APPENDIX A

Order of the United States Court of Appeals for the Sixth Circuit
Denying a Certificate of Appealability issued January 2, 2019

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Filed: January 02, 2019

Ms. Mary Anna Owens
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Re: Case No. 18-2006, *Patrick Kinney v. Connie Horton*
Originating Case No. : 2:18-cv-00027

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Jennifer Earl
Case Manager
Direct Dial No. 513-564-7066

cc: Mr. Thomas Dorwin

Enclosure

No mandate to issue

No. 18-2006

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PATRICK NEIL KINNEY,

Petitioner-Appellant,

v.

CONNIE HORTON, Warden,

Respondent-Appellee.

ORDER

Patrick Neil Kinney, a Michigan state prisoner, moves through counsel for a certificate of appealability to appeal the district court's dismissal of his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Kinney is serving a life sentence for second-degree murder. This petition does not address his conviction, but a 2014 decision finding him guilty of a prison misconduct for possessing escape material (a drawing of the prison fence). Kinney unsuccessfully challenged the misconduct finding in the state courts. Kinney alleged that as a result of the conviction, he was temporarily sentenced to segregation and placed at a higher security level, and that his eligibility for parole was affected. The underlying claim raised was that the rule prohibiting possession of escape material was unconstitutionally vague and did not provide him fair notice that his conduct was a violation. Therefore, he alleged that he was denied due process.

The district court screened the petition and dismissed it, concluding that the claim was not properly brought under § 2254 because Kinney was challenging only the conditions of his confinement. Alternatively, the court concluded that the claim did not state a due process violation because the misconduct finding did not necessarily affect the length of Kinney's confinement.

Kinney argues that his claim is properly brought under § 2254 and repeats his claim that his due process rights were violated. In order to be entitled to a certificate of appealability, Kinney must demonstrate that jurists of reason would find it debatable whether his petition stated a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

The district court dismissed the petition on the ground that Kinney was challenging only the conditions of his confinement, citing *Martin v. Overton*, 391 F.3d 710, 714 (6th Cir. 2004). In two previous appeals of a similar nature, this court considered the merits of Kinney's claims without deciding whether they were properly brought under § 2254. (Case Nos. 08-2515 and 13-2327).

However, even if it is assumed that jurists of reason would find it debatable whether the district court's dismissal on this ground was correct, Kinney has failed to establish that jurists of reason would find it debatable whether his petition stated a valid claim of the denial of a constitutional right. The district court cited *Nali v. Ekman*, 355 F. App'x 909 (6th Cir. 2009), for the proposition that a misconduct conviction in a Michigan prison does not give rise to a due process claim because it does not implicate a liberty interest, as it does not necessarily affect the length of the prisoner's confinement. Kinney argues that a liberty interest was found in *Harden-Bey v. Rutter*, 524 F.3d 789, 794-95 (6th Cir. 2008), where the prisoner was subject to indefinite administrative segregation, and in *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005), where the misconduct disqualified the prisoner from parole eligibility. However, here Kinney's placement in segregation was not indefinite and he continues to be eligible for parole consideration.

For the above reasons, the motion for a certificate of appealability is **DENIED**.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

APPENDIX B

Order of the United States District Court for the Western District of Michigan Denying Habeas Corpus Petition issued August 8, 2018 (ECF No. 3, PageID.133-143)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

PATRICK NEIL KINNEY,

Petitioner,

v.

CONNIE HORTON,

Respondent.
_____/

Case No. 2:18-cv-27

Honorable Gordon J. Quist

OPINION

This is a habeas corpus action brought by a state prisoner under 28 U.S.C. § 2254. Promptly after the filing of a petition for habeas corpus, the Court must undertake a preliminary review of the petition to determine whether "it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." Rule 4, Rules Governing § 2254 Cases; *see* 28 U.S.C. § 2243. If so, the petition must be summarily dismissed. Rule 4; *see Allen v. Perini*, 424 F.2d 134, 141 (6th Cir. 1970) (district court has the duty to "screen out" petitions that lack merit on their face). A dismissal under Rule 4 includes those petitions which raise legally frivolous claims, as well as those containing factual allegations that are palpably incredible or false. *Carson v. Burke*, 178 F.3d 434, 436-37 (6th Cir. 1999). After undertaking the review required by Rule 4, the Court concludes that the petition must be dismissed because it fails to raise a meritorious federal claim.

Discussion

I. Factual allegations

Petitioner Patrick Neil Kinney is incarcerated with the Michigan Department of Corrections at the Chippewa Correctional Facility (URF) in Kincheloe, Chippewa County, Michigan. Petitioner is serving a life sentence for second-degree murder. On March 1, 2018, Petitioner filed his habeas corpus petition challenging a March 3, 2014, misconduct conviction for possession of dangerous contraband, which consisted of a drawing/diagram of the security perimeter at the Alger Maximum Correctional Facility (LMF). *See* ECF No. 1-6, PageID.83.

Following the decision of Hearing Officer Maki that Petitioner was guilty of possession of dangerous contraband, Petitioner was granted a rehearing on June 27, 2014. The rehearing order asked for three aspects of the case to be examined and for findings of fact on each of the aspects. Following rehearing, Hearing Officer Marutiak concluded that Petitioner had sufficient notice that a drawing of the facility grounds could be considered escape material, that Petitioner did not make the drawing with a nefarious purpose such as an escape attempt, and that Petitioner was not legitimately authorized by MDOC staff to create the drawing for an art project. Hearing Officer Marutiak affirmed the misconduct conviction. *See* ECF No. 1-5, PageID.75-79.

Petitioner subsequently sought judicial review of the misconduct conviction in the Ingham County Circuit Court. On September 3, 2015, the Ingham County Circuit Court affirmed the misconduct conviction. *See* ECF No. 1-4. This decision was affirmed by the Michigan Court of Appeals on January 19, 2017. *See* ECF No. 1-3. On June 27, 2017, the Michigan Supreme Court denied application for leave to appeal. *See* ECF No. 1-7.

Petitioner filed this application for habeas corpus relief on March 1, 2018. The

petition raises one ground for relief: "The 'dangerous contraband' rule did not provide fair notice that Petitioner's painting was 'escape material,' in violation of the Due Process Clause of the Fourteenth Amendment." *See* ECF No. 1, PageID.6.

II. AEDPA standard

This action is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, 110 Stat. 1214 (AEDPA). The AEDPA "prevents federal habeas 'retrials'" and ensures that state court convictions are given effect to the extent possible under the law. *Bell v. Cone*, 535 U.S. 685, 693-94 (2002). An application for writ of habeas corpus on behalf of a person who is incarcerated pursuant to a state conviction cannot be granted with respect to any claim that was adjudicated on the merits in state court unless the adjudication: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d). This standard is "intentionally difficult to meet." *Woods v. Donald*, 575 U.S. __, 135 S. Ct. 1372, 1376 (2015) (internal quotation omitted).

The AEDPA limits the source of law to cases decided by the United States Supreme Court. 28 U.S.C. § 2254(d). This Court may consider only the holdings, and not the dicta, of the Supreme Court. *Williams v. Taylor*, 529 U.S. 362, 412 (2000); *Bailey v. Mitchell*, 271 F.3d 652, 655 (6th Cir. 2001). In determining whether federal law is clearly established, the Court may not consider the decisions of lower federal courts. *Williams*, 529 U.S. at 381-382; *Miller v. Straub*, 299 F.3d 570, 578-79 (6th Cir. 2002). Moreover, "clearly established Federal law" does not include decisions of the Supreme Court announced after the last adjudication of the merits in state

court. *Greene v. Fisher*, 565 U.S. 34 (2011). Thus, the inquiry is limited to an examination of the legal landscape as it would have appeared to the Michigan state courts in light of Supreme Court precedent at the time of the state-court adjudication on the merits. *Miller v. Stovall*, 742 F.3d 642, 644 (6th Cir. 2014) (citing *Greene*, 565 U.S. at 38).

A federal habeas court may issue the writ under the "contrary to" clause if the state court applies a rule different from the governing law set forth in the Supreme Court's cases, or if it decides a case differently than the Supreme Court has done on a set of materially indistinguishable facts. *Bell*, 535 U.S. at 694 (citing *Williams*, 529 U.S. at 405-06). "To satisfy this high bar, a habeas petitioner is required to 'show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Woods*, 135 S. Ct at 1376 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). In other words, "[w]here the precise contours of the right remain unclear, state courts enjoy broad discretion in their adjudication of a prisoner's claims." *White v. Woodall*, 572 U.S. ___, 134 S. Ct. 1697, 1705 (2014) (internal quotations omitted).

The AEDPA requires heightened respect for state factual findings. *Herbert v. Billy*, 160 F.3d 1131, 1134 (6th Cir. 1998). A determination of a factual issue made by a state court is presumed to be correct, and the petitioner has the burden of rebutting the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Lancaster v. Adams*, 324 F.3d 423, 429 (6th Cir. 2003); *Bailey*, 271 F.3d at 656. This presumption of correctness is accorded to findings of state appellate courts, as well as the trial court. *See Sumner v. Mata*, 449 U.S. 539, 546 (1981); *Smith v. Jago*, 888 F.2d 399, 407 n.4 (6th Cir. 1989).

III. Analysis

As noted above, Petitioner is serving a life sentence. As a result of the misconduct conviction being challenged in this habeas corpus petition, Petitioner was sentenced to 20 days of detention in segregation and 20 days loss of privileges. Where a prisoner is challenging the very fact or duration of his physical imprisonment and the relief that he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a petition for writ of habeas corpus. *See Preiser v. Rodriguez,* 411 U.S. 475, 500 (1973). However, habeas corpus is not available to prisoners who are complaining only of the conditions of their confinement or mistreatment during their legal incarceration. *See Martin v. Overton,* 391 F.3d 710, 714 (6th Cir. 2004); *Lutz v. Hemingway,* 476 F. Supp. 2d 715, 718 (E.D. Mich. 2007). Complaints concerning conditions of confinement "do not relate to the legality of the petitioner's confinement, nor do they relate to the legal sufficiency of the criminal court proceedings which resulted in the incarceration of the petitioner." *Lutz,* 476 F. Supp. 2d at 718 (quoting *Maddux v. Rose,* 483 F. Supp. 661, 672 (E.D. Tenn. 1980)). Because Petitioner's misconduct conviction does not affect the length of his sentence, his claim "fall[s] outside of the cognizable core of habeas corpus relief." *Hodges v. Bell*, 170 F. App'x 389, 393 (6th Cir. 2006).

An inmate like Petitioner may, however, bring a claim challenging the conditions of his confinement under 42 U.S.C. § 1983. However, a prisoner's ability to challenge a prison misconduct conviction in federal court depends on whether the convictions implicated any liberty interest. In the seminal case in this area, *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court prescribed certain minimal procedural safeguards that prison officials must follow before depriving a prisoner of good-time credits on account of alleged misbehavior. The *Wolff* Court did

not create a free-floating right to process that attaches to all prison disciplinary proceedings; rather the right to process arises only when the prisoner faces a loss of liberty, in the form of a longer prison sentence caused by forfeiture of good-time credits:

> It is true that the Constitution itself 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 Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.

Wolff, 418 U.S. at 557 (citations omitted).

Petitioner does not allege that his major misconduct convictions resulted in any loss of good-time credits, nor could he. The Sixth Circuit has examined Michigan statutory law, as it relates to the creation and forfeiture of disciplinary credits[1] for prisoners convicted of crimes occurring after April 1, 1987. In *Thomas v. Eby*, 481 F.3d 434 (6th Cir. 2007), the court determined that loss of disciplinary credits does not necessarily affect the duration of a prisoner's sentence. Rather, it merely affects parole eligibility, which remains discretionary with the parole board. *Id.* at 440. Building on this ruling, in *Nali v. Ekman*, 355 F. App'x 909 (6th Cir. 2009), the court held that a misconduct citation in the Michigan prison system does not affect a prisoner's constitutionally protected liberty interests, because it does not necessarily affect the length of

[1] For crimes committed after April 1, 1987, Michigan prisoners earn "disciplinary credits" under a statute that abolished the former good-time system. Mich. Comp. Laws § 800.33(5).

confinement. 355 F. App'x at 912; *accord, Taylor v. Lantagne*, 418 F. App'x 408, 412 (6th Cir. 2011); *Wilson v. Rapelje*, No. 09-13030, 2010 WL 5491196, at * 4 (E.D. Mich. Nov. 24, 2010) (Report & Recommendation) (holding that the "disciplinary hearing and major misconduct sanction does not implicate the Fourteenth Amendment Due Process Clause"), *adopted as judgment of court*, 2011 WL 5491196 (Jan. 4, 2011). In the absence of a demonstrated liberty interest, Petitioner has no due-process claim based on the loss of disciplinary credits. *See Bell v. Anderson*, 301 F. App'x 459, 461-62 (6th Cir. 2008).

Even in the absence of a protectible liberty interest in disciplinary credits, a prisoner may be able to raise a due-process challenge to prison misconduct convictions that result in a significant, atypical deprivation. *See Sandin v. Connor*, 515 U.S. 472 (1995). Petitioner has not identified any significant deprivation arising from his convictions. Unless a prison misconduct conviction results in an extension of the duration of a prisoner's sentence or some other atypical hardship, a due-process claim fails. *Ingram v. Jewell*, 94 F. App'x 271, 273 (6th Cir. 2004). As noted above, Petitioner has failed to allege any such deprivation. Therefore, even if Petitioner's claim was brought in the context of a civil rights action, it would fail to state a claim.

Conclusion

In light of the foregoing, the Court will summarily dismiss Petitioner's application pursuant to Rule 4 because it fails to raise a meritorious federal claim.

Certificate of Appealability

Under 28 U.S.C. § 2253(c)(2), the Court must determine whether a certificate of appealability should be granted. A certificate should issue if Petitioner has demonstrated a "substantial showing of a denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court's dismissal of Petitioner's action under Rule 4 of the Rules Governing § 2254 Cases is a

determination that the habeas action, on its face, lacks sufficient merit to warrant service. It would be highly unlikely for this Court to grant a certificate, thus indicating to the Sixth Circuit Court of Appeals that an issue merits review, when the Court has already determined that the action is so lacking in merit that service is not warranted. *See Love v. Butler*, 952 F.2d 10 (1st Cir. 1991) (it is "somewhat anomalous" for the court to summarily dismiss under Rule 4 and grant a certificate); *Hendricks v. Vasquez*, 908 F.2d 490 (9th Cir. 1990) (requiring reversal where court summarily dismissed under Rule 4 but granted certificate); *Dory v. Comm'r of Corr. of New York*, 865 F.2d 44, 46 (2d Cir. 1989) (it was "intrinsically contradictory" to grant a certificate when habeas action does not warrant service under Rule 4); *Williams v. Kullman*, 722 F.2d 1048, 1050 n.1 (2d Cir. 1983) (issuing certificate would be inconsistent with a summary dismissal).

The Sixth Circuit Court of Appeals has disapproved issuance of blanket denials of a certificate of appealability. *Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001). Rather, the district court must "engage in a reasoned assessment of each claim" to determine whether a certificate is warranted. *Id.* at 467. Each issue must be considered under the standards set forth by the Supreme Court in *Slack v. McDaniel*, 529 U.S. 473 (2000). *Murphy*, 263 F.3d at 467. Consequently, this Court has examined each of Petitioner's claims under the *Slack* standard. Under *Slack*, 529 U.S. at 484, to warrant a grant of the certificate, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Id.* "A petitioner satisfies this standard by demonstrating that . . . jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). In applying this standard, the Court may not conduct a full merits review, but must limit its examination to a threshold inquiry into the underlying merit of Petitioner's claims. *Id.*

The Court finds that reasonable jurists could not conclude that this Court's dismissal of Petitioner's claims was debatable or wrong. Therefore, the Court will deny Petitioner a certificate of appealability.

The Court will enter a Judgment and Order consistent with this Opinion.

Dated: August 8, 2018

/s/ Gordon J. Quist
GORDON J. QUIST
UNITED STATES DISTRICT JUDGE

APPENDIX C

Opinion of the Michigan Court of Appeals Affirming the Misconduct Conviction issued January 19, 2017

STATE OF MICHIGAN

COURT OF APPEALS

PATRICK NEIL KINNEY,

Plaintiff-Appellant,

V

DEPARTMENT OF CORRECTIONS,

Defendant-Appellee.

UNPUBLISHED
January 19, 2017

No. 329588
Ingham Circuit Court
LC No. 15-000144-AA

Before: O'CONNELL, P.J., and MARKEY and MURRAY, JJ.

PER CURIAM.

In this prison-misconduct appeal, plaintiff argues that the prison rule under which he was charged and adjudicated is unconstitutionally vague. We disagree and affirm.

Plaintiff was charged with violating Michigan Department of Corrections (MDOC) Prisoner Discipline Policy Directive 03.03.105, possession of dangerous contraband—escape material. The charge is based on a detailed drawing that plaintiff created that depicts the prison security perimeter from a vantage point inside the prison. The drawing includes the fence, support posts, guard tower, and light posts. Plaintiff claims that he created the drawing as an art project and that he intended on submitting it in a contest in which he had previously participated. Following a hearing, the misconduct charge was initially upheld. A hearings' administrator who ordered a rehearing requested that the next hearing officer determine whether the drawing was escape material and whether plaintiff had sufficient notice that the drawing could be considered escape material. The hearing officer subsequently determined that even though plaintiff likely intended to use the drawing for an art project and not to attempt to escape, he was nevertheless not authorized by prison staff to create the drawing. The hearing officer also determined that the drawing was escape material based on the MDOC prisoner mail policy directive, which prohibits prisoners from receiving drawings or detailed descriptions of corrections facilities that depict methods of escape. The hearing officer determined that plaintiff had sufficient notice that the drawing could be considered escape material, noting that the prisoner mail policy clearly defines escape material as including a detailed drawing of a prison facility and that the mail policy "adds some of the lacking exemplifications in the pertinent part of the Prisoner Discipline Policy." Plaintiff's initial guilty adjudication was upheld.

Plaintiff filed an appeal in the circuit court, arguing that the prison rule prohibiting escape material is unconstitutionally vague and that the hearing officer's decision that plaintiff's

A

drawing was escape material was not supported by substantial evidence. The circuit court affirmed, noting that the prisoner discipline policy did not define escape material but that the "common definitions of escape material would obviously find that drawings of prison facilities created with exacting details would constitute escape materials." The court also noted that the mail policy defined escape materials, which put plaintiff on notice that his drawing was prohibited. Addressing plaintiff's argument that other prisoners had created similar drawings in the past and gone unpunished, the court noted that the other drawings "were all stylized, artistic depictions," while plaintiff's drawing "is of an identifiable section of fencing and includes the fence, support posts, guard tower, light posts, and even snow banks." The court ultimately determined that plaintiff had fair notice that his conduct was prohibited and that the prison rule was not unconstitutionally vague.

When reviewing a decision of an administrative agency, a court must determine whether the decision was authorized by law and whether the agency's factual findings were "supported by competent, material and substantial evidence." Const 1963, art 6, § 28; MCL 791.255(4). This Court must then decide "whether the lower court applied correct legal principles and whether it misapprehended or grossly misapplied the substantial evidence to the agency's factual findings." *Boyd v Civil Serv Comm*, 220 Mich App 226, 234; 559 NW2d 342 (1996). This Court reviews de novo the interpretation of administrative regulations. *In re Petition of Attorney General for Investigative Subpoenas*, 274 Mich App 696, 698; 736 NW2d 594 (2007).

Because the principles of statutory interpretation apply equally to the construction of administrative rules, *City of Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 65; 678 NW2d 444 (2003), this Court should presume the prison rule involved here to be constitutional, and plaintiff must prove it is invalid. See *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009)(citations omitted)("A statute is presumed constitutional, and the party challenging the statute has the burden of proving its invalidity."). A statute may be challenged on vagueness grounds if it "does not provide fair notice of the conduct proscribed." *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999). Fair notice, requires that a statute give a person of ordinary intelligence a reasonable opportunity to know what is prohibited. *Id.* at 652. "A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words." *Id.*

If an administrative rule's language is unambiguous, further judicial interpretation is not allowed, but where the language is ambiguous, a court may "properly go beyond the words of the statute or administrative rule to ascertain the drafter's intent." *Id.* An agency's interpretation of its own administrative rule "is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 108; 754 NW2d 259 (2008). While "the agency's interpretation cannot conflict with the plain meaning of the statute," it "can be particularly helpful for 'doubtful or obscure' provisions." *Id.* (citation omitted).

The prisoner discipline policy directive lists possession of dangerous contraband as a class I misconduct. According to the directive, dangerous contraband includes "escape material," but nowhere in the directive is that phrase defined. Defendant urges this Court to look at the ordinary dictionary definition and the prisoner mail policy directive to interpret the phrase.

Given these tools of statutory construction, defendant contends, and we agree, it is clear that a detailed drawing of a prison falls within the prohibited escape material and that plaintiff received fair notice of this prohibition. Plaintiff, on the other hand, suggests that he should not be required to read another policy directive to figure out what conduct the phrase prohibits, and he contends that a plain reading of the prisoner discipline policy directive would not put him on notice that a drawing of a prison intended for submission to an art show is prohibited conduct.

Under the doctrine of *in pari materia*, statutes or rules "that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law." *People v Mazur*, 497 Mich 302, 313; 872 NW2d 201 (2015). MDOC policy directive 03.03.105 is entitled prisoner discipline, outlines procedures for prisoner discipline, and lists the levels of misconduct. MDOC policy directive 05.03.118 is entitled prisoner mail, outlines rules regarding the mail system, and describes mail content that a prisoner is prohibited from receiving. Thus, both directives proscribe certain conduct, and the purpose of each directive is to regulate prisoner conduct and foster a safe environment for the facility. Because they share a common purpose, they should be read together.

"Escape material" is not defined in policy directive 03.03.105, and none of the listed "common examples" are comparable to the drawing at issue here.[1] MDOC policy directive 05.03.118 expressly prohibits "[m]ail depicting, encouraging, or describing methods of escape from a correctional facility . . . includ[ing] blueprints, drawings, or similar detailed descriptions of correctional facilities. . . ." *Id.*, ¶ MM(16). Reading the two directives together because they are *in pari materia*, one cannot question that "escape material" as used within policy directive 03.03.105, includes "blueprints, drawings, or similar detailed descriptions of correctional facilities," policy directive 05.03.118. While plaintiff posits that a "person of ordinary intelligence" should not be required to read multiple policy directives to determine what conduct is prohibited, it is not unreasonable to require prisoners—who are inherently subject to strict regulations—to know and understand all of the policy directives to which they are subject. Because a prisoner is subject to the policy prohibiting incoming mail depicting escape methods such as drawings of correctional facilities, it is reasonable to conclude that the policy prohibiting escape material includes the same type of drawings. Thus, we conclude that plaintiff had fair notice that he was subject to discipline for possessing a detailed drawing of the correctional facility.

Plaintiff also incorporated into his vagueness argument claims that he was not given fair notice because prison staff allowed plaintiff to receive drawings of prisons through the mail and allowed other prisoners to make drawings of prisons in the past without punishment. In support of his position, plaintiff relies heavily on *Wolfel v Morris*, 972 F2d 712 (CA 6, 1992). In *Wolfel*, prisoners circulated the signature page of petitions among facility inmates. *Id.* at 714. The facility's guards and officials seized the pages and charged the prisoners with "possession of,

[1] Both parties note that the policy directive has now been amended to include as common examples of escape material "blueprints, drawings, or similar detailed descriptions of correctional facilities, courthouses, and medical care facilities."

conspiracy to possess, or attempt to possess contraband" in violation of prison rules. *Id.* The *Wolfel* court noted that prisoners in the past had been allowed to circulate numerous petitions without punishment. *Id.* at 717. Therefore, the court found that the prisoners charged in the case "had no reason to believe that they were engaging in activity prohibited by prison regulations," noting that their conduct "was 'virtually identical to conduct previously tolerated.' " *Id.*, quoting *Waters v Peterson,* 161 US App DC 265, 274; 495 F2d 91 (1973). Ultimately, the *Wolfel* court held that the prisoners' punishment "violated their due process rights since they had no fair warning that they were engaging in prohibited activity." *Id.*

The case at hand is distinguishable from *Wolfel.* Contrary to plaintiff's assertion, there is no evidence that prison officials allowed other prisoners to make similar drawings in the past without punishment. The drawings that are included in the agency record are substantially different. Some include artistic imagery and are not intended to factually represent the details of an existing prison structure. They are not "detailed drawings" that depict the prison perimeter and highlight the intricacies of the prison security system. The included drawings that do include some detail are from a vantage point *outside* of the facility. Plaintiff's drawing depicts in detail a section of the prison perimeter from *inside* the facility, including the fence, posts, guard tower, lighting, and snow banks. Thus, the fact that these other drawings did not trigger punishment does not negate the fair-notice analysis above or render the prison rule void for vagueness.

Plaintiff also references his intent as a factor to determine whether he had fair notice that his conduct was prohibited. Intent is neither a part of a vagueness analysis nor a part of the rule under which plaintiff was charged. A rule provides fair notice if it gives "a *person of ordinary intelligence* a reasonable opportunity to know what is prohibited." *Noble*, 238 Mich App at 652 (emphasis added). The rule at issue states nothing regarding intent—it merely prohibits a prisoner from possessing dangerous contraband, including escape material. Thus, even if plaintiff's only intent were to submit his drawing to an art competition, he was still given fair notice that he could not possess such a detailed drawing of a prison. And the rule provided fair notice that his intent in possessing the drawing was not relevant. Therefore, the administrative rule prohibiting escape material was not void for vagueness as applied to the facts of this case.

We affirm.

/s/ Peter D. O'Connell
/s/ Jane E. Markey
/s/ Christopher M. Murray

APPENDIX D

Opinion of the Michigan Trial Court Affirming the Misconduct Conviction issued September 3, 2015

STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

PATRICK NEAL KINNEY, #253729,

Petitioner,

v

MICHIGAN DEPARTMENT OF CORRECTIONS,
in his official capacity.

Respondents.

OPINION & ORDER

CASE NO. 15-144-AA

HON. WILLIAM E. COLLETTE

At a session of said Court
held in the city of Mason, county of Ingham,
this 3rd day of ~~August~~ September, 2015

PRESENT: HON. WILLIAM E. COLLETTE

This case comes before the Court on Patrick Kinney's (Petitioner) petition for judicial review of a major misconduct ticket issued by the Michigan Department of Corrections (MDOC) which found him guilty of possessing dangerous contraband, that being escape materials. This Court, being fully apprised of the premises, AFFIRMS the MDOC's determination.

FACTS

While Petitioner was housed at the Alger Correctional Facility (LMF), staff conducted a search of Petitioner's property and located an incomplete drawing or painting of the LMF security perimeter, including the fence, support posts, lighting, and a guard tower. Petitioner was given a class I major misconduct ticket for dangerous contraband.

Petitioner was afforded a hearing on the ticket on March 3, 2014, and Hearing Officer Maki found him guilty of possessing dangerous contraband, finding that the drawing was an accurate depiction of the security perimeter and therefore constituted escape materials. The MDOC granted Petitioner's request for a rehearing, ordering the hearing officer to address three issues: 1) whether a drawing of a prison facility could constitute escape material; 2) whether the drawing could be used to escape versus merely being art; and 3) whether Petitioner was on notice that the drawing could constitute escape material.

At the re-hearing, Hearing Officer Marutiak again found Petitioner guilty of possessing dangerous contraband. With regards to the three questions the MDOC ordered the HO to address, HO Marutiak found: 1) that the MDOC prisoner mail policy, PD 05.03.118, defined escape materials as including "blueprints, drawings, or similar details descriptions of correctional facilities;" 2) that whether the drawing could be considered art was immaterial, because the fact that the drawing was escape material superseded any other potential use for the drawing; and 3) that the mail policy definitions of escape material was sufficient to put Petitioner on notice that drawings of the LMF security perimeter was disallowed. Furthermore, HO Marutiak noted that the MDOC did not authorize Petitioner to make his drawing for any art project.

STANDARD OF REVIEW

After exhausting his administrative remedies, Petitioner is entitled to judicial review of the final decision set forth in MCL 791.255(4), which provides:

> The review shall be confined to the record and any supplemental proofs submitted pursuant to subsection (3). The scope of the review shall be limited to whether the department's action is authorized by law or rule and

whether the decision or order is supported by competent, material and substantial evidence on the whole record.

Substantial evidence is "the amount of evidence that a reasonable person would accept as being sufficient to support a conclusion; it may be substantially less than a preponderance of the evidence." *Wayne Co v Mich State Tax Comm*, 261 Mich App 174, 186-87; 682 NW2d 100 (2004). Judicial review of an agency decision requires "great deference be given to the findings of the administrative hearing officer." *Campbell v Marquette Prison Warden*, 119 Mich App 377, 385; 326 NW2d 516 (1982). A Hearing Officer's decision will be upheld so long as it is supported by substantial evidence on the record to support the administrative agency's decision. *In re Payne*, 444 Mich 769, 692; 514 NW2d 212 (1994). The Court will not interfere unless the Hearing Officer clearly abused his discretion. *Meadows v. Marquette Prison Warden*, 117 Mich App 794, 798-99 (1982).

ANALYSIS

Petitioner argues that the MDOC policy directive that Petitioner was found guilty of violating is unconstitutionally vague as applied to Petitioner's drawing because the policy directive regarding dangerous contraband prohibited "escape material" but did not define escape material within that specific directive and therefore Petitioner did not have fair notice that his drawing might be considered dangerous contraband. Petitioner also argues that the directive gives improper enforcement discretion.

Although the dangerous contraband directive did not define escape material, the directive does not exist in a vacuum. The common definitions of escape material would obviously find that drawings of prison facilities created with exacting details would constitute escape materials. Furthermore, the MDOC mail policy directive does define

escape materials as including drawing of the prison facilities, and this directive was available to Petitioner as part of the entirety of the prison rules. Therefore, this Court finds that the Petitioner did have fair notice that drawings of the prison facilities could have constituted escape materials.

Petitioner also argues that the directive was unconstitutionally vague because it was applied with improper enforcement discretion on the part of the authorities. The first HO found Petitioner guilty based on his possession of the drawing and did not consider whether the Petitioner intended to use it to escape or whether the drawing could actually have been used to escape. The HA reversed, finding that the HO should have determined whether the drawing could have been used to escape or whether the Petitioner intended to use it in such a manner. The second HO disagreed, finding that whether the Petitioner intended to use it to escape or whether it could actually have been used to escape was irrelevant. Both HOs then agree that the directive is violated by mere possession of escape materials. Therefore, the directive was not applied with improper enforcement discretion on the part of the authorities.

Petitioner further argues that the HO's decision that the drawing was "escape material" under the dangerous contraband policy directive was not supported by competent, material, and substantial evidence of the record because the drawing was incomplete and lacked detail, and therefore could not have been used to escape. Under the plain meaning of "escape materials" and under the entirety of the MDOC policy directives, including the mail policy, a drawing of a security perimeter clearly constitutes escape material. The drawing of the fence, support posts, guard tower, and lighting, was material that could have been used to circumvent those parts of the security perimeter. Although

some details were changed or not present, viewing the drawing side-by-side with photographs, the drawing is very similar to the actual view. Therefore, the HO's decision is affirmed.

Petitioner also argues that he was only required to have implicit authorization to make the drawing, and that he had such implicit authorization, and therefore, his possession of the drawing does not constitute possession of dangerous contraband. However, participating in an art project at the prison does not authorize a prisoner to create a drawing of the security perimeter layout with the fence, support posts, guard tower, and lighting intact. The other drawings sent to Petitioner through the mail system were all stylized, artistic depictions. For example, the drawing of a section of fence contained no details of the fence's context; there are no light posts, no guard towers, and no context whatsoever. By contrast, Petitioner's drawing is of an identifiable section of fencing and includes the fence, support posts, guard tower, light posts, and even snow banks. It would be dangerous precedent for this Court to find that a prisoner could create and possess detailed drawings of the perimeter that mirrors the reality of the prison security systems under the guise of an art project. Therefore, this Court affirms the HO's determination that Petitioner did not have any authorization to create and possess such a drawing.

THEREFORE IT IS ORDERED that Respondent's decision is **AFFIRMED.**

In compliance with MCR 2.602(A) (3), this Court finds that this decision resolves the last pending claim and closes the case.

Hon. William E. Collette
Circuit Court Judge

PROOF OF SERVICE

I hereby certify that I mailed a copy of the above ORDER which each attorney of record, or upon the parties, by placing the true copy in a sealed envelope, addressed to each, with full postage prepaid and placing said envelope in the United States mail at Mason, Michigan, on September 8, 2015.

Kacie Smith
Law Clerk

APPENDIX E

Order of the Michigan Supreme Court Denying Discretionary Review
issued June 27, 2017

*896 N.W.2d 441; 2017 Mich. LEXIS 1300, **

PATRICK NEIL KINNEY, Plaintiff-Appellant, v DEPARTMENT OF CORRECTIONS, Defendant-Appellee.

SC: 155299

SUPREME COURT OF MICHIGAN

896 N.W.2d 441; 2017 Mich. LEXIS 1300

June 27, 2017, Decided

PRIOR HISTORY: **[*1]** COA: 329588. Ingham CC: 15-000144-AA.
Kinney v. Dep't of Corr., 2017 Mich. App. LEXIS 95 (Mich. Ct. App., Jan. 19, 2017)

JUDGES: Stephen J. Markman, Chief Justice. Brian K. Zahra, Bridget M. McCormack, David F. Viviano, Richard H. Bernstein, Joan L. Larsen, Kurtis T. Wilder, Justices.

OPINION

Order

On order of the Court, the application for leave to appeal the January 19, 2017 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

APPENDIX F

Prison Misconduct Rehearing Report Finding Petitioner Guilty issued July 18, 2014 (Agency Record, pp. 1-5).

MICHIGAN DEPARTMENT OF CORRECTIONS

CLASS I MISCONDUCT HEARING REPORT

CSJ-240B
Rev. 10/10

Prisoner	Prisoner Name	Facility Code	Lock	Violation Date
253729	Kinney	AMF		02/26/2014

Charge(s)

(030) Possession of Dangerous Contraband - REHEARING

If Charge Changed by Hearing Officer	Plea
	☐ Guilty ☒ Not Guilty

Misconduct Report Read to and Discussed with Prisoner	☒ (check if applies)	No Hearing Investigation Requested ☐ (check if applies)
Hearing Investigation Read to and Discussed with Prisoner	☒ (check if applies)	

EVIDENCE/STATEMENTS IN ADDITION TO MISCONDUCT REPORT

07/17/14: Prisoner present. This is a REHEARING ordered by the Office of Legal Affairs on 06/27/14. This rehearing is being conducted by video from HO's location at another facility. The original hearing was conducted by ALE Makl on 03/03/14 at the AMF and is hereby incorporated into this hearing by reference and by attachment. The incident at issue occurred at the LMF on 02/26/14.

HO has verified from the record that the prisoner received 24 notice of this Rehearing and the prisoner acknowledges same.

Prior to the commencement of this Rehearing and upon an initial review of the record, AMF was asked to arrange to have the actual drawing at issue available for the Rehearing which was to be done by video. AMF was also asked to have the appropriate staff (which now appears to LFM staff, where the misconduct report was written), either the Deputy Warden

(CONTINUED ON PAGE TWO: EVIDENCE/STATEMENTS)

REASONS FOR FINDINGS

It is undisputed that prisoner Kinney was in possession of a drawing at the LMF on 02/28/14 which was confiscated from his property and became the subject of an (030), Dangerous Contraband, misconduct. ALM Makl found the prisoner guilty of the misconduct on 03/03/14 and a Rehearing Order was subsequently issued by the DOC on 06/27/14.

The Rehearing Order asks for three (3) aspects of the case to be examined and for findings of fact on those aspects.

Firstly, the Rehearing Order asks this ALE to determine if a drawing of a prison facility grounds/fence area qualifies as escape material. The Order notes that policy (meaning the Prisoner Discipline Policy, PD 03.03.105) does not specifically list all items that can be considered escape material and that it would be impossible to do so. Ergo, the ALE must decide if the drawing – admittedly showing the security fence, tower and grounds – is escape material.

(CONTINUED ON PAGE FOUR: REASONS FOR FINDINGS)

PROPERTY DISPOSITION (for contraband see PD 04.07.112)

FINDINGS

Charge No. 1	☒ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code (030)
Charge No. 2	☐ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code ____
Charge No. 3	☐ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code ____
Charge No. 4	☐ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code ____

DISPOSITION (select one or more) (Toplock & LOP Sanctions End at 5:00 am)

	Begins	Ends		
____ Days of Detention	____	____	____	Days Credit
____ Days Top Lock	____	____	____	Hours Extra Duty
____ Days Loss of Privileges	____	____	$ ____	Restitution

Misconduct Hearing Report personally handed to Prisoner by Hearing Officer on this date: ____ (Check if Applies) ☐	Hearing Report given to Staff Member by Hearing Officer for Delivery to Prisoner this date: 7/21/2014 (Check if Applies) ☒
Date of Hearing 07/14/2014	Name of Staff Member HI Raymond - AMF

Hearing Officer's Name	Hearing Officer's Signature	Date
061 Marutiak	Michael J. Marutiak	07/18/14

DISTRIBUTION. Record Office, Central Office File, Prisoner, Counselor File, Hearing Investigator

P1

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4243 12/90
CSJ-240D

Class I Misconduct - Rehearing (Type of Hearing) HEARING REPORT – Continuation Page No. 2

Prisoner Number	Prisoner Name	Institution	Violation/Notice Date
253729	Kinney	AMF	02/26/14

(Continued from Page One: Evidence/Statements):

or the Hearings Investigator, or perhaps the Hobbycraft Director, prepare a statement specifying which non-exempt Policy Directive, non-exempt Operating Procedure, Prisoner Guidebook, Housing Unit Rule, posted notice, or whatever, gave the prisoner reasonable notice that such a drawing might be considered dangerous contraband and/or escape material.

The record present was reviewed with prisoner Kinney. The record now consists of a copy of the 2/26/14 Misconduct Report for (030), Possession of Dangerous Contraband, at the LMF; the three (3) page Class I Misconduct Hearing Report by ALE Maki dated 03/03/14; the two (2) page Rehearing Decision from the Hearings Administrator; four (4) pages of a Rehearing Request filed on behalf of the prisoner by one Peter Martel; twenty-one (21) pages of a statement from prisoner Kinney; a statement from Colleen Cirocco and others from the Prison Creative Arts Project; another statement from Ms. Cirocco; a document appearing to be form letter to prisoners from the Literary Review Committee of the Prison Creative Arts Project; another three (3) page letter similar to the one previously mentioned, but from Sari Adelson on behalf of others; a two (2) page "Affidavit of Roger Escober" (497341); an Amazon.com mailing invoice for watercolor supplies; a Hobbycraft Card for prisoner Kinney from the LMF; a Prisoner Personal Property Receipt dated 3/2014 for prisoner Kinney from the AMF; six (6) pages of forms purportedly submitted by prisoner Kinney to the 18th annual Exhibition of Art by Michigan Prisoners with a date in early 2014; a memo from C. Eiseman at the LMF stating that Kinney did not participate in the "Arts callouts" at the LMF nor did the prisoner ever submit art for the University of Michigan program nor did he even watch the DVD from the University of Michigan nor are "drawings of the facility layout" permissible art projects for security reasons; a memo from the Hearings Investigator at the LMF describing prisoner Kinney's drawing as a "detail[ed] map drawing that gives the exact location of our institutional gun tower, inner and exterior perimeter lighting, and our security perimeter fencing" and citing PD.05.03.118; a photocopy of the drawing at issue; seven (7) photocopies of drawings appearing to have been submitted as evidence for comparisons to the drawing at issue; four (4) photocopies of photographs of the LMF security perimeter apparently taken by LMF staff as comparisons to Kinney's drawing (found by ALE Maki to be confidential after prisoner Kinney was able to view them during the original investigation of this matter); a statement dated 2/28/14 from "Hearings Investigator (S.R.); prisoner Kenney's original statement to the HI, also dated 2/28/14; and two (2) pages of email communications between the AMF HI and ALE Marutiak prior to this hearing.

Neither the AMF nor the LMF submitted anything further and prisoner Kinney stated he thought the record contained everything he submitted.

Prisoner Kinney explained he had been classified to Administrative Segregation at the AMF on the basis of the guilty finding on the Dangerous Contraband misconduct.

For purposes of clarification and upon questioning, prisoner Kinney acknowledged that seven (7) photocopies of drawings were not his art work, were either sent to him by postcard or submitted by other interested groups, as comparisons to his single drawing which is the direct subject of this hearing.

The prisoner's twenty-one (21) page statement was summarized by the ALE as follows: 1) the drawing in question was authorized as an art project and thus not considered escape material; 2) the drawing is not detailed enough to be considered escape material and was not being used as such, and; 3) there was an absence of required notice that the drawing could be considered escape material and therefore he could not have known he was committing a misconduct.

(Continued on Page Three: Evidence/Statements):

HEARING OFFICER'S NAME & CMIS CODE (Typed)	Copy of Hearing Report personally handed to Prisoner by Hearing Officer this date (check if applied) ☐	
061 Marutiak		
HEARING OFFICER'S SIGNATURE	Copy of Hearing Report Given to Staff Member By Hearing Officer for Delivery to Prisoner this date (check if applied) ☒	
	Date of Hearing: 07/14/14	(Name & Clock No. of Staff Member: HI Raymond - AMF

DISTRIBUTION: White – Institution; Green – Central Office; Canary – Prisoner; Pink – Visitor/Counselor; Goldenrod – Hearing Investigator

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4243 12/90
CSJ-240D

Class I Misconduct - Rehearing (Type of Hearing) HEARING REPORT – Continuation Page No. 3

Prisoner Number	Prisoner Name	Institution	Violation/Notice Date
253729	Kinney	AMF	02/26/14

(Continued from Page Two: Evidence/Statements):

Prisoner Kinney agreed with the fairness of the summation.

HO then determined that the requests for additional information on Pages 19, 20, and 21 of the prisoner's statement were already in the record, duplicative or unnecessary. ALE himself sought LMF's position regarding notice to the prisoner of the misconduct criteria. Prisoner Roger Escobar submitted an affidavit for the record. The questions posed for other LMF prisoners (prisoners Albin and Stott) are either duplicative of material already in the record or unnecessary as potential responses would not tend to prove or disprove an element of the charge or an aspect of the Rehearing Order.

The actual, color drawing in question was then viewed by this ALE via video and zoom lens and the ALE asked prisoner Kinney pertinent questions and noted the prisoner's claims.

Prisoner Kinney explained he was inspired to do the drawing at issue by postcards he received from the Prisoner Arts Project which showed the drawings other prisoners had submitted in the past (some of those postcards are in the record, as noted earlier in this report). Prisoner Kinney responded to questions by stating that he did not participate in the Arts callouts at the LMF or view the DVD mentioned in the record because he was familiar with the process and the content of the DVD from other prisoners.

The ALE asked prisoner Kinney when the drawing at issue was to be submitted to the Arts project (noting that it was confiscated from him in late February) and the prisoner responded "the Arts people were to come by in January or February and their instructions said to not mail the submission, so I followed the instructions, but they didn't come in time". The prisoner noted that if he had ignored the instructions from the Arts Project and had sent the drawing directly to the Arts Program, "none of this would have happened".

Prisoner Kinney claimed that the drawing is not an accurate representation of the security perimeter of LMF because numerous security features were omitted, such as the double fence, the razor wire, etc. The prisoner described the drawing as "an artistic view" from his vantage point inside of the prison and described his artistic purpose of demonstrating the beauty of the sunrise or sunset even through a prisoner perimeter. Prisoner Kenney explained that his drawing was no more specific or detailed than many video shots of DOC facilities seen on the nightly news programs or even on the DOC's website.

The ALE drew a distinction between the prisoner's intent with the drawing and the issue of his authorization to do it or to possess it and asked the prisoner to respond to that distinction. The prisoner then explained that the submission of past and similar projects from prisoners to the Arts Project was a tacit or constructive form of authorization (ALE's phrasing).

Prisoner Kenney acknowledged he was satisfied that all of the claims have been reviewed and addressed. The prisoner was informed that determinations in this Rehearing would be held under advisement and that he would be informed by receipt of a copy of the final report. The hearing portion of this matter was concluded and C/O Dory and C/O Hyatt escorted the prisoner out of the video room.

(Continued on Page One: Reasons for Findings):

HEARING OFFICER'S NAME & CMIS CODE (Typed)	Copy of Hearing Report personally handed to Prisoner by Hearing Officer this date (check if applied) ☐	
061 Marutiak		
HEARING OFFICER'S SIGNATURE	Copy of Hearing Report Given to Staff Member By Hearing Officer for Delivery to Prisoner this date (check if applied) ☒	
	Date of Hearing: 07/14/14	(Name & Clock No. of Staff Member: HI Raymond - AMF

DISTRIBUTION: White – Institution; Green – Central Office; Canary – Prisoner; Pink – Visitor/Counselor; Goldenrod – Hearing Investigator

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4243 12/90
CSJ-240D

Class I Misconduct - Rehearing (Type of Hearing) HEARING REPORT – Continuation Page No. 4

Prisoner Number	Prisoner Name	Institution	Violation/Notice Date
263729	Kinney	AMF	02/26/14

(Continued from Page One: Reasons for Findings):

I do not find this aspect to require much analysis. The DOC had a depiction of the drawing in the record when the Rehearing Request was evaluated. ALE Maki made specific factual findings that the drawing showed the fence, support posts, guard post and light pole locations (both inner and outer perimeter lighting) and the location of snow banks. A State department has the authority and presumed capability to interpret its own policies. This aspect of the Order is asking the ALE on rehearing to "tell us what we were thinking when we wrote the misconduct rule and what we meant by it". So be it.

One need only look so far as the DOC's Prisoner Mail policy (Paragraph MM (16) of PD 05.03.118) to find that methods of escape include blueprints, *drawings*, or similar detailed descriptions of correctional facilities. . . (emphasis added by ALE). The prisoner would have been prohibited from receiving such a drawing in the mail from another as the drawing meets the Prisoner Mail policy criteria of escape material.

The second aspect of the Rehearing Order asks the ALE to determine how the particular drawing could be used to escape versus a permitted art project. This point was fully addressed by ALE Maki in her 03/03/14 report. The DOC's misconduct policy (PD 03.03.105) makes the mere unauthorized possession of escape material the core and single element of the (030) misconduct. Prisoner Kinney has argued, and the Rehearing Order appears to add, that another element of the misconduct is necessary: "how" the item can be used in an escape attempt. The comparison of escape materials to a state issued belt (which could be non-contraband and could be contraband, depending on how the belt is used) is a faulty comparison because the items are not treated similarly under the DOC misconduct policy. As ALE Maki noted, for such a drawing as the one at issue here, the unauthorized possession itself constitutes the misconduct, not the possession with a particular intent or a possession with an explanation of how one might facilitate and escape with it. In this sense, a truer comparison might be to a prisoner's possession of a detailed road map, matches, or an uncased razor blade, as the misconduct definition doesn't include an element that the prisoner intended to do anything nefarious with those items or that practicality would even allow him to do so.

The third aspect of the Rehearing Order – whether prisoner Kinney was provided sufficient notice that such a drawing was escape material – is the core and real issue here. As noted above, I visually inspected the original copy of the drawing. It does show the features described in ALE Maki's report and it also has a somewhat "artistic flavor" to it. (The latter point reflecting on the prisoner's purpose of the drawing, of course, not his possession of it nor his notice that it was prohibited.)

The non-exempt Prisoner Mail policy adequately if not clearly defines a drawing with detailed descriptions of the prison facility as escape material, which was notice to all prisoners. The definition contained in the Prisoner Mail policy adds some of the lacking exemplifications in the pertinent part of the Prisoner Discipline Policy. Additionally, the statement from C. Eiseman at the LMF states that drawings of the facility layout were not permitted in the arts project for security reasons.

The other evidence in the record purporting to show that Kinney was authorized to create the drawing is not decisive nor does it originate from DOC staff. If, by arguendo, similar drawings were in fact submitted to the Arts Project in times past by other prisoners, that fact did not create a constructive authorization by the DOC for prisoner Kinney to do the same.

(Continued on Page Five: Reasons for Findings)

HEARING OFFICER'S NAME & CMIS CODE (Typed)	Copy of Hearing Report personally handed to Prisoner by Hearing Officer this date (check if applied) ☐
061 Marutiak	
HEARING OFFICER'S SIGNATURE	Copy of Hearing Report Given to Staff Member By Hearing Officer for Delivery to Prisoner this date (check if applied) ☒
	Date of Hearing: 07/14/14 — (Name & Clock No. of Staff Member): HI Raymond - AMF

DISTRIBUTION: White – Institution; Green – Central Office; Canary – Prisoner; Pink – Visitor/Counselor; Goldenrod – Hearing Investigator

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4243 12/90
CSJ-240D

Class I Misconduct - Rehearing (Type of Hearing) HEARING REPORT – Continuation Page No. 5

Prisoner Number	Prisoner Name	Institution	Violation/Notice Date
253729	Kinney	AMF	02/26/14

(Continued from Page Four: Reasons for Findings):

If the Arts Project or other parties did mail Kinney postcards with drawings of prison security features and DOC staff did deliver those postcards to Kinney, those actions did not constitute reasonable authorization for Kinney to do anything in violation of the DOC policy.

Accordingly, I make the following findings of fact:

1. Prisoner Kinney did have sufficient notice that a drawing of the facility grounds, including the fence areas, could be considered to be escape material, such notice found in the above-cited portion of PD 05.03.118 (Prisoner Mail), and the drawing does in fact depict those features, albeit not in as great of detail as the actual photographs submitted by LMF for comparison purposes, yet the drawing was still in the incomplete stage, as noted by ALE Maki;

2. Prisoner Kinney's purpose of the drawing at issue was very likely to use the drawing in connection with an Arts project or for some artistic endeavor and there is no credible evidence in the record present today that the drawing was associated with a nefarious purpose such as an attempted escape;

3. Prisoner Kinney however, was not legitimately authorized by any DOC staff to create the drawing for an Arts project, said finding supported by the Prisoner Mail policy and the report from C. Eisman at the LMF, and the total absence in the record of any specific authorization from DOC staff for the drawing.

The salient points of much of the evidence submitted by prisoner Kinney and those outside of the DOC are more of an equity nature: that the purpose of the drawing and the lack of a miscreant intent should disprove the misconduct violation. Those aspects were addressed by ALE Maki in her findings and were likely considerations during the sanction phase of the 03/03/14 hearing. But they do not prove or disprove the element(s) of the Dangerous Contraband charge as written by the DOC and as in effect on the date of the violation. The sanction imposed by ALE Maki was in accordance with the DOC policy at the time (a 30-day detention sanction is now longer permitted by current DOC policy) and is not under review here. Nor is the prisoner's claim that he was classified to Administrative Segregation based solely on the (030) finding under review here and no evidence was taken on that factor.

The finding of guilty by ALE Maki on 03/03/14 on the (030), Dangerous Contraband, charge is affirmed and in accordance with the Rehearing Order the above factual findings are made by this ALE. The prisoner will be informed of these determinations by receipt of a copy of this report from AMF staff.

The determinations regarding confidentiality made by ALE Maki under the authority of MCL 791.252(H) and R 791.3315 are left undisturbed.

Report issued on 07/21/14. End of report.

HEARING OFFICER'S NAME & CMIS CODE (Typed)	Copy of Hearing Report personally handed to Prisoner by Hearing Officer this date (check if applied) ☐
061 Marutiak	
HEARING OFFICER'S SIGNATURE	Copy of Hearing Report Given to Staff Member By Hearing Officer for Delivery to Prisoner this date (check if applied) ☒
	Date of Hearing: 07/14/14 — (Name & Clook No. of Staff Member: HI Raymond - AMF

DISTRIBUTION: White – Institution; Green – Central Office; Canary – Prisoner; Pink – Visitor/Counselor; Goldenrod – Hearing Investigator

APPENDIX G

Prison Order Granting Misconduct Rehearing issued June 27, 2014

MICHIGAN DEPARTMENT OF CORRECTIONS
REQUEST FOR REHEARING RESPONSE

AMF

005

PRISONER NUMBER	Name:	Facility:
253729	KINNEY	AMF

Misconduct Date:	Hearing Officer:	Hearing Date:	Received Date	☐ Warden RFR ☑ Prisoner RFR
2/26/2014	034	3/3/2014	3/20/2014	

1st Charge 030 030 - Possession of Dangerous Contraband
2nd Charge
3rd Charge
4th Charge:

REHEARING DECISION

Prisoner Kinney was found guilty of the Class I charge of possession of dangerous contraband after it was determined at a formal administrative hearing that he was in possession of escape material. In particular, it was found prisoner was in unauthorized possession of what the Hearing Officer concluded to be a detailed diagram of the LMF security perimeter. For this appeal response, the diagram in question will be referred to as a drawing.

Prisoner Kinney, through the assistance an outside criminal justice program, raises several points as a basis for granting a rehearing. The issue of notice was raised, specifically what constitutes escape materials and how the prisoner is to know what s/he is allowed to possess. Another issue presented is how this particular drawing is an escape material. The final issue raised is hearing officer bias. However, there is insufficient evidence to support the existence of bias in this case.

PD 03.03.105 "Prisoner Discipline" and its attachments, include the definitions of the misconduct charges and gives notice of how and what a prisoner may be charged with. The attachments also provide notice of the inclusion of attempt, accomplice to, and conspiracy to commit the listed charges.

There is no dispute that prisoner Kinney was in possession of the drawing as described in the misconduct report. The key issues are whether the drawing constitutes an escape material and whether he knew or should have known it constituted an escape material.

Policy does not specifically identify drawings of the facility grounds/fence area as escape materials. However, it would be impossible to list in policy all items that would be considered escape materials. For example, a state issued belt would not be considered escape material by itself but could be considered escape material if established that the belt was used or was to be used in aiding a prisoner to escape. Therefore, other evidence can establish an item is escape material.

In this case, however, there are insufficient findings addressing whether prisoner had authorization to create and possess this drawing via a permitted art project and, in turn, how he knew or should have known it would be considered an escape material.
As such, the Hearing Officer's findings are not supported by competent, material, and substantial evidence on the record.

A rehearing is granted on the matter. The prisoner shall be given at least 24 hour notice prior to the rehearing and the opportunity to attend. The Hearing Officer conducting the rehearing shall not be the same Hearing Officer who conducted the original hearing. As there is no dispute prisoner Kinney was in possession of the drawing, the Hearing Officer does not need to revisit that specific issue. The hearing officer is asked to determine if the drawing in question is an escape material, including how this drawing can be used to escape, versus a permitted art project AND whether prisoner Kinney was provided sufficient notice that the drawing in question is an escape material. The Hearing Officer shall provide a detailed description of the evidence to support the findings. The Hearing Officer may allow or require additional evidence if s/he feels it to be necessary and relevant to reach an informed decision. A copy of the Hearing Officer's written decision which includes the facts found and the evidence relied on shall be provided to the prisoner.

Decision:	Date Mailed:
☑ Approved ☐ Denied ☐ Returned without action: Not filed within 30 calendar days	MAILED JUN 27 2014

Richard D. Russell
RICHARD D. RUSSELL, HEARINGS ADMINISTRATOR

14044

MICHIGAN DEPARTMENT OF CORRECTIONS
REQUEST FOR REHEARING

CSJ-418
REV. 10/10
4835-3418

005

INSTRUCTIONS

1. This form is to be used only to request reconsideration of the decision of a hearing officer on one of the following:
   a. Class 1 Misconduct.
   b. Notice of Intent to Classify to Administrative Segregation.
   c. Visitor restriction.
   d. High or very high risk classification.
   e. Excess legal property hearing.
   f. Special Education Individual Education Planning Committee (IEPC) hearing.
2. You MUST attach a copy of the hearing report to this request and, if appealing a misconduct hearing, a copy of the Class 1 Misconduct Report. If they are not attached, this form may be returned to you without a decision. You do not have to include a copy of the hearing investigation packet.
3. Submit the completed form to: Hearings Administrator, Department of Corrections, Office of Legal Affairs, P.O. Box 30003, Lansing, Michigan 48909. This form must be received by the Hearings Administrator within 30 calendar days of the date of the decision by the hearing officer.

PRISONER'S NUMBER	PRISONER'S NAME	INSTITUTION
253729	KINNEY	AMF
DATE OF MISCONDUCT 2/26/2014	TYPE OF HEARING (IF MISCONDUCT, LIST CHARGES ALSO) 030	
DATE OF HEARING 3/3/2014		

Briefly explain why you believe a rehearing should be ordered: SEE ATTACHED

SIGNATURE OF PERSON REQUESTING REHEARING	DATE

DECISION

☐ Disapproved

See Attached

☒ Approved – Rehearing Ordered

☐ Returned without action – Not filed within 30 calendar days

HEARINGS ADMINISTRATOR	DATE
Richard Russell	MAILED JUN 27 2014

DISTRIBUTION: White – Hearings Administrator; Canary – Person Requesting Rehearing

APPENDIX H

Prison Hearing Report Finding Petitioner Guilty issued March 3, 2014
(Agency Record, pp. 8-10)

MICHIGAN DEPARTMENT OF CORRECTIONS

CSJ-240B
Rev. 10/10

CLASS I MISCONDUCT HEARING REPORT

Prisoner	Prisoner Name	Facility Code	Lock	Violation Date
253729	Kinney	AMF	3-131	02/26/2014

Charge(s)

030: Possession of Dangerous Contraband*

If Charge Changed by Hearing Officer

Plea: ☐ Guilty ☒ Not Guilty

Misconduct Report Read to and Discussed with Prisoner ☒ (check if applies)
Hearing Investigation Read to and Discussed with Prisoner ☒ (check if applies)

No Hearing Investigation Requested ☐ (check if applies)

EVIDENCE/STATEMENTS IN ADDITION TO MISCONDUCT REPORT

LMF misconduct scheduled for hearing on prisoner at AMF with Hearing Officer at LMF through tele-video hearing. (Unless otherwise noted, each listed document consists of one page.) Misconduct report, removal record, investigator note and Hearing Investigation Report read to the prisoner. Diagram and four photos showing the gun tower, which had been shown to the prisoner by the Hearing Investigator, examined by the Hearing Officer.
SEE PAGE TWO

*PD 03.03.105.A defines this charge as "Unauthorized possession of an explosive, acid, caustic, toxin, material for incendiary device; escape material; detailed road map for any area within the State of Michigan, adjacent state or Ontario, Canada; bodily fluid stored in a container within a cell or room; tattoo device; cell phone or other electronic communication device or accessory; a critical or dangerous tool or other item needing to be strictly controlled as specifically identified in the attachments to PD 04.04.120 "Tool Control", including failure to return any item covered by the definition which is signed out for a work or school assignment or any other purpose."

REASONS FOR FINDINGS

CONFIDENTIAL: Since the diagram supports the charge, it is considered, by definition to be a threat to the security and good order of the institution. As such it is being marked confidential. In addition, the photos of the gun tower, which was the subject of the diagram, are also being held confidential as they depict security features of the prison. Prisoner is not prejudiced by this finding as he is the author of the diagram and was shown the photos of the gun tower during the investigation. Finding is only to prevent the prisoner from obtaining a copy of the diagram or photos.
OTHER PAINTING: Prisoner claims he has a painting of a dog and his cell. There is no reason to doubt that assertion but that painting is irrelevant as that painting is not subject to this hearing. The fact that he may or may not have another painting that may or may not support another charge has no bearing on whether the diagram subject to this hearing supports the charge. No error in not obtaining the painting.

SEE PAGE TWO

PROPERTY DISPOSITION (for contraband see PD 04.07.112)

FINDINGS

Charge No. 1	☒ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code 030
Charge No. 2	☐ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code
Charge No. 3	☐ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code
Charge No. 4	☐ Guilty	☐ Not Guilty	☐ Dismissed	Reporting Code

DISPOSITION (select one or more) (Toplock & LOP Sanctions End at 6:00 am)

		Begins	Ends		
30	Days of Detention	03/03/2014	04/02/2014		Days Credit
	Days Top Lock				Hours Extra Duty
30	Days Loss of Privileges	04/02/2014	05/02/2014	$	Restitution

Misconduct Hearing Report personally handed to Prisoner by Hearing Officer on this date: ____ (Check if Applies) ☐

Hearing Report given to Staff Member by Hearing Officer for Delivery to Prisoner this date: 3/3/2014 (Check if Applies) ☒

Name of Staff Member Hearing Investigator Raymond

Date of Hearing 03/03/2014

Hearing Officer's Name	Hearing Officer's Signature	Date
L. Maki 034		3/3/14

DISTRIBUTION Record Office, Central Office File, Prisoner, Counselor File, Hearing Investigator

P8

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4243 12/90
CSJ-240D

MAJOR MISCONDUCT (Type of Hearing) HEARING REPORT – Continuation Page No. 2

Prisoner Number	Prisoner Name	Institution	Violation/Notice Date
253729	Kinney	AMF	2/26/14

030: Possession of Dangerous Contraband

EVIDENCE / STATEMENTS IN ADDITION TO MISCONDUCT REPORT Continued from Page One

At the hearing the prisoner stated that this was nothing more than a painting of sunrise and, if this was to be used in an escape attempt, everything in the painting would be the same as in the photos. They would match, but the photos do not match the painting. The photos look similar to his painting and are in the "same style" but things are in different positions. He balanced the painting with tall light pole to support the guard tower. The fence doesn't match the real fence. He tried to show depth of the fences without any regard for reality. He left out key security details. There is no barbed wire and supports for the electric wire. It is a "generic" security fence. It was done for artistic purposes, to show what beauty can be found in prison. The sunrise with the guard post. He painted a dog with his cell to show that contrast. He made this painting for the Michigan Creative Arts project. To get it submitted he would have to submit to painting to the rec director. He talked about this painting in his J-pay e-mails. There is one painting posted by the Michigan Creative Arts project showing a prison garden downstate with a fence. This is the same thing. He left out key security features. His painting did not match reality. Prisoner had no other comment when asked – stated, "Nope." Prisoner informed of the decision and sanction prior to leaving the hearings room.

REASONS FOR FINDINGS Continued from Page One:

OTHER DOCUMENTS: Prisoner wanted at the time of the investigation a "submission form" to show that it was his intent to submit this diagram to the Michigan Creative Arts project. The form is irrelevant. Just because the prisoner obtained a submission form would not prove that the diagram he made was not a detailed representation of the facility's security perimeter. As to the prisoner's J-pay e-mails mentioning his diagram of the fence that the prisoner spoke about during the hearing, this would not provide the prisoner with any type of defense as the purpose of possession is irrelevant as to the charge. Prisoner was NOT charged with "possession of escape material that is intended to be used in an escape attempt." He was charged with possession of "escape materials." For what it is worth, however, the fact that the prisoner was mentioning his diagram to outside parties would only increase, not decrease, the possibility that it was the prisoner's intent was to use this diagram in a possible escape attempt.
INVESTIGATOR: Although hearing on the 036: Out of Place 037: Theft; Possession of Stolen Property misconduct report will not be completed until next week and a decision has not made on the merits of that misconduct report at this time, there is key information that will be mentioned in the instant decision. Attach a copy of it to this instant misconduct report so there is support for different facts that will be discussed in this decision.
CONTRABAND: On 2/26/14 it was discovered that the prisoner had made a detailed diagram of the LMF security perimeter showing the fence, support posts, guard post and light pole locations (both the inner and perimeter lighting), and the location of snow banks. The drawing depicts the view from the institution's dog handling area looking out to the west of the facility. This diagram could be used to aid an escape attempt and as such, is escape material. Prisoner knew he had this diagram as it was located in his property. Prisoner had no authorization to have this diagram. Prisoner does not dispute that he had this diagram but claims that the diagram is not an exact match to the photos of the security perimeter. It is true that it is not an exact match, but, as already noted in the misconduct report, the diagram is incomplete. (The fact that the diagram was incomplete is evident by the fact that the prisoner had his perspective lines on top of the tower still visible and no roof had been placed on the guard tower.) In addition, it is improbable that anyone, without spending a lot of time on a diagram, would get an exact match. What was shown, however, was very, very close to the "real thing."

SEE PAGE TWO

HEARING OFFICER'S NAME & CMIS CODE (Typed)	Copy of Hearing Report personally handed to Prisoner by Hearing Officer this date (check if applied) ☐
L. Maki 034	
HEARING OFFICER'S SIGNATURE	Copy of Hearing Report Given to Staff Member By Hearing Officer for Delivery to Prisoner this date (check if applied) x
	Date of Hearing: 3/3/14 — (Name & Clock No. of Staff Member: Investigator Raymond

DISTRIBUTION: White – Institution; Green – Central Office; Canary – Prisoner; Pink – Visitor/Counselor; Goldenrod – Hearing Investigator

MICHIGAN DEPARTMENT OF CORRECTIONS

4835-4243 12/90
CSJ-240D

MAJOR MISCONDUCT HEARING REPORT – Continuation Page No. 3
(Type of Hearing)

Prisoner Number	Prisoner Name	Institution	Violation/Notice Date
253729	Kinney	AMF	2/26/14

030: Possession of Dangerous Contraband

REASONS FOR FINDINGS Continued from Page Two:

CONTRABAND: Continued from page two

Prisoner asserts that this is not escape material because he was painting a sunrise as he wanted to contrast the beauty of the rising sun with the security features of the prison. He points out that he left out some key security features and moved a light pole. Prisoner's claims do not provide him with a defense as the main focus of the diagram was not the smudges, apparently representing a rising sun, but the fence and the guard tower. (Prisoner's assertion that he was trying to demonstrate beauty in prison is somewhat suspect when there is no sunrise behind a guard tower when that guard tower is sitting on the west side of the compound.) Changing the position of a pole or leaving out some wire does not make it less a depiction of the security fence or less in the nature of escape material. Using the prisoner's logic, a prisoner inside can draw whatever he wants of any security device without any worry if he throws in a sun, or a flower, and doesn't add every single detail. That is ridiculous. Prisoner drew an area of the yard and security fence in which he believed, as a dog handler, he had full access without any restriction from staff members because it was the dog yard. Based on the earlier hearing, prisoner went out of the unit at 2025, which is dark at this time of the year, without a dog, in fact without any dogs being on the yard or any other dog handlers being present, to get some milk that he stored outside without any authorization. When that is combined with the prisoner's J-pay's e-mails about the diagram that he mentioned during this hearing and with the fact that he was keeping a record as to when he went on the yard to shovel snow that he mention during his hearing on the Out of Place misconduct report, one can't wonder if escape was the prisoner's actual intended purpose. There is no doubt that this was escape material. Reporting staff member factual and is credible in his assertion that the diagram was escape paraphernalia. Charge upheld.

HEARING OFFICER'S NAME & CMIS CODE (Typed)	Copy of Hearing Report personally handed to Prisoner by Hearing Officer this date (check if applied) ☐
L. Maki 034	
HEARING OFFICER'S SIGNATURE	Copy of Hearing Report Given to Staff Member By Hearing Officer for Delivery to Prisoner this date (check if applied) X
	Date of Hearing: 3/3/14 — (Name & Clock No. of Staff Member: Investigator Raymond

DISTRIBUTION: White – Institution; Green – Central Office; Canary – Prisoner; Pink – Visitor/Counselor; Goldenrod – Hearing Investigator

APPENDIX I

2014 Prison Dangerous Contraband Rule (Policy Directive 03.03.105)

MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE**	EFFECTIVE DATE 04/09/12	NUMBER 03.03.105
SUBJECT PRISONER DISCIPLINE	SUPERSEDES 03.03.105 (11/01/10)	
	AUTHORITY MCL 791.203, 791.206, 791.251, et. seq., 800.33; Administrative Rules 791.3301 - 791.3320, 791.5501	
	PAGE 1 OF 14	

POLICY STATEMENT:

Disciplinary sanctions shall be imposed against prisoners for rule violations in accordance with due process requirements.

POLICY:

GENERAL INFORMATION

A. Alleged violations of written rules are classified as Class I, Class II, or Class III misconduct and are further defined in Attachments A, B, and C of this policy. Misconduct reports may be written only for violations identified in these attachments.

B. Class I misconducts are subject to all hearing requirements set forth in MCL 791.252 and all requirements currently set forth in Department Administrative Rules and policy directives for "major" misconduct. Class II and Class III misconducts are subject to all requirements currently set forth in Department Administrative Rules and policy directives for "minor" misconducts.

C. The structure of the disciplinary process is one of progressive sanctions, with the maximum sanction reserved for only the most serious or persistent violators. Counseling shall be attempted to correct minor violations. A Misconduct Report (CSJ-228) may be written, however, when rule infractions require more formal resolution. If a Misconduct Report is written, it shall be prepared as soon as possible after the violation is observed or reported.

D. A Misconduct Report may be written by any Department staff person or person under contract with the Department who has knowledge that misconduct has occurred. A Misconduct Report shall be written if the behavior constitutes a non-bondable Class I misconduct, as identified in Attachment A.

E. A misconduct which is a felony shall be referred to the appropriate law enforcement agency as well as being pursued through the Department disciplinary process. The initiation of the disciplinary process may be delayed if it would interfere with the criminal investigation or prosecution.

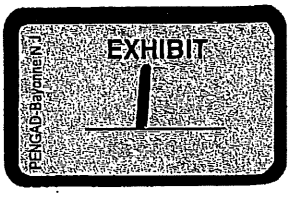
F. A prisoner is presumed to be in possession of an item found in an area over which the prisoner has control and for which s/he has been assigned responsibility even if the prisoner is not present. The prisoner shall have the burden of proof in rebutting this presumption at a misconduct hearing. A prisoner's area of control includes the following:

1. If single-celled, the prisoner's assigned room or cell, including door track or frame and window and window ledge;

2. If assigned to a multiple occupancy room or area, that part of the room or area assigned to the prisoner, including bed, locker, and surrounding wall, floor, and ceiling space;

3. Any personal property belonging to the prisoner, unless it has been reported as stolen;

4. Area of work or school assignment for which prisoner is responsible.



G. In computing the time limit for a hearing, the day on which the prisoner is confined, transferred, or received written notice of the charge is not counted; however, the day on which the hearing occurs is counted.

H. A prisoner charged with misconduct has the right to be present at the misconduct hearing. The hearing may be conducted without the prisoner, however, if a finding is made on the record that the prisoner chose not to attend the hearing after proper notice was given or that the prisoner is so assaultive or disruptive that the hearing cannot be held with the prisoner present; the mere fact that the prisoner is in segregation is not sufficient.

I. All hearings shall be conducted in a room or office designated by the Warden; hearings shall not be conducted in-cell or at cell-front unless approved by the Warden for a Class II or III hearing based on the conduct of the specific prisoner. Prisoners shall be subject to a patdown search prior to entering the hearing room; restraints may be applied as deemed appropriate by the institution based on PD 04.05.112 "Managing Disruptive Prisoners". Prisoners in segregation, classified to security Level IV or V, or on toplock pending hearing shall be properly cuffed when brought to a Class I hearing; custody staff shall remain in the hearing room during the hearing. Custody staff also shall remain in the vicinity of the hearing room during all Class I hearings to ensure staff is available to readily respond to any disturbance or request for assistance.

J. All staff members shall cooperate fully with Hearing Investigators and hearing officers, including complying with requests for information or assistance necessary to conduct a proper hearing.

K. The Hearings Administrator in the Office of Legal Affairs shall maintain the Hearings Handbook and the Pocket Guide for Prisoner Rule Violations (CAX-398) to assist staff in implementation of the misconduct hearing process.

HEARING INVESTIGATOR

L. The Hearing Investigator shall coordinate all Class I and Class II misconduct hearings. This responsibility shall include the following:

1. Scheduling the hearing date with the appropriate hearing officer to ensure the hearing is conducted in a timely manner;

2. Preparing the Misconduct Docket (CAH-991) and ensuring that the misconduct reports identified on the misconduct docket and any other required documentation are presented to the hearing officer on the scheduled hearing date;

3. Making available to the hearing officer a record of the prisoner's prior Major/Class I and Class II misconduct history to assist the hearing officer in determining an appropriate sanction;

4. Identifying the reporting codes for Class II misconducts to allow for proper entry into the Department's computerized database (e.g., CMIS; OMNI);

5. Determining the sanction dates for any discipline imposed for Class II misconducts;

6. Ensuring that the completed Hearing Report is distributed, including to the prisoner, in a timely manner. If the prisoner waives the hearing and pleads guilty, the Hearing Investigator also shall ensure that the Misconduct Report is distributed, including to the prisoner, in a timely manner;

7. Ensuring that a copy of the completed Misconduct Docket is posted within 48 hours after the hearing date in an area which is not ordinarily accessible to prisoners but is readily accessible to staff. The Hearing Investigator shall include on the Misconduct Docket information on Class II misconducts to which prisoners plead guilty at review. The Misconduct Docket shall remain posted for at least 72 hours and be retained in accordance with the Department's Retention and

Disposal Schedule;

8. Other responsibilities as set forth in this policy for Class I misconducts.

CLASS I MISCONDUCT

M. Prisoners charged with a Class I misconduct are entitled to a formal hearing as set forth in Administrative Rule 791.3315. All Class I misconduct hearings shall be conducted by hearing officers from the Department of Licensing and Regulatory Affairs (LARA). Any issues or concerns regarding this hearing process shall be referred as necessary through the appropriate chain of command to the Hearings Administrator for resolution. The Hearings Administrator shall serve as the liaison with LARA on issues regarding the prisoner disciplinary process.

REVIEW

N. A supervisory level employee shall conduct a review of the Misconduct Report with the prisoner. The review shall be conducted within 24 hours after the report is written unless there is reasonable cause for delay as determined by the LARA hearing officer at the misconduct hearing or as set forth in Paragraph III. The misconduct shall be dismissed by the hearing officer if the report is not reviewed within that time period and the hearing officer does not determine that there was reasonable cause for delay.

O. The review shall include the following:

1. Examining the Misconduct Report to determine that the charge is appropriate and that the name and number of the prisoner are correct.

2. Reading the Misconduct Report to the prisoner.

3. Advising the prisoner of his/her right to witnesses, relevant documents, and a Hearing Investigator. The reviewing officer shall note on the Misconduct Report if the prisoner requests a Hearing Investigator as well as identifying any witnesses and documents requested.

4. Noting on the Misconduct Report the location of any physical evidence.

5. Ensuring the prisoner receives a copy of the Misconduct Report after the review is completed.

P. If the reviewing officer determines a Misconduct Report is not appropriate or not properly written, s/he may return the report to the staff member who wrote it for rewriting. The reviewing officer also may pull a Misconduct Report which s/he determines to be inappropriate but shall first discuss it with the reporting staff person. Once a Misconduct Report has been reviewed, it shall not be pulled except by the Warden or designee for good cause. If a Misconduct Report is pulled, it shall be retained for at least six months and shall be accompanied by a written statement indicating why it was pulled. A Misconduct Report shall not be pulled after it has been heard by a LARA hearing officer.

Confinement Pending Hearing

Q. At the review, the reviewing officer shall order a prisoner charged with a non-bondable misconduct to be confined in temporary segregation or, if a temporary segregation cell is not available, on toplock pending the hearing except if the misconduct is for escape from a facility of a lower security level than the one where the prisoner is now incarcerated and the reviewing officer determines the prisoner will not be a threat to safety or security at the present custody level. In addition, the Warden may allow a prisoner charged with a non-bondable offense to remain on bond status if it is determined this will not present a threat to safety or security.

R. The reviewing officer may order a prisoner charged with a bondable misconduct to be confined in temporary segregation or, if a temporary segregation cell is not available, on toplock pending a hearing

only if there is a reasonable basis to believe failure to do so would constitute a threat to the security or good order of the facility. This must relate to the specific circumstances of the incident. The reason for confinement shall be stated on the Misconduct Report and must include the facts underlying the charge which make it necessary to confine the prisoner for an offense which policy has already determined can normally be safely handled as a bondable matter. In other words, it must state why this case differs from other instances of this charge and thus presents a threat to security. Conclusory phrases such as "necessary for the good order of the facility" are not acceptable as reasons.

S. Whenever a prisoner is confined in temporary segregation or on toplock pending a Class I misconduct hearing, the exact time and date of placement shall be noted on the Misconduct Report by the reviewing officer, who also shall immediately notify the prisoner's housing unit of this placement. The person notified in the housing unit shall be indicated on the Misconduct Report.

INVESTIGATION

T. A Hearing Investigator shall be assigned to conduct an investigation of Class I misconduct charges if:

1. The prisoner requested, at the time of review, a Hearing Investigator, witnesses, or documents.

2. The prisoner chooses not to cooperate during the review process, including choosing not to attend the review.

3. The prisoner is in a Residential Treatment Program (RTP), (including Secure Status Residential Treatment Program and Adaptive Skills Residential Program) and the Secure Status Outpatient Treatment Program.

4. The prisoner is confined in temporary segregation pending the Class I hearing.

5. The prisoner is receiving special education services.

6. The prisoner is on an Outpatient Corrections Mental Health Services active caseload; this does not apply if the prisoner is in the Secure Status Outpatient Treatment Program.

U. The Hearing Investigator shall gather all witness statements and other evidence necessary to conduct a hearing and not simply respond to the questions raised by the prisoner. The prisoner may submit a personal statement and written questions to the Hearing Investigator to be asked of a witness; a Hearing Investigation Report (CAJ-681) shall be used for this purpose. The Hearing Investigator shall obtain answers to all questions which s/he reasonably believes are relevant, not repetitious, and not a threat to the security of the facility. The Hearing Investigator also shall contact any other witness and obtain any documents which s/he believes are relevant to the charge. Although the Hearing Investigator may initially determine if a question should be asked or a witness contacted, the LARA hearing officer has the final authority and may require the Hearing Investigator to obtain an answer to a question if s/he determines an answer is needed. The Hearing Investigator shall obtain all information requested by the hearing officer or clearly explain in writing why it cannot be obtained.

V. Whenever the Hearing Investigator is assigned to conduct an investigation under Paragraph T, nos. 4 through 6, the Hearing Investigator shall complete a Misconduct Sanction Screening form (CSJ-330) unless the prisoner was referred pursuant to Paragraph EEE or GGG, and forward the completed form to a Qualified Mental Health Professional (QMHP) and/or to the school principal, as appropriate, within one business day after being assigned. The QMHP or school principal shall assess available disciplinary sanctions given the prisoner's mental condition and/or limitations and document the assessment on the Misconduct Sanction Assessment (CSJ-331). The assessment form shall be returned to the Hearing Investigator within three business days after the QMHP's or principal's receipt of the Misconduct Sanction Screening form.

W. The Hearing Investigation Report (CAJ-681), screening and assessment forms, and written witness

statements shall be either typewritten or completed in black ink to facilitate copying of records on appeal. All hearing investigation reports, screening and assessment forms, and written witness statements shall be kept in designated Hearing Investigator files at the institution where the hearing is held. They shall be kept in chronological order by date of hearing and in order by prisoner number so the record can be retrieved if necessary for an appeal.

X. A copy of any information determined by the LARA hearing officer to be confidential shall be kept with the Hearing Investigation Report and clearly marked as confidential by the hearing officer. All photographs shall be attached to the Hearing Investigation Report. All video and audio recordings which the hearing officer reviews and makes a part of the record also shall be retained and clearly marked as part of the hearing record.

Y. Information determined by the LARA hearing officer to be confidential is exempt from disclosure under the Freedom of Information Act. The Hearing Investigator shall release a copy of confidential documents or materials only to the Office of Legal Affairs, the Office of the Legislative Corrections Ombudsman upon request of that Office, or with approval of the Hearings Administrator or designee.

Z. The misconduct record, including all documents identified in this section, and photographs shall be retained in accordance with the Department's Retention and Disposal Schedule. If the facility is aware that a lawsuit is filed, the records shall be retained until the litigation is completed. A facility will ordinarily be alerted that a lawsuit appealing the misconduct has been filed when a request is made by the Office of Legal Affairs for a copy of the Hearing Investigation Report. Physical evidence other than photographs may be kept separately from the misconduct record but shall be retained for at least 90 calendar days after the hearing or until litigation is completed if a lawsuit is filed.

HEARING

AA. A Class I misconduct hearing shall be conducted within seven business days after the Misconduct Report was reviewed with the prisoner except as follows:

1. If a Hearing Investigator is assigned, in which case the hearing shall be conducted within 14 business days; however, if the prisoner is confined to segregation or on toplock pending the hearing, the hearing must be conducted within seven business days after such confinement, unless the prisoner is released from confinement before that time period expires.

2. If the prisoner is transferred to a higher security level, not including segregation, as a result of the misconduct. In such cases, the hearing shall be conducted within 14 business days after that transfer or receipt of written notice of the charge, whichever occurs first.

3. If there is reasonable cause for delay, as determined by the LARA hearing officer. Circumstances which may be found to be reasonable cause for delay include, but are not limited to, an institutional disturbance, equipment failure, required attendance of all hearing officers at state-wide meetings, mobilization, or severe weather. Workload is not a reasonable cause for delay unless it is due to unusual circumstances, as determined by the Hearings Administrator or designee. Whenever a hearing is not held within the required time limits, the reasons for delay shall be set forth in the Class I Misconduct Hearing Report (CSJ-240B).

BB. The LARA hearing officer shall ensure all relevant evidence and testimony has been presented and shall return the matter to the Hearing Investigator for further investigation if needed. The hearing officer may interview a witness at the hearing if s/he determines this is necessary and not unduly hazardous to the safety of the facility, staff, or prisoners.

CC. Some rule violations necessarily include other less serious violations. A lesser included violation would contain some, but not all, elements of the greater charge. For example, threatening behavior is a lesser included violation of assault and battery; insolence is a lesser included violation of threatening behavior; and creating a disturbance is a lesser included violation of inciting to riot. If the evidence does not

support the particular violation charged but does establish a lesser included violation, the LARA hearing officer has the authority to find the prisoner guilty of the lesser included violation, even if it is a different class of misconduct.

DD. In making a decision as to whether a prisoner is guilty of a charge, the LARA hearing officer shall consider only evidence which relates to the specific charge or charges or their lesser included violations. Decisions shall be based upon a preponderance of evidence. The hearing officer shall make an individual determination of the credibility of staff and prisoner witnesses. The evidence relied upon in making a determination and the reasons for the decision shall be set forth by the hearing officer in the Class I Misconduct Hearing Report; the hearing officer also shall assign the appropriate misconduct code.

EE. If the prisoner is found guilty of the misconduct, the hearing officer shall determine the appropriate sanction and sanction dates consistent with the requirements set forth in Paragraphs KKK and LLL, and the appropriate disposition of any contraband confiscated consistent with PD 04.07.112 "Prisoner Personal Property". A copy of the Misconduct Report and the Class I Misconduct Hearing Report shall be kept in the prisoner's Central Office, Record Office, and Counselor files.

FF. If the prisoner is found not guilty or the charges are dismissed, the Misconduct Report and the Class I Misconduct Hearing Report shall not be filed in any of the prisoner's files or used against the prisoner. However, a copy of the Misconduct Report, Class I Misconduct Hearing Report, and Hearing Investigation Report, if any, shall be retained by the Hearing Investigator to assist in responding to requests for rehearing and litigation. The Hearing Investigator shall also retain these documents in cases where a Class I misconduct charge was reduced to a Class II or III misconduct by the LARA hearing officer.

GG. After the hearing has been concluded, the prisoner may request and shall be provided a copy of his/her hearing investigation packet, including the Hearing Investigation Report, any written witness statements, screening and assessment forms, and copies of photographs which have not been determined by the LARA hearing officer to be confidential; such requests shall be made to the Hearing Investigator at the facility where the hearing occurred.

HH. The hearing records for not guilty or dismissed charges shall be reviewed by the Warden or designee to monitor for any errors which have been made by facility staff in the misconduct process. If the Warden disagrees with the results of a hearing, s/he may submit a request for a rehearing to the Hearings Administrator as set forth in Paragraph SSS.

II. Statistics shall not be kept on the guilty, not guilty, or dismissal rates of individual LARA hearing officers. Hearing officers shall not be threatened with or subjected to disciplinary action in whole or in part because of the number or percentage of hearings conducted which resulted in other than a guilty finding.

JJ. Facility staff shall not communicate with a LARA hearing officer or other LARA staff regarding a hearing decision except as authorized by this policy. Any prohibited communications, including attempts, shall be reported to the Hearings Administrator.

CLASS II MISCONDUCT

REVIEW

KK. A supervisory level staff member other than the person who issued the Misconduct Report shall conduct a review of the Class II misconduct violation with the prisoner. The review shall be conducted within 24 hours after the report is written unless there is reasonable cause for delay as determined by the facility hearing officer at the misconduct hearing or as set forth in Paragraph III. The misconduct shall be dismissed by the hearing officer if the report is not reviewed within the required time period and the hearing officer does not determine there was reasonable cause for delay.

LL. The review shall include the following:

1. Examining the Misconduct Report to determine the charge is appropriate and the name and number of the prisoner are correct.

2. Reading the Misconduct Report to the prisoner.

3. Noting on the Misconduct Report the location of any physical evidence.

4. Ensuring the prisoner receives a copy of the Misconduct Report after the review is completed. If the prisoner waives the hearing and pleads guilty; however, the Hearing Investigator shall be responsible for ensuing the prisoner receives the copy after the Hearing Investigator determined the sanction dates.

MM. The reviewing officer shall elevate a Class II misconduct that occurred during or in connection with a visit to a Class I misconduct at the time of review. The reviewing officer may elevate any other Class II misconduct to a Class I misconduct based on the seriousness of the specific facts as stated in the misconduct or the circumstances of the misconduct. The reason for elevation of the charge shall be stated on the Misconduct Report and must include the facts which make it necessary to elevate to a Class I misconduct what policy has determined is generally to be treated as a Class II misconduct. In other words, it must state why this case differs from other instances of this charge; conclusory phrases such as "necessary for the good order of the facility" are not acceptable as reasons. If elevated to a Class I misconduct, all requirements set forth in this policy for Class I misconducts apply. The Warden shall review all hearing records for Class II misconducts elevated to Class I to monitor this process.

NN. If the reviewing officer determines the Misconduct Report is not appropriate or not properly written, s/he may return the report to the staff member who wrote it for rewriting. The reviewing officer also may pull a Misconduct Report which s/he determines to be inappropriate but shall first discuss it with the reporting staff person. Once a Misconduct Report has been reviewed, it shall not be pulled except by the Warden or designee for good cause. If a Misconduct Report is pulled, it shall be retained for at least six months and shall be accompanied by a written statement indicating why it was pulled.

HEARING

OO. A prisoner may waive his/her Class II misconduct hearing and plead guilty in writing. The waiver and guilty plea may be accepted by the reviewing officer at the time of review or the facility hearing officer at the time of the hearing. In such cases, the reviewing officer or hearing officer accepting the guilty plea shall determine the appropriate sanction, consistent with the requirements set forth in Paragraphs KKK and LLL, and the appropriate disposition of any contraband confiscated in conjunction with the misconduct, consistent with PD 04.07.112 "Prisoner Personal Property". This shall be documented on the Misconduct Report or Class II or III Misconduct Hearing Report (CSJ-229), as appropriate.

PP. Unless the prisoner waives the Class II hearing and pleads guilty, an informal hearing shall be conducted in accordance with Administrative Rule 791.3310. Only Resident Unit Managers, Captains, and/or Lieutenants designated by the Warden shall conduct the hearing. The staff person conducting the hearing shall have had no prior direct involvement in the matter at issue.

QQ. A Class II hearing shall be conducted within seven business days after the date of review except as follows:

1. If the hearing officer directs the Hearing Investigator to collect additional evidence, in which case the hearing shall be conducted within 14 business days.

2. If there is reasonable cause for delay as determined by the facility hearing officer. Circumstances which may be found to be reasonable cause for delay. Workload is not a reasonable cause for delay. Whenever a hearing is not held within the required time limits, the

reason for delay shall be set forth in the Class II or III Misconduct Hearing Report.

RR. A prisoner is not entitled to an investigation by a Hearing Investigator; however, the facility hearing officer shall make a reasonable investigation of the charges and may direct the Hearing Investigator to collect additional evidence, including statements from other staff and prisoners. The hearing officer also shall assist those prisoners who have limited intelligence or education in presenting a defense.

SS. Some rule violations necessarily include other less serious violations. A lesser included violation would contain some, but not all, elements of the greater charge. For example, a lesser included violation of out of place is temporary out of place. If a prisoner is charged with misconduct, and the evidence does not support the particular violation charge but does establish a lesser included violation, the facility hearing officer has the authority to find the prisoner guilty of the lesser included violation, even if it is a different class of misconduct.

TT. The decision of the facility hearing officer shall be based on a preponderance of the evidence. In making a decision as to whether a prisoner is guilty, the hearing officer shall consider only evidence which relates to the specific charge or its lesser included violation. The hearing officer shall make an individual determination of the credibility of staff and prisoner witnesses. The evidence relied upon in making a determination and the reasons for the decision shall be set forth by the hearing officer in the Class II or III Misconduct Hearing Report.

UU. If the prisoner is found guilty of misconduct, the facility hearing officer shall determine the appropriate sanction, consistent with the requirements set forth in Paragraphs KKK and LLL and the appropriate disposition of any contraband confiscated consistent with PD 04.07.112 "Prisoner Personal Property". The Hearing Investigator shall assign the sanction dates and identify the appropriate reporting code for each misconduct charge.

VV. If the prisoner is found guilty, a copy of the Misconduct Report and the Class II and III Misconduct Hearing Report shall be kept in the prisoner's Record Office and Counselor file; they shall not be kept in the prisoner's Central Office file. Any evidence directed by the facility hearing officer to be collected by the Hearing Investigator shall be retained by the Hearing Investigator until the administrative appeal period has run. If a Class I misconduct charge is reduced to a Class II misconduct charge, a copy of the hearing record shall be retained in the same manner as set forth in this policy for Class I misconducts.

WW. If the prisoner is found not guilty or the charges are dismissed, the Misconduct Report and the Class II or III Misconduct Hearing Report shall not be filed in any of the prisoner's commitment files or used against the prisoner. The Hearing Investigator, however, shall retain a copy of hearing record.

XX. Not guilty or dismissed charges shall be reviewed by the Warden or designee to monitor for any errors which may have been made by staff in the misconduct process.

CLASS III MISCONDUCT

REVIEW

YY. A staff member other than the person who issued the Misconduct Report shall conduct a review of the Misconduct Report with the prisoner. The review shall include the following:

1. Examining the Misconduct Report to determine that the charge is appropriate and the name and number of the prisoner are correct.

2. Reading the Misconduct Report to the prisoner.

3. Noting on the Misconduct Report the location of any physical evidence:

4. Ensuring the prisoner receives a copy of the Misconduct Report after the review is completed.

HEARING

ZZ. A prisoner may waive his/her Class III misconduct hearing and plead guilty in writing. The waiver and guilty plea may be accepted by the reporting staff member who wrote the Misconduct Report prior to review of the misconduct, the reviewing officer at the time of review, or the facility hearing officer at the time of the hearing. In such cases, the person accepting the guilty plea shall determine the appropriate sanction, including sanction dates, consistent with the requirements set forth in Paragraphs KKK and LLL and the appropriate disposition of any contraband confiscated in conjunction with the misconduct consistent with PD 04.07.112 "Prisoner Personal Property". This shall be documented on the Misconduct Report or, if accepted by the hearing officer, on the Class II or III Misconduct Hearing Report and a copy provided to the prisoner.

AAA. Unless the prisoner waives the Class III hearing and pleads guilty, an informal hearing shall be conducted in accordance with Administrative Rule 791.3310. The hearing shall be conducted within seven business days after the date of review. Only staff designated by the Warden shall conduct the hearing. Staff conducting the hearing shall have had no prior direct involvement in the matter at issue.

BBB. A prisoner is not entitled to a Hearing Investigator, but the facility hearing officer shall make a reasonable investigation of the charges. The decision of the hearing officer shall be based on a preponderance of the evidence and stated on the Class II or III Misconduct Hearing Report. If the prisoner is found guilty, the hearing officer shall determine the appropriate sanction, including sanction dates, consistent with the requirements set forth in Paragraphs KKK and LLL and the appropriate disposition of any contraband confiscated in conjunction with the misconduct, consistent with PD 04.07.112 "Prisoner Personal Property".

CCC. A copy of the Misconduct Report shall be kept only in the prisoner's Counselor file. The report shall be kept for at least 60 calendar days after the date of the hearing or waiver for control and monitoring purposes and to provide the basis for establishing a pattern of Class III misconducts if other action becomes necessary. If a Class I or II misconduct charge is reduced to a Class III misconduct charge, a copy of the hearing record shall be retained in the same manner as set forth in this policy for Class I or II misconducts, as appropriate.

SPECIAL PROVISIONS FOR PRISONERS WITH A MENTAL DISABILITY

DDD. A prisoner with a mental disability is not responsible for misconduct if s/he lacks substantial capacity to know the wrongfulness of his/her conduct or is unable to conform his/her conduct to Department rules as a result of the mental disability. "Mental disability" is defined as any of the following:

1. Mental illness, which is a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or the ability to cope with the ordinary demands of life.

2. Severe chronic brain disorder, which is characterized by multiple cognitive defects (e.g., memory impairment resulting from a medical condition or brain injury due to trauma or toxins).

3. Developmental disorder, which usually manifests before the age of 18 years and is characterized by severe and pervasive impairment in several areas of development (e.g., autism; retardation).

EEE. If a prisoner, a Hearing Investigator, or a Hearing Officer raises the issue that the prisoner may not be responsible for the misconduct due to a mental disability, a request for a responsibility determination shall be directed to the Outpatient Mental Health Team if the prisoner is on their caseload or to a QMHP. If the issue of responsibility is raised by the prisoner and the hearing officer determines on the record that the claim is frivolous, a referral need not be made.

FFF. A prisoner who is receiving inpatient mental health services, including through the Crisis Stabilization Program (CSP) or Rehabilitative Treatment Services (RTS), shall be subject to the disciplinary process only for behavior which constitutes a nonbondable Class I misconduct charge as defined in Attachment A. In all other cases, the prisoner's behavior and the immediate therapeutic response is to be thoroughly documented in the prisoner's health record to ensure the safety of the prisoner and others is not jeopardized by lack of knowledge of a serious incident.

GGG. Whenever a non-bondable Class I misconduct is written on a prisoner who is receiving inpatient mental health services or a Class I or Class II misconduct is written on a prisoner who is receiving mental health services through an RTP, (including Secure Status Residential Treatment Program or Adaptive Skills Residential Program) or Secure Status Outpatient Treatment Program, the Unit Chief or QMHP shall determine prior to the hearing whether the prisoner is not responsible for his/her behavior due to his/her mental disability. This information shall be provided prior to any review with or notice to the prisoner.

HHH. If the prisoner is determined to be not responsible for his/her behavior due to his/her mental disability, the Class I or Class II Misconduct Report shall not be processed. The prisoner's behavior, however, shall be documented as set forth in Paragraph JJJ. If the prisoner is believed to be responsible for his/her behavior, the matter may proceed to a hearing unless the prisoner is receiving inpatient mental health services, in which case the treatment team and/or Regional Corrections Mental Health Program Director shall first determine whether the misconduct process would be detrimental to the prisoner's mental health treatment needs; if it is determined to be detrimental, the misconduct shall not be processed.

III. Whenever a referral for a responsibility determination is made pursuant to Paragraph GGG, the misconduct is not required to be reviewed with the prisoner within 24 hours of the time the Misconduct Report is written. The misconduct also shall not be dismissed on timeliness grounds unless the delay between the time when a violation occurred and the time the report is reviewed has resulted in actual prejudice to the charged prisoner. If the prisoner is found guilty, the hearing officer may assign only the sanctions of loss of privileges and/or restitution, as appropriate; if loss of privileges is ordered, the privileges to be withheld shall be determined by the Director of the Corrections Mental Health Program or designee.

JJJ. Whenever a Misconduct Report is not written or processed due to the prisoner's mental disability, including if it is not processed because the disciplinary process is determined to be detrimental to the prisoner's treatment needs, the prisoner's behavior shall be documented in the prisoner's health record and addressed therapeutically. If the prisoner's behavior was violent or assaultive or related to an attempt to escape, the incident shall be discussed in the prisoner's discharge summary and other appropriate reports (e.g., Special Problem Offender Notice) to ensure that it is brought to the attention of facility staff. Such behavior also shall be included in the Parole Eligibility/Lifer Review Report (CSJ-123) in accordance with PD 06.05.103 "Parole Eligibility/Lifer Review Reports".

MISCONDUCT SANCTIONS

KKK. Upon a finding of guilt in a misconduct hearing, the hearing officer shall impose one or more of the sanctions set forth in Attachment D. The hearing officer or, for Class II misconducts, the Hearing Investigator shall assign the dates for which the sanctions are to be imposed. Except for detention and extra duty, sanctions imposed shall begin and end at 6:00 a.m. at the conclusion of any previous misconduct sanctions remaining to be served; except for extra duty, sanctions imposed shall run on consecutive days. Hearing officers may consider all relevant information in determining a sanction, including the prisoner's prior record of misconduct guilty findings, any mitigating or aggravating circumstances, and, for prisoners for whom a Misconduct Sanction Assessment (CSJ-331) was completed, information provided by the QMHP and/or special education teacher on that form.

LLL. A hearing officer may give a prisoner credit for time spent in temporary segregation or on toplock pending a hearing but is not required to do so. The sanction given by the hearing officer, and the time

during which the sanction is to be served, shall not be changed by the facility except as set forth in Paragraph RRR.

TOPLOCK

MMM. A prisoner on toplock is restricted to his/her own cell, room, or bunk and bunk area. For purposes of this section, "bunk area" is defined as the prisoner's bunk and the floor area next to the prisoner's bunk which extends to the mid-point between the adjacent bunks on all sides. If a prisoner is housed in a multiple occupancy cell or room, toplock may consist of placement in a cell/room which is designated as a toplock cell/room. If placed in such a cell/room, the prisoner shall be given the same access to his/her property which would be provided if housed in his/her own cell/room and shall be treated in all other respects as being on toplock.

NNN. A prisoner on toplock shall not leave his/her cell, room, or bunk area for any reason without specific authorization from the appropriate staff person. The prisoner may be deprived of use of his/her television, radio, tape player, and portable media player while on toplock as provided in the facility operating procedure.

OOO. Prisoners shall be released from toplock for regular showers, visits, medical care (including individual and group therapy), school, and law library. The Warden or designee may authorize prisoners on toplock to go to the dining room, work assignments, and/or other specified activities, including group religious services; prisoners not released from toplock for store and Securepak orders shall have store and Securepak orders delivered to them. Prisoners on toplock shall have a minimum of one hour per day of out-of-cell activity, which may include all out-of-cell activities authorized by this paragraph.

LOSS OF PRIVILEGES

PPP. Attachment E identifies those privileges that may be lost by a prisoner as a result of a loss of privileges sanction. Unless the hearing officer identifies specific privileges to be lost, a loss of privileges sanction includes all privileges identified in Attachment E. If all privileges are lost, the hearing officer need only identify the number of days and dates during which the sanction will run.

YARD PRIVILEGES WHILE SERVING A SANCTION

QQQ. A prisoner serving a sanction of detention, toplock, loss of privileges, or any combination of these sanctions, shall not be deprived of yard for more than 30 consecutive days without being provided a seven - day break during which the prisoner shall be given the opportunity for yard consistent with his/her status (i.e., one hour per day in general population; one hour per day, five days per week, in segregation). However, yard privileges for all segregation prisoners are subject to restriction by written order of the Warden or Deputy Warden as set forth in PD 04.05.120 "Segregation Standards".

WAIVER OF SANCTIONS BY WARDEN

RRR. The Warden may waive all or any part of a sanction period that has not been served by a prisoner. If the prisoner is being reclassified to general population, including for placement in any Residential Mental Health Treatment program, all of the remaining detention sanction must be waived; it cannot be waived in part. The excused sanction periods shall be documented in writing by the Warden and placed in the prisoner's Record Office and Counselor files, as appropriate. An excused sanction may not be reinstated in whole or in part at a later date.

MISCONDUCT APPEALS/REQUEST FOR REHEARING

CLASS I MISCONDUCT APPEALS

SSS. If the prisoner or Warden disagrees with the results of a Class I misconduct hearing, s/he may submit a Request for Rehearing to the Hearings Administrator; no other staff may request a rehearing from the

Administrator. The request must be submitted using a Request for Rehearing (CSJ-418) within 30 calendar days after a copy of the Class I Misconduct Hearing Report is received. The Request for Rehearing form shall be available to prisoners upon request from the hearing officer or housing unit staff. A copy of the Misconduct Report and Class I Misconduct Hearing Report being appealed shall be attached to the Request for Rehearing when submitted.

TTT. Generally, a Request for Rehearing will be decided within 30 calendar days after receipt of a properly completed Request for Rehearing form. A rehearing may be ordered by the Hearings Administrator in response to a Request for Rehearing or on her/his own motion. In accordance with MCL 791.254, a rehearing shall be ordered if any of the following are found to have occurred:

1. The record of testimony made at the hearing is inadequate for judicial review.

2. The hearing was not conducted pursuant to applicable statutes or policies and rules of the Department and departure from the statute, rule, or policy resulted in material prejudice to either party.

3. The prisoner's due process rights were violated.

4. The decision of the LARA hearing officer is not supported by competent, material, and substantial evidence on the record as a whole.

5. The LARA hearing officer was personally biased in favor of either party.

CLASS II AND III MISCONDUCT APPEALS

UUU. A prisoner who is found guilty of a Class II misconduct may file an appeal of the facility hearing officer's decision to the Deputy Warden. A Class II and Class III Misconduct Appeal form (CSJ-274) shall be used for this purpose. The appeal must be filed within 15 days after receipt of the hearing officer's written decision. If the misconduct charge is combined with a Class I misconduct charge for which the prisoner was found guilty, the prisoner shall instead file a Request for Rehearing as set forth in Paragraph SSS.

VVV. A prisoner who is found guilty of a Class III misconduct may file an appeal of the facility hearing officer's decision to appropriate supervisory level staff as determined by the Warden. A Class II and Class III Misconduct Appeal form (CSJ-274) shall be used for this purpose. The appeal must be filed within 15 calendar days after receipt of the hearing officer's written decision. If the misconduct charge is combined with a Class II misconduct charge for which the prisoner was found guilty, the prisoner shall instead file an appeal as set forth in Paragraph UUU. If the misconduct charge is combined with a Class I misconduct charge for which the prisoner was found guilty, the prisoner shall instead file a Request for Rehearing as set forth in Paragraph SSS.

WWW. A response shall be provided in writing to an appeal filed pursuant to Paragraph UUU or VVV within 30 calendar days after receipt of the appeal. The hearing officer's decision shall be reversed, and a rehearing may be ordered, if any of the following are found to have occurred:

1. The hearing was not conducted pursuant to Department policies and procedures and the departure from policy and procedure resulted in material prejudice to the prisoner.

2. The prisoner's due process rights were violated.

3. The decision of the hearing officer is not supported by the evidence on the record.

XXX. The Warden may reverse a hearing officer's decision, and may order a rehearing, on his or her own initiative for any of the reasons set forth in Paragraph WWW.

ENTRY ON DATABASE

YYY. The Warden of the institution where the hearing is conducted shall ensure that all Class I and Class II misconduct hearing results are entered onto the Department's computerized database (e.g., CMIS; OMNI). Guilty findings shall be entered within one business day after the hearing.

ZZZ. If all Class I or Class II charges on a Misconduct Report result in a not guilty or dismissed finding, or if all charges are reduced to Class III violations, the hearing results shall be entered into the Department's computerized database for research and statistical reporting purposes only. Except for designated staff in the Office of Legal Affairs and other staff authorized by the Administrator of the Office of Legal Affairs, the results shall not be accessible by users of the computerized database. After entry and auditing of this information, the Hearing Reports used for entry shall be destroyed.

OTHER ACTIONS RESULTING FROM MISCONDUCT

AAAA. A prisoner cannot earn good time or disciplinary credits during any month in which s/he engaged in behavior for which s/he is subsequently found guilty of a Class I misconduct. In addition, the Warden may forfeit all or a portion of the prisoner's earned good time or disciplinary credits due to the guilty finding as set forth in PD 03.01.100 "Good Time Credits" and PD 03.01.101 "Disciplinary Credits".

BBBB. A prisoner who is serving a sentence subject to disciplinary time who is found guilty of a Class I misconduct violation shall accumulate disciplinary time on that sentence as set forth in PD 03.01.105 "Disciplinary Time".

CCCC. Each prisoner who is found guilty of a non-bondable Class I misconduct shall be reviewed by the Security Classification Committee to ensure the prisoner is still at the appropriate security level. Each prisoner also shall be reviewed by appropriate staff to determine if the prisoner's assaultive or property risk classifications have changed.

DDDD. A prisoner may be reclassified to administrative segregation based solely on a Class I misconduct guilty finding without a separate hearing being conducted, consistent with PD 04.05.120 "Segregation Standards". A prisoner may be reclassified to administrative segregation based on the behavior underlying the Class II misconduct for which the prisoner was found guilty only if a separate hearing is conducted pursuant to PD 04.05.120.

EEEE. A prisoner who is found guilty of misconduct may be referred to other appropriate staff or services, such as for psychological or psychiatric evaluation, counseling, program reclassification, or security reclassification. Class I and II misconduct guilty findings, however, shall be used to determine the appropriate security classification of a prisoner.

PROCEDURES

FFFF. Wardens shall ensure that procedures are developed as necessary to implement requirements set forth in this policy directive; this shall be completed within 60 calendar days after the effective date of the policy directive. This requirement includes ensuring that their existing procedures are revised or rescinded, as appropriate, if inconsistent with policy requirements or no longer needed. Facility procedures shall not conflict with operating procedures issued by the Director.

AUDIT ELEMENTS

GGGG. A Primary Audit Elements List has been developed and is available on the Department's Document Access System to assist with self audit of this policy, pursuant to PD 01.05.100 "Self Audit of Policies and Procedures".

ATTACHMENTS

HHHH. This policy directive contains the following attachments:

1. Attachment A - Class I Misconducts
2. Attachment B - Class II Misconducts
3. Attachment C - Class III Misconducts
4. Attachment D - Disciplinary Sanctions
5. Attachment E - Loss of Privileges

APPROVED: DHH 04/06/12

ATTACHMENT A

CLASS I MISCONDUCTS

CODES (Used Only by Hearing Officers for Reporting Purposes)	CLASS I RULE VIOLATIONS (Including Attempt, Accomplice to, and Conspiracy to Commit)	COMMON EXAMPLES
007 (Prisoner victim) 008 (Staff victim) 009 (Other victim)	* Assault and Battery Intentional, non-consensual touching of another person done either in anger or with the purpose of abusing or injuring another; physical resistance or physical interference with an employee. Injury is not necessary but contact is.	Throwing urine or feces or spitting on another person; physically resisting staff efforts to apply restraints. (NOTE: The victim of an assault and battery should not be charged with a violation of this rule.)
003 (Prisoner victim) 004 (Staff victim) 005 (Other victim)	Assault Resulting in Serious Physical Injury * Physical attack on another person which resulted or was intended to result in serious physical injury. Serious physical injury means any injury which would ordinarily require medical treatment.	Attack using a knife, club, or other weapon; assault involving use of closed fists, kicking.
001 (Escape from Level I) 050 (Escape from secure facility)	Escape * Leaving or failing to return to lawful custody without authorization; failure to remain within authorized time or location limits while on a public works crew.	Leaving from hospital trip or while housed at hospital.
017	* Failure to Disperse Failure or refusal of a prisoner to leave an area in which a disturbance is occurring when the prisoner is physically able to leave; includes obstruction of staff at the scene of the disturbance. Disturbance is defined as a fight between prisoners, subduing or taking into custody of a prisoner or prisoners by staff, destruction of property, or any similar action or occurrence.	Preventing a staff member from coming to the aid of other staff; remaining at the scene of a fight to observe or offer encouragement to combatants; blocking staff who are removing a prisoner from an area.
002	Felony Any act that would be a felony under state law is also a Class I misconduct violation. Reference shall be made to the specific statutory citation in all cases where this charge is alleged.	Breaking and entering - MCL 750.110. (NOTE: Use this charge only if there is no other specific violation which is applicable.)
014	* Fighting Physical confrontation between two or more persons, including a swing and miss, done in anger or with intent to injure.	Fights between prisoners, whether with fists, broom handles, or other weapons.
010	* Homicide Causing the death of another person by any	

of a sexual nature)		location or manner where such exposure has no legitimate purpose; imitating the appearance of the opposite sex; words or actions of a sexual nature directed at another person in order to harass or degrade that person.	(NOTE: Threats of sexual assault should be charged as Threatening Behavior.)
045	*	Smuggling Bringing or attempting to bring any unauthorized item into or out of a correctional facility or a specialized area or unit within a facility such as segregation.	Receiving jewelry, shoes, etc. during a visit.
034 (Alcohol) 039 (Marijuana) 040 (Heroin/morphine) 041 (Cocaine) 042 (Other substance) 043 (Drug test refusal) 044 (Narcotics paraphernalia) 046 (Tobacco product)		Substance Abuse Possession, use, selling, or providing to others, or being under the influence of, any intoxicant; inhalant, controlled substance (as defined by Michigan statutes), alcoholic beverages, marijuana or any other substance which is used to cause a condition of intoxication, euphoria, excitement, exhilaration, stupefaction, or dulling of the senses or nervous system; unauthorized possession or use of prescribed or restricted medication; possession of narcotics paraphernalia; failure or refusal to voluntarily submit to substance abuse testing which is requested by the Department for the purpose of determining the presence in the prisoner of any substance included in this charge; possession of a tobacco product.	Narcotics paraphernalia includes such items as marijuana and "crack" pipes, needles and syringes which are used to administer narcotics, but does not include such items as "roach clips" and cigarette papers; failure to return prescribed or restricted medication after its authorization date has expired.
012	*	Threatening Behavior Words, actions, or other behavior which expresses an intent to injure or physically abuse another person. Such misconduct includes attempted assault and battery.	Threat of sexual assault made by one prisoner to another prisoner; writing threatening letter to another person; threat made to a third person.

* Nonbondable Charge

NOTE: A Class II misconduct that occurred during or in connection with a visit shall be elevated to a Class I misconduct at the time of review. Any other Class II misconduct may be elevated to a Class I misconduct by the reviewing officer based on the seriousness of the specific facts as stated in the misconduct or the circumstances of the misconduct. If elevated, the hearing officer shall change the first digit of the misconduct code from a "4" to a "0" (for example, 420 changed to 020 if elevated).

		Advocating or instigating actions which are intended to seriously endanger the physical safety of the facility, persons, or property or to disrupt the operation of the facility by group cessation of normal activity; participation in such action; joining others in unauthorized work stoppage.	group action to injure staff, destroy property, or disrupt normal operations; refusal of prisoners as a group to leave the yard when instructed by staff to do so.
030	*	Possession of Dangerous Contraband Unauthorized possession of an explosive, acid, caustic, toxin, material for incendiary device; any escape material; bodily fluid stored in a container within a cell or room; tattoo device; cell phone or other electronic communication device or accessory; a critical or dangerous tool or other item needing to be strictly controlled as specifically identified in the attachments to PD 04.04.120 "Tool Control," including failure to return any item covered by the definition which is signed out for a work or school assignment or any other purpose.	Unauthorized possession of gasoline, lighter, matches, toilet bowl cleaner; any escape material which includes but is not limited to rope, grappling hook, documents depicting, encouraging, or describing methods of escape from a correctional facility; blueprints, drawings, or similar detailed descriptions of correctional facilities, courthouses, and medical care facilities; detailed roadmaps of Michigan, any state contiguous to Michigan, or the province of Ontario, Canada, etc.; screwdriver, hammer, or cell phone battery or charger. (NOTE: Possession of any item covered by this definition with the intent to cause physical injury should be charged as Possession of a Weapon).
029	*	Possession of Weapon Unauthorized possession of any item designed or intended to be used to cause or threaten physical injury to another person; unauthorized possession of piece, strip, or chunk of any hard material which could be used as a weapon or in the creation of a weapon.	Possession of a prison-made knife, club, or any item fashioned or intended as a weapon; possession of a rock.
013 (Prisoner victim; sexual acts) 051 (Prisoner victim; abusive sexual contact) 052 (Staff victim) 053 (Other victim)	*	Sexual Assault Non-consensual sexual acts, meaning sexual penetration of, or sexual contact with, another person without that person's consent or with a person who is unable to consent or refuse; abusive sexual contact, meaning physical contact with another person for sexual purposes without that person's consent or with a person who is unable to consent or refuse.	Rape; intentional touching of sexual area (e.g. buttocks, breasts, genitals) without consent; kissing or embracing without consent of one who is kissed or embraced.
033 (Prisoner/prisoner contact) 054 (Prisoner/other contact) 055 (Exposure) 056 (Imitating appearance) 057 (Words/actions of a sexual nature)		Sexual Misconduct Consensual touching of the sexual or other parts of the body of another person for the purpose of gratifying the sexual desire of either party, except that an embrace of a visitor at the beginning and end of a visit, or holding hands with a visitor during a visit is not sexual misconduct; intentional exposure of the sexual organs to another person in a location or manner where such exposure has no	Kissing, hugging, intercourse, or sodomy; exposure of sexual organs when prisoner knows staff will be making rounds; wearing clothing of the opposite sex; wearing of makeup by male prisoners; whistling at and making sexual remarks to another person; making propositions of a sexual nature. (NOTE: Threats of sexual assault

		means.	
022	*	Incite to Riot or Strike; Rioting or Striking Advocating or instigating actions which are intended to seriously endanger the physical safety of the facility, persons, or property or to disrupt the operation of the facility by group cessation of normal activity; participation in such action; joining others in unauthorized work stoppage.	Encouraging other prisoners to take group action to injure staff, destroy property, or disrupt normal operations; refusal of prisoners as a group to leave the yard when instructed by staff to do so.
030	*	Possession of Dangerous Contraband Unauthorized possession of an explosive, acid, caustic, toxin, material for incendiary device; escape material; detailed road map for any area within the State of Michigan, adjacent state or Ontario, Canada; bodily fluid stored in a container within a cell or room; tattoo device; cell phone or other electronic communication device or accessory; a critical or dangerous tool or other item needing to be strictly controlled as specifically identified in the attachments to PD 04.04.120 "Tool Control", including failure to return any item covered by the definition which is signed out for a work or school assignment or any other purpose.	Unauthorized possession of gasoline, lighter, matches, toilet bowl cleaner, rope, and grappling hook, screwdriver, hammer, or cell phone battery or charger. (NOTE: Possession of any item covered by this definition with the intent to cause physical injury should be charged as Possession of a Weapon.)
029	*	Possession of Weapon Unauthorized possession of any item designed or intended to be used to cause or threaten physical injury to another person; unauthorized possession of piece, strip, or chunk of any hard material which could be used as a weapon or in the creation of a weapon.	Possession of a prison-made knife, club, or any item fashioned or intended as a weapon; possession of a rock.
013 (Prisoner victim; sexual acts) 051 (Prisoner victim; abusive sexual contact) 052 (Staff victim) 053 (Other victim)	*	Sexual Assault Non-consensual sexual acts, meaning sexual penetration of, or sexual contact with, another person without that person's consent or with a person who is unable to consent or refuse; abusive sexual contact, meaning physical contact with another person for sexual purposes without that person's consent or with a person who is unable to consent or refuse.	Rape; intentional touching of sexual area (e.g., buttocks, breasts, genitals) without consent; kissing or embracing without consent of one who is kissed or embraced.
033 (Prisoner/prisoner contact) 054 (Prisoner/other-contact) 055 (Exposure) 056 (Imitating appearance) 057 (Words/actions		Sexual Misconduct Consensual touching of the sexual or other parts of the body of another person for the purpose of gratifying the sexual desire of either party, except that an embrace of a visitor at the beginning and end of a visit, or holding hands with a visitor during a visit is not sexual misconduct; intentional exposure of the sexual organs to another person in a	Kissing, hugging, intercourse, or sodomy; exposure of sexual organs when prisoner knows staff will be making rounds; wearing clothing of the opposite sex; wearing of makeup by male prisoners; whistling at and making sexual remarks to another person; making propositions of a sexual nature.

ATTACHMENT B

CLASS II MISCONDUCTS

CODES (Used Only by Hearing Investigators for Reporting Purposes.)	CLASS II VIOLATIONS (Including Attempt, Accomplice to, and Conspiracy to Commit)	COMMON EXAMPLES
424	Bribery of an Employee Offering to give or withhold anything to persuade an employee to neglect duties or perform favors.	
432	Creating a Disturbance Actions or words of a prisoner which result in disruption or disturbance among others but which does not endanger persons or property.	
427	Destruction or Misuse of Property Any destruction, removal, alteration, tampering, or other unauthorized use of property; unauthorized possession of a component part of an item.	Tampering with locking device; use of a door plug; destruction of property belonging to another person; unauthorized use of a telephone or using another prisoner's Personal Identification Number (PIN) to make a telephone call; possession of television or tape player parts.
420	Disobeying a Direct Order (DDO) Refusal or failure to follow a valid and reasonable order of an employee.	Refusal to submit to a shakedown; fleeing from staff after being directed to stop.
438	Gambling; Possession of Gambling Paraphernalia Playing games or making bets for money or anything of value; possession of gambling equipment, or other materials commonly associated with and intended for wagering.	Possession of dice, betting slips, point spreads, items used as counters in a card game, and similar items.
426	Insolence Words, actions, or other behavior which is intended to harass, degrade, or cause alarm in an employee.	Using abusive language to refer to an employee; writing about or gesturing to an employee in a derogatory manner.
423	Interference with the Administration of Rules Acts intending to impede, disrupt, or mislead the disciplinary process for staff or prisoners, including failure to comply with a loss of privileges sanction imposed as a result of a misconduct guilty finding.	Intimidating or tampering with a witness; tampering with evidence; interfering with an employee writing a misconduct report; breaking toplock without authorization; making false accusations of misconduct against another prisoner or staff which results in disciplinary action being initiated

		against the person. (NOTE: If written as result of a grievance, it must be shown that prisoner knew allegation was false when s/he made it and intentionally filed a false grievance. Ordinarily, the statement of staff member refuting the claim will not be sufficient.)
436	Out of Place Being within the lawful boundaries of confinement and not attempting to escape, but in a location without the proper authorization to be there; absent from where one is required to be; being outside assigned housing unit without prisoner identification card; being absent from required location during count.	"Skating" in another block; no pass; no I.D. card; failure to be where required by call-out or detail; failure to remain on own bunk or other location as designated by facility rules during count. (NOTE: "Skating" in own housing unit during the day is a Class III misconduct unless on toplock.)
421	Possession of Forged Documents; Forgery Knowingly possessing a falsified or altered document; altering or falsifying a document with the intent to deceive or defraud; unauthorized possession or use of the identification card, prisoner store card, pass, or detail of another prisoner.	A fake pass, application, etc. which is represented to be true; unauthorized alteration or removal of metered mail stamp; unauthorized alteration of metered envelope.
431	Possession of Money Possession of money or money from unauthorized sources. Money is defined as cash, negotiable instrument, credit card, or blank check.	Arranging to obtain money from another prisoner or from a family member or friend of another prisoner.
437	Possession of Stolen Property; Theft Possession of property which the prisoner knows, or should have known, has been stolen; any unauthorized taking of property which belongs to another.	
435	Unauthorized Occupation of Cell or Room Being in another prisoner or prisoners' cell or room, or clearly defined living area, without specific authorization from staff; being present in any cell, room, or other walled area with another prisoner or prisoners or a member or members of the public without staff authorization.	Two prisoners in a "one-person" cell; being in a room, cell, bay, cubicle, or other area to which the prisoner is not assigned; two prisoners in a restroom stall.

NOTE: A Class II misconduct that occurred during or in connection with a visit shall be elevated to a Class I misconduct at the time of review. Any other Class II misconduct may be elevated to a Class I misconduct by the reviewing officer based on the seriousness of the specific facts as stated in the misconduct or the circumstances of the misconduct. If elevated, the first digit of the misconduct code shall be changed from a "4" to a "0"; e.g., 420 changed to 020 if elevated.

ATTACHMENT C

CLASS III MISCONDUCTS

(All are coded 049)	CLASS III VIOLATIONS (Including Attempt, Accomplice to, and Conspiracy to Commit)	COMMON EXAMPLES
	Abuse of Privileges Intentional violation of any Department or institution regulation dealing with prisoner privileges unless it is specified elsewhere as a Class I or II misconduct.	
	Contraband Possession or use of non-dangerous property which a prisoner has no authorization to have, but there is no suspicion of theft or fraud.	Possession of unauthorized items or anything with someone else's name or number on it; having excessive store items.
	Excessive Noise Creation of sound, whether by use of human voice, a radio, TV, or any other means, at a level which could disturb others.	Playing TV or radio above allowable level; banging objects against cell bars.
	Health, Safety, or Fire Hazard Creating a health, safety, or fire hazard by act or omission.	Dirty cell; lack of personal hygiene.
	Horseplay Any physical contact, or attempted physical contact, between two or more persons done in a prankish or playful manner without anger or intent to injure or intimidate.	Towel snapping at others in showers; playful body punching.
	Lying to an Employee Knowingly providing false information to an employee.	Giving a false name, number, or room/cell assignment. (NOTE: making false accusations of misconduct is included under the Class II violation of Interference with Administration of Rules.)
	Temporary Out of Place/Bounds In own housing unit during the day; out of place for a brief time or adjacent to where supposed to be.	
	Unauthorized Communications Any contact, by letter or gesture or verbally, with an unauthorized person or in an unauthorized manner.	Love letters to another prisoner; passing property on a visit either directly or through a third person.
	Violation of Posted Rules Violation of rules of housing units, dining room, work, or school assignment which is not covered elsewhere.	Violation of kitchen sanitary regulations; wasting food; excessive noise in housing unit, playing TV or radio without earphone.

ATTACHMENT D

DISCIPLINARY SANCTIONS

Sanctions for Class I Misconduct

The hearing officer shall impose one or more of the following sanctions upon a finding of guilt with the maximum reserved for only the most serious or persistent violators.

A. Detention (punitive segregation), not to exceed 10 days for each violation or 20 days for all violations arising from a single incident.

B. Toplock, not to exceed 30 days for each violation, but not to be combined with a detention sentence.

C. Loss of privileges, not to exceed 30 days for each violation or 60 days for all violations arising from a single incident.

D. Restitution and/or disgorgement of funds/ill-gotten gains.

Sanctions for Class II Misconduct

The hearing officer to conduct Class II hearings shall impose one or more of the following sanctions upon a finding of guilt with the maximum reserved for only the most serious or persistent violators:

A. Toplock (confinement to quarters), not to exceed five days for all violations arising from a single incident.

B. Loss of privileges, not to exceed 30 days for all violations arising from a single incident.

C. Assignment of extra duty, not to exceed 40 hours for all violations arising from a single incident.

D. Restitution and/or disgorgement of funds/ill-gotten gains.

Sanctions for Class III Misconduct

The hearing officer shall impose one or more of the following sanctions upon a finding of guilt, with the maximum reserved for only the most serious or persistent violators:

A. Toplock (confinement to quarters), not to exceed five days for all violations arising from a single incident.

B. Loss of privileges, not to exceed 15 days for all violations arising from a single incident.

C. Assignment of extra duty, not to exceed 20 hours for all violations arising from a single incident.

D. Counseling and reprimand.

APPROVED: DHH 03/31/14

ATTACHMENT E

LOSS OF PRIVILEGES SANCTION

Unless the hearing officer identifies specific privileges to be lost, all of the following privileges will be lost by a prisoner as a result of a "loss of privileges" sanction:

A. Day room, activity room, TV room, study room, or other designated area where similar activities occur.

B. Exercise facilities, such as yard, gym, and weight room/pit.

C. Group meetings, such as Bible class and Jaycees, but not including primary religious worship service; this does not apply to group therapy.

D. Out-of cell hobbycraft activities.

E. Kitchen area, including microwave, ice machine, and hot water dispenser.

F. Direct access to general library (not law library; prisoners in segregation shall continue to have books delivered to them consistent with PD 04.05.120 "Segregation Standards").

G. Movies.

H. Music practice; musical instruments.

I. Radio, tape player, television, and portable media player as set forth in facility procedures.

J. Leisure time activities offered pursuant to PD 05.03.104 "Leisure Time Activities", except as approved by Warden or designee.

K. Telephone, except calls to the Office of Legislative Corrections Ombudsman and to return calls from an attorney upon request of the attorney.

L. Visiting. This applies only if hearing officer identified in the hearing report that the misconduct occurred in connection with a visit, and only with the visitor named in the hearing report.

M. Use of kiosk (e.g., to send/receive electronic messages or retrieve account information).

APPENDIX J

2015 Prison Revised Dangerous Contraband Rule
(Policy Directive 03.03.105)

New Rule 1

		Advocating or instigating actions which are intended to seriously endanger the physical safety of the facility, persons, or property or to disrupt the operation of the facility by group cessation of normal activity; participation in such action; joining others in unauthorized work stoppage.	group action to injure staff, destroy property, or disrupt normal operations; refusal of prisoners as a group to leave the yard when instructed by staff to do so.
030		Possession of Dangerous Contraband Unauthorized possession of an explosive, acid, caustic, toxin, material for incendiary device; any escape material; bodily fluid stored in a container within a cell or room; tattoo device; cell phone or other electronic communication device or accessory; a critical or dangerous tool or other item needing to be strictly controlled as specifically identified in the attachments to PD 04.04.120 "Tool Control," including failure to return any item covered by the definition which is signed out for a work or school assignment or any other purpose.	Unauthorized possession of gasoline, lighter, matches, toilet bowl cleaner; any escape material which includes but is not limited to rope, grappling hook, documents depicting, encouraging, or describing methods of escape from a correctional facility; blueprints, drawings, or similar detailed descriptions of correctional facilities, courthouses, and medical care facilities; detailed roadmaps of Michigan, any state contiguous to Michigan, or the province of Ontario, Canada, etc.; screwdriver, hammer, or cell phone battery or charger. (NOTE: Possession of any item covered by this definition with the intent to cause physical injury should be charged as Possession of a Weapon).
029	*	Possession of Weapon Unauthorized possession of any item designed or intended to be used to cause or threaten physical injury to another person; unauthorized possession of piece, strip, or chunk of any hard material which could be used as a weapon or in the creation of a weapon.	Possession of a prison-made knife, club, or any item fashioned or intended as a weapon; possession of a rock.
013 (Prisoner victim; sexual acts) 051 (Prisoner victim; abusive sexual contact) 052 (Staff victim) 053 (Other victim)	*	Sexual Assault Non-consensual sexual acts, meaning sexual penetration of, or sexual contact with, another person without that person's consent or with a person who is unable to consent or refuse; abusive sexual contact, meaning physical contact with another person for sexual purposes without that person's consent or with a person who is unable to consent or refuse.	Rape; intentional touching of sexual area (e.g. buttocks, breasts, genitals) without consent; kissing or embracing without consent of one who is kissed or embraced.
033 (Prisoner/prisoner contact) 054 (Prisoner/other contact) 055 (Exposure) 056 (Imitating appearance) 057 (Words/actions of a sexual nature)		Sexual Misconduct Consensual touching of the sexual or other parts of the body of another person for the purpose of gratifying the sexual desire of either party, except that an embrace of a visitor at the beginning and end of a visit, or holding hands with a visitor during a visit is not sexual misconduct; intentional exposure of the sexual organs to another person in a location or manner where such exposure has no	Kissing, hugging, intercourse, or sodomy; exposure of sexual organs when prisoner knows staff will be making rounds; wearing clothing of the opposite sex; wearing of makeup by male prisoners; whistling at and making sexual remarks to another person; making propositions of a sexual nature. (NOTE: Threats of sexual assault

APPENDIX K

2014 Prisoner Mail Policy Directive (Policy Directive 05.03.118)

MICHIGAN DEPARTMENT OF CORRECTIONS **POLICY DIRECTIVE**	EFFECTIVE DATE 09/14/09	NUMBER 05.03.118
SUBJECT PRISONER MAIL	SUPERSEDES 05.03.118 (01/01/06)	
	AUTHORITY MCL 791.203, 800.43; Administrative Rules 791.6603; 791.6605	
	ACA STANDARDS 4-4266; 4-4275; 4-4487 through 4-4496; 1-ABC-5D-01 through 10; 2-CO-5D-01; 3-ACRS-5C-01 through 10	
	PAGE 1 OF 12	

POLICY STATEMENT:

Mail to and from prisoners in a Correctional Facilities Administration (CFA) or Field Operations Administration (FOA) facility, and electronic messages received through the Department's approved vendor, shall be processed as set forth in this policy.

RELATED POLICIES:

04.02.105	Prisoner Funds
04.02.120	Indigent Prisoners
04.07.112	Prisoner Personal Property

POLICY:

DEFINITION

A. Mail - Any written, typed, or printed communication of information, including magazines, catalogs, books, and photographs. Stamps, stickers, and similar items do not communicate information and thus are not considered mail for purposes of this policy even if delivered through the mail. Electronic messages received through the Department's approved vendor also are not considered mail for purposes of this policy.

GENERAL INFORMATION

B. Where in conflict with this policy, PD 05.01.142 "Special Alternative Incarceration Program" controls for prisoners in the Special Alternative Incarceration Program (SAI).

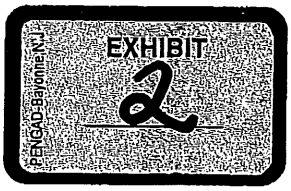
C. For purposes of this policy, "prisoner" includes parolees in a Residential Reentry Program facility.

D. Prisoners shall be permitted to send and receive uncensored mail to or from any person or organization unless the mail violates this policy or Administrative Rule 791.6603. Mail shall not be prohibited solely because its content is religious, philosophical, political, social, sexual, unpopular, or repugnant. However, mail shall be prohibited if it is a threat to the security, good order, or discipline of the facility, may facilitate or encourage criminal activity, or may interfere with the rehabilitation of the prisoner. This includes the following:

1. Mail violating federal or state law.

2. Mail violating postal regulations.

3. Mail containing physical contraband, which is defined as any property that a prisoner is not specifically authorized to possess or that is from an unauthorized source. This includes postage stamps, except that a prisoner may receive a single stamped self-addressed envelope from an attorney, a court, or a legitimate religious organization.



4. Mail containing a criminal plan or conspiracy.

5. Mail containing threats.

6. Mail addressed to anyone who has objected to receiving mail from the prisoner sending the mail. This only applies after the prisoner has been notified of the objection. A prisoner who continues to send mail to a person who has objected to receiving mail from that prisoner after receiving notice of the objection also may be subject to discipline in accordance with PD 03.03.105 "Prisoner Discipline".

7. Mail for the purpose of operating a business enterprise while within the facility.

E. Prior to rejecting mail for violation of this policy, the prisoner is entitled to a fact-finding hearing conducted pursuant to Administrative Rule 791.3310 unless otherwise specifically stated in this policy.

F. Law enforcement officials shall be contacted immediately through the appropriate chain of command if mail addressed to or sent by a prisoner contains evidence of illegal activity. Upon request of a law enforcement official and approval of the facility head, notices required to be issued and hearings required to be conducted pursuant to this policy may be delayed for a reasonable length of time to allow for a criminal investigation.

WRITING MATERIALS AND POSTAGE

G. Each CFA facility shall have available a reasonable quantity of free writing materials (i.e., pencils or pens; paper) for use by prisoners. Paper provided free to a prisoner does not need to be lined or of typing quality. Funds to purchase standard-size envelopes (e.g., 3 5/8" x 6 1/2"; 4 1/8" x 9 1/2") also shall be loaned to prisoners eligible to receive a postage loan under this section if the prisoner does not have, or does not have the funds to purchase, an envelope.

H. Additional writing materials, including typing paper for legal work, carbon paper, and metered envelopes, shall be available for prisoner purchase in CFA facilities as set forth in PD 04.02.130 "Prisoner Store". Funds to purchase a reasonable quantity of carbon paper and to purchase over-sized envelopes of a sufficient size to mail legal materials (e.g., 10" x 15"; 15" x 20") to a court, an attorney, or a party to a lawsuit due to pending litigation, including the initial filing and service of a lawsuit, shall be loaned to a prisoner who lacks sufficient funds to purchase such items in the prisoner store upon demonstrated proof by the prisoner that the items are for litigation. In CFA, the funds shall be loaned by the Prisoner Benefit Fund (PBF). The cost of envelopes and carbon paper provided shall be considered an institutional debt and collected as set forth in PD 04.02.105 "Prisoner Funds". Funds collected to repay a loan from a PBF shall be returned to that PBF.

I. A prisoner on indigent status pursuant to PD 04.02.120 "Indigent Prisoners" shall be loaned funds for postage as set forth in that policy.

J. Funds for additional first class postage shall be loaned to prisoners who lack sufficient funds to send mail to a court, an attorney, or a party to a lawsuit due to pending litigation. This includes the initial filing and service of a lawsuit. The cost of certified mail shall be loaned only if the prisoner is required by court order to use certified mail (e.g., an order denying the prisoner's motion for substituted service by first class mail.) Postage shall be loaned to prisoners on indigent status pursuant to this paragraph only after the prisoner has used all postage available pursuant to Paragraph I.

K. Funds for additional first class postage also shall be loaned to prisoners who lack sufficient funds to mail a grievance to another facility or to mail a Step III grievance or a Request for Rehearing to Central Office. Funds shall be loaned for these purposes only if there is not a Department of Management and Budget (DMB) interdepartment mail run available and the mail must be posted before the prisoner will receive postage pursuant to Paragraph I.

L. A prisoner requesting a postage loan pursuant to Paragraph J or K may be required to present the mail unsealed to staff to verify that it qualifies for the loan. In such cases, staff shall read only those sections of the mail that are necessary to make this determination; the mail shall not be read in its entirety. In CFA, the cost of any postage or envelopes loaned to the prisoner shall be borne by the PBF. Any funds loaned for postage or envelopes shall be treated as an institutional debt and collected as set forth in PD 04.02.105 "Prisoner Funds". Funds collected to repay a loan from a PBF shall be returned to that PBF.

M. Prisoners shall not be loaned postage for any reason other than as set forth above.

PRISONER OUTGOING MAIL

N. Each facility shall offer prisoners outgoing mail service through the U. S. Postal Service. The facility also may offer outgoing mail service for oversize or overweight mail, including packages, through a legitimate alternate carrier. Except as set forth in Paragraphs I through L, prisoners shall be required to pay the cost of postage for any mail service used.

O. A prisoner in a CFA facility shall be permitted to send air, certified and foreign mail, and mail that weighs more than two ounces, via disbursement. Mail that a prisoner is sending via disbursement that is clearly identified as being to a court, an attorney, or a party to a lawsuit due to pending litigation, including the initial filing and service of a lawsuit, shall be processed as soon as possible. This includes mail being sent via disbursement to a court, an attorney, or a party to a lawsuit pursuant to Paragraph I or J. An expedited process for such mail shall be established by the CFA Deputy Director; the expedited process also shall be available to prisoners to send mail to a court or court reporter to request a transcript of the prisoner's court proceeding and to legal service organizations (e.g., American Civil Liberties Union, State Appellate Defender Office, Michigan Appellate Assigned Counsel System). The prisoner may be required to present the mail unsealed to staff to verify that it qualifies for expedited handling. In such cases, staff shall read only those sections of the mail that are necessary to make this determination; the mail shall not be read in its entirety.

P. Prisoners may use DMB interdepartment mail runs, in facilities where such service is available, to send postage-free mail to staff in other facilities serviced by interdepartment mail runs and to Central Office. DMB interdepartment mail runs shall not be used by prisoners for any other purpose. Mail designated for delivery through a DMB interdepartment mail run in violation of this policy shall be returned to the prisoner and not processed for mailing.

Q. There is no limit on the amount of outgoing mail a prisoner may send, except that prisoners in a CFA facility are allowed to purchase and possess metered envelopes only in the quantities set forth in PD 04.07.112 "Prisoner Personal Property" and OP CFA 04.02.130 "Purchase of Metered Envelopes". Outgoing mail must contain the prisoner's first and last name and identification number, and the name and address of the facility at which the prisoner is housed as the return address, on the envelope. Envelopes pre-printed with the name and address of a facility shall be corrected as necessary when mailed from a different facility. The envelope shall not be considered altered solely due to the prisoner correcting this information. The correct information also may be stamped or written on the envelope by staff prior to mailing. Mail which does not contain at least the prisoner's name and identification number may be destroyed.

R. General population prisoners, including prisoners in Field Operations Administration (FOA) facilities, and prisoners in protective segregation shall be permitted to send sealed mail, subject to Paragraphs D, L, O, S, T and U. Outgoing mail of prisoners in any form of segregation other than protective segregation shall not be sealed and shall be inspected by staff prior to mailing. However, mail that is clearly identified as being sent to the business address of one of the following may be sealed by the prisoner and shall not be opened or otherwise inspected by staff prior to mailing, unless the entity has specifically objected in writing to receiving mail from the prisoner sending the mail, and subject to Paragraphs D, L, O, S, T and U:

1. A licensed attorney; this includes the Attorney General, an assistant attorney general, a prosecuting attorney, and an attorney of a legitimate legal service organization (e.g., American Civil Liberties Union, State Appellate Defender Office, Michigan Appellate Assigned Counsel System).

2. State or federal courts.

3. Federal, state, or local public officials.

4. The Director or any other Central Office staff.

5. Staff at the institution in which the prisoner is segregated.

6. Representatives of the news media, being persons who are primarily employed to gather or report news for any of the following:

   a. A newspaper of general circulation in the community in which it publishes;

   b. A magazine of statewide or national circulation that is sold at newsstands or by mail to the general public;

   c. A radio or television station which is licensed by the Federal Communications Commission.

S. Outgoing mail of <u>any</u> prisoner may be opened and inspected if it is determined by the facility head or designee that there are reasonable grounds to believe the mail is being sent in violation of Paragraph D. However, mail which is clearly identified as being sent to the business address of one of the following may be sealed by the prisoner and shall not be opened or otherwise inspected by staff prior to mailing, unless the entity has specifically objected in writing to receiving mail from the prisoner sending the mail or as required pursuant to Paragraph L, O or U:

1. A licensed attorney; this includes the Attorney General, an assistant attorney general, a prosecuting attorney, and an attorney of a legitimate legal service organization (e.g., American Civil Liberties Union, State Appellate Defender Office, Michigan Appellate Assigned Counsel System).

2. State or federal courts.

3. Federal, state, or local public officials.

4. The Director or any other Central Office staff.

5. Staff at the institution in which the prisoner is housed.

T. Except as set forth in Paragraph F, if it is determined that a prisoner's outgoing mail may violate Paragraph D of this policy and that the mail therefore will not be sent, the prisoner shall be issued a notice of the alleged violation and a hearing shall be conducted pursuant to Administrative Rule 791.3310. The hearing officer shall not be the person who issued the notice. If a violation is established at the hearing, the mail shall be turned over to law enforcement authorities, if it appears to be in violation of state or federal law, or destroyed.

U. If it is determined that a prisoner's outgoing mail cannot be processed due to insufficient postage, failure of the prisoner to sign a disbursement authorization, or other reason unrelated to the content of the mail, the mail shall be searched in the same manner as incoming mail prior to its return to the prisoner.

ELECTRONIC MESSAGES

V. Family members and other members of the public may transmit messages electronically to a prisoner; however, the electronic messages may be sent only through a vendor approved by the Department. The use of electronic messaging is considered a privilege. Senders are required by the vendor to comply with all of its terms and conditions of use, including not to use the service for fraudulent or other inappropriate purposes. All electronic messages are scanned for suspicious content, recorded, and archived. All electronic messages will be monitored and will not receive any special handling, regardless of sender, even if the message would qualify for special handling if received through the mail.

W. Upon receipt at the facility, electronic messages shall be printed by designated staff, searched, and processed in the same manner as set forth for mail in this policy; however, the written content may be read in its entirety to determine if it violates this policy. All electronic messages that have been determined by the vendor to include suspicious content shall be read in its entirety. An electronic message that is determined to pose a threat to the security, good order, or discipline of the facility, which may facilitate or encourage criminal activity, or which may interfere with the rehabilitation of the prisoner shall be rejected, using the same criteria as set forth in Paragraphs D and MM for mail.

X. Whenever an electronic message is rejected pursuant to Paragraph W, the prisoner to whom the electronic message was intended is not entitled to notice of its rejection or a hearing on the rejection. Designated staff shall notify the sender through the vendor, however, that the electronic message was rejected and therefore will not be delivered, and provide the reason for the rejection. The sender may appeal the rejection in the same manner as set forth for rejected mail in this policy. The printed copy of the rejected message shall be retained for at least fifteen business days after the sender is notified of the rejection; the printed copy shall then be destroyed unless an appeal by the sender is pending or the rejection determination has otherwise been reversed. Although the printed copy is destroyed, the vendor will retain an archived copy.

Y. The Department may block a sender from transmitting electronic messages if the sender has repeatedly sent such messages in violation of this policy or for other reasons as approved by the CFA Deputy Director. The Department may similarly block a prisoner from receipt of electronic messages if such messages have repeatedly been sent to the prisoner in violation of Department policy or for other reasons as approved by the CFA Deputy Director. Notice of the block shall be sent to the sender or prisoner, as appropriate, within a reasonable time after the block is initiated. If blocked, the sender and prisoner may continue to send/receive mail in accordance with this policy. The sender may appeal the block to the Warden.

PRISONER INCOMING MAIL

Z. Staff shall only accept mail that has been delivered from a legitimate commercial carrier (e.g., U. S. Postal Service, United Parcel Service) or through DMB interdepartment mail runs as provided for in this policy. Staff shall not accept mail for prisoners left at the facility by members of the public, including prisoner family members and visitors, except that attorneys may be permitted to deliver legal mail to prisoners pursuant to standards issued by the CFA Deputy Director.

AA. Prisoners shall not be permitted to receive mail identified as being sent "bulk rate" or "pre-sorted standard", as indicated by the U. S. Postal Service marking, unless it was sent from a federal or state agency or a court, is a catalog allowed pursuant to Paragraph DD, is a publication received from the publisher or an authorized vendor pursuant to Paragraph CC, or is correspondence course material approved pursuant to PD 05.02.119 "Correspondence Courses". All other mail identified by the U. S. Postal Service marking as being sent "bulk rate" or "pre-sorted standard" may be discarded upon receipt by the facility without notice to the prisoner.

BB. If mail is received in an envelope that is padded, corrugated, or otherwise cannot be effectively searched, the envelope may be discarded after a copy of the envelope is made showing the name and

address of the sender and postmark. The copy shall be delivered to the prisoner instead of the original envelope, along with an explanation of why the copy was provided.

CC. Prisoners shall be permitted to receive books, magazines, and other publications only if ordered by a member of the public from an internet vendor identified in Attachment A or from the publisher and sent directly to the prisoner by the vendor or publisher, ordered by the prisoner from a vendor identified in Attachment B or from the publisher and sent directly to the prisoner from the vendor or the publisher, or, if the prisoner is approved to take a correspondence course pursuant to PD 05.02.119 "Correspondence Courses", sent directly from the approved correspondence school. All prisoner orders must be through established facility ordering procedures. Under no circumstances shall prisoners in a correctional facility be permitted to order a publication from an internet vendor.

DD. Prisoners in a CFA facility shall not be permitted to receive retail or wholesale catalogs through the mail, except that a prisoner in a CFA facility who is permitted to possess a catalog pursuant to PD 04.07.112 "Prisoner Personal Property" may receive a catalog sent directly from a vendor approved at that facility as a source of allowable prisoner personal property. Unauthorized catalogs may be discarded upon receipt by the facility without notice to the prisoner. Prisoners in a Residential Reentry Program facility are permitted to receive catalogs unless prohibited by the supervisor of the facility.

EE. Unless transmitted by or on behalf of the Department, mail received by staff for a prisoner via facsimile machine or e-mail may be destroyed upon receipt instead of being delivered to the prisoner, unless it is clear from the mail that it conveys emergency information (e.g., imminent death of family member) and the facility head authorizes delivery. If the mail is not delivered and the sender's address is sufficiently identified in the transmittal, the sender shall be notified by mail that the mail received via facsimile was not delivered due to the method of transmission. Subsequent transmittals by the same sender may be destroyed without notification to the sender.

FF. All incoming mail for prisoners must be clearly identified with the recipient's name and prisoner identification number to ensure proper delivery. Incoming mail which does not clearly identify the recipient may receive delayed processing or, if the recipient cannot be adequately identified, may be returned to the sender.

GG. All incoming mail that is <u>not</u> receiving special handling pursuant to Paragraphs HH and II, or Paragraph LL, shall be opened in one location at each facility and inspected at that location to determine if it contains money, controlled substances, or other physical contraband. All physical contraband shall be confiscated prior to delivery of the mail to the prisoner. The mail's written content also shall be skimmed and, if it appears from skimming the content that the mail may violate this policy, the item shall be read to determine if it is allowed. All incoming mail from one prisoner to another shall be read.

<u>SPECIAL HANDLING OF LEGAL MAIL</u>

HH. A prisoner may have his/her incoming legal mail receive special handling as set forth in Paragraph II by submitting a written request to the institution's mailroom Supervisor, or Residential Reentry Program facility Supervisor or designee, as appropriate. Only mail from an attorney or law firm, a legitimate legal service organization, a non-prisoner paralegal working on behalf of an attorney, law firm, or legal service organization, the Department of Attorney General, a prosecuting attorney's office, a court, a clerk of the court, or a Friend of the Court office shall receive this special handling, and only if the mail is clearly identified on the face of the envelope as being from one of the above. It is not sufficient for the envelope to be simply marked "legal mail".

II. Incoming legal mail for a prisoner who has requested special handling of legal mail pursuant to Paragraph HH shall be opened and inspected for money, controlled substances, and other physical contraband in the prisoner's presence. The content of the mail shall not be read or skimmed. All physical contraband shall be confiscated prior to delivery to the prisoner. In CFA, written documentation shall be maintained regarding the delivery of legal mail to prisoners who have requested special handling of the mail. The documentation shall include the date the mail was received in the

mailroom, the sender's name, the prisoner's name and number, the date the mail was given to the prisoner, and the prisoner's signature acknowledging receipt of the mail. If the prisoner chooses not to sign or accept the mail, that shall be documented and the mail delivered to the prisoner.

JJ. Each prisoner received at a reception facility shall be asked if s/he wants his/her legal mail to receive special handling as outlined in Paragraphs HH and II. If the prisoner does not request special handling at that time, s/he shall be told that s/he may submit a request to the institutional mailroom supervisor or Residential Reentry Program facility Supervisor or designee, as appropriate, at any time during his/her incarceration.

KK. A request for special handling of legal mail shall be entered on the Department's computerized database (e.g., CMIS, OMNI) within two business days after receipt. A prisoner shall not be required to renew his/her request upon transfer within CFA; appropriate staff at the receiving facility shall be responsible for determining if there is a request for special handling of legal mail.

LL. The Warden may require that all incoming legal mail for prisoners at his/her facility receive special handling rather than limiting it to those prisoners who request it. In such cases, the incoming legal mail shall be opened, inspected, and logged as set forth in Paragraph II.

PROHIBITED INCOMING MAIL

MM. Prisoners are prohibited from receiving mail that may pose a threat to the security, good order, or discipline of the facility, may facilitate or encourage criminal activity, or may interfere with the rehabilitation of the prisoner. The following pose such risks under all circumstances and therefore shall be rejected:

1. Mail containing specific information regarding the manufacture or operation of electronic security systems, weapons, explosives, ammunition, or incendiary devices.

2. Mail depicting or describing procedures for manufacturing poisons, alcoholic beverages, or controlled substances.

3. Mail advocating or promoting the violation of state or federal laws. This includes mail advocating or promoting the filing of a false or fraudulent UCC financing statement in violation of MCL 440.9501.

4. Mail advocating or promoting violence, group disruption, or insurrection.

5. Mail describing or depicting acts of sadism, masochism, bondage, or bestiality, or describing, depicting, or appearing to promote sexual acts involving children. This does not include small advertisements in a publication sent directly from the publisher or an authorized vendor except if the advertisement depicts or appears to promote sexual acts involving children.

6. Mail advocating racial supremacy or ethnic purity or attacking a racial or ethnic group, which is reasonably likely to promote or cause violence or group disruption in the facility.

7. Mail providing detailed instruction in the martial arts such as judo, karate, aikido, kendu, kung fu, and similar techniques.

8. Subject to Paragraph CC, a book, magazine, newspaper, or other publication that is not received directly from the publisher, an Internet vendor identified on Attachment A, a vendor identified on Attachment B, or, if the prisoner is approved to take a correspondence course pursuant to PD 05.02.119 "Correspondence Courses", directly from the approved correspondence school. This does not apply to an article or a few pages, or copies of a few pages, from a publication that may be included with a letter or other mail, unless it is reasonably believed to be an attempt to circumvent this restriction. Retail and wholesale catalogs are

specifically addressed in Paragraph DD.

9. A used publication.

10. A publication received on a credit basis (e.g., from a book club). This does not apply if the publication is completely pre-paid and receipt does not obligate the prisoner to make future credit purchases.

11. Mail encouraging or providing instruction in the commission of criminal activity. This includes mail encouraging or providing instruction in the filing of a false or fraudulent UCC lien.

12. Mail containing a provocative or scurrilous attack on any religion or religious group. This does not include a thoughtful and rational discussion of religious beliefs or differences between religions.

13. Nude photographs, except if included in a publication sent directly from the publisher or an authorized vendor. Nude photographs are defined as any photograph exposing the buttocks, pubic area or genitalia, or, except if a baby or infant, the female breast below the top of the areola. This includes exposure through "see through" materials.

14. Photographs depicting actual or simulated sexual acts by one or more persons. This includes photographs in a publication sent directly from the publisher or a vendor authorized by the facility.

15. Official photographs of a victim at a crime scene or depicting injuries to a victim sustained as a result of a crime that were taken for purposes of criminal investigation or prosecution. This includes photographs of the autopsy of a victim.

16. Mail depicting, encouraging, or describing methods of escape from a correctional facility. This includes blueprints, drawings, or similar detailed descriptions of correctional facilities, courthouses, and medical care facilities, and detailed roadmaps of Michigan, any state contiguous to Michigan, or the Province of Ontario, Canada.

17. Mail written in code, or in a foreign language that cannot be interpreted by institutional staff to the extent necessary to conduct an effective search. If facility staff are not available, the facility head may authorize the use of another reliable interpreter. Prisoners shall not be used as interpreters.

18. Mail that is known to contain personal information about an employee or an employee's family, unless it is sent by the employee and the employee is related to the prisoner by blood or marriage, or is provided with the approval of the Administrator of the Office of Legal Affairs or designee for pending litigation. This includes personal information published in newspapers.

19. Mail that is taped, pasted, or otherwise joined to another item in a manner which prevents an effective search. This does not apply to a visiting room photograph that is being returned directly from a copying service to the prisoner who sent the photograph to the service to be copied, provided it was sent in accordance with institutional procedures.

20. Mail containing a foreign substance which prevents an effective search or which contains an unknown substance. If the substance is suspected of being a controlled substance, the mail shall be turned over to law enforcement officials as set forth in Paragraph F.

21. Mail depicting a sign or symbol of a security threat group designated pursuant to PD 04.04.113 "Security Threat Groups".

22. Mail for the purpose of operating a business enterprise while within the facility. This does not

apply to mail regarding the operation of a business enterprise after release.

NN. If any written material, picture, or photograph contained within a publication is believed to be in violation of this policy, the entire publication shall be rejected. However, if the written material, picture or photograph is in a section of a newspaper that is not stapled or otherwise affixed to the rest of the newspaper, only that section of the newspaper shall be rejected. The rest of the newspaper shall be delivered to the prisoner.

OO. Whenever mail addressed to a prisoner is believed to be in violation of this policy, a Notice of Package/Mail Rejection (CSJ-316) shall be completed and promptly sent to the prisoner. The Notice shall identify the specific item believed to be in violation of this policy and why the item is believed to be in violation. A copy of the Notice shall be sent to the person or entity who sent the mail, if a return address is identified.

PP. Unless the prisoner waives his/her right to a hearing in writing, and the prisoner and staff agree on the appropriate disposition of the mail, a prompt hearing shall be conducted pursuant to Administrative Rule 791.3310 to determine if the mail violates this policy for the reason(s) identified in the Notice of Package/Mail Rejection and, if so, the appropriate disposition of the mail. The hearing officer shall not be the person who issued the Notice. Mail may be disposed of only as set forth below.

QQ. If a hearing is conducted, an Administrative Hearing Report (CSJ-144) shall be completed by the hearing officer. The prisoner shall be provided the opportunity to review the mail or a copy of the mail at the hearing unless the review itself would threaten the order and security of the facility, encourage or provide instruction in criminal activity, or interfere with the rehabilitation of the prisoner. If the prisoner is not permitted to review the mail or a copy of the mail at the hearing, the hearing officer shall state the reason for that decision on the Administrative Hearing Report.

RR. If the hearing officer finds that the mail does not violate this policy, the mail shall be promptly delivered to the prisoner. If the hearing officer finds that the mail violates this policy, the hearing officer shall determine the appropriate disposition of the mail as set forth in Paragraph AAA. The disposal option chosen by the hearing officer shall be specifically stated on the Administrative Hearing Report. The hearing officer may take into consideration the prisoner's choice of disposition in making that determination.

SS. Whenever a hearing officer finds that a newspaper, magazine, book, or other publication violates this policy based on its written or pictorial content, the publication shall be submitted in a timely manner to the facility head along with a copy of the Notice and the Administrative Hearing Report. If the facility head does not agree that the publication violates this policy based on its content, that decision shall be noted on the Administrative Hearing Report and the publication promptly delivered to the prisoner with a copy of the facility head's decision. If the facility head agrees that the publication violates this policy based on its written content or depicts a sign or symbol of a security threat group, s/he shall proceed as set forth in Paragraph UU. In all other cases involving pictorial content of a publication, the facility head shall make the final decision; the facility head may maintain a list of publications rejected under his/her authority due to pictorial content.

TT. An item other than funds that is received through the mail at a CFA facility which is alleged to be contraband, but does not meet the definition of "mail" pursuant to this policy, shall be treated as property and processed as set forth in PD 04.07.112 "Prisoner Personal Property". However, free promotional items (e.g., compact discs; make-up samples) that are not authorized property pursuant to PD 04.07.112 that are attached to a publication, and fasteners holding mail together, may be removed and discarded upon receipt by the facility without notice to the prisoner if the item can be easily removed without risk of damage to the publication. If a fastener is removed that was holding mail together, the mail shall be securely sealed prior to delivery to the prisoner. Funds received through the mail shall be processed as set forth in PD 04.02.105 "Prisoner Funds".

RESTRICTED PUBLICATIONS LIST

UU. If the facility head concurs with the hearing officer's decision that a publication violates this policy based on its written content or depicts a sign or symbol of a security threat group, the facility head or designee shall promptly submit copies of the Notice, the Administrative Hearing Report, the publication's cover, and a representative sampling of the specific sections of the publication found to be in violation of this policy to the CFA Deputy Director for a final determination as to whether the publication violates this policy. The facility head shall be notified of the decision. The facility head shall ensure that the prisoner is notified of the decision and, if the CFA Deputy Director does not agree that the publication violates this policy, ensure that the publication is promptly given to the prisoner.

VV. If the CFA Deputy Director agrees that a publication violates this policy for the reason(s) identified in the Administrative Hearing Report, it shall be placed on the Restricted Publications List. The Restricted Publications List shall be maintained by the CFA Deputy Director or designee and distributed to all Wardens and FOA Regional Administrators.

WW. Once a publication is placed on the Restricted Publications List, it shall be rejected at all facilities without the need for a hearing to determine the basis for the rejection removed, unless otherwise indicated on the Restricted Publication List. If a facility head maintains a list of publications rejected under his/her authority due to pictorial content pursuant to Paragraph SS, a publication placed on that list also shall be rejected at that facility without the need for a hearing. However, a Notice of Package/Mail Rejection shall be completed whenever a publication on the Restricted Publications List or the list maintained by the facility head is subsequently received for a prisoner. Copies of the Notice shall be sent to the prisoner and to the person or entity that sent the publication, if a return address is identified. The Notice shall identify the publication and state that the publication will not be delivered because it is on the Restricted Publications List or the list maintained by the facility head, as applicable.

APPEAL OF REJECTED MAIL

XX. A prisoner who disagrees with the outcome of a hearing may file a grievance as set forth in PD 03.02.130 "Prisoner/Parolee Grievances"; if the publication was referred to the CFA Deputy Director for a final determination pursuant to Paragraph UU, the grievance should not be filed until a final determination has been made.

YY. Within ten business days after the date of the Notice, the sender may appeal the proposed rejection by sending a letter to the facility head. An appeal received by any other facility staff shall be referred to the facility head as soon as possible. If the mail was referred to the CFA Deputy Director pursuant to Paragraph UU, the facility head shall not respond to the sender until a decision is made by the CFA Deputy Director. If the mail was rejected because it was already on the Restricted Publications List, the sender's appeal shall be forwarded to the CFA Deputy Director through the appropriate chain of command for review. In all circumstances, the sender shall be notified in writing whether the appeal is granted or denied. If the appeal is granted, that decision shall be noted on the Administrative Hearing Report and the mail promptly delivered to the prisoner.

DISPOSITION OF REJECTED MAIL

ZZ. Prior to disposal, rejected mail shall be retained at the facility for at least 15 business days after the date of issuance of the Notice of Package/Mail Rejection or hearing, whichever is later. However, if a publication was referred to the CFA Deputy Director pursuant to Paragraph UU, it shall be retained at the facility until a final decision is made by the CFA Deputy Director. If the CFA Deputy Director determines that the publication violates this policy, the publication shall be retained at the facility until the prisoner has exhausted the grievance process. If the sender appeals the rejection, the mail shall not be disposed of until after a response to the appeal is sent. If the mail violates state or federal law, it shall be turned over to appropriate law enforcement and only a copy retained.

AAA. After retention for the period set forth in Paragraph ZZ, rejected mail shall be disposed of by one of the following means as determined by the hearing officer or as indicated by the prisoner on the Notice of Package/Mail Rejection if a hearing is not required pursuant to Paragraph PP or WW of this policy:

1. Returned to the sender at the prisoner's expense. Funds shall not be loaned for this purpose. If the prisoner does not have sufficient funds to pay the required postage, the mail may be destroyed no sooner than ten business days after the prisoner is notified in writing of this intent; the mail shall be mailed out at the prisoner's expense during this ten day period if the prisoner receives sufficient funds to pay the cost of the postage.

2. Mailed at the prisoner's expense to a person designated by the prisoner, except that the mail shall not be sent to another prisoner, a court, an identified public official, or a Department employee unless that employee or public official is related by blood or marriage to the prisoner. Funds shall not be loaned for this purpose. If the prisoner does not have sufficient funds to pay the required postage, the mail may be destroyed no sooner than ten business days after the prisoner is notified in writing of this intent; the mail shall be mailed out at the prisoner's expense during this ten day period if the prisoner receives sufficient funds to pay the cost of the postage.

3. If the item is a photograph, book, or magazine, retained and stored by the facility for up to 15 business days for pick-up by a person designated by the prisoner. If the mail is not picked up within 15 business days, it may be destroyed no sooner than ten business days after the prisoner is notified in writing of this intent; the mail may be picked-up during this ten day period.

4. If the item is the prisoner's birth certificate, Social Security card, GED certificate or other official document that the prisoner may need upon release, retained in the prisoner's Record Office file until the prisoner paroles or discharges, at which time the documents shall be given to the prisoner.

5. Destroyed, except that a publication or photograph shall be destroyed only if the prisoner agrees or as allowed pursuant to nos. 1 through 3 above. Documents identified in no. 4 above shall not be destroyed.

PROCESSING OF MAIL

BBB. Facilities shall endeavor to process all incoming and outgoing mail within one business day after receipt. Mail received by any form of express mail or special delivery is not required to be expedited. Mail sent or received over holidays or weekends, and mail requiring special handling, may require additional time in processing. However, mail sent via disbursement to a court, an attorney, or a party to a lawsuit shall be processed consistent with the requirements set forth in Paragraph O. Prisoners shall not be used to process mail.

CCC. Mail received for a prisoner who has transferred to another Department facility shall be returned unopened to the postal carrier that delivered the item. The new mailing address of the prisoner shall be provided to the carrier for at least two months after the transfer to allow for forwarding of the mail, when possible.

DDD. Upon notification of parole or discharge, a prisoner in a CFA facility shall inform the mailroom supervisor in writing of his/her new address if the prisoner wants the mail forwarded as set forth in Paragraph CCC. Upon release to the community from a Residential Reentry Program facility, a prisoner shall inform the facility supervisor or designee in writing of his/her new address if the prisoner wants mail similarly forwarded. If a prisoner does not request that his/her mail be forwarded, any mail received for the prisoner shall be returned to the carrier for return to the sender or, if the carrier will not return the mail, for disposition in accordance with the carrier's regulations.

EEE. Mail received for a prisoner who has been released on court writ shall be returned to the carrier for return to the sender or, if the carrier will not return the mail, for disposition in accordance with the

carrier's regulations, unless the prisoner has made other arrangements in writing with the institutional mailroom Supervisor or Residential Reentry Program facility supervisor or designee, as applicable.

PROCEDURES

FFF. The CFA and FOA Deputy Directors and Wardens shall ensure that procedures are developed as necessary to implement requirements set forth in this policy directive. Procedures shall be completed within 60 calendar days after the effective date of this policy directive. This includes ensuring that their existing procedures are revised or rescinded, as appropriate, if inconsistent with policy requirements or no longer needed. Facility procedures shall not conflict with operating procedures issued by the Director.

AUDIT ELEMENTS

GGG. A Primary Audit Elements List has been developed and is available on the Department's Document Access System to assist with self audit of this policy pursuant to PD 01.05.100 "Self Audit of Policies and Procedures".

ATTACHMENTS

HHH. This policy includes the following attachments:

1. Attachment A - Approved Internet Vendors
2. Attachment B - Authorized Vendors for Publications

APPROVED: PLC 09/01/09

ATTACHMENT A

APPROVED INTERNET VENDORS

A. Prisoners may receive publications ordered by members of the public from the following Internet vendors provided the publication is not used and is sent directly to the prisoner from the Internet vendor:

NOTE: Some approved Internet vendors, such as Amazon.com, allow private individuals and other vendors to directly sell publications on their websites. That individual or vendor, not the approved Internet vendor, then mails out the publication. In such cases, prisoners are allowed to receive the publication only if the vendor actually selling and mailing the publication is identified on this attachment as an approved vendor; prisoners are not allowed to receive the publication if sold and/or mailed by a private individual.

Amazon.com including Waldenbooks
Barnesandnoble.com
Borders.com
EdwardRHamilton.com and HamiltonBooks.com
prisonlegalnews.org
Schulerbooks.com
Waldenbooks.com
Walmart.com

B. Visually impaired prisoners who read Braille also may receive Braille publications ordered by members of the public from the following Internet vendor:

American Printing House for the Blind (aph.org)

Under no circumstances shall prisoners in a correctional facility be permitted to order publications from an Internet vendor.

Prisoners also may receive publications ordered by members of the public from a publisher provided the publication is not used, was sent directly to the prisoner by the publisher, and does not otherwise violate this policy.

PD 05.01.142 "Special Alternative Incarceration Program" controls for prisoners in the Special Alternative Incarceration Program.

ATTACHMENT B

AUTHORIZED VENDORS FOR PUBLICATIONS

A. Prisoners may order and receive non-used publications from the following vendors:

B. Dalton Bookseller
Barnes & Noble Booksellers
Borders Books
Edward R. Hamilton Bookseller, Falls Village, CT 06031-5000
Prison Legal News, 2400 NW 80th Street, PMB #148, Seattle, WA 98117
Schuler Books & Music
Waldenbooks

B. Visually impaired prisoners who read Braille also may order and receive Braille publications ordered from the following vendors:

National Library of Congress
Service for the Blind and Physically Handicapped
American Printing House for the Blind

C. Wardens and, for Residential Reentry Program facilities, the FOA Administrator of Parole and Probation Services or designee may authorize additional local vendors from whom prisoners at their respective facilities may order and receive non-used publications. The prisoner shall be permitted to receive the publication, subject to other policy restrictions, if transferred to another facility prior to receipt of the publication.

D. Wardens and, for Residential Reentry Program facilities, the FOA Administrator of Parole and Probation Services or designee or designee shall authorize vendors from whom prisoners at their facility may order and receive non-used religious publications, as set forth in PD 05.03.150 "Religious Beliefs and Practices of Prisoners".

All publications must be ordered from the above vendors through institutional ordering procedures and received directly by the prisoner from the vendor. Publications ordered from the above vendors from members of the public shall be rejected in accordance with Paragraph MM of this policy. Publications ordered by prisoners are subject to all requirements set forth in this policy.

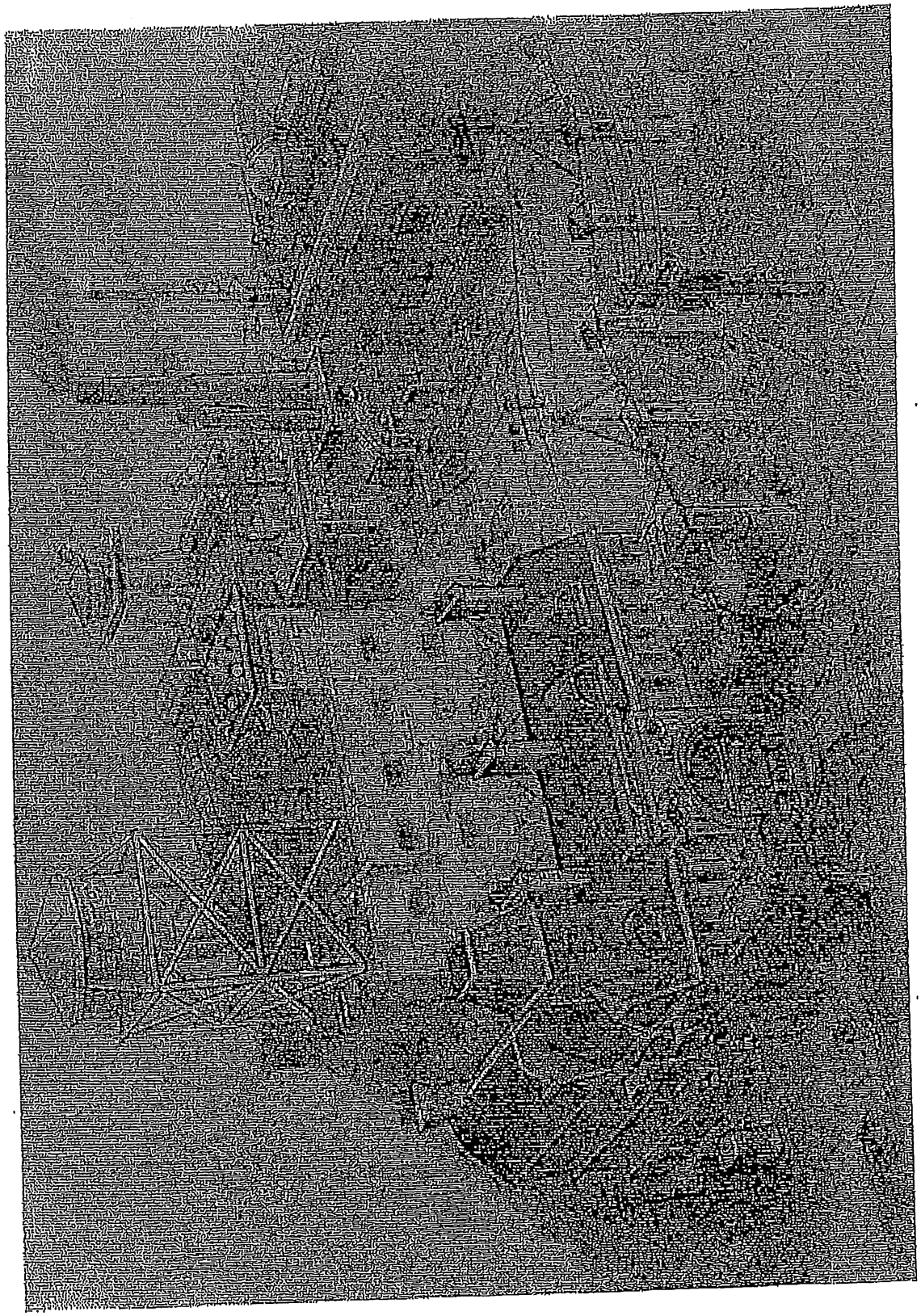
Prisoners also may receive publications ordered through institutional ordering procedures, or by members of the public, from the publisher provided the publication was sent directly to the prisoner from the publisher and does not otherwise violate this policy.

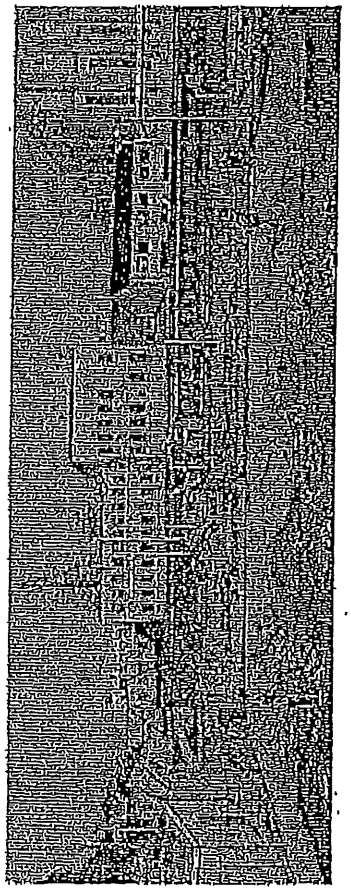
PD 05.01.142 "Special Alternative Incarceration Program" control for prisoners in the Special Alternative Incarceration Program.

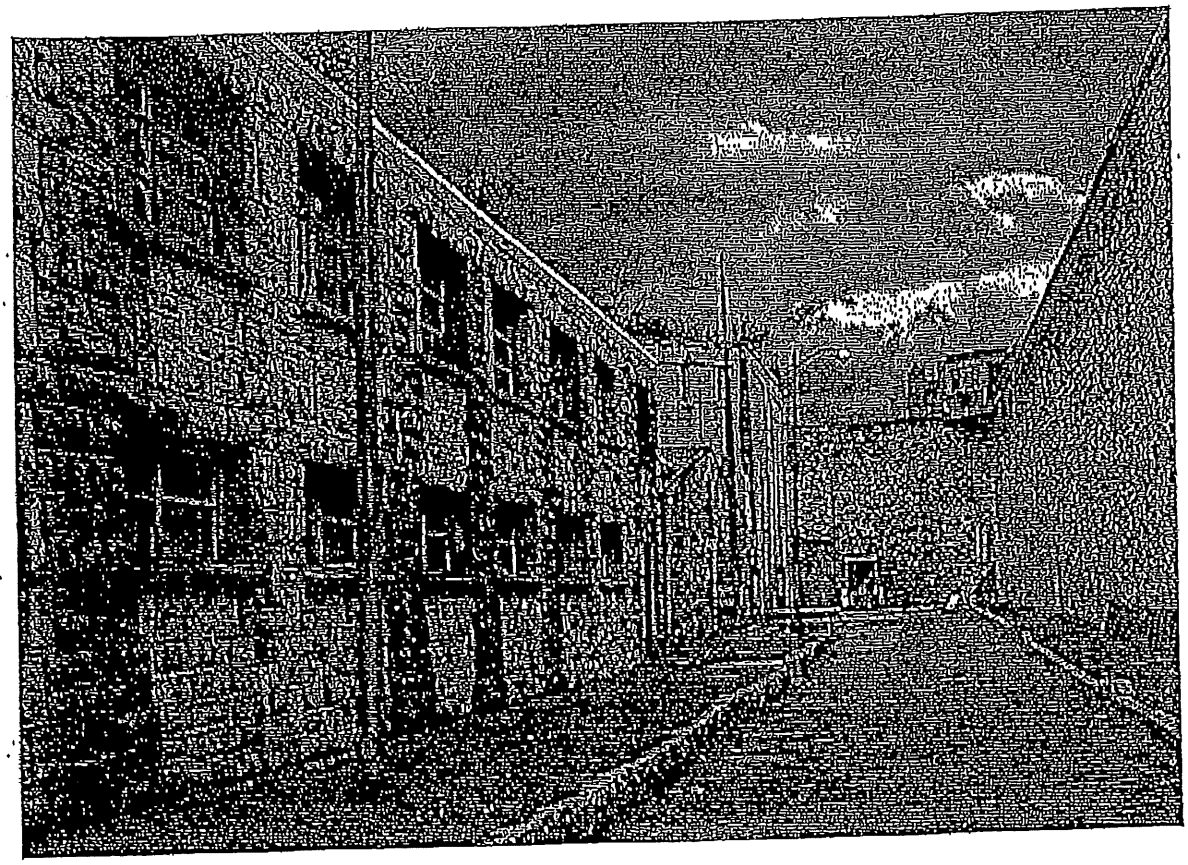
APPROVED: PLC 12/15/09

APPENDIX L

Paintings Made by Other Prisoners Without Punishment







APPENDIX M

Affidavit of Petitioner Patrick Kinney

AFFIDAVIT OF PATRICK NEIL KINNEY

I, Patrick Neil Kinney, state as follows:

1. I suffered the following consequences as a result of the March 3, 2014 prison misconduct conviction for possession of dangerous contraband:

   a. 30 days detention and 30 days loss of privileges.

   b. Classification to administrative segregation for an indefinite period, which ended up lasting 5 months (from February 28, 2014 to August 6, 2014).

   c. Transfer from security Level II to security Level V at Baraga Correctional Facility in Michigan's Upper Peninsula for an indefinite period (which ended up lasting 15 months, February 29, 2014 to May 1, 2015) and then to security Level IV at Chippewa Correctional Facility in Michigan's Upper Peninsula for an indefinite period (which ended up lasting 5 months, May 1, 2015 to October 14, 2015), before being returned to Level II.

   d. Loss of a job as a dog trainer, that was held by very few prisoners, was highly sought-after, and was paid at the highest pay-rate available for a non-MSI prison job in Michigan, that is, $3.34 per day, 7 days per week, or approximately, $2,000.00 over the 20 months that I was classified to level IV and V and therefore ineligible for that job.

   e. Denial of parole on February 12, 2015, for a period of 5 years. See attached Notice of Parole Board Decision, which is a true, accurate, and unaltered copy of the document as I received it from prison officials.

   f. Confiscation of the watercolor painting that was determined to be "dangerous contraband" at the March 3, 2014 misconduct hearing and thus the inability to share it and the artistic expression it contained with the free-world citizens who attended the University of Michigan's Prisoner Creative Arts Project art show, which was my sole purpose for making the painting, which depicted a sunrise as seen through the fence to express the view that beauty can be found in any situation, even in prison.

   g. Severe psychological stress and mental and emotional anguish and suffering from being punished for doing what I believed I was allowed to do, from the indefinite confinement to segregation and the similar conditions of level IV and V, including isolation, the loss of gainful employment, the loss of a fulfilling and meaningful job

as a dog trainer, the loss of the highest paid non-MSI prison job in Michigan, and the denial of parole.

2. The conditions of administrative segregation to which I was classified included (a) confinement to a cell approximately 9x12 feet in size for 23 hours per day 5 days per week without an opening window for fresh air (the other 1 hour, 5 days per week was spent outside in a chain-link cage no larger than the cell), (b) confinement to that cell for 24 hours per day for 2 days per week, (c) only 3 showers per week, (d) being restrained in handcuffs, leg shackles, and/or belly chains and being escorted by two officers on a tether connected to the restraints whenever I was not in the cell, and (e) inability to do many things that are allowed outside administrative segregation, including buying food and coffee from the commissary, using the telephone and JPay email system, jogging, lifting weights, playing basketball and, other activities on the yard, and possessing my own personal music player, typewriter, desk fan, reading light, beard trimmers, watch, personal shoes, nail clippers, and other personal items.

3. The conditions of security Levels IV and V to which I was confined were essentially the same as administrative segregation except that the 1 hour per day out of cell in Level V (and two hours in Level IV) were spent on a basketball-court-sized yard instead of a cell-sized cage, restraints were not used, and I was allowed to shower everyday and buy food and coffee and possess some of my personal items.

4. When I was found guilty of the painting misconduct on March 3, 2014, I had not been found guilty of another Class I or II misconduct for nearly ten years.

5. I have been confined with the Michigan Department of Corrections continually for over 20 years (since 1997), and in my experience, only the most serious misconducts, like murder, serious assault on staff, and attempted escape (or slightly less serious misconducts, like assaults on prisoners and fighting, committed by the same prisoner repeatedly in a short period of time) result in the type of consequences I suffered above. Whatever the case may be in other state prison systems, those conditions are, to me and most other prisoner I know, very significant and not typically endured as part of a normal prison sentence in Michigan. In fact, I and most other prisoners I know consider the indefinite confinement in administrative segregation and Level V as akin to the confinement of a free-world citizen to jail. This is even reflected in the slang terms we use to refer to administrative segregation, including "the hole," "the box," and "jail."

6. Every prisoner and prison staff member whom I have told that

I suffered the above consequences for making a watercolor painting of a portion of the fence for the University of Michigan's Prisoner Creative Arts project has expressed surprise and astonishment that I was treated so harshly for for that offense.

I swear under penalty of perjury that the foregoing is true and correct.

Date: 9/3/18

Patrick Neil Kinney

Michigan Department of Corrections Parole Board Notice of Decision

Name:	Number:	Location:	Mailed:
KINNEY, PATRICK	A253729	AMF	02/18/2015

The **Michigan Parole Board,** having conducted a review of the above prisoner's case, has determined the following:

[X] The majority of the Parole Board has no interest in taking action at this time. Your case will be reviewed as required by law.

DECISION DATE:	ACTION:	Next Interview Scheduled:
02/12/2015	No Interest	4-19-2020

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APPENDIX N

Affidavit of Michele Freiberger and attachments

AFFIDAVIT OF MICHELE FREIBERGER

I, Michele Freiberger, state as follows:

1. In mid 2015, I made a Freedom of Information Act (FOIA) request to the Michigan Department of Corrections (MDOC) for a copy of all documents related to the Michigan Parole Board's February 12, 2015 denial of parole to Patrick Neil Kinney.

2. In response to that request, I received from the MDOC the attached "Case Summary Evaluation," which is a true, accurate, and unaltered copy of the document as I received it.

I swear under penalty of perjury that the foregoing is true and correct.

Date: 9/5/2018

Michele Freiberger

Michele Freiberger

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Final Vote:

Deferral

Assessments:

Correctional Adjustment

Misconduct? Yes

The behavior reflected in the misconducts:

Resulted in placement in segregation within past 24 months

Shows that prisoner has received misconduct(s) since coming to MDOC or since last PBI.

P has total of 5 misconducts and was in Ad Seg 05/2014.(Not used as reason)

Institution Management? Yes

The prisoners institutional management suggests that the prisoner(s):

Security level increasing

Behavior has required current placement in maximum security facility at Level 5 or 6

Move to level V Feb. 2014(Not used as reason)

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Correctional Adjustment

INTERVIEW - MISCONDUCT & MGMT? No

Post Conviction History? No

The prisoner has no previous probation or parole failures

INTERVIEW - POST CONVICTION? No

Crime & Criminal Behavior

Assaultive? Yes

The assaultive crime:

Resulted in loss of life

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Crime & Criminal Behavior

Assaultive? Yes

The assaultive crime:

Arose in a multiple offender situation

Involved the touching with or discharge of a weapon

Involved a dangerous weapon(s)

Genesee Co. 03/18/95, P (age 16) and co def held V adown while P stabbed him over 40 times, causing death. V was the co-defs brother. According to P's confession, the murder was planned several days in advance by P, the co-def and their step-mother P and co def were planning to steal P's mother's van and run away.(Not used as reason)

Sexually Motivated? No

The present offense is not sexually motivated

Property? No

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Crime & Criminal Behavior

Drug Law Violation? No

INTERVIEW - CRIME? No

Criminal History? Yes

The prisoner has a criminal history:

Which includes only the present offense

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

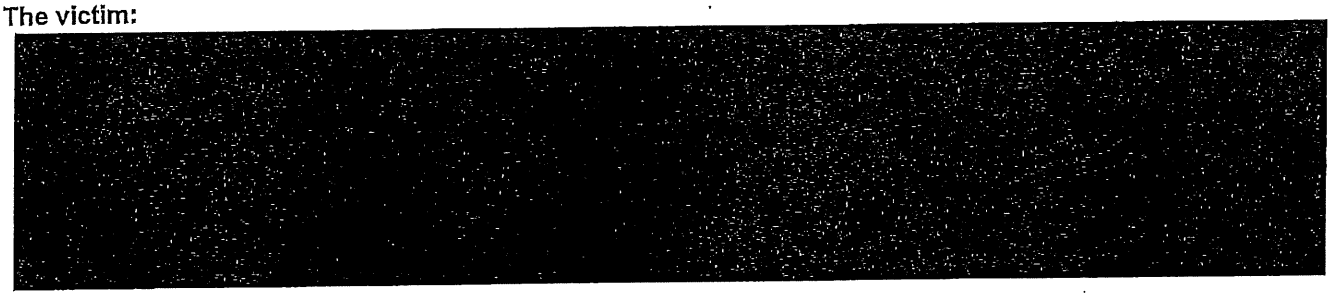
Assessments:

Crime & Criminal Behavior

INTERVIEW - CRIMINAL HISTORY? No

Victim History? Yes

The victim:



INTERVIEW - VICTIM? No

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Personal History

Mental Health History? No

Substance Abuse History? Yes

The prisoner has a history of substance abuse which:

PSI: MJ & Alco.(Not used as reason)

Social History? Yes

The prisoner's social history indicates:

The prisoner has maintained family support and/or has support system in the community

PSI: No reports of abuse in formative years.(Not used as reason)

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Personal History

Suitability of Placement Plan? Yes

The placement plan submitted by the offender in the PER:

Proposed placement acceptable; pending MDOC approval

Placement: Uncle / Frankenmuth, MI Work: Antique Business with Uncle in Frankenmuth, MI(Not used as reason)

Relevant Information? Yes

Review of the file discloses the following relevant information that the prisoner must be advised of:

Relevant documents reviewed by interviewer

Pre-screened by Ann Maynard

p was 16 at the time of the IO; recently released from seg.due to have drawings of the prison security perimeter; p is in general population now and wrking; has completed some programming in the past. not interest at this time.(Not used as reason)

INTERVIEW - ACCEPTED INFO? No

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Personal History

INTERVIEW - REJECTED INFO? No

INTERVIEW - PERSONAL HISTORY? No

Preliminary Matters

30 DAYS NOTICE MET? Yes

Regarding 30-day notice:

5-year lifer file review. 30 day notice not applicable

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Preliminary Matters

REPRESENTATIVE? No

PER CORRECTIONS? No

CHANGES IN PLAN? No

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Preliminary Matters

INTERVIEW NOT CONDUCTED? Yes

An interview was not conducted because:

5-year lifer review

Program Involvement

Psychological? Yes

Psychological programming has been recommended or required and:

compas dated 1/6/15 [redacted] According to PER, P completed T4C = 9/27/12(no report in cof = requested copy).(Not used as reason)

Education? Yes

Educational programming was recommended and:

Prisoner has some post high school education

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Program Involvement

Work? Yes

Routine work assignments have been recommended and:

Involvement has been adequate

Work: Kitchen worker w/good reports. Voc: Not a recommendation.(Not used as reason)

Substance Abuse? Yes

Recommendation(s) has been made S.A. programming and:

The prisoner has completed the programs

No final SASSI - [redacted] Not used as reason)

Community Programs? No

Case Summary Report
RE: Prisoner KINNEY, PATRICK A253729

Assessments:

Program Involvement

Other Programming? Yes

Participation in other department sanctioned program(s) has:

Resulted in completion of self help programming

PER: P completed Business Ed Tech = 2003.(Not used as reason)

INTERVIEW - PROG INVOLVEMENT? No

Interviewer: ABIGAIL CALLEJAS

Vote:

Deferral 88

RE: Prisoner KINNEY, PATRICK A253729

Final Vote:

Deferral

Exec Voter: BARBARA SAMPSON

Vote:

Deferral 88

Exec Voter: ANTHONY KING

Vote:

Exec Voter: SONIA WARCHOCK

Vote:

Deferral 88

Exec Voter: AMY BONITO

Vote:

Deferral 88

Exec Voter: JANE PRICE

Vote:

Exec Voter: MICHAEL EAGEN

Vote:

Deferral 88

Exec Voter: SR WARFIELD

Vote:

RE: Prisoner KINNEY, PATRICK A253729

Exec Voter: KEVIN BELK

Vote:

Exec Voter: SANDRA WILSON

Vote:

Deferral	88

APPENDIX O

Petitioner's District Court Habeas Brief, Kinney v. Horton, W.D. Mich., Case No. 2:18-cv-00027, ECF No. 1-1, PageID.15-60.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN

PATRICK NEIL KINNEY,

Petitioner,

v. No.

CONNIE HORTON,

Respondent.

BRIEF IN SUPPORT OF PETITION UNDER 28 U.S.C. 2254 FOR A WRIT OF HABEAS CORPUS

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STATEMENT OF FACTS

On February 26, 2014, Michigan prison officials suspected that Petitioner Patrick Kinney was planning to escape, a suspicion that a prison a hearing officer later found to be mistaken. Appendix C, p.5, para. #2. Based on that suspicion, prison officials searched Petitioner's cell and found a watercolor painting of a sunrise as seen through a prison fence, including a guard tower, lampposts, and snow banks. They charged Petitioner with violating the "escape material" clause of the "dangerous contraband" rule in the Michigan Department of Corrections' (M.D.O.C.) "prisoner discipline" policy directive. Appendix F, Attachment A, p.2. That rule (as written at the time) did not define "escape material" except for the examples "rope, and grappling hook." *Id.*

At the initial misconduct hearing on March 3, 2014, Petitioner explained that he made the painting for the annual, prison-approved University of Michigan's Prison Creative Arts Project (P.C.A.P.). Appendix D. He said he did not intend to depict the actual prison security perimeter (he left out many details and changed the positions of several objects for aesthetic reasons) but only an artistic representation of a generic prison fence in front of a sunrise to express the

idea that beauty can be found even in prison. Appendix D, p.9. Petitioner said his painting was similar to art that prison officials allowed him to receive through the mail and that other prisoners had made for the same art show for at least 18 years without any punishment. *Id.* The hearing officer found Petitioner guilty, however, holding that his intent was irrelevant and that his painting was "escape material" because, although it was "incomplete" and "not an exact match," it was "very, very close to the 'real thing.'" *Id.*

Petitioner was sentenced to 30 days detention (punitive segregation) and another 30 days loss of privileges. Appendix D. He was also transferred from a level II (minimum security) prison with all-day out-of-cell activity to a level V (maximum security) prison with only one hour out-of-cell activity for fifteen months, five of which he was confined to administrative segregation. Appendix D, p.8; Appendix C, p.5. The conviction also severely diminished Petitioner's prospects for parole on his parolable life sentence, even though he committed his offense when he was only sixteen years old. See *Wershe v. Combs*, No. 1:12-CV-1375; 2016 U.S. Dist. LEXIS 43150 (W.D. Mich. Mar. 31, 2016)(upholding the 2012 parole denial for a juvenile lifer based on a single misconduct); *People v. Carp*, 298 Mich. App. 472, 533; 828 N.W.2d 685, 721

(2012)(acknowledging "legitimate concerns whether the court's discretion in sentencing a juvenile homicide offender to life with the possibility of parole will actually result in a meaningful review by the Parole Board premised on its 'life means life' policy.").

On June 7, 2014, the M.D.O.C.'s Hearings Administrator ordered a rehearing on the misconduct, requiring the hearing officer "to determine if the drawing in question is an escape material including how this drawing can be used to escape, versus a permitted art project AND whether [Petitioner] Kinney was provided sufficient notice that the drawing in question is an escape material." (Emphasis in Original).

Before holding the rehearing, the hearing officer sent an email to the prison's hearing investigator, saying, "The Rehearing Order basically states that the DOC's definition of the misconduct charge, by itself, was not sufficient notice" and "[t]o that end, please obtain a statement . . . specifying . . . whatever gave the prisoner reasonable notice that such material might be considered dangerous contraband and/or escape material." Appendix C, p.67.

The hearing investigator responded by pointing to the "prisoner mail" policy directive, 05.03.118, para. MM.16 (Appendix H), which prohibits prison

staff from delivering mail to prisoners that contains "drawings or similar detailed descriptions of correctional facilities," but does not refer to the dangerous contraband rule in the separate "prisoner discipline" policy directive, 03.03.105, Attachment A, p.2 (Appendix F), which Petitioner was charged with violating, or vice versa.

At the rehearing on July 18, 2014, the hearing officer acknowledged that prison officials allowed Petitioner to receive art similar to his through the mail and allowed other prisoners to make similar art for the P.C.A.P. without any punishment. Appendix C. But he held that these facts were irrelevant to the question of fair notice. He held that the mail policy gave Petitioner fair notice that his painting was "dangerous contraband" under the prisoner discipline policy and found Petitioner guilty. *Id.*, 4-5.

Petitioner appealed to the Ingham County Circuit Court. On July 3, 2015, before the appeal was decided, the M.D.O.C. amended its "prisoner discipline" policy to include the language prohibiting detailed drawings of prisons from the "mail policy." Appendix G. On September 3, 2015, the Ingham County Circuit Court affirmed, holding that "common definitions of escape material would obviously find that drawings of prison facilities created with *exacting detail*

would constitute escape materials," even though the same court admitted that, in Petitioner's painting, "some details were changed or not present." Appendix B, pp.3, 5 (emphasis added).

The Michigan Court of Appeals granted leave to appeal and affirmed. Appendix A. It held that the Fourteenth Amendment "requires prisoners -- who are inherently subject to strict regulations -- to know *and understand all* of the policy directives to which they are subject." *Id.*, p.3 (emphasis added). It held that prisoners are required to correctly apply the "tools of statutory construction" to correctly integrate multiple prison policy directives to divine the rules governing their conduct and that Petitioner had fair notice under this standard because, correctly construed under the "in pari materia" doctrine, the mail policy defines the "dangerous contraband" rule in the discipline policy. *Id.*, 2-3.

The Michigan Court of Appeals also held that the paintings made by other prisoners were distinguishable from Petitioner's and that Petitioner's innocent intent and the lack of a mens rea requirement in the dangerous contraband rule were both irrelevant. *Id.*, 4.

On June 27, 2017, the Michigan Supreme Court denied leave to appeal. Appendix E.

On November 27, 2017, the United States Supreme Court denied certiorari. No. 17-6001.

Petitioner now seeks the writ of habeas corpus. Further relevant facts are set forth below.

STATEMENT REGARDING PROCEDURAL ISSUES

I. The Petition is timely.

Petitioner had one year to file his habeas corpus petition. 28 U.S.C. 2244(d)(1). This "limitation period shall run from the latest of" the four dates listed in Section 2244(d)(1)(A)-(D).

In this case, the latest of these dates is "the date on which the judgment became final by the conclusion of direct review . . ." 28 U.S.C. 2244(d)(1)(A). Direct review concluded on November 27, 2017, when the United States Supreme Court denied certiorari. No. 17-6001. See *Abela v. Martin*, 348 F.3d 164 (6th Cir. 2003)(en banc). Petitioner filed his habeas petition within one year of November 27, 2017. Therefore, his petition is timely.

II. Petitioner's claim is exhausted.

Petitioner has the burden of proving that he has exhausted his state-court remedies with respect to his habeas claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994); 28 U.S.C. 2254(b) & (c). To satisfy this requirement, a petitioner must "fairly present" his federal claims to the state courts through one complete round of the state's established appellate review process, *O'Sullivan v.*

Boerckel, 526 U.S. 838 (1999), and must make clear their factual and federal-law basis, *Baldwin v. Reese*, 541 U.S. 27 (2004).

Petitioner fairly presented the factual and federal-law basis of his Fourteenth Amendment fair-notice claim by raising the same factual and federal-law claim on appeal to the Ingham County Circuit Court, the Michigan Court of Appeals, and the Michigan Supreme Court. Appendices A, B, and E.

Accordingly, Petitioner has satisfied the exhaustion requirement of 28 U.S.C. 2254(b) & (c).

III. Petitioner's claim is not procedurally barred.

"A federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Walker v. Martin*, 562 U.S. 307, 315 (2011). In this case, the state court did not rest its decision on any state-law ground. It denied Petitioner's Fourteenth Amendment claim on the merits. See Appendices A & B.

Accordingly, Petitioner's claim is not procedurally barred.

IV. AEDPA'S standard of review does not bar relief.

Under the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, a federal court may not grant habeas relief on a claim

> that was adjudicated on the merits in State court proceedings unless the adjudication of the claim --
>
> (1) resulted in a decision that was contrary to, or involved a unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

First, "[u]nder [Section] 2254(d)(1), a habeas petitioner may obtain relief (1) 'if the state court arrives at a conclusion opposite that reached by [the Supreme] Court on a matter of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts'; or (2) 'if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.'" *Thaler v. Haynes*, 599 U.S. 43, 47 (2010)(quoting *Williams*

v. Taylor, 529 U.S. 362, 413 (2000)). See also *Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017).

If this standard is "difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). The "unreasonable application of" standard requires "an error well understood in existing law beyond any possibility for fairminded disagreement." *Id.*, 103.

However, it is still an "objective" standard. *Williams*, 529 U.S. at 409-410. "The federal habeas court should *not* transform the inquiry into a subjective one by resting its determination instead on the simple fact that at least one of the nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Id.* (emphasis added).

"Second, habeas relief may also be warranted where the state-court adjudication 'resulted in a decision that was based on an unreasonable determination of the facts.'" *Pouncy v. Palmer*, 846 F.3d 144, 158 (6th Cir. 2017)(quoting 28 U.S.C. 2254(d)(2)). "To show that a state court's determination of the facts was 'unreasonable,' it is not enough that the 'federal habeas court would have reached a different conclusion in the first instance.'" *Pouncy*, supra (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)). "Instead, [Section] 2254(d)(2)

requires that [federal courts] accord the state court substantial deference." *Brumfield v. Cain*, 135 S.Ct. 2269, 2277 (2015). "[H]owever, even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review, and does not by definition preclude relief." *Id.* (quotation marks omitted). For example, in *Brumfield*, the Supreme Court held that the state court's finding that there was no possibility that Brumfield was intellectually disabled was unreasonable under Section 2254(d)(2) even though "there was other evidence in the record that may have cut against Brumfield's claim of intellectual disability." *Brumfield*, at 2280.

Although AEDPA's standard is difficult to meet, it is not impossible. The Supreme Court has found it met in several cases.

In *Williams v. Taylor*, 529 U.S. 362, 413 (2000), the Virginia Supreme Court relied on *Lockhart v. Fretwell*, 506 U.S. 364 (1993), to hold that, under the prejudice prong of an ineffective-assistance claim, "a 'mere' difference in outcome is not sufficient to establish ineffective assistance of counsel." *Williams,* 529 U.S. at 397. The U.S. Supreme Court held that this "mischaracterized, at best, the appropriate rule, made clear by this Court in *Strickland [v. Washington*, 466 U.S. 668 (1984)]." *Williams*, 529 U.S. at 397. That rule is that the defendant must

show only a reasonable probability that the outcome would have been different. *Id.* The Virginia Supreme Court's "analysis in this respect was thus not only 'contrary to,' but also, inasmuch as the Virginia Supreme Court relied on the inapplicable exception recognized in *Lockhart*, an 'unreasonable application of' the clear law established by this Court." *Williams*, 529 U.S. at 397.

In *Penry v. Johnson*, 532 U.S. 782, 803-804 (2001), the Supreme Court held, "to the extent that the Texas Court of Criminal Appeals concluded that the substance of the jury instructions given at Penry's second sentencing hearing satisfied our mandate in *Penry I*, that determination was objectively unreasonable. . . . The three specified issues submitted to the jury were identical to the ones we found constitutionally inadequate as applied in *Penry I*. Although the supplemental instructions made mention of mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical."

In *Wiggins v. Smith*, 539 U.S. 510, 527-528 (2003), the Supreme Court held, "The Maryland Court of Appeals' application of *Strickland*'s governing legal principle was objectively unreasonable. Though the state court acknowledged petitioner's claim that counsel's failure to prepare a social history

'did not meet the minimum standards of the profession,' the court did not conduct any assessment of whether the decision to cease all investigation upon obtaining the PSI and the DSS records actually demonstrated reasonable professional judgment." The state court's decision also involved an unreasonable determination of the facts under Section 2254(d)(2) because it held that the records counsel saw mentioned the defendant's sexual abuse when, in fact, they did not. *Wiggins*, 539 U.S. at 528.

In *Rompilla v. Beard*, 545 U.S. 374, 388 (2005), the state court held that "defense counsel's efforts to find mitigating evidence by other means excused them from looking at the prior conviction file. . . . We think this conclusion of the state court fails to answer the considerations we have set out, to the point of being an objectively unreasonable conclusion. It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecution will cull for aggravating evidence, let alone when the file is sitting in the trial courthouse, open for the asking. No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family relations whether they recalled anything helpful or damaging in the prior victim's testimony."

In *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 258 (2007), the

Supreme Court held, "In our view, denying relief on the basis of that formulation of the issue, while ignoring the fundamental principles established by our most relevant precedents, resulted in a decision that was both 'contrary to' and involved an 'unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States.' 28 U.S.C. [Section] 2254(d)."

In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Supreme Court held that the state court's adjudication was "contrary to" and involved an "unreasonable application of" the Supreme Court's holding in *Ford v. Wainwright,* 477 U.S. 399 (1986), which requires that, once a prisoner seeks a stay of execution and makes "'a substantial threshold showing of insanity,'" he must receive (1) a "'fair hearing' in accord with fundamental fairness" and (2) a decision not based solely on a state-appointed psychiatrist's opinion. *Panetti*, 949. After the prisoner made a threshold showing of insanity, the state court denied his claim without holding a hearing and solely on the basis of a state-appointed psychiatrist's opinion. 477 U.S. at 950-952.

In *Porter v. McCollum*, 558 U.S. 30, 42 (2009), the Supreme Court held, "The Florida Supreme Court's decision that Porter was not prejudiced by his counsel's failure to conduct a thorough -- or even cursory -- investigation is

unreasonable. The Florida Supreme Court either did not consider or unreasonably discounted the mitigating evidence adduced at the postconviction hearing."

In *Lafler v. Cooper*, 566 U.S. 156, 173 (2012), the Supreme Court held that the Michigan Court of Appeals' holding was contrary to clearly established Supreme Court precedent "because the Michigan Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying *Strickland,* the state court simply found that respondent's rejection of the plea was knowing and voluntary."

In *McWilliams v. Dunn*, 137 S.Ct. 1790 (2017), the Supreme Court held that an Alabama appellate court's ruling was "contrary to" and involved an "unreasonable application of" clearly established Supreme Court precedent:

> "The Alabama appeals court held that 'the requirements of *Ake v. Oklahoma*, [470 U.S. 68 (1985)] . . . are met when the State provides the [defendant] with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine [McWilliams].' *McWilliams*, 640 So.2d, at 991. This was plainly incorrect. *Ake* does not require just an examination. Rather, it requires the State to provide the defense with 'access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation* [3] *preparation* and [4]*presentation* of the defense.' *Ake*,

supra, at 83 (emphasis added).

McWilliams, 137 S.Ct. at 1800 (emphasis and alterations by *McWilliams* Court).

In *Brumfield v. Cain*, 135 S.Ct. 2269 (2015), the Supreme Court held that a state court's adjudication involved an unreasonable determination of the facts under Section 2254(d)(2) because "our examination of the record before the state court compels us to conclude that both of its critical factual determinations were unreasonable." *Brumfield*, 2277. The state court found (1) that Brumfield's IQ score of 75 precluded any possibility that he possessed subaverage intelligence, which is defined as an IQ score of 70, and (2) that the record failed to raise any possibility that Brumfield had an impairment in adaptive skills, which is defined as substantial limitations in three or more areas of major life activity, i.e., self-care, understanding and use of language, learning, mobility, self-direction, and capacity for independent living. *Id.*, at 2278-79. The first finding was unreasonable because the margin of error must be considered, and an IQ score of 75 is within the margin of error of 70. *Id.*, at 2278. The second finding was unreasonable because there was "evidence that he was at risk of 'neurological trauma' at birth, was diagnosed with a learning disability and placed in special education classes,

was committed to mental health facilities and given powerful medication, reads at a fourth-grade level, and simply cannot 'process information.'" *Id.*, at 2280. Indeed, the state court's findings were unreasonable even though "there was other evidence in the record that may have cut against Brumfield's claim of intellectual disability." *Id.*

In this case, the state court's adjudication is "contrary to" clearly established Supreme Court precedent, involves an "unreasonable application of" that precedent, and involves an unreasonable determination of the facts in light of the evidence presented to the state court, as shown below. If this Court agrees with any one of these three arguments, Petitioner's claims are then reviewed de novo. *Johnson v. Williams,* 568 U.S. 289, 303 (2013)("AEDPA permits de novo review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent."); *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in [Section] 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.").

A. The state court's ruling is contrary to Supreme Court precedent.

1. The state court held that intent is irrelevant, contrary to Supreme Court precedent.

The Michigan Court of Appeals held: "Intent is neither a part of a vagueness analysis nor a part of the rule under which plaintiff was charged." Appendix A, p.4. But, in fact, the United States Supreme Court "has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Gonzalez v. Carhart*, 550 U.S. 124, 149 (2007)(quoting *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)(citing cases)).

In *Colautti*, the Supreme Court held that a statute was unconstitutionally vague in part because it had no criminal-intent requirement, so a person could violate it without having any criminal intent: "Because of the absence of a scienter requirement in the provision . . ., the statute is little more than 'a trap for those who act in good faith.'" *Id.*, 395. "[The] requirement of a specific intent to do a prohibited act may avoid the consequences to the accused which may otherwise render a vague or indefinite statute invalid. . . . [I]t relieves

the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Id.*, n.13 (quotation marks omitted).

Conversely, the Supreme Court has upheld otherwise vague statutes precisely because they had criminal-intent requirements, since they could not be violated by a person acting in good faith. See, e.g., *Gonzalez*, 550 U.S. at 149-150 ("Because a doctor performing D&E will not face criminal liability if he or she delivers a fetus beyond the prohibited point by mistake, the Act cannot be described as 'a trap for those who act in good faith.'")(quoting *Colautti*, supra).

The Michigan Court of Appeals' holding that "[i]ntent is neither a part of a vagueness analysis[,]" Appendix A, p.4, is therefore "contrary to" clearly established Supreme Court precedent under 28 U.S.C. 2254(d)(1). The prison hearing officer held (1) that the prison rule had no intent element, and (2) that Petitioner's intent was innocent, i.e., that he only made his painting for an art show and not for any "nefarious" purpose, such as escape. Appendix C, pp.4-5. Therefore, like the statute in *Colautti*, the prison rule here could be "described as 'a trap for those who act in good faith." *Id.* Indeed, it was for Petitioner Kinney.

According to the Supreme Court's clearly established precedent, as quoted above, Petitioner's intent and the rule's lack of an intent element were both

highly relevant to Petitioner's vagueness claim. Yet, the Michigan Court of Appeals held that they were irrelevant. Thus, its decision is "contrary to" clearly established Supreme Court precedent. Petitioner's claim is therefore reviewed de novo. *Johnson,* 568 U.S. at 303.

2. The state court held that prisoners must know and understand all prison rules, contrary to Supreme Court precedent.

The Michigan Court of Appeals held that the Fourteenth Amendment "requires prisoners -- who are inherently subject to strict regulations -- to *know and understand all* of the policy directives to which they are subject." Appendix A, p.3 (emphasis added).

But saying prisoners are required to "know and understand all" of the rules governing their conduct, is the same as saying prisoners are required to have fair notice of what conduct is prohibited, rather than prison officials being required to give fair notice. If this is so, then a prisoner could never make out a vagueness claim, no matter how vague the rule at issue. This would effectively carve out an exception to the Fourteenth Amendment's fair-notice requirement for

a class of persons, prisoners.

Contrary to this, the Supreme Court has held that "[l]iving under a rule of law entails various suppositions, one of which is that *all persons* are entitled to be *informed* as to what the State commands or forbids." *F.C.C. v. Fox Television Stations, Inc.*, 576 U.S. 239, 253 (2012)(emphasis added; quotation marks omitted). "A fundamental principle of our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Id.* Prisoners are, indisputably, "persons." Therefore, the state court's decision, holding that prisoners are required know and understand, i.e., have fair notice of, all rules governing their conduct is "contrary to" clearly established Supreme Court precedent holding that the state is required to give fair notice to all persons.

B. The state court unreasonably applied Supreme Court precedent.

Clearly established Supreme Court precedent requires that "laws give the person of *ordinary intelligence* a *reasonable opportunity* to know what is prohibited." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)(emphasis

added). See *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007)("That the standard was stated in general terms does not mean the application was reasonable. AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied. Nor does AEDPA prohibit a federal court from finding an application of a principle unreasonable when it involves a set of facts different from those of the case in which the principle was announced. The statute recognizes, to the contrary, that even a general standard may be applied in an unreasonable manner.")(quotation marks and citations omitted; citing *Williams v. Taylor*, 529 U.S. 362 (2000)(holding that a state court's ruling involved an unreasonable application of the general standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984)).

Petitioner was charged with violating the "escape material" clause of the "dangerous contraband" rule in the "prisoner discipline" policy directive. Appendix F, Attachment A, p.2. That rule (as written at the time) did not define "escape material" except for the examples "rope, and grappling hook." *Id.*

The Michigan Court of Appeals held that Petitioner had fair notice based on the "tools of statutory construction," specifically, the plain language doctrine and the in pari materia doctrine. Appendix A, pp. 2-3.

Under the plain language doctrine, the Ingham County Circuit Court held, "common definitions of escape material would obviously find that drawings of prison facilities created with *exacting detail* would constitute escape materials" and thus that Petitioner had fair notice. Appendix B, p.3 (emphasis added). This is objectively unreasonable because the very same court (and the prison hearing officer) found that "some details were changed or not present" in Petitioner's painting, *Id.*, p.5, and that his painting was "incomplete" and "not an exact match," Appendix D, pp.2-3, findings that the Michigan Court of Appeals did not disturb. A person of ordinary intelligence would not have a reasonable opportunity to know that Petitioner's painting was a prohibited "drawing[] of [a] prison facilit[y] created with *exacting detail"* when it was not created with exacting detail, i.e., when it was "incomplete," "not an exact match," and had "some details [that] were changed or not present." The state court's holding to the contrary was an objectively unreasonable application of Supreme Court precedent.

Second, the state court held that Petitioner had fair notice under the "*in pari materia*" doctrine. Under that doctrine, the state court held that the "dangerous contraband" rule that Petitioner was charged with violating incorporated the section of the "prisoner mail" policy directive, 05.03.118, para.

MM.16 (Appendix H), that prohibits prison officials from delivering mail to prisoners containing detailed drawings of prisons. Appendix A, pp. 2-3. This is an unreasonable application of Supreme Court precedent for two reasons.

First, the mail policy only prohibits "detailed" drawings of prisons and, as stated above, the state court (and the prison hearing officer) found that "some details were changed or not present" in Petitioner's painting, Appendix B, p.5, and that it was "incomplete" and "not an exact match," Appendix D, pp.2-3. Therefore, even assuming a person of ordinary intelligence had a reasonable opportunity to know that the mail policy defined the dangerous contraband rule in the discipline policy, such a person would not have a reasonable opportunity to know that Petitioner's painting was prohibited.

Second, a person of "ordinary intelligence" would not have a "reasonable opportunity" to know that the "prisoner mail" policy directive is properly read to define the separate "prisoner discipline" policy directive under the *"in pari materia"* doctrine because even reasonable attorneys (the legal experts) could have disagreed with that interpretation, given that other rules of statutory construction and the actions of prison officials themselves suggested the opposite.

The first such rule is that "[w]henever possible, every word of a

statute should be given meaning. And no word should be treated as surplusage or nugatory." *Apsey v Memorial Hospital*, 730 N.W.2d 695, 699 (Mich. 2007); *Marbury v. Madison*, 5 U.S. 137, 174 (1803)("The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction."). Reading the mail policy to define the phrase "escape material" in the discipline policy would render paragraph D.6. of the mail policy surplusage or nugatory because paragraph D.6. is the only part of the 14-page mail policy (Appendix H) that refers to the separate 20-page discipline policy (Appendix F). Paragraph D.6. says prisoners are prohibited from sending mail "to anyone who has objected to receiving mail from the prisoner" and that doing so could result in "discipline in accordance with PD 03.03.105 'Prisoner Discipline.'" No other part of the mail policy refers to the discipline policy, including paragraph MM.16., which prohibits mail containing "detailed" drawings of prisons. Thus, a person of ordinary intelligence could have reasonably concluded that paragraph MM.16. of the mail policy did not define "escape material" in the discipline policy because, otherwise, paragraph D.6. of the mail policy would be rendered surplusage or nugatory. See *Marbury*, 5 U.S. at 174-175 ("Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a

negative or exclusive sense must be given to them or they have no operation at all. . . . If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction").

The second rule of statutory construction that would have suggested to a reasonable attorney (and thus to a person of ordinary intelligence) at the time Petitioner made his painting that the mail policy did not define the "dangerous contraband" rule in the discipline policy is the rule that an agency's interpretation of its own rules "is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons." *In re Rovas Complaint*, 754 N.W.2d 259, 270 (Mich. 2008). This is because a prison hearing officer had held in a previous case that the mail policy did not define the contraband rules in the discipline policy. See *Iscaro v. Dept. of Corrections*, No. 304976; 2013 WL 2319458 (Mich. App. May 28, 2013)(noting that "the hearing officer concluded that the [prisoner's] possession of Uniform Commercial Code filing statements failed to qualify as contraband," even though such documents are prohibited by paragraph MM.11. of the mail policy, see Appendix H).

Moreover, "canons [of statutory construction] are not mandatory rules." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). "They are

guides that need not be conclusive. They are designed to help *judges* determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force." *Id.* (emphasis added; citations and quotation marks omitted). There were other circumstances in this case that a person of ordinary intelligence could have reasonably concluded overcame the force of the "in pari materia" doctrine, i.e., the fact that prison officials allowed Petitioner to receive similar art through the mail and allowed other prisoners to make similar art for the very same art show for which the prison hearing officer found Petitioner made his art for at least eighteen years without any punishment. Appendix C, p.5; Appendix D, p.9; Appendix I.

To be sure, Petitioner does not dispute the Michigan Court of Appeals' holding as to the correct interpretation of the "dangerous contraband" rule. But he does dispute that a person of ordinary intelligence would have a reasonable opportunity to know that this interpretation was the correct one. If lawyers could reasonably disagree, as shown above, then "men of common intelligence must [have] necessarily guess[ed] at its meaning and differ[ed] as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

The Supreme Court held that "a fair warning should be given to the

world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct evokes in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or on the speculation that, if the legislature had thought of it, very likely broader words would have been used." *McBoyle v. United States*, 283 U.S. 25, 27 (1935). Similarly here, the rule, as written in 2014, only prohibited "escape material," which it defined only as "rope, and grappling hook." Appendix F, Attachment A, p.2. This does not evoke in the common mind an artistic, non-detailed painting of a prison for a prison-approved art project.

Therefore the rule did not provide fair notice that Petitioner's painting was prohibited, and the state court's holding to the contrary involved an objectively unreasonable application of Supreme Court precedent.

Because the state court's ruling involved an unreasonable application of clearly established Supreme Court precedent, Petitioner's habeas claim is reviewed de novo. *Panetti v. Quarterman,* 551 U.S. 930, 953 (2007)("When a state court's adjudication of a claim is dependent on an antecedent unreasonable

application of federal law, the requirement set forth in [Section] 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.").

C. The state court unreasonably determined the facts.

Petitioner argued that he did not have fair notice that his painting was prohibited because prison officials allowed him to receive mail containing similar art and allowed other prisoners to make similar art for the same art show for eighteen years without any punishment. The Michigan Court of Appeals rejected this argument by finding that the other prisoners' art was "substantially different" from Petitioner's. Appendix A, p.4. This is an unreasonable determination of the facts, as revealed by the state court record, i.e., Appendix I, pp.59, 63, 64.

The Michigan Court of Appeals made the following findings regarding the other prisoners' art.

> Some include artistic imagery and are not intended to factually represent the details of an existing prison structure. They are not detailed drawings that depict the prison perimeter and highlight the intricacies of the prison security system. The included drawings that do

> include some detail are from a vantage point *outside* the facility. Plaintiff's drawing depicts in detail a section of the prison perimeter from *inside* the facility, including the fence, posts, guard tower, lighting, and snow banks. [Appendix A, p.4 (emphasis in original)]

All of these findings are unreasonable in light of the evidence presented to the state court.

First, there is absolutely no evidence in the record to support the finding that the other art was "not intended to factually represent the details of an existing prison structure." Id. The only evidence regarding the artists' intent is the art itself. And the art itself implies that the artists intended their art to be at least as detailed as Petitioner's, as anyone comparing them can see (and as discussed below). See Appendix I, pp.59, 63, 64. (The prison hearing officer held Petitioner's painting confidential, but it was presented to the state courts for review and may require this Court to enter a specific order for the state to produce it for this Court's review. See M.C.L. 791.253).

In any event, the intent of the prisoners who made the other art is not a reasonable basis to distinguish it from Petitioner's because both the prison hearing officer and the Ingham County Circuit Court found that Petitioner had the

very same intent -- to make an artistic depiction that was "incomplete," "not an exact match," and in which "some details were changed or not present" for artistic reasons, findings that the Michigan Court of Appeals did not disturb. Appendix D, pp.2-3, 9; Appendix B, p.5.

Second, some of the other prisoners' drawings are, indeed, "detailed drawings that depict the prison perimeter and highlight the intricacies of the prison security system," at least to the same extent as Petitioner's, if not more. Appendix A, p.4. The Michigan Court of Appeals described Petitioner's painting as showing "a section of the prison perimeter from *inside* the facility, including the fence, posts, guard tower, lighting, and snow banks." Appendix A, p.4 (emphasis in original). Similarly, the painting at Appendix I, p.59, shows almost an entire prison, including the fence, guard towers, lampposts, lighting, buildings, windows, doors, water towers, smoke stacks, chimneys, walkways, and many other details. Likewise, the painting at Appendix I, p.63, shows fencing, lampposts, lighting, and other details. And the painting at Appendix I, p.64, shows the prison wall (from the inside), a gun tower (on top of the wall), lampposts, buildings, windows, doorways, and other details.

Third, some of the art made by other prisoners is, in fact, from a

vantage point inside the prison. Appendix I, p.63, is from the perspective of a prison yard, looking partly outside the prison (the perimeter fence is on the left) and partly inside the prison (the prison buildings are on the right). Appendix I, p.64, is from a walkway inside the prison with the prison wall on the right (with a guard tower on top) and prison buildings on the left, as well as lampposts, windows, and other details. And, although Appendix I, p.59, shows a perspective from outside the prison, this does not reasonably distinguish it from Petitioner's because Appendix I, p.59 is from a bird's-eye view and thus shows just as many details, if not more, as Petitioner's.

In any event, the Michigan Court of Appeals' distinction between inside and outside perspectives was never made by any policy directive, prison official, hearing officer, lower court, or even the assistant attorney general representing the M.D.O.C. in state court. Rather, it was only made by the Michigan Court of Appeals *sua sponte* and thus is just the sort of "post hoc rationalization" that is indicative of a law or rule that is unconstitutionally vague. *Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 758 (1988).

In sum, the Michigan Court of Appeals' finding that Petitioner's painting is "substantially different" from the paintings that Petitioner was allowed

to receive through the mail and that other prisoners were allowed to make for at least eighteen years without any punishment "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d)(2). As in *Brumfield*, this Court's "examination of the record before the state court [should] compel[it] to conclude that . . . its critical factual determinations were unreasonable." 135 S.Ct. at 2277.

ARGUMENT

I. THE DANGEROUS CONTRABAND RULE DID NOT PROVIDE FAIR NOTICE THAT PETITIONER'S PAINTING WAS PROHIBITED, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. Standard of Review.

The following argument assumes that this Court has found that AEDPA's standard of review is satisfied, as argued above, in which case, the claim is reviewed *de novo*. *Johnson v. Williams*, 568 U.S. 289, 303 (2013)("AEDPA permits de novo review in those rare cases when a state court decides a federal claim in a way that is 'contrary to' clearly established Supreme Court precedent.");

Panetti v. Quarterman, 551 U.S. 930, 953 (2007)("When a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in [Section] 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference AEDPA otherwise requires.").

B. Discussion.

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)(emphasis added).

Since this claim is reviewed de novo, circuit precedent controls. The controlling case is *Wolfel v. Morris*, 972 F.2d 712 (6th Cir. 1992), in which the Sixth Circuit held that prison rules prohibiting "contraband" and "group organizing" did not provide fair notice that circulating a petition complaining of prison conditions was prohibited because those rules did not specifically prohibit circulating petitions, circulating petitions was not inherently unlawful or wrongful, and prisoners had never before been punished for it. *Id.*, 717. Thus, the court held

that the inmates "had no reason to believe that they were engaging in activity prohibited by prison regulations when they circulated the petitions." *Id.* "The conduct was 'virtually identical to conduct previously tolerated.'" *Id.* "Punishing the inmates for circulating petitions, therefore, violated their due process rights since they had no fair warning that they were engaging in prohibited activity." *Id.*

The same is true here. The "dangerous contraband" rule Petitioner was charged with violating did not specifically prohibit paintings like Petitioner's. Appendix F. It is not inherently unlawful or wrongful to make a painting depicting a sunrise as seen though a prison fence that the prison hearing officer and the Ingham County Circuit Court both found (1) was only intended as an artistic depiction and (2) was "incomplete," "not an exact match," and in which "some details were changed or not present." Appendix D, pp.2-3, 9; Appendix B, p.5. And prisoners had been allowed to make similar art for at least eighteen years without any punishment. See Appendix I and the argument in Section IV.C., above. Thus, Petitioner "had no reason to believe that [he was] engaging in activity prohibited by prison regulations." *Wolfel*, 972 F.2d at 717. Accordingly, Petitioner's Fourteenth Amendment right to fair notice was violated.

The state courts attempted to avoid this conclusion by holding (1) that

Petitioner had fair notice under the plain language of the rule and under the *in pari materia* doctrine, (2) that Petitioner's painting was distinguishable from the other prisoners' art, and (3) that Petitioner's innocent intent and the rule's lack of a criminal-intent element were irrelevant. As shown above, these findings are contrary to, or involve an unreasonable application of, clearly established Supreme Court precedent, or an unreasonable determination of the facts in light of the evidence presented to the state court.

In addition, as to the state court's holding that Petitioner had fair notice under the in pari materia doctrine by reading the mail policy into the discipline policy, at least one circuit has specifically held that "prisoners are not required to integrate multiple [policy] directives in order to divine the rules governing their conduct." *Farid v. Ellen*, 593 F.3d 233, 241 (2d Cir. 2010). See also *Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir.1999)(holding that prisoners are not required to "perform[] the lawyer-like task of statutory interpretation by reconciling the texts of . . . separate documents."). In making these rulings, the Second Circuit, like the Sixth Circuit in *Wolfel v. Morris*, was straightforwardly applying the person-of-ordinary-intelligence test while "remain[ing] mindful that . . . [l]awful incarceration brings about the necessary withdrawal or limitation of

many privileges and rights." *Chatin*, 186 F.3d at 85 (quotation marks omitted). As in *Chatin*, the punished activity in this case implicated First Amendment rights and the prisoner suffered penal-like sanctions. *Chatin*, at 85.

These cases recognize that, while prison officials may promulgate rules that are reasonably related to legitimate penological interests, see *Turner v. Safley*, 482 U.S. 78, 89 (1987), there is no legitimate penological interest in prohibiting prisoners from doing something that a person of ordinary intelligence has no reasonable opportunity to know he is prohibited from doing. See *Wolfel,* 972 F.2d at 717 ("the prison could prevent its inmates from circulating petitions if it did so with advance notice of its policy"). Punishing prisoners for failing to follow rules that an ordinary person does not have a reasonable opportunity to understand does not further the penological goals of safety, security, order, or rehabilitation. In fact, it only undermines them by fostering resentment when vague and indecipherable rules are unfairly and arbitrary enforced.

The M.D.O.C. did clearly prohibit inmates from making detailed drawings of prisons when this case was on appeal in state court. At that time, the M.D.O.C. added the very language from the mail policy to the "dangerous contraband" rule in the discipline policy that they had argued was already

incorporated therein all along. Appendix G. This change supports Petitioner's claim that the version of the rule in effect when he possessed his painting (Appendix F, Attachment A, p.2) did not provide fair notice that such paintings or drawings were prohibited because it is evidence that even prison officials believed, despite their arguments to the contrary, that the rule did not clearly prohibit such drawings.

The Ingham County Circuit Court said, "It would be dangerous precedent for this Court to find that a prisoner could create and possess detailed drawings of the perimeter that mirrors the reality of the prison security systems under the guise of an art project." Appendix B, p.5. That would be dangerous precedent, but a ruling in Petitioner's favor would not be such precedent. Petitioner raises only an as-applied challenge, and the prison hearing officer found that Petitioner's painting was *not* detailed and *was* actually made for an art project. Appendix D, p.2; Appendix B, p.5; Appendix C, p.5. Thus, a ruling in Petitioner's favor on his as-applied challenge would not help any prisoner who, with nefarious intent, made and possessed a detailed drawing of the prison perimeter for a nefarious purpose under the guise of an art project.

Further, as stated above, the M.D.O.C. revised the "dangerous

contraband" rule after Petitioner appealed his misconduct to specifically prohibit detailed drawings of prisons. Appendix G. Therefore, whatever the ruling in this case, it would not be precedent for prisoners to possess detailed drawings of prisons.

A ruling in Petitioner's favor would do only one thing. It would correct the injustice Petitioner suffered for doing something that a person of ordinary intelligence had no reasonable opportunity to know was prohibited.

RELIEF REQUESTED

Petitioner Patrick Kinney asks this Honorable Court to grant the writ of habeas corpus and order Respondent to correct the Constitutional violation by reversing the misconduct conviction and entering a not guilty verdict thereon.

Respectfully submitted,

Date: March 1, 2018

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