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

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GLOSSARY OF TERMS

DR: Disciplinary Report

KDOC: Kansas Department of Corrections

INTRODUCTION

As the Supreme Court has long recognized, solitary confinement is devastating to humans. *In re Medley*, 134 U.S. 160, 168–71 (1890). More recently, Justice Kennedy observed, "research still confirms what this Court suggested over a century ago: Years on end of near total isolation exact a terrible price." *Davis v. Ayala*, 576 U.S. __, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). Nonetheless, Defendants maintain implausibly that twenty-plus years of solitary confinement is "routine" and consistent with the Eighth and Fourteenth Amendments.

Defendants' specific arguments for affirmance are no more compelling. They argue they are entitled to qualified immunity from Grissom's Due Process and Eighth Amendment claims because those claims are not supported by "clearly established" law. Grissom's liberty interest in avoiding prolonged solitary confinement and his right to meaningful reviews of that confinement, however, are clearly established. Further, Defendants raise qualified immunity as to Grissom's Eighth Amendment claim for the first time on appeal and have therefore waived or forfeited the defense. Even if they have not, Defendants had fair warning that their conduct would violate the Eighth Amendment.

With respect to Grissom's Equal Protection claim, contrary to Defendants' argument, Grissom did challenge the district court's conclusion that he "failed to

demonstrate he was treated differently from similarly situated inmates"—he proffered evidence of the more favorable treatment of White prisoners in segregation, prisoners who had similar infractions as his, which the district court improperly ignored.

This Court should follow Supreme Court and Tenth Circuit precedent and apply the continuing-violations doctrine to Grissom's claims, which are based not on any discrete act, but on the cumulative effects of repeated conduct occurring over twenty-plus years. Finally, while Defendants ask this Court to affirm on the bases of collateral estoppel and res judicata, doing so is inappropriate. Defendants concede they did not raise these arguments before the district court and therefore, they are waived.[1] Defendants' preclusion arguments fail on substantive grounds, too.

ARGUMENT

I. Grissom Was Denied Procedural Due Process.

Defendants face several hurdles in defending the summary-judgment grant on Grissom's due-process challenge. First, the liberty interest in avoiding two decades of solitary confinement and the right to meaningful reviews of that confinement are clearly established under Supreme Court and Tenth Circuit

[1] In light of the constitutional significance of Grissom's extraordinary solitary confinement and the disputed record of it, this Court should reject Defendants' contention that this case does not merit oral argument.

authority, as well as the weight of authority from other circuits. Second, Defendants do not dispute that the perfunctory reviews of Grissom's administrative segregation were insufficient to satisfy due process. Third, they concede that the district court made impermissible findings of fact at summary judgment.

A. Grissom Has a Clearly Established Liberty Interest in Avoiding Twenty Years of Solitary Confinement.

Grissom has a liberty interest in avoiding twenty-plus years of segregation.[2] Although not mandatory, this Court may utilize the *DiMarco* factors to guide its liberty-interest analysis. *Estate of DiMarco v. Wyo. Dep't of Corrs.*, 473 F.3d 1334, 1342 (10th Cir. 2007). Under those factors, Grissom demonstrated a clearly established liberty interest in avoiding prolonged segregation.

1. Factor 1: Grissom's prolonged administrative segregation did not relate to or further a legitimate penological interest.

Prison officials may segregate a prisoner only if doing so rationally serves an existing legitimate penological interest. *DiMarco*, 473 F.3d at 1342. No such relationship exists. Defendants do not contend that there were penological justifications for Grissom's placement beyond those on his administrative-review forms. Rather, they implausibly stretch the stated justifications to cover time periods not supported by the forms themselves.

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[2] Grissom agrees with Defendants that the district court's imprecision in identifying his liberty interest did not "affect[] its analysis of whether he had a liberty interest in avoiding administrative segregation." Appellees' Br. 22.

Defendants contend that Grissom's December 2015 review form refers to disciplinary infractions from 2003 and 2005. A-0303; Appellees' Br. 25. It does not. Nothing on the form contains a 2003 or 2005 date. The only listed adverse retention fact is dated 1996. Moreover, even if the forms had included justifications from 2003 or 2005, they would remain too temporally divorced to constitute a legitimate penological interest in 2015. *See Toevs v. Reid* (*Toevs II*), 685 F.3d 903, 912 (10th Cir. 2012) ("'[A]dministrative segregation may not be used as a pretext for indefinite confinement of an inmate.'") (quoting *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983)).

Defendants next argue that the 1996 disciplinary incident justifies indefinite segregation, hypothesizing that "an inmate's past pattern of behavior raises legitimate concerns about the inmate's security risk even years after the fact." Appellees' Br. 26. Yet, the Supreme Court has made clear that a decades-old disciplinary infraction cannot give prison officials permission to lock a prisoner in solitary and throw away the key.[3] *Hewitt*, 459 U.S. at 477 n.9. Other circuit courts have also uniformly rejected this argument. *E.g.*, *Proctor v. LeClaire*, 846 F.3d 597, 611 (2d Cir. 2017); *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015).

[3] Defendants also argue that Grissom's alleged "history of compromising" prison officials justifies his twenty-year solitary confinement. *E.g.*, Appellees' Br. 26. Any inadequacy, however, in the hiring, training, and supervision of prison personnel is attributable to Defendants rather than the prisoners they incapacitate.

Because there was no penological interest in retaining Grissom in segregation for twenty years, the first *DiMarco* factor weighs in favor of a liberty interest.

2. Factor 2: The conditions of Grissom's confinement are extreme.

Defendants urge this Court to hold that no reasonable fact-finder could find twenty years of segregation to be extreme.[4] This ignores the myriad cases Grissom cited holding that shorter segregation periods under similar conditions were extreme. Defendants also concede that the district court made an impermissible factual finding on summary judgment on this factor.

The Supreme Court used the words "extreme" and "severe" to characterize conditions where inmates remain in their cells for twenty-three hours a day, a light remains on at all times, the cell doors are specifically designed to prevent communication, meals are eaten alone in the cell, and opportunities for visitation are limited. *Wilkinson v. Austin*, 545 U.S. 209, 214–15 (2005). That precisely describes Grissom's confinement, Appellant's Br. 6–8, and this Court agreed such

[4] Defendants' citation to *Grissom I* is misplaced. *Grissom I* never held that the conditions of Grissom's confinement were not extreme; it merely noted that the district court made that conclusion. *Grissom v. Werholtz*, 524 F. App'x 467, 474 (10th Cir. 2013) (unpublished). Furthermore, Grissom spent ten additional years in administrative segregation after the *Grissom I* complaint; duration is relevant to the analysis of extremeness. *E.g.*, *Trujillo v. Williams*, 465 F.3d 1210, 1225 (10th Cir. 2006).

conditions are "extreme." *Rezaq v. Nalley*, 677 F.3d 1001, 1013 (10th Cir. 2012). District courts applying authoritative law concur. *E.g.*, *Silverstein v. Fed. Bureau of Prisons*, 704 F. Supp. 2d 1077, 1092 (D. Colo. 2010). Defendants do not address any of these authorities in their response brief, nor do they dispute that other circuit courts are in accord. *E.g.*, *Wilkerson v. Goodwin*, 774 F.3d 845, 856, 858 (5th Cir. 2014); *Williams v. Sec'y Pa. Dep't of Corrs.*, 848 F.3d 549, 562 (3d Cir. 2017); *Incumaa*, 791 F.3d at 531–32.

Instead, Defendants rely on *Rezaq* for the principle that Grissom's conditions were not extreme. But *Rezaq* is readily distinguishable; as this Court recognized, *Rezaq* concluded that the conditions were not extreme "where inmates had control over their cell lights, . . . regular contact with staff [and] the ability to occasionally communicate with other inmates." *McAdams v. Wyo. Dep't of Corrs.*, 561 F. App'x 718, 721 (10th Cir. 2014) (unpublished) (construing *Rezaq*). In contrast, Grissom has no ability to turn off all his lights and human contact is prohibited. Of equal significance, the prisoners in *Rezaq* were subjected to shorter terms of solitary confinement than Grissom, rendering Defendants' comparison of limited utility. See *Rezaq*, 677 F.3d at 1004–05.

Finally, describing alleged inconsistencies between *Penrod v. Zavaras*, 94 F.3d 1399 (10th Cir. 1996) and *Rezaq*, Defendants appear to suggest that the

proper baseline comparator is an open question in the Tenth Circuit.[5] It is not; the proper baseline is "general population." *Penrod*, 94 F.3d at 1407. Even if the proper baseline were other inmates in segregation, however, Grissom has presented at least a fact question whether his placement was atypical and significant "under any plausible baseline" given its extraordinary duration. *Wilkinson*, 545 U.S. at 223; *see also*, *e.g.*, *Isby v. Brown*, 856 F.3d 508, 524 (7th Cir. 2017); *Incumaa*, 791 F.3d at 519, 534.

3. Factor 4: Grissom's segregation was indeterminate in length.

Wilkinson held that administrative segregation is "indefinite" if it is "limited only by an inmate's sentence" and when "there is no indication how long" the prisoner will be in segregation "once assigned there." 545 U.S. at 214. This understanding — that segregation is "indefinite" or "indeterminate" if it has no fixed end date — accords with the plain meaning of the terms as well as case law. Appellant's Br. 24.

Although Defendants submitted a report confirming that Grissom's segregation had no fixed end date, A-0238, they insist that periodic reviews meant Grissom's segregation was not indeterminate. But this Court has never held that the existence of periodic reviews renders an otherwise indefinite length

[5] Defendants do not challenge that to the extent *Penrod* and *Rezaq* conflict, *Penrod* is binding as the earlier decision.

"determinate."[6] Indeed, *Wilkinson* foreclosed such a holding, characterizing segregation as "indefinite" despite periodic reviews. 545 U.S. at 224; *see also*, *e.g.*, *Wilkerson*, 774 F.3d 845 at 856 (the "rote repetition of the reason for the inmates[']continued confinement . . . effectively eliminates any possibility of release," rendering the confinement "effectively indefinite."). Notwithstanding Defendants' argument to the contrary, factual determinations on the meaningfulness of Grissom's reviews are therefore relevant to this factor.

4. *DiMarco* Factors Conclusion.

The first, second, and fourth *DiMarco* factors weigh in favor of a liberty interest in avoiding twenty-plus years of solitary confinement. Defendants challenge Grissom to find cases involving the precise balance of factors. This challenge is misplaced for three reasons.

First, "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. Second, identifying a case with the identical balance of factors is unnecessary for purposes of qualified immunity. *See infra* at 11. Third, courts in this circuit have repeatedly held that a liberty interest exists under the same, or fewer, *DiMarco* factors. *E.g.*, *Toevs v. Reid* (*Toevs I*), 646 F.3d 752, 756–

[6] Defendants argue that *Rezaq* held that confinement with periodic reviews cannot be indeterminate. There is no such holding in *Rezaq*.

57 (10th Cir. 2011) (only the fourth factor weighs in favor of the plaintiff, but is dispositive), *cited for that proposition by Willett v. Turley*, No. 2:10-CV-382 DB, 2012 WL 733756, at *5–6 (D. Utah Mar. 6, 2012); *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1149 (D. Colo. 2012) (second and fourth factors); *Dodge v. Shoemaker*, 695 F. Supp. 2d 1127, 1139–41 (D. Colo. 2010) (first factor only); *Stine v. Lappin*, No. 07-cv-01839-WYD-KLM, 2009 WL 103659, at *9–10 (D. Colo. Jan. 14, 2009) (first, second, and fourth factors); *Rezaq v. Nalley*, No. 07-CV-02483-LTB-KLM, 2008 WL 5172363, at *8–10 (D. Colo. Dec. 10, 2008) (same); *Smith v. Anderson*, No. 10-cv-01869-PAB-KMT, 2011 WL 1043367, at *5–8 (D. Colo. Jan. 24, 2011) (first and second factors).

5. *Wilkinson* Analysis.

Although an examination of the *DiMarco* factors emphasizes Grissom's liberty interest, this Court need only look to *Wilkinson* and its progeny, which clearly establish a liberty interest in avoiding twenty years of segregation. This is so because its extreme nature and duration rendered Grissom's solitary confinement an "atypical and significant hardship under any plausible baseline." *Wilkinson*, 545 U.S. at 223; *see also*, *e.g.*, *Toevs II*, 685 F.3d at 911; *Trujillo*, 465 F.3d at 1225; Appellant's Br. 26–27 (aggregating cases).

B. Sham Reviews Violated Grissom's Liberty Interest.

Defendants violated Grissom's due-process rights by failing to provide meaningful reviews of his segregation. Defendants counter that Grissom received periodic reviews. But that is not enough. "[P]risoners cannot be placed indefinitely in administrative segregation without receiving *meaningful* periodic reviews." *Toevs II*, 685 F.3d at 916 (emphasis added); *Hewitt*, 459 U.S. at 477 n.9. Other circuits are in accord. Appellant's Br. 27–28 (collecting cases). The reviews must involves "real evaluations of the administrative justification for confinement" and consideration of "all of the relevant evidence" about whether the "justification remains valid." *Proctor*, 846 F.3d at 614; *see Wilkinson*, 545 U.S. at 225–26 ("Our procedural due process cases have consistently observed" that "notice of the factual basis leading to consideration for [segregation] and a fair opportunity for rebuttal" are "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations.").

Grissom raised a factual dispute about whether his reviews were merely "a sham or a pretext." *Toevs II*, 685 F.3d at 912. Grissom's evidence showed that the reviews were perfunctory; most lasted a minute, and the reviewers repeatedly cut-and-paste — including the same typo — identical justifications for continued segregation. Upon inquiry, Grissom's reviewers could give no reason for his continued segregation. Appellant's Br. 4–6, 29–31.

Yet, the district court disregarded this evidence at the summary-judgment stage. Instead, the district court made a factual finding that Grissom's reviews were meaningful. This factual finding on a disputed question is reversible error. *Johnson ex rel. Estate of Cano v. Holmes*, 455 F.3d 1133, 1145 (10th Cir. 2006).

C. Qualified Immunity is Inappropriate.

Because Grissom has shown that the Defendants deprived him of a constitutional right, the qualified-immunity question is whether the right was clearly established at the time. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Although *Hope v. Pelzer*, 536 U.S. 730, 736, 741 (2002), "shifted the qualified immunity analysis from a scavenger hunt for prior cases with precisely the same facts toward the more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional," *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004), Grissom's rights at issue were crystal-clear. Defendants are not entitled to qualified immunity.

Sandin v. Conner, 515 U.S. 472, 484 (1995), clearly established the liberty interest in avoiding atypical and significant hardship. *Wilkinson* then clarified that a liberty interest exists in avoiding indefinite segregation. 545 U.S. at 223–24. This Court has repeatedly given notice to prison officials that prolonged confinement in administrative segregation gives rise to a liberty interest. *E.g.*, *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006); *Gaines v. Stenseng*, 292

F.3d 1222, 1226 (10th Cir. 2002). Other courts agree. *E.g.*, *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 698–99 (7th Cir. 2009); *Incumaa*, 791 F.3d at 532; *Wilkerson*, 774 F.3d at 855; *Brown v. Ore. Dep't of Corrs.*, 751 F.3d 983, 988 (9th Cir. 2014); *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000); *Isby*, 856 F.3d at 524.

Defendants are also incorrect that the right to meaningful reviews was not clearly established. This Court held: "Since *Hewitt*, it has been clearly established that prisoners cannot be placed indefinitely in administrative segregation without receiving meaningful periodic reviews." *Toevs II*, 685 F.3d at 916. Supreme Court and Tenth Circuit cases have put prison officials on notice that their reviews cannot be shams or pretexts for continued segregation. *Hewitt*, 459 U.S. at 477 n.9; *Toevs II*, 685 F.3d at 912. Qualified immunity cannot shield prison officials who provide rote, meaningless reviews that repeat stale justifications for confinement.

Further, Defendants' reliance on *Grissom I* is misplaced. *Grissom I* has no bearing on whether spending twenty years in segregation gives rise to a protected liberty interest; Grissom's confinement in segregation doubled in length after the filing of his *Grissom I* complaint. Given this Court's warning that "the duration of [segregation] is a distinct factor bearing on atypicality," a reasonable official was on notice that such prolonged confinement would give rise to a protected liberty

interest. *Trujillo*, 465 F.3d at 1225. And the weight of authority from other courts — including decisions after *Grissom I* — is in accord. *E.g.*, *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013); *Isby*, 856 F.3d at 524; *Incumaa*, 791 F.3d at 531–32; *Williams*, 848 F.3d at 560. Moreover, *Grissom I* is silent on whether the reviews Grissom received were adequate. A reasonable prison official would continue to rely on *Hewitt* and its progeny for the proposition that reviews of segregation must be *meaningful*.

Finally, on summary judgment, a court must view the disputed facts relevant to qualified immunity in the light most favorable to the non-moving party. *Anderson v. Creighton*, 483 U.S. 635, 656 n.12 (1987). In that light, a reasonable fact-finder could determine that Grissom's twenty-year segregation constituted an atypical and significant hardship that was not accompanied by meaningful reviews.

II. Defendants Had Fair Warning that Locking Grissom in Solitary Confinement for Twenty Years Would Violate the Eighth Amendment.

Defendants decline to engage with the merits of Grissom's Eight Amendment claim, effectively conceding that twenty years in solitary confinement constitutes cruel and unusual punishment. Appellant's Br. 39–43. They also concede that they and the district court overlooked this claim, an error that requires reversal and remand. *Id*. Instead, Defendants argue for affirmance on qualified-immunity grounds. But Defendants waived or forfeited this affirmative defense by failing to raise it before the district court. Even on the merits of the defense,

however, clearly established law provided Defendants with fair warning that segregating Grissom for twenty years was unlawful.[7]

A. Defendants Cannot Assert Qualified Immunity For The First Time on Appeal.

"Qualified immunity is an affirmative defense and . . . the burden of pleading it rests with the defendant." *Crawford-El v. Britton*, 523 U.S. 574, 586–87 (1998) (internal quotation marks omitted); *see* Fed. R. Civ. P. 8(c). "Failure to plead an affirmative defense results in a waiver of that defense," and this Court does not consider waived arguments for the first time on appeal. *Bentley v. Cleveland Cty. Bd. of Cty. Comm'rs*, 41 F.3d 600, 604 (10th Cir. 1994); *see Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011).[8]

B. Clearly Established Law Prohibits Protracted Deprivations of Basic Human Needs that Threaten a Prisoner's Health.

Even if Defendants had not forfeited or waived qualified immunity, summary judgment would be inappropriate. As with Grissom's procedural due-

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[7] Defendants appear to imply that Grissom failed to clearly present his Eighth Amendment claim, but Grissom could not have been clearer. A-0223 (Am. Compl.) (alleging that the "prolonged adverse effects and excessive duration of 19 years plus of continuous indefinite solitary confinement . . . constitutes cruel and unusual punishment and violates the 8th Amendment").

[8] Even if Defendants could be viewed to have forfeited the defense rather than waived it, *Richison*, 634 F.3d at 1127–28, the distinction does not save Defendants. *Wood v. Milyard*, 566 U.S. 463, 470 (2012) ("An affirmative defense, once forfeited, is excluded from the case, and, as a rule, cannot be asserted on appeal.") (cleaned up).

process claim, Defendants frame "clearly established law" too narrowly. Contrary to Defendants' argument, Grissom's task is not to point to an Eighth Amendment case with *identical* facts. *See Hope*, 536 U.S. at 739; *Pierce*, 359 F.3d at 1298. Rather, Grissom must show that the state of the law gave Defendants "fair warning that [their] conduct would violate [Grissom's] constitutional rights." *Denver Justice and Peace Comm., Inc. v. City of Golden*, 405 F.3d 923, 932 (10th Cir. 2005). Defendants had fair warning.

First, "[t]he obvious cruelty inherent in this practice should have provided [Defendants] with some notice that their alleged conduct violated [Grissom's] constitutional protection against cruel and unusual punishment." *Hope*, 536 U.S. at 745. Defendants describe as "routine" the conditions of solitary confinement to which Grissom was subjected. *E.g.*, Appellees' Br. 41. In fact, a twenty-year solitary confinement term is extraordinary. The compulsion to meaningfully interact with other humans is universal.[9] Depriving Grissom of that opportunity

[9] Defendants argue that Grissom interacted with staff and prisoners alike. Grissom's evidence is to the contrary, Appellant's Br. 6–7, rendering the issue unsuitable for resolution on summary judgment. Tellingly, Defendants identify only three instances in which Grissom allegedly interacted with other humans in a period that spanned more than twenty years. Appellees' Br. 5, 29. And Defendants have presented no evidence that any interactions were (a) meaningful or (b) in-person. In fact, the reasonable inference is that Grissom's only access to staff and prisoners is in writing. *See Hays v. Jackson Nat'l Life Ins. Co.*, 105 F.3d 583, 589 (10th Cir. 1997) (on summary judgment, "all justifiable inferences are to be drawn in [the non-moving party's] favor.").

for more than twenty years ensured that he "was treated in a way antithetical to human dignity." *Hope*, 536 U.S. at 745.

Mercifully, there are few examples in American jurisprudence of two-decade solitary confinement. A "constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that this conduct cannot be lawful." *Pierce*, 359 F.3d at 1298 (internal quotation marks omitted). Here, Defendants cannot "escape liability simply because the instant case could be distinguished on some immaterial fact, or worse, because the illegality of the action was so clear that it had seldom before been litigated." *Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002); *see also*, *e.g.*, *Callahan v. Unified Gov't of Wyandotte Cty.*, 806 F.3d 1022, 1027 (10th Cir. 2015) (conduct was "so obviously improper that any reasonable officer would know it is illegal"); *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1998) ("[It] seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total."); *Shoatz v. Wetzel*, No. 2:13-cv-0657, 2016 WL 595337, at *9 (W.D. Pa. Feb. 12, 2016) (it should not strike anyone "as rocket science" that solitary substantially increases the risk of mental illness); *Wilkerson v. Stalder*, 639 F. Supp. 2d 654, 684 (M.D. La. 2007) ("It is also a matter of common sense that three decades of extreme social isolation and enforced inactivity in a space smaller than

a typical walk-in closet present the antithesis of what is necessary to meet basic human needs.").

Second, long before Grissom was placed in solitary, Supreme Court and other authoritative cases put Defendants on notice that twenty years of solitary confinement would violate the Eighth Amendment. For example, the Supreme Court held that segregation "is a form of punishment subject to scrutiny under Eighth Amendment standards" and that it may be unconstitutional depending on its duration. *Hutto v. Finney*, 437 U.S. 678, 685–87 (1978). Numerous courts have recognized the devastating effect that solitary inflicts on prisoners' health. *E.g.*, *In re Medley*, 134 U.S. at 168; *Davenport*, 844 F.2d at 1316 (there is "plenty of medical and psychological literature concerning the ill effects of solitary confinement"); *Palakovic v. Wetzel*, 854 F.3d 209, 225 (3d Cir. 2017) (noting the long-standing and "robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement"). That authority became further entrenched after Grissom was placed in solitary. Appellant's Br. 38–41 (collecting cases and statutes). And, of course, the Supreme Court has long held that the Eighth Amendment prohibits conditions that result in the deprivation of the "minimal civilized measure of life's necessities," *Farmer v. Brennan*, 511 U.S. 825, 834 (1994), or pose a risk to a prisoner's health, *Estelle v. Gamble*, 429 U.S. 97, 102–04 (1976); *Ramos v. Lamm*,

639 F.2d 559, 568 (10th Cir. 1980). This clearly established law gave Defendants fair warning.

Defendants are also wrong that their conduct did not evince deliberate indifference. The condemnation of solitary confinement by correctional experts and administrators is "ubiquitous and well-documented." Appellant's Br. 46–48. And Defendants concede that questions concerning the imposition of solitary confinement are familiar even to the general public. Appellees' Br. 41. Under these circumstances, it is implausible that a reasonable corrections officer was unaware that twenty years of solitary confinement would run afoul of the Eighth Amendment. *See supra* at 16; *see also Wilkerson*, 639 F. Supp. 2d at 684 (a reasonable corrections officer "would have realized in 1999 that an inmate's being held in extended lockdown for 27 years constitutes a sufficiently serious deprivation of basic human needs to trigger the protections of the Eighth Amendment"). Moreover, the subjective component of an Eighth Amendment claim can be satisfied by demonstrating that the risk of harm was obvious or that its duration "ma[de] it easier to *establish* knowledge." *Wilson v. Seiter*, 501 U.S. 294, 300 (1991); *Hope*, 536 U.S. at 738. Although Defendants all but ignore the

argument, Grissom has shown that he was subjected to an obvious risk of harm for twenty years.[10]

C. Clearly Established Law Prohibits Grossly Disproportionate Punishments that Lacks Penological Justification.

Clearly established law also gave prison officials fair warning that subjecting prisoners to grossly disproportionate punishment—*i.e.*, that which lacked a current penological justification—would violate the Eighth Amendment. Yet Defendants retained Grissom in solitary confinement long after any conceivable justification evaporated. *See supra* at 4. Indeed, even their own records show that they retained Grissom in solitary confinement when he posed "[n]o security or case management concerns" and no "management issues for security staff or unit team." A-0075–81, A-0090, A-0103–11, A-0162. Further, this Court "must accept [Grissom's] evidence as true and make all inferences in [his] favor" for the purposes of Defendants' motion for summary judgment. *Hays*, 105 F.3d at 589. The reasonable inference of these records is that Defendants held

[10] With respect to the alleged adequacy of Grissom's mental healthcare, Defendant Zabel conceded that her interactions with Grissom were brief, and that she did not treat Grissom. A-0319. Indeed, she admits that she never developed a psychologist-patient relationship with Grissom. *Id*. Under such circumstances, "mental-health staff have a harder time observing the patient and diagnosing illnesses effectively." *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1239 (M.D. Ala. 2017). Grissom alleged he was injured by his solitary confinement and this Court must accept those allegations as true and must draw all reasonable inferences in Grissom's favor. At minimum, Grissom raised a dispute of material fact over the state of his health and the adequacy of Defendants' care.

Grissom in solitary confinement long after any supposed security concerns ceased to exist. That has long been prohibited by the Eighth Amendment. *E.g.*, *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981); *Hope*, 536 U.S. at 738; *Isby*, 856 F.3d at 526; *Proctor*, 846 F.3d at 611; *Mims v. Shapp*, 744 F.2d 946,t 953–54 (3d Cir. 1984).

III. Grissom Identified Similarly Situated White Prisoners Who Were Treated Differently.

Contrary to Defendants' argument, Grissom clearly challenges the district court's conclusion that Grissom "failed to demonstrate he was treated differently from similarly situated inmates." A-0701; Appellant's Br. xvi, 51. Grissom argued that in reaching that conclusion, the district court ignored Grissom's evidence that he was treated differently from other inmates in segregation because of his race, and overlooked that Grissom raised a fact dispute regarding whether he was treated differently from similarly situated inmates. Appellant's Br. xvi, 51.

Grissom pointed to evidence that Black inmates in segregation spend, on average, significantly more time in segregation than White inmates with more, and more serious DRs. Appellant's Br. 9. Grissom also provided evidence that he, in particular, accumulated only five DRs (one for trafficking contraband, two for possession of dangerous contraband and one for undue familiarity, A-0229, A-0237), yet spent twenty years in segregation, while White prisoners with far more DRs (including many for the same conduct—*i.e.*, possession of dangerous

contraband, trafficking in contraband, and undue familiarity, A-0112–29), spent only a fraction of that time in segregation.

Defendants argue that Grissom had to do more than just compare himself to White prisoners who accumulated DRs in segregation. Appellees' Br. 46. Citing no law in support, they claim Grissom had to identify another White prisoner "who repeatedly compromised prison staff to obtain cell phones while in administrative segregation." Appellees' Br. 46. Defendants describe the comparator too narrowly. *E.g.*, *Penrod*, 94 F.3d at 1406 (the test for equal-protection violations is disparate treatment of "similarly situated" individuals, not identically situated ones). Even if Grissom had to establish that he was treated differently from White prisoners who corrupted prison staff in segregation, rather than from White prisoners in segregation who accumulated massive numbers of Class I DRs, Grissom has done so. A-0028–29; A-0112–29.

Among other things, two of the White prisoners in segregation accumulated nine dangerous contraband and one undue familiarity, and five dangerous contraband and two undue familiarity DRs, respectively. A-0028–29; A-0112–29. Four of those prisoners accumulated a total of twenty-one dangerous contraband DRs. *Id.*[11] The group of White prisoners to which Grissom compares himself, also

[11] Without discovery, Grissom was unable to describe the precise kind of contraband the White prisoners had in their possession (*i.e.*, whether they were

accumulated a host of other DRs that evidence their ability to corrupt staff members, including eight DRs for possession of stimulants, three DRs for possession of less dangerous contraband, fourteen DRs for unauthorized dealing and trading, one DR for intoxication, and three DRs for trafficking in contraband. A-0112–29. The district court ignored this evidence when making a factual finding that Grissom "is very much unlike other inmates." A-0701. That was inappropriate on a motion for summary judgment.

IV. The Continuing-Violations Doctrine Applies to Grissom's Constitutional Claims.

Contrary to Defendants' argument, this Court *does* apply the continuing-violations doctrine to Section 1981 claims when the theory of liability is based on the cumulative effects of repeated and enduring conduct, as Grissom argues here. *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1153–55 (10th Cir. 2008). Further, this Court has not precluded the application of the doctrine to Section 1983 suits, and at least eight other circuits have applied the doctrine to such claims, including to Eighth Amendment claims. *E.g.*, *DePaola v. Clarke*, No. 16-7360, __ F.3d __, 2018 WL 1219611, at *4 (4th Cir. Mar. 9, 2018); *Heath v. Bd. of Supervisors*, 850 F.3d 731, 740 (5th Cir. 2017) (applying doctrine to Section 1983 claim and noting

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cellphones). At a minimum, however, the evidence Grissom proffered raises a dispute of material fact that is not susceptible to resolution on summary judgment.

that the Sixth, Seventh, and Ninth Circuits have done so as well); *Ayala-Sepulveda v. Municipality of San German*, 671 F.3d 24, 30 n.6 (1st Cir. 2012); *O'Connor v. City of Newark*, 440 F.3d 125, 127–29 (3d Cir. 2006); Appellant's Br. 51–54. This Court should likewise apply the doctrine with equal force to Grissom's Eighth and Fourteenth Amendment claims, which challenge the cumulative effect of Defendants' determination to keep Grissom in solitary. Appellant's Br. 51–54.

Defendants' argument that Grissom's twenty-year solitary was a consequence of discrete acts "made by different decision makers," Appellees' Br. 52, misses the point. Challenges to prolonged solitary confinement do not fault any one decision in particular, but rather the cumulative effect of the repeated failure to provide him with meaningful reviews, among other things. *E.g.*, *Wilkinson*, 545 U.S. at 226–27 (conducting systemic evaluation of prison's procedural-due-process regime); *Turley v. Rednour*, 729 F.3d 645, 651 (7th Cir. 2013) (applying continuing-violations doctrine to Eighth Amendment claim based on "the cumulative impact of numerous imposed lockdowns"); *Kuhnle Bros., Inc. v. Cty. of Geauga*, 103 F.3d 516, 522 (6th Cir. 1997) (applying doctrine to Section 1983 procedural-due-process claim where "each day that the invalid resolution remained in effect, it inflicted 'continuing and accumulating harm'") (internal citation omitted); *Centifanti v. Nix*, 865 F.2d 1422, 1432–33 (3d Cir. 1989) (applying doctrine to a Section 1983 procedural-due-process claim where plaintiff

"alleges what is in essence a continuing wrong" that "continues to accrue on each day of the alleged wrong"). It is this systemic failure—the continual regurgitation of the prior board's decisions—that violated Grissom's constitutional rights.

Nothing in the hostile-work-environment line of cases requires separating the individual acts as Defendants suggest—rather, the opposite is true for purposes of determining liability under the continuing-violations doctrine. Defendants concede that Grissom's claims are based in part on a durational component, Appellees' Br. 53, and if the review boards' decisions were separated into individual acts, prisons could forever evade liability for claims with durational components. This Court should reject an interpretation that would force such a result.

V. Affirming on the Alternative Basis of Preclusion is Inappropriate.

Defendants urge this Court to affirm on the alternative bases of collateral estoppel and res judicata. But Defendants concede that they "did not raise a preclusion argument below." Appellees' Br. 56. Under Supreme Court and Tenth Circuit precedent, these preclusion arguments are waived unless raised before the trial court, and Defendants offer no reason to excuse the waiver.

Preclusion is an affirmative defense that "must be raised as such on the trial level and cannot be raised for the first time upon appeal." *Schramm v. Oakes*, 352 F.2d 143, 150 (10th Cir. 1965) (per curiam). Failure to assert these defenses

results in waiver because the opposing party has no opportunity to develop a factual record against the preclusion.[12] *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 350 (1971); *see Robinson v. Maruffi*, 895 F.2d 649, 651 & n.1 (10th Cir. 1990) (collateral estoppel waiver); *Horwitz v. State Bd. of Med. Exam'rs*, 822 F.2d 1508, 1512 (10th Cir. 1987) (res judicata waiver); *Wood*, 566 U.S. at 470 ("An affirmative defense, once forfeited, is excluded from the case, and, as a rule, cannot be asserted on appeal.") (cleaned up).

Defendants cite no cases in which this Court affirmed on the basis of preclusion without it first being raised before the district court. Defendants' citation to *Gilkey v. Marcantel*, 637 F. App'x 529 (10th Cir. 2016) (unpublished) is inapposite; there, "the district court determined [in the first instance] that the allegations . . . were barred by the doctrine of res judicata," and this Court affirmed. 637 F. App'x at 530.

Even if waiver did not bar consideration of preclusion, *Grissom I* should have no preclusive effect in this case. Preclusion does not apply because the Defendants are neither identical to nor in privity with the defendants from *Grissom I*. Defendants recognize that "Grissom has named different KDOC officials" in the

[12] Because Defendants waived the preclusion affirmative defenses, they should not be allowed to plead these defenses on remand. Fed. R. Civ. P. 8(c); *Arizona v. California*, 530 U.S. 392, 410 (2000) ("We disapprove the notion that a party may wake up because a 'light finally dawned,' years after the first opportunity to raise a [preclusion] defense.").

two suits, Appellees' Br. 49, so proceed on a privity-based theory. But "while government employees are in privity with their employer in their official capacities, they are not in privity in their individual capacities." *Gonzales v. Hernandez*, 175 F.3d 1202, 1206 (10th Cir. 1999). Grissom sued the prison officials in their individual and official capacities. Compl., *Grissom v. Werholtz*, No. 5:07-cv-03302-SAC, ECF No. 1 (D. Kan. Dec. 7, 2007); A-0018; A-0200–01.

At a minimum, there is a fact question whether privity exists between the two sets of defendants. This Court has held: "[B]ecause [appellee] did not raise res judicata in the summary judgment motion, [appellant] had no reason to present evidence disputing privity. In these circumstances, we decline to decide the issue of res judicata in the first instance." *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1116–17, 1119 (10th Cir. 2014).

Moreover, circumstances have changed since the *Grissom I*'s complaint from 2007. *See Whole Woman's Health v. Hellerstedt*, 579 U.S. __, 136 S. Ct. 2292, 2305 (2016) ("'[W]here important human values . . . are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.'") (citation omitted); *United Bhd. Of Carpenters & Joiners v. Brown*, 343 F.2d 872, 885 (10th Cir. 1965) (changed circumstances preclude application of res judicata). Grissom has spent ten additional years in segregation. This Court has emphasized that duration is a particularly significant

factor in analyzing due-process and Eighth Amendment claims. *E.g.*, *Trujillo*, 465 F.3d at 1225; *Craig v. Eberly*, 164 F.3d 490, 495 (10th Cir. 1998). Moreover, much of the evidence Grissom cites in support of his claims post-dates his earlier complaint. *E.g.*, A-0075–111 (perfunctory reviews from 2012 through 2015); A-0141–47 (declarations from other inmates from 2014). And, as noted above, the justifications for Grissom's solitary confinement became stale.

As with the privity question, there is at least a fact question on changed circumstances. Defendants' failure to raise preclusion before the district court meant that Grissom had no reason to present evidence or argument on changed circumstances, and this Court should decline to consider it in the first instance on appeal. *See Lenox*, 762 F.3d at 1119.

Furthermore, res judicata does not bar Grissom's equal-protection claim. Res judicata bars the claim only if it arose "from the same transaction, event, or occurrence" as the claims in *Grissom I*. Appellees' Br. 48. Whether the new cause of action arises from the "same transaction" is a fact-bound determination, "'giving weight to such considerations as whether the facts are related in time, space, origin, or motivation.'" *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1149 (10th Cir. 2006) (citation omitted). Such a determination should be made by the trial court in the first instance. *Id.* at 1151. A fact-finder could reasonably conclude that *Grissom I* does not arise from the same "transaction" as the equal-protection

challenge. Grissom's equal-protection claim does not challenge segregation itself; it challenges the Defendants' racially discriminatory motivation and method for applying segregation. The evidence for the equal-protection claim relates to the disparate application, a wholly separate factual nucleus from the conditions and duration of segregation.

CONCLUSION

For the aforementioned reasons, this Court should reverse the district court's grant of summary judgment.

Respectfully submitted,

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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 6,357 words.

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Dated: March 12, 2018

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of March 2018, a copy of Appellant Richard Grissom's Reply 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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