Filing # 50454001 E-Filed 12/22/2016 04:51:57 PM

RECEIVED, 12/22/2016 04:53:27 PM, Clerk, Supreme Court

IN THE

SUPREME COURT OF FLORIDA

ROBERT E. BANKS, Petitioner, v. JULIE L. JONES, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, Respondent.	Case No. SC16-1478 Lower Tribunal No(s).: 1D15-330 2014-CA-585

INITIAL BRIEF OF THE PETITIONER

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **BANKS**

A. TABLE OF CONTENTS

Page

A. TABLE OF CONTENTS. ii

B. TABLE OF CITATIONS. iv

1. Cases. iv

2. Statutes. vii

3. Other Authority.. vii

C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS. . . . 1

D. SUMMARY OF ARGUMENT.. 5

E. ARGUMENT AND CITATIONS OF AUTHORITY.. 6

1. Habeas corpus – not mandamus – is the proper vehicle for an inmate to pursue when seeking release from close management into the general prison population. 6

a. Standard of Review 6

b. Argument. 6

2. The Petitioner is entitled to relief because "spitting" on another person is *not* "an act causing injury or an act which could have resulted in injury to another" 33

a. Standard of Review 33

b. Argument. 33

F. CONCLUSION. 37

G. CERTIFICATE OF SERVICE. 38

H. CERTIFICATE OF COMPLIANCE. 39

B. TABLE OF CITATIONS

Page

1. Cases

Adams v. Wainwright, 512 F. Supp. 948 (N.D. Fla. 1981). 17

Al-Amin v. Donald, 165 Fed. App'x 733 (11th Cir. 2006). 23

Arizona v. Evans, 514 U.S.1 (1995). 23

Arizona v. Rumsey, 467 U.S. 203 (1984). 26

Ashley v. Moore, 732 So. 2d 498 (Fla. 1st DCA 1999). 7-8, 21, 24

Banks v. Jones, 197 So. 3d 1152 (Fla. 1st DCA 2016).. . . . . *passim*

Barrett v. Belleque, 176 P.3d 1272 (Or. 2008). 10

Briggs v. Kempf, 191 P.3d 250 (Idaho Ct. App. 2008). 10

Castillo v. State, Dep't of Corr., 174 So. 3d 452 (Fla. 1st DCA 2015). 24

Clark v. Wainwright, 490 So. 2d 1055 (Fla. 1st DCA 1986). 17

Cooper v. Gammon, 943 S.W.2d 699 (Mo. Ct. App. 1997). 10

Costello v. Strickland, 418 So. 2d 443 (Fla. 1st DCA 1982). 7-8, 21, 29

Dep't of Highway Safety & Motor Vehicles v. Roberts,
938 So. 2d 513 (Fla. 5th DCA 2006). 33

Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003). 35

Gardener v. Fla. Dep't of Corr., 178 So. 3d 92 (Fla. 1st DCA 2015). 24

Granger v. Florida State Prison, 424 So. 2d 937 (Fla. 1st DCA 1983).. 7-8, 22, 25

Guess v. Barton, 599 So. 2d 770 (Fla. 1st DCA 1992).. . . . . 7-8, 21

Harris v. Nelson, 394 U.S. 286 (1969). 9

Harvard v. Singletary, 733 So. 2d 1020 (Fla. 1999). 4, 28

Henry v. Santana, 62 So. 3d 1122 (Fla. 2011). 8-9

Holland v. State, 791 So. 2d 1256 (Fla. 5th DCA 2001) 3-4, 7, 21

In re Cabrera, 158 Cal. Rptr. 3d 121 (Cal. 2013). 10

In re Pers. Restraint of Gentry, 245 P.3d 766 (Wash. 2010). 11

Jellison v. Mahoney, 986 P.2d 1089 (Mt. 1999).. 10

John v. Crews, 149 So. 3d 149 (Fla. 1st DCA 2014). 24-25, 30

Johnson v. State, 858 So. 2d 1071 (Fla. 3d DCA 2003).. 34-35

Johnson v. United States, 559 U.S. 133 (2010). 35

Keck v. Eminisor, 104 So. 3d 359 (Fla. 2012). 6

Kelly v. Nix, 329 N.W.2d 287 (Iowa 1983).. 10

Kendrick v. McNeil, 6 So. 3d 657 (Fla. 1st DCA 2009). 3, 6-8, 21, 24, 26

Kimble v. Marvel Entm't, LLC, – U.S. – , 135 S. Ct. 2401 (2015). 25-26

Lopez v. Penn. Dep't of Corr., 566 M.D. 2013 (Pa. Comm. Ct. 2015). 11

Magwood v. Tucker, 98 So. 3d 725 (Fla. 1st DCA 2012).. . . . . 7-8, 21, 24, 26

McConico v. Ala. Dep't of Corr., 893 So. 2d 577 (Ala. Crim. App. 2004). 11

Miller v. State, 988 So. 3d 188 (Fla. 1st DCA 2008). 36

Norris v. Dep't of Corrections, 721 So. 2d 1235 (Fla. 1st DCA 1998). . 7-8, 21, 24

Perez v. State, 620 So. 2d 1256 (Fla. 1993). 7-8

Pettit v. Crosby, 862 So. 2d 865 (Fla. 1st DCA 2003). 9

Plymel v. Moore, 770 So. 2d 242 (Fla. 1st DCA 2000). 24-25, 27

Rigterink v. State, 66 So. 3d 866 (Fla. 2011). 23

Rodgers v. Singletary, 142 F.3d 1252 (11th Cir. 1998). 13

Roy v. Dugger, 592 So. 2d 1235 (Fla. 1st DCA 1992). 7-8, 21

Sandin v. Conner, 515 U.S. 472 (1995). . . . . *passim*

Santana v. Henry, 12 So. 3d 843 (Fla. 1st DCA 2009).. 8-9

Settle v. Tenn. Dep't of Corr., 276 S.W.3d 420 (Tenn. Ct. App. 2008). 11

Shea v. Cochran, 680 So. 2d 628 (Fla. 4th DCA 1996). 9

Smith v. Moore, 749 A.2d 132 (D.C. 2000). 10

Smith v. State, 500 So. 2d 125 (Fla. 1986). 7

State ex rel. Larkins v. Wilkinson, 683 N.E.2d 1139 (Oh. 1997). 11

State v. Horwitz, 191 So. 3d 429 (Fla. 2016). 23

State v. Schopp, 653 So. 2d 1016 (Fla. 1995). 7-8

Sutton v. Strickland, 485 So. 2d 25 (Fla. 1st DCA 1986).. 27

Taylor v. Frey, 942 N.E.2d 758 (Ill. App. Ct. 2011). 11

Taylor v. Perrin, 654 So. 2d 1019 (Fla. 1st DCA 1995). 7-8, 21

Terrell v. State, 573 So. 2d 730 (Miss. 1990). 11

Thompson v. Dugger, 509 So. 2d 391 (Fla. 1st DCA 1987).. . . . . 7-8, 21, 25, 27

Vandever v. Comm'r of Corr., 106 A.3d 266 (Conn. 2014).. 10

Watkins v. Mitchem, 50 So. 3d 485 (Ala. Civ. App. 2010).. . . . . 13-14, 18-19

Westphal v. City of St. Petersburg, 194 So. 3d 311 (Fla. 2016).. 26

Westphal v. City of St. Petersburg, 122 So. 3d 440 (Fla. 1st DCA 2013). 26

Wilkinson v. Austin, 545 U.S. 209 (2005).. . . . . 12-13, 23, 30-31

Williams v. Fountain, 77 F.3d 372 (11th Cir. 1996).. . . . . 8, 13-14

Williams v. Tucker, 87 So. 3d 1270 (Fla. 1st DCA 2012). 24

Wolff v. McDonnell, 418 U.S. 539 (1974).. . . . . 22, 25

Wright v. McDonough, 958 So. 2d 1132 (Fla. 1st DCA 2007). 25

2. Statutes

§ 775.084, Fla. Stat... 35

§ 776.08, Fla. Stat... 35

§ 784.03(1)(a)1., Fla. Stat... 35

§ 784.03(1)(a)2., Fla. Stat... 35

3. Other Authority

Art. I, § 13, Fla. Const. 3, 29

F.A.C. 33-601.314. 1

F.A.C. 33-601.800. . . . . 20, 33-34

F.A.C. 33-601.800(1)(d). 20

F.A.C. 33-601.800(1)(e). 20

F.A.C. 33-601.800(2)(a). 9

F.A.C. 33-601.800(2)(a)2. 36

F.A.C. 33-601.800(2)(a)2.b.. 1

F.A.C. 33-601.800(11)(b). 15

F.A.C. 33-601.800(11)(b)5. 15

F.A.C. 33-601.800(11)(c)1. 15

F.A.C. 33-601.800(11)(c)2. 16

F.A.C. 33-601.800(11)(d)1. 15

F.A.C. 33-601.800(11)(d)3. 16

F.A.C. 33-601.800(12). 21

F.A.C. 33-601.800(13)(a). 14

F.A.C. 33-601.800(13)(b). 14

F.A.C. 33-601.800(16)(a). 20

F.A.C. 33-601.800(16)(e). 20

F.A.C. 33-601.800(19)(e). 15

Fla. R. App. P. 9.210(a)(2). 39

Grant Henderson, *Disciplinary Segregation; How the Punitive Solitary Confinement Policy in Federal Prisons Violates the Due Process Clause of the Fifth Amendment in Spite of Sandin v. Conner*, 99 Marq. L. Rev. 477 (Winter 2015).. 21

John P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U.L. Rev. 1 (1983). 8

U.S. Const. amend. XIV 3

C. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Petitioner is an inmate serving a thirty-year prison sentence for robbery in the Florida Department of Corrections (hereinafter "Department"). The robbery allegedly occurred in 1992.

On September 17, 2014, the Petitioner received a disciplinary report for a violation of Florida Administrative Code Rule 33-601.314, section 1-16 (battery or attempted battery on staff other than a correctional officer), based on the allegation that he "spit" on a Department mental health doctor. (Exhibit A attached to the Petitioner's original *pro se* petition filed in the district court). On September 25, 2014, after being found guilty by a hearing team (resulting in the Petitioner receiving 60 days in disciplinary confinement and a 364-day loss of previously earned gain-time), the Petitioner was served close management I referral assignment paperwork based on the same act. (R-11).[1] The sole basis for this recommendation was that the Petitioner committed "an act causing injury or an act which could have resulted in injury to another" as set forth in Rule 33-601.800(2)(a)2.b. (R-11).

Thereafter, the Petitioner filed a timely grievance appeal. In the grievance appeal, the Petitioner challenged his placement in close management, asserting that

---

[1] References to the district court record on appeal will be made by the designation "R" followed by the appropriate volume number and page number.

his act of "spitting" was not "an act that caused injury or that could have resulted in the injury to another." (Exhibit A attached to the Petitioner's original *pro se* petition filed in the district court). The Department denied the Petitioner's grievance appeal.

Subsequently, the Petitioner filed a writ of habeas corpus in the Eighth Circuit challenging his placement in close management. (R-1). On January 7, 2015, the circuit court summarily denied the petition, concluding:

> Petitioner has failed to demonstrate that he is entitled to due process protection in regard to the Department's decision to place him, or retain him, in CM. Nothing in the record demonstrates that Petitioner has a protected liberty interest in remaining free from a CM custody classification. Respondent's decision to place Petitioner in a particular confinement classification is a discretionary one that is necessary to maintain the order of the institution and the safety of the inmates and staff. The conditions of confinement in CM fall within the expected parameters of Petitioner's court-imposed prison sentence, and do not impose an "atypical or significant hardship" on Petitioner "in relation to the ordinary incidents of prison life." *See Sandin v. Conner*, 515 U.S. 472, 483-86 (1995).

(R-14).

The Petitioner proceeded to file a *pro se* petition for writ of certiorari in the First District Court of Appeal seeking review of the circuit court's order. The First District:

> subsequently ordered this case to be heard *en banc* regarding "whether the court should recede from decisions holding that an inmate seeking release from close management into the general prison population is entitled to proceed through a petition for writ of habeas corpus. *See, e.g.*

Kendrick v. McNeil, 6 So. 3d 657 (Fla. 1st DCA 2009)."

Banks v. Jones, 197 So. 3d 1152, 1157 (Fla. 1st DCA 2016). The First District then appointed undersigned counsel to represent the Petitioner on a *pro bono* basis and the parties submitted pleadings to address the question presented on *en banc* review. Ultimately, the *en banc* First District receded from decades of precedent and held that an inmate who seeks release from close management back into the general prison population must seek relief pursuant to a petition for writ of mandamus – *not* a petition for writ of habeas corpus:

> We now hold that a prisoner's claim that he has been improperly assigned to Close Management classification does not state a claim for relief by writ of habeas corpus under Article I, section 13 of the Florida Constitution or under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Thus, we hold that such a claim can only be considered by petition for writ of mandamus, asserting that the Department has not complied with its own Close Management procedures and filed in the Second Circuit Court in Leon County, as are other claims challenging disciplinary reports issued in state prisons.

Banks, 197 So. 3d at 1155 (citations omitted). However, the First District acknowledged that its decision was in conflict with precedent from the Fifth District Court of Appeal:

> In addition to our holding today, we also certify conflict with the Fifth District Court of Appeal in *Holland v. State*, 791 So. 2d 1256 (Fla. 5th DCA 2001), which cites prior decisions of this court from which we now recede.

Id. at 1156. *See also id.* at 1169-70 ("Because we recede from our prior decisions in

this court allowing such claims to be considered in habeas corpus, we certify conflict with *Holland*. We also acknowledge that in *Harvard v. Singletary*, 733 So. 2d 1020, 1024 (Fla. 1999), the Florida Supreme Court transferred a petition challenging a Close Management assignment to the county in which the prisoner was incarcerated.").

Judge Wolf, joined by Judges Makar, Bilbrey, Jay, and M.K. Thomas, wrote a concurring in part and dissenting in part opinion disagreeing with the majority's decision to recede from the First District's precedent:

> The effect of the majority's holding is to deny *any review* of any assignment to close management for any duration because this court has long held that a prisoner must have a liberty interest in order to bring a petition for writ of mandamus challenging the Department's actions.

Id. at 1174 (Wolf, J., concurring in part and dissenting in part) (emphasis added). Judge Makar, joined by Judge Bilbrey, also wrote a dissenting opinion wherein he stated:

> The [majority's] result is a judicial outlier in a sea of precedent to the contrary; no court anywhere has read *Sandin* as does this Court.

Id. at 1179 (Makar, J., dissenting).

On November 1, 2016, the Court accepted jurisdiction of this case.

D. SUMMARY OF ARGUMENT

Habeas corpus – not mandamus – is the proper vehicle for an inmate to pursue when seeking release from close management into the general prison population. As explained by Judge Wolf in his concurring in part and dissenting in part opinion below, the First District's conclusion that habeas review is no longer available to inmates placed in close management "denies the prisoner any meaningful judicial review of the decision to be placed in close management, no matter the duration." *Banks v. Jones*, 197 So. 3d 1152, 1174 (Fla. 1st DCA 2016) (Wolf, J., concurring in part and dissenting in part).

Regarding the merits of the Petitioner's claim, the Petitioner is entitled to relief. "Spitting" on another person is *not* "an act causing injury or an act which could have resulted in injury to another."

E. ARGUMENT AND CITATIONS OF AUTHORITY

1. Habeas corpus – not mandamus – is the proper vehicle for an inmate to pursue when seeking release from close management into the general prison population.

a. Standard of Review.

The issues in this case is a pure question of law and therefore the standard of review is *de novo*. *See Keck v. Eminisor*, 104 So. 3d 359, 363 (Fla. 2012) (explaining that the standard of review for pure questions of law is *de novo*).

b. Argument.

(i). Stare Decisis.

Initially, the Petitioner submits that pursuant to the doctrine of stare decisis, the First District should not have receded from its prior decisions holding that an inmate seeking release from close management into the general prison population is entitled to proceed through a petition for writ of habeas corpus. In *Kendrick v. Moore*, 6 So. 3d 657, 658 (Fla. 1st DCA 2009), the First District – relying on six of its own cases and one case from the Fifth District – held that an inmate who seeks release from close management back into the general prison population is entitled to proceed through a petition for writ of habeas corpus:

> This Court has consistently held that an inmate who seeks release from close management back into the general prison population is entitled to proceed through a petition for writ of habeas corpus. *See*

> *Ashley v. Moore*, 732 So. 2d 498 (Fla. 1st DCA 1999); *Norris v. Dep't of Corrections*, 721 So. 2d 1235 (Fla. 1st DCA 1998); *Taylor v. Perrin*, 654 So. 2d 1019 (Fla. 1st DCA 1995); *Guess v. Barton*, 599 So. 2d 770 (Fla. 1st DCA 1992); *Roy v. Dugger*, 592 So. 2d 1235 (Fla. 1st DCA 1992); *Thompson v. Dugger*, 509 So. 2d 391 (Fla. 1st DCA 1987); *see also Holland v. State*, 791 So. 2d 1256 (Fla. 5th DCA 2001).

The cases cited in *Kendrick* in support of its holding span almost three decades. *See also Costello v. Strickland*, 418 So. 2d 443 (Fla. 1st DCA 1982); *Granger v. Florida State Prison*, 424 So. 2d 937 (Fla. 1st DCA 1983); *Magwood v. Tucker*, 98 So. 3d 725 (Fla. 1st DCA 2012).

In *State v. Schopp*, 653 So. 2d 1016, 1023 (Fla. 1995), Justice Harding stated the following regarding the doctrine of stare decisis:

> The doctrine of stare decisis provides stability to the law and to the society governed by that law. While no one would advocate blind adherence to prior law, certainly a change from that law should be principled. Where a rule of law has been adopted after reasoned consideration and then strictly followed over the course of years, the rule should not be abandoned without a change in the circumstances that justified its adoption. The only circumstance that has changed since the Court issued its decision in *Smith* [*v. State*, 500 So. 2d 125 (Fla. 1986),] is the membership of the Court.
>
> As Justice Overton stated in his concurrence in *Perez v. State*, 620 So. 2d 1256, 1259 (Fla. 1993) (Overton, J., concurring), "adhering to precedent is an essential part of our judicial system and philosophy." Justice Overton also explained that the doctrine of stare decisis requires an examination of
>
>> "the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law. Such a separate inquiry is appropriate not

> only when an old rule is of doubtful legitimacy . . . but also when an old rule that was admittedly valid when conceived is questioned because of a change of circumstances that originally justified it."
>
> *Id.* (quoting John P. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. Rev. 1, 9 (1983)).

(Harding, J., dissenting). For all of the reasons expressed by Justice Harding, the First District should not have receded from its holdings in *Magwood*, *Kendrick*, *Ashley*, *Norris*, *Taylor*, *Guess*, *Roy*, *Thompson*, *Costello*, and *Granger.* Because there has been no change in the circumstances that justified the holdings in those cases, those holdings should not have been abandoned.

(ii). Habeas Corpus v. Mandamus

As explained in this brief, because the Petitioner has established that placement in close management represents substantially more "atypical and significant hardships" in relation to the ordinary incidents of prison life, this liberty deprivation is entitled to due process. *See Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996). Upon establishing that he is entitled to due process, the proper vehicle for the Petitioner to seek review of his due process rights is a petition for a writ of habeas corpus.

"[T]he 'writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.'" *Santana v. Henry*, 12

So. 3d 843, 844-45 (Fla. 1st DCA 2009) (quoting *Harris v. Nelson*, 394 U.S. 286, 290-91 (1969)). In the instant case, the Petitioner is asserting that his actions did not rise to the level required under Florida Administrative Code Rule 33-601.800(2)(a) to place him in close management I (hereinafter "CMI") status – i.e., the Petitioner is asserting that his placement in CMI status was arbitrary and contrary to the requirements of Florida law. Thus, habeas corpus was the proper vehicle for the Petitioner to raise this challenge.

In the opinion below, the First District receded from years of precedent and held that mandamus is the proper vehicle for an inmate to challenge improper placement in close management. *See Banks v. Jones*, 197 So. 3d 1152, 1155 (Fla. 1st DCA 2016). "Mandamus is an appropriate remedy to compel the performance of a ministerial act that an agency has the clear legal duty to perform." *Shea v. Cochran*, 680 So. 2d 628, 629 (Fla. 4th DCA 1996). For example, an inmate who has been denied a request to present witnesses at a prison disciplinary hearing may seek mandamus relief seeking to compel the prison officials to allow him to present the witnesses at the hearing. *See Pettit v. Crosby*, 862 So. 2d 865 (Fla. 1st DCA 2003). In the instant case, the Petitioner is not seeking to compel the Department to perform a ministerial act; rather, the Petitioner is asserting that his placement in CMI status was arbitrary and contrary to the requirements of Florida law. Thus, habeas corpus

– not mandamus – was the proper vehicle for the Petitioner to raise this challenge.

A cursory examination of the caselaw of several American jurisdictions reveals the following regarding how inmates are allowed to seek judicial review of their placement in close management (or that jurisdiction's equivalent):

- Habeas corpus is seemingly the most popular means of reviewing inmate placement in CM-equivalent status, as it is entertained in at least eight jurisdictions (not including Florida): California, *In re Cabrera*, 158 Cal. Rptr. 3d 121 (Cal. 2013); Connecticut, *Vandever v. Comm'r of Corr.*, 106 A.3d 266 (Conn. 2014); District of Columba, *Smith v. Moore*, 749 A.2d 132 (D.C. 2000); Idaho, *Briggs v. Kempf*, 191 P.3d 250 (Idaho Ct. App. 2008); Iowa, *Kelly v. Nix*, 329 N.W.2d 287 (Iowa 1983); Missouri, *Cooper v. Gammon*, 943 S.W.2d 699 (Mo. Ct. App. 1997); Montana, *Jellison v. Mahoney*, 986 P.2d 1089 (Mt. 1999); Oregon, *Barrett v. Belleque*, 176 P.3d 1272 (Or. 2008).
- A statutory cause of action replacing common-law claims has been created in at least five jurisdictions for review of inmate placement in CM-equivalent status: Colorado, C.R.C.P. 106; Kansas, K.S.A. 60-1501; Kentucky, K.R.S. 418.040; New York, C.P.L.R. 78; North Dakota, N.D.C.C. 29-32.
- A direct appeal of the administrative decision to place an inmate in CM-

equivalent status is entertained in at least two jurisdictions: Mississippi, *Terrell v. State*, 573 So. 2d 730 (Miss. 1990); Washington, *In re Pers. Restraint of Gentry*, 245 P.3d 766 (Wash. 2010).

- Appeal by writ of certiorari is used to afford review of inmate placement in CM-equivalent status in at least two jurisdictions: Alabama, *McConico v. Ala. Dep't of Corr.*, 893 So. 2d 577 (Ala. Crim. App. 2004); Tennessee, *Settle v. Tenn. Dep't of Corr*, 276 S.W.3d 420 (Tenn. Ct. App. 2008).
- Finally, mandamus is entertained as a challenge to an inmate's placement in CM-equivalent status in at least two jurisdictions: Illinois, *Taylor v. Frey*, 942 N.E.2d 758 (Ill. App. Ct. 2011); Ohio, *State ex rel. Larkins v. Wilkinson*, 683 N.E.2d 1139 (Oh. 1997). *But see* Pennsylvania, *Lopez v. Penn. Dep't of Corr.*, 566 M.D. 2013 (Pa. Comm. Ct. 2015) (holding that mandamus is an inappropriate instrument to challenge an inmate's placement in administrative segregation).

(iii). The Petitioner's due process rights have been triggered by placement in close management.

In *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995), the United States Supreme Court clarified the circumstances in which changes made to an inmate's conditions

of confinement as a result of disciplinary action will deprive the inmate of a constitutionally protected liberty interest:

> 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 relation to the ordinary incidents of prison life.

(Citations omitted). In *Sandin*, the United States Supreme Court concluded that thirty days in segregation did not impinge on the inmate's protected liberty interest so as to trigger his due process rights because the disciplinary segregation at issue was substantially similar to the conditions imposed on inmates segregated for other reasons and the inmate's disciplinary record was later expunged; thus, the disciplinary offense would not impact the inmate's chance of parole. *See id.* at 486-87.

In *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005), the United States Supreme Court reiterated that the standard established in *Sandin* required a court to determine if a prison policy "'impose[d] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (quoting *Sandin*, 515 U.S. at 484). The United States Supreme Court discussed its holding in *Sandin* and stated:

> *Sandin* found no liberty interest protecting against a 30-day assignment to segregated confinement because it did not "present a dramatic departure from the basic conditions of [the inmate's] sentence." *Id.* at 485. We noted, for example, that inmates in the general population

> experienced "significant amounts of 'lockdown time'" and that the degree of confinement in disciplinary segregation was not excessive. *Id.* at 486. We did not find, moreover, the short duration of segregation to work a major disruption in the inmate's environment. *Ibid*.

Wilkinson, 545 U.S. at 223.

In light of the foregoing, in order to determine whether the Petitioner's due process rights have been triggered by placement in close management, a finding must be made regarding the type and degree of deprivation caused by placement in close management. As explained by the Court of Civil Appeals of Alabama in *Watkins v. Mitchem*, 50 So. 3d 485, 492-93 (Ala. Civ. App. 2010):

> From our reading of *Sandin* and *Wilkinson*, it is clear that the type of deprivation and the degree of that deprivation determines whether an inmate's right to due process is triggered. Thus, simply because the defendants labeled the citation given to Watkins as a "behavioral" one rather than as a "disciplinary" one does not control whether Watkins's right to due process was triggered.
>
> The standard established in *Sandin* has since been applied to conclude that an inmate disciplined for a minor behavioral infraction by short-term segregation from his or her regular prison placement is not entitled to a due-process hearing or other due-process protections. *See, e.g., Rodgers v. Singletary*, 142 F.3d 1252, 1253 (11th Cir. 1998) (affirming the lower court's holding that a two-month confinement in administrative segregation was not a deprivation of a constitutionally protected liberty interest). In *Williams v. Fountain*, 77 F.3d 372 (11th Cir. 1996), however, the United States Court of Appeals for the Eleventh Circuit determined that placement in solitary confinement for 12 months as punishment for a disciplinary infraction triggered the inmate's due-process rights. The Eleventh Circuit Court of Appeals stated that 12 months of solitary confinement "represent[s] substantially more 'atypical and significant hardship[s] . . . in relation to the ordinary

> incidents of prison life,' [and] we assume that [a prisoner suffering such] a liberty deprivation [is] entitled to due process." *Williams*, 77 F.3d at 374 n.3.

A comparison of the conditions of close management to the conditions of the general prison population demonstrates that close management imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.

Close management imposes the following atypical and significant hardships that are not suffered by inmates in the general prison population:

- CM status affects an inmate's ability to work, which affects an inmate's ability to earn gain-time. CM inmates do not get credit or gain-time for participating in the GED/education class because their work is all in-cell, which means their participation time is not accounted for. In contrast, for inmates in the general population, gain-time for education/vocation is based upon an inmate's presence in the classroom and his or her participation. Notably, CMI inmates *cannot work* because there are no jobs for them. And CMII inmates have to request a job, which may or may not be granted. Only CMIII inmates are mandatorily assigned jobs despite the implementation of Rule 33-601.800(13)(a-b),

Florida Administrative Code.[2] By comparison, inmates in the general population are automatically assigned to a job or program.

- CM inmates shower only three times per week (*see* Fla. Admin. Code R. 33-601.800(19)(e)), whereas inmates in the general population can shower seven days per week (and all day on the weekends and holidays).
- CM inmates' visits are restricted as follows: CMI – one non-contact for two hours, once a month; CMII – one contact visit for two hours every two weeks; and CMIII inmates are allowed one contact visit every two weeks. All visits must be scheduled by appointment. *See* Fla. Admin. Code R. 33-601.800(11)(b), (11)(c)1., & (11)(d)1. By comparison, inmates in the general population are allowed weekly contact visits (Saturday/Sunday) for six hours (plus the holidays).
- CMI inmates are only allowed to make one fifteen-minute call per month (*see* Fla. Admin. Code R. 33-601.800(11)(b)5.); CMII inmates are only allowed to make one fifteen-minute call every two weeks (*see*

[2] The Petitioner was in CMI without incident for one year (October 2014 - October 2015) and he only received a total of 62 days of gain-time, whereas had he been in the general population, he would have been able to earn 240 days of gain-time (i.e., 12 months x 20 days = 240). By comparison, from October 2009 to August 2014 (when the Petitioner was in the general population), the Petitioner received the full amount of gain-time each month.

Fla. Admin. Code R. 33-601.800(11)(c)2.); and CMIII inmates are only allowed to make one fifteen-minute call every week (*see* Fla. Admin. Code R. 33-601.800(11)(d)3.). In the general population, during weekdays, phones are turned on at 12:00 p.m. and remain on until 11:00 p.m., and on weekends and holidays, phones are turned on at 8:00 a.m. and remain on until 11:00 p.m., and inmates may make as many calls as they like.

- CMI and CMII inmates are handcuffed and shackled upon exiting their cells at all times, whether it is for group activities, medical or dental appointments, counseling, etc.
- CM inmates are allowed to have personal gym shorts, sweat shirts, under clothing, and sneakers. *But*, they *cannot* order such items from the Quarterly Order catalogs (which inmates in the general population can do). So if an inmate does not have such items upon coming to CM, the inmate will not be able to receive the items, which means during the winter-like months, the inmate will not or may not be able to go out to recreation (six hours per week) unless that inmate can withstand the cold.
- The only group programs available for all CM inmates are psychological

group therapy, *but* the inmate must be on psychotropic medication or within the highest psychological grade (S-3) in order to participate. Psych grade 1 inmates see mental health staff every ninety days and psych grade 2 inmates see mental health staff every sixty days.

- CMI and CMII inmates can only order five food and five non-food items per week and CMIII inmates can only order ten food and five non-food items per week. By comparison, in the general population, inmates can order up to $100 of any items per week.

Based on the foregoing, the Petitioner submits that close management imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *See also Clark v. Wainwright*, 490 So. 2d 1055, 1056 (Fla. 1st DCA 1986) ("It has been determined that state administrative procedures required for placing an inmate on administrative confinement and its subcategory 'close management' generate a liberty interest in an inmate remaining in the general prison population.") (citing *Adams v. Wainwright*, 512 F. Supp. 948 (N.D. Fla. 1981)).

Alternatively, a remand for an evidentiary hearing is necessary so that the circuit court can make the factual determination regarding whether close management imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In *Sandin*, the United States Supreme Court was able to

answer the question as to whether the confinement in question imposed "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" because the record in that case was sufficiently developed. *See Sandin*, 515 U.S. at 486 ("*The record shows* that, at the time of Conner's punishment, disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody.") (emphasis added) (footnote omitted). If the Court is not convinced by the bullet points set forth above demonstrating that close management imposes greater restrictions in kind and degree, then the appropriate remedy is to remand this matter for an evidentiary hearing so that the circuit court can make the factual determination regarding whether close management imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Notably, in *Watkins* – a case in a similar posture to the instant case – the Alabama Court of Civil of Appeals remanded for further proceedings because the record in that case was devoid of evidence establishing that the confinement in question was not a significant departure from normal conditions:

> Further, because the trial court considered whether the defendants were entitled to a judgment on the pleadings, *the record is wholly devoid of any evidence to establish that six months in administrative segregation did not represent a significant departure from the normal conditions of Watkins's confinement and did not work a major*

> *disruption in Watkins's prison environment, sufficient to trigger his due-process rights*. *See Sandin, supra*. Under *Sandin*, that is the issue alleged in Watkins's complaint.

Watkins, 50 So. 3d at 493-94 (emphasis added). Consistent with *Watkins*, this case should be remanded for a greater development of the factual record. Based on the current record, no court can determine whether close management imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" – a determination that is necessary before deciding whether the Petitioner is entitled to relief.

(iv). The dissenting opinions below.

In his concurring in part and dissenting in part opinion below, Judge Wolf stated the following:

> I respectfully dissent from the decision to overturn almost 35 years of precedent which allowed inmates to file habeas corpus proceedings in the state circuit courts to challenge their assignments to close management.
>
> The majority opinion states that we should adopt the reasoning of *Sandin v. Conner*, 515 U.S. 472 (1995), and holds that an inmate has no liberty interest concerning the Florida Department of Corrections' (Department) decision to place him or her in close management. The majority therefore determines that habeas corpus review is no longer available.
>
> Under our existing precedent, this holding denies the prisoner any meaningful judicial review of the decision to be placed in close management, no matter the duration. As explained later in this opinion, the decision by federal courts and the federal government, which have no custodial responsibility for these inmates, to limit their oversight of prison management should not affect the review process at the state

level. If anything, the limited oversight adopted by the federal courts makes it more essential to maintain reasonable review of decisions made by the party having primary custodial responsibility of our prisoners, the Department. Inmates segregated from the general prison population for a potentially significant period of time should continue to have the same reasonable court oversight concerning their segregation from the general prison population that they have had since 1982. Insignificant justification has been provided to overturn our precedent and to effectively extinguish this important safeguard.

Facts

The majority has accurately described the procedural posture and underlying facts in support of petitioner's placement in close management status. Thus, there is no need to repeat the work of the majority.

For purposes of this opinion, however, it is necessary to clarify petitioner's status and the implications concerning his placement.

Close management is "confinement of an inmate apart from the general population." Fla. Admin. Code R. 33-601.800(1)(d). The Department placed petitioner in the Close Management I (CMI) category, the most restrictive single-cell housing level of the close management classifications. Fla. Admin. Code R. 33-601-800(1)(e). The record does not show how long petitioner will be held in close management, presumably until the Department feels such segregation from the general population is no longer necessary. *See* Fla. Admin. Code R. 33-601.800(16)(a). While risk assessments are done periodically, formal review only takes place after 180 days (six months) of placement in close management and every 180 days thereafter. Fla. Admin. Code R. 33-601.800(16)(e). There is no guarantee that an inmate will be released at the time of any formal review; therefore, the duration of the segregation is indefinite and may be for extended periods of time.

While a review of Florida Administrative Code Rule 33-601.800 demonstrates that close management is not the solitary confinement as depicted in movies like "Murder in the First" (Warner Bros. 1995) or "The Shawshank Redemption" (Castle Rock Entertainment 1994), it still involves segregation from the general population and significant restrictions on items associated with human dignity which may have

serious implications regarding a prisoner's wellbeing. *See* Grant Henderson, *Disciplinary Segregation; How the Punitive Solitary Confinement Policy in Federal Prisons Violates the Due Process Clause of the Fifth Amendment in Spite of Sandin v. Conner*, 99 Marq. L. Rev. 477 (Winter 2015). It is particularly significant that inmates who are placed in close management are subject to having any of their privileges suspended or revoked with very limited review. *See* Fla. Admin. Code R. 33-601.800(12).

Indeed, the courts of this state have consistently held that these substantial and significant deprivations for potentially lengthy periods of time are subject to habeas corpus review.

Current Status of the Law

For almost 35 years, this court has held that an inmate is entitled to challenge the assignment to close management status by filing a petition for writ of habeas corpus in circuit court. *Costello v. Strickland*, 418 So. 2d 443 (Fla. 1st DCA 1982).

In *Kendrick v. McNeil*, 6 So. 3d 657 (Fla. 1st DCA 2009), we recognized the consistent availability of this remedy. The *Kendrick* opinion noted:

> This Court has consistently held that an inmate who seeks release from close management back into the general prison population is entitled to proceed through a petition for writ of habeas corpus. *See Ashley v. Moore*, 732 So. 2d 498 (Fla. 1st DCA 1999); *Norris v. Dep't of Corrections*, 721 So. 2d 1235 (Fla. 1st DCA 1998); *Taylor v. Perrin*, 654 So. 2d 1019 (Fla. 1st DCA 1995); *Guess v. Barton*, 599 So. 2d 770 (Fla. 1st DCA 1992); *Roy v. Dugger*, 592 So. 2d 1235 (Fla. 1st DCA 1992); *Thompson v. Dugger*, 509 So. 2d 391 (Fla. 1st DCA 1987); *see also Holland v. State*, 791 So. 2d 1256 (Fla. 5th DCA 2001).

Id. at 658.

Since *Kendrick*, we have continued to recognize our consistent holding that an inmate challenging close management status may do so through habeas corpus. *Magwood v. Tucker*, 98 So. 3d 725 (Fla. 1st DCA 2012). The right to challenge "arbitrary transfers" from the general prison population to administrative segregation is based not only

on federal due process concerns, but also rights recognized by the State of Florida. *Granger v. Fla. State Prison*, 424 So. 2d 937 (Fla. 1st DCA 1983). The majority and the Department urge this court to recede from our precedent because of the holding in *Sandin v. Conner*, 515 U.S. 472 (1995).

Sandin v. Conner, 515 U.S. 472 (1995)

We should not recede from our well-reasoned precedent in light of *Sandin* because: 1) the holding in *Sandin* merely limits the right of federal courts to interfere with supervisory decisions made by state prison officials; 2) the holding in *Sandin* does not mandate that states no longer recognize a limited liberty interest in remaining in the general prison population; 3) this court has recognized a state liberty interest in remaining in the general prison population a number of times since *Sandin* was decided 21 years ago; 4) the State has not presented sufficient justification to depart from almost 35 years of precedent; 5) *Sandin* addressed segregation from the general prison population for a limited period of time – here we have confinement for an unlimited duration; 6) if both federal and state oversight are extinguished, a prisoner faced with arbitrary confinement will be left with no adequate remedy; and 7) the obligation of the State to treat prisoners held in its custody fairly and humanely implores us not to do so.

Sandin involved review of a federal lawsuit filed by a Hawaiian prisoner pursuant to 42 U.S.C. § 1983 to challenge his assignment to close management for 30 days. *Id.* at 476. He asserted that the State of Hawaii had denied him due process guaranteed by *Wolff v. McDonnell*, 418 U.S. 539 (1974). *Id.* He sought injunctive relief, declaratory relief and damages among other items. *Id.* The holding in *Sandin* was that 30 days of administrative segregation did not involve such an atypical and significant deprivation to create a federal liberty interest to justify federal intervention into the oversight of inmates by the state. It further stated that state rules providing inmates protection from abuses would not create such a right. *Id.* at 487.

Sandin did not mandate that the state limit its own oversight of officials that place prisoners in administrative segregation, nor did it mandate that the state, the entity responsible for the health, safety, and humane treatment of human beings held in its custody, no longer provide meaningful judicial review. *Sandin* did not hold that the state may not recognize a limited liberty interest in close management

decisions. Indeed, both the Florida Supreme Court and the United States Supreme Court have recognized that "'state courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.'" *Rigterink v. State*, 66 So. 3d 866, 888 (Fla. 2011) (quoting *Arizona v. Evans*, 514 U.S. 1, 8 (1995)). *See also State v. Horwitz*, 191 So. 3d 429, 438 (Fla. 2016) ("[T]he United States Constitution generally sets the 'floor' – not the 'ceiling' – of personal rights and freedoms that must be afforded to a defendant by Florida law."). Once the federal system effectively withdrew from any oversight of prison officials responsible for the classification and living conditions of inmates, it became even more essential for the state court system to maintain meaningful review.

Indeed, even the federal courts might not refrain from oversight of potentially indefinite durations of administrative segregation. *See Wilkinson v. Austin*, 545 U.S. 209 (2005). In *Wilkinson*, the United States Supreme Court held that there were limited federal due process rights for inmates placed in "supermax" facilities where placement was for an indefinite period. While the conditions faced by the prisoners in *Wilkinson* were far more onerous than the ones outlined in our rules regarding close management, the court was also concerned with the indefinite period of segregation that was limited only by the length of an inmate's sentence. Ohio, like Florida, had limited formal review of the duration of the segregation.

The federal courts, which do not have primary responsibility for an inmate's safety and wellbeing, have stated that they will not get involved unless an inmate's deprivation is atypical and substantial. *See Sandin*, 515 U.S. 472. State courts with primary oversight responsibilities should not draw the same line. As noted by the majority, the Eleventh Circuit has held that 3 years in close management was not an atypical and significant hardship. *See Al-Amin v. Donald*, 165 Fed. App'x 733, 734 (11th Cir. 2006). A standard that does not provide meaningful review for this length of segregation is unworkable at the state level.

In fact, to this point, we have chosen not to draw the same line. In at least four cases since *Sandin*, this court has stated that a petition for writ of habeas corpus is still the appropriate method for challenging

close management classification. *See Magwood*, 98 So. 3d 725; *Kendrick*, 6 So. 3d 657; *Ashley*, 732 So. 2d 498; *Norris*, 721 So. 2d 1235.

Effect of Majority's Holding

The majority holds that the decisions regarding a prisoner's placement in close management and segregation from the general prison population do not implicate a constitutionally-protected liberty interest. Therefore, the majority holds that habeas corpus review is no longer available and that any request for relief must be by petition for writ of mandamus filed in the Second Circuit for Leon County.

The effect of the majority's holding is to deny any review of any assignment to close management for any duration because this court has long held that a prisoner must have a liberty interest in order to bring a petition for writ of mandamus challenging the Department's actions.

In *Plymel v. Moore*, 770 So. 2d 242, 249 (Fla. 1st DCA 2000), this court held that a prisoner was entitled to mandamus relief to require the Department to follow its own rules and provide limited due process predicated on the substantive liberty interest implicated by the prisoner's loss of gain time. In a number of recent cases, we have held that absent a showing of such a liberty interest, a prisoner lacks even minimal due process rights, and thus is not entitled to mandamus relief. *See Williams v. Tucker*, 87 So. 3d 1270, 1271 (Fla. 1st DCA 2012) (affirming the denial of a petition for writ of mandamus because the prisoner, who was subjected to 60 days' disciplinary confinement, "failed to demonstrate any liberty interest implicating the protections of the Due Process Clause"); *see also Gardener v. Fla. Dep't of Corr*., 178 So. 3d 92, 94 (Fla. 1st DCA 2015) (finding the circuit court applied the correct law in denying a prisoner's petition for writ of mandamus in reliance on Sandin, concluding "no liberty interest was involved" in prison disciplinary action that resulted in disciplinary confinement); *Castillo v. State, Dep't of Corr*., 174 So. 3d 452, 453 (Fla. 1st DCA 2015) (finding a circuit court did not depart from the essential requirements of the law in denying as "frivolous" a mandamus petition challenging a prison disciplinary proceeding that resulted in 30-days' disciplinary confinement because the prisoner "failed to demonstrate any liberty interest implicating the protections of the Due Process Clause"); *John v. Crews*, 149 So. 3d 149, 151 (Fla. 1st DCA 2014) (affirming the

dismissal of a petition for writ of mandamus because "the revocation of gain-time does not implicate appellant's liberty interests in this case because appellant is serving a life sentence" and thus is "ineligible for gain-time"); *Wright v. McDonough*, 958 So. 2d 1132, 1133 (Fla. 1st DCA 2007) (finding the circuit court properly denied a petition for writ of mandamus challenging a disciplinary proceeding which "adversely affected Petitioner's ability to earn gain-time," citing *Wolff* and *Sandin*).

Thus, the type of review available under existing law would cease to exist. Issues such as arbitrariness (which this court said was reviewable in *Granger*, 424 So. 2d 937), lack of proper notice (which this court found to be reviewable in *Thompson*, 509 So. 2d 391), and even failures of the Department to follow its own rules (*see Plymel*, 770 So. 2d 242) would not be reviewable by the court without demonstrating a liberty interest, which the majority finds is not implicated by close management. The majority's suggestion that review is available by mandamus is merely a dead end due to the majority's holding that there is no liberty interest. The majority's suggestion that it is not creating a dead end is simply not supported by our recent case law that requires a liberty interest in order for a prisoner to obtain mandamus relief. It also creates confusion regarding the scope of mandamus review.

Insufficient Justification for Overturning Precedent

Absent a significant change in circumstances or a substantial policy reason, a court should adhere to its precedent pursuant to the doctrine of stare decisis. *Kimble v. Marvel Entm't, LLC*, – U.S. –, –, 135 S. Ct. 2401, 2409 (2015).

> Overruling precedent is never a small matter. Stare decisis – in English, the idea that today's Court should stand by yesterday's decisions – is "a foundation stone of the rule of law." Application of that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."

Id. at 2409 (citations omitted).

In refusing to overturn precedent, the United States Supreme

Court went on to say that adhering to stare decisis means an allegation by itself that prior decisions are wrong provides an insufficient reason to overturn precedent.

> Accordingly, an argument that we got something wrong – even a good argument to that effect – cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. *To reverse course, we require as well what we have termed a "special justification" – over and above the belief "that the precedent was wrongly decided*."

Id. (emphasis added; citations omitted).

This court acknowledged the vital importance of precedent and stare decisis in *Westphal v. City of St. Petersburg*, 122 So. 3d 440, 447 (Fla. 1st DCA 2013), *quashed on other grounds by Westphal v. City of St. Petersburg*, 194 So. 3d 311 (Fla. 2016). We noted with approval the United States Supreme Court case of *Arizona v. Rumsey*, 467 U.S. 203 (1984), which stated the rule of law "that a Court should not depart from precedent in the absence of a special justification." *Westphal*, 122 So. 3d at 447. While the court in *Westphal* departed from precedent, it did so based on two justifications not present in the existing case: 1) that the legal argument (unconstitutional application of the statute) had not been made in the previous cases; and 2) the prior court interpretation had spawned unexpected and unjust results. Neither is present or argued in this case. The precise argument made by the Department in this case was previously rejected in *Kendrick* and *Magwood*. Further, there is no evidence that any unexpected results have occurred as a result of this court's precedent. A review of the case law demonstrates a system that is operating well with reasonable limited review of decisions to segregate prisoners.

The Department's main arguments for overturning precedent are that 1) by not confining challenges to the Leon County Circuit Court, it may receive inconsistent decisions affecting its ability to supervise prisoners; and 2) the habeas standard of review may lead to the courts micromanaging the prison system. Mere speculation concerning

possible inconvenience is insufficient to justify abandoning precedent. In fact, a review of prior case law demonstrates the Department's fears are unrealistic.

The Department has not cited one instance in 35 years in which there has been an inconsistent circuit or appellate decision which has affected its ability to manage the prison population. Our court system is designed to resolve such conflicts should they arise. Nor is there any evidence that trial judges in circuits other than the Second Circuit would not render well-thought-out decisions concerning whether the Department is following its rules or providing minimal due process in imposing administrative segregation. Departmental convenience concerning Leon County venue privileges is not a valid reason for limiting this important right of inmates.

The majority asserts that the courts should not be involved in micromanaging the Department in its difficult job of maintaining control within the prison system, and therefore, we should recede from our prior case law. No one disputes it is a difficult job to manage inmates, but the Department has failed to demonstrate that in almost 35 years of limited court oversight, the courts have interfered with the operation of the prison system. No specific instance concerning micromanagement is cited. Few, if any, decisions have resulted in the Department's decisions being overturned. Review even by habeas corpus is limited in nature. The present habeas corpus review is limited and does not allow an inmate to bring an action in circuit court until all administrative remedies have been exhausted. *See Sutton v. Strickland*, 485 So. 2d 25 (Fla. 1st DCA 1986). The Department has a full opportunity during the administrative process to demonstrate it has met the limited due process rights afforded an inmate concerning classification decisions. *See, e.g., Plymel*, 770 So. 2d at 249. Decisions of the Department have not been second-guessed, but court oversight has served to protect from totally arbitrary actions of the Department or substantial failure of the Department to follow its own rules. *Id.*

In those rare occurrences where the Department has been required to respond, it has primarily been for the Department to present record evidence that it has followed its own rules. *See, e.g., Thompson*, 509 So. 2d 391. Again, the convenience of the Department to have cases filed in Leon County does not justify overturning our precedent.

Reasonable oversight does not violate separation of powers

> principles. In fact, it is the duty of the court to provide limited oversight to prevent arbitrary abuses. It cannot be reasonably argued that such abuses may not occur. The courts need to be available, even if on a limited basis, to prevent such behavior. Because the Department has failed to demonstrate that "special justification" for overturning our well-reasoned precedent, I would not do so.

Banks, 197 So. 3d at 1170-77 (Wolf, J., concurring in part and dissenting in part) (footnotes omitted). The Petitioner requests the Court to adopt Judge Wolf's well-reasoned opinion.

Similarly, in his dissenting opinion, Judge Makar stated the following:

> Thirty-five years of precedent are jettisoned, replaced in part by a pastiche of legal concepts cobbled together to create a newfound remedy, proving the adage that a camel is a horse designed by committee. Neither constitutional text, precedent, nor changed circumstances support the result; conflict and confusion are created where none has existed; and unforeseen, hydra-like consequences are born. Little commends the end product; it's a solution for a non-existent problem.
>
> Let's put this *en banc* case – purportedly of exceptional importance – in context. It is one of a minuscule subcategory of inmate petitions comprising about 0.2% of our annual workload of approximately 5000 cases. About ten times a year, an inmate put in close management (CM) seeks judicial review, claiming his placement is so arbitrary or oppressive as to invoke judicial intervention. Relief is usually denied, sometimes summarily, but not always. The judicial burden of processing these few cases pales in comparison to the avalanche of prisoner petitions processed in this Court and others for which relief is most often denied. *See Harvard v. Singletary*, 733 So. 2d 1020, 1023 (Fla. 1999) ("Many prisoner petitions are successive, and a large number are completely without merit."). From a judicial administration perspective, we face greater challenges than the processing of this lilliputian sliver of our docket.
>
> For over three decades, our precedent has authorized this process,

one that has proven neither unworkable nor controversial. *See, e.g., Costello v. Strickland*, 418 So. 2d 443 (Fla. 1st DCA 1982) (granting relief in prisoner's challenge to CM status raised in a habeas petition). Now, the Department wants us to depart from our long-standing precedent, eliminating judicial review of its CM decisions entirely. It asks that we abandon an established constitutional remedy, the writ of habeas corpus, which is "granted freely and without cost" and "shall never be suspended," article I, section 13, Florida Constitution, because using it in the CM context is a "diminution of the Great Writ that must end." The Department says that the status quo "may have made sense years ago when little was known about the conditions of CM units and allegations of arbitrary placement abounded." Judicial review of CM challenges should be eliminated, we are told, because CM processes have evolved and become so "modern" as to operate independently of the judicial branch without fear that abuses in prison will occur.

The claim that judicial precedents over the past decades justify overruling our caselaw has no support whatsoever. Nothing in the Florida or United States constitutions has changed; no case from the United States Supreme Court or the Florida Supreme Court in the past thirty-five years suggests that our precedents on this topic should be abandoned; and decisions of our sibling courts are in accord with our precedents. Indeed, no court nationwide has done what the Department asks us to do.

The entire linchpin of the Department's theory is *Sandin v. Conner*, 515 U.S. 472 (1995), a twenty-year-old decision that limited – but did not eliminate – judicial review of disciplinary challenges. *Sandin* specifically left open review where an institution imposes an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484. Courts nationwide have cited *Sandin* 16,628 times, but none have read it as ushering in the elimination of judicial review of CM-type assignments. The Department also cites a smattering of cases that purportedly support the total elimination of an inmate's liberty interest in the CM context, but none specifically do so; and the cases are either unpublished, non-precedential, or they merely support the general concept from *Sandin* that only atypical and significant conditions create a protectable interest.

Moreover, though debate exists on the baseline of *Sandin's*

standard, no debate exists on its application; courts have routinely applied it to decide whether a prison placement falls within its parameters. The United States Supreme Court has done so. *See, e.g., Wilkinson*, 545 U.S. at 223 (concluding that "assignment to [Supermax prison] imposes an atypical and significant hardship under any plausible baseline"). And, indeed, we've applied it a number of times and found it workable. *See, e.g., John v. Crews*, 149 So. 3d 149, 151 (Fla. 1st DCA 2014) ("Based on *Sandin*, appellant's placement in disciplinary confinement for forty-three days did not present an atypical, significant deprivation implicating the protections of the due process clause.").

Simply said, no precedent supports a deviation from stare decisis; no flawed logic has been shown; and recasting the status quo in another form serves no purpose. Our precedents have not thrust us into "improper judicial second-guessing" of governmental actions, whether dangerous or otherwise, as the Court believes; nor have they – as the Court claims – "encourage[d] excessive state judicial oversight and interference with prison management, without any real substance at stake or real benefit conferred on state prisoners while creating a risk of diminishing state prison security and safety." Maj. Op. at –. Not a single instance has been brought to our attention to support the claim that the judges of this Court or any other have acted improperly or, through excessive oversight, interfered with prison operations for no good reason.

And no "changed circumstances" warrant the exercise of *en banc* powers to overturn our caselaw. While it is highly laudable that Florida's prison system has adopted additional rules, procedures, and protocols for CM assignments, which are said to be solely non-punitive management tools, that does not logically mean that courts should fold up their tents and forego judicial review, particularly under separation of powers principles. Courts exist to protect rights, and no law or tradition exists to abdicate that responsibility absent the most compelling of justifications. We are in the business of reviewing governmental actions that may impinge on people's rights; administrative deference, not judicial abdication, is what's due.

What's more, the United States Supreme Court has made clear that the determination of an inmate's liberty interest is not based solely on what state regulations say (or how numerous and dense they are), but

on the nature of prison conditions imposed relative to prison life generally. The Court explained this point as follows:

> After *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but *the nature of those conditions themselves 'in relation to the ordinary incidents of prison life*.'

Wilkinson, 545 U.S. at 223 (citation omitted) (emphasis added). Thus, contrary to the Department's (and the Court's) view that inmates "do not have a liberty interest in their custody status while in prison," it is clear they do, albeit more narrowly circumscribed. We are in no position to overrule the United States Supreme Court on this point. And the high court has clearly said that facial readings of prison regulations are not the touchstone; instead, it is the nature of the actual conditions imposed. This makes sense because of the improbability of a state promulgating prison regulations that facially impose atypical, significant restrictions.

A few final observations. First, the Court concedes that by overturning long-standing precedent it creates conflict with our sibling courts and potentially our supreme court. The result is a judicial outlier in a sea of precedent to the contrary; no court anywhere has read *Sandin* as does this Court. We will be seen as straining to squeeze juice from *Sandin's* timeworn rind, overplaying its significance, and altering our caselaw for no good reason. Second, the Court's lengthy opinion and new-fangled remedy, much like a Rube Goldberg machine, are over-engineered to perform what has been a simple, uncomplicated, and non-controversial task; they will likely create unnecessary confusion and have the unintended consequence of increased prisoner litigation. It is said the new remedy specifically does not displace existing review via a petition for a writ of habeas corpus based on prison conditions in the CM system. Thus, inmates will now file two petitions, one seeking mandamus to review the CM placement decision, and another seeking a writ of habeas corpus to review the conditions of CM. This will undoubtedly result in more burdens on judicial administration, not fewer. And prisoners who pursue the new remedy, if indigent, as most are, will impose further burdens due to the process and paperwork

> necessary to waive filing fees in this new class of cases. Finally, courts have a role to play in making the law understandable and efficient; we accomplish neither in this case. If it ain't broke, don't fix it.

Id. at 1177-80 (Makar, J., dissenting) (footnotes omitted). The Petitioner also requests the Court to adopt Judge Makar's well-reasoned opinion.

As explained by Judge Wolf in his concurring in part and dissenting in part opinion, the First District's conclusion that habeas review is no longer available to inmates placed in close management "denies the prisoner *any meaningful judicial review of the decision to be placed in close management, no matter the duration*." *Banks*, 197 So. 3d at 1174 (Wolf, J., concurring in part and dissenting in part) (emphasis added). Accordingly, for all of the reasons stated in Judge Wolf's opinion and Judge Makar's opinion, an inmate seeking release from close management into the general prison population should be permitted to seek review pursuant to a petition for a writ of habeas corpus. The First District's decision below should be quashed.

2. The Petitioner is entitled to relief because "spitting" on another person is *not* "an act causing injury or an act which could have resulted in injury to another."

a. Standard of Review.

The standard of review for certiorari in an appellate court is limited to whether the circuit court afforded procedural due process and whether it departed from a clearly established legal principle. *See Dep't of Highway Safety & Motor Vehicles v. Roberts*, 938 So.2d 513, 515 (Fla. 5th DCA 2006).

b. Argument.

Rule 33-601.800 sets forth the limited circumstances in which an inmate can be placed in CMI status:

> (2) Levels of Close Management.
> (a) Close Management I (CMI).
> 1. Close Management I is the most restrictive single cell housing level of all the close management status designations.
> 2. An inmate assigned to CMI will be ineligible for a work assignment. An inmate may be placed in CMI without having previously been in CMII or III. Any of the following factors constitutes a basis for placement of an inmate in CMI status:
> a. An incident causing death;
> b. An act causing injury or an act which could have resulted in injury to another;
> c. Any physical assault or battery on staff which caused injury;
> d. The taking of a hostage or an attempt to take a hostage;
> e. Instigation or incitement of a riot or disorder;
> f. Creating or causing property damage in excess of $1,000;
> g. Participation in or causing further institutional disruption during a riot or disorder;
> h. An escape or escape attempt involving use of a weapon, outside assistance, use of equipment or tools to penetrate a secure perimeter or

> violence committed during or while on escape;
>
> i. An escape or escape attempt from a secure perimeter;
>
> j. An escape or escape attempt while under armed supervision while outside the perimeter of the institution;
>
> k. Possession of weapons, ammunition, explosives, flammables, or initiation of or participation in trafficking of these items or trafficking in drugs;
>
> l. Participation in a sexual assault or battery;
>
> m. An inmate who is currently CMII or CMIII and shows an inability to adjust as evidenced by subsequent major rule violation(s);
>
> n. Documented leadership in a security threat group that is certified by the threat assessment review committee in central office.

In the instant case, the Department alleged that the Petitioner qualified for placement in CMI status pursuant to Rule 33-601.800(2)(a)2.b. because he allegedly committed "an act causing injury or an act which could have resulted in injury to another." (R-11). The alleged "act" in question occurred when the Petitioner purportedly "spit" on a mental health doctor in the prison. (R-11). As explained below, "spitting" on another person is *not* "an act causing injury or an act which could have resulted in injury to another."

In support of his argument, the Petitioner relies on *Johnson v. State*, 858 So. 2d 1071, 1072 (Fla. 3d DCA 2003), wherein the Third District held that the defendant's conviction for battery on a law enforcement officer based on the defendant spitting on the law enforcement officer did not constitute a qualifying offense for the purpose of sentencing the defendant as a violent career criminal:

> Robert Johnson was convicted of (among other offenses) one count of battery on a law enforcement officer and was sentenced as a

> violent career criminal as provided by section 775.084, Florida Statutes (2001). We reverse, and remand for resentencing.
>
> Johnson's current (battery) offense, spitting on a law enforcement officer, is not one of the forcible felonies enumerated in section 776.08 and does not amount to "the use or threat of use of physical force or violence" as provided by that section. Battery is a qualifying offense where the defendant struck or intentionally caused bodily harm to another person. § 784.03(1)(a)1, 2, Fla. Stat. (2001). *While spitting on a law enforcement officer amounts to an unwanted touching, it does not amount to the use or threat of use of physical force* or violence. Johnson's spitting offense is not a qualifying one for sentencing as a violent career criminal.
>
> Because Johnson does not have any current qualifying offense that would authorize application of the violent career criminal sentencing statute, we reverse and remand for a new sentencing proceeding in accordance with this opinion.

(Emphasis added) (footnote omitted). In *Johnson v. United States*, 559 U.S. 133, 140 (2010), the United States Supreme Court stated the following regarding the term "physical force":

> We think it clear that in the context of a statutory definition of "violent felony," the phrase "physical force" means violent force – that is, force capable of causing *physical pain or injury to another person*. *See Flores v. Ashcroft*, 350 F.3d 666, 672 (C.A.7 2003) (Easterbrook, J.).

(Emphasis added). Pursuant to both *Johnson* cases, because "physical force" is force capable of causing injury, and because spitting does not amount to the use or threat of use of "physical force," it follows that spitting is *not* "an act causing injury or an act which could have resulted in injury to another." Thus, the Petitioner *did not*

commit any act that would have made him eligible for placement CMI status. *See, e.g., Miller v. State*, 988 So. 3d 188, 139 (Fla. 1st DCA 2008) ("[A] manifest injustice includes convicting appellant for an offense for which he could not have been convicted.") (citations omitted).

Clearly it is a violation of the Petitioner's due process rights to place him in close management for an act that does not qualify for such treatment (as delineated by the plain language of Rule 33-601.800(2)(a)2.). The Petitioner is therefore entitled to relief.

F. CONCLUSION

The appropriate remedy is to quash the district court's decision and to hold that (1) an inmate seeking release from close management into the general prison population is entitled to proceed through a petition for writ of habeas corpus and (2) the Petitioner is entitled to relief (because "spitting" on another person is *not* "an act causing injury or an act which could have resulted in injury to another").

G. CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing brief and the appendix have been furnished to:

Deputy Solicitor General Denise M. Harle
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
Email: denise.harle@myfloridalegal.com
jennifer.bruce@myfloridalegal.com
daniel.johnson@myfloridalegal.com

by email delivery this 22nd day of December, 2016.

Respectfully submitted,

/s/ Michael Ufferman

MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **BANKS**

H. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Initial Brief of the Petitioner complies with the type-font limitation.

/s/ Michael Ufferman
MICHAEL UFFERMAN
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308
(850) 386-2345/fax (850) 224-2340
FL Bar No. 114227
Email: ufferman@uffermanlaw.com

Counsel for Petitioner **BANKS**