4-1-2011

Burghart v. Carlin Respondent's Brief Dckt. 38137

IN THE SUPREME COURT OF THE STATE OF IDAHO

RANDOLF L. BURGHART,	)	
	)	**Supreme Court Docket No. 38137-2010**
Plaintiff-Appellant,	)	
vs.	)	Ada County District Court No. 2009-362
	)	
TEREMA CARLIN, Warden	)	
PROBATION AND PAROLE,	)	
	)	
Respondents-Respondents	)	
On Appeal.	)	
	)	

BRIEF OF RESPONDENTS CARLIN AND IDAHO COMMISSION OF PARDONS AND PAROLE

Appeal From the District Court of the
Second Judicial District of the State of Idaho,
In and For the County of Clearwater

HONORABLE JOHN BRADBURY
DISTRICT JUDGE, PRESIDING

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STATEMENT OF THE CASE

Nature Of The Case

The Appellant ("Burghart"), a pro se incarcerated inmate, appeals the district court's Memorandum Decision and Order granting Respondents' motion to dismiss and dismissal of Burghart's Petition for Writ of Habeas Corpus.

Statement of Facts

Burghart is a presently incarcerated within the Idaho Department of Correction ("IDOC") by virtue of a judgment of conviction and order of commitment. (R., p.16.) Burghart is currently housed at the Idaho Correctional Institution Orofino ("ICIO"). (Id.) Burghart was convicted in 1998 and sentenced to five (5) years fixed not to exceed twenty (20) years. (Id., p. 17.)

Procedural History

Burghart filed a Petition for Writ of Habeas Corpus on December 23, 2009. (R., p. 16.) In his Petition Burghart made four claims:

> (1) Given the statutory language "shall" in statue under Sass v. California Par. Bd. 461 F3d 1123 and Martin vs. Marshall 448 FSupp 2nd 1143 Petitioner has a liberty interest in parole 5th & 14th Amendment.
>
> (2) The parole board showed no evidence under the "some evidence" rule guaranteed to prisoners in a disciplinary, which under Hill vs Superintendent, some evidence applies to the parole context.
>
> (3) State parole board would satisfy due process requirements in action on petitioner's application when board conducts hearings, considers inmate's circumstance, prior record, institutional record, future plans and advising their reason denying application.
>
> (4) The commission is arbitrary, capricious and unconstitutional in their activities is why the Corrections budget went from $25 million in 1985 when Olivia Craven became director to $200 million now, because the parole board has went unchecked.

(R., p. 18.)

The district court issued an Order Directing Response and Notice of Hearing on December 29, 2009 directing that Respondents file a response within 60 days of the court's order. (R., p. 22.) The Respondents' filed their Response and Motion to Dismiss on February 17, 2010. (R., pp. 26-35.) The Respondents' moved to dismiss the Petition for Burghart's failure to state a claim and failure to exhaust his administrative remedies. (R., p.26.)

Burghart filed a Reply to Respondents' Answer and Motion to Dismiss Habeas Corpus on March 1, 2010. (R., pp. 36-39.)

The district court held a hearing on April 2, 2010. (R., p. 40.) Both parties presented argument to the court. (Id., pp. 40-41.) The court granted Burghart an additional 10 days to supplement his Petition with paperwork regarding exhaustion of remedies. (Id., p. 41.)

Burghart filed a Supplemental Attachment (Exhaustion) on April 7, 2010. (R., p. 46.) The Respondents' filed a Supplemental Response to Motion to Dismiss on April 12, 2010. (R., pp. 42-44.)

The district court issued its Memorandum Decision and Order on June 1, 2010, granting the Respondents' motion to dismiss and dismissing Burghart's Petition for Writ of Habeas Corpus. (R., pp. 45-51.)

Burghart filed a Motion For Reconsideration and Motion to Leave to Amend Petition on June 11, 2010. (R., pp. 53-59.) The Respondents' filed an Objection to Motion to Reconsider and Motion to File Amended Petition on July 13, 2010. (R., pp. 60-64.)

The district court issued a Memorandum Decision and Order on August 16, 2010. (R., pp. 66-70.) The district court denied Burghart's motion to amend and motion to reconsider. (R., pp. 68-69.) Thereafter Burghart filed a Notice of Appeal on September 9, 2010. (R., pp. 77-81.)

ISSUES

Burghart has asserted five issues on appeal as follows:

1. Did Petitioner exhaust his administrative remedies?

2. Unless denied, disputed or argued, petitioner's claims are deemed true for purposes of habeas corpus relief?

3. Like a disciplinary proceedings, some evidence attached to the parole commission?!

4. Arbitrary and capricious activities by the commission are unconstitutional?!

5. Idaho Statute IC 20-223(c) creates a liberty interest in parole in using the word shall in statute.

(Appellant's Brief, p.5.)

The state rephrases the issues on appeal as follows:

1. Did the district court abuse its discretion in dismissing Burghart's Petition for Writ of Habeas Corpus upon a finding that Burghart failed to state a claim for relief that denial of parole is a violation of Burghart's constitutional rights?

2. Did the district court abuse its discretion in granting the Respondents' motion to dismiss Burghart's Petition for Habeas Corpus Petition for failure to exhaust his administrative remedies?

ARGUMENT
I.
BURGHART HAS FAILED TO ESTABLISH THAT THE DISTRICT COURT ABUSED ITS DISCRETION IN DISMISSING HIS PETITION FOR WRIT OF HABEAS CORPUS

A. Introduction

Burghart appeals the district court's Memorandum Decision and Order granting Respondents' Motion to Dismiss and dismissing Burghart's Petition for Writ of Habeas Corpus.

B. Standard Of Review

The decision to issue a writ of habeas corpus is a matter within the discretion of the court. *Johnson, v. State*, 85 Idaho 123, 127, 376 P.2d 704, 706 (9162); *Brennan v. State*, 122 Idaho 911, 914, 841 P.2d 441, 444 (Ct. App. 1992). When the court reviews an exercise of discretion in a habeas corpus proceeding, the court conducts a three-tiered inquiry to determine whether the lower court rightly perceived the issue as one of discretion, acted within the boundaries of such discretion, and reached its decision by an exercise of reason. *Id.*; *Sivak v. Ada County*, 115 Idaho 762, 763, 769 P.2d 1134, 1135 (Ct. App. 1989). If a petition is not entitled to relief on an application for a writ of habeas corpus, the decision by the petitioned court to dismiss the application without an evidentiary hearing will be upheld. *Brennan*, 122 Idaho at 917, 841 P.2d at 447. When a court considers matters outside the pleadings on an I.R.C.P. 12(b)(6) motion to dismiss, such motion must be treated as a motion for summary judgment. *Hellickson v. Jenkins*, 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990).

When reviewing an order for summary judgment, the standard of review utilized by this Court is the same standard used by the district court in initially ruling on the motion. *Mendenhall v. Aldous*, 146 Idaho 434, 436 (2008). Under Idaho R. Civ. P. 56(c), summary judgment is to be rendered to the moving party if all the pleadings, depositions, and admissions

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In considering summary judgment the Court liberally construes all facts and all reasonable inferences in favor of the non-moving party. *A & J Const. Co., Inc. v. Wood*, 141 Idaho 682, 684 (2005).

In order to withstand a motion for summary judgment, a non-moving party may not rest on allegations in the pleadings, but must produce evidence by affidavit or deposition to contradict the assertions of the moving party. I.R.C.P. 56(e); *Worthen v. State*, 96 Idaho 175, 176 (1974). A non-moving party may not rely on general or conclusory allegations unsupported by specific facts, particularly where opposing affidavits set forth specific and otherwise uncontroverted facts. *Cameron v. Neal*, 130 Idaho 898, 902 (1997). Rather, a party must provide factual details of specificity equal to those furnished by his opponent. *Bob Daniels and Son v. Weaver*, 106 Idaho 535, 541 (1984). "A mere scintilla of evidence or only *slight doubt* as to the facts is not sufficient to create a genuine issue of material fact for the purposes of summary judgment." *Finholt v. Cresto*, 143 Idaho 894, 897 (2007) (emphasis added). Moreover, even disputed facts will not defeat summary judgment when the non-moving party fails to establish the existence of an essential element of his of her case, *Badell v. Beeks*, 115 Idaho 101, 102 (1988), or when a plaintiff fails to establish a prima facie case on which he or she bears the burden of proof. *State v. Shama Res. Ltd. P'ship*, 127 Idaho 267, 270 (1955).

C. The District Court Properly Dismissed Burghart's Petition For Writ Of Habeas Corpus For Failure To State A Claim For Relief

In reviewing a petition for writ of habeas corpus to decide if the writ should issue and an evidentiary hearing be held the court must treat all allegations contained in the petition as true. *Mahaffey v. State*, 87 Idaho 228, 392 P.2d 279 (1964). In order for a court to have jurisdiction to grant a writ of habeas corpus, it must appear a violation of constitutional rights has occurred. If,

after treating the allegations as true, the court finds that they do not state a constitutional claim, the court must dismiss the petition without further hearing. *Mitchell v. Agents of the State*, 105 Idaho 419, 670 P.2d 520 (1983). Although a petition for writ of habeas corpus differs somewhat from a typical civil complaint, the Idaho Rules of Civil Procedure do apply to habeas corpus proceedings. *Sivak v. Ada County*, 118 Idaho 193, 795 P.2 898 (Ct. App. 1990).

I.R.C.P. 12(b)(6) provides that a party may raise as a defense the failure of the opposing party to state a claim upon which relief can be granted. A court may grant a motion to dismiss based on I.R.C.P. 12(b)(6) for failure to state a claim upon which relief can be granted when it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. I.R.C.P. 12(b)(6); *Yoakum v. Hartford Fire Insurance Co.*, 129 Idaho 171, 923 P.2d 416, 420 (1996); *Orthman v. Idaho Power Co.*, 126 Idaho 960, 962, (1995). Under this standard, the non-moving party is entitled to have all inferences from the record viewed in its favor. *Id.* As to the proper standard to be applied to 12(b) motions, the Idaho Supreme Court held that:

> On a motion to dismiss, the court looks only at the pleadings, and all inferences are viewed in favor of the non-moving party. *Young v. City of Ketchum*, 137 Idaho 102, 104 44 P.3d 1157, 1159 (2002) (regarding 12(b)(6) motions); *Osborn v. United States*, 918 f.2d 724, 729, n. 6 (8th Cir. 1990) (regarding 12(b)(1) motions raising facial challenges to jurisdiction. "[T]he question then is whether the non-movant has alleged sufficient facts in support of his claim which, if true, would entitle him to relief." *Rincover v. State*, 128 Idaho 653, 656, 917 P.2d 1293, 1296 (1996) (regarding 12(b)(6) motions); *Serv. Emp. Intern. v. Idaho Dept. of H. & W.*, 106 Idaho 756, 758, 683 P.21d 404, 406 (1984) (regarding 12(b) challenges generally; *Osborn*, 918 F.2d at 729, n. 6 (regarding 12(b)(1) facial challenges). "[E]very reasonable intendment will be made to sustain a complaint against a motion to dismiss for failure to state a claim." *Idaho Comm'n on Human Rights v. Campbell*, 95 Idaho 215, 217, 506 P.2d 112, 114 (1973). "the issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims. *Young,* 137 Idaho at 104, 44 P.3d at 1159.

Owsley v. Idaho Industrial Commission, 141 Idaho 129, 106 P.3d 455, 459 (2005).

In this case the district court should look to draw all inferences in favor of Burghart and seek to determine whether he has alleged sufficient facts in support of his claim, which, if true, would entitle him to relief, and whether he is entitled to offer evidence in support of his claims. As the following discussion will illustrate, even when all inferences are drawn in Petitioner's favor, it was proper for the district court to dismiss Burghart's claims.

The Idaho Habeas statutes set forth certain requirements of the Petitioner when filing a Petition. Idaho Code §19-4205(4)(a) states that the Petition shall specify "the identity and address of the person or officer whom the prisoner believes is responsible for the alleged state or federal constitutional violations, and shall name the persons identified individually as respondents." Idaho Code § 19-4205(4)(d) also states that the petition shall specify "a short and plain statement of the facts underlying the alleged state or federal constitutional violation." Idaho Code § 19-4209(1)(c) grants the court authority to dismiss a petition, if the court finds "the petition fails to state a claim of constitutional violation upon which relief may be granted."

The district court granted the Respondents' motion to dismiss on the basis that Burghart failed to provide sufficient facts to support his allegations, allege conduct that would constitute a violation of his constitutional rights and that his reliance on *Greenholtz v. Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979) is misplaced. (R., p. 49.) Furthermore the district court stated that *Sass v. Cal. Bd. Of Prison Terms*, 461 F.3d 1123 (9th Cir. 2206), *Biggs v. Terhune*, 334 F.3d 910 (9th Cir., 2003), *Martine v. Marshall*, 448 F.Supp.2d 1143 (N.D. Cal. 2006) and *Walpole v. Hill*, 472 U.S. 445 (1985) are inapplicable. (Id.)

1. Does Burghart Have A Liberty Interest In Parole?

Burghart argues in his Petition that he has a liberty interest in parole under *Sass* and the "some evidence" standard in *Walpole* applies to parole hearings. (R., p.17.) Burghart also argues

that the "shall" language in the statue creates a liberty interest pursuant to *Sass* and *Martin*. (Id., p.18.) The district court was correct in holding that the Burghart did not state a claim for relief. Burghart has no liberty interest in parole and therefore does not have a constitutionally protected right to due process in a parole hearing.

The United States Supreme Court has clearly stated "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Idaho courts have consistently held there is no right to parole. *Izatt v. State*, 104 Idaho 597, 661 P.2d 763 (Ct. App. 1983); *Hays v. Craven*, 131 Idaho 761, 963 P.2d 1198 (Ct. App. 1998). "The Idaho Supreme Court has concluded that Idaho statutes do not provide a legitimate expectation of parole, but merely the possibility thereof." *Hays*, 131 Idaho at 764 (citing *Izatt*, 104 Idaho at 600). Furthermore, "Idaho's statutory parole scheme allows for parole only in the discretion of the Commission for Pardons and Parole." *Vittone v. State*, 114 Idaho 618, 619, 759 P.2d 909 (Ct. App. 1988); Idaho Code § 20-223(c) ("A parole shall be ordered when, in the discretion of the commission, it is in the best interests of society, and the commission believes the prisoner is able and willing to fulfill the obligations of a law-abiding citizen.") "[I]t has long been settled—that the possibility of parole is not protected by due process and that inmates have no constitutional right to due process in parole hearings." *Drennon v. Craven*, 141 Idaho 34, 36, 105 P.3d 694 (Ct. App. 2004). Because Idaho law does not give Burghart a liberty interest in parole, he is precluded from asserting a due process claim challenging the Commission's decision denying him parole.

Petitioner attempts to argue around this clearly established law by relying on *Sass v. California Board of Prison Terms*, 461 F.3d 1123 (9th Cir. 2006). In *Sass*, the Ninth Circuit Court of Appeals explained that whether the denial of parole violates a prisoner's due process

rights depends on whether the relevant state statute governing parole creates a liberty interest by using mandatory language. *Sass*, 461 F.3d at 1127. As clarified by the court, if state law does not create a liberty interest in parole, then a due process challenge is not allowed. *Id.* Because Idaho law does not create a liberty interest in parole, Petitioner's reliance on *Sass* is misplaced.

Recently, the United States District Court for the District of Idaho decided a series of cases addressing the same issue as raised by Burghart. As explained by the court in *Fox v. Craven*, 2007 WL 2782071 (D. Idaho 2007):

> It remains the law that an inmate can bring a procedural due process challenge to a parole decision only where there is a state-created liberty interest in parole. *See Board of Pardons v.* 482 U.S. 369, 380-81 (1987); *Sass v. California Board of Prison Terms,* 461 F.3d 1123, 1127 (9th Cir.2006). ... Therefore, before an inmate may bring a due process claim arising from a parole denial, he must show that there is a state-created liberty interest in parole.

Id. at *4. The district court further explained

> In *Banks v. State of Idaho*, 920 P.2d 905 (Idaho 1996), the Idaho Supreme Court addressed the liberty interest question. The court noted that the Idaho sentencing statue, I.C. § 19-2513, uses the nonmandatory words "[t]he offender may be considered for parole or discharge at any time during the indeterminate period of the sentence." The *Banks* Court held that, as a result of the statute's language, in Idaho "parole is not an automatic right or liberty interest." (Citations omitted.) the *Banks* Court acknowledged the existence of I.C. § 20-223, which governs parole commission decisions and contains the phrase "a parole shall be ordered when ...." However, the court apparently did not find the statute's "shall" language controlling in the liberty interest analysis, although that section is nearly the same as the language deemed mandatory in *Greenholtz* and *Allen*. Rather, the Idaho Supreme Court relied on I.C. § 19-2513-which governs sentencing-noting that it does not contain mandatory language, but instead states that "[t]he offender may be considered for parole or discharged at any time during the indeterminate part of the sentence."

Id. at *5. "All Idaho cases are in agreement that the parole statutes are not mandatory and that there is not liberty interest in parole in Idaho." Id. The court in *Balla v. Idaho State Board of Correction*, 869 F.2d 461 (9th Cir. 1989), the Ninth Circuit noted that "§ 20-223 does not establish any entitlement to parole" and cited Allen and Greenholtz. *Id.* The court then reviewed

Idaho's parole statutes and related cases before concluding:

> In *Sass,* the Ninth Circuit Court of Appeals relied on the principle that "a State's highest court is the final judicial arbiter of the meaning of state statutes" to determine whether a state parole statute was mandatory or permissive. 461 F.3d at 1127. Because the Idaho Supreme Court has spoken on this issue, this Court is bound to follow its interpretation of state law. Parole is not mandatory in Idaho, resulting in no liberty interest in parole. This conclusion, in turn, prevents an inmate from pursuing due process claims arising from a denial of parole.

Id. The court applied the same analysis in *Abbott v. Craven*, 2007 WL 2684817, *5 (D. Idaho 2007) and *Muraco v. Sandy*, 2007 WL 1381795, *7 (D. Idaho 2007). Based on the foregoing analysis, the district court properly held that Burghart's reliance on *Sass* is misplaced.

Burghart relies on *Superintendent, Massachusetts Correctional Institution, Walpole v. Hill*, 472 U.S. 445 (1985) for the proposition that the "some evidence" standard in *Hill* attaches to the Commission in a parole proceeding. (Appellant's Brief, p.8.) Burghart argues that he was deprived of due process when the Commission's decision was not supported by "some evidence." (Id.) Burghart contends that the Respondents did not address this issue. (Id.)

The Respondents' moved to dismiss the Petition for failure to state a claim and did address Burghart's claims in that the Respondents argued that Burghart had not stated a claim for relief and therefore was not entitled to any relief.

The district court held that the *Walpole* case was inapplicable. (R., p. 49.) In *Walpole* the issue before the court was "whether revocation of an inmate's good time credits violates the Due Process Clause of the Fourteenth Amendment if the decision of the prison disciplinary board is not supported by evidence in the record." *Walpole*, 472 U.S. 447. The court concluded that "where good time credits constitute a protected liberty interest, a decision to revoke such credits must be supported by some evidence." *Id. Walpole* is distinguishable from Burghart's case because in *Walpole* good time credits were being revoked and the decision was being made by

the prison disciplinary board. Walpole has a liberty interest in the good time credits that were being revoked. In this case, Burghart is claiming his sentence is being extended by the Commission and that he is being denied parole by the Commission. The Commission makes determinations about parole and it is not a disciplinary board. Burghart has not liberty interest in parole therefore he has not right to due process. *See Izatt v. State*, 104 Idaho 597 (Ct. App. 1983). Nothing is being revoked from Burghart therefore the state has not created a liberty interest in his parole. For the foregoing reasons, the district court did not abuse its discretion in holding that the *Walpole* case was inapplicable.

D. The District Court Properly Found That Burghart Failed To Exhaust His Administrative Remedies Against Respondent Carlin Prior To Filing A Lawsuit

Respondents moved to dismiss the claims in Burghart's Petition against Respondent Carlin on the basis that Burghart failed to exhaust his administrative remedies. (R., pp.30-32.) The district court during a hearing on April 2, 2010 granted Burghart additional time to supplement his Petition with paperwork indicating exhaustion of remedies because Burghart had marked the box in his Petition indicating that he exhausted his administrative remedies. (R., p.41.) The Plaintiff provided supplemental documentation on April 7, 2010 in which he provided the district court with a document from his parole hearing and not from any administrative appeal. (R., p.46.) The district court held that Burghart checked the box asserting he exhausted his administrative remedies and was attaching documents to prove so but no documents were filed. (R., p. 49.) Burghart was given additional time to produce documentation that he exhausted his administrative remedies. (Id.) The district court held that the documents produced by Burghart did not pertain to exhaustion of remedies and dismissed part of his claim with prejudice. (Id.)

Idaho Code § 19-4206(1), provides that:

> Unless a petitioner who is a prisoner establishes to the satisfaction of the court that he is in imminent danger of serious physical injury, no petition for writ of habeas corpus *or any other civil action* shall be brought by any person confined in a state or county, or in a state, local or private correctional facility, with respect to conditions of confinement until *all available administrative remedies have been exhausted.* If the institution, or state, local or private correctional facility does not have a system for administrative remedy, this requirement shall be waived.

(*Emphasis added*). This statute requires that any prisoner in Idaho who brings an action in state court exhaust "all available administrative remedies" as a prerequisite to bringing a civil action. This prerequisite may be waived only if the Petitioner is in imminent danger of physical harm or if the prison does not have a grievance system in place. Burghart does not allege in his Petition that he is in physical danger.

Similarly, on the federal level, the Prison Litigation Reform Act ("PLRA"), as codified at 42 U.S.C. § 1997e(a), provides that

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison or other correctional facility until such administrative remedies as are available are exhausted.

The Ninth Circuit has held that failure to exhaust one's administrative remedies, as required by the PLRA, is an affirmative defense on which defendants bear the burden of proof. *Wyatt v. Terhune*, 315 F.3d 1108, 1118 (9th Cir. 2003). As noted earlier, the Ninth Circuit has held that such a defense should be asserted by way of a motion to dismiss, while at the same time stating that the Court may consider matters beyond the pleadings. *Wyatt*, at 1119-1120.

The U.S. Supreme Court addressed the issue of exhaustion of remedies in *Booth v. Churner*, 532 U.S. 731 (2001). *Booth* involved a prison inmate who sought monetary damages, which were not available through the prison grievance system. *Booth* held that exhaustion of a prison's administrative remedy process was mandatory under the Prison Litigation Reform Act, regardless of whether the relief sought was available. 532 U.S. at 741. *Booth* expressly rejected

an interpretation of 42 U.S.C. § 1997e(a), which would have required an effective remedy to actually be available. The majority opinion noted that prior to enactment of an amendment in 1995 which created the present version of the statute, a court had discretion to require a state inmate to exhaust "such...remedies as are available" but only if those remedies were "plain, speedy and effective." 42 U.S.C. § 1997e(a) (1994 ed.). *Booth*, 532 U.S. at 739. But, under the present statute, a court lacks discretion to dispense with the exhaustion requirement. *Id.* at 739. The Supreme Court concluded that exhaustion is a procedural requirement, rather than a substantive or result-driven one, and that "exhaust," in the context of the statute, requires exhaustion of a process, not exhaustion of possible relief. *Id.* Thus, the phrase "such administrative remedies as are available" "requires a prisoner to exhaust the grievance procedures offered, whether or not the possible responses cover the specific relief the prisoner demands." *Id.* at 738.

The exhaustion requirement serves an important purpose, as the Supreme Court held in *Porter v. Nussle*, 534 U.S. 516, 623-25 (2002):

> Beyond doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case. In some instances, corrective action taken in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation...In other instances, the internal review might "filter out some frivolous claims"...And for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy.

(*citations omitted*), cited in *McKinney v. Carey*, 311 F.3d 1198, 1200 (9th Cir. 2002).

The district court did not abuse its discretion in dismissing Burghart's claims in his Petition against Respondent Carlin for failure to exhaust his administrative remedies. The law is settled, that in order to proceed in a habeas corpus action, Idaho Code § 19-4206(1) requires that

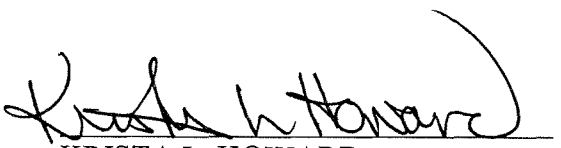
any prisoner in Idaho who brings an action in state court exhaust "all available administrative remedies" as a prerequisite to bringing a civil action. Burghart in his appeal argues that the Commission cannot be grieved according to their own IDAPA rules. (Appellant's Brief, p.6.) The Respondents do not argue that Burghart needed to exhaust his administrative remedies against the Commission; the Respondents argue that Burghart failed to exhaust his administrative remedies against Respondent Carlin. (R., p. 32.) Even after the district court gave Burghart the opportunity to supplement the record on the exhaustion issue, Burghart failed to provide evidence that he exhausted his administrative remedies. The district court properly exercised its discretion in dismissing the claims against Respondent Carlin for failing to exhaust his administrative remedies.

CONCLUSION

Based on the foregoing reasons and well settled Idaho law, the district court did not abuse its discretion in dismissing Burghart's Petition for Writ of Habeas Corpus. Accordingly, Respondents respectfully request that the Court affirm the dismissal of Burghart's Petition for Writ of Habeas Corpus.

DATED this 1 day of April, 2011.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL



KRISTA L. HOWARD
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1 day of April, 2011, I caused to be served a true and correct copy of the foregoing BRIEF OF IDOC RESPONDENTS to be served on:

Randolph Burghart #55288
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Via U.S. Mail

KRISTA L. HOWARD