

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

KEITH CLAYTON BROOKS JR. — PETITIONER
(Your Name)

vs.

RICK RAEMISCH, E.D. CDOC — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Tenth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Keith C. Brooks Jr., CDOC #108827
(Your Name)

BVCC, PO Box 2017
(Address)

Buena Vista, CO 81211
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Prison officials denied Petitioner's disciplinary appeal in two separate proceedings. Colorado law mandates that judicial review of due process violations that occur in prison disciplinary proceedings can only be obtained if a state prisoner files a complaint within 28-days of the final decision of the prisons administrative review process. In both cases, prison officials expunged each disciplinary conviction only after Petitioner had initiated civil proceedings, causing Petitioner to be left with the bill for court costs and fees with a clear intent to preclude recovery of the money associated filing said actions. The Tenth Circuit's Order and Judgment finding Petitioner's First and Fourteenth Amendment claims that this effectively imposes a justice for sale condition of confinement, thus penalizing prisoner's for filing legitimate state actions and who are able to prosecute claims, are factually and legally frivolous presents this Honorable Court with these two naturally intertwined questions:

- (1) Whether the Tenth Circuit's Judgment incentivizes for prison officials, a failure to observe minimal due process requirements in prison disciplinary proceedings and encourages a monetary penalty against state prisoners for exercising their First Amendment rights, thus presenting a practice by state prison officials that constructively disrupts the uniform fair treatment of prisoners standard that this Court set out to accomplish in Sandin v. Conner, 515 U.S. 472 (1995); and
- (2) Whether this practice, permitted to continue according to the Judgment of the Tenth Circuit Court of Appeals, exempts from judicial review injuries suffered by state prisoners and completely frustrates Congress' intent in enacting 42 U.S.C. §1997, as decided by this Court in its well established line of cases governing said purpose and benefits of the PLRA?

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RICK RAEMISCH, individually and in his official capacity as EXECUTIVE DIRECTOR of Colorado Department of Corrections,
KRIS KLINE, individually and in his official capacity as PRIVATE PRISON WARDEN of Kit Carson Correctional Center,
LOIS ROSA, individually and in his official capacity as PRIVATE PRISON ASSOCIATE WARDEN of Kit Carson Correctional Center,
ROBERT ALLEN, individually and in his official capacity as PRIVATE PRISON MONITORING UNIT ASSOCIATE DIRECTOR of Colorado Department of Corrections,
DELAGADO, individually and in his official capacity as PRIVATE PRISON LIEUTENANT,
PRIVATE PRISON MONITORING UNIT DESIGNEE, whose true name and identity is unknown, individually and in their official capacity,
PRIVATE PRISON WARDEN DESIGNEE, whose true name and identity is unknown, individually and in their official capacity, and
CORRECTIONS CORPORATION OF AMERICA,

Defendants-Appellees-Respondents;

KEITH CLAYTON BROOKS JR.,

Plaintiff-Appellant-Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was November 20, 2017.

☐ No petition for rehearing was timely filed in my case.

☒ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: December 28, 2017, and a copy of the order denying rehearing appears at Appendix C.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIRST AMENDMENT TO UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION, SECTION 1

All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

COLORADO CONSTITUTION, ARTICLE II, SECTION 6, EQUALITY OF JUSTICE

Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property, or character; and right and justice should be administered without sale, denial or delay.

STATEMENT OF THE CASE

I. FACTS

(a) First Prison Disciplinary Proceedings, APPENDIX E

On March 14, 2015, Petitioner was confined at Kit Carson Correctional Center (KCCC) in Burlington, Colorado, and was removed from general population pursuant to policy for investigation of a sexual relationship between him and a female contract worker, Ms. Terri Atkins.

On March 30, 2015 Petitioner was served with a Notice of Charges alleging he tried to persuade Ms. Atkins into an unlawful act that was also a violation of Colorado Department of Corrections (CDOC) policy. Appellant was charged with "Solicitation," a Class-I, Rule 19 violation of the Code of Penal Discipline, (COPD). KCCC is operated by Corrections Corporation of America (CCA) through a contract with CDOC.

At the hearing on April 1, 2015, Petitioner presented a defense that he did not use "persuasion, intimidation, or influence" to convince Ms. Atkins to commit any unlawful acts which also violated CDOC policy. Petitioner's defense repeated what Inspector General Investigator Corey Fox related; Ms. Atkins admitted to several other unlawful actions that violated CDOC policy voluntarily with at least five other prisoners prior to her relationship with Petitioner.

Petitioner was found guilty and was given the maximum penalty of 30-days punitive segregation. On April 13, 2015 KCCC Warden Kline affirmed the disposition and CDOC Private Prison Monitoring Unit (PPMU) Brownstein approved of the conviction on April 15, 2015. Petitioner timely filed a disciplinary appeal on April 29,

2015 and KCCC Associate Warden Rosa upheld the conviction on May 5, 2015. The final decision of CDOC was the approval of the hearing decision, denying Petitioner's appeal, entered by PPMU Brownstein on May 6, 2015. See Appx. E(2) at 83-85.

Meanwhile, Ms. Atkins was charged with §18-7-701 C.R.S. for the sexual relationship and eventually pled guilty for the criminal complaint filed. Upon returning to general population, Petitioner was informed by KCCC staff that he was banned from the kitchen due to the "PREA incidents occurring there."

(b) First State District Court Proceedings, APPENDIX E

On May 28, 2015 Petitioner filed a Colorado Rule of Civil Procedure 106.5 Complaint in the Kit Carson County District Court for review of prison disciplinary proceeding case number 15-105, seeking expungement of the Solicitation conviction and relief in the form of expungement and recovery of court costs and fees.

Following the filing of the Colo.R.Civ.P. 106.5 Complaint, a private law firm representing the Defendants (Executive Director of CDOC and Warden of KCCC), filed a Motion to Dismiss for Lack of Jurisdiction which Petitioner received on August 6, 2015. See Appx. E(2). This motion was based on the claim that on July 8, 2015, the "Defendants received word that the CDOC expunged [Petitioner's] COPD conviction based on a lack of substantial evidence presented by the Department at the COPD hearing." Id at 74. The Defendants moved to moot Petitioner's case due to the "total expungement" of the disciplinary conviction. Id at 86.

The state district court granted the motion to dismiss for lack of jurisdiction due to mootness and denied Petitioner's motion for recovery of court costs and fees in the amount of

\$263.34 pursuant to §13-16-111 C.R.S. on August 24, 2015.

(c) First Prison Grievance Proceedings, APPENDIX E

On August 17, 2015 Petitioner filed an informal grievance for retaliation associated with disciplinary proceedings. See Appx. E(5) at 95. On August 31, 2015, Petitioner received a response "approving reimbursement in the amount of \$263.34." Id. However, no credit to Petitioner's prisoner account was entered.

Petitioner filed a Step-I grievance. Id. at 96. Again the requested relief in the form of reimbursement was granted. Id. Again, no credit was entered. Id. at 97.

After more internal written and verbal communications, on February 1, 2016 KCCC Warden Kline issued a written response explaining why he overrode the reimbursement. Kline stated that the language in the COPD regulation that Petitioner relied on to support his assertion that reimbursement was consistent with expungement, did not apply to costs incurred. See Appx. D(6) at 52. Again reimbursement was denied. Id. at 95.

(d) Second Prison Disciplinary Proceedings, APPENDIX F

On June 15, 2016 Petitioner was served with a Notice of Charges for "Failure to Work," a Class-II, Rule 22 violation of the COPD. Acting investigating Disciplinary Officer Lt. Rogers informed Petitioner the "Non-Disciplinary Resolution" provision of COPD was not executed because "Associate Warden Rosa wanted [Petitioner] charged." See Appx. D(6) at 52-53. At the hearing on June 21, 2016, Hearing Officer Delgado did not accept into evidence documentary materials relevant to the defense.

Petitioner called his Case Manager Ms. Johnson as a witness. After each party verbally identified themselves on the digital

expungement and recovery of court costs and fees.

On December 7, 2016 the Defendants (Executive Director of CDOC and Warden of KCCC), filed a Motion to Dismiss for Lack of Jurisdiction through private attorneys. See Appx. F(2). The motion was based on the expungement of the disciplinary conviction due to the "unavailability of COPD documentation." Id at 109.

On January 12, 2017, having granted the Motion to Dismiss, See Appx. F(3), the court denied Petitioner's Motion for Court Costs and Fees in the amount of \$255.86 finding that "[Petitioner] is not entitled to his costs and fees." See Appx. F(4).

(f) Second Prison Grievance Proceedings, APPENDIX F

On March 18, 2017, CDOC granted a reimbursement of court costs and fees in the amount of \$255.86 in a grievance response to Petitioner's claim of retaliation and due process violations in COPD proceedings. See Appx. F(5). On March 22, 2017, the \$255.86 was credited to Petitioner's prisoner account. See Appx. F(6).

II. FEDERAL CIVIL PROCEEDINGS

(a) United States District Court for the District of Colorado

On May 8, 2017, Petitioner filed a Prisoner's Complaint pursuant to 42 U.S.C. §1983 alleging First and Fourteenth Amendment violations under the United States Constitution.

Petitioner filed an Amended Prisoner's Complaint which alleged that the Defendant's acted without authority under the COPD to expunge each conviction after the final decision pursuant to COPD regulation and that this extraneous action was in retaliation for the civil complaints filed in state court seeking review of their abuse of discretion in violating due process rights in the disciplinary proceedings. See Appx. B 12-13. Petitioner alleged:

recorder, Delgado yelled "DON'T LOOK AT HER!" for no legitimate reason at all. Petitioner immediately became afraid of further harmful actions by staff as he was already in jeopardy of facing disciplinary conviction arbitrarily. Nothing in the record or behavior by Petitioner justified Delgado's aggressive and intimidating tone and posture. Petitioner was found guilty and given the maximum penalty of 40-days loss of privileges, (LOP).

At the conclusion of the hearing, while Lt. Delgado was preparing to place the LOP band on Petitioner's wrist, Petitioner asked Delgado why probation was not entered as a punishment. See e.g. Appx. D(6) at 49. Delgado answered "I don't do probation for inmates that lie." When probed for what lie Petitioner told, Delgado responded "I convicted because I think your're bull-shitting, you knew Atkins wasn't in the kitchen anymore, I think you used that as an excuse to get out of the kitchen. That's why I didn't give you probation, because you fought it. Besides, you knew what you were doing, you chose to mess with Atkins, it wasn't her fault, it was your fault."

On June 23, 2016 Warden Kline affirmed the disposition. On June 29, 2016 Warden Kline denied Petitioner's timely filed disciplinary appeal alleging a bias hearing officer, and the final decision approving the upholding of the conviction was entered by the PPMU on the same day, July 5, 2016.

(e) Second State District Court Proceeding, APPENDIX F

On July 27, 2016 Petitioner filed a C.R.C.P. 106.5 Complaint in the Kit Carson County District Court for review of prison disciplinary proceedings case number 16-305, seeking the expungement of the Failure to Work conviction and relief in the form of

- (1) There was a strong expectation of finality to the prison officials' decision pursuant to COPD, see Appx. D(6) at 50-51, state rules, see Appx. D(4) at 24, and state law, see Appx. D(1) at 22, under due process principles;
- (2) There was a strong expectation of recovery of court costs and fees under state law for the due process violations, see Appx. D(2), D(3);
- (3) There was a strong interest in funds committed to judicial review possessed by Petitioner;
- (4) There was no reasonable notice that administrative actions of disciplinary convictions entered arbitrarily could result in loss of court costs and fees;
- (5) That expungement following the pursuit of judicial relief was authorized by COPD;
- (6) That expungement of the disciplinary convictions were extraneous of the COPD;
- (7) That the expungement actions were in retaliation to Petitioner's right to petition to the government for relief and had a chilling effect on the exercise of this right;
- (8) That it forced Petitioner to choose between letting an arbitrary disciplinary conviction stand or paying money to correct it; and
- (9) That it violated Petitioner's Due Process rights in that he was required to pay for a fair outcome.

Among the remedies sought were:

- (1) reimbursement of costs and fees incurred as a result of the response by Defendants;
- (2) injunctive relief to include written notice that pursuit of judicial relief would result in court costs and fees;
- (3) injunctive relief to include a provision directing CDOC to provide reimbursement of court costs and fees under the circumstances of Petitioner's case;
- (4) injunctive relief to include clear criteria for the factors CDOC must follow to expunge convictions under the circumstances of Petitioner's case;

- (5) compensatory damages for the monetary loss suffered by Petitioner as a result of the Defendants' actions;
- (6) declaratory relief that Petitioner is entitled to due process protections under the circumstances of Petitioner's case;
- (7) declaratory relief that the Defendant's violated Petitioner's First and Fourteenth Amendment rights;
- (8) nominal damages; and
- (9) punitive damages.

The U.S. District Court for the District of Colorado decided that the Amended Prisoner's Complaint was frivolous, finding that (1) the administrative expungement in response to filing the civil complaint was not an "adverse action" but was a "favorable result; (2) the administrative expungement following the filing of the civil complaint was not extraneous of COPD, and wasn't a due process violation, specifically addressing the popular liberty interest, not property interest claim, see Appx. B 15-18, and dismissed the case pursuant to 28 U.S.C. §1915(e)(2)(B)(i). Permission to proceed in forma pauperis on appeal was denied as well. Id at 19.

(b) U.S. Court of Appeals for the Tenth Circuit

On appeal, Petitioner claimed that the district court erred in dismissing the First Amendment retaliation claim as frivolous, finding that (1) expungement was a favorable result; (2) expungement was not an adverse action; (2) paying for expungement is success; and (4) that expungement intended to deprive Petitioner recovery as prevailing party causing a loss of over \$250.00 in each case would not chill a person of ordinary firmness from continuing to exercise right to C.R.C.P. 106.5 relief. See Appx. A 3, 5.

Petitioner argued that (1) expungement resulting in deprivation of recovery of costs and fees pursuant to §13-16-111 C.R.S. is an adverse action; (2) that "favorable result" conclusion had no legal support; and (3) the Defendant's response to expunge the disciplinary conviction after Petitioner filed for judicial review was substantially motivated by the exercise of the right to obtain judicial relief from due process violations in disciplinary proceedings meeting the Tenth Circuit's criteria for demonstrating First Amendment violations set forth in Gee v. Pacheko, 627 F.3d 1178, 1189 (10th Cir. 2010).

Petitioner also claimed that the district court erred in dismissing the Fourteenth Amendment due process claims as frivolous, finding that (1) no liberty interest existed; (2) no property interest existed; and (3) conditions of confinement related to COPD abuses did not rise to a level constituting an atypical and significant hardship. See Appx. A at 3, 6-7.

Petitioner argued that (1) the expungement was extraneous of COPD (implicating atypical and significant hardship conditions of confinement upon the ordinary incidents a prisoner can expect as a part of prison life); (2) property interest existed in funds committed to judicial review of COPD actions; and (3) Defendant's actions in state court proceedings deprived him of recovering costs and fees related to C.R.C.P. 106.5 actions, all in violation of his due process rights under applicable law.

(c) Petition for Rehearing En Banc

On December 28, 2017 the U.S. Court of Appeals for the Tenth Circuit denied Petitioner's request for a rehearing en banc. See Appx. C.

REASONS FOR GRANTING THE PETITION

Petitioner's case presents this Honorable Court with an opportunity to address whether proper exhaustion accrues upon the final decision of prison officials per disciplinary process, whether a state prisoner has a reasonable expectation to finality of disciplinary proceedings per state law, and whether a post-PLRA proper exhaustion disciplinary action by prison officials qualifies as a government response to a state prisoner's petition to state courts for redress deserving of First Amendment protection.

A decision of this question will also provide this Honorable Court with an opportunity to bolster its earlier proposition set forth in Sandin v. Conner, 515 U.S. 472 (1995) which meant to better serve the uniform treatment of state prisoners by prison officials under the Fourteenth Amendment when it comes to disciplinary policies and practices, an inherent component of conditions of confinement. Lower courts are left without direction on when it is appropriate to issue relief under applicable statutes.

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE TENTH CIRCUIT COURT OF APPEALS DECISION THAT PRISON OFFICIALS' RESPONSE TO EXPUNGE DISCIPLINARY CONVICTIONS ONLY AFTER A PRISONER FILES A CIVIL COMPLAINT SEEKING JUDICIAL REVIEW WITH THE INTENT TO DEPRIVE HIM OR HER FROM RECOVERING COURT COSTS AND FEES ASSOCIATED WITH CIVIL PROCEEDINGS CREATES A LOOPHOLE THAT CONGRESS DID NOT INTEND BY ENACTING THE PRISONER'S LITIGATION REFORM ACT

A WHAT DID CONGRESS INTEND BY ENACTING THE PLRA?

In a unanimous opinion, this Court observed that an exhaustion requirement, as a precondition to filing suit, serves several distinct purposes: (1) it protects the agency's authority by affording the agency an opportunity to correct its own errors, which eliminates federal-court interference with the administrative process; (2) discourages a disregard of agency procedures; (3)

provides useful records for judicial review; and (4) reduces the quantity [and improving the quality] of federal suits by virtue of prisoners successfully obtaining administrative remedies in the administrative process. Porter v. Nussle, 534 U.S. 516, 524-25 (2002).

This Court has repeatedly emphasized that the scheme of the PLRA can only be realized if non-compliance with procedural requirements of agency rules carries a sanction. Woodford v. Ngo, 548 U.S. 81, 85 (2006) (PLRA is rendered ineffective and benefits of requiring exhaustion cannot be achieved if prison officials are not given a fair opportunity to consider complaints).

More recently, Justice Kagan wrote the opinion in Ross v. Blake, 136 S. Ct. 1850 (2016) which dealt with, in large part, the availability of remedies according to the scheme of the PLRA. In Ross, the Court highlighted "three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." Id at 1859. In the first instance, a remedy is unavailable when the process operates as a dead end. The second being a remedy is unavailable when the process is incapable of use. The last being a remedy is unavailable when prison officials interfere with a prisoner's pursuit of relief.

The common thread in each instance is the focus on the prison officials' administration of Congress' directives as opposed to just the prisoner's compliance. In this latest installment, this Court turned a corner and acknowledged a much needed analysis of prison officials' execution of Congress' edicts.

B HOW HAS THIS COURT INTERPRETED EXHAUSTION?

In Booth v. Churner, 532 U.S. 731, 741 (2001), this Court resolved a split in the lower courts on what constitutes exhaustion. In sum, this Court found that Congress has mandated exhaustion for prisoners by enacting the PLRA, regardless of the relief offered through administrative procedure.

Two significant procedural issues that had arisen in implementing the PLRA was addressed by this Court in Jones v. Bock, 549 U.S. 199 (2007). In deciding what constitutes exhaustion, this Court decided that prisoners were not required to plead and demonstrate exhaustion and that the PLRA did not require prisoners to name each defendant in their grievances in order to satisfy exhaustion.

The most influential PLRA case this Court has considered to date is Ngo wherein this Court expressly determined that the PLRA required "proper exhaustion." Id 548 U.S. at 90-91 (proper exhaustion demands compliance with an agency's deadlines).

Having made clear what the PLRA mandates before federal review of claims may be invoked, this Court recently acknowledged prison officials meddling in a prisoner's ability to exhaust administrative remedies. Ross, supra. Key to the opinion was whether prison officials effectively rendered administrative remedies "unavailable" under the meaning of the PLRA.

To date, there is no holding on how the PLRA, 42 U.S.C. §1997 applies to prison disciplinary proceedings, though Booth and Porter seem to direct that the PLRA would encompass disciplinary proceedings. Porter, 534 U.S. at 524, 532 (PLRA only applies to prisoner suits); accord Booth, supra.

C HOW HAS COLORADO IMPLEMENTED EXHAUSTION PRINCIPLES
SET FORTH IN THE PLRA?

In Colorado, state legislatures enacted §13-17.5-102.3 C.R.S. (2001) in an effort to adopt the PLRA's scheme for state courts. See Appx. D at 22. As part of a cluster of state laws aimed at controlling lawsuits filed by state prisoners and pre-trial detainees, Colorado's legislators declared in §17-17.5-101 C.R.S. that Colorado has a strong interest in limiting frivolous, groundless, or vexatious lawsuits. Glover v. People, 129 P.3d 1083, 1085 (Colo. App. 2005). §13-17.5-102.3(1) C.R.S. plays an integral role to this effect, as a failure to exhaust administrative remedies precludes inmates from bringing any sort of civil action in court.

In recognition of the benefits associated with compliance of proper exhaustion, courts in Colorado have effectively determined that exhaustion is mandated for prison disciplinary proceedings as well. Glover, supra. In fact, this rule is so well settled that prisoners have not brought claims without first exhausting disciplinary procedures. This is a model of effectiveness.

When exercising its discretion, courts in Colorado don't stray far from federal law when interpreting state laws derived from federal statutes. See e.g. Farmer v. Raemisch, 2014 COA 3, ¶10 (Jan. 2, 2014)(noting §13-17.5-102.7 parallels 28 U.S.C. §1915(g); Glover, 129 P.3d at 1085 (noting §17-17.5-101 modeled after 42 U.S.C. §1997)).

As this Court has expressly recognized in McCarthy v. Madigan, 503 U.S. 140, 145 (1992), the focus of proper exhaustion is on the

relevant agency rules before a federal remedy may issue. See also Jones, 549 U.S. at 122-23 (agencies, not courts have primary responsibility for statutes that Congress has charged them to follow). Indeed, in the context of the case at hand, whether a federal remedy may issue, under a proper exhaustion scheme, turns on state review of prison officials actions as governed by state law.

Ngo,

- (1) Exhausting the Prison Disciplinary Review Process Marks the Accrual of Colorado's 28-day Jurisdictional Requirement For Review of Due Process Violations

The natural flow of exhaustion, as a precondition to filing suit is contingent on prison officials' final decision in the disciplinary process. See Appx. D(6) at 51. This final step is but a link necessary for a prisoner to initiate the judicial process. See Appx. D(4) at 24. Synder v. Lakewood, 189 Colo. 421, 428, 542 P.2d 371, 376 (1975)(failure to bring 106(a)(4) proceeding within 106(b) time limit of final decision is jurisdictional defect).

A prisoner cannot bring a C.R.C.P. 106.5 action without first filing an appeal and prison officials issuing a final decision. See Apps. D(5) at 25.

- (2) There is an Expectation of Finality Attached to the Prison Officials' Final Decision in Prison Disciplinary Proceedings According to the PLRA

42 U.S.C. §1997 is not titled Prisoner's Grievance Reform Act. The principles decided by this Court in its PLRA precedence applies with equal force to any available administrative remedy provided by prison rules regardless of form. Booth, supra. Additionally, §17-17.5-101 C.R.S. expressly states that Colorado

reserves a strong expectation of finality to administrative decisions. Glover, supra. This creates a compelling interest for state agents to execute their duties properly in accordance with policy and legislative intent.

This also creates a strong interest for Petitioner to finality of disciplinary proceedings. With the guarantee of justice without sale afforded Petitioner by Colorado Constitution, Article II, Section 6, it is difficult not to observe a state conferred right to relief from abuses occurring at the administrative level of government. Ngo, 548 U.S. at 94 (observing state interest is strongest in the administration of prisons).

In conjunction with this strong, indeed shared, degree of reliance on finality, Colorado has long held that deadlines for agency employees demonstrates a clear intent on the part of CDOC to limit prison officials discretionary authority and that this is inexorably intertwined with a trial courts jurisdiction to review official actions. People v. Medina, 193 Colo. 190, 564 P.2d 119 (1977); Wilson v. Hill, 782 P.2d 874 (Colo. App. 1989) (statutes prescribing the time within which public officials are required to discharge public functions are regarded as directory).

The key to the nature of Petitioner's interest here lies in the regulation prescribing the final action "leaving nothing further fro the agency to decide." Carney v. Civil Serv. Comm'n, 30 P.3d 861, 863 (Colo. App. 2001). To this effect, CDOC AR 150-01, COPD, governs the prison officials' discretionary authority, limits the exercise of their actions, and when proper exhaustion occurs, initiates Petitioner's ability to invoke judicial review. Accord, Appx. D(6) at 51; D(4) 24.

What is clear here is that Petitioner's strong expectation to finality arises from proper exhaustion and is firmly grounded in the separate, but connected arenas - administrative (executive) actions and trial court (judicial) authority. Petitioner's two-fold basis serves to double his interest in finality to discretionary decisions in administrative proceedings. The fact that the disciplinary proceedings occurred while Petitioner was in the custody of CCA does not alleviate the legally binding limitations and interest retained by Petitioner. See Murphy v. Pakenham, 923 P.2d 375 (Colo. App. 1996)(CCA is subject to C.R.C.P. 106).

D WHY IS THE DISTINCTION BETWEEN THE ADMINISTRATIVE
 PROCEEDING AND JUDICIAL PROCESS SO IMPORTANT WARRANTING
 THIS COURT'S EXTRAORDINARY AUTHORITY AND CONSIDERATION?

The relationship between the administrative claim and federal suit are not mutually exclusive. Steele v. Fed. Bureau of Prisons, 355 F.3d 1204 (10th Cir. 2003). Basically, the claims underlying the federal suit are squarely focused on the administrative proceeding to decide whether a federal remedy is in order. Ngo, 548 U.S. at 89-90; Bullard v. CDOC, 949 P.2d 999 (Colo. 1997) (discussing principles behind separation of power between executive and judiciary branches of government).

If there is no distinction, there is no final decision by which a prisoner, prison official, or court can ever review. See Ross, 136 S. Ct. 1859, fn 3 (interference with pursuit of relief renders remedy unavailable). In fact, there are a plethora of judicial decisions in support of this account. See Pub. Serv. Co. v. City of Boulder, 2016 COA 138 (citing Carney, Citizens for Responsible Growth v. RCI Dev. Partners Inc., 252 P.3d 1104, 1106-07 (Colo. 2011)(final judgment or decision necessarily depends on

the scope and nature of the proceeding and rights at issue); Porter, 534 U.S. at 529 (exhaustion required even when available administrative remedy appears futile as long as the authority at the administrative level have the power to take some responsive action).

What the prison officials have done in the two state civil actions and related administrative proceedings, grievance and disciplinary, is completely exempted themselves from what Colorado courts and this Court clearly prescribed in the form of writs for relief. Glover, 129 P.3d at 1084 (requiring exhaustion prevents the interruption or fragmentation of the administrative process and ensures judicial intervention only if the administrative process fails to provide adequate remedies); accord Ngo, supra.

This case is deserving of this Court's attention because of the particular factors involved in this area of law and the need of a clear precedence set for prison administrators and lower courts to follow regarding rights of prisoners and the PLRA.

A far worse scenario has been created in prison administration predicted by Justice Kagan in Ross and that is that under the practice by prison officials playing what Justice Ginsburg so eloquently termed as "hide-and-seek" with administrative remedies, in conjunction with state court decisions, an administrative remedy under COPD is never "available" unless, as the Tenth Circuit and U.S. District Court for Colorado provided - a prisoner pay court costs and fees in order to achieve expungement for violation of due process - the proverbial "justice for sale" circumstance is at hand. See Appx. A at 5; Appx. B at 15.

These conditions of confinement clearly violate Colorado's "justice without sale" provision set forth in the State's Constitution, Article II, Section 6, is inconsistent with the scheme of the PLRA, and is set squarely against the remedial provisions of §1983.

Reviewing courts take a highly deferential approach to prison officials' discretionary authority, so much so that it has been recognized that the scale is weighted in favor of prison officials. Ponte v. Real, 471 U.S. 491, 499 (1985)(adding weight to already deferential scale); See also Colorado Springs v. Dist. Ct. County of El Paso, 184 Colo. 177, 181, 519 P.2d 325, 327 (1974)(a presumption of validity attaches to officials' acts and courts presume that state officials properly execute their official duties, citing U.S. v. Chemical Foundation, 272 U.S. 1 (1926)). It is entirely within this court's sound discretion to issue an opinion along similar lines of the Sixth Circuit with regard to this loophole that lower courts have no direction on. Brown v. Crowley, 312 F.3d 782 (6th Cir. 2002)(admonishing practice of utilizing prison rules as a backdoor means to punish prisoners for exercising constitutional rights).

Prisoners are in dire need for this Court's explicit protection.

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE TENTH CIRCUIT COURT OF APPEALS DECISION THAT PETITIONER HAS NO CONSTITUTIONALLY RECOGNIZED RIGHT TO FUNDS IN HIS PRISONER ACCOUNT, BY VIRTUE OF COLORADO LAW ENTITLING A PREVAILING PARTY IN STATE ACTIONS FOR REVIEW OF PRISON DISCIPLINARY PROCEEDINGS TO RECOVER COSTS AND FEES FOR SAID SUIT, OFFENDS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND PENALIZES PRISONERS FOR THE EXERCISE OF THEIR FIRST AMENDMENT RIGHT, A WRIT OF CERTIORARI SHOULD ISSUE IN ORDER TO PROTECT THE INTEGRITY OF FAIRNESS AND ENSURE THE GOALS OF THIS COURT'S PRECEDENCE IN WOLFF V. MCDONNELL 418 U.S. 539 (1979) ARE BEING ADHERED TO IN ADMINISTRATIVE PRACTICE ACCORDING TO 42 U.S.C. §1983

E WHAT DID CONGRESS INTEND BY ENACTING 42 U.S.C. §1983?

Historically, the Supreme Court decided that §1983 had three principle aims in mind. The two relevant here are to override certain kinds of state laws to provide a remedy when state law was inadequate and to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. Monroe v. Pape, 365 U.S. 167, 174 (1961). In the grand scheme of §1983, it is of no significance that the state has a law that if enforced, would provide some sort of relief; the federal remedy is "supplementary to the state remedy." Id at 183. At its core, §1983 was created to provide adequate, plain, and speedy relief. Carney v. Phipps, 435 U.S. 247 (1974).

(1) Where Does Petitioner Derive His Right to Relief as a State Prisoner?

Colorado created a remedy that has the same objective as 42 U.S.C. §1983. C.R.C.P. 106 gives judicial authority over prison disciplinary proceedings where the body abuses their discretion or exceeds their jurisdiction. Kodama v. Johnson, 786 P.2d 417, 420 (Colo. 1990)(describing function of reviewing court); See also Fisher v. Colo. Dep't of Corr., 56 P.3d 1210, 1213 (Colo. App. 2002); Freisen v. People, 118 Colo. 1, 6, 192 P.2d 430, 433 (1948)(speedy, plain, and adequate remedy).

In this vein, prevailing parties in C.R.C.P. 106 actions are entitled to recovery of court costs and fees under §13-16-111 C.R.S. Branch v. Colo. Dep't of Corr., 89 P.3d 496, 498 (Colo. App. 2003). This provision ensures that justice is administered without sale, denial, or delay. Board of County Commr's v. Sundheim, 926 P.2d 545, 550 (Colo. 1996)(citing Colo. Const. Art. II, Sec. 6).

(2) How Does A State Prisoner Assert His Rights
and Become Eligible for Protection From
Abuses Resulting in Actual Injury?

CDOC implemented regulations that explicitly relate to this Court's long standing recognition of limited due process rights of prisoners in disciplinary proceedings. See Appx. D(6) at 54. Thomas v. Colo. Dep't of Corr., 117 P.3d 7, 10 (Colo. App. 2004). Once disciplinary proceedings are initiated, prison officials are required to abide by their own administrative regulations without exception. Boles v. Bartruff, 228 P.3d 183, 186-87 (Colo. App. 2009)(when an agency creates procedures for review, due process of law requires the agency to adhere to those procedures).

It is up to the state prisoner to exhaust these administrative remedies before judicial jurisdiction in the matter can be invoked. Crawford v. State Dep't of Corr., 895 P.3d 1156 (Colo. App. 1995); Talley v. Diesslin, 908 P.2d 1173 (Colo. App. 1995).

The mandate for jurisdiction under C.R.C.P. 106(b) is predicated on the final decision which leaves nothing further for the agency to decide. Carney, supra; Accord Appx. D(6) at 51.

These cases direct that administrative remedies and the practices by prison officials to this effect are indispensable factors in considering exhaustion. See e.g. Goebert v. Lee County, 510 F.3d 1312, 1323 (11th Cir. 2007)(if we allowed prison officials to play hide-and-seek with administrative remedies, they could withhold all remedies until after a lawsuit is filed and uncover them). A clear line distinguishes administrative remedies and judicial review of official actions in the course of pending litigation.

F WHAT DID THE TENTH CIRCUIT'S JUDGMENT ALLOW PRISON OFFICIALS TO DO IN LIGHT OF THESE HOLDINGS?

The Tenth Circuit's dismissal of Petitioner's First Amendment claim as frivolous contradicts the function of Congress' intent in enacting the PLRA because it is prison officials, not prisoners, by passing mechanisms in place in administrative procedures designed to provided prisoners administrative relief - pre - litigation stage. This effectively breakdown the orderly structure of the adjudicative system because prison officials have no incentive to comply with administrative rules that serve to limit their discretionary decisions in the performance of their duties under state and constitutional law. Ngo, supra.

The Tenth Circuit's judgment turns the table in reviewing what Congress' enactment of the PLRA imposes on prison officials in terms of non-compliance. Once finality occurs, should non-compliance carry some consequence? It seems that the answer to this question already exists in the form of a 42 U.S.C. §1983 action and the relief it provides is exactly the sort of legal "sanction" that fits neatly within the parameters of the PLRA and purposes of the remedy. Owens v. City of Independence, 445 U.S. 622, 651-52 (1980)(deterrence effect); Piphus, supra.

The Tenth Circuit's judgment endorses the approach to the PLRA by prison officials to only grant a remedy after judicial review is sought. This has the effect of rendering the PLRA "toothless" by virtue of handing full control over legal relief to prison authority exactly as Justices Kagan and Ginsburg expected. Ross, supra. No remedy is "available" within the scope of the PLRA if no finality attaches to the administrative

proceedings and refusal of prison officials to abide by agency rules purporting to provide some remedy.

Under this case the remedy is only available once the post-exhaustion or legal stage of unsettled claims arise. Notably, in the Petitioner's untrained mind, this undercuts the policy-makers expertise, removing the intent behind the "final decision" objective in accordance with law. This displacement of the proper scope of carefully chosen phrases that are not haphazardly constructed does not serve to avail prison officials of the outcome of these irresponsible actions violating rights. This Court is fully aware of the distinguishment between policy-writing and policy following. The Court's experience in this matter here should be informative in the opinion rendered.

G PETITIONER'S FIRST AMENDMENT CLAIM ARISES AS AN
 INHERENT OUTCOME OF THE UNAVAILABILITY OF AN
 ADMINISTRATIVE REMEDY UNDER THE IMPROPER
 ADMINISTRATIVE PRACTICE ACCORDING TO THE PLRA

In the Tenth Circuit, to establish a First Amendment retaliation claim, a prisoner demonstrate (1) the exercise of a constitutionally protected activity; (2) a response that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) the adverse action was substantially motivated by that constitutionally protected activity. Gee v. Pacheko, 627 F.3d 1178, 1189 (10th Cir. 2010).

The PLRA on the other hand is designed to give prison officials an opportunity to resolve complaints (without a requirement for payment) which if denied, opens the door for judicial relief (also, not coincidentally, shouldn't cost money). The specific context of the factual posture before this Court: (1)

following exhaustion of disciplinary appeals, both convictions were upheld; (2) following pursuit of relief under state law by Petitioner, both convictions were expunged; and (3) following expungement, the Defendants moved to dismiss Petitioner's suit on the grounds that he is not entitled to relief. See Appx. E(2) at 76, 78; E(3) at 88; F(2) at 102; 106; 109.

On the face of his Amended Prisoner's Complaint, Petitioner pleaded (1) exercise of constitutionally protected activity, (filing C.R.C.P. 106.5 action against "Defendant" prison officials, see Appx. D(5) at 25); (2) a response to that activity (expungement after judicial jurisdiction has been invoked, see Appx. E(2) at 86; F(2) at 109); and (3) the adverse action was substantially motivated by that constitutionally protected activity (demonstrated by the Defendants specific arguments that no relief is available, specifically court costs and fees, see Appx. E(2) at 79; E(3) at 88; 89; E(4) at 91; 92)).

The motivation for expungement was to deprive Petitioner of his relief in the form of court costs and fees pursuant to §13-16-111 C.R.S. See Appx. E(4). In both cases, the Defendants were successful. See Appx. A at 3.

The Tenth Circuit seems to view Petitioner's case as one of semantics, deciding that having to choose between allowing an ill-gotten disciplinary conviction to stand or paying court costs and fees in order to achieve a fair outcome by virtue of expungement is not the sort of injury that would chill a person of ordinary firmness from continuing to pay court costs and fees in order to achieve success. Id at 5. In the furtherance of this word-play, the Tenth Circuit decided that the expungement "is not

an adverse action." Id. Both legal determinations are without support by legal precedence. Specifically at odds with clearly established law is that filing a C.R.C.P. 106.5 action is not protected activity.

It is plainly obvious that a failure to adhere to finality and exhaustion doctrines forms the basis of the Defendants' actions at issue here and equates to a government response necessitating First Amendment protections from paying for success in prison disciplinary proceedings.

H PETITIONER'S FOURTEENTH AMENDMENT CLAIM ARISES AS AN INHERENT CONSEQUENCE OF THE UNAVAILABILITY OF AN ADMINISTRATIVE REMEDY DUE TO THE DISREGARD OF RULES

First and foremost, state judicial jurisdiction is properly invoked only if timely complaints are filed. Synder, supra; Crawford, supra; C.R.C.P. 106(b), Appx. D(4) at 24. The next indispensable step in pursuing judicial relief is paying the court costs. Not even indigency excuses a party from initiating civil actions.

Turning to Colorado, §13-16-103 C.R.S. and §13-17.5-103 C.R.S. permits the courts discretion to allow a plaintiff to file an action without prepayment of fees. This effectuates a persons right to justice without sale, denial, or dealy guaranteed by Colorado Constitution, Article II, Section 6. Sundheim, supra; Almarez v. Carpenter, 173 Colo. 284, 477 P.2d 792 (1970)(§13-16-103 aids in administering justice without sale). This provision was granted to Petitioner in both cases. See Appx. E(1) at 70; F(1) at 98.

Having established commitment of his funds to prosecuting each case, see Appx. E(1) at 71-71; F(1) at 99-100, and the unequivocal provision in Colorado's Constitution affording him the

right to justice without sale, it is difficult to reconcile the purpose of §13-16-111 C.R.S. with the Tenth Circuit's decision in light of (1) due process principles associated with disciplinary hearings; (2) proper exhaustion; and (3) the clear fact that a pattern of violating state prisoners rights has developed which by all measures provokes litigation.

Factor into this equation that the regulation governing the prison officials' discretionary authority gives no indication of what criteria is used for extraneous review and expungement actions and it is impossible to conclude that the prison officials are entitled to deferential review so prevalent today. Again, the fact that this practice provokes litigation deserves due weight.

The injury here is the loss of over \$250.00 stemming from the adverse action of the post-exhaustion relief. Surely the Tenth Circuit realizes that a property interest exists according to the Fourteenth Amendment. Gilliam v. Shillinger, 872 F.2d 235, 938-39 (10th Cir. 1989)(prisoner has protected property interest in money in his account). Why Petitioner is exempted from this right under the circumstances of his case deserves review.

I WHAT WOULD THE EFFECT OF A REVERSAL OF THE TENTH
CIRCUIT'S JUDGMENT HAVE ON PRISONER CASES INVOLVING
CLAIMS AGAINST PRISON OFFICIALS IN §1983 ACTION

Should an opinion issue in Petitioner's case, it would pick up where Justice Alito left off in Ngo. This Court had positioned its decision on an assumption that corrections officials needed to maintain order and that having internal methods that provided prisoners with a meaningful opportunity to obtain administrative remedies served this vital purpose. In this case, the issue is not the procedural rules on their face, but the practice and

exercise of discretionary authority in complete contradiction to this assumption.

Prison administrators would be forced to abide by their internal rules and any deviation from these mechanisms leading to a final decision meriting judicial relief would leave prison administrators in the exact position the PLRA intended them to be in - under judicial scrutiny and subject to accountability. In reality, a decision in favor of Petitioner would not change any practice or precedence in place today. All this would do is put bright lines down where limitations already exist.

A decision by this Court in Petitioner's favor would be an affirmation of earlier decisions. Prison administrators can either provide relief or leave the door open for judicial review, the intention of the PLRA. They cannot have it both ways, playing hide-and-seek with remedies. Debasing their final decision at the detriment of a prisoner exercising their constitutional right is improper. Brown, supra.

A narrowly tailored remedy could issue under the PLRA. Two disciplinary proceedings and state actions are at issue here. Both involved expungement actions extraneous of the regulation limiting prison officials' discretionary authority. Both resulted in precluding Petitioner from recovering court costs and fees as a prevailing party under state law. See Appx. E(5) at 95; F(4) at 112. One was resolved administratively, the other was not. See Appx. F(5) at 113; F(6) at 114; E(5) at 95; E(7) at 97. The remedy fashioned by this Court can simply be to allow a First Amendment claim to proceed, or a directive can issue under the PLRA to prison officials in line with this Court's previous

opinions and the effect it should have on administrative proceedings and civil suits. This option is at the Court's discretion.

In either case, this Honorable Court will re-direct prison officials authority back in line with the guidance of Sandin wherein the uniform fair treatment of prisoners was the primary focus. This, Petitioner urges the Court to concede, is a condition of confinement that creates an atypical and significant hardship upon the ordinary instances of prison life.

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI BECAUSE THE TENTH CIRCUIT COURT OF APPEALS DECISION THAT PETITIONER'S CLAIMS ARE FRIVOLOUS PROVIDES PRISON OFFICIALS WITH IMMUNITY FROM FUTURE CONSTITUTIONAL VIOLATIONS AND PETITIONER HAS ESTABLISHED THAT THIS ABUSE IS PREVALENT IN COLORADO AND WILL REOCCUR UNLESS THIS COURT SETTLES THIS IMPORTANT QUESTION OF FIRST IMPRESSION

J PETITIONER SOUGHT RELIEF AVAILABLE UNDER §1983

Lower courts lack guidance on how to proceed. It is imperative for this Honorable Court to return to the historical impressions deciding the purposes of §1983. As raised earlier, §1983 serves to provide a federal remedy where state law is inadequate or a state remedy is not available in practice. Monroe, supra. Taking the Defendant's at their word, there is no available state relief for Petitioner in this case. See Appx. E(2) at 74, 102.

It should be distinguished in this case that Petitioner, aside from punitive damages, sought declatory and injunctive relief in the form of amending prison rules, regulations, and practices to prevent future harm. For example, Petitioner sought to add language that provided reimbursement pursuant to CDOC's provision for expungement and restoration. See Appx. D(6) at 52. If this provision added a clause that reimbursed a prisoner for lost money incurred and set forth criteria for extraneous expungement

after the final decision, administrative goals and interest of prisoners would be best served, negating the need for 106 suits.

Not without significance is this Court's holding in Wolff and Preiser v. Rodriguez, 411 U.S. 475 (1973) that prisoner complaints calling into question the fact or length of confinement are cognizable only in habeas corpus actions. Both opinions allowed §1983 actions to proceed where the conditions of confinement leading to constitutional violations were the basis of claims, i.e. procedures used to obtain disciplinary convictions. Wolff 418 U.S. at 554-55.

It is alleged here that prison officials take this Court's direction in Wolff to observe minimal due process as a joke and mere formality. In five disciplinary proceedings, not one was administered with fairness in mind. The two at issue and three cases preceding this one resulted in expungements following judicial review. See Appx. G(1)-(3) at 115-117.

K A PENDING 106 ACTION DEMONSTRATES THIS ISSUE WILL
 LIKELY RECUR WITHOUT A DECISION IN THIS PETITION

The level of culpability is clear in the proceedings below. An inference can be made by the arguments advanced by Defendants' counsel. In both cases, the motions indicated that the Defendants acted on their own without guidance by counsel. See Appx. E(2) at 74, §4; F(2) at 102, §4.

The fact that this is a case of first impression doesn't absolve the Defendant's of liability for their actions, triggering qualified immunity protections under Harlow v. Fitzgerald, 457 U.S. 800 (1982). Even in under what may appear to be novel circumstances, public officials can still be held accountable for

actions that violate clearly established law. Hope v. Pelzer, 536 U.S. 730, 741 (2002). Given the nature of the rights at issue and the laws and regulations relevant to the prison officials' discretionary authority, this bar has been cleared.

The handling of the first administrative grievance process suffices to demonstrate a clear intent to penalize and deprive Petitioner under the First and Fourteenth Amendment. Disciplinary exhaustion occurred. Administrative relief was approved, but later denied. See Appx. E(5); E(7). This denial was based on a judicial finding whose decision relied on a PLRA-violating post-disciplinary exhaustion action. The administrative denial of the \$263.34 reimbursement was based on the unavailability of relief in the disciplinary proceeding because, as logic dictates, had the remedy been granted via reversal on appeal, the extraneous expungement never occurs and quite uncoincidentally, precludes invocation of judicial authority and the mandatory attachment of costs, thus implicating the claims and right before this Court.

It may better be said by this Court and Petitioner asks that this Court excuse his long winded arguments as he is pro-se. Haines v. Kerner, 404 U.S 519, 520-21 (1972). This is the only way Petitioner can make sense of his case before the Court.

Finally Petitioner hopes that Officers of this Honorable Court don't rely on the good-will of prison officials or expect the Tenth Circuit to have a change of heart. The former, Petitioner implores is naive; the latter Petitioner warns is irresponsible given Justice Kagan and Ginsburg's observations in Ross. A pending case below colors the need for granting certiorari.

Pending action 2017CV16 involves a disciplinary conviction entered against Petitioner for "Advocating or Creating A Facility Disruption," resulting in punitive segregation. This proceeding is based on a prison staff members false allegations of physical and verbal threatening behavior. Despite a corresponding charge of "Threats" and reported statements by the female staff member that Petitioner attempted an attack on her person, causing her, "out of fear," to protect herself from physical harm by slamming a door in the face of Petitioner, thus preventing an assault, video footage from three camera angles capturing the entire episode were not admitted in the hearing or made part of the certified record pursuant to C.R.C.P. 106.5(g). See Appx. D(5) at 25.

Petitioner requested the video evidence and attendance of the reporting staff member which was denied by the hearing officer. The video, Petitioner argued, was part of the investigation phase of the proceeding as Petitioner was placed in prehearing segregation due to the safety and security interests raised by this staff member's allegations. To consider whether the Hearing Officer was bias and elected not to permit the exculpatory footage controverting the staff member's account of the incident, the video was necessary for the Court's decision on the bias Hearing Officer claim. See e.g. Patterson v. Coughlin, 905 F.2d 564, 570 (2nd Cir. 1990)(impartial decision maker "does not prejudge the evidence and...cannot say...how he would assess evidence he has not yet seen"); Mangels v. Pena, 789 F.2d 836, 838 (10th Cir. 1986)(party must provide some substantial countervailing reason to conclude that a decision-maker is actually bias with respect to factual issues being adjudicated).

The Tenth Circuit assessed a second strike against Petitioner based on these factual circumstances pursuant to 28 U.S.C. §1915.

Besides the most indefensible of actions (1) making "unavailable" materials central to charges brought and the process for review of decisions related to charges and (2) the approving of administrative relief while not actual issuing a remedy, a monetary penalty has been created for prisoners able to show the mistreatment of prison officials under the authority of COPD and like regulations. This is not a frivolous claim under any standard.

Defering to prison officials who policy-make through practice without regard to the intent, spirit, and clear language shows the faux pas of near sightedness and is an abdication of judicial responsibility. Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

This Court has to keep in mind when considering the merits of Petitioner's claim and other state prisoners, that the prison officials authority is virtually unchallengeable. Johnson v. California, 543 U.S. 499, 511 (2005)(governments power is at its apex in the prison setting). This makes for an atypical and significant hardship where absolutely no observance of the rule of law and order exists in the exercise of authority.

This is why the drafters of the United States Constitution and Colorado Constitution instituted a separation of powers doctrine. Bullard, supra. The claims are colorable, address a specific abuse, impact a considerable number of rights, duties, and laws, thereby meriting a judgment of relief.

A monetary penalty is not frivolous. Nietzke v. Williams, 490 U.S. 319, 330 (1989). This pending case is instructive.

State prisoners suffer from a complete refusal of prison officials to observe Wolff's precedence despite constructing COPD with the opinion in mind. See Appx. D(6) at 54. By the Defendant's measure, only inculpatory evidence is admitted, while exculpatory evidence is "unavailable." See Appx. H at 118-119. No effort, whatsoever is given to the most obvious of demands for fairness as is demonstrated by the illogical dismissal of the "Threats" charge at the hearing for lack of substantial evidence and conviction at issue. This particular fact is relevant because it shares a trait with one of the cases at issue before the Court now. See Appx. F(2) at 109. A pattern of covering up abuses at hearings by Hearing Officers becomes apparent.

If the PLRA and Wolff, by this Court's reasoning is intended to create a record for review and preservation of evidence for reviewing courts to consider, then Petitioner has a legitimate claim about abuses in disciplinary proceedings by CDOC.

There is sufficient cause to merit this Court's extraordinary supervisory authority for a more appropriate question posed to the court may be: Is it fair for a state prisoner to pay for success in the form of expungement just to have prison officials say, yea, he's right, we never observe due process? Or as Justice Ginsburg might say, uncovered once a suit is filed. There is no deterrent and prison officials bent on penalizing prisoners have incentive to hide administrative remedies.

Relief in this matter, in the form of injunctive relief, requiring the Department to promulgate sufficient rules to guide administrative decisions under the circumstances of Petitioner's

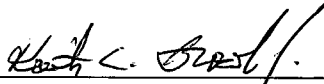
case is consistent with Colorado law and reviewing courts function to provide relief. Elizondo v. State, 194 Colo. 113, 118, 570 P.2d 518, 521-22 (1977); accord Wolff, supra; Sandin, supra. The interest of Petitioner parallels the interest of the state.

Provoking litigation is the vice of prison administration here with the fall out being this Petitioner for A Writ of Certiorari to counteract the provocation and invocation of judicial intervention to stop harm and pursue the vindication of rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Keith C. Brooks Jr.
Pro-se CDOC #108827

Date: March 27, 2018