No.

In the Supreme Court of the United States

DAVID JACKSON,
PETITIONER,

v.

MASSACHUSETTS DEPARTMENT OF CORRECTION,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

PETITION FOR A WRIT OF CERTIORARI

JOHN D. FITZPATRICK (BAR NO. 272544)
SENIOR CLINICAL INSTRUCTOR AND
SUPERVISING ATTORNEY
HARVARD PRISON LEGAL ASSISTANCE
PROJECT
Wasserstein Caspersen Clinical Wing
6 Everett Street, Suite 5107
Harvard Law School
Cambridge, MA 02138
Email: jfitzpat@law.harvard.edu
Phone (office) (617) 495-3969
Mobile: (617) 901-5060
Fax: (617) 496-2286

QUESTION PRESENTED

Whether the petitioner, a senior African American prisoner complaining about systemic racism in a letter he mailed to the governor of Massachusetts at the Massachusetts State House, in which he averred he could "expose" the governor, his family, and prison officials as racists, may be punished by prison officials with solitary confinement, for making a "true threat," when he was in fact engaging in protected speech and petitioning under the First Amendment to the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner David Jackson., a prisoner in the custody of the Respondent Massachusetts Department of Correction (DOC), was the plaintiff in the Massachusetts Superior Court and the appellant in the Massachusetts Appeals Court.

Respondent DOC was the defendant in the Superior Court and appellee in the Appeals Court.

LIST OF PROCEEDINGS DIRECTLY RELATED TO THE CASE

There are no directly related proceedings outside of the opinions below.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

OPINIONS BELOW

The unpublished opinion of the Massachusetts Appeals Court, which is the subject of this petition, was entered on June 9, 2021, and is attached as Appendix A (Pet. App. 1–12a). The Massachusetts Supreme Judicial Court's order denying further appellate review was filed on August 2, 2021, and is attached as Appendix B (Pet. App. 13a). The Memorandum of Decision and Order on Cross Motions for judgment on the Pleadings of the Massachusetts Superior Court, which was appealed to the Appeals Court, was issued on February 7, 2020, and is attached as Appendix C (Pet. App. 14–21a).

JURISDICTION

The decision of the Massachusetts Appeals Court to be reviewed was filed on June 9, 2021. The Supreme Judicial Court of Massachusetts denied Further Appellate Review on August 2, 2021. This petition is filed within 90 days of that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech…or the right of the people…to petition the Government for the redress of grievances."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mass. Gen. Laws. ch. 127, § 87 provides in pertinent part: "Every inmate of a correctional institution or any other penal institution in the commonwealth shall be allowed to send mail to . . . the governor of the commonwealth."

103 Code Mass. Regs. § 430.24 (2017) provides in relevant part that a state prisoner shall be punished for, *inter alia*, the following disciplinary offenses: Offense 3–04, "[t]hreatening another with bodily harm or with any offense against another person, their property or their family," Offense 3–25, "[c]ommunicating, directly or indirectly with any staff member, contract employee, volunteer or their relatives at their home address," Offense 3–26, "[u]se of obscene, abusive or insolent language or gesture," Offense 3–30, "[a]ttempting to commit any of the above offenses," Offense 4–04 "use of mail in violation of regulations," and offense 4–11, "[v]iolating any departmental rule or regulation."

STATEMENT OF THE CASE

This case involves an elderly, African American prisoner serving a life without parole sentence, complaining in a letter to the governor of Massachusetts about his inability to obtain orthopedic sneakers, protesting that a racist system was obstructing his quest for the sneakers. After mailing the letter, the petitioner was subject to disciplinary action and solitary confinement for his alleged intemperance, which was found to be threatening and insolent. The petitioner maintains this punishment violated his right to free speech.

I. Factual Background

This case arises from disciplinary charges filed by respondent Massachusetts Department of Correction (the DOC) against petitioner David Jackson (Jackson) who, while serving a life sentence in a DOC prison, wrote and mailed a grievance letter to the Governor of Massachusetts, Charles Baker. Pet. App. 1–2a.

In September 2018, aggrieved by the prison's denial of his request for supportive sneakers, which were prescribed to him because of a plantar fasciitis diagnosis, Jackson handwrote and mailed a letter addressed to "Charles Baker/State House/ Office of the Governor/Boston, MA 02133." Pet. App. 26a. In full, the letter stated:

> Re: Abuse of authority
>
> I am compelled to reiterate my position, grievance's [sic]. Especially after receiving your message via the property s[er]g[ean]t. History tells the story of how blacks have been made to suffer at the hand of the white man better than I could ever express by way of pen, paper. Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operation. Please note that the retaliation and the withholding of my special order medical needed footwear will not go without a challenge.
>
> Each time a person of color seeks redress you racist white bitches respond as if you don't understand what is being requested or conveyed no matter how clear the correspondence. This being a common practice perhaps your understand the seriousness of this matter esculating [sic]. This is the second letter regarding how you coward ass bitches abuse authority. I will not waiver from this fight or to expose your mother, wife son and certain members of this Dept to whom is very much apart of the corrupt, hatred that continues to cause division, unrest among the raciest [sic].
>
> I realize ad [sic] the tricks designed to hinder my rights and to frustrate any attempt for redress. Again I will not waiver until this matter is resolved. If you evaluate my record carefully and all the racist abusive unnecessary shit

> you white bitch has subject me, family and those of color to there will be no doubt about my commitment to right this wrong.
>
> David Jackson

Pet. App. 26–27a.

The DOC brought disciplinary action against Jackson, charging him with offense 3–04 ("[t]hreatening another with bodily harm or with any offense against another person, their property or their family," offense 3–25 ("[c]ommunicating, directly or indirectly with any staff member, contract employee, volunteer or their relatives at their home address"), offense 3–26 ("[u]se of obscene, abusive or insolent language or gesture"), offense 3–30 ("[a]ttempting to commit any of the above offenses") offense 4–04 ("use of mail in violation of regulations"), and offense 4–11 ("[v]iolating any departmental rule or regulation"). *See* 103 Code Mass. Regs. § 430.24 (2017). The subject disciplinary report accused Jackson of "engag[ing] in obscene, insolent and threatening language by stating 'Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operation'" and of "expand[ing] on his threats by stating, 'If you evaluate my record carefully . . . there will be no doubt about my commitment to right this wrong.'" Pet. App. 25a. Throughout the disciplinary proceeding, the DOC deemed the letter "view-only" evidence, and Jackson and his student attorneys were denied a copy of the letter.[1] Pet. App. 16a, n. 9.

[1] Jackson was represented at his disciplinary hearing by law students from the Harvard Prison Legal Assistance Project (PLAP), pursuant to 103 Code Mass. Regs. § 430.12(1).

The Disciplinary Hearing Officer (DHO) found that the words "bitch(es)" and "rotten crackers" were "both insolent and obscene language directed towards a person of white skinned color." Pet. App. 22–23a. In addition, the DHO found that the "language of exposing the intended recipients (Charles Baker) family members [wa]s both concerning and inappropriate" and was "a clear threat of an offense against another person and their family." Pet. App. 23a. The DHO thus found Jackson guilty of charges 3–30 (attempt) via 3–04 (threatening) and 3–26 (use of obscene, abusive or insolent language).[2] Pet. App. 24a. Jackson filed an administrative appeal to the prison superintendent (103 Code Mass. Regs. 430.18), who denied the appeal in January 2019. Pet. App. 3a.

II. Procedural History

In March 2019, Jackson filed an action against the DOC in the Suffolk County (Massachusetts) Superior Court pursuant to Massachusetts General Laws (G. L.), c. 249, § 4, arguing, *inter alia*, that the disciplinary sanctions violated his right to free speech under the First Amendment. The trial court granted the DOC's Cross-Motion for Judgement on the pleadings per Mass. R. Civ. P. 12 (c), concluding without elaboration that the First Amendment issue was "not properly before the court." Pet. App. 21a.

The Massachusetts Appeals Court affirmed the judgment, but on different grounds. Pet. App. 1a. In an unpublished disposition, the Appeals Court found that

[2] The DHO was unable to conclude whether the letter ever actually reached the governor's office, and thus concluded that the evidence supported only the attempt charge (3–30) via the threat charge (3–04), and not the threat charge alone. Pet. App. 22–23a.

Jackson "did preserve his First Amendment argument," and that the issue "was 'properly before'" the trial court. Pet. App. 5a. Nevertheless, the Appeals Court, addressing the question on the merits in the first instance, found that Jackson's statements in the letter, "when read together, evince a 'serious expression of an intent to commit an act of unlawful violence' directed to the Governor and his family." Pet. App. 7a, quoting *O'Brien v. Borowski*, 461 Mass. 415, 423 (2012). The Appeals Court thus concluded that the statements constitute "true threats" unprotected by the First Amendment. *Id.* The Massachusetts supreme court, the Supreme Judicial Court, denied Jackson's Application for Further Appellate Review by a summary notice issued on August 2, 2021. Pet. App. 13a.

REASONS FOR GRANTING THE WRIT

I. The Letter Was Protected Speech and Did Not Constitute a True Threat Because Jackson Expresses No Intent to Commit an Act of Unlawful Violence

In holding that Jackson's letter was an unprotected true threat, the Massachusetts Appeals Court, the Appeals Court decided an important First Amendment question in a manner at odds with this Court's true threat jurisprudence. A statement is excluded from First Amendment protection as a true threat only when "the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003).[3] True threats, as a category of constitutionally unprotected speech, must be viewed "against the background of a profound national

[3] The First Amendment applies to the states via the Fourteenth Amendment. *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943).

commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *Watts v. United States*, 394 U.S. 705, 708 (1969) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). In *Watts*, the petitioner declared at a political rally, "If they ever make me carry a rifle the first man I want to get in my sights is L.B.J." *Id.* at 706. The Court found that the statement was not a true threat, but "political hyperbole," and that it was thus not criminally punishable. *Id.* at 708.

As a preliminary matter, while "examin[ing] the surrounding circumstances to discern the significance of" the utterance of certain words, courts "must not distort or embellish their plain meaning so that the law may reach them." *United States v. Bagdasarian*, 652 F.3d 1113, 1120 (9th Cir. 2011). In *Bagdasarian*, the Ninth Circuit held that the defendant's statements "Obama fk the niggar, he will have a 50 cal in the head soon" and "shoot the nig," made during the 2008 presidential election, were not true threats, because "one [statement] is predictive in nature and the other exhortatory." *Id.* at 1122. The court found that the "meaning of the words is absolutely plain" and that they "do not constitute a threat." *Id.* at 1120. The Massachusetts Appeals Court went well beyond the plain meaning of Jackson's letter, making unwarranted assumptions about Jackson and his intent, in its conclusory determination that the statements in the letter, "when read together," communicated an objective intent to commit some unspecified act of violence.

In addition to the ordinary meaning of the words in a statement, courts have also considered the context of the statement in determining whether it constitutes a true threat. Courts have considered factors including whether the statement was made in a political context, whether the alleged threat is conditional, whether the intended recipient of the statement is the target of the alleged threat, whether the statement touches on "matters of public concern," whether the speaker would personally carry out the threat, and whether the alleged threat is specific and unambiguous." *Griffin v. Lockett*, 2009 WL 179685, at *4 (M.D. Pa. Jan. 26, 2009) (citing *United States v. Kosma*, 951 F.2d 549, 554–55 (3d Cir. 1991)).

The plain meaning of the letter and its context both suggest that the letter does not communicate a true threat. In the letter, Jackson expressed no "intent to commit an act of unlawful violence." *Black*, 538 U.S. at 359. By stating that he would "not waiver from this fight" or from his "commitment to right this wrong," he made it clear that he would continue what he had been doing—that is, defending his rights in a lawful, nonviolent way. Pet. App. 26–27a. The only sentence that made any reference to violence was "Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operation." Pet. App. 26a. This statement, however, is merely descriptive, and it expresses no intent on Jackson's part to engage in violence. If it is "absolutely plain" that the statement "shoot the nig" in *Bagdasarian* does not constitute a threat, then it taxes the imagination to interpret Jackson's expression of anger against racism as a true threat. 652 F.3d at 1120. Moreover, it borders on risible to suggest, as the Appeals Court did, that threatening

to "expose" the racism of the governor, his family, and DOC officials was somehow a threat to commit violence. Pet. App. 7a n. 4. It defies the plain meaning of such words to contort them in such a way.

The context of the letter further suggests that the statements were not true threats, but at most "political hyperbole." *Watts*, 394 U.S. at 708. First, while Jackson was not speaking at a political rally, he was making use of one of the very limited political fora available to incarcerated persons to express his grievances and convey a political message to a public official. *See* Mass. Gen. Laws. ch. 127, § 87 (West) ("Every inmate of a correctional institution or any other penal institution in the Commonwealth shall be allowed to send mail to . . . the governor of the Commonwealth."). Second, Jackson mailed the letter to the Governor's State House office, rather than any personal address. Third, Jackson's letter addressed the issues of racial discrimination and abuse of power by correctional officers, which are salient social and political issues of public concern. Finally, to the extent that Jackson's letter could be interpreted to convey any threat, the threat is too vague to constitute a true threat under the First Amendment. In fact, the reporting officer, the DHO, and the Appeals Courts did not agree on which part of the letter conveyed a true threat. The reporting officer relied on the statements "Its apparent that you rotten crackers only respect violence . . ." and "If you evaluate my record carefully . . . there will be no doubt about my commitment to right this wrong," Pet. App. 25a, while the DHO cited the reference to the Governor's family as a true threat. Pet. App. 23a. The Appeals Court, in turn, found that "the statements contained in the letter, when read together,"

constituted a true threat. Pet. App. 7a. Neither the DHO nor the Appeals Court provided any example as to what act of unlawful violence Jackson might have been threatening to commit. Therefore, Jackson's statements were merely "political hyperbole" and should not constitute true threats.

II. The Disciplinary Action in This Case Was an Unlawful Infringement of Jackson's First Amendment Rights Because No Substantial Government or Penological Interest Is Served by Punishing Inmates for Airing Legitimate Grievances in Mail Directed Outside of Prison.

Since Jackson's letter does not fall within any categories of speech unprotected by the First Amendment, the Massachusetts Appeals Court should have reached the question of whether the DOC's disciplinary action against him was within the DOC's authority to suppress the exercise of rights "inconsistent with proper incarceration." *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003). Jackson's letter was mailed outside of the prison, with no intention that it would be read by other inmates or correctional staff, and thus bears no logical relation to the DOC's ability to control the prison environment. Moreover, not only was it mailed to a third party outside the prison—it was mailed specifically to the highest elected official of the state, at his public place of business, the Massachusetts State House, in accordance with a state statute expressly authorizing prisoners to petition the governor. It was, beyond any reasonable doubt, political speech, seeking redress for the prisoner's grievances, that addressed a matter of topical societal concern (systemic racism). The DOC's action here is especially troubling because the DOC misused its disciplinary power to punish

speech related to a matter of considerable social and political significance, racial injustice in the criminal justice system, with which Jackson has firsthand experience.

At a minimum, restrictions of a prisoner's First Amendment rights must "bear a rational relation to legitimate penological interests." *Id.* at 132, citing *Turner v. Safley*, 482 U.S. 78, 89 (1987) (holding that regulations impinging upon fundamental rights must be "reasonably related to legitimate penological interests."). Moreover, this Court has established a more demanding inquiry for prison actions restricting outgoing mail, requiring (1) that the regulation "furthers one or more of the substantial governmental interests of security, order, and rehabilitation" and (2) that "the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Procunier v. Martinez*, 416 U.S. 396, 413–14 (1974), *overruled in part by Thornburgh v. Abbott*, 490 U.S. 401 (1989).[4]

[4] While *Turner* was decided after *Martinez*, the *Martinez* test continues to apply to regulations affecting outgoing inmate mail. *See Thornburgh v. Abbott*, 490 U.S. 401, 413 (1989) ("[W]e acknowledge today that the logic of our analyses in *Martinez* and *Turner* requires that *Martinez* be limited to regulations concerning outgoing correspondence. As we have observed, outgoing correspondence was the central focus of our opinion in *Martinez*."); *Nasir v. Morgan*, 350 F.3d 366, 371 (3d Cir. 2003) ("Because *Thornburgh* holds that *Turner* does not squarely overrule *Martinez* as applied to outgoing mail, we will apply *Turner* to incoming mail and *Martinez* to outgoing correspondence."); *Stow v. Grimaldi*, 993 F.2d 1002, 1004 (1st Cir. 1993) ("[The] *Martinez* standard applies when assessing the constitutionality of regulations concerning outgoing correspondence, but regulation of incoming mail is subject to [the] more deferential reasonableness standard."). However, lower courts do not consistently apply the correct standard, and would benefit from additional clarification from this Court on the appropriate demarcation between the two. *See Nordstrom v. Ryan*, 856 F.3d 1265, 1272–74 (9th Cir. 2017) (striking down the Arizona Department of Corrections' policy of inspecting outgoing legal mail but relying on the *Turner* test to do so); *cf. Leonard v. Nix*, 55 F.3d 370, 376 (8th Cir. 1995) (concluding that because the "defamatory comments [contained in outgoing mail] were directed toward prison officials, they cannot fairly be characterized as purely outgoing personal correspondence within the holdings of *Martinez* and *Abbott*.").

This is underscored by the analogous differences between on-campus speech and off-campus speech in the school context, addressed by this Court in its recent decision in *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 141 S. Ct. 2038 (2021). Prisons are often compared to schools in that special characteristics of both environments justify certain limitations on First Amendment protection in these environments. *See*, *e.g.*, *Martinez*, 416 U.S. at 409–10 (citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969), a school case, for the proposition that "First Amendment guarantees must be 'applied in light of the special characteristics of the . . . environment.'"); *Koutnik v. Brown*, 456 F.3d 777, 783 (7th Cir. 2006) (analogizing prison regulations against gang symbols with school regulations against "gang-like activity"). In *Tinker*, this Court held that schools' "special interest in regulating speech that 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others" called for "special leeway when schools regulate speech that occurs under its supervision." *Mahanoy*, 141 S. Ct. at 2045 (quoting *Tinker*, 393 U.S. at 513). While this special interest sometimes extends to the regulation of off-campus speech, this Court pointed out that one of the "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech" was that "regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day." *Id.* at 2046. Similarly, although "special characteristics" of prison allow the prison greater leeway in regulating speech within the institution, these characteristics often do not

extend to speech made by prisoners in outgoing correspondence, which is directed at an outside audience. Furthermore, because prisoners' speech is already regulated "during the full 24-hour day," outgoing correspondence becomes the only outlet for some kinds of speech, especially political speech, and the regulation thereof should be subject to a higher standard review. Because prisons are special institutions where the resolution of complaints made internally receives little scrutiny, sanctioning complaints that go outside the prison wall especially threatens prisoners' constitutional and legal rights.

The DOC lacks a substantial government interest in security, order, or rehabilitation that could justify its disciplinary action here, and it cannot meet even the less demanding legitimate penological interest standard. The DOC cannot, and has not attempted to, argue that a grievance letter directed to a public figure outside the prison poses any threat to security or order inside the prison. As this Court stated in *Thornburgh*, "outgoing personal correspondence from prisoners [does] not, by its very nature, pose a serious threat to prison order and security." 490 U.S. at 411. The Court further explained that outgoing correspondence posing any danger is "likely to fall within readily identifiable categories" such as "escape plans, plans relating to ongoing criminal activity, and threats of blackmail or extortion." *Id.* at 412. Of particular relevance to Jackson's letter, the Court noted that these categories are different in kind from "outgoing correspondence that magnifies grievances or contains inflammatory racial views" because such outward-facing criticism "cannot reasonably

be expected to present a danger to the community *inside* the prison." *Id.* at 411–12 (emphasis in original).

Likewise, DOC's action here cannot be justified on grounds of rehabilitation. While this Court has established that "rehabilitation" is a substantial government interest that can justify some regulation of outgoing mail, *Martinez*, 416 U.S. at 413, it has never granted prison administrators a free-floating power to punish and censor any criticism it finds objectionable in the name of inmate rehabilitation. Rather, in the outgoing mail context, *Martinez* requires that the government interest be "unrelated to the suppression of expression" and that the "limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.*[5] Here the only purpose for punishing Jackson was to suppress his ability to petition the governor of his state to complain about what he believed to be a racist system preventing him from successfully pursuing his request for a pair of orthopedic sneakers.

It is beyond question that sending a letter to a public official such as the state governor is an appropriate avenue for an inmate to petition for redress. *See* Mass. Gen. Laws. ch. 127, § 87 (West) ("Every inmate of a correctional institution or any other penal institution in the commonwealth shall be allowed to send mail to . . . the governor of the commonwealth . . ."). The DOC's argument thus turns on the dubious

[5] Lower court decisions upholding First Amendment restrictions under this test on the basis of rehabilitation dealt with speech far more serious than that contained in Jackson's letter. *See e.g.*, *Lane v. Salazar*, 911 F.3d 942, 946–48 (9th Cir. 2018) (inmate wrote in a grievance petition and in outgoing mail to the District Attorney that he "may be forced to take a life!"); *Koutnik*, 456 F.3d at 785 (inmate included a swastika and a "veiled reference to the KKK" is his outgoing mail).

assertion that punishing Jackson with disciplinary segregation and loss of canteen based on the contents of his letter would have a rehabilitative effect. In *Martinez*, this Court rejected the argument that regulations instructing inmates to not "unduly complain" or "magnify grievances" made any contribution to "the rehabilitation of criminals." 416 U.S. at 415–16. Jackson's frustration with the DOC and the Commonwealth of Massachusetts, as vividly captured in his letter, stems from his belief, rooted in lived experience as a Black man in custody, that the DOC has been indifferent or hostile to his grievances. *See* Pet. App. 26a ("Each time a person of color seeks redress you racist white bitches respond as if you don't understand what is being requested or conveyed no matter how clear the correspondence."). The DOC's reflexive response, disciplinary charges and punishment, can serve only to reinforce this perception, and it strains credulity to suggest that the lesson Jackson would draw from the experience is that he was simply not polite enough.

While rehabilitation is a legitimate government and penological interest, the DOC's disciplinary action here did nothing to further it. The extraordinary deference granted prison administrators in making such determinations does not logically extend to correspondence that originates within the institution but is never intended to be read within it.[6] Since the DOC's action here places a greater limitation on First Amendment freedoms than is necessary to further its interest in rehabilitation, and is not reasonably related to any penological objective, it constitutes an unconstitutional abridgement of Jackson's First Amendment freedoms. Jackson

[6] Jackson does not challenge the validity of the disciplinary regulations he was charged with as applied to speech, either written or spoken, occurring *within* the prison.

should not have been subjected to "disciplinary detention" (solitary confinement) for having written and mailed his letter to the governor at the Massachusetts State House.

Conclusion

Jackson's letter to the Massachusetts governor was a protected exercise of his rights to free speech and to petition for the redress of grievances. His certiorari petition should be allowed, and the decision of the Massachusetts Appeals Court should be vacated and reversed accordingly.

Respectfully submitted for Petitioner,

JOHN D. FITZPATRICK (BAR NO. 272544)
SENIOR CLINICAL INSTRUCTOR AND
SUPERVISING ATTORNEY
HARVARD PRISON LEGAL ASSISTANCE PROJECT
Wasserstein Caspersen Clinical Wing
6 Everett Street, Suite 5107
Harvard Law School
Cambridge, MA 02138
Email: jfitzpat@law.harvard.edu
Phone (office) (617) 495-3969
Mobile: (617) 901-5060
Fax: (617) 496-2286

APPENDIX

I. Appendix A: Unpublished opinion of the Massachusetts Appeals Court, June 9, 2021

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-649

DAVID JACKSON

vs.

DEPARTMENT OF CORRECTION.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The plaintiff, David Jackson, an inmate in the custody of the Department of Correction (DOC), filed an action in the Superior Court pursuant to G. L. c. 249, § 4, seeking judicial review of a decision in a disciplinary proceeding. The plaintiff moved for judgment on the pleadings and the defendant, DOC cross-moved for judgment on the pleadings. A Superior Court judge allowed the defendant's motion and dismissed the plaintiff's complaint. On appeal, the plaintiff argues that the judge erred in allowing the defendant's motion because the disciplinary decision violated his constitutional free speech rights and failed to comply with due process. The plaintiff also argues that the judge erred in denying him access to evidence at issue in this case. We affirm.

1. Background. While housed at NCCI-Gardner, the plaintiff wrote and mailed a letter, dated September 6, 2018, to Governor "Baker, Family" at the State

House in Boston. The two-page letter contained the following statements: "Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operation"; "I will not waiver from this fight or to expose your mother, wife son and certain members of this Dept to whom is very much apart [sic] of corrupt, hatred that continues to cause division, unrest among the races"; and "If you evaluate my record carefully and all the racist abusive unnecessary shit you white bitch has subject me, family and those of color to there will be no doubt about my commitment to right this wrong." The letter also stated, "Please note that the retaliation and the [withholding] of my special order medical needed footwear will not go without a challenge."

On September 19, 2018, the Executive Office of Public Safety and Security received the letter. A DOC employee filed a disciplinary report, asserting that the plaintiff had "violated department rules and regulations by using obscene, abusive or insolent language and by threatening another with bodily harm or with any offense against another person, their property or their family." The disciplinary report charged the plaintiff with the following offenses: (1) offense 3–04: "[t]hreatening another with bodily harm or with any offense against another person, their property or their family"; (2) offense 3–25: "[c]ommunicating, directly or indirectly with any staff member, contract employee, volunteer or their relatives at their home address"; (3) offense 3–26: "[u]se of obscene, abusive or insolent language or gesture"; (4) offense 3–30: "[a]ttempting to commit any of the above offenses"; (5) offense 4–04: use of mail in violation of regulations; and (6) offense 4–

11: "[v]iolating any departmental rule or regulation." See 103 Code Mass. Regs. § 430.24 (2017). A disciplinary hearing was then scheduled.

Prior to the hearing, the defendant permitted the plaintiff and his attorney to review the letter. Because the defendant deemed the letter "view only" for safety and security reasons, the defendant denied the plaintiff's request for a copy of the letter. See 103 Code Mass. Regs. §§ 430.11(1) & (7) (2017). On November 28, 2018, the disciplinary hearing was held; however, it was continued to December 4, 2018, so that a copy of the letter's envelope could be produced and entered in evidence. At the hearing, the plaintiff's attorney presented evidence, examined witnesses, and argued to the disciplinary hearing officer, inter alia, that the letter was protected speech under the First Amendment because any threatening language did not rise to the level of a "true threat." The hearing officer found the plaintiff "guilty of charges 3–30 [attempt] via 3–04 [threatening] and 3–26 [use of obscene, abusive, or insolent language]" and dismissed the other charges. As a result, the plaintiff received ten days in disciplinary detention and lost the use of the canteen for sixty days.

The plaintiff appealed the guilty finding to the superintendent, who denied the appeal. On March 7, 2019, the plaintiff filed an action in the Superior Court pursuant to G. L. c. 249, § 4, seeking relief from the disciplinary decision. After the defendant answered and filed the administrative record, the plaintiff moved for judgment on the pleadings and moved to correct the record and request that he

have access to a copy of the letter.[1] The defendant cross-moved for judgment on the pleadings. The judge allowed the plaintiff's motion to correct the record in part, but otherwise denied the motion. The judge also allowed the defendant's motion for judgment on the pleadings, finding that substantial evidence supported the disciplinary decision, there were no due process violations, and the plaintiff did not demonstrate any prejudice resulting from the defendant's processing of the disciplinary report. The judge declined to address the plaintiff's First Amendment argument, concluding that it was "not properly before the court."

Discussion. 1. Standard of Review. We review de novo a decision allowing a motion for judgment on the pleadings. See *UBS Fin. Servs., Inc.* v. *Aliberti*, 483 Mass. 396, 405 (2019); Drayton v. Commissioner of Correction, 52 Mass. App. Ct. 135, 136 n.4 (2001). In considering an appeal from a hearing officer's decision, we review the administrative record "to correct substantial errors of law on the record that adversely affect material rights." *Drayton*, *supra* at 140. "Our review of a disciplinary proceeding is based on whether the record contains substantial evidence to support the hearing officer's decision." *Puleio* v. *Commissioner of Correction*, 52 Mass. App. Ct. 302, 305 (2001).

2. Protected speech. The plaintiff argues that the judge erred in finding that the letter constituted a sufficient basis for a guilty finding because the letter was a "valid exercise of [his] constitutional and statutory free speech rights." Because the

[1] Although the trial record contains a copy of the letter, the letter is marked "not for inmate retention."

judge concluded that the plaintiff's First Amendment argument was "not properly before the court," we first address whether the plaintiff preserved the argument for appeal.[2]

Whether a party raised an issue in the trial court, which is necessary to preserve the issue for appeal, requires a fact specific inquiry. See *Boss* v. *Leverett*, 484 Mass. 553, 563 (2020). That a trial judge determines that an argument is not before her does not end our inquiry. See *M.H. Gordon & Son, Inc.* v. *Alcoholic Beverages Control Comm'n*, 386 Mass. 64, 67 (1982). Here, the record demonstrates that the plaintiff did preserve his First Amendment argument. He argued that his letter was protected speech under the First Amendment at each stage of the administrative proceedings. In his complaint to the Superior Court, the plaintiff alleged that "the letter was apetitioning activity and otherwise protected speech under the First Amendment to the United States Constitution and concomitant rights under Articles 9 and 16 of the Massachusetts Declaration of Rights" and that the disciplinary hearing decision was in "violation of constitutional provisions." The plaintiff also asserted his free speech arguments in his motion for judgment on the pleadings. Accordingly, the plaintiff's First Amendment argument was "properly before" the judge.

Because we conclude that the plaintiff raised this argument, we must determine whether to address it in the first instance. "We generally decline 'to

[2] Although a transcript of any hearing in the trial court may have shed light on the judge's conclusion, no transcript is in the record before us.

consider constitutional issues for the first time on appeal in order to avoid an unnecessary constitutional decision'" (citation omitted). *Commonwealth* v. *Guzman*, 469 Mass. 492, 500 (2014). However, we may exercise our discretion "to consider important questions of public concern" for the first time on appeal where the record is complete. *Gagnon, petitioner*, 416 Mass. 775, 780 (1994). Here, we exercise our discretion to decide the issue. As discussed *supra*, the plaintiff has raised his free speech arguments at every stage of the proceedings. The record is complete, and no issues of fact remain unresolved. In addition, the parties presented and argued the First Amendment issue.

The plaintiff contends that the statements in the letter are constitutionally protected and do not constitute "true threats" under the First Amendment.[3] The plaintiff contends that the letter contains no evidence of an intent to commit an unlawful action against the Governor and his family and that, because he is serving a life sentence without parole, a reader of the letter could not believe that he "could actually make good on any kind of threat." Accordingly, he argues, the sending of the letter constituted a valid exercise of free speech that cannot be the basis of a disciplinary action. We disagree.

True threats are an unprotected class of speech under the First Amendment. *O'Brien* v. *Borowski*, 461 Mass. 415, 422 (2012). "'True threats' encompass those

[3] The plaintiff also argues that the letter is protected under art. 16 of the Massachusetts Declaration of Rights, as amended by art. 77 of the Amendments to the Massachusetts Constitution. He does not suggest, however, that we analyze art. 16 separately from the First Amendment in this instance. See *O'Brien* v. *Borowski*, 461 Mass. 415, 422 (2012) (discussing unprotected speech under both First Amendment and art. 16 of Massachusetts Declaration of Rights).

statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. . . . The speaker need not actually intend to carry out the threat." *Id.* at 423, quoting *Virginia* v. *Black*, 538 U.S. 343, 359–360 (2003).

Here, the statements contained in the letter, when read together, evince a "serious expression of an intent to commit an act of unlawful violence" directed to the Governor and his family.[4] *Id.* That the statements arguably do not convey an overt threat does not affect our analysis. See *Commonwealth* v. *Chou*, 433 Mass. 229, 236 (2001) (true threats are those that intend "to place the target of the threat in fear, whether the threat is veiled or explicit"). Moreover, contrary to the plaintiff's argument that he could not "actually make good on any kind of threat," there need not be evidence "that the threat will be immediately followed by actual violence or the use of physical force" for a statement to constitute a true threat. *O'Brien*, 461 Mass. at 424, quoting *Chou*, *supra* at 235. Cf. *Commonwealth* v. *Ditsch*, 19 Mass. App. Ct. 1005, 1005 (1985) (that defendant was incarcerated when he mailed threat to victim did not have "immediate ability, physically and personally,to do bodily harm" did not preclude conviction for threats; recipient of threat could reasonably have believed that defendant had ability to carry out threat

[4] The statements include, but are not limited to, the following: "[i]ts apparent that you rotten crackers only respect violence," "I will not waiver from this fight or to expose your mother, wife son and certain members of this Dept to whom is very much apart of corrupt, hatred that continues to cause division, unrest among the raciest," and "[i]f you evaluate my record carefully and all the racist abusive unnecessary shit you white bitch has subject me, family, and those of color to there will be no doubt about my commitment to right this wrong."

"through the employment of an agent").

The plaintiff's argument that his statements in the letter are analogous to the statement at issue in *Watts* v. *United States*, 394 U.S. 705, 706 (1969), is unavailing. In *Watts*, the petitioner stated at a political rally that, if inducted into the Army and made to carry a rifle, "the first man I want to get in my sights is L.B.J." *Watts*, *supra*. The "statement was made during a political debate, . . . it was expressly made conditional upon an event -- induction into the Armed Forces -- which [the speaker] vowed would never occur, and . . . both [the speaker] and the crowd laughed after the statement was made." *Id.* at 707. The United States Supreme Court concluded that, based on those factors, this speech was political hyperbole, constituting a "very crude offensive method of stating political opposition to the President." *Id.* at 708. Here, the plaintiff's statements have no expressive purpose, they did not add to or comment on public discourse. See *Chou*, 433 Mass. at 236. Nor were they conditional or followed by laughter by the plaintiff or any listeners. Rather, the statements are a veiled threat intended to place Governor "Baker, Family" in fear of violence. Because we conclude that the plaintiff's letter contained unprotected "true threats," the letter was a sufficient basis for disciplinary action.[5]

[5] The plaintiff also argues that the letter constituted a protected petitioning activity under the First Amendment, art. 19 of the Massachusetts Declaration of Rights, and pursuant to G. L. c. 127, § 87. Because we determine that the plaintiff's speech was unprotected, we conclude that there was no violation of his right to petition. To the extent that the plaintiff argues that the regulations as applied to him abridged his First Amendment rights, this argument too is unavailing where we conclude that the letter was not protected speech under the First Amendment.

The plaintiff does not otherwise challenge the judge's conclusion that substantial evidence supported the hearing officer's determination that the plaintiff's statements in the letter "were insolent and threatening when read as a whole" and that there was "sufficient evidence in the record to support" that "[the plaintiff] was guilty of attempting to commit an offense because the letter was not received by Charles Baker/family" (emphasis omitted). We discern no error in the judge's conclusion.[6]

3. Due process. The plaintiff next contends that the judge erred in finding that the "disciplinary hearing was properly conducted" and satisfied due process. We agree with the judge that there was no due process violation here, albeit for different reasons. See *French King Realty Inc.* v. *Interstate Fire & Cas. Co.*, 79 Mass. App. Ct. 653, 659 (2011) ("This court may affirm a motion judge's ruling on any ground, even if it differs from the reason relied upon by the judge"). Although the judge determined that procedural due process was satisfied under the test enunciated in *Wolff* v. *McDonnell*, 418 U.S. 539, 563–567 (1974), before we reach that analysis, under the Federal Constitution, an inmate has procedural due process protections only if an existing liberty or property interest is at stake. See *Sandin* v. *Conner*, 515 U.S. 472, 484 (1995); *Torres* v. *Commissioner of Correction*, 427 Mass. 611, 617, cert.

[6] The plaintiff argues that we should abrogate the "judicially-created rule of deference" towards the defendant. Because he did not raise this argument in the trial court, it is waived on appeal. *Cacicio* v. *Secretary of Pub. Safety*, 422 Mass. 764, 769 n.9 (1996). Regardless, we note that "this principle is deference, not abdication." *Warcewicz* v. *Department of Envtl. Protection*, 410 Mass. 548, 550 (1991). On the record before us, we discern no error in the judge's deference to the defendant in her decision.

denied, 525 U.S. 1017 (1998). A liberty interest is infringed upon where a restraint imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, *supra*. See *Torres*, *supra*, at 617–618.

Here, the plaintiff received ten days in disciplinary detention and lost the use of the canteen for sixty days. Our case law establishes, and the plaintiff has not argued to the contrary, that this disciplinary sanction is not an atypical and significant hardship compared to ordinary prison life that results in the deprivation of a liberty interest. See *Puleio*, 52 Mass. App. Ct. at 306 ("Ten days' detention in a disciplinary segregated unit does not present the type of atypical, significant deprivation in relation to ordinary incidents of prison life that results in infringement of a liberty interest"); *Drayton*, 52 Mass. App. Ct. at 138 (thirty days in isolation, loss of visitation privileges for one year, and transfer to higher security prison did not infringe on prisoner's liberty interests). See also *Sandin*, 515 U.S. at 486 (thirty days in segregated confinement "did not present the type of atypical, significant deprivation" that might create liberty interest).[7]

The plaintiff also contends that the defendant violated due process by failing to comply with its own regulations. See *Drayton*, 52 Mass. App. Ct. at 139–140 (even where punishment does not implicate a liberty interest, prisoners may still allege that prison officials failed to adhere to process required in department

[7] On appeal, the plaintiff also asserts his due process rights under art. 12 of the Massachusetts Declaration of Rights. This argument does not appear in the trial record, however, and is waived. See *Cacicio*, 422 Mass. at 769 n.9. Even assuming the plaintiff preserved the argument and established an "atypical and significant hardship," on the record before us, we concludethat his due process rights under art. 12 were not violated. See *Torres*, 427 Mass. at 618 & 619 n.11.

regulations). This argument is unavailing.

The plaintiff first argues that the defendant failed to apprise him of the proscribed conduct that was the basis of his later punishment in violation of 103 Code Mass. Regs. § 430.09(3) (2017). This regulation requires, in relevant part, that "[a]t all levels of review, the disciplinary report shall be reviewed for accuracy." Here, the disciplinary report provided a list of the offenses that the plaintiff was accused of, stated that the offenses stemmed from the letter the plaintiff sent to Governor "Baker, Family," and used excerpts from the letter to support the offenses charged in the report. To the extent that the report did not quote the precise portionsof the letter that the hearing officer's decision relied upon, the plaintiff has not shown how he was prejudiced by that omission. See *Massachusetts Prisoners Ass'n Political Action Comm.* v. *Acting Governor*, 435 Mass. 811, 824 (2002) (court's power on certiorari is not exercised to remedy mere technical errors that have not resulted in manifest injustice).

The plaintiff next argues that the defendant denied him a copy of the letter in violation of discovery rules in 103 Code Mass. Regs. § 430.11. The defendant "deemed the letter view only for safety and security reasons." As the judge noted, "[the plaintiff] and his counsel were permitted to view the letter before the hearing and did in fact review it prior to the hearing" and the plaintiff's counsel waived the forty-eight hournotice requirement and proceeded with the hearing. We discern no violation of the regulation. See 103 Code Mass. Regs. § 430.11(7). Moreover, we see no prejudice entitling the plaintiff to relief. See *Massachusetts Prisoners Ass'n*

Political Action Comm., 435 Mass. at 824.

4. Access to the letter. The plaintiff contends that the judge erred in denying his request for a copy of the letter. We disagree. As discussed *supra*, the defendant determined that the letter was "view only for safety and security reasons" and therefore limited the plaintiff's access to the letter during the disciplinary proceedings. See 103 Code Mass. Regs. § 430.11(7). On appeal to the Superior Court, and to this court, the administrative record included a copy of the letter,which was marked "not for inmate retention." We see no error inthe judge's decision to deny the plaintiff's request where he remains in the defendant's custody and the defendant is responsible for maintaining safety and security. See *Commonwealth* v. *Jessup*, 471 Mass. 121, 129 (2015).

Judgement Affirmed

By the Court (Neyman, Sacks & Lemire, JJ.[8]),

s/ Joseph F. Stanton

Clerk

Entered: June 9, 2021

[8] The panelists are listed in order of seniority.

II. Appendix B: Massachusetts Supreme Judicial Court's summary denial of further appellate review, August 2, 2021

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-28364

DAVID JACKSON

vs.

DEPARTMENT OF CORRECTION

Suffolk Superior Court No. 1984CV00753

A.C. No. 2020-P-0649

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on August 2, 2021, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: August 2, 2021

To: John D. Fitzpatrick, Esquire

Madeleine Gates, Student Practitioner

Daniel Brown, Student Practitioner

C. Raye Poole, Esquire

Nancy Ankers White, Special A.A.G.

III. Appendix C: Massachusetts Superior Court, Memorandum Decision, February 7, 2020

SUFFOLK SUPERIOR COURT

CIVIL ACTION

No. 1984CV00753

DAVID JACKSON

vs.

DEPARTMENT OFCORRECTION

MEMORANDUM OF DECISION AND ORDER ON CROSS MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff, David Jackson, is an inmate lawfully in the custody of the Department of Correction (DOC). The plaintiff has filed a complaint in the nature of certiorari pursuant to G.L. c.249, §4, regarding Disciplinary Report (D-Report) No. 421516. Plaintiff raises five claims for relief due to deficiencies in the DOC decision and disciplinary procedure: (1) DOC failed to meet its burden of proof at the hearing; (2) the hearing officer erroneously interpreted the terms "insolence", "obscenity", "threat" and "attempt"; (3) the guilty findings were the result of due process violations; (4) the guilty findings violated the plaintiff's constitutional right of free speech; (5) Plaintiff was denied a fair hearing due to deficiencies in the hearing process. Plaintiff has moved for Judgment on the Pleadings. The defendant opposes and has moved for judgment in its favor based on the pleadings and the administrative record. After hearing and review of the pleadings and record, Plaintiff's Motion for Judgment on the Pleadings pursuant to Mass. R. Civ. P.12(c) is DENIED and Defendant's cross

motion for Judgment on the Pleadings is ALLOWED and the action is dismissed. There was substantial evidence, presented to the hearing officer at the disciplinary hearing, to support guilty findings.

ANALYSIS

The proper vehicle for a prisoner to challenge the validity of a prison disciplinary hearing is an action in the nature of certiorari pursuant to G.L. c. 249, § 4. *Murphy v. Superintendent, MCI-Cedar Junction*, 396 Mass. 830, 833 (1986); *Pidge v. Superintendent, MCI-Cedar Junction*, 32 Mass. App. Ct. 14, 17 (1992); *McLellan v. Commissioner of Correction*, 29 Mass. App. Ct. 933, 934 (1990). Judicial review pursuant to G.L. c. 249, § 4, is not de novo, but is limited to a determination of the legal sufficiency of the evidence to support the hearing officer's findings. *Hill v. Superintendent, Mass. Correctional Inst., Walpole*, 392 Mass. 198, 202 (1984), rev'd on other grounds, 472 U.S. 445 (1985). Due process requires that a finding of a disciplinary offense in prison must be supported by substantial evidence. *Murphy v. Superintendent, MCI-Cedar Junction*, 396 Mass. 830, 833 (1986). Substantial evidence is evidence that "a reasonable mind might accept as adequate to support a conclusion, . . . taking into account whatever in the record fairly detracts from the weight of the evidence." *Cepulonis v. Commissioner of Correction*, 15 Mass. App. Ct. 292, 296 (1983), internal citations omitted. It is the hearing officer's exclusive function to weigh the credibility of witnesses and to resolve factual disputes, and the court may not displace the hearing officer in that role. Id. at 295. The court may not alter the hearing officer's choice between two fairly conflicting views, even where the

court might justifiably have made a different finding had the matter been before it *de novo. Id.*

D-Report No. 421516

The disciplinary report alleges that Jackson, while housed at NCCI Gardner, was the author of a two-page letter addressed to Governor "Baker, family" and mailed to the State House.[9] In the letter, Jackson wrote, among other things:

> History tells the story of how blacks have been made to suffer at the hands of the white man better than I could ever express by way of pen, paper. Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operations.
>
> Please note that the retaliation and the withholding of my special order medical needed footwear will not go without a challenge.
>
> Each time a person of color seeks redress you racist white bitches respond as if you don't understand what is being requested or conveyed no matter how clear the correspondence.
>
> This being a common practice perhaps you understand the seriousness of the matter esculating, this is the second letter regarding how you cowardass bitches abuse authority. I will not waiver from this fight or to expose your mother, wife son and certain members of this Dept to whom is very much apart of the corrupt, hatred that continues to cause division, unrest among the races… Again, I will not waiver until this matter is resolved. If you evaluate my record carefully and all the racist abusive unnecessary shit you white bitch has subject me, family and those of color to there will be no doubt about my commitment to right this wrong."

The letter was intercepted by Executive Office of Public Safety and Security ("EOPSS"). As a result, Plaintiff was issued a disciplinary report charging him with violations of DOC's Inmate Discipline regulations, Code of Offenses, 103 CMR 430. 24:

---

[9] The letter was made available to Plaintiff and his counsel on a "view-only" basis. DOC originally reported to counsel that the envelope did not exist. The envelope was introduced into evidence at the December 4, 2018 hearing.

3–26: use of obscene, abusive or insolent language;

3–04: threatening another with bodily harm or with any offense against another person, their relatives at their home addresses.....

4–04: use of mail or telephone in violation of established rules or regulations;

4–11: violating any departmental rule or regulation, or any other rule, regulation, or condition of an institution or community based program.

3–30: attempting to commit any of the above offenses, making plans to commit any of the above offenses or aiding another person to commit any of the above offenses.....

A hearing was conducted on December 4, 2018 where Plaintiff was represented by [student] counsel. Hearing Officer Yelle heard from two witnesses, Reporting Officer Sgt. Hough and Disciplinary Officer, Sgt. Montalvo. Yelle concluded that Jackson was guilty on offenses 3–26 and 3–30 via 3–04. Jackson was sanctioned to 60 day loss of canteen on 3–26 and 10 days disciplinary detention on offense 3–30 via 3–04. The remaining charges were dismissed. Plaintiff appealed the findings on December 21, 2018 and on January 18, 2019, the Superintendent denied Plaintiff's appeal. This suit was filed on March 7, 2019. In the hearing officer's statement of evidence relied upon to support findings; he includes the following:

> "I find the letter to include insolent and obscene language along with threatening statements. Within the letter Jackson uses insolent and obscene language to include use of the words “bitches" and “rotten crackers", which I find to be both insolent and obscene language directed towards a person of white skinned color in the manner in which it is used by Jackson in the letter. Additionally, Jackson writes in the letter "I will not waiver from this fight or to expose your mother, wife, son and certain members of this Dept to whom is very much a part of corrupt, hatred that continues to cause division, unrest among the racist". Although there is no issue with Jackson documenting his grievances, I find that including language of exposing the intended recipients (Charles Baker) family members is both concerning and inappropriate and I find this to be a clear threat of an offense against another person and their family."

Though the court may disagree with the hearing officer's determination that any statement made by Jackson in the letter was obscene, there is substantial evidence to support the finding that the statements referenced by Yelle were insolent and threatening when read as a whole. Courts must "accord an agency's interpretation of its own regulations considerable deference unless [it is] arbitrary, unreasonable, or inconsistent with the plain terms of the regulations themselves." *Doe v. Sex Offender Registry Bd.*, 456 Mass. 612, 623 (2010) quoting *Rasheed v. Commissioner of Correction*, 446 Mass. 463, 476 (2006). I find that Yelle's interpretation of the plain language of the regulations is reasonable. Yelle determined that Jackson was guilty of *attempting* to commit an offense because the letter was not received by Charles Baker/family. There is sufficient evidence in the record to support that finding.

Due Process

It is clear that "lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen. . . . But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). Prison inmates "may not be deprived of life, liberty, or property without due process of law." *Id.* at 556. Liberty interests are generally limited to "freedom from restraint which... imposes atypical and significant hardship . .. in relation to the ordinary incidents of prison life." *Torres v.*

Commissioner of Corr., 427 Mass. 611, 617–618 (1998), cert. denied, 525 U.S. 1017 (1998), quoting from *Sandin v. Conner*, 515 U.S. 472, 484 (1995).

In a disciplinary proceeding where a prisoner's liberty interest is at stake he must be given "(1) advanced written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and to present evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action." *O'Malley v. Sheriff of Worcester County*, 415 Mass. 132, 138 (1993) quoting *Superintendent, Mass. Correctional Inst. at Walpole v. Hill*, 472 U.S.445, 454 (1985) and citing *Wolff*, 418 U.S. at 563–567. See also *Torres*, 427 Mass. at 618. Thus, a "properly conducted prison disciplinary hearing generally satisfies due process." *Ciampi v. Commissioner of Correction*, 452 Mass. 162 (Mass. 2008). I find that Jackson was given advanced written notice of the charges against him through the disciplinary report. He also received notice of the date of the hearing (and the date that it was re-scheduled to be heard). Originally, Plaintiff was told that the envelope in which the letter was sent could not be found. When it was determined that DOC was in possession of a copy of the envelope, the hearing was continued so that Mr. Jackson and his counsel could examine the envelope. Jackson argues that failure to provide him with a copy of the letter violates his due process rights. This court disagrees. The hearing officer determined that for "safety and security reasons", the letter was "view only." Jackson and his counsel were permitted to view the letter before the hearing and did in fact review it prior to the hearing. Additionally, counsel

decided to waive the 48-hour notice requirement and proceed with the hearing. The hearing officer provided written findings outlining the evidence on which he relied and his reasons for the disciplinary action. The disciplinary hearing was properly conducted. Plaintiff's procedural due process rights were not violated. Id.

The sanctions that Jackson received did not violate due process. If the segregated confinement of a prisoner is not atypical, does not impose a significant hardship on the inmate, does not exceed similar. but discretionary confinement in either duration or degree of restriction, and does not affect the duration of the inmate's sentence, it does not implicate an inmate's constitutional liberty interest. *Sandin*, 115 S.Ct. at 2301 (based on a comparison between segregation and general population, disciplinary segregation for thirty days does not work a major disruption in an inmate's environment). See *Haverty v. Commissioner of Correction*, 440 Mass. 1, 7 (2003).

Jackson also argues that the disciplinary report was not processed in accordance with the applicable regulations and should be dismissed. DOC's memorandum opposing Plaintiff's motion for judgement on the pleadings and in support of DOC's motion for judgment on the pleadings cites authority that where an agency's action in relaxing procedural rules is challenged there must be a showing of substantial prejudice. Here, Jackson has failed to show any prejudice resulting from delays in the manner in which DOC processed his disciplinary report.

Furthermore, Jackson's argument that the disciplinary report and guilty finding are an unconstitutional abridgment of his First Amendment Rights, is not properly before the court.

Accordingly, Plaintiff's Motion for Judgment on the Pleadings is DENIED; the defendants' cross motion for judgment on the pleadings is ALLOWED.

ORDER

For the foregoing reasons, the Plaintiff's Motion for Judgment on the Pleadings is DENIED; the defendants' cross motion for judgment on the pleadings is ALLOWED. Plaintiff's complaint is DISMISSED

s/ Beverly J. Cannone

Beverly J. Cannone

Associate Justice of the Superior Court

February 7, 2020

IV. Appendix D: Massachusetts Department of Correction Disciplinary Hearing for Inmate David Jackson, Statement of Evidence Relied Upon to Support Findings, December 19, 2018

. . .

Statement of Evidence Relied Upon to Support Findings:

Using the standard of a preponderance of the evidence as set forth in the disciplinary regulation 103 CMR 430, this Disciplinary Hearing Officer (DHO) has determined that culpability on the part of Inmate Jackson has been undeniably established. This decision is predicated on the reporting officers written report along with supporting evidence to include the copy of the letter provided and the copy of the envelope provided. Upon review I find a letter was received by the Executive Office of Public Safety and Security as both the copies of the letter and the envelope were stamped as such. I find the letter was written and forwarded by inmate Jackson while he was housed at NCCI Gardner. This finding is based on the envelope having a return address with Jackson's name along with the address for NCCI Gardner along with being stamped with the common Department of Correction stamp which identified the mailing as coming from a correctional institution. In addition, the letter itself has both the name and commitment number of Jackson and includes information on Jackson's medical footwear to which additional evidence and defense brought by Jackson's representative identifies as a grievance of Jackson. Upon review of the letter in question I find the letter to include insolent and obscene language along with threatening statements. Within the letter Jackson uses insolent and

obscene language to include use of the words "bitch(es)" and "rotten crackers", which I find to be both insolent and obscene language directed towards a person of white skinned color in the manner in which it is used by Jackson in the letter. Additionally, Jackson writes in the letter "I will not waiver from this fight or to expose your mother, wife, son and certain members of this Dept to whom is very much apart of corrupt, hatred that continues to cause division, unrest among the raciest". Although there is no issue with Jackson documenting his grievances, I find that including language of exposing the intended recipients (Charles Baker) family members is both concerning and inappropriate and I find this to be a clear threat of an offense against another person and their family. There was no evidence provided to indicate the letter was received by the intended party (Charles Baker) and as a result I find the inmates actions to be an attempt to commit the offense. The inmate's representative's motions and defense were considered by this hearing officer. Through testimony of the reporting officer it was found that evidence (the envelope) that was originally denied due for a reason of not being sent to the DOC was in fact viewed via email by the reporting officer. Although I find this to be concerning I do not find it to warrant a dismissal as it appears to be a miscommunication between disciplinary and investigation staff. As a result, this DHO continued the hearing (per 103 CMR 430.14(6) and overruled the denial of the envelope. Copies of the envelope were served to the inmate's representative whom chose to waive the 48 hour time limits and proceed with the hearing which was resumed on December 4, 2018. It's also to be noted that the motion to dismiss for not receiving copies of the letter in question is

also denied. The institution gave access to the evidence to the representative which I find to be in compliance with 103 CMR 430. It is to be noted that the inmates representative did waive the 48 hour limits for all evidence given access too. In conclusion I find that it is more likely than not that the proponent's contention is true. I find Jackson guilty of charges 3–30 via 3–04 and 3–26. I find the evidence does not support charge 3–25 and therefore this charge is dismissed. Charges 4–04 and 4–11 are dismissed as duplicative charges.

. . .

V. Appendix E: Commonwealth of Massachusetts Department of Correction Disciplinary Report, D-Report No. 42156, Description of Offense, September 19, 2018

. . .

Description of Offense(s)

On September 19, 2018 Inmate David Jackson W60037 violated department rules and regulations by using obscene, abusive or insolent language and by threatening another with bodily harm or with any offense against another person, their property or their family.

On September 19, 2018 a correspondence addressed from Inmate David Jackson W60037 to Governor "Baker, family" was received by the Executive office of Public Safety & Security. In the letter dated September 6, 2018, Jackson engaged in obscene, insolent and threatening language by stating "Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operation." Inmate Jackson expanded on his threats by stating, "If you evaluate my record carefully…there will be no doubt about my commitment to right this wrong."

Inmate Jackson was placed in T-RHU pending investigation and the letter was entered into evidence.

. . .

VI. Appendix F: Transcription of David Jackson's Handwritten Letter, September 6, 2018

[Envelope]:

Charles Baker/State House/ Office of the Governor/Boston, MA 02133.

[Text of Letter]:

Re: Abuse of authority

I am compelled to reiterate my position, grievance's [sic]. Especially after receiving your message via the property s[er]g[ean]t. History tells the story of how blacks have been made to suffer at the hand of the white man better than I could ever express by way of pen, paper. Its apparent that you rotten crackers only respect violence and other acts that disrupt the white rule movement mode of operation. Please note that the retaliation and the withholding of my special order medical needed footwear will not go without a challenge.

Each time a person of color seeks redress you racist white bitches respond as if you don't understand what is being requested or conveyed no matter how clear the correspondence. This being a common practice perhaps your understand the seriousness of this matter esculating [sic]. This is the second letter regarding how you coward ass bitches abuse authority. I will not waiver from this fight or to expose your mother, wife son and certain members of this Dept to whom is very much apart of the corrupt, hatred that continues to cause division, unrest among the raciest [sic].

I realize ad [sic] the tricks designed to hinder my rights and to frustrate any attempt for redress. Again I will not waiver until this matter is resolved. If you evaluate my record carefully and all the racist abusive unnecessary shit you white bitch has subject me, family and those of color to there will be no doubt about my commitment to right this wrong.

David Jackson