No. 08-596

In the Supreme Court of the United States

JASON WILSON, PETITIONER

v.

KAREN HOGSTEN, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

EDWIN S. KNEEDLER
Acting Solicitor General
Counsel of Record
MICHAEL F. HERTZ
Acting Assistant Attorney General
BARBARA L. HERWIG
LOWELL V. STURGILL, JR.
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals and the district court erred in concluding that petitioner failed to allege a liberty interest protected under the Due Process Clause.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and regulation:

In the Supreme Court of the United States

No. 08-596

JASON WILSON, PETITIONER

v.

KAREN HOGSTEN, WARDEN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 269 Fed. Appx. 193. The opinion and order of the district court granting defendants' motion to dismiss or in the alternative for summary judgment (Pet. App. 7a-29a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 2008. A petition for rehearing was denied on June 4, 2008 (Pet. App. 30a-31a). On August 27, 2008, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including November 1, 2008. The petition for a writ of certiorari was

filed on October 31, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is currently serving a 108-month prison sentence for distribution of a controlled substance in violation of the federal narcotics laws. 12/7/06 Decl. of Joseph McCluskey ¶ 3; Def.'s Mot. to Dismiss, Exh. 1, at 2. His projected release date from federal custody is May 13, 2009. *Ibid*.

From January 28, 2003, through February 8, 2006, petitioner was incarcerated at the Federal Correctional Institution in Allenwood, Pennsylvania (FCI Allenwood). Pet. 2. On April 13, 2005, petitioner was removed from the general population at FCI Allenwood and placed on administrative detention status in that Institution's Special Housing Unit during an internal investigation of alleged misconduct by inmates and prison staff. Pet. App. 5a, 25a. The investigation concluded on November 17, 2005, and although petitioner was not found to have engaged in illegal activity, he remained in administrative detention pending his transfer to another federal correctional institution on February 8, 2006. *Id*. at 25a & n.8.

2. Federal regulations provide that inmates may be placed in administrative detention for a number of reasons. See 28 C.F.R. 541.22; Pet. App. 33a-38a. Under those regulations, administrative detention is appropriate when the inmate is "pending transfer" to another institution, "when the inmate is in holdover status (i.e., en route to a designated institution) during transfer," or when the inmate "is a new commitment pending classification." 28 C.F.R. 541.22(a) and (a)(1). Administrative detention is also warranted where, *inter alia*, the inmate

is involved in "an investigation of a violation of Bureau regulations." 28 C.F.R. 541.22(a)(2).

The regulations prescribe certain procedures that accompany placement of an inmate in administrative detention. 28 C.F.R. 541.22(b) and (c). When an inmate is so designated, prison officials must generally prepare and, if institutional security permits, deliver to the inmate an administrative detention order (ADO) detailing the reasons for the placement. 28 C.F.R. 541.22(b). A segregation review official (SRO) is required to review the inmate's status at specified intervals. 28 C.F.R. 541.22(c). If the inmate remains in administrative detention for longer than 30 days, prison officials must interview the inmate each month and prepare a report assessing his psychological condition. *Ibid.*

3. a. On January 17, 2006, petitioner filed a pro se complaint in the United States District Court for the Middle District of Pennsylvania naming various FCI Allenwood employees, respondents here. Pet. App. 7a-9a. The complaint alleged deprivations of petitioner's rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution, as well as violations of federal Bureau of Prisons regulations, arising from his placement and experience in administrative detention. As relevant here, the complaint asserted that respondents violated petitioner's Fifth Amendment due process rights by failing to comply with their regulatory obligations to ensure that he received an ADO explaining the basis for his detention, periodic review of his status before the SRO, and monthly psychological evaluations. *Id.* at 8a-9a. The complaint, which named respondents in their individual and official capacities, sought millions of dollars in compensatory and punitive

damages as well as injunctive and declaratory relief. *Id.* at 10a.

b. The district court awarded summary judgment to respondents on various grounds. Pet. App. 7a-28a. In the portion of the decision at issue in this Court, the district court held that respondents were entitled to qualified immunity on petitioner's due process claim because petitioner's placement in administrative detention did not implicate a protected liberty interest. *Id.* at 22a-23a. The court concluded that, under the standard articulated in *Sandin* v. *Conner*, 515 U.S. 472 (1995), petitioner's ten-month placement in administrative detention did not constitute an "atypical and significant hardship * * * in relation to the ordinary incidents of prison life." Pet. App. 24a (quoting *Sandin*, 515 U.S. at 484). In the court's view, the "undisputed circumstance[]" that petitioner was implicated in an investigation of inmate and staff misconduct "provided a legitimate need" to place him in administrative detention while the investigation was underway. *Id.* at 25a. The court also reasoned that the approximately ten weeks that petitioner remained in administrative detention after the conclusion of the investigation "was not of such magnitude" to trigger due process protection under *Sandin*. *Id.* at 25a-26a. In support of that conclusion, the court cited the Third Circuit's decision in *Griffin* v. *Vaughn*, 112 F.3d 703 (1997), which held that an inmate's placement in administrative detention for 15 months did not constitute an atypical and significant hardship. Pet. App. 24a.

The district court thus reasoned that, because petitioner had failed to allege a protected liberty interest, there was no need to assess the constitutional adequacy of the procedures respondents provided. Pet. App. 24a. The court noted in rejecting petitioner's claims arising

from the federal regulations, however, that based on a review of the documentary evidence respondents offered in support of their motion for summary judgment, petitioner was in fact "provided with all mandated SRO reviews and psychological assessments during his ten month" period in administrative detention, including weekly status reviews and six psychological counseling sessions. *Id.* at 26a-27a.

4. The court of appeals affirmed the district court's judgment in a non-precedential, per curiam order. Pet. App. 1a-6a. The court of appeals agreed with the district court that because petitioner "was the subject of an internal investigation," there was "a need for his confinement" in administrative detention until the completion of that process. *Id.* at 4a. The court further reasoned that the ten weeks in which petitioner remained in such status following the investigation "also did not transform the entire detention into the atypical and significant hardship contemplated in *Sandin*." *Id.* at 4a (citing *Griffin*, 112 F.3d at 706). And "[i]n any event," the court noted, "the forms and affidavits submitted by the Defendants indicate that [petitioner] received psychological assessments and SRO reviews" in compliance with the federal regulations. *Id.* at 5a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. "The Due Process Clause standing alone confers no liberty interest in freedom from state action taken 'within the sentence imposed.'" *Sandin* v. *Conner*, 515 U.S. 472, 480 (1995) (quoting *Hewitt* v. *Helms*, 459 U.S.

460, 468 (1983)). "States may under certain circumstances create liberty interests which are protected by the Due Process Clause," *id.* at 483-484, but those interests are generally limited to freedom from restraint that "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at 484.

At issue in *Sandin* was an inmate's sentence to 30 days of disciplinary segregation. See *Sandin*, 515 U.S. at 475. After the inmate sought administrative review of that sentence, he filed a federal civil suit alleging that he was deprived of due process because prison officials refused to allow him to call witnesses at the hearing he was afforded to challenge his punishment. See *id.* at 475-476.

This Court held that petitioner's discipline in segregated conditions "did not present the type of atypical, significant deprivation in which a State might conceivably create a liberty interest" triggering due process protections. *Sandin*, 515 U.S. at 486. "[A]t the time of [petitioner's] punishment," the Court explained, "disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Ibid.* (footnote omitted). Thus, petitioner's confinement "did not exceed similar, but totally discretionary, confinement in either duration or degree of restriction." *Ibid.* "Indeed," the Court noted, the conditions at the prison to which petitioner was assigned involved "significant amounts of 'lockdown time' even for inmates in the general population." *Ibid.* (footnote omitted). The Court thus concluded that, "[b]ased on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing [the inmate] there for 30 days

did not work a major disruption in his environment." *Ibid.* (footnote omitted).[*]

In *Wilkinson* v. *Austin*, 545 U.S. 209 (2005), the Court applied those principles to hold that an inmate's assignment to a state "Supermax" facility did implicate a liberty interest under the Due Process Clause because an assignment to that facility "imposes an atypical and significant hardship" within the meaning of *Sandin*. 545 U.S. at 223. "Unlike the 30-day placement in *Sandin*," this Court noted, placement at the Supermax facility at issue in *Wilkinson* "is indefinite and, after an initial 30-day review, is reviewed just annually." *Id.* at 224. This Court further distinguished the outcome in *Sandin* on the ground that placement in the state Supermax facility at issue in *Wilkinson* "disqualifies an otherwise eligible inmate for parole consideration." *Ibid.* (citation omitted).

The Court observed in *Wilkinson* that "[i]n *Sandin*'s wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure what is atypical and significant in any particular prison system." 545 U.S. at 223 (citations omitted). This Court decided it was unnecessary to address that issue, however, because the Court was "satisfied that assignment to [the supermax facility in that case] imposes an atypical and significant hardship under any plausible baseline." *Ibid.*

2. Petitioner argues that further review is warranted in this case to address the Due Process "baseline"

---

[*] In a footnote, this Court also noted that petitioner had requested that he be placed in protective custody after he had been released from disciplinary segregation—a fact that provided "some evidence that the conditions suffered were expected within the contour of the actual sentence imposed." *Sandin*, 515 U.S. at 487 n.9.

issue *Wilkinson* identified but did not resolve. Just as this Court found it unnecessary to address that question in *Wilkinson*, however, there is no reason for reviewing here. Under "any plausible baseline," *Wilkinson*, 545 U.S. at 223, the court of appeals correctly concluded that the administrative detention to which petitioner was subjected does *not* impose an "atypical and significant hardship" under *Sandin* and *Wilkinson*.

As the regulations on which petitioner relies make clear, assignment to administrative detention is an ordinary incident of life in the federal prison system and can occur for any number of different reasons. Administrative detention is appropriate, for example, when an inmate is pending classification upon arrival at an institution, as well as when the inmate is awaiting or in the process of transfer to another facility. 28 C.F.R. 541.22(a). The regulations furnish a broad list of additional circumstances in which such a designation is warranted. *Ibid*. The breadth of these reasons shows that, far from imposing an "atypical and significant hardship," *Sandin*, 515 U.S. at 484, administrative detention is an ordinary and expected—if not inevitable—incident of a federal inmate's sentence.

In asserting a deprivation of his due process rights, petitioner relies principally on the length of his assignment to administrative detention. As both courts below held, however, no reasonable fact-finder could conclude that the duration of petitioner's commitment to administrative detention, considered in light of the reasons for the confinement, would be considered an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin*, 515 U.S. at 484. Contrary to petitioner's contention, moreover, decisions

from other courts of appeals would not compel a different result in the circumstances of this case.

Petitioner was in administrative detention for approximately ten months, a period significantly shorter than the duration of detention involved in nearly all of the cases petitioner cites where courts of appeals held an inmate's special confinement to be "atypical." See, *e.g.*, *Tellier* v. *Fields*, 280 F.3d 69, 74 (2d Cir. 2000) (514 days of administrative segregation atypical); *Williams* v. *Norris*, 277 Fed. Appx. 647 (8th Cir. 2008) (12 years administrative segregation atypical). Although the Second Circuit concluded in *Colon* v. *Howard*, 215 F.3d 227 (2000), that 305 days of restrictive confinement gave rise to a protected liberty interest, that case is readily distinguishable from this one because it involved disciplinary segregation in a state prison system and, unlike here, the court emphasized the lack of any indication that such confinement was "typically endured by other prisoners in the ordinary course of prison administration." *Id.* at 231 (quoting *Welch* v. *Bartlett*, 196 F.3d 389, 394 (2d Cir. 1999).

As the courts below properly concluded, moreover, the typicality of an inmate's administrative detention should be judged in part by the reasons for such detention. See Pet. App. 4a, 25a. It is hardly unusual for prison officials to have needed approximately seven months to complete the kind of complex investigation that occurred here, involving suspected misconduct between and among prison inmates and staff. See *id.* at 8a-9a. Petitioner does not argue the contrary.

Nor is it atypical for respondent to have remained in administrative detention for an additional ten weeks after the investigation concluded. Reassignment of an inmate to the general population or to another facility

implicates numerous issues, including complex predictive judgments about the inmate's likely future behavior, potential risks to prison safety and good order, practical concerns such as the availability of cell space at various institutions, matters relating to the inmate's rehabilitation needs, and questions regarding when resources can be freed up to effectuate the inmate's transfer. For those reasons, the federal regulations direct that administrative detention is appropriate where, as here, the inmate "is pending tranfer" to another institution, and the regulations specifically contemplate that reassignment of an inmate from administrative detention may take as long as three months. 28 C.F.R. 541.22(a)(6)(i); Pet. App. 34a (providing that "[e]xcept for pretrial inmates or inmates in a control unit program, staff ordinarily within 90 days of an inmate's placement in post-disciplinary detention shall either return the inmate to the general inmate population or request regional level assistance to effect a transfer to a more suitable institution").

This case is also wholly unlike *Wilkinson*, where an inmate's special detention or segregation was "indefinite and, after an initial 30-day review, * * * reviewed just annually." 545 U.S. at 224. As the courts below noted, defendants attached to their motion for summary judgment "copies of institutional records indicating that thirty (30) day status reviews were provided to the Plaintiff throughout his [time in administrative detention]" and affidavits confirming that he received six separate counseling sessions and nearly a dozen psychological assessments. Pet. App. 27a; see *id.* at 5a.

In any event, both courts below duly considered the matter and found that petitioner's stay in administrative detention did not amount to an atypical and significant

hardship. That fact-bound determination does not warrant this Court's review. Cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) (explaining that this Court will not "undertake to review concurring findings of fact by two courts below in the absence of a very obvious and exceptional showing of error").

3. Even assuming *arguendo* that this case turned on the baseline for determining whether a particular form or period of confinement imposes atypical and significant hardship, further review would not be warranted. In *Wilkinson*, this Court deemed it unnecessary to address that question even though the Court noted that the courts of appeals have applied differing formulations. See *Wilkinson*, 545 U.S. at 223 (citing cases). Petitioner fails to demonstrate that the legal landscape has changed significantly since *Wilkinson* was decided or that the differences among the circuits noted in *Wilkinson* are the kind that require clarification.

The test set forth in *Sandin* and *Wilkinson* is a highly fact-specific inquiry that requires a court to weigh any number of relevant factors, including the duration and conditions of the special confinement in question and whether that confinement can lengthen the inmate's sentence. A court must determine whether, "taken together," *Wilkinson*, 545 U.S. at 224, those factors reveal an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 223 (quoting *Sandin*, 515 U.S. at 484). All the circuits acknowledge these basic propositions.

Moreover, the cases petitioner cites reveal that the circuits, despite applying sometimes differing verbal formulations, have reached substantially consistent results in applying the *Sandin* test. Thus, the circuits have held that long periods of administrative or disci-

plinary segregation are atypical, see, *e.g.*, *Tellier*, *supra* F.3d 69 (514 days); *Williams*, *supra* (12 years); *Shoats* v. *Horn*, 213 F.3d 140 (3d Cir. 2000) (eight years); *Gans* v. *Rozum*, 267 Fed. Appx. 178 (3d Cir.), cert. denied, 129 S. Ct. 84 (2008) (11 years), while shorter periods generally are not. See, *e.g.*, *Sealey* v. *Giltner*, 197 F.3d 578 (2d Cir. 1999) (101 days not atypical); *Beverati* v. *Smith*, 120 F.3d 500 (4th Cir. 1997) (six months); *Griffin* v. *Vaughn*, 112 F.3d 703 (3d Cir. 1997) (15 months); *Townsend* v. *Fuchs*, 522 F.3d 765 (7th Cir. 2008) (59 days); *Skinner* v. *Cunningham*, 430 F.3d 483 (1st Cir. 2005) (40 days); *Thomas* v. *Warner*, 237 Fed. Appx. 435 (11th Cir. 2007) (20 days). This case, which involved approximately ten months of administrative confinement for reasons specifically identified in the federal regulations, falls squarely within the group of appellate decisions in which the courts have held there was no due process liberty interest at issue.

Because the standard announced in *Sandin* and applied in *Wilkinson* has not led to inconsistent results among the circuits, there is no urgent need to clarify it now. To the contrary, the development of the law in this area would benefit by allowing the courts of appeals to continue to apply the *Sandin* standard to new fact patterns. See generally *United States* v. *Mendoza*, 464 U.S. 154, 160 (1984) (noting the benefit this Court derives from allowing the courts of appeals to explore difficult issues before granting certiorari). This Court recently denied a petition for certiorari requesting clarification of the same purported circuit conflict, *Jordan* v. *Federal Bureau of Prisons*, 127 S. Ct. 2875 (2007), and there is no reason for a different result here.

4. In any event, this case would not be a suitable vehicle for addressing the question petitioner presents

because even if he were able to establish a protected liberty interest, he still would not be entitled to any relief. Petitioner's request for injunctive relief is moot because he has been released from administrative detention and he has not attempted to demonstrate any likelihood that he will be assigned to that status in the future sufficient to satisfy Article III. See generally *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 111 (1983) (possibility that petitioner would again be subjected to police choke hold was too speculative to provide Article III standing to challenge policy concerning use of choke holds; Article III requires a "real or immediate threat that the plaintiff will be wronged again"). Indeed, petitioner's projected release date is May 13, 2009. Thus, even if this Court were to grant certiorari, petitioner likely would have been released long before briefing in this case could be completed.

That leaves only petitioner's claims for monetary relief against the individual respondents, who are entitled to qualified immunity under the second part of the test set forth in *Saucier* v. *Katz*, 533 U.S. 194 (2001). "If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* at 202; see *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) ("If the law at [the time the officer acted] did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation."). To satisfy that standard, a plaintiff must show that the alleged violation was clearly unlawful in the "particularized" sense that a reasonable official would have understood that his actions violated the law in the specific "situation he con-

fronted." *Brosseau*, 543 U.S. at 199 (quoting *Saucier*, 533 U.S. at 202).

At the time the individual respondents acted, the law did not (and still does not) clearly establish that administrative detention for approximately ten months during and shortly after a complex internal investigation under the conditions of petitioner's confinement requires due process protections. To the contrary, as petitioner concedes (see Pet. 10-11), both courts below considered themselves bound as a matter of controlling circuit precedent to hold that petitioner failed to demonstrate a due process liberty interest under the Third Circuit's decision in *Griffin*, *supra*. See Pet. App. 4a-5a; *id*. at 24a-25a. Petitioner does not argue that *Griffin* is distinguishable from this case.

The central thrust of petitioner's argument, moreover, is that the law in this area is confused, not clear. That contention alone defeats any possibility that petitioner could recover damages from the defendants in their individual capacities based on the allegations he advances in this case.

Finally, even if a reasonable fact finder could conclude that petitioner had a liberty interest concerning his administrative detention, it was not clearly established at the time defendants took the actions alleged against them that petitioner was entitled to more process than he received. To the contrary, as the district court found, the record contains "copies of institutional records indicating that thirty (30) day status reviews were provided to the Plaintiff throughout [his term of administrative detention]." Pet. App. 27a. See *ibid.* (noting that the record also contains unrebutted declarations from prison officials explaining that petitioner was given all mandated reviews and psychological assess-

ments during the period of his administrative detention). For these reasons, this case does not provide an appropriate vehicle for clarifying *Sandin*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWIN S. KNEEDLER
Solicitor General
MICHAEL F. HERTZ
Acting Assistant Attorney General
BARBARA L. HERWIG
LOWELL V. STURGILL, JR.
Attorneys

FEBRUARY 2009