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## **Argument**

For nearly seven years, Mark Gossett's children, all of whom have now attained the age of majority except for his 15-year old son, have been denied by the Department any visitation with their father. Seven years. In saying "no" to the Gossett family over and over again, the Department has utterly failed to follow its own regulatory guidelines, essentially creating a new *ad hoc* set of "*de facto*" guidelines based upon claimed past practices. The Department's disregard of its own written guidelines is a violation of due process and equal protection, and must stop.

Before addressing each argument raised by the Department in the "Argument" section of its Response, attention should be directed to a claim made by the Department in its "Statement of Facts." In its dealings with the Gossett family, and in its Response to this Court, the Department has attempted to characterize the visitation between Mr. Gossett and his children ordered by the trial court in its "Order Amending and Clarifying Judgment and Sentence" as "supervised." Response of Department at 5. The Department's attempt to characterize the amended Judgment and Sentence as somehow requiring special supervised visitation ignores the plain language of that Order. Correctional Program Manager Liza Rohrer, in her e-mail to Linda Gossett on October 12, 2010, stated:

“The initial judgment and sentence shows that Mark (Gossett) was to have no contact with any minor, including his own adopted or biological children. The Judgment and Sentence was later modified on August 10, 2010 allowing visitation with children as supervised by the Department of Corrections, during normal visitation in accordance with the rules and regulations of the Department of Corrections. According to our policies, DOC 450.300 Visits for Prison Offenders, Section VII: Who May Not Visit, A.3. “Persons restricted per the Judgment and Sentence. While supervised visits may be allowed per the Judgment and Sentence, supervision by facility visiting staff does not constitute as supervised visitation.”

The amended Judgment and Sentence did not require a special “supervised visit” – it states that the children may visit “in the normal course of the visitation process followed by the Department of Correction’s facility the Defendant is in.” Again, to make it even clearer that no special supervision is required, the amended Judgment and Sentence states (in language not quoted by the Department or Ms. Rohrer) “[t]hat the normal supervision of visitation by two or more correctional officers in an open room where numerous other inmates may be exercising visitation privileges is sufficient supervision for the Defendant to have visitation with his children.” If this language is describing “supervised” visitation, then every normal prison visit that occurs would be “supervised.” Thus, the Department’s claim that “...it is not typical for DOC to allow such contact that requires supervision” (Response of Department at 5) would be utterly false; the DOC allows such visitation with inmates every single visiting

day. The Department's contention that it cannot provide the "supervised visits" required by the amended Judgment and Sentence is without merit.

A. MARK GOSSETT DOES HAVE A PROTECTED LIBERTY  
INTEREST IN VISITATION WITH HIS CHILDREN

In Section A. of its "Argument" the Department contends that Mark Gossett does not have a protected liberty interest in visitation with his children. In so arguing, the Department relies upon *In re Dyer*, 143 Wn.2d 384, 20 P.3d 907 (2001). The Department seems to read *Dyer* to say that the principle expressed in *Ky. Dep't of corrections v. Thompson*, 490 U.S. 454, 109 S. Ct. 1904, 104 L.Ed.2d 506 (1989), that a state law may create a liberty interest through explicitly mandatory language, has been rejected by the U.S. Supreme Court in *Sandin v. Conner*, 515 U.S. 472, 115 S. Ct. 2293, 132 L.Ed.2d 418 (1995).

However, the *Dyer* and *Sandin* cases in no way negate Mark Gossett's argument as the Department claims. The *Dyer* court states outright that "...state statutes or regulations can create a due process liberty interest where none otherwise would have existed." 143 Wn.2d at 392. The court even cited *Thompson* in acknowledging that prior to *Sandin* "...for a state law to create a liberty interest, it had to have contained 'explicitly

mandatory language' in connection with the establishment of 'specified substantive predicates' to limit discretion." 143 Wn.2d at 392-393. This principle was not overruled in *Sandin*, however. Indeed, the *Sandin* court expressly refused to overrule or modify the result or rationale of *Thompson*. The *Dyer* court went on to point out what the *Sandin* decision did change:

In *Sandin*, the United States Supreme Court held that liberty interests are not created by negative implications from mandatory language in prison regulations. Rather, to create a liberty interest, the action taken must be an atypical and significant deprivation from the normal incidents of prison life. *Sandin*, 515 U.S. at 484. There is a hardship in that Dyer cannot participate in the extended family visits program; however, this is not an atypical and significant hardship. Dyer still has regular visitation rights to spend time with his wife and children.

Extended family visitation is a privilege. Statutory language explicitly confirms that extended family visitation is a privilege. [RCW 72.09.470] the privilege of extended family visits is not a normal incident of prison life. It is a privilege granted only to a few qualified inmates.

(Emphasis added.) 143 Wn.2d at 393.

In the *Sandin* case, inmate Conner alleged that Hawaii prison officials deprived him of due process when an adjustment committee refused to allow him to present witnesses during a disciplinary hearing, and then sentenced him to segregation for misconduct. The Court of Appeals for the Ninth Circuit agreed with Conner, basing its conclusion on

a prison regulation instructing the committee to find guilt when a misconduct charge is supported by substantial evidence. The Ninth Circuit court reasoned that the committee's duty to find guilt was nondiscretionary. From that regulation, the court drew a negative inference that the committee could not impose segregation if it did not find substantial evidence of misconduct, that this was a state-created liberty interest, and that therefore *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2693, 41 L.Ed.2d 935 (1974) entitled Conner to call witnesses.

In overturning the Ninth Circuit opinion, the Supreme Court in *Sandin* rejected the lower court's reliance upon the negative inference it had drawn from the regulation in question. That such a practice was the concern of the *Sandin* court is evidenced by the court's statement that:

“...we believe that the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause. The time has come to return to the due process principles we believe were correctly established and applied in *Wolff*... 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 relationship to the ordinary incidents of prison life.”

515 U.S. at 483-484. The court went on to state that Conner's discipline in segregated confinement "...does not present a dramatic departure from the basic conditions of Conner's indeterminate sentence." 515 U.S. at 485. It held that a liberty interest was not created and that Conner's due process rights were not violated.

Mark Gossett's case is different than *Sandin*, however. The "...search for a negative implication from mandatory language in prisoner regulations..." that so concerned the *Sandin* court is not an issue here. No such negative implication from the regulatory language need be drawn here to achieve the result Gossett is seeking. The language of DOC 450.050 is as clear as the proverbial bell when it states that "An offender may be prohibited from contact with his/her own children only if..." the conditions stated in the regulation are present. (Emphasis added.) That language was purposely and carefully crafted by the Department to ensure that a consistent and objective policy would be maintained when it came to the administration of family visits. Inmates and their families cannot help but have a legitimate and reasonable expectation that such a policy will be upheld by the Department, and not be effectively vetoed by Department staff on a case-by-case basis. That is what due process is supposed to protect against. Disregard by the Department of its own regulatory guidelines also runs afoul of the Equal Protection Clause of the

Fourteenth Amendment, in that some inmates and their families will enjoy the visitation rights protected by DOC 450.050 and some will not, despite the fact that all of them are similarly protected by the language of the regulation. Moreover, the Department's prohibition of visits between Mark Gossett and his children exceeds and negates the express allowance of such visits by the amended sentence.

The instant case is also different from the *Dyer* case in at least one significant way. As cited above, the *Dyer* court stated:

... to create a liberty interest, the action taken must be an atypical and significant deprivation from the normal incidents of prison life. *Sandin*, 515 U.S. at 484. There is a hardship in that Dyer cannot participate in the extended family visits program; however, this is not an atypical and significant hardship. Dyer still has regular visitation rights to spend time with his wife and children.

Extended family visitation is a privilege. Statutory language explicitly confirms that extended family visitation is a privilege. [RCW 72.09.470] the privilege of extended family visits is not a normal incident of prison life. It is a privilege granted only to a few qualified inmates.

(Emphasis added.) 143 Wn.2d at 393. The *Dyer* court reasoned that the denial of extended family visitation was not “an atypical and significant deprivation from the normal incidents of prison life” because Dyer still had visitation rights with his wife and children. Unlike extended visitation, these visitation rights were a normal incident of prison life, and were not

“granted only to a few qualified inmates.” They are enjoyed by the prison population at large, and their families.

That this is the intent of the Department is clearly expressed in its own guidelines regarding visits for prison offenders. In DOC 450.300, “Visits for Prison Offenders,” it states, in pertinent part:

“POLICY

- I. The Department recognizes the vital role families play in the re-entry process and will support offenders in maintaining ties with family, friends, and the community by setting reasonable criteria for personal visits.
- II. The Department recognizes the need to engage community stakeholders, partners, and offender families in the re-entry process.”

The “reasonable criteria” set by the Department concerning denial of visits to an offender’s children, are set forth in DOC 450.050(I)(C):

“DIRECTIVE

- I. Criteria  
....
- C. An offender may be prohibited from contact with his/her own child(ren) only if the offender’s Judgment and Sentence and/or a No Contact Order prohibits contact, or if necessary to protect the child(ren) from any specific and documented threat of harm. Documentation includes, but is not limited to:
  1. A written opinion from a mental health professional or Child Protective Services, and

2. Specific verified incidents of harm to the child(ren) resulting from contact with the offender while s/he was incarcerated in a Department facility.”

Thus, the Department’s own regulatory guidelines create an expectation that normal family visitation privileges should be and are a normal incident of prison life. It would certainly seem, then, that the Department’s denial of visitation with respect to Mark Gossett’s teenage and adult children is an atypical and significant hardship under *Dyer*. The assertion by the Department that it is common for certain offenders to be denied visitation with their children (Response of Department at 16), presumably with no more justification than the vague invocation of “legitimate penological interests” used in Gossett’s case, is not a justification; it is an unfortunate admission that the Department has in fact ignored its own stated legitimate penological interests.

**B. THE DEPARTMENT’S DISREGARD OF ITS OWN  
REGULATORY GUIDELINES WAS ARBITRARY AND  
CAPRICIOUS AND THUS VIOLATED MARK GOSSETT’S  
CONSTITUTIONAL RIGHTS**

The Department also argues that “Even if DOC policies did create a liberty interest, there would be no constitutional violation because the Department did not violate its own policy.” Response of Department at 16.

In making this claim, the Department quotes the key provision at issue,

DOC 450.050 Directive I.C., as follows:

“An offender may be prohibited from contact with his/her own children only if the offender’s Judgment and Sentence and/or a No Contact Order prohibits contact, or if necessary to protect the children from any specific and documented threat of harm.

Documentation includes, but is not limited to:

1. A written opinion from a mental health professional or Child Protective Services, and
2. Specific verified incidents of harm to the children resulting from contact....”

Response of Department at 17. The Department then goes on to argue that there were in fact “documented threats of harm to the children resulting from contact,” pointing to police reports, the original Judgment and Sentence (later amended), and even relying on a “pre-sentencing investigation indicating that the victim of the Rape of Child offenses had claimed that Ms. Gossett (Mark Gossett’s wife) had abused her physically.” Response of Department at 17.

The Department’s argument, sadly, is based upon cherry-picking at its worst and an utter disregard of context. The Department’s quotation of DOC 450.050 I.C. completely omits the last part of subsection 2.

Immediately following the words (quoted by the Department) “Specified verified incidents of harm to the children resulting from contact....” comes the following (not quoted by the Department): “...with the offender while

s/he was incarcerated in a Department facility.” Thus, 450.050 I.C.2. actually reads: “Specified verified incidents of harm to the children resulting from contact with the offender while s/he was incarcerated in a Department facility.” (Emphasis added.) The language omitted by the Department in its Response makes all the difference. The Department’s argument now collapses, as none of the “documented threats of harm to the children” cited by the Department as justifying its prohibition of contact between Mark Gossett and his children result from “contact with the offender while he was incarcerated” as required by DOC 450.050. Indeed, the Department’s reference to the alleged physical abuse by Ms. Gossett as justifying its denial of visitation doesn’t even result from “contact with the offender” at all. (There is also the fact that none of the incidents relied upon by the Department even involved the children who are being denied visitation, but that argument is unnecessary in light of the egregious misquotation and misapplication of DOC 450.050 committed by the Department here.)

The Department argues that the standard of review in this case is whether its action was arbitrary and capricious, citing *In re Dyer*, 143 Wn.2d at 395, and pointing out that a decision is arbitrary and capricious only if the agency’s action is wholly unsupported, citing *In re Stockwell*, 28 Wn. App. 295, 302, 622 P.2d 910 (1981). Response of Department at

14. In the instant case, the Department's action is wholly unsupported by any of the criteria contained in its regulatory guidelines. Moreover, the Department has violated the clear language of its own regulatory guidelines, and attempted to justify that violation by pretending that explicitly mandatory language in those guidelines does not exist. In doing so, the Department concludes that none of this really matters because it is not "an atypical and significant deprivation from the normal incidents of prison life." Response of Department at 15-16. This conclusion appears to be based solely upon the claim that the Department has always done things this way. Response of Department at 16. The Department is essentially saying "because we have always allowed our staff (on an *ad hoc* basis) to disregard our own departmental mandatory written guidelines concerning the denial of visitation rights with children, that disregard should be accepted as a set of new "*de facto*" guidelines which replace the existing ones codified in DOC 450.050. Such action is arbitrary and capricious.

C. THE TURNER TEST FOR CONSTITUTIONALITY OF PRISON REGULATIONS DOES NOT APPLY IN THIS CASE

The Department next argues that "even if Mr. Gossett were challenging the constitutionality of the DOC policy which permits his visitation restriction, his claim would fall under a *Turner* analysis."

Response of Department at 19. Under *Turner*, when a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261, 96 L. Ed. 2d 64 (1987). The Department takes several pages arguing that *Turner* applies to this case. Response of Department at 19-22.

Unfortunately, this argument just obfuscates the issues. The problem with the Department’s analysis in this regard is that it fails to comprehend that Mark Gossett is not challenging a prison regulation – he is challenging the misapplication and disregard by the Department of its own regulations. (See Brief of Petitioner at 9.) It is those regulations, had they been observed, that would have prevented the denial of his visitation rights. Gossett has no wish to challenge the Department’s regulatory guidelines. Thus, *Turner* does not apply.

D. MARK GOSSETT’S PETITION IS PROPERLY BEFORE THIS  
COURT BECAUSE HE HAS NO OTHER ADEQUATE  
REMEDIES

The Department contends in Section D of its “Argument” that Mark Gossett’s claims in this case are better suited to a civil rights lawsuit, and that this petition should thus be dismissed under RAP 16.4(d). That rule

states, in pertinent part: “The appellate court will only grant relief by a personal restraint petition if other remedies which may be available to petitioner are inadequate under the circumstances...” The Department argues that a 42 U.S.C. 1983 action for violation of Gossett’s due process rights would afford the time needed “...to investigate the claims, retain experts, interview witnesses and conduct discovery.” However, none of that is necessary in this case. The facts are undisputed, and the issue is clear: does the Department’s failure to follow its own regulatory guidelines set out in DOC 450.050 violate Mark Gossett’s due process and equal protection rights? Mr. Gossett is not seeking a money judgment – he just needs this court to rule that the Department must follow its own rules and allow his children the opportunity, after seven long years, to visit him in prison. A civil suit would delay justice even longer. Washington courts have been hearing petitions on similar matters for decades. This petition is properly before the court, and should be granted.

### **Conclusion**

In short, the Department has violated its own codified guidelines in denying Gossett visits from his children. In so doing, it has denied Gossett his due process and equal protection rights under the Fourteenth Amendments. Gossett’s children should be allowed to visit him pursuant

to the terms of the "Order Amending and Clarifying Judgment and Sentence" entered by the trial court.

Respectfully submitted this 4th day of April, 2017.

Mark Gossett / *Mark Gossett*  
Mark Gossett, Petitioner / 4/13/2017  
(by Tad A. Sowers, attorney-in-fact)