ORAL ARGUMENT REQUESTED

No. 16-7358

United States Court of Appeals for the Fourth Circuit

ERIC JOSEPH DEPAOLA,

Plaintiff-Appellant,

DENIS RIVERA; LUIS VELAZQUEZ,

Plaintiffs,

-v.-

VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL.,

Defendants-Appellees,

EXTERNAL REVIEW TEAM, ET AL.,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

OPENING BRIEF FOR PLAINTIFF-APPELLANT

Daniel Levin
Andrew L. Black
Maxwell J. Hyman
Luca Winer
Alexaida Collet
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
(202) 626-3600
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES AND RULES

SECONDARY SOURCES

JURISDICTIONAL STATEMENT

The district court possessed jurisdiction pursuant to 28 U.S.C. § 1331. The district court granted summary judgment to Appellees on September 28, 2016 (ECF No. 77), disposing of all of Mr. DePaola's claims. Mr. DePaola filed a timely notice of appeal on October 6, 2016 (ECF No. 78). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

Mr. DePaola has been held in solitary confinement for the last eight years and will remain in solitary confinement until his sentence ends in 2040. The district court granted summary judgment on all of Mr. DePaola's claims under 42 U.S.C. § 1983.

1. Did the district court abuse its discretion by forcing Mr. DePaola into summary judgment proceedings prior to discovery, prejudicing his ability to support his Eighth Amendment and procedural due process arguments?

2. Did Mr. DePaola demonstrate a genuine dispute of material fact that holding him in solitary confinement for the past eight years and for the remainder of his sentence, without regard to whether he presents an ongoing risk to the general population, violates his procedural due process rights?

3. Did Mr. DePaola demonstrate a genuine dispute of material fact as to whether his past eight years and continuing solitary confinement violates the Eighth Amendment because: (1) it deprives him of basic human needs to which Appellees are deliberately indifferent; and/or (2) serves no valid penological purpose?

STATEMENT OF THE CASE

I. MR. DEPAOLA IS SENTENCED TO PRISON AS A JUVENILE AND SUBSEQUENTLY PLACED IN SOLITARY CONFINEMENT

Sentenced to prison at age 16, Eric J. DePaola has been housed in solitary confinement at Virginia's Red Onion State Prison ("Red Onion") for the last eight years. Unless this Court intervenes, he will remain in solitary confinement until Virginia releases him from prison in 2040—a total of 31 years. J.A.-375.

In 2004, Mr. DePaola pleaded guilty to two counts of malicious wounding, use of firearm in a felony, statutory burglary, and two counts of abduction. He was sentenced to 38 years in prison. J.A.-210; 378-379, 386.

Mr. DePaola began serving his sentence in the general population of Wallens Ridge State Prison. On February 27, 2007, he was transferred to Red Onion's general population. J.A.-161 ¶ 11; 379. On September 14, 2009, after a dispute, Mr. DePaola stabbed a prison guard. J.A.-161 ¶ 11. The wound was non-fatal. As a result, Mr. DePaola was convicted of malicious wounding in July 2011. He was sentenced to ten years with five years suspended, to run concurrently with his previous sentence. J.A.-161 ¶ 11; 210.

In addition to general population prisoners, Red Onion houses prisoners in "administrative segregation," more commonly known as solitary confinement. This form of solitary confinement "is not a disciplinary measure," but used to isolate prisoners that Virginia Department of Corrections ("VDOC") determines

pose a disruption or risk to the general population. J.A.-166-167 (O.P.830.A at III); 313. In 2009, Red Onion placed Mr. DePaola in solitary confinement on the basis of his stabbing offense. J.A.-92 ¶¶ 81-82.

A. The Conditions Of Mr. DePaola's Solitary Confinement

For the approximately 500 prisoners held in solitary confinement at Red Onion, life is marked by extreme deprivation. J.A.-330. According to Mr. DePaola's uncontested evidence, he is:

- confined alone in an 8 x 10-foot cell, with a frosted-glass window that prevents any view of the outside world, for 24 hours a day on non-recreation and non-shower days (J.A.-273-275 ¶¶ 61, 66, 70, 75);

- required to eat all meals alone in his cell (J.A.-273-275 ¶¶ 61, 74; 313);

- forced to sleep under bright lights, which "stay[] on inside the cells at all times, 24/7," in the presence of "feces, blood, urine" and pervasive "noises of . . . prisoners screaming, beating on doors [and] walls." (J.A.-273-274 ¶¶ 63-65);

- obliged to undergo a cavity search "which includes the parting of one's buttocks for visual inspection of the anus, the lifting of one['s] testicles and penis," each time before leaving his cell (J.A.-273 ¶ 58);

- deprived of any physical human contact except when a guard places handcuffs and leg shackles on him each time before leaving his cell (J.A.-274 ¶¶ 67, 68; 89 ¶ 71);

- permitted to leave his cell only for a 15-minute shower three times per week, and for an hour of

"recreation . . . five separate days a week" in a 5-by-9-foot "dog style cage" (J.A.-90 ¶ 73; 313);

- escorted at all times when outside his cell, under the aim of a 40mm gun that shoots live rounds and the watch of a K-9 dog (J.A.-90 ¶ 72); and
- unable to obtain a prison job or participate in vocational training (J.A.-289 ¶ 208; 87 ¶ 60).

Unsurprisingly, as of October 2012, at least 173 of the 505 prisoners in solitary confinement at Red Onion—over one third (34%)—"were considered mentally ill." J.A.-331.

The harsh conditions of solitary confinement at Red Onion have caused Mr. DePaola to suffer from mental illness and mental deterioration, frustration, anxiety, anguish, and night terrors. J.A.-94 ¶ 93. He has also experienced physical deterioration, headaches, weight loss, loss of eyesight due to the bright fluorescent lights, loss of sleep, and akathisia. J.A.-94 ¶ 93. And, Mr. DePaola is denied the ability to reduce his sentence through credited time for his good behavior while in solitary confinement. J.A.-275 ¶ 78.

B. Because VDOC Classifies Mr. DePaola As An "IM" Prisoner, His Solitary Confinement Is Permanent

O.P. 830.A became effective on February 18, 2013, four years after Mr. DePaola was placed in solitary confinement. J.A.-86 ¶ 54-56. Upon initial assignment to administrative segregation, prison staff sort prisoners into one of two pathways based on an evaluation of their risk to the prison population: Intensive

Management ("IM") or Special Management ("SM"). *See* J.A.-166-167 (O.P.830.A at I-III); 168 (O.P.830.A at (IV)(B)(1)(d)(i)) (prisoners are assigned "to *either* [IM] *or* [SM] based on their identified risk level (emphases added)).

Prisoners designated IM include those whom prison staff have determined possess a behavior characteristic "for extreme and/or deadly violence." J.A.-166-167 (O.P.830.A at III). Prisoners assigned to SM include those with "disruptive behaviors at lower level facilities," such as violent resistance to staff intervention "resulting in harm to staff . . . without the intent to [seriously] harm or . . . kill." J.A.-166-167 (O.P.830.A at III).

Prisoners in SM are able to participate in Red Onion's Step-Down Program. J.A.-172 (O.P.830.A at (IV)(F)(6)(a)). The Step-Down program tracks the prisoners' progress in three areas: disciplinary infractions, responsible behavior, and self-improvement and education. J.A.-169-170 (O.P.830.A at (IV)(E)(4)(a)). Prisoners who meet their goals in these areas can progress to Level 6, where they begin a process of "re-socialization in preparation for stepping down to Level 5," which is the general population. J.A.-172 (O.P.830.A (IV)(F)(6)); 110 (O.P.830.2 at (IV)(A)).

Appellees admitted in their Answer below that, unlike SM prisoners, "IM status prisoners are not eligible for the step-down program." *Compare* J.A.-85 ¶ 52, *with* J.A.-152 ¶ 52. That judicial admission is binding. *See Lucas v. Burnley*,

879 F.2d 1240, 1242-43 (4th Cir. 1989) ("[A] party is bound by the admissions of his pleadings."). That IM prisoners are not eligible for the record is further supported by the record. *See* J.A.-172 (O.P.830.A at (IV)(F)(6)(a)) (IM prisoners "are not currently eligible for Step-Down" to the general population and "[t]he Step-Down program is for previously ***SM*** offenders" (emphasis added)). A detailed flow chart in an updated version of the Step-Down Program guidelines further demonstrates this point. *See* Attachment at 14, June 23, 2017, ECF No. 25.

As such, prisoners assigned to the IM pathway based on a single past transgression are permanently barred from reentering the general population. Unsurprisingly, a "large number of prisoners [in Virginia] are in prolonged segregation for years and decades" and "will one day be released directly into the community, without first spending time in general prison population." J.A.-314; *see also* J.A.-317 (some prisoners "have been in solitary confinement for 15 years").

In lieu of a Step-Down Program, IM prisoners complete a curriculum that allows them to advance in "privilege level" from IM-0—the most restrictive level—to IM-1, IM-2, and finally to IM-SL6—the "lowest security level" for IM prisoners. J.A.-161 ¶ 9; 169 (O.P.830.A at (IV)(D)(1), (3)(b)). As of July 2016, Mr. DePaola was designated IM-1. J.A.-165 ¶ 24. According to O.P. 830.A, the IM-1 privilege level entitles an inmate to three library books per week, television

from Friday at noon until Monday at 6:00 a.m., an AM/FM radio, one video visitation per month, one audio book per month, two phone calls per month, and a one-hour "non-contact" in-person visitation per week, during which the inmate is separated from his visitor by a pane of plexiglass. J.A.-382; 178 (O.P.830.A at Appx. F). The privileges for IM-2 prisoners are only slightly better. *See* J.A.-178-80 (one more library book per month, one more phone call per month, television on "[s]pecial events," and group programming in a "secure chair"); J.A.-91 ¶ 75 (a "secure chair" is a "steel desk chair" to which the inmate "leg-shackled"). These privileges do little to compensate for the "inhumane" conditions of permanent solitary confinement that Red Onion before their release. J.A.-321.

IM prisoners who advance to IM-SL6 are moved to the IM-SL6 Closed Pod, but they can progress no further. *See* J.A.-89 ¶ 69 ("IM status prisoners are not allowed to progress any further than the IMC SL6 Pod for the duration of their sentence."); J.A.-169 (O.P.830.A at (IV)(D)(1)(b); 273 ¶ 60; 162 ¶ 14 (IM-SL6 Closed Pod is "for offenders possibly facing a long term in a high security setting"); Attach. to Mot. for Leave to File at 14, June 23, 2017, ECF No. 25 ("IM offenders are not eligible for Step-Down.").

An IM inmate confined to the IM-SL6 Closed Pod is still "locked in [his] cell[] 23-24 hours a day" (J.A.-90-91 ¶ 75); faces a cavity search each time before his cell (J.A.-273 ¶ 58); exercises alone in a "5x9 dog style cage" on the back

section of the yard" (J.A.-90 ¶ 73); "continue[s] to have . . . segregated showers"; "out-of-cell restraints, shackles, and dual escorts" (J.A.-385); is "under constant aim of a 40mm assault weapon that shoots live rounds" and the watch of a K-9 dog at all times when outside his cell (J.A.-89-91 ¶¶ 71, 72, 75). Put simply, IM prisoners who progress to the IM-SL6 Closed Pod remain in solitary confinement. *See* J.A.-290 ¶ 211 (IM-SL6 Closed Pod is "segregation"); J.A.-178 (O.P.830.A at Appx. F: listing some confinement conditions in IM-SL6 Closed Pod); J.A.-162 ¶ 14 (same).

Prisoners housed in the IM-SL6 Closed Pod can "earn more privileges than any other group of IM inmates" (J.A.-385) but these privileges are not meaningfully distinguishable from those afforded to IM prisoners held at levels IM-0 to IM-2. *See* J.A.-178 (830.A at Appx. F). Compared to IM prisoners at the IM-2 privilege level, prisoners in the IM-SL6 Closed Pod receive one more book, one more hour of visitation time per week, and one more phone call and one more video visitation per month. J.A.-178 (830.A at Appx. F). Prisoners in the IM-SL6 Closed Pod who are eligible for jobs "are required (on a rotating basis) to be leg shackled to a steel desk chair (labeled a secure chair) at the front of the pod (under aim of 40mm and threat of K-9) to roll sporks, salt and pepper into napkins . . . for several hours per day." J.A.-90-91 ¶ 75. Prisoners who refuse to work receive an

infraction, are removed from the IM-SL6 Closed Pod, and have their privileges revoked. J.A.-90-91 ¶ 75.

C. Mr. DePaola's ICA Reviews

The Institutional Classification Authority ("ICA") reviews administrative-segregation prisoners' "adjustment and behavior" every "90 days." J.A.-238 (O.P.861.3 at (IX)(A)(5)); 175 (O.P.830.A at (IV)(K)(5)(A)); *see also* J.A.-385; 161 ¶ 11. For SM prisoners, ICA Reviews provide an opportunity for their "progress" to be recognized with "reduction to . . . Level 6" and eventually the general population. J.A.-116 (O.P.830.2 at (G)(8)). However, because the Step-Down Program does not apply to IM prisoners (*see* J.A.-172 (O.P.830.A at (IV)(F)(6)(a))), ICA Reviews are only used to determine the prisoners' privilege level, not their fitness for return to the general population. J.A.-159 ¶ 5, 14; 175 (O.P.830.A at (IV)(K)(5)).

In theory, the ICA's recommendations must determine and explain why an inmate classified as IM presents a "threat to security." J.A.-238 (O.P.861.3 at (IX)(A)(5)(b)); *see also* J.A.-238 (O.P.861.3 at (IX)(A)(5)(a)) (ICA Review recommendations must be based on "the reason for assignment [to administrative segregation]" and "the offender's behavior"). Mr. DePaola's ICA Review reports, however, do not provide a basis for his ongoing solitary confinement. Many of the reports in the record have no substantive justifications for holding Mr. DePaola in

solitary confinement and do not explain why he poses a risk to the general population. *See, e.g.*, J.A.-360 (Dec. 6, 2013) ("ICA recommends IM Closed Pod"); J.A.-367 (Dec. 5, 2014) ("ICA recommends segregation"); J.A.-353 (May 15, 2012) ("[F]or orderly operations of the institution"); J.A.-370; 371 (September 3, 2015) ("Remain segregation."); J.A.-374 (April 8, 2016) (DePaola "is housed appropriately in segregation"). Others refer to Mr. DePaola's now nearly decade-old stabbing offense. *See* J.A.-357 (March 5, 2013); J.A.-358 (June 6, 2013).

Mr. DePaola's behavior in solitary confinement has been largely positive. For the first four years days of his segregation—from September 14, 2009, until December 22, 2013—Mr. DePaola did not receive a single disciplinary infraction. J.A.-162-163 ¶ 15; 210. The infractions Mr. DePaola incurred since are mostly minor "200 series" charges: two for possession of contraband within the span of eight months (J.A.-161 ¶ 11; 219) (possession of magnets); (J.A.-162-163 ¶ 15; 214) (possession of undisclosed "contraband"), and one for failing to comply with grooming standards, a charge that was later dismissed (J.A.-164 ¶ 22; 249). Mr. DePaola has received two "100 series" charges in his eight years of solitary confinement: one for "tampering with [a] lever on the side of [his] sink" (J.A.-163 ¶ 16; 216; 163 ¶ 17; 219), and one for "possession of a sharpened instrument" that prison staff found in a cell Mr. DePaola previously occupied—a charge he emphatically denies (J.A.-164 ¶ 23; 251). None of Mr. DePaola's ICA Reviews

mentions the sharpened-instrument charge as a basis for continuing his administrative segregation, or that he has committed or threatened any violence during his eight years in solitary confinement.

II. PROCEDURAL HISTORY

On December 19, 2014, Mr. DePaola filed his action under 42 U.S.C. § 1983 in the U.S. District Court for the Western District of Virginia against VDOC and 31 persons—including VDOC Director Harold Clarke, VDOC Chief of Operations A. David Robinson, Red Onion Warden Randall Mathena, and Red Onion IM-SL6 Closed Pod Manager J. Artrip. J.A.-76-83 ¶¶ 3-38. Specifically, Mr. DePaola alleged, *inter alia*, that (1) that the administrative segregation review procedures for IM prisoners violate his Fourteenth Amendment right to procedural due process rights; and (2) the conditions of prolonged solitary confinement constitute cruel and unusual punishment under the Eighth Amendment. J.A. 378; 83 ¶¶ 39, 41. The district court denied Mr. DePaola's request to appoint counsel for his benefit. J.A.-57 (finding no "exceptional circumstances justifying appointment of counsel").

Mr. DePaola propounded interrogatories to Appellees seeking to identify proper defendants for his § 1983 action. J.A.-59. Appellees then moved to dismiss Mr. DePaola's Complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for failure to state a claim. J.A.-63. Appellees also moved for a

protective order to stay discovery while their motion to dismiss was pending, J.A.-65. The district court granted the protective Order next day, allowing Mr. DePaola no time to oppose or even receive the Motion for Protective Order by mail. J.A.-69. In granting the protective order, the district court directed Appellees to file interrogatory responses within 21 days of an order on Appellees' motion to dismiss. J.A.-69. Mr. DePaola subsequently filed an objection to the Protective Order. Objections, *DePaola v. Va. Dep't of Corrs.*, No. 7:14-cv-00692 (W.D. Va. Nov. 13, 2015), ECF No. 48.

Mr. DePaola opposed Appellees' motion to dismiss and moved to amend his Complaint. J.A.-70. The district court granted Mr. DePaola's motion to amend and denied Appellees' motion to dismiss. J.A.-71-72. In that same order, the district court directed Appellees to file a motion for summary judgment within 60 days. J.A.-73.

When Appellees failed to file a response to Mr. DePaola's interrogatories within 21 days of the denial of Appellees' motion to dismiss, Mr. DePaola filed a motion to compel (J.A.-134), which the district court granted (J.A.-137). Appellees' eventual responses to Mr. DePaola's interrogatories were incomplete, claiming that "some of the interrogatories could not be fully answered." J.A.-141.

On July 28, 2016, Appellees filed both their Motion for Summary Judgment and their Answer to Mr. DePaola's Amended Complaint. J.A.-156; 147. The

district court issued a *Roseboro* notice to Mr. DePaola, but the notice did not advise Mr. DePaola of his right to seek reasonable discovery in order to demonstrate a triable issue of fact. J.A.-261.

Mr. DePaola filed an opposition to summary judgment that attached a lengthy and detailed sworn declaration[1] describing his harsh confinement conditions and suffering in prolonged solitary confinement. Mr. DePaola's affidavit refers to 48 exhibits.

From this evidence, Mr. DePaola argued, *inter alia*, that the conditions of his near-decade in solitary confinement violate procedural due process because they are atypical and significantly harsh compared to conditions in the general population. J.A.-399. He argued ICA Reviews are meaningless because the evidence establishes that Appellees have predetermined he will permanently reside in administrative segregation, regardless whether he presents a present or future security risk, because they label him as an IM prisoner. J.A.-389. Mr. DePaola also argued that his lengthy solitary violates the Eighth Amendment because of the conditions of his solitary confinement and because no penological purpose exists

[1] An inmate's allegations in his verified complaint are the "equivalent of an opposing affidavit for summary judgment purposes" and may establish a genuine dispute of material fact. *Williams v. Griffin*, 952 F.2d 820, 823-27 (4th Cir. 1991) (inmate's allegations in verified complaint on conditions of confinement protected his Eighth Amendment claim from summary judgment).

for his continued solitary confinement. J.A.-393n.5. Appellees did not file a reply brief or any contrary evidence.

The district court granted summary judgment to Appellees on all of Mr. DePaola's claims. J.A.-378, 408. The court concluded that Mr. DePaola's eight years and counting of solitary confinement does not implicate a protected liberty interest because "if [he] continues to work on improving his behavior and changing his thinking . . . he can be evaluated for steps toward . . . a general population setting." J.A.-400. The court did not examine whether Mr. DePaola had been afforded meaningful periodic review to determine if he could reenter the general population. J.A.-402. As for Mr. DePaola's Eighth Amendment claim, the court concluded that he did "not allege that he was deprived of any necessity for life, such as food or shelter" and faulted Mr. DePaola for failing to offer evidence that his "various mental and physical discomforts" were serious or required medical attention. J.A.-407.

Mr. DePaola timely appealed the district court's decision on October 10, 2016. J.A.-410. This Court assigned White & Case LLP to represent Mr. DePaola on appeal, and White & Case LLP accepted the representation on a pro bono basis.

SUMMARY OF THE ARGUMENT

The district court abused its discretion by ordering the Appellees to move for summary judgment and by granting summary judgment without allowing for any meaningful discovery. In addition, the district court erred in granting summary judgment because Mr. DePaola, despite having no meaningful opportunity for discovery, raised genuine disputes of material fact as to whether his procedural due process rights were violated. The district court further erred in granting summary judgment on Mr. DePaola's Eighth Amendment claims.

The district court ordered Appellees to file a motion for summary judgment even before Appellees had filed an answer to Mr. DePaola's Amended Complaint. Indeed, a Standing Order of the district court has institutionalized the practice of ordering summary judgment on claims of Red Onion prisoners before discovery. Mr. DePaola had no reasonable opportunity to obtain discovery that would have aided his opposition to Appellees' motion, such as an evaluation by an independent health professional. This prejudiced Mr. DePaola's ability to raise genuine disputes of material fact on his constitutional claims. Yet, the district court granted summary judgment on all Mr. DePaola's claims, and even pointed to Mr. DePaola's lack of evidence as part of its reasoning for doing so. This was an abuse of discretion.

In addition, the district court erred by granting summary judgment on Mr. DePaola's procedural due process claims. The court concluded that his conditions of confinement do not implicate a protected liberty interest. But, viewing Mr. DePaola's uncontested evidence in the light most favorable to him, the conditions he has endured during his eight years of solitary confinement are nearly identical to those that this Court held in *Incumaa v. Stirling*, 791 F.3d 517 (4th Cir. 2015), are atypical in comparison to the general population, and more severe than conditions that the Supreme Court held in *Wilkinson v. Austin*, 545 U.S. 209 (2005), implicated a liberty interest under any plausible baseline.

The court reasoned that the Step-Down Program "addresses and alleviates" these conditions because, through good behavior and concerted efforts, Red Onion will eventually permit Mr. DePaola to reenter the general population. The district court was wrong. Appellees admitted in their Answer that IM prisoners like Mr. DePaola are not eligible for the Step-Down Program, and Mr. DePaola's uncontested evidence establishes that, for IM prisoners, solitary confinement is ***permanent***. Notably, the district court has made the same finding when granting summary judgment without discovery in at least nine other Red Onion solitary cases, glossing over the record and largely copying its reasoning from one opinion to the next. Because the uncontested record evidence raises a question whether VDOC has or will ever provide Mr. DePaola meaningful periodic review of

whether he can return to the general population, summary judgment on Mr. DePaola's procedural due process claim was improper.

The district court also erred in granting summary judgment on Mr. DePaola's Eighth Amendment claim. Mr. DePaola faces a total of 31 years in solitary confinement. He has already served eight years. The conditions of Mr. DePaola's solitary confinement—exacerbated by the extraordinary length of that confinement—cause serious physical and emotional injury. A contrary conclusion would ignore uniform scientific consensus, international and social norms, and a growing body of case law acknowledging the significant harm such confinement causes. Mr. DePaola put forward evidence of numerous harms that are hallmarks of the deleterious effects of long-term solitary confinement. Further, genuine disputes of material fact also remain as to whether Mr. DePaola has suffered serious harm due to constant light and noise that deprive him of the basic human need for sleep, or because his existing mental illness makes him especially susceptible to the afflictions of solitary confinement.

The harms caused by lengthy solitary confinement are obvious. Indeed, in the light of the vast body of scientific data demonstrating the harms of long-term solitary and the ever growing body of case law, State correctional departments, including Virginia's, have recognized the need for solitary confinement reform.

As a result, genuine disputes of material fact exist as to whether Appellees acted with deliberate indifference.

Finally, summary judgment on Mr. DePaola's Eighth Amendment claim was improper for another, independent reason. Because Mr. DePaola's solitary confinement is permanent and not based on an ongoing assessment of whether he still presents a risk to the general population, there remains a genuine dispute as to whether Mr. DePaola's suffering serves any valid penological purpose.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN ALLOWING SUMMARY JUDGMENT PRIOR TO DISCOVERY

The district court abused its discretion by entertaining summary judgment before discovery and without considering whether this would prejudice Mr. DePaola's ability to mount an adequate opposition. *See Webster v. Rumsfeld*, 156 F. App'x 571, 576 (4th Cir. 2005) ("[S]ummary judgment is not appropriate prior to the completion of discovery."); *Hellstrom v. U.S. Dep't of Veterans Affairs*, 201 F.3d 94, 97 (2d Cir. 2000) ("Only in the rarest of cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct discovery.").

Rule 56(d)[2] of the Federal Rules of Civil Procedure directs that "summary judgment be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n.5 (1985); *see also Putney v. Likin*, 656 F. App'x 632, 639 (4th Cir. 2016) ("Ruling on a summary judgment motion before discovery forces the non-moving party into a fencing match without a sword or mask." (quoting *McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 483 (4th Cir. 2014))).

At the time Appellees filed their summary judgment motion, Mr. DePaola—proceeding pro se after the district court declined to appoint counsel (J.A.-57)—had already issued interrogatories and objected to the protective order to stay discovery pending review of their motion to dismiss. *See* J.A.-59. Notwithstanding his attempts to pursue discovery, the accelerated timeframe the district court imposed provided no meaningful opportunity for discovery. *See Hellstrom*, 201 F.3d at 98 (holding that grant of summary judgment was premature and nonmovant was prejudiced because no opportunity for discovery was given). And, the interrogatories Mr. DePaola had issued remained unanswered at the time of discovery. J.A.-141. Under these facts, the district court was alerted that discovery was needed, serving as the functional equivalent of a Rule 56(d)

[2] At the time *Anderson* was decided what is now Rule 56(d) was Rule 56(f).

affidavit. *See First Chi. Int'l v. United Exch. Co.*, 836 F.2d 1375, 1380-81 (D.C. Cir. 1988) (holding that outstanding discovery requests served as the functional equivalent of a Rule 56(d) affidavit because the district court had reason to know further discovery was needed).

Moreover, any attempt by Mr. DePaola to oppose summary judgment on the basis that summary judgment was premature and discovery was needed would have been futile. The district court ordered Appellees to move for summary judgment, and the district court's Standing Order further instructs parties that the court may direct parties to file a motion for summary judgment supported by affidavits, i.e., without discovery. *See* Standing Order No. 2013-6 at 1 (effective July 1, 2013). Indeed, the Standing Order warns prisoners that "[f]ailure to comply with such an order in an appropriate case may result in the imposition of sanctions including, but not limited to, motion preclusion at trial." *Id.* And, the district court's *Roseboro* notice did not inform Mr. DePaola of his right to oppose summary judgment on the ground that he needed discovery.[3]

[3] The district court's *Roseboro* notice was insufficient here because Mr. DePaola was not informed of his right to undertake reasonable discovery. *Cf. Davis v. Zahradnick*, 600 F.2d 458, 461 (4th Cir. 1979) ("Such [*Roseboro*] notice must be reasonably calculated to inform the nonmoving party of the conversion, and of his right to file countering affidavits ***or to undertake reasonable discovery in an effort to produce a triable issue of fact***." (emphasis added)). In *Zahradnick*, this Court explained what notice was necessary for a converted 12(b)(6) motion. The facts here are similar because the Rule 56 motion was filed the same day as Appellees' Answer, allowing no time for discovery. As a pro se plaintiff, Mr. DePaola should

These premature summary judgment proceedings prejudiced Mr. DePaola. *See Tyree v. United States*, 642 F. App'x 228, 230 (4th Cir. 2016). For example, the district court granted summary judgment on Mr. DePaola's Eighth Amendment claim because he did not show that his mental and physical complaints arising from over eight years in solitary confinement were "health concerns [that] qualified as a serious or significant harm, or that he needed medical help for them." J.A.-407. But the district court never permitted Mr. DePaola to obtain a court-ordered examination by an independent health professional. Fed. R. Civ. P. 35; *See, e.g.*, *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d at 549, 574 (3d Cir. 2017) (inmate retained expert who concluded that 20 years in solitary confinement left him "deteriorated to the point of *social death*" (emphasis added)). Similarly, the district court never permitted Mr. DePaola to obtain testimony from prison employees on the reasons for continuing to hold him in solitary confinement, which has proven to be an indispensable benefit for prisoners defending similar claims from summary judgment. *E.g.*, *Isby v. Brown*, 856 F.3d 508, 515 (7th Cir. 2017); *Proctor v. LeClaire*, 846 F.3d 597, 612-13 (2d Cir. 2017); *Williams v. Hobbs*, 662 F.3d 994, 1002 (8th Cir. 2011).[4]

---

have been informed of his right to oppose summary judgment on Rule 56(d) grounds.

[4] The district court has apparently institutionalized a practice of granting summary judgment without discovery on claims brought by prisoners in solitary confinement at Red Onion. In addition to Mr. DePaola's case, it also ordered summary

II. GENUINE DISPUTES OF MATERIAL FACT EXIST ON MR. DEPAOLA'S PROCEDURAL DUE PROCESS CLAIM

The uncontested evidence in this case establishes a genuine dispute of material fact regarding whether Appellees violated Mr. DePaola's procedural due process rights. *Incuma*, 791 F.3d 517, 526 (4th Cir. 2015) (expounding two-part test for violations of procedural due process).

First, regardless of whether Mr. DePaola's administrative segregation has a valid penological purpose, he possesses a protected liberty interest in avoiding administrative segregation. *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (liberty interest analysis does not consider whether confinement conditions are "necessary or appropriate"). VDOC policies mandate review of Mr. DePaola's segregation status "at least every ninety days," and the Due Process Clause mandates this

---

judgment in several other cases—all pursuant to motions for summary judgment that the court ordered before any opportunity for discovery, and all utilizing the same language appearing here that "an inmate's confinement in segregation at Red Onion is, for a likely majority of inmates, only as lengthy and restrictive as dictated by his own effort and behavior." *See, e.g.*, *Barnard v. Clarke*, No. 7:15-cv-160 (W.D. Va. Sept. 26, 2016), ECF No. 41; *Faison v. Clarke*, No. 7:15-cv-530 (W.D. Va. Sept. 26, 2016), ECF No. 21; *Batte v. Clarke*, No. 7:15-cv-158 (W.D. Va. Sept. 27, 2016), ECF No. 32; *Canada v. Clarke*, No. 7:15-cv-65 (W.D. Va. Sept. 27, 2016), ECF No. 68 (appeal noticed Oct. 21, 2016); *Valazquez v. VDOC*, No. 7:15-cv-157 (W.D. Va. Sept. 27, 2016), ECF No. 60; *Vigil v. Clarke*, No. 7:15-cv-159 (W.D. Va. Sept. 27, 2016), ECF No. 35; *Obataiye-Allah v. VDOC*, 7:15-cv-230 (W.D. Va. Sept. 28, 2016), ECF No. 62; *Rivera v. VDOC*, No. 7:15-cv-156 (W.D. Va. Dec. 8, 2016), ECF No. 92. Indeed, the District Court for the Western District of Virginia appears to order summary judgment proceedings prior to discovery in all prisoner cases pursuant to the court's "Standing Order No. 2013-6." *See, e.g.*, Order, *Freeman*, No. 7:16-cv-61 (W.D. Va. May 20, 2016), ECF No. 16.

meaningful periodic review. J.A.-385; 186 (O.P.830.A at Appx. G); *see Hewitt*, 459 U.S. at 477 n.9; *Incumaa*, 791 F.3d at 527 (liberty interest where prison policy required review every 30 days). Mr. DePaola's harsh and indefinite solitary confinement also presents "atypical and significant hardship in relation to the general prison population." *Incumaa*, 791 F.3d at 529. Mr. DePaola offered evidence that his conditions of confinement are materially indistinguishable from the conditions this Court in *Incumaa* found created a liberty interest when compared to the general population and worse than those the Supreme Court in *Wilkinson* held created a liberty interest under any plausible baseline. Appellees offered no evidence to the contrary. The district court simply ignored Mr. DePaola's evidence and failed to construe the record in his favor, as it must when considering whether to enter summary judgment. *Id.* at 524. Because Mr. DePaola established a protected liberty interest, he is entitled to periodic "meaningful review" of whether he presents a current or future risk to the general population. *Incumaa*, 791 F.3d at 533.

Second, Appellees admitted they did not provide "periodic review" of whether Mr. DePaola remains a security risk or can reside safely in the general population. *Id.* at 534 (quoting *Hewitt v. Helms*, 450 U.S. 460, 477 n.9 (1983)). Because VDOC has permanently barred Mr. DePaola from reentering the general population solely on the basis of his past act, ICA Reviews are "pre-ordained [and]

tantamount to no review at all." *Proctor*, 846 F.3d at 610. This violates Mr. DePaola's procedural due process rights.

The district court concluded that Mr. DePaola is not entitled to ***any*** meaningful review because he has no liberty interest in avoiding oppressive and indefinite solitary confinement. This was error. As such, this Court should reverse the district court's award of summary judgment to Appellees.

A. Uncontested Evidence Establishes Mr. DePaola's Liberty Interest

"Although lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a prisoner's right to liberty does not entirely disappear." *Incumaa*, 791 F.3d at 526 (alteration in original omitted) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)). As this Court has recognized, "prisoners have a liberty interest in avoiding confinement conditions that impose 'atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* (quoting *Sandin v. Conner*, 515 U.S. 472, 484 (1995)).

Mr. DePaola meets the first requirement of establishing a liberty interest because O.P. 830.A sets forth criteria for which prisoners should be assigned to segregation and "creates an expectation that 'S' level offenders will receive reviews of their classification status," as does the Due Process Clause. J.A.-384; *see Incumaa*, 791 F.3d at 527 (citing *Prieto v. Clarke*, 780 F.3d 245, 249 (4th Cir.

2015)) (setting forth the two prongs of liberty-interest analysis); *Hewitt*, 459 U.S. at 477 n.9. The only question here is whether Mr. DePaola's lengthy and indefinite solitary confinement "constitutes atypical and significant hardship in relation to the ***general prison population***." *Incumaa*, 791 F.3d at 528-29 ("[A]lthough the general prison population is not the relevant atypicality baseline in all cases, it is the touchstone in cases where the inmate asserting a liberty interest was sentenced to confinement in the general population and later transferred to security detention.") (emphasis added); J.A.-385. The answer is clearly "yes."

The prisoners in *Wilkinson* established a liberty interest in avoiding segregation in Ohio's Supermax prison. There, "every aspect of an inmate's life [was] controlled and monitored"; prisoners were "deprived of almost any environmental or sensory stimuli and of almost all human contact," and spent 23 hours per day alone in a 7-by-14 foot cell, where they ate all meals; the cell light was left on 24 hours per day, but could be dimmed; prisoners were permitted to leave their cells to exercise "for one hour per day, but only in a small indoor room"; visitation opportunities were "rare and in all events . . . conducted through glass walls"; and placement in administrative segregation was "indefinite," i.e., "limited only by an inmate's sentence," and disqualified prisoners from consideration for parole . 545 U.S. at 214; *id.* at 223-24. The Supreme Court held that these conditions "impose[d] an atypical and significant hardship" not only

when compared to the general population, but also "under ***any plausible baseline***." *Id.* at 223 (emphasis added).

This Court similarly concluded that the inmate in *Incumaa* possessed a liberty interest because he was "confine[d] to a small cell for all sleeping and waking hours," except for a ten-minute shower three times per week and for an hour of "recreation" indoors "approximately ten times per month"; was "required to eat all meals in his cell"; was unable to socialize with other prisoners; and was denied "educational, vocational, and therapy programs." 791 F.3d at 531; *see also id.* at 521-22 (providing bulleted list describing harsh conditions). The *Incumaa* prisoner's solitary confinement was "extraordinary in its duration and indefiniteness" because he had already served 20 years in these highly restrictive conditions and prison regulations placed no maximum time limit on his administrative segregation. *Id.* at 531-32. And, notably, this Court concluded that the "near-daily cavity and strip searches" the *Incumaa* prisoner endured each time before leaving his cell rendered his confinement conditions "worse in some respects" than what the *Wilkinson* prisoners experienced. *Id.* at 531.

Mr. DePaola's conditions in solitary confinement are practically indistinguishable from *Incumaa* or, in some respects, worse than those the Supreme Court in *Wilkinson* concluded were atypical compared to "any plausible baseline," 545 U.S. at 223: His administrative segregation is indefinite because

O.P. 830.A does not place a time limit on his in solitary confinement. J.A.-273 ¶ 59; 375. He is subject to "a highly intrusive" cavity search each time before leaving his cell. *Incumaa*, 791 F.3d at 531 (noting that "near-daily" cavity searches rendered an inmate's conditions of confinement "worse" than those present in *Wilkinson*). His cell is 18 square feet smaller than those at issue in *Wilkinson*. The bright light in his cell stays on "at all times, 24/7," even while he sleeps—it is never dimmed. And, while in solitary confinement, Mr. DePaola's ability to accrue credits toward an early end of his sentence for good behavior is restricted. J.A.-275 ¶ 78.

The district court recognized that, "[w]ithout question," IM prisoners "are confined under highly restrictive conditions at Red Onion, including single-cell assignment, limited out-of-cell activity and face-to-face contact with other inmates, and movement outside the cell only in full restraints and with dual escorts." J.A.-399. The court nonetheless concluded that Mr. DePaola's conditions of confinement do not implicate a liberty interest because, ***first***, "the parties d[id] not present evidence" that "[o]ut-of-cell movement . . . involve[s] a visual strip search," *id.*; ***second***, the Step-Down Program "addresses and alleviates the isolating conditions and indefiniteness identified in *Wilkinson* and *Incumaa*," J.A.-400; and ***third***, unlike the prisoners in *Wilkinson*, segregation does not deprive Mr. DePaola of parole consideration, J.A.-401.

The district court was wrong. Mr. DePaola ***did*** offer unrebutted evidence that he is subject to a cavity search each time before leaving his cell. J.A.-273 ¶ 58. Ironically, even the district court recognized that, under *Incumaa*, conditioning temporary relief from solitary confinement on a highly invasive and dehumanizing cavity search contributes to an "atypical and significant" hardship. J.A.-398; *Incumaa*, 791 F.3d at 531; *accord Sec'y Pa. Dep't of Corr.*, 848 F.3d at 554 & n.15, 562 ("a body of research . . . show[s]" solitary confinement and constant cavity searches "can trigger devastating psychological consequences, including a loss of a sense of self").

Mr. DePaola's eight-year solitary confinement is also "extraordinary in its duration." *Incumaa*, 791 F.3d at 531. He has not yet spent 20 years in isolation like the inmate in *Incumaa*, but this difference makes no legal distinction. A period of eight years in solitary confinement itself implicates a protected liberty interest. *See Sec'y Pa. Dep't of Corr.*, 848 F.3d at 560 (quoting *Shoats v. Horn*, 213 F.3d 140, 144 (4th Cir. 2000)) (concluding eight years in solitary confinement is atypical in relation to the ordinary incidents of prison life); *Aref v. Lynch*, 833 F.3d 242, 254 (D.C. Cir. 2016) ("Duration [of confinement] is significant precisely because 'especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical."). "Indeed, other courts of appeals have held that periods of confinement that

approach or exceed one year may trigger a cognizable liberty interest without any reference to conditions." *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 698-99 & n.4 (7th Cir. 2009); *see also Trujillo v. Williams*, 465 F.3d 1210, 1225 (10th Cir. 2006) (over two years in segregation was "itself . . . atypical and significant"); *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000) (solitary confinement for 305 days was "a sufficient departure from the ordinary incidents of prison life to require procedural due process protections"); *Covino v. Vt. Dep't of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991) (after nine months, the necessity of administrative segregation "begins to pale"); *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir. 1996) (concluding that "the full year of solitary confinement" was atypical and significant).

And, to be sure, Mr. DePaola will surpass *Incumaa*'s length of solitary confinement of 20 years by a decade unless this Court intervenes.

The district court seemed to recognize that Mr. DePaola's solitary confinement is atypically harsh and indefinite. But concluded that O.P. 830.A['s] . . . step down procedure addresses and alleviates" these concerns because, through the Step-Down Program, Mr. DePaola "can be evaluated for steps through Level 6, and, eventually, ***to a general population setting***," (concluding that Mr. DePaola can "make measurable progress to[wards] . . . transfer to general population conditions"). J.A.-400-401.

But uncontested evidence and Appellees' own submissions show that IM prisoners are held in solitary confinement for the duration of their sentence. In fact, Appellees' Answer admits that "IM status prisoners are ***not eligible for the step-down program***." *Compare* J.A.-85 ¶ 52, *with* J.A.-147 ¶ 52; *see Lucas*, 879 F.2d at 1242 (judicial admissions in pleadings are "binding"); *Keller v. United States*, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (judicial admissions are "conclusive" on appeal); *See also* J.A.-172 (O.P.830.A at (IV)(F)(6)(a)) ("IM offenders are not currently eligible for Step-Down."); *see supra* Statement of the Case, Part I.A (reviewing other uncontested record evidence that solitary confinement of IM prisoners is permanent).

The privileges that prisoners housed in the IM-SL6 Closed Pod receive are only incremental changes from their confinement at levels IM-0 to IM-2 and in no way "ameliorate" solitary confinement. *Incumaa*, 791 F.3d at 534. J.A.-178 (O.P.830.A. at Appx. F) (comparing IM-2 and IM-SL6 Closed Pod privileges); *Wilkerson v. Goodwin*, 774 F.3d 845, 855-56 (5th Cir. 2014) (concluding that "some contact visits, telephone privileges, [and] peer counseling" are not "material" in light of inmate's severe, lengthy, and indefinite solitary confinement). The IM-SL6 Closed Pod is not "the general population" of Virginia's "prison system" by any valid definition of the term. *See Incumaa*, 791 F.3d at 533 (quoting *Wilkinson*, 545 U.S. at 225).

"[C]oncerted effort to change his thinking and behavior" in solitary confinement, as the district court put it, will not help Mr. DePaola reach the general population. J.A.-400. IM prisoners are barred from the Step-Down Program. J.A.-172 (O.P.830.A at (IV)(F)(6)(a)). Thus, Mr. DePaola's solitary confinement is ***not*** "only as lengthy and restrictive as dictated by his own effort and behavior," as the district court believed (J.A.-401)—rather, it is permanent and "limited only by [his] sentence," *Wilkinson*, 545 U.S. at 214-15.

In any event, the district court's assumption that a program to reenter the general population can "alleviate" the most oppressive confinement conditions is inconsistent with *Incumaa*'s result. In *Incumaa*, the prison actually did employ a program for reducing the inmate's "behavior level" towards eventual return to the general population. *Incumaa*, 791 F.3d at 522. That program in no way "alleviated" the inmate's atypical and significant hardship. *See id.* at 522, 532 (rejecting similar reasoning by district court that the inmate's confinement was not "indefinite" where no regulation "guarantee[d] release to the general population" after a period of time).

The district court also concluded that Mr. DePaola's period in solitary confinement "does not render confinement . . . atypical or significantly harsh[] because general population inmates can expect ***temporary*** terms in solitary confinement" such as "thirty days" or "sixth months," (J.A.-396 (emphasis added)

(citing *Sandin* and *Beverati*). Mr. DePaola has already spent ***over eight years*** in permanent isolation—"many multiples of *Sandin*'s thirty days" or *Beverati*'s six months." *Sec'y Pa. Dep't of Corr.*, 848 F.3d at 561; *see also id.* at 562 & n.79 (noting that "duration and deprivations" for prisoners in punitive segregation, like those in *Sandin*, "is often predetermined and fixed"). The district court's failure to recognize the difference constitutes error.

Finally, it was undisputed below that Appellees have restricted Mr. DePaola's eligibility to accrue credit for good behavior (J.A.-275), making his case similar to *Wilkinson*. *See* 545 U.S. at 224 (finding liberty interest in part because placement in segregation "disqualifies an otherwise eligible inmate for parole consideration"). The district court was simply wrong that Mr. DePaola "fail[ed] to state facts showing that confinement at Red Onion makes him ineligible to earn good conduct time." J.A.-401-402. Except for the period from March to October 2014, Appellees did not show that they permitted Mr. DePaola to earn any good behavior credit since entering segregation. J.A.-162-163 ¶¶ 15-16. In any event, as this Court concluded in *Incumaa*, whether Mr. DePaola is eligible for parole or good time credits "does not undermine the material and substantial similarities" that his solitary confinement bears to *Wilkinson*. *Incumaa*, 791 F.3d at 532 (quoting *Wilkerson*, 774 F.3d at 855)).

Under *Wilkinson* and *Incumaa*, and in light of the uncontested evidence in this case, Mr. DePaola has demonstrated a liberty interest in avoiding his continued solitary confinement.

B. Uncontested Evidence Shows That ICA Reviews Are Constitutionally Meaningless

Because Mr. DePaola's confinement conditions implicate a liberty interest, the Due Process Clause of the Fourteenth Amendment required Appellees to conduct periodic meaningful review of whether Mr. DePaola remains a security risk or should be returned to the general population. Had the district court examined ***VDOC's own admissions***, policies, and the uncontested evidence in this case, it would have concluded that ICA Reviews are meaningless. Red Onion will hold Mr. DePaola in solitary confinement regardless of whether he presents a current or future security risk.

VDOC recognizes that administrative segregation "is not a disciplinary measure," but serves to protect "the welfare of the offender or the facility."[5] J.A.-238 (O.P.861.3 at (IX)(A)(1)); *Incumaa*, 791 F.3d at 521 (administrative segregation "is used to protect inmates and staff and to maintain prison order"). As the Supreme Court made clear in *Hewitt*, prisons must provide periodic review of whether continued confinement of an inmate in administrative segregation is still

[5] Disciplinary segregation, used as a punishment for violation of prison rules, is limited to 30 days per infraction. J.A.-237 (O.P.861.3 at (VII)(A)(2)).

justified—i.e., whether he "represents a security threat" or may be returned to the general population. 459 U.S. at 476; *see also Incumaa*, 791 F.3d at 534 (administrative segregation may not be used as "a pretext for indefinite confinement" (quoting *Hewitt*, 459 U.S. at 477 n.9)); *see also Proctor*, 846 F.3d at 609 (same); *Isby*, 856 F.3d at 518 (same). A genuine dispute of material fact exists as to whether Appellees have or will ever periodically review whether Mr. DePaola can return to the general population.

"The periodic [administrative segregation] review test announced by the *Hewitt* Court is not whether the confined inmate ***was*** at threat to the facility when he was confined initially," but "whether the inmate '***remains*** a security risk' on the date of the periodic review." *Proctor*, 846 F.3d at 611 (emphasis in original (quoting *Hewitt*, 459 U.S. at 477 n.9)); *accord Incumaa*, 791 F.3d at 534 (suggesting that administrative segregation imposed "for an insufficient reason" and without regard to an inmate's disciplinary record while in segregation indicates a violation of procedural due process rights); *Hobbs*, 662 F.3d 994, 1006-07 (8th Cir. 2011) (administrative segregation review "looks to the present and the future rather than to the past" (quoting *Kelly v. Brewer*, 525 F.2d 394, 399 (8th Cir. 1975))); *see also Sec'y Pa. Dep't of Corr.*, 848 F.3d at 566 ("[P]rocedural protections must be in place to determine if the level of dangerousness justifies the deprivations imposed."); *Kelly*, 525 F.2d at 400 (the justification for administrative

segregation "must continue to subsist during the period of the segregation" because "a reason for administrative segregation of an inmate that is valid today may not necessarily be valid six months or a year in the future"). VDOC "may not use Ad Seg as a charade in the name of prison security to make indefinite punishment for past transgressions." *Proctor*, 846 F.3d at 611. And its review of an inmate's security risk must "be based on facts relating to [the] particular prisoner," *Toevs v. Reid*, 685 F.3d 903, 912 (10th Cir. 2012) (quoting *Hewitt*, 459 U.S. at 477 n.9); *accord Kelly*, 525 F.2d at 400 ("[A] prison warden may not constitutionally put an inmate in administrative segregation[] involving solitary confinement . . . simply because he . . . desires to punish him for past misconduct").

When prisons have failed to provide meaningful review of an inmate's fitness for return to the general population, the courts have consistently found a violation of due process. For example, in the Eighth Circuit's *Kelly*, prison officials administratively segregated a prisoner named Parras for three years in solitary confinement after he committed a non-fatal stabbing of a correctional officer. 525 F.2d at 396. The prison never once evaluated whether Parras could again be released to the general population. *Id.* at 401. It instead asserted that Parras's stabbing offense conclusively established he was "a fit subject for administrative segregation for a prolonged and indefinite period of time and perhaps for the duration of his term of imprisonment." *Id.* The Eighth Circuit

concluded that, by failing to conduct meaningful periodic review of whether there was "a valid and subsisting reason" for continuing Parras's solitary confinement and "without giving undue effect to his past conduct and conviction," the prison violated Parras's procedural due process rights. *Id.* at 400, 402.

The Second Circuit reached a similar result this year in *Proctor*. 846 F.3d 597. Prison officials held an inmate in solitary confinement for "thirteen years . . . with no release date in sight" after he attempted escape. *Id.* at 610. The prison's regulations required staff to periodically review "whether the inmate continues to pose a safety threat to the facility," but several deposed prison officials admitted that, in "practice," the inmate "who once posed an escape risk would never be appropriate release from Ad Seg." *Id.* at 602, 612. Despite the fact that the inmate had a number of "minimal" disciplinary infractions, because the prison's administrative segregation reviews appeared preordained and designed to mask his indefinite solitary confinement, the inmate demonstrated a genuine dispute of material fact regarding whether the prison provided him meaningful review. *Id.* at 615; *see also Isby*, 856 F.3d at 526-28 (reversing summary judgment because it was "unclear" whether the provided basis of solitary confinement "occurred in the distant or recent past as opposed to currently affecting [the prisoner's] readiness to return to the general prison population"); *Hobbs*, 662 F.3d at 997-1009.

Here, the uncontested evidence shows that Appellees not only failed to provide Mr. DePaola with meaningful periodic review in "practice," but also as a matter of policy. Appellees classified Mr. DePaola as an IM prisoner on the basis of his 2009 stabbing offense. (J.A.-160 ¶ 7) (DePaola "is classified as IM because his convictions demonstrate that he has the potential for extreme and/or deadly violence"); (J.A.-387) (DePaola "was assigned to the IM pathway based on the serious nature of his assault on the officer in 2009"); *see also* J.A.-279 ¶ 114; 357 (DePaola assigned to IM pathway, after enactment of O.P. 830.A, due to the "serious nature of [his] charge"). Appellees permanently and categorically bar IM prisoners from rejoining the general population; the ICA Reviews they receive only consider changes in "privilege level," not transfer to the general population. J.A.-169 (O.P.830.A at (IV)(D)(1)). Thus, Appellees in effect will hold Mr. DePaola in solitary confinement solely because of his "past transgressions" and will never consider returning him to the general population—even if he becomes "the most compliant inmate" in Red Onion Prison. *Sec'y Pa. Dep't of Corr.*, 848 F.3d at 562; *see also Hobbs*, 662 F.3d at 1008 (prison officials admitted that inmate would always remain in solitary confinement, even if he proved to be a "model prisoner").

"The decision whether a prisoner remains a security risk [must] be based on facts relating to a particular prisoner," and Mr. DePaola's disciplinary record in

segregation—not his IM label—is the most relevant "then-available evidence" of his suitability for return to the general population. *Hewitt*, 459 U.S. at 476 & 477 n.9. On the whole, Mr. DePaola's behavior in segregation has been remarkably positive, and none of his disciplinary reports indicates that he still possess a capacity for violence.

Yet, Appellees do not even consider Mr. DePaola's behavior in his so-called "periodic reviews." As a matter of policy, Appellees dismiss "more than a year of compliant, polite, and cooperative behavior and attitude" from IM prisoners as irrelevant to judging whether they still possess a "potential for extreme and deadly violence." J.A.-166-167 (O.P.830.A at III); *see also* A-14 ("Compliant" prisoners are still held in IM-SL6 Closed Pod). Indeed, Mr. DePaola's Offender Timeline confirms that Appellees intend to keep him in administrative segregation until his release, regardless of whether he remains "infraction free" at all times. J.A.-375. Appellees apparently believe that Mr. DePaola's past administrative segregation is the only justification they need to hold him in administrative segregation for another 23 years. Indeed, Appellees own policy makes clear that prisoners are kept in segregation based on their past behavior. *See* Attach. to Mot. for Leave to File at 41, June 23, 2017, ECF No. 25 (citing past behavior as a predictor of future behavior). When other prisons have likewise attempted to ignore years of cooperative behavior by an inmate in segregation, the courts have invariably held

that this practice violates procedural due process. *See, e.g.*, *Proctor*, 846 F.3d at 606 (asserting that inmate's years-old escape attempt was a "stand-alone justification for continuing his Ad Seg"); *Hobbs*, 662 F.3d at 1003 (asserting that an inmate "once a threat to security is always a threat to security").

A genuine dispute of material fact exists as to whether Mr. DePaola has received any meaningful periodic review during his eight years and counting of solitary confinement and whether he will receive any meaningful periodic review going forward. This Court should therefore reverse summary judgment on Mr. DePaola's procedural due process claim.

III. GENUINE DISPUTES OF MATERIAL FACT EXIST ON MR. DEPAOLA'S EIGHTH AMENDMENT CLAIMS

To establish an Eighth Amendment violation based on conditions of confinement, a prisoner, such as Mr. DePaola, must show that the deprivation claimed is both "sufficiently serious" and was inflicted with "deliberate indifference." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A condition of confinement is sufficiently serious where there is "evidence of a serious or significant physical or emotional injury resulting from the challenged conditions." *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993)[6]; *see also Scher v. Engelke*, 943 F.2d 921, 924 (8th Cir. 1991) ("the scope of eighth amendment

[6] In *Strickler*, this Court reconciled the divergent standards of *Shrader* and *Lopez*. *See Strickler*, 989 F.2d at 1380 n.5.

protection is broader than the mere infliction of physical pain . . . evidence of fear, mental anguish and misery" can suffice). Further, the harms need not have occurred; a risk of future harm can satisfy the requirement. *See Helling v. McKinney*, 509 U.S. 25, 32-35 (1993) (holding that unreasonable risk of serious damage to future health states a cause of action under the Eighth Amendment).

The subjective hurdle to a conditions-of-confinement claim requires a showing that the prison officials acted with deliberate indifference. *See Farmer*, 511 U.S. at 834. To make this showing, a prisoner must demonstrate the prison "official knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837. Where the risk is obvious, a factfinder may conclude the prison official knew of the risk. *Id.* at 842.

Mr. DePaola has established a genuine issue of material fact as to whether the conditions of his lengthy solitary confinement have inflicted or will inflict serious injury and that Appellees are deliberately indifferent to these harms.

A. Mr. DePaola's Conditions of Confinement Are "Sufficiently Serious" To Establish An Eighth Amendment Violation

1. Mr. DePaola's Lengthy Solitary Confinement Is Itself "Sufficiently Serious" Because Of The Substantial Risk of Harm It Creates

As far back as 1890, the Supreme Court has recognized the pernicious effects of solitary confinement on prisoners. *See In re Medley*, 134 U.S. 160, 168 (1890) (stating that prisoners after a month of solitary confinement fell into a

"semi-fatuous condition," "became violently insane," "committed suicide," and others "did not recover sufficient mental activity to be of any subsequent service to the community."). In *In re Medley*, the Supreme Court granted a habeas writ and released from prison a convicted murder sentenced to death rather than subject him to one month of solitary confinement. *See id.* at 175. Here, Mr. DePaola has already served eight years in solitary confinement. J.A.-92 ¶¶ 81-82]. And, his solitary confinement will continue until his scheduled release in September 6, 2040. J.A.-375. Thirty-one years in solitary confinement creates a "sufficiently serious" claim to establish an Eighth Amendment violation. To survive summary judgment, Mr. DePaola needed only to establish a genuine dispute of material fact as to whether his Eighth Amendment claim meets the "sufficiently serious" standard. He has done so.

A lengthy period of solitary confinement, like Mr. DePaola's, works a deprivation of a basic human need because it inflicts serious physical and emotional injury. *See Strickler*, 989 F.2d at 1381. As the Third Circuit recently recognized, the strong consensus in the scientific literature "compels an unmistakable conclusion: this experience is psychologically painful, can be traumatic and harmful and puts many of those who have been subjected to it at risk of long-term . . . damage." *Sec'y Pa. Dep't of Corr.*, 848 at 566 (quoting Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological*

Analysis of Supermax and Solitary Confinement, 23 N.Y.U. Rev. L. & Soc. Change 477, 500 (1997)); *see also Morris v. Travisono*, 499 F. Supp. 149, 160 (D.R.I. 1980) ("Even if a person is confined to an air conditioned suite at the Waldorf Astoria, denial of meaningful human contact for such an extended period may very well cause severe psychological injury."); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 131-132 (2003) ("[M]any of the negative effects of solitary confinement are analogous to the acute reactions suffered by torture and trauma victims, including post-traumatic stress disorder or PTSD and the kind of psychiatric sequelae that plague victims of what are called 'deprivation and constraint' torture techniques.'" (internal citations omitted)).

In his concurrence in *Davis v. Ayala*, Justice Kennedy emphasized that the "the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). Justice Breyer also recently noted harms caused by solitary confinement. *See Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (observing that "it is well documented that . . . prolonged solitary confinement produces numerous deleterious harms"). Moreover, this past April, Judge Jones noted that the impacts of solitary can be similar to torture. *See Latson v. Clarke*, No. 1:16-cv-00039, 2017 WL 1407570, at *3 (W.D. Va. April 20, 2017)

("Research has shown that the impacts of solitary confinement can be similar to those of torture and can include a variety of negative physiological and psychological reactions.").

The United Nations' recent resolution fully supports these views. Under Rule 43 of the U.N.'s Standard Minimum Rules for the Treatment of Prisoners (known as the Mandela Rules), prohibits both indefinite and prolonged solitary confinement as "restrictions or disciplinary sanctions amount[ing] to torture or other cruel, inhuman or degrading treatment or punishment." U.N. Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), U.N. Econ. & Soc. Comm. on Crime Prevention and Criminal Justice, 24th Sess., U.N. Doc. E/CN.15/2015/L.6/Rev.1 (May 21, 2015). The Mandela Rules define solitary confinement as "22 hours or more a day without meaningful human contact" and define prolonged solitary confinement as a "time period in excess of 15 days." *Id.* at Rule 44. The conditions of confinement Mr. DePaola has lived in for the past eight years and will continue to live in for the next 23 years violate the U.N.'s Mandela Rules. While not controlling, U.N.'s ban on solitary confinement for periods longer than 15 days is instructive. *See Roper v. Simmons*, 543 U.S. 551 (2005) ("[A]t least from the time of the Court's decision in *Trop*, the Court has referred to the laws of other countries and to international authorities as instructive

for its interpretation of the Eighth Amendment prohibition of 'cruel and unusual punishments.'" (citing *Trop v. Dulles*, 356 U.S. 86, 102-103 (1958))).

The scientific community also uniformly concludes that solitary confinement creates an unreasonable risk of harm to prisoners. *See, e.g.*, Hernán Reyes, *The worst scars are in the mind: psychological torture*, 89 Int'l Rev. of the Red Cross, No. 867, 591, 607 (Sept. 2007) ("Being confined for prolonged periods of time alone in a cell has been said to be the most difficult torment of all to withstand."). Indeed, "[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies." Kenneth Appelbaum, *Am. Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. Am. Acad. Psychiatry & L. 406, 410 (2015); *see also* Haney, 49 Crime & Delinquency at 130 ("Empirical research on solitary and supermax-like confinement has consistently and unequivocally documented the harmful consequences of living in these kinds of environments."); Thomas L. Hafemeister & Jeff George, *The Ninth Circle of Hell: An Eighth Amendment Analysis of Imposing Prolonged Supermax Solitary Confinement on Inmates with Mental Illness*, 90 Denv. U.L. Rev. 1, 35 (2012) ("[S]ystematic research spanning multiple continents over more than a century is

virtually unanimous in its conclusion: prolonged supermax solitary confinement can and does lead to significant psychological harm.").

In opposing summary judgment below, Mr. DePaola submitted numerous exhibits demonstrating that solitary confinement inflicts serious physical and emotional injuries on prisoners. *See, e.g.*, J.A.-313; 317; 325; 328; 330. For example, Patrick Hope's statement to the U.S. Senate Judiciary Committee speaks directly to the conditions of Red Onion and the effects on its prisoners in solitary for several years or more. J.A.-314. Mr. Hope notes the need for normal human contact and the detrimental effects solitary confinement imposes on prisoners with and without mental illness. J.A.-315.

Further, the numerous specific harms Mr. DePaola identifies are consistent with the overwhelming scientific research regarding the effects of long-term solitary confinement. *Cf.* Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J.L. Pol'y 325, 335-36 (2006) (identifying psychiatric effects to include: hyperresponsivity to external stimuli; panic attacks; difficulties with thinking, concentration, and memory; intrusive obsessional thoughts; overt paranoia; problems with impulse control); Haney, 49 Crime & Delinquency at 130-131 (identifying effects of solitary, including: "appetite and sleep disturbances," "anxiety," "panic," "rage," "loss of control," "paranoia," "hallucinations," "self-mutilations," "insomnia," "hypersensitivity," "cognitive dysfunction," "lethargy,"

"depression," and "suicidal ideation and behavior") (collecting studies showing same). In his Amended Complaint, Mr. DePaola provides testimony that his extensive solitary confinement has caused or contributed to mental illness, anguish, mental deterioration, night terrors, lack of social interactions, anxiety, headaches, loss of sleep, akathisia, physical deterioration, loss of weight, and deterioration of eyesight. J.A.-94 ¶ 93.

Dr. Craig Haney's study of prisoners housed in solitary confinement at Pelican Bay found that a majority of the prisoners exhibited symptoms of psychological and emotional trauma, including: anxiety, headaches, lethargy, loss of appetite, nightmares, and impending nervous breakdown. Haney, 49 Crime & Delinquency at 133 Table 1. That study further found a large percentage of the prisoners exhibited psychopathological effects including: ruminations, irrational anger, oversensitivity to stimuli, confused thought process, social withdrawal, chronic depression, emotional flatness, mood swings, overall deterioration, talking to self, and violent fantasies. *Id.* at 134 Table 2. And, "sizable minorities" of the prisoners had "symptoms typically only associated with more extreme forms of psychopathology—hallucinations, perceptual distortions, and thoughts of suicide." *Id.* at 134. Dr. Haney's description of the environment of solitary confinement that brings about these psychological harms are markedly similar to those in which Mr.

DePaola has lived these last eight years. *Compare* Statement of the Case, Section I.A., *supra*, *with* Haney, 49 Crime & Delinquency at 126-127.

Here, the extraordinary length of Mr. DePaola's solitary confinement also strongly supports a finding that an Eighth Amendment violation exists. *See Dixon v. Godinez*, 114 F.3d 640, 643 (7th Cir. 1997) ("A condition which might not ordinarily violate the Eighth Amendment may nonetheless do so if it persists over an extended period of time."); *Davis*, 135 S. Ct. at 2210 (Kennedy J. concurring) ("Years on end of near-total isolation exact a terrible price."); *see also* Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. Pa. J. Const. L. 115, 118 (2008) ("No study of the effects of solitary or supermax-like confinement that lasted longer than 60 days failed to find evidence of negative psychological effects.").

Mr. DePaola has already served eight years in solitary confinement. Under O.P. 830.A, Mr. DePaola will be in solitary confinement another 23 years—the full remaining length of his sentence. By contrast, the United Nations recommends limiting prolonged solitary confinement to 15 days "because at that point . . . some of the harmful psychological effects of isolation can become irreversible." U.N. Interim Report Of The Special Rapporteur Of The Human Rights Council On Torture And Other Cruel, Inhuman Or Degrading Treatment Or Punishment, at 9, U.N. Doc. A/66/268 (Aug. 5, 2011).

Even if the harms Mr. DePaola has suffered to date somehow do not establish serious physical and emotional injury today, the scientific evidence demonstrates that such a long period of solitary confinement poses an unreasonable risk of serious damage to his future health. *See, e.g.*, Haney, 49 Crime & Delinquency at 132 ("[T]here is not a single published study of solitary or supermax-like confinement in which nonvoluntary confinement lasting longer than 10 days, where participants were unable to terminate their isolation at will, that failed to result in negative psychological effects."). Consequently, Mr. DePaola need not wait until additional harms come to fruition to establish an Eighth Amendment claim. *See Helling*, 509 U.S. at 33 ("We have great difficulty agreeing that prison authorities . . . may ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year."). The widespread efforts of the U.S. prison systems to reform their use of solitary confinement, and the ban of solitary confinement by both the U.N. and a number countries, show that the harms solitary inflicts "violate[] contemporary standards of decency." *Id.* at 36.

Combined, the conditions of Mr. DePaola's confinement, the physical and emotional harms he has already suffered, the likelihood of future harm, and the extraordinary length of his solitary confinement create a genuine dispute of material fact as to whether Appellees committed an Eighth Amendment violation.

See Mitchell v. Rice, 954 F.2d 187, 191 (4th Cir. 1992) ("This Court has repeatedly stated that when reviewing Eighth Amendment claims, courts must consider the totality of the circumstances.").

2. Constant Light and Noise Deprive Mr. DePaola of the Basic Human Need for Sleep

Mr. DePaola's sworn testimony regarding the constant light and noise he endures on a daily basis, depriving him of the basic human need for sleep, creates separate disputes of material facts making summary judgment on his Eighth Amendment claims improper. *See Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999) ("[S]leep undoubtedly counts as one of life's basic needs. Conditions designed to prevent sleep, then, might violate the Eighth Amendment."). Mr. DePaola has provided sworn testimony that "[a] bright light stays on inside the cells at all times 24/7" and that "[p]risoners are constantly bombarded w/ the noises of guard slamming doors &/or tray slots, prisoners screaming, beating on doors, walls, etc." J.A.-273-274 ¶ 64, 65. And, he further asserts he suffers from "night terrors" and "loss of sleep" as a result. J.A.-94 ¶ 93.

Addressing nearly identical prisoner allegations, the Ninth Circuit concluded that such allegations—even when contested by contrary evidence from defendants—created "a disputed issue of material fact not subject to summary judgment." *See Keenan v. Hall*, 83 F.3d 1083, 1090-91 (9th Cir. 1996). Here, Appellees have presented no facts contesting Mr. DePaola's testimony regarding

the constant light and noise. Thus, summary judgment was improper as to Mr. DePaola's claim that the constant light and noise he experiences violate the Eighth Amendment.

3. Mr. DePaola's Allegations of Mental Illness Create a Separate "Sufficiently Serious" Condition

Prisoners with mental illness are at particular risk when placed in solitary confinement. *See, e.g.*, *Latson*, 2017 U.S. Dist. LEXIS at *8 (noting that the effects of solitary confinement "are amplified in individuals with mental illness and can exacerbate underlying conditions"); *Madrid v. Gomez*, 889 F. Supp. 1146, 1265 (N.D. Cal. 1995) (observing that placing a mentally ill prisoner in solitary "is the mental equivalent of putting an asthmatic in a place with little air to breathe."); Metzner & Fellner, *Solitary Confinement and Mental Illness in U.S. Prisons: A Challenge for Medical Ethics*, 38 J. Am. Acad. Psychiatry Law 104, 104 (2010) ("The adverse effects of solitary confinement are especially significant for persons with serious mental illness . . . ."). Mr. DePaola provided sworn testimony that he suffers from mental illness. J.A.-94 ¶ 93. Appellees have provided no evidence to challenge Mr. DePaola's assertions that he suffers from mental illness. On this record, a genuine dispute of material fact exists as to whether Mr. DePaola's solitary confinement violates the Eighth Amendment as a result of his mental illness. *See Madrid*, 889 F. Supp. at 1265-66 ("Such inmates are not required to endure the horrific suffering of a serious mental illness or major exacerbation of an

existing mental illness before obtaining relief." (citing *Helling*, 509 U.S. at 31-35)).

B. Genuine Disputes Of Material Fact Exist As To Whether Appellees Acted with "Deliberate Indifference"

Discovery has not yet occurred. So, a subjective analysis into Appellees' knowledge of the risks created by Mr. DePaola's conditions of confinement is not possible at this time. Absent depositions, interrogatories, and other discovery requests, Mr. DePaola cannot hope to penetrate the minds of Appellees. *See Farmer*, 511 U.S. at 842 ("knowledge of a substantial risk is a question of fact").

Regardless, a genuine dispute of material fact exists as to whether Appellees acted with "deliberate indifference" because the excessive risk of harm created by the conditions of Mr. DePaola's confinement are obvious. *See id.* ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."). That subjecting a prisoner to solitary confinement—whereby they are stripped of almost all human contact and confined to a small space 23 hours a day and continuing those conditions for years—creates a substantial risk of serious harm would be obvious to any lay person. To a prison official, the conclusion is inescapable.

In fact, the American Correctional Association (ACA) and the Association of State Correctional Administrators (ASCA) recently passed reform principles on restrictive housing in light of the challenges they pose. *See* Am. Corr. Assoc.,

Committee on Standards, August 2016; Assoc. of State Corr. Adm'rs, Guiding Principles for Restrictive Housing, http://www.asca.net/pdfdocs/9.pdf.[7] The President-elect of the ACA, Gary Mohr, in advocating for reforms to U.S. prisons' use of solitary confinement explained that "we believe lengthy stays manufacture or increase mental illness." *See* Gary C. Mohr and Rick Raemisch, *Restrictive Housing: Taking the Lead*, Corrections Today (2015), *available at* http://www.asca.net/pdfdocs/6.pdf.

In the light of the recent efforts to reform the use of solitary confinement in the United States, the overwhelming scientific literature explaining the harms such confinement causes, and the repeated observations in the caselaw of the substantial harms caused by solitary confinement, a genuine dispute of material fact exists as to whether the serious risk to Mr. DePaola's health and safety is obvious. Thus, summary judgment on Mr. DePaola's Eighth Amendment claims was improper.

C. The Permanence Of Mr. DePaola's Confinement Serves No Valid Penological Purpose

Separately, the Eighth Amendment can be violated when a prisoner endures a sanction imposed without penological justification that results in gratuitous infliction of suffering. *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976). A prison's valid penological interest in confining an inmate to administrative

[7] It is worth noting that Appellee Harold Clarke has in recent years served as president of both the ACA and ASCA. *See* About Us, Va. Dep't of Corr., https://vadoc.virginia.gov/about/hclarke.shtm (last visited June 23, 2017).

segregation "continues only so long as the inmate continues to pose a safety or security risk." *Isby v. Brown*, 856 F.3d 508, 526 (7th Cir. 2017) (citing *Mims v. Shapp*, 744 F.2d 946, 953 (3d Cir. 1984) ("The validity of the government's interest in prison safety and security as a basis for [administrative segregation] of an inmate subsists only as long as the inmate continues to pose a safety or security risk.")); *see also Proctor*, 846 F.3d at 611 (administrative segregation "must be based on 'valid' justifications (such as institutional safety and escape prevention) that . . . 'continue to subsist during the period of segregation'" (quoting *Kelly*, 525 F.2d at 400)); *Incumaa*, 791 F.3d at 534 (administrative segregation may not be imposed "for an insufficient reason" where unwarranted by an inmate's disciplinary record in segregation (quoting *Wilkinson*, 545 U.S. at 226)); J.A.-238 (O.P.861.3 at (IX)(A)(1)) (stating that administrative segregation "is not a disciplinary measure but a means of custodial or protective control" for "the welfare of the offender or the facility, or both.").

"Cutting an individual off from all meaningful human contact after the reasons for such segregation no longer exist offends in a fundamental way contemporary standards of decency." *Morris v. Travisono*, 549 F. Supp. 291, 295 (D.R.I. 1982) (concluding that confining a prisoner to solitary for eight-and-a-half years was without penological justification and thus violated the Eighth Amendment). As discussed in more detail in Argument Section II, *supra*, the

reasoning for Mr. DePaola's lengthy solitary confinement is not based on a need to prevent present or future harm to Mr. DePaola or others in the prison.

Instead, Mr. DePaola's indefinite solitary confinement appears to be a product of Red Onion's O.P.830.A, which provides no mechanism for an inmate to ever regain a position in the general prison population once he has been branded with IM status. Mr. DePaola's continuation in IM status and consequently solitary confinement is based on a closed procedural loop. Once entered, no IM prisoner can exit, regardless of whether he bears a security risk. Because Mr. DePaola's IM status is divorced from consideration of whether he bears a continuing security risk, his solitary confinement is without penological justification and thus violates the Eighth Amendment. *See Hewitt v. Helms*, 459 U.S. 460, 478 n.9 (1983) ("[A]dministrative segregation may not be used as a pretext for indefinite confinement" instead continuing confinement turns on "whether a prisoner remains a security risk . . . based on facts relating to a particular prisoner.").

And, Appellees made no attempt in their summary judgment motion to argue that that permanently removing Mr. DePaola from the general prison population serves any valid penological purpose. They do not argue that Mr. DePaola is a current or future security risk. Further, there is a growing belief in the U.S. corrections system that the type of solitary confinement Mr. DePaola endures does not create a safer prison environment. *See, e.g.*, Gary C. Mohr and Rick Raemisch,

Restrictive Housing: Taking the Lead, Corrections Today (2015) ("First, it is our belief that those lengthy periods of 23 hours per day in confinement multiplies a problem, not solves it."), *available at* http://www.asca.net/pdfdocs/6.pdf. Thus, a genuine dispute of material fact exists as to whether Appellees currently have a valid penological interest in holding Mr. DePaola in solitary confinement, let alone for a total of 31 years until his release.

D. Fourth Circuit Precedent Does Not Preclude Mr. DePaola's Eighth Amendment Claims

This Court's precedent does not prevent a conclusion that Mr. DePaola's solitary confinement for the past eight years and the next twenty-three years violate the Eight Amendment. *Cf. Mickle v. Moore*, 174 F.3d. 464 (4th Cir. 1999). In *Moore*, the Court made clear that the prisoners there had not shown that the conditions in administrative segregation "work a serious deprivation of a basic human need." *Id.* at 471-472 (citing *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). As demonstrated above, the evidence here creates genuine disputes of material fact that Mr. DePaola's solitary confinement creates unreasonable risks to his health and safety.

In any event, this Court's interpretation of the Eighth Amendment should and must evolve with the changing scientific understanding of the devastating effects on a prisoner's mind and body long-term solitary confinement imposes. *See Rhodes v. Chapman* 452 U.S. 337, 346 (1981) ("No static 'test' can exist by

which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society'" (quoting *Trop*, 356 U.S. at 101)); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976) ("Thus the Clause forbidding 'cruel and unusual' punishments 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice.'"). In 2017, medical science and social constructs are in agreement that long-term segregation inflicts serious physical and emotional injuries. And, Appellees have presented no valid penological purpose for Mr. DePaola's lengthy and indefinite solitary confinement. Under these facts, there can be no question that genuine disputes of material facts exist as to whether an Eighth Amendment violation has occurred.

* * *

This appeal presents an opportunity to explain a rule of law within this Circuit and involves legal issues of continuing public interest. Thus, Mr. DePaola respectfully requests oral argument.

CONCLUSION

For the above reasons, Mr. DePaola respectfully asks this Court to reverse the district court's grant of summary judgment and remand for further proceedings.

June 23, 2017

Respectfully submitted,

/s/ Maxwell J. Hyman
Daniel Levin
Andrew L. Black
Maxwell J. Hyman
Luca Winer
Alexaida Collet
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
(202) 626-3600
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

June 23, 2017

/s/ Maxwell J. Hyman
Maxwell J. Hyman

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June 2017, I caused the foregoing Opening Brief for Plaintiff-Appellant to be filed with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following:

Trevor S. Cox
Matthew R. McGuire
Office of the Attorney General
Criminal Justice and Public Safety Div.
202 N. Ninth Street
Richmond, VA 23219

/s/ Maxwell J. Hyman
Maxwell J. Hyman