No. 17-3185

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD GRISSOM,

Plaintiff-Appellant,

v.

RAYMOND ROBERTS, Secretary of Corrections, in his individual and official capacity, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Kansas
The Honorable Judge Thomas Marten
D.C. No. 5:15-CV-03221-JTM-DJW

APPELLANT'S OPENING BRIEF

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PRIOR AND RELATED APPEALS

There are no prior appeals in this action. Appellant Richard Grissom filed a prior appeal of a different 42 U.S.C. § 1983 action. *Grissom v. Werholtz*, No. 12-3255, 524 F. App'x 467 (10th Cir. 2013) (unpublished).

GLOSSARY OF TERMS

ASCA:	Association of State Correctional Administrators
ASRB:	Administrative Segregation Review Board
BMP:	Behavior Management Program
BOP:	Bureau of Prisons
DR:	Disciplinary Report
EDCF:	El Dorado Correctional Facility
KDOC:	Kansas Department of Corrections
OSR:	Other Security Risk
PMC:	Program Management Committee
TOADS:	Total Offender Activity Documentation System
UT:	Unit Team

STATEMENT OF JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. On August 21, 2017, Grissom filed a timely notice of appeal from the final judgment entered July 24, 2017, which disposed of all claims.[1] A-0708–09.[2] This Court has appellate jurisdiction under 28 U.S.C. § 1291.

[1] On August 22, 2017, Grissom moved to extend the notice of appeal deadline. Mot. for Extension of Time, ECF No. 97. The district court concluded that Grissom's notice was timely filed but nevertheless granted Grissom's motion. Order dated 9/18/2017, ECF No. 102.

[2] Record citations are to the Joint Appendix.

STATEMENT OF THE ISSUES

Whether the district court erred in granting summary judgment because:

1. Grissom raised at least a genuine issue of material fact as to whether twenty years of solitary confinement constitutes an atypical and significant departure from the ordinary incidents of prison life such that clearly established Fourteenth Amendment law demands meaningful review of that isolation, which he did not receive.
2. It did not review Grissom's claim that twenty years of solitary confinement violates the Eighth Amendment and Grissom raised at least a genuine issue of material fact as to whether Defendants knew of but disregarded a serious risk of harm by confining him in segregation for two decades.
3. It applied *Turner v. Safley*, 482 U.S. 78 (1987) rather than *Johnson v. California*, 543 U.S. 499 (2005) to Grissom's race-based Equal Protection claim and because Grissom raised at least a genuine issue of material fact as to whether he was treated differently than White prisoners in segregation.

STATEMENT OF THE CASE

This appeal arises from Appellant Richard Grissom's Eighth and Fourteenth Amendment challenges to his solitary confinement. Defendants moved to dismiss and, in the alternative, for summary judgment. A-0330; A-0530; *see also* A-0592 (motion for summary judgment). The district court construed Defendants' motions as motions for summary judgment, granted them, and entered final judgment. A-0683; A-0708. This appeal follows.

INTRODUCTION

Justice Kennedy has lamented that "the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 576 U.S. ___, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring). For more than ***twenty years***, Defendants subjected Richard Grissom to that regime. Grissom challenged his injurious and unrelenting solitary confinement as incompatible with the Eighth and Fourteenth Amendments. Without affording Grissom discovery, however, the district court awarded defendants summary judgment. That decision is error, not least because the district court ignored genuine disputes of material fact and neglected to review an entire claim. This Court should reverse and remand.

STATEMENT OF THE FACTS[3]

I. Grissom's Good Conduct

In 1989, Grissom began serving four consecutive life sentences in general population at the Lansing Correctional Facility.[4] A-0044–45. Grissom spent six years in general population and did not receive a single disciplinary report. A-

[3] Grissom's verified complaints should be treated as affidavits for purposes of summary judgment. *See* A-0042; A-0220; A-0409; *Conaway v. Smith*, 853 F.2d 789, 792 (10th Cir. 1988) (per curiam). And, it was proper for Grissom to rely on his verified pleadings and the sworn declarations and affidavits he collected. *Id.* at 792–93; *Bryant v. Famers Ins. Exch.*, 432 F.3d 1114, 1122 (10th Cir. 2005).

[4] Since 1989, Grissom has been moved between Lansing, Hutchinson, and El Dorado, but he has resided in El Dorado since March 2009. A-0045.

0021. Despite his clean record, Grissom was placed in solitary in 1996. He remained there for twenty years. *Id.*; A-0029; A-0047; A-0174; A-0706.

Grissom was placed in solitary based on allegations that he was trafficking drugs. A-0021; A-0047–48. At the conclusion of the investigation, however, Grissom was neither criminally charged nor issued a disciplinary report (DR). *Grissom v. Werholtz*, No. 07-3302-SAC, 2012 WL 3732895, at *1 (D. Kan. Aug. 28, 2012). Nevertheless, on October 28, 1996, Defendants changed Grissom's status from "pending an investigation" to "Other Security Risk" (OSR) and retained him in solitary. A-0047–48.

Consistent with his general-population record, Grissom's behavior was favorable in solitary. Indeed, in September 2000, officials reported that Grissom was "perform[ing] well." A-0055. Nevertheless, in October 2000, officials elevated Grissom's status from OSR to "Extreme Escape Risk" because a correspondent expressed a desire to free him.[5] A-0048, 0053. There is no evidence that Grissom solicited such assistance or condoned such a scheme. Again, no DR issued. *Grissom*, 2012 WL 3732895, at *2.

It was not until 2003—after more than thirteen years in prison—that Grissom received a DR. A-0024. Grissom was found with a cell phone and spent thirty days in disciplinary segregation. *Id.*; A-0229. In 2005, Grissom was twice

[5] On January 1, 2003, Grissom was reclassified OSR. A-0056.

found with cell phones and other contraband items, and each time was sanctioned with disciplinary segregation. *Id*. After these incidents, Grissom maintained a clean record for five years. A 2009 report indicates Grissom had a "satisfactory review period," "has not been a management issue for UT [Unit Team] or Security staff," and was encouraged to continue "with his positive behaviors." A-0162. In 2010, Grissom received a DR because his hot pot exceeded the authorized temperature. A-0024; A-0088.

After the 2010 DR, records reflect that Grissom's "disciplinary history and management history have been very good for a long time" and that Grissom posed "[n]o security or case management concerns" and no "management issues for security staff or unit team." A-0075–81, 90; A-0103–11. Grissom had no "negative officer chrono's or unit team TOADs [Total Offender Activity Documentation System] entries" and was "respectful to all staff and inmates." A-0079. Indeed, officials believed Grissom deserved "an opportunity to participate in the BMP [Behavior Management Program] and then be moved to the general population." *Id*.

Grissom received his final DR in October 2015 for sending a sexually explicit note to a female officer. A-0237. Grissom received thirty days' disciplinary segregation. *Id*. All told, Grissom earned five DRs in twenty-six years—a clean record compared to the numerous DRs amassed by other prisoners

in these facilities. A-0112–29 (prisoner #1: 27 DRs in 14 years; prisoner # 2: 38 DRs in 7 years, 5 months; prisoner #3: 318 DRs in 18.5 years; prisoner #5: 118 DRs in 7.5 years); A-0130–38 (showing average of 40 DRs per listed prisoner).

II. KDOC's Meaningless Reviews of Solitary

The KDOC [Kansas Department of Corrections] Internal Management Policy and Procedure establishes its review process. A-0246. After a prisoner's placement into administrative segregation, the Administrative Segregation Review Board (ASRB) meets monthly to consider whether the prisoner should remain in solitary. *Id.*; A-0336–37. Returning to general population requires the ASRB's recommendation. A-0370. The Program Management Committee (PMC) reviews the ASRB's recommendation and makes a recommendation to the warden. A-0337.

Comments from the ASRB and PMC appear on an "Administrative Segregation Review" form, which includes a field for "Segregation Placement / Retention Facts" for reviewers to justify retaining a prisoner in segregation and a box labeled "Reasons for Recommendations" for comments. A-0074–101; A-0248–75.

From December 2013 through November 2014, twelve consecutive reviews completed by Defendants list—verbatim—just one reason to justify Grissom's segregation: "Placement facts still apply." A-0251–63. In December 2014, the

verbiage changed slightly to "Retain; Placement facts still apply;" this formulation was repeated verbatim—including the typo—for nine consecutive reviews. A-0264–72. The typo was removed on Grissom's October 2015 review form, but the language remained the same, through December 2015. A-0273–75. In total, ***twenty-five*** of Grissom's reviews cite "placement facts" as the sole justification for his segregation. A-0251–75. What's more, all twenty-five of these forms describe just one adverse "placement fact": the 1996 contraband violation. That the review comments are perfunctory is not surprising given that most of Grissom's reviews lasted ***less than a minute***. A-0026. These short reviews were commonplace; as Grissom notes, "the staff openly bragged how expeditiously the seg reviews were conducted." A-0073; *see* A-0026–27; A-0070–72.

The forms do not explain the relevance of a decades-old infraction. On several occasions, Grissom questioned why he remained in segregation despite the stale justifying "placement fact," but did not receive an answer. For example:

- Grissom asked the ASRB why he remained in segregation whereas a prisoner who killed a guard spent only five years in segregation. Defendant Marlett responded: "We can't really give you a valid explanation and we can't justify it." A-0027.

- Grissom asked the ASRB if they could give any justification for his continued segregation. Defendant Marlett responded: "No, we can't." A-0028. Defendant Randa concurred. *Id*.

- Grissom asked why "placement facts still apply" after 18 years of segregation. Defendant Marlett responded: "They don't apply[.]" *Id.* Once again, Defendant Randa agreed. *Id*.

- When Grissom asked whether the ASRB could tell him why he remained in segregation and why the PMC discouraged the ASRB from recommending his release, Defendant Marlett responded: "No and no!" *Id.*

Nor do the forms provide guidance regarding behavior that would merit release from segregation. When Grissom requested that information, a member of the ASRB responded: "No . . . [The PMC] didn't give much info." A-0066. In 2015, Grissom filed an official request for information to Defendant Walmsley, a member of the ASRB, stating: "I've been in ad seg for over 18 years 6 months and I would like to be submitted for release back to gen pop or at least informed as to how many more years must I do . . . ." A-0067. Walmsley replied: "They said keep doing what you are doing, but didn't give any time table." *Id.*; *see* A-0026.

III. Grissom's Isolation and its Adverse Effects

The El Dorado Correctional Facility (EDCF), where Grissom spent the last eight years, has three solitary-confinement wings. A-0626. The cells in the A and B wings measure eight-by–fourteen-feet and contain a solid concrete bed with a two-inch mattress. A-0037. The cells are designed to maximize sensory deprivation—they have solid metal doors trimmed with rubber seals such that, when the cell door is closed, no sound can enter or exit the cell. *Id.* Neither photos nor art nor anything else may be placed on the cell walls. A-0626. Library and

legal materials are available only by using a form to request them.[6] A-0634. There is lighting in each cell that, when turned off, activates secondary lighting so that the cell is always lit. A-0037. Officers conduct rounds every thirty minutes at night and shine a bright flashlight into prisoners' eyes. A-0038. The conditions in the C cell house are substantially the same. A-0037–38.

Regardless of wing, prisoners in segregation are locked in their cells for twenty-three to twenty-four hours a day. They eat all meals alone, in their cells; food is passed through a door slot. *Id.*; A-0171; A-0626. Prisoners leave their cells only for very short periods under very limited circumstances. They may take ten-minute showers up to three times per week. A-0167; A-0171; A-0632. They may exercise for an hour in an eight-by-twenty-feet cage up to five times per week, although yard is sometimes cancelled. A-0038; A-0167–71; A-0627. To participate, prisoners must submit to a full strip search. A-0628.[7] Visitation is limited to one hour on Saturdays and Sundays and must be conducted by video. A-0633. That is, no human contact is permitted. *Id*. When prisoners leave

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[6] At Hutchinson, Grissom's reading material was further limited—to old encyclopedia volumes. A-0377.

[7] "Correctional facility strip searches have been described elsewhere as requiring an inmate to lift and shake his genitalia, bend over, spread his buttocks in the direction of the officer so that he may look at the inmate's anus . . . ." *Williams v. Sec'y Pa. Dep't of Corrs.*, 848 F.3d 549, 554 n.15 (3d Cir. 2017) (internal quotation marks omitted).

segregation for showers, yard, or visitation, they are shackled and escorted by two officers. A-0038; A-0171.

In contrast, general-population prisoners are allowed out-of-cell for seven to ten hours per day to meaningfully interact with others, to play cards and music, use the telephone, or engage in group activities. A-0167. They may possess electronic devices, such as MP3 players and typewriters, and have access to email permitting photo, music, and movie downloads. *Id*. General-population prisoners can purchase fresh foods and a variety of other items from the canteen, as well as items not available at the canteen. *Id*. They are allowed to participate in trade programs. *Id*. They are given full law-library access. *Id*. They are allowed two to six hours of yard time per day (not in a cage), can shower daily without time limit, and are allowed contact visits for more than seven hours daily. A-0038.

As a result of Grissom's protracted time in solitary, he has suffered significant psychological and physiological injury. A-0038–39. Grissom asserts that solitary has caused a drastic change in his personality—affecting him "psychologically by altering his personality." *Id*.; A-0218. He has become emotionally detached, non-emotive, and bitter. *Id*. He suffers from insomnia, exhaustion, paranoia, and depression. A-0218; A-0671–72. The one meaningful relationship Grissom did have while in prison—his marriage—eventually

collapsed because of his psychological changes. A-0038. Human contact now causes Grissom discomfort. A-0584–86.

IV. Race-Based Discrimination in the Application of Solitary

Grissom is Black. A-0044. Despite that minorities make up 62% of the segregation population, as of August 2015, only four Black prisoners were approved for the BMP compared to six White prisoners. A-0028; A-0140. Grissom accumulated only five DRs over twenty-six years, yet was in segregation for over twenty years. *See* A-0228–30; A-0237; A-0706. In comparison, White prisoners approved for the BMP as of August 2015 had accumulated on average twenty-eight DRs and had served far less time in segregation. A-0029; A-0140; *see also* A-0112–38. Further, on average, Black prisoners spend twice as long in segregation as White prisoners. A-0029; A-0140. Grissom also proffers multiple examples of White prisoners with more, and more serious, DRs (including assaults and batteries on officers) who had significantly shorter confinements in segregation than Grissom. A-0029; A-0112–38; A-0141–55; A-0176.

V. District-Court Proceedings

On September 17, 2015, Grissom, proceeding *pro se*, filed a complaint (which he later amended and supplemented) pursuant to 42 U.S.C. § 1983, asserting that his twenty years in segregation violated his rights under the Eighth

and Fourteenth Amendments.[8] A-0018; A-0198; A-0400. In particular, Grissom alleged that Defendants' periodic reviews of his segregation were meaningless. A-0025–27. He also alleged that segregation deprived him of the basic human needs of social contact and environmental stimulation, which injured him. A-0223. Finally, Grissom alleged that Defendants violated the Equal Protection Clause by treating him differently from White prisoners in segregation. *E.g.*, A-0028–30; A-0221. Grissom sought damages and injunctive and declaratory relief. *E.g.*, A-0041–42.

Defendants are corrections and medical personnel who were members of the ASRB or PMC or who were otherwise responsible from Grissom's prolonged segregation. *See* A-0226–27. Defendants moved to dismiss or, in the alternative, for summary judgment. A-0330; A-0530; A-0592. With respect to Grissom's due-process claim, Defendants argued, predominantly, the following: First, that Grissom's solitary confinement did not impose an "atypical and significant hardship." A-0343; A-0540. Second, that they were protected by qualified immunity. *Id.* As to Grissom's Eighth Amendment claim, Defendants appear to have overlooked the claim that his prolonged solitary confinement constituted

[8] Grissom does not pursue his conspiracy and retaliation claims on appeal. Nor does he challenge the district court's conclusion that money damages are unavailable from defendants sued in their official capacities. Finally, Grissom does not press his injunctive claim on appeal.

cruel and unusual punishment—neither of Defendants' first motions even mention the Eighth Amendment or the phrase "cruel and unusual."[9] *See* A-0333; A-0533. Relying on *Turner v. Safley*, 482 U.S. 78 (1987) and Tenth Circuit cases interpreting that decision, Defendants argued that Grissom's equal-protection claim failed. A-0350–53.

The district court reviewed Defendants' motions as ones for summary judgment and, without opening discovery, granted them. A-0683. With respect to Grissom's due-process claim, the district court held that the law was not clearly established that a twenty-year term of solitary implicated a protected liberty interest such that Grissom was entitled to due process.[10] A-0698. As the district court saw it, "the segregation experienced by Grissom . . . is, though harsh, neither extreme or atypical[.]" A-0697. That segregation was appropriate in any event, the district court concluded, because Grissom procured contraband while in prison "by bribing or corrupting guards." A-0696–97. Further, Grissom "attempted to encourage an inappropriate relationship by passing a sexually explicit note to a

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[9] The only time Defendants moved against any Eighth Amendment claim was in their consolidated motion for summary judgment, but there, they address only Grissom's assertions in his Supplemental Complaint that he had to "stay in his boxers for two hours a day in a cell that was under 65 degrees." A-0608 (Defs.' Mot.); A-0405–06 (Supplemental Complaint).

[10] The district court incorrectly construed the applicable liberty interest as the right to "early release" from segregation.

female corrections officer." A-0697. The district court also made a factual finding that the reviews Grissom received were "detailed, meaningful, and substantive." A-0698.

As to Grissom's Eighth Amendment claim, the district court neglected to address Grissom's claim that prolonged solitary constituted cruel and unusual punishment, yet dismissed Grissom's claims in their entirety. A-0702–03; A-0708. Regarding Grissom's equal-protection claim, the district court, like Defendants, analyzed the claim under *Turner*. A-0700–01. It also concluded that Grissom's claim was supported by insufficient evidence. *Id*.

SUMMARY OF THE ARGUMENT

First, the district court erred in analyzing Grissom's due-process claim. As an initial matter, the court misidentified the liberty interest at stake, describing it as an interest in "early release" from segregation, as opposed to an interest in freedom from restraint imposing an atypical and significant hardship—here, twenty years of segregation. That error alone calls for remand. More fundamentally, the court incorrectly held that no clearly established law indicates that twenty years of solitary confinement under extremely restrictive conditions implicates a liberty interest. Such a conclusion is foreclosed by Supreme Court and Tenth Circuit precedent and by the weight of authority in other federal circuits. The court also erred in concluding that Defendants did not violate any purported liberty interest.

That decision required the court to disregard disputed material facts concerning Defendants' meaningless segregation reviews. And the right to meaningful reviews is clearly established.

Second, the district court did not review Grissom's claim that a twenty-year term in segregation is incompatible with the Eighth Amendment. Yet Grissom presented evidence that, at the very least, establishes a genuine dispute of material fact regarding whether (1) twenty years in solitary caused, and exposed Grissom to a substantial risk of, sufficiently serious harm, and (2) whether Defendants knew of but disregarded that harm. That solitary harmed Grissom was obvious. Further, well before Defendants released Grissom from solitary in 2016, no competent official tasked with making segregation determinations could maintain they were unaware of the pernicious effects of prolonged solitary. Correctional experts and scientists have long denounced its use as harmful and lacking a countervailing penological benefit. Moreover, significant reforms at the state and federal levels reflect this widespread recognition. Society's evolving standards of decency recognize that solitary confinement is cruel, unusual, and excessive punishment that should be prohibited by the Eighth Amendment.

Third, the district court employed the wrong standard and disregarded disputed material facts in analyzing Grissom's claim of race-based discrimination.

Fourth, the district court erred by overlooking Grissom's continuing-violations argument, erroneously ignoring nearly eighteen years of his solitary confinement.

This Court should reverse the grant of summary judgment against Grissom and remand.

ARGUMENT

I. Standard of Review

This Court reviews a grant of summary judgment *de novo* and affirms only if the record, viewed in a light most favorable to the non-movant, establishes no genuine issue of material fact. *Jones v. Denver Pub. Schs.*, 427 F.3d 1315, 1318 (10th Cir. 2005). Because Grissom proceeded *pro se* at the district court, this Court construes his pleadings liberally. *E.g.*, *Murray v. Archambo*, 132 F.3d 609, 612 (10th Cir. 1998) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (per curiam)).

II. Grissom was Denied Procedural Due Process

As an initial matter, the district court misidentified the liberty interest at stake, construing it as a right to "early release from segregation," as opposed to an interest in freedom from restraint imposing an atypical and significant hardship. A-0695 & n.1. The court held that the Defendants are entitled to summary judgment on Grissom's Fourteenth Amendment claim for two reasons:

- "[B]ecause Grissom has failed to demonstrate that the alleged liberty interest was clearly established" and, accordingly, that Defendants were entitled to qualified immunity. A-0698.

- Because "defendants did not violate any [purported] liberty interest." *Id.*

Both holdings are foreclosed by Supreme Court and Tenth Circuit precedent and by the weight of authority from other circuits.

A. Procedural Due Process Standards

The Due Process Clause of the Fourteenth Amendment "protects persons against deprivations of life, liberty, or property." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). Prisoners retain a liberty interest in freedom from restraints that impose "atypical and significant hardship" relative to "ordinary incidents of prison life." *Id.* at 223. Where, as here, a prisoner is subjected to atypical and significant hardship, he is entitled to meaningful reviews of his segregation status. *Toevs v. Reid* (*Toevs II*), 685 F.3d 903, 912 (10th Cir. 2012).

In *Wilkinson*, the Supreme Court recognized, but did not resolve, a circuit split regarding the baseline from which to measure "atypical and significant" hardship. 545 U.S. at 223 (collecting cases). This Court can hold that Grissom has established a liberty interest "under any plausible baseline," as the Supreme Court did in *Wilkinson*. *Id.* To the extent that determining which appropriate baseline is necessary, this Court answered the question in favor of general population in *Penrod v. Zavaras*, 94 F.3d 1399 (10th Cir. 1996). *See Rezaq v. Nalley*, 677 F.3d

1001, 1011 (10th Cir. 2012) (construing *Penrod*).[11] But even if administrative segregation were the appropriate baseline, Grissom has raised a fact issue as to whether his placement was "atypical and significant" given its harsh nature and extraordinary duration. *Accord, e.g.*, *Wilkinson*, 545 U.S. at 223; *Brown v. Ore. Dep't of Corrs.*, 751 F.3d 983, 988 (9th Cir. 2014).

B. The District Court Misidentified Grissom's Liberty Interest

The court misidentified Grissom's liberty interest as one in "an ***early*** release from segregation." A-0695 (emphasis added); *see also id.* n.1. But Grissom's due-process challenge does not seek "early" release from segregation; rather, Grissom argued that "his continued segregation is excessive and is being utilized under pretext for 'indefinite' confinement which constitutes an atypical significant hardship and violates his liberty interests." A-0028. This misidentification alone requires remand. *See TON Servs., Inc. v. Qwest Corp.*, 493 F.3d 1225, 1229 (10th Cir. 2007) (vacating dismissal and remanding because "the district court misconstrued the nature of [plaintiff's] claims.").

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[11] To the extent that *Rezaq* and other Tenth Circuit cases conflict with *Penrod* with respect to the appropriate baseline, *Penrod* is binding as the earlier decision. *See Hiller v. Okla. ex rel. Used Motor Vehicle & Parts Comm'n*, 327 F.3d 1247, 1251 (10th Cir. 2013) ("To the extent that [cases] are in conflict, however, we are obligated to follow the earlier panel decision over the later one.").

C. Grissom Had a Liberty Interest in Avoiding Twenty Years of Solitary Confinement

In *Estate of DiMarco v. Wyoming Department of Corrections*, this Court identified four factors relevant to whether a condition imposes an atypical and significant hardship: "[W]hether (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 . . .; and (4) the placement is indeterminate." 473 F.3d 1334, 1342 (10th Cir. 2007). These factors are not dispositive. *Id.* Instead, "the proper approach is a fact-driven assessment that accounts for the totality of conditions presented by a given inmate's sentence and confinement." *Rezaq*, 677 F.3d at 1012. Significantly, a prisoner need not satisfy all four factors to establish a liberty interest. *Toevs v. Reid*, 646 F.3d 752, 756 (10th Cir. 2011) (*Toevs I*), *amended and superseded on rehearing*, 685 F.3d 903 (10th Cir. 2012) (*Toevs II*); *see also, e.g.*, *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1149 (D. Colo. 2012) (finding a liberty interest where two factors weighed against a liberty interest).

The district court relied heavily on this Court's opinion in *Grissom v. Werholtz*, 524 F. App'x 467 (10th Cir. 2013) (unpublished) (*Grissom I*), in assessing the *DiMarco* factors. A-0696. That was error, not least because the record before the district court in *Grissom I* was even less developed than it is in this case. There, Grissom did not present *DiMarco* evidence or argument in

opposing summary judgment.[12] *See* Opp'n. to Defs.' MSJ, *Grissom v. Werholtz*, No. 5:07-cv-03302-SAC, ECF No. 64 (July 18, 2012).[13] Further, Grissom languished in solitary for an additional decade since he brought suit in *Grissom I*, rendering the prior analysis irrelevant.

Here, Grissom demonstrated that the first, second, and fourth *DiMarco* factors weigh in favor of a liberty interest.

1. *DiMarco* Factor One: Does the Segregation Relate to a Legitimate Penological Interest?

To place or retain a prisoner in segregation, there must be a rational connection between the penological interest and the challenged conduct. *DiMarco*, 473 F.3d at 1342; *see Rezaq*, 677 F.3d at 1013–14 (legitimate penological interest

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[12] *Grissom I* has no preclusive effect in this case. *See* 10th Cir. R. 32.1(A). Further, Defendants did not raise the affirmative defense of preclusion before the district court. *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971) (citing Fed. R. Civ. P. 8(c)). In general, this Court "will not review matters raised for the first time on appeal," including the affirmative defense of preclusion. *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1512 (10th Cir. 1987). Similarly, parties "waive[] their collateral estoppel issue by failing to raise it before the district court." *Worthington v. Anderson*, 386 F.3d 1314, 1317–18 (10th Cir. 2004) (footnote omitted). And the doctrine of law of the case applies only to "govern the same issues in subsequent stages in the *same* case." *McIlravy v. Kerr-McGee Coal Corp.*, 204 F.3d 1031, 1034 (10th Cir. 2000) (emphasis added).

[13] This court may exercise its discretion to take judicial notice of "publicly[] filed records in our court and certain other courts . . . that bear directly upon the disposition of the case at hand." *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1289 n.11 (10th Cir. 2017).

in segregating a terrorist with bomb-making training). "[A] regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Turner v. Safley*, 482 U.S. 78, 89–90 (1987).

Thus, a stated justification for segregation does not last indefinitely. *Proctor v. LeClaire*, 846 F.3d 597, 611 (2d Cir. 2017). That is, "[t]he validity of the government's interest in prison safety and security as a basis for restricting the liberty rights of an inmate subsists only as long as the inmate continues to pose a safety or security risk." *Mims v. Shapp*, 744 F.2d 946, 953 (3d Cir. 1984); *see also Toevs II*, 685 F.3d at 913 (administrative segregation "is not punitive and it looks to the present and the future rather than to the past"); *Kelly v. Brewer*, 525 F.2d 394, 400 (8th Cir. 1975) ("[A] reason for administrative segregation of an inmate that is valid today may not necessarily be valid six months or a year in the future."). Similarly, a purported legitimate penological interest does not justify a restriction that is excessive in relation to the purpose assigned to it. *See Bell v. Wolfish*, 441 U.S. 520, 538–39 & n.20 (1979) (noting that confining a detainee in a "dungeon may ensure his presence at trial and preserve the security of the institution" but would nevertheless be unconstitutional because those "objectives [] could be accomplished [by] so many alternative and less harsh methods").

Here, relying on Defendants' assertions that Grissom "obtain[ed] contraband items" and "attempted to encourage an inappropriate relationship" by sending a sexually explicit letter to a corrections officer, the district court found a legitimate penological interest in segregating Grissom. A-0695–97. But the court could do so only by impermissibly ignoring Grissom's evidence that the prison's stated penological interests for keeping him in segregation were stale and also excessive in relation to their purpose. *See* A-0503–05.

For example, Grissom's segregation-review report dated December 7, 2015 recommends continued segregation because "[p]lacement facts still apply." A-0303. The only adverse "placement fact" listed refers to Grissom's possession of contraband. That "placement fact" is dated October 28, 1996—over ***nineteen years*** earlier. Similarly, the review report acknowledges that 1996 incident as the only fact justifying continued segregation and concedes that Grissom received "No DRs since 2010." *Id.* Grissom also proffered evidence that prisoners who engaged in violence were subjected to far shorter terms of segregation than he was. A-0503–04. Such evidence establishes that Grissom's segregation was excessive in relation to its purpose and contradicts Defendants' evidence that Grissom's prolonged segregation was penologically necessary. Moreover, Grissom did not send the explicit letter until 2015, so it cannot serve as the basis for segregating him since 1996. A-0688. By ignoring Grissom's evidence, which blatantly

contradicts Defendants' purported penological interest in segregating Grissom for twenty years, the district court erred in making a factual finding at the summary-judgment stage.

2. *DiMarco* Factor Two: Are the Conditions of Placement Extreme?

In *DiMarco*, this Court held that the second factor weighed against a liberty interest, as DiMarco "participated in out-of-cell time of at least five-and-one-half hours a day" and had merely "commonplace" concerns about her conditions that "border[ed] on the absurd." *Id.* at 1343.

Conversely, in *Wilkinson*, the Supreme Court held that conditions mirroring Grissom's solitary confinement were "extreme." 545 U.S. at 214; *see id.* at 223. In the Supermax at issue in *Wilkinson*, "almost all human contact is prohibited, even to the point that conversation is not permitted from cell to cell." *Id.* at 223–24. Prisoners spend twenty-three hours a day in their cell, where a light remains on at all times. *Id.* at 214. "All meals are taken alone in the prisoner's cell instead of in a common eating area." *Id.* The Court concluded that Supermax prisoners are "deprived of almost any environmental or sensory stimuli and of almost all human contact." *Id.*; *see also Toevs II*, 685 F.3d at 911 (citing *Wilkinson*); *Silverstein v. Fed. Bureau of Prisons*, 704 F. Supp. 2d 1077, 1092 (D. Colo. 2010) (holding that conditions similar to those in *Wilkinson* are "extreme").

Similarly, in *Anderson*, the district court held that the second *DiMarco* factor weighed in favor of finding a liberty interest, noting that Anderson's "extreme isolation and the fact that he has remained in administrative segregation for 12 years and counting, are atypical and exceptionally harsh." 887 F. Supp. 2d at 1149; *see id.* at 1137 (finding "extreme isolation" where Anderson spent 23 hours a day in-cell; the cell design restricted communication between cells; meals are consumed in-cell; and prisoners have "little human contact except with prison staff and limited opportunities for visitors."). And this Court held that a district court "abused its discretion in concluding that there was no arguable basis that a three-year period of administrative segregation—during which time [plaintiff] was confined to his cell for all but five hours each week . . .—is not 'atypical.'" *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006); *see also Gaines v. Stenseng*, 292 F.3d 1222, 1226 (10th Cir. 2002) (reversing a finding that seventy-five days in segregation was not "atypical and significant"). Other courts have held that similar conditions are extreme. *E.g.*, *Wilkerson v. Goodwin*, 774 F.3d 845, 856 (5th Cir. 2014); *id.* at 858 (collecting cases); *Williams v. Sec'y Pa. Dep't of Corrs.*, 848 F.3d 549, 562 (3d Cir. 2017); *Incumaa v. Stirling*, 791 F.3d 517, 531–32 (4th Cir. 2015).

Here, the court found that Grissom's segregation was "neither extreme [n]or atypical in comparison to other prisoners in segregation." A-0697. This finding is

erroneous. First, the district court made an impermissible factual finding on summary judgment notwithstanding countervailing evidence from Grissom regarding the nature and duration of his segregation. A-0505–07. For example, Grissom proffered substantial evidence comparing the restrictions he was subjected to with the privileges afforded comparable prisoners. *Supra*, at 6–8. Grissom also introduced evidence of the injurious nature of his confinement. A-0038–39. Second, a finding that these conditions are not atypical is foreclosed by the case law set forth above. Third, the proper baseline comparison is general population rather than segregation, *Penrod*, 94 F.3d at 1407, although twenty years of solitary is atypical under any plausible baseline, *Wilkinson*, 545 U.S. at 223.

3. *DiMarco* Factor Three: Does Segregation Increase the Duration of Confinement?

Courts in this circuit have repeatedly found a liberty interest even where the third *DiMarco* factor is not satisfied. *E.g.*, *Toevs I*, 646 F.3d at 756–57 (recognizing a liberty interest even though "[f]actor[] . . . three work[s] against the existence of a liberty interest."); *Anderson*, 887 F. Supp. 2d at 1149; *Dodge v. Shoemaker*, 695 F. Supp. 2d 1127, 1139 (D. Colo. 2010); *Romero v. Bd. of Cnty. Comm'rs*, 202 F. Supp. 3d 1223, 1257–58 (D.N.M. 2016); *Willett v. Turley*, No. 2:10-CV-382 DB, 2012 WL 733756, at *5–6) (D. Utah Mar. 6, 2012). Other circuits are in accord. *E.g.*, *Westefer v. Snyder*, 422 F.3d 570, 590 (7th Cir. 2005); *Incumaa*, 791 F.3d at 532 (citing *Wilkerson*, 774 F.3d at 855); *Williams*, 848 F.3d

at 560 n.55. Were it otherwise, officials could, without process, subject to solitary in perpetuity anyone sentenced to natural life.

4. *DiMarco* Factor Four: Is the Segregation Indeterminate?

Courts analyzing this factor use the terms "indeterminate" and "indefinite" interchangeably. *E.g.*, *Wilkinson*, 545 U.S. 209 at 224; *Toevs I*, 646 F.3d at 756–57; *Rezaq*, 677 F.3d at 1016; *Silverstein*, 704 F. Supp. 2d at 1091–92; *Anderson*, 887 F. Supp. 2d at 1149–50. Segregation is "indeterminate" or "indefinite" if it has no fixed end date. Black's Law Dictionary 886, 889 (10th ed. 2009); *see Lankford v. Idaho*, 500 U.S. 110, 119–20 (1991); *Williams*, 848 F.3d at 562.

Toevs I concluded that the fourth factor weighed in favor of a liberty interest. 646 F.3d at 757. This Court noted that placement in segregation was "indefinite" and "there is no maximum" duration for the program. *Id.* Because Toevs "had no knowledge of any end date," and spent "seven years" in segregation, this Court concluded: "Mr. Toevs's indefinite placement that actually lasted for years, in the type of conditions he alleged, established a protected liberty interest." *Id.* The District of Colorado reached a similar conclusion in *Silverstein*. There, the court found: "all indications are that Mr. Silverstein's placement in solitary confinement is for an indefinite period of time." 704 F. Supp. 2d at 1092.

Here, Defendants submitted a report confirming that Grissom's segregation was indefinite or indeterminate. A-0238 ("There is no fixed timetable for inclusion

in a program or release from segregation . . . ."). And Defendants all but admitted that no amount of good behavior would earn Grissom release from segregation. *See supra* at 5–6. But the district court held that Grissom's segregation was not "indeterminate" because it was subject to periodic reviews.

The court fundamentally misconstrued the meaning of the term. Whether segregation is "indeterminate" or "indefinite" depends on whether it is of fixed duration, not whether there are periodic reviews. *Wilkinson*, 545 U.S. at 224 (holding that placement is indefinite even when subject to periodic reviews). Because it is undisputed that Grissom was never given a definite end-date for his segregation, the court erred in finding that it was not indeterminate.[14] In addition, the existence of periodic reviews does not foreclose a due-process challenge. As this Court has explained, "[T]he review must be ***meaningful***; it cannot be a sham or a pretext." *Toevs II*, 685 F.3d at 912 (emphasis added). As explained *infra*, Grissom raised a fact question regarding whether his reviews were meaningful. *E.g.*, A-0500, 03, 05, 08–10.

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[14] To be sure, *DiMarco* noted that periodic reviews may inform the determinacy analysis. 473 F.3d at 1343; *see also Rezaq*, 677 F.3d at 1016 (10th Cir. 2012) ("The availability of periodic reviews merely suggests that the confinement was not indefinite."). But this Court has never held that the existence of periodic reviews makes an indefinite length "determinate." Indeed, *Wilkinson* forecloses such a holding. 545 U.S. at 224.

5. *DiMarco* Factors Conclusion

Grissom has demonstrated that his conditions of confinement were (1) not related to and furthering a legitimate penological interest; (2) extreme; and (3) indeterminate. Accordingly, this Court should reverse and hold that Grissom demonstrated a liberty interest in avoiding twenty years of solitary.

But given the extraordinary length of and restrictions imposed by Grissom's solitary confinement, the *DiMarco* analysis is unnecessary; the nature and duration of Grissom's segregation amount to an "atypical and significant hardship" irrespective of countervailing considerations. *E.g.*, *Marion v. Columbia Corr'n Inst.*, 559 F.3d 693, 698–99 (7th Cir. 2009) ("Our decision . . . is consistent with the decisions of our sister circuits [that] have held that periods of [solitary] confinement that approach or exceed one year may trigger a cognizable liberty interest without any reference to conditions.") (footnote omitted); *see Isby v. Brown*, 856 F.3d 508, 524 (7th Cir. 2017) ("Defendants-appellees sensibly do not contest the conclusion that the extraordinary length [eleven years] of Isby's segregation . . . implicates his due process rights."); *Incumaa*, 791 F.3d at 532 (twenty years' administrative segregation constitutes an atypical and significant hardship under any plausible baseline); *Wilkerson*, 774 F.3d at 855 ("[I]t is clear that . . . continued detention in [solitary] constitutes an atypical and significant hardship on the prisoner in relation to the ordinary incidents of prison life

according to any possible baseline we could consider."); *Brown*, 751 F.3d at 988 (9th Cir. 2014) ("[Plaintiff's] twenty-seven month confinement . . . for over twenty-three hours each day with almost no interpersonal contact" is an "atypical and significant hardship under any plausible baseline."); *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000) ("[W]e have no difficulty concluding that eight years in administrative custody, with no prospect of immediate release in the near future, is 'atypical' in relation to the ordinary incidents of prison life . . . .").

D. A Fact Question Exists on Whether Grissom's Liberty Interest was Violated

Disputed issues of material fact remain regarding whether Defendants afforded Grissom the process that was due under clearly established law. As this Court explained in *Toevs II*: "Since *Hewitt*, it has been clearly established that prisoners cannot be placed indefinitely in administrative segregation without receiving *meaningful* periodic reviews." 685 F.3d at 916 (emphasis added). A meaningful review "cannot be a sham or a pretext." *Id.* at 912. This is so because meaningful reviews are critical to ensure that "administrative segregation [is not] used as a pretext for indefinite confinement of an inmate." *Hewitt v. Helms*, 459 U.S. 460, 477, n.9 (1983); *accord, e.g.*, *Proctor*, 846 F.3d at 610; *see id.* at 611–12 (citing *Kelly v. Brewer*, 525 F.2d 394, 399-400 (8th Cir. 1975)); *Jackson v. Meachum*, 699 F.2d 578, 584 (1st Cir. 1983); *Williams*, 848 F.3d at 575–76; *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013); *Incumaa*, 791 F.3d at 534; *Isby*, 856

F.3d at 527–28; *Brown*, 751 F.3d at 989–90; *Magluta v. Samples*, 375 F.3d 1269, 1279 n.7 (11th Cir. 2004); *Crosby-Bey v. Dist. of Columbia*, 786 F.2d 1182, 1183–84 (D.C. Cir. 1986).

In *Toevs II*, a prisoner in administrative segregation brought a due-process claim, alleging "that his progression reviews were perfunctory and repetitive." 685 F.3d at 912. This Court agreed. *Id.* at 914–15. It declared that a "meaningful" review requires evaluation of "the prisoner's *current* circumstances and future prospects, and, considering the reason(s) for his confinement to the program, determines whether that placement *remains* warranted." *Id.* at 913 (emphasis added); *see also Proctor*, 846 F.3d at 610–11 (reviewing officials must determine "whether the inmate *remains* a security risk on the date of the periodic review" for the review to be "meaningful"). That review must also "provide a statement of reasons, which will often serve as a guide for future behavior (i.e., by giving the prisoner some idea of how he might progress toward a more favorable placement)." *Toevs II*, 685 F.3d at 913 (citing *Wilkinson*, 545 U.S. at 226). But Toevs's reviews "contained "largely . . . the same information, with occasional updates." *Id.* at 914. His review forms "never stated why" the segregation remained necessary, and for twenty-one months there was no change in status. *Id.* at 914–15. This Court held that Toevs did not receive meaningful periodic reviews. *Id.* at 915.

The Seventh Circuit recently considered a factually similar case in *Isby v. Brown*, 856 F.3d 508 (7th Cir. 2017). There, a prisoner brought a due-process challenge after spending eleven years in administrative segregation under conditions similar to Grissom's. *See id.* at 513. The defendants argued that "the reviews that [the prisoner] receives every thirty days are sufficient for due process." *Id.* at 524. The Seventh Circuit held, however: "Here, the repeated issuance of the same uninformative language (without any updates or explanation of why continued placement is necessary) coupled with the length of . . . confinement, could cause a reasonable trier of fact to conclude that [the prisoner] has been deprived of his liberty interest without due process." *Id.* at 529. Other circuits have reached similar conclusions. *E.g.*, *Proctor*, 846 F.3d at 612; *Incumaa*, 791 F.3d at 534; *Selby*, 734 F.3d 554 at 559–60; *Kelly*, 525 F.2d at 399–402.

Here, the court ignored this authority clearly establishing that Defendants did not afford Grissom due process. *See* A-0698. Like the plaintiff in *Isby*, Grissom has "raised triable issues of material fact regarding whether his reviews were meaningful or pretextual." 856 F.3d at 529. And, as in *Isby*, Grissom has demonstrated that his reviews were "perfunctory, meaningless, rote iterations of stale justifications." A-0028. His reviews usually lasted less than a minute. A-0026; *see Williams v. Hobbs*, 662 F.3d 994, 1002, 1006 (8th Cir. 2011) (holding

that reviews were not meaningful where the hearings lasted "only four or five minutes"). Beginning in December 2013, Grissom's monthly review forms include a mere four-word entry explaining his continued placement in segregation: "Placement facts still apply." A-0251. The forms contain a field for "Segregation Placement/Retention Facts," in which the only adverse entry is dated October 1996. Indeed, there is no indication on the form that the reviewers considered Grissom's "current circumstances"—a hallmark of meaningful review—when evaluating whether Grissom should remain in solitary. *Toevs II*, 685 F.3d at 913. Nor does the form provide Grissom with "a statement of reasons [that could] serve as a guide for future behavior." *Id*.

Moreover, the stated reason for the reviewers' recommendation — "Placement facts still apply" — is copied verbatim, without elaboration, for twelve consecutive reviews. A-0251–63. For the thirteenth review, one word and an underlined semi-colon were added: "Retain; Placement facts still apply." A-0264. That language and typo are copied—verbatim—for nine reviews through August 2015. A-0265–72. The justification remains the same through December 2015; the sole change is the removal of the typo. A-0273–75. As Grissom explained to the district court: "[T]he rote iterations . . . are identic[al] down to the punctuation in their comments which is a testament that [the] seg reviews were meaningless."

A-0500; *see also* A-0510; A-0518–19. Moreover, the forms do not explain why a ***nineteen-year-old*** violation justified Grissom's continued segregation.

Grissom also noted that his review forms reflected identical rationalizations for his continued segregation even when he was reviewed by different officials. A-0500. The review forms contain six boxes for individual reviewers to comment. *E.g.*, A-0259. In July 2014, the first row of comments states: "Retain for now," "Placement facts," and "Retain, placement facts." Later, the comments remain identical notwithstanding the fact that the reviewers changed. *Compare id.* (reviewers Zabel, Randa, and Marlett) *with* A-0272 (reviewers Clouser, Buchanan, and Walmsley). That same boilerplate continues for fourteen consecutive reviews. A-0259–72. The Second Circuit has held that "repetitive and rote" reviews that contain "years of virtually identical reports" raise a fact question of whether the review was meaningful. *Proctor*, 846 F.3d at 613. Similarly, the consecutive identical review forms here raise at least a fact question as to whether Grissom's reviews were meaningful.

Moreover, Grissom alleged that he repeatedly asked his reviewers to justify his continued segregation. Repeatedly, he was told that there was no legitimate reason. A-0028–29; *see also* A-0505 ("We can't give you a valid explanation and we can't justify it."); *id.* ("Plaintiff was informed by the ASRB that they 'can't' provide him with a legitimate reason for continued segregation, [and] that his

Placement Facts for confinement 'don't apply . . . .'" (internal citation omitted)). Viewing these statements in the light most favorable to Grissom, a fact-finder could reasonably conclude that Grissom's reviews were shams.

But the district court improperly ignored this evidence when it found—without analysis—that Grissom's "reviews were detailed, meaningful, and substantive, even if the plaintiff disliked the results." A-0697–98. Such a factual finding on "a disputed question of material fact . . . is inappropriate for resolution on summary judgment." *Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1145 (10th Cir. 2006).[15] As the Seventh Circuit did in *Isby*, this Court should reverse the grant of summary judgment because Grissom's reviews were not meaningful.

E. Qualified Immunity is Inappropriate

When defendants engage in impermissible conduct, qualified immunity may shield them if they did not violate "clearly established statutory or constitutional rights." *Toevs II*, 685 F.3d at 916. "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or

[15] The district court also made the inappropriate factual finding that Defendants Roberts and Goddard "had nothing to do with deciding to put or keep Grissom in segregation" and granted summary judgment for them on that basis. A-0701. But the record clearly shows their involvement. *E.g.*, A-0026, 36–37, 40–41, 60–62, 162–65, 181–85 (Roberts); A-0030, 504, 516–17 (Goddard). Moreover, Defendants concede that both men could autonomously release Grissom from segregation. A-0226–27.

the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Id*. (internal quotation marks omitted). But that does not mean "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Hope v. Pelzer*, 536 U.S. 730 (2002).

The district court stated that Defendants are entitled to qualified immunity because Grissom's liberty interest was not clearly established. But as set forth in Section C, *supra*, Tenth Circuit and Supreme Court precedent and the weight of authority from other circuits clearly establish that Grissom had a liberty interest in avoiding twenty years of segregation under the conditions of confinement to which he was subjected. *E.g.*, *Wilkinson*, 545 U.S. at 223; *Toevs I*, 646 F.3d at 757; *Fogle*, 435 F.3d at 1259; *Gaines*, 292 F.3d at 1226; *Shoats*, 213 F.3d at 144; *Incumaa*, 791 F.3d at 532; *Wilkerson*, 774 F.3d at 855; *Marion*, 559 F.3d at 698–99; *Isby*, 856 F.3d at 524; *Brown*, 751 F.3d at 988.

Similarly, as set forth in Section D, *supra*, the right to meaningful reviews is clearly established by the Supreme Court and this Court. *See Toevs II*, 685 F.3d at 916 ("Since *Hewitt*, it has been *clearly established* that prisoners cannot be placed indefinitely in administrative segregation without receiving *meaningful* periodic reviews." (emphasis added)) (citing *Hewitt*, 459 U.S. at 477 n.9). And, as noted in Section D, *supra*, the weight of authority from other circuits is in accord.

III. Grissom's 20 Years in Solitary Confinement Constitutes Cruel and Unusual Punishment

Grissom alleged in his Amended Complaint that the "prolonged adverse effects and excess duration of nineteen years plus of continuous indefinite solitary confinement" constituted cruel and unusual punishment. A-0223. But Defendants and the district court ignored this claim. The district court's failure to review it is error. *See Woods v. Thieret*, 903 F.2d 1080, 1081–82 (7th Cir. 1990) (per curiam) (reversing and remanding Eighth Amendment claim where district court failed to address it); *see also Tabor v. Hilti, Inc.*, 703 F.3d 1206, 1227 (10th Cir. 2013) ("Where an issue has not been ruled on by the court below, we generally favor remand . . . ."); *O'Toole v. Northrop Grumman Corp.*, 305 F.3d 1222, 1227–28 (10th Cir. 2002) (reversing and remanding where district court granted summary judgment against all of plaintiff's claims where defendant had not moved for summary judgment on all claims). Had the district court addressed this claim, summary judgment would not have been granted against Grissom.

A. Eighth Amendment Standards

An Eighth Amendment claim contains both objective and subjective components. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To establish the objective component, Grissom must show that he was subjected to deprivations "sufficiently serious" to deprive him of the "minimal civilized measures of life's necessities." *Id*. This requirement can be satisfied by showing that prison officials

deprived Grissom of a "single, identifiable human need," such as social interaction or environmental stimulation, *Wilson v. Seiter*, 501 U.S. 294, 304 (1991), thereby exposing him to a "substantial risk of serious harm," *e.g.*, *DeSpain v. Uphoff*, 264 F.3d 965, 973 (10th Cir. 2001). Notably, the Eighth Amendment protects against future injury, *Helling v. McKinney*, 509 U.S. 25, 33 (1993), including "psychological harm," *Benefield v. McDowall*, 241 F.3d 1267, 1272 (10th Cir. 2001). The Eighth Amendment can also be violated when punishment is "grossly disproportionate to the severity of the crime" or when it has questionable "penological justification." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

The "touchstone" of determining "when prison conditions pass beyond legitimate punishment and become cruel and unusual . . . is the effect upon the imprisoned.'" *Id.* at 364 (Brennan, J., concurring); *see also Hope*, 536 U.S. at 738 (holding Eighth Amendment violated based on punishment's effects on prisoner—unnecessary pain, heat exposure, thirst, and deprivation of bathroom breaks). When a condition "threatens the physical, mental, and emotional health and well-being of the inmates . . . the court must conclude that the conditions violate the Constitution." *Rhodes*, 452 U.S. at 364 (internal quotation marks omitted).

Because there is no "static test" for determining whether conditions are "cruel and unusual," courts must look to "the evolving standards of decency that mark the progress of a maturing society." *Id.* To determine those "evolving

standards," courts may draw from a variety of "objective indicia" including history, legislation, national and international authorities, and the obviousness of the risks posed by the challenged conduct. *Id*.; *Roper v. Simmons*, 543 U.S. 551, 575 (2005).[16]

Grissom must also establish that these deprivations were inflicted with "deliberate indifference." *Farmer*, 511 U.S. at 834. This "subjective component" is satisfied where the "official knows of and disregards an excessive risk to inmate health or safety." *Id*. at 837. Knowledge of the risk may be demonstrated by the fact it was obvious. *Id*. at 842. Further, the duration of the "cruel prison condition may make it easier to *establish* knowledge and hence some form of intent." *Wilson*, 501 U.S. at 300 (emphasis original).

B. Grissom's Solitary was "Sufficiently Serious" Because of Both the Actual Harm, and the Substantial Risk of Further Harm, that it Created

By 1890, the Supreme Court recognized the devastating effects of solitary confinement. *See In re Medley*, 134 U.S. 160, 168 (1890) (after even *one month* of solitary confinement, prisoners fell into a "semi-fatuous condition," "became

[16] This Court may take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned," such as federal and state statutes and regulations, government reports, medical and scientific reports and journals. *O'Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1224–25 (10th Cir. 2007); *see also Simon v. Taylor*, 252 F. Supp. 3d 1196, 1239–40 (D.N.M. 2017) (collecting judicial-notice cases).

violently insane," "committed suicide," and "did not recover sufficient mental activity to be of any subsequent service to the community"). Since that time, more evidence that solitary causes profound harm has accrued. *E.g.*, Kenneth Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. Am. Acad. Psychiatry & L. 406, 410 (2015) ("[E]very scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies."). Specifically, the effects of solitary confinement include hallucinations, depression, hypersensitivity to stimuli, insomnia, headaches, lethargy, anxiety, panic, paranoia, irritability, aggression, rage, irrational anger, and withdrawal. *Id.* at 410–13. Further, advances in neurobiology have established that, in response to psychological trauma caused by segregation, the brain undergoes detectable changes in neural pathways, adversely affecting the nature and functioning of the brain. *E.g.*, Ajai Vyas *et al.*, *Effect of Chronic Stress on Dendritic Arborization in the Central and Extended Amygdala*, 965 Brain Research, 290–94 (2003).

Despite the growing body of evidence documenting the deleterious effects of prolonged solitary, courts have sometimes been reluctant to question the practice, anxious to avoid interfering with prison administration. Indeed, three years ago,

this Court declined to hold a thirty-year term of segregation cruel and unusual, although it acknowledged the duration as "*extraordinary* . . . under any conditions." *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739 (10th Cir. 2014) (unpublished) (emphasis original).

Society's standards of decency have evolved even since 2014 such that today, the question of prolonged segregation's inhumanity is beyond serious dispute. *E.g.*, *Davis*, 135 S. Ct. at 2209 (Kennedy, J., concurring) ("[S]olitary confinement . . . will bring you to the edge of madness, perhaps to madness itself."); *Glossip v. Gross*, 576 U.S. ___, 135 S. Ct. 2726, 2765, (2015) (Breyer J., dissenting) ("[It is] well documented that . . . prolonged solitary confinement produces numerous deleterious harms") (citing sources); *Williams*, 848 F.3d at 567 ("Now, with the abundance of medical and psychological literature, the 'dehumanizing effect' of solitary confinement is firmly established."); *Latson v. Clarke*, 249 F. Supp. 3d 838, 847 (W.D. Va. 2017) ("Research has shown that the impacts of solitary confinement can be similar to those of torture and can include a variety of negative physiological and psychological reactions."); *People v. Annucci*, 180 F. Supp. 3d 294, 299 (S.D.N.Y. 2016) (same).

As society's knowledge of the adverse effects of solitary has evolved, so too have judicial views. A growing number of courts have concluded denying the basic human needs of social interaction and environmental stimulation can violate

the Eighth Amendment, especially when the deprivation lasts for years. *E.g.*, *Johnson v. Wetzel*, 209 F. Supp. 3d 766, 775–81 (M.D. Pa. 2016) (granting plaintiff's preliminary injunction finding plaintiff likely to succeed on Eighth Amendment claim based on 36 years of solitary); *Annucci*, 180 F. Supp. 3d at 294 (approving class-action settlement on Eighth Amendment claims for prolonged solitary); *Shoatz v. Wetzel*, No. 2:13-cv-0657, 2016 WL 595337, at *7–9 (W.D. Pa. Feb. 2, 2016) (denying defendants' motion for summary judgment where plaintiff endured 22 years of solitary); *Ashker v. Brown*, No. C 09-5796 CW, 2013 WL 1435148, at *4–6 (N.D. Cal. Apr. 9, 2013) (denying motion to dismiss where plaintiffs held in solitary for at least eleven years).

Moreover, in recognition of the adverse effects and limited penological utility of solitary confinement, reforms are occurring at both the federal and state level. *See* Appelbaum, *supra*, at 407–09 (discussing that there is no evidence that solitary reduces violence but there is evidence that curtailing its use limits violence and misconduct). For example, following the U.S. Government Accountability Office's (GAO) 2013 report on the Federal Bureau of Prison (BOP)'s use of solitary, the BOP agreed to reduce its segregated population and submit to an independent assessment of its practices. U.S. GAO, Improvements Needed in [BOP] Monitoring and Evaluation of Impact of Segregated Housing, at 61–65, May 2013, *available at* http://www.gao.gov/assets/660/654349.pdf. In January

2016, the U.S. Department of Justice issued a Report and Recommendations on solitary confinement, calling for a number of reforms aimed at reducing its use. U.S. DOJ Final Report, R. & R. Concerning the Use of Restrictive Housing, at 104–21, *available at* https://www.justice.gov/archives/dag/file/815551/download. At the state level, comprehensive reforms focused on reducing solitary confinement and improving the conditions of such confinement are in effect or underway in a majority of states. *See* Maurice Chammah, *Stepping Down from Solitary Confinement*, The Atlantic, Jan. 7, 2016, *available at* https://www.theatlantic.com/politics/archive/2016/01/solitary-confinement-reform/422565 (noting that since 2009 at least thirty states have undertaken such reforms); U.S. DOJ Final Report, *supra*, at 72–78 (discussing state level reforms); *see also id*. at 79–92; Peter Raemisch, *Why We Ended Long-Term Solitary Confinement in Colorado*, N.Y. Times, Oct. 12, 2017.

The international community also recognizes the pernicious effects of solitary. In 2015, the United Nations promulgated Rule 43, which prohibits prolonged solitary confinement. U.N. Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules), U.N. Econ. & Soc. Comm. On Crime Prevention and Criminal Justice, 24th Sess., U.N. Doc. E/CN.15/2015/L.6/Rev.1 (May 21, 2015); *see also* Raemisch, *supra*, (describing Colorado's head of corrections' participation in the creation of the Mandela Rules). Still other international bodies

have called for a reduction in the use of solitary, including the European Committee for the Prevention of Torture, the Inter-American Commission on Human Rights, and the Commission on Safety and Abuse in America's Prisons. Appelbaum, *supra* at 413.

The literature and case law make clear that the harmful psychological and physical effects of solitary result from the fact that it deprives prisoners of at least two basic human necessities essential to physical and mental health—social interaction and environmental stimulation. *See Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 678 (M.D. La. 2007) ("[S]ocial interaction and environmental stimulation have been identified as basic human psychological needs, either directly or indirectly, by other courts."); Appelbaum, *supra*, at 410 (citing sources).

While specific conditions vary by institution, solitary confinement, as currently practiced—*e.g.*, twenty-two to twenty-four hour a day in-cell confinement (alone or with another prisoner), limited visibility of the outside world, without *meaningful* human contact (i.e., beyond incidental contact with officers or prisoners) or positive environmental stimulation, and with limited opportunities for exercise—accomplishes that deprivation. *E.g.*, *Wilkinson*, 545 U.S. at 223–24; *Annucci*, 180 F. Supp. 3d at 298 n. 8 (citing Ltr. From Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Hon. Tom Corbett, Gov. of Pa. 5 (May 31, 2013), *available at* https://www.justice.gov/sites/default/files/

crt/legacy/2013/06/03/cresson_findings_5-31-13.pdf). Importantly, for solitary to inflict such damage, it need not amount to complete social isolation or deprivation of stimuli. *E.g.*, *Johnson*, 209 F. Supp. 3d at 774–75, 777. Thus, even conditions that include in-cell televisions and radios, contact with corrections officers, and the opportunity to speak to other prisoners (either on the yard or through cell doors) can violate the Eighth Amendment. *E.g.*, *id.*

In light of these evolving scientific, sociological, judicial, legislative, and international standards of decency, and on the record proffered by Grissom, a fact-finder could reasonably conclude that Grissom's protracted solitary confinement constituted a sufficiently serious deprivation of basic human needs that harmed him or exposed him to a substantial risk of harm.

The conditions of Grissom's segregation were substantially identical to those conditions compelling courts to find that solitary may violate the Eighth Amendment. *Supra* at 39, 42. For twenty years, Grissom was confined to his cell, alone, for twenty-three to twenty-four hours per day. A-0038; A-0171. He ate his meals alone and, to the extent Grissom had any contact with other humans, it was limited to incidental contact with guards—*e.g.*, when he was shackled or unshackled and during invasive strip searches. A-0038; A-0171; A-0626–36. While it is conceivable that Grissom had some interactions with other prisoners, the reasonable inference is that they were extremely limited and achieved primarily

by shouting through a solid steel door (thereby risking discipline for violating prison rules). A-0037–38; A-0627. Drawing all reasonable inferences in Grissom's favor, none of these interactions amount to meaningful human contact.

Grissom's environmental stimulation was also severely limited. Although Grissom was denied discovery and the record is not well developed on this issue, prison rules prohibited him from affixing anything to the walls of his cell to break the visual monotony, he could not access the library but through a written form, and he was limited in the amount of property he could keep. A-0626–36. For at least part of the time he was in solitary, his reading material was restricted to expired encyclopedia volumes. A-0377. Prison rules show that he was allowed only minimal time outside his cell, and then, only in the confines of yet another cell after submitting to a dehumanizing strip search. A-0626–36.

The specific harms Grissom experienced are consistent with the body of research regarding the effects of solitary. *Supra* at 37–38. Prolonged exposure to solitary "[a]ffected [Grissom] psychologically by altering his personality" such that he "has become emotionally detached, non-emotive" and bitter. A-0218. Grissom suffers from insomnia and paranoia, and he no longer is comfortable with human contact. *Id*. He has experienced "substantial psychological, emotional, [and] mental . . . damage," including depression and "physical[] exhaust[ion]." *Id*. Further, it is well established that twenty years in solitary poses an unreasonable

risk to Grissom's future health. *E.g.*, *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting).

There is no Tenth Circuit precedent holding that protracted terms in solitary are permissible under the Eighth Amendment, although a panel recently considered the constitutionality of such isolation in *Silverstein*, an unpublished decision. There, the panel focused on several factors, noting that Silverstein's confinement did not amount to total isolation, that any mental health damages Silverstein might have experienced were the "inevitable byproduct of anyone facing a long sentence," and that Silverstein had a history of "murderous and violent behavior." 559 F. App'x at 754–59, 764.

Even were *Silverstein* binding, its analysis would not control. First, Silverstein appears to have had more social contact and environmental stimulation than Grissom. *Id*. at 756. Second, studies—including those that post-date *Silverstein*—show that the serious consequences of solitary confinement accrue without total isolation or a complete lack of stimulation. *See supra* at 37–38, 42.

This research also shows that the "various symptoms of psychological distress" reported by Grissom *are* unique to prisoners subjected to solitary. The symptoms of psychological and physiological harm occur with greater frequency and severity in solitary than among general-population prisoners serving long sentences. *E.g.*, *Davis*, 135 S. Ct. at 2209 (Kennedy, J., concurring, recognizing

that "even for prisoners sentenced to death, solitary confinement bears a 'further terror.'"); David H. Cloud, *Public Health and Solitary Confinement in the U.S.*, 105 Gov't, Law and Pub. Health Practice 18, 21 (2006); Peter Scharff Smith, *The Effects of Solitary Confinement on Prison Inmates: A Brief History and Review of the Literature*, 34 Crime & Just. 441, 476 (2006). Moreover, the particular dissociative, confused, perceptual disturbance, and hypersensitivity to stimuli symptoms they experience rarely occur outside of solitary such that their occurrence at the same time represents a distinct syndrome. Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Wash. U. J. L. & Pol'y 325, 337–38 (2006); *U.S. v. D.W.*, 198 F. Supp. 3d 18, 91–94 (E.D.N.Y. 2016) (describing solitary "syndrome").

Finally, Grissom's conduct stands in stark contrast to Silverstein's violent, incorrigible behavior. Unlike Silverstein, no evidence suggests that Grissom belonged to a gang. Grissom accumulated only five DRs in twenty-six years, and none were for violent offenses. *Supra* at 2–4. While the district court pointed to records calling Grissom an "extreme escape risk," there is no evidence that he attempted escape—only that a correspondent may have wished to free him. Moreover, these "security" concerns are undermined by records indicating that Grissom posed no security threat and was trouble free for years on end.

In sum, a dispute of material fact remains regarding whether Defendants subjected Grissom to a substantial risk of harm by keeping him in solitary for twenty years.

C. Prison Officials Were Deliberately Indifferent to the Substantial Risk of Harm

As an initial matter, even without discovery, Grissom was able to cobble together evidence showing that he informed Defendants that his solitary confinement was excessive. A-0060–64; A-0251–72. Those communications establish that Defendants knew of but disregarded a risk of serious harm.

Even if Defendants were to claim that they were unaware of Grissom's pleas, the subjective prong would be satisfied. This is so because the harm Grissom endured and the substantial risk of harm posed by his confinement were obvious, *Hope*, 536 U.S. at 738, and no competent corrections official tasked with creating and implementing solitary-confinement policies could be unaware of the risk posed by twenty years of segregation. *E.g.*, *Shoatz*, 2016 WL 595337, at *9 (noting it should not strike anyone "as rocket science" that solitary substantially increases the risk of mental illness).

The condemnation of the practice by correctional experts is ubiquitous and well-documented. For example, the Association of State Correctional Administrators (ASCA) has acknowledged the harm caused by solitary and noted that "[c]orrectional leaders across the country are committed to reducing the

number of people in restrictive housing and altering what it means to be there." Press Release, ASCA, *New Report on Prisoners in Admin. Segregation Prepared by the [ASCA] and the Arthur Liman Pub. Interest Program at Yale Law Sch.* (Sept. 2, 2015). Similarly, the president-elect of ASCA explained that ASCA "believe[s] that lengthy stays [in solitary confinement] manufacture or increase mental illness." *See* Gary C. Mohr and Rick Raemisch, *Restrictive Housing: Taking the Lead*, Corrections Today (2015), *available at* http://www.asca.net/pdfdocs/6.pdf. The American Correctional Association and ASCA have also promulgated solitary reduction principles in light of the problems it poses. *See* Am. Corr. Assoc. Committee on Standards, August 2016; ASCA, Restrictive Housing Policy Guidelines, *available at* http://www.asca.net/pdfdocs/9.pdf; *see also* DOJ Final Report, *supra*, at 40 (providing recommendations to reduce the use of solitary).

With respect to the KDOC, specifically, newspapers document that the KDOC is curtailing the use of solitary at EDCF. Justin Wingerter, *Kansas Prisons Make Slow Shift Away from Solitary Confinement*, Topeka Capital-Journal, Apr. 29, 2017. And, former KDOC secretary Ray Roberts, an Appellee in this action, has acknowledged that housing "offenders in solitary confinement . . . create[s] a dangerous environment for correctional officers." A-0170–71.

As discussed above, the scientific community's condemnation of solitary is well-documented and the practice is undoubtedly a matter of public discourse. *Supra* at 37–41. Indeed, several networks have recently aired documentaries about the impact of solitary and efforts to curtail its use. *E.g.*, *See Solitary: Life Inside Red Onion State Prison*, HBO (2017), *available at* https://www.hbo.com/documentaries.solitary-inside-red-onion-state-prison; *Last Days of Solitary*, PBS (2017), *available at* https://www.pbs.org/wgbh/frontline/ announcement/ on-april-18-frontline-presents-last-days-of-solitary-a-major-two-hour-documentary-on-solitary-confinement-in-america; *Reforming Solitary Confinement at Infamous California Prison*, CBS (2017), *available at* https://www.cbsnews.com/news/reforming-solitary-confinement-at-infamous-california-prison/.

Defendants knew of but disregarded a serious risk to Grissom by keeping him in solitary for twenty years. To the extent that Defendants' knowledge of the risks of the substantial harm created by solitary is an open question, a remand to allow discovery to proceed is necessary.

D. Grissom's Solitary Constitutes Grossly Disproportionate Punishment and Lacks Penological Justification

The Eighth Amendment is also violated when punishment is "grossly disproportionate to the severity of the crime" or lacks "penological justification." *Rhodes*, 452 U.S. at 346. A penological justification lasts "only so long as the prisoner continues to pose a safety or security risk." *Isby*, 856 F.3d at 526.

The district court found that Defendants had a legitimate penological interest in segregating Grissom for twenty years because he posed a security risk since he was able to obtain contraband while confined and attempted to encourage an inappropriate relationship with an officer. A-0696–97. These justifications are absurd. First, Grissom did not even obtain any contraband until after his first seven years of confinement.[17] Second, Grissom only obtained contraband three times—once in 2003 and twice in 2005—and he did not send the sex note until ten years after his last contraband violation. A-0229; A-0616. Yet Defendants kept him in solitary for two years after his first violation and *eleven* years after his third. *Id*. Possession of a cellphone and other contraband cannot plausibly justify thirteen years of solitary, especially where Defendants admit that during that time, Grissom posed no security risk. *Supra* at 2–3. Finally, while Defendants argue that it was Grissom's ability to "manipulate" prison officials that kept him in solitary, they concede that the only way Grissom could have obtained the contraband was through those officials. *E.g.*, A-0315; A-0345 n.3. Defendants'

[17] To the extent Defendants attempt to justify Grissom's initial seven years with the 1996 incident, that argument lacks merit as every other prisoner involved in that incident was released from segregation within two years. *Grissom*, 2012 WL 3732895, at *4. Nor does the letter from an outside correspondent justify fourteen years in solitary, especially where there is no evidence Grissom requested such assistance and no DR issued. A-0048, 0053; *Grissom*, 2012 WL 3732895, at *2.

argument amounts to a concession that they punished Grissom with twenty years of solitary because of the malfeasance of their own officers.

Three separate possessions of contraband in the mid-2000s do not justify cutting Grissom off from meaningful human contact, and doing so well after "the reasons for such segregation no longer exists offends in a fundamental way contemporary standards of decency." *Morris v. Travisono*, 549 F. Supp. 291, 295 (D.R.I. 1982); *see also, e.g.*, *Isby*, 856 F.3d at 526; *Proctor*, 846 F.3d at 611; *Mims*, 744 F.2d at 953–54.

IV. The District Court Applied the Wrong Standard of Review and Made Inappropriate Findings of Fact as to Grissom's Equal Protection Claim

Grissom asserts that Defendants' decision to keep him in solitary for twenty years was racially discriminatory because he was held in segregation longer than White prisoners who had more, and more severe, disciplinary infractions. When the district court analyzed this claim, it applied the "reasonable-relationship" test from *Turner v. Safley*, 482 U.S. 78 (1987). Applying that test rather than strict scrutiny was reversible error.[18] In *Johnson v. California*, 543 U.S. 499, 509 (2005), the Supreme Court explained that strict scrutiny applies to prison policies that discriminate on the basis of race. There, the Supreme Court stated that it had

[18] The district court also erred in relying on *Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006) because *Pierson* did not involve claims of racial discrimination.

"never applied *Turner* to racial classifications" and that "*Turner* itself did not involve any racial classification . . . ." *Id*. at 510.

Having applied the wrong standard of review, the district court then concluded that Grissom failed to provide "any specific information" that "would permit the court to find that inmates who received supposedly more favorable treatment were in fact similarly situated." A-0701. This conclusion ignores that Grissom claims race-based discrimination, not just that he was treated differently from all other prisoners in segregation. It also ignores the various facts proffered by Grissom that support his racial-discrimination claim.[19] *See supra* at 9. On the district-court record, a fact-finder could reasonably conclude that Grissom raised a material issue of fact with respect to whether Defendants racially discriminated against him by keeping him in solitary for twenty years.

V. The Continuing-Violations Doctrine Applies to All of Grissom's Claims

The district court erroneously ignored Grissom's continuing-violations argument, A-0515–16, and limited its review of Grissom's claims to a fraction of the time he endured solitary.[20] *See generally* A-0683–707. The continuing-

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[19] To the extent Defendant Moore's affidavit conflicts with the evidence proffered by Grissom, A-0316–17, Grissom has established a dispute of material fact making summary judgment inappropriate. *Johnson ex rel. Estate of Cano*, 455 F.3d at 1145.

[20] It does not appear that Defendants responded to this argument either.

violations doctrine applies where an unlawful practice cannot "be said to occur on a particular day" but rather "over a series of days or perhaps years" such that the claim itself is based "on the cumulative effect of individual acts." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115–18 (2002). Under such circumstances, the statute of limitations begins to run on the last date of impermissible conduct, *see id.* at 118, here on December 5, 2016—the day that Grissom was released from solitary confinement.

The nature of the underlying claim determines whether the continuing-violation doctrine applies. Thus, in *National Railroad*, the Supreme Court distinguished between discrete retaliatory acts and hostile work environment claims. 536 U.S. at 115–18. The latter, but not the former, invokes the continuing-violations doctrine because the "very nature" of hostile work environment claims "involves repeated conduct." *Id.* at 115; *see also Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1184–86 (10th Cir. 2003) (recognizing this distinction).

Like hostile work environment claims, Grissom's claims depend on the causes and "cumulative effects" of twenty years of solitary. They are not based on any one discrete act, or any particular decision by prison officials to keep him there. Rather, they are based on decades of inhumane treatment caused by meaningless reviews and discriminatory treatment. *See O'Connor v. City of Newark*, 440 F.3d 125, 128 (3d Cir. 2006) (describing *Nat'l R.R.* and noting that

hostile work environment claims are "based on the cumulative effect of a thousand cuts rather than on any particular action taken by defendant.").

Numerous courts support the application of the continuing-violations doctrine to claims like Grissom's.[21] *E.g.*, *Gonzalez v. Hasty*, 802 F.3d 212, 224 (2d Cir. 2015) (applying doctrine to solitary claim because it "accrued only after the defendants had confined him . . . for some threshold period of time."); *Montin v. Estate of Johnson*, 636 F.3d 409, 415-16 (8th Cir. 2011) (doctrine could apply where plaintiff suffered "daily" unconstitutional restrictions of liberty); *Shomo v. City of New York*, 579 F.3d 176, 180-83 (2d Cir. 2009) (applying doctrine to

[21] This Court has yet to announce a "precedential blanket rule that the continuing violation doctrine is inapplicable to Section 1983 suits." *McCormick v. Farrar*, 147 F. App'x 716, 719 (10th Cir. 2005) (unpublished). In *Silverstein*, this Court declined to apply the continuing violations doctrine to a long-term solitary confinement claim on the grounds that the plaintiff failed to show "anything [that] prevented him from seeking redress years ago . . . ." 559 F. App'x at 752. The Court relied in part on *Davidson*, asserting parenthetically that *Davidson* held that a "continuing violation claim fails if one knew or through exercise of reasonable diligence would have known his injury." *Id*. But the section of the *Davidson* opinion to which *Silverstein* cites is not the *Davidson* Court's holding, but rather dicta noting that the Court had *previously* held that a continuing violation claim may fail under those circumstances, citing *Bullington v. United Airlines, Inc.*, 186 F.3d 1301 (10th Cir. 1999). *Bullington* was decided before *Nat'l R.R.*, and in *Davidson*, this Court recognized that *Nat'l R.R.* "[E]xpressly held that the date on which a plaintiff becomes aware that he or she has an actionable Title VII claim is of no regard in the context of determining a hostile work environment claim." *Davidson*, 337 F.3d 1179, 1185. In all events, Grissom has been trying to get both the KDOC and the judiciary to recognize his Constitutional claims since late 2007. *Grissom I*, 524 F. App'x at 470.

medical deliberate-indifference claim); *Heard v. Sheahan*, 253 F.3d 316 (7th Cir. 2006) (same).

Moreover, a ruling that the doctrine does not apply to claims based on protracted solitary puts prisoners in a "head I win, tails you lose" predicament. One aspect of these claims is the duration of solitary. *E.g.*, *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978); *Silverstein*, 559 F. App'x at 754; *DeSpain*, 264 F.3d at 974; *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998). Thus any requirement that plaintiffs refile their lawsuit every two years would create a situation in which no prisoner could ever bring a claim that prolonged solitary violates the Eighth or Fourteenth Amendments.[22] *See Heard*, 253 F.3d at 319. And, even if prisoners could somehow establish that solitary was cruel and unusual or atypical and significant by bringing claims two years at a time, such a requirement would unreasonably burden the courts with the task of "entertain[ing] an indefinite number of suits and apportion[ing] damages among them." *Id*. at 319–20. Accordingly, this Court should apply the continuing-violations doctrine to Grissom's Eighth and Fourteenth Amendment claims and consider the entire twenty-year duration of his solitary confinement.

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[22] The Kansas statute of limitations for Section 1983 claims is two years. *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008) (citing Kan. Stat. Ann. § 60-513(a)(4)).

CONCLUSION

For the above reasons, Grissom respectfully asks this Court to reverse the district court's grant of summary judgment and remand for further proceedings.

STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and 10th Cir. R. 28(C)(4), counsel for Appellant Richard Grissom respectfully suggest that oral argument will further assist the Court's resolution of this matter. This case presents complex issues, including those involving the intersection of constitutional rights and qualified immunity. Counsel may assist in navigating the record developed over two decades as to many different defendants.

CERTIFICATES OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), this document contains 12,922 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using **Microsoft Office Word 2013** in **Times New Roman 14-point font.**

3. Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that a copy of the foregoing **APPELLANT'S OPENING BRIEF**, as submitted in Digital Form via the Court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Sophos Anti-Virus, Version 10.7.2.49 and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of December 2017, a copy of Appellant Richard Grissom's Opening Brief was filed with the Court through the ECF system, which provides electronic service of the filing to all counsel of record who have registered for ECF notification in this matter.

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MEMORANDUM AND ORDER, DATED JULY 24, 2017

DISTRICT COURT DOCKET NUMBER: 95

JOINT APPENDIX BEGINNING PAGE NUMBER: A-0683 (VOLUME 4)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

RICHARD GRISSOM,

Plaintiff,

vs. Case No. 15-3221-JTM

RAYMOND ROBERTS, *et al.*,

Defendants.

MEMORANDUM AND ORDER

Plaintiff Richard Grissom is an inmate currently incarcerated at the El Dorado Correctional Facility (EDCF) in El Dorado, Kansas. He was housed in administrative segregation during the relevant time periods of this lawsuit. He is currently serving four consecutive life sentences and is not eligible for parole until 2093.

Grissom instituted the present litigation seeking monetary damages and injunctive relief for his recent placement in segregation at EDCF. In addition to his original Complaint, the plaintiff has also filed an Amended Complaint in which he expanded on his original allegations. He later obtained leave to file a Supplemental Complaint, which ultimately appears to address separate claims against separate defendants.

Grissom's Amended Complaint essentially advances three general claims — that he

was denied his due process right to liberty by the segregation, that the defendants discriminated against him in placing or keeping him in segregation, and that the defendants engaged in an illegal conspiracy to coerce him into revealing the location of the bodies of his victims.

Grissom's Supplemental Complaint has little in common with the Amended Complaint. The Supplemental Complaint focuses on Grissom's alleged treatment while in segregation, with the plaintiff contending that the Supplemental defendants imposed disciplinary measures in a retaliatory fashion and in violation of his Eight Amendment rights. Only one of the defendants named in the Amended Complaint (Maria Bos) is also named in the Supplemental Complaint, and vice versa. Grissom has also moved for injunctive relief, seeking an order precluding future segregation.

As the defendants have been served with process, the defendants have moved for summary judgment as to Grissom's claims (Dkt. 35, 45, 75), asserting that they are protected by qualified or Eleventh Amendment immunity, that they did not personally participate in any given deprivation, and that no evidence of the claimed conspiracy exists. They also argue that plaintiff's request for injunctive relief is moot. The court finds that the defendants' motions should be granted.

Uncontroverted Facts

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no

genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. *McKenzie v. Mercy Hospital*, 854 F.2d 365, 367 (10th Cir. 1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. *Ellis v. El Paso Natural Gas Co.*, 754 F.2d 884, 885 (10th Cir. 1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. *Dayton Hudson Corp. v. Macerich Real Estate Co.*, 812 F.2d 1319, 1323 (10th Cir. 1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must come forward with 'specific facts showing that there is a **genuine issue for trial**.'" *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in *Matsushita*). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows

it to accomplish this purpose. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The court excludes from the present findings any requested fact, or putative denial of facts otherwise established by the evidence, which are not grounded on admissible evidence or which are not supported by any concise citation to the evidentiary record. *See* D.Kan.R. 56.1. 56.1(b)(2); *Sperry v. Werholtz*, No. 04-3125-CM, 2008 WL 4216110, at *1 (D. Kan. Sept. 12, 2008) (*Grissom I*), *aff'd*, 321 F. App'x 775 (10th Cir. 2009) (Rule 56.1(d) requires denials based on personal knowledge of the affiant). Thus, the common rejoinder by the plaintiff to numerous facts established by the defendants, namely, that he does not personally believe the evidence offered by the defendants, is insufficient create a factual dispute.

The defendants named in plaintiff's Amended Complaint include James Heimgartner (EDCF Warden from 2011 to the present), Ray Roberts (Warden of EDCF from 2003 to 2011, and the Secretary of Corrections for the Kansas Department of Corrections from 2011 to 2015), Johnnie Goddard (Deputy Secretary of Facilities Management and former Interim Secretary of Corrections), Fred Early (Deputy Warden at EDCF in charge of programs and operations), Mary Wilson (who holds a similar position), Dale Call (a Compliance Officer assisting the Warden and Deputy Warden on compliance issues), Deane Donley (originally a Reception Diagnostic Unit officer, later a Classification Administrator overseeing the Unit and Deputy Warden), Maria Bos (a unit team manager in a general population cell house, later a Compliance Officer, and eventually a Classification Administrator in charge of the classification staff), Paul Snyder (Deputy

Warden), Brandon Walmsey (Corrections Manager II at the Reception Diagnostic Unit), Timothy Randa (a Lieutenant, and later Captain, in charge of segregation security officers), Roland Buchanan (another Lieutenant in segregation), and Matthew Moore (Corrections Counselor II).

The Supplemental Complaint names as defendants Tammy Martin (Unit Team Manager at EDCF), Allison Austin (also a Unit Team Manager), Billie Grey (an employee of EDCF), Charles Miller (another employee), Susan Gibreal, as well as Maria Bos. Other than Bos, none of the original defendants in Amended Complaint are implicated in the Supplemental Complaint.

As indicated earlier, the Amended Complaint generally focuses on the placement, and ultimate removal, of Grissom in segregation. In contrast, the Supplemental Complaint presents various grievances regarding Grissom's experiences while in segregation, and is largely unconnected to the facts asserted in the earlier complaint.

The prison's Administrative Segregation Review Board (ASRB) conducts monthly hearings to determine whether to recommend the release of an inmate from administrative segregation to general population. The ASRB is comprised of a Unit Team Manager, head security officer of the specific cell house, and a member of the Mental Health Staff. Randa and Buchanan are (or were) members of the ASRB.

These reviews require ASRB members to consider a questionnaire filled out by the inmate on the day prior to the hearing. The panel then holds a hearing, with or without the participation of the inmate. A request for participation is solicited from each inmate. After

the review, the staff comments are summarized and printed in a report. Not every comment made at a hearing is incorporated into these reports.

Recommendations by the ASRB are then reviewed by the prison's Program Management Committee (PMC). The ASRB comprises the Warden (or designee), and administrative representatives from the Programs and Security divisions of the facility. The PMC formulates its own recommendation to the Warden. Heimgartner, Early, Call, Wilson, Donley, and Bos are PMC members.

Other than Heimgartner, none of the defendants has the autonomous authority to release any inmate from administrative segregation. Only the Warden has the final authority to grant or deny a release.

In the past, Grissom has been able to procure a cell phone and other contraband while housed in administrative segregation. He did so by influencing and compromising staff and other inmates who supplied him with contraband.

Security cameras were installed in Grissom's cell to monitor his interactions with prison staff.

In October 2015, Grissom again attempted to commence an improper relationship with prison security staff, passing a note to COI Jaymee Cook which contained sexually suggestive content which indicated his intent to engage in an impermissible sexual relationship. Grissom was issued, and convicted of, a disciplinary report in violation of K.A.R. 44-12-328 (Undue familiarity).

From August 20, 2014 through August 17, 2015 Grissom was offered monthly

reviews of his administrative segregation. The ASRB never recommended his release from segregation.

Grissom claims that Defendant Moore informed another inmate that he would not be released from administrative segregation because he was black. However, Moore denies making any such comment, and in any event Moore is unable to release an inmate from administrative segregation.

From August 2013 through the present, State Defendants are unaware of any outside law enforcement officials who have attempted to solicit information from Grissom regarding any investigation outside of the Department of Corrections facilities.

Grissom alleges that Austin placed a disciplinary segregation sign above his door, would not allow him to make a telephone call while he was serving a segregation term, destroyed his legal papers; refused to advance him to level II incentive status, and failed to submit a canteen bubble sheet, and (together with Martin) required him to wear boxers for two hours a day before going out to the yard. He alleges that Martin confiscated his personal property and would not return it until after his disciplinary report hearing. He alleges that Grey forged her supervisor's signature on a grievance, and that Bos and Miller gave the wrong reasons that his property was held in storage. He also alleges that various items were missing from his legal file. During 2015, Grissom advanced numerous grievances against the Supplemental Complaint defendants — on April 30 (Raymond Roberts, et al); September 14 (Grey and Austin); September 18 (Grey); October 20 (Martin); November 4 (Martin); and December 20 (Austin).

On October 8, 2015, Grissom was moved from C cellhouse to B cellhouse after receiving a charge for a disciplinary report, based on a sexually explicit note he passed to an officer while he was in the Behavior Modification Program while in segregation in C cellhouse. The only cell available in B cellhouse when Grissom was moved there was an observation cell, which includes no hard property except for a mattress that is on the floor.

Grissom stayed in the observation cell for five days. On October 13, he was moved to a regular cell once one opened up in B cellhouse.

Martin was informed when Grissom was moved to B cellhouse that his property was in storage so that Enforcement, Investigations, and Apprehensions (EAI) or Special Security Team (SST) could search it for any letters indicating further undue familiarity, which was the basis for his pending disciplinary charge, or contraband. SST did, in fact, search his property on October 25, 2015, after Grissom received his property back from storage.

In addition, because only an observation cell was available in any of the segregation living units, he was temporarily without his property while in the observation cell. This is because inmates are not permitted to possess any hard property in an observation cell.

It was Martin's understanding that Grissom's property was also held in storage because it was not in compliance with property limitations for an inmate who was on incentive level D for disciplinary segregation.

After looking at his records, Martin determined Grissom was not placed on incentive level D until October 22, 2016, the day after he received all of his incentive level III property back from storage. At that point, he should not have been able to possess all

of the property he previously possessed. However, it appears a mistake was made, and he was allowed to keep all of the incentive level III property that is permitted in a segregation unit.

After Grissom was convicted of his disciplinary charge, he was moved from incentive level III to incentive level I, under which an inmate is permitted less property.

Again however, Grissom was allowed to keep all of the property he possessed previous to being placed on incentive level D or on incentive level I. Thus, he actually benefitted from this mistake.

Bos sent a letter to Grissom on November 12, 2015 explaining why his property had been held. She wrote that the property was not in compliance with level I property limitations and that it was being held for this reason.

Martin never touched Grissom's property and is not aware of any property that was confiscated from him. Grissom was given all of his property back on October 21, 2015.

Grissom was required to serve 30 days of disciplinary segregation after he was convicted of his disciplinary report for undue familiarity. He was given credit for the five days he spent in the observation cell, and two days that he was without his property. Thus, he only spent 23 days on disciplinary segregation status.

Martin denies that Grissom was required to sit in his cell in only boxer shorts for two hours a day in order to be permitted to go to the yard. Cell house rules provide that, in order to go to the yard, inmates must be up and ready to go when an officer reaches his cell door to take the inmate to the strip-out cell before yard time. If the inmate is not up and

ready by the time the officer reaches his cell door, the inmate is not permitted to go to the yard.

The reason for this policy is to streamline the process for strip searching segregation inmates in order to search for contraband before they go to yard. If inmates are wearing socks, hoodies, or clothes other than boxers and a shirt each time an officer reaches a cell, it takes considerably more time for each inmate to take off those clothes and get out of the cell in preparation for the strip search that is required before yard time.

Officers start on one side of the cell block and announce which side they are starting with, so the inmates on the other side know that they do not have to immediately be up and ready. Usually officers announce when they are getting close to each cell so that the inmate in the cell knows that it is time for him to prepare to be up and ready.

Martin knows of only a single occasion in which Grissom was not up and ready and he was not permitted to go to yard.

Grissom is not required to sit in only boxer shorts while waiting to go to yard. Rather, he is only required to prepare to be up and ready right before an officer gets to his cell.

Grissom claims that, on January 6, 2016, he submitted a form 9 to Defendant Austin requesting to be advanced to incentive level II the following month.

However, Austin has no authority to advance any inmate to a higher incentive level before the inmate becomes eligible to do so. According to EDCF Internal Management Policy and Procedure (IMPP) 11-101, Austin does not have authority to advance inmates

to a different level before they become eligible to be placed on a different incentive level. IMPP 11-101 states the following.

> Any inmate who, after his or her most recent admission, sustains a second or subsequent return to Level I (i.e., the inmates' third or greater time on Level I), must remain free of convictions related to class I and class II disciplinary reports, and demonstrate a willingness to participate in recommended programs and/or work assignments for two hundred forty (240) days from the date of his or her last return to Level I.

All inmates are subject to this policy and are treated that same, and Austin has never advanced an inmate to a higher incentive level before the inmate was eligible

Grissom was placed on incentive level I on November 13, 2015, the third time he had been placed on this level. He had been previously dropped to incentive level I twice in 2005 and once in 2004. Accordingly, Grissom was not eligible for advancement to another incentive level for 240 days.

As of January 6, 2016, 240 days had not yet passed since the date he was placed on incentive level I. Thus, Grissom had not yet become eligible to advance to another incentive level.

Austin does not place disciplinary signs above inmates' doors and did not place a sign above Grissom's door. Other officers may place signs above any inmate's door who is in disciplinary segregation. This is the same for all inmates who are in disciplinary segregation.

The purpose of the signs is to let other officers know that the inmate is in disciplinary segregation, so that they know how much property the inmate is allowed to

have, along with other restrictions that are placed on inmates in disciplinary segregation.

Grissom's claim that he was not allowed to have any telephone calls for 30 days while in disciplinary segregation is true. However, under cellhouse rules for A, B, and C cellhouses, no disciplinary segregation inmates get telephone calls. This is the same for all inmates who are in disciplinary segregation.

Grissom claims that he lost legal papers that were attached to an account withdrawal request on October 28, 2015, and believes that Austin destroyed them. Austin denies doing this. When she receives an account withdrawal request, Austin places the request in the accounting box to be processed that same day. If legal papers were attached to one of Grissom's account withdrawal requests, she would have submitted the request to be processed with the legal papers attached.

Grissom was released from segregation into general population while on step three of the Behavior Modification Program on December 5, 2016.

Although Grissom did receive a disciplinary report for undue familiarity on October 5, 2015, he remains in general population. Absent additional infractions, EDCF officials have no plan to place Grissom back into segregation.

Conclusions of Law

When a defendant pleads qualified immunity, the plaintiff must show both that the defendant's actions violated a federal constitutional or statutory right, and that the right was clearly established at the time. *Scott v. Hern*, 216 F.3d 897, 910 (10th Cir. 2000)

(quotations omitted). When advanced at the summary judgment stage, "the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Thomson v. Salt Lake Cnty.*, 584 F.3d 1304, 1312 (10th Cir.2009) (internal quotation marks omitted). In resolving the issue, the court construes the facts in the light most favorable to the plaintiff. *Id.*[1]

Here, to establish his due process claim, the plaintiff must demonstrate that the defendants deprived him of a constitutionally protected liberty interest. *Steffey v. Orman*, 461 F.3d 1218, 1221 (10th Cir. 2006). Conditions of confinement do not invoke a liberty interest unless they "impose atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandlin v. Conner*, 515 U.S. 472, 484 (1995). The court finds that the plaintiff has failed to demonstrate that he had a liberty interest in an early release from segregation.

"Prisoners held in lawful confinement have their liberty interests 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." *Wilkinson*

[1] Citing *Harbert Int'l, Inc. v. James*, 157 F.3d 1271 (11th Cir. 1998), Grissom argues that before they can invoke the protection of qualified immunity, the defendants must first show they were acting in the scope of their discretionary authority. *See Harbert*, 157 F.3d at 1281 (qualified immunity is not available for an official who "goes completely outside the scope of his discretionary authority" and "is acting wholly outside the scope of his discretionary authority"). The defendants argue that this Eleventh Circuit standard has never been explicitly adopted in the Tenth Circuit, *see PJ ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1196 (10th Cir. 2010); *Scott v. Hern*, 216 F.3d 897, 910 (10th Cir. 2000), but it unnecessary to resolve the issue, as the pleadings demonstrate that plaintiff is indeed arguing that defendants (the Warden, the Secretary of Corrections, members of the ASRB and PMC, and prison staff) failed to approve his early release from segregation, a decision within their discretionary authority.

v. Austin, 545 U.S. 209, 225 (2005). In determining whether a liberty interest exists, the court considers whether (1) the segregation supports a legitimate penological interest, such as safety or rehabilitation, (2) the conditions of confinement are extreme, (3) the segregation increases the duration of the confinement, and (4) any indeterminancy in the segregation. *See Estate of DiMarco v. Wyoming Dept. of Corr.*, 473 F.3d 1334, 1342 (10th Cir. 2007).

The Tenth Circuit has previously addressed Grissom's liberty interests in previous litigation challenging his placement in segregation. *See Grissom v. Werholtz*, No. 07-3302-SAC, 2012 WL 3732895 (D. Kan. Aug. 28, 2012), *aff'd*, 524 Fed.Appx. 467 (10th Cir. 2013). The Tenth Circuit affirmed the district court's determination that Grissom's segregation did not implicate a liberty interest. Applying the relevant factors, the court observed:

> With respect to the first factor, the court found that defendants had met their burden of showing a reasonable relationship between Mr. Grissom's isolation and the prisons officials' asserted penological interests, noting Mr. Grissom's propensity for obtaining dangerous contraband and the security risks created by such behavior. On the second factor, the court concluded that the conditions Mr. Grissom endured in segregation were not extreme or atypical. On the third factor, the court noted that Mr. Grissom is serving four life sentences and his parole-eligible date has not been affected by his placement in segregation. Finally, on the fourth factor, the court found that Mr. Grissom's placement in administrative segregation is not indeterminate because the prisons conducted regular reevaluations of Mr. Grissom's placement in administrative segregation via twice-yearly program reviews, as well as various monthly reviews.

524 Fed.Appx. at 474-75.

These conclusions are appropriate here. The prison had a legitimate penological interest is segregating the plaintiff. Evidence in the record supports the conclusion that Grissom has been able to obtain contraband items while in segregation by bribing or

corrupting guards. And there is evidence that in violation of prison rules Grissom attempted to encourage an inappropriate relationship by passing a sexually explicit note to a female corrections officer. Grissom has failed to provide any admissible evidence that the reviewing authorities, including the ASRB and the PMC, acted in a discriminatory fashion or with improper intent. Accordingly, the first factor supports a determination in favor of the defendants.

Second, the segregation experienced by Grissom is similar to that addressed in *Grissom I* — it is, though harsh, neither extreme or atypical in comparison to other prisoners in segregation. *Cf. Sandin v. Conner*, 515 U.S. 472, 483 (1995) ("federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile [prison] environment"). Prison inmate segregation as practiced in Kansas has been upheld by the courts as not atypical or harsh. *See Counce v. Wolding*, 2016 WL 2344560, *7 (D. Kan. May 4, 2016) (segregation is "within the discretion of prison officials, and generally not reviewable in federal court," and inmate failed to show "such extreme conditions or restrictions, and adverse impacts to show they were atypical and significant deprivations warranting due process protections").

Third, the period in segregation did not change the total imprisonment time faced by the plaintiff, who is serving four consecutive life terms and will not be eligible for parole until 2093.

Finally, the segregation was not "indeterminate" in that the plaintiff's status was subject to periodic monthly reviews. Although Grissom complains these reviews were

perfunctory, the evidence establishes otherwise. The reviews were detailed, meaningful, and substantive, even if the plaintiff disliked the results. Each month, ASRB members conduct hearings on inmates held in segregation, and consider questionnaires completed by the inmates. Inmates are asked to participate in the hearing, and a hearing is conducted with or without such participation. The committee issues a summary report based on member comments, although not every comment is incorporated into the report. If an inmate has been in segregation for more than six months, the PMC considers whether to transfer the inmate to an alternative program. The proceedings are similar to those in place in *Grissom I*, and the plaintiff has failed to cite evidence that procedures were defective in any substantial way.

The uncontroverted facts show that the prison provided for periodic, reasoned examination of the segregation, that the plaintiff had notice and the chance to respond to these reviews, and that defendants acted with consideration for legitimate safety and security concerns. Here, due process is satisfied if Grissom received: (1) a sufficient initial level of process, i.e., a reasoned examination of the assignment; (2) the opportunity to receive notice of and respond to the decision; and (3) safety and security concerns are weighed as part of the placement decision. *DiMarco*, 473 F.3d at 1344 (citation omitted)

Accordingly, the defendants have met the first prong of qualified immunity—the defendants did not violate any liberty interest of the plaintiff. Moreover, defendants are also entitled to summary judgment under the second prong, because Grissom has failed to demonstrate that the alleged liberty interest was clearly established. To the contrary, the

plaintiff's response fails to make any argument in support of finding that plaintiff had a clearly established liberty interest in early release from segregation or in the application of any particular alternative review procedures.

Next, defendants seek summary judgment as to any claims against them in their official capacities pursuant to the Eleventh Amendment. "It is well-settled that a request for money damages against a state defendant in his official capacity is generally barred by the Eleventh Amendment." *Hunter v. Young*, 238 Fed. Appx. 336, 338 (10th Cir. 2007). *See, e.g., Elephant Butte Irr. Dist. of New Mexico v. Dep't of Interior*, 160 F.3d 602, 607 (10th Cir. 1998) ("[t]he Eleventh Amendment generally bars suits against a state in federal court commenced by citizens of that state or citizens of another state). "An official-capacity suit is, in all respects other than name, to be treated as a suit against the entity . . . it is not a suit against the official personally, for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). As employees of the State and the Kansas Department of Corrections during the time in question, State Defendants share the State's immunity for suits against them in their official capacities. *Jones v. Courtney*, 466 F. App'x 696, 698 (10th Cir. 2012). Because they share the State's immunity from suit, Grissom's official capacity claims should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Of course, the Eleventh Amendment does not bar actions for injunctive relief. See *Ex Parte Young*, 209 U.S. 123, 159–60 (1908). However, the entire thrust of the plaintiff's complaint has been directed at the past actions or inactions of individual prison officials, rather than a challenge to particular prison policies. And, as noted elsewhere in the Order,

the plaintiff's claim seeking release from segregation is rendered moot by his release from segregation. The plaintiff's response fails to address the issue of Eleventh Amendment immunity, and the court grants summary judgment as to the claims against defendants in their official capacities.

As noted earlier, the plaintiff also argues that the defendants discriminated against him by placing him in segregation. The Equal Protection Clause requires "that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). The plaintiff in the present action has failed to show that he was treated differently from similarly situated prisoners. Where a prisoner challenges institutional treatment, he must show first that he was treated differently from similarly situated general population inmates, and second that this difference was grounded on something other than legitimate penological interests. *Fogle v. Pierson*, 435 F.3d 1252, 1261 (10th Cir. 2006) (citations omitted).

Because of the need to balance inmate rights with prison administrate needs, the Supreme Court has held that a prison regulation "is valid if it is reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Citing *Turner*, the Tenth Circuit has identified four relevant factors:

> (1) whether a valid and rational connection exists between the regulation and a legitimate governmental interest advanced as a justification; (2) whether, notwithstanding the regulation, alternative means exist for the prisoner to exercise the right; (3) what effect an accommodation of the prisoner's constitutional right would have on guards, inmates and prison resources; and (4) whether an alternative is available which would accommodate the prisoner's rights at a *de minimis* cost to valid penological interests.

Patel v. Wooten, 15 Fed.Appx. 647, 650-51 (10th Cir. 2001).

Here, the plaintiff has failed at both steps. First, he has failed to demonstrate he was treated differently from similarly situated inmates. The plaintiff has failed to provide any specific information which would permit the court to find that inmates who received supposedly more favorable treatment were in fact similarly situated. In contrast, as noted earlier, defendants have provided evidence that the plaintiff is very much unlike other inmates, having corrupted staff members into passing him contraband cell phones into his segregation cell on three occasions, and recently attempting to continue such activities by passing a sexually explicit note to a female staff officer.

The same evidence demonstrates that the prison had a legitimate penological interest in segregating Grissom as a means to ensure prison safety. The segregation was reasonably related to plaintiff's continuing efforts to undermine prison regulations and effective order. The plaintiff has failed to show alternative treatment would be similarly effective, and there is no evidence that any defendant with decision-making authority as to plaintiff's segregation status acted with any improper motive.[2]

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[2] Defendants Roberts (Warden of the El Dorado prison until 2011 and Secretary of Kansas Department of Corrections from 2011 to 2015) and Goddard (former Interim Secretary of Corrections and now Deputy Secretary of Facilities Management) have also moved for dismissal on claims against them because they had nothing to do with deciding to put or keep Grissom in segregation. The court finds that summary judgment is warranted. To the extent that the allegations against Roberts touch on his service as Warden, that service ended in 2011. Any claims based upon his actions as warden would be outside the relevant two-year statute of limitations. *See* K.S.A. 60-513(a)(4).

And with respect to the generalized complaint that Roberts and Goddard, in their state KDOC roles should have instituted different rules for processing inmates in segregation, the plaintiff has failed to provide evidence that the State Secretary had the responsibility for crafting particularized regulations for prisons within the KDOC system. The plaintiff has failed

Finally, Grissom alleges that the defendants in the Amended Complaint held him in segregation as a part of a conspiracy to force him to reveal where he hid the bodies of the women he murdered. These allegations are substantially similar to conspiracy theories set forth and rejected in *Grissom I.* Rather than being the product of any underlying conspiracy, the court determined in *Grissom I* that the plaintiff's lengthy segregation was the product of his repeated violation of prison rules:

> Plaintiff was initially placed in administrative segregation as a result of an investigation into his role as a key participant in the distribution and sale of narcotics at LCF. Thereafter, prison officials reasonably found that Plaintiff was an escape risk based on statements made in a letter written to him. Plaintiff admits that on three separate occasions thereafter, he was convicted of trafficking or possessing contraband, including cell phones.

2012 WL 3732895, at *11.

Turning to the Supplemental Complaint, as noted earlier the plaintiff presents various claims related to his treatment while in segregation. Generally, he alleges that the Supplemental Complaint defendants imposed additional restrictions or deprivations as acts of retaliation for his participation in conduct protected by the First Amendment. He also alleges that these deprivations amounted to cruel and unusual punishment in violation of the Eighth Amendment.

To support his First Amendment retaliation claim, the plaintiff must provide proof that he engaged in constitutionally-protected conduct, that the defendants caused him an

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to demonstrate that either Roberts or Grissom, in their state-wide secretarial capacities, were personally involved in any decision as to his segregation. Similarly, Grissom has cited no authority requiring a particular review procedure for segregated inmates, or that such a procedure would have resulted in his earlier return to general population.

injury which would chill a person of ordinary firmness from continuing that conduct, and that the defendants were substantially motivated by that conduct. *Shero v. City Grove, Okla.*, 510 F.3d 1196, 1203 (10th Cir. 2007). However, mere allegations of retaliatory motive are insufficient to defeat a motion for summary judgment. *Mollie v. Ward*, 106 F.3d 414, 1997 WL 22525, at * 1 (10th Cir. 1997). A claim of retaliation must rest on evidence of improper motive, not mere allegation. *See Smith v. Maschner*, 899 F.2d 940, 948 n. 4 (10th Cir. 1990). *See also Peterson v. Shanks*, 149 F.3d 1140, 1144 (10th Cir. 1998) ("inmate claiming retaliation must allege *specific facts* showing retaliation because of the exercise of the prisoner's constitutional rights") (emphasis in original, internal quotation omitted).

To support his claim that various restrictions during his term of segregation violated his rights under the Eighth Amendment, the plaintiff must show that the restriction deprived him of "'the minimal civilized measure of life's necessities' as measured under a contemporary standard of decency." *Jackson v. Wilkinson*, 2016 WL 7336570, at *2 (10th Cir. Dec. 19, 2016) (holding deprivation of television, MP3 player, and charger did not amount to cruel and unusual punishment). *See also Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803,809 (10th Cir. 1999) ("An Eighth Amendment claim has ... an objective component—whether the deprivation is sufficiently serious").

Here, summary judgment is appropriate because the plaintiff has failed to show that the claimed acts of retaliation — such as the allegation that Grey signed a grievance form using her supervisor's name, the failure to turn in a canteen "bubble sheet," or mistakenly listing in a form the reason for holding his personal property in storage — are not

sufficiently serious to deter an ordinary person from continuing in the allegedly protected conduct. Set against his underlying prison term itself and the additional commitment to administrative segregation, the conduct alleged in the Supplemental Complaint represents relative inconveniences, or restrictions which are inherent in segregation status. Further, the supposed retaliations certainly had no chilling effect on the plaintiff himself, who continued to energetically present additional grievances each month.

Summary judgment is warranted as to plaintiff's First Amendment claims because the plaintiff has failed to show that any defendant acted with a retaliatory motive. Here, while there may be some general temporal proximity between Grissom's grievances and the various restrictions cited in the Supplemental Complaint, this may simply be a function of the plaintiff's filing of so many grievances. Generally, such proximity is insufficient to defeat summary judgment. *See Wright v. McCotter*, 1999 WL 76904, *1 (10th Cir. Feb. 18, 1999) ("Standing alone, some temporal proximity between Plaintiff's grievance and lawsuit filings and the administrative segregation does not constitute sufficient circumstantial proof of a retaliatory motive to state a claim.").

Finally, as to each alleged deprivation, the court finds that the cited conduct was not a restriction which deprived plaintiff of the necessities of life in light of contemporary standards of decency.

For example, as noted above, the plaintiff alleges that defendants Martin and Austin, as a condition for being allowed into the yard, required him to remain in his boxer shorts in his cell for up to two hours. The evidence from the defendants establishes that

inmates in segregation are merely required to be in boxer shorts at the time each prisoner is processed for entry into the yard; there is no requirement the inmate remain in boxer shorts for any set period of time. The requirement that the inmates be in boxer shorts serves a legitimate penological interest — preventing segregated inmates from carrying weapons or contraband into the prison yard. And the requirement the inmate be in boxer shorts when the guard reaches each cell facilitates the efficient processing of inmates into the yard. The defendants note authority finding comparable prison clothing restrictions did not amount to constitutional violations, *see Mauchlin v. Bier*, 2010 WL 419397, at *4 (D. Colo. Jan. 28, 2010), *aff'd*, 396 F. App'x 519 (10th Cir. 2010); *DeSpain v. Uphoff*, 229 F.3d 1162, 2000 WL 1228003 (10th Cir. August 30, 2000), and plaintiff has failed to present any authority indicating that defendant Austin violated any clearly established constitutional right.[3]

Similarly, the allegation that defendants illegally seized Grissom's personal property or failed to return it lacks evidentiary support. The evidence establishes that the plaintiff was temporarily deprived of some property while he was placed in an intermediate observation cell, consistent with prison rules regarding the possession of personal property. The evidence does not show any substantial or permanent deprivation of property, fails

[3] Plaintiff also complains that Austin advanced the incentive level rating of other inmates, but not him. She also, he alleges, placed a sign over his door that he was not permitted phone calls. However, prison procedure establishes that Austin could not have advanced Grissom's incentive level because he was ineligible for advancement for other reasons. Further, the evidence before the court is that all prisoners in disciplinary segregation are prohibited from making phone calls.

to show that Grissom suffered any material injury from the deprivation,[4] and fails to show that any defendant acted with a retaliatory motive. The plaintiff was temporarily deprived of certain property as the result of prison procedures, not as a part of a retaliatory plot by prison staff.

Finally, the evidence establishes that toward the end of 2016 the plaintiff was moved from administrative segregation and placed on a Behavior Modification Program (BMP). The BMP provides a means for the release of inmates from administrative segregation into general population. Under the program, which may be completed early, an inmate will be removed back to segregation only if he fails the program. And after his participation in the BMP, prison officials returned Grissom from segregation to the prison's general population on December 5, 2016, where he remains. The removal occurred at step three of the prison's BMP. The evidence before the court establishes that Grissom will not be returned to segregation, in the absence of additional violation of prison rules.

Unlike *Reza v. Nalley*, 677 F.2d 1001 (10th Cir. 2012), where the potential for additional segregation was not moot given the failure of the defendants to demonstrate the existence of procedures which would correct such placements, the evidence in the present action does not demonstrate any substantial flaw in the El Dorado BMP procedures. As a result, the plaintiff's claim for injunctive relief is moot, and the court lacks jurisdiction in

[4] For example, Grissom alleges that certain signed statements from other prisoners were not in his papers when they were returned to him. But Grissom was placed in segregation as the result of passing a sexually explicit note to a staff officer. Any statement from another inmate would not have been relevant to the disciplinary charge against him. The plaintiff has failed to show any material injury from the loss of the statements.

the absence of an ongoing controversy. *See Habecker v. Town of Estes Park*, 518 F.3d 1217, 1223 (10th Cir.2008); *Beierle v. Colorado Dep't of Corr.*, 79 Fed. Appx. 373, 375 (10th Cir. 2003).

Finally, the court denies Grissom's motion for injunctive relief (Dkt. 68). To the extent the motion seeks relief for the prior placement in segregation, the request is moot for the reasons stated earlier. To the extent that Grissom seeks to enjoin any future placement in segregation, the court denies the motion. The plaintiff's underlying claim is unlikely to succeed on the merits, an essential element of injunctive relief. *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). Grissom offers nothing but speculation about the possibility that he may be placed in segregation at some future time. Moreover, as discussed earlier, Grissom's underlying constitutional claims as to the previous segregation are without merit, and the additional speculation about future deprivation does not alter this conclusion.

IT IS ACCORDINGLY ORDERED this 24th day of July, 2017, that the defendants' Motions for Summary Judgment (Dkt. 35, 45, 75) are granted; plaintiff's Motion for Injunctive Relief (Dkt. 68) is denied.

s/ J. Thomas Marten
J. THOMAS MARTEN, JUDGE