18-9486

Number: _____

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

CLIFFORD C. ABSHIRE, III,
Petitioner

V.

JAMES LEBLANC, SECRETARY:
LOUISIANA DEPARTMENT OF PUBLIC SAFETY & CORRECTIONS
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL, FIRST CIRCUIT, STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

CLIFFORD C. ABSHIRE, III, NO. 439164
GENERAL DELIVERY
RAYMOND LABORDE CORRECTIONAL CENTER
1630 PRISON ROAD
COTTONPORT, LOUISIANA 71327-4055

QUESTIONS PRESENTED

(1) Are prison disciplinary hearings considered "communicative acts," entitled to the protections of the First Amendment of the United States Constitution?

(2) Is this Court's holding in Sandin v Conner applicable in matters where the appellant has raised a "property interest, and not a "liberty interest?"

(3) Does this Court's holding in Sandin v Conner declare a statutory law, as it pertains to the handling of judicial appeal disciplinary hearings, unconstitutional?

(4) Did the drafters of the United States Constitution and/or this Court place a monetary amount on the due process clause protections of the Fourteenth Amendment of the United States Constitution?

(5) Does the "protected property" clause of the Fourteenth Amendment of the United States Constitution apply to the money in a inmate's prison account?

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover sheet.

[ ] All parties **do not** appear in the caption of the case on the cover sheet. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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OTHER

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari will be issued to review the judgment of a **LOUISIANA STATE COURT** below.

The decision of the Louisiana Supreme Court appears as Appendix A, to this petition and is unpublished.

The decision of the First Circuit Court of Appeal appears as Appendix B, to this petition and is unpublished.

The decision of the State Trial Court as Appendix C.

JURISDICTION

This case arises out of **LOUISIANA STATE COURT**:

The date on which the Louisiana Supreme Court affirmed the decision of the First Circuit Court of Appeal was January 8, 2019, a copy of that decision appears as Appendix A.

A timely application for rehearing was filed into the First Circuit Court of Appeal was denied on October 7, 2018.

An application for rehearing was not filed into the Louisiana Supreme Court due to the provisions of La.S.Ct. Rule IX § 6, which states that when the Court "has...denied an application for writ of certiorari or other supervisory writ" and application for rehearing "will not be considered." See, La.S.Ct. Rule IX § 6.

An extension of time to file the instant petition for writ of certiorari was granted to and including June 7, 2019 on March 26, 3019, in Application 18A967.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment I to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof, or abiding the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

This case involves Amendment XIV to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No state shall make or enforce laws which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State 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 law.
>
> Section 5. The Congress shall have the power to enforce by, appropriate legislation, the provisions of this article.

The Amendments are enforced by 42 U.S.C. § 1983:

> Every person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person with the jurisdiction thereof to the deprivation of rights, privileges, or immunities by the Constitution and laws, shall be liable to the party injured in an action of law, suit or equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The Petitioner, Clifford C. Abshire, III, is an inmate in the custody of the Louisiana Department of Public Safety and Corrections, ["Department/Defendant"]. On November 25, 2015, the Petitioner and another offender, Brandon Nickens, ["Offender Nickens"] were in a physical altercation. According to the reporting officer, Corrections Officer Kathleen Theriot, while she and another officer were attempting to conduct a major count, the Petitioner got up from his assigned bed as and began to strike Offender Nickens in the fact without provocation.[1]

Both Offender Nickens and the Petitioner was subsequently restrained, and written-up for violating prison Rule 10 (Simple Fighting).

Offender Nickens was taken directly to Pre-Hearing Segregation ("Ph.D."), the Petitioner, before being taken to Ph.D. was taken to medical due to the facial injuries he sustained as a result of the altercation. The Petitioner was treated for a contusion above his right eye and bruising to his ribs.[2]

On December 1, 2015, five (5) days after the incident, both the Petitioner and Offender Nickens were taken before the Disciplinary Board. Based upon the Petitioner's knowledge and belief, Offender Nickens was released without the imposition of a sanction; having been found not guilty and was granted a self-defense declaration.

The Petitioner, who was brought before the disciplinary board after Offender Nickens, was found guilty as charged with violating prison Rule 10 (Simple Fighting), and was ordered to pay restitution in the amount of $5.00.[3] The Petitioner was sanctioned with a "custody change to

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[1] Although the contents of the report are not currently before the Court, the Petitioner would like to document that he maintains that this version of the events are inaccurate.

[2] According to the medical report that should have been included in the Appellate packet provided by the Department, Offender Nickens did not sustain any injuries.

[3] For reasons unknown, the Department withdrew $8.00 from the Petitioner's inmate account.

maximum custody,"[4] and placement in isolation for ten (10) days.[5] The Petitioner timely appealed the decision of the Disciplinary Board. In an appeal numbered: WNC-2015-430, the administration upheld the decision of the Board. The Petitioner then appealed the decision of the administration. Both the administration and Department both held that the "report was clear, concise, and provided convincing evidence of the violation charged."

After spending nearly sixty (60) days, in the cellblock the Petitioner was released back into general population and believing that his rights of due process were violated; he filed a Petition for Judicial Review into the Nineteenth (19th) Judicial District Court, in East Baton Rouge Parish. The petition was referred to a Commissioner for screening, pursuant to Louisiana Revised Statutes 15:1178 and 1188. The Commissioner issued a screening report wherein it was recommended that the Petitioner's suit be dismissed for failure to state a cause of action under Louisiana Revised Statute 15:1177A(9).

The District Court concluded that under this Court's findings in *Sandin v* Conner,[6] there were no substantial rights involved in the matter, and the Court adopted the Commissioner's Report and Recommendation, and ordered that the appeal be dismissed at the Petitioner's cost.[7]

A timely appeal was taken in the First Circuit Court of Appeal, State of Louisiana, wherein the Petitioner expounded on the argument that he presented to the District Court, which is that an order of restitution satisfies the requirements of *Sandin* thereby satisfying subject matter jurisdiction. The Petitioner, at no time, attested to the sanction that was imposed. In furtherance of his argument, the Petitioner cited *Longmire v Guste*,[8] and *Anderson v LeBlanc*,[9]

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[4] This sentence was imposed.

[5] This sentence was never imposed.

[6] 515 U.S. 472, 484-86, 115 S.Ct. 2293, 2300-01, 132 L.Ed.2d 418 (1995).

[7] A copy of the Judgment of the District Court is attached hereto as Appendix C.

[8] 921 F.2d 620 (5th Cir. 1991).

both of which held, "Money in an inmate's account is protected property" under the 14th Amendment to the United States, "requiring due process of law."

On September 15, 2017, the Court issued is opinion. Circuit Court Judge Crain issued the following:

> "It is well settled that a change of custody status, such as the one here, is not atypical or significant hardship in relation to the ordinary incidents of prison life, and does not prejudice an inmate's substantial rights...[The Petitioner], however, argues that the order of restitution affects a substantial right...[However,] this Court has repeatedly recognized that significantly smaller awards of restitution [such as the case with the Petitioner] do not impose an unusual and significant hardship on an inmate in relation to the ordinary incidents of prison life and, therefore, do not prejudice his substantial right." Consistent with this jurisprudence, we find that the $5.00 award of restitution does not affect a substantial right of [the Petitioner]; therefore, the district [court] did not err in dismissing his claim for failure to state a cause of action...The district court's judgment is affirmed." (Citations omitted, brackets added by the Petitioner.)[10]

In theory, the First Circuit Court of Appeal has determined that constitutional protections, such as the 14th Amendment to the United States, and the protections against the "deprivations of life, liberty, and property without due process of law" are triggered not by the property in jeopardy, but the amount of the property in jeopardy.

A timely writ application was filed into the Louisiana Supreme Court. The Petitioner maintained that the District Court and Court of Appeal erred as a matter of law and jurisprudence when holding that the award of restitution does not affect a substantial right. On January 8, 2019, in a unanimous decision, the Louisiana Supreme Court denied the Petitioner's request for the issuance of a writ of certiorari.[11]

An extension was granted by this Court, and this timely writ application follows and the reasons therein set out, the Petitioner prays the Court will grant his request.

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[9] 2011 CA 1800 (La. App, 1st Cir. 2012) – Unpublished.

[10] A copy of the Opinion of the Court of Appeal is attached hereto as Appendix B.

[11] A copy of the Decision of the Louisiana is attached hereto as Appendix A.

REASONS FOR GRANTING THE WRIT

A. Conflicts with Decisions of Other Courts

I. Inmate disciplinary hearings are communicative acts entitled to First Amendment protections.

The holding of the courts below that decisions made by administrative law examiner with regard to inmate disciplinary hearings were not communicative acts entitled to First Amendment protections is directly contrary to the holdings of at least one federal circuit. See, *Perry v McGinnis*, 209 F.3d 597 (6th Cir. 2000), which held that since "decisions come in the form of guilty/not guilty determinations...a disciplinary hearing decision, like the assignment of a letter grade, is a communicative act entitled to First Amendment protection." *Parate v Isibor*, 868 F.2d 821 (6th Cir. 1989) (holding that "the assignment of a letter grade is symbolic communication intended to send a specific message to the student.). In addition, this Court has repeatedly held that communicative actions are protected by the First Amendment. *Cf.*, *Tinker v Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-06, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969); *Brown v Louisiana*, 383 U.S. 131, 141-42, 15 L.Ed.2d 637, 86 S.Ct. 719 (1966)/

II. Sandin v Conner, not applicable in matters where the appellant does not allege any liberty violation.

The holding of the courts below that the Department of Corrections impairment of property rights, even absent the permanent physical deprivation of property, is not enough to trigger the "Due Process Clause" of the United States Constitution, and fails to satisfy the requirements of this Court's holdings in *Sandin v Conner*, 512 U.S. 472, 132 L.Ed.2d 418, 115 S.Ct. 2293 (1995), is directly contrary to the holdings of four federal circuits. See, *Burns v Pennsylvania Dept. of Corr.*, 544 F.3d 279 (6th Cir. 2008), granted in part, denied in part, 2009 U.S. Dist. LEXIS 45357 (E.D. Pa. 5/26/09); *Reynolds v Wagner*, 128 F.3d 166, 179 (3d Cir. 1997); *Higgins v Beyer*, 293 F.3d 683, 693 (3d Cir. 2002); *Longmire v Guste*, 921 F.2d 620 (5th Cir. 1991). In

addition, the First Circuit Court of Appeal, State of Louisiana held that, "[m]oney in an inmate's prison account is protected property of [an] inmate, thus requiring due process. *Anderson v Leblanc*, 11-1800, 2012 La. App. Unpub. LEXIS 347, 2012 WL 1550529 (La. App. 1st Cir. 5/2/12), quoting *Longmire v Guste*, 921 F.2d 620 (5th Cir. 1991).

III. Enforcement of Sandin v Conner defies Legislative intent.

The holdings of this Court in *Sandin v Conner*, 512 U.S. 472, 132 L.Ed.2d 418, 115 S.Ct. 2293 (1995), is directly contrary to applicable law passed by the Louisiana Legislative, thereby undermining the intentions of Louisiana's law making party. See, Louisiana Revised Statute 15:1177, et seq. In addition, the question of application of *Conner*, in matters where an order of restitution was made, was addressed by the United States Sixth Circuit in *Burns v Pennsylvania Dept. of Corr.*, 544 F.3d 279 (6th Cir. 2008), granted in part, denied in part, 2009 U.S. Dist. LEXIS 45357 (E.D. Pa. 5/26/09), the Petitioner "does not challenge the DOC's decision to place him in disciplinary custody" so therefore he "does not allege any liberty violation." Applying this Court's holding in *Sandin v Conner*, supra, the U.S. Sixth Circuit, held that "Sandin...[does] not control this case,...[as it pertains to] deprive[ation] of constitutionally protected rights."

B. Importance of the Question Presented

This cases presents several fundamental questions of this Court's interpretation in *Sandin v Conner*, 512 U.S. 472, 132 L.Ed.2d 418, 115 S.Ct. 2293 (1995). The questions presented are of great public importance because it affects the operations of the prison disciplinary system in all 50 states, the District of Columbia, and hundreds of city, parish, and county jails. In view of the large amount of litigation over prison disciplinary proceedings, guidance on these questions is also of great to prisoners, because it affects their ability to receive fair and impartial decisions that may result months or years being added to their incarceration or harsh punitive confinement.

The issue's importance is enhanced by the fact that the Louisiana state courts in this case are seriously misinterpreting *Sandin*. This Court held in *Sandin* that "neither the prison regulation nor the due process clause itself...would entitle the inmate to procedural protections under the due process clause, with respect to [a] disciplinary hearing..." The question of application of this Court's decision in *Sandin*, when a liberty interest is not involved, was reiterated in two ways. The Third (3d) Circuit, in *Burns v Pennsylvania Dept. of Corr.*, 544 F.3d 279 (3rd Cir. 2008); ruled that since Burns did not question the punitive portion of his disciplinary action that "*Sandin* and its progeny, do not control this case." Moreover, the *Burns* Court held, that since "the Department of Corrections...is akin to that of a Judgment Creditor...deprivation [of funds in his prison account was] sufficient to trigger the protections of the Due Process Clause." Furthermore, the United States Fifth Circuit, in *Longmire v Guste*, 921 F.2d 620 (5th Cir. 1991), held that not only does "U.S. Const. amend XIV protect against deprivations of life, liberty, and property without due process of law," the Court also held that "[t]here is no doubt that Longmire was deprived of property – funds in his prison account."

Another reason of importance is the mere fact that the United States Sixth Circuits holdings in *Perry v McGinnis*, 209 F.3d 597 (6th Cir. 2000), which held:

> "When a [disciplinary] hearing officer conducts hearings, he is doing so at the behest of the [Louisiana legislature, in Louisiana Administrative Code ["LAC"], § 341, and Louisiana Revised Statute 15:1177 A(9)(e), they are] making decisions that can result in a greater or lesser period of incarceration for an inmate. These are public matters...[because of this] the public...has an interest in the public employee's efforts to remain undeterred by the public employer's policy that seeks to limit constitutionally mandated fairness in inmate disciplinary proceedings." (Brackets and opinions added by the Petitioner, otherwise it is quoted as written.)

Moreover, the Court was tasked with "determ[ining] whether *Perry's* decisions made in disciplinary hearings constitute expression as protected by the First Amendment." The United

States Sixth Circuit Court found that those decisions do rise to the occasion, citing that this Court "has long held that communicative action is protected by the First Amendment." See, *Tinker v Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 505-506, 21 L.Ed.2d 89 S.Ct. 733 (1969); *Brown v Louisiana*, 383 U.S. 131, 141-142, 15 L.Ed.2d 637, 86 S.Ct. 719 (1966); *Parate v Isibor*, 868 F.2d 821 (6th Cir. 1989).

The common sense understanding of "entitle[ment] to procedural protections under the due process clause...with respect to [a] disciplinary hearing," has given the administrative law examiners in the Louisiana Department of Corrections, as well as all the Courts on the state level has lead to an absolute disregard for the Louisiana Legislative intent, when Louisiana Revised Statute 15:1177 was passed into law in 1987, which holds in a pertinent part:

> "(9) The Court may reverse of modify the decision [of an administrative law examiner] only if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are: (a) In violation of constitutional or statutory provisions; (b) In excess of the statutory authority of the agency; (c) Made upon unlawful procedure; (d) Effected by other error of law; (e) Arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; [and/or] (f) Manifestly erroneous in the view of reliable, probative and substantial evidence on the whole record. In the application of the rule, where the [Department] has the opportunity to judge the credibility of the witnesses by firsthand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the [Department's] determination of credibility issues." (Brackets and opinions added by the Petitioner, otherwise it is quoted as written.)

Before the passage the *Sandin* decision was handed down by this Court, the Louisiana Legislature stepped forward and passed legislation that laid out the conditions for which the state courts can reverse of modify the decision of a disciplinary hearing. One problem that has arisen since the *Sandin* decision was handed down is that several disciplinary review boards have adhered to their own policies, which have included the finding of guilt regardless of the evidence that was presented, thereby enforcing a 90% conviction rate, and the imposition of sanctions that

severely limiting the inmate's right to review, etc. In *Perry*, the Court held that "[i]f hearing officers focus in finding 90% of the defendants before them guilty...they cannot be impartial, as is required by *Wolff* [*v McDonnell*, 418 U.S. 539, 41 L.Ed.2d 539, 94 S.Ct. 2963 (1974)]." Furthermore, the Court found that such as system "is sunk...[h]is fate is sealed before his filed is opened [and] [s]uch a system reeks of arbitrary justice, which can only be an injustice." *Perry*, 209 F.3d at 560.

The lower court's reasoning that the review of any disciplinary action is grossly limited by the Court's findings in *Sandin* completely sidesteps legislative intent, and has become a "cloud" over the real issue, which is that guilt and innocence is of no concern because "officer credibility" reigns supreme. For example, in a separate matter, the Petitioner was disciplined for typing a letter to the Veterans Administration concerning his service file. The Petitioner was written up for knowingly and intentionally using a law library computer to type a personal letter, and for using the computer without permission. In the district court judgment, the Court held that the disciplinary appeal was "arbitrary and capricious, in part..." however, was unable to reverse of modify the decision because of this Court's findings in *Sandin v Conner*. See, *Abshire v Louisiana Dept. of Public Safety and Corrections*, 19th Judicial District Court, Docket No. 652,898: *currently on appeal.*

Moreover, the lower court's reasoning that the review of any disciplinary action is grossly limited by the Court's findings in *Sandin*, because of the belief that there is a monetary amount which triggers the United States Constitutional Amendment XIV. The Courts in *Guste*, *Burns*, and *Anderson* all concur on the fact that the Fourteenth Amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV. Moreover, the Court in *Reynolds v Wagner*, 128 F.3d 166, 179 (3d Cir.

1997), made it clear that "[i]nmates have a property interest in funds in their prison accounts," and in *Higgins v Beyer*, 293 F.3d 683, 693 (3d Cir. 2002), the Court stated that "inmates are entitled to due process with respect to any deprivation of money [from their prison accounts]." There is nothing really contrary to the distinctions made in *Sandin* between property rights and the due process clause. The only questions left is whether the *Sandin* rule incorporates the protection of the First Amendment, and how it pertains to 'communicative actions" and whether the Legislative intent of Louisiana Revised Statute 15:1177 supersedes this Court's holdings.

The Louisiana Judicial System has seriously misinterpreted *Sandin* and has transformed this Court's holdings into a blanket policy that forbids review of a disciplinary appeal outside the sanctions so defined within; thereby, shutting down any and all attempts at impartiality and nonbiased decision. The Court should correct that misinterpretation and make it clear that: (a) money in an inmate's account is protected property for the purposes of the Fourteenth Amendment; (b) Inmate disciplinary hearings are in-fact 'communicative actions" for the purposes of the First Amendment; and that (c) There is no established monetary amount for the enforcement of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, certiorari should be granted in this case.

Date: May 20, 2019

Respectfully Submitted,

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