where he could present evidence, written statements, and challenge the PRC determinations in an effort to work his way through the system and be found parole qualified. Where the PC process has effectively been foreclosed for a one-year period at a time, so too has the PRC review become effectively foreclosed for a six-month period at a time.

What is more, the intended rules will now foreclose the matter of petitioner's PRC review for **twice** as long. Actually, there are a number of changes proposed in the respondents' proffer which are undoubtedly more onerous, are intended to be retrospectively applied and, therefore, constitutionally offensive. To wit:

> **a)** Section DOC 302.15(8), provides for an increase to a one-year period between reviews, instead of a six-month period.
>
> **b)** Section DOC 302.17(7), allows for the consideration of factors other than those listed in §§DOC 302.07 and DOC 302.08, to be used against prisoners "serving a life sentence," including the needs of the "community," which has nothing whatsoever to do with the internal workings of the prison classification system. What is more, it is a "static" factor which the prisoner has no control over and which will never change.
>
> **c)** Section DOC 302.07(9), provides for additional consideration of the "public's perception of the offense" which, again, has nothing whatsoever to do with the internal function of the prison classification system, and is another "static" factor which the prisoner has no control over and which will never change.
>
> **d)** Sections DOC 302.10(1), DOC 302.15(5), and DOC 302.17(6), allow for the addition of recommending a multitude of treatment programs which may or may not be substantiated. The latter section allowing for only a "majority vote," as opposed to a "unanimous vote." With such a reduced level of approving authority, many prisoners will be subjected to program needs which have no foundation; e.g., drug programs for prisoners who do not use drugs or whose offenses are not drug-related.
>
> **e)** Section DOC 302.07(11), allows for the additional

consideration of a prisoner's litigious inclinations: those who choose to vindicate their rights through the court system will now be officially "considered" for denial of custody reduction.

f) Section DOC 302.07(12), provides **again** for the crucial determination to be made by the PC prior to a prisoner being properly classified.

g) Section DOC 302.17(4), eliminates a prisoner's opportunity to document the record with "written submissions" unless he is for some reason absent from the proceedings.

h) Section DOC 302.07(13), allows the additional use of an impersonal and subjective "risk rating instrument" for assessment of a prisoner's classification. Such so-called "instruments" have in the past proved amorphous, arbitrary and capricious at best for attempting to determine any aspect of a prisoner's classification.

i) Sections DOC 302.07, DOC 302.10(1), and DOC 302.17(7), allow for the additional consideration of factors not even listed, written or otherwise contained in the rules proper. The latter section provides for unwritten factors for lifers other than those found in §§DOC 302.07, and DOC 302.08. In the past courts have held unwritten criteria to be unlawful for a variety of legal reasons.

j) The Appendix Notes to §DOC 302.19, explains a great deal about the respondents' true agenda. It deals with the mass transfers of prisoners to virtually any cell in any county in the state, as well as any state in the nation because of the massive overcrowding the above rules will doubtless cause.

With regard to the retroactivity problems associated with the rules at issue, the respondent knew full well of the force and effect the rules would have upon those already incarcerated, and created the rules for applying to "new commitments only." From the facts of record, it is clear the respondents knew the rules should only be applied to those prisoners received on or after the effective date to avoid problems such as those presented in the instant case.

The time-trigger recognized in the original court order (Exhibit B) pointed to the above problem. Judge Frankel noted

the timing is of essence because "(t)he new rules explicitly state that the new criteria apply to 'an inmate serving a life sentence who is received at a correctional institution following sentence of revocation on or after the effective date of this section and to an inmate serving a life sentence who has a maximum security classification on the effective date of this section.'" (Emphasis supplied.)(Exhibit B, p.12.) "Petitioner was not received at a correctional institution on or after the effective date of the section and he did not have a maximum security classification on the effective date of the section." (Emphasis supplied.)(**Id.**, p.13.) As retroactivity effects the application of the proposed rules, they offend the United States and Wisconsin Constitutions in even greater ways.

In the original state proceedings, petitioner sought to have the determination of his custody status based upon the rules and standards as they existed prior to December 1988. **Welsh v. Mizell**, 668 F.2d 328, 332 (7th Cir. 1982)(the prisoner has an affirmative right to be evaluated by the regulations in effect at the time the crime had been consummated.) Petitioner's action was based upon the combination ex post facto claim and the claim that it was unconstitutional for the PRC to refuse to consider a reduction in classification based upon a rule which was unconstitutionally applied to his hearing.

The mis-application of the rules, and subsequent mis-classification, has resulted in a scenario where the PC states that petitioner has no need to be seen by them because he has not met the substantive predicate criteria (minimum status),

only to then have the PRC state that there is no reason to be seen by them because they are precluded from even recommending a classification reduction to minimum status. The classic "catch-22." And the exhibits affixed to petitioner's brief depict the ongoing problem will not be resolved absent resolution by this Honorable Court.

Even the Public Defender's Office was aware of the potential problems associated with the rules, and admitted it was to be considered sufficient for a "new factor" for sentence modification motions. (See, Exhibit P through P-5, submitted with NR:20.)

Another disturbing memory which is on point concerning the retroactivity problem, is the manner in which DOC implemented the rules, kidnapping all the lifers at 04:00, placing them in shackles and returning them to medium and maximum facilities because they did not meet the PC criteria. Of course, they were all returned subsequent to petitioner prevailing in the original certiorari action. The same kidnap bus routine will doubtless be utilized again since there are a great many prisoners at minimum facilities who in no way could meet all of the proposed subjective criteria. No doubt they will be returned to mediums and maximums and, subsequently, recommended for out of state transers for four years at a crack. Potentially, those cells could be in the farthest reaches of the nation, or beyond.

And petitioner has been in a similar predicament since the re-application of the rules in 1998. Instead of making the proper classification determination using the appropriate

criteria, the respondents are currently recommending petitioner be transferred out of state for a period of four-years at a crack. Given the fact that petitioner has had his classification reduced to minimum some five times (when the respondents were complying with the certiorari court order), the only means by which the respondents can render such a recommendation in petitioner's situation is by directly, in the conduct of normal administrative affairs, engaging in activities which ignore petitioner's Federal rights as protected in the court order. It is a pattern of unlawful activity which is certain to continue absent the relief requested herein from this Honorable Court.

There is no other venue available to remedy the violation of petitioner's Federal rights, mainly because the respondents have utilized virtually every administrative function to continue their agenda.

Movant believes this Honorable Court may tailor any preliminary injunctive relief necessary to correct the violation of Federal rights, and that the foregoing facts and those circumstances presented are sufficient to demonstrate his need for the requested order.

Pursuant to Title 18 U.S.C. §3626, this Honorable Court has jurisdiction to enter such restraining orders or injunctions, or to take other actions including, but not limited to, the requested relief herein. From the foregoing facts and circumstances, it appears the relief request herein is the least intrusive means by which the protection of petitioner's Federal rights can be made.

That Title 18 U.S.C. §3626 provides "remedies to those necessary to remedy the proven violation of federal rights." H.R. Rep. No 104-21, at 24 n.2 (1995); see, **Plyler v. Moore**, 100 F.3d 365, 369 (4th Cir. 1996).

The Court's power to act is plenary and may be entered sua sponte or ex parte without the necessity of a hearing. Congress has the authority to require a court in equity to make certain findings before issuing injunctive relief. **Gavin v. Branstad**, 122 F.3d 1081, 1087 (8th Cir. 1997). Section 3626 expressly permits the district court to appropriately tailor prospective relief that the court finds necessary to remedy a current violation of Federal rights.

That "principles of federalism and comity require that 'a federal court's regulatory control ... not extend beyond the time required to remedy the effects of past (constitutional violations)." **ARC v. Sinner**, 942 F.2d 1235, 1239 (8th Cir. 1991), quoting **Board of Educ. v. Dowell**, 111 S.Ct. 630 (1991).

If the Court fails to enter such an order as prayed by petitioner, the respondents will thereby frustrate the ends of public justice.

WHEREFORE, petitioner respectfully request this Honorable Court to enter an Order providing as follows:

A. Restraining and prohibiting the respondents from the continued ex post facto application of the currently used §DOC 302.145, WAC;

B. Enjoining the respondents from implementing the newly proposed §DOC 302.07, WAC (Resp. Ex. 101), pending the litigation

in the instant case;

C. Enjoining the respondents from inappropriately determining that petitioner be sent to an out of state facility;

D. Further restraining, prohibiting and enjoining the respondents from participating in any conduct whatsoever which would tend in any way to diminish petitioner's chance of prevailing in this action by the intentional destruction of documents, or the purging of DOC files pending the outcome of the litigation in this matter.

Movant prays this Honorable Court will find the above the least intrusive means necessary to correct the harm and protect petitioner's Federal rights and will, therefore, grant the requested relief pending the resolution of litigation in this matter.

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.

PERSONAL AFFIDAVIT IN SUPPORT

COMES NOW the above-named and undersigned petitioner, pro se, and offers the following facts in support of his motions for evidentirary hearing, preliminary injunctive relief, release order, request for three-judge court, and appointment of special master in the above-captioned action.

1. That I am the above-named petitioner, and supply this affidavit in good faith, and in support of the instant motions;

2. That petitioner has previously had a state certiorari court enter an order vindicating the deprivation of his Federal rights as argued in the instant case;

3. That the respondents have had more than a reasonable amount of time to comply with the previous court orders and, from 1990 through 1998, they did so, allowing petitioner to work and earn his way through the classification system to a point where he was parole qualified;

4. That petitioner was returned to medium security

institutions some five times during that period of time through no action or misconduct on his part, but purely due to nefarious administrative reasons, the last return being in 1997;

5. That in 1998 the respondents again began using the ex post facto classification rules despite the court order, promptly after which petitioner sought relief in this Court, where he was instructed to return to state court to exhaust contempt proceedings;

6. Petitioner did so, and discovered the original certiorari judge was no longer on the bench, his replacement arriving from the AG's office after practicing law with the respondents' lawyer for some 26 years -- he was tendentious and did not acknowledge any part of the original court order;

7. The respondents as well as their counsel have not been forthcoming in the past and, through feigning misunderstanding and other deceptive practices regarding petitioner's claims, have been perpetuating a "catch-22" resulting in petitioner's mis-classification and ultimate deprivation of any opportunity to obtain a parole;

8. The respondents have been deceptively denying their knowledge of the effects of the rules on petitioner's classification, as well as the effects on the classification of countless other Wisconsin prisoners, and have known from the onset the incredibly onerous conditions the retroactive application of the rules generate;

9. A prime example of the allegation in ¶8, supra, is the fact of respondent's instant proffer (Resp. Ex. 101), and the

duly sworn affidavit of the respondent which clearly states the rules in this case (§DOC 302.145) have been repealed, while not disclosing the fact that the same constitutionally offensive provision appears in their proffer under a different number and phraseology (§DOC 302.07(12));

10. Since 1998 to the present date, solely due to the use of the rules at issue, the respondents have had petitioner in a situation where he cannot possibly be classified to his rightfully earned miminum status where he would again be parole qualified, and have effectively devised a means of eliminating the function of his due process classification hearings;

11. That the respondents' unlawful activities have also caused the elimination of the function of petitoner's parole hearings, and since 1998 have been recommending his out of state transfer for a period of four years at a crack;

12. The only means by which the respondents can render such a recommendation in petitioner's situation is by directly and indirectly, in the conduct of normal administrative affairs, intentionally ignoring the prior court orders prohibiting the use of specific classification rules at his classification hearing;

13. That absent said rules petitioner would have again been properly classified as minimum status many years ago;

14. It is apparent from the documentary evidence in the record that the injury petitioner has and is suffering will continue absent the relief requested in the instant motions;

15. This affiant believes an evidentiary hearing is necessary to bring all of the facts and evidence to bear, where

the respondent will be before the prudent eye of the Court;

16. This affiant further believes that the requested preliminary injunctive relief is necessary given the fact-driven nature of the case, the present and clear injury to petitioner, as well as the very real probability of the same injury occurring to many thousands of prisoners in the near future;

17. That this affiant has been and is suffering great manifest injury through the violation of his Federal rights which will continue to flow from the actions of the respondents and, therefore, he believes a release order should also be granted in this matter;

18. Because the respondents have acted with such blatant disregard for petitioner's Federal rights, and obviously plan to continue their actions by inflicting the same injury upon other with the implementation of the rules contained in their proffer, this affiant believes the appointment of a special master to oversee the respondents' actions would be most appropriate;

19. That there is evidence to suggest the most poignant reason for the massive overcrowding in Wisconsin's prisons is due to the gross mis-classifying of its prisoners;

20. That this affiant believes if the Court fails to grant the prospective preliminary relief as requested, the respondents will thereby frustrate the ends of public justice and will continue to escalate the gross mis-classification of Wisconsin prisoners;

21. This affiant believes this Honorable Court may tailor any prospective relief necessary to correct the violation of

Federal rights, and that the foregoing facts and the many exhibits in this case are sufficient to demonstrate his need for the relief requested in the instant motions;

22. It is this affiant's belief that he needs the preliminary injunctive relief as requested, and that injunctive relief is designed to meet a real threat of a future wrong or contemporary wrong of a nature likely to continue or recur;

23. This affiant also believes that a reparative injunction is necessary to prevent future harmful effects of past acts by the respondents, and would require the respondents to restore petitioner to pre-existing conditions to which he is entitled; see, **Lampkin v. District of Columbia**, 886 F.Supp. 56 (D.D.C. 1995);

24. This affiant believes that a mandatory injunction would be a proper document to compel the respondents into positive action to change the existing unlawful conditions and restore the status quo by undoing the illegal actions, when a serious hardship or injustice will result without the injunction, if the violations represent an established practice of persons to be enjoined, and if prison officials have persistently opposed the recognition of petitioner's Federal rights;

25. That it is obvious the respondents are intending to persist in their unlawful acts;

26. This affiant believes he is in need of both prohibitive and mandatory injunctive relief because of the dual characteristic features of each, **Towery v. Garber**, 162 P.2d 878 (1945), inasmuch as in its mandatory form it is prohibitory when

the injury results from present and continuing affirmative acts and the injunction orders the respondents to refrain to preserve the status quo;

27. That Congress authorized courts to maintain jurisdiction where respondents have failed to comply with prior court orders, and allow courts to maintain jurisdiction only where prison officials are guilty of "current and ongoing" violations of a federal right, see **Imprisoned Citizens Union v. Ridge**, 169 F.3d 178 (3rd Cir. 1999);

28. This affiant believes he is in need of such preventative relief provided via temporary injunction because the status quo preserved by a preliminary injunction is the last actual, peaceable, noncontested status preceding the pending controversy;

29. Court's have equitable authority to award both forms of relief in conformity with settled equitable considerations, such as those presented in this case, pursuant to Rule 65(b)(1), FRCVP;

30. Affiant believes a temporary injunction should be allowed to preserve the status quo because in its mandatory form it is preventative in character and available when the injury is serious, substantial, and imminent, and irreparable harm by the respondents' injurious invasion of petitioner's Federal rights by continued and repeated acts;

31. In addition to the above, affiant believes the facts contained in the pleadings demonstrate the need for the appointment of a Special Master as part of the provisional remedy

requested herein, especially given the facts in this matter, the Court should presume special reason for such an appointment and temporary injunction and, very possibly, given the likelihood of petitioner prevailing on the merits, the Court could also award a permanent injunction;

32. Affiant believes a Court that has obtained jurisdiction of a cause of action has the inherent power to do all things reasonably necessary to the administration of justice in the case before it, including the power to issue injunctive relief in aid of, or ancillary to, the principal action when necessary to preserve existing status or preserve things in the same state or condition and to restrain actual or threatened acts that would be contrary to equity and good conscience;

33. This affiant believes that some circumstances create an entitlement to injunctive relief as a matter of right upon a clear showing that the acts complained of cause a material, substantial, and irreparable injury to the petitioner, but understands the Court must still use its discretion in analyzing whether the facts show a necessity for the intervention of equity in order to protect the Federal rights in equity;

34. Deciding an injunction motion is a delicate balancing of several factors, including the character of the interests to be protected, any irreparable harm that the petitioner would suffer absent an injunction, the petitioner's success on the merits or the reasonable likelihood thereof, the adequacy of injunction in comparison to other remedies, any related misconduct by the respondents, a comparison of the hardship to

the petitioner if relief is denied and the hardship to the respondents if relief is granted, the interests of justice, and courts generally have broad discretion in balancing these factors in a qualitative rather than quantitative manner;

35. This affiant believes the equities of this case should take into account the gravity and blatant willfulness of the violations, see **Town of Haddam v. LaPointe**, 680 A.2d 1010 (1996);

36. That the specific acts to be so restrained are set forth in petitioner's proposed Order For Preliminary Injunctive Relief, and affiant believes that the interests of fair justice requires granting of such equitable relief because to not do so would allow the respondents' actions to continue evading review unabated;

37. This affiant would be remiss not to mention the additional and considerable injury suffered by his family and friends by having their expectations of his release and reintegration into society dashed and stripped away time after time as petitioner would be again mis-classified and returned to higher security through no action on his part;

38. The injury referenced in ¶37, supra, pales in light of the injury suffered by the State, valid societal interests, the tax-payers at large, and the entire prison system as a whole where many prisoners have been, are, and will be mis-classified in the future, because it is by far the most poignant reason for

the massive overcrowding of the Wisconsin prison industrial complex.

This affiant believes in good faith that he is entitled to the relief requested in his motions, and offers this affidavit in support of those motions.

I, Ronald S. Schilling, petitioner herein pro se, do hereby submit that a notary public is not presently available to me, and that pursuant to the grace of the Court in **Carter v. Clark**, 616 F.2d 228 (5th Cir. 1980), I certify under the penalty of perjury that the foregoing is true and correct to the best of my personal knowledge, belief and experience.

Dated this 31st day of December 2001.

Respectfully submitted,

Ronald Schilling

Ronald Schilling
Petitioner, pro se