ORIGINAL

IN THE SUPREME COURT OF NORTH DAKOTA

20060074

CASE No. 20060074

LeRoy K. Wheeler,
Petitioner,

vs.

Tim Schuetzle, Warden of North Dakota State Penitentiary, Leann K. Bertsch, Director of Department of Correction & Rehabilitation and Wayne K. Stenehjem, Attorney General,

Respondents.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

APR 25 2006

STATE OF NORTH DAKOTA

REPLY BRIEF

FOR PETITIONER

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LAW AND ARGUMENT

Inreply to Mr. Sorensons responce, Mr. Wheeler says that he does have a state created right to goodtime credits and the state also recognizes that right by sanctioning Wheeler to stop all goodtime until in compliance with their staff recommended treatment. The United States Supreme Court supports Mr. Wheelers argument in Wolff v. McDonnell 418 U.S. 539, 557 (1974), citing, Restraunt Workers v. McElroy 367 U.S. 886, 894 (1961), where the court said;

> But the state having created the right to goodtime and itself recognizing that its deprivation is a sanctoin authorized for major misconduct, the prisoners interest has real substance and is sufficiently embraced within 14th 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.

and good time credits brings a liberty interest because it brings Wheelers release date sooner than without it, and the denial of the goodtime credits simply for invoking his 5th Amendment privilege is constitutionally prohibited. A sanction is given for major misconduct, and invoking the 5th Amendment privilege is not major misconduct. NDSP simply wants to compel a confession from Wheeler for a crime he did not commit for the sole

purpose of financial gain through their treatment department.

Mr. Sorenson cites McKune v. Lile 536 U.S. 24 (2002), and in that case the prisoner was not suffering the loss of goodtime cerdits or the loss of parloe eligibility or any liberty status at all and he also served most of his sentence. These cases do not apply to Wheeler, because Wheeler is suffering the loss of goodtime credits, (App. A page 8), and the threat of loss of parloe eligibility, (App. A p. 26), and these losses fall within the liberty portion of the 14th Amendment and supported by Sandin v. Conner 515 U.S. 472 (1995), where they said liberty interests will be limited to freedom from restraint.

In the case at bar, lost goodtime and parole eligibility for invoking Wheelers 5th Amendment privilege would create a significant hardship.

In the McKune case the court said: broad range of choices that might infringe constitutional rights in free society fall within expected conditions of confinement of those who have suffered a lawful conviction. In the case at bar, Wheelers conviction is on direct appeal and is far from a lawful conviction. In fact there is no evidence of any kind that proves a crime was even committed and the testimony was coerced making it unreliable. Wheelers conviction rests solely on prejudice due to the nature of the charge.

In the sex offender treatment program they require the participants to take full responcibility for the charges convicted of. Wheeler was not found guilty on any evidence, only a suspicion, and if Wheeler maintains his innocence he cannot take responcibility for a crime that never occured. His conviction was not founded on total certainty that the crime actually occurred. The treatment program will kick participants out for not taking total responcibility for the crime and call it non-compliant, so it is the same as not taking it at all. Mr. Sorensons claim that Wheeler is just simply denying the benefit of the goodtime offered by DOC&R is simply a false presumption. The fact here is , is that the alleged crimes never occurred and Wheeler cannot for DOC& R's financial gain take responcibility for a crime that never occurred and if Mr. Sorenson continues to believe the crime did occur then that shows he is blinded by the prejudice that surrounds the nature of the charge as well. The conviction will be overturned and to take responcibility in the program would no doubt be used to prosecute at a latter date.

On the second subject Mr. Sorenson says that Wheeler has had abilities to file motions in the courts citing, Wheeler v. Jahnke 2005 ND 57, 694 NW2d 22, and Wheeler v. Gardner 2006 ND 24, 708 NW2d 908, but deceives the court by withholing the fact that those cases were filed from

Grandfoks County Jail not from NDSP and therefore does not show that Wheeler has had access to the courts

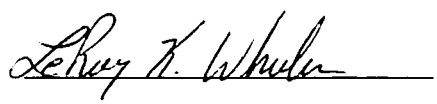
Mr. Sorenson claims that Wheeler has not shown any actually from denial of access to the courts but he obviously has not read the App. A and App. B. In App. A pages 19, 24 & 35 Wheeler shows the court that Schuetzle has in his own handwriting and signed that Wheeler would only be given a $4.00 limit on credit for legal expenses per month, and by looking at Wheelers institutional pay on page 11 of this brief, he is only making approximately $43.00 per month prior to deductions. It also shows that Wheeler owes for legal expenses, $184.00. At $4.00 per month it would take approximately 46 months to file those papers, thats almost 4 years. N.D.R.Crim.P. 31 only allows 40 days after the delivery of the transcripts. In the attached addendum Wheeler managed to get Penny Miller to write a letter compelling Schuetzle to provide the appropriate number of copies needed for Wheelers direct appeal. Handwritten on the letter is Schuetzles responce to Wheeler from this corrospondance. See p. # 14. Wheeler also requested Schuetzle to arrange with administrative Services to make the copies because they were refusing. Schuetzles responce left it open as far as what was to be copied, so Wheeler first sent in the appendix for this petition in the case at bar, and that is the only reason that Wheeler was able to file the petition and appendix because Wheeler originally planned

to file it in November 2005, but was hindered by NDSP policies. This court must rule on Schuetzles own written orders rather than Mr. Sorensons presumption of correctness.

In the addendum p. 8, Wheeler grieved the drawing of too much money from his inmate account denying him the ability to buy his hygenes, violating the inmate handbook, Inmate Rights,# 4, App. B p. 28. So it is obvious that Wheeler has been injured by this denial and is continueing to suffer injury of his access to the courts.

Schuetzle would not have allowed Wheeler to make these copies had Penny not sent that letter and Wheeler would have been stuck with only a $4.00 limit per month until it was all covered. As you can see by App. A p. 35 that Schuetzle had no intenttion on giving an extension to Wheeler above the $4.00 limit on credit.

If the court does find the statute constitutional then it should find that the statute is unconstitutionally vague, because there should be some exceptional circumstances in some situations such as the case at bar. The statute is unconstitutional, and that Wheeler is being denied adequate access to the courts pursuant to Schuetzles responces on the request forms and grievances.



CERTIFICATE OF SERVICE

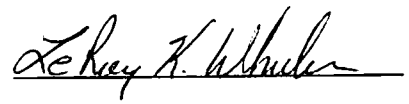
I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF FOR PETITIONER has been furnished by mail on the following parties:

1). Ken Sorenson- assistant Attorney General- 600 E. Boulevard ave. Bismarck, N.D. 58505.

2). Leann K. Bertsch- Director of DOC&R- P.O.Box 1898 Bismarck, N.D. 58502.

3). Tim Schuetzle - Warden for NDSP- P.O.Box 5521 Bismarck, N.D. 58506.

on this 25th day of April, 2006.



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