No. 23-5478

9th Circuit # 21-35861

D.C. Oregon # 6:18-cv-02214-YY

IN THE

SUPREME COURT OF THE UNITED STATES

BRADLEY WILLIAM MONICAL – PETITIONER

VS.

JEREMY NOFZIGER, ET. AL. – RESPONDENDT(S)

On Petition for a WRIT OF CERTIORARI to the

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Bradley William Monical

2605 State Street

Salem, Oregon, 97310

LIST OF PARTIES

Employees of the Oregon Department of corrections

Jeremy M. Nofziger;

R. Foss;

Craig Prins;

Cheryl Lenex;

J. Rochester;

Judy Gilmore;

Michael Gower;

John Does, 1-3,

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The opinion of the United States court of appeals at Appendix A to the petition and is reported at, 2023 WL 2584125, Case # 21-35861

The Opinion of the United States District court appears at Appendix B to the petition and is reported at, 2021 WL 4491711, Case # 6:18-cv-02214-yy.

JURISDICTION

The 9th Circuit court of appeals gave its memorandum on, March 14, 2023 (App # A-9th Cir. Memorandum). A timely petition for panel rehearing and rehearing en banc and was denied by the United States Court of Appeals, on June 28th 2023. (App. C - Rehearing Denial Order).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves 14th Amendment Due Process rights of prisoner's subject to "Atypical and Significant" Treatment compared to everyday prison life. 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, § 1. The lower court's rulings are in contention with and present matters raising issues with the U.S Supreme court's rulings in, Sandin V. Conner, 515 U.S. 472 (1995), Wolff v. McDonnell, 418 U.S. 539, 563-71 (1974) and Superintendent v. Hill, 472 U.S. 445, 455 (1985), that go beyond the Supreme courts intention and now have become circuit law where there is wide variation among the States.

The issues of this case touch upon a number of federal and state statutes, including but not limited to, 18 USC 1512(d)(2), 28 U.S.C. § 1291, 28 U.S.C. § 1915(e)(2)(B)(ii)), 29 U.S.C. 794, 29 USC 794(a), 42 U.S.C. § 12101, 42 U.S.C. § 1983,

QUESTIONS PRESENTED

(1) Can the U.S. District Court of Oregon and the 9th Circuit ignore a prisoners prior 3 years in solitary confinement when making its "Atypical and Significant" under, Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L.Ed.2d 418 (1995), when deciding whether a disciplinary hearing required the procedural safeguards under, Wolff v. McDonnell, 418 U.S. 539, 566, 94 S. Ct. 2963, 2979–2980, 41 L.Ed.2d 935 (1974), be followed, with regards to allowing evidence and witnesses at the hearing?

(2) Can prison officials in the United States, now completely do away with the Due Process Requirements in, Wolff v. McDonnell, 418 U.S. 539, and Superintendent v. Hill, 472 U.S. 445, 105 S. Ct. 2768, 86 L.Ed.2d 356 (1985). and put all inmates into solitary confinement, for years, without a hearing?

(3) Does the "Some Evidence" rule, as outlined in, Superintendent, Mass. Corrections Inst. v. Hill, 472 U.S. 445, 455–56, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356 (1985). apply to rule infractions that occurred outside of the prisons officials Statutory Authority to impose punishment on?

(4) Does an Agency of the Government, when there is "Atypical and Significant", liberty interest involved, created by its policies, have to follow the State laws it operates under and abide by its own administrative rules when providing due process in a disciplinary hearing?

(5) Does a "corrected" prison disciplinary record, a reversal after a wrong charge and denial of due process right in a disciplinary hearing, fix the loss of liberty after the solitary confinement was already completed before the reversal?

STATEMENT OF THE CASE

The 9th circuit and its sister circuits, have largely expanded the Supreme court's rulings in, Sandin V. Conner, where it decided that a prisoner's 14th Amendment Due Process rights, outlined in, Wolff V. McDonnel, were only implicated when a prisoner's solitary confinement was "Atypical and Significant" to everyday prison life. In Sandin, the prisoner's solitary confinement was only 30 days. Since this time the circuits have extended the definition of what is "Atypical and Significant" to everyday prison life, see:

> Al-Amin v. Donald, 165 F. App'x 733, 739 (11th Cir. 2006) *(finding thirty months' confinement to administrative segregation was not an atypical and significant hardship that gave rise to a liberty interest...);* Lekas v. Briley, 405 F.3d 602, 611 (7th Cir. 2005) *(finding the ninety-day confinement to disciplinary segregation was not an atypical and significant hardship);* Morefield v. Smith, 404 F. App'x 443, 446 (11th Cir. 2010) *(finding a four-year confinement in administrative segregation, although lengthy, did not create a*

liberty interest...). see also Hudson v. Belleque, No. 07-cv-1058-HA, 2009 WL 2015396, at *3 (D. Or. July 6, 2009) *(holding denial of privileges, working, attending religious and school programming for eighty-four days while in DSU was not atypical or significant hardship); accord* Fort v. Mauney, Civ. No. 10-1407-AA, 2011 WL 2009351, at *4 (D. Or. May 23, 2011), *aff'd 486 F. App'x 655 (9th Cir. 2012) (holding 180-day DSU placement did not implicate due process liberty concerns).*

In this case the 9th circuit now goes even further, it has affirmed that agencies of the government can go outside their statutory and legal authority, to hold a disciplinary hearing, and punish for rule violations, contrary to both the State of Oregon's and its Administrative law that forbid it from even holding a disciplinary hearing. The 9th circuit has ruled that agencies of the government do not even have to follow their own laws.

The 9th circuit court has ruled that "some evidence", even that which could not be brought into a hearing by State law, and the denial of all witnesses and evidence to fight a leveled charge, was sufficient to afford due process, contrary to Wolff v. McDonnell. The district court and 9th circuit have now determined that no procedural due process rights are even required if a prisoner's proposed solitary confinement is less than some undefined limit.

Under the current scheme, stretching this court's ruling in, Sandin v. Conner, to the limits, a prison official can now place a prisoner into solitary confinement for 6

months to 26 months without even giving them a hearing, can place an individual into solitary confinement for an unlimited number of separate consecutive terms to solitary confinement and be completely exempt from the court's scrutiny. In this case, petitioner had been in solitary confinement for many years prior to the hearings involved, was not allowed a single witness or piece of evidence to be presented at the illegal hearing and was found to have violated rules of the Oregon Department of Corrections – (ODOC), that could not be charged, because the alleged charges were committed outside of the institution's legal authority to punish for.

These rulings implicate the Due Process Clause of the Fourteenth Amendment, which protects liberty interests that arise either under the clause itself or under state law. *Chappell v. Manderville*, 706 F.3d 1052, 1062 (9th Cir. 2013). Due process claims require a determination of (1) whether a governmental actor interfered with a recognized liberty or property interest; and (2) whether the procedures surrounding the alleged interference were constitutionally sufficient. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989).

Standing alone, the Due Process Clause does not confer a liberty interest in freedom from the conditions or degree of confinement ordinarily contemplated by a prison sentence, *Sandin v. Conner*, 515 U.S. 472, 480 (1995). The underlying premised idea, though not expressly said in Sandin, was that ALL prisoners would break the rules at some point and end up in solitary confinement. Which is simply not true and goes against the entire premise of the corrections systems stated goal. Nevertheless, the Supreme Court recognizes that states "may under certain circumstances create

liberty interests which are protected by the Due Process Clause." Sandin. *Id.* at 484. However, a federal due process claim does not arise out of the mere violation of state prison regulations. Instead, "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.' " Wilkinson v. Austin, *545 U.S. 209, 223 (2005)* (quoting *Sandin*, 515 U.S. at 484).

Everyday prison life today is the touchstone of a societies move towards normalcy and rehabilitation. Today the difference in a prisoner's confinement between Disciplinary segregation and either Administrative segregation or General population is significant, as the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958), have changed considerably since Sandin was heard. Everyday prison life today expresses the want and need for a community of adults incarcerated, to become better people and reintegrate back into society. Everyday prison life today in Oregon is almost like an idyllic, self-sufficient, gated community, the least violent and most life changing in the nation, a model prison for other states to follow.

Any term in solitary confinement in Oregon is "Atypical and Significant" to everyday prison life and should require that prison officials follow both State and Federal law when taking a prisoner's liberty away for a predetermined amount of time. Some individuals never recover from being isolated for 180 to 800 days. The Supreme court knows this, see Apodaca v. Raemisch, 139 S. Ct. 5, 6 (2018) (noting

that "[a] punishment need not leave physical scars to be cruel and unusual[,]" and "we do know that solitary confinement imprints on those that it clutches a wide range of psychological scars"); Ruiz v. Texas, 137 S. Ct. 1246, 1247, 197 L.Ed.2d 487 (2017) (noting that the petitioner "developed symptoms long associated with solitary confinement, namely severe anxiety and depression, suicidal thoughts, hallucinations, disorientation, memory loss, and sleep difficulty... in 1890, this Court recognized longstanding "serious objections" to extended solitary confinement. The Court pointed to studies showing that "[a] considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others still, committed suicide; while those who stood the ordeal better were not generally reformed, and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.", " more recently pointed out that a terrible "human toll" is "wrought by extended terms of isolation" and that "[y]ears on end of near-total isolation exact a terrible" psychiatric "price." Davis v. Ayala, 576 U.S. 257, 135 S.Ct. 2187192 L.Ed.2d 323 (2015) (KENNEDY, J., concurring) (citing. In re Medley, supra, at 170, 10 S.Ct. 384). As a result, it has been suggested that, "[i]n a case that present[s] the issue," this Court should determine whether extended solitary confinement survives Eighth Amendment scrutiny. Palakovic v. Wetzel, 854 F.3d 209, 225-26 (3d Cir. 2017), (acknowledging "the robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement"); Kervin v. Barnes, 787 F.3d 833, 837 (7th Cir. 2015) (recognizing that the "serious psychological consequences of . . . quasi-solitary

imprisonment [has] been documented"); Grissom v. Roberts, 902 F.3d 1162, 1175-77 (10th Cir. 2018) (citing studies addressing the effects of solitary confinement and recognizing the serious harms of solitary confinement and noting that "[g]iven our society's present understanding that prolonged solitary confinement inflicts progressive brain injury, we cannot consider such prolonged, unjustified confinement as anything other than extreme and atypical"). Solitary confinement for any period of time beyond what the United Nations has deemed to be torture is an important issue for appellate review. See Glossip v. Gross, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) ("[T]he United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days.").

It cannot be, that Due Process is only required and the law only need to be followed AFTER a prisoner has spent years in solitary confinement, when the emotional and mental damage has already been done. It cannot be, that a governmental agency can just ignore the legal statutory authority it operates under and not even follow its own rules and still be considered to be providing Due Process. It cannot be, that the States can ignore the basic procedural requirements of Due Process in disciplinary hearings, and simply not allow ANY witnesses or evidence to be brought into the hearing based upon some flimsy reasoning, when none of the reasons are based upon institutional safety or even convenience as allowed under, Turner v. Safley, 482 U.S. 78, 107 S.Ct. 2254. It cannot be, that be that prison official can just not give ANY preplacement disciplinary or solitary confinement hearing because the government lawyers have determined that 6 months, a year or 2 years in solitary confinement don't present "atypical and significant" treatment that they need

worry about being sued over. This is what, Sandin v. Conner, though has now done, allowed the prison system to imposed years of solitary confinement without court review until after the fact, which has now stretched, Sandin's, 30-day time in solitary confinement, which was typical time in a cell during this period of history, all the way to many years in solitary confinement now, which is not typical to everyday prison life of even administrative segregated inmates everyday prison life.

It is time for the court to speak on, and define, the issue of solitary confinement and what constitutes "atypical and significant" treatment to everyday prison life. It cannot be that some states have determined that 27 months in solitary confinement is fine, when other states have determined as little as 90 days is significant, when this court has known for decades about the severe consequences of solitary confinement on individuals and society as a whole after such confined persons are released into society.

FOUNDATIONAL RELEVANT FACTS OF THE CASE

The foundations of this case stretch back to November of 2013. Petitioner had been sentenced to the Oregon State prison for a Robbery conviction in July of 2011. He spent a total of around 40 days in the ODOC intake center and then shortly thereafter transferred into the custody of the Jackson County Oregon Sheriff upon court Order, under ORS 135.767, in August of 2011 to await trial on additional charges. While awaiting trial, petitioner climbed up onto the roof of the jail's

recreation yard, climbed down a tree and walked off into the night, officially to have escaped from the county jail in November 2012. A year later, petitioner was arrested by the Federal Marshals service and returned to await trial at the Jackson County jail. Upon return, petitioner was placed in a solid door, double insulated isolation cell. Petitioner was never given an administrative segregation hearing or disciplinary write up for such placement. Petitioner was not given a single moment of exercise out of the 35sq ft. cell for months at a time while confined there. Petitioner was not given a shower for 6-1/2 months, 2 months, and multiple week stretches at a time, resulting in 9 showers in the first 14 months. Petitioner was not allowed to access any legal materials to file a suit about said conditions. This is all a matter of public record (Appx' I - pg. 3 Showing - SWHR and -Exercise allowed @ pg.3 and 5 REC & DAYR) and led to the filing of a 42 USC § 1983 at the first available time after being transferred out of the jail facility, Monical V. Jackson County et.al. 1:17-cv-00476-YY.[1]

After 22 months of said solitary confinement at the Jackson County jail, all without a single hearing or the due process requirements for pre-trial detainees, petitioner was transferred to the Oregon State Prison intake center on September 28, 2015, and summarily written up for ODOC rule violations for having escaped in 2012. This was in violation too of the ORS statutes and Administrative rules under OAR-291-105-0005, as the ODOC had not been given the authority to punish for rule

[1] This case is currently pending appeal in the 9th circuit as the district court found for plaintiff on the access to the court claims but had dismissed a portion of the suit because of a late filing, which was caused by the same denial of access to the courts. Defendants had created their own statute of limitations defense by not allowing petitioner to file suit while in their custody and not allowing grievances to be even filed on the issues.

violations that had allegedly occurred outside of ODOC facilities. Petitioner was not allowed to call witnesses or collect evidence and could not do a single thing, having been confined 24/7 to segregation cell upon arrival. Petitioner was given an additional 3 months in solitary confinement in addition to the previous 22 months.

Before the ODOC disciplinary sanction was completed, petitioner was again transferred, this time by court order under ORS 135.767, into the custody of the Marion County Sherriff of Oregon, December 16, 2015. (Appx' E ex #1 pg. -5) Petitioner was again placed in 23/7 solitary confinement lockdown, without a hearing and without exercise, access to the courts, etc., for the next year.

In November of 2016, petitioner was transferred from the Marion County Jail to the Oregon State Penitentiary (OSP) for safety concerns. For the next 9 months petitioner remained in the legal custody, by court order of the Marion County courts, of the Marion County sheriff. (Appx' E pg. 5, 6) Upon arrival to OSP, petitioner made a federal PREA report to staff about the actions of the jail deputies, which concerned the incidents alleged to have occurred at the Marion county jail, which had led to the transfer. After the report was filed, petitioner was taken and housed in OSP's segregation unit for alleged rule violations that had occurred at the county jail. OSP staff took pictures of the many bruises covering petitioner due to beating by the county sheriff deputies.

Plaintiff had never seen or ever been given the rules of the ODOC prior to this incident except for the escape charge the year prior, as he had never been through orientation and was unfamiliar with the justice system.

Plaintiff was charged under ODOC rules for Assaulting jail staff at the Marion County jail (same staff as in the PREA report) and Property 1, both ODOC rules that did not apply to the county jail nor could be charged and disciplined for under State law because the alleged offenses had not occurred in the Oregon Department of Corrections facilities[2]. Petitioner was given a hearing, at which he requested multiple witnesses and video evidence of the alleged charges because the deputy involved had opened the cell doors as alleged in the PREA report. Petitioner requested witnesses, provided all the relevant questions to be asked the witnesses as to why the cell door had been opened in the first place. Petitioner was denied all witnesses and all evidence and was found guilty. (App. E - Ex 1- Pg. 6-10)

The assault charges were later dismissed by the States Inspector General, after four months in solitary confinement, but a new charge replaced the original, creating

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[2] Oregon Administrative rules clearly dictated the defendant's authority under the law.

OAR 291-105-0005 (Authority, Purpose and Policy)

"(1) Authority: The authority for this rule is granted to the Director of the Department of Corrections in accordance with ORS 179.040, 421.068, 421.180, 423.020, 423.030, and 423.075.";" (A) To provide for the safe, secure, efficient, and orderly management of Department of Corrections facilities, specifically including the safety and security of Department employees, inmates, and property of the Department of Corrections.")
- OAR 291 105-0010 (11)) (Department of corrections facility: Any institution, facility, or staff office, including the grounds, operated by the Department of corrections.),

The authority for the Oregon Department of Corrections – is clearly set out in:
ORS 179.040
(1) The Department of Corrections, the Department of Human Services and the Oregon Health Authority shall:
(a) Govern, manage and administer the affairs of the public institutions and works within their respective jurisdictions.
(d) Make and adopt rules for the guidance of the agencies and for the government of their respective institutions.

This clearly did not include facilities outside of ODOC control.

a "disturbance 1" at a facility. The issues being that (1) The ODOC only had authority to punishes inmates for violations of rules in State "facilities" (see note 2) not the county jail, and (2) petitioner should have been allowed to call witnesses for the charges against him and have at least the video of the alleged incident as a defense if he was being given a legal hearing.

Again, petitioner was denied all witnesses and right to present evidence at the hearing. Petitioner spent the next 14 months in solitary confinement for these charges, because the charge changed petitioner's custody level, which placed petitioner in IMU for a 23.5/ 7 hours lockdown for an additional 8 months, without access to the law library, without exercise and which was simply a continuation of petitioner's solitary confinement all the way back to November 13th, 2013. Petitioner had spent over 4 years of "atypical and significant" confinement by the time this suit ensued, which was clearly outlined in petitioners Amended complaint (Appx' D - pgs. 14-16- Amended Complaint)[3]

Oregon State and Administrative law did not give legal statutory authority for the defendants in this case to hold and then punish petitioner for rule violations of the ODOC while petitioner was held at the Marion County jail under a court order of ORS 135.767. (See appendix E ex #1 pg. -5) Allowing a hearing and denying all

[3]." In, Sims v. Artuz, 230 F.3d 14,23 (2nd Cir. 1999) [Segregation times] should be aggregated for purposes of the Sandin inquiry. See generally Sealey v. Giltner, 197 F.3d at 587 n.7 (suggesting that "if conditions were of sufficient harshness that confinement for 365 days constituted atypicality, an official who held a hearing for a prisoner already confined in such conditions for 364 days would normally have to accord procedural due process before continuing the confinement beyond an aggregate interval of 365 days."). Prior to the disciplinary hearing being held in this case plaintiff had been in solitary confinement for over 40 months or for over 1200 days.

witnesses and evidence in that hearing should have never happened in the first place, as the defendants did not have the legal right to even hold a hearing.

There can be no Due Process in a disciplinary hearing that could not be held and no amount of "some evidence" could justify disciplinary charges and sanctions for rule violations not authorized to be punished for. (Appx' E ex #1 pg. -12-15) The ODOC officials had no more legal authority to punish an inmate under the circumstances, than the State of Oregon has for prosecuting an individual for a crime committed in the State of Florida, under Oregon law.

Allowing these rulings to stand means that prison officials in all 50 states can ignore the clear dictates of Wolff V. McDonell and Sandin v. Conner. If a State agency does not have to even abide by its own laws or rules than no true Due Process can be had, only violations of it, which result in the courts being overloaded with needless litigation.

The State's prison officials need to be clearly directed as to what constitutes "atypical and significant treatment to everyday prison life" and be told whether they are required to even follow their own respective state and administrative laws with regards to providing Due Process.

REASONS FOR GRANTING THE WRIT

This court should grant the petition so that it can bring unanimity between the states, where its ruling under, Sandin V. Conner, on the issue of "Atypical and Significant" treatment, has been stretched to absurdity by the states and now become law. If the Court knows that 6 months in solitary confinement is damaging to an individual, then how can some states justify 48 months as not being atypical and significant treatment to "everyday prison life" while others say as little as 12 months is significant. The wide range and disparity in the case law today now only invites prisoner lawsuits because they can point to the wide discrepancies between the circuits.

This court should grant the petition to confirm to the states that they need to follow both the federal due process requirements along with their own state statutes and administrative rules. Confirm that agencies of the government cannot go outside the law and still be said to be providing due process in their respective duties. This should be obvious but agencies of the government continue to believe they are outside of the elected official's authority and continued to act so.

SUMMARY OF ARGUMENT

Petitioner had been in Solitary confinement from November 2013, until the solitary confinement placement by the ODOC in November of 2016, which should have triggered "due process" rights in a disciplinary hearing prior to further solitary

confinement of 14 months. Petitioner had been removed by court order from the Oregon Department of Corrections at the time of his alleged rule violations. Petitioner was outside of the Oregon Department of Corrections facilities and legal authority to punish for ODOC rule infractions at the time his alleged charges arose, which was clear under the ODOC's own policy and procedures, OAR 291-105-0005. (note 2)

The District court ruled that the word "facilities" as used in the ODOC rules, could include any facility in the U.S., when the policy explicitly excluded such a reading and definitions of the ODOC administrative rules said otherwise. The court ignored the States statutory authority it gave the ODOC.

The District court ruled that in any event, that ORS 135.767 - transport of a prisoner, used the permissive word "may" when it spoke of a court ordering the ODOC to surrender a prisoner, (Appx' B – pg. 3) and that there was no record of a court ordering the ODOC to surrender custody, so by default, the ODOC could punish petitioner, even if he was in a "facility" outside of ODOC control. The issue here was that there WAS a clear court order in the record for the removal of petitioner from ODOC custody and the administrative rules did not allow for ANY application of ODOC rules for violations outside of ODOC facilities. (Appx' E ex #1 pg. – 5 and 6)

The district court ignored the fact that petitioner was not allowed any witnesses in his first or second hearing. It ignored the questions that were to be asked the witnesses the defendants did not allow. The court ignored the fact or justified its ruling that the hearings could not even be held by law and justified the disallowance of witnesses and due process violations because it was later overturned on appeal,

despite the fact that at that time petitioner had already been in solitary confinement 4 months in ODOC custody and a previous 3 years prior to this confinement.

The court ignored the clear fact that if an agency is acting outside its statutory and legal authority, that it cannot be affording Due Process in a disciplinary hearing it could not hold to begin with. The court substituted its own definition of the Oregon Administrative rules, rather than ruling that a government agency has to follow its own rules.

The laws on these issues should be clear but they are not, the court is legislating from the bench and writing its own law instead of interpreting it.

ARGUMENTS

(1) Can the U.S. District Court of Oregon and the 9th Circuit ignore a prisoners prior 3 years in solitary confinement when making its "Atypical and Significant" under, Sandin v. Conner, 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), when deciding whether a disciplinary hearing required the procedural safeguards under, Wolff v. McDonnell, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979-2980, 41 L.Ed.2d 935 (1974), be followed, with regards to allowing evidence and witnesses at the hearing?

The procedural due process required for disciplinary hearings involving a deprivation of a liberty interests is outlined in, Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), and in, Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). In Wolff, 418 U.S. at 556, The Supreme Court held,

that before a prisoner may be deprived of his liberty interest... due process required certain minimal protections. Those protections include: (1) written notice of the charges at least 24 hours before the hearing; (2) the right of the inmate to "call witnesses and present documentary evidence in his defense when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals"; and (3) a written statement by the factfinders as to the evidence relied on and reasons for the disciplinary action. See id. at 564-66; Zimmerlee v. Keeney, 831 F.2d 183, 186 (9th Cir.1987). Further, the Supreme Court has held that, due process requires that the decision of factfinder be supported by "some evidence" in the record. See Superintendent v. Hill, 472 U.S. 445, 454, 105 S. Ct. 2768, 86 L.Ed.2d 356 (1985).

These safeguards though are only seemingly required now when a prisoner is expecting to spend "atypical and significant" time in segregation compared to everyday prison life, Sandin v. Conner, 515 U.S. @ 484. This language allows for the prison officials to first determine whether their placement of an inmate in solitary confinement, for a given length of time, is going to implicate "atypical and significant" treatment, before they have to hold a disciplinary hearing at all. This violates the required procedures in Wolff v. McDonnell.

The U.S District and Appeal courts have now determined that an extreme amount of solitary confinement does not implicate a prisoner's due process rights,

> See Smith v. Deemer, 641 F. App'x. 865, 868 (11th Cir. 2016) *(to find a liberty interest, the atypical and significant hardship must exist for a significant length of time). Compare* Al-Amin v. Donald, 165 F. App'x 733, 739 (11th Cir.

2006) *(finding thirty months' confinement to administrative segregation was not an atypical and significant hardship that gave rise to a liberty interest);* Lekas v. Briley, 405 F.3d 602, 611 (7th Cir. 2005) *(finding the ninety-day confinement to disciplinary segregation was not an atypical and significant hardship);* Morefield v. Smith, 404 F. App'x 443, 446 (11th Cir. 2010) *(finding a four-year confinement in administrative segregation, although lengthy, did not create a liberty interest ...)* Williams v. Foote, No. CV08-2838-CJC (JTL), 2009 WL 1520029, at *10 (C.D. Cal. May 28, 2009) *(holding 701-day duration of segregation, alone, did not give rise to a liberty interest...) In White v. Taylor, the court held that a 180-day stay in DSU and a 28-day loss of yard privileges did not implicate the AIC's liberty interests. No. 2:17-CV-00981-AC, 2020 WL 3964996, at *6 (D. Or. July 13, 2020))*

In this case it was clearly determined that petitioner had been in previous solitary confinement and that such prior segregation required should be considered in the aggregate when considering the Sandin Atypical rule. (Appx E ex #1 pg. -13-16) *see* Sims v. Artuz, 230 F.3d 14, 23-34 (2d Cir. 2000), *separate SHU sentences "should be aggregated for purposes of the Sandin inquiry" when they constitute a sustained period of confinement. Id.; see also* Sealey v. Giltner, 197 F.3d 578, 587-88 (2d Cir. 1999) *(aggregating two periods of SHU segregation) ... (We have held that "[c]onfinement in normal SHU conditions for 305 days is in our judgment a sufficient departure from the ordinary incidents of prison life to require procedural due process protections under Sandin."* Colon v. Howard, 215 F.3d 227, 231 (2d Cir. 2000). And, while petitioner had spent 36 months in prior solitary, the court additionally did not consider that the total

imposed solitary confinement was an actual14 months, simply under a different name as petitioner had already been sent to IMU before his disciplinary 6 months sanction even was finished.

The 42 U.S.C. 1983 complaint clearly outlined the stark differences to everyday prison life and solitary confinement (Appx' D ex 1 – pg. 15 – 17) which clearly shown that a liberty interest was at stake, over and beyond the untrue statements that the only consequence of the defendants' actions was 180 days in solitary confinement, when as a result of the hearing, petitioner was subjected to an additional 10 months in IMU confinement. This would not have happened had it not been for the wrongfully held disciplinary hearing.

The fact that petitioner was given a hearing, even if it followed the basic procedural grounds of 24-hour notice, is completely irrelevant when the ODOC rules clearly stated that the only authority given to the ODOC official for disciplinary actions was for violations inside the ODOC facilities, operated by the ODOC, (See note 2). The district courts justification (Appx' B @ pg3) did not encompass the actual first due process violation claims in the complaint (Appx' D ex # 1pg 14-20) and by law could not ignore the Oregon state statute and administrative law that gave the ODOC its authority to punish inmates, which did not include doing so for violation outside of ODOC facilities. (see note 2) Thus the court's ruling in regards to the second rule violation hearing, that replaced the first, was still a violation of petitioner's due process rights when he should have not been subjected to a hearing in the first place.

Had there been no hearing at all though, the court clearly ruled that petitioner was not required to have any hearing because his solitary confinement period, both before and after, the total of over 4 years, was not "atypical and significant" to the Sandin inquiry. (App. B pg. 4-6) The court did not even consider the evidence in the record and the court outright lied that there was no claim that segregation was different to everyday prison life, when these claims were clearly outlined with evidence presented in both the amended complaint (Appx' D ex #1 – pg. 12-18) and the MSJ (Appx' E ex # 1 – pg14-18) as well as the motion for reconsideration (Appx H @ pg 8 -12). The court "only" applied the 180-day sanction for the rule violation in its examination when it was clear that petitioner had spent a total of 4 plus years in solitary.

The issue too, of allowing witnesses or evidence or the time to marshal resources to present a defense in the disciplinary hearing, should not be set aside here. Plaintiff was locked down 24/7 in solitary confinement and had no way to marshal a single fact or gather witnesses. These matters then were required to be done by the hearings officer or an aid. No such procedures happened. The hearing was set over for an investigation of the facts but none were gathered. There was no video of the alleged incident, there was no questioning of the requested witnesses, there was not an allowed single thing to be brought into the hearing. The reason petitioner was out of the cell was clearly a question asked of a witness (Appx' E-ex1 pg 26-32, facts outlined @ pg 7-11) (That sheriff's deputy had open cell to have sex with cellmate) and would have provided a mitigation as to why petitioner was out of the cell. The court cited that witnesses could be disregarded but discounted this

court's finding that, *"a call for witnesses is properly refused when the projected testimony is not relevant to the matter in controversy. See Wolff v. McDonnell, 418 U.S. 539, 566, 94 S.Ct. 2963, 2979–2980, 41 L.Ed.2d 935 (1974) (justifications for a prison tribunal's refusing to hear witnesses are "irrelevance, lack of necessity, [and] the hazards [to institutional **2304 safety or correctional goals] presented in individual"* Nowhere in the record does it reflect that a complete denial of witnesses had anything to do with irrelevancy, lack of necessity or safety to the institution. These procedural defaults of required due process were explicitly pointed out to the court. (Appx' E – ex1 – pg. 28-32)

The court simply decided that it was going to ignore the facts, not even mention them in its, Opinion and Order, as if they did not exist, so they could not be appealed, again sidestepping due process, and allowed an agency of the government to go outside of its legal authority and place petitioner in additional solitary confinement, regardless of how many years of confinement that may have been. The questioning of those governmental actions only coming a dozen years after the fact and due to the court's rulings, will continue to allow an agency of the government to go outside its statutory authority and place individuals into solitary confinement, no matter how long and it still not be considered worthy of "atypical and significant "to everyday prison life.

(2) Can prison officials in the United States, now completely do away with the Due Process Requirements in, Wolff v. McDonnell, 418 U.S. 539, and Superintendent v. Hill, 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985). and put all inmates into solitary confinement, for years, without a hearing?

The rulings in this court are clear. It is put forth that, unless a prisoner is going to be subjected to some undetermined amount of solitary confinement that is "atypical and significant" that there is no need to even have a disciplinary hearing at all. In Oregon, the courts have ruled that anywhere from 6 to 26 months in solitary confinement does not constitute atypical or significant treatment and thus no hearing is even required. (Appx' B – pg. 4-6).

The District court seems to have done away with the actual requirement of due process under the law. The U.S supreme court did not do away with the requirement of due process in a disciplinary hearing, but added to it in Sandin. Under, Sandin, Wolff, and Meachum, they all support the proposition that a statute or regulation which involves "state-created right[s]," [Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)], creates a protectable liberty interest when an official's failure to adhere to the statute results in an "atypical, significant deprivation," Sandin, 515 U.S. at 486, of "real substance," Wolff, 418 U.S. at 557, and not simply "ephemeral and insubstantial" violations. Meachum v. Fano, 427 U.S. 215, 228, 96 S.Ct. 2532, 49 L.Ed.2d 451.

Similarly, in Smith v. Cruse, the Northern District of California held that Sandin's "atypical and significant hardship" due process analysis must be triggered

by the existence of a state regulation which significantly limits the discretion of prison officials. No. C 10-3684 SBA (PR), 2012 U.S. Dist. LEXIS 49140, 2012 WL 1155964, at *7 (N.D. Cal. Mar. 30, 2012); see also Lopez v. Cate, No. C 11-2644 YGA (PR), 2012 U.S. Dist. LEXIS 142027, 2012 WL 4677221, at *5 (N.D. Cal. Sept. 30, 2012) ("Deprivations that are authorized by state law . . . may also amount to deprivations of a procedural protected liberty interest, provided that: (1) state statutes or regulations narrowly restrict the power of prison officials to impose the deprivation, i.e., give the inmate a kind of right to avoid it, and (2) the liberty in question is one of 'real substance.'")

A liberty interest can be created either by state law or by the Due Process Clause of the United States Constitution." Id. at ¶ 11, 303 P.3d at 105; see Sandin v. Conner, 515 U.S. 472, 479, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995), overruled on other grounds by Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997).

Oregon law is clearly established and direct on a State employee's requirement to follow administrative law, see State v. Newell, 238 Or App 385, 242 P3d 709 (Or. App., 2010) "Indeed, any valid administrative rule-whether or not approved by the legislature-has the effect of statutory law. As the Supreme Court explained in Bronson v. Moonen, 270 Or. 469, 476, 528 P.2d 82 (1974): 'Administrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute.' "

So, in this case, in order for there to be due process requirement under the Sandin inquiry, there also had to be a State regulation that gave a liberty interest to the petitioner to be free from "atypical and significant' confinement to everyday

prison life". The State could not just do away with its disciplinary hearing or not follow the rules that they had authority to work under. In this case, petitioner was given a liberty interest in being free from disciplinary charges that occurred outside of the ODOC authority, outside of ODOC facilities (See note 2) (Appx' H -pgs 14 - 28). The state employees of the ODOC could not hold a disciplinary hearing for rule violations outside of their authority and yet they did. They were required to follow administrative rules but they did not. The court simply ignored the facts.

The courts have strayed from the Sandin inquiry, they now put the cart before the horse and now do not even consider whether a government agency is even required by law to hold hearings by their own rules and even if they are, and don't follow their own rules, violating all procedural due process rights, and not allowing witnesses or investigations to be done during the hearings, it doesn't matter because the prisoner only spent 180, 400, 700 days in solitary confinement and that is not "atypical and significant". The court should have ruled that the ODOC is required to follow its own rules and statutory authority in disciplinary hearings the create a liberty interest in being free from solitary confinement, in order to provide Due Process.

(3) Does the "Some Evidence" rule, as outlined in, Superintendent, Mass. Corrections Inst. v. Hill, 472 U.S. 445, 455-56, 105 S. Ct. 2768, 2774, 86 L. Ed. 2d 356 (1985). apply to rule infractions that occurred outside of the prisons officials Statutory Authority to impose punishment on?

The 9th circuit of appeals and the U.S district court of Oregon, both ruled that "some evidence" was the basis for a valid a disciplinary hearing (Appx' A @ pg. 1-2) and (Appx' B @ pg. 10). The obvious problem for these rulings was that contrary to the courts defining of Oregon law, it was clear from the evidence and case law presented to the court, that the ODOC could not by law even hold a hearing. So "some evidence" does not matter in a hearing that is held outside of the law. This was clearly presented to the court and argued again in petition for enbanc hearing to the 9th circuit (Appx' F @ pg. 7 - 10) and again previously at the District court in motion for reconsideration (Appx' H @ pg. 8 - 23)

The district courts own ruling shows this to be true, (Appx' B @pg 10)when it quotes the rule being violated, "OAR 291-105, *Rule 4.05 provides: An inmate commits a Disturbance if he/she advocates, incites, creates, engages in, maintains or promotes a situation characterized by unruly, noisy, or violent conduct or unauthorized group activity, which disrupts the orderly administration of* *or poses a direct threat to the security of a facility, facility programs or the safety of DOC or OCE employees or other persons."* The court clearly knew that OAR 291-105-005 - Authority, Purpose and Policy , only allowed authority for infractions within the ODOC, *"(1) Authority: The authority for this rule is granted to the Director of the Department of Corrections in accordance with ORS 179.040, 421.068, 421.180, 423.020, 423.030, and 423.075.";" (A)*

To provide for the safe, secure, efficient, and orderly management of Department of Corrections facilities, specifically including the safety and security of Department employees, inmates, and property of the Department of Corrections."). It was very clear what the law defined as an ODOC facility, *"OAR 291 105-0010 (11)) (Department of corrections facility: Any institution, facility, or staff office, including the grounds, operated by the Department of corrections.)"* Thus, the ODOC employees did not have the authority to hold a disciplinary hearing for actions done at a county jail facility to non-ODOC employees, and "some evidence" no matter the source or reliability of that evidence, mattered. A hearing should not have ensued.

The court's ruling is equivalent to holding that an officer of the law can go to another state, see someone committing a crime, arrest that individual outside of their authority to do so, haul that person back to the officer's home state and then prosecute them for the crime. While none of actions are allowed under the law, it is determined that it was fine because the arrested person got a fair trial.

It is oddly apparent that the U.S. district court of Oregon wishes that Americas legal system become that of a banana republic, where the government officials run the people, do not have to follow the law, and not act as servants of the public at all.

(4) Does an Agency of the Government, when there is "Atypical and Significant", liberty interest involved, created by its policies, have to follow the State laws it operates under and abide by its own administrative rules when providing due process in a disciplinary hearing?

In a long line of cases beginning with, Bridges v. Wixon, 326 U.S. 135, 152-153, 65 S.Ct. 1443, 1451-1452, 89 L.Ed. 2103 (1945), this Court has held that "one under investigation . . . is legally entitled to insist upon the observance of rules" promulgated by an executive or legislative body for his protection. See United States v. Nixon, 418 U.S. 683, 695-696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Morton v. Ruiz, 415 U.S. 199, 235, 94 S.Ct. 1055 1074, 39 L.Ed.2d 270 (1974); Yellin v. United States, 374 U.S. 109, 83 S.Ct. 1828, 10 L.Ed.2d 778 (1963); Vitarelli v. Seaton, 359 U.S. 535, 79 S.Ct. 968, 3 L.Ed.2d 1012 (1959); Service v. Dulles, 354 U.S. 363, 77 S.Ct. 1152, 1 L.Ed.2d 1403 (1957); The Accardi Doctrine: "deeply rooted principles of administrative law, not to mention common sense, government agencies are generally required to follow their own regulations." Fed. Defs. of New York, Inc. v. Fed. Bureau of Prisons, 954 F.3d 118, 130 (2d Cir.2020). And "[w]hen agencies fail to do so, (as developed by case law) gives aggrieved parties a cause of action to enforce compliance." Id. This cause of action "is sometimes called 'the Accardi principle,'" after the decision cited most frequently for it, United States ex rel. Accardi v. Shaughnessy, [347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954)] ··· While courts have expressed reluctance to "review the merits of decisions made within the area of discretion delegated to administrative agencies," they have "insisted that where the agencies have laid down their own procedures and regulations, those procedures and regulations cannot be ignored by

the agencies themselves even where discretionary decisions are involved." Smith v. Resor, 406 F.2d 141, 145 (2d Cir. 1969). (Appx, F. @ pg 7- 10)

Sandin, Wolff, and Meachum, all support the proposition that a statute or regulation which involves "state-created right[s]," Wolff v. McDonnell, 418 U.S. 539, 557, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974), creates a protectable liberty interest when an official's failure to adhere to the statute results in an "atypical, significant deprivation," Sandin, 515 U.S. at 486, of "real substance," Wolff, 418 U.S. at 557, and not simply "ephemeral and insubstantial" violations. Meachum, 427 U.S. at 228.280 F.3d at 83.

A liberty interest can be created either by state law or by the Due Process Clause of the United States Constitution." Id. at ¶ 11, 303 P.3d at 105; see Sandin v. Conner, 515 U.S. 472, 479, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). Oregon law is established and very clear on a State employee's requirement to follow law, see State v. Newell, 238 Or App 385, 242 P3d 709 (Or. App., 2010) "Indeed, any valid administrative rule-whether or not approved by the legislature-has the effect of statutory law. As the Supreme Court explained in Bronson v. Moonen, 270 Or. 469, 476, 528 P.2d 82 (1974): 'Administrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute.' "

Again, in this case, the Court ruled, despite the evidence in the record, (Appx' B @ A. Legal Authority to Discipline for Rule 4.05 Violation) that the ODOC had the authority to punish petitioner, when the law clearly said they did not. This, despite

the clear law and rules to the contrary (see note 2), (Argument and supports @ #3 – this section) [4] was a complete misstatement of the law. The case law is clear, ANY agency of the government has to follow the law that it operates under. It is not for the court to redefine a statute or law that a state or agency of the state has promulgated. Here, the court justified its ruling, allowing the ODOC not to have to follow its rules, by deciding that the ODOC had the "permissive" authority not to follow a court order, under ORS 135.767 (Appx' B pg. 3) It is the COURTS permissibility under the law, not the ODOC's that was in question. And it was without question that the court DID order the ODOC

(5) Does a "corrected" prison disciplinary record, a reversal after a wrong charge and denial of due process right in a disciplinary hearing, fix the loss of liberty, after the solitary confinement was already completed before the reversal?

The 9th Circuit court of appeals opined that it was right for the district court to find for defendants in summary judgment on petitioners first due process violation claim because, even though defendants had denied all the witnesses in violation of Wolff V. Mc Donnell, the appeal process eventually corrected the error of a wrong disciplinary charge, the court quoted themselves (App. A @ pg. 2. - Frank v. Shultz,

[4] "that OAR 291-105-005 – Authority, Purpose and Policy, only allowed authority for infractions within the ODOC, "(1) Authority: The authority for this rule is granted to the Director of the Department of Corrections in accordance with ORS 179.040, 421.068, 421.180, 423.020, 423.030, and 423.075.";" (A) To provide for the safe, secure, efficient, and orderly management of Department of Corrections facilities,"

808 F.3d 762,764(9th Cir. 2015) "administrative [disciplinary hearing] reversal may cure due process violations". (Appx' G. @ pg.2 – Case cite) The district court chose to ignore this original due process violation claim in its opinion and Order (Appx' B) which was clearly argued to the court in the Amended complaint (Appx' D @ pg. 14 – 20), and Motion for Summary Judgment (Appx' E @ pg. 18 – 32). The case cited by the court was for a disciplinary hearing that was reversed and the inmate was given back his "good time" credits he had lost. This case was inapposite to the facts in plaintiffs' case, where he had spent over 120 days in solitary confinement due to the procedural and statutory due process violations.

Petitioner had argued that he was denied "procedural due process" when the defendants did not allow petitioner to collect any evidence nor any witnesses, contrary to established law, see Viens v. Daniels, 871 F.2d 1328, 1336 n.2(7th Cir 1989) *"when a prisoner contends that he was denied access to evidence necessary to defend against disciplinary charges, his claim is properly understood as "one of procedural due process...".* Mitchell v. Dupnik, 75 F.3d 517, 525 (9th cir. 1996) *(we have previously held that a blanket denial of inmate to have witnesses... during a disciplinary hearing is impermissible)* Wolff v. McDonnell 418 U.S. 539, 566 *"The inmate should be allowed to call witnesses and present documentary evidence in his defense...".*

The court wrongly decided, that when the defendants later corrected their error and dismissed the wrong disciplinary charges they had brought and found guilt, without allowing any due process in the hearing, that this correction cured their due process violations. But petitioner had already spent 120 days in solitary confinement

without exercise by this point so the reversal did not correct any of the procedural due process violations, especially when the defendants simply changed the charge and proceeded to completely deny all procedural due process in the very next hearing (Appx' D @pg. 20 – 21).

The court's ruling simply justified the defendant's denial of due process, allows for the complete denial of any and all procedural due process rights due a prisoner under Wolff V. McDonnell. If prison hearings officials do not think witnesses are relevant or videos showing an incident relevant, despite the statements made to the official, then they can simply deny anything and everything and find guilt without allowing a single defense (Appx' D @ pg. 18 – 19). And this was for charges that could not even be brought or a hearing had by State law.

Quite clearly, a reversed disciplinary charge, after the fact or months of solitary confinement in "Atypical and Significant "conditions, does not cure the loss of liberty or the original denial of procedural due process. The court has, in essence, ruled that when officers of the law, arrest and hold an individual in jail for 4 months on an illegal and wrong charge, then convict them of that charges without any representation or legal authority to do so, that these defects in due process are all cured when they suddenly decide they errored and release you from jail. Sorry our bad. Have a nice day. This case obviously was in the prison setting and does not require the legal due process required under criminal law, but the defendants in this case and any prison disciplinary case cannot simply do away with all procedural due processes and then when found to be in error for doing so, simply have no

consequences for their errors by correcting a record, after they have already tortured you, not when the law is clearly established that they were required to allow procedural due process. The court errored and is allowing for future errors to be made and many more prisoner lawsuits to be filed.

Conclusion

The court should not be able to look at this suit and decide that Due Process is had when an agency of the government goes outside its statutory authority to punish a prisoner and then does not allow for any procedural due process in the hearing it does hold. Agencies of the government should be held to abiding by the law they operate under.

The court should look at the issues presented and conclude that the issue of what constitutes "atypical and significant" treatment in the prison setting, compared to everyday prison life, in societies evolved prison environments of today, needs to be clearly defined for the states so that there is not such a wide discrepancy between states where solitary confinement is concerned. The court's ruling in Sandin V. Conner (1995) looked at a disciplinary sanction of a mere 30 days, in comparing prison conditions that were starkly different than today's conditions between solitary confinement and everyday life. The district courts have now extended Sandins' analysis by as much as 48 times the amount of confinement in Sandin, or some 1400 days plus in solitary confinement w/o it being determined to be "atypical and significant". This is now absurd and should be shocking to the

consciousness of any reasonable person in our society. Such confinement is clearly known to cause permanent psychological damage and should not be able to be done to a person without procedural due process procedures in place, that cannot be simply set aside by prison officials when they believe they can get away without being sued because the Sandin analysis says they can place a prisoner in solitary confinement for up to 4 years without it being "atypical and significant"

The court should look at these issues to continue its work in limiting needless prisoner lawsuits through the PLRA, where fewer lawsuits would be instituted by prisoners, if prison officials were put on notice that they must follow the law. The current PLRA has become a game where prison officials and state lawyers simply have instituted a series of grievance procedures, not to correct wrongs within the prison system, but to win against prisoner lawsuits through defaulted grievance procedures prior to filing suit. The PLRA has only increased the duplicity of prison officials, not become an avenue for the officials to correct their actions before a suit is filed. The court can now remedy that by clearly defining the issues, mandating that rules and laws be followed by state officials, and that due process be allowed in all circumstances where liberty interest, of a known amount of time in solitary confinement, is handed down.), (The court needs to set some time frame, is 90 days in solitary confinement atypical and significant or 400 days significant – one prisons confinement cannot be so disparate to another's, to where some known amount of time cannot be set in today's scientific based society)

The petition for writ of Certiorari should be granted,

Respectfully Submitted, this 24th day of August, 2023.

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