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

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

Defendants-Appellees placed and held Mr. Williamson—an innocent, pretrial detainee—in solitary confinement as a Safekeeper without notice, a hearing, or any way to challenge that restriction for more than three-and-a-half years.[1] This action, under 42 U.S.C. § 1983, seeks damages from individuals who are responsible for violating Mr. Williamson's substantive and procedural due process rights. By granting Defendants summary judgment, the district court erred by misapplying clearly established law and overlooking genuine issues of material fact.

First, the district court did not determine whether Mr. Williamson's solitary confinement "appears excessive in relation to the . . . purpose assigned," as the Supreme Court requires. *Bell v. Wolfish*, 441 U.S. 520, 538 (1979). A pretrial detainee can "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). Citing no law, Defendants respond that a court need only analyze the "excessiveness" of the "reasons for the placement on safekeeper status" and that the "conditions of the confinement" are immaterial. Opp. Br. 15. But "[a] court must

[1] A jury acquitted Mr. Williamson of one murder charge. Dkt. *State v. Williamson*, No. 2013A0610400187, June 6, 2017, http://bit.ly/2iy5YZ4. He pleaded guilty to one armed robbery charge (receiving time served), and the remaining charges were dismissed. Dkt. *State v. Williamson*, No. 2013A0620100094, http://bit.ly/2CVo9zb.

decide whether ***the disability*** [i.e., solitary confinement] is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538 (emphasis added). That is, courts must analyze whether the purported purpose for the disability fits the conditions imposed by that disability. The district court's failure to do so warrants reversal.

This failure, in turn, caused the court to dismiss genuine issues of material fact showing that Mr. Williamson's solitary confinement constituted punishment. Defendants argue that the existence of a single letter containing death threats is ample justification for the initial Safekeeping order and every renewal of that order for more than three-and-a-half years. Opp. Br. 13. Yet, they do not dispute that the record shows that they repeatedly broke their own regulations when they (1) initially transferred Mr. Williamson to the Maximum Security Unit, (2) renewed his Safekeeper Order in excess of 90 days in violation of Executive Order #2000-11, (3) found good cause to continue the confinement when security conditions improved, and (4) denied him the process afforded to other prisoners placed in solitary confinement. Br. 30–35. And they do not deny the punishing conditions to which they subjected Mr. Williamson. These issues of fact preclude summary judgment.

Second, the district court granted Defendants qualified immunity because "no clear precedent exists that would guide the court in analyzing whether the defendants provided Williamson with constitutionally adequate process." JA 647. But Mr.

Williamson has shown that Supreme Court precedents in *Bell* and *Wilkinson v. Austin*, 545 U.S. 209, (2005), entitle pretrial detainees to due process. Br. 38–41. And the courts of appeals uniformly hold that pretrial detainees are entitled to due process when imposing administrative detention. *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).

Defendants assert that the law is not clearly established, and thus they did not have notice of what is required, until a Fourth Circuit case "address[ing] the due process requirements, if any, that apply to a safekeeper decision-making process" is decided. Opp. Br. 10. This is wrong. Supreme Court decisions, independently, and "'a consensus of cases of persuasive authority' from other jurisdictions, if such exists" define clearly established law. *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538–39 (4th Cir. 2017). The law "do[es] not require a case directly" deciding the rights of pretrial detainees to supply notice. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam). As Defendants' own authority holds, "the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity." *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999). This holds more weight here because the "due process rights of a pretrial detainee are at least as great as" those of prisoners. *Martin v. Gentile*, 849 F.2d 863, 870 (4th Cir. 1988). Defendants had sufficient notice.

Defendants' other arguments for affirmance, as to individual parties or collectively, should all be rejected. Defendants' assert that they are not liable because they are not individually responsible for placing Mr. Williamson on Safekeeping status (an issue the district court did not decide), but there are material facts showing that each Defendant had a hand in seeking the Safekeeper Order and maintaining him on Safekeeper status. Br. 13–17. Defendant Miller's prosecutorial immunity claims are also invalid because, under South Carolina law, the Safekeeper process is excluded and unrelated to the judicial process, and therefore prosecutorial immunity is improper. Defendant Rogers is a proper party to this appeal as Mr. Williamson has appealed the order dismissing his case. JA 813. Finally, Defendants' mootness argument, properly ignored by the district court, is meritless.

This Court should reverse the district court's opinion on both grounds.

ARGUMENT

I. THE DISTRICT COURT'S SUMMARY JUDGMENT GRANT SHOULD BE REVERSED BECAUSE IT DID NOT DETERMINE WHETHER DEFENDANTS' ACTIONS WERE EXCESSIVE AND IGNORES GENUINE ISSUES OF FACT.

This Court should reverse the district court's holding that nearly 1,300 days in solitary confinement—were "necessary for security purposes," and thus "precludes a reasonable inference of punitive intent." JA 645. The district court committed legal error by failing to evaluate whether the solitary confinement was excessive in relation to its purported purpose, and it overlooked genuine issues of material fact that show this solitary confinement was "not reasonably related to a legitimate goal." *Bell*, 441 U.S. at 539. Failing to take these steps precluded the court from "infer[ring] that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees." *Id.*

As an initial matter, Defendants wrongly assert that Mr. Williamson "has not pursued a substantive due process claim on appeal challenging any such conditions of confinement" and that this "appeal is limited to the claim of procedural due process." Opp. Br. 11–12. Mr. Williamson pleaded that he had a liberty interest arising from "substantive due process" "to be free from jail conditions and any type of punishment while awaiting trial." JA 70. This was violated because he "is being punished by the punitive conditions of his confinement." JA 71. The opening brief asks whether he "at least raised a genuine issue of material fact as to whether his

long-term solitary confinement constitutes punishment." Opp. Br. 5. And it further devotes eight pages to showing that the district court erred by finding that Mr. Williamson's solitary confinement was not punishment under *Bell*. Br. 27–35.

In his opening brief, Mr. Williamson explained that the restrictions imposed on him and the duration of those restrictions were excessive compared to the security rationale provided by Defendants. *Id.* Defendants disagree, claiming that a court need only analyze the "excessiveness" of the "reasons for the placement on safekeeper status" and that the "conditions of the confinement" are immaterial. Opp. Br. 15. But, the Supreme Court demands that "[a] court must decide whether ***the disability*** is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell*, 441 U.S. at 538 (emphasis added). Illustrating the point, the Court explained that shackling a detainee and "throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution," both non-punitive reasons, "[b]ut it would be difficult to conceive of a situation where conditions so harsh, … would not support a conclusion that the purpose for which they were imposed was to punish." *Id.* at n.20.

Though "not every hardship encountered during pretrial detention amounts to punishment," this Court and others hold that the conditions of Mr. Williamson's solitary confinement are punishment and with good reason. *Dilworth v. Adams*, 841 F.3d 246, 253 (4th Cir. 2016) (collecting cases). The medical profession and the

courts recognize that "solitary confinement, the deprivation of human contact and other meaningful perceptual and intellectual stimulation, can have disastrous consequences." Professors and Practitioners of Psychology and Psychiatry Amici Br. at 4; *see, e.g.*, *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring); *Glossip v. Gross*, 135 S. Ct. 2726, 2765-66 (2015) (Breyer, J., dissenting). And here, it was plainly excessive in relation to its purpose. *Bell*, 441 U.S. at 538 & n. 20.

In failing to consider the excessiveness of the solitary confinement, the district court relied solely on Defendants' justification, 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. Yet, Mr. Williamson presented objective evidence that this action was punitive, including that his alleged conduct normally constitutes a "disciplinary offense" pursuant to SCDC policy. JA 403. And had the court evaluated the solitary confinement for its excessiveness, it would have found that Mr. Williamson's term far exceeded the experiences of other detainees and that the rote renewals of the Safekeeping Order ignored the improvement in his behavior. Br. 29.

For their part, Defendants do not address these arguments and suggest that "there is no evidence to support a finding that the decision to place the Appellant on safekeeper status was 'arbitrary or purposeless.'" They argue that a single letter

making death threats against law enforcement and a state court judge[2] is a legitimate, non-punitive reason for placing Mr. Williamson in solitary confinement for three-and-a-half years. Opp. Br. 16.

Contrary to Defendants' claim, Mr. Williamson argued that this does not meet the "uncontrollable behavior" standard in S.C. Code § 24-3-80. *Compare* Opp. Br. 16–17, *with* Br. 18. He has also shown that Defendants repeatedly violated their own regulations in seeking and renewing his solitary confinement. Br. 31–34. And when a personal right is at issue, an agency's failure to follow its own regulations is evidence of arbitrariness. *Cf. United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 268 (1954); *United States v. Morgan*, 193 F.3d 252, 266 (4th Cir. 1999) ("failure to afford an individual procedural safeguards required under [agency's] own regulations may result in the invalidation of the ultimate administrative determination").

Defendants also fail to rebut record evidence that the district court overlooked showing the drastic departures from SCDC and Safekeeper policies to place and hold Mr. Williamson in punishing conditions of solitary confinement. Their claim that

[2] Defendants disagree with a characterization of an email noting that "Judge Early was not concerned with Williamson's threats." Opp. Br. 17 n.2. The record speaks for itself. Mr. Williamson meant only to show that nearly two years after the threatening letter, when a transfer to another facility was discussed, Solicitor Miller reported that Judge Early was not concerned with Williamson. This statement is admissible as to the effect that Judge Early's words had on Solicitor Miller.

"SCDC has no other placement option for safekeepers" is belied by Defendant Stirling's testimony that reasons "support the discretion to assign Mr. Williamson to the most secure unit at SCDC." Opp. Br. 16 at n.1. SCDC policy SK-22.02 requires that male Safekeepers be held at Lee Correctional Institute—but Mr. Williamson was sent to the Maximum Security Unit at Kirkland Correctional Institute. Br. 31.

Even if Mr. Williamson's initial Safekeeper placement had a legitimate non-punitive purpose, there is no evidence that supports the rote renewal of his Safekeeper status for a thousand days longer than permitted under Executive Order #2000-11. This Court has explained that rubber-stamping the same justification for renewals encourages "arbitrary decision making and risks the possibility that the [Defendants] may single out Appellant 'for an insufficient reason.'" *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) (quoting *Wilkinson*, 545 U.S. at 226). Defendants offer no explanation as to why they sought and approved renewals in excess of the 210-day maximum prescribed by EO #2000-11. It is undisputed that Mr. Williamson had no disciplinary infractions as a Safekeeper. JA 565–566. Because Safekeeper renewals must be justified by a "showing of good cause and/or no material change in circumstances," each renewal was error. JA 248–249. Defendants have not tried to address or justify their abuse of Safekeeper procedures.

The district court's failure to evaluate the circumstances of Mr. Williamson's solitary confinement in relation to Defendants' security rational requires reversal.

II. REVERSAL IS REQUIRED BECAUSE THE COURT MISCONSTRUED THE SCOPE OF MR. WILLIAMSON'S PROCEDURAL DUE PROCESS RIGHTS, WHICH WERE VIOLATED.

This Court should also reverse because the district court misconstrued the procedural due process rights owed to Mr. Williamson that Defendants violated. The law is clearly established that pretrial detainees are entitled to basic due process protections before indefinite placement in solitary confinement. Defendants do not contest that the due process rights of inmates establishes a "floor" for the rights of pretrial detainees. *See Martin*, 849 F.2d at 870. Nor do they dispute that due process requires giving inmates notice and a hearing when being assigned to solitary confinement for administrative reasons. *See Wilkinson*, 545 U.S. at 226; *Incumaa*, 791 F.3d at 532. And every court of appeals has agreed that pretrial detainees are to be given an explanation of the reason for the transfer and an opportunity to respond.[3] Br. 36–38. To do any less would grant convicted inmates greater due process protections than pretrial detainees. Because Mr. Williamson received no such due process, reversal is required.

In response, Defendants argue that there is no violation of procedural due process absent violation of a rule espoused by a Fourth Circuit case directly on

[3] Defendants' claim that *Miller*'s modification of *Higgs v. Carver*, 286 F.3d 437 (7th Cir. 2002), is dictum and should be ignored. Opp. Br. 24. In fact, the district court cited language in *Higgs* that was dictum and obsolete at that time. Br. 37 n.13.

point—that is, Mr. Williamson "has not shown clearly established law within the Fourth Circuit to give 'fair notice' to Defendants in November 2013." Opp. Br. 24. *First*, they argue that the Fourth Circuit requires in-circuit precedent for notice. *Id.* at 21. *Second*, Defendants claim they did not know what the state Safekeeper provision requires because it had not "previously been interpreted or applied by a state or federal court." *Id.* at 22. *Third*, because *Incumaa* and *Dilworth* were decided after November 2013, they assert that those precedents do not supply notice prior to the officials' actions. Each of these are incorrect.

As an initial matter, there is no such absence of in-circuit precedent. It has been decades since the Supreme Court announced the principles that control here: (1) pretrial detainees cannot be punished, (2) prolonged solitary confinement cannot be inflicted upon convicts without process, and (3) the rights of pretrial detainees are at least as great as the rights of inmates. *Bell*, 441 U.S. at 535; *Wilkinson*, 545 U.S. at 226. Moreover, these principles are merely reaffirmed by this Court's decisions in *Incumaa* and *Dilworth*.

Defendants' own case law refutes their contention that only a Fourth Circuit precedent directly on point strips them of immunity. Their brief notes that "case law from this Circuit and *the Supreme Court* that provide notice of whether a rights is clearly established." Opp. Br. 21 (citing *Lefemine v. Wideman*, 672 F.3d 292, 298 (4th Cir. 2012)) (emphasis added). And "when 'there are no such decisions from

courts of controlling authority, we may look to 'a consensus of cases of persuasive authority' from other jurisdictions, if such exists." *Booker*, 855 F.3d at 538–39.

These cases explain that a "constitutional right is clearly established for qualified immunity purposes not only when it has been 'specifically adjudicated' but also when it is 'manifestly included within more general applications of the core constitutional principle invoked.'" *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (holding officer liable under Supreme Court precedent); *Edwards*, 178 F.3d at 251 ("the nonexistence of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity"); *see also* Br. 38. Conduct "patently violative of the constitutional right that reasonable officials would know without guidance from the courts' that the action was unconstitutional" is not protected. *Clem*, 284 F.3d at 553. Here, Defendants cannot "escape liability simply because the instant case could be distinguished on some immaterial fact, or worse, because the illegality of the action was so clear that it had seldom before been litigated." *Id.*[4]

[4] Defendants argue that even if there was notice for what kind of process is required for pretrial detainees, qualified immunity would still be proper because there is no Fourth Circuit precedent addressing the process due to Safekeepers. Opp. Br. 21. This exemplifies the kind of self-defined "immaterial" label that does not prevent this Court from holding Defendants liable.

Defendants also argue that qualified immunity is appropriate until a state or federal court interprets the Safekeeper provision or EO #2000-11. Opp. Br. 22. As an initial matter, the Fourth Circuit holds to the contrary. *See, e.g.*, *Wall*, 741 F.3d at 503 (rejecting qualified immunity improper where a court has not "previously passed judgment on the appropriateness" of the policy at issue).

Defendants' sole support for this argument, *Springmen v. Williams*, 122 F.3d 211 (4th Cir. 1997), is unhelpful. In *Springmen*, a gun store owner was charged with reckless endangerment for failing to properly secure weapons and ammunition. 122 F.3d at 212. Because Maryland's reckless endangerment statute "exempts from its coverage 'any conduct involving the manufacture, production, or sale of any product or commodity,'" Springmen claimed that he broke no law. *Id*. at 214. He then brought a malicious prosecution suit, alleging "that it is a clear violation of the Fourth Amendment to force a person to appear before a court to defend himself when that person has not violated any law." *Id*. The case turned on the scope of this exemption, including whether the statute "was designed for the limited purpose of precluding criminal prosecution in standard product liability cases." *Id*. Because the exemption had not been interpreted under Maryland law, the prosecutor retained qualified immunity. In contrast, Defendants do not, and cannot, point to any statutory provision preventing them from providing pretrial detainees federal due

process rights. Moreover, they should not benefit from any lack of interpretation because this statute bars all judicial proceedings. *See* S.C. Code § 24-3-80.

Defendants also reject that this Court's precedents in *Incumaa* and *Dilworth* provide adequate notice because they postdate November 2013 and do not involve Safekeepers.[5] That would be true if these were announcements of new rules, but they are not. That they postdate *some* of Defendants' unconstitutional conduct is irrelevant, because, as Defendants note, Supreme Court precedent supplies notice. Opp. Br. 21 (citing *Lefemine*, 672 F.3d at 298).

For instance, *Incumaa* affirms that *Wilkinson* requires inmates on indefinite administrative segregation to receive notice and an opportunity to challenge that restriction. *Incumaa*, 791 F.3d at 532. This Court explains that the "Supreme Court has made clear that [the inmate] is entitled to periodic review: 'administrative segregation may not be used as a pretext for indefinite confinement of an inmate. Prison officials must engage in some sort of periodic review of the confinement of

[5] Defendants assert that *M.C. ex rel. Crawford v. Amrhein*, 598 F. App'x 143 (4th Cir. 2015), is similar because the cases cited by Mr. Williamson "either post-dated the events or were from outside the circuit." Opp. Br. 22. But *Amrhein*, deciding what process is required before performing sex assignment surgery, bears no semblance to this case. The court noted that "citations to [other] state statutes and cases [we]re unpersuasive because many postdate 2006, when the surgery took place, and *all come from outside South Carolina*, where the surgery took place." *Id.* at 149 (emphasis added). In contrast, Mr. Williamson cites long-standing Supreme Court precedent and uniform decisions by the courts of appeals.

such inmates.'" *Id.* at 534 (citing *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983)). Moreover, in evaluating SCDC's classifications review process for inmates (unavailable to Mr. Williamson), this Court found that it "encourage[d] 'arbitrary decisionmaking' and risk[ed] the possibility that the [SCDC review committee] may single out [the inmate] 'for an insufficient reason.'" *Id.* (citing *Wilkinson*, 545 U.S. at 226). This was especially concerning "in light of [the inmate's] nearly perfect disciplinary record while in security detention." *Id.* Thus, *Incumaa* applies clearly established Supreme Court precedent.

Likewise, *Dilworth* re-affirms that procedural due process protections afforded to inmates apply to pretrial detainees. 841 F.3d at 251 ("pretrial detainees like Dilworth may not be placed in disciplinary segregation without due process."). Specifically, this Court noted that the "elements of due process in prison disciplinary proceedings" applies to pretrial detainees and "were established by the Supreme Court in *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974)." *Id.* at 253. The key to *Dilworth* is that pretrial detainees may be placed temporarily in administrative segregation if a disciplinary hearing is later afforded. *Id.* at 255 (citing *Hewitt*, 459 U.S. at 463–465). But "all of this presupposes that there is, in fact, a hearing in connection with the final imposition of disciplinary action." *Id.* *Dilworth* demonstrates that the due process supplied to inmates provides background

principles for pretrial detainees. *See also Martin*, 849 F.2d at 870. And there is no reason to limit *Dilworth* from applying to Safekeepers who are pretrial detainees.

Liability for violating clearly established law "do[es] not require a case directly on point," *Mullenix*, 136 S. Ct. 305, and officials cannot escape liability by trampling fundamental due process rights, *Clem*, 284 F.3d at 553. Without correction, this Court will sanction providing pretrial detainees with less process than inmates receive.

III. DEFENDANTS ARE INDIVIDUALLY RESPONSIBLE FOR PROVIDING DUE PROCESS PROTECTIONS TO PRETRIAL DETAINEES.

Defendants further claim that none of them are individually responsible for depriving Mr. Williamson of his due process rights as an alternative ground for affirmance. Opp. Br. 25–28. The district court did not decide this issue. *Id.* at 25. And this Court should not resolve genuine issues of material fact in the first instance. Defendants also argue that the statute's silence prohibits them from providing a due process hearing and places the onus on Mr. Williamson's attorney to submit an unsolicited petition to the Governor. Opp. Br. 26.

Defendants do not rebut the five pages of record citations[6] showing that they each had a hand in violating Mr. Williamson's due process rights. *See* Br. 13–16;

[6] In support, Defendants cite only the Deering affidavit, but that document causally connects Defendants to the offending actions. Opp. Br. 27.

JA 608 (Sheriff Carroll admitting that "Chief Deputy David Deering, Deputy Solicitor General David Miller, Governor Nikki Haley, and Director Bryan Stirling had some involvement in Plaintiff being placed within [SCDC]."). Sheriff Carroll conceded that he sought the Safekeeping Orders. Opp. Br. 27. Director Stirling approved deficient Safekeeper applications. Br. 14–15. Solicitor Miller assisted in seeking the Safekeeping Order. Br. 16. And Ms. Charlton and Mr. Rogers are responsible for discipline and the conditions at the jail facilities that housed Mr. Williamson. Br. 15, 17. These issues of material fact preclude summary judgment.

Defendants contend that because neither the statute nor EO #2000-11 requires a hearing, they are only required to give "sufficient notice" to Mr. Williamson's criminal attorney to fulfill their due process duties. Opp. Br. 26. They claim that Appellant's criminal defense attorney "was certainly not denied the opportunity to respond to the application"[7] and "could have submitted a response to the Governor

[7] The notice to Mr. Ness was constitutionally invalid because he had no "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). "The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). The Deering affidavit was notarized at 2:08 p.m. on November 22, 2013: the same day the Safekeeper order issued. JA 203, 206. The notice does not state that a submission to the Governor would be permitted or considered. JA 210. Moreover, it is unclear that Mr. Ness was counsel of record then. *See* Dkt. *Williamson*, No. 2013A0620100094, http://bit.ly/2CVo9zb (showing defendant attorney as Ms. Singletary on November 14, 2013).

if he chose to do so"—even though no statutory or executive authority supports that assertion. Opp. Br. 26. Yet, Defendants' interrogatory responses claimed that "to challenge his confinement as a Safekeeper … the proper procedure would be the filing of a petition for writ of habeas corpus."[8] JA 620–621. Defendant Carroll also admitted that S.C. Code 24-3-80 does not set forth a process within the statute to challenge the placement of a pretrial detainee on Safekeeper status. JA 393–394. Defendants must concede that nothing in the statute or EO #2000-11 prohibits them from providing a hearing as to whether the Safekeeper Order should be sought, or one in front of Director Stirling prior to making his recommendation.

Collectively, Defendants also claim that as the Governor ultimately issues the Safekeeper Order, they cannot be responsible for seeking it, approving deficient Safekeeper applications, and breaking their own regulations to keep Mr. Williamson in solitary confinement. Opp. Br. 27. But the statutory scheme places the responsibility for fact-finding with the Defendants. Sherriff Carroll must provide the reason why the individual should be held as a Safekeeper and prepare the arrest warrants for the application. JA 248, EO #2000-11 § 2. Solicitor Miller was required to concur with the transfer. *Id.* And Director Stirling was required to review the "documents submitted and *any other relevant facts*" and submit a

[8] Of course, pursuing a § 1983 claim challenging due process violations and pretrial segregation placement is proper. *See, e.g.*, *Dilworth*, 841 F.3d at 250.

recommendation to the Governor. *Id.* (emphasis added). And Defendants were required to give a notice of the Safekeeper application to Mr. Williamson's attorney. *Id.* Thus, the statutory scheme confers fact-finding obligations and thus the accompanying due process obligations on Defendants.

Moreover, there are issues of material fact as to the Defendants' involvement in this process that should be decided by the district court. Sheriff Carroll admits that he "made the decision to seek the Safekeeping Order as well as to request the periodic renewals." Opp. Br. 27. Director Stirling admits he reviews the applications and makes recommendations to the Governor. Opp. Br. 27. Noticeably, Solicitor Miller does not deny that he helped seek the initial Safekeeper placement but denies any role in seeking the renewals of the Safekeeping Order. Opp. Br. 28.

These Defendants claim that as long as their decisions were not "erroneous, invalid or arbitrary," they are not liable. Mr. Williamson, however, showed that each of these decisions to seek the Safekeeper Order and the renewals are procedurally defective. To obtain a Safekeeping Order, the application must include "a certificate prepared by the circuit solicitor indicating concurrence with the transfer." JA 248. It is undisputed that the Safekeeping Order only includes a certificate of service of the application; it does not contain a certificate concurring in the transfer. JA 231. Additionally, as the Safekeeper Order can only be renewed up to 90 additional days, each subsequent renewal of the Safekeeping Order was unlawful and in error. Still,

Sheriff Carroll sought the renewals and Director Stirling rubber-stamped the facially inadequate Safekeeper applications.

Mr. Williamson has shown that there are genuine issues of fact that the district court did not decide. This Court should remand the case for that determination.

IV. DEPUTY SOLICITOR MILLER IS NOT ENTITLED TO PROSECUTORIAL IMMUNITY BECAUSE SAFEKEEPING ORDERS ARE EXCLUDED FROM THE JUDICIAL PROCESS.

Defendants ague that in "presenting the [proposed Safekeeper] order to Judge Early for his consideration, Solicitor Miller was acting in his role as a prosecutor" and should be afforded absolute immunity. Opp. Br. 29. Yet, Defendants claim that the one case that addresses whether absolute immunity applies to Safekeeper Orders, *Allen v. Lowder*, 875 F.2d 82 (4th Cir. 1989), is inapplicable because unlike in *Allen*, criminal charges were pending against Mr. Williamson at the time of the order. Opp. Br. 29. But that distinction is not important because there is no link between the Safekeeping Order and any pending criminal charge. Indeed, Solicitor Miller admits that he was not involved with the criminal case until months later. JA 200.

Defendants' reliance on *Dababnah v. Keller-Burnside*, 208 F.3d 467 (4th Cir. 2000) (Motz, J. concurring), is similarly misplaced. There, law enforcement seized property when it took a fugitive into custody. *Dababnah*, 208 F.3d at 469. During a bond hearing in open court, the prosecutor moved for an order authorizing the seizure and detention of that property. *Id.* This Court held that "the issuance of the

court order in this case was 'unquestionably a judicial act.'" *Id.* at 470. This Court noted that by resorting to the judicial process other safeguards protected the defendant's rights, including potential judicial sanctions and that Dababnah was present in court when the request was made. *Id.* Judge Motz explained that the court order was in furtherance of the prosecutorial function: the prosecutor "requested the order to further evidence-gathering investigative activities, and the judge understood that it was to be so used." *Id.* at 473.

That is not the case here. *First*, no law authorizes a court to issue a Safekeeping Order or a prosecutor to seek one. The only mention of judicial process in the statute explains that no detainee "shall have a right or cause of action" for being a Safekeeper. S.C. Code § 24-3-80. Further, EO #2000-11 explicitly makes Safekeeping Orders the domain of the executive branch. *Second*, Solicitor Miller did not seek the order in open court as part of a criminal case. It was done ex parte with no notice to Mr. Williamson or his counsel. *Third*, the Safekeeper Order does not further any investigative or prosecutorial functions—it imposes punishment for a separate act without process. As a result, the Safekeeper procedure is not intimately linked to the judicial phase and prosecutorial immunity is improper.

V. MR. WILLIAMSON'S ACTION IS NOT MOOT.

Appellees claim that Mr. Williamson's action is moot because he did not seek nominal or compensatory damages and he has already been released from

Safekeeper custody as requested. Opp. Br. 30–31. The district court properly ignored this argument—it is meritless.

"Pro se complaints are held to less stringent standards than those drafted by attorneys." *Martin v. Cox*, 36 F.3d 1093 (4th Cir. 1994). "Courts are obligated to 'liberally construe[ ]' pro se complaints, 'however inartfully pleaded,'" *Booker*, 855 F.3d at 540 (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)) (permitting unpleaded claims to proceed). And a failure to request compensatory and nominal damages does not make a claim moot. *See, e.g.*, *Bryan v. Capers*, 2007 WL 2116452, at *3 (D.S.C. July 19, 2007), *aff'd*, 252 F. App'x 546 (4th Cir. 2007) (reasoning that a *pro se* plaintiff's complaint can still be construed to include compensatory and nominal damages when only asking for punitive damages and any additional relief).

Mr. Williamson, *pro se*, requested punitive damages as well as any "additional relief deemed just, proper, and equitable." JA 73. Because he has made out a meritorious case, this Court should liberally interpret Mr. Williamson's request for additional relief to include compensatory and nominal damages.

CONCLUSION

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

Respectfully submitted,

s/ Jeff P. Johnson

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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 5,310 words and therefore complies with the type-volume limitation of Rule 32(a)(7)(B) and (C).

Dated: March 2, 2018

/s Jeff P. Johnson
Jeff P. Johnson

CERTIFICATE OF SERVICE

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

Dated: March 2, 2018

s/ Jeff P. Johnson
Jeff P. Johnson