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## Brief for Appellant, *Ramirez v. Nietzel*

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## Brief for Appellant, *Ramirez v. Nietzel*

### Notes/Citation Information

Brief for the Appellant, *Ramirez v. Nietzel*, 424 S.W.3d 911 (2014) (No. 2012-SC-000131-D).

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SUPREME COURT

SUPREME COURT OF KENTUCKY  
2012-SC-000131-D

JOSE RAMIREZ

APPELLANT

V.

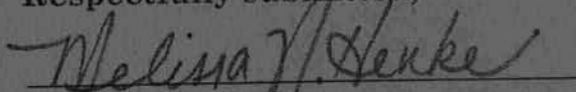
ON DISCRETIONARY REVIEW FROM  
THE COURT OF APPEALS  
NO. 2011-CA-000382  
BOYLE CIRCUIT COURT NO. 10-CI-00269

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

APPELLEES

BRIEF FOR APPELLANT

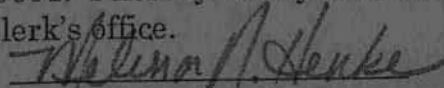
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original and nine copies of the foregoing Brief for Appellant will be hand-delivered this 23<sup>rd</sup> day of January, 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 23<sup>rd</sup> day of January, 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 been returned to the Clerk's office.



Counsel for Appellant

## INTRODUCTION

This appeal involves the denial of Appellant Jose Ramirez's procedural due process rights, under the Fourteenth Amendment to the U.S. Constitution and Section 2 of the Kentucky Constitution, during an inmate disciplinary hearing. Mr. Ramirez was denied the right to call as a hearing witness an inmate victim who would testify as to Mr. Ramirez's innocence; specifically, the inmate would have testified that Mr. Ramirez was not even involved in the assault that led to the disciplinary hearing at issue. Corroborating evidence confirms Mr. Ramirez was asleep elsewhere in the facility at the time of the assault. As a result of the due process violations, Mr. Ramirez served 180 days in solitary confinement, lost two years non-restorable good-time credit, and was ordered to pay restitution.

## STATEMENT CONCERNING ORAL ARGUMENT

Pursuant to the Court's October 26, 2012 Order, oral argument will not be scheduled in this case. While the case does involve some issues of first impression, it will stand submitted at the conclusion of briefing submitted to the Court.

## 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). References to the Appendix of this brief are made (Appendix, tab number, page number).

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## STATEMENT OF THE CASE

On August 18, 2009, at approximately 2:20 p.m., Henry Rodgers and Ricky Lee, two inmates at the Northpoint Training Center (Northpoint), were assaulted behind the Northpoint Chapel (hereafter, the Incident). (Circuit Record, 20). It is unrefuted that the area where the Incident took place is monitored by surveillance video. (Circuit Record, 19, 43; Appellate Record 6, 5-6).

At the time of the Incident, Appellant Jose Ramirez was asleep in the Northpoint dorm. (Circuit Record, 19-20, 27, 109). Mr. Ramirez was not involved in the Incident in any way, and was not even near the Northpoint Chapel at the time of the Incident. (*Id.*). In fact, both inmate victims, Rodgers and Lee, have confirmed that Mr. Ramirez was not one of the inmates involved in the Incident. (Circuit Record, 24-26, 55; Appendix C, 1; Appendix D, 1).

Nevertheless, on August 19, 2009, Mr. Ramirez was placed in Administrative Segregation pending completion of the investigation into the Incident. (Circuit Record, 20). During the investigation, Mr. Ramirez advised the investigating captain that he had nothing to do with the Incident and was asleep at the time it occurred. (*Id.*). The investigation resulted in a written report dated September 22, 2009. (*Id.*). While the report claims that Mr. Ramirez was involved in the Incident along with at least eight other inmates, the report makes no specific statement about how Mr. Ramirez was

allegedly involved or what Mr. Ramirez allegedly did in connection with the Incident. (Id.). The report is also void of any clear statement about the source of the investigating captain's findings. (Id.).

Shortly thereafter, Mr. Ramirez received the disciplinary report, which charged a Category 7 Item 2 infraction ("Physical action resulting in death or serious physical injury of another inmate"). (Circuit Record, 19). Mr. Ramirez responded by requesting that the relevant surveillance camera footage for the date and time of the Incident be viewed in connection with the disciplinary proceeding. (Circuit Record, 19, 52). Mr. Ramirez also timely requested that inmates Luis Pena-Martinez and Henry Rodgers be called as witnesses at the disciplinary hearing. (Circuit Record, 19, 52, 109). In addition, Mr. Ramirez submitted a witness statement from Henry Rodgers, in which inmate Rodgers stated that no Mexicans were involved in the Incident, a fact that would exclude involvement by Mr. Ramirez. (Circuit Record, 55, 109; Appendix D, 1) (Witness Statement for Adjustment Hearing; stating that the assailants were black and unknown to Rodgers, the victim).<sup>1</sup>

Adjustment officer Tracy Nietzel (hereafter, Adjustment Officer) conducted the inmate disciplinary hearing on October 26, 2009. (Circuit Record, 19, 109). The investigating captain indicated that confidential information was forwarded to the hearing officer. (Circuit Record, 19).

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<sup>1</sup>The other victim inmate, Ricky Lee, has also provided affidavits that confirm Mr. Ramirez was not involved in the Incident. (Circuit Record, 24-25).

However, Mr. Ramirez never received written notice of the general nature of the confidential information, and the Adjustment Officer never summarized the supposed informant's statement during the hearing, both of which are generally required by Kentucky Corrections Policies and Procedures 9.18(D)(2) and (D)(7). (Circuit Record, 19-20; Appendix, E, 2, 4). The record also fails to reflect whether the Adjustment Officer gave the basis for a finding of confidential informant reliability, which is also in violation of Kentucky Corrections Policies and Procedure 9.18(D)(7). (Circuit Record, 19; Appendix, E, 4).

During the disciplinary hearing, Mr. Ramirez pled not guilty and reiterated that he was asleep in the Northpoint dorm at the time of the Incident. (Circuit Record, 19, 109). The Adjustment Officer accepted the telephonic testimony of inmate Pena-Martinez, which corroborated Mr. Ramirez's alibi. (Circuit Record, 27) (stating that inmate Ramirez was not involved in the Incident and "was in the dorm asleep at the time of the fight"); see also (Circuit Record, 19, 109). Mr. Ramirez's requests to call inmate victim Rodgers as a witness and to submit Rodgers' witness statement were both denied. (Circuit Record, 19, 109). Even though Rodgers was a friendly, willing witness who would testify that Mr. Ramirez was innocent of the disciplinary charge rendered against him, the Adjustment Officer denied both requests due to the fact that the inmate was the victim and on the basis of institutional safety and security. (Circuit Record, 19, 54,

109). The Adjustment Officer also denied the request regarding review of camera footage of the Incident on the basis of institutional security. (Id.). Although clearly relevant, there is no indication in the record that the Adjustment Officer reviewed this surveillance footage before finding Mr. Ramirez guilty. (Circuit Record, 19).

Just like the investigative report, the hearing report fails to identify a single act that Mr. Ramirez allegedly committed in connection with the Incident. (Circuit Record, 19-20). At the close of the disciplinary hearing, which lasted only 16 minutes, the Adjustment Officer found Mr. Ramirez guilty of the Category 7 Item 2 offense under the inchoate provisions in (a-d) of Kentucky Corrections Policies and Procedures 15.2(II)(E). (Circuit Record, 19). Mr. Ramirez's penalty included 180 days in solitary confinement, loss of two years non-restorable good time credit, and an order to pay restitution. (Id.). The amount of restitution that Mr. Ramirez has been ordered to pay is \$ 556.17. (Appellate Record, 5, App. B). Mr. Ramirez has served the 180 days in solitary confinement and has paid almost all of the ordered restitution.

The Warden denied Mr. Ramirez's timely appeal. (Circuit Record, 16-19). Upon exhausting all administrative appeals, Mr. Ramirez timely filed a Petition for Declaration of Rights, pursuant to KRS 418.040, in Boyle Circuit Court on May 24, 2010. (Circuit Record, 1-27). In the Petition, Mr. Ramirez argued, *inter alia*, that his due process rights were violated when the

Adjustment Officer refused to view surveillance video of the Incident, denied the Incident victims as witnesses, and failed to follow Kentucky Corrections Policies and Procedures (namely regarding confidential informant information). (Circuit Record, 1-15). The Boyle Circuit Court denied the petition on August 2, 2010, (Appendix, A, 1-3), and the Kentucky Court of Appeals affirmed the trial court order on February 3, 2012. (Appendix, B, 1-6). Mr. Ramirez timely filed a Motion for Discretionary Review on March 23, 2012. On October 27, 2012, this Court granted the motion in regards to the issue of witness testimony at the disciplinary hearing.

### ARGUMENT

In reviewing an inmate petition for a declaration of rights in connection with a dispute with the Kentucky Corrections Department, the court affords due deference, but must “ensure that the agency’s judgment comports with the legal restrictions applicable to it.” Smith v. O’Dea, 939 S.W.2d 353, 355 (Ky. App. 1997) (citation omitted). Here, those legal restrictions arise out of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and Section 2 of the Kentucky Constitution.

**I. The Denial of Mr. Ramirez’s Request to Call Inmate Victim Rodgers and to Admit Rodgers’ Witness Statement at the Inmate Disciplinary Proceeding Violated Mr. Ramirez’s Due Process Rights.**

It is well-settled that inmate disciplinary proceedings affecting the overall duration of an inmate’s sentence give rise to minimal due process protections.

Sandin v. Conner, 515 U.S. 472, 477-78 (1995) (quoting Wolff v. McDonnell, 418 U.S. 539 (1974)). Where deprivation of a liberty interest occurs, including the loss of good time credit, the minimum requirements afforded by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution must be satisfied. Wolff, 418 U.S. at 563-66; see also McMillen v. Kentucky Dep't of Corr., 233 S.W.3d 203, 205 (Ky. App. 2007) (setting forth the due process required in connection with prison disciplinary proceedings). Moreover, section 2 of the Kentucky Constitution is seen as a due process provision that assures "fundamentally fair and unbiased procedures." O'Dea, 939 S.W.2d at 358.

One important procedural protection is the right for an inmate to be allowed to call witnesses and to present documentary evidence in his defense whenever it is consistent with institutional safety and correctional goals. McMillen, 233 S.W.3d at 205 (citing Superintendent, Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445 (1985)); see also Wolff, 418 U.S. at 566. While prison officials are afforded discretion in responding to an inmate's request to call witnesses or present documentary evidence, that discretion is not unlimited, because the reasons given for the denial of a witness request must be "logically related to preventing undue hazards to institutional safety or correctional goals." Ponte v. Real, 471 U.S. 491, 496-97 (1985) (noting the right to call witnesses in a disciplinary hearing involves the "mutual

accommodation between institutional needs and objectives and the provisions of the Constitution”) (citations omitted).

Here, Mr. Ramirez’s due process rights were violated three times at the sixteen minute disciplinary hearing when the Adjustment Officer did the following: (A) denied Mr. Ramirez’s request to present evidence of his innocence through the critical testimony of inmate victim Rodgers, which could have been done via telephone; (B) denied Mr. Ramirez’s request to present inmate Rodger’s written statement, which was exculpatory evidence that could be admitted without any legitimate safety concern; and (C) failed to allow Mr. Ramirez to present a complete defense of innocence in response to the charge rendered against him.

**A. Inmate Victim Rodgers Should Have Been Permitted to Testify at Mr. Ramirez’s Disciplinary Hearing.**

The denial of an inmate’s witness request can violate due process, especially where the requested witness is the victim. For example, in Jenkins v. Henderson, No. 2005-CA-000664, 2006 WL 1045713 (Ky. App. Mar. 31, 2006) (unpublished) (Appendix, F, 1-3), the defendant was denied the right to call the victim accuser as a witness at his inmate disciplinary hearing. The Kentucky Court of Appeals reversed the lower court ruling and found that the hearing adjustment committee abused its discretion when it denied the defendant’s request to call the victim as a witness. Id. at \*3. The court noted that cross-examination of this witness was particularly important because the other witnesses who did testify had not actually observed the

incident in question. Id. at \*2. The court also reasoned that the victim's appearance "would not have endangered either the prison system's security or its correctional goals," even though the witness had been intimidated by the defendant, because she could have testified via speakerphone just as the other officers did. Id. at \*3.

Other courts agree with the view taken by the Kentucky Court of Appeals. For example, in Torres v. Coughlin, 563 N.Y.S.2d 152, 153-54 (App. Div. 1990), the court found that the inmate's due process rights were violated when the hearing officer denied the inmate's request to call as a witness the victim of the alleged incident giving rise to the hearing. There was also some indication that the testimony would be exculpatory. Id. at 154. The court ruled that the testimony of the victim of the alleged assault was "relevant and material," and further stated that there was no indication that interviewing the victim "would have jeopardized institutional safety or correctional goals." Id. at 153-54 (suggesting the testimony could "at the very least, have been taken over the telephone"). The court reached a similar conclusion in Roberson v. Bezio, 897 N.Y.S.2d 529, 529-30 (App. Div. 2010), where the inmate was denied the right to call the victim as a witness, even though the victim had information relevant to the charges. In both cases, the due process violation resulted in an annulment of the disciplinary proceeding. Torres, 563 N.Y.S.2d at 154; Roberson, 897 N.Y.S.2d at 530.



In this case, Mr. Ramirez requested that Henry Rodgers, the inmate victim, be called as a witness at the hearing. (Circuit Record, 19, 109). Rodgers was a willing hearing participant and a friendly witness, as supported by the witness statement he was willing to submit on Mr. Ramirez's behalf that made clear Mr. Ramirez could not have been involved in the Incident. (Circuit Record, 55; Appendix, D, 1). Just like the denial of the request to call the victim as a witness was a violation of the defendant's due process rights in Jenkins, as well as in Torres and Roberson, the denial of Mr. Ramirez's request to call Rodgers as a witness at his disciplinary hearing violated his due process rights. Indeed, Mr. Ramirez's request was not even an adversarial situation like that found in Jenkins, where the victim witness may not have wanted to testify, and yet still should have been required to do so. Rather, here, both Rodgers' affidavit and his witness statement support that he was a willing witness, had no concern regarding intimidation or safety, and had relevant and material testimony to provide regarding Mr. Ramirez's innocence. (Circuit Record, 26, 55; Appendix C, 1; Appendix D, 1).

In addition, any claimed safety concern arising out of the fact that Mr. Ramirez sought testimony from another inmate (versus an officer) is nothing more than a red herring. That is because any such concern could easily be remedied by allowing Rodgers to testify via telephone. That is precisely how the Adjustment Officer handled the testimony of inmate Pena-Martinez in this very case. (Circuit Record, 19, 27). Moreover, the court made clear in

Jenkins that testimony via speakerphone “would not have endangered either the prison system’s security or its correctional goals.” 2006 WL 1045713, at \*3. And the very same reasoning applied in Torres, 563 N.Y.S.2d at 153-54 (suggesting the relevant testimony from the victim witness could “at the very least, have been taken over the telephone”).

Given these circumstances, the Adjustment Officer’s denial of Mr. Ramirez’s request to call Rodgers as a witness violates due process.

**B. Alternatively, Inmate Rodgers’ Written Statement Should Have Been Permitted at the Disciplinary Hearing.**

While courts have also considered whether a written statement by an important witness can satisfy due process in lieu of live testimony, it is undisputed that no such alternative was afforded to Mr. Ramirez. For example, in Brown v. Braxton, 373 F.3d 501, 502 (4th Cir. 2004), the defendant inmate was found guilty of assaulting another inmate. The hearing officer denied the defendant’s request to call the victim inmate as a live witness, but the officer allowed the defendant to instead submit the victim inmate’s written statement. Id. The Fourth Circuit explained that even if the hearing officer had somehow erred in not calling the victim inmate as a live witness, the defendant could not demonstrate that he had been harmed, because the officer instead allowed the witness to testify in writing. Id. at 508. What mattered to the court is that the requested witness’s written testimony was still part of the hearing’s record. See id.

In contrast, in Mr. Ramirez's hearing, the Adjustment Officer denied both Mr. Ramirez's request to call inmate Rodgers as a live witness and to submit Rodgers' written statement. (Circuit Record, 19, 54-55, 109). Both would have supported Mr. Ramirez's innocence – Rodgers' signed affidavit indicates his live testimony would establish that Mr. Ramirez was not involved in the Incident, (Circuit Record, 26; Appendix, C, 1), and Rodgers' written statement makes clear that no Mexican inmates, such as Mr. Ramirez, were involved in the Incident. (Circuit Record 55; Appendix, D, 1). Thus, unlike the situation in Brown, where the denial of a live witness was permissible, at least in part, because of the defendant's ability to support his case with a written witness statement, there was no such opportunity given to Mr. Ramirez. As such, Mr. Ramirez's due process rights were violated when the Adjustment Officer denied both the witness request and the written statement request in regards to inmate victim Rodgers.

Moreover, while the Adjustment Officer stated during the hearing that she was denying the request for Rodgers' witness statement on the same grounds as the live testimony, presumably safety concerns (Circuit Record, 109), no such concerns legitimately exist. To be sure, if testimony via speakerphone avoids any purported safety concerns, as it did for the court in Jenkins, 2006 WL 1045713, at \*3 and Torres, 563 N.Y.S.2d at 153-54, then there is simply no way that the submission of Rodgers' *written* witness statement could raise *legitimate* safety concerns. And the U.S. Supreme

Court has made clear that the officer's stated reason for the denial of the inmate's witness request must be "*logically* related to preventing undue hazards to 'institutional safety or correctional goals.'" Ponte, 471 U.S. at 497 (citation omitted). No such logical relationship exists between Rodgers' written statement and the Adjustment Officer's claimed security concerns.

Thus, the Adjustment Officer also denied Mr. Ramirez's due process rights when she refused to allow into the record Rodgers' written witness statement.

**C. Victim Rodgers' Testimony Is Critical to a Fair Hearing.**

Finally, the fact that inmate Pena-Martinez was allowed to testify on Mr. Ramirez's behalf at the disciplinary hearing did not somehow make Rodgers' testimony redundant or irrelevant. Pena-Martinez gave important testimony that corroborated Mr. Ramirez's alibi – he was asleep in the Northpoint dorm at the time of the Incident. (Circuit Record, 19, 27). Such testimony is in no way redundant of testimony from Rodgers, the victim who was actually a witness to the Incident. Together, the corroborating testimony from Pena-Martinez *and* Rodgers' testimony regarding Mr. Ramirez's innocence would have allowed Mr. Ramirez to present a full defense to the disciplinary charge brought against him at this hearing. And the right to present a defense is particularly important to an inmate who is accused of violating a prison rule, such as Mr. Ramirez was here. See, e.g., Sauls v. McKune, 260 P.3d 95, 100 (Kan. Ct. App. 2011) ("We find that [the

defendant's] due-process rights were violated by the denial of the ability to call witnesses who might have rebutted the evidence presented against him.”).

Indeed, Kentucky Corrections Policies and Procedure 9.18 illustrates just how critical the testimony of an assault victim can be. Section II(B) provides that “the statement of a seriously injured assault victim may be sufficient evidence to support an Adjustment Committee finding without corroborating evidence.” (Appendix, E, 2). If a victim’s statement alone can be sufficient to support a finding of guilty at a disciplinary hearing, then it would follow that exculpatory evidence from assault victim Rodgers could have supported a finding of not guilty for Mr. Ramirez.

Thus, without the testimony by inmate Rodgers, Mr. Ramirez did not – and could not – receive a fair hearing.

In conclusion, the Adjustment Officer violated Mr. Ramirez’s due process rights three times during the sixteen minute disciplinary hearing.

## **II. The Adjustment Officer’s Failure to View the Surveillance Video of the Incident Also Violated Mr. Ramirez’s Due Process Rights.**

Mr. Ramirez also requested that the Adjustment Officer view the surveillance video of the area around the Northpoint Chapel at the time of the Incident. (Circuit Record, 20). At no time during this action has there been a claim that the video does not exist. (Circuit Record, 19, 43; Appellate Record 6, 5-6). As such, it is unrefuted that relevant documentary evidence

existed that could have supported Mr. Ramirez's defense of innocence, and yet the Adjustment Officer failed to view it. This alone is a violation of Mr. Ramirez's due process rights. For example, in Foley v. Haney, 345 S.W.3d 861, 864 (Ky. App. 2011), the court held that the inmate's disciplinary hearing was constitutionally deficient, in part because the hearing officer failed to review documentary evidence that would support defendant's claim of an alibi that would refute his involvement in the charged incident. Mr. Ramirez's hearing was likewise constitutionally deficient, because the Adjustment Officer failed to review surveillance video of the Incident that would confirm Mr. Ramirez was not present in the video, and thus not involved in the Incident. This surveillance video evidence would, in turn, further support Mr. Ramirez's alibi evidence that he was asleep in his dorm at the time the Incident occurred. (Circuit Record, 19, 27).

While this appears to be a case of first impression in Kentucky, other courts have addressed this very issue in the context of available surveillance video. For example, in Hoskins v. McBride, 202 F. Supp. 2d 839, 844-45 (N.D. Ind. 2002) (citing multiple cases), the court stated that the inmate had a right to have security videos viewed by the adjustment board in considering whether the inmate violated prison rules. Given that the Appellees have never refuted the existence of surveillance video of the Incident, the same right should have been afforded to Mr. Ramirez here.

Moreover, the fact that Mr. Ramirez may not have been entitled to view the surveillance video himself – if there exist logical safety or correctional concerns against such viewing – has absolutely no bearing here. The key is that the *Adjustment Officer* should have viewed the potentially exculpatory surveillance evidence in connection with the disciplinary hearing. See Cobbs v. Superintendent, 821 F. Supp. 2d 1071, 1072 (N.D. Ind. 2011) (“Though due process does not require that an inmate always be permitted to watch the videotape, it does require that the [hearing officer] review any relevant video evidence that exists if requested at or before the hearing.”) (citation omitted).

Thus, the Adjustment Officer’s failure to view relevant surveillance tape evidence, in response to Mr. Ramirez’s timely request, constitutes a violation of due process.

### CONCLUSION

For the foregoing reasons, Appellant Jose Ramirez respectfully requests that this Court grant Appellant’s appeal because his due process rights were violated. The Appellant further requests that the Court grant his petition; annul the disciplinary report and conviction in question; order expungement from Appellant’s institutional file of any and all references to the disciplinary proceeding, report, and/or conviction at issue on appeal; order that the good time credit lost by Appellant be immediately restored; order repayment to the Appellant of all money paid for restitution in connection

with this disciplinary proceeding; and further order any other relief the Court  
deems appropriate.

Respectfully submitted,



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