No. 19-2624

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RODERICK JOHNSON,
Plaintiff-Appellant,

v.

PENNSYLVANIA DEPARTMENT OF CORRECTIONS, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the
Middle District of Pennsylvania, No. 4:18-CV-01924
Before the Hon. Matthew W. Brann, District Judge

OPENING BRIEF OF APPELLANT RODERICK JOHNSON

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This case concerns "the clear constitutional problems raised by keeping prisoners . . . in near-total isolation from the living world, in what comes perilously close to a penal tomb." *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (statement of Sotomayor, J., respecting denial of certiorari) (internal quotations and citations omitted).

Notwithstanding Roderick Johnson's exemplary prison disciplinary record, he languished in solitary confinement for nearly 20 years. Defendants—prison officials and the Department of Corrections ("DOC") that employs them—subjected him to this regime despite their knowledge that isolation devastates the mind and body. In fact, Defendants' disregard for Johnson was so complete that they continued to inflict solitary confinement upon him for years even after their only conceivable rationale for doing so—his capital conviction and sentence—evaporated when a Pennsylvania post-conviction court vacated both and ordered a new trial.

Throughout, Defendants rubber-stamped Johnson's interminable isolation. For the first eighteen years of Johnson's ordeal, Defendants justified his solitary confinement with an erroneous interpretation of a regulation requiring the isolation of prisoners scheduled to be executed within sixty *days*. After Johnson's conviction and death sentence were overturned, Defendants defended their intransigence by claiming that he remained under an "active death sentence" in light of their appeal

of the post-conviction order, pressing an argument that this Court called "meritless and disappointing." *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 562 n.72 (3d Cir. 2017).

Before and after the *Williams* decision issued, Johnson appealed to Defendants to put an end to his unexamined solitary confinement. They refused and Johnson eventually sued, alleging that his nearly two decades of isolation without penological justification violated the Eighth Amendment's prohibition on cruel and unusual punishment and the Fourteenth Amendment's guarantees of procedural and substantive due process.

The district court threw out all of Johnson's claims on Defendants' motion to dismiss. Adopting Defendants' argument that the Commonwealth's appeal of the post-conviction order left Johnson with an "active" death sentence, the district court found *Williams* inapplicable. It then concluded that two decades of solitary confinement is neither atypical nor significant, and therefore did not entitle Johnson to any process, whether substantive or procedural. The district court thought Johnson's Eighth Amendment claim was doomed by *Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988), a decision resolving a facial challenge from a bygone era.

As Johnson alleged, two decades of penologically purposeless, unchallengeable solitary confinement amounts to "horrific torture" that inflicted "irreversible damage" upon him. Such conduct plainly states Eighth and Fourteenth

Amendment claims. The district court's order granting Defendants' motion to dismiss for failure to state a claim should be vacated.

JURISDICTIONAL STATEMENT

Johnson brought this civil rights action under 42 U.S.C. § 1983. App'x 33-43. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. On May 7, 2019, the district court entered a final order dismissing all claims. App'x 1, 17. Johnson moved for and was granted an extension of time during which to file a notice of appeal, which he timely filed on July 11, 2019. App'x 18, 19. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court erred in dismissing Johnson's procedural due process claim when *Williams*, 848 F.3d at 576, recognized a liberty interest in avoiding death row isolation for those prisoners whose death sentences have been vacated, and Defendants continued to reflexively renew Johnson's solitary confinement for years after his death sentence and conviction were vacated. App'x 41; Dkt 30 at 5-6; App'x 13-14.

2. Whether the district court erred in dismissing Johnson's procedural due process claim when *Williams*, 848 F.3d at 564-66; *Wilkinson v. Austin*, 545 U.S. 209, 224, 226 (2005), and *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000), make clear that decades of solitary confinement inflicting the perils of extreme isolation creates a liberty interest regardless of the status of Johnson's death sentence, yet Defendants automatically renewed Johnson's isolation notwithstanding his exemplary prison record. App'x 41; Dkt 36 at 3; Dkt 30 at 6-8; App'x 13-14.

3. Whether the district court erred in dismissing Johnson's Eighth Amendment claim when the scientific consensus, recognized by this Court in *Palakovic v. Wetzel*, 854 F.3d 209 (3d Cir. 2017) and *Williams*, 848 F.3d at 567, and known to Defendants, establishes that prolonged isolation causes grave physical and

psychological harms, and Johnson alleged that his two-decade solitary confinement had injured him in the expected ways. App'x 36-38; Dkt 30 at 8-11; App'x 9.

4. Whether the district court erred in dismissing Johnson's substantive due process claim when Defendants' rote renewal of Johnson's penologically purposeless solitary confinement for two decades shocks the conscience. App'x 41; Dkt 30 at 6-8; App'x 13-14.

5. Whether defendants are entitled to qualified immunity on any damages claim in light of the clarity of precedent, Johnson's allegation that Defendants knew that their conduct was unlawful, and the obvious nature of the constitutional violations. Dkt 30 at 11-12; Dkt 36 at 5-6; App'x 10; App'x 15.

6. Whether Johnson's declaratory claims are moot when there is a "reasonable likelihood" that Johnson will once again be subjected to the perils of extreme isolation, even-short term solitary confinement can inflict grave damage, *Williams*, 848 F.3d at 566, and such additional unlawful conduct may evade judicial review. App'x 39-40.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. On October 10, 2019, oral argument was heard in *Porter v. Sec'y Pa. Dep't of Corr.*, No. 18-3505 (3d Cir.), which raises several related issues.

STATEMENT OF THE CASE

I. Factual Background.

A. Johnson's Isolation and its Pernicious Effects.

Roderick Johnson was placed in solitary confinement on Pennsylvania's death row in 1998. App'x 30; App'x 86. From that date forward, Johnson's prison disciplinary record was "exemplary." App'x 49. Nonetheless, his isolation was

rubber-stamped every 90 days. App'x 38; App'x 49-51; App'x 53; App'x 69; App'x 79; Dkt 36 at 8; Dkt 40 at 2. As a result, he remained in solitary confinement until well after his conviction and death sentence were vacated, a period spanning almost twenty years. App'x 30; App'x 1.

Throughout this extraordinary duration, Johnson endured "horrific torture," Dkt 52 at 4, under conditions this Court has described as inflicting "the perils of extreme isolation," *Williams*, 848 F.3d at 574. For 22-24 hours a day, Johnson was confined to a single-occupant cell. App'x 36. In that cramped room, he ate all of his meals and emptied his bowels. *Id*.

Johnson was permitted to leave his cell—in handcuffs—only after submitting to a humiliating strip search and only under limited circumstances. App'x 36-37. Up to two hours a day, Johnson was permitted to take "recreation" without exercise equipment in a "dog kennel style cage" smaller than a compact parking spot. App'x 36; Dkt 37 at 5; *see Davis v. Ayala*, 135 S. Ct. 2187, 2208 (2015) (Kennedy, J., concurring) (noting solitary cells are "no larger than a typical parking spot"); Neb. Mun. Code § 55-740(b)(2) ("Compact parking stalls . . . shall be eight feet in width and 16 feet in depth."). He was authorized to conduct legal research in a three-foot by four-foot "cage." App'x 37. Three times a week, Johnson was offered a shower. App'x 36. And he was permitted occasional non-contact visits with loved ones. App'x 36.

There was no exposure to positive stimuli to counterbalance this social isolation. Johnson could not participate in the religious studies offered to general-population prisoners. App'x 36-37. Nor was he permitted to benefit from the educational opportunities afforded to general-population prisoners. *Id*. The music programs available to other prisoners were also denied to Johnson. App'x 36. In sum, Johnson's sensory deprivation and social isolation were near complete.

This unrelenting desolation has caused "irreversible damage." App'x 37. Johnson suffers from severe anxiety, depression, hopelessness, and suicidal impulses. App'x 38; Dkt 35 at 3. He endures obsessive-compulsive disorder, panic attacks, paranoia, and bipolar mood shifts. App'x 38. He struggles with insomnia and nightmares. Dkt 35 at 3. Johnson will require "lifetime therapy" to heal. App'x 31; Dkt 40 at 2. He has also experienced cognitive decline as exemplified by short-term memory loss and a difficulty with concentration. Dkt 35 at 3. And Johnson fears that his prolonged solitary confinement will leave him with additional physical scars. Dkt 36 at 8.

The extreme solitude and sensory deprivation that Johnson endured stand in marked contrast to the conditions experienced in general population, App'x 36-37; Dkt 37 at 3-5, including by the more than 5,300 people serving life without parole sentences for murder. *See* App'x 39; Samantha Melamed, *Racial disparities plague Pennsylvania's life-without-parole system—but can it be fixed?*, PHILA. INQUIRER,

Sept. 18, 2018 (noting there are more than 5,300 lifers in the DOC). Prisoners in general population regularly socialize with each other. Dkt 37 at 4-5; *see also Williams*, 848 F.3d at 563. They eat together in a communal dining room. *Id*. They may take communal classes, worship together, partake in group sports activities, and are eligible for a variety of skilled jobs with higher pay. App'x 36-37, App'x 48; *see also Williams*, 848 F.3d at 563. They are allowed congregate outdoor exercise daily and have access to weights and other equipment. Dkt 37 at 5. They are also allowed contact visits and have no limit on the amount of phone calls they can place. *See Williams*, 848 F.3d at 563.

B. Johnson's Solitary Confinement is Automatically Renewed Every 90 Days For Two Decades.

Every 90 days, prison officials automatically renewed Johnson's isolation. App'x 38; App'x 49-51; App'x 53; App'x 69; App'x 79; Dkt 36 at 8; Dkt 40 at 2; *Williams*, 848 F.3d at 562. Each time, the outcome of the "hearing" was predetermined: Johnson's solitary confinement would be extended. App'x 38; App'x 49-51; App'x 53; App'x 69; App'x 79; Dkt 36 at 8; Dkt 40 at 2. These reflexive renewals did not include an assessment of Johnson's conduct in prison, his deteriorating mental health, or even the necessity of continued solitary confinement. App'x 38; App'x 49-51; App'x 53; App'x 69; App'x 79; Dkt 36 at 8. That is because prior to November 18, 2019, it was Defendants' policy to hold all death-sentenced prisoners in perpetual solitary confinement. Pa. Dep't of Corr. Policy 802

§ 1(B)(1)(j). They claim this policy was mandated by 61 Pa. Cons. Stat. § 4303, a regulation requiring only that death-sentenced prisoners be isolated from general population "[u]pon receipt of the [death] warrant," which cannot be issued more than 60 days immediately preceding execution. As a result, Defendants followed this procedure of rote renewals in Johnson's case for twenty *years*, including subsequent to two events that modified the already constitutionally infirm status quo. App'x 30.

First, Johnson's conviction and death sentence were vacated. App'x 37; App'x 83. As the Supreme Court of Pennsylvania noted, confidential informant George Robles was the "the linchpin to the Commonwealth's case" against Johnson. App'x 93. Several years after trial, however, Johnson discovered that the Commonwealth had concealed multiple police reports suggesting that the "linchpin" had inculpated Johnson in exchange for extraordinary benefits in pending criminal cases. App'x 87-89; App'x 93.

In post-conviction proceedings, Johnson alleged that the Commonwealth had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose this material exculpatory evidence. App'x 89. In July of 2015, a state habeas court, emphasizing the "volume" of undisclosed evidence suggesting "bias," granted Johnson's petition, vacated both his conviction and capital sentence, and awarded him a new trial.[1] App'x 83; App'x 90.

[1] Johnson is currently a pretrial detainee at Berks County Jail. Docket Sheet at 2

Second, in February of 2017—by which point Johnson had endured almost 19 years in solitary confinement, including a year and a half since his conviction and death sentence were vacated—this Court issued a consolidated opinion holding that "there is a constitutionally protected liberty interest that prohibits the State from continuing to house inmates in solitary confinement on death row after they have been granted resentencing hearings, without meaningful review of the continuing placement." *Williams*, 848 F.3d at 552.

Notwithstanding these watershed events, both of which Johnson repeatedly raised as a basis to transfer him to general population, Defendants continued to automatically renew his solitary confinement. App'x 38; App'x 49-51; Dkt 36 at 8; Dkt 40 at 2. In fact, it was not until January 2018, nearly a month after the Supreme Court of Pennsylvania affirmed the vacatur of Johnson's conviction and capital sentence, App'x 83, that Defendants finally relented and transferred him to general population. App'x 30; App'x 45. By that point, 2.5 *years* had elapsed since Johnson had been granted a new trial, and 11 months had passed since this Court's decision in *Williams*. In total, he spent 10,926 days in solitary confinement despite a near-perfect disciplinary record. App'x 30; App'x 38; App'x 49.

(Confinement Information), *Commonwealth v. Johnson*, No. CP-06-CR-0000118-1997 (Pa. Ct.C.P. Berks). His retrial is scheduled to commence on January 13, 2020. *Id.* at 2 (Calendar Events). The Commonwealth is no longer seeking the death penalty. *Id.* at 46 (Commonwealth's Mot. to Withdraw Death Penalty Certification).

II. Procedural History

A. Johnson Files a Verified Complaint.

In May of 2018, Johnson, proceeding pro se, filed a verified complaint pursuant to 42 U.S.C. § 1983 against John Wetzel, the Secretary of the DOC; Robert Gilmore, the Superintendent of SCI-Greene; unnamed death row personnel; and the DOC itself. App'x 29-44.

Johnson claimed that, as a result of being subjected for two decades to the isolating and dehumanizing conditions of solitary confinement, he suffers from severe mental illness. App'x 38. Defendants, Johnson asserted, were "on notice of the adverse effects of long term solitary confinement," but remained deliberately indifferent to the plight of prisoners enduring it. App'x 37-38. Beyond its cruelty, Johnson asserted that his solitary confinement served no penological purpose because he "pose[d] no greater threat to any other persons . . . the ordinary operation of the institution . . . or its security than any other inmates in the general population." App'x 38. Instead of meaningful reviews, for twenty years Johnson received only "perfunctory and rote" Program Review Committee ("PRC") hearings that ignored his excellent behavior, deteriorating mental health, that his death sentence and conviction had been vacated years earlier, and even this Court's decision in *Williams*. App'x 37-39.

In light of this persistent misconduct, Johnson claimed that Defendants had knowingly violated the Eighth Amendment's prohibition on conditions that amount to cruel and unusual punishment and the Fourteenth Amendment's substantive and procedural due process guarantees.[2] App'x 39-43. Defendants' conduct was also incompatible, Johnson asserted, with this Court's holding in *Williams*. App'x 37. As relief, he sought damages, a declaratory judgment, and "life time therapy." App'x 31.

B. Defendants Move to Dismiss Johnson's Complaint.

Defendants moved to dismiss all claims. Dkt. 29. Johnson's procedural due process claim, they argued first, was inconsistent with this Court's decision in *Williams*. Dkt 30 at 4-6. Reprising an analysis this Court called "meritless and disappointing," *Williams*, 848 F.3d at 561 n.72, Defendants argued that Johnson "was not in the position of [the *Williams*] prisoners" because the Commonwealth's appeal of the order for a new trial rendered that "PCRA relief … *inactive*" but Johnson's death sentence "*active* for purposes of dictating his housing within the Department," Dkt 30 at 6 (emphasis added). Defendants also asserted that, in light of their appeal of the post-conviction order, Johnson lacked a liberty interest entitling him to challenge his solitary confinement. Dkt 30 at 6-8.

[2] Johnson also raised an equal protection claim, App'x 39; App'x 42-43, which he does not press on appeal.

Defendants argued that Johnson's Eighth Amendment claim was foreclosed by *Peterkin v. Jeffes*, 855 F.2d 1021, 1032-34 (3d Cir. 1988), which held in response to a facial challenge that "the totality of the conditions on Pennsylvania's death rows [does not] constitute punishment grossly disproportionate to the severity of the crime[s]." Dkt 30 at 10-11. Johnson's substantive due process claim, Defendants argued, was better addressed under the Eighth Amendment framework. Dkt 30 at 7-8. And Defendants asserted that qualified immunity shielded them from liability for damages on all claims. Dkt 30 at 11-12.

C. The District Court Grants Defendants' Motion to Dismiss.

The district court acknowledged the "harsh" conditions Johnson endured in solitary confinement for two decades, but granted Defendants' motion to dismiss. App'x 4, 6. Johnson's Eighth Amendment claim, the court found, challenged conditions "substantially similar to those that the Third Circuit found tolerable in *Peterkin*" in 1988. App'x 9. As a result, the court felt "compel[led] . . . to conclude that Johnson ha[d] failed to state an Eighth Amendment claim." App'x 6. The court noted, however, that "[t]he Third Circuit may wish to revisit *Peterkin* in light of the recent advances in social sciences, recent advanced [sic] in our understanding of the impact that prolonged isolation has on an individual, and the evolving standards of decency that mark the progress of a maturing society." App'x 9 (internal quotation marks and citation omitted).

With respect to Johnson's procedural due process claim, the district court concluded that "Johnson was serving an active capital sentence at all times during his confinement within the capital unit" due to the Commonwealth's appeal of the PCRA court's order. App'x 14. The court accordingly found *Williams* inapplicable. App'x 14-15. Johnson did not otherwise have a protected liberty interest, the court concluded, because "it cannot be said that [his] conditions presented a significant and atypical hardship." App'x 15. For this reason, Johnson's substantive due process claim failed, too. App'x 13-15. The court also found that the Defendants were entitled to qualified immunity on all claims. App'x 10, 15.

After the district court dismissed Johnson's claims with prejudice, App'x 16-17, this timely appeal followed, App'x 18-21.

STANDARD OF REVIEW

This Court "exercise[s] plenary review of a district court's order granting a motion to dismiss." *Hassen v. Gov't of Virgin Islands*, 861 F.3d 108, 114 (3d Cir. 2017). In doing so, this Court must "accept all factual allegations as true and determine whether 'under any reasonable reading of the complaint, the plaintiff may be entitled to relief.'" *Furgess v. Pennsylvania Dep't of Corrections*, 933 F.3d 285, 288 (3d Cir. 2019) (quoting Fed. R. Civ. P. 12(b)(6)). In reviewing pleadings filed by a *pro se* litigant, this Court has recognized a "special obligation to construe [such

pleadings] liberally." *Ricks v. Shover*, 891 F.3d 468, 473 (3d Cir. 2018) (quoting *Zilich v. Lucht*, 981 F.2d 694, 694 (3d Cir. 1992)).

SUMMARY OF ARGUMENT

1. Defendants violated Johnson's right to procedural due process. *Williams* recognized that "inmates on death row whose death sentences have been vacated have a due process right to avoid continued placement in solitary confinement." 848 F.3d at 576. Because Johnson's death sentence was vacated in 2015, he was entitled to meaningful review of the necessity for continued solitary confinement. That the Commonwealth appealed the vacatur is "simply irrelevant" to the liberty interest inquiry. *Id.* at 561 n.72. Indeed, Johnson's continued isolation was even more egregious than that in *Williams* because both Johnson's death sentence *and* underlying conviction had been vacated while Defendants continued to prolong his solitary confinement. Before Johnson could be resentenced at all, the Commonwealth had to prove its case against him at a new trial.

Irrespective of the status of Johnson's death sentence, however, Johnson's nearly 20 years in solitary confinement created a liberty interest. Properly compared to conditions in general population, Johnson's isolation easily constituted an atypical and significant hardship sufficient to trigger a liberty interest. But Johnson's two decades long solitary confinement is so egregious that it is atypical and significant even compared to death row. Evaluated against either baseline, Johnson was entitled

to regular, meaningful reviews of the necessity of further isolation. Instead, Defendants automatically renewed his solitary confinement every 90 days for two decades notwithstanding Johnson's excellent prison record.

2. Defendants violated the Eighth Amendment in two ways. First, Defendants inflicted cruel and unusual punishment on Johnson by subjecting him to nearly two decades of solitary confinement. The scientific consensus—recognized by this Court in *Palakovic v. Wetzel*, 854 F.3d 209 (3d Cir. 2017) and *Williams*, 848 F.3d 549, and known specifically to Defendants—is that prolonged solitary confinement exposes prisoners to a substantial risk of serious physical and psychological harm. Johnson suffers from psychological and physical symptoms long associated with solitary confinement, and Defendants refused to remove him despite their knowledge that such extraordinary isolation constitutes a grave and dangerous deprivation of basic human needs. *Peterkin v. Jeffes* does not control. For one thing, it is a facial holding of limited relevance to Johnson's as-applied challenge. And, even if it were apposite, *Peterkin* no longer comports with the Eighth Amendment because the standards of decency have evolved radically since this Court decided that case over three decades ago.

Second, Defendants imposed on Johnson nearly 20 years of solitary confinement without penological purpose. Given Johnson's exemplary disciplinary record, there was no legitimate reason to keep him in isolation for decades. After

Johnson's sentence and conviction were vacated, Defendants' continued isolation of him became even less defensible.

3. Defendants also violated Johnson's right to substantive due process, because their solitary confinement of Johnson for 20 years, which Johnson could not challenge, which was not justified by any penological rationale, and which injured Johnson profoundly, shocks the conscience.

4. Defendants are not entitled to qualified immunity on any claim. That it was unconstitutional to inflict nearly two decades of solitary confinement on a model prisoner who suffers from mental illness, including for more than two years following the vacatur of Johnson's death sentence and conviction, has been clearly established for years, and Johnson alleged that Defendants knowingly violated the law. Even if the caselaw of this Court, the Supreme Court, and this Court's sister circuits did not provide ample notice—and it did—Defendants would not have needed to open a case book to know that their conduct was unlawful in light of the obvious nature of the constitutional violations they inflicted for two decades.

5. Johnson's claims for declaratory relief remain live. If Johnson should be convicted at his retrial, there is a reasonable likelihood that Defendants will once again subject him to an unconstitutional solitary confinement regime. In light of this Court's recognition that even short-term isolation can inflict grave damage, *Williams*, 848 F.3d at 566, further unlawful conduct may evade judicial scrutiny.

Under these circumstances, Johnson's claims are not moot—rather, they are "capable of repetition, yet evading review." *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999).

ARGUMENT

I. Johnson Stated A Procedural Due Process Claim.

Johnson alleged that his two-decade solitary confinement created a liberty interest entitling him to the protections of the due process clause, but that Defendants offered him sham reviews rather than what was called for in light of the "torture" he endured—meaningful consideration of the necessity of prolonging his dangerous and interminable solitary confinement. App'x 37-39. He is correct in all respects.

A. Johnson Had A Liberty Interest In Avoiding Death Row Isolation.

Prisoners have a due process liberty interest in "freedom from restraint which . . . imposes *atypical and significant hardship* on the inmate in relation to the ordinary incidents of prison life." *Williams v. Sec', Pa. Dep't of Corr.*, 848 F.3d 549, 559 (3d Cir. 2017) (citing *Griffin v. Vaughn*, 112 F.3d 703, 708 (3d Cir. 1997)). To determine whether prison conditions constitute atypical and significant hardship, this Court follows a two-step inquiry, examining: "(1) the duration of the challenged conditions; and (2) whether the conditions overall imposed a significant hardship in relation to the ordinary incidents of prison life." *Williams*, 848 F.3d at 560 (citing

Shoats v. Horn, 213 F.3d 140, 144 (3d Cir. 2000)). As Johnson alleged, Dkt 36 at 3, 6, 12, his two-decade solitary confinement easily satisfies this test.

1. *Williams* Recognizes That Johnson Was Entitled To "Regular And Meaningful" Opportunities to Contest His Solitary Confinement Once The PCRA Court Vacated His Conviction And Death Sentence Because The Exercise Of Appellate Rights Is "Simply Irrelevant" To The Constitutional Analysis.

In *Williams*, this Court recognized that "inmates on death row whose death sentences have been vacated have a due process right to avoid continued placement in solitary confinement on death row, absent . . . meaningful protections." 848 F.3d at 576. Therefore, once a prisoner has "been granted a new sentencing hearing," *id.* at 553 n.4, solitary confinement cannot be inflicted without "*regular and meaningful* review of their continued placement on death row," *id*. at 576 (emphasis original). Johnson was not merely "granted a new sentencing hearing"—his entire *conviction* was vacated by the PCRA court. App'x 83.

Defendants argue that *Williams* is inapplicable because the Commonwealth appealed the post-conviction order tossing out Johnson's conviction and sentence. Dkt 30 at 5-6. The *Williams* court—which rejected the DOC's assertion that the *Williams* plaintiffs' exercise of appellate rights warranted further unexamined solitary confinement—called that argument "meritless and disappointing." 848 F.3d at 561 n.72. And rightfully so. The *Williams* court defined "vacated" without any reference to appeals or the future prospect of re-imposing a death sentence:

"'Vacated' as used throughout this opinion refers to situations where a defendant has initially been sentenced to death, but has subsequently been granted a new sentencing hearing." *Id.* at 553 n.4. *Williams* does not assert, for example, that a liberty interest arises after a prisoner's death sentence is vacated so long as the state does not appeal that decision. Nor does it maintain that a liberty interest arises once the appellate process has run its course. Nor does it hold that a liberty interest arises only at the conclusion of a re-sentencing proceeding that imposes a sentence other than death. *Williams* simply declares that once a prisoner's death sentence has been vacated, a liberty interest arises. Vacatur alone—*not* vacatur plus some undefined quantum of future appellate review—triggers the liberty interest. *Id.* at 576.

Thus, the Commonwealth's "exercise of their rights to appellate review is simply irrelevant to [this Court's] assessment of the constitutionality of [Johnson's] conditions on confinement." *Id.* at 561 n.72. That the Commonwealth, not Johnson, appealed here does not transform a losing position into a winning one. Under Pennsylvania's Rules of Appellate Procedure, the *Williams* plaintiffs' appeals of their convictions had the same effect as the Commonwealth's appeal in this case. *See* 210 Pa. R. App. P. § 1701(a) ("after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit may no longer proceed further in the matter."). The rules of procedure do not distinguish between appeals by criminal defendants and appeals by the Commonwealth—both pause

enforcement of the underlying order. The *Williams* plaintiffs, like Johnson, could not be resentenced until the completion of the appellate process. This Court found the rules of procedure "simply irrelevant" to the liberty interest inquiry in *Williams*, 848 F.3d at 561 n.72, and there is no reason to find otherwise here.[3]

Here, the vacatur of Johnson's conviction makes Defendants' rules-of-appellate-procedure grounded argument even weaker than it was in *Williams*. In this case, the PCRA court granted Johnson a new trial—*i.e.*, not just a new sentencing hearing. If under *Williams*, a new sentencing hearing triggers a due process liberty interest in avoiding death row isolation without regard to the initiation of an appeal, surely a new trial does, too.

The district court's description of Johnson's death sentence as "active and viable" in light of the Commonwealth's appeal, App'x 14, not only disregards *Williams* but also strains logic. There was not a single day during the relevant time period—the 2.5 years between the PCRA court's vacatur and Johnson's removal from death row—when Johnson could be executed in accordance with Pennsylvania

[3] Subsequent to *Williams*, the Eastern District of Pennsylvania had occasion to examine the issue in *Hall v. Wetzel*, No. 17-CV-4738, 2018 WL 1035780 (E.D. Pa. Feb. 22, 2018). There, the court granted a preliminary injunction to a prisoner whom the DOC refused to remove from death row while the vacatur of his death sentence was pending on appeal. *Id.* at *4. Although the DOC defendants made the same argument as they do here, the district court concluded that *Williams* was "on all fours" with the case before it, finding it "self-evident" that Hall was "all but guaranteed to succeed on the merits," and calling prison officials' refusal to move Hall "somewhat perplex[ing]." *Id.* at *7.

law. A post-conviction court—examining Johnson's conviction under a standard of review deferential to the Commonwealth, *see Commonwealth v. Spotz*, 84 A.3d 294, 311 (Pa. 2014)—held that Johnson's *conviction* (let alone death sentence) was unconstitutional. From that moment forth, Johnson's death sentence was neither "active" nor "viable" under any reasonable construction of those terms. Only had the Commonwealth obtained a complete reversal from the Pennsylvania Supreme Court could Johnson's death sentence once again be considered "active and viable." As *Williams* explained, "the vacatur of [Johnson's] death sentence made *life* [his] to lose." 848 F.3d at 575 n.180 (emphasis in original).

2. Regardless Of The Status of Johnson's Death Sentence and Conviction, The Atypical and Significant Conditions He Endured Entitled Him To Meaningful Process.

Even assuming Johnson had an "active and viable" death sentence following the PCRA court's vacatur—and he did not—Johnson's nearly 20 years of isolation nonetheless constitute an "atypical and significant hardship" sufficient to trigger a liberty interest.[4]

Williams compels this conclusion in two ways. First, *Williams* made clear that the "atypical and significant hardship" analysis must be conducted in comparison to

[4] Nowhere did *Williams* say that individuals with "active and viable" death sentences have *no* liberty interest in avoiding death row confinement. The *Williams* court only stated that any liberty interest is distinct from those whose sentences have been vacated. 848 F.3d at 553 n.2.

the baseline conditions in general population—not those on death row. There, this Court explicitly rejected the DOC's argument that death row itself is the appropriate baseline comparison for the liberty interest inquiry:

> [T]he standard Defendants propose is inconsistent with *Shoats*. There, we did not limit our focus to the conditions of solitary confinement, even though the DOC might think it appropriate to subject inmates evidencing violent tendencies such as Shoats' to that level of deprivation. Rather, we judged Shoats' condition "in relation to the *ordinary* incidents of prison life" or relative to "'*routine*' prison conditions." The terms "ordinary" and "routine" direct us to use a general metric (the general population), not one specific to a particular inmate.

848 F.3d at 564. The relevant comparator for assessing Johnson's liberty interest is thus conditions in the general population.

Properly evaluated as such, Johnson's 20 years of sensory deprivation and dehumanizing isolation surely constitute an atypical and significant hardship giving rise to a liberty interest. Like the plaintiffs in *Williams*, Johnson endured "extreme social isolation," *id.*, where "[e]ven the most basic activities of daily living . . . [were] done in utter solitude" "accompanied only by the emptiness within the walls of [his] cell[]," *id.* at 563. This "poses a grave threat to well-being," *id.* at 569, and "can trigger devastating psychological consequences, including a loss of a sense of self," *id.* at 563. This Court had no difficulty concluding that these conditions amounted to an atypical and significant hardship. *Id.* at 564, 569.

The district court erred in suggesting *Williams* cuts the other way. Though *Williams* did "recognize[] a consensus among other circuit courts that, when an inmate is serving a capital sentence, 'confinement on death row [i]s not a significant or atypical hardship for them,'" App'x 14 (quoting *Williams*, 848 F.3d at 569), it did not maintain that these out-of-circuit views were persuasive. Rather, this Court was simply explaining the DOC's argument—which was rooted in three cases from other circuits, two of which are over thirty years old—that death row was the baseline.[5] 848 F.3d at 569. Notably, the district court omitted the last sentence of the relevant paragraph, which confirms that this Court was not adopting the position: "[For prisoners with vacated death sentences] liberty interests are thus not comparable to those of inmates with active death sentences that *arguably* require continued placement on death row." *Williams*, 848 F.3d at 569 (emphasis added).

But even if Johnson's alleged status as a "capital case prisoner" did make death row solitary confinement the baseline, that would not end the liberty interest analysis. This Court must still look at the duration for which such conditions of confinement have been imposed. *Id.* at 560. Johnson's extraordinary 20 years in

[5] In one of these cases, *Parker v. Cook*, 642 F.2d 865, 874 n.7 (5th Cir. 1981), the cited statement that "it appears that no liberty interest is affected when [death-sentenced inmates] are placed in administrative segregation" was dicta. That case concerned a non-death sentenced inmate who was transferred to administrative segregation after being suspected of selling favors to other inmates. *Id.* at 866. The court made clear that it was "concerned with transfers within a particular prison" and that "initial assignments . . . are not at issue." *Id.* at 876.

solitary confinement stands out as "atypical and significant," even if death row is the baseline, in light of the extreme isolation that he endured. *See Wilkinson v. Austin*, 545 U.S. 209, 233 (2005) (noting the conditions at Ohio State Penitentiary—which the *Williams* Court characterized as *less* restrictive than SCI Greene, 848 F.3d at 564—were atypical and significant "under any plausible baseline").

Second, *Williams* confirmed that penological justifications for isolation, such as purported prisoner dangerousness, are irrelevant to the liberty interest analysis (although, of course, can be taken into account when meaningful process is afforded). 848 F.3d at 565-66. There, the DOC had argued that prisoners with vacated death sentences were "still liable to have the death penalty re-imposed," and thus "present the same security and safety issues" as those with active death sentences. *Id*. at 565. This Court rejected that argument, recognizing that *Wilkinson* "counsels against weighing inmate dangerousness in determining whether Defendants' continued confinement of Plaintiffs on death row without meaningful review violated their liberty interests." *Id.* Penological justifications for solitary confinement, this Court made clear, are simply not part of the liberty interest inquiry. Rather, "it is the conditions themselves that determine whether a liberty interest is implicated and procedural protections must be in place to determine if the level of dangerousness justifies the deprivations imposed." *Id*. at 566 (quoting *Wilkinson*, 545 U.S. at 224). Here, Johnson endured "the perils of extreme isolation," *id.* at 574,

which "can be as clinically distressing as physical torture," *id.* (citation omitted) for two decades. Those conditions entitled him to procedural protections.

B. Johnson Was Denied Regular And Meaningful Evaluation Of The Necessity Of His Continued Placement In Solitary Confinement.

Because Johnson had a liberty interest in avoiding solitary confinement, he was entitled to "regular and meaningful" review of the necessity of continuing to subject him to dangerous isolation. "[M]eaningful" is the benchmark against which any question of adequate process is judged. *Williams*, 848 F.3d at 575-76. Periodic reviews are "not an inconvenient ritual intended to shelter officials from liability so that they may mechanically" renew solitary confinement. *Id*. Instead, they must serve as "guards against arbitrary decisionmaking." *Id*. at 576 n.182 (quoting *Wilkinson*, 545 U.S. at 226). Thus, Defendants owed Johnson a genuine opportunity to contest his continued isolation. *Id*. at 575-76.

Defendants did not come close to satisfying that requirement. Rather, the sham "hearings" offered to Johnson provided no opportunity for release from death row: "Plaintiffs could not even hope to be released based on prison PRC review because these pro forma assessments did not consider the necessity of their severe conditions of confinement." *Id*. at 562. Indeed, despite the fact that Johnson's conviction and sentence were vacated and he had an "exemplary" disciplinary record, the PRC "informed [him] that there was nothing [he] could do to change [his] custody level/classification." App'x 49. Rather than meaningfully reviewing

Johnson's solitary confinement, Defendants reflexively renewed his isolation every 90 days. App'x 49-51; App'x 69; App'x 79; *Williams*, 848 F.3d at 562. Such a "mechanical" ritual falls short of the constitutional minima—*i.e.*, "*regular and meaningful* review," including "a statement of reasons," "a meaningful opportunity to respond," and a genuine "hearing"—owed Johnson. *Williams*, 848 F.3d at 567 (emphasis in original).

II. Johnson Stated A Violation Of His Eighth Amendment Rights.

Prison officials must "provide humane conditions of confinement." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Eighth Amendment also prohibits prison officials from imposing punishment "without penological justification." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). As Johnson alleged, Defendants violated the Eighth Amendment in both respects.

A. Defendants Subjected Johnson to Inhumane Conditions of Confinement.

An Eighth Amendment conditions claim has two parts: an objective component (*i.e.*, was Johnson subjected to a sufficiently severe risk of harm?) and a subjective component (*i.e.*, were Defendants deliberately indifferent?). *Farmer*, 511 U.S. at 834.

To satisfy the objective prong, Johnson was required to allege, as he did, App'x 36-38; Dkt 35 at 3, that the deprivation to which he was subjected is "sufficiently serious" to "result in the denial of the minimal civilized measure of

life's necessities." *Farmer*, 511 U.S. at 834. This requirement may be satisfied with evidence that prison officials denied a "single, identifiable human need" such as physical or psychological health, social interaction, or environmental stimulation. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991); *see also Porter v. Clarke*, 923 F.3d 348, 368 (4th Cir. 2019) (characterizing "meaningful social interaction and positive environmental stimulation" as "basic human needs"). "Some conditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson*, 501 U.S. at 304. To meet the objective component, Johnson need only allege risk of future harm; actual injury is not required. *Helling v. McKinney*, 509 U.S. 25, 33 (1993); *see also Farmer*, 511 U.S. at 834. And the Eighth Amendment responds to "the evolving standards of decency that mark the progress of a maturing society." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

To satisfy the subjective prong, Johnson must allege, as he did, App'x 42; Dkt 36 at 5, that Defendants inflicted these deprivations with "deliberate indifference," *Farmer*, 511 U.S. at 834. A prison official is deliberately indifferent where he "knows of and disregards an excessive risk to inmate health or safety." *Id.* at 837.

"[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id.* at 842.

Knowledge of risk can be demonstrated by the fact that it was obvious. *Id.* The duration of the "cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Wilson*, 501 U.S. at 300. And the absence of a legitimate penological justification for challenged conduct permits the inference that prison officials were deliberately indifferent. *Hope v. Pelzer*, 536 U.S. 730, 737-38 (2002).

1. Defendants Exposed Johnson To A Substantial Risk of Serious Harm.

For nearly 20 years, Defendants subjected Johnson to brutal conditions in solitary confinement, including social isolation and sensory deprivation. By doing so, Defendants have deprived him of the basic human needs of psychological and physical health, social interaction, and environmental stimulation. These privations, individually and cumulatively, have injured Johnson, exposed him to a substantial risk of further serious harm, and are more than sufficient to satisfy the Eighth Amendment's objective component.

Justice Kennedy wrote of the "terrible price" imposed by solitary confinement. *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015). And with good reason: "[i]t is well documented that . . . prolonged solitary confinement produces numerous

deleterious harms." *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (collecting sources).

This Court recently recognized the "unmistakable conclusion" that solitary confinement "is psychologically painful, can be traumatic and harmful, and puts many of those who have been subjected to it at risk of long-term . . . damage." *Williams*, 848 F.3d at 566 (quoting Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 500 (1997)). This conclusion is supported by a "robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement." *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017). Indeed, "[t]here is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects." *Williams*, 848 F.3d at 566 (quoting Haney & Lynch at 531).

"Solitary confinement is strikingly toxic to mental functioning." *Id.* at 567 (quoting Haney & Lynch at 354). The conditions to which Johnson was subjected "can cause severe and traumatic psychological damage, including anxiety, panic, paranoia, depression, post-traumatic stress disorder, psychosis, and even a disintegration of the basic sense of self-identity." *Palakovic*, 854 F.3d at 225. Indeed,

"even a short time in solitary confinement is associated with drastic cognitive changes." *Williams*, 848 F.3d at 567.

But "the damage does not stop at mental harm." *Palakovic*, 854 F.3d at 226. Solitary confinement consistently results in physical harm as well. For example, isolation often precipitates a decline in neural activity and shrinks the hippocampus and amygdala, structures critical to decision-making, memory, and emotional regulation. *E.g.*, Dana G. Smith, *Neuroscientists Make a Case Against Solitary Confinement*, SCIENTIFIC AMERICAN (Nov. 2018);[6] Bruce S. McEwen, et al., *Stress Effects on Neuronal Structure: Hippocampus, Amygdala, and Prefrontal Cortex*, 41 NEUROPSYCHOPHARMACOLOGY 3 (2015). "[T]he lack of opportunity for free movement" in solitary is also "associated with more general physical deterioration. The constellations of symptoms include dangerous weight loss, hypertension, and heart abnormalities, as well as the aggravation of pre-existing medical problems." *Williams*, 848 F.3d at 568. Indeed, a study of 225,000 former prisoners found that survivors of solitary confinement were at a disproportionate risk of premature death when compared to prisoners generally. Lauren Brinkley-Rubinstein, et al., *Association of Restrictive Housing During Incarceration With Mortality After Release*, 2 JAMA NETWORK OPEN, 1, 5-6, 9 (Oct. 2019).[7] That is, research

[6] https://www.scientificamerican.com/article/neuroscientists-make-a-case-against-solitary-confinement.
[7] https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350.

consistently demonstrates that solitary confinement causes damage that is extreme compared to the harms experienced by prisoners in general population. *See also* Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. AM. ACAD. PSYCHIATRY & L. 406, 410 (2015).

What's more, it is now clear that solitary confinement's adverse effects do not stop once an inmate is removed from its harsh conditions. Rather, the devastating conditions of solitary confinement may continue to impact prisoners even decades after they are released into a less restrictive environment such as general population or the community. Terry A. Kupers, *The SHU Post-Release Syndrome: A Preliminary Report*, 17 CORR. MENTAL HEALTH REPORT 81, 92 (March/April 2016).

Despite Johnson's allegations that he had already experienced serious psychological and neurological injury, the overwhelming scientific consensus, and the district court's acknowledgment that Johnson's conditions were "undoubtedly harsh," the court nonetheless felt "compel[led]" by a three-decade old decision of this Court "to conclude that Johnson failed to state an Eight Amendment claim." App'x 6. However, the precedent to which the district court referred, *Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988), does not recommend such a result.

a. The District Court Misconstrued The Effect Of Peterkin.

For two reasons, *Peterkin* does not control. First, *Peterkin*'s holding was facial, and Johnson's challenge is as-applied. Second, *Peterkin* no longer aligns with

our society's standards of decency. The district court recognized this fact, noting that "[t]he Third Circuit may wish to revisit *Peterkin* in light of recent advances in social sciences, recent advanced [sic] in our understanding of the impact that prolonged isolation has on an individual, and the 'evolving standards of decency that mark the progress of a maturing society.'" App'x 9. On this point, though the district court's instinct was correct, its analysis was flawed—this Court has already effectively recognized that prolonged solitary confinement does not reflect contemporary standards of decency.

i. Peterkin's Facial Holding Does Not Control Johnson's As-Applied Challenge.

Peterkin upheld the conditions of confinement on Pennsylvania's death row against a facial challenge. 855 F.2d at 1032. As such, its conclusion that those conditions did not violate the Eighth Amendment meant only that they did not violate the Eighth Amendment *for everyone*. *See United States v. Stevens*, 559 U.S. 460, 472 (2010). *Peterkin* thus did not address Johnson's claim that, as applied to him for nearly two decades, death row isolation was unconstitutional. *Peterkin*'s facial holding does not speak to whether these conditions are constitutional for someone like Johnson who suffers from mental illness, App'x 38; Dkt 35 at 3, whose conviction and death sentence have been vacated, App'x 83, and who was kept in solitary for almost 20 years. The district court thus erred in concluding that *Peterkin* tied its hands in this case.

ii. *Peterkin* No Longer Comports With The Eighth Amendment.

Even if *Peterkin* were apposite, its holding no longer aligns with our society's standards of decency and thus does not comport with the Eighth Amendment. This Court has effectively recognized as much.

The Eighth Amendment's objective component responds to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This is because the standard for what is cruel and unusual "necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change." *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting)). With respect to the conditions of confinement found constitutional in *Peterkin*, the basic mores of society have since changed. This fact is reflected by the condemnation of prolonged solitary confinement from actors as varied as the scientific establishment, the leading correctional associations, the federal judiciary, the international community, and state and federal prison authorities.

Consider first the scientific consensus reflected above. It is now beyond serious dispute that placing a prisoner in prolonged solitary confinement often causes grave, even permanent, physical and psychological injury.

In recent years, the leading correctional associations have also called attention to the unique dangers of prolonged solitary confinement. For example, the Association of State Correctional Administrators ("ASCA"), of which Defendant Wetzel is currently the President[8], has repeatedly emphasized the harm caused by solitary. ASS'N OF STATE CORR. ADM'R AND LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., REFORMING RESTRICTIVE HOUSING: THE 2018 ASCA-LIMAN NATIONWIDE SURVEY OF TIME-IN-CELL 6 (October 2018) (recognizing the "national and international consensus that restrictive housing imposes grave harms" and asserting that "prison officials around the United States are finding ways to solve the problem of restrictive housing")[9]; THE LIMAN PROGRAM, YALE LAW SCHOOL AND ASS'N OF STATE CORR. ADM'R TIME-IN-CELL: THE ASCA-LIMAN 2014 NATIONAL SURVEY OF ADMINISTRATIVE SEGREGATION IN PRISON 3-4 (August 2015) (outlining ASCA's efforts to reduce solitary over the years, including a special subcommittee in 2012 and the adoption of guidelines aimed at reducing isolation in 2013).[10] Likewise, the American Correctional Association ("ACA") has stated that "[p]rolonged isolation of individuals in jails and prisons is a grave problem" and that the ACA is committed to an "ongoing effort to limit or end extended isolation."

[8] https://www.cor.pa.gov/Pages/Secretary%20of%20Corrections.aspx.
[9] https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_restrictive_housing_revised_sept_25_2018_-_embargoed_unt.pdf.
[10] https://law.yale.edu/sites/default/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf.

Timothy Williams, *Prison Officials Join Movement to Curb Solitary Confinement*, N.Y. TIMES, Sept. 2, 2015. Corrections officials have also advocated against solitary's harms in the courts. For example, in 2015, sixteen "corrections directors and administrators with first-hand experience supervising solitary confinement units in prisons across the United States," including the former president of the ACA and ASCA, filed an *amicus* brief urging United States Supreme Court review of a decision blessing automatic solitary confinement for death-sentenced prisoners. *See* Brief of Amici Curiae Corrections Experts in Support of Petitioner at 1, 7, *Prieto v. Clarke*, 136 S. Ct. 319 (2015) (No. 15-21), 2015 WL 4720277. Their arguments included that solitary is "uniquely mentally and physically debilitating," *id.* at 12, and that "there is no penological justification for automatic and permanent confinement of death-sentenced inmates in extreme isolation," *id.*at 17.

Consistent with this scientific and professional consensus, numerous reforms have been occurring at both the state and federal level. *See generally* REFORMING RESTRICTIVE HOUSING, *supra* (describing continuing reduction of use of solitary confinement in the United States). At the state level, for example, comprehensive reforms focused on reducing solitary confinement and improving the conditions of such confinement are underway in a majority of states, including those within this circuit. *See* Press Release, State of N.J. Office of the Governor, Governor Murphy Signs Legislation to Restrict the Use of Isolated Confinement in New Jersey's

Correctional Facilities (July 11, 2019) (discussing new bill limiting solitary confinement to 20 days)[11]; Kyrie Greenberg, *Delaware ending prisoner isolation, improving mental health care as part of settlement*, WHYY, Sept. 22, 2016 (discussing Delaware's 2016 settlement which included a guarantee of 17.5 hours a week of unstructured recreation to inmates in solitary);[12] Brittany Hailer, *Were the 2015 Reforms on Solitary Confinement in PA Enough to Protect Vulnerable Inmates?*, PUBLIC SOURCE (Nov. 7, 2018) (discussing Pennsylvania's 2015 policy prohibiting inmates with serious mental illness form being confined to a cell for 22 hours a day).[13] Indeed, recently, the Pennsylvania DOC agreed to extend its 2015 reforms by halting the policy of automatically confining death-sentenced prisoners to solitary confinement. Settlement Agreement, *Reid v. Wetzel*, No. 18-cv-0176 (M.D. Pa. Nov. 15, 2019).[14] In recognition of the scientific consensus, that agreement includes "mental health evaluations . . . includ[ing] an inquiry by the appointed physicians into and assessment of the impact of long-term restrictive housing on each prisoner." Settlement Agreement, *supra* at 23.

[11] https://www.nj.gov/governor/news/news/562019/approved/20190711b.shtml.
[12] https://whyy.org/articles/delaware-ending-prisoner-isolation-improving-mental-health-care/.
[13] https://www.publicsource.org/were-the-2015-reforms-on-solitary-confinement-in-pa-enough-to-protect-vulnerable-inmates/.
[14] https://www.aclupa.org/sites/default/files/field_documents/reid_settlement_agreement_-_signed_with_exhibits.pdf

Those local changes are mirrored in reforms occurring all across the country. *See generally* REFORMING RESTRICTIVE HOUSING, *supra*; ASS'N OF STATE CORR. ADM'R AND LIMAN CTR. FOR PUB. INTEREST LAW AT YALE LAW SCH., WORKING TO LIMIT RESTRICTIVE HOUSING: EFFORTS IN FOUR JURISDICTIONS TO MAKE CHANGES (October 2018)[15] (describing continuing reduction of use of solitary confinement in the United States with representative examples from several states); *see also* Maurice Chammah, *Stepping Down from Solitary Confinement*, THE ATLANTIC, Jan. 7, 2016 (noting that since 2009 at least thirty states have undertaken such reforms);[16] U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING 72-78 (2016) (discussing state level reforms);[17] *see also id.* at 79-82 (discussing federal support of state-level reform efforts).

And at the federal level, following the U.S. Government Accountability Office's ("GAO") 2013 report on the Federal Bureau of Prison ("BOP")'s use of solitary, the BOP agreed to reduce its segregated population and submit to an independent assessment of its practices. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 13-429, IMPROVEMENTS NEEDED IN BUREAU OF PRISONS' MONITORING AND

[15] https://law.yale.edu/sites/default/files/documents/pdf/Liman/asca_liman_2018_workingtolimit.pdf.
[16] https://www.theatlantic.com/politics/archive/2016/01/solitary-confinement reform/422565.
[17] https://www.justice.gov/archives/dag/file/815551/download.

EVALUATION OF IMPACT OF SEGREGATED HOUSING 61-65 (2013).[18] Further, in January 2016, the U.S. Department of Justice issued a Report and Recommendation on solitary confinement, calling for a number of reforms aimed at reducing its use. U.S. DEP'T OF JUSTICE, *supra*, at 104-21.

The international community also recognizes the pernicious effects of solitary. In 2015, the United Nations promulgated Rule 43, which prohibits prolonged solitary confinement. G.A. Res. 70/175 ("the Nelson Mandela Rules") (Dec. 17, 2015); *see also* Rick Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. TIMES, Oct. 12, 2017 (describing Colorado's head of corrections' participation in the creation of the Mandela Rules). Still other international bodies have called for a reduction in the use of solitary confinement, including the European Committee for the Prevention of Torture, the Inter-American Commission on Human Rights, and the Commission on Safety and Abuse in America's Prisons. Appelbaum, *supra* at 413.

Judicial views have also evolved. As set forth above, Justices Kennedy, Breyer, and Sotomayor have expressed serious constitutional concerns about prolonged solitary confinement. But they are not alone. A growing number of courts, including this one, have recognized that prolonged isolation has devastating effects, and have found that subjecting inmates to long-term solitary can violate the Eighth

[18] https://www.gao.gov/assets/660/654349.pdf.

Amendment. *E.g.*, *Porter v. Clarke*, 923 F.3d 348, 356 (4th Cir. 2019) (holding prolonged solitary on death row violates Eighth Amendment, explaining that "Courts have [recently] taken note of th[e] extensive—and growing—body of literature . . . establishing the risks and serious adverse psychological and emotional effects of prolonged solitary confinement"); *Williamson v. Stirling*, 912 F.3d 154, 184 (4th Cir. 2018) (holding jail officials not entitled to qualified immunity after imposing isolation without process, explaining "our society has learned much about the physical and mental health impacts of solitary confinement"); *Wallace v. Baldwin*, 895 F.3d 481, 484-85 (7th Cir. 2018) (describing "negative psychological effects" of isolation, and holding that solitary subjected mentally ill prisoner to "imminent danger of serious bodily injury"); *Quintanilla v. Bryson*, 730 F. App'x 738, 740, 743-48 (11th Cir. 2018) (describing social isolation inherent to solitary confinement, holding that inflicting it without adequate procedure states due process and conditions claims); *Finley v. Huss*, 723 F. App'x 294, 299 (6th Cir. 2018) (holding that three-month solitary confinement of mentally ill prisoner states Eighth Amendment claim); *Palakovic v. Wetzel*, 854 F.3d 209, 225-26 (3d Cir. 2017) (holding that multiple 30-day solitary stints state Eighth Amendment claim, describing the "robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation"); *Williams*, 848 F.3d at 566 (holding that solitary without process violates Fourteenth

Amendment, explaining "[t]here is not a single study of solitary . . . last[ing] for longer than 10 days [that] failed to result in negative psychological effects"); *Shepard v. Quillen*, 840 F.3d 686, 691 (9th Cir. 2016) (reversing grant of summary judgment and denying qualified immunity because "horrors of solitary confinement" were sufficient to "chill a 'person of ordinary firmness' from complaining"); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) (holding that prisoner had liberty interest in avoiding extended isolation, emphasizing that "[p]rolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate's mind even after he is resocialized."); *Fogle v. Pierson*, 435 F.3d 1252, 1259-60 (10th Cir. 2006) (Eighth Amendment claim stated where prisoner in solitary confinement denied outdoor exercise); *Keenan v. Hall*, 83 F.3d 1083, 1089-91 (9th Cir. 1996) (Eighth Amendment claim stated where prisoner in solitary confinement denied outdoor exercise and exposed to unsanitary conditions, excessive noise, and constant illumination).

The landscape was much different in 1988. When *Peterkin* was decided more than three decades ago, this Court did not have the benefit of the now overwhelming scientific consensus that solitary confinement devastates the mind and body. Indeed, neither the Third Circuit nor the district court even *referenced* scientific evidence. *See Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988); *Peterkin v. Jeffes*, 661 F. Supp. 895 (E.D. Pa. 1987). Nor did the *Peterkin* court have the benefit of a resounding

chorus of correctional experts, jurists, and lawmakers condemning the practice. And this Court has all but explicitly recognized that *Peterkin* is confined to a bygone era. A fair reading of more recent cases like *Williams* and *Palakovic*—whose analyses reflect these evolutions—suggest that *Peterkin*'s holding no longer retains vitality.

2. Defendants Were Deliberately Indifferent.

As Johnson alleged, Dkt 36 at 6; App'x 37, Defendants knew well that prolonged solitary confinement exposed him to excessive risk of harm. First, Defendants have conceded personal knowledge of the risk to which they exposed Johnson. Second, the danger attendant nearly two decades of isolation is obvious, particularly in light of the human compulsion to interact with others and the widespread criticism of solitary confinement. Despite their knowledge that prolonged solitary is dangerous, however, Defendants refused to moderate the risk to Johnson by terminating his isolation.

a. Defendants' Polices And Admissions Demonstrate Actual Knowledge Of The Dangers They Imposed Upon Johnson.

Defendants cannot plausibly claim that they were unaware of the dangers of prolonged solitary confinement. First, department policy concerning solitary confinement—which Defendants implement and Defendant Wetzel himself established—demonstrates their actual knowledge that the practice is dangerous. To start, DOC policy regarding placement in solitary confinement states: "If the inmate

has a mental illness, the PRC should explore the feasibility of placing him/her into a Secure Residential Treatment Unit (SRTU), Residential Treatment Unit (RTU), or Special Needs Unit (SNU) as an alternative" to solitary confinement. Pa. Dep't of Corr. Policy 802 § 1(A)(5). A policy to remove mentally ill prisoners from solitary confinement surely reflects knowledge that isolation has dangerous effects on mental health. Likewise, DOC's criteria concerning release from solitary confinement demonstrates Defendants' knowledge of its perils. Among the "factors [that] shall be evaluated in making a decision to continue or release an inmate" from isolation are "length of time in [Restricted Housing Unit]." *Id.* at § 4(A)(3). That being isolated for an extended time is a reason to remove a prisoner from solitary confinement is an explicit acknowledgement that prolonged isolation is harmful.

Second, Defendant Wetzel has admitted his awareness of solitary confinement's grave risks. In litigation involving another prisoner, Wetzel indicated that he was familiar with "the work of Dr. [Craig] Haney, which sets forth at length the harmful effects of solitary confinement;" recognized "that 'long term' solitary confinement 'certainly could' have negative effects on mental health"; and acknowledged "that isolation should be used 'only . . . in very narrow circumstances when it's absolutely necessary.'" *Johnson v. Wetzel*, 209 F. Supp. 3d 776, 779 (M.D. Pa. 2016).

b. The Risks Of Solitary Confinement Are Obvious.

Even if this Court were to disregard the evidence demonstrating Defendants' actual knowledge, it must nonetheless conclude that defendants were deliberately indifferent. Put simply, it is obvious that subjecting Johnson to nearly 20 years of solitary confinement, during which he endured 22-24 hours alone in his cell and had almost no meaningful interaction with other human beings, risked "serious damage" to his mental and physical health. *See Palakovic*, 854 F.3d at 226; *see also e.g.*, *Shoatz v. Wetzel*, No. 2:13-cv-0657, 2016 WL 595337, at *9 (W.D. Pa. Feb. 12, 2016) (noting that it should not strike anyone "as rocket science" that solitary substantially increases the risk of mental illness). Besides the fact that all humans are "literally wired to connect to others," Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 296 (2018) (internal quotation marks omitted), the condemnation of solitary as unreasonably dangerous is so widespread that it is hard to imagine *anyone* could remain unaware of its risks. It is doubly difficult to imagine that a competent correctional official could remain unaware of the dangers of isolation, particularly in light of the scientific consensus, position statements from the leading correctional associations (including one that Defendant Wetzel leads), and the reforms occurring at both the state and federal level.

B. Defendants Subjected Johnson to Nearly 20 Years of Solitary Confinement Without Penological Justification.

Apart from their deliberate indifference to the inhumane conditions Johnson endured, Defendants violated the Eighth Amendment by subjecting him to punishment without "penological justification." *Rhodes*, 452 U.S. at 346; *see also Young v. Quinlan*, 960 F.2d 351, 364 (3d Cir. 1992) (solitary confinement violates the Eighth Amendment when it is "totally without penological justification"). In fact, Defendants' isolation of Johnson—including before his conviction was overturned—lacks *any* justification.

Defendants cannot argue that Johnson's isolation was compelled by any ongoing security rationale. Johnson has been a model prisoner for the entirety of his two decades long incarceration. App'x 38; App'x 49. And, as Johnson alleged, App'x 38, any argument that Johnson's death sentence was itself evidence of a security threat is baseless. Research demonstrates just the opposite: upon controlling for conditions of confinement, death-sentenced inmates are no more violent than their non-death-sentenced counterparts. Mark D. Cunningham et al., *Wasted Resources and Gratuitous Suffering: The Failure of a Security Rationale for Death Row*, 22 PSYCHOL. PUB. POL'Y & L. 185, 195 (2016). Indeed, Defendant Gilmore stated in 2015 that it had been his personal experience and the experience of the DOC generally that death-sentenced prisoners were no "more difficult to manage" or "aggressive" than a "normal inmate." App'x 48. No safety interest justified

Johnson's isolation. *See Mims v. Shapp*, 744 F.2d 946, 953 (3d Cir. 1984) ("The validity of the government's interest in prison safety and security as a basis for restricting the liberty rights of an inmate subsists only as long as the inmate continues to pose a safety or security risk.").

Likewise, Defendants cannot justify Johnson's nearly two decades of solitary confinement by relying on the Pennsylvania statute that purportedly requires housing death row inmates in solitary. *See* 61 Pa. Cons. Stat. § 4303. The text of that statute does not mandate solitary confinement until a death warrant is signed. *Id*. ("Upon receipt of the warrant, the secretary shall . . . keep the inmate in solitary confinement"). And a death warrant may not issue more than 60 *days* prior to execution. *Id*. at § 4302(a)(1). Johnson was held in solitary confinement for 182 *times* longer than the statute permits.

And finally, during Johnson's final 2.5 years of solitary confinement, his capital conviction—the reason he was placed in solitary in the first place—had been overturned. There was simply no reason to continue holding Johnson in isolation during that period.

III. Johnson Stated A Violation Of His Right To Substantive Due Process.

The substantive due process clause prohibits "certain government actions regardless of the fairness of the procedures used to implement them." *L.R. v. Sch. Dist. of Phila.*, 836 F.3d 235, 241 (3d Cir. 2016). Among the government conduct

that is forbidden by this clause is "that which shocks the conscience." *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998). Defendants' near 20 year isolation of Johnson does just that.

For nearly two decades, Defendants subjected Johnson to "extreme social isolation." *Williams*, 848 F.3d at 564. Defendants persisted in this conduct notwithstanding their knowledge that the deprivations they imposed risked devastating Johnson's mind and body. They persisted in this conduct notwithstanding Johnson's excellent prison record. And they continued to persist in this conduct until January 2018 notwithstanding the fact that their only conceivable justification—Johnson's murder conviction and death sentence—vanished more than two years prior.

Defendants' persistence in the face of this evidence does "more than offend some fastidious squeamishness or sentimentalism." *Rochin v. California*, 342 U.S. 165, 172 (1952). Rather, Defendants engaged in behavior—for nearly two decades—that is "too close to the rack and the screw to permit of constitutional differentiation." *Id.* Defendants' conduct is conscience-shocking.

IV. Defendants Are Not Entitled To Qualified Immunity On Any Claim.

Analyzing a qualified immunity defense requires a two-party inquiry. *Williams*, 848 F.3d at 557. First, this Court must ask whether a constitutional right has been violated. *Id.* Then, this Court "must decide if the right at issue was clearly

established when violated such that it would have been clear to a reasonable person that her conduct was unlawful." *Id.*

While courts are no longer required to address the two questions in that order, the Supreme Court has "recognized that it is often appropriate and beneficial to define the scope of a constitutional right" by asking first whether a violation has occurred. *Id.* at 558. Beginning with the constitutional question "'promotes the development of constitutional precedent' and is especially valuable 'with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable.'" *Id.* (quoting *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). Further, "defining rights when given the opportunity to do so not only inures to the benefit of potential plaintiffs, it also informs prison personnel and others about what is appropriate." *Id.* Addressing the constitutional violations in this case is especially important given "the salience of the underlying questions to the ongoing societal debate about solitary confinement." *Id.*

Here, because Defendants have violated Johnson's Fourteenth and Eighth Amendment rights, this Court must next determine whether those rights were clearly established. To clearly establish the law, existing precedent "need not perfectly match the circumstances of the dispute in which the question arises." *Id.* at 570. Indeed, "[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741

(2002)). This is because "[r]equiring that precedent and subsequent disputes rest on identical facts would license state actors to violate constitutional rights with impunity simply by varying some irrelevant aspect of constitutional violations." *Id.* Moreover, the "obvious cruelty" of a practice may provide fair warning that Defendants' conduct violated the constitution. *Hope*, 536 U.S. at 745.

A. Procedural Due Process Claim

Defendants are not entitled to qualified immunity on Johnson's procedural due process claim, because it has long been clearly established that it violates the Fourteenth Amendment to hold a prisoner in solitary confinement for decades without any procedural safeguards, including for years after his conviction and death sentence have been vacated.

In February 2017, this Court held in *Williams* that "it is now clearly established that inmates on death row whose sentences have been vacated have a due process right to avoid continued placement in solitary confinement on death row." 848 F.3d at 576. In July 2015, the PCRA court overturned Johnson's conviction and sentence and ordered a new trial. App'x 2; App'x 83. Because Johnson's death sentence was thus "vacated" as this Court used the term in *Williams*, *Williams* clearly established the violation in this case. Indeed, as soon as *Williams* was decided, Johnson began notifying Defendants of the decision in his grievances. App'x 58-62;

Dkt 36 at 3. Yet Defendants did not transfer Johnson to general population for nearly a year after *Williams* issued. App'x 45.

But Johnson's due process right was clearly established even if this Court finds *Williams* inapplicable. For one thing, the Supreme Court in *Wilkinson v. Austin* held that prisoners have a liberty interest in avoiding conditions of solitary confinement less restrictive than those endured by Johnson. 545 U.S. 209, 223-24 (2005). And, unlike in this case, the prisoners in *Wilkinson* were placed in solitary confinement because they posed security risks. *Id.* at 215. The Defendants here have never claimed that Johnson posed any such risk, and indeed, Johnson's disciplinary record is exemplary. App'x 38; App'x 49. If it is clearly established that prisoners who pose security risks have a liberty interest in avoiding solitary confinement, the same must be true for prisoners like Johnson who pose no such risk.

And this Court, too, has concluded that inmates who endured conditions substantially similar to Johnson's have a liberty interest in avoiding continued solitary confinement. In *Shoats v. Horn*, for example, this Court found that a prisoner isolated for eight years under restrictive conditions had a liberty interest. 213 F.3d 140, 144 (3d Cir. 2000). Johnson endured similar conditions for nearly 20 years—more than twice as long as the prisoner in *Shoats*. And in *Allah v. Bartkowski*, this Court found that a prisoner in solitary confinement for six years under restrictive conditions had sufficiently stated claims giving rise to a liberty interest in their

avoidance. 574 F. App'x 135, 138-39 (3d Cir. 2014) (per curiam). Johnson languished in comparably isolating conditions for more than three times as long.

That some of these cases do not involve death-row prisoners does not affect this Court's analysis, and the District Court was thus incorrect to grant qualified immunity based on "the consensus achieved by various circuit courts holding that confinement in capital units is not a significant or atypical hardship for death-sentenced prisoners." App'x 15. In *Williams*, this Court specifically relied upon "the scientific consensus and the recent precedent involving non-death row solitary confinement" because "[t]hose decisions advance our inquiry into the unique, yet analogous" situation on death row. 848 F.3d at 574. What's more, *Williams* explicitly analogized a non-death row prisoner's interest in avoiding extreme seclusion to a death row prisoner's liberty interest. *Id.* at 570 ("We agree that the interest in avoiding extreme seclusion in *Shoats* is analogous to Plaintiffs' liberty interest even though *Shoats* did not involve confinement on death row."). In any case, this Court "do[es] not require a case directly mirror[ing] the facts at hand, so long as there are sufficiently analogous cases that would have placed a reasonable official . . . on notice that his actions were unlawful." *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) (citations and internal quotation marks omitted).

Other circuits that have considered prolonged solitary confinement under conditions comparably isolating to those endured by Johnson have held that such

confinement gives rise to a liberty interest. *E.g.*, *Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 2000) (305 days); *Incumaa v. Stirling*, 791 F.3d 517, 531-32 (4th Cir. 2015) (20 years); *Wilkerson v. Goodwin*, 774 F.3d 845, 855, 857-58 (5th Cir. 2014) (two and one-half years); *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013) (thirteen years); *Isby v. Brown*, 856 F.3d 508, 524-29 (7th Cir. 2017) (eight years); *Kelly v. Brewer*, 525 F.2d 394, 396-98 (8th Cir. 1975) (three years); *Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014) (two years); *Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004) (500 days); *Aref v. Lynch*, 833 F.3d 242, 248-49, 257 (D.C. Cir. 2016) (five years). And Johnson endured the dangerous conditions of solitary confinement for nearly 20 years—two, three, even ten times the duration that gives rise to a liberty interest in other circuits.

Additionally, the conceded and obvious dangers attendant imposing years of isolation, provided Defendants with sufficient notice that it was unconstitutional to deprive Johnson of any opportunity to challenge the imposition of still more solitary confinement. *See Hope*, 536 U.S. at 745. That obvious constitutional violation was only amplified once Johnson's conviction was vacated and he had been granted a new trial.

B. Eighth Amendment Claim.

Defendants are not entitled to qualified immunity because the state of the law at the time of their conduct gave them ample warning that isolating a prisoner for

decades under restrictive conditions would violate the Eighth Amendment. Indeed, they needed to look no further than this Circuit's precedent. *Palakovic*, 854 F.3d at 226 (finding allegations "more than sufficient to state a plausible claim" that inmate's multiple 30-day stints in solitary under "inhumane conditions of confinement" violated the Eighth Amendment); *Allah*, 574 F. App'x at 138-39 (six years of solitary confinement in unsanitary conditions stated Eighth Amendment claim). None of the precedential decisions where this Court considered and rejected Eighth Amendment claims concerned prisoners who had been isolated for a length of time even remotely comparable to that which Johnson had endured. *E.g.*, *Griffin v. Vaughn*, 112 F.3d 703, 705-08 (3d Cir. 1997) (15 months); *U.S. ex rel. Tyrrell v. Speaker*, 471 F.2d 1197, 1201-02 (3d Cir. 1973) (eight months); *Ford v. Bd. of Managers of N.J. State Prison*, 407 F.2d 937 (3d Cir. 1969) (five days).

The fair warning of the Third Circuit cases is buttressed by "a robust 'consensus of cases of persuasive authority.'" *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (citation omitted). Other courts of appeals have held that placing prisoners in damaging conditions of solitary is harmful enough to violate the Eighth Amendment even when prisoners experience those conditions for only a few years, or even a matter of months or days—periods posing far less risk of harm than the nearly 20 years of solitary endured by Johnson. *E.g.*, *Fussell v. Vannoy*, 584 F. App'x 270, 271 (5th Cir. 2014) (per curiam) (holding that decades in solitary

confinement could constitute serious deprivation of a basic human need and therefore stated Eighth Amendment claim); *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 666 (7th Cir. 2012) (finding Eighth Amendment claim stated where prisoner languished for seven months in solitary cell and noting that "prolonged confinement in administrative segregation may constitute a violation of the Eighth Amendment . . . depending on the duration and nature of the segregation and whether there were feasible alternatives to that confinement"); *Walker v. Shansky*, 28 F.3d 666, 668-69, 673 (7th Cir. 1994) (reversing summary judgment, denying qualified immunity on Eighth Amendment claims related to 10-month solitary confinement); *Davenport v. DeRobertis*, 844 F.2d 1310, 1311-13 (7th Cir. 1988) (Eighth Amendment violated where prisoners held in solitary confinement for 90 days and noting that "isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage"); *Meriweather v. Faulkner*, 821 F.2d 408, 415 (7th Cir. 1987) (reversing dismissal and noting that confinement in administrative segregation for periods of up to five months "may constitute cruel and unusual punishment in violation of the Eighth Amendment"); *Keenan v. Hall*, 83 F.3d 1083, 1089-91 (9th Cir. 1996) (Eighth Amendment claim stated where prisoner in solitary confinement denied outdoor exercise and exposed to unsanitary conditions, excessive noise, and constant illumination for one year); *Fogle v. Pierson*, 435 F.3d 1252, 1259-60 (10th Cir. 2006) (Eighth Amendment

claim stated where prisoner in solitary confinement for almost three years denied outdoor exercise).

District court cases applying settled precedent from the Supreme Court and circuit courts provided additional notice to Defendants. *E.g.*, *Shoatz v. Wetzel*, No. 2:13-cv-0657, 2016 WL 595337, at *8 (W.D. Pa. Feb. 12, 2016) (denying summary judgment on Eighth Amendment claim because "[i]t is obvious that being housed in isolation in a tiny cell for 23 hours a day for over two decades results in serious deprivations of basic human needs."); *Ashker v. Brown*, No. C 09-5796, 2013 WL 1435148, at *5 (N.D. Cal. Apr. 9, 2013) (finding plaintiffs had stated Eighth Amendment claim alleging harms based on the "prolonged social isolation and lack of environmental stimuli" of 11 years of solitary confinement); *Morris v. Travisono*, 549 F. Supp. 291, 295 (D.R.I. Oct. 12, 1982) ("Cutting an individual off from all meaningful human contact after the reasons for such segregation no longer exist offends in a fundamental way contemporary standards of decency."), *aff'd*, 707 F.2d 28 (1st Cir. 1983).

Apart from the weight of legal precedent, depriving Johnson of meaningful social interaction and environmental stimulation by confining him in a 7 by 12 foot cell for at least 22 hours a day, seven days a week, 52 weeks a year, for decades is obviously cruel. That remarkable circumstance would provide any reasonable prison official with adequate notice that their conduct constituted cruel and unusual

punishment. *See Hope*, 536 U.S. at 745-46. Moreover, in addition to being obvious to a reasonable correctional officer, the cruelty of such long-term solitary confinement was specifically obvious to Defendant Wetzel. *E.g.*, *Palakovic*, 854 F.3d at 226; *see also Johnson*, 209 F. Supp. 3d at 777; *Shoatz*, 2016 WL 595337, at *8.

Peterkin changes none of this. As discussed above, *Peterkin*'s holding was facial; it did not address the circumstances of this case. And furthermore, as noted above, this Court's own caselaw provided Defendants with sufficient notice that *Peterkin* did not permit their conduct. The recognition of solitary confinement's devastating harms in *Palakovic*, 854 F.3d at 226 and *Williams*, 848 F.3d at 566-69, made clear that Johnson's nearly two decades of isolation was cruel and unusual, and that *Peterkin* did not authorize their conduct. Defendants had plenty of warning, and they are not entitled to immunity from suit on Johnson's Eighth Amendment claim.

C. Substantive Due Process Claim.

That it would shock the conscience to isolate Johnson from human interaction and environmental stimuli for 20 years notwithstanding the vacatur of his capital sentence and conviction should have been obvious to Defendants. *Hope*, 536 U.S. at 741; *Kane*, 902 F.3d at 195 ("[T]he right here is so 'obvious' that it could be deemed clearly established without materially similar cases."). Even without consulting a

casebook, Defendants had adequate notice that their conduct violated the substantive due process clause and are therefore not entitled to qualified immunity on this claim.

V. Johnson's Claim For Declaratory Relief Is Not Moot.

In addition to damages, Johnson sought declaratory relief on all claims. App'x 39-40. Defendants' eventual transfer of Johnson does not moot those claims.

There is no evidence in the record—or indeed elsewhere—that Defendants no longer impose solitary confinement. Should Johnson be convicted at his re-trial, he might once again be subjected to the injurious isolation regime that has already left him in need of "lifetime therapy." App'x 31; Dkt 40 at 2. That he would endure this isolation beyond the confines of death row does not lessen its psychological, physical, or constitutional impact.

Where, as here, there is a "reasonable likelihood" that Defendants might once again subject Johnson to the perils of extreme isolation, prison transfer does not moot an equitable claim because the injuries are "capable of repetition, yet evading review." *See, e.g.*, *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999). This is particularly so in light of this Court's recognition that even short-term solitary confinement can inflict grave damage. *Williams*, 848 F.3d at 566.

For that reason, even if this Court were to conclude that Defendants were entitled to qualified immunity, it must still answer the question whether Defendants' conduct violates the Constitution. As set forth above, it very plainly does.

CONCLUSION

For the aforementioned reasons, this Court should vacate the district court's order granting Defendants' motion to dismiss for failure to state a claim.

Dated: November 25, 2019

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: November 25, 2019

/s/ Daniel M. Greenfield
Daniel M. Greenfield

CERTIFICATE OF TYPE-VOLUME COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 12,956 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: November 25, 2019

/s/ Daniel M. Greenfield
Daniel M. Greenfield

CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2019, I electronically filed the foregoing *Opening Brief and Appendix Vol. I of Appellant* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 25, 2019

/s/ Daniel M. Greenfield
Daniel M. Greenfield

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

Dated: November 25, 2019

/s/ Daniel M. Greenfield
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CERTIFICATE OF VIRUS CHECK

Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using VIPRE Endpoint Security, version 79592, last updated November 25, 2019 and that no virus was detected.

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/s/ Daniel M. Greenfield
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