No. 17-6922

United States Court of Appeals for the Fourth Circuit

DUSTIN ROBERT WILLIAMSON,
PLAINTIFF - APPELLANT,

v.

BRIAN STERLING, ET AL.,
APPELLEES - DEFENDANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA, NO. 15-CV-04755
HON. MARY GEIGER LEWIS, PRESIDING

BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 17-6922 Caption: Dustin Williamson v. Brian Sterling, et al.

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(name of party/amicus)

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

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

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

Signature: /s/ Jeff P. Johnson Date: 08/03/17

Counsel for: Dustin Robert Williamson

CERTIFICATE OF SERVICE

****

I certify that on August 3, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Jeff P. Johnson (signature) 08/03/17 (date)

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INTRODUCTION

This is an action for damages against persons acting under color of state law that deprived Defendant Dustin Williamson of due process by improperly subjecting him, as a pretrial detainee,[1] to more than *three years* of solitary confinement. The district court erred as a matter of law when it entered summary judgment against Mr. Williamson. This Court should reverse.

For nearly 1,300 days, the South Carolina Department of Corrections ("SCDC") held Mr. Williamson—a mentally ill, pre-trial detainee who, so far, has been acquitted of all charges against him—in stark conditions of solitary confinement with no recourse to challenge that confinement. Mr. Williamson's solitary confinement spanned two facilities: the Maximum Security Unit ("MSU") at Lee Correctional Institution (approximately 640 days) and the Restrictive Housing Unit ("RHU") at Kirkland Correctional Institution (approximately 648 days). While in the MSU and RHU, he was a model prisoner. Yet, at no point did Defendants provide Mr. Williamson any due process to challenge his solitary confinement.

Mr. Williamson initially sought relief in the district court under Section 1983 for violations of his First, Fourth, Sixth, Eighth, and Fourteenth Amendment rights.

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[1] On June 15, 2017, a jury returned a not guilty verdict on a murder charge. *State v. Williamson*, No. 2013A0610400187 (2d Jud. Cir. Ct. Gen. Sess. June 15, 2017), see also *id.*, docket *available at* http://bit.ly/2iy5YZ4.

But on appeal, he argues only that the district court erred in granting summary judgment to Defendants on his claim that, in violation of the Fourteenth Amendment, Defendants Stirling,[2] Carroll, Miller, Charlton, and Rogers denied him due process prior to and throughout the terms of his solitary confinement.

The district court ruled that Mr. Williamson's 1,288 days in solitary confinement was not punishment. The court also granted Defendants qualified immunity on the basis that this Circuit's law did not clearly establish "what procedures" are owed to pre-trial detainees when subjecting them to harsh conditions of confinement for purportedly administrative reasons. Both holdings constitute legal error, and each error independently warrants reversal.

First, the district court overlooked long-standing Supreme Court precedent when finding that Mr. Williamson failed to raise a genuine issue as to whether his three years of solitary confinement constituted punishment: an intent to punish may be inferred where a restriction "appears excessive in relation to the . . . purpose assigned" to it. *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). This is such a case. Mr. Williamson's solitary confinement is extraordinary, not only due to its length, but also due to its deleterious effects and the arbitrary nature in which it was imposed. Starting when he was a teenager, he spent more than three years locked in a cell for

[2] Defendant Bryan Stirling's name was misspelled in the case caption in the district court.

23 or 24 hours a day, deprived of virtually all human interaction, access to exercise, and opportunities to bathe—situations this Court has described as a "severely restrictive and socially isolating environment." *See Incumaa v. Stirling*, 791 F.3d 517, 531 (4th Cir. 2015).

Moreover, the court did not credit any of Mr. Williamson's other evidence of punishment, even though such evidence was to be reviewed in a light favoring *denial* of summary judgment. For example, the court insisted that Defendants' offer of a purportedly legitimate, non-punitive objective was irrefutable proof that Mr. Williamson was not punished. This, too, overlooks Supreme Court precedent, because a "legitimate nonpunitive governmental objective" is not conclusive evidence clearing the defendant of punitive intent—instead, "a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). At a very minimum, Mr. Williamson raised a genuine issue as to whether his confinement constituted punishment.

Second, the court independently erred when granting Defendants qualified immunity on the ground that "no clearly established precedent exists that would have put the defendants on notice" that placing him in three years of solitary confinement violated his due process rights. JA 649. In so ruling, the court found that pretrial

detainees like Mr. Williamson have less due process rights than prisoners. This holding conflicts with recent precedent from this Court that reaffirmed long-settled due process principles. In *Incumaa*, the Court held—consistent with *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005)—that prisoners in administrative segregation are entitled to a due process hearing to challenge their confinement. 791 F.3d at 535. Then, in *Dilworth v. Adams*, 841 F.3d 246 (4th Cir. 2016), this Court clarified—again, affirming *Bell*, 441 U.S. at 546—that the due process rights of pretrial detainees, like Mr. Williamson, are at least as great as those of convicted prisoners. The district court's decision cannot be squared with these holdings.

In sum, Mr. Williamson's solitary confinement was unrelenting and exacerbated his mental illness. He deserves damages for the harm that was done, and the harm that could have been avoided. As Justice Kennedy explained, "[y]ears on end of near-total isolation exact a terrible price." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). Even for hardened criminals, "solitary confinement bears 'a further terror and peculiar mark of infamy.'" *Id.* at 2209. Mr. Williamson paid that terrible price when he had not been convicted of a crime.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331. On June 22, 2017, it granted summary judgment and dismissed Dustin Williamson's complaint filed under 42 U.S.C. § 1983. JA 798. Dustin Williamson timely filed a notice of appeal

on July 19, 2017. JA 135. The district court amended its judgment on July 20, 2017. JA 812. Mr. Williamson timely amended his notice of appeal on July 25, 2017. JA 806–807. This Court has jurisdiction under 28 U.S.C. § 1291. JA 813–814.

STATEMENT OF ISSUES

Whether the district court erred in granting summary judgment because either, or both: (1) Mr. Williamson at least raised a genuine issue of material fact as to whether his long-term solitary confinement constitutes punishment, or (2) Defendants are not entitled to qualified immunity given clearly established law that entitles Mr. Williamson to due process.

STATEMENT OF THE CASE

A. MR. WILLIAMSON'S ARREST AND INITIAL DETENTION

On August 12, 2013, Mr. Williamson was arrested on charges of murder and other serious crimes. He was denied bail and held in custody at the Barnwell County Detention Center to await trial. Because he was being held on suspicion of committing murder, Mr. Williamson was assigned to the Administrative Segregation Unit at the Barnwell County Detention Center. JA 479. As a result, Mr. Williamson was afforded "at least one hour of recreation daily" whereas general population detainees received "approximately three hours" daily. JA 478. But for that potential difference, Mr. Williamson was afforded "[a]ll other privileges" available to detainees in general population. *Id*. During his confinement there, he had three disciplinary infractions: one instance of fighting where neither party required medical attention,

and two instances where he sat on a mattress rather than leave his cell as ordered. JA 46–51.

On November 22, 2013, Mr. Williamson sent a letter to Defendant Barnwell County Sheriff Ed Carroll requesting a meeting. JA 641. If Defendant Carroll did not agree to meet within two hours, the letter threatened that an "officer" would kill law enforcement officers, a state court judge, and Mr. Williamson's defense lawyer. JA 326. On Defendant Carroll's instruction, Chief Deputy Sheriff David Deering "advised Sherriff Carroll of its contents." JA 324. Defendant Carroll then took responsibility for having the State Law Enforcement Division ('SLED") contacted for purposes of investigating the letter. JA 607. After being interviewed by a SLED officer, Mr. Williamson attempted to strike that SLED officer and did strike a detention center officer. *Id.*

That day, officials in SLED, the Circuit Solicitor's office (including Defendant Miller), and the Barnwell County Sheriff's office "determined that Williamson should be placed in 'safekeeper' status in the South Carolina Department of Corrections [] pending his criminal trial." JA 641. Mr. Williamson was immediately transferred to Aiken County Detention Center pending approval of the Safekeeper application by the Governor. *Id.* Defendant Miller sought and received an ex parte order from a state court judge finding that Mr. Williamson should be held in Safekeeper

status. JA 642. He also prepared the arrest warrants to be included in the Safekeeper application. JA 201, Miller Aff. ¶ 9.

Chief Deputy Sheriff Deering executed an affidavit recounting only the events on November 22. JA 641–642. He concluded that "Dustin Williamson should be held for safekeeping in the [SCDC] because he continues to exhibit extremely violent and uncontrollable behavior while confined in Barnwell County Jail." *Id.* The Deering affidavit and the arrest warrants were sent to Defendant Stirling for review, who recommended that Mr. Williamson should be transferred to SCDC for Safekeeper status. JA 642.

Later on November 22, the Governor approved the Safekeeper status and ordered Mr. Williamson transferred to SCDC custody. *Id.* On November 25, 2013, Mr. Williamson was transferred from Aiken County Detention Center to SCDC's Maximum Security Unit ("MSU") at Kirkland Correctional Institution. *Id.*

After the original Safekeeper Order's 120 days expired, Defendant Carroll has sought to renew it every 90 days. *Id.; see also, e.g.*, JA 547-49. Defendant Stirling has recommended, and the Governor has granted, renewal each time. JA 546–563. It is undisputed that Defendants did not provide a hearing or other mechanism by which to challenge his Safekeeper status of solitary confinement.

No charges for any of Mr. Williamson's alleged behavior were brought, and he faced no other discipline as a result of the events of November 22. In the only trial he has had to date, Mr. Williamson was acquitted by a jury.

B. SOUTH CAROLINA'S SAFEKEEPER STATUTE AND REGULATIONS

South Carolina's Safekeeper statute provides that:

> The director of the prison system shall admit and detain in the Department of Corrections for safekeeping any prisoner tendered by any law enforcement officer in this State by commitment duly authorized by the Governor, provided, a warrant in due form for the arrest of the person so committed shall be issued within forty-eight hours after such commitment and detention. No person so committed and detained shall have a right or cause of action against the State or any of its officers or servants by reason of having been committed and detained in the state prison system.

S.C. Code. 24-3-80.[3] Notably, the statute precludes any legal challenge by those committed and detained under the statute. And it neither provides for nor prohibits any of the hallmarks of due process: notice, a hearing, or a statement providing the reasons for confinement.

Pursuant to South Carolina Executive Order #2000-11 (July 7, 2009) ("EO #2000-11"), there are three grounds to transfer a pretrial detainee to Safekeeper status: (1) the individual must be a high escape risk, (2) the individual must exhibit

[3] This appeal does not challenge the validity of the Safekeeper law.

extremely violent or uncontrollable behavior, or (3) removal must be necessary for the person's protection. JA 248, EO #2000-11 § 1. To obtain a safekeeping order, the county must provide a properly issued arrest warrant; an affidavit from the chief county law enforcement officer providing the reason(s) why the individual should be committed to SCDC custody; a certificate prepared by the circuit solicitor indicating concurrence with the transfer (Defendant Miller); and a certificate of service indicating that notice of the application of safekeeping filed by the county (Defendant Carroll) has been given to the individual's attorney. *Id.* § 2.

Per the statute, the Director of Corrections (Defendant Stirling) reviews "the documents submitted and any other relevant facts and forward[s] his recommendation of action to the Governor." *Id*. Based upon that recommendation, the Governor "shall make a determination as to whether a safekeeping order should be granted," and issue an appropriate order. *Id.* § 3. These orders are valid for 120 days and "may be renewed for up to ninety (90) days upon a showing of good cause and/or no material change in circumstances." JA 248–249, EO #2000-11 § 5.

Pursuant to SCDC Policy and Procedure SK-22.02 ("SK-22.02"), "Male Safekeepers will be received and processed at Lee Correctional Institution," will be placed in a Special Management Unit, and will not be allowed routine contact with other inmates." JA 319. "Safekeepers are assigned to SD Level II when they are admitted. If they commit disciplinary infractions, their SD Level may be decreased

pursuant to procedures in SCDC Policy/Procedure OP-22.12." JA 321. Of the five solitary confinement classifications in the SCDC, only one is more restrictive than SD Level II. JA 421.

C. CONDITIONS OF PRETRIAL DETENTION FOR SAFEKEEPERS

Despite the SCDC Policy and Procedures discussed above (SK-22.02), SCDC did not initially place Mr. Williamson at Lee Correctional Institution. JA 642. Instead, he was placed in the Maximum Security Unit ("MSU") at Kirkland Correctional Institution, on 24-hour lockdown—the South Carolina equivalent of Supermax. *Id.* According to Defendant Stirling, "the housing assignment was the responsibility of the Deputy Director of Operations and ultimately made by him, I understand that there were penologically valid and legitimate reasons to place Mr. Williamson in the Maximum Security Unit, where there is more security staff." JA 312, Stirling Aff. ¶ 11. He did not reveal the reasons for that decision nor how the Deputy Director could violate regulations promulgated under Stirling's authority. Defendant Stirling said he knew only one other Safekeeper who had been placed in the MSU, and that Safekeeper, unlike Mr. Williamson, "was a well documented escape threat." *Id.*

In the MSU, Mr. Williamson was subjected to punitive, solitary-confinement conditions in a wing reserved for convicted prisoners facing "disciplinary infractions." JA 68. Most troubling, Mr. Williamson, who suffers from mental illnesses,

was, with limited exceptions, confined to his cell—in solitary confinement—24 hours a day. *Id.* Deprived of all access to outdoor exercise, Mr. Williamson was authorized to leave his cell only for legal calls and once- or twice-weekly showers. *Id.* Mr. Williamson's solitary confinement was so extreme that Defendant Miller conceded that his "current security classification ma[de] it difficult for [his defense attorney] to meet with him." JA 593. Mr. Williamson also complained that he did not have adequate medical care, access to the canteen, and could not obtain legal books. JA 69.

After approximately 640 days in solitary confinement in the MSU, Mr. Williamson was transferred to Lee Correctional Institution's Restrictive Housing Unit ("RHU") in late August 2015.[4] JA 642. In the RHU, Mr. Williamson was once again subjected to solitary confinement, this time for 648 additional days. Defendant Stirling admitted that "[t]he conditions of confinement [in RHU] are largely comparable" to MSU. JA 405. And Mr. Williamson's defense attorney represented to the state court that while at MSU "he was actually on lock down, 24 hours a day," and she thought "if I got him to Lee Correctional, then I would have more access to him. Well that's not the case." JA 530–531. She continued, "he's still locked down 24 hours a day." *Id.*

[4] On the record before this Court, these verified allegations regarding Mr. Williamson's 640-day stay in the MSU are largely unrebutted.

In sworn testimony, Defendant Rogers disputes this, claiming that, in the RHU, Mr. Williamson was only locked in his cell 23 hours a day. JA 307, Rogers Aff. ¶ 3. Specifically, Defendant Rogers asserts that Mr. Williamson was "allowed to come out for showers every Monday, Wednesday, and Friday, and every Tuesday and Thursday for recreation in the outdoor cages." *Id.*

No matter whether Mr. Williamson was confined in his cell for 23 or 24 hours a day, other restrictions abounded. As Mr. Williamson attested, "a lot of the same punitive conditions remain and some ha[ve] gotten worse." JA 69. Defendant Stirling confirmed that "Safekeepers do not have canteen privileges." JA 514. Accordingly, they are not even permitted to order hygiene products from the canteen. JA 308. And Defendant Rogers admitted that Mr. Williamson was allowed only a single book and "primary religious materials." JA 307. Moreover, SD Level II prisoners like Mr. Williamson are denied contact with the outside world because they lack visiting privileges with family members or friends and are prohibited even from making personal phone calls. JA 423–24. Notably, others in solitary confinement within the SCDC are not deprived of this crucial lifeline. *Id.* And, of course, because he was a Safekeeper in solitary confinement, Mr. Williamson could not interact with other inmates. JA 319.

These punitive conditions persisted until June 2017, when Mr. Williamson was transferred back to Barnwell County Detention Center for trial. While held as

a Safekeeper, Mr. Williamson had no disciplinary incidents. JA 565–566. In total, Mr. Williamson spent more than *three years* in solitary confinement. Not surprisingly, this long-term solitary confinement exacerbated Mr. Williamson's mental illness. JA 68–69. Indeed, as time wore on, SCDC medical personnel began treating him for psychosis. JA 166.

D. DEFENDANTS STIRLING, CARROLL, MILLER, CHARLTON, AND ROGERS WERE ALL PERSONALLY INVOLVED IN CAUSING AND CONTINUING MR. WILLIAMSON'S SOLITARY CONFINEMENT

Defendants have maintained that they are not "the officials [personally] responsible for providing Williamson with some degree of process." JA 649 n.12.[5] In addition to the actions noted above, the following facts demonstrate their personal involvement.

Defendant Sheriff Carroll is "legally responsible for operation of the Barnwell County Detention Center and the welfare of all" its inmates. JA 65. On November 22, 2013, Defendant Carroll directed Chief Deputy Deering on how to proceed with Mr. Williamson's letter. JA 270, 607–608. Although the original application lists Chief Deputy Sheriff Deering as the requestor, JA 568, Sheriff Carroll authorized him "to perform all duties as Acting Sheriff of Barnwell County," JA 285, Deering

[5] The district court assumed, and the record supports, that the Defendants were personally involved in violating Mr. Williamson's due process rights to trigger § 1983 liability. JA 649 n.2. Moreover, given materially disputed facts, it would have been improper to resolve this question on summary judgment.

Aff. ¶ 1. That day, the Sheriff contacted the Chief Deputy and "instructed him to get the letter from the jail and open it," and after learning its contents, the Sheriff instructed him "to immediately inform the judge and to contact SLED," all of which Chief Deputy Deering did. JA 285 (Deering Aff.¶¶ 2, 3, 5). The Sheriff's office participated on a call where it was decided to seek Safekeeper status. JA 200–201, Miller Aff. ¶ 6. Furthermore, every application to renew Mr. Williamson's Safekeeper status was sought by Defendant Carroll pursuant to his authority. *See, e.g.*, JA 547–549. Defendant Carroll "did not provide [Mr. Williamson] with a hearing or [a] notice to contest his transfer from Barnwell County Detention Center." JA 70.

Defendant Director Brian Stirling is responsible for the South Carolina Department of Corrections. JA 309, Stirling Aff. ¶ 2. His statutory authority includes the power "to make and promulgate rules and regulations necessary for the proper performance of the department's functions." S.C. Code § 24-1-90. SK-22.02 lists the Director of Operations as the Responsible Authority. JA 318. Also pursuant to SK-22.02, Defendant Stirling was responsible for conducting an "evaluation of all available information" relevant to determining whether Safekeeper status is appropriate. *Id.* In this case, after "review[ing] the documents submitted and any other relevant facts," JA 721, Defendant Stirling "made the recommendation that Mr. Williamson qualified for a transfer to SCDC as a safekeeper." JA 311. It was Defendant

Stirling's "judgment" that Mr. Williamson should be placed on Safekeeper status. JA 311.

Moreover, "[o]n each occasion [of a renewal], [he] ha[s] found the requests to be in order and ha[s] made the recommendation that Mr. Williamson remain at SCDC as a Safekeeper." JA 313. Even though it is not clear that those applications complied with EO #2000-11, he approved the application to keep Mr. Williamson in solitary confinement. JA 546–563. For example, Director Stirling knew that Mr. Williamson was placed at Kirkland Correctional Institution in violation of SK-22.02. JA 312, Stirling Aff. ¶ 9. After the first Safekeeper order, Mr. Williamson was detained in SCDC—the agency Director Stirling oversees. JA 309. And Defendant Stirling knew both that Mr. Williamson suffered from mental illness and that "[m]entally ill" detainees "are not eligible for safekeeping at the Department of Corrections." JA 204, 525–26.

Defendant Deloris Charlton is the jail administrator for Barnwell County Detention Center. JA 269, Charlton Aff. ¶ 2. During Mr. Williamson's tenure at Barnwell County Detention Center, she signed Mr. Williamson's disciplinary forms and determined the appropriate punishment. JA 47–51. Defendant Charlton "did not provide [Mr. Williamson] with a hearing or [a] notice to contest his transfer from Barnwell County Detention Center." JA 70.

Defendant Miller was a Deputy Solicitor for the Second Judicial Circuit, which encompasses Barnwell County.[6] JA 199, Miller Aff. ¶¶ 1–2. On November 22, 2017, he participated in a series of telephone conversations involving the Barnwell County Sheriff's Office and SLED, during which it was determined that Mr. Williamson would be placed in Safekeeper status. JA 200–201, Miller Aff. ¶ 6. In a letter to Mr. Williamson, Defendant Carroll stated that "[t]he safe keeping order came at the request of the Solicitor's Office." JA 534.

Defendant Miller drafted a proposed order directing Mr. Williamson to be placed in Safekeeper status. JA 200–201, Miller Aff. ¶ 6. That order was *ultra vires* because it is not part of the process to have someone declared a Safekeeper. JA 201, Miller Aff. ¶ 7. He also provided documents as part of the request to place Mr. Williamson on Safekeeper status. JA 201–202, Miller Aff. ¶¶ 9–11. Although absent from the application for Mr. Williamson, EO #2000-11 requires the Solicitor's Office to provide a certificate concurring in the Safekeeper decision. JA 203–247. The record further shows that Defendant Miller helped facilitate the transfer from MSU

[6] Defendant Miller has claimed absolute immunity for actions in seeking and maintaining the Safekeeper order. This Court has long held that "a prosecutor is not entitled to absolute immunity when engaged in purely administrative or investigative functions." *Allen v. Lowder*, 875 F.2d 82, 85 (4th Cir. 1989) (no immunity because attorney "act[ed] in a purely administrative capacity when he assisted the Sheriff's office in obtaining the safekeeping order.").

in Kirkland Correctional Institution to Lee Correctional Institution in August 2015. JA 583–494.

Defendant Rogers[7] is the manager of the RHU at Lee Correctional Facility where Mr. Williams was housed under several renewals of the Safekeeper Order. JA 306. Defendant Rogers admits that he is "very familiar" with Mr. Williamson due to his Safekeeper status. JA 307. Plaintiff has alleged in sworn testimony that Defendant Rogers "is fully aware of the punitive conditions that" Mr. Williams has been housed in. JA 690. And Defendant Stirling suggests that Defendant Rogers is responsible for those conditions. JA 300. Defendant Rogers has not provided a hearing or process to challenge the continued renewal of those conditions.

E. PROCEEDINGS BELOW

On November 23, 2015, Mr. Williamson, by way of a verified complaint, first filed suit against Director of Corrections Brian Stirling, Barnwell County Sheriff Ed Carroll, Barnwell County Detention Center Administrator Deloris Charlton, and some Doe plaintiffs claiming that this long-term solitary confinement was unlawful and exacerbated his mental illness. JA 26–27, 31. On April 25, 2016, the First

[7] The claims against Defendant Rogers were dismissed under pre-screening provisions of the PLRA. As a result, this Court must reverse the district court if Mr. Williamson has set forth a sufficient factual basis that relief is plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Amended Complaint, which was also verified, added David Miller and Jack Hammack[8] from the Solicitor's Office. JA 65. In both complaints, Mr. Williamson alleged violations of his First, Fourth, Eighth, and Fourteenth Amendment rights. In particular, he claimed that the Defendants had interfered with his mail to his attorney, the Safekeeper status was in error because his behavior was not uncontrollable, his confinement was a punishment, he was being held in punitive conditions without notice and a hearing, his access to the law library had been impeded, and that Defendants had interfered with his access to his attorney. JA 65–72. He requested declaratory and injunctive relief, as well as "punitive damages" against each defendant, and any additional relief deemed just, proper, and equitable. JA 72.

On January 9, 2017, Defendants moved for summary judgment asserting, among other defenses,[9] that they were not personally involved in these actions, the Safekeeper status was not punitive, and they deserved qualified immunity. *See* JA 289–305. Mr. Williamson's opposition, containing more than 60 exhibits, was timely filed. JA 353.

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[8] Solicitor Hammack was dismissed on September 28, 2017.

[9] Defendants also argued that the claims were barred under *Younger* abstention, Eleventh Amendment immunity, and failure to exhaust state judicial remedies. The district court properly ignored these claims. *Younger* abstention is unavailable because S.C. Code. 24-3-80 precludes a state court from "provid[ing] an adequate opportunity for the plaintiff to raise the federal constitutional claim." *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 165 (4th Cir. 2008). The state bar also exhausts all state proceedings.

On March 21, 2017, Magistrate Judge Gossett recommended granting summary judgment to the Defendants. JA 650. Regarding the First, Fourth, and Sixth Amendment claims, the court found that Mr. Williamson had failed to plausibly allege defendants' personal involvement. JA 644. Because, according to the court, "personal participation of a defendant is a necessary element of a § 1983 claim against a government official," and Mr. Williamson had not alleged it, his First, Fourth, and Sixth Amendment claims were dismissed. *Id.*

On March 21, 2017, the magistrate judge recommended dismissing the Fourteenth Amendment claims on two grounds. First, the court found that Mr. Williamson had "provided no evidence of an 'express intent to punish' by the defendants, and the defendants' assertion that Williamson's transfer was necessary for security purposes" dispelled any inference of punishment. JA 645. By the court's lights, Mr. Williamson's argument and evidence were no match for Defendant Stirling's statements that the confinement conditions are in place to maintain the safety and security of all, and that "there is no intention at SCDC to subject a safekeeper to punishment." *See* JA 645 (citing JA 313, Stirling Aff. ¶ 13).

Second, the court afforded Defendants qualified immunity on the procedural due process claims. Because Mr. Williamson is a pretrial detainee, the court held that "no clearly established precedent exists that would have put the defendants on notice that their actions violated Williamson's right to due process." JA 649. The

court noted that "the Second and Third Circuits have found that a minimal degree of process is owed," but the Seventh Circuit has held that no process was required. JA 646. Despite discussing this Court's decision in *Dilworth*, which ruled that short-term administrative segregation of detainees pending a hearing is permissible, the Magistrate Judge found that there was no clear precedent to put Defendants on notice here because *Dilworth* was predicated on finding that the detainee had been punished. JA 647, 649.

On April 10, 2017, Judge Lewis adopted the Magistrate's report over Mr. Williamson's objections, but permitted him to amend his complaint to name the Doe plaintiffs who personally violated his constitutional rights. JA 667–669. Mr. Williamson's Second Amended Complaint, like the first two, verified, named Clarance Rogers (supervisor for the RHU at Lee Correctional Institution) and Deborah Eastridge (mailroom clerk)[10] on May 2, 2017. JA 671–674. In addition to realleging all of his previous causes of action, he asserted that Defendant Eastridge had interfered with his legal mails. JA 689. Due to the delays inherent in prosecuting a 1983 claim from lock down, the court excused the late filing. JA 785 n.1.

[10] Mr. Williamson dismissed all claims against Ms. Eastridge on November 20, 2017. He is not pursuing his claims based on the First, Fourth, and Sixth Amendments against the remaining Defendants.

On June 2, 2017, the Magistrate Judge dismissed all claims of the Second Amended Complaint against the new Defendants, under the prescreening provisions of 28 U.S.C. § 1915A, for failure to state a claim. JA 788. The court rejected Williamson's conditions of confinement claim because it "fail[ed] to allege a sufficiently serious deprivation of human need" and did not rise to the standard of deliberate indifference. JA 792.

On June 22, 2017, the district court adopted the magistrate's recommendations and the summary judgment issued. JA 796–797. Mr. Williamson's objections were received on June 29, 2017. JA 799. The court excused any tardiness due to his confinement and dismissed the claims with prejudice on July 19, 2017. JA 809–810. On appeal, Mr. Williamson contends only that the district court erred in granting summary judgment to Defendants on his claim from the First and Second Amended Complaints that, in violation of the Fourteenth Amendment, Defendants Stirling, Carroll, Charlton, Miller, and Rogers denied him due process prior to and throughout the term of his solitary confinement.

STANDARD OF REVIEW

This Court reviews a district court's award of summary judgment *de novo*. *Dilworth*, 841 F.3d at 250. Summary judgment is appropriate if "no material facts are disputed and the moving party is entitled to judgment as a matter of law." *Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (*en banc*). The "government is only

entitled to summary judgment if the proffered evidence is such that a rational fact-finder could only find for the government." *Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009).

"[T]he party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of his pleading, but must come forward with specific facts showing that there is a genuine issue for trial." *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008). "[A] *verified* complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations" are based on personal knowledge. *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991). The Court should "review the entire record, evaluating the evidence in the light most favorable to Appellant." *Incumaa*, 791 F.3d at 524.

SUMMARY OF ARGUMENT

The district court erred as a matter of law when entering summary judgment against Mr. Williamson on his due-process claim, and this Court should reverse. As the Supreme Court has held: "[P]retrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell*, 441 U.S. at 546. "[U]nder the Due Process Clause, a [pretrial] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535. Punishment may be express or implied. *Id.*

Where, as here, a liberty restriction is labeled "administrative" or there is no express intent to punish, a court must consider whether, because it "appears excessive in relation to the alternative purpose assigned to it," punitive intent should nevertheless be inferred. *Id*. at 538; *Dilworth*, 841 F.3d at 252 (A court "may infer an intent to punish if a 'restriction or condition is not reasonably related' to some other legitimate goal."). If punishment can be inferred, at a minimum, this Circuit requires that pretrial detainees receive notice of the reason for and a hearing to contest their placement into solitary confinement. *Dilworth*, 841 F.3d at 250.

Reversal under this standard is warranted for two independent reasons:

First, the district court overlooked genuine issues of material fact as to whether Mr. Williamson's 1,288 days in solitary confinement constituted punishment, because such confinement was "excessive in relation to the [] purpose assigned" to it. *Bell*, 441 U.S. at 538. The court improperly granted summary judgment against Mr. Williamson by accepting Defendants' disputed assertion that Mr. Williamson's solitary confinement "was necessary for security purposes"—without examining whether that restriction was excessive in relation to its purpose, or otherwise viewing the evidence in the light most favorable to Mr. Williamson as required in the summary-judgment context. JA 645.

The record evidence raised, at a very minimum, a genuine issue as to whether Mr. Williamson's lengthy term of solitary confinement resulted from punitive intent

on behalf of one or more Defendants. Defendants repeatedly flouted their own regulations to place Mr. Williamson in the harsh environment of MSU at Kirkland Correctional Institution and kept him in solitary confinement for *more than a thousand days* in excess of the 210-day maximum prescribed by Executive Order #2000-11. Also, with each renewal of the Safekeeper order, Defendants' rationale for holding Mr. Williamson became thinner because he had no disciplinary infractions the entire time he was so confined. JA 565–566. Defendants' failure to officially impose punishment after Mr. Williamson's more serious behavioral problems implies that his solitary confinement term served as the punishment for that behavior. Reversal is warranted for this reason alone.

Second, the district court independently erred by granting qualified immunity because the court held that there was no clearly established law that required Defendants to afford Mr. Williamson due process in connection with his solitary confinement. But it is well established that pretrial detainees are entitled to due process safeguards. *Bell*, 441 U.S. at 535. Indeed, this Court's precedent is consistent with the precedent of other Circuits holding that these due-process protections entail, at a minimum, notice and a hearing. *Dilworth*, 841 F.3d at 255; *Miller v. Dobier*, 634 F.3d 412, 415 (7th Cir. 2011); *Stevenson v. Carroll*, 495 F.3d 62, 69 (3d Cir. 2007); *Benjamin v. Fraser*, 264 F.3d 175, 190 (2d Cir. 2001).

Thus, the district court erred when holding that Defendants are entitled to qualified immunity on the ground that Mr. Williamson's due process rights purportedly were not clearly established. While the district court relied on the Seventh Circuit's decision in *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002), to show that courts of appeals disagree over whether any "process is required when a pretrial detainee is placed in segregation for managerial reasons," this holding misconstrued the state of the law. JA 646. The Seventh Circuit has long since clarified that *Higgs* "did not mean to suggest that once the emergency was past, the jail could nevertheless keep the prisoner in [administrative] segregation indefinitely without providing" due process. *Miller*, 634 F.3d at 415. As shown below, the courts of appeals have uniformly and clearly established that pretrial detainees being held under restrictive conditions are entitled to due process protections.

It is clearly established in this Circuit, and others, that transferring a pretrial detainee to the state equivalent of Supermax requires due process safeguards. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209 (2005). This Court's decision in *Incumaa* reaffirms that convicted inmates on administrative segregation are entitled to notice and hearing. 791 F.3d at 535. Because the rights of pretrial detainees are at least as great as convicted inmates, *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988), the district court's finding that this Court had provided no guidance on the process due pretrial detainees on administrative segregation cannot stand.

The district court's finding of qualified immunity cannot stand in the face of such precedent and warrants reversal.

ARGUMENT

As shown below, this Court should reverse the summary judgment against Mr. Williamson because of two independent, legal errors by the district court. First, the court overlooked genuine issues of material fact concerning whether Mr. Williamson's solitary confinement constituted punishment. Second, the court erred when granting Defendants qualified immunity.

I. THE DISTRICT COURT ERRED BY MISAPPLYING THE LAW AND OVERLOOKING GENUINE ISSUES OF MATERIAL FACT AS TO WHETHER DEFENDANTS IMPERMISSIBLY PUNISHED MR. WILLIAMSON WITH 1,288 DAYS IN SOLITARY CONFINEMENT.

The district court made two legal errors when holding that Mr. Williamson's initial classification and continued Safekeeper detention in solitary confinement was not punishment. First, the district court misapplied the law by not considering whether Mr. Williamson's restriction "appear[ed] excessive in relation to the alternative purpose assigned" to it. *Bell*, 441 U.S. at 538. This inquiry determines whether punitive intent can be inferred. Second, and similarly, the district court failed to recognize genuine issues of material fact that controvert Defendants' purported "nonpunitive government objective." JA 645. For either or both of these reasons, this Court should reverse.

A. The district court did not examine whether the solitary confinement was excessive in relation to the reason for the confinement.

The court's finding that Mr. Williamson's solitary confinement was not punishment skipped a crucial, and legally required step: evaluating the rationale against the action taken. Importantly, the court should have reviewed the justification for the original transfer to solitary confinement and each subsequent renewal that kept Mr. Williamson in solitary confinement for 1,100 additional days. Instead, the court accepted at face value that the actions—i.e., nearly 1,300 days in solitary confinement—were "necessary for security purposes," and thus "precludes a reasonable inference of punitive intent." JA 645. That constitutes legal error.

A "legitimate nonpunitive governmental objective" is not conclusive evidence clearing the defendant of punitive intent. Even absent an express intent to punish, "a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015). Thus, "if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees." *Bell*, 441 U.S. at 539.

Here, the court held that the "transfer to SCDC facilities was based on managerial and operational concerns of the detention center officials resulting from Williamson's violent behavior." JA 645. In doing so, the court relied on the Deering affidavit that recounts the events of November 22, 2013, and its conclusory statement that Williamson "continues to exhibit extremely violent and uncontrollable behavior." JA 285–286. The court also credited—even though the evidence was to be viewed in the light most favorable to Mr. Williamson, Fed. R. Civ. P. 56—Defendant Stirling's testimony that "[t]he conditions of the confinement are not punitive," and that "[t]here is no intention at SCDC to subject a Safekeeper to punishment." JA 313.

The court's inquiry should not have ended there. First, Defendant Stirling's statements about the intentions of SCDC towards Safekeepers are immaterial. The Supreme Court has explained that in evaluating prison conditions, *Bell* "did not consider the prison officials' subjective beliefs about the policy," "… [r]ather the Court examined objective evidence." *Kingsley*, 135 S. Ct. at 2473. But the district court did the exact opposite. It did not discuss the objective evidence and fully relied on the subjective statements of prison officials—statements that, at best, raised a triable issue of fact that precluded summary judgment. Notably, Defendant Stirling admit-

ted that Mr. Williamson's alleged conduct, if proved, would have constituted a "disciplinary offense" pursuant to SCDC regulations, objective evidence that the confinement was punitive. JA 403.

Second, the court does not connect Mr. Williamson's behavior on November 22, 2013, to the conditions in which Mr. Williamson was kept for 1,288 days. This solitary confinement term far outstrips the 85 days experienced in *Dilworth* and the six-month segregation in *Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997). *See also Higgs*, 286 F.3d at 438 (Plaintiff spent a "total of 34 days in segregation before being allowed to rejoin the general jail population" without a hearing). And this Court has held that "confine[ment] to [a] cell for 23 hours each day and denied all personal contact except with attorneys or clergy" is classified as punishment under *Bell*. *Dilworth*, 841 F.3d at 253.

Third, even though the court understood that Mr. Williamson challenged his detention at both the MSU and the RHU, at no point did the court evaluate whether repeatedly renewing his solitary confinement was excessive. It is undisputed that Mr. Williamson did not incur any disciplinary infractions during his time there. JA 565–566. Thus, with each renewal of the Safekeeper order, there was no additional proof that security concerns required his continued solitary confinement. In August 2012, Defendant Miller even stated that he did "not know of any reason [Mr Williamson] would have to remain at the Kirkland MSU." JA 592. Defendants supplied

only the Deering Affidavit as evidence to renew Mr. Williamson's Safekeeper status, an affidavit that described Mr. Williamson's behavior on one day *before* he was placed in solitary confinement. The court's failure to evaluate his continued confinement with the purported governmental objective is error.

B. Genuine issues of material fact remain regarding whether Mr. Williamson's 1,288 days of solitary confinement was punitive

Compounding its failure to ask whether the solitary confinement was excessive in relation to its purpose, the district court overlooked Mr. Williamson's evidence supporting punitive intent—which, at a minimum, raised a genuine issue of material fact. JA 645 (Mr. "Williamson has provided no evidence to support his claim that he was subjected to impermissible punishment as a pretrial detainee."). Time after time, Defendants made exceptions to SCDC policy to (1) initially transfer Mr. Williamson to the MSU, (2) renew his Safekeeper order in excess of 90 days, (3) find good cause to continue the confinement when security conditions improved, and (4) deny him the process afforded to other prisoners placed in solitary confinement in the SCDC. During his initial transfer, and thereafter, Mr. Williamson was a model detainee—thus undercutting the security and managerial reasons for holding him. Moreover, the absence of any formal discipline or punishment for his behavior further infers that the state authorities used his Safekeeper status to punish him.

The district court's decision upends the summary-judgment procedure and applicable law. The district court required Mr. Williamson, the *non-moving* party, to

prove he had suffered impermissible punishment. JA 645. But Mr. Williamson need only show evidence "upon which a jury could properly proceed to find a verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). That is, he needed to produce only enough evidence from which a jury could infer punitive intent. And the record—including that he served nearly 1,300 days in solitary confinement without a conviction or any other disciplinary issues—is replete with material facts showing at least a triable issue as to punitive intent.

Indeed, several facts show that the Mr. Williamson's transfer to and continued detention in SCDC solitary confinement was punitive. First, Defendants' documented failures to follow their own procedures, alone, raise a genuine issue of material fact. For example, Mr. Williamson was not transferred from local detention to the Lee Correctional Institution as required by SCDC policy SK-22.02. JA 319. Instead, he was sent directly to the MSU at Kirkland Correctional Institution. JA 641. It was not until August 7, 2014, that SCDC explained that his allegedly "extremely violent and uncontrollable behavior" resulted in his confinement. JA 43. But that reason is merely grounds for Safekeeper custody at Lee, not solitary confinement in the MSU at Kirkland.

SCDC policies provide that procedural protections must accompany the initial solitary confinement of prisoners. JA 411-419. Yet, Mr. Williamson was afforded no process. In addition, the mentally ill may not be held under a Safekeeper order,

EO #2000-11 § 6, but Defendants were aware that SCDC personnel diagnosed Mr. Williamson with several mental illnesses. JA 525–526.

Similarly, Defendants violated regulations each time they sought to renew the Safekeeper order. Their practice of renewing a Safekeeper order for more than one 90-day period violates the text of EO #2000-11 that permits an order to "be renewed for up to ninety (90) days." JA 315 at § 5; *cf.* JA 319 (SK 22.02 states that the order can be renewed 90 days "at a time."). In total, then, a Safekeeper order only permits segregation only for 210 days, 120 under the initial order and a renewal not to exceed 90 days. Yet, the record shows rote renewal of the Safekeeper order in excess of one thousand days. JA 546–563.

EO #2000-11 likewise requires a finding of good cause or no change in circumstances to renew a Safekeeping order. JA 315 at § 5. Defendant Stirling expressed that "there is an expectation that SCDC policies are complied with." JA 560. But Mr. Williamson did not have any new infractions during his Safekeeper custody. So every time the order was renewed, the circumstances had changed for the better—he had gone another 90 days without any infractions. Where officials

violate established internal protocols,[11] punitive intent is the natural inference, no matter how it is labeled.

Second, there is no evidence that security or managerial reasons to seek the more restrictive placement for Mr. Williamson persisted while he was in the MSU or RHU. Indeed, he was not even transferred directly from the Barnwell County Detention Center to MSU. JA 645. After the interview with the SLED agent, he was immediately sent to Aiken, another county jail. JA 641. Because he did not incur any disciplinary infractions at Aiken, the MSU, or the RSU, JA 565–566, there was no additional proof that security concerns required his continued, solitary confinement. In the light most favorable to Mr. Williamson, this measure sufficiently rebuts the purported, nonpunitive government objective to take the case to trial. Mr. Williamson's subsequent transfer from Aiken to solitary confinement in the SCDC should be construed as at least raising a genuine issue as to punitive intent.

Third, the authorities' failure to seek "official" disciplinary measures for Mr. Williamson's behavior on November 22 implies that his detention in solitary confinement was punitive. Detainees can be disciplined for anything that is a crime under federal or state law. JA 404. Defendant Carroll admitted that it was "standard

[11] Additionally, the mentally ill may not be held under a Safekeeper order. EO #2000-11 § 6. Mr. Williamson alleged that he took seven pills a day for his mental health. JA 68–69; *see also* JA 525–526.

policy and procedure to charge a detainee with a disciplinary charge" for assaulting an officer. JA 380. Defendant Stirling similarly admitted that "threatening to inflict harm on/assaulting an employee" is a disciplinary offense and, if convicted, would "likely result in some disciplinary detention." JA 403–404. Here, the record shows that for much less serious infractions, e.g., sitting on his mattress, Mr. Williamson was punished. JA 47–51. Yet, after he was combative with two officers and delivered death threats against a state court judge and law enforcement officers, which were never taken seriously,[12] he received no formal punishment. JA 404–406. Instead, he was reclassified as a Safekeeper, and Defendant Stirling did not deny that Safekeepers are subjected to the same conditions as convicted prisoners who have disciplinary infractions. JA 514. The absence of other corrective measures, itself an exception to standard procedure, is telling.

Indeed, for a period in excess of three years, Mr. Williamson was subjected to one of the cruelest conditions of confinement imposed by our prisons. *See, e.g.*, *Incumaa*, 791 F.3d at 534 ("Prolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate's mind even after he is resocialized."); *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 567-68 (3d Cir. 2017)

[12] The state court judge was consulted before Mr. Williamson was transferred from the MSU to the RHU. Reportedly, he "was not concerned about Williamson['s]" threat. JA 593.

(noting that "psychological damage" and "[p]hysical harm" can result from solitary confinement). Under these circumstances, Mr. Williamson's solitary confinement was at least arguably excessive in relation to its purported purpose and constituted punishment. The district court improperly usurped the role of the jury in deciding this issue for Defendants.

In sum, taking the record as a whole and in the light most favorable to Mr. Williamson, as this Court must do in this procedural posture, leads to the inescapable conclusion that Mr. Williamson's lengthy placement in solitary confinement raises at least a genuine issue of material fact as to punitive intent. This factual question as to due process requires reversal of summary judgment. *Bell*, 441 U.S. at 535 ("a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law.").

II. THE DISTRICT COURT ERRONEOUSLY GRANTED QUALIFIED IMMUNITY TO DEFENDANTS BECAUSE THE LAW CLEARLY ESTABLISHED THAT MR. WILLIAMSON'S PROLONGED, SOLITARY CONFINEMENT REQUIRED DUE PROCESS.

The district court improperly granted Defendants qualified immunity on the ground that "no clear precedent exists that would guide the court in analyzing whether the defendants provided Williamson with constitutionally adequate process." JA 647. Qualified immunity does not lie where the facts show a violation of a constitutional right and that the right was "clearly established" at the time of defendant's alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). But

that does not mean "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730 (2002); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (qualified immunity "do[es] not require a case directly on point").

The district court found it was unsettled as to what process was due to pretrial detainees like Mr. Williamson—citing two grounds. First, the court perceived a "circuit split between the Second and Third Circuits and the Seventh Circuit" on whether pretrial detainees held for administrative purposes are entitled to any process, but no such split exists. JA 649. Second, the court misconstrued pertinent law when finding a "lack of guidance from the Fourth Circuit." *Id.* These legal errors were necessary to support summary judgment, thus providing an independent basis for reversal.

A. It is clearly established among the courts of appeals that pretrial detainees require due process protections.

Simply put, the district court identified a circuit split that does not exist. It correctly acknowledged that the Second and Third Circuits agree that "if the restraint is for 'administrative' purposes, the minimal procedures outlined in *Hewitt* [*v. Helms*, 459 U.S. 460 (1983)] are all that is required." JA 646; *see Benjamin*, 264 F.3d at 190; *Stevenson*, 495 F.3d at 70. Then, citing *Higgs v. Carver*, the court observed that "the Seventh Circuit has found that no process is required when a pretrial detainee is placed in segregation for managerial reasons, including to protect

jail staff from his violent propensities." JA 646–647. Thus, the court found that the courts of appeals disagreed over what process is owed to a pretrial detainee on prolonged administrative segregation. JA 647.

But the Seventh Circuit has long since clarified *Higgs*, holding that "the duty [to provide due process] attaches regardless of the motive for the deprivation"—i.e., irrespective of whether segregation is imposed upon pretrial detainees in response to punitive or administrative concerns. *Miller v. Dobier*, 634 F.3d 412, 415 (7th Cir. 2011). To be sure, the *Higgs* court explained that no process was due a detainee who "spent a total of 34 days in [administrative] segregation before being allowed to rejoin the general jail population."[13] 286 F.3d at 438. But the Seventh Circuit's decision in *Miller* by Judge Posner (who also authored *Higgs*), clarified that "[*Higgs*] did not mean to suggest that once the emergency was past, the jail could nevertheless keep the prisoner in segregation indefinitely without providing the procedural safeguards encapsulated in the term 'due process.'" *Id.* Thus, the Seventh Circuit has clearly established that "if there is such a deprivation [of liberty or property,] the duty [to provide due process] attaches regardless of the motive for the deprivation."

[13] This aspect of the *Higgs* decision is also dicta. The Seventh Circuit vacated and remanded the case because it "[could] not determine from the record whether Higgs was placed in lockdown segregation for preventive purposes or as punishment." *Higgs*, 286 F.3d at 438 (7th Cir. 2002).

Id. This clarification of *Higgs* resolves any perceived circuit split. *See Stevenson*, 495 F.3d at 70; *Benjamin*, 264 F.3d at 190.

B. It is clearly established that this Court requires due process protections for pretrial detainees

The district court held that whether a pretrial detainee "is owed any level of process under the Fourteenth Amendment is not a settled question in this circuit." JA 646. This Court's precedents in *Incumaa* and *Dilworth*, however, demonstrate that the Supreme Court has long required giving pretrial detainees due process safeguards enjoyed by convicted inmates. Thus, Defendants' failure to do so makes "the unlawfulness of the[ir] conduct" that much more "manifest under existing authority," such that qualified immunity is improper. *Vathekan v. Prince George's Cty.*, 154 F.3d 173, 179 (4th Cir. 1998).

It has long been established that convicted prisoners are entitled to due process when subjected to harsh, prolonged solitary confinement of the sort experienced by Mr. Williamson—even when, as here, it is characterized as administrative. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, (2005) (administrative placement into Ohio Supermax facility implicated due process liberty interest). And it is beyond dispute that pretrial detainees are owed at least as much process as convicted prisoners. *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983). Thus, due process rights that are clearly established for convicted prisoners apply to pretrial detainees as well.

The district court felt bound to define this due process right "in light of the specific context of the case, not as a broad general proposition." JA 648 (quoting *Parrish v. Cleveland*, 372 F.3d 294, 301 (4th Cir. 2004)). But the district court narrowed the inquiry to "[w]hether a *pretrial detainee* who is transferred into more restrictive housing for administrative purposes …is owed any level of process." JA 646 (emphasis added). When it found no Fourth Circuit case addressing precisely that subgroup, the court announced that "no clearly established *precedent* exists" to put defendants on notice that Mr. Williamson was entitled to due process as to his solitary confinement. JA 649 (emphasis added). In failing to recognize that the due process rights of convicted prisoners serve as a "floor" for pretrial detainees, the court mistakenly "require[d] a case directly on point" applying the same rights to pretrial detainees. *Mullenix*, 136 S. Ct. at 308.

Rather than a "lack of guidance from the Fourth Circuit," JA 649, this Court's decisions in *Dilworth* and *Incumaa* confirm that pretrial detainees are entitled to process. Indeed, in *Dilworth*, this Court reaffirmed that *Bell* and *Wilkinson* stand for the proposition that any process due to convicted inmates subjected to harsh conditions of solitary confinement is due to pretrial detainees. 841 F.3d at 251. As held in *Dilworth*, which the district court acknowledged but disregarded, this Court explained that pretrial detainees may be subjected to immediate placement in adminis-

trative segregation in response to safety and security concerns *as long as* the detainees was later afforded process. 841 F.3d at 255. Nor did the district court address this Court's decision in *Incumaa* that granted due process protections to a convicted inmate housed in administrative segregation conditions similar to the solitary confinement endured by Mr. Williamson. 791 F.3d at 532, 535.

To be sure, *Incumaa* involved a convicted prisoner and not a pretrial detainee. But that distinction is not important here.[14] *Incumaa* is instructive because this Court found that SCDC's "review process is inadequate and fails to honor the basic values of procedural due process" to convicted inmates on administrative segregation. 791 F.3d at 535. There, the inmate had been held in the SMU for more than 20 years with a near-perfect disciplinary record. *Id.* He had also "offered evidence demonstrating that conditions in the SMU are significantly worse than in the general population and that the severity, duration, and indefiniteness of his confinement implicate" liberty interests. *Id.* at 531. As a result, this Court found that he "demonstrated a liberty interest in avoiding solitary confinement in security detention." *Id.* at 532. Again, this liberty interest arises not only for convicted criminals, but to pretrial detainees like Mr. Williamson as well.

[14] This distinction is important when convicted inmates seek to be free from punishment, *see Sandin v. Conner*, 515 U.S. 472, 484 (1995), or when prison officials allege that "only a subcategory of prison punishments will infringe on protected liberty interests" of pretrial detainees, *see Dilworth*, 841 F.3d at 251–252.

The district court not only misapplied the law—including the Supreme Court precedent in *Wilkinson* and *Bell*—but also issued a decision that, if upheld, would produce absurd results for individuals subject to harmful restrictions. As a pretrial detainee, Mr. Williamson received no process (no notice, no review, and no hearing) to challenge his solitary confinement. Yet, this Circuit has held that due process requires *convicted* inmates to receive such process. *Incumaa*, 791 F.3d at 535. Indeed, SCDC regulations are replete with process requirements for those subjected to solitary confinement in the Lee and Kirkland facilities. JA 411-17. The district court's decision, if upheld, would grant pretrial detainees, who have not been convicted, fewer due process rights than convicted criminals. That is not—and should not be—the law.

Members of the Supreme Court have expressed grave concerns over the acute harm of solitary confinement. For example, Justice Kennedy emphasized the trauma of solitary confinement, stating that "the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). And Justice Breyer has observed that "it is well documented that . . . prolonged solitary confinement produces numerous deleterious harms." *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (citing Craig Haney, Mental Health Issues in Long-Term Solitary and "Supermax" Confinement, 49 Crime & Delinquency 124,

130 (2003); Stuart Grassian, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J. L. & Policy 325, 331 (2006)).

Moreover, "'[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, American Psychiatry Should Join the Call to Abolish Solitary Confinement, 43 J. Am. Acad. Psychiatry & L. 406, 410 (2015) (quoting David H. Cloud, et al., Public Health and Solitary Confinement in the United States, 105 Am. J. Pub. Health 18, 18–26 (2015)) (alteration in original); *see also* 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) ("systematic 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."); Haney, *supra*, 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.").

In sum, because it is clearly established that Mr. Williamson was entitled to some process (no matter whether his three-year pre-trial solitary confinement was

punitive or administrative), and Mr. Williamson received none at all—qualified immunity affords Defendants no shelter. The district court's opinion must be reversed

CONCLUSION

For all the foregoing reasons, Mr. Williamson requests that this Court reverse the opinions below and remand for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Local Rule 34(a), Mr. Williamson respectfully suggests that oral argument will further assist the Court's resolution of this matter. This case presents complex constitutional issues involving the intersection of due process rights and qualified immunity. Counsel may assist in navigating the lengthy record developed as to six different defendants.

Respectfully submitted,

s/ Jeff P. Johnson

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NOVEMBER 20, 2017

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I, Jeff P. Johnson, an attorney, certify that I have complied with the above-referenced rule, and that according to the word processor used to prepare this brief, Microsoft Word, this brief contains [9,964] words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: November 20, 2017

/s Jeff P. Johnson
Jeff P. Johnson

CERTIFICATE OF SERVICE

I, Jeff P. Johnson, an attorney, certify that on this day the foregoing Brief for Plaintiff-Appellant was served electronically on all parties via CM/ECF.

Dated: November 20, 2017

s/ Jeff P. Johnson
Jeff P. Johnson