No. 19-6524

United States Court of Appeals
FOR THE FOURTH CIRCUIT

GARY WALL,
Petitioner - Appellant,

v.

WARDEN JEFFREY KISER,
Respondent - Appellee.

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

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BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 because Mr. Wall's petition for habeas corpus alleging constitutional violations arose under 28 U.S.C. § 2254, the federal habeas statute for state prisoners. The district court entered a final judgment dismissing the petition on March 31, 2019, J.A. 360, and Mr. Wall filed a timely notice of appeal by depositing his notice in the prison mail system on April 9, 2019, J.A. 361; *see* Fed R. App. P. 4(a)(1)(A), (c)(1). This Court therefore has appellate jurisdiction pursuant to 28 U.S.C. § 1291. This Court granted Mr. Wall a certificate of appealability, authorizing exercise of jurisdiction under 28 U.S.C. § 2253(c).

STATEMENT OF THE ISSUE

Whether Virginia prison disciplinary authorities deprived Mr. Wall of due process by revoking 270 days of accrued good-time credits without reviewing—as Mr. Wall repeatedly requested—potentially exculpatory video evidence of the underlying incident.

STATEMENT OF THE CASE

I. Factual Background

Appellant Gary Wall was charged with disciplinary infractions related to an incident at Red Onion State Prison involving himself and two corrections officers, Elijah Rasnick and Jason Hicks. Despite conflicting accounts of what happened, the hearing officers adjudicating the charges refused Mr. Wall's requests that they review video of the underlying events. Relying on testimony of corrections officers, the hearing officers found Mr. Wall guilty of the charged infractions and stripped him of 270 days' accrued good-time credit.

A. The Underlying Events

On August 14, 2015, Officers Rasnick and Hicks conducted a security check during recreation time. J.A. 228–29. After Mr. Wall allegedly refused orders to return to his cell from a common area, Officer Hicks ordered Mr. Wall to move to a vestibule area where they could speak. J.A. 210, 229. Mr. Wall began walking towards the vestibule, with Officers Rasnick and Hicks close behind. J.A. 74. What happened next is disputed.

According to Mr. Wall, he turned to ask the officers about the "unusual directive" to proceed to the vestibule. J.A. 228. One of the officers grabbed Mr. Wall's arm, and Officer Rasnick began repeatedly punching Mr. Wall in the face. J.A. 74, 228. All three individuals "went to the ground," and Mr. Wall attempted to roll away from Officer Rasnick's punches. J.A. 74. While doing so, Mr. Wall collided with Officer Hicks, but at no time did he throw, or attempt to throw, any punches at either officer. J.A. 74. After Mr. Wall was handcuffed and lying face down, Officer Rasnick and Officer Hicks's heads collided, causing Officer Hicks's head to "bleed profusely." J.A. 93.

Officer Hicks tells a different story. He says he ordered Mr. Wall to "get on the wall" to be handcuffed, but Mr. Wall refused, "squared around," and swung at him. J.A. 229. Officer Hicks then grabbed Mr. Wall to "gain control" before Officer Rasnick joined to assist. J.A. 89. After Officer Rasnick joined, all three fell to the ground, where Mr. Wall allegedly "struck" Officer Hicks's eye. J.A. 89.

All three individuals suffered injuries. Officer Rasnick was seen at a local hospital for an injured knee and a "reddened area [a]round his left eye." J.A. 52. Officer Hicks had a fractured hand and an eye injury. J.A.

75. Mr. Wall had a broken hand, lacerations on his wrist, two black eyes, and knots on his head. J.A. 75.

B. Disciplinary Proceedings

Mr. Wall was charged with institutional violations relating to the incident and transferred to Wallens Ridge State Prison, where the charges were heard. J.A. 181. The charges included one count of aggravated assault on a "non-offender" for the alleged assault on Officer Rasnick and a similar charge related to Officer Hicks. J.A. 38, 60; *see* J.A. 36 (defining aggravated assault in relevant part as "intentional, impermissible physical contact . . . resulting in serious injury or committed with the intent to inflict serious injury"). Mr. Wall had two separate disciplinary hearings, one for each charge.

Mr. Wall filed one written request for each disciplinary hearing asking that the hearing officer, the sole factfinder, *see* J.A. 283, review surveillance video of the underlying incident. J.A. 41, 62. Each hearing officer denied Mr. Wall's written request, checking a box on the request form: "[I]nformation will not be obtained due to being from an outside source, restricted for security reasons such as video and audio recordings,

information is not written documentation, or is otherwise restricted to the offender." J.A. 41, 62.

In addition to his written requests, Mr. Wall verbally requested review of the video during each hearing. *See* J.A. 48, 71. In the hearing related to Officer Rasnick's injuries, Officer Rasnick was not present to testify. *See* J.A. 52. Mr. Wall testified he did not strike Officer Rasnick or Officer Hicks, and he asked the hearing officer, Officer C.W. Franks, to review the video. J.A. 48, 53. Officer Franks responded that Captain Still, the Red Onion Reporting Officer who investigated the incident, had reviewed the video and would report what he observed. J.A. 49. Captain Still testified the video showed that Mr. Wall "turned around and swung on" Officer Hicks and then Officer Rasnick "came to assist [Officer] Hicks and all three of the individuals began to fight." J.A. 52. Crediting Captain Still's testimony, Officer Franks found Mr. Wall guilty of aggravated assault and revoked 90 days of accrued good-time credit. J.A. 42.

In the hearing related to Officer Hicks's injuries, Mr. Wall again unsuccessfully asked the hearing officer to view the surveillance video. Both Officer Hicks and Mr. Wall testified about what happened, J.A. 74–

75, and Mr. Wall pointed to aspects of Officer Hicks's testimony that "could only be confirmed or contradicted by reviewing the irrefutable [video] evidence requested," J.A. 69. The hearing officer, Officer W.R. Hensley, though, stated he needed to "be convinced" to watch the video and that Mr. Wall had not convinced him. J.A. 71. Officer Hensley instead credited Officer Hicks's testimony over Mr. Wall's and found Mr. Wall guilty. J.A. 76. As punishment, Officer Hensley revoked 180 days' accrued good-time credit. J.A. 67.

Mr. Wall timely appealed both decisions to the Wallens Ridge Warden, claiming the hearing officers erred by refusing to review the video. J.A. 43–45, 68–69. Mr. Wall stated the video would have supported his testimony and contradicted Captain Still's and Officer Hicks's. J.A. 43–45, 69. The Warden denied both of Mr. Wall's appeals, leaving the decision to review security footage to each hearing officer's discretion. J.A. 49, 71. Mr. Wall then sought his last available form of administrative review by separately appealing the Warden's decisions to the Virginia Department of Corrections Regional Administrator. J.A. 55–58, 78–79. The Regional Administrator denied Mr. Wall's appeals on November 9, 2015, J.A. 80–81, and December 8, 2015, J.A. 59.

In a sworn affidavit, Mr. Wall attests he gained access to the surveillance video when state criminal charges were filed against him in connection with the same underlying incident. J.A. 93–94. After receiving the video during discovery, Mr. Wall and his criminal defense attorney viewed the video in May 2016. J.A. 94. The footage "shows [he] never threw any punches at either officer," J.A. 93, and "the injury to Officer J. Hicks' right eye was caused by a head-to-head collision with Officer Rasnick, while [Mr. Wall] was on the ground, face-down, fully restrained," J.A. 94. Virginia dropped the criminal charges after the surveillance video was brought to the prosecutor's attention. J.A. 94.

II. Procedural History

A. State Habeas Proceedings

Two months after the Regional Administrator denied Mr. Wall's last administrative appeal, Mr. Wall filed a pro se petition for a writ of habeas corpus in the Virginia Supreme Court seeking restoration of the 270 days of accrued good-time credits revoked during his disciplinary proceedings. *See* J.A. 26–28; *see also* Va. Code § 8.01-654(A)(1) (permitting habeas petitions to be filed directly in the Virginia Supreme Court). Mr. Wall claimed he was denied due process under the

Fourteenth Amendment because his hearing officers refused to review video footage of the underlying incident.[1] J.A. 27.

The Virginia Supreme Court dismissed Mr. Wall's petition on June 10, 2016, holding it lacked habeas jurisdiction to hear challenges to "institutional proceeding[s] resulting in loss of good conduct . . . credit." J.A. 26. Such challenges are "not cognizable in a [state] petition for a writ of habeas corpus," the Virginia Supreme Court explained, because they do not "as a matter of law . . . directly impact the duration of a petitioner's confinement."[2] J.A. 26 (quoting *Carroll v. Johnson*, 685 S.E.2d 647, 652 (Va. 2009)).

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[1] The State did not put Mr. Wall's petition in the record below, but the State has not disputed that the petition raised a due process challenge regarding the hearing officers' refusals to review video evidence. *See* J.A. 106 (asking the State to produce records from the state habeas proceeding), J.A. 333 (noting that the State's response was "clearly missing the initial Habeas Corpus petition").

[2] Mr. Wall attempted to move for reconsideration, but the mailing containing his motion was returned due to an insufficient address. J.A. 24, 29. Mr. Wall then filed a second state habeas petition, again raising his Fourteenth Amendment claim. J.A. 126–36. The Virginia Supreme Court denied this second petition, explaining Mr. Wall's claims had been "previously resolved against [him]." J.A. 180.

B. Federal Habeas Proceedings

Mr. Wall filed a timely pro se federal petition for a writ of habeas corpus in the Western District of Virginia on November 8, 2016, again claiming he was denied due process because the prison hearing officers refused to view the surveillance video. J.A. 5, 9, 18, 20.

The State moved to dismiss Mr. Wall's petition, J.A. 112–13, arguing "the Virginia Supreme Court addressed the merits of Wall's claim," and 28 U.S.C. § 2254(d) barred him from relitigating that claim in federal court, J.A. 119. The district court denied the State's motion and held Section 2254(d) inapplicable because the Virginia Supreme Court's dismissal for lack of jurisdiction did not reach the merits of Mr. Wall's claims. J.A. 336–38. The district court then invited the State to file an amended motion addressing the merits of Mr. Wall's claims. J.A. 338.

The State filed an amended motion to dismiss, arguing the disciplinary proceedings satisfied due process. J.A. 339, 341–44. In particular, the State argued sufficient evidence supported Mr. Wall's

guilt and hearing officers have discretion whether or not to review video evidence.[3] J.A. 341–44.

On March 31, 2019, the district court granted the State's amended motion. J.A. 348. It held that although Mr. Wall had a qualified due process right to present *documentary* evidence, J.A. 353 (citing *Wolff v. McDonnell*, 418 U.S. 539, 563–67 (1974)), surveillance footage was "clearly outside the definition of 'documentary evidence,'" J.A. 356 (quoting *Wallace v. Watford-Brown*, No. 1:13-cv-319, 2015 WL 5827622, at *4 (E.D. Va. Oct. 5, 2015)). The district court also noted that "a hearing officer may decide that legitimate penological interests justify the denial of an individual inmate's documentary evidence request, and their decisions are not to be lightly second-guessed by courts far removed from the demands of prison administration." J.A. 356–57.

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[3] The State made the video evidence argument as to only one of the two hearings. *See* J.A. 344 (noting that Officer Hensley declined to view the video evidence after hearing Officer Hicks's testimony). The State's failure to raise this argument in connection with the other hearing appears to be based on its misunderstanding of the record. The State apparently believed one of the hearing officers *had* reviewed the video, J.A. 342, but the evidence cited for this belief indicates that a *witness*, Captain Still, reviewed the video, J.A. 182. The district court did not discuss this apparent confusion and applied the State's video evidence argument to both hearings. *See* J.A. 356–57.

Mr. Wall filed a timely notice of appeal. J.A. 361. While the appeal was pending, this Court held prisoners have a qualified due process right to obtain and present surveillance video evidence in disciplinary proceedings. *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019). This Court appointed undersigned counsel to represent Mr. Wall and granted a certificate of appealability with instructions to "address this Court's decision in *Lennear* . . . and whether the retroactivity analysis announced in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, applies in this case."

SUMMARY OF THE ARGUMENT

Virginia prison authorities violated Mr. Wall's due process rights by stripping him of good-time credits after refusing his repeated requests to review exculpatory surveillance video evidence. In *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019), this Court held that inmates have a qualified due process right to obtain and present surveillance video evidence in prison disciplinary proceedings. Under *Lennear*, disciplinary authorities must either review video evidence or establish a case-specific penological justification for declining to do so. The disciplinary authorities here did neither.

Teague v. Lane, 489 U.S. 288 (1989), which generally bars federal courts from retroactively applying new rules of criminal procedure on collateral review of convictions or sentences, does not prevent this Court from recognizing the violation of Mr. Wall's due process rights. *Teague*'s restrictions rest on finality and comity concerns raised when a federal court upsets a final judgment no longer subject to direct judicial review—considerations not implicated by judicial review of a prison administrative decision. Where, as here, a prisoner's first and only opportunity for judicial review of such a decision is federal habeas corpus,

the habeas court must apply binding precedent like *Lennear*. And even if this Court disagrees and holds that *Teague* bars *Lennear*'s direct application here, this Court is left to resolve de novo the same due process issue it considered in *Lennear*. It should reach the same result.

ARGUMENT

This Court reviews the district court's decision dismissing Mr. Wall's habeas petition de novo. *Tyler v. Hooks*, 945 F.3d 159, 165 (4th Cir. 2019). After the district court's decision, this Court clarified the appropriate due process analysis in *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019). *Lennear* squarely controls this case and requires reversal.

I. Virginia Prison Authorities Violated Due Process by Refusing to Review Video Evidence.

Lennear requires prison authorities to review video evidence in disciplinary hearings absent a case-specific penological justification for refusing to do so. *Lennear*, 937 F.3d at 272. Here, prison officials revoked Mr. Wall's good-time credits after rejecting his account of a contested incident and refusing his timely and repeated requests that they consult video evidence capable of corroborating his testimony. They did so without providing any case-specific rationale for their refusal. Under *Lennear*, these facts make out a due process violation.

Lennear and this case share materially identical facts. An inmate repeatedly requested, during all stages of the disciplinary process, that his hearing officer review surveillance video of an underlying incident. *Id.* at 265–67; J.A. 41, 62. His requests were denied without any security

rationale, and he lost good-time credits after a hearing officer accepted a corrections officer's version of contested events. *Lennear*, 937 F.3d at 266; J.A. 41–42, 62, 67. The inmate then filed a federal habeas petition challenging the refusal to review the video as a violation of his due process right to "present documentary evidence in his defense." *Lennear*, 937 F.3d at 268 (quoting *Wolff*, 418 U.S. at 566); J.A. 9 (same).

Lennear's holding on these facts was clear: "[I]nmates at risk of being deprived of a liberty interest, like good time credits, have a qualified right to obtain and present prison video surveillance evidence." *Lennear*, 937 F.3d at 262. Access to such evidence, this Court reasoned, is "an essential aspect of the inmate's due process right to 'marshal facts in his defense and present witnesses and documentary evidence'" in disciplinary proceedings.[4] *Id.* at 269 (quoting *Gibbons v. Higgins*, 73 F.3d 364, 364 (7th Cir. 1995) (table decision)). Video footage is particularly important because it provides unbiased evidence of what happened, thereby addressing the "severe credibility problem" inmates face when

[4] In reaching its holding, *Lennear* explicitly noted that video surveillance evidence falls within "the universe of 'documentary evidence' subject to . . . due process protections." *Lennear*, 937 F.3d at 268. The district court did not have the benefit of *Lennear* when it held to the contrary. *See* J.A. 356.

giving testimony that contradicts a corrections officer's. *Id.* (quoting *Hayes v. Walker*, 555 F.2d 625, 630 (7th Cir. 1977)). Thus, this Court held, inmates may not be "deprived of potentially critical 'evidence contradicting statements of prison staff'" simply because other evidence may suggest guilt. *Id.* at 272 (quoting *Howard v. U.S. Bur. of Prisons*, 487 F.3d 808, 814 (10th Cir. 2007)).

Lennear squarely governs here. Mr. Wall lost accrued good-time credit in his disciplinary proceedings. J.A. 42, 67. His timely written and verbal requests for review of video evidence were denied, J.A. 41, 50, 62, 71, with no demonstration that "consideration of such evidence would be, under the particular circumstances of the case, 'unduly hazardous to institutional safety or correctional goals,'" *Lennear*, 937 F.3d at 272 (quoting *Wolff*, 418 U.S. at 566) (emphasis omitted). Indeed, prison authorities in this case never offered a case-specific penological justification for refusing to review the video.[5] *See id.* at 270–71 (rejecting "blanket policies of exclusion" and emphasizing "the importance of case-by-case analysis in deciding to grant or deny inmate requests to obtain

[5] The district court's observation that courts will not "lightly second-guess[]" the penological decisions of prison officials is therefore irrelevant. J.A. 356–57.

access to or present evidence”). Instead, they refused to review potentially exculpatory video evidence simply because they credited the testimony of two corrections officers over Mr. Wall’s. J.A. 50, 71. *Lennear* prohibits this. 937 F.3d at 272.

II. *Teague* Does Not Bar Application of the Due Process Principles that Resolve This Case.

Although this Court decided *Lennear* after Virginia stripped Mr. Wall of his good-time credit, *Teague v. Lane*, 489 U.S. 288 (1989), which restricts the retroactive application of newly announced rules of criminal procedure, does not bar *Lennear*’s application here. *Teague* explained that new rules apply retroactively to cases “pending on direct review or not yet final, with no exception.” *Teague*, 489 U.S. at 304–05 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)). When a court has entered final judgment and no opportunities for appellate or certiorari review remain, though, *Teague* instructs that finality and comity considerations generally bar the application of new rules on collateral review of that final judgment. *See id.* at 309–10; *see also Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (explaining when a criminal judgment is “final” for *Teague* purposes). Here, Mr. Wall has not yet obtained a judicial ruling on his due process claim that is final under *Teague*.

Teague's retroactivity bar does not apply where, as here, a petitioner has had no prior opportunity to obtain judicial review of a prison disciplinary decision. Whether a disciplinary decision is *administratively* final is irrelevant; *Teague* is concerned with *judicial* finality. *See Teague*, 489 U.S. at 308–10. Prison disciplinary bodies, unlike courts, do not make law. *See White v. Ind. Parole Bd.*, 266 F.3d 759, 765 (7th Cir. 2001) (distinguishing administrative from judicial decisionmakers). Their determinations simply do not carry the presumptive finality of judicial rulings. *See Tyler*, 945 F.3d at 167. Similarly, comity interests are not implicated absent a state court's judgment. *Hamlin v. Warren*, 664 F.2d 29, 31 (4th Cir. 1981) (suggesting comity interests are absent, "or at least not highly visible, in controversies over good time credits"). Thus, when federal habeas corpus provides the only judicial means to challenge an administrative decision, a habeas court may retroactively apply new law because the court "effectively act[s] as if [it] were reviewing the issue on direct appeal."[6] *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169, 1172 (9th Cir. 2001).

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[6] Indeed, this Court has suggested "*Teague* has no application" *at all* to habeas petitions that, like Mr. Wall's, "do not challenge the validity of [criminal] convictions or sentences." *Plyler v. Moore*, 129 F.3d 728, 735

Under these principles, *Teague* does not bar this Court from applying *Lennear* to Mr. Wall's habeas petition. Virginia provides no judicial review of good-time credit revocations,[7] *see* J.A. 26, and, as this Court has recognized, a current prisoner like Mr. Wall "may challenge the revocation of good-time credits" in federal court "only by way of habeas corpus," *see Dilworth v. Corpening*, 613 F. App'x 275, 275 (4th Cir. 2015) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (2011)). Mr. Wall has diligently pursued his petition and has not defaulted on any prior opportunity to receive a final judicial pronouncement on the merits of his due process claim. Thus, in reviewing this petition, this Court "effectively act[s] as if [it] were reviewing the [due process] issue on direct appeal," *Alvarenga-Villalobos*, 271 F.3d at 1172, and so must apply all

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n.9 (4th Cir. 1997). But the Court need not address that broader issue here. This case can be resolved on the narrower ground that Mr. Wall's federal habeas petition is his first and only opportunity for judicial review.

[7] Relying on Virginia courts' inability to hear Mr. Wall's claim, the district court correctly held that 28 U.S.C. § 2254(d) does not apply here. Section 2254(d) prevents federal habeas courts from revisiting certain claims previously "adjudicated on the merits" by a state court. *See* 28 U.S.C. § 2254(d). As the district court recognized, a claim is not "adjudicated on the merits" when a state court refuses to reach the merits and instead dismisses for lack of jurisdiction. J.A. 336–38.

existing rules of law regardless of when they were announced, *see Griffith*, 479 U.S. at 326.

Applying *Lennear*'s due process principles here would be consistent with this Court's approach in procedurally similar cases. The *Lennear* Court applied its due process holding to past events without suggesting *Teague* barred it from doing so. *See Lennear*, 937 F.3d at 273; *see also Caspari*, 510 U.S. at 389 (holding that courts may, but need not, *sua sponte* raise and apply *Teague*). And, in *McWilliams v. Saad*, No. 19-6996, 2020 WL 824004, at *2 (4th Cir. 2020), this Court applied *Lennear* to another habeas petition denied in the district court before *Lennear* was announced. These petitioners were in the exact same position as Mr. Wall: although they were federal prisoners, *Teague*'s retroactivity principles apply to them in the same way they apply to state prisoners like Mr. Wall. *See United States v. Martinez*, 139 F.3d 412, 416 (4th Cir. 1998) ("It would be wrong to create an anomaly whereby new rules would apply retroactively to those in federal custody but not to state prisoners."). Thus, Mr. Wall should be treated the same.

Indeed, even if *Teague* bars this Court from relying on *Lennear* as binding precedent, Mr. Wall is nevertheless entitled to habeas relief. In

Lennear, this Court faced a due process issue nearly identical to the issue it faces here on de novo review. With no single precedential decision squarely dictating the outcome, the *Lennear* Court surveyed the principles embodied in "existing—and controlling—Supreme Court and Fourth Circuit case law" and held in favor of the petitioner. 937 F.3d at 274. If this Court holds that it cannot rely directly on *Lennear*, it is left to rely instead on the same body of controlling precedent underpinning *Lennear*'s holding. That precedent directs the same conclusion here that it directed just a few months ago in *Lennear*.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's dismissal of Mr. Wall's habeas petition and remand with instructions to grant the petition.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Wall respectfully requests oral argument pursuant to Federal Rule of Appellate Procedure 34(a) and Fourth Circuit Rule 34(a). Oral argument will provide this Court an opportunity to ensure the proper application of Fourth Circuit precedent regarding the due process implications of a prison hearing officer's failure to review surveillance video during disciplinary proceedings. The opportunity for oral argument is especially important here, where the Court must consider how to apply the retroactivity analysis announced in *Teague v. Lane*, 489 U.S. 288 (1989).

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,937 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Nicolas Sansone, certify that on March 23, 2020, a copy of Appellant's Brief and Joint Appendix was served on counsel for Appellee via the Court's ECF system.

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