04 January 2002

Ronald Schilling
Box 233
Black River Falls, WI
54615

Senator Judith B. Robson
Room 15 South
State Capitol
Box 7882
Madison, WI 53707-7882

Re: Prison classification; and
constitutionally offensive criteria

Dear Senator Robson:

It was recently brought to my attention that you might be able to assist in some way with the predicament prisoners are experiencing due to administrative mis-classification.

Enclosed please find copies of my last three letters to Senator Moore, which provide some overview of the situation. Also enclosed are copies of the legal pleadings in the pending litigation against the prison classification rules (§DOC 302.145, in particular), including the newest set of criteria (§DOC 302.07) which are intended for use beginning 02.01.02. The pleadings explain in pointed detail what has been, is, and will be transpiring with the classification system in Wisconsin's prisons.

Referencing the Blue Book, I noticed you were once affiliated with the JCRAR, a co-chairperson, no less. It is my hope that you will be able to appreciate the serious implications involved with the Administrative Rules and subsequent mis-classification of Wisconsin prisoners. Something needs to be done. I believe the matter needs to be thoroughly investigated.

Of course, it is further my hope that you might possibly be able to offer some meaningful intervention with my personal predicament. Perhaps an inquiry to the classification director in Madison voicing an opinion concerning the enclosures might be beneficial.

At any rate, please peruse the enclosures. I thank you for your time and attention to this matter.

Sincerely,

Ronald Schilling

Ronald Schilling

Enclosures

cc: file

27 November 2001

Ronald Schilling
Box 233
Black River Falls, WI
54615

Senator Gwendolynn Moore
Room 409 South
State Capitol
Box 7882
Madison, WI 53707-7882

Re: Prisoner mis-classification

Dear Senator Moore:

I am writing with hopes of once again piquing your interest in the mis-classification of Wisconsin prisoners. Given the important ramifications, it is further my prayer that you might feel compelled to intervene in some meaningful way.

It was brought to my attention that some time ago you took an interest in the mis-classification issue and suggested an investigation into the matter. It is further my understanding that DOC then stepped in and undertook their own investigation, concluding that mis-classification in WI was no worse than other states. I have heard nothing further on the matter.

Much to my own personal sacrifice, I took the DOC to task concerning my own mis-classification. After prevailing and gaining relief in the Dane County Circuit Court in 1990, it ultimately proved to be quite the detriment to my proper classification and, subsequently, my interests in parole as well. This is, of course, despite the fact that the Judge found the classification rules to be in violation of the prohibition against the creation of ex post facto law, and therefor unconstitutional, and not to be utilized for my classification. Sadly, my current situation has become worse than it was sixteen years ago, in that I find myself locked into a classic "catch-22" where I cannot return to a minimum setting absent favor from the parole commission, and yet I cannot obtain a parole until I am at minimum for an extended period of time. It's sort of like not being allowed into the Capitol absent ID, and then not being permitted to obtain ID.

Enclosed please find my letter of appeal to the classification director in Madison, along with various exhibits supporting said appeal. They are self-explanatory and depict my current situation. As in the past, the appeal will doubtless be responded to with the standard rote brush-off form.

What is more, and what I am also hoping you will notice with this situation, is that I am not alone. There are thousands of prisoners being intentionally mis-classified for a multitude of reasons but, mainly, for the monetary gains had by retaining more people in the system than it can hold. By doing so, it is possible to transfer prisoners to other states who could not otherwise be recommended for such transfer. It all leads to even more departmental revenue. Mis-classification is, by far, the single most poignant reason for the relentless overcrowding in WI prisons.

In 1998, when DOC again began using the rules at issue, I filed for federal habeas relief. After considerable cost and litigation, the federal courts required that I return to the original court to seek enforcement of the order prior to seeking relief in the federal courts. After even more cost and litigation while exhausting all state courts, the matter is currently back in the federal court. Who knows what will transpire there; I do have another eleven years of favorable federal law backing me up.

At this point I am uncertain whether you could offer any assistance with my dilemma or try to reason with the classification bureaucrats in Madison. Or possibly you might initiate a valid investigation into the matter where DOC will not be permitted to investigate itself.

As you may be aware, DOC has recently submitted another batch of Administrative classification rules to the Legislature for approval. I have not been able to locate an updated copy of the rules, nor have I been able to discover the date of the Open Meeting addressing those rules. I do know that the "draft" I obtained about a year ago is also replete with increased classification criteria which will make a prisoner's transition through the system even more onerous. Which will, in turn, probably result in another fount of litigation.

In any case, if you desire more information on any of the above, or clarification of the enclosures, please feel free to contact me and I will be happy to comply.

I thank you kindly for your time, consideration and any assistance you might render.

Sincerely,

Ronald Schilling

Ronald Schilling

Enclosures

cc: ✓file

06 December 2001

Ronald Schilling
Box 233
Black River Falls, WI
54615

Senator Gwendolynn Moore
Room 409 South
State Capitol
Box 7882
Madison, WI 53707-7882

Re: Prisoner mis-classification

Dear Senator Moore:

This is but a follow-up to my 27 November 2001 letter depicting widespread mis-classification of WI prisoners, my own personal case being possibly the most blatant example of the "catch-22" in the system.

As mentioned in my last letter, much to my continued detriment, I have pending litigation in the federal Western District Court challenging the retroactive application of the currently-used ex post facto classification rules. The AG's office recently filed their response to my re-opening that case. Contained in their response was a copy of the final version of the proposed Administrative classification rules (§DOC 302.), which are supposedly coming into play on 01 February 2002. It is the AG's position that since the rules at issue in the case (§§DOC 302.14(15) and 302.145, et al.) have been repealed, the case is therefore moot. Of course, I am in the process of tending a brief opposing such a position which will pointedly present the many reasons why.

It is alleged that §§DOC 302.14(15) and 302.145 have been repealed. The former section requires numbered-sentenced prisoners to be within 18 months of their Mandatory Release dates prior to being considered for minimum classification; the latter requires a lifer to obtain a PPI (pre-parole investigation request) from the parole commission prior to being considered for reduction in classification. For instance, as a lifer, absent that particular provision (after prevailing in the Dane County Circuit Court), I was permitted to properly earn minimum classification and subsequent transfer some five times under the old rules (pre-1988). Unfortunately, each and every time I met with opposition and administrative shenanigans from Madison and was returned through no action on my part. Those facts notwithstanding, §DOC 302.145 has been repealed in number only.

A fair reading of the proposed rules clearly shows the constitutionally offensive criteria still existing under a different number and phraseology. Ergo, the parole commission still has the crucial role in determining classification albeit, and admittedly, they are not even part of DOC and have no authority to do so.

Additionally, the proposed rules also contain numerous other subjective criteria which will doubtless be used to mis-classify WI prisoners across the board. Especially so for those prisoners who are currently serving their sentences. Which is the crux of the ex post facto issue; that the rules would not otherwise be unconstitutional if they were "grandfathered" into the system. It is constitutionally offensive to force prisoners already serving their sentences with expectation of proper classification and potential for release to now be subject to more onerous rules preventing or, as in my case, prohibiting any possibility for earning a minimum classification and thereby being parole-qualified.

Over the past 27 years of incarceration I have had due cause to study the system not only from the perspective of a prisoner, but from the legislative, administrative and judicial perspectives, as well as the spiritual and moral perspective. Sadly, what I see is a system woefully inadequate to deal with the root problem of "crime;" it does not even come close to adequately addressing the symptoms of crime. The proposed rules will do nothing more than allow an already overcrowded system to become insanely overpopulated. And while the proposed rules might seem at first blush to achieve legitimate penological objectives, they cannot be allowed to do so at the expense of the constitutional protections afforded WI prisoners.

I feel it is imperative to reiterate that the above issue is the most poignant reason for the overcrowding in WI prisons. Seeing various operational patterns manifesting in the system over the years, I suspect there are verifiable fiscal reasons for operating the classification system in such an irresponsible fashion. Is it "smart on crime"? I think not. It is antithetical to the objectives which should be accomplished.

In closing, please feel free to share my letters and exhibits with your colleagues in hopes that they might also glean a better measure of understanding concerning the implications of the pending classification rules. There is a great deal to be said about it all.

I thank you once again for any assistance you might afford.

Sincerely,

Ronald Schilling

Ronald Schilling

cc: ✓file

04 January 2002

Ronald Schilling
Box 233
Black River Falls, WI
54615

Senator Gwendolynn Moore
Room 409 South
State Capitol
Box 7882
Madison, WI 53707-7882

Re: Prisoner mis-classification

Dear Senator Moore:

This is a follow-up to my 06 December 2001 letter, which was itself a follow-up to my 27 November 2001 letter, concerning the mis-classification of Wisconsin prisoners.

In my first letter I enclosed a copy of my classification appeal to the classification director in Madison, anticipating it would be rotely brushed-off with the standard denial form. Sadly, it was. In that letter I also addressed part of the on-going saga surrounding my personal mis-classification issue.

In my second letter I went a bit more in depth as things developed in the litigation of the case I have pending addressing the issue in the federal court. The State's lawyer submitted a copy of the proposed new classification rules into the record in an attempt to moot the case. Since then, I have completed my response to the court, addressing both sets of rules, which I figured would also bring the issue to perfect clarity for you.

Enclosed please find copies of my Memorandum Opposing Mootness, Brief Of Petitioner, Motion For Preliminary Injunctive Relief, and Personal Affidavit In Support. In a nutshell, these documents tell the entire story of my personal saga, as well as addressing the issues as they will effect many thousands of prisoners in the near future. Please give these documents a thorough perusal.

I am also enclosing copies of same, as well as my three letters to you, to Senator Robson. I am hopeful that she, too, will care enough to examine them and realize the detrimental implications the new rules will retroactively impose on Wisconsin prisoners. Perhaps you might wish to speak with her about the issues.

Little would be gained by elaborating further on the issue in this letter, except to say that because of the patterns I see with the out of state transfers I still have good reason to

suspect that DOC administrators are orchestrating the entire ordeal and are double-dipping on the funding associated with it. It would not surprise me to also discover most of them triple-dipping by owning stock in Corrections Corporation of America, Correctional Services Corporation, CiviGenics, Wackenhut, Australasian Correctional Management, Cornell Corrections, Transcor, etc. There simply has to be a reason they seemingly mis-manage the system with such efficiency.

If you desire to know more about any of the above, feel free to correspond. I will doubtless be here because my mis-classification has me perpetually locked in this "catch-22" situation.

Again, thank you for your time and consideration, and any assistance you might yield.

Sincerely,

Ronald Schilling

Ronald Schilling

cc: ✓file

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

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RONALD S. SCHILLING,

Petitioner,

-v- Case No. 98-C-565-C

DONALD W. GUDMANSON, Warden
Jackson Correctional Institution,

Respondent.

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**MEMORANDUM OPPOSING MOOTNESS**

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**COMES NOW**, the above-named petitioner, pro se, and offers the following memorandum opposing the issue of mootness in the above-captioned matter.

It is petitioner's position that the respondent has not formally moved this Court for relief as required by the Federal Rules of Civil Procedure. The respondent cites not one legal case or statutory authority to moot the instant proceedings. It is generally not necessary to aver the capacity of the respondent to attempt to moot the case, except to the extent required to show the jurisdiction of the Court. Respondent has not done so with any written instrument.

Additionally, respondent has made no showing that the rules at issue, nor the rules included in their instant proffer, are statutorily valid pursuant to §227.11(2), Wis.Stats. That statute is cited in the respondent's proffer as supplying authority for the creation and implementation of the rules. It

provides that, "(a) ... a rule is not valid if it exceeds the bounds of correct interpretation," "(b) ... this paragraph does not authorize the imposition of a substantive requirement in connection with a form or procedure," and "(c) ... A rule promulgated in accordance with this paragraph is valid only to the extent that the agency has discretion to base an individual decision on the policy expressed in the rule." (Emphasis added.) The rules fail all three subsections, as Petitioner's Brief will demonstrate.

In a habeas context, mootness is an issue of constitutional dimension. **Van Zant v. Florida Parole Com'n**, 104 F.3d 325 (11th Cir. 1997). If a petitioner is suffering no adverse consequences then the habeas petition is moot. **Phifer v. Clark**, 115 F.3d 496 (7th Cir. 1997). A habeas petition is moot when it no longer presents an Article III case or controversy. **Aragon v. Shanks**, 144 F.3d 690 (10th Cir. 1998). Likewise, a claim for equitable relief in a federal habeas proceeding can become moot when the prisoner is no longer subject to the conditions of which he complained, **Bayerle v. Godwin**, 825 F.Supp. 113 (N.D.W.Va. 1993); the case must raise a live case or controversy. **Id.**

In order to satisfy an Article III's injury-in-fact requirement when challenging the constitutional propriety of both sets of rules in the record of this case, petitioner must demonstrate the challenged consequences in order to satisfy the case-or-controversy requirement. **Spencer v. Kemna**, 118 S.Ct. 978 (1998). Petitioner's Brief and affixed exhibits easily make said demonstration with room to spare.

There is a causation requirement between a habeas corpus petitioner's current confinement and the allegations in his petition. **Keith v. Sullivan**, 956 F.Supp. 1478 (E.D.Wis. 1997). There must be presented a justiciable controversy. **Hall v. Furlong**, 77 F.3d 361 (10th Cir. 1996). When determining mootness, the Court must assure itself that an actual case or controversy exists. **Velez v. People of State of N.Y.**, 941 F.Supp. 300 (E.D.N.Y. 1996).

A federal habeas action remains justiciable unless there is no possibility that any collateral legal consequences will be imposed. **Ayers v. Doth**, 58 F.Supp.2d 1028 (D.Minn. 1999); **Larche v. Simmons**, 53 F.3d 1068 (9th Cir. 1995). Such collateral consequence could even be the possible loss of employment to be sufficiently harmful to be a collateral consequence for mootness purposes. **Robbins v. Christianson**, 904 F.2d 492 (9th Cir. 1990). There is no doubt that petitioner has been and continues to be injured by the respondent's repeated and continued inflexible application of the rules at issue in this case, and will continue to be so injured by the use of the rules provided in respondent's instant proffer. Petitioner's incarceration itself constitutes concrete injury. **Ayers**, supra. A petition is viable on the theory that the petitioner may continue to be deprived of rights or subjected to disabilities because of the respondent's actions, **Barber v. Moran**, 753 F.Supp. 421 (D.R.I. 1991), or if past conduct toward petitioner provided the necessary reasonable expectation that he would again be subject to the same injury. **Rastelli v. Warden, Metropolitan Correctional Center**, 782 F.2d 17

(2nd Cir. 1986). A petition is not moot unless there is no possibility that petitioner will suffer future collateral consequences, which is to say adverse effect on petitioner at some future time. **Bryan v. Duckworth**, 88 F.3d 431 (7th Cir. 1996).

A petition is not moot unless there is no possibility that the underlying circumstances will have collateral consequences, **Bryan**, supra, and if petitioner faces sufficient repercussions. **Leonard v. Nix**, 55 F.3d 370 (8th Cir. 1995). A habeas corpus action is moot when there is no possibility that any collateral legal consequences will be imposed, **Brewer v. State of Iowa**, 19 F.3d 1248 (8th Cir. 1994), and only if it is shown that there is no such possibility. **Walker v. McLain**, 768 F.2d 1181 (10th Cir. 1985).

A habeas action is not moot if adverse collateral consequences continue to flow, **Wood v. Hall**, 130 F.3d 373 (9th Cir. 1997), and collateral consequences persist to give petitioner a substantial stake. **Puchner v. Kruziki**, 111 F.3d 541 (7th Cir. 1997). In the instant case there is a positive and demonstrable nexus, **Willis v. Collins**, 989 F.2d 187 (5th Cir. 1993), between the unflexible application of the ex post facto rules and petitioner's continually augmented incarceration, and that petitioner's continued confinement based upon those rules is in violation of the Constitution. **U.S. ex rel. French v. Nelson**, 947 F.Supp. 1195 (N.D.Ill. 1996). Such a present justiciable case or controversy is required for federal jurisdiction. **Ayers**, supra.

While exhausting the state court process petitioner discovered a "draft" copy of the respondent's current proffer. Petitioner submitted the "draft" as an exhibit to show that the entire course of litigation was purely for dilatory purposes; to stall for time in an attempt to ultimately moot the case. The U.S. Supreme Court in **Spencer**, supra, has stated that even if the mootness resulted from the dilatory tactics of the state attorney general's office, such a tactic is not grounds for determining mootness. While not all that surprising, it is still scandalous to have the respondent now present their proffer in the instant case in an attempt to moot the case. Trouble is, the controversy still exists, as is laid bare in Petitioner's Brief, and the controversy has become very repetitious and continues to evade review.

In such a situation mootness is inappropriate, especially when it involves a reasonable expectation that the same complaining party would be subject to the same action again, **Cox v. McCarthy**, 829 F.2d 800 (9th Cir. 1987), and where the grounds to the challenge is on ex post facto grounds. **Id.**

Under the exceptions to mootness doctrine, a habeas petition will be considered ripe for review where, 1) collateral consequences exist which give the petitioner a substantial stake, and 2) there exist circumstances capable of repetition, yet evading review. **Brooks v. North Carolina Dept. of Correction**, 984 F.Supp. 940 (E.D.N.C. 1997); **Papadakis v. Warden, Metropolitan Correctional Center, New York, New York**, 631 F.Supp. 252 (S.D.N.Y. 1986). A habeas petition would also be ripe for

determination that the custody to which petitioner might be subject to in the future would violate the Constitution, laws, or treaties of the United States. **Leacock v. Henman**, 996 F.2d 1069 (10th Cir. 1993).

Respondents submission of even more onerous, retroactively applied, ex post facto rules do nothing for their argument, and cannot be a legal basis for mooting the case. The damage is done, and continues to flow to this date. It is perpetuating without review sans the original trial court.

As has been demonstrated in Petitioner's Brief, §DOC 302.145 in particular has been repealed in number only. The parole commission factor remains in existence under a different number and phraseology (See, Resp. Proffer, p.2, "Custody Classification," and §DOC 302.07(12)), and in its present incarnation is more onerous still than the current rules.

What is more, with the promulgation of the current rules, the respondent at least acknowledged the time-trigger effective date on the opening page of the rules to avoid retroactivity. The respondent's current proffer makes no hint of avoiding retroactivity problems, I suspect, because the state courts have allowed the DOC an exemption from the Ex Post Facto Clause. Fact remains, the rules are definitely a more onerous punishment, and they are applied retroactively. The latest proffer of rules will have the same, if not worse, effect on the entire population of prisoners in Wisconsin prisons.

For the foregoing reasons the respondent's request for a

mootness determination must be denied. There are very serious implications involved which will not be resolved if the respondent's actions continue to evade review. The mis-use of the classification system is the most poignant reason for the overcrowding of Wisconsins prisons.

Dated this 31st day of December 2001.

Respectfully submitted,

Ronald Schilling

Ronald Schilling
Petitioner, pro se

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

---

RONALD S. SCHILLING,

Petitioner,

-v- Case No. 98-C-565-C

DONALD W. GUDMANSON, Warden
Jackson Correctional Institution,

Respondent.

---

**BRIEF OF PETITIONER**

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RESPECTFULLY SUBMITTED BY:

RONALD S. SCHILLING #32219
P.O. BOX 233
BLACK RIVER FALLS, WI
54615

PRO SE, PETITIONER - PRISONER

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WISCONSIN

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RONALD S. SCHILLING,

Petitioner,

-v- Case No. 98-C-565-C

DONALD W. GUDMANSON, Warden
Jackson Correctional Institution,

Respondent.

---

**BRIEF OF PETITIONER**

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STATEMENT OF THE CASE

The prison classification rules at issue herein have been in effect since 07 December 1988. A Dane County certiorari court ordered the respondents to discontinue the use of the rules at petitioner's classification hearings on 12 July 1990. Respondents complied with the court's order until February of 1998.

After attempting to secure federal habeas relief the USCA7 granted the Certificate of Appealability after reviewing the USDC pleadings and finding "a substantial showing of the denial of a constitutional right." The specific issue being the application of the rules at issue. The USCA7 only affirmed the USDC holding that petitioner had to further exhaust state court remedies prior to seeking federal habeas relief. Petitioner did so, and moved this Court to reopen the case. The respondent has supplemented the record and now moves the Court to moot the case. (See, petitioner's Motion For Evidentiary Hearing, and Memorandum

Opposing Mootness, submitted herewith.)

STATEMENT OF THE FACTS

On 12 July 1990 the certiorari court entered an order holding that the then newly-minted classification rules violate the prohibition against ex post facto legislation and were unconstitutional as applied to petitioner's classification determination and, therefore, the Program Classification Committee (hereafter PRC) decision relying thereupon was arbitrary, capricous and contrary to law. The order further stated that petitioner's PRC hearings should be facilitated "without the use of the newly-promulgated criteria." (See, Exhibit B, affixed to original petition.)

Even without the use of the rules, and despite having a minimum recommendation prior to that point, petitioner was not afforded his rightfully earned minimum classification status for another two years, and in 1992 was finally transferred to a minimum facility. On occasion the respondents erroneously utilized the prohibited rules but almost immediately corrected that error. For the most part, respondents have abided by the court's order until 1998.

In February of 1998 respondents again began utilizing the rules at issue despite petitioner's protestations that he was the only WI prisoner with court orders to the contrary.

Of paramount importance are the facts demonstrating the deprivation of petitioner's liberty interests through the use of the mandatory classification rules. Petitioner is once again locked into the identical classic "catch-22" situation which

precipitated the certiorari action, where he is absolutely precluded from being considered for any reduction in classification by PRC until the Parole Commission (hereafter PC) gives their indication per §DOC 302.145, Wis.Admin.Code (hereafter WAC), and yet the PC maintains that it "**doesn't** handle inmate movement." (Emphasis supplied.) (See, Exhibit V-4, affixed hereto.) The "catch-22" arises because petitioner cannot be granted a parole absent the mandatory security reduction. Petitioner essentially has to have a parole before going to minimum, and yet has to be at minimum to get a parole. Clearly, an unworkable situation. When the mandatory PRC classification rules and the mandatory parole rules are applied inflexibly, this is the ultimate and inevitable result.

Petitioner currently has been interviewed by PRC at the regular six-month intervals, and interviewed by the PC at the annual one-year intervals, with the same mandatory results. Petitioner continues to be informed by the PC that he must "re-earn minimum" before the risk factor will be reduced sufficiently to meet that required substantive predicate and be found qualified for parole, and yet the PRC continues to inform petitioner they cannot even consider returning his reduction to minimum classification. This result is solely due to the manner in which the rules work together to strip the liberty interest petitioner once enjoyed in earning his way through the system to where he can be found parole qualified. Petitioner remains locked into a situation where he can never be paroled.

## ARGUMENT

### I. THE LIBERTY INTERESTS AT STAKE.

A protectible liberty interest "may arise from two sources - the Due Process Clause itself and the laws of the States." **Hewitt v. Helms**, 103 S.Ct. 864, 868-69 (1983); **Colon v. Schneider**, 899 F.2d 660, 666 (7th Cir. 1990).

The United States Supreme Court in **Kentucky Dept. of Corrections v. Thompson**, 109 S.Ct. 1904 (1989), held that the method of inquiry for determining whether a state statute or regulation creates an enforceable liberty interest is to "examine closely the language of the relevant statutes and regulations" to ascertain whether the State has established "'substantive predicates' to govern official decisionmaking..." and further whether the statute or regulation mandates "the outcome to be reached upon a finding that the relevant criteria have been met." **Id.** at 1910. This inquiry was also described in **Thompson** as a requirement that "the regulations contain 'explicitly mandatory language,' i.e., specific directives to the decision maker that if the regulations' substantive predicates are present, a particular outcome must follow." **Id.**

Section PAC 1.06(7) contains explicitly mandatory language; the word "shall" appears in virtually every single subsection of that rule.

Furthermore, "a State creates a protected liberty interest by placing substantive limitations on official discretion." **Olim v. Wakinekona**, 103 S.Ct. 1741, 1748 (1983).

In **Hewitt**, supra, the Court found that a state may create a

liberty interest protected by the due process clause through the enactment of certain statutory or regulatory schemes. Id. at 870.

A state statute or regulation may give rise to a liberty interest if the state has used "language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed and that (the action) will not occur absent specified substantive predicates. . . ." **Culbert v. Young**, 834 F.2d 624 (7th Cir. 1987)(quoting) **Hewitt**, at 471-72. See also, the unmistakably mandatory language contained in WAC §PAC 1.06(7). The rules at issue use language of a mandatory character, as does §304.06, Wis.Stats. There has always been explicit language of a mandatory character in the parole and classification rules from their inception in 1981.

"(T)he repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest." **Hewitt**, supra, at 871. The existence of a cognizable liberty or property interest is necessary to trigger the requirements of substantive due process. **Jefferies v. Turkey Run Consolidated School District**, 492 F.2d 1 (7th Cir. 1974). "Due process is flexible and calls for such procedural protections as a particular situation demands." **Morrisey v. Brewer**, 408 U.S. 471, 481 (1972).

No matter how the parole regulations are parsed, they cannot be interpreted in such a neglectful manner meaning that parole would not be granted once the five substantive predicates are met. It defies logic to posit the regulations are not mandatory.

There is no judgment or discretion involved in the decision once the five substantive predicates are met. The PC must grant parole, no ifs, ands, or buts.

Under Wisconsin law, the PC actions are purely ministerial, not discretionary, once the five substantive criteria are met. A public officer's duty is ministerial "when it is absolute, certain, and imperative, involving merely the performance of a specific task when the law imposes, prescribes and defines the time, mode, and occasion for its performance with such certainty that nothing remains for judgment or discretion." **Larsen v. Wisconsin Power & Light Co.**, 355 N.W.2d 557 (Ct.App. 1984), citing **Lister v. Board of Regents**, 240 N.W.2d 610, 621 (1976).

The ministerial duty imposed by the parole regulations, through the requirements contained therein, is absolute, certain and imperative. The rules use language of a mandatory character, and that language is replete throughout the various subsections.

"If parole is discretion(ary) and nothing but, then there is no liberty interest," **Huggins v. Isenbarber**, 798 F.2d 203 (7th Cir. 1986), but "(i)f rules of law require the parole officials to act in specified ways, then there is a protected interest, a 'legitimate claim of entitlement.'"

In the instant case WAC §PAC 1.06(7) does just that; once the five substantive criteria are met the PC "shall" grant parole. As such, it establishes a liberty interest under the analysis in **Greenholtz v. Nebraska Penal Inmates**, 99 S.Ct. 2100 (1979), and also **Board of Pardons v. Allen**, 107 S.Ct. 2415 (1987). When the respondent then applies §DOC 302.145, which

absolutely strips the petitioner's interest from him (the appropriate classification for the fifth criteria for being found parole qualified), and prevents him from ever meeting the five substantive criteria, it violates his right to be found parole qualified, potentially forever. Given the facts and exhibits affixed hereto, there is no question about that, either.

The PC regulations have undergone numerous amendments over the years and, on many occasions, the Legislature has changed the language from mandatory "shall," "will," and "must" to permissive terms like "may." This has not been the case with the substantive rules governing the PC apparatus; they were obviously left mandatory with that intention in mind.

As will be advanced in further argument, there is also a liberty interest associated with a minimum classification for work/study release. This logically suggests the intent to have prisoners work and earn their way through the system to be found parole qualified. Conversely, the work/study regulations also provide for reclassification to a higher security rating as "punishment" for administrative rule infractions. All of the administrative rules have to be read and considered in harmony with one another, and not in a manner which would render one (or more) of them superfluous. Administrative regulations are subject to the same rules of statutory construction as statutes enacted by the Legislature. The standards applicable to the resolution of this issue have been set forth in various WI courts. In State v. Ozaukee County Bd. of Adj., 449 N.W.2d 47, 50 (1989), the court provided that "(i)t is a cardinal rule of

construction that no part of a statute should be rendered superfluous by interpretation." The court in **Logerquist v. Board of Canvassers**, 442 N.W.2d 551, 554 (1989), also held that "(s)tatutes relating to the same subject matter are to be construed together and harmonized in order to give each statute full force and effect. Glinski v. Sheldon, 88 Wis.2d 509, 519, 276 N.W.2d 815, 820 (1979)." See, also **Bingenheimer v. Wisconsin Dept. of Health**, 383 N.W.2d 898, 901 (1986)("We will not construe statutes so as to work absurd or unreasonable results."); and **State v. Hagaman**, 395 N.W.2d 617, 618 (1986).

Since rules dealing with the same subject matter are to be harmonized so that each is given full force and effect, a scrutiny of §DOC 302.19 is required in tandem with §DOC 302.145, to see that each is given full force and effect. Section DOC 302.19(4) reads that "(t)he classification chief shall approve or deny changes in an inmate's security classification." And since the classification chief is required to approve all classification changes under §DOC 302.19(4), it would render an absurd or unreasonable result to conclude that §DOC 302.145 confers a discretionary interpretation. The classification chief **must** approve all changes in classification. Yet, as the documentation affixed hereto clearly shows, the PRC is absolutely precluded from recommending a reduction. Following the "cardinal rule," anything other than an interpretation that the rules are mandatory would render §DOC 302.145 superfluous. The same results are mandated in §DOC 302.07(12) of the respondent's proffer.

And the same argument holds when the mandatory parole regulations are factored into the equation. Any discretion derived from those rules is qualified, and once the five substantive predicates are met, the PC's action becomes purely and wholly a ministerial matter to grant parole.

What is more, it was conceded in the initial certiorari action that a lifer has never been paroled from maximum security, and that the current rules prohibit a lifer from obtaining a parole from medium security. DOC statistics also bear this fact. Even some five years before the current rules were promulgated, the Parole Board Staff Meeting Minutes, 30 September 1983, p.3, explains to the commissioners that parole interviews held at maximum security are only for information gathering and not for parole granting. It is a fact, per the PAC rules, that petitioner can only be paroled from a minimum facility. The mandatory classification rules and mandatory PAC rules, "work together," establish the egregious facts that pursuant to §PAC 1.06(7), prisoners will not be recommended for parole unless and until they "(c) Demonstrate satisfactory adjustment to the institution and program participation at the institution; . . . and (e) Reach a point at which in the judgment of the commission, discretionary parole would not pose an unreasonable risk to the public." See, §PAC 1.06(7), as it relates to the Parole Commission Interview Criteria and the facts which are considered significant; that is, the Security Classification. Petitioner is now mandated as a moderate security risk solely through the inflexible application of the classification rules, where he was

not locked into such a security rating under the old rules.

Petitioner has shown, as the documentation demonstrates, that despite being properly rated as minimum with a minimum security placement some five times since 1992, that he is now absolutely precluded from even having the PRC consider such a security reduction solely due to the inflexible application of the classification rules. Petitioner's PRC hearings and PC hearings have been effectively reduced to nothing but form without substance.

Likewise, it is true that, technically, the mere formality of a parole hearing meets the requirements of §57.06, Wis.Stats., but it still violates the spirit and intent of the statute. The parole eligibility statute was created to give lifers a meaningful opportunity to obtain parole. A parole hearing, where it is understood by all parties that the lifer will not receive a parole under any circumstances, violates the spirit of §57.06, Wis.Stats. **State ex rel. Schaeve v. VanLane**, 370 N.W.2d 271, 277 (1985) provides:

> We shall construe a statute, however, not only by its exact words, but also by its apparent general purpose. ... Furthermore, the spirit of a statute should govern over the literal or technical meaning of the language used.

The respondent may not rely on a procedural formality to replace the chance for a parole.

As mentioned earlier, §DOC 324.01(3) recognizes the important purpose of work/study release programs, and Wisconsin's progressive security classification system was actually designed to permit a smoother transition from the dependency of prison to

complete freedom and earlier release from incarceration under conditions designed to test the prisoner's capacity to "make it on the outside." Such social reintegration was designed for all prisoners by statutorily creating the liberty interest in work/study release "to provide inmates with a program activity in which they may demonstrate, through responsible behavior, their readiness for parole." See, §DOC 324.01(3), WAC. Yet petitioner is mandated as an unreasonable risk purely through the inflexible application of the rules, which even operate contrary to the proposed intent of not requiring mandatory time in a higher risk setting.

In **Winsett v. McGinnes** 617 F.2d 996, 1007-08 (3rd Cir. 1980), the Court held that the inmates' liberty interest is violated by consideration of factors outside the criteria to deny work release status. Moreover, the Honorable Myron L. Gordon, J., in **Perrote v. Percy**, 465 F.Supp. 112, 114 (W.D.Wis. 1979), found Wisconsin inmates have a statutorily created liberty interest in work/study release. See also, §§DOC 302.11, DOC 302.12, DOC 302.13, DOC 324.01(3), and PAC 1.06(7).

The Court in **Kerr v. Puckett**, 138 F.2d 321, 324 (7th Cir. 1998), held that "Mr. KERR was required to participate in the prison drug rehabilitation programs in order to secure the earliest possible parole." Moreover, in **Kerr v. Farrey**, 95 F.2d 472, 474-75 (7th Cir. 1996), the Court held that "(a)ccording to Kerr, whose version of facts we accept on appeal from summary judgment, the penalty for nonattendance at NA meetings was a higher security risk classification and negative effects on

parole eligibility." (Emphasis added.) And moreover, the Wisconsin DOC admitted as the Court judicially noticed and reported, **Id.** at 475, "(f)inally, she confirmed that refusal to attend recommended treatment programs like NA could have an adverse impact on an inmate's security risk rating and consideration for parole, although she asserted that no inmate had ever suffered the former penalty solely for refusing to participate in NA or in Alcoholics Annonymous, a similar program for alcoholics." (Emphasis added.) It is clear the rules can, and do, have a punitive effect even with this respect, in addition to all the facts presented in petitioner's pleadings.

The affects on (even) one's chances for parole are noted in **Kerr v. Farrey**, supra, where that petitioner "was subject to significant penalties if he refused to attend the NA meetings: classified to a higher security risk category and adverse notations in his prison record that could affect his chances for parole." (Emphasis added.) In the instant case, §DOC 302.145, goes well beyond affecting the chance for parole; it completely eliminates it. Therefore, it does unconstitutionally punish petitioner by increasing his length of incarceration, by stripping away his liberty interests without due process or equal protection of the law. The respondent's instant proffer will work the same result.

In **Patten v. North Dakota Parole Bd.**, 783 F.2d 140, 142 (8th Cir. 1986), the court held that "(s)tate statutes, rules, and regulations can create a constitutionally protected liberty interest in parole." And the court in **Parker v. Corrothers**, 750

F.2d 653, 655 (8th Cir. 1984), held that "(a) protected liberty interest is created when 'particularized substantive standards or criteria ... significantly guide parole decisions' and the language is mandatory."

And the U.S. Supreme Court in **Board of Pardons v. Allen**, supra, made clear that "Montana statutes (which are very similar to Wisconsin's substantive parole criteria) providing that the parole board shall release a prisoner on parole when certain prerequisites are met, held to create a liberty interest protected under the Fourteenth Amendment." And in **Greenholtz**, supra, the Court held that the "(p)arole Board's regulations are relevant to determinations of whether parole scheme gives rise to constitutionally protected liberty interest."

Following **Greenholtz**, the **Allen** Court found that specific state regulations governing parole release determinations may have the effect of creating a liberty interest in parole release entitled to the constitutional protection of due process if such regulations are constructed in a way which provides parole applicants with a legitimate expectation of parole release. In the instant case, §PAC 1.06(7), creates such an expectation of release rising to the level of a liberty interest. Therefore, it must equally stand that the Wisconsin DOC is precluded from effectively preventing petitioner from any opportunity of meeting the substantive prerequisites of being found parole qualified as a policy. It violates substantive due process.

Furthermore, the court in **Ellis v. District of Columbia**, 84 F.3d 1413 (D.C.Cir. 1996), visited the ramifications of the

holding in **Sandin v. Conner**, 515 U.S. 472, 115 S.Ct. 2293 (1995), and held that "we must follow Greenholtz and Allen because, unlike Sandin, they are directly on point. Both cases deal with a prisoner's liberty interest in parole; Sandin does not." What **Sandin** does is establish the quantum of punishment associated with the termination of a liberty interest. It puts a yardstick on the quantum of punishment required by due process. **Sandin** held that inmates are not deprived of a liberty interest and are therefore not entitled to the protections outlined in **Wolff v. McDonnell**, 418 U.S. 535 (1979), "**unless**" they are subjected to disciplinary measures which involve "the type of atypical, significant deprivation in which a state might conceivably create a liberty interest." The Court left undisturbed the holding in **Wolff**.

A procedural due process violation occurs when the respondent deprives the prisoner of a liberty interest and the deprivation occurs without the constitutionally required procedures. **Doherty v. City of Chicago**, 75 F.3d 318 (7th Cir. 1996). Applying the **Sandin** yardstick, the punishment associated with the termination of petitioner's liberty interest in work release and subsequent expectation of parole is considerably more than an atypical hardship. It amounts to the functional equivalent of what occurred in **Lindsey v. Washington**, 57 S.Ct. 797 (1937), where a mandatory minimum was changed to a mandatory maximum. In such a situation, due process is mandatory before the deprivation can occur.

Given the nature of petitioner's pleadings in relation to

his situation regarding the liberty interest in remaining parole qualified, it can be demonstrated that such a deprivation should not occur absent due process because it not only necessarily affected his application for release on parole, but because it completely eliminated it. Potentially forever.

This matter springs forth from the fact that the **Sandin** Court noted in certain instances an otherwise innocuous deprivation may result in the erosion of a liberty interest in view of the proliferated rights at stake. Specifically, the **Sandin** majority implied that a liberty interest as presented in this case is implicated "where the State's action will inevitably affect the duration of (the prisoner's) sentence." 115 S.Ct. at 2302. Thus, in view of the **Sandin** Court, and the mandatory nature of the PC regulations requiring the PC to deny parole in the face of unmet substantive criteria, a state-created liberty interest has been implicated.

Moreover, not having a minimum rating forecloses any possibility for petitioner to be found parole qualified. And, indeed, petitioner has been and is being denied his parole application for this very reason. (See, Exhibits V-4, V-6, V-13, affixed hereto, and Exhibits G through G-5, submitted with original petition.) Since all of the PC forms depict a need for minimum, the collateral consequences are undeniable.

Petitioner's removal from minimum security itself implicates a liberty interest under **Sandin** because in view of his prior participation in minimum security, such a transfer and confinement in medium security amounts to a deprivation of real

substance that imposed an atypical, significant and very substantial hardship upon him in relation to the ordinary incidents of the prison life to which he had become accustomed and in relation to his realistic expectation of an opportunity to maintain being found parole qualified. This is especially so in view of the mandatory classification rules in conjunction with the mandatory nature of the parole rules. And, even more frightening, the rules the respondent has submitted in their proffer, which will operate in even more detrimental fashion.

The above analysis basically hinges upon the **Sandin** liberty interest. Even pre-**Sandin** courts have held that state-created liberty interests may not be terminated absent individualized due process. See, **Tracy v. Salamack**, 572 F.2d 393, 396 (2nd Cir. 1978); **Severino v. Negron**, 996 F.2d 1439, 1442 (2nd Cir. 1993) It has been clear since **Tracy** that a liberty interest exists in an prisoner's continued participation in a work release program.

In **Gibson v. Lynch**, 652 F.2d 348 (1981), the court held "(i)t is this totality of circumstances which ... conclude that 'plaintiff's interest in the way of life which is afforded to inmates who are not subject to disciplinary restrictions "has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances...."'" Quoting **Wolff**, supra.

The Court in **Quartararo v. Catterson**, 917 F.Supp. 919 (E.D.N.Y. 1996), found that "it constitutes a manifestation of injury attributable to a liberty interest implicated through his removal from a work release program." See also, **Quartararo v.**

**Catterson**, 73 F.Supp.2d 270 (E.D.N.Y. 1999); and **Quartararo v. Hoy**, 113 F.Supp.2d 405 (E.D.N.Y. 2000). The same is true of the present situation regarding the deprivation of a **Tracy** interest without due process of law. The atypical significant hardship is that petitioner is now absolutely foreclosed from being found parole qualified solely because of the liberty interest deprivation which, in turn, is solely because of the inflexible application of the rules.

Prudential considerations concerning the liberty interests associated with this case were at the heart of the relief granted in the original certiorari action. The Judge in that action twice revisited the thrust of the "effect" the mandatory classification rules play when working together with the mandatory parole rules giving rise to the constitutional claims. As presented in the case vindicating petitioner's interests, petitioner pointed out the fact that, absent the use of the new and constitutionally offensive criteria, the relevant and proper criteria governing petitioner's classification were all rated "low." Such factors are, and have been in the past, appropriate for a reduction in classification and subsequent return transfer to a minimum facility. As argued earlier, it is important to realize that while the respondents were not applying the rules, petitioner had his classification reduced and was transferred to minimum five times. The fact that petitioner was returned to medium classification so many times purely reflects administrative opposition to such a transfer, and has not resulted from any action or misconduct on petitioner's part.