

IN THE SUPREME COURT OF THE STATE OF NEVADA

THEODORE R. BURKETT,  
Appellant,  
vs.  
WARDEN, NEVADA STATE PRISON,  
JOHN IGNACIO,  
Respondent.

No. 37696

**FILED**

FEB 15 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from an order of the district court denying a post-conviction petition for a writ of habeas corpus.


We have reviewed the record on appeal, and we conclude that the district court properly denied appellant's petition. The district court properly concluded that appellant had a right to challenge the prison disciplinary proceedings because a liberty interest was implicated due to the fact that appellant forfeited 119 days of statutory good time credit.<sup>1</sup> The district court further properly determined that appellant's claims that

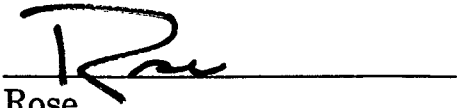
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<sup>1</sup>Sandin v. Connor, 515 U.S. 472 (1995); Wolff v. McDonnell, 418 U.S. 539 (1974).

his due process rights had been violated lacked merit.<sup>2</sup> Therefore, for the reasons in the attached order of the district court, we

ORDER the judgment of the district court AFFIRMED.<sup>3</sup>

 J.  
Shearing

 J.  
Rose

 J.  
Becker

cc: Hon. William A. Maddox, District Judge  
Attorney General/Carson City  
Carson City District Attorney  
Theodore R. Burkett  
Carson City Clerk

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<sup>2</sup>See Wolff, 418 U.S. 539.

<sup>3</sup>Briefing and oral argument are not warranted in this case. Lockett v. Warden, 91 Nev. 681, 682, 541 P.2d 910, 911 (1975), cert. denied, 423 U.S. 1077 (1976).

We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

1 Case No. 00-00422H

2 Dept. No. 2

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BY J. M. ... CLERK

6 IN THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
7 IN AND FOR CARSON CITY

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9 THEODORE R. BURKETT,

10 Petitioner,

11 vs.

12 JOHN IGNACIO, Warden, Nevada State  
13 Prison,

14 Respondent.

**FINDING OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER DENYING POST-  
CONVICTION PETITION FOR  
WRIT OF HABEAS CORPUS**

15 This matter comes before the Court pursuant to a Petition for Writ of  
16 Habeas Corpus (Post-Conviction) filed by Theodore R. Burkett on April 11, 2000.  
17 A Response and Return to the Petition for Writ of Habeas Corpus (Post-  
18 Conviction) was ordered and then filed on May 25, 2000 by the Attorney  
19 General's Office of the State of Nevada. The Court has received and reviewed  
20 the parties' written briefs, the court file, and the law applicable to the issues  
21 raised in the Petition. The Court, deeming itself fully advised of the matter,  
22 hereby enters its Findings of Fact, Conclusions of Law, and Judgment as follows:

23 **STATEMENT OF PROCEEDINGS**

24 Theodore R. Burkett was convicted on August 20, 1981 in Case No.  
25 C52477, Department XI in the Eighth Judicial District Court of the State of  
26 Nevada, in and for the County of Clark. He was convicted of two counts of  
27 Sexual Assault, a violation of NRS 200.310, NS 200.364 and NRS 200.366. He was  
28 sentenced to the Nevada State Prison for a term of Life on both counts and his

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1 sentences were ordered to run concurrently. He received 51 days of credit for  
2 time served.

3 On December 29, 1998, Theodore R. Burkett submitted a sample of urine.  
4 A test of that urine returned a positive result for the presence of marijuana in his  
5 system. On January 5, 1999, Burkett was served with a Nevada Department of  
6 Prisons' (NDOP) Notice of Charges and a Summary of Hearing Officer's Inquiry  
7 and Disposition, for violating the NDOP Code of Penal Discipline (hereinafter  
8 Code). Burkett was charged with one count of major violation (MJ) 45, use of a  
9 controlled substance and G1, disobedience of an order from any correctional  
10 employee.

11 At a disciplinary hearing held on January 7, 1999, Burkett pled not guilty to  
12 the charges against him. Burkett was informed of the possible criminal charges  
13 which could be brought against him and his right to remain silent. Burkett  
14 argued that he was taking Motrin and had Hepatitis C, both of which he claimed  
15 could return a false positive for marijuana. Burkett requested to see a copy of the  
16 test results and requested a second drug test. These requests were denied.  
17 Burkett also requested the assistance of an inmate law clerk at the disciplinary  
18 hearing, which was denied. Burkett was found guilty of MJ45, and the other  
19 charge was dismissed. Burkett received 90 days disciplinary segregation, 180  
20 days of non-contact visits, 30 days loss of audio/video/tv, 30 days loss of phone  
21 privileges, monthly drug testing, restitution for the urinalysis test, and he was  
22 referred to the Director of NDOP for a forfeiture of statutory sentence credits, in  
23 the amount of 119 days. Burkett appealed the disciplinary committee's findings  
24 to the Warden of Nevada State Prison on January 14, 1999. The appeal was  
25 denied on January 20, 1999.

#### 26 ISSUES PRESENTED

27 In his Petition for Writ of Habeas Corpus (Post-Conviction) Burkett asserts  
28 that:

- 1 1. He was made to choose between his constitutional right to remain  
2 silent after being read his rights because of potential criminal charges, or,  
3 choose to exercise his constitutional right to defend against the charges at  
4 the disciplinary hearing.
- 5 2. He was denied the right to be provided a copy of the drug test  
6 results.
- 7 3. He was denied a second confirmatory test.
- 8 4. He was denied the assistance of an inmate law clerk.
- 9 5. NDOP failed to follow, comply and adhere to written rules,  
10 regulations and procedures governing disciplinary hearings, thus, denying  
11 him his right to rely on those procedures when preparing his defense and  
12 attending the disciplinary proceedings.

### 13 FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### 14 I. Generally

15 NRS 34.720 provides that:

16 The provisions of NRS 34.720 to 34.830, inclusive, apply  
17 only to petitions for writs of habeas corpus in which the  
18 petitioner:

- 19 1. Requests relief from a judgment of conviction or  
20 sentence in a criminal case; or
- 21 2. Challenges the computation of time that he has  
22 served pursuant to a judgment of conviction.

23 This is a petition in which Burkett is challenging a disciplinary process  
24 which resulted in his receiving sanctions of 90 days disciplinary segregation, 180  
25 days of non-contact visits, 30 days loss of audio/video/tv, 30 days loss of phone  
26 privileges, monthly drug testing, restitution for the urinalysis test, and he was  
27 referred to the Director of NDOP for a forfeiture of statutory sentence credits, in  
28 the amount of 119 days. This Court is inferring that because neither party said  
otherwise, Burkett lost 119 days of his statutory good time credits.

It is difficult to determine when a prisoner can challenge a disciplinary  
action taken by the Nevada Department of Prison by filing a post-conviction  
petition for writ of habeas corpus. The Nevada Supreme Court has consistently  
held that "the imposition of a qualitatively more restrictive type of confinement  
within the prison, such as punitive segregation, may not be challenged by a

1 petition for writ of habeas corpus." *See Sandin v. Conner*, 515 U.S. 472 (1995);  
2 *Bowen v. Warden*, 100 Nev. 489, 686 P.2d 250 (1984); *Director, Dep't Prisons v.*  
3 *Arndt*, 98 Nev. 84, 640 P.2d 1318 (1982); *Rogers v. Warden*, 84 Nev. 539, 445 P.2d  
4 28 (1968); *Rainsberger v. Leypoldt*, 77 Nev. 399, 365 P.2d 489 (1961), *cert. denied*,  
5 368 U.S. 516 (1962); *Enforcement of Prison Discipline and Its Effect Upon the*  
6 *Constitutional Rights of Those Imprisoned*, 8 Vill. L. Rev. 379, 388 (1963).

7 In *Sandin v. Conner*, 515 U.S. 472, 486 (1995), that court stated that the  
8 prisoner's "discipline in segregated confinement did not present the type of  
9 atypical, significant deprivation in which a State might conceivably create a  
10 liberty interest."

11 This Court has reviewed all of the decisions by the Nevada Supreme Court  
12 in this area. On the one hand, some of the cases indicate that if the discipline by  
13 prison officials falls within the expected parameters of the sentence imposed by a  
14 court of law, a challenge by way of a post-conviction petition for writ of habeas  
15 corpus is not allowed. *See Sandin v. Conner*, 515 U.S. 472 (1995); *Bowen v.*  
16 *Warden*, 100 Nev. 489, 686 P.2d 250 (1984); *Director, Dep't Prisons v. Arndt*, 98  
17 Nev. 84, 640 P.2d 1318 (1982); *Rogers v. Warden*, 84 Nev. 539, 445 P.2d 28 (1968);  
18 *Rainsberger v. Leypoldt*, 77 Nev. 399, 365 P.2d 489 (1961), *cert. denied*, 368 U.S.  
19 516 (1962). On the other hand, it appears that if the discipline or action by the  
20 prison in any way increases the sentence that might be served by the prisoner,  
21 that is atypical and a liberty interest is at stake. *See Pangallo v. State*, 112 Nev.  
22 1535, 930 P.2d 100 (1996) and *Boatwright v. Angelone*, 109 Nev. 318, 849 P.2d 274  
23 (1993).

24 Because Burkett lost 119 days of his statutory good time credits, this case  
25 involves more than the imposition of a qualitatively more restrictive type of  
26 confinement within the prison. Therefore, Burkett has a liberty interest in his  
27 good time credits and has a right to challenge the prison disciplinary process by  
28 filing a post-conviction petition for writ of habeas corpus.

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**II. Right to Procedure Set Out in Regulations**

In *Pella v. Adams*, 638 F. Supp. 94 (D. Nev. 1986), that court states that:

Before a prison inmate may be deprived of a protected liberty interest in good time credits, the inmate must receive: (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 563-567, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). Due process also requires that some evidence must exist to support the decision by the prison disciplinary board to revoke good time credits. *Superintendent, Mass. Correctional Institution v. Hill*, 472 U.S. 445, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356 (1985).

As already stated, Burkett had a liberty interest in statutory good time credits. He is entitled to the due process procedures described above in *Pella v. Adams*, 638 F. Supp. 94 (D. Nev. 1986) but nothing more. *See Sandin v. Conner*, 515 U.S. 472 (1995). He received advance written notice of the disciplinary charges, a hearing was conducted and some evidence was presented. He was given a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. He additionally received the right to appeal the initial hearing determination which was denied.

**III. Right to Counsel and Right to Remain Silent**

An inmate does not have the right to either retained or appointed counsel in a prison disciplinary hearing. *Baxter v. Palmigiano*, 425 U.S. 308, 323, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 563-567, 41 L. Ed. 2d 935, 94 S. Ct. 2963 (1974). The issues presented in this petition are not complex. The denial of his request to such assistance did not deprive him of his right to remain silent. Like any other person accused of misconduct, Burkett had the right to remain silent or offer his own testimony in defense of these charges. He was not compelled to do one or the other and therefore no recognized right was denied. *Baxter v. Palmigiano*, 425 U.S. 308, 323, 47 L. Ed. 2d 810, 96 S. Ct. 1551 (1976).

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