No. 18–7313

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ELBERT SMITH
(State Prisoner: 1148130),

Plaintiff-Appellant,

v.

DENNIS COLLINS; ANTHONY GILBERT;
RICHARD LIGHT; LESLIE FLEMING; MARCUS ELAM,

Defendants-Appellees.

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

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January 7, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Pursuant to FRAP 26.1 and Local Rule 26.1,

DENNIS COLLINS; ANTHONY GILBERT; RICHARD LIGHT;LESLIE FLEMING; MARCUS ELAM
(name of party/amicus)

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If yes, identify all parent corporations, including all generations of parent corporations:

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
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6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Laura H. Cahill Date: 10/17/2019

Counsel for: Defendants - Appellees

CERTIFICATE OF SERVICE

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I certify that on 10/17/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTRODUCTION

Plaintiff-Appellant Elbert Smith is an inmate in the custody of the Virginia Department of Corrections (VDOC). After he assaulted a prison guard, Smith was placed in administrative segregation, designated security level "S," and eventually enrolled in VDOC's Segregation Reduction Step-Down Program (Step-Down Program).

Despite the multi-layer review mechanisms VDOC uses to assess the status of inmates in the Step-Down Program, Smith sued several VDOC officials under 42 U.S.C. § 1983, claiming that his procedural due process rights were violated by his continued confinement at level "S." The district court ordered discovery and eventually granted summary judgment to all defendants.

That district court's decision should be affirmed. As the court concluded, Smith had no protected liberty interest in avoiding continued confinement at security level "S" because the conditions imposed on him were not harsh and atypical as compared to the ordinary incidents of prison life. Even if Smith could establish a protected liberty interest, moreover, VDOC's multi-layer review process provided him with all the process he was due. And even if that were not

the case, defendants would be entitled to qualified immunity because any conceivable violation of Smith's due process rights was not clearly established at the time of the challenged conduct.

Nor is Smith entitled to a remand to conduct additional discovery. By failing to challenge any of the magistrate judge's discovery rulings before the district court, Smith waived any discovery-related challenge on appeal. Nor did Smith properly put the district court on notice that additional discovery was needed before summary judgement could be adjudicated.

JURISDICTIONAL STATEMENT

Because this is an action under 42 U.S.C. § 1983, the district court had jurisdiction under 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment on September 20, 2018, JA 310, and Smith filed a timely notice of appeal on October 18, 2018, JA 311–13. See Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

I. Whether the district court properly granted summary judgment to defendants on Smith's procedural due process claim.

II. Whether Smith is entitled to remand to engage in further discovery where he failed to object to the magistrate judge's order denying his motions to compel and did not put the district court on notice that additional discovery was needed before summary judgment could be adjudicated.

STATEMENT

I. Virginia's Segregation Reduction Step-Down Program

A. VDOC procedures for identifying and evaluating offenders warranting segregated confinement

1. In Virginia, "offenders who must be managed in a segregation setting" are classified as security level "S." JA 74, JA 75, 110; see also JA 68–69; 293–94. Offenders may be so designated for a number of reasons, including risk of "extreme or deadly violence" or "escape" or exhibiting a "[p]attern of excessive violent disciplinary charges reflecting inability to adjust to a lower level of supervision." JA 75. An inmate's initial assignment to security level "S" requires a formal hearing by the Institutional Classification Authority (ICA), review by Central Classification Services, and the approval of both the warden of the prison where level "S" inmates are housed and the appropriate regional administrator. JA 76, 110.

2. An offender's categorization as level "S" need not be permanent. Since 2013, for example, VDOC has maintained a "Segregation Reduction Step-Down Program" that uses "incentive based offender management" to "create a pathway for offenders to step-down from Security level S to lower security levels." JA 74, 294; see *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019) (describing the Step-Down Program as "a sophisticated, well-conceived program to better inmates' behavior and their confinement, as well as to improve safety and the overall operation of the prison").

The Step-Down Program categorizes offenders based on the level of risk they pose and then uses an incentives-based approach to improve their behavior. As relevant here, offenders with a history of fighting with staff or other offenders "without the intent to invoke serious harm or the intent to kill" are placed in the Special Management (SM) program. JA 74–75; see also JA 294–95.[1] SM offenders are assigned levels—SM0, SM1, SM2, and SM-SL6—which correspond to

[1] Offenders "with the potential for extreme and/or deadly violence" are placed in a different pathway known as the Intensive Management (IM) program. JA 74. IM offenders progress through parallel privilege levels, from IM0 to IM6. See *id.*

progressively greater privileges. JA 77, 78, 86–88, 91–93; see also JA 295. Using "observable standards" to evaluate inmates, the program rewards those who engage in positive behavior with incremental privileges. JA 74, 81. Progress is assessed based on offenders' performance across three areas: disciplinary goals, responsible behavior goals, and programming participation goals, including completion of designated portions of seven workbooks in the *Challenge Series*. JA 295.

"Following a successful period in . . . SM, offenders [are] eligible for advancement and to step down from Level S to their first introduction into general population at Security Level 6." JA 78, 110–11. Such a change must be recommended by the ICA and reviewed by the wardens of Red Onion and Wallens Ridge state prisons, which house security level 6 inmates. JA 110–11. Offenders who make adequate progress at security level 6 are reclassified as security level 5, "stepped down" into the general population, and considered for eventual transfer to a lower security level institution. JA 111.

3. All level "S" offenders undergo periodic formal and informal reviews to ensure that they are appropriately classified. Those reviews consist of:

- *Formal reviews by the ICA at least once every 90 days*. See JA 72, 83, 110. Offenders are given notice of an ICA review at least 48 hours in advance, have the opportunity to be present at the hearing, and may appeal any classification decision through the offender grievance procedure. JA 97–98. The Facility Unit Head or designee reviews each ICA action and either approves or disapproves the recommendation. JA 99.
- *Annual reviews by an interdisciplinary external review team.* See JA 82. This review assesses: (1) whether the offender is appropriately assigned to level "S"; (2) whether the offender meets the criteria for the internal pathway to which he is currently assigned (such as Special Management); (3) whether a pathway change would be appropriate; and (4) whether the team assigned to evaluate the offender at his specific facility has made appropriate decisions for his advancement. JA 82.
- *As-needed reviews by the dual treatment team*. See JA 83. That team is required to advise the Regional Operations

Chief and the warden "if the team believes an offender may not meet the criteria for Level S." JA 83.

- *Weekly informal ratings by prison officials and counselors.* These officials are encouraged to communicate with offenders routinely to acknowledge positive performance and to motivate them to improve when needed. JA 77, 78; see also JA 297.

B. Conditions of confinement at security level "S"

1. Because level "S" offenders pose greater risks than inmates in the general population, such offenders are subjected to enhanced security measures. Level "S" offenders are confined in a single cell, whose lights are dimmed at night, but not completely turned off. JA 296. Such offenders must "undergo a visual strip search" whenever they leave their cells, "and, until they reach the SM-SL6 stage" they cannot leave their cells without being "restrained in handcuffs and shackles and escorted by two officers." *Id.*

Although the conditions of confinement imposed on level "S" offenders differ in certain respects from those experienced by inmates in the general population, many other aspects of treatment remain the

same. Level "S" offenders receive laundry, barbering and hair care services, and exchanges of clothing, bedding, and linen in the same manner as offenders in the general population. JA 296, 306; see also OP 841.4(IV)(K)(2). They also receive the same number and type of meals as the general population, although they eat those meals in their cells, rather than in a congregate setting. JA 296, 306; see also OP 841.4(IV)(K)(3)(c). Level "S" offenders in the Special Management (SM) program are permitted at least three showers per week. JA 296. They are allowed to check out two library books per week, possess legal and religious materials, and purchase up to $10 of commissary items from an approved list. JA 91–93. SM inmates also have access to a television that is mounted on the pod wall and may purchase a radio after three months charge-free. *Id.* They have in-cell programming and out-of-cell recreation, including one hour outside per day. *Id.* They are permitted one hour of non-contact visitation per week and may make two 15-minutes phone calls per month. *Id.* As offenders progress through the various levels, they gain additional privileges. *Id.*; see also JA 295–96.

2. The Step-Down Program does not govern good-time credits. Rather, VDOC Operating Procedure 830.3, *Good Time Awards*,[2] sets forth the applicable rules and procedures for earning such credit. Under the "earned sentence credit" system,[3] offenders are assigned a class level from I to IV, which governs the rate at which they earn future sentence-reducing credit. See OP 830.3(VIII)(B).

Like all inmates assigned to restrictive housing, security level "S" offenders are not eligible to advance from a lower earning-class level to level I. OP 830.3(V)(G). But that is the only restriction placed on their assigned good time earning level. Offenders who commit a felony offense while in custody, however, are automatically assigned to level IV, and must remain at that level for at least 12 months following their date of conviction. See OP 830.3(V)(H)(2).

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[2] VDOC OP 830.3, *Good Time Awards*, is publicly available at https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-830-3.pdf.

[3] This system governs good-time credits for offenders sentenced for crimes committed after January 1, 1995—the date that Virginia abolished discretionary parole. Public records available through the Virginia Courts Case Information System indicate that the offense date for Smith's underlying murder conviction was January 25, 1995. *Commonwealth v. Smith*, CR95-002121 (Virginia Beach Cir. Ct.) (second degree murder and use of a firearm in a felony).

II. Factual and procedural background

C. Factual background

1. Smith entered VDOC custody in November 1996 and is serving a 44-year sentence for second-degree murder, two counts of malicious wounding, use of a firearm in the commission of a felony, and distribution of cocaine. JA 292–93. Because Smith refused to cut his hair as required by VDOC policy, in November 2010, he was assigned to the Grooming Policy Violators Housing Unit (VHU) then located at Keen Mountain Correctional Center. JA 293, see also JA 176–80.[4] Three months later, in February 2011, Smith was arrested and charged with aggravated assault against a correctional officer. JA 293. As a result, he was transferred to Wallens Ridge on an emergency basis (JA 240) and then moved to Red Onion, see JA 190–91. He was officially assigned to security level "S." JA 293. Per VDOC policy, Smith received formal ICA

[4] VDOC no longer maintains a separate VHU, instead assigning individuals who refuse to comply with the grooming policy to security level 5. See OP 864.1, *Offender Grooming and Hygiene* (effective June 1, 2019), available at https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-864-1.pdf. Under the current grooming policy, offenders may maintain any hair length they desire, provided that long hair is not used to conceal contraband or signal gang affiliation and poses no other health and safety concern. See *id.*

hearings at least every 90 days.[5] In addition to those formal 90-day reviews, Smith had an annual review of good time earning level on November 28, 2011. JA 196.

2. In 2012, while still at Red Onion, Smith entered into an early version of the Step-Down Program. JA 298. He was initially classified as SM0, but progressed to SM-1 in less than a month. JA 202–04. Smith had 90-day reviews on December 27, 2012, and March 22, 2013, with no recommended change to his status. See JA 168–69, 206–07. It appears that Smith may have progressed to SM-2, but on June 6, 2013, an administrative reviewer determined that he should "Step back to SM-1 due to being out of compliance with the grooming policy." JA 208; see also JA 170.

Smith's good time earning level was also reviewed regularly. When he entered Red Onion in 2011, Smith was classified at level IV. See JA 196. He remained at level IV through several reviews. See, *e.g.*, JA 205.

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[5] Smith received these reviews on March 21, 2011 (JA 165, 192), May 30, 2011 (JA 193), August 24, 2011 (JA 166, 194), November 17, 2011 (JA 195), February 13, 2012 (JA 197), April 16, 2012 (JA 199), June 19, 2012 (JA 200), and August 29, 2012 (JA 201).

3. In July 2013, Smith was transferred to Wallens Ridge, where he continued to participate in the Step-Down Program. JA 171, 209; see also JA 298. While at Wallens Ridge, Smith had formal ICA status reviews every 90 days, as dictated by VDOC policy.[6] Although Smith asked to have his security level reduced so that he could return to the VHU, the ICA continuously recommended that he remain at security level "S." See, *e.g.*, JA 211, 216, 219, 225. During two of these ICA reviews, the same staff member recommended a disposition and then approved that recommendation on administrative review, in violation of VDOC policy. JA 299–300. When Smith appealed those decisions through the institutional grievance procedure, the warden and regional administrator agreed that a procedural violation had occurred, but did not otherwise recommend that Smith be transitioned out of security level "S." *Id.*

[6] Smith's ICA reviews occurred on December 19, 2013 (JA 172, 211), March 24, 2014 (JA 173, 214), June 17, 2014 (JA 215), September 16, 2014 (JA 216), December 9, 2014 (JA 217), March 9, 2015 (JA 174, 219), August 10, 2015 (JA 175, 220), October 28, 2015 (JA 221), February 1, 2016 (JA 223), April 28, 2016 (JA 224), July 20, 2016 (JA 225), October 3, 2016 (JA 226), December 20, 2016 (JA 228), March 27, 2017 (JA 229), June 22, 2017 (JA 230), and August 14, 2017 (JA 231).

Smith's good-time earning class level was also reviewed regularly at Wallens Ridge. Smith's class level was advanced to III in January 2014 after he completed a treatment program through the *Challenge Series* and enrolled in multiple classes. JA 212. But in December 2014, Smith's earning class level was reduced back to IV because he received a disciplinary infraction and did not complete any treatment programs during the review period. JA 218.[7] Smith's earning level remained at IV for the following two years, with reviews noting that he failed to

[7] The reduction was also necessitated by Smith's 2014 conviction for malicious wounding stemming from the 2011 incident at Keen Mountain. See OP 830.3(V)(H)(2) (stating that when an inmate receives a felony conviction for an offense that occurred while in custody, the inmate's good time level is automatically reduced to Level IV for a period of at least 12 months). The district court opinion states that the charges against Smith were ultimately dismissed, see JA 293, but that is incorrect. Although the Commonwealth dismissed the initial set of charges, and a circuit court dismissed the second set of charges based on a violation of the Speedy Trial Act, the court of appeals overturned the later finding and remanded the case for trial. See *Commonwealth v. Smith*, No. 0985–12–3, 2012 WL 5866517 (Cir. Ct. Buchanan Cty. Nov. 20, 2012). Smith was then convicted of malicious wounding by a Buchanan County jury. *Commonwealth v. Smith*, CR12000086-01 (Buchanan Cnty. Cir. Ct.). This Court may take judicial notice of that conviction. See *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (noting that court records are the most common type of judicially noticed records); see also *United States v. McDonald*, 617 Fed. Appx. 255, 258 (4th Cir. 2015) (taking judicial notice of state court judgment).

complete any treatment programs, did not obtain institutional employment, and was out of compliance with VDOC's grooming standards. JA 222, 227.

4. In October 2017, Smith was transferred back to Red Onion, along with all other level "S" inmates. JA 232, 304. Two months later, Smith was transitioned from level "S" to security level 6, having completed the Step-Down Program. JA 235. His good-time earning class level advanced to III on December 8, 2017. JA 236.

Several months later, in May 2018, Smith was transferred back to Wallens Ridge. JA 288. As of July 24, 2019, Smith had been transferred to Greensville Correctional Center, a lower security institution. *See* ECF 56 in the district court (notice of change of address).

D. Procedural background

1. In May 2017, Smith filed suit against four defendants from Wallens Ridge—unit manager Dennis Collins, Lieutenant Richard Light, counselor Anthony Gilbert, and Warden Leslie Fleming—along with VDOC's western regional administrator, Marcus Elam (collectively, defendants). Smith alleged that each defendant violated his procedural due process rights in connection with his ICA reviews at

Wallens Ridge and sought compensatory and punitive damages, as well as injunctive relief.[8] The district court later granted Smith leave to supplement his complaint to add factual allegations about his conditions of confinement as a security level "S" offender. JA 24–29.

2. Smith filed three discovery requests in the district court—two requests for production of documents, JA 39, 49, and interrogatories directed at Defendant Gilbert, JA 42. Defendants filed a motion for summary judgment raising a qualified immunity defense, JA 52, and sought a protective order to stay discovery until that motion could be adjudicated, JA 135. The district court denied the motion for a protective order and directed defendants to file responses to the three pending discovery requests. JA 181-82.

Defendants served and filed responses to Smith's discovery requests. JA 183–251. Dissatisfied with the responses, Smith filed

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[8] The equitable relief sought included a pathway "out of segregation," transfer to the VHU, transfer to a security level III facility, "preferably Greensville Correctional Center," a change to Smith's good-time earning level, a change in the sentence-reducing credit he should have received "for time served in confinement awaiting trial and pending appeals," and a "psychological screening." JA 17. As described below, Smith acknowledges that his requests for injunctive relief are now moot. See Smith Br. 22.

additional requests for documents, JA 272, and moved to compel further answers to interrogatories, JA 269. Shortly thereafter, Smith submitted additional interrogatories directed at Defendant Collins, see JA 263, and Defendant Light, see JA 275. Upon receiving responses to those interrogatories, Smith filed a motion to compel Defendant Collins to supplement one of his answers. JA 279. Before his pending motions to compel had been resolved, Smith filed yet another motion, this one reiterating complaints about certain of defendants' responses. JA 282.

Smith's four pending motions to compel were referred to a magistrate judge, who denied them without prejudice after determining that Smith could respond to defendants' motion for summary judgment without additional discovery. JA 287. Because Smith did object to the magistrate judge's discovery ruling, his motions to compel were not brought before the assigned district court judge.

3. With only defendants' motion for summary judgment before it, the district court granted the motion in full. JA 292–310.

The district court emphasized that Smith "has not alleged that the named defendants deprived him of his right to free exercise of his religious beliefs, denied him inadequate mental health treatment, or

imposed unconstitutional living conditions." JA 300–01 n.4. Instead, the court understood Smith's complaint, "[l]iberally construed," to be alleging two separate procedural due process claims: "that ([a]) [Smith] was inappropriately assigned to Level S without due process, and ([b]) the defendants' actions that kept [Smith] in segregation for four years under the Step-Down Program deprived him of a protected liberty interest without due process." JA 300.

a. As to the first claim (involving Smith's initial designation as level "S"), the district court concluded that the statute of limitations had run before Smith filed his complaint. JA 302–03. The court noted that the period for bringing a claim under 42 U.S.C. § 1983 in Virginia is two years after the claim accrued. See JA 303 (citing *A Society Without A Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011)). And it determined that any claim regarding Smith's initial assignment to security level "S" accrued in April 2013, and that Smith did not file suit until May 2017—more than four years later. *Id.*

b. The district court also concluded that defendants were "entitled to judgment as a matter of law as to Smith's" assertion that

his due process rights had been violated "during his classification under the Step-Down Program." JA 309.

The court explained that "[a]s a convicted prisoner, Smith does not have an *inherent*, constitutionally protected liberty interest in release from a more restrictive security classification." JA 304 (citing *Wilkinson v. Austin*, 545 U.S. 209, 221–22 (2005)) (emphasis added). The court acknowledged that Smith could have "[a] state-created liberty interest," but it emphasized that, under governing precedent, any such claim would require Smith to satisfy a two-part test. JA 304 (emphasis added). *First*, Smith would need to identify "'a basis for an interest or expectation in state regulations' in avoiding the conditions of his confinement under the Step-Down Program." *Id.* (quoting *Prieto v. Clark*, 780 F.3d 245, 250 (4th Cir. 2015)). *Second*, even if Smith could establish such an interest or expectation, he also needed to show "that those conditions 'impose[] atypical and significant hardship . . . in relation to the ordinary incidents of prison life.'" *Id.* (quoting *Sandin v. Connor*, 515 U.S. 472, 484 (1995)).

The district court concluded that Smith satisfied the first prong of the test but failed the second. JA 304–09. The court determined that

"Smith has a state-created liberty interest" because VDOC policies call for regular reviews of every level "S" inmate, including those in the Step-Down Program, "to determine whether [their] current segregation status remains appropriate or should be adjusted." JA 304–05. But the district court concluded that "Smith's continued confinement in the various segregation classifications within the OP 830.A categories" had not "imposed 'aytpical and significant hardship' compared to the 'ordinary incidents of prison life.'" JA 305 (quoting *Sandin*, 515 U.S. at 484).

The district court emphasized that "[t]he atypical hardship requirement is difficult to satisfy" and that "[m]ere limitations on privileges, property, and activities for administratively segregated inmates [] fall within the expected perimeters of the sentence imposed by a court of law." JA 305 (citing *Sandin*, 515 U.S. at 485, and *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991)). The court acknowledged that "VDOC inmates classified to the SM pathway are confined under highly-restrictive conditions" that differ from general population inmates in various respects. JA 305. But the court emphasized that, "in many other ways, living conditions in SM status approximate conditions

for general population inmates," JA 306; see *id.* (listing examples), and that it had "repeatedly found that an inmate's confinement . . . under the Step-Down Program . . . is not atypical and significantly harsh as contemplated under *Sandin*." *Id.* (citing three decisions, one of which was affirmed by this Court in an unpublished opinion). For that reason, the district court concluded that "[t]he evidence . . . does not support a finding that Smith was subjected to the sort of prolonged, extreme deprivation of sensory stimuli or social contact that gave rise to concerns in [*Wilkinson v. Austin*, 545 U.S. 209]." JA 307.

In reaching this conclusion, the district court highlighted the procedural protections embodied in the Step-Down Program. JA 307. Those protections, the court explained, "prevent confinement . . . from falling into the category of indefinite isolation identified in *Wilkinson* and [*Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015)] as triggering constitutional due process protections." JA 307 (citation and quotations omitted). Specifically, the court noted that:

> [VDOC policies] require[] staff to conduct frequent and detailed reviews of each Level S inmate's status and communicate with him about those reviews and his progress. Privilege levels are informally reviewed weekly and formally reviewed every three months. The procedures define clearly what actions an inmate must take to be considered for status

> changes: participating in the required programming, improving behavior, and remaining infraction free. While the policy recognizes that some inmates' assaultive history or other factors will require lengthy terms in some form of segregated confinement, the procedure informs the inmate of choices and changes he can make to progress toward less restrictive conditions.

JA 307.[9]

For those reasons, the district court perceived no genuine dispute of material fact about whether Smith was able to "establish that his confinement at Red Onion or Wallens Ridge . . . ha[d] been atypical and significantly harsh compared to conditions contemplated by his sentence." JA 308. Accordingly, the court concluded that Smith could not "show that he had a constitutionally protected liberty interest in avoiding any particular security classification or reclassification under

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[9] The district court rejected Smith's specific contention that VDOC's grooming policy created an atypical and significant hardship. JA 308. Because the challenged policy was "the same grooming policy applicable to inmates in general population," the court determined that "it cannot be atypical" for due process purposes. *Id.* (quotation marks and citation omitted). The district court also concluded that Smith had no viable Section 1983 claim regarding any defendant's alleged misapplication of VDOC policies because "[s]tate officials' failure to abide by state procedural regulations is not a federal due process issue." JA 308–09 (citing *Riccio v. Cty. of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990)).

[VDOC policies] or that any particular procedural protection was constitutionally required during the . . . classification proceedings." *Id.*

SUMMARY OF ARGUMENT

1. The district court properly granted defendants' motion for summary judgment.

a. The district court correctly determined that Smith did not establish a protected liberty interest with respect to his continuing confinement at security level "S." In *Wilkinson v. Austin*, 545 U.S. 209 (2005), the Supreme Court identified three factors to consider when analyzing whether prison conditions are "harsh and atypical" within the meaning of the due process clause: (1) the magnitude of the restrictions imposed on the inmate; (2) the duration of the segregation—specifically, whether it is indefinite in nature; and (3) whether assignment to segregation imposes any collateral consequences on the inmate's sentence. 545 U.S. at 214–15. All of those factors weigh against finding a protected liberty interest here.

i. As the district court observed, many of the conditions of confinement imposed on level "S" offenders apply to inmates in the general population as well. And unlike the circumstances before the

Supreme Court in *Wilkinson*, 545 U.S. 209, and this Court in *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015), the summary judgement record here "does not support a finding that Smith was subjected to . . . prolonged, extreme deprivation of sensory stimuli or social contact." JA 307

ii. Nor was Smith's confinement "indefinite" in duration. Rather, the record in this case demonstrates that Smith's confinement at security level "S" was completed in December 2017 and he has already been transferred to a lower-security institution. See ECF 56 (change of address). And the requirement that Smith comply with VDOC's grooming standards does not mean that he lacked a "viable avenue" to return to the general population for due process purposes. Smith's suggestion that those standards burdened his religious beliefs could have formed the basis for a claim under the Free Exercise Clause or the Religious Land Use and Institutionalized Person's Act (RLUIPA). But Smith has never made any such claims in this case, and he cannot smuggle them in through the procedural due process claim he did make.

iii. Smith's continuation as a level "S" offender also did not impose "significant collateral consequence" on his sentence. Contrary to

Smith's suggestion, VDOC officials did not deprive him of good-time credits or render him ineligible to earn future credits by continuing his confinement at level "S." Although level "S" offenders may not advance through the earning class levels all the way to level I, that is the *only* limitation imposed on their earning eligibility. And that limitation is not relevant here because Smith never advanced past level III. Smith's good-time credit earning level vacillated between IV and III as a result of disciplinary issues and failure to complete treatment, as well as the felony conviction he incurred in 2014. Accordingly, any limitation on the rate at which Smith earned future sentence-reducing credit was not solely attributable to his continuing status as a level "S" offender, nor did it impact his prior, vested sentence-reducing credits or the finite duration of his criminal sentences.

b. Even if Smith could establish a protected liberty interest, he has received all of the process that would have been due. As the Supreme Court has emphasized, Smith's status as a lawfully confined prisoner sharply limits the scope of the private interest in this case. *Wilkinson*, 545 U.S. at 225. And that limited private interest cannot outweigh either the Commonwealth's "dominant" interest in ensuring

that dangerous prisoners are housed in a manner that protects the safety of prison officials and other inmates, *id.* at 226, or its separate interest in ensuring that scarce resources are used efficiently, *id.* at 228. That is particular true where, as here, the multi-layer review mechanisms used to assess the status of inmates in segregated housing reduce the risk that an offender will remain confined at level "S" past the point at which that designation is justified.

c. In any event, all of the defendants would also be entitled to qualified immunity. At the time of Smith's confinement in segregated housing, no court had found that the multi-layer, regular review mechanisms VDOC employs to assess inmates in the Step-Down Program violated the Due Process Clause. To the contrary, multiple courts, including this one, had concluded that VDOC inmates have no protected liberty interest in avoiding administrative segregation. See, *e.g.*, *Obataiye-Allah v. Clarke*, 688 Fed. Appx. 211, 212 (4th Cir. 2017) (finding "no reversible error" in the district court's conclusion that plaintiff had no protected liberty interest). For that reason, even if Smith could demonstrate a constitutional violation, that violation was not "clearly established at the time of the challenged conduct." *Crouse v.*

Town of Moncks Corner, 848 F.3d 576, 583 (4th Cir. 2017) (internal quotation marks and citation omitted).

2. Smith is also not entitled to remand to conduct additional discovery.

a. As an initial matter, Smith failed to object to the magistrate judge's order denying his motion to compel additional discovery. Accordingly, Smith has waived appellate review of any discovery-related issues. *Solis v. Malkani*, 638 F.3d 269, 274 (4th Cir. 2011) ("[A] party's failure to object to a magistrate judge's recommendations within ten days in . . . a nondispositive . . . matter . . . waives further review.") (citations omitted).

b. Even if Smith had not forfeited his challenge, he cannot establish that that the district court abused its discretion in granting summary judgment on the record before it. Smith did not submit an affidavit stating that "for specified reasons, [he could not] present facts essential to justify [his] opposition" to summary judgment as required by Federal Rule of Civil Procedure 56(d). And because Smith had sufficient opportunity to conduct discovery and failed to inform the district court of his position that more discovery was needed before

summary judgment could be adjudicated, his failure to comply with Rule 56 is not excused. Cf. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002). Accordingly, remand is unnecessary and unwarranted.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc). "In reviewing the grant of summary judgment, [this Court] can affirm on any legal basis supported by the record and [is] not confined to the grounds relied on by the district court." *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002).

The 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). This Court allows district courts "wide latitude in controlling discovery," and will not disturb a district court's discovery order "absent a showing of clear abuse of discretion." *Rowland v. Am. Gen. Fin., Inc.*, 340 F.3d 187, 195 (4th Cir. 2003) (internal quotation marks omitted).

ARGUMENT

The issues before this Court are few and narrow. As the district court observed, Smith has not raised any claims under the Free Exercise Clause or the Eighth Amendment. JA 301–302 n.4. Nor has Smith raised any claim under the Religious Land Use and Institutionalized Persons Act (RLUIPA). Smith has also abandoned any claim related to his initial classification to security level "S," see Smith Br. 17 n.6, and he concedes that "his claims for injunctive relief are moot" because he "is no longer in segregated confinement," Smith Br. 22. Accord *Williams v. Ozmint*, 716 F.3d 801, 808 (4th Cir. 2013); *Rendelman v. Rouse*, 569 F.3d 182, 186 (4th Cir. 2009).

Accordingly, all that remains of this case is a single (i) procedural due process claim (ii) for damages that is (iii) based solely on Smith's *continued* confinement as a level "S" inmate. The district court properly concluded that defendants were entitled to summary judgment on that claim, and its decision should be affirmed for the numerous reasons described below.

I. The district court correctly found that defendants were entitled to summary judgment on Smith's due process claim

The Due Process Clause provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. "To state a procedural due process violation, a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law." *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). Smith is unable to satisfy either part of that test. Even if he could, defendants would be entitled to qualified immunity because the alleged constitutional violation was not clearly established during Smith's (now-completed) period of segregated confinement.

A. Smith failed to establish a protected liberty interest

"[T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). And although "state policies or regulations" may create such an interest, the district court properly recognized that all such claims are "subject to the important limitations set forth in *Sandin v. Connor*, 515 U.S. 472 (1995)." *Wilkinson*, 545 U.S. at 222. To avoid creating "a disincentive for States to promulgate

procedures for prison management," the Supreme Court emphasized "that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement *is not* the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" *Id.* at 222–23 (quoting *Sandin*, 515 U.S. at 484) (emphasis added). Put another way, no matter what state law or policies say, there is no constitutionally protected liberty interest in the first place unless the challenged conditions "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484.[10]

In *Wilkinson*, the Supreme Court considered three factors in determining whether the *Sandin* standard was satisfied: (1) the magnitude of the restrictions imposed on the inmate; (2) the duration of the restrictions; and (3) any collateral consequences on the inmate's sentence (such as disqualification for parole). 545 U.S. at 224. In its

[10] Defendants do not challenge the district court's conclusion (at JA 304–05) that Smith satisfied the *other* requirement for establishing a state-created liberty interest—"a basis for an interest or expectation in state regulations." *Prieto*, 780 F.3d at 250.

analysis, the Court made clear that the second and third factors were critical. "Save perhaps for the especially severe limitations on all human contact," the Court explained, the conditions imposed on inmates at Ohio's supermax facility "likely would apply to most solitary confinement facilities." 524 U.S. at 224. Only when the Court considered those conditions together with the "added components" of indefinite duration and ineligibility for parole did it find that "they impose[d] an atypical and significant hardship within the correctional context." *Id.*

Here, the three *Wilkinson* factors support the district court's conclusion that Smith had no protected liberty interest in avoiding continued classification as a level "S" inmate.

1. a. There is no question that offenders classified as security level "S" have fewer privileges than offenders in the general population. But that fact alone does not convert a prison environment into one that is harsh and atypical. To the contrary, as the district court observed, "[m]ere limitations on privileges, property, and activities for administratively segregated inmates . . . 'fall[]within the expected perimeters of the sentence imposed by a court of law.'" JA 305 (quoting

Sandin, 515 U.S. at 485); cf. *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991) ("[C]hanges in conditions of confinement (including administrative segregation), and the denial of privileges [are] matters which every prisoner can anticipate are contemplated by his original sentence to prison.").

Moreover, although there are some differences, level "S" offenders share many of same conditions and treatment as inmates in the general population: They eat the same meals with the same frequency as other inmates; have visitation, recreational, telephone, and mail and correspondence privileges; and enjoy the same access to educational opportunities, medical and legal services, religious guidance, laundry, barbering, and hair care. See JA 91–93, 296, 306; see also OP 841.4(IV)(K). Also relevant, the baseline conditions imposed on offenders assigned to security level "S" "mirror[] th[e] conditions imposed upon inmates" held in special housing for other reasons. *Sandin*, 515 U.S. at 486 ("segregated confinement did not present the type of atypical, significant deprivation" where "disciplinary segregation, with insignificant exceptions, mirrored those conditions

imposed upon inmates in administrative segregation and protective custody"); see also JA 77–78.

b. Smith errs in suggesting that the Supreme Court's decision in *Wilkinson* and this Court's decision in *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015), establish that the "magnitude-of-restriction" factor weighs in his favor. In *Wilkinson*, the Supreme Court observed that "inmates [we]re deprived of almost any environmental or sensory stimuli and of almost all human contact." 545 U.S. at 214. And in *Incumaa*, this Court noted that the plaintiff and similarly situated inmates received only "ten hours of activity outside the cell per month," were unable "to socialize with other inmates," and were denied "educational, vocational, and therapy programs." 791 F.3d at 531.

The conditions in this case are not so severe. The summary judgment record reflects that level "S" offenders are allowed to see visitors regularly, make phone calls, and, after advancing in the Step-Down Program, interact with other inmates through the courses and treatment offered. See JA 91–93. They are allowed time out of their cell at least five days per week, have access to in-cell programming (see, *e.g.*, JA 91–93), and are encouraged to maintain institutional

employment, as Smith did for at least part of his time in the Step-Down Program, JA 236 (noting that Smith was employed as a pod barber during 2017). Additionally, corrections officers, counselors, and unit managers communicate with level "S" offenders "routinely" to encourage their continued participation in the Step-Down Program. JA 307. Accordingly, as the district court correctly held, the evidence in this summary judgement record "does not support a finding that Smith was subjected to the sort of prolonged, extreme deprivation of sensory stimuli or social contact that gave rise to the concerns" in *Wilkinson* and *Incumaa. Id.* [11]

[11] It also bears noting that Smith's reading of the summary judgment record is flawed. For example, Smith's contention that his recreation opportunities "were always indoors" (Smith Br. 27) is belied by the record: As Smith acknowledged in a verified amendment to his complaint, he was provided one hour of "fresh air" per day. JA 27; accord JA 91 (specifying that the one hour of daily recreation occurs "outside"). In addition, some of the claims Smith advances on appeal were not properly before the district court at summary judgement. Specifically, Smith's claims that his cell was modified with a metal security box to prevent communication with other inmates, that he was subjected to body cavity searches, and that he was denied mental health treatment and educational and vocational opportunities were included only as allegations in his brief in opposition to summary judgment. See JA 146–47; see also Smith Br. 26, 28, 33. Because "[a] plaintiff may not amend his complaint through arguments in his brief opposing summary judgment," *Shanahan v. City of Chicago*, 82 F.3d 776, 781 (7th Cir.

c. VDOC's requirement that Smith cut his hair also does not increase the magnitude of restrictions he faced for due process purposes. VDOC's grooming standards apply equally to *all* inmates within VDOC custody, regardless of their housing situation. That baseline is the appropriate consideration—indeed, the only consideration—when determining whether the conditions applicable to those in administrative segregation are "atypical" as compared to the general population. See *Wilkinson*, 545 U.S. at 223 (due process analysis "requires [courts] to determine if assignment to [restricted housing] imposes atypical and significant hardship on the inmate *in relation to the ordinary incidents of prison life*") (internal quotation marks omitted) (emphasis added).[12]

1996), these claims should not be considered on appeal, see *James v. Zimmerman*, 319 Fed. Appx. 432, at *1 (7th Cir. 2009) ("[B]are allegations in a brief, unsupported by an affidavit in the summary judgment record, are insufficient to overturn the grant of summary judgment."); cf. *Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 110 (4th Cir. 2017) (affirming summary judgment on plaintiff's due process claim because "[plaintiff's] affidavits do not present specific facts demonstrating [an atypical] hardship").

[12] To the extent Smith suggests that inmates in the general population were not subject to the grooming policy (see, *e.g.*, Smith Br. 30), he is incorrect. All VDOC inmates were (and are) subject to the

Smith argues that "defendants' reliance on the grooming policy to stall [his] progress in the Step-Down Program burdened his religious practice." Smith Br. 29. But that argument sounds in the Free Exercise Clause or RLUIPA, and Smith never brought any such claims in district court. JA 300–01 n.4. Smith cannot sidestep that omission on appeal by shoehorning alleged substantive burdens on his religious exercise into a claim that VDOC officials violated his right to procedural due process. Accord *Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 110 (4th Cir. 2017) (rejecting due process claim and finding that "[t]o the extent that Mr. Thompson alleges that segregation was retaliatory punishment, that argument is better addressed under either the First or Eighth Amendment"); *Prieto*, 780 F.3d at 251 (procedural due process is not a "catch-all" constitutional provision that is violated any time a

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grooming policy. Smith's argument seems to be based on the existence of the VHU. See Smith Br. 35. But the VHU does not establish that the grooming standards did not apply to inmates in the general population. To the contrary, the VHU housed persistent *violators* of the grooming standards separately from other inmates and was designed to motivate offenders to comply with the grooming standards to reenter the general population. See, *e.g.*, *Coto v. Clarke*, No. 7:14CV00685, 2015 WL 5043288 (W.D. Va. Aug. 26, 2015).

defendant allegedly engages in conduct that "fall[s] squarely within the ambit" of another constitutional amendment).

2. a. The second factor identified in *Wilkinson*—"duration"—clearly favors defendants. Unlike the security assignments at issue in *Wilkinson*, Smith's assignment to security level "S" was neither "indefinite," nor "reviewed just annually." *Wilkinson*, 545 U.S. at 224. Instead, inmates in the SM pathway have their placement and privilege-status are formally reviewed *every 90 days* in a hearing of which they are given advanced notice and an opportunity to be present. JA 97–98. Additional formal reviews are conducted every year by an external team, and informal reviews are conducted regularly by a dual treatment team within the facility, as well as by prison officials and counselors who are directed to communicate with the inmate about his progress. JA 77, 78, 82, 83.

Indeed, the record here belies any suggestion that confinement at level "S" is "indefinite." After several years in the Step-Down Program, Smith progressed through the SM tiers and was transitioned to a lower-security facility. Although Smith believes that he should have progressed faster, that argument is no more than a disagreement with

the conclusions VDOC officials reached regarding his status—it does not mean that the system offered "no meaningful review[] at all." Smith Br. 37.[13]

b. Smith's reliance on out-of-circuit precedent to support his contention that the duration of his confinement at level "S" is sufficient to establish an atypical hardship fails as a matter of fact and law. To start, the relevant period for purposes of this case is four years—not six—because Smith did not sue any Red Onion officials and the Wallens Ridge defendants had no control over Smith during the two years he spent at Red Onion before his transfer in 2013. Compare Smith Br. 5 n.3 (acknowledging that Smith did not sue Red Onion officials) with *id.* at 33–34 n.9 (contending that Smith's time at Red Onion is relevant

[13] Nor does Smith's reliance on policy violations that occurred in this course of his ICA reviews advance his argument. Smith Br. 37. As indicated above, Smith complained that VDOC officials approved their own recommendations, and those complaints were determined to be well-founded. Nonetheless, reviewers declined to change Smith's status. JA 299, 300. That outcome does not undercut the substance of VDOC's review mechanism. Rather, the fact that Smith was able to appeal the decisions and to establish that policy violations indeed occurred shows that VDOC procedures allow for meaningful review. In any event, as the district court found, "officials' failure to abide by state procedural regulations is not a federal due process issue." JA 309 (citing *Riccio v. Cty. of Fairfax*, 907 F.2d 1459, 1469 (4th Cir. 1990)).

because defendants knew that he was confined in administrative segregation there).

Regardless, none of the cases Smith cites found a protected liberty interest based on a period of segregated confinement as short as Smith's. In *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 698–99 (7th Cir. 2009), the Seventh Circuit determined only that a span of 240 days was sufficient to survive a *motion to dismiss*. *Id.* It did not hold that the plaintiff had established an atypical hardship—only that the district court erred in dismissing the complaint without any consideration of the conditions imposed. *Id.* The same was true of the three-year span in *Harden-Bey v. Rutter*, 524 F.3d 789, 792–93 (6th Cir. 2008), except there, the plaintiff had not been released from administrative segregation and the Sixth Circuit concluded that the plaintiff *had* plausibly alleged that his confinement was "indefinite." *Id.* ("On remand, the court should consider whether the nature of this placement in administrative segregation together with its duration creates a cognizable liberty interest."). Only in *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000)—a case that preceded *Wilkinson*—did the court actually find a protected liberty interest. But in that case, the plaintiff had spent

"eight years in administrative custody, with no prospect of immediate release in the near future." *Id.*; see also *Incumaa*, 791 F.3d at 520 (finding liberty interest where inmate was in segregation for twenty years); *Wilkerson v. Goodwin*, 774 F.3d 845, 855 (5th Cir. 2014) (finding liberty interest where inmate was in solitary confinement for 39 years).

c. Nor is there merit to Smith's claim that VDOC officials "made segregation 'indefinite' by taking away any viable avenue for release." Smith Br. 35. Even if, as Smith claims, "[t]he summary judgment record reasonably supports the conclusion," *id.*, that Smith's refusal to cut his hair was the reason he remained confined as a level "S" inmate, that does not mean that he lacked a pathway to return to the general population. Indeed, it shows the opposite: Smith was aware that he could progress through the Step-Down Program (and potentially return to the VHU) if he complied with all VDOC policies, including the grooming policy. As just described, Smith's claim that his compliance with the grooming policy offended his free exercise rights is a separate constitutional claim that he could have, but did not, advance. Just as that separate constitutional claim does not equate to a violation of Smith's procedural due process rights, it does not transform his time-

limited and regularly reviewed confinement at level "S" into one of indefinite duration.

3. The final *Wilkinson* factor—collateral consequences—likewise favors defendants. To start, Smith did not suffer the "loss of good time credits" as he suggests. See Smith Br. 38. Assignment to security level "S" affects, at most, a possibility of earning future sentence-reducing credits—it does not void credits that have already vested and in which an inmate possesses a protected liberty interest. Compare *Wilkinson*, 545 at 215 ("Inmates otherwise eligible for parole lose their eligibility while incarcerated at OSP.").

Nor did "defendants . . . ma[ke] [Smith] ineligible for good time credits" by confining him a level "S" offender. Smith Br. 38. As described above, the only restriction placed on level "S" offenders' ability to earn good-time credit is that they cannot advance through the earning class levels all the way to level I. See OP 830.3(V)(G); see also JA 25 (Smith alleging that he was disqualified for "Level #1 Good Time Credit"). But that restriction did not affect Smith because he never progressed past level III: He was at level IV when he entered Red Onion and vacillated between level III and level IV throughout the relevant

period due to his failure to complete treatment programs and disciplinary infractions, as well as the 2014 conviction he received for committing a violent felony while in custody. JA 205, 218, 222, 227; see also OP 830.3(V)(H)(2) ("Any offender who commits a felony or misdemeanor . . . while in confinement will automatically be reduced to Class Level IV effective the conviction date.").

For those reasons, any limitation on the rate at which Smith earned good-time credit did not impact his prior, vested sentence-reducing credits and was not solely attributable to his continuing status as a level "S" offender.[14]

B. Smith received constitutionally sufficient process during regular reviews of his status

Even if Smith had established a protected liberty interest in avoiding continued confinement at security level "S", the uncontroverted record establishes that he, like the plaintiffs in

[14] Smith's argument that his non-compliance with the grooming policy blocked his ability to earn good-time credits fails for the same reason. Although level "S" inmates generally cannot advance to level I, that limitation had no impact on Smith because he never got beyond level III.

Wilkinson, received all of the process that was constitutionally due. See *Wilkinson*, 545 U.S. at 228.[15]

1. Smith's due process claim is reviewed under the well-known framework established in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *Wilkinson*, 545 U.S. at 224; *Incumaa*, 791 F.3d at 533. Under that test, courts consider three factors:

- "the private interest that will be affected by the official action";
- "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and
- "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.'"

[15] Although the district court did not address this issue, this Court "may affirm on any ground that would support the district court's judgment." *Bounds v. Parsons*, 700 Fed. Appx. 217, 219 (4th Cir. 2017); accord *Attkisson v. Holder*, 925 F.3d 606, 621 n.7 (4th Cir. 2019); *Martin v. Duffy*, 858 F.3d 239, 250–51 (4th Cir. 2017); *King v. Rubenstein*, 825 F.3d 206, 222 n.3 (4th Cir. 2016); *Korb v. Lehman*, 919 F.2d 243, 246 (4th Cir. 1990).

Wilkinson, 545 U.S. at 224–25 (quoting *Mathews*, 424 U.S. at 335). Here, as in *Wilkinson*, the balance of factors favors the government.

a. As to the first factor, the Supreme Court has emphasized that an inmate's private liberty interests must be "evaluated . . . within the context of the prison system and its attendant curtailment of liberties." *Wilkinson*, 545 U.S. at 225. Because "[p]risoners held in lawful confinement have their liberty curtailed by definition, . . . the procedural protections to which they are entitled are more limited than in cases where the right at stake is to be free from confinement at all." *Id.* Moreover here (unlike in *Wilkinson*), Smith's claim concerns only his *continued* classification as a level "S" offender, not the procedures used to initially designate him as such. Accordingly, whatever reduced liberty interest he maintains as a "prisoner[ ] held in lawful confinement," *id.*, is further diminished by his (presumably correct) placement in segregated housing. Accord *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (contrasting initial determinations that inmates should be placed in administrative segregation with "periodic review[s] of the confinement of such inmates" and observing that the latter "will

not necessarily require that prison officials permit the submission of any additional evidence or statements").

That diminished liberty interest is not significantly impeded by the treatment Smith received as a level "S" offender. As described above, level "S" offenders receive many of the same privileges as offenders in the general population. Moreover, Smith has already been transitioned out of the Step-Down Program and thus his confinement cannot be described as "indefinite." Compare *Incumaa*, 791 F.3d at 533–34 ("Because Appellant has already been held in solitary confinement for 20 years, he has a significant private interest in leaving the restrictive conditions in the [segregated unit] and serving some part of his remaining life sentence outside of solitary confinement."). For all of these reasons, the first *Mathews* factor does not weigh heavily in Smith's favor.

b. The second factor—the risk of erroneous deprivation—plainly favors VDOC. Like the procedures found constitutionally sufficient in *Wilkinson*, VDOC's process affords offenders "multiple levels" of review while they progress through the Step-Down Program. 545 U.S. at 227. As described above, ICA reviews occur every 90 days,

offenders are given notice at least 48 hours in advance and have an opportunity to participate. All ICA recommendations are reviewed by the Facility Unit Head or designee and offenders may appeal an adverse decision through the offender grievance process. JA 97–99. Notice and opportunity to be heard have consistently been recognized as "the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson*, 545 U.S. at 226. And the opportunity for appeal "further reduces the possibility of an erroneous deprivation." *Id.* Compare *Incumaa*, 791 F.3d at 534–35 (finding "exceedingly high" risk of erroneous deprivation where procedures called for "single-layered confinement review" in which a single agency made the "sole decision" about release from segregation, reviewing agency was not required to "provide a factual basis for its decision," and regulations did not guarantee inmate the right to be present at the review or contest the factual basis for the decision).

Indeed, VDOC's review mechanisms are more protective than the procedures approved in *Wilkinson*. In addition to the four yearly ICA reviews, VDOC procedures call for annual reviews by the external team, which assesses the inmate's position in the Step-Down Program,

privilege-level, and whether the internal team assigned to the inmate is doing its job. JA 82. And beyond the more formal ICA and external-team reviews, VDOC provides frequent informal reviews by prison staff and counselors who are directed to keep the offender informed of his status and progression through the program. JA 77, 78, 82. This back-and-forth reduces the risk of arbitrary decision-making, while parallel assessments by different institutional actors guard against the risk of an erroneous deprivation—particularly where, as here, the question is whether an inmate's segregated status should be maintained, not whether it is justified in the first instance. Cf. *Hewitt*, 459 U.S. at 477 n.9.

c. The third factor—the State's interest—also heavily favors VDOC. As the Supreme Court has explained, that interest is "dominant" in the specific "context of prison management." *Wilkinson*, 545 U.S. at 227. Like Ohio, Virginia "has responsibility for imprisoning" tens of thousands of inmates and the Commonwealth's "first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves." *Id.* (citations omitted). Here, Smith revealed himself as a security risk when he committed a serious assault

on a prison guard. JA 8, 293; see also *Commonwealth v. Smith*, CR12-000086-01 (Buchanan Cnty. Cir. Ct.). Consistent with its "first obligation" to protect those who associate with Smith, VDOC officials had a substantial interest in maintaining his designation as a level "S" offender until they could be assured that he could safely return to the general population.

"The problem of scarce resources is another component of the [Commonwealth's] interest." *Wilkinson*, 545 U.S. at 228. "[F]aced with [the] costs [of housing offenders in restrictive confinement,] [States] will find it difficult to fund more effective education and vocational assistance programs to improve the lives of the prisoners." *Id.* "It follows that courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior." *Id.* Were VDOC to provide additional procedures, "both the [Commonwealth's] immediate objective of controlling the prisoner and its greater objective of controlling the prison could be defeated." *Id.*

d. Given the diminished liberty interest Smith maintains as a prison inmate previously found to warrant placement in restrictive housing, the multi-layered review VDOC provides to offenders in the Step-Down Program, and the Commonwealth's substantial interest in maintaining safety and security and conserving scarce resources, it is apparent on this record that Smith cannot show a triable issue of fact as to whether the process afforded to him was constitutionally sufficient.

C. Defendants are entitled to qualified immunity.

Even had Smith created a genuine issue of material fact, the district court's grant of summary judgment should be affirmed on the alternate ground that Defendants are entitled to qualified immunity. See, *e.g.*, *Attkisson v. Holder*, 925 F.3d 606, 622 n.7 (4th Cir. 2019) (affirming district court's grant of a motion to dismiss on qualified immunity grounds where the district court had not addressed the issue, noting that this Court "may affirm on any grounds apparent from the record" (internal quotation marks and citation omitted)).

As this Court has explained, "qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known." *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017) (quotation marks and citation omitted). "An official's conduct violates clearly established law when, at the time of the challenged conduct, [t]he contours of [a] right [are] sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Martin v. Duffy*, 858 F.3d 239, 251 (4th Cir. 2017) (alterations in original) (quotation marks omitted); see also *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Although a "court does not need to find a case directly on point," "existing precedent must have placed the statutory or constitutional question beyond debate." *Crouse*, 848 F.3d at 583 (quotation marks omitted).

Smith cannot meet that standard. No federal court has ever suggested that the Step-Down Program contravenes an inmate's right to procedural due process. Accord *Greenhill*, 944 F.3d 243 at 250 (describing Step-Down Program as a "sophisticated, well-conceived program to better inmates' behavior and their confinement, as well as to improve safety and the overall operation of the prison"). To the contrary, *every* sitting judge in the district in which this case arose has

rejected the claim that the conditions of confinement for level "S" inmates are harsh and atypical and thus give rise to a protected liberty interest, including in cases spanning the time of Smith's confinement.[16] This Court affirmed two such decisions in unpublished opinions, finding "no reversible error." *Delk v. Younce*, 709 Fed. Appx. 184 (4th Cir. 2018); *Obataiye-Allah v. Clarke*, 688 Fed. Appx. 211 (4th Cir. 2017) (affirming "for the reasons stated by the district court"). And in *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997), this Court held that conditions

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[16] *See. e.g., Cooper v. Gilbert*, No. 7:17cv00509, 2018 U.S. Dist. LEXIS 65096, at *8–9 (W.D. Va. Apr. 17. 2018) (Conrad, J.); *Jordan v. Va. Dep't of Corr.*, No. 7:16cv00228, 2017 U.S. Dist. LEXIS 150501, at *23–26 (W.D. Va. Sept. 18, 2017) (Dillon, J.); *Muhammad v. Smith*, No. 7:16cv00223, 2017 U.S. Dist. LEXIS 125335, at *32-33 (W.D. Va. Aug. 8, 2017) (Conrad, J.); *Barksdale v. Clarke*, No. 7:16cv00355, 2017 U.S. Dist. LEXIS 123518, at *13–20 (W.D. Va. Aug. 4, 2017) (Kiser, J.); *Snodgrass v. Gilbert*, No. 7:16cv00091, 2017 U.S. Dist. LEXIS 39122, at *34–38 (W.D. Va. Mar. 17, 2017) (Conrad, C.J.); *Delk v. Youce*, No. 7:14cv00643, 2017 U.S. Dist. LEXIS 36581, at *21–25 (W.D. Va. Mar. 14, 2017) (Moon, J.), *aff'd*, 709 Fed. Appx. 184 (4th Cir. 2018); *Hubbert v. Washington*, No. 7:14cv00530, 2017 U.S. Dist. LEXIS 41695, at *12–18 (W.D. Va. Mar. 22, 2017) (Urbanski, J.); *Muhammad v. Mathena*, No. 7:14cv00529, 2017 U.S. Dist. LEXIS 11734, at *4–5 (W.D. Va. Jan. 27, 2017) (Conrad, J.); *DePaola v. Va. Dep't of Corr.*, No. 7:14cv00692, 2016 U.S. Dist. LEXIS 132980, at *22–31 (W.D. Va. Sept. 28, 2016) (Jones, J.), *aff'd*, 703 Fed. Appx. 205 (4th Cir. 2017); *Obataiye-Allah v. Va. Dep't of Corr.*, No. 7:15cv00230, 2016 U.S. Dist. LEXIS 133316, at *25–31 (W.D. Va. Sept. 28, 2016) (Jones, J.).

more onerous than those at issue here were not "harsh and atypical" when compared to the ordinary incidents of prison life. See *id.* at 504 (accepting plaintiffs' claims that "those assigned to administrative segregation . . . were permitted to leave their cells three to four times per week, rather than seven, and that no outside recreation was permitted; that there were no educational or religious services available; and that food was served in considerably smaller portions").

In addition, no court has found that the multiple review mechanisms VDOC uses to assess the status of inmates in the Step-Down Program—mechanisms that are *more* protective than those approved in *Wilkinson*—fail to provide sufficient process.[17]

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[17] *Incumaa* did not so hold. As described above, the mechanisms used to review the inmate's placement in that case are not comparable to the Step-Down Program: Among other differences, South Carolina provided only a "single-layered confinement review" where one agency made the "sole decision" on whether release from segregation was appropriate. 791 F.3d at 534. In any event, in that case the Court did not even hold that the procedures at issue were constitutionally insufficient—only that "the record establishe[d] a triable question of whether the Department's review process was adequate to protect Appellant's right to procedural due process." *Id.* at 535. That holding was not sufficient to afford VDOC officials "fair warning" that the different, multi-layered review afforded Smith violated his constitutional rights. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017). Compare *Williamson v. Stirling*, 912 F.3d 154, 189–90

"[A]t the time of the challenged conduct," therefore, "reasonable [VDOC] official[s] would [not have understood] that what [they were] doing violate[d]" Smith's procedural due process rights. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Accordingly, even if this Court were to conclude that the district court erred in granting summary judgment on Smith's constitutional claim, defendants would be entitled to qualified immunity. Accord *Latson v. Clarke*, No. 18-2457, 2019 U.S. App. LEXIS 37495, at *7 (4th Cir. Dec. 18, 2019) (finding VDOC defendants entitled to qualified immunity on claim that solitary confinement violated Eighth Amendment based on "circuit authority at the time of the alleged violation" notwithstanding "dreadful conditions imposed on [the plaintiff]").

(4th Cir. 2018) (finding that *Incumaa* "gave clear notice to jail officials in 2015 that a long-term detention in solitary confinement . . . justifies *some* level of procedural protection" and finding that officials would not be entitled to qualified immunity for period post-dating *Incumaa* if they failed to satisfy the minimal standard of providing a "periodic review") (emphasis added). And of course, *Incumaa* did not establish that Smith maintained a protected liberty interest in avoiding confinement at level "S", as demonstrated by the multiple court decisions finding no such interest after *Incumaa* was decided. See *supra* at 50 n.16.

II. The district court did not abuse its discretion by granting summary judgment without ordering additional discovery

Smith argues in the alternative that he is entitled to a remand because the district court abused its discretion in granting summary judgment without ordering further discovery. Smith Br. 21. That argument fails as well. Because Smith did not object to the magistrate judge's pretrial discovery order denying his motions to compel, see JA 287, he has waived appellate review of his discovery-related claims. Even if Smith had not forfeited his challenge, the district court did not abuse its discretion because Smith had a sufficient opportunity to conduct discovery and failed to alert the district court that he believed summary judgment was premature.

A. Smith waived any argument regarding denial of discovery by failing to object to the magistrate judge's order

This Court has repeatedly held that if a party "does not object to one of a magistrate's findings or recommendations with sufficient specificity so as reasonably to alert the district court of the true ground for the objection then that objection is waived on appeal." *United States v. Hill*, 849 F.3d 195, 201–02 (4th Cir. 2017) (internal quotation marks and citation omitted); see also *Wells v. Shriners Hosp.*, 109 F.3d 198, 199, 201 (4th Cir. 1997). The Court has also repeatedly held that "a

party . . . waives a right to appellate review of particular issues by failing to file timely objections specifically directed to those issues." *United States v. Midgette*, 478 F.3d 616, 621 (4th Cir. 2007). The rule is the same whether the order in question concerns a dispositive motion or, as here, a nondispositive one. *Solis v. Malkani*, 638 F.3d 269, 274 (4th Cir. 2011) ("[A] party's failure to object to a magistrate judge's recommendations within ten days in either a nondispositive, Fed. R. Civ. P. 72(a), or a dispositive matter, Fed. R. Civ. P. 72(b), waives further review."); see also *Caidor v. Onondaga Cty.*, 517 F.3d 601, 605 (2d Cir. 2008) ("[A] *pro se* litigant who fails to object timely to a magistrate's order on a non-dispositive matter waives the right to appellate review of that order, even absent express notice from the magistrate judge that failure to object within ten days will preclude appellate review.").[18]

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[18] This Court has repeatedly applied the waiver rule in cases involving discovery orders. See, *e.g.*, *Escalante v. Anderson Cnty. Sheriff's Dep't*, 698 Fed. Appx. 754, 755 (4th Cir. 2017) (plaintiff "waived appellate review of th[e] issue" where he never objected to the magistrate judge's ruling); *Sewell v. Wells Fargo Bank N.A.*, No. 12-2132, 2013 WL 1224107, at *1 (4th Cir. Mar. 27, 2013) (per curiam) ("[T]he timely filing of specific objections to a magistrate judge's nondispositive order is necessary to preserve appellate review.");

Here, the magistrate judge reviewed all four of Smith's motions to compel and denied them without prejudice, concluding that Smith could respond to defendants' summary judgment motion without additional discovery. JA 287. Because Smith did not file objections to that order, his motions to compel were never brought before the assigned district court judge. Under this Court's precedent, Smith has waived appellate review of any discovery-related claims.

B. Smith had an opportunity to conduct discovery and did not inform the district court that summary judgment was premature

Even if Smith had preserved his discovery-related challenge, the district court did not abuse its discretion by granting summary judgment on the record before it.

Under Federal Rule of Civil Procedure 56(d), the non-moving party may respond to a summary judgment motion by presenting an "affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). A court that receives such a request may "defer considering the motion or deny

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Wadley v. Park at Landmark, LP, 264 Fed. Appx. 279, 281 (4th Cir. 2008) (failure to file timely objections to magistrate judge's denial of motion to compel precluded review on appeal).

it"; "allow time to obtain affidavits or declarations or to take discovery"; or "issue any other appropriate order." Fed. R. Civ. P. 56(d)(1)–(3).

To be sure, this Court concluded that a Rule 56(d) affidavit (which Smith did not file) is not invariably necessary "[w]hen the nonmoving party, through no fault of its own, has had little or no opportunity to conduct discovery" and has "adequately informed" the district court that summary judgment is premature. *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002).[19] But that exception does not help Smith here.

First, it cannot be said that Smith had "little or opportunity to conduct discovery." *Harrods*, 302 F.3d at 244. As described above, the district court denied defendants' request for a protective order and ordered defendants to respond to three of Smith's discovery requests. See *supra* at 15. Defendants also produced additional documents and

[19] *Harrods* refers to Rule 56(f), rather than Rule 56(d), reflecting a pre-2010 version of the Rule. See Fed. R. Civ. P. 56 Advisory Committee Notes (explaining that, per the 2010 amendment, "[s]ubdivision (d) carries forward without substantial change the provisions of former subdivision (f)").

submitted answers to interrogatories in response to further requests. See *supra* at 16.[20]

Second, Smith did not "adequately inform" the district court that more discovery was needed before summary judgment could be adjudicated. *Harrods*, 302 F.3d at 244. Smith contends that the district court was "on notice" of his position because, in his two summary judgment oppositions, "he expressly cited Rule 56(d) and stated [that] he needed more discovery." Smith Br. 43. But those filings were submitted *before* defendants had provided even the first of five responses to Smith's discovery requests. See JA 139, 256. After defendants provided those responses, Smith had ample opportunity to present specific arguments as to how discovery should be supplemented before the district court ruled on the motion for summary judgment. Indeed, Smith made those arguments in his motions to compel, where

[20] Smith confines his arguments that defendants failed to provide sufficient information in response to his discovery requests to defendant Gilbert's submissions (see Smith Br. 41–42), ignoring entirely responses from defendants Collins and Light, despite having asked similar questions of all three defendants. See JA 263–67, 275–77.

he articulated his dissatisfaction with some of the Defendants' specific responses. See, *e.g.*, JA 269–71.

Smith could have easily repeated those arguments in a supplemental brief opposing summary judgment, making clear to the district court his position that summary judgment would be premature. He did not. Instead, Smith failed to oppose the magistrate judge's decision denying his requests for additional discovery and simply awaited the district court's decision on defendants' outstanding motion for summary judgment. See *supra* at 16. Compare *Harrods*, 302 F.3d at 246 (noting that it was unclear from the record "whether Harrods UK had outstanding discovery requests pending when summary judgment was granted . . . But if it did not, the only reason is that summary judgment was granted so early in the proceedings"). That was insufficient to put the court "on notice" that additional discovery was necessary.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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By: /s/

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,054 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/ Martine Cicconi

Martine Cicconi

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2020, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Martine Cicconi*

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