No. 23-1034

# In the Supreme Court of the United States

TONY LOVE, PETITIONER

*v.*

RON NEAL

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## REPLY BRIEF FOR PETITIONER


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**CONSTITUTION**

## INTRODUCTION

The Seventh Circuit below applied its now-entrenched rule that courts cannot enforce any procedural due process protections in prison disciplinary proceedings that were not raised and discussed in *Wolff v. McDonnell*, 418 U.S. 539 (1974), and *Superintendent v. Hill*, 472 U.S. 445 (1985). That rule conflicts with the balancing test *Wolff* and *Hill* adopted and applied, as well as the decisions of at least five other circuits. The Court should grant certiorari and reverse.

The state offers no reason to deny review. The state claims that this Court has already embraced the Seventh Circuit's outlier rule; that decisions from other circuits align with that rule; and that the decision below doesn't establish any rule at all. None of those arguments withstands scrutiny. *Hill* holds that the "requirements of due process are flexible and depend on a balancing of interests affected by the relevant government action," 472 U.S. at 454—not that there is a bright-line rule against enforcing any procedural due process protection that wasn't discussed in a pair of this Court's decisions announcing a *framework* for deciding which protections apply. That's why the state cannot cite a single decision that agrees with the Seventh Circuit's view. Many other circuit cases recognize due process protections not discussed in *Wolff* or *Hill*, which shows that the circuits are indeed split and the Seventh Circuit is on an island. And although the decision below was fractured, the outcome merely followed the Seventh Circuit's square holding in *Crawford v. Littlejohn*, 963 F.3d 681, 683 (7th Cir. 2020), that lower courts can never "add procedures to *Wolff*'s list."

Thus, if the Court reverses on the question presented, the Seventh Circuit on remand will need to decide the merits of Mr. Love's underlying due process claim.

Unable to explain away the circuit split, the state spends much of its brief arguing that Mr. Love's due process claim ultimately fails because it was procedurally defaulted and forfeited. But the panel's procedural-default and forfeiture reasoning turned on its view of the question presented here—namely, that the Seventh Circuit could not entertain any due process challenges based on rights not discussed in *Wolff* or *Hill*. If the Court reverses the Seventh Circuit on that question, the Seventh Circuit will need to decide Mr. Love's due process claim on the merits.

Given that everything comes down to the question presented, the state spends the rest of its brief in opposition arguing the underlying merits question—that Mr. Love isn't entitled to a fair opportunity to argue in mitigation before an open-minded decisionmaker. But those arguments at most present a remand question, not a barrier to this Court's review. And in any event, the state is wrong. If the Court decides the question presented in Mr. Love's favor—that *Wolff* and *Hill* are not an exhaustive list for all time—then the Seventh Circuit will need to decide the underlying merits question. And if Mr. Love does receive the fair opportunity to argue in mitigation before an open-minded decisionmaker—a right the Due Process Clause promises him—there is a strong likelihood that the Indiana Department of Correction will revoke less than the 5,700 days of good time credits it took away. Mr. Love behaved well for many years to earn those credits, and other inmates who committed worse conduct during the very same prison fight received much more lenient punishments

than the effectively 16-year additional sentence imposed on Mr. Love without due process.

The Court should grant review.

## ARGUMENT

### I. Seventh Circuit precedent contravenes *Wolff* and *Hill*, and creates a circuit split.

**A.** The "requirements of due process are flexible and depend on a balancing of interests affected by the relevant government action." *Hill*, 472 U.S. at 454. Applying this longstanding due process principle, the Court's decisions in *Wolff* and *Hill* established a balancing test to determine the procedures prisoners are due when prisons assess whether to revoke good time credits for disciplinary infractions. Under that test, courts assess whether applying ordinary due process requirements in the prison context would harm the prison's "legitimate institutional needs of assuring the safety of inmates and prisoners, avoiding burdensome administrative requirements that might be susceptible to manipulation, and preserving the disciplinary process as a means of rehabilitation." *Id.* at 454-55.

**B. 1.** Seventh Circuit precedent directly and unmistakably contradicts *Wolff* and *Hill*. Rather than conducting the "balancing of interests" required by due process, *id.* at 454, the panel below applied circuit precedent holding that lower courts can *never* "add procedures to *Wolff*'s list" of protections. *Crawford*, 963 F.3d at 683. Judge Brennan explained that he was following *Crawford*, which "probably forecloses" "add[ing] to the *Wolff* and *Hill* protections … again." App. 19a-20a. Judge Hamilton agreed, citing *Crawford* for the proposition that lower courts cannot "add procedures to the ones adopted in [*Wolff* and *Hill*]

where they apply." App. 38a (Hamilton, J., dissenting). The message is clear: the Seventh Circuit has renounced *Wolff*'s and *Hill*'s balancing test in favor a bright-line rule that due process never requires any protections for prisoners beyond those specifically discussed in *Wolff* and *Hill*.

**2.** As a result, the Seventh Circuit's position also creates a circuit split. No other circuit has embraced the Seventh Circuit's bright-line rule that courts can never entertain due process challenges involving rights that weren't discussed in *Wolff* or *Hill*. To the contrary, the Second, Sixth, Eighth, Ninth, and Tenth Circuits have all faithfully applied *Wolff*'s and *Hill*'s balancing test to recognize rights not at issue in *Wolff* or *Hill*. *See Hensley v. Wilson*, 850 F.2d 269, 282-83 (6th Cir. 1988) (right to be disciplined based on only on credible evidence); *accord, e.g.*, *Freitas v. Auger*, 837 F.2d 806, 810 (8th Cir. 1988); *Cato v. Rushen*, 824 F.2d 703, 705 (9th Cir. 1987); *Brown v. Smith*, 828 F.2d 1493, 1495 (10th Cir. 1987); *Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir. 2001). The cases all would come out the other way in the Seventh Circuit, since neither *Wolff* nor *Hill* discusses whether due process requires that an inmate be disciplined based only on evidence that a reviewing court later finds credible.

**C.** The state's efforts to downplay the Seventh Circuit's departure from *Wolff*, *Hill*, and its sister circuits are unconvincing.

**1.** The state first argues that Seventh Circuit's rule does not contradict *Wolff* and *Hill*, because *Baxter v. Palmigiano*, 425 U.S. 308 (1976), held that lower courts cannot "add additional requirements to *Wolff*'s list." Br. 16. But *Baxter* held no such thing. *Baxter* rejected decisions finding a right to counsel and a

right to cross-examination in certain prison disciplinary proceedings, because *Wolff* had already held that those rights do not extend to prison disciplinary hearings. *Baxter*, 425 U.S. at 314-15, 322, 324. In other words, *Baxter* holds only that lower courts cannot revisit the specific due process protections the Supreme Court addressed and calibrated in *Wolff*. *Baxter* doesn't say anything about prohibiting due process balancing for protections not already addressed by *Wolff*, *Hill*, or other precedent. To the contrary, after *Baxter*, the Court applied *Wolff*'s balancing test in *Hill* to add to *Wolff*'s list, 472 U.S. at 454-55, belying the idea that *Baxter* announced any sweeping limits on prison due process.

None of the state's cases (Opp. 17), other than the Seventh Circuit's decision in *Crawford*, either cites *Baxter* or says anything supporting the state's claim that prisoners enjoy only those due process protections discussed in *Wolff* and *Hill*. *See MacMillan v. Pontesso*, 73 F. App'x 213, 215 (9th Cir. 2003) (holding that disciplinary finding was supported by some evidence, in spite of a single, immaterial inaccuracy in the report); *Mitchell v. Maynard*, 80 F.3d 1433, 1445 (10th Cir. 1996) (listing *Wolff*'s and *Hill*'s requirements, without stating that those are the only due process protections available in all cases); *Ragan v. Lynch*, 113 F.3d 875, 876 (8th Cir. 1997) (same); *Kalwasinski v. Morse*, 201 F.3d 103, 108 (2d Cir. 1999) (same). Thus, if anything, the state's cases only underscore how far the Seventh Circuit has deviated from this Court and other circuits.

**2.** The state next argues that there is no circuit split because "[n]o 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." Opp. 17.

The state misses the point. The Seventh Circuit has parted ways with several other circuits over how to determine whether due process guarantees any procedures beyond those discussed in *Wolff* and *Hill*, and that disagreement is outcome-determinative. In the Seventh Circuit, the answer is categorically that a court can never recognize due process protections in prison disciplinary proceedings that are not on "*Wolff*'s list." *Crawford*, 963 F.3d at 683. But other circuits use *Wolff*'s and *Hill*'s balancing test to recognize due process protections not discussed in those decisions. *Supra* p. 4. Had the Seventh Circuit followed that approach, it would have proceeded to the merits of Mr. Love's specific due process claim—whether he is entitled to present mitigation arguments to an open-minded decisionmaker. The circuits are divided.

The state's fallback attempts to recast the Second, Sixth, Eighth, Ninth and Tenth Circuits' holdings—that due process requires "prison disciplinary committees … to assess the reliability of inmate informants upon whose testimony they rely to deprive inmates of good time credits," *Hensley*, 850 F.2d at 283—as applications of *Hill*'s "some evidence" standard, rather than recognitions of a new due process right in prison proceedings. Opp. 17-19. That's wrong. *Wolff* and *Hill* don't say anything about whether prison disciplinary committees must conduct reliability assessments. Indeed, *Hill* held that even "meager" evidence can be sufficient to find an inmate guilty of a rules infraction. 472 U.S. at 457. Because the right to be disciplined based only on credible evidence is not on "*Wolff*'s list" of recognized protections, *Crawford*, 963 F.3d at 683,

the Seventh Circuit would not have recognized it, underscoring the split.

What's more, the state misstates Mr. Love's due process claim. Mr. Love has never claimed that the Indiana Department of Correction was required to conduct "a separate mitigation hearing before imposing any sanction." Br. 17. Rather, Mr. Love's claim is that the Department of Correction violated his due process rights when it determined what punishment to impose—taking away all of his credits, rather than some lesser number—before his disciplinary hearing. This Court's decisions recognize that when the government is deciding how severely to punish a person, it must give him a fair opportunity to argue for a lesser sanction before an open-minded decisionmaker who has not predetermined the outcome. *See, e.g.*, *Morrissey v. Brewer*, 408 U.S. 471, 487-88 (1972). By deciding through Executive Directive #17-09 that the Department would take away 5,700 days of his good time credits before his hearing even convened, and without any legitimate penological justification for doing so, the state violated this fundamental due process requirement.

**3.** Confronted with the circuit disagreement, the state pivots, arguing (Opp. 14-15) that the fractured panel decision below doesn't bind the Seventh Circuit. But, as the state concedes, the Seventh Circuit's decision in *Crawford* held that lower courts cannot "add additional requirements to *Wolff*'s list." Br. 16-17. The panel here simply followed *Crawford*. App. 19a-20a; App. 38a (Hamilton, J., dissenting). The Seventh Circuit's rule is clear: courts cannot use *Wolff*'s and *Hill*'s balancing test to recognize due process protections not discussed in those decisions,

no matter what *Wolff*, *Hill*, and the decisions of other circuits say.

**D.** This Court alone can resolve the circuit split. As the petition explains (at 22), in a point the state ignores, the Seventh Circuit used to follow *Wolff*'s and *Hill*'s balancing test, and would sometimes apply that test to recognize new due process protections in the prison setting. *See Chavis v. Rowe*, 643 F.2d 1281, 1285-86 (7th Cir. 1981) (*Brady* rule); *Piggie v. Cotton*, 344 F.3d 674, 678-79 (7th Cir. 2003) (qualified right of access to security footage); *Whitlock v. Johnson*, 153 F.3d 380, 388 (7th Cir. 1998) (qualified right to present live witness testimony). But the Seventh Circuit expressly renounced that approach in *Crawford*, 963 F.3d at 683, and the decision below confirms that the Seventh Circuit will not employ *Wolff*'s and *Hill*'s balancing test going forward. Thus, only this Court can bring the Seventh Circuit into line with *Wolff*, *Hill*, and the other courts of appeals that follow *Wolff* and *Hill*'s balancing test.

## II. The question presented is important and is squarely preserved.

**A.** The question presented is exceptionally important. By choosing to apply Executive Directive #17-09 and thereby deciding to take away all 5,700 days of good time credit Mr. Love had earned before his hearing even convened, the Indiana Department of Correction effectively increased Mr. Love's term of incarceration by nearly 16 years. App. 1a-2a. That punishment was "unprecedented by a factor of ten." App. 30a, 36a (Hamilton, J., dissenting). Yet, because of the Seventh Circuit's decision to renounce *Wolff*'s and *Hill*'s balancing test, the court did not decide whether the Department's decision to give Mr. Love

an unprecedented punishment without any chance to present mitigation arguments comported with due process. The Court's intervention is necessary not just for Mr. Love, but also more broadly to "prevent arbitrary deprivations" of inmates' constitutional rights, *Hill*, 472 U.S. at 455, and ensure that the Seventh Circuit's rule does not erect the sort of "iron curtain drawn between the Constitution and the prisons of this country" that the Court forbids, *Wolff*, 418 U.S. at 555-56.

**B.** The state's arguments against review are unpersuasive.

**1.** The state first argues (Opp. 10-13) that review is inappropriate because Mr. Love procedurally defaulted his due process claim by not raising it during his prison disciplinary hearings. But as the petition explains (at 27), in a point the state ignores, the procedural-default reasoning rests squarely on the Seventh Circuit's resolution of the question presented; it doesn't present an independent reason to deny Mr. Love relief. Specifically, the panel found that the Indiana Department of Correction "caused [Mr. Love's] procedural default by misleading him as to which policies applied to his disciplinary rehearing and what potential penalties he faced." App. 9a. While Judge Brennan found that Mr. Love could not show prejudice, that reasoning rested on the view that circuit precedent "foreclose[d]" adding "to the *Wolff* and *Hill* protections." App. 19a. If the Court holds that the Seventh Circuit was wrong to abandon *Wolff*'s and *Hill*'s balancing test, the Seventh Circuit will apply that balancing test in the first instance to determine both the merits of the underlying due process question and thus also whether Mr. Love has shown prejudice

under the correct legal standard. Procedural default is thus no reason to deny review.

The state next insists that Mr. Love could never satisfy the prejudice standard because he cannot show that the Indiana Department of Correction certainly would have revoked fewer credits if it had held an open disciplinary hearing rather than applying Executive Directive #17-09. Br. 11. But as explained, that's at best an issue for remand, not a barrier to this Court's review.

Moreover, the state is wrong. Under its own policies, the Indiana Department of Correction takes into account a wide array of factors in determining a sanction, including a preference for "progressive discipline … before maximum sanctions are assessed," the prisoner's "attitude and demeanor during the hearing," the likelihood "of the sanction(s) having a corrective effect on [his] future behavior," "[s]anctions imposed for comparable offenses," and the prisoner's "prior disciplinary record." CA7 SA25-26. If Mr. Love had been given an opportunity to make mitigation arguments before a neutral hearing officer, there is a strong likelihood that the officer would have chosen to revoke fewer than *all* 5,700 days of good time credits Mr. Love had earned, given that Mr. Love had behaved well for a long time to earn those credits, other offenders who committed more serious misconduct during the same altercation (*e.g.*, stealing a guard's pepper spray and spraying the guard in the face) received substantially less severe punishments, and something less than a nearly-16-year sanction would still be sufficient to punish Mr. Love and deter future misconduct.

**2.** The state next says (Opp. 13-14) that Mr. Love forfeited his constitutional claim by failing to raise it in the district court. But that question too collapses into the question presented. Judge Brennan declined to excuse the forfeiture because he thought, based on the Seventh Circuit's incorrect view of the methodological question presented here, that Mr. Love could not win on the merits. *See* App. 19a-20a. Judge Hamilton would have excused the forfeiture. App. 40a-41a. Thus, if this Court corrects the Seventh Circuit's erroneous view on the question presented, that court on remand will reach Mr. Love's claim on the merits.

**3.** The state also falsely claims (Opp. 22) that the question presented isn't important because it won't impact other cases. Whether prison officials must comport with procedural due process protections other than those discussed in *Wolff* and *Hill* affects many cases. For example, it controls the critical question whether prison officials determine credibility during disciplinary proceedings, as the Second, Sixth, Eighth, Ninth, and Tenth Circuits have held.

**4.** Finally, the state argues that "there are factual deficiencies that make this case a poor candidate for review" because the state chose not to develop evidence or arguments below that it has a valid penological need to decide whether to revoke all of an inmate's good time credits without hearing mitigation arguments. Opp. 23. But Mr. Love does not ask *this Court* to decide the merits of his underlying due process claim. The petition seeks review of the Seventh Circuit's categorical rule that lower courts cannot consider any procedural due process protection not discussed in *Wolff* or *Hill*. That purely legal question doesn't implicate any of the gaps in the

record created by the state's litigation strategy, which at most present issues for the state on remand.

## CONCLUSION

The Court should grant certiorari.

Respectfully submitted.

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July 31, 2024