NO. ALB-24-01

IN THE SUPREME COURT OF THE UNITED STATES

Zachary BRAVERMAN,

PETITIONER

v.

Jonathan VOSS, et al.,

RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Fourteenth Circuit

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BRIEF FOR RESPONDENTS

Best Respondent Brief

QUESTIONS PRESENTED

I. Does the Sixth Amendment guarantee assistance of counsel at bail hearings, and if so, did the performance of Petitioner's counsel prejudice the guilty plea?

II. Does the Eighth Amendment categorically forbid the postconviction, non-punitive isolation of juvenile offenders, and if not, did the particular conditions of Petitioner's confinement violate either the Eighth or Fourteenth Amendment?

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On September 1, 2022, a grand jury indicted Petitioner Zachary Braverman on one count of assaulting an individual with a deadly weapon for the purpose of stealing a motor vehicle, in violation of A.G.L. ch. 365, § 33. [R. 5]. Known colloquially as "carjacking" with a deadly weapon, this felony offense carries a mandatory minimum sentence of eight years. A.G.L. ch. 365, § 33; [R. 5]. A warrant was issued for Petitioner's arrest, and he was arrested the following day, September 2, 2022. [R. 5].

After he was arrested, Petitioner was brought to Albers City Superior Court, where, after considering the Probation Department's Pretrial Services Report, Petitioner's criminal record and indictment, and arguments from both the Assistant District Attorney and the court-appointed counsel, Harold Melvoin, the judge set bail at $10,000. [R. 6-7].

Four months later, Melvoin negotiated, and Petitioner agreed to, a plea agreement under which the ADA would reduce the charge from carjacking with a deadly weapon to simple carjacking, which carries no mandatory minimum. A.G.L. ch. 365, § 33; [R. 7]. Under Albers law, Petitioner would be sentenced as an adult, but he would be separated from the general prison population during his period of incarceration. A.G.L. ch. 390, § 11; [R. 8].

On January 6, 2023, in accordance with the plea agreement, Petitioner pled guilty to one count of carjacking and was sentenced to two years less four months of time served, and two years of probation upon release. [R. 8]. He was then remitted to the custody of the Beacon Rock Institute for the Moral Betterment of Wayward Adolescents ("Beacon Rock"). [R. 8].

On February 15, 2023, after obtaining new counsel, Petitioner filed a petition in the United States District Court for the District of Albers for a writ of habeas corpus, pursuant to 28 U.S.C. § 2241. [R. 13]. Petitioner sought to have his conviction and sentence vacated, claiming

he had received ineffective assistance of counsel at his bail hearing in violation of the Sixth Amendment. [R. 13]. After conducting an evidentiary hearing, United States Magistrate Judge Marie-Celeste Bhattacharya issued a Memorandum and Recommendation, to which Petitioner timely filed objections, in which she stated that his habeas petition should be dismissed because even if he had a Sixth Amendment right to effective assistance of counsel at his initial bail hearing, Melvoin's assistance was effective. [R. 13].

On May 2, 2023, after reviewing the evidentiary hearing record and Magistrate Judge Bhattacharya's conclusions, United States District Judge Henry Allen Nguyen adopted her recommendation and dismissed Petitioner's habeas petition. [R. 13-14]. While Judge Nguyen held that Petitioner did have a right to effective assistance of counsel at his bail hearing, he agreed with Magistrate Judge Bhattacharya that Melvoin's assistance was indeed effective: Melvoin did not violate any professional norms and Petitioner could not establish prejudice because he received a favorable plea agreement. [R. 14]. Petitioner timely appealed Judge Nguyen's order. [R. 14].

Two weeks earlier, on April 18, 2023, Petitioner had filed a separate action against Beacon Rock under 42 U.S.C. § 1983. [R. 14]. He sought a permanent injunction prohibiting Beacon Rock from placing residents in isolation, as well as compensatory damages for alleged violations of the Eighth Amendment protection against cruel and unusual punishment, and the Fourteenth Amendment right to due process. [R. 14]. After discovery, Respondents, Defendants below, moved for summary judgment. [R. 14].

On May, 31, 2023, Judge Nguyen granted Respondents' motion for summary judgment and dismissed Petitioner's § 1983 claim. While he declined to address the Eighth Amendment claim, he found that the conditions of isolation at Beacon Rock did not violate the Fourteenth

Amendment. [R. 14-15]. Petitioner appealed, and the United States Court of Appeals for the Fourteenth Circuit issued an order consolidating that appeal with Petitioner's appeal of the order dismissing his habeas petition. [R. 15].

On October 20, 2023, after expedited briefing and oral argument earlier in the summer, the Fourteenth Circuit unanimously affirmed both of the District Court's decisions. [R. 26]. First, the Court agreed with the District Court that while a bail hearing is a "critical stage" requiring the presence of counsel, Melvoin's assistance was effective. [R. 20]. Second, the Court refused to hold that the isolation of juveniles is per se unconstitutional, and concluded that Beacon Rock violated neither the Eighth nor the Fourteenth Amendment. [R. 24-26].

This Court granted Braverman's petition for a writ of certiorari on January 19, 2024. [R. 27].

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. amend. XIV, § 1

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.

STATEMENT OF THE CASE

Zachary Braverman ("Petitioner") carjacked an innocent civilian on August 2, 2022 in Albers City. [R. 4]. Albers City is the capital of the state of Albers, and has seen an uptick in gang-related, violent carjackings in recent years. [R. 3]. After the carjacking, Petitioner was indicted by a grand jury, [R. 5], held in pretrial detention with bail set, and pled guilty four months later. [R. 8]. But Petitioner did not have to serve the mandatory eight years because his court-appointed counsel, Harold Melvoin, convinced the prosecution to drop a deadly weapons charge, and instead, Petitioner would serve just twenty more months, plus probation. [R. 8]. Despite Melvoin having reduced Petitioner's sentence by nearly eighty percent, Petitioner sought habeas relief for ineffective assistance of counsel. [R. 13]. While in juvenile detention, a rival gang beat up Petitioner's fellow gang members and threatened that he was "next." [R. 9]. So, Petitioner was moved into "protective isolation," which Petitioner now alleges was cruel and unusual punishment and lacked due process in violation of his Eighth and Fourteenth Amendment rights. [R. 14].

1. Pre- and Post-Bail Hearing Proceedings

Petitioner was arrested and brought to the Albers City Superior Court for a bail determination the day after the Albers Assistant District Attorney secured a grand-jury indictment. [R. 4-5]. Upon arrival, on September 2, 2022, a probation officer interviewed Petitioner and completed a Pretrial Services Report to assist the judge when making the bail determination. [R. 5]. The sole purpose of this report is to collect administrative and biological information. [R. 5 n.7]. Although Petitioner told the officer that he "bounce[d] around," was "on [his] own," and "look[ed] after [him]self," he gave the probation officer his mother's home

address and her phone number, as well as his grandfather's phone number. [R. 5]. Petitioner stated he stayed with his mom sometimes and his grandparents other times. [R. 5].

The court clerk compiled the report, along with Petitioner's criminal history report and the indictment, and gave copies to the judge and ADA. [R. 6]. The clerk also realized that Melvoin happened to be present and qualified for appointment, [R. 6 n.8], so the clerk gave him a copy of everything and told Melvoin that he might be appointed by the judge soon. [R. 6].

Melvoin visited Petitioner in pretrial lock-up and spoke with him about the situation for about ten minutes. [R. 6]. Melvoin explained to Petitioner that his living situation and ties to the community could be relevant to the judge's determination on bail. [R. 6]. He then asked if Petitioner wanted him to call his mother or grandparents, but Petitioner said "[i]t doesn't matter . . . I don't care." [R. 6]. Melvoin then discussed the administrative and logistical matters with the ADA, who said he intended to request that the judge set bail because Petitioner lacked "any solid family connections." [R. 7]. The bail hearing began fifteen minutes later. [R. 7].

At the bail hearing, the judge appointed Melvoin to represent Petitioner. [R. 7]. After informing Petitioner of the charges against him, the judge discussed with the ADA and Melvoin whether bail should be set. [R. 7]. While the ADA pointed to Petitioner's lack of secure family connections, Melvoin made the strategic decision to focus on Petitioner's juvenile status and minimal criminal record, which the ADA previously described as "pretty clean." [R. 6-7]. The judge acknowledged the various factors for his consideration, deemed Petitioner a flight risk, and set bail at $10,000 as "reasonably necessary to ensure" he appeared at trial. [R. 7].

Melvoin visited Petitioner multiple times in pretrial detention to discuss case strategy. [R. 7]. Melvoin listened to his client's concerns. Petitioner told him, "Just do whatever you got to do to get me out of here, I just want to get out of here." [R. 7]. And when Melvoin asked if he

were interested in negotiating a guilty plea, Petitioner replied, "Whatever gets me out of here as soon as possible." [R. 7].

Melvoin convinced the ADA to reduce the charge from carjacking with a deadly weapon—carrying a mandatory minimum eight-year sentence—to simple carjacking with no mandatory minimum. [R. 7]. Melvoin then explained the successful terms of the deal to Petitioner: he would get credit for time already served; he would not be in general population with adults; and rather than serve almost a decade, he would be released on probation in twenty months—before he would ever be transferred to the adult prison population. [R. 7]. Petitioner pled guilty on January 6, 2023 and was remitted to the custody of the Beacon Rock Institute. [R. 8].

2. Petitioner's Carceral Experience

Beacon Rock Institute is a juvenile center that follows a "training school" model. [R. 8]. This consists of a "rigorous program of academic and professional instruction." [R. 8]. The institution employs teaching staff to instruct students in math, science, history, and English, to the high school equivalent. [R. 9]. In addition to academic development, residents also have supervised access to wood shop, a half-acre of farmland, a small library, and state-of-the-art physical education facilities. [R. 9]. Beacon Rock also has a resident psychiatrist, Dr. Tabitha Watson, who, upon reviewing Petitioner's medical history, ensured his daily antipsychotic medication was available upon his arrival. [R. 9]. And for the first three months at Beacon Rock, the staff considered Petitioner to be a "model student." [R. 9].

However, Petitioner butted heads with several staff members, and he made no secret of his membership in the Breakers, a violent gang known to have committed several carjackings and other crimes in Albers City. [R. 5, 9]. On one occasion, Petitioner had to be restrained after

physically striking staff member Lincoln Johnson. [R. 9]. In addition to violence with the staff, occasional gang violence loomed. [R. 9]. On April 2, 2023, a fistfight broke out and five members of the Blood Brothers, the rival gang of Petitioner's Breakers, put two Breakers in the infirmary with bruises and a broken nose. [R. 9]. Johnson and another staff member heard a Blood Brother warn Petitioner that he was "next," and later they made "threatening gestures" toward Petitioner. [R. 9]. So, superintendent Jonathan Voss ordered the staff to move Petitioner to "protective isolation to prevent further violence." [R. 9].

3. Protective Isolation

The isolation wards at Beacon Rock are located in the Reflective Rehabilitation Unit ("RRU") and measure nine feet by ten feet. [R. 10]. The rooms have a twin-sized cot, a metal sink, a toilet, and a six-inch square window for natural light. [R. 10]. Every day, the lights turn on at 6:30 AM and turn off at 8:30 PM. [R. 10-11]. Although the cells are heated during winter, they do not have air conditioning. [R. 10]. Although Beacon Rock's policy limits the duration of stay to twenty-four hours when inmates are sent for disciplinary reasons, no such policy interest is at play when, like Petitioner, inmates are sent to the RRU for their personal safety. [R. 10]. In Petitioner's case, Beacon Rock's policy allows his protective isolation for "as long as necessary to guarantee the safety of the isolated resident." [R. 10]. This policy has never been litigated, nor is there any state law regulating it. [R. 10].

Petitioner and others in the RRU followed the same daily routine, slightly modified from the at-large "training school" model. [R. 10]. Petitioner exercised outdoors for one hour every day, during which time he was able to interact with his non-isolated friends. [R. 11]. He also self-studied with a daily "curriculum packet" for each subject and was expected to keep up with non-isolated residents. [R. 11]. Petitioner received hourly wellness checks from the staff, who

also cleaned and sanitized each isolation unit every day. [R. 11]. And every other day, Petitioner was visited by Dr. Watson, who monitored his overall mental and emotional state, and performed a self-harm assessment. [R. 11].

Petitioner stayed in protective isolation at the RRU for one unseasonably warm week. [R. 11]. Throughout the first three days, his toilet was non-functional, so to mitigate the unpleasant odor, staff escorted him to an adjacent cell to use the toilet. [R. 12]. Petitioner and Johnson disagreed on personal items and medication. [R. 11-12]. Johnson exercised his discretion to remove anything deemed dangerous and confiscated Petitioner's personal items, replacing, for example, Petitioner's toothbrush with a "safe design" toothbrush. [R. 11]. And although Petitioner complained to Johnson that he only received half the dosage of his medication, Johnson swore under oath that he administered the exact amount directed on the paperwork he was given. [R. 12]. Petitioner claimed he felt depressed from the second day in the RRU until two weeks after his release, but Dr. Watson's evaluations indicated his emotional state did not meet the benchmarks to qualify as "depressed." [R. 12]. Petitioner never attempted, or even displayed any desire, to harm himself or any other inmate in the RRU, nor did he have a single altercation with staff or residents for the remainder of his sentence. [R. 13].

SUMMARY OF THE ARGUMENT

The two main issues in this case both turn on the extent to which the federal constitution can be used to restrict the discretion of state and local government officials. This Court should reject Petitioner's attempt to drastically expand the reach and responsibilities of federal courts. Instead, this Court should continue to grant public servants a sensible degree of deference as they strive to carry out their duties in accordance with their informed professional judgment.

This Court should affirm the lower court's denial of Petitioner's habeas corpus petition because the specific provisions of the Sixth Amendment have never included protections at bail hearings, and Petitioner's counsel made reasonable judgment calls that resulted not in a prejudiced plea deal, but a successful negotiation on Petitioner's behalf.

The Sixth Amendment was carefully crafted by the framers with specific objectives such as guaranteeing the assistance of counsel during prosecutions. The Framers well understood the role of bail hearings and deliberately excluded them from protection under the Sixth Amendment. When this Court has extended the amendment beyond the text, it has done so cautiously and only on rare occasions when developments rendered a critical stage of criminal procedure to be akin to the trial itself. The focus has always been trial. On pretrial liberty, the Sixth Amendment is silent.

The bail hearing is administrative in nature. It is not adversarial like trial. Trial turns on the merits of the case; trial has witnesses, cross-examination, rules of evidence, and, ultimately, trial decides the outcome of the case. Bail hearings have none of these critical features. There are no witnesses to cross-examine, no evidence, and no discussion of the merits other than determining an appropriate tier of cash bail, if at all. Although the prosecution proffers evidence, the proper rules of evidence do not apply because everything presented is merely to inform the

court for purposes of setting bail. Ultimately, the case itself is not decided; all that is determined is pretrial detention. This is not relevant to the Sixth Amendment. While in past cases, changes in criminal procedure have rendered a pretrial phase equal to trial itself, prompting this Court to expand Sixth Amendment protections, no such change has occurred here.

By any plausible understanding of the word, Petitioner's outcome was not *prejudiced*. First, Attorney Melvoin's strategic decision receives high deference and is judged against an objectively reasonable standard. Second, the decision not to call family at the bail hearing lacks any tangible nexus with the successful plea deal. Petitioner instructed his attorney to get him out of prison as soon as possible, so Attorney Melvoin successfully negotiated a plea deal to secure Petitioner's release at least six years early—from a mandatory *minimum* eight years to time served plus twenty months.

This Court should also affirm the Fourteenth Circuit's dismissal of Petitioner's § 1983 claim because non-punitive isolation of juvenile offenders is not per se unconstitutional, and the particular conditions of Petitioner's confinement violated neither the Eighth nor the Fourteenth Amendment.

Unlike recent cases in which this Court expanded Eighth Amendment protections, a national consensus against the relevant practice is conspicuously absent here. Quite the opposite, in fact: every single state affirmatively authorizes some form of non-punitive isolation of juvenile offenders—a clear, uniform confirmation of its constitutionality. But a categorical rule prohibiting this practice would not only nullify democratically enacted statutes in all fifty states—it would also replace prison administrators' firsthand knowledge and expertise with individual judges' opinions, launching federal courts into the day-to-day operations of juvenile detention facilities. Prison officials know that protective isolation is not a cruel or unusual

punishment, but rather a regrettably necessary means for maintaining individual and institutional security in volatile situations. This Court should refuse to second-guess that assessment.

Petitioner's particular conditions of confinement also violated neither the Eighth nor the Fourteenth Amendment. Regarding his Eighth Amendment claim, Petitioner's conditions included daily socialization, exercise, and educational opportunities, as well as hourly wellness checks, and thus never posed a substantial risk of serious harm. Additionally, Petitioner never showed any signs of serious harm to which Respondents could have been deliberately indifferent, and their efforts to protect him from physical harm and provide him with continuous mental health care likewise illustrate no such indifference. Regarding his Fourteenth Amendment claim, even if Petitioner could show that he had a liberty interest in avoiding restrictive conditions of confinement, the multiple threats he received following a brawl between rival gangs justified immediate protective isolation. Petitioner's conditions of confinement were constitutional, and this Court should affirm the Fourteenth Circuit's dismissal of Petitioner's § 1983 action.

ARGUMENT

I. THE SIXTH AMENDMENT DOES NOT EXTEND TO BAIL HEARINGS BECAUSE THEY HAVE NO EFFECT ON TRIAL, AND PETITIONER'S SUCCESSFUL PLEA DEAL WAS NOT PREJUDICED IN ANY WAY.

The reach of the Sixth Amendment "is limited by its terms." Rothgery v. Gillespie Cnty., 554 U.S. 191, 198 (2008). The Sixth Amendment reads, in "all criminal *prosecutions*, the accused shall enjoy . . . the Assistance of Counsel *for his defense*." U.S. Const. amend. VI (emphasis added). Because of the "intricacies of the law," the "core purpose" of the right to counsel is to "assure 'Assistance' at trial." United States v. Ash, 413 U.S. 300, 309 (1973). Only certain pretrial proceedings require counsel. United States v. Wade, 388 U.S. 218, 224-25 (1967) (deeming proceedings critical when "the results might well settle the accused's fate and reduce the trial itself to a mere formality"). This Court has never extended the right to counsel to bail hearings. Guill v. Allen, No. 1:19CV1126, 2023 WL 6159978, at *28 (M.D.N.C. Sept. 21, 2023) ("[T]he Court has not addressed whether a bail hearing constitutes a critical stage."). This issue is reviewed de novo. Ash, 413 U.S. at 301.

This Court should affirm the lower court's denial of habeas relief for three reasons—though *each* is sufficient to resolve the case. First, criminal procedure has not sufficiently evolved regarding bail hearings to warrant a new Sixth Amendment extension. Second, the bail hearing closely resembles non-critical stages of the prosecution. Third, following the history and tradition of resolving cases by non-constitutional means, this Court can resolve this case on the narrow grounds that counsel's performance was not *constitutionally deficient*, nor did it prejudice the outcome.

A. An extension of the Sixth Amendment to bail hearings is unnecessary to preserve a fair trial, and the liberty interest at issue has no textual basis in the Amendment.

This Court has wrestled with the Sixth Amendment and bail hearings for over two hundred years and never extended the right to counsel at bail hearings. The Court has only extended the right to counsel to pretrial events when they become "parts of the trial itself." Ash, 413 U.S. at 310 (describing extensions of the right to counsel as having "resulted from changing patterns of criminal procedure and investigation"). In Missouri v. Frye, this Court recognized a modern development that over ninety-seven percent of criminal cases resulted in guilty pleas, so the Sixth Amendment should protect the accused during that critical stage. 566 U.S. 134, 135 (2012). Frye emphasized that plea bargains had "become so central" that the modern justice system had become "a system of pleas, not a system of trials." Id. at 143 (quoting Lafler v. Cooper, 566 U.S. 156, 157 (2012)).

But the institution of bail, and particularly its relation to the entire criminal process, has remained largely unchanged as an informal hearing in preparation for prosecution at trial. When the Sixth Amendment was adopted, Blackstone's description was considered the "preeminent authority on English law." Rothgery, 554 U.S. at 219 (Thomas, J. dissenting) (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)). Blackstone's Commentaries describe the "various stages" as progressive steps with "commitment and bail" preceding formal "prosecution." Id. at 219-20 (distinguishing the criminal process as a whole from "prosecution," which was "the third step in a list of successive stages"). Significantly, Blackstone's description "accorded with the ordinary meaning of the term." Id. at 221 (citing 2 Noah Webster, An American Dictionary of the English Language (1828)). So, bail has always been understood to be informal preparation *before* the prosecution.

An extension to bail hearings is also unnecessary because, like probable cause determinations, bail hearings pose no risk to a fair trial. See Rothgery, 554 U.S. at 216 (Alito, J. concurring) (quoting Gerstein v. Pugh, 420 U.S. 103, 122-23 (1975)) (explaining probable cause hearing "'is addressed only to pretrial custody' and has an insubstantial effect on the defendant's trial rights"). The Sixth Amendment provides counsel to the accused during the prosecution; it does not protect the liberty interests at issue during bail hearings. See United States v. Gouveia, 467 U.S. 180, 191 (1984); Kirby v. Illinois, 406 U.S. 682, 689-90 (1972). Bail hearings present serious risks, to be sure, but these are primarily liberty interests in avoiding pretrial detention, which are protected by other constitutional amendments like the Fourth Amendment's probable cause requirement and the Fifth and Fourteenth Amendments' guarantee of due process. U.S. Const. amends. IV, V, XIV. Bail hearings affect only pretrial liberty, not the fair trial itself.

In sum, this Court should reject constitutionalizing the bail hearing because there have not been adequate changes in criminal process to substantiate a seismic departure from the plain text and original public meaning of the Sixth Amendment.

B. Bail hearings are not critical stages of criminal prosecution because they are not formal adversarial proceedings on the merits and do not risk prejudice on a fair trial.

The right to counsel is not absolute. The right of the "accused to assistance of counsel in 'all criminal prosecutions' 'does not attach until a prosecution is commenced.'" Rothgery, 554 U.S. at 198 (quoting McNeil v. Wisconsin, 501 U.S. 171, 175 (1991)). But defense counsel is not actually required to be present when the right attaches nor at every stage thereafter. Id. at 212 (explaining the accused is only "entitled to the presence of appointed counsel during any *critical sta*ge of the *post*-attachment proceedings") (emphasis added). Conflating the distinct analyses of attachment and critical stage is "an analytical mistake." Id.; Michigan v. Jackson, 475 U.S. 625,

629 n.3 (1986) (distinguishing "the initiation of adversary judicial proceedings" from a "critical stage requiring the presence of counsel").

Although here "attachment" likely occurred, this Court should not repeat the "analytical mistake" of conflating attachment with the critical stage analysis necessary to require counsel. This Court has made clear that for counsel to be a constitutional requirement, the proceeding must be a critical stage. And this Court has never held the bail hearing to be a critical stage.

The "principle of Powell" requires courts to "scrutinize *any* pretrial confrontation of the accused" to determine whether the right to counsel is necessary. Wade, 388 U.S. at 227 (citing Powell v. Alabama, 287 U.S. 45 (1932)). This scrutiny requires a two-part critical stage analysis. First, "whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial *as affected by his right meaningfully to cross-examine the witnesses against him*." Id. Second, "whether potential *substantial prejudice* to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Id. (all emphasis added). The Court elaborated on the critical stage analysis using practical, prosecutorial terms in four factors, which justified a distinction of critical stage.

The Court expounded on the Wade critical stage two-part analysis and considered four factors in Coleman v. Alabama, to elevate the preliminary hearing to a critical stage. 399 U.S. 1 (1970). When Wade and Coleman are applied to the bail hearing, it becomes clear that the bail hearing is not a critical stage of the *criminal prosecution*.

1. The presence of counsel at a bail hearing does not affect the preservation of the right to a fair trial because of its limited, informal function and absence of witnesses.

Bail hearings affect pretrial liberty not the right to a fair trial. The parallel reasoning yet opposite holdings of Coleman and Gerstein illustrate how the bail hearing is not a critical stage.

When this Court extended the Sixth Amendment to the preliminary hearing in Coleman, it described four factors that justified the preliminary hearing as a critical stage. First, the "skilled examination and cross-examination of witnesses may expose fatal weaknesses"; second, "the skilled interrogation of witnesses . . . can fashion a vital impeachment tool"; third, "trained counsel can more effectively discover the case the state has . . . [and make] preparation of a proper defense"; and fourth, "counsel can be influential at the *preliminary hearing* . . . for an early psychiatric examination or bail." Coleman, 399 U.S. at 9 (emphasis added). None of the critical stage factors from Coleman apply to bail hearings.

However, five years later, this Court weighed these factors in the context of the probable cause hearing and rejected extending the Sixth Amendment any further. In Gerstein, the Court held that pretrial proceedings serious enough to be deemed "critical stages," should be limited to only those that "would impair defense on the merits if the accused is required to proceed without counsel." 420 U.S. at 122. The Court distinguished the probable cause hearing as having a "limited function" and "nonadversary character." Id. at 122-23.

The Gerstein Court identified "two critical factors" that supported the distinction to *not* require counsel at probable cause hearings. First, although pretrial custody "may affect to some extent" the defendant's ability to prepare for trial, it would not present "the high probability of substantial harm identified as controlling in Wade and Coleman." Id. at 122-23. Second, the defense counsel's role in the defense "on the merits" to confront and cross-examine witnesses was not at issue because the prosecution does not produce witnesses nor leverage rules of evidence, so these considerations do "not apply." Id.; 18 U.S.C. § 3142.

The crux of the critical-stage factors and Sixth Amendment is trial. And, like the probable cause hearing, the bail hearing lacks the essential nexus with trial rights. Unlike critical stage as

described in Coleman, Petitioner's bail hearing did not require "skilled examination and cross-examination" because there were no witnesses. Second, Petitioner's bail hearing did not require "skilled interrogation" nor "fashion[ing] a vital impeachment tool" because, again, no witnesses and no rules of evidence. Third, "trained counsel" was not required to "discover" the state's case because the ADA simply proffered the same facts from the court-provided Pretrial Services Report. [R. 6-7]. When the Court fashioned this critical stage analysis, it had in mind situations where a defendant could not "prepare his defense, even though he had a perfect one," and instead "face[d] the danger of conviction because he does not know how to establish his innocence." Powell, 287 U.S. at 69. It strains credulity to analogize the overwhelmed defendant in Powell with Petitioner's bail hearing.

2. Petitioner's bail hearing did not have the potential to substantially prejudice his rights, and even if it did, the ability of counsel to help avoid that prejudice is negligible.

Bail hearings do not have the potential to prejudice the defendant's right to a fair trial. The "principle of Powell" requires courts to analyze whether "substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." Wade, 388 U.S. at 227. The dynamic, physical lineup, for example, which may "elicit identification evidence is peculiarly riddled with innumerable dangers . . . might seriously, even crucially, derogate from a fair trial." Id. at 228. Moreover, a defendant's inability "to reconstruct at trial any unfairness that occurred at the lineup may deprive him" of the chance to confront the witness and attack his credibility at trial. Id. at 231-32. However, the Court distinguished "preparatory steps," like fingerprints and biographical information, as non-critical. Id. at 227. The preparatory steps were not critical because they had "minimal risk" to "derogate from his right to a fair trial." Id.

Petitioner's only interest at stake at the bail hearing was his pretrial liberty—not his right to a fair trial. Petitioner cannot plausibly claim prejudice without wrenching the Sixth Amendment from its core purpose and calling into question the entire pretrial detention process. Given Petitioner was appointed counsel—indeed Melvoin engaged with him *before* being appointed—their ability to prepare a defense for trial was perfectly intact. The biographical and logistical facts were well known to all, so Melvoin's ability to avoid any prejudice against Petitioner was minimal. Petitioner already provided statements and information to the court in the Pretrial Services Report, which had the essential information: two addresses and one phone number. [R. 5]. Attorney Melvoin could have only presented this information in a thorough bail plan if he called the family *and they were supportive*, which was a risk, in his professional judgment, he did not want to take. Instead, he relied on the hard, reliable fact that Petitioner had a clean rap sheet.

In sum, bail hearings only affect pretrial liberty interests, which are not a concern of the Sixth Amendment right to counsel at trial. Further, there was no substantial likelihood of prejudice on Petitioner's basic right to a fair trial at the bail hearing. The bail hearing, therefore, is not a constitutionally critical stage.

C. Attorney Melvoin met or exceeded the professional standard for effective assistance of counsel, which is an objective standard of reasonableness.

Ineffective assistance of counsel is a constitutional claim, not a matter of personal preference. The hallmark of effective assistance of counsel is in the context of a fair trial. Strickland v. Washington, 466 U.S. 668, 686 (1984) (declaring counsel ineffective only when "the trial cannot be relied on as having produced a just result"). Defendants must first show that their counselor's performance was so deficient that it fails an objectively reasonable standard. Id. at 688. Second, after failing the performance prong, a defendant *must also show* that counsel's

deficiency prejudiced the trial such that the outcome would have been different. Id. at 691, 694 (elucidating ineffective counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). In the context of a guilty plea, a defendant must persuade the court that there was "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59 (1985).

This Court should affirm because Attorney Melvoin's performance was well within the range of professional conduct and had no prejudicial effect on the guilty plea. First, as the lower courts agreed, Melvoin's decision not to call Petitioner's family was a reasonable decision. Second, Petitioner was not prejudiced in any material way because the outcome was a sentencing reduction of nearly eighty percent. Claims of ineffective assistance of counsel are mixed questions of law and fact reviewed for clear error. Id. at 698; Fed. R. Civ. P. 52(a).

1. Petitioner's counsel made strategic decisions based on his professional judgment, which courts give high deference.

When counselors make "strategic choices," they are "virtually unchallengeable." Strickland, 466 U.S. at 691. There is a "strong presumption" that an attorney's performance "falls within a wide range of reasonable professional assistance." Id. at 689; McMann v. Richardson, 397 U.S. 759, 771 (1970). Even when decisions are made after "less than complete investigation," the reasonableness of the decision is viewed in light of the limitations in the moment while "applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 690-91. The depth of the investigation is "determined or substantially influenced," i.e., limited, "by the defendant's own statements." Id. at 691. Courts avoid second-guessing defense counsel under "the harsh light of hindsight." Bell v. Cone, 535 U.S. 685, 702 (2002).

Defense attorneys do not have endless time and resources, so they must make reasonable judgment calls throughout the criminal process. This includes ceasing an investigation with "good reason" to believe it "would be a waste." Rompilla v. Beard, 545 U.S. 374, 383 (2005); Wiggins v. Smith, 539 U.S. 510, 525 (2003) (holding further investigation unnecessary if attorney believed it to be "fruitless").

Caselaw with constitutionally defective attorney performance at bail hearings is as rare as the facts are absurd. In United States v. Frappier, for example, a defense attorney put the defendant *on the stand* with almost zero preparation for cross-examination. 615 F. Supp. 51, 52 (D. Mass. 1985). The attorney was also "regretfully unaware" of the depth of the "two-year FBI investigation" that led to her arrest. Id. at 52-53. Unsurprisingly, the defendant said too much, and, on appeal, the court held her right to a fair trial had been prejudiced by such constitutionally deficient counsel performance. Id.; see generally, Bail Reform Act of 1984, 18 U.S.C. § 3142(f) (statutory authority to proffer on behalf of clients). The American Bar Association uses mere discretionary language regarding investigations. ABA Standards for Criminal Justice § 4-3.2(a) (4th ed. 2017) (suggesting "counsel *should* investigate community and family resources") (emphasis added); cf. Rayborn v. United States, 489 F. App'x 871, 878 (6th Cir. 2012) (holding decisions to call a witness and how to conduct testimony are "classic questions of trial strategy that merit Strickland deference").

Melvoin's decision not to call Petitioner's family was well within the wide, reasonable range of assistance and was influenced by Petitioner's own statements. Melvoin, a fully qualified court-appointed lawyer, applied his professional judgment and determined not to call Petitioner's family. Calling his family not only could have been "fruitless," Wiggins, 539 U.S. at 525, but it also could have *backfired*. Without family involvement at all, the judge could only speculate

whether their response would have benefitted Petitioner; however, an angry or aloof family member could have removed all doubt. And Melvoin's duty of candor to the court would have exposed this fatal flaw in a bail plan. Petitioner already told the court he was on his own, bounced around, and took care of himself. [R. 5]. A reasonable defense attorney may believe the situation did not inspire hope that the family would have been supportive, particularly now that Petitioner's shenanigans landed him in jail.

Instead, Melvoin highlighted a positive fact: Petitioner was young with a clean rap sheet. [R. 6]. This is exactly the type of strategic, gestalt decision-making that attorneys make every day under truncated timelines that courts should refrain from judging in the "harsh light of hindsight." Bell, 535 U.S. at 702.

2. Attorney Melvoin reduced Petitioner's prison time by almost eighty percent, so Petitioner could not have been prejudiced in any way.

Both courts below found, and this Court should affirm absent clear error, that Petitioner's plea deal was not prejudiced by counsel's strategic decision. Petitioner must show that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Hill, 474 U.S. at 58-59 (focusing on "whether counsel's constitutionally ineffective performance affected the outcome of the plea process"). Moreover, courts are faced with "a prediction" how a hypothetical fact *would have* changed the outcome. Hill, 474 U.S. at 59. Rather than "upset a plea" because of "post hoc assertions from a defendant," courts look to "contemporaneous evidence to substantiate" the defendant's ex post preference to go to trial. Lee v. United States, 582 U.S. 357, 369 (2017).

In Lee, for example, the defendant was willing to risk a "Hail Mary" attempt at jury acquittal because a guilty verdict or plea would both result in deportation, which, for the

defendant, was "*the* determinative factor." 582 U.S. at 369 (original emphasis). The Court held that regardless of a slim chance at acquittal, the petitioner convinced the court "by substantial and uncontroverted evidence" that but for his counsel's misunderstanding of deportation consequences, he would not have pled guilty. Id. at 371.

But unlike Lee, Petitioner's determinative factor was satisfied, and his counsel did not make a critical legal error. First, Petitioner was not prejudiced; his plea deal vastly accelerated his release—as he demanded. Petitioner's "determinative factor" was "[w]hatever gets [him] out of here as soon as possible." [R. 7]. He feared lingering in prison as Lee feared deportation. His contemporaneous statements undermine his post-plea claim that he would have been willing to risk a mandatory minimum eight years at trial. Second, the legal error by Lee's counsel was profoundly different than Melvoin's strategic decision. Lee's counsel was completely ignorant that Lee's crime resulted in mandatory deportation. This made going to trial—even on a very slim chance of winning—worth it because pleading guilty *guaranteed* deportation. But here, Melvoin made a judgment call with the information before him. And unlike the certainty of Lee's deportation, there was no way of predicting whether Petitioner's family would have even answered the phone, much less contributed toward an adequate bail plan to satisfy the court.

Ultimately, there was no link between the bail hearing performance and the guilty plea, much less a "substantial and uncontroverted" one. Accepting Petitioner's claim that his pretrial detention prejudiced his guilty plea would call into question the entire pretrial detention system. At bottom, the plea deal was an immense success because Petitioner got exactly what he wanted: out of prison "as soon as possible." [R. 7].

For the reasons stated above, this Court should affirm the Fourteenth Circuit's denial of habeas relief, and in doing so, it should clarify that the Sixth Amendment does not extend to bail hearings and Attorney Melvoin's performance was far from constitutionally deficient.

II. THE NON-PUNITIVE ISOLATION OF JUVENILE OFFENDERS IS CONSTITUTIONAL AND THE PARTICULAR CONDITIONS OF PETITIONER'S CONFINEMENT COMPORTED WITH BOTH THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Eighth Amendment prohibits the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. This Court has long used conformity to society's "evolving standards of decency" as the touchstone of a punishment's constitutionality. Roper v. Simmons, 543 U.S. 551, 561 (2005) (citing Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)). Unless a punishment is fully inconsistent with contemporary standards of human decency, it does not violate the Eighth Amendment. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

In addition to a sentence itself, the conditions of a prisoner's confinement are also subject to scrutiny under the Eighth Amendment. Helling v. McKinney, 509 U.S. 25, 31 (1993). Prison officials must provide humane conditions and "take reasonable measures to guarantee the safety of the inmates." Hudson v. Palmer, 468 U.S. 517, 526-27 (1984). This Court has also, in recent years, made note of juveniles' special circumstances in the Eighth Amendment context. See, e.g., Montgomery v. Louisiana, 577 U.S. 190, 193 (2016). Nevertheless, "the Constitution does not mandate comfortable prisons." Rhodes, 452 U.S. at 349. "[R]estrictive and even harsh" conditions "are part of the penalty that criminal offenders pay." Id. at 347.

Some conditions-of-confinement claims are also cognizable under the Fourteenth Amendment, which prohibits states from "depriv[ing] any person of life, liberty, or property . . . without due process of law." U.S. Const. amend. XIV. This Court, however, only reaches the question of what process is due if petitioner inmates first show a constitutionally

protected liberty interest in avoiding restrictive conditions of confinement. See Wilkinson v. Austin, 545 U.S. 209, 221 (2005).

Petitioner's § 1983 claim is essentially composed of three arguments. He first argues that solitary confinement of juveniles—punitive or non-punitive—is unconstitutional in all circumstances. Alternatively, he claims that the particular conditions of his confinement violated the Eighth Amendment. Finally, he claims that those same conditions also infringed on his due process rights under the Fourteenth Amendment. The lower court's legal conclusions on these issues are reviewed de novo. See Kolisek v. Spencer, 774 F.3d 63, 84 (1st Cir. 2014).

This Court should affirm the Fourteenth Circuit's dismissal of Petitioner's § 1983 claim because all three of his arguments fail. First, the solitary confinement of juvenile offenders is not per se unconstitutional because no national consensus exists against non-punitive isolation. Second, the conditions of Petitioner's confinement did not violate the Eighth Amendment because he was neither deprived of necessities, nor treated with deliberate indifference. And third, Petitioner's isolation complied with the Fourteenth Amendment's due process requirements because even if he had a liberty interest, emergency conditions justified immediate administrative segregation.

A. The solitary confinement of juvenile offenders is not per se unconstitutional because non-punitive isolation conforms to contemporary standards of decency.

Over the past few decades, this Court has carefully expanded Eighth Amendment protections for juvenile offenders, creating a series of categorical rules prohibiting certain punishments. See Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (plurality opinion) (execution of offenders younger than sixteen); Roper, 543 U.S. at 578 (execution of juvenile offenders); Graham v. Florida, 560 U.S. 48, 82 (2010) (life sentence without parole for juvenile

nonhomicide offenders); Miller v. Alabama, 567 U.S. 460, 489 (2012) (mandatory life sentence without parole for juvenile offenders).

In each case, the Court has held that the relevant punishment offends contemporary standards of decency; and in each case, a "national consensus" on the issue has been a prerequisite, the Court's primary barometer for deducing the current contours of these evolving standards. See Roper, 543 U.S. at 561. Indeed, both in and outside the juvenile context, fundamental changes in the national consensus have been the main reason for the creation of new categorical rules under the Eighth Amendment. See id. at 574-75 (emphasizing changing national consensus on execution of juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 307 (2002) (emphasizing national consensus against execution of intellectually disabled criminals). To find a national consensus, the Court looks to "objective indicia of society's standards, as expressed in legislative enactments and state practice." Roper, 543 U.S. at 563-64 (noting thirty states prohibited juvenile death penalty and practice was infrequent in other states).

Here, no such national consensus exists on the issue of whether non-punitive isolation of juvenile offenders is cruel or unusual. A 2016 survey of juvenile solitary confinement rules in all fifty states and the District of Columbia reported that while several states either prohibited or placed limits on *punitive* solitary confinement of juveniles, not a single jurisdiction expressly prohibited *non-punitive* isolation in all circumstances. Natalie J. Kraner et al., Lowenstein Ctr. for the Pub. Int., 51-Jurisdiction Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems (July 2016), https://www.lowenstein.com/media/2825/51-jurisdiction-survey-of-juvenile-solitary-confinement-rules-72616.pdf. While the rules for such isolation varied, all jurisdictions affirmatively authorized some form of non-punitive segregation or "room restriction," especially for safety and security reasons. See id. Federal law similarly prohibits

punitive solitary confinement of juveniles adjudicated delinquent under federal law, but it still allows for limited "room confinement" in the event of a "serious and immediate risk of physical harm." 18 U.S.C. § 5043. Thus, to the extent that legislative enactments reveal any national consensus on this issue, it is that the non-punitive isolation of juvenile offenders is, at least in certain circumstances, unquestionably constitutional under the Eighth Amendment.

Additionally, unlike other instances in which the Court detected a national consensus, the practice at issue here is far from "infrequent." See Roper, 543 U.S. at 564. As the Fourteenth Circuit noted below, in 2016, "44% of juvenile detention centers and 40% of training schools reported using room isolation to control behavior." [R. 23 n.17 (citation omitted)]. And while international attitudes may differ on the subject, see, e.g., U.N. Convention on the Rights of the Child, Art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, that fact alone—in the absence of a clearly expressed *national* consensus—has never been sufficient to establish a novel standard of decency. See Roper, 543 U.S. at 578 (noting opinion of world community provides "confirmation for our own conclusions," but does "not control[] our outcome").

Finally, as a policy matter, this Court has consistently accorded significant deference to prison administrators, emphasizing that "central to all other corrections goals is the institutional consideration of internal security." Pell v. Procunier, 417 U.S. 817, 823 (1974). Lower courts have followed suit. See, e.g., Santana v. Collazo (Santana I), 714 F.2d 1172, 1181 (1st Cir. 1983) (citing Bell v. Wolfish, 441 U.S. 520, 547-48 (1979)) ("The Supreme Court has cautioned us against substituting our judgment for that of correction officials charged with maintaining institutional order and security."); Harris v. Lake Cnty. Sheriff's Dep't, No. 15-CV-00850, 2015 WL 5138388, at *6 (N.D. Cal. Sept. 1, 2015) (citing Wright v. Rushen, 642 F.2d 1129, 1132 (9th

Cir. 1981)) ("Federal courts . . . should avoid enmeshing themselves in the minutiae of prison operations in the name of the Eighth Amendment.").

A new categorical rule in this case would not simply restrict the sentencing decisions of lower court judges like in some recent Eighth Amendment cases. See Miller, 567 U.S. at 475-76. Rather, it would thrust federal courts into the day-to-day operations of juvenile detention facilities and require judges to second-guess prison officials' responses to emergency situations. "Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters." Pell, 417 U.S. at 827.

B. The conditions of Petitioner's confinement did not violate the Eighth Amendment because he was never deprived of life's necessities, and Respondents never acted with the requisite culpable state of mind.

In Farmer v. Brennan, this Court clarified how to properly analyze prisoners' conditions-of-confinement claims under the Eighth Amendment. 511 U.S. 825, 834 (1994). And while the confinement of a juvenile was not at issue there, lower courts have, in turn, relied on Farmer when evaluating such claims. See, e.g., Campbell v. Florian, 972 F.3d 385, 393 (4th Cir. 2020); Reed v. Palmer, 906 F.3d 540, 550 (7th Cir. 2018).

After explaining that "prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners," Farmer, 511 U.S. at 833 (alteration in original) (citation omitted), the Farmer Court prescribed a two-prong test for determining whether a prisoner's conditions of confinement violate the Eighth Amendment. Id. at 834. The first prong is objective: the alleged conditions must "pos[e] a substantial risk of serious harm." Id. The second is subjective: the prison officials must have had a "sufficiently culpable state of mind." Id. (quoting

Wilson v. Seiter, 501 U.S. 294, 297 (1991)). Unless a prisoner meets both requirements, he fails to show any Eighth Amendment violation. Id.

Here, Petitioner can satisfy neither prong. First, neither the length nor the conditions of his confinement, which included daily socialization and exercise, as well as hourly wellness checks, ever posed a "substantial risk of serious harm." Second, none of the Respondents ever treated him with "deliberate indifference." See id. (quoting Wilson, 501 U.S. at 302-03).

1. Petitioner was not subjected to a substantial risk of serious harm.

For Petitioner to satisfy the objective prong, he must show that he faced "conditions so dire as to deprive him of 'the minimal civilized measure of life's necessities.'" LaVergne v. Stutes, 82 F.4th 433, 437 (5th Cir. 2023) (quoting Farmer, 511 U.S. at 834). In most cases, the challenged conditions are evaluated separately from one another; they should only be considered together when "they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." Wilson, 501 U.S. at 304. "Nothing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment . . . ." Id. at 305.

Courts have recognized a variety of "human needs" of which prisoners cannot be deliberately deprived. See, e.g., Estelle v. Gamble, 429 U.S. 97, 103 (1976) (basic medical care); Brooks v. Warden, 800 F.3d 1295, 1303 (11th Cir. 2015) (basic sanitation); Maddox v. Berge, 473 F. Supp. 2d 888, 896 (W.D. Wis. 2007) (socialization); Turner v. Palmer, 84 F. Supp. 3d 880, 884 (S.D. Iowa 2015) (education); Harvard v. Inch, 411 F. Supp. 3d 1220, 1234 (N.D. Fla. 2019) (exercise). But see Isby v. Brown, 856 F.3d 508, 522 (7th Cir. 2020) (quoting Bono v. Saxbe, 620 F.2d 609, 614 (7th Cir. 1980)) ("Inactivity, lack of companionship[,] and a low level of intellectual stimulation do not constitute cruel and unusual punishment . . . .").

The duration of solitary confinement is also a factor when determining whether conditions of confinement posed a substantial risk of serious harm. Compare J.H. v. Williamson Cnty., 951 F.3d 709, 714 (6th Cir. 2020) (finding Eighth Amendment violation where fourteen-year-old pretrial detainee was isolated for over a month), with Vega v. Parsley, 700 F. Supp. 879, 883 (W.D. Tex. 1988) (finding no violation where juvenile offender was held in solitary confinement for 9.5 hours and would have been there longer had he not committed suicide), and Johnson v. Prentice, 29 F.4th 895, 905 (7th Cir. 2022) (finding no violation where adult prisoner was kept in solitary confinement with limited yard privileges for over three years), cert. denied, 144 S. Ct. 11 (2023).

Here, the conditions of Petitioner's confinement never approached the point of depriving him of "the minimal civilized measure of life's necessities." See Farmer, 511 U.S. at 834. During his time in protective isolation, Petitioner exercised outside and socialized with non-isolated residents every day. [R. 10-11]; see Maddox, 473 F. Supp. 2d at 896-97. While he did not participate in in-person academic instruction, he received daily "curriculum packets" with all relevant reading materials and assignments, and was expected to keep up with the non-isolated residents. [R. 11]; see Turner, 84 F. Supp. 3d at 884 (requiring education where plaintiff was allowed no homework or reading material in solitary confinement). As far as sanitation, Beacon Rock staff provided Petitioner with a toothbrush and toothpaste, and they cleaned his isolation unit daily. [R. 11-12]; see Brooks, 800 F.3d at 1303 (requiring sanitation where inmate was forced sit in his own feces for two days). And while the plumbing in Petitioner's unit was initially non-functional, creating an unpleasant odor, the staff accommodated him by allowing him to use the toilet in an adjacent cell before they repaired his. [R. 12].

Regarding medical care, Petitioner received hourly wellness checks from Beacon Rock staff and a full psychiatric evaluation from Dr. Watson every other day. [R. 11]; see Estelle, 429 U.S. at 107 (finding no Eighth Amendment violation where plaintiff was seen by medical personnel seventeen times in three months). And while Petitioner was given only half his normal dosage of antipsychotic medication, that error, as explained below, did not stem from any "deliberate indifference" on the part of Respondents. See Estelle, 429 U.S. at 105.

Finally, there is no clear threshold at which the duration of solitary confinement crosses into the realm of "cruel and unusual," but Petitioner's period of non-punitive isolation was significantly shorter than that found to be unconstitutional in other cases brought by juvenile offenders. See J.H., 951 F.3d at 719.

Many of these conditions are undeniably unpleasant, but discomfort is surely not synonymous with the deprivation of "the minimal civilized measure of life's necessities." See Farmer, 511 U.S. at 834. The conditions of Petitioner's confinement never posed a substantial risk of harm, and thus fail to satisfy Farmer's objective prong.

2. Respondents never treated Petitioner with deliberate indifference.

Petitioner also fails to satisfy the subjective prong because Respondents never had a "sufficiently culpable state of mind." See Farmer, 511 U.S. at 834. "In prison-conditions cases[,] that state of mind is one of 'deliberate indifference' to inmate health or safety." Id. (quoting Wilson, 501 U.S. at 303). "Deliberate indifference" is akin to criminal recklessness: "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety." Id. at 837-38.

In Paykina ex rel. E.L. v. Lewin, the defendants knew that the conditions of the plaintiff's confinement posed a substantial risk to his mental health because (1) they knew he was not attending programming or recreation; (2) they knew he was harming himself; (3) they had recategorized him at the "highest level of mental health severity"; and (4) prior litigation put them on notice about the general risks of solitary confinement. 387 F. Supp. 3d 225, 244 (N.D.N.Y. 2019). But see Mack v. Wilkinson, 79 F. App'x 137, 139 (6th Cir. 2003) (finding no deliberate indifference where prison official, obeying institutional policy, denied isolated inmate medication).

Finally, even when officials have knowledge of a risk to an inmate's mental health, deliberate indifference is still rare in cases of protective, rather than punitive, isolation. See Harrelson v. Dupnik, 970 F. Supp. 2d 953, 979 (D. Ariz. 2013). Confronted with a choice between potential mental health issues in solitary confinement, and near-certain physical brutality in general population, a prison official's decision certainly "d[oes] not exhibit a total lack of care," and courts "cannot say that no reasonable person would have chosen to place [the prisoner] in isolation for his own protection." D.M. v. Chatman, No. 1:13-CV-03565, 2014 WL 3955810, at *7 (N.D. Ga. Aug. 12, 2014).

Here, Respondents never treated Petitioner with deliberate indifference because unlike the defendants in Paykina, they never had knowledge of an excessive risk to Petitioner's health or safety. Petitioner exhibited no signs of harm: he never skipped exercise and he never attempted, or even expressed any desire, to harm himself—before, during, or after his time in isolation. [R. 11, 13]. There was also no prior litigation in Albers, let alone against Beacon Rock specifically, that could have put Respondents on notice. [R. 10]. And while Petitioner stated that

he felt "depressed," Dr. Watson noted in her professional evaluation that he "did not meet the objective benchmarks necessary to qualify as 'depressed.'" [R. 12-13].

Respondent Johnson's failure to provide Petitioner with a full dosage of medication likewise evinces no deliberate indifference, as Johnson testified under oath "that he gave Petitioner the dosage noted on the paperwork [he] was given." [R. 12]; see Estelle, 429 U.S. at 105 ("An accident . . . is not . . . to be characterized as wanton infliction of unnecessary pain.").

Finally, even if the risks of solitary confinement are so commonly known among the carceral community that Respondent Voss was on notice, he did not "disregard" those risks when he moved Petitioner into protective isolation. [R. 9]. Rather, Voss carefully determined that the risk of further physical violence between the rival gangs—and against Petitioner specifically—outweighed the potential negative effects of protective isolation. See D.M., 2014 WL 3955810, at *7.

Petitioner fails to satisfy either prong of the Farmer test and can therefore show no Eighth Amendment violation.

C. The conditions of Petitioner's confinement did not violate the Fourteenth Amendment because even if Petitioner had a liberty interest, emergency conditions justified immediate administrative segregation.

Petitioners bringing conditions-of-confinement claims under the Fourteenth Amendment face an additional two-part test. Wilkinson v. Austin, 545 U.S. 209, 224 (2005). To show that prison officials deprived him of procedural due process, a petitioner must show that (1) he has a "liberty interest in avoiding particular conditions of confinement;" and (2) he was denied the

procedural protections due in that particular situation. Id. at 222.[1] Nevertheless, "the fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed." Wolff v. McDonnell, 418 U.S. 539, 556 (1974).

While courts disagree on whether prisoners have certain liberty interests, compare Incumaa v. Stirling, 791 F.3d 517, 529 (4th Cir. 2015) (holding inmate had liberty interest in avoiding twenty-year solitary confinement), with Townsend v. Fuchs, 522 F.3d 765, 771 (7th Cir. 2008) (holding inmates necessarily have no liberty interest in avoiding transfer to administrative segregation), all agree that "emergency conditions" supersede certain procedural concerns. See, e.g., Pinkston v. Kuiper, 67 F.4th 237, 242 (5th Cir. 2023) (per curiam) ("[E]mergency circumstances justify the abbreviation or elimination of pre-deprivation procedures like hearings."); Ort v. White, 813 F.2d 318, 327 n.3 (11th Cir. 1983) (citing Hughes v. Rowe, 449 U.S. 5, 11-12 (1980)) ("[E]mergency conditions can justify actions which otherwise might violate the due process protections of the [F]ourteenth [A]mendment."); Hayes v. Walker, 555 F.2d 625, 633 (7th Cir. 1977) ("[W]here prison authorities are allegedly reacting to emergency situations in an effort to preserve the safety and integrity of the institution, the state's interest in decisive action clearly outweighs the inmate's interest in a prior procedural safeguard."); Johnson v. Noack, No. 3:16-CV-00443, 2018 WL 3340876, at *6 n.11 (D. Or. July

[1] While Petitioner's Fourteenth Amendment argument appears to center around procedural due process, a substantive due process claim would be equally unavailing under the general/specific canon of construction. Although confusion on this point abounds among lower courts, see, e.g., S.P.X. ex rel. C.P.X. v. Garcia, 450 F. Supp. 3d 854, 909-10 (S.D. Iowa 2020), this Court has been clear that "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." United States v. Lanier, 520 U.S. 259, 272 n.7 (1997); see also Porter v. Pennsylvania Dep't of Corrections, 974 F.3d 431, 447 (3d Cir. 2020) (rejecting appellant's substantive due process claim "because his Eighth Amendment claim covers the same allegations"). Here, Petitioner's allegations are covered by the Eighth Amendment, and he raises no additional allegations in his Fourteenth Amendment argument, so any substantive due process claim is foreclosed.

6, 2018) (finding no due process violation where plaintiff threatened institutional security and pre-segregation hearing was not required under state regulations).

Here, Albers has no state law requiring a pre-segregation hearing, [R. 10], but even if it did, Respondent Voss decided to move Petitioner and other Breakers to isolation not on a whim, but because a fistfight had erupted between rival gangs, Petitioner had received multiple threats, and Voss wanted to prevent further violence. [R. 9]. In other words, there was an emergency at Beacon Rock. See Hayes, 555 F.2d at 633 (finding emergency where prisoners gathered in yard to discuss getting prison rules changes). The existence of a liberty interest is thus immaterial here: even if Petitioner did have such an interest in avoiding transfer to protective isolation, the emergency circumstances surrounding his isolation properly curtailed any procedural protections to which he would otherwise have been entitled, and his procedural due process claim also fails. This Court should therefore affirm the Fourteenth Circuit's dismissal of Petitioner's § 1983 action.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Court AFFIRM the judgment of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully Submitted,

Jonathan Voss, et al.

By their attorneys,

/s/ Attorney 1
Attorney 1

/s/ Attorney 2
Attorney 2