No. 17-_____

In The
Supreme Court of the United States

_____◊_____

ALMIGHTY SUPREME BORN ALLAH,

Petitioner,

v.

LYNN MILLING, ET AL

Respondents.

_____◊_____

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

_____◊_____

PETITION FOR WRIT OF CERTIORARI

_____◊_____

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QUESTIONS PRESENTED

In the seminal cases of *Bell v. Wolfish*, 441 U.S. 520 (1979) and *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) the Court defined what constitutes "punishment" and held that the Due Process Clause prohibited the state from punishing a detainee prior to an adjudication of guilt. In this case, arbitrarily incarcerating pretrial detainees in solitary confinement with "near total physical restrictions" and without identifying a legitimate governmental purpose was unanimously held unconstitutional.

The plaintiff in this case was subjected to exactly the sort of pre-trial punishment held unconstitutional by the Supreme Court, as well as several Circuit Court holdings and District Court precedents. However, the Second Circuit granted immunity in this case because: "No prior decision of the Supreme Court or of this Court has assessed the constitutionality of [the] particular practice." Accordingly, the questions presented are:

1) To overcome qualified immunity, must a plaintiff show that a "particular practice" was already held unlawful by a controlling court?

2) In the alternative, should the doctrine of qualified immunity be modified or overruled?

PARTIES TO THE PROCEEDING

Petitioner – Represented by John J. Morgan

Almighty Supreme Born Allah

Respondents – Represented by Steven M. Barry

Lynn Milling, Director of Population Management

Brian Griggs, Counselor Supervisor

Jason Cahill, Captain

Angel Quiros, Warden

L. Powers, Deputy Warden

Brett Fulcher, Deputy Warden

Michael LaJoie, District Administrator

Deputy Commissioner James Dzurenda

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PETITON FOR WRIT OF CERTIORARI

Petitioner, Almighty Supreme Born Allah, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The original opinion of the Court of Appeals, dated November 22, 2017,is reported at *Allah v. Milling*, 876 F. 3d 48 (2d. Cir. 2017)

The opinion of the District Court, dated April 4, 2016, is not reported, but is available at *Allah v. Milling*, 2016 U.S. Dist. Lexis 45081 (D. Conn. 2016).

The Denial of Motion for rehearing or rehearing en banc was denied on January 23, 2018.

JURISDICTION

The district Court's jurisdiction was invoked pursuant to 28 U.S.C. §1331. The final disposition of the Court of Appeals entered on January 23, 2018. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The plaintiff commenced this action alleging a section 1983 violation because the conditions imposed upon him as a pretrial detainee amounted to unconstitutional punishment. The plaintiff had not been convicted of a crime but he was placed by the Connecticut Department of Corrections directly into "Administrative Segregation" upon his arrest in September 2010.

The Department of Corrections established a number of so-called "restrictive statuses" for prisoners who are not placed in the general prison population. In Administrative Segregation Mr. Allah was held in solitary confinement within his cell 23 hours a day; his telephone usage was severely restricted; his interpersonal visits were severely restricted; his recreation was limited in time and restricted by shackles; his ability to keep incoming mail was restricted to 5 pieces (as distinct from general population which was restricted only by available space); the amount of property he was allowed to own was reduced from 6 ft.^{3} to 4 ft.^{3} ; he was prohibited from having any contact visits; and, he was forced to shower in shackles which prevented removal of undergarments during the shower. He was never allowed to move outside his cell without being shackled hand and foot. In addition, Mr. Allah was denied access to the programs and privileges of general population. In addition to the physical restrictions, the length of incarceration time for Administrative Segregation prisoners

was extended because they were denied statutory good time, outstanding meritorious performance, etc.

At trial, uncontradicted evidence was adduced showing that the conditions of "Punitive Segregation" (a restrictive status expressly intended as punishment), were substantially *less* onerous than the conditions of "Administrative Segregation." Punitive Segregation inmates are not forced to shower in leg irons or wet underwear. Punitive Segregation inmates remain entitled to good time (if applicable) and unlike Administrative Segregation, Punitive Segregation lasts a closed period of time.

The District Court entered judgment in Mr. Allah's favor and the State appealed. The Court of Appeals unanimously held that Mr. Allah's constitutional rights were violated as a result of the onerous treatment imposed while he was a pretrial detainee. *Opinion*, at 17-22 and *Concurring Opinion*, at 1. However, the panel divided on the issue of qualified immunity, with the majority granting qualified immunity.

Both the majority and the dissent, considered a hypothetical examined in *Bell v. Wolfish*, 441 U.S. 520, 538 n. 20 (1979). The principal holding of which established the rule that corrections officials could never justify punishment, retribution or deterrence with respect to a pretrial detainee. The Court adopted an inferential standard under which a restriction or condition which may on its face appear to be punishment

might be justified by a legitimate non-punitive government objective. In making the point, the Court identified what amounts to a worst-case scenario:

> "[L]oading a detainee with chains in shackles and throwing him in a dungeon may insure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish."

Bell v. Wolfish, 441 U.S. 520, 538 n. 20 (1979).

The majority acknowledged that the treatment described by *Wolfish* is "excessively harsh." *Opinion*, at 20. Later, the majority held that the onerous treatment of Mr. Allah "may have related to prison security in the sense that it incapacitated Allah. But the extremity of the conditions opposed on Allah comes *perilously close* to the Supreme Court's description of 'loading a detainee with chains and shackles and throwing them in a dungeon.'" *Opinion*, at 21. Significantly, "Defendants have failed to explain why such extreme treatment was necessary." *Id.*

The dissent argued that the conditions imposed on Mr. Allah were not materially different from loading him with chains in shackles and throwing him in a dungeon. *Dissent*, at 5-6. Therefore, both the majority and the defense acknowledged that the onerous conditions under which Mr. Allah was held as a pretrial detainee were at least "*perilously close*" to the worst-case example discussed by the *Wolfish* Court.

Furthermore, both the majority and the dissent acknowledge that the onerous conditions were *imposed arbitrarily* upon Mr. Allah. The majority held that Mr. Allah's placement "cannot be said to be reasonably related to institutional security, and the defendants have identified no other legitimate governmental purpose justifying the placement." *Opinion*, at 22. The dissent noted that the conditions imposed on Mr. Allah bore no relationship to an underlying infraction nor did they have any conceivable relationship to institutional security. *Dissent*, at 4-5. The dissent noted that under *Wolfish* "near-total physical restrictions" could only be justified by a significant governmental interest. However, the defendants in this case imposed the restrictions without any interest in justifying them whatsoever. *Dissent*, at 6. In short, neither the majority nor the dissent identifies any plausible governmental interest upon which the harsh conditions could be justified.

Despite the acknowledged arbitrary imposition of excessively harsh conditions unrelated to a legitimate governmental objective, the majority granted qualified immunity. The opinion turned on a single consideration: "No prior decision of the Supreme Court or of this Court has assessed the constitutionality of [the] particular practice." Opinion, at 25.

LAW AND ARGUMENT

Our laws acknowledge that any time an individual is detained by the state, it is unpleasant. Detention by its nature entails restriction on

liberty and control of personal freedom. However, solitary confinement, physical bindings, loss of privileges and increased the time of confinement far exceed the restriction on liberty and control of personal freedom necessary to assure presence at trial and objectively constitute unconstitutional punishment when applied to a pretrial detainee. We submit, any reasonable officer must have understood that any condition remotely close to the worst-case scenario is unconstitutional per se. As a result, any reasonable governmental official had "fair warning" of the unconstitutionality of arbitrarily holding Mr. Allah in solitary confinement pending trial because of the *Wolfish* Court's explicit example. We further submit that the Court of Appeals' requirement of a "prior decision assessing the constitutionality of a particular practice" is contrary to the standard applied by several Courts of Appeal as well as the rules enunciated by this Court. If certiorari is granted, we will request the Court to reverse the decision of the Second Circuit Court of Appeals.

I. The Court should grant certiorari because lower courts are divided and inconsistent in their application of the "clearly established law" standard.

There is a two part test used to decide assertions of qualified immunity.

(1) that a government official violated a statutory or constitutional right; and,

(2) that the right was clearly established at the time of the alleged conduct.

See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In this case, as in many cases, the first part of the test is not the substantial issue. Rather, the formulation of the "clearly established" prong proves problematic.

Most, if not all, lines of authority regarding whether a rule was "clearly established" derive from *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). That case held that a governmental officer was entitled to immunity if their actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id*, at 818. Early cases required a plaintiff to identify a previous case that was "fundamentally similar" or "materially similar" to the plaintiff's action. That standard was rejected in *United States v. Lanier*, 520 U.S. 259, 263 (1997) and *Hope v. Pelzer*, 536 U.S. 730, 740-43 (2002).

The "similarity" standards were largely abandoned due to the "rigid overreliance on factual similarity." Instead, the Court adopted a "fair warning" requirement. *Hope v. Pelzer*, 536 U.S. 730, 740-43 (2002). The Hope Court determined that unlawfulness can be "clearly established" from direct holdings, from specific examples describing certain conduct as prohibited, or from the general reasoning that a court employs. *Id*, at 742-44. After *Hope*, the salient question became whether the state of the law gave the government officers "fair warning" that their alleged treatment of the plaintiff was unconstitutional. *Id.* As presently formulated, the "fair warning" test grants immunity unless the contours of the constitutional

right are sufficiently clear such that a reasonable official would have understood that what he was doing violates that right.

The Court has always at least given lip service to the concept that case law directly on point is not required, but existing precedent must place the statutory or constitutional question beyond debate. See e.g. *City and Cty. of San Francisco v. Sheehan*,-US-135 S.Ct. 1765, 1775 (2015). The holding stands for the proposition that officials may be on notice that their conduct violates established law even in novel factual circumstances. So while similar earlier cases can provide "especially strong support for a conclusion that the law was clearly established, they are not necessary to such a finding." *Hope v. Pelzer*, 536 U.S. at 739, 741.

Meanwhile, another line of authority began to develop in "excessive force" cases. In those cases, the Court demanded a higher degree of fact specific analysis about the specific context of the case rather than a broad general proposition. This was because the dispositive inquiry in excessive force cases was whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*. The Court required a more particularized (and hence more relevant) fact based inquiry. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). This fact sensitive approach has been followed in subsequent excessive force cases. See e.g. *White v. Pauly*, -US-, 137 S.Ct. 548, 552 (2017); *Plumhoff v. Rickard*, -US-, 134 S.Ct. 2012, 2023 (2014).

Over the various terms of the Court, the two lines of authority merged resulting in a standard which has been described as an "absolute shield." *Kisela v. Hughes*, -US- 2018 US Lexis 2066 at *12 (April 2, 2018) (Sotomayor and Ginsburg dissenting) and "impossible for any plaintiff to meet." *Latits v. Phillips*, 878 F 3d. 541,558 (6th Cir. 2017) (Clay, J. concurring in part and dissenting in part). The standard looks deceptively straight forward. In practice, however, the Courts of Appeal struggle mightily to consistently apply the standard.

II. The Second Circuit's application of qualified immunity is incorrect and virtually impossible for any plaintiff to overcome.

As noted above, in this case, the Second Circuit Court of Appeals granted qualified immunity because it did not identify a prior decision of the Supreme Court or of the Second Circuit which assessed the constitutionality of the particular solitary confinement practice in this case. Opinion, at 25.

a) Second Circuit precedents are incorrect, internally inconsistent and unduly restrictive of constitutional rights.

Terebesi v. Torresco, 764 F.3d 217, 230-31 (2d Cir. 2014) holds that:

> the purpose of the qualified immunity doctrine is to ensure that the official being sued had fair warning that his or her actions were unlawful. To this end, plaintiff need not show a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate. To determine whether the relevant law was clearly established we consider

the specificity with which the right was defined by the Supreme Court or Court of Appeals case law on the subject and the understanding of a reasonable officer in light of pre-existing law. Even if the Court has not explicitly held a course of conduct to be unconstitutional, the Court may nevertheless treat the law as clearly established if decisions from this circuit or other circuits clearly foreshadow a particular ruling on the issue. *Id.* The Second Circuit also held that "even in the absence of a binding precedent, a right is clearly established if the contours of the right are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Townes v. City of New York*, 176 F.3d 138, 144 (2d Cir. 1999). These decisions adopt a rather broad "fair warning" standard.

However, other holdings within the Second Circuit are substantially different and more restrictive. For instance, in *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir. 2004), the Court held: "*Only* Supreme Court and Second Circuit precedent existing at the time of the alleged violation is relevant in deciding whether a right is clearly established." *Id.*(emphasis added); *Bock v. Gold*, 408 Fed. Appx. 461, 462 (2d Cir. 2011); *Dean v. Blumenthal*, 577 F.3d 60, 68 (2d Cir. 2009) (relied on by the majority). These cases reflect the narrowest possible view of qualified immunity. Under these decisions, even if there is no contrary precedent, a plaintiff can only overcome qualified immunity if there is a specific precedent. Further, the precedent

must be from either the Supreme Court or the Second Circuit Court of Appeals. This highly restrictive standard was applied in the instant case. Mr. Allah identified two appellate cases (one of which was a Second Circuit case), several District Court cases as well the compelling example set out in *Wolfish*. That comprehensive showing was still not enough for the Second Circuit. Based upon the result, one might reasonably ask: How much "establishment" is necessary before a principle becomes "clear" for qualified immunity purposes?

The present case, *Dean v. Blumenthal*, *Moore v. Vega*, and *Bock v. Gold* are inconsistent with *Terebesi v. Torresco* and *Townes v. City of New York*. The Second Circuit itself is internally inconsistent. If one of the preeminent courts in the land cannot consistently apply the clearly established test, it is small wonder that other courts routinely struggle with it.

b) The qualified immunity standard, as applied by the Second Circuit in this case, cannot be reconciled with decisions in other Courts of Appeal.

Other circuits reviewing the Supreme Court mandates regarding the "clearly established" prong of qualified immunity have adopted standards which differ materially from those adopted by the Second Circuit. We submit the Court should harmonize its "clearly established" jurisprudence and eliminate inconsistencies amongst the Courts of Appeal. We submit a small sampling of cases applying what is supposed to be the same standard in an inconsistent manner.

The most stark departure from the present case is seen in the Seventh Circuit which holds fast to the principle that "a case directly on point is not required for a right to be clearly established," and that "[e]ven where there are 'notable factual distinctions,' prior cases may give an officer reasonable warning that his conduct is unlawful." *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) (quoting *Estate of Escobedo v. Bender*, 600 F.3d 770, 781 (7th Cir. 2010)). That is radically different from the Second Circuit's stated requirement the there be a prior decision in which a particular practice has been assessed. The Seventh Circuit, as recently as last year, seemed almost diametrically opposed to the Second Circuit in *Estate of Perry v. Wenzel*, 872 F.3d 439, 460 (7th Cir. 2017): "The defendants urge us to narrowly define Perry's right. But, in doing so, they are essentially urging us to conclude that because there is no case with the exact same fact pattern, qualified immunity applies. That is not what the qualified immunity analysis requires us to do." The Seventh Circuit's analysis cannot be reconciled with the Second Circuit decision in this case.

The Sixth Circuit's review seems similarly incongruent with the Second Circuit. In *Baynes v. Cleland*, 799 F.3d 600, 610-13 (6th Cir. 2015) that court adopted the fair warning standard as well as an objective inquiry with respect to whether that standard had been met. It further held that a right could be clearly established even in novel factual

circumstances. It specifically rejected the obligation to cite a fundamentally similar or materially similar case.

The Eleventh Circuit adopted the fair warning standard, but also incorporated an "obvious clarity" standard in which the conduct could be so bad or the constitutional violation could be so obvious that it overcomes qualified immunity even in the total absence of decisional case law. *Vinyard v. Wilson*, 311 F. 3d 1340, 1350 (11th Cir. 2002).

The Tenth Circuit in *A.M. ex rel. FM v. Holmes,* 830 F.3d 1123, 1130-37 (10th Cir. 2016) held that a right could be clearly established by identifying an on point Supreme Court or 10th Circuit decision or alternatively if the weight of authority from other courts found the law to be as the plaintiff maintains. It adopted the "novel factual circumstances" standard and went on to adopt a "sliding-scale" to determine when the law is clearly established. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation. More recently, the application of the qualified immunity test so troubled a three judge panel it issued three highly fractured opinions. *Harte v. Bd. of Comm'rs.*, 864 F.3d 1154 (10th Cir. 2017). The Tenth Circuit's "sliding-scale" analysis cannot be squared with the Second Circuit's decision in this case.

The foregoing examples display inconsistencies concerning the scope of precedent required in various Courts of Appeal, but another Circuit

differs from the Second Circuit regarding the source of precedents. The First Circuit adopted the "fair warning" standard but instead of the restricted review required by the Second Circuit, the First Circuit examined all available case law including federal cases outside the Circuit as well as relevant state precedents. *Wilson v. Boston*, 421 F. 3d 45, 56-7 (1st Cir. 2005). The Second Circuit's limitation of precedential sources is inconsistent with this opinion.

The Ninth Circuit adopted the fair warning standard, but specifically noted that where fair warning exists, there is no need to demonstrate an analogous pre-existing case. *Schwenk v. Hartford*, 204 F. 3d 1187, 1198 (9th Cir. 2000).

The inconsistencies within Circuits and between Circuits when applying the "clearly established" test used since *Harlow* wholly justifies the grant of certiorari in this matter. Marked inconsistencies on crucial Constitutional matters cannot be ignored. It is clear that the Courts of Appeal are struggling with this test. A grant of certiorari will permit this Court to distil qualified immunity to its foundational principles and, if necessary, recast it so the kind of inconsistencies seen even in this smattering of cases will occur less often. For this reason Mr. Allah's Petition for Certiorari should be granted.

III. In the alternative, certiorari should be granted to consider whether qualified immunity should be modified or overruled because the "clearly established" test, as applied, is not working as intended.

Section 1983's historic purpose was to prevent state officials from using the cloak of their authority under state law to violate rights protected against state infringement. *Lugar v. Edmondson Oil Co.*, 457 U.S. 992, 948 (1982). The Court has repeatedly stated "qualified immunity is important to 'society as a whole'." *White v. Pauly*, -US-, 137 S.Ct. 548, 552 (2017); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982); *City and Cnty. of San Francisco v. Sheehan*,-US-, 135 S. Ct. 1765, 1774, fn. 3 (2015). It is axiomatic that a right without a remedy is no right at all. See, e.g., *Angel v. Bullington*, 330 U.S. 183, 209 (1947). Unfortunately, as applied, qualified immunity has become an obstacle that virtually no plaintiff can overcome. That certainly was not Congress's intention when enacting section 1983 and this outcome simply should not be condoned by the Court.

Law scholars and jurists are questioning the qualified immunity test, its application and the unintended consequences which developed since *Harlow*. See, *Ziglar v. Abbasi*,-US-, 137 S.Ct. 1843, 1871 (2017) (Thomas, J concurring in part and concurring in the judgment); *Crawford-El v. Brittton*, 523 U.S. 574, 611 (1998) (Scalia, J, dissenting) and most recently, *Kisella v. Hughes*, -US-, 2018 US LEXIS 2066 (April 2, 2018) (Sotomayor, J. and Ginsburg, J., Dissenting) (suggesting the court's qualified immunity jurisprudence has become an "absolute shield") See

generally, Susan Bendlin, *Qualified Immunity: Protecting All but the Plainly Incompetent (and Maybe Some of Them, Too)*, 45 J. Marshall L. Rev. 1023 (2002); William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018); Joanna C Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2 (2017); Allen K Chen, *The Facts About Qualified Immunity*, 55 Emory L.J 229 (2006). See also, Brief of the Cato Institute as Amicus Curiae Supporting Petitioners, filed in *Pauly v. White*, Docket No.17-1078 (March 2, 2018); Brief of the American Civil Liberties Union and the American Civil Liberties Union of the District of Columbia as Amici Curiae in Support of the Respondents, filed in *District of Colombia v. Westby*, Docket No. 15-1485 (July 2017).

As a result, Justice Thomas has explicitly suggested that the court should seek an "appropriate case" for the Court to review the "freewheeling policy choices" now at the heart of qualified immunity jurisprudence. *Ziglar v. Abbasi*,-US-137 S.Ct. 1843, 1872 (2017) (Thomas, J, concurring). We submit the present case is the "appropriate case" sought by Justice Thomas.

a) The qualified immunity standard is circular and amorphous.

One commentator cogently explained the principal difficulty with the "clearly established" standard flowing from *Harlow*.

> "[The standard] has proven hopelessly malleable because there is no objective way to define the level of generality at which it should be applied. The Court has repeatedly instructed lower courts 'not to define clearly established law

> at a high level of generality.' *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). But for more specific guidance, the Court has stated simply that the dispositive question is whether the violative of nature of the particular conduct is clearly established. *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 US at 742). The difficulty, of course, is that this instruction is circular -- how to identify clearly established law depends on whether the illegality of the conduct was clearly established."

Brief of the Cato Institute as Amicus Curiae, *Pauly v. White*, Docket No.17-1078, at 16-17.

The circularity of the "clearly established" standard identified by the Cato Institute has resulted in the inconsistent, fractured and confused decisions coming out of the Courts of Appeal. For that reason alone, the Court should grant certiorari to overhaul its qualified immunity jurisprudence.

b) Qualified Immunity serves none of the purposes for which it was intended.

First, the Court purportedly created the "clearly established" test to balance competing interests between the only realistic avenue for vindication of constitutional guarantees with the desire not to unduly inhibit officials in the discharge of their duties. See e.g. *Ziglar v. Abbasi*, 137 Sup. Ct. at 1866. The desired balance failed to materialize. In practice, rather than being protected by a merely "qualified" immunity, many of today's public officials enjoy nearly *absolute* immunity for their wrongful actions. See, Chen, supra. at 232 (2006); Baude, at 82; see also Bendlin, supra. at 1023. In fact, only twice in thirty opportunities at the

merits stage has this Court found a public official to have violated clearly established law.

The Court has previously recognized that evidence might undermine the assumptions that underlie the qualified immunity doctrine and that this might justify reconsideration of the balance struck in qualified immunity cases. See, *Anderson v. Creighton*, 483 U.S. 635, 642 n. 3 (1987). Experience has now shown that, far from creating a balance, qualified immunity tipped the scales decidedly in favor of public officials. As a result, the doctrine serves only to insulate public officials from damages flowing from sometimes grotesque constitutional violations rather than to make them accountable for them as Congress intended.

Second, the failure of rules to meet the "clearly established" standard might have been a self-fulfilling prophecy. Because the grant of qualified immunity frequently avoids the need for courts to address the underlying constitutional determination, it may prevent otherwise meritorious constitutional rules from ever becoming clearly established. Indeed, the Court described this problem relatively succinctly as follows:

> Consider a plausible but unsettled constitutional claim asserted against a government official in a suit for money damages. The court does not resolve the claim because the official has immunity. He thus persists in the challenged practice; he knows that he can avoid liability in any future damages action, because the law has still not been clearly established. Another plaintiff brings suit, and another court awards immunity and bypasses the claim. And again, and again, and again. So the moment of decision does not arrive.

Camreta v. Green, 563 U.S. 692, 706 (2011). Thus, the frequent avoidance of constitutional questions limits viable constitutional claims from ever being adjudicated whether in the initial suit or in suits which would otherwise have followed.

Third, by definition, qualified immunity is only relevant when a public official has, in fact, violated rights protected by federal law. In practice, the qualified immunity standard has the effect of crippling the ability for citizens to vindicate even their most sacred constitutional rights. While some state officials may view qualified immunity is an entitlement, that an expectation should not outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected. See *Arizona v. Gant*, 556 U.S. 332, 349 (2009). To the extent that qualified immunity is justified at all, it must not arbitrarily deprive citizens with valid constitutional rights from a just remedy. As a matter of core principles, if the citizenry of this country is unable to vindicate their constitutional rights, all of us will be in peril of losing them. The only practical way to vindicate constitutional rights is through civil litigation. As applied, the *Harlow* standard has eviscerated the ability to enforce constitutional rights. For that reason alone, it cannot be allowed to stand unchanged.

c) Despite crushing otherwise valid constitutional claims, the Harlow standard also fails its stated goal to protect public officials from the need to engage in protracted litigation.

The harm to plaintiffs with valid constitutional claims is self-evident. Perhaps paradoxically, the *Harlow* doctrine fails to effectively shield public officials from claims. To be sure, the doctrine virtually eliminates any possibility that a plaintiff will actually recover damages for meritorious constitutional claims. However, the immunity does not shield public officials from the obligation to engage in costly protracted litigation. In fact, in her review of section 1983 actions, Professor Joanna Schwartz found that qualified immunity led to the dismissal of just 0.6% of cases before discovery, and only 3.2% of cases before trial. Schwartz, supra. at 11. Therefore, in practice, the qualified immunity standard imposes extensive costs on both plaintiffs and defendants. The parties are required to engage in protracted litigation including pleading, discovery, dispositive motion practice and ultimately trial in almost 100% of cases. Only after incurring all of those litigation costs, only after the parties have tried the case and only after a court or jury has attested that a defendant's conduct violates a core constitutional principle does the court step in to defeat meritorious claims at the decisive moment. As applied, qualified immunity serves no one. The system is broken and must be fixed.

Only this Court can appropriately pair our constitutional rights with

a remedy. Accordingly, this Court should grant the plaintiff's petition for writ of certiorari to instate the balance the *Harlow* court originally sought.

CONCLUSION

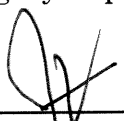
The ability to enforce constitutional rights is fundamental to the American identity. As a country, we simply cannot permit public officials to violate core constitutional protections without recourse. The qualified immunity doctrine has metastasized from its original goal to protect reasonable but mistaken public officials into an impregnable fortress behind which all manner of constitutional violations become impervious to judicial process.

Our Courts of Appeal have uniformly struggled with qualified immunity resulting in a multitude of inconsistent decisions. However well-intentioned, the qualified immunity standard enunciated in *Harlow* fails in each of its major objectives. A practical way to address the myriad failures resulting from the *Harlow* standard, as applied, is for this Court to grant the petitioner's writ of certiorari. Accordingly, for these reasons and for all

the reasons set forth hereinabove, the petitioner, Almighty Supreme Born Allah, respectfully submits that his petition for writ of certiorari should be granted.

Respectfully submitted this 23rd of April, 2018.

Almighty Supreme Born Allah



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APPENDIX

Allah v. Milling

United States Court of Appeals for the Second Circuit

February 28, 2017, Argued; November 22, 2017, Decided

Docket No. 16-1443-pr

Reporter

876 F.3d 48 *; 2017 U.S. App. LEXIS 23631 **; 2017 WL 5615989

ALMIGHTY SUPREME BORN ALLAH, Plaintiff-Appellee, — v. — LYNN MILLING, Director of Population Management, GRIGGS, Counselor Supervisor, and CAHILL, Captain, Defendants-Appellants, QUIROS, Warden, POWERS, Deputy Warden, FULCHER, Deputy Warden, LAJOIE, District Administrator, and DEPUTY COMMISIONER DZURENDA, Defendants.

Prior History: [**1] Defendants-appellants Lynn Milling, Brian Griggs and Jason Cahill ("Defendants") appeal from a judgment entered in favor of plaintiff-appellee Almighty Supreme Born Allah ("Allah") by the United States District Court for the District of Connecticut (William I. Garfinkel, Magistrate Judge). Following a two-day bench trial, the district court ruled that Allah's due process rights were violated when prison officials assigned Allah, who was then a pretrial detainee, to Administrative Segregation in October 2010. The district court also rejected Defendants' claim that they were entitled to qualified immunity. For the reasons that follow, we agree with the district court that Allah's substantive due process rights were violated, but we conclude that Defendants were entitled to qualified immunity. Accordingly, we REVERSE the judgment of the district court, and direct the entry of a judgment in favor of Defendants.

Almighty Supreme Born Allah v. Milling, 2016 U.S. Dist. LEXIS 45081 (D. Conn., Apr. 4, 2016)

Core Terms

Segregation, inmates, detainee, district court, placement, pretrial detainee, Phase, conditions, prison official, classification, qualified immunity, incarceration, assigned, cell, prison, prior term, custody, institutional security, confinement, reasonably related, restrictions, detention, leg irons, punish, shower, internal quotation marks, individualized, measures, pretrial, harsh

Case Summary

Overview

HOLDINGS: [1]-Plaintiff's substantive due process rights were violated when he was placed in Administrative Segregation while a pretrial detainee because prison officials made no individualized assessment whatsoever of the risk that plaintiff posed to institutional security; [2]-Nonetheless, the officials were entitled to qualified immunity and could not be held liable for civil damages for violating plaintiff's substantive due process rights because the general principle articulated in Bell v. Wolfish did not clearly establish that a substantive due process violation would result from plaintiff's placement in Administrative Segregation based solely on his prior assignment to (and failure to complete) that program.

Outcome

Judgment affirmed in part and reversed in part.

LexisNexis® Headnotes

Civil Rights Law > Protection of Rights > Prisoner Rights > Segregation

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

HN1[] **Prisoner Rights, Segregation**

In evaluating a due process challenge to pretrial detention, the court of appeals reviews the district court's findings of historical fact for clear error and its ultimate resolution of the constitutional due process issue de novo.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

HN2[] **Local Officials, Individual Capacity**

The court of appeals reviews de novo a decision affording a defendant qualified immunity following a bench trial.

Constitutional Law > Substantive Due Process > Scope

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Due Process

HN3[] **Constitutional Law, Substantive Due Process**

Under the *Due Process Clause*, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. Thus, in assessing whether restrictions on pretrial detainees comport with substantive due process, a court must decide whether the restriction is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent proof of intent to punish, that determination generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned. Accordingly, if a restriction or condition is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees.

Civil Rights Law > Protection of Rights > Prisoner Rights > Segregation

Constitutional Law > Substantive Due Process > Scope

HN4[] **Prisoner Rights, Segregation**

In many cases, a pretrial detainee's placement in a restrictive housing status like Administrative Segregation may be determined to be reasonably related to legitimate governmental purposes. In Bell v. Wolfish, the Supreme Court recognized that the government has a legitimate interest in the security of prisons, and that prison officials should be afforded deference in the adoption and execution of policies and practices needed to preserve internal order and discipline and to maintain institutional security.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review

HN5[] **Standards of Review, Clearly Erroneous Review**

In reviewing findings for clear error following a bench trial, the court of appeals is not allowed to second-guess the trial court's choice between permissible competing inferences.

Civil Rights Law > Protection of Rights > Prisoner Rights > Segregation

Constitutional Law > Substantive Due Process > Scope

HN6[] **Prisoner Rights, Segregation**

Although prison officials are to be afforded deference in matters of institutional security, such deference does not relieve officials from the requirements of due process or permit them to institute restrictive measures on pretrial detainees that are not reasonably related to legitimate governmental purposes.

Civil Rights Law > ... > Section 1983 Actions > Scope > Due Process in State Proceedings

Constitutional Law > Substantive Due Process > Scope

HN7[] **Scope, Due Process in State Proceedings**

Under Bell v. Wolfish, a restriction related to a legitimate goal such as institutional security will still be punitive if it is excessively harsh. Indeed, loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

Civil Rights Law > ... > Immunity From Liability > Local Officials > Individual Capacity

HN8[] **Local Officials, Individual Capacity**

The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Thus, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

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STEVEN M. BARRY, Assistant Attorney General, for George Jepsen, Attorney General for the State of Connecticut, Hartford, CT, for Defendants-Appellants.

Judges: Before: KATZMANN, Chief Judge, POOLER and LYNCH, Circuit Judges. [**2] Judge POOLER concurs in part and dissents in part in a separate opinion.

Opinion by: GERARD E. LYNCH

Opinion

[*50] GERARD E. LYNCH, *Circuit Judge*:

Defendants-appellants Lynn Milling, Brian Griggs and Jason Cahill (collectively, "Defendants") appeal from a judgment entered in favor of plaintiff-appellee Almighty Supreme Born Allah ("Allah") in the United States District Court for the District of Connecticut (William I. Garfinkel, *Magistrate Judge*). Following a two-day bench trial, the district court ruled that Allah's due process rights were violated when prison officials assigned Allah, who **[*51]** was then a pretrial detainee, to Administrative Segregation in October 2010. The district court also rejected Defendants' claim that they were entitled to qualified immunity. For the reasons that follow, we agree with the district court that Allah's substantive due process rights were violated, but we conclude that Defendants were entitled to qualified immunity. Accordingly, we REVERSE the judgment of the district court.

BACKGROUND

The facts as found by the district court are not in dispute, *see* *Almighty Supreme Born Allah v. Milling, No. 11 Civ. 668, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997 (D. Conn. Apr. 4, 2016)*, and we recite only those necessary to explain our resolution of this appeal.

I. Factual Background

A. The Inmate Classification Process [**3]

During the relevant time period, Allah was an inmate in the custody of the State of Connecticut Department of Correction ("DOC"). Pursuant to DOC administrative directive, each inmate is assigned to a DOC facility through a "classification process," *2016 U.S. Dist. LEXIS 45081, [WL] at *1*, the goal of which is to place inmates in a facility appropriate for their individual needs while accounting for the security risk they pose. As part of the classification process, inmates are assigned an "overall risk score" of one (low risk) to five (high risk), *id.*, calculated on the basis of certain risk factors, including the severity or violence of the inmate's current offense, any history of escape or violence, and the inmate's disciplinary history.

An inmate's overall risk score can determine whether he or she is placed in Administrative Detention or Administrative Segregation, which are, as described in more detail below, "restrictive housing status[es]" in DOC facilities that "provide[] for closely regulated [inmate] management" and physical separation from the general prison population. A. 82. Pursuant to DOC administrative directive, inmates who receive an overall risk score of five are placed in Administrative Segregation. In addition, **[**4]** and central to this case, if an inmate re-enters DOC custody after having been released from a prior term of incarceration with an overall risk score of five, the inmate is automatically placed in Administrative Detention upon re-entry pursuant to DOC administrative directive, pending a determination within 15 days of whether Administrative Segregation should be continued. If a continuance is recommended, a "classification hearing" must be held within 30 days, at which a hearing officer is required to "examin[e] evidence to support the classification, including statements by the inmate and/or any witnesses." *Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *4* (internal quotation marks omitted). The hearing officer then makes a written recommendation to the Director of Offender Classification and Population Management, who decides whether the inmate is to be placed in Administrative Segregation.

DOC administrative directives leave discretion to prison officials to discontinue Administrative Segregation for inmates who re-enter DOC custody after being released from a prior term of incarceration with an overall risk score of five. But the district court found, on the basis of Defendants' testimony at trial, that placement in Administrative Segregation **[**5]** "will continue" for such inmates except in specific circumstances: where the inmate was close to completing all three phases of the Administrative Segregation program or had been released from DOC custody more than five years

before re-entry. *2016 U.S. Dist. LEXIS 45081, [WL] at *5*. In such cases, the inmate "might not be continued in Administrative Segregation." *Id.*

[*52] B. Allah's Previous Incarceration and Assignment to Administrative Segregation

In December 2009, after being sentenced to 27 months' imprisonment for violating probation, Allah was in DOC custody as a post-conviction prisoner with an overall risk score of three and was incarcerated at Carl Robinson Correctional Institution, a medium-security "open campus dormitory-style facility." *2016 U.S. Dist. LEXIS 45081, [WL] at *4*. On December 22, 2009, Allah and approximately fifty other inmates were standing near a control station waiting for a commissary visit when they were told that the visit would be delayed. Allah asked the correctional officer in the control station if he could speak to a lieutenant about the delay — a request that was apparently perceived, in the context of a facility with a history of riots, as an attempt to incite other inmates to protest the delay. In response, a lieutenant was called **[**6]** to the scene with prison staff and dogs, and Allah later received a disciplinary report charging him with "Impeding Order," *id.*, to which he pled guilty. Thereafter, following a hearing, Allah's overall risk score was increased to five, and on February 11, 2010, he was placed in Administrative Segregation, where he remained until his release from DOC custody on March 25, 2010.

Allah does not challenge his placement in Administrative Segregation, as a post-conviction prisoner, on that occasion.

C. Allah's Subsequent Arrest and Return to Administrative Segregation

Following his release, Allah was arrested on new drug-related offenses and returned to DOC custody as a pre-trial detainee on September 13, 2010. Consistent with the classification procedures described above, Allah was placed in Administrative Detention upon re-entry and transferred to Northern Correctional Institution ("Northern"), a maximum-security facility, pending a classification hearing to determine whether he should be reassigned to Administrative Segregation. On September 23, 2010, Allah received written notice of the hearing, which stated in relevant part as follows: "According to the DOC Classification Manual, any inmate **[**7]** who discharges while on Administrative Segregation (A/S) shall be re-admitted at that status. You were placed on A/S on 02/08/10. Since that time you discharged and returned to the DOC without completing the program." A. 109.

Plaintiff's classification hearing was held on September 30, 2010. The hearing officer, Defendant Griggs, explained to Allah that he was being considered for placement in Administrative Segregation because he had been discharged from a prior term of incarceration while on that status. Hearing records prepared by prison officials note that Allah stated at the hearing that "[he] was in Phase One," A. 106, ostensibly referring to the fact that Allah was in the first of the three phases of Administrative Segregation when released from his prior term of incarceration.

On October 4, 2010, Griggs recommended that Allah be placed in Administrative Segregation, reasoning in relevant part as follows:

> Summary of placement rationale: According to the DOC Classification Manual, any inmate who discharges while on Administrative Segregation (A/S) shall be re-admitted at that status. I/M Allah was placed on A/S on 02/08/10. Since that time he discharged and returned to the DOC without **[**8]** completing the program. . . .
>
> Reason(s) for recommendation: Inmate Allah did not complete the program, therefore, he needs [to] continue in Administrative Segregation placement to **[*53]** complete program requirements prior to being placed in

general population.
A. 106-07. Defendant Milling, in her capacity as Director of Offender Classification and Population Management, authorized the placement the same day, writing on the approval form, "Continue in A.S. program Phase TBD by facility." A. 107.

D. Administrative Segregation at Northern

As a result of the classification process described above, Allah was placed in Administrative Segregation at Northern while a pretrial detainee from October 4, 2010 to September 26, 2011.[1] As noted above, Administrative Segregation is one of many restrictive housing statuses in DOC facilities that "provide[] for closely regulated [inmate] management" and physical separation from the general prison population. A. 82. Administrative Segregation, in particular, consists of a "three phase program" that is "designed to remove problematic inmates from the general population, usually based on an incident that occurred while the inmate was in the general population, for **[**9]** safety and security reasons." *Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *2*. Phase I is the most restrictive of the three phases and generally lasts for a minimum of four months. During Phase I, an inmate typically spends 23 hours a day alone in his cell, and must be put in leg irons and handcuffed behind the back whenever out of his cell. Phase I inmates are permitted to leave their cell for three 15-minute showers per week (during which they may remove their handcuffs but must wear leg irons); one 30-minute visit per week with an immediate family member (during which a physical barrier is placed between the inmate and his or her visitor); one 15-minute telephone call per week (during which inmates are handcuffed in front, rather than in back, and must wear leg irons); and five 60-minute recreation sessions per week (during which handcuffs must be worn unless the inmate is in a secured, individual recreation area). Meals are eaten inside an inmate's cell, and inmates may keep a radio, five pieces of mail, and reading materials not exceeding the four cubic feet of total property allowed in their cells.

During Phases II and III, which generally last around three months each, some of those restrictions are relaxed, *see 2016 U.S. Dist. LEXIS 45081, [WL] at *2-*3* (describing **[**10]** the differences between Phases I, II and III), and inmates complete "programming" called "Thinking for a Change" that is designed to improve their anger management and coping skills, *2016 U.S. Dist. LEXIS 45081, [WL] at *4*. That programming is completed in a group setting, which allows inmates to gradually increase their interaction with others as they progress through Phases II and III of Administrative Segregation, thereby facilitating their return to the general prison population. Progression through the phases of Administrative Segregation is contingent on "successful completion of the prior phase." *2016 U.S. Dist. LEXIS 45081, [WL] at *2*.

Allah began Phase I of Administrative Segregation on October 4, 2010 and was alone in his cell for approximately 23 hours a day during the placement. Because inmates are not permitted to walk to the shower area naked and must wear leg irons while showering during Phase I, Allah had to shower in his underwear and **[*54]** walk back to his cell wearing the wet clothing. On one occasion, Allah's leg irons became caught in the rubber carpeting in the shower area, and he fell and hit his head. He was returned to his cell after being examined by medical staff.

On December 13, 2010, Allah was recommended for Phase II of Administrative Segregation **[**11]** but refused to sign a "progression document" setting forth the expectations of inmates in Phase II

[1] On September 26, 2011, Allah became a post-conviction prisoner after pleading guilty to the charges for which he was arrested in September 2010. On November 3, 2011, having completed Phase III of the Administrative Segregation program, he was transferred to Cheshire Correctional Institute and released from Administrative Segregation, and on May 30, 2012, he was released from DOC custody. Allah does not challenge his placement in Administrative Segregation during his time as a post-conviction prisoner.

because he did not want to consent to the placement and felt that he should not be in Administrative Segregation as a pretrial detainee. *2016 U.S. Dist. LEXIS 45081, [WL] at *6*. He later consented to progression to Phase II because it would allow him additional contact with his family, and on April 27, 2011, Allah progressed to Phase II. Approximately four months later, Allah progressed to Phase III and completed that phase on November 3, 2011, at which point he was transferred to Cheshire Correctional Institute and taken out of Administrative Segregation.

At trial, Allah testified that his placement in Administrative Segregation strained his relationship with his family because it was difficult for his wife to travel to Northern and because he did not want his four-year old daughter to see him in restraints during visits. Allah also testified that while in Administrative Segregation, he "rarely slept," "lost weight," "always rested in such a way where he could 'get up immediately' if necessary to protect himself," and felt paranoid and "always . . . on guard and on edge." *2016 U.S. Dist. LEXIS 45081, [WL] at *7*. Those feelings of paranoia persisted even after Allah's **[**12]** release from DOC custody.

II. Procedural History

In April 2011, while in Phase I of Administrative Segregation, Allah brought suit against Defendants in the district court pursuant to *42 U.S.C. § 1983*, asserting that prison officials violated his due process rights when they placed him in Administrative Segregation in October 2010 while a pretrial detainee. In December 2015, the district court held a two-day bench trial at which Allah and all three Defendants testified. Thereafter, the district court issued a written opinion ruling that Defendants had violated Plaintiff's due process rights and rejecting Defendants' claims that they were entitled to qualified immunity. The district court entered judgment in favor of Allah and awarded him $62,650 in compensatory damages. This timely appeal followed.

DISCUSSION

On appeal, Defendants challenge the district court's determination that Allah's due process rights were violated when he was placed in Administrative Segregation in October 2010 while a pretrial detainee. Defendants also challenge the district court's ruling that they were not entitled to qualified immunity.[2] *HN1*[↑] In evaluating a due process challenge to pretrial detention, "we review the district court's **[**13]** findings of historical fact for clear error and its ultimate resolution of the constitutional due process issue *de novo*." *United States v. Briggs, 697 F.3d 98, 101 (2d Cir. 2012)* (internal quotation marks and alteration omitted). "*HN2*[↑] [W]e review *de novo* . . . a decision affording a defendant qualified immunity [following a bench trial]." *Zalaski [*55] v. City of Hartford, 723 F.3d 382, 388 (2d Cir. 2013)*.

I. Allah's Due Process Claim

HN3[↑] "[U]nder the *Due Process Clause*, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*. Thus, in assessing whether restrictions on pretrial detainees comport with substantive due process, "[a] court must decide whether the [restriction] is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id. at 538*. Absent proof of intent to punish, "that determination generally will turn on

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[2] Defense counsel suggests in passing that Defendant Cahill was not involved in the decision to place Allah in Administrative Segregation, but does not squarely argue that the district court erred in determining that Cahill had the requisite personal involvement for liability under *§ 1983*. *See Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994)*. Because we reverse the district court's judgment as to all Defendants on qualified immunity grounds, we do not reach the question of Cahill's personal involvement in the challenged conduct.

'whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.'" *Id.*, quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) (alteration in original); *see* Block v. Rutherford, 468 U.S. 576, 584, 104 S. Ct. 3227, 82 L. Ed. 2d 438 (1984). Accordingly, "if a restriction or condition is not reasonably related to a legitimate goal — if it is arbitrary or purposeless — a court permissibly may infer that the purpose of the governmental **[**14]** action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." Wolfish, 441 U.S. at 539.[3]

HN4[↑] In many cases, a pretrial detainee's placement in a restrictive housing status like Administrative Segregation may be determined to be reasonably related to legitimate governmental purposes. In *Wolfish*, the Supreme Court recognized that the government has a legitimate interest in the security of prisons, and that prison officials should be afforded deference "in the adoption and execution of policies and practices . . . needed to preserve internal order and discipline and to maintain institutional security." Wolfish, 441 U.S. at 547. Accordingly, in prior summary orders, we have found measures similar to Administrative Segregation not to violate substantive due process where prison officials subjected **[*56]** pretrial detainees to such measures in response to specific evidence that those detainees posed a risk to institutional security, and where the measures were not excessive in relation to that purpose. *See* Cabral v. Strada, 513 F. App'x 99, 103 (2d Cir. 2013) (rejecting substantive due process claim where pretrial detainees were placed in segregated housing unit after prison officials received reports from confidential informants **[**15]** that, *inter alia*, a "green light" had been issued by rival gang members to physically attack the detainees on sight in the prison); Taylor v. Comm'r of N.Y.C. Dep't of Corr., 317 F. App'x 80, 82 (2d Cir. 2009) (rejecting substantive due process claim where pretrial detainee was placed in segregated housing unit after being "implicated in an assault against an inmate who subsequently died").

Here, the district court found no such evidence. Prison officials did not, for example, make an "individualized or specific finding of the risk Allah may have presented in the fall of 2010," or any "real determination . . . [or] individualized assessment[] that Administrative Segregation was appropriate for Allah" during that time period. Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *9-*10. Nor did they review the particulars of the December 2009 incident that gave rise to Allah's prior placement in Administrative Segregation and make a determination that the incident justified continued placement in Administrative Segregation in October 2010, or assess Allah's disciplinary record since the December 2009 incident to determine whether the placement was appropriate. Instead, the district

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[3] Claims under the *Wolfish* framework concern a pretrial detainee's substantive due process rights. *See* Wolfish, 441 U.S. at 532; *see also* Block, 468 U.S. at 593 (Blackmun, J., concurring) (describing *Wolfish* as "announc[ing]" a "substantive due process standard"). In addition to his substantive due process claim, Allah also asserts what he characterizes as a procedural due process claim, challenging the standard used by prison officials at the September 30, 2010 classification hearing to determine whether to place Allah in Administrative Segregation. Specifically, Allah argues that prison officials erred when they asked at that hearing only whether he had been released from a prior term of incarceration while on Administrative Segregation in determining whether he should be reassigned to the placement, instead of assessing whether he posed a risk to institutional security. That argument, however, sounds in substantive rather than procedural due process and is governed by the *Wolfish* framework. Procedural due process requires that a pretrial detainee be given "written notice, adequate time to prepare a defense, a written statement of the reasons for action taken, and a limited ability to present witnesses and evidence" before being subjected to punitive as opposed to administrative measures. Benjamin v. Fraser, 264 F.3d 175, 190 (2d Cir. 2001). On appeal, Allah does not squarely challenge the adequacy of those aspects of the classification hearing, and Allah's counsel specifically disavowed any challenge to "the procedure that was done" or "[t]he notice and stuff like that" before the district court. A. 393. Accordingly, we conclude that the district court erred in concluding that Allah's procedural due process rights were violated, and we consider Allah's assertions regarding the substantive standard employed at his classification hearing in the course of evaluating his substantive due process claim under the Wolfish framework.

court found that the "only reason for the placement" was the fact that Allah had previously been assigned to Administrative Segregation during **[**16]** his prior term of incarceration and "had not completed the program." *2016 U.S. Dist. LEXIS 45081, [WL] at *10*.[4]

On those findings of fact, which Defendants do not squarely challenge and in which we find no clear error, we agree with the district court that Allah's substantive due process rights were violated when he was assigned to Administrative Segregation in October 2010 while a pretrial detainee. *HN6*[↑] Although prison officials are to be afforded deference in matters of institutional security, such deference does not relieve officials from the requirements of due process or permit them to institute restrictive measures on pretrial detainees that are not reasonably related to legitimate governmental purposes. *See Wolfish, 441 U.S. at 539*. Here, in assigning Allah to Administrative Segregation in October 2010, prison officials made no individualized assessment whatsoever of **[*57]** the risk that Allah posed to institutional security. Instead, they placed Allah in Administrative Segregation solely on the basis of his prior assignment to (and failure to complete) the Administrative Segregation program during a prior term of incarceration, consistent with their practice of doing so for any such inmate, unless he or she had nearly completed all three phases **[**17]** of the program or more than five years had elapsed since the inmate's prior term of incarceration.[5]

That practice may serve as a useful rule of thumb for determining when an inmate who has previously been identified as a security risk is sufficiently rehabilitated, such that prison officials may want to consider whether he or she should re-enter the general prison population. We do not quarrel with the proposition that such rules of thumb may often be appropriate in guiding the many day-to-day decisions that prison officials must make to safeguard institutional security. But when such rules of thumb are applied inflexibly to justify severe restrictions on pretrial detainees at the expense of any meaningful consideration of whether those restrictions are justified by a legitimate governmental purpose, due process concerns come into play. Here, prison officials adhered reflexively to a practice that did not allow for individualized consideration of Allah's circumstances and that required him to be placed in Administrative Segregation regardless of his actual threat, if any, to institutional security. On that basis, Allah was isolated in his cell for up to 23 hours a day; required for months **[**18]** to wear restraints whenever out of his cell, including when

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[4] Defendants' primary argument on appeal attempts to duck the district court's findings of fact. Specifically, without challenging the relevant findings of fact for clear error, Defendants assert that Allah's October 2010 placement in Administrative Segregation was based on Allah's involvement in the December 2009 incident, and thus stemmed from concerns about Allah's continuing threat to institutional security. The district court acknowledged that Griggs and Milling testified at trial that they had reviewed paperwork relating to the December 2009 incident in the course of determining that Allah should be reassigned to Administrative Segregation in October 2010, but it found, nevertheless, that the decision was based solely on the fact of Allah's prior placement in (and failure to complete) Administrative Segregation during his prior term of incarceration. *Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *6, *10*. We detect no clear error in that finding, which Defendants do not squarely challenge and which is well-supported by the testimony and documentary evidence introduced at trial. *See Arch Ins. Co. v. Precision Stone, Inc., 584 F.3d 33, 39 (2d Cir. 2009)* ("*HN5*[↑] In reviewing findings for clear error [following a bench trial], we are not allowed to second-guess . . . the trial court's . . . choice between permissible competing inferences." (internal quotation marks omitted; alterations in original)).

[5] Although Griggs' October 4, 2010 recommendation suggests that the practice of continuing Administrative Segregation was based on guidance in the "DOC Classification Manual," *Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *6*, the district court did not make a finding as to that point, nor do the parties make any argument to that effect on appeal or provide a copy of the operative manual. Instead, as noted, the district court found that in practice, Administrative Segregation was continued for inmates who had been released from a prior term of incarceration while on Administrative Segregation, except in certain circumstances in which Administrative Segregation "might not be continued." *Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *5*. Thus, regardless of whether it was memorialized in the relevant version of the DOC Classification Manual, it remains the case that prison officials, based on the district court's findings, would continue Administrative Segregation for any inmate who had been previously assigned to the program and failed to complete it, subject to the exceptions described above.

showering; allowed very limited opportunities to see his family; and subjected to the numerous other restrictions described above.

Defendants argued before this Court and the district court that they justifiably placed Allah in Administrative Segregation because his prior disciplinary record warranted that placement as a special security measure. We reject the factual premise of that argument, *see supra* note 4, and conclude that Allah's placement in Administrative Segregation violated due process because the placement was not based on any concern about institutional safety, but simply on Allah's prior assignment to (and failure to complete) Administrative Segregation during a prior term of incarceration. We note, however, that even had Defendants adequately considered Allah's disciplinary history, it is not clear that Allah's placement would be constitutional. *HN7*[↑] Under *Wolfish*, a restriction related to a legitimate goal such as institutional security will still be punitive if it is excessively harsh. *441 U.S. at 538*. Indeed,

> loading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and **[*58]** preserve **[**19]** the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

Id. at 539 n.20.

Here, Defendants have failed to show how certain aspects of Allah's confinement during Phase I of Administrative Segregation were reasonably related to the ostensible goal of prison security. For instance, Defendants have not adequately explained how limiting Allah to a single, 15-minute phone call and a single, 30-minute, non-contact visit with an immediate family member per week, allowing him to keep only five pieces of mail in his cell, or permitting him to keep a radio but not a television, related to any security risk suggested by his disciplinary record. Similarly, other aspects of Allah's confinement during Phase I, although plausibly related to security concerns in general, were so excessively harsh as to be punitive. Allah was kept in solitary confinement for 23 hours a day for almost seven months. During that time, he was forced to shower in leg irons and wet underwear. **[**20]** He received "absolutely no programming or counseling or therapy" during that period. *Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *10*. That treatment may have related to prison security in the sense that it incapacitated Allah. But the extremity of the conditions imposed upon Allah come perilously close to the Supreme Court's description of "loading a detainee with chains and shackles and throwing him in a dungeon." *Wolfish, 441 U.S. at 539 n.20*. Defendants have failed to explain why such extreme treatment was necessary.

To be sure, we have upheld the placement of pretrial detainees in Administrative Segregation in the past, including for purposes of the detainees' protection. *See Cabral, 513 F. App'x at 103; Taylor, 317 F. App'x at 82*. The measures imposed on Allah are not categorically out of bounds for all pretrial detainees. And courts will generally be highly deferential to judgments about the conditions of confinement necessary to protect inmates and staff, and the public outside the facility, from particularly dangerous individuals, even in pretrial detention. However, prison officials should be prepared to articulate actual reasons for imposing seemingly arbitrary and undoubtedly harsh measures on individuals who have not been convicted of a crime. *Wolfish* demands as much.

Under the circumstances of this **[**21]** case, prison officials' October 2010 placement of Allah in Administrative Segregation cannot be said to be reasonably related to institutional security, and Defendants have identified no other legitimate governmental purpose justifying the placement.

Accordingly, we conclude that the district court "permissibly . . . infer[red] that the purpose of the governmental action [was] punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Wolfish, 441 U.S. at 539*.[6]

II. Qualified Immunity

Having decided that Allah's substantive due process rights were violated, we nonetheless conclude that Defendants are entitled to qualified immunity. **[*59]** "*HN8*[↑] The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Messerschmidt v. Millender, 565 U.S. 535, 546, 132 S. Ct. 1235, 182 L. Ed. 2d 47 (2012)* (internal quotation marks omitted). "A Government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Ashcroft v. al-Kidd, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)* (internal quotation **[**22]** marks and brackets omitted). Thus, qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Id. at 743* (internal quotation marks omitted).

Allah argues, and the district court concluded below, that Defendants are not entitled to qualified immunity because *Wolfish* and its progeny clearly established the "right to be free from punishment before guilt" under substantive due process, Appellee Br. 30, and prison officials therefore should have understood that assigning Allah to Administrative Segregation solely on the basis of his prior assignment to that program violated his constitutional rights. Allah's argument, however, sets the qualified immunity analysis at an impermissibly "high level of generality." *Al-Kidd, 563 U.S. at 742*.

We agree that *Wolfish* and its progeny put prison officials on notice that pretrial detainees have a substantive due process right not to be subjected to restrictions amounting to punishment. But just as "[t]he general proposition, for example, that an unreasonable search or seizure violates the *Fourth Amendment* is of little help in determining whether the violative nature of particular conduct is clearly established," *Al-Kidd, 563 U.S. at 742*, the general principle articulated in *Wolfish* does **[**23]** not clearly establish that a substantive due process violation would result from Allah's placement in Administrative Segregation based solely on his prior assignment to (and failure to complete) that program. Nor does Allah identify any other case law that would have placed Defendants on notice that their conduct violated substantive due process. *See Dean v. Blumenthal, 577 F.3d 60, 68 (2d Cir. 2009)* (noting that in assessing whether a right is clearly established, we look to "the decisional law of the Supreme Court and the applicable Circuit court"). Rather, as the district court noted, "[t]he evidence shows that the defendants, though mistaken, were simply trying to fulfill their professional duties." *Allah, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *15*.

As noted above, in assigning Allah to Administrative Segregation, Defendants were following an established DOC practice. No prior decision of the Supreme Court or of this Court (or, so far as we are aware, of any other court) has assessed the constitutionality of that particular practice. Moreover, neither *Wolfish* nor any subsequent decision has prohibited the confinement of pretrial detainees under the conditions imposed here if those conditions are imposed upon an individualized finding that a particular detainee

[6] It bears emphasis that this holding is rooted in Allah's status upon his readmission to DOC custody in September 2010, as a pretrial detainee. We have no occasion to assess the constitutionality of the practice of automatic assignment to Administrative Segregation as applied to inmates who are returned to DOC custody as post-conviction prisoners, and express no view on that subject.

poses a threat to security. [**24] [7] Finally, the line between using a [*60] prior assignment to Administrative Segregation without completion of the full program as a trigger for closer scrutiny and inflexibly relegating pretrial detainees with such a prior record to renewed Administrative Segregation, although critical to the constitutionality of the determination, is a fine one that would not necessarily be apparent to prison officials in the absence of specific judicial evaluation of the practice.

Accordingly, we conclude that Defendants were entitled to qualified immunity and cannot be held liable for civil damages for violating Allah's substantive due process rights.

CONCLUSION

For the foregoing reasons, we REVERSE the judgment of the district court, and direct the entry of a judgment in favor of Defendants.

Concur by: POOLER (In Part)

Dissent by: POOLER (In Part)

Dissent

POOLER, *Circuit Judge*, concurring in part, dissenting in part, and dissenting from the judgment:

I concur with the majority's holding that Allah's constitutional rights were violated when prison officials failed to consider whether he posed a risk to the institution before placing him in extended solitary confinement. I would additionally hold, however, that [**25] the restraints imposed in this case were unconstitutional as a response to the minimal infraction Allah committed. And I would not afford the defendants qualified immunity for having imposed the restraints.

* * *

We must remember that Allah's misdeed in this case was the asking of a single question. As the district court found, and as defendants do not dispute, "Allah was standing with approximately fifty other inmates in his dormitory" on December 22 . . ., as they were "awaiting their turn to visit the commissary to purchase items that are sold only during the holiday season." *Almighty Supreme Born Allah v. Milling, No. 3:11cv668, 2016 U.S. Dist. LEXIS 45081, 2016 WL 1311997, at *4 (D. Conn. Apr. 4, 2016)* (hereinafter "Dist. Ct. Op."). When "[p]rison officials decided to permit inmates in [another dormitory] to go to the commissary before the inmates in [Allah's dormitory]," "Allah asked the correctional officer . . . if he could speak to a lieutenant about this." *Id.* "Because of a history of riots at [the facility]," "[o]ne of the correctional officers perceived the request to talk to a lieutenant as an attempt to incite other inmates to unite and protest the delay in visiting the commissary." *Id.* Allah's question was therefore deemed a security risk. *Id.*

The defendant [**26] officials do not explain how Allah's seemingly minor request led to disorder or a breakdown of security. The officials state, vaguely, that Allah "created a significant disturbance," and "incited" a "protest." Appellant's Opening Br. at 3.

[7] For these reasons, we respectfully disagree with our dissenting colleague's view that *Wolfish* alone was sufficient to put prison authorities on notice that the conditions applied to Allah, based on an aspect of his particular prior history at the institution, violated the Constitution. *Wolfish* suggested that certain generalized conditions at a detention facility, applied indiscriminately to every detainee, might be so severe that they could only be regarded as punitive, and not as mere incidents of confinement so as to assure the detainees' presence at trial. *441 U.S. at 539 n.20*. *Wolfish* did not hold that such conditions may never be applied to any detainee, regardless of his history or the specific risks that he may pose to the security of prison staff, other inmates, or persons in the community. Nor did it address whether restrictive conditions that could not be applied to detainees as a matter of course may, in the cases of particular detainees, be sufficiently justified by security rationales that they could not be regarded as punitive. Thus, while we hold that Defendants violated the Constitution in applying highly restrictive conditions to Allah, we also recognize that in deciding what restrictions could legitimately be placed on a *particular* detainee, Defendants lacked definitive guidance from the Supreme Court or from this Court.

But defendants do not say any protest took place. Nor do they explain how Allah's **[*61]** question might have caused one. Nor do they state that anyone was harmed, or explain specifically why or how harm might have resulted from Allah's question.

For this conduct, defendants placed Allah in solitary confinement for more than a year, spread across two terms of incarceration. During part of that time, he was a pretrial detainee, which means that any restraints imposed upon him must be evaluated in light of *Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*, the leading case explaining what conditions may lawfully be imposed upon pretrial detainees.

In *Wolfish*, the Supreme Court explained that "the proper inquiry" for whether conditions may be imposed upon a pretrial detainee "is whether those conditions amount to punishment of the detainee." *Id. at 535*. "[U]nder the *Due Process Clause*, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* Because "[a] person lawfully committed to pretrial **[**27]** detention has not been adjudged guilty of any crime," a condition that amounts to punishment of the detainee is unlawful. *Id. at 536*.

The Supreme Court provided the following guidance for determining whether a condition imposed upon pretrial detainees amounted to unconstitutional punishment:

> A court must decide whether the [condition] is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose. Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on [1] whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and [2] whether it appears excessive in relation to the alternative purpose assigned to it. Thus, if a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally **[**28]** be inflicted upon detainees *qua* detainees.

Id. at 538-39 (internal quotation marks, citations, footnotes, and brackets omitted). The Supreme Court thus set forth a two-part test for evaluating whether a condition of confinement amounts to an unconstitutional punishment of a pretrial detainee. We must ask, first, whether there is a non-punitive purpose rationally connected to a given condition, and, second, whether the condition is proportional to that purpose: whether it is an excessive means for accomplishing the purpose.

The Supreme Court provided an illustration of this test, describing a scenario in which certain conditions are related to non-punitive purposes, but would nevertheless be disproportionate means of achieving those purposes:

> [L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished in so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.

Id. at 539 n.20.

Several of the conditions in this case do **[**29]** not pass the test articulated in *Wolfish*, **[*62]** particularly in light of the Supreme Court's example. First, as the majority suggests, some conditions imposed on Allah related only to

punishing him. Neither here, nor in the district court, did the officials explain how limiting Allah to five pieces of mail at a time related to any goal but punishment. *See* 2016 U.S. Dist. LEXIS 45081, [WL] at *9 (concluding that "the defendants could not explain (nor can the Court) how limiting . . . a pretrial detainee[] to having only five pieces of mail in his cell was reasonably related to a security concern"). The same is true of the rules limiting him to one phone call and one family visit per week. *Id.* These conditions should be held unconstitutional as imposed on Allah, particularly in that they have no relationship at all to his infraction.

Similarly, there is no good argument that Allah's asking of a single question justifies more than a year of solitary confinement, much of it under oppressive conditions. 2016 U.S. Dist. LEXIS 45081, [WL] at *3, *4-7. For many months during his time as a pretrial detainee, Allah spent twenty-three hours per day alone in his cell. 2016 U.S. Dist. LEXIS 45081, [WL] at *6. He was required to wear leg irons, and shackles behind his back, when he exited. 2016 U.S. Dist. LEXIS 45081, [WL] at *6. The leg irons stayed on even when **[**30]** he showered. 2016 U.S. Dist. LEXIS 45081, [WL] at *6. He had few visits with family, few phone calls, and few other privileges. 2016 U.S. Dist. LEXIS 45081, [WL] at *3.

I do not see how these conditions were materially different from "loading [him] with chains and shackles and throwing him in a dungeon." *Wolfish*, 441 U.S. at 539 n.20. Allah was isolated from others and could not walk anywhere without total restraint and supervision. He endured these conditions for a long period of time. The Supreme Court's purpose in employing the above-quoted example was to show that near-total physical restrictions could only be justified by a significant government interest. Allah endured such restrictions without any apparent interest justifying them.

The majority's analysis of this case is that Allah's treatment was unconstitutional, but not because it was excessive in light of his minor infraction. The majority believes that Allah was put into Administrative Segregation only due to the policy of automatically placing detainees in Administrative Segregation as a result of their previous placement there. *See* Slip Op. at 19-20 n.6. It appears, however, that the district court addressed this policy only because the court viewed the defendants' principal justification for the restraints—i.e., their security **[**31]** concerns—as obviously wanting. *See* 2016 U.S. Dist. LEXIS 45081, [WL] at *9. Moreover, on appeal, defendants have primarily argued that they correctly placed Allah within Administrative Segregation because "he was a threat to safety and security," Appellants' Opening Br. at 13, 15, 20, 27. Nevertheless, the majority holds that the treatment was unlawful because it was based on the policy of automatically placing detainees in Administrative Segregation as a result of their previous placement in that program.

Even if the majority is correct that Allah was punished based on that policy, I would still deny the officials qualified immunity. As the majority notes, and as I agree, the policy "was not reasonably related to any legitimate government interest" at all. Slip Op. at 19-20 n.6. *Wolfish* squarely stated that officials must have a very significant justification for "loading a [pretrial] detainee with chains and shackles and throwing him in a dungeon." 441 U.S. at 539 n.20. Imposing such restraints upon a detainee without *any* justification clearly does not comport with *Wolfish*.

In light of the similarity of Allah's conditions to the Supreme Court's example in *Wolfish*, and in light of the lack of legitimate **[*63]** government interest in instituting those **[**32]** conditions, I would not afford the defendants qualified immunity. Accordingly, I dissent from the portion of the majority's opinion granting immunity to the officials and from its disposition reversing the judgment below.

End of Document

Almighty Supreme Born Allah v. Milling

United States District Court for the District of Connecticut

April 4, 2016, Decided; April 4, 2016, Filed

No. 3:11cv668(WIG)

Reporter
2016 U.S. Dist. LEXIS 45081 *

ALMIGHTY SUPREME BORN ALLAH, Plaintiff, vs. LYNN MILLING, et al., Defendants.

Subsequent History: Reversed by *Allah v. Milling, 2017 U.S. App. LEXIS 23631 (2d Cir. Conn., Nov. 22, 2017)*

Prior History: *Almighty Supreme Born Allah v. Milling, 2011 U.S. Dist. LEXIS 91097 (D. Conn., July 29, 2011)*

Core Terms

inmate, administrative segregation, pretrial detainee, placement, Phase, cell, punitive, general population, Detention, restrictions, damages, conditions, days, housing, shower, reasonably related, classification, confinement, progress, custody, notice, visits, disciplinary, recreation, discharged, prison, Segregation, programming, reasons, prison official

Counsel: **[*1]** For Almighty Supreme Born Allah, Plaintiff: John J. Morgan, LEAD ATTORNEY, Barr & Morgan, Stamford, CT.

For Lynn Milling, Director of Population Management, Griggs, Counselor Supervisor, Cahill, Captain, DcZurenda, Deputy Commissioner, Defendants: Steven M. Barry, LEAD ATTORNEY, Office of the Attorney General--Sherman, Hartford, CT.

Judges: WILLIAM I. GARFINKEL, United States Magistrate Judge.

Opinion by: WILLIAM I. GARFINKEL

Opinion

RULING

Plaintiff Almighty Supreme Born Allah ("Allah") brings this civil rights action pursuant to *42 U.S.C. § 1983* alleging that defendants violated his *Fourteenth Amendment* rights to substantive and procedural due process by confining him to Administrative Segregation as a pretrial detainee. Allah's constitutional claims arise out of the defendants' decision to return him to Administrative Segregation after he had been released from a prior term of incarceration while on that status. During the time giving rise to Plaintiff's allegations, defendant Jason Cahill was a Shift Commander at Northern Correctional Institution ("Northern"), defendant Brian Griggs was a Supervisor in the Offender Classification and Population Management Unit, and defendant Lynn Milling was the Director of Offender Classification and Population **[*2]** Management.

A bench trial was held on December 2 and 3, 2015. At trial, Plaintiff testified on his own behalf. Defendants Cahill, Griggs, and Milling also testified. The evidence adduced at trial is summarized below as necessary to explain the Court's findings and conclusions. For the reasons that follow, the Court enters judgment in favor of the plaintiff.[1]

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[1] Plaintiff also requests that judgment be entered in his favor against Deputy Commissioner Dzurenda. As to Dzurenda, "[i]t is well settled in this Circuit that personal involvement of defendants in

FINDINGS OF FACT

Each inmate under State of Connecticut Department of Correction ("DOC") custody must be placed in a facility appropriate for that inmate's security and treatment needs. This placement procedure is known as the classification process. In the classification process, inmates are assigned an overall risk score of one to five, with one being the lowest security level and five being the highest. Any inmate with an overall risk score of five will be assigned to Administrative Segregation. State of Connecticut Department of Correction Administrative Directive ("Administrative Directive") 9.2(8)(A) requires consideration of the following factors when assessing an inmate's risk: history of escape; severity and/or violence of current offense; history of violence; length of sentence; presence of pending charges, bond amount and/or detainers; discipline history; and security risk group membership.

In determining [*4] an inmate's placement, DOC officials also consider an inmate's health needs, education needs, community resource needs, and sex offender status. The goal of the classification process is to place inmates appropriately based upon the risk they present and their needs.

When an inmate who has been released from a prior term of incarceration re-enters DOC custody as a pretrial detainee, a classification assessment is made. When, however, a pretrial detainee was released from a prior term of incarceration with an overall risk score of five, that person will be automatically placed on Administrative Detention pending a hearing to decide whether placement in Administrative Segregation is appropriate. In such a scenario, the risk factors enumerated in Administrative Directive 9.2(8)(A) are not considered by DOC personnel in assignment placement.

The DOC has several placement categories for inmates. Among these are restrictive housing statuses. Punitive Segregation, Administrative Detention, and Administrative Segregation are three types of restrictive housing statuses. Inmates are assigned to a restrictive housing status typically because they have been determined to pose a threat to the safety [*5] and security of a general population facility. Inmates on restrictive housing status are not permitted access to the same programs and privileges afforded to inmates in the general population. Programs and privileges afforded to the general population include the following: attending general population recreation including outside yard, dayroom, gymnasium, and library; attending work assignment; attending school if under twenty-one years of age; attending social visits; attending collective religious services; attending addiction services programs; using the telephone; receiving commissary; showering; attending meals with the general population; and retaining a television and/or radio in one's cell. Further, an inmate in Administrative Segregation will not earn or receive statutory good time credit while on that status. Inmates on restrictive housing status may earn back access to limited privileges based upon satisfactory behavior.

Punitive Segregation is a component of the disciplinary process; it is a consequence for an infraction committed by an inmate which results in placement in a restrictive housing unit at any

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alleged constitutional deprivations is a prerequisite to an award of damages under *§ 1983*." Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) (internal quotation marks omitted). Personal involvement can be established by evidence showing:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited [*3] deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring.

Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995). No evidence presented at trial established Dzurenda had personal involvement. Accordingly, any claims against him are hereby dismissed.

facility. Punitive Segregation typically lasts for a short, circumscribed [*6] period of time.

Administrative Detention is also a temporary restrictive housing status: an inmate is placed in Administrative Detention after being removed from the general population and is held there pending a hearing or disciplinary disposition determining whether continued restrictive status is appropriate.

Administrative Segregation, as opposed to a brief and/or temporary placement, is a three phase program. During the period at issue, the program was implemented at Northern, which is a maximum security prison. Administrative Segregation is designed to remove problematic inmates from the general population, usually based on an incident that occurred while the inmate was in the general population, for safety and security reasons. Its programming aims to provide coping and anger management skills so that inmates can return to the general population better adjusted to that setting. In Phase I, an inmate is typically alone in his cell for twenty-three hours per day. Phase I lasts for a minimum of four months. There are no programming components in this phase. Phases II and III, which each last for approximately three months, contain some programming where inmates address anger management [*7] and coping skills in a group setting. The program becomes less restrictive as inmates are offered more privileges and opportunities as they successfully progress through it. While an inmate is in Administrative Segregation, he is reviewed for progression through the program, which is contingent upon successful completion of the prior phase.

The DOC has delineated provisions and management standards for the restrictive housing statuses. These standards do not differentiate between pretrial detainees and post-conviction prisoners. An inmate in Punitive Segregation or Administrative Detention is required to be handcuffed behind the back before being removed from his cell, except when making a telephone call, at which time he is handcuffed in the front. The inmate must be escorted on a one staff, one inmate basis when out of his cell. Inmates on these two statuses are entitled to a minimum of three fifteen-minute showers per week. They may have work assignments, but are limited to cleaning and food service assignments in the housing unit. Meals are eaten inside their cell. Recreation is allowed for one hour per day, five days a week, in a controlled area. Counseling, chaplaincy, and health [*8] services will tour the unit at least once every seven days. Visits are generally not allowed. Inmates on these two statuses will be entitled to legal visits as needed and approved by a unit administrator. They may send and receive mail, but may only retain five letters in their cells. These inmates are limited to retaining two books or periodicals at a time. Legal materials are provided upon an inmate's request to address a legal issue that requires immediate attention. Telephone calls are not allowed unless approved by the Unit Administrator. Finally, an inmate in Punitive Segregation or Administrative Detention is not allowed a television or radio in his cell.

As for Administrative Segregation, an inmate in **Phase I** must be handcuffed behind the back and put in leg irons before being released from his cell. If the inmate will be making a phone call, he will be handcuffed in front and also put in leg irons. The inmate must be escorted on a one staff, one inmate basis when out of his cell. Inmates are entitled to three fifteen-minute showers per week. When the inmate is in Phase I of Administrative Segregation, he is taken to the shower area in handcuffs and in leg irons; upon arrival [*9] at the secure shower area, the handcuffs are removed and the inmate must shower with the leg irons on. Phase I inmates are not allowed to have work assignments. Meals are eaten inside their cells. Recreation is permitted one hour per day, five days per week. Handcuffs are required during recreation unless the inmate is in a secure individual recreation area. The secured recreation area at Northern is a space approximately 50 x 20 feet in size, divided into three enclosures. Each enclosure is a fenced area when an inmate can recreate without restraints.

There is no sporting equipment in the recreation area. Inmates are permitted to exercise in their cells. Program opportunities are provided only in-cell during Phase I, and religious and counseling programs are available on a limited basis. Inmates are allowed one thirty-minute non-contact visit per week with an immediate family member. Extended family is not allowed to visit. Non-contact visits require a physical barrier to be placed between the inmate and his visitor. Legal visits are allowed as needed and approved. Inmates may send and receive mail, but may only retain five letters in their cells. Reading materials, including legal [*10] materials, may not exceed four cubic feet of total allowable property. One fifteen-minute telephone call is permitted per week, except for legal telephone calls as approved by a supervisor or counselor. An inmate is not allowed a television, but is permitted to have a radio in his cell.

Some of these restrictions are alleviated in **Phase II** of Administrative Segregation. For example, after the inmate has been in Phase II for thirty days, restraints are not required when the inmate is transported within the unit. Inmates may have a work assignment within the unit. For recreation, handcuffs in the front are required for the first thirty days, and no restraints are required thereafter. Program opportunities are provided out of cell after the first thirty days of Phase II, but inmates remain in restraints and in a secured area. In Phase II, inmates can retain more than five letters, but their total possessions may not exceed four cubic feet. Visits and telephone calls are increased to two per week.

Restrictions are lessened further in **Phase III** of Administrative Segregation. For example, restraints are not required for movement within the unit. Meals are eaten outside of the cell but within [*11] the housing unit. No restraints are required during recreation. Program opportunities are provided out of cell in a secured area, and inmates are not restrained. Telephone calls and visits are increased to three per week.

Defendant Griggs testified about the programming component of Administrative Segregation. In Phases II and III, inmates, in groups, complete several modules of a program called "Thinking for a Change," which is designed to improve anger management and coping skills. The defendants testified that the program allows the inmate to gradually interact with other Administrative Segregation inmates as he progresses through the phases with the goal of returning to the general population. According to the defendants, the integrity of the program is maintained by inmates successfully completing all three phases.

Inmates progress through the Administrative Segregation phases contingent upon successful completion of specific program components. A panel of DOC officials reviews each inmate's progress and makes a recommendation as to whether an inmate should move on to the next phase. If an inmate refuses to progress after a recommendation is made, the inmate can be issued a disciplinary [*12] report for Violation of Program Provisions. If such a disciplinary report is issued, the inmate will be retained in Phase I. There is no differentiation between a pretrial detainee and a post-conviction prisoner with respect to the consequences of accepting or rejecting progression.

According to DOC policy, all inmates who were released from incarceration while on Administrative Segregation must be placed on Administrative Detention upon readmission pending review of continuance of Administrative Segregation status within fifteen days of readmission. If continuance of Administrative Segregation is recommended, a classification hearing must be held within thirty days. Inmates cannot be placed into Administrative Segregation without notice and a hearing. Written notice of the hearing and the reasons for the hearing must be provided to the inmate at least two business days prior to the hearing. The purpose of the hearing is to consider the classification assignment to Administrative Segregation by examining "evidence to support the classification," including

statements by the inmate and/or any witnesses. Administrative Directive 9.4(12).

In December 2009, Allah was incarcerated at Carl [*13] Robinson Correctional Institution ("Carl Robinson"), which is an open campus dormitory-style facility that is medium security. Allah was assigned to dormitory five of Carl Robinson.

On December 22, 2009, Allah was standing with approximately fifty other inmates in his dormitory around the control station awaiting their turn to visit the commissary to purchase items that are sold only during the holiday season. Another thirty inmates were in other parts of dormitory five. Prison officials decided to permit inmates in dormitory six to go to the commissary before the inmates in dormitory five. Allah asked the correctional officer in the control station if he could speak to a lieutenant about this. There were only two correctional officers in dormitory five at the time. One of the correctional officers perceived the request to talk to a lieutenant as an attempt to incite other inmates to unite and protest the delay in visiting the commissary. The correctional officer summoned additional staff to the dormitory. A lieutenant responded to the building with other prison staff and dogs. Because of a history of riots at Carl Robinson, prison officials considered any disturbance or demonstration [*14] involving several inmates to pose a serious threat to safety and security. Past incidents had resulted in severe harm to inmates and staff.

After the December 22, 2009 incident, Allah received a disciplinary report for Impeding Order. He pled guilty to the charge. Prison officials held a hearing on January 19, 2010, to determine whether Allah should be sent to Administrative Segregation at Northern, and Allah was in fact assigned to Administrative Segregation on February 11, 2010 to complete the three-phase program.[2] Allah was discharged from DOC custody on March 25, 2010. At that time, he had completed only three months of Phase I of Administrative Segregation.

Administrative Directive 9.4(17)(A), which was in effect at the time of Allah's discharge, provided that if an inmate was discharged from custody while in the Administrative Segregation Program, upon readmission to the Department of Correction, he would be [*15] placed on Administrative Detention pending a determination whether he should be placed back into the Administrative Segregation program.

On September 10, 2010, New Britain police officers arrested Allah. On September 13, 2010, Allah was returned to DOC custody at Hartford Correctional Center as a pretrial detainee. Allah was immediately placed on Administrative Detention. The Restrictive Housing Unit Status Order for Allah, dated September 13, 2010, states the reason for the Administrative Detention placement as follows: "The inmate s/my (sic) continued placement in the general population poses a serious threat to life, property, self, other inmates, and/or the security of the facility because: Inmate Allah was place (sic) on Administrative Detention pending Transfer: Overall Level 5." The defendants testified that Allah was placed on Administrative Detention because he entered the system with an overall risk level of five. Placement on Administrative Detention allows DOC officials to separate a re-admitted inmate from the general population until they have an opportunity to determine whether Administrative Segregation should be continued. The Office of Offender Classification and Population [*16] Management will continue Administrative Segregation placement when a pretrial detainee had been discharged from a previous term of incarceration while on Administrative Segregation status. There are two possible exceptions: if the inmate was close to completing the third and final phase of Administrative Segregation during the prior

[2] The plaintiff is not challenging the 2009 incident and the classification process in January and February of 2010. This information is provided as relevant background to his challenge to the events occurring in September and October of 2010 when Allah was a pretrial detainee.

incarceration, or had been discharged from DOC custody more than five years before, a pretrial detainee might not be continued in Administrative Segregation.

On September 17, 2010, DOC officials transferred Allah to Northern on Administrative Detention pending a hearing to determine whether to place him in Administrative Segregation. Allah was notified of the hearing on September 23, 2010. The notice listed the reason for the hearing as follows: "You were placed on A/S on 02/08/10. Since that time you discharged and returned to the DOC without completing the program." The notice informed Allah that he could choose a staff advocate and request relevant and non-redundant witness statements.

Allah chose Correctional Counselor Tourangeau as his advocate. Correctional Counselor Tourangeau completed an Advocate Investigation Report on September 24, 2010. On the **[*17]** report, he wrote that "inmate will bring a written statement to the scheduled hearing." The remainder of the report, which has sections for "Inmate Witness(s) Statements(s)," "Staff Witness(es) Testimony," and "Advocate's Conclusion and Recommendation," was blank.

The hearing was held on September 30, 2010. Notes on the Hearing Record form state "[s]ee enclosed advocate statement, I was in Phase One." Prison officials present at the hearing were defendant Griggs, who was the hearing officer, and Correctional Counselor Miller, who was the recording officer. Correctional Counselor Miller is listed as the Inmate Advocate. At the hearing, defendant Griggs explained the appeals process in depth, and noted that Allah was being reviewed for Administrative Segregation because he had been discharged on that status.

On October 4, 2010, defendant Griggs completed a Restrictive Status Report of Hearing for Placement or Removal in which he recommended Allah's placement in Administrative Segregation. The summary of the placement rationale stated: "According to the DOC Classification Manual, any inmate who discharges while on Administrative Segregation (A/S) shall be re-admitted at that status. I/M/ Allah **[*18]** was placed on A/S on 02/08/10. Since that time he discharged and returned to the DOC without completing the program." The stated reason for the recommendation was: "Inmate Allah did not complete the program, (sic) therefore he needs to continue in Administrative Segregation placement to complete program requirements prior to being placed in the general population." Defendant Milling authorized the placement that same day, and Allah, as a pretrial detainee, officially began Phase I of the program.

Defendants Griggs and Milling testified that they had reviewed the placement and hearing paperwork from the fall of 2010, as well as the paperwork relating to the December 2009 incident at Carl Robinson, when making the classification determination in October 2010. The defendants testified that nothing Allah had done in DOC custody since his new arrest in 2010 would have warranted placement in Administrative Segregation in and of itself. The charges pending against Allah in 2010 were not considered. Allah's status as a pretrial detainee was also not considered by defendants Griggs or Milling in making their decision to place him in Administrative Segregation.

After Allah was placed in Administrative **[*19]** Segregation on October 4, 2010, he was alone in a cell for approximately twenty-three hours a day for his stay in Phase I. He was not provided with any in-cell programing during the first phase. An inmate in Phase I must be handcuffed and placed in leg irons when out of his cell, including when going to shower. Because inmates cannot walk to the shower completely undressed, and because his leg irons were not removed upon arrival at the shower area, Allah was required to shower in his boxer shorts and walk back to his cell wearing the wet garment. On January 22, 2011, Allah fell while showering when his leg irons got caught in the

rubber carpeting in the shower area. Allah testified that he hit his head during this fall. After being examined by medical staff, he was returned to his cell.

Allah did not have access to a law library while in Phase I as a pretrial detainee. While he was able to request copies of certain materials and request legal calls, he was unable to do independent legal research. Allah testified that his time in Administrative Segregation as a pretrial detainee put strain on his relationship with his family because it was difficult for his wife to make the trip to see **[*20]** him at Northern and he did not want his four-year-old daughter to visit because she would have seen him in shackles. He testified that when he had been housed in the general population during other periods of incarceration he was able to visit with his family more often, some contact was allowed, and the visits were not in a setting such as Northern, where the most serious offenders in the state are housed.

On December 13, 2010, prison officials recommended Allah progress to Phase II of Administrative Segregation. Allah refused to sign the progression document which delineated the expectations of Phase II. As a result, he remained in Phase I for another 4 months. Allah testified that he refused progress in the program because he felt that as a pretrial detainee he should not be in Administrative Segregation and did not want to sign his consent to the placement. Allah did eventually progress to Phase II on April 27, 2011. He relented because Phase II would allow him one additional visit and phone call per week with his family. Approximately four months thereafter, Allah progressed to Phase III. Allah completed some programming during Phases II and III. In addition, his options for recreation **[*21]** were broadened and he was able to play basketball.

On September 26, 2011, Allah pleaded guilty to the charges associated with his September 2010 arrest. As of that date, the plaintiff became a post-conviction prisoner. Allah was transferred to Cheshire Correctional Institute on November 3, 2011, upon his completion of all three phases of Administrative Segregation. He was released from DOC custody on May 30, 2012.

Allah summarized his experience in Administrative Segregation in this way: "There's prison, and then there's Northern. It's just a whole different level." He testified that he was housed alongside "the most heinous [inmates] in the state." He was not able to have regular visits with his family and was not able to keep more than five letters in his cell. He was not able to call his family as often as he would have been able to had he been in the general population. He always rested in such a way where he could "get up immediately" if necessary to protect himself. Allah testified that he rarely slept and that he lost weight while in Administrative Segregation as a pretrial detainee. He testified to feeling paranoid, and of always being on guard and on edge. Those feelings have **[*22]** remained with him, even after his release.

CONCLUSIONS OF LAW

1. Substantive Due Process

The plaintiff contends that his confinement in Administrative Segregation as pretrial detainee violated his constitutional right to substantive due process. The Court agrees. Allah's placement in Administrative Segregation as a pretrial detainee on October 2010 does not comport with the *Due Process Clause of the Fourteenth Amendment*.[3]

Allah was a pretrial detainee from his placement in DOC custody on September 13, 2010 until September 26, 2011, when he pleaded guilty to the charges associated with his September 2010 arrest. Under the *Due Process Clause of the Fourteenth Amendment*, a pretrial detainee "may not be

[3] The ***Fourteenth Amendment*** provides that a state may not "deprive any person of life, liberty, or property, without due process of law." ***U.S. Const. amend. XIV***.

punished prior to an adjudication of guilt in accordance with due process of law." *Bell v. Wolfish, 441 U.S. 520, 535, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979)*. It is thus the court's role to determine whether a condition or restriction placed upon a pretrial detainee "is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id. at 538*. "Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on 'whether an alternative **[*23]** purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it].'" *Id* (citing *Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-169, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963)*). When "a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id. at 539*. In the converse, when a restriction "is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment." *Id.* Legitimate governmental objectives include "ensuring the pretrial detainees' presence at trial, maintaining security and order within the prison facility and operating the facility in a manageable fashion." *Friedland v. Otero, No. 3:11-cv-606(JBA), 2014 U.S. Dist. LEXIS 38767, 2014 WL 1247992, at *4 (D. Conn. March 25, 2014)*.

Courts examine *the Mendoza-Martinez* factors in analyzing whether a condition or restriction is punitive:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution **[*24]** and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

Bell at 537-538 (citing *Mendoza-Martinez, 372 U.S. at 168-169*).

The defendants claim that maintaining the integrity of the Administrative Segregation program by ensuring that all inmates who need the program complete it is a legitimate correctional goal. The policy, they argue, maintains safe and orderly operations of all correctional facilities in the state. While maintaining safety and security are generally valid governmental objectives, the restrictions placed on Allah as a pretrial detainee in this case were not reasonably related to such a purpose, and were excessive in relation to this purpose.

The conditions imposed on the plaintiff amounted to what has "historically been regarded as punishment." During Phase I of Administrative Segregation, Allah remained alone in a cell for approximately twenty-three hours a day. "Solitary confinement 'is itself an infamous punishment,' and 'not ... a mere unimportant regulation **[*25]** as to the safe-keeping of the prisoner.'" *Levine v. Menifee, No. 05 CIV. 1902 (RCC), 2005 U.S. Dist. LEXIS 11362, 2005 WL 1384021, at *9 (S.D.N.Y. June 9, 2005)* (citing *In re Medley, 134 U.S. 160, 169, 10 S. Ct. 384, 33 L. Ed. 835 (1890)*).

Other restrictions placed upon Allah are obvious forms are punishment. He was deprived of many privileges available to inmates in the general population, including the extent to which he could use the phone and attend visits. He was also deprived of attending general population recreation, accessing the law library, and attending meals with the general population. These deprivations are in fact considered punishment by the DOC: Defendant Cahill testified, for example, that loss of phone and visiting privileges were punitive in nature. DOC Administrative Directives also deem such

restrictions punitive. Under Administrative Directive 9.5(10)(D), violation of the disciplinary code warrant penalties such as loss of telephone privileges and loss or modification of social visits. Some of the conditions to which the plaintiff was subjected in Administrative Segregation were even more severe that the restrictions applied to inmates officially on *punitive* status. For example, those on punitive status are not always required to wear leg irons when moving throughout the unit and are not required to shower in leg irons (and thus with an article **[*26]** of clothing on). Punitive Segregation inmates may have work assignments and recreate without restraints, while inmates in Phase I of Administrative Segregation cannot.

Many of the restrictions placed on Allah were not reasonably related to the goal of safety and security. For example, the defendants could not explain (nor can the Court) how limiting Allah, as a pretrial detainee, to having only five pieces of mail in his cell was reasonably related to a security concern. Likewise, there appears no reason why allowing him to have a television in his cell would be a safety concern. There was also no evidence presented as to why limiting phone calls and social visits were related to safety concerns. When examined as a whole, the severe restrictions of Administrative Segregation, particularly those in Phase I, were simply not reasonable in this case absent an individualized finding that Allah was a threat to safety and security as a pretrial detainee in 2010. When conditions of confinement — as these are — are arbitrary, the Court can properly infer they are punitive. *See Bell, 441 U.S. at 539*.

Next, the conditions imposed were excessive in relation to prison officials' proffered purpose. Such excessiveness **[*27]** compels a finding that the restrictions were not reasonably related to a legitimate government objective. *See Iqbal v. Hasty, 490 F.3d 143, 168 (2d Cir. 2007), rev'd on other grounds sub nom. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. The defendants testified that the 2009 incident at Carl Robinson was deemed significant in large part because it occurred at an open-dormitory facility with a history of riots. Yet, as a pretrial detainee in the fall of 2010, the plaintiff could have (and according to defendant Milling's testimony likely would have) been housed in a jail-type facility where the risk of riots would be mitigated. In addition, there was no evidence that the defendants made a particularized finding that the plaintiff failed to understand the reason for the sanction in 2009 and was inclined to repeat his behavior, or that he would pose a threat in a jail-type setting. In fact, testimony established that the plaintiff had exhibited no problematic behavior while in Administrative Segregation in 2009 or after his arrest and readmission in 2010. Without any specific, individualized findings that Allah presented a risk to safety and security as a pretrial detainee, the restrictions as applied to him were excessive.

The defendants made clear that Allah's status as a **[*28]** pretrial detainee was not considered in deciding to place him in Administrative Segregation. This is problematic in various ways, and particularly because all three phases of Administrative Segregation inhibit access to the law library. While the plaintiff could have requested certain legal materials, he was not able to conduct any legal research independently. As a pretrial detainee, Allah still enjoyed the presumption of innocence. Preparing and participating in the preparation of his defense is critical at that stage.

The defendants' testimony, as a whole, revealed that not only was pretrial detainee status not considered, but that the defendants failed to recognize why that status is significant. As is evident from the phrase *pretrial detainee*, such a person "has not been adjudged guilty of any crime," and is being housed by the state in a facility "the purpose of [which] is to detain." *Bell, 441 U.S. at 536-537*. While "[l]oss of freedom of choice and privacy are inherent incidents of confinement" in general, prison officials must recognize that a pretrial detainee cannot be subjected to restrictions

and conditions amounting to punishment. *Id. at 537*.

In all, the restrictions and conditions of Administrative Segregation **[*29]** smack of punishment in Allah's case.[4] They were not reasonably related to the DOC's stated purpose, and were excessive in relation to that purpose. In plain terms, the DOC was taking privileges away because the plaintiff had not completed a previously-imposed program. This is constitutionally impermissible. There was no reassessment that the plaintiff, if he ever had been a threat, remained a threat at the time he re-entered DOC custody in September 2010, or that the conditions and restrictions of Administrative Segregation were reasonably related to any threat. Without any individualized or specific finding of the risk Allah may have presented in the fall of 2010, one is left to conclude that the DOC was continuing to punish him for his conduct in December of 2009.

While the defendants repeatedly claim that Administrative Segregation was a "management tool" for inmates who pose a threat to safety and security to enable them to address their behavior so that they may return to the general population, saying something repeatedly does not make it so, at least in Allah's case. The evidence **[*30]** adduced at trial belies this claim with respect to Allah and his experience in Administrative Segregation. There was absolutely no programming or counseling or therapy or any sort of "management" services provided to the plaintiff during the entire first phase of the program. Further, despite their insistence to the contrary, the defendants acknowledged the punitive nature of Administrative Segregation: Defendant Cahill testified that one goes to Administrative Segregation after one has "done something to warrant that placement." Likewise, defendant Griggs stated that Administrative Segregation was to "segregate the inmate if they did something very bad." This characterization supports an interpretation of the program as a mechanism for punishment of problematic inmates. While, of course, prison officials must be able to punish or segregate or control inmates who present a risk to the safety and security of the facility and to others, prison officials cannot place a pretrial detainee in such a setting without a genuinely sensible reason for doing so.

There was no real determination, no individualized assessment, that Administrative Segregation was appropriate for Allah for any reason **[*31]** other than that he did not complete the program before. This, coupled with the admission that his pretrial detainee status was not considered, compels the conclusion that Allah was returned to Administrative Segregation because he owed the DOC time — because he never completed his punishment from before — rather than because there was a fair assessment that the restrictions of Administrative Segregation were reasonably related to a safety or security concern Allah presented as a pretrial detainee. It is also worth noting that the plaintiff's initial placement in Administrative Segregation after the 2009 incident occurred on February 8, 2010. In a memo to defendant Milling from the warden of Carl Robinson on December 23, 2009, the warden of Carl Robinson stated that the plaintiff's maximum discharge date was March 25, 2010. Prison officials knew of the imminence of Allah's release when they placed him in Administrative Segregation; thus, they knew there was no chance that he would actually complete the program. This undermines the claim that the program was a management tool and that its integrity would be compromised if an inmate did not complete all three phases. It strongly suggests **[*32]** that the initial placement, in Allah's case, was for punitive purposes, and perhaps to send a message to other inmates at Carl Robinson. When Allah returned to DOC custody as a pretrial detainee in 2010, the punishment was simply re-imposed.

In general, "the court is required to defer in matters

[4] This is not to say this is true for other inmates or in all Administrative Segregation placements.

of prison security to the 'professional expertise of corrections officials ... in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations.'" *Dolphin v. Manson, 626 F.Supp. 229, 235-236 (D. Conn. 1986)* (citing *Bell, 441 U.S. at 540-541*). This deference does not, however, require a court to accept blindly any explanation prison officials offer. Here, with little to bolster the defendants' proffered explanation, and evidence as to the excessiveness of the conditions even in light of the proffered explanation, the Court simply cannot accept it. Here, there is "substantial evidence" that the defendants "exaggerated their response" to this situation involving a pretrial detainee. *See id.*

The above findings are consistent with relevant caselaw. In *Taylor v. Comm'r of New York City Dep't of Corr., 317 F. App'x 80 (2d Cir. 2009)*, a pretrial detainee was sent to a segregation unit after assaulting an inmate who subsequently died. The confinement was reasonable to protect Taylor and the **[*33]** prison population and "was also not excessive in relation to the purpose of maintaining safety." *Id. at 82*. In *Dolphin, 626 F. Supp. at 235*, a pretrial detainee's placement in administrative segregation was likewise "reasonably related to the legitimate governmental objective of maintaining order and security." Dolphin had escaped from custody during a court appearance and then "committed several serious and violent crimes before his recapture." *Id. at 232*. A second reason for Dolphin's placement in Administrative Segregation was to protect him from other inmates who had threatened him. *Id.* In Allah's case, there was no such security threat. The restrictions imposed on him were simply not reasonably related to the purpose of maintaining safety. The only reason for the placement stated in DOC's documentation is that Allah had not completed the program. That is not enough.

In all, the Court finds that Allah's placement in Administrative Segregation as a pretrial detainee was continued punishment for the 2009 incident and was not a response to concerns of facility safety or security, or to address a threat Allah presented as a pretrial detainee. As such, the plaintiff's substantive due process rights were violated. To be clear, this **[*34]** is not to say that a pretrial detainee can never be placed on a restrictive status. What is problematic here is that there was no individual determination that the restraints and conditions of Administrative Segregation were reasonably related to, and not excessive in light of, concerns about placing Allah in the general population.

2. Procedural Due Process

The plaintiff also contends that the defendants violated his right to procedural due process in deciding to continue his Administrative Segregation status. Again, the Court agrees. The defendants' failure to provide the plaintiff with adequate procedural protections when he came into DOC custody as a pretrial detainee in the fall of 2010 violated his constitutional rights.

Courts look to the purpose of the restraint or condition of confinement when determining the due process protections to which a pretrial detainee is entitled. When a restraint or condition is imposed for disciplinary or punitive reasons, the pretrial detainee is entitled to the protections set forth in *Wolff v. McDonnell, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974)*. *See Benjamin v. Fraser, 264 F.3d 175, 189-190 (2d Cir. 2001)*. "The *Wolff* Court, while holding that full adversary proceedings are not required for disciplinary deprivations of liberty in the prison setting, required **[*35]** written notice, adequate time to prepare a defense, a written statement of the reasons for action taken, and a limited ability to present witnesses and evidence." *Id. at 189* (citing *Wolff at 561-570*). In contrast, when the purpose of the restraint is administrative, the less-stringent procedures set forth in *Hewitt v. Helms, 459 U.S. 460, 103 S. Ct. 864, 74 L. Ed. 2d 675 (1983)* are due. *Id. at 189-190*. Pursuant to *Hewitt*, an inmate

"must merely receive some notice of the charges against him and an opportunity to present his views." Hewitt, 459 U.S. at 476. Here, because the Court has found that the plaintiff's placement in Administrative Segregation as a pretrial detainee was punitive, the protections afforded by *Wolff* were required. *See* Friedland, 2014 U.S. Dist. LEXIS 38767, 2014 WL 1247992, at *4 ("The Court of Appeals for the Second Circuit has held that a pretrial detainee who has been subjected to disciplinary sanctions or punitive restraints is entitled to the due process protections set forth in *Wolff*.") (citing Benjamin, 264 F.3d at 190).

The defendants, in their post-trial brief, claim that the plaintiff stipulated at trial that he was not challenging the procedure at the September 2010 hearing. The Court has reviewed the relevant portion of the transcript. Counsel for Plaintiff stated, "we'll stipulate there's not a problem with the procedure that was done. It was the outcome and what was **[*36]** considered that was the problem. The notice and stuff like that, that's not an issue." The language challenging "what was considered" during the hearing process *is* a challenge to procedural due process. What the plaintiff is challenging — the meaningfulness of the process — is precisely what the Court finds as deficient. Under basic principles of due process, a pretrial detainee is entitled to "meaningful" process. *See* Mathews v. Eldridge, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). What the plaintiff alleges here is that, while he was provided in the technical sense notice and a hearing, the entire process amounted to no more than a sham. The Court agrees.

DOC officials provided only the semblance of process to Allah. He received a timely Notification of Hearing form, was offered an advocate and the opportunity to present witnesses, had a hearing, and thereafter received a hearing report. A close examination of what actually transpired during this process, however, reveals constitutional deficiency.

Under *Wolff*, an inmate is entitled to written notice of the charges against him. Notice must be "something more than a mere formality." Taylor v. Rodriguez, 238 F.3d 188, 192 (2d Cir. 2001). Notice must "inform the inmate of what he is accused of doing so that he can prepare a defense to those charges **[*37]** and not be made to explain away vague charges set out in a misbehavior report." Id. at 192-93. The Notification of Hearing Allah received stated the reason for the hearing as follows: "You were placed on A/S on 02/08/10. Since that time you discharged and returned to the DOC without completing the program." This language does nothing to indicate to the plaintiff what the hearing would be about to enable him to prepare a defense. For notice to be sufficient, it is required to "inform the [inmate] of more specific facts underlying the allegation." Id. at 193. The defendants provided Allah with no specific facts as to why Administrative Segregation may be warranted in his particular circumstance. In fact, the wording of the notice strongly suggests that the hearing was a mere formality and that the decision to continue him in Administrative Segregation had already been made. The description of the hearing confirms this. Defendant Griggs testified that at the hearing, which lasted approximately eight to ten minutes, he "explained the appeal process, why [Allah is] being reviewed because he's, you know, discharged on AS status...also explain the appeal process more in-depth." There is no indication that any meaningful **[*38]** process was provided; instead, the evidence shows that the defendants did not consider or give Allah notice of anything he had done to warrant restrictive placement.

Wolff also requires that an inmate be provided with a written statement of the reasons for the action taken. Here, the hearing decision states the following placement rationale: "According to the DOC Classification Manual, any inmate who discharges while on Administrative Segregation (A/S) shall be re-admitted at that status. I/M Allah was placed on A/S on 02/08/10. Since that time he discharged and returned to the DOC without completing the program." The stated reason for the recommendation was as follows: "Inmate Allah did

not complete the program, (sic) therefore he needs to continue in Administrative Segregation placement to complete program requirements prior to being placed in the general population." Again, a semblance of process was provided, but it was not meaningful. A pretrial detainee has "a due process right to a written statement describing the evidence upon which a hearing officer relied in finding the detainee guilty of a disciplinary infraction." *Friedland, 2014 U.S. Dist. LEXIS 38767, 2014 WL 1247992, at *8*. While the plaintiff did receive a report of the placement **[*39]** decision, the report does not state "the evidence relied on and reasons for the disciplinary action, as required by *Wolff*." *Jermosen v. Smith, No. CIV-81-1037E, 1990 U.S. Dist. LEXIS 21201, 1990 WL 154792, at *3 (W.D.N.Y. Sept. 28, 1990)* (finding that a report lacking a statement of the evidence relied upon and the reasons for the disciplinary action violated due process). Allah was not provided with any specific reasons for the placement beyond a constitutionally problematic policy when applied to pretrial detainees. He was merely told he needed to complete the program, but was not given reasons why this placement was appropriate for him as a pretrial detainee. Again, the explanation Allah received indicates the entire process was spurious with the outcome predetermined.

A perfunctory hearing, held as a mere formality, where the final outcome was essentially automatic, does not comport with the guarantees of due process. Here, there was no allegation the plaintiff broke any rules as a pretrial detainee, no particularized determination that he was a risk, and no factual review or any indication that discretion was used in making the decision to place him once again in Administrative Segregation. "[I]t is a bedrock requirement of due process that such hearing be **[*40]** held 'at a meaningful time and in a meaningful manner.'" *Taylor, 238 F.3d at 193* (citing *Mathews, 424 U.S. at 319*). "A hearing is not 'meaningful' if a prisoner is given inadequate information about the basis of the charges against him." *Id.* Further, due process is not satisfied when the hearing process is "a sham; the reviews must be meaningful and not simply perfunctory." *McClary v. Kelly, 4 F. Supp. 2d 195, 212-213 (W.D.N.Y. 1998)* (finding that periodic reviews of an inmate's placement in administrative segregation must amount to more than a sham).

The defendants' failure to provide the plaintiff with adequate procedural protections when he came into DOC custody as a pretrial detainee in 2010 violated his constitutional right to procedural due process.

3. Qualified Immunity

Defendants argue that they are entitled to qualified immunity. Qualified immunity "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)* (quoting *Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)*). An official is entitled to qualified immunity unless (1) the official violated a constitutional right of the plaintiff, and (2) the right was clearly established at the time of the constitutional violation. *See Ashcroft v. al-Kidd, 563 U.S. 731, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)* **[*41]** .

Under the first prong, as discussed supra, the defendants violated the plaintiff's substantive and procedural due process rights. Under the second prong, a right is clearly established if, "at the time of the challenged conduct... 'every reasonable official would have understood that what he [was] doing violate[d] that right.'" *Id.* (quoting *Anderson v. Creighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)*). There does not need to be a case "directly on point" in order for the right to be clearly established, "but existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* "A broad general proposition" does not constitute a clearly established right. *See Reichle v. Howards, 132 S.Ct. 2088, 2094, 182 L. Ed. 2d 985 (2012)*. Rather, the constitutional right

allegedly violated must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Id.* (quoting *Anderson, 483 U.S. at 640*).

With respect to substantive due process, at the time of Allah's placement in administrative segregation as a pretrial detainee, it was clearly established that a pretrial detainee's right to due process includes being "housed in a manner that is not punitive." *Osgood v. Amato, No. 12-CV-565 TJM/CFH, 2013 U.S. Dist. LEXIS 99866, 2013 WL 3777189, at *19 (N.D.N.Y. July 17, 2013)*. Likewise, it was clearly established that purposeless restrictions or conditions of confinement **[*42]** can constitute impermissible punishment when imposed on pretrial detainees. *See Bell, 441 U.S. at 535* ("[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment."); *Benjamin, 343 F.3d at 50* ("[U]nder the *Due Process Clause*, [a pretrial detainee] may not be punished in any manner—neither cruelly and unusually or otherwise.... Accordingly, courts considering challenges by pretrial detainees must initially consider whether the challenged conditions are punitive.") (citations omitted). It certainly should have been clear to the defendants that Allah, who as a pretrial detainee had done nothing to warrant it, could not be placed on a restrictive housing status with conditions amounting to punishment.

Turning to procedural due process, it was also clearly established at the time that "the requirements in *Wolff* applied to the disciplinary hearing of a pretrial detainee involving punitive sanctions or restraints." *See Friedland, 2014 U.S. Dist. LEXIS 38767, 2014 WL 1247992, at *16; see also Osgood, 2013 U.S. Dist. LEXIS 99866, 2013 WL 3777189, at *19* ("the right of a pretrial detainee to a heightened level of due process given punitive restrictions" is clearly established.). In addition, it was clearly established that the process provided "be 'meaningful' and not a sham **[*43]** or a fraud." *McClary v. Coughlin, 87 F. Supp. 2d 205, 214 (W.D.N.Y. 2000) aff'd sub nom. McClary v. Kelly, 237 F.3d 185 (2d Cir. 2001)* (citing *Mathews v. Eldridge, 424 U.S. at 333*).

In their post-trial brief, the defendants argue that they are entitled to qualified immunity because it was not clearly established that an inmate possessed a liberty interest in avoiding placement in Administrative Segregation. There are two glaring deficiencies with this argument. First, it suggests that the plaintiff does not have a protected liberty interest triggering a right to procedural due process under *Sandin v. Conner, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995)*. *Sandin*, however, "does not apply to pretrial detainees and that, accordingly, pretrial detainees need not show that an imposed restraint imposes atypical and significant hardships to state deprivation of a liberty interest protected by procedural due process." *Iqbal, 490 F.3d at 163, rev'd on other grounds sub nom. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*. Second, the defendants' argument ignores the Second Circuit caselaw outlined above which finds that the rights at issue here were clearly established in 2010. Accordingly, the Court finds that the defendants are not entitled to qualified immunity in this case.

4. Damages

Section 1983 creates "a species of tort liability in favor of persons who are deprived of rights, privileges, or immunities secured to them by the Constitution." *Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 305-306, 106 S. Ct. 2537, 91 L. Ed. 2d 249 (1986)* (citing *Carey v. Piphus, 435 U.S. 247, 253, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978)*). Damages for constitutional **[*44]** violations are thus "ordinarily determined according to principles derived from the common law of torts." *Id. at 306*. Among the types of damages available under *Section 1983* are damages to compensate a person for injury caused by the constitutional deprivation. This type of damages —

compensatory damages — is awarded when there is proof of actual injury. *See Farrar v. Hobby, 506 U.S. 103, 112, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992)*. Compensatory damages "may include not only out-of-pocket loss and other monetary harms, but also such injuries as impairment of reputation ... personal humiliation, and mental anguish and suffering." *Stachura, 477 U.S. at 307*.

In this case, the plaintiff was subjected to heightened conditions of confinement in violation of his substantive due process rights. He was placed in a program with restrictions and conditions amounting to punishment, and the defendants' proffered reason for the placement was not reasonably related to, and was excessive in light of it. As a result, the plaintiff suffered physical harm: he testified as to the incident where he fell in the shower because he was made to shower with leg irons on; he also testified as to his difficulties sleeping and his weight loss as a result of the unconstitutional placement. Allah testified extensively about his psychological **[*45]** harm, and the Court finds his testimony reliable. His familial relations, his interpersonal skills, and his overall perception of the world were profoundly altered by the time he spent in solitary confinement and by being housed at Northern in close quarters with inmates who are among the most dangerous in the state. Moreover, as explained in detail above, Allah lost numerous privileges as a result of being held in Administrative Segregation for 358 days as opposed to in the general prison population.[5] Those deprivations took a toll.

In such a situation there is no magic formula for determining compensatory damages. Courts addressing situations of wrongful confinement have "compar[ed] the conditions of the general prison population with those of isolation ... or [have assessed] the emotional distress that plaintiff has suffered from such punishment." *Nolley v. Cty of Erie, 802 F. Supp. 898, 907 (W.D.N.Y. 1992)* (citing *Patterson v. Coughlin, 722 F.Supp. 9, 11 (W.D.N.Y.1989), aff'd in part and vacated in part, 905 F.2d 564 (2d Cir. 1990)*. In *Nolley*, more than twenty-five years ago, the plaintiff was awarded $125 per day for each of the 310 days she was wrongfully confined in segregation (in which she was subjected to severe conditions giving rise to "psychological trauma."). *Id. at 908*. Other courts have adopted a similar approach in awarding damages for cases involving wrongful confinement: *See, e.g., McClary v. Coughlin, 87 F. Supp. 2d at 221, aff'd sub nom. McClary, 237 F.3d 185* ($175 per day for each day unconstitutionally confined); *Smith v. Rowe, 761 F.2d 360, 368 (7th Cir. 1985)* ($119 per day of segregation). Allah is entitled to damages that will fairly compensate him for his unconstitutional placement in an environment **[*47]** much more restrictive than general population and for its impact upon him. The Court sets the amount of such damages at $175 per day. The rate cannot be detailed with scientific precision. It is, however, fair, just, and reasonable. $175 per day for 358 days totals $62,650.00.

Punitive damages may be awarded in a *Section 1983* case when "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v. Wade, 461 U.S. 30, 56, 103 S. Ct. 1625, 75 L. Ed. 2d 632 (1983)*. This standard is not met here. The evidence shows that the defendants, though mistaken, were simply trying to fulfill their professional duties. They all have admirable records of public service.

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[5] Allah was officially placed in Administrative Segregation on October 4, 2010 and pleaded guilty to the charges pending against him on September 26, 2011. The plaintiff was placed in Administrative Detention on September 17, 2010, but as the evidence at trial did not show that this placement was unconstitutional, the Court will not factor that time into the damages calculation. In addition, although Allah was offered the opportunity to progress to Phase II in December 2010 and refused to consent to progression, the Court will not modify the damages calculation to account for the plaintiff's failure to consent to an unconstitutional placement. Finally, the **[*46]** plaintiff asks that the Court add an additional five days to account for his inability to earn good time credit while in Administrative Segregation. Because there was insufficient evidence as to this issue at trial, the Court will not add the additional time.

The Court will not make an award of punitive damages.

CONCLUSION

"There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff, 418 U.S. at 555-556*. While the Court appreciates the extraordinary challenges the defendants, and all DOC staff, face in effectively running a prison, it also must ensure that constitutional guarantees are secured.

For the reasons discussed above, judgment will be entered in favor of the plaintiff jointly and severally against defendants Cahill, Griggs, and Milling **[*48]** in the amount of $62,650.00. The plaintiff's counsel should submit his application for an award of attorney's fees pursuant to *42 U.S.C. § 1988* no later than thirty (30) days following the entry of Judgment. The defendants will have fourteen (14) days to respond to any such application and the plaintiff may reply within seven (7) days thereafter.

SO ORDERED, this 4th day of April, 2016, at Bridgeport, Connecticut.

/s/ William I. Garfinkel

WILLIAM I. GARFINKEL

United States Magistrate Judge

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of January, two thousand eighteen.

Almighty Supreme Born Allah,

Plaintiff - Appellee,

v.

Lynn Milling, Director of Population Management, Griggs, Counselor Supervisor, Cahill, Captain,

Defendants - Appellants,

Quiros, Warden, Powers, Deputy Warden, Fulcher, Deputy Warden, LaJoie, District Administrator, Deputy Commissioner Dzurenda,

Defendants.

ORDER

Docket No: 16-1443

Appellee, Almighty Supreme Born Allah, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc.*

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk