No. 18-7313

United States Court of Appeals
FOR THE FOURTH CIRCUIT

ELBERT SMITH,
Appellant,

v.

DENNIS COLLINS, *et al.*,
Appellees.

Appeal from the United States District Court
for the Western District of Virginia

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF JURISDICTION 1

STATEMENT OF THE ISSUES 2

STATEMENT OF THE CASE 3

I. Factual History 3

A. Red Onion Segregated Confinement: February 2011–July 2013 5

B. Wallens Ridge Segregated Confinement: July 2013–October 2017 7

II. Procedural History 12

SUMMARY OF THE ARGUMENT 19

ARGUMENT 22

I. Mr. Smith's Six-Plus Years of Administrative Segregation Deprived Him of a Liberty Interest Protected by Due Process 23

A. Defendants Kept Mr. Smith Trapped in Confinement Restrictions More Severe Than in *Wilkinson* 25

B. Mr. Smith's Six-Year Segregated Confinement With No Release Path Contributed to Atypical and Significant Hardship 33

C. Collateral Consequences of Mr. Smith's Confinement Also Weigh in Favor of Atypical Conditions 38

II. The District Court Erred by Granting Summary Judgment Without Allowing Mr. Smith an Adequate Opportunity for Discovery 39

CONCLUSION 45

STATEMENT REGARDING ORAL ARGUMENT 46

CERTIFICATE OF COMPLIANCE 47

CERTIFICATE OF SERVICE 48

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986) 42

Beverati v. Smith,
120 F.3d 500 (4th Cir. 1997) 37, 46

Bounds v. Smith,
430 U.S. 817 (1977) 34

Couch v. Jabe,
679 F.3d 197 (4th Cir. 2012) 31

Estelle v. Gamble,
429 U.S. 97 (1976) 34

First Chicago Int'l v. United Exch. Co.,
836 F.2d 1375 (D.C. Cir. 1988) 47

Harden-Bey v. Rutter,
524 F.3d 789 (6th Cir. 2008) 36

Harrods Ltd. v. Sixty Internet Domain Names,
302 F.3d 214 (4th Cir. 2002) .... passim

Holt v. Hobbs,
135 S. Ct. 853 (2015) 31

Incumaa v. Stirling,
791 F.3d 517 (4th Cir. 2015) .... passim

Ingle ex rel. Estate of Ingle v. Yelton,
439 F.3d 191 (4th Cir. 2006) 43, 45

Lewis v. Casey,
518 U.S. 343 (1996) 34

Marion v. Columbia Corr. Inst.,
559 F.3d 693 (7th Cir. 2009) 36

Porter v. Clarke,
923 F.3d 348 (4th Cir. 2019) 29

Putney v. Likin,
656 F. App'x 632 (4th Cir. 2016) 48

Rhodes v. Chapman,
452 U.S. 337 (1981) 34

Sandin v. Conner,
515 U.S. 472 (1995) 24, 25, 37

Shoats v. Horn,
213 F.3d 140 (3d Cir. 2000) 34, 37

Smith v. Ozmint,
578 F.3d 246 (4th Cir. 2009) 23

Warsoldier v. Woodford,
418 F.3d 989 (9th Cir. 2005) 31

Wilkerson v. Goodwin,
774 F.3d 845 (5th Cir. 2014) 31, 33, 40

Wilkinson v. Austin,
545 U.S. 209 (2005) .... passim

Williams v. Sec'y Pa. Dep't. of Corrs.,
848 F.3d 549 (3d. Cir. 2017) 30, 31

Wolff v. McDonnell,
418 U.S. 539 (1974) 41

Statutes

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 .... 1, 3

Rules

Fed. R. App. P. 4 1

Fed. R. Civ. P. 56 47

Fed. R. App. P. 34 50

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Mr. Smith's complaint alleged a 42 U.S.C. § 1983 due process violation. The district court granted summary judgment to defendants and entered a final order dismissing Mr. Smith's complaint on September 20, 2018. JA292, JA310. Mr. Smith timely filed his notice of appeal on October 18, 2018, when he deposited his notice in the prison mail system. JA313; *see* Fed. R. App. P. 4(c). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether Mr. Smith's six-plus years in brutally restrictive segregated confinement with no path for release because of his religious beliefs implicates a due process liberty interest.

II. Whether the district court abused its discretion by granting judgment in favor of defendants after summarily denying Mr. Smith's repeated motions to discover material evidence about his conditions of confinement and defendants' intent to keep him in segregation indefinitely because of his religious beliefs.

STATEMENT OF THE CASE

Appellant Elbert Smith was held in "highly restrictive" conditions of solitary confinement for almost seven years in two Virginia Department of Corrections ("VDOC") facilities. JA8, JA145. He filed suit against five VDOC employees in their individual capacities, seeking damages under 42 U.S.C. § 1983 for their refusal to provide him any path for release from the brutal conditions of solitary confinement during the four and a half years he spent at Wallens Ridge State Prison ("Wallens Ridge").[1] JA7–8, JA14–15.

I. Factual History

Mr. Smith is a practicing Rastafarian whose faith prohibits him from having his hair cut. *See* JA145, JA293. He also is an inmate in VDOC custody serving a forty-four year prison sentence. *See* JA292–93. On November 12, 2010, VDOC officials placed Mr. Smith in a Grooming Policy Violators Housing Unit ("VHU") at Keen Mountain Correctional

[1] In a footnote, the district court said Mr. Smith's complaint challenges defendants' original decision confining him to segregation. JA302–03. He does not challenge that original designation but instead his continued confinement in segregation without a path for release. JA14–15. Even if his complaint could be read otherwise, Mr. Smith on appeal challenges only his continued confinement at Wallens Ridge without due process protection.

Center ("Keen Mountain") because VDOC's grooming policy required inmates to either keep their hair shorter than one inch or be moved to alternative housing like a VHU. *See* JA8, JA124, JA126–27, JA293.

In February 2011, a Keen Mountain staff member claimed to have been assaulted by Mr. Smith. *See* JA8, JA293. Prison administrators transferred Mr. Smith on an emergency basis to Wallens Ridge, a facility with a segregation unit for holding inmates in solitary confinement. JA163, JA189. Wallens Ridge officials placed Mr. Smith in administrative segregation as a Level S inmate, VDOC's security classification for prisoners in segregation. JA69–70, JA74. They then approved transfer to Red Onion State Prison ("Red Onion"), the other VDOC facility with segregated housing units.[2] JA189–90, JA295.

[2] The district court's opinion says Mr. Smith was not officially confined to Level S segregation until 2013. That is incorrect. His Level S segregation was approved in March 2011. JA190.

A. Red Onion Segregated Confinement: February 2011–July 2013[3]

Red Onion officials affirmed Mr. Smith's Level S segregation status upon his arrival in February 2011. JA192. Although criminal charges based on the alleged assault at Keen Mountain were dismissed in April 2012, JA9, Mr. Smith remained confined in segregation at Red Onion, JA199–209.

Immediately after those charges were dismissed, Mr. Smith started a Segregation Reduction Step-Down Program ("Step-Down Program") at Red Onion, JA9, JA298, a new program designed to provide a path for people confined in segregation to earn release back into general prison population,[4] JA70, JA243. The Step-Down Program defines criteria Level S inmates must satisfy before prison officials will (1) remove them from complete segregation to prepare them for reentry into general

[3] Mr. Smith did not sue Red Onion officers. But because he spent over two years in segregated confinement at Red Onion before being transferred back to Wallens Ridge, his time at Red Onion provides context for his claims.

[4] VDOC adopted formal Guidelines for the Step-Down Program after Red Onion and Wallens Ridge piloted it. *See* JA74, JA94 (formally adopting programs in place at Wallens Ridge and Red Onion). The record is not clear when Red Onion started and fully implemented the Step-Down Program.

population, and (2) return them to general prison population. JA70–71, JA294–95.

The Step-Down Program has distinct stages or "steps"—starting with the most severe at SM0 and progressing through SM1, SM2, and SM-SL6—through which inmates advance before being returned to general prison population. JA77–78. SM-SL6 encompasses two phases of confinement, the first of which allows inmates slightly more freedom than the first three SM steps, and the second of which provides limited interaction with other inmates. JA77–79.

Prison officials evaluate Step-Down Program inmates each week on things like "cell maintenance, personal hygiene, standing for count, respect, and programming participation." JA295. If an inmate earns good weekly ratings in these areas and evaluators find he has met the goals of his current step, he may advance in the program.[5] JA295–96. If his weekly ratings are not sufficiently positive, prison officials may impose additional requirements before he can advance or may even move him back a step in the program. JA296. Inmates who commit

[5] Both Red Onion and Wallens Ridge house only male inmates so this brief uses the male pronoun.

disciplinary infractions may be moved down one or more steps. JA58, JA83. No inmate can be placed back in general prison population until he has completed select portions of seven workbooks that form part of a curriculum called the *Challenge Series*. JA58.

Red Onion officers advanced Mr. Smith to SM1, the second step of the Step-Down Program, in November 2012. JA204. A Red Onion correctional officer recommended Mr. Smith advance to the next step, SM2, in June 2013, but that recommendation was not approved because of Mr. Smith's noncompliance with the grooming policy. JA208. Mr. Smith completed the required *Challenge Series* workbooks on July 20, 2013, JA9, shortly before his transfer out of Red Onion.

B. Wallens Ridge Segregated Confinement: July 2013–October 2017

Because Mr. Smith had advanced to SM-1 and was eligible to be transferred out of Red Onion, JA78, prison officials at Red Onion and Wallens Ridge agreed to move him to Wallens Ridge on July 30, 2013, JA9, 209. Defendant Dennis Collins, Wallens Ridge's Unit Manager, placed Mr. Smith in segregation upon arrival. JA9. Defendants then required Mr. Smith to spend the next four and a half years at Wallens Ridge in segregated confinement. *See, e.g.*, JA210–33. Unlike at Red

Onion, which reported a Step Level every ninety days, *see, e.g.*, JA207, Wallens Ridge reviews for two and a half years reported his status only as "segregation" without specifying a step, JA210–11, 214–21. In 2016, Mr. Smith's written reviews finally reflected an SM0 status—lower than his Red Onion SM1 status—due to his supposed need for a "longer period of stable adjustment" and his noncompliance with the grooming policy. JA223–26. Defendants also refused to transfer Mr. Smith to Wallens Ridge's VHU despite his multiple requests for a path out of segregation. *See, e.g.*, JA216, JA219.

During his nearly seven years in segregation at Wallens Ridge (and previously at Red Onion), Mr. Smith experienced dehumanizing and degrading conditions. Each time he left his cell, prison officials subjected him to a highly invasive strip and cavity search, *see* JA146, and only allowed him to move in full restraints, JA305–06. They kept lights shining in his cell at all times. JA26. Prison officials also confined him to his cell for at least twenty-three hours a day, and for twenty-four hours a minimum of two days a week. JA25–26. Because defendants prevented him from progressing in the Step-Down Program, he was also classified as ineligible for good time credit. JA26, JA164, JA196, JA205, JA218,

JA222, JA227; *see also* Virginia Department of Corrections 830.3 at 11 (2019), https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf.

Prison officials deprived Mr. Smith of almost all human contact during those years in segregation. JA25–26. Prison officials: (1) modified his cell with a "metal security box device" that restricted communication of any kind from inmates or prison staff, JA146; (2) required him to eat all his meals alone in his cell, JA26; (3) gave him only limited access to solitary recreation in another indoor cell, JA25; and (4) restricted his communication with his family and loved ones, by limiting his telephone privileges and granting him only "rare" visitation opportunities and only behind glass walls, JA26. Prison officials also barred his participation in educational and vocational programs otherwise available to general prison population. JA147.

VDOC policy requires an Institutional Classification Authority ("ICA") to formally review each Level S inmate every ninety days to determine whether segregation status remains appropriate and whether the inmate should advance in the Step-Down Program. JA59. For each inmate's review, the prison's facility unit head appoints an "experienced

senior staff member" who is familiar with the inmate to serve as the ICA. JA96. The ICA reviews the inmate's behavior and adjustment and recommends whether he should remain assigned to segregation and at what step. JA108.

Defendants Dennis Collins and Richard Light were among Mr. Smith's ICAs at Wallens Ridge. JA10, JA174–75, JA224–25. Defendant Anthony Gilbert, Mr. Smith's counselor, made recommendations to defendants Collins and Light when they served as Mr. Smith's ICAs. JA 242. The ICA reports describe Mr. Smith's attempts to secure guidance on what it would take for prison officials to transfer him out of segregation. At multiple ICA reviews, he requested a path out of segregation, *see* JA23–31, JA223–24, JA226, and into a VHU, JA211, JA219, JA225, JA229. At one ICA review, he even asked if there was any way he could be released from segregation without violating his Rastafarian beliefs by cutting his hair. JA234; *see also* JA145, JA293. At each review where they served as ICA, defendants Collins and Light recommended Mr. Smith remain in "segregation" or SM0 status because of (1) his non-compliance with the grooming policy, JA222, JA224–26, JA228, JA230–31, JA233, and/or (2) the need for a "longer period of stable

adjustment," *see* JA220, JA223–25, JA228–30. Defendants provided no other explanation.

VDOC also requires that a prison's facility unit head or his designee review the ICA's recommendation and decide whether to approve it. JA99. Prison officials acting as facility unit head designees may not review or approve their own ICA recommendations. *Id.* Despite the clear rule, both defendants Collins and Light served as reviewing authorities for their own recommendations. JA10–12. Defendant Leslie Fleming, the warden at Wallens Ridge who reviewed internal appeals, JA7, agreed the approvals violated VDOC regulations but provided no relief. JA10–12. Defendant Marcus Elam, the relevant VDOC regional administrator, signed off on Fleming's resolution of Mr. Smith's administrative appeals. *Id.*

Mr. Smith filed this suit in May 2017 challenging his continued segregated confinement. JA6. At the end of October 2017, Mr. Smith was transferred back to Red Onion as an SM0 inmate. JA232–331. Shortly after his transfer, Red Onion officials changed his classification from SM0 to SM-SL6, a three-step jump that took him all the way from

the *most* severe segregated confinement restrictions to the initial stage of non-segregation. JA235.

II. Procedural History

Mr. Smith filed this 42 U.S.C. § 1983 action in May 2017 against four Wallens Ridge defendants—Unit Manager Collins, Counselor Gilbert, Lieutenant Light, and Warden Fleming—along with VDOC regional administrator Marcus Elam, all in their individual and official capacities. JA6–8. The district court twice denied Mr. Smith's requests for counsel, so he litigated pro se from segregated confinement. JA21–23, JA252–54, JA287.

In his complaint, Mr. Smith alleged defendants violated his due process rights by keeping him in segregated confinement with no possible pathway for release. JA6, JA15–16. He requested compensatory and punitive damages. JA16–17. He also sought a permanent injunction ordering defendants to move him out of segregated confinement at Wallens Ridge, restore good time credits that had been denied as a result of his security classification, and provide him with mental health treatment he had been denied in segregation. JA16. After defendants answered the complaint, JA31–35, a magistrate judge put the case on an

expedited schedule, giving defendants just three weeks to file a motion for summary judgment, JA36.

Mr. Smith immediately pursued discovery. He filed two requests for document production, JA39–41, JA49–51, and one set of interrogatories, JA42–45. These discovery requests sought information about his security assignment and review procedures, and information about conditions in segregation. For instance, he sought additional context for defendants' decisions to keep him in segregation and information on Step-Down Program procedures. JA39–41. And he requested information on both cavity search procedures and cleaning policies for segregated confinement cells. JA39–40.

Defendants moved for summary judgment without responding to Mr. Smith's discovery requests. They argued that several unpublished district court cases had concluded VDOC segregation procedures were constitutional and that VDOC had recently adopted a policy governing the treatment of those in segregation who violated the grooming policy for religious reasons. JA54–55, JA62–63, JA71. They also provided an affidavit from VDOC's Security Operations and Corrections Enforcement Coordinator describing Mr. Smith's segregated confinement and review

procedures, JA68–73, and several formal prison operating procedures that governed the Step-Down Program, JA74–93, the inmate classification system, JA94–102, the security level assignment of inmates, JA103–22, and the inmate grooming standards, JA123–29. Defendants later filed a motion for a protective order arguing they did not need to respond to Mr. Smith's discovery requests because those requests related "mainly" to issues addressed in their motion for summary judgment. JA136. They also argued the district court should decide whether defendants were protected by the affirmative defense of qualified immunity before requiring them to respond to discovery requests. *Id.*

Mr. Smith opposed summary judgment. JA139. He explained prison officials created unsanitary conditions, conducted frequent cavity searches, deprived him completely of human contact, confined him almost twenty-four hours a day to his cell, and denied him mental health treatment. JA145–47. He emphasized defendants gave him "no pathway and no foreseeable expectation[]" to escape these dehumanizing conditions. JA151. According to Mr. Smith, officials would not allow him

out of segregated confinement or allow him to advance in the Step-Down Program unless he violated his religion. JA145, JA151.

The district court ordered defendants to respond to Mr. Smith's pending discovery motions. JA181–82. In response to his document production requests, defendants produced the authorization for his initial assignment to segregated housing, JA237–40, and documentation of his ICA reviews from 2011 to 2017, JA183–236. In response to Mr. Smith's interrogatories, defendant Gilbert stated he had been Mr. Smith's counselor since 2013 and assisted with his ICA reviews. JA241–42. But Gilbert stated he could not explain what was meant by "needs longer period of stable adjustment," an oft-repeated rationale for keeping Mr. Smith in segregation, unless Mr. Smith identified each particular review date the rationale was used. JA241. And in response to questions about how Mr. Smith could leave segregated confinement, Gilbert provided only general descriptions of the Step-Down Program. JA242–45.

After receiving this information, Mr. Smith filed an additional opposition to summary judgment, explaining he needed further discovery to prove defendants conducted "sham reviews," and barred him from progressing in the Step-Down Program. JA260–61. He also filed more

interrogatories, JA263–68, and two motions to compel discovery, JA269–71, JA272–74. Over the next three months, Mr. Smith filed another discovery request, set of interrogatories, and motion to compel discovery. JA275–78, JA279–81, JA282–86. His discovery requests repeated his earlier interrogatory about the meaning of "needs stable period of adjustment" with the specific ICA review dates Gilbert had said he needed. JA265. He also sought information about defendants' application of the review procedures: whether officials ever considered him for a grooming policy violators' VHU, JA266, JA276–77, and why he had been stalled in the Step-Down Program, JA265–66, JA276–77. He also sought discovery on his confinement conditions, including information on the cavity searches and cell cleaning procedures, and photo images of his cell, shower area, and security box. JA272–73.

The district court summarily denied all Mr. Smith's motions to compel discovery without prejudice because "additional discovery [was] not necessary" to respond to defendants' motion for summary judgment. JA287. It then granted summary judgment to defendants because it concluded Mr. Smith failed to establish a genuine dispute of material fact

that could point to a due process violation.[6] JA292. It explained Mr. Smith needed to show he had both (1) been deprived of a liberty interest, and (2) he had experienced an atypical and significant hardship, to establish a due process violation.[7] JA304–05.

The district court concluded Mr. Smith had a state-created liberty interest in avoiding segregated confinement conditions because VDOC's operating procedure provides a right to formal reviews every ninety days, but it held the record could not reasonably support a finding of atypical and significant hardship. JA305, JA308. The district court reasoned that Mr. Smith's conditions mirrored some conditions in general population so Mr. Smith could not establish atypical and significant hardship. JA 306. The district court also concluded the grooming policy applied to all

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[6] The district court appears to have concluded Mr. Smith challenged defendants' original decision to confine him in segregation, *see supra* n.1, and concluded that any such claim was barred by the statute of limitations, JA302–03. Mr. Smith does not challenge his initial designation to segregated confinement but rather defendants' refusal to provide a path for release. *See supra* n.1.

[7] The district court erroneously treated the liberty interest analysis as distinct from the atypical and significant hardship analysis. As discussed below, this Court and the Supreme Court require both a state law basis for avoiding confinement and atypical and significant hardship to establish a protected liberty interest. *See infra* Part I. This brief thus addresses atypical and significant hardship as part of liberty interest analysis.

inmates, so Mr. Smith's suffering from the policy based on his sincerely held religious beliefs was not atypical. JA308. The district court further held the record did not show that Mr. Smith was subject to "prolonged, extreme deprivation" because prison review procedures "inform[ed] the inmate of choices and changes he c[ould] make to progress toward less restrictive conditions." JA307. The district court did not reach the issue of damages because it concluded there had been no due process violation.

Mr. Smith timely noticed an appeal on October 18, 2018. JA313; Fed. R. App. P. 4(c). This Court appointed undersigned counsel. It expressed interest in due process issues related to inmate classification and whether Mr. Smith's ongoing confinement in segregation created an atypical and significant hardship. It also expressed interest in the district court's conclusion that any challenge to Mr. Smith's initial segregation classification was untimely. *Id.* Because Mr. Smith does not challenge that initial classification, *see supra* n.1, this brief addresses only due process.

SUMMARY OF THE ARGUMENT

Defendants subjected Mr. Smith to grim and dehumanizing solitary confinement conditions at Wallens Ridge with no end in sight and significant collateral consequences. Mr. Smith has a constitutionally protected liberty interest in avoiding such confinement. The district court found, and defendants did not dispute, the required state-law basis for such an interest. *See* JA 304–05. And Mr. Smith presented ample evidence showing his years in solitary confinement imposed atypical and significant hardship under this Court's precedent. *See Incumaa v. Stirling*, 791 F.3d 517, 530 (4th Cir. 2015) (citing *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005)).

The conditions were atypical and significant for three reasons. First, Mr. Smith's harsh and isolating conditions in segregation were as bad as or worse than confinement conditions the Supreme Court has found to be atypical and significant. Prison officials at Wallens Ridge forced Mr. Smith to stay in his cell for twenty-three to twenty-four hours a day, precluded almost any human contact, subjected him to highly invasive cavity searches each time he left his cell, and forced him to choose between adhering to his religious beliefs or remaining in these

repressive conditions. Second, defendants made Mr. Smith's solitary confinement temporally indefinite. He endured these conditions for over six years with no indication he would ever be able to leave. Finally, defendants imposed significant collateral consequences by stalling Mr. Smith in the Step-Down Program because he lost good time credit eligibility as a result.

The district court erred in concluding these facts, taken together, could not establish atypical and significant hardship. In reaching its conclusion, the district court relied on limited similarities between segregation and general prison conditions. This reasoning was flawed on multiple grounds. First, the district court failed to recognize the distinctly harsh and dehumanizing nature of the restrictions Mr. Smith experienced in segregation, as required by this Court and the Supreme Court. Second, the district court focused on some constitutionally required privileges defendants could not have denied to any inmate. And third, Mr. Smith's evidence showed defendants denied him of some of the very privileges the district court cited as available to him.

Even if this Court holds Mr. Smith's evidentiary showing insufficient to defeat summary judgment, the decision below should be

reversed because the district court granted summary judgment on an incomplete record. When Mr. Smith filed his opposition to defendants' summary judgment motion, he told the district court he needed discovery before responding to their motion, and he also had multiple pending motions to compel this discovery. The district court abused its discretion by summarily denying those motions without explanation and prematurely granting summary judgment.

ARGUMENT

The district court erred in granting summary judgment because record evidence, including Mr. Smith's sworn allegations, establishes a genuine issue of material fact as to whether his six-plus years in solitary confinement imposed an atypical and significant hardship. Two clarifications defining the scope of his arguments narrow the issues before this Court. First, Mr. Smith initially brought claims for both injunctive relief and damages because he was still in segregated confinement when he filed suit. *See* JA6–7, JA16–17. He is no longer in segregated confinement, *see* JA313, so his claims for injunctive relief are moot. Second, although this Court expressed interest in the timeliness of any claim regarding the initial decision to confine Mr. Smith to segregation, he only challenges the inadequate process defendants provided him during his later segregation confinement at Wallens Ridge. Mr. Smith presses only individual capacity damages claims against defendants for their role in leaving him in ongoing and severe conditions of segregated confinement without providing a genuine pathway for relief. JA7–8, JA14–16.

Summary judgment on these claims was improper because: (1) Mr. Smith's time in segregation implicated a liberty interest protected by the Due Process Clause; and in the alternative (2) Mr. Smith was not provided an adequate opportunity for discovery.

I. Mr. Smith's Six-Plus Years of Administrative Segregation Deprived Him of a Liberty Interest Protected by Due Process.

The district court erred in granting summary judgment because Mr. Smith demonstrated he had a state-created liberty interest protected by the Due Process Clause in avoiding his conditions of segregation. *See* U.S. Const. amend. XIV, § 1. The district court's grant of summary judgment is reviewed de novo. *Incumaa v. Stirling*, 791 F.3d 517, 524 (4th Cir. 2015) (citing *Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009)).

Two elements establish a state-created liberty interest, *see Wilkinson v. Austin*, 545 U.S. 209, 221–23 (2005), and Mr. Smith satisfied both. First, he has shown state law provides a basis for an interest in avoiding segregated conditions of confinement. *See* JA61–62. The district court correctly concluded, without opposition from defendants, that VDOC policies, which require classification reviews of Level S inmates at least every ninety days, create a basis for such an

interest. JA304–05; *see also Incumaa*, 791 F.3d at 527 (finding state policy provided a basis for an expectation in avoiding conditions of confinement where it mandated periodic review of the inmate's classification status).

Second, the record before the district court, viewed in the light most favorable to Mr. Smith, demonstrates that his segregation confinement restrictions imposed "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *See Sandin v. Conner*, 515 U.S. 472, 484 (1995). The atypical and significant hardship analysis requires a comparison between conditions Mr. Smith experienced in administrative segregation and those in general prison population. *See Incumaa*, 791 F.3d at 527. This Court considers three factors: (1) the cumulative magnitude of confinement restrictions; (2) the temporal indefiniteness of segregation; and (3) any collateral consequences on the inmate's sentence. *Id.* at 530 (citing *Wilkinson*, 545 U.S. at 224).

Applying each of these factors, Mr. Smith's six-plus years in administrative segregation constituted an "atypical and significant hardship" compared to the "ordinary incidents of prison life." *See Wilkinson*, 545 U.S. at 222–23 (quoting *Sandin*, 515 U.S. at 484). First,

Mr. Smith's confinement conditions in segregation were grim and dehumanizing. Unlike inmates in general prison population, Mr. Smith was physically isolated, cut off from virtually all communication, and subjected to highly invasive strip searches each time he left his cell. JA25–27. Second, defendants kept Mr. Smith confined to segregation indefinitely for over four and a half years at Wallens Ridge. They identified no way out of segregation consistent with his faith, and neither the Step-Down Program nor the ICA reviews provided any path. *See* JA14–15. Finally, Mr. Smith suffered a significant collateral consequence as a result of segregation: ineligibility for good time credits available to inmates in general prison population. *See* JA26. "[T]aken together," these factors show Mr. Smith's confinement in administrative segregation imposed atypical and significant hardship. *See Wilkinson*, 545 U.S. at 224.

A. Defendants Kept Mr. Smith Trapped in Confinement Restrictions More Severe Than in *Wilkinson*.

Mr. Smith endured confinement restrictions in administrative segregation even more harsh and inhumane than what the Supreme Court described in *Wilkinson*, 545 U.S. at 223–24. In *Wilkinson*, the Supreme Court found confinement at Ohio's supermax facility imposed

atypical and significant hardship, in part because of grim and markedly isolating confinement restrictions. *See id.* at 214, 223–24. *Wilkinson* requires this Court to analyze Mr. Smith's segregation conditions in light of its concerns about extreme isolation. *See Incumaa*, 791 F.3d at 531 (comparing conditions of confinement to those described in *Wilkinson*). To be sure, severity alone "might not be sufficient" to establish a liberty interest. *Wilkinson*, 545 U.S. at 224. But as in *Wilkinson*, the harsh and isolating conditions in segregation here contributed to the atypical and significant hardship defendants imposed on Mr. Smith. *See id.*

Defendants subjected Mr. Smith to virtually all the extreme restrictions that disturbed the *Wilkinson* Court. Prison officials modified Mr. Smith's cell with a "metal security box device" that eliminated all communication with inmates or prison staff. JA146; *see Wilkinson*, 545 U.S. at 214 (noting that cells in the Ohio supermax facility have metal strips "which prevent conversation or communication with other inmates"). Defendants limited his telephone privileges and granted him only "rare" visitation opportunities that always took place through glass walls. JA26; *see Wilkinson*, 545 U.S. at 214 (explaining "[o]pportunities for visitation" at the Ohio supermax facility "are rare and in all events

are conducted through glass walls"). And defendants confined him to his cell for up to twenty-four hours a day with lights on at all times. JA25–26; *see Wilkinson*, 545 U.S. at 214 ("Inmates must remain in their cells . . . for 23 hours per day. A light remains on in the cell at all times[.]"). Mr. Smith also had to eat every meal alone inside that same cell. JA26; *see Wilkinson*, 545 U.S. at 214 ("All meals are taken alone in the inmate's cell instead of in a common eating area.").

In addition, segregation meant Mr. Smith could not participate in educational and vocational programs available to other inmates, JA147, and the limited opportunities for recreation prison officials afforded him were always indoors, JA27; *see Wilkinson*, 545 U.S. at 214 ("During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells."). Defendants stalled Mr. Smith at a segregation level that made him ineligible for good time credits. JA26; *see Wilkinson*, 545 U.S. at 215 (stressing that inmates "otherwise eligible for parole lose their eligibility" while incarcerated at Ohio's supermax facility).

These relentless and extreme conditions inflicted serious psychological harm on Mr. Smith. JA17, JA147 (describing segregation's

impact on Mr. Smith's mental health); *see Porter v. Clarke*, 923 F.3d 348, 357, 360 (4th Cir. 2019) (explaining risk that lengthy solitary confinement will cause "serious psychological and emotional harm" and comparing conditions to those in *Wilkinson*). This Court has highlighted the extensive body of literature detailing the "heavy psychological toll" prolonged stays in solitary confinement inflict on inmates like Mr. Smith. *See id*. at 354–57 (quoting *Incumaa*, 791 F.3d at 534). This psychological toll weighed particularly heavily on Mr. Smith because defendants denied him access to mental health treatment. JA147.

Mr. Smith's experience in segregation was even worse than that described in *Wilkinson* in two notable ways. First, unlike in *Wilkinson*, prison officials subjected Mr. Smith to highly invasive cavity and strip searches each time he left his cell. JA146. These intrusive searches were more degrading and dehumanizing than any restrictions in *Wilkinson*. *See Incumaa*, 791 F.3d at 531 (finding confinement conditions were "worse in some respects" than in *Wilkinson* where an inmate was subject to a "highly intrusive strip search" each time he left his cell); *see also Williams v. Sec'y Pa. Dep't. of Corrs.*, 848 F.3d 549, 564 (3d. Cir. 2017)

("[I]nmates in *Wilkinson* were not subject to invasive strip searches when they left their cells.").

Second, defendants' reliance on the grooming policy to stall Mr. Smith's progress in the Step-Down Program burdened his religious practice, further magnifying the harshness of his confinement restrictions. As a "documented Rastafarian," Mr. Smith cannot "cut his hair or shave" without violating his religion. *See* JA145. The VDOC grooming procedures required inmates to have hair no longer than one inch. JA176–80. Defendants blocked Mr. Smith from advancing in the Step-Down Program, rendering him ineligible for good time credits, because he could not comply with a grooming policy that conflicted with his faith. *See* JA168; Virginia Department of Corrections 830.3 at 11. As a result, Mr. Smith languished without progress in segregation for over four years at Wallens Ridge, with continual reminders from defendants that his religious beliefs were a primary reason for his plight. *See, e.g.*, JA225–26, JA228–31.

Each day Mr. Smith was trapped in segregation, defendants forced him to choose between defying his religious beliefs or enduring dreadfully grim segregation conditions. By forcing this daily choice—a choice

general population inmates did not face—defendants burdened Mr. Smith's religious practice and made his confinement conditions even harsher.[8] *See Williams*, 848 F.3d at 563 (finding conditions atypical and significant in part because officials limited access to group religious services); *cf. Wilkerson v. Goodwin*, 774 F.3d 845, 855 (5th Cir. 2014) (noting inmates in closed-cell restriction were not given the same opportunity to "partake in religious . . . opportunities" as general population inmates).

Inmates in general population also did not face a coercive choice between disobeying the dictates of his religion or losing good time credit eligibility. The grooming policy plainly stated inmates could "not be restricted from earning good conduct time based solely on refusal to comply with grooming standards." JA126. But Mr. Smith lost good time credit eligibility because of his status in segregation, *see* JA26, which was often solely justified by his non-compliance with the grooming policy, *see, e.g.,* JA226, JA231, JA233. Thus defendants forced Mr. Smith, unlike

[8] This Court has recognized the gravity of similar burdens in the Religious Land Use and Institutionalized Persons Act context. *See Couch v. Jabe*, 679 F.3d 197, 199–201 (4th Cir. 2012); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Warsoldier v. Woodford*, 418 F.3d 989, 995–96 (9th Cir. 2005).

general prison population inmates, to sacrifice eligibility for good time credit in order to adhere to his religious beliefs.

The district court erroneously concluded these admittedly "highly restrictive" conditions—similar to but even more dehumanizing than those in *Wilkinson*—did not implicate *Wilkinson*'s concerns. *See* JA305–06. It based this conclusion on the limited ways in which conditions in administrative segregation "approximate conditions for general population inmates[,]" such as by providing "access to hygiene and legal materials, telephone usage, legal counsel, medical and mental health care, library books, commissary items, ingoing and outgoing mail services . . . [a] grievance procedure . . . religious materials . . . regular meals, laundry services, and visitation opportunities." JA306.

The district court misapplied *Wilkinson* by focusing on a "point-by-point comparison" of the limited similarities between segregation condition and general prison population conditions. *See Incumaa*, 791 F.3d at 530; *see also Wilkerson*, 774 F.3d at 855–56 (rejecting argument that conditions were not sufficiently severe where inmates "were allowed some contact visits, telephone privileges, peer counseling, and correspondence courses"). *Wilkinson* instead calls for comparing the

"collective[]" harshness of confinement conditions in segregation to the overall severity of conditions in general prison population. *See Wilkerson*, 774 F.3d at 856.

In addition, some of the conditions the district court cited in determining that segregation was sufficiently similar to life in general population enjoy independent constitutional protection and cannot be denied to any inmate. That Mr. Smith had access to privileges the Constitution requires made his confinement no less draconian. *See*, *e.g.*, *Lewis v. Casey*, 518 U.S. 343, 346 (1996) (explaining the Constitution requires prison authorities to provide prisoners adequate legal resources); *Rhodes v. Chapman*, 452 U.S. 337, 348 (1981) (observing that depriving an inmate of "essential food" likely violates the Eighth Amendment); *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) (establishing prison officials' Eighth Amendment obligation to provide adequate medical care).

Further, many of the conditions the district court relied on were present in cases imposing confinement conditions courts found atypical and significant. *See*, *e.g.*, *Wilkinson*, 545 U.S. at 214 (visitation opportunities and regular meals); *Shoats v. Horn*, 213 F.3d 140, 142 (3d

Cir. 2000) (access to legal materials and personal religious volumes). Mr. Smith also submitted evidence showing prison officials denied him access in segregation to some of the services the district court cited. *Compare* JA147 (attesting Mr. Smith has been denied access to mental health evaluations and treatment), *with* JA306 (stating Mr. Smith received mental health care); *compare* JA146 (asserting Mr. Smith had limited food rations in segregation), *with* JA 306 (noting Mr. Smith received regular meals). Mr. Smith's extreme and repressive segregation confinement conditions were collectively at least as harsh as those in *Wilkinson*, if not more so.

B. Mr. Smith's Six-Year Segregated Confinement With No Release Path Contributed to Atypical and Significant Hardship.

Not only did the severity of Mr. Smith's conditions contribute to his atypical and significant hardship, so too did the lengthy and indefinite nature of his segregated confinement. *See Incumaa*, 791 F.3d at 531.

When Mr. Smith filed his complaint, he had endured solitary confinement for over six years.[9] JA 8–14. That extended duration

[9] Atypical and significant hardship examines segregation's effects on inmates. *See Incumaa*, 791 F.3d at 533–34 (highlighting the impact of prolonged segregation on mental health). Because defendants knew Mr.

indicates atypical and significant hardship. *See Wilkinson*, 545 U.S. at 224; *see also Incumaa*, 791 F.3d at 531–32 (weighing extraordinary duration in favor of atypical and significant hardship). Other circuits have found durations far less than or equivalent to six years contribute to atypical and significant hardship. The Seventh Circuit in *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 698–99 (7th Cir. 2009), found 240 days of segregation was sufficient to support the existence of a liberty interest. In *Harden-Bey v. Rutter*, 524 F.3d 789, 793 (6th Cir. 2008), the Sixth Circuit found three years with restrictive conditions triggered a liberty interest. And in *Shoats*, 213 F.3d at 144, the Third Circuit had "no difficulty concluding" that eight years in segregation was atypical. Mr. Smith's six-year stay in segregation is far longer than, or at least comparable to, these time periods. And his time in segregation far exceeds the abbreviated time periods that have not supported a finding of atypical and significant hardship. *See, e.g.*, *Sandin*, 515 U.S. at 475–76 (thirty days); *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997) (six months).

Smith had been in segregation at Red Onion for a lengthy time before his transfer to Wallens Ridge, this brief includes his entire time in segregation. JA212.

Aggravating the duration's harm, defendants made segregation "indefinite" by taking away any viable avenue for release. *Incumaa*, 791 F.3d at 531–32; *see Wilkinson,* 545 U.S. at 224 (finding atypical hardship in part because the inmate could remain segregated indefinitely). The summary judgment record reasonably supports the conclusion prison officials kept Mr. Smith in segregation conditions because his religion prevented him from cutting his hair. Mr. Smith's religious adherence to Rastafarian precepts forbidding him from cutting his hair, JA145, was always going to violate VDOC's grooming policy. JA124. Defendants repeatedly used Mr. Smith's religious observance to keep him in segregated confinement even though the grooming policy permitted transfer to the non-segregated VHU. *See* JA126–27; *see, e.g.*, JA206–08, JA224, JA226. And they ignored Mr. Smith when he asked multiple times for a path to leave segregation to go to VHU. *See* JA211, JA219, JA225, JA234. He was going to remain in segregation or violate his religion; defendants gave him no other option.

The record also reasonably supports the conclusion that the Step-Down Program and the ICA review process were mere formalities that offered Mr. Smith no way out of segregation. The Step-Down Program

allows inmates to reduce their security status and seek reintroduction into general population. JA70. As inmates reach goals, they are eligible to "advance in status." JA70–71. VDOC policy requires that an ICA conduct a review every ninety days and recommend whether the inmate remain in segregation. JA59. The Facility Unit Head or other designee must approve the recommendation. JA99. Inmates must complete seven *Challenge Series* workbooks and remain infraction-free to advance. JA58, 71.

After Mr. Smith completed the *Challenge Series* workbooks in 2013 and had advanced in the Step-Down Program at Red Onion, defendants barred him for the next four years from proceeding to the next step even as other inmates advanced. JA9–10, JA12–13. Defendants relied on the same three rationales to maintain his status in segregation: he violated the grooming policy, *see, e.g.*, JA206–08, 226, he was "deemed appropriate for" or should "remain" in segregation, *see, e.g.*, JA202, JA204, 211, or he needed a longer period of stable adjustment, *see, e.g.*, JA201, JA203, JA214–17, JA219–21, JA223–25, JA228–30.

As discussed, *see supra* Part I.A, as a religious objector, Mr. Smith could *never* address the first rationale: that his grooming choices violated

the grooming policy. And the remaining two rationales–that he was "appropriate for" and should "remain" in segregation, or that he needed a longer period of stable adjustment–were conclusory and devoid of substance. Such rote and perfunctory rationales indicate the formal ICA reviews offered no meaningful review at all. *See Wilkerson*, 774 F.3d at 856 (finding indefinite segregation when the prison officials used rote repetition in their rationales). That defendants Collins and Light violated VDOC policy by approving their own recommendations further supports a conclusion Mr. Smith's ICA recommendations were an entirely pro forma empty gesture. *See* JA11–12; *cf. Incumaa*, 791 F.3d at 523, 532, 534 (finding indefinite confinement despite thirty-day reviews).

In the end, Mr. Smith endured over six years in hopeless and dehumanizing conditions, and had every indication that unless he abandoned his faith defendants would ensure he would remain there for many more. Both the lengthy and indefinite nature of his confinement contribute to the atypical and significant hardship he suffered as compared to general population prisoners.

C. Collateral Consequences of Mr. Smith's Confinement Also Weigh in Favor of Atypical Conditions.

Mr. Smith also suffered collateral consequences—specifically loss of good time credits, JA26—because defendants stalled him in the harshest segregated confinement classification. *Incumaa*, 791 F.3d at 530, 532. VDOC's grooming policy specifies inmates cannot be restricted from earning good time credits solely as a result of grooming violations. JA126. At times, defendants stalled Mr. Smith in the Step-Down Program solely because of grooming policy violations. *See, e.g.,* JA226, JA231, JA233. And Mr. Smith attests that in doing so, defendants necessarily made him ineligible for good time credits. *See* JA26.

This Court has recognized loss of parole eligibility can increase the length of an inmate's incarceration and therefore weighs in favor of finding atypical and significant hardship. *Incumaa*, 791 F.3d at 530, 532. Taking away good time credit eligibility likewise increases the length of an inmate's incarceration. *See* Virginia Department of Corrections 830.3 at 1 (2019), https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf. And this is partly why the Supreme Court has acknowledged that loss of good time credits can implicate a liberty interest under the Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). Losing good time credit eligibility, like losing parole

eligibility, constitutes a collateral consequence bearing on liberty. Therefore, Mr. Smith's loss of good time credit eligibility militates in favor of finding defendants imposed an atypical and significant hardship on him.

II. The District Court Erred by Granting Summary Judgment Without Allowing Mr. Smith an Adequate Opportunity for Discovery.

In the alternative, if this Court finds summary judgment appropriate on the record developed below, the district court's decision should still be reversed because that record was incomplete. "Summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 245–46 (4th Cir. 2002) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1986)). When a nonmovant has little opportunity for discovery, needs discovery on material issues, and notifies the district court of that need, this Court will reverse a grant of summary judgment and remand for further development of the evidentiary record. *Id.* at 247. A district court's decision to grant summary judgment without allowing further discovery is reviewed for abuse of discretion. *Ingle ex rel. Estate of Ingle*

v. Yelton, 439 F.3d 191, 193, 195–96 (4th Cir. 2006). The district court here abused its discretion by granting summary judgment when Mr. Smith had requested and still needed essential discovery.

From the outset, defendants were disinclined to provide any information to Mr. Smith. The district court gave defendants only three weeks to file for summary judgment. JA36. During this short timeline, Mr. Smith diligently sought discovery showing his particular confinement conditions and defendants' operating procedures. He also asked for discovery on the defendants' formal reviews and Step-Down Program. JA42, JA49–51. Instead of responding, defendants sought a protective order against Mr. Smith, a pro se litigant in solitary confinement, arguing they should not have to answer any of his discovery requests. JA135. It was only when summary judgment briefing was complete and the district court ordered that defendants respond to Mr. Smith's discovery motions, JA181, that defendants finally answered Mr. Smith's requests.

Defendants provided insufficient discovery. *See Ingle*, 439 F.3d at 245 (reversing grant of summary judgment when the non-movant had "almost no" opportunity for discovery). In response to Mr. Smith's

requests for pictures of his cell and information on cell cleaning procedures and cavity searches, JA39–40, defendants claimed such information was "irrelevant," "overly broad," and "unduly burdensome." JA184.

Defendant Gilbert shed little light on defendants' justifications for keeping Mr. Smith in segregated confinement. Even though defendants had used the rationale "needs longer period of stable adjustment" in many reviews, defendant Gilbert could not explain what it meant—he found Mr. Smith's interrogatory requesting clarification too "vague" unless Mr. Smith identified a specific review using the rationale. JA244. Defendant Gilbert also could not explain why defendants had approved their own formal review recommendations because Mr. Smith's question was again too "vague." JA249.

In response to Mr. Smith's interrogatory asking why he was stalled for four years from advancing in the Step-Down Program, defendant Gilbert instead gave general descriptions of the program. JA245. He also could not explain when an inmate who completes the *Challenge Series* is moved to the next step because Mr. Smith did "not identify" which step he was referring to. *Id.* Nor could he explain why Mr. Smith completed

one step and was barred from proceeding to the next step's required programming. JA248–49. In sum, defendant Gilbert provided no explanation *at all* on why Mr. Smith's Step-Down Program progress "stagnated" for four years. *Id.*

Mr. Smith was entitled to more discovery than these non-responsive and evasive answers. He still needed "material" information when the district court issued its summary judgment decision. *Ingle*, 439 F.3d at 195–96. Specifically, he needed information on the "necessarily . . . fact specific" issue whether he suffered atypical and significant hardship in segregation. *Beverati*, 120 F.3d at 503; *see also Harrods*, 302 F.3d at 247 (explaining a district court may abuse its discretion by granting summary judgment without discovery on complex factual questions). And Mr. Smith sought that information, in a motion for discovery, JA272, and four motions to compel discovery,[10] JA269, JA272, JA279, JA282.

The information he sought went to material issues. Mr. Smith, a pro se litigant, was quite specific in what he needed. He sought evidence

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[10] One filing contained both a motion to compel discovery and a request for the production of documents in the same document. JA272.

that defendants never considered releasing him from segregated confinement. *See Incumaa*, 791 F.3d at 530–31; *see also Harrods*, 302 F.3d at 247 (explaining that motive and intent are fact-intensive issues for which discovery is needed). And Mr. Smith responded to defendants' objections to his earlier interrogatories by specifying exact ICA review dates. JA241, JA265.

Finally, the district court was plainly "on notice" that more discovery was needed. *Harrods*, 302 F.3d at 245–46. Nonmovants typically file an affidavit with the district court pursuant to Federal Rule of Civil Procedure 56(d) to oppose summary judgment on the basis that they need more time for discovery. But district courts will excuse the failure to file a Rule 56(d) affidavit if the nonmovant has "adequately informed the district court . . . that more discovery is necessary." *Harrods*, 302 F.3d at 244 (citing *First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380–81 (D.C. Cir. 1988)). This is "especially true" for pro se litigants. *See Putney v. Likin*, 656 F. App'x 632, 638 (4th Cir. 2016). In addition to Mr. Smith's six motions for additional discovery, in both summary judgment oppositions, he expressly cited Rule 56(d) and stated he needed more discovery. JA139, 256. These filings served as the

functional equivalent of a Rule 56(d) affidavit putting the district court on notice. In any event, the district court did not base its decision to grant summary judgment without further discovery on the absence of a Rule 56(d) motion from Mr. Smith. This Court has not always insisted on a Rule 56(d) affidavit where the district court did not rely on its absence. *Harrods*, 302 F.3d at 246.

Despite Mr. Smith's best efforts, the district court summarily denied his outstanding discovery requests without explanation and granted summary judgment to defendants on an incomplete record. JA292. This decision was an abuse of discretion and should be reversed.

CONCLUSION

The record before the district court reflected genuine factual disputes material to the question whether Mr. Smith suffered an atypical and significant hardship triggering due process protections. And even if this Court concludes otherwise, the district court abused its discretion by granting summary judgment before essential discovery that would have uncovered such disputes. For the foregoing reasons, this Court should vacate the district court's grant of summary judgment and remand this case for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Smith respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a). Oral argument will provide this Court an opportunity to ensure the proper application of Supreme Court and Fourth Circuit precedent regarding the due process implications of keeping an inmate in solitary confinement for an extended period. Doing so is especially important under the circumstances of this case, where Appellant's only clear path out of segregation would have required him to violate his religious faith.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8085 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Erica Hashimoto, certify that on December 3, 2019, a copy of Appellant's Brief and Joint Appendix was served on counsel for Appellees via the Court's ECF system.

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