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The impact of

Sandin v Conner

on the

INMATE DISCIPLINARY PROCEDURES

of the

HARRIS COUNTY SHERIFF'S DEPARTMENT

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ABSTRACT

After creating a liberty interest mandating hearings for parole and probation revocation actions in two previous cases [*Morrissey v Brewer (1972)* and *Gagnon v Scarpelli (1973)*], the United States Supreme Court in *Wolff v McDonnell* (1974) ruled that inmates of state penitentiaries have liberty interests vested in 'good time' programs and disciplinary segregation. The Supreme Court required some type of formal hearing/disciplinary procedure be in place and used prior to the taking of an inmate's 'good time' or his or her placement in disciplinary segregation. The Court, in *Wolff*, set forth several specific procedures to be used for this purpose. With little deviation, we see these same regulations encapsulated in Chapter 283 of the Minimum Jail Standards of the Texas Jail Commission as well as the current policy of the Harris County Sheriff's Department.

Between *Wolff* and *Sandin v Conner (1995)*, the appellate courts began to twist the concept of 'grievous loss' from a determination of what event had actually impacted the inmate to a search for 'non-discretionary language'. The United States Supreme Court resoundingly struck down this lingual safari in *Sandin* and strongly reaffirmed its support for the concepts and procedural requirements of *Wolff*. Perhaps the most startling revelation given correctional officials in *Sandin* is the concept that, should the conditions of disciplinary segregation closely mirror those of administrative segregation and protective custody, no liberty interest is created in awarding inmates disciplinary segregation or other lesser punishment. With no liberty interest, no procedural due process, as per *Wolff*, is required.

INTRODUCTION

In mid-October 1995, Dr. Mark Kellar, Director of the Planning and Evaluation Bureau, Harris County Sheriff's Department raised questions concerning a new United States Supreme Court decision, *Sandin v Conner (1995)*, and how it would impact the procedural rules set forth in *Wolff v McDonnell (1974)* with respect to inmate disciplinary procedures. *Wolff* set forth the inmate disciplinary standards currently in use by the Harris County Sheriff's Department, and mandated, largely verbatim, by the Texas Jail Commission for use in all county jails.

For the last fifteen to twenty years, Harris County's jails have been under both a public and a federal microscope. In *Alberti v Heard (1974)*, a federal court held the system unconstitutional and ordered massive changes, in addition to the monitoring, of its daily operations. While recently released from this judgment, it seems only prudent that the Sheriff's Department ensure all detention operations are well within current constitutional limits. However, many of these procedures are labor intensive. For example, a deputy assigned to the jail is one less available for law enforcement-related duties. As case law from time to time requires additional procedures, it is no less judicious to examine recent decisions so our personnel avoid prosecuting out dated duties or those no longer required.

The purpose of this research paper is to explore the judicial history and philosophy leading to the *Wolff* mandates and to determine to what extent, if any, these procedures have been altered by *Sandin*. This research is relevant for two reasons. First, we have a professional responsibility to keep the prisoners of the county in a manner well within the bounds set by current state and federal law. Secondly, we have a duty to

the taxpayers of this county to ensure their tax dollars are not wasted by outmoded and/or inefficient operations.

In attempting to answer these questions, the author has reviewed not only these two cases, but several of the underlying cases relied upon by the Supreme Court in reaching these decisions. In developing this history, it is hoped the reader will gain not only answers to the questions posed above, but an understanding of the rationale used by the Court and, perhaps more important, its judicial intent.

Please note the author is not a graduate of law school nor a member of the Bar. As such, this paper is not to be construed as a qualified legal opinion but solely a lay analysis intended strictly for the GMI Research Project required for graduation from the Bill Blackwood Law Enforcement Management Institute of Texas and the internal usage of the Harris County Sheriff's Department. The author would like to thank Dr. Mark Kellar for this assignment and Mr. Mark Stelter, Harris County District Attorney's Office *(who does happen to be a lawyer as well as a long time friend),* for his legal review of this document.

HISTORICAL, LEGAL AND THEORETICAL CONTEXT

The path to *Sandin v Conner, 115 S.Ct. 2293 (1995)* is paved through three earlier decisions by the Supreme Court of the United States: *Morrissey v Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972); Gagnon v Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973);* and, *Wolff v McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).* Each of these three cases creates or amplifies a liberty interest which, in turn, invokes the Due Process Clause of the United States Constitution requiring a formal hearing prior to the revocation of parole, probation, "good time" or placement in disciplinary segregation.

MORRISSEY *v* BREWER

If *Sandin* represents the delta in this stream of judicial thought, *Morrissey* is truly the headwater beginning in Iowa in 1967. Morrissey was a small-time criminal who pled guilty to issuing bad checks. He served a short sentence in the Iowa State Penitentiary and was subsequently paroled. Shortly thereafter, Morrissey was arrested as a parole violator. The Iowa Parole Board reviewed the case against Morrissey and, within one week of his arrest, revoked his parole sending him back to prison without a hearing.[1]

At the beginning of its opinion in *Morrissey*, Mr. Chief Justice Burger wrote for the Court:

> We begin with the proposition that the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations...Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions.[2]

The Court firmly sets a clear distinction between the rights accorded a defendant during the trial stage of a criminal case and those which may be applicable to a later administrative action impacting the defendant. This will be a position echoed in each of the cases leading to *Sandin*.

The State of Iowa argued no liberty interest was created because parole was a privilege and not a right; that the parolee was only administratively released for an indeterminant time, hence, was still under the supervision (in the custody) of the State. The Court rejected this argument stating:

> We see, therefore, that the liberty of a parolee, although indeterminant, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others...By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[3]

Having established a liberty interest in an administrative release from custody, the Court took the extra step of developing a two-tier system to be followed in revoking parole. The first involved the initial arrest of the parolee and his or her preliminary revocation hearing and the second, the revocation hearing itself. [4]

Of more interest to the Harris County Sheriff's Department is the opinion of the Court with respect to the actual revocation hearing. The Court specified the minimum requirements of due process:

> They include,
>
> (a) written notice of the claimed violations of parole;
>
> (b) disclosure to the parolee of evidence against him;
>
> (c) opportunity to be heard in person and to present witnesses and documentary evidence;
>
> (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confronta-

tion);

(e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and

(f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense.[5]

With *Morrissey*, the Supreme Court had now taken the very large step of attaching a "liberty interest" to what in the past had been thought of as merely an administrative action, the revocation of parole, thus invoking a right to Due Process under the Fourteenth Amendment to the Federal Constitution. Secondly, the Court very specifically set forth what minimal steps would be required for such due process.

GAGNON *v* SCARPELLI

Scarpelli closely mirrors *Morrissey* in that a person was convicted of a crime, released under a specific set of conditions, then arrested for violations of those conditions. However, in *Morrissey* the release involved parole after incarceration; in *Scarpelli*, the release was probation after conviction.

Gerald Scarpelli was arrested in 1965 and charged with an armed robbery in Wisconsin. He was sentenced to fifteen years in a Wisconsin prison, but the sentence was probated for a period of seven years. Scarpelli was later arrested in Illinois for the burglary of a habitation whereupon Wisconsin revoked his probation without a hearing.[6] Scarpelli was returned to Wisconsin and, after serving three years, filed a writ of Habeas Corpus on two grounds. First, Scarpelli stated that, under *Morrissey*, he had a due process right to a hearing prior to the revocation of his probation. Secondly, Scarpelli argued he had, as an indigent, a right to the representation of a court-appointed

attorney at the hearing as established in *Betts v Brady*,[7] *Argersinger v Hamlin*,[8] and *Gideon v Wainwright*.[9]

Mr. Justice Powell, in addressing Scarpelli's first point, wrote:

> Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one. Probation revocation, like parole revocation, is not a stage of the criminal prosecution, but does result in a loss of liberty. Accordingly, [a probationer,] like a parolee, is entitled to a preliminary and a final revocation hearing, under the conditions specified in Morrissey v Brewer, supra.[10]

Following *Morrissey*, the Court stopped short of requiring parolees and probationers be represented by counsel during revocation hearings:

> We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather, that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority...[11]

With *Scarpelli*, the Court reaffirms the due process required in revocation actions and extends these requirements to probation situations. The Court continues, however, to refuse mandating attorneys and/or the "full panoply of rights,"[12] for these administrative situations as are required in criminal prosecutions.

WOLFF *v* MCDONNELL

In deciding *Sandin*, the Supreme Court relied largely on the due process and procedural methods developed in *Wolff*. Wolff was an inmate in a Nebraska prison who filed a multi-pronged civil rights action against that system under Title 42 U.S.C. § 1983. Wolff alleged the Nebraska penitentiary's:

> ...disciplinary proceedings did not comply with the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, that the inmate legal assistance program did not meet constitutional standards, and that the regulations governing the inspection of mail to and from attorneys for inmates did not meet constitutional standards.[13]

Concerning the disciplinary system, Nebraska codified two types of offense classifications in its prisons, 'major' and 'minor' misconduct. Prison regulations set forth that, essentially, 'major' misconduct was punishable by either loss of state-mandated 'good-time', and/or solitary confinement and that 'minor' misconduct was punishable only by loss of privileges.

Wolff cited *Morrissey* and *Scarpelli* arguing that, even though the good-time program was wholly a creation of the State, it created a liberty interest and, as such, the procedural due process protections mandated by *Morrissey* and *Scarpelli* applied. Mr. Justice White, writing for the majority, agreed:

> But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty' to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.[14]

The Court then moved with caution to Wolff's argument that the Nebraska prison's disciplinary procedures were unconstitutional:

> ...the Nebraska procedures are in some respects constitutionally deficient but the *Morrissey-Scarpelli* procedures need not in all respects be followed in disciplinary cases in state prisons...[15]

Further,

> ...it is immediately apparent that one cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison.[16]

Prior to giving its mandate concerning prison disciplinary procedures, the Court clearly stated its rationale:

> It is against this background that disciplinary proceedings must be structured by prison authorities; and it is against this background that we must make our constitutional judgments, realizing that we are dealing with the maximum security insti-

> tution as well as those where security considerations are not paramount. The reality is that disciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional system.[17]

Having set the tone in its preamble, the Court handed down a set of disciplinary requirements which should sound very familiar to those of us working in the county jails across this state. The Supreme Court in *Wolff* required prison disciplinary procedures include, at a minimum: [18]

1. Written notice of the charge(s) pending;
2. A preparatory period not less than twenty-four (24) hours from the time of notice until the disciplinary hearing;
3. A "'written statement by the factfinders as to the evidence relied upon and reasons' for the disciplinary action;" [19]
4. The charged prisoner should be allowed to call witnesses to testify and present documentary evidence in his or her behalf provided the safety and security of the institution are not unduly compromised; and,
5. An inmate who is illiterate and/or faced with a highly complex charge may confer with fellow inmates, or inmates or staff members assigned to aid them, in developing a defense. [20]

[emphasis added]

The Court then moved to the question of whether or not a prison inmate had a right to confront and cross-examine those providing testimony against him or her as does a person charged with a criminal offense. While the Court earlier in *Wolff* entered

into a heartfelt attempt to find constitutionally adequate solutions protecting both parties' interests while not completely disadvantaging the other, with respect to confrontation and cross-examination, here, a line is firmly drawn:

> Confrontation and cross-examination present greater hazards to institutional interests. If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed as a matter of course, as in criminal trials, there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability...We think that the Constitution should not be read to impose the procedure at the present time...[21]

This line is continued with respect to requiring lawyers be present to represent the charged inmate at disciplinary hearings. Closely following *Morrissey* and *Scarpelli*, Mr. Justice White wrote:

> As to the right to counsel, the problem as outlined in *Scarpelli* with respect to parole and probation revocation proceedings is even more pertinent here...The insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals.[22]

Wolff's last complaint against the disciplinary procedures of the Nebraska State Penitentiary was that the disciplinary committee was not sufficiently impartial as to enable it the ability of rendering a fair verdict based on the facts presented. The Court noted the committee was comprised of senior managers and operated under a system of rules and regulations which, in practice, did much to greatly reduce or eliminate, "arbitrary decision making," [23] and, as such, held the practice did not violate Wolff's right to due process.

In *Wolff*, the Supreme Court acknowledged a "liberty interest" in the revocation of an inmate's "good time" and/or placement in solitary confinement — mandating that the due process, begun in *Morrissey* and continued through *Scarpelli*, now be extended into the prison environment. The Court then articulated precise methods to be employed in

the prison disciplinary process. As is cited in *Sandin*, the key to this aspect of *Wolff* is the delicate balancing of an inmate's Due Process rights versus the realities of prison operations. [24] Perhaps the intent of the Court in *Wolff* is best captured in the following:

> There is much play in the joints of the Due Process Clause...Within the limits set forth in this opinion we are content for now to leave the continuing development of measures to review adverse actions affecting inmates to the sound discretion of corrections officials administering the scope of such inquiries.[25]

SANDIN *v* CONNER

Sandin v Conner, rendered in 1995, serves as more than a capstone to the three previous decisions. It is a turning point where the Court re-examines the issue of liberty interests triggering Due Process protections in relation to disciplinary actions against inmates. In *Sandin,* the Court re-affirms the disciplinary processes mandated by *Wolff* under certain conditions, scythes through the verbal clutter left by several lower courts after *Wolff* and charts a much more conservative course when dealing solely with disciplinary segregation.

Inmate DeMont Conner was convicted in Hawaii of several felonies, including murder, and incarcerated in a maximum security prison to serve an indeterminant sentence of thirty years to life-in-prison. In August, 1987 Conner became involved in a verbal altercation with a prison guard while being moved from one cell to another and being strip searched along the way. A disciplinary report was filed against Conner and, during the hearing, Conner was denied the opportunity to call witnesses in his behalf; Inmate Conner was awarded thirty days solitary confinement. [26]

Conner filed suit against the prison stating his procedural due process rights as set forth in *Wolff* had been violated by his not being allowed witnesses during the disciplinary hearing. Prison officials sought and were granted summary judgment by the District Court. The Court of Appeals, however, reversed stating that the non-discretionary language of the prison regulations created a liberty interest, hence Conner was entitled to the due process mandated by the Supreme Court in *Wolff.* As stated in the syllabus of *Sandin*:

The Court [of Appeals] based its conclusion on a prison regulation instructing the

> [disciplinary] committee to find guilt when a misconduct charge is supported by substantial evidence, reasoning that the committee's duty to find guilt was non-discretionary. From that regulation, it drew a negative inference that the committee may not impose segregation if it does not find substantial evidence of misconduct, that this is a state created liberty interest, and that therefore *Wolff* entitled Conner to call witnesses.[27]

The Court of Appeals cited from *Kentucky Department of Corrections v Thompson:*

> Stated simply, 'a State creates a protected liberty interest by placing substantive limitations on official discretion.' [28] A State may do this a number of ways. Neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions suggest, however, that the most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' [29] to govern official decision making...and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met.[30]

This 'directed' finding of guilt, reasoned the Court of Appeals in *Sandin*, was non-discretionary, hence, the negative inference is that the prisoner may not be found guilty if such "substantial evidence" is not found. This non-discretionary language then, not the action or deprivation (grievous loss) itself, is what the appeals courts in other cases ruled created the liberty interest mandating the procedural due process functions set forth in *Wolff.*

Prison officials appealed to the Supreme Court. In granting certiorari, Mr. Chief Justice Rehnquist wrote:

> We granted certiorari to reexamine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause.[31]

Mr. Chief Justice Rehnquist began the Court's opinion with a review of *Meachum v Fano.* [32] After a series of arson fires, several inmates of a Massachusetts penitentiary were transferred from a medium to a maximum security institution though no one was charged. The prisoners brought suit alleging they had a 'liberty interest' in remaining in a medium security institution rather than being transferred to a maximum security prison. Their right to due process as established in *Wolff*, they argued, was violated

when prison officials effected the transfers without first conducting fact-finding hearings. Setting the stage for its opinion in *Sandin*, the Court, in *Meachum*, wrote strongly:

> We reject at the outset the notion that any grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause.[33]

Mr. Justice White, writing for the Court, continued:

> ...We cannot agree that *any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protections of the Due Process Clause...given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution.[34]

The Court further chipped away at the concept of a liberty interest being created in non-discretionary language in *Greenholtz v Inmates of Nebraska Penal and Correctional Complex*:[35]

> Decisions of the Executive Branch, however serious their impact, do not automatically invoke due process protection; there simply is no constitutional guarantee that all executive decision making must comply with standards that assure error-free determinations.[36]

Greenholtz dealt with the mandatory nature of Nebraska's discretionary parole program. The Court then moved to *Hewitt v Helms* which is more directly related. Helms was an inmate in a Pennsylvania prison where, in 1978, he was re-assigned to administrative segregation after a riot. Helms sued, stating Pennsylvania laws created a liberty interest in his staying in general population. In writing for the Court, then Mr. Justice Rehnquist stated,

> Respondent argues, rather weakly, that the Due Process Clause implicitly creates an interest in being confined to a general population cell, rather than the more austere and restrictive administrative segregation quarters. While there is little question on the record before us that respondent's confinement added to the restraint on his freedom...We have repeatedly said both that prison officials have broad administrative and discretionary authority over the institutions they manage and that lawfully incarcerated persons retain only a narrow range of protected lib-

erty interests.[37]

In reviewing Helm's disciplinary hearing before the prison authorities, the Court in *Hewitt* held:

> We think an informal, nonadversary evidentiary review is sufficient both for the decision that an inmate represents a security threat and the decision to confine an inmate to administrative segregation pending completion of an investigation into misconduct charges against him.[38]

The Court, in *Sandin*, was beginning to distinguish between what had begun as an earnest attempt to determine if an inmate had suffered a "grievous loss" in his or her conditions of liberty and its perversion by lower courts into a searching for "non-discretionary language" in the finding of a liberty interest:

> As this methodology took hold, no longer did inmates need to rely on a showing that they had suffered a 'grievous loss' of liberty retained even after sentenced to terms of imprisonment...For the Court had ceased to examine the 'nature' of the interest with respect to interests allegedly created by the State.[39]

The Court then came to the first of its major points in *Sandin: Hewitt* had produced two undesirable side effects. First, since the courts were concerning themselves with the language of prison regulations, they had created an incentive for prison officials to simply not write rules of management procedure hence leaving the treatment of prisoners to the unfettered discretion of prison guards.[40] Secondly, courts were being dragged into the daily operations of prison systems far in excess of what the Supreme Court felt was necessary and proper:

> ...federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment...Such flexibility is especially warranted in the fine-tuning of the ordinary incidents of prison life...[41]

The Court then moved to Conner's claim that the segregation was a punishment prior to, or in lieu of, a finding of guilt and that any punishment at the hands of correctional officials created a liberty interest; Conner cited *Bell v Wolfish:*[42]

> ...we think that the proper inquiry is whether those conditions amount to punishment of the detainee. For under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt...[43]

The Court quickly dismissed this contention by noting *Bell* dealt with pre-trial detainees and that neither *Bell* nor a collateral case, *Ingraham v Wright* [44] contained any such rule.[45] Mr. Chief Justice Rehnquist foreclosed Conner's argument, with respect to the punishment meted out to prisoners for violation of regulations, by holding the line established in previous opinions. Punishment is necessary for the proper management of prisons and furtherance of correctional goals.[46]

The Court went on, however, to note a distinction which may be very useful to sheriff's departments and prisons throughout the country. Mr. Chief Justice Rehnquist noted:

> This case, though concededly punitive, does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence...We hold that Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest. **The record shows that, at the time of Conner's punishment, disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody.**[47]
>
> [emphasis added]

A "liberal" interpretation of this portion of the Court's opinion could have a significant impact on the current disciplinary system. The Court ruled in *Wolff* that a person in the custody of the State has a liberty interest in being deprived of "good time" or being placed in disciplinary segregation. This liberty interest automatically triggers the procedural requirements, as set forth in *Wolff*, arising from the Due Process Clause.

In *Sandin*, significantly departing from *Wolff*, the Court states flatly that no liberty interest is created by an inmate's placement in disciplinary segregation if the conditions in disciplinary segregation "mirror" those in administrative custody and protective cus-

tody. Stretching just a bit farther, should no "good time" be taken from an inmate and the facilities remain relatively equal, the system of disciplinary procedures and hearings now in use by Sheriff's Departments throughout Texas are no longer required by the United States Supreme Court.

The Court closed its opinion in *Conner* by throwing out his claim a prison disciplinary record would inevitably lead to reduced prospects for parole, hence creating a liberty interest invoking the procedural requirements of *Wolff.* [48] The tone of *Sandin* is, perhaps, best summed by Mr. Chief Justice Rehnquist:

> The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum.* Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause...But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force...nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.[49]

CONCLUSION AND RECOMMENDATIONS

It appears that *Wolff* is the milestone with regard to custodial disciplinary proceedings against which all others are measured. The path to *Wolff* was paved through *Morrissey* then *Scarpelli*. *Wolff* sets two important standards.

First, the Court gave us clear, constitutional requirements with which to set up custodial disciplinary systems. Very little guess-work is left the local warden or chief jailer as to what the Court has mandated. Second is the "line in the sand" drawn by the Court from which subsequent decisions have not deviated: no confrontation or cross-examination of witnesses is required to operate within constitutional boundaries. Additionally, the inmate charged with an offense has no right to counsel during the proceedings.

Possibly more important is the "tone" of the Court beginning with *Wolff* and continuing through *Sandin*. It is the province of senior correctional officials to decide what best suits the safety and security of their inmates, staff and facilities. It appears the Court goes to great lengths in begging off entering the "prison door" and feels federal resources are best put to other uses.

Wolff continues to represent the course the Supreme Court intended correctional officials to follow. *Sandin* is the messenger sent by the Court directing us out of the confusion and fog generated by the search for non-discretionary language presented in *Helms*, back to the determination of actual 'grievous loss.' *Sandin* does not weaken the decision in *Wolff*, it strengthens it.

Additionally, *Sandin* gives us the doctrine that, should conditions in disciplinary segregation closely match those of both administrative segregation and protective

custody, no liberty interest is created, hence due process questions are significantly weakened. Again, a liberal reading would indicate the *Wolff* procedures are no longer required should the punishment consist solely of disciplinary segregation or other, lesser, measures.

Chapter 283: Discipline and Grievances, of the Minimum Jail Standards Manual, required by the State of Texas for the discipline of inmates, not only mirrors the standards set forth in *Wolff*, but is sometimes word–for–word identical.[50] Regardless of the latitude a 'liberal reading' of *Sandin* may allow us, the State of Texas holds us to a higher standard and renders any internal usage of this portion of *Sandin* moot at this time.

Two other issues bear address. First is the language in which our disciplinary rules are couched. The Harris County Sheriff's Department does not currently codify offenses into various levels of severity. While no "non-discretionary" directions are known to this author mandating a certain finding when presented with certain evidence, the disciplinary committee is vaguely told to, "Make a determination of guilty or not guilty/dismissed based on the proceedings."[51] The disciplinary committee follows a standardized regimen in conducting its business. If the inmate is found in violation then, weighing all the factors together, he or she is awarded the punishment deemed most appropriate. Punishment is given on a case–by–case basis which is found most suitable for all factors impacting that particular incident. With *Sandin* overturning *Helms*, whether or not the Sheriff's Department's disciplinary regulations meet *Helms'* tougher non-discretionary language requirements is now academic.

Secondly is the "neutrality of the board" required by the case law presented

here, the Minimum Jail Standards of the State of Texas,[52] and the Harris County Sheriff's Department System Plan.[53] Currently, inmate discipline is assigned to personnel in a separate bureau (a major organizational unit) who have no routine "floor" or "housing" duties. While this system appears eminently defensible as being neutral and detached, the author submits applicable case law and the Minimum Jail Standards are not nearly so strict. The Minimum Jail Standards require only that personnel convened as the disciplinary committee, "...shall not include anyone involved in the claimed violation or charges..."[54]

It appears the present administration is forming a troika to handle detention operations. The Central and 701 Jails each form separate commands, headed by a Major with a third, administrative/support bureau also headed by a member of the command staff. If there is administrative interest in reviewing current staff allocation with an eye toward shifting positions from detention to law enforcement duties, perhaps some thought may be given to re-deploying disciplinary and grievance responsibilities to personnel assigned to the Central and 701 Jails. Minimal records-keeping and procedural oversight responsibilities could be placed in the classification sections of each facility.

It would seem that if *Sandin* only reemphasizes the procedural requirements of *Wolff,* if the Texas Jail Commission's procedures closely follow *Wolff* and our disciplinary procedures recently passed an inspection by the Texas Jail Commission, we may well be wise, "not to fix that which ain't broken." The author respectfully submits that after a careful and considered lay review of *Sandin v Conner,* with respect to *Wolff v McDonnell* and other applicable case law, state regulations and current Harris County Sheriff's Department policy, nothing has been found indicating a change in the current

inmate disciplinary operations is mandated. However, some interesting possibilities do present themselves should the command staff desire them pursued.

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[26] *Sandin*, at 2295 – 2296

[27] *Sandin*, at 2294

[28] *Olim v Wakinekona*, 461 U.S. 238, at 249,103 S.Ct. 1741, 75 L.Ed.2d 813 (1983)

[29] *Hewitt v Helms*, 459 U.S. 460, at 472, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983)

[30] *Kentucky Department of Corrections v Thompson*,

490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506, at 516 (1989)

[31] *Sandin*, at 2295

[32] *Meachum v Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976)

[33] *Meachum*, at 458

[34] *Meachum*, at 459

[35] *Greenholtz v Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)

[36] *Greenholtz*, at 675

[37] *Hewitt*, at 685

[38] *Hewitt*, at 691

[39] *Sandin*, at 2298

[40] *Sandin*, at 2299

[41] *Sandin*, at 2299

[42] *Bell v Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)

[43] *Bell*, at 466

[44] *Ingraham v Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977)

[45] *Sandin*, at 2300

[46] *Sandin*, at 2301

[47] *Sandin*, at 2301

[48] *Sandin*, at 2302

[49] *Sandin*, at 2300

[50] *Minimum Jail Standards*, Texas Commission on Jail Standards, Austin, Texas (no date listed)

[51] *System Plan*, Harris County Sheriff's Department; Procedures for the Inmate Disciplinary Committee, Section IV. Procedures, Sub-section D(7). (no page number listed)

[52] *Minimum Jail Standards*, at Chapter 283.1(5)(C). page 229

[53] *System Plan*, Harris County Sheriff's Department; Procedures for the Inmate Disciplinary Committee, Section II. Members of the Committee, Sub-section B.3. (no page number listed)

[54] *Minimum Jail Standards*, at Chapter 283.1(5)(C). page 229