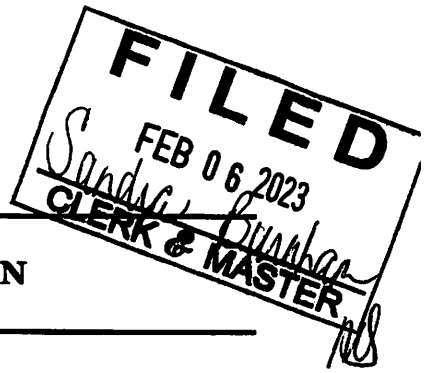
IN THE CHANCERY COURT FOR THE TWENTY-FIFTH JUDICIAL DISTRICT, LAUDERDALE COUNTY, TENNESSEE

FREDERICK BRAXTON, *Petitioner,* *v.* TENNESSEE DEPARTMENT OF CORRECTION, *et al.*, *Respondents.*	§ § § § § § § § § § §	Case No.: 22-CV-16298



BRIEF OF PETITIONER FREDERICK BRAXTON

I. INTRODUCTION

Petitioner Frederick Braxton is an inmate in the custody of the Tennessee Department of Correction. On April 29, 2022, Mr. Braxton was charged with two disciplinary infractions. Mr. Braxton maintained his innocence of the charges—to which other inmates had already confessed guilt—and he insisted on a hearing regarding them.

When the time came for Mr. Braxton's disciplinary hearings, the TDOC denied Mr. Braxton his right to have his counsel present. That decision contravened TDOC policy, which authorizes attorneys "to be present as observers" at inmate disciplinary hearings.[1] Even if this policy could be construed as affording the TDOC discretion, the TDOC also wielded its discretion arbitrarily, failing even to *mention* counsel's request to be present in the Administrative Record of Mr. Braxton's case, let alone evaluate it.[2]

Within 24 hours of Mr. Braxton's counsel asking to be present for his disciplinary

[1] TDOC Uniform Disciplinary Procedure 502.01(VI)(L)(4)(j).
[2] *Compare* Exs. 1, 3, & 4 to Pet. for Writ of Certiorari (repeated requests from counsel seeking to be present), *with* Administrative Record (including no mention of counsel's request).

hearing, prison officials also pledged to retaliate against Mr. Braxton for invoking his rights under TDOC policy.[3] TDOC officials then followed through with that threat and did retaliate against Mr. Braxton, charging him with "defiance" specifically for "stating that he would contact his attorney."[4] This fact—and the concededly authentic document supporting it—was omitted from the Administrative Record filed here, too.[5]

Indeed, the Administrative Record contains vanishingly little information about what took place during or before Mr. Braxton's disciplinary hearings. There is also a reason why. In particular, by design, disciplinary hearings are no longer recorded at West Tennessee State Penitentiary, even though they used to be and doing so would pose no difficulty. Instead, the "record" of a disciplinary proceeding is incompletely—and in this case, inaccurately—summarized by handwritten notes taken by a designated "Reporting Employee."[6] That person is not a trained transcriptionist. That person also does not have to certify the resulting notes as complete or accurate, and she did not do so here. Thus, regardless of what actually occurs during inmate disciplinary hearings, TDOC employees may—and in this case, did—conceal improprieties and insulate them from meaningful appellate review by omitting or misstating what occurred in the handwritten, non-verbatim "report[s]" resulting from them.

None of this is permissible. It also contravened Mr. Braxton's rights under TDOC policy and his due process rights. Thus, this Court should grant Mr. Braxton certiorari and order:

(1) That Mr. Braxton's disciplinary charges be vacated;

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[3] *See* Ex. 4 to Pet. for Writ of Certiorari.
[4] *See* Ex. 6 to Pet. for Writ of Certiorari.
[5] *Compare generally* A.R., *with* Ex. 6 to Pet. for Writ of Certiorari.
[6] *See* A.R. at 0013; 0022.

(2) That Mr. Braxton is entitled to a new disciplinary hearing for both of his disciplinary charges with counsel present to observe;

(3) That Mr. Braxton is entitled to have his new disciplinary hearings audio-recorded;

(4) That Mr. Braxton's "good time" sentence credits be reinstated; and

(5) That Mr. Braxton is entitled to receive a prompt new parole hearing, which was materially compromised by the due-process-offending inmate disciplinary convictions at issue.

II. FACTS

On April 29, 2022, Mr. Braxton's multi-person cell was searched by correctional staff.[7] During that search, tobacco, cocaine, and methamphetamine were discovered in small baggies.[8] Along with at least one other inmate,[9] Mr. Braxton was charged with two disciplinary violations.[10]

Knowing that he was innocent and that his charges would detrimentally affect his chances of making parole, Mr. Braxton promptly contacted his counsel for assistance. But when Mr. Braxton's counsel contacted Warden Fitz's assistant, Lucy Diane Henson, and asked to be present at Mr. Braxton's hearing, Ms. Henson made clear that counsel would not be allowed to be present, TDOC rules notwithstanding.[11] Subsequent written demands for compliance with applicable TDOC policy were rebuffed as well.[12] When Mr. Braxton insisted on going "by the book" and waiting to have the hearing until his attorney

[7] *Id.* at 0010.
[8] *Id.* at 0010; 0024.
[9] *See id.* at 0008 (referencing another inmate with "a different incident number").
[10] *Id.* at 0009–0011; 0023–0025.
[11] *See* Exs. 1 & 3 to Pet. for Writ of Certiorari.
[12] *See* Exs. 3 & 4 to Pet. for Writ of Certiorari.

was present as permitted by TDOC Uniform Disciplinary Procedure 502.01(VI)(L)(4)(j), prison officials also retaliated against Mr. Braxton by charging him with "defiance."[13]

Over his own and his counsel's objections, Mr. Braxton was thus forced to proceed with his disciplinary hearings for two drug-related disciplinary charges without his attorney present. Because West Tennessee State Penitentiary no longer records disciplinary proceedings, though, there is no complete record of: (1) what happened during Mr. Braxton's disciplinary hearing; (2) what the actual testimony was; (3) what evidence Mr. Braxton was permitted to introduce at the hearing; and—most importantly—(4) what evidence Mr. Braxton was *prevented from* introducing. Mr. Braxton himself also cannot attest to everything that took place, because he was thrown out of one of his disciplinary hearings—and the balance of it was conducted without him—when he began cross-examining the prison official who was (falsely) testifying against him.[14]

Even with an incomplete hearing record, though, two things are clear. First, Mr. Braxton explicitly refused to waive any of his rights.[15] Second, Mr. Braxton specifically refused to waive his right to call witnesses on his behalf.[16]

What the record fails to reflect, though, is that Mr. Braxton was not permitted to call multiple essential witnesses on his behalf who would have provided exonerating testimony. For instance, Mr. Braxton was not allowed to call a sergeant who was present for the search but who conspicuously was not mentioned in the disciplinary report or present for Mr. Braxton's disciplinary hearing. That sergeant would have testified that the contraband at issue was not, in fact, found on Mr. Braxton's person as the lone

[13] Ex. 6 to Pet. for Writ of Certiorari.
[14] Ex. 8 to Pet. for Writ of Certiorari ("I was put out of my second hearing because I was asking questions about T.D.O.C. policy").
[15] *See* A.R. at 0004; *see also id.* at 0019.
[16] *Id.*

testifying witness falsely claimed.[17] Nor was video footage considered which would have exculpated Mr. Braxton considered despite his specific request that prison officials review it.[18]

Mr. Braxton was not allowed to call two inmate witnesses who had confessed responsibility for the violations with which Mr. Braxton was charged, either—witnesses who had also attested, in writing, before Mr. Braxton's hearing that Mr. Braxton "was in no way involved[.]"[19] The Administrative Record fails to indicate whether the Disciplinary Board considered the exculpatory affidavit that those two inmate witnesses provided. The handwritten notes of the hearing reflect that Mr. Braxton had that affidavit with him,[20] but they do not indicate whether the Disciplinary Board allowed him to introduce it or whether the Disciplinary Board considered it.

Because all of the above evidence would have been contrary to—and irreconcilable with—the testimony of the lone witness who testified against Mr. Braxton, a credibility determination regarding who was testifying truthfully and who was not was also necessary for the TDOC to sustain its burden of proof. Without his counsel present—at minimum— to observe his hearings and attest to what happened during them, though, Mr. Braxton was convicted of both infractions and left to exhaust his administrative appeals based on a materially incomplete, inaccurate, and misleading Administrative Record.[21] The accuracy of that record also could not meaningfully be contested due to the prison's calculated failure to record the proceeding and its refusal to allow Mr. Braxton's

[17] *See* Ex. 5 to Pet. for Writ of Certiorari.
[18] *See* Ex. 8 to Pet. for Writ of Certiorari (specifically asking for "[a] review of the cameras in the 4-B on 4-29-22").
[19] *See* Ex. 5 to Pet. for Writ of Certiorari.
[20] A.R. at 0007.
[21] Ex. 7 to Pet. for Writ of Certiorari; Ex. 8 to Petition for Writ of Certiorari.

attorney to be present to observe it. Thus, Mr. Braxton was convicted of Class A and Class B disciplinary infractions, and he was punished with fifty days in punitive solitary confinement and a fine.[22]

The convictions at issue have also seriously compromised Mr. Braxton's legal rights outside of prison. Before receiving his disciplinary convictions, Mr. Braxton had a presumptive right to parole under the Reentry Success Act. *See* Tenn. Code Ann. § 40-35-503(i). After being convicted of Class A and Class B infractions,[23] though, Mr. Braxton lost his presumptive right to parole. *See* Tenn. Code Ann. § 40-35-503(i)(2)(D). Thus—after spending nearly two months in punitive solitary confinement for which he was denied "good time" sentence credits—Mr. Braxton appealed his convictions, first, to the warden at West Tennessee State Penitentiary and then, second, to the Commissioner of the Tennessee Department of Correction. Having properly exhausted his administrative remedies, Mr. Braxton timely petitioned for a writ of certiorari.

III. LEGAL STANDARD

"A writ of certiorari is the 'procedural vehicle through which prisoners may seek review of decisions by prison disciplinary boards, parole eligibility review boards, and other similar administrative tribunals.'" *Garrett v. Tenn. Bd. of Parole*, No. M2019-01742-COA-R3-CV, 2021 WL 2556643, at *2 (Tenn. Ct. App. June 22, 2021) (citing *Settle v. Tenn. Dep't of Corr.*, 276 S.W.3d 420, 425 (Tenn. Ct. App. 2008)). Tenn. Code Ann. § 27-8-101 specifically provides that:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or

[22] A.R. at 0005; *id.* at 0020.
[23] *Id.* at 0004; *id.* at 0019.

> adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

Id.

Tenn. Code Ann. § 27-9-101 provides further that:

> Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have the order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter.

Id.

"Under the common law writ of certiorari, the decisions of the Board are reviewable to determine whether the Board exceeded its jurisdiction, or acted illegally, fraudulently, or arbitrarily." *Arnold v. Tenn. Bd. of Paroles*, 956 S.W.2d 478, 480 (Tenn. 1997) (citing *Powell v. Parole Eligibility Rev. Bd.*, 879 S.W.2d 871, 873 (Tenn. Ct. App. 1994)). Somewhat more comprehensively, the Tennessee Supreme Court has held that:

> [A] common-law writ of certiorari may be used to remedy "(1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal's authority; and (5) plain and palpable abuses of discretion."

Gordon v. Tennessee Bd. of Prob. & Parole, No. M2006-01273-COA-R3CV, 2007 WL 2200277, at *2 (Tenn. Ct. App. July 30, 2007) (quoting *Willis v. Tennessee Dep't of Corr.*, 113 S.W.3d 706, 712 (Tenn. 2003)). Thus, illegally or arbitrarily refusing to allow an inmate's attorney to be present as an observer at his disciplinary hearing in contravention of applicable TDOC policy is a decision that can be remedied by certiorari. *See id. See also, Wilson v. Adcock*, No. W2017-00901-COA-R3-CV, 2018 WL 1976065, at *2 (Tenn. Ct. App. Apr. 26, 2018) ("A common law writ of certiorari is the proper device for inmates seeking review of actions such as prison disciplinary proceedings.").

IV. ARGUMENT

A. THE DISCIPLINARY BOARD VIOLATED UNIFORM DISCIPLINARY PROCEDURE 502.01(VI)(L)(4)(j) BY REFUSING TO ALLOW MR. BRAXTON'S COUNSEL TO BE PRESENT TO OBSERVE HIS DISCIPLINARY HEARING.

The Tennessee Supreme Court has made clear that:

> The Uniform Disciplinary Procedures exist "[t]o provide for the fair and impartial determination and resolution of all disciplinary charges placed against inmates." TDOC Policy No. 502.01(II). While it "is not intended to create any additional due process guarantees for inmates beyond those which are constitutionally required," deviations from the policy will warrant dismissal of the disciplinary offense if the prisoner demonstrates "some prejudice as a result and the error would have affected the disposition of the case." TDOC Policy No. 502.01(V).

Willis, 113 S.W.3d at 713.

Thus, "even if a state prisoner is not entitled to due process protections in a disciplinary proceeding, the inmate may nevertheless assert a claim under a common-law writ of certiorari that the prison disciplinary board otherwise acted illegally or arbitrarily in failing to follow TDOC's Uniform Disciplinary Procedures." *See Patterson v. Tenn. Dep't of Corr.*, No. W2009–01733–COA–R3–CV, 2010 WL 1565535, at *2 (Tenn. Ct. App., filed Apr. 10, 2010).

Given the foregoing—and separate from his due process right to a meaningful opportunity to contest his disciplinary charges—Tennessee law afforded Mr. Braxton the right to have the TDOC follow its own self-imposed procedures. *See id. See also Howard v. Turney Ctr. Disciplinary Bd.*, No. M2017-00230-COA-R3-CV, 2018 WL 625115, at *3 (Tenn. Ct. App. Jan. 30, 2018). Here, though, the TDOC did *not* follow its own rules. The TDOC's failure to do so also resulted in substantial prejudice to Mr. Braxton. As a result, Mr. Braxton is entitled to relief. *See Bonner v. Cagle*, No. W201501609COAR3CV, 2016 WL 97648, at *7 (Tenn. Ct. App. Jan. 7, 2016) ("an inmate may be entitled to relief under

a common law writ of certiorari if he demonstrates that the disciplinary board failed to adhere to the Uniform Disciplinary Procedures and that its failure to do so resulted in substantial prejudice to the inmate.") (citing *Irwin v. Tennessee Dep't of Correction*, 244 S.W.3d 832, 835 (Tenn. Ct. App. 2007)).

1. TDOC Procedure 502.01(VI)(L)(4)(j)

Tennessee Department of Correction Uniform Disciplinary Procedure 502.01(VI)(L)(4)(j) provides that: "**Attorneys** shall not be permitted to participate in disciplinary hearings but **may be permitted to be present as observers.**" *Id.* (emphases added). Thus, whether prison officials violated TDOC procedures by refusing to allow Mr. Braxton's attorney to be present as an observer at his disciplinary hearing turns substantially on the meaning of "may" as used in Procedure 502.01(VI)(L)(4)(j).

To guide its interpretation of TDOC rules, this Court applies general principles of statutory construction. *See Hammond v. Harvey*, 410 S.W.3d 306, (Tenn. 2013) ("[G]eneral principles of statutory construction also apply to administrative regulations and rules."). As detailed below, though, under *any* interpretation of the term "may" as it is used in Tennessee Department of Correction Uniform Disciplinary Procedure 502.01(VI)(L)(4)(j), Mr. Braxton is entitled to relief.

2. As used in TDOC Procedure 502.01(VI)(L)(4)(j), "may" means that an attorney "is allowed to be" or "can be" present.

""Generally speaking, 'may' is an auxiliary verb, of most common use, with various meanings, qualifying the meaning of another verb by expressing ability, competency, contingency, liability, possibility, probability, or potentiality. In its ordinary signification, to have permission; to be allowed.'" *See Black v. State*, 154 Tenn. 88, 290 S.W. 20, 21 (1927) (quoting 39 Corpus Juris, 1392)). Thus, "[i]t is well established that *may* has

multiple meanings[,]" and "[a]mong [the] definitions for *may* are these: '2a: have permission to (you may go now) … used nearly interchangeably with *can*[.]'" *See Linstroth v. Dorgan*, 2 So. 305, 313 (Fla. Dist. Ct. App. 2008) (dissenting opinion) (cleaned up).

As used in TDOC Procedure 502.01(VI)(L)(4)(j), the most natural reading of "may" is that attorneys are "allowed to be" or "can be" present as observers at inmate disciplinary hearings, even if they are not *required* to be present. Considered in context, the term also indicates that inmates—the beneficiaries of the policy—are the ones who may (or may not) choose to exercise it. *Cf. WM Cap. Partners, LLC v. Thornton*, 525 S.W. 3d 265, 270 (Tenn. Ct. App. 2016) ("The use of the word 'may' in referencing each of these rights and the context confirms that **the secured party has discretion in choosing which rights to exercise and when**." (emphasis added)).

Tennessee's Rules of Civil Procedure consistently use the word "may" in this way—affording beneficiaries of a rule *permission* to invoke its protections without *requiring* them to do so. *See, e.g.*, Tenn. R. Civ. P. 14.02 ("When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so."); Tenn. R. Civ. P. 15.01 ("A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15 days after it is served."); Tenn. R. Civ. P. 48 ("The parties may stipulate that the jury shall consist of any number less than that provided by law, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.").

Further, interpreting TDOC Procedure 502.01(VI)(L)(4)(j) in a manner that entitles the TDOC—rather than inmates—the right to decide whether to let an inmate's attorney be present would render the rule purposeless as a practical matter. *Contra Reiss v. Rock Creek Constr., Inc.*, No. E2021-01513-COA-R3-CV, 2022 WL 16559447, at *8 (Tenn. Ct. App. Nov. 1, 2022) (courts "'must avoid constructions which would render portions of the [procedure] meaningless or superfluous.'") (quoting *Leab v. S & H Mining Co.*, 76 S.W.3d 344, 350 n.3 (Tenn. 2002)); *Womack v. Corr. Corp. of Am.*, 448 S.W.3d 362, 373 (Tenn. 2014) ("[W]e have a duty to avoid construing a statute in such a way that would render any part of it superfluous or insignificant."). Put simply: If prison officials have the exclusive right to determine whether opposing attorneys are present to observe TDOC disciplinary proceedings, then there is no circumstance in which opposing attorneys will ever be permitted to be present.

Interpreting Procedure 502.01(VI)L)(4)(j) in this way, the TDOC violated Procedure 502.01(VI)L)(4)(j) by refusing Mr. Braxton's and his counsel's requests to have his attorney present to observe his disciplinary hearings. Mr. Braxton timely exercised his rights under Procedure 502.01(VI)L)(4)(j), and his counsel made multiple requests, before Mr. Braxton's hearing, to be present as an observer and to assist Mr. Braxton with pre-hearing preparation as well. Even so, prison officials required Mr. Braxton to proceed to hearing without his counsel present. Mr. Braxton's convictions should be vacated with instructions to conduct new and compliant disciplinary hearings for each of his charges as a result.

3. Alternatively, "may" means shall in the context of TDOC Procedure 502.01(VI)(L)(4)(j).

"At times, Tennessee courts have concluded that words of a permissive nature,

such as 'may,' are to be given a mandatory significance." *Baker v. Seal*, 694 S.W.2d 948, 951 (Tenn. Ct. App. 1984). Indeed, such use is "frequent[.]" *See, e.g.*, *Fiske v. Grider*, 106 S.W.2d 553, 555 (Tenn. 1937) ("In statutory construction the word 'may' is frequently construed to mean 'shall'"); *Burns v. Duncan*, 133 S.W. 1000, (Tenn. 1939) ("the word 'may', in statutes, has been frequently construed as imperative, and meaning the same as 'shall'"); *Jones v. Dailey*, 785 S.W.2d 365, 366 (Tenn. Ct. App. 1989) ("In *For v. Noe*, 144 Tenn. 337, 233 S.W. 516 (1920), our Supreme Court interpreted the word 'may' in T.C.A. § 20-12-132 to read 'shall[.]'"). Here, as detailed below, TDOC Procedure 502.01(VI)(L)(4)(j) alternatively supports a reading that "may" is used in its imperative sense.

When construing a statute or administrative rule, courts should afford significant weight to the purpose of the larger statutory scheme. *See Dudley v. Unisys. Corp.*, 852 S.W.2d 435, 438 (Tenn. Ct. App. 1992) ("In construing statutes, the court must give effect to legislative intent which is fundamental and paramount."). "[P]urpose is to be ascertained primarily from the natural and ordinary meaning of the language used when read in context of the entire statute and without any forced construction to limit or extend the meaning." *Id.*; *see also Baker v. Seal*, 694 S.W.2d 948, 951 (Tenn. Ct. App. 1984) ("In determining whether a provision is permissive or mandatory, 'the prime object is to ascertain the legislative intent, from a consideration of the entire state, its nature, its object, and the consequences that would result from construing it one way or the other....'" (quoting *Stiner v. Powells Hardware Co.*, 168 Tenn. 99 (1934))). Courts also interpret administrative procedures based on the "context in which they appear[.]" *Wallace v. Metro. Gov't of Nashville*, 546 S.W.3d 47 (Tenn. 2018) ("The words used in a statute are to be given their natural and ordinary meaning, and, because 'words are known by the

company they keep,' we construe them in the context in which they appear and in light of the general purpose of the statute." (quoting *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 526 (Tenn. 2010))).

Here, this Court need not strain to discern the purpose of the Uniform Disciplinary Procedures, because the TDOC has made it explicit: "[t]o provide for **the fair and impartial determination and resolution of all disciplinary charges** placed against inmates committed to the Tennessee Department of Correction (TDOC)." Uniform Disciplinary Procedure 502.01(II) (emphasis added). With the explicit purpose of promoting "fair and impartial" proceedings in mind, this Court must also consider the consequences of a mandatory versus permissive interpretation. *See Baker*, 694 S.W.2d at 952 ("In determining whether a provision is permissive or mandatory, 'the prime object is to ascertain the legislative intent, from a consideration of . . . the consequences that would result from construing it one way or the other....'").

Under a mandatory interpretation of "may," inmates facing disciplinary charges would have a right to have a witness present to observe their disciplinary hearings, which are not recorded. That result would help ensure accurate accounts of what took place and would afford inmates an otherwise unavailable opportunity to contest misstatements in the Administrative Record.

On the other hand, under a permissive interpretation, inmates would be left to appeal challenges without a witness available to attest to any improprieties in the Administrative Record. Thus, as here, they would be forced to exhaust their administrative remedies based on an incomplete, non-verbatim Administrative Record that is not and need not even be certified as accurate.

Given this context, the only reading of Procedure 502.01(VI)(L)(4)(j) that matches

its purpose is to allow attorneys to be present as observers when inmates have an attorney and invoke their right to have their attorney be present. This allows inmates to ensure that the proceedings are conducted in compliance with internal procedures, are recorded accurately, and can be subject to meaningful appellate review if they are not. This reading is also consistent with the first half of Procedure 502.01(VI)(L)(4)(j) (stating that "[a]ttorneys shall not be permitted **to participate** in disciplinary hearings") (emphasis added)—a provision that simply reflects the Supreme Court's holding in *Wolff* that inmates have no right to have "retained or appointed counsel [represent them] in disciplinary proceedings." *See Wolff*, 418 U.S. at 570.

4. <u>Regardless of the meaning of "may," discretion cannot be wielded arbitrarily, and there is no indication in the administrative record that prison officials considered the request or denied it for any specific reason.</u>

Even assuming that the word "may," as used in Procedure 502.01(VI)(L)(4)(j), is a discretionary term—and assuming further that the discretion afforded by Procedure 502.01(VI)(L)(4)(j) belonged to *the TDOC*, rather than to Mr. Braxton—Mr. Braxton is *still* entitled to relief in this proceeding. Simply put: prison officials cannot wield their discretion under Procedure 502.01(VI)(L)(4)(j) arbitrarily and without an adequate explanation. *See, e.g., Ponte v. Real*, 471 U.S. 491, 499 (1985) ("to hold that the Due Process Clause confers a circumscribed right on the inmate to call witnesses at a disciplinary hearing, and then conclude that no explanation need ever be vouched for the denial of that right, either in the disciplinary proceeding itself or if that proceeding be later challenged in court, would change an admittedly circumscribed right into a privilege conferred in the unreviewable discretion of the disciplinary board."). Here, the Administrative Record makes plain that that is precisely what they did, and that the

decision was made without any explanation at all.

Courts have "'emphasized time and again that the touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.'" *See Consol. Waste Sys., LLC v. Metro. Gov't of Nashville & Davidson Cnty.*, No. M2002-02582-COA-R3CV, 2005 WL 1541860, at *4 (Tenn. Ct. App. June 30, 2005) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845-46, 118 S.Ct. 1708, 1716 (1998)). Thus, "the exercise of power without reasonable justification" gives rise to a due process violation. *See id.* at *5. *Cf. Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) ("citizens have a substantive due process right not to be subjected to arbitrary or irrational zoning decisions."). Arbitrary action by prison officials is also remediable by certiorari as both an illegality and an abuse of discretion. *See, e.g., Arnold*, 956 S.W.2d at 480 (observing that illegal or arbitrary conduct is remediable by certiorari); *Gordon*, 2007 WL 2200277, at *2 (observing that "plain and palpable abuses of discretion" are remediable via certiorari).

The Tennessee Court of Appeals has explained that "[a]n arbitrary decision is one that is based alone on one's will and not upon any cause of reasoning or exercise of judgment." *See SPE, Inc. v. Metro. Gov't of Nashville & Davidson Cnty.*, 817 S.W.2d 330, 332 (Tenn. Ct. App. 1991) (citing *State ex rel. Nixon v. McCanless*, 176 Tenn. 358, 141 S.W.2d 887 (1940)); *Madison Cnty. v. Tennessee State Bd. of Equalization*, No. W2007-01121-COA-R3-CV, 2008 WL 2200050, at *4 (Tenn. Ct. App. May 27, 2008) ("'An arbitrary decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis

that would lead a reasonable person to reach the same conclusion.'" (quoting *Jackson Mobilphone Co., Inc. v. Tennessee Pub. Serv. Comm'n*, 876 S.W.2d 106, 110 (Tenn. Ct. App. 1993))). As detailed below, that standard is met here.

Procedure 502.01(VI)(L)(4)(j) reflects that, at least sometimes, attorneys are permitted to be present to observe inmate disciplinary hearings. The text of the rule supports no other conclusion. *See id.* ("Attorneys shall not be permitted to participate in disciplinary hearings but may be permitted to be present as observers.").

Given that context, then, if prison officials are afforded discretion under Procedure 502.01(VI)(L)(4)(j), then their decisions to refuse an attorney's request to be present to observe a client's disciplinary hearing cannot "be based alone on [an official's] will and not upon any cause of reasoning or exercise of judgment." *See SPE, Inc.*, 817 S.W.2d at 332. Instead, such decisions must be based on a "course of reasoning or exercise of judgment" that does not "disregard[] the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion." *See Jackson Mobilphone Co.*, 876 S.W.2d at 111.

Here, the decision to refuse to allow Mr. Braxton's counsel to be present to observe Mr. Braxton's disciplinary hearing—notwithstanding advance requests from both Mr. Braxton and his counsel—cannot be characterized as anything but an arbitrary decision. The Administrative Record does not reflect any articulated basis for that decision. Indeed, the Administrative Record does not reflect any consideration of the requests made by Mr. Braxton and his counsel at all.[24] That omission notwithstanding, prison officials refused to allow counsel to be present without explanation, and the TDOC then

[24] *Compare generally* A.R., *with* Exs. 1, 3 & 4 to Pet. for Writ of Certiorari

omitted all documents related to that request from the Administrative Record.

What TDOC records *do* reflect is that prison officials pledged to retaliate against Mr. Braxton for invoking his rights under TDOC policy, and that TDOC officials then followed through with their threat and baselessly charged him with "defiance" for "stating that he would contact his attorney."[25] That approach does not indicate that TDOC officials acted rationally, considering "the facts or circumstances of the case" in a manner "that would lead a reasonable person to reach the same conclusion[,]" though. *See Jackson Mobilphone Co.*, 876 S.W.2d at 111. To the contrary, it reflects that TDOC officials acted *illegally*. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) ("In a retaliation claim such as this, however, the harm suffered is the adverse consequences which flow from the inmate's constitutionally protected action. . . . [R]etaliation for the exercise of constitutional rights is itself a violation of the Constitution.").

The harm resulting from an unreasoned denial of the right to have an observer present is also obvious from the proceedings below, which were not recorded. Had counsel been present, Mr. Braxton would have had a witness who could attest that he sought to introduce—but was forbidden from introducing—exonerating evidence from multiple witnesses that would have shown that drugs were never found on his person as the lone testifying witness falsely claimed. Mr. Braxton emphasized his complaints about these improprieties while he was exhausting his administrative remedies,[26] but they were summarily rejected, and the materially incomplete Administrative Record substantially fails to mention them. Thus, if counsel had been present, there would be at least one non-participant party—one with a duty of candor who is subject to professional consequences

[25] *See* Ex. 6 to Pet. for Writ of Certiorari. *Cf.* Ex. 4 to Pet. for Writ of Certiorari.
[26] *See* Ex. 7 to Pet. for Writ of Certiorari at 1–2; *id.* at Ex. 8 to Pet. for Writ of Certiorari at 1–3.

for misstatements—who could attest to the vast defects and omissions in the Administrative Record, portions of which Mr. Braxton himself could not observe because he was "put out" of one of his own hearings for conducting cross-examination.[27]

In summary: Prison officials' refusal to allow Mr. Braxton's counsel to attend his disciplinary hearings as an observer was arbitrary and illegal. It also resulted in substantial prejudice to Mr. Braxton. Mr. Braxton is entitled to relief and a new, compliant disciplinary hearing as to each charge as a result.

B. THE TDOC VIOLATED MR. BRAXTON'S DUE PROCESS RIGHTS.

Inmates in the custody of the Tennessee Department of Correction are "not wholly stripped of constitutional protections[.]" *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Thus, when an inmate's legitimate and protected liberty interest in a statutorily created right is threatened, inmates may not be deprived of that right without "due process of law." *See id.* at 556. *See also Mayes v. Trammell*, 751 F.2d 175, 179 (6th Cir. 1984) (finding that Tennessee's then-existing parole rules "do indeed create a liberty interest" protected by due process).

Here, Mr. Braxton had precisely that: a protected liberty interest in the statutorily created right to parole under the Reentry Success Act. *See* Tenn. Code Ann. § 40-35-503. As such, Mr. Braxton was entitled "to those minimum procedures appropriate under the circumstances required by the Due Process Clause to insure that the state-created right [to parole] is not arbitrarily abrogated." *See Wolff*, 418 U.S. at 557.

[27] *See* Ex. 7 to Pet. for Writ of Certiorari at 2 ("I was put out of my second hearing because I was asking C/O Mark Hayes questions about policy in T.D.O.C. and C/O Hayes seemed oblivious to said T.D.O.C. policy."); *see also* Ex. 8 to Pet. for Writ of Certiorari at 1 ("I was put out of my second hearing because I was asking questions about T.D.O.C. policy, and c/o Hayes seemed unfamiliar to said T.D.O.C. policy mentioned in hearing.").

1. Mr. Braxton had a due process-protected liberty interest in his presumptive right to parole under the Reentry Success Act.

For most of Tennessee's history, parole was a privilege, rather than a right. But when the General Assembly enacted the Reentry Success Act in 2021, it established a presumptive right to parole for a narrow class of eligible inmates. *See* Tenn. Code Ann. § 40-35-503. Critically, though, to be an "eligible" inmate under the Reentry Success Act, an inmate must not have "received a Class A or Class B disciplinary offense under department of correction policy within one (1) year of the inmate's parole hearing[.]" *See id*. at § 40-35-503(i)(2)(D).

"'There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires.'" *See Hughes v. Tennessee Bd. of Prob. & Parole*, 514 S.W.3d 707, 713 (Tenn. 2017). The statutory presumption of parole created by the Reentry Success Act falls within the former category. *See Mayes*, 751 F.2d at 179 (holding that a presumption of parole is a due process-protected liberty interest). *See also Wolff*, 418 U.S. at 558 ("We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government[.]" (citing *Dent v. West Virginia*, 129 U.S. 114, 123 (1889)). Thus, because a conviction of a Class A or B disciplinary offense carried with it the automatic loss of Mr. Braxton's presumptive right to parole under the Reentry Success Act of 2021, he was entitled "to those minimum procedures appropriate under the circumstances required by the Due Process Clause to insure that the state-created right [to parole] is not arbitrarily abrogated." *Wolff*, 418 U.S. at 557.

At least one part of the process that is due under these circumstances is clear:

Tennessee prison disciplinary boards are bound to follow their own self-imposed procedures. *See Howard*, 2018 WL 625115, at *3. Thus, a prisoner is entitled to certiorari relief "if he demonstrates that the disciplinary board failed to adhere to the Uniform Disciplinary Procedures and that its failure to do so resulted in substantial prejudice to the inmate." *Bonner v. Cagle*, No. W2015-01609-COA-R3-CV, 2016 WL 97648, at *7 (Tenn. Ct. App. Jan. 7, 2016) (citing *Irwin v. Tennessee Dep't of Correction*, 244 S.W.3d 832, 835 (Tenn. Ct. App. 2007)).

The loss of a presumptive right to parole qualifies as substantial prejudice. *See Mayes*, 751 F.2d at 179. It is also "atypical in comparison to the 'ordinary incidents of prison life[,]'" because only some of the prison population is entitled to the Reentry Success Act's presumptive right to parole. *Willis*, 113 S.W.3d at 711 (quoting *Sandin*, 515 U.S. at 483-84). As such, the remaining question is whether the disciplinary board "failed to adhere to the Uniform Disciplinary Procedures" during Mr. Braxton's May 9, 2022, disciplinary hearings. *Id.*

2. Mr. Braxton's disciplinary hearings did not satisfy minimum due process guarantees.

Prison officials failed to adhere to the Uniform Disciplinary Procedures when conducting Mr. Braxton's disciplinary hearings. Indeed, they violated Mr. Braxton's due process rights in several respects, including by creating a deliberately incomplete and inaccurate Administrative Record that insulated their procedural non-compliance from appellate review. Relief is warranted accordingly.

The Administrative Record here—though materially incomplete—supports multiple irregularities. For instance, although Mr. Braxton had an exonerating affidavit with him during his hearing and mentioned it, the Disciplinary Board did not allow Mr.

Braxton to admit the affidavit of the two other inmates who took "full responsibility of any and all contraband" that Mr. Braxton was charged with possession and attested that they had "informed several Staff and Gold Badges at the time[.]"[28] Nor did the Disciplinary Board permit Mr. Braxton to complete cross-examination, opting to "put [him] out" of the hearing and conduct the balance of it in Mr. Braxton's absence instead.[29] The Disciplinary Board did not allow Mr. Braxton to call another Sergeant who would have testified that the drugs at issue were never found on Mr. Braxton's person as alleged, either.[30] Mr. Braxton also was not permitted the assistance of counsel before his hearing to prepare—something TDOC policy does not forbid in any respect—or permitted to have his counsel present as an observer, which TDOC policy expressly allows, *see* TDOC Uniform Disciplinary Procedure 502.01(VI)(L)(4)(j).

Unless waived, inmates like Mr. Braxton have a right "[t]o call witnesses in his/her own behalf" and "[t]o cross-examine his/her accuser and hostile witnesses[.]"[31] Here, though, Mr. Braxton was denied the right to call three exonerating witnesses—two inmates and a guard—without explanation;[32] his written testimony from two such witnesses—though referenced in the handwritten report of the proceedings—was not admitted and is absent from the Administrative Record;[33] and he was also tossed out of

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[28] Ex. 5 to Pet. for Writ of Certiorari.
[29] *See* Ex. 7 to Pet. for Writ of Certiorari at 2; *see also* Ex. 8 to Pet. for Writ of Certiorari at 1.
[30] *See* Ex. 8 to Pet. for Writ of Certiorari at 1.
[31] *See* Ex. 2 to Pet. for Writ of Certiorari at 10; *see also id.* at 12–13 ("To cross-examine any witness (except a confidential source) who testified against him/her and to review all adverse documentary evidence (except confidential information)." "The right to present the testimony of relevant witness(es), unless allowing the witness to appear would pose a threat to institutional safety or order.")
[32] *See e.g.*, Ex. 7 to Pet. for Writ of Certiorari at ("Two (2) officers searched by Sgt. Aaron Williams was not listed nor was he present at D-Board hearing when I requested that he be present").
[33] *Compare generally* A.R., *with* Ex. 7 to Pet. for Writ of Certiorari at 2 ("I provided board members with an affidavit that was notarized to show my innocence, but no one even looked at said valid document") *and* Ex. 8 to Pet. for Writ of Certiorari at 1 ("I provided Board Members with an Affidavit that was notarized, to support by innocence, but the members refused to consider the evidence"). *See also* Ex. 5 to Pet. for Writ of Certiorari.

one of his own disciplinary hearings for conducting cross-examination of the guard who testified against him.[34] Compounding those improprieties, the violations were concealed by a materially incomplete, non-verbatim Administrative Record that omitted them; Mr. Braxton was denied the opportunity to have his counsel present as an observer without explanation and in contravention of TDOC policy; and Mr. Braxton's disciplinary hearings were not recorded.

Put another way: TDOC officials violated procedure, Mr. Braxton was denied a meaningful right to be heard during his initial disciplinary hearings, and Mr. Braxton was denied meaningful appellate review afterward due to deliberately-introduced deficiencies in the Administrative Record—a record that is materially incomplete and inadequate by design. *Cf. Hale v. Turney Ctr. Disciplinary Bd.*, No. M2020-00724-COA-R3-CV, 2020 WL 6948529, at *3 (Tenn. Ct. App. Nov. 25, 2020) (providing that judicial relief is warranted when "'a departure from the Uniform Disciplinary Procedures [] effectively den[ies] the prisoner a fair hearing.'" (quoting *Jeffries v. Tennessee Dep't of Correction*, 108 S.W.3d 862, 873 (Tenn. Ct. App. 2002)). Individually—and certainly in combination—these improprieties contravened minimum due process guarantees. *See Manning v. City of Leb.*, 124 S.W.3d 562, 566 (Tenn. Ct. App. 2003) ("The essence of procedural due process is notice and an opportunity to be heard at a meaningful time and in a meaningful manner."). *Cf. Mayes*, 751 F.2d at 179 ("Plaintiff complains that he was not allowed to present any evidence at his parole hearing. Although *Greenholtz* suggests that a full panoply of adversary procedural rights is not required at a parole hearing, it is

[34] *See* Ex. 7 to Pet. for Writ of Certiorari at 2 ("I was put out of my second hearing because I was asking C/O Mark Hayes questions about policy in T.D.O.C. and C/O Hayes seemed oblivious to said T.D.O.C. policy."); *see also* Ex. 8 to Pet. for Writ of Certiorari at 1 ("I was put out of my second hearing because I was asking questions about T.D.O.C. policy, and c/o Hayes seemed unfamiliar to said T.D.O.C. policy mentioned in hearing.").

unclear whether plaintiff can be stripped entirely of his right to be heard.") (internal citations omitted).

Procedure 502.01(VI)(L)(4)(n) specifies the details that the hearing officer must include in their disciplinary decision, while Procedure 502.01(V) mandates that "[f]air and impartial proceedings will be administered against inmates charged with disciplinary infractions." *Id.* "Considering both policies together, the Department has an obligation to provide accurate and specific reasons for its decisions." *Ivy v. Tennessee Dep't of Correction*, No. M2001-01219-COA-R3-CV, 2003 WL 22383613, at *4 (Tenn. Ct. App. Oct. 20, 2003). When witness testimony or similar information—such as evidence that was not allowed to be admitted at the hearing—is omitted from the written record or materially mischaracterized, though, the panel "not only violates the Department's policies but also undermines the fundamental fairness of the disciplinary hearing and the efficacy of judicial review of prison disciplinary decisions." *Id.*

Indeed, the TDOC's deliberate efforts to ensure that a complete record of proceedings is not available is a due process violation by itself, because it conceals errors that take place during a disciplinary proceeding, and all appellate review is compromised by it. Written records ensure that administrators such as disciplinary panel members act fairly, and the absence of a written record leaves an inmate "at a severe disadvantage in propounding his own cause to or defending himself from others." *Wolff*, 418 U.S. at 565. As such, "there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action. *Id.* at 564–65 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 2604 (1972)).

On several occasions, the Court of Appeals has relied on omissions from an Administrative Record to determine what occurred during inmate disciplinary hearings

and adjudicate inmates' claims arising from them. *See, e.g., Rogers v. Payne*, No. E201000523COAR3CV, 2010 WL 4272745, at *3 (Tenn. Ct. App. Oct. 28, 2010) ("Petitioner claims that he had requested the presence of five witnesses. Despite these allegations, the *record* simply does not support a finding that Petitioner requested and was denied the opportunity to call witnesses on his behalf. We have previously denied relief to a prisoner who claimed that he was not allowed to call witnesses when '[t]he record before us show[ed] *by omission* that appellant did not make a request to put on a witness to testify in his defense.'") (quoting *Holmes v. Tenn. Dep't of Corr.*, No. E2008–00894–COA–R3–CV, 2009 WL 1065941, at *3 (Tenn.Ct.App. Apr.21, 2009)). When disciplinary hearings are not recorded, though—and when material components of them, including the actual testimony of witnesses, what occurred during the proceedings, and documentary exhibits that an inmate tried to introduce, are omitted from the administrative record arising from them—this inquiry is fundamentally compromised.

Put another way: Without an accurate and verbatim record of what occurred during an inmate disciplinary hearing, omissions in the Administrative Record do not actually demonstrate that something did not happen. Instead, as here, they simply reflect *that the TDOC omitted the matter* from its deliberately incomplete record of proceedings. That alone accounts for why (among other omissions): (1) Mr. Braxton's requests for counsel to be present as an observer appear nowhere in the Administrative Record;[35] (2) the exonerating affidavit that he sought to introduce appears nowhere in the Administrative Record;[36] (3) the fact that he was removed from his hearing for conducting

[35] *Contra* Ex. 1 to Pet. for Writ of Certiorari; *see also* Exs. 3–4 to Pet. for Writ of Certiorari.
[36] *Contra* Ex. 5 to Pet. for Writ of Certiorari.

cross-examination appears nowhere in the Administrative Record;[37] and (4) the fact that he was subject to retaliation for "stating that he would contact his attorney"[38] appears nowhere in the Administrative Record.[39] These omissions—which were exclusively within the control of the TDOC, and which West Tennessee State Penitentiary's thoughtful decision to stop recording disciplinary hearings deliberately insulates from meaningful appellate review—are incompatible with due process, particularly when paired with prison officials' decision to deny Mr. Braxton the opportunity to have a witness present as an observer without justification. Thus, Mr. Braxton is entitled to certiorari relief and a new disciplinary hearing that satisfies minimum due process guarantees.

V. CONCLUSION

For the foregoing reasons, this Court should grant Mr. Braxton's petition and enter a final judgment:

1. Reversing Defendant Helton's disposition affirming Mr. Braxton's disciplinary charges;

2. Vacating Mr. Braxton's disciplinary charges without prejudice to the charges being retried at a due-process-compliant, recorded hearing with his counsel present and with the benefit of pre-hearing assistance from his counsel;

3. Declaring that Mr. Braxton's counsel may be present as an observer at any

[37] *Contra* Ex. 7 to Pet. for Writ of Certiorari at 2 ("I was put out of my second hearing because I was asking C/O Mark Hayes questions about policy in T.D.O.C. and C/O Hayes seemed oblivious to said T.D.O.C. policy."); *see also* Ex. 8 to Pet. for Writ of Certiorari at 1 ("I was put out of my second hearing because I was asking questions about T.D.O.C. policy, and c/o Hayes seemed unfamiliar to said T.D.O.C. policy mentioned in hearing.").
[38] *See* Ex. 6 to Pet. for Writ of Certiorari.
[39] *Contra id.* (charging Mr. Braxton with a disciplinary infraction for defiance for "stating that he would contact his attorney").

future disciplinary hearing; and

4. Declaring that all consequences, including loss of sentencing credits and parole consequences, resulting from the Defendants' illegal and unconstitutional disciplinary proceedings are a nullity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of February, 2023, a copy of the foregoing was served via email or USPS mail upon the following:

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