No. 17-3185

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RICHARD GRISSOM,

Plaintiff-Appellant,

v.

RAYMOND ROBERTS, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Kansas (No. 15-CV-03221-JTM-DJW)
Honorable J. Thomas Marten, United States District Judge

BRIEF OF DEFENDANTS-APPELLEES

Roger W. Slead
Jeffrey T. Donoho
Horn Aylward & Bandy, LLC
2600 Grand Blvd., Suite 1100
Kansas City, MO 64108
(816) 421-0700
rslead@hab-law.com
jdonoho@hab-law.com

Attorneys for Defendants-Appellees Katherine Clouser and Connie Zabel

Toby Crouse
Solicitor General of Kansas
Dwight R. Carswell
Assistant Solicitor General
Bryan C. Clark
Assistant Solicitor General
Rachael D. Longhofer
Assistant Attorney General
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215
toby.crouse@ag.ks.gov
dwight.carswell@ag.ks.gov
bryan.clark@ag.ks.gov
rachael.longhofer@ag.ks.gov

Attorneys for all Defendants-Appellees except Katherine Clouser and Connie Zabel

ORAL ARGUMENT IS NOT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

PRIOR AND RELATED APPEALS

Plaintiff Richard Grissom has not filed a prior appeal in this case, but he did appeal a decision in an earlier § 1983 case involving many of the same claims. *See Grissom v. Werholtz*, 524 F. App'x 467 (10th Cir. 2013) (unpublished).

GLOSSARY

ASRB:	Administrative Segregation Review Board
DR:	Disciplinary Report
EDCF:	El Dorado Correctional Facility
KDOC:	Kansas Department of Corrections
PMC:	Program Management Committee

STATEMENT OF ISSUES

1. Are Defendants entitled to qualified immunity on Grissom's procedural due process claim when Grissom lacked a clearly established liberty interest in avoiding administrative segregation and when he failed to identify any clearly established law demonstrating that the reviews of his segregation were not meaningful?

2. Are Defendants entitled to qualified immunity on Grissom's Eighth Amendment claim given Grissom's inability to identify a single appellate decision finding administrative segregation to be cruel and unusual punishment?

3. Did the district court properly grant summary judgment on Grissom's equal protection claim given his failure to show that similarly situated inmates of other races were treated differently?

4. Are Grissom's constitutional challenges to his administrative segregation precluded by his prior § 1983 action challenging his administrative segregation?

STATEMENT OF THE CASE

Plaintiff Richard Grissom was convicted of murdering three women and is currently serving four life sentences as an inmate in the custody of the Kansas Department of Corrections (KDOC). *See State v. Grissom*, 251 Kan. 851, 840 P.2d 1142 (1992). He challenges his former placement in administrative segregation under a variety of legal theories.

1. Grissom's History in Administrative Segregation

Grissom was first placed in administrative segregation in 1996 after being identified as a key participant in the distribution and sale of drugs within Lansing Correctional Facility. A-48, 228.[1] Prison officials classified him as a high risk inmate. A-48. Later that year, Grissom was transferred from administrative segregation at Lansing Correctional Facility to administrative segregation at El Dorado Correctional Facility (EDCF). A-228.

In 2000, while still in administrative segregation, Grissom received written correspondence from an outside source indicating a

[1] Record citations are to the Joint Appendix.

desire to help Grissom escape from prison once he was released into the prison's general population. A-53. His administrative segregation status was changed to Extreme Escape Risk. A-56. While this status was changed back to Other Security Risk in 2003, Grissom's administrative segregation review forms continued to reflect that Grissom presented an escape risk as a placement/retention fact for his administrative segregation. A-229, 303.

In 2003, Grissom was caught with a cell phone and extra phone batteries. A-229. He obtained this contraband even though he was being held in administrative segregation. Grissom received a disciplinary report (DR) and was placed in disciplinary segregation for 30 days. A-229.

In January of 2005, while still in administrative segregation at EDCF, prison officials found a cell phone on the floor near Grissom. Grissom received a DR and was again placed in disciplinary segregation for 30 days. A-229. In February of 2005, he was transferred to Lansing Correctional Facility. A-229.

In June of 2005, while Grissom was in administrative segregation at Lansing Correctional Facility, prison officials discovered two cell

phones, phone chargers, sandpaper, razors, a soldering iron, box cutter blades, a screwdriver, and drill bits in his cell. A-229. Grissom received a DR and was placed in disciplinary segregation for 45 days. A-229. A week later he was transferred to administrative segregation at Hutchinson Correctional Facility. A-229.

Grissom's repeated ability to obtain cell phones and other contraband while in administrative segregation suggested he had been able to compromise prison staff, which raised serious security concerns. As the former Warden of Hutchinson Correctional Facility explained:

> Cell phones are one of the most concerning devices an inmate can possess. Not only do cell phones permit the inmate to communicate beyond the ability of the correctional facility to monitor him, but an inmate with a cell phone can actually execute an escape plan with those on the outside, which was another serious concern about [Mr. Grissom] possibly attempting an escape.

A-230.

Former EDCF Warden James Heimgartner submitted an affidavit in this case explaining that there have been two escapes from KDOC facilities in the last ten years. A-314. Those escapes had at least two things in common. First, in both escapes, prison staff were compromised and assisted the offenders. A-314. Second, cell phones and other

contraband were used to plan and execute the escape. A-314. Thus, Grissom's "pattern of influencing and compromising prison staff and other offenders who will supply him with contraband, including cell phones" raised serious security concerns and became "one of the primary reasons that he remained in administrative segregation." A-315.

Following Grissom's June 2005 DR, prison officials developed a more restrictive protocol to manage his security risk. This included video surveillance of his cell and rotating him every few months between Hutchinson, Lansing, and El Dorado Correctional Facilities to prevent him from developing unduly familiar relationships with prison staff and using those relationships to obtain contraband. A-230. These rotations lasted until March 17, 2009, when Grissom returned to administrative segregation at EDCF. A-243.

In October of 2015, Grissom received a DR for undue familiarity after passing a note to a female corrections officer requesting her telephone number and making sexually suggestive comments to her. A-237. This was particularly concerning given Grissom's history of compromising prison staff. As Warden Heimgartner explained, if the

officer had responded to the letter, Grissom would have had a compromising letter that he could have used as leverage. A-314. In the letter, Grissom discussed his ability to engage in unauthorized communications, stating: "I also have a cellphone on the street that belongs to my bro, and it's high tech which allows him to program the phone so that whenever I dial his phone number it will automatically ring on whosever phone he has programmed to and it's *undetectable* by the facility." A-374 (emphasis in original). Grissom was sentenced to 30 days in disciplinary segregation following this DR. A-691.

Toward the end of 2016, Grissom was placed on a Behavior Modification Program, which is designed to help inmates transition from administrative segregation back to the prison's general population, and on December 5, 2016, Grissom was returned to general population, where he remains. A-706.

2. Periodic Reviews of Inmates in Administrative Segregation

While in administrative segregation, Grissom received periodic reviews to determine whether he should be returned to the prison's general population. Each KDOC facility has an Administrative Segregation Review Board (ASRB) that conducts monthly hearings to

determine whether inmates should remain in administrative segregation. A-246. The ASRB is comprised of three members appointed by the warden: a person from the security staff, a person from the clinical staff, and a person from the classification staff. A-246. On the day before the scheduled hearings, prison staff offer a questionnaire to inmates so they can put any comments or concerns in writing. A-231. Inmates are also invited to participate in the hearing and given an opportunity to discuss their concerns and plans with the board. A-232. Grissom regularly participated in his ASRB hearings. A-237.

After each ASRB hearing, prison staff prepares an administrative segregation review form containing the ASRB's recommendation. A-231. The form does not reflect all of the ASRB's discussion. A-232. Unless the ASRB unanimously agrees that the inmate should be retained in administrative segregation, the ASRB's recommendation is forwarded to the warden for a decision. A-247. The warden makes the final determination whether an inmate should be retained in or released from administrative segregation. A-228.

Each prison also has a Program Management Committee (PMC) that reviews the status of inmates in administrative segregation at

least every 180 days. A-246. The PMC consists of the warden or his designee, a representative from the security staff, and a representative from the programs staff. A-232. The PMC considers whether any special management transition programs, such as the Behavior Modification Program that Grissom ultimately participated in, might be used to assist inmates in administrative segregation transition back into the general population. A-232.

In addition, the warden of each prison annually conducts an independent review of every inmate in administrative segregation. A-246, 314.

3. Procedural History

Grissom filed this lawsuit on August 25, 2016, alleging that his confinement in administrative segregation violated his procedural due process and equal protection rights, among other things.[2] A-18-42. Defendants include Ray Roberts (the Secretary of Corrections for KDOC from 2011 to 2015 and EDCF Warden from 2003 to 2011), James

[2] Grissom's Amended and Supplemental Complaints raised several other claims he does not pursue on appeal. *See* Brief of Appellant at 10 n.8.

Heimgartner (EDCF Warden from 2011 to 2017), Johnnie Goddard (Deputy Secretary of Facilities Management and a former Interim Secretary of Corrections for KDOC), and a number of officials who reviewed his segregation as members of the ASRB and PMC at EDCF. A-18-20, 360-61. Grissom later filed an Amended Complaint expanding on his allegations (including adding an Eighth Amendment claim) and a Supplemental Complaint adding new defendants who allegedly retaliated against him. A-198-225, 400-409.

Defendants moved to dismiss Grissom's complaint or, in the alternative, for summary judgment, A-330-358, 530-553, and the district court granted summary judgment to Defendants on July 24, 2017. A-683-707. As relevant to this appeal, the district court held that Defendants were entitled to qualified immunity on Grissom's due process claim and that Grissom had failed to identify similarly situated inmates who were treated differently as required to prevail on his equal protection claim. A-694-791 Grissom now appeals.

SUMMARY OF ARGUMENT

The district court properly granted summary judgment to the Defendants.

1. The Defendants are entitled to qualified immunity on Grissom's procedural due process claim. Grissom previously filed a § 1983 action alleging that his administrative segregation violated his procedural due process rights, and that claim was rejected by the district court in a decision affirmed by this Court in 2013. *See Grissom v. Werholtz*, 524 F. App'x 467 (10th Cir. 2013) (unpublished) ("*Grissom I*"). Thus, it was not clearly established at least as late as 2013 that administrative segregation violated Grissom's due process rights, and Grissom does not cite a single case from this Circuit since that time addressing administrative segregation, much less one that would clearly establish that the Defendants could no longer rely on *Grissom I*. Defendants are entitled to qualified immunity for this reason alone.

A. Grissom had no liberty interest in avoiding administrative segregation, much less a clearly established one. Whether Grissom had a liberty interest is assessed using the four-factor test from *Estate of*

DiMarco v. Wyoming Department of Corrections, 473 F.3d 1334 (10th Cir. 2007).

Under the first *DiMarco* factor, Grissom's administrative segregation related to and furthered legitimate penological interests. The district court in *Grissom I* found this factor weighed against finding a liberty interest given "Grissom's propensity for obtaining dangerous contraband and the security risks created by such behavior." 524 F. App'x at 474. Thus, at minimum, it was not clearly established that Grissom's administrative segregation was not rationally related to a legitimate penological interest. Grissom exhibited a pattern of compromising prison staff to obtain contraband, including cell phones, while in administrative segregation. This behavior was particularly concerning given that both escapes from KDOC custody in recent times involved inmates compromising prison staff and using cell phones and other contraband to facilitate the escape. Prison officials have a legitimate penological interest in preventing inmates from escaping—particularly an inmate who has killed at least three women—and placing Grissom in administrative segregation given his security risk was reasonably related to this interest.

Grissom's administrative segregation also was not extreme under the second *DiMarco* factor. The conditions of Grissom's confinement were found not to be extreme in *Grissom I*, and he has not alleged that his conditions became more restrictive after that decision. This Court's decision in *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012), also demonstrates that Grissom's conditions of confinement were not extreme. In *Rezaq*, this Court held that conditions in the federal Administrative Maximum Prison (ADX) in Florence, Colorado, while "undeniably harsh," were "not extreme as a matter of law." *Id.* at 1014-15. Grissom has not shown that the conditions of his administrative segregation were any more restrictive than the conditions in ADX. In fact, the conditions of administrative segregation at EDCF were actually less restrictive than ADX in at least some respects. Given *Grissom I* and *Rezaq*, it certainly was not clearly established that the conditions of Grissom's confinement were extreme for purposes of the second *DiMarco* factor.

Grissom concedes that the third *DiMarco* factor favors the Defendants, as his placement in administrative segregation did not increase the length of his imprisonment.

The fourth and final *DiMarco* factor also weighs against finding a liberty interest. *Rezaq* held that administrative segregation is not indeterminate when, as here, periodic reviews are provided. 677 F.3d at 1016. Grissom's argument that his reviews were not meaningful conflates the question of whether a liberty interest exists with the question of whether due process was provided in depriving a person of a liberty interest. As *Rezaq* explained, "it is not necessary . . . to closely review the process at this stage." *Id.* Grissom received reviews every month and was given the opportunity to be heard at each review, so his confinement was not indeterminate under *Rezaq*. The duration of Grissom's confinement alone did not give rise to a liberty interest given *Rezaq*'s holding that "duration is properly considered in tandem with indeterminacy." *Id.*

Each of the *DiMarco* factors weighs against finding a liberty interest, but even if Grissom could show that one or more factors favor him, he has failed to identify a single case involving the same balance of factors. Thus, it was not clearly established that Grissom had a liberty interest in avoiding administrative segregation, and so Defendants are entitled to qualified immunity.

B. Even if Grissom had a liberty interest, he has failed to demonstrate that the Defendants violated clearly established law in allegedly failing to provide him with due process. Grissom asserts that the right to meaningful reviews is clearly established, but the Supreme Court has held that clearly established law cannot be defined at such a high level of generality. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017). Rather, Grissom must identify clearly established law demonstrating that the particular reviews at issue here were not meaningful, and he has not done so. The process here was no different than the process found to be constitutionally sufficient in *Grissom I*, in a decision affirmed by this Court. Thus, it was not clearly established that the process was inadequate. This Court's decision in *Toevs v. Reid*, 685 F.3d 903 (10th Cir. 2012), did not clearly establish that the requirement to provide a statement of reasons as a guide for future behavior applies outside the context of a stratified behavior-modification program such as the one at issue in that case.

2. Defendants are also entitled to qualified immunity on Grissom's Eighth Amendment claim. In 2014, this Court held that a thirty-year term of administrative segregation did not constitute cruel

and unusual punishment. *See Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 753-64 (10th Cir. 2014) (unpublished). While Grissom claims that society's standards of decency have evolved since 2014, this dubious claim does not constitute clearly established law. Grissom cannot cite a single appellate decision holding that routine conditions of administrative segregation constitute cruel and unusual punishment, and so Defendants are entitled to qualified immunity. Grissom also cannot show that Defendants acted with "deliberate indifference" as required to establish an Eighth Amendment claim.

3. The district court properly granted summary judgment on Grissom's equal protection claim because Grissom failed to identify similarly situated inmates of other races who were treated differently. Contrary to Grissom's claim, the similarly situated requirement applies even in cases of alleged racial discrimination. *See United States v. Armstrong*, 517 U.S. 456, 465-67 (1996); *cf. Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998) (requiring a showing of similarly situated individuals in the context of alleged sex discrimination). Grissom has not identified a *single* inmate of another race who

repeatedly compromised prison staff to obtain cell phones while in administrative segregation, thereby posing a serious escape risk.

4. Grissom's claims are also precluded by *Grissom I*. Although Defendants did not raise a preclusion argument below, this Court "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal." *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (2011). Both claim and issue preclusion bar Grissom's constitutional challenges to his administrative segregation. Grissom raised identical due process and Eighth Amendment challenges to his administrative segregation in *Grissom I*, and those claims were rejected on the merits. And while Grissom did not raise an equal protection claim in *Grissom I*, this case involves the same cause of action, and so his equal protection claim is barred by claim preclusion.

5. Finally, the district court correctly held that Grissom's claims against Defendant Ray Roberts based on his role as Warden of EDCF were barred by the two-year statute of limitations, since his service as Warden ended in 2011. Grissom's argument that the continuing violations doctrine applies is incorrect. This Court has never

decided whether the continuing violations doctrine even applies to § 1983 actions, *see Fogle v. Slack*, 419 F. App'x 860, 864 (10th Cir. 2011) (unpublished), but the Court has rejected its application to § 1981 claims for reasons that apply equally here. *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1514 (10th Cir. 1997). This Court has also rejected the application of the continuing violations doctrine to § 1983 claims by inmates challenging administrative segregation in two unpublished but persuasive decisions. *See Silverstein*, 559 F. App'x 739; *Fogle*, 419 F. App'x 860. The decisions to retain Grissom in administrative segregation were discrete events by different individuals across three different correctional facilities that cannot be aggregated into one continuing violation.

ARGUMENT

I. The Defendants Are Entitled to Qualified Immunity on Grissom's Due Process Claim.

The district court properly concluded that Defendants are entitled to qualified immunity on Grissom's due process claim. A-695-99.

Qualified immunity shields the Defendants from liability so long as their conduct did "not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To carry his burden, Grissom must establish that (1) the Defendants violated his constitutional rights, and (2) "the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

These questions can be considered in either order, and in fact it is often appropriate to address only the immunity question without reaching the constitutional question. *See Pearson*, 555 U.S. at 236-42 (detailing a range of circumstances in which courts should address only the immunity question). "After all, a 'longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.'" *Camreta v. Greene*, 563 U.S. 692, 705 (2011) (quoting *Lyng v. Nw. Indian Cemetery Protective Assn.*, 485 U.S. 439, 445 (1988)). "In general, courts should think hard, and then think hard again, before turning small cases into large ones." *Id.* at 707.

In order to be clearly established, a right must be "'sufficiently clear that every reasonable official would have understood that what he

is doing violates that right.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012)). "In this circuit, to show that a right is clearly established, the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Callahan v. United Gov't of Wyandotte County*, 806 F.3d 1022, 1027 (10th Cir. 2015) (internal quotation marks omitted). This "existing precedent must have placed the statutory or constitutional question *beyond debate*." *al-Kidd*, 563 U.S. at 741 (emphasis added). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix*, 136 S. Ct. at 308 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

There is a glaring problem with Grissom's due process argument here. Grissom previously brought a § 1983 action alleging that his administrative segregation violates his procedural due process rights. The district court held that Grissom did not have a liberty interest in avoiding administrative segregation and that even if he did have a liberty interest, prison officials provided him with due process. *Grissom*

v. Werholtz, No. 07-3302, 2012 WL 3732895 (D. Kan. Aug. 28, 2012). This Court affirmed that decision in 2013. *See Grissom v. Werholtz*, 524 F. App'x 467 (10th Cir. 2013) (unpublished) ("*Grissom I*"). Thus, at least as late as 2013, it could not have been clearly established that administrative segregation violated Grissom's due process rights, and Grissom does not cite a single case from this Circuit since that time addressing administrative segregation, much less one that would clearly establish that the Defendants could no longer rely on *Grissom I*.

Grissom makes a feeble attempt to get around this problem by claiming that the record in *Grissom I* was less developed than the record here. But every reasonable official would not have understood that continuing to hold Grissom in administrative segregation violated his due process rights when this Court specifically held that Grissom's due process rights were not violated in *Grissom I*. Defendants could not reasonably be expected to parse the record in *Grissom I* and conclude that that decision was clearly wrong, as Grissom now alleges. The continued retention of Grissom in administrative segregation was not unconstitutional "beyond debate," and so Defendants are entitled to qualified immunity. *See Mullenix*, 136 S. Ct. at 308.

In any event, *Grissom I* was correctly decided. To establish a procedural due process violation, Grissom must demonstrate that (1) he had a constitutionally protected liberty interest in avoiding administrative segregation, and (2) Defendants deprived him of that interest without providing adequate process. *See, e.g.*, *Rezaq v. Nalley*, 677 F.3d 1001, 1010 (10th Cir. 2012). Grissom has made neither of those showings here. At the very least, any alleged due process violation was not clearly established.

A. Grissom did not have a clearly established liberty interest in avoiding administrative segregation.

Grissom begins by claiming that the district court misidentified the liberty interest at issue by referring to "early release from segregation." While it is not clear what the district court meant by "early" release since Grissom was not placed in segregation for a set amount of time, the district court properly understood and analyzed Grissom's alleged liberty interest. Other cases addressing administrative segregation have described the relevant liberty interest as "avoiding restrictive conditions of confinement." *See Wilkinson v. Austin*, 545 U.S. 209, 223 (2005); *see also Rezaq*, 677 F.3d at 1010

(describing the asserted liberty interest as "avoiding the conditions of confinement at ADX"). There is no material difference between characterizing the liberty interest as avoiding continued administrative segregation or being released from administrative segregation.

The district court also applied the correct legal standard in analyzing Grissom's alleged liberty interest, citing *Wilkinson v. Austin*, 545 U.S. 209 (2005) and *Sandin v. Conner*, 515 U.S. 472 (1995), and applying the four-factor test from *Estate of DiMarco v. Wyoming Department of Corrections*, 473 F.3d 1334 (10th Cir. 2007). Grissom has not shown that the district court's reference to "early release" in any way affected its analysis of whether he had a liberty interest in avoiding administrative segregation.

As the district court recognized, conditions of confinement do not implicate a liberty interest unless they "impose[] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. "Courts have struggled to identify the appropriate baseline for assessing what constitutes an 'atypical and significant hardship' on inmates," specifically whether the proper baseline is the conditions typically found in administrative

segregation or whether the proper baseline is conditions in a prison's general population. *Rezaq*, 677 F.3d at 1011. The Supreme Court recognized divergent views on this issue in *Wilkinson* but declined to resolve the question there. *Id.*[3]

Rather than making "'a rigid either/or assessment' of proper comparator evidence," this Court has instead identified "four potentially relevant, nondispositive factors" for determining whether a liberty interest exists: "'whether (1) the segregation relates to and furthers a legitimate penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement, as it did in *Wilkinson*; and (4) the placement is indeterminate.'" *Rezaq*, 677 F.3d at 1011-12 (quoting *DiMarco*, 473 F.3d

[3] Grissom claims this Court's decision in *Penrod v. Zavaras*, 94 F.3d 1399 (10th Cir. 1996), held that a prison's general population is the appropriate baseline. While *Penrod* referred to conditions in the prison's general population and may have implicitly assumed this was the proper baseline, the Court did not squarely address that question. *Id.* at 1407. In any event, this Court recognized uncertainty concerning this issue in *Rezaq*, so at minimum *Penrod* did not clearly establish that the general population is the proper baseline. *See Reichle*, 566 U.S. at 669-70 ("[I]f judges thus disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy.").

at 1342). Consideration of these factors here indicates that Grissom did not have a liberty interest in avoiding administrative segregation, much less a clearly established one.

(1) Grissom's administrative segregation related to and furthered a legitimate penological interest.

In *Grissom I*, the district court, in a decision affirmed by this Court, "found that defendants had met their burden of showing a reasonable relationship between Mr. Grissom's isolation and the prison officials' asserted penological interests, noting Mr. Grissom's propensity for obtaining dangerous contraband and the security risks created by such behavior." 524 F. App'x at 474. Since this Court's decision in *Grissom I*, Grissom received another DR that reaffirmed prison officials' concerns about Grissom compromising prison staff and engaging in unauthorized communications. Given *Grissom I* and this subsequent development, it was not clearly established that prison officials lacked a legitimate penological interest in retaining Grissom in administrative segregation.

Contrary to Grissom's claim, the fact that the ASRB and PMC repeatedly stated "placement facts still apply" does not mean that

Grissom's drug trafficking in prison in 1996 was the sole basis for his continued segregation. The placement facts on his administrative segregation review form also refer to his possession of cell phones and chargers, which occurred in 2003 and twice in 2005, and the fact that Grissom was considered to be an extreme escape risk. *See, e.g.*, A-303. As Warden Heimgartner explained, "Grissom's history has shown a pattern of influencing and compromising staff and other offenders who will supply him with contraband, including cell phones."[4] A-315. Grissom's 2015 DR reaffirmed this pattern of attempting to compromise prison staff and engage in unauthorized communications. This history—which raised serious concerns about prison security, as both escapes from KDOC facilities in recent years involved the use of cell phones and inmates compromising prison staff to assist in their escape—was "one of the primary reasons that [Grissom] remained in administrative segregation." A-314-15.

[4] The ASRB recommends whether an inmate should be retained in or released from administrative segregation, but the warden makes the final decision. A-228.

Grissom argues that at some point his history of compromising staff to obtain contraband, including cell phones, became a stale justification for his continued confinement. But prison officials could reasonably conclude that an inmate's past pattern of behavior raises legitimate concerns about the inmate's security risk even years after the fact. After all, the district court found that Grissom's administrative segregation was reasonably related to a legitimate penological interest in 2012, a decision this Court affirmed in 2013, eight years after Grissom's 2005 DR. How could it have been clearly established that this pattern of behavior would not remain a legitimate penological justification for continued segregation for at least two more years, until Grissom received his 2015 DR for undue familiarity with prison staff?

In essence, Grissom is asking this Court to second guess the good-faith determinations of prison officials as to whether administrative segregation would help ensure prison security. But as this Court explained in *Rezaq*, it is not appropriate to engage in "exacting scrutiny," such as determining whether isolation is "essential." 677 F.3d at 1013. Instead, the question is whether there is a reasonable relationship between administrative segregation and legitimate

penological interests. *Id.* (citing *Jordan v. Bureau of Prisons*, 191 F. App'x 639, 652 (10th Cir. 2006) (unpublished)). Given Grissom's history of obtaining cell phones and other dangerous contraband and compromising prison staff—raising serious concerns about the potential escape of an inmate responsible for at least three murders—the decision to retain Grissom in administrative segregation was reasonably related to legitimate penological interests.

(2) The conditions of Grissom's confinement were not extreme.

The conditions of Grissom's confinement were found not to be extreme in *Grissom I*, and he makes no allegation that the conditions of his confinement have become any more restrictive since then. In fact, other than a period of time following his 2015 DR, Grissom has spent most of his time since 2013, until his release to general population in 2016, in EDCF cellhouse C. A-31, 231. Grissom's own complaint states that cellhouse C is less restrictive than the other cellhouses at EDCF where administrative segregation occurs. A-31. Thus, it was not clearly established that Grissom's conditions of confinement were extreme for purposes of the *DiMarco* analysis.

This Court's decision in *Rezaq* also demonstrates that the conditions of Grissom's administrative segregation were not extreme. In *Rezaq*, this Court held that conditions in the federal Administrative Maximum Prison (ADX) in Florence, Colorado, while "undeniably harsh," were "not extreme as a matter of law." 677 F.3d at 1014-15. The Court noted that conditions in ADX were "comparable to those routinely imposed in the administrative segregation setting." *Id.*

Rezaq noted two differences between the conditions in ADX and those at issue in *Wilkinson*. Although the Court did not "draw fine distinctions based on these comparisons," 677 F.3d at 1015, the conditions of Grissom's administrative segregation were more similar to ADX in both respects.

First, in *Rezaq*, there was some "evidence that plaintiffs could communicate with other inmates," unlike in *Wilkinson*, where "almost all human contact [was] prohibited." *Id.* Although there was "a factual dispute over the degree of human contact permitted at ADX," this dispute did not affect the Court's "determination that the conditions are not extreme" because "[e]ven viewing the disputed facts in the light most favorable to plaintiffs, the limitations on human contact were not

'especially severe' in relation to most solitary confinement facilities." *Id.* at 1014 n.6.

Similarly, there is evidence here that inmates in administrative segregation at EDCF could communicate with other inmates. For example, Grissom was able to solicit affidavits from his fellow inmates in administrative segregation to support his claims in this case. A-141-47. And while those affidavits are of dubious credibility, the inmates discuss being able to communicate with each other, including Grissom. A-143. Grissom also expressed concern about being overheard by his fellow inmates in the 2015 letter that led to his DR, writing, "I'm extremely prudent and that's why I talk so quietly sometimes to avoid nosy neighbors." A-374. In addition, Grissom's administrative segregation review forms indicate that he had personal contact with other inmates while in administrative segregation, noting that Grissom "continues to mentor inmate Nguyen in speaking and writing English" and "continues to help inmate Nguyen with homework assignments." A-83.

Second, *Rezaq* noted that unlike the inmates in *Wilkinson* who were restricted to indoor recreation cells, inmates in ADX were

permitted outdoor recreation. 677 F.3d at 1015. Likewise, inmates in administrative segregation in EDCF are permitted outdoor recreation. A-627.

Grissom has not shown that the conditions of his administrative segregation were any more restrictive than the conditions in *Rezaq*. In fact, the conditions of administrative segregation at EDCF were actually less restrictive than ADX in at least some respects. While inmates at ADX are limited to two fifteen-minute phone calls per month, *Rezaq*, 677 F.3d at 1015, EDCF inmates in administrative segregation have telephone privileges from 5 a.m. to 10 p.m. daily.[5] A-631. Also, while inmates at ADX were limited to five 'no contact' social visits a month, *Rezaq*, 677 F.3d at 1015, EDCF inmates in administrative segregation are allowed two one-hour visits every week. A-633. Thus, under *Rezaq*, the conditions of Grissom's administrative segregation were not extreme as a matter of law.

[5] In fact, the note that Grissom passed to a guard in 2015, which led to his DR, specifically mentioned that he could contact her by calling a number on his list of approved contacts, which could be set up to forward to her phone number. A-374.

This Court's decision in *Fogle v. Pierson*, 435 F.3d 1252 (10th Cir. 2006), does not help Grissom. *Fogle* held that there was an "arguable basis" that a three-year period of administrative segregation (under harsher conditions than here—such as no outdoor recreation) implicated a liberty interest. *Id.* at 1259. But to overcome the Defendants' qualified immunity, Grissom must do much more than present an "arguable basis" for his constitutional claims; he must show that the constitutional question is "*beyond debate*." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (emphasis added). And given this Court's decisions in *Grissom I* and *Rezaq*, Grissom has failed to meet that burden.

(3) Administrative segregation did not increase the length of Grissom's imprisonment.

Grissom concedes that the third *DiMarco* factor favors the Defendants. Grissom is serving four life sentences with his first opportunity for parole in 2093. A-241, 335. His placement in administrative segregation did not increase the length of his imprisonment.

(4) Grissom's administrative segregation was not indeterminate.

The fourth and final *DiMarco* factor also weighs against finding a liberty interest. In *Grissom I*, the district court found that Grissom's placement in administrative segregation was not indeterminate purposes of this factor 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 F. App'x at 474. Thus, it could not have been clearly established that Grissom's segregation was indeterminate.

Grissom argues that segregation is indeterminate when it is not for a predetermined length of time. But *Rezaq* held otherwise. The confinement there was not for a specified amount of time, but the Court held that the placements were not indeterminate and that this factor weighed against finding a liberty interest because of the availability of periodic reviews. 677 F.3d at 1016.

Grissom cites *Toevs v. Reid*, 646 F.3d 752 (10th Cir. 2011) (which he refers to as "*Toevs I*"), in support of his understanding of indeterminacy, but his reliance on that opinion is inappropriate. That

opinion was later amended by the panel to remove the liberty interest analysis. *See Toevs v. Reid*, 685 F.3d 903, 906-07 (10th Cir. 2012). Thus, the opinion as originally written is no longer a decision of this Court, much less clearly established law.

Similarly, the district court's order in *Silverstein v. Federal Bureau of Prisons*, 704 F. Supp. 2d 1077 (D. Colo. 2010), does not help Grissom. As an initial matter, that order was only a district court decision, and so at most it can contribute to clearly established law only in conjunction with "the weight of authority from other courts." *See Callahan*, 806 F.3d at 1027.[6] But just as importantly, the district court in *Silverstein* ultimately concluded that the confinement *was not* indeterminate because the plaintiff received periodic reviews, in line with this Court's later holding in *Rezaq*. *See Silverstein v. Fed. Bureau of Prisons*, No. 07-cv-2471, 2011 WL 4552540 (D. Colo. Sept. 30, 2011).

[6] The Supreme Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *See District of Columbia v. Wesby*, ___ S. Ct. ____, 2018 WL 491521 at *12 n.8. But "a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction, much less in the entire United States." *al-Kidd*, 563 U.S. at 741.

Grissom also argues that his reviews were not meaningful, but this conflates the question of whether a liberty interest exists with the question of whether due process was provided in depriving a person of a liberty interest. As *Rezaq* explained in discussing indeterminacy, "it is not necessary for us to closely review the process at this stage." 677 F.3d at 1016. In support, *Rezaq* cited *DiMarco* as holding that "confinement was not indefinite where prisoner had reevaluations every ninety days and had the opportunity to be heard at the meetings." *Id.* (citing *DiMarco*, 473 F.3d at 1343). Here, Grissom received reviews every month and was given the opportunity to be heard at each review hearing. He took advantage of that opportunity and regularly attended the hearings. A-237. Therefore, his confinement was not indeterminate under *Rezaq*.

Finally, Grissom argues that the duration of his confinement alone is atypical and significant. Plaintiffs made a similar claim in *Rezaq*, but the Court there held that "duration is properly considered in tandem with indeterminacy." 677 F.3d at 1016. This distinguishes many of the cases from other Circuits that Grissom cites. Brief of Appellant at 22, 26-27, 33. Those cases rely heavily—and in some cases

exclusively—on the duration of administrative segregation.[7] But the duration of administrative segregation is not one of the *DiMarco* factors, only something that is considered in tandem with indeterminacy. And *Rezaq* ultimately found that this factor weighed against finding a liberty interest because the inmates received periodic reviews, as Grissom did here.

(5) On balance, the DiMarco *factors do not support finding a liberty interest, much less a clearly established one.*

Each of the *DiMarco* factors weighs against finding a liberty interest here. But even if Grissom could show that one or more factors favor him (which is certainly not clearly established given *Grissom I* and *Rezaq*), he has failed to identify any case involving the same balance of factors. Thus, it cannot be said that every reasonable official would have understood that Grissom had an undebatable liberty

[7] In addition, several of the cases Grissom cites postdate his release from administrative segregation and therefore do not show that the law was clearly established "at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735. Other cases are relevant to the qualified immunity analysis only for conduct occurring after they were decided. For example, *Wilkinson* was not decided until 2005 and therefore cannot constitute clearly established law with regard to Grissom's original placement or retention in administrative segregation prior to that date.

interest in avoiding administrative segregation. Defendants are entitled to qualified immunity.

B. Grissom has not identified any clearly established law demonstrating that the process Defendants provided was inadequate.

Even assuming Grissom had a liberty interest in avoiding administrative segregation, he has failed to demonstrate that the Defendants violated clearly established law in allegedly failing to provide him with due process.

Grissom argues that "the right to meaningful reviews is clearly established," Brief of Appellant at 33, but the Supreme Court has repeatedly held that "'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017). Instead, "the clearly established law must be 'particularized' to the facts of the case." *Id.* In other words, it is not enough to state the generic proposition that meaningful reviews are required; Grissom must identify clearly established law demonstrating that the particular reviews at issue here were not meaningful. In *Toevs v. Reid*, 685 F.3d 903 (10th Cir. 2012), for instance, this Court stated that since *Hewitt v. Helms*, 459 U.S. 460 (1983), "it has been clearly established that

prisoners cannot be placed indefinitely in administrative segregation without receiving meaningful periodic reviews." 685 F.3d at 916. But the Court nevertheless granted qualified immunity because it was not clearly established that the reviews at issue in that case were not meaningful. *Id.*

Grissom has identified no clearly established law demonstrating that the reviews he received while in administrative segregation were not meaningful. ASRB members conducted hearings each month on whether Grissom should be released from administrative segregation. A-246. Grissom was given the opportunity to submit written comments and to personally participate in the hearings, and he regularly did so, demonstrating that he recognized the hearings were more than a meaningless formality. A-231-32, 237. Grissom's placement in administrative segregation was also reviewed every 180 days by the PMC and independently by the warden every year. A-246, 314. These were the very same procedures involved in *Grissom I*, where the district court concluded "that, even if Mr. Grissom established a protected liberty interest, he received all of the process that he was due." 524 F. App'x at 475. Based on *Grissom I*, the Defendants could have

reasonably believed that the process they were providing was constitutionality adequate.

Grissom argues that this Court's decision in *Toevs* required Defendants as part of their reviews "to 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)." 685 F.3d at 913. But he conveniently omits the first part of that sentence: "Where, as here, the goal of the placement is *solely and exclusively* to encourage a prisoner to improve his future behavior . . . ." *Id.* (emphasis added). Grissom was placed and retained in administrative segregation to ensure the security of the prison and to prevent escape, not solely and exclusively to encourage him to change his behavior. *Toevs* did not clearly establish that a statement of reasons to guide future behavior is required outside of the context of a stratified behavior-modification program such as the one at issue in that case. Thus, even if Grissom somehow had a clearly established liberty interest, it was not clearly established that Defendants deprived him of that interest without due process of law.

II. Defendants Are Entitled to Qualified Immunity on Grissom's Eighth Amendment Claim Because It Was Not Clearly Established that Administrative Segregation Constitutes Cruel and Unusual Punishment.

Grissom did not raise an Eighth Amendment claim in his original complaint. Grissom later submitted an Amended Complaint on court-approved forms expanding on the allegations in the original complaint. The Amended Complaint contains one sentence, along with one sentence cross-referencing supporting facts, alleging that administrative segregation violates his Eighth Amendment rights. A-223. Grissom later filed a Supplemental Complaint in which he raised additional Eighth Amendment claims. A-406. The district court's order granting summary judgment addressed Grissom's Eighth Amendment claims from the Supplemental Complaint, but not Grissom's Eighth Amendment claim from his Amended Complaint. A-703-05.

Contrary to Grissom's argument, this oversight does not require reversal. This Court "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented . . . on appeal." *Richison v. Ernest Group, Inc.*, 634 F.3d 1123, 1130 (2011) (emphasis in original). And here, Grissom's

Eighth Amendment claim can easily be rejected because he cannot identify any clearly established law holding that administrative segregation violates the Eighth Amendment, as necessary to overcome the Defendants' qualified immunity.

In fact, Grissom acknowledges that in 2014 this Court held that a thirty-year term of administrative segregation did not constitute cruel and unusual punishment. *See Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 753-64 (10th Cir. 2014) (unpublished). But Grissom claims that since 2014, "[s]ociety's standards of decency have evolved" so as to render administrative segregation clearly unconstitutional under the Eighth Amendment. Brief of Appellant at 38. Even putting aside the dubious nature of this claim, neither the Supreme Court nor this Court have ever held that alleged new "standards of decency" constitute clearly established law.

Instead, "to show that a right is clearly established, the plaintiff must point to 'a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.'" *Callahan*, 806 F.3d at 1027. The best Grissom can do is point to a few random district court

decisions finding that administrative segregation *may* violate the Eighth Amendment in certain circumstances. Grissom cannot cite a single appellate decision holding that the routine conditions of administrative segregation violate the Eighth Amendment. The use of administrative segregation may be a legitimate "matter of public discourse," Brief of Appellant at 48, but it is not clearly unconstitutional.

Grissom also cannot show that Defendants acted with "deliberate indifference," as he must to establish an Eighth Amendment claim. *See Wilson v. Falk*, 877 F.3d 1204, 1209 (10th Cir. 2017). "In order for a plaintiff to show that a defendant prison official was deliberately indifferent, the plaintiff must show both 'that the official was subjectively aware of the risk' and that the official 'recklessly disregarded that risk.'" *Id.* (internal citations and brackets omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 828, 836 (1994)). Thus, "an official's failure to alleviate a significant risk that he should have perceived but did not" does not violate the Eighth Amendment. *Farmer*, 511 U.S. at 838. "In addition, prison officials who actually knew of a substantial risk to inmate health or safety may be found free from

liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Id.* at 844.

There is no indication that Defendants here were subjectively aware of any substantial risk of serious harm to Grissom, and they took reasonable steps to protect the mental health of inmates placed in administrative segregation. While in administrative segregation, Grissom was visited by a mental health professional on daily walkthroughs and weekly segregation rounds. A-319. During weekly segregation rounds, the mental health professional would check with Grissom to see how he was doing and to advise him of the availability of counseling sessions and therapy programs. A-319. The mental health professional would also make daily walkthroughs, Monday through Friday, that gave Grissom another opportunity to voice mental health concerns. A-319. In addition, Grissom could have made a "sick call" request at any time, which a mental health professional would have been required to address within a day. A-319.

During his confinement in administrative segregation, Grissom never requested any mental health services. A-319. Instead, Grissom would respond that he was fine, did not need anything, or did not want

to be bothered. A-319. Grissom also never exhibited any behavior that indicated he needed mental health treatment. A-320-21. Grissom's Eighth Amendment claim is without merit.

III. Defendants Are Entitled to Summary Judgment on Grissom's Equal Protection Claim Because He Has Failed to Identify Similarly Situated Inmates of Other Races Who Were Treated Differently.

In rejecting Grissom's equal protection claim, the district court cited this Court's decision in *Fogle v. Pierson*, 435 F.3d 1252 (2006). A-700-01. *Fogle* held that an inmate is required to show (1) that he was "similarly situated" to the inmates treated differently, and (2) that the difference in treatment was not "reasonably related to legitimate penological interests." *Id.* at 1261. *Fogle* cited *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998), in support of the first requirement and *Turner v. Safley*, 482 U.S. 78, 89 (1987), in support of the second.

Defendants recognize that *Turner*'s "reasonably related to legitimate penological interests" test does not apply to claims of racial discrimination. *See Johnson v. California*, 543 U.S. 499, 509-10 (2005). If inmates can establish that they were treated differently on the basis of race, strict scrutiny would apply. *Id.* at 505-07, 515.

But in order to trigger strict scrutiny, a plaintiff must first demonstrate that discrimination on the basis of race has occurred.[8] And so the requirement that "plaintiffs must first make a threshold showing that they were treated differently from others who were similarly situated to them" still applies. *Barney*, 143 F.3d at 1312. Contrary to Grissom's suggestion, this requirement applies even in the context of alleged racial discrimination. After all, *Barney* involved a claim of sex discrimination, which would have been subject to heightened scrutiny rather than *Turner*'s "reasonably related to legitimate penological interests" standard. And in *United States v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court required a showing that similarly situated individuals of a different race were treated differently in the context of alleged race discrimination. While *Armstrong* was a selective prosecution case, its holding was not limited to that context. Rather, the Court described the similarly situated requirement as based on "ordinary equal protection standards." *Id.* at 465; *see also id.* at 467

[8] *Johnson* involved an "express racial classification," 543 U.S. at 509, and thus the initial analysis of whether different treatment on the basis of race occurred was unnecessary there.

("Our holding was consistent with ordinary equal protection principles, *including the similarly situated requirement*." (emphasis added)).

Here, the district court specifically held that Grissom "failed to demonstrate he was treated differently from similarly situated inmates." A-701. Other than a single, conclusory sentence alleging that this conclusion "ignores the various facts proffered by Grissom that support his racial-discrimination claim," Brief of Appellant at 51, Grissom does not address this conclusion in the argument section of his brief, focusing instead on his claim that the district court applied the wrong standard. Grissom's failure to adequately brief this issue waives any challenge to the district court's conclusion. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007) (holding that arguments inadequately presented in an appellant's opening brief are waived); *Exum v. United States Olympic Comm.*, 389 F.3d 1130, 1133 n.4 (10th Cir. 2004) ("Scattered statements in the appellant's brief are not enough to preserve an issue for appeal.").

In any event, the district court correctly concluded that Grissom failed to identify similarly situated inmates of other races who were treated differently than him. While Grissom identified inmates with a

higher total number of DRs (i.e., not limited to DRs within administrative segregation) who spent less time in administrative segregation, he has not identified a *single* inmate of another race who repeatedly compromised prison staff to obtain cell phones while in administrative segregation, thereby posing a serious escape risk.

IV. Grissom's Constitutional Claims Are Precluded by His Previous Lawsuit Challenging His Administrative Segregation.

In addition to the reasons given by the district court, summary judgment was also appropriate because Grissom's constitutional claims are precluded by his prior lawsuit challenging his administrative segregation. Although Defendants did not raise a preclusion argument below, this Court "may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal." *Richison*, 634 F.3d at 1130. Grissom's claim to the contrary fails to recognize that this Court "treat[s] arguments for *affirming* the district court differently than arguments for *reversing* it." *Id.* (emphasis in original).

Claim preclusion (sometimes referred to as res judicata[9]) prevents parties to a prior action "or their privies from relitigating issues that were or *could have been raised* in the prior action" when the following elements are met: "(1) a [final] judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." *Wilkes v. Wy. Dep't of Employment Div. of Labor Standards*, 314 F.3d 501, 503-04 (10th Cir. 2002) (quoting *Satsky v. Paramount Commc'ns*, 7 F.3d 1464, 1467 (10th Cir. 1993); *King v. Union Oil Co. of Ca.*, 117 F.3d 443, 445 (1997)); *see also Gilkey v. Marcantel*, 637 F. App'x 529 (10th Cir. 2016) (unpublished) (applying these factors to conclude that a prisoner's challenge to his segregation classification was precluded by a previous lawsuit).

A related doctrine, issue preclusion (or collateral estoppel), prevents a party from relitigating an issue already decided when:

> (1) the issue previously decided is identical with the one presented in the action in question, (2) the prior action has been finally adjudicated on the merits, (3) the party against whom the doctrine is invoked was a party or in privity with a party to the prior adjudication, and (4) the party against

[9] The term "res judicata" can also be used in a broader sense to encompass both issue and claim preclusion. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984).

> whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

See Moss v. Kopp, 559 F.3d 1155, 1161-62 (10th Cir. 2009).

Both doctrines bar Grissom's claims here. Grissom actually raised due process and Eighth Amendment challenges to his administrative segregation in *Grissom I*, and the district court rejected those challenges on the merits, in a decision affirmed by this Court. 524 F. App'x at 471, 473-75. Grissom raises identical issues in this case. There is no indication that anything changed after *Grissom I*—such as more restrictive conditions of confinement or less meaningful reviews—that might allow Grissom to raise new claims.

And while Grissom did not raise an equal protection claim in *Grissom I*, this case involves the same cause of action, and so his equal protection claim is barred by claim preclusion. This Court uses "the transactional approach of Restatement (Second) of Judgments to determine what constitutes a 'cause of action' for claim preclusion purposes." *Wilkes*, 314 F.3d at 504. Under this approach, "a cause of action includes all claims or legal theories of recovery that arise from the same transaction, event, or occurrence." *Id.* Grissom challenged his

continued retention in administrative segregation in *Grissom I*, so he cannot now assert new legal theories related to the same transaction. The fact that Grissom has named different KDOC officials does not alter this analysis. *See United States v. Rogers*, 960 F.2d 1501, 1509 (10th Cir. 1992) ("There is privity between officers of the same government so that a judgment in a suit between a party and [one officer of the government] is res judicata in relitigation of the same issue between that party and another officer of the government."); *see also Gilkey*, 637 F. App'x at 530-31 (finding privity between different prison officials).

V. The Continuing Violations Doctrine Does Not Exempt Grissom's Claims Against Defendant Roberts from the Statute of Limitations.

The district court also held that Grissom's claims against Defendant Ray Roberts based on his role as Warden of EDCF were barred by the two-year statute of limitations, since his service as Warden ended in 2011, when he became Secretary of KDOC. A-701 n.2. Grissom argues that the statute of limitations does not bar his claims in

light of the continuing violations doctrine.[10] Obviously, if the Court finds that the district court properly granted qualified immunity or that Grissom's claims are precluded by *Grissom I*, it is unnecessary to address this alternative basis for the district court's grant of summary judgment in favor of Defendant Roberts. But the district court correctly held that the two-year statute of limitations applies.

As an initial matter, this Court has never decided whether the continuing violations doctrine even applies to § 1983 actions. *See Fogle v. Slack*, 419 F. App'x 860, 864 (10th Cir. 2011). This Court has,

---

[10] In a footnote, Grissom also challenges the district court's conclusion that Defendants Roberts and Goddard, in their state-wide secretarial capacities, did not personally participate in any alleged constitutional violation. *See* Brief of Appellant at 32 n.15. It is doubtful this argument is adequately briefed. *See Bronson*, 500 F.3d at 1104 (holding that arguments inadequately presented in an appellant's opening brief are waived). But in any event, the fact that the Secretary of Corrections has the power to unilaterally release an inmate from administrative segregation does not demonstrate that either Defendants Roberts or Goddard personally participated in a decision to retain Grissom in administrative segregation. While Grissom filed a grievance with the Secretary of Corrections, KDOC regulations provide that "[t]he grievance procedure shall not be used in any way as a substitute for, or as part of, . . . the classification decision-making process . . . ." *See* Kan. Admin. Reg. § 44-15-101a(d)(2). Besides, "a denial of a grievance, by itself without any connection to the violation of constitutional rights alleged by plaintiff, does not establish personal participation under § 1983." *Gallagher v. Shelton*, 587 F.3d 1063, 1069 (10th Cir. 2009).

however, rejected its application to § 1981 claims, reasoning that the continuing violations theory in the Title VII context "is a creature of the need to file administrative charges" and that even when the continuing violations doctrine applies under Title VII, section 2000e–5(g) limits damages to the two-year period before filing administrative charges. *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1514 (10th Cir. 1997) ("The state limitation period in a section 1981 suit serves the same function that section 2000e–5(g) performs in a Title VII case, that is, it provides a cap on the period for which damages can be recovered."). The same analysis would seem to apply in the § 1983 context.

And in two unpublished but persuasive decisions, this Court has rejected the application of the continuing violations doctrine to § 1983 claims by inmates challenging administrative segregation. In *Silverstein v. Federal Bureau of Prisons*, 559 F. App'x 739 (10th Cir. 2014) (unpublished), this Court noted that the continuing violations doctrine "cannot be employed where the plaintiff's injury is definite and discoverable, and nothing prevented the plaintiff from coming forward to seek redress." *Id.* at 751-52 (quoting *Tiberi v. CIGNA Corp.*, 89 F.3d 1423, 1431 (10th Cir. 1996)). The Court noted that nothing prevented

the inmate in that case from seeking redress years earlier. *Id.* at 751. That is equally true here. In fact, Grissom previously raised identical due process and Eighth Amendment claims in *Grissom I*.

Likewise, in *Fogle v. Slack*, 419 F. App'x 860 (10th Cir. 2011) (unpublished), this Court declined to apply the continuing violations doctrine to a § 1983 action challenging administrative segregation because "each segregation decision was of a discrete nature and that, in many instances, segregation decisions were made by different decision makers across three different correctional facilities, thus making it inappropriate to aggregate all such decisions into one continuing violation for limitations purposes." *Id.* at 864-65.

The same rationale applies here. The decisions to retain Grissom in administrative segregation were of a discrete nature and were made by different decision makers. For instance, there is no indication that any of the Defendants had anything to do with Grissom's initial placement in administrative segregation in 1996. Different ASRBs and PMCs at different facilities with different wardens evaluated Grissom's retention in administrative segregation since that time. For example, Defendant Ray Roberts only became Warden of EDCF (and thus a

member of the PMC) in 2003. A-686. He left that position in 2011 to become Secretary of Corrections and had no involvement with the PMC after that date. A-686. Similarly, several Defendants were only members of the ASRB between 2012 and 2014, while others only joined the ASRB in 2014 or 2015. A-20. In addition, between February 14, 2005 and March 17, 2009, Grissom spent periods of time in Hutchinson and Lansing Correctional Facilities, where his administrative segregation was reviewed by entirely different officials. A-243. The decisions to retain Grissom in administrative segregation were discrete events by different individuals that cannot be aggregated into one continuing violation.

Application of the continuing violations doctrine is not, as Grissom claims, necessary to allow inmates to challenge prolonged administrative segregation. To the extent the duration of administrative segregation affects whether an inmate has a liberty interest, courts can still consider that duration as part of the analysis. Applying the statute of limitations would only limit an inmate to recovering for deprivations of a liberty interest without due process caused by particular defendants within the limitations period.

Grissom's claim that other circuits apply the continuing violations doctrine to claims like his is misleading at best. In one of the cases he cites, *Montin v. Estate of Johnson*, 636 F.3d 409 (8th Cir. 2011), the court explicitly stated, "We make no comment as to the merits of Montin's 'continuing violation' argument." *Id.* at 415-16. In another case he cites, *Gonzalez v. Hasty*, 802 F.3d 212 (2d Cir. 2015), the court actually *rejected* the application of the continuing violations doctrine to a plaintiff's due process claim, although the court held the doctrine did apply to an Eighth Amendment claim. *Id.* at 223-24. And the other two case he cites only involved Eighth Amendment claims. Brief of Appellant at 53-54. Thus, at most, these cases only support application of the doctrine to Grissom's Eighth Amendment claim. But *Silverstein* correctly held that the doctrine does not apply even to Eighth Amendment claims under the law of this Circuit.

CONCLUSION

The district court's grant of summary judgment to the Defendants should be affirmed. Grissom's due process and Eighth Amendment claims are barred by qualified immunity, and he has failed to identify similarly situated inmates of other races who were treated differently

as required to prevail on his equal protection claim. Alternatively, Grissom's constitutional claims are precluded by his prior lawsuit challenging his administrative segregation.

Respectfully submitted,

/s/ Dwight R. Carswell
Toby Crouse
Solicitor General of Kansas
Dwight R. Carswell
Assistant Solicitor General
Bryan C. Clark
Assistant Solicitor General
Rachael D. Longhofer
Assistant Attorney General
Office of Kansas Attorney General
Derek Schmidt
120 SW 10th Ave., 2nd Floor
Topeka, KS 66612-1597
(785) 296-2215
toby.crouse@ag.ks.gov
dwight.carswell@ag.ks.gov
bryan.clark@ag.ks.gov
rachael.longhofer@ag.ks.gov

Attorneys for all Defendants-Appellees except Katherine Clouser and Connie Zabel

/s/ Roger W. Slead
Roger W. Slead
Jeffrey T. Donoho
Horn Aylward & Bandy, LLC
2600 Grand Boulevard, Suite 1100
Kansas City, Missouri 64108

(816) 421-0700
rslead@hab-law.com
jdonoho@hab-law.com

Attorneys for Defendants-Appellees Katherine Clouser and Connie Zabel

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 10,186 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 10th Cir. R. 32(b), as calculated by the word-counting function of Microsoft Word 2013.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface—14-point Century Schoolbook—using Microsoft Word 2013.

CERTIFICATE OF PRIVACY REDACTIONS

As required by Fed. R. App. P. 25(a)(5) and 10th Cir. R. 25.5, the undersigned attorney certifies that all required privacy redactions have been made.

CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing BRIEF OF DEFENDANTS-APPELLEES, as submitted in digital form is an exact copy of the written document filed with the Clerk.

CERTIFICATE OF SCANNING

I hereby certify that the digital form of the foregoing BRIEF OF DEFENDANTS-APPELLEES has been scanned for viruses using the Sophos Endpoint Security and Control (version 10.7), last updated February 12, 2018, and according to the program is free of viruses.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that on February 12, 2018, the foregoing BRIEF OF DEFENDANTS-APPELLEES was electronically filed with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I caused seven paper copies to be delivered by Federal Express to the Clerk's Office.

DATED: February 12, 2018 /s/ Dwight R. Carswell