



ORIGINAL

FILED

03/14/2022

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: OP 22-0126

MAKUEEYAPEE D. WHITFORD
MT DOC #3015941
Montana State Prison
700 Conley Lake Road
Deer Lodge, MT 59722

FILED

IN THE SUPREME COURT OF THE STATE OF MONTANA MAR 14 2022

No. _____

Bowen Greenwood
Clerk of Supreme Court
State of Montana

MAKUEEYAPEE D. WHITFORD,
Petitioner,

v.

MONTANA STATE PRISON, WARDEN JIM
SALMONSEN,
Respondant,

PETITION FOR WRIT OF HABEAS
CORPUS

The petitioner, Makueeyapee D. Whitford, is representing himself, and he believes that he is entitled to a Writ of Habeas Corpus under § 46-22-101, MCA, for an illegal prison infraction that resulted in the illegal restraint of his First Amendment right to the Freedom of Religion, a substantive liberty interest.

Introduction

Montana Department Of Corrections (MDOC) Policy and Montana State Prison (MSP) Procedure regarding prisoner disciplinary proceedings allows for a six-month infraction free stipulation when an inmate is found guilty of a major disciplinary infraction. Mr. Whitford, the petitioner, was infracted for possession of a weapon and subsequently found guilty in a disciplinary proceeding which resulted in certain aspects of his religious freedom's being restricted pursuant to MDOC Policy and MSP Procedure. Namely, the ability to participate in Native American Drumming, Native American Sweat Set-Up, and Native American Spiritual Gatherings; additionally, Mr. Whitford is restricted from becoming the Native American Pipe

carrier, which he had just been elected to do. Mr. Whitford contends that his restraint is illegal for two reasons: (1) Because of his right to be able to practice his religion without being punished for doing so, and (2) Because his Native American religious rights being taken presents a substantive liberty interest not subject to the provisions of Sandin v. Conner "atypical and significant hardship" standard. (See, Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293 (1995)) He further contends that his rights to due process were violated during his prison disciplinary hearing and that the infraction should be thrown out and stricken from the record. He also seeks to be released from Maximum Custody which resulted because of this infraction.

Statement of Facts

1. On November 15th, 2021 at 1915 hours, Correctional Officer Teruel discovered a 14 inch piece of steel wrapped in napkins and paper towels and tied by a piece of string to Mr. Whitford's window. The weapon was outside in the Conex area between High Side Units 1 and 2, below Lower Delta Cell #5 in High Side Unit 1.

2. Mr. Whitford was the only individual living in the Upper Delta Cell #5 and it was automatically assumed that the weapon belonged to Mr. Whitford because it was tied to his cell window.

3. Mr. Whitford was arrested and escorted to the Restrictive Housing Unit on or around December 2nd, 2021 and placed on Administrative Segregation status to await the conclusion of an investigation.

4. On December 8th, 2021 Mr. Whitford was formally charged with a disciplinary infraction. Infraction #4102-Possession of a Weapon.

5. The infraction simply stated, "On the above date and time, I Unit Manager A. Graham concluded on investigation and found that on 11-15-21 inmate Whitford was in possession of a home made weapon (shank) that was found by staff."

6. There was no further information. Mr. Whitford was placed on Pre-Hearing Confinement after being given notice of the charge that he was being infracted with. The process therefore turned from an investigation, to a prosecution of an infraction.

7. On the same day that Mr. Whitford was given a notice of his infraction, December 8th, 2021, Mr. Whitford wrote an Offender/Staff Request (OSR) to the Law Library requesting two books: The Disciplinary Self-Help Litigation Manual & The (Regular) Prisoner's Self-Help Litigation Manual. Both legal books. Those legal books were both sent to Mr. Whitford and he recieved them several days later.

8. Mr. Whitford wrote another OSR to the Law Library and requested DOC Policy and MSP Procedure on Disciplinary Investigations and Infractions. This request was denied Mr. Whitford and he was told that he either had to be on the indigent list or he had to have a copy card in order to buy copies of the policies.

9. This has been a consistent issue with Mr. Whitford and a systematic one at that. Mr. Whitford has filed several grievances on this same type of refusal. At one point, DOC Legal Bureau, Robert Lichmen, printed out a memo and directed MSP staff to provide free copies to inmates requesting legal materials and policy & procedures because of Mr. Whitford's complaints regarding Detention block inmates.

10. While inmates are located on Level 0 (during Classification

Decisions or Pre-Hearing Confinement, or Detention) they are not provided with any way to look at policy or procedure or other legal materials or law and have to specifically request it from the law library.

11. There are Edovo Tablets that have the policy & procedure on them, that have Lexis Nexis on them, but Level 0 inmates are not allowed to utilize them, even for short periods of times or under direct supervision in order to research their disciplinary cases. These Tablets are available to every other Level and Classification but those on Detention Blocks.

12. The Law Library per DOC Policy & MSP Procedure are responsible for ensuring that inmates have access to Policy & Procedure and other legal materials for access to the courts purposes.

13. The next day, On December 9th, 2021 Mr. Whitford requested a time extension in which to prepare for his disciplinary hearing and was granted a hearing continuation by Disciplinary Hearing Investigator, (DHI), Carrie Walsted.

14. Also, on December 9th, 2021 Mr. Whitford wrote to the Law Library Bureau Chief, Director of Education, concerning the denial of his access to Policy and Procedure. Reminding her that this issue had been an old issue and that every time he was infracted and brought to Level 0 this continues to happen. And, that this was the third time that he had to address the issue.

15. Each time that this issue occurs, Mr. Whitford has been successful at forcing administration to provide him legal materials and Policy & Procedure, but only after his time to prepare a defense for his disciplinary hearing had elapsed. Which violated his right to be able to prepare a defense. Such as the instant case.

16. On December 10th, 2021, Mr. Whitford attempted to get Policy & Procedure from the Unit Sergeant, who explained that he would need to kite the law library in order to recieve access to Policy & Procedure.

17. On December 12th, 2021 Mr. Whitford attempted to order case law from the law library on pertinent case law regarding disciplinary hearing's. This request was also denied and Mr. Whifford was again asked to purchase these legal materials utilizing a copy card. Mr. Whitford needed to access case law on his disciplinary hearing in order to prepare just in case his disciplinary hearing ended up in court. Which it has.

18. Mr. Whitford sent several OSR's to the Disciplinary Department requesting more time to be able to prepare a defense and explained what was going on. This was again a systematic denial, as his OSR's were never responded to and his requests went unheard.

19. Mr. Whitford prepared a 4 page statement to the disciplinary hearings officer as best as he could, in an attempt to prepare for his disciplinary hearing.

20. Mr. Whitford's disciplinary hearings officer was C. Johnson. Mr. Whitford requested a continuance and was denied. He then went on to try to explain his grounds for dismissing the infraction.

21. He explained that the Notice that he was given was lacking. Mr. Whitford was given a copy of the incident report that was given to him by Carrie Walsted the DHI. Missing were the pictures that Mr. Whitford requested. He also requested to see any video evidence and he requested to see any and all confidential information that did not violate the public disclosure law.

22. Mr. Whitford had sent in a request explaining that there

was no evidence connecting him to the weapon tied to his window where niether him nor anyone in his cell could see it.

23. Mr. Whitford explained that there was more than a 51% prbability that someone else could have put the weapon where it was at. And, that the weapon could have been there even before he had moved into the cell as he had only been there a short time.

24. Mr. Whitford only seen the photos of the floor and his cell at the hearing and was never given access to them prior to his disciplinary hearing, although the DHO did send him copies of the photos afterwards. The disciplinary hearings officer found him guilty regardless of this fact.

25. The DHO didn't listen to anything that Mr. Whitford said, refused to give him a continuation even after showing him evidence that Mr. Whitford never recieved 24 hours in advance and against Mr. Whitford's objections. This was a blantant disregard for Mr. Whitford's due process rights to have an unbiased and fair disciplinary hearings officer.

26. Mr. Whitford had requested all of the back reports, incident reports, pictures, video, etc. Specifically, Mr. Whitford requested information pertaining to the "routine" searches of the conex area in order to determine how often the Conex area is searched and what kind of search routine was considered a routine search.

27. Mr. Whitford also requested to see physical evidence and the actual weapon, which did not happen.

28. Mr. Whitford also requested help with his defense from an inmate helper du to the nature of the confidential information. A staff member who could move around and go about in order to discover any information that Mr. Whitford could no. This request wasn't

even addressed.

29. Mr. Whitford requested law in order to determine what the correct standard of law was, but this request was ignored. Recently, HB 762 recently changed the law and Mr. Whitford was told that it also changed the standard of proof, either in the Policy & Procedure that came from the law or from the law itself.

30. Mr. Whitford also brought up the 6-month infraction free stipulation as a sanction to being found guilty of a major infraction. This was also ignored.

31. In fact, everything that Mr. Whitford wrote in his disciplinary statement went ignored by DHO C. Johnson. This was caught in the disciplinary recording, when the DHO tired of hearing Mr. Whitford and cut the disciplinary hearing short. He made his decision then and there and never giving the written statement any thought at all.

32. DHO C. Johnson, found Mr. Whitford guilty. His reasoning was simply, "Offender was in Possession of a sharpened instrument/weapon." He didn't explain any further. He relied on the infraction report, confidential information, and photos to find Mr. Whitford guilty. He gave Mr. Whitford 30 days Detention.

33. On December 15th, 2021, Mr. Whitford submitted a Disciplinary Appeal to the Warden. In his appeal he reiterated everything that he said at the hearing and asked that the Warden look at the record. He brought up the fact that his Due Process was violated to 24 hour notice, requested documentation, general summary of confidential information, access to policy & procedure, law, and legal materials.

OSR's 34. Mr. Whitford asked for the Warden to review the record,

OSR's, and recording of the hearing. His Appeal was affirmed on January 13th, 2022.

35. Mr. Whitford has been infracted hundreds of times at MSP and has made quite a study of the disciplinary process. The due process violations listed herein are systematic and occur at each and every disciplinary hearing that he and others have. When the Warden reviews his appeals he doesn't ever take into consideration the due process violations and whether or not the disciplinary hearings are fair and impartial. In fact, some DHO's are told they were told from higher-ups that they don't have a choice and that they have to find inmates guilty because they were directed to do so. Mr. Whitford has been an active prisoners rights activist and has attempted to create a major record concerning these civil rights abuses. He now leaves it in the hands of the Court.

Statement of Claims

36.

Violation of Due Process

Liberty Interest

36. In order to invoke a due process claim, Mr. Whitford must present the Court with a liberty interest that passes muster under the Sandin v. Conner, supra., "atypical and significant hardship" standard, or in the alternative, a liberty interest that "exceeds the sentence in such a manner as to give rise in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force", See Sandin v. Conner, above.

37. Mr. Whitford brings fourth two different aspects of the same liberty interest that he presents to the court: (1) The punishment via a sanction on his Religious Freedom; and, (2) Disciplinary Hearing due process based on the six-month infraction free stipulation

tion that acts as a sanction on Mr. Whitford's ability to practice his Religious Freedom.

38. In either case, Mr. Whitford's First Amendment right to practice his religion through the Freedom of Religion Clause to the United States Constitution and to the Montana State Constitution "gives rise in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force". Thus, the "atypical and significant hardship" standard does not apply to Mr. Whitford's liberty analysis.

39. The reason that the Religious Freedom of the petitioner should pass muster in this manner should be obvious. The First Amendment right to Freedom of Religion is enshrined in the U.S. and Montana Constitutions, and it is well known that one should not be punished for exercising their religion. The First Amendment prohibits the government from interfering with the "free exercise" of religion. The Supreme Court has held that jail and prison officials must give inmates a reasonable opportunity to exercise their religious beliefs without fear of penalty. *Cruz v. Beto*, 405 U.S. 319, 322n.2, 92 S.Ct. 1079 (1972). Additionally, the Religious Land Use and Institutionalized Person's Act was passed after the similar Religious Freedom Restoration Act was ruled unconstitutional as applied to state inmates. The Religious Freedom Restoration Act (RFRA) restored inmates rights to previous established principles. The Religious Land Use and Institutionalized Person's Act (RLUIPA) does the same thing and was passed as a cure to the unconstitutional RFRA Act as applied to State prisoners. These acts provide greater protection than the *Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254 (1987) standard. In fact, the petitioner invokes

the RLUIPA Act standard as applied in this case, as the correct standard in which to judge this case.

40. The MDOC Policy & MSP Procedure's related to this six-month Infraction free sanction, should therefore be ruled as an unconstitutional Policy & Procedure. However, if the Court find's otherwise, the petitioner moves for Due Process protections to be applied on a substantive basis to all disciplinary hearings where these types of restrictions are placed on inmates Religious Freedom rights. Specifically, Mr. Whitford's disciplinary hearing in this case. If the court find's Mr. Whitford's argument persuasive and concludes that these Policy & Procedure's are in fact unconstitutional, Mr. Whitford asks that the Court also find that Mr. Whitford's disciplinary hearing is also unconstitutional. If the Court find's that the Policy & Procedure is not unconstitutional, Mr. Whitford requests that the Court review his disciplinary hearing on substantive due process grounds.

Violation of Due Process

Particular Due Process Violations

41. Notice - Mr. Whitford had a right to a sufficient Notice with advance Notice 24 hours prior to his disciplinary hearing.

42. Mr. Whitford has a right to be given a Notice of the disciplinary hearing charges against him. This Notice must include in it enough information in order to allow Mr. Whitford the ability to prepare a defense against the charges against him.

43. In this Notice that was given to Mr. Whitford, he was deprived of that due process right. The Notice was not sufficient in order to give Mr. Whitford notice of the action that he was doing was wrong. Furthermore, there was nothing in the Notice that

casually connected Mr. Whitford to the weapon that he was being blamed of possessing.

44. Had Mr. Whitford been given a proper Notice, the Notice would have included a general summary of the confidential information being utilized against him and he could of then had some type of idea about what he was being charged with. What actions caused him to possess the weapon. But, there is noting in the Notice connecting him to the weapon other than it was tied to his cell. There was no summary of confidential information to provide a casual connection between Mr. Whitford's behavior and the rule infraction.

45. The weapon could of been put there by one of the 24 hour people being housed on Mr. Whitford's block, or it could have been put there by the prior occupants of the cell.

46. There was no direct evidence connecting Mr. Whitford too the weapon.

47. There was a pictures of Mr. Whitford's cell floor of old marks that appeared to be an area where something was sharpened. These pictures were never given to Mr. Whitford 24 hours in advance of the disciplinary hearing in order for Mr. Whitford to prepare a defense. But, Montana State Prison was built in the early 1980's, and many cells have different types of marks like these. In fact, there is such distruction of cells that Officer's can't keep up with the amount of distruction that occurs within each cell.

48. There was a photo of a piece of sheet hooked totthe window, which was misleading. Had Mr. Whitford been given pictures prior to his hearing in order to prepare a defense, he could of explained that that sheet wasn't even hooked to anything other than the window and was used to keep the window closed. Mr. Whifford had put in
a

a grievance to get the window ceiled shut, because they are normally ceiled and it was freezing outside. When maintenance finally arrived, they actually welded the sheet in place and it is most likely still there to this day.

48. A more questioning thought is why Mr. Whitford would ask for the window to be ceiled shut if he knew that a weapon was outside and attached to his window.

49. And, what of the so called "string" that was attached to the window? A piece of sheet as thick as that certainly couldn't be called a piece of string. And, where are the pictures of this string?

50. Mr. Whitford was never given any type of documentary or physical evidence that he requested in order to prepare a defense. Mr. Whitford requested Policy & Procedure regarding investigative procedures. But, never recieved them. He requested law and legal materials in order to research the law so that he could prepare a defense using up-to-date law. It was denied, unless he was willing to pay for his right to them. In fact, MSP officials went above and beyond denial and attempted to charge him a price in order to exersize his legal right to due process of the law, in order to prepare a defense.

51. Mr. Whitford attempted to request information that would of told him how often the "Conex" area was searched on a so called "routine basis". This information would of told how long the weapon could of been in that area without anyone searching. If it was longer than Mr. Whitford had been living in that cell, than it could of pointed to evidence that the weapon had belonged to someone else prior to Mr. Whitford moving into that cell.

53. Mr. Whitford requested a staff assistant in order to help him with his defense due to the complexity of the case. This request was blantly ignored.

54. Mr. Whitford requested the Standard of Proof and to review Policy & Procedures and House Bill 763 in order to determine the Standard of Proof so that he could determine the correct statistical correlation regarding the probability of someone having had access to the area where the weapon was found. Under preponderance of evidence standard, if there is a 51% probability or higher of another human being having access to or knowing about the weapon, than Mr. Whitford would not be able to legally be found guilty of the infraction because of the type of standard of proof.

55. The confidential summary that Mr. Whitford asked for and didn't receive, could of told Mr. Whitford a little more about exactly how his behavior violated the institutional rules. Under public disclosure laws, only the identifying information can be withheld. All non-identifying information has to be disclosed. At the very minimum, a "summary" of the confidential information should have been disclosed in order to connect Mr. Whitford's conduct to the rule violation and to give Mr. Whitford notice of that specific conduct. If the conduct could not be legitimately connected to the rule violation than Mr. Whitford should of never been charged with an infraction. However, if there was a summary of confidential information it would of allowed Mr. Whitford the ability to prepare a defense, while protecting the source of information. To say that there is confidential information without saying more is arbitrary to say the least.

56. Again, Mr. Whitford is systematically denied Policy &

Procedure, legal materials (such as case law), and the ability to prepare a defense. In fact, each and every inmate that recieved an infraction and goes to detention blocks are denied the ability to prepare a defense because of MSP procedures and practices of not allowing inmates to see the policy & procedures that they are supposed to abide by, the ability to access cas law and statutory law. This is a common everyday theme at MSP. Although in the same unit's, inmates on other levels are given access to Edovo Tablets that have policy & procedures, access to Lexis Nexis, and every other law for free.

57. All of these things violate Mr. Whitford's right to due process of the law, under the U.S. and Montana Constitutions.

Relief Requested

58. Mr. Whitford requests:

(A) That MDOC & MSP Policy and Procedure related to this six-month infraction free sanction be ruled unconstitutional;

(B) That Mr. Whitford's infraction be ~~stricken~~ from the record and be ruled unconstitutional if given the relief in (A) above. And, that Mr. Whitford be reinstated to his original custody.

(C) That if the Court elects not to find that the Policy and Procedure is not unconstitutional as it relates to the six-month infraction free sanction, that the Due Process Clause of the U.S. and Montana Constitutions create a substantial liberty interest and rises to a due process protection of its own force which require due process protections be put in place.

(D) That if the Court elects not to find that the Policy and Procedure is not unconstitutional as it relates to the six-month infraction sanction, that Mr. Whitford's disciplinary hearing

is unconstitutional because it violates principles of due process and does not adequately protect the liberty interest established in (G) above. That Mr. Whitford's disciplinary infraction is dismissed with prejudice as a deterrent to inefficient due process standards at the Montana State prison in relation to inmates on Level 0 (Detention Blocks/Pre-Hearing Confinement/Ad-Seg etc.) and stricken from Mr. Whitford's disciplinary record. That Mr. Whitford is released to his previous status as a Closed Custody inmate instead of a Maximum Custody inmate.

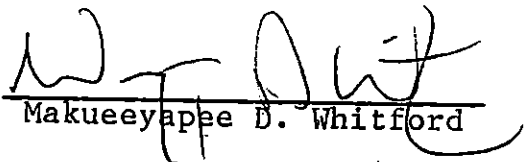
(E) Any other remedy that the law may require in the interest of justice.

VERIFICATION

STATE OF MONTANA)
COUNTY OF POWELL.) ss. MAKUEEYAPPEE D. WHITFORD

I believe that liberty is being restrained illegally. Specifically, my Right to Religious Freedom under the Constitution of the U.S. and of Montana State. I certify that the contents of this petition are true and correct and accurate to the best of my knowledge.

Dated this 10th day of March, 2022.

Signed, 
Makueeyappee D. Whitford

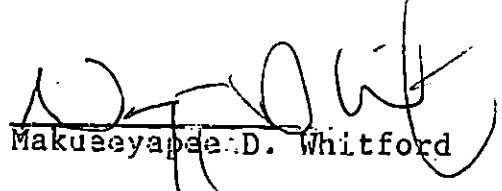
CERTIFICATE OF MAILING (SERVICE)

I hereby certify that on 10th day of March, 2022, I mailed the Petition for a Writ of Habeas Corpus, to the following attorney by giving a copy to a Correctional Officer working the floor in the Restrictive Housing Unit, so that he could deliver it via institutional mail, to the mailroom in order to be placed in the United States Mail, postage Prepaid:

State of Montana
Officer of the Attorney General
P.O. Box 201401
Helena, MT 59620-1401

and, to the Montana Supreme Court Clerk at:

Court Clerk
Montana Supreme Court
P.O. Box 203001
Helena, MT 59620-3001

Signed, 
Makueyapae D. Whitford