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SC16-1478

In the Supreme Court of Florida

ROBERT E. BANKS,

Petitioner,

v.

JULIE L. JONES,
SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIRST DISTRICT
CASE NO.: 1D15-330

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Petitioner asks this Court to quash an en banc decision of the First District Court of Appeal applying the test and logic set forth by the United States Supreme Court in *Sandin v. Conner*, and the principles undergirding habeas corpus. In particular, the First District's decision rests upon three bedrock legal principles: first, that a prison inmate does not possess a constitutional liberty interest in avoiding administrative or disciplinary classification; second, that absent a constitutionally protected liberty interest, individuals are not entitled to due process guarantees; and finally, that the writ of habeas corpus is reserved for the most severe restriction of liberty, viz., when an individual is wrongfully imprisoned.

Against these basic tenets, Petitioner sought to employ the writ of habeas corpus to challenge an internal administrative decision affecting the amount of particular privileges he enjoyed in his confinement. But, as *Sandin* established, Petitioner's confinement conditions do not give rise to a protected liberty interest. Moreover, Petitioner was not challenging the fact or duration of his prison sentence (which could make a petition for writ of habeas corpus proper). Therefore, the First District correctly concluded that Petitioner's claim does not implicate a constitutionally protected liberty interest and habeas is not the appropriate remedy for someone who is admittedly lawfully incarcerated.

STATEMENT OF THE CASE AND FACTS

The facts of this case are not contested. Petitioner, Robert Banks, is a state prisoner serving a 30-year sentence for various felonies. In October 2014, he was assigned to Close Management status, a more restrictive prison classification than general population. Inmates in Close Management retain basic privileges and are incentivized to exhibit good behavior to earn additional leniency. The Department of Corrections ("Department") uses Close Management to ensure institutional order and safety in its facilities, and the Department's decision to assign an inmate to Close Management is an internal, administrative process. Petitioner's assignment to Close Management came after an altercation in which he spat in the face of a doctor treating him, repeatedly cursed the doctor and medical staff, and had to be forcibly restrained and escorted out of the doctor's office by security. (R. 11) The incident led to a disciplinary report being filed and Petitioner's independent referral to Close Management assignment. (R. 3, 12)

In the report referring Petitioner to Close Management, the referring officer detailed that Petitioner had been "very hostile," "jumped out of his chair," repeatedly cursed the doctor and nurses, and "spit in the face of the doctor." (R. 11) The referral report noted that Petitioner "continued his aggressive behavior to the point that physical force became necessary to control his aggressive behavior." (*Id.*) Petitioner was provided a hearing before the institutional classification team on the Close

Management referral, but he declined to make any statement, either verbally or in writing. (R. 11–12) Based on the evidence before it, the institutional classification team recommended Close Management I assignment for Petitioner. (R. 12) The state classification office then reviewed and considered the referral and recommendation, and approved Petitioner's assignment to Close Management I. (R. 12)

Petitioner challenged his assignment to Close Management, asserting that his referral to Close Management for "allegedly having committed an act causing injury or an act which could have resulted in injury to another" was unsupported because his alleged actions could not "injur[e]" anyone. (R. 3) The essence of Petitioner's challenge was a claim that the Department had not complied with its own procedures in assigning him to Close Management. For example, Petitioner alleged that although his Close Management referral and recommendation identified his behavior as "aggressive and demanding" and involving the use of "force," the disciplinary report had not used the same words in characterizing the events. (R. 3) Petitioner also claimed that there was not enough evidence to support his referral to Close Management, citing to a criminal case in which the act of spitting on a police officer was determined to not be a felony involving violence, (R. 7), and a case in which a prison disciplinary charging document included only facts sufficient to support a lesser offense of battery rather than sexual battery, (R. 9). Based on these

contentions, Petitioner sought entitlement to incarceration in the prison's general population—and not, of course, to release from incarceration entirely. (R. 7–9)

Petitioner sought this relief by petition for writ of habeas corpus. (R. 1) Because Petitioner was not claiming that his imprisonment itself was unlawful, both the trial court and the First District concluded that no constitutionally protected liberty interest was implicated. *Banks v. Jones*, 197 So. 3d 1152, 1155 (Fla. 1st DCA 2016) (en banc). Accordingly, the First District held that Petitioner's claim may not be brought by petition for habeas corpus but only by petition for writ of mandamus. *Id.*

In holding that a petition for writ of mandamus is the proper vehicle for Petitioner's challenge, the First District acknowledged it was receding from prior decisions to the contrary. *Id.* The First District explained that its prior decisions "relied on an analytical foundation . . . rejected more than 20 years ago by the United States Supreme Court in *Sandin v. Conner*, 515 U.S. 472 (1995)." *Id. Sandin* had clarified that any prison regulation not imposing an "atypical and significant hardship" on a state prisoner does not implicate a liberty interest that would trigger due process protections. 515 U.S. at 484. *Sandin* reiterated the settled principle that a prisoner does not have a generic liberty interest in remaining in the prison's general population. *Id.* at 480. Observing that its precedent had not properly heeded *Sandin*, the First District's en banc majority set out over several pages a detailed, reasoned

analysis of why a habeas petition is not the proper method for challenging whether the Department complied with internal prison management procedures, when such a challenge does not assert a protected liberty interest, much less allege unlawful incarceration. *Banks*, 197 So. 3d at 1155–56, 1159–68. Moreover, the First District concluded that its prior approach did not accord due deference to the executive function of managing state prisons and the related difficulties and dangers. *Id.* at 1155, 1159, 1162. Accordingly, because Petitioner was not asserting entitlement to immediate release from prison but simply challenging an administrative, typical hardship of incarceration, the First District concluded that habeas relief was procedurally improper. *Id.* at 1168–69.

At the same time, the First District acknowledged that the Fifth District, in *Holland v. State*, 791 So. 2d 1256 (Fla. 5th DCA 2001), had affirmed a circuit court order denying a petition for writ of habeas corpus filed by a prisoner seeking release from Close Management assignment. The Fifth District in *Holland* did not discuss the propriety of the relief sought, but cited to the First District's decisions in *Taylor v. Perrin*, 654 So. 2d 1019 (Fla. 1st DCA 1995), and *Granger v. Florida State Prison*, 424 So. 2d 937 (Fla. 1st DCA 1983), which involved prisoners filing petitions for writs of habeas corpus—both of which were decided pre-*Sandin*. The Fifth District's cite to *Taylor* and *Granger* appears to be for the proposition that Holland had not raised any arguments that would entitle him to release from Close

Management. *Holland*, 791 So. 2d at 1256–57 & n.2. Regardless, *Holland* did not analyze whether a habeas petition was the appropriate method for such a challenge and made no decision on that basis. To the extent that *Holland* relied on *Taylor* and *Granger* for the notion that a habeas petition was the proper vehicle for challenging Close Management status, *Holland* was relying on cases decided before *Sandin* was issued. Nonetheless, because the Fifth District had looked to prior First District decisions from which the First District receded in its en banc opinion below, the First District certified conflict with *Holland*.

SUMMARY OF THE ARGUMENT

This case is now moot. Last month, Petitioner was released from his Close Management assignment. Petitioner now resides in a facility that does not house inmates in Close Management, and there is no reason to believe that he will engage is substantial disciplinary or security violations in the future. In particular, Petitioner has not alleged that he would be reassigned to Close Management and has not alleged that he would seek to challenge such reassignment by filing a petition for writ of habeas corpus rather than a petition for writ of mandamus.

In any event, the United States Supreme Court's decision in *Sandin* established that prison regulations imposing restraints that are within the realm of ordinary incidents of prison life do not implicate a prisoner's liberty interests. 515 U.S. at 484. The First District below recognized that its precedent—almost entirely

pre-*Sandin*—had allowed claims challenging ordinary prison restraints to be considered in habeas corpus, as though involving due process liberty interests. Because *Sandin* changed the law, the First District's adherence to this binding precedent required it to recede from its prior decisions and articulate the new rule. And because Petitioner's claims do not involve any atypical or significant hardships beyond standard conditions of imprisonment—in fact, his complaints seem largely directed toward the integrity of the underlying administrative process—Petitioner's liberty-based claim is foreclosed by *Sandin*.

Not only is the First District's decision required by United States Supreme Court precedent, it also has the advantage of being both correct and fair. The decision below leaves available the procedurally proper avenue for prisoners seeking to challenge their Close Management status: they may seek relief by petition for writ of mandamus in the Leon County Circuit Court. Indeed, this is the same procedure by which inmates may raise challenges to disciplinary actions in state prison or appeal other administrative decisions. Access to justice is not impaired by this straightforward application of the United States Supreme Court's decision in *Sandin* and longstanding principles of habeas corpus.

This Court should either discharge jurisdiction of this moot case or approve the First District's correct en banc decision.

ARGUMENT

I. THIS CASE IS MOOT BECAUSE PETITIONER HAS BEEN RELEASED FROM HIS CLOSE MANAGEMENT ASSIGNMENT.

Petitioner's entire claim rests—as it has for the duration of this case—on his objections to his retention in Close Management. More specifically, Petitioner's argument is that the Department did not properly follow its own administrative procedures in assigning him to Close Management on October 9, 2014. *See* Pet. Br. 9 (Petitioner "is asserting that his placement in CMI status was arbitrary and contrary to the requirements of Florida law.").

On January 6, 2017, after one of Petitioner's periodic classification reviews, the Department released Petitioner from Close Management and transferred him to a correctional facility that does not accommodate Close Management. (Supplemental Appendix, Tab A)[1] Accordingly, Petitioner's claim is now resolved. The theoretical possibility that Petitioner could be reassigned to Close Management

[1] The Secretary concurrently files a Supplemental Appendix containing a Florida Department of Corrections Report of Close Management for Petitioner, dated February 14, 2017 ("Report"), and requests that this Court take judicial notice of this official agency record of action. *See* § 90.202(5), Fla. Stat. (permitting judicial notice of "[o]fficial actions of the legislative, executive, and judicial departments" of the State); § 90.202(12), Fla. Stat. (permitting judicial notice of "[f]acts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned"). Although the Report is outside the record on appeal, it reflects a critical recent factual development that goes to the heart of Petitioner's claims and the now-moot controversy.

does not place this case within an exception to the mootness doctrine. Petitioner has not alleged that he plans to engage in security or disciplinary transgressions in the near future, has not shown that prison officials would likely respond to any such transgressions by placing him in Close Management, and has not alleged that he would seek to challenge any such placement by filing a habeas petition rather than a mandamus petition. *See Banks*, 197 So. 3d at 1176–77; *infra* Part IV.

Because Petitioner's entire case and the essence of the alleged conflict turns on how a prisoner may properly challenge his assignment to Close Management, the question before this Court is now moot. *See Goodwin v. State*, 593 So. 2d 211, 212 (Fla. 1992) ("A case is moot when it presents no actual controversy or when the issues have ceased to exist."). When an inmate is challenging his confinement classification, his challenge becomes moot when he is released from the particular classification. For example, in *Smith v. McNeil*, 49 So. 3d 298, 299 (Fla. 1st DCA 2010), an inmate "was removed from close management status and transferred to another correctional facility where close custody is not a classification option"—just like Petitioner here. The First District concluded that the inmate's challenge to his Close Management classification was moot, since he was no longer in Close Management and was transferred without any expectation that he would return to Close Management or even to a facility accommodating that classification. *Id.* Similarly, in *Spears v. Thigpen*, 846 F.2d 1327, 1328 (11th Cir. 1998), an inmate

challenged his conditions of administrative segregation at a facility where he had been previously incarcerated. The Eleventh Circuit vacated and remanded for dismissal of those claims as moot, holding that his claims "relating to the conditions of his administrative segregation at the West Jefferson facility no longer presented a case or controversy." *Id.* Here, Petitioner is no longer assigned to Close Management and therefore has nothing to challenge. Any future assignment of Petitioner to Close Management would necessarily be based on new and different facts that do not yet exist.

If an inmate's challenge to his confinement classification becomes moot once the inmate is no longer so classified, then a fortiori an inmate's challenge to the method by which he can challenge his confinement classification becomes moot when the inmate is no longer in the particular confinement classification. In short, the controversy that gave rise to the certified conflict has been resolved, and this Court need not and should not retain jurisdiction over a certified conflict when it determines that the case has become moot. *See Yegge v. State*, 180 So. 3d 128, 129 (Fla. 2015) ("[A]lso because this case is moot, we exercise our discretion and discharge jurisdiction.").

A decision to discharge jurisdiction over this case would not adversely affect the administration of justice. The underlying issue is not a frequently occurring matter of statewide importance. As even Judge Makar noted in dissent from the First

District's en banc decision, the number of cases conceivably affected by the legal question at hand is a "lilliputian sliver of our docket"—relating only to "a miniscule subcategory of inmate petitions comprising about 0.2% of our annual workload." *Banks*, 197 So. 3d at 1177 (Makar, J., dissenting). Of that infinitesimal fraction of challenges, under the First District's holding, any may be brought by petition for writ of mandamus. *Id.* at 1167–68.

Moreover, the certified conflict is uniquely poised to resolve itself without this Court's attention. The Fifth District's opinion in *Holland* did not directly address whether a habeas petition or mandamus petition was the proper means for challenging Close Management status. Neither the analysis nor the holding in *Holland* focuses on the central question in the decision below. The *Holland* decision also did not address the significance of *Sandin*; it merely cited two First District cases that involved habeas corpus petitions, in a footnote and without any discussion. *See Holland*, 791 So. 2d at 1256–57 & n.2. More importantly, to the extent that *Holland* was relying on the First District's prior precedent regarding habeas petitions, this issue is apt to clear up on its own among the district courts. Should the Fifth District continue looking to the First District for guidance, it would likely follow suit with the decision below, and any conflict will be resolved.

Because there is no live controversy, because the broader legal question arises extremely infrequently, and because the alleged conflict is poised to resolve itself,

this Court should exercise its discretion and discharge jurisdiction of this case as moot.

II. *SANDIN* CLARIFIED THAT THERE IS NO PROTECTED LIBERTY INTEREST IN BEING FREE FROM TYPICAL CONFINEMENT CONDITIONS THAT ARE ORDINARILY INCIDENT TO IMPRISONMENT AND NOT SIGNIFICANT DEPRIVATIONS.

More than three decades ago, the United States Supreme Court made explicit that prison inmates do not possess a due process right to remain in the general prison population. *Hewitt v. Helms*, 459 U.S. 460, 468 (1983). *Hewitt* built upon the foundation laid in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Meachum v. Fano*, 427 U.S. 215 (1976), setting forth the framework for determining when a state's prison regulation creates a liberty interest for a prisoner. In *Wolff*, the Court held that a regulation providing that good-time credits were revocable only if the prisoner was guilty of serious misconduct created a liberty interest because the prisoner's interest in being deprived of good-time credit he had already earned had "real substance." 418 U.S. at 557. In *Meachum*, however, the regulation at issue provided prison officials with direction to transfer a prisoner to a different facility in which the prison conditions were "substantially less favorable to the prisoner." 427 U.S. at 216. The Court found that there was no state-created liberty interest triggering the due process clause—"given a valid conviction, the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him

to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution." *Id.* at 225. "That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules." *Id.* at 225. The *Hewitt* Court then extended the analysis to include whether a state had gone beyond issuing mere procedural guidelines and had used "language of an unmistakably mandatory character" such that the intrusion on liberty would not occur "absent specified substantive predicates." *Sandin*, 515 U.S. at 480 (citing *Hewitt*, 418 U.S. at 471–72).

When a similar due process challenge was presented in *Sandin*, the United States Supreme Court concluded that *Hewitt* had improperly shifted the focus of the liberty-interest inquiry from one based on the substantive deprivation to one based on whether the particular regulation at issue used language that is mandatory or discretionary. *Sandin*, 515 U.S. at 480. The *Sandin* Court went to great lengths to detail the problems in *Hewitt*'s analytical foundation. That approach, the Court explained, had led to problematic consequences: states could "avoid the creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel"; and federal courts had been drawn into "the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone." *Sandin*, 515 U.S. at 482.

The facts in *Sandin* are similar to the facts here. In *Sandin*, a prisoner—like Petitioner, sentenced to 30 years for committing various felonies—alleged he had been denied due process when prison officials refused to allow him to present witnesses at a disciplinary hearing and sentenced him to disciplinary segregation based on his misconduct. 515 U.S. at 476. After the district court granted the prison officials summary judgment, the Ninth Circuit reversed, holding that the prisoner had a liberty interest in remaining free from disciplinary segregation and that disputed facts remained regarding whether the inmate had received due process—more specifically, whether the prison officials had complied with their own regulations regarding evidentiary requirements and discretion to impose segregation. *Id.*

Recognizing that caselaw had "strayed from the real concerns undergirding the liberty protected by the Due Process Clause," *id.* at 483, the *Sandin* Court announced a return to established due process principles—namely that although States may in certain circumstances create protected liberty interests, those circumstances "will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *id.* at 484. The Court reaffirmed the reality that, while "prisoners do not shed all constitutional rights at the prison gate, . . . [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a

retraction justified by the considerations underlying our penal system." *Id.* at 485 (citations omitted). For that reason, "transfer to less amenable quarters for nonpunitive reasons [is] 'ordinarily contemplated by a prison sentence.'" *Id.* at 480 (quoting *Hewitt*, 459 U.S. at 468). And regulations governing such transfers, "designed to guide correctional officials in the administration of a prison[,] . . . are . . . not designed to confer rights on inmates." *Sandin*, 515 U.S. at 481–82.

Against that legal backdrop, the *Sandin* Court noted that the prisoner's confinement was not characterized by abnormally excessive restrictions and that the State's action in placing the prisoner in temporary disciplinary segregation "did not work a major disruption in his environment" as compared to his ordinary conditions in the general prison population. *Id.* at 486. The Court held, therefore, that the prison regulation underlying the disciplinary segregation did not "afford [the inmate] a protected liberty interest that would entitle him to [due process] procedural protections . . . . The regime to which he was subjected as a result of the misconduct hearing was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life." *Id.* at 487.

Sandin therefore was not a radical development in due process jurisprudence, but simply clarified that prisoners not facing an extraordinary substantive deprivation of freedoms do not possess constitutional liberty interests in their confinement conditions. *See id*. at 483–86. As the United States Supreme Court

summarized, "[a]fter *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 . . . the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (quoting *Sandin*, 515 U.S. at 484).

III. BECAUSE THE BINDING IMPLICATION OF *SANDIN* ESTABLISHES THAT PETITIONER HAS ASSERTED NO LIBERTY INTEREST, THE FIRST DISTRICT CORRECTLY CONCLUDED THAT HABEAS CORPUS RELIEF IS UNAVAILABLE.

In the decision below, the First District adhered to *Sandin* in concluding that Petitioner had no liberty interest in being transferred from Close Management into the general prison population. The hardships Petitioner asserts are neither atypical not significant deprivations; they are nothing but typical. *See infra* Part III.A. Specifically, Petitioner complains that in Close Management, he got fewer showers, fewer visits with outsiders, fewer phone calls, and limits on the number of food and non-food items he could order per week. Pet. Br. 15–17. Petitioner also argues that diminished ability to earn gain time compounds an atypical hardship, Pet. Br. 14, but he does not assert that any gain time he would have earned could entitle him to immediate or even early release from his 30-year prison sentence. Absent any such showing of a liberty interest at stake, *Sandin* dictates that Petitioner is not entitled to due process protections, *see* 515 U.S. at 484—and consequently has no rights that

could be vindicated through a petition for writ of habeas corpus, *see Murray v. Regier*, 872 So. 2d 217, 222 (Fla. 2002) ("[T]he traditional purpose of the writ of habeas corpus is to furnish a . . . remedy to one who liberty is unlawfully restrained.").

Because habeas corpus is "a remedy for severe restraints on individual liberty," *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973), the logical implication of *Sandin*—under which Petitioner's claim raised *no* liberty interest—is that habeas relief is improper for such challenges. Indeed, this Court has long recognized that "[t]he great writ of habeas corpus is a writ of right obtainable under our Constitution by all men who claim to be unlawfully imprisoned against their will. It is designed to test solely the legality of the petitioner's imprisonment." *Sneed v. Mayo*, 66 So. 2d 865, 869 (Fla. 1953). Lower appellate courts in Florida have acknowledged the same principle. *See, e.g.*, *Durden v. Briody*, 787 So. 2d 260, 261–62 (Fla. 2d DCA 2001) (habeas relief improper when inmate "seeks to challenge the conditions of his confinement rather than the fact or duration of his confinement"); *Steele v. State*, 733 So. 2d 1117, 1118 (Fla. 4th DCA 1999) ("If, upon the filing of a mandamus petition, it appears that appellant would be *entitled to immediate release from incarceration* . . . , the petition should be treated as a petition for writ of habeas corpus.") (emphasis supplied); *William v. James*, 684 So. 2d 868, 869 (Fla. 2d DCA 1996) ("[S]ince Williams did not allege that he would be entitled to immediate

release but for the loss of the gain time, we treat Williams' petition for habeas corpus as a petition for writ of mandamus."). A challenge asserting something less than a recognized liberty interest, *see Sandin*, 515 U.S. at 484, cannot be made through a means reserved for the most substantial impairments of liberty.

A. There Is No Liberty Interest in Avoiding Ordinary Prison Restrictions.

Petitioner includes a lengthy discussion of what habeas relief is for, Pet. Br. 8–10—without acknowledging the critical questions at issue here: whether the restrictions of which Petitioner complains are ordinary incidents of penal incarceration, *see Al-Amin v. Donald*, 165 F. App'x 733, 736–38 (11th Cir. 2006), and whether Petitioner is claiming entitlement to release from prison, *Sneed*, 66 So. 2d at 869. Whether Petitioner's day-to-day restrictions within prison differed in magnitude from the general population is, as *Sandin* established, not the ultimate question. *Sandin*, 515 U.S. at 484; *cf. Meachum*, 427 U.S. at 222–24 (no liberty interest transfer to medium- or maximum-security setting, even if "a significant modification of the overall conditions of confinement").

Petitioner complains of several features of his prior Close Management confinement, labeling them—without any authority—"atypical and significant hardships." Pet. Br. 14. But Petitioner's conclusory assertions do not establish that these features of his confinement "presented a dramatic departure from the basic

conditions of [his] sentence." *Sandin*, 515 U.S. at 485. Close Management prison conditions are not "atypical" of general population status in a way that creates a liberty interest requiring a due process analysis. *See Al-Amin*, 165 F. App'x at 737–39 (prisoner's placement in administrative segregation for three years—where he received the opportunity to appeal and periodic reviews of his classification—"does not give rise to a liberty interest" under *Sandin*). Petitioner's complaints fall far short of establishing a liberty interest:

Fewer showers. Petitioner alleges that Close Management inmates "shower only three times per week." Pet. Br. 15. Such a limitation does not give rise to a liberty interest. *See Al-Amin*, 165 F. App'x at 736; *Osterback v. Johnson*, No. 2:97-cv-314-FTM-16DNF, 2003 WL 25571396, at *4 (M.D. Fla. June 2, 2003).

Fewer visits and telephone calls. Pet. Br. 15–16. The United States Supreme Court has stated that even complete withdrawal of visitation privileges for a limited period of time as a means of effecting prison discipline is "not a dramatic departure from accepted standards for conditions of confinement." *Overton v. Bazzetta*, 539 U.S. 126, 137 (2003) (upholding suspension of visiting privileges for a minimum two years for inmates with two substance abuse violations) (citing *Sandin*, 515 U.S. at 485); *see also Bazzetta v. McGinnis*, 430 F.3d 795, 802 (6th Cir. 2005) (recognizing the Supreme Court's implicit holding in *Overton* that there is no liberty interest in prison visitation because a mandatory two-year suspension with indefinite

suspension afterward is not an atypical hardship in relation to the ordinary incidents of prison life). The Eleventh Circuit has also held that a prisoner has no liberty interest in the temporary suspension of his visiting privileges. *See Charriez v. Secretary, Fla. Dep't of Corrections*, 596 F. App'x 890, 893–94 (11th Cir. 2015) ("Accordingly, the district court did not err in granting summary judgment as to the procedural due-process claims . . . because, under the Due Process Clause, Charriez did not have a protected liberty interest in unfettered visitation privileges while in prison . . . . Nor did Charriez have a state-created liberty interest in unfettered visitation such that a one-year suspension of his visitation privileges would impose "atypical and significant hardship" in relation to ordinary prison life."); *West v. Higgins*, 346 F. App'x 423, 426 (11th Cir. 2009) ("Other examples of prison decisions not giving rise to liberty interests include . . . visitation.").

Similarly, prisoners do not have a due process liberty interest in temporary restriction or even suspension of phone privileges. *See Freitas v. Ault*, 109 F.3d 1335, 1337–38 (8th Cir. 1997) (10-day placement in segregation allowing for 1 hour per day out of cell and 30 additional days of limited time out of cell, limited visitors, and no work or phone privileges, did not constitute atypical and significant hardship); *Lammers v. Ellard*, 202 F.3d 273, at *1 (7th Cir. 1999) (Table) ("Fourteen days' telephone privileges are neither 'liberty' nor 'property,' so federal courts do not review . . . [under] the due process clause."); *Brown v. Ives*, No. 6:11-CV-00160-

HRW, 2012 WL 1633243, at *3 (E.D. Ky. May 9, 2012) (inmate's punishment of 14 days in disciplinary segregation, one year's loss of phone privileges, and 90 days' loss of commissary privileges did not constitute an atypical and significant hardship); *cf. Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994) ("The exact nature of telephone service to be provided to inmates is generally to be determined by prison administrators . . . .") (citation omitted).

Handcuffs or shackles during transport. Pet. Br. 16. Petitioner's allegations regarding handcuffs and shackles, which many prisoners who are not in Close Management also may be required to wear at times, does not demonstrate an atypical and significant hardship. *See Adamson v. McNeil*, No. 3:08cv231/RV/EMT, 2008 WL 5231869, at **2–3 (N.D. Fla. Dec. 12, 2008) (no liberty interest in a change of classification to Close Management I based on conditions including the use of handcuffs, leg irons, and waist chains for escort purposes); *cf. Key v. McKinney*, 176 F.3d 1083, 1086–87 (8th Cir. 1999) (restraint in handcuffs and shackles for 24 hours straight did not constitute a significant and atypical hardship under *Sandin*).

Fewer privileges for ordering various goods. Pet. Br. 16–17. Petitioner complains that he was subject to a reduced number of weekly food and non-food orders and could not order from a catalog while in Close Management. But restrictions on canteen privileges do not impose an atypical and significant hardship giving rise to a liberty interest. *See McKune v. Lile*, 536 U.S. 24, 39–40 (2002)

(inmate's loss of access to his personal television, prison organizations, gym area, and canteen and other privileges does not implicate a liberty interest).

Restricted group programs. Pet. Br. 16–17. Various restrictions on recreational, education, and group activities do not impose an atypical and significant hardship giving rise to a liberty interest. *See Dubose v. Allen*, No. 7:13-CV-152(HL), 2014 WL 287501, at *3 (M.D. Ga. Jan. 24, 2014) ("Prisoners likewise have 'no constitutionally protected liberty interest in prison vocational, rehabilitation, and educational programs.'") (citation omitted); *Searcy v. Culliver*, No. 06-0126-BH-M, 2008 WL 926588, at **6–7 (S.D. Ala. Apr. 3, 2008) (prisoner did not have a liberty interest in "vocational, educational, and recreational activities (including television, movies, interactive games), and group activities (including religious services and sporting events)"). In fact, the very nature of incarceration generally is restriction from such activities that citizens outside of prison freely enjoy.

Diminished opportunities to work or earn gain time. Pet. Br. 14–15. As many courts have acknowledged, a prisoner has no due process liberty interest in a particular job assignment. *See, e.g.*, *Dawson v. Frias*, 397 F. App'x 739, 741 (3d Cir. 2010) (citing the "well-established principle that prisoners have neither a liberty or property interest in prison employment"); *Woodworth v. United States*, 44 F. App'x 112, 112 (9th Cir. 2002) (citing *Sandin* and concluding that prisoner "has

neither a liberty nor a property interest in his prison job"). Florida courts likewise recognize that "prison inmates do not have a constitutionally protected right to obtain a certain job." *Walker v. Walker*, 654 So. 2d 1049, 1050 (Fla. 5th DCA 1995).

To the extent Petitioner is challenging his diminished opportunity to potentially earn gain time through prison work, he likewise establishes no liberty interest. *Hartley v. Warden of Fla. State Prison*, 352 F. App'x 368, 371 (11th Cir. 2009) ("[T]he loss of the eligibility to earn incentive gain-time provided by Florida law is not a sufficient liberty interest to invoke the protections of the Due Process Clause."); *Wright v. McDonough*, 958 So. 2d 1132, 1133 (Fla. 1st DCA 2007) (citing *Sandin* in upholding the circuit court's denial of a mandamus petition which alleged that a disciplinary action prevented the petitioner from earning gain time). There is no right under the Constitution to earn sentence credits. *Hansard v. Barrett*, 980 F.2d 1059, 1062 (6th Cir. 1992); *see also Antonelli v. Sheahan*, 81 F.3d 1422, 1431 (7th Cir. 1996) (holding loss of opportunity to earn good-time credits not constitutionally protected under *Sandin*); *Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) ("*mere opportunity*" to earn good-time credits does not amount to liberty interest). Neither is there any fundamental right to parole or to release from a sentence of incarceration that has itself been lawfully imposed. *See Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 7 (1979).

Although Petitioner lists these complaints in detail, he offers no cases suggesting that any one of the restrictions has ever been deemed an atypical or significant hardship with respect to the ordinary nature of imprisonment. Under *Sandin*, binding on Florida courts, that is the test; both the trial court and First District correctly concluded that Petitioner's conditions in Close Management are neither atypical nor significant under *Sandin*.[2]

While arguing that this Court should conclude that some aspect of Close Management constitutes an "atypical and significant hardship," Petitioner insists that this Court may not conclude the opposite but must, in the alternative, remand for an evidentiary hearing and factual determination regarding the significance and typicality of the Close Management restrictions. Pet. Br. 17 (positing that remand is "the appropriate remedy" "[i]f this Court is not convinced by the bullet points"); *but see* Pet. Br. 19 ("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' . . . ."). In doing so, Petitioner incorrectly suggests that the applicable inquiry is whether "close management imposes greater restrictions in kind and degree" than imprisonment in the general population. Pet.

[2] Petitioner's assertion that eight other states permit habeas corpus review for Close Management status, Pet. Br. 10, and thereby fail to correctly apply *Sandin*, if true, is not a persuasive argument for why Florida should continue in a similar mistake.

Br. 18. This is wrong. That Petitioner experienced greater restrictions in kind and degree in Close Management is not contested; indeed, it is the very essence of Close Management. The relevant inquiry is whether the conditions of Close Management confinement are significant hardships or atypical with respect to the ordinary conditions of imprisonment. *See Sandin*, 515 U.S. at 484.[3]

B. Other Courts Have Likewise Interpreted *Sandin* and Held That Prisoners Have No Liberty Interest in Freedom From Administrative Segregation.

The First District's decision accords with the decisions of many state and federal courts that have applied *Sandin* to inmate challenges to prison classification status. These cases have consistently interpreted *Sandin* and found no liberty interest in being free from various prison restrictions incident to administrative or

[3] At the outset of his argument, Petitioner asserts, as an unsupported conclusion, that he "has established that placement in close management represents substantially more 'atypical and significant hardships' in relation to the ordinary incidents of prison life." Pet. Br. 8. Petitioner has not established that proposition, as his subsequent argument regarding the alleged inadequacy of the factual record demonstrates. *See* Pet. Br. 19 ("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' . . . ."); *see also* Pet. Br. 17 ("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' . . . ."). For the reasons set forth in the main text, the kinds of restrictions of which Petitioner complains do not, as a matter of law, qualify for relief via habeas (as opposed to relief via mandamus, *see infra* Part IV). Accordingly, and assuming *arguendo* the truth of Petitioner's factual allegations concerning the kinds of restrictions he faced under Close Management, this Court should approve the decision below.

disciplinary segregation rules and, consequently, no cognizable due process claim. *See, e.g.*, *Millhouse v. Bledsoe*, 458 F. App'x 200, 203 (3d Cir. 2012) (citing *Sandin* and concluding there is no liberty interest created by disciplinary regulation or prison official's alleged failure to comply); *Luken*, 71 F.3d at 193 ("*Sandin* establishes that Luken's administrative segregation, without more, does not constitute a deprivation of a constitutionally cognizable liberty interest."); *Rimmer-Bey v. Brown*, 62 F.3d 789, 790–91 (6th Cir. 1995) (citing *Sandin* and holding that no liberty interest is implicated by placement in administrative segregation); *Talley v. Hesse*, 91 F.3d 1411, 1413 (10th Cir. 1996) (holding that, under *Sandin*, prisoner lacked liberty interest in being free from administrative segregation); *Bonner v. Parke*, 918 F. Supp. 1264, 1270 (N.D. Ind. 1996) (finding that "placement in disciplinary segregation for three years does not constitute an extreme term of segregation and, by itself, does not create an atypical and significant hardship in relation to the ordinary incidents of prison life. Therefore, under *Sandin*, Mr. Bonner has no liberty interest . . . ."); *Jackson v. Easley*, No. 3:06CV58-01-MU, 2006 WL 660065, at *1 (W.D.N.C. Mar. 8, 2006) ("discipline in segregated confinement does not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest" under *Sandin*); *Frazier v. Hesson*, 40 F. Supp. 2d 957, 965 (W.D. Tenn. 1999) (under *Sandin*, "there is no constitutional right to a particular security classification. Plaintiff's belief that the classification is unwarranted does

not elevate this issue to one of constitutional significance."); *Gonzales v. Dretke*, No. H-05-3396, 2005 WL 6472776, at *1 (S.D. Tex. Oct. 10, 2005) ("Due process protections do not attach to ordinary prison disciplinary cases, but only those which serve to lengthen the inmate's sentence or exceed its expected parameters.") (citing *Sandin*, 515 U.S. at 484); *Donate v. Taylor*, No. 01-C-0491-C, 2001 WL 34377564, at *3 (W.D. Wisc. Nov. 30, 2001) (transfer to high-security facility and strict segregation status "do not implicate liberty interests . . . [or] the due process clause," under *Sandin*); *Carson v. Hargett*, 689 So. 2d 753, 754–55 (Miss. 1996) (an "inmate has no interest in his custody classification" and "loss of these privileges does not illustrate a significant hardship amounting to a liberty interest for the purposes of judicial intervention per *Sandin*").

Accordingly, courts have rejected inmates' attempts to seek habeas as a form of relief, when the issue has been raised. *See, e.g.*, *York v. Addison*, 44 F. App'x 296, 297 (10th Cir. 2002) (affirming, under *Sandin*, district court's rejection of habeas petition and concluding prisoner was not deprived of liberty interest protected by due process clause when placed in disciplinary segregation); *McFarland v. Dir., Tex. Dep't of Criminal Justice*, No. 9:09CV46, 2009 WL 1025551, at *5 (E.D. Tex. Apr. 16, 2009) (rejecting inmate's habeas claim because, under *Sandin*, inmate's "punishment of reduction in classification status . . . does not implicate a constitutionally protected liberty interest"); *Branum v. Quarterman*, No. H-07-0414,

2007 WL 419450, at **1–2 (W.D. Tex. Feb. 5, 2007) (habeas relief unavailable because, under *Sandin*, "imposition of a restriction on commissary or recreation privileges, and a cell restriction or solitary confinement on a temporary basis, are the type of sanctions that do not pose an atypical or significant hardship beyond the ordinary incidents of prison life").

Other courts, even if not specifically invoking *Sandin*, have rejected inmates' habeas claims based on administrative actions in prison because such claims do not seek to vindicate liberty interests subject to due process protections, much less seek to challenge the fact or duration of incarceration. *See, e.g.*, *Ex parte Boykins*, 862 So. 2d 587, 593 (Ala. 2002) (inmate's challenge to administrative decision of Department of Corrections, in applying its agency rules, was not cognizable by petition for writ of habeas corpus because inmate had no due-process liberty interest). Still other courts have acknowledged the impropriety of opening up habeas relief to prisoners protesting administrative corrections decisions. *E.g.*, *Brown v. Plaut*, 131 F.3d 163, 138 (D.C. Cir. 1997) (noting that if an inmate "were required to invoke habeas corpus to challenge his placement in administrative segregation, then the same rule would presumably apply to a myriad of prison officials' other administrative decisions affecting conditions of confinement, such as visitation, mail, shower, or library privileges"); *cf. Wagner v. Hanks*, 128 F.3d 1173, 1175 (7th Cir. 1997) (to recognize a constitutionally protected liberty in confinement

conditions would send courts "deep into the minutiae of prison administration, much as if they were managing a hotel chain").

C. Petitioner's Position Disregards the Logic of *Sandin*.

The holding Petitioner seeks would not comport with *Sandin* and, in fact, would require adoption of a premise directly at odds with *Sandin*'s—that administrative segregation within a 30-year prison sentence results in a "major disruption" of Petitioner's environment. 515 U.S. at 486. Accordingly, Petitioner is wrong to argue that "there has been no change in the circumstances that justified the holdings in those cases [relying on pre-*Sandin* rationale]." Pet. Br. at 8. A new rule of law issued by the United States Supreme Court is indeed a change in circumstances warranting departure from stare decisis—even more so when that new legal rule makes clear that "there has been an error in [prior] legal analysis." *Brown v. Nagelhout*, 84 So. 3d 304, 309 (Fla. 2012). Notably, Petitioner does not cite any case decided after *Sandin* suggesting that disciplinary confinement or administrative segregation is a deprivation of liberty.[4] That the First District's conformity to the

[4] Petitioner's only proffered supporting caselaw comes from an intermediate Alabama court and does not even find a liberty interest based on the inmate's six-month administrative segregation but merely notes a deficient record. Pet. Br. 13–14; *see Watkins v. Mitchem*, 50 So. 3d 485, 492–94 (Ala. Civ. App. 2010) (partially reversing judgment on the pleadings when "record is wholly devoid of any evidence" whether the confinement "represent[ed] a significant departure from the normal conditions"). Reliance on *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996), *see* Pet. Br. 8, 13–14, is misplaced because that case involved an inmate

new rule of law and correction of error in legal analysis was delayed makes it no less compulsory.

IV. ACCESS TO JUSTICE WILL REMAIN UNIMPEDED THROUGH THE PROPER CHANNELS.

Petitioner incorrectly suggests as a reason for this Court to quash the decision below that the First District's decision forecloses relief to state prisoners seeking to challenge their Close Management status. Pet. Br. at 32 (quoting *Banks*, 197 So. 3d at 1174 (Wolf, J. concurring in part and dissenting in part)). To the contrary, the First District's decision articulates the clear and proper procedure for such challenges: an inmate may file a petition for writ of mandamus challenging his Close Management assignment in circuit court in Leon County, where the Department's administrators are headquartered. "[S]hould the inmate state a prima facie case that the Department failed to comply with its own rules [regarding confinement assignments,] . . . a circuit court could be required to issue a show cause order to the Department, necessitating further evaluation in that court." *Banks*, 197 So. 3d at 1167. As the First District noted in response to Judge Wolf's concern, this procedure is akin to what this Court outlined in *Moore v. Florida Parole & Probation Commission*, 289 So. 2d 719, 720 (Fla. 1974)—namely that habeas corpus is not available to challenge

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ordered to a full year of solitary confinement. In any event, in neither *Watkins* nor *Williams* did the inmates seek relief by writ of habeas corpus; both involved § 1983 claims.

a Department decision not entitling an inmate to a reasonable expectation of imminent release from incarceration; instead, mandamus relief may be sought. *Banks*, 197 So. 3d at 1167.

Indeed, a petition for writ of mandamus has long been the procedure used for inmate appeals of administrative decisions or challenges to disciplinary actions in state prisons. *Bush v. State*, 945 So. 2d 1207, 1215 (Fla. 2006) (holding that "the proper remedy for a prisoner to pursue in challenging a sentence-reducing credit determination by the Department, where the prisoner has exhausted administrative remedies and is not alleging entitlement to immediate release, continues to be a mandamus petition filed in circuit court"). In the event the circuit court denies the mandamus petition, a prisoner may seek relief in the district court by petition for writ of certiorari. *See* Fla. R. App. P. 9.030(b); *Sheley v. Fla. Parole Comm'n*, 720 So. 2d 216, 217 (Fla. 1998) (explaining, in the context of a challenge to an order of the Florida Parole Commission, that "[a] circuit court order denying relief is reviewable in the district court by certiorari").

Every district court in the State has recognized mandamus petitions as the proper method for seeking relief in these circumstances. *See Banks*, 197 So. 3d at 1155–56 (citing *Holcomb v. Dep't of Corrections*, 609 So. 2d 751 (Fla. 1st DCA 1992)); *Green v. Moore*, 777 So. 2d 425, 426 (Fla. 1st DCA 2000) (prisoner's "selection of mandamus as his circuit court remedy was correct," in challenge to

disciplinary sanction imposed by the department); *Woullard v. Bishop*, 734 So. 2d 1151, 1152 (Fla. 1st DCA 1999) (quashing trial court's order denying relief and explaining that "[a]lthough [the inmate] styled his petition as seeking habeas corpus relief, it more properly is viewed as seeking relief through a writ of mandamus, which is the appropriate remedy for seeking review of a prison disciplinary proceeding allegedly conducted in violation of constitutional requirements or the rules of the Department of Corrections")[5]; *Walker v. McDonough*, 967 So. 2d 1134, 1135–36 (Fla. 2d DCA 2007) ("In the event that Walker has exhausted his administrative remedies and is not alleging entitlement to immediate release, he may elect, if he is not time-barred, to file his petition for a writ of mandamus in Leon County . . . ."); *Drayton v. Moore*, 807 So. 2d 819, 823 & n.7 (Fla. 2d DCA 2002) (reversing and remanding trial court's dismissal of petition for mandamus when inmate alleged that the Department failed to adhere to its own rules during disciplinary proceedings); *Jones v. Joseph*, 989 So. 2d 744, 745 (Fla. 4th DCA 2008) (reversing trial court's dismissal of mandamus petition inmate filed to challenge disciplinary proceedings and subsequent disciplinary confinement, and remanding

[5] Indeed, the First District below considered Petitioner's claim, in the alternative, under the mandamus standard and concluded that mandamus relief would have been properly denied here because Petitioner did not "deny[] that he committed the acts involved or assert[] a credible argument that such acts were not an adequate basis for the reclassification." *Id.* at 1169.

for consideration of inmate's indigency); *Smiley v. State*, 948 So. 2d 964, 965 n.2 (Fla. 5th DCA 2007) ("Mandamus is the accepted remedy for circuit court review of DOC disciplinary actions.") (citing *Bush*, 945 So. 2d 1207); *see also Hale v. McDonough*, 970 So. 2d 362, 365 (Fla. 3d DCA 2007) (affirming dismissal of inmate's petitions for writ of mandamus challenging disciplinary proceedings, solely on the grounds that the petitions were untimely).

Petitioner concedes that he was raising just such a challenge: he was "asserting that his placement in CMI status was arbitrary and contrary to the requirements of Florida law." Pet. Br. 9. In other words, Petitioner was appealing an administrative decision made within a state prison and claiming it was made improperly. Nothing has changed regarding the mandamus procedure, which remains available to inmates for such appeals. *Banks*, 197 So. 3d at 1167–68. And, should Petitioner ever again be placed in Close Management, nothing in the First District's decision prevents Petitioner from challenging his Close Management status in the future, using the same general arguments,[6] through the proper vehicle, a petition for writ of mandamus.

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[6] If Petitioner were to seek mandamus relief in the future based on a subsequent assignment to Close Management, he would need to, at a minimum, "sufficiently allege that the Department unlawfully classified Petitioner to Close Management status," *id.* at 1169, and support his allegations with prima facie evidence "that the Department relied on improper considerations or failed to follow its own rules," *id.* at 1168—something Petitioner has thus far failed to do, *id.* at 1169.

CONCLUSION

This Court should approve the decision of the First District.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by electronic service through the Florida Courts E-Filing Portal on this 16th day of February, 2017, to the following:

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