME CATEGORY:

When the Unit Discipline Committee or DHO finds that an inmate has committed a prohibited act in the Low Moderate, Moderate, or High category, and when there has been a repetition of the same offense(s) within recent months (offenses for violation of the same code), increased sanctions are authorized to be imposed by the DHO according to the following chart. (Note: An informal resolution may not be considered as a prior offense for purposes of this chart.)

Category	Prior Offense (same code) within time period	Frequency of repeated offense	Sanction permitted
Low Moderate (400 series)	6 months	2nd offense	Low moderate sanctions, plus 1. Disciplinary segregation, up to 7 days. 2. Forfeit earned SGT up to 10% or up to 15 days, whichever is less, and/or terminate or disallow EGT (an EGT sanction may not be suspended).
		3rd offense or more	Any sanctions available in Moderate (300) and Low Moderate (400) series.
Moderate (300 series)	12 months	2nd offense	Moderate sanctions(A,C,E-N), plus 1. Disciplinary segregation, up to 21 days. 2. Forfeit earned SGT up to 37-1/2% or up to 45 days, whichever is less, and/or terminate or disallow EGT (an EGT sanction may not be suspended).
		3rd offense or more	Any sanctions available in Moderate (300) and High (200) series.
High (200 series)	18 months	2nd offense	High Sanctions (A,C,E-M), plus 1. Disciplinary segregation, up to 45 days. 2. Forfeit earned SGT up to 75% or up to 90 days, whichever is less, and/or terminate or disallow EGT (an EGT sanction may not be suspended).
		3rd offense or more	3rd offense, or more........ Any sanctions available in High (200) and Greatest (100) series.

28 CFR § 541.13 - Table - 6

SANCTIONS BY SEVERITY OF PROHIBITED ACT, WITH ELIGIBILITY FOR RESTORATION OF FORFEITED AND WITHHELD STATUTORY GOOD TIME:

Severity of act	Sanctions Allowed	Max. Amt. forf. SGT	Maximum Amount Withheld Statutory Good Time, (SGT)	Eligible restoration of forfeited SGT	Elig. restoration on W/hd/S GT	Maximum Disciplinary Segregation
Greatest	A-F	100%	Good time creditable for single month during which violation occurs. Applies to all categories.	24 mos.	18 mos	60 days
High	A-M	50% or 60 days, which ever is less.		18 mos.	12 mos	30 days
Moderate	A-N	25% or 30 days, whichever is less.		12 mos.	6 mos	15 days
Low Moderate	E-P	N/A		N/A (1st offense) 6 mos. (2nd offense in same category within six months)	3 mos	N/A (1st offense). 7 days (2nd offense) 15 days (3rd offense).

Note.-Restoration will be approved at the time of initial eligibility only when the inmate has shown a period of time with improved good behavior. When the Warden or his delegated representative denies restoration of forfeited or withheld statutory good time, the unit team shall notify the inmate of the reasons for denial. The unit team shall establish a new eligibility date, not to exceed six months from the date of denial.

An inmate with an approaching parole effective date, or an approaching mandatory release or expiration date who also has forfeited good time may be placed in a Community Treatment Center only if that inmate is otherwise eligible under Bureau policy, and it there exists a legitimate documented need for such placement. The length of stay at the Community Treatment Center is to be held to the time necessary to establish residence and employment.

[53 FR 197. Jan, 5, 1988. as amended at 53 FR 40686, Oct. 17, 1988: 54 FR 38987. Sept. 22, 1989: 54 FR 39095, Sept. 22, 1989.

APPENDIX - B

Table Of Authorities

Cases

*28 CFR § 542.19 .... 96, 98

*Wolf .... *

Bartholomew v Reed, 477 F Supp 223, 227 (D Or 1979), *modified*, 665 F2d 915 (9th Cir 1982) 41

Batista v Kuhlmann, 90 AD2d 934, 457 NYS2d 931 (1982) 37

Mathews v Eldridge, 424 US 319 (1976) 101

Rushing v State, 382 NW2d 141 (Iowa 1986) 49

U.S. v Austin, __ U.S.__. 113 S.Ct 2801, 125 L.Ed2d 488 (1993) 27

42 U.S.C. § 1983 .... 114, 115

42 U.S.C. § 1983 110

Adamns v Gunnell, 729 F2d 362 (5th Cir 1984) 21

Adams v Bunnell, 729 F.2d 362 (5th Cir. 1984) 11

Adams v Carlson, 375 F Supp 1228 (ED ILL 1974), *aff'd in part rev'd in part*, 521 F2d 168 (7th Cir 1975) 54

Adams v Wainwright, 875 F2d 1536 (11th Cir 1989) 17

Adkins v Martin, 599 F Supp 1510 (WD Okla 1988) 34

Adorno v Jones, 113 AD2d 973, 493 NYS2d 644 (1985) 52

Aikins v Lash, 514 F2d 55 (7th Cir 1975), *vacated*, 425 US 947, *modified on remand*, 547 F2d 372 (7th Cir 1976) 20

Alexander v. Ware, 714 F.2d 416, 419 (5th Cir. 1983) 7, 10, 13

Allen v State,418 NW2d 67 (Iowa 1988) 18

Alvardo v Lefevre, 11 AD2d 475, 488 NYS2d 856 (1985) 40

Amezquita v Coughlin, 169 AD2d 857, 564 NYS2d 584 (1991) 28

Anderson v Fiedler, 798 F Supp 544 (ED Wis 1992) 10

Anderson v. Creighton, 483 U.S. 635, 638 (1987) 115

Arcoren v Peters, 829 F2d 671 (8th Cir SD 1987) *cert den* 485 US 987 (1988) 113

Armstead v State, 714 F2d 360 (5th Cir 1983) 54

Armstead v State, 714 F2d 360 (5th Cir 1983) 26

Avant v Clifford, 67 NJ 496, 341 A2d 629 (1975) 14, 15, 23

Aviles v Scully, 154 AD2d 371, 545 NYS2d 847 (1989) 18

Balla v Idaho State Bd of Corrections, 569 F Supp 1558 (D Idaho 1984) 20

Barfield v Brierton, 843 F2d 923 (11th Cir 1989) 14

Barnes v LeFevre, 69 NY2d 649, 503 NE2d 1022, 511 NYS2d 591 (1986) 40

Barry v Whalen, 796 F Supp 885 (ED Va 1992) 20, 26

Bartholomew v Reed, 477 F Supp 223, 227 (D Or 1979), *modified*, 665 F2d 915 (9th Cir 1982) 25

Bartholomew v Reed, 477 F Supp 223, 229 (D Or 1979), *modified*, 655 F2d 915 (9th Cir 1982) 52

Bates v Dalsheim, 90 AD2d 485, 454 NYS 2D 552 (1982) 17

Battle v Anderson, 376 F Supp 402, 422 (ED Ala 1974) 55

Battle v Anderson, 376 F Supp 402, 422 (ED Okla 1974) 55

Baxter v Palmigiano, 425 U.S. 308 (1976) 15, 20

Baxter v Palmigiano, 425 US 308, 96 S Ct. 1551, 47 L Ed 2d 810 (1976) 29

Beeks v. Hundley, 34 F.3d 658 (8th Cir. 1994) 121

Bell v Hood, 327 US 678, 66 S.Ct. 773, 90 LE 939 (1946) 112

Bell v. Wolfish, 441 U. S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) 3

Benitez v Wolff 18

Berch v Stahl, 373 F Supp 412 (WDNC 1974) 14

Bickham v Cannon, 516 F2d 885 (7th Cir 1975) 55

Bill v Henderson, 631 F2d 1287 (6th Cir 1980) 16

Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 US 388, 91 SCt 1999, 29 LE2d 619 (1971) 112

Black v Brown, 524 F Supp 856 (ND ILL 1981), rev'd in part & aff'd in part, 688 F2d 841 (7th Cir 1982) 55

Black v Parker, 4 F 3d 442 (6th Cir 1992) 16

Blackshear v Coughlin, 586 NYS2d 34 (App Div 1992) 22

Blake v Commissioner of Corrections, 390 Mass 537, 457 NE2d 281 (1983) 16

Bonney v Oregon State Penitentiary, Corrections Div. 16 Or App 509, 519 P2d 383 (1974) 27

Bono v Saxbe, 450 F Supp 934 (ED ILL 1978), *affd in part*, 620 F2d 609 (7th Cir 1980) 52

Bourgeios v Murphy, 809 P2d 472 (Idaho 1991) 35

Boyde v Coughlin, 105 AD2d 532, 481 NYS2d 769 (1984) 41

Bradley v State, 473 NW 2d 224 (Iowa Ct App 1991) 40

Bradley v State, 473 NW2d 224 (Iowa Ct App 1991) 29

Brady V Maryland, 373 US 83, 83 S Ct 1194, 16 L Ed 215 (1963) 100

Brady v Maryland, 373 US 83, 83 S Ct 1194, 16 L Ed 215 (1963) 32

Bressman v Farrier, 825 F. Supp. 231 (ND IA 1993) 106

Brooks-Bey v Smith, 819 F2d 178 (7th Cir 1987) 48

Brown v Coughlin, 165 AD2d 935, 561 NYS2d 99 (1990) 21

Brown v Fauver, 819 F2d 395 (3rd Cir 1987) 101

Brown v Fauver, 819 F2d 395 (3rd Cir 1987) 45

Brown-El v Delo, 969 F2d 644 (8th Cir 1992) 74

Brown-El v Delo, 969 F2d 644 (8th Cir 1992) 48

Brown-El v Delo, 969 F2d 644 (8th Cir 1992) 41

Brown-El v Delo, 969 F2d 644 (8th Cir 1992) 20

Bruce v Wade, 537 F2d 850, 854 n9 (5th Cir 1976) 16

Bryant v Miller, 637 F Supp 226 (MD Pa 1984) 52

Burbank v Twomey, 520 F2d 744 (7th Cir 1975) 50

Burk v Coughlin, 97 AD2d 862, 469 NYS2d 240 (1983) 52

Bush v Lucas, 462 US 367, 103 S.Ct. 2404, 76 LE2d 648 (1983) 112

Butz v Economou, 438 US 478, 98 SCt 2894, 57 LE2d 895 (1978) 114

Byerly v Ashley, 825 SW2d 286 (Ky Ct App 1991), *cert denied*, 113 S Ct 364 (1992) 37

Cain v Lane, 857 F2d 1139 (7th Cir 1988) 105

Caldwell v Miller, 790 F2d 589 (7th Cir 1986) 12

Cale v Johnson, 861 F 2d 584 (2d Cir 1985) 106

Cale v Johnson, 861 F2d 584 (2nd Cir 1988) 113

Cale v. Johnson, 861 F.2d 943 (6th Cir. 1988) 109

Cambell v Marquette Prison Warden, 119 Mich App 377, 326 NW2d 516 (1982) 42

Campbell v Beto, 460 F2d 765 (5th Cir 1972 54

Campbell v Henman, 931 F2d 1212 (7th Cir 1991) 52

Carlson v Green, 446 US 14, 100 S.Ct. 1468, 64 L.Ed 2d 15 (1980) 112

Casper v Marquette Prison Warden, 126 Mich App 271,337 NW2d 56, 58 (1983) 27

Castaneda v Henman,. 914 F2d 981 (7th Cir 1990), cert denied, 498 U.S. 1124 (1991) 14

Caudle-El v Peters, 727 F Supp 1175 (ND ILL 1989) 20

Chavis v Rowe, 64 F2d 1281 (7th Cir), *cert den*, 454 US 907 (1981) 48

Chavis v Rowe, 643 F2d 1281 (7th Cir), *cert denied*, 555 F Supp 137 (ND ILL 1982) 100

Chavis v Rowe, 643 F2d 1281 (7th Cir), *cert denied*, 555 F Supp 137 (ND ILL 1982) 32

Chavis v. Rowe, 643 F.2d 1281, 1287 (7th Cir. 1981) 9, 31

Chochrek v Oregon State Penn, 21 Or App 406, 534 P2d 1175 (1975) 25

City Natl Bank v United States, 907 F2d 536 (5th Cir 1990) 94

Clardy v Levi, 545 F2d 1241 (9th Cir 1976) 41

Clark v Brewer, 776 F2d 226 (7th Cir 1985) 14

Clark v Solem, 336 NW2d 381 (SD 1983) 53

Clutchette vs Procunier, 510 F2d 613(9th Cir 1975), *rev'd sub nom Baxter vs Palmigiano*, 425 US 308(1976) 58

Clutchette v Procunier, 510 F2d 613 (9th Cir 1975), *rev'd sub nom* 15, 20

Coats v Bechtel, 811 F2d 1045 (7th Cir Wis 1987) 116

Coffman v Trickey, 884 F.2d 1057 (8th Cir. 1989) 11

Colbeth v Civiletti, 516 F Supp 73 (SD Ind 1980) 28

Coleman v California Yearly Meeting of Friends Church, 27 Cal.App.2d 579, 81 P2d 469, 470 114

Coleman v Turner, 838 F2d 1004 (8th Cir 1988) 20

Collings v King, 743 F2d 248 (5th Cir 1984) 54

Collins v Bordenkircher, 403 F Supp 820 (ND Va 1975) 55

Collins v Hancock, 354 F Supp 1253 (DNH 1973) 22

Collins v Sullivan, 392 F Supp 621, 625 (MD Ala 1975) 50

Collins v Vitek, 375 F Supp 856 (DNH 1974) 10, 12, 22, 53

Commonwealth v Brooks, 330 Pa Super 335, 479 A2d 589, 594-95 (1984) 28

Commonwealth v Brooks, 479 A2d 589 (Pa Super 1984) 28

Commonwealth v Casper Forte, No. 97548 102

Conner v Reinhard, 847 F2d 384, 396-97 (7th Cir 1988) 115

Conner v Saki, 15 F3d 1463 (9th Cir 1993) 4, 5

Conner v. Sakai, 15 F.3d 1463 (9th Cir. 1993) 1

Cook v Teaxs Dept of Crimm Justice, Planning Dept, 37 3d 166 (5th Cir 1994) 115

Cooper v Lane, 969 F2d 368 (7th Cir 1992) 48

Cooper v Sheriff, 929 F2d 1078 (5th Cir 1991) 18

Cortez v Coughlin, 67 NY2d 907, 492 NE2d 1225, 501 NYS2d 809 (1986) 25

Crafton v Luttrel, 378 F Supp 521 (MD Tenn 1974) 50

Craig v Hocker, 405 F Supp 656 (D Nev 1975) 20

Crooks v Warne, 516 F2d 837 (2d Cir 1975) 5

Cruz v Beto, 405 US 319, 321 (1972) 52

Cummings v Caspari, 797 F Supp 747 (ED Mo 1992) 54

Dagle v Helgemore, 399 F Supp 416 (DNH 1975) 14, 15

Daigle v Helgemoe, 399 F Supp 416 (DNH 1975 19

Dalton vs Hutto, 71 F2d 75 (4th Cir 1983) 74

Davis v Andrews, Tex.Civ.App., 361 S.W.2d 419, 423 43

Davis v Andrews, Tex.Civ.App., 361 S.W.2d 419, 423 102

Dawes v Leonardo, 167 AD2d 585, 563 NYS2d (1990) 20

Devaney v Hall, 509 F Supp 497 (D Mass 1981) 16

Dewyer v. Davis, 842 F. Supp. 1304 (WD WA 1993) 7

Diercks v Durham, 959 F.2d 710 (8th Cir. 1992 21

Dixon v. *Brown*, 38 F.3d 379 (8th Cir. 1994) 106

Douglas v California, 372 US 353 (1963); 19

Dowdy v Johnson, 510 F Supp. 836 (ED Va 1981) 16

Drayton v Robinson, 519 F Supp 545 (MD Pa 1981) 55

Drayton v Robinson, 719 F2d 1214 (3rd Cir 1983) 16

Dudly v Stewart, 724 F2d 1493 (11th Cir 1984) 14

Dunn v White, 880 F2d 1188 (10th Cir 1989), cert denied, 493 U.S. 1059 (1990) 13

Dyson v Kocik, 689 F.2d 466 (3rd Cir. 1982) 44

Edwards v White, 501 F Supp 8 (MD Pa 1979), affd, 633 F2d 209 (3rd Cir 1980) 105

Edwards v White, 501 F Supp 8 (MD Pa 1979), affd, 633 F2d 209 (3rd Cir 1980) 12

Elkin v Fauver, 969 F2d 48 (3rd Cir), *cert denied*, 113 S Ct 473 (1992) 37

Elkin v Fauver, 969 F2d 48 (3rd Cir 1992) 54

Eng v Coughlin, 858 F.2d 889 (2nd Cir. 1988) 19

Engel v Wendl, 921 F2d 148 (8th Cir 1991) 101

Engel v Wendl, 921 F2d 148 (8th Cir 1991) 45

Evans v State, 485 So 2d 402 (Ala Crim App 1986) 42

Ex parte Floyd, 457 So 2d 961 (Ala 1984) 40

Ex parte Hawkins, 475 So 2d 489 (Ala 1985) 49

Fellowship Baptist Church v Benton, 815 F2d 485 (8th Cir Iowa 1987), *on remand* 678 F Supp 213 (SD Iowa 1988) 116

Fielding v State, 409 So 2d 964 (Ala Crim App 1981) 49

Finney v Mabry, 455 F Supp 756 (ED Ark 1978) 49, 50

Flowers v Phelps, 595 So 2d 668 (La Ct App 1991) 50

Flythe v Davis, 407 F Supp 137 (ED Va 1976) 55

Flythe v Davis, 407 F Supp 137 (ED Va 1976) 41

Forbes vs Trigg, 976 F2d 308 (7th Cir 1992), *cert denied*, 113 S Ct 1362 (1993) 74

Ford v Commissioner of Correction, 27 Mass App 1127, 537 NE2d 1265 (1989), *review denied*, 405 Mass 1202, 541 NE2d 344 (1989) 49

Ford v Commissioner of Corrections, 27 Mass App 1127, 537 NE 2d 1265 (1989), *review denied*, 405 Mass 1202, 541 NE2d 344 (1989) 21

Foster v Coughlin, 156 AD2d 806, 549 NYS2d 223 (1989), *appeal granted*, 75 NY2d 709, 555 NE2d 619, 556 NYS2d 247, affd, 76 NY2d 964, 565 NE2d 477, 563 NYS2d 728 (1990) 40

Franco v Kelley, 854 F.2d 584 (2nd Cir. 1988) 106

Franco v Kelly, 854 F.2d 584, 589 (2nd Cir. 1988) 107

Franco v Kelly, 854 F2d 584 (2d Cir 1988) 105

Franco v. Kelley, 854 F.2d 584 (2nd Cir. 1988) 109

Franco v. Kelly, 854 F.2d 584 (2nd Cir. 1988) 108

Franco v. Kelly, 854 F.2d 584. 589 (2nd Cir. 1988) 108

Franco v. Kelly, 854 F.2d 584, 589-90 (2nd Cir. 1988) 106

Franklin v Israel, 558 F Supp 712 (WD Wis 1983) 49

Frazier v Dubois, 922 F2d 560 (10th Cir 1990) 17

Frazier v. Coughlin, 850 F.2d 129, 130 (2d Cir.1988) 38

Freeman v Rideout, 808 F.2d 949 (2nd Cir.1986) 107

Freeman v. Rideout, 808 F.2d 949, 951 (2nd Cir. 1986) 108

Freeman v. Rideout, 808 F.2d 949, 951 (2nd Cir. 1986) 108

Freeman v. Rideout, 808 F.2d 949, 951-53 (2nd Cir. 1986) 108

Frietas v Auger, 837 F2d 806 (8th Cir 1988) 43

Frietes v Auger, 837 F 2d 806, 810-11 (8th Cir 1988) 27

Frost vs Railroad Commn, 271 US 583(1962) 60

Gagnon v Scarpelli, 411 US 778, 790 (1973) 20

Galimore v Lane, 635 F Supp 1367 (ND ILL 1986) 26

Garcia v Singletary, 13 F.3d 1487 (11th Cir. 1994) 29

Gardner vs Johnson, 429 F Supp 432 (ED Mich 1977) 61

Garfield v Davis, 566 F Supp 1069 (ED Pa 1983) 17

Garfield v Davis, 566 F Supp 1069; *Pearson v Townsend*, 362 F Supp 207 (DSC 1973) 51

Garrity v New Jersey, 385 US 493(1967) 60

Gaston v Taylor, 918 F.2d 25 (4th Cir. 1990) 10, 13

Gates v Collier, 454 F Supp 579 (ND Miss 1978),aff'd, 606 F2d 115 (5th Cir 1979) 21

Giano v Sullivan, 709 F Supp 1209 (SDNY 1989) 18

Gibbs v Hopkins, 10 F3d 373 (6th Cir 1993) 106

Gibbs v King, 779 F2d 1040 (5th Cir 1985), cert denied, 476 US 1117 (1986) 10, 12

Gibson v Roush, 587 F Supp 504 (WD Miss 1984) 54

Gibson v Roush, 587 F Supp 504 (WD Miss 1984) 26

Gick v Sargent, 696 F2d 413 (8th Cir 1983) 21

Gilbert v. Frazier, 931 F.2d 1581 (7th Cir. 1991) 8

Gilliard v Oswald, 552 F2d 456 (2d Cir 1977) 55

Gilmore v Lane, 635 F Supp 1637 (ND ILL 1986) 53

Gloria v Miller, 658 F Supp 229 (W.D. Okl 1987) 28

Goff v Dailey, 789 F Supp 978 (SD Iowa 1992), *affd in part, rev'd in part*, 991 F2d 1437 (8th Cir 1993) 101

Goff v Dailey, 789 F Supp 978 (SD Iowa 1992), *affd in part, rev'd in part*, 991 F2d 1437 (8th Cir 1993)45

Goff v Dailey, 789 F Supp 978 (SD Iowa 1992), *affd in part, rev'd in part*, 991 F2d 1437 (8th Cir 1993)44

Goldberg v Kelley, 92 S.Ct 1011 (1972) 22

Gonzales v Lefevre, 105 AD2d 909, 482 NYS2d 409 (1984) 24, 25

Gotcher v. Wood, 66 F.3d 1097 (9th Cir. 1995) 6, 7

Grant v Senkowski, 146 AD2d 948, 537 NYS2d 323 (1989) 22

Grant v State, 154 Ga App 758, 270 SE2d 42 (1980) 29

Grayned v City of Rockford, 408 U.S. 104 (1972) 10

Green v Secretary of Public Safety 68 Md App 147, 510 A2d 613 (1986) 14

Green to Ward v Johnson, 667 F2d 1126 (4th Cir 1981) 5

Green v Nelson, 442 F Supp 1047 (D Conn 1977) 24

Green v Secretary of Public Safety, 68 Md App 147, 510 A2d 613 (1986), ... 5

Griffin v Illinois, 351 US 12, (1956) 19

Grillo v Coughlin, 31 F.3d 53 (2nd Cir. 1994) 32

Grillo v. Coughlin, 31 F.3d 53, 56 (2nd Cir.1994) 108

Hamilton v Love, 358 F Supp 338 (ED Ark 1973) 10, 12

Hampson v Satrin, 319 NW2d 796 (ND 1982) 24

Hankins v. Finnel, 964 F.2d 853 (8th Cir. 1992) 121

Hanran v Lane, 747 F2d 1137 (7th Cir 1984) 53

Hardwick v Ault, 447 F Supp 116 (MD Ga 1978) 49

Hargrove v Dept of Corrections, 601 So 2d 623 (Fla Dist Ct App 1992) 41

Harlow v. Fitzgerald, 457 U.S. 800, 806-07, 813-14 (1982) 115

Harris v MacDonald, 555 F Supp 137 (ND ILL 1982) 100

Harris v MacDonald, 555 F Supp 137 (ND ILL 1982) 32

Harrison v Dahm, 911 F2d 37 (8th Cir 1990) 34

Hayes v Thompson, 637 F2d 483 (7th Cir 1980) 28

Hayes v Walker, 555 F2d 625 (7th Cir), *cert denied*, 434 US 959 (1977) 49

Hayes v Walker, 555 Fd 625 (7th Cir), *cert den*, 434 US 959 (1977) 48

Heck v. Humphrey, 114 S.Ct. 2364 (1994) 6

Heimstra v Walter, 117 Misc 2d 245, 457 NYS2d 704 (1982) 52

Hendrix v Faulkner, 525 F Supp 435, 447 (ND Ind 1981), *affd in part, vacated in part*, 715 F2d 269 (7th Cir 1983), *cert denied*, 468 US 1217 (1984) 20

Hensley v Wilson, 850 F2d 269 (6th Cir) 54

Hensley v Wilson, 850 F2d 269, 276-277 (6th Cir 1988) 27

Hewett v Helms, 459 US 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983) 2, 4, 8, 16

Hewitt v Helms, 459 US 460 (1983), *rev'd*, 482 US 755 (1987) 55

Higgs v Wilson, 616 F Supp 226 (WD Ky 1985), *vacated*, 793 F2d 1291 (6th Cir 1986); *Nash v Thielke*, 743 F Supp 1301 (ED Wis 1990). 37

Higgs v Bland, 888 F2d 443 (6th Cir 1989) 36

Constitutional Provisions

Regulations

Statutes and Laws

Rules Of Court Procedure

Miscellaneous

* * * * * * **Higgs v Bland*, 888 F2d 443 (6th Cir 1989) 34
Hilton v Dalsheim, 81 AD2d 887, 439 NYS2d 157 (1981) 21, 25

Higgs v Bland, 888 F2d 443 (6th [illegible] v Dalsheim, 81 AD2d 887, 439 NYS2d 157 (1981)21, 24

Hines v. Gomez, 853 F. Supp. 329 (ND C[illegible] *v Coughlin*, 583 NYS2d 703 (App Div 1992)35

Homer v Morris, 684 P2d 64 (Utah 1984)24*Houstin* v. *Lack*, 487 US 266, 108 S Ct. 2379 (1988)51

Howard v Grinage, 6 F 3d 410 (6th C[illegible]rd v Kelly, 117 AD2d 1002, 499 NYS2d 547 (1986)23

Howard v Wilkerson, 768 F Supp 1002 (SDNY 19[illegible]*Hudson v Hedge*, 27 F3d 274 (7th Cir 1994)120

Hughes v Rowe, 101 US 1735[illegible] Smith, 112 Misc 2d 484, 447 NYS 2d 226 (S. Ct. 1982)12

Hutto vs Finny, 437 U.S. 678, 98 S. Ct. [illegible]*Lord*, 148 AD2d 453, 538 NYS2d 951 (1989)40

In re Gault, 387 US 1 (1967) .... 19*In re Lamb*, 34 Ohio App 2d 85, 296 NE2d 280 (1973)28

In re Plunkett, 57 Wash App 230, 780 P2d 1090 (19[illegible]*n Re Johnston*, 745 P2d 864 (Wash., 1987)34

[illegible] Cal Reptr 324 (1985), cert denied, 476 US 1152 (1986

)5

Ingraham v. Wright, 430 U. S. 651 (1977)3Irby v Young, 139 Wis2d 279, 407 NW2d 314 (1987)17

in re *Lamb*, 34 Ohio App [illegible]Misc 2d 437, 440 NYS2d 154 (S.Ct. 1981)24

Jacob v Winch, 121 AD2d 446, 50[illegible]*lin*, 99 AD2d 635, 472 NYS2d 195 (1984)37

Jensen v Satran, 332 NW2d 222 (N[illegible]kin v Racette, 111 AD2d 579, 489 NYS2d 643 (1985)20

Johnson v Vitek, 205 Neb 745, 290 N[illegible]*Schoemehl*, 878 F.2d 1043 (8th Cir. 1989)109

Jones v Marquez, 526 F Supp 871 (D K[illegible]v Smith, 116 AD2d 993, 496 NYS2d 712 (1986)25

Joseph v Hustad Corp., 454 P2d 916, 918. .... 118Kastigar v United States, 406 US 441 (1972)24

Keenan v Van Ochten, 136 Mich App 364, 356 NW2d 648 (1984) ... x, 19 F 3d 1060 (5th Cir 1994)12

Kelly v Brewer, 525 F2d 394 (8th Cir 1975) ..... 54Kelly v Brewer, 525 F2d 394 (8th Cir 1985)15

Kelly v Nix, 29 F3d 1287 (DOC 1986) ... mpson, 490 US 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 1989. 105

Kimball v Scotts, 1993 WL 455266 (D Kim... v Coughlin, 86 AD2d 893, 447 NYS2d 521 (1982) 24

King v Hilton, 525 F Supp 1197 (DNJ 1981) .... 51*King v Wells*, 760 F2d 89 (6th Cir 1985) 16

King v Wells, 760 F2d 89 (6th Cir 1985)23*Kingsley v Bureau of Prisons*, 937 F 2d 26 (2nd Cir 1991) 40

Kingsley v Bureau of Prisons, 937 F2d 26 (2d Cir 1991) ... *enig v Vannelli*, 971 F2d 422 (9th Cir 1992) 55

Kvitka v Board of Registration in Medicine, 407 Mass 140 (1990) ... *rry*, 677 F2d 1386 (11th Cir 1982) 58

Kyle v Hanberry, 677 F2d 1386 (11th Cir 1982) .. 40LaBatt v Twomey, 513 F2d 641 (7th Cir 1975) 19

Lamoureux v Superintendent, 390 Mass 409, 4... *Landman v Royster*, 333 F Supp 621 (ED Va 1971) 25

Landman v Royster, 333 F Supp 621 (ED Va 1971) *Landman v Royster*, 333 F Supp 621 (ED Va 1971) 47

Landman v Royster, 333 F Supp 621 (ED Va 1971) . 5Langley v Scurr, 305 NW2d 418 (Iowa 1981) 3

Lathrop v Brewer, 340 F Supp 873 (SD Iowa 1972)27*Lavine v Wright*, 423 F Supp 357 (D Utah 1976) 36

Law v Racette, 120 AD2d 846, 501 NYS2d 959 (1986)25Layton v Beyer, 953 F2d 839 (3rd Cir 1992) 50

Lewis v Israel, 528 F Supp 960 (ED Wis 1981) ..... 37*Lewis v Lane*,882 F2d 1171 (7th Cir 1989) 26

Locks v Three Unident... ... 455 US ... S.Ct. 1148 (1982) 18

Loggins v Delo, *999* F.2d 364 (8th Cir. 1993)*Lopez v Smith*, 105 AD2d 1124, 482 NYS2d 583 (1984) 55

Lowrance v Coughlin, 98 AD2d 733, 469 NYS2d 148 (1983) ... *chtyl*, 20 F.3d 529, 537 (2nd Cir. 1994) 114

Maldonado Santiago v Velazquez Garcia, 821' F2d 822 ... Mahler v Slatt ... pp, 822 F2d 812 (8th Cir 1987) 53

Malik v Tanner, 697 F Supp 1294 (SDNY 1988) ... v Dalsheim, 97 AD2d 545, 467 NYS2d 903 (1983) 54

Mapp vs Ohio, 367 US 643 (1961) . . . . 15Martino v Carey, 563 F Supp 984 (D Or 1983) 54

Massachusetts Correctional [illegible] Misc 2d 910, 487 NYS2d 925 (S.Ct 1985) 35

Massop v Lefevre, 127 M[illegible] S Ct. 150, 20 L Ed2d 381 (1968) 55

Mathews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L Ed[illegible]*Eldridge*, 424 US 319 (1976) 48

Mathis v U.S., 391 U.S. 1, 88 S.Ct. 1503 (1968) . . 33*Mays v Mahoney*, 23 F.3d 660 (2nd Cir. 1994) 41

McCann v Coughlin, 698 F2d 112[illegible]*ann v. Coughlin*, 698 F.2d 112, 121 (2d Cir.1983) 27

McCans v Armour and Co., 254 F2d 903 . 49*McCorkle v. Walker*, 871 F. Supp. 555 (ND NY 1995) 26

McDonnell v Wolff, 483 F2d 1059 (8th Cir 1973), *aff'd in part & rev'd in part*, 418 US 539 (1981) . . . . . . 14*McGill v Coughlin*, 583 NYS2d 702 (App Div 1992) 27

McGinnis v Stephens, 543 P2d 1221, 1231 n28[illegible] Stevens, 543 P2d 1221 (Alaska 1975) 46, 47

McIntosh v Carter, 578 F Supp 96 (WD Ky 1983)52*McKinney v Meese*, 831 F2d 728 (7th Cir 1987) 28

McKinnon v. Patterson, 568 F.2[illegible]nt, 29 Mass App 122, 558 NE2d 5 (1990) 42

Meachum v Fano, 427 U.S. 215, (1976) . . . . 40Meachum v Fano, 520 F2d 374 (1st Cir 1975) 20

Meachum v. Fa[illegible]*te Prison Warden*, 117 Mich App 794, 324 NW2d 507 (1982) 53

Meis v Gunter, [illegible] 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986) 113

Mendoza v Mill[illegible] US 1142 (1986) 106

Mendoza v Mill[illegible] US 1142 (1986) 25

Mendoza v Miller, 779 F2d 1287, 1295 (7th Ci[illegible] (7th Cir. 1985) 16

Merioather v Coughlin, 879 F2d 1037 (2nd C[illegible]tt v De Los Santos, 721 F2d 598 (7th Cir 1983) 41

Mins v Sharp, 744 F2d 946 (3rd Cir 1984) . . . . 21*Miranda v Arizona*, 384 US 436 (1966) 61

Mitchell v Dupnik, 95 C.D.O.S. 7572(Calif. App Ct.5Mi95)ell v Hicks, 614 F2d 1016 (5th Cir 1980) 52

Monell v Department of Social Services, 43[illegible]*cNamara,* 606 F.2d 621 (5th Cir. 1979) 36

Moody v McNamara, 606 F.2d 621 (5th Ci29Morales v California DOC, 16 F3d 1001 (9th Cir 1994) 21

Morales v. California Department of Correction, 57 CrL 2021, April 26, 1995, 1995 WL 236551 (US)45Morgan v District of Columbia, 647 S Supp 694 (DDC 1986) 29

Morgan v Lavalle, 526 F.2d 221 (2nd Cir. 1975) . . . . 52Morrisey v Brewer, 93 S.Ct 2593 73

Morrison v Lefevre, 592 F Supp 1052 (SDNY 1984)*rison v Lefevre,* 592 F Supp 1052 (SDNY 1984) 22

Morrissey v Brewer, 408 US 471[illegible]*v Commissioner of DOC,* 529 F.2d 272 (2nd Cir.1976) 53

Murray v State, 116 Idaho 744, 779 P2d 43[illegible], 338 So 2d 1128 (Fla Dist Ct App 1976) 27, 50, 99

Nash v Thielke, 743 F Supp 1301 [illegible] *Coughlin,* 110 AD2d 981, 488 NYS2d 273 (1985) 42

Nigro v. Sullivan, 40 F.3d 990 (9th Cir. 1994) . . . . 53*Nigro v. Sullivan, 40* F.3d 990 (9th Cir. 1994) 7

Nix v Evatt, 850 F. Supp.[illegible], 461 US 238 (1983); 103 S Ct 1741, 75 L 2d 813 (1983) 15, 16

Olim v Wakinekona, 461 US 238, 103 S.Ct. 1741, 75 L[illegible]3 F2d 318 (11th Cir 1987) 2

Pace v Oliver, 634 F2d 302 (5th Cir 1981)53*Palmigiano vs Travisano,* 317 F Supp 776 (DRI 1970) 11

Palmigiano v Baxter, 487 F2d 1280 (1st Cir 1973), *rev'd*[illegible]7 F2d 21 (1st Cir 1984) 26

Parker v Cook, 642 F2d 865 (5th Cir 1981) . 27*Parker v State,* 597 So 2d 753 (Ala Crim App 1992) 100

Parrat v Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981)Paterson v Coughlin, 905 F2d 564 (2d Cir 1990) 48

Patterson v Riddle, 407 F Supp 1035 (ED Va 1976), *aff'd without opinion,* 556 F2d 574 (4th Cir 1977) 9*Payne v. Axelrod,* 871 F. Supp. 1551 (ND NY 1995) 106

Pearson v Townsend, 362 F Supp 207 (DSC 1973) 21*Pella v Adams,* 638 F Supp 94 (D Nev 1986) 15

Pella v Adams, 702 F Supp 294 (D Nev 1988) ... 102 AD2d 942, 482 NYS2d 619 (1984) ... 4

People ex rel Corcoran v Smith, 105 AD2d 1142, 482 NYS2d 618 (1984) ... 115

People ex rel Vega v Smith, 66 NY2d 130, 486 NE2d 1074, 495 NYS2d 332 (1985) ... 106

People ex rel Yoder v Hardy, 116 ILL App 3d 489, 451 NE2d 1055 (1983) ... 653, 386 NW2d 631 (1986) ... 3

Peranzo v Coughlin, 608 F Supp 1504 (SDNY 1985) *Peranzo v Coughlin*, 850 F2d 125 (2nd Cir 1988) ... 105

Phelps v U.S. Federal Government, 15 F3d 735 (8th Cir 1994) ... *v State*, 339 NW2d 368 (Iowa 1983) ... 42

Pino vs Dalsheim, 605 F Supp 1305 (SDNY 1984) *Pino v Dalsheim*, 605 F Supp 1305 (SD NY 1984) ... 48

Pitts v Kee, 511 F Supp 497 (D Del 1981) ... 471 U.S. 491, 495, 105 S.Ct. 2192, 85 L Ed 2d 553 (1985) ... 18

Powell v Ward, 392 F Supp 628 (SDNY 1975) ... (2nd Cir 1976) ... 37

Pratt v Rowland, 770 F Supp 1399 (ND Cal 1991) Pratt v Rowland, 856 F Supp 565 (N.D. Calif 1994) ... 51

Preiser v Rodriguez, 411 US 475 ... 51 *Prock v District Court*, 630 P2d 772 (Okla 1981) ... 19

Procunier v Martinez, 416 U.S. 396, 94 S Ct. 1800, 40 L Ed 2d 224 (1974) ... F2d 1521 (9th Cir 1985) ... 2, 14

Quinlan v Fairman, 663 F Supp 24 (ND Ill 1987) ..., 218 Cal Reptr 324 (1985), cert denied 476 U.S. 1152; 106 S.Ct 2266, 90 L Ed 2d 711 (1986) ... 25

Ramirez v Turner, 991 F.2d 351 (7th Cir. 1993) 60 *Ransom v Davies*, 816 F Supp 681 (D Kan 1993) ... 20, 23

Reed v Parratt, 207 Neb 796, 301 NW2d 343 (1981) 16 *Reeves v Pettcox*, 19 F 3d. 1060 (5th Cir 1994) ... 14, 15

Reeves v Pettcox, 19 F.3d 1060 (5th Cir. 1994) ... 40 *Reeves v Pettcox*, 19 F 3d. 1060 (5th Cir 1994) ... 116

Reinhard v Lawrence Warehouse Co, 41 Cal App 2d 741, 107 P2d 501, 504 ... 55

Richardson v Department of Interior, 740 F Supp 15 (D.D.C. 1990) ..., 893 F. Supp. 709 (ED MI 1995) ... 51

Rios v Lane, 812 F.2d 1032 (7th Cir. 1987) ... 37 *Rivera v Toft*, 477 F2d 534 (10th Cir 1973) ... 37

Rodgers v Thomas, 879 F2d 380 (8th Cir 1989) [illegible] Wainwright, 474 So2d 1263 (Fla Dist Ct App 1985) 101

Rogers v Oestreich, 736 F Supp 964 (ED Wis 1990) [illegible] Rowe v. DeBruyn, 17 F.3d 1047 (7th Cir. 1994) 99

Ruckert v Johnson, 724 F Supp 568 (ND ILL 1989) 24*Rudd v Sargent*, 866 F2d 260 (8th Cir 1989) 18, 52

Rudd [illegible] (5th Cir), *modified*, 688 F2d 266 (5th Cir 1982), *cert denied*, 460 US 1042 (1983) 36, 38

[illegible] Supp 476 (WD Va), *aff'd without opinion*, 530 F2d 969 (4th Cir 1975) 29

Russell v Scully, 782 F Supp 876 (S.D.N.Y. 1993), [illegible] (7th Cir 1987) 74

Sanchez v Smith, 115 AD2d 285, 496 NYS[illegible]ner, 63 L.W. 4601; 115 S.Ct. 2293 (1995) 18

Sands v Wainwright, 357 F Supp 1062 (MD Fla), vacated 491 F2d 417 (5th Cir 1973) . . . . 24, 99*Sands v Wainwright*, 357 F Supp 1062 (MD Fla), *vacated*, 491 F 2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974) 5, 21, 22

Scarpa v Ponte, 638 F Supp 1019 (D Mass 1986) [illegible] *Scarpa v Ponte*, 638 F Supp 1019 (D Mass 1986) 41

Schere v Engelke, 948 F2d 921 (6th Cir 1991) [illegible] *Schmerber v California*, 384 US 757, 760-61 (1960) 115

Schneckloth vs Bustamonte, 412 US 18(1973) . . . . . . 52Scott v Kelly, 962 F2d 145 (2d Cir 1992) 11

Sczderbaty v Oswald, 341 F. Supp. 571 (SD NY 1972) [illegible] *Sellers v Roper*, 554 F Supp 202 (ED Va 1982) 44

Sellers v Roper, 554 F Supp 202 (ED [illegible] *Coughlin*, 182 AD2d 928, 582 NYS22d 302 (1992) 21

Shakur v Coughlin, 182 AD2d 928, 582 NYS22d [illegible] Jurich, 608 F Supp 931 (ND ILL 1985) 53

Sharpe v Coughlin, 177 AD2d 774, 576 NYS2d 62 [illegible] v Dugger, 833 F2d 1420, (11th Cir 1987) 17

Sheppard v LeFevre, 116 AD2d 867, 498 NYS2d 190 [illegible] *v Satran*, 368 NW2d 531 (ND 1985) 42

Smith v Coughlin, 583 NYS 2D 622 (App Div 1992) [illegible] *Smith v Maschner*, 899 F2d 949 (10th Cir 1990) 113

Smith v Massachusetts Dept of Corrections, 936 F2d 1390 [illegible] *State*, 298 So2d 482 (Ga 1983) 11

Sostre v McGinnis, 442 F.2d 178 (2nd Cir. 1971) *v Lord*, 693 F.Supp 8, 693 F Supp 8 (S.D.N.Y. 1988 25

Soto v. Walker, 44 F.3d 169 (2nd Cir. 1995) Spellmon-Bey v Lynaugh, 778 F Supp 338 (ED Tex 1991) 44, 46

Spence v Farrier, 807 F2d 753 (8th Cir 1986) .. 8 *Sprouse v Babcock*, 870 F.2d 450 (8th Cir. 1989 44

Sprouse v. Babcock, 870 F.2d 450 (8th Cir. 1989) 40 Spruytte v Walters, 753 F2d 498 (6th Cir 1985) 46

State ex rel Hoover v Gagnon [illegible] 115, 289 NW2d 357 (1980) 29

State *ex rel Meeks v Gagnon*, [illegible] 2d 115, 289 NW2d 357 (1980) 26

State ex rel Staples v Department of Health & Social Services, 130 Wis 2d 308, 387 NW2d 551 (1986) 54 *State v Evans*, 219 Kan 515, 548 P2d 772, 777 105

State v Evans, 219 Kan 515, 548 P2d 772, 777 5, 7, 8 *State v Grant*, 26 N.C App 554, 217 S.E.2d 3,5 .... 10, 12, 21, 36, 46, 47, 52

State v Grant, 26 N.C App 554, 217 S.E.2d 3,5 42 *State v Johnson*, 527 A2d 250 (Conn App 1987) 32

State v Luke, 382 So 2d 1265 (Fla Dist Ct App 1980) Stewart v Jozwiak, 399 F Supp 574 (ED Wis 1975) 106

Stokes v Fair, 795 F2d 235 (1st Cir 1986) .... 33 *Stone v Powell*, 428 US 465 (1976) 60

Storms v Coughlin, 600 F Supp 1214 (SDNY 1984) *Storms v Coughlin*, 600 F Supp 1214 (S.D.N.Y. 1984) 105

Strickland v Beyer, 1990 US Dist LEXIS 2510 (DNJ 1990) *Strickland v Beyer*, 1990 US Dist LEXIS 2510 (DNJ 1990) 55

Strickland v Delo, 758 F Supp 1319 (ED Mo 1991) .. 46 *Superintendent v Hill*, 472 US 445 (1985) 101

Superintendent v Hill, 472 US 445 (1985) *Superintendent v. Hill*, 472 US 445, 105 S.Ct. 2768 (1985) 36

Superintendent, Massachusetts Correctional Institution [illegible] (ED Ark 1965) 52

Taylor v Clement, 433 F Supp 585, 687-88 (S.D.N.Y. 1977) 40 *Thomas v State*, 339 NW2d 166 (Iowa 1983) 12

Thompson v Hall, 883 F2d 70 (4th Cir 1989) *Ting v United States*, 927 F2d 1504 (9th Cir Cal 1991) 26

Ting v United States, 927 F2d 1504 (9th Cir Cal 1991) [illegible], 123 Mich App 395, 333 NW2d 295 (1983) 105

Torres v Coughlin [illegible overprinted text] 984), aff'd in part rev'd in part, 801 F2d 1080 (9th Cir 1986), cert denied, 481 U.S. 1069, 107 S.Ct 2462, 95 L Ed 2d 871 (1987), subsequent order following remand, 711 F Supp 536, aff'd in part, rev'd in part, 926 F2d 800 (9th Cir 1990), cert denied, 112 S. Ct 213, 116 L Ed 2d 171 (1991) 16, 19

Toussaint v McCarthy, 801 F2d 1080 (9th Cir 1986), *cert denied*, 481 US 1069, *subsequent order following remand*, 711 F Supp 536 ND Cal, *aff'd in part, rev'd in part, & vacated in part*, 926 F2d 800 9th Cir, *cert denied*, 112 S Ct 213 (1991) *Townes v Hewitt*, 84 Pa Commw 151, 478 A2d 548 (1984) 34

Tracy v Salamack, 572 F2d 393, 395 n9 (2d Cir 1978) *[illegible]er v Dickey*, 613 F Supp 1124 (WD Wis 1985) 106

Turner v Safeley, 482 US 78, 107 S.Ct. 2254, 96 L Ed 2d 64 (1987) [illegible]ack, 811 F2d 424 (8th Cir 1987) 13

U.S. vs Lilly, 576 F2d 1240 (5th Cir 1978) [illegible], 653 F2d 403 (9th Cir), *cert denied*, 454 US 904 (1981) 36

U.S. Ex Rel Larkins v Oswald [illegible overprinted text] 1973), *cert denied*, 414 US 1146 (1974) 49

U.S. v Austin, __ U.S.__. 113 S.Ct 2801, [illegible overprinted text] (1993) S.Ct 2801, 125 L.Ed2d 488 (1993) 102

U.S. v Boomer, 571 F2d 543, 546 (10th Cir 1978) . . . . 42 U.S. v Cacereys 440 U.S. 741 (1979) 102

U.S. v Calandra, 414 US 338 (1974) . . . . 34 *U.S. v Courtney*, 979 F2d 45 (5th Cir 1993) 55

U.S. v Duke, 527 F2d 386 (5th Cir), *U.S. v Halper*, 490 US 435 [illegible overprinted text] Ct. 1892, 104 L.Ed2d 487(1989) 55

U.S. v Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed2d 487 (1989) [illegible] *v Newby*, 11 F.3d 1143 (3rd Cir) 39

U.S. v Rising, 867 F2d [illegible overprinted text]57 (8th Cir 1975), *cert denied*, 425 US 953 (1976) 44

U.S. vs Ready, 574 F2d 1009 (10th Cir 1978) . . . . 101 *U.S. vs Stumes*, 549 Fd 831(8th Cir 1977) 44

United States ex rel Miller v Twomey, 479 F2d 701 (7th Cir 1973), *cert denied*, 414 US 1146 (1974) . . . . 101 *United States v Cook*, 783 F2d 1207 (5th Cir), affd on reconsideration, 793 F2d 734 (5th Cir 1986) 101

United States v Dunkel, 927 F2d 955, 956 (7th Cir [illegible overprinted text] (1984) 54

Van Poyck v Dugger, 582 So2d 108 (Fla 1st DCA 1991); 779 F Supp 571 (MD Fla 1991), aff'd, 977 F2d 598 (11th Cir 1992) Van Poyck v Dugger, 779 F. Supp 571 (M.D. Fla 1991), aff'd, 977 F2d 598 (11th Cir 1992) 15

Varnson v Satran, 368 NW2d 533 (ND 1985) [illegible]*z v Coughlin*, 118 AD2d 897, 499 NYS2d 461 (1986) 34

Vasquez v Coughlin, 726 F Supp 466 (S.D.N.Y.1989)Vaughn v Franzen. 549 F Supp 426 (ND ILL 1982
. . . . 114

Vines v Howard, 676 F Supp 608 (ED Pa 1987)445 US 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980)
. . . . 25

Vogelsang v Coombe, 105 AD2d 913, 482 NYS2d 348 (1984), *affd*, 66 NY2d 835, 489 NE2d 251, 498 NYS2d 364 (1985)Williford, 804 F2d 1012 (7th Cir 1986), *appeal after remand*, 902 F2d 578 (7th Cir 1990)
. . . . 54

Walker v Bates, 23 F.3d 652 (2nd Cir. 1994) . . . . . . 28*Walker v Bates*, 23 F.3d 652 (2nd Cir. 1994)
. . . . 16

Walker v Hughs, 558 F2d 1247, 1255 (6th Cir 1977)39Walker v Sumner, 917 F2d 382 (9th Cir 1990)
. . . . 1, 11

Wall v Scully, 121 Misc 2d 698, 468 NYS2d 984 (1983)*Walsh v. Finn*, 865 F. Supp. 126 (SD NY 1994)
. . . . 61

Ward v Johnson, 667 F2d 1126 (4th Cir 1981)Ward v Village of Monroeville, 409 U.S. 57, 93 S. Ct 80, 34 L Ed 2d 267 (1972)
. . . . 105

Warren v Irvin, 584 NYS2d 366 (App Div 1992)Washington v Harper, 494 US 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990)
. . . . 27

Washington v State 405 So 2d 62 (Ala Crim App 1981) . . 102Weaver v Graham, 450 US 24 (1981)
. . . . 28

Weaver v. Brenner, 40 F.3d 527, 532 (2d Cir. 1994)Wells v Israel, 629 F Supp 498 (ED Wis 1986), affd, 854 F2d 995 (7th Cir 1988)
. . . . 41

Werlinger v State, 117 Idaho 47, 785 P2d 172 (1990)25White v Booker, 598 F Supp 984 (ED Va 1984)
. . . . 28

Whitehorn v Harrelson, 758 F2d 1416 (11th Cir 1985)Whitford v. Boglino, 63 F.3d 527 (7th Cir. 1995)
. . . . 102

Wightman v Superintendent, Massachusetts Correctional Institution, 19 Mass App 442, 475 NE 2d 85 (1985)*Wightman v Superintendent, Massachusetts Correctional Inst.*, 19 Mass App Ct 442, 475 NE2d 85 (1985) 28

Wildberger v Bracknell, 869 F2d 1467 (11th Cir 1989)*Williams v Oregon State Corr*, 24 Or App 61, 544 P2d 198 (1976)
. . . . 61

Williams v Schulte, 605 F Supp 498 (ED Mo 1984) 61Williams v State, 421 NW2d 890 (Iowa 1990)
. . . . 45

Williams v. Smith, 717 F. Supp. 523 (WD MI 1989) . 96*Wilson v Higgs*, 940 F2d 664 (6th Cir 1991
. . . . 95

Witters v United States, 70 U.S.App.D.C. 316, 106 F2d 837, 840 *Witters v United States*, 70 U.S. App. D.C. 316, 106 F2d 837, 840
. . . . 15

Wolfe v Carlson, 582 F Supp 977 (SDNY 1984) . . . 14*Wolfel v Bates*, 707 F2d 935 (6th Cir 1983)
. . . . 40

Wolfel v Morris, 972 F.2d 712 (6th Cir. 1992) .... 36*Wolff v McDonnell*, 418 US 539 (1974) 27

Wolff v McDonnell, 418 US 539 (1974) .... 18, 28Wolff v. McDonnell, 418 US 539 (1974) 21

Wong v Coughlin, 138 AD2d [illegible]*aturalization Service*, 385 US 276 (1966) 18

Woodby v Immigration Service, 385 US 276 (1966) 25*Woods v. Smith*, 60 F.3d 1161 (5th Cir. 1995) 53

Works v State, 575 So 2d 622 (Ala Crim App [illegible]right v Caspari, 779 F Supp 1025 (ED Mo 1992) 16

Wykoff v Resig, 613 F.Supp 1504, at 1513 (D.[illegible] *v Kann*, 926 F Supp 1396 (3rd Cir 1991) 50

Young v Kann, 926 F2d 1396 (3rd Cir 1991) ..... 31*Young v Kann*, 926 F2d 1396 (3rd Cir 1991) 14

Young v Selsky, 41 F.3d 47 (2nd Cir. 1994) .... 21*Zavaro v Coughlin*, 970 F2d 1148 (2d Cir 1992) 19

Zeltner v New Jersey Dept. of Corr, 201 NJ Super 195, 492 A2d 1084 (App Div), *cert denied*, 102 NJ 299, 508 A2d 186 (1985) .... 3*Zilich v. Longo*, 34 F.3d 359, 364 (6th Cir. 1994) 46

Hines v. Gomez, 853 F. Supp. 329 (ND CAL 1994) 5
Holms v Coughlin, 583 NYS2d 703 (App Div 1992) 115

Homer v Morris, 684 P2d 64 (Utah 1984) 26
Houstin v. *Lack*, 487 US 266, 108 S Ct. 2379 (1988) 51

Howard v Grinage, 6 F 3d 410 (6th Cir 1993) 55
Howard v Kelly, 117 AD2d 1002, 499 NYS2d 547 (1986) 14

Howard v Wilkerson, 768 F Supp 1002 (SDNY 1991) 9
Hudson v Hedge, 27 F3d 274 (7th Cir 1994) 42

Hughes v Rowe, 101 US 173, 177 (1980) 41
Hunyadi v Smith, 112 Misc 2d 484, 447 NYS 2d 226 (S. Ct. 1982) 105

Hutto vs Finny, 437 U.S. 678, 98 S. Ct. 2565 (1978) 27
Hylton v Lord, 148 AD2d 453, 538 NYS2d 951 (1989) 54

In re Gault, 387 US 1 (1967) 20
In re Lamb, 34 Ohio App 2d 85, 296 NE2d 280 (1973) 109

In re Plunkett, 57 Wash App 230, 780 P2d 1090 (1990) 36
In Re Johnston, 745 P2d 864 (Wash., 1987) 102

in re Lamb, 34 Ohio App 2d 85, 296 NE2d 280 (1973 42
In re Ramirez, 39 Cal 3d 931, 705 P2d 897, 218 Cal Reptr 324 (1985), cert denied, 476 US 1152 (1986)40

Ingraham v. Wright, 430 U. S. 651 (1977) 106

Irby v Young, 139 Wis2d 279, 407 NW2d 314 (1987) 11

in re *Lamb*, 34 Ohio App 2d 85, 296 NE2d 280 (1973) 40
Jackson v Kuhlmann, 109 Misc 2d 437, 440 NYS2d 154 (S.Ct. 1981) 45, 47

Jacob v Winch, 121 AD2d 446, 503 NYS2d 417 (1986) 1, 2, 4-7, 18, 20, 21, 25, 27, 48, 65, 67, 73, 99-101
Jennings v Coughlin, 99 AD2d 635, 472 NYS2d 195 (1984) 18

Jensen v Satran, 332 NW2d 222 (ND 1983) 45
Johnakin v Racette, 111 AD2d 579, 489 NYS2d 643 (1985) 101

Johnson v Vitek, 205 Neb 745, 290 NW2d 190 (1980) 110
Johnson-El v Schoemehl, 878 F.2d 1043 (8th Cir. 1989) 35

Jones v Marquez, 526 F Supp 871 (D Kan 1981) 24
Jones v Smith, 116 AD2d 993, 496 NYS2d 712 (1986) 34, 37

Joseph v Hustad Corp., 454 P2d 916, 918. 62
Kastigar v United States, 406 US 441 (1972) 32

Keenan v Van Ochten, 136 Mich App 364, 356 NW2d 640 (1984) 100
Keeves v Pettcox, 19 F 3d 1060 (5th Cir 1994) 107

Kelly v Brewer, 525 F2d 394 (8th Cir 1975) 46
Kelly v Brewer, 525 F2d 394 (8th Cir 1985) 53

Kelly v Nix, 29 NW2d 287 (Iowa 1983) 109
Kentucky DOC v Thompson, 490 US 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 1989. . . . . 2, 16

Kimball v Scotts, 1993 WL 455266 (D Kan 1993) 35
Kincaide v Coughlin, 86 AD2d 893, 447 NYS2d 521 (1982) 41

King v Hilton, 525 F Supp 1197 (DNJ 1981) 55
King v Wells, 760 F2d 89 (6th Cir 1985) 54

King v Wells, 760 F2d 89 (6th Cir 1985) 48
Kingsley v Bureau of Prisons, 937 F 2d 26 (2nd Cir 1991) 33

Kingsley v Bureau of Prisons, 937 F2d 26 (2d Cir 1991) 41
Koenig v Vannelli, 971 F2d 422 (9th Cir 1992) 35, 35, 37

Kvitka v Board of Registration in Medicine, 407 Mass 140 (1990) 27
Kyle v Hanberry, 677 F2d 1386 (11th Cir 1982) 49

Kyle v Hanberry, 677 F2d 1386 (11th Cir 1982) 26
LaBatt v Twomey, 513 F2d 641 (7th Cir 1975) 14

Lamoureux v Superintendent, 390 Mass 409, 456 NE2d 1117 (1983) 27
Landman v Royster, 333 F Supp 621 (ED Va 1971) 36

Landman v Royster, 333 F Supp 621 (ED Va 1971) 46, 47
Landman v Royster, 333 F Supp 621 (ED Va 1971) 52

Landman v Royster, 333 F Supp 621 (ED Va 1971) 28
Langley v Scurr, 305 NW2d 418 (Iowa 1981) 21

Lathrop v Brewer, 340 F Supp 873 (SD Iowa 1972) 42

Lavine v Wright, 423 F Supp 357 (D Utah 1976) 40

Law v Racette, 120 AD2d 846, 501 NYS2d 959 (1986) 20
Layton v Beyer, 953 F2d 839 (3rd Cir 1992) 16

Lewis v Israel, 528 F Supp 960 (ED Wis 1981) 53
Lewis v Lane,882 F2d 1171 (7th Cir 1989) 43

Locks v Three Unidentified Customs Service Agents, 759 F Supp 1131 (ED Pa 1990) 113
Logan v. ZimmermanBrush Company, 455 US 422, 102 S.Ct. 1148 (1982) 119

Loggins v Delo, 999 F.2d 364 (8th Cir. 1993) 106
Lopez v Smith, 105 AD2d 1124, 482 NYS2d 583 (1984) 46

Lowrance v Coughlin, 98 AD2d 733, 469 NYS2d 148 (1983) 25
Lowrance v. Achtyl, 20 F.3d 529, 537 (2nd Cir. 1994) 108

Maldonado Santiago v Velazquez Garcia, 821' F2d 822 (1st Cir 1987) 16
Malek v Camp, 822 F2d 812 (8th Cir 1987) 22

Malik v Tanner, 697 F Supp 1294 (SDNY 1988 41
Mallard v Dalsheim, 97 AD2d 545, 467 NYS2d 903 (1983) 21

Mapp vs Ohio, 367 US 643 (1961) 61
Martino v Carey, 563 F Supp 984 (D Or 1983) 5

Massachusetts Correctional Inst v Hill, 472 US 445 (1985) 52
Massop v Lefevre, 127 Misc 2d 910, 487 NYS2d 925 (S.Ct 1985) 25, 47

Massop v Lefevre, 127 Misc 2d 910, 487 NYS2d 925 (SCt 1985) 36
Mathes v United States, 391 U.S. 1, 88 S Ct. 150, 20 L Ed2d 381 (1968) 29

Mathews v Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L Ed 2d 18 (1976) 21
Mathews v Eldridge, 424 US 319 (1976) 45

Mathis v U.S., 391 U.S. 1, 88 S.Ct. 1503 (1968) 29
Mays v Mahoney, 23 F.3d 660 (2nd Cir. 1994) 52

McCann v Coughlin, 698 F2d 112 (2d Cir 1983) 73
McCann v. Coughlin, 698 F.2d 112, 121 (2d Cir.1983) 38

McCans v Armour and Co., 254 F2d 903 22
McCorkle v. Walker, 871 F. Supp. 555 (ND NY 1995) 108

McDonnell v Wolff, 483 F2d 1059 (8th Cir 1973), *aff'd in part & rev'd in part*, 418 US 539 (1981) 53
McGill v Coughlin, 583 NYS2d 702 (App Div 1992) 36

McGinnis v Stephens, 543 P2d 1221, 1231 n28(Alaska 1975) 27, 50, 99
McGinnis v Stevens, 543 P2d 1221 (Alaska 1975) 24

McIntosh v Carter, 578 F Supp 96 (WD Ky 1983) 42
McKinney v Meese, 831 F2d 728 (7th Cir 1987) 53

McKinnon v. Patterson, 568 F.2d 930, 939 (2nd Cir. 1977) 7
McLellen v Superintendent, 29 Mass App 122, 558 NE2d 5 (1990) 24

Meachum v Fano, 427 U.S. 215, (1976) 15, 16
Meachum v Fano, 520 F2d 374 (1st Cir 1975) 15

Meachum v. Fano, 427 US 215 (1976) 2
Meadows v Marquette Prison Warden, 117 Mich App 794, 324 NW2d 507 (1982) 53

Meis v Gunter, 906 F.2d 364 (8th Cir. 1990) 11
Mendoza v Miller, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986) 32

Mendoza v Miller, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986) 26
Mendoza v Miller, 779 F2d 1287 (7th Cir 1985), cert denied, 476 US 1142 (1986) 27

Mendoza v Miller, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986) 100
Mendoza v Miller, 779 F2d 1287 (7th Cir 1985), *cert denied*, 476 US 1142 (1986) 100

Mendoza v Miller, 779 F2d 1287, 1295 (7th Cir 1985) *cert den*, 476 US 1142 (1986) 48
Mendoza v. Miller, 779 F.2d 1287 (7th Cir. 1985) 9

Merioather v Coughlin, 879 F2d 1037 (2nd Cir 1989) 106
Merritt v De Los Santos, 721 F2d 598 (7th Cir 1983) 21

Mins v Sharp, 744 F2d 946 (3rd Cir 1984) 15
Miranda v Arizona, 384 US 436 (1966) 29

Mitchell v Dupnik, 95 C.D.O.S. 7572(Calif. App Ct. 1995) 4
Mitchell v Hicks, 614 F2d 1016 (5th Cir 1980) 16

Monell v Department of Social Services, 436 US 658 (1978) 115
Moody v McNamara, 606 F.2d 621 (5th Cir. 1979) 76

Moody v McNamara, 606 F.2d 621 (5th Cir. 1979) 106
Morales v California DOC, 16 F3d 1001 (9th Cir 1994) 3

Morales v. California Department of Correction, 57 CrL 2021, April 26, 1995, 1995 WL 236551 (US) 3
Morgan v District of Columbia, 647 S Supp 694 (DDC 1986) 18

Morgan v Lavalle, 526 F.2d 221 (2nd Cir. 1975) 105
Morrisey v Brewer, 93 S.Ct 2593 22

Morrison v Lefevre, 592 F Supp 1052 (SDNY 1984) 42
Morrison v Lefevre, 592 F Supp 1052 (SDNY 1984) 55

Morrissey v Brewer, 408 US 471, 489 (1972) 48
Mukmuk v Commissioner of DOC, 529 F.2d 272 (2nd Cir.1976) 105

Murray v State, 116 Idaho 744, 779 P2d 419 (Ct App 1989) 18
Myers v Askew, 338 So 2d 1128 (Fla Dist Ct App 1976) 21

Nash v Thielke, 743 F Supp 1301 (ED Wis 1990) 37
Newman v Coughlin, 110 AD2d 981, 488 NYS2d 273 (1985) 37

Nigro v. Sullivan, 40 F.3d 990 (9th Cir. 1994) 51
Nigro v. Sullivan, 40 F.3d 990 (9th Cir. 1994) 51

Nix v Evatt, 850 F. Supp. 455 (D SC 1994) 19
Olim v Wakina, 461 US 238 (1983); 103 S Ct 1741, 75 L 2d 813 (1983) 17

Olim v Wakinekona, 461 US 238, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983) 2, 14
Ort v White, 813 F2d 318 (11th Cir 1987) 14

Pace v Oliver, 634 F2d 302 (5th Cir 1981); 25
Palmigiano vs Travisano, 317 F Supp 776 (DRI 1970) 60

Palmigiano v Baxter, 487 F2d 1280 (1st Cir 1973), *rev'd*, 425 US 308 (1976) 20, 23
Parenti v Ponte, 727 F2d 21 (1st Cir 1984) 16

Parker v Cook, 642 F2d 865 (5th Cir 1981) 14, 15
Parker v State, 597 So 2d 753 (Ala Crim App 1992) 40

Parrat v Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981) 116
Paterson v Coughlin, 905 F2d 564 (2d Cir 1990) 21

Patterson v Riddle, 407 F Supp 1035 (ED Va 1976), *aff'd without opinion*, 556 F2d 574 (4th Cir 1977) 55
Payne v. Axelrod, 871 F. Supp. 1551 (ND NY 1995) 108

Pearson v Townsend, 362 F Supp 207 (DSC 1973) 51
Pella v Adams, 638 F Supp 94 (D Nev 1986) 37

Pella v Adams, 702 F Supp 244 (D Nev 1988), see also, 723 F Supp 1394 37
People ex rel Bridges v Smith, 105 AD2d 1142, 482 NYS2d 619 (1984) 46

People ex rel Corcoran v Smith, 105 AD2d 1142, 482 NYS2d 618 (1984) 101
People ex rel Corcoran v Smith, 105 AD2d 1142, 482 NYS2d 618 (1984) 46

People ex rel Vega Smith, 66 NY2d 130, 485 NE2d 997, 495 NYS2d 332 (1985) 99
People ex rel Vega Smith, 66 NY2d 130, 485 NE2d 997, 495 NYS2d 332 (1985) 24

People ex rel Yoder v Hardy, 116 ILL App 3d 489, 451 NE2d 965 (1983) 18, 52
People v Carr, 149 Mich App 653, 386 NW2d 631 (1986) 29

Peranzo v Coughlin, 608 F Supp 1504 (SDNY 1985) 36, 38
Peranzo v Coughlin, 850 F2d 125 (2nd Cir 1988) 34

Phelps v U.S. Federal Government, 15 F3d 735 (8th Cir 1994) 29
Picard v State, 339 NW2d 368 (Iowa 1983) 52

Pino vs Dalsheim, 605 F Supp 1305 (SDNY 1984) 74
Pino v Dalsheim, 605 F Supp 1305 (SD NY 1984) 49

Pitts v Kee, 511 F Supp 497 (D. Del 1981) 18
Ponte v Real, 471 U.S. 491, 495, 105 S.Ct. 2192, 85 L Ed 2d 553 (1985) 24, 99

Powell v Ward, 392 F Supp 628 (SDNY 1975), modified, 542 F2d 101 (2d Cir 1976) 5, 21, 22
Powell v Ward, 487 F Supp 931 (1975), *aff'd* 542 F2d 701 (2nd Cir 1976) 18, 55

Pratt v Rowland, 770 F Supp 1399 (ND Cal 1991) 41
Pratt v Rowland, 856 F Supp 565 (N.D. Calif 1994) 17

Preiser v Rodriguez, 411 US 475 115
Prock v District Court, 630 P2d 772 (Okla 1981) 52

Procunier v Martinez, 416 U.S. 396, 94 S Ct. 1800, 40 L Ed 2d 224 (1974) 11
Quick v Jones, 754 F2d 1521 (9th Cir 1985) 10

Quinlan v Fairman, 663 F Supp 24 (ND ILL 1987) 44
Ramirez v In re, 566 39 3d 931, 705 P2d 897, 218 Cal Reptr 324 (1985), cert denied 476 U.S. 1152; 106 S.Ct 2266, 90 L Ed 2d 711 (1986) 10

Ramirez v Turner, 991 F.2d 351 (7th Cir. 1993) 21
Ransom v Davies, 816 F Supp 681 (D Kan 1993) 35

Reed v Parratt, 207 Neb 796 , 301 NW2d 343 (1981) 53
Reeves v Pettcox, 19 F 3d. 1060 (5th Cir 1994) 51

Reeves v Pettcox, 1 9 F.3d 1060 (5th Cir. 1994) 17
Reeves v Pettcox, 19 F 3d. 1060 (5th Cir 1994) 51

Reinhard v Lawrence Warehouse Co., 41 Cal App2d 741, 107 P2d 501, 504 42
Reinhard v Lawrence Warehouse Co., 41 Cal App2d 741, 107 P2d 501, 504 102

Richardson v Department of Interior, 740 F Supp 15 (D DC 1990) 113
Riley v. Kurtz, 893 F. Supp. 709 (ED MI 1995) 109

Rios v Lane, 812 F.2d 1032 (7th Cir. 1987) 11
Rivera v Toft, 477 F2d 534 (10th Cir 1973) 28

Rodgers v Thomas, 879 F2d 380 (8th Cir 1989) 25
Roesch v Wainwright, 474 So2d 1263 (Fla Dist Ct App 1985) 17

Rogers v Oestreich, 736 F Supp 964 (ED Wis 1990) 44, 46
Rowe v. DeBruyn, 17 F.3d 1047 (7th Cir. 1994) 8

Ruckert v Johnson, 724 F Supp 568 (ND ILL 1989) 44
Rudd v Sargent, 866 F2d 260 (8th Cir 1989) 40

Rudd v Sargent, 866 F2d 260, 262 (8th Cir 1989) 46
Ruiz v Estelle, 679 F2d 1115, 1155-56 (5th Cir), *modified*, 688 F2d 266 (5th Cir 1982), *cert denied*, 460 US 1042 (1983) 50

Rusher v Arnold, 550 F2d 896 (3rd Cir 1977) 29
Russell v Division of Corrections, 392 F Supp 476 (WD Va), *aff'd without opinion*, 530 F2d 969 (4th Cir 1975) 55

Russell v Scully, 782 F Supp 876 (S.D.N.Y. 1993), *rev'd* 15 F3d 219 (2nd Cir 1993) 26
Saenz v Young, 811 F2d 1172 (7th Cir 1987) 54

Sanchez v Smith, 115 AD2d 285, 496 NYS2d 152 (1985) 105
Sandin v Conner, 63 L.W. 4601; 115 S.Ct. 2293 (1995) 1, 3-5, 7, 8

Sands v Wainwright, 357 F Supp 1062 (MD Fla), vacated 491 F2d 417 (5th Cir 1973) .. 10, 12, 21, 36, 46, 47, 52
Sands v Wainwright, 357 F Supp 1062 (MD Fla), *vacated*, 491 F 2d 417 (5th Cir 1973), *cert denied*, 416 US 992 (1974) 42

Scarpa v Ponte, 638 F Supp 1019 (D Mass 1986) 32
Scarpa v Ponte, 638 F Supp 1019 (D Mass 1986) 100

Schere v Engelke, 948 F2d 921 (6th Cir 1991) 106
Schmerber v California, 384 US 757, 760-61 (1960) 33

Schneckloth vs Bustamonte, 412 US 18(1973) 60

Scott v Kelly, 962 F2d 145 (2d Cir 1992) 24

Sczderbaty v Oswald, 341 F. Supp. 571 (SD NY 1972) 105
Sellers v Roper, 554 F Supp 202 (ED Va 1982) 51

Sellers v Roper, 554 F Supp 202 (ED Va 1982) 55
Shakur v Coughlin, 182 AD2d 928, 582 NYS22d 302 (1992) 46

Shakur v Coughlin, 182 AD2d 928, 582 NYS22d 302 (1992) 101
Shango v Jurich, 608 F Supp 931 (ND ILL 1985) 26

Sharpe v Coughlin, 177 AD2d 774, 576 NYS2d 62 (1991 36
Shelly v Dugger, 833 F2d 1420, (11th Cir 1987) 15

Sheppard v LeFevre, 116 AD2d 867, 498 NYS2d 190 (1986) 52
Shultz v Satran, 368 NW2d 531 (ND 1985) 40

Smith v Coughlin, 583 NYS 2D 622 (App Div 1992) 12
Smith v Maschner, 899 F2d 949 (10th Cir 1990) 105

Smith v Massachusetts Dept of Corrections, 936 F2d 1390 (1st Cir 1991) 26
Smith v State, 298 So2d 482 (Ga 1983) 34

Sostre v McGinnis, 442 F.2d 178 (2nd Cir. 1971) 105
Soto v. Lord, 693 F.Supp 8, 693 F Supp 8 (S.D.N.Y. 1988 38

Soto v. Walker,44 F.3d 169 (2nd Cir. 1995) 16, 19
Spellmon-Bey v Lynaugh, 778 F Supp 338 (ED Tex 1991) 18

Spence v Farrier, 807 F2d 753 (8th Cir 1986) 34
Sprouse v Babcock, 870 F.2d 450 (8th Cir. 1989 105

Sprouse v. Babcock, 870 F.2d 450 (8th Cir. 1989) 106
Spruytte v Walters, 753 F2d 498 (6th Cir 1985) 14

State ex rel Hoover v Gagnon, 124 Wis 2d 135, 368 NW2d 6576 (1985) 13
State ex rel Meeks v Gagnon, 95 Wis 2d 115, 289 NW2d 357 (1980) 49

State *ex rel Meeks v Gagnon,* 95 Wis 2d 115, 289 NW2d 357 (1980 36
State *ex rel Meeks v Gagnon,* 95 Wis 2d 115, 289 NW2d 357 (1980) 47

State ex rel Staples v Department of Health & Social Services, 130 Wis 2d 308, 387 NW2d 551 (1986) 49
State v Evans; 219 Kan 515, 548 P2d 772, 777 42

State v Evans, 219 Kan 515, 548 P2d 772, 777 102
State v Grant, 26 N.C App 554, 217 S.E.2d 3,5 42

State v Grant, 26 N.C App 554, 217 S.E.2d 3,5 102
State v Johnson, 527 A2d 250 (Conn App 1987) 34

State v Luke, 382 So 2d 1265 (Fla Dist Ct App 1980) 55
Stewart v Jozwiak, 399 F Supp 574 (ED Wis 1975) 20

Stokes v Fair, 795 F2d 235 (1st Cir 1986) 55
Stone v Powell, 428 US 465 (1976) 41

Storms v Coughlin, 600 F Supp 1214 (SDNY 1984) 39
Storms v Coughlin, 600 F Supp 1214 (S.D.N.Y. 1984) 34

Strickland v Beyer, 1990 US Dist LEXIS 2510 (DNJ 1990) 44
Strickland v Beyer, 1990 US Dist LEXIS 2510 (DNJ 1990) 101

Strickland v Delo, 758 F Supp 1319 (ED Mo 1991) 44
Superintendent v Hill, 472 US 445 (1985) 101

Superintendent v Hill, 472 US 445 (1985) 101
Superintendent v. Hill, 472 US 445, 105 S.Ct. 2768 (1985) 44, 45

Superintendent, Massachusetts Correctional Institution v Hill, 472 US 445 (1985) 54
Talley v Stephens, 247 F Supp 683 (ED Ark 1965) 12

Taylor v Clement, 433 F Supp 585, 687-88 (S.D.N.Y. 1977) 15
Thomas v State, 339 NW2d 166 (Iowa 1983) 54

Thompson v Hall, 883 F2d 70 (4th Cir 1989) 34
Ting v United States, 927 F2d 1504 (9th Cir Cal 1991) 113

Ting v United States, 927 F2d 1504 (9th Cir Cal 1991) 114
Tocco v Marquette Prison Warden, 123 Mich App 395, 333 NW2d 295 (1983) 17

Torres v Coughlin, 161 AD2d 1080, 557 NYS2d 636 (1990) 25
Toussaint v McCarthy, 597 F Supp 1388 (N.D. Cal 1984), aff'd in part rev'd in part, 801 F2d 1080 (9th Cir 1986), cert denied, 481 U.S. 1069, 107 S.Ct 2462, 95 L Ed 2d 871 (1987), subsequent order following remand, 711 F Supp 536, aff'd in part, rev'd in part, 926 F2d 800 (9th Cir 1990), cert denied, 112 S. Ct 213, 116 L Ed 2d 171 (1991) 14

Toussaint v McCarthy, 801 F2d 1080 (9th Cir 1986), *cert denied*, 481 US 1069, *subsequent order following remand*, 711 F Supp 536 ND Cal, *aff'd in part, rev'd in part, & vacated in part*, 926 F2d 800 9th Cir, *cert denied*, 112 S Ct 213 (1991) 54
Townes v Hewitt, 84 Pa Commw 151, 478 A2d 548 (1984) 28

Tracy v Salamack, 572 F2d 393, 395 n9 (2d Cir 1978) 16
Tucker v Dickey, 613 F Supp 1124 (WD Wis 1985) 36, 39

Turner v Safeley, 482 US 78, 107 S.Ct. 2254, 96 L Ed 2d 64 (1987) 1, 11
Tyler v Black, 811 F2d 424 (8th Cir 1987) 15

U.S. vs Lilly, 576 F2d 1240 (5th Cir 1978) 61
U.S. vs Vallez, 653 F2d 403 (9th Cir), *cert denied*, 454 US 904 (1981) 61

U.S. Ex Rel Larkins v Oswald, 510 F.2d 583 (2nd Cir. 1975) 105
U.S. ex rel Miller v Twomey, 479 F2d 701 (7th Cir 1973), *cert denied*, 414 US 1146 (1974) ... 101

U.S. v Austin, __ U.S.__. 113 S.Ct 2801, 125 L.Ed2d 488 (1993) 27
U.S. v Austin, __ U.S.__. 113 S.Ct 2801, 125 L.Ed2d 488 (1993) 102

U.S. v Boomer, 571 F2d 543, 546 (10th Cir 1978) 28
U.S. v Cacereys 440 U.S. 741 (1979) 16, 17

U.S. v Calandra, 414 US 338 (1974) 41
U.S. v Courtney, 979 F2d 45 (5th Cir 1993) 35

U.S. v Duke, 527 F2d 386 (5th Cir), *cert denied*, 426 US 952 (1976) 28

U.S. v Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed2d 487(1989) 27

U.S. v Halper, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed2d 487(1989) 102
U.S. v Newby, 11 F.3d 1143 (3rd Cir) 28

U.S. v Rising, 867 F2d 1255, 1259 (10th Cir 1989) 28
U.S. v Stead, 528 F2d 257 (8th Cir 1975), *cert denied*, 425 US 953 (1976) 28

U.S. vs Ready, 574 F2d 1009 (10th Cir 1978) 61
U.S. vs Stumes, 549 Fd 831(8th Cir 1977) 61

United States ex rel Miller v Twomey, 479 F2d 701 (7th Cir 1973), *cert denied*, 414 US 1146 (1974) 45
United States v Cook, 783 F2d 1207 (5th Cir), affd on reconsideration, 793 F2d 734 (5th Cir 1986) 96

United States v Dunkel, 927 F2d 955, 956 (7th Cir 1991), *aff'd*, 986 F2d 1425 (7th Cir 1993) . . 95
United States v Gouveia, 467 US 180 (1984) 19

Van Poyck v Dugger, 582 So2d 108 (Fla 1st DCA 1991); 779 F Supp 571 (MD Fla 1991), aff'd, 977 F2d 598 (11th Cir 1992) 15
Van Poyck v Dugger, 779 F. Supp 571 (M.D. Fla 1991), aff'd, 977 F2d 598 (11th Cir 1992) 14

Varnson v Satran, 368 NW2d 533 (ND 1985) 40
Vasquesz v Coughlin, 118 AD2d 897, 499 NYS2d 461 (1986) 36

Vasquez v Coughlin, 726 F Supp 466 (S.D.N.Y. 1989) 27
Vaughn v Franzen, 549 F Supp 426 (ND ILL 1982 . . . . . 18, 28

Vines v Howard, 676 F Supp 608 (ED Pa 1987) 21
Vitek v Jones, 445 US 480, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) 3

Vogelsang v Coombe, 105 AD2d 913, 482 NYS2d 348 (1984), *affd*, 66 NY2d 835, 489 NE2d 251, 498 NYS2d 364 (1985 18
Wagner v Williford, 804 F2d 1012 (7th Cir 1986), *appeal after remand*, 902 F2d 578 (7th Cir 1990) 25

Walker v Bates, 23 F.3d 652 (2nd Cir. 1994) 53
Walker v Bates, 23 F.3d 652 (2nd Cir. 1994) 106

Walker v Hughs, 558 F2d 1247, 1255 (6th Cir 1977 16
Walker v Sumner, 917 F2d 382 (9th Cir 1990) 12, 15

Wall v Scully, 121 Misc 2d 698, 468 NYS2d 984 (1983) 50
Walsh v. Finn, 865 F. Supp. 126 (SD NY 1994) 31

Ward v Johnson, 667 F2d 1126 (4th Cir 1981) 14
Ward v Village of Monroeville, 409 U.S. 57, 93 S. Ct 80, 34 L Ed 2d 267 (1972) 21

Warren v Irvin, 584 NYS2d 365 (app Div 1992) 19
Washington v Harper, 494 US 210, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) 3

Washington v State 405 So 2d 62 (Ala Crim App 1981) 46
Weaver v Graham, 450 US 24 (1981) 5

Weaver v. Brenner, 40 F.3d 527, 532 (2d Cir. 1994) 115
Wells v Israel, 629 F Supp 498 (ED Wis 1986), affd, 854 F2d 995 (7th Cir 1988) 26

Werlinger v State, 117 Idaho 47, 785 P2d 172 (1990) 51
White v Booker, 598 F Supp 984 (ED Va 1984) 55

Whitehorn v Harrelson, 758 F2d 1416 (11th Cir 1985) 14
Whitford v. Boglino, 63 F.3d 527 (7th Cir. 1995) 9

Wightman v Superintendent, Massachusetts Correctional Institution, 19 Mass App 442, 475 NE 2d 85 (1985) 42
Wightman v Superintendent, Massachusetts Correctional Inst., 19 Mass App Ct 442, 475 NE2d 85 (1985) 41

Wildberger v Bracknell, 869 F.2d 1467 (11th Cir. 1989) 105
Wilkerson v Oregon State Corr, 24 Or App 61, 544 P2d 198 (1976) 27

Williams v Schulte, 605 F Supp 498 (ED Mo 1984) 54
Williams v State, 421 NW2d 890 (Iowa 1990) 20

Williams v. Smith, 717 F. Supp. 523 (WD MI 1989) 109
Wilson v Higgs, 940 F2d 664 (6th Cir 1991 36

Witters v *United States*, 70 U.S. App. D.C. 316, 106 F2d 837, 840 102
Witters v *United States*, 70 U.S. App. D.C. 316, 106 F2d 837, 840 42

Wolfe v Carlson, 582 F Supp 977 (SDNY 1984) 40
Wolfel v Bates, 707 F2d 935 (6th Cir 1983) 106

Wolfel v Morris, 972 F.2d 712 (6th Cir. 1992) 11
Wolff v McDonnell, 418 US 539 (1974) 40

Wolff v McDonnell, 418 US 539 (1974) 45, 47
Wolff v. McDonnell, 418 US 539 (1974) 1, 2, 4-7, 18, 20, 21, 25, 27, 48, 65, 67, 73, 99-101

Wong v Coughlin, 138 AD2d 899, 526 NYS2d 640 (1988) 18
Woodby v Immigration & Naturalization Service, 385 US 276 (1966) 45

Woodby v Immigration Service, 385 US 276 (1966) 101
Woods v. Smith, 60 F.3d 1161 (5th Cir. 1995) 110

Works v State, 575 So 2d 622 (Ala Crim App 1991) 35
Wright v Caspari, 779 F Supp 1025 (ED Mo 1992) 24

Wykoff v Resig, 613 F.Supp 1504, at 1513 (D.C. Ind. 1985) 34, 37
Young v Kann, 926 F Supp 1396 (3rd Cir 1991) 62

Young v Kann, 926 F2d 1396 (3rd Cir 1991) 32
Young v Kann, 926 F2d 1396 (3rd Cir 1991) 100

Young v Selsky, 41 F.3d 47 (2nd Cir. 1994) 107
Zavaro v Coughlin, 970 F2d 1148 (2d Cir 1992) 46

Zeltner v New Jersey Dept. of Corr, 201 NJ Super 195, 492 A2d 1084 (App Div), *cert denied*, 102 NJ 299, 508 A2d 186 (1985) 53
Zilich v. Longo, 34 F.3d 359, 364 (6th Cir. 1994) 109