

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2005 CA 1038**

**ALVIN T. WELCH, SR.**

**VERSUS**

**N. BURL CAIN, WARDEN AND LOUISIANA STATE  
PENITENTIARY REVIEW BOARD COMMITTEE**

Judgment Rendered: SEP 20 2006

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On Appeal from the 19<sup>th</sup> Judicial District Court  
In and for the Parish of East Baton Rouge, State of Louisiana  
Docket No. 458,529, Division "J"

Honorable Curtis A. Calloway, Judge Presiding

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Alvin T. Welch, Sr.  
Angola, LA

Plaintiff/Appellant  
In Proper Person

Annette Rhodes Seng  
Baton Rouge, LA

Counsel for Defendant/Appellee  
N. Burl Cain, Warden & Louisiana  
State Penitentiary Review Board  
Committee

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**BEFORE: PARRO, PETTIGREW, McDONALD,  
McCLENDON, AND HUGHES, JJ.**

*McDonald, J. dissents and will assign reasons.*

*PHB  
JJP  
PMc  
ay*

**HUGHES, J.**

This is an appeal from a district court judgment dismissing petitioner's suit for judicial review. For the reasons that follow, we reverse and remand with instructions.

**FACTS AND PROCEDURAL HISTORY**

Alvin Welch, an inmate with the Department of Public Safety and Corrections, filed a petition for judicial review claiming a violation of his due process rights in connection with his confinement in extended lockdown.

On January 4, 1999, after 23 months without a disciplinary infraction, Welch appeared before the prison's classification review board and requested to be released from extended lockdown to either a working cell or general prison population; the board denied his request. Welch filed a request for Administrative Remedy Procedure (ARP) alleging that he was not granted a proper review hearing on his lockdown status. Welch felt that his lockdown status was not justified in light of his 23-month discipline-free record and that the board was not properly reviewing his lockdown status; he requested that the board's actions be reviewed through the ARP.

On January 25, 1999, DPSC rejected the request on the basis that decisions of the Lockdown Review Board are not appealable through the ARP process. Welch was informed that he could seek judicial review within 30 days if he was dissatisfied.

Welch timely filed a petition for judicial review in the Nineteenth Judicial District Court, again complaining of a deficient review process of his continued extended lockdown status. Particularly, Welch claimed that the review board did not properly consider his request to be released from

extended lockdown and had informed him his request could not be granted absent an order from the warden.

Welch explained in his petition the circumstances surrounding his lockdown status. According to Welch, he was sentenced to Camp J/extended lockdown on February 14, 1997, pursuant to the Disciplinary Board's determination that his possession of a "shim," which was found in his cell and classified by the prison as contraband, made him an escape risk. He argued that the Lockdown Review Board's continued classification of him as an escape risk, however, is not based on this determination but rather on a May 28, 1987 determination that he was an escape risk and a threat to prison security. The incident that gave rise to his lockdown status in 1987 involved threats to prison personnel and other inmates made by Welch wherein he voiced an ability and willingness to make bombs. Welch pled guilty to the charges resulting from those threats. The Disciplinary Board adopted the findings of a psychological report that Welch was an escape risk and a present threat to prison security and thereby placed him in Camp J/extended lockdown.

In his petition for judicial review, Welch claimed that he had been maintained in lockdown for ten years on the basis of this 1987 finding and contended this continued classification triggered his right to procedural due process.

After considering the record and arguments made, the commissioner concluded that petitioner's due process rights were not abridged and recommended dismissal of petitioner's request for judicial review with prejudice. The commissioner noted in the report that petitioner's placement in extended lockdown was for a disciplinary infraction, he was not entitled to a due process hearing during the review by the Lockdown

Review Board of that placement, and petitioner did not assert the type of “atypical substantial hardship” that would otherwise afford the petitioner due process protection. **Sandin v. Connor** 515 U.S. 472, 115 S.Ct. 2293, 132 L.Ed.2d. 418 (1995).

## **DISCUSSION**

We first address the procedural objection raised by defendant in this matter regarding the timeliness of the appeal. An appellant’s failure to file a devolutive appeal timely is a jurisdictional defect. **Lay v. Stalder**, 99-0402 (La.App. 1 Cir. 3/31/00), 757 So.2d 916. LSA-C.C.P. art. 2121 provides, in pertinent part, that an appeal is taken by obtaining an order therefor, within the delay allowed, from the court which rendered the judgment. The jurisdiction of the appellate court attaches upon the granting of the order of appeal. LSA-C.C.P. art. 2088. Generally, when no order of appeal has been obtained from the district court, the appellate court will take notice of the failure of the appellant to obtain said order, and, on its own motion, dismiss the appeal for lack of jurisdiction. See LSA-C.C.P. art. 2162.

However, it is well settled that the law favors appeals. Thus, an appeal is to be maintained unless a legal ground for dismissal is clearly shown. **Davidge v. Magliola**, 346 So.2d 177 (La. 1977). Additionally, an appeal shall not be dismissed because the trial record is missing, incomplete, or in error, no matter who is responsible; nor shall it be dismissed because of any other irregularity, error, or defect unless it is imputable to the appellant. LSA-C.C.P. art. 2161.

On March 27, 2006 defendant filed his brief with this court, contending that he only became aware of this appeal when he received notice from this court on February 24, 2006, informing him that the appeal was docketed for March 27, 2006. He asserts that since receiving this notice

he has attempted to ascertain the procedural status and substance of the appeal by reviewing the record lodged in this court as well as the record in the district court. He indicates that pursuant to this inquiry he became aware of a writ action taken in this matter in 2005, but was unable to ascertain the nature of the action. Defendant briefly addresses the merits of the appeal, but urges this court to dismiss Welch's appeal as untimely because "(it) was filed more than 3 years after the final judgment was entered in this case, long after the appeal delays had run" and "there is no indication in the record on appeal that [Welch] filed a proper notice of appeal, that the district court ever set a return date, or that petitioner ever served . . . a copy of any documents he filed after the date the final judgment was entered." Alternatively, he urges this court to strike Welch's appeal brief because service by mail, as indicated in the certificate attached to petitioner's brief, is "not adequate service on defendants of plaintiff's brief." We deny this request.<sup>1</sup>

Upon our initial review of the record lodged in this matter, we recognized that it did not contain a motion or order for appeal, late or otherwise. As evidenced by the stamp and signature of a deputy clerk of court for the district court affixed to the judgment in this matter, the judgment was filed into the record on June 25, 2002, and mailed to all parties on the same date. The next, and only other post-judgment filing in the suit record, is an appellate pauper motion and order, filed by Welch, with attached affidavits and prison account statement, on September 23, 2002.

On January 7, 2004, Welch filed an application for a "Writ of Mandamus" with this court, seeking an order directing the Clerk of Court for

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<sup>1</sup> Legible copies of all papers filed in a Court of Appeal by any party shall, at or before the time of filing, be delivered or mailed by the party to all other parties, or counsel of record.

the Nineteenth Judicial District Court to prepare and lodge the record. He claimed that on July 1, 2002 he filed a notice of appeal in the district court, and the clerk of court forwarded to him a pauper form indicating the notice of appeal had been filed. The clerk of court did not file an opposition. Upon determining that the pauper order had been filed on September 23, 2002 and was yet unsigned, this court granted the writ with an order directing the court to act upon the pauper motion on or before March 15, 2004. The order was then signed, as submitted.

A year later, on January 11, 2005, Welch filed a second writ application “to get appellate record into this Court.” He again alleged that his notice of appeal had been filed and further alleged that he had received notification from the clerk for the district court that his initial appeal costs were paid. Again, no opposition was filed. This court ascertained that the pauper order had been signed pursuant to the earlier writ and on March 21, 2005 issued the following order: “WRIT GRANTED WITH ORDER: Due to the unusual facts in regard to the appeal of this case, this Court hereby orders the district court to file the record with this Court in a timely manner.” The record was lodged in this Court, whereupon it was assigned an appellate docket number and a return date was set. The matter was docketed, the parties filed briefs and the case has been submitted for decision.

We likewise take note of the “unusual facts in regard to the appeal of this case.” First, the judgment appealed from reads that it was rendered and signed on June 21, 2001. This is evidently a clerical error, as the record clearly reveals the judgment was rendered on June 21, 2002. Nevertheless, judgment with the erroneous date was mailed to the parties. Second, the petitioner filed two separate writ applications in this court after the rendering

of judgment in the district court, referencing the appeal order in both; both of which this court considered in the context of a pending appeal. Neither writ application was opposed. Both were granted with the goal of moving along the appeal process.

In light of the procedural background of this matter and the above noted provisions of law relating to appeal procedure, we find that this court does have jurisdiction over the appeal of the judgment of the district court. We will now address the merits of Welch's claims.

Insofar as Welch's complaints relate to his initial placement in extended lockdown or the procedures in place at the prison for reviewing this classification, we agree with the district court and the commissioner's report that Welch's due process rights were not abridged. The due process clause does not protect every change in the conditions of confinement having an adverse impact on the prisoner. **Meachum v. Fano**, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). An inmate does not have a liberty right to remain in the general population. **Hewitt v. Helms**, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983). Once properly placed in extended lockdown, an inmate is not entitled to a due process hearing on review of that placement. **Lay v. R. Rachel-Major**, 99-0476 (La.App. 1 Cir. 5/12/00), 761 So.2d 723, 728; **Giovanni v. Lynn**, 48 F.3d 908, 913 (5 Cir. 1995).

Welch's complaint, however, involves more than his initial placement or the prison's internal procedures relating to review of that placement. The essence of Welch's complaint is that his continued confinement in extended lockdown for ten years has imposed the type of "atypical and significant hardship" that gives rise to the procedural protections afforded by the due process clause. The commissioner's report accepted Welch's allegation that

he was placed in extended lockdown pursuant to the disciplinary board's determinations that he was an escape risk following two incidents, one in 1997 and one in 1987 (Welch's disciplinary record is not a part of the record considered on judicial review), but summarily rejected petitioner's assertion that this confinement presented the type of hardship that would implicate the due process clause. Noting the broad discretion and authority of the Department of Public Safety and Corrections in matters of discipline and prison security, the report concluded that the determination that the petitioner continues to be a security threat should not be disturbed.

Disciplinary detention/extended lockdown is a maximum security area for confining inmates. LAC 21: I.345. This type of segregation is used primarily after a disciplinary hearing for an inmate found guilty of violating one or more serious rules or determined to be a danger to himself or others, to be a serious escape risk, or to pose a clear threat to the security of the facility. LAC 21:I.347. An inmate confined in disciplinary detention/extended lockdown will be reviewed for possible release to a less restricted status approximately every 90 days or upon the inmate's request. If determined ineligible, he should be notified in writing as to the reasons for the ineligibility. LAC 21:I.311(D). The determination of ineligibility for release from continued confinement in disciplinary detention/extended lockdown is not a disciplinary sanction but rather an incident to the board's finding upon review that, given all necessary considerations, the need for segregation remains because the inmate continues to be either a danger to himself or others, a serious escape risk, or to pose a clear threat to the security of the facility.

The United States Supreme Court has repeatedly found that prison officials have broad administrative and discretionary authority over the



institutions they manage, while lawfully incarcerated persons retain only a narrow range of protected liberty interests. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights and not every substantial deprivation imposed by prison authorities will trigger the procedural protections of the due process clause. **Meachum v. Fano**, 427 U.S. 215. However, the Supreme Court, in **Sandin v. Connor**, recognized that states may under certain circumstances create liberty interests which are protected by the due process clause. “(T)hese interests will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” Confinement results in an “atypical and significant hardship” on an inmate when it is imposed in such a manner as to exceed similar confinements in duration or degree, thereby working a major disruption in the inmate’s environment. See Sandin, 515 U.S. at 486; see also Giles v. Cain, 99-1201 (La.App. 1 Cir. 6/23/00), 762 So.2d 734, 739.

In conducting this liberty interest analysis, the **Sandin** court compared inmates both inside and outside disciplinary detention. The Court first noted that the restrictions imposed upon an inmate in disciplinary segregation were comparable in degree to restrictions imposed at other levels of segregation within the prison. **Sandin**, 515 U.S. at 486. It also noted that inmates in the general population were likewise subject to significant amounts of “lockdown time,” or confinement to their cells. **Id.** The Court thus concluded that because the confinement “did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction . . . [t]he State’s actions in placing (the inmate in disciplinary segregation) for 30 days did not work a major disruption in his environment.” **Id.**

Welch alleges, and the defendant does not dispute, that Welch was sentenced to Camp J for disciplinary detention/extended lockdown following an incident in 1997 upon the determination of a Disciplinary Board that he was an escape risk; and he has been continuously confined in lockdown since. Welch suggests, however, that his confinement in disciplinary detention/extended lockdown has been continuous since 1987, and thus he has been classified with this restrictive status since that time. Additionally, Welch alludes to a third disciplinary incident, which occurred on June 23, 1995 and resulted in a transfer from C.C.R., a solitary confinement unit, to Camp J extended lockdown. Neither party offered into evidence a complete record of the disciplinary actions taken against Welch throughout his incarceration. Neither party offered Welch's prison record, which would establish the dates of changes in classification or custody status throughout his incarceration. Neither party offered the Lockdown Review Board's records, which could establish the factors relied upon or the circumstances considered by the Board as warranting continued confinement of Welch in disciplinary detention/extended lockdown.<sup>2</sup> Such evidence is necessary for a determination of whether Welch's confinement, as imposed, exceeds similar confinements in duration or degree, thereby working a major disruption in his environment. See Sandin, supra.

We note however, that a reading of the prison rules and regulations suggests that a prolonged confinement in disciplinary detention/extended lockdown under the circumstances alleged by Welch exceeds what is to be expected as an ordinary incident of prison life. All inmates confined in

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<sup>2</sup> Welch contends that he did not receive written reasons for the Board's denial of his request for reclassification. LAC 22:I.311 provides, in reference to a reclassification request, "prisoners determined ineligible should be notified in writing as to the reasons for their ineligibility". This rule also provides that "(a)ll classifications and reclassifications shall be recorded on the classification sheet in the prison record. The results of each board meeting shall be maintained in such a manner that they can be readily retrieved for inspection."

disciplinary detention/extended lockdown are eligible for consideration for possible release after only 90 days of confinement. Confinement in excess of 90 days would necessarily be based upon the action of the Lockdown Review Board, which is mandated to review the inmate for possible release every 90 days. The Board acts within its discretion in maintaining the more restrictive status if, based upon interim information, it determines that release to a less restrictive status is not warranted. However, Welch claims the Board told him it had no such discretion and could only release him if the Warden authorized such action. Classification Board actions, even if resulting from an incident handled in the disciplinary process, are not disciplinary sanctions. LAC: 22:I.345.

We note also that a working cell block is, like disciplinary detention/extended lockdown, a form of maximum custody utilized for inmates considered to be dangerous, escape risks or security threats. A working cell block, however, offers access to work and other programs not available to inmates confined in disciplinary detention/extended lockdown. LAC 22: I.345.

The facts asserted by Welch may demonstrate that the confinement was imposed and maintained in such a manner as to create in Welch a protected liberty interest in freedom from restraint. The district court erred in dismissing the matter without developing the facts necessary to determine, as instructed in **Sandin**, whether the confinement has resulted in an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

In a judicial review, the reviewing court may require additions to the record that has been transmitted for review or may order that additional evidence be taken before the agency upon conditions determined by the

court. LSA-R.S. 15:1177(A)(4) and (5). Additionally, the court may remand the case for further proceedings, or order that additional evidence be taken. LSA-R.S. 15:1177(A)(8). In light of these provisions, we remand to the district court for the development of additional evidence, including but not limited to the Lockdown Review Board's written reasons for the denial of Welch's request for reclassification.

### **CONCLUSION**

For the foregoing reasons, we reverse the judgment of the district court and remand for the development of additional evidence consistent with this opinion.

**REVERSED AND REMANDED WITH INSTRUCTIONS.**

ALVIN T. WELCH

STATE OF LOUISIANA

COURT OF APPEAL


VERSUS

N. BURL CAIN, WARDEN, AND  
LOUISIANA STATE PENITENTIARY  
REVIEW BOARD COMMITTEE

FIRST CIRCUIT

NO. 2005 CA 1038

McDONALD, J., DISSENTING:



I respectfully dissent from the opinion of the majority because I believe it creates additional inmate rights under ARP. The trial court adopted the recommendation of the Commissioner in favor of the defendants and dismissing the plaintiff's petition. The recommendation points out that the disciplinary rules provide that inmates in lockdown will have their status reviewed by a review board every 90 days. There is nothing authorizing a hearing for the inmate or providing that the inmate be present when the review is conducted. There is nothing in the record before us indicating that this procedure was not followed. By remanding this matter for a hearing, the majority is creating an additional right for the inmate where none has previously existed. For these reasons I respectfully dissent.