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Reply Brief for Appellant, Ramirez v. Nietzel

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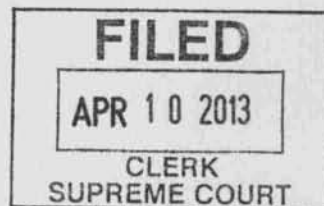
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SUPREME COURT OF KENTUCKY
2012-SC-000131-D



JOSE RAMIREZ

APPELLANT

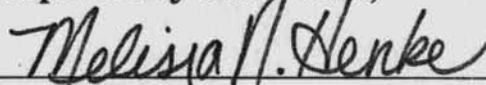
V. ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS
NO. 2011-CA-000382
BOYLE CIRCUIT COURT NO. 10-CI-00269

TRACY NIETZEL, IN HER CAPACITY
AS ADJUSTMENT HEARING OFFICER
AT THE NORTHPOINT TRAINING CENTER,
ET AL.

APPELLEES

REPLY BRIEF FOR APPELLANT

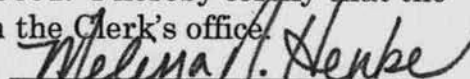
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original and nine copies of the foregoing Reply Brief for Appellant will be hand-delivered this 10th day of April, 2013 to the Clerk of the Supreme Court, 209 Capitol Bldg., 700 Capitol Ave., Frankfort, KY 40601; and that a true and correct copy of said brief was mailed, first class mail, postage prepaid, this 10th day of April, 2013 to the following: Wesley W. Duke, Justice and Public Safety Cabinet, Office of Legal Services, 125 Holmes St., Second Floor, Frankfort, KY 40601; Judge Darren W. Peckler, Boyle Circuit Court, Boyle County Courthouse, 321 West Main St., Danville, KY 40422; and Honorable Samuel P. Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601. I hereby certify that the Record on Appeal has not been removed from the Clerk's office.


Counsel for Appellant

NOTICE TO CITATIONS

Citations to the record of the Boyle Circuit Court are made (Circuit Record, page number). Citations to the record of the Kentucky Court of Appeals are made (Appellate Record, docket number, page number). Citations to the Brief for Appellant, filed on January 23, 2013, are made (Opening Br., page number). Citations to the Brief for Appellee, filed on March 26, 2013, are made (Appellee Br., page number).

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INTRODUCTION

Adjustment officer Tracy Nietzel (Adjustment Officer) conducted a disciplinary hearing against Appellant Jose Ramirez for his alleged involvement in an assault against two Northpoint Training Center (Northpoint) inmates, Henry Rodgers and Ricky Lee. At the close of the 16-minute hearing, the Adjustment Officer found Mr. Ramirez guilty even though:

- The hearing report (just like the investigative report) failed to identify a single act that Mr. Ramirez allegedly committed in connection with the assault. (Circuit Record, 19-20).
- The Adjustment Officer failed to comply with the Department of Corrections' written policies and procedures regarding confidential informants. (See Circuit Record, 20).
- No correctional officers, not even the officer involved in the assault investigation, testified at the hearing. (Circuit Record, 19, 109).
- The only witness to testify at the hearing stated that Mr. Ramirez was not involved in the assault and was instead asleep in his dorm at the time of the incident, which corroborated Mr. Ramirez's statement. (Circuit Record, 19, 27, 109).
- Victim inmate Rodgers would have confirmed Mr. Ramirez's innocence, but the Adjustment Officer refused to allow his testimony in violation of Mr. Ramirez's due process rights. (See Circuit Record 19, 54, 109).
- The Adjustment Officer failed to review available surveillance video footage that would have further confirmed that Mr. Ramirez was not involved in the assault, which is also in violation of his due process rights. (See Circuit Record, 19-20, 109).

As a result of the Adjustment Officer's procedurally and substantively invalid finding of guilt, Mr. Ramirez served 180 days in solitary confinement,

lost two years of non-restorable good time credit, and has paid almost \$600 in ordered restitution. (Circuit Record, 19; Appellate Record, 5, Appendix B). This case followed.

In response, the Appellee effectively argues in her brief that unfettered discretion should be given to prison adjustment officers – even in a case such as this one where there are numerous, demonstrated due process violations against an inmate with overwhelming evidence of his innocence, and where there is insufficient evidence in the record to support a finding of guilt. While there are indeed legitimate reasons why discretion is afforded to a prison adjustment officer, that discretion is not unlimited. Specifically, judicial review is available to make sure that the officer's findings are supported by evidence and not "otherwise arbitrary." Superintendent, Mass. Corr. Instit., Walpole v. Hill, 472 U.S. 445, 457 (1985). As shown here and in the Appellant's Opening Brief, the Adjustment Officer's decisions are unsupported and arbitrary, and thus fail to comply with the minimum due process requirements. Accordingly, Mr. Ramirez is entitled to judicial review and relief in connection with this prison disciplinary hearing.

I. **Mr. Ramirez Has Demonstrated That Numerous Due Process Violations Occurred During the Disciplinary Hearing.**

Judicial review exists to ensure that a prison disciplinary hearing comports with the applicable due process protections afforded by the Fourteenth Amendment to the U.S. Constitution and Section 2 of the Kentucky Constitution, and to provide relief to the inmate when the hearing

fails to conform with those protections. Wolff v. McDonnell, 418 U.S. 539, 563-66 (1974); McMillen v. Kentucky Dep't of Corr., 233 S.W.3d 203, 205 (Ky. App. 2007); Smith v. O'Dea, 939 S.W.2d 353, 355, 358 (Ky. App. 1997).

Here, Mr. Ramirez has demonstrated that several due process violations occurred during his disciplinary hearing, including (A) the Adjustment Officer's refusal to allow critical, exculpatory testimony by victim inmate Henry Rodgers, and (B) the Adjustment Officer's failure to review available surveillance video of the inmate assault in question to confirm that Mr. Ramirez was not involved.

A. The Adjustment Officer Violated Mr. Ramirez's Due Process Rights by Refusing to Allow Victim Inmate Rodgers' Exculpatory Testimony or Written Statement, Which Were Critical to a Fair Hearing.

Mr. Ramirez has demonstrated that the Adjustment Officer at least twice violated his due process rights by denying critical testimony from victim inmate Rodgers.

The Appellee does not dispute that Mr. Ramirez had a right to call witnesses and present documentary evidence in his defense so long as doing so was consistent with institutional safety and correctional goals. See Wolff, 418 U.S. at 566; McMillen, 233 S.W.3d at 205. (See also Appellee Br., 3-4). Rather, the Appellee rests her entire argument here on the naked assertion that the Adjustment Officer denied Mr. Ramirez's request to call inmate Rodgers as a witness based on a "potential threat to the security of the institution." (Appellee Br., 1). However, the U.S. Supreme Court has made

clear that the reason given for the denial of the witness request must be “logically related” to preventing undue institutional safety hazards. Ponte v. Real, 471 U.S. 491, 496-97 (1985) (emphasis added). No such logical relationship has been or can be shown here. Indeed, the Appellee fails to even attempt to respond to Mr. Ramirez’s arguments on this point. (See Appellee Br., 3-4; Opening Brief, 5-13).

Because she fails to respond, the Appellee effectively concedes there was no legitimate safety concern behind the Adjustment Officer’s decisions regarding victim inmate Rodgers. Specifically, the Appellee concedes that any supposed safety threat that may have existed in calling inmate Rodgers as a witness – a friendly and willing witness at that – would have been resolved by taking his testimony via speakerphone. (See Opening Br., 7-9). That is precisely how the Adjustment Officer handled the testimony of Mr. Ramirez’s alibi witness, inmate Luis Pena-Martinez, in this very case. (Circuit Record, 19, 27). The Appellee also concedes that there cannot be any legitimate safety concern in alternatively taking as evidence Rodger’s written statement. (See Opening Br., 10-11).

Moreover, inmate Rodgers was the victim who actually witnessed the assault in question. (Circuit Record, 26, 55). And he was prepared to testify that Mr. Ramirez was not involved in the assault and was therefore innocent of the charge. (Id.; see also Opening Br. Appendix C, 1; Opening Br. Appendix D, 1). Thus, contrary to the Appellee’s assertion, inmate Rodgers’

testimony is by no means redundant of other testimony offered by Mr. Ramirez, and is instead critical to a fair hearing. While Pena-Martinez testified that Mr. Ramirez was asleep in his dormitory during the assault, Rodgers would have affirmatively testified that Mr. Ramirez was not involved in the assault in any way. (*Id.*) (See also Opening Br., 9-12).

In sum, the Adjustment Officer violated Mr. Ramirez's due process rights by refusing to allow Rodgers' testimony (via speakerphone or in writing) confirming Mr. Ramirez's innocence, especially where there was no legitimate safety concern to support the witness request denial.

B. The Adjustment Officer Violated Mr. Ramirez's Due Process Rights by Failing to Review Available Surveillance Video That Would Have Confirmed Mr. Ramirez Was Not Involved in the Assault.

Mr. Ramirez has also demonstrated that the Adjustment Officer violated his due process rights by failing to review available surveillance video of the assault to confirm Mr. Ramirez was innocent of the charge brought against him.

It remains unrefuted that surveillance video of the assault exists, and yet the Adjustment Officer never reviewed this evidence before ruling against Mr. Ramirez at the disciplinary hearing. (Opening Br., 1; Appellee Br., 4-5). Instead, the Appellee repeats the misdirected argument that Mr. Ramirez was rightfully denied the right to view the video himself due to claimed safety concerns. (Appellee Br., 4-5). The Appellee continues to miss the point. The issue is not about whether Mr. Ramirez should have been given

access to the surveillance video. Rather, the point is that *the Adjustment Officer* should have accessed and viewed the available evidence in the disciplinary proceeding. Doing so would have confirmed that Mr. Ramirez was not in the video because he was not involved in the assault. (Circuit Record, 19, 26-27, 55, 109). The Adjustment Officer's failure to review available, exculpatory evidence is itself a due process violation. See Cobbs v. Superintendent, 821 F. Supp. 2d 1071, 1072 (N.D. Ind. 2011) (stating that due process requires that the hearing officer review any relevant video evidence that exists if requested at or before the hearing). (See also Opening Br., 13-15). The Appellee cites no case that holds otherwise.

Moreover, the Appellee's reliance on Wilson v. Morgan, No. 2003-CA-000236-MR, 2003 WL 22064261 (Ky. App. Sept. 5, 2003) is inapposite. (See Appellee Br., 5; Appellee Br., Appendix E). In that case the *defendant inmate* wanted access to the evidence at issue, 2003 WL 22064261, at *3, which is different than the request by Mr. Ramirez that *the Adjustment Officer* view the available surveillance video. Moreover, in the Wilson case, there was also other overwhelming evidence of guilt, including officer testimony at the disciplinary hearing. Id. However, as discussed in more detail below, no such evidence of guilt exists in Mr. Ramirez's case, which instead involves substantial evidence of innocence.

Thus, the Adjustment Officer also violated Mr. Ramirez's due process rights by refusing to view the relevant surveillance tape evidence in response to Mr. Ramirez's timely request.

II. **The Record Does Not Support the Adjustment Officer's Finding of Guilt, and there is Overwhelming Evidence of Mr. Ramirez's Innocence.**

Contrary to the assertion in her brief, the hearing report does not support the Adjustment Officer's decision in this matter, because there is no summary of the confidential informant's statement supposedly relied on and no other stated reasons for the decision. In addition, the Adjustment Officer arbitrarily ignored overwhelming evidence of Mr. Ramirez's innocence in reaching her decision.

In order to comply with the due process requirements for a prison disciplinary hearing, the officer must "provide a written statement from the fact finder of the evidence relied on *and the reasons for the disciplinary actions.*" McMillen, 233 S.W.3d at 205 (emphasis added) (citing Hill, 472 U.S. at 445). As the Supreme Court explained in Wolff, this written record requirement helps ensure that prison officials "will act fairly" in the proceeding. 481 U.S. at 565. Moreover, requiring that an official's finding of guilt be supported by some record evidence "will help prevent arbitrary deprivations without threatening institutional interests or imposing undue administrative burdens." Hill, 472 U.S. at 456; see also O'Dea, 939 S.W.2d at 358.

The hearing record in this case does not satisfy the requirement that there be some evidence supporting the finding of guilt against Mr. Ramirez. As a result, the disciplinary hearing and report fail to comport with the due process requirements set forth in Wolff. First, the Adjustment Officer failed to make any specific findings about Mr. Ramirez's involvement in the assault. (See Circuit Record, 19-20, 109). Second, neither the officer(s) called to respond to the assault, nor the officer responsible for completing the disciplinary report, were called as witnesses at the hearing. (Id.) This is in stark contrast to the Hill case relied on by the Appellee. (Appellee Br., 5-8). In that case, the officer who responded to the assault in question, and who also prepared the investigative report to follow, testified against the defendant at the disciplinary hearing. Hill, 472 U.S. at 456 (noting this officer testimony in particular when finding the evidence before the disciplinary board was sufficient for due process purposes). In fact, the only witness called at Mr. Ramirez's 16-minute hearing was inmate Pena-Martinez, who corroborated Mr. Ramirez's statement that he was not involved in the assault and was instead asleep in his dormitory. (Circuit Record 19, 27, 109).

Furthermore, while the hearing report makes reference to confidential information, the Adjustment Officer failed to follow the Department of Corrections' own policies and procedures in using such information. As an initial matter, Mr. Ramirez never received written notice of the general

nature of that information. Moreover, the Adjustment Officer failed to summarize the supposed informant's statement during the hearing, and she also failed to give the basis for a finding of informant reliability. (Circuit Record, 19-20, 109). All *three* of these actions are generally required by Kentucky Corrections Policies and Procedures 9.18(D)(2) and (D)(7). (Opening Br., Appendix, E, 2, 4). By failing to respond to this important point made in the Appellant's Opening Brief, the Appellee effectively concedes that her handling of any alleged confidential information in this proceeding was in violation of the Department of Corrections' own written policies and procedures. (See Opening Br., 2-3). Thus, the Appellee cannot rely on this information to support a finding against Mr. Ramirez. Again, no other evidence exists.

Perhaps what makes this case even more egregious is that the Adjustment Officer's decision also came after she refused to consider victim inmate Rogers' testimony and the available surveillance testimony, both of which would have confirmed Mr. Ramirez's innocence. And the Adjustment Officer made these refusals under the incorrect and unsupported guise of institutional safety.

For these reasons, the Adjustment Officer's decision is both substantively and procedurally invalid. Moreover, because there is no permissible evidence to support a finding of guilt, and there is ample

evidence of Mr. Ramirez's innocence, it would be futile to remand this case for further review by the Adjustment Officer.

III. **Judicial Review Exists as a Check Against Prison Disciplinary Proceedings That Are Without Support and Otherwise Arbitrary.**

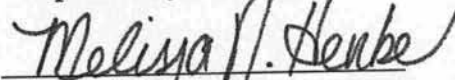
While the Appellee seeks to rely on the discretion generally afforded to prison officials in disciplinary proceedings, that deference is not warranted when the record is void of any evidence or findings that would support her decision, as is the case here. Courts require a written statement from the prison official of the evidence relied on, and the *reasons* for the disciplinary actions, so that they can review the decision to confirm it was not unsupported or arbitrary. Hill, 472 U.S. at 457; McMillen, 233 S.W.3d at 205. No such evidence or reasons exist to support the Adjustment Officer's decision here. Courts also require that a prison official's refusal to allow an inmate to call witnesses be "logically related" to the claim of institutional safety. Ponte, 471 U.S. at 496-97. Yet the Adjustment Officer denied Mr. Ramirez's request to call victim inmate Rodgers as a witness even though it could not cause undue institutional safety hazard.

Accepting the Appellee's position here would effectively mean that inmate disciplinary proceedings are never reviewable, and that is simply not what the courts contemplate. Mr. Ramirez's case illustrates precisely why judicial review and relief are available to an inmate in connection with a prison disciplinary hearing, and the relief he seeks is warranted in this case.

CONCLUSION

For the reasons set forth here and in the Opening Brief, Appellant Jose Ramirez respectfully requests that this Court grant his appeal, because his due process rights were violated and the hearing record fails to support the conviction. The Appellant further requests that the Court grant his petition; annul the disciplinary report and conviction at issue; order expungement from Appellant's institutional file of any and all references to the disciplinary proceeding, report, and conviction at issue; order that the good time credit lost by Appellant be immediately restored; order immediate repayment to the Appellant of the approximately \$600 paid for restitution; order reimbursement of all expenses incurred by the Appellant in filing and litigation of this case; and further order any other relief the Court deems appropriate.

Respectfully submitted,



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