No. 19-6524

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GARY WALL,

Petitioner-Appellant,

v.

WARDEN JEFFREY KISER,

Respondent-Appellee.

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

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INTRODUCTION

Plaintiff-Appellant Gary Wall was found guilty of assaulting two corrections officers at Red Onion State Prison and lost 270 days of good time credit. Wall sought relief in federal court under 28 U.S.C. § 2254, alleging that his due process rights were violated during the prison disciplinary proceedings that led to the revocation of his good time credit.

Four years after the disciplinary proceedings at issue (and months after the district court dismissed Wall's habeas petition), this Court decided *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019). In *Lennear*, the Court held that inmates facing deprivations of a liberty interest, including the loss of good time credit, have "a qualified right" under the Due Process Clause "to obtain and present video surveillance evidence." *Id.* at 262. Relying on *Lennear*, Wall contends that he is entitled to the restoration of his good time credit because prison officials declined to review security video relevant to his case without adequate justification.

The district court's decision dismissing Wall's habeas petition should be affirmed, because, under two lines of Supreme Court

precedent, the new procedural rule this Court announced in *Lennear* cannot be applied retroactively to disciplinary proceedings that predated its issuance. The key decision establishing an inmate's right to due process protection during prison disciplinary proceedings—*Wolff v. McDonnell*, 418 U.S. 539 (1974)—specifically held that "new procedural rules affecting inquiries into infractions of prison discipline" cannot apply retroactively. *Id.* at 573. In addition, *Teague v. Lane*, 489 U.S. 288 (1989), creates a general bar on the retroactive application of new procedural rules in federal habeas corpus proceedings. Separately and together, these precedents foreclose Wall's right to relief.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Wall's habeas petition under 28 U.S.C. § 2254. Wall timely appealed the district court's order granting the warden's motion to dismiss. JA 361. This Court granted a certificate of appealability and therefore has jurisdiction under 28 U.S.C. §§ 1291, 2253(c).

ISSUES PRESENTED

Whether the new procedural rule announced in *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019), may be applied retroactively to

invalidate a prison discipline proceeding that was completed before the rule was announced.

STATEMENT

Wall is serving a sentence of 43 years, 19 months, and 290 days for various convictions, including five counts of assault and battery, four counts of robbery, and two counts of felonious injury to a correctional employee and unlawful wounding. JA 181. He is currently confined at Red Onion State Prison (Red Onion).

1. On August 14, 2015, Wall was involved in an altercation with Red Onion corrections officers. The facts of what happened are disputed. According to Wall, he was walking towards a vestibule door with two corrections officers (Officer Hicks and Officer Rasnick) behind him. JA 273. Wall contends that he turned around when he reached the door and saw Officer Hicks stop with his walkie-talkie to his ear. *Id.* Officer Rasnick, however, continued walking towards Wall and eventually grabbed his arm. In the ensuing struggle, Rasnick swung at Wall, striking him in his left eye. *Id.* Wall contends that he ducked to avoid further blows as Officer Hicks became involved. Although he did not attempt to hit either officer, Wall acknowledges that he and Officer

Hicks collided as he attempted to avoid Rasnick's blows. *Id.* Wall alleges that the altercation was preceded by cursing between him and Rasnick and that Rasnick was agitated when the incident occurred. *Id.* Wall received several injuries in the struggle, including two black eyes, lacerations from the handcuffs, a cracked bone in his hand, and several bruises on his head. JA 274.

The officers offer a different account. According to Officer Hicks, he ordered Wall to stand against the wall when they reached the vestibule door. JA 274. Hicks contends that Wall spun around and swung at him, but missed. *Id.* Hicks then grabbed Wall around the waist and they fell to the ground. *Id.* Rasnick and Hicks attempted to gain control of the situation when Wall struck Hicks in the eye. *Id.* Hicks received three stitches around his eye and a fracture in his hand. *Id.* Rasnick suffered knee and eye injuries, which "were serious enough to require treatment at the local hospital." JA 49.

2. a. Wall was charged with a number of disciplinary offenses, including aggravated assault charges against both Rasnick and Hicks. JA 348–49. Hearings on the charges related to the two officers were held separately. JA 349, 351. Wall was given notice of the

charges in advance of both hearings, which took place on September 8, 2015 (Hicks) and August 25, 2015 (Rasnick). *Id.*

b. Before the hearing on the assault charge regarding Hicks, Wall asserted his right to appear and requested an advisor, a witness, and documentary evidence, including three rapid-eye security videos. JA 349. Although Wall was provided an advisor, his request for a witness was denied when the officer in question submitted a statement indicating that he had no relevant information about the incident. *Id.*; JA 272. On a form provided to Wall in advance of the hearing, the hearing officer indicated that Wall's request for video evidence would be denied. JA 264. During the hearing, however, the hearing officer explained that requests for video evidence need not be submitted by form and that an offender needs only to make the request at the hearing. He observed that, in his view, the video would not show whether Wall had intentionally struck the officer because only Wall could know his own intent. JA 274. After listening to the testimony, the hearing officer found Wall guilty of the charge of assaulting Officer Hicks and revoked 180 days of good time credit. JA 67, 351.

c. With respect to the hearing related to the assault on Officer Rasnick, Wall again appeared and was provided with an advisor, per his request. JA 351. Because Rasnick remained out of work due to his injuries at the time of the hearing, another officer, Captain Still, served in the role of reporting officer. JA 351 & n.4. A form provided to Wall in advance of the hearing indicated that video surveillance evidence would not be provided. JA 241. Captain Still, however, reviewed the video and testified that it showed Wall swinging at Rasnick as he attempted to handcuff Wall, and Hicks coming to Rasnick's aid. JA 247. According to Captain Still, the three fell to the floor while Wall continued to fight the two officers. *Id.* When Wall inquired about the video evidence at the hearing, the hearing officer responded that Captain Still had reviewed it and testified as to its contents, and that no form was needed to request video evidence. *Id.* Crediting Captain Still's testimony, the hearing officer found Wall guilty of the charge of assaulting Officer Rasnick and revoked 90 days of good time credit. JA 352.

d. The hearing officers' determination of guilt in both cases was reviewed and approved by higher-level officers. JA 351–52. Wall further appealed both findings to the warden and the regional administrator,

both of whom upheld the hearing officers' decisions. *Id.*; see also JA 257 (regional administrator denying Rasnick appeal on December 8, 2015); JA 280–81 (regional administrator denying Hicks appeal on November 9, 2015).

2. In January 2016, Wall filed a petition for a writ of habeas corpus in the Virginia Supreme Court. The court denied the petition, concluding that Wall's "claims, which concern an institutional proceeding resulting in loss of good conduct or sentence credit, are not cognizable in a petition for a writ of habeas corpus." JA 124. The court explained that, under Virginia law, its habeas jurisdiction covered only "'cases in which an order, entered in the petitioner's favor . . . will, as a matter of law and standing alone, directly impact the duration of a petitioner's confinement.'" *Id.* (quoting *Carroll v. Johnson*, 685 S.E.2d 647, 652 (Va. 2009)). Wall filed a second state habeas petition, which the Virginia Supreme Court denied on the ground that Wall's claims were "previously resolved against [him]." JA 180.

3. Having exhausted state remedies, Wall filed a federal habeas petition under 28 U.S.C. § 2254 in the Western District of

Virginia, alleging, *inter alia*, that the hearing officers' failure to review the rapid-eye video violated his right to procedural due process.

a. The warden moved to dismiss the petition, arguing that the Virginia court's decision was not "contrary to or an unreasonable application of clearly established federal law." JA 119. The district court denied that motion, concluding that, because the Virginia Supreme Court had not decided the merits of Wall's petition, that court's decision did not constitute "an adjudication 'on the merits'" for purposes of Section 2254(d). JA 336–38.

b. After inviting the warden to file an amended motion, the district court granted the motion to dismiss. The court explained that "'[t]o state a procedural due process violation, a plaintiff must (1) identify a protected liberty . . . interest and (2) demonstrate deprivation of that interest without due process of law.'" JA 353 (quoting *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015)). "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Id.* (quoting *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005)).

With respect to earned good time credit, the district court observed that "[f]ederal habeas courts recognized a protected liberty interest . . . requiring 'those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated.'" JA 353 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974)). But because "[p]rison disciplinary proceedings are not part of a criminal prosecution, . . . the full panoply of rights due a defendant in such proceedings does not apply." *Id.* Citing Supreme Court precedent, the district court concluded that, in a proceeding in which good time credit may be revoked, "the inmate must receive (1) advance written notice of the disciplinary charges; (2) an opportunity, when consistent with institutional safety and correctional goals, to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action." *Id.* (citing *Superintendent, Mass. Corr. Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985)). The district court emphasized that "[t]he requirements of due process are flexible and depend on a balancing of the interests affected by the relevant government action." JA 354

(quotation marks omitted). The court also emphasized that "the fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators [in disciplinary proceedings] that have some basis in fact." *Id.* (quotation marks omitted).

As to Wall's claim that his due process rights were violated by the hearing officers' refusal to review the rapid-eye security video, the district court concluded that "denials of this evidence did not constitute a Due Process violation because this type of surveillance footage is clearly outside the definition of 'documentary evidence' to which plaintiff is entitled." JA 356. (quotation marks omitted). "Further, 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." JA 356–57. Having determined that "Wall ha[d] not demonstrated a due process violation" (JA 357) or stated a claim as to the other counts in his petition, the district court granted the motion to dismiss, see JA 353–59.

c. Wall filed a timely notice of appeal from the district court's final order denying his federal habeas petition. JA 360–61.

3. While Wall's federal habeas petition was pending, he also filed a separate suit under 42 U.S.C. § 1983 related to the altercation with Officers Rasnick and Hicks. Among other claims, Wall alleged that his right to procedural due process was violated by the hearing officers' refusal to consider video evidence of the incident. See ECF No. 1. at 7, No. 7:17-cv-00385-JLK-PMS (W.D. Va. Aug. 17, 2017). At a bench trial, both hearing officers who presided over Wall's disciplinary hearings testified that they would not have reached a different conclusion as to Wall's guilt if they had reviewed the surveillance system video before or during the hearings. See ECF No. 87 at 45–46, No. 7:17-cv-00385-JLK-PMS (May 17, 2019).[1]

[1] Following the trial, the Magistrate Judge recommended granting judgment against Wall on all of his claims, and judgement in favor of Officers Rasnick and Hicks on their counter-claims for assault and battery. See ECF No. 87 at 67, No. 7:17-cv-00385-JLK-PMS (May 17, 2019). The Judge found that Hicks and Rasnick were each entitled to compensatory damages for pain and suffering, as well as punitive damages because "Wall's actions were not merely negligent, but were intentional." *Id.* at 62–63. The district court has not yet acted on the recommendation. This Court may take judicial notice of the Magistrate Judge's report and recommendation in Wall's Section 1983 case insofar

4. On August 23, 2019—nearly five months after the district court dismissed his federal habeas petition, more than four years after the final conclusion of disciplinary proceedings in which Wall was found guilty of assaulting Officers Rasnick and Hicks, and nearly four years after the end of Wall's administrative appeals from those decisions—this Court decided *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019).

In *Lennear*, a federal inmate "appeal[ed] a decision holding that prison officials did not violate [his] due process rights when the officials did not review allegedly pertinent video surveillance evidence in a disciplinary proceeding that led to revocation of [the inmate's] good time credits." 937 F.3d at 262. Looking to the Supreme Court's decision in *Wolff v. McDonnell*, this Court held that "the universe of 'documentary evidence' subject to the due process protections recognized in *Wolff* encompasses video surveillance evidence"—a point the federal government did not contest. *Lennear*, 937 F.3d at 268. The Court further stated that "an inmate's due process rights related to video surveillance evidence has at least two dimensions: (A) the qualified

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as it bears on this appeal. *United States v. White*, 620 F.3d 401, 415 n.14 (4th Cir. 2010); *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir.1989).

right of access to such evidence and (B) the qualified right to compel official review of such evidence." *Id.* at 269.

"Regarding the first dimension—the qualified right of access," *Lennear* held that "upon request, an inmate is entitled to access prison video surveillance evidence pertaining to his or her disciplinary proceeding unless the government establishes that disclosure of such evidence would be, under the particular circumstances of the case, 'unduly hazardous to institutional safety or correctional goals.'" 937 F.3d at 269 (quoting *Wolff*, 418 U.S. at 566). Although it declined to "comprehensively set forth the universe of 'safety or correctional goals' that can justify a penological institution's decision to deny or otherwise place limits on an inmate's access to video surveillance," the Court emphasized "four overarching principles." *Lennear*, 937 F.3d. at 270.

- "First, prison officials bear the 'burden to come forward with evidence of the reasons for denying an inmate's request for access to documentary evidence, including video surveillance footage.'" *Id.* (quoting *Smith v. Massachusetts Dep't of Corr.*, 936 F.2d 1390, 1400 (1st Cir. 1991)).

- "Second, prison officials must consider documentary evidence requests, including requests for video surveillance evidence, on an individualized basis," rather than relying on blanket policies to deny access. *Id.*
- "Third, if prison officials decide to deny an inmate access to requested documentary evidence, including video surveillance evidence, on grounds that such evidence is not pertinent to the inmate's alleged violation, then that determination must be made by the disinterested hearing officer, not prison officials involved in lodging the charge." *Id.* at 271.
- "Fourth, if prison officials identify a valid penological reason for restricting a particular inmate's access to video surveillance evidence . . . then, before categorically denying access to such evidence, the prison officials should consider whether alternative avenues are available to provide the inmate with pertinent information included in that evidence." *Id.* at 271–72.

"As to the second dimension—the right to have video surveillance evidence considered in disciplinary proceedings," the Court held that, "upon an inmate's request, the disciplinary hearing officer must review video surveillance unless the government establishes 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)). Although the Court once again declined to engage in a "comprehensive discussion of which 'safety or correctional goals' are constitutionally sufficient to justify a refusal to consider video surveillance," it explained that the same guidelines that apply to the right of access to video evidence also apply to the obligation to consider such evidence. *Id.* at 273. The Court emphasized, however, that "the universe of 'safety or correctional' interests justifying prison officials' refusal to consider video surveillance evidence will necessarily be smaller than [the] universe of interests sufficient to justify prison officials' refusal to provide access to such evidence." *Id.*

5. On January 29, 2019, five months after *Lennear* was decided, this Court granted Wall a certificate of appealability on the

question whether "the prison disciplinary proceedings failed to comport with the Due Process Clause because the hearing officers failed to review the surveillance video of the incident." Dkt. 16. The Court specifically directed the parties to "address [the] decision in *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019), and whether the retroactivity analysis announced in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, applies in this case." *Id.*

SUMMARY OF ARGUMENT

The new procedural rule announced in *Lennear v. Wilson*, 937 F.3d 257 (4th Cir. 2019), cannot be applied retroactively to Wall's long-completed prison disciplinary proceedings.

1. Two independent strands of Supreme Court authority preclude application of *Lennear*'s rule to Wall's case. In *Wolff v. McDonnell*, 418 U.S. 539, 574 (1974), the Court expressly stated that the sweeping new procedural protections it recognized for inmates facing the loss of a liberty interest in prison discipline proceedings would not apply retroactively given the "the significant impact a retroactivity ruling would have on the administration of all prisons in the country." And in *Teague v. Lane*, 489 U.S. 288 (1989), the Court

interpreted the federal habeas statute to preclude retroactive application of new rules to cases on collateral review except in specifically enumerated circumstances.

2. Both *Wolff* and *Teague* foreclose Wall's claim for habeas relief.

a. As a sister circuit has found, under *Wolff*'s non-retroactivity holding, a habeas petitioner seeking restoration of good time credit in federal court may not reap the benefits of a rule announced after his disciplinary proceedings are complete. See *Sanchez v. Miller*, 792 F.2d 694, 700 (7th Cir. 1986). Like the petitioner in that case, Wall seeks relief based on a rule of procedure that is not "inherent in" or "compelled by" *Wolff*; and "imposes greater burdens on prison authorities." *Id.* at 702–03. Moreover, any failure to comply with *Lennear*'s rule in Wall's disciplinary proceeding "did not so undermine the legitimacy of [the] hearing[] as to warrant imposing the burden of retroactivity on prison officials." *Id.* at 703.

b. *Teague* also precludes relief because every element of the non-retroactivity framework is met, and most are uncontested. *First*, *Lennear* announced a new rule, as this Court's decision in *Tyler v.*

Hooks, 945 F.3d 159, 168 (4th Cir. 2019), demonstrates. *Second*, the new rule for which Wall seeks retroactive application does not fit within either of the exceptions to *Teague*'s non-retroactivity holding: It is procedural, not substantive; and it is not "necessary to prevent an impermissibly large risk of an inaccurate conviction", nor does it "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton v. Bockting*, 549 U.S. 406, 418, 420 (2007) (quotation marks omitted).

c. Wall's effort to avoid the *Teague*'s non-retroactivity holding is unavailing. For one thing, his insistence that *Teague* is concerned only with "*judicial* finality" (Wall. Br. 19), ignores the separate retroactivity bar in *Wolff*, which is uniquely concerned with prison discipline proceedings.

But Wall's reading of *Teague* fails on its own terms. Contrary to Wall's contention, a federal court exercising jurisdiction under the federal habeas statutes does not transform into a court of direct review simply because a state fails to permit a prisoner to challenge the revocation of good time credit. Moreover, Wall's reading would engender "unfortunate disparit[ies] in the treatment of similarly situated

defendants." *Teague*, 489 U.S. at 305. At a minimum, Wall's approach would create disparities between prisoners alleging due process infirmities in their criminal trials and those challenging revocation of good time credit—the latter group, despite having "less . . . at stake." *Wolff*, 418 U.S. at 574, would be permitted to obtain relief in circumstances where their counterparts challenging criminal convictions could not. It would also create disparities between prisoners challenging revocation of good time credit in different states and even within the same state if the state courts failed to consistently enforce the bounds of their habeas jurisdiction. In short, Wall's approach would engender precisely the "unprincipled and inequitable" results that led the Supreme Court to abandon its prior retroactivity standard in favor of the *Teague* framework. 489 U.S. at 304 (plurality opinion).

2. Nor is Wall correct that, even if *Teague* bars retroactive application of the rule announced in *Lennear*, this Court can simply apply the same principles it did in that case and reach the same result. See Wall Br. 21–22. That is not how retroactivity doctrine works. The non-retroactivity holdings in *Wolff* and *Teague* cannot be overcome simply by ignoring them and doing the thing they forbid anyway.

3. Should the Court decide that, notwithstanding *Wolff* and *Teague*, *Lennear*'s rule applies to Wall's long-completed disciplinary proceedings, remand would be required to determine whether the *Lennear* standard was satisfied. This court is one "of review, not of first view," *Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006), and it should not undertake to address that question in the first instance, based on a record compiled without the benefit of the Court's guidance in *Lennear*. Remand would also be required to allow appellee to develop his more-than-colorable argument that any potential error was harmless because review of the video would not "have aided [Wall's] defense." *Lennear*, 937 F.3d at 277.

STANDARD OF REVIEW

This Court's reviews *de novo* a district court's decision to dismiss a petition brought under 28 U.S.C. § 2254. See *Deyton v. Keller*, 682 F.3d 340, 343 (4th Cir. 2012).

ARGUMENT

I. The new procedural rule announced in *Lennear* cannot be retroactively applied to Wall's long-concluded disciplinary proceedings

A. Two separate lines of Supreme Court precedent preclude retroactive application of new procedural rules in the prison-discipline context

Two independent lines of Supreme Court authority establish that new procedural rules cannot be applied retroactively to prison discipline proceedings that were completed before the rule was announced. First, in *Wolff v. McDonnell*, 418 U.S. 539 (1974), the case that established an inmate's right to due process protections in disciplinary proceedings, the Court stated unequivocally that the right it recognized was forward-looking only. Second, in *Teague v. Lane*, 489 U.S. 288 (1989), the Court made clear that federal habeas courts generally may not order habeas relief based on new constitutional rules of procedure.[2]

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[2] As noted previously, the district court concluded that the separate relitigation bar imposed by 28 U.S.C. § 2254(d) was not implicated here because the Virginia courts never adjudicated Wall's current claims "on the merits." See JA 336–38. But "[t]he retroactivity rules that govern federal habeas review on the merits—which include *Teague*—are quite separate from the relitigation bar imposed by" § 2254(d), and "neither abrogates or qualifies the other." *Greene v. Fisher*, 565 U.S. 34, 39 (2011).

1. In *Wolff*, a Nebraska inmate filed a class action under Section 1983, alleging that "disciplinary proceedings did not comply with the Due Process Clause of the Fourteenth Amendment to the Federal Constitution." 418 U.S. at 543. Under the rule of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), Wolff was unable to seek the restoration of good time credit under Section 1983. 418 U.S. at 543. But the Court held that Wolff's separate claims for damages and injunctive relief were not foreclosed, and thus his Section 1983 suit challenging the procedures resulting in the loss of good time credit could proceed. *Id.* at 554.[3]

After reciting the due-process principles guiding adjudication of inmate offenses, the *Wolff* Court articulated critical limits on the remedies available for violations of the right it recognized. Specifically reversing the Eighth Circuit on this point, the Court described "[t]he question of retroactivity of new procedural rules affecting inquiries into

[3] In its post-*Wolff* decision in *Edwards v. Balisock*, 520 U.S. 641 (1997), the Supreme Court limited the universe of cases challenging prison disciplinary adjudications resulting in the loss of good time credit that are cognizable under Section 1983. Under *Edwards*, only claims that would not "necessarily imply the invalidity of the judgment" may be raised in a Section 1983 suit. *Id.* at 645.

infractions of prison discipline" as "effectively foreclosed" by the Court's decision two years earlier in *Morrisey v. Brewer*, 552 U.S. 264 (1972), which expressly stated "that the due process requirements there announced were to be 'applicable to *future* revocations of parole.'" *Wolff*, 418 U.S. at 573 (quoting *Morrisey*, 408 U.S. at 490). Emphasizing that the number of prison disciplinary proceedings (at issue in *Wolff*) dwarfed the number of parole and probation hearings (at issue in *Morrisey*), the Court explained that "[i]f [parole] rules are not retroactive out of consideration for the burden on federal and state officials, this case is *a fortiori*." *Id.* The Court also emphasized that because "less is generally at stake for an individual" in prison "disciplinary proceedings" "than at a criminal trial," "great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures." *Id.*

Nor does *Wolff* stand alone. The very next year, the Supreme Court applied *Wolff*'s non-retroactivity ruling to reverse a decision of this Court that had permitted an inmate's Section 1983 suit to proceed

against Virginia prison officials based on an alleged deprivation of the procedural due process rights recognized in *Wolff.* See *Cox v. Cook*, 420 U.S. 734, 736 (1975). The Court specifically emphasized that it had "expressly held [the] decision [in *Wolff*] not to be retroactive." *Id.* at 736. Acknowledging that *Wolff*'s "holding was made in the context of a request for expunction of the records of prison discipline determinations," the Court reasoned that "the same result obtains, *a fortiori*, to monetary claims against prison officials acting in good-faith reliance on a pre-existing procedure." *Id.*

2. Whereas *Wolff*'s rule of non-retroactivity focuses on the specific nature of prison disciplinary proceedings, the rule of *Teague v. Lane*, 489 U.S. 288 (1989), is based on the federal habeas statute. "Under *Teague*, as a general matter, new constitutional rules of criminal procedure will not be applicable to . . . cases which have become final before the new rules are announced." *Welch v. United States*, 136 S. Ct. 1257, 1264 (2016) (quoting *Teague*, 489 U.S. at 310).

In adopting that now-familiar framework, the Court emphasized that "[h]abeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final" and

"is not designed as a substitute for direct review." *Teague*, 489 U.S. at 306 (plurality opinion) (citation omitted). Consistent with that understanding of the "function of habeas corpus," the Court noted that it had "never . . . defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error," but rather had "recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review." *Id.* at 308. This is so, the Court explained, because "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Id.* at 309. The Court also emphasized that "[t]he costs imposed upon the State[s] by retroactive application of new rules of constitutional law on habeas corpus . . . generally far outweigh the benefits of this application." *Id.* at 310 (quotation marks omitted).[4]

[4] Like the plurality, the concurring and dissenting opinions in *Teague* also analyzed the question of when a rule would be retroactive on collateral review by looking to the scope of the federal habeas statute. See 489 U.S. at 318 (White, J., concurring) ("If we are wrong in construing the reach of the habeas corpus statutes, Congress can of

Having established that the federal courts' authority to award habeas relief does not extend to retroactive applications of new rules—defined as those that "break[] new ground or impose[] a new obligation on the States or the Federal Government," *Teague,* 489 U.S. at 301—the *Teague* Court articulated two exceptions to that general principle: (1) rules "plac[ing] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; and (2) rules "requir[ing] the observance of those procedures that . . . are implicit in the concept of ordered liberty," and "without which the likelihood of an accurate conviction is seriously diminished." *Id.* at 307, 313 (quotation marks omitted). All other rules, the Court held, may not be retroactively applied to cases on collateral review.

b. In the years following *Teague*, the Court has reiterated that its decision turned on the nature and scope of the federal habeas statutes. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), for example, the Court rejected the proposition that States were bound to apply the *Teague* framework in their own habeas proceedings, explaining that

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course correct us."); *id.* at 332 (Brennan, J., dissenting) (referring to the Court's "interpretation of the reach of federal habeas corpus").

"*Teague*'s general rule of nonretroactivity was an exercise of this Court's power to interpret the federal habeas statute." *Id.* at 277. "[T]he U.S. Code," the Court explained, "gives federal courts the authority to grant 'writs of habeas corpus,' but leaves unresolved many important questions about the scope of available relief." *Id.* at 278. The Court historically viewed "that congressional silence—along with the statute's command to dispose of habeas petitions 'as law and justice require'—as an authorization to adjust the scope of the writ in accordance with equitable and prudential considerations." *Id.* (quoting 28 U.S.C. § 2243). Adoption of the *Teague* rule, *Danforth* emphasized, was "plainly grounded in [that] authority." *Id.*

B. *Wolff*' s non-retroactivity holding bars Wall's habeas petition

Although *Wolff* and *Cox* both arose in the Section 1983 context, a sister circuit has applied the non-retroactivity rule announced in those decisions to habeas claims seeking the restoration of good time credit. That holding reinforces the conclusion that the qualified procedural right to review video evidence recognized in *Lennear* is not applicable to prison discipline proceedings that were completed before the rule was announced.

1. In *Sanchez v. Miller*, 792 F.2d 694, 700 (7th Cir. 1986), for example, the Seventh Circuit considered whether a decision establishing standards of reliability for confidential informants used in prison disciplinary adjudications could be applied to invalidate a proceeding that resulted in the loss of good time credit two years before the decision was issued. Concluding that the later-announced indicia-of-reliability standard was not "inherent in the holding in *Wolff*" but rather a "new procedural rule," the court determined that it "[could] be given prospective effect only." *Id.* at 702–03. "[T]he primary question," the court explained, was "whether the rule imposes greater burdens on the prison authorities, not whether it increases the accuracy of the proceedings." *Id.* at 703. And although "*Wolff* did not say that procedural changes could *never* be applied retroactively, [it] indicated that the procedural defects at issue did not so undermine the legitimacy of prior disciplinary hearings as to warrant imposing the burden of retroactivity on prison officials." *Id.* "If the sweeping changes mandated in *Wolff* to reduce the risk of inaccurate results are not to be applied retroactively," the Seventh Circuit concluded, the same was true of "the comparatively small change made" to require indicia of reliability for

confidential informants in situations where doing so "burdens prison officials." *Id.*

2. *Sanchez* is on all fours with this case with respect to retroactivity.[5] As in *Sanchez*, Wall seeks relief under a federal habeas statute, alleging procedural due process violations in a prison disciplinary proceeding that resulted in the loss of good time credit. 792 F.2d at 695. And, as in *Sanchez*, Wall seeks retroactive application of a new rule of procedure that: (i) was not "inherent in" or "compelled by" *Wolff*; and (ii) "imposes greater burdens on prison authorities." *Id.* at 702–03. As for the former: this Court has *already* acknowledged that *Lennear* "extend[ed] the legal principles announced in *Wolff* to a new legal context." See *Tyler v. Hooks*, 945 F.3d 159, 168 (4th Cir. 2019). And it is plain from this Court's opinion that *Lennear* "imposes greater burdens on prison authorities" than pre-*Lennear* authority because, among other things, *Lennear* requires prison officials to: (1) "come forward with evidence of the reasons for denying an inmate's request for

[5] *Sanchez* arose in a different procedural posture because the petitioner failed to exhaust administrative remedies. See 792 F.2d at 699. That procedural posture did not affect the court's retroactivity analysis.

access . . . to video surveillance footage"; (2) "consider . . . requests for video surveillance evidence . . . on an individualized basis"; (3) ensure that decisions to deny access to or consideration of video evidence are made by an impartial hearing officer; and (4) "consider whether alternative avenues are available to provide the inmate with pertinent information included in [video] evidence" when institutional interests preclude access to or consideration of the video itself. 937 F.3d at 270–72, 274.

The similarities do not end there. Like in *Sanchez*, the new rules announced by this Court in *Lennear* do not "so undermine the legitimacy of prior disciplinary hearings as to warrant imposing the burden of retroactivity on prison officials," particularly as compared to the "sweeping changes mandated in *Wolff*." *Sanchez*, 792 F.3d at 703. As the Seventh Circuit emphasized, *Wolff*'s rejection of retroactivity despite the breadth of its holding set a high bar for any subsequent rule of procedure to warrant retroactive application. The qualified right to access to video evidence recognized in *Lennear* falls short of that standard.

C. *Teague*'s retroactivity framework also bars Wall's petition

Teague's holding that new rules are not retroactively applicable to cases on collateral review also precludes application of the procedural right recognized in *Lennear* to prison disciplinary proceedings that were finally concluded almost four years before *Lennear* was decided. Every element of the *Teague* framework is met here, and nearly all are uncontested.

1. *First*, *Lennear* plainly announced a "new rule." Under *Teague*, a rule is "new" "when it breaks new ground or imposes a new obligation on the States or the Federal Government." 489 U.S. at 301. As already explained, *Lennear* did just that.

Wall does not argue otherwise, and for good reason: This Court's precedent has already resolved the issue. It is well established that "[w]hatever would qualify as an old rule under . . . *Teague* . . . will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under [Section] 2254(d)(1)." *Williams v. Taylor*, 529 U.S. 362, 412 (2000); see *id.* (noting "caveat . . . that § 2254(d)(1) restricts the source of clearly established law to [Supreme] Court[] jurisprudence"). Conversely, a principle of procedure

that would *not* qualify as "clearly established law" under Section 2254(d) is, necessarily, a "new rule" for *Teague* purposes. And, in *Tyler*, this Court specifically rejected the argument that an inmate's right to have an impartial hearing officer "personally review and consider . . . video footage"—*i.e.*, the right announced in *Lennear*—was "clearly established" two years before *Lennear* was decided, noting that *Lennear* "extend[ed] the legal principles . . . in *Wolff*" to "review of video surveillance evidence for the first time in this Circuit." 945 F.3d at 168–69 (quotation marks omitted). Accordingly, this Court has already confirmed that *Lennear* announced a new rule under *Teague.*

2. *Second*, neither of the exceptions *Teague* recognized to the general bar on retroactivity is present here. Once again, Wall does not argue otherwise.

a. With respect to the first exception, the rule announced in *Lennear* is clearly procedural, not substantive.[6] In *Teague* terms, *Lennear* does not "place[] certain kinds of primary, private individual

[6] "Although *Teague* describes new substantive rules as an exception to the bar on retroactive application of procedural rules, [the Supreme] Court has recognized that substantive rules are more accurately characterized as . . . not subject to the bar." *Montgomery v. Louisiana*, 136 S.Ct. 718, 728 (2016) (quotations omitted).

conduct beyond the power of the criminal law-making authority to proscribe." 489 U.S. at 307. Instead, it establishes additional protections to guard against the possibility that an inmate will be erroneously deprived of his liberty.

b. Nor did *Lennear* announce a "watershed" rule. As later cases have described *Teague*'s second exception, it permits retroactive application of a procedural rule only when the rule "implicat[es] the fundamental fairness and accuracy of the criminal proceeding." *Whorton v. Bockting*, 549 U.S. 406, 416 (2007). As the Supreme Court has repeatedly explained, "[t]his exception is extremely narrow," and it is "'unlikely that any such rules ha[ve] yet to emerge." 549 U.S. at 417 (quotation marks omitted). Indeed, in the three decades "since *Teague*, [the Supreme Court] ha[s] rejected *every* claim that a new rule satisfied the requirements for watershed status." *Id.* (emphasis added).

This case could not properly be the first for a different result. To qualify as a "watershed rule," a newly announced principle "must be necessary to prevent an impermissibly large risk of an inaccurate conviction" and it must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Whorton*,

549 U.S. at 418, 420 (quotation marks and citation omitted). The rule announced in *Lennear* does neither. As *Lennear* itself emphasized, the right recognized in that case is a "qualified" one that can be overcome with a sufficient showing of institutional necessity. *Lennear*, 937 F.3d at 273. It could thus hardly be described as an "unrecognized bedrock procedural element that is essential to the fairness of a proceeding." *Whorton*, 549 U.S. at 421; accord *Wolff*, 418 U.S. at 573–74 (noting that the procedures prescribed were solely "*related to* the integrity of the factfinding process" (emphasis added)). For the same reason the *Lennear* rule cannot meet the bar *Wolff* set for retroactive procedural rules, it is not a "watershed" rule under *Teague.*

D. Wall's effort to avoid *Teague*'s retroactivity bar is unavailing

Instead of arguing that *Lennear* did not announce a "new rule" or that the rule it articulated falls into either one of *Teague*'s exceptions, Wall contends that the entire *Teague* framework is inapplicable because he had "no prior opportunity to obtain judicial review of [his] prison disciplinary decision." Wall Br. 19. According to Wall, "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." *Id.* (quotation marks omitted). That argument fails for several reasons.

1. As an initial matter, Wall's focus on *Teague* ignores the separate retroactivity bar announced in *Wolff*—which is *specific* to prison discipline proceedings. As described above, that bar applies to habeas petitions seeking the restoration of good time credit. See *Sanchez*, 792 F.2d at 700. And as *Wolff* explained, its non-retroactivity rule is based on the principle that "great weight should be given to the significant impact a retroactivity ruling would have on the administration of all prisons in the country, and the reliance prison officials placed, in good faith, on prior law not requiring such procedures." 418 U.S. at 574. So even if Wall were correct that *Teague* is inapplicable (which he is not, as explained, *infra*), *Wolff*'s anti-retroactivity holding would still preclude relief.

2. But Wall's reading of *Teague* also fails in its own right. As already explained, *Teague*'s non-retroactivity framework is based on an interpretation of the statutes conferring authority on the federal courts to award habeas relief to prisoners—28 U.S.C. §§ 2243, 2254—rather

than freestanding applicable principles of finality. "Habeas corpus always has been a *collateral* remedy" and a federal court reviewing a habeas petition does not magically become a court of direct review simply because the state does not provide a venue to challenge the revocation of good time credit. *Teague*, 489 U.S. at 306. Moreover, under Wall's reading, not only would the nature of the court's role change, its capacity to award relief would expand and contract based on various exogenous factors. While the sort of shapeshifting statutory authority Wall envisions would be unusual in any circumstance, it is particularly untenable in the context of federal habeas corpus.[7]

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[7] Wall cites no judicial decision adopting his view that a habeas petitioner challenging the revocation of good time credit can reap the benefit of a retroactive rule notwithstanding *Teague*. *Alvarenga-Villalobos v. Ashcroft*, 271 F.3d 1169 (9th Cir. 2001), which Wall quotes for the proposition that, when a habeas court "provides the only judicial means to challenge an administrative decision," (Wall Br. at19), it "act[s] as if [it] were reviewing the issue on direct appeal," *Alvarenga-Villalobos*, 271 F.3d at 1172, does not help him. In that case, the Ninth Circuit *rejected* the petitioner's effort to avoid the *Teague* bar in a non-criminal case. See *id.* The court made the statement Wall quotes in the context of distinguishing a previous case, which arose in the highly distinguishable and atypical circumstance of a prisoner attempting to *avoid* retroactive application of an unhelpful precedent, rather than seeking to benefit from a new procedural rule. See *id.* (citing *United States v. Newman*, 203 F.3d 700, 702 (9th Cir. 2000)).

a. For one thing, if Wall's reading were adopted, convicted prisoners who complain about procedural deficiencies in prison disciplinary proceedings—where "less is generally at stake for an individual," *Wolff*, 418 U.S. at 573—would have access to remedies unavailable to those complaining about inadequate safeguards *in their criminal trials*. As the Supreme Court explained in *Danforth*, "[a] decision . . . that a new rule does not apply retroactively under *Teague* does not imply that there was no right and thus no violation of that right at the time of trial—only that no remedy will be provided in federal habeas courts." 552 U.S. at 291. It would be more than a bit strange to interpret the federal habeas statute such that procedural due process violations at trial go unremedied in federal habeas review, while similar violations in prison disciplinary proceedings may be redressed.

b. Beyond creating an odd (and, at minimum, challenging to justify) dichotomy between procedural violations at trial and in prison disciplinary proceedings, Wall's understanding of *Teague* would cause the authority of the federal courts to order habeas relief to change depending on the level of process provided in state court. According to

Wall, he is entitled to retroactive application of *Lennear*'s rule because Virginia "provides no judicial review of good-time credit revocations," including in habeas proceedings. Wall Br. 20; see also *id.* at 19 n.6 (urging the Court to "resolve[] [this case] on the narrow ground that Mr. Wall's federal habeas petition is his first and only opportunity for judicial review"). Presumably, then, if Virginia *did* allow judicial review of prison disciplinary proceedings resulting in the loss of good time credit, Wall's view would be that federal courts would be foreclosed from retroactively applying a new procedural rule to remedy a constitutional violation that occurred during those proceedings. So, in addition to the *type* of claim, the federal court's authority to grant habeas relief based on a retroactive rule would depend on the rules of the State in which the claim arose.[8]

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[8] Wall expressly disclaims reliance on dicta in *Plyer v. Moore*, 129 F.3d 728 (4th Cir. 1997), stating that "*Teague* has no application [w]here . . . [i]nmates do not challenge the validity of their convictions or sentences." *Id.* at 735 n.9; see Wall Br. 19. As the Court noted in *Plyer*, *Teague*'s retroactivity bar was not raised in that case. See 129 F.3d at 735 n.9. But it would not have mattered in any event because the petitioners in *Plyer* sought the benefit of a substantive rule, not a procedural one. See *id.* at 734 ("[T]he [i]nmates maintain that application to them of [an amended statute] would increase the punishment for a crime after its commission by depriving them of a six-

But it gets worse from there. Wall contends that Virginia courts were unable to hear his claim because they "lack[] habeas jurisdiction to hear challenges to 'institutional proceeding[s] resulting in loss of good conduct . . . credit.'" Wall Br. 9. Virginia law, however, is not as categorical as Wall suggests. Although the Virginia Supreme Court declined to exercise jurisdiction in Wall's specific case, the decision on which it relied, *Carroll v. Johnson*, 685 S.E.2d 647 (Va. 2009), does not establish that due process challenges to the revocation of good time credit are necessarily or inevitably foreclosed. Rather, in *Carroll*, the Virginia Supreme Court *reversed* a longstanding rule limiting habeas jurisdiction to cases in which a judgment in the petitioner's favor would result in his immediate release. *Id.* at 649–52. What is more, the court based its abrogation of the "immediate release" rule in part on *Preiser*'s holding that "'habeas corpus [is] [an] appropriate remedy'" for petitioners seeking "'the restoration of good time credits.'" *Id.* at 651 (quoting *Preiser*, 411 U.S. at 487).

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month reduction in the sentenced period of incarceration to which they were entitled under the [prior] version of the law.").

As construed in *Carroll*, the Virginia statute conferring habeas jurisdiction "allows a petitioner to challenge the lawfulness of the entire duration of his or her detention so long as an order entered in the petitioner's favor will result in a court order that, on its face and standing alone, will directly impact the duration of the petitioner's confinement." *Id.* at 652. Nothing in that reading suggests that any challenge to the revocation of good time credit would necessarily fall outside the habeas jurisdiction of the Virginia courts. Indeed, Virginia courts have considered habeas petitions challenging prison disciplinary proceedings that resulted in the loss of good time credit. See, *e.g.*, *Shambaugh v. Johnson*, 72 Va. Cir. 409 (Fairfax Cnty. Cir. Ct. Jan. 30, 2007) ("[I]f an inmate contends that his constitutional rights have been violated at a disciplinary hearing, filing a writ of habeas corpus for loss of good time credits is an appropriate action."). And to the extent that the Virginia Supreme Court suggested otherwise when dismissing Wall's petition, its unpublished order established no binding precedent. In a future case, the same court could determine that it has jurisdiction and adjudicate a habeas petition on its merits. Were that to occur, under Wall's view, the federal court would be foreclosed from awarding

habeas relief based on a retroactive application of any procedural rule issued after the state court's decision.

d. Wall's view thus has the potential to generate significant inequities between similarly situated prisoners. Consider, for example, two habeas petitioners who challenge pre-*Lennear* disciplinary proceedings on the ground that the hearing officer failed to review pertinent video evidence. The first petitioner is permitted to proceed in state court, but the court denies the petition on the merits upon finding that a hearing officer's refusal to consider video evidence does not violate the Due Process Clause. The second, like Wall, sees his state habeas petition denied because the requested relief falls outside the jurisdiction of the court. Under this Court's precedent, the first petitioner's federal habeas petition would fail notwithstanding *Lennear* because the state court's decision was not "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law." *Tyler*, 945 F.3d at 168 (quoting 28 U.S.C. § 2254(d)(1)). And because a principle of procedure that is *not* "clearly established Federal law" under Section 2254(d)(1) constitutes a "new rule" under *Teague*, accord *Williams*, 529 U.S. at 412, the first petitioner is doubly foreclosed from relief. The

second petitioner, however, would be barred from relief *neither* by the deferential standard set by Section 2254(d)(1) nor by *Teague*'s non-retroactivity holding. In other words, despite making the same arguments to federal courts applying the same statute and bound by the same precedent, the two petitioners would get different results.

Of course, two habeas petitioners raising similar claims might see divergent outcomes in federal court depending on whether the deferential standard of Section 2254(d)(1) applies, even when seeking relief based on an "old rule" not subject to the *Teague* bar. But that sort of divergence is contemplated by the federal habeas statute itself insofar as Section 2254(d)(1) requires substantial deference to state courts when a claim has been adjudicated on the merits, but permits federal courts to review a claim *de novo* when it has not (provided the claim is otherwise proper). See *Gordon v. Braxton*, 780 F.3d 196, 202 (4th Cir. 2015). The inequitable results Wall's theory would engender are *not* contemplated by the statue because, as interpreted in *Teague* and its progeny, the statute precludes retroactive application of new rules in all cases unless one of the enumerated exceptions applies. See 489 U.S. at 310.

e. When adopting the *Teague* framework, the Supreme Court went to great lengths to describe the deficiencies of the "unprincipled and inequitable" approach to retroactivity it had previously followed, including that it "led to unfortunate disparit[ies] in the treatment of similarly situated defendants." 489 U.S. at 305. This Court should decline Wall's invitation to return to the bad old days where prison disciplinary proceedings are concerned.

II. This Court cannot simply adopt *Lennear*'s rule anew in Wall's case

Wall argues in the alternative that, even if *Teague* bars retroactive application of *Lennear*, this Court can simply apply the same principles it did in that case and reach the same result here. See Wall Br. 21–22. That is not how retroactivity doctrine works.[9]

For one thing, because *Teague* is based on the limits of the federal court's authority to order relief under the federal habeas statutes, those

[9] Moreover, under this Court's rules, the panel is bound by precedent and could not ignore *Lennear* while simultaneously "rely[ing] on the same body of controlling precedent underpinning [its] holding." Wall Br. 22. See, *e.g.*, *United States v. Simms*, 441 F.3d 313, 318 (4th Cir. 2006) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it is overruled by a subsequent *en banc* opinion of this court or a superseding contrary decision of the Supreme Court." (quotation omitted)).

limits cannot be evaded by simply not referring to *Teague* by name. At any rate, *Wolff*'s separate retroactivity bar is specifically based on the "significant impact a retroactivity ruling would have on the administration of . . . prisons . . . and the reliance prison officials placed, in good faith, on prior law not requiring such procedures." 418 U.S. at 574. Applying a new but identical rule retroactively in this case would afford no more weight to the concerns expressed in *Wolff* than directly relying on *Lennear*. 418 U.S. at 573.

To be sure, as Wall points out, this Court applied the new rule it announced in *Lennear* "to past events [in that case] without suggesting *Teague* barred it from doing so." Wall Br. 21. But the federal government did not argue that *Teague* barred retroactive application of any new rule in *Lennear*. See U.S. Br., *Lennear v. Wilson*, No. 18-6403 (4th Cir. Mar. 6, 2019) (Dkt. 30). Accordingly, the *Lennear* Court was not required to—and did not—consider the issue. See, *e.g.*, *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994) ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it.").[10] Having

[10] This Court also applied the rule in two unpublished cases where the disciplinary proceedings predated *Lennear*. See *McWilliams v.*

specifically directed the parties to brief the issue in this case, the retroactive application of the new rule announced in *Lennear* is squarely before the Court. And, for the reasons described previously, this Court should conclude that the rule cannot be applied to disciplinary proceedings predating its issuance.

III. If the Court declines to recognize a retroactivity bar, remand is required

Should this Court determine that *Lennear*'s rule can be applied retroactively notwithstanding *Wolff* and *Teague*, a remand would be necessary to determine whether the principles outlined in *Lennear* were met with respect to Wall's disciplinary proceedings and, if not, whether any error was harmless. Contrary to Wall's contention, this Court should not simply "instruct[] the district court to grant the petition" (Wall Br. 22) on the existing record.

1. Because the district court proceedings in this case predated *Lennear*, the parties did not have the benefit of this Court's guidance when litigating the case. As *Lennear* repeatedly stated, the new right

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Saad, 794 Fed. Appx. 288 (4th Cir. 2020); *Hawkins v. Coakley*, 779 Fed. Appx. 183 (4th Cir. 2019). Both cases were litigated by *pro se* petitioners who submitted informal briefs, with no brief filed by the government.

recognized in that decision was a "qualified" one, see *Lennear*, 937 F.3d at 263, 269–70, 273–74, the contours of which this Court declined to fully delineate. This Court made clear, however, that although prison officials "bear the burden to come forward with evidence of the reasons for denying an inmate's request for access to documentary evidence, including video surveillance footage, they 'may wait to assert such institutional concerns until after the disciplinary hearing'" and can present those reasons "in court." *Id.* at 270 (quoting *Ponte v. Real*, 471 U.S. 491, 497 (1985)). Appellee should be permitted the opportunity to present such justifications and to supplement the record as needed to support them, as well as to otherwise defend the hearing officers' decisions not to review the video evidence under the standard articulated in *Lennear*. Rather than deciding whether Wall's disciplinary hearings satisfied the *Lennear* standard for the first time on appeal (and based on a record compiled before the decision was issued), this Court should remand so that the question can be litigated in district court in the first instance. See *Lovelace v. Lee*, 472 F.3d 174, 203 (4th Cir. 2006) ("[W]e are a court of review, not of first view.").

2. In addition, as this Court specifically recognized in *Lennear*, "procedural errors in disciplinary proceedings are subject to harmless error review." *Lennear*, 937 F.3d at 276. "[I]n evaluating whether prison officials' failure to disclose or consider evidence was harmless, courts must determine whether the excluded evidence could have aided the inmate's defense." *Id.* at 277. Given the hearing officers' sworn testimony (after watching the video) that Wall's disciplinary hearings would not have come out differently had they seen the video before making their determinations of guilt, see ECF No. 87 at 45–46, No. 7:17-cv-00385-JLK-PMS (May 17, 2019), appellee would have a more-than-colorable argument that any potential error was harmless. See also *id.* at 56 (Magistrate Judge noting that "the video evidence confirms much of the officers' versions of events"). Remand is necessary to permit development of that argument as well.

CONCLUSION

The judgment of the district court should be affirmed. In the alternative, the case should be remanded for further proceedings.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Respondent-Appellee agrees that oral argument may aid in the decisional process.

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 9,392 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on June 5, 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/

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
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- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-6524 Caption: Gary Wall v. Jeffrey Kiser, Warden

Pursuant to FRAP 26.1 and Local Rule 26.1,

Warden Jeffrey Kiser
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Martine E. Cicconi Date: 6/5/2020

Counsel for: Warden Jeffrey Kiser

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