

NARVIEZ V. ALEXANDER # 44839

Ely State Prison
Post Office Box 1989
Ely, Nevada 89301

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CLERK US DISTRICT COURT DISTRICT OF NEVADA		
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Petitioner In- Proper Person

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

Narvyez V. Alexander,	}	3:10-cv-00584-LRH-VPC
Petitioner,	}	Case No. CV-N-00584-LRH-VPC
vs.	}	
Howard Skolnik, et al.,	}	MOTION FOR EVIDENTIARY
Respondents.	}	<u>HEARING</u>

Petitioner, Narvyez V. Alexander (Alexander) In- Proper Person respectfully submits this Motion For Evidentiary Hearing pursuant to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts

This motion is made and based upon the attached points and authorities, exhibits and all pleadings and papers on file in the above-entitled matter.

Respectfully submitted this 1st day of November, 2010.

without holding a hearing and giving petitioner an opportunity to present evidence, such findings clearly result in an 'unreasonable determination' of the facts.")

Accordingly, where a petitioner establishes a colorable claim for relief and has never been afforded a state or federal hearing on his claim, the ninth circuit will remand for an evidentiary hearing. Id., Karp, 431 F.3d at 1167; citing, Insyxiengmay v. Morgan, 403 F.3d 657, 670 (9th Cir. 2005); Stankewitz v. Woodford, 365 F.3d 706, 708 (9th Cir. 2004); Phillips v. Woodford, 267 F.3d 966, 973 (9th Cir. 2001).

In the instant case, Alexander alleged six (6) claims of constitutional error, and alleged facts, which, if proven, would entitle him to relief under the "Structural Defect" standard enunciated in Neder v. U.S., 527 U.S. 1, 7, 119 S.Ct. 1827 (1999); Arizona v. Fulminante, 499 U.S. 279, 309 - 10, 111 S.Ct. 1246 (1991); Edwards v. Balisok, 520 U.S. 641, 646 - 47, 117 S.Ct. 1584 (1997); and, Sullivan v. Louisiana, 508 U.S. 275, 281 - 82, 113 S.Ct. 2078 (1993). All of the facts stated were based upon the attached Affidavits sworn facts as relayed in Alexander's initial filings in the State Courts. See attached Exhibit "A".

Despite Alexander's diligence in relaying those facts, he did not receive a full and fair opportunity to develop those facts. Williams v. Woodford, 384 F.3d 567, 586 (9th Cir. 2004). Hence, Alexander is entitled to an evidentiary hearing to develop material facts, to resolve factual disputes and to receive or produce evidence which will support his entitlement to relief. Townsend, 372 U.S. at 313, 83 S.Ct. 745.

In both the State Court and now the Federal Court, Alexander alleged that the Disciplinary Hearing Officer falsified the confidential information section and witness section of the Summary of Disciplinary Hearing Form III. (Exhibit "A", p. 8, # 28 and 29). Yet, the State Court neglected to explore these facts, despite the fact that the Respondents refused to produce the Disciplinary Hearing Transcripts and the remaining record could not repel these allegations.

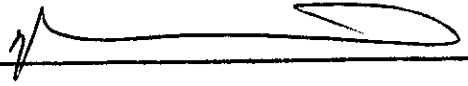
Alexander also alleged that he was denied notice of or an opportunity to review the evidence against him (undisputed); an opportunity to defend himself with selected witnesses and evidence (undisputed); that the Disciplinary Hearing Officer was partial and biased (disputed); that the petitioner was retaliated against (unchallenged); and, that the confidential information was not adequately determined to be reliable pursuant to the requirements of the U.S. Supreme Court. See Exhibit "A", p. 5, # 17-18; "A", p. 7, # 26 and 27; "A", p. 6, # 22 thru 29; "A", p. 3-4, # 11-13; and, "A", p. 6-7, # 24 thru 28. Again, the State Court neglected to explore these facts, despite the fact that the Respondents refused to produce the Disciplinary Hearing Transcripts and the remaining record could not repel these allegations.

Therefore, based on the above and pursuant to the authority set forth in Townsend, Earp and Taylor, Alexander is entitled - as a matter of law - to an evidentiary hearing to develop facts for the above-stated factual allegations.

CONCLUSION

Alexander prays this Court conduct an evidentiary hearing and allow him to marshal the facts in support of his factual allegations. Therefore, Alexander prays he is granted the relief to which he is entitled.

Respectfully submitted this 1st day of November, 2010.

By 

Narvies V. Alexander #44839

Petitioner In-Proper Person

CERTIFICATE OF MAILING

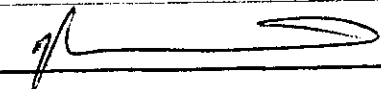
I, Narvies V. Alexander, do hereby certify that I mailed a true and correct copy of the foregoing Motion For Evidentiary Hearing on the 1st day of November, 2010, by placing the same into the hands of prison officials for mailing at Ely State Prison, postage prepaid and pre-addressed to the following:

Jaime J. Resch

Deputy Attorney General

555 East Washington Ave. Ste. 3900

Las Vegas, Nevada 89101

By 

Narvies V. Alexander #44839

Petitioner In-Proper Person

Exhibit A

AFFIDAVIT

STATE OF NEVADA)

WHITE PINE COUNTY)

I, Darvlez V. Alexander # 44839, do solemnly swear under the penalty of perjury and pursuant to NRS 53.045, NRS 208.165 et seq., and 28 U.S.C. 1746, that the following is true and correct:

1. On June 30, 2009, at approximately 8:30 p.m., my cell-mate Nathaniel Johnigan # 95389 and inmate Devon Alexander # 1015158, were escorted to the H.D.S.P. medical department where they were examined and questioned by Sgt. W. Bloomfield;

2. At that time, Sgt. Bloomfield notified them that he had received an "anonymous" kite stating that inmate Alexander # 44839 (Affiant) had sexually assaulted them. Both inmates denied that any "Sexual Assault" occurred;

3. At approximately 10:00 p.m. on June 30, 2009, the affiant was escorted to H.D.S.P.'s medical department wherein he was examined and questioned by Sgt. W. Bloomfield in regards to the Sexual Assault allegations. At that time, the affiant denied the allegations and the medical department concurred;

4. Upon completion of the medical evaluation the affiant was sent to the Operations' Holding Cells where he was placed under Admin-

Administrative Segregation;

5. On July 5, 2009, the affiant received an NDOC Disciplinary Form I (OIC 292979) charging him with violations of the NDOC, Code of Penal Discipline, to wit: one (1) count of Sexual Assault (MJ-19) and one (1) count of Possession of Contraband (MJ-26);

6. The Report stated, "On 6/30/2009 at approximately 8:00 PM, I SGT Bloomfield, was notified by LT. Provencal that inmate Alexander, Nerviez # 44839, 12D27A was identified on a snitch kite that he allegedly sexually assaulted inmate Alexander, Devon, 101518, # 12D24A. Inmates Alexander, D. and Johnigan, Nathaniel # 95389, 12D27A at approximately 8:15 PM were escorted to the infirmary for medical evaluation. Both inmates claimed that no sexual assault took place. Inmate Alexander was later escorted to the infirmary for medical evaluation and released to Operations Holding Cells where he was placed under Administrative Segregation...";

7. The N.O.C. listed the "Anonymous kite and officer's report" as evidence as required by the Disciplinary Procedure listed in NDOC A.P. 707.2(3), which states, "The report shall contain specific details of the violation, including the following: Evidence, if collected, and location," and, "the exact disposition of any evidence involved."

8. Also, on July 5, 2009, the affiant received the NDOC Disciplinary Form II. Under the Statement of Offender, it only stated, "I'm not guilty." The Preliminary Hearing Officer, Sgt. Allan Capper

failed to list the affiant's requested witnesses;

9. On August 7, 2009, the affiant attended his Disciplinary Hearing. At that time, the affiant requested numerous witnesses, yet the Disciplinary Hearing Officer, Lt. Conrad Schaff, did not allow any of the affiant's witnesses to appear or be questioned as required by WDOC A.R. 707.2(B)(3)(e)(7)(a), which states, "If the inmate pleads "not guilty," they shall be given a qualified opportunity to call witnesses on their behalf.";

10. The hearing officer never met or considered any testimony from the affiant's witnesses and based his entire conclusion on the officer's report wherein it stated, "Both inmates claimed that no sexual assault took place." As a result of that statement, the Hearing Officer Dismissed the charges;

11. On August 19, 2009, the affiant, inmate Johnigan and the alleged victim, inmate Alexander # 1015158, were released from Administrative Segregation, however, the affiant was told he would not be allowed to return to work and would be transferred to another medium institution;

12. On August 21, 2009, the affiant sent a Notice of Intent to Sue to the Inspector General's Office based upon the treatment he was enduring as a result of the sexual assault allegations;

13. Upon receipt of my notice, and approximately twelve (12) days

after sending the notice, an investigator (H. Bush) from the Inspector General's Office had the affiant returned to Administrative Segregation and further recharged the affiant with the same Sexual Assault charge, against the same alleged victim, from the same charges that had been previously dismissed;

14. Although written on September 3, 2009, the affiant did not receive the new report until October 7, 2009;

15. On October 7, 2009, the affiant received an NDAC Disciplinary Form I (ORC 296540) charging him with a single violation of the NDAC, Code of Penal Discipline, to wit: one (1) count of Sexual Assault (MJ-19);

16. The Report stated, "On 7-1-2009 a notice of charges statement was written regarding information received from a reliable source stating that Nerviez Alexander did engage in sexual activity with inmate Alexander, Devon # 1015158 using fear and pressure to force Alexander, D to submit. This notice of charges was dismissed due to a computer error which has since been repaired. The information received by the I.G.'s office stated that 'Nerviez' had been having sexual relations with 'Devon' for several months, against "Devon's" will. The sexual activity only stopped when 'Devon' had gained enough confidence and enough associates that he no longer felt threatened by 'Nerviez' and told him to stop. Additionally, it should be noted that 'Devon' was a YOP inmate and at the time of the activity was 17 years old.";

17. Under the evidence section the N.O.C. failed to "notify" the affiant of any evidence in support per A.R. 707.2(A)(3), failed to "notify" the affiant of the use of a confidential informant per A.R. 707.2(A)(3), and failed to contain any additional documentary evidence in support thereof; A.R. 707.2(B)(3)(e)(2);

18. In fact, the body of the report misled the affiant into believing that this N.O.C. was based entirely upon the "anonymous kite" from the first Disciplinary Report (OIC 292979); and, completely failed to "notify" the affiant of a confidential informant in which to defend against;

19. Also, on October 7, 2009, the affiant received the Disciplinary Form II. Under the Statement of Offender, the affiant explained to the Preliminary Hearing Officer Sgt. Everett Ercolani, that, "This Was Investigated By The Medical Staff At H.D.S.P. And By SGT. Bloomfield And In Which They Both (Alexander, D. And Johnigan) Told Them That No Sexual Activities Occurred. Also, The Original NOC Was Dismissed By Lt Schaff Based On The Testimony Of Alexander And Johnigan."

20 The affiant also requested inmates Alexander, D., Johnigan, N., and officer Holmes, W. as witnesses, and further explained to Sgt. Ercolani, that, Devon Alexander was expected to testify that - out of anger - he told some inmates a slanderous rumor in an attempt to get the affiant beat up. That he never expected it to make it to the police, and that he testified to the truth in the first interview;

21. The affiant also requested, the interviewing nurse, the video

surveillance and the anonymous kite. Upon finding the affiant's requests relevant, Sgt. Ercolani listed most of this information on the Disciplinary Form II; to be, carried over to the Disciplinary Form III;

22. On October 15, 2009, at approximately 8:45 p.m., while serving summary forms to two other cells, Lt. Conrad Schaff not only discussed the affiant's personal confidential information with another inmate, but in fact told the other inmate that he would find the affiant guilty;

23. At that time, Lt. Conrad Schaff also came to the affiant's cell door and told him, "I don't care what you say! I'm just going to sentence you to 540 days and 180 days stat loss!"

24. On October 17, 2009, at approximately 9:30 p.m., DHO Conrad Schaff conducted the affiant's Disciplinary Hearing. At that time, the DHO failed to produce any new evidence; failed to elicit or present testimony from the confidential informant (A.R. 707.2(B)(3)(e)(1a)(b);
707.2(A)(3) and 707.9(E)(1)); failed to disclose that he had or had not considered evidence of a confidential nature (Id. A.R. 707); failed to disclose whether or not he knew the confidential informant and considered him reliable (A.R. 707.9(c)(2) and 707.9(E)(1)); failed to present testimony from the investigating officer as to the truthfulness of his report (A.R. 707.9(c)(2) and 707.9(E)(1)) or even allowed the investigator to testify; and, directly refused to allow the affiant to present his witnesses (A.R. 707.2(B)(3)(e)(7)); his evidence or request disclosure of evidence that would undermine the informant's allegations (A.R. 707.2(B)(3)(e)(6) and 707.3(B)(3)(e)(11)(b));

25. After becoming severely frustrated with the affiant's requests, the DHO continued the Disciplinary Hearing;

26. Then, on November 7, 2009, at approximately 7:30 p.m., the DHO, Lt. Schaff conducted a second disciplinary hearing. Again, the DHO failed to produce any evidence other than the officer's notice of charges (report) (A.R. 707.2(B)(3)(e)(12)(b)); failed to introduce or notify the affiant of the confidential informant or confidential investigative interview (A.R. 707.2(A)(3); 707.2(B)(3)(e)(12)(b) and 707.9(E)(1)); failed to elicit or present testimony from the confidential informant (Id. A.R. 707); failed to disclose that he had or had not considered evidence of a confidential nature (Id. A.R. 707); failed to disclose whether or not he knew the confidential informant and considered him reliable (A.R. 707.9(c)(2) and 707.9(E)(1)); failed to present testimony from the investigating officer as to the truthfulness of his report (A.R. 707.9(c)(2) and 707.9(E)(1)) or even allowed the investigator to testify; failed to conduct a separate confidential informant hearing (A.R. 707.2(B)(3)(e)(1) and 707.2(B)(3)(e)(12)(b)); failed to consider exculpatory evidence that would have proven the confidential information to be un-reliable (A.R. 707.2(B)(3)(e)(11)(b)); and, directly refused to permit the affiant to present his witnesses (A.R. 707.2(B)(3)(e)(7)); his evidence, or request disclosure of evidence that would undermine the informant's allegations (A.R. 707.2(B)(3)(e)(6) and 707.2(B)(3)(e)(11)(b));

27. The DHO told the affiant to save his witnesses and evidence for his appeal and would not allow the affiant to put on a defense

through specified witnesses or factual evidence ;

28. Then, in his preparation of the Summary of Disciplinary Hearing Form III, the DHO falsified the confidential informant area by stating that the investigator testified, when he did not ; that there was corroborating testimony, when there was none ; that he had first hand knowledge of the source, when he didn't even know who the source was ; and, that he reviewed the documents and found them reliable, when he never even read them ;

29. He further falsified the witness information area with deceit and bias by declaring that the affiant, "Was asked and does not want a witness," when the affiant clearly requested to present witness testimony ;

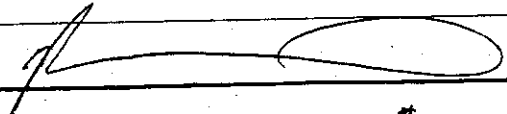
30. The affiant was sanctioned to and has received 120 days Disciplinary Segregation, which has been changed to "indefinite" confinement, 400 days stat less, a transfer to a maximum custody facility, one (1) year loss of parole ; and, restitution ;

Further your affiant sayeth naught ;

Pursuant to Nevada Revised Statutes 53.045, Nevada Revised Statutes 208.165 et seq., and 28 U.S.C. 1746, I, Narvies V. Alexander #44839, do hereby declare, under the penalty of perjury, that the foregoing Affidavit is true and correct to the best of my knowledge as to each and every fact stated herein. As to those matters stated on belief, the affiant believes them to be true to the best of

his knowledge.

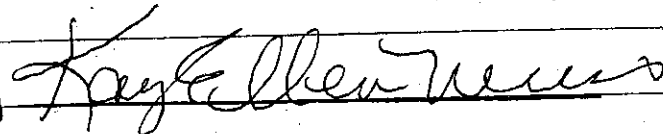
Executed at Ely State Prison on the 21 day of October, 2010.

By 

Narviez V. Alexander # 44839

Affiant

Subscribed and sworn to before
me on the 21st day of October,
2010.

By 

NOTARY PUBLIC

