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

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APPELLANT'S REPLY BRIEF

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ARGUMENT

Defendants argue throughout their brief that VDOC policies did not violate Mr. Smith's due process rights. Appellees' Br. 31–47. This argument misses the point. Mr. Smith argues defendants, not VDOC policy, denied him constitutionally required process. Defendants' misplaced reliance on VDOC policies drives their argument that Mr. Smith raises no genuine issues of material fact. But the record, including his sworn statements, contains evidence sufficient for a reasonable juror to conclude defendants violated his clearly established due process rights by indefinitely isolating him from human contact in degrading and demoralizing conditions with no meaningful path for release. VDOC policy cannot resolve the dispute over defendants' actual conduct. Alternatively, the fact-specific nature of Mr. Smith's due process claim required more discovery before summary judgment.

This Court should reverse and remand for trial or, in the alternative, for initial determinations on the alternate grounds for affirmance, or for additional discovery.

I. Defendants Ignore Disputed Facts Material to Whether Mr. Smith Had a Protected Liberty Interest in Freedom from Segregation.

Defendants assert VDOC policies ensured Mr. Smith suffered no atypical and significant hardship. They argue those policies required his confinement to resemble general population's conditions, Appellees' Br. 31–32; mandated regular review, *id.* at 37; and ensured good time credit eligibility was determined separately from Level S classification, *id.* at 41. These arguments misunderstand Mr. Smith's claim.

A. The Severity of Mr. Smith's Confinement Conditions Gives Rise to a Protected Liberty Interest.

Defendants agree this case turns on similarities between Mr. Smith's segregated confinement conditions and those in *Wilkinson v. Austin*, 545 U.S. 209 (2005), and *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015). *See* Appellees' Br. 33–34. But their conclusion that confinement conditions here were insufficiently harsh to trigger a protected liberty interest is flawed. *See id.* First, defendants ignore factual disputes about Mr. Smith's actual experience in segregation because they discount his sworn allegations. Second, defendants misunderstand how the arbitrary burden they placed on his faith

magnified segregation's harshness. Third, defendants misapply *Wilkinson*, comparing conditions in segregated confinement and the general population point by point rather than as a whole.[1]

1. Defendants Ignore Mr. Smith's Sworn Factual Allegations About Segregation Conditions.

Defendants contend this Court cannot consider Mr. Smith's claims that prison officials modified his cell to restrict all communication, denied him mental health treatment and prison programming, and regularly subjected him to invasive strip searches because they "were included only as allegations in his brief in opposition to summary judgment." Appellees' Br. 34 n.11. Defendants are mistaken. In his verified amended complaint, Mr. Smith alleged "metal strips" on his cell door "prevent[ed] communication" and defendants denied him access to prison programming. JA26–27. His verified complaint also alleged his mental health had "deteriorated considerably" in segregation, JA17, and he

[1] Defendants are wrong to suggest comparing Mr. Smith's confinement conditions to conditions in "special housing." Appellees' Br. 32. "[T]he general population is the baseline for atypicality for inmates who are sentenced to confinement in the general prison population and have been transferred to security detention while serving their sentence." *Incumaa*, 791 F.3d at 527.

confirmed in an affidavit he was "suffering from untreated mental health issues, due to being isolated in segregation for so long." JA162. These sworn allegations properly placed these facts before the district court. *See* 28 U.S.C. § 1746. And although Mr. Smith's allegations about the details of the degrading strip searches in segregation appear only in his opposition to summary judgment,[2] defendants concede these searches occurred, *see* Appellees' Br. 7 (noting Level S inmates must "undergo a visual strip whenever they leave their cells"); JA293 n.1, JA296.

Defendants' argument that VDOC policies ensured segregation conditions less harsh than those in *Wilkinson* likewise ignores Mr. Smith's sworn allegations defendants routinely violated those policies. *See* Appellees' Br. 33, 34 n.11. For instance, VDOC policy guarantees Level S inmates one hour outside their cells (albeit in an outdoor cage, JA91) "at least five days per week."[3] Appellees' Br. 33–34. By contrast,

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[2] Mr. Smith sought discovery on these searches, JA39, but defendants refused to provide any, JA184.

[3] Defendants assert Mr. Smith's amended complaint confirmed he received one hour of "fresh air" per day. Appellees' Br. 34 n.11. Mr. Smith's allegation that he was "restricted" to an hour of "fresh air" does not indicate that he *received* that hour regularly, let alone every day. JA27.

Mr. Smith alleged in his sworn amended complaint prison officials frequently confined him to his cell for twenty-four hours five to six days a week and "frequently canceled" his supposedly regular recreation. JA25. In light of these allegations, simply pointing to VDOC policy cannot remove dispute about what actually happened.

2. This Court Should Consider the Burden Defendants Chose to Place on Mr. Smith's Religious Practice.

Each day Mr. Smith spent in segregation, defendants forced an impossible choice: violate his religious beliefs by complying with VDOC's grooming policy or languish indefinitely in brutal conditions. *See* Smith Br. 29–30. This forced choice magnified the brutality of Mr. Smith's segregation.

This Court can and should consider how defendants' decision to force this impossible choice exacted a devastating toll on Mr. Smith. Defendants argue this Court cannot consider this toll since this case raises no Free Exercise or RLUIPA claim challenging VDOC grooming policy. Appellees' Br. 36. That Mr. Smith has not brought such claims is beside the point. He does not challenge the grooming policy's validity.

He argues instead that defendants placed him indefinitely in intolerable conditions, and the religious burden defendants inflicted was one particularly severe aspect of those conditions. Regardless whether this burden was unlawful in itself, defendants offer no reason for this Court to discount its contribution to the overall harshness of Mr. Smith's conditions. Courts applying *Wilkinson* regularly consider the degree to which confinement conditions impose a burden on an inmate's religious practice when evaluating the magnitude of confinement conditions. *See* Smith Br. 29–30 (citing cases). Mr. Smith simply asks this Court to do the same.

Defendants stress, and Mr. Smith does not dispute, that VDOC's grooming policy also applies to general population inmates. Appellees' Br. 35. But VDOC did not force inmates in general population to make the coercive choice demanded of Mr. Smith. As defendants acknowledge, VDOC transferred persistent violators of their (now defunct) grooming policy to a Grooming Policy Violators Housing Unit ("VHU"), Appellees' Br. 36 n.12, with considerably less draconian conditions than segregated confinement, *see* JA126–29.

3. The Collective Harshness of Mr. Smith's Confinement Conditions Mirrors *Wilkinson*.

Defendants also assert Mr. Smith cannot establish a protected liberty interest under *Wilkinson* because not *every* condition in segregated confinement is harsher than in general population. Appellees' Br. 32 (noting Mr. Smith received regular meals, mail, visitation, medical and legal services, and religious guidance). But as this Court has explained, *Wilkinson* "did not engage in a point-by-point comparison of the conditions that inmates experienced in a supermax facility with the ordinary incidents of prison life." *Incumaa*, 791 F.3d at 530. Rather, it requires comparing "collective" severity of confinement conditions. *See Wilkerson v. Goodwin*, 774 F.3d 845, 856 (5th Cir. 2014).

Indeed, defendants rely on conditions that failed to mitigate the atypical and significant hardship present in *Wilkinson*, *see* 545 U.S. at 214 (visitation opportunities and regular meals), and other cases, *see* Smith Br. 32–33. And Mr. Smith was constitutionally entitled to many of these privileges. *See id.* at 32.

Defendants argue Mr. Smith had access to institutional employment during his time in segregation at Wallens Ridge, Appellees'

Br. 33–34, but that fact is not clear from the record. Defendants stalled Mr. Smith at the first level of the Step-Down Program, SM-0, Smith Br. 7–8, 11, rendering him ineligible for employment under VDOC policy, JA91. That policy reauthorized Mr. Smith's access to institutional employment only in 2017, after VDOC transferred him to Red Onion where, no longer under defendants' control, he vaulted three steps from SM-0 to the initial stage of non-segregation. *See* JA91, JA235. The record says nothing about Mr. Smith's employment before 2017.[4]

Considered as a whole, Mr. Smith endured conditions "synonymous with [the] extreme isolation" that most concerned the *Wilkinson* Court. *See Wilkinson*, 545 U.S. at 214. He spent up to twenty-four hours a day in a cell modified to prevent any communication, with lights on at all times. *See* Smith Br. 27. His sworn complaint also alleged his untreated mental health "deteriorated significantly" in segregation. *See* JA17, JA147, JA162. Collectively, Mr. Smith's confinement conditions were at

[4] If defendants *did* violate VDOC policy and permit employment at Wallens Ridge despite Mr. Smith's SM-0 status—a point on which they have produced no evidence—their decision to stall him at SM-0 becomes even more arbitrary.

least as harsh as those in *Wilkinson*, if not harsher. *See* Appellees' Br. 7 (explaining prison officials subject Level S inmates to a "visual strip" search every time they leave their cell); *Incumaa*, 791 F.3d at 531 (noting confinement conditions were "worse in some respects" than in *Wilkinson* because the inmate was subjected to a "highly intrusive strip search" each time he left his cell).

B. The Nearly Seven-Year Duration and Indefinite Continuation of Mr. Smith's Confinement Weigh in Favor of Atypical and Significant Hardship.

Minimizing the nearly *seven years* Mr. Smith spent in these conditions with no hope for release, defendants argue his segregation had definite duration because they periodically reviewed his status. Appellees' Br. 37. In fact, the lengthy period itself supports a finding of atypical and significant hardship. And the record establishes Mr. Smith's detention was indefinite despite periodic reviews because these reviews had predetermined conclusions.

1. Mr. Smith's Entire Time in Segregation Weighs in Favor of Atypical and Significant Hardship.

Mr. Smith languished for nearly seven years in segregated confinement. Defendants: (1) urge this Court to ignore Mr. Smith's two

years in segregated confinement immediately preceding his transfer to Wallens Ridge; and (2) argue this duration is too short to support atypical and significant hardship. Appellees' Br. 38–40. They are incorrect on each point.

First, this Court should consider Mr. Smith's entire time in segregation because atypical and significant hardship focuses on the inmate's experience. *See Wilkinson*, 545 U.S. at 223 (considering "atypical and significant hardship *on the inmate*") (quotation marks and citation omitted) (emphasis added). Defendants were also well aware Mr. Smith had already suffered two years in segregation when they subjected him to an additional four-plus years. *See* JA212; *see also Wilkerson*, 774 F.3d at 857 (considering the entire timeline when defendants knew of previous segregated confinement); *Shoats v. Horn*, 213 F.3d 140, 142–44 (3d Cir. 2000) (considering cumulative eight-year timeline despite multiple prison transfers). Given long-term segregated confinement's psychological toll, *see Incumaa*, 791 F.3d at 534, this Court cannot ignore the hardship inflicted by previous segregated confinement simply because it occurred at another VDOC facility.

Second, without citing a single case saying so, defendants argue four (and presumably seven) years is insufficient to weigh in favor of a liberty interest. Appellees' Br. 38–40. Other circuits would easily find four years, let alone nearly seven, sufficient to support a finding of atypical and significant hardship. *See*, *e.g.*, *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 698–99 (7th Cir. 2009) (240 days); *Harden-Bey v. Rutter*, 524 F.3d 789, 792–93 (6th Cir. 2008) (three years); *Iqbal v. Hasty*, 490 F.3d 143, 161 (2d Cir. 2007) (reversed on other grounds) (305 days).

2. Mr. Smith's Detention Was Indefinite Despite Periodic Reviews.

Although defendants agree officials must maintain an avenue for release of segregated confinement inmates, they argue Mr. Smith's time in segregated confinement was definite because he moved out of segregation eventually, received periodic reviews, and supposedly could have left segregated confinement sooner by cutting his hair. Appellees' Br. 37, 40. The record belies each argument.

First, defendants omit key information when they state: "After several years . . . Smith progressed . . . and was transitioned to a lower security facility." Appellees' Br. 37. Defendants relegated Mr. Smith to

the harshest level in every single review under their control for four years. *See* JA8–14. Only after he filed this lawsuit, transferred to another prison, and came under the control of new officials, did he "progress" in the Program by jumping three steps in one day. *See* JA6, JA235. To "progress," Mr. Smith had to file a lawsuit and leave defendants' control.

Second, defendants ignore material factual disputes about whether Mr. Smith's ninety-day Institutional Classification Authority ("ICA") reviews offered him any real opportunity for release from segregation. *See* Smith Br. 36–37; *Incumaa*, 791 F.3d at 523, 532, 534 (finding indefinite confinement despite thirty-day reviews where reviews were not meaningful). Defendants kept Mr. Smith at the harshest Step-Down level each review from December 20, 2013 to August 16, 2017. Their rote repetition of perfunctory rationales—such as should "remain" in segregation, *see, e.g.*, JA211, or needed a longer period of "stable adjustment," *see, e.g.*, JA223–25—indicates reviews were meaningless and offered no genuine consideration. *See Incumaa*, 791 F.3d at 534; *see also Wilkerson*, 744 F.3d at 856 (noting "rote repetition" in reviews

showed segregation was "effectively indefinite"). As explained below, *see infra* Part II.A, the arbitrary grooming rationale was inadequate too.

Defendants also offered no genuine avenue for review of their rationales. Reviewers of initial ICA recommendations rubberstamped each perfunctory and rote recommendation, often copying and pasting the initial rationale as their own. *See*, *e.g.*, JA225. Indeed, appellate procedures were sometimes conducted by the very official who made the decision below. JA11–12. Rather than offering any evidence Mr. Smith received genuine consideration during ICA reviews, defendants point to VDOC policy requiring annual and informal reviews. Appellees' Br. 37. But the sufficiency of Mr. Smith's other reviews cannot be determined because defendants refused to provide discovery about them. JA183; *see infra* Part III.

Third, defendants argue Mr. Smith had a clear avenue for release: cutting his hair. Appellees' Br. 40. Defendants identified a release avenue they *knew* Mr. Smith could not take, *see* JA154, JA219, JA225, and one VDOC policies never required, *see* JA126 (explaining consistent grooming offenders may be placed in VHU as an alternative to remaining

in segregation or restrictive housing); Appellees' Br. 35–36 n.13 (explaining grooming violators were housed in VHU).

Nor would violating his religion necessarily provide a path out of segregation. Other vague rationales in defendants' reviews ensured that even if Mr. Smith cut his hair, defendants could *still* keep him at the first—and harshest—Step-Down level. *See, e.g.*, JA224–25 (recommending continued segregation because additional "stable adjustment" was needed); *see also Incumaa*, 791 F.3d at 532 (explaining uncertain pathways do not alleviate indefiniteness). Even defendant Gilbert could not explain what "stable adjustment" might mean. JA241. A reasonable juror could therefore find even if Mr. Smith cut his hair, one bar to leaving segregation would simply be replaced by another.

C. Stalling Mr. Smith in the Harshest Segregation Status Foreclosed Good Time Credit Accrual.

Defendants accept that depriving someone of good time credit eligibility is a collateral consequence relevant to atypical and significant

hardship. Appellees' Br. 41–42. Their argument that Mr. Smith was not deprived of such eligibility, *id.*, ignores Mr. Smith's reality.[5]

VDOC assigns each inmate one of four good time credit class levels, from Class Level I (accruing the most credits) to Class Level IV (accruing none). VDOC 830.3 at 11 (2019), https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf.[6] Defendants concede Mr. Smith was ineligible to progress to Class Level I while in Level S segregation, but they argue this did not affect him because he never reached Level II and so would not have reached Level I even if not in segregation. Appellees' Br. 41. This argument fails to capture how defendants' decision stalling Mr. Smith's Step-Down Program progress *caused* his stagnation in Class Level.

The record demonstrates that causal link. Defendants do not dispute Mr. Smith was eligible to progress in Class Level from his 2015

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[5] Mr. Smith does not claim segregation cost him already-accrued good time credits. Rather, he claims he was unable to accrue good time credits he would otherwise have received. Smith Br. 37-39.

[6] This policy became effective March 1, 2019, but defendants accept the same rules governed Mr. Smith's time in segregation. Appellees' Br. 9, 9 n.2–3.

review onward.[7] Despite zero infractions, defendants recommended Class Level IV at each review thereafter because Mr. Smith was not enrolled in treatment programs such as Step-Down programming; not employed; and not in compliance with grooming policy. JA222, JA227; *see also* JA212 (describing the *Challenge Series*, a Step-Down course, as a "treatment program"). But defendants *barred* Mr. Smith's enrollment in Step-Down programs, JA11–12, and stalled him at the harshest Step-Down classification where he was ineligible for *any* employment, JA91. And VDOC's own policy prohibited their third justification—grooming compliance—for restricting good time credit accrual. JA126. Defendants nonetheless kept Mr. Smith at Class Level IV, barred from accruing any good time credit.

The connection between Step-Down and Class Level stagnation is even more obvious given Mr. Smith's simultaneous progression in both. On December 8, 2017, after Mr. Smith filed this suit and was transferred to Red Onion, he accelerated three levels in the Step-Down Program. *See*

[7] Defendants assert Mr. Smith's conviction was finalized in 2014, which required he remain at Class Level IV for one year. Appellees' Br. 13 n.7.

JA6, JA72 JA235. The very same day, an ICA at Red Onion recommended Class Level III, allowing Mr. Smith to accrue good time credit for the first time in three years. JA236.

II. Defendants' Alternative Grounds for Affirmance Fail.

Defendants offer two alternative grounds for affirming the grant of summary judgment. First, they argue no reasonable juror could conclude Mr. Smith received constitutionally insufficient process during his time in segregation. *See* Appellees' Br. 42–48. Second, they argue defendants are entitled to qualified immunity, presumably regardless of what facts are found at trial. *See* Appellees' Br. 49–53. Both arguments are flawed.

A. Defendants' Sham Reviews Offered Mr. Smith No Meaningful Process for Escaping Segregation.

Defendants argue VDOC policies provided Mr. Smith all process constitutionally due under *Mathews v. Eldridge*, 424 U.S. 319 (1976). Appellees' Br. 42–44. That is no answer because Mr. Smith's damages claims do not challenge policies' facial constitutionality under *Mathews*. Rather, he argues defendants, in their individual capacities, never gave him the "meaningful" review due process requires. *Incumaa*, 791 F.3d at 533. This Court should hold genuine fact disputes preclude summary

judgment for defendants if it reaches this question or, in the alternative, should remand to allow the district court to first address it.

Defendants did not provide meaningful review of Mr. Smith's segregation status. They arbitrarily barred him from Step-Down programming for over four years. To leave segregation, inmates must complete the Step-Down Program, which involves completing a multi-step curriculum. JA58–59. Although defendants knew Mr. Smith completed one portion of the curriculum at Red Onion, *see* JA212, and was largely infraction free,[8] JA212, JA218, JA222, JA227, JA236, they nevertheless barred him advancing in the Step-Down curriculum for his *entire* four years at Wallens Ridge without any adequate reason, *see* JA11–12, JA248–49.

The record shows defendants relied on an arbitrary justification they knew Mr. Smith could not address. They decided a grooming violation that did not justify his initial assignment to segregated confinement nevertheless blocked his way out. *See* JA126–27 (general

[8] Mr. Smith received two minor infractions, one in 2014 and one in 2017. Defendants have never indicated these infractions barred Mr. Smith's enrollment. *See* JA11–12, JA248–49.

population inmates who violate the grooming policy enter VHU rather than segregated confinement); Appellees' Br. 35–36 n.12. And they did so even though Mr. Smith told them he could not cut his hair and was desperate for any other way out of segregation. *See* JA154, JA219 ("I meet the criteria to be placed in the violator housing unit, for offenders in a non-compliance with the grooming policy"), JA225 ("I want to go to the hair pod"). Defendants acknowledge grooming policy offenders received VHU housing assignments not segregation, *see* Appellees' Br. 34 n.11, but they chose to force Mr. Smith to violate his religion or stay in segregation forever. Defendants' arbitrary decision to force this choice was not due process. *Cf. Incumaa*, 791 F.3d at 521, 524, 534–35 (concluding that whether an inmate received meaningful process raised a triable fact issue where segregated confinement was based, in part, on his religion despite several general population inmates' affiliation with the same religion).

Defendants argue ICA reviews and appellate procedures remove any factual dispute over whether Mr. Smith received adequate process.[9] Appellees' Br. 45–47. But defendants never meaningfully considered Mr. Smith for release in their ICA reviews, and appellate review merely rubberstamped those empty recommendations. *See Incumaa*, 791 F.3d at 534; *supra* Part I.B.2.

Nor did defendants provide any meaningful feedback in their reviews to guide Mr. Smith in adjusting his behavior to earn release from segregation. Perhaps Mr. Smith could have done something to advance, short of cutting his hair. But defendants' vague rationales—he must "remain" in segregation or he needed a longer period of "stable adjustment"—provided no insight into what that might be. *See Wilkinson*, 545 U.S. at 226 (explaining a statement of reasons is a central

[9] Defendants would require lesser procedural protections when recommending inmates remain in segregation than when initially assigning them to segregation. Appellees' Br. 44–45. This distinction is misplaced. Periodic reviews with adequate procedural protections remain crucial after inmates are assigned to segregated confinement to avoid indefinite continuation of segregation. *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983). This Court need not decide exactly what due process requires of such reviews because, at a minimum, it requires them to ensure meaningful consideration—a point defendants do not dispute.

due process requirement because it provides a basis for objection and a guide for future behavior). Defendants thus ensured Mr. Smith could not secure release by adjusting his behavior or challenging any particular factual basis.

In light of the record, including Mr. Smith's sworn statements, whether defendants meaningfully applied review procedures presents a genuine issue of material fact for a jury to resolve. *See Selby v. Caruso*, 734 F.3d 554, 559–61 (6th Cir. 2013). At the very least, this is a fact-specific issue this Court should remand for the district court to decide in the first instance. *See Incumaa*, 791 F.3d at 533, 535 (remanding to determine whether inmate received adequate process); *see also Williams v. Hobbs*, 662 F.3d 994, 999–1000 (8th Cir. 2011) (noting previous remand to assess whether defendants applied procedures "meaningfully").

B. Qualified Immunity Is Not an Adequate Alternate Ground for Affirmance.

Qualified immunity does not shield defendants if they (1) violated a constitutional right (2) "clearly established at the time of the challenged conduct." *Williamson v. Stirling*, 912 F.3d 154, 186 (4th Cir. 2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). This Court should

remand so the district court may first assess each defendant's individual liability after additional discovery. If this Court chooses to address the issue, it should deny qualified immunity because defendants were on notice they were failing to provide constitutionally required process to protect Mr. Smith's clearly established liberty interest.

1. This Court Should Remand for Individualized Qualified Immunity Analysis.

The district court did not address qualified immunity, an issue requiring individualized assessment of each defendant's role in depriving Mr. Smith of due process. *See Gilliam v. Sealey*, 932 F.3d 216, 229 (4th Cir. 2019); *Estate of Williams by Rose v. Cline*, 902 F.3d 643, 651 (7th Cir. 2018) (stressing the importance of individualized qualified immunity analysis when the relevant facts "differ from defendant to defendant"). This analysis is complex and fact-intensive, as defendants had varying degrees of involvement in stalling Mr. Smith's progress in the Step-Down Program. *See, e.g.*, Smith Br. 10 (explaining defendants Collins and Light provided justifications for continued segregation); *id.* (noting defendant Gilbert's involvement in each of Mr. Smith's ICA reviews). The district court is better equipped to conduct this individualized, fact-

specific inquiry. *See Cline*, 902 F.3d at 652 (explaining the district court "must articulate an individualized analysis" of the facts before assessing qualified immunity).

In addition, any qualified immunity decision would be premature because Mr. Smith needs additional discovery on defendants' reviews of his segregation status. *See Crawford-El v. Britton*, 523 U.S. 574, 593 n.14 (1998) (explaining discovery may be necessary "before the district court can resolve a motion for summary judgment based on qualified immunity"); *infra* Part III. For example, defendants argue they are entitled to qualified immunity because VDOC policy provided a "multilayered review" of Mr. Smith's segregated status, including an annual external review as well as other informal reviews "as needed." Appellees' Br. 6, 52 n.17. Mr. Smith sought discovery on these other "layers" of review. JA39. He requested documents generated in these reviews, and names and positions of everyone involved. *Id.* Defendants refused to provide this information. JA183. Challenging defendants' refusal, Mr. Smith described this discovery as "integral" to his claim. JA272; *see also supra* Part II.A. This Court should remand for the district

court to determine whether additional discovery is required and qualified immunity applies.

2. Defendants Are Not Entitled to Qualified Immunity.

If this Court addresses qualified immunity, it should hold defendants are not entitled to it. As discussed above, defendants violated Mr. Smith's constitutional rights by infringing a protected liberty interest without due process. *See supra* Parts I, II.A. Mr. Smith's protected liberty interest and right to meaningful review were clearly established when defendants violated his rights.

a. *Wilkinson* Clearly Established Mr. Smith's Protected Liberty Interest.

The Supreme Court's 2005 decision in *Wilkinson* clearly established Mr. Smith's liberty interest in avoiding the brutal segregated confinement conditions defendants imposed. *See* 545 U.S at 222–24. As this Court has explained, *Wilkinson* provides government officials "fair notice of their due process obligations" where *Wilkinson*'s three "distinct" factors are present: (1) high cumulative magnitude of confinement conditions; (2) temporal indefiniteness of segregation; and (3) collateral

consequences on the inmate's sentence. *See Williamson*, 912 F.3d at 188 n.26; *Incumaa*, 791 F.3d at 530 (articulating the three *Wilkinson* factors). A reasonable officer would have understood *Wilkinson*'s "distinct" factors present on Mr. Smith's facts. *See supra* Part I.

Defendants argue otherwise because multiple unpublished district court opinions rejected claims "that the conditions of confinement for level 'S' inmates are harsh and atypical." Appellees' Br. 50–51. Unpublished district court opinions say nothing about whether Mr. Smith's protected liberty interest was clearly established. *See Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545–46 (4th Cir. 2017). This Court has stressed even published district court opinions do not affect whether a right is clearly established, as those opinions lack precedential value. *See id.* at 545 ("Given that published district court opinions, like unpublished opinions from our Court, have no precedential value, it follows that we should not consider them."). In addition, because Mr. Smith focuses not on VDOC policies but instead on defendants' particular conduct, *see supra* Part I.A.1, defendants' unpublished cases have even less relevance.

b. Mr. Smith's Right to Meaningful Review Was Clearly Established When Defendants Provided Sham Reviews.

In 1983, the Supreme Court held prisoners are entitled to periodic review of their segregation status to ensure segregation is not "used as a pretext for indefinite confinement." *See Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983). As a result, "prison officials have been on notice since *Hewitt* that periodic reviews of administrative segregation are constitutionally required, and it is self-evident that they cannot be a sham." *Isby v. Brown*, 856 F.3d 508, 530 (7th Cir. 2017); *see, e.g., Selby v. Caruso*, 734 F.3d 554, 560–61 (6th Cir. 2013) (holding *Hewitt* put prison officials on notice an inmate "could not be confined in administrative segregation for pretextual reasons" because inmates have a right to "meaningful periodic reviews").

Even if this Court concludes *Hewitt* did not clearly establish a right to *meaningful* periodic reviews, many court of appeals decisions provided defendants notice. *See, e.g.*, *Selby*, 734 F.3d at 560 (holding prison officials must provide "meaningful periodic reviews"); *Hobbs*, 662 F.3d at 1006 (concluding segregation reviews "were not meaningful as the Due

Process Clause requires"); *Toevs v. Reid*, 685 F.3d 903, 912 (10th Cir. 2012) ("[T]he review must be meaningful; it cannot be a sham or a pretext."); *see also Booker*, 855 F.3d at 544–45 (explaining opinions from other circuits can clearly establish a right).

At a minimum, this Court clearly said in *Incumaa*, decided two years before Mr. Smith initiated this suit and VDOC transferred him from Wallens Ridge, that review procedures must be meaningful. 791 F.3d at 533 ("This record, bereft of any evidence that Appellant has ever received meaningful review, stands in contrast to *Wilkinson* and falls short of satisfying *Hewitt*."). Thus, even if *Hewitt* and the consensus of persuasive authority did not clearly establish meaningful segregation reviews are constitutionally required, *Incumaa* laid the matter to rest in this Court, and defendants were then not entitled to qualified immunity.

Defendants stress factual differences between VDOC's ICA review procedures and the review procedures in *Incumaa*. Appellees' Br. 52 n.17. But Mr. Smith challenges defendants' failure to conduct meaningful reviews, not VDOC's review procedures. Just as importantly, *Incumaa*'s facts need not be identical to clearly establish meaningful

reviews of an inmate's segregated confinement status are constitutionally required. *See Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017) (explaining a case need not be "directly on point" for a right to be clearly established). As in *Incumaa*, Mr. Smith's reviews were meaningless because defendants repeated the same rote, perfunctory justifications for keeping him in segregation. *See supra* Part II.A. That meaningless repetition continued even after this Court's 2015 *Incumaa* decision. *See, e.g.*, JA223–26, JA228–30.

III. Mr. Smith's Discovery Claims Are Properly Before This Court, and the District Court Abused Its Discretion by Granting Summary Judgment.

Even if this Court concludes the existing record presents no genuine issue of material fact, the district court prematurely granted summary judgment because Mr. Smith needed additional discovery. The district court never addressed this issue. Defendants argue Mr. Smith received adequate discovery and failed to notify the district court he needed more. Appellees' Br. 56–59. They also argue he waived his discovery arguments because he did not object to the magistrate judge's order denying his motions to compel. *Id.* at 54–56. Both arguments fail.

Defendants do not dispute Mr. Smith sought material discovery. *Id*. at 57–58. Nor do they dispute a district court abuses its discretion in granting summary judgment when a litigant puts it on notice there has been inadequate opportunity for discovery. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 247 (4th Cir. 2002). Defendants argue only that Mr. Smith received discovery and failed to notify the district court he needed more. Appellees' Br. 57–59. That argument fails to consider the quality of the discovery he received.

Defendants argue their responses to three sets of interrogatories and requests for production of documents were adequate. *Id*. at 57–58. Simply counting the number of discovery responses, without considering their quality, fails to establish adequate opportunity for discovery. Mr. Smith sought discovery defendants do not dispute was material about conditions in segregation and his reviews. JA39–40, JA244–49. Defendants refused his requests to provide pictures of his cell and its modifications, information on cell cleaning procedures, and information on the strip and cavity searches he endured. *See* JA39–40, JA183–184, JA273. Nor did they provide any documentation from his external and

informal reviews. *See* JA39–40, JA183–184, JA272. These incomplete responses meant Mr. Smith did *not* get adequate discovery on the "fact-specific" issue of atypical and significant hardship. *Incumaa*, 791 F.3d at 527 (internal quotation marks and citation omitted); *see also Harrods*, 302 F.3d at 247 (explaining fact-specific issues weigh in favor of additional discovery); JA292–309. Mr. Smith twice put the district court on notice he had not received an adequate opportunity for discovery by specifically referencing Rule 56(d) in two oppositions to defendants' summary judgment motions. JA139, JA255. Defendants never argued to the district court that any discovery they subsequently provided addressed Mr. Smith's Rule 56(d) concerns, and Mr. Smith made clear they did not by filing additional motions to compel. JA269, JA272, JA279, JA282.

Defendants argue Mr. Smith waived his discovery arguments by failing to object to the magistrate judge's order denying his motions to compel. Appellees' Br. 54–56. But it is far from clear the magistrate judge's denial was intended to address the Rule 56(d) oppositions already pending before the district court. *See* JA287, JA139, JA255. The

magistrate judge's order neither explained Mr. Smith needed to object nor presented consequences for failing to do so. JA287. Instead, the order stated the decision was "without prejudice" and discovery could "reopen" if trial was scheduled, JA287, language Mr. Smith, a pro se litigant, could reasonably think left unresolved his Rule 56(d) argument. *Cf. Wright v. Collins*, 766 F.2d 841, 843, 846–47 (4th Cir. 1985) (excusing pro se litigant's failure to object to report and recommendation on dispositive issue where there was no notice of the consequences).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of summary judgment and remand this case for further proceedings including: (1) trial, (2) an initial determination on the process Mr. Smith received, (3) an initial determination on qualified immunity, or (4) further discovery.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 5,594 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 January 28, 2020, a copy of Appellant's Reply Brief was served on counsel for Appellees via the Court's ECF system.

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