

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OSIEL RODRIGUEZ,

Petitioner,

v.

CHARLES RATLEDGE,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The decision below turned on two questions that have divided the Federal Courts of Appeal. The first question, left open by this Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), is:

1. Whether the federal habeas statute, 28 U.S.C. § 2241, permits a federal inmate to challenge a change in his or her conditions of confinement, as the First, Second, Third, and D.C. Circuits have held, or is instead limited exclusively to challenges to the fact or duration of confinement, as the Fourth, Seventh, Sixth, Eighth and Tenth Circuits have held.

The second question, left open by this Court's decision in *Sandin v. Conner*, 515 U.S. 472 (1995), is:

2. Which, if any, of the multiple, competing baselines offered by the Courts of Appeal should be used when determining whether a change in an inmate's conditions of confinement subjects the inmate to "atypical and significant hardship" in violation of the inmate's liberty interests?

LIST OF PARTIES

The names of all parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is reported at 2017 U.S. App. LEXIS 24122 and is reproduced starting at App. A-1. The opinions of the District Court for the Western District of Virginia are reported sub nom. *Rodriguez v. Zych* at 2016 U.S. Dist. LEXIS 16666 and sub nom. *Rodriguez v. Ratledge* at 2017 U.S. Dist. LEXIS 25139, and are reproduced starting respectively at App. B-1 and App. C-1.

JURISDICTION

The judgment of the Fourth Circuit Court of Appeals was entered on November 29, 2017. Petitioner filed a timely petition for panel rehearing and rehearing en banc on January 10, 2018. The Fourth Circuit denied the rehearing petition on January 29, 2018. (App. D-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that “No person shall be ... deprived of life, liberty, or property, without due process of law.”

28 U.S.C. §2241(a) provides, in pertinent part, that “Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”

28 U.S.C. §2241(c)(1) provides, in pertinent part, that “The writ of habeas corpus shall not extent to a prisoner unless—He is in custody under or by color of the authority of the United States”

28 U.S.C. §2243 provides, in pertinent part, that “The court shall ... dispose of the matter as law and justice require[s].”

STATEMENT OF THE CASE

A. Factual Background

Petitioner Osiel Rodriguez is a federal inmate. He was incarcerated in the general prison population at United States Penitentiary, Lee County (“USP Lee”). USP Lee is a high-security penitentiary.

He was transferred indefinitely to United States Penitentiary, Administrative Maximum Facility (“ADX Supermax”) in 2016 where he is still held. ADX Supermax is the most restrictive federal penitentiary. The facility houses inmates who are too dangerous or too great a security risk for even a maximum-security prison, such as Zacarias Moussaoui (the “20th 9-11 Hijacker”), Richard Reid (the “Shoe Bomber”), Umar Abdulmutallab (the “Underwear Bomber”), Dzhokhar Tsarnaev (the “Boston Marathon Bomber”), Ted Kaczynski (the “Unabomber”), and Terry Nichols (one of the “Oklahoma City Bombers”). ADX Supermax wardens have reportedly described the prison as “a cleaner version of Hell”¹ and “not designed for humanity.”²

Rodriguez was transferred following his conviction in a prison disciplinary proceeding for attempted escape from USP Lee. His conviction violated Bureau of Prison (“BOP”) regulations that govern prison disciplinary proceedings, 28 C.F.R. Part 541.

In particular, Rodriguez was originally tried and found innocent of the attempted escape charge, the hearing officer calling the claim “baseless” and “far fetched/hard to believe.” He was convicted instead of attempting to import narcotics into USP Lee (a claim that presumed

¹ “The U.S.’s Most Secure Prison: ADX Florence,” *Sometimes Interesting* (July 12, 2011), available at <http://sometimes-interesting.com/2011/07/12/the-most-secure-prison-adx-florence> (last visited March 7, 2017).

² M. Binelli, “Inside America’s Toughest Federal Prison,” *New York Times Magazine* (Mar. 26, 2015), available at <https://www.nytimes.com/2015/03/29/magazine/inside-americas-toughest-federal-prison.html> (last visited March 7, 2017).

Rodriguez did not plan to escape). He lost 41 days of good-time credit as a sanction on the narcotics charge.

According to the Bureau of Prisons' ("BOP") interpretation of its regulations, the acquittal on the attempted escape charge was "final" and could be reversed only by BOP's regional director upon appeal. BOP Program Statement P5270.09, "Inmate Discipline Program" (July 8, 2011) at p.18. In violation of those regulations, the hearing officer collaborated with the investigator to re-write the disciplinary report against Rodriguez following the acquittal, alter the purported evidence for the attempted escape charge, and though there had been no appeal, set aside the acquittal and re-try Rodriguez. The retrial resulted in a 180° turnabout. Rodriguez was acquitted of the narcotics charge and convicted of the "baseless," "far fetched" and "hard to believe" attempted escape charge. The 41-days disallowance of good-time credit originally imposed on the narcotics charge remained in place.

The reason for the hearing officer's about-face is disputed. But construing the evidence and inferences in Rodriguez's favor since the district court granted summary judgment against him, the evidence showed Rodriguez was retried to fabricate grounds to transfer him to ADX Supermax. Rodriguez previously had been at ADX Supermax because of two prior escape attempts but eventually qualified for transfer to a less restrictive facility, resulting in his transfer to USP Lee. The USP Lee warden, however, did not want to house Rodriguez and was "hell bent" on transferring him back to ADX Supermax. The narcotics conviction would not accomplish that end. Transfer to ADX Supermax is limited to inmates with "severe or chronic behavior patterns that cannot be addressed in any other Bureau institution" BOP Program Statement P5100.08, "Inmate Security Designation and Custody Classification" (Sept. 12, 2006) at Chapter 7, p.18. An offense involving drugs for personal use does not come close to meeting

that standard, inasmuch as it has the lowest severity rating for prisoner classification and transfers. *Id.* at Appendix A, p.4. Escape, by contrast, has the highest rating. *Id.* at Appendix A, p.1. Prison officials thus needed a do-over of the disciplinary hearing to obtain an outcome that could justify Rodriguez’s transfer.

The attempted escape conviction provided that excuse. Rodriguez was referred for transfer to ADX Supermax following the conviction and found to meet the criteria for transfer. The attempted escape conviction was central to the referral and eligibility finding, and he would not have been transferred but for the attempted escape conviction. As Respondent admitted below, Rodriguez’s discipline for attempted escape “prompted his recent designation to the ADX facility.” Respondent’s Memorandum of Law in Support of His Motion to Dismiss or Alternatively for Summary Judgment (filed May 13, 2016) at p.1. Rodriguez was not allowed to challenge the conviction, or otherwise show that he had not attempted to escape, in the transfer hearing.

B. Court Proceedings

Rodriguez filed two habeas petitions in the district court—one following his conviction for attempted escape after the re-trial and a second following the transfer order. The petitions claimed that the re-trial and conviction for attempted escape violated BOP regulations and therefore Rodriguez’s due process rights, invoking the *Accardi* doctrine. Named for *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)—in which the Court held that a writ of habeas corpus should issue where the BIA held a deportation proceeding that did not conform to its regulations—the doctrine recognizes that an agency’s violations of its own procedures can constitute a due process violation. *Accord, Morton v. Ruiz*, 415 U.S. 199, 235-36 (1974); *Service v. Dulles*, 354 U.S. 363, 388 (1957). The petitions sought to expunge the attempted escape conviction and set

aside the actions the BOP took based on that conviction, specifically the loss of good-time credits and the transfer to ADX Supermax.

Respondent filed motions to dismiss both proceedings, which the district court *sua sponte* converted to summary judgment motions and granted. The district court granted Respondent summary judgment on the first petition on the basis Rodriguez filed the petition before exhausting administrative remedies (although it was undisputed he exhausted those remedies before the district court ruled on the petition). (App. B-3 to B-4) The district court additionally held the re-trial did not injure Rodriguez because Rodriguez did not lose any good-time credit for the attempted escape conviction beyond what he lost for the narcotics charge. (App. B-5 to B-6) The district court also stated Rodriguez has no liberty interest in avoiding placement at ADX Supermax. (App. B-10 n.3)

The district court granted summary judgment on the second petition for lack of jurisdiction because the petition challenged Rodriguez's transfer to ADX Supermax and not the fact or duration of his confinement. (App. C-5) The district court also repeated its holding that Rodriguez has no liberty interest in avoiding placement at ADX Supermax. (App. C-6)

Rodriguez appealed both judgments, which the court of appeals consolidated. The court of appeals disagreed with the district court's exhaustion ruling in the first appeal, holding that Rodriguez's exhaustion of administrative remedies before the district court granted summary judgment satisfied "the prudential exhaustion requirement." (App. A-8) Nonetheless the court of appeals affirmed. The court of appeals did not decide whether the re-trial and ensuing attempted escape conviction violated BOP regulations and deprived Rodriguez of due process. It held instead the conviction did not prejudice Rodriguez because he lost the same amount of

good-time credits for the attempted escape conviction as he did on the narcotics charge. (App. A-11 to A-12) Neither of these holdings is the subject of this petition.

The court of appeals' two holdings with respect to Rodriguez's second appeal form the basis of this petition for certiorari. First, the court of appeals held that it lacked jurisdiction to review Rodriguez's challenge to his transfer to ADX Supermax because his challenge did not contest the fact or duration of his imprisonment—and was therefore outside the scope of the federal habeas statute. (App. A-9) Second, and alternatively, the court of appeals held that conditions at ADX Supermax “do not constitute an atypical and significant hardship.” (App. A-9, n.3) In making this latter holding, the court first noted that the Fourth Circuit uses the “general prison population” as the baseline for determining whether transfer would cause “atypical and significant hardship;” however, the court did not then apply or discuss that test. Nor did it compare the conditions at USP Lee to those at ADX Supermax, or otherwise consider any evidence about Rodriguez's confinement conditions. Instead, the court of appeals relied on *Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012), which rejected the claims of four prisoners that their transfers to ADX Supermax violated their liberty interests based on a “fact driven” four-factor analysis that included “the conditions . . . routinely imposed in the administrative segregation setting” as the baseline for comparison. *Id.* at 1015.

The court of appeals subsequently denied Rodriguez's petition for panel and *en banc* rehearing. (App. D-1) This petition for certiorari follows.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to answer two important questions that have divided the Courts of Appeal. The first is whether habeas jurisdiction exists to challenge a change in an inmate's conditions of confinement that violates the inmate's liberty interests where the inmate does not contest the fact or duration of confinement. The second is what baseline should be used

to determine whether a change in a prisoner's confinement conditions imposes atypical and significant hardship in violation of the prisoner's liberty interests.

The Court's prior decisions expressly left these questions open. The Courts of Appeals have splintered in answering them, with the *de facto* result being that the liberty interests of federal prisoners vary depending upon what federal jurisdiction they happen to be incarcerated within. The split has matured in recent years, with essentially every Circuit weighing in on them. Only this Court can resolve these conflicts and bring uniformity to these important areas of federal law. The petition for certiorari should be granted.

I. The Court Should Grant Certiorari To Resolve An Acknowledged Circuit Split Over Whether A Habeas Petition Can Challenge Unconstitutional Conditions Of Confinement That Do Not Affect The Fact Or Duration Of Confinement

In *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the Court acknowledged—but left unanswered—the question of whether habeas is available to challenge unconstitutional prison conditions. *Id.* at 499. The Court has made clear since *Preiser* that the question remains open, most recently in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), where the Court observed that habeas relief might be available for federal inmates challenging their conditions of confinement. Citing *Preiser*, the Court said: “we have left open the question whether [federal inmates] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus.” *See also*, *Bell v. Wolfish*, 441 U. S. 520, 526 n.6 (1979) (citing *Preiser* and stating: “[W]e leave to another day the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement”).

Without direction from this Court, the courts of appeals have split on this question. The First, Second, Third, and D.C. Circuits hold that habeas lies to correct unconstitutional conditions of confinement. The Fourth, Seventh, Eighth and Tenth Circuits hold the opposite.

A. There Is Deep Division Among The Courts Of Appeals Over Whether Habeas Jurisdiction Exists For Condition Of Confinement Claims

The First, Second, Third, and D.C. Circuits hold that habeas jurisdiction exists to remedy unconstitutional confinement conditions without regard to whether the challenge would affect the fact or duration of confinement. *E.g., Aamer v. Obama*, 742 F.3d 1023, 1038 (D.C. Cir. 2014) (holding that “a prisoner may, in a federal habeas corpus petition, ‘challenge the conditions of his confinement’”); *United States v. DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006) (“If the conditions of incarceration raise Eighth Amendment concerns, habeas corpus is available.”); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (“This court has long interpreted §2241 as applying to challenges to the execution of a federal sentence, ‘including such matters as ... prison conditions’”); *Woodall v. Federal Bureau of Investigation*, 432 F.3d 235 (3d Cir. 2005) (holding that habeas jurisdiction exists over inmate’s challenge to BOP’s refusal to transfer him to community corrections center with stepped-down confinement conditions).

An additional circuit, the Eleventh, articulates its rule somewhat differently but reaches the same result for unconstitutional conditions that impose atypical and significant hardship. The Eleventh Circuit differentiates between claims challenging the “circumstances of an inmate’s confinement” [no habeas jurisdiction] versus “execution of an inmate’s sentence” [habeas jurisdiction]. Under that standard, a challenge to an inmate’s “conditions of confinement” that impose atypical and significant hardship in relation to the ordinary incidents of prison life concerns “execution of the inmate’s sentence” and can be raised in habeas. *E.g., Gorrell v. Hastings*, 541 Fed. App’x 943, 945-46 (11th Cir. 2013).

Along with the Fourth Circuit, the Seventh, Eighth and Tenth Circuits hold the opposite. They hold that habeas is limited to challenges to the fact or duration of confinement, and cannot be used to challenge confinement conditions. *E.g., Glaus v. Anderson*, 408 F.3d 382 (7th Cir.

2005); *Spencer v. Haynes*, 774 F.3d 467 (8th Cir. 2014); *United States v. Garcia*, 470 F.3d 1001 (10th Cir. 2006). The Ninth Circuit holds the same, at least for state inmates. *Nettles v. Grounds*, 830 F.3d 922, 931 (9th Cir. 2016).

The question is unresolved in the two remaining circuits. Noting that “[t]he line between claims which must initially be pressed by writ of habeas corpus and those cognizable under §1983 is a blurry one,” the Fifth Circuit recently acknowledged that its opinions have been “less clear” and do not answer whether condition-of-confinement claims can be brought in habeas. *Poree v. Collins*, 866 F.3d 235, 243-244 & n.29 (5th Cir. 2017).

The Sixth Circuit has inconsistent opinions, sometimes allowing habeas claims that do not challenge the fact or duration of imprisonment and sometimes disallowing them. Compare *Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011) (allowing Eighth Amendment challenge to method of execution to proceed as habeas claim), with *Luedtke v. Berkebile*, 704 F.3d 465, 466 (6th Cir. 2013) (“§2241 is not the proper vehicle for a prisoner to challenge conditions of confinement”).

B. The Court Should Hold That Claims Challenging Transfers That Impose Atypical And Significant Hardship Are Cognizable In Habeas

Protecting an inmate’s liberty interests against transfers that impose atypical and significant hardship without due process comports with this Court’s precedents that allow habeas petitions challenging inmates’ places of confinement. The Court permitted those challenges even though the inmates did not challenge their convictions or the length of their sentences. They instead challenged only the venue of their imprisonment. *Humphrey v. Cady*, 405 U.S. 504, 514 (1972) (habeas petition challenging confinement in state prison rather than mental hospital); *In re Bonner*, 151 U.S. 242 (1894) (habeas petition challenging confinement in state penitentiary rather than territorial jail).

More broadly, the Court has long recognized that habeas “is not ‘a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose’”—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty. *Boumediene v. Bush*, 553 U.S. 723, 780 (2008), quoting *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). Interpretations “that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements” must be rejected. *Hensley v. Mun. Court*, 411 U.S. 345, 350 (1973).

Categorically denying habeas relief because the challenged constitutional violation can be labelled a “condition of confinement” is just the type of stifling formalism that this Court rejects. The habeas statute, 28 U.S.C. §2241(a), does not distinguish between claims challenging “conditions of confinement” and those challenging the fact or duration of imprisonment in bestowing habeas jurisdiction on federal courts. The Act requires only that the petitioner be in custody “in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. §2241(c). Inmates subject to unconstitutional conditions of confinement are held in custody in violation of the Constitution as much as prisoners who are held longer than the law allows or who should not be detained at all. The “conditions of confinement” label, therefore, should not be a rigid litmus test for measuring habeas’ scope. *See, Nelson v. Campbell*, 541 U.S. 637, 644 (2004) (concluding that “[n]either the ‘conditions’ nor the ‘fact or duration’ label is particularly apt” to resolve whether habeas jurisdiction exists over challenge to method of execution).

The inappropriateness of rigidly using the “conditions of confinement” label is all the more apparent since the distinction between claims challenging “conditions of confinement” and those challenging “duration of confinement” is illusory. Extending an inmate’s confinement by, say, reducing the inmate’s good-time credits can be categorized as a condition of the inmate’s

confinement—the inmate is detained subject to the condition of reduced good-time credits. Conversely, a claim challenging conditions of confinement merges into one concerning duration of confinement if the prisoner seeks, or the court orders, release if the unlawful conditions are not corrected. As the D.C. Circuit explains, a court in a condition of confinement claim:

may simply order the prisoner released unless the unlawful conditions are rectified, leaving it up to the government whether to respond by transferring the petitioner to a place where the unlawful conditions are absent or by eliminating the unlawful conditions in the petitioner’s current place of confinement.

Aamer, 742 F.3d at 1035.

Indeed, Rodriguez seeks immediate release from his confinement at ADX Supermax, and it is difficult to see any meaningful substantive distinction between his claim and a “place of confinement” challenge that unquestionably sounds in habeas. A place of confinement claim “rests on the contention that the conditions of confinement in a particular place violate the law.” *Id.* Rodriguez’s claim involves the very same inquiry: do the conditions in which he is held at a particular place (ADX Supermax) violate the law (by subjecting him to atypical and significant hardship without due process)? That habeas jurisdiction exists for the former but not the latter claim is an artificial distinction.

The artificiality of that distinction is all the more stark when, as here, the “condition of confinement” claim arises from the same underlying wrong as the “duration of confinement” claim. Here there was a common wrong—a disciplinary action that violated Rodriguez’s due process rights. Two injuries flowed from that wrong—the loss of good-time credits and a change in level of custody. It makes no sense to hold a habeas court can remedy the first but not the second. The habeas statutes command courts to dispose of habeas claims “as law and justice require.” 28 U.S.C. §2243. Providing complete relief to an inmate, by undoing all the acts taken in reliance on the unlawful conduct, effectuates that command.

That is especially true since habeas is the only meaningful avenue for federal prisoners to vindicate their liberty interest against atypical and significant hardship. They cannot, of course, bring §1983 actions which are limited to claims against state actors. *Bivens* actions are likely unavailable as well in light of *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), which essentially limits *Bivens* to the three narrow contexts the Supreme Court previously approved, none of which concerned a change in an inmate's level of confinement. Nor would *Bivens* offer meaningful relief in any event, as it is limited to damages against federal officials in their individual capacities and cannot compel official actions. *Id.* at 1856-57. In sum, the liberty interests of federal prisoners against transfers that impose atypical and significant hardship would be illusory if habeas is unavailable to remedy that violation.

To relieve the impairment of liberty interests that Rodriguez continues to suffer, the illegal disciplinary action must be expunged and the transfer to ADX Supermax based on that unlawful action undone. Only a habeas petition can provide that relief, which is why habeas should extend to a claim of this nature. *Cf. Munaf v. Geren*, 553 U.S. 674, 676 (2008) (exhortation to interpret habeas statute liberally in the absence of alternate forum for relief); *Hensley*, 411 U.S. at 350 (holding that habeas writ “must retain the ‘ability to cut through barriers of form and procedural mazes’ ... ‘to insure that miscarriages of justice within its reach are surfaced and corrected.’”) (quoting *Harris v. Nelsen*, 394 U.S. 286, 291 (1969)).

C. The Circuits That Do Not Recognize Habeas Jurisdiction For Any Condition Of Confinement Claims Misapply *Preiser*

The Circuits that exclude condition of confinement claims from the reach of habeas do not ground their rulings on the text of the habeas statute. Nor do they consider the Court's admonishment against “static, narrow, formalistic” application of the habeas writ. Rather, they rely on a mistaken premise. As the D.C. Circuit explains, *Aamer*, 742 F.3d at 1037, they rest on

a “questionable rationale, one reflecting a fundamental misunderstanding of the Supreme Court’s decision” in *Preiser v. Rodriguez*, 411 U.S. 475 (1973). In rejecting Rodriguez’s claim, the Court below joined those Circuits that misunderstand *Preiser*.

In *Preiser*, the Court considered the scope of §1983 vis-à-vis the scope of habeas. The Court held that when a state prisoner challenges the fact or duration of his confinement and seeks immediate or speedier release from imprisonment, “his sole federal remedy is a writ of habeas corpus.” 411 U.S. at 500. Such claims, the Court explained, lie at the “core of habeas corpus” jurisdiction and must be pursued via habeas. *Id.* at 489.

That holding was a matter of statutory construction. Although “the literal terms of §1983 might seem to cover” claims that a prisoner’s confinement violates the Constitution, *id.* at 489, the language of the habeas statute is more specific. Section 1983 broadly allows relief from illegal state action in general, while the writ of habeas corpus concerns relief from illegal confinement in particular and traditionally “has been accepted as the specific instrument to obtain release from such confinement.” *Id.* at 486. The specific remedy provided by the habeas statute, therefore, “must override the general terms of §1983.” *Id.* at 490. Further, habeas corpus actions require a petitioner fully to exhaust state remedies, which §1983 does not. *Id.* at 489-90. Based on these “considerations of linguistic specificity, history and comity,” the Court concluded that Congress intended to make “an implicit exception from §1983’s otherwise broad scope for actions that lie ‘within the core of habeas corpus.’” *Wilkinson*, 544 U.S. at 79, quoting *Preiser*, 411 U.S. at 487.

In making that ruling, the Court did not hold that habeas is limited to claims seeking immediate or speedier release from confinement. Just the opposite. As discussed above, *supra* p. 7, the Court expressly reserved the question whether habeas is available to challenge

unconstitutional prison conditions. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862 (2017) (“[W]e have left open the question whether [federal inmates] might be able to challenge their confinement conditions via a petition for a writ of habeas corpus.”) (citing *Preiser*). Yet, the circuits that preclude condition-of-confinement habeas challenges take *Preiser* to mean that claims that do not challenge the fact or duration of confinement must be filed as civil rights claims and not in habeas. *E.g.*, *Glaus*, 408 F.3d at 388; *Garcia*, 470 F.3d at 1003. But as the D.C. Circuit explains, *Preiser* “imposed a habeas-channeling rule, not a habeas-limiting rule: the Court held only that claims lying at the ‘core’ of the writ must be brought in habeas, and expressly disclaimed any intention of restricting habeas itself.” *Aamer*, 742 F.3d at 1037 (emphasis in original).

And this does not even mention that *Preiser*’s reasoning is inapplicable to habeas petitions by federal inmates under 28 U.S.C. §2241. Unlike with state prisoners, there are no overlapping habeas and civil rights statutes for federal inmates. Any limitations on petitions under §2241 by dint of its interface with §1983 do not apply to habeas petitions by federal inmates.

II. The Court Should Grant Certiorari To Resolve A Deep And Acknowledged Division Among The Circuits Over The Appropriate Baseline To Determine Whether A Change In An Inmate’s Confinement Conditions Imposes Atypical And Significant Hardship

In *Sandin v. Conner*, 515 U.S. 472 (1995), the Court recognized that prison policies and regulations that restrict the discretion of prison officials to transfer prisoners to more restrictive confinement (like those that govern transfers to ADX Supermax) may give a prisoner a constitutionally protected liberty interest in avoiding the more restrictive confinement. A liberty interest is implicated, the Court held, if the change “imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Id.* at 484. The Court reaffirmed

that holding in *Wilkinson v. Austin*, 545 U.S. 209 (2005). However, the Court did not define in either *Sandin* or *Wilkinson* the baseline that constitutes the “ordinary incidents of prison life.”

In the absence of a clear baseline from this Court, the Courts of Appeals have developed a conflicting welter of baseline measures, a muddle this Court acknowledged in *Wilkinson*, stating: “In *Sandin*’s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system.” *Id.* at 223. Even the decision the Fourth Circuit relied on here for the baseline determination—*Rezaq v. Nalley*, 677 F.3d 1001 (10th Cir. 2012)—acknowledged the split among the Circuits (and even within Circuits), stating: “Courts have struggled to identify the appropriate baseline for assessing what constitutes an ‘atypical and significant hardship’ on inmates. Our own cases have taken two different approaches to the baseline question in assessing conditions in segregated confinement. ... Our sister circuits are certainly not in agreement regarding the correct approach.” *Id.* at 1011. *See also Aref v. Lynch*, 833 F.3d 242, 257 (D.C. Cir. 2016) (“the difficulty of establishing an appropriate *Sandin* baseline has led to widely disparate conclusions about what constitutes an atypical and significant hardship.”); *Skinner v. Cunningham*, 430 F.3d 483, 486-87 (1st Cir. 2005) (“The [*Sandin*] hardship test has itself become the source of major disagreement” among the Circuits.). The Court should grant this petition to resolve this disagreement and bring clarity.

A. The Courts Of Appeals Are Divided About The Baseline For The Ordinary Incidents Of Prison Life

The two decades since *Sandin* have brought inconsistency in the Courts of Appeals’ definitions of the baseline to determine the “ordinary incidents of prison life,” with almost as many competing definitions as there are Circuits. *See Aref*, 833 F.3d at 253-55 (surveying the Courts of Appeals’ different approaches). The practical consequence of these wide-ranging

interpretations is that a prisoner's liberty interests may ultimately depend not on the circumstances of the inmate's change in conditions but upon the happenstance the jurisdiction in which the inmate is incarcerated.

On one end of the spectrum, the Fourth Circuit compares the confinement conditions at issue to those in the general prison population (or at least it did before this case). *E.g.*, *Incumaa v. Stirling*, 791 F.3d 517, 528-29 (4th Cir. 2015); *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997).

Other Circuits balance the duration of the challenged confinement against the severity of the conditions, but use different baselines for determining whether the conditions are severe. The Second Circuit uses as the baseline the deprivations typically endured by prisoners in the general population in the ordinary course of prison administration. *E.g.*, *Palmer v. Richards*, 364 F.3d 60, 63-66 (2d Cir. 2004); *Tellier v. Fields*, 280 F.3d 69, 80 (2d Cir. 2000); *Colon v. Howard*, 215 F.3d 227, 231 (2d Cir. 2000).

The Third Circuit compares the challenged conditions to typical conditions of administrative segregation. Confinement in conditions typically encountered in administrative or punitive segregation, the Third Circuit holds, "will rarely be sufficient, without more, to establish the kind of 'atypical' deprivation of prison life necessary to implicate a liberty interest." *Smith v. Mesinger*, 293 F.3d 641, 653 (3d Cir. 2002). *Accord*, *Powell v. Weiss*, 757 F.3d 338, 344 (3d Cir. 2014).

The Seventh Circuit looks to the ordinary conditions in the highest security prison in the state, regardless of whether the inmate was housed there. *E.g.*, *Kervin v. Barnes*, 787 F.3d 833 (7th Cir. 2015); *Marion v. Radke*, 641 F.3d 874, 876 (7th Cir. 2011).

The District of Columbia Circuit considers “the most restrictive [confinement] conditions that prison officials, exercising their administrative authority to ensure institutional safety and good order, routinely impose on inmates serving similar sentences.” *Hatch v. District of Columbia*, 184 F.3d 846, 847 (D.C. Cir. 1999). That baseline can include “more restrictive conditions at other prisons if it is likely both that inmates serving sentences similar to [the claimant’s] will actually be transferred to such prisons and that once transferred they will actually face such conditions.” *Id. Accord, Aref*, 833 F.3d at 254.

The Eleventh Circuit too considers the duration and severity of the confinement conditions. However, unlike the other Circuits that consider these two factors, the Eleventh Circuit requires a long duration for atypical and significant hardship. In other words, the factors are not balanced, so a short confinement cannot impose atypical and significant hardship even if the confinement conditions are especially severe. Also, the prisoner’s sentence must be extended for atypical and significant hardship to exist under the Eleventh Circuit’s test. E.g., *Del Giudice v. Primus*, 679 Fed. Appx. 944 (11th Cir. 2017); *Smith v. Deemer*, 641 Fed. Appx. 865 (11th Cir. 2016); *Morefield v. Smith*, 404 Fed. Appx. 443 (11th Cir. 2010).

The Ninth Circuit follows a more holistic approach. Recognizing that the baseline is “not entirely clear,” *Brown v. Oregon Dept. of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014), the Ninth Circuit says “[t]here is no single standard for determining whether a prison hardship is atypical and significant’ and that the analysis under this standard requires ‘case by case, fact by fact consideration.’” *Chappell v. Mandeville*, 706 F.3d 1052, 1064 (9th Cir. 2013), quoting *Ramirez v. Galaza*, 334 F.3d 850, 861 (9th Cir. 2003).

Then there is the four factor test the Tenth Circuit adopted which the lower courts here followed. That test considers whether: (1) the segregation relates to and furthers a legitimate

penological interest, such as safety or rehabilitation; (2) the conditions of placement are extreme; (3) the placement increases the duration of confinement; and (4) the placement is indeterminate, with weight on the last two factors. *Rezaq*, 677 F.3d at 1012.

Finally, the remaining circuits have applied *Sandin*'s "atypical and significant hardship" test without selecting any comparative baseline. *E.g.*, *Perry v. Spencer*, 2016 U.S. Dist. Lexis 136991 at *43 (D. Mass. Sept. 30, 2016) ("Neither the Supreme Court nor the First Circuit has established a baseline against which the parameters of 'an atypical and significant hardship' are to be measured."); *Wilkerson v. Goodwin*, 774 F.3d 845, 854-55 (5th Cir. 2014) (noting different baselines used by the Circuits but not deciding which is correct because solitary confinement for 39 years imposes atypical and significant hardship "according to any possible baseline we could consider."); *Harden-Bey v. Rutter*, 524 F.3d 789, 793-94 (6th Cir. 2008) (agreeing that nature of the more restrictive confinement and its duration must be considered, but not defining the baseline to use for comparing the nature of the confinement conditions).

B. A Clear Standard Would Benefit Courts, Prison Officials And Inmates

An inmate's liberty interest in avoiding restrictive confinement that entails atypical and significant hardship is an important right that demands serious protection. As the Seventh Circuit recently observed, the "psychological damage" that modern prison segregation can impose on a prisoner is well documented. *Kervin v. La Clair Barnes*, 787 F.3d at 837, citing Elizabeth Bennion, *Banning the Bing: Why Extreme Solitary Confinement is Cruel and Far Too Usual Punishment*, 90 Indiana Law Journal 741 (2015); Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 Washington University Journal Law & Policy 325 (2006); Craig Hanley & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. Review of Law & Social Change 477 (1997).

The risk of psychological damage is particularly high at Supermax facilities. Incarceration at a Supermax prison, the Court wrote in *Wilkinson v. Austin*, “is synonymous with extreme isolation.” 545 U.S. at 214. “[A]lmost all human contact is prohibited, even to the point that a conversation is not permitted from cell to cell; [the] light, though it may be dimmed, is on for 24 hours, exercise is for 1 hour per day, but only in a small indoor room.” *Id.* at 223-24. “It is fair to say that [Supermax] inmates are deprived of almost any environmental or sensory stimuli and of almost all human contact.” *Id.* at 214.

An uniform rule that makes clear what constitutes atypical and significant hardship would give real force to that constitutional safeguard. As the Second Circuit explains:

This is a context in which a high degree of certainty is extremely desirable. Prison officials conduct thousands of prisoner hearings each year, and they are entitled to know beforehand whether these hearings are subject to the procedural due process requirements of the Constitution. It is better alert these officials to the federally enforceable requirements that must be observed than to leave the officials uncertain and merely afford damage remedies in those rare cases where courts determine after the fact both that the conditions were atypical and that the defendant officials were not entitled to qualified immunity.

Colon, 215 F.3d at 233.

Indeed, prison officials should welcome an uniform rule. Uncertainty whether prisoners have a liberty interest that must be protected in prisoner proceedings is a breeding ground for administrative complaints and protracted lawsuits by prisoners. A clear, uniform rule could foreclose many of those claims and protect officials from damages, by giving a clear yardstick to follow and measure their actions. Courts could more quickly winnow out prisoner claims that are filed, because they would have a clear standard to determine whether the complaint pleads facts sufficient to satisfy the announced standard.

This Court has often recognized the merits of specific standards in other contexts to aid officials and courts. As the Court explained in *County of Riverside v. McLaughlin*, 500 U.S. 44

(1991), in which the Court adopted 48-hours as the benchmark to determine compliance with the Fourth Amendment requirement that arrested persons be afforded a “prompt” determination of probable cause:

Although we hesitate to announce that the Constitution compels a specific time limit, it is important to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds

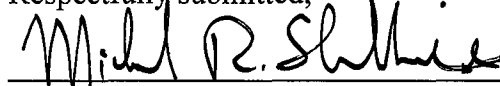
Id. at 56. *See also, Brown v. Louisiana*, 447 U.S. 323, 331 (1980) (“Though the line separating the permissible jury practice from the impermissible may not be the brightest, a line must be drawn somewhere”) (citations omitted).

The time has come to draw the line. The Court of Appeals have had two decades to reach consensus on what the baseline rule should be for atypical and significant hardship. They have been unable to develop a consistent answer. They are now hopelessly divided. After 20 years of their unsuccessful effort, the time is appropriate for the Court to define the standard.

CONCLUSION

Petitioner Osiel Rodriguez respectfully requests that the Court grant this petition and issue a writ of certiorari to the Court of Appeals for the Fourth Circuit for the foregoing reasons.

Respectfully submitted,



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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-6332

OSIEL RODRIGUEZ,

Petitioner - Appellant,

v.

CHARLES RATLEDGE,

Respondent - Appellee.

No. 17-6301

OSIEL RODRIGUEZ,

Petitioner - Appellant,

v.

CHARLES RATLEDGE,

Respondent - Appellee.

Appeals from the United States District Court for the Western District of Virginia, at
Roanoke. Norman K. Moon, Senior District Judge. (7:15-cv-00082-NKM-RSB; 7:15-
cv-00684-NKM-RSB)

Argued: September 12, 2017

Decided: November 29, 2017

Before NIEMEYER, DUNCAN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

ARGUED: Michael Randolph Shebelskie, HUNTON & WILLIAMS LLP, Richmond, Virginia, for Appellant. Joseph W.H. Mott, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. **ON BRIEF:** William H. Wright, Jr., HUNTON & WILLIAMS LLP, Richmond, Virginia, for Appellant. Rick A. Mountcastle, Acting United States Attorney, Mitchell A. Hanson, Third Year Law Intern, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Appellant Osiel Rodriguez filed two petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2241 claiming that prison disciplinary proceedings violated his due process rights and challenging his transfer from United States Penitentiary, Lee County, to a maximum security facility. The district court granted summary judgment in favor of Appellee, Warden Christopher Zych, on the grounds that Rodriguez failed to exhaust his administrative remedies prior to filing his first habeas petition and that Rodriguez's second petition challenging his transfer did not constitute a cognizable or actionable due process violation. Rodriguez appeals, arguing that his failure to exhaust administrative remedies should be excused, that his habeas petitions are cognizable, and that his due process rights were violated. We hold that although Rodriguez's failure to exhaust is excusable, his cognizable claims do not constitute a due process violation. For the foregoing reason, we affirm the district court's grant of summary judgment.

I.

Osiel Rodriguez is a federal inmate. While incarcerated in United States Penitentiary, Lee County ("USP Lee"), Rodriguez was charged with two disciplinary code violations—attempted escape and attempted introduction of narcotics. The charges were memorialized in an incident report dated November 19, 2014 ("incident report"). The incident report accused Rodriguez of planning to escape from USP Lee by assuming the identity of another inmate, Marcos Ramos, who was to be released to the Bureau of Immigration and Customs Enforcement. The incident report also alleged that Rodriguez

propositioned Ramos to purchase Suboxone, a narcotic pain reliever, from a drug store in Mexico on Rodriguez's behalf.

Rodriguez appeared at a disciplinary hearing ("first hearing") before a Disciplinary Hearing Officer (DHO). Rodriguez was found guilty of attempted introduction of narcotics, but the attempted escape charge was dismissed. At the hearing, the presiding DHO sanctioned Rodriguez to 30 days of disciplinary segregation, six months without phone privileges, six months' suspension of visitation rights, and 41 days' disallowance of good conduct time.

After the hearing, but before any formal report on the hearing was issued, the DHO noticed a typographical error in the initial incident report. The DHO believed the error substantively changed the incident report such that the report had not provided Rodriguez adequate notice of the charges that were heard during the first hearing and that the report did not support the charges against him. Consequently, the DHO requested that the incident report be rewritten and that a rehearing be held on the charges.¹ The first hearing was never memorialized in a formal DHO after-hearing report ("DHO Report"), though the penalties were noted in Rodriguez's disciplinary record.

The revised version of the incident report went beyond remedying the typographical error. Information was added detailing the ways in which Rodriguez's

¹ The parties dispute the circumstances surrounding the incident report revisions and rehearing. Rodriguez argues the revision of the incident report was a pretext used to justify a rehearing, whereas the government asserts the revisions were necessary to ensure the conduct described in the incident report supported the charges against Rodriguez.

conduct showed an intent to escape from USP Lee. A rehearing of the charges with a new DHO was scheduled for January 30, 2015 (“second hearing”). At the second hearing, based on the revised incident report, the new DHO reached the opposite conclusion of the first: that Rodriguez committed an attempted escape but not an attempted introduction of narcotics. The DHO imposed the same penalties levied at the first hearing, however, including disallowance of 41 days of good conduct time.

Rodriguez filed a pro se habeas corpus petition on February 25, 2015, under 28 U.S.C. § 2241 (“first petition”). He asserted that the second hearing was collaterally estopped by the findings of the first hearing and that the attempted escape charge from the second hearing violated his due process rights. Rodriguez did not file an administrative appeal prior to filing his habeas petition, claiming he was unable to do so because the presiding DHO was delaying in providing him with the formal DHO report from the second hearing. Pursuant to Bureau of Prison (BOP) policy, Rodriguez filed unsuccessful appeals with the BOP Regional Director and General Counsel after the DHO report was received.

On August 3, 2015, Rodriguez was notified that he was being referred for a transfer hearing regarding a possible transfer to United States Penitentiary, Administrative Maximum Facility—a maximum security facility located in Florence, Colorado (“ADX Florence”). The notice listed Rodriguez’s attempted escape from USP Lee and two prior escape attempts from other BOP facilities as grounds for the transfer hearing. After the transfer hearing, Rodriguez was recommended for transfer to ADX Florence. In December 2015 Rodriguez filed a second 28 U.S.C. § 2241 pro se habeas

petition (“second petition”) challenging his transfer. Rodriguez claimed the transfer order to ADX Florence violated his right to due process because it was based in part on his second hearing, which was collaterally estopped by the findings of the first hearing and constitutionally problematic. Rodriguez exhausted all administrative remedies regarding his transfer to ADX Florence prior to filing his second petition.

On February 11, 2016, the district court granted summary judgment on Rodriguez’s first petition in favor of the government. The district court held that Rodriguez failed to exhaust administrative remedies prior to filing his habeas petition, that he failed to state an actionable due process violation, and that any potential due process violations were not prejudicial. On February 23, 2017, the district court granted summary judgment in the government’s favor on Rodriguez’s second petition, holding that Rodriguez had not alleged a proper § 2241 habeas claim and that even construed as a civil rights complaint, Rodriguez failed to demonstrate that his transfer to ADX Florence implicated a protected liberty interest. Rodriguez timely appealed both determinations, which were consolidated into a single appeal.

II.

We review denials of habeas corpus relief de novo. *Fontanez v. O’Brien*, 807 F.3d 84, 86 (4th Cir. 2015). Summary judgment is appropriate when no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law. *United States v. Leak*, 123 F.3d 787, 794 (4th Cir. 1997). Evidence is evaluated in the light most favorable to the non-moving party. *Id.*

III.

Prior to hearing a § 2241 petition, federal courts require exhaustion of alternative remedies, including administrative appeals. *See e.g., Boumediene v. Bush*, 553 U.S. 723, 793 (2008); *Timms v. Johns*, 627 F.3d 525, 531 (4th Cir. 2010). The exhaustion requirement is a prudential restraint, not a statutory requirement. *Dragenice v. Ridge*, 389 F.3d 92, 98 (4th Cir. 2004). It allows agencies to exercise autonomy and discretion and prevents premature judicial intervention. *Darby v. Kemp*, 957 F.2d 145, 147 (4th Cir. 1992), *rev'd on other grounds sub nom. Darby v. Cisneros*, 509 U.S. 137 (1993).

Rodriguez failed to exhaust his administrative remedies prior to filing his first habeas petition but argues his subsequent exhaustion cures his premature filing. We agree. Failure to exhaust administrative remedies typically results in dismissal without prejudice, in order to allow the refile of an action once the administrative process is complete. *See Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011); *Fitzgerald v. Corr. Corp. of Am.*, 403 F.3d 1134, 1139 (10th Cir. 2005). Though he did not exhaust administrative remedies before filing his first habeas petition, Rodriguez exhausted the administrative process prior to the district court's grant of summary judgment. Because Rodriguez exhausted his administrative remedies, the district court's grant of summary judgment did not further the practical considerations underlying the exhaustion

requirement. Rather than dismissing Rodriguez's claim as premature and requiring an unnecessary refiling, we will consider the prudential exhaustion requirement satisfied.²

IV.

We next turn to consider whether Rodriguez's claims challenging his deprivation of earned good conduct time and transfer to ADX Florence are cognizable as § 2241 petitions.

Section 2241 habeas petitions are appropriate when an inmate seeks to challenge "the very fact or duration of his physical imprisonment." *See Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). This Court has not directly addressed whether a § 2241 petition may also be used to challenge conditions of confinement or whether such challenges must be brought as civil rights actions under 42 U.S.C. § 1983 or *Bivens*. *See* 42 U.S.C. § 1983 (providing civil remedy for deprivation of rights under color of law); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (establishing the validity of actions for damages when a federal officer acting under the color of federal authority violates plaintiff's constitutional rights). Nonetheless, courts have generally held that a § 1983 suit or a *Bivens* action is the appropriate means of challenging conditions of confinement, whereas § 2241 petitions are not. *See Braddy v.*

² This is consistent with this Court's approach in *Dragenice*, 389 F.3d at 98. In *Dragenice*, the habeas petitioner had not exhausted his administrative remedies when he filed his petition, though he subsequently exhausted other avenues of relief. *Id.* at 96. Although dismissal of detainee's habeas petition would have been appropriate, this Court determined that the district court had jurisdiction. *Id.* at 100.

Wilson, 580 F. App'x 172, 173 (4th Cir. 2014) (deciding that when petitioner alleged constitutional violations “regarding only the conditions of his confinement” not the fact or duration of his sentence, his claims were properly brought under *Bivens*); *Glaus v. Anderson*, 408 F.3d 382, 388 (7th Cir. 2005) (holding that filing a § 2241 challenge to a condition of confinement was improper). *But see Aamer v. Obama*, 742 F.3d 1023, 1032 (D.C. Cir. 2014) (“[O]ne in custody may challenge the conditions of his confinement in a [§ 2241] petition . . .”).

Here, Rodriguez argues his habeas petitions challenging his deprivation of earned good conduct time and transfer to ADX Florence are both cognizable pursuant to 28 U.S.C. § 2241. The government contends that only Rodriguez’s deprivation of good conduct time is cognizable under 28 U.S.C. § 2241. We agree with the government. Rodriguez’s deprivation of good conduct time is a cognizable § 2241 claim, because this petition challenges the duration of his confinement as impacted by the disallowance of his earned good conduct time. *See Preiser*, 411 U.S. at 500. Conversely, Rodriguez’s transfer to ADX Florence is not a cognizable § 2241 claim, because this petition challenges the conditions of his confinement, not its fact or duration.³

³ This Court has authority to sua sponte consider Rodriguez’s challenge to his transfer as a *Bivens* civil rights claim. *See Wilwording v. Swenson*, 404 U.S. 249, 251 (1971) (construing petitioners’ premature habeas claim as an actionable 42 U.S.C. § 1983 petition); *see also Haines v. Kerner*, 404 U.S. 519, 520–21 (1972) (construing pro se petitions liberally). However, Rodriguez seeks a reversal of his transfer, whereas *Bivens* provides relief in the form of damages. *Bivens*, 403 U.S. at 397. Moreover, his claim fails even construed as a *Bivens* complaint. Inmates do not have “a liberty interest in avoiding transfer,” *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005), unless the transfer would impose an “atypical and significant hardship” compared to the general prison (Continued)

V.

We now consider the merits of Rodriguez’s § 2241 petition challenging his loss of good conduct time—his only cognizable claim. A § 2241 petition for a writ of habeas corpus will be granted where petitioner is in custody “in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2241(c), and demonstrates that the alleged violation was prejudicial, *Burgess v. Dunbar*, 628 F. App’x 175, 176 (4th Cir. 2015) (citing *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir. 1997)). The Fifth Amendment protects persons from deprivations of “life, liberty or property without due process of law.” U.S. CONST. amend. V. Thus, relief may be granted to a petitioner pursuant to § 2241 if petitioner’s Fifth Amendment due process rights were violated and the violation was prejudicial.

The government violates an individual’s right to due process if it deprives the individual “of ‘liberty’ . . . interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.” *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Incarcerated persons have only “a narrow range of protected liberty interests.” *Hewitt v. Helms*, 459 U.S. 460, 467 (1983). Statutes and regulations can create liberty interests

population, *id.* at 223 (citing *Sandin v. Conner*, 515 U.S. 472, 484 (1995)). The conditions at ADX Florence do not constitute an atypical and significant hardship. *Rezaq v. Nalley*, 677 F.3d 1001, 1014–17 (10th Cir. 2012) (conditions in ADX Florence are not atypical or a significant hardship as placement furthers BOP’s legitimate interests, conditions are “substantially similar to conditions experienced in any solitary confinement setting,” placement is not indeterminate, and does not increase the duration of confinement). Accordingly, Rodriguez’s transfer did not implicate a protected liberty interest and did not violate his due process rights.

when the law or regulation provides “freedom from restraint which . . . imposes [an] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.” *Sandin*, 515 U.S. at 483–84 (holding that disciplinary confinement did not implicate a liberty interest despite regulations suggesting it may not be imposed absent significant misconduct).

Rodriguez challenges the constitutionality of the second hearing on the basis that it was not conducted in accordance with BOP regulations. Pursuant to BOP regulations, presiding DHOs have the discretion to “correct mistakes [in disciplinary hearing reports] locally” but do not have the authority to grant re-hearings absent direction from a reviewing official. J.A. 60. Rodriguez argues that the BOP violated his right to due process by contravening its regulations and subjecting him to a second hearing on attempted escape and attempted introduction of controlled substances charges without direction from a reviewing official.

In considering Rodriguez’s § 2241 petition challenging the loss of his good conduct time, however, we need not determine whether the BOP violated its regulations or whether the regulations created a protected liberty interest. Even if we assume the second hearing deprived Rodriguez of a liberty interest and constituted a due process violation, the second hearing was not prejudicial because Rodriguez would have forfeited the same good conduct time even if the second hearing had not been conducted. The sanctions levied against Rodriguez after the second hearing were identical to those assessed in the first hearing, including the forfeiture of 41 days of good conduct time, 30

days of disciplinary segregation, six months without phone privileges, and six months' suspension of visitation rights.

Rodriguez attempts to establish prejudice by contending that the second hearing vacated the first hearing, such that his loss of good conduct time resulted solely from the second hearing. His argument is unavailing. If the second hearing presents a due process violation, it cannot also have validly vacated the penalties stemming from the first hearing. Thus, Rodriguez's due process challenge to his second hearing provides no basis for vacating the district court's judgment.

VI.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

OSIEL RODRIGUEZ,	)	Civil Action No. 7:15cv00082
Petitioner,	)	
	)	<u>MEMORANDUM OPINION</u>
v.	)	
	)	By: Norman K. Moon
CHRISTOPHER ZYCH,	)	United States District Judge
Respondent.	)	

Osiel Rodriguez, a federal inmate proceeding *pro se*, filed a petition for writ of habeas corpus pursuant 28 U.S.C. § 2241, challenging a disciplinary proceeding that resulted in, *inter alia*, the loss of good conduct time. Respondent filed a motion for summary judgment, and Rodriguez responded thereto, making this matter ripe for disposition.¹ For the reasons stated herein, I will grant respondent's motion for summary judgment.

I.

On November 20, 2014, while housed at United States Penitentiary at Lee County, Virginia, Rodriguez was issued an Incident Report, charging him with Disciplinary Code Violations 102(A): Attempted Escape, and 111(A): Attempted Introduction of Narcotics. At a hearing on these charges, Discipline Hearing Officer ("DHO") Rupert found that Rodriguez attempted to introduce narcotics but did not attempt an escape. DHO Rupert sanctioned Rodriguez with, *inter alia*, 41 days loss of good conduct time. However, DHO Rupert never completed a DHO Report of the hearing because, when he began to prepare the report, he noticed what he thought was an error in the facts section of the Incident Report. During the hearing, DHO Rupert thought that the Incident Report stated that drugs were to be sent to Rodriguez at the prison. However, after the hearing, DHO Rupert noticed that the Incident Report actually

¹ Respondent filed a motion to dismiss and attached affidavits and other documents, which I rely upon. Accordingly, I have converted respondent's motion to dismiss into a motion for summary judgment and given appropriate notice. Fed. R. Civ. P. 12(d).

stated that drugs were to be sent to another inmate. DHO Rupert believed that the statement in the report was a typographical error, but determined that the Incident Report did not give Rodriguez adequate notice of the charges against him because the facts as written in the Incident Report did not support the Attempted Introduction of Narcotics charge. DHO Rupert consulted with Special Investigative Services (“SIS”) Lt. Duff and they agreed that the Incident Report should be rewritten. Lt. Duff rewrote the Incident Report to contain more details in support of the charges and clarify that the overall intent of Rodriguez’s conduct was to escape from custody, not to introduce drugs into the facility. Thereafter, DHO Rupert felt that he was too involved in the matter and that his impartiality could be questioned if he were to conduct the rehearing. Accordingly, DHO Rupert contacted his supervisor, the Regional Discipline Hearing Administrator, who determined that it would be appropriate to have another DHO who had not been involved with the original hearing or Incident Report conduct the hearing. The rehearing was assigned to DHO McGee, who works in the Mid-Atlantic Regional Office in Maryland.

On December 23, 2014, Rodriguez received a copy of the rewritten Incident Report.² On December 28, 2014, Rodriguez was advised of his rights concerning the disciplinary process. On January 13, 2015, Rodriguez was provided a “Notice of Discipline Hearing Before the DHO” and advised of his rights concerning the DHO hearing. Rodriguez requested a staff representative and witnesses. On January 30, 2015, a hearing was held before DHO McGee and Rodriguez was represented by a case manager and presented three witnesses. DHO McGee determined that Rodriguez did attempt escape but did not attempt to introduce narcotics. DHO McGee imposed the exact same sanctions that had been imposed after the first DHO hearing, including the loss of 41 days good conduct time. DHO McGee prepared a DHO Report,

² The second Incident Report was assigned the same Incident Report Number, but the word “REWRITE” was placed at the top of the second report.

documenting his findings and the evidence.³ A copy of the DHO Report was given to Rodriguez, and he was advised of his appeal rights on February 25, 2015.

Rodriguez filed this § 2241 petition on February 15, 2015, ten days before he received the DHO Report. Rodriguez states that the second DHO hearing was precluded, and thus illegal, based on the doctrines of collateral estoppel and *res judicata*.⁴

II.

Respondent contends that Rodriguez's § 2241 petition should be dismissed because Rodriguez failed to exhaust his administrative remedies before filing this action. Although § 2241 does not contain a statutory exhaustion requirement, courts consistently require federal prisoners challenging the execution of their sentences pursuant to § 2241 to exhaust administrative remedies before seeking review in federal court. *See Timms v. Johns*, 627 F.3d 525, 531 (4th Cir. 2010) (concluding that, absent exceptional circumstances, prisoners must exhaust alternative remedies before seeking federal habeas relief); *McClung v. Shearin*, 90 F. App'x 444, 445 (4th Cir. 2004) ("Federal prisoners must exhaust their administrative remedies prior to filing § 2241 petitions."); *United States v. Odiana*, 7 F.3d 227, 227 (4th Cir. 1993) (finding administrative exhaustion required prior to filing § 2241); *see also United States v. Mercado*, 37 F. App'x 698, 699 (4th Cir. 2002) (approving dismissal of § 2241 petition for failure to exhaust BOP's administrative remedies prior to filing). Failure to exhaust may be excused only upon a showing of cause and prejudice. *McClung*, 90 F. App'x at 445.

³ Pursuant to policy, an inmate "will receive a written copy of the DHO's decision following the hearing." 28 C.F.R. § 541.8(h).

⁴ I note that Rodriguez specifically states that he is not challenging "any evidence in regard[to the] disciplinary hearings," and his "guilt or innocence is not at issue here."

A federal inmate challenging a decision of a DHO must appeal to the Regional Director. 28 C.F.R. § 542.14(d)(2). If the inmate is dissatisfied with the Regional Director's response, the inmate then may appeal to the Bureau of Prison's Central Office. 28 C.F.R. § 542.15.

In this case, Rodriguez filed this action before he even received the DHO Report. Therefore, it is clear that he could not have exhausted his administrative remedies before filing this action. In addition, Rodriguez has not shown that he was prevented in any way from appealing the DHO Report. Nor has he demonstrated any other grounds to establish cause or prejudice necessary to excuse his failure to exhaust administrative remedies before commencing this action. Accordingly, the court concludes that Rodriguez did not exhaust his administrative remedies before filing his petition and, thus, respondent's motion for summary judgment shall be granted.

III.

Even if Rodriguez had exhausted his administrative remedies before he filed his petition, his claims nevertheless fail. Rodriguez argues that the second DHO hearing was barred by the doctrines of collateral estoppels and *res judicata*. Collateral estoppel, or issue preclusion, bars subsequent litigation of legal and factual issues common to an earlier action that were "actually and necessarily determined" in the first litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Combs v. Richardson*, 838 F.2d 112, 114 (4th Cir. 1988). Thus, "collateral estoppel forecloses the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [collateral estoppel] is asserted had a full and fair opportunity to litigate." *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998) (internal quotation marks omitted). To apply collateral estoppel to an issue or fact, the proponent must demonstrate that: (1) the issue or

fact is identical to the one previously litigated; (2) the issue or fact was actually resolved in the prior proceeding; (3) the issue or fact was critical and necessary to the judgment in the prior proceeding; (4) the judgment in the prior proceeding is final and valid; and (5) the party to be foreclosed by the prior resolution of the issue or fact had a full and fair opportunity to litigate the issue or fact in the prior proceeding. *See id.*

Res judicata, or claim preclusion, provides that if a claim arises from the same cause of action as a claim already litigated, then the judgment in the first action bars litigation of the second claim. *See Nevada v. United States*, 463 U.S. 110, 129-30 (1983). Thus, “[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). For claim preclusion to apply, there must be (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) an identity of parties or their privies in the two suits. *See Nash County Bd. of Educ. v. Biltmore Co.*, 640 F.2d 484, 486 (4th Cir. 1981).

Rodriguez has not shown that either of these doctrines applies in the context of a prison DHO hearing. Also, there was no final judgment or determination in regard to Rodriguez’s first DHO hearing. The only DHO Report produced was after the second DHO hearing. Accordingly, I conclude that Rodriguez’s claims that the second hearing was barred based on collateral estoppel and *res judicata* must fail.

IV.

Furthermore, before the court will issue a writ of habeas corpus, “the petitioner must demonstrate that he has suffered some prejudice as a result of the alleged constitutional violation” *Simpson v. Ortiz*, 995 F.2d 606, 609 (5th Cir. 1993) (citing *Brown v. Collins*,

937 F.2d 175, 182 (5th Cir.1991); *see Clark v. Maggio*, 737 F.2d 471, 475-76 (5th Cir. 1984) (“We do not grant a writ of habeas corpus in every instance in which the state has failed to conform to constitutional requirements.”). In this case, the same exact sanction was imposed after the second DHO hearing as he would have received after the first DHO hearing. Accordingly, Rodriguez has not demonstrated how he was prejudiced by any alleged constitutional violation.

V.

For the reasons stated herein, the court grants respondent’s motion for summary judgment.⁵

ENTER: This 11th day of February, 2016.


NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

⁵ Rodriguez also filed a motion seeking a court order preventing the defendants from transferring him to another facility. Rodriguez has not demonstrated any basis for me to enter such an order and, therefore, his request is denied. *See Hewitt v. Helms*, 459 U.S. 460, 468 (1983); *Meachum v. Fano*, 427 U.S. 215, 224 (1976); *Gaston v. Taylor*, 946 F.2d 340, 343 (4th Cir. 1991); *Rezaq v. Nalley*, 677 F.3d 1001, 1016 (10th Cir. 2012).

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

OSIEL RODRIGUEZ,	)	Civil Action No. 7:15cv00684
Petitioner,	)	
	)	<u>MEMORANDUM OPINION</u>
v.	)	
	)	By: Norman K. Moon
C. RATLEDGE,	)	United States District Judge
Respondent.	)	

Osiel Rodriguez, a federal inmate proceeding *pro se*, filed a petition for writ of habeas corpus pursuant 28 U.S.C. § 2241, challenging his designation by the Federal Bureau of Prisons (“BOP”) to the Administrative Maximum BOP Facility in Florence, Colorado (“ADX”). Respondent filed a motion for summary judgment and this matter is ripe for disposition.¹ For the reasons stated herein, I will grant respondent’s motion for summary judgment.

I.

Rodriguez alleges that he was denied due process before being placed at ADX in January 2016 after his third attempted escape from lower security facilities. Specifically, Rodriguez claims that the hearing administrator was not fair and impartial because he considered all three of Rodriguez’s prior attempted escapes and “knowingly relied on an invalid, collaterally estopped disciplinary hearing officer’s decision . . . as a basis for his ADX placement decision.”

In 2003 and 2006, Rodriguez was found guilty of disciplinary infractions for attempting to escape from Federal Correctional Institution Coleman in Florida and United States Penitentiary (“USP”) Atwater in California. After his second attempted escape, Rodriguez was sent to ADX for approximately 7 years. Rodriguez arrived at USP Lee in Virginia from ADX on August 6, 2013 and attempted to escape again on or about September 22, 2014.

¹ Respondent filed a motion to dismiss and attached a declaration and other documents, which I rely upon. Accordingly, I have converted respondent’s motion to dismiss into a motion for summary judgment and given appropriate notice. Fed. R. Civ. P. 12(d).

On November 20, 2014, Rodriguez was charged with Disciplinary Code Violations 102(A): Attempted Escape, and 111(A): Attempted Introduction of Narcotics. On January 30, 2015, after a hearing, the Disciplinary Hearing Officer (“DHO”) determined that Rodriguez did attempt escape but did not attempt to introduce narcotics, and sanctioned him to, *inter alia*, loss of good conduct time. Additional details of this disciplinary conviction are discussed in *Rodriguez v. Zych*, Civil Action No. 7:15cv00082 (W.D. Va. Feb. 11, 2016). In that case, Rodriguez challenged the disciplinary proceeding, arguing that the DHO hearing was precluded, and thus illegal, based on the doctrines of collateral estoppel and *res judicata*. On respondent’s motion for summary judgment, I concluded that Rodriguez failed to exhaust administrative remedies before filing the action and that his claims were nevertheless meritless.²

After his third attempted escape, Rodriguez was referred for an ADX General Population Hearing before the Hearing Administrator. Rodriguez received notice of the hearing on August 3, 2015. The notice outlined Rodriguez’s three prior attempted escapes and stated that his conduct “creates a risk to institution security and good order [and] poses a risk to the safety of staff, inmates or others, or to public safety.” It also noted that Rodriguez demonstrated that he “is unable to function in a less restrictive correctional environment.” A hearing was conducted on August 5, 2015 and Rodriguez participated in it by making a statement and submitting

² To the extent that Rodriguez may be attempting to challenge this disciplinary conviction again in the instant action, he is barred by the doctrines of collateral estoppel and *res judicata*. Collateral estoppel, or issue preclusion, bars subsequent litigation of legal and factual issues common to an earlier action that were “actually and necessarily determined” in the first litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979); *Combs v. Richardson*, 838 F.2d 112, 114 (4th Cir. 1988). Thus, “collateral estoppel forecloses the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [collateral estoppel] is asserted had a full and fair opportunity to litigate.” *Sedlack v. Braswell Servs. Group, Inc.*, 134 F.3d 219, 224 (4th Cir. 1998) (internal quotation marks omitted).

Res judicata, or claim preclusion, provides that if a claim arises from the same cause of action as a claim already litigated, then the judgment in the first action bars litigation of the second claim. See *Nevada v. United States*, 463 U.S. 110, 129-30 (1983). Thus, “[a] final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.” *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

documentary evidence. The Hearing Administrator determined that Rodriguez met the criteria for placement at ADX and Rodriguez acknowledged receipt of the Hearing Administrator's written report on August 10, 2015. Rodriguez appealed the ADX placement decision to no avail.

The BOP's general population units at ADX are designed for male inmates who have demonstrated an inability to function in a less restrictive environment without being a threat to others, or to the secure and orderly operation of the institution. Wardens refer inmates to ADX by submitting proposed cases to the BOP's North Central Regional Director. A referral packet is generated which contains the Warden's memorandum citing the specific rationale supporting the recommendation, copies of all disciplinary reports, investigative materials, or other official documentation related to the behavior prompting the referral, a current progress report, a copy of the inmates latest Presentence Investigation Report, and a recent psychiatric or mental health evaluation. The North Central Regional Director has final review authority for referrals to the ADX general population unit. After a referral to ADX has been made, BOP policy provides that the inmate should receive notice of the transfer hearing, an opportunity to participate in the hearing, a written recommendation by the hearing officer, and administrative review of the regional director's decision through the remedy process.

Rodriguez filed this habeas petition, alleging that: 1) the Notice of ADX Referral Hearing listed all three of his escape attempts, without identifying "which one triggered the ADX hearing referral," and, thus, "tainted" his "chances of a fair and impartial consideration for ADX placement"; and 2) the Hearing Administrator's "sense of impartiality" toward Rodriguez was questionable because he was "intimate[ly]" familiar with the circumstances surrounding the disciplinary proceedings for Rodriguez's third attempted escape. As relief to his petition, Rodriguez seeks a declaration that the ADX referral hearing was invalid.

II.

Rodriguez filed this action as a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. A federal court may only grant a petition for writ of habeas corpus if the federal petitioner can demonstrate that he “is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2241(a), (c)(3). A habeas corpus petition is the correct method for a prisoner to challenge “the very fact or duration of his confinement,” and where “the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment.” *Preiser v. Rodriguez*, 411 U.S. 475, 489 (1973). In contrast, a civil rights action pursuant to 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), is the proper method for a prisoner to challenge the conditions of that confinement. *McCarthy v. Bronson*, 500 U.S. 136, 141-42 (1991); *Preiser*, 411 U.S. at 499; *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004); *see also Muhammad v. Close*, 540 U.S. 749, 750 (2004) (“Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus,” whereas “requests for relief turning on circumstances of confinement may be presented” in a civil rights action); *Moore v. Driver*, No. 1:07cv166, 2008 U.S. Dist. LEXIS 85896, at *7, 2008 WL 4661478, at *3 (N.D. W. Va. Oct. 21, 2008) (a claim regarding custody classification cannot be raised in the context of a § 2241 petition). If a successful conditions of confinement challenge would not necessarily shorten the prisoner’s sentence, then § 1983 or *Bivens* is the appropriate vehicle. *See Wilkinson v. Dotson*, 544 U.S. 74 (2005). “[A] request by a federal prisoner for a change in the place of confinement is properly construed as a challenge to the conditions of confinement and, thus, must be brought pursuant to [*Bivens*].” *United States v. Garcia*, 470 F.3d 1001, 1003 (10th Cir. 2006); *Valenteen*

v. Driver, No. 1:08cv89, 2009 U.S. Dist. LEXIS 12943, at *5, 2009 WL 304835, at *2 (N.D.W.V. 2009).

In his § 2241 petition, Rodriguez does not allege any ground on which he is entitled to a shorter term of confinement. Because the core of his complaint is clearly not concerning the fact or duration of his incarceration, his claim is not properly before me as a habeas claim under § 2241.

III.

In an appropriate case, a habeas petition may be construed as a civil rights complaint. *See Johnson v. Matevousian*, No. 1:15cv600, 2016 U.S. Dist. LEXIS 28947, at *8, 2016 WL 8201061, at *3 (E.D. Cal. Mar. 7, 2016). In this case, I have jurisdiction over Rodriguez's due process claims as raised in an action pursuant to *Bivens*. However, Rodriguez's allegations are insufficient to state a claim against the named defendant. *See West v. Atkins*, 487 U.S. 42 (1988) (to state a cause of action under § 1983, a plaintiff must allege facts indicating that he has been deprived of rights guaranteed by the Constitution or laws of the United States and that this deprivation resulted from conduct committed by a person acting under color of state law). Even if Rodriguez named and alleged facts against a proper defendant, his allegations nevertheless fail to state a claim.³

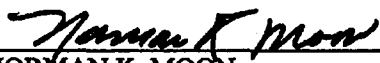
The Fifth Amendment provides that no person shall "be deprived of life, liberty, or property, without due process of law. U.S. Const. amend. V. "A liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word 'liberty,' or it may arise from an expectation or interest created by state laws or policies." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). In the penological context, not every deprivation of liberty at the hands of prison

³ I note that the respondent/defendant does not specifically refer to *Bivens* in his motion for summary judgment, but he does address the merits of a Fifth Amendment due process claim and whether Rodriguez has a liberty interest in his transfer to ADX.

officials has constitutional dimension because incarcerated persons retain only a “narrow range of protected liberty interests.” *Hewitt v. Helms*, 459 U.S. 460, 467 (1983). “[B]efore [a prisoner] can cry foul as to inadequate process, he must identify a liberty interest in avoiding transfer” to ADX. *McAdams v. Wyoming Dept. of Corr.* 561 F. App’x 718, 720 (10th Cir. 2014) (citing *Wilkinson*, 545 U.S. at 221, and *Rezaq v. Nalley*, 677 F.3d 1001, 1016 (10th Cir. 2012)). “[T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement.” *Wilkinson*, 545 U.S. at 221. A protected liberty interest only arises from a transfer to harsher conditions of confinement when an inmate faces an “atypical and significant hardship . . . in relation to the ordinary incidents of prison life.” *Id.* at 223. Rodriguez does not allege, and the record does not indicate, that his transfer to ADX imposes an atypical and significant hardship compared to the ordinary incidents of prison life. Further, courts have long held that a prisoner has no constitutional right to select a particular correctional facility for his placement or to be transferred to a different facility upon request. *See Olim v. Wakinekona*, 461 U.S. 238, 245-46 (1983); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). Instead, 18 U.S.C. § 3621(b) provides the BOP with broad discretion to choose the location of an inmate’s imprisonment. *Newbold v. Stansberry*, No. 1:08cv1266, 2009 U.S. Dist. LEXIS 1941, at *10, 2009 WL 86740, at *3 (E.D. Va. 2009) (citing *Fulfs v. Sanders*, 442 F.3d 1088, 1090 (8th Cir. 2006)). Because Rodriguez has not demonstrated a liberty interest in his referral to ADX, no due process protections were required before he was transferred to ADX. Finding no genuine dispute as to any material fact, I will grant defendants’ motion for summary judgment.⁴

⁴ A party is entitled to summary judgment if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). Material facts are those necessary to establish the elements of a party’s cause of action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists if, in viewing the record and all reasonable inferences drawn therefrom in a light most favorable to the non-moving party, a reasonable fact-finder could return a verdict for the non-movant. *Id.* The moving party has the burden of showing – “that is, pointing out to the district court – that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317,

ENTER: This 23rd day of February, 2017.


NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

325 (1986). If the movant satisfies this burden, then the non-movant must set forth specific, admissible facts that demonstrate the existence of a genuine issue of fact for trial. *Id.* at 322-23. A party is entitled to summary judgment if the record as a whole could not lead a rational trier of fact to find in favor of the non-movant. *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991); *see Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995) ("Mere unsupported speculation . . . is not enough to defeat a summary judgment motion."). However, summary judgment is not appropriate where the ultimate factual conclusions to be drawn are in dispute. *Overstreet v. Ky. Cent. Life Ins. Co.*, 950 F.2d 931, 937 (4th Cir. 1991). In adjudicating a motion for summary judgment, a court may not resolve disputed facts, weigh the evidence, or make determinations of credibility. *Russell v. Microdyne Corp.*, 65 F.3d 1229, 1239 (4th Cir. 1995); *Sosebee v. Murphy*, 797 F.2d 179, 182 (4th Cir. 1986). Instead, a court accepts as true the evidence of the non-moving party and resolves all internal conflicts and inferences in the non-moving party's favor. *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979).

FILED: January 29, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-6332 (L)
(7:15-cv-00082-NKM-RSB)

OSIEL RODRIGUEZ

Petitioner - Appellant

v.

CHARLES RATLEDGE

Respondent - Appellee

No. 17-6301
(7:15-cv-00684-NKM-RSB)

OSIEL RODRIGUEZ

Petitioner - Appellant

v.

CHARLES RATLEDGE

Respondent - Appellee

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Duncan, and Judge Floyd.

For the Court

/s/ Patricia S. Connor, Clerk