No. 122626

IN THE
SUPREME COURT OF ILLINOIS

AARON P. FILLMORE, B63343,	)	On Appeal from the Appellate Court of
	)	Illinois, Fourth Judicial District,
Plaintiff-Appellee,	)	No. 4-16-0309
	)	
	)	There on Appeal from the Circuit Court
v.	)	for the Seventh Judicial Circuit,
	)	Sangamon County, Illinois,
	)	No. 15 MR 915
GLADYSE TAYLOR, LIEF McCARTHY,	)	
and ELDON COOPER,	)	The Honorable
	)	RUDOLPH M. BRAUD,
Defendants-Appellants.	)	Judge Presiding.

CROSS-REPLY BRIEF OF APPELLEE

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ARGUMENT

Plaintiff-Appellee Aaron Fillmore seeks to reinstate several mandamus and certiorari claims alleging that Defendants Gladyse Taylor, Eldon Cooper, and Lief McCarthy violated the Illinois Department of Corrections' ("IDOC") regulations governing disciplinary proceedings, as well as Fillmore's due process rights. Fillmore demonstrated in his appellee brief ("Resp. Br.") that inmates may enforce IDOC's regulations, that Defendants had a mandatory duty to follow those regulations in Fillmore's disciplinary proceeding, and that they failed to do so, resulting in revocation of a year of good conduct credits, a year of segregation, and other punishment. The Appellate Court therefore erred in affirming dismissal of several of Fillmore's state-law claims and in failing to reinstate his federal constitutional claims.

Defendants ask this Court to deny cross-relief on several grounds. First, because IDOC's "regulations do not create enforceable rights for inmates." Reply 14. Second, because these regulations do not support a mandamus claim. *Id.* at 14-19. Third, because Fillmore's disciplinary hearing complied with due process. *Id.* at 20. And fourth, because the Court should remand to the Appellate Court for Defendants to file a rehearing petition. *Id.* at 20-22. As explained below, none of these reasons justifies denying Fillmore's requested cross-relief.

I. Fillmore Is Entitled To Cross-Relief Under Illinois Law.

A. Inmates May Enforce Regulations Governing Disciplinary Proceedings.

The Code of Corrections ("Code"), the Illinois Administrative Procedure Act ("IAPA"), and this Court's precedents establish that inmates may enforce IDOC's regulations governing disciplinary proceedings.

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First, Fillmore showed that the Code's plain language and history demonstrate the General Assembly's intent to make these regulations enforceable. The Code's purpose is "to 'prevent arbitrary or oppressive treatment of persons adjudicated offenders.'" Resp. Br. 11. Accordingly, the Code obligates IDOC "to issue regulations to 'establish disciplinary procedures' for 'disciplinary cases which may involve the imposition of disciplinary segregation and isolation[] [or] the loss of good time credit.'" *Id.* Furthermore, "'the disciplinary procedure by which [these penalties] may be imposed shall be available to committed persons.'" *Id.*

These provisions have effect only if IDOC's regulations for disciplinary proceedings are enforceable. Unenforceable regulations cannot "prevent arbitrary or oppressive treatment" of inmates. *Id.* at 11-12. As a practical matter, these regulations would be a nullity, as would IDOC's statutory duty to promulgate them. The same is true of IDOC's duty to make available the "disciplinary procedure by which" penalties "may be imposed." 730 ILCS 5/3-8-7(a). If these regulations are unenforceable, then IDOC could "impose[]" punishment using a "disciplinary procedure" other than the one it promulgated and made "available to committed persons."

Interpreting the regulations to be unenforceable therefore would violate Illinois's "bedrock law that a court 'must not read a statute so as to render any part superfluous or meaningless.'" Resp. Br. 11 (quoting *People ex rel. Ill. Dep't of Corr. v. Hawkins*, 2011 IL 110792, ¶ 23). Defendants' evasion of entire provisions is even more egregious than the interpretation rejected in *Hawkins*, where IDOC ignored a single statutory clause. *Id.* at 12.

Defendants do not dispute that the Code protects inmates from "arbitrary [and] oppressive treatment," that IDOC must promulgate and publicize the regulations

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Defendants violated here,[1] or that Defendants' interpretation conflicts with the Code's plain language. They also ignore *Hawkins* altogether. Through their silence, Defendants therefore concede that "[t]he only way to 'give effect to every word, clause, and sentence' of these provisions is to allow inmates to enforce IDOC's regulations." *Id.*

Beyond this interpretive principle, which defeats Defendants' argument, Fillmore showed that the Code's history supports the same conclusion. Inmates possess "'legitimate reliance interests . . . in their [good conduct] credits,'" and revoking those credits "'is one of the most serious negative consequences that can be directed to an inmate's behavior.'" *Id.* at 13. Thus, a principal goal of the General Assembly's sentencing reform in the 1970s was reducing "prison officials' 'broad discretion in revoking good-conduct credits as a penalty for prison rule infractions.'" *Id.* at 12. Respecting that intent requires curbing officials' discretion, not expanding it as Defendants request.

Defendants do not challenge this history; in fact, they agree "that the loss of good conduct credit time is a serious consequence." Reply 6. Yet Defendants assert that the Due Process Clause is inmates' only protection against unwarranted revocation of their credits. *Id.*

This position ignores the legislature's intention to *protect* good conduct credits by *limiting* prison officials' discretion. Defendants subvert that legislative aim by trying to resurrect the "broad discretion in revoking good-conduct credits as a penalty for prison rule infractions" that sentencing reform eliminated. *Lane v. Sklodowski*, 97 Ill. 2d 311, 317

[1] Defendants' contention that the latter provision is a "non sequitur" because "[d]isciplinary regulations were enacted to provide guidance to prison officials, not for the sole benefit of inmates" (Reply 5), conflicts with the Code's purpose to "prevent arbitrary or oppressive treatment of *persons adjudicated offenders*," 730 ILCS 5/1-1-2(c) (emphasis added), and also begs the question at issue in this appeal.

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(1983). Only by holding IDOC to its own regulations can the Court give effect to the General Assembly's intent, manifested in the Code's text and history, to "carefully circumscribe[] the authority of every public official charged with making any decision affecting the time of a prisoner's release." *Id.* at 318.

Second, Fillmore showed that enforcing the regulations governing disciplinary proceedings effectuates the IAPA. These regulations underwent notice and comment, which serves the "vital purposes" of "'ensur[ing] informed agency decisionmaking,'" "'encourag[ing] public participation in the administrative process,'" and "'ensur[ing] that the agency maintains a flexible and open-minded attitude towards its own rules.'" Resp. Br. 14. These benefits cannot be realized if the resulting rules have no practical effect. Moreover, interpreting the regulations to be unenforceable conflicts with the IAPA's command that "'[e]ach rule' adopted pursuant to notice and comment generally 'is effective upon filing.'" *Id.* A dead letter cannot be "effective."

Defendants do not dispute that these regulations must undergo notice and comment, that notice and comment serves indispensable purposes, or that interpreting the regulations to be unenforceable would frustrate those purposes. Defendants concede that a rule becomes "effective" upon filing, and do not disagree that an unenforceable rule is not "effective." Their sole rejoinder is that a rule's effectiveness does not make it "judicially enforceable at the behest of any particular class of would-be plaintiffs." Reply 7. But Fillmore showed, and Defendants do not disagree, that only inmates will enforce these regulations. Resp. Br. 11. Inmates must enforce these rules if they are to be enforced at all.

Third, Fillmore showed that Illinois's courts have long allowed inmates to enforce prison regulations affecting their confinement status. This Court held that prison

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regulations create enforceable rights half a century ago in *People ex rel. Abner v. Kinney*, 30 Ill. 2d 201 (1964). The Court granted mandamus to compel a parole hearing for which a regulation made the inmate eligible. Resp. Br. 15. Under a Parole Board policy, only inmates who achieved a certain merit classification, determined by prison officials, received hearings. *Id.* Mandamus was warranted, the Court held, because "the Parole Board had 'a mandatory duty to hear [the inmate's] application for parole'" "once [he] became 'eligible for parole' under the . . . regulation." *Id.* The Court thus recognized and vindicated the inmate's right to enforce prison regulations affecting the duration of his incarceration.

Defendants contend that *Kinney* involved only "a claim that a regulation [wa]s facially in excess of the statutory authority granted to a department or agency" because "the parole board had enacted rules that 'change[d] the statutory provisions of eligibility for parole.'" Reply 8. But as Fillmore explained, this argument conflates the inmate's *right* to a parole hearing (the regulation) with the *impediment* to that right (the Parole Board policy). Resp. Br. 21. In fact, *Kinney*'s statutory-regulatory framework mirrors the one in this case, for the Sentence and Parole Act made parole generally available but left the particulars of eligibility to "rules and regulations." 30 Ill. 2d at 202. Contrary to Defendants' suggestion, it makes no difference that the Parole Board subverted the regulation by means of a rule. Simply ignoring the regulation (as Defendants did here) would have equally frustrated the inmate's right to a hearing, but on Defendants' reading, the Parole Board could have done just that.

Regardless, Fillmore showed that the Court has twice reaffirmed the enforceability of prison regulations in cases *not* involving a rule that exceeded an agency's statutory authority. Resp. Br. 15-16. *People ex rel. Johnson v. Pate* held that a parolee incarcerated

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for alleged parole violations could not seek habeas corpus, but could pursue mandamus to "direct[] the Parole . . . Board to comply with . . . its own Rule" requiring "an administrative hearing on . . . whether [the parolee] ha[d] violated the conditions of his parole." 47 Ill. 2d 172, 176-77 (1970). Similarly, *People ex rel. Tucker v. Kotsos* held that parolees are not entitled to bail but may seek mandamus "to enforce the . . . right to a reasonably prompt final revocation hearing." 68 Ill. 2d 88, 99 (1977). No fewer than three times, then, this Court has authorized inmates to enforce the rules of proceedings affecting the duration of their incarceration. Fillmore also showed that the Appellate Court frequently allows inmates to enforce IDOC's regulations through mandamus and certiorari. Resp. Br. 16-17.

Lacking contrary authority from this Court, Defendants argue that *Kinney*, *Pate*, and *Kotsos* did not "involve[] inmates suing to enforce internal Department regulations governing disciplinary proceedings," and therefore establish only that "an inmate may seek an order of mandamus to ensure that parole (or parole revocation) hearings take place when they are required by statute." Reply 9.

But this misstates the facts of these cases. In each, a regulation—not a statute—provided for a hearing. *See Pate*, 47 Ill. 2d at 176 ("Rule 21 of the Rules and Regulations of the Parole and Pardon Board provides for an administrative hearing . . . ."); *Kinney*, 30 Ill. 2d at 202 ("The 'good time' regulations . . . provide that a person serving an indeterminate sentence with a minimum of 15 years is eligible to receive a parole hearing after he has served 8 years and 9 months."); *see also Kotsos*, 68 Ill. 2d at 99 (citing *Pate*).

Defendants' distinction is fictitious anyway. Sentencing reform "abolished the Parole and Pardon Board," replacing its former "broad powers to establish a prisoner's date of release" with a "determinate-sentencing system" where "the time of early release is fixed

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by operation of law." *Lane*, 97 Ill. 2d at 317. Good conduct credits are integral to this system, *see id.*, and a hearing to revoke credits is thus equivalent to a parole hearing.

The final attempt to undercut these precedents dovetails with Defendants' primary argument on appeal: that *Sandin v. Conner*, 515 U.S. 472 (1995), and *Ashley v. Snyder*, 316 Ill. App. 3d 1252 (4th Dist. 2000), identify "undesirable effects" of enforcing prison regulations and therefore "cast doubt on the continuing vitality of the cases relied on by Fillmore." Reply 8.

But *Ashley* cannot affect the "vitality" of *Kinney* and its progeny because "[t]he appellate court lacks authority to overrule decisions of this [C]ourt." *People v. Artis*, 232 Ill. 2d 156, 164 (2009). Furthermore, Defendants do not dispute that their argument invites this Court to violate *stare decisis*. Resp. Br. 21 ("There is 'no merit' to Defendants' suggestion that this Court's unbroken line of precedent is 'an "antiquated formality" which justifies a departure from *stare decisis*.'").

Defendants also are wrong on the merits. Fillmore showed that *Sandin*, which held that a Hawaii regulation concerning solitary confinement created no federal liberty interest, does not control in this case. The Supreme Court applied federal, not state law. Resp. Br. 23. If anything, *Sandin* encouraged the enforcement of inmates' rights under state law. *Id.* And unlike the inmate in *Sandin*, Fillmore undisputedly has a liberty interest in his good conduct credits. *Id.* at 24.

Defendants agree that *Sandin* "states that inmates 'may draw upon . . . state judicial review *where available*,'" but contend that this "begs the question whether state-court review is available." Reply 11-12. But if the Supreme Court's policy rationales for rejecting the constitutional claim in *Sandin* also impaired inmates' state-law rights, then "state

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judicial review" would *never* be available, meaning *Sandin*'s footnote would be nonsense. 515 U.S. at 487 n.11.[2] And the *Kinney* line of cases establishes that, under Illinois law, judicial review *is* available when inmates seek to enforce regulations affecting the duration of their confinement.

Nor can *Ashley* bridge the gap between *Sandin* and Illinois law. *See* Reply 2-3. Fillmore explained that the relevant part of *Ashley*, like *Sandin*, interpreted only the Due Process Clause. Resp. Br. 24. And *Ashley* did not involve a disciplinary proceeding, much less the revocation of good conduct credits. *Id.* Finally, the inmate there relied on his facility's orientation manual rather than IDOC regulations. *Id.* With no reason to consider the enforceability of those regulations, *Ashley*'s "Epilogue"—that "prison regulations . . . were never intended to confer rights on inmates"—is dicta. *Id.* at 24-25.

Defendants concede that *Ashley* was about "a due process claim based on an alleged property interest created by a prison orientation manual." Reply 3. Nevertheless, Defendants argue that subsequent Appellate Court decisions applied *Ashley* to IDOC regulations. *Id.* at 3, 10-11. But the Appellate Court cannot overrule this Court's decisions allowing inmates to enforce rules affecting their confinement status. *Supra*, p. 7. Furthermore, as Fillmore has already explained, these cases merely parroted *Ashley*'s dicta without independent analysis. Resp. Br. 26. And none involved a disciplinary proceeding—they concerned only ordinary elements of prison life such as commissary prices. *Id.* Defendants address none of these deficiencies; they merely repeat that these cases "cited

[2] Defendants' reading is also irreconcilable with *Sandin*'s acknowledgment that state law can "create liberty interests which are protected by the Due Process Clause." 515 U.S. at 483-84. The Supreme Court could not have rendered state prison regulations entirely unenforceable if it did not even rule out enforcing them as a *constitutional* matter.

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Ashley and reiterated . . . that prison regulations do not create enforceable rights." Reply 10 (emphasis omitted).

Defendants also contend that *Ashley*'s "Epilogue" is not dicta (Reply 11), but they fail to explain how the discussion of IDOC's regulations was "necessary to the court's holding" that an orientation manual creates no constitutional liberty interest. *1350 Lake Shore Assocs. v. Healey*, 223 Ill. 2d 607, 626 (2006). In fact, Defendants concede that the *Ashley* plaintiff brought only "constitutional and statutory claims" and did not seek to enforce regulations. Reply 11. Accordingly, it does not matter whether the Epilogue was "carefully considered" or whether other appellate decisions "did not consider it dicta*.*" *Id.* A case's holding is "determined not from the opinion rendered but from a consideration of the judgment actually entered in reference to the issues presented for decision," *People ex rel. Scott v. Chicago Park Dist.*, 66 Ill. 2d 65, 70 (1976), and *Ashley*'s judgment had nothing to do with IDOC's regulations.

Defendants urge that the "policy considerations underpinning *Sandin* and *Ashley* apply with equal force to state-law claims." Reply 12. As Fillmore showed, however, these policies—deferring to prison administrators, avoiding flooding the courts, and encouraging codification of prison regulations—cannot override the General Assembly's stated intent. Resp. Br. 27.

And even if these policies could somehow prevail over the legislature's plain language, they would not support Defendants' position here. First, Fillmore showed—and Defendants do not dispute—that deferring to prison administrators requires *enforcing* IDOC's regulations, not allowing individual officers to ignore those regulations at will. Resp. Br. 29. Refusing to enforce IDOC's rules for disciplinary proceedings would

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undermine, rather than defer to, IDOC expertise. Fillmore also demonstrated that his disciplinary hearing was not an "'urgent problem[] of prison administration and reform' that prison officials are specially equipped to handle." *Id.* at 27. Defendants charge that Fillmore "never explains why this is so" (Reply 12), but he showed that Defendants' supporting cases upheld only regulations necessary to eliminate security threats such as prison violence and contraband. Resp. Br. 27-28. Although Defendants point out that "security concerns . . . may arise" in "prison disciplinary proceedings" (Reply 12), nothing in the record shows that Fillmore's hearing posed a security risk, and courts will not presume the existence of a risk "'unless DOC specifically says so.'" Resp. Br. 45. Finally, courts are at least as competent as prison officials to review disciplinary hearings' compliance with procedural requirements, for "[a]dministrative 'adjudication resembles what courts do in deciding cases.'" *Id.* at 28. Defendants do not disagree.

Second, enforceable regulations will not burden the courts. As Fillmore showed, inmates have been enforcing the rules of administrative proceedings affecting confinement status since *Kinney*. *Supra*, pp. 4-6; Resp. Br. 29. In that time, Illinois courts have capably avoided Defendants' parade of horribles. Indeed, the Appellate Court's holding in this case was applied to affirm the dismissal of a mandamus petition challenging photocopy prices. Resp. Br. 29-30 (citing *Cebertowicz v. Baldwin*, 2017 IL App (4th) 160535). Cases like *Cebertowicz*, and the fact that officials already must comply with IDOC regulations, refute Defendants' assertion that enforcing these regulations will "interfere[] with the ability of prison officials to administer their facilities." Reply 13-14.[3]

[3] Defendants' insistence that *Cebertowicz* "[e]rased" "any doubt that the court's holding swept beyond regulations concerning disciplinary proceedings" (Reply 13) blinks reality.

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The argument that enforcing prison regulations will disincentivize their codification fares no better. Fillmore showed that IDOC cannot refrain from promulgating regulations for disciplinary proceedings because the Code requires them. Resp. Br. 30. And enforcing these regulations is the only way to avoid the "standardless discretion" Defendants decry. *Id.* Defendants challenge none of these points.

B. Defendants' Additional Arguments For Denying Cross-Relief Are Meritless.

Because inmates may enforce regulations governing disciplinary proceedings, Fillmore is entitled to cross-relief on five claims for violating those regulations: (1) Defendants' failure to appoint a hearing investigator to review Fillmore's disciplinary report, (2) Defendants' failure to explain the denial of his witnesses in writing, (3) Defendants' refusal to allow him to present relevant evidence, (4) Defendants' failure to notify him of facts presented against him, and (5) the disciplinary committee ("Committee") members' refusal to recuse themselves despite admitted bias. Each states a claim for mandamus and certiorari, and the Appellate Court erred in affirming dismissal.

1. Fillmore showed that 20 Ill. Admin. Code 504.60(a)[4] requires a hearing investigator to review "major" disciplinary reports, and that Fillmore's disciplinary report was "major" as a matter of law because the alleged violations are "major offense[s]" under the IAC. Resp. Br. 31-32. The Appellate Court erroneously concluded that determining whether a disciplinary report is "major" is discretionary rather than controlled by regulation.

[4] Unless otherwise indicated, all references are to the 2003 version of the Illinois Administrative Code ("IAC"), which was in effect at the time of Fillmore's hearing.

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Defendants do not dispute these points, arguing only that this regulation is "directory" rather than "mandatory." Defendants contend that "procedural commands to government officials" are presumptively directory unless "(1) negative language in the statute prohibits further action in the case of noncompliance or (2) the right the statue is designed to protect would generally be injured under a directory reading." Reply 16 (quoting *Round v. Lamb*, 2017 IL 122271). Because the hearing-investigator regulation fulfills neither condition, Defendants argue, it is unenforceable. *Id.* at 16-17.

This argument suffers from several flaws. First, *Round* interpreted a statute whose legislative history made clear that it "was designed to provide greater clarity for the Department of Corrections." 2017 IL 122271, ¶ 15. Here, the Code's language and history show that it protects "persons adjudicated offenders" from "arbitrary or oppressive treatment." 730 ILCS 5/1-1-2(c). So unlike *Round*, where a directory reading was "consistent with" the statute's other provisions (2017 IL 122271, ¶ 17), interpreting the rules for disciplinary proceedings as directory would conflict with the Code.

Second, these regulations satisfy both parts of *Round*'s test. As Fillmore explained, the Code provision requiring IDOC to make available "'the disciplinary procedure by which . . . penalties may be imposed'" indicates that "'penalties may' *not* 'be imposed'" according to any other procedure. Resp. Br. 11. Thus, the Code "prohibit[s] further action in the case of noncompliance." *Round*, 2017 IL 122271, ¶ 13.

These regulations protect rights that will "generally be injured" if the regulations are unenforceable. In *Round*, where an inmate unsuccessfully argued that a supervised release term omitted from his sentencing order was invalid, the Court relied on the availability of an alternate procedure "to protect the rights of persons being sentenced"—

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the requirement that defendants "be admonished of the full consequences before pleading guilty." *Id.* ¶ 15. No other procedure exists to protect the rights secured by these regulations. If officials refuse to follow the rules, those rights are lost.

Defendants contend that Fillmore's rights were not injured because due process does not require the protections the regulations create. Reply 17. But the regulations establish safeguards *beyond* those required by due process. For instance, although due process does not require it, the IAC mandates that "a written reason shall be provided" "[i]f any witness request is denied." 20 Ill. Admin. Code 504.80(h)(4).[5] As with the Code, Defendants are ignoring intentional drafting choices. And it is no answer to the loss of these rights that inmates may receive some lesser protection.

Third, cross-relief is proper even if the regulations are directory. "[R]elief for a violation of a directory rule" is available where the injured party "show[s] [that] he was prejudiced." *Round*, 2017 IL 122271, ¶ 16. Taking his allegations as true, Fillmore has made that showing. Among other punishments, Fillmore lost a year of good conduct credit and spent another year in solitary confinement because of his deficient hearing. Resp. Br. 7; C10. Defendants admit that this punishment "is a serious consequence." Reply 6. Because Fillmore has shown that Defendants' violations of IDOC's regulations prejudiced him, he is entitled to cross-relief even if those regulations are directory.

2. Fillmore explained that 20 Ill. Admin. Code 504.80(h)(4) requires "'a written reason'" for denying any witness request. Resp. Br. 32-33. He requested witnesses twice: first in a written hearing request and then in his written defense. *Id.* at 33. Despite these

[5] IDOC heeded the Supreme Court's advice that "it would be useful for the Committee to state its reason for refusing to call a witness." *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974).

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requests, the Committee incorrectly indicated that Fillmore requested no witnesses. *Id.* The Appellate Court recognized that there are two types of witness request—one for an interview and one to appear at a hearing—but erroneously construed Fillmore's requests, which cited both regulations, as ambiguous. *Id.* at 33-34.

Defendants do not contest most of these points. They suggest that cross-relief should be denied because "the Committee's report noted that no witnesses were requested" (Reply 17), but do not dispute that this finding conflicts with the record because Fillmore did request witnesses. And Defendants' argument that this regulation is directory, and therefore unenforceable, fails for the reasons explained above. *Supra*, pp. 12-13.

3. Next, Fillmore explained that 20 Ill. Admin. Code 504.80(f)(1) allows an inmate to "'produce any relevant documents in his or her defense'" in a disciplinary proceeding, which creates a ministerial duty to allow the inmate to review such documents. Resp. Br. 34. Defendants violated this duty by refusing to let Fillmore review the evidence against him. The Appellate Court's conclusion that determining relevance is discretionary was no basis for denying relief because Defendants conceded the evidence's relevance by using it against Fillmore. *Id.*

Defendants argue that "this regulation imposes no duty on any Department official to act" because "it explains only what the inmate may present during the hearing, not what evidence the Department must allow the inmate to see." Reply 18. This objection makes little sense. Authorizing an inmate to present evidence correspondingly forbids prison officials to prevent the inmate from doing so. And Defendants do not (and cannot) explain how an "inmate may present [evidence] during the hearing" that officials have not "allow[ed] the inmate to see."

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4. Fillmore explained that 20 Ill. Admin. Code 504.80(b) requires "'written notice of the facts and charges being presented against [the inmate]'" at least 24 hours before the hearing. Resp. Br. 35. The charging report did not mention Fillmore's purported Offender Tracking System ("OTS") status establishing his membership in a security threat group, yet the Committee relied on this fact in its final report. *Id.* Thus, Fillmore did not receive "written notice" of the relevant "facts . . . being presented against him."[6]

Defendants concede that "the disciplinary report did not mention the OTS [status]" but oppose cross-relief because (1) Fillmore received the notice the regulation requires, and (2) the disciplinary report adequately informed Fillmore "of the nature of the charges against him." Reply 18-19.

Both arguments misread the regulation. The first improperly equates the regulation with a due process requirement, even though the regulation requires notice of "the *facts and charges* being presented against" the inmate (20 Ill. Admin. Code 504.80(b) (emphasis added)), rather than "notice of the claimed *violation*" (*Wolff*, 418 U.S. at 563 (emphasis added)). This plain language also defeats Defendants' second argument, because the regulation requires notice of more than the "charges against [Fillmore]."[7] Because Fillmore's OTS status is a "fact[]" "presented against him," he did not receive proper notice. 20 Ill. Admin. Code 504.80(b).

[6] The Appellate Court never addressed this claim. Resp. Br. 35-36.

[7] Both cases Defendants cite (Reply 19) involved due process rights, and only one involved an Illinois inmate. *Northern v. Hanks*, 326 F.3d 909, 909 (7th Cir. 2003) (affirming dismissal of Indiana inmate's habeas petition "claiming that prison officials violated his due process rights when they failed properly to notify him of a disciplinary charge"); *Armstrong v. Snyder*, 336 Ill. App. 3d 567, 569 (4th Dist. 2003) (plaintiff alleged "that he was denied due process in [his] disciplinary hearings").

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5. Fillmore showed that 20 Ill. Admin. Code 504.80(d) "forbid[s] '[a]ny person . . . who is . . . not impartial' to 'serve on the . . . Committee.'" Resp. Br. 36. Fillmore further explained that someone who finds the accused guilty after agreeing to do so is not impartial as a matter of law. *Id.* Thus, Cooper and McCarthy's refusal to recuse themselves despite being instructed to find Fillmore guilty and revoke his good conduct credits, among other things, violated IDOC's regulation.

Defendants contend that Cooper and McCarthy are presumed to be fair unless Fillmore shows they could not "judg[e] [the] particular controversy fairly on the basis of its own circumstances." Reply 19. Fillmore has not done so, Defendants argue, because there were "numerous pieces of evidence forming the basis of the Committee's decision." *Id.* But the evidence against the accused is unrelated to the decision-maker's impartiality. Under Defendants' rule, a decision-maker need only be impartial when the evidence is thin. In any event, Fillmore's allegation—which must be taken as true—that the Committee was ordered to, and did in fact, prejudge his case overcomes any presumption of fairness.[8]

II. The Court Should Reinstate Fillmore's Constitutional Claims.

The Court should reinstate Fillmore's claims that Defendants violated his due process rights in addition to his rights under Illinois law. Fillmore explained that he has an undisputed liberty interest in his good conduct credits (Resp. Br. 38), and that Defendants violated his due process rights by refusing to let him call witnesses and present evidence in his defense, and by depriving him of an impartial decision-maker.

[8] This allegation distinguishes Fillmore's case from *Wolin v. Department of Financial & Professional Regulation*, where an agency was not biased because the decision-maker had not "made any judgments regarding the merits of the case in advance of hearing it." 2012 IL App (1st) 112113, ¶ 34 (cited at Reply 19).

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Fillmore demonstrated that the Committee may not "'prevent [him] from offering material evidence.'" *Id.* at 39. The Committee violated Fillmore's right by unjustifiably refusing to call his witnesses—indeed, the Committee incorrectly stated that Fillmore requested no witnesses. *Id.* at 40. Defendants did not defend this erroneous finding, but instead offered three new justifications—that Fillmore did not complete a witness request form, he inadequately described the witnesses' expected testimony, and calling the witnesses would have been dangerous and cumulative. *Id.* at 41. These reasons are not properly before the Court, Fillmore showed, because the Committee did not rely on them. *Id.* Defendants' *post hoc* justifications also fail on their merits because the witness request form is not required for witnesses to appear at a hearing, Fillmore sufficiently explained his witnesses' expected testimony, the pleadings and record do not suggest that calling Fillmore's witnesses was dangerous, and their testimony would not have been cumulative. *Id.* at 42-44.

Next, Fillmore explained that the Committee violated his right to "'have exculpatory evidence disclosed'" and considered by rejecting Fillmore's request to review and present notes he allegedly wrote concerning his security threat group membership, recordings of alleged phone conversations about the same topic, and logs of those alleged calls. *Id.* at 45. The Committee said nothing about these denials in its report, so Defendants again manufactured after-the-fact justifications—that showing Fillmore the notes was a security risk, the call logs were irrelevant because only the content (rather than the dates) mattered, and Fillmore could describe the calls without the recordings. *Id.* at 45-46. These reasons are not properly before the Court either, and also fail on their merits. First, withholding the notes used as evidence against Fillmore because he denied writing them

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turns due process on its head. *Id.* at 46. Second, the call logs were relevant to show that the calls never happened. *Id.* And third, Fillmore could not corroborate his account of the alleged calls, or rebut Defendants' selective quotations, without the recordings. *Id.* at 46-47.

Finally, Fillmore showed that Defendants violated his right to an impartial decision-maker. *Id.* at 47. Fillmore explained that Cooper told him the Committee had been directed to find Fillmore guilty, "'revoke a year good conduct credits,'" and "'impose punitive segregation and other punitive sanctions for a year.'" *Id.* at 47-48. This prejudging of Fillmore's case was "an 'obvious' violation of due process." *Id.*

In a single paragraph, Defendants refer the Court to their opening brief and assert without elaboration that Fillmore "received all of the due process protections provided to him by *Wolff*." Reply 20. By failing to address Fillmore's arguments, Defendants have forfeited any opposition. *See Hammond v. N. Am. Asbestos Corp.*, 97 Ill. 2d 195, 209-10 (1983) (party waived issue by not responding to opponent's argument). Regardless, Defendants are mistaken for the reasons just discussed.

Importantly, holding that Fillmore has stated a claim for due process violations does *not* dispose of his state-law claims. Defendants do not dispute that where Illinois law is more protective than the Due Process Clause, Fillmore may obtain relief on his state-law claims even if he does not prevail on his constitutional claims. Resp. Br. 37 n.8.

III. The Appellate Court Correctly Refused Defendants' Rehearing Petition.

The Court should reject Defendants' argument that the Appellate Court erred in refusing to accept their rehearing petition under Supreme Court Rule 367(e). Fillmore showed that the Court should not decide this issue because Defendants request no affirmative relief. On the contrary, they "admit that a remand for filing of their rehearing

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petition 'would be a waste of judicial resources' and ask this Court 'instead' to 'decide the merits' of this case." Resp. Br. 48. Deciding this issue would amount to an advisory opinion, or at least "'would not result in appropriate relief.'" *Id.*

In reply, Defendants again concede that "a remand to the appellate court to rule on the petition for rehearing would be a waste of judicial resources." Reply 20. Nonetheless, Defendants suggest that the "issue is not moot" because they requested remand to file their rehearing petition as "alternative relief." *Id.*

This half-hearted response underscores that deciding this issue "would not result in appropriate relief." Furthermore, Defendants do not dispute that their rehearing petition, which rehashed the arguments about *Sandin* and *Ashley* that Defendants presented the first time around, violated Rule 367(b) and therefore would not have warranted rehearing. Resp. Br. 48-49 n.11.

If the Court reaches the issue, Fillmore showed that Rule 367(e)'s text, history, and commentary require rejecting Defendants' rehearing petition. The rule bars additional rehearing petitions once the Appellate Court "'has acted upon a petition for rehearing and entered judgment on rehearing.'" Resp. Br. 49. Both conditions were satisfied here, as the Appellate Court "acted upon" Fillmore's first-filed petition by denying it and "entered judgment on rehearing" by entering the order denying rehearing. *Id.* The 2005 amendment to the rule, which substituted "acted upon" for "granted," confirms that Defendants are wrong that the Appellate Court "acts upon" a petition only by granting it. *Id.* at 50. And the commentary to Rule 367(e) states that there is "'no need for further consideration'" of a case once the Appellate Court has considered it "'initially and a second time on

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rehearing.'" *Id.* at 51. As Fillmore explained, the denial of rehearing is just as much a second consideration as a grant. *Id.*[9]

Defendants contend that Rule 367(e) permits each party adversely affected by a judgment "to timely file a petition for rehearing so long as the court has not already granted a petition for rehearing and entered judgment on rehearing." Reply 21. Here, Defendants ignore Rule 367(e)'s plain language and try to undo the 2005 amendment by replacing "acted upon" with "granted." But the Court "'may not' 'reinsert language' that was 'affirmatively removed.'" Resp. Br. 50.[10]

Defendants also contend that the commentary to Rule 367(e) supports their interpretation because the Appellate Court does not "consider" a case a second time when it "denies a rehearing petition without calling for an answer." Reply 21. But the Committee Comments do not mention answers to rehearing petitions in discussing Rule 367(e).

Fillmore showed that Defendants' reading of Rule 367(e) would permit unlimited rehearing petitions in most cases, for the rule's bar on successive rehearing petitions would apply only in the rare case when the Appellate Court grants a rehearing petition. Resp. Br. 50-51. Defendants do not meaningfully respond, claiming only that they "are not urging that parties be given unlimited rehearing petitions." Reply 21-22. But they do not dispute that this would be the result of their interpretation.

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[9] Defendants do not challenge Fillmore's showing that their interpretation of Rule 367(e) contravenes this Court's decision in *A.J. Maggio Co. v. Willis*, 197 Ill. 2d 397 (2001), which held that amending a judgment on rehearing barred the filing of another rehearing petition. Resp. Br. 51.

[10] Rule 367(d), which prohibits answers to rehearing petitions "unless requested by the court or unless the petition is granted," shows that the rules' drafters knew how to link filings to a grant of rehearing. The use of "acted upon" instead of "granted" is a deliberate choice *not* to limit the scope of Rule 367(e).

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Nonetheless, Fillmore agrees that each aggrieved party should be allowed to file a rehearing petition, and he showed that the proper means to accomplish that objective is amending the rule. Defendants do not dispute that amendment is available, or that it would allow the Court to "'benefit' from the 'public hearing process before [it] decide[s] whether to amend the rule.'" Resp. Br. 52. Accordingly, the Court should decline Defendants' invitation to subvert Rule 367(e)'s text and history.

CONCLUSION

The Court should reverse the Appellate Court's judgment to the extent that it affirmed dismissal of Fillmore's mandamus and certiorari claims premised on 20 Ill. Admin. Code 504.60(a), 504.80(b), 504.80(d), 504.80(f)(1), and 504.80(h)(4). The Court also should reinstate Fillmore's federal constitutional claims. The Court should not remand to the Appellate Court for Defendants to file a rehearing petition.

The case should be remanded for additional proceedings consistent with the relief requested here and in Fillmore's opening brief.

January 7, 2019

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,993 words.

/s/ Peter B. Baumhart
Peter B. Baumhart

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CERTIFICATE OF FILING AND SERVICE

I certify that on January 7, 2019, I electronically filed the foregoing Cross-Reply Brief of Appellee with the Clerk of the Court for the Illinois Supreme Court by using the Odyssey eFileIL system.

I further certify that all counsel of record were electronically served through the Odyssey eFileIL system, which sent notice of the filing to Kaitlyn N. Chenevert at the following email addresses: CivilAppeals@atg.state.il.us and kchenevert@atg.state.il.us.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Peter B. Baumhart
Peter B. Baumhart

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