IN THE SUPREME COURT OF THE STATE OF ALASKA

MATE VALOAGA, Appellant, v. STATE OF ALASKA, DEPARTMENT OF CORRECTIONS, Appellee,	Supreme Court No. S-18814

Trial Court Case No. 3PA-22-01593CI

APPEAL OF A DISCIPLINARY DECISION OF THE DEPARTMENT OF CORRECTIONS FROM THE FINAL SECISION OF THE SUPERIOR COURT, THIRD JUDICIAL DISTRICT AT PALMER THE HONORABLE JOHN C. CAGLE, SUPERIOR COURT JUDGE PRESIDING, TO THE SUPREME COURT OF ALASKA

APPELLANT'S REPLY BRIEF

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Filed in the Supreme Court

February 21, 2024.

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No person shall be deprived of life, liberty or property, without due process of law.

ARGUMENT

I. Valoaga will Reply to the Appellee's Brief as it was argued.

Valoaga is American Samoa who speaks English as a second language and is recognized by the Superior Court to require the assistance of an interpreter. Judicial Notice Requested, 3AN-18-03373CR.

For clarity, Valoaga will make a concise reply to each of the appellee's points of argument in the order that the appellee has presented them to the Court.

II. A preponderance of the evidence "standard of proof" violates due process.

A. Hill does not establish the minimum "standard of proof" to be used in a disciplinary hearing that involves a prisoner's liberty interest.

The appellee opens their argument by throwing the Court a red herring in asserting:

> Mr. Valoaga contends that in Superintendent, Massachusetts Corr. Inst., Walpole v. Hill the United States Supreme Court approved the "some evidence" standard as the standard of review a court applies in reviewing a disciplinary decision, and not the minimal evidentiary standard a disciplinary tribunal may use. [Appellant's Br. 4].

Appellee's Brief, (AeeBr., hereafter) p.9.

FIRST: Valoaga's contention is not as the appellee asserts above, but is instead a claim that Alaska has never performed a constitutional analysis of article I, § 7 of the Alaska Constitution as it applies to the "standard of proof" that must be used in a prisoner disciplinary hearing that involves a liberty interest. Exc., pp.6-11, 38-41; Appellant's Brief, (Br., hereafter) pp.1-6; Brandon v. Dep't of Corrections, 73 P.3d 1230, 1233-34 (Alaska 2003)(citing to the Court's holdings that interpret due process more broadly for prisoner disciplinary hearings under the Alaska Constitution than the United States Constitution and, that, the Court cites the "parameters of state

constitutional due process to include "'substantially more probable than ... innocent'" standard of adjudicating guilt.".

SECOND: Valoaga does not mention Superintendent, Massachusetts Correctional Institution v. Hill, 472 U.S. 445 (1985) until page 5 of his brief (Appellee may have mistakenly cited p.4) and only in the context that the trial court had switched Valoaga's unconstitutional "standard of proof" claim into an unconstitutional "standard of review" appellate claim. Compare Aee.Br., p.9 with Br., pp.5-6.

Nevertheless, the appellee's assertion that the Hill Court stands as an example that can be cited in which a fact is "found" by less than a preponderance of the evidence is absurd. In American law a preponderance of the evidence is the rock bottom at the factfinding level be it administrative factfinding or civil litigation. This is because "the application of any standard [of proof] lower than a 'preponderance of evidence' would have the effect of requiring the accused to prove his innocence". Smthy v. Lubbers, 398 F. Supp. 777, 799 (W.D. Mich. 1975); see also 3 Kenneth Culp Davis, Administrative Law Treatises § 16.9, at 256 (2d ed. 1980)("One can never prove a fact by something less than a preponderance of the evidence. Any view to the contrary is based on misunderstanding").

In closing of this section Valoaga would like to point out the appellee's use of a comma within a quote, that does not actually exist, has significant implications. The appellee introduces a quote from Hill that states: "closed, tightly controlled environment," AeeBr., p.10. The comma at the end of "environment," encourages a separation of thought and no need to read any further. However, there is no comma in the actual text. The actual quote reads: "closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." Hill, 472 U.S. at 454.

Valoaga points this out because the Supreme Court's holding of "some evidence" in Hill is exclusive to "those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so" Id. Valoaga cannot be bound by this because Valoaga remains innocent as he stands accused, and is incarcerated **only** because he is unable to afford bail. Request Judicial Notice.

B. **The preponderance of the evidence standard is unconstitutional under state law.**

1. **Balancing of the interests supports a clear and convincing standard of proof.**

The appellee agrees that the framework in Mathews v. Eldridge should be used to determine the appropriate standard of proof. Aee.Br., 12. The appellee additionally acknowledges that a prisoner disciplinary guilty findings will often have grave collateral consequences outside the controls of prison administration. Aee.Br., 13. However, the appellee asserts Valoaga failed to balance the grave collateral consequences against "the important interests that DOC has as the prison administrator." id. Valoaga apologizes for this oversight and will balance the three factors that the appellee identifies: 1) The concern for institutional safety, 2) administrative efficiency, and 3) preserving the rehabilitative nature of the disciplinary process. Aee.Br., p.13 ¶ 3.

i. **The concerns for institutional safety.**

Any real concern for institutional safety is not and cannot be addressed through the finite reach of a prison disciplinary tribunal -- but is instead addressed through the infinite reach of administrative segregation. This is because a disciplinary guilty finding is limited by a finite amount of time that restrictions can be imposed, 22 AAC 05.470, whereas administrative segregation is infinite in the amount of time that restrictions can be imposed as they relate to concerns for institutional safety. 22 AAC 05.485.

ii. The concerns for administrative efficiency.

The appellee does not cite to any jurisprudence or scholarly works that support a concern that a clear and convincing standard of proof is administratively more burdensome than a preponderance of the evidence standard of proof for the factfinder to determine guilt or innocence in a prisoner disciplinary hearing. Aee.Br., pp.9-17.

Without evidence to the contrary the Court can rely on the presumption that a correctional officer who sits as a factfinder in a disciplinary tribunal has been trained to employ the proper standard of proof and, that, the training is equally burdensome under a clear and convincing standard of proof or a preponderance of the evidence standard of proof. Dep't of Corr., Policy & Procedure 401.01

iii. The concerns for preserving the rehabilitative nature of the disciplinary process.

Here again the appellee does not cite to any jurisprudence or scholarly works that support a concern that a clear and convincing standard of proof degrades the rehabilitative nature of a disciplinary process more than that of a disciplinary process that uses a preponderance of the evidence standard of proof. AeeBr., pp.9-17.

Without evidence to the contrary, the Court can rely on the presumption of regularity that the rehabilitative nature of the disciplinary process is unaffected by either standard of proof. This is because the "presumption of regularity" supports the acts of public officers. In the absence of clear evidence to the contrary the doctrine presumes that public offices have properly discharged their official duties. United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926). The doctrine thus allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show the

contrary. United States v. Roses, Inc., 706 F.2d 1536, 1567 (Fed. Cir. 1983).

2. **Alaska precedent does not support a preponderance of the evidence standard of proof.**

It is interesting that the appellee uses, contextually, this Court's decision in Disciplinary Matter Involving Walton, 676 P.2d 1078 (Alaska 1983) to persuade the Court that "Alaska precedent" supports a preponderance of the evidence standard of proof, AeeBr., pp.14-15, when Brandon v. Dep't of Corrections is more directly on point:

> A comparison of the relevant holdings of this court and the United States Supreme Court in the area of prisoner disciplinary proceedings shows that we have interpreted the due process guarantee under the Alaska Constitution more broadly than the United States Supreme Court has interpreted the identical provision of the United States Constitution. In McGinnis v. Stevens, we held that under the Alaska Constitution punitive segregation of a prison inmate following a major disciplinary infraction is a deprivation of liberty sufficient to trigger the right to due process. In that case we set out the parameters of state constitutional due process rights to be afforded to prisoners in disciplinary proceedings: Subject to certain limitations, inmates accused of major disciplinary infractions are entitled to ... a "'substantially more probable than ... innocent'" standard for adjudicating guilt,"

Brandon v. Dep't of Corrections, 73 P.3d at 1234.

The Brandon Court speaks to broadening the due process guarantee for a prisoner disciplinary proceeding so that inmates accused of a major disciplinary infraction would be **entitled** to a substantially more probable than innocent standard of proof for adjudicating guilt. Id. Nevertheless, the appellee does not mention Brandon, but instead relies on Walton to support their position. AeeBr., 14-15. The appellee's use of Walton falls short of being persuasive however. The appellee never explains how the substantial public interest of not having the State continue to license an unethical attorney who manufactures evidence, is equally as substantial to a prisoner accused of violating a regulation promulgated by the Department of Corrections. Id.

3. **Valoaga's other arguments change the propriety of the preponderance of evidence to a clear and convincing standard of proof.**

The appellee admits a pretrial detainee has, under federal law, greater due process protections before punishment can be imposed, than those who are sentenced. AeeBr., 16-17. This admission bolsters Valoaga's argument that our Supreme Court's holding in McGinnis v. Stevens of "substantially more probable than ... innocent" was subsequently solemnized in Brandon to "set out the parameters of state constitutional due process rights to" ... "entitle" prisoners to a "'substantially more probable than ... innocent'" standard for adjudicating guilt." Brandon v. Dep't of Corrections, 73 P.3d at 1234.

Therefore, in consideration of the above, the appellee's assertion that: "Mr. Valoaga was provided with a due process hearing with the protections outlined in McGinnis v. Stevens." is patently false and should be rejected.

C. **The error of applying the correct constitutional evidentiary standard of proof is "structural error" requiring automatic reversal.**

The appellee asserts that this Court need not reach the question of the applicability of the constitutional standard of proof for a prisoner disciplinary hearing because the evidence presented at Valoaga's hearing renders Valoaga guilty under any standard. AeeBr., 17-18.

The error with this assertion is a failure of the appellee to recognize that where a deficient burden of proof is given to a "fact-finder" adjudicating a person's liberty interest -- structural error attaches to the framework of the proceeding -- requiring automatic reversal, no matter what evidence was presented against the accused to indicate guilt. Br., 3-4.

Given the fact that all major prisoner disciplinary proceedings involve a prisoner's liberty interest, this Court should determine the constitutional standard of proof that is to be applied by the fact-finder. Id.

III. DOC P&P 808.14 is unconstitutional as applied to implement 22 AAC 05.400(c)(16).

A. The appellee waived their objection in the trial court against Valoaga's argument that P&P 808.14 is constitutionally required to offer Valoaga alternative testing prior to charging Valoaga with a 22 AAC 05.400(c)(16) infraction.

On April 17, 2023, the trial court issued an Opinion where the court "understands through review of the record", that Valoaga's "objection in the trial court's understanding, is a challenge to the legality of DOC P&P 808.14: whether it correctly implements 22 AAC 05.400(c)(16) and passes the due process requirements of the Alaska Constitution." Exc. 28-29.

A month later the trial court issued an order holding in abeyance the court's April 17, 2023, opinion. Exc. 33. The trial court held its order in abeyance due to Valoaga never receiving a copy of the appellee's brief. Exc. 31-33. Any objection that the appellee had to the trial court addressing Valoaga's challenge to the legality of policy 808.14, as it implements 22 AAC 05.400(c)(16), was required to be entered by the appellee after the trial court issued its order in abeyance, Exc. 33, after Valoaga filed his Reply Brief, Exc. 34-42, or once the trial court issued its Amended Opinion, Exc. 43-51.

Even if there is a question of whether the appellee has waived their right of objection in the trial court, this Court has well established that the Court will not hesitate to consider an issue that is critical to a proper and just action, regardless if it has been argued in the trial court and properly raised on appeal. Vest v. First Nat'l Bank, 659 P.2d 1233, 1234 n.2 (Alaska 1983).

B. Due process required DOC to sua sponte offer Valoaga an opportunity to submit to alternate testing before DOC could charge Valoaga with a violation of 22 AAC 05.400(c)(16).

The appellee does not deny that the word "refusal" in 22 AAC 05.400(c)(16) requires a wilful disobedience on the part of the prisoner who has been given a demand to submit a urine specimen. See Exc. 29 & Compare Br., pp.7-10 with AeeBr., pp.18-23.

The appellee instead shoulders the burden on Valoaga to request alternative testing or disclose "a medical or mental health condition" to the urine collection officer when Valoaga experienced a physical inability to urinate within the time allotted by officer Clark. AeeBr., p.21.

Aside from the HIPPA violation that the appellee has now baked into their argument, 42 USCS § 1320d-(1-9), the burden never shifts from the government to the inmate to provide a method of substance abuse testing that an inmate can physically perform and comply with -- or intentionally refuse. Exc. 29 n.17.

It is important for this Court's due process consideration that the appellee has full knowledge of the factual basis why inmate Larson is provided alternative testing (Exc. 42) under policy 808.14 VI is because the terms of the settlement prohibit the collection of urine from Larson -- not because Larson "has a demonstrated medical/mental health condition that prevents the submission of a urine sample," Policy 808.14 VI (E).

This is important because it proves that the appellee's revised alternative testing procedures exist for the purpose of obtaining a specimen from the inmate that can be tested for substance abuse anytime, and for whatever reason, that a urine specimen cannot be obtained. Br., pp.7-10.

The appellee wants this Court to reject that "DOC" was constitutionally required to provide Valoaga with alternate testing because:

> Taking this argument to its end, DOC would essentially be required to provide saliva testing anytime a prisoner failed to provide a sample within the two-hour time frame.

AeeBr., pp.21-22.

The appellee's argument above is **why** this Court **SHOULD** find that DOC was required under process to provide Valoaga with alternate substance abuse testing when Valoaga could not produce a urine sample within the time-frame he was given. Br., pp.7-10.

Valoaga **does not** require that alternate testing be "saliva testing" as the appellee asserts. Id. Valoaga only requires that DOC provide a type of alternate substance abuse testing that Valoaga can physically perform -- or intentionally refuse. Br., pp.7-10; Exc. 29 n.17.

Currently, saliva testing is just the testing method that DOC has chosen to accomplish their commitment "to the elimination of substance abuse in institutions by enforcing a zero tolerance policy for substance abuse which if violated shall result in disciplinary sanctions." Policy 808.14 V; Br., p.7.

With no aspersion towards the appellee's intelligence, the appellee's argument is utterly absurd that Valoaga's reason for not being able to urinate within the time frame demanded:

> could easily be used by prisoners seeking to evade disciplinary violations for failure to provide a urine sample where the alleged "failure" was motivated by avoiding a positive test result.

AeeBr., p.22 ¶ 2.

The absurdity of the appellee's argument comes in three parts.

FIRST: If DOC offers alternative testing to an inmate who is feigning an inability to urinate, "motivated by avoiding a positive test result", the alternate test will provide DOC with the same result that the inmate is "motivated" to avoid.

SECOND: By not offering alternative testing to an inmate who professes a willingness to submit to testing, but cannot urinate, the DOC undercuts its commitment "to the elimination of substance abuse in its institutions" by never knowing if the inmate violated the Department's "zero tolerance policy" or not. Br., pp.7-10.

THIRD: The inmate's only option after alternate testing is offered is to intentionally refuse the alternate testing procedure which, would result in the inmate receiving a disciplinary infraction under 22 AAC 05.400(c)(16) for intentionally refusing to submit to a substance abuse testing procedure that the inmate can comply with. Exc. 29 n.17; Br., pp.7-10.

The appellee makes one final argument before their conclusion that asserts:

> Larson also indicates that a prisoner is required to actually make a showing of a need for an accommodation to obtain an exception from the urine testing that is generally applicable to the prisoner population. In Larson the prisoner had provided evidence that he had repeatedly brought the issue to the attention of correctional officers, medical staff, and the superintendent, and had requested various accommodations including being allowed to drink as much water as possible to provide a urine sample, to use a substitute testing method such as saliva, or to be placed in a dry cell by himself to provide a urine sample.

AeeBr., p.23.

Valoaga has to admit that the appellee makes a strong claim for intentional infliction of emotional distress for every prisoner that has suffered, post Larson, by DOC's systemic refusal to offer alternate testing for

those inmates who have made a Larson showing. Watkinson v. Dep't of Corr., 2023 Alas. LEXIS 124 at pp.18-19.

However, and aside from the above, Valoaga asks for this Court to consider that because policy 808.14 VI (E) provides alternate substance abuse testing procedures -- a claim filed under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") would provide the "least restrictive" testing procedure which, currently, is the saliva test. Exc. 42; See 42 U.S.C. § 2000cc-1(a); and generally Larson v. Alaska, 670 Fed. Appx. 940 (9th Cir. 2016)(stating that under RLUIPA, "[n]o government shall impose a substantial burden on the religious exercise" of a prisoner unless the government establishes that the burden furthers "a compelling governmental interest" and does so by "the least restrictive for further proceedings).

CONCLUSION

Valoaga, as a legal matter, is not attempting to alter the Department of Corrections use of its urinalysis substance abuse testing procedures. Nor is Valoaga attempting to advise or implement any specific alternate substance abuse testing method. Valoaga's **ONLY** intent is to have this Court find that the due process clause of the Alaska Constitution requires the government to provide a substance abuse testing method that an inmate can physically comply with -- or that the inmate can intentionally refuse.

In consideration of Valoaga's Reply to the Appellee's brief, this Court should find that article I, § 7 of the Alaska Constitution requires a "clear and convincing" standard of proof in all prisoner major disciplinary hearings, and that an alternate substance abuse testing method **must** be offered to an inmate who professes an inability to provide urine, but otherwise is willing to submit to a substance abuse test that he or she can physically comply with.

Respectfully submitted this 5th day of February 2024.

Mate Valoaga

Mate Valoaga

I certify that a copy of this Reply Brief was mailed to Andalyn Pace at her address of record on 02/06/2024.

Mate Valoaga

Mate Valoaga