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March 7, 2019

Clerk of the Court
Supreme Court of the United States
1 First Street NE
Washington, DC 20543

Re: Patrick Neil Kinney v. Connie Horton
NEW CASE
6th Cir. No. 18-2006
W.D. Mich. No. 2:18-cv-00027

Dear Clerk:

Please find enclosed for filing in the above-captioned case 1 original and 10 copies of:

1. Petitioner's Motion for Leave to Proceed In Forma Pauperis;

2. Affidavit or Declaration in Support of Motion for Leave to Proceed In Forma Pauperis;

3. Petition for Writ of Certiorari and Appendices, and;

4. Proof of Service.

Thank you.

Very Truly Yours,

Mary A. Owens

cc: Respondent, File

V:\WPDOCS\KINNEY-P\1901S19bcvr

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK NEIL KINNEY -- Petitioner,

v.

CONNIE HORTON -- Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner Patrick Neil Kinney, by and through his attorney Mary A. Owens, asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Petitioner has previously been granted leave to proceed in forma pauperis in the United States Court of Appeals for the Sixth Circuit.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Counsel is representing Petitioner on a pro bono basis.

Petitioner therefore asks leave to proceed in forma pauperis.

Respectfully submitted,

Mary A. Owens
Attorney for Petitioner
124 E. Fulton, Ste. 100
Grand Rapids, MI 49503
(616) 742-0431
maryowens515@att.net

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK NEIL KINNEY -- Petitioner,

v.

CONNIE HORTON -- Respondent.

PROOF OF SERVICE

I, Mary A. Owens, do swear or declare that on the date set forth below, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or on that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Dana Nessel, Michigan Attorney General, PO Box 30217, Lansing, MI 48909

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____, 2019

_____
Mary A. Owens

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICK NEIL KINNEY -- Petitioner,

v.

CONNIE HORTON -- Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mary A. Owens P-33896
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QUESTIONS PRESENTED

1. Did the Sixth Circuit err in denying a certificate of appealability under 28 U.S.C. 2253(c)(2) on the issue whether claims by prisoners challenging their conditions of confinement are cognizable in habeas corpus under 28 U.S.C. 2241 where there is a circuit split on the question, meaning that it is debatable among reasonable jurists?

2. Did the Sixth Circuit err in denying a certificate of appealability under 28 U.S.C. 2253(c)(2) on the issue whether the punishment Petitioner suffered as the result of his prison misconduct gave rise to a due process liberty or property interest, where at least one federal district court held that materially identical punishments gave rise to a due process liberty interest, meaning that it is debatable among reasonable jurists?

3. Did the Sixth Circuit err in denying a certificate of appealability under 28 U.S.C. 2253(c)(2) on the issue whether the prison rule gave Petitioner fair notice that his conduct would result in punishment, where the legal principle enunciated by the state court in denying this claim -- that prisoners are held to a higher standard than the "person of ordinary intelligence" test prescribed by this Court -- is directly contrary to the holding of the Second Circuit on the same issue of federal law, meaning that the issue is debatable among reasonable jurists?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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INDEX TO APPENDICES

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OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The United States Court of Appeals denied Petitioner's motion for a certificate of appealability on January 2, 2019.

No petition for rehearing was filed.

The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Section 9, Clause 2 provides: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

U.S. Constitution, Amendment I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

U.S. Constitution, Amendment XIV, Section 1 provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 U.S.C. 2241(c) provides, in relevant part, "The writ of habeas corpus shall not extend to a prisoner unless -- . . . (3) He is in custody in violation of the Constitution or law or treaties of the United States[.]"

28 U.S.C. 2253(c) provides, in relevant part, "(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of the process issued by a State court . . . . (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

The 2014 "dangerous contraband" rule under which Petitioner was convicted appears at Appendix I.

The 2015 revised "dangerous contraband" rule appears at Appendix J.

The 2014 "prisoner mail" policy appears at Appendix K.

STATEMENT OF THE CASE

Petitioner Patrick Neil Kinney is serving a "parolable" life sentence in Michigan for second-degree murder committed in 1995, when he was sixteen years old. Appendix B (Dist. Ct.'s Opinion and Order, RE 3, Page ID # 134); Mich. Comp. Laws 750.317; 791.234(7)-(8).

On February 26, 2014, corrections officers suspected Petitioner was planning to escape, a suspicion that later proved to be mistaken. Appendix F (Rehearing Report of July 21, 2014, page 5, para. 2). Based on these mistaken suspicions, the officers searched Petitioner's cell and found a watercolor painting depicting a sunrise as seen through a section of prison fence, including a guard tower, lampposts, and snow banks. Appendix H (Hearing Report of March 3, 2014).

For possessing this painting, the corrections officers charged Petitioner with the prison misconduct "possession of dangerous contraband (escape material)," in violation of the Michigan Department of Corrections "prisoner discipline" policy directive. Appendix I. That rule, as written at the time, prohibited, in relevant part, only "escape material," which it defined only as "rope, and grappling hook." Appendix I.

At the misconduct hearing on March 3, 2014, Petitioner explained that he made the painting solely for submission to the annual, prison-approved University of Michigan's Prisoner Creative Arts Project (PCAP) to express the view that beauty can be found even in prison. Appendix H. Petitioner told the prison hearing officer that he had been waiting for the University of Michigan volunteers to come to the prison to collect the art, as he had been

instructed, and that the painting did not accurately depict the actual fence, since he omitted many details (such as the rolls of concertina wire, the separate electric fence, and an entire chain-link fence) and altered the positions of several objects for reasons of artistic composition. Id. Petitioner also said his painting was similar to art that prison officials had allowed him to receive through the mail from the University of Michigan and that other prisoners had made for the same art project for at least eighteen years without any punishment. Id. The hearing officer held that Petitioner's intent was irrelevant and found him guilty. Although acknowledging that the painting was "incomplete" and "not an exact match" to the prison's actual security perimeter, the hearing officer found that it was "very, very close to the 'real thing.'" Id.

Petitioner was sentenced to 30 days detention plus 30 days loss of privileges and, as a result of the conviction, he suffered placement in administrative segregation for an indefinite period (which ended up lasting 5 months), transfer from security Level II (with all day out-of-cell activity) to Level V (with only one hour out-of-cell activity) for an indefinite period (which ended up lasting another 10 months), then transfer to security Level IV (with only 2 hours per day out-of-cell activity) for an indefinite period (which ended up lasting another 5 months), before finally being returned to Level II twenty months after receiving the misconduct, loss of a coveted, high-paying prison job as a dog trainer (approximately $2,000.00 in lost wages over the 20 months he was removed from eligibility from that job by virtue of his transfer to higher security levels), and severe psychological stress, and mental and emotional anguish and suffering. Appendices F, p.5; H, and M.

In addition, the Class I misconduct conviction and security-level increases resulted in Petitioner being denied parole for at least a five-year period because, in Michigan, Class I misconducts and security-level increases are calculated into every prisoner's "parole guidelines" score. Mich. Dept. of Corr. Policy Directive 06.05.100A, p.4. This score "shall govern the exercise of the parole board's discretion . . ." Mich. Comp. Laws 791.233e. And the Michigan Parole Board specifically cited this misconduct conviction and the resulting security-level increases in its February 12, 2015 order denying Petitioner parole for a period of at least five years. Appendix N (Affidavit of Michele Freiberger and attached Parole Board "Case Summary Report" (CSR)). The CSR contains the notation "not used as reason," but the Michigan Parole Board has explained that this is a meaningless "software . . . glitch," and that the parole board "consider[s] all material noted in the CSR." See *In re Parole of Strutz*, Mich. Ct. App. No. 323101; 2016 WL 514295; 2016 Mich. App. LEXIS 239*, at *11-12 (Feb. 9, 2016); *Wershe v. Combs*, No 1:12-cv-1375; 2016 U.S. Dist. LEXIS 44566 (W.D. Mich. Jan. 5, 2016), at n.2 (same).

On June 27, 2014, the Michigan Department of Corrections Hearings Division granted a rehearing on the misconduct conviction. Appendix G. At the rehearing, Petitioner was again found guilty, but the hearing officer also found that the "escape material" at issue was, in fact, a piece of art that Petitioner intended solely for submission to the University of Michigan's Prisoner Creative Arts Project (PCAP) and not for any "nefarious" purpose. Appendix F, p.5.

Petitioner sought state-court judicial review, arguing that the prison's "dangerous contraband" rule, as applied to the facts of this case, did not provide fair notice, in violation of the Due Process Clause of the Fourteenth Amendment, that Petitioner's art would result in punishment because (1) the rule (as written at the time) defined "escape material" solely as "rope, and grappling hook" (compare Appendices I and J), (2) the Michigan Department of Corrections (MDOC) had allowed prisoners to make similar art for the PCAP for at least eighteen years without any punishment, (3) the prison hearing officer found that Petitioner's intent was innocent, and (4) although the MDOC's "prisoner mail" policy could be read to define "escape material" to include art like Petitioner's, a reasonable prisoner could also interpret it not to include such art for several reasons, including that the MDOC had allowed prisoners to submit similar art to the PCAP for at least eighteen years without any punishment, that the MDOC had allowed the PCAP to send prisoners similar art through the mail, that at least one prison hearing officer had interpreted the prisoner mail policy as not defining the contraband rules in the prisoner discipline policy, and that several rules of statutory construction implied that the mail policy should not be read to define terms in the discipline policy. See Appendix F; Appendix L; Appendix O, pp.23-30.

On September 3, 2014, Michigan's Ingham County Circuit Court affirmed the misconduct conviction because "common definitions of escape material would obviously find that drawings of prison facilities created with exacting detail would constitute escape materials." Appendix D, p.3. At the same time, however, the court admitted that, in Petitioner's drawing,

"some details were changed or not present." Appendix D, pp.4-5. The court also held that "the MDOC mail policy directive does define escape materials as including drawing[s] of the prison facilities, and this directive was available to Petitioner as part of the entirety of the prison rules." Appendix D, pp.3-4. But the court did not address Petitioner's arguments as to why this still did not provide fair notice to a person of ordinary intelligence.

On January 19, 2017, the Michigan Court of Appeals affirmed. Appendix C. Without citation to authority (and contrary to decisions of the United States Court of Appeals), it held prisoners to a higher standard than other persons of ordinary intelligence, saying, "While plaintiff posits that a 'person of ordinary intelligence' should not be required to read multiple policy directives to determine what conduct is prohibited, it is not unreasonable to require prisoners -- who are inherently subject to strict regulations -- to know and **understand** all of the policy directives to which they are subject." Appendix C, p.3 (emphasis added). Compare *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)(holding that the Due Process Clause requires that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited."); *Farid v. Ellen*, 593 F.3d 233, 241 (2d Cir. 2010)("prisoners are not required to integrate multiple directives in order to divine the rules governing their conduct."); *Chatin v. Coombe*, 186 F.3d 82, 89 (2d Cir. 1999)(holding that prisoners are not required to "perform[] the lawyer-like task of statutory interpretation by reconciling the texts of . . . separate documents.").

On June 27, 2017, the Michigan Supreme Court denied leave to appeal. Appendix E.

On November 27, 2017, this Court denied certiorari. *Kinney v Michigan*, Case No.

17-6001.

On March 1, 2018, Petitioner filed a habeas corpus petition under 28 U.S.C. 2254 with the United States District Court for the Western District of Michigan, raising the same fair-notice claim. On August 8, 2018, the district court summarily denied the petition under Rule 4 of the Rules Governing Section 2254 Cases, holding that Petitioner's claim was not cognizable in habeas corpus because it concerned only prison conditions and that no due process liberty interest had been at stake. Appendix B (Doc. # 3, Page ID # 133-141). The district court also denied a certificate of appealability (COA) under 28 U.S.C. 2253(c)(2). Appendix B.

On January 2, 2019, the United States Court of Appeals for the Sixth Circuit denied a COA. Appendix A. Without deciding whether jurists of reason could debate whether Petitioner's claim was cognizable in habeas corpus, it concluded that, "even if it is assumed that jurists of reason would find it debatable whether the district court's dismissal on this ground was correct, Kinney has failed to establish that jurists of reason would find it debatable whether his petition stated a valid claim of the denial of a constitutional right. . . . [as] Kinney's placement in segregation was not indefinite and he continues to be eligible for parole consideration." Id., p.2.

Petitioner now seeks the writ of certiorari because the Sixth Circuit clearly misapplied the COA standard, as at least one reasonable jurist has explicitly held that exactly the same deprivations Petitioner suffered implicates a due process liberty interest, *Dorn v. M.D.O.C.*, No 1:15-cv-359; 2017 WL 2436997; 2017 U.S. Dist. LEXIS 86417, at *17 (W.D. Mich. June 6, 2017), and there is a circuit split on the issue whether a claim like Petitioner's is cognizable in habeas corpus, *Aamer v. Obama*, 742 F.3d 1023 (D.C. Cir. 2014).

REASONS FOR GRANTING THE PETITION

Standard of Review

A certificate of appealability (COA) may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). "When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claims, a COA should issue (and an appeal of the district court's order may be taken) if the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

For example, a COA should be granted if other courts have decided the issue differently, if it has been identified as open or unresolved, *Lynce v. Mathis*, 519 U.S. 433, 436 (1997), *Lozada v. Deeds*, 498 U.S. 430, 431-432 (1991), if "a court could resolve the issue in a different manner," *Barefoot v. Estelle*, 463 U.S. 880, 893-894, & n.4 (1983), if the issue is "adequate to deserve encouragement to proceed further," id., or if it is not "squarely foreclosed by statute, rule or authoritative court decision," id. See *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003)(holding that 28 U.S.C. 2253(c)(2) "codified [the] standard announced in *Barefoot*").

"The COA inquiry, [this Court has] emphasized, is not coextensive with a merits analysis." *Buck v. Davis*, 137 S. Ct. 759, 773 (2017). "At the COA stage, the only question is

whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his claims or that jurists of reason could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck*, at 773 (quoting *Miller-El*, at 327). "This threshold question should be decided without 'full consideration of the factual or legal bases adduced in support of the claim.'" *Buck*, at 773 (quoting *Miller-El*, at 336).

"That a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean he failed to make a preliminary showing that his claim was debatable." *Buck*, at 774. "'[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.'" *Buck*, at 774 (quoting *Miller-El*, at 338). See also *Tennard v. Dretke*, 542 U.S. 274, 282 (2004)(reversing the Fifth Circuit's denial of COA because that court merely "pa[id] lip service to the principles guiding issuance of a COA.").

I. IT IS AT LEAST DEBATABLE AMONG REASONABLE JURISTS WHETHER PETITIONER'S CHALLENGE TO HIS PRISON MISCONDUCT IS COGNIZABLE IN HABEAS CORPUS.

This Court and several circuits have squarely held that challenges to prison disciplinary confinement are cognizable in habeas corpus proceedings, even if the prisoners did not lose good time credit. *Johnson v. Avery*, 393 U.S. 483, 484, 490 (1969); *Wilwording v. Swenson*, 404 U.S. 249, 251 (1971); *Aamer v. Obama*, 742 F.3d 1023, 1031-38 (D.C. Cir.

2014)(citing cases).

Despite this Court's clear holdings, some circuits have held that such claims are not cognizable in habeas. See, e.g., *Cook v. Hanberry*, 592 F.2d 248, 249 (5th Cir. 1979). This appears to be mostly due to this Court's later dicta in a non-habeas case that mischaracterized the issue as unresolved. *Preiser v. Rodriguez*, 411 U.S. 475 (1973).

The D.C. Circuit thoroughly discussed the issue in *Aamer v. Obama,* 742 F.3d 1023, 1031-38 (D.C. Cir. 2014):

> The Supreme Court once suggested -- indeed, held -- that the scope of the writ encompasses conditions of confinement claims such as those petitioners assert. In *Johnson v. Avery*, 393 U.S. 483 (1969), the Court permitted a federal prisoner to challenge by writ of habeas corpus a prison regulation that prohibited him from providing legal assistance to other prisoners [resulting only in his confinement in disciplinary segregation]. See id. at 484, 490. Likewise, in *Wilwording v. Swenson*, 404 U.S. 249 (1971), the Court expressly held that a petition brought by state prisoners challenging 'their living conditions and disciplinary measures,' id. at 249, was 'cognizable in federal habeas corpus,' id. at 251.
>
> Subsequently, however, in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Supreme Court . . . treat[ed] as an open question the writ's extension to conditions of confinement claims. . . . The Court held that when a challenge falls within the 'heart of habeas corpus,' id. at 498, state prisoners may not proceed by way of a section 1983 action, ... Id. at 489-90. Significantly, [however,] the Court did not hold that the converse is also true -- that is, that any claim challenging something apart from the fact or duration of confinement may not be raised in habeas. To the contrary, citing both *Johnson* and *Wilwording*, the Court stated: 'This is not to say

> that habeas corpus may not also be available to challenge . . . prison conditions.' *Preiser,* 411 U.S. at 499.

Indeed, this Court could not have held in *Preiser* that habeas corpus is unavailable to challenge prison conditions because *Preiser* was not a habeas case. In any event, it implied just the opposite: "When a prisoner is put under additional and unconstitutional restraints during his lawful custody, it is arguable that habeas corpus will lie to remove the restraints making the custody illegal." 411 U.S. at 499. The Court's error, in this dicta, was mistakenly characterizing the issue as unresolved. As shown above, the Court explicitly held in two habeas cases, *Avery* and *Wilwording*, that prisoners' claims that they suffered disciplinary confinement in violation of the Constitution were cognizable in habeas corpus.

It is true that this Court has held, in 42 U.S.C. 1983 cases in which prisoners alleged Constitutional violations in prison discipline, that such claims are not cognizable under 1983 but only in habeas corpus actions -- if success in the 1983 action would necessarily imply the invalidity of their confinement or its duration, such as through the implied invalidation of good-time credit revocation. See *Heck v. Humphrey*, 512 U.S. 477 (1994). This is often called the "*Heck*" doctrine or the "favorable termination doctrine" because it requires the underlying conviction to be terminated in the litigant's favor before he may file a Section 1983 action. This doctrine has resulted in a long line of decisions from this Court -- in 1983 cases -- holding that claims whose success would necessarily invalidate the prisoner's confinement or its duration are not cognizable under 1983 but only in habeas corpus. See, e.g., *Wilkinson v. Dotson*, 544 U.S.

74, 81-82 (2005)("a state prisoner's [Section] 1983 action is barred (absent prior invalidation) -- no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings) -- **if** success in that action would necessarily demonstrate the invalidity of confinement or its duration")(emphasis in original).

But all those cases are Section 1983 cases. So this Court was only ruling on the scope of Section 1983 cognizability. This Court has never held that an alleged Constitutional violation that resulted only in a prisoner's disciplinary confinement is non-cognizable in habeas. To the contrary, as stated above, this Court explicitly held that such a claim **is** cognizable in habeas. *Johnson v. Avery*, 393 U.S. 483 (1969); *Wilwording v. Swenson*, 404 U.S. 249 (1971).

It is true that this Court has stated in later dicta that "constitutional claims that merely challenge the conditions of confinement, whether the inmate seeks monetary or injunctive relief, fall outside that core [of habeas corpus] and may be brought pursuant to [Section] 1983 in the first instance." *Nelson v. Campbell,* 541 U.S. 637, 643 (2004). But notably absent from this sentence is the word "only," as in, "may **only** be brought pursuant to [Section] 1983." In other words, the fact that such a claim may be brought pursuant to Section 1983 does not mean it may **only** be brought pursuant to Section 1983. Even if the word "only" were present, it still would not be dispositive because *Nelson* was a Section 1983 case. So any statement about the scope of habeas corpus jurisdiction in that case was obiter dictum, i.e., not necessary to the decision in the

case (whether the claim was cognizable under 1983) and therefore not part of the holding.

All of the same is true of a similar statement made by this Court in *Muhammad v. Close,* 540 U.S. 749, 750 (2004)("Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus; requests for relief turning on circumstances of confinement may be presented in a [Section] 1983 action.").

This Court also stated in *Muhammad*, "This Court has never followed the speculation in *Preiser* . . . that such a prisoner subject to 'additional and unconstitutional restraints' might have a habeas claim independent of [Section] 1983, and the contention is not raised by the state here." *Muhammad,* 540 U.S. at 751, n.1. Technically, this is true. This Court has never **followed** the "speculation" in *Preiser*. But that is irrelevant because this Court **held** in *Avery* and *Wilwording* **before** *Preiser* that such a claim **is** cognizable in habeas. The fact that this Court never followed some dicta in a later 1983 case is simply irrelevant. In any event, *Muhammad* itself was a Section 1983 case. Therefore, the Court's statement in that case about the scope of habeas corpus jurisdiction is just another non-binding obiter dictum that cannot possibly overrule this Court's explicit holdings in *Avery* and *Wilwording* that prison disciplinary confinement is sufficient to make a claim cognizable in habeas corpus.

In fact, even the dissenting judge in *Aamer v. Obama*, 742 F.3d 1023, 1031-38 (D.C. Cir. 2014), although disagreeing with the majority's holding that a claim challenging force-feeding was cognizable in habeas, conceded that habeas jurisdiction "extends to habeas

claims that might affect [a prisoner's] eligibility for parole." Id., at 1047 (Williams, Senior Circuit Judge, dissenting)(quotation marks omitted). That is exactly the type of claim that Petitioner Kinney raises here, a disciplinary decision that affected his parole.

The most recent and perhaps most well-written Court of Appeals decision holding that conditions-of-confinement claims are not cognizable in habeas is *Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016)(en banc). But that decision has several fatal flaws, and with a 6-5 split, it could not have been closer. Its most important flaw is that it utterly ignores this Court's holdings in *Johnson v. Avery* and *Wilwording v. Swenson*. It also relies solely on the above-described dicta in this Court's Section 1983 cases to define the scope of habeas cognizability. *Nettles*, 830 F.3d at 927-930 ("Although the Supreme Court has not provided an express ruling on the scope of habeas we afford considered dicta from the Supreme Court a weight that is greater than ordinary judicial dicta")(quotation marks omitted). And the dissent is just as well-written. Id., at 938-947. Most notably, the dissent points out that the majority's holding that only claims which necessarily imply the invalidity of a prisoner's confinement or its duration are cognizable in habeas, "if taken seriously, will foreclose habeas relief on many procedural claims" relating to criminal trials that were heretofore unquestionably cognizable in habeas. Id., at 939 (Berzon, J., dissenting).

Thus, the district court's ruling in this case that Petitioner's claim is not cognizable in habeas is at the very least debatable among reasonable jurists. Just as in *Avery* and

Wilwording, where this Court explicitly held that the prisoners' claims were cognizable in habeas, Petitioner suffered disciplinary confinement as a result of the challenged prison misconduct conviction. He suffered 30 days detention and 30 days loss of privileges. In addition, he suffered indefinite administrative segregation (which ended up lasting 5 months), transfer from security Level II (with all day out-of-cell activity) to Level V (with only one hour out-of-cell activity) for an indefinite period (which ended up lasting another 10 months), then to Level IV (with only 2 hours out-of-cell activity) for an indefinite period (which ended up lasting 5 months), before finally being returned to Level II, loss of a coveted well-paying prison job as a dog trainer (approximately $2,000.00 in lost wages over the 20 months he was removed from eligibility from that job by virtue of his transfer to higher security levels), severe psychological stress, mental and emotional anguish and suffering, and denial of parole for at least a five-year period. Appendices G, p.5, H, and M. [1]

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[1] Petitioner could not have brought his claim under Section 1983 because (1) the only possible defendant is immune from suit, and (2) the claim would likely be barred by the doctrine of res judicata.

The person who proximately caused Petitioner's injury (and thus the only person who could be sued under Section 1983) is the hearing officer who found Petitioner guilty. But Michigan prison hearing officers enjoy absolute judicial immunity. *Shelly v. Johnson*, 849 F.2d 228 (6th Cir. 1988). It is true that judicial immunity does not shield defendants from claims for declaratory or injunctive relief. *Pulliam v. Allen*, 466 U.S. 522, 541-543 (1984); 42 U.S.C. 1983. But whatever form of relief is sought, Petitioner's fair-notice claim would likely be barred in a 1983 action by the doctrine of res judicata because Petitioner appealed his misconduct conviction to the state courts, which rejected it on the merits. See *Exxon Mobil Corp v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005); *Bates v. Twp. of Van Buren*, 459 F.3d 731 (6th Cir. 2006); Appendices C & D. By contrast, "[a]ll the authorities agree that res judicata does not apply to applications for habeas corpus." *Darr v. Buford*, 339 U.S. 200, 214 (1950). See also *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 15 (1992)(O'Connor, J., dissenting)(citing cases).

The district court held that Petitioner's claim is not cognizable in habeas because "habeas corpus is not available to prisoners who are complaining only of the conditions of their confinement or mistreatment during their legal incarceration." Appendix B, p. Given the discussion above, this ruling is at least debatable among reasonable jurists. The Court of Appeals did not disagree. Appendix A. Rather, it merely sidestepped the issue to address the due process claim. Id.

Given this circuit split on an "important federal question" and the fact that both this Court and so many Courts of Appeal have ignored this Court's clear holdings in *Avery* and *Wilwording*, this Court should grant certiorari to take the opportunity to resolve this split, reaffirm its holdings in *Avery* and *Wilwording*, and thus clarify this important area of federal law. See SCR 10(a) & (c).

II. IT IS AT LEAST DEBATABLE AMONG REASONABLE JURISTS WHETHER PETITIONER HAD A DUE PROCESS LIBERTY OR PROPERTY INTEREST.

This Court held in *Sandin v. Conner*, 515 U.S. 472, 484 (1995), that prisoners have a due process "liberty" interest in only three instances: (1) When the right at issue is independently protected by the Constitution, such as the right to be free from involuntary commitment to a mental hospital, id., or the right to be free from the unjustified censorship of incoming and outgoing mail, *Procunier v. Martinez*, 416 U.S. 396, 417-419 (1974), (2) when the

challenged action "will inevitably affect the duration of his sentence," *Sandin*, at 487, or (3) when the action imposes "an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, at 484.

The district court held that Petitioner's misconduct conviction did not implicate a due process liberty interest because he did not lose good time credits and only suffered 20 days detention and 20 days loss of privileges. Appendix B, pp.5-6. And the Court of Appeals held that reasonable jurists could not debate that ruling. Appendix A, p.2. But Petitioner actually suffered far more than that, and other courts have held that deprivations virtually identical to those suffered by Petitioner stated a due process claim. Thus, by definition, reasonable jurists could debate whether the deprivations suffered by Petitioner gave rise to a due process liberty interest. This is true under all three of the circumstances identified in *Sandin* as giving rise to such a due process liberty interest, individually and combined.

First, as the prison hearing officer explicitly found, the "dangerous contraband" at issue was a piece of art that Petitioner intended solely for submission to an outside art show. Appendix F, p.5. It was, therefore, similar to outgoing mail, in which this Court has held prisoners have a First Amendment right to due process before prison officials may censor it or impose punishment for it. *Procunier*, 416 U.S. 417-19, overruled on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989)(not discussing the due process issue but holding that incoming prisoner mail is subject to stricter censorship than outgoing mail).

Second, it is at least debatable among reasonable jurists whether the misconduct conviction "inevitably affect[ed] the duration of his sentence," *Sandin*, 515 U.S. at 487, because (1) the Michigan Parole Board is required to account for Class I misconduct convictions and security level increases in calculating a prisoner's parole guidelines score, Mich. Dept. of Corr. Policy Directive 06.05.100A, page 4 (http:// www.michigan.gov/corrections (follow the "Publications and Information" link, then follow the "Policy Directives" link), which "shall govern the exercise of the parole board's discretion," Mich. Comp. Laws 791.233e, and (2) the parole board specifically cited Petitioner's misconduct conviction and the resulting security-level increases in its February 12, 2015 denial of parole consideration for a period of five years. See Appendix N. Compare *Wilkinson v. Austin*, 545 U.S. 209, 233 (2005)(holding that temporary parole ineligibility was one factor in finding that placement in a supermax prison implicated a liberty interest); *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997)(holding that sex offender classification which removed parole eligibility implicated a liberty interest).

Third, it is at least debatable whether the deprivations Petitioner suffered as a result of the misconduct conviction imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. This Court in *Sandin* held that 30 days detention, without more, did not meet this standard. But, as shown in Issue I, above, Petitioner suffered much more than that. Further, *Sandin* "note[d] also that the State expunged Conner's disciplinary record with respect to the 'high misconduct' charge nine months

after Conner served [the 30 days] in segregation." *Sandin*, at 485-86. Thus, Conner's misconduct conviction did not affect his subsequent administrative classification or his parole prospects, unlike the misconduct conviction at issue here. Appendix M.

Indeed, the deprivations Petitioner suffered are virtually identical to those suffered by another Michigan prisoner, which another district court held "permit a plausible inference of an atypical and significant hardship." *Dorn v. M.D.O.C.*, No 1:15-cv-359; 2017 WL 2436997; 2017 U.S. Dist. LEXIS 86417, at *17 (W.D. Mich. June 6, 2017). There, the court explained:

> *Dorn argues that his 'punishment included an indefinite period of administrative segregation that ultimately lasted nearly one year[.]' Dorn also alleges that he was confined to his cell for 23 or 24 hours per day, was restrained in handcuffs, leg shackles, and/or belly chains, and was escorted by at least two officers any time he was out of his cell. Upon release from administrative segregation, Dorn was placed in Level V at the Baraga Correctional Facility in the Upper Peninsula [of Michigan] for approximately 10 months. Afterward, he was transferred to the Level IV area at the Alger Correctional Facility, which was also located in the Upper Peninsula. . . . The conditions for Levels IV and V were similar to the conditions of administrative segregation. [*Dorn*, at *14-16 (citations to the record omitted)].

The *Dorn* court focused on the fact that the duration of the confinement was not predetermined, i.e., "indefinite" (rather than on its ultimate duration) and on its effect on the prisoner's parole prospects. Id., at *14 (citing *Hardin-Bey v. Rutter*, 524 F.3d 789, 794 (6th Cir. 2008)(finding a liberty interest in indefinite confinement in administrative segregation in Michigan) and *Wilkinson*, 545 U.S. at 224 (finding a liberty interest in segregated confinement

that was similar to "most solitary confinement facilities" but, in addition, was "indefinite" in duration and temporarily disqualified inmates from parole eligibility)).

After citing *Wilkinson*, the *Dorn* court said, "Similarly, because Dorn alleges that he was placed indefinitely in administrative segregation and his parole eligibility was affected, he is arguably entitled to due process protections."*Dorn*, at *17. See also *Lebron v. Conroy*, No. 4:11-cv-0784; 2011 WL 3704067; 2011 U.S. Dist. LEXIS 94014, at *10 (E.D. Ohio Aug. 23, 2011)("Because Plaintiff alleges that he was placed indefinitely in administrative segregation, he is arguably entitled to due process protections.").

Petitioner Kinney, just like his fellow Michigan prisoner Dorn, alleges that he was placed indefinitely in administrative segregation, that he was then placed indefinitely at Level V at the same prison as Dorn, Baraga Correctional Facility, and then at Level IV at Chippewa Correctional Facility, both in Michigan's Upper Peninsula, under exactly the same conditions as Dorn, and that he was then denied parole due to the misconduct conviction and the higher security level placements. Appendix M. Petitioner also alleges that the conditions he suffered were subjectively atypical and significant. Id. See *Sandin*, 515 U.S. at n.9 ("a prisoner's subjective expectation . . . provide[s] some evidence that the conditions he suffered were expected").

Given the holdings in *Dorn* and *Lebron*, **by definition** the district court's ruling in this case that Petitioner had no liberty interest is debatable among reasonable jurists.

Accordingly, a COA should issue on this claim.

The Court of Appeals's decision to the contrary consists of one, conclusory sentence: "However, here, Kinney's placement in segregation was not indefinite and he continues to be eligible for parole consideration." Appendix A, p.2. This is clearly erroneous. It is true that Petitioner's initial confinement to **punitive** segregation was "not indefinite" because it was for a pre-defined period, i.e., 30 days. Appendix H. But it is simply not true that Petitioner's subsequent confinement to **administrative** segregation was for a definite period because that confinement was not of pre-defined duration but was instead begun without pre-defined limits, reviewed on a monthly basis, and continued at the whim of prison officials, exactly like the "supermax" confinement in *Wilkinson*, which is what this Court meant by "indefinite" in that case. See Mich. Dept. of Corr. Policy Directive 04.05.120 (http:// www.michigan.gov/corrections (follow the "Publications and Information" link, then follow the "Policy Directives" link) and Appendices F, p.5 and M.

Petitioner's confinement in **administrative** segregation did not end until prison officials ultimately determined that Petitioner was not a threat to the security of the facility, which did not occur in this case until after the hearing officer at the misconduct rehearing determined that Petitioner had no nefarious intent with respect to his painting and only intended it for submission to the outside art show. Appendices F, p.5 and M. The fact that this occurred after a period that is now (after the fact) defined does not mean that the placement was for a

"definite" period as this Court meant in *Wilkinson*. It was for an "indefinite" period because its duration was not predefined and could be continued at the whim of prison officials. That is what this Court meant by "indefinite" in *Wilkinson* and what the Sixth Circuit meant in *Harden-Bey* and what the district courts meant in *Dorn* and *Lebron*. The same is true of Petitioner's subsequent placement in security levels V and IV, just as in *Dorn*. Appendix M.

The Court of Appeals also clearly erred in holding that Petitioner's denial of parole for a five-year period, based on the misconduct conviction and the resulting security-level increases, was irrelevant because Petitioner "continues to be eligible for parole consideration." Appendix A, p.2. In *Wilkinson*, this Court found a due process liberty interest in supermax placement in part because that placement resulted in **temporary** parole ineligibility **while the supermax placement lasted.** The supermax placement did not forever disqualify prisoners for parole. It only disqualified them for the duration of their supermax placement. This case is materially indistinguishable. Although Petitioner is now eligible for parole, he was effectively disqualified from parole for a period of time due to his misconduct conviction and higher security-level placement. At the very least, whether Petitioner's situation is distinguishable from the situation in *Wilkinson* is debatable among reasonable jurists. Therefore, a COA should issue on this claim.

It is also debatable among reasonable jurists whether Petitioner had a due process property (as opposed to liberty) interest in his painting, requiring pre-deprivation process (notice and a hearing) before its confiscation. This Court's decision in Sandin addressed only deprivations of liberty and therefore arguably does not apply to deprivations of property, as several circuits have held. See *Pickelhaupt v. Jackson*, 364 F. App'x 221, 225-26 (6th Cir. 2010)(noting a circuit split on the issue).

It is true that the Due Process Clause is not violated by the intentional, **unauthorized** deprivation of property without pre-deprivation process, as long as the state provides an adequate post-deprivation remedy; however, the intentional, **authorized** deprivation of property without pre-deprivation process does violate due process. See *Hudson v. Palmer*, 468 U.S. 517, 532 (1984); *Branham v. Spurgis*, 720 F.Supp. 605, 607-608 (W.D. Mich. 1989).

Petitioner's painting was confiscated from him intentionally and ostensibly pursuant to the prison's discipline policy, i.e., in a manner "authorized" by prison rules, as those rules were authoritatively construed by prison officials. Petitioner received a hearing (the misconduct hearing), but he alleges that he did not receive fair notice that the rule prohibited the possession of such a painting. Thus, Petitioner alleges the intentional, authorized deprivation of property without sufficient process, which is a cognizable federal due process property claim.

At the very least, it is at least debatable among reasonable jurists whether

Petitioner had a due process property interest that required fair notice. Accordingly, a COA should issue on this claim (which the lower courts failed to address despite Petitioner raising it).

In sum, reasonable jurists could disagree with the district court's ruling that Petitioner had no interest protected by the Due Process Clause in the outcome of the prison misconduct proceeding in this case. At least one federal district court has held that deprivations which were virtually identical to the deprivations Petitioner suffered stated a Fourteenth Amendment Due Process claim. Dorn, supra. And Petitioner suffered the intentional, authorized deprivation of property without fair notice. The Court of Appeals clearly erred in denying a COA, and there is a circuit split on the question whether Sandin applies to property interests. Therefore, certiorari should be granted on this claim. SCR 10(a) & (c).

III. IT IS AT LEAST DEBATABLE AMONG REASONABLE JURISTS WHETHER PETITIONER'S DUE PROCESS RIGHT TO FAIR NOTICE WAS VIOLATED.

There is a circuit split as to the proper standard that applies to prison regulations challenged for lack of fair notice (i.e., "vagueness") under the Due Process Clause. See *Anderson v. Crosby*, No. 5:04cv164/SPM/MD, 2005 U.S. Dist LEXIS 34531*, at *15 (N.D. Fla. Mar. 25, 2005)(citing cases). Some courts employ the same standard applicable to criminal statutes, while others employ a "less rigorous" standard. Id. (citing cases). The Michigan Court of Appeals employed a standard that is so rigorous as to be virtually impossible to satisfy, as it literally

requires prisoners to "know and **understand all** of the policy directives to which they are subject." Appendix C, p.3 (emphasis added).

The existence of a circuit split on this "important federal question" that "has not been, but should be, settled by this Court," together with the arguably meritorious nature of Petitioner's particular vagueness claim, as shown below, call for the issuance of the writ of certiorari and a certificate of appealability. SCR 10(a) & (c); *Buck v. Davis*, 137 S.Ct. 759, 773 (2017).

"Living under a rule of law entails various suppositions, one of which is that **all persons** are entitled to be informed as to what the State commands and forbids." *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)(emphasis added; quotation marks omitted). "A fundamental principle of our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." Id.

Therefore, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

As this Court explained in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972)(footnotes and quotation marks omitted),

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.

"When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *FCC*, supra.

The ultimate question is whether the law or regulation is written with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)(citations omitted). Any judicial construction previously given to the provision must also be considered. Id., at 355.

Further, "[t]his Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). This is because, if a statute requires a showing of criminal intent and the person is found to have acted with criminal intent, then it is

difficult for the person to claim that he was attempting to steer clear of violating the law or that he would have steered clear of violating it but for its lack of clarity. Id., at n.13 (explaining that a statute's scienter requirement "relieves the state of the objection that it punishes without warning an offense of which the accused was unaware.")(quotation marks omitted). See also *Gonzalez v. Carhart*, 550 U.S. 124, 149 (2007)("The Court has made clear that scienter requirements alleviate vagueness concerns.").

But even when the person acted with criminal intent, a statutory provision may still be so lacking in specificity as to fail to provide fair notice. For example, this Court held in one case that a statute prohibiting the transportation of stolen "vehicles" was unconstitutionally vague as applied to airplanes, even though the defendant knew the airplane was stolen. See, e.g., *McBoyle v. United States*, 283 U.S. 25, 27 (1931)("To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft, simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used.").

The fair notice requirement applies -- at least debatably -- not only to penal statutes but also to all laws and administrative regulations that affect the life, liberty, or property of all persons and entities. See *Kolendar*, supra (applying it to a penal statute); *FCC*, supra (applying it to the FCC's regulations governing television stations); *Lakewood v. Plain Dealer*

Publication Co., 486 U.S. 750 (1988)(applying it to an ordinance giving a mayor unbridled discretion to issue permits for placement of news racks on public property); *Chatin v. Coombe,* 186 F.3d 82, 87 (2d Cir. 1999)(applying it to prison regulations).

"The degree of vagueness that the Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment." *Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982).

> Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action. . . . The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vagueness . . . . Finally, perhaps the most important factor affecting the clarity that the Court demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply. [*Hoffman Estates*, 455 U.S. at 498-499 (footnotes omitted)]

As stated above, the circuits are split on the standard applicable to prison disciplinary regulations. See *Anderson v. Crosby*, No. 5:04cv164/SPM/MD, 2005 U.S. Dist LEXIS 34531*, at *15 (N.D. Fla. Mar. 25, 2005)(citing cases).

In a case similar to this one, the Second Circuit applied the same person-of-ordinary-intelligence test applicable to penal statutes. *Chatin v. Coombe*, 186 F.3d 82,

87 (2d Cir. 1999). Chatin was punished for praying on the prison yard with 15 days "keeplock," 15 days loss of privileges, and a $5.00 fine. Id. The Second Circuit held that, because these sanctions were "more akin to criminal rather than civil penalties and also implicate[d] the free exercise of an individual's religion," the court would "scrutinize the rule closely." *Chatin*, 186 F.3d at 87. The court reached this conclusion "mindful that while inmates do not shed all constitutional rights at the prison gates, . . . [l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights.'" Id. (quoting *Sandin v. Conner*, 515 U.S. 472, 485 (1995)(internal quotation marks omitted)).

Indeed, although prisoners are subject to greater restrictions on their constitutional rights than ordinary citizens, i.e., restrictions that are rationally related to legitimate penological interests, *Turner v. Safley*, 482 U.S. 78, 89 (1987), there is no conceivable legitimate penological interest in prohibiting prisoners from doing something that a person of ordinary intelligence has no reasonable opportunity to know is prohibited. Punishing a prisoner for doing what he could not reasonably know is prohibited does not rationally advance any legitimate penological interest. To the contrary, it does nothing but foster resentment and disrespect for authority and thereby undermine the penological goals of safety, security, order, and rehabilitation.

The sanctions in *Chatin* were similar to but much less severe than the sanctions Petitioner Kinney suffered in this case, and Kinney's sanctions also implicated his First Amendment freedoms because they were imposed for his possession of a painting that the prison

hearing officer explicitly found was intended solely as art for a prison-approved art show. Appendix F, p.5. Petitioner was sentenced to 30 days detention plus 30 days loss of privileges and suffered placement in administrative segregation for an indefinite period (which ended up lasting 5 months), transfer from security Level II (with all day out-of-cell activity) to Level V (with only one hour out-of-cell activity) for an indefinite period (which ended up lasting another 10 months), then transfer to security Level IV (with only 2 hours per day out-of-cell activity) for an indefinite period (which ended up lasting another 5 months), before finally being returned to Level II twenty months after receiving the misconduct, loss of a coveted, high-paying prison job as a dog trainer (approximately $2,000.00 in lost wages over the 20 months he was removed from eligibility from that job by virtue of his transfer to higher security levels), and severe psychological stress, and mental and emotional anguish and suffering. Appendices F, p.5; H, and M. He was also denied release from prison on parole for at least a period of five years. Appendix N.

Chatin is also similar to this case on the merits of whether the disciplinary rule provided fair notice. Chatin was punished for engaging in silent, individual, demonstrative prayer on the prison yard in violation of disciplinary rule 105.11, which said simply, "'Religious services, speeches or other addresses by inmates other than those approved by the Superintendent or designee are prohibited." *Chatin*, 186 F.3d at 84. Prison officials argued that Chatin had fair notice that this rule prohibited his conduct because a separate DOCS Directive 4202 and a

separate memorandum specifically prohibited individual, "'demonstrative prayer . . . in any area of the facility other than designated religious areas or individual cells.'" 186 F.3d at 84-85. The Second Circuit disagreed because (1) Rule 105.11, under which Chatin was actually charged, did not clearly prohibit his conduct, (2) there was evidence that Rule 105.11 was not consistently enforced to prohibit such conduct, and (3) "neither Directive 4202 nor the Memorandum interpreting it refers to the Rule, and neither was issued contemporaneously with it. Neither purports to define the terms contained in the Rule and . . . both documents prohibit conduct not explicitly proscribed by the Rule. DOCS argues, in effect, that Chatin should have performed the lawyer-like task of statutory interpretation by reconciling the text of three separate documents. Such a holding, on these facts, would be unfair." 186 F.3d at 87-89. See also *Farid v. Ellen*, 593 F.3d 233, 241 (2d Cir. 2010)("prisoners are not required to integrate multiple directives in order to divine the rules governing their conduct.").

The instant case is strikingly similar. Petitioner made a painting for submission to a prison-approved art show that (generally, although not in detail) depicted part of the prison, which it is undisputed other prisoners had been allowed to do for nearly two decades without any punishment. Appendix F, p.5, Appendix L, Appendix M. Petitioner was charged under a disciplinary rule that, in relevant part, prohibited only "escape material," which it defined only as "rope, and grappling hook." Appendix I. Prison officials claimed that a separate prison policy, the one governing prisoner mail, defined escape material to include detailed drawings of prisons. See

Appendices F & K. But the mail policy does not refer to the discipline policy or otherwise purport to define its terms. Indeed, at least one Michigan prison hearing officer had previously held that the same mail policy did not define the contraband rules in the discipline policy. See *Iscaro v. Dept of Corrections*, Mich. Ct. App. No. 304976, 2013 WL 2319458, 2013 Mich. App. LEXIS 928*, at *1-2 (May 28, 2013)(noting that "the hearing officer concluded that the [prisoner's] possession of Uniform Commercial Code filing statements failed to qualify as contraband" even though such documents are expressly prohibited by the mail policy, Appendix K, para. MM.11).

The Michigan Court of Appeals rejected the Second Circuit's interpretation of the Due Process Clause: "While plaintiff posits that a 'person of ordinary intelligence' should not be required to read multiple policy directives to determine what conduct is prohibited, it is not unreasonable to require prisoners -- who are inherently subject to strict regulations -- to know and **understand all** of the policy directives to which they are subject." Appendix C, p.3 (emphasis added).

Besides contributing to the split of authority on this issue, the Michigan Court of Appeals' requirement that prisoners "understand all" of the policy directives to which they are subject effectively prevents any prisoner from ever succeeding on a claim that he lacked fair notice, which is -- at least debatably -- "contrary to" or involves an "unreasonable application of" this Court's clearly established precedent. 28 U.S.C. 2254(d)(1). See *FCC v. Fox Television*

Stations, Inc., 567 U.S. 239, 253 (2012)("**All persons** are entitled to be informed as to what the State commands and forbids.")(emphasis added; quotation marks omitted); *Procunier v. Martinez*, 416 U.S. 396, 405-06 (1974)("When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.").

The Michigan Court of Appeals' ruling is "contrary to" or involves an "unreasonable application of" this Court's clearly established precedent for another reason. Petitioner argued that the prison rule's lack of mens rea requirement, together with Petitioner's own lack of "nefarious" intent, as found by the prison hearing officer (Appendix F, p.5), supports his claim that he lacked fair notice. The Michigan Court of Appeals rejected this argument by holding that "intent is neither a part of a vagueness analysis nor a part of the rule under which plaintiff was charged." Appendix C, p.4. But "[t]his Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). See also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)("Vague laws trap the innocent by not providing fair warning.").

Further, the Michigan Court of Appeals held that Petitioner had fair notice by applying the "tools of statutory construction," that is, the rules that lawyers and judges use to interpret statutory language. Appendix A, pp. 2-3. It is debatable among reasonable jurists

whether the tools of statutory construction, other than perhaps the plain-language doctrine and common rules of English grammar, should be used when assessing whether a person of ordinary intelligence would have a reasonable opportunity to know what conduct is prohibited because the Second Circuit explicitly held that prisoners are not required to perform the "lawyer-like task of statutory interpretation." *Chatin*, 186 F.3d at 89.

Even if using the tools of statutory construction in this context is beyond reasonable debate, it is still reasonably debatable whether those tools would give a person of ordinary intelligence fair notice under the facts of this case. This is because reasonable lawyers and jurists (let alone persons of ordinary intelligence) could reach differing interpretations of the disciplinary rule at issue in this case on the facts of this case, as Petitioner argued in the lower courts, and as evidenced by the disagreement in this case between the prison hearing officer and the Michigan Department of Corrections Hearings Administrator as to the proper interpretation of this rule under the facts of this case. See Appendix O, pp.23-30, Appendix F, Appendix G.

In sum, a certificate of appealability should issue on this claim because it is, at the very least, debatable among reasonable jurists. And certiorari should be granted because there is a split of authority on the proper fair-notice standard applicable to prison rules. SCR 10(a) & (c).

CONCLUSION

Petitioner Patrick Neil Kinney asks this Honorable Court to (1) grant the writ of certiorari, vacate the Court of Appeals' decision, and remand for issuance of a certificate of appealability, or (2) grant certiorari and decide the issues presented on the merits.

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