UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

OMAR REZAQ Plaintiff – Appellant, vs. NALLEY, et. al. Defendants – Appellees	**CASE NO. 11-1069**
MOHAMMED SALEH, IBRAHIM ELGABROWNY, and EL-SAYYID NOSAIR, Plaintiffs – Appellants, vs. FEDERAL BUREAU OF PRISONS, Defendant – Appellee	**CASE NO. 11-1072**

On Appeal from the Unites States District Court for the District of Colorado

Rezaq v. Nalley, et al., District Court Case No. 1:07-cv-02483-LTB-KLM
The Honorable Judge Lewis T. Babcock
Saleh, et al. v. BOP, District Court Case No. 1:05-cv-02467-PAB-KLM
The Honorable Judge Philip A. Brimmer

APPELLANTS' OPENING BRIEF

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Oral Argument is requested.

TABLE OF CONTENTS

ATTACHMENTS:

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

PRIOR OR RELATED APPEAL

None.

I. STATEMENT OF JURISDICTION

Jurisdiction in the district court was proper for both cases pursuant to 28 U.S.C. §§ 1331, 1343(a)(4), 1346, 2201, and 2202. On December 15, 2010, the district court entered Judgment in Mr. Rezaq's case, dismissing and disposing all of his claims. On December 30, 2010, the district court entered Judgment in Mr. Saleh's, Mr. Nosair's, and Mr. Elgabrowny's case, dismissing and disposing all of their claims. Both judgments are final. Appellants timely filed their respective Notices of Appeal on February 14, 2011, under Fed.R.App. P. 3 and 4. The Tenth Circuit consolidated the appeals on March 2, 2011. Doc. 01018594590. The Tenth Circuit has jurisdiction to review final decisions of the District Courts of the United States. 28 U.S.C. § 1291; *United States v. Mike*, 632 F.3d 686, 689 (10th Cir. 2011).

II. STATEMENT OF THE ISSUES

1. The district courts erred as a matter of law when they relied upon the BOP's alleged penological interest in segregation to determine that Appellants did not have a liberty interest in their extended isolation.

2. When deciding if Appellants' isolation was an atypical and significant hardship, the district courts erred by comparing Appellants' conditions of confinement, not to the ordinary incidents of prison life, but to those at issue in *Wilkinson v. Austin*, a supermax prison in Ohio.

3. The district courts erroneously elevated the due process standard by relying on incorrect standards of law to determine that Appellants' conditions were not extreme.

4. The district courts erred in failing to consider the long duration of Appellants'

isolated placements in segregation in determining that they did not have a liberty interest.

5. The district courts inappropriately resolved material factual disputes concerning the extremity of Appellants' conditions and the indefinite nature of their placement.

III. STATEMENT OF THE CASE

A. The Nature of the Case

This case challenges the Federal Bureau of Prison's ("BOP") transfer of four men ("the Appellants") to the most restrictive prison in the entire federal system, without due process of law. This prison, the United State Penitentiary Administrative Maximum ("ADX"), is the only federal "supermax" prison and houses less than one-third of one percent of the federal inmate population. Prisoners confined in the "general population" of ADX are almost completely isolated from other humans. They spend 23 hours a day alone in their cells, a space that is 87 square feet – the equivalent of a small bathroom. They never see other individuals face-to-face, unmediated by bars or glass. The only interaction they have with other people is through a steel cell door, or between recreation cages for a few hours each week.

All of the Appellants had previously been confined without incident at high-security open population prisons. Open population prisons are those where individuals are out of their cells for the majority of each day and are able to move freely through the prison as they access employment and educational opportunities, and speak frequently to other people. None of the Appellants knew why the BOP chose to move them from these open conditions to solitary confinement in ADX, nor did they know what they could do to get out of isolation. Each Appellant was held at ADX for an extraordinarily long time,

the shortest for seven years and the longest for thirteen. During that time, the BOP repeatedly denied Appellants entry to its Step-Down Program, the sole vehicle for transfer out of ADX. Eventually, Mr. Saleh, Mr. Elgabrowny, Mr. Nosair, and Mr. Rezaq each filed lawsuits, now consolidated for purposes of appeal, alleging, *inter alia*, that they were transferred to ADX and continued to be held there without due process.

B. The Course of Proceedings and the Disposition Below

The BOP moved for summary judgment in both cases. (v. I(a) at 90-151; v. II(a) at 1658-93.) The district courts ruled in favor of the BOP, holding that Appellants' conditions of confinement at ADX did not give rise to a liberty interest, and thus, no process was required. (v. I(f) at 1472-73; v. II(g) 3290-3303.) The court entered Judgment on December 15, 2010, in *Rezaq* and December 30, 2010, in *Saleh*. (v. I(f) at 1474-75; v. II(g) at 3304-06.) Appellants timely appealed. (v. I(f) at1476-77; v. II(g) at 3307-08.) On March 3, 2011, Appellants' cases were consolidated into a single appeal. (Doc. 01018594590.) On March 4, 2011, the BOP filed a *Motion to Dismiss For Mootness* and, on May 12, 2011, an *Amended Motion to Dismiss for Mootness*, which have not yet been decided and are now pending before the panel. (Docs. 01018596100 and 01018639522.)

IV. STATEMENT OF THE FACTS

ADX is the most restrictive prison in the federal system. (v. II(c) at 2058.) It is the only federal "supermax" and holds a small number of people, housing less than one-third of one percent of the entire federal inmate population. (v. I(a) at 111.)

The BOP provides conflicting information about the purpose of ADX and the type

of prisoners it is designed to house. BOP policy states that ADX is intended for male "inmates who have demonstrated an inability to function in a less-restrictive environment" because they have threatened others or disrupted the orderly running of the institution. U.S. Dep't of Justice, Fed. Bureau of Prisons, *P5100.08: Inmate Security Designation and Custody Classification*, FED. BUREAU OF PRISONS, 92 (Sept. 12, 2006), http://www.bop.gov/policy/progstat /5100_008.pdf; (v. I(c) at 659). According to the BOP, "the main mission of ADX is to effect inmate behavior" and allow inmates to "demonstrate non-dangerous behavior." (v. II(d) at 2363.) Despite this policy, all four Appellants in this case—Mr. Saleh, Mr. Elgabrowny, Mr. Nosair, and Mr. Rezaq—were placed at ADX despite clear conduct in prison and without any evidence that they had an inability to function in less restrictive, open population prisons.

Conditions of Confinement in the ADX

Individuals housed at ADX are in near-total isolation, spending 95% of their lives alone in their small, concrete cells. (v. II(c) at 2058, 2122.) In the "general population" unit of ADX, individuals are confined alone for 23 hours a day in cells that measure 87 square feet (approximately the same space as two king-sized mattresses.)[1] (*Id.*) In this small space, each cell contains a bed, desk, sink, toilet, and shower, all made from poured concrete. (*Id*. at 2058, 2130-32.) Individuals eat all meals alone inside their cells, within arm's length of their toilet. (*Id*.) Each cell has one small window to the outside;

[1] The term "general population," as used universally in the correctional field, is a misnomer. At ADX, "general population" cells are actually solitary confinement cells that are the most restrictive in the entire federal BOP. In any other BOP prison, these cells would be termed "administrative segregation."

however, the only view is of the cement "yard." (*Id*. at 2059.) Prisoners at ADX cannot see any nature, not the surrounding mountains or even a patch of grass. (*Id*.)

The only time that prisoners are regularly allowed outside of their cells is for limited recreation. (*Id*.) Recreation occurs in a windowless, indoor cell that is empty except for a pull-up bar, or in an outdoor cage. (*Id*. at 2059, 2133.) In both locations, each prisoner remains isolated. (*Id*. at 2059.) The outside recreation cages are only slightly larger than the size of the inside cells and are known as "dog runs" because they resemble animal kennels. (*Id*.) Concrete walls and a partial roof surround the outside cages. (*Id*.) While prisoners can see the sky, there is no view of the surrounding landscape, only of concrete walls. (*Id*.) While the BOP policy states that ADX prisoners receive ten hours of recreation a week, recreation is rarely provided in compliance with this policy. (*Id*. at 2059-60; *compare* v. II(d) at 2344 *with* v. II(c) at 2205-26.) Prisoners frequently receive fewer than ten hours of recreation because the warden can cancel recreation for any reason he deems appropriate, including weather, shakedowns, or lack of staff. (v. II(c) at 2060; v. II(c) at 2205-06; v. III at 3335-36.) Accordingly, at times ADX prisoners go days without ever leaving their cells. (v. II(c) at 2205-06.)

Contact with others is extremely restricted at ADX. (v. I(c) at 509-11; v. II(c) at 2058-61.) The ADX facility is specifically designed to limit all communication between the individuals that it houses. (v. II(c) at 2058.) Accordingly, the cells have thick concrete walls and two doors, one with bars and a second which is made of solid steel. (Id. at 2059, 2130-33, 2148-49.) The only "contact" Appellants had with other inmates while housed in the "general population" unit was attempted conversations with prisoners

in adjacent cells that took place through the thick cell walls and doors. (v. I(c) at 510; v. I(e) at 1154.)

Interaction with staff is negligible. Prison staff only speak to a prisoner for a few minutes each week, and prisoners often go for days at a time without having more than a few words spoken to them. (v. I(d) at 983.) While the BOP claims that staff rounds are weekly and that each prisoner is spoken with, this assertion is not correct. (v. I(c) at 511.) Rather, during rounds the units are on lockdown and an inmate can only speak with a staff member if he affirmatively stops that person. (*Id*.) Otherwise, the administrative staff does not even look into the inmate's cell. (*Id*.) Any actual interaction usually lasts only seconds and takes places through an inmate's solid steel cell door. (*Id*. at 629.) Contact beyond a merely functional provision of meals and escort to recreation is not a daily occurrence. (*Id*. at 511.)

Each and every time an ADX prisoner is permitted to leave his cell, he is restrained with leg irons, handcuffs, and a belly chain. (v. II(c) at 2060.) Even on the rare occasions when a prisoner receives a visitor, these restraints must remain on during the entire visit despite the fact that the visit is non-contact, meaning the prisoner and visitor are separated by a plexi-glass barrier. (*Id*.) Prisoners in ADX "general population" units are eligible to receive five social visits a month. (*Id*.) Yet, due to the remote location of ADX, three of the four Appellants never received a social visit during the years they were confined at ADX. (*Id*.) One Appellant received only two social visits in the thirteen years he spent at ADX. (v. I(c) at 510.) Even if Appellants' families were able to visit them, they would not be able to shake hands, hug, or touch in any way,

as no human contact is permitted. (v. II(c) at 2061.) Not being able to touch their loved ones, even for a moment, makes the idea of visiting so painful for both the prisoner and his family members that many elect to forego visits altogether. (v. I(e) at 1157.)

Formal opportunities for rehabilitation are extremely limited. (v. II(c) at 2061.) All educational programming occurs via closed-circuit television in the prisoners' cells. (*Id*.) The programming consists of shows being broadcast on the television (sample titles include, "World of Byzantium," "Parenting I and II," and "Peloponnesian War I and II") and the prisoner filling out a short quiz. (v. II(b) at 1824, 1866, 1901; v. II(c) at 2185.) There is no interaction with an educator or other students for these "classes." (v. II(c) at 2173, 2185.) The only job available is a three-month orderly position, which entails cleaning the tier. (*Id*. at 2062.) Some prisoners apply for this coveted position repeatedly, but are denied without explanation. (*Id*.)

Religious practice is severely curtailed. The only religious services are shown on the closed-circuit television. (*Id*. at 2061.) Group prayer, an essential tenet of the Appellants' faith, is strictly forbidden. (*Id*.) Although the BOP agreed, in the form of a Settlement Agreement put into place in 2008 (v. II(a) at 1558-60), to provide adequate religious accommodations to Appellants, including regular Imam visits, the Imam is only in Florence once a month and only visits with each prisoner for two to three minutes (v. II(c) at 2061-62).[2]

[2] J-Unit conditions are functionally identical to "general population" conditions except that J-Unit prisoners are allowed one and half hours of recreation time with a maximum of eight other prisoners each day, showers are not in the cell, and they pick up their meals before eating them alone in their cells. (v. I(a) at 114; v. II(c) at 2062.)

The BOP Moved Appellants to ADX without a Hearing or Explanation

Following their convictions, all Appellants were housed safely and without serious incident at lower security, open population prisons. For approximately six years, Mr. Saleh, Mr. Elgabrowny, and Mr. Nosair lived in general population units in United States Penitentiaries ("USP-GPs"). (v. II(c) at 2063-64.) They were out of their cells for sixteen hours per day, held jobs, ate communally in the mess hall, recreated with other prisoners, and engaged daily in group prayer. (*Id*.) Appellants were in frequent communication with their families, usually speaking to them daily. (*Id*. at 2061.) During this time, the BOP noted Appellants' positive institutional adjustment and never accused them of any behavior that would threaten national security. (*See Id*. at 2063-64.)

Similarly, Mr. Rezaq was previously incarcerated for over a decade in open population prisons in District of Columbia and Malta and had an exemplary record in both systems. (v. I(c) at 493-94, 518-19.) In each location, he worked and was in constant interaction with other prisoners. (*Id*. at 493-94.) Mr. Rezaq behaved as a model prisoner, living among others without incident or security concerns. (*Id*. at 493-94, 518-19.) His positive conduct in Malta was striking enough that the warden of that institution flew to DC to testify on his behalf during his United States trial. (*Id*.) When placed in the federal system, the BOP designated Mr. Rezaq to an open population prison based on his prior history. (*Id*. at 499.)

In the hours after the September 11th attacks, Mr. Saleh, Mr. Elgabrowny, and Mr. Nosair were moved, first into segregation at their respective prisons, and then to ADX. (v. II(c) at 2064.) These transfers occurred despite their prior positive records and the

fact that they have no connection to 9/11 and the BOP never even alleged any such connection. (*Id*.) Regardless, the BOP moved these Appellants to ADX, and did so without giving them prior notice or an opportunity to challenge their transfers. (*Id*.) Over the years following their removal from the USP-GPs, and despite asking multiple BOP officials, Appellants were never told why they were transferred to ADX, why they were kept there, and if they would ever get out. (*Id*. at 2064, 2068-71.)

Mr. Rezaq also was not given any notice or explanation of his transfer to the ADX. (v. I(c) at 498.) Upon arrival at his designated prison, a Captain approached Mr. Rezaq and told him that because he was Arab, the officer did not want him to remain in the USP. (*Id*. at 502.) Shortly thereafter, Mr. Rezaq was moved to ADX. (*Id*. at 498.) Like his co-Appellants, he never knew why he was there or what, if anything, he could do to be returned to a USP-GP. (*Id*. at 503, 509.)

The BOP Confined Appellants at ADX for Years without Adequate Reason or Explanation

For many years, Appellants were repeatedly denied access to the one Program that would allegedly permit them to leave ADX. According to BOP policies, the ADX "Step-Down Program"[3] is the only means by which a prisoner can transfer out of ADX to an open population institution, such as a USP-GP. (v. II(c) at 2066; v. II(d) at 2348-49, 2570-71.) Prisoners in the "general population" are considered for placement in the

[3] Although Appellants have conceded the mootness of their separate claim about the lack of Due Process in the Step-Down Program, the operation of the Step-Down Program is highly relevant to one of the main factors in determining whether a liberty interest exists in avoiding ADX confinement—whether placement in ADX is indefinite. *See infra* at 33.

Program, which consists of three units: J-Unit; K-Unit; and D/B Unit. (v. II(d) at 2348-54.)[4] Despite this policy, there have been individuals who were moved directly out of ADX from the general population or one of the Step-Down units, without completing the program. (v. II(c) at 2066.) Indeed, Mr. Rezaq, Mr. Saleh, and Mr. Nosair were all moved out of ADX without completing the Step-Down Program, though no explanation has been provided for this breach of policy. (Doc. 01018607370 at 9; Doc. 01018639522 at 1.)

BOP policy states that prisoners will require, at minimum, three years to progress out of ADX. (v. II(c) at 2067.) In reality, most ADX prisoners spend far longer in each unit than the recommended time; fewer than five percent are permitted to complete the program in three years. (*Id.*; v. II(d) at 2570.) There is no maximum amount of time that a prisoner may be confined at ADX. (v. II(c) at 2067; v. II(d) at 2555.) Thus, a prisoner can indefinitely and repeatedly be denied entry into the Step-Down Program, even without receiving any disciplinary reports. (*Id.*) Even once he is in the Step-Down Program, a prisoner can be removed and placed back into the ADX general population for any reason, such as speaking in a tone of voice that the ADX warden finds disrespectful. (v. II(c) at 2067; v. III at 3337.) No hearing or process is required for removing an inmate from the Program. (*See* v. III at 3337-38.)

Prisoners have no opportunity to participate in the decision of whether they

[4] In the policy discussing Step-Down, the BOP refers to the Program alternately as having three units (J, K, and D/B) and four units (including the GP units as part of the Program itself). (*Compare* v. II(d) at 2348 *with id.* at 2349). Regardless of this distinction the processes used to progress an individual through these units is the same.

progress through ADX. The process begins by a unit team staff member qualifying a prisoner as "eligible," which means that he has met the basic requirements, including no disciplinary infractions for one year and keeping a clean cell. (v. II(d) at 2349-51.) While a unit team member makes this "eligibility" determination, that individual has no input on whether the prisoner will ultimately be progressed. (v. II(f) at 2956, 2967-68.) The decision is made by a Step-Down Committee, which reviews "eligible" prisoners every six months for placement in and progression through the Program. (v. II(c) at 2068; v. II(d) at 2351-52.) As the decisions to place Appellants in ADX were made at higher levels of the BOP—including by regional and executive staff—the Step-Down Committee may not be able to move someone out of ADX unless directed to do so by those outside of the institution. (*See* v. I(b) at 369-70; v. II(d) at 2526-29, 2531-32; v. II(e) at 2792, 2794.)

Prisoners have no opportunity to participate in the Step-Down Committee decision. Prisoners receive no notice of the Committee reviews and are not even aware of when the Step-Down Committee sessions take place. (v. II(c) at 2068.) They are not present at these meetings, nor are they permitted any opportunity to give input, including providing a written or oral statement, prior to the review or determination. (*Id*.) Under this system, a prisoner only becomes aware that a review occurred upon receiving a notice telling him that he was denied entry into the Program. (*Id*. at 2069.)

Further, even if those individuals held at ADX could participate, the decision is pre-determined, based on factors outside of their control. The main inquiry of the Step-Down Committee is whether the individual has "sufficiently mitigated" the reasons for

his placement at ADX. (*Id*. at 2068; v. II(e) at 2583.) Although the policies governing the Step-Down processes have been modified twice since these lawsuits were filed (in October 2009 and December 2009), the BOP testified that the actual processes and considerations of the Step-Down Committee have not changed. (v. II(d) 2562-63.) The main inquiry remains whether the reasons for placement have been mitigated. Similarly, denial can be based on other factors outside of the prisoners' control, such as notoriety, media coverage, or world events. (v. I(c) at 695; v. II(d) at 2352-53, 2554; *see also* v. II(d) at 2352-53.) Prisoners do not receive any explanation of the decision to permit or deny them progression through ADX. (v. II(c) at 2069.) Although they receive a notice, these are boilerplate and do not give specific reasons for an admittance or denial. (v. II(e) at 2602-07, 2609-10, 2612-14.) Thus, the prisoner has no idea how to alter his behavior in the future in order to successfully move through the Program and out of ADX.

The ultimate decision-maker regarding progression through the Step-Down Program is, and always has been, the ADX Warden. (v. II(c) at 2069; v. II(d) at 2563-64.) At times, the Warden admitted people to the Program who were not eligible and denied individuals who were recommended. (v. I(d) at 779-780; v. II(e) at 2587-90.) The Warden's actions were taken without explanation or reason. (v. I(c) at 669-70, 698, 701-02; v. III at 03341-42.)

The BOP Repeatedly Denied Appellants Progression Out of ADX

For years, the BOP held Appellants in ADX and arbitrarily denied them entry to the Step-Down Program. (v. I(c) at 507; v. II(c) at 2068-71.) Each Appellant was held at ADX for an extraordinarily long time: Mr. Rezaq was confined at ADX for nearly

fourteen years, until October 2010; Mr. Nosair was confined at ADX for eight years, until December 2010; Mr. Elgabrowny was confined at ADX for seven years, until December 2009; Mr. Saleh was confined at ADX for eight years, until April 2011. (*See* v. I(a) at 100; v. II(c) at 2064; Doc. 01018596100 at 6; Doc. 01018639522 at 1.) Although all were eligible for progression after being at ADX for one year,[5] they were repeatedly denied progression, collectively more than fifty times. (*See*, *e.g.*, v. I(d) at 783-90; v. II(e) at 2602-07, 2609-10, 2612-14) (approximation calculated by presumed reviews for progression every six months of eligibility).)

The notices denying them progression into and through Step-Down never informed the Appellants as to the specific actions they needed to take to be transferred out of ADX. (*Id*.) Instead, they received notices containing formulaic language, including that their "reasons for placement have not been mitigated" or that "safety and security" prevented them from being progressed.[6] (*Id*.; v. I(c) at 507, 513; v. II(c) at 2069.) Case Manager Tena Sudlow testified that Step-Down denials contain formulaic language that is used "over and over and over." (v. II(d) at 2338-39.) Because the Appellants did not know the reason for their placements in ADX, they did not know what

[5] Only Mr. Saleh had a second period of time when he was not eligible, following his receipt of an incident report for fighting. (v. II(c) at 2072-73.) Mr. Saleh alleges that he was defending himself while under attack from another prisoner, after the BOP illegally distributed a grievance he submitted. (*Id*.) This incident is the subject of a separate lawsuit. *See Saleh v. United States, et al.*, No. 09-cv-02563-PAB-KLM. After receiving this incident report, Mr. Saleh was removed from Step-Down and placed back into the "general population" units. (v. II(c) at 2072-73.)

[6] Other reasons offered for Mr. Rezaq's denial from Step-Down were the severity of his crime and his effect on the orderly operation of the facility. (v. I(c) at 507.)

they needed to do to mitigate this reason. (v. I(c) at 507-09; v. II(c) at 2069.) Even once Appellants were admitted into the Step-Down Program, they did not know what caused this admittance nor why their reasons for placement in ADX had suddenly been mitigated. (v. I(c) at 508-09; v. I(d) at 792; v. II(c) at 2071-73.) Accordingly, Appellants did not know what to do to ensure that they continued moving through Step-Down levels and, ultimately, out of ADX. (v. I(c) at 509; v. II(c) at 2071, 2073.)

After several years in isolation, all Appellants filed lawsuits alleging, *inter alia*, that: (1) they were transferred to ADX without due process; and (2) they continued to be held in ADX without due process. (v. I(a) at 31-34; v. II(a) at 1597-1600.) After these lawsuits were filed, the BOP suddenly began to enter Appellants into the Step-Down Program. In April and July of 2007, after three years of unexplained denials, Mr. Saleh and Mr. Elgabrowny were admitted to Step-Down, despite no change in their behavior or crime of conviction. (v. I(a) at 2072-73.) When asked the reason Mr. Saleh was now eligible for the program, the BOP stated only that "the factors which originally led to Mr. Saleh's placement had been sufficiently mitigated." (*Id.*) No explanation was provided as to what the reasons were or as to how that mitigation had occurred. (*Id.*) Similarly, in 2009, close to the summary judgment briefing deadlines, and after twelve and six years of denial into Step-Down, respectively, Mr. Rezaq and Mr. Nosair were also admitted into the Step-Down Program. (v. I(c) at 490; v. II(c) at 2071-72.) Neither the Appellants' behavior nor their crimes of conviction had changed, and no explanation was given on the Step-Down admission notification form as to why, suddenly, placement in Step-Down was appropriate. (v. I(c) at 490; v. I(d) at 783-90, 792; v. II(c) at 2071-73; v. II(e)

at 2602-07, 2609-10, 12-14.)

Retroactive "Transfer Hearings" Provided at the time of Summary Judgment

Even recently provided retroactive "transfer hearings" failed to provide Appellants with an explanation of what they could do to ensure progression out of the supermax. In the fall of 2009, the BOP created special retroactive hearings for those who, like Appellants, were moved to ADX without adequate process. (v. II(e) at 2758.) These retroactive "transfer hearings" were not governed by policy, but by procedures delineated in a memo by Regional Director Nalley ("Nalley Memo"). (*Id.*; v. II(f) at 2867.) Initially, Appellants were not provided with these hearings; only individuals transferred to ADX in 2005 and later received them. (v. II(e) at 2758.) Then, just weeks before the dispositive motion briefing deadlines in both cases, the BOP suddenly administered these retroactive "transfer hearings" to Appellants. (*Id.* at 2769; v. I(c) at 490.)

The decision to conduct these hearings was specifically based on Appellants' pending litigation. (v. II(e) at 2758-59; v. II(f) at 2870.) In fact, counsel for the BOP and the AUSA's office exchanged a memo specifically concerning this litigation, and the BOP admitted that it decided to extend the retroactive hearings beyond those individuals initially selected, to include Appellants, based in part on this memo. (*Id.*) The details of these hearings are discussed at length in other filings in this case. (v. I(d) at 986-92, 1000-10; v. II(e) at 2758-62, 2776-80; Doc. 01018607370 at 6-9.)

Based on the circumstances of the hearings, including their timing and the lack of knowledge of the hearing administrator, Appellants allege that the outcomes were pre-determined and that the hearings were a sham. (v. II(e) at 2776-80.) Appellants'

hearings were timed before major deadlines in these actions. (*Id*. at 2778.) The attorneys representing the BOP provided direction to the individual conducting the hearing. (*Id*. at 2758; v. II(f) at 2867.) The hearings were then cited by the BOP to support allegations of mootness, in repeated attempts to terminate these cases. (v. I(a) at 104-10; v. I(d) at 976-77; v. II(a) 1662-69, 1683-86; v. II(g) at 3239, 3242-43.) Further, even after the hearings, Appellants still had no idea what they could do to mitigate their reasons for placement, or to ensure their removal from ADX. (v. II(f) at 2901, 2908.)

The district courts in both cases rejected the BOP's assertions that these hearings mooted Appellants' claims. (v. I(f) at 1345-47; v. II(g) at 3293-94.) The court held that, "[the BOP's] unilateral decision to provide additional process [] does not render [the] claims moot because the sufficiency of that process is a disputed legal issue in [the] case." (v. I(f) at 1345; v. II(g) at 3211-12; *see also* v. II(g) at 3294.)

Recent Transfer Hearing Changes

Even more recently, and for the first time in this litigation, the BOP raised a "new" procedural policy: the "Dodrill Memo." Doc. 0108596100 at 6. The BOP allegedly issued this memo on June 9, 2010, *id.*, yet it failed to mention it to Appellants or to the district courts at any time during the discovery disclosures and summary judgment briefing, which were ongoing after the Memo's effective date. *See* Doc. 01018607370 at 17. The first mention of the Dodrill Memo was made in the BOP's Motion to Dismiss in this Court, over nine months after it was allegedly in use. *Id.* at 10. Regardless of what any "new" Dodrill transfer procedures entail, they are irrelevant to this case as it is undisputed that Appellants have not and will not receive these processes retroactively.

V. SUMMARY OF THE ARGUMENT

A prisoner has a protected liberty interest in avoiding segregation when his conditions of confinement create an "atypical and significant hardship…in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). In determining the "ordinary incidents of prison life" to which to compare challenged conditions, the Supreme Court did not establish a baseline or standard for what conditions are "ordinary." *Wilkinson v. Austin*, 545 U.S. 209, 223 (2005). In *Estate of DiMarco v. Dept. of Corr.*, this Court also declined to adopt a baseline for the liberty interest inquiry, and instead directed district courts to consider four factors in assessing whether an individual has a protected liberty interest. 473 F.3d 1334, 1341-42 (10th Cir. 2007). In the instant pair of cases, the district courts made five errors which alone or in combination resulted in a determination that Appellants did not have a liberty interest in their conditions of confinement at the ADX.

First, the district courts erred in placing significant reliance upon the Government's asserted penological interest in holding that Appellants did not have a protected liberty interest in their years of solitary confinement at the ADX. Although this Court's opinion in *DiMarco* directs consideration of the Government's interest in keeping a prisoner in segregation to decide whether a liberty interest exists, the Supreme Court specifically prohibited consideration of this factor in *Wilkinson*.

Second, in formulating a comparator for the "atypical and significant" inquiry, the district courts erred by comparing Appellants' conditions not to those of ordinary prisoners, but rather to those of a non-federal supermax facility in Ohio.

Third, the district courts further erred by erroneously elevating the standard for determining whether the challenged conditions were extreme by inappropriately referencing language from the Eighth Amendment and substantive due process standards.

Fourth, because each Appellant was held in isolation for many years, the district courts further erred in not considering the extraordinary length of their segregation, a central factor in *Wilkinson*'s and the majority of other circuits' liberty interest analysis.

Finally, the district courts erred in resolving material factual disputes in favor of the non-moving party regarding the extremity of conditions, the amount of human contact, and the meaningfulness of the periodic reviews that were given to Appellants.

VI. ARGUMENT

A. Statement of the Standard of Review

This Court reviews a grant of summary judgment *de novo* and affirms only if the record, viewed in the light most favorable to the losing party, establishes no genuine issue of material fact. *Jones v. Denver Public Schools*, 427 F.3d 1315, 1318 (10th Cir. 2005).

B. Introduction to Liberty Interest

The Fifth and Fourteenth Amendments prohibit the government from depriving a person of life, liberty, or property without procedural due process. U.S. CONST. amend. V, XIV. The due process clause works to ensure that when individuals are deprived of liberty, a process exists to ensure this action is reasonable and not erroneous. *Wolff v. McDonnell*, 418 U.S. 539, 556-57 (1974). It is well-established that due process protections apply to individuals in prison, as "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." *Id.* at 555.

Individuals in prison are protected by the due process clause and possess a liberty interest in avoiding restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. The touchstone inquiry in determining whether a person possesses a liberty interest in avoiding particular conditions of confinement is the *nature* of the conditions themselves. *Wilkinson*, 545 U.S. at 223. Yet, the due process clause does not preclude the Government from imposing any particular condition, even if it is harsh or atypical. *Id.* at 224-26. Rather, when a liberty interest exists, the clause requires that procedures are put in place to ensure that individuals are not caused to suffer deprivations in error or without reason. *Id.*

In *Sandin v. Conner*, the Court found that placement in segregated confinement for thirty days did not give rise to a liberty interest. 515 U.S. at 485. The Court considered both the severity of the conditions at issue and the duration that the prisoner was subject to them, comparing the restrictions to those found in other prisons within the Hawaii system. *Id.* at 486. Concerning the severity of conditions, the Court determined that the challenged conditions were similar to those imposed upon other inmates, even those within general population units during lockdown. *Id.* The Court also looked at the duration of the conditions and found that thirty days was an insufficient time in lockdown to be atypical or to "work a major disruption in [Mr. Sandin's] environment." *Id.* Thus, because the thirty-day placement did not constitute an "atypical and significant hardship" compared to "to the ordinary incidents of prison life," due process was not required. *Id.* at 485-86.

Ten years later, in *Wilkinson v. Austin*, the Supreme Court examined whether placement in Ohio's "supermax" maximum-security prison ("OSP") imposed an atypical and significant hardship and thereby created a liberty interest in avoiding such placement. 545 U.S. at 224. The Court recognized that in order to determine whether a condition was atypical, as required by *Sandin*, a court needed to identify "the baseline from which to measure what is atypical and significant in any particular prison system." *Id.* at 223. The Court noted that the circuit courts had not reached consistent conclusions regarding the appropriate baseline, demonstrating the difficulty of this issue. *Id.* Despite this confusion below, the Court declined to resolve the baseline issue in *Wilkinson* because it found that assignment to OSP imposed an atypical and significant hardship under "any plausible baseline"; that is, assignment to OSP was atypical compared to conditions in *any* of Ohio's prisons. *Id.* at 214, 223. The ADX conditions currently at issue are remarkably similar to those at issue in *Wilkinson*. *Compare Austin v. Wilkinson*, 189 F. Supp. 2d 719, 724-26 (N.D. Ohio 2002) *with* (v. II(c) at 2058-62).

In determining that the challenged conditions in OSP imposed an atypical and significant hardship, *Wilkinson* highlighted several factors related to the severity of restrictions imposed at the supermax and the duration of these restrictions. 545 U.S. at 223-24. First, conditions at OSP were "more restrictive than any other form of incarceration in Ohio." *Id.* at 214. Second, OSP imposed "especially severe limitations on all human contact." *Id.* at 224. Third, unlike the thirty-day placement in *Sandin*, the duration of placement at OSP was indefinite and reviewed only annually. *Id.* Finally, placement at OSP disqualified an otherwise eligible inmate for parole consideration. *Id.*

Even though "any of these conditions standing alone might not be sufficient to create a liberty interest," the Court held that "taken together" these conditions imposed an atypical and significant hardship under "any plausible baseline." *Id.* at 223-24.

Importantly, the Court distinguished these relevant factors from an irrelevant one: the prison's reason or interest in placing an individual in isolation. The Court emphasized that any penological justification for placement of a prisoner in OSP should not be considered in determining whether a liberty interest exists: "OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners…That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." *Id.* at 224.

Two years after *Wilkinson* was decided, the Tenth Circuit took up the liberty interest issue in *Estate of DiMarco v. Wyoming Dept. of Corr., Div. of Prisons,* 473 F.3d 1334 (10th Cir. 2007). Ms. DiMarco, who was a hermaphrodite with both male and female characteristics, was an "admittedly unique prisoner, with a physiological and psychological condition never before encountered by Wyoming prison officials." *Id.* at 1342. Because of this, Ms. DiMarco was placed into segregation, where she remained until her release from prison fourteen months later. *Id.* at 1336. Unlike the prisoners here, Ms. DiMarco conceded that her initial placement into segregation was appropriate. *Id.* at 1339, 1342 ("No one suggested the initial segregation for evaluative purposes was inappropriate"). Ms. DiMarco challenged the decision to place her into the "most severe classification" without an adversarial hearing or right to appeal and Wyoming's failure to

"give her the opportunity" to improve her placement. *Id*. at 1339.

The Court found that Ms. DiMarco did not have a liberty interest in avoiding her placement in segregation and the conditions of her confinement. *Id.* at 1339. It began by recognizing that a determination of the appropriate baseline (the "ordinary incidents of prison life") from which to compare Ms. DiMarco's conditions was a necessary but troubling question in the liberty interest inquiry. *Id*. at 1340. Despite this recognition, however, the Court declined to adopt an appropriate baseline. *Id.* at 1341-42. Instead, it created a four-factor test: (1) whether the segregation furthers a legitimate penological interest; (2) whether the conditions of placement are extreme; (3) whether the placement increases the duration of confinement; and (4) whether the placement is indeterminate. *Id.* at 1342. Other circuits also have struggled to identify the appropriate baseline, but none has similarly resolved this question by adopting a factored test. *See generally* Myra A. Sutanto, *Wilkinson v. Austin and the Quest for a Clearly Defined Liberty Interest Standard*, 96 J. Crim. L. & Criminology 1029, 1046 (2006) (comparing circuit baselines); Michael Z. Goldman, *Sandin v. Conner and Intraprison Confinement: Ten Years of Confusion and Harm in Prisoner Litigation*, 45 B.C. L. Rev. 423, 441-53 (2004) (same).

As demonstrated below, the *DiMarco* four-factor test is inconsistent with the Supreme Court's holding in *Wilkinson* in four fundamental ways. First, *DiMarco*'s direction to consider the government's "legitimate penological interest" to determine if a liberty interest exists directly conflicts with *Wilkinson's* holding that penological necessity "does not diminish [a] conclusion that the conditions give rise to a liberty interest in their avoidance." *Wilkinson*, 545 U.S. at 224. Second, the test does not

provide a baseline for comparison, which has resulted in lower courts—including the courts in this case—erroneously using the conditions at issue in *Wilkinson* as a baseline. Third, it inappropriately elevated the standard for what is an "extreme condition" by incorporating Eighth Amendment and substantive due process standards—standards that independently would make the conditions unconstitutional—as a requirement to establish a liberty interest. Finally, *DiMarco* ignored *Wilkinson*'s direction to give weight to the duration of confinement in segregated conditions, looking only at whether the individual receives periodic reviews.

In addition to the problems with *DiMarco*'s four-factor liberty interest test, the courts below erred in improperly resolving material factual disputes regarding factual issues pertaining to these factors in favor of the BOP, and the courts' decisions should therefore be reversed.

C. *DiMarco*'s Use of "Legitimate Penological Interest" as a Factor in the Liberty Interest Inquiry Is in Direct Conflict with the Plain Language of *Wilkinson*.

In *Wilkinson*, the Supreme Court held that the penological justification for prison officials' placement of a prisoner in segregation is irrelevant to the liberty interest inquiry: "OSP's harsh conditions may well be necessary and appropriate in light of the danger that high-risk inmates pose both to prison officials and to other prisoners…That necessity, however, does not diminish our conclusion that the conditions give rise to a liberty interest in their avoidance." *Wilkinson*, 545 U.S. at 224. *DiMarco*'s inclusion of "legitimate penological interest" as a factor in the liberty interest inquiry is therefore in direct conflict with *Wilkinson*'s holding that penological interest does not diminish a

liberty interest where one otherwise exists. *Compare DiMarco*, 473 F.3d at 1342, *with Wilkinson*, 545 U.S. at 224.

Prison officials' penological interest in placing inmates in the challenged conditions is not relevant to the liberty interest inquiry because it has no effect on the severity of restraint imposed by those conditions or the duration of time spent in them. *See Wilkinson*, 545 U.S. at 223 (holding that the touchstone of the existence of a liberty interest is the nature of the conditions). Rather, the penological interest in transferring an inmate into segregation and the legitimacy of that interest is only relevant *after* a liberty interest is found, during any actual due process hearing.

The incompatibility of *DiMarco*'s inclusion of legitimate penological interest in the liberty interest inquiry is further demonstrated by the absence of such a consideration in other circuits' post-*Wilkinson* liberty interest tests. *See, e.g. Orr v. Larkins*, 610 F.3d 1032, 1034 (8th Cir. 2010); *Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 699 (7th Cir. 2009); *Harden-Bey v. Rutter*, 524 F.3d 789, 792-93 (6th Cir. 2008); *Iqbal v. Hasty*, 490 F.3d 143, 161 (2d Cir. 2007), *overruled on other grounds by Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009); *Richardson v. Joslin*, 501 F.3d 415, 419 (5th Cir. 2007). Indeed, only two other circuits appear to have given *any* consideration to penological interest during the liberty interest inquiry since *Wilkinson*, and even then it was within the context of a temporary, emergency segregation. *See Skinner v. Cunningham*, 430 F.3d 483, 487 (1st Cir. 2005) (finding no liberty interest in avoiding temporary segregation due to pending murder investigation where segregation was "rational," its duration was not excessive, and isolation from other prisoners was essential to the prison's purpose); *Hernandez v.*

Velasquez, 522 F.3d 556, 563-64 (5th Cir. 2008) (temporary lockdown designed to prevent gang-related violence found to be "expected as an ordinary incident of prison life.").

In the present case, the district courts erred not only by considering penological interest in determining if a liberty interest existed, but in giving this factor predominant weight. The district courts held that the BOP was justified in moving Appellants to ADX because of general "safety issues." (v. I(f) at 1353; v. II(g) at 3221.) They noted that even if they did not fully understand the BOP's decisions, that these decisions were entitled to deference.[7] (v. I(f) at 1354; v. II(g) at 3222.) This holding thwarts the purpose of the due process clause, which is to provide a check on governmental action. *Wolff*, 418 U.S. at 558 ("The touchstone of due process is protection of the individual against arbitrary action of the government."). Rather than examine whether the conditions required review, the district courts determined that review was not warranted essentially "because the BOP said so." While the BOP's decision during the actual due process hearing may be entitled to deference, this should not permit the BOP's judgment to control the determination of *whether* process is required. That determination is governed by the Constitution.

The BOP's alleged penological interest—that Appellants were convicted of terrorism-related crimes—should be considered only during the actual due process

[7] In other areas of law, such as First Amendment, the Government's penological interest is entitled to deference. *See Turner v. Safley*, 482 U.S. 78, 89 (1987). This deference does not apply in determining whether a protected liberty interest exists. *See Wilkinson*, 545 U.S. at 224.

hearing or other review procedure where it is determined whether Appellants should be confined at ADX. *See Wilkinson*, 545 U.S. at 224-27. During this hearing, Appellants would also have the opportunity to present reasons why the BOP's asserted justification is incorrect. *See id.* at 221, 226. A fact-finder considering both parties' positions on the asserted penological justification and the facts presented at the hearing would then determine whether Appellants should be confined at ADX or elsewhere. *See id.* at 226.

D. The *DiMarco* Four-Factor Test Fails to Establish a Baseline as Required by the Supreme Court and Has Led to Inappropriate Comparators Being Used by Lower Courts.

As noted above, many courts have struggled with the question of the appropriate baseline (the "ordinary incidents of prison life") to which to compare challenged prison conditions in determining whether a liberty interest exists. *See DiMarco*, 473 F.3d at 1340-42 (considering different potential baselines). *DiMarco*'s failure to determine the appropriate baseline and its alternative four-factor test has led to confusion in the lower courts. This confusion is exemplified here by the district courts' erroneous use of the conditions at the OSP (the supermax prison at issue in *Wilkinson*) as the appropriate baseline to which to compare conditions at ADX. *See* v. II(g) at 3227 ("[T]o the extent that any comparison is appropriate, it is a comparison of Plaintiffs' conditions of confinement in the general population unit at ADX with those at issue in *Wilkinson*."); v. II(g) at 3300 ("There is[ ] ample precedent for comparing an institution's conditions to those demonstrated in *Wilkinson*."); *see also* v. I(f) at 1358.) But using the conditions in *Wilkinson* as a baseline improperly elevates the burden necessary to demonstrate that challenged conditions are atypical and significant. As noted above, the Supreme Court

found the conditions at issue in *Wilkinson* – conditions similar to those at issue here – to be so extreme that they were "an atypical and significant hardship *under any plausible baseline*." 545 U.S. at 223 (emphasis added). While further explanation of the appropriate baseline would assist lower courts, the district courts' choice of OSP as the point of comparison is sufficient error alone to require remand of these cases.

The district courts' use of OSP conditions as a baseline also conflicts with Supreme Court precedent that conditions should be compared to those within the prison system at issue. In *Sandin*, the Supreme Court specifically compared the challenged conditions to others in the Hawaii system; in *Wilkinson*, the Court assumed that the conditions for comparison would be "in any particular prison system" and compared the conditions at issue to those in Ohio. *Sandin*, 515 U.S. at 486; *Wilkinson*, 545 U.S. at 214, 223. The district courts erred by using OSP as a comparator, given that this was not part of the BOP system. As ADX is the only federal supermax and has the most restrictive conditions in the BOP (*supra* at 3), these facts alone are sufficient to demonstrate that placement there establishes an atypical and significant hardship.

E. *DiMarco* and the District Courts Have Erroneously Elevated the Required Showing for a Liberty Interest by Incorporating Eighth Amendment and Substantive Due Process Standards.

Under the second factor, whether conditions are extreme, the district courts erroneously incorporated standards from other, more onerous areas of caselaw. This incorrect use of heightened standards began when *DiMarco* incorporated Eighth Amendment language into the liberty interest analysis. *See DiMarco*, 473 F.3d at 1343 ("DiMarco's conditions of confinement were admittedly spartan, but not atypical of

protective custody. She had access to the basic essentials of life…"). The district courts in the instant case relied on language both Eighth Amendment and substantive due process standards to find that a liberty interest does not exist. (*See, e.g.*, v. I(f) at 1356 ("Plaintiff …was not deprived of these basic necessities"); v. II(g) at 3225 ("Simply, the conditions complained of…did not deprive Plaintiff of access to the basic essentials of life."); v. I(f) at 1358 ("restrictions such as those at ADX, while harsh, are not so shocking to the conscience that they can be deemed 'atypical and significant' of their own accord."); v. II(g) at 3227 (same).)

The Eighth Amendment standard has no place in the liberty interest inquiry. The Eighth Amendment prohibits the Government from inflicting of conditions that are "cruel and unusual." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). The pertinent legal standard asks if prisoners are receiving "life's necessities" and whether their "basic human needs" are satisfied. *See id.* If the answer to either of these questions is no, the condition is illegal; thus, there can be no amount of process that could cure such conditions. *See Farmer v. Brennan*, 511 U.S. 825, 832-34 (1994). In contrast, the liberty interest inquiry is significantly less onerous because conditions found to represent an "atypical and significant hardship" are permissible, provided that constitutionally sufficient process is afforded. *Wilkinson*, 545 U.S. at 228-29. By employing Eighth Amendment language as the lens through which Appellants' conditions of confinement are judged, this Circuit has erroneously conflated separate constitutional standards and impermissibly altered the liberty interest inquiry.

The courts below also imported another incorrect constitutional standard, from

Fifth Amendment substantive due process, when they considered whether conditions at ADX "shock the conscience." (v. I(f) at 1358 ("restrictions … are not so shocking to the conscience that they can be deemed 'atypical and significant'"); v. II(g) at 3227 (same)); *see also Georgacarakos v. Wiley*, No. 07-cv-01712-MSK-MEH, 2010 WL 1291833, at *13 (D. Colo. Mar. 30, 2010) ("restrictions such as those at ADX, while harsh, are not so shocking to the conscience"). The finding of a liberty interest does not require the substantive due process standard that a prisoner's conditions "shock the conscience." *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 848-49 (1998) (holding that substantive due process prevents the government from engaging in conduct that "shocks the conscience" and citing cases). Rather, it only requires that the conditions at issue are "atypical and significant in relation to the ordinary incidents of prison life."

As a result of *DiMarco* and the courts below employing the hallmark language of incorrect, irrelevant, and more onerous standards, the Supreme Court's directive to consider the degree of the deprivation has been impermissibly altered. In particular, the liberty interest standard has been elevated beyond assessing degree of deprivation and instead requires something more than atypical conditions – it requires conditions that are unconstitutional under either the Eighth or Fifth Amendments.

F. The District Courts Erred by Failing to Properly Consider the Duration of Segregation.

In *Sandin* and *Wilkinson*, the Supreme Court relied primarily on the severity of the conditions of confinement and their duration in determining whether those conditions imposed an "atypical and significant hardship" compared to "ordinary incidents of prison

life." *Sandin*, 515 U.S. at 484; *Wilkinson*, 545 U.S. at 223. While *DiMarco* established factors that appear to consider both degree and duration of conditions (whether the conditions are extreme and whether they are indefinite), in practice the duration of confinement was ignored entirely by the district courts in making the liberty interest determination. The failure of the district courts in this case to consider the extraordinary amount of time the Appellants were held in isolation is reversible error.

These two factors – degree and duration – are necessarily interrelated, and cannot be separated as *DiMarco* suggests. When a deprivation is relatively short, the Supreme Court has found it less likely to raise a liberty interest. *Sandin*, 515 U.S. at 486 (30-day duration in disciplinary segregation). However, when the duration of a deprivation is relatively long or is unknown and could continue indefinitely, this factor weighs in favor of finding a liberty interest. *Wilkinson*, 545 U.S. at 224. As the Second Circuit held, "[b]oth the conditions and their duration must be considered since especially harsh conditions endured for a brief interval and somewhat harsh conditions endured for a prolonged interval might both be atypical." *Sealey v. Giltner*, 197 F.3d 578, 586 (2d Cir.1999).

In addition to *Sandin* and *Wilkinson*, the majority of the circuit courts have recognized the centrality of the duration-of-confinement to the liberty interest inquiry. *See Harden-Bey*, 524 F.3d at 793 ("Consistent with [*Sandin* and *Wilkinson*], most (if not all) of our sister circuits have considered the nature of the more-restrictive confinement *and* its duration in determining whether it imposes an "atypical and significant hardship.") (emphasis in original); *Iqbal*, 490 F.3d at 161 (noting that "[r]elevant

factors…include both the conditions of segregation and its duration"); *Stephens v. Cottey*, 145 F. App'x 179, 181 (7th Cir. 2005) ("In determining whether prison conditions meet [the *Sandin*] standard, courts place a premium on the duration of the deprivation."); *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997) (assessing duration). This Circuit has also considered the amount of time a prisoner is segregated to be a central factor in determining whether a deprivation is atypical and significant. *See Trujillo v. Williams*, 465 F.3d 1210, 1225 (10th Cir. 2006) (finding that where "the prisoner is subjected to a lengthy period of segregation, the duration of that confinement may itself be atypical and significant."); *see also Payne v. Friel*, 266 F. App'x 724, 728 (10th Cir. 2008) (reversing when district court did not consider whether the duration of the confinement was itself atypical and significant).

In *DiMarco*, the Court failed to properly address the duration factor, leading to the district courts' erroneous holdings. Instead, the Court identified "indeterminate" confinement as a new factor in the liberty interest inquiry.[8] *DiMarco*, 473 F.3d at 1342. Rather than focus on the length of the challenged segregation, this new factor focuses on whether individuals receive periodic reviews throughout their time in segregation. *Id.* at 1343-44. This new definition was counter to any other Tenth Circuit analysis of a prisoner's duration-of-confinement in segregation. *See Trujillo*, 465 F.3d at 1225; *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (holding district court abused its

[8] In discussing whether a prisoner's sentence in segregation is finite, *Wilkinson* uses the term "indefinite" and *DiMarco* used the term "indeterminate." *Compare Wilkinson*, 545 U.S. at 224 *with DiMarco*, 473 F.3d at 1342. These two terms are used interchangeably in this brief.

discretion in concluding that three-year period of segregation was not even arguably atypical); *Gaines v. Stenseng*, 292 F.3d 1222, 1225-26 (10th Cir. 2002) (remanding to determine whether 75-day confinement in disciplinary segregation was atypical and significant). Thus, *DiMarco*'s and its progeny's use of the "indeterminateness" factor has clashed with the Supreme Court's instructions and prior Tenth Circuit precedent on the role of duration in the liberty interest inquiry. First, the district courts below completely disregarded the impact of the duration of the conditions in deciding whether Appellants had been subjected to an atypical and significant hardship. Second, *DiMarco*'s instruction to consider "periodic reviews" during segregation as a factor in determining whether a prisoner's placement in segregation is "indefinite" is improper.

1. The district courts erred when they disregarded Appellants' long duration of confinement.

Contrary to Supreme Court and Tenth Circuit precedent, the district courts determined the length of time spent in restrictive conditions to be irrelevant as to whether those conditions imposed an atypical and significant hardship. (v. I(f) at 1359; v. II(g) at 3228.) The courts below merely noted that Appellants' confinements of five to thirteen years in ADX were "particularly long periods time" and that the duration of their confinement "d[id] not impact the fact that the conditions at issue here are simply not as restrictive as those at issue in *Wilkinson*."[9] (*Id*.) Yet, under other circuits' analyses of

[9] Under the district courts' interpretation of the *DiMarco* parole factor, Appellants would never have a liberty interest, no matter how long they were held at ADX. The district courts stated that because Appellants' parole eligibility was not impacted, they did not have a liberty interest. (v. I(f) at 1360-62; v. II(g) at 3229-30, 3301.) Yet, because the BOP eliminated parole for all federal prisoners sentenced after 1987, this interpretation

time spent in segregation, the fact that Appellants were held in solitary confinement for five to thirteen years would alone be sufficient reason to find an atypical and significant hardship. *See, e.g., Williams v. Norris*, 277 F. App'x 647, 648 (8th Cir. 2008) (twelve years in segregation "constitutes an atypical and significant hardship"); *Iqbal*, 490 F.3d at 161 (2d Cir. 2007) ("[s]egregation of longer than 305 days ... is sufficiently atypical to require procedural due process protection under *Sandin*"); *Shoats v. Horn*, 213 F.3d 140, 144 (3d Cir. 2000) ("[W]e have no difficulty concluding that eight years in administrative custody ... is 'atypical' in relation to the ordinary incidents of prison life").

2. *DiMarco*'s use of "periodic reviews" to determine "indefiniteness" of segregation conflicts with *Wilkinson*.

Additionally, *DiMarco* and the lower courts have created a definition of "indefinite" that fails to actually consider the amount of time a person is held in segregation, instead basing this determination solely on whether a prisoner received regular reviews. This definition conflicts with *Wilkinson*, where the Supreme Court relied on the fact that a prisoner's placement in OSP was limited only by his sentence in finding that the prisoners' placement in OSP conditions was "indefinite." 545 U.S. at 214-15 ("[P]lacement at OSP is for an indefinite period of time, limited only by an

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would likely prohibit the finding of a liberty interest for almost any prisoner in the federal system, no matter how long he remained isolated. (v. I(f) at 1361-62.) Thus, the BOP could hold any individual in ADX—*infinitely*—without ever providing a reason for his transfer or for his continued retention there. Such a result does not comport with the spirit or plain language of *Sandin* or *Wilkinson*. Additionally, the Supreme Court's reasoning in the parole cases that preceded *Sandin* and *Wilkinson* suggests that the loss of parole eligibility is independently sufficient to invoke a liberty interest, separate from the atypical and significant standard imposed by the rule articulated in *Sandin*. *See, e.g. Wolff*, 418 U.S. at 557; *Greenholtz v. Inmates of the Neb. Penal & Corr. Complex*, 442 U.S. 1, 12 (1979).

inmate's sentence."). The Supreme Court's definition comports with standard understanding of the word "indefinite" and its dictionary definition, which is "having no exact limits."[10] MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/indefinite (last visited May 30, 2011). Accordingly, "indefiniteness" in the liberty interest context means that the confinement in the challenged conditions has neither a set end-date nor any limits other than the end of a prisoner's sentence.

DiMarco created a new and incorrect definition of "indefiniteness" that is directly contrary to *Wilkinson*. According to *DiMarco*, placement in segregation is not indefinite so long as the prisoner receives "regular reevaluations" (called "periodic reviews" by the district courts) throughout his segregated confinement. *DiMarco*, 473 F.3d at 1343. But the existence of periodic reviews is irrelevant to both "indefiniteness" and "duration" of confinement. In fact, *Wilkinson* found that the OSP prisoners had been indefinitely confined, *even though they received periodic annual reviews.* *Wilkinson*, 545 U.S. at 224. The Supreme Court considered the import of periodic reviews only in its analysis of the *sufficiency of process prong* of the Due Process analysis – after it had already established that the prisoners had a liberty interest in avoiding OSP. *Id*. at 228-29.

Beyond being in conflict with the Supreme Court standard, the definition of indefiniteness relied upon by the district courts is unreasonable. The purpose of

[10] Similarly, the term "indeterminate" is defined as: "not definitely or precisely determined or fixed" or "not leading to a definite end or result." MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/indeterminate (last visited May 30, 2011).

considering whether a liberty interest exists is to determine *if* process is due. *See id.* at 221. Under the current definition, to determine if process is due the district courts actually looked to see whether the prisoner was already receiving process. If he *is* receiving process, this fact actually weighs against him having a liberty interest. (v. I(f) at 1362-64; v. II(g) at 3230-34, 3301-02.) In other words, if process is given throughout segregation, no matter how long that segregation is, there is no requirement to provide process to determine if the prisoner should be there in the first place. This definition of "indefinite" is both inefficient, as it requires some review of the processes in place to make the threshold liberty interest inquiry, and illogical.

Further, to the extent that this Court finds it permissible to include periodic reviews in determining whether a liberty interest exists, those reviews must be meaningful. Notice of review and a fair opportunity for rebuttal "are among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." *Wilkinson*, 545 U.S. at 225-26; *see also Horton v. Zavaras*, No. 09-cv-02220-REB-KMT, 2010 WL 3341259, at *9 (D. Colo. June 11, 2010) (the "provision of periodic, *but meaningless*, reviews of [a prisoner's] status should not weigh against a conclusion that his segregation was indeterminate") (emphasis added). *DiMarco* recognized the importance of the meaningfulness of periodic reviews when it noted the inclusion of an interview of Ms. DiMarco and an opportunity for her to present her views as part of her periodic reviews. 473 F.3d at 1343-44.

The district courts below ignored the meaningfulness requirement. They acknowledged Appellants' claim that the periodic reviews were meaningless, yet chose to

ignore that evidence entirely. (v. I(f) at 1362-63 ("Although Plaintiff contends that these reviews are meaningless, he does not dispute that they occurred and that he had some opportunity to participate."); v. II(g) at 3302 (acknowledging that "plaintiffs contest the meaningfulness of program reviews," but holding that "*DiMarco* does not require the level of process contemplated by plaintiffs in order for a term of confinement to be definite"). Thus, the district courts allowed potentially meaningless reviews to militate against the finding of a liberty interest.

DiMarco and its progeny's failure to consider duration of segregation in the liberty interest inquiry and their consideration of periodic reviews as a factor in determining whether that segregation is "indefinite" directly violate Supreme Court precedent and constitutes reversible error.

G. The District Court Improperly Resolved Material Factual Disputes in Favor of the BOP.

Summary judgment is proper only when the record reflects "that there is no genuine issue as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Allen v. Muskogee, Okl.*, 119 F.3d 837, 839 (10th Cir. 1997). Material facts are "facts that might affect the outcome of the suit under the governing law;" genuine disputes exist when "a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). All inferences must be made in favor of the non-moving party. *Id.* at 255. "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are [fact-finder] functions, not those of the judge." *Id.*

Here, there are several disputes of material fact that go to the heart of the issue in this case: whether a liberty interest exists in avoiding solitary confinement at the ADX. Those material disputes of fact include (1) whether the conditions of confinement at ADX are "extreme," and, in particular, the amount of human contact afforded to ADX prisoners; and (2) whether the placement of the Appellants at ADX was "indefinite." *See Wilkinson*, 545 U.S. at 224; *DiMarco*, 473 F.3d at 1343. The courts below erred in resolving these material factual disputes in favor of the non-moving party – the BOP.

It is not surprising that the courts below drew improper inferences in favor of the BOP; in one decision, the court blatantly stated that it was deferring to the BOP. (v. I(f) at 1363.) In explaining its factual determination of the reasons it took the BOP thirteen years of "reviews" to determine that Mr. Rezaq was ready to be placed into the Step Down program, the Rezaq court stated: "The decisions of BOP officials, including the decision to delay and the decision to ultimately place [Rezaq] in the Program *are entitled to deference.*" (*Id*. (emphasis added).) But any deference due to prison officials by a fact finder *at trial* does not override the summary judgment standard that "all justifiable inferences are to be drawn in [the non-movant's] favor." *Anderson*, 447 U.S. at 255.[11]

[11] Moreover, deference "does not insulate from review actions taken in bad faith or for no legitimate penological purpose." *Whitley v. Albers*, 475 U.S. 312, 322 (1986). And "[i]n order to warrant deference, prison officials *must present credible evidence* to support their stated penological goals." *See Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) (emphasis in original).

1. There is a material factual dispute over the extremity of conditions.

In *Wilkinson*, the Supreme Court considered the extremity of the conditions of confinement at the supermax prison and specifically recognized the importance of human contact in the extremity-of-conditions analysis. 545 U.S. at 224 (noting the "especially severe limitations on all human contact"). Further, the information presented regarding the severity of the conditions should have been weighed and considered in its totality to determine whether Appellants' conditions were extreme.

a) *There is a material factual dispute concerning the amount of human contact Appellants had at ADX.*

Here, the evidence presented by the parties on the amount of human contact the Appellants had at ADX is in direct dispute. The BOP presented evidence that prisoners at ADX have daily contact with staff and that they can "talk with each other while in their cells, in moderate tones, or during their out-of-cell recreation." (v. I(a) at 210-11; v. I(d) at 904; v. II(b) at 1771-72.) Appellants, on the other hand, presented evidence that: (1) they often went days without communicating with another person—staff members or inmates, (v. I(e) at 1155; v. II(c) at 2172, 2184, 2236); (2) when Appellants came into contact with ADX staff, they were often ignored, few words were exchanged, and those exchanges took place between steel doors, (v. I(e) at 1155 v. II(c) at 2184, 2236); (3) Appellants' only communication with other prisoners was by shouting through the steel doors in their cells, and they risked punishment for doing so, (v. I(e) at 1154; v. II(c) at 2137); and (4) when exercising, they were either alone or not able to speak with other prisoners, (v. I(e) at 1154.)

Despite this direct evidentiary conflict between the parties, the courts below drew every inference in favor of the BOP, finding that Appellants had "regular contact with staff, and the ability to communicate with each other." (v. II(g) at 3300; *see also* v. I(f) at 1355-56.) Given the importance of human contact to the extremity-of-conditions factor in the liberty interest analysis, it was improper for the courts below to make such material factual determinations in favor of the BOP. *Anderson*, 477 U.S. at 255.

b) *Appellants presented evidence sufficient to raise a genuine issue of material fact that the totality of their conditions were extreme.*

To determine whether conditions caused an atypical and significant hardship, the Supreme Court assesses the totality of restrictions placed upon the segregated prisoner. *Sandin*, 515 U.S. at 486-87; *Wilkinson*, 545 U.S. at 223-24; *see also DiMarco*, 473 F.3d at 1342 (finding "[r]elevant factors might include" and listing considerations). The Court looks at all relevant elements, including the amount of human contact, the context of this contact, the amount and duration of light in-cell, the opportunity for exercise for the prisoner, the placement's impact on parole, the prisoner's contact with family, and the available educational and vocational opportunities. *Wilkinson*, 545 U.S. at 223-24. These factors are considered as a whole and compared to the "ordinary incidents of prison life." *Id.* Other district courts in this circuit have understood and followed this directive, finding that any liberty interest analysis is "highly-fact dependent and the factors should be 'viewed in their totality'." *Horton*, 2010 WL 3341259, at *8 (quoting *Dodge v. Shoemaker*, 695 F. Supp. 2d 1127, 1140 (D. Colo. 2010)); *see also Allmon v. Bureau of Prisons*, No. 08-cv-01183-ZLW-CBS, 2010 WL 2163773, at *5-6 (D. Colo.

May 26, 2010).

When viewed as a whole, Appellants presented evidence from which a reasonable trier of fact could decide that the conditions at ADX are extreme. Because this conclusion could be drawn from the offered facts, judgment as a matter of law was inappropriate and is reversible error. *See Anderson*, 477 U.S. at 248. The facts regarding Appellants' conditions of confinement in ADX have been described at length in prior briefings and are not repeated herein. (v. I(c) at 522-525; v. I(d) at 996-98; v. I(f) at 1380-82; v. II(c) at 2075-77; v. II(g) at 3188-90, 3255-56.)

In sum, the conditions at ADX are the most restrictive in the BOP (*supra* at 3) and are "harsher than those experienced by the prisoners in the typical general population of a federal prison." (v. I(f) at 1357.) Individuals at ADX are severely restricted in their communication with others in the prison, with their families, and with any other person. *Supra* at 5-7. They have severe restraints on their movement, on their religious practice, on their recreation, on educational programming, on work opportunities, and even on their ability to see any outside or nature. *Supra* at 5-8. The time in ADX left Appellants feeling depressed, isolated, and at times, in despair. (v. II(c) at 2061.) Though a reasonable fact-finder could have concluded that the conditions at issue were extreme, the district courts improperly disregarded the totality of the conditions and drew a conclusion that they were not extreme. "Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment." *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984).

Here, rather than leave this decision to the fact-finder or review the conditions as a

whole, the district courts improperly selected several facts and performed a one-to one comparison with those in *Wilkinson*. For example, *Wilkinson* noted that one onerous condition in the OSP was that the lights were on twenty-four hours a day. 545 U.S. at 224. The Court clearly did not intend this as a requirement for the existence of a liberty interest, but, rather, as one of many facts in the totality-of-conditions analysis. *Id.* (noting that "these conditions likely would apply to most solitary confinement facilities). Yet, the district courts below gave substantial weight to the fact that the ADX lights could be turned off at night—one of the few distinctions between ADX conditions and those at issue in *Wilkinson*—in their denial of the existence of a liberty interest. (v. I(f) at 1355; v. II(g) at 3223, 3300.) This precise matching of conditions between ADX and OSP is thwarts the main purpose of the liberty interest inquiry, which is to determine if the totality of conditions, taken together, create an atypical and significant hardship in comparison to the ordinary incidents of prison life. Further, because a fact-finder properly weighing the totality of the evidence regarding conditions could have determined that ADX imposes an "atypical and significant hardship" upon those housed within, summary judgment was inappropriate.

2. There is a material factual dispute over the indefiniteness of placement at ADX.

As explained above, the question of whether a prisoner's placement in segregation is indefinite is an important factor in the liberty interest inquiry. *Wilkinson*, 545 U.S. at 224. In examining this factor, the *DiMarco* court considered whether the prisoner had regular, meaningful reviews throughout her segregation. *DiMarco*, 473 F.3d. at 1343-44.

The provision alone of periodic reviews is not, however, sufficient. Due process requires that a hearing "must be a real one, not a sham or a pretense." *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 164 (1951) (Frankfurter, J., concurring) (internal quotation omitted). In the prison segregation context, numerous courts have likewise recognized this fact. *See, e.g.*, *Horton*, 2010 WL 3341259, at *9 (the "provision of periodic, *but meaningless*, reviews of [a prisoner's] status should not weigh against a conclusion that his segregation was indeterminate") (emphasis added); *McClary v. Kelly*, 4 F. Supp. 2d 195, 213 (W.D.N.Y. 1998) ("Due process is not satisfied where the periodic reviews are a sham; the reviews must be meaningful and not simply perfunctory."); *Rhinehart v. Gomez*, No. C-95-0434-VRW, 1998 WL 118179, at *4 (N.D. Cal. Mar. 2, 1998) ("reviews of indeterminate placements in administrative segregation must amount to more than 'meaningless gestures' because of the potentially unlimited span of confinement").

The question of whether the reviews provided to the Appellants were meaningful is a disputed issue of material fact that should not have been decided on summary judgment. "A plaintiff who can introduce evidence that the decision has already been made and any hearing would be a sham is entitled to go forward with a procedural due process claim." *Ryan v. Illinois Dep't of Children and Family Services*, 185 F.3d 751, 762 (7th Cir. 1999); *see also Williams v. Norris*, 277 F. App'x 647, 649 (8th Cir. 2008) (in a prison segregation case, the court concluded that "there remains an unresolved fact issue on this record as to whether Williams actually received meaningful reviews, rather than sham reviews, as he contends").

Here, the evidence presented by the parties on the meaningfulness of the periodic reviews afforded to the Appellants during their solitary confinement at ADX is in direct dispute. Appellants contend that the decisions about their placement and progression are all made at either the Step-Down Committee meeting or at higher levels in the BOP (i.e. the regional and national offices). *Supra* at 11-12. They never had an opportunity to communicate with these individuals, either to hear the evidence presented against them, to rebut this evidence, or to even learn the reasons they were denied progression. *Id.* Accordingly, Appellants have consistently contended that the periodic reviews were a sham and that decisions of where they will be placed are made by individuals to whom they have no access.

The BOP points out that Appellants are given several so-called "reviews" annually: (1) Initial Classification and Program Reviews; (2) custody classification scoring; and (3) Step-Down Committee meetings. (v. I(a) at 102-04; v. II(a) at 1669-75.) These "reviews" may give a misleading impression that Appellants are receiving some type of meaningful process, but even one hundred reviews each year would be insufficient if, as here, they are shams. Here, Appellants assert that none of the "reviews" provided by the BOP provides any opportunity to meaningfully participate or object to their outcomes.

The details surrounding these alleged "reviews" is discussed at length in the briefings. (v. I(c) at 500-03; v. I(f) at 1389-97, 1461-63; v. II(c) at 2068-71, 78-79; v. II(g) at 3191-94, 3256-59.) In short, the Appellants presented evidence that none of these reviews is meaningful. (*Id.*) Initial Classification and Program Reviews concern the type

of programming the inmate is required to engage in and have no impact on whether a person will be progressed out of ADX. (v. II(b) at 1773-75.) The custody classification score is done without the inmate's input, (v. II(d) at 2340), and has no impact on ADX placement. (v. I(c) at 736 (scoring prisoner at "medium" custody classification), 741 (override of custody classification to continue confinement in ADX).) The Step-Down Committee meeting does not include any participation by an inmate, who cannot even present a written statement on his own behalf. (v. II(d) at 2353; v. II(f) at 2890, 2900-01, 2907-08.) Even following all of these "reviews," Appellants still did not know why they were denied progression out of ADX or what they could do be progressed in the future. *Supra* at 12.

Despite the clear factual dispute over the meaningfulness of these events, the courts below improperly found that no material dispute existed. (v. I(f) 1362-64; v. II(g) 3301-02.) The courts acknowledged the Appellants' claim that the periodic reviews were meaningless and a sham, yet chose to ignore that evidence entirely. (v. I(f) at 1363 ("Although Plaintiff contends that these reviews are meaningless, he does not dispute that they occurred and that he had some opportunity to participate."); v. II(g) at 3302 (acknowledging that "plaintiffs contest the meaningfulness of program reviews," but holding that "DiMarco does not require the level of process contemplated by plaintiffs in order for a term of confinement to be definite").

Because a reasonable fact-finder could have concluded that the periodic reviews provided to the Appellants were meaningless and that their term of confinement at ADX

was, therefore, indefinite, the courts below erred in resolving this factual dispute in favor of the BOP and granting them summary judgment.

VII. CONCLUSION

Based on the foregoing, Appellants respectfully request that this Court remand this litigation to the district courts with instructions regarding the appropriate comparator and information to be considered in analyzing whether a liberty interest exists in segregated conditions. Further, Appellants request that this Court direct the district courts to abide by the summary judgment standard and not to provide deference to, or draw inferences in favor of, the moving party, and not to make factual findings when material issues are in dispute.

VIII. STATEMENT OF COUNSEL AS TO ORAL ARGUMENT

Oral argument is necessary on this matter to clarify the extensive factual background and issues, which involve four separate Appellants, each with a separate history, timeline, and experience in the BOP. Additionally, because of the novel issues presented, counsel thinks oral argument may be helpful to the Court.

Respectfully submitted,
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I hereby certify that a copy of the foregoing APPELLANT'S OPENING BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Symantec Antivirus Program, Version 10.1.5.5010, and according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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