

IV. STATEMENT OF CLAIM - continued.

State of South Carolina  
County of Richland

In The S.C. Court of Appeals  
Appellate No. 2016 - 000086

William Pipkin, 228810,  
Appellant,  
vs.

Pipkin's Initial Brief  
With A Declaration Of Bernard

S.C. Dept. Of Corrections,  
Respondent's.

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Statement Of Issues On Appeal :

SC Court of Appeals

Argument # 1 : Did the administrative law court err in not conducting an evidentiary hearing where declarations have been submitted, claiming Pipkin was denied witnesses, in violation of the 14<sup>th</sup> Amendment of the U.S. Constitution in light of Johnson vs. Finnan, 467 Fed. 693, 694 (U.S. App. 7<sup>th</sup> Cir. 2006) ?

Argument # 2 : Did the administrative law court err in not finding Pipkin's action of pushing officer was not willful, where Pipkin witnessed inmate calling officer for help in restraining alleged psychotic inmate, and officers sprayed the inmate calling for help, no evidence, violating the 14<sup>th</sup> Amendment of the U.S. Constitution in light of U.S. vs. Gore, 592 Fed. 489, 495 (U.S. App. 4<sup>th</sup> Cir. 2010) ?

Statement of the Case :

On 2/5/2015, appellant Pipkin was charged with striking an Employee,

disciplinary offense code 807 while confined in SMU. Because accusing Ofc. / Sgt. McKay's incident report was not served prior to the hearing on 2/11/2015 (for reasons not stated here), Pipkin's case was continued until 2/18/2016.

After finding Pipkin guilty, the DHO took (6) days good-time credits, suspended canteen, phone and visitation for (175) days. Pipkin filed a Step One Grievance on 2/25/2015 which was denied on 4/9/2015.

Pipkin filed a Step Two Grievance on 4/13/2015. This appeal, which is S.C. Dept. of Correction's final decision, was denied 7/9/2015 and was received by Pipkin on 7/17/2015.

Appellant timely file his Notice of Intent to Appeal with the clerk of the administrative Law Court, but without an evidentiary hearing and without any factual findings and conclusions of law, the S.C. Administrative Law Court denied Pipkin's appeal.

This appeal follows.

### **Facts For Argument # 1 :**

The record before this court will show the following facts: According to a Declaration of Bernard McFadden, 199135, submitted in the Administrative Law Court, McFadden informed DHO Bittinger and the counsel substitute Armstrong prior to his 2/11/2016 DHO hearing. he and Pipkin were assaulted by an alleged mental health inmate Ross Gillard, who stopped taking his anti-psychotic medications. (See McFadden's 9/25/2015 Declaration, Record on Appeal at pages 21-22.)

That Pipkin was a witness to McFadden being assaulted and was

assaulted himself by Gillard in McKay's presence not more than (5) hours after Pipkin heard Gillard fighting McFadden, and the being sprayed by McKay after McFadden called for help. (See Pipkin's 10/02/2015 Original Brief and Declaration, ROA at pages 14-15.)

That Respondent's 12/01/2015 Brief does not specifically answer / address any of Pipkin's two issues. (See Respondent's Brief, ROA at pages 23-31). Respondent generally argued because Pipkin was provided a (24) hour notice of charge a hearing and a written record, etc., he was provided process due him (ROA at p. 27).

That Pipkin filed a Reply Brief dated 12/08/2015, and McFadden again signed another declaration therein, stating he told both Armstrong and Bittinger of the potential witnesses and why their testimonies were relevant. McFadden declared Armstrong and Bittinger were aware of potential medical and inmate witnesses for Pipkin's 02/18/2015 DHO hearing from the fact that McFadden previously told Armstrong and Bittinger of said witnesses at his 02/11/2015 DHO hearing - (7) days prior to Pipkin's hearing. (See McFadden's 9/25/2015 Declaration, ROA at pgs. 21-22.)

The Administrative Law Court dismissed this case without an excludatory hearing. *Id.*

### Argument:

Because the Administrative Law Court dismissed Pipkin's case without an excludatory hearing, Pipkin contends his procedural due process rights were violated within the meaning of Johnson vs. Finnan, 467 F.3d 693 (U.S. App. 7th Cir. 2006) (Reversed and remanded, where

<sup>1)</sup> Except for saying Pipkin did not request any witnesses at his DHO hearing, Respondent does not address Armstrong's duty to represent Pipkin.

district Court should have held evidentiary hearing, given inmate's sworn testimony and extrinsic evidence that contradicted disciplinary board's version of events.)

In Johnson vs. Finnan, 467 F.3d. 693, 694 (U.S. App. 7<sup>th</sup> Cir. 2006), the Court stated:

"When a prisoner who seeks federal habeas corpus relief provides competent evidence, e.g., affidavit by someone with personal knowledge of events in question, contradicting assertion by prison disciplinary board on material question of fact pertinent to issue of constitutional law, district court must hold evidentiary hearing to determine issue."

Here, the Administrative Law Court order appears to apply the presumption of correctness standard - which is error. In Piggie vs. McBride, 277 F.3d. 922, 925 (U.S. App. 7<sup>th</sup> Cir. 2002) (The Seventh Circuit Court of Appeals reversed and remanded where determination in disciplinary proceeding that prisoner has failed to timely request surveillance videotape, so that failure to consider request did not violate prisoner's due process rights, was not a determination of a factual issue by a state court, and thus was not presumptively correct for purposes of habeas review.)

The Piggie Court went on and stated:

"A state may not benefit from presumption of correctness that applies under federal habeas corpus statute to determination of a factual issue made

by a state court in appeals from disciplinary proceedings."

Pipkin further directs this court's attention to the Respondent's argument that because he didn't timely request witnesses, he waived this right. Appointed counsel, Pipkin contends he should not have to when Mr. Armstrong had the duty, that he was educationally challenged, and where Bernard McFadden declared he told Mr. Armstrong and Bittinger at his 02/11/2015 DHO hearing, but McFadden nor mental health and inmate witnesses were used by Bittinger and Armstrong at Pipkin's 02/18/2015 hearing. (See Pipkin's Reply Brief with McFadden's Declaration included, Rolt at pages 33-34.)

Pipkin also directs this court's attention to Pannell vs. McBride, 306 F.3d 499, 503 (U.S. App. 7<sup>th</sup> Cir. 2002) (Vacated and remanded, stating rejection of state inmates federal habeas claim that prison officials denied him due process by not allowing him to present witnesses in his defense during disciplinary proceeding on grounds that inmate did not make timely request for witness was premature and not supported by the record, where verified habeas corpus petition stated inmate had submitted request...).

In this case, because McFadden had timely informed both DHO Bittinger and counsel substitute Armstrong of the potential mental health and inmate witnesses at his 02/11/2015 hearing, this court should find that Pipkin was denied these witnesses at his 2/18/2015 hearing, that Pipkin had no duty in light of counsel substitute Bittinger and that Pipkin was confined and educationally challenged - all in violation of the 14<sup>th</sup> Amendment of the

U.S. Constitution.

### Facts For Argument # 2:

The record will also show the following facts: That when McKay wrote his incident report against Pipkin, McKay did not charge Pipkin with a separate offense nor indicate the reason he wanted Pipkin's ID. (See McKay's 01/30/2015 incident report charging Pipkin with the single offense of Striking an Employee, B04 at p. 3.) Nor does McKay mention Gillard's alleged assault.

The transcript of Pipkin's 08/18/2015 DTD hearing shows, for the first time, a statement from Sgt. Williams, where she stated that Pipkin called alleged psychotic inmate Rasl Gillard a snitch, and that Pipkin refused to go to his cell. And like McKay's report, no where in Williams' report does she indicate the assaultive behavior of Gillard, that Gillard was released from medical after McFadden told officials Gillard wasn't taking his medication, thus hitting him on the right side of his face. Nor does Williams' incident report give a reason why they wanted Pipkin's ID.

Finally, that no where in Pipkin's disciplinary hearing transcript do the DTD Bittinger and counsel substitute Armstrong ever mention, much less considered relevant, whether Gillard's alleged assaultive behavior could possibly have stemmed from Gillard not taking his anti-psychotic medication. Legally, it's not what McFadden or Pipkin knew about Gillard's psychotic mental health condition; it's what Armstrong and Bittinger should have known from Gillard's records, e.g., what was disseminated on a need to know basis or otherwise.

<sup>2)</sup> (In McKay's report, McKay doesn't mention Gillard's assaults or whether mental health officials were contacted concerning Gillard's condition.)

See Reed vs. Williams, 2007 WL 3140506 (U.S. D. Cal. 2007) at p. 5 ("... what the defendants knew about the aggressor patient's dangerous proclivities and when they knew is the crux of an 8th Amendment case; of course, warning, et al., about the aggressor patient found in the records would be entirely relevant.").

As discussed in above Argument # 2, Todd Smith was asked by Gillard whether Gillard should fight or forgive McFadden for reading his institutional mail from Chaplain Potolca (10) days prior to 01/30/2015. And that Todd Smith, Steven Guter, Terrence Bradshaw and the Appellant William Pipkin over-heard McFadden calling McKay to come get (restrain) Gillard, but rather than McKay restraining Gillard, McKay sprayed McFadden. Id.

The question now is: After Pipkin witnessed McKay spraying McFadden after McFadden called for help to restrain Gillard, after Pipkin had been allegedly assaulted by Gillard in McKay's presence after Gillard was released from medical less than (5) hours from allegedly assaulting McFadden, and after McKay first reached for Pipkin without first giving a directive, then was Pipkin's pushing a response to an unlawful and present threat of serious bodily injury within meaning of U.S. vs. Gore, 592 F3d 489 (U.S. App. 4th Cir. 2010) (holding that self-defense is available in limited circumstances to inmates, but defense requires response to unlawful and present threat of death or serious bodily injury). See also U.S. vs. Scott, 113 F3d 493, 496 (... a limited right of self-defense does arise if defendant presents

evidence that the officer used excessive force in carrying out his official duties. See Robinson, 649 A2d. at 587; Nelson, 580 A2d. at 117. A defendant who responds to an officer's use of excessive force with force reasonably necessary for self-protection under the circumstances has acted with "justification and excusable cause"...

This court should find that under the circumstances of Pipkin witnessing McFadden calling officers for help to come restrain alleged psychotic inmate Ras! Gillard, but was only sprayed with mace by McKay; that Pipkin witnessed McKay's inactive response to Gillard assault on Pipkin in McKay's presence; and that McKay unreasonably reached for Pipkin without first giving a directive, Pipkin acted reasonable and was justified by simply pushing McKay's hand away. Additionally, after McFadden told officials Gillard was not taking his anti-psychotic medication, this court should also find that it was Respondents' duty to know about the aggressor Gillard's dangerous proclivities - that which caused Pipkin to also be assaulted and the unnecessary use of force.

### Conclusion :

For the reasons stated, this court should reverse the judgment of the Administrative Law Court for evidentiary hearing.

Respectfully Submitted,  
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