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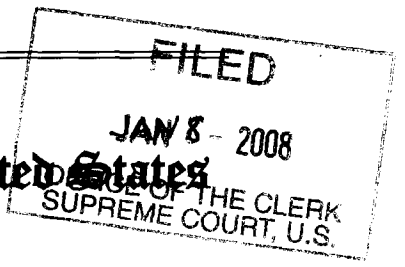

In The
Supreme Court of the United States

THOMAS CARROLL, WARDEN OF
THE DELAWARE CORRECTIONAL CENTER,

Petitioner,

v.

DAVID STEVENSON, MICHAEL
MANLEY, MICHAEL L. JONES,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The Brief in Opposition oversimplifies the issues in this case and avoids addressing the actual procedural rule issued by the Third Circuit. It asserts that Warden Carroll concedes that punishment of detainees is constitutionally prohibited, and for that reason "the State has conceded the general legal issues" in this case and the Petition "does not raise a constitutional issue at all." (Opp. Br. at 8, 10).

REASONS FOR GRANTING THE WRIT

I. Procedural due process for detainees: there is a need for the Court to clarify the law.

In their Brief in Opposition, Respondents assert that the law in this area is not confused. In fact, from Respondents' assertions, one may conclude the law is as well ordered as it could be. The circuits are all in agreement on a rule of law that is workable and makes sense. (Opp. Br. at 11).

The law in this area is not well defined. No circuit has adopted *Stevenson*'s rule of law – that transfers of detainees to higher security housing generally require due process at or about the time of the transfer. No precedent from this Court supports a finding of a general rule that transfers of detainees into more restrictive housing for an indefinite period require due process procedures. And there is confusion among

the district courts. Several have remarked upon the existence of confusion in this area.

A. *Stevenson*: detainees placed in highly secure housing are generally entitled to due process.

The Third Circuit's procedural rule in *Stevenson* is overly broad. By focusing on the "indefinite" nature of the Respondents' placement in the Security Housing Unit ("SHU"), and requiring due process at or about the time of transfer, the court has devised a rule that sweeps in virtually all administrative transfers of detainees to high security custody.

Finding a liberty interest based on the Respondents' duration in SHU, the *Stevenson* court applies the due process requirements retroactively, so that the duty to give notice and allow a response arose at the time of the transfer. It is illogical that due process requirements arise years in advance of the time duration that gives rise to these requirements. Of course, the Warden here had no way of knowing when the Respondents would be resentenced. Thus, any detainees transferred administratively for other than a definite and very short time period must be treated as if they have due process rights. In fact, the *Stevenson* opinion states this as a rule. (Pet. App. 15-16). When *Stevenson* is viewed this way, the authorities from other circuits relied upon by Respondents do not support such a rule.

B. There is little or no support in other circuits for *Stevenson*'s procedural rule of law.

Contrary to Respondents' assertions, one cannot find another circuit with a general rule that transfers of detainees into more restrictive housing require due process. Rather, cases on this issue from other circuits hold that administrative transfers of detainees generally do not require due process. *See Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991); *Holly v. Woolfolk,* 415 F.3d 678, 679 (7th Cir. 2005); *Higgs v. Carver*, 286 F.3d 437, 438 (7th Cir. 2002); *Zarnes v. Rhodes*, 64 F.3d 285 (7th Cir. 1995); *Crane v. Logli*, 992 F.2d 136 (7th Cir. 1993). *See also, Miramontes v. Chief of Department of Corrections*, 86 Fed. Appx. 325 (9th Cir. 2004); *Alexander v. Frank*, 967 F.2d 583 (table), 1992 WL 149679 (9th Cir. June 30, 1992); *Stafford v. Edmonds*, 76 F.3d 380 (table), 1996 WL 38222 (6th Cir. Jan. 30, 1996); *Franklin v. True*, 76 F.3d 381 (table), 1996 WL 43532 (7th Cir. Jan. 30, 1995). Although the duration of segregation housing in those cases is not equal to the 32 months in *Stevenson*, the Third Circuit in *Stevenson* did not restrict its holding to segregation housing for such a period. Rather, the opinion holds that due process must be given at or about the time of any transfer to more restrictive housing for an indefinite period. Where prison officials do not know how long the transfer will last, they are compelled to provide due process as a matter of course. This holding is not consistent with

the holdings of other circuits on the issue of administrative transfers.

It is in the nature of administrative transfers not to know how long they will last. Unlike disciplinary transfers, which are intended for short, specific time periods, administrative transfers are done for security or safety concerns that are not easily resolved in a given time frame or subject to prediction.

In their Brief in Opposition, Respondents attempt to explain away the broad sweep and inconsistency of the Third Circuit's decision in *Stevenson* by asserting that:

> The Third Circuit made the distinction between the administrative transfer cases and this case clear, holding that "although pretrial detainees do not have a liberty interest in being confined in the general prison population, they do have a liberty interest in not being detained indefinitely in the SHU without explanation or review of their confinement."

(Opp. Br. at 21, quoting Pet. App. 14). This attempt ignores the procedural rule that the Third Circuit issued even with respect to virtually all administrative transfers: "Prison officials must provide detainees who are transferred into more restrictive housing for administrative purposes . . . an explanation of the reason for their transfer as well as an opportunity to respond." (Pet. App. 15). Thus, under the Third Circuit's rule, even if the district court finds that the

transfer was not disciplinary, the Respondents are still entitled to due process, as are all other detainees who are administratively transferred for a period that is not time-certain.

C. *Wilkinson v. Austin* does not support the Third Circuit's rule in *Stevenson*.

Meachum v. Fano, 427 U.S. 215, 228-29 (1976), established that, in the absence of a state-created interest, prisoners transferred to higher security housing generally do not have a liberty interest in due process procedures with respect to their transfer. *Bell v. Wolfish,* 441 U.S. 520, 545-46 (1979), extended this principle to detainees, finding that lawful incarceration itself extinguishes the general liberty interest with respect to prison conditions that a non-incarcerated person enjoys.[1]

Wilkinson v. Austin, 545 U.S. 209 (2005), did not overrule *Meachum*, and in fact it explicitly reaffirmed it. *Id.* at 221. In *Wilkinson,* Ohio prison regulations provided procedural protections to prisoners transferred into Ohio's "supermax" prison, and the *Wilkinson* opinion stated that its finding of an "atypical and significant hardship" with respect to supermax placement was based on a "state-created" liberty interest:

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[1] *See* the *amicus* brief filed by the Commonwealths of Pennsylvania and Puerto Rico and the States of Alaska, Colorado, Hawaii, and New Hampshire in support of the Petition for a more extended discussion of this point. *Amicus* brief at 5-6.

> [T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement. [*Meachum v. Fano* citation.] . . . We have also held, however, that a liberty interest in avoiding particular conditions of confinement may arise from state policies or regulations, subject to the important limitations set forth in *Sandin v. Connor*, 515 U.S. 472 (1995).
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> * * *
>
> " . . . The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* [*Wolff v. McDonnell*, 418 U.S. 539 (1974)] and *Meachum*. Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause. But these interests will generally be limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." [Citation to *Sandin* omitted.]

545 U.S. at 221-23. Thus, it appears, contrary to Respondents' assertion, that the existence of a state-created liberty interest – or lack thereof – is still the departure point for liberty interest analysis. In the instant case, the district court went through this analysis and concluded that the State of Delaware did not create any liberty interest for the Respondents in the context of their confinement in SHU. (Pet. App. 23).

Even if conditions alone can create a liberty interest regardless of state law, *Wilkinson* did not fashion a general rule that a transfer to highly restrictive conditions for an indefinite period creates a liberty interest. The Court was careful to emphasize that it was the totality of all factors, including the impact on parole eligibility, that led to the conclusion there was a liberty interest. *Id.*, 545 U.S. at 224.

Moreover, the Court emphasized in *Wilkinson* that an "indefinite" transfer meant potentially for the rest of the prisoner's life:

> . . . [P]lacement at OSP [Ohio's supermax prison] is for an indefinite period of time, limited only by an inmate's sentence. For an inmate serving a life sentence, there is no indication how long he may be incarcerated at OSP once assigned there.

545 U.S. at 214-15. In this context, "indefinite" means potentially perpetual. However, as used by the Third Circuit in the instant case, "indefinite" transfer means merely the absence of a time-certain period. When the period is defined by the waiting period before resentencing, one would expect that period to be no more than a few months or a few years at most. The extended period that occurred in this case, involving the death penalty, is highly unusual.

The ambiguous meaning of "indefinite" has made the Third Circuit's holding more pernicious than it otherwise would be: the holding sweeps in virtually all administrative transfers of detainees, which by their nature are for indefinite periods.

D. District Court confusion.

If the law is clear and consistent as Respondents suggest, we would not expect to find any concerns about confusion expressed in district court opinions. However, several district courts have observed that there is confusion and inconsistency in this area. *See Rodriguez v. Penobscot County Jail*, 2001 WL 376453 at *3-*4 (D. Me. Apr. 11, 2001) (finding law is unclear for purposes of qualified immunity); *Cornett v. Webb*, 2004 WL 3437504 at *5 (E.D. Ky. May 13, 2004) (noting conflict among circuits and applying *Bell*, *Hewitt v. Helms*, 459 U.S. 460 (1983), and *Sandin* analysis to find no liberty interest); *Walton v. NFN Douglas*, 2006 WL 1751735 at *5 (D.S.C. June 23, 2006) (noting "conflicting views" of whether disciplinary segregation of detainee entitles him to due process).

E. The *Stevenson* opinion makes little sense.

Finally, it is critical whether the Third Circuit's procedural rule of law in *Stevenson* makes sense and whether it is workable.

The *Stevenson* opinion does not make sense. It makes little sense that a prisoner is being punished by being moved off death row, that a prisoner needs procedural protections when being moved off death row, or that it is irrational or excessive for prison officials to place a convicted first-degree murderer awaiting a redetermination of the death penalty in a

high security housing area.[2] Even where a prisoner in his complaint uses the term "punishment" or alleges other prisoners were treated differently, it still makes little sense.

Stevenson's rule of law is not workable. In most instances, prison officials cannot know how long a detainee being transferred administratively will be in the more restrictive housing unit. Adopting a general rule of due process procedures for administrative transfers would be unnecessarily burdensome.

II. Substantive due process for detainees: there is a need for the Court to clarify that a detainee's bare allegation of punishment or dissimilar treatment, even coupled with restrictive housing conditions, fails to state a substantive due process claim.

Respondents assume that any allegation of punishment or dissimilar treatment, coupled with restrictive housing conditions, states a substantive due process claim. In fact, a bare allegation of punitive or malicious intent or dissimilar treatment is

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[2] Respondents greatly emphasize that the Petitioner conceded the Respondents' detainee status. Although the Warden concedes that Respondent Jones is a detainee under any commonly used definition, as to Stevenson and Manley he concedes only that they are detainees under Third Circuit precedent. Warden Carroll has not focused his defense on their status because the outcome of this appeal should not turn thereon.

insufficient to state such a claim.[3] This should be especially true where the complaint itself sets forth the reasonable relationship required under *Bell v. Wolfish, supra.*

Respondents' view is essentially the same as the minority argument in *Bell Atlantic Corp. v. Twombly*, 550 U.S. ___, 127 S. Ct. 1955 (2007). In *Twombly,* the majority rejected this position. *Id.*, 127 S. Ct. at 1965 n.3 (citation omitted). Factual allegations must be enough to raise a right to relief above the speculative level. *Id.* at 1965. Facts that merely create "a suspicion of a legally cognizable right of action" are insufficient. *Id.* (citation omitted).

In the instant action, the Respondents have alleged: 1) a conclusory allegation of punitive or retaliatory intent by the Warden, 2) a detailed account of the conditions in SHU, which are highly restrictive, and 3) that they, and others who they believe were similarly situated, have not always been placed in such highly restrictive housing.

The first allegation is simply a legal conclusion, unsupported by anything beyond the second two sets of allegations. The second two sets of allegations do not establish a substantive due process violation other than at the speculative level.

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[3] If a mere allegation of punishment or dissimilar treatment is not enough to state a cognizable substantive due process claim, then Respondents are incorrect that this Court must make a factual determination of the Warden's intent to find the complaint fails to state a substantive due process claim.

It is not difficult to hypothesize factual allegations that actually would raise a reasonable inference of punitive intent or arbitrary imposition of harsh conditions. If the Respondents were charged with property crimes and had no history of violent conduct or escape attempts, their placement in SHU for an extended period would raise serious legal questions that probably could not be met with a Rule 12(b)(6) motion to dismiss. Instead, there is no dispute that this action concerns, *inter alia*, two convicted murderers who are being taken off death row pending a redetermination of their death-penalty sentences. In setting forth this allegation in the complaint, Respondents Stevenson and Manley have provided the reasonable relationship between their housing status and a legitimate government objective – prison security. The complaint also provides the reason for the transfer of Stevenson and Manley: when their death sentences were vacated, they were transferred off death row pursuant to "standard practice." (Pet. App. 34).

One can imagine or infer other reasons for the housing of Respondents in SHU, as the Third Circuit was willing to do and as Respondents urge this Court to do, but the allegations in this case make that inference in the realm of speculation.

It is always possible to imagine or infer an improper or arbitrary purpose behind the conduct of prison officials. In the absence of factual allegations that, if true, constitute a cognizable claim, federal courts should not feel obligated under the Federal Rules to imagine bad motives or bad conduct by

prison officials. Such inferences are not reasonable. To hold that the mere possibility of such an inference means the case must go through discovery is to hold that virtually any set of allegations by a prisoner in high security housing states a claim. If federal judicial deference to the discretion of state prison officials is a principle with any substance as a practical matter, prison officials must be freed from going through discovery in every case with detainees just because punitive intent or dissimilar treatment is alleged. These allegations are made in virtually every case.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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