SCV: Submitted on 09-28-2018 14:32:57 EDT for filing on 09-28-2018

IN THE

Supreme Court of Virginia

RECORD NO. 171562

JOHN ALBERT ANDERSON,

Appellant,

v.

JEFFREY N. DILLMAN, WARDEN,
FLUVANNA CORRECTIONAL CENTER
FOR WOMEN, et al.,

Appellees.

APPELLANT'S OPENING BRIEF

Cary B. Bowen (VSB#17313)
BOWEN, CLEMENTS,
FAVRET & BUNDY. PLLC
8740 Landmark Road
Richmond, Virginia 23228
(804) 801-5939
(804) 597-0067 (fax)
cbowen@carybowenlaw.com

Counsel for Appellant

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

Page(s)

Index of Authorities ..... ii, iii, iv

Nature of the Case and Material Proceedings Below.... 1

Assignment of Errors 2

Statement of Facts 3

Standard of Review 8

Argument and Authorities 10

I) The Circuit Court Erred by Holding that the Claim as to Defendant Maurice Should be Dismissed 10

II) The Circuit Court Erred by Holding that the DOC Procedures Used During Anderson's Disciplinary Hearing Provided Adequate Due Process Protection and that the Penalty Imposed Did Not Rise to the Level of the Constitutional Violation 12

III) The Circuit Court Erred by Holding that the Defendants are Entitled to the Defense of Qualified Immunity 17

IV) The Circuit Court Erred by Holding that Anderson is Improperly Attempting to Use the Court as a Means to Challenge the Accuracy of the Findings Made at the Disciplinary Hearings 19

Conclusion 20

Certificate of Service 21

INDEX OF AUTHORITIES

Cases Page(s)

Anderson v. Walrath, Warden, Powhatan County Circuit Court No. CL17000311 (Virginia Supreme Court Petition for Appeal Record No. 180359 (pending) 13

Ashcroft v. Iqbal, 556 U.S. 662 (2009) 9

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) 9

Bingham v. City of Manhattan Beach, 329 F.3d 723 (9th Cir. 2003) 17

Booker v. South Carolina Dept. of Corrections, 855 F.3d 533, (4th Cir. 2017) 18

Bourgeois v. Murphy, 119 Idaho 611, 809 P.2d 472 (1991)..... 15

Elliott v. Shore Shop, Inc., 238 Va. 237, 348 S.E.2d 752 (1989) 9

Ellison v. Zateky, 820 F.3d 271 (7th Cir. 2016) 14

INDEX OF AUTHORITIES
continued

Cases | Page(s)

Garraghty v. Virginia Department of Corrections, 52 F.3d 1274 (4th Cir. 1995) 10

Harris v. Kreutzer, 271 Va. 188, 624 S.E.2D 24 (2006) ... 8

Houch v. Substitute Trustee Services, Inc., 791 F.3d 473 (4th Cir. 2015) 9

Ingraham v. Wright, 430 U.S. 651 (1977) 17

Sandlin v. Conner, 515 U.S. 472 (1995) 16

Superintendent v. Hill, 472 U.S. 445 (1985) 14

Viens v. Daniels, 871 F.2d 1378 (7th Cir. 1989) 14

West v. Atkins, 487 U.S. 42 (1988) 10

Wolff v. McDonnell, 418 U.S. 539 (1974) 14

Woodard v. Mills, 511 F.2d 1399 (4th Cir. 1975) 19

Wright v. Collins, 766 F.2d 841 (4th Cir. 1985) 10

INDEX OF AUTHORITIES
continued

Page(s)

Rules, Regulations & Operating Procedures

OP-861.1, Offender Discipline, Institutions 10, 11

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This is an appeal from a judgment dismissing a civil action complaint (a.k.a. "Motion for Judgment") for equitable relief and damages arising under the Fourteenth Amendment to the Constitution of the United States of America, Article I § 11 of the Constitution of Virginia, and 42 U.S.C. §§ 1983, 1985, and 1988. Jurisdiction in the Circuit Court for Powhatan County, Virginia was predicated upon § 17.1-513. The complaint herein was filed on April 4, 2017, and service on the defendants personally was perfected on April 6, 2017. **Appendix** at **pg. 2.**

On May 4, 2017, defendants, through their counsel, the Assistant Attorney General, filed and served their Motion to Dismiss and Demurrer. No in-court hearing or other proceedings were held in this matter. Accordingly, there is no transcript or statement of facts or incidents for this Court to review.

On July 14, 2017, the Honorable Paul W. Cella, Circuit Judge, issued an opinion letter to counsel articulating the reasons for his upcoming decision. **Appendix** at **pg. 176**. On July 31, 2017, the Court entered its final order granting the defendants' Motion to Dismiss and Demurrer and dismissing this action with prejudice. This appeal follows.

Notice of appeal was timely filed in the Circuit Court by counsel on August 18, 2017, with copies thereof mailed or delivered to opposing counsel and the Clerk of this Court on that date. **Appendix** at **pg. 181**. Upon his petition, an appeal was awarded to John Anderson from the judgment in this matter rendered by the Circuit Court of Powhatan County with no bond or other security required by this Court on May 4, 2018.

ASSIGNMENTS OF ERROR

I. The Circuit Court erred by holding that the claim as to Defendant Maurice should be dismissed. This error was preserved in the "Plaintiff's Response to Defendants' Motion to Dismiss and Demurrer" (hereinafter also "Plaintiff's Response") at page 4 and by objection on the final order entered in this case on July 31, 2017. **Appendix** at **pgs. 136 and 180**.

II. The Circuit Court erred by holding that the VDOC procedures used during Anderson's disciplinary hearing provided adequate due process protection and that the penalty imposed did not rise to the level of a constitutional violation. This error was preserved in the Plaintiff's Response at pages 04-05 and by objection on the final order entered in this case on July 31, 2017. **Appendix** at **pg. 180**.

III. The Circuit Court erred by holding that the defendants are entitled to the defense of qualified immunity. This error was preserved in the

Plaintiff's Response at pages 10-12 and by objection on the final order entered in this case on July 31, 2017. **Appendix** at **pgs. 142-144, and 180**.

IV. The Circuit Court erred by holding that Anderson is improperly attempting to use the Court as a means to challenge the accuracy of the findings made at the disciplinary hearing. This error was preserved in the Plaintiff's Response at pages 4-6 and by objection on the final order entered in this case on July 31, 2017. **Appendix** at **pgs. 136–138 and 180**.

STATEMENT OF FACTS

On or about February 25, 2016, a mass urine surveillance was conducted of all inmates residing in Dormitory 6A at the State Farm Correctional Complex, Deep Meadow Correctional Center (hereinafter also 'DMCC'. **Verified Civil Action Complaint for Declaratory Judgment, Equitable Relief, and Damages with a Jury Demand** (hereinafter also '**Complaint'**) at page 10, paragraph 14, **Appendix** at **pg. 11**. Appellant John A. Anderson, was an inmate resident of DMCC 6A on that date and was among approximately sixty inmates from whom urine samples were taken. **Complaint** at pages 10-13, paragraphs 14-33, **Appendix** at **pg. 11**.

The atmosphere in Building 6A during the urine collection procedure was chaotic. The procedure utilized by defendants to collect and secure the

urine specimens in question was random, arbitrary, and totally inconsistent with Virginia Department of Corrections (hereinafter also "DOC") guidelines as established in DOC Operation Procedure OP-841.5 (Offender Alcohol and Other Drug Testing and Treatment Services) as well as minimum standards, much less best practices, for the collection of evidentiary urine specimens or to adequately establish the identity of specimen donors or chain of custody of those specimens as also described by defendant D. Leonard, DOC Intelligence Officer, in his affidavit. **See Defendants' Motion to Dismiss and Demurrer** (hereinafter also **"MTD"**) at **Exhibit 1** (Leonard Affidavit, hereinafter also **"Leonard Aff."**) pages 1-2, paragraph 5, **Appendix** at **pgs. 33-34**.

The result of laboratory testing, done remotely, of Anderson's urine specimen were electronically posted to the VACORIS (computer-based DOC offender information management system) Drug Testing Module on March 3, 2016, where it languished for weeks prior to the initiation of disciplinary charges. **Complaint** at pages 13-14, paragraphs 35-36; **Leonard Aff.** at **Enclosure B** (Disciplinary Offense Report) page 1. **Appendix** at **pgs. 14-15 and 48-50**.

After being formally charged on March 25, 2016, Anderson made a formal request for documentary evidence including: (1) the Chain of

Custody Form (hereinafter also 'COC'); (2) the access log for the Drug Testing Module in VACORIS; and (3) the list of medications then currently prescribed to him. **Complaint** at page 15, paragraph 40, **Appendix** at pg. 16. See also **MTD** at **Exhibit 2** (Affidavit of DMCC Hearings Officer G. Grant, hereinafter also **'Grant Aff.'** (**Appendix** pgs. 65-70)) at **Enclosure D** (Request for Documentary Evidence). On April 7, 2016, Defendant Grant found Anderson's request for this documentary evidence to be "relevant," **Grant Aff.** at **Enclosure D, Appendix** at **pg. 118**; however, none of the requested documentary evidence was ever provided to Anderson. **Complaint** at page 15, paragraph 41, **Appendix** at **pg. 16**.

It is worth noting here that Judge Cella, in a sister-case involving a habeas petition also filed by Anderson in the Powhatan County Circuit Court based on these same events, has issued an opinion letter wherein he confirms that, based on his review of this fact pattern, it is now his opinion that Anderson was never provided with the documentary evidence he requested and which was found to be "relevant." **See Anderson v. Walrath, Warden**, Powhatan Circuit Court Case No. CL17000311, **Opinion Letter** (September 11, 2017) at page 1 ("I do not believe that petitioner was actually provided with a copy of the chain of custody form,

and if this were a criminal trial, petitioner's claim regarding the chain of custody might have some merit.").

Anderson's disciplinary hearing began on April 7, 2016. Intelligence Officer Leonard, the charging officer, testified in person at the hearing. According to Leonard's own statement, although he wrote the charge, he neither collected Anderson's urine specimen nor viewed the test results. **Leonard Aff.** at page 2, paragraph 7 ("I did not collect the urine specimen from Anderson. Officer Diming read Anderson's test results, which were positive for opiates, and I assisted Officer Diming in writing the disciplinary offense reports for the offenders with positive drug tests."). **Appendix** at **pg. 49**. His only mention of the COC Form Anderson had requested was documentary evidence was to state that, "[a]ll Chain of Custody forms are sent to the lab with the sample matching the numbers and bar code on both the urine sample cup and the Chain of Custody." **Id.** at paragraph 8, **Appendix** at **pgs. 49- 50**.

Significantly, in his affidavit, Hearings Officer Grant did not state that he produced or viewed any of the three pieces of documentary evidence (COC Form, VACORIS Drug Testing Module Access Log, prescribed medications list). He did acknowledge that he reviewed the documentary evidence **request** ("regarding Anderson's request for documentary

evidence, I reviewed the request…" **Grant Aff.** at page 4, paragraph 10, **Appendix** at **pg. 68**). He further stated that he "asked Reporting Officer Leonard whether he had checked with medical staff regarding Anderson's prescribed medications…" and was told that Leonard "wrote the charge based on the positive test for opiates, but had not checked with medical staff," **Id.** He then "deemed Anderson's request for documentary evidence, including the Chain of Custody form and list of prescribed medications to be relevant." **Id.** **Appendix** at **pg. 68**.

Following testimony by the parties, Hearings Officer Grant continued the disciplinary hearing to April 8, 2016 (the following day) in order to consult with DMCC medical staff about Anderson's prescribed medications. **Id**. at page 5, paragraph 12, **Appendix** at **pg. 69**. After being advised by Nurse Dabney that "Anderson was not taking any opiate medications," and that he "was not taking any medications… that would have caused a false positive drug test result" **Id.** at paragraph 13, **Appendix** at **pg. 69**. "Accordingly, I found Anderson guilty of the #122c offense." **Id. See also MTD** at **Exhibit 2, Enclosure B** (Disciplinary Offense Report) at page 2, **Decision of the Hearings Officer** ("Reason for Decision: Based on the urine sample submitted by you and that the sample did test positive for opiates."). No further mention was made of the Chain of Custody (COC) or

other requested documentary evidence, all of which had been deemed "relevant" by the Hearings Officer. Anderson was penalized with a ten dollar ($10.00) fine. **Id. Appendix** at **pgs. 63 and 64**. On that same date, Defendant Maurice, DMCC Chief Correctional Supervisor, formally approved the disciplinary action. **Id.** at **Enclosure B, Institutional Review. Appendix** at **pg. 64**.

Anderson exhausted his administrative appeals/remedy with respect to the determination of the Hearings Officer. **See MTD, Exhibit 2, Enclosure E, Appendix** at pg. 119. Thereafter, he filed his complaint in the Powhatan Circuit Court, the decision on which forms the basis for the instant appeal. It is worth noting, however, that even in those proceedings none of the "relevant" evidence was ever produced.

As a result of the above decision, Anderson was changed to a higher custody status, lost accumulated good time, and was transferred to a facility with higher security.

STANDARD OF REVIEW

"A trial court's decision sustaining a demurrer presents a question of law which we review de novo." Harris v. Kreutzer, 271 Va. 188, 196, 624 S.E.2d, 24, 28 (2006). "A demurrer tests the legal sufficiency of a motion

for judgment and admits the truth of all material facts that are properly pleaded." **Id.** (citing Elliott v. Shore Shop, Inc., 238 Va. 237, 238-240, 348 S.E.2d 752, 753 (1989)).

Legal sufficiency is determined by assessing whether the complaint contains adequate facts, when accepted as true, to "state a claim to relief that is plausible on its face." Ashcroft v Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly**,** 550 U.S. 544, 570 (2007)). This 'plausibility standard' only requires that the complaint's factual allegations "be enough to raise the right to relief above the speculative level." Twombly**,** 550 U.S. at 555.

"The facts admitted are those expressly alleged, those that are impliedly alleged, and those that may be fairly and justly inferred from the facts alleged." **Kreutzer, supra,** 271 Va. At 195, 624 S.E.2d at 28. If the plaintiff's "explanation is plausible [his] complaint survives a motion to dismiss…, regardless of whether there is a more plausible alternative explanation." Houch v. Substitute Trustee Services, Inc.**,** 791 F.3d 473, 484 (4th Cir. 2015).

ARGUMENT AND AUTHORITIES

Appellant Anderson has fully and completely stated a claim for relief that is plausible on its face. The Circuit Court below has declined to take all allegations as true and construe the material facts herein in a manner favorable to Anderson as the nonmoving party.

I. The Circuit Court Erred by Holding That the Claim as to Defendant Maurice Should be Dismissed.

The Circuit Court erred in finding that the claim against Defendant Maurice should be dismissed. Pursuant to 42 U.S.C. § 1983, a plaintiff must allege that he has been deprived of rights guaranteed by the Constitution, and that the deprivation resulted from conduct committed by a person acting under color of state law. West v. Atkins, 487 U.S. 42 (1988). A plaintiff must affirmatively alleged that the named defendants were personally involved in the alleged violation of his constitutional rights. See e.g. Garraghty v. Virginia Department of Corrections, 52 F.3d 1274, 1280 (4th Cir. 1995); Wright v. Collins, 766 F.2d 841, 850 (4th Cir. 1985).

The final step in the DOC disciplinary hearing process is the "Institutional Review" following the in-person hearing. **See DOC OP-861.1 (Offender Discipline, Institutions) at Attachment 6 (Format for Disciplinary Hearings)**, page 2 ("Stage IV: At the Conclusion of the

Hearing * * * C. Forward completed Disciplinary Offense Report and all related documents to the Institutional Reviewer as soon as possible after the hearing.”). The disciplinary hearing procedure is not complete until after the Institutional Review.

“The purpose of the review is to determine if proper procedures were followed and to ensure that the appropriate penalty was assessed.” **OP-861.1, XVI. Institutional Review**, page 33, paragraph ‘**B**’. The Institutional Reviewer has the authority to approve, dismiss, order rehearing or informal resolution, reduce the charge, or suspend or reduce the penalty. See **Grant Aff.** at **Enclosure B,** page 2 (Disciplinary Offense Report, Institutional Review).

Pursuant to this policy, Defendant Maurice, as Institutional Reviewer, was charged with the responsibility “to determine if proper procedures were followed,” and he was provided with the “completed Disciplinary Offense Report and all related documents.” This would presume that, upon his review of the disciplinary process here, he knew or reasonably should have known of the procedural due process failures inherent therein and complained of in this litigation. Nevertheless, Defendant Maurice personally approved the disciplinary hearing process on the same date that it occurred. Accordingly, no principled argument can be made that

Defendant Maurice lacked specific personal involvement in this matter to make him amenable to suit under § 1983.

II. The Circuit Court Erred by Holding that the DOC Procedures Used During Anderson's Disciplinary Hearing Provided Adequate Due Process Protection and that the Penalty Imposed Did not Rise to the Level of a Constitutional Violation.

The complaint in this matter describes the urine collection procedure as "disorderly and chaotic." Complaint at page 3, **Appendix** at **pg. 4**. "The process and procedures utilized by DMCC staff to collect and secure the urine specimens in question was random, arbitrary, and totally inconsistent with minimum standards [DOC policy], much less best practices, for collection of evidentiary urine specimens or to adequately establish the identity of the sample donors or chain of custody of those specimens." Id.

Significantly, among the myriad process errors, long before even producing a urine specimen, Anderson was compelled to sign a Chain of Custody (COC) Form certifying that the specimen accompanying that form was his own. The form was precompleted to indicate that Anderson was not taking any prescribed medications. Complaint at page 11, paragraphs 20-21, **Appendix** at **pgs**. **12-13**.

Prior to his disciplinary hearing, Anderson specifically requested both the Chain of Custody (COC) Form and a list of medications prescribed to him by the DMCC Medical Department as documentary evidence for his defense. Complaint at page 15, paragraph 40, **Appendix** at **pg.16**. Defendant Hearings Officer Grant found the requested evidence "relevant." See **Grant Aff.** at **Enclosure D, Appendix** at **pg. 118**. Where, as here, the documentary evidence requested is determined to be relevant to the Hearing. The Hearing Officer "will obtain the information if such information exists" and "give a copy of the Documentary Evidence to the offender at least one-half hour prior to the hearing." OP-861.1, Offender Discipline, XIV. Hearings Officer Prior to the Hearing, A.2.b. at page 29 (**Grant Aff.** at **Enclosure A**), **Appendix** at **pg. 99**. This was not done, as the Powhatan Circuit Court found in its opinion letter in the habeas corpus sister-case to this matter. See Anderson v. Walrath, Warden, Powhatan County Circuit Court No. CL17000311.

A. Minimum Due Process Protections Were not Observed

The United States Supreme Court has clearly established Anderson's right to "those minimum procedures appropriate under the circumstances and required by the Due Process Clause to ensure that the state-created

right is not abrogated." Wolff v. McDonnell, 418 U.S. 539, 557 (1974). "Among the minimum procedures appropriate under the circumstances, Id., is "an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense." Superintendent v. Hill, 472 U.S. 445, 454 (1985).

Here, Anderson was never provided with any of the documentary evidence he requested notwithstanding the Hearing Officer's determination that it was "relevant" - a determination that carried with it specific DOC policy requirements for the provision of such evidence to Anderson. "[W]hen a prisoner contends that he was denied access to evidence necessary to defend against a disciplinary charge, his claim is properly understood as 'one of procedural due process rather than sufficiency of the evidence.'" Ellison v. Zatecky, 820 F.3d 271, 274 (7th Cir. 2016) (quoting Viens v. Daniels, 871 F.2d 1378, 1386 (7th Cir. 1989)).

The disciplinary charge at issue here was predicated upon nothing more than an electronic notification that Anderson's alleged urine specimen did test positive. Intelligence Officer Leonard, the charging staff member, has concluded that he did not even read the electronic transmission, **Leonard Aff.** at page 2, paragraph 7, **Appendix** at **pg. 49**, and that he was only assisting another officer who allegedly did so. Id.

Questions raised by the chaotic nature of the collection procedure (including the issue of prescribed medications) could have been answered had the COC been produced and provided to Anderson as requested. In a case very much on all fours with this one, the Seventh Circuit Court of Appeals stated: "We note, however, that the record contains nothing more than an e-mail to the hearing officer stating that the substance 'did test positive' with no information about who performed the test, the type of test used, or the chain of custody." Zatecky, supra, 820 F.2d at 275. "Administrative decisions resting on chemical analysis typically require both the test results and a chain of custody linking those results to the particular prisoner." Id, see also Bourgeois v. Murphy, 119 Idaho 611, 809 P.2d 472, 482 (1991) ("when there is no documentation to the chain of custody to show that that which was analyzed by the laboratory came from the inmate in question, there is no test from a legal standpoint."). Defendants' suggestion that Anderson received due process in his disciplinary hearing is unprincipled and the Circuit Court's determination to that effect is similarly flawed.

B. The Penalty Imposed Does Not Determine Constitutionality

It is not the level of penalty imposed that determines whether due process was provided, and for the Circuit Court to so hold turns the entire equation on its head. The Supreme Court in Wolff found that the potential for losing good time credits, also present in this case, is sufficient to create a liberty interest under the Fourteenth Amendment entitling Anderson "to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to ensure that the state-created right is not arbitrarily abrogated." Wolff, 418 U.S. at 557. The Court analogized its analysis to that of a property interest stating that, "[t]his analysis as to liberty parallels the accepted due process analysis as to property." Id.

Appellees, specifically relying on the Sandin v. Conner (515 U.S. 472, 475 (1995)) "atypical and significant hardship in relation to the ordinary incidents of prison life" analysis, argue in their opposition to Anderson's petition for appeal that "[t]he fine Anderson received did not place atypical and significant hardship on him in relation to the ordinary incidents of prison life," **Brief in Opposition** at 8. Therefore, they posit, "the due process clause [sic] is not implicated – much less violated." Id. This "tail-wags-dog" reasoning turns the due process controversy in the case at bar on its head. It is by now black letter that Anderson's challenge here is governed

by the procedural due process protections set forth in Wolff v. McDonnell, supra. By contrast, in Sandin, the Court rejected a results-based methodology holding that the specific policy and the process applied in that controversy did not even "entitle him to the procedural protections set forth in Wolff." Sandin, 515 U.S. at 487.

Here, Anderson potentially faced both the loss of good time credits and the loss of property through a fine. The fact that the Hearings Officer only imposed a pecuniary penalty is irrelevant to Anderson's standing to challenge the procedural due process he should have been afforded using § 1983. "Although the Supreme Court has held that some governmental intrusions may be so minor as to not violate the [Constitution] at all, see Ingraham v. Wright, 430 U.S. 651, 674 (1977) [quotation omitted], it has never held that actions that do violate the [Constitution] may result in such little harm that § 1983 is not an available remedy." Bingham v. City of Manhattan Beach, 329 F.3d 723, 730 (9th Cir. 2003) (alterations added).

III. The Circuit Court erred by Holding that the Defendants are Entitled to the Defense of Qualified Immunity.

"Qualified immunity protects officials 'who commit constitutional violations but who, in light of clearly established law, could reasonably believe that their actions were lawful." Booker v. South Carolina Dept. of

Corrections, 855 F.3d 533, 537-538 (4th Cir. 2017) (citation omitted). "In conducting the qualified immunity analysis 'our first task is to identify the specific right that the plaintiff asserts to have been infringed by the challenged conduct.'" Id. at 538 (citation omitted). "We then engaged in a two-step inquiry, asking 'whether a constitutional violation occurred' and "whether the right violated was clearly established at the time of the official's conduct.'" Id. (citations omitted).

"In conducting the clearly established analysis, we first examine 'cases of controlling authority in [this] jurisdiction,' [citations omitted] – that is, 'decisions of the Supreme Court, this Court of Appeals, and the highest Court of the state in which the case arose, [citations and quotations omitted].'" Id. "We ordinarily need not look any further than decisions from these courts." Id. (citation omitted).

Here, Anderson's due process rights to documentary evidence found "relevant" to his defense in a disciplinary hearing has been clearly established by the Supreme Court, see Wolff v. McDonnell, supra, 418 U.S. 539 at 557. See also Superintendent v. Hill, supra, 472 U.S. 445 at 454. Accordingly, the Circuit Court's determination that the defendants have qualified immunity from suit is clearly erroneous.

IV. The Circuit Court Erred by Holding that Anderson is Improperly Attempting to Use the Court as a Means to Challenge the Accuracy of the Findings Made at the Disciplinary Hearings.

Relying exclusively on the Fourth Circuit's unpublished opinion in Woodard v. Mills, 511 F.2d 1399 (4th Cir. 1975), the Circuit Court below found that Anderson was improperly "trying to use this Court to challenge the accuracy of the findings that were made in his VDOC disciplinary hearing." **Opinion Letter** at page 2, paragraph 6. Woodard, however, is clearly distinguishable from the case at bar by its very language:

> The Supreme Court has recently affirmed that the Federal Courts possess authority to ensure that prison disciplinary proceedings accord inmates the fundamental components of due process. Wolff v. McDonnell, 415 U.S. 539 (1974). Woodard's procedure employed by the prison discipline Authority which found against him. He does not allege that he was wrongfully convicted because of inadequate procedural safeguards. In essence, his complaint is simply that the charges against him had no basis in fact.

Woodard v. Mills, supra, 511 F.2d at 1399.

Here, that is exactly what Anderson has alleged – wrongful conviction because of inadequate procedural safeguards. Anderson has clearly challenged the disciplinary hearing procedure as being constitutionally inadequate and denying him due process under Wolff and Hill for failing to provide him with documentary evidence that was relevant to his defense. Where, as here, "a prisoner contends that he was denied access to

evidence necessary to defend against a disciplinary charge, his claim is properly understood as one of procedural due process rather than sufficiency of the evidence." Ellison v. Zatecky, supra, 820 F.3d at 274 (citation omitted).

Conclusion

Wherefore, the foregoing premises considered, Appellant John A. Anderson prays that this Court will vacate or reverse the judgment of the Circuit Court below and remand this matter to the court for trial.

Respectfully submitted,

JOHN A. ANDERSON

By: /s/ Cary B. Bowen
Counsel

Cary B. Bowen, Esquire (VSB #17313)
Bowen, Clements, Favret & Budny, PLLC
8740 Landmark Road
Richmond, Virginia 23228
(804) 801-5939
Facsimile: (804) 597-0067
cbowen@carybowenlaw.com

Certificate of Service

I hereby certify on this 28th day of September, 2018 that Rule 5:26(e) of the Supreme Court of Virginia has been complied with and pursuant to the Rule, a PDF version of this brief has been filed through VACES and three paper copies delivered to the Clerk's Office.

An electronic version has also been delivered to opposing counsel via email to:

Mary Grace Miller, Esq.
Matthew R. McGuire, Esq.
Toby J. Heytens, Esq.
Assistant Attorney Generals
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219

Telephone: (804) 225-4021
Facsimile: (804) 786-4239
Email: mmiller@oag.state.va.us, mmcguire@oag.state.va.us, and theytens@oag.state.va.us.

/s/ Cary B. Bowen
Cary B. Bowen, Esquire