**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

# REPLY BRIEF OF APPELLANT RODERICK JOHNSON

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Roderick Johnson entered Pennsylvania's Capital Case Unit—more commonly known as death row—in 1998. App'x 30; App'x 86. On death row, Johnson endured the "horrific torture" inflicted by solitary confinement, including the mental illness and cognitive decline that accompanies long-term social and environmental isolation. Opening Br. 5. He remained there for two decades despite both an "exemplary" prison disciplinary record belying a sound penological justification for his torment, and two watershed events that called for—but did not result in—modification of the already-constitutionally-suspect status quo.

First, the Commonwealth's capital case against Johnson unraveled in 2015. App'x 83; App'x 90. Emphasizing the "volume" of undisclosed exculpatory evidence, a Pennsylvania Post Conviction Relief Act ("PCRA") court vacated Johnson's death sentence *and* conviction, and awarded him a new trial. App'x 83; App'x 90. That turn of events did not, however, alter Defendants' stance—the Pennsylvania Department of Corrections ("DOC") kept Johnson in solitary confinement on death row while he awaited trial. App'x 38

Second, nearly two years later, by which point Johnson had endured 19 years—a period spanning nearly half his life—in solitary confinement, this Court devoted pages to setting forth the scientific consensus regarding the "grave threat to well-being" and "long-term psychic harm" inflicted by prolonged isolation.

*Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 569 (3d Cir. 2017). It noted the pronounced "jurisprudential shift" that had taken place as a consequence of our increased awareness of the ravages of solitary confinement. *Id.* at 572. And it then held, in a case indistinguishable from Johnson's, 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." *Id.* at 552. In so holding, this Court emphasized that the DOC's rationale for continuing to hold prisoners like Johnson in solitary confinement was "meritless and disappointing." *Id*. at 561 n.72.

Still, and notwithstanding the fact that Johnson had been granted considerably more than a new sentencing hearing, the DOC refused to chart a new course; Johnson remained in solitary confinement on death row. App'x 30; App'x 38. In fact, Johnson was restrained there for nearly a month after the Supreme Court of Pennsylvania affirmed the new-trial order in an opinion emphasizing the unreliability of the "linchpin" of the Commonwealth's case. App'x 83; App'x 93.

All told, the DOC subjected Johnson to hazardous conditions for 10,926 days, a period that includes the 2.5 years after a court ordered a new trial, the eleven months that passed after this Court roundly rejected the DOC's rationale for extending Johnson's solitary confinement, and a month beyond the time when even

that absurd argument could be sustained. For years, Defendants ignored the obvious risks to which they exposed Johnson, each turn of events that further counseled an end to his prolonged isolation, and the revolution in the federal judiciary's approach to solitary confinement. Defendants' response to Johnson's arguments suggests a continued imperviousness to a changed factual and legal landscape.

First, Johnson argued that the Fourteenth Amendment procedural due process clause entitled him to meaningful reviews of his unrelenting isolation on two grounds: (1) as mandated by this Court's holding in *Williams*; (2) in light of its extraordinary duration, without regard to vacatur. Opening Br. 17-26. In response, Defendants do not bother to argue that Johnson received a single meaningful review—*i.e.*, one that could lead to his removal from solitary confinement—during the two decades they subjected him to desolation. They have thus waived any contrary argument on appeal. *See Warren G. ex rel. Tom G. v. Cumberland Cty. Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999) ("An issue is waived unless a party raises it in its opening brief.").

As to the arguments preserved by Defendants, the first is indistinguishable from the one that earned this Court's rebuke in *Williams*—*i.e.*, the exercise of appellate rights justified Johnson's mistreatment. *Williams*, 848 F.3d at 561 n.72. The second—*i.e.*, that Johnson does not have a liberty interest if *Williams* is

inapplicable—turns on Defendants' substantial mischaracterization of Third Circuit case law.

Second, Johnson argued that Defendants violated the Eighth Amendment in two ways: (1) by imprisoning him in solitary confinement for two decades despite their knowledge that doing so was dangerous; (2) by inflicting twenty years of isolation without a penological purpose. Opening Br. 26-45. Defendants do not dispute that prolonged solitary confinement inflicts severe psychological and physical injury. They do not dispute that they knew that to be the case. And they do not argue that a penological purpose necessitated his solitary confinement. This Court should enforce those waivers.

The arguments Defendants preserved must likewise be rejected. To start, *Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988), a case resolving a *facial class action* challenge to solitary confinement terms *at least* 75% *shorter* than Johnson's, is simply irrelevant to this as-applied, two-decade case. Even if *Peterkin* were relevant, it no longer comports with the "[j]urisprudential [s]hift" compelled by "scientific evidence of the harms of solitary confinement," *Williams*, 848 F.3d at 572-73, and Defendants concede that this Court is duty-bound to account for these evolving standards of decency. Appellee Br. 14. Faced with this evolution, the best Defendants can come up with is four unpublished, unpersuasive orders. Appellee Br. 16.

Responding to the absence of penological necessity for Johnson's two-decade solitary confinement, Defendants resort to a plea to be left to run their prisons without judicial oversight. Appellee Br. 17-18. But the days when prisoners were considered "slave[s] of the State," are long since passed, *Meachum v. Fano*, 427 U.S. 215, 231 (1976) (Stevens, J., dissenting), and thus "[t]here is no iron curtain drawn between the Constitution and the prisons of this country," *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

Third, Johnson explained why Defendants are not entitled to qualified immunity on any claim: (1) a robust body of binding precedent and out-of-circuit authority provided clear notice to halt or violate the Constitution; (2) in the alternative, it was blindingly obvious that their conduct was contrary to federal law. Opening Br. 46-56. Moreover, qualified immunity is seldom susceptible to resolution without discovery.

Defendants stake their claim to qualified immunity from Johnson's *Williams*-focused procedural due process claim on the fact that two district court orders—plus the decision below—reflect different interpretations of *Williams*; one court adopted Johnson's interpretation, whereas the other, which is pending on appeal, takes Defendants' view. Defendants also drop a footnoted citation to an unpublished habeas order they merely contend "seems" to support their position. Appellee Br. 29 n.4. That two district court decisions (one of which may be reversed) conflict does

not get even close to saying the law is unsettled. If that were the case, *no* law would ever be clearly established. And the unpublished habeas order is easily susceptible to an interpretation opposite the one Defendants put forth. Defendants do not argue that they are entitled to qualified immunity from Johnson's alternative procedural due process argument. Likewise, Defendants do not contest Johnson's argument that their conduct was an obvious violation of the procedural due process clause. Having waived those arguments, they must now wait for summary judgment to assert them. *Warren G.*, 190 F.3d at 84.

With respect to Johnson's Eighth Amendment claims, Defendants rely solely on *Peterkin* to claim entitlement to qualified immunity from Johnson's conditions of confinement claim. Appellee Br. 31-32. But that case is not on point and has been supplanted by relevant authority that Johnson cited and Defendants ignored. Again, they must now wait for summary judgment to assert immunity. *Warren G.*, 190 F.3d at 84.

Finally, Johnson asserted that his claim for declaratory relief was not mooted by his eventual release from solitary confinement because Defendants might once again confine him to prolonged isolation. Opening Br. 56. In response, Defendants deem that impermissibly speculative and call attention to reforms to death row that they have agreed to implement on a temporary basis. Appellee Br. 32-33. But if past is prologue, that Defendants might subject Johnson to solitary confinement should

he be convicted at retrial is anything but a remote possibility. Separately, Defendants' commendable intention to reduce the use of solitary confinement on death row is irrelevant to the mootness analysis for at least three reasons: (1) Defendants have not abolished solitary confinement throughout the DOC; (2) the agreement has yet to be fully implemented; and (3) the agreement is temporary.[1]

This Court should reverse.[2]

[1] Below and in his opening brief, Johnson pressed a substantive due process claim, and argued that it was not necessarily coextensive with his Eighth Amendment claims. App'x 43; Opening Br. 45-46. The district court and Defendants disagree. App'x 13-15; Appellee Br. 19-21. On further reflection, and in light of the arguable overlap among Johnson's substantive due process and Eighth Amendment claims, Johnson is now withdrawing his substantive due process claim.

[2] Defendants twice suggest that Johnson failed to timely file papers. Appellee Br. 4 (characterizing Johnson's brief in opposition as "untimely"); *id.* ("The Notice of Appeal was eventually filed"). This is false. Under the prison mailbox rule, Johnson's brief in opposition was timely. *Spencer v. Beard*, 351 F. App'x 589, 590 (3d Cir. 2009) (citing *Houston v. Lack*, 487 U.S. 266, 276 (1988)); *see also* Dkt 30; Dkt 36 at 16. Johnson sought and was granted an extension to file his Notice of Appeal, App'x 18, and he timely filed accordingly, App'x 19.

## ARGUMENT

### I. Johnson Had A Liberty Interest In Avoiding Solitary Confinement On Death Row Once His Conviction And Sentence Were Vacated By The PCRA Court.

#### A. Defendants' Argument That The Order Granting Johnson A New Trial Did Not Entitle Him To Meaningful Reviews Of The Necessity Of Continued Death Row Isolation Was Already Rejected By This Court In *Williams*.

In his opening brief, Johnson argued that *Williams v. Sec'y, Pa. Dep't of Corr.*, 848 F.3d 549 (3d Cir. 2017), compels reversal. Opening Br. 18-21. In *Williams*, confronted with prisoners in the same sentencing posture as Johnson, this Court held 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. Johnson did not simply have his death sentence vacated—his entire *conviction* was thrown out by the PCRA court. App'x 83.

Defendants do not contest that *Williams* established that a liberty interest in avoiding death row solitary arises once a prisoner has been granted a new sentencing hearing. Instead, they cling to the very argument this Court lambasted. Defendants' response goes as follows: They ignore the fact that the *Williams* plaintiffs appealed their post-conviction relief orders, placing them in the same sentencing posture as Johnson. They then argue *Williams* is inapplicable because the Commonwealth's appeal of Johnson's post-conviction relief order "reactivated [Johnson's] death

sentence" such that he "was not awaiting resentencing or re-trial" but was instead "awaiting the outcome of [the Commonwealth's] appeal." Appellee Br. 10. Defendants' approach is unsound for four reasons.

First, Defendants' argument is premised on their representation that the *Williams* plaintiffs were differently situated than Johnson. Appellee Br. 10-11. Defendants tell this Court that the *Williams* plaintiffs "remained in the CCU awaiting only resentencing and without an appeal effectuating a stay of their relief." Appellee Br. 10-11. But that is plainly false. As this Court explained, both of the *Williams* plaintiffs continued to appeal their convictions. 848 F.3d at 561 n.72. And—as Johnson pointed out and Defendants do not dispute—those appeals had the same effect as the Commonwealth's appeal in this case. Opening Br. 19-20. The Pennsylvania Rules of Appellate Procedure do not distinguish between appeals by criminal defendants and those by the Commonwealth: both stay enforcement of the underlying order. *See* 210 Pa. R. App. P. § 1701(a). The *Williams* plaintiffs were thus not "simply awaiting resentencing," Appellee Br. 13; they were, like Johnson, awaiting the completion of appellate review. Indeed, if there exists any "clear difference[] in sentencing posture," Appellee Br. 13, between Johnson and the *Williams* plaintiffs, it is that Johnson also had his conviction overturned by the PCRA court. Surely if a new *sentencing* hearing—after which the *Williams* plaintiffs

were certain to be remanded to the custody of the DOC—triggers a liberty interest, so too does a new *trial* entailing the very real possibility of acquittal.

Second, Defendants ignore the plain text of *Williams*. Defendants rely on that case to argue that the Commonwealth's appeal somehow reversed the PCRA court's vacatur and "reactivated [Johnson's] death sentence." Appellee Br. 10. But *Williams* held that formerly death-sentenced prisoners possess a liberty interest when they are "granted a new sentencing hearing," without reference to the content, duration, or outcome of the appellate process or re-sentencing proceeding. 848 F.3d at 552, 553 n.4. And, in any case, *Williams* expressly repudiated Defendants' argument, deeming it "meritless and disappointing" because subsequent appeals are "simply irrelevant" to the liberty interest analysis. 848 F.3d at 561 n.72. Rather, the PCRA court's order vacating Johnson's death sentence and conviction "made *life* [his] to lose." *Id*. at 575 n.180 (emphasis in original).

Third, Defendants' assertion that the Commonwealth's appeal "reactivated [Johnson's] death sentence" is divorced from reality. Appellee Br. 10. As an initial matter, of course, that's not how appeals work—they are not a do-over. But even more importantly, there was not a single day during the 2.5 years between the PCRA court's vacatur of Johnson's death sentence and his eventual removal from death row during which the Commonwealth could have executed him without committing

a capital crime. Johnson raised this, Opening Br. at 20, and Defendants' silence speaks volumes.

Fourth, Defendants point out that *one* other district court order—also pending on *de novo* review before this Court—incorporated their preferred interpretation of *Williams*. Appellee Br. 11-12 (citing *Porter v. Wetzel*, No. 17-cv-763, 2018 WL 5846747 (W.D. Pa. Nov. 8, 2018)). But prior to this Court's review, the *Porter* court's stance is entitled to no more weight than the district court's preliminary injunction order in *Hall v. Wetzel*, where the DOC argued in customary fashion that the Commonwealth's appeal of post-conviction relief rendered *Williams* inapplicable. No. 17-cv-4738, 2018 WL 1035780, at *7 (E.D. Pa. Feb. 22, 2018). That court deemed the DOC's position "perplex[ing]," explained that the case was, in fact, "on all fours" with *Williams*, and held it "self-evident" that the DOC had violated *Williams* by refusing to release Hall from solitary confinement during the pendency of the Commonwealth's appeal.[3] *Id.* at *6, 7.

*Williams* established that Johnson had a liberty interest entitling him to meaningful reviews of his solitary confinement once the PCRA order issued.

[3] One final point merits mention. Defendants repeatedly mischaracterize Johnson's argument as one claiming entitlement to "immediate release" from death row upon the issuance of the PCRA order. E.g., Appellee Br. 6. In fact, Johnson consistently asserted only that the PCRA order entitled him to meaningful reviews of the continued necessity of solitary confinement. E.g., Opening Br. 14.

Defendants' argument to the contrary, already repudiated by this Court in 2017, has not improved with age.

### B. Regardless Of The Status of Johnson's Death Sentence and Conviction, The Extreme Conditions He Endured For Two Decades Entitled Him To Meaningful Process.

In his opening brief, Johnson argued that even if this Court were to conclude that he had an "active" death sentence following the reversal of his sentence and conviction, his two-decade solitary confinement would nonetheless amount to an atypical and significant departure from the ordinary incidents of prison life, thus entitling him to meaningful process. Opening Br. 21-25. In *Williams*, this Court made clear that the baseline comparator for such an analysis is general population. 848 F.3d at 564 (citing *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000)). Properly evaluated as such, Johnson explained, his 20 years of solitary confinement diverged radically from those "'routine' prison conditions," *id*., against which Johnson's confinement was to be judged. Opening Br. 22. But even compared to the conditions on death row, Johnson's social isolation and sensory deprivation were atypical and significant in light of their extreme length. Opening Br. 22-23.

Rather than meaningfully engage with Johnson's argument, Defendants blatantly mischaracterize the inconvenient controlling authority he cited and, instead, hang their hat on two out-of-circuit cases. Neither is persuasive, both are distinguishable, and one may have been overruled *sub silentio*.

First, Defendants badly misrepresent dicta in *Williams*. They contend *Williams* established that for prisoners with active death sentences, continued confinement on death row does not trigger a liberty interest. Appellee Br. 9-10. But the language Defendants rely on is cherry-picked. They omit the rest of the quoted paragraph, which reads: "[The *Williams* plaintiffs'] liberty interests are thus not comparable to those of inmates with active death sentences that *arguably* require continued placement on death row." 848 F.3d at 569 (emphasis added). Without that omission, the dicta Defendants latch onto stands solely for the proposition that prisoners with and without active death sentences have different liberty interests in avoiding solitary confinement. The former group are *automatically* entitled to meaningful review of their isolation, and the latter group are not; for those with an active death sentence, the liberty interest question can only be answered on a case by case basis. *See id.* Said differently, no one-size-fits-all analysis is possible and, thus, courts must, at the very least, take into account conditions of confinement and duration in determining whether a prisoner with an active death sentence is entitled to meaningful reviews of his solitary confinement. *See id*.

Second, Defendants direct this Court to *Wilkinson v. Austin* in an attempt to secure a favorable baseline comparator for prisoners with active death sentences. Appellee Br. 9. In *Wilkinson*, of course, the Supreme Court declined to command a baseline against which atypicality and significance must be measured, leaving that

question for other courts. 545 U.S. 209, 223 (2005). But Defendants gain nothing from that misdirection because the Third Circuit has already answered the question: general population is the baseline. *Williams*, 848 F.3d at 564. Moreover, even if death row were the baseline, the extreme restrictions and duration of Johnson's solitary confinement would entitle him to meaningful process. Opening Br. 22-23.

Finally, Defendants cite to *Prieto v. Clarke*, 780 F.3d 245, 254 (4th Cir. 2015) and *Rezaq v. Nalley*, 677 F.3d 1001, 1012 (10th Cir. 2012), to suggest that death row prisoners lack any liberty interest in avoiding the harsh conditions of solitary confinement. Appellee Br. 9. But those cases are not persuasive. As an initial matter, neither is binding. Moreover, it is reasonable to think that *Prieto v. Clarke* is no longer good law. In *Porter v. Clarke*—which Defendants pass over—the Fourth Circuit held that automatic death row solitary confinement violates the Eighth Amendment. 923 F.3d 348, 356 (4th Cir. 2019). It would be surprising if conditions amounting to cruel and unusual punishment could constitute an ordinary incident of prison life. *See, e.g.*, *Gillis v. Kitscher*, 468 F.3d 488, 495 (7th Cir. 2006) (reaching the "inevitable conclusion" that cruel and unusual conditions must also amount to atypical and significant departure from the ordinary incidents of prison life); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996), *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998) ("We suggest that if [the district court] finds conditions in the IMU that violate the Eighth Amendment, the transfer to the IMU

would impose 'atypical and significant hardship.'"). With respect to *Rezaq*, the language Defendants quote explains the Tenth Circuit's own idiosyncratic procedural due process test that considers "four potentially relevant, nondispositive factors." 677 F.3d at 1012. It says nothing about the liberty interest analysis in this Court. Finally, both cases predate *Williams* and at least some of the "jurisprudential shift" recognized therein.

Even if this Court were to conclude that Johnson had an active death sentence while the Commonwealth appealed the new-trial order, the extraordinary duration and conditions of his solitary confinement invoked a liberty interest. None of Defendants' arguments come close to showing otherwise.

### C. Defendants Do Not Dispute That Johnson Was Denied Adequate Process.

In his opening brief, Johnson argued that because he had a liberty interest in avoiding death row isolation, he was entitled to—but did not receive—meaningful review of his continued solitary confinement. Opening Br. 25-26. Instead of a genuine opportunity to contest his isolation, Johnson received only sham "hearings" that offered no possibility of release from death row. Opening Br. 25. Perhaps because they cannot, Defendants do not dispute that Johnson's hearings were meaningless. Defendants have thus waived any argument that Johnson received constitutionally adequate process. *Warren G.*, 190 F.3d at 84. Accordingly, this Court must reverse if it concludes Johnson was entitled to process.

## II. Defendants Violated The Eighth Amendment When They Subjected Johnson To "Horrific Torture" For Two Decades.

In his opening brief, Johnson explained that his nearly twenty years of solitary confinement violated the Eighth Amendment in two ways. Opening Br. 26-45. First, prolonged solitary confinement exposes prisoners to a substantial risk of serious physical and psychological harm. Johnson observed that the scientific consensus, as recognized by this Court and known specifically to Defendants, confirms isolation's devastating effects. Opening Br. 29-31. Second, Defendants imposed Johnson's nearly two decades of solitary confinement without any penological purpose. Opening Br. 44-45. As Johnson pointed out, nothing in his exceptional disciplinary record warranted prolonged isolation. *Id*.

Defendants' response does not engage with the arguments before this Court. They do not contest the robust scientific consensus that solitary ravages the mind and body. Defendants do not dispute that prolonged solitary confinement inflicts severe psychological and physical injury. Nor do they dispute that they knew this to be the case. And they do not, and cannot, offer any penological purpose warranting Johnson's nearly two decades of isolation. This Court should enforce those waivers. *Warren G.*, 190 F.3d at 84.

Defendants' preserved arguments should likewise be rejected. Primarily, they rely on a three-decades old case whose holding no longer comports with the Eighth Amendment, although Defendants seek to bolster their position with a series of

unpublished and off-point orders. Finally, Defendants try to misdirect this Court by focusing on the discretion afforded to correctional officers.

### A. Defendants Subjected Johnson To Inhumane Conditions Of Confinement.

It is telling that Defendants do not dispute that prolonged solitary confinement is uniquely dangerous. Likewise, they do not claim to have been unaware that solitary confinement would cause Johnson to deteriorate.

Instead, Defendants argue that Johnson's conditions claim is foreclosed by *Peterkin v. Jeffes*, 855 F.2d 1021 (3d Cir. 1988), which they assert "is not distinguishable from the current matter on the facts." Appellees' Br. 15. Defendants are incorrect in every respect.

To start, the case is nothing if not distinguishable. *Peterkin* resolved a facial class action claiming that solitary confinement was unconstitutional as applied to *everyone* on Pennsylvania's death row, 855 F.2d at 1022-23, whereas Johnson claims only that *his* solitary confinement was unconstitutional. Moreover, no class member in *Peterkin* endured solitary confinement for more than four years, whereas Johnson spent two decades in isolation. *Id.* at 1029.

But even if *Peterkin* were on point, its holding no longer comports with the Eighth Amendment, which, as Defendants concede, necessarily evolves over time. Appellee Br. 14. In his opening brief, Johnson noted this Court's and the national jurisprudential shift occasioned by irrefutable scientific evidence that prolonged

solitary confinement imperils those who endure it. Opening Br. 38-40. Johnson also emphasized the sea change among correctional officials and lawmakers. Opening Br. 33-41.

Defendants do not meaningfully engage with any of this. They do not dispute the scientific consensus, the jurisprudential shift, or the evolution among prison authorities. They do not explain how *Peterkin* could still be good law in light of this shift, which includes *Palakovic v. Wetzel*, 854 F.3d 209 (3d Cir. 2017) and *Williams*, 848 F.3d at 566-69, cases explicitly condemning prolonged isolation. Instead, Defendants just assert that *Peterkin* has "continued validity," Appellee Br. 15, but ipse dixit does not cut it. In any case, this Court and the Supreme Court of the United States determine how the Constitution is analyzed—not Defendants. The Eighth Amendment asks whether the standards of decency have evolved, and they surely have over the more than quarter century since *Peterkin* was decided.

Defendants' alternative reliance on a spate of unpublished Third Circuit opinions fares no better. Appellees' Br. 16. Aside from lacking any precedential value, 3d Cir. IOP 5.7, these cases are inapposite.

*Bracey v. Sec'y Pa. Dep't of Corr.*, 686 F. App'x 130 (3d Cir. 2017), did not even remotely confront the claim Johnson raises. The plaintiff there merely "argue[d] that the housing by correctional officials of mentally ill and non-mentally ill inmates in close proximity violated his rights under the Eighth Amendment

because it caused him to suffer a mental breakdown." *Id.* at 133. The *Bracey* court therefore had no reason to consider whether holding someone in solitary confinement for 20 years violates the Eighth Amendment. Neither did this Court in *Green v. Coleman*, 575 F. App'x 44, 47 (3d Cir. 2014), where the question presented was whether a five-year or shorter solitary-confinement stint violated the Eighth Amendment. Likewise, *Jones v. Sec'y Pa. Dep't of Corr.*, 549 F. App'x 108, 109-10 (3d Cir. 2013), was a challenge to thirty *days* of solitary confinement.

Defendants' reliance on *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739 (10th Cir. 2014), is similarly misplaced. To begin, the Tenth Circuit apparently did not recognize the devastating harms of solitary confinement until 2018. *See Grissom v. Roberts*, 902 F.3d 1162, 1175-77 (10th Cir. 2018) (Lucero, J., concurring) (writing separately to establish that twenty years of solitary confinement violates the Due Process Clause and recognizing the robust scientific consensus against prolonged isolation). What's more, *Silverstein* upheld thirty years of solitary confinement based on the specific disciplinary record of the prisoner in that case. 559 F. App'x at 759-61. In addition to three convictions for in-prison murders, Silverstein's record included "assaults on three staff members, a threat to a staff member, an escape attempt by posing as a United States Marshall, and the discovery of weapons." *Id.* at 744. Contrast that with Johnson's admirable disciplinary record. App'x 38; App'x 49.

### B. Defendants Subjected Johnson To Nearly 20 Years Of Torture Without Penological Justification.

Defendants do not meaningfully contest that Johnson's two decades of solitary confinement had no penological utility. They do not grapple with his sterling disciplinary record, and they do not even attempt to offer a penological justification for Johnson's continued isolation following the PCRA court's vacatur of his death sentence and conviction. The only direct response Defendants offer is to disclaim reliance on Pa. Cons. Stat § 4303. Appellee Br. 17. But if Defendants did not rely on that statute to justify Johnson's solitary confinement, it is difficult to imagine *any* plausible purpose. Faced with a clear absence of penological purpose, Defendants' principle tactic is to highlight the "expansive discretion in inmate housing decisions" conferred upon them by a different statute. Appellee Br. 17. This is misleading. Though it is true that corrections officials are afforded a degree of autonomy to dole out housing assignments, their discretion is quite obviously bounded by the Constitution and policed by federal courts. *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). No amount of discretion would permit DOC officials to subject an inmate to nearly two decades of solitary confinement without penological purpose in violation of the Eighth Amendment.[4] *See Wallace v. Robinson*, 940 F.2d 243, 247

[4] Further, Defendants' reliance on the Pennsylvania statute conferring discretion on prison officials is perplexing. Johnson raises a *federal* constitutional challenge. State codes do not provide any safe harbor against allegations that conduct violates federal law. *Martinez v. State of Cal.*, 444 U.S. 277, 284 n.8 (1980) ("Conduct by persons

(7th Cir. 1991) ("[T]he eighth amendment . . . would have something to say about unending solitary confinement even if state rules gave the warden complete discretion over the subject.").

## III. Defendants Are Not Entitled To Qualified Immunity On Any Claim Because They Ignored Clearly Established Law And Their Conduct Was Obviously Unconstitutional.

As Johnson's opening brief laid out, caselaw from this Court and others clearly established that twenty years of near-total isolation violates the Constitution in multiple respects. Opening Br. 48-55. Despite the clarity of prior precedent, however, Defendants try to characterize the questions presented by this case as "novel." Appellee Br. 25. The time when that was so has long passed. Far from being a new issue, the subjection of prisoners to extended periods of solitary confinement without adequate process or penological purpose is a recurring problem in the DOC. *See Williams*, 848 F.3d at 553, 556-57.

Defendants further seem to suggest that qualified immunity must be analyzed with particular generosity to the government in the prison context, Appellee Br. 26, but the cases they cite do not support that proposition. In fact, it is in the policing—not prison—context, in which officers have to make split-second decisions, where the Supreme Court has emphasized the importance of clearly established law.

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acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law.").

*District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (citing *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)) (instructing that the "specificity" of the clearly established rule is "especially important" in cases involving split-second decision-making). Here, in contrast, Defendants had years to consider their conduct.

One further point merits mention. Motions to dismiss are particularly poor vehicles for addressing qualified immunity because determining whether misconduct is shielded by qualified immunity is a fact-intensive exercise. *Newland v. Reehorst*, 328 F. App'x 788, 791 n.3 (3d Cir. 2009) ("[I]t is generally unwise to venture into a qualified immunity analysis at the pleading stage as it is necessary to develop the factual record in the vast majority of cases."). On remand, Johnson might obtain discovery dooming any claim to immunity. For example, records maintained by and in the sole possession of Defendants might strip them of immunity by showing that they knowingly or purposefully violated the law. *See Gomez v. Toledo*, 446 U.S. 635, 640-41 (1980) (answering whether defendants knowingly or purposefully violated the law "depends on facts peculiarly within the knowledge and control of the defendant").

### A. Defendants Are Not Entitled To Qualified Immunity On Johnson's Procedural Due Process Claim.

In his opening brief, Johnson explained why Defendants were not entitled to qualified immunity from his procedural due process claim. Opening Br. 48-51. First, *Williams*, which is indistinguishable from this matter, established—long before the

DOC released Johnson from solitary confinement—that Defendants violated federal law by continuing to deny him meaningful reviews of his isolation. Opening Br. 48-49. Second, and irrespective of whether Johnson had an "active" death sentence, it has long been clearly established that it violates the Fourteenth Amendment to hold a prisoner in extreme isolation for decades without procedural safeguards. Opening Br. 49-51. Third, imposing solitary confinement without meaningful process after a new trial is awarded constituted an "obvious" constitutional violation. Opening Br. 51.

To support its argument that *Williams* did not clearly establish the law in Johnson's favor, Defendants note that two other district courts have disagreed on its application. Appellee Br. 27-30. Tellingly, Defendants cite no authority to support this proposition. If Defendants' unsupported proposition were correct it seems likely that *no* law would ever be clearly established.

But even if district court decisions alone could demonstrate whether an appellate case clearly established the law, Defendants' analysis is flawed. In arguing that *Porter* (and the district court below) have offered the correct interpretation of *Williams*, Defendants make two attempts to distinguish *Hall v. Wetzel*, No. 17-cv-4738, 2018 WL 1035780 (E.D. Pa. Feb. 22, 2018)—a district court decision coming to the opposite conclusion. Both fail.

First, Defendants contend that *Hall* is entitled to less weight because it "decided only a preliminary injunction" while *Porter* and *Johnson* addressed a summary judgment motion and a motion to dismiss, respectively. Appellee Br. 28. But Defendants do not cite to a single authority suggesting 12(b)(6) or summary judgment orders are more persuasive than preliminary injunctions. And if any of the three are entitled to more weight, it would seem to be a preliminary injunction order, where the prisoner had to run the table to prevail. *See Singer Management Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) ("[T]he 'merits' requirement is difficult to meet in the context of . . . preliminary injunctions.").

Second, Defendants suggest the analysis in *Hall* was cursory. Appellee Br. 29. In fact, the opposite is true. The *Hall* court took account of an expansive record, including multiple expert reports, extensive briefing, exhibits including correctional and mental health records, and held a multi-day hearing at which both fact and expert witnesses were examined and cross examined. *See* ECF Nos. 37, 40, 43, 45, 47, *Hall*, 2018 WL 1035780. Far from the shallow analysis Defendants suggest, the Eastern District decided the case on a robust record.

Finally, Defendants devote a footnote to *Bridges v. Sec'y Pa. Dep't of Corr.*, 706 F. App'x 75 (3d Cir. 2017), which they argue "utilized language that seems to tacitly endorse the Appellees' application of *Williams*." Appellee Br. 29 n.4. But unpublished decisions are of limited utility in the qualified immunity context. *E.g.*,

*Williams v. Bitner*, 455 F.3d 186, 193 (3d Cir. 2006). This is particularly so where, as here, the order contains no relevant substantive analysis. *E.g.*, *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (explaining unpublished dispositions "have no precedential force" and "the absence of substantive discussion deprives [such a disposition] of any marginal persuasive value it might otherwise have had"). Further, Defendants presumably hedge in their description of *Bridges* because it is simply impossible to say with certainty what the sentence Defendants latch onto means. Indeed, taken in context, an equally plausible reading is that the *Bridges* panel thought it was the *district court's* vacatur of the conviction and sentence that compelled release from death row. *Bridges*, 706 F. App'x at 85-86.

Defendants do not contest Johnson's arguments that qualified immunity is inappropriate even if this Court were to conclude that *Williams* is inapplicable. Opening Br. 49-51. Nor do Defendants challenge Johnson's argument that Defendants' conduct amounts to an "obvious" constitutional violation. Opening Br. 51. They have thus waived contrary arguments on appeal. *Warren G.*, 190 F.3d at 84.

Defendants also plead for leniency from this Court, asserting that they "have attempted, in good faith, to effectuate this Court's ruling" in *Williams*. Appellee Br. 30. As exemplified by Defendants' habitual pressing of "meritless and disappointing" arguments in the post-*Williams* era, no such presumption is

warranted. Qualified immunity may only shield those who are incompetent or knowingly violate the law, *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), but that standard does not help Defendants in this case.

### B. Defendants Are Not Entitled To Qualified Immunity On Johnson's Eighth Amendment Claim.

In his opening brief, Johnson argued that Defendants had plenty of fair warning that subjecting him to solitary confinement for 20 years violated the Eighth Amendment. Opening Br. 51-55. Johnson cited to several cases from this circuit and sibling circuits that provided Defendants with adequate notice. Opening Br. 52-55 (collecting cases). Defendants do not grapple with any of these cases. Once again, Defendants simply cite to *Peterkin*. Appellee Br. 31-32. They suggest that because *Peterkin* was not expressly overruled by *Williams*, it mandates qualified immunity in this case. Appellee Br. 32. This misses the mark. First, as Johnson has explained, *Peterkin* did not authorize Defendants' conduct. Opening Br. 31-41. Not only does it address a meaningfully different claim, but its holding can no longer withstand constitutional scrutiny. Second, that this Court did not overrule *Peterkin* in *Williams* is meaningless. *Williams* was a due process case and thus had no occasion to formerly overrule *Peterkin*.

Johnson also argued on the merits that Defendants violated the Eighth Amendment by subjecting him to punishment without "penological justification." Opening Br. 44-45. In support, Johnson relied on clear Supreme Court and published

Third Circuit precedent. *Id*. In response, Defendants claim that they have discretion in matters of housing, but do not cite a single authoritative case suggesting they could exercise that discretion without attention to a prisoner's disciplinary record. Appellee Br. 16-18. To claim entitlement to qualified immunity from that claim, therefore, Defendants must wait until remand.

Finally, the Supreme Court holds that the "obvious cruelty" of a practice may provide fair warning that Defendants' conduct was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). It would be obvious to any sentient being that years of unjustifiable solitary confinement is unlawful, a conclusion made even more obvious by the fact that Johnson's disciplinary record was "exemplary."

## IV. Johnson's Claim For Declaratory Relief Is Not Moot Because Defendants' Past Conduct Places Johnson At Immediate Risk Of Suffering In Solitary Confinement Again.

Finally, Johnson argued that his claim for declaratory relief was not mooted by his eventual release from death row because upon retrial Defendants might once again confine him to solitary confinement. Opening Br. 56. In response, Defendants deem Johnson's fear impermissibly speculative and emphasize term-limited reforms to death row that they have agreed to implement. Appellee Br. 32-33.

Defendants' response to Johnson's mootness argument misses the point. Johnson is not concerned about a future assignment to solitary confinement on *death row*. Rather, in light of the DOC's conduct, it is reasonable to assume that Johnson

would be assigned to solitary confinement in a *non-capital* unit should he reenter the DOC after retrial. The DOC has never reserved solitary confinement for death-sentenced prisoners, and Defendants do not assert that the DOC has abolished solitary confinement for other prisoners.

Moreover, at this point the agreement is largely aspirational: it has not been fully implemented, it is revocable, and it still requires court approval. *See* ECF Nos. 46-2, 105, *Reid v. Wetzel*, No. 1:18-cv-00176 (M.D. Pa.). In light of these circumstances, the DOC's agreement falls far short of mooting Johnson's declaratory claims.

## CONCLUSION

For the reasons set forth in Johnson's opening brief and above, the Court should vacate the district court's order.

Dated: January 30, 2020

Respectfully submitted,

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## 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 6,399 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: January 30, 2020

*/s/ Eliza J. McDuffie*
Eliza J. McDuffie

## CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2020, I electronically filed the foregoing *Reply Brief 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: January 30, 2020

*/s/ Eliza J. McDuffie*
Eliza J. McDuffie

**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: January 30, 2020

*/s/ Eliza J. McDuffie*
Eliza J. McDuffie

**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 11.0.7632, last updated January 30, 2020 and that no virus was detected.

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*/s/ Eliza J. McDuffie*
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