No. ___

IN THE
SUPREME COURT OF THE UNITED STATES

ASKARI DANSO MS LUMUMBA

F/K/A DALE LEE PUGHSLEY,

PETITIONER,

V.

JEFFREY KISER,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

PETITION APPENDIX

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7512

ASKARI DANSO MS LUMUMBA, f/k/a Dale Lee Pughsley,

Petitioner – Appellant,

v.

JEFFREY KISER,

Respondent – Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Norman K. Moon, Senior District Judge. (7:20-cv-00379-NKM-JCH)

Argued: May 10, 2024 Decided: September 6, 2024

Before WYNN, RICHARDSON, and RUSHING, Circuit Judges

Affirmed by published opinion. Judge Richardson wrote the opinion, in which Judge Rushing joined. Judge Wynn wrote an opinion concurring in part and dissenting in part.

ARGUED: Mary G. Triplett, Casey Schmidt, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Kevin Michael Gallagher, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee. **ON BRIEF:** J. Scott Ballenger, Appellate Litigation Clinic, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, Charlottesville, Virginia, for Appellant. Jason S. Miyares, Attorney General, Theophani K. Stamos, Deputy Attorney General, Richard C. Vorhis, Senior Assistant Attorney General, Andrew N. Ferguson, Solicitor General, Erika L. Maley, Principal Deputy Solicitor General, Rick W. Eberstadt, Assistant Solicitor General,

OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

RICHARDSON, Circuit Judge:

Askari Lumumba filed a 28 U.S.C. § 2254 petition challenging a prison regulation that prohibits "[p]articipating in, or encouraging others to participate in, a work stoppage, or a group demonstration." J.A. 66. On appeal, he argues that the regulation is facially unconstitutional under the First Amendment and facially void for vagueness under the Fourteenth Amendment's Due Process Clause. But we find that Lumumba has failed to state a claim upon which relief can be granted. We therefore affirm the district's court order dismissing Lumumba's petition.

I. Background

A. Facts

In 1999, a Virginia state court jury convicted Askari Lumumba (known then as Dale Lee Pughsley) of second-degree murder, shooting into an unoccupied vehicle, possession of a firearm by a felon, and use of a firearm by a felon.[1] He was sentenced to fifty-eight years' imprisonment.

In July 2018, Lumumba was serving his sentence in Virginia's Sussex I state prison. While there, he engaged in a series of communications that eventually became the subject of disciplinary action. First, on July 2, he spoke on the phone with his wife. During the call, he stated: "Do you know how hard I'm fighting not to organize? Seeing you is the

[1] In assessing whether a 28 U.S.C. § 2254 petition states a claim for relief, we may consider the record from state habeas proceeding without having to convert the Federal Rule of Civil Procedure 12(b)(6) motion to one for summary judgment under Rule 56(b). *Walker v. Kelly*, 589 F.3d 127, 139 (4th Cir. 2009). We may also consider matters of public record, including documents from prior state court proceedings, pursuant to a Rule 12(b)(6) motion. *Id.*

only reason I'm not acting crazy." J.A. 55. He then said: "N[*]ggas is primed and ready. These young boys are ready to go." *Id.*. And he claimed that several Blood and Crip gang members had approached him about making him their "Big Homie," which means their leader.

Second, on July 6, Lumumba emailed Margaret Breslau, a non-incarcerated third party. Lumumba mentioned in the email that Breslau had forwarded him a message from "H," later determined to be H. Shabazz, an inmate at a different state prison. Then, in another section of the email titled "For H.", Lumumba wrote: "Look, these S1/S2 joints are severely understaffed! Word! Burh, I've been talking to brothers about a Gandhian Attica. Word, 'Blood in the Water' you feel me? Hundreds of people check in at once! We all want to go to the STAR program!" J.A. 54. He also stated: "Man, I'm telling you it's time to use the Art of War!" *Id*.

Third, on July 7, Lumumba sent a second email to Breslau, which she forwarded to Chanell Burnette, an inmate at a Virginia female prison. In that message, Lumumba wrote: "This involves a radical reeducation! I use the religious institutions that are legitimized by the state to do this." *Id*. "I'm new Afrikan," Lumumba continued, "and so I personally like to sue the Rastsfarian [] class to teach New Afrika[]/Pan Afrikanism[]/Afrikan[] Internationalism. It's tricky and require a bit of artistry but people will begin to respond." *Id*.

On July 9, 2018, prison investigators learned of the email communications and the phone call. The next day, they interviewed Lumumba, who claimed that he was just casually writing to Breslau, not attempting to organize anything among fellow inmates. He

also asserted that he supported peaceful reforms of the prison system and had told other inmates to "write up their issues without using violence." J.A. 55. When asked about his reference to a "Gandhian Attica," Lumumba explained that "Gandhian" referred to the political figure Mahatma Gandhi, while "Attica" referred to the prison riot in Attica, New York, in 1971.

That same day, Lumumba was transferred to Virginia's Red Onion State Prison. Officers there served him with a copy of a disciplinary report, which charged him with "attempt[ing] to garner support for a group demonstration that would disrupt the orderly operation of" the prison, in violation of Disciplinary Offense Code 128. J.A. 99. Offense Code 128 prohibits "[p]articipating in, or encouraging others to participate in, a work stoppage, or a group demonstration." J.A. 66.

Officer M. Counts conducted Lumumba's disciplinary hearing about a week after his transfer. At the hearing, an investigator testified that Lumumba "was attempting to garner support from other offenders to disrupt the orderly operation of Sussex I State Prison and other Virgina Department of Corrections facilities," introducing the emails and phone call as evidence. J.A. 56. After cross-examining the investigator, Lumumba acknowledged that he had authored the emails and placed the phone call. But, as he did in his interview, he claimed that he neither advocated violence nor intended to cause disruption. Officer Counts nonetheless concluded that Lumumba was guilty of violating Offense Code 128. *See* J.A. 101 ("I have found the intentions of [Lumumba] was to encourage others to participate in acts of violence against DOC."). So he imposed a penalty of 30 days in disciplinary segregation, with credit for time served, and 180 days' loss of good-conduct

sentence credits.[2] Lumumba appealed to the Warden and then to the Regional Director, both of whom denied the petition.

Lumumba then petitioned for a writ of habeas corpus in the Supreme Court of Virginia. But the Court denied the petition after finding that challenges to the calculation of a petitioner's good-conduct sentencing credits are not cognizable under Virginia law in a petition for state habeas corpus. The Court later denied his petition for rehearing.

B. Procedural History

Unlike Virginia state habeas, challenges to deprivations of good-conduct sentencing credits are cognizable on federal habeas. *See Preiser v. Rodriguez*, 411 U.S. 475, 487 (1973); *Wall*, 21 F.4th at 271. So Lumumba petitioned for habeas corpus under 28 U.S.C. § 2254 in federal district court. In his statement of the issues, Lumumba advanced two claims: (1) Offense Code 128 is void for vagueness, in violation of the Fourteenth Amendment's Due Process Clause, because it fails to provide notice of the standard it uses; and (2) he is entitled to an evidentiary hearing on this matter. As to the first claim, Lumumba, in a subsection titled "Overbreadth," cited the Supreme Court's decision in *Procunier v. Martinez*, 416 U.S. 396 (1974), and argued that he had "a right to speak critically of the government in outgoing correspondence." J.A. 24–25. He contended in the next two subsections that Offense Code 128 is void for vagueness.

[2] Under Virginia law, prisoners can obtain good-conduct sentencing credits "as a result of good conduct while in prison" and can use them to get "a reduction of th[eir] sentence." *Wall v. Kiser*, 21 F.4th 266, 271 (4th Cir. 2021).

Jeffrey Kiser, Warden of Red Onion State Prison, moved to dismiss the petition. The district court granted the motion, dismissing Lumumba's petition with prejudice. The court first held that Offense Code 128 is not void for vagueness, for, while it "certainly prohibits a wide range of conduct, . . . it is not 'vague' in the sense that it is unclear what it proscribes." J.A. 119. The court then rejected what it interpreted as Lumumba's argument that Offense Code 128 is facially overbroad under the First Amendment, finding that the regulation satisfies the standard set forth in *Turner v. Safley*, 482 U.S. 78 (1987).

Lumumba requested a certificate of appealability from the district court and filed a notice of appeal. We subsequently remanded to the district court to supplement the record with an order granting or denying a certificate of appealability. The district court granted a certificate of appealability on January 25, 2022, permitting Lumumba to appeal its holdings that Offense Code 128 were valid under "the void-for-vagueness and overbreadth doctrines." *Lumumba v. Kiser*, No. 7:20-cv-379, 2022 WL 228318, at *1 (W.D. Va. Jan. 25, 2022).[3]

[3] When a state court adjudicates a habeas petition on the merits, we may grant relief only if the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). By contrast, "when a state court does not adjudicate a claim on the merits, [such] deference is inappropriate and [we] must review the claim de novo," *Winston v. Pearson*, 683 F.3d 489, 496 (4th Cir. 2012), "unless the state court found the claim procedurally defaulted," *Richardson v. Kornegay*, 3 F.4th 687, 695 (4th Cir. 2021).

Before petitioning under § 2254, Lumumba first sought relief in Virginia state court. But the Virginia Supreme Court determined that claims like his—challenges to revocation of accrued good-conduct sentencing credits—are not cognizable in state habeas, so it dismissed for lack of jurisdiction without reaching the merits. In *Wall v. Kiser*, we faced the same situation and found that the Virginia Supreme Court did not adjudicate the claims (Continued)

II. Discussion

This appeal presents two issues.[4] First, Lumumba argues that Offense Code 128 is facially unconstitutional under the First Amendment because it abridges prisoners' freedom of speech. Second, Lumumba argues that Offense Code 128 is unconstitutional under the Due Process Clause of the Fourteenth Amendment because it is facially void for vagueness. We address each argument in turn, finding neither convincing. Accordingly, we affirm the district court.

A. First Amendment Challenge

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. And "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner*, 482 U.S. at

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on the merits. *See* 21 F.4th at 272–73. Therefore, rather than reviewing Lumumba's claims under § 2254(d)'s substantial-deference regime, we review them de novo.

[4] Lumumba claims that this appeal also involves a First Amendment challenge to Offense Code 128 as applied to his particular conduct. But Lumumba labelled his claim below as an "Overbreadth" claim, J.A. 24, and cited the Supreme Court's decision in *Martinez*, 416 U.S. at 404, which involved a facial First Amendment challenge. Likely for this reason, the district court interpreted his petition to raise a facial First Amendment challenge and resolved the case on that basis. The district court then granted a certificate of appealability for review of the merits of that overbreadth claim and the void-for-vagueness claim. *Lumumba*, 2022 WL 228318, at *1 ("Petitioner may appeal the Court's merits holdings on the void-for-vagueness and overbreadth doctrines."). Because the certificate of appealability does not include an as-applied challenge, we are precluded from considering one in this appeal. *See* 28 U.S.C. § 2253(c)(3) (providing that a certificate of appealability must "indicate which specific issues or issues" make the required showing for issuing the certificate); *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012) (explaining that certificates of appealability "screen[] out issues unworthy of judicial time and attention and ensure[] that frivolous claims are not assigned to merits panels"); *see also Cox v. Weber*, 102 F.4th 663, 673–74 (4th Cir. 2024).

84. At the same time, however, the Supreme Court recognized in *Turner* that certain constitutional rights are "inconsistent" with proper incarceration. *See id*. at 95; *Johnson*, 543 U.S. at 510. "This is because certain privileges and rights must necessarily be limited in the prison context" in order to ensure prison and prisoner safety and security. *See Johnson*, 543 U.S. at 510. For such rights, prison administrators deserve great deference to act in the best interest of their institutions. 482 U.S. at 84–85. So the Court in *Turner* established that, when a prisoner claims that a prison practice or regulation is invalid because it impinges on his constitutional rights,[5] he prevails only if he shows the prison's policy is not "reasonably related to legitimate penological interests." *Id.* at 89.

> To determine whether a prison policy satisfies *Turner*, we consider four factors:
>
> (1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it;
>
> (2) whether there are alternative means of exercising the right that remain open to prison inmates;
>
> (3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally; and
>
> (4) whether there are ready alternatives.

Firewalker-Fields v. Lee, 58 F.4th 104, 115 (4th Cir. 2023) (quoting *Greenhill v. Clarke*, 944 F.3d 243, 253 (4th Cir. 2019)); *see also Turner*, 482 U.S. at 89–91. In applying these factors, we afford substantial deference to prison officials' judgment, particularly with

[5] Before we even consider a policy's reasonableness under *Turner*, a prisoner must first show that the policy impinges on his constitutional rights. *See Heyer v. U.S. Bureau of Prisons*, 984 F.3d 347, 356 (4th Cir. 2021). Here, Kiser does not dispute that Offense Code 128 impinges on Lumumba's freedom of speech, so we focus only on the reasonableness inquiry.

respect to the third factor. *Firewalker-Fields*, 58 F.4th at 115. "The burden is not on the State to prove the validity of prison regulations but on the prisoner to disprove it." *Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015) (cleaned up) (quoting *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)).

Lumumba insists that we start on the wrong foot by applying *Turner*. Relying on *Johnson v. California*, 543 U.S. 499 (2005), he argues that *Turner* applies "*only* to rights that are 'inconsistent with proper incarceration,'" *id.* at 510 (quoting *Overton*, 539 U.S. at 131), but not to "*structural* constraints on state action," Opening Br. at 36–37. And he contends that overbreadth challenges fall into the second bucket, such that they should assessed according to the normal standards that apply outside prison walls. *See United States v. Hansen*, 599 U.S. 762, 770 (2023) (explaining that an overbreadth challenger must demonstrate "that the statute 'prohibits a substantial amount of protected speech' relative to its 'plainly legitimate sweep'" (quoting *United States v. Williams*, 553 U.S. 285, 292 (2008)).

We refuse to abandon *Turner* in this context. The Court in *Johnson* never distinguished between rights-based and "structural" challenges. Rather, it distinguished between rights inconsistent and consistent with proper incarceration and determined that the right at issue there, "[t]he right not to be discriminated against based on one's race," falls into the latter category. *Johnson*, 543 U.S. at 510. The Court also recognized that it has repeatedly held that First Amendment rights—including the freedom of speech—*do*

fall within *Turner*'s ambit. *Id.* at 510.[6] And overbreadth doctrine is not some separate "structural" constraint on state action, but a kind of facial challenge to laws that burden the freedom of speech. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024). Because *Turner* establishes the standard for vindicating First Amendment rights in prison, we hold that Lumumba cannot bring an overbreadth challenge separate from *Turner*.[7]

1. Offense Code 128 prohibits participating in or encouraging other prisoners to participate in public displays of group opinion on political or other issues within Virginia correctional facilities.

Before applying *Turner*, we consider the scope of the challenged regulation. Offense Code 128 prohibits "[p]articipating in, or encouraging *others* to participate in, a work stoppage, or a *group demonstration*." J.A. 66 (emphasis added). The parties dispute how far this prohibition extends. According to Lumumba, the term "group demonstration" is very open-ended and covers any "outward exhibition of feeling" by two or more people,

[6] *See Turner*, 482 U.S. at 89–91 (restriction on correspondence); *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 348–50 (1987) (restriction on attending religious services); *Thornburgh v. Abbott*, 490 U.S. 401, 406–14 (1989) (restriction on receipt of subscription publications); *Lewis v. Casey*, 518 U.S. 343, 361–62 (1996) (restriction on access to courts); *Shaw v. Murphy*, 532 U.S. 223, 228–32 (2001) (restriction on correspondence); *Overton*, 539 U.S. at 131–32 (restriction on freedom of association). The Supreme Court has never addressed whether or how *Turner* might apply to the Establishment Clause.

[7] Alternatively, Lumumba argues that the stricter standard set forth in *Martinez*, 416 U.S. at 412–15, should govern here. But the Supreme Court and our Circuit have narrowly cabined *Martinez* to cases involving *censorship* of *outgoing* personal correspondence from prisoners. *See Thornburgh*, 490 U.S. at 409–14; *Altizer v. Deeds*, 191 F.3d 540, 548 (4th Cir. 1999); *see also Matherly v. Andrews*, 859 F.3d 264, 281 (4th Cir. 2017). For all other First Amendment free-speech claims brought by prisoners, *Turner* supplies the controlling standard. *See Turner*, 482 U.S. at 84–89; *Thornburg*, 490 U.S. at 409. Because, as we will explain shortly, Offense Code 128 prohibits certain speech directed at other prisoners, *Turner* controls here.

including "a worship service, sitting in a prayer circle, organizing a workout, creating an art project, composing music, or observing a religious or patriotic holiday." Opening Br. at 32. And because the term "others" is undefined and sweeping, Lumumba argues that Offense Code 128 prohibits encouraging even non-prisoners to participate in a group demonstration. Kiser, by contrast, insists that it is limited to public, group expressions of opinion within Virginia correctional facilities on political or other matters.[8]

"[W]e start where we always do: with the text of the [regulation]." *Van Buren v. United States*, 593 U.S. 374, 381 (2021).[9] As Lumumba correctly notes, the term "demonstration" can, in some contexts, encompass any outward display of sentiment or affection. But this meaning normally inheres in the context of *individual* demonstrations. *See, e.g.*, *Demonstration*, *American Heritage Dictionary of the English Language* (5th ed. 2016) ("An expression or manifestation, as of one's feelings: *a demonstration of her displeasure*."); *Demonstration*, *Oxford English Dictionary*, https://doi.org/10.1093/OED/2254065070 (Sept. 2023) ("An exhibition or outward display of a quality or feeling," for example, "Mr. Bush made a public demonstration of willingness to honor the traditional rules of the game"). Offense Code 128, by contrast, refers to

[8] The parties do not address or dispute the meaning of "participating" or "encouraging." We presume that these words carry their ordinary meaning. *See Encourage*, *Merriam Webster's Collegiate Dictionary* (11th ed. 2020) ("to attempt to persuade"); *Participate*, *id.* ("to take part").

[9] Offense Code 128 is part of the Virginia Department of Correction's Operating Procedure, which was promulgated under the Director of Correction's rulemaking authority. *See* Va. Code § 53.1-25. Virginia courts interpret state regulations according to their plain meaning when they are unambiguous. *Chesapeake Hosp. Auth. v. State Health Comm'r*, 301 Va. 82, 93, 872 S.E.2d 440, 446 (2022). So we do the same here.

demonstrations by *groups*. When used in the context of group activity, "demonstration" more narrowly refers to a public display of group opinion on political or other issues, such as a protest or rally. *See Demonstration*, *American Heritage Dictionary*, *supra* ("A public display of group opinion, as by a rally or march: *peace demonstrations*."); *Demonstration*, *Oxford English Dictionary*, *supra* ("A public march or rally expressing an opinion about a political or other issue; esp. one in protest against or support of something," for example, "Activists participating in the massive New York demonstration for nuclear disarmament"); *Demonstration*, *Webster's Third New International Dictionary* (1981) ("[A] public display of group feeling (as of approval, sympathy, or antagonism) esp. towards a person, cause, or action of public interest," for example, "while the delegates are howling and conducting their [demonstrations], the leaders may be quietly engaged in the highest statesmanship"). Offense Code 128 is most plausibly read to prohibit only this narrow form of group demonstration, not the broader kind of individual demonstration that Lumumba identifies.

This reading of the regulation is confirmed by the surrounding language. *See Yates v. United States*, 574 U.S. 528, 543 (2015) (plurality opinion) ("[A] word is known by the company it keeps."). Offense Code 128 doesn't just prohibit group demonstrations; it also prohibits prisoners from participating in or encouraging others to participate in a "work stoppage." A work stoppage is "[a] cessation of work by a group of employees as a means of protest." *Work Stoppage*, *American Heritage Dictionary*, *supra*; *accord Work Stoppage*, *Merriam-Webster's Collegiate Dictionary*, *supra*. In other words, it is a kind of concerted group activity intended to convey a message. This definition informs the meaning of

"group demonstration" because it is a noun in a series with work stoppage. When several nouns . . . are associated in a context suggesting that the words have something in common, they should be assigned a permissible meaning that makes them similar." Antonin Scalia & Brian A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012). Accordingly, we find that "group demonstration" in Offense Code 128 refers only to a public display of group opinion on political or other social issues.

What about encouraging "others" to participate? On its face, this term could refer to anyone in the world or just to a smaller subset of people. But "[w]hen words have several plausible definitions, context differentiates among them." *Hansen*, 599 U.S. at 775. Here, context indicates that "others" refers only to fellow prisoners. Offense Code 128 is, after all, a prison disciplinary regulation. And the offenses, penalties, and disciplinary procedures in Virginia's regulations are "for all offenders incarcerated in the Department of Corrections institutions" and "appl[y] to all institutions operated by the Department of Corrections (DOC)." J.A. 59. Given this context, Offense Code 128 appears to only govern interactions between prisoners within Virginia correctional facilities, not interactions between prisoners and anyone in the outside world.

This reading is supported by the fact that when a Virginia prison regulation applies to words or conduct directed at non-prisoners, it specifically says so. *See* Scalia & Garner, *supra*, at 170 ("[W]here the document has used one term in one place, and a materially different term in another, the presumption is that the different term denotes a different idea."); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115–16 (2001). For example, Offense Code 136 prohibits threats or intimidation of "public officials" or "member[s] of

the general public." J.A. 67. Similarly, Offense Code 222 prohibits "[v]ulgar or insolent language, gestures, or actions directed toward an employee, or directed toward, or in the presence of, persons who are not offenders or not employed by DOC (general public, volunteers, and visitors)." J.A. 69. And Offense Code 232 proscribes "[u]nauthorized contact with or harassment of any private citizen or off duty employee, in person, by mail, or by telephone or other communication system/device." *Id.* As these examples show, when an offense applies to actions directed at non-prisoners, it ordinarily says so. But Offense Code 128 does not say so; it merely refers to "others." The most plausible reading of "others," therefore, is that it refers only to other Virginia prisoners, not to anyone in the world.

In the end, Lumumba may be right that Offense Code 128, read in a vacuum, has a wide ambit. But read in context, the plain meaning of its words indicates a narrower meaning. Offense Code 128 prohibits prisoners from participating in or encouraging other prisoners to participate in public displays of group opinion on political or other social issues within Virginia correctional facilities. It does not, however, prohibit any conceivable expression of sentiment or feeling directed at anyone in the world.

2. Offense Code 128 does not facially violate the First Amendment.

Now that we have defined Offense Code 128, we can determine whether it is consistent with the First Amendment. Under *Turner*'s framework, we first consider whether there is "a valid, rational connection" between the prison regulation and a "legitimate penological interest." 482 U.S. at 89 (citation omitted). A regulation fails this prong if the "logical connection" between it and the prison's asserted interest "is so remote

as to render the policy arbitrary or irrational." *Id.* at 89–90. The prison bears the burden of offering the interests that support its policy. *Firewalker-Fields*, 58 F.4th at 117.

As Lumumba effectively acknowledges, this factor weighs in Kiser's favor. Kiser explains that Offense Code 128 promotes order, discipline, and security in the Virginia prison system. These are legitimate penological interests, *Martinez*, 416 U.S. at 412. And restricting group demonstrations is a reasonable way to promote these interests. Group demonstrations can disrupt the normal order of prison operations and unsettle the disciplinary efforts undertaken therein. *Pilgrim v. Luther*, 571 F.3d 201, 205 (2d Cir. 2009). They also can balloon into full-scale riots, which pose a danger to prison officers and other inmates. *See Jones v. N.C. Prisoners' Lab. Union, Inc.*, 433 U.S. 119, 132–33 (1977); *cf. Overton*, 539 U.S. at 134 ("[C]ommunication with other felons is a potential spur to criminal behavior." (citation and internal quotation marks omitted)). Prohibiting participation in or encouragement of such demonstrations is therefore a valid and reasonable way to preserve order, discipline, and security within prison walls.

Second, we consider whether "there are alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. A lack of alternatives does not automatically doom a regulation, but it does provide "some evidence that the regulation[] [is] unreasonable." *Overton*, 539 U.S. at 135. Importantly, when assessing this factor, "the right in question must be viewed sensibly and expansively." *Thornburgh*, 490 U.S. at 417 (cleaned up); *see also Firewalker-Fields*, 58 F.4th at 117.

This factor leans in Kiser's favor, too. Lumumba claims that Offense Code 128 prevents prisoners from ever expressing their grievances with prison administration. But

this is based on his mistaken belief that Offense Code 128 applies to "any mode of communication" that a prisoner employs. Opening Br. at 29. Under that belief, there may not be any alternatives. In reality, Offense Code 128 only prohibits prisoners from communicating grievances through work stoppages or group demonstrations. Other ways to express grievances remain available, including filing an official complaint with the prison. *See Watkins v. Kasper*, 599 F.3d 791, 797 (7th Cir. 2010). And since these alternatives exists, this factor cuts against Lumumba.

Third, we consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. When a potential accommodation will have a "significant 'ripple effect,'" *id.*, we must be particularly deferential to prison officials, *Firewalker-Fields*, 58 F.4th at 117.

Like the first two factors, this one favors Kiser. Much of Lumumba's argument on this prong is based on his own conduct, which he insists was nonviolent, "abstract advocacy." Opening Br. at 29. But Lumumba's conduct, as already discussed, involves more than his conduct in isolation. It involves group demonstrations which can "pose additional and unwarranted problems and frictions" between prisoners and officers. *See Jones*, 433 U.S. at 129. Accommodating group demonstrations therefore forces a prison to undertake safeguards to ensure that the demonstration does not get out of hand. That puts a "drain on scarce . . . resources," *See O'Lone*, 482 U.S. at 353 (citation omitted).

Finally, we consider possible alternative policies. *Turner*, 482 U.S. at 90. The "absence of ready alternatives is evidence of the reasonableness of a prison regulation"

while the presence of "obvious, easy alternatives" may suggest that it is unreasonable. *Id.* Yet "[t]his is not a least-restrictive-alternative test; it looks for easy and obvious alternatives that do not 'impos[e] more than a de minimis cost to the valid penological goal.'" *Firewalker-Fields*, 58 F.4th at 118 (alteration in original) (quoting *Overton*, 539 U.S. at 136). The prisoner ultimately bears the burden to propose reasonable alternatives. *Id.*

Lumumba has failed to carry his burden on this factor. On appeal, he proposes a "more narrowly drafted rule" that would impose "restrictions on speech that is actually disruptive, or that actually threatens disruption." Opening Br. at 11, 38–41. But Lumumba forfeited this argument by failing to suggest it or any other alternative to the prison, in his habeas petition, or in his district court briefing. *Firewalker-Fields*, 58 F.4th at 120 ("Because he pitched none of these creative solutions to the prison at the time, he cannot use them after the fact to prove that the prison's rules were not reasonable."). And even if we ignored this forfeiture, Lumumba's proposed alternative would still fail. Prisons have a strong and legitimate interest in adopting prophylactic rules that head off activities that are likely to cause violence or disruption, even if those activities are not themselves violent or disruptive. *Jones*, 433 U.S. at 132–33 ("Responsible prison officials must be permitted to take reasonable steps to forestall [] threat[s], and they must be permitted to act before the time when they can compile a dossier on the eve of a riot."). Requiring prison officials to wait until riots break out would jeopardize prison security and risk danger to officers and other prisoners. Accordingly, Lumumba's proposed alternative is neither easy, obvious, nor low-cost.

Lumumba has failed to show that Offense Code 128 is unreasonable under *Turner*. The district court was thus correct to rule that his petition fails to state a viable First Amendment claim.

B. Void for Vagueness Challenge

Besides his First Amendment claim, Lumumba also argues that Offense Code 128 is unconstitutionally vague. The Due Process Clause of the Fourteenth Amendment prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. xiv. "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C. v. Fox Television Station, Inc.*, 567 U.S. 239, 253 (2012). The government violates this prohibition when it deprives someone of life, liberty, or property pursuant to a statute or regulation that is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972). When a regulation "interferes with the right of free speech or of association," the Supreme Court has advised that "a more stringent vagueness test should apply." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 19 (2010) (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.,* 455 U.S. 489, 499 (1982)). Here, Lumumba argues that Offense Code 128 is facially void for vagueness because it

fails to provide adequate notice of the conduct it prohibits and vests significant discretion in prison officials, thus inviting arbitrary and discriminatory enforcement.[10]

Not just any litigant can bring a facial vagueness challenge, however. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Humanitarian L. Project*, 561 U.S. at 18–19; *United States v. Hosford*, 843 F.3d 161, 170 (4th Cir. 2016) ("[I]f a law clearly prohibits a defendant's conduct, the defendant cannot challenge, and a court cannot examine,

[10] Kiser argues that we need not conduct a separate void-for-vagueness inquiry because Offense Code 128 is constitutional under *Turner*. But whether *Turner* supplants traditional vagueness doctrine for prisoners is a difficult question that we need not resolve today. Unlike the First Amendment, the Supreme Court has never addressed whether void-for-vagueness principles apply in prisons. Other circuits are split over this question. *Compare Waterman v. Farmer*, 183 F.3d 208, 212–14 (3d Cir. 1999) (concluding that vagueness doctrine does not apply independently from *Turner* in the prison context), *and Bahrampour v. Lampert*, 356 F.3d 969, 975–76 (9th Cir. 2004) (same), *with Reynolds v. Quiros*, 25 F.4th 72, 95–96 (2d Cir. 2022) (analyzing a prison regulation under the vagueness doctrine separate from *Turner*), *Jones v. Caruso*, 569 F.3d 258, 276–77 (6th Cir. 2009) (same), *and Koutnik v. Brown*, 456 F.3d 777, 783–84 (7th Cir. 2006) (same); *see also Amatel v. Reno*, 156 F.3d 192, 203 (D.C. Cir. 1998) (remanding for the district court to decide this question). Moreover, there are plausible reasons to think that the right not to be subject to vague laws is consistent with incarceration. *See Johnson*, 543 U.S. at 510. Providing notice of prohibited conduct to regulated parties is "not only consistent with proper prison administration," *id.*, but arguably the only way good administration is possible—people can only follow rules if they know what the rules demand of them, *cf. Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926); *see also* Lon L. Fuller, *The Morality of Law* 35–36, 63–65 (rev. ed. 1969). And preventing vague prohibitions "bolsters the legitimacy of the entire criminal justice system," *Johnson*, 543 U.S. at 511, as it ensures that every prisoner is treated with fundamental fairness and respect, *see Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *see also* John Finnis, *Natural Law & Natural Rights* 270–73 (2d ed. 2011). Thus, it is not obvious that *Turner* supplants traditional vagueness doctrine in the prison context. We need not decide this question today, however; because we ultimately conclude that Offense Code 128 is constitutional even under normal void-for-vagueness principles, we will assume, without deciding, that such principles apply here.

whether the law may be vague for other hypothetical defendants."). This is true "even to the extent a heightened vagueness standard applies" due to First Amendment implications; for the "rule makes no exception for conduct in the form of speech." *Humanitarian L. Project*, 561 U.S. at 20; *see also Fusaro v. Howard*, 19 4th 357, 374 (4th Cir. 2021). So if Offense Code 128 clearly proscribes Lumumba's conduct, he cannot successfully challenge it as unconstitutionally vague.

Offense Code 128 clearly proscribes Lumumba's conduct. Remember, Offense Code 128 prohibits prisoners from participating in or encouraging other prisoners to participate in public displays of group opinion within Virginia correctional facilities. We agree with the district court that "[t]he evidence presented at Lumumba's disciplinary hearing clearly suggested that he was planning to lead some sort of non-violent civil disobedience campaign—exactly the kind of conduct forbidden by Disciplinary Offense Code 128." J.A. 119. The record from Lumumba's disciplinary proceedings indicates that he was punished for "attempt[ing] to garner support for a group demonstration that would disrupt the orderly operation of Sussex I State prison." J.A. 54; *see also* J.A. 101 ("[Lumumba] had attempted to garner support for a group demonstration that would disrupt the orderly operation of the institution."). This finding was backed by multiple pieces of evidence indicating that Lumumba had attempted organizing a mass demonstration among Virginia inmates. So Lumumba was clearly engaging in precisely the sort of conduct that

Offense Code 128 prohibits. As a result, he cannot challenge the regulation as facially vague.[11]

Even if his own conduct were not clearly proscribed, Lumumba's vagueness challenge would still fail. A litigant must make a high showing before we will strike down a regulation as void for vagueness. "That some smidgen of ambiguity remains is no reason to find a statute unconstitutionally vague." *Recht v. Morrisey*, 32 F.4th 398, 415 (4th Cir. 2022). A law is not void for vagueness so long as it "(1) establishes minimal guidelines to govern law enforcement, and (2) gives reasonable notice of the proscribed conduct." *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853 (4th Cir. 1998) (internal quotation marks omitted). In other words, "a court considering a vagueness challenge must determine if the statutory prohibitions 'are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with.'" *United States v. Whorley*, 550 F.3d 326, 333 (4th Cir. 2008) (cleaned up) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 608 (1973)).[12]

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[11] Lumumba insists that he was not attempting to organize a demonstration but was merely expressing a desire for non-violent advocacy to a non-prisoner (*i.e.*, Breslau). Yet this appeal does not involve a sufficiency-of-the-evidence challenge to the prison's disciplinary ruling. Whether or not he was guilty, Lumumba was adjudged to have attempted to encourage other inmates to participate in some kind of group demonstration.

[12] "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Vill. of Hoffman Ests.*, 455 U.S. at 498. For this reason, our sister circuits generally demand less specificity from prison regulations than they do from ordinary criminal laws. *See, e.g.*, *Adams v. Gunnell*, 729 F.2d 362, 369-70 (5th Cir. 1984); *Wolfel v. Morris*, 972 F.2d 712, 717 (6th Cir. 1992); *Meyers v. Aldredge*, 492 F.2d 296, 310 (3d Cir. 1974); *Reynolds*, 25 F.4th at 96; *Koutnik*, 456 F.3d at 783.

We conclude that Offense Code 128 is not facially vague. Though the regulations do not explicitly define words like "encourage," "others," or "group demonstration," we have already explained that these words have determinate, ordinary meanings that apply to a fixed range of conduct. *See Fusaro*, 19 F.4th at 371 (explaining that the void-for-vagueness inquiry "is aided by both 'dictionary definitions and old-fashioned common sense'" (quoting *Wag More Dogs Liab. Corp. v. Cozart*, 680 F.3d 359, 371 (4th Cir. 2012)). Moreover, Offense Code 128 utilizes "run-of-the-mill statutory phrases" that have been "upheld by other courts in the face of vagueness challenges." *Recht*, 32 F.4th at 415; *see, e.g.*, *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997) ("demonstrating"); *Sword v. Fox*, 446 F.2d 1091, 1100 (4th Cir. 1971) ("demonstration"); *United States v. Anderton*, 901 F.3d 278, 283 (5th Cir. 2018) ("encourage"). So Offense Code 128 is not unconstitutionally vague.

* * *

Prison administrators deserve substantial deference to design policies and procedures in the best interests of their institutions. Accordingly, the bar for successfully mounting a constitutional challenge against prison policies is high. We conclude that Lumumba has not cleared that bar here. So the district court's order is

AFFIRMED.

WYNN, Circuit Judge, concurring in part and dissenting in part:[1]

We are bound to liberally construe pro se pleadings. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam). So construed, Lumumba's pro se petition includes an as-applied First Amendment challenge alongside the facial challenges addressed in the majority opinion.[2] The majority, like the district court, errs by concluding otherwise. Because the district court did not consider Lumumba's as-applied First Amendment challenge, I would vacate the district court's opinion in relevant part and remand for review of that claim.[3]

Courts must liberally construe all pro se filings and complaints, "however inartfully pleaded." *Erickson*, 551 U.S. at 94 (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). "[T]his liberal construction allows courts to recognize claims despite various formal deficiencies, such as incorrect labels or lack of cited legal authority." *Wall v. Rasnick*, 42 F.4th 214, 218 (4th Cir. 2022). Courts must often "recharacterize" a filing to which a pro se litigant has attached the wrong label to "avoid an unnecessary dismissal, to avoid inappropriately stringent application of formal labeling requirements, or to create a better

[1] While I am troubled by the sweeping breadth of Code 128, I agree with the majority opinion that Lumumba's facial overbreadth and vagueness claims fail.

[2] Lumumba's petition also raises an as-applied vagueness challenge, but I agree with the majority opinion that such a challenge fails.

[3] We have jurisdiction to determine whether the district court properly considered the scope of Lumumba's claims. The district court granted a certificate of appealability to review its "holding[] on the . . . overbreadth doctrine[]." *Lumumba v. Kiser*, No. 7:20-cv-379, 2022 WL 228318, at *1 (W.D. Va. Jan. 25, 2022). Our analysis of whether the district court erred in reaching its holding on the overbreadth doctrine necessarily requires us to examine whether the district court properly considered the scope of the issue before it.

correspondence between the substance of a *pro se* motion's claim and its underlying legal basis." *Castro v. United States*, 540 U.S. 375, 381–82 (2003) (citations omitted); *see also Fitz v. Terry*, 877 F.2d 59, 1989 WL 64157, at *2 (4th Cir. 1989) (per curiam, unpublished table decision) ("[L]iberal construction requires active interpretation in some cases.").

This liberal construction is especially critical when deciphering whether a complaint raises as-applied or facial challenges. Indeed, even when a plaintiff is represented by counsel, "[t]he label [of 'as-applied' or 'facial'] is not what matters." *John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010). That's because the line between the two types of challenges is "amorphous," *Elgin v. Dep't of Treasury*, 567 U.S. 1, 15 (2012), meaning it is "not so well defined that it has some automatic effect or that it must always control the pleadings," *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). And if the distinction between as-applied and facial challenges is murky even for judges, we must grant pro se litigants considerable leeway when characterizing their claims.

Here, the majority opinion correctly notes that Lumumba's petition did not explicitly label his claim as an "as-applied" challenge. Maj. Op. at 8 n.4. However, though inartful, Lumumba's petition clearly articulates his belief that Code 128 is not only facially unconstitutional, *e.g.*, J.A. 26 ("Offense Code 128 is facially insufficient[.]"), but *also* unconstitutional as applied to his particular speech, *e.g.*, J.A. 24 (discussing First Amendment protections for outgoing prison correspondence); J.A. 25 (twice referencing "the Petitioner's" First Amendment rights, twice discussing "*Petitioner's*" own right to criticize the government in "*his 'outgoing' correspondence*," and specifically referencing

his speech in his emails and phone calls (emphases added)).[4] These allegations discuss how the enforcement of Code 128 against Lumumba's specific speech violated his rights, which is paradigmatic of an as-applied challenge. *See Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 204 (4th Cir. 2019) (defining as-applied challenges as those "which test the constitutionality of a statute applied to the plaintiff based on the record").

The majority opinion also refuses to acknowledge Lumumba's as-applied challenge because he cited *Procunier v. Martinez*, 416 U.S. 396 (1974), in his petition, and *Martinez* involved a facial challenge. Maj. Op. at 8 n.4. The majority opinion gets this backward: Lumumba's citation of *Martinez supports* reading his petition as intending to raise an as-applied challenge. The Supreme Court held in *Martinez*, and later clarified in *Thornburgh v. Abbott*, 490 U.S. 401 (1989)—which Lumumba also cited—that intermediate scrutiny applies to the review of First Amendment challenges to the regulation of *outgoing* prison correspondence. *See Martinez*, 416 U.S. at 412–14; *Thornburgh*, 490 U.S. at 412–13. This is the precise matter at issue in Lumumba's own case. So, in citing *Martinez* and *Thornburgh*, Lumumba was highlighting how courts should review the particular way in which Code 128 was enforced against him, not how courts might review the Code's application more generally. And, critically, nothing in the logic or holding of *Martinez* is

[4] At oral argument, my colleague in the majority and Kiser agreed that the district court itself appeared to have mistakenly conducted an as-applied analysis of Lumumba's First Amendment claim, despite labeling the claim as facial. Oral Arg. at 25:20–29:10, available at https://www.ca4.uscourts.gov/OAarchive/mp3/21-7512-20240510.mp3. Notwithstanding this acknowledgment, the majority now inexplicably holds Lumumba to a "stringent application of formal labeling requirements." *Castro*, 540 U.S. at 381.

limited to facial challenges. Thus, while the majority opinion is correct to analyze Lumumba's facial challenge under *Turner* because most applications of Code 128 involve internal prison speech, *Martinez* is the appropriate case to use in analyzing Lumumba's as-applied challenge, and Lumumba's reliance on *Martinez* in his petition supports that he raised such a claim.

In sum, by failing to consider an as-applied First Amendment claim, the district court did not construe Lumumba's pro se petition liberally. I would accordingly vacate in part and remand with instructions for the district court to consider Lumumba's as-applied First Amendment challenge under the *Martinez* standard for outgoing correspondence.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ASKARI DANSA M.S. LUMUMBA, *Plaintiff*, v. JEFFERY KISER, *Defendant*.	CASE NO. 7:20-cv-379 MEMORANDUM OPINION & ORDER JUDGE NORMAN K. MOON

Order Granting Petitioner's Certificate of Appealability, Dkt. 19

On September 30, 2021, this Court entered an order, Dkt. 18, granting Defendant's motion to dismiss Petitioner's petition for the writ of habeas corpus under 28 U.S.C. § 2254. Petitioner then filed a request for certificate of appealability, Dkt. 19, which now comes before the Court.

When issuing a final order adverse to a § 2254 petitioner, the court must issue or deny a certificate of appealability. Fed. R. Gov. § 2254 Cases 11(a). A certificate of appealability may issue only if the movant has made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2). The movant must show that reasonable jurists could debate whether the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Slack v. McDaniel*, 529 U.S. 473, 483–84 (2000).

Here, Petitioner has shown a substantial denial of a constitutional right that reasonable jurists might disagree about. In granting Defendant's motion to dismiss, the Court denied Defendant's procedural arguments but granted Defendant's merits arguments. Dkt. 18 at 3–8.

Petitioner made two merits arguments: one, on the void-for-vagueness doctrine, and two, on the overbreadth doctrine. *Id.* With respect to void-for-vagueness, Petitioner argued that the prison disciplinary offense under which he was punished was unconstitutionally vague. *Id.* at 5–6. With respect to overbreadth, Petitioner argued that the same offense was overbroad because it allegedly punished constitutionally protected speech. *Id.* at 7–8.

Although the Court did not accept Petitioner's arguments, the Court holds that a reasonable jurist could disagree. The Fourth Circuit has not developed case law directly on point for either issue, and the Court relied on the Supreme Court's more generally applicable decisions in *Grayned v. City of Rockford*, 408 U.S. 104 (1972) for the void-for-vagueness issue and *Turner v. Safley*, 482 U.S. 78 (1987) for the overbreadth issue. Because there are no directly-on-point Fourth Circuit cases with respect to either issue, and because both the void-for-vagueness and overbreadth doctrines as applied here require interpretation of the relevant disciplinary offense on which reasonable jurists might disagree, the Court will **GRANT** Petitioner's request for a certificate of appealability, Dkt. 19. Petitioner may appeal the Court's merits holdings on the void-for-vagueness and overbreadth doctrines. *See* 28 U.S.C. § 2254(c)(2)–(3) (requiring that the Court "indicate which specific issue or issues satisfy the showing" that "the applicant has made a substantial showing of the denial of a constitutional right").

The clerk is directed to send copies of this memorandum opinion and accompanying order to petitioner and all counsel of record.

ENTERED this 25th day of January 2022.

NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ASKARI DANSA M.S. LUMUMBA, *Plaintiff*, v. JEFFERY KISER, *Defendant*.	CASE NO. 7:20-cv-379 MEMORANDUM OPINION & ORDER JUDGE NORMAN K. MOON

I. Introduction

This matter is before the Court on Askari Dansa M.S. Lumumba (formerly Dale Lee Pughsley)'s petition for the writ of habeas corpus pursuant to 28 U.S.C. § 2254, Dkt. 1, and respondent Jeffery Kiser's motion to dismiss, Dkt. 10. Lumumba has been incarcerated in the Virginia state prison system since 1999 for several convictions, including second degree murder, shooting into an occupied vehicle, possession of a firearm by a convicted felon, and use of a firearm by a convicted felon. Dkt. 1 at 1. In July 2018, he was incarcerated at Sussex I State Prison. Dkt. 1-1 at 1. On July 9th, he was placed in solitary confinement on suspicion of violating prison rules. *Id.* The next day, July 10th, he was transferred across the state to Red Onion State Prison. *Id.* When he arrived at Red Onion, prison officials served him a Disciplinary Offense Report, in which the reporting officer accused him of violating Offense Code 128 of the Virginia Department of Correction's Offense Disciplinary Procedure. *Id.*; Exh. A to Dkt. 1-1. Offense Code 128 prohibits "[p]articipating in, or encouraging others to participate in, a work stoppage or group demonstration." Exh. A to Dkt. 1.

The prison held a disciplinary hearing on the matter on July 19th. Dkt. 1-1 at 2. At the hearing, officers accused Lumumba of "attempt[ing] to garner support for a group demonstration that would disrupt the orderly operation of the institution." Exh. B to Dkt. 1. According to the officers, Lumumba had used his prison-run email account to communicate with other prisoners via an outside, third-party intermediary about inciting civil disobedience. *Id.* He had sent a message intended for another prisoner that several of the cell blocks were understaffed, and that he had been talking to other prisoners about a "Gandhian Attica," referring, evidently, to a non-violent (i.e., inspired by Mahatma Gandhi) alternative to the Attica prison riot of 1971. *Id.* Officers further alleged that Lumumba said in a telephone conversation with an unspecified person: "[D]o you know how hard I am fighting not to organize? . . . [other prisoners are] primed and ready, [t]hese young boys are ready to go," and "Blood and Crip gang members have approached about making [him] their 'big Homie' or leader." *Id.* At the end of the hearing, the hearing officer found Lumumba guilty and imposed a penalty of thirty days disciplinary segregation along with 128 days of lost statutory good time credit. Exh. B to Dkt. 1.

Soon after, on July 25th, Lumumba submitted an appeal to the Warden of Red Onion, J.A. Kiser, for Level I review, and Kiser affirmed the decision on August 14th. Exh. C to Dkt. 1. On August 21st, Lumumba submitted an appeal to VDOC Eastern Regional Administrator Gregory Holloway for Level II review, and Holloway affirmed the decision on October 29th. Exh. D. to Dkt. 1. Then, on May 2, 2019, Lumumba petitioned the Virginia Supreme Court for state habeas relief, which the court denied in an order on February 24, 2020. Dkt. 1 at 7.

Now, Lumumba petitions this Court for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. Specifically, Lumumba challenges the constitutionality of Offense Code 128 under the void-for-vagueness and overbreadth doctrines.

II. Procedural Barriers

A. Timeliness

Kiser contends that Lumumba's petition is not timely. Dkt. 11 at 2. Lumumba contends that it is. Dkt. 14 at 1–2. The conflict boils down to what the proper start date is for calculating when Lumumba's cause of action accrued.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires that petitioners seeking relief under § 2254 file within one year of the statutorily specified triggering date. 28 U.S.C. § 2244(d)(1); *see also Felker v. Turpin*, 518 U.S. 651, 662 (1996). However, certain proceedings can toll the triggering date. Section 2244(d)(2) provides that periods of time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent claim shall not be counted towards the period of limitations.

Here, Lumumba's disciplinary hearing occurred on July 19, 2018. Exh. B to Dkt. 1. He filed his Level I appeal within VDOC on July 25th, 2018 and received a decision on August 14th. Exh. C to Dkt. 1. He filed is Level II appeal on August 21st and received a decision on October 29th. Exh. D to Dkt. 1. He filed his state habeas petition on May 2, 2019 and received a decision from the Virginia Supreme Court on February 24, 2020. Dkt. 1 at 7. He then filed the present petition on June 28, 2020. Kiser argues that the present petition is untimely because the disciplinary hearing occurred on July 19, 2018, and Lumumba filed the present petition on June 28, 2020 (which Kiser calculates as 708 days), and Kiser also claims that the cause of action was only tolled for 298 days (the period in which the petition was pending before the Virginia Supreme Court), meaning, if this calculation were correct, that 410 non-tolled days passed between the accrual of the cause of action and the filing of the present petition—surpassing the one-year limit. Dkt. 11 at 2–3.

But Kiser uses the wrong date to calculate when the cause of action first accrued; the proper date is when VDOC issued its final judgment in Lumumba's administrative appeal process (i.e. the date that VDOC denied Lumumba's Level II appeal), not when the original disciplinary hearing occurred. When the basis of a habeas petition is a constitutional challenge to a state prison's disciplinary decision, as here, § 2244(d)(1)(D) establishes the statute of limitations. *See Wade v. Robinson*, 327 F.3d 328 (4th Cir. 2003) (holding that § 2244(d)(1)(D) sets the statute of limitations for a petitioner challenging the state's rescindment of his good time credits); *Clay v. Clarke*, 2018 WL 5305676 at *12 (E.D. Va. Aug. 22, 2018) ("Petitioner challenges the execution of his state sentence rather than attacking the underlying judgment of conviction. Accordingly, Section 2244(d)(1)(D) controls the date on which the limitation period commences."). Therefore, "the limitations period began running on the date that Petitioner became aware, through the exercise of due diligence, of the allegedly illegal deprivation of his due process rights by VDOC." *Clay*, 2018 WL 5305676 at *12. The day that a petitioner becomes aware of the alleged deprivation of their rights in a case where the petitioner alleges that they lost good time credits due to a state prison's disciplinary decision is the date on which the state prison system issued its final judgment in the administrative appeal process. *Id.* at *13 ("Petitioner's institutional disciplinary decision became final . . . when the Regional Administrator denied Petitioner's Level II appeal.").

In this case, then, the date on which Lumumba's cause of action accrued was the date that VDOC denied his Level II appeal: October 29, 2018. In total, 608 days passed between then and when Lumumba filed the present petition on June 28, 2020. It is uncontested that the statute of limitations was tolled while Lumumba's state habeas petition was pending before the Virginia Supreme Court from May 2, 2019, to February 24, 2020—a period of 298 days. Subtracting

those 298 days from the total of 608 days, there were 310 non-tolled days between when Lumumba's cause of action accrued and when he filed the present petition. Therefore, less than one year of non-tolled time passed before Lumumba filed the present petition, meaning that the present petition is timely.

B. Exhaustion

The next issue is whether Lumumba has exhausted the state remedies available to him. Under § 2254(b)(1)(A), a petitioner must have "exhausted the remedies available in the courts of the State" prior to filing a federal habeas petition. The respondent may waive the exhaustion requirement so long as the waiver is express. *Granberry v. Greer,* 481 U.S. 129, 130 (1987). Kiser expressly asserts that Lumumba "exhausted his state court remedies." Dkt. 11 at 2. Therefore, the court will consider the issue waived.

III. Merits

Lumumba challenges Disciplinary Offense 128 on two grounds: that it is void-for-vagueness, and thus facially unconstitutional under Fourteenth Amendment, and that it is overly broad with respect to the kinds of speech it proscribes, and thus facially unconstitutional under the First Amendment's Free Speech Clause. Dkt 1-1 at 4–6.

A. Void-for-Vagueness

The void-for-vagueness doctrine holds that penal rules are unconstitutional when they "are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The 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. Lawrence*, 461 U.S. 352, 357 (1983). These twin concerns of inadequate notice and arbitrary or discriminatory enforcement are

especially pronounced "where a vague statute abuts upon sensitive areas of basic First Amendment freedoms" because ambiguity "inevitably lead[s] citizens to steer far wider of the unlawful zone than if the boundaries . . . were clearly marked," thereby chilling protected speech. *See Grayned*, 408 U.S. at 109 (cleaned up). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *United States v. Williams*, 553 U.S. 285, 304 (2008).

Disciplinary Offense 128 prohibits "[p]articipating in, or encouraging others to participate in, a work stoppage or group demonstration." Exh. A to Dkt. 1. Lumumba contests the specificity of the terms "group" and "demonstration." Dkt. 1-1 at 5. "Group," he says, could refer to a gathering of any size, even just two prisoners. *Id.* And "demonstration" could mean anything from "prayer, signing a petition, a letter writing campaign, [and] group exercise," to "standing a certain way collectively." *Id* at 5–6. But there is a difference between a rule being broad and being vague; Disciplinary Offense 128 certainly prohibits a wide range of conduct, but it is not "vague" in the sense that it is unclear what it proscribes. The evidence presented at Lumumba's disciplinary hearing clearly suggested that he was planning to lead some sort of non-violent civil disobedience campaign—exactly the kind of conduct forbidden by Disciplinary Offense 128. Lumumba has not supported his position with citations to cases where courts have struck down similar prison rules; in fact, at least one other federal district court has upheld a functionally identical rule. *See Best v. Lake*, 2019 WL 3409868 at *5 (E.D. Cal. July 29, 2019) (holding that a prison rule nearly identical to Disciplinary Offense 128 was not void-for-vagueness).

Therefore, Disciplinary Offense 128 is not void-for-vagueness.

B. Overbreadth

Lumumba also challenges Disciplinary Offense 128 as being overly broad. The overbreadth doctrine is a particular way to challenge the constitutionality of laws under the First Amendment. *United States v. Stevens*, 559 U.S. 460, 473 (2010). A law may be invalidated under the overbreadth doctrine if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Id.* (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)).

A prisoner's constitutional rights survive incarceration. *Bell v. Wolfish*, 441 U.S. 520, 545 (1975). However, Lumumba cites the wrong line of cases under which the court must analyze Disciplinary Offense 128. Lumumba cites to *Procunier v. Martinez*, 416 U.S. 386 (1974) and *Thornburgh v. Abbott*, 470 U.S. 401 (1989) for the proposition that the court must apply a "stricter standard" for measuring the constitutionality of Disciplinary Offense 128. *Procunier* and *Thornburgh* provide the standards for when prison officials place some burden on a prisoner's correspondence with the outside world. But that is not what happened here; VDOC officials did not burden Lumumba's ability to send or receive mail. Rather, they punished him for what he said in his outgoing communications. Thus, *Procunier* and *Thornburgh* are inapt.

The case that provides the correct standard of review is *Turner v. Safley*, 482 U.S. 78 (1987). *Safley* held that a prison regulation that affects inmates' constitutional rights "is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89. The reasonableness of the regulation is judged by four factors:

(1) Whether there is a "valid, rational connection" between the regulation and the legitimate governmental interest used to justify it;

(2) Whether there are alternative means for the prisoner to exercise the right at issue;

(3) The impact that the desired accommodation will have on guards, other inmates, and prison resources (so-called "ripple effects"); and

(4) The presence or absence of "ready alternatives," where the presence of ready alternatives make it more likely that a regulation is unreasonable, while the absence make it less likely that the regulation is unreasonable.

Safley, 482 U.S. at 89–91. Here, Kiser proffers a legitimate government interest supported by Disciplinary Offense 128: maintaining order and safety in prisons. Dkt. 11 at 8–9. There is a "valid, rational connection" between Disciplinary Offense 128's prohibition on inciting group demonstrations and Kiser's proffered governmental interest in maintaining order because group demonstrations are potentially disruptive to prison order. The "ripple effect" of permitting Lumumba to organize a mass disobedience campaign would have a direct impact on guards and on prison resources, which would have to accommodate Lumumba's actions. And, while neither Lumumba nor Kiser have identified any "ready alternatives," it is likely that Lumumba does have alternative means of expressing the same grievances he would air in his planned civil disobedience campaign; this is especially true because VDOC never apparently limited his ability to communicate with the outside world or with other prisoners, but only policed the content of his communications for plain violations of prison rules.

Therefore, Disciplinary Offense 128 is not unconstitutional under the First Amendment. Because both of Lumumba's claims fail on the merits, the Court **GRANTS** Kiser's motion to dismiss, Dkt. 10, and the Court **DISMISSES WITH PREJUDICE** Lumumba's petition for the writ of habeas corpus, Dkt. 1.

The Clerk of Court is directed to send this Memorandum Opinion and Order to all counsel of record.

Entered this 30th day of September, 2021.

NORMAN K. MOON
SENIOR UNITED STATES DISTRICT JUDGE

AO 241
(Rev. 01/15)

PETITION UNDER 28 U.S.C. § 2254 FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

United States District Court	District: Western Dist. of Virginia, Roanoke
Name (under which you were convicted): DALE LEE PUGHSLEY	Docket or Case No.: 7:20CV379
Place of Confinement: River North Correctional Center	Prisoner No.: #1108900
Petitioner (include the name under which you were convicted): Dale L. Pughsley	Respondent (authorized person having custody of petitioner): Jeffery Kiser
The Attorney General of the State of: Virginia	

PETITION

1. (a) Name and location of court that entered the judgment of conviction you are challenging:
Lynchburg Circuit Court, P.O. Box #4, 900 Court Street, Lynchburg Virginia 24505

(b) Criminal docket or case number (if you know): CR98010435-00

2. (a) Date of the judgment of conviction (if you know): April 1, 1999

(b) Date of sentencing: May 21, 1999

3. Length of sentence: Fifty Eight Years, Five Suspended (TOTAL: 53 yrs. active)

4. In this case, were you convicted on more than one count or of more than one crime? ☑ Yes ☐ No

5. Identify all crimes of which you were convicted and sentenced in this case:
- 2nd Degree Murder § 18.2-32
- Shooting into an occupied vehicle § 18.2-~~286~~ 154
- Firearm Poss. by a Convicted Felon § 18.2-308.2
- Use of A Firearm by a Convicted felon § 18.2-53.1

6. (a) What was your plea? (Check one)

☑ (1) Not guilty ☐ (3) Nolo contendere (no contest)

☐ (2) Guilty ☐ (4) Insanity plea

(b) If you entered a guilty plea to one count or charge and a not guilty plea to another count or charge, what did you plead guilty to and what did you plead not guilty to? I plead guilty to 'Possession of a Firearm by a Convicted Felon § 18.2-308.2 and received a Five year suspended sentence.

(c) If you went to trial, what kind of trial did you have? (Check one)

☑ Jury ☐ Judge only

7. Did you testify at a pretrial hearing, trial, or a post-trial hearing?

☐ Yes ☑ No

8. Did you appeal from the judgment of conviction?

☑ Yes ☐ No

9. If you did appeal, answer the following:

(a) Name of court: Court of Appeals of Virginia

(b) Docket or case number (if you know): 1846-99-3

(c) Result: Conviction Affirmed

(d) Date of result (if you know): October 31, 2000

(e) Citation to the case (if you know): Dale Lee PUGHSLEY v. COMMONWEALTH of Virginia

(f) Grounds raised: "Trial Court erred by permitting the Commonwealth to introduce during the [redacted] sentencing phase of the trial prejudicial [redacted] rebuttal evidence

(g) Did you seek further review by a higher state court? ☑ Yes ☐ No

If yes, answer the following:

(1) Name of court: Virginia Supreme Court

(2) Docket or case number (if you know): 002659

(3) Result: Conviction Affirmed

(4) Date of result (if you know): Unknown

(5) Citation to the case (if you know): Dale Lee PUGHSLEY v. COMMONWEALTH of Virginia

(6) Grounds raised: See (9) (f) hereinbefore

(h) Did you file a petition for certiorari in the United States Supreme Court? ☐ Yes ☑ No

If yes, answer the following:

(1) Docket or case number (if you know):

(2) Result:

(3) Date of result (if you know):

(4) Citation to the case (if you know):

10. Other than the direct appeals listed above, have you previously filed any other petitions, applications, or motions concerning this judgment of conviction in any state court? ☐ Yes ☐ No

11. If your answer to Question 10 was "Yes," give the following information:

(a) (1) Name of court: Virginia Supreme Court

(2) Docket or case number (if you know): 021882

(3) Date of filing (if you know): Unknown

(4) Nature of the proceeding: Habeas Corpus Petition

(5) Grounds raised: * Ineffective Assistance of Counsel [denial 6th Amend.]

* Violation of Miranda [denial of 5th & 6th Amend.]

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☑ No

(7) Result: Petition Denied

(8) Date of result (if you know): Unknown

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(b) If you filed any second petition, application, or motion, give the same information:

(1) Name of court: U.S. Dist. Court, Western. Dist. of VA., Roanoke Division

(2) Docket or case number (if you know): 7:02cv01246-SGWL-ge

(3) Date of filing (if you know): December 4, 2002

(4) Nature of the proceeding: Habeas Corpus Petition

(5) Grounds raised: see (11) (a) (5) hereinbefore

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☑ No

(7) Result: Petition Denied

(8) Date of result (if you know): April 15, 2003

(c) If you filed any third petition, application, or motion, give the same information:

(1) Name of court: Fourth Circuit Court of Appeals

(2) Docket or case number (if you know): N/A

(3) Date of filing (if you know):

(4) Nature of the proceeding: Certificate of Appealability

(5) Grounds raised: see (11) (a) (5) hereinbefore

(6) Did you receive a hearing where evidence was given on your petition, application, or motion?

☐ Yes ☑ No

(7) Result: Certificate Denied

(8) Date of result (if you know): June 10, 2003

(d) Did you appeal to the highest state court having jurisdiction over the action taken on your petition, application, or motion?

(1) First petition: ☐ Yes ☐ No

(2) Second petition: ☐ Yes ☐ No

(3) Third petition: ☐ Yes ☐ No

(e) If you did not appeal to the highest state court having jurisdiction, explain why you did not:

12. For this petition, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

CAUTION: To proceed in the federal court, you must ordinarily first exhaust (use up) your available state-court remedies on each ground on which you request action by the federal court. Also, if you fail to set forth all the grounds in this petition, you may be barred from presenting additional grounds at a later date.

GROUND ONE: Denial OF 14th Amendment Right to U.S. Const.

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

SEE MEMORANDUM ATTACHED

(b) If you did not exhaust your state remedies on Ground One, explain why:

N/A

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground One:

GROUND TWO:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Two, explain why:

(c) **Direct Appeal of Ground Two:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

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(c) **Direct Appeal of Ground One:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☑ No

(2) If you did not raise this issue in your direct appeal, explain why: I'm challenging a prison disciplinary conviction in VDOC at Red Onion State Prison where the duration of my confinement was extended as a penalty.

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☑ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: Petition For Habeas Corpus under § 8.01-654

Name and location of the court where the motion or petition was filed: Virginia Supreme Court

Docket or case number (if you know): 190612

Date of the court's decision: February 24, 2020

Result (attach a copy of the court's opinion or order, if available): Petition Denied

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☑ No

(4) Did you appeal from the denial of your motion or petition? ☑ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: Petition For Rehearing, Virginia Supreme Court

Docket or case number (if you know): 190612

Date of the court's decision: May 14, 2020

Result (attach a copy of the court's opinion or order, if available): Petition Denied

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(b) If you did not exhaust your state remedies on Ground Three, explain why: _____

(c) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ☐ Yes ☐ No

(2) If you did not raise this issue in your direct appeal, explain why: _____

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

☐ Yes ☐ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition: _____

Name and location of the court where the motion or petition was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition? ☐ Yes ☐ No

(4) Did you appeal from the denial of your motion or petition? ☐ Yes ☐ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ☐ Yes ☐ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Two : _____

_____

_____

_____

GROUND THREE: _____

_____

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

_____

_____

_____

_____

_____

_____

_____

Name and location of the court where the motion or petition was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

(3) Did you receive a hearing on your motion or petition? ❒ Yes ❒ No

(4) Did you appeal from the denial of your motion or petition? ❒ Yes ❒ No

(5) If your answer to Question (d)(4) is "Yes," did you raise this issue in the appeal? ❒ Yes ❒ No

(6) If your answer to Question (d)(4) is "Yes," state:

Name and location of the court where the appeal was filed: _____

_____

Docket or case number (if you know): _____

Date of the court's decision: _____

Result (attach a copy of the court's opinion or order, if available): _____

_____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

_____

_____

_____

_____

_____

_____

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Four: _____

_____

_____

_____

_____

_____

_____

(7) If your answer to Question (d)(4) or Question (d)(5) is "No," explain why you did not raise this issue:

(e) **Other Remedies:** Describe any other procedures (such as habeas corpus, administrative remedies, etc.) that you have used to exhaust your state remedies on Ground Three:

GROUND FOUR:

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

(b) If you did not exhaust your state remedies on Ground Four, explain why:

(c) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue? ❒ Yes ❒ No

(2) If you did not raise this issue in your direct appeal, explain why:

(d) **Post-Conviction Proceedings:**

(1) Did you raise this issue through a post-conviction motion or petition for habeas corpus in a state trial court?

❒ Yes ❒ No

(2) If your answer to Question (d)(1) is "Yes," state:

Type of motion or petition:

13. Please answer these additional questions about the petition you are filing:

(a) Have all grounds for relief that you have raised in this petition been presented to the highest state court having jurisdiction? ☑ Yes ☐ No

If your answer is "No," state which grounds have not been so presented and give your reason(s) for not presenting them:

(b) Is there any ground in this petition that has not been presented in some state or federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them:

NO!

14. Have you previously filed any type of petition, application, or motion in a federal court regarding the conviction that you challenge in this petition? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, the issues raised, the date of the court's decision, and the result for each petition, application, or motion filed. Attach a copy of any court opinion or order, if available.

15. Do you have any petition or appeal now pending (filed and not decided yet) in any court, either state or federal, for the judgment you are challenging? ☐ Yes ☑ No

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised.

16. Give the name and address, if you know, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: 1) James Angel Esq., 725 Church Street, 14th Floor, P.O. Box # 1042, Lynchburg VA. 24505

(b) At arraignment and plea: See (a)

(c) At trial: See (a)

(d) At sentencing: See (a)

(e) On appeal: See (a)

(f) In any post-conviction proceeding: See (a)

(g) On appeal from any ruling against you in a post-conviction proceeding: See (a)

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? ☑ Yes ☐ No

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: Augusta County Circuit Court, P.O. Box # 689, Staunton VA. 24402-0689

(b) Give the date the other sentence was imposed: November 7, 2019

(c) Give the length of the other sentence: Six Months

(d) Have you filed, or do you plan to file, any petition that challenges the judgment or sentence to be served in the future? ☑ Yes ☐ No

18. TIMELINESS OF PETITION: If your judgment of conviction became final over one year ago, you must explain why the one-year statute of limitations as contained in 28 U.S.C. § 2244(d) does not bar your petition.*

* The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") as contained in 28 U.S.C. § 2244(d) provides in part that:

(1) A one-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of -

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Therefore, petitioner asks that the Court grant the following relief: Invalidate the Disciplinary Conviction in question in the instant petition

or any other relief to which petitioner may be entitled.

Nate Pugh, Pro se
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Petition for Writ of Habeas Corpus was placed in the prison mailing system on 6.28.20 (month, date, year).

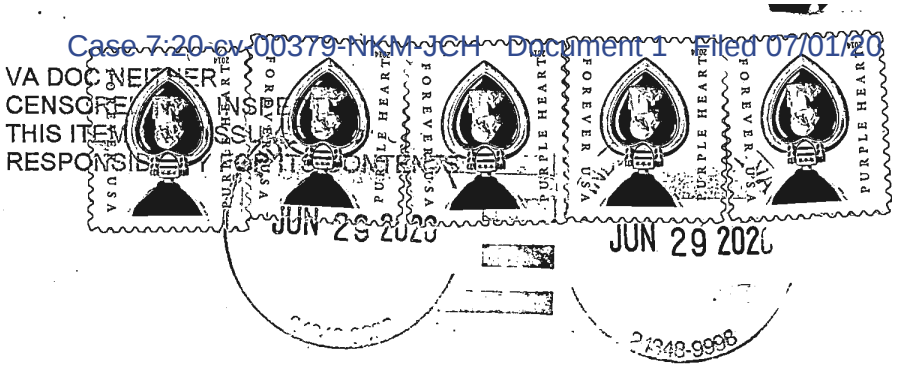
Executed (signed) on 6.28.20 (date).

Nate Pugh
Signature of Petitioner

If the person signing is not petitioner, state relationship to petitioner and explain why petitioner is not signing this petition.

DALE L. PUGHSLEY #1108900
River North Correctional Center
329 Dellbrook Lane
Independence VA. 24348

Clerk, United
Western Distric
210 Franklin
Roanoke VA



States District Court

of Virginia, Roanoke Div.

nad, SW, Suite 540

011-2208

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

DALE LEE PUGHSLEY, Prison Number #1108900
Petitioner

V.
JEFFREY KISER,
The Respondent

MEMORANDUM OF LAW IN SUPPORT OF PETITION OF HABEAS CORPUS PURSUANT TO 28 USC §2254

As a matter of introduction, the Petitioner respectfully submits that the events which transpired in the instant case constituted a denial of the Petitioner's Fourteenth Amendment right to due process of law. This error was not merely procedural, but substantially infringed upon the Petitioner's Constitutional rights. At minimum, the Petitioner requests a hearing be held on these issues.

STATEMENT OF THE ISSUES

I. Offense Code 128 within the Virginia Department of Corrections (VADOC) Operating Procedure (O.P.) 861.1 "Inmate Discipline" is void-for-vagueness inasmuch as it fails to provide sufficient 'NOTICE' to satisfy the standard mandated by the Fourteenth Amendment's due process guarantee.

II. The Petitioner is entitled to an evidentiary hearing on this matter.

STATEMENT OF FACTS

On July 9th 2018 at approximately 3:30 PM, Dale Pughsley (the Petitioner) was placed in Solitary Confinement under investigation at Sussex I State Prison. On July 10th 2018 at approximately 2:30 PM the petitioner was emergency transferred eight hours away to Red Onion State Prison. At

approximately 11:00 PM, on July 10th 2018, the Petitioner arrived at Red Onion and was served a Disciplinary Offense Report (DOR). In the DOR, Reporting Officer J. Issac (Issac) accused the Petitioner of violating Offense Code 128, "Participating in, or encouraging others to participate in a work stoppage or group demonstration." [See Exhibit A] On July 19th 2019, Institutional Hearings Officer M. Counts (Counts) conducted a disciplinary hearing for case no SXI-2018-1538, the foregoing offense, and found the Petitioner guilty. Counts imposed a penalty of thirty days disciplinary segregation and 128 days loss of statutory good time [See Exhibit B]. On July 25th 2018, the Petitioner submitted an appeal to Warden J. A. Kiser (Kiser) for level one review [See Exhibit C]. On August 14th 2018, Kiser upheld the Petitioner's conviction. On August 21st 2018, the Petitioner submitted an Appeal to Eastern Regional Administrator Gregory Holloway for Level II review. On October 29th 2018, Gregory Holloway upheld the Petitioner's conviction [See Exhibit D].

STATEMENT OF JURISDICTION

Federal law provides a safety net for defendants whose constitutional rights have been violated in state proceedings. 28 USC §2254 provides an avenue for redress of Federal Constitutional violations during a disciplinary proceeding where the penalty was a loss of statutory good time which will extend the duration of his confinement. see Adams v. Fleming no. 7:16 cv 00445, 2017 US Dist. Lexis 10960, 2017 WL 2992508 *3 (W.D. Va. July 12, 2017). The petitioner exhausted state court remedies in the Virginia Supreme Court, record no. 190612, where he presented to the state court both the operative facts and controlling issues. see Kasi v Angelone 300 F.3d 487 (4th Cir. 2002).

> *"Virginia's habeas corpus jurisdiction includes cases in which an order entered in the petitioner's favor... will as a matter of law standing alone directly impact the duration of a petitioner's confinement... Thus, a petitioner's challenge to the unconstitutional loss of vested time credit is cognizable on Virginia State habeas review because the petitioner is detained without lawful authority."* Adams v Flemming no. 7:16 CV 00445, 2017 US Dist. Lexis 10960, 2017 WL 2992508 at *3 <W.D. Va. July 12, 2017>

ARGUMENT

Purpose of Writ of Habeas Corpus is to safeguard a person's freedom from detention in violation of constitutional guarantees... Blackledge v. Allison 431 U.S. 63, 97 S.Ct. 1621

Federal habeas corpus petitioner who claims he is detained pursuant to final judgement of state court in violation of the United States Constitution is entitled to have federal habeas corpus court make its own independent determination of his claim... Wainwright v. Sykes 433 U.S. 72, 97 S.Ct. 2497 (1977).

In order to raise an issue in a Habeas Corpus motion, the issue must be one that was not presentable in direct appeal. Smith v. Murray 477 U.S. 527 (1986).

State prisoners' suits fall within traditional scope of Habeas Corpus where they allege that the deprivation of their good conduct time credits on their sentences causes, or will cause, them to be in illegal physical confinement after their conditional release dates have passed, and they seek restoration of their good time credits. Prieser v. Rodriguez 411 U.S. 475 (1973). Habeas Corpus is an appropriate remedy for restoration of prisoner's good time credit on their sentences even if the restoration of their credits will not result in their immediate release but only in shortening the length of their actual confinement in prison. Id; see also Royster v. Polk 299 Fed. Appx 250 <,4th Cir. 2008>.

In the instant case the Petitioner lost statutory good time credit during a disciplinary hearing whereby the state lengthened the Petitioner's duration of confinement without providing the minimal procedural safeguards by the Fourteenth Amendment's due process clause.

Once the State has created the right to good time credit and has recognized that deprivation of such credit is a sanction authorized for major misconduct the prisoner's interest has real substance and is sufficiently embraced with the Fourteenth Amendment liberty to entitle him to those minimum

procedures appropriate under the circumstance and require by the due process clause to insure that the tae created right is not arbitrarily abrogated. Wolf v. McDonnell 418.215 539 (1974).

I. Offense Code 128 within O.P. 861.1 is void-for-vagueness inasmuch as it fails to provide sufficient "NOTICE" to satisfy the standard mandated by the Fourteenth Amendment's due process guarantee.

The language of the law is unconstitutionally vague if persons of common intelligence must necessarily guess at the meaning of the language and differ to its application. Tanner v. City of Va. Beach 674 S. E. 2d 848 (2009). A court may invalidate a law as being unconstitutional for vagueness for either one or two independent reasons. City of Chicago v. Morales 574 4.5 41 (1990). First, if a statute fails to provide people of ordinary intelligence a reasonable opportunity to understand conduct it prohibits. Boyd v. County of Henrico 42 Va. App 495 (2004). Second, an enactment may be found vague if it authorizes, or even encourages, arbitrary and discriminatory enforcement. Id. The Constitutional prohibition against vagueness derives from the requirement of fair NOTICE embodied in the "Due Process Clause" Tanner Id. accord. United States v. Williams 128 S. Ct. 1830 (2008); Grayned v. City of Rockford 408 U.S. 104, 92 S. Ct. 2294 (1972). For the minimum requirement of procedural due process to be satisfied in State prison disciplinary hearings, prisoners must be provided with advance written notice in order to inform them of the changes and to enable them to marshall the facts and prepare a defence. Wolff Id. at 563

A. Overbreadth

The U.S. Supreme Court has long established that an individual's right to free speech survives incarceration. See Procunier v. Martinez 416 U.S. 386 (1974). The U.S. Supreme Court has also established a stricter standard for measuring the constitutionality of prison regulations or prison official's conduct that restrict prisoners outgoing correspondence than for those that restrict prisoner's incoming correspondence. See Thornburgh v. Abbott 470 U.S. 401 (1989). In 'Martinez', the Court pointed out that outgoing correspondence that magnifies grievances or contains inflammatory radical views cannot

reasonably be expected to present a danger to the community inside the prison. Martinez id at 416. Dangerous outgoing correspondence is more likely to fall within readily identifiable categories; examples noted in 'Martinez' include escape plans, plans relating to ongoing criminal activity, and threats of blackmail or extortion. Thornburgh id at 412. The present case involves a dispute over the scope of the Petitioner's constitutionally protected free speech liberty guaranteed by the First Amendment.

The Petitioner wrote an email and made phone calls to members of the public wherein inflammatory language was used. The Petitioner contends that he has a right to speak critically of the government in outgoing correspondence even if inflammatory language is used when doing so. The government does not have a right to restrain the Petitioner's First Amendment liberty or censor his 'outgoing' correspondence unless:

1. The regulation of practice in question furthers an important substantial government interest unrelated to the suppression of expression.

2. The limitation of First Amendment freedoms is no greater than necessary of essential to the protection of the government interest involved. Martinez id at 413.

VADOC officials were required to be particularly careful in this matter because it involved the Petitioner's free speech liberty.

B. Failure to Give Notice of What is Prohibited

Offense Code 128 in VADOC O.P. 861.1 reads:

> *"Partpicating in, or encouraging others to participate in, a work stoppage or group Demonstration,"* [See Exhibit E]

As noted above, the Petitioner was accused of "encouraging others to participate in a group demonstration". However, the Petitioner contends that nowhere in O.P. 861.1 is either the term "group" or "demonstration" defined. What constitutes a "group"? Is a group 2 or more, 3 or more, 4 or more, or 5 or more persons? Do all of the members of a "group" have to be housed in the same prison? What constitutes a "demonstration"? Is prayer, signing a petition, a letter writing campaign, group exercise,

standing a certain way collectively, etc. a "demonstration"? The Petitioner submits that there is no way any person of ordinary intelligence knows what constitutes a 'group demonstration'. Ergo, prisoners can't be expected to know what language in their phone calls or outgoing correspondence is prohibited by Offense Code 128 under its current wording. Therefore, Offense Code 128 is facially insufficient of the Fourteenth Amendment's due process mandate inasmuch as it fails to give a person of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Supra.

C. Offense Code 128 Authorizes and Encourages Arbitrary and Discriminatory Enforcement

A law should be invalidated unless its clarity has been designated as voided so as to allow the net to be cast at large Papachristos v. City of Jacksonville 405 U.S. 156, 166, 92 S. Ct. 837 (1972). Since there's no definition of 'group' or 'demonstration' within O.P. 861.1, the policy failed to describe what conduct is generally prohibited thereby failing to guide the minimal exercise of discretion afforded prison officials under the Constitution. See Grayned Id. The vagueness test does not forbid individual assessments by law enforcement officers. What it forbids is a law that, by its expansive sweep of language, enacts an elastic definition of illegality -- one that authorized an officer to define for himself what is and is not legal. Boyd id at 520-21.

There are thousands of corrections officers within the VADOC who are allowed to determine for themselves what constitutes a 'group' and what constitutes a 'demonstration'. The Virginia General Assembly gave the director of VADOC the power to create regulations that govern prisoner conduct. Therefore, this regulation must lay out what conduct the director of VADOC prohibits, as not to invite disparate treatment impermissibly delegating policy considerations to prison officials for resolution on an *ad hoc* and subjective basis with the attendant danger of arbitrary and discriminatory application. Tanner id at 852. As it's currently written, Offense Code 128 allowed prison officials to punish the Petitioner's speech in the form of outgoing correspondence and phone calls, as an act threatening the security and

order of VADOC, thereby proving the language in Offense Code 128 allows officials to case too wide of a net when enforcing it. The Petitioner asserts that Reporting Officer J. Isaac never describes in his description of offense [see exhibit A] what fact he listed was probative nor what action constituted the ultimate fact proving Offense Code 128 was violated.

Further, Counts never explains during the hearing or in her 'reason for decision' <ROD> what 'group demonstration' the Petitioner encouraged [see exhibit B]. Counts states in the foregoing ROD that she "found offender Pughsley's intention was to encourage 'others' to participate in acts of violence against DOC", however, Counts never describes what prescribed action was taken by the Petitioner. Counts never answered the question, "What group demonstrations was the Petitioner encouraging?" and "Who all was the Petitioner encouraging?" or "Did the number of people constitute a group?" Thus, Offense Code 128 fails the second prong of the void-for-vagueness test because it authorizes arbitrary and discriminatory enforcement of the offense.

II. The Petitioner is Entitled to an Evidentiary Hearing on These Matters

The State Court ruled sua sponte that the claim herein lacked cognizance. Consequently, the merits of the claim weren't reviewed so a determination on the factual basis of the petitioners claim wasn't made. The instant petition makes an appropriate showing of a constitutional violation entitling the petitioner to an evidentiary hearing. 28 USC §2254 (e) (2) (B). see also Harris v. Nelson 394 US 286, 89 S.Ct. 1082 (1969); Cardwell v. Greene 152 F.3d 331 (4th Cir 1998); Bell v. Jarvis 236 F.3d 149 (4th Cir 2000) More conclusions or opinions of the pleader will not suffice. Id.

In the present case, the Petitioner contends that he has set forth facts in his petition which entitle him to relief. Therefore, at the minimum, the Court should order an evidentiary hearing in this matter.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Honorable Court grant his petition for a writ of habeas corpus or, at a minimum, grant him an evidentiary hearing.

Respectfully Submitted

Dale L. Pughsley, pro se

~~Red Onion State Prison~~ River North Correctional Center

~~P. O. Box 970~~ 329 Dellbrook Lane

~~Pound, VA 24279~~ Independence VA 24348

6.25.20

Date

VIRGINIA:

IN THE SUPREME COURT

Dale L. Pughsley, No. 1108900,

Petitioner,

against Record No. 190612

Jeffrey Kiser,

Respondent.

AFFIDAVIT

State of Virginia, County of Wise, to-wit:

M. COUNTS, first being duly sworn, states as follows:

1. I am the Inmate Hearings Officer at Red Onion State Prison (Red Onion).

2. The information contained in this affidavit is based on personal knowledge and records maintained in the regular and ordinary course of business.

3. I am generally aware that Dale Pughsley, #1108900, has filed litigation in which he claims that he was not afforded due process during a hearing for a #128 disciplinary offense that he received on July 7, 2018 at Sussex I State Prison.

4. Division Operating Procedure (DOP) 861.1, effective January 1, 2016, sets forth the procedures for inmate discipline. As an Inmate Hearings Officer, I am the sole fact finder in the hearing and decide on the guilt or innocence of an accused offender. I am also responsible for imposing an appropriate penalty. Individuals are appointed as Inmate Hearings Officers by the Warden with approval of the Manager of the Offender Discipline Unit, and are required to have a thorough understanding of the disciplinary process, be an objective and impartial decision-

maker, successfully complete the training requirements set forth by the Chief of Corrections Operations and follow the Institutional Hearings Officer Code of Ethics. I report to the Warden or his designee. A copy of the relevant portion of DOP 861.1, effective January 1, 2016, is attached as Enclosure A.

5. On July 7, 2018, Pughsley was charged with Disciplinary Offense #128, participating in, or encouraging others to participate in a group disturbance after it was determined that Pughsley attempted to garner support for a group demonstration that would disrupt the orderly operation of Sussex I State Prison (Sussex I). During an investigation of Pughsley's communications, Sussex I Intel Unit became aware of a JPay email sent by Pughsley on July 6, 2018 addressed to Margaret Breslau. In this email, Pughsley stated that Breslau had already forwarded him an email from "H" that morning. In the second portion of the letter, Pughsley states, "For H." Investigators determined that with this message, Pughsley had attempted to contact offender H. Shabazz, who was housed at another institution. In the message, Pughsley states, "Look, these S1/S2 joints are severely understaffed! Word! Burh, I've been talking to brothers about a Gandhian Attica. Word, 'Blood in the Water' you feel me? Hundreds of people check in at once! We all want to go to the STAR program!" Additionally, Pughsley states, "Man, I'm telling you it's time to use the Art of War!"

6. In a second communication on July 7, 2018, Pughsley sent an email that was forwarded to an offender Chanell Burnette at a female facility in the State of Virginia. In this email, Pughsley stated that "This involves a radical reeducation! I use the religious institutions that are legitimized by the state to do this." He stated, "I'm new Afrikan and so I personally like to sue the Rastsfarian (sic) class to teach New Afrika(sic)/Pan Afrikanism(sic)/Afrikan(sic) Internationalism. It's tricky and require a bit of artistry but people will begin to respond."

During the investigation, investigators also accessed Pughsley's phone calls through Global Tell Link and found a call on July 2, 2018 in which he states to the recipient, "Do you know how hard I'm fighting not to organize? Seeing you is the only reason I'm not acting crazy." Pughsley further stated, "Niggas is primed and ready. These young boys are ready to go." During the same conversation, Pughsley states that a number of Blood and Crip gang members have approached about making Pughsley their "Big Homie" or leader. The Intelligence Unit at Sussex I became aware of Pughsley's communications on July 9, 2019.

7. When interviewed by Intel Officers Darby and Mears on July 10, 2018, Pughsley stated that he was not attempting to organize anything amongst the other offenders, and stated that he wa s just writing to Ms. Breslau on the street and what she did after that was up to her. Pughsley stated that he is about peaceful reformations of the prison system. He stated that he tells other offenders to write up their issues without using violence. Lastly, when questioned as to what "Gandhian Attica" means, Pughsley stated "Gandhian" refers to Gandhi, the political figure that helped India achieve independence from the United Kingdom. "Attica" is in regards to the prison riots that took place in 1971 in Attica, New York.

8. On July 10, 2018, Pughsley was received at Red Onion State Prison. On this date, he was served with a copy of the disciplinary offense report for Disciplinary Offense Code #128 received on July 7, 2018 at Sussex State Prison. Pughsley was advised of his due process rights for his upcoming disciplinary hearing that was scheduled for July 13, 2018. Pughsley refused to sign the disciplinary offense report, a copy of which is attached as Enclosure B.

9. On July 13, 2018, Pughsley was provided with a Notice of Postponement Report and was informed that his disciplinary hearing was rescheduled for July 19, 2018. At this time, Pughsley was provided a Witness Request Form and Request for Documentary Evidence Forms.

Copies of the Notice of Postponement Report, Witness Request Form and Documentary Evidence Forms are attached as Enclosure C.

10. On July 19, 2018, I conducted Pughsley's disciplinary hearing at Red Onion State Prison. Pughsley was present for the hearing and Reporting Officer Isaac, the Institutional Investigator at Sussex I State Prison, testified by telephone. At the beginning of the hearing, I read the disciplinary charge for the record and advised Pughsley of his due process rights. I asked Pughsley if he had any questions about his rights and he stated that he had no questions. Pughsley pled not guilty to the charge. I read each of Pughsley's requests for documentary evidence. He requested transcripts of telephone conversations on July 2 and July 9, 2018. I informed him that transcripts of telephone calls are not available. Pughsley also requested copies of emails for "Chanell" and "H" described in the disciplinary offense report and I denied the requests because the emails are part of the investigation and are, therefore, restricted for offender access. The pertinent details of the emails are included in the description of the disciplinary offense. Last, Pughsley requested Sergeant Hall as a witness to demonstrate that he was having mental health and suicidal thoughts. I found this request to be not relevant to the offense so a statement from Sergeant Hall was not obtained.

11. Reporting Officer Isaac testified that his report was correct and accurate and stated that his investigation revealed that Pughsley was attempting to garner support from other offenders to disrupt the orderly operation of Sussex I State Prison and other Virginia Department of Corrections facilities. Pughsley asked questions of Investigator Isaac. I also asked questions of Investigator Isaac regarding his interpretation of Pughsley's statements in the emails including "blood in the water" and the "art of war." Pughsley was also provided the opportunity to testify about and explain the meaning of these and other statements in his emails to others. Pughsley

asked what proof there was, other than the emails, that he was "on the ground" trying to organize offenders about a disturbance. Pughsley acknowledged that he was the author of the emails and telephone calls but stated that he disagrees with violence.

12. At the conclusion of the hearing, after considering the testimony and evidence provided during the hearing, I found sufficient evidence to find Pughsley guilty of Disciplinary Offense #128 by attempting to disrupt the orderly operation of Sussex I State Prison and other Virginia Department of Corrections facilities. I noted for the record that Counselor Gibson served as Pughsley's staff advisor because Counselor Mullins was not available for the hearing. Pughsley acknowledged that he had had time to meet with his advisor before the hearing and that Counselor Gibson was present to assist Pughsley during the hearing.

13. Upon my finding of guilty, I informed Pughsley that his penalty was 30 days in disciplinary segregation, with credit for time served, and 180 days loss of good time. I advised Pughsley that he had 15 days to appeal my decision and he should appeal to Warden Kiser at Red Onion State Prison. Pughsley appealed my decision to Warden Kiser and Regional Director Holloway where the decision was upheld on August 14, 2018 and October 29, 2018 respectively. Pughsley's disciplinary hearing was conducted in accordance with the due process requirements of OP 861.1. Copies of the Warden's and Regional Administrator's Appeal responses are

attached as Enclosure D.

M. COUNTS

M. Counts

Affiant

Sworn and subscribed to before me, a Notary Public, in and for the State of Virginia, County of Wise, on this 24 day of June, 2019.

Notary Public

My commission expires:

JAMES H. MIDDLETON
NOTARY PUBLIC
REG. #7130596
MY COMMISSION EXPIRES
10/31/2019
COMMONWEALTH OF VIRGINIA

VIRGINIA DEPARTMENT OF CORRECTIONS

Disciplinary Offense Report

861.1 A-1
Report generated by Messer, J M
Report run on 07/10/2018 at 6:48 PM

B-307

Case Number: SXI-2018-1538 Offender Name: Pughsley, Dale L DOC #: 1108900 Housing: HU2-C-42B
Facility: Sussex I State Prison Reference:
Offense Code: 128 Offense Title: Participating in, or encouraging others to participate in...
Offense Date: 7/7/2018 Approximate Time: 7:34 PM Location:

DESCRIPTION OF THE OFFENSE
Provide a summary of the details of the offense (i.e.: who, what, when, where, and how; any unusual behavior, any physical evidence and its disposition, and any immediate action taken – including use of force, etc.)

Upon the completion of an investigation, it was determined that you, Offender D. Pughsley #1108900, have attempted to garner support for a group demonstration that would disrupt the orderly operation of this institution. On July, 9th, 2018 the Intel Unit at Sussex 1 State Prison (S1SP) was made aware that you had attempted to contact Offender H. Shabazz, whom is currently housed at another institution. The communication in question was a JPay email sent on July 6th, 2018 addressed to a Ms. Margaret Breslau. In this email you state that Breslau had already forwarded an email from "H" that morning, to you. In the second portion of the letter, you state, ... <Con't>

[X] Investigation Date Completed: 7/10/2018 [X] DESCRIPTION CONTINUED ON ATTACHED PAGE

Witnesses: Darby, L
Mears, D

Reporting Officer: Isaac, S J
Title: Institutional Investigator
Date: 7/10/2018 Time: 1:56 PM

Officer -In-Charge : Messer, J M Title: Lieutenant
OIC Signature: C.T. Messer Date: 7/10/2018 Time: 6:45 PM

ADVISEMENT OF RIGHTS

By signing below, you indicate your preference regarding the rights indicated. Failure to respond, or indicate a preference, constitutes a **WAIVER** of the first three rights. The following forms are available to the offender **UPON REQUEST** in each housing unit: *Witness Request Form, Documentary Evidence Request Form,* and the *Reporting Officer Response Form.* The offender must submit these request forms to the Hearings Officer within **48-HOURS** of the charge being served.

DO YOU REQUEST A STAFF OR OFFENDER ADVISOR TO ASSIST YOU AT THE HEARING?	[✓] Yes	[ ] No	[ ] REFUSED TO RESPOND
DO YOU WISH TO REQUEST WITNESSES?	[✓] Yes	[ ] No	[ ] REFUSED TO RESPOND
DO YOU WISH TO REQUEST DOCUMENTARY EVIDENCE?	[✓] Yes	[ ] No	[ ] REFUSED TO RESPOND
DO YOU WISH TO WAIVE YOUR RIGHT TO 24-HOUR PREPARATION TIME PRIOR TO THE HEARING?	[ ] Yes	[✓] No	[ ] REFUSED TO RESPOND
DO YOU WISH TO APPEAR AT THE DISCIPLINARY HEARING? Refusal to appear is an admission of guilt, a waiver of witnesses and the right to a disciplinary hearing.	[✓] Yes	[ ] No	[ ] REFUSED TO RESPOND

YOU HAVE THE RIGHT TO QUESTION REPORTING OFFICER
(In person for Category I Offenses; by submitting a Reporting Officer Response Form for Category II Offenses)

YOU HAVE THE RIGHT TO ENTER INTO A PENALTY OFFER.

YOU MAY REMAIN SILENT. Silence does NOT constitute an admission of guilt.

THE CHARGE MAY BE VACATED AND RE-SERVED AS A DIFFERENT OFFENSE, WHICH CAN BE A HIGHER, EQUIVALENT OR LESSER OFFENSE CODE.

YOU MAY BE FOUND GUILTY OF A LESSER-INCLUDED OFFENSE CODE, IN ACCORDANCE WITH OPERERATING PROCEDURE 861.1

You have been informed of the charges against you, and advised of your rights at the Disciplinary Hearing. Refused to sign

Served and Witnessed By: S. Hall Offender's Signature:
Print Name: S. Hall Print Name:
Date of Service: 7/10/18 Approximate Time: 1055 hrs
IF OFFENDER REFUSES TO SIGN,SERVING OFFICER WILL CERTIFY REFUSAL: S. Hall

ADVISOR AT SERVICE OF DOR: S. Hall FORMS PROVIDED AT SERVICE (IF REQUESTED): [✓] Yes [ ] No
Date of Hearing: 7/13/2018 Revised Date: Revised Date: Revised Date:

Enclosure B Rev. 01/01/2016

DISCIPLINARY OFFENSE REPORT (attachment)

Case Number: SXI-2018-1538 Offender Name: Pughsley, Dale L DOC #: 1108900 Housing: HU2-C-42B

Facility: Sussex I State Prison Reference:

Description of Offense (continued):

"For H". In this section you state the following, "Look, these S1/S2 joints are severely understaffed! Word! Burh, I've been talking to brothers about a Gandhian Attica. Word, 'Blood in the Water' you feel me? Hundreds of people check in at once! We all want to go to the STAR program!" Additionally, you state, "Man, I'm telling you it's time to use the Art of War!"

In addition to this email, you sent another email through JPay addressed to Ms. Breslau on July 7th, 2018. In this email, you begin the second portion of this email with "For Chanell"; you are referencing Offender Chanell Burnette housed at a female facility in the State of Virginia. In this email you state, "This involves a radical re-education! I use the religious institutions that are legitimized by the state to do this." You continue with, "I'm New Afrikan and so I personally like to sue the Rastsfarian (sic) class to teach New Afrika(sic)/Pan Afrikanism(sic)/Afrikan(sic) Internationalism. It's tricky and require bit of Artistry but people will begin to respond." Ms. Breslau forwarded this email to Offender Burnette on the same date.

This reporting party accessed your phone calls through the Global Tell Link (GTL) offender phone call system. On July 2nd, 2018, you made a call at approximately 10:38 A.M. to the number (804)250-1981. In this call you state to the recipient, "Do you know how hard I'm fighting not to organize? Seeing you is the only reason I'm not acting crazy." You go on to state, "Niggas is primed and ready. These young boys are ready to go." You go on to state that a number of Blood and Crip gang members have approached you about making you their "Big Homie" or leader.

On July 10th, 2018, you were interviewed by Intel Officers L. Darby, D. Mears and this reporting party. During this interview you stated you were not attempting to organize anything amongst the other offenders. You stated you were just writing Ms. Breslau on the street and what she did after that was up to her. You continued by stating you are all about peaceful reformations of the prison system. You stated you tell other offenders to write up their issues up, without using violence. Lastly, when questioned as to what "Gandhian Attica" was in regards to, you stated "Gandhian" refers to Gandhi, the political figure that helped India achieve independence from the United Kingdom.

"Attica" is in regards to the prison riots that took place in 1971 in Attica, New York.

After review of the evidence uncovered during the course of this investigation, it has been determined that you are in violation of Offense 128 – Participating in or encouraging other to participate in group demonstration. This charge has been written in accordance with Operating Procedure 861.1.

Case Number: SXI-2018-1538 Offender Name: Pughsley, Dale L DOC #: 1108900 Housing: HU2-C-42B

Facility: Sussex I State Prison Reference:

OFFENDER'S PLEA AND RIGHTS

Hearing Location: Red Onion State Prison Date: 7/19/2018 Time: 1:24 PM

Plea: ☐ Guilty ☒ Not Guilty ☐ No Plea

Advisor at hearing:

Reason for absence/exclusion of the accused offender:

Was the Reporting Officer present at the Disciplinary hearing? ☐ Yes ☐ No

Has there been a denial of requested witnesses? ☐ Yes ☐ No

Has there been a denial of Documentary Evidence Forms? ☐ Yes ☐ No

DECISION OF THE HEARINGS OFFICER

☒ Guilty ☐ Not Guilty ☐ Dismissed ☐ Accepted Penalty Offer within 24 Hours of Service

☐ Informal Resolution ☐ Reduced to Lesser-Included Offense ☐ Reduced Penalty

☐ Vacated - Offender waived rewrite/reserve of offense ☐ Vacated for Rewrite/Re-serve

☒ For the charge of: Offense Title: 128 - Participating in, or encouraging others to participate in...

☐ For the Lesser Included Offense of: Offense Title:

Reason for Decision:

Investigator Isaac reports at the conclusion of an investigation it was determined that offender D. Pughsley # 1108900 had attempted to garner support for a group demonstration that would disrupt the orderly operation of the institution. Intelligent such as the offender sending email with the intent to relay messages to other offenders housed within the DOC , to include a completed telephone call. Email has language as S1/S2 joints are severely understaffed! I've been talking to brothers about a Gandhian Attica. Word! "blood in the water" you feel me, "Man, I'm telling you it's time to use the Art of War!. Telephone reviewed has offender Pughsley stating "do you know how hard I am fighting not to organize? Seeing you I the only reason I'm not acting crazy", "niggas is primed and ready, These young boys are ready to go". "Blood and Crip gang members have approached about making you their "big Homie" or leader.

At the disciplinary hearing offender Pughsley denied his intent was to cause a disruption. The language used references to books. Offender stated that he is not a violent person. The telephone call that was monitored was a discussion with his wife.

I IHO Counts questioned the reason behind the misspelling of words in his email. He states he does talk in code but the misspelling of Gandhi as a typographical error. I questioned the telephone call conversation about of the meaning when offender Pughsley states these "young boys being primed and ready to go, and the desire to have Pughsley as their leader. Offender stated he and his wife were having a disagreement.

Based on the information I have received at the disciplinary hearing, from the reporting officer and consideration of the language used in the email, telephone conversation along with the testimony of the offender. I have found the intentions of offender Pughsley was to encourage others to participate in acts of violence against DOC. These acts would severely disrupt the operations of the state facilities. Guilty decision rendered.

Penalty: 6 - Disciplinary Segregation - Imposed Value: 30 Days

7a+7b - Loss of SGT up to 180 Days Good Conduct Allowance or Equivalent Earned Sentence Credits - Imposed Value: 180 Days

Comment:

Hearing Officer's Signature: M Counts Date: 7/19/2018

Print Name: Counts, M L

Case Number: SXI-2018-1538 Offender Name: Pughsley, Dale L DOC # 1108900 Housing: HU2-C-42B

Facility: Sussex I State Prison Reference:

INSTITUTIONAL REVIEW:

☑ Approved ☐ Dismissed ☐ Suspended Penalty ☐ Informal Resolution

☐ Reduced Penalty ☐ Rehear ☐ Reduced to Lesser-Included Offense

☒ For the charge of: Offense Title: 128 - Participating in, or encouraging others to participate in...

☐ For the Lesser Included Offense of: Offense Title:

Comments:

Penalty: 6 - Disciplinary Segregation - Imposed Value: 30 Days

7a+7b - Loss of SGT up to 180 Days Good Conduct Allowance or Equivalent Earned Sentence Credits - Imposed Value: 180 Days

Signature: W Swiney Date: 7/23/18

Print Name: W Swiney Title: Lt

Rev. 01/01/2016

FILED: January 25, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-7512
(7:20-cv-00379-NKM-JCH)

ASKARI DANSO MS LUMUMBA, f/k/a Dale Lee Pughsley

Petitioner - Appellant

v.

JEFFREY KISER

Respondent - Appellee

O R D E R

The court grants leave to proceed in forma pauperis.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk