United States Court of Appeals

for the

Third Circuit

Case No. 21-2310

ANGELO CLARK,

Appellant,

– v. –

ROBERT COUPE, DOC Commissioner; PERRY PHELPS; DAVID PIERCE; MAJOR JEFFREY CARROTHERS; CAPTAIN BURTON; CAPTAIN RISPOLI; CAPTAIN WILLY; DR. WILLIAM RAY LYNCH; DR. PAOLA MUNOZ; DR. DAVID YUNIS; RHONDA MONTGOMERY; SUSAN MUMFORD; STEPHANIE D. JOHNSON; CONNECTIONS COMMUNITY SUPPORT PROGRAMS INC; STEFANIE STREETS; STEPHANIE EVANS-MITCHELL; CAROL VODVARKA; CAROL VANDRUNEN; LEZLEY SEXTON.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE IN CASE NO. 1-17-CV-00066 HONORABLE RICHARD G. ANDREWS, U.S. DISTRICT JUDGE

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I. INTRODUCTION

When the Vaughn Wardens placed Mr. Clark in extended periods of solitary confinement in 2012, 2015 and 2016, the national standards of decency used to interpret the Eighth Amendment (*Trop v. Dulles*, 356 U.S. 86, 101 (1958)) had matured and prohibited placing seriously mentally ill persons into solitary for extended time periods. The Wardens' own regulations incorporated the prohibition, making clear that the seriously mentally ill needed to be placed in treatment settings, not solitary confinement. *App-III 502*. This Court has made clear that "it is well-established in our Circuit that . . . prolonged solitary confinement . . . may give rise to an Eighth Amendment claim." *Porter v. Pa. Dep't of Corrs.*, 974 F.3d 431, 451 (3d Cir. 2020). Yet the Vaughn Wardens – one of whom the ACA identified as stubbornly resistant to recognizing the need to adhere to the law (*App-III 588-593*) -- continue to argue that, even today, they have the right to place a seriously mentally ill person into solitary for extended periods of time. *Appellees' Answering Brief* ("Wardens' Brief") at 34-36. They are wrong.

None of the Vaughn Wardens' arguments persuade, as they lack legal weight. As explained in Section I, this Court is not barred by the statute of limitations from considering Mr. Clark's extended solitary confinement in 2012.

As explained in Section II.A, on the central issue of the substance of the Eighth Amendment claim, the Wardens' Brief fails to overcome the controlling nature of *Estelle v. Gamble*, 429 U.S. 97 (1976) combined with a nationwide judicial and scientific consensus that placing a seriously mentally ill person into solitary for extended periods of time exacerbates their mental illness. The Vaughn Wardens' legal argument to the contrary relies primarily on a Delaware district court decision, *Miller v. Metzger*, No. 19-cv-01794, 2021 WL 1999716 (D. Del. May 19, 2021), dismissing Eighth Amendment claims. *Wardens' Brief* 33-34. Yet the Vaughn Wardens fail to draw the Court's attention to the fact that this unpublished decision is being reconsidered by the court, and involved an incarcerated person who apparently was not diagnosed as seriously mentally ill and who was forced to proceed *pro se.* The Vaughn Wardens also rely on *Norris v. Davis*, No. 10-1118, 2011 WL 5553633 (W.D. Pa., Nov. 15, 2011). *Wardens' Brief* 34. Yet that case similarly involved a *pro se* litigant whose poverty forced him to relinquish his appeal to this Court. The Vaughn Wardens seek to have these unpublished decisions—obtained against *pro se* litigants who lack means and legal training—serve as the measuring stick for national standards of decency. *Wardens' Brief* 33-34. Such an effort reflects poorly on them and evidences their continued resistance to adhering to the law governing solitary confinement.

As explained in Section II.B, the Vaughn Wardens cannot rely on the law of the case, res judicata, collateral estoppel or any other doctrines of judicial finality to avoid accountability. *Warden's Brief* 26-36. The record below is clear. Although Mr. Clark was allowed to try to prove that the Vaughn Wardens placed him in solitary *because* he was mentally ill, he was not allowed to litigate his claim that – regardless of the motive -- the Vaughn Wardens violated the Eighth Amendment by placing him in solitary for extended periods of time. The district court erroneously dismissed that claim, and doctrines of judicial finality have no bearing on Mr. Clark's statutory right to appeal that erroneous decision.

As explained in Section III, the Vaughn Wardens are not entitled to qualified immunity. In an effort to persuade this Court to extend immunity, the Vaughn Wardens ignore the Supreme Court's teaching that the judicially created qualified immunity doctrine cannot be viewed as a "license to lawless conduct." *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). *Warden's Brief* 15-23. They fail to rebut -- or indeed even attempt to rebut -- Mr. Clark's showing that they were given fair warning of the prohibited nature of their conduct. *Warden's Brief* 11-24. This fair warning came in many forms, including a Delaware statute, internal prison regulations, a USDOJ investigation and Memorandum and an ACA audit. Taken together with the existence of a national judicial and scientific consensus establishing that placing a seriously mentally ill person into solitary for extended

periods exacerbates mental illness, the record fails to support the Vaughn Wardens' immunity claim.

Mr. Clark respectfully requests that this Court overturn the poorly reasoned and legally erroneous district court dismissal of his Eighth Amendment claim, and remand this matter to allow that meritorious claim to be litigated.

II. THE STATUTE OF LIMITATIONS DOES NOT BAR THIS COURT FROM CONSIDERING THE WARDENS' EXTENDED 2012 CONFINEMENT OF MR. CLARK.

The Vaughn Wardens ask this Court to consider only Mr. Clark's solitary confinements after January 23, 2015. *Wardens' Brief* 9-11. This Court need not rule on this legal argument for three reasons: ***First***, Mr. Clark's post-January 23, 2015, confinement, standing alone, violates the Eighth Amendment.

Second, it is unclear whether the Vaughn Wardens preserved a statutory defense as to the dismissed claim. Below, they raised a statute of limitations defense in only cursory and non-specific ways. *See* Dkt. No. 102, Answer, Affirmative Defense 3 ("Plaintiff's claims are barred the applicable statute of limitation."); Dkt. No. 32, Motion to Dismiss at 2 n.1 ("Claims arising 2012 and before are clearly barred by the applicable statute of limitations."). They did not rely on the statute as reason to seek dismissal, and cannot belatedly raise it now. *See* Dkt. No. 32, 43 (Reply).

Third and importantly, it is black-letter law that events occurring prior to any statutory cut-off are still relevant and admissible before the jury. *See Clark v. Township of Falls*, 890 F.2d 611, 613-614 (3d Cir. 1989) (evidence pre-dating relevant date admissible "in order to show context, motive, and pattern" to the jury even if "sufficient evidence" analysis focuses within permissible period); *see also* Fed. R. Evid. 406 (pattern or practice evidence admissible); *U.S. v. James*, 955 F.3d 336, 345 n.8 (3d Cir. 2021) ("evidence of activity that predates the statute of limitations [was] relevant to proving" fraud scheme); *Commonwealth v. Porter*, 659 F.2d 306, 320 (3d Cir. 1981) (admitting evidence predating statutory period as part of pattern or practice); *Croker v. Boeing Co. (Vertol Div.)*, 662 F.2d 975, 990 (3d Cir. 1981) (quoting *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977) ("'A discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed. It may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue, but separately considered, it is merely an unfortunate event in history which has no present legal consequences.'")). For all these reasons, the Vaughn Wardens' misguided effort to cabin in the scope of Mr. Clark's claim fails.

III. THE EIGHTH AMENDMENT PROHIBITED THE VAUGHN WARDENS FROM PLACING MR. CLARK INTO SOLITARY FOR EXTENDED PERIODS OF TIME.

The Vaughn Wardens claim that they did not violate the Eighth Amendment when they placed Mr. Clark in solitary for extended periods of time. *Wardens' Brief* 25-35. This position lacks any legal merit, which is reflected by the Vaughn Wardens' resort to pitching a host of meritless theories, hoping one will find traction with this Court. *Wardens' Brief* 26-35, alleging Mr. Clark's claims are barred by the law of the case, collateral estoppel, res judicata and a failure to state a claim.

Subsection A summarizes the caselaw clearly establishing that the Eighth Amendment prohibits placing a seriously mentally ill person into solitary conditions for extended periods of time.

Subsection B explains why the proceedings below – including a jury verdict on Mr. Clark's other claims – do not bar his right to appeal to this Court to overturn his erroneously dismissed Eighth Amendment claim.

A. Placing Seriously Mentally Ill Persons into Solitary for Extended Periods of Time Causes Significant Harm.

By 2012 and certainly by 2016, our nation had reached a robust judicial and scientific consensus that incarcerating seriously mentally ill persons in solitary conditions for extended periods of time exacerbated their mental illnesses and violated the Eighth Amendment. *See, e.g., Langley v. Coughlin*, 715 F. Supp. 522,

540 (S.D.N.Y. 1989) (discussing various failures or denials of psychiatric care in denying summary judgment to the state defendants); *Casey v. Lewis*, 834 F. Supp. 1477, 1549-50 (D. Ariz. 1993) (unconstitutional to isolate mentally ill such as the "egregious" case of H.B., who was locked down for 11.5 months and saw a psychiatrist only 9 times); *Madrid v. Gomez,* 889 F. Supp. 1146, 1265-66 (N.D. Cal. 1995) (known impact of solitary conditions on mental health); *Davenport v. DeRobertis*, 844 F.2d 1310, 1316 (7th Cir. 1988); *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999), *rev'd and remanded on other grounds sub nom. Ruiz v. U.S.*, 243 F.3d 941 (5th Cir. 2001); *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1117-18, 1125-26 (W.D. Wis. 2001) (granting preliminary injunction ordering removal of seriously mentally ill inmates from Supermax prison because solitary confinement but for four hours per week not appropriate for seriously mentally ill inmates); *Terry v. Rice*, No. IP 00-0600-C, 2003 WL 1921818, at *15-16 (S.D. Ind. Apr. 18, 2003) (placing a mentally ill and potentially suicidal prisoner in isolation could amount to deliberate indifference); *Indiana Protection & Advocacy Servs. Comm'n v. Commissioner, Indiana Dep't of Corr.*, No. 1:08–cv–01317, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012) (isolation of and lack of mental health care for mentally ill prisoners in solitary confinement units violated Eighth Amendment); *Sardakowski v. Clements*, No. 12-cv-01326, 2013 WL 3296569, at *8 (D. Col. July 1, 2013) (allegations that isolation exacerbated prisoner's mental illness and that

defendants had knowledge of this adequately stated an Eighth Amendment conditions of confinement claim); *Graves v. Arpaio*, 48 F. Supp. 3d 1318, 1335 (D. Ariz. 2014) ("Holding inmates with serious mental illness in prolonged isolated confinement may cause serious illness and needless suffering in violation of the Eighth Amendment."); *Easley v. Burns*, 1:16-cv-331, 2016 WL 3561797, at *2-3 (S.D. Ohio June 1, 2016) (plaintiff's allegations that he was "mentally ill and at risk of suicide as a result of being locked in solitary confinement with no mental health care or medication" stated an Eighth Amendment claim).

The Vaughn Wardens argue that this Court should ignore the many Eighth Amendment authorities cited by Mr. Clark because "[t]his sampling of non-binding district court cases cannot support a finding that a robust consensus of persuasive authority exists." *Wardens' Brief* 22. This argument ignores the Third Circuit's holding to the contrary. *Peroza-Benitez v. Smith*, 994 F.3d 157, 165-166 (3d Cir. 2021). In that case, this Court explained the sources of law relevant to the qualified immunity analysis, noting that in addition to Supreme Court and appellate jurisprudence, "[w]e may also take into account district court cases, from within the Third Circuit or elsewhere." *Id*. The Court is not limited to looking only at the authorities considered by the district court. *Id.* at n.3 (citing *Elder v. Holloway*, 510 U.S. 510, 512 (1994)).

The Vaughn Wardens' argument also fails to grapple with the controlling nature of *Estelle v. Gamble*, 429 U.S. 97 (1976), which prohibited correctional officers from being deliberately indifferent to existing serious medical needs. This Supreme Court decision undergirded and supported the national consensus, yet the Vaughn Wardens' discussion of that case misses the point. They argue that *Estelle* "by no means establishes that placing Mr. Clark in Maximum Security housing for seven months after he attacked another inmate constituted cruel and unusual punishment under the Eighth Amendment." *Wardens' Brief* 18. Yet they simply assert this as fact, without any supporting legal authority and without challenging the validity of the nationwide judicial and scientific consensus that placing a seriously mentally ill person in extended periods of solitary confinement exacerbates his or her mental illness. The Third Circuit jurisprudence reaches a contrary result, finding that "researchers have found that even *a few days* in solitary confinement can cause cognitive disturbances." *Williams v. Sec'y, Pa. Dep't of Corrs.*, 848 F.3d 549, 562 (3d Cir. 2017). As a result, extended solitary of a seriously mentally ill person violates the Eighth Amendment even in those instances when adequate medical care is provided.

The Vaughn Wardens argue that the jury rejected Mr. Clark's claim that he received inadequate medical care, and therefore this Court should uphold the district court's erroneous dismissal of Mr. Clark's Eighth Amendment claim

premised on his placement in solitary. *Wardens' Brief* 26-35. This argument collapses the distinction between the harms caused by placement in solitary and the harms caused by failure to provide adequate medical care while in solitary. Consider an analogy to physical health: if the Vaughn Wardens wrongfully and intentionally broke both legs of an incarcerated person, they could not defend against an Eighth Amendment claim by proving the person thereafter received adequate medical care. Here, the Vaughn Wardens' extended placement of Mr. Clark into solitary is equivalent to the breaking of the legs. Whether the jury viewed his medical care while in solitary as sufficient or not has no bearing on this Court's analysis.

The Vaughn Wardens also argue that this Court should ignore the Third Circuit decisions issued after they had already placed Mr. Clark into extended solitary confinement. *Wardens' Brief* 18-21. But this again misses the point of Mr. Clark's argument. Mr. Clark expressly noted in his brief that the Third Circuit issued the *Palakovic v. Wetzel*, 854 F.3d 209 (3d Cir. 2017) subsequent to the dates on which the Vaughn Wardens violated his Eighth Amendment rights. *Opening Brief* 29. But Mr. Clark explained that in *Palakovic*, the Third Circuit acknowledged the controlling nature of *Estelle* and cited to the robust national consensus on the proper interpretation of the Eighth Amendment. Given that the *Estelle* decision and the robust consensus existed long before the Vaughn Wardens

confined Mr. Clark, the Eighth Amendment prohibited their acts even though the Third Circuit had not yet been given an occasion to add its voice to that unified and robust judicial consensus.

The Vaughn Wardens argue that this Court should defer to the reasoning of the district court in *Miller v. Metzger*, 2021 WL 1999716 (D. Del. May 19, 2021). *Wardens' Brief* 23, 33-34. But this unpublished case lacks any weight whatsoever for four reasons: ***First***, Mr. Miller sought reconsideration from the district court (Circuit Judge Bibas sitting by designation). This reconsideration is pending, and the Third Circuit has stayed consideration of the appeal until reconsideration has been completed. *See* Summary of Third Circuit Case No. 21-2223; Dkt. No. 67, No. 1:19-cv-01794-SB (D. Del.) As a result, the memorandum decision issued on May 19, 2021, may well be withdrawn. ***Second***, Mr. Miller lacked counsel and was forced to proceed *pro se.* It cannot reasonably be disputed that *pro se* incarcerated litigants operate at a significant and insurmountable disadvantage. *See, e.g., Lebron v. Sanders*, 557 F.3d 76, 78 (2d Cir. 2009)("we are concerned about the impact on the appearance of justice when pro se litigations may not have financial access to case authorities that form the basis of a court's decision, thereby hampering the litigants' opportunities to understand and assert their legal rights.") ***Third***, it is unclear from the handwritten complaints whether Mr. Miller has been diagnosed with serious mental illness. ***Fourth***, the court inexplicably failed to cite

or discuss the Third Circuit's own relevant precedents in *Williams*, 848 F.3d at 562; *Palakovic*, 854 F.3d 209; *Porter v. Pennsylvania Department of Corrections*, 974 F.3d 431 (3d Cir. 2020).

The other district court case relied upon by the Vaughn Wardens – *Norris v. Davis*, 2011 WL 5553633 (W.D. Pa., Nov. 15, 2011) – predates those Third Circuit decisions but again is an unpublished decision issued by a magistrate judge ruling on a record created by a *pro se* litigant. Based on the handwritten pleadings filed by Mr. Norris, it does not appear that the solitary confinement in that matter came anywhere close to the length of time at issue in Mr. Clark's case. *See* Dkt. No. 3 (filed Sept. 3, 2010). Further, Mr. Norris sought to appeal the district court's denial but his poverty prevented his exercise of that right. *See* Dkt. No. 41 (February 6, 2012 Order of this Court in 11-4370), holding that the appeal was dismissed for failure to pay the requisite fee.

The Vaughn Wardens fail to persuade with a misplaced reliance on two district court unpublished decisions issued against *pro se* litigants with distinguishable facts. *See U.S. v. Saunders*, 29 F. App'x 78 (3d Cir. 2002) (district court did not err by failing to consider unpublished decisions). It is troubling that the Wardens seek to leverage the weight of decisions issued in unfair circumstances to persuade this Court.

B. None of the Legal Doctrines Relied upon by the Wardens Prevent this Court from Reversing the District Court's Erroneous Decision.

The Wardens' Brief concocts a legally infirm argument lacking any judicial support. (*Id.* at 25-35.) They cite to judicial doctrines developed to ensure judicial finality and efficiency (law of the case, collateral estoppel and res judicata) as a reason this Court cannot overturn the district court's dismissal and allow Mr. Clark to have his day in court on his dismissed Eighth Amendment claim. In essence, they are arguing that this Court should ignore the fact that the Wardens successfully persuaded the district court to dismiss one of Mr. Clark's three Eighth Amendment claims for failure to state a claim under F.R.C.P. 12(b)(6). They now argue that Mr. Clark's dismissed claim should be viewed as subsumed by the other two Eighth Amendment claims that were heard by the jury. Relying on an inaccurate description of Mr. Clark's dismissed claim (*Wardens' Brief* 26), they assert that the law of the case, collateral estoppel and res judicata all apply and prevent this Court from granting Mr. Clark appellate relief. *Wardens' Brief* 26-36. This argument distorts the record below and ignores the reality that Mr. Clark is entitled to seek ***appellate*** redress.

The record below proves the scope of the dismissal: On March 26, 2019, after considering objections filed by the parties, the district court adopted the magistrate's Recommendations as to Count I. *See App-I 1-10* (district court

decision); *App-II 84-144* (report). The district court explained in a single paragraph that the magistrate had found that placing a mental ill inmate in solitary confinement does not violate a clearly established Eighth Amendment prohibition and therefore the Vaughn Wardens enjoy qualified immunity. *App-I 4*. Without any further analysis or discussion of the caselaw, the court adopted the Report's recommendation and dismissed Count I "to the extent it alleges an Eighth Amendment violation because of Plaintiff's confinement to the solitary housing unit." *App-I 4.* Mr. Clark requested and received reconsideration. *App-I 12-17.* In its second decision, the district court refined its holding, cited *Robinson v. California*, 370 U.S. 660, 667 (1962), and acknowledged that placing an inmate in solitary confinement *because* he is mentally ill violates the Eighth Amendment. *Id*. *at 13*. The court, however, again dismissed Mr. Clark's Eighth Amendment claim premised on his placement in solitary confinement, stating "I stand by the Court's previous determination that no clearly established law supports finding that housing a mentally ill inmate in solitary confinement is *per se* a violation of the Eighth Amendment." *Id.* The court noted that *Palakovic* "gets Plaintiff closer to showing that there may be some right barring confinement of mentally ill individuals to the solitary housing unit, but still misses the mark." The court acknowledged the Third Circuit had cited to "the robust body of legal and scientific authority recogniz[ing] the devastating mental health consequences

caused by long-term isolation in solitary confinement." *App-I 15*. Yet the court held that the case did not control the analysis because "the court did not consider whether they alleged a constitutional violation, whether the defendants were insulated by qualified immunity, or any other potential bar to the Palakovics successfully bringing such a claim. The fact that the Third Circuit found 'vulnerability to suicide' is not the only claim available to a deceased inmate's estate does not provide for a clearly established right. Thus, I again conclude that there is no clearly established Eight Amendment right that *per se* prohibits housing a mentally ill inmate in solitary confinement." *Id. at 15-16*.

Mr. Clark is entitled to ask this Court to overturn this erroneous district court ruling. He is not *relitigating* a district court decision – he is *appealing* a district court decision because it was wrong as a matter of law. The district court's ruling meant that the jury never heard Mr. Clark's evidence proving that the Vaughn Wardens violated his Eighth Amendment rights by placing him in extended periods of solitary confinement. Instead, they heard evidence regarding Mr. Clark's other two claims that the district court permitted to proceed to discovery and trial: (1) the Vaughn Wardens put him in solitary ***because*** he was seriously mentally ill, and (2) the Vaughn Wardens deprived him of adequate medical care while he was in solitary confinement. The jury verdict form makes it clear these were the only two issues being tried. *Supp.App. at 723-725*; *App-I 20*.

The law of the case refers to a discretionary practical approach designed to prevent courts from revisiting issues previously resolved during the litigation. It in no way limits the power of an appellate court to review actions of a lower court. *See, e.g., Christianson v. Colt Industries Operating Corp*, 486 U.S. 800, 802 (1988) ("Moreover, the doctrine merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit on their power.") Mr. Clark complied with L.A.R. 3.0 and has a right to seek appellate review of the erroneous district court decision under F.R.C.P. 12(b)(6). This review is plenary. *See Allen ex rel. Martin v. LaSalle Bank, N.A.*, 629 F.3d 364, 367 (3d Cir. 2011); *Morrow v. Balaski*, 719 F.3d 160, 165 (3d Cir. 2013); *McLaughlin v. Watson*, 271 F.3d 566, 570 (3d Cir. 2013); *Argueta v. ICE*, 643 F.3d 60 (3d Cir. 2011); *Kedra v. Schroeter*, 876 F.3d 424, 434 (3d Cir. 2017). The law of the case does not undermine or diminish this Court's power to hear this appeal.

Likewise, collateral estoppel and res judicata prevent parties and third parties from evading the conclusive effect of final judgments issued by the highest relevant authority. *See generally Brownback v. King*, 141 S.Ct. 740 (2021); *Parklane Hoisery Inc. v. Shore*, 439 U.S. 322 (1979). But nothing in either of these doctrines cuts off a party's right to appeal to an appellate court. 28 U.S.C. § 1291.

The Vaughn Wardens ignore the fact that Mr. Clark appealed the decision below. Instead, they rely on attenuated factual inferences to try to convert a jury verdict on the non-dismissed claims into an umbrella factual finding that they were not deliberately indifferent to Mr. Clark's health and safety. *Wardens' Brief* 31. But the jury verdict form makes clear that the jury was never asked to rule on whether the Vaughn Wardens evidenced deliberate indifference towards Mr. Clark's health and safety. Rather, the jury was asked whether Mr. Clark proved "that he was deprived of his Eighth Amendment rights by being placed into solitary confinement ***because*** of his mental illness?" (emphasis added) and "that he was deprived of his Eighth Amendment rights to adequate medical care while he was in solitary confinement?" *Supp.App. at* 723-724. It is impossible to infer from these answers that the jury would necessarily have answered no to the question "did the Vaughn Wardens deprive Mr. Clark of his Eighth Amendment rights by placing him into extended solitary confinements despite knowledge of his serious mental illness?" The Vaughn Wardens are not permitted to stretch and distort the doctrines of collateral estoppel and res judicata well beyond their permissible limits into mechanisms that prevent Mr. Clark from exercising his statutory right to review by this Court.

Consider another analogy to physical health: an incarcerated man alleges prison officials violated the Eighth Amendment in three ways – they (1) assaulted

him, (2) because he was Black, and (3) and failed to give him adequate medical care for the assault. The prison officials prove that (1) they assaulted him because he mocked them and (2) he received adequate medical care for injuries arising from the assault. The lack of racial motive and the adequate medical care cannot be deemed to eliminate the Eighth Amendment violation based on the assault itself. Likewise, Mr. Clark, a seriously mentally ill person, endured the practical equivalent of an egregious and debilitating physical assault: namely, extended periods of solitary confinement. That the Vaughn Wardens persuaded a jury that they did not put him in solitary *because* he was mentally ill, and gave him adequate care while in solitary, does not defeat Mr. Clark's Eighth Amendment claim premised on the unconstitutionality of extended confinement of the seriously mentally ill. Mr. Clark can prevail on his claim at trial by proving the length of confinement and the Vaughn Wardens' knowledge of the extent of his mental illness. He need not prove motive nor substandard medical care. The jury verdicts are irrelevant, and do not support the invocation of the collateral estoppel and res judicata doctrines.

IV. THE VAUGHN WARDENS HAD FAIR NOTICE THAT THEIR CONDUCT VIOLATED THE EIGHTH AMENDMENT.

The Vaughn Wardens fail to address Mr. Clark's arguments about the many forms of notice they received about the illegality of placing a person with serious mental illness into solitary confinement for more than 200 days. Instead, relying

heavily on inapposite police cases, they argue the district court acted within the law when it granted them qualified immunity. This Court should reject these arguments, as the weight of the controlling law establishes that the Vaughn Wardens are not entitled to qualified immunity on the facts here. *Marbury v. Madison*, 5 U.S. 137, 163 (1803); *Hope v. Pelzer*, 536 U.S. 730, 740 (2002); *Peroza-Benitez*, 994 F.3d at 164; *Thomas v. Independence Twp.*, 463 F.3d 285, 291 (3d Cir. 2006); *Young v. Martin*, 801 F.3d 172, 181-182 (3d Cir. 2015).

A. The Vaughn Wardens Are Not Entitled to Presume Immunity.

The Vaughn Wardens begin their Argument with the false premise that government officials are generally entitled to qualified immunity. *See Wardens' Brief* 13 ("As a general matter, government officials sued in their individual capacity under § 1983 are entitled to qualified immunity."). This is wrong as a matter of law and an inappropriate attempt to create a presumption of immunity and shift the evidentiary burden to Mr. Clark. Given that qualified immunity extinguishes governmental accountability for violations of constitutional and statutory rights, the Court should presume its absence, not its presence. *See, e.g. Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if laws furnish no remedy for the violation of a vested legal right.").

As the Third Circuit explained in *Peroza-Benitez*, the "judicially created doctrine of qualified immunity 'balances two important interests – the need to hold public officials accountable when they exercise power irresponsibility and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.'" 994 F.3d at 164 (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This Court should reject the Vaughn Wardens' effort to presume immunity, as none of the authorities they cite for this proposition lend any weight. The *Thomas* case cited expressly contradicts the Vaughn Warden's attempt at using a presumption of immunity to burden shift. There, the Third Circuit reaffirmed that "the burden of pleading a qualified immunity defense rests with defendant, not the plaintiff." 463 F.3d at 293. The Third Circuit also pointed out the very error that pervades the Vaughn Wardens' Opposition, explaining "the Individual Defendants' argument ultimately lacks merit because it conflates qualified immunity with the merits of a plaintiff's cause of action under § 1983." *Id.* at 292.

Nor do any of the other cited authorities support a presumption of immunity. *Argueta* merely holds that the plaintiffs seeking redress under Bivens "failed to allege a plausible claim to relief on the basis of the supervisors' 'knowledge and acquiescence' or any other theory of liability." 643 F.3d at 70. In *Wright v. City of Philadelphia*, 409 F.3d 595, 599 (3d Cir. 2005), the Third Circuit examined

whether or not a Constitutional violation occurred when police arrested a sexual assault victim for theft. There, because the qualified immunity analysis of the lower court served as the jurisdictional basis for the interlocutory appeal, the Court addressed the police officers' argument that no constitutional violation occurred, and held that reasonable police officers could have found probable cause. This case does not establish a presumption of immunity, and sheds no light on the issues here: whether the Vaughn Wardens had fair notice that placing a seriously mentally ill person in solitary confinement for more than 200 days violated the Constitution.

Throughout their Opposition, Vaughn Wardens rely primarily on police cases – *see, e.g., Southerland v. Pennsylvania*, 389 F. App'x 166, 170 (3d Cir. 2010) – without acknowledging that the qualified immunity analysis applicable to correctional officers varies greatly from the analysis of police behavior because correctional officers have the luxury of time. As explained by the Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998), when analyzing whether a government official violated the Constitution, factual circumstances control, and "in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prison to exercise ordinary responsibility for his welfare." By contrast, the police have to act in haste and make split-second judgments in circumstances "that are

tense, uncertain and rapidly evolving." *Id*. at 853 (citing *Graham v. Connor*, 490 U.S. 386, 397 (1989)). *See also Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999) (contrasting police actions in high-speed chase with prison officials who have the luxury of time); *El v. City of Philadelphia*, 975 F.3d 327, 342 (3d Cir. 2020) (no qualified immunity even for police officer making a split-second decision because officer knew plaintiff unarmed and outnumbered).

B. The Vaughn Wardens Fail to Rebut Their Receipt of Fair Notice through the CLASI Decision, Statute, Prison Regulations, USDOJ Investigation and ACA Audit.

The Vaughn Wardens admit that "[t]he ultimate question is whether the defendant had 'fair warning' that his conduct deprives his accuser of a constitutional right." *See Wardens' Brief* 16 (citing *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)). Yet the Vaughn Wardens are wholly silent on the fair warning they received about the unconstitutionality of their conduct from the CLASI decision, Delaware statute, their own prison regulations, a USDOJ investigation and memorandum and an ACA audit that identified by name Warden Pierce as engaging in improper conduct. Such a failure to rebut operates as a concession of fair warning.

1. CLASI Decision

The Vaughn Wardens fail to rebut Mr. Clark's argument that the CLASI decision placed them on notice of the illegality of extended solitary confinement for those with serious mental illness. *Opening Brief* 43-44. In *Community Legal*

Aid Society v. Coupe, No. 15-688, 2016 WL 1055741 (D. Del. Mar. 16, 2016), the court held CLASI stated a claim that Commissioner Coupe violated the Eighth Amendment by alleging that seriously mentally ill inmates were kept in solitary confinement. Relying on *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) and *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991), the court concluded that "CLASI has alleged facts which could support a viable Eight Amendment claim." *CLASI*, 2016 WL 1055741, at *4. The Wardens' Brief ignores the CLASI decision. *See Wardens' Brief, Table of Citations*.

2. Delaware Code Section 3902

Mr. Clark explained that Delaware Code Section 3902 put the Vaughn Wardens on notice that solitary confinement longer than three months was prohibited for all persons incarcerated, not only the seriously mentally ill. *Opening Brief* 45-46. This Code Section is of obvious significance to the qualified immunity analysis.

The Third Circuit has repeatedly held state legislation should be considered in the qualified immunity analysis. *See, e.g., Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018); *Williams*, 848 F.3d at 570-71 (state statute bears on Constitutional rights analysis); *Brown v. Muhlenberg Twp*., 269 F.3d 205, 211-12 (3d Cir. 2001) (state legislation controlled the qualified immunity analysis); *W.B. v. Matula*, 67 F.3d 484, 500-01 (3d Cir. 1995), *abrogated on other grounds by A.W. v. Jersey*

City Pub. Sch., 486 F.3d 791 (3d Cir. 2007) (regulations led to denial of immunity). *See also Vazquez v. County of Kern*, 949 F.3d 1153, 1164-65 (9th Cir. 2020) (statutory standards relevant).

The Vaughn Warden's Opposition Brief says ***nothing*** about the controlling Delaware Code Section that prohibits the very conduct at issue. Yet the Vaughn Wardens are certainly deemed to be on notice of Delaware law, and cannot evade the import of this Code Section on the qualified immunity analysis by simply ignoring it.

3. Department of Correction's Policy

Mr. Clark explained that the Department of Correction's own policy on segregating offenders put the Vaughn Wardens on notice that they were violating his Constitutional rights. *Opening Brief* 46-47. The policy expressly states that severe mental illness is "contradictory to confinement or would require special accommodations." *App-III 502*. The Supreme Court made clear in *Hope* that an officer's violation of a Department of Correction regulation bears on the qualified immunity analysis.

That is, it strains credibility for a correctional officer to claim he or she did not know they were violating a Constitutional right when the conduct itself was prohibited or regulated by Department of Correction regulations. *Hope*, 536 U.S. at 741-744. This Court has similarly consulted Department of Corrections

regulations to determine whether officials had "fair warning" of the unlawfulness of their conduct. *Young*, 801 F.3d at 181-182. *See also Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) (internal policies relevant to analysis of warning to officials); *Nelson v. Corr. Med. Servs.*, 583 F.3d 522, 531, 533-34 (8th Cir. 2009) (*en banc*) (prison regulations relevant and supported denial of immunity); *Alexander v. Perrill*, 916 F.2d 1392, 1398 (9th Cir. 1990).

In *Young*, the prison officials relied on a reasonable interpretation of the regulations to support their immunity claim. But here, as established by the Vaughn Wardens' failure to argue otherwise, the only way to read the relevant Department of Correction policy is to prohibit solitary confinement for those who have several mental illness. Yet the Vaughn Wardens ignored this policy and instead placed Mr. Clark in solitary for extended periods.

4. USDOJ Investigation and Memorandum

Mr. Clark explained that the USDOJ investigation and the Memorandum of Agreement that resulted from this investigation gave the Vaughn Wardens fair warning that their conduct violated the law. *Opening Brief* 47-48. This argument should persuade given that the Supreme Court considered such an investigation as significant in *Hope*. The Vaughn Wardens do not even try to rebut the argument that the USDOJ investigation and Memorandum of Agreement gave them fair

warning that they were violating the law when they placed Mr. Clark, a seriously mentally ill person, into extended consecutive periods of confinement.

5. ACA Audit

As in *Hope*, no single factor stands in isolation but rather must all be considered together in assessing notice. In addition to the Delaware statute, prison regulations, and USDOJ investigation and Memorandum of Agreement, the Vaughn Wardens had notice of the illegality of extended periods of solitary by the ACA audit of the Vaughn prison. The ACA directed that seriously mentally ill persons should *never* be placed solitary but rather should be placed in secure residential treatment units. *App-III* 598.

The ACA identified Warden Pierce as willing to violate the Constitution. *App-III 590*. Even though he had been educated by ACA and knew his conduct violated the Eighth Amendment, he continued to engage in improper conduct towards the mentally ill, believing himself to be above the law. *App-III 588-593.* Notably, the Opposition fails to rebut this showing of fair notice.

Instead, the Vaughn Wardens double down on the improper conduct, insisting they were entitled to place a seriously mentally ill person in solitary for periods as long as seven consecutive months. *Warden's Brief* 25-35.
Warden Pierce may believe he is above the law, as he expressed to the ACA, but his subjective beliefs are not relevant. He and Commissioner Coupe cannot ignore

established constitutional standards for the mentally ill; they had fair warning of these standards. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

The Vaughn Wardens assert that the Supreme Court decision in *In re Medley* "has no bearing on the question of qualified immunity in this case." *Wardens' Brief* 18. As support for this argument, the Vaughn Wardens merely quote extensively from the district court. *Wardens' Brief* 17-18. But as Mr. Clark explained, the district court, echoing the magistrate judge, erroneously viewed only judicial decisions on qualified immunity as relevant to determining the contours of clearly established Eighth Amendment jurisprudence. *Opening Brief* 17-20. This is clear legal error yet the Vaughn Wardens rely upon it and fail to respond in any way to Mr. Clark's arguments, and instead simply quote the district court. *Wardens' Brief* 17. Mr. Clark explained that the Supreme Court's 1890 recognition of the grave harms of solitary – even on those without mental illness – must be considered when determining whether extended solitary confinement of a seriously mentally ill person violated the Eighth Amendment. As interpreted by Justice Douglas' concurrence in *Robinson*, 370 U.S. 660, 675 (1962), *In re Medley* recognizes solitary confinement may be considered cruel and unusual. *Robinson*, 370 U.S. at 675. This early recognition from the Supreme Court on the dangerous nature of solitary confinement cannot be ignored. Taken together with the holding in *Estelle*, the Supreme Court laid the foundation for the "maturing" of the Eighth

Amendment prohibition against extended solitary confinement. *Opening Brief* 22-23.

V. CONCLUSION

The scope of conduct prohibited by the Eighth Amendment evolves along with the "standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. By the time of Mr. Clark's confinement, the nation developed a uniform nationwide consensus among courts that considered the issue: seriously mentally ill incarcerated persons cannot be placed into solitary conditions for extended periods of time because doing so causes extreme deterioration of mental health. That this national consensus took time to develop is not reason to ignore its controlling effect. *See McGirt v. Oklahoma*, 140 S.Ct. 2452, 2480 (2020) ("the magnitude of a legal wrong is no reason to perpetuate it.") The Vaughn Wardens' conduct was inhumane and unacceptable, and it violated the Eighth Amendment.

Respectfully Submitted,

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CERTIFICATION OF ADMISSION TO BAR

I, Susan L. Burke, certify as follows:

1. I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

2. Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: December 8, 2021

By: /s/*Susan L. Burke*
Susan L. Burke

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). This brief contains 6,472 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using the 2008 version of Microsoft Word in 14 point Times New Roman font.

This brief complies with the electronic filing requirements of Local Rule 31.1(c) because the text of this electronic brief is identical to the text of the paper copies, and the Vipre Virus Protection, version 3.1 has been run on the file containing the electronic version of this brief and no viruses have been detected.

Dated: December 8, 2021

By: /s/*Susan L. Burke*
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CERTIFICATE OF FILING AND SERVICE

I certify that on this 8th day of December 2021, the foregoing Reply Brief was filed through CM/ECF system and served on all parties or their counsel of record through the CM/ECF system.

Dated: December 8, 2021

By: /s/ *Susan L. Burke*
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