No. 20-281

In The
Supreme Court of the United States

WASEEM DAKER,
Petitioner,
v.
WARDEN, MACON STATE PRISON, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

WASEEM DAKER
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QUESTIONS PRESENTED

Petitioner filed a habeas corpus petition pursuant to 28 U.S.C. §§ 2241, 2254, challenging his placement on segregated/solitary confinement. The district court dismissed his Petition, citing a conflict between the Circuits on whether habeas corpus can be used to challenge segregated confinement, but siding with those Circuits holding that it cannot. The Eleventh Circuit vacated in part, holding that Petitioner's due process claim challenging his placement on segregated confinement was cognizable in habeas corpus, but that his Eighth Amendment claim was not. The questions presented are as follows

I. Whether a prisoner may file a habeas corpus petition to challenge his placement on segregated/solitary confinement.

II. If so, whether a court considering such a petition challenging placement on segregated/solitary confinement may consider the conditions of confinement.

LIST OF PARTIES

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Daker, Waseem, Petitioner;

McLaughlin, Gregory, former Warden, Respondent;

Perry, Clinton, current Warden, Respondent.

LIST OF RELATED CASES

Daker v McLaughlin, No. 5:18-CV-00171, U. S. District Court for the Middle District of Georgia. Judgment entered July 18, 2018.

Daker v Warden, Nos. 18-13800, 18-14984, U. S. Court of Appeals for the Eleventh Circuit Judgment entered Feb. 14, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Waseem Daker respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Daker v. Warden*, Nos. 18-13800, 18-14984.

OPINIONS BELOW

The Opinion of the Court of Appeals is unpublished, but reported at *Daker v. Warden*, Nos. 18-13800, 18-14984, 805 FedAppx 648, 2020 WL 751817 (11th Cir. Feb. 14, 2020).

JURISDICTION

The Court of Appeals affirmed Petitioner's appeal from the dismissal of Petitioner's Complaint on February 14, 2020. *Appendix A.* The Court of Appeals denied a petition for rehearing on April 3, 2020. *Appendix D.* On March 19, 2020, this Court entered its COVID-19 Order extending the deadline to file Petition for Writ of Certiorari for 150 days, or until August 31, 2020. 589 U.S. ___. On April 15, 2020, this Court entered its COVID-19 Order holding that "a single paper copy of the document, formatted on 8½ x 11 inch paper, may be filed." 589 U.S. ___. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

This case involves the Eighth Amendment to the United States Constitution, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This case involves the Fourteenth Amendment to the United States Constitution, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

This case involves Title 28, United States Code ("U.S.C.") § 2241, which provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.
>
> ***
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—

***

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States[.]

This case involves Title 28, United States Code ("U.S.C.") § 2254, which is reproduced in the Appendix at *Appendix E.*

This case involves Title 42, United States Code ("U.S.C.") § 1983, which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such of-

> ficer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On May 17, 2018, Petitioner Waseem Daker brought this action pursuant to 28 U.S.C. §§ 2241, 2254, in the District Court for the Middle District of Georgia against Respondent Warden Gregory McLaughlin based on his placement on the Georgia Department of Corrections ("GDC") Tier-II Segregation Program at Macon State Prison ("MSP").

First, Petitioner claimed that his placement on Tier II segregation violated due process. Second, Petitioner claimed that the conditions of Tier II violated the First and Eighth Amendments.

On July 18, 2018, the district court sua sponte dismissed the Petition without prejudice, holding that his claims were non-cognizable in habeas, that he had not paid the $400.00 civil filing fee, and was barred from proceeding in forma pauperis under the Prison Litigation Reform Act ("PLRA") three-strikes provi-

sion, 28 U.S.C. § 1915(g), and did not satisfy the "imminent danger of serious physical injury" ("IDOSPI") exception to § 1915(g). *Appendix B.*

On August 14, 2018, Petitioner timely filed a Fed.R.Civ.P. 59(e) Motion to Vacate that Order and Judgment. (Doc. 6.) Petitioner also filed a Motion to Proceed IFP on Appeal. (Doc. 11.)

On October 25, 2018, the district court denied Petitioner's Fed.R.Civ.P. 59(e) Motion, *Appendix C* at 2-10.

Petitioner timely appealed.

The Eleventh Circuit opinion affirmed in part and vacated in part the dismissal. *Appendix A.* Petitioner unsuccessfully sought rehearing, which the Eleventh Circuit denied on April 3, 2020. *Appendix D.*

REASONS FOR GRANTING THE WRIT

I. Whether a prisoner may file a habeas corpus petition to challenge his placement on segregated/solitary confinement.

A. There is a conflict between the federal Courts of Appeals.

As the district court recognized, *Appendix C* at 5 n.2, there is a conflict between the federal Courts of Appeals on this question. The Second, Third, Fifth, and D.C. Circuits have allowed claims similar to Petitioner's to proceed in habeas corpus. *See, e.g., Poree v. Collins*, 866 F.3d 235 (5th Cir. 2017); *Thompson v.*

Choinski, 525 F.3d 205 (2nd Cir. 2008); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 242 n.5 (3rd Cir. 2005); *Aamer v. Obama*, 742 F.3d 1023 (D.C.C. 2014). The district court recognized that "Petitioner's arguments reflect the reasoning in some of these cases." *Appendix C* at 5 n.2.

On the other hand, the Ninth and Seventh Circuits have determined or suggested that § 1983 and habeas are mutually exclusive. *See Nettles v. Grounds*, 830 F.3d 922 (9th Cir. 2016); *Richmond v. Scibana*, 387 F.3d 602, 605 (7th Cir. 2004). Both Circuits have further determined that challenges to placement in administrative segregation are not cognizable in habeas. *Nettles*, 830 F.3d at 922; *Jaske v. Hanks*, 27 FedAppx 622, 623 (7th Cir. 2001).

The Eleventh Circuit appears to have taken a middle, rather conflicting approach. On one hand, the Eleventh Circuit has stated, regarding habeas corpus petitions under § 2254 and complaints under 42 U.S.C. § 1983, that "[t]hese avenues are mutually exclusive: if a claim can be raised in a federal habeas petition, that same claim cannot be raised in a separate § 1983 civil rights action." *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006). *Appendix A* at 3. On the other hand, the Eleventh Circuit has also specifically held that such claims may proceed in a habeas petition,

> it is proper for a district court to treat a petition for release from administrative segregation as a petition for a writ of habeas corpus. [Cits.] Such release falls

> into the category of "fact or duration of . . . physical imprisonment" delineated in *Preiser v. Rodriquez*, 1973, 411 U.S. 475, 498-500, 93 S.Ct. 1827, 1841, 36 LE2d 439, 455-456 and reserved for habeas jurisdiction.

Krist v. Ricketts, 504 F.2d 887, 887–88 (5th Cir. 1974). *See also Sheley v. Dugger*, 833 F2d 1420, 1423-30 (11th.Cir.1987); *Medberry v Crosby*, 351 F3d 1049, 1053 (11th.Cir.2003). *See Appendix A* at 4-5. Reflecting this somewhat conflicting approach, the Eleventh Circuit held that Petitioner's due process claim could properly be raised in habeas corpus but that his Eighth Amendment claim could not.

B. The Eleventh Circuit opinion, holding that habeas corpus cases and Section 1983 cases are mutually exclusive conflicts with this Court's prior decisions.

This Court's Rule 10(c) provides that one factor this Court considers in deciding whether to grant certiorari is whether "United States court of appeals has decided... has decided an important federal question in a way that conflicts with relevant decisions of this Court." That standard is met here.

The district court cited *Muhammad v. Close*, 540 US 749, 750 (2004), holding that "Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." (citing *Preiser v. Rodriguez*, 411 US 475, 500 (1973)).

Appendix B at 2; *Appendix C* at 3 n.1, 4. But a challenge to placement on segregation, also known as "solitary confinement," is a "challenge to the validity of any confinement." Id.

Muhammad also stated in a footnote that

> The assumption is that the incarceration that matters under *Heck* is the incarceration ordered by the original judgment of conviction, not special disciplinary confinement for infraction of prison rules. This Court has never followed the speculation in *Preiser v. Rodriguez*, 411 US 475, 499 (1973), that such a prisoner subject to "additional and unconstitutional restraints" might have a habeas claim independent of § 1983, and the contention is not raised by the State here.

Muhammad, 540 US at 751 n.1. However, this was an assumption, not a holding, and the Court did not decide this question because "the contention is not raised by the State here." The Eleventh Circuit opinion below held:

> Here, the district court erred in concluding that Daker could not challenge his disciplinary segregation

> in a § 2254 proceeding. Although the Supreme Court has suggested that such claims might not be cognizable in a habeas proceeding, it has not done so in an opinion that is "clearly on point," so as to overrule our precedent, which says that such claims are cognizable.

Appendix A at 4-5.

However, the Eleventh Circuit held that habeas and § 1983 "avenues are mutually exclusive: if a claim can be raised in a federal habeas petition, that same claim cannot be raised in a separate § 1983 civil rights action." Appendix A at 3, quoting *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006). See also Appendix A at 5 ("Daker's First and Eighth Amendment claims were cognizable under § 1983 and, therefore, not cognizable under the mutually exclusive remedy of § 2254.").

First, *Muhammad* recognized that "Some cases are hybrids, with a prisoner seeking relief unavailable in habeas, notably damages, but on allegations that not only support a claim for recompense, but imply the invalidity either of an underlying conviction or of a particular ground for denying release short of serving the maximum term of confinement." *Muhammad*, 540 US at 750-51. However, the fact of hybrid claims suggests itself that some claims are cognizable in either habeas corpus or § 1983.

Similarly, the district court cited *Nelson v. Campbell*, 541 US 637, 124 SC 2117, 158 LE2d 924 (2004), to hold that, "constitutional claims that merely challenge the conditions of a prisoner's confinement, whether the inmate seeks monetary or injunctive relief, fall outside [the core of habeas] and may be brought pursuant to § 1983 in the first instance." *Appendix C* at 3, 5. This reliance is misplaced for two(2) reasons. First, the fact that a claim may be raised under § 1983 does not mean that it must be so raised. *Nelson* is permissive, not mandatory. Second, *Nelson* held that challenges to the procedure employed in executing a death sentence without challenging the sentence itself can be raised in a § 1983 action, but *Nelson* says nothing about whether a challenge to placement on segregation, also known as "solitary confinement," is a "challenge to the validity of any confinement," *Muhammad*, 540 US at 750, cognizable in habeas corpus.

The other case cited by the district court, *Appendix B* at 2, *Hill v. McDonough*, 547 US 573, 126 SC 2096, 165 LE2d 44 (2006), also does not in any way undermine cases holding that challenges to segregated confinement may be brought under habeas corpus, in any way. Like *Nelson*, *Hill* held that challenges to the procedure employed in executing a death sentence without challenging the sentence itself can be raised in a § 1983 action. Like *Nelson*, *Hill* says nothing about whether a challenge to placement on segregation, also known as "solitary confinement," is a "challenge to the validity of any confinement," *Muhammad*, 540 US at 750, cognizable in habeas corpus.

Similarly, the rule set forth in *Heck v. Humphrey*, 512 US 477 (1994), and *Edwards v. Balisok*, 520 US 641 (1997), that "where success in a prisoner's §

1983 damages action would implicitly question the validity of conviction or duration of sentence, the litigant must first achieve favorable termination of his available state, or federal habeas, opportunities to challenge the underlying conviction or sentence," *Muhammad*, 540 US at 751, is not a bar to habeas corpus; instead it is a bar to § 1983 claims. Rather than limiting habeas corpus, the *Heck/Balisok* rule requires it.

This Court's cases make clear that *they are not limits on habeas corpus; they are limits on § 1983.* Some claims must be brought under habeas corpus, but other claims may be brought under § 1983. *Wilkinson v. Dotson*, 544 US 74, ___, 125 SC 1242, 161 LE2d 253, 259 (2005) ("The question before us is whether they may bring such an action under Rev Stat § 1979, 42 U.S.C. § 1983, the Civil Rights Act of 1871, or whether they must instead seek relief exclusively under the federal habeas corpus statutes. We conclude that these actions may be brought under § 1983."); *Hill*, 547 US at ___, 126 SC at ___, 165 LE2d at 49 ("The question before us is whether Hill's claim must be brought by an action for a writ of habeas corpus under the statute authorizing that writ, 28 U.S.C. § 2254, or whether it may proceed as an action for relief under 42 U.S.C. § 1983."); *Hill*, 547 US at ___, 126 SC at ___, 165 LE2d at 49 ("An inmate's challenge to the circumstances of his confinement, however, may be brought under 1983.") (citing *Muhammad*, 540 US at 750).

This Court's cases hold that habeas corpus is the "sole" or "exclusive" remedy to challenge one's conviction or sentence, *Dotson*, 544 US at ___, 125 SC ___, 161 LE2d at 262 ("habeas was the sole vehicle..."); Id. ("the prisoner's claim for an injunction barring future

unconstitutional procedures did not fall within habeas' exclusive domain."), but this Court has never held that § 1983 is the "sole" or "exclusive" remedy to challenge one's conditions of confinement. Instead, "conditions of confinement" cases are not limited to civil rights cases, but may also be based statutory rights enforced in ways other than § 1983 actions, *See Friedl v. City of New York*, 210 F3d 79, 86 (2nd.Cir.2000) ("not every 'challenge to the conditions of confinement' takes the form of a civil rights action"), such as state law claims. *Arce v. Walker*, 58 FSupp2d 39, 44 (W.D.N.Y.1999). Without invoking § 1983, a state prisoner may challenge his conditions of confinement under RLUIPA, 42 U.S.C. §§ 2000cc-1 *et seq.*; the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 *et seq.*, *Pennsylvania Department of Corrections v. Yeskey*, 524 US 206, 118 SC 1952 (1998), Section 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794, *Harris v. Thigpen*, 941 F2d 1495, 1522 n.41 (11th.Cir.1991); *Onishea v. Hopper*, 171 F3d 1289, 1301-04 (11th.Cir.1999); or if the prerequisites are met, under the Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350; pendent jurisdiction, 28 U.S.C. § 1367; diversity jurisdiction, 28 U.S.C. § 1332. In rare circumstances, a prisoner may challenge his conditions of confinement under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1362, 1364, or Anti-Trust Act.

The district court also held that, "since the cases relied on by Petitioner were decided, the Supreme Court has 'declared [] in no uncertain terms, that when a prisoner's claim would not "necessarily spell speedier release," that claim does not lie at the "core of habeas corpus," and may be brought, if at all, under § 1983.'" *Appendix C* at 5 (quoting *Skinner v.*

Switzer, 562 US 521, 535 n.13, 131 SC 1289, 179 LE2d 233 (2011). However, as the Eleventh Circuit held below, *Skinner* also did not overrule those cases holding that challenges to segregated confinement may be raised in a habeas corpus case.

First, *Skinner* quoted *Wilkinson v. Dotson*, 544 US 74, 82, 125 SC 1242, 161 LE2d 253 (2005), that certain claims "may be brought, if at all, under § 1983." *Skinner*, 562 US at 535 n.13. However, nothing in either *Skinner* or *Dotson* translates into meaning that the fact that a claim "may" be brought under § 1983 means that it "must" be brought under § 1983. Again, that line of cases is a limit on § 1983 actions, not on habeas cases.

Second, *Skinner* held that the prisoner's claims in that case could be used brought under § 1983, and were not jurisdictionally barred by either the *Rooker-Feldman* doctrine, *Skinner*, 562 US at ___(II.B.), 179 LE2d at 242-244 (citing *Rooker v. Fidelity Trust Co.*, 263 US 413, 44 SC 149, 68 LE 362 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 US 462, 103 SC 1303, 75 LE2d 206 (1983)), or the *Heck* doctrine, *Skinner*, 562 US at ___(II.C.), 179 LE2d at 244-246.

Third, *Skinner* was distinguishable in that it pertained to a death row prisoner's challenge o a state limiting post-conviction DNA testing. *Skinner* had nothing to do at all with challenges to segregated confinement.

Fourth, most importantly of all, *Skinner* recognized that the purposes of habeas corpus include to

"terminate custody, accelerate the future date of release from custody, []or reduce the level of custody." *Skinner*, 562 US at ___(II.C.), 179 LE2d at 245 (emphasis supplied) (quoting *Dotson*, 544 US at 86, 125 SC 1242, 161 LE2d 253 (Scalia, J., concurring)). In *Dotson*, Justice Scalia noted that

> It is one thing to say that permissible habeas relief, as our cases interpret, includes ordering a "quantum change in the level of custody," *Graham v. Broglin*, 922 F2d 379, 381 (7th.Cir.1991) (Posner, J.), such as release from incarceration to parole. It is quite another to say that the habeas statute authorizes federal courts to order relief that neither terminates custody, accelerates the future date of release from custody, nor reduces the level of custody.

Dotson, 544 US at 86, 125 SC at ___, 161 LE2d at 265 (Scalia, J., concurring) (emphasis supplied). A habeas petitioner challenging segregated confinement might not seek to "terminate custody, [or] accelerate the future date of release from custody," but he does seek to "reduce the level of custody," making his claim entirely consistent with *Skinner*. A prisoner seeking release from solitary confinement to general population seeks a "quantum change in the level of custody," *Dotson*, 544 US at 86, 125 SC at ___, 161 LE2d at 265

(Scalia, J., concurring) (quoting *Graham v. Broglin*, 922 F2d 379, 381 (7th.Cir.1991) (Posner, J.)) (emphasis supplied), much like one seeking relief "such as release from incarceration to parole." Id.

The district court here held that "Petitioner's civil rights claims do not affect the duration of his confinement. Instead, even if Petitioner prevailed on all of his claims and received all the relief demanded, 'the duration of his sentence would not be shortened by one moment.'" *Appendix B* at 4 (quoting *McKinnis v. Mosely*, 693 F2d 1054, 1057 (11th.Cir.1982)); *Appendix C* at 4-5. The flaw in the district court's reasoning is that it narrowly views shortening of a sentence as the only way one may be released from confinement and fails to recognize that "reduce[ing] the level of custody," *Skinner*, 562 US at ___(II.C.), 179 LE2d at 245, or ordering a "quantum change in the level of custody," *Dotson*, 544 US at 86, 125 SC at ___, 161 LE2d at 265 (Scalia, J., concurring) (citing *Graham v. Broglin*, 922 F2d 379, 381 (7th.Cir.1991) (Posner, J.)), is a valid form of habeas relief. Segregated confinement is an even more restrictive form of custody than general population. If Petitioner prevails on his claims, he would be released from the highly restrictive form of segregated confinement, i.e., "reduce the level of custody," *Skinner*, 562 US at ___(II.C.), 179 LE2d at 245, even if he is not released altogether from prison.

Consider the nature of a due process claim challenging segregation. In *Sandin v. Conner*, 515 US 472, 115 SC 2293 (1995), this Court held that prisoners can be found to have a liberty interest protected by the Due Process Clause in three sets of circumstances: (1) when the right at issue is independently protected by the Constitution, (2) where the challenged action

causes the prisoner to spend more time in prison, and (3) where the action imposes "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 US at 484. Since *Sandin* was decided, however, some courts have often focused on the third *Sandin* situation—"atypical and significant hardship in relation to the ordinary incidents of prison life"—and overlooked the first *Sandin* situation—when the right at issue is independently protected by the Constitution.

Sandin says that some prison conditions "exceed[] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force." Id. 515 US at 484. That is, they are "so severe in kind or degree (or so removed from the original terms of confinement) that they amount to deprivations of liberty" regardless of the terms of state law." *Id.* 515 US at 497 (Brewer, J., dissenting). *Sandin* cited as examples involuntary commitment to a mental hospital, *Id.* 515 US at 484 (citing *Vitek v. Jones*, 445 US 480, 491-94, 100 SC 1254 (1980), unwanted administration of antipsychotic drugs, *Id.* (citing *Washington v. Harper*, 494 US 210, 221-22, 110 SC 1028 (1990), and unjustified infringement on First Amendment rights.

In *Vitek*, this Court held that a prisoner lawfully sentenced to prison could not be involuntarily committed to a mental hospital without due process. The state's lawful conviction and sentence gave the state the right to confine the prisoner in prison, but not in a mental hospital. Thus, in such a case, a prisoner should be allowed to file a habeas corpus petition naming the hospital medical director as respondent, and seeking release from the hospital, even if he is not

challenging his conviction or sentence. Habeas relief is appropriate because it would result in his release from the more restrictive confinement of the hospital, even if he could still be kept in custody in prison. Thus, a *Vitek* claim is an example of a due process claim that may be brought under either § 1983 or habeas corpus.

The *Vitek* situation is particularly relevant here. In *Kirby v. Siegelman*, 195 F3d 1285, 1292 (11th.Cir.1999), the Eleventh Circuit cited *Vitek* to note that, in *Vitek*, "The Court also noted that one of the historic liberties protected by the Due Process Clause is the right to be free from unjustified intrusions on personal security." *Kirby*, 195 F3d at 1292 (citing *Vitek*, 445 US at 492, 100 SC at 1263 (quoting *Ingraham v. Wright*, 430 U.S. 651, 97 SC 1401, 51 LE2d 711 (1977))). "The compelled treatment through mandatory behavior modification programs, to which the prisoners in *Vitek* were exposed, was a proper factor to be considered by the district court," *Kirby*, *supra*, (citing *Vitek*, supra, and that "the subjection of the prisoner to mandatory behavior modification as a treatment for mental illness, constitute the kind of deprivations of liberty that requires procedural protections." *Id.* (Citing *Vitek*, at 494, 100 SC at 1264).

Without even addressing the second and third Sandin situations, Tier II imposes "compelled treatment through mandatory behavior modification programs" of the kind held in *Vitek* and *Kirby* to require "protection by the Due Process Clause of its own force." *Sandin*, *supra*, 515 US at 484. GDC SOP IIB09-0003, (Policy 209.08), "Administrative Segregation – Tier II," § III.D provides:

> Offenders under [sic] Transition (O.U.T.) Program: Cognitive Behavioral Program utilized in the Tier II facilities designed to enhance an offenders' [sic] motivation to change problem behaviors, criminal thinking, and provide prosocial skills. The curriculum is based on the cognitive behavioral treatment model and motivational interviewing techniques.

(Doc. 1-1 at 4.) GDC SOP IIB09-0003, (Policy 209.08), "Administrative Segregation – Tier II," § IV.F.5 provides:

> Release from Tier II:
> a. The offender must be actively participating in the O.U.T. Program (Offenders Under Transition). If appropriate, the offender must successfully complete the program prior to release from Tier II.

(Doc. 1-1 at 4-5.) Thus, for this reason alone, without more, Tier II placement is akin to involuntary commitment in a mental hospital in *Vitek*. Thus, challenges to Tier II segregated confinement should be cognizable in a habeas petition, just as a challenge to involuntary commitment in a mental hospital in *Vitek* would be.

Although some of this Court's precedents are limits on § 1983 actions, they are not limits on habeas corpus. Thus, the Eleventh Circuit decision that § 1983 and habeas corpus are "mutually exclusive" is contrary to this Court's precedents.

C. The issue presented is of exceptional public importance.

The issue presented is of exceptional public importance for several reasons. First, if all prisoners seek is release from a more restrictive form of confinement, such as solitary confinement, to a less restrictive form of confinement, such as general population—and if they do not seek damages or other forms of injunctive relief—then there is no legitimate reason to force them to file a § 1983 action as opposed to a habeas corpus petition. Under 28 U.S.C. § 1914, the filing fee for a habeas corpus petition is only $5.00, as opposed to $350.00 filing fee to file a § 1983, plus an additional $50.00 administrative fee, or $400.00 total.

Second, habeas corpus cases can typically be resolved expeditiously, as opposed to the typically longer § 1983 process. This is especially important when a prisoner seeks release from segregation confinement, because "writs of habeas corpus are intended to afford a "'swift and imperative remedy in all cases of illegal restraint or confinement."'" *Johnson v. Rogers*, 917 F2d 1283, 1284 (10th.Cir.1990) (quoting *Fay v. Noia*, 372 U.S. 391, 400, 83 S.Ct. 822, 828, 9 L.Ed.2d 837 (1963) (citation omitted)). *See also Van Buskirk v. Wilkinson*, 216 F.2d 735, 737-38 (9th Cir.1954) (habeas corpus "is a speedy remedy, entitled by statute to special, preferential consideration to insure expeditious hearing and determination."); *McClellan v. Young*,

421 F.2d 690, 691 (6th Cir.1970) (same); *Glynn v. Donnelly*, 470 F.2d 95, 99 (1st Cir.1972) (28 U.S.C. § 2243 manifests policy that habeas petitions are to be heard promptly). Plainly, "the writ of habeas corpus, challenging detention, is reduced to a sham if the trial courts do not act within a reasonable time." (Footnote omitted). *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir.1978), and its purpose is eviscerated if the petitioner is unnecessarily forced to raise his claim under § 1983 instead.

Third, under the Prison Litigation Reform Act of 1995 ("PLRA") three-strikes provision, 28 U.S.C. § 1915(g), a prisoner with three-strikes is barred from filing § 1983 in forma pauperis, but "The PLRA, including Section 1915(g), applies only to civil cases and does not, for example, apply to habeas corpus proceedings." *Rivera v. Allin*, 144 F.3d 719, 722 n.3 (11th.Cir.1998). Thus, forcing a prisoner to file under § 1983 could effectively—and unnecessarily—deny him court access to challenge his segregated confinement whereas allowing him to raise his claim under habeas corpus would not.

Fourth, where a prisoner challenges his segregated confinement on constitutional grounds, assuring that his claims are heard on the merits is in the public interest because "it is always in the public interest to protect constitutional rights." *Phelps-Roper v. Nixon*, 543 F3d 685, 670 (8th.Cir.2008) . *Accord Mayweathers v. Newland*, 258 F3d 930, 938 (9th.Cir.2001); *Washington v. Reno*, 35 F3d 1093, 1103 (6th.Cir.1994).

II. If a prisoner may file a habeas corpus petition to challenge his placement on segregated/solitary

confinement, whether a court considering such a petition challenging placement on segregated/solitary confinement may consider the conditions of confinement.

A. There is a conflict between the federal Courts of Appeals.

The Eleventh Circuit held:

> Claims that a prison has violated the Eighth Amendment are cognizable under § 1983. *See Thomas v. Bryant*, 614 F.3d 1288, 1303–04 (11th Cir. 2010). Release from custody is generally not an available remedy for a violation of the Eighth Amendment. *Gomez v. United States*, 899 F.2d 1124, 1126 (11th Cir. 1990). However, in *Sheley*, we remanded, in a habeas proceeding, for an evidentiary hearing on an Eighth Amendment claim that the length of an inmate's administrative segregation constituted cruel and unusual punishment. *Sheley v. Dugger*, 833 F.2d 1420, 1428–30 (11th Cir. 1987) (*per curiam*).

Appendix A at 4. However, the Eleventh Circuit then went on to hold:

> However, Daker's First and Eighth Amendment claims were cognizable under § 1983 and, therefore, not cognizable under the mutually exclusive remedy of § 2254. Although we allowed an Eighth Amendment claim to proceed under § 2254 in *Sheley*, that inmate was challenging the duration of his segregation as unconstitutional, so that claim was within the "core" of habeas. In contrast, Daker claims only that he was denied adequate food and medical care and was exposed to unsanitary conditions.

Appendix A at 5. This holding conflicts with the holdings of the Second and Third Circuits, which have held that courts must consider both the duration and conditions of segregation to determine if it is atypical and significant. *Palmer v Richards*, 364 F3d 60, 64 (2nd.Cir.2004); *Mitchell v. Horn*, 318,F3d 523, 532 (3rd.Cir.2003).

In *Palmer v Richards*, 364 F3d 60, 64 (2nd.Cir.2004), the Second Circuit held:

A prisoner's liberty interest is implicated by prison discipline, such as SHU confinement, only if the discipline "imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," *Sandin v. Conner*, 515 U.S. 472, 484, 115 S.Ct. 2293, 132 L.Ed.2d 418 (1995); *see Frazier v. Coughlin*, 81 F.3d 313, 317 (2d Cir.1996) (per curiam)... Factors relevant to determining whether the plaintiff endured an "atypical and significant hardship" include "the extent to which the conditions of the disciplinary segregation differ from other routine prison conditions" and "the duration of the disciplinary segregation imposed compared to discretionary confinement." *Wright v. Coughlin*, 132 F.3d 133, 136 (2d Cir.1998).

Our cases "make clear that duration is not the only relevant factor. The conditions of confinement are a distinct and equally important

> consideration in determining whether a confinement in SHU rises to the level of `atypical and severe hardship....'" *Ortiz v. McBride*, 323 F.3d 191, 195 (2d Cir.2003) (per curiam).

Similarly, in *Mitchell v. Horn*, 318,F3d 523, 532 (3rd.Cir.2003), the Third Circuit held that, "In deciding whether a protected liberty interest exists under *Sandin*, we consider the duration of the disciplinary confinement and the conditions of that confinement in relation to other prison conditions."

The Eleventh Circuit opinion below thus conflicts with those of the Second and Third Circuits.

B. The Eleventh Circuit opinion, holding that an Eighth Amendment claim, challenging the duration, but not conditions, of segregated confinement, conflicts with this Court's prior decisions..

This Court's Rule 10(c) provides that one factor this Court considers in deciding whether to grant certiorari is whether "United States court of appeals has decided... has decided an important federal question in a way that conflicts with relevant decisions of this Court." That standard is met here, as the Eleventh Circuit opinion below conflicts with those of this Court.

In *Sandin v. Conner*, 515 US 472, 484 (1995), this Court held that:

> Certain circumstances create liberty interests which are protected by the Due Process Clause. *See also Board of Pardons v. Allen*, 482 U. S. 369 (1987). But these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force,... nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Both inquiries, whether the restraint "exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause" and whether it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," necessarily require an inquiry into the conditions of said confinement, as the Second and Third Circuits recognized. Indeed, in *Sandin*, this Court expressly considered the conditions of discipline segregation vis-à-vis general population and administrative segregation:

> Conner's discipline in segregated confinement did not present the type of atypical, significant deprivation

> in which a State might conceivably create a liberty interest. *The record shows that, at the time of Conner's punishment*, disciplinary segregation, with insignificant exceptions, *mirrored those conditions imposed upon inmates in administrative segregation and protective* custody... Thus, Conner's confinement did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction. Indeed, *the conditions at Halawa involve significant amounts of "lockdown time" even for inmates in the general population.*

(Emphasis supplied, footnotes omitted).

Similarly, in *Wilkinson v. Austin* 545 US 209, (2005), this Court held that placement in Ohio's supermax prison constituted an "atypical and significant hardship" under *Sandin*. This Court considered both the conditions and the duration of confinement in its holding:

> *Conditions at OSP are more restrictive than any other form of incarceration in Ohio, including conditions*

on its death row or in its administrative control units. The latter are themselves a highly restrictive form of solitary confinement... In the OSP almost every aspect of an inmate's life is controlled and monitored. Inmates must remain in their cells, which measure 7 by 14 feet, for 23 hours per day. A light remains on in the cell at all times, though it is sometimes dimmed, and an inmate who attempts to shield the light to sleep is subject to further discipline. During the one hour per day that an inmate may leave his cell, access is limited to one of two indoor recreation cells.

Incarceration at OSP is synonymous with extreme isolation. In contrast to any other Ohio prison, including any segregation unit, OSP cells have solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates. All meals are taken alone in the inmate's cell instead of

> in a common eating area. Opportunities for visitation are rare and in all events are conducted through glass walls. It is fair to say OSP inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.
>
> *Aside from the severity of the conditions*, placement at OSP is for an indefinite period of time, limited only by an inmate's sentence.

Id. At 214-15 (Emphasis supplied, footnotes omitted).

Thus, the Eleventh Circuit's holding below that Petitioner's claim based on the conditions of Tier II could not be raised conflicts with this Court's holdings in *Sandin* and *Austin*.

C. The issue presented is of exceptional public importance.

The issue presented is of exceptional public importance because the Eleventh Circuit's holding raises a dilemma because it can lead to either of two interpretations, both of which are internally contradictory or inconsistent.

On one hand, by holding that Petitioner could raise his Fourteenth Amendment Due Process claim, but not his First and Eighth Amendment claims, in

habeas, the Eleventh Circuit effectively gutted Petitioner's Due Process claim. Indeed, the violations of First and Eighth Amendment rights on Tier II Segregation are highly relevant to whether that confinement "exceed[s] the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause" and whether it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," under Sandin. Thus, this inconsistent holding effectively prevents Petitioner from proving what he must prove in order to prove a Due Process claim under *Sandin*.

On the other hand, if the Eleventh Circuit meant that the district court could consider the facts of the First and Eighth Amendment violations on Tier II as relevant to the Due Process claim but not as stand-alone claims on their own, that too is an inconsistent approach, given that the same facts form the basis for both Due Process Clause claims and First and Eighth Amendment claims. Thus, this Court should grant the writ to rectify these inconsistencies in this matter of public interest.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully Submitted,

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