IN THE
NINETEENTH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA

No. _____

STATE OF LOUISIANA
vs.
ERNEST BILLIZONE

On Disciplinary Appeal From
The Louisiana Department of Public Safety and Corrections,
Decision No.: DCI-2008-159,
Honorable James M. LeBlanc, Secretary, Presiding

APPELLANT'S ORIGINAL BRIEF ON APPEAL

_____
KATIE SCHWARTZMANN
Legal Director
American Civil Liberties Union of Louisiana
La State Bar #30295
P.O. Box 56157
New Orleans, LA 70156

_____
BARRY GERHARZ
American Civil Liberties Union of Louisiana
La State Bar #29207
P.O. Box 56157
New Orleans, LA 70156

PRISON DISCIPLINARY APPEAL
ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over the disciplinary action taken against Ernest Billizone pursuant to Article 5, §10 of the Louisiana Constitution of 1974 and Louisiana Revised Statute 15:1177.

ISSUES PRESENTED

1. Whether the United States Due Process clause is violated when a prisoner is disciplined and loses 90 days of good time credit for behavior that is not prohibited?
2. Whether a rule prohibiting "communication of malicious, frivolous, false, and/or inflammatory statements or information, the purpose of which is reasonably intended to harm, embarrass, or intimidate an employee, visitor, guest, offender or their families" violates a prisoner's First Amendment right of free speech and to petition the government for a redress of grievances?
3. Whether the United States and Louisiana Due Process clause is violated when a prisoner is punished for "spreading rumors" because the statement of prohibited behavior is unconstitutionally vague or overbroad?
4. Whether a disciplinary action brought pursuant to an unconstitutional rule can be reviewed after an unqualified guilty plea?
5. Whether a prisoner's guilty plea in a prison disciplinary hearing, when not protected by the same procedural safeguards as a criminal defendant, constitutes a waiver of all due process claims?

ASSIGMENTS OF ERROR

1. The Louisiana Department of Corrections erred by punishing a prisoner for behavior that is not prohibited by any D.O.C. regulation.
2. The Louisiana Department of Corrections erred by disciplining a prisoner pursuant to a vague and overbroad prohibition.
3. The Louisiana Department of Corrections erred by disciplining a prisoner pursuant to a rule that unconstitutionally impinges on a prisoner's right to free speech and to access courts.
4. The Louisiana Department of Corrections erred by refusing to review a guilty plea to an unconstitutional rule.

STATEMENT OF THE CASE

On July 22, 2008, Ernest Billizone (hereinafter, "Billizone") received a disciplinary report for a rule violation. Exhibit A. In the disciplinary report, the Louisiana Department of Public Safety and Corrections (hereinafter, "D.O.C.") alleged one incident of general prohibited behavior, "spreading rumors," a violation of "Rule Number 30K." Id.

On July 23, 2008 Billizone appeared before a disciplinary board for a hearing, represented by inmate counsel substitute. A guilty plea was entered. The Disciplinary Board imposed a sentence of 90 days loss of good time and "job change from cull. Arts to C-1 Crew." Id.

On July 24, 2008, Billizone filed an appeal of the disciplinary action. Exhibit B. On August 7, 2008 Warden Steve Rader denied Billizone's appeal. Exhibit C.

On August 11, 2008, Billizone appealed the Warden's decision to the Secretary of the Louisiana Department of Public Safety and Corrections.

On October, 7, 2008 the Secretary of the Louisiana Department of Public Safety and Corrections denied Billizone's appeal. Exhibit D. On October 24, 2008 Billizone received a copy of the Secretary's decision. Appellant now timely files this brief.

STATEMENT OF FACTS

On June 27, 2008 Ernest Billizone filed a written Administrative Remedy Procedure grievance, hereinafter referred to as "A.R.P." Exhibit E. In his grievance, Ernest Billizone wrote that his recent denial of work release was not according to the criteria listed in a recent work release appendix. Id. In addition, Ernest Billizone wrote that the Director of Classification for Dixon Correctional Institute, Ivy Miller, appeared to have a conflict of interest and should not be responsible for classifying inmates.[1] Ernest Billizone alleged that "Ivy Miller's brother Britt Miller was killed by inmates, and there is no way he does not feel hate or something against inmates." Id.

On July 22, 2008, Deputy Warden Janet Lorena (hereinafter referred to as "Deputy Warden Lorena") issued Billizone a disciplinary report, the basis for which was the written A.R.P. Exhibit A. Deputy Warden Lorena cited Ernest Billizone for a violation of "Rule 30K," stating that the written A.R.P. "[made] blatant reference to Mr. Miller's family by spreading rumors [,] a violation of general behavior prohibited #30k" Id. After the disciplinary report was issued, Ernest Billizone was immediately placed in administrative segregation.

On July 23, 2008, a disciplinary board meeting was held in this matter. Ernest Billizone was represented by inmate counsel substitute, who entered a plea of guilty on Ernest's behalf after briefly speaking to Ernest before the hearing. At the conclusion of the hearing, Ernest Billizone was sentenced to a loss of 90 days of good time and a job change.

On July 24, 2008, Ernest Billizone filed an appeal of the Disciplinary Board's decision to the Warden pursuant to Louisiana Department of Public Safety and Correction's Disciplinary Rules and Procedures for Adult Offenders. See Louisiana Department of Public Safety and Corrections, Disciplinary Rules and Procedures for Adult Offenders, pages 18-19 (August 2008). On August 11, 2008, Ernest Billizone appeal was denied in an Appeal Decision by Warden Steve Rader. Exhibit C. In his decision, the Warden both concurred with the initial report and also declined to review the guilty plea. That same day, Ernest Billizone appealed the denial to the Secretary of the Louisiana Department of Safety and Corrections.

On October 24, 2008, Ernest Billizone received a denial from the Secretary of the Louisiana Department of Public Safety and Corrections. Exhibit D. In the discussion of the

[1] This appeal is strictly limited to the disciplinary punishment Billizone received as a result of the ARP grievance and will not address any of the underlying claims in the Administrative Remedy Grievance.

decision, the Secretary's designee concurred with the Warden's response and deemed the disciplinary report adequate and appropriate.

Ernest Billizone now timely files an appeal of the Secretary's denial with this Court. La. R.S. 15:1177 (2008).

ARGUMENT

I. THE DEPARTMENT OF CORRECTIONS VIOLATED THE DUE PROCESS CLAUSE BY DISCIPLINING A PRISONER FOR "SPREADING RUMORS" IN A WRITTEN GRIEVANCE

A. THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS ERRED BY PUNISHING A PRISONER FOR BEHAVIOR THAT WAS NOT PROHIBITED.

It is well settled that an inmate cannot be deprived of good-time credits without due process of law. See, e.g., Wolff v. McDonnell, 418 U.S. 539, 558 (1974). A prisoner "has a fundamental right not to be deprived of good-time credits as punishment for conduct that [has] not been prohibited." Gonzalez v. Berkebile, 2008 WL 1758630 *1 (N.D. Tex.), citing Wallace v. Nash, 311 F.3d 140, 143 (2d Cir.2002) and Coffman v. Trickey, 884 F.2d 1057, 1060 (8th Cir .1989)(Finding that district court should have granted a directed verdict because plaintiff, a prisoner, was deprived of liberty without due process of law when punished for conduct that was not proscribed.); See also Adams v. Gunnell, 729 F.2d 362, 369-370 (5th Cir. 1984) ("Basic due process was violated by the eventual imposition of severe punishment for conduct no inmate could have known was against prison rules."); Reeves v. Pettcox, 19 F. 3d 1060, 1061 (5th Cir 1994)(Prisoner must be given a "fair opportunity to know, that his conduct was prohibited before being punished for that conduct.")

Currently, there is no rule in the Louisiana Department of Corrections Disciplinary Rules and Procedures that prohibits "spreading of rumors." As noted in Comeaux v. Stalder, the D.O.C. issued an emergency rule on January 20, 2005 that revised the disciplinary rules changing Rule 30k, which prior to the changes prohibited "spreading rumors about an employee, visitor, guest, or inmate." Comeaux v. Stalder, 2007 WL 4355056 *1 (W.D. La) (unreported). The emergency rule change eliminated any mention of "spreading rumors" from the Disciplinary Rules and Procedure. LAC 22:363(EE)(May 2005); Louisiana Department of Public Safety and Corrections, Disciplinary Rules and Procedures for Adult Offenders, page 27 (August 2008).[1]

Compare this to the case of Reeves v. Pettcox, 19 F. 3d 1060 (5th Cir. 1994), in which a prisoner was disciplined for placing a food tray outside his cell. Although Reeves violated actual

[1] After Cassels, Rule 30k was revised to prohibit:

> the communication of malicious, frivolous, false, and/or inflammatory statements or information, the purpose of which is reasonably intended to harm, embarrass, or intimidate an employee, visitor, guest, offender or their families; (this rule shall not apply to information and/or statements communicated for the express purpose of obtaining legal assistance).

LAC 22:363(EE)(11)(May 2005); Louisiana Department of Public Safety and Corrections, Disciplinary Rules and Procedures for Adult Offenders, page 27 (August 2008).

prison policy by placing the tray outside his cell, Reeves had not been given a copy of the rules before the act. The United States Fifth Circuit Court of Appeals reversed the District Court's dismissal of a Reeves' lawsuit because the prisoner was not given notice that his behavior was prohibited. However, unlike the act in Reeves, the behavior that Billizone was punished for was not even a violation of current prison policy.

Despite the nonexistence of a prohibition on "spreading rumors" in the current Rule 30k, Ernest Billizone was punished with the loss of 90 days of good time and placed in administrative segregation for "spreading rumors," as indicated on his disciplinary write-up and the final decision of the Secretary of the Louisiana Department of Public Safety and Corrections. Exhibit A and D. Because Billizone's behavior was not prohibited, he was denied due process of law. U.S. Const. Amend XIV; Reeves v. Pettcox, 19 F. 3d 1060, 1061 (5th Cir 1994).

Most troubling, Billizone was also punished for non-prohibited behavior that, when prohibited, was unconstitutional.

B. THE LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS ERRED BY PUNISHING A PRISONER PURSUANT TO A PROHIBITION THAT IS VAGUE AND OVERBROAD

A disciplinary rule or decision punishing prisoners for "spreading rumors" is unconstitutionally vague facially and as applied. Cassels v. Stalder, 342 F.Supp.2d 555, 566 (M.D. La 2004). Cassels held that:

> [A] person of ordinary intelligence deserves a reasonable opportunity to know what is prohibited, so that he may act accordingly. … Clearly a prohibition on "spreading rumors" provides no opportunity whatsoever for a person of ordinary intelligence to know what is prohibited. Therefore, the Court finds Rule 30k is facially vague.

Cassels v. Stalder, 342 F.Supp.2d 555, 566 (M.D. La 2004)(citation omitted). The "void for vagueness" doctrine serves the purpose of "protecting individuals from laws lacking sufficient clarity of purpose or precision in drafting." J&B Entertainment, 152 F. 3d 366 (5th Cir. 1998) citing Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18 (1975). The standard for deciding whether a law is so vague as to be constitutionally invalid is whether it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). As the District Court noted in Cassels, a person of ordinary intelligence would necessarily have to guess what statements constitute "rumors" for the purpose of the prohibition. Ernest Billizone could not have known

that by filing a written administrative grievance alleging a perceived conflict of interest he was spreading a rumor.

Additionally, a prohibition on "spreading rumors" in written administrative grievances is overbroad. The Supreme Court has long recognized that the danger of permitting some speech that is not constitutionally protected is outweighed by the possibility that protected speech "may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes." Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973). In the instant matter, a significant danger exists that D.O.C.'s prohibition on "spreading rumors" will inhibit and chill protected speech written in A.R.P.'s.

A prohibition on "spreading rumors" is overbroad because it chills a prisoner's ability to file a grievance without the fear of reprisal in the form of 90 days lost good time. For example, the rule is so overbroad that it can be used to punish any disputed statement, including a prisoner's complaint or claim of abuse, giving too much discretion to a prison official who could use this rule to engage in arbitrary or retaliatory enforcement against virtually any conduct.

II. ERNEST BILLIZONE'S PUNISHMENT VIOLATES THE FIRST AMENDMENT

Assuming, arguendo, that the Department of Corrections asserts that Ernest Billizone was validly punished pursuant to the new Rule 30k, the punishment nevertheless violates Billizone's freedom of speech and his right to access courts and petition government for grievances.

A. THE RULE UNCONSTITUTIONALLY INHIBITS RIGHT TO ACCESS TO COURTS AND PETITION GOVERNEMENT

Prison walls do not form a barrier separating prison inmates from the protections of the Constitution. Turner v. Safley, 482 U.S. 78, 84 (1987). Prisoners have a well-founded constitutional right of free speech, as well as a right of access to the courts, grounded in the First Amendment's protection of the right to "petition the Government for a redress of grievances." U.S. Const. amend. I; Lewis v. Casey, 518 U.S. 343(1996); Bounds v. Smith, 430 U.S. 817, 821-24 (1977) (listing case law supporting the right); Wolff v. McDonnell, 418 U.S. 539, 577-80 (1974) (extending Johnson, infra, to cover prisoner assistance in civil rights actions); Johnson v. Avery, 393 U.S. 483, 488-90 (1969) (striking down prison prohibition against inmates aiding one another with applications for habeas corpus); Ex parte Hull, 312 U.S. 546, 549, 61 S.Ct. 640, 85 L.Ed. 1034 (1941) (striking a prison regulation that essentially screened all prisoner habeas applications); Berryman v. Rieger, 150 F.3d 561, 567 (6th Cir.1998) ("It has long been

recognized that the lawful resort to the courts is part of the First Amendment right to petition the Government for a redress of grievances."); John L. v. Adams, 969 F.2d 228, 231-32 (6th Cir.1992) (listing sources for the right, including the First Amendment).

When a prison rule impinges on a prisoner's First Amendment rights, the regulation is valid only if it is "reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987). The reasonableness of the regulation is weighed using four factors:

> 1) whether there is a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it
> 2) Whether there are alternative means of exercising the right that remains open to prison inmates
> 3) the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally
> 4) the absence of ready alternatives is evidence of the reasonableness of a prison regulation…the evidence of obvious, easy alternatives may be evidence that the regulation is not reasonable.

Turner, 482 U.S. at 89-91. These factors will be addressed in turn below.

a. The relationship between the goal, prison security, and the regulation is insufficient.

The first factor considers whether the prison has a valid goal and whether the regulation is rationally related to that goal. "General Prohibited Behaviors" have the goal of prohibiting behaviors that "impair or threaten the security or stability of the unit or wellbeing of an employee." LAC 22:363(EE)(May 2005). This is obviously a valid goal. See e.g. Hewitt v. Helms, 459 U.S. 460, 473 (1983)("[t]he safety of the institution's guards and inmates is perhaps the fundamental responsibility of the prison administrator").

However, there is little or no rational connection between a false or defamatory statement in any forum at any time and total breakdown of prison security and discipline. Hancock v. Thalacker, 933 F. Supp 1449, 1489(N.D. Iowa 1996)(rule barring false and malicious statement in grievances had no rational relationship, in part, because "the chilling of recourse to grievance procedures means the tensions the system addresses must be directed elsewhere less controlled or appropriate"), citing Loggins v. Delo, 999 F.2d 364, 367 (8th Cir. 1993)(letter stating a mail reviewer was "a beetled eye'd bit- back here who enjoys reading people's mail" and who hoped to read a letter "talking dirty sh-, so she could go in the bathroom and masturbate" did not implicate security concerns); Bradley v. Hall, 64 F.3d 1276 (9th Cir.1995); see also, McNamara v. Moody, 606 F.2d 621, 625 (5th Cir.1979) (letter from prisoner to his girl friend in which prisoner charged that mail censoring officer, while reading mail, engaged in masturbation and had sex with a cat would not result in a breakdown in prison security and discipline) but see, Alward v. Golder, 148

P.3d 424, 426 (Colo. App. 2006)(rational relationship in light of the fact prisoner refiled grievance after ignoring warning to remove language referring to prison officials as "wanna-be Nazis," "doughnut eating, coffee swilling buffoons," "der fueher [sic],""toad[ies]," and "tinpot Nazi pigs" who should "take [their] thumb out of [their]butt and do [their] job").

In his A.R.P. Billizone simply alleged a conflict of interest on the part of a prison employee. He did not advocate any harm to the employee, and there is no allegation that the employee's wellbeing was ever jeopardized. To read every prisoner statement about a prison employee as a threat to the institution would mean essentially that prisoners could not complain about any perceived employee misconduct, whether the allegations are true or false. According to the D.O.C.'s current interpretation of the law, if a prisoner was in fact beaten by a guard and filed a grievance complaining of the beating, he could be punished with the loss of good time, as such a statement could be "inflammatory."

b. Allowing the continued application of the current rule would prevent prisoners from being able to complain of guard misconduct

The next factor, whether there are "alternative means of exercising the right that remains open to prison inmates," weighs heavily in Billizone's favor. The filing of grievances is the only method for prisoners to formally voice complaints to the prison administration and begin the process of litigation. Department of Public Safety and Corrections, Regulation No. B-05-005. ("Inmates may request administrative remedies to situations arising from policies, conditions, or events within the institution that affect them personally."). The Department of Public Safety and Corrections grievance procedure is the "administrative remedy available to offenders for the purpose of preserving *any* cause of action they may claim to have against the [Department of Public Safety and Corrections]." La R.S. 15:1172(A) (emphasis added). Not only is the grievance procedure a prerequisite for filing any state claims, it also is a prerequisite for filing any §1983 claims. "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. §1997(e)(a).

Access to courts by prisoners is undoubtedly constitutionally protected. Bounds v. Smith, 430 U.S. 817, 821 (1987). Furthermore, prisoners have a right to complain to a supervisor about a prison employee's conduct without fear of reprisal. See Woods v. Smith, 60 F.3d 1161, 1164

(5th Cir 1995) citing Ruiz v. Estelle, 679 F.2d 1115 (5th Cir.), opinion amended in part and vacated in part, 688 F.2d 266 (5th Cir.1982), cert. denied, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983); Gibbs v. King, 779 F.2d 1040 (5th Cir.), cert. denied, 476 U.S. 1117, 106 S.Ct. 1975, 90 L.Ed.2d 659 (1986); Andrade v. Hauck, 452 F.2d 1071 (5th Cir.1971).

Under Rule XX, a prisoner risks punishment for exercising his right to complain. If a prisoner fears consequences beyond denial, *i.e.* the imposition of punishment, for the content of a grievance, the prisoner's access to the grievance system is chilled. See Hancock v. Thalacker, 933 F. Supp 1449, 1488 (N.D. Iowa 1996). See also Jackson v. Cain, 864 F.2d 1235, 1248 (5th Cir 1989) (noting that "[f]illing out a prison-mandated form and complaining about treatment by means of a private letter to the warden can be compatible with the acceptable behavior of a prisoner and thus may not adversely affect the discipline of the prison.")

By punishing prisoners for the content of a written A.R.P. pursuant to this rule, the Department of Corrections leaves a prisoner with no option or alternate means open to express concerns over conditions of confinement. Although the United States 5th Circuit Court of Appeals has upheld restrictions on prisoner speech, they have only done so after noting that a restriction is valid if a prisoner still has the internal grievance procedure available as an alternate means to voice a complaint. See Freeman v. Texas Dept. of Criminal Justice, 369 F.3d 854, 864 (5th Cir. 2004), citing Adams v. Gunnell, 729 F.2d 362, 367-68 (5th Cir 1984). This rule deprives prisoners of the only means of redress they have in prison.

c. Accommodation of the prisoners' right to access the courts and to free speech would not burden the prison

Turner also requires an examination of the impact an accommodation of the asserted constitutional right would have on guards and other inmates, and on the allocation of prison resources generally. A prohibition on applying the new Rule 30k to written A.R.P.s would have little impact, as there is an alternate means to discipline prisoners that verbally abuse employees, visitors, guests, offenders or their families. See LAC 22:363(EE)(1-3)(May 2005) (prohibitions on threatening people); LAC 22:363(H) (prohibition on disrespectful behavior); LAC 22:363(D-F) (prohibitions on disobedience); LAC 22:363(EE)(18) (prohibition on abusing the grievance procedure).

It is unquestionable that the prison retains the right to maintain order. It may punish misconduct by prisoners, including any threats to prison officials. The prohibition on false or

inflammatory statements is not necessary for the maintenance of order, and therefore, the only additional burden on the facility is that it may be expected to have to field complaints, which is, in fact, already its constitutional obligation.

Furthermore, the Supreme Court has recognized that, as an objective matter, law enforcement officers are expected to exercise greater self-control when their authority is challenged. See City of Houston v. Hill, 482 U.S. 451, 462 (1987); Lewis v. City of New Orleans, 415 U.S. 130, 135, (Powell, J. concurring in result) ("a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen and thus be less likely to respond belligerently to fighting words") (citations omitted) See also, Musselman v. Commonwealth, Ky., 705 S.W.2d 476 (1986)(citizen calling a police officer "a little, fat person who had a continuing incestuous relationship with his mother,[using coarser language]," is protected speech).[2] Prison administrations must be both resilient and open to criticism, because speech "does not lose its protected character ... simply because it may embarrass others or coerce them into action." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982).

c. There are several alternatives to this prison regulation

The final factor weighs in Billizone's favor, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation." Turner, 482 U.S. at 90. There are several reasonable alternatives available to the prison. First, they could limit the rule so that it does not apply to the grievance system. For example, the current rule does not apply to speech "communicated for the express purpose of obtaining legal assistance." LAC 22:363(EE)(11)(May 2005). This exemption could be extended to apply to any speech made in the context of the grievance system. Additionally, (and more appropriately) they could limit the prohibition to speech that actually threatens the security of the institution.

When the United States Fifth Circuit has upheld rules that impinge on a prisoner's First Amendment rights, the rule has been limited to face-to-face, confrontational speech, which truly was a threat to the security of the institution. For example, the Fifth Circuit recently upheld a disciplinary rule that punished a prisoner for a public verbal challenge to a prison administrator that incited other prisoners' conduct. The prisoner made disparaging comments while verbally

[2] The portion of the rule that prohibits behavior that "embarrasses" also creates additional problems, as a "listener's reaction to speech is not a content-neutral basis for regulation." Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 134 (1992).

confronting a chaplain in front of his congregation during a church service, inciting 50 prisoners to walk out. Freeman v. Texas Dept. of Criminal Justice, 369 F. 3d 854 (5th Cir 2004).

Likewise, in Gibbs v. King, the Court held that a rule restricting speech was constitutional, in large part because of the State's overriding interest in maintaining order, control and discipline in prisons, where the verbal speech was bordering on threatening and was made during a face-to-face confrontation between a prisoner and the subject of criticism. Gibbs v King, 779 F.2d 1040, 1046 (5th Cir. 1986). Furthermore, that rule prohibited remarks that were intrusively made to an employee while engaged in official duties. Such speech is much more likely to create a disturbance than is the speech in the immediate case.

Courts have repeatedly ruled in the prisoner's favor when a prohibition punishes written correspondence. For example, one court found that "imposing disciplinary sanctions merely for false or defamatory statements [in grievances] would violate a prisoner's constitutional right of petition under a Turner analysis." Hancock v. Thalacker, 933 F. Supp 1449, 1489 (N.D. Iowa 1996).

B. THE RULE UNCONSTITUTIONALLY INHIBITS FREEDOM OF SPEECH

The new Rule 30k punishes speech that is merely inflammatory or false, regardless of whether or not the prisoner knew it was false, and therefore burdens speech in excess of that which could be prohibited as defamation. Although knowingly false statements and false statements made with reckless disregard of the truth do not enjoy constitutional protection, the new Rule 30k does not possess a scienter with regards to false statements, and therefore it inhibits protected speech. See Garrison v. Louisiana, 379 U.S. 64, 75-77 (1964) ("[a]lthough honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity"); Wolfel v. Bates, 707 F.2d 932, 934 (6th Cir.1983)(invalidating punishment for false statements in petition on grounds that the officials had not found that statements were false or maliciously communicated).

Even if Billizone's statements in the written grievance were false, the Constitution precludes attaching adverse consequences to any except the knowing or reckless falsehood. Garrison v. Louisiana, 379 U.S. 64, 74 (1964). In its current form, the rule could be used to punish any disputed statement in a written administrative remedy grievance.

III. THE LOUISIANA DEPARMENT OF CORRECTIONS ERRED BY REFUSING TO REVIEW DUE PROCESS CLAIMS DESPITE A PLEA THAT WAS NOT PROTECTED BY SUFFICIENT PROCEDURAL SAFEGUARDS

A prisoner's admission that he pleaded guilty at the disciplinary hearing cannot constitute a waiver of his due process claim because an inmate pleading guilty in a prison disciplinary hearing is not protected by the same procedural safeguards as a criminal defendant. Reeves v. Pettcox, 19 F. 3d 1060 (5th Cir. 1994); Downs v. Wages, 62 F.3d 395, fn. 4 (5th Cir 1995)(unreported).[3]

Louisiana courts have ruled that even an unqualified plea of guilty does not preclude review of jurisdictional defects such as a statute under which the prosecution is brought is unconstitutional. State v. Crosby, 338 So. 2d 584, 588 (La 1976), citing State v. Bergeron, 92 So. 726, 727 (La 1922) ("[t]he general rule that a plea of guilty is a waiver of the right to appeal is founded upon a presumption of acquiescence, which has no application when the defendant, while confessing his guilt of the act or conduct charged in the indictment, insists that the law does not prohibit it" and "'[a] plea of guilty admits only the acts charged and does not preclude the defendant from claiming that they do not constitute a crime'"), cited with approval in State v. Joseph, 916 So.2d 378, 383 (La.App. 3 Cir. 2005)(reversing guilty plea on double jeopardy grounds); State v. Sellers, 902 So.2d 418, 421(La. App. 4 Cir. 2005) (reversing guilty plea based on patent errors in indictment); State v. Smith, 883 So.2d 505, 508 (La.App. 3 Cir. 2004)(reversing guilty plea because crime of aggravated robbery did not exist at time of offense).

Billizone alleged in his initial appeal to the Warden that, *inter alia*, he was punished pursuant to a prohibition that was unconstitutionally vague and overly broad. Exhibit B. The vagueness and overbreadth doctrines are an outgrowth of the Due Process Clause of the Fifth Amendment. U.S. v. Williams, 128 S. Ct. 1830, 1839 (2008). The Warden erred when he refused to address Billizone's Due Process claims because Billizone pled guilty. Additionally, Billizone's punishment violates the First Amendment. Therefore, the DOC erred in not reversing his punishment.

[3] Counsel for Billizone has made several attempts to receive a full copy of the record, but have yet to receive a transcript or audio recording of the hearing. See Attached Exhibit F, G, H and I. (Letters from counsel requesting full record, including audio recording.) Billizone respectfully requests the right to amend these pleadings, in whole or in part, after the full record is lodged in this matter.

PRAYER FOR RELIEF

A prisoner should not fear of losing good time credits every time he files a written administrative remedy grievance, especially when that grievance is devoid of foul language, threats of violence or unlawful action, or abusive or disrespectful language. The current Rule 30k chills prisoners from filing even the most meritorious prisoner grievances by creating fears of retaliatory action cloaked in an official disciplinary report for a violation of Rule 30k. Even if a disciplinary report for a Rule 30k violation lacks retaliatory intent, it nevertheless can punish a prisoner for filing a claim that the prison administration simply disagrees with.

Ernest Billizone asks this Court, for the reasons herein and others that may be apparent to this Court, to vacate his disciplinary conviction and sentence for at least three reasons. First, he was punished for behavior that is not prohibited, violating his Due Process rights. Second, the prohibited behavior, "spreading rumors," is unconstitutionally vague and overly broad. Finally, the current Rule 30k impinges on a prisoner's right to access courts and right to free speech.

Respectfully Submitted,

_____

BARRY JAMES GERHARZ, T.A.
American Civil Liberties Union Foundation
of Louisiana
La State Bar #29207
P.O. Box 56157
New Orleans, LA 70156

KATIE SCHWARTZMANN
Legal Director
American Civil Liberties Union Foundation
of Louisiana
La State Bar #30295
P.O. Box 56157
New Orleans, LA 70156

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing brief upon the Louisiana Department of Public Safety and Corrections, Legal Section, P.O. Box 94304, Baton Rouge, LA 70804 by First Class U.S. Mail.

On this, the 6th day of November, 2008.

_____
BARRY JAMES GERHARZ
State Bar No. 29207