No. _____

In the Supreme Court of the United States

ALFREDO PRIETO,
Petitioner,
v.
HAROLD C. CLARKE, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

MICHAEL E. BERN
Counsel of Record
ABID R. QURESHI
KATHERINE M. GIGLIOTTI
ALEXANDRA P. SHECHTEL*
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-1021
michael.bern@lw.com

* Admitted in California only; all work supervised by a member of the DC Bar.

Counsel for Petitioner

QUESTIONS PRESENTED

In *Wilkinson v. Austin*, 545 U.S. 209 (2005), this Court held that an inmate possesses a liberty interest protected by the Due Process Clause in avoiding assignment to conditions of confinement that "'impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" Like only seven other inmates out of 39,000 managed by the Virginia Department of Corrections, petitioner is *permanently* assigned to extreme conditions of solitary confinement that even the Fourth Circuit majority acknowledged are "undeniably severe," "harsh[]," and "perhaps … 'dehumanizing.'" Although petitioner has been "by all accounts a model prisoner" during his seven years of solitary confinement, he has never received any review of whether his harsh conditions are appropriate. Over a strong dissent, the divided Fourth Circuit nonetheless held that petitioner had no liberty interest in avoiding his permanent placement in solitary confinement. The questions presented are:

1. Whether, in conflict with *Wilkinson* and the decisions of ten other courts of appeals, the Second and Fourth Circuits properly require inmates to satisfy a "two-part analysis" under which they cannot establish a liberty interest in avoiding atypical and severe conditions of confinement without first pointing to an entitlement stemming from mandatory language in state law.

2. What is the proper resolution of the extensive circuit split upon which this Court expressly reserved judgment in *Wilkinson*, regarding what conditions within a jurisdiction establish the "ordinary incidents of prison life."

PARTIES TO THE PROCEEDING

Petitioner, Plaintiff-Appellee below, is Alfredo Prieto.

Respondents, Defendants-Appellants below, are Harold C. Clarke, the Director of the Virginia Department of Corrections; A. David Robinson, Deputy Director of the Virginia Department of Corrections; and Keith W. Davis, Warden of Sussex I State Prison.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

APPENDIX

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS AND STATUTES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alfredo Prieto respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App.1a-28a) is reported at 780 F.3d 245. The opinion of the district court granting summary judgment to petitioner and denying summary judgment to respondents (*id.* at 29a-50a) is not reported, but is available at 2013 WL 6019215.

JURISDICTION

The court of appeals entered judgment on March 10, 2015. App.1a. On April 7, 2015, the court of appeals denied Prieto's petition for rehearing en banc. *Id.* at 51a-52a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "[n]o State shall … deprive any person of life, liberty, or property without due process of law." U.S. Const. amend XIV, § 1.

INTRODUCTION

This case presents important questions, on which the courts of appeals are sharply divided, regarding the proper test for determining when states must afford due process before assigning inmates to atypical and severe conditions of confinement that meaningfully depart from the ordinary consequences of a criminal conviction in a given jurisdiction.

In *Sandin v. Conner*, 515 U.S. 472 (1995), and *Wilkinson v. Austin*, 545 U.S. 209 (2005), this Court held that inmates possess a state-created liberty interest in avoiding assignment to conditions of confinement that "'impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Wilkinson*, 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484). This Court recognized, however, that "the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." *Id.* Several circuits look to conditions in the general prison population; others to conditions in administrative segregation; others to conditions imposed only on inmates serving similar sentences; and still others reject all those approaches and employ multi-factor balancing tests. *See, e.g.*, *Skinner v. Cunningham*, 430 F.3d 483, 486-87 (1st Cir. 2005) (describing split). Because it was unnecessary to decide the appropriate baseline in *Wilkinson*, *see* 545 U.S. at 223, the courts of appeals remain badly fractured over what conditions constitute "the ordinary incidents of prison life" in a particular jurisdiction.

This petition offers an opportunity to resolve that split, which has "become the source of major disagreement" among the courts of appeals. *Skinner*, 430 F.3d at 486. Pursuant to Virginia Department of Corrections practice, the eight Virginia inmates sentenced to death are permanently assigned to conditions of extreme isolation that "differ in almost every meaningful respect" from the conditions experienced by all other 39,000 inmates in Virginia—including those convicted of identical crimes (capital

murder) but sentenced to life without parole. CAJA617-18[1]; App.40a. Some Virginia inmates have been maintained in solitary confinement for over *15 years* without any review of whether their conditions are appropriate. As Justice Kennedy recently noted, "[y]ears on end of near-total isolation exact a terrible price." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). Indeed, the unrebutted expert report in this case described petitioner's conditions as "a place of constant mental agony" that inflicts "severe and deleterious psychological harm." CAJA424. Whether or not such confinement imposes an "'atypical and significant hardship … in relation to the ordinary incidents of prison life,'" turns squarely on the proper resolution of the split this Court recognized, but reserved judgment upon, in *Wilkinson*.

This petition also provides an opportunity to resolve a related, threshold conflict among the circuits. Prior to *Sandin*, this Court held that the existence of a state-created liberty interest turned on whether an inmate could identify "language of an unmistakably mandatory character" in state laws or regulations establishing an entitlement not to suffer particular conditions of confinement "absent specified substantive predicates." *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983). In *Sandin*, however, the Court expressly "abandon[ed] *Hewitt*'s methodology," 515 U.S. at 483 n.5, which it concluded had "strayed from the real concerns undergirding the liberty protected by the Due Process Clause," *id.* at 483. "After *Sandin*, it is clear that the touchstone of the inquiry into the existence of

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[1] CAJA refers to the Joint Appendix produced in the court of appeals, with Volume III of III (CAJA903-70) filed under seal.

a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" *Wilkinson*, 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484).

Notwithstanding this Court's seemingly clear directive, one court of appeals continued to treat *Hewitt* as good law, understanding *Sandin* and *Wilkinson* not to have replaced *Hewitt*'s test, but only to have "added a second requirement for establishing a liberty interest." App.5a. Under the Second Circuit's aberrant "two-part analysis," an inmate must continue to satisfy *Hewitt*'s requirement that state "'statutes or regulations require, in "language of an unmistakably mandatory character," that a prisoner not suffer a particular deprivation absent specified predicates,'" in addition to *Sandin*'s dictate that "the alleged deprivation [be] atypical and significant." *Tellier v. Fields*, 280 F.3d 69, 80-81 (2d Cir. 2000) (citations omitted).

The Second Circuit's self-described "*Hewitt/Sandin* analysis," *id.* at 81, is incompatible with this Court's modern approach, which expressly "abandon[ed] *Hewitt*'s methodology," *Sandin*, 515 U.S. at 483 n.5. For that reason, the overwhelming majority of courts of appeals have rejected *Tellier* as "not persuasive in analyzing the established law during the post-*Sandin* period." *Hill v. Fleming*, 173 F. App'x 664, 674 (10th Cir. 2006); *see also, e.g.*, *Chappell v. Mandeville*, 706 F.3d 1052, 1064 (9th Cir. 2013) ("[T]he discretionary/mandatory substantive predicates approach was 'abandoned' or 'overruled' in *Sandin*, and

our decisions have focused only on the 'atypical and significant hardship' test.").

By rejecting the majority view and adopting the Second Circuit's previously anomalous approach, App.5a-6a & n.3, the Fourth Circuit further aggravated the conflict among the courts of appeals regarding the proper test for establishing a state-created liberty interest in avoiding highly restrictive conditions of confinement. Certiorari is warranted to resolve that deep divide, which is squarely presented and outcome-determinative in this case.

STATEMENT OF THE CASE

A. The Ordinary Incidents Of Prison Life In Virginia

Nearly all inmates managed by the Virginia Department of Corrections (VDOC) are assigned upon conviction to conditions of confinement ranging from minimum-security (level one) to maximum-security (level five) on the basis of an individualized assessment to determine their security needs. CAJA825. VDOC believes "[c]lassification of offenders into appropriate security levels … enhances public, staff, and offender safety by ensuring that each offender receives the appropriate level of control and management while reducing the operating cost of the DOC by ensuring that offenders are not subjected to excessive control and management." CAJA218. VDOC's overall goal is to move an offender to the lowest security level in which he can be safely and effectively maintained. CAJA617, 765.

In VDOC's view, "knowing more" about an offender and "looking at a variety of factors … ensure[s] better classification." CAJA734. As such, VDOC considers it insufficient and inadequate to classify individuals solely

on the basis of their initial crime or sentence. *See* App.61a-62a, 67a. Instead, VDOC assigns inmates to confinement conditions using a multi-factor test accounting for an inmate's (1) history of institutional violence; (2) criminal history; (3) escape history; (4) length of sentence remaining; (5) age; (6) education; (7) employment history; and (8) whether the offender formerly was managed successfully in less-restrictive conditions. CAJA244, 913.

Offenders are reclassified annually to reflect changes in their security needs that become evident as VDOC gains more experience with the inmate. CAJA776, 247. To that end, VDOC places greater weight during reclassification on an inmate's conduct in prison, and less weight on the inmate's crime and sentence. S*ee* CAJA912-15; *see also* CAJA718-19. Most offenders' classifications change over time, sometimes drastically, largely based on their behavioral record. CAJA762, 718-19. Even offenders convicted of multiple counts of capital murder are reclassified to less-restrictive conditions when well-behaved. *See, e.g.*, CAJA907-17. By contrast, those convicted of relatively minor crimes may be reassigned to more-restrictive conditions when disruptive or violent. *See, e.g.*, CAJA953-70.

VDOC policy affords inmates assigned even to maximum-security facilities significant human contact with other offenders and visitors, including "substantial time every day out of the confines of their cells" to engage in a variety of social, recreational, educational, religious, and vocational activities. App.40a; *see also* Virginia Department of Corrections, Department of Corrections Procedures at Operating Procedure ("VDOC OP") 841.6, 841.3, *available at*

http://vadoc.virginia.gov/About/procedures/default.shtm (last visited June 28, 2015) ("Va. Dep't of Corr. web site"); CAJA903-06. Inmates "enjoy the near-constant company of others." App.40a. Maximum-security inmates receive outdoor recreation with other inmates several times a week, with access to basketball courts and jogging tracks, as well as daily "in-pod recreation," during which inmates may socialize and play games together in a common area. *Id.*; VDOC OP 841.6; CAJA903. They also enjoy "two communal meals per day, regular contact visits from family and friends, and group religious and educational programming." App.40a; *see also* CAJA306-13, 385; CAJA903-06. In short, the experience of inmates at Virginia's maximum-security facilities "is hardly a solitary one." App.40a. And inmates at lower-security facilities enjoy greater privileges and even more human contact. *See* CAJA903-06.

B. Petitioner's Conditions Of Confinement

Unlike all other 39,000 inmates managed by VDOC, CAJA617-18, the eight Virginia inmates sentenced to death are permanently assigned to "harsh[]," "undeniably severe," and "perhaps … 'dehumanizing'" conditions of confinement, App.17a-18a (quoting App.39a), which "differ in almost every meaningful respect" from conditions in even Virginia's maximum-security prisons, *id.* at 40a.

Petitioner Alfredo Prieto was convicted in 2008 of two counts of capital murder for homicides that occurred in 1988. For the last seven years, he has spent 23 hours or more every day alone in a 71-square foot cell. CAJA823. He is "deprived of almost all human contact, even cell-to-cell contact with other death row inmates." App.21a-22a (Wynn, J.,

dissenting). He may not use the recreation yard or gymnasium. *Id.* at 30a. He receives no in-pod recreation. *Id.* He may not attend congregational religious services, nor participate in group educational, behavioral, or vocational programming. *Id.* at 31a. He eats every meal alone in his cell. *Id.* Visitation is highly restricted. He may only visit with immediate family, and even those visits must take place through a pane of glass; if an inmate has no immediate family, he cannot receive visitors at all. *Id.* Each inmate sentenced to death is isolated from each other's cells within the housing unit and placed behind solid metal doors impeding communication. *Id.* at 30a-31a.

Petitioner's "conditions of confinement are largely devoid of stimuli." App.22a (Wynn, J., dissenting); *see also id.* at 30a. He leaves his cell only for three weekly showers or for one hour of "recreation," five days per week, in an outdoor cage similar in size to his 71-square foot cell. *Id.* Recreation cages have concrete floors and no exercise equipment; he cannot do any exercise there that he cannot do in his cell. CAJA668. Before and after recreation, he is strip-searched, during which he must squat, lift his genitals, and cough. CAJA368-69, 930, 943. Although it is dimmed somewhat at night, a light remains shining in petitioner's cell 24 hours a day. App.39a. Like the inmates in *Wilkinson*, the "only real break from the monotony" of petitioner's confinement comes from a small television he may purchase for his cell. *Id.*

The unchallenged expert report in this case described petitioner's conditions as "a place of constant mental agony" that imposes "severe and deleterious psychological harm." CAJA424; *see* CAJA406. Even petitioner's own Warden—who is a respondent in this

case—agreed that "we—as humans, we don't survive very well that way with lack of human contact." CAJA282.

In many material respects, "Prieto's conditions of confinement essentially mirror those in *Wilkinson*," App.21a (Wynn, J., dissenting), in which this Court unanimously found that such "harsh conditions" imposed "an atypical and significant hardship within the correctional context," giving rise to "a liberty interest in avoiding assignment" to the conditions. 545 U.S. at 224. "In some respects, Prieto's conditions are actually more restrictive than those in *Wilkinson*." App.21a-22a (Wynn, J., dissenting) (noting reduced opportunities for human contact and exercise). And while inmates in *Wilkinson* were reviewed for possible transfer to less-restrictive conditions at least annually, 545 U.S. at 224, petitioner's placement is interminable.

Petitioner's permanent conditions are similar to those experienced for significantly shorter periods by Virginia inmates placed into disciplinary or administrative segregation. Such assignments are generally "temporary or short-term assignments" imposed as a "result of offender misconduct." CAJA436. VDOC considers even such short-term assignments so serious that it provides inmates a formal due process hearing beforehand. CAJA238-40, 449. Even then, inmates may be assigned to disciplinary segregation only for a maximum of 30 days, even for a major rule violation. CAJA239. The status of inmates assigned to administrative segregation, meanwhile, is reviewed every seven days to ensure it is appropriate. CAJA232. By contrast, petitioner has been assigned to solitary confinement for almost *seven years*, during which time he has received no review of

whether his conditions are appropriate, even though he is "by all accounts a model prisoner," has maintained a clean disciplinary record throughout his incarceration, and has been described by correctional officers as "polite" and giving them "no issues whatsoever." CAJA840, 227.19-20, 338, 375.

C. The District Court Grants Summary Judgment To Petitioner

In October 2012, petitioner filed a civil rights action under 42 U.S.C. § 1983, alleging, *inter alia*, that his ongoing confinement in restrictive conditions without due process violated the Fourteenth Amendment. App.33a. Following cross-motions for summary judgment, the district court granted petitioner's motion for summary judgment in November 2013. *Id.* at 29a-50a.

Relying on this Court's decisions in *Sandin* and *Wilkinson*, the district court determined an inmate's conditions of confinement implicate a liberty interest when they "'impose[] [an] atypical and significant hardship … in relation to the ordinary incidents of prison life.'" *Id.* at 37a (alterations in original) (citation omitted). While acknowledging that the appropriate baseline "has caused considerable consternation in the circuit courts," the district court used the general prison population as its comparator. *Id.* at 38a. Finding that petitioner's permanent conditions of solitary confinement were "undeniably extreme and atypical of conditions in the general population" at even a maximum-security prison in Virginia, the district court concluded that petitioner's conditions gave rise to a liberty interest requiring due process. *Id.* at 36a-46a. The court next found that VDOC's "fail[ure] to provide even the most basic procedural protections" while

maintaining inmates in permanent solitary confinement violated due process, noting that petitioner "could go a decade or more without any opportunity to object to his restrictive conditions of confinement or otherwise be heard." *Id.* at 43a, 46a-50a.

D. The Divided Fourth Circuit Reverses

On appeal, VDOC challenged only whether petitioner had established a liberty interest. A divided panel of the Fourth Circuit reversed. *Id.* at 1a-28a. While acknowledging its view conflicted with that of other courts of appeals, *id.* at 5a & n.3, the panel majority concluded that *Sandin* and *Wilkinson* did not dispense with *Hewitt*'s requirement that to establish a liberty interest, an inmate must point to state laws or regulations entitling the inmate not to suffer restrictive conditions absent substantive predicates, *id.* at 7a-12a. Like the Second Circuit in *Tellier*, the panel majority understood *Sandin* and *Wilkinson* only to have "added a second requirement"—that an inmate show the deprivation of that entitlement imposed an atypical and significant hardship. *Id.* at 5a-11a & n.3.

The panel majority next held that petitioner failed to satisfy either prong of that "two-part analysis." *Id.* at 5a & n.3, 11a. First, it concluded that petitioner could not establish a liberty interest because he failed "to point to a Virginia law or policy providing him with an expectation of avoiding the conditions of his confinement." *Id.* at 11a-12a. Second, although it agreed that petitioner's conditions are "undeniably severe" and "perhaps … 'dehumanizing,'" *id.* at 17a (quoting *id.* at 39a), the majority concluded that petitioner failed to "demonstrate that those conditions are harsh and atypical in relation to the ordinary incidents of prison life," *id.* at 11a. In its view, the

"ordinary conditions of prison life" are defined for petitioner not by the conditions to which Virginia's inmates ordinarily are subject in the general prison population, but by the highly restrictive conditions VDOC permanently imposes only on inmates sentenced to death. *Id.* at 12a-17a.

Judge Wynn dissented. He first criticized the majority's two-part analysis, explaining that its "myopic search" for particular language in a "written regulation" is inconsistent with Supreme Court precedent. *Id.* at 25a (Wynn, J., dissenting). Rather, he argued, this Court has directed that courts focus "not [on] the language of regulations 'but the nature of th[e] conditions themselves in relation to the ordinary incidents of prison life.'" *Id.* at 20a (citation and internal quotation marks omitted in original) (quoting *Wilkinson*, 545 U.S. at 223).

Applying that test, Judge Wynn found that petitioner's conditions "are strikingly similar to those in *Wilkinson*" and in some ways are "more restrictive." *Id.* at 22a-23a (Wynn, J., dissenting). Noting that this Court unanimously found that such conditions "are sufficiently egregious" that they "taken together, [they] 'impose[d] an atypical and significant hardship *under any plausible baseline*'" and "thus 'give rise to a liberty interest in their avoidance,'" he concluded that the same result should follow here. *Id.* at 22a-23a, 26a (alteration in original) (quoting *Wilkinson*, 545 U.S. at 223). Moreover, "because Virginia affords capital offenders no process" before placing them into permanent solitary confinement, Judge Wynn agreed with the district court that Virginia violated the requirements of procedural due process. *Id.* at 27a-28a.

REASONS FOR GRANTING THE WRIT

As this Court has already recognized, the courts of appeals are sharply divided over how to evaluate whether an inmate's assignment to highly restrictive conditions of confinement "'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005) (citation omitted). Review is likewise warranted to resolve a threshold disagreement over whether the Second and Fourth Circuits—in conflict with *Sandin* and *Wilkinson* and the decisions of every other court of appeals—properly require inmates to satisfy a test that this Court expressly "abandoned" in *Sandin*. This Court's intervention is necessary to resolve those important disputes, and provide clear guidance to the courts of appeals regarding the circumstances in which states must afford basic due process before maintaining inmates in atypical and severe conditions of solitary confinement for an exceptional duration.

I. CERTIORARI IS WARRANTED TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF THIS COURT AND NUMEROUS COURTS OF APPEALS

A. The Fourth Circuit's "Two-Part Analysis" Conflicts With *Wilkinson*, *Sandin*, And The Large Majority Of Other Circuit Courts

Certiorari is warranted to resolve the conflict between the decision below and the decisions of this Court and numerous other courts of appeals as to whether inmates must identify an entitlement based on the mandatory language of state laws or regulations in order to establish a liberty interest.

1. This Court's approach to evaluating the existence of a state-created liberty interest has changed over time. *See, e.g.*, *Sandin v. Conner*, 515 U.S. 472, 477-84 (1995) (discussing evolution of Court's approach); *see also* App.24a-25a (Wynn, J., dissenting). In its early decisions, this Court focused on whether an inmate's conditions imposed a "'grievous loss' of liberty" over and above the ordinary consequences that follow from a criminal conviction. *Sandin*, 515 U.S. at 480 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). Over time, however, the Court ceased to focus on whether a state imposed restrictions outside "the normal limits or range of custody" within a given jurisdiction. *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Instead, this Court came to "employ[] a methodology for identifying state-created liberty interests that emphasized 'the language of a particular [prison] regulation' instead of 'the nature of the deprivation.'" *Wilkinson*, 545 U.S. at 222 (alteration in original) (quoting *Sandin*, 515 U.S. at 481). Under that approach, which reached its high-water mark in *Hewitt v. Helms*, the existence of a state-created liberty interest turned on whether an inmate could point to "language of an unmistakably mandatory character" in state laws or regulations entitling an inmate not to suffer particular conditions "absent specified substantive predicates." 459 U.S. 460, 471-72 (1983).

In *Sandin*, however, this Court "abandon[ed] *Hewitt*'s methodology," explaining that "the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." 515 U.S. at 483 & n.5. This Court therefore expressly "abrogated the methodology of parsing the

language of particular regulations" in favor of a return to a focus on whether an inmate's conditions "'impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Wilkinson*, 545 U.S. at 222-23 (quoting *Sandin*, 515 U.S. at 484). As this Court made explicit in *Wilkinson*, "[a]fter *Sandin*, it is clear that the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but *the nature of those conditions themselves* 'in relation to the ordinary incidents of prison life.'" *Id.* at 223 (emphasis added).

"The *Sandin* standard requires [courts] to determine if assignment to [particular conditions of confinement] 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* (quoting *Sandin*, 515 U.S. at 484). Thus, in *Wilkinson*, this Court determined that Ohio prisoners possessed a liberty interest in avoiding assignment to Ohio's supermax prison exclusively by analyzing that prison's "harsh conditions" as compared to the ordinary incidents of prison life. *See id.* at 223-24. Nowhere did this Court require inmates to identify an entitlement stemming from mandatory language in prisoner regulations. *See id.*

2. Although *Sandin* specifically "abandon[ed] *Hewitt*'s methodology," 515 U.S. at 483 n.5, the decision below adopted the Second Circuit's previously outlier "two-part analysis," under which inmates must continue to satisfy *Hewitt*'s test. App.5a & n.3. That approach is irreconcilable with this Court's decisions in *Sandin* and *Wilkinson*, and conflicts with the decisions of every other court of appeals.

a. Notwithstanding this Court's decisions in *Sandin* and *Wilkinson*, the Second Circuit continues to require "courts considering the existence of an alleged liberty interest [to] ascertain whether 'statutes or regulations require, in "language of an unmistakably mandatory character," that a prisoner not suffer a particular deprivation absent specified predicates.'" *Tellier v. Fields*, 280 F.3d 69, 81 (2d Cir. 2000) (citations omitted); *see also id.* ("We find that Section 541.22 contains such mandatory language and therefore creates a protectable liberty interest in not being confined."). In the Second Circuit's view, *Sandin* and *Wilkinson* did not displace *Hewitt*'s requirement that inmates must point to mandatory language in state law establishing an entitlement to avoid particular conditions of confinement. *See, e.g.*, *Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir. 1996) ("[N]othing in *Sandin* suggests that a protected liberty interest arises in the absence of a particular state regulation or statute that (under *Hewitt*) would create one.").

Rather, the Second Circuit reads *Sandin* and *Wilkinson* merely to add a second requirement for establishing a liberty interest protected by the Due Process Clause—that the deprivation of that entitlement imposes an atypical hardship. *See, e.g.*, *Tellier*, 280 F.3d at 80-81; *see also Iqbal v. Hasty*, 490 F.3d 143, 160-63 (2d Cir. 2007) (finding that *Tellier* remains good law after *Wilkinson*), *rev'd on other grounds sub nom. Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The divided Fourth Circuit in this case expressly adopted the Second Circuit's "two-part analysis." *See* App.5a-6a & n.3. Like the Second Circuit, it concluded that *Sandin* did not abandon *Hewitt*'s test, but merely

"added a second requirement for establishing a liberty interest warranting constitutionally adequate process." *Id.* at 5a; *see also id.* at 9a ("*Wilkinson* neither eliminates the first prong nor implies that the 'nature of th[e] conditions' *alone* establishes a protected liberty interest." (alterations in original) (citation omitted)). Following *Tellier*, the Fourth Circuit concluded that *Sandin*'s primary effect was to clarify that not *all* mandatory language in state regulations gave rise to a liberty interest. *See id.* at 8a. Rather, it viewed *Sandin* as requiring inmates to make "an additional showing" only after identifying language sufficient to create "an interest or expectation in state regulations." *Id.*; *see also Incumaa v. Stirling*, No. 14-6411, 2015 WL 3973822, at *7 (4th Cir. July 1, 2015) (because "Department [of Corrections] policy here *mandates* review of Appellant's security detention every 30 days … Appellant has met the first prong of his burden under *Sandin*" (emphasis added)).

b. The two-part analysis followed by the Second and Fourth Circuits is incompatible with this Court's decisions in *Sandin* and *Wilkinson*. As those cases make clear, *Sandin* did not retain *Hewitt*'s requirement that inmates point to particular language in state regulations in order to establish a liberty interest. Rather, this Court expressly "abrogated the methodology of parsinshoatg the language of particular regulations" in favor of a return to a focus on "the nature of [an inmate's] conditions themselves 'in relation to the ordinary incidents of prison life.'" *Wilkinson*, 545 U.S. at 222-23 (quoting *Sandin*, 515 U.S. at 484). *Sandin* and *Wilkinson* could not be clearer that *Hewitt*'s test is no longer good law. *See Sandin*, 515 U.S. at 483 n.5 (acknowledging

"abandonment of *Hewitt*'s methodology"); *id.* at 483 ("[T]he search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause."); *Wilkinson*, 545 U.S. at 229 ("*Sandin* abrogated … *Hewitt*'s methodology for establishing the liberty interest …."). In its place, this Court returned to a focus on whether an inmate's conditions "'impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" 545 U.S. at 222-23 (quoting *Sandin*, 515 U.S. at 484).

The Fourth Circuit believed that "a court need only reach the atypicality question if an inmate has been deprived of a state-created liberty interest." App.12a n.8. That view is flatly inconsistent with *Wilkinson*, which explains that "the touchstone of the inquiry into *the existence of a protected, state-created liberty interest* in avoiding restrictive conditions of confinement is … the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.'" 545 U.S. at 223 (emphasis added) (quoting *Sandin*, 515 U.S. at 484). That sharp conflict with this Court's cases necessitates this Court's attention. Sup. Ct. R. 10(c).

c. The other geographic courts of appeals have universally rejected the two-part analysis adopted by the Second and Fourth Circuits as "not persuasive in analyzing the established law during the post-*Sandin* period." *Hill*, 173 F. App'x at 674. As other circuit courts have consistently recognized, *Sandin* did not "add[] a second requirement" to *Hewitt*'s test for establishing a state-created liberty interest, App.5a, but rather abandoned *Hewitt*'s approach altogether.

See, e.g., *Chappell*, 706 F.3d at 1064 ("[T]he discretionary/mandatory substantive predicates approach was 'abandoned' or 'overruled' in *Sandin*, and our decisions have focused only on the 'atypical and significant hardship' test, even in the face of relevant prison regulations."); *Thomas v. Ramos*, 130 F.3d 754, 760 (7th Cir. 1997) ("In *Sandin*, the Supreme Court abandoned the approach that the mandatory nature of statutory and regulatory language creates a liberty interest protected by the Due Process Clause, and held that the actual focus of the liberty interest inquiry is the nature of the deprivation that a prisoner suffers."); *Clark v. Wilson*, 625 F.3d 686, 691 (10th Cir. 2010) ("*Sandin* expressly rejects the *Hewitt* methodology by shifting the focus of the inquiry from the language of the regulation to whether the punishment 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" (citation omitted)), *cert. denied*, 131 S. Ct. 2884 (2011).

The Fifth Circuit's approach in *Wilkerson v. Goodwin*, 774 F.3d 845 (5th Cir. 2014), is typical of the modern approach taken by most courts of appeals. There, the Fifth Circuit found a Louisiana inmate's long-term assignment to solitary confinement gave rise to a liberty interest because of the "duration of the solitary confinement, the severity of the restrictions, and their effectively indefinite nature." *Id.* at 855. At no point did the court look to whether mandatory language in state regulations created an entitlement giving rise to a liberty interest.

Other circuits likewise agree that *Sandin* "reject[ed]" this Court's prior approach of "requir[ing] courts to delve into the minutiae of prison regulations and search for mandatory language that would entitle

inmates to state-conferred privileges." *Powell v. Weiss*, 757 F.3d 338, 345 (3d Cir. 2014). In its place, "*Sandin* 'announced a *new standard* for determining whether prison conditions deprive a prisoner of a liberty interest that is protected by procedural due process guarantees,'" holding "that a prisoner is deprived of a state-created liberty interest if the deprivation 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" *Id.* at 346, 344 (citations omitted). The United States understands this Court's modern approach in exactly the same way. *See* Brief for the United States as Amicus Curiae 8, *Wilkinson*, 545 U.S. 209 (2005) (No. 04-495), 2005 WL273649 ("[T]his Court held in *Sandin* that state action creates a liberty interest when it 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life ….'" (citation omitted)).

Every other court of appeals has reached the same conclusion. *See McGuinness v. Dubois*, 75 F.3d 794, 797 n.3 (1st Cir. 1996) ("The Court, in *Sandin* …, refocused the due process inquiry away from the parsing of the mandatory/discretionary language in prison regulations and back to the nature of the deprivation, *i.e.*, whether the restraint 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life ….'" (citation omitted)); *Mackey v. Dyke*, 111 F.3d 460, 462 (6th Cir.) ("The Court in *Sandin* expressly overruled the *Hewitt* methodology, which required a reviewing court to ask whether the state had … used 'language of an unmistakably mandatory character ….'" (citation omitted)), *cert. denied*, 522 U.S. 848 (1997); *Phillips v. Norris*, 320 F.3d 844, 847 (8th Cir. 2003) ("In order to

determine whether an inmate possesses a liberty interest, we compare the conditions to which the inmate was exposed in segregation with those he or she could 'expect to experience as an ordinary incident of prison life.'" (citation omitted)); *Magluta v. Samples*, 375 F.3d 1269, 1284 (11th Cir. 2004) (In *Sandin*, "the Supreme Court expressly abandoned *Hewitt's* methodology."); *Hatch v. District of Columbia*, 184 F.3d 846, 850 (D.C. Cir. 1999) ("*Sandin* abandoned *Hewitt*'s approach ….").

d. The Fourth Circuit majority acknowledged that its decision conflicted with the results of other courts of appeals. *See* App.5a n.3. Nonetheless, it was persuaded that *Tellier*'s two-part analysis correctly reflected this Court's decisions in *Sandin* and *Wilkinson*. Ten other courts of appeals have rejected that approach, recognizing that it is incompatible with this Court's decisions. That mature conflict between the Second and Fourth Circuit and the decisions of this Court and other circuit courts warrants this Court's review.

B. The Courts Of Appeals Are Sharply Divided Over What Conditions Within A Jurisdiction Define The "Ordinary Incidents Of Prison Life"

Review is also warranted on the second question presented. As *Wilkinson* explained, "[t]he *Sandin* standard requires us to determine if assignment to [particular conditions of confinement] 'imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484). This Court recognized, however, that "the Courts of Appeals have not reached consistent conclusions for identifying the

baseline from which to measure what is atypical and significant in any particular prison system." *Id.* That split is widely acknowledged as a "source of major disagreement" among the circuit courts. *Skinner*, 430 F.3d at 486. And because it was unnecessary to resolve that split in *Wilkinson*, *see* 545 U.S. at 223, the disagreement continues to persist. *See, e.g.*, *Rezaq v. Nalley*, 677 F.3d 1001, 1011 (10th Cir. 2012) ("Our sister circuits are certainly not in agreement regarding the correct approach."); *Wilkerson*, 774 F.3d at 854 ("Courts have considered different baselines when determining what conditions are 'atypical' in a particular case."). Certiorari is warranted to resolve that intractable conflict.

1. A number of circuits define the baseline based on what conditions are ordinary within a state's "prison *system*," *Wilkinson*, 545 U.S. at 223 (emphasis added), but differ as to what those ordinary conditions are.

Several courts of appeals compare the conditions of confinement at issue to those in the general prison population. *See, e.g.*, *Phillips*, 320 F.3d at 847 ("[I]n order for Phillips to assert a liberty interest, he must show some difference between his new conditions in segregation and the conditions in the general population which amounts to an atypical and significant hardship."); *Keenan v. Hall*, 83 F.3d 1083, 1089 (9th Cir. 1996) (comparing "the conditions for the general prison population and the segregated population"); *Marion v. Radtke*, 641 F.3d 874, 876 (7th Cir. 2011) ("[T]he right comparison is between the ordinary conditions of a high-security prison in the state, and the conditions under which a prisoner is actually held.").

The Third Circuit, meanwhile, has expressly rejected the view that "the baseline for determining

'atypical and significant' are the conditions in the general population." *Griffin v. Vaughn*, 112 F.3d 703, 706 n.2 (3d Cir. 1997). Reasoning that "it is not extraordinary for inmates in a myriad of circumstances" to find themselves in administrative segregation, that court instead compares an inmate's conditions of confinement to conditions of administrative segregation. *Id.* at 708.

The Second Circuit takes an intermediate approach, comparing an inmate's conditions both to conditions in the general population and to those in administrative segregation—at least where the latter conditions are imposed on inmates in the ordinary course. *See, e.g.*, *Welch v. Bartlett*, 196 F.3d 389, 393 (2d Cir. 1999) ("Whether the conditions of Welch's confinement constitute an atypical and significant hardship requires that they be considered in comparison to the hardships endured by prisoners in general population, as well as prisoners in administrative and protective confinement, assuming such confinements are imposed in the ordinary course of prison administration.").

Although these circuits disagree regarding the appropriate baseline, each court's approach recognizes that "[w]hatever the 'ordinary incidents of prison life' may encompass, they must be decided with reference to the particular prison system at issue, and can only be truly 'ordinary' when experienced by a significant proportion of the prison population." *Austin v. Wilkinson*, 372 F.3d 346, 355 (6th Cir. 2004), *aff'd in part, rev'd in part on other grounds*, 545 U.S. 209 (2005); *see, e.g.*, *Welch*, 196 F.3d at 394 n.2 (doubting that conditions to which only 6% of New York inmates were subject were "typical of the ordinary incidents of prison life"); *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir.

2000) (finding inmate's conditions atypical because "very few Pennsylvania prisoners have been confined in administrative custody for periods of eight years or more"). Under any of those approaches, petitioner's exceptional assignment to permanent conditions of extreme solitary confinement would impose an atypical and significant hardship.

2. The D.C. Circuit takes a different approach, holding that the appropriate baseline varies by prisoner. In its view, "due process is required when segregative confinement imposes an 'atypical and significant hardship' on an inmate in relation to the most restrictive conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, *routinely impose on inmates serving similar sentences*." *Hatch*, 184 F.3d at 847 (emphasis added). That approach requires a state to afford due process to some inmates before placing them in conditions that may be commonplace for others serving different sentences within that state. By contrast, it permits a state to impose far harsher and exceptional conditions on small groups of inmates without affording due process. That approach arguably produces "anomalous results" that "stray[] from the real concerns" underlying the due process clause. *Sandin*, 515 U.S. at 483 & n.5.

3. Other courts have rejected any particular baseline in favor of multi-factor balancing tests that not only examine an inmate's restrictive conditions of confinement, but account for the state's justification for imposing those conditions. The Tenth Circuit, for instance, has directed district courts to consider a set of factors including "whether (1) the segregation relates to and furthers a legitimate penological

interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate (in *Wilkinson* the placement was reviewed only annually)." *Estate of DiMarco v. Wyo. Dep't of Corr.*, 473 F.3d 1334, 1342 (10th Cir. 2007). The First Circuit, meanwhile, has examined a different set of considerations when assessing whether a liberty interest is implicated. *See Skinner*, 430 F.3d at 487 ("[I]t is enough here that [the inmate's] segregation was rational, that its duration was not excessive, and that the central condition—isolation from other prisoners—was essential to its purpose.").

As *Wilkinson* makes clear, the First and Tenth Circuits' focus on a state's justification for imposing restrictive conditions improperly conflates the inquiry into whether inmates "have a liberty interest in avoiding assignment to … harsh conditions" with the separate inquiry into whether a state has afforded sufficient process when imposing such conditions. 545 U.S. at 224; *see id.* ("OSP's [Ohio State Penitentiary's] harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." (citation omitted)). At minimum, the multi-factored tests employed by the First and Tenth Circuit further aggravate the differences among the courts of appeals.

4. Still other circuit courts have declined to resolve the question of what baseline constitutes the ordinary incidents of prison life, but have issued

decisions indicating that petitioner's permanent assignment to extreme conditions of solitary confinement would give rise to a liberty interest—in conflict with the decision below. *See, e.g.*, *Williams v. Fountain*, 77 F.3d 372, 374 n.3 (11th Cir.) ("Because Williams's sanctions—especially the full year of solitary confinement—represent substantially more 'atypical and significant hardships … in relation to the ordinary incidents of prison life,' we assume that he suffered a liberty deprivation and was entitled to due process." (alteration in original)), *cert. denied*, 519 U.S. 952 (1996); *Wilkerson*, 774 F.3d at 855 ("[C]onsidering the duration of the solitary confinement, the severity of the restrictions, and their effectively indefinite nature, it is clear that Woodfox's continued detention in [segregation] constitutes an 'atypical and significant hardship'"); *see also Harden-Bey v. Rutter*, 524 F.3d 789, 793 (6th Cir. 2008) (finding complaint alleging inmate was placed in segregation for three years was improperly dismissed).

5. The divided Fourth Circuit's decision further exacerbates the disagreement among the courts of appeals by adopting yet another approach to identifying the baseline—one fundamentally at odds with *Wilkinson*.

a. In an earlier decision, *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997), the Fourth Circuit concluded that "the general population was the baseline." *Incumaa*, 2015 WL 3973822, at *8 (discussing *Beverati*). The panel majority in this case, however, believed a different result followed here because "[w]hat the inmates in *Beverati* could expect to experience and what Prieto can expect to experience differ significantly." App.14a. Observing that Virginia

Department of Corrections procedure directs that all inmates sentenced to death shall be assigned from the outset to permanent solitary confinement, the court concluded that those conditions constitute the expected and ordinary incidents of prison life, *id.* at 16a-17a—though only for the eight out of 39,000 Virginia inmates assigned to them.[2]

The Fourth Circuit made clear that its decision to apply a different baseline compared to *Beverati* did not stem from differences in the nature of petitioner's particular conviction or sentence. *See id.* at 16a ("We do not hold, or even suggest, that differences in the nature of a conviction or the length of a sentence give rise to different liberty interests."). Rather, it held that "in determining whether a deprivation imposes a significant or atypical hardship on him, the court must use as its benchmark the incidents of prison life to which [petitioner] is *entitled*." *Id.* at 17a (emphasis added). Noting that VDOC assigns all "offenders convicted of a certain crime and receiving a certain sentence" from the outset to the admittedly "harsh," "undeniably severe," and "perhaps … 'dehumanizing'"

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[2] At the outset of its opinion, the Fourth Circuit acknowledged that petitioner's conditions are the product of VDOC Operating Procedures. *See* App.2a-3a. The majority later inexactly referred to those procedures as "state law." *See id.* at 15a-17a, To be clear, petitioner's conditions indisputably are the product of VDOC Operating Procedures, particularly Operating Procedure 460.1A (later retitled Operating Procedure 460.A), a "Local Operating Procedure" of Virginia's Sussex I State Prison setting forth the conditions that prison imposes on inmates sentenced to death. *See* App.2a; CAJA941-49. Such operating procedures are neither laws, nor formal regulations, "may be modified or updated at any time," and are required neither by petitioner's conviction, nor sentence. *See, e.g.*, Va. Dep't of Corr. web site, *supra* at 6-7.

conditions at issue, it concluded that petitioner was not "entitled" to anything else. *See id.* at 16a-19a (quoting *id.* at 39a); *see also id.* at 17a ("Prieto, like any other inmate, can only be *deprived* of that to which he is entitled.").

Recently, in *Incumaa*, the Fourth Circuit crystalized its approach, explaining that "the general population is the baseline for atypicality for inmates who are sentenced[3] to confinement in the general prison population and have been transferred to security detention while serving their sentence." 2015 WL 3973822 at *8. For inmates like petitioner who are directly placed into harsher conditions outside the general prison population, however, the Fourth Circuit explained that those harsher conditions will constitute the appropriate baseline. *See id.* at *8-9.

b. Under the Fourth Circuit's test, the "ordinary incidents of prison life" are defined by the conditions into which an inmate is directly placed upon entry into the prison system. That result cannot be squared with *Wilkinson*, and other courts of appeals have rejected it.

In *Wilkinson*, this Court concluded that *all* Ohio inmates possessed a liberty interest in avoiding assignment to conditions similar to—and in important respects, less severe than—those at issue here, even though written Ohio procedures established that

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[3] Both *Prieto* and *Incumaa* incorrectly assert that inmates are "sentenced" to particular conditions of confinement. They are not. Inmates are sentenced to *prison*. An inmate's particular conditions of confinement are the product of Department of Corrections policy and discretion, not an inmate's *sentence*. *See, e.g.*, *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (noting sentencing judges do not account for "whether [an inmate's] time in prison will or should be served in solitary").

inmates "convicted of certain offenses" were routinely placed directly into those conditions upon conviction. *Wilkinson*, 545 U.S. at 216; *see also* App.24a (Wynn, J., dissenting). Such inmates plainly were not *entitled* to avoid assignment to Ohio's supermax prison. To the contrary, an inmate's placement in such conditions upon "entry into the prison system" was unexceptional for those "convicted of certain offenses." *Wilkinson*, 545 U.S. at 216. Although supermax confinement constituted normal—even expected—conditions of confinement under Ohio Department of Corrections procedures for inmates convicted of certain crimes, this Court unanimously concluded that those inmates, like others, possessed "a liberty interest in avoiding assignment to OSP" because their "conditions … taken together … impose an atypical and significant hardship within the correctional context." *Id.* at 218, 224.

Because the Fourth Circuit's contrary approach cannot be reconciled with *Wilkinson*'s result, other courts of appeals have rejected it. *See, e.g.*, *Wilkerson*, 774 F.3d at 852 ("[T]he Supreme Court and [the Fifth Circuit] have made clear that there is no dispositive bright line between deprivations resulting from initial custodial classifications and deprivations resulting from disciplinary measures.").

More fundamentally, the Fourth Circuit's approach is inconsistent with the "touchstone of the inquiry into the existence of a protected, state-created interest in avoiding restrictive conditions of confinement." *Wilkinson*, 545 U.S. at 223. As the dissent recognized, the Fourth Circuit's approach would authorize states to impose "even extreme hardships" on any group of inmates without affording procedural safeguards—simply by treating small groups of inmates atypically

from all other inmates. *See* App.23a-24a (Wynn, J., dissenting). That would unmoor the analysis from whether an inmate's conditions "'impose an atypical and significant hardship … in relation to the *ordinary* incidents of prison life,'" *Wilkinson*, 545 U.S. at 222-23 (emphasis added) (citation omitted), and convert it to a self-fulfilling inquiry into whether an inmate's extraordinary conditions are not unlike others extraordinarily situated. *But see Austin*, 372 F.3d at 355 ("[T]he 'ordinary incidents of prison life' … can only be truly 'ordinary' when experienced by a significant proportion of the prison population.").

6. This Court has already recognized that the courts of appeals are sharply conflicted regarding the appropriate baseline "from which to measure what is atypical and significant in any particular prison system." *Wilkinson*, 545 U.S. at 223; *see also Wilkerson*, 774 F.3d at 854; *Rezaq*, 677 F.3d at 1011; *Skinner*, 430 F.3d at 486-87; App.25a (Wynn, J., dissenting) ("[L]ower courts have not found it easy to agree on how best to read the due process tea leaves in the prison context."). The Fourth Circuit's decision in this case further aggravated that well-acknowledged split. This Court's intervention is needed to resolve that conflict.

II. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S REVIEW

This Court's review is particularly warranted because of the important stakes implicated by whether states may place and maintain inmates in highly atypical and extreme conditions of long-term solitary confinement without affording basic procedural

safeguards to ensure that such harsh conditions are appropriate or necessary.

1. As Justice Kennedy recently noted, "[t]he human toll wrought by extended terms of isolation long has been understood." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). This Court itself recognized 125 years ago that solitary confinement imposes unique and severe consequences different in kind from ordinary incarceration. *See In re Medley*, 134 U.S. 160, 168 (1890) ("A considerable number of the prisoners fell, after even a short confinement, into a semi-fatuous condition, from which it was next to impossible to arouse them, and others became violently insane; others, still, committed suicide; while those who stood the ordeal better were not generally reformed …."). "[I]solating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir.), *cert. denied*, 488 U.S. 908 (1988); *see also In re Medley*, 134 U.S. at 169-70 (noting that even occasional contact with prison officials, doctors, religious advisers, and family does not alter the "essential character" of solitary confinement).

The United States likewise has recognized that the hardships imposed by long-term solitary confinement are "radically unlike" the consequences of ordinary incarceration. As it explained in a brief filed by Solicitor General Robert Bork in *Meachum v. Fano*:

> [S]olitary confinement is radically unlike the normal conditions in which a prisoner is placed. Its basic ingredient is isolation from human contact, an isolation that

> affects an inmate psychologically as well as physically…. *Solitary confinement thus produces a loss of freedom apart from that taken away by incarceration in general, in even the most secure institutions.*

Brief for the United States as Amicus Curiae 22 n.15, *Meachum v. Fano*, No. 75-252 (U.S. Jan. 26, 1976), 1976 WL 181738 (emphasis added).

There is little disagreement that "[y]ears on end of near-total isolation exact a terrible price." *Davis*, 135 S. Ct. at 2210 (Kennedy, J., concurring); *see also, e.g.*, Michael Schwirtz and Michael Winerip, *Kalief Browder, Held at Rikers Island for 3 Years Without Trial, Commits Suicide*, N.Y. Times, June 8, 2015, http://www.nytimes.com/2015/06/09/nyregion/kalief-browder-held-at-rikers-island-for-3-years-without-trial-commits-suicide.html?_r=1 (noting inmate "was never able to recover from the years he spent locked alone in a cell for 23 hours a day"). Overwhelming scientific consensus recognizes that long-term solitary confinement imposes severe and damaging mental and physical health consequences. *See Davis*, 135 S. Ct. at 2210 (Kennedy, J., concurring) (noting expert scholarship in area); Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 Crime & Delinquency 124, 132-34 (2003) (identifying significant rates of psychological trauma including anxiety, confusion, chronic depression, hallucinations, perceptual distortions, lethargy, and suicidal ideation); Stuart Grassian, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1452-53 (1983) (finding "strikingly consistent" impacts including anxiety,

hallucinations, cognitive difficulties, memory lapses, and paranoia); Richmond Times-Dispatch, *Study ties inmates in solitary, self-harm*, Mar. 10, 2014, http://www.timesdispatch.com/study-ties-inmates-in-solitary-self-harm/article_fab4055c-5ff2-58c1-b460-d0834efa3ae5.html (Inmates in solitary confinement "are nearly seven times more likely to try to hurt or kill themselves" than other inmates.); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Justice 441 (2006).

Correctional leaders themselves—*including respondents in this case*—have acknowledged that solitary confinement imposes severe hardships that are different in kind from the ordinary consequences of a criminal conviction. After spending only twenty hours in solitary confinement, the current head of the Colorado Department of Corrections described feeling "twitchy and paranoid" and reported that he would lose his mind from long-term confinement. Rick Raemisch, Op-Ed., *My Night in Solitary*, N.Y. Times, Feb. 20, 2014, http://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html?_r=0. Numerous other former state department of corrections leaders agreed below that "the conditions of solitary confinement on Virginia's death row are a uniquely mentally and physically debilitating form of incarceration." Brief of Amici Curiae Correctional Experts in Support of Appellee 4-5. Even petitioner's own Warden acknowledged that "there is real importance to … getting out and being with other people, I agree, and not being 24/7 in a cell…. [W]e—as humans, we don't survive very well that way with lack of human contact." CAJA282.

The decision below, however, affords states carte blanche to impose such "undeniably severe" and "perhaps … 'dehumanizing'" hardships for years or even decades—regardless of inmates' behavior—without affording basic procedural safeguards to ensure that such conditions are necessary or appropriate. App.17a (quoting *id.* at 39a). That would only exacerbate the extent to which some prisoners will be "shut away—out of sight, out of mind," *Davis*, 135 S. Ct. at 2209 (Kennedy, J., concurring), without any assessment of whether their conditions are proper.

2. The facts of this case powerfully illustrate the impact of that denial of due process. During discovery in this case, VDOC evaluated petitioner using the same informal, individualized assessment tool that VDOC admittedly uses "very successful[ly]" to classify all other 39,000 inmates in Virginia "to the right [security] level." CAJA621. Largely on the basis of petitioner's age and longstanding record of good behavior, VDOC's own Director of Offender Management concluded that petitioner likely would be assigned to less harsh conditions if he had not been automatically placed in solitary confinement. *See* App.63a-64a. Without due process, however, petitioner's conditions will never be reevaluated, nor will he receive even the basic individual assessment that Virginia itself considers essential to classifying all other 39,000 inmates to appropriate conditions of confinement.

"Of course, prison officials must have discretion to decide that in some instances temporary, solitary confinement is a useful or necessary means to impose discipline and to protect prison employees and other inmates." *Davis*, 135 S. Ct. at 2210 (Kennedy, J., concurring). But the approach adopted by the court

below would sanction the placement of inmates in even a *permanent* "'solitary confinement regime that will bring [them] to the edge of madness, perhaps to madness itself,'" without requiring any procedural safeguards to ensure that their placement is and continues to be necessary in light of their individual circumstances. *Id.* at 2209 (citation omitted). *But see id.* ("Even if the law were to condone or permit this added punishment, so stark an outcome ought not to be the result of … unawareness or indifference.").

3. This case is an especially good vehicle to resolve the questions presented. Respondents limited their appeal below to whether petitioner could establish a liberty interest, and the court of appeals resolved this case solely on that issue. App.4a. In any event, because "Virginia affords capital offenders no process" before assigning them to permanent solitary confinement, *id.* at 27a (Wynn, J., dissenting); *see also id.* at 49a, whether petitioner has established a liberty interest is dispositive of his due process claim.

4. This Court, other courts, the United States, mental health experts, and correctional officials have consistently recognized that long-term solitary confinement imposes extreme hardships on inmates that differ in kind from the ordinary consequences of incarceration. By imposing "an atypical and significant hardship within the correctional context"—a grievous loss of liberty over and above that ordinarily experienced upon criminal conviction—such "conditions give rise to a liberty interest in their avoidance." *Wilkinson*, 545 U.S. at 224.

In light of the well-recognized conflict among the courts of appeals on the questions presented, and the importance of resolving whether states may maintain

inmates in extreme, long-term conditions of solitary confinement without affording any due process, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. BERN
Counsel of Record
ABID R. QURESHI
KATHERINE M. GIGLIOTTI
ALEXANDRA P. SHECHTEL*
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-1021
michael.bern@lw.com

* Admitted in California only; all work supervised by a member of the DC Bar.

Counsel for Petitioner

July 6, 2015

APPENDIX

APPENDIX

Page

UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

Alfredo PRIETO, Plaintiff–Appellee,

v.

Harold CLARKE, Director; A. David Robinson, Deputy Director; E. Pearson, Warden, Defendants–Appellants.

Toni V. Bair; F. Warren Benton; Kathleen M. Dennehy; Brian Jason Fischer; Martin F. Horn; Steve J. Martin; Chase Riveland; Reginald A. Wilkinson; Jeanne Woodford, Amici Supporting Appellee.

Alfredo Prieto, Plaintiff–Appellee,

v.

Harold Clarke, Director; A. David Robinson, Deputy Director; E. Pearson, Warden, Defendants–Appellants.

Toni V. Bair; F. Warren Benton; Kathleen M. Dennehy; Brian Jason Fischer; Martin F. Horn; Steve J. Martin; Chase Riveland; Reginald A. Wilkinson; Jeanne Woodford, Amici Supporting Appellee.

Nos. 13-8021, 14-6226. | Argued: Oct. 28, 2014. | Decided: March 10, 2015.

Before MOTZ, SHEDD, and WYNN, Circuit Judges.

Opinion

Reversed by published opinion. Judge Motz wrote the majority opinion, in which Judge Shedd joined. Judge Wynn wrote a dissenting opinion.

DIANA GRIBBON MOTZ, Circuit Judge:

The district court held that the procedural Due Process rights of a capital prisoner were violated by a

state policy requiring his confinement, prior to execution, in a single cell with minimal visitation and recreation opportunities. The court ordered state officials either to alter the policy or to improve these conditions. The officials appeal and, for the reasons that follow, we reverse.

I.

Upon conviction for two capital murders and receipt of two death sentences, Alfredo Prieto was incarcerated by the Commonwealth of Virginia at Sussex I State Prison in Waverly, Virginia. Prieto is one of eight Virginia convicts imprisoned after receipt of the death penalty. All eight capital offenders are housed in the same portion of Sussex I, known widely as Virginia's "death row." Appellant's Br. 11–13.

A written state policy mandates that all persons sentenced to death in Virginia be confined on death row while awaiting execution. *See* Virginia Dep't. of Corr. Operating Procedure 830.2(D)(7), 460.1A(I). Unlike other prisoners, these prisoners are not subject to security classification or assignment to any alternative confinement. *Id.* Inmates on death row live in separate single cells, with visitation and recreation restrictions more onerous than those imposed on other inmates.

After incarceration on Virginia's death row for nearly six years as he pursued post-conviction challenges, Prieto brought this 42 U.S.C. § 1983 action pro se. He alleged that his confinement on death row violated his procedural Due Process and Eighth Amendment rights and sought injunctive relief. The district court dismissed the Eighth Amendment claim but found that Prieto had stated a plausible Due

Process claim and appointed counsel for him.[1] Following discovery, the parties filed cross motions for summary judgment

The district court granted Prieto's motion. The court noted that the conditions on Virginia's death row were "eerily reminiscent" of those held in *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005), to implicate a liberty interest protected by the Due Process Clause. *See Prieto v. Clarke*, No. 12–1199, 2013 WL 6019215, at *6 (E.D.Va. Nov. 12, 2013). Reasoning that because these conditions were "uniquely severe" and pervasive compared to the conditions of the general prison population, the court concluded that Prieto had established a Due Process liberty interest in avoiding them and that Prieto's automatic and permanent assignment to death row did not afford him constitutionally adequate process. *Id.* at *7–8.

The district court then issued an injunction ordering Virginia prison officials either to "improve [Prieto]'s conditions of confinement" or provide Prieto with "an individualized classification determination" for his prison housing, like the classification procedure afforded by state law to non-capital offenders. *Id.*

In a subsequent order, the court awarded Prieto all costs and attorney's fees. The prison officials appeal both orders; we consolidated the cases on appeal.

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1 Prieto initially appealed the district court's dismissal of his Eighth Amendment claim, but we dismissed the appeal for failure to prosecute and Prieto does not challenge that decision in the present appeal.

II.

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV. To state a procedural due process violation, a plaintiff must (1) identify a protected liberty or property interest and (2) demonstrate deprivation of that interest without due process of law. Because we conclude that Prieto cannot establish a protected liberty interest, we need not consider the sufficiency-of-process requirement.

The Supreme Court has long recognized that a prisoner may have a state-created liberty interest in certain prison confinement conditions, entitling him to procedural Due Process protections. *See, e.g.*, *Meachum v. Fano*, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976); *Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).[2] But the Court has been equally clear that if no state statute, regulation, or policy creates such a liberty interest, a prisoner *cannot* "invoke the procedural protections of the Due Process Clause." *Meachum*, 427 U.S. at 224,

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[2] The Court has also held that such a liberty interest can arise from the Constitution itself but only rarely has recognized such an interest. *See, e.g., Vitek v. Jones*, 445 U.S. 480, 493–494, 100 S.Ct. 1254, 63 L.Ed.2d 552 (1980) (recognizing liberty interest in avoiding involuntary psychiatric treatment and transfer to mental institution). For the first time on appeal, Prieto contends that the Constitution standing alone provides a liberty interest entitling him to relief. Even if he had preserved this argument, it would be meritless. *See Sandin v. Conner*, 515 U.S. 472, 480, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995) ("The Due Process Clause standing alone confers no liberty interest in freedom from state action taken within the sentence imposed." (internal quotations and citation omitted)).

96 S.Ct. 2532. And the Court has expressly "reject[ed] ... the notion that *any* grievous loss visited upon a person by the State is sufficient" to require constitutionally adequate procedure. *Id.*

In the late 70s and early 80s the Court broadly defined state-created interests, holding that any mandatory state directive created a state law liberty interest triggering procedural Due Process protections. *See, e.g.*, *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 74 L.Ed.2d 675 (1983); *Greenholtz v. Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979). In an effort to eliminate the resultant "[p]arsing" of state statutes to find rights by "negative implication," the Court corrected course in *Sandin v. Conner*, 515 U.S. 472, 481–82, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995). There it added a second requirement for establishing a liberty interest warranting constitutionally adequate process. *Sandin* holds that, while a state statute or policy may "create liberty interests" giving rise to Due Process protection, this is so only if the denial of such an interest "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484, 115 S.Ct. 2293.

A decade later, in *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005), the Court applied this "two-part analysis."[3] *Wilkinson* expressly

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[3] The Second Circuit has so dubbed and then applied this analysis first established in *Sandin*. *See Tellier v. Fields*, 280 F.3d 69, 80 (2d Cir.2000). *Contra Chappell v. Mandeville*, 706 F.3d 1052, 1064 (9th Cir.2013) (bypassing the first prong in this two-part analysis); *but see id.* at 1065–66 (Graham, J., concurring in the judgment) (labeling majority's departure from this "two-part inquiry" a "radical change in due process jurisprudence").

reaffirmed that in determining if a prisoner has established a state-created liberty interest in certain conditions of confinement, the "threshold question" is whether such an interest "arise[s] from state policies or regulations." *Id.* at 221–22, 125 S.Ct. 2384. The Court then reiterated that even if state policies could be read to create such an interest, to garner the protection of the Due Process Clause an inmate must also establish that "the nature of [the] conditions themselves, 'in relation to the ordinary incidents of prison life,' " impose "an atypical and significant hardship." *Id.* at 223, 125 S.Ct. 2384 (quoting *Sandin*, 515 U.S. at 484, 115 S.Ct. 2293).

When the *Wilkinson* Court applied this two-prong analysis, the parties agreed as to the first prong. That is, the State and the inmates agreed on the "threshold question," that written Ohio prison classification regulations controlled the prison assignment, and so confinement conditions, of all inmates. *Id.* at 215–17, 221, 125 S.Ct. 2384. The *Wilkinson* Court thus focused on the second prong: whether these regulations created a "liberty interest in avoiding restrictive conditions of confinement." *Id.* at 223, 125 S.Ct. 2384. Reiterating *Sandin's* teaching, *Wilkinson* noted that the "touchstone of th[is] inquiry ... is not the language of the regulations regarding those conditions," but whether their application imposed "atypical and significant hardship ... in relation to the ordinary incidents of prison life." *Id.* (quoting *Sandin*, 515 U.S. at 484, 115 S.Ct. 2293) (internal quotation marks omitted). Assignment to and confinement at the supermax was found to constitute an "atypical and significant hardship," because all other prisons in which the inmates could have been housed under Ohio's

classification regulations had markedly less-onerous confinement conditions. *See id.* at 223–24, 125 S.Ct. 2384. And, for this reason, the Court concluded that "under any plausible baseline," the harsh conditions at the supermax "g[a]ve rise to a liberty interest in their avoidance." *Id.* at 223–24, 125 S.Ct. 2384.[4]

Prieto properly recognizes the importance of *Sandin* and *Wilkinson* to his challenge. But his analysis, which the district court adopted, rests on interrelated, critical misunderstandings of those cases. Prieto treats *Sandin* and *Wilkinson* as establishing a new regime in which atypical and harsh confinement conditions, *in and of themselves*, give rise to a protected liberty interest, regardless of whether any state law or policy creates the possibility of avoiding such conditions. Moreover, Prieto fails to recognize that he cannot satisfy either of the two requirements for a protected, state-created liberty interest specified in *Sandin* and *Wilkinson*. We address these issues in turn.

III.

We begin with Prieto's apparent belief that *Sandin* and *Wilkinson* hold that atypical and harsh confinement conditions, standing alone, can give rise to a state-created liberty interest. Noting that *Wilkinson* held that the conditions at the Ohio supermax imposed an atypical hardship under "any plausible baseline," 545 U.S. at 223, Prieto asserts that because the conditions on Virginia's death row are just as harsh as those in *Wilkinson*, he too must have a liberty interest.

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4 *Wilkinson* went on to hold that a new Ohio law provided the inmates with constitutionally sufficient process. *Wilkinson*, 545 U.S. at 228–29, 125 S.Ct. 2384.

But the view that prison conditions, simply by virtue of their severity, give rise to a protected liberty interest misreads *Sandin*, *Wilkinson*, and the cases that preceded them, and overlooks our binding circuit precedent.

Prieto reads *Sandin* as "abandon[ing]" the Supreme Court's prior teaching in *Meachum* that a plaintiff must point to a state statute, regulation or policy in order to "establish a liberty interest." Appellee's Br. 17. But the *Sandin* Court did no such thing. Rather, in *Sandin*, the Court expressly embraced this portion of *Meachum*, noting that "[t]he time ha[d] come to return to the due process principles ... correctly established in ... Meachum." *Sandin*, 515 U.S. at 483, 115 S.Ct. 2293. What the *Sandin* Court did do was reject some *dicta* in *Meachum* suggesting that any mandatory language in a regulation "created an absolute right to ... certain substantive procedures." *Id.* at 481, 115 S.Ct. 2293. Because not all such policies are "designed to confer rights on inmates," *id.* at 482, *Sandin* added an additional showing necessary to establish a protected liberty interest. *Id.* at 482, 115 S.Ct. 2293. After finding a basis for an interest or expectation in state regulations, an inmate must then demonstrate that denial of this state-created interest resulted in an "atypical and significant hardship" to him. *Id.* at 484, 115 S.Ct. 2293.

Prieto, now joined by our friend in dissent, also misreads *Wilkinson*. For *Wilkinson* does not hold that harsh or atypical prison conditions in and of themselves provide the basis of a liberty interest giving rise to Due Process protection. Rather, it was "the inmates' interest in avoiding" erroneous placement at the supermax under the state's classification regulations

combined with these harsh and atypical conditions that triggered Due Process protections. *Wilkinson*, 545 U.S. at 224–25, 125 S.Ct. 2384. The *Wilkinson* Court simply applied the two-prong approach established in *Sandin*. Thus *Wilkinson* neither eliminates the first prong nor implies that the "nature of th[e] conditions" *alone* establishes a protected liberty interest.[5] *Id.* at 223, 125 S.Ct. 2384

Moreover, Prieto ignores our own binding precedent rejecting his approach. In *Lovelace v. Lee*, 472 F.3d 174, 202 (4th Cir.2006), we expressly recognized that *Wilkinson* requires a prisoner seeking to bring a procedural due process claim to satisfy the two-prong test. Relying on *Wilkinson*, we held that to demonstrate a liberty interest meriting procedural due process protection, a prisoner must show (1) denial of "an interest that can arise either from the Constitution itself or from state laws or policies," and that (2) "this denial imposed on him an 'atypical and significant hardship ... in relation to the ordinary incidents of prison life.' " *Lovelace*, 472 F.3d at 202 (quoting *Sandin*, 515 U.S. at 484, 115 S.Ct. 2293). Even more recently we reaffirmed the necessity of the first prong. *See Burnette v. Fahey*, 687 F.3d 171, 181 (4th Cir.2012) (explaining that a "liberty interest may arise ... from an expectation or interest created by state laws or

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[5] If Prieto's reading of *Sandin* and *Wilkinson* were correct, a state would "create" a liberty interest simply by imposing harsh confinement conditions. This outcome would not bring the Court's precedent in line with *Meachum*, as *Sandin* sought to do. Rather, it would reject the express teaching in *Meachum* that a state-created liberty interest does not arise simply from "conditions of confinement having a substantial adverse impact on the prisoner." 427 U.S. at 224, 96 S.Ct. 2532.

policies" (internal quotation marks and citation omitted)).[6]

In addition to espousing a theory contrary to *Sandin*, *Wilkinson*, and our binding circuit precedent in *Lovelace* and *Burnette*, Prieto's approach would collapse a prison conditions Due Process claim into an Eighth Amendment claim. The Eighth Amendment's prohibition on cruel and unusual punishment "appl[ies] when the conditions of confinement compose the punishment at issue." *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). Allegations that prison conditions "involve the wanton and unnecessary infliction of pain," or are "grossly disproportionate to the severity of the crime," or are "without any penological purpose" fall squarely within the ambit of the Eighth Amendment—not the Due Process Clause. *Id.* The Eighth Amendment requires a court to examine whether prison conditions impose cruel and unusual punishment. The Due Process clause requires a court to determine whether a state has

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6 Contrary to Prieto's contention, a recent Fifth Circuit case lends him no support. *See Wilkerson v. Goodwin*, 774 F.3d 845 (5th Cir.2014). There, the court held that an inmate's almost forty-year incarceration in solitary confinement, assertedly in violation of a state classification system, gave rise to a liberty interest protected by due process. *Id.* at 851–57. Prieto points out that the court recognized that the existence of a state-created interest turns on the nature of the deprivation "resulting from a state regulation," rather than the "language of the regulation." *Id.* at 852 (quotation marks and citation omitted). Yes, but in so concluding, the Fifth Circuit expressly acknowledged, as we hold, that to give rise to a due process challenge, a deprivation must "result[ ] from" the alleged violation of a state regulation. *Id.* Unlike Wilkerson, Prieto can point to no deprivation resulting from the violation of a state regulation.

provided prisoners with adequate process in applying prison regulations and policies. Treating *Sandin* and *Wilkinson* as holding that confinement conditions alone trigger a Due Process claim—without regard to whether a state policy or regulation provides the basis to challenge such conditions—would elide that critical distinction.

Prieto thus errs in contending that harsh and atypical confinement conditions in and of themselves give rise to a liberty interest in their avoidance.[7]

IV.

Of course, regardless of this initial error, Prieto could still establish a basis for Due Process protection. To do so, he would need to point to a Virginia law or policy providing him with an expectation of avoiding the conditions of his confinement *and* demonstrate that those conditions are harsh and atypical in relation to the ordinary incidents of prison life. Prieto does neither.

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[7] Prieto's contention that Virginia officials waived the argument that he must point to an entitlement in state regulations or statutes to establish a Due Process claim is meritless. The officials contended before the district court, albeit briefly, that a liberty interest must be "created by state laws or policies" and that Prieto could not establish a right to reclassification because one does not exist under state law. Defs' Mem. in Supp. of Mot. Summ. J. 8, ECF No. 80; Defs' Resp. to Pls' Mot. Summ. J. 6, ECF No. 81. The district court clearly understood and indeed stated that the "sole issue" before it was whether Prieto's "automatic and permanent" placement in the restrictive conditions of confinement present in Virginia's death row violates Prieto's Fourteenth Amendment due process rights, and that this analysis required an initial determination of "whether a liberty interest exists." *Prieto*, 2013 WL 6019215, at *4.

A.

The record is clear that under Virginia law, a capital offender has no expectation or interest in avoiding confinement on death row. A written Virginia policy requires all capital offenders to be housed on death row prior to execution, without any possibility of reclassification. *See* Virginia Dep't of Corr. Operating Procedure 830.2(D)(7) ("Any offender sentenced to Death will be assigned directly to Death Row.... No reclassification will be completed.").

This state policy forecloses any Due Process expectation or right on the part of Virginia capital offenders to any other housing assignment. For the corollary to the requirement that a state-created liberty interest must be anchored in a state policy is that when a state policy expressly and unambiguously disclaims a particular expectation, an inmate cannot allege a liberty interest in that expectation. That is, a court cannot conclude that death row inmates have a state-created interest in consideration for non-solitary confinement when the State's established written policy expressly precludes such consideration.

Prieto apparently regards the written Virginia policy as being of no moment, but in fact that policy eliminates his procedural Due Process claim.

B.

Nor can Prieto establish that the conditions of his confinement impose an atypical and significant hardship in relation to the ordinary incidents of prison life.[8] Prieto recognizes, as he must, that the Supreme

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[8] Of course, a court need only reach the atypicality question if an inmate has been deprived of a state-created liberty interest. Here there has been no deprivation, because there is no state-

Court has yet to identify the baseline for determining whether a state regulation imposes such an atypical and significant hardship. But he raises several arguments in support of his view that the conditions of his confinement on death row satisfy the atypicality requirement.

Citing *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir.1997), Prieto asserts that this court has "long explained that the ordinary incidents of prison life are established by the conditions imposed on the general prison population." Appellee's Br. 27. Prieto also contends that his conditions of confinement on death row impose an atypical hardship "relative to ordinary prison conditions" in other Virginia prisons. *Id.* And he argues at length that his confinement conditions "mirror" those in *Wilkinson*, and thus must impose an atypical and significant hardship "under any plausible baseline." *Id.* at 22 (quoting *Wilkinson*, 545 U.S. at 223, 125 S.Ct. 2384); *see also id.* at 16, 23–27.

Prieto is wrong on all counts. First, neither in *Beverati* nor elsewhere have we indicated that in *all* cases, the relevant atypicality baseline is the "general prison population." *Beverati* involved inmates initially subjected to thirty days of disciplinary segregation but thereafter retained in segregation for six more months. *Beverati*, 120 F.3d at 501–02. Only with respect to those inmates in disciplinary segregation, whose conditions of confinement were set by Maryland (not Virginia) law, did we describe the baseline as the conditions those particular inmates could expect to

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created liberty interest. Nevertheless, we address the atypicality inquiry because it is Prieto's principal contention and was the basis for the district court's holding.

"experience as an ordinary incident of prison life." *Id.* at 503. What the inmates in *Beverati* could expect to experience and what Prieto can expect to experience differ significantly. It should come as no surprise that the baseline does, too. Moreover, we have never interpreted *Beverati* to establish the rule Prieto suggests. Rather, we have, as *Sandin* instructed, stressed that the atypicality baseline should be determined " 'in relation to the ordinary incidents of prison life.' " *Lovelace*, 472 F.3d at 202 (quoting *Sandin*, 515 U.S. at 484, 115 S.Ct. 2293). *Beverati* simply does not stand for the broad proposition Prieto would like it to.

Second, as to Prieto's argument that the proper baseline for assessing his conditions of confinement are the "ordinary prison conditions" in the state's prisons, *Wilkinson* is instructive. None of the parties in *Wilkinson* even suggested that "ordinary prison conditions" in other Ohio prisons provided the proper baseline for the dangerous offenders assigned to the supermax. At oral argument in *Wilkinson*, counsel for both Ohio and the inmates acknowledged that they had clashed in the lower courts as to the appropriate baseline for determining atypicality. But no party contended that the "ordinary prison conditions" of the general prison population constituted the appropriate baseline for assessing the confinement conditions of those dangerous prisoner plaintiffs. *See generally* Transcript of Oral Argument, *Wilkinson v. Austin*, 545 U.S. 209, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005) (No. 04–495).[9]

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9 Ohio suggested that the baseline be the security classification just below that which renders Ohio prisoners eligible for housing

Further, neither *Wilkinson* nor *Beverati* involved a discrete class of inmates who had been *sentenced to death* and *for that reason* were required by state law to be confined under particular conditions.[10] Rather, *Wilkinson* and *Beverati* found confinement conditions that were *not* required by a particular conviction and sentence to impose an atypical and significant hardship. These holdings certainly do not mean that similar conditions pose an atypical and significant hardship where, as here, state law does mandate that a particular conviction and sentence require confinement under such conditions.

When determining the baseline for atypicality, a court must consider whether the confinement conditions are imposed on a prisoner *because of* his conviction and sentence. For conditions dictated by a prisoner's conviction and sentence are the conditions constituting the "ordinary incidents of prison life" for that prisoner. *Sandin*, 515 U.S. at 484, 115 S.Ct. 2293;

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at the supermax. The inmates argued that the baseline should be segregated confinement units at other Ohio prisons. *See* Transcript at 6–7, 52.

[10] Contrary to our dissenting colleague's suggestion, confinement of the inmates in *Wilkinson* to the supermax was not the "automatic [ ]" result "of being convicted of certain offenses." Conviction of certain egregious crimes did result in automatic *consideration* for assignment to the supermax, but not automatic *confinement* there. *Wilkinson*, 545 U.S. at 216, 125 S.Ct. 2384. In stark contrast to the case at hand, in *Wilkinson* a detailed written state policy governed assignment in every case. That policy set forth a highly individualized assignment procedure "based on numerous factors (e.g., the nature of the underlying offense, criminal history, or gang affiliation) but [ ] subject to modification at any time during the inmate's prison term." *Id.* at 215, 125 S.Ct. 2384.

Lovelace, 472 F.3d at 202; *Beverati*, 120 F.3d at 502–03. As the Tenth Circuit recently explained, conditions "will differ depending on a particular inmate's conviction and the nature of nonpunitive confinement routinely imposed on inmates serving comparable sentences." *Rezaq v. Nalley*, 677 F.3d 1001, 1012 (10th Cir.2012).

We do not hold, or even suggest, that differences in the nature of a conviction or the length of a sentence give rise to different liberty interests. Rather, we simply recognize, as we must, that in the unusual instances in which state law mandates the confinement conditions to be imposed on offenders convicted of a certain crime and receiving a certain sentence, those confinement conditions are, by definition, the "ordinary incidents of prison life" for such offenders. Virginia law mandates that all persons convicted of capital crimes are, upon receipt of a death sentence, automatically confined to death row. Thus, in Virginia the ordinary incidents of prison life for those inmates, including Prieto, include housing on death row.

This conclusion follows from the importance the Supreme Court has attached to the sentence of conviction in assessing possible Due Process violations. In *Meachum*, the Court rejected the contention that "burdensome conditions" imposed by transfer to a maximum security facility provided the basis for a Due Process claim because those conditions fell "within the normal limits or range of custody *which the conviction has authorized the State to impose*." *Meachum*, 427 U.S. at 225, 96 S.Ct. 2532 (emphasis added) (quoted with approval in *Sandin*, 515 U.S. at 478, 115 S.Ct. 2293). Similarly, in rejecting a prisoner's Due Process claim, the *Sandin* Court found significant the fact that

the challenged confinement conditions fell "within the *expected perimeters of the sentence imposed.*" *Sandin*, 515 U.S. at 485, 115 S.Ct. 2293 (emphasis added). As the Court explained in *Sandin* and repeated in *Wilkinson*, a prisoner does not establish a state-created liberty interest in avoiding disciplinary segregated confinement if such confinement "does not present a dramatic departure *from the basic conditions of [the inmate's] indeterminate sentence.*" *Id.* (emphasis added); *Wilkinson*, 545 U.S. at 223, 125 S.Ct. 2384.

Prieto, like any other inmate, can only be *deprived* of that to which he is entitled. Thus, in determining whether a deprivation imposes a significant or atypical hardship on him, the court must use as its benchmark the incidents of prison life to which he is entitled. Virginia imposes death row confinement on capital offenders because of the crime they have committed and the sentence they have received. That confinement is the expected—indeed mandated—confinement condition flowing from the conviction and sentence. State law defines the perimeters of confinement conditions, and here state law is pellucid: tethered to the death sentence in Virginia is pre–execution confinement on death row

V.

We do not in any way minimize the harshness of Virginia's regime. Prieto's conditions of confinement are undeniably severe. Indeed, the district court, perhaps correctly, described the isolation that characterizes Virginia's death row as "dehumanizing".

Prieto, 2013 WL 6019215, at *6.[11] But the Supreme Court has long held, as it did in *Wilkinson*, that state correctional officials have broad latitude to set prison conditions as they see fit since "[p]rison security, imperiled by the brutal reality of prison gangs, provides the backdrop of the state's interest." 545 U.S. at 227, 125 S.Ct. 2384. Recently the Court emphasized once more that "[t]he difficulties of operating a detention center must not be underestimated by the courts," and that "correctional officials ... must have substantial discretion to devise reasonable solutions to the problems they face." *Florence v. Bd. of Chosen Freeholders*, —— U.S. ——, 132 S.Ct. 1510, 1515, 182 L.Ed.2d 566 (2012).

Of course, the Supreme Court could prescribe more rigorous judicial review of state statutes and regulations governing prison confinement conditions. But it has not. Concerned with eliminating "disincentives for States to 'codify' prison management procedures," the *Sandin* Court adopted an approach that would encourage States to codify their policies regarding treatment and confinement of inmates. 515 U.S. at 482, 115 S.Ct. 2293. This approach, reaffirmed in *Wilkinson*, provides inmates and prison administrators with clear notice of a prisoner's rights, but it also permits a given state to codify procedures establishing very restrictive confinement conditions.

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[11] We note, however, that the conditions on Virginia's death row are apparently not altogether unlike those imposed by some other states on their capital offenders. A study cited by one of Prieto's amici, the ACLU, reports as much. See Mark D. Cunningham & Mark P. Vigen, *Death Row Inmate Characteristics, Adjustment, and Confinement: A Critical Review of the Literature*, 20 Behav. Sci. & L. 191, 204 (2002).

The judgment that this trade-off strikes the correct balance between the dictates of the Due Process Clause and the pressures on state correctional systems is one that the Supreme Court has made and we cannot disturb. Of course, the Court may one day alter its approach to the Due Process Clause. But unless and until the Court retreats from *Sandin* and *Wilkinson*, a procedural Due Process claim like that offered by Prieto fails.

For the foregoing reasons, we reverse the judgment of the district court.[12]

REVERSED

WYNN, Circuit Judge, dissenting:

A unanimous Supreme Court told us in no uncertain terms that prisoners have a liberty interest in avoiding indefinite, highly restrictive imprisonment. *Wilkinson v. Austin*, 545 U.S. 209, 220–21, 125 S.Ct. 2384, 162 L.Ed.2d 174 (2005). And the Supreme Court told us that in determining whether such a liberty interest exists, we must focus on the "the nature of those conditions themselves in relation to the ordinary incidents of prison life." *Id.* at 223, 125 S.Ct. 2384 (quotation marks omitted).

The Supreme Court found the conditions in *Wilkinson* sufficiently egregious that "taken together[,] they impose an atypical and significant hardship within the correctional context ... [and thereby] give rise to a liberty interest in their avoidance." *Id.* at 224, 125 S.Ct. 2384. In other words,

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[12] Because 42 U.S.C. § 1988(2) authorizes the award of attorney's fees only to a "prevailing party," we must also reverse the order awarding costs and attorney's fees to Prieto.

the restrictive conditions could be imposed-but not without procedural safeguards such as notice and an opportunity to be heard.

This case presents conditions of confinement strikingly similar to, and arguably more egregious than, those in *Wilkinson*. I would therefore follow *Wilkinson* and find Plaintiff Alfred Prieto entitled to at least some modicum of procedural due process. In my view, the majority opinion reads *Wilkinson* unnecessarily narrowly in signing off on Prieto's automatic, permanent, and unreviewable placement in the highly restrictive conditions of Virginia's death row. Accordingly, I respectfully dissent.

I.

A.

"The Fourteenth Amendment's Due Process Clause protects persons against deprivations of life, liberty, or property; and those who seek to invoke its procedural protection must establish that one of these interests is at stake." *Id.* at 221, 125 S.Ct. 2384.

In *Wilkinson*, the Supreme Court found a prisoner's liberty interest at stake and got there by noting that "the touchstone of the inquiry into the existence of" the liberty interest in avoiding restrictive conditions of confinement was not the language of regulations "but the nature of those conditions themselves in relation to the ordinary incidents of prison life." 545 U.S. at 222, 125 S.Ct. 2384 (citation and quotation marks omitted). The centerpiece of the Court's *Wilkinson* opinion, therefore, was an analysis of the conditions themselves.

Nowhere in *Wilkinson* did the Supreme Court parse the language of any law or regulation or otherwise suggest that written words governing the

conditions of confinement are the linchpins to finding a liberty interest. *See id.* Instead, the Court analyzed the conditions themselves and then held that "taken together they impose an atypical and significant hardship within the correctional context. It follows that [the prisoners] have a liberty interest in avoiding" them. *Id.* at 224, 125 S.Ct. 2384. In other words, the Supreme Court looked not at verbiage but at the facts on the ground, comparing the conditions at issue with typical conditions. And finding the conditions at issue atypically harsh, the Court held that a prisoner subjected to the conditions is due at least an informal notice and hearing before he is subjected to them.[1]

Several conditions caught the Supreme Court's eye in *Wilkinson:* the solitary nature of the confinement and near complete prohibition on human contact; the lack of stimuli, with exercise limited to one hour per day in a small indoor room; the potentially indefinite period of the placement-with only an annual review after the initial thirty-day review; and potential disqualification of inmates otherwise eligible for parole. *See Wilkinson*, 545 U.S. at 223–24, 125 S.Ct. 2384. The Supreme Court looked at the totality of the conditions and held that "taken together they impose an atypical and significant hardship within the correctional context." *Id.* at 224, 125 S.Ct. 2384.

In this case, the conditions of confinement essentially mirror those in *Wilkinson.* Prieto is

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[1] The Supreme Court did not, however, hold that the conditions themselves were unconstitutional and needed to be changed; that would be a separate, Eighth Amendment inquiry. Nor would I hold so here, not least because, as in *Wilkinson*, that is not before us.

deprived of almost all human contact, even cell-to-cell contact with other death row inmates. His conditions of confinement are largely devoid of stimuli: He must remain in his small single cell for twenty-three hours a day, except for one hour five days per week, when he may exercise in a small enclosure with a concrete floor and no exercise equipment. And Prieto's confinement on death row is indefinite: No opportunity for review of the placement exists.

In some respects, Prieto's conditions are actually more restrictive than those in *Wilkinson.* For example, Prieto's cell is smaller than the cells in *Wilkinson.* Unlike the prisoners in *Wilkinson*, Prieto has no opportunity for group programming or religious services. And Prieto has fewer opportunities for exercise.

One condition at issue in *Wilkinson* but absent here is disqualification for parole. Specifically, inmates otherwise eligible for parole became ineligible when placed into the restrictive supermax confinement at issue in *Wilkinson*, 545 U.S. at 224, 125 S.Ct. 2384. But the Supreme Court in no way limited its holding only to those (few) inmates who would otherwise be eligible for parole but for their supermax confinement. And I agree with the Seventh Circuit that any contention that *Wilkinson* turned on the (in)eligibility for parole constitutes "far too crabbed a reading of the decision." *Westefer v. Snyder*, 422 F.3d 570, 590 (7th Cir.2005).

In the end, the Supreme Court felt "satisfied" that the conditions in *Wilkinson*, taken together, "impose[d] an atypical and significant hardship *under any plausible baseline.*" *Wilkinson,* 545 U.S. at 223, 125 S.Ct. 2384 (emphasis added). The Supreme Court

therefore felt no need to identify the baseline to which the conditions should be compared. *Id.*

Here, I feel "satisfied" that Prieto's conditions of confinement, which are strikingly similar to those in *Wilkinson*, when taken together "impose[ ] an atypical and significant hardship under any plausible baseline." *Id.* And if the Supreme Court did not need to identify a particular baseline to reach such a conclusion, neither do I.

B.

In my view, the majority opinion seeks to engage in just the sort of "parsing" that the Supreme Court moved away from with Sandin and Wilkinson. For example, the majority opinion understands *Sandin* and *Wilkinson* as holding that a prisoner must first show that a written prison regulation gives rise to a protected liberty interest before reaching the atypical and significant hardship inquiry. *See ante* at 248–52. But following that logic to its end would mean that prisoners have no interest in avoiding even extreme hardships so long as a state simply removes all delineating prison regulations or expressly disclaims any liberty expectation. Yet it was precisely this type of "parsing" and resulting "disincentive[s] for States to promulgate procedures for prison management" that the Supreme Court sought to curtail. *Wilkinson*, 545 U.S. at 222, 125 S.Ct. 2384.

The majority opinion also "re-organizes" the Supreme Court's *Wilkinson* analysis in misleading ways. For example, the only "threshold question" the Supreme Court identified in *Wilkinson* was whether "the inmates establish[ed] a constitutionally protected liberty interest"—not the sentence fragment from a

different paragraph that the majority opinion redlines in to play the part of the "threshold question." 545 U.S. at 221, 125 S.Ct. 2384. A second example: The majority opinion contends that the risk of erroneous placement coupled with the harsh conditions "triggered" due process protections. *Ante* at 250–51. Yet in *Wilkinson*, the Supreme Court considered the erroneous placement issue only after it had already held that a liberty interest in avoiding the harsh conditions existed, as a factor for determining whether the procedures in place sufficed. 545 U.S. at 224–25, 125 S.Ct. 2384.

The majority opinion places much emphasis on the fact that because all capital offenders in Virginia automatically land on death row, Prieto has no interest in avoiding its conditions and thus no due process rights. *See ante* at 252. In this respect, too, Prieto's case overlaps with *Wilkinson:* The Supreme Court noted that some defendants there were automatically assigned to the restrictive supermax confinement as a consequence of being "convicted of certain offenses." *Wilkinson*, 545 U.S. at 216, 125 S.Ct. 2384. But the Supreme Court in no way excluded those inmates from the ambit of its holding or otherwise suggested that because of their automatic assignment, they had no liberty interest in avoiding the restrictive supermax conditions.

Instead, the Supreme Court broadly stated that "the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves 'in relation to the ordinary incidents of prison life.' " *Id.* at 221, 125

S.Ct. 2384 (citation omitted). In my view, the majority opinion's myopic search of a written regulation betrays this touchstone and "stray[s] from the real concerns undergirding the liberty protected by the Due Process Clause." *Sandin,* 515 U.S. at 483, 115 S.Ct. 2293.

I agree with the majority opinion that the Supreme Court has been anything other than consistent in its approach to prisoner due process cases. The Supreme Court suggested that prisoner liberty interests exist whenever something is sufficiently important. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Then it indicated that liberty interests are a function of mandatory verbiage in written regulations. *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Later the Court rethought that approach, holding that such verbiage is, in fact, not so important after all. *See, e.g.*, *Wilkinson*, 545 U.S. 209, 125 S.Ct. 2384. It is, therefore, not surprising that lower courts have not found it easy to agree on how best to read the due process tea leaves in the prison context. *See ante* at 249 (comparing *Chappell v. Mandeville*, 706 F.3d 1052 (9th Cir.2013), with *Tellier v. Fields*, 280 F.3d 69 (2d Cir.2000)).

Finally, the majority opinion suggests that an analysis like mine bucks controlling circuit precedent, and particularly *Lovelace v. Lee*, 472 F.3d 174, 202 (4th Cir.2006). Yet that case does not present the obstacle the majority opinion portrays. In *Lovelace*, we admonished the district court for its failure to address the plaintiff's due process claim and remanded the matter to the district court for a determination "in the first instance." 472 F.3d at 203. Therefore, even assuming that one could not square my view with

Lovelace, anything *Lovelace* said about the due process claim seems to be only dictum, and in any event the assertion that the case "reject[ed] [my] approach" is gross overstatement. *Ante* at 250–51. Moreover, to the extent *Lovelace* parts ways with *Wilkinson*, we certainly "have no authority to overrule a Supreme Court decision." *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1018 (7th Cir.2002) (Posner, J.).

In sum, taking the Supreme Court at its word, it told us that we are not to parse written regulations but rather that the "touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the language of regulations regarding those conditions but the nature of those conditions themselves in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 223, 125 S.Ct. 2384 (quotation marks omitted). Here, as in the strikingly similar *Wilkinson*, the conditions are sufficiently egregious that "taken together[, they] impose an atypical and significant hardship within the correctional context" when compared to "any plausible baseline" and thus "give rise to a liberty interest in their avoidance." *Wilkinson*, 545 U.S. at 223, 125 S.Ct. 2384.

That being said, there is no necessary tension between the existence of a liberty interest in avoiding restrictive conditions of confinement and, for example, the state's penological interests or the fact that we are dealing with a prison and not a resort. As the Supreme Court has stated, "harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not

diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." *Id.*

II.

Once a liberty interest is established, the question then becomes what process is due to protect it. To determine whether procedural safeguards sufficed to protect the liberty interest in *Wilkinson*, the Supreme Court looked to three factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. at 224–25, 125 S.Ct. 2384 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). Applying those factors, the Supreme Court held that "informal, nonadversary procedures" informing inmates of the factual basis for their restrictive placement, a fair opportunity for rebuttal, and regular review sufficed to comport with due process. *Id.* at 229, 125 S.Ct. 2384.

Here, any attempt to apply the salient factors would be in vain—because Virginia affords capital offenders no process. Virginia tries to offer up its sentencing procedures as all the due process required. Of course, the same could be said of all prisoners. Yet no Supreme Court case has ever suggested that is so. Further, under such a regime, sentencing discretion

could result in two defendants who commit the same crime and possess the same aggravating factors receiving vastly different conditions of confinement and procedural safeguards. The conviction and sentence alone, therefore, do not represent a principled manner for determining due process rights.[2]

At the end of the day, all of this ink is being spilled over whether Virginia needs to provide minimalist procedural safeguards like those in *Wilkinson* to less than ten prisoners—the current number of inmates on Virginia's death row. Again, the "harsh conditions may well be necessary and appropriate" for these prisoners. *Wilkinson*, 545 U.S. at 223, 125 S.Ct. 2384. But that "does not diminish" the conclusion that "the conditions give rise to a liberty interest in their avoidance"—and that all that would be required to comport with due process would be informal notice and an informal opportunity to be heard. *Id.* at 224, 125 S.Ct. 2384. These procedural safeguards, in my view, Prieto should have.

III.

For the reasons above, I would affirm the district court's judgment and, accordingly, respectfully dissent.

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[2] The majority opinion purports that it does "not hold, or even suggest, that differences in the nature of a conviction or the length of a sentence give rise to different liberty interests." *Ante* at 254. But allowing Virginia to confine Prieto automatically, based on his death sentence, to highly restrictive conditions for the duration of his incarceration (so far, almost seven years) and without any opportunity for review does just that.

UNITED STATES DISTRICT COURT, E.D. VIRGINIA, ALEXANDRIA DIVISION

Alfredo PRIETO, Plaintiff,

v.

Harold C. CLARKE, et al., Defendants.

No. 1:12cv1199 (LMB/IDD). | Nov. 12, 2013.
2013 WL 6019215

MEMORANDUM OPINION

LEONIE M. BRINKEMA, District Judge.

Before the Court are the parties' cross-motions for summary judgment. For the reasons that follow, Plaintiff's Motion for Summary Judgment will be granted and the Motion for Summary Judgment by defendants will be denied.

I. BACKGROUND

Alfredo Prieto ("Prieto" or "plaintiff") is an inmate at Sussex I State Prison ("SISP") in Waverly, Virginia, awaiting execution for two capital murder convictions. Like all capital offenders in Virginia,[1] plaintiff is confined in a separate housing unit commonly known as "death row." He has been there since October 30, 2008. *See* Defs.' Mem. in Supp. [hereinafter Defs.' Mem.], Ex. 1, ¶ 4.

Conditions on death row are more restrictive than incarceration in the general population housing units at SISP, which is a maximum-security facility. The

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1 As of October 2013, plaintiff was one of only eight capital offenders in the state, all of whom are housed at SISP. *See* Pl.'s Mem. in Supp. of Summ. J. [hereinafter Pl.'s Mem.], Ex. 19, at 75:9–10.

former amount to a form of solitary confinement: On average, plaintiff must remain in his single cell for all but one hour of the day. *See* Pl.'s Mem., Ex. 27 ("Virginia Department of Corrections, Operating Procedure 460.A"); *see also id.* at Ex. 1, at 91:1–15. That cell measures 71 square feet, *id.* at Ex. 16, at 4, and features only a narrow, mesh-covered window for natural light. It is otherwise illuminated by a main light mounted on the wall. In the evening hours, when the main light is turned off, a nightlight remains on in plaintiff's cell, as do the pod lights immediately outside of it, ensuring that his cell is never completely dark. *See id.* at Ex. 15, at 57:14–58:7. Plaintiff is allowed to leave his cell for just one hour of outdoor recreation approximately five days per week. *Id.* at Ex. 27, at 6. During that time, however, he is limited to a similarly-sized outdoor cell with a concrete floor and no exercise equipment. *See id.* at Ex. 1, at 92:1–19. Plaintiff is not allowed to use the gymnasium or prison yard, nor is he given an opportunity for in-pod recreation. *See id.* at Ex. 1, at 91:1–25. Plaintiff may leave his cell for a ten-minute shower three days per week. *Id.* at Ex. 27, at 7. He may also purchase a television and compact disc player for use in his cell, as well as request delivery of certain books from the law library. *See* Defs.' Mem., Ex. 1, ¶¶ 11–12.

Perhaps the most significant restrictions are those depriving plaintiff of human contact. He must spend almost all of his time alone. Although death row houses seven other inmates, they are separated by at least two (and often many more) empty cells within the 44–unit pod. *See* Pl.'s Mem., Ex. 15, at 69:8–24. Solid metal doors with no openings apart from small slits substantially impede any communication among death

row inmates. *See id.* at Ex. 26 (Photograph of Cell Interior). In addition, plaintiff takes all three daily meals in his cell. *Id.* at Ex. 27, at 4. Visitation opportunities are limited to non-contact visits from immediate family members on weekends in a room with a glass partition, *id.* at Ex. 27, at 7, though in actuality no one ever comes, *id.* at Ex. 15, at 107:20–108:2. Thus, plaintiff's only regular source of human contact is prison officials, including those tasked with administering medical and mental health services in his cell. He is not allowed to join general population inmates for vocational, educational, or behavioral programming, nor is he allowed to attend group religious services. *See id.* at Ex. 1, at 91:3–15.

Capital offenders are automatically and permanently placed in such restrictive conditions as a matter of policy—contrary to the practice for all other inmates in Virginia. Upon entering the prison system, the latter are assigned an initial security classification between level one (minimum risk) and level five (maximum risk) by the Virginia Department of Corrections ("VDOC").[2] *See id.* at Ex. 3, at 30:11–20. This classification is based on eight distinct factors, including an individual's history of institutional violence, history of escape attempts, and "other stability factors."[3] *See id.* at Ex. 7 ("Virginia

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[2] An additional security level—known as level "S"—exists for certain inmates assigned to a segregated housing unit within a level-five facility. *See* Pl.'s Mem., Ex. 1, at 46:18–25.

[3] The factors are published in the VDOC's "Scoring Guide" for the "Initial Offender Security Level Classification." They are as follows: (1) history of institutional violence, (2) severity of current offense, (3) prior offense history severity, (4) escape history,

Department of Corrections, Operating Procedure 830.2, Attachment 1"). Numerical values are attached to each factor, the sum of which is the score used to determine the level of risk. *See id.* at Ex. 2 ("Virginia Department of Corrections, Operating Procedure 830.2"); *see also id.* at Ex. 3, at 44:18–25 (describing the initial classification score as the "primary" determinant of an inmate's risk level). Non-capital offenders are then placed in facilities commensurate with the risk they present, though VDOC officials retain some override authority in exceptional circumstances. *See id.* at Ex. 2, at 5. These placements are subject to modification at any time for a number of reasons. *See id.* at Ex. 2, at 6. In addition, the VDOC conducts a classification review for each inmate on an annual basis, providing an opportunity to move to a lower security level. *See id.* at Ex. 8 ("Virginia Department of Corrections, Operating Procedure 830.1").

Capital offenders, by contrast, receive no such initial security classification. Instead, based on sentence alone, they are automatically placed in restrictive conditions on death row at SISP. *Id.* at Ex. 2, at 5 ("Any offender sentenced to Death will be assigned directly to Death Row...."). Only a nominal classification is prepared for purposes of the prison computer system, yielding a final score of "99"-an arbitrary value signifying an offender's capital status—which corresponds to security level "X." *Id.* at Ex. 2, at 5; *id.* at Ex. 3, at 59:5–15. Capital offenders are never brought to a reception center, nor are they evaluated using the multi-factor scoring guide. *See id.*

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(5) length of time remaining to serve, (6) current age, (7) prior felony convictions, and (8) other stability factors. Pl.'s Mem., Ex. 7.

at Ex. 3, at 57:15–25. Thus, their sentence conclusively determines their placement. Once a capital offender arrives on death row, he remains there for as long as it takes to carry out his sentence, *see id.* at Ex. 2, at 5, in most cases more than six years. Capital offenders are ineligible for any subsequent classification review by the VDOC. *Id.* at Ex. 2, at 5 ("No reclassification will be completed."). In other words, their placement is permanent. The only exception is for a capital offender whose sentence is commuted or whose conviction is overturned, at which point he is reclassified pursuant to the usual review process. Defs.' Answer, ¶ 5.

On October 24, 2012, plaintiff, initially proceeding *pro se*, brought a civil action under 42 U.S.C. § 1983 challenging his placement and continued confinement in the restrictive conditions on death row. *See* Compl. He named as defendants Harold C. Clarke, the Director of the VDOC, David Robinson, the Chief of Corrections Operations for the VDOC, and Eddie L. Pearson, the Chief Warden at SISP (collectively, "defendants").

Plaintiff's complaint made two particular allegations. First, he claimed that SISP's visitation policies, which prohibit virtually all contact visits for death row inmates, violated his rights under the Eighth Amendment. Second, he claimed that his automatic and permanent placement in the restrictive conditions of confinement prevailing on death row violated his rights under the Due Process Clause of the Fourteenth Amendment. Accordingly, plaintiff sought a declaration that defendants must provide him with additional outdoor recreation opportunities and an appropriate program for inmates not facing disciplinary measures.

On November 2, 2012, the Court issued a Memorandum Opinion and Order dismissing plaintiff's Eighth Amendment claim pursuant to 28 U.S.C. § 1915A(b)(1). *See* Mem. Op. & Order. Plaintiff appealed but ultimately failed to prosecute, resulting in a dismissal of the proceeding. *See Prieto v. Clarke*, No. 12–8025 (4th Cir. Feb. 6, 2013). Only his due process claim remains before the Court at this point in the litigation.

On January 25, 2013, defendants filed a Motion for Summary Judgment with respect to the remaining claim. Plaintiff, represented by pro bono counsel, opposed the motion as premature because he had not been given an opportunity to conduct discovery. Pl.'s Mem. Opposing Summ. J. & Requesting Disc. Pursuant to Fed.R.Civ.P. 56(d). The Court agreed with plaintiff, and issued an Order denying defendants' motion without prejudice. Order of Feb. 20, 2013. The parties then proceeded to conduct extensive discovery.

At the close of discovery, the parties filed the instant cross-motions for summary judgment. Pl.'s Mot. for Summ. J.; Defs.' Mot. for Summ. J. In support of his motion, plaintiff argues that he has a constitutionally protected liberty interest in avoiding permanent assignment to his present conditions of confinement on death row. Plaintiff further argues that he was deprived of his liberty interest by the VDOC's automatic assignment process, which did not afford him notice of the reasons for his assignment or an opportunity to contest it. Accordingly, plaintiff seeks relief only in the form of an individualized classification determination using procedures that are the same or substantially similar to the procedures used for all non-capital offenders. He has indicated a

belief that, if so classified, his score would render him eligible for assignment to a general population unit at a lower-security facility.

Conversely, in support of their cross-motion, defendants argue that the conditions in Virginia's death row are not sufficiently severe to implicate a protectable liberty interest in avoiding placement there. To the extent such an interest exists, defendants further argue that the existing classification system for capital offenders provides whatever minimal process may be due because plaintiff's interest in avoiding certain onerous conditions is dwarfed by defendants' interest in safe and efficient penal administration.

II. STANDARD OF REVIEW

Summary judgment is appropriate where the record demonstrates "that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). A genuine dispute of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must view the record in the light most favorable to the nonmoving party, and must draw all reasonable inferences in its favor as well, *see Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir.2002); however, "the mere existence of a scintilla of evidence in support of" the nonmoving party's position is insufficient, *Anderson*, 477 U.S. at 252; *see also Othentec Ltd. v. Phelan*, 526 F.3d 135, 140 (4th Cir.2008). Accordingly, to survive a motion for summary judgment, "[t]he disputed facts must be material to an issue necessary for the proper resolution of the case, and the quality

and quantity of the evidence offered to create a question of fact must be adequate to support a jury verdict." *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir.1995) (citation omitted).

III. DISCUSSION

The sole issue before the Court is whether plaintiff's automatic and permanent placement in the restrictive conditions of confinement prevailing in Virginia's death row violates his Fourteenth Amendment due process rights. The analysis proceeds in two parts, looking first at whether a liberty interest exists and then at whether plaintiff was deprived of that interest without sufficient procedural protections.

A. *Protectable Liberty Interest*

The Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." It is well settled that due process protections extend to inmates seeking to avoid certain conditions of confinement, albeit in a circumscribed fashion, the contours of which the Supreme Court has defined in two seminal decisions.

In *Sandin v. Conner*, 515 U.S. 472 § 1995), the Court considered whether an inmate's placement in disciplinary segregation for 30 days implicated a protectable liberty interest. *Id.* at 486. Focusing on the nature of the alleged deprivation, the Court held that no such interest arose for three reasons: the inmate's "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody"; the inmate's segregation "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction"; and the inmate's

segregation did not "inevitably affect the duration of his sentence." *Id.* at 486–87. The Court also explained that a limited liberty interest would arise in the event that an inmate's conditions "impose[ ] [an] atypical and significant hardship ... in relation to the ordinary incidents of prison life." *Id.* at 484.

The Court returned to the due process issue in *Wilkinson v. Austin*, 545 U.S. 209 (2005). There, the Court considered whether an inmate's assignment to a maximum-security prison with "highly restrictive conditions" sufficed to create a liberty interest under the *Sandin* test. *Id.* at 213. The Court held that it did based in large measure on differences between the conditions at the maximum-security prison and "most [other] solitary confinement facilities." *Id.* at 224. At the former, inmates were denied virtually all sensory and environmental stimuli, as well as many basic forms of human contact. *Id.* at 214. The Court then identified two additional factors: "First is the duration. Unlike the 30–day placement in *Sandin,* placement at [the maximum-security prison] is indefinite and, after an initial 30–day review, is reviewed just annually. Second is that placement disqualifies an otherwise eligible inmate for parole consideration." *Id.* at 224. "While any of these conditions standing alone might not be sufficient to create a liberty interest," the Court concluded, "taken together they impose an atypical and significant hardship within the correctional context." *Id.*

Together, *Sandin* and *Wilkinson* conclusively establish that segregated confinement can trigger due process protections in certain circumstances. These decisions further establish that "the touchstone of the inquiry into the existence of a protected, state-created

liberty interest in avoiding restrictive conditions of confinement is ... the nature of those conditions themselves in relation to the ordinary incidents of prison life." *Id.* at 223 (internal quotation marks and citation omitted). Only conditions that constitute an "atypical and significant hardship" suffice. It is evident that this inquiry is necessarily context-dependent and demands fact-by-fact consideration. *See, e.g., Farmer v. Kavanagh*, 494 F.Supp.2d 345, 356 (D.Md.2007) ("*Wilkinson* does not set forth a checklist of factors, all of which must be present, to hold that a protected liberty interest ... exists, but instead directs lower courts to consider the totality of circumstances in a given facility.").

By its terms, the "atypical and significant hardship" test requires courts to first "identify[ ] the baseline from which to measure what is atypical and significant in any particular prison system." *Wilkinson*, 545 U.S. at 223. Although this threshold issue has caused considerable consternation in the circuit courts, *see id.* (acknowledging "the difficulty of locating the appropriate baseline" from which to measure but declining to "resolve the issue"), it is clear that the Fourth Circuit uses a facility's "general prison population" as the relevant baseline, *see Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir.1997). Here, that means the Court must look to the general population units at SISP, where Prieto would presumptively be placed but for his automatic separation as a consequence of his death sentence.

The "atypical and significant hardship" test then requires courts to perform a comparison to determine whether an inmate's confinement deviates sufficiently from the baseline. Consistent with this task, courts

have considered whether the conditions in question are particularly extreme or restrictive, whether the duration of confinement is excessive or indefinite, whether an inmate's parole status is negatively affected, and whether an inmate's confinement in such conditions bears a rational relationship to legitimate penological interests. *See, e.g., Harden–Bey v. Rutter*, 524 F.3d 789, 793 (6th Cir.2008); *Estate of DiMarco v. Wyo. Dep't of Corrs.*, 473 F.3d 1334, 1342 (10th Cir.2007); *Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir.2005). The Court will consider each of these factors in turn.

Plaintiff's conditions of confinement on death row are undeniably extreme and atypical of conditions in the general population units at SISP. He must remain alone in his cell for nearly 23 hours per day. *See* Pl.'s Mem., Ex. 1, at 91:1–15. The lights never go out in his cell, although they are scaled back during the overnight hours. *See id.* at Ex. 15, at 57:14–58:7. Plaintiff is allowed just five hours of outdoor recreation per week, *id.* at Ex. 27, at 6, and that time is spent in another cell at best slightly larger than his living quarters, *id.* at Ex. 1, at 92:1–19. He otherwise has no ability to catch a glimpse of the sky because the window in his cell is a window in name only. *Id.* at Ex. 26. Nor can he pass the time in the company of other inmates; plaintiff is deprived of most forms of human contact. *See id.* at Ex. 1, at 91:3–15. His only real break from the monotony owes to a television and compact disc player in his cell and limited interactions with prison officials. Such dehumanizing conditions are eerily reminiscent of those at the maximum-security prison in *Wilkinson*. *See* 545 U.S. at 214. More importantly, the conditions on death row are a good deal more restrictive than

those experienced by general population inmates at SISP.

Conditions for the latter group—the baseline from which to measure in this instance—differ in almost every meaningful respect. First, general population inmates spend substantial time every day out of the confines of their cells. For example, they are given approximately 80 minutes of outdoor recreation four or five days per week, and they have access to the open prison yard, complete with a jogging track and basketball courts. *See* Pl.'s Mem., Ex. 15, at 28:24–29:18. Second, general population inmates enjoy the near-constant company of others. They receive additional "in-pod recreation" time, during which they may socialize and play games together in a common area. *See id.* at Ex. 15, at 34:15–25. This is to say nothing of the benefits of two communal meals per day, regular contact visits from family and friends, and group religious and educational programming. In other words, the experience for general population inmates at SISP is hardly a solitary one.

Comparing these conditions to plaintiff's experience, *see Beverati*, 120 F.3d at 504, leads the Court to conclude that the conditions on death row are uniquely severe. Whereas general population inmates are subject to a difficult but ultimately social existence, death row inmates like plaintiff are denied all freedom of movement and most freedom to interact with others. There can be no dispute that "almost every aspect" of a death row inmate's life "is controlled and monitored." *Wilkinson*, 545 U.S. at 214. It is true that plaintiff is not deprived of all environmental and sensory stimuli or human contact. *Cf. id.* ("It is fair to say OSP inmates are deprived of almost any environmental or

sensory stimuli and of almost all human contact."). He is allowed to have a television and compact disc player in his cell, and he may have certain books delivered from the law library. *See* Defs.' Mem., Ex. 1, ¶¶ 11–12. Plaintiff also has occasional contact with guards and other prison officials administering health services. But these rudimentary privileges do not mitigate the overwhelming fact of isolation—plaintiff is left alone in a small cell for nearly every hour of every day.

The Court likewise finds it significant that plaintiff has already spent five years in this placement, and there is no end in sight. Plaintiff has not even begun federal post-conviction proceedings, which are likely to play out over the course of several years and further delay the carrying out of his sentence.[4] For all practical purposes, his placement "is for an indefinite period of time," just as in *Wilkinson.* 545 U.S. at 214–15.

The Court also finds it unreasonable that the VDOC refuses to afford plaintiff any classification review as a matter of policy in the meantime. Pl.'s Mem., Ex. 2, at 5; *cf. Wilkinson*, 545 U.S. at 224 ("Unlike the 30–day placement in *Sandin*, placement at OSP is indefinite and, after an initial 30–day review, is reviewed just annually."). Defendants do not dispute this fact. The VDOC's no-review policy guarantees that plaintiff will ultimately remain in his current conditions for a period of years. *See* Defs.' Mem. 19 (noting that most death

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[4] Plaintiff filed a petition for a writ of habeas corpus in state court, which was denied by the Virginia Supreme Court on September 12, 2013. *See Prieto v. Warden of the Sussex I State Prison*, 748 S.E.2d 94 (Va.2013). Plaintiff has not yet pursued federal habeas relief.

row inmates are confined for "between 6–9 years"). Thus, on its own, the excessive duration here weighs strongly in favor of finding that a cognizable liberty interest exists. *Cf. Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 699 (7th Cir.2009) ("[O]ther courts of appeals have held that periods of confinement that approach or exceed one year may trigger a cognizable liberty interest without any [specific] reference to conditions.").

Plaintiff's indefinite, long-term confinement in severe conditions is even more weighty when compared to the duration of confinement for general population inmates placed in administrative or disciplinary segregation. All inmates at SISP may be placed in segregation for an interval of time in which they experience conditions virtually identical to those on death row. Pl.'s Mem., Ex. 6 ("Virginia Department of Corrections, Operating Procedure 861 .3")/ at 12. As such, occasional confinement in restrictive conditions is an "ordinary incident of prison life" at SISP. *See Wilkinson*, 545 U.S. at 223. The important difference is that the length of that interval is strictly limited for non-capital offenders. Inmates "may be assigned to Disciplinary Segregation for a maximum period of 30 days for each major rule violation." Pl.'s Mem., Ex. 6, at 12. In addition, those inmates receive a status review within 72 hours of arrival, and every 30 days thereafter in the event of an extended placement for multiple violations. *See id.*, Ex. 15, at 137:20–138:12. By contrast, plaintiff has not been granted a single review in five years, nor will he ever get one without a change in policy. While other inmates can be sure that they will be considered for reassignment to a general population unit on a defined scheduled, plaintiff has no

such hope. In the end, he could go a decade or more without any opportunity to object to his restrictive conditions of confinement or otherwise be heard on the matter.

Finally, the Court finds that the nature of plaintiff's confinement furthers few, if any, legitimate penological goals. *See DiMarco*, 473 F.3d at 1342 (considering whether "the segregation relates to and furthers a legitimate penological interest"); *Skinner*, 430 F.3d at 486 (considering whether an inmate's segregation "was rational"). For starters, it bears no clear relationship to any of the valid punitive, protective, or investigative goals that justify temporarily placing general population inmates in similar conditions. *See Sandin*, 515 U.S. at 485–86 (suggesting that most disciplinary segregation does not implicate a protectable liberty interest because discipline is to be expected in the prison context). Plaintiff has been by all accounts a model prisoner. Pl.'s Mem., Ex. 4, at 100:25–101:6; *id.* at Ex. 19, at 109:15–18. He has not engaged in any of the behaviors that would normally support placement in segregated confinement.

Nor is plaintiff's confinement well calibrated to further legitimate safety—and resource-related goals. The VDOC's policy toward death row inmates largely rests on two fundamental assumptions: first, that these inmates inherently present a greater risk to prison safety because they "have nothing to lose," and second, that they are less deserving of limited prison resources because they will never reenter society. *See, e.g.*, *id.* at Ex. 1, at 93:5–13; *id.* at Ex. 4, at 63:19; Defs.' Mem., Ex. 2, at 28:14–29:21. Neither assumption finds much support in the record. Death row inmates have obvious incentives to behave well and take rehabilitation

seriously, including the possibility that new forensic evidence might undercut a conviction, a habeas petition might be granted, or that good behavior might improve the prospects of a commuted sentence. *See* Pl.'s Mem., Ex. 1, at 76:9–21.

These assumptions are also inconsistent with VDOC practices. Compare the treatment of inmates sentenced to death and those sentenced to life imprisonment without the possibility of parole. Although the VDOC's stated reasons for separating death row inmates and denying them programming apply with equal force to both classes, inmates serving life sentences are presumptively assigned to the general population units at SISP, where they may avail themselves of limited programming. In any event, the presence of legitimate safety concerns "does not diminish" plaintiff's liberty interest in avoiding particularly harsh conditions. *See Wilkinson*, 545 U .S. at 224 ("OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners. That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance."(citation omitted)).

For these reasons, the Court concludes that plaintiff's conditions of confinement "taken together [ ] impose an atypical and significant hardship within the correctional context." *Wilkinson*, 545 U.S. at 224.

Defendants contend that *Sandin* and *Wilkinson* dictate a different outcome here. They view those cases as establishing an exclusive list of three necessary factors that bear on the liberty interest analysis, *see* Defs.' Mem. 9, two of which have been discussed above-the degree of restriction and duration.

The third factor is whether placement in the challenged conditions of confinement "disqualifies an otherwise eligible inmate for parole consideration." *Wilkinson*, 545 U.S. at 224. Plaintiff clearly has not been eligible for parole at any point and therefore has not had his sentence lengthened by his current placement. But defendants are wrong to suggest that this factor standing alone is dispositive under *Sandin* and *Wilkinson*. The "atypical and significant hardship" test is not so rigid; rather, the Supreme Court indicated that lower courts ought to consider the cumulative effect of several relevant factors. *See, e.g.*, *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir.2003) (noting that the standard requires "case by case, fact by fact consideration"); *Farmer*, 494 F.Supp.2d at 356 (noting that *Wilkinson*" directs lower courts to consider the totality of circumstances in a given facility"). To read *Sandin* and *Wilkinson* any more narrowly would cabin those decisions to their facts. *See Westefer v. Snyder*, 422 F.3d 570, 590 (7th Cir.2005) ("Illinois' contention that the liberty interest identified in *Wilkinson* turned exclusively on the absence of parole constitutes ... far too crabbed a reading of the decision.").

Moreover, the appropriate baseline in this case is not the conditions at the Halawa Correctional Facility (*Sandin*) or the Ohio State Penitentiary (*Wilkinson*). To the contrary, plaintiff's conditions of confinement must be compared to the conditions experienced by general population inmates at SISP. *Beverati*, 120 F.3d at 504; *see Wilkinson*, 545 U.S. at 223 (describing the "touchstone of the inquiry" as "the nature of [the challenged] conditions themselves *in relation to the ordinary incidents of prison life*" (emphasis added)).

On that score, the Court finds that the severity of the conditions on death row, the excessive duration of plaintiff's confinement in such conditions, and minimal legitimate penological justification outweigh the absence of negative parole effects, and impose an "atypical and significant hardship" on plaintiff. Accordingly, plaintiff has a protectable liberty interest in avoiding his current placement.

B. *Process Due*

Having found that a liberty interest exists, the next question is what process plaintiff is due before he may be placed in such conditions of confinement. *Wilkinson*, 545 U.S. at 224. It is important to bear in mind that plaintiff's constitutional rights are not violated by the imposition of the above-described hardship itself, but by the imposition of that hardship without sufficient procedural protections

At this step in the analysis, the Court must employ the familiar framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *See Wilkinson*, 545 U.S. at 224–25. The *Mathews* framework provides three components for courts to consider:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. (quoting *Mathews*, 424 U.S. at 335).

In the prison context, the Supreme Court has further held that due process is satisfied by providing "notice of the factual basis" for an inmate's placement and "allowing the inmate a rebuttal opportunity." *Id.* at 226 (describing notice and a fair opportunity to respond as "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations"). This modest requirement—"informal, nonadversary procedures"—reflects an inmate's "limited" interest in avoiding erroneous placement in unusually restrictive conditions and the state's "dominant" interest in ensuring the safety of guards and inmates alike, maintaining prison security, and preserving scarce resources. *Id.* at 226–27.

Setting aside the parties' competing interests, the Court finds that the VDOC's automatic placement policy for capital offenders fails to provide even the most basic procedural protections. Plaintiff did not receive advance notice of the factual basis leading to his placement in segregated confinement, nor did he receive an opportunity to contest it. *Cf. id.* Instead, he was shuttled directly to death row at SISP, bypassing the initial security classification process followed for all other inmates (and its attendant safeguards). *See* Pl.'s Mem., Ex. 2, at 5 ("Any offender sentenced to Death will be assigned directly to Death Row...."). In other words, plaintiff was afforded no before-the-fact process at all. Defendants concede as much. Defs.' Resp. to Pl.'s Mot. for Summ. J. [hereinafter "Defs.' Resp."] 12 ("Plaintiff is classified as a death row offender simply by the existence of a court order imposing the penalty of death."). The automatic nature of the VDOC's assignment policy in fact guarantees that prison officials have no ability to provide a reasoned

explanation of placement decisions or discretion to consider an inmate's rebuttal.

Likewise, the permanent nature of that policy forecloses any after-the-fact process. *Cf. Skinner*, 430 F.3d at 486 ("Due process, even where it is due, does not invariably mean process before the fact."). Plaintiff has had no subsequent opportunity to contest his placement because classification review is not available to capital offenders on any basis. Pl.'s Mem., Ex. 2, at 5 ("No reclassification will be completed."). The aggregate effect is that plaintiff is deprived of safeguards against erroneous placement in conditions that are more restrictive than necessary by virtue of his sentence alone. He has no forum in which to argue that he belongs in conditions more akin to those experienced by general population inmates at his maximum-security facility. Clearly, defendants have not provided even "informal, nonadversary procedures" in this instance. *See Wilkinson*, 545 U.S. at 226–27. The Court therefore concludes that defendants have failed to comply with the demands of due process.

Defendants respond with a variety of counterarguments, none of which are persuasive. First, it is no answer that plaintiff's conviction for a capital offense ensures that he is properly placed on death row. *See* Defs.' Resp. 13 ("Given that the death sentenced offenders all are placed on death row, there is essentially no risk of error of an erroneous placement. The order from the sentencing court either sentences the defendant to death or it does not."). Defendants fail to distinguish among the multiple deprivations at play here. Plaintiff undoubtedly received process in the Virginia state courts before he

was removed from free society; he does not argue otherwise. Instead, plaintiff challenges only the additional deprivation that occurred when he was placed in segregated confinement, a severe form of imprisonment usually reserved for problematic inmates or those with special needs. *Cf. Wilkinson*, 545 U.S. at 225 ("Prisoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all."). For the latter deprivation, plaintiff has received no process at all pursuant to VDOC policy, as explained above.

It is similarly no answer to suggest that process in the form of classification review for plaintiff would be futile. *See* Defs.' Resp. 12–13 (claiming that capital offenders would be assigned to the most restrictive conditions of confinement in any event). There is no futility exception to the Due Process Clause. Regardless of whether plaintiff would in fact be eligible for placement in less-restrictive conditions or a lower-security facility, it is the evaluative process itself that vindicates his constitutional rights.

The Court's limited ruling leaves defendants with multiple options going forward. First, defendants could provide plaintiff with an individualized classification determination using procedures that are the same or substantially similar to the procedures used for all non-capital offenders, as plaintiff requests. Doing so would likely comport with the minimal due process requirements described in *Wilkinson.* 545 U.S. at 226–27. Second, defendants could vary the basic conditions of confinement on death row, if only slightly, such that confinement there would no longer impose an

atypical and significant hardship on plaintiff. Either way, the Court's ruling does not necessarily entail a wholesale shift in Virginia's penal policy. The cost of compliance is limited by the very small class of affected inmates.

IV. CONCLUSION

For the reasons stated above, Plaintiff's Motion for Summary Judgment will be granted and the Motion for Summary Judgment by defendants will be denied by an appropriate Order to be issued with this Memorandum Opinion.

FILED: April 7, 2015

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-8021 (L)
(1:12-cv-01199-LMB-IDD)

ALFREDO PRIETO

Plaintiff - Appellee

v.

HAROLD CLARKE, Director; A. DAVID ROBINSON, Deputy Director; E. PEARSON, Warden

Defendants - Appellants

- - - - - - - - - - - - - - -

TONI V. BAIR; F. WARREN BENTON; KATHLEEN M. DENNEHY; BRIAN JASON FISCHER; MARTIN F. HORN; STEVE J. MARTIN; CHASE RIVELAND; REGINALD A. WILKINSON; JEANNE WOODFORD

Amici Supporting Appellee

No. 14-6226
(1:12-cv-01199-LMB-IDD)

ALFREDO PRIETO

Plaintiff - Appellee

v.

HAROLD CLARKE, Director; A. DAVID ROBINSON, Deputy Director; E. PEARSON, Warden

Defendants - Appellants

- - - - - - - - - - - - - - -

TONI V. BAIR; F. WARREN BENTON; KATHLEEN M. DENNEHY; BRIAN JASON FISCHER; MARTIN F. HORN; STEVE J. MARTIN; CHASE RIVELAND; REGINALD A. WILKINSON; JEANNE WOODFORD

Amici Supporting Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

NOV – 2 2012

Alfredo Prieto, Plaintiff,	)	
v.	)	1:12cv1199 (LMB/IDD)
Harold Clarke, et al., Defendants.	)	

MEMORANDUM OPINION AND ORDER

Alfredo Prieto, a Virginia inmate proceeding pro se, has filed a civil rights action, pursuant to 42 U.S.C. § 1983, alleging that the visitation policy at Sussex I State Prison constitutes cruel and unusual punishment, and that his confinement in a special housing unit violates his right to due process and constitutes cruel and unusual punishment. After reviewing plaintiffs complaint, the claim against defendants concerning the visitation policy must be dismissed pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim for which relief can be granted.[1] However, plaintiff has

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1 Section 1915A provides:

(a) **Screening**—The court shall review, before docketing, if feasible or, in any event, as soon as practicable after docketing, a complaint in a civil action in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity.

stated a claim that his due process rights have been violated by his indefinite placement in a special housing unit.

I. Background

Plaintiff is a death row inmate at Sussex I State Prison. Compl. 5. He alleges that the prison's policy permitting death row inmates to receive visitors from only immediate family members violates his constitutional rights and constitutes cruel and unusual punishment. Id. He also claims that his right to due process is being violated by his placement in "special housing confinement." Id. at unnumbered page 1. He claims that he has not received a disciplinary violation and is not a "valid security risk" and that keeping him in a six foot by sixteen foot "single cage" is cruel is unusual punishment. Id. Plaintiff attached to the complaint copies of several informal complaints and grievances that he filed at Sussex I. In response to an informal complaint he filed on July 24, 2012, a Sussex I employee wrote that plaintiffs "special housing confinement was determined by the judicial system." Att. 1 at 15, ECF No. 1-1.

II. Standard of Review

In reviewing a complaint pursuant to § 1915A, a court must dismiss a prisoner complaint that is frivolous, malicious, or fails to state a claim upon which

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(b) **Grounds for dismissal.**—On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—

(1) is frivolous, malicious, or fails to state a claim upon which relief can be granted; or

(2) seeks monetary relief from a defendant who is immune from such relief.

relief can be granted. 28 U.S.C. § 1915A(b)(1). Whether a complaint states a claim upon which relief can be granted is determined by "the familiar standard for a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." Sumner v. Tucker, 9 F. Supp. 2d 641,642 (E.D. Va. 1998). Thus, the alleged facts are presumed true, and the complaint should be dismissed only when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). To survive a 12(b)(6) motion, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. ---, ---, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to meet this standard, id., and a plaintiffs "[f]actual allegations must be enough to raise a right to relief above the speculative level ...". Twombly, 550 U.S. at 55. Moreover, a court "is not bound to accept as true a legal conclusion couched as a factual allegation." Iqbal, 129 S. Ct. at 1949–50.

III. Analysis

To establish a claim for cruel and unusual punishment due to conditions of confinement that violate the Eighth Amendment, a plaintiff must allege facts sufficient to show (1) an objectively serious deprivation of a basic human need—that is, one causing serious physical or emotional injury—and (2) that

prison officials were deliberately indifferent to that need. Farmer v. Brennan, 511 U.S. 825, 834 (1994); Wilson v. Seiter, 501 U.S. 294, 198 (1991). To meet the first prong, plaintiff must allege facts sufficient to show that the condition complained of was a "sufficiently serious" deprivation of a basic human need. Farmer, 511 U.S. at 834) (citing Wilson, 501 U.S. at 298). Only extreme deprivations will make out an Eighth Amendment claim, and it is plaintiff's burden to allege facts sufficient to show that the risk from the conditions of his confinement was so grave that it violated contemporary notions of decency and resulted in serious or significant physical or emotional injury. Hudson v. McMillian, 503 U.S. 1, 8 (1992); Strickler v. Waters, 989 F.2d 1375, 1379–81 (4th Cir. 1993). To meet the second prong, plaintiff must allege facts sufficient to show that defendants were deliberately indifferent, that is, that they knew of facts from which an inference could be drawn that a "substantial risk of serious harm," was posed to his health and safety, that they drew that inference, and then disregarded the risk posed. Farmer, 511 U.S. at 837.

Claims of cruel and unusual punishment that concern the deprivation of liberty interests must be reviewed according to the principles of Sandin v. Conner, 515 U.S. 472 (1995). Confinement does not strip inmates of all liberty interests, and the due process clause of the Fourteenth Amendment mandates procedural safeguards before an inmate can be punished by conditions so dramatically different from the basic range of constraints contemplated by his sentence. Id. at 483-84. However, such liberty interests "will generally be limited to the freedom from restraint which, while not exceeding the sentence in

such an unexpected manner as to give rise to protection by the Due Process Clause by its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Id. at 484. On the other hand, the protections of the due process clause do not attach unless the plaintiff was deprived of such a liberty interest. Lekas v. Briley, 405 F.3d 602, 607 (7th Cir. 2005).

A. *Visitation*

Plaintiffs claim regarding his visitation rights fails to meet the first prong of the test for cruel and unusual punishment. The right to visitation privileges with extended family and friends is not a basic human need, and it is well established that a prisoner has no direct constitutional right to visitation. See, e.g., Kentucky Dept. of Corrections v. Thompson, 490 U.S. 454, 460–61 (1989) ("The denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, therefore is not independently protected by the Due Process Clause."). Furthermore, courts that have analyzed inmates' entitlement to visitation under the Sandin principles also have concluded that there exists no liberty interest in visitation while incarcerated which is adequate to trigger the due process protections of the Fourteenth Amendment. See, e.g., Stevens v. Robles, 2008 WL 667407 at **6-7 (S.D. Cal. Mar. 7, 2008) (prisoners have no right to family visits, either independently protected by the Due Process Clause or as a liberty interest created by state laws or regulations), and cases cited. Therefore, plaintiff has failed to state a claim for which § 1983 relief can be granted.

B. *Housing Placement*

Plaintiff's claim regarding his housing placement also fails to meet the first prong of the test for cruel and unusual punishment. He does not assert that the decision about his housing placement affects a basic human need, and he does not claim to have any injury from being in the segregated housing unit. Alleging that the fact alone of his confinement to the segregated housing unit constitutes cruel and unusual punishment, without injury, is insufficient. See Sweet v. South Carolina Dep't. of Corrections, 529 F.2d 854, 861 (4th Cir. 1975) ("'[I]solation from companionship,' 'restriction on intellectual stimulation and prolonged inactivit' inescapable accompaniments of segregated confinement, will not render segregated confinement unconstitutional absent other illegitimate deprivations ...").

However, plaintiff has sufficiently stated a claim that his placement in a special housing unit violates his due process rights. When a defendant is lawfully convicted and confined to jail, he loses a significant interest in his liberty for the period of that sentence. Gaston v. Taylor, 946 F.2d 340, 343 (4th Cir. 1991). Nonetheless, when applying the Sandin principles to plaintiff's claim, plaintiff's indefinite confinement in a restrictive housing unit amounts to an "atypical and significant hardship ... in relation to the ordinary incidents of prison life," and warrants constitutional protection. Sandin, 515 U.S. at 484. While a thirty-day placement in disciplinary segregation in Sandin did not implicate a liberty interest, the Supreme Court has held that an indefinite placement in highly restrictive conditions suffices to implicate such an interest. Wilkinson v. Austin, 545 U.S. 209, 213, 224 (2005); see

also Harden-Bey v. Rutter, 524 F.3d 789, 793 (6th Cir. 2008) (holding that the duration of restrictive segregation bears on whether a cognizable liberty interest exists). Because plaintiff alleges that he has been in a special housing unit for several years without the right to due process protections, he has stated a claim upon which relief could be granted.

IV. Motion to Proceed In Forma Pauperis

Plaintiff has applied to proceed in forma pauperis in this action; however, to determine whether plaintiff qualifies to proceed in forma pauperis, the Court directs plaintiff's correctional institution to provide additional information.

Accordingly, it is hereby

ORDERED that plaintiff's claim regarding Sussex I State Prison's visitation policy be and is DISMISSED WITH PREJUDICE for failure to state a claim, pursuant to 28 U.S.C. § 1915A(b)(l); and it is further

ORDERED that plaintiff's request to proceed in forma pauperis is conditionally granted to the extent that plaintiff need not prepay the filing fee at this time. Plaintiff is directed to sign and return the attached Consent Form within thirty (30) days from the date of this Order. If the Court grants plaintiff in forma pauperis status, he will be required to pay the filing fee in installments after first paying an initial filing fee; and it is further

ORDERED that the Clerk request plaintiff's institution to provide an Inmate Account Report Form on plaintiff within thirty (30) days of the date of this Order; and it is further

ORDERED that plaintiff's failure to comply with any part of this Order within THIRTY (30) DAYS FROM THE DATE OF THIS ORDER, or failure to

notify this Court immediately in the event he is transferred, released, or otherwise relocated, may result in the dismissal of this complaint pursuant to Fed. R. Civ. P. 41 (b).

To appeal, plaintiff must file a written notice of appeal with the Clerk's Office within thirty (30) days of the date of this Order. See Fed. R. App. P. 4(a). A written notice of appeal is a short statement stating a desire to appeal this Order and noting the date of the Order plaintiff wants to appeal. Plaintiff need not explain the grounds for appeal until so directed by the court.

The Clerk is directed to send a copy of this Order and a Consent Form to plaintiff, as well as a copy of this Order and the Inmate Account Report Form to plaintiffs current institution of confinement.

Entered this 2nd day of November 2012.

/s/ LMB
Leonie M. Brinkema
United States District Judge

Alexandria, Virginia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ALFREDO PRIETO, Plaintiff,	)	Civil Action No.: 1:12-CV-01199
v.	)	
HAROLD W. CLARKE, et al., Defendants.	)	

* *

DEPOSITION OF HAROLD W. CLARKE

* *

June 27, 2013

* * *

[49]

* * *

Q So you mentioned that the department of corrections looks to a number of factors before – your offense, your escape risk, et cetera. Why do you look to a number of factors when making your determination about where to classify someone?

A Because all of those things gives you a big picture in terms of what you're dealing with and what to do to manage that person.

Q So in your view it's not your sufficient to just examine, for instance, someone's escape risk?

A No.

[50] Q Or the length of their sentence?

A No.

Q Or what the initial crime that they were convicted of was?

A No.

Q So you get a better picture by looking at all those different factors together?

A Uh-huh. Yes, you do.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

ALFREDO PRIETO, Plaintiff,	)	Civil Action No.: 1:12-CV-01199
v.	)	
HAROLD W. CLARKE, et al., Defendants.	)	

* *

DEPOSITION OF JAMES PARKS

* *

June 13, 2013

* * *

[87]

* * *

Q Okay. So staying on page 861, I'd just like to walk through and have you help me understand how our [88] client Mr. Prieto would be scored if he was eligible for reclassification. And so I'll make some representations to you but -- as we're going through this.

So history of institutional violence, I'll represent to you that he has had no institutional violence. So what score would he receive for that?

A Anyone who has not had any assaults, 105 assaults in a DOC facility or a mental institution or juvenile within the past five years would receive a zero.

Q Okay. And so then turning to severity of current offense, because he's in for capital murder, what score would he receive for that?

A Anyone in for a murder conviction would receive 10 points.

Q Okay. So for prior offense history, I will represent that I believe he falls into the highest category, so what will he receive for that?

A Anyone getting scored who has prior crime of the highest in severity gets seven points.

Q Okay. I'll represent to you that Mr. Prieto has made no escape attempts in the last five years, so what would he score for that?

A Anyone without history of escape is going to be zero points.

Q Okay. In terms of length of time remaining [89] to serve, our client's sentence is indefinite to death. What would be the highest points that you could receive from the length of time remaining to serve?

A We don't score death sentences. But if someone has life, multiple life or sentence beyond 80 years, the maximum points is 20.

Q Okay. In terms of current age, I'll represent to you that Mr. Prieto is over 35 years old.

A Anyone over 35 years of age gets 6 points taken off, that's a negative 6.

Q Institutional disciplinary record, I'll represent to you that he has no institutional disciplinary history within the last 24 months.

A Anybody with no charges in the past 24 months is going to get 9 points taken off.

Q Okay. And, again, because he has no disciplinary record within the last 24 months, he has -- what would he receive in the severity of most serious disciplinary report?

A With no charges in the past 24 months, an individual would receive zero points.

Q Okay. And what score would he receive in the class level assignment section?

A I don't know without that scoresheet being able to be performed, but it would be anywhere from **[90]** negative four to positive four points. That's going to be based on interactions with officers, participate on in programming, infractions, things of that nature.

Q Okay. I'll represent to you that earlier today we asked David Clarke regarding his interactions with Mr. Prieto. And I'll represent to you that in other depositions with prison guards on the death row that he -- that our client has generally been described as nice, polite, neat and quiet and he has no disciplinary record. So based on that can you make an assessment as to what score he would receive?

A Quite honestly, Mr. Clarke would be in a good position to do that because that's normally who does that and sends it in to us. Typically that's going to be at lower range, probably not picking up positive points. Safest thing to do an estimate might just be to put a zero there.

Q Okay. So can you check my math and see --

A I've got a total of 25 points. How about you?

Q That works. That makes it easier. So with 25 points, what facility would be appropriate for Mr. Prieto?

A For someone scoring 25 points on a reclass, that falls within the level three security level range.

[91]

* * *

A . . . [S]omeone who has not been in a general population setting, we would probably start them off at a higher level to make sure things progress down slowly. Someone who has not been in a general population level who is scoring in a level three range, it's unlikely it would go straight to a level three. There would probably be some time of maybe working their way down from a level five to a level four.

Q So you might start by putting them in a general population within a level five or level four facility?

A With a lengthy sentence like that, that's typically what we do, yes.

Q Okay. And this reclassification tool represents the best thinking of the department of corrections as to an assessment of where an appropriate place for an offender within the system is?

[92] A Yes.

Q And this is the tool that's used for all 30,000 other inmates in the system except for those on death row?

A Correct.

Q So in your opinion do you think looking at an inmate's -- just on an overall basis, do you think that looking at an inmate's sentence is the best -- alone is

the best way to classify an individual within the prison system?

A For individuals that have options of different security levels to score into then I think it would -- you do not want to look at just one element. I think looking at a variety of elements for classification is most appropriate.

Q So if someone who was sentenced to death was eligible for other facilities, you would -- would you think that looking at just an individual's death sentence would be an appropriate way of sentencing them?

A Not if they were eligible for other assignments, no, it would not be.

* * *