No. _____ 07-575 OCT 29 2007



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**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Two of the three Respondents (Stevenson and Manley) were sentenced to death for committing first-degree murder. After their sentences were vacated and their cases were remanded for resentencing, prison officials transferred them from death row to a highly-secure housing area known as the Security Housing Unit (SHU). The third Respondent (Jones), transferred to SHU after a prison disturbance, was awaiting trial for first-degree murder. The questions presented are:

1. Whether, as the Third Circuit held, Respondents were entitled under the Due Process Clause to receive an explanation of the reason for their transfer and an opportunity to respond.

2. Whether, as the Third Circuit held, Respondents stated a substantive due process claim upon which relief could be granted because they alleged that their transfer to SHU constituted punishment.

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## OPINIONS BELOW

The opinion of the court of appeals is reported at 495 F.3d 62 (3d Cir. 2007), and is reproduced at App. 1. The district court's opinion is unreported but reproduced at App. 20.

## JURISDICTION

The court of appeals entered its opinion and judgment on July 30, 2007. No rehearing petition was filed below. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional provision is the Due Process Clause of the Fourteenth Amendment to the United States Constitution, which states as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

## STATEMENT OF THE CASE

On March 4, 2004, the Respondents – three prisoners housed at the Delaware Correctional Center ("DCC") – filed an action under 42 U.S.C. § 1983 against Warden Thomas Carroll, alleging violations of their substantive and procedural due process rights. The United States District Court for the District of Delaware dismissed their complaint. The United States Court of Appeals for the Third Circuit reversed, holding that Respondents stated valid substantive and procedural due process claims sufficient to survive a motion to dismiss.

### A. Factual Background

1. The three Respondents in this case are David Stevenson, Michael Manley, and Michael L. Jones. At the time of their complaint, Respondents Stevenson and Manley were awaiting resentencing. Both had been convicted and sentenced to death in January 1997, but their sentences were vacated and remanded on or about May 30, 2001. At that time, they were moved off death row and into the Security Housing Unit ("SHU"). Stevenson was moved from the SHU to a less restrictive pre-trial facility in December 2003, but was returned to the SHU in January 2004.

According to the complaint, neither one of them received a hearing or explanation for their transfers into the SHU. They were both subsequently resentenced to death on February 3, 2006.

The third Respondent, Jones, was awaiting trial for first-degree murder at the time he filed his complaint. Following an alleged prisoner riot at Gander Hill Prison in Wilmington, Delaware, he and several other inmates were moved to the SHU on or about February 19, 2003. Jones asserted that, like Stevenson and Manley, he was not afforded an explanation or hearing regarding his transfer into more restrictive housing. He did, however, state that he was alleged to have been involved in the riot at Gander Hill. Jones was subsequently found guilty of first-degree murder and sentenced to life imprisonment on September 16, 2005.

Prior to their resentencing (in the case of Stevenson and Manley) and conviction (in the case of Jones), the Respondents filed their § 1983 actions. They sought relief in the form of a transfer into the general prison population, monetary damages, and the establishment of a system of review for transfers of pretrial detainees into the SHU.

2. The Delaware Correctional Center (DCC) is the largest prison in Delaware, and is located in Smyrna, Delaware (10 miles north of Dover). It houses both convicted and sentenced inmates, and it holds the State's only death row housing area, which is maximum security. DCC also houses pretrial

detainees (a category which, under Third Circuit precedent, includes inmates whose sentences but not convictions have been overturned).[1] DCC provides two levels of housing for pretrial detainees: the general population is housed in the B Building pretrial unit, and security-risk detainees are housed in the Security Housing Unit (SHU) in Building #18. (App. 53). SHU is more restrictive than the general population pretrial, but detainees in SHU are permitted access to attorneys, the law library, commissary, recreation, and grievance procedures. (App. 54). Upon receiving a sentence, the prisoners will go through the classification process. (App. 54).

In their complaint, Stevenson and Manley alleged that they had been housed in SHU for 32 months since being off death row. (App. 34, 37). Contrasting the conditions in the SHU with pretrial general population conditions (App. 34-37), they characterized the transfers as "punitive." (App. 34). At no place in the complaint, however, did they allege any motive by any official to punish them or any statement by any official indicating an intent to punish them.

The complaint failed to address the conditions in death row or compare them to the conditions in SHU.

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[1] Prisoners who have been convicted but not yet sentenced are deemed pretrial detainees in the Third Circuit. App. 7 (citing *Cobb v. Aytch*, 643 F.2d 946, 962 (3d Cir. 1981); *Fuentes v. Wagner*, 206 F.3d 335, 341 (3d Cir.), *cert. denied*, 531 U.S. 821 (2000).

In fact, the complaint acknowledged that Stevenson and Manley's transfer off death row and return to pretrial detainee status after their sentences were vacated was pursuant to "standard practice" at DCC. (App. 34). The complaint alleged that "other inmates . . . in the same situation" were moved to general population for detainees instead of SHU. (App. 8). The complaint failed to specify whether the "same situation" meant having a sentence vacated or having a death sentence vacated.

An affidavit by the Warden that was attached to his motion to dismiss described the reasons for the Respondents' placement in SHU. (App. 52). The Warden's affidavit stated that detainees considered a security risk are housed in the SHU pretrial area. Because all three plaintiffs were charged with first-degree murder, and two of them had been convicted of that charge, they were considered highly dangerous. Stevenson and Manley were considered especially dangerous because they were subject to being sentenced to death again. Therefore, they were assigned to the pretrial area of SHU. (App. 53).

### B. Proceedings Below

The district court held that the Respondents' complaint failed to state a claim upon which relief can be granted. (App. 23). It found that their transfer into the SHU was within the scope of the prison officials' authority with respect to prison management. And, relying on *Hewitt v. Helms*, 459 U.S. 460

(1983), and *Sandin v. Conner,* 515 U.S. 472, 482-83 (1995), the court found no state law or regulation conferring a liberty interest upon the Respondents. (App. 23).

Respondents appealed to the Third Circuit. They presented two arguments as to why their complaint should have survived the motion to dismiss. First, they argued that they sufficiently asserted a liberty interest in being free from punishment prior to imposition of sentence. Second, they asserted that they should have been afforded notice of their transfer and an opportunity to respond. The Warden disputed the sufficiency of their substantive and procedural due process claims, arguing that the gist of their complaint was that they had a right to be in general population, for which they had no cognizable liberty interest.

The court of appeals held that the Respondents were entitled to procedural due process at the time they were transferred to SHU. (App. 14). This holding applied to Stevenson and Manley as well as to Jones, even though Stevenson and Manley had been housed in death row before their transfer. The court reasoned that "[a]lthough 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." (App. 14). The court ruled, therefore, that detainees who are administratively transferred are generally entitled to procedural due process: "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." (App. 15).

The court of appeals also held that the complaint sufficiently alleged a substantive due process claim to survive a motion to dismiss. The court found that the reasoning of *Sandin v. Connor*, 515 U.S. 472 (1995), had no application to the Respondents in this case, who are all deemed pretrial detainees under Third Circuit precedent. Relying upon *Bell v. Wolfish*, 441 U.S. 520 (1979), the court stated that the issue was whether prison officials were punishing the Respondents when they transferred them to the SHU. Noting that Stevenson and Manley asserted they were not treated the same as other similarly situated inmates, the court found that one reasonable inference from the complaint was that the Respondents' confinement in SHU was arbitrary and, therefore, punitive. (App. 11).[2]

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[2] In a footnote, the court stated that the Respondents' request for a system of review for transfers of pretrial detainees into SHU was moot because, at the time of this decision, Stevenson and Manley were back on death row and Jones was housed in the part of SHU for sentenced inmates. However, the court viewed the plaintiffs' claims for monetary damages and relief in the form of a transfer into the general population as viable. (App. 3 n.1). The court also ruled that the determination of qualified immunity should be initially decided by the district court. (App. 19).

## REASONS FOR GRANTING THE PETITION

It has been nearly 30 years since this Court issued its seminal opinion on the rights of pretrial detainees: *Bell v. Wolfish*, 441 U.S. 520 (1979). Today, the circuit courts are going in different directions on the scope of detainees' rights under the Due Process Clause, each in reliance upon *Bell*. It is time for this Court to provide additional guidance on the issue.

The instant case is the appropriate vehicle to address the issue, for it illustrates the conflict and confusion among the circuits, as well as a departure from the original precepts of *Bell*. The Third Circuit has announced a sweeping rule that *all* pretrial detainees have a liberty interest entitling them to notice and opportunity to respond *any* time they are transferred to more restrictive housing. Applied here, the Third Circuit rule led to the following, utterly illogical, outcome: convicted murderers moved from death row to a highly secure housing area for pretrial detainees, pending a determination in state court as to whether they should receive death sentences or life imprisonment, are deemed to have procedural due process rights that are triggered by the move. The same result would not obtain in several other federal courts of appeal, which have concluded in conflict with the Third Circuit that administrative transfers do not implicate pretrial detainees' liberty interests.

The Third Circuit's substantive due process ruling also warrants this Court's review. The Third Circuit held that, because the complaint asserted that

the Respondents were not treated the same as other similarly situated inmates, the complaint stated a claim for a violation of their substantive due process rights. It is highly implausible, however, that a death row inmate is being punished when he is transferred *out of* death row. The complaint did not assert that the new housing unit is any more restrictive than death row. Nor did it identify any fact supporting the Respondents' allegation of dissimilar treatment. If such a complaint can survive a motion to dismiss, motions to dismiss will never succeed on this issue. It should not be that easy for prisoners to force prison officials to go through discovery.

## I. CERTIORARI SHOULD BE GRANTED TO REVIEW THE THIRD CIRCUIT'S RULING THAT THE DUE PROCESS CLAUSE REQUIRES PRISON OFFICIALS TO PROVIDE PRETRIAL DETAINEES WITH NOTICE AND AN OPPORTUNITY TO RESPOND WHENEVER THE DETAINEES ARE TRANSFERRED TO MORE RESTRICTIVE HOUSING UNITS.

### A. The Circuits Are in Conflict over This Issue.

#### 1. The circuits are in conflict over whether administrative transfers of detainees implicate procedural due process.

a. Numerous precedential opinions from other courts of appeal, most notably the Sixth and Seventh

Circuits, have held that administrative transfers of detainees generally do not implicate procedural due process concerns. *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).

Detainees charged with murder are commonly housed in maximum security, with many restrictions and few privileges, and their due process challenges are commonly rejected by the courts. In *Crane v. Logli*, 992 F.2d 136 (7th Cir. 1993), the Seventh Circuit rejected a detainee's procedural due process claim on facts similar to those alleged here. The detainee was held in a maximum security prison during the period after his conviction was reversed by an appellate court and pending retrial. The lower court dismissed the complaint and the Seventh Circuit affirmed the dismissal. Applying the *Bell v. Wolfish* due process analysis, the court found no liberty interest was implicated. *Id.* at 139. Although the Seventh Circuit questioned whether the plaintiff was really a pretrial detainee, it also relied on the analysis of the district court in *Getch v. Rosenbach*, 700 F.Supp. 1365, 1370 (D.N.J. 1988). In *Getch*, the plaintiff's detainee status was accepted by the court but found subordinate to the fact that the Due Process Clause simply did not create a liberty interest under those circumstances. Although the plaintiff in

*Getch* failed to dispute that he lacked a liberty interest under the Due Process Clause of the Fourteenth Amendment, the district court's analysis clearly demonstrated the court's belief that such an interest was absent. *Id.* at 1370. The Seventh Circuit agreed with that view. *See also Franklin v. True*, 76 F.3d 381 (table), 1996 WL 43532 (7th Cir. Jan. 30, 1995).

The Sixth Circuit has likewise rejected the notion that detainees have a liberty interest in the security level of their confinement. In *Martucci v. Johnson*, 944 F.2d 291 (6th Cir. 1991), the Sixth Circuit rejected the claim of a liberty interest in the context of a short-term disciplinary confinement for a detainee. The lower court found that the confinement was based on a security decision and granted summary judgment for the defendants. Applying *Bell v. Wolfish*, the Sixth Circuit embraced the lower court's reliance on the principle of deference to the judgment of prison officials as to security decisions. The appellate court stated: "The federal Constitution, standing alone, does not confer upon prisoners a 'liberty interest' in any particular form of confinement." *Id. See also Stafford v. Edmonds*, 76 F.3d 380 (table), 1996 WL 38222 (6th Cir. Jan. 30, 1996).

b. Through unpublished opinions, the Second and Ninth Circuits have also rejected the notion that the Due Process Clause grants pretrial detainees a liberty interest in the security level of their housing assignment. In *Garcia v. Pugh*, 8 F.3d 26 (table), 1993 WL 362268 (9th Cir. Sept. 17, 1993), the Ninth Circuit held that a detainee's placement in maximum

security did not violate his procedural due process rights because he had no liberty interest in a particular classification. The Ninth Circuit reached the same result in *Alexander v. Frank*, 967 F.2d 583 (table), 1992 WL 149679 (9th Cir. June 30, 1992), in which the court affirmed summary judgment for prison officials where a detainee alleged his classification to maximum security violated the Due Process Clause. Applying *Bell v. Wolfish*, the appellate court held that prisoners "do not have a constitutional right to a particular classification status." *Id.* at *1. The court found a reasonable relationship between the prisoner's murder charges and his classification to maximum security. *Id. See also Miramontes v. Chief of Department of Corrections*, 86 Fed. Appx. 325 (9th Cir. 2004).

The Second Circuit has also rejected the claim that classifying a detainee to maximum security implicates any liberty interest under the due process clause. In *McMillian v. Cortland County Correctional Facility*, 198 F.3d 234 (table), 1999 WL 753336 (2d Cir. Sept. 14, 1999), the Second Circuit affirmed summary judgment for prison officials after finding the classification was rationally related to a legitimate government interest. The appellate court stated that the classification comported with *Bell v. Wolfish* and "did not otherwise impair any liberty interest that would trigger due process requirements." *Id.* at *1.

Although many of these cases were decided at the summary judgment stage, their analysis applies

equally at the motion-to-dismiss stage. The courts reasoned as follows: (1) the Due Process Clause does not create a liberty interest with respect to a transfer to administrative segregation or maximum security, (2) if such an interest exists, it is because it is created by state law, and (3) where state law creates no liberty interest, none exists. In this case, the district court was well aware, through precedent, that Delaware has never provided a liberty interest with respect to housing transfers for administrative or classification reasons, and so it was entitled to dismiss the procedural due process claim. In reversing the district court, the Third Circuit departed from the sound reasoning of several other federal courts of appeals.

### 2. The circuits are in conflict over whether *Sandin v. Connor* applies to administrative transfers of detainees.

In *Sandin v. Conner*, 515 U.S. 472, 484 (1995), this Court held that a State creates liberty interests protected by the Due Process Clause only when it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." In the decision below, the Third Circuit found that *Sandin* had no application to this action because the Respondents were, under that court's precedents, deemed "pretrial detainees." The Third Circuit's opinion deepens an existing conflict over whether *Sandin* applies to determinations of liberty interests

of detainees. Three circuits have held that it does; four circuits agree with the Third Circuit that it does not. This conflict over how to analyze detainees' procedural due process claims further highlights the need for this Court's review.

The Second, Third, Seventh, and Ninth Circuits have held that *Sandin* procedural due process analysis does not apply to detainees. In *Rapier v. Harris,* 172 F.3d 999, 1004-05 (7th Cir. 1999), for example, the Seventh Circuit distinguished *Sandin* on the ground that pretrial detainees "are not under a sentence of confinement, and therefore it cannot be said that they ought to expect whatever deprivation can be considered incident to serving such a sentence." *See also Benjamin v. Fraser*, 264 F.3d 175, 188-89 (2d Cir. 2001) (same); *Fuentes v. Wagner,* 206 F.3d 335, 341-42 n.9 (3d Cir.) (same), *cert. denied,* 531 U.S. 821 (2000); *Resnick v. Hayes,* 213 F.3d 443, 448 (9th Cir. 2000) (same); *Mitchell v. Dupnik,* 75 F.3d 517, 523 (9th Cir. 1996) (same).

By contrast, the Sixth, Eighth, and District of Columbia Circuits have explicitly applied the *Sandin v. Connor* analysis to detainee due process claims, even in the disciplinary segregation context. *See Polk v. Parnell*, 132 F.3d 33 (table), 1997 WL 778511 (6th Cir. Dec. 8, 1997); *Johnson v. Esry*, 210 F.3d 379 (table), 2000 WL 375269 (8th Cir. Apr. 13, 2000); *Rae v. Henderson*, 1995 WL 759466 (D.C. Cir. Nov. 17, 1995). In *Polk*, the Sixth Circuit found that allegations by a pretrial detainee of being placed in disciplinary segregation for four days without due process

did not constitute an atypical and significant hardship under *Sandin*. In *Johnson*, the Eighth Circuit affirmed the dismissal of a detainee's complaint, finding his due process claim lacked merit because eight days in a solitary cell did not amount to an atypical and significant deprivation under *Sandin*. And in *Rae*, the District of Columbia Circuit granted a motion for summary affirmance, finding that a detainee's due process rights were not violated by placement in protective custody because the confinement did not constitute an atypical and significant hardship under *Sandin*.

Several district courts have remarked upon the confusion that exists 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).

### B. The Third Circuit's Ruling Conflicts with This Court's Decisions.

In viewing the issue as whether pretrial detainees have a right to procedural due process when they

are administratively transferred, the Third Circuit framed the issue in an overly general manner.[3] The issue is, more precisely, whether *these* pretrial detainees had a right to due process under these circumstances. That is, whether pretrial detainees convicted of first-degree murder and housed on death row, or charged with first-degree murder, are entitled to due process when transferred to another high security area. This Court's decisions establish that they are not.

### 1. This Court has always rejected the view that, in the absence of a state-law liberty interest, the Due Process Clause requires procedural protection for prison transfers.

Historically, this Court has found that prisoners have a liberty interest in administrative prison transfers and classification decisions only where state law created such an interest. *See Meachum v. Fano*, 427 U.S. 215, 228-29 (1976); *Montanye v. Haymes*, 427 U.S. 236 (1976); *Olim v. Waukinekona*, 461 U.S. 238 (1983). In contexts other than prisoner transfers and classification, this Court has found that the Due Process Clause itself may be the source of a liberty interest in certain circumstances where some form of

[3] The court stated: "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." (App. 15).

grievous loss is imposed. *See Vitek v. Jones*, 445 U.S. 480, 494 (1980) (stigmatizing consequences of transfer to mental hospital coupled with mandatory behavior modification as treatment for mental illness gave rise to liberty interest). In *Sandin v. Connor*, 515 U.S. 472 (1995), the Court did not reject state law as the general source of liberty interests for prisoner due process claims, but restricted such state-law created liberty interests to the context in which an atypical and significant hardship relative to the ordinary incidents of prison life is alleged.

Even though the decisions of this Court in *Meachum v. Fano*, *Montayne v. Haymes*, and *Sandin v. Connor* were partially premised upon the fact of conviction, they were also premised upon the absence of state law creating a liberty interest, as well as upon the historical discretion of prison officials in making such decisions and the limited role of the federal judiciary with respect to prison management. These latter factors apply with equal strength in the detainee context as with convicted and sentenced inmates.

The district court in this action carefully noted the lack of any state law or regulation creating a liberty interest for the Respondents here. It also noted that prison regulations affirmatively gave the Warden a great amount of discretion: "DOC Procedure 3.31 explicitly states that the warden has virtually unlimited discretion in placing inmates within the prison 'in any security/custody level.'" (App. 42). The court also relied upon *Brown v. Cunningham,*

730 F.Supp. 612, 614 (D.Del. 1990), a District of Delaware precedent that found no state-law created liberty interest in the Delaware prison system. Thus, the most important source of a liberty interest according to *Hewitt v. Helms* and *Sandin v. Connor* – state law – is utterly lacking here.

### 2. There is no reasonable expectation of general population housing conditions here.

In *Sandin*, this Court approached the issue of the existence of a liberty interest from the perspective of what conditions a prisoner may reasonably expect to be subjected to in the prison environment: "Although we do not think a prisoner's subjective expectation is dispositive of the liberty interest analysis, it does provide some evidence that the conditions suffered were expected within the contour of the actual sentence imposed." 515 U.S. at 486 n.9. The fact that a convicted and sentenced prisoner may reasonably expect to face somewhat harsh conditions as part of the punishment counseled against a finding of a liberty interest even where state law could have been said to provide it.

Here, the logic of punishment does not apply, but the question of what housing conditions a detainee charged with or convicted of first-degree murder may reasonably expect is still relevant. The reasonable expectations of a person claiming to have suffered a

deprivation due to state action are always an important factor in liberty interest analysis. Thus, in *Vitek v. Jones, supra,* the Court noted approvingly the district court's conclusion that:

> This "objective expectation, firmly fixed in state law and official penal complex practice," that a prisoner would not be transferred unless he suffered from a mental disease or defect that could not be adequately treated in the prison, gave Jones a liberty interest that entitled him to the benefits of appropriate procedures in connection with determining the conditions that warranted his transfer to a mental hospital.

*Id.* at 489-90.

A detainee convicted of first-degree murder is not in the same position as a detainee charged with shoplifting. However, the court of appeals' decision would treat them as the same because they are both detainees. Some consideration should be paid to what security constraints a detainee should reasonably expect given the circumstances of his case. A detainee convicted of first-degree murder and possibly subject to having the death penalty reimposed should expect to be housed in a restrictive, high-security environment. If he is placed in general population, he may consider himself fortunate, but any expectation of that level of security housing is not reasonable and should not be the basis for a finding of a liberty interest.

### 3. A transfer from one maximum-security housing area to another should not require procedural due process.

Another pertinent factor is what the conditions were in the environment from which the detainee was transferred. Where a detainee convicted of first-degree murder has been housed in death row, and is being moved to another high security area, it is difficult to see how his prior residence in death row conferred a liberty interest upon him. As this Court stated in *Washington v. Harper*, 494 U.S. 210, 222 (1990), "[t]he extent of a prisoner's right under the Clause to avoid [detrimental state action] . . . must be defined in the context of the inmate's confinement."

In *Sandin*, this Court stated that "lawful incarceration" results in the necessary withdrawal or limitation of many privileges and rights. 515 U.S. at 485. A detainee convicted of murder, but not yet sentenced, is as lawfully incarcerated as is a sentenced inmate. Even in terms of the punishment of convicted and sentenced inmates, this Court noted that the process "effectuates prison management and rehabilitative goals." *Id.* While rehabilitation may be inapplicable to detainees, this Court stated in *Bell v. Wolfish, supra,* that the prison management considerations are the same for convicts and detainees. 441 U.S. at 546 n.28. The reasoning of *Sandin* should apply to a detainee, especially one who has been convicted of first-degree murder.

Nothing in *Wilkinson v. Austin*, 545 U.S. 209 (2005), is to the contrary. In *Austin*, this Court held that extended confinement in the Ohio supermax prison created an atypical and significant hardship because of its indefinite duration, and the fact that placement there disqualified an otherwise eligible inmate for parole consideration. *Id.* at 224. There is no allegation in this case that the transfer to SHU had any detrimental effect upon the sentence that the Respondents would receive or serve, including future parole consideration. And it is undisputed that Respondents Stevenson and Manley were only placed in pretrial SHU pending their resentencing to either death or life imprisonment.

### C. This Issue Is Important to the Administration of State Prisons.

The Third Circuit's holding creates a procedural due process right for all pretrial detainees, including convicted but unsentenced prisoners, at or about the time of transfer to a higher security housing area than general population, regardless of the reason for the transfer.[4] The court ruled that "[p]rison officials must provide detainees who are transferred into more restrictive housing for administrative purposes . . . an

[4] The court of appeals seemed to assume that pretrial SHU housing is more restrictive than death row, even though this was not alleged. The complaint focused on a comparison of SHU to the general population conditions, as the court itself noted. (App. 12).

explanation of the reason for their transfer as well as an opportunity to respond." (App. 15). The holding contains no limits: it means that *all* detainees being moved to pretrial SHU will have to receive written notice of the reason for their housing status, with opportunity for them to rebut those reasons, regardless of the reason for their transfer or where they were housed before. Although this rule will aid detainees only marginally, it will cause prison officials considerable time and effort.

Given that the reason for Respondents' confinement in SHU is that they are either convicted of or charged with first-degree murder, there is nothing that notice to them and a paper review of their response would accomplish. It would become a meaningless paperwork task, in addition to already-considerable paperwork obligations, and a further distraction from core responsibilities to protect the lives of prison staff and other inmates. While obligations such as the one imposed in this case may appear in isolation not to be onerous, collectively as such obligations grow in the expanding universe of prisoner rights they can become an enormous distraction from the central tasks of managing a prison or detention facility.

As this Court stated in *Meachum v. Fano*, 427 U.S. 215, 228-29 (1976):

> Holding that arrangements like this [prison transfers] are within the reach of the procedural protections of the Due Process Clause

> would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States.

If every detainee housing transfer allegedly resulting in more onerous conditions is deemed to trigger due process protection, as the Third Circuit holds, then indeed the Due Process Clause has been placed astride the day-to-day functioning of state prisons.

## II. CERTIORARI SHOULD BE GRANTED TO REVIEW THE THIRD CIRCUIT'S RULING THAT RESPONDENTS' SUBSTANTIVE DUE PROCESS RIGHTS WERE VIOLATED WHEN THEY WERE TRANSFERRED TO THE SECURITY HOUSING UNIT.

In *Bell v. Wolfish*, this Court held that "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." 441 U.S. at 535-36. That is not all the Court stated in *Bell*. The Court also set forth three important principles that bear on this case: (1) the presumption of innocence is a doctrine for allocating the burden of proof in criminal trials, and has no bearing on the rights of a detainee concerning prison

conditions (*id.* at 533); (2) security and other institutional considerations are generally the same with respect to convicted inmates and pretrial detainees, as pretrial detainees may be as dangerous or even more so than convicted inmates (*id.* at 546 n.28); and (3) the courts should play a "very limited role" with respect to detention facilities and, where there is a reasonable relationship between a restriction and a legitimate governmental purpose, restrictions do not without something more amount to punishment (*id.* at 539, 547-48). *See also Block v. Rutherford*, 468 U.S. at 584, 589. Given these principles, it is difficult to reconcile the recent expansion of detainee rights in the Third Circuit with *Bell.*

In the instant case, there is no allegation in the complaint of an express intent to punish by Warden Carroll. The gist of the complaint (as to Stevenson and Manley) is that convicted murderers who have been moved to a pretrial area with conditions little or no better than those in death row would like to be housed in the general population. At one place in the complaint, Respondents characterize their transfers to SHU as "punitive." (App. 34). The use of this term should not, by itself, lead to the conclusion that the complaint states a claim for a substantive due process violation. The court of appeals, more focused on its own broad definition of "pretrial detainee" than the analysis of *Bell*, refuses to incorporate into its analysis any recognition that one should expect first-degree murderers, and those charged with first-degree murder, to be placed in a highly secure housing area.

Nor should it matter that not every person charged with first-degree murder has been placed in SHU: the reasonable relationship between security concerns and highly secure housing exists regardless of past practice.

This Court expanded on the nature of the *Bell v. Wolfish* test in a subsequent case, *Block v. Rutherford,* 468 U.S. 576 (1984). In *Block,* this Court stated that the due process/detainee reasonable relationship test is not a balancing test. That is, the trial court may not balance the detainee's deprivations against the state's interest and determine whether the restrictions are justified. If there is a reasonable relationship between the asserted state interest and the restrictions about which the detainee complains, the trial court is obligated to defer to the professional judgment of prison officials:

> When the District Court found that many factors counseled against contact visits, its inquiry should have ended. The court's further "balancing" resulted in an impermissible substitution of its view on the proper administration of Central Jail for that of the experienced administrators of that facility. Here, as in *Wolfish*, "[i]t is plain from [the] opinions that the lower courts simply disagreed with the judgment of [the jail] officials about the extent of the security interests affected and the means required to further those interests."

468 U.S. at 589.

In the instant action, the Respondents complain that they are held in a high security housing area that is highly restrictive. The asserted state interest is prison security. (*See* affidavit of Warden Tom Carroll at App. 53). Respondents admit that they are charged with capital crimes. (App. 33). The professional judgment of the prison officials is that persons charged with first-degree murder are likely to be highly dangerous individuals, and therefore they present a security risk. Because they are deemed to present a security risk, they are housed in a high security unit of SHU.

The reasonable relationship between the charges against Respondents and the state's interest in prison security is obvious. Only by engaging in some form of balancing can a court alter the required analysis and its necessary outcome. However, such balancing is prohibited. The issue of security, above all others, is one where the professional judgment of prison officials must be respected and judicially affirmed. The housing of alleged murderers is a situation where the issue of security is more clearly implicated than in any other.

In fact, some states do not transfer out of death row those inmates who have been convicted of first-degree murder but are being resentenced. The officials here moved Respondents Stevenson and Manley to the pretrial area of SHU to comport with the Third Circuit's position that they had, by having their death sentences vacated, become like pretrial detainees. From a security perspective, however, nothing

changed with respect to Stevenson and Manley. They remained equally dangerous as when they were sentenced to death.

Finally, if every prisoner complaint using the term "punitive" or alleging that somebody else was treated differently is deemed to state a claim, regardless how insubstantial, the courts will not play a "very limited role" with respect to prison management. The prisoners have all the time in the world to litigate everything they do not like. The prison officials do not. If the prison officials must litigate every detainee housing decision where a detainee uses the term "punitive" in a complaint, or where he alleges others were treated better, the distraction created thereby will be substantial – not limited.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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