No. 23-1034

IN THE
Supreme Court of the United States

TONY LOVE,
Petitioner,
v.

RON NEAL, Warden,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Indiana offers inmates in its custody good time credit if they meet certain qualifications. That credit may reduce the amount of time an inmate is incarcerated. The credit is offered and removed at the discretion of the State.

In this case, Tony Love was serving a 55-year sentence for murder. Nearly two decades into that sentence, he participated in a prison brawl that seriously injured multiple corrections officers. Prison officials sought to revoke Love's good time credit for an egregious violation of prison policy.

Prison officials gave Love a written statement of the charges against him, allowed him to call witnesses, relied on contemporaneous statements and video to find him responsible, and provided a written summary of their findings. The officials did not conduct a separate sanctions-phase hearing.

The questions presented are:

1. Whether Love preserved his constitutional challenge for this Court's review.

2. Whether *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill*, 472 U.S. 445 (1985), require prison officials to conduct a separate sanctions-phase hearing to hear arguments and evidence for mitigation before revoking good time credit.

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INTRODUCTION

Tony Love was convicted of murder in 2002. Sentenced to 55 years in prison, he had earned 5,700 days of good time credit when he was involved in a multi-inmate brawl that injured at least three corrections officers. Indiana prison officials provided Love with a written statement of the charges against him, allowed him to call witnesses, and relied on contemporaneous statements and video to confirm that he had been involved in the brawl. After finding him responsible, prison officials revoked all of Love's good time credit, pursuant to a policy that directed prison officials to revoke all good time credit for specific egregious offenses.

Despite the hearing he received, Love argues that *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill*, 472 U.S. 445 (1985), required prison officials to hear from him again before imposing a sanction. But Love never argued in district court that *Wolff* and *Hill* require officials to hold a separate mitigation-phase hearing before imposing prison discipline. Nor did the Seventh Circuit announce a new rule regarding *Wolff* and *Hill*. Instead, one member of the panel deemed Love to have waived his constitutional claims. And another member of the panel concluded that Love had procedurally defaulted on his claims and then forfeited his arguments in the federal court. That judge mentioned *Wolff*'s and *Hill*'s requirements only to explain why Love suffered no cognizable prejudice from the alleged constitutional violation.

To the extent the decision below establishes anything regarding due process, it is consistent with decisions from this Court and other circuits. Neither *Wolff* nor *Hill* requires prison officials to conduct "sentencing hearings" akin to those in criminal cases. And Love cites no decision from another circuit requiring such a hearing. In fact, Love concedes that he seeks to extend *Wolff* and *Hill* to a "novel context." Pet.19 (quoting Pet.App.20a (opinion of Brennan, J.)). This case does not warrant this Court's review.

STATEMENT OF THE CASE

I. Statutory Background: Good Time Credit

Generally, if an Indiana inmate was convicted before July 1, 2014, he may earn good time credit while imprisoned or awaiting trial or sentencing. Ind. Code § 35-50-6-3. This credit is time added to an offender's actual days served to determine parole eligibility. § 35-50-6-0.5(5). An inmate may lose this credit, however, if he violates the "rules of the department of correction" or of any "penal facility in which the person is imprisoned." § 35-50-6-5(a)(1)–(2).

Before an inmate loses good time credit, though, Indiana law requires that he "be granted a hearing to determine the person's guilt or innocence." § 35-50-6-5(b). The inmate must have "advance written notice" of the hearing, as well as any "alleged misconduct and the rule the alleged misconduct is alleged to have violated." § 35-50-6-4(f)(1). Additionally, Indiana law requires that the inmate "have reasonable time to prepare for the hearing," "have an impartial decisionmaker," "appear and speak in [his] own behalf," be permitted to "call witnesses and present evidence," "confront and cross-examine each witness," receive

"assistance of a lay advocate," and receive "a written statement of the findings of fact, the evidence relied upon, and the reasons for the action taken." § 35-50-6-4(f)(2)–(8). Any finding of guilt must be "supported by a preponderance of the evidence presented at the hearing." § 35-50-6-4(f). By statute, Indiana does not set any maximum or minimum days of good time credit that inmates may earn or lose while incarcerated.

The Indiana Department of Correction (IDOC) sets internal policies through the Disciplinary Code for Adult Offenders (the Code). From February 2017 to March 2020—the time period relevant for this case—Executive Directive #17-09 supplemented the existing Code regarding reductions of good time credit. Pet.App.3a–4a. Under that directive, if an inmate was found guilty of an egregious or offensive act (like committing battery against an IDOC staff member), the inmate would lose the entire balance of his good time credit. Pet.App.4a.

II. Factual Background

In 2002, Tony Love was convicted of murder. Pet.App.1a. He was sentenced to 55 years in prison, and his earliest release date was 2046. Pet.App.57a. While incarcerated, he eventually accrued 5,700 days of good time credit. Pet.App.2a.

While serving his sentence, Love and several other inmates assaulted three correctional officers in August 2018. Pet.App.51a–55a. Love punched one officer "at least" eight times in the face and head, and another officer three times on the back of the head. Pet.App.54a. The officers suffered injuries, including

black eyes, a swollen forehead and nose, abrasions, and cuts. Pet.App.55a.

Indiana pursued both criminal charges and administrative sanctions. In state court, the State convicted Love of three counts of battery, for which he was sentenced to an additional four and a half years in prison. Pet.App.3a. IDOC pursued its disciplinary sanctions as well. Pet.App.2a. IDOC charged Love with violating prison rule A-102, which prohibits prisoners from violating state or federal law. Pet.App.4a. At Love's first disciplinary hearing in December 2018, IDOC imposed penalties including one year of restrictive housing, monetary restitution, a written reprimand, and restricted access to phone and commissary privileges for forty-five days. Pet.App.4a. IDOC did not mention Directive #17-09 but revoked all 5,700 days of love's good time credit. Pet.App.5a, 14a.

The prison reviewed Love's case a second time after an appeal review officer vacated the sanctions and assigned Love's case for a rehearing. Pet.App.51a. At the second hearing, the disciplinary hearing officer again found Love guilty of violating the prison rule A-102, which prohibits inmates from violating state or federal law. *Id*. The officer reinstated all previously imposed sanctions, including the loss of all good time credit. Pet.App.56a. None of these documents referenced Directive #17-09. Pet.App.14a.

Love appealed the determination of the hearing officer to the facility head. Pet.App.58a. This appeal was denied. *Id*. Love then appealed to the Final Reviewing Authority for IDOC. *Id*. The Final Reviewing Authority denied his appeal on May 1, 2020. *Id*.

III. Proceedings Below

Proceeding pro se, Love filed a federal habeas petition under 28 U.S.C. § 2254. Pet.App.56a. Love raised the following grounds for habeas relief: (1) "the Appeal Review officer's orders were ignored;" (2) "the conduct report was duplicated to extend his sanctions;" (3) he was "denied witness statements;" and (4) "his sanctions were excessive." Pet.App.56a. Love did not argue that the loss of good time credit violated due process. *Id.* The district court ruled that Love's claims were meritless or did not provide grounds for granting federal habeas relief. Pet.App.60a–62a; *see* Pet.App.5a.

Love appealed to the Seventh Circuit. His initial pro se brief raised the same four arguments he made below. *See* Love C.A. Br., ECF No. 4. The Seventh Circuit then assigned counsel and ordered supplemental briefing on "whether the State may, consistent with the due process clause of the Fourteenth Amendment, deprive petitioner of so much earned time by using the due process requirements" of *Wolff* and *Hill*. Pet.App.5a. "Love and his counsel chose not to make this argument on appeal." Pet.App.29a (opinion of Brennan, J.,); *see also* Pet.App.45a n.3 (Hamilton, J., dissenting) ("recruited counsel apparently chose not to address the issue as we tried to frame it"). Rather, Love raised two main arguments: (1) that due process required IDOC to provide Love an opportunity to argue why revocation of less good time credit would have been more appropriate; and (2) that Directive #17-09 was arbitrary for linking penalties to the quantity of good time credit rather than the degree of the offense. Pet.App.5a–6a.

The Seventh Circuit ruled that Love was not entitled to habeas relief. Pet.App.2a. Judge Brennan wrote the lead opinion announcing the court's judgment, with Judge Kirsch concurring only in the judgment. Pet.App.27a. Judge Hamilton dissented. Pet.App.30a.

Judge Brennan rejected Love's two new arguments, explaining that they were procedurally defaulted and forfeited. As Judge Brennan explained, Love did not raise either of his claims during prison administrative proceedings. Pet.App.8a. Judge Brennan thought that Love could show good cause for the default because IDOC did not tell Love that Directive #17-09 controlled the revocation of his good time credit. Pet.App.9a–10a. In Judge Brennan's view, however, Love could not show he had been prejudiced by that omission because he did not show his good time credit sanction would have been reduced if he had presented additional evidence. Pet.App.12a–13a.

Judge Brennan also concluded that Love had forfeited his due process arguments by failing to raise them in district court. Pet.App.14a. For the court to overlook the forfeiture, Judge Brennan explained, Love would have to demonstrate that plain error review was warranted. Pet.App.15a–16a. That, in turn, would require Love to "demonstrate that: '(1) exceptional circumstances exist; (2) substantial rights are affected; and (3) a miscarriage of justice will occur if plain error review is not applied.'" Pet.App.15a. In Judge Brennan's view, Love could satisfy none of those requirements because there was no constitutional flaw in Directive #17-09. Pet.App.16.

Judge Brennan first explained how, generally, determinate punishments for offenses are constitutional. Sentencing schemes providing for individualized consideration in sentencing reflect "public policy" choices, not "constitutional commands." Pet.App.17a (quoting *Lockett v. Ohio*, 438 U.S. 586, 604–05 (1978)). Judge Brennan rejected Love's argument that *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill,* 472 U.S. 445 (1985), require prison administrators to hear mitigating arguments before deciding how much good time credit to revoke. Pet.App.17a. Together, those decisions establish that prisoners must have (1) advance written notice of disciplinary charges, (2) an opportunity to call witnesses and present evidence, (3) a written statement reflecting the factfinder's conclusion, and (4) "some evidence" supporting that conclusion. Pet.App.18a. But nothing in *Wolff* or *Hill* requires a separate mitigation hearing before an official revokes good time credit. Pet.App.18a, 20a. In fact, Judge Brennan observed, the Seventh Circuit has regularly declined to impose requirements beyond what *Wolff* and *Hill* require. Pet.App.19a–20a.

Judge Brennan also rejected Love's argument that Directive #17-09—which mandated the loss of all good time credit for egregious policy violations—was arbitrary on its face. Pet.App.21a. He concluded that it was reasonable for IDOC to decide that good time credit "is incompatible with egregious policy violations." Pet.App.22a. And even if Directive #17-09 had been applied differently to different inmates, it would still be constitutional under *Wolff* and *Hill* so long as inmates received due process when the prison determined their guilt. Pet.App.25a.

Judge Kirsch concurred only in the judgment. Pet.App.27a. He concluded that Love's constitutional arguments had not been properly preserved "because he never presented them to the district court." Pet.App.29a. In fact, Judge Kirsch observed, Love's appellate counsel did not even raise "what the dissent sees as the real problem—that *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill*, 472 U.S. 445 (1985), provide insufficient procedural protections when more than eighteen months of good time credit are at stake." Pet.App.27a–28a. To reach the issue raised by the dissent would not only require overlooking Love's forfeiture in district court, but would require "dramatically departing from the principle of party presentation upon which our adversarial system of adjudication rests." Pet.App.29a.

Judge Hamilton dissented. Pet.App.30a. He conceded that Love's submissions in the district court "did not raise the specific due-process" concern he had. Pet.App.44a. Judge Hamilton further conceded that "recruited counsel apparently chose not to address the issue" on appeal. Pet.App.45a n.3. Instead, recruited counsel raised a distinct due process theory that lacked merit. *Id.* Nevertheless, Judge Hamilton would have reached the merits. On the merits, he would have held that due process requires greater protections than *Wolff* and *Hill* where more than eighteen months of good time credit are at stake. Pet.App.38a. Judge Hamilton, however, declined to outline the precise procedures he would require. *Id.*

Love petitioned for rehearing en banc, but no active service judge requested a vote, and the petition was denied on October 17, 2023. Pet.App.46a–47a.

REASONS TO DENY THE PETITION

This Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And even if it were "to ignore the value of other courts going first, [it] could not proceed very far" because Love failed to preserve "the critical issue[]" below. *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2399 (2024).

Love argues that due process requires prison administrators to hold a separate, "sanctions phase" hearing before revoking good time credit, even if a prison policy sets a mandatory sanction. Pet.23. Love, however, failed to press that constitutional argument before the prison officials and in the district court. That forfeiture alone makes this a poor candidate for review, especially since Love did not provide evidence of prejudice from the alleged due process violation.

There is, moreover, no circuit split over whether prison administrators must hold a separate, mitigation-phase hearing before imposing a sanction. The cases Love cites address different issues, such as whether prison officials must consider an informant's reliability in determining guilt. And there is not even a majority opinion in this case that establishes a rule for the Seventh Circuit. Judges Brennan and Kirsch ruled against Love for different procedural reasons, and Judge Kirsch did not address the due-process issue even in that context.

To the extent Judge Brennan's single-judge opinion establishes any substantive rule for the Seventh Circuit, it is consistent with this Court's directives in *Wolff* and *Hill* regarding the process due to inmates.

This Court should not grant review to consider a forfeited argument in a case that was resolved on procedural grounds and affects no one but Love himself.

I. Love's Constitutional Claim Is Procedurally Defaulted and Forfeited

Courts may only adjudicate cases "bearing a fair resemblance to the case shaped by the parties." *United States v. Sineneng-Smith*, 590 U.S. 371, 380 (2020); *see Moody*, 144 S. Ct. at 2397 (parties' litigation choices "come[] at a cost"). At this stage, Love has presented a single constitutional argument: that *Wolff* and *Hill* require courts to conduct a free-ranging inquiry balancing penological interests against a prisoner's right to due process in disciplinary proceedings, and that this balancing requires prison administrators to hold a separate mitigation-phase hearing before imposing discipline. *See, e.g.*, Pet.15, 23. But Love failed to raise this argument (1) before the IDOC officers, (2) at the district court, and (3) at the Seventh Circuit. This Court should not be the first to consider an argument triply forfeited.

A. Love failed to exhaust state remedies before seeking federal habeas review

Habeas petitioners must exhaust state remedies for each claim specified in their petition. 28 U.S.C. § 2254(b)(1). This includes presenting "both the operative facts and controlling law," *Anderson v. Benik*, 471 F.3d 811, 814 (7th Cir. 2006) (citation omitted), to give state bodies "a fair opportunity to act," *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (emphasis omitted). The rule of exhaustion "has as much relevance in areas of particular state administrative con-

cern as it does where state judicial action is being attacked." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973); *see Markham v. Clark*, 978 F.2d 993, 995–96 (7th Cir. 1992) (holding that § 2254's exhaustion requirement applies to state administrative proceedings regarding loss of good time credit). There is no debate here that Love did not raise his constitutional claim before prison officials.

Where an offender fails to exhaust his state remedies, the offender can overcome this default by (1) demonstrating "cause and prejudice" or (2) showing a "miscarriage of justice" absent a court's intervention. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). In the Seventh Circuit, Pet.App.9a, and here, Pet.26–27, Love relies on the "cause and prejudice" prong only. He argues prejudice on the ground that he was unable to "present mitigation arguments" regarding the sanction to be imposed. Pet.27. But Love misunderstands the standard for prejudice. He must show "not merely a substantial federal claim, such that the errors at trial created a *possibility* of prejudice, but rather that the constitutional violation worked to his *actual* and substantial disadvantage." *Shinn v. Ramirez*, 596 U.S. 366, 379–80 (2022) (cleaned up).

Setting aside for the moment whether any constitutional violation occurred, Love provides no evidence that an opportunity to present mitigation evidence would have resulted in a lesser sanction. *See* Pet.App.25a–26a (opinion of Brennan, J.). This Court gives prisons discretion to impose different punishments on different inmates, so long as they provide a clear statement of reasons for their decisions.

Pet.App.25a–26a (opinion of Brennan, J.) (citing *Wolff*, 418 U.S. at 563–64). It is entirely possible that Love could present mitigation evidence and still lose all his good time credit due to his participation in the prison brawl. So he has not shown prejudice.

Love cannot fulfill this requirement by simply asserting that other offenders received different sentences. *See* Pet.5, 25. First, it is far from clear that the Department could impose a lesser sanction. Although Judge Brennan suggested that the Department could depart from Directive #17-09, *see* Pet.App.25a, that directive was couched in mandatory terms, *see* Pet.App.5a ("[p]er the Directive, the Department must revoke all accrued good time credit from inmates found guilty of qualifying offenses"); Pet.App.10a ("the Directive requires revoking all credit"). And, of course, mandatory penalties are constitutionally permissible. *See Townsend v. Burke*, 334 U.S. 736, 741 (1948). Any mitigation evidence thus may well not have moved the needle on Love's sanction (even if other inmates had accrued fewer days of good time credit).

Second, it is not clear from the record that Love *was* treated differently from the other offenders. One offender, Perry, initially lost 4,500 days of good time credit. *Perry v. Zatecky*, No. 1:20-cv-02916-JRS-DML, 2021 WL 5113985, at *1 (S.D. Ind. Nov. 2, 2021). Some of his good time credit was restored in November 2020 after the Directive was no longer in effect. *See id.* at *3. "But we have no information on why the Department made that decision." Pet.App.24a (opinion of Brennan, J.). Another offender, Schrock, lost

730 days of good time credit. Pet.App.24a–25a (opinion of Brennan, J.). But nothing in the record indicates that he had any more to lose. Pet.App.25a (opinion of Brennan, J.). And the department applied the Directive to the final participant in the fight. *Webb v. Warden*, No. 3:19-CV-273-JD-MGG, 2020 WL 8910953, at *2 (N.D. Ind. April 21, 2020). Love's argument regarding prejudice rests on speculation.

B. Love forfeited his constitutional claim by failing to raise it below

Love again failed to raise his current argument about *Wolff* and *Hill* in the district court. Pet.App.15a (opinion of Brennan, J.). And this Court "normally decline[s] to entertain such forfeited arguments." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016). Even when the Seventh Circuit appointed counsel and specifically asked Love to address "whether the State may, consistent with the due process clause of the Fourteenth Amendment, deprive petitioner of so much earned time by using the due process requirements of *Wolff* . . . and *Hill*," he (through appointed counsel) did not. Pet.App.5a (opinion of Brennan, J.). As the dissent explained, "recruited counsel apparently chose not to address the issue as we tried to frame it" and as the dissent itself "addressed it." Pet.App.45a n.3.

Instead, Love contends that *Wolff* and *Hill* require a broad due-process inquiry for every part of a prison disciplinary process, including the sanctions phase. This is the exact type of forfeited argument that this Court "normally declines to entertain." *Ohio v. EPA*, 144 S. Ct. 2040, 2057 (2024) (cleaned up). Or, at minimum, this Court should follow its usual rule to "not

decide in the first instance issues not decided below." *Zivotfsky v. Clinton*, 566 U.S. 189, 201 (2012). There is "no persuasive reason to depart" from the Court's ordinary rule here, especially considering the dearth of evidence that Love suffered any actual prejudice. *Ohio*, 144 S. Ct. at 2057.

II. Judge Brennan's Opinion, Announcing His Views Only, Does Not Create a Circuit Split or Depart from This Court's Precedents

Even if Love had properly preserved his arguments below, there is still no reason for this Court to address them. There is no circuit split or departure from this Court's precedents. As an initial matter, Judge Brennan's opinion does not establish a "rule" for the Seventh Circuit. *Contra* Pet. 12. And his analysis is entirely consistent with the other appellate decisions the Petition cites, which all apply *Wolff* and *Hill* in the same manner. Love identifies no lower-court decision holding that prison officials must provide a separate mitigation hearing after determining guilt but before imposing sanctions. In fact, imposing such a rule would contravene *Wolff* and *Hill*—neither of which insisted on a separate mitigation hearing. That missing requirement is precisely why the dissent below proposed a rule under which a mitigation hearing would be required only if the loss of good time credit exceeded eighteen months. But nothing in the Due Process Clause's text supports an arbitrarily selected eighteen-month rule.

A. The Seventh Circuit's judgment does not conflict with any other appellate courts

Much of the Petition's ire is directed against a purported "rule" about "due process" established by the

decision below. Pet. 12. But there is no majority opinion that establishes a rule for the Seventh Circuit. Judge Brennan wrote for himself, voting to affirm on the ground that Love's arguments were procedurally defaulted and forfeited. Pet.App.26a. Judge Brennan discussed due process' requirements for the purpose of explaining why Love suffered no prejudice and no miscarriage of justice would result. *Id.* Judge Kirsch "concur[red] in the judgment alone." Pet.App.29a. He did not discuss due process because he believed Love had waived any due-process argument by failing to raise the argument in district court. *Id.* The only issue on which the two justices agreed was a procedural point—Love's argument was not preserved.

Nor can Love cobble together a rule for the Seventh Circuit with the aid of Judge Hamilton's dissent. *Contra* Pet.26. He cites no Seventh Circuit precedent permitting this type of creative vote-counting. Even when evaluating decisions from this Court, the Seventh Circuit does not count dissents "in trying to discern a governing holding from divided opinions." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014); *see also Planned Parenthood of Ind. & Ky., Inc. v. Box*, 991 F.3d 740, 745 (7th Cir. 2021) (collecting cases from the Second, Third, Fourth, Tenth, Eleventh, and D.C. Circuits saying same), *vacated and remanded on other grounds*, 142 S. Ct. 2893 (mem.) (2022). And there is nothing in common between Judge Brennan's and Judge Hamilton's analyses of due process. What the Seventh Circuit decided thus extends no further than its judgment that Love himself is not entitled to habeas relief. There is no "decision in conflict" with another circuit. S. Ct. R. 10(a).

B. Judge Brennan's analysis is consistent with *Wolff*, *Hill*, and other circuits

Even if one takes Judge Brennan's opinion as announcing a rule for the Seventh Circuit, there is no circuit split to resolve. Neither *Wolff*, nor *Hill*, nor any opinion from another circuit requires prison officials to hold a separate mitigation-phase hearing before revoking good time credit. It suffices to afford inmates the procedures described in *Wolff* and *Hill*.

1. Generally, inmates' good time credit is protected by the Due Process Clause. *Wolff*, 418 U.S. at 557. In *Wolff*, however, this Court recognized that procedural due process in prison disciplinary hearings will look different from ordinary court proceedings. *Id.* at 560, 566. That's because the prison context has different goals and needs. *Id. Wolff* identified three procedural protections required before a prison may deprive an inmate of good time credit: (1) advance written notice of the claimed violation; (2) the inmate's ability to call witnesses and present evidence (within the prison's discretion); and (3) a written statement regarding the evidence relied on and the reasons for the action taken. *Id.* at 564–66. Interpreting and applying *Wolff*, *Hill* added a fourth requirement: that "some evidence" must support a decision to revoke good time credit. 472 U.S. at 455.

This Court has reversed lower courts that attempted to add additional requirements to *Wolff*'s list. *See Baxter v. Palmigiano*, 425 U.S. 308, 321–22 (1976). Outside of *Wolff*'s and *Hill*'s specific requirements, this Court has explained, procedures must be left "to the sound discretion of the officials of state prisons." *Id.* at 322 (citation omitted). Inmates may

challenge actions outside of *Wolff's* and *Hill*'s list of requirements only if there is "evidence of the abuse of discretion by the state prison officials." *Id.* at 323.

Lower courts across the Nation have taken this Court at its word. *See, e.g.*, *Crawford v. Littlejohn*, 963 F.3d 681, 683 (7th Cir. 2020) ("We have been told not to add procedures to *Wolff*'s list"); *see also MacMillan v. Pontesso*, 73 F. App'x 213, 215 (9th Cir. 2003) (due process is satisfied when *Wolff* and *Hill*'s requirements are met); *Mitchell v. Maynard*, 80 F.3d 1433, 1445 (10th Cir. 1996) (same); *Ragan v. Lynch*, 113 F.3d 875, 876 (8th Cir. 1997) (same); *Kalwasinski v. Morse*, 201 F.3d 103, 108 (2d Cir. 1999) (same). And Love does not ask this Court to overrule *Baxter*.

2. Of course, courts still must decide the extent of the four procedural requirements laid out in *Wolff* and *Hill*. Love cites to multiple cases creating a purported "circuit split." Pet.19–20. No case holds that, after determining the inmate's guilt using the processes laid down in *Wolff* and *Hill*, prison administrators must hold a separate mitigation hearing before imposing any sanction. Nor do the cases even employ the type of broad balancing test Love advocates for. Rather, each lower court asked detailed questions about what is required to fulfill *Wolff's* and *Hill*'s requirements. We will take each case in turn.

In *Taylor v. Rodriguez*, the Second Circuit asked whether the prison's determination "was based on 'some evidence'" as required by *Hill*. 238 F.3d 188, 194 (2d Cir. 2001). Contrary to Love's claim, Pet.20–21, the court did not add a new requirement for an independent credibility assessment. It simply decided

that a prison could not say it had relied on "some evidence" when it relied only on the statements of a confidential informant. *Taylor*, 238 F.3d at 194. Without any documentation from the prison, the court could only "speculate" how the prison's decision "was supported by 'some evidence' as required by federal law." *Id.*

Freitas v. Auger, 837 F.2d 806 (8th Cir. 1988), reached the same conclusion. "A bald assertion by an unidentified person, without more, cannot constitute some evidence of guilt." *Id.* at 810. The Ninth Circuit likewise rejected an inconclusive polygraph and second-hand informants as sufficient for "some evidence" under *Hill*. *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987); *cf. Scott v. Trimble*, 538 F. App'x 780 (9th Cir. 2013) ("[N]o reliable evidence supports the prison's finding[.]"). And the Tenth Circuit conducted the same analysis—a confidential informant and "two polygraph tests . . . did not constitute any evidence that supported the conclusion reached by the prison officials." *Brown v. Smith*, 828 F.2d 1493, 1495 (10th Cir. 1987).

Hensley v. Wilson, 850 F.2d 269 (6th Cir. 1988), is in the same vein. There, the prison had not independently assessed whether informants were reliable. *Id.* at 276. So the court held that there was no way to know if the prison had relied on "some evidence" in disciplining the inmates. *Id.* And while the court stated that the written record required by *Wolff* should be produced "contemporaneously," it did so only because there was no prison security interest in delaying production of the record. *Id.* at 283.

In short, none of the decisions Love cites extemporizes on the list of procedures required by *Wolff* and *Hill*. The circuits' uniform insistence that prison disciplinary committees "assess both the sufficiency of the evidence and the credibility of the witnesses who provide it" is not a new due process right. *Hensley*, 850 F.2d. at 276. It simply is an application of *Hill*'s "evidentiary standard." *Hill*, 472 U.S. at 456. By contrast, Love asks for the imposition of a new procedure—a separate mitigation-phase hearing—in what he admits is a "novel context." Pet.19. No other circuit has embraced his expansive view of due process.

3. In all events, Judge Brennan's analysis is consistent with this Court's precedent. There is no dispute that Love received the specific procedural protections discussed in *Wolff* and *Hill*. He was "notified of the charge[s]" in writing before his hearing. Pet.App.55a. He had the opportunity to present arguments and witnesses at the hearing. *Id.* The prison provided a written statement regarding its decision. Pet.App.56a. And it cited evidence that Love participated in the fight, including witness testimony, video evidence, and a conduct report. Pet.App.51a–55a. As *Wolff* and *Hill* recognize, Love could still have argued that prison officials violated due process by abusing their discretion. But that is not the argument he makes. Love argues that *Wolff* and *Hill* require prison officials to hold a separate, "sanctions phase" hearing before revoking good time credit. Pet.23.

Wolff and *Hill* do not support Love's argument. In neither *Wolff* nor *Hill* did this Court require prison administrators to hold a mitigation hearing. Instead, this Court held that due process would be satisfied if

they afforded inmates the four procedural protections discussed. *See Hill*, 472 U.S. at 454; *Wolff*, 418 U.S. at 563–67. It distinguished between those rights and "other due process rights." *Baxter*, 425 U.S. at 321. That is precisely why the dissent proposed that additional procedures should be required only if the loss of good time credit exceeds eighteen months. Pet.App.38a (Hamilton, J., dissenting). Arguing that a separate mitigation-phase hearing is always required would conflict with *Wolff* and *Hill*. But Love does not embrace the dissent's proposed eighteen-month limitation, which lacks any textual or precedential grounding. And he does not identify a more principled line. Love appears to reject any line at all. *See* Pet. 23–24.

Nor is Love correct that requiring a mitigation-phase hearing before any loss of good time credit is cost-free to prisons. *Contra* Pet. 24. At a minimum, affording inmates another hearing beyond the one *Wolff* required would "impose significant new burdens" on prison administrators. *Hill*, 472 U.S. at 455. Administrators would have to double the number of hearings they conduct, provide security for all these newly required mitigation hearings, and if Love has his way, deal with the logistical complexities of receiving additional evidence and arguments. And it is not clear what process is due in this hearing, or whether the process should shift depending on the severity of the sanction. Even the dissent recognized that this "sliding scale" would be "quite difficult to apply and even more difficult to work out through case law." Pet.App.38a.

In arguing (at 4, 23) for prison proceedings to replicate the proceedings in criminal courts for revocation of parole, moreover, Love overlooks that prison disciplinary proceedings serve a different purpose. In *Wolff*, this Court specifically rejected the argument that prison administrators must afford inmates the specific procedural protections outlined in *Morrissey v. Brewer*, 408 U.S. 471 (1972)—the case Love repeatedly invokes. *See Wolff*, 418 U.S. at 569–70. Part of the Court's reason for doing so is that prison disciplinary proceedings are a "means to further correctional goals." *Id.* at 570. "[O]ne cannot automatically apply procedural rules designed for free citizens in an open society, or for parolees or probationers under only limited restraints, to the very different situation presented by a disciplinary proceeding in a state prison." *Id.* at 560. That observation applies with equal force here. As in *Wolff*, "continuing development of measures to review adverse actions affecting inmates" should be entrusted "to the sound discretion of corrections officials administering the scope of such inquiries." *Id.* at 568.

Ultimately, Love does not so much ask this Court to apply *Wolff* and *Hill* as reinvent them. Not only does Love ask this Court to backtrack on its admonition against adding to *Wolff* and *Hill*'s requirements, but he also wants to expand their reach in what he admits is a "novel context." Pet.19. He cites no examples of other circuits applying this type of balancing test in the *penalty* phase of prison adjudications. *Wolff* and *Hill* address the penalty phase of a hearing—in other words, whether Love participated in the brawl that led to the loss of his good time credit. But Love

does not dispute the finding of guilt. He only challenges the procedure used to revoke his good time credit. Pet.10. This Court, however, has never required specific procedures for how prisons impose *penalties* once they have determined guilt.

III. This Case Raises No Issue of Exceptional Importance and Is a Poor Vehicle

At bottom, Love seeks error correction. The decision below did not announce a new due-process rule for the Seventh Circuit. It merely announced the panel's judgment that Love is not entitled to habeas relief, either because he waived his constitutional claim or failed to overcome his procedural defaults. Pet.App.16a, Pet.App.29a. Nor does the decision below conflict with decisions from other circuits regarding whether due process requires mitigation-phase hearings. In fact, Love does not identify any other cases that would be affected. His arguments about why this case purportedly presents an "issue of exceptional importance," Pet.26, concern his own loss of good time credit.

Nor are Love's characterizations of his case correct. Judge Brennan did not hold that "courts can *never* examine the context and circumstances of an individual case to determine the process due, no matter the circumstances or the gravity of the charges or punishment that might be imposed." Pet. 26. In his view and consistent with *Wolff*, courts can still ask whether prison officials failed to meet the standards set out in *Wolff* and *Hill*, Pet.App.18a, made arbitrary decisions, Pet.App.21a, or abused their discretion, Pet.App.25a. Similarly, there is no evidence that prison officials "prejudg[ed]" Love's case, Pet.2, rather

than simply applying a directive that mandated a sanction. And applying that directive did not result in an "*extension* of Mr. Love's prison time." Pet.26. Love's prison sentence was already set at 55 years—the loss of good time credit only insured that Love served time to which he had already been sentenced.

Finally, there are factual deficiencies that make this case a poor candidate for review. Not only do Love's prejudice arguments require speculation about circumstances outside the record, but the parties did not develop a record below about the sorts of considerations that might be relevant under a balancing inquiry—such as security and logistical considerations—precisely because Love *never* raised the constitutional claim that he now seeks to press. The Court should decline to be the first to entertain a claim never preserved or developed.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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