UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

AARON ISBY-ISRAEL, Plaintiff, v. JAMES WYNN Director of classification in the IDOC, RICHARD BROWN Superintendent at W.V.C.F., JACK HENDRIX Asst. Superintendent of W.V.C.F., JERRY SNYDER unit Team Manager of W.V.C.F., BEVERLY GILMORE Case Work Manager of W.V.C.F., Defendants.	)	No. 2:12-cv-00116-JMS-MJD

Introduction

Plaintiff Aaron Isby-Israel ("Mr. Isby") was confined in solitary confinement at Wabash Valley Correctional Facility ("Wabash Valley") for 11 years. He is now so confined at the Westville Correctional Facility ("Westville"). Mr. Isby is confined in a small cell 23 hours a day, and allowed out for one hour of recreation, by himself. Whenever he leaves his cell, he is handcuffed behind the back and his legs are shackled. He can shower only three times a week. He eats all his meals alone from food trays passed through a narrow opening in his cell door. A security light remains on 24 hours a day, disturbing his sleep. He is allowed no physical contact with any visitors. Under the 14th Amendment to the United States Constitution, he is entitled to meaningful periodic reviews to determine whether he remains a security risk and restrictive housing is still warranted. Instead, he has received nothing but perfunctory 30-day reviews and occasional 90-day reviews. Often, he is not given a reason for his continued segregation, and recent reasons given for

denying his release from solitary confinement have been his poor attitude and refusal to participate in step-down programming. Brought to mind are the words of an anguished creation in a classic novel: "I am malicious because I am miserable." Mary W. Shelley, Frankenstein, 99 (Millennium Publications 1818 ed., copyright 2014).

Findings of Fact and Conclusions of Law

The Court conducted a second bench trial in this action on September 25 and 26, 2018 in Indianapolis, Indiana, after the action was remanded by the Seventh Circuit Court of Appeals in *Isby v. Brown*, 856 F.3d 508 (7th Cir. 2017). Mr. Isby was present in person and by counsel.[1] All defendants were present by counsel. Defendant Beverly Gilmore was present in person on the first day of trial and Jack Hendrix was present in person on the second day of trial. Defendants Jerry Snyder and Richard Brown were present in person both days.

On the second day of trial, counsel for the defendants moved for judgment as a matter of law as to defendants James Wynn, Beverly Gilmore, Julie Snider, Jack Hendrix, and Dusty Russell. That motion was granted as to defendants James Wynn, Julie Snider, and Dusty Russell and denied as to defendants Beverly Gilmore and Jack Hendrix. The claims against defendants Richard Brown, Jack Hendrix, Jerry Snyder, and Beverly Gilmore will be resolved in this Entry.

The issue for trial following the Seventh Circuit's remand is whether Mr. Isby's confinement in long-term administrative restrictive status housing, also known as solitary confinement, at Wabash Valley has deprived him of a liberty interest without due process. More specifically, the Seventh Circuit remanded this action for trial on the Fourteenth Amendment due process claim after finding that "[g]iven the long stretches of time during which Isby had no serious

[1] The Court greatly appreciates the dedicated and capable representation that volunteer counsel, Daniel R. Kelley, Melissa M. Orizondo, Burnell K. Grimes, and Jason M. Rauch of Faegre Baker Daniels LLP provided to the plaintiff.

disciplinary problems, as well as the conflicting evidence as to the reasons for his ongoing segregation, Isby has raised triable issues of material fact regarding whether his reviews were meaningful or pretextual." *Isby*, 856 F.3d at 529. After consideration of the evidence presented during the bench trial, the Court now issues its findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a)(1).[2]

I. Findings of Fact[3]

A. Mr. Isby's Institutional History

Mr. Isby has been incarcerated in the Indiana Department of Correction ("IDOC") continuously since April 1989, based on a conviction of robbery with serious bodily injury. In October of 1990, when incarcerated at the Pendleton Correctional Facility ("Pendleton"), Mr. Isby hit a unit counselor in the face. A canine unit was ordered into Mr. Isby's cell to perform a cell extraction and Mr. Isby stabbed two correctional officers and killed the canine with a homemade weapon. He was convicted of two counts of attempted murder and battery and was sentenced to an additional forty years in prison. He was placed in administrative restrictive status housing after the 1990 stabbings at Pendleton. The terms "segregation," "administrative segregation," "solitary confinement," and "restrictive status housing" will be used interchangeably in this Entry because they mean the same thing. Dkt. 271 at 173-74.

In October of 2006, Mr. Isby was transferred to Wabash Valley. Mr. Isby had been found guilty of battery in April 2006 at the Indiana State Prison and served 6 months in "disciplinary" at Westville before he was transferred to Wabash Valley. Dkt. 271 at 50, lines 7-20; Ex. Nos. 145-

[2] Any finding of fact that is more properly considered a conclusion of law is adopted as such. Similarly, any conclusion of law that is more properly considered a finding of fact is adopted as such.

[3] Some undisputed facts gleaned from the first trial have been included in these Findings of Fact for background as needed.

153. He was initially placed in the general population where he remained for 19 days. On October 23, 2006, he was placed in department-wide administrative segregation. Defendant Jerry Snyder testified that nothing happened during those 19 days to warrant him being placed in restrictive housing. Dkt. 271 at 50, lines 1-20. The reclassification was based on Mr. Isby's "extensive and serious conduct history," his having "stabbed a correctional officer in the throat," ex. 200, and his being a "threat to facility security." Ex. Nos. 154-55.[4]

Mr. Isby is kept in his 7' x 12' cell 23 hours a day. A light stays on 24 hours a day, which disrupts his sleep, frustrates him, and stresses him out. He is not allowed to cover the light. Unlike inmates in general population, when he leaves his cell, he is handcuffed behind his back, and sometimes is shackled with leg irons. Unlike inmates in general population, he has no access to vocational work or educational programs. When he is taken out for recreation, he can walk around an area that is about the size of two cells, by himself. He is allowed three showers a week, while general population inmates shower daily. Unlike general population inmates, he cannot have contact visits, meaning he cannot hug or have physical contact with family members. He is allowed much less time using a phone than general population inmates, about 20 minutes a week. Dkt. 270 at 45-48.

When Mr. Isby receives 30-day reviews, he learns about them after the fact when a copy of the form is placed in his packet. Dkt. 270 at 80. He did not receive a "full" 90-day review each time he requested one. He requested 90-day reviews for three years from 2006 to 2009 but never received one. He requested 90-day reviews from Ms. Gilmore and from Mr. Snyder in March and June of 2010, and May and June of 2012, but received no response. Dkt. 270 at 81-82.

[4] This action was filed on May 15, 2012. At trial, evidence was admitted dating back to 2002, but for purposes of the applicable two-year statute of limitations, the Court will limit most of its discussion to the review procedures that were in place in 2010 and thereafter.

Mr. Isby was conduct clear from March 10, 2000 through May 26, 2005, for a total of five years and two months. Dkt. 270 at 59, lines 5-11. He was also conduct clear from March 24, 2009 through December 15, 2014, for a total of five years and eight months. Dkt. 270 at 53, lines 11-19. He received a B level conduct report[5] in December 2014, for attempted battery without a weapon.[6] Ex. E. Mr. Isby has also been conduct clear from December 15, 2014 until September 25, 2018, the date of trial, for a total of three years and nine months. Dkt. 270 at 53, lines 23-25.

Mr. Isby is not willing to participate in any type of programming to get out of administrative segregation. Dkt. 270 at 74-5. Mr. Isby appealed his classification reviews on a number of occasions dating back to September of 2009, but they were all denied. Ex. Nos. 85, 223-25, 96, 198, 122, 201, 203, 208, 209, 223, 194, 213, 17, 215, 42, 43, 231. There was no response given to Mr. Isby's appeal of a 90-day review in May 2011 even though it was Warden Brown's responsibility to ensure that a decision was issued. Dkt. 271 at 104-105; Ex. 122. In June of 2012, Mr. Isby appealed the denial of a transfer request. Ex. 203. This appeal was denied at the facility and was not sent to the Director of Classification, whose office is supposed to review appeal denials. Dkt. 271 at 214-217.

[5] Level C and D offenses are relatively minor, D being the lowest of the offenses. Dkt. 270 at 108, lines 8-16. Level A (the most severe) and B offenses are considered major conduct offenses. *Id*. at 102, lines 17-21; dkt. 270 at 189, line 15.

[6] The Court described this incident in findings after the first trial in this case as follows: "On December 15, 2014, Mr. Isby-Israel was using a phone in his cell. Correctional Officer Jaymison Bennett went to the cell to retrieve the phone when Mr. Isby-Israel's 20 minutes of time was up. Mr. Isby-Israel became angry because the officer did not allow him time to say goodbye. Officer Bennett reported that Mr. Isby-Israel threw the phone toward the cuff port on his cell door. Mr. Isby-Israel testified that he set the phone back on the cuff-port. Video evidence shows that Mr. Isby-Israel took a swipe with his hand toward the officer through the cuff-port. Officer Bennett then sprayed Mr. Isby-Israel with OC spray and wrote him up for attempted battery without a weapon. Mr. Isby-Israel was found guilty of that disciplinary charge." Dkt. 135 at 4.

Similarly, in April of 2014, Mr. Isby appealed a 90-day review and no appeal decision was made. Dkt. 271 at 113-114; Ex. 208. The response area on the form was left entirely blank. Dkt. 271 at 218-19; Ex. 208. Mr. Isby's May of 2014 request to transfer to Indiana State Prison ("ISP") was denied and the written reason made by a superintendent was that Mr. Isby could not request the transfer because ISP does not have department-wide restrictive housing. Dkt. 271 at 114-118; Ex. 205.[7] The Director of Classification's designee did not fill out the Central Office section on the form, but she should have. Dkt. 271 at 217-18. In addition to denying his ability to even make such a request, when Mr. Isby appealed, the reason the appeal was denied was that it was "not appealable." Dkt. 271 at 119; Ex. 209. In accordance with policy, a decision on a transfer request is, in fact, appealable to the Executive Director of Classification. Dkt. 271 at 120.

In August of 2014, a full 90-day review was conducted. Ex. 213. At this time although Mr. Isby had been clear of any major conduct reports for more than six years dating back to a nonviolent level B offense in May of 2008 for filing frivolous lawsuits, his request for release from department-wide restrictive status was denied. Dkt. 271 at 125-127. The caseworker at the time wrote that Mr. Isby had "an extensive conduct history," noting conduct reports for "battery, disorderly conduct and filing frivolous lawsuits." Ex. 213. The battery offense, however, was not even listed on the review document because it dated back to 2006. The disorderly conduct offense occurred in October of 2007, seven years earlier. *Id.* In addition, the caseworker listed the 1990 stabbing incident as a reason for his decision. *Id.*

The reason given by the Custody Manager in August of 2014 for denying release from department-wide restrictive status was because Mr. Isby was "argumentative during interview and

[7] The only prisons in Indiana that have a department-wide restrictive housing unit are Wabash Valley, Westville, and Pendleton.

was demanding open population instead of transition units." Dkt. 213 at 2. The STG (Security Threat Group) Coordinator commented that there was "no known STG affiliation. Remains confrontational with staff." *Id.* Jerry Snyder wrote, "serious history of assaults against staff. Remains disrespectful and argumentative with staff as documented in this review. Harbors intense anger toward authoritative figures. Stated refusal to go to NCN-TU."[8] *Id.* Warden Brown noted Mr. Isby's "comments made during the interview that he will not go to NCN-TU." *Id.* Mr. Isby was not provided with a copy of the decision and comments after this review, as it was marked "confidential." Dkt. 271 at 124, lines 3-4; Ex. 213. Warden Brown testified that had Mr. Isby been willing to go to the NCN-TU, it would have been appropriate to transfer him there regardless of Mr. Isby's behavior. Dkt. 271 at 129.

In May 2015, Mr. Isby again requested a transfer to ISP. Ex. 14. His request was denied for the reason "appropriately placed." Ex. 15. Mr. Isby appealed, pointing out that he had not been given any "rationale" for why his request was denied. Ex. 16. He also wrote that he had been in restrictive housing for nine years and that placement was not based on "valid security justifications." Ex. 17. Deputy Commissioner Basinger denied the appeal, writing in July 2015, that, "[a]lthough Wabash Valley may not be the facility of your choosing, you are appropriately placed. You are encouraged to continue working with staff and taking advantage of available programming." Ex. 18.

On June 22, 2017, a month after the Seventh Circuit issued its remand in this case, Mr. Isby was transferred to Westville, "per administrative request." Ex. 217. Warden Brown recommended the transfer. Dkt. 271 at 137. The reasons given for the transfer were "departmental needs" and "superintendent recommendation." *Id.*; Ex. 217. The additional reason of "recent

[8] The STAND program at New Castle Correctional Facility, called NCN-TU (transition unit), is to help inmates transition from restrictive housing to general population. Dkt. 271 at 15, 55.

positive adjustment" was added by Director of Classification Hendrix. Dkt. 271 at 226; Ex. 218. Warden Brown testified that after he consulted with Jerry Snyder, he recommended the transfer because Mr. Isby could benefit from "a change of scenery." Dkt. 271 at 138, lines 1-11. Jerry Snyder, at the direction of Director Hendrix at the Central Office, advised that Warden Brown should complete a letter on Mr. Isby although that was not normal procedure. Mr. Snyder wrote the letter to Michael Osburn, Southern Regional Director, for the Warden's signature. Dkt. 271 at 138-141; dkt. 271 at 249; Ex. 219. The letter stated that Mr. Isby's continued placement in department-wide administrative restrictive status housing in the Secure Confinement Unit at Wabash Valley was "due to an extensive history of staff assault and a refusal to participate in recommended self-help programs." Ex. 219. The letter described the 1990 incident and his December 29, 2014 level B conduct report for reaching out of the cuffport of his cell in an attempt to assault an officer. *Id.* It further stated that Mr. Isby had refused to participate in programs recommended by the unit team. *Id.* The letter also noted that the mental health evaluations revealed that Mr. Isby did not exhibit signs or symptoms of an AXIS 1 Diagnosis and is not at high risk to decompensate in a Secure Confinement Unit. *Id.* The transfer did not change Mr. Isby's classification at all. Rather, it continued his placement in department-wide administrative restrictive status housing at a different prison. *Id.* Mr. Isby was not provided a copy of the letter because it was marked "confidential." *Id.*

B. Defendants' Review of Mr. Isby's Placement

Defendant Beverly Gilmore was a casework manager in the administrative restrictive housing unit at Wabash Valley from 2008 until July 2014. Dkt. 270 at 91, 163-64. She supervised Charles Dugan, a caseworker. Her supervisor was defendant Jerry Snyder, the Unit Team Manager.

Ms. Gilmore conducted 30-day, 90-day, and annual reviews of inmates' placement in department-wide restrictive housing. The only reviews that are conducted automatically are the 30-day and the annual reviews. Dkt. 270 at 113, lines 6-10.

In her affidavit presented in support of the defendants' motion for summary judgment, filed on September 23, 2013, Ms. Gilmore testified that Mr. Isby "is reviewed for continued placement in the department-wide administrative segregation unit every thirty days pursuant to DOC policy." Dkt. 52-1, ¶14. She further stated, "[t]he thirty-day review consists of examining the offender's Case Plan and other documents related to behavior, conduct, and safety concerns, as well as reviewing any conduct reports and history." Dkt. 52-1, ¶12.

At this second trial, Ms. Gilmore testified that she stood by her affidavit. Dkt. 270 at 113-115. She testified that to prepare for each 30-day review, she reviewed case notes, spent 30 minutes with Mr. Isby if he allowed that, checked his conduct report history, talked to correctional officers assigned to the unit about his behavior to get their perspective, considered his behavior toward her and other inmates, and would also take into account whether he participated in programming such as the ACT ("Action, Consequences, and Treatment") cognitive restructuring program. Dkt. 270 at 115-118. Participation in such a program was not required to be recommended for release from segregation, but she considered it "extremely important" because it showed initiative. *Id.* at 147. Participation in those programs also does not guarantee that an inmate will be released from segregation, and some ACT graduates may remain in segregation even after completing the program. *Id.* at 118.

Ms. Gilmore testified that she also always referred to notes in the Offender Case Management System (OCMS). This is where all treatment team staff could place case notes and record incidents of rudeness or cursing, and where all conduct reports were automatically

populated. *Id.* at 118. Ms. Gilmore testified that for every 30-day review, she made an individual decision regarding whether she would recommend the prisoner for release from segregation and into general population. Dkt. 270 at 116, lines 9-13. In sum, the factors that Ms. Gilmore considered during a 30-day review were "their conduct reports, cooperation, their behavior, programming completion, [and] staff interactions." Dkt. 270 at 175, lines 10-14; lines 23-25. She also noted, however, that the 30-day reviews could be "cookie cutter" reviews "when there is nothing that has changed." Dkt. 270 at 174, lines 1-3.

Each 30-day review form was titled "WVCF SECURED HOUSING UNIT, Administrative Segregation Review." The date of review, offender's name, identification number, location, and segregation intake date were listed on each report. The body of each 30-day review that Ms. Gilmore produced provided as follows:

> Per order of the Southern Regional Director, Offender Isby, Aaron, DOC #892219, is currently assigned to the Department-Wide Administrative Segregation Unit of the Wabash Valley Correctional Facility.
>
> Your status has been reviewed and there are no changes recommended to the Southern Regional Director at this time. Your current Department-Wide Administrative Segregation status shall remain in effect unless otherwise rescinded by the Southern Regional Director.
>
> This segregation review was prepared by B. Gilmore, CWM, Special Confinement Unit. If there are any questions regarding this report, they may be directed to either the Unit Counselor or the Casework Manager.

E.g., Ex. Nos. 73, 74, 78, 81-83, 86, 88, 89, 91-93, 97, 99-117, 124 (dated Dec. 15, 2008, through April 2013).

Every 30-day review form was the same except for the date. The form was auto-populated. Ms. Gilmore does not remember any 30-day review resulting in a recommendation of release out of segregation for any offender. Dkt. 270 at 129, lines 19-21; dkt. 270 at 175, lines 1-3 ("[N]one of the times that you recommended release came as a result of the 30-day reviews, correct?

Correct."). She did recall inmates being recommended for release as a result of 90-day or annual reviews. Dkt. 270 at 129, lines 7-15; dkt. 270 at 171, lines 19-25; dkt. 270 at 172, lines 1-10.

Ms. Gilmore described Mr. Isby as "belligerent, rude, and crude" toward her. Dkt. 270 at 141, lines 24-25. Of the 288 offenders in the SHU, Ms. Gilmore testified that Mr. Isby's "behavior was one of the top five most belligerent, hateful, mean" inmates. Dkt. 270 at 170, lines 15-16. She would go by his cell to give him his legal mail and he would tell her to "get the F away from my cell." *Id.* at lines 17-19. He was uncooperative, would not sign anything for her, and she could not get him to listen to her. *Id.* at lines 23-15. Nonetheless, when asked, "Mr. Isby's behavior generally wasn't extraordinary to the point where you had to write him up, correct?" She replied, "Correct." *Id.* at 96.

Ms. Gilmore conducted an annual review of Mr. Isby's classification on September 24, 2009. Ex. 84. At that time, Mr. Isby had a single relatively minor conduct violation, a C-level, in the prior year. Dkt. 270 at 99, lines 10-20. His classification remained unchanged.

Ninety-day reviews with a hearing occur only when requested by staff or by the inmate, but Ms. Gilmore is not aware of any staff member who initiated a 90-day review without Mr. Isby requesting it. Dkt. 270 at 101, lines 16-25; dkt. 270 at 102, lines 1-11. She conducted a 90-day review on April 27, 2011. *Id.* at 102, lines 1-3; Ex. 98. At that time, Mr. Isby had had no conduct reports since March 24, 2009, the C-level offense of "lying or providing false statement," meaning he had been conduct clear for more than two years. *Id.* at 104, lines 1-4; Ex. 98. Ms. Gilmore admitted that being conduct clear for more than two years would be one "very positive" factor when considering whether to recommend release from segregation. Dkt. 270 at 104, lines 5-13. Ms. Gilmore did not, however, recommend Mr. Isby's release from segregation. *Id.* at 106, lines 6-12. Ms. Gilmore wrote the following in the review:

> Offender believes he is all knowing about policy, procedure, and the law. He seems to enjoy trying to start arguments with staff. He is not a pleasant person. After researching his institutional packet, I chose to add the paragraph regarding Isby's 'Freedom Fighters' activity from 1999 through 2000. I believe this exposes insight into his deceptive cognitive behavior. It is my conviction that given the opportunity in general population Isby will have more freedom to play havoc with any situation possible in the [sic] order to satisfy his own wants and perceived needs.[9]

Ex. 98 at 3.

Ms. Gilmore considered the Freedom Fighters incident, a C-level offense, as a factor for keeping Mr. Isby in segregation 11 years later. Dkt. 270 at 107, lines 10-22; dkt. 270 at 108, lines 13-17. The Custody Manager, STG Coordinator, Unit Manager J. Snyder, Assistant Superintendent, and Superintendent D. Brown all signed the 90-day review, and circled "not recommended" on the form. Dkt. 98 at 3. Their comments included "do [sic] to his violent history," "no known STG, extremely violent past, and could not maintain in G.P. (general population) the last time in G.P." *Id.* Defendant Snyder commented "extremely violent past as described above. He has not done well in GP when given the opportunity (B212 on 4/4/06 in GP at ISP)." *Id.*

One month after the April 2011 90-day review, Ms. Gilmore conducted an annual review in May 2011. Not surprisingly, this review also indicated that in the prior 12-month period, Mr. Isby had no conduct reports. Ex. 121. Again, as of that time Mr. Isby had maintained clear conduct since March 24, 2009, more than two years prior to the review. Dkt. 270 at 103, lines 13-25. The March 24, 2009, C-level conduct report was written for "lying or providing a false statement." Ex. 98. The conduct report before that was issued in May 2008 for "filing a frivolous lawsuit." *Id.* Ms. Gilmore testified that it was Mr. Isby's "attitude and actions" that kept her from recommending him for release to general population in 2011. Dkt. 270 at 101, lines 7-10. She would not

[9] The paragraph referenced states, in part, "In 1999, Isby attempted to create a Non-Profit organization called 'Freedom Fighters.' The first of the investigations was initiated due to Isby's failure to gain IDOC permission to operate said organization. The next three were due to his continued efforts to operate the organization." Ex. 98 at 1.

recommend someone for release who "is not behaving himself and being rude and crude to staff and other offenders around them." *Id.* at 101, lines 11-15.

Ms. Gilmore also wrote a 90-day review on December 20, 2011. Ex. 125. She had no intention of recommending Mr. Isby for release from segregation because "he had not straightened his behavior up, and he is cursing me and calling me bad names. Won't happen." Dkt. 270 at 109, lines 19-24. She included the same paragraph about Mr. Isby believing he is "all knowing" and the 1999-2000 Freedom Fighters C-level conduct report in the December 2011 review. Ex. 126. The Custody Manager concurred and the STG Coordinator noted, "no known STG. Very disruptive and violent." *Id.* at 3. J. Snyder, Unit Manager, did not recommend release because of "extremely violent DOC history." *Id.* Warden Brown did not recommend release but had no comments. *Id.*

Every 90 days, psychiatric evaluations were performed on inmates in segregation at Wabash Valley, including Mr. Isby. Casework managers and caseworkers, however, were not provided copies of the mental health reviews nor did they ask the mental health workers about the inmates' mental health status. Dkt. 270 at 122-136. As noted by Unit Team Manager Jerry Snyder, however, there are treatment team meetings during which mental health professionals discuss their observations of each inmate with the caseworkers and unit team managers at least once a month. Dkt. 271 at 44-45.

The mental health reports on Mr. Isby dating from June 2008 through June 2017 consistently included either the statement, "[c]ustody reported [Isby] is generally cooperative and voiced no specific problems with the management of this offender" or "[c]ustody officers voiced no specific recent problems with the management of this offender." Ex. Nos. 182, 187, 75, 79, 80, 87, 90, 94, 118, 119, 127, and 129, 131, 133-37, 6, 8, 9, 11, 20, 23, 24, 26, 28, 30, 32, 34, 36, 38, 45, 47, 51, 54, 56, 58, 60, 63, 65, 67. Ms. Gilmore testified that even if she had been privy to the

mental health reports and opinions, it "would not have [changed her recommendations] because of the fact [Isby] was belligerent, rude, and crude." Dkt. 270 at 141, lines 20-25; dkt. 270 at 144, lines 3-9.

Mr. Charles Dugan has been a caseworker at Wabash Valley since 2011. He was supervised by Ms. Gilmore. On direct, he was asked, "In your opinion, sir, Mr. Isby is in restrictive status housing in 2018 because of the 1990 incident with the two officers, correct?" Dkt. 270 at 180, lines 6-8. Mr. Dugan responded, "That, that would be correct." *Id.* at line 9. Mr. Dugan further testified that one reason for conducting 30-day reviews "is to let the offenders know how they can get out of restrictive status housing." Dkt. 270 at 196, lines 13-16. He did the 30-day reviews because policy told him to. Dkt. 270 at 197, lines 20-22. Mr. Dugan did not perform 90-day reviews. Dkt. 270 at 192, lines 3-7.

When Mr. Dugan prepared the 30-day reviews, he opened his computer, opened a form, typed in the date, and an Excel spreadsheet auto-populated the report. Dkt. 270 at 197, lines 23-25; dkt. 270 at 198, lines 1-15. Mr. Dugan checked the spelling of the inmate's name and DOC number and then hit "print" and gave a copy to the inmate. *Id.* at 198, lines 16-25. A copy was also sent to classification. That was the entire process. *Id.* at 199, lines 3-6. Mr. Dugan prepared 30-day reviews on Mr. Isby from approximately March 2015 through June 2017. *See* Ex. Nos. 5, 19, 25, 46, 55, 57, 64, 66 (representative exhibits).

As noted above, each 30-day review form said, "Your status has been reviewed and there are no changes recommended . . . at this time." Dkt. 270 at 198, lines 3-4; dkt. 270 at 208, lines 23-25. There was no other form that said, "your status has been reviewed and a change has been recommended." *Id.* at 198, lines 6-8; dkt. 270 at 209, lines 1-7. Mr. Dugan conceded that there was "not much review behind it." *Id.* at 199, lines 7-9. He was trained to do the reviews this way by

Ms. Gilmore and she never told him that he was leaving out any steps in the process. *Id.* at 199, lines 13-25; dkt. 270 at 200, lines 1-3. In any given month, it took him 15-20 minutes to do the 30-day reviews for all 144 inmates on his caseload, depending on how long it took the printer to print them. *Id.* at 207, lines 20-25; dkt. 270 at 208, lines 1-6; dkt. 270 at 211, lines 1-9. Mr. Dugan testified that he never did and would not have enough time to sit down and talk with each inmate to discuss each 30-day review. *Id.* at 211, lines 13-19.

When completing the 30-day review forms, Mr. Dugan did not take into account how long Mr. Isby had gone without any conduct reports being issued or any other updated circumstances since the last review. Dkt. 270 at 212, lines 19-25. Indeed, "there was no way that you would have or could have recommended that Mr. Isby be released from the SCU, correct?" "Correct." *Id.* at 213, lines 2-5. When Mr. Dugan completed the 30-day reviews, "it had already been determined that release was not going to be recommended?" "Correct." *Id.* at 213, lines 8-10. That was true for every 30-day review that he completed for Mr. Isby, and for everybody on his caseload, every month. *Id.* at 213, lines 11-18. The only thing that changed was the date. *Id.* at 213, line 18. Mr. Dugan testified that the conclusion on the 30-day forms was a "preordained conclusion." Dkt. 270 at 219, lines 10-11. When asked, "[b]ut there is never any actual review that takes place in connection with the 30-day review, correct?" Mr. Dugan responded, "Correct." *Id.* at 225, lines 19-23. This is how Mr. Dugan was trained to do the 30-day reviews by Ms. Gilmore and others. *Id.* at 213, lines 19-23.

When asked about Ms. Gilmore's statement in her affidavit presented in support of the defendants' motion for summary judgment, dkt. 52-1, ¶ 12, that "[u]nder DOC policy, offenders who are housed in the department-wide administrative segregation unit are reviewed for continued placement there every 30 days," Mr. Dugan testified that those offenders are not actually reviewed

for continued placement. "The process that we have gone over repeatedly, that is the process that is, that is how the review is done." Dkt. 270 at 226, lines 8-16. When asked, "[t]hat is the only process[?]" Mr. Dugan responded, "[f]or the 30-day review?" Correct." *Id.* at lines 17-18. For all 30-day reviews, "[n]o thought goes into what that conclusion is going to be, right?" "That is correct." *Id.* at 224, lines 5-17. "And you didn't do a review in any meaningful sense of that word in connection with [the 30-day review], right?" "That's correct." *Id.* at 225, lines 6-8. "And you are not aware of a review in any meaningful sense of that word having been done with any of the 30-day reviews we have looked at, right?" "That's correct." *Id.* at lines 9-12. Although the statement that Mr. Isby's "'status has been reviewed' appears on all of the 30-day reviews of Mr. Isby's status in solitary confinement," "there is never any actual review that takes place in connection with the 30-day review, correct?" "Correct." *Id.* at lines 15-21. Mr. Dugan admitted that the statement that an offenders' "status had been reviewed" was false. *Id.* at lines 19-23. Mr. Dugan also responded to the question that "it is fairly common to get in arguments with staff when you are a prisoner on the SCU, right?" "Correct." Dkt. 270 at 192, lines 21-23.

Jerry Snyder has been employed as a correctional officer, counselor, casework manager, and unit team manager with the IDOC. He has worked at Wabash Valley since 1993. Dkt. 271 at 3-5. Mr. Isby was on Mr. Snyder's unit team caseload for a long time. *Id.* at 6, lines 8-11. He testified that Mr. Isby remains in restrictive housing based on his serious past conduct, based on his anger and hatred exhibited on a daily basis, and based on his refusal to participate in programs. Dkt. 271 at 10, 12. Mr. Snyder admitted that participation in programs is not required for an offender to be released from restrictive status housing and that some offenders in that status have participated in programs but not been released. Dkt. 271 at 12, lines 5-22. Mr. Isby was transferred out of Wabash Valley to Westville on June 22, 2017, because "it was determined that a change of

scenery might be better for his attitude." Dkt. 271 at 13, lines 3-6. Warden Brown and Mr. Snyder made that decision, along with deputy wardens. *Id.* at lines 7-12.

Mr. Snyder testified that the mechanism that the IDOC relies on to conduct meaningful reviews of inmates' restrictive housing status is the 30-day review process. Dkt. 271 at 45-47. He testified that to conduct a 30-day review, "all staff does is just enter information into the computer, and it generates the form, correct?" "Yes." *Id.* at 22, lines 9-11. He further admitted that "all staff does is change a few things like the date, the name, and submit that to the offender." Dkt. 271 at 22, lines 12-15. As a supervisor, he checks to make sure they are being done correctly. *Id.* at lines 16-20.

Mr. Snyder stated that the 90-day reviews also comply with the Supreme Court's directive for meaningful review, but offenders are required to request those even though staff have the option to request them. Dkt. 271 at 47, lines 10-16. In response to questioning from the Court, Mr. Snyder testified that every inmate who is disrespectful, angry, surly, cussing, and every inmate who has committed murder is *not* in restrictive housing. Dkt. 271 at 46-47.

When Mr. Snyder participated in 90-day reviews, in determining whether an inmate should be released from solitary confinement, he considered the reason the offender was in solitary confinement, the offender's conduct history since being admitted to solitary confinement, a review of the OCMS notes, the offender's interactions with staff, and whether programs have been recommended and whether the offender has participated in those programs. Dkt. 271 at 17-18. Ninety-day reviews are not automatic. They can be requested by the offender or initiated by staff. *Id.* at 18, lines 13-19. The recommendation process during 90-day reviews goes from the casework manager, to the housing lieutenant, to the Office of Investigation and Intelligence, to the unit team manager, to the deputy warden of operations, and finally to the warden. *Id.* at 18-19. During the

August of 2014 90-day review, Mr. Snyder interviewed Mr. Isby but recommended denying release from solitary confinement based on the "best interest of safety and security." Dkt. 271 at 19, lines 13-25; dkt. 271 at 20, lines 12-14; Ex. 192. Mr. Isby was not provided any report of what factors were considered during the review. Specifically, he was not informed that his attitude, refusal to participate in programs, or interactions with staff were considered in making the determination. Dkt. 271 at 20-21.

Mr. Snyder testified on cross that in addition to the 1990 incident, when Mr. Isby was released from department-wide restrictive status housing and assigned to general population in 1996, within ten months he threatened to do physical harm on a staff member. Dkt. 271 at 56. He further testified that when Mr. Isby was released from department-wide restrictive status housing to facility restrictive status housing in 2005, within six months he had threatened staff and had battered another offender. *Id.* That is why Mr. Snyder believes that Mr. Isby should go through programming before recommending that he be released from administrative restrictive status housing. *Id.*

Mr. Richard Brown has been the Warden of Wabash Valley since February of 2011. Dkt. 271 at 58. Offenders in segregation, unlike those in general population, are in their cell 23 hours a day, they have recreation alone, their property is restricted, they cannot have contact visits, and they do not have access to an email kiosk that allows general population inmates to email family and friends. Dkt. 271 at 61-62, 97.

Warden Brown agreed that Indiana law requires that every offender placed in administrative segregation be reviewed at least once every 30 days to determine whether the reason for segregation still exists. Dkt. 271 at 73; Ex. 232; Ind. Code § 11-10-1-7. He testified that the basic objective of the IDOC classification system is to assign offenders to the least restrictive

security and custody levels consistent with the goal to protect the community and to ensure the safety of staff and other offenders. Dkt. 271 at 77. Participation in programming is not one of the criteria that must be met to be released from department-wide administrative restrictive status housing. Dkt. 271 at 89-90.

Warden Brown testified that the purpose of the 30-day reviews is to determine the continuing need for and appropriateness of continued placement in restrictive status housing. Dkt. 271 at 83-84. Warden Brown agreed that Mr. Isby was originally placed in and remains in segregation because of his past assaultive behavior, his continued attitude and demeanor toward staff, and his unwillingness to participate in programming. *Id.* at 85.

As Warden, Mr. Brown is the last facility decision-maker in the line of reviewers during 90-day reviews. Dkt. 271 at 65-66; 79-81; 148. If an offender is recommended for transfer or release from restrictive status housing, only then would the review go from the Warden to the Central Office. *Id.* at 149. According to IDOC policy, wardens are responsible for the operation of their respective facilities, including the intrafacility classification and assignment of offenders. The Warden of each facility is responsible for providing ongoing in-house classification training to ensure that all staff members involved in offender classification are aware of the procedures and their roles and responsibilities in offender classification, assignment, and reassignment. *Id.* at 81. Warden Brown has not provided any ongoing classification training at Wabash Valley nor is he aware of the last time training was provided. *Id.* at 81-82.

When Warden Brown makes 90-day review decisions, he considers past conduct history, comments made by staff who deal with the offender on a daily basis, cooperation with staff, current conduct, sentencings, and whether or not the inmate participated in any programming within the unit. Dkt. 271 at 149. The main reasons Warden Brown never recommended that Mr. Isby be

transferred out of department-wide administrative restrictive status housing were because of Mr. Isby's unwillingness to participate in programs and comments from staff about how uncooperative he was. Dkt. 271 at 150.

Defendant Jack Hendrix was an Assistant Superintendent at Wabash Valley from 2006 until 2011. He became Director of Classification for the IDOC in the Central Office in 2011. In 2014, he became Executive Director of Classification for the IDOC and was on the Commissioner of the IDOC's executive staff. Dkt. 271 at 168-170. He reports to the Deputy Commissioner of Operations. *Id.* at 177. It is among his duties to ensure that IDOC personnel are complying with policies and state and federal law and to "develop, implement, operate, monitor, evaluate, and revise the department's [IDOC's] classification system." Dkt. 271 at 177-79. He supervises the offender placement section. *Id.* at 179.

Director Hendrix testified that the goal of the 30-day reviews was to determine whether the conditions that warranted placement in solitary confinement still existed. Dkt. 271 at 174. For inmates assigned to department-wide restrictive status housing, including Mr. Isby, any appeal from a 30-day, 90-day, or annual review complaining about his continued placement in segregation was supposed to be directed to Mr. Hendrix's office rather than handled at the facility. Dkt. 271 at 179-83. As noted, Mr. Isby's appeals were not always reviewed by Director Hendrix's office. Otherwise, 90-day reviews come to his office only if a warden recommends transfer. Dkt. 271 at 245.

As noted, Mr. Isby was transferred from Wabash Valley to Westville in June of 2017. Dkt. 217. On July 27, 2017, a full review was completed at Westville and it recommended Mr. Isby for release from department-wide administrative restrictive status housing. Dkt. 271 at 226-228; Ex. 228. There were no comments written in by the signature of each of the six reviewers. Ex. 228.

Thereafter, Director Hendrix contacted the Westville warden, classification supervisor, and unit team manager at Westville, and requested an additional review. Dkt. 271 at 227-233. Then in less than a month, on August 17, 2017, the same employees and officials conducted another full review and this time the request for release from department-wide administrative restrictive status housing was denied. Dkt. 271 at 229-232; Ex 229. The comments given the second time were "this offender doesn't want to comply with policy or procedure," "since arrival at WCU on June 28, 2017, the offender has been anti-administration. He wants to control the facility rather than following procedure/policy," and "not recommended at this time due to his anti-social behavior, seems to think all DOC personnel is against him and continuously fights back, seems to have a lot of anger issues." Dkt. 229. This confidential report was not provided to Mr. Isby.

II. Conclusions of Law and Analysis

"The Supreme Court held in *Hewitt* [*v. Helms,* 459 U.S. 460 (1983)] that the Due Process Clause mandates that prison officials periodically review whether an inmate placed in administrative segregation continues to pose a threat." *Isby*, 856 F.3d at 524. As noted above, the question presented here is whether Mr. Isby's due process rights have been violated by the defendants while keeping him in solitary confinement, a/k/a "department-wide restrictive status housing," for years. Consideration of the circumstances presented in this case is influenced by the Court's awareness that "research still confirms what this [Supreme] Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." *Davis v. Ayala,* 135 S. Ct. 2187, 2210 (2015) (J. Kennedy, concurring). "Prolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate's mind even after he is resocialized." *Incumaa v. Stirling,* 791 F.3d 517, 534 (4th Cir. 2015); *see also Williams v. Secretary Pennsylvania Dept. of Corrections,* 848 F.3d 549, 573-74 (3d Cir. 2017) ("explicitly add[ing] our jurisprudential

voice to this growing chorus" of the "judiciary's increasing recognition of the scientific evidence of the harms of solitary confinement.").

"[T]he extraordinary length of Isby's segregation in the SCU implicates his due process rights." *Isby*, 856 F.3d at 524. "To evaluate Wabash Valley's procedures in light of *Hewitt*, we consider the three *Mathews v. Eldridge* factors: (1) the private interest (that is, Isby's interest) affected by a governmental decision, (2) the governmental interests at stake, and (3) 'the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.'" *Isby*, 856 F.3d at 525 (quoting *Mathews*, 424 U.S. 319, 335 (1976)).

The Seventh Circuit held that the "extended, indefinite length of his placement in the SCU tips the scale in [Isby's] favor on this [first] prong of the analysis." *Id.* at 526. The *Isby* Court further found that the government's interests are "substantial" because "[m]aintaining institutional security and safety are crucial considerations in the management of a prison, and, to the extent that an inmate continues to pose a threat to himself or others, ongoing segregation may well be justified." *Id.*

The Seventh Circuit continued its analysis by stating, "[w]ith no potential end date on Isby's segregation, we confront the third of the *Mathews* factors and note that the boilerplate output of each review seems all the more concerning." *Id.* at 526-27. On remand, the *Isby* Court held that "there is a genuine dispute of fact as to whether the thirty-day reviews take into account any updated circumstances in evaluating the need for continued confinement, given the length of Isby's segregation, his long stretches of time without any disciplinary issues, and the rote repetition of the same two boilerplate sentences following each review." *Id.* at 528.

Inmates placed in solitary confinement are entitled to "an informal and nonadversary periodic review (the frequency of which is committed to the discretion of the prison officials) that keeps administrative segregation from becoming a pretext for indefinite confinement." *Isby*, 856 F.3d at 525 (internal quotation omitted). The Seventh Circuit also quoted with approval the Tenth Circuit's holding in *Toevs v. Reid*, 685 F.3d 903, 913 (10th Cir. 2012) that '"a meaningful review ... is one that evaluates the prisoner's current circumstances and future prospects, and, considering the reason(s) for his confinement to the program, determines whether that placement remains warranted.'" *Isby*, 856 F.3d at 527. "And while submission of new evidence or a full hearing may not be *necessary* to meet the requirements of due process under *Hewitt*, an actual review—*i.e.*, one open to the possibility of a different outcome—certainly is." *Id.* at 528 (citing *Proctor v. LeClaire*, 846 F.3d 597, 611 (2d Cir. 2017) ("It is inherent in *Hewitt's* use of the term 'periodic' that ongoing Ad Seg reviews may not be frozen in time, forever rehashing information addressed at the inmate's initial Ad Seg determination....prison officials must look to the inmate's present and future behavior and consider new events to some degree to ensure that prison officials do not use past events alone to justify indefinite confinement.")).

Thus, periodic reviews must be meaningful and cannot be a sham or pretext for indefinite segregation. They cannot rely only on past events, nor can they only include uninformative boilerplate language. In this case, periodic reviews must consider Mr. Isby's current circumstances and future prospects, in addition to the reasons for his placement in solitary confinement when determining whether his continued solitary confinement is warranted.

It is plain from the record that the 30-day reviews at Wabash Valley were perfunctory, meaningless, and not even rubber stamped. The identical forms with the same language were printed out each month by a single reviewer, a caseworker or casework manager. No factual basis

or rationale is provided in the 30-day reviews, leaving the basis for "no changes" in status entirely unknown. *See Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) (discussing similar reasons for finding *Mathews*' "risk of erroneous deprivation" factor weighed in favor of inmate who had been in solitary confinement for 20 years).

The testimony by the two caseworkers relating to how the 30-day reviews were actually conducted tell completely different stories. Although what circumstances were considered for each review, or whether or not *anything* was considered, ranged from some consideration to none, the end result was always the same: a predetermined form that provided no explanation for what review took place or any rationale for the decision.

The Court does not credit the testimony of Ms. Gilmore that for each 30-day review she reviewed case notes, spent time with Mr. Isby if he allowed it, talked to correctional staff, and referred to OCMS notes. Mr. Dugan admitted that no actual review took place in the 30-day "review" and that Ms. Gilmore's statement to the contrary was false. Ms. Gilmore is a defendant in this case and faces personal liability, unlike Mr. Dugan, whose candid testimony was credited by the other defendants. She had a personal animus toward Mr. Isby because of how he treated her.

It was only after counsel was appointed in this case after remand on the due process issue that the striking testimony from caseworker Dugan was discovered. While one might argue that Ms. Gilmore and Mr. Dugan conducted their reviews very differently, Mr. Dugan made it clear that Ms. Gilmore trained him to do the reviews just the way he did them. It took him a matter of minutes to do 30-day reviews for his entire caseload. Each review took seconds. All of the caseworkers simply printed out the forms each month the way he did. Mr. Dugan never examined case plans or other documents in connection with a 30-day review. He did not meet with each

inmate every 30 days. No possibility for a different outcome existed. And, no one testified that the manner in which Mr. Dugan conducted the 30-day "reviews" was improper.

The 30-day "reviews" were "frozen in time." Not surprisingly, there was no evidence that any inmate had ever been released from solitary confinement as a result of a 30-day "review."

Based on this record, the only reasonable answer to the question of whether the 30-day reviews were pretextual is "yes." The Seventh Circuit foreshadowed this Court's conclusion when it stated, "Here, the repeated issuance of the same uninformative language (without any updates or explanation of why continued placement is necessary) coupled with the length of Isby's confinement, could cause a reasonable trier of fact to conclude that Isby has been deprived of his liberty interest without due process." *Isby*, 856 F.3d at 529. For these reasons, the Court finds the 30-day process conducted at Wabash Valley rendered the "risk of an erroneous deprivation" unacceptably high. Simply put, the 30-day reviews do *not* pass Constitutional muster.

Of great concern is the fact that defendants have done a complete about face as to their position throughout this litigation that the 30-day reviews satisfied the Constitution. *Isby*, 856 F.3d at 524 (Defendants "claim, however, that the reviews that Isby receives every thirty days are sufficient for due process."). They now argue that "[t]he important review of the plaintiff's status is what is referred to as the 90-day review." Dkt. 225 at 2. In opening argument, defendants stated that "the Seventh Circuit did not focus solely on the 30-day reviews, and the facts will show that in addition to the 30-day reviews, the offenders in administrative restrictive status housing may request a full review." Dkt. 270 at 19. They contend what was not supported through any testimony, that "[t]he 30-day review is merely to make sure no offender is overlooked," rather than being an actual review of the appropriateness of placement in solitary confinement. Dkt. 225 at 2. Interestingly, at trial, casework manager Gilmore testified that the 30-day reviews do *not* exist

solely to make sure that no offender was overlooked. Dkt. 270 at 119, lines 14-16. Mr. Snyder also testified that the 30-day review was the mechanism by which the IDOC provided meaningful review, in addition to the 90-day review when an inmate requested one. IDOC policy requires the 30-day reviews. Warden Brown also confirmed that the purpose of the 30-day reviews was to determine the continuing need and appropriateness of continued confinement in restrictive status housing.

This change in defendants' position from what was presented on summary judgment to this Court and on appeal to the Seventh Circuit is extremely troubling. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation omitted). The purpose of the rule of judicial estoppel is "to protect the integrity of the judicial process." *Id.* (internal quotation omitted). The doctrine of judicial estoppel "protects the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F3d 785, 795 (7th Cir. 2013). "There are certain clear prerequisites that must obtain before judicial estoppel applies: (1) the later position must be clearly inconsistent with the earlier position; (2) the facts at issue should be the same in both cases; and (3) the party to be estopped must have convinced the first court to adopt its position." *1st Source Bank v. Neto*, 861 F.3d 607, 612 (7th Cir. 2017) (internal quotations omitted). All three elements are present here. Therefore, the defendants cannot slink away from their position that the 30-day reviews passed Constitutional muster.

Having attempted to retreat from their position that the 30-day reviews satisfied due process, the defendants back further into a position where there was *no periodic review*. Even though prison staff can initiate the reviews, they did so only once while Mr. Isby was at Wabash

Valley, in 2017 shortly after the Seventh Circuit's ruling in this case. The 90-day reviews were simply not periodic. They were not conducted every 90 days, nor were they even conducted each time Mr. Isby requested one. As recruited counsel observed in closing argument, "[a] system in which the important reviews might not happen at all is not a system of ongoing reviews under [*Smith v.*] *Shettle* [946 F.2d 1250 (7th Cir. 1991)]." Dkt. 271 at 279, lines 22-23.

The defendants also take the startling position for the first time that Mr. Isby has *waived* his right to due process merely by not exercising it. Defendants cite to *Domka v. Portage County*, 523 F.3d 776, 782 (7th Cir. 2008) for this proposition, but as counsel for Mr. Isby points out, *Domka* does not support this position at all. *Id.* ("A constitutional waiver is considered to be valid if it is knowing and voluntary."). Consistent with *Domka*, the law is well-settled that any waiver of procedural due process rights must be knowing and voluntary. *See United States v. Baptist*, 759 F.3d 690, 695 (7th Cir. 2014) ("While due process rights can be waived, such a waiver must be made knowingly and voluntarily.") (internal quotation omitted). Even if Mr. Isby had signed some kind of waiver form, which he has not, that would not necessarily suffice. "When constitutional rights are implicated, more is required [than signing a waiver]; [m]eticulous care must be exercised lest the procedure by which [the plaintiff] is deprived of that liberty not meet the essential standards of fairness." *Id.* (internal quotation omitted). Merely not asking for the periodic reviews at regular intervals, reviews to which he is entitled, would not constitute a waiver of Mr. Isby's due process rights. And in fact, Mr. Isby often appealed and requested release from solitary confinement which militates against any alleged waiver.

The appeals that Mr. Isby filed challenging his continued placement in solitary confinement were ignored or not reviewed to the highest level on more than one occasion. Warden Brown's testimony about his failure to train and ensure proper compliance with classification procedures

was startling, especially in light of how long the issue of long-term segregation in this case has been in litigation. When Mr. Isby filed a classification appeal in June 2015, he complained that he had been in administrative segregation since 2006 and had received no explanation for why his requests to be released from that status were denied. Ex. 17. In response, the only explanation given was he was "appropriately placed," with no explanation as to why. Ex. 18.

No one having any responsibility for classification of inmates at Wabash Valley and at the state level can feign ignorance of or justify the lack of attention given to these concerns. Even after the Seventh Circuit spelled out due process law that is already well-settled, the only thing that Warden Brown did in terms of ratcheting up the focus on Mr. Isby's plight was to transfer him to a different prison. Mr. Isby was still kept in solitary confinement even though to justify the transfer Executive Director of Classification Hendrix noted that Mr. Isby's behavior had improved ("recent positive adjustment"). Ex. 218. In his letter explaining the transfer, dated June 26, 2017, Warden Brown still highlighted Mr. Isby's assault in 1990. Dkt. 219.

Defendants continue to argue that no statement of reasons was required during reviews. The Seventh Circuit discussed this on appeal and said, nonetheless, the periodic review must be meaningful and not a pretext or a sham. "While such a statement of reasons may not be constitutionally required, however, under *Hewitt*, the periodic review must still be meaningful and non-pretextual." *Isby*, 856 F.3d at 527.

Warden Brown testified that participating in programming or refusal to do so is not among the IDOC criteria for placement or retention in segregation. When Commissioner Lemmon granted Mr. Isby's appeal in 2005 to release him to facility administrative segregation, ex. 278, he did so without having Mr. Isby agree to participate in programming. Before May of 2015, Mr. Isby was never informed through any written review process that his refusal to participate in various

programs was one reason he was denied release from segregated housing. Of course, even if he had been so informed, the record is clear that participating in step down programs did not necessarily guarantee a change in status. Some inmates have completed those programs and still not been released from restrictive housing.

The Court acknowledges the difficulty prison staff face every day in dealing with inmates who behave like Mr. Isby. *See Isby*, 856 F.3d at 524-25. *Isby* and *Hewitt* emphasize that an inmate's security risk is the reason to allow segregation, not an inmate's manners. *Id.* at 525 ('"The decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner….'") (quoting *Hewitt*, 459 U.S. at 477 n. 9); *Id.* ("The [*Hewitt*] Court recognized that lawfully incarcerated persons retain only a narrow range of protected liberty interests, and that broad discretionary authority is necessary because the administration of a prison is at best an extraordinarily difficult undertaking.") (internal quotation omitted). At the same time, however, prison staff cannot keep an inmate in solitary confinement indefinitely because they do not like him, or even because he is vulgar, rude, and belligerent. They cannot even keep him in solitary confinement indefinitely for an assault that occurred 28 years ago. Yet that is what the evidence establishes here. When this case was filed, it had been four years since Mr. Isby had been written up for any major conduct violation – a non-violent offense of filing frivolous lawsuits. Mr. Isby had no conduct reports for most of 2009, all of 2010, 2011, 2012, 2013, and through December 29, 2014. He also had no conduct incidents in 2015, 2016, and 2017.

No one is urging that Mr. Isby is a model of decorum or that the 1990 incident was not serious. But neither factor can result in his being kept in solitary confinement for decades. It is difficult for the Court to comprehend how the defendants could reasonably expect a compliant attitude would result from decades of solitary confinement without meaningful review, a clear path

to release, or human interaction. '"The state may not use Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions.'" *Isby*, 856 F.3d at 529 (quoting *Proctor*, 846 F.3d at 611).

The May 2011 90-day review was denied based on Mr. Isby being unpleasant, argumentative, and for organizing a group called the "Freedom Fighters" back in 2000, the agenda for which is not of record but nowhere is it implied that it was to perpetuate violence. The December 20, 2011 90-day review was denied for having an "extremely violent DOC history." Ex. 126 at 3. This "extremely violent" history dated back to 1990 and 2006 (when he was found guilty of battery). A 2014 90-day denial of release from solitary also was based in large part on the 1990 incident. These examples of the rationale applied to Mr. Isby that demonstrate his years of being conduct clear were given inadequate consideration because of his past transgressions.

The Court finds that the defendants denied Mr. Isby's Fourteenth Amendment due process rights by failing to provide meaningful and periodic reviews of his placement in solitary confinement. Having found this constitutional violation, the Court turns to what remedies shall be awarded.

III. Remedies

Mr. Isby seeks compensatory damages and injunctive relief as well as punitive damages. The Court considers each in turn.

Compensatory Damages

The 30-day reviews are what the defendants have held up as meeting "constitutional muster." In truth, these were reviews in name only. There was a preordained outcome each month. The review consisted of nothing more than printing a form. No consideration was given to changed

circumstances or the current lack of major conduct reports. In addition, the 90-day reviews were not "periodic."

Defendants contend that because Mr. Isby has been appropriately housed even if his due process rights were violated, he is entitled to only nominal damages. The Court finds, however, that if a meaningful review based on proper criteria had been provided, Mr. Isby would have been released from department-wide restrictive status housing as of May 2010, at which time he had been clear of major conduct reports for two years. Moreover, he remained conduct clear until December 15, 2014.[10]

Mr. Isby acknowledges that because he did not suffer any physical injury, he cannot recover compensatory damages for mental or emotional injury. 42 U.S.C.A. § 1997e(e); *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003) ("We agree that, absent a showing of physical injury, § 1997e(e) would bar a prisoner's recovery of compensatory damages for mental and emotional injury."). "But if that same prisoner alleges some other type of non-physical injury, the statute would not foreclose recovery, assuming that the damages sought were not 'for' any mental or emotional injuries suffered." *Id.* Although Mr. Isby claims that he has suffered mental and emotional injuries, something the Court views as obvious in light of his extensive solitary confinement, Mr. Isby is not seeking money damages for those injuries.

Mr. Isby argues correctly that he is entitled to compensatory damages for other types of injuries, even if intangible, including the deprivation of society, deprivation of meaningful human contact and ease of communication, the loss of freedom of movement, lack of access to the law library, vocational programs, and job assignments, and diminished quality of life. *See Aref v.*

[10] The Court notes that in 2017 Mr. Isby was recommended for release from department-wide restrictive status housing, ex. 228, but then defendant Hendrix talked to the Warden of Westville and those same reviewers recommended against release a few weeks later. Ex. 229; dkt. 271 at 232-34.

Lynch, 833 F.3d 242, 264-65 (D.C. Cir. 2016) ("We therefore conclude there exists a universe of injuries that are neither mental nor emotional and for which plaintiffs can recover compensatory damages under the PLRA.") (listing cases); *Cassidy v. Indiana Department of Correction*, 199 F.3d 374, 377 (7th Cir. 2000) (plaintiff's claims for damages for mental and emotional injuries were barred but he "may nonetheless pursue all of his other claims for damages.").

In his post-trial brief, Mr. Isby suggests an award of $140 per day of segregation for 3,071 days between May 15, 2010 (two years before this action was filed) and the date of the brief, October 11, 2018, amounting to a total of $429,940.00, citing *Smith v. Rowe*, 761 F.2d 360, 368 (7th Cir. 1985) (affirming $119 per day of segregation) and *Campbell v. Peters*, 1999 WL 1313698 (N.D.Ill. Sept. 30, 1999) ($140 per day of unjustified confinement), *rev'd on qualified immunity grounds*, 256 F.3d 695 (7th Cir. 2001). Although *Rowe* is still cited for its $119 per day award of damages, the Court does not rely on that case because it predated the Prison Litigation Reform Act of 1996 and its bar on damages for mental and emotional injury without a prior showing of physical injury. 42 U.S.C. § 1997e(e).

Guidance from other courts aids in exercising the Court's discretion in assessing damages. *See McClary v. Kelly*, 237 F.3d 185 (2d. Cir. 2001) (affirming district court's award of $125 per day to prisoner held for extensive period in administrative segregation without periodic review); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (reversing $1.00 award with directions to district court to award compensatory damages in the vicinity of $100 per day for days unlawfully spent in administrative segregation and citing cases awarding between $25 and $129 per day).

The Court finds that a reasonable per day damages award lies within the range of $25 and $129. An award of $100 per day in damages for Mr. Isby's wrongful loss of freedom of movement, deprivation of human contact, lack of access to services, and ease of communication is supported

by the evidence and caselaw. There are 3,140 days between May 15, 2010 and the date of this Entry, December 19, 2018. This amounts to $314,000.00 in compensatory damages.

Injunctive Relief

Mr. Isby's claim for injunctive relief is also granted. The record establishes the Defendants have violated Mr. Isby's due process rights and have failed to provide meaningful review of the basis of his segregation. While the Court might ordinarily simply order Mr. Hendrix to ensure compliance with Mr. Isby's due process rights by providing ongoing periodic and meaningful review of his placement in administrative restricted housing, Defendants' conduct in its years-long review of Mr. Isby's segregation status gives the Court no assurance that the same pre-ordained conclusion would not be reached. Accordingly, not later than January 4, 2019, Executive Director Hendrix shall file a proposed plan by which Mr. Isby is removed from department-wide or facility restrictive status housing. Mr. Isby will have fourteen (14) days in which to respond to the proposed plan, and the Court will then decide whether to accept the proposed plan. The Court understands that Mr. Isby cannot be placed directly into general population given his years of isolation, but there is evidence that within the IDOC there are transition options.

The Court is mindful that some of Mr. Isby's conduct while in segregation might have otherwise prompted discipline but for his extreme housing status. Nothing in this Order should be read to imply that the IDOC cannot fairly, and in a non-retaliatory manner, implement its disciplinary policies. The Court also takes this opportunity to advise Mr. Isby that he would be well-served by toning down his angry and belligerent behavior and attempting to cooperate with the people who are charged with his safety and security.

Punitive Damages

With regard to punitive damages, they may be awarded in a section 1983 case "'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.'" *Alexander v. City of Milwaukee*, 474 F.3d 437, 453 (7th Cir. 2007) (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). Ms. Gilmore's testimony evidenced a willful violation of Mr. Isby's due process rights. She had no intention of releasing him from segregated housing because of how he verbally abused her and how angry he was. She held against him the violence he exhibited in 1990 and for which he is serving an additional 40-year sentence. She admitted that Mr. Isby being conduct clear for two years was a "very positive factor." Yet, his attitude and long past actions won out in her mind. It was Mr. Dugan's opinion that Mr. Isby is still in restrictive status housing because of the 1990 incidents.

Testimony from Warden Brown demonstrated that he willfully failed to comply with the IDOC's own policies and procedures. He utterly failed to provide training or otherwise ensure that the reviews and appeals were being processed according to policy, state law, and the Constitution.

Mr. Isby persuasively posits that Warden Brown and Director Hendrix were reckless in their management styles which resulted in the deprivation of Mr. Isby's due process rights. Moreover, the Court views Warden Brown's and Mr. Snyder's transfer of Mr. Isby to a different prison a month after the Seventh Circuit issued its opinion in this case as a willful and knowing attempt to avoid an order of injunctive relief. After years of confinement at Wabash Valley, the transfer immediately after the Seventh Circuit foreshadowed this Court's rulings cannot be viewed as motivated by anything but an attempt to avoid some of the penalties. Certainly, no other viable reason for the coincidental "change of scenery" with no change in housing status has been offered.

The fact that Mr. Isby was conduct free for years at various times while he was kept in solitary confinement is proof that he was being held there for past behavior or because he was belligerent. The purported determinations based on safety and security were again grounded in long ago incidents while not taking into account Mr. Isby's more recent clear conduct. The 30-day reviews were nothing but a sham. The 90-day reviews were not consistently provided. None of the defendants ever requested 90-day reviews on Mr. Isby's behalf. Even when Mr. Isby did not violate prison rules for years on end, there was no possibility that he would be released from solitary confinement. Mr. Isby has shown much more than mere sloppiness or inattentiveness on the part of the defendants. *See Littler v. Indiana Dept. of Corrections Commissioner*, No. 3:11-cv-218, 2013 WL 4551072 at *4 (N.D. Ind. Aug. 28, 2013) ("If all Littler needed to prove [to be awarded punitive damages] was that the defendants were sloppy and inattentive to the procedural requirements inherent in such transfers, he would have easily succeeded. But that is not the test."). In sum, the record demonstrates that the defendants who participated in the decision-making process or lack thereof held a personal animus against Mr. Isby and showed a reckless or callous indifference to his due process rights.

The Court does not impose punitive damages lightly, but by concluding that an inmate's due process rights have been willfully violated for years resulting in his indefinite confinement in solitary confinement, they must be awarded. Due process is hardly a new concept. Retaining a human being in solitary confinement for years is unconstitutional unless it is accompanied by meaningful and thoughtful consideration of whether he continues to pose a safety or security risk. Again, the defendants have shown a callous disregard for this well-settled doctrine.

The purpose of punitive damages is to punish and deter future conduct. *See Hendrickson v. Cooper*, 589 F.3d 887, 894 (7th Cir. 2009); *see also* Federal Civil Jury Instructions of the

Seventh Circuit; Constitutional Torts, 42 U.S.C. § 1983, Jury Instruction 7.28 (2017) ("The purposes of punitive damages are to punish a defendant for his or her conduct and to serve as an example or warning to Defendant and others not to engage in similar conduct in the future.").

Ms. Gilmore is no longer employed with the IDOC. Although she acted willfully in disregarding Mr. Isby's due process rights, the concept of deterrence does not apply to her as directly as it does to the other defendants.

Director Hendrix, Warden Brown, and Mr. Snyder are still employed by the IDOC. Director Hendrix will continue to be involved in Mr. Isby's reviews. There is a possibility that Warden Brown and Mr. Snyder could cross paths again with Mr. Isby if either he is transferred back to Wabash Valley or they change jobs. Warden Brown arguably had the most direct high-level responsibility to protect Mr. Isby's due process rights and failed to provide leadership in that regard.

Taking these circumstances into consideration, punitive damages are not assessed against Ms. Gilmore. Punitive damages are assessed as follows: Warden Brown, $10,000.00; Director Hendrix, $7,500.00. and Mr. Snyder, $5,000.00.

IV. Conclusion

The Court summarizes its findings as follows:

a. Defendants willfully violated Mr. Isby's due process rights by failing to provide periodic, meaningful review of his long-term placement in solitary confinement;

b. Compensatory damages in the amount of $314,000.00 are awarded;

c. Punitive damages in the amounts set forth above are awarded;

d. Injunctive relief is awarded as set forth above;

e. Plaintiff's counsel may seek attorney's fees consistent with 42 U.S.C. 1997e(d), which limits fees to 150% of the damages award. *See Pearson v. Welborn*, 471 F.3d 732, 742 (7th Cir. 2006).

IT IS SO ORDERED.

Date: 12/19/2018

Hon. Jane Magnus-Stinson, Chief Judge
United States District Court
Southern District of Indiana

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AARON ISBY-ISRAEL
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WESTVILLE - CF
WESTVILLE CORRECTIONAL FACILITY
Inmate Mail/Parcels
5501 South 1100 West
WESTVILLE, IN 46391

David A. Arthur
OFFICE OF THE ATTORNEY GENERAL
David.Arthur@atg.in.gov

Burnell K Grimes, Jr.
FAEGRE BAKER DANIELS LLP
Burnell.Grimes@FaegreBD.com

Daniel R. Kelley
FAEGRE BAKER DANIELS LLP (Indianapolis)
daniel.kelley@faegrebd.com

Melissa Marie Orizondo
FAEGRE BAKER DANIELS LLP
melissa.orizondo@faegrebd.com

Jason Rauch
FAEGRE BAKER DANIELS LLP (Indianapolis)
jason.rauch@faegrebd.com

Ryan Joseph Sterling
INDIANA ATTORNEY GENERAL
ryan.sterling@atg.in.gov