No. 04-495

In The Supreme Court of the United States

REGINALD WILKINSON, et al.,

Petitioners,

v.

CHARLES E. AUSTIN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED

In light of the findings of the district court that confinement in the Ohio State Penitentiary imposed an "atypical and significant hardship" on prisoners confined there, and that placements at the prison occurred in an arbitrary and haphazard fashion, are the procedures ordered by the court below an appropriate remedy?

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STATEMENT OF THE CASE

I. Hardship Of OSP Confinement

The courts below held that confinement at the Ohio State Penitentiary (hereafter, "OSP") creates an "atypical and significant hardship." They based their opinions on three factors: (1) what Judge Rogers of the court of appeals panel termed the "extraordinarily strict conditions" of confinement, Pet.App. 27a (Rogers, J., concurring in part, dissenting in part); (2) the indeterminate and often extremely lengthy duration of confinement; and (3) the automatic disqualification from eligibility for parole. Ohio has not challenged the district court's factual findings. *Id*. 10a, 22a.

High maximum security (Level 5) prisoners at OSP are locked in single cells except for approximately five one-hour periods per week. Pet.App. 52a-53a, 57a; Joint Appendix (hereafter "JA") 35, 102. Each cell measures approximately 89.7 square feet, has a sink and toilet, a small desk, a concrete immovable stool, a narrow concrete slab with a thin mattress, and a narrow window to the outside that cannot be opened and that does not comply with the standards of the American Correctional Association. Pet.App. 53a. Unlike cells in any other Ohio prison or even segregation unit, OSP has solid steel cell doors with metal strips along the sides and bottoms of the doors "that do not allow conversation with adjacent inmates." *Id*. 53a, 92a. "The conditions at the OSP do not allow any amelioration of the prolonged isolation designed into the OSP's structure." *Id.* 55a.

OSP was constructed without outdoor recreation facilities. At the time of trial, many prisoners had not been outside the walls of OSP for almost four years. Pet.App. 92a. Prisoners' only access to the outdoors was in small,

completely enclosed exercise rooms about the size of their cells located inside the building, which had a grated opening approximately six inches wide and four feet high. Ohio termed this room the "outdoor exercise" area, but the district court found "it hard to believe anyone would seriously suggest such a space constitutes outdoor recreation." *Id.* 93a. The American Correctional Association found that OSP's recreational facilities violated the generally accepted correctional practices expressed in its standards. *Id.* 54a.

Prisoners at OSP "have extremely limited contact with other individuals." Pet.App. 92a. Phone calls can be made only to approved persons; an unsuccessful attempt may count as one of one or two ten-minute phone calls allowed per month. *Id.* 57a; First Amended Complaint and Answer, Docs. 20 and 27, ¶ 51; JA 34, 101. Any time prisoners leave their cellblocks, they are strip-searched, shackled and placed in full restraints, which include an uncomfortable "black box" that holds their hands in a rigid position. OSP inmates are strip-searched before and after visits even though physical contact with visitors, who are behind solid glass, is impossible. Pet.App. 93a. No work assignments are offered other than one porter's job in each pod. There are no educational programs beyond the GED level, which, the court found, reach the prisoner through closed-circuit TV and self-study workbooks, and offer no human contact. *Id.* 57a. There are no vocational or job-readiness programs. Docs. 20 and 27, ¶ 54; Pet.App. 57a. Prisoners are not permitted to share books, magazines, or other personal property. *Id.* 55a-56a. Prisoners may be punished if they save a piece of bread or a packet of sugar from a food tray for a snack at a later time, or place any

photographs or other items on the cell walls. Docs. 20 and 27, ¶ 43.

These conditions are significantly more harsh than conditions in any other form of administrative detention in Ohio. They are harsher than conditions in Administrative Control on Death Row, where prisoners have "outdoor recreation, more access to personal property, more access to telephone usage, and more access to counsel." Pet.App. 54a-56a.

During the first two years of operation, there were three suicides at OSP. First Amended Complaint and Answer of Defendants, Docs. 20 and 27, ¶ 79.

The district court also emphasized the indefinite and often very lengthy duration of confinement at OSP. The court found that the "vast majority of inmates placed at the OSP will remain there for a minimum of two years, with only an annual review of their status." Pet.App. 90a. At the time of trial, 200 OSP prisoners had been there for more than three years, a duration limited solely by the circumstance that OSP had then only been open for slightly more than three and one-half years. *Id.* 90a, 96a. As the district court found, "even with good behavior, inmates at the OSP serve indefinite terms at the institution." *Id.* 91a.

Finally, placement at OSP automatically disqualifies a prisoner for parole. The district court found that there were prisoners who met the parole guidelines and whom the Parole Board was ready to release, but were denied parole under this rule. In the court of appeals, Judge Rogers placed particular emphasis on the rule suspending parole eligibility for all prisoners at OSP. Pet.App. 27a, citing *Sandin v. Conner*, 515 U.S. 472, 487 (1995) ("finding no protected liberty interest in remaining free

from disciplinary segregation, but noting that disciplinary record did not preclude parole").

The district court concluded that prisoners at OSP have a constitutionally-protected liberty interest. Pet.App. 39a, 96a. All three judges in the court of appeals panel agreed. *Id.* 14a, 26a-28a.

II. A Pattern Of Subjective, Haphazard And Arbitrary Decisionmaking

After a trial involving twenty witnesses and more than a thousand pages of exhibits, Pet.App. 48a, the district court found that "the Department's procedure for selecting and retaining inmates at the OSP has great potential for error." *Id.* 102a. The court of appeals affirmed, relying on the district court's "specific findings concerning past erroneous and haphazard placements at OSP, which go unchallenged on appeal." *Id.* 22a.

The district court found that there was an institutional bias toward transfer of prisoners to OSP so as to fill it. During the five years before OSP opened, the twenty cells in the high maximum security block at Ohio's maximum security prison, the Southern Ohio Correctional Facility (hereafter, "SOCF"), were less than half full most of the time. Pet.App. 51a, citing testimony of Peter Davis, JA 293. The evidence led the district court to find that Ohio had created "too much capacity" for high maximum cells and "insufficient capacity" at maximum security, "causing an imbalance in assigning prisoners to appropriate confinement." Pet.App. 51a-52a. As a result, prison officials transferred to OSP prisoners who did not need its level of restrictions. *Id.* 52a.

A. Initial Transfers

Ohio began transferring prisoners to OSP in May 1998. In violation of Ohio Administrative Rule 5120-9-53, JA 13, the initial transferees to OSP received neither notice that they were being considered for reclassification to high maximum security nor an opportunity to be heard. The Department sent more than 100 prisoners to OSP before adopting a written policy as to who should be placed in high maximum security. Pet.App. 58a.

A quality review team made up entirely of high-ranking Department personnel visited OSP in December 1998 and issued a report consistent with "plaintiffs' claim that no clear standard describes which inmates would be placed at the OSP." Pet.App. 51a. At the time of these initial transfers, "the Department had no policy in effect identifying which inmates could suitably be placed at the OSP. . . . Without any set criteria, similarly situated inmates were often treated differently." *Id.* 58a.

B. Policy 111-07 And Arbitrary Decisionmaking

In August 1998, the Department "attempted to establish some predictability to placement at the OSP" by issuing Policy 111-07. Slightly modified in January 1999, this policy ("Old Policy 111-07") remained in effect at the time of trial in January 2002. Pet.App. 59a.

The district court found that arbitrary and haphazard placements at OSP continued despite the promulgation of Policy 111-07. The court concluded that Ohio had violated the prisoners' right to due process by denying them adequate notice, adequate hearings, and an adequate explanation of its decisions. Pet.App. 39a.

The case of James DeJarnette illustrates the haphazard system of placement and retention at time of trial. DeJarnette assaulted an officer at Orient Correctional Institution while intoxicated. A classification committee at Orient (a medium security facility) concluded that placement in high maximum security and transfer to OSP were not appropriate, and recommended Administrative Control. The warden agreed. Nevertheless, the Bureau of Classification increased DeJarnette's security classification to high maximum and transferred him to OSP in October 1998 without notice or explanation. Pet.App. 62a.

In November 2000, the OSP classification committee recommended that DeJarnette be reduced in security classification and transferred out of OSP because of his "good adjustment" and the fact that he was "not a behavioral problem," but higher administrators disagreed and DeJarnette was retained at OSP. Pet.App. 64a. The ultimate decisionmaker "never heard from DeJarnette before deciding to keep him at the OSP, never fully explained his reasons behind the decision, and never told DeJarnette what issues prevented a reduction in his security level." *Id.*

The district court found that DeJarnette's case also exemplified the effect placement at the OSP has on parole eligibility. Pet.App. 62a. Ohio has a policy that

> stops consideration of parole for prisoners in the high maximum or maximum security classifications. (Pls.' Ex. 3 at 8 [ODRC Policy 501.36, JA 152]). To receive parole, an OSP inmate must first be reclassified to maximum security. Once he spends approximately a year at maximum security he may be reclassified to close security and be eligible for parole.

Id. 94a. The Parole Board was ready to release DeJarnette but could not do so because he was at OSP. *Id*. 63a-64a, citing Ohio Parole Board Decision, Pl.Ex. DeJarnette-9, JA 187 ("He has served above the recommended range. However, his Security Status prevents a release recommendation").

Similarly, the district court found that Ohio's questionable decisions to place and retain Daryl Heard and Keith Gardner at OSP rendered these prisoners ineligible for parole. Heard was jumped four security levels from minimum to high maximum security for being involved in a scheme to bring marijuana into a prison. Pet.App. 65a. Under the Parole Board guidelines, Heard should have been paroled after serving 156-192 months. He had served 235 months and had not been involved in violence within the previous sixty months, but was denied parole because of his high maximum security classification. *Id.* 67a, 95a. Gardner, according to the district court, was also denied parole because "the Department's rule forbidding parole release from high maximum security denied the parole board an opportunity to exercise its discretion." *Id.* 69a.

The haphazard system of placement and retention at OSP was further exemplified by Kevin Roe and Lahray Thompson who were transferred to OSP in 1999, without notice or hearing, based upon "essentially no evidence" showing that either man was connected to gang-related tension. Both were retained at OSP despite no evidence of current gang activity. Pet.App. 74a-80a, 103a, 108a-110a.

The problems of these five class representatives were typical. "The reclassification committee's recommendations are often cursorily denied by someone for reasons the inmate never knew were at issue." Pet.App. 117a. During

a twelve-month period prior to trial reviewed by the Department's classification expert, only 71 of 157 prisoners recommended for security reduction by the OSP classification committee were ultimately approved for reduction. *Id*. 81a, 110a-111a. Ohio's expert witnesses testified that this high rate of reversal was "not common," "excessive" and "not good." *Id*. 81a-82a, citing the testimony of Chase Riveland, Tr. 934; testimony of James Austin, JA 449-450.[1]

This disturbing "excessive" reversal rate was aggravated by Ohio's particular classification process. The classification committee is the only entity before which the prisoner has a right to appear, but the classification committee merely recommends. The higher official who makes the ultimate decision in most cases gives only a one- or two-sentence boilerplate explanation. "Even if an inmate were able to see this explanation, such a cursory statement would not adequately inform him of evidence justifying the reviewer's decision." Pet.App. 111a.

The district court found that the Department denied the prisoners due process by failing to afford notice and an adequate opportunity to be heard before placement at OSP; by failing to give sufficient notice of the grounds serving as the basis for retention at OSP; and by failing to

[1] James Austin testified as to the confusion caused when committee recommendations were reversed by higher-ups: "Because if I was an inmate, I would say 'Tell me what the game is that I got to do. If I want to get back . . . out into the general population, you all tell me what I need to do.' " Austin continued: "So if you have one release authority saying 'Yeah, we do think you are ready to go,' and another one cutting half of those, then that's not good." JA 450. See also Pet.App. 96a, quoting Austin: "I mean, you have to give reasonable explanation as to why the person is being kept there."

give the prisoners sufficient opportunity to understand the reasoning and evidence used to retain them at OSP. Pet.App. 39a, 111a.

C. New Policy 111-07: An Inadequate Remedy

On the eve of trial, Ohio promulgated a new version of Policy 111-07, JA 15-36 (hereafter, "New Policy 111-07"), which was to take effect on March 1, 2002. Ohio argues that injunctive relief was unnecessary because New Policy 111-07 would correct any earlier problems. Pet.App. 112a. The district court disagreed.

According to the district court, a fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. Pet.App. 107a, citing *Mathews v. Edlridge*, 424 U.S. 319, 333 (1976). The hearings provided by New Policy 111-07 to place and retain prisoners at OSP were not "meaningful" because prisoners would be given inadequate information about the basis of the charges against them.

Specifically, the district court found that New Policy 111-07 failed to afford due process in the following respects with regard to placement and retention at OSP:

– The Notice of Hearing does not ensure that inmates are given notice of the specific grounds for which they are being considered for placement at OSP, nor notice of the evidence relied upon, Pet.App. 113a;

– New Policy 111-07 does not call for any information to be given to the inmate prior to the retention hearing and prisoners are given no notice of the grounds claimed to support their retention, *id.* 118a;

– New Policy 111-07 does not require the true decisionmaker to give "any explanation" in support of his decision to place or retain a prisoner at OSP, *id.* 116a-117a;

– New Policy 111-07 does not describe the specific conduct necessary for a prisoner to leave OSP, and lacks a defined standard for determining whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security, *id.* 119a.

The district court therefore held that while New Policy 111-07 improved the Department's placement and retention policies, particular additional modifications were necessary to remedy the constitutional defects revealed by the evidence at trial. Pet.App. 113a. Accordingly, the district court ordered the parties to file proposed injunctive orders that would extend no further than necessary to correct the violation of the federal right by the least intrusive means. *Id.* 121a. After the Department complied, the court adopted the defendants' proposed policy (hereafter, "Revised Policy 111-07") with certain changes not at issue. *Id.* 36a-37a, JA 70-104.

Ohio objects to the following modifications of Policy 111-07 ordered by the district court, Pet.Br. at 11-12:

– To provide the prisoner with written notice of all the grounds believed to justify his placement at Level 5 and a summary of the evidence relied on for the placement, Pet.App. 40a;

– At the classification committee hearing, to allow the prisoner an opportunity to call reasonable witnesses and present documentary evidence as long as permitting him

to do so will not be unduly hazardous or burdensome to institutional safety or correctional goals, *id.* 36a-37a;

– If Ohio wants to use the statement of a witness whose identity it wishes to withhold, or to rely on a statement not made known to the prisoner, to indicate this reliance and disclose to the prisoner as much of the substance of the information as possible, and provide the prisoner a reasonable opportunity to respond through a written statement and/or documentary evidence, *id.* 40a-41a;

– To give the prisoner written notice of the recommendations of the classification committee and the warden, including the justification for the recommendation and a summary of the evidence supporting the recommendation, *id.* 41a-42a;

– To record a detailed and specific justification for the final decision of the Bureau of Classification.

> The justification shall set out all grounds justifying the inmates' placement at Level 5 classification and will not use conclusory or boilerplate language. The justification statement shall describe the facts relied upon and the reasoning used. This written statement shall address an inmate's specific case and not contain merely vague boilerplate language. . . .

Id. 42a;

– To advise the prisoner what specific conduct is necessary for that prisoner to be reduced from Level 5 and

the amount of time it will take before reduction of the prisoner's security level classification. *Id.* 44a.[2]

Ohio seeks to return to the unmodified New Policy 111-07 which would permit placement or retention of a prisoner on Level 5 at OSP – under extraordinarily harsh conditions, for a very long and indeterminate time, postponing parole eligibility for years – without having given him notice of all the grounds believed to justify his placement at Level 5 or a summary of the evidence relied on, without a final decision that describes the facts relied upon and the reasoning used, and without telling him what he needs to do to get out. Pet.App. 40a, 42a, 44a.

The district court recognized the principle that federal courts are hesitant to interfere with the administration of prisons, Pet.App. 83a, but held on the basis of an exhaustive factual record that the narrowly tailored procedural modifications it ordered were needed to address the problems found to exist at trial. The court of appeals determined that the modifications ordered by the district court were necessary to protect the prisoners' liberty interest. *Id.* 25a.

SUMMARY OF THE ARGUMENT

The proper framework for evaluating whether state procedures meet due process requirements is set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). This

[2] The district court later clarified that the notice of progress toward security level reduction "is meant to be advisory and is not binding on the classification committee, warden, or the Bureau of Classification." Order, July 12, 2002, Doc. 312.

test requires examination of the particular factual context. Not only private and governmental interests must be weighed, but also the risk of erroneous decisions and the extent to which court-ordered procedures will increase the accuracy of decisionmaking.

Based upon an exhaustive factual record, the courts below found that incarceration in the Ohio State Penitentiary (OSP) is an "atypical and significant hardship" and that prisoners at OSP therefore have a liberty interest under *Sandin v. Conner*, 515 U.S. 472, 484 (1995). Prisoners at OSP are kept in solitary confinement under very strict conditions. In contrast to many "supermax" prisons, the duration of confinement at OSP is not limited to a period of years but is indefinite, and OSP prisoners have no possibility of parole.

The liberty interest of prisoners at OSP is far greater than the liberty interest at issue in *Hewitt v. Helms*, 459 U.S. 460 (1983), which involved temporary segregation pending investigation. All the more important, accordingly, are procedures for placement and retention at OSP that enhance careful and accurate decisions.

The district court found a pattern of arbitrary, erroneous and haphazard decisionmaking at OSP, and correctly determined that Ohio's "New Policy 111-07" would not provide basic due process: notice of charges, meaningful hearing, and reasoned decisionmaking.

There is no bright line rule to be applied across-the-board regardless of the facts in particular situations. Reasonable policy choices can be made by different prison administrations. The federal Bureau of Prisons and a number of states use procedures for administrative placement in their most restrictive prison settings that are

virtually identical to those ordered by the courts below in this case, demonstrating that the procedures at issue are not inconsistent with sound penological practice.

The court of appeals held that the district court properly considered the complex factual issues in this case, found serious violations of the prisoners' due process rights, and narrowly tailored the remedy to correct the violations by the least intrusive means. That decision should be affirmed.

ARGUMENT

I. The Courts Below Correctly Applied *Mathews v. Eldridge* In Determining What Process Was Due

Petitioners do not dispute that the question of what process is due here requires application of the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Yet Petitioners would transform this context-specific balancing test into a wooden rule that government decisions which are in any way predictive need not entail the basic protections of notice, a meaningful opportunity to be heard, and a statement of reasons. The court below properly eschewed Ohio's mechanical approach, and instead considered all the factors this Court has identified as relevant in *Mathews*. It found that (a) the prisoners' interest in avoiding supermax confinement was "significant" and "weighty," (b) "past erroneous and haphazard placements at OSP" demonstrated the need for procedural protections, and (c) any burdens imposed on government by Revised Policy 111-07 "pass[ed] muster under *Mathews v. Eldridge*." Pet.App. 21a-23a.

A. First *Mathews* Factor: The Private Interest Of Prisoners In Avoiding Supermax Confinement Is Very Great

Ohio does not challenge the lower courts' findings that confinement at OSP constitutes an "atypical and significant hardship," *Sandin v. Conner*, 515 U.S. 472, 484 (1995), even compared to the segregated units at other prisons in the Ohio system. Yet, in direct contradiction to those very findings and their own concession, Ohio argues that the prisoners' interest in avoiding OSP is "not that high, as conditions there do not differ much from the highest-security conditions in the next-highest security prison," indeed that the interest of prisoners in staying out of OSP is "minimal." Pet.Br. at 31, 42.

The point of the *Sandin* test is precisely to separate those prison restraints that are part of the ordinary regime of prison life from those that force a prisoner to suffer "a dramatic departure from the basic conditions of [his] sentence." *Sandin*, 515 U.S. at 485. See *McKune v. Lile*, 536 U.S. 24, 41 (2002) (plurality) (*Sandin* test is thus designed to ensure that the prisoner's interest is weighty and not minimal).[3]

[3] Ohio misconstrues the court of appeals' conclusion that a "liberty interest which passes *Sandin*'s threshold comes with a higher presumption of process due than those which may have been found pre-*Sandin*." Pet.App. 22a n.12. The court of appeals was simply expressing the common sense proposition, reflected in the first prong of the *Mathews v. Eldridge* test, that the weightier is plaintiffs' liberty interest, the stronger the procedural protections that presumptively ought to be provided before plaintiffs can be deprived of that interest. Since *Sandin* requires a showing of "atypical and significant hardship" relative to ordinary prison life to support a liberty interest, 515 U.S. at 484, it is likely that any interest that meets that threshold will be one meriting substantial procedural protection.

The record here demonstrates that confinement at OSP "has immense consequences" for at least some prisoners. Pet.App. 61a. It is well known among corrections administrators and mental health professionals that severely isolated confinement for significant periods of time can be drastically damaging to prisoners' mental health.[4] Confinement in OSP represents the most severe punishment allowable in American corrections short of the death penalty.

Indeed, the confinement of many prisoners at OSP for almost four years, in the absence of any misconduct committed while at OSP, raises the question of whether those prisoners may have been effectively confined to OSP for the duration of their sentences. See *Hewitt v. Helms*, 459 U.S. at 477 n.9 (need for periodic review to ensure that administrative segregation not pretext for indefinite confinement); *United States v. Johnson*, 223 F.3d 665, 673 (7th Cir. 2000).

Further, confinement at OSP does not just have an "effect" on parole opportunities: it destroys them. Compare *Sandin*, 515 U.S. at 487 (nothing in Hawaii's code requires the parole board to deny parole), and *McKune*, 536 U.S. at 38 (prisoner's eligibility for parole unaffected). Where a person has been sentenced to a prison term that includes the possibility of parole at the discretion of the parole

[4] See *In re Medley*, 134 U.S. 160, 168 (1890) (striking down a statute retroactively imposing solitary confinement as an *ex post facto* law). See also Judge Posner's comment in *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988), *cert. den. sub nom. Lane v. Davenport*, 488 U.S. 908 (1988): "the record shows, what anyway seems pretty obvious, that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage."

board, an administrative decision to remove that possibility and to eliminate the discretion of the parole board amounts to a change in the sentence imposed on the prisoner. See *Garner v. Jones*, 529 U.S. 244, 255-57 (2000) (rule which "in its operation" creates a significant risk of a longer period of incarceration for prisoners may well violate the Ex Post Facto Clause).

Ohio seeks to minimize the hardship of Level 5 placement at OSP by arguing that, as a practical matter, it is unlikely that inmates at OSP would qualify for parole. The factual record is to the contrary. Pet.App. 63a, citing Pl.Ex. DeJarnette-9, JA 184-88 (DeJarnette); 67a (Heard); 69a (Gardner). The automatic denial of parole eligibility particularly affects prisoners who are erroneously or arbitrarily incarcerated on Level 5 at OSP and have not committed the type of misconduct that would otherwise cause the Parole Board to deny them parole. *Id.* It is precisely those inmates for whom the district court's procedural requirements are most important.

So too, Ohio's claim that hundreds of inmates have volunteered to go to OSP is not in the record, is inaccurate, and seeks to entangle this Court in a separate controversy presently pending before the court of appeals. In fact, Ohio concedes that no prisoner has volunteered to go to Level 5 at OSP. The implementation of Revised Policy 111-07 resulted in a drastic reduction in Level 5 placements at OSP,[5] and as a result, Ohio adopted a plan, first proposed

[5] This reduction confirmed the finding of the district court that the "opening of the OSP has created too much capacity for the highest level of security," and that as a result "the defendants consider inmates for placement at the OSP who do not need its level of restrictions." Pet.App. 52a. Ohio's officials were thereby confronted with substantial

(Continued on following page)

in the prisoners' complaint, to convert OSP from a supermax prison to a maximum security prison with a supermax unit. It is to the new maximum security (Level 4) units, not to the supermax (Level 5) unit, that prisoners already on Level 4 "volunteered" to go. Ohio asserts that the Level 4, maximum security prisoners' stay at OSP is "short-term," that they can transfer back to the maximum security facility in Southern Ohio "at any time," and that the restrictions imposed on Level 4 prisoners are comparable to those at other "high security" facilities in the State. Defendants-Appellants' Reply Br. *Austin v. Wilkinson*, Case No. 03-3840 (*appeal pending*) at 4-5. A voluntary short-term transfer that can be revoked by the prisoner at any time is, of course, far different from the involuntary transfer of prisoners for the very long, indefinite duration involved in this appeal.

Finally, the liberty interest involved here is particularly weighty because incarceration at OSP is in some ways more burdensome than at other supermax prisons in the United States. All or almost all supermax prisons in the United States permit parole from supermax housing.[6]

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excess capacity at OSP, and converted most of OSP from a high maximum security, Level 5 prison to a maximum security, Level 4 facility. The issues of whether the new Level 4, maximum security units at OSP still constitute "atypical and significant hardship," and whether transfers were really voluntary, were disputed before the district court. *Austin v. Wilkinson*, Case No. 03-3840 (*appeal pending*).

[6] For a list of supermax facilities, see LIS, Inc., Supermax Housing: A Survey of Current Practice (1997), cited in Brief of *Amici Curiae* States of California *et al.* at 7. Respondents have sought and obtained responses from 26 of the approximately 30 state departments of corrections that operate supermax prisons. Of those 26 states, *only* Ohio has a rule automatically disqualifying supermax prisoners from eligibility for parole. One more state, Maine, has no parole.

Some supermax prisons hold prisoners for definite terms, and most were constructed with outdoor recreation facilities. See Brief of *Amici Curiae* States of California *et al.* at 8-9 (duration of confinement, possibility of parole); testimony of Jamie Fellner, JA 268 (Connecticut releases in 18 months, Colorado in 3 years); testimony of Chase Riveland, JA 402-03 (most supermax prisons have recreation areas outside the building). Transfer to Level 5 at OSP is at least as burdensome as a prisoner's transfer to a mental hospital that this Court has held to give rise to a liberty interest stemming from the Due Process Clause itself. *Vitek v. Jones*, 445 U.S. 480 (1980).

B. Second *Mathews* Factor: A Serious Risk Of Erroneous Decisions Was Demonstrated At Trial, And Revised Policy 111-07 Significantly Enhances Careful And Accurate Decisionmaking

The district court held that *Mathews v. Eldridge* requires courts to consider, in addition to the interest of the individual and the interest of the state, "how great the risk is that the procedures used will come to an erroneous decision, and whether additional procedural protections would sufficiently reduce a risk of mistake." Pet.App. 102a.

1. The Lower Courts Found A Pattern Of Haphazard Decisionmaking

In affirming the decision of the district court, the court of appeals emphasized the risk of erroneous decisionmaking in the procedures used by the Department. There had been "placement of inmates at OSP who did not

meet the high-maximum-security requirements, contrary to both corrections policy and constitutional norms," the court found. Pet.App. 3a.

> Some of the more troubling instances of this haphazard system occurred when the Bureau [of Classification] would, without stating its reasons, overrule the recommendations of both the classification committee and the warden and either place or maintain the placement of an inmate at OSP; when inmates who would otherwise be recommended for parole were ineligible because of a suspect OSP placement; when multiple jumps in security levels happened as a result of a single incident; when decisions were made with little factual support; and when decisions were based solely on the use or smuggling in of small amounts of drugs.

Id. at 4a. All of these cases were of prisoners who were still being housed at OSP at the time of trial.

Moreover, the court stressed, the Department did not challenge on appeal the district court's "specific findings concerning past erroneous and haphazard placements at OSP." Pet.App. 22a. Ohio ignores those substantial factual findings, presenting this case as if it were a facial challenge to the constitutionality of New Policy 111-07.

a. Security Classification Based On Alleged Membership Or Leadership In A Prison Gang Is A Particularly Fertile Source Of Subjective And Arbitrary Classification Decisions

Ohio claims that these mistakes were made in the past and that New Policy 111-07 would have cured any

problems. Pet.Br. at 37. The district court found, to the contrary, that these arbitrary incarcerations were ongoing as of trial and that New Policy 111-07 was an insufficient remedy. Moreover, Ohio's brief offers a particularly vivid example of the continuing risk of erroneous decisionmaking under New Policy 111-07.

Ohio declares that New Policy 111-07 still permits a Security Threat Group Coordinator to identify a prisoner as a "gang leader," perhaps relying only on "rumor" or "reputation," and that the classification committee "may then take the Coordinator's judgment as a given, without conducting fact-finding regarding the inmate's gang membership." Pet.Br. at 35. The evidence at trial concerning prisoners Kevin Roe and Lahray Thompson demonstrated the risk of error resulting from reliance on such a procedure.

Kevin Roe was transferred to OSP in 1999 although he had been imprisoned for ten years with no violent or gang-related rule violations. Approximately 20 other prisoners were transferred from SOCF to OSP at the same time, although many "had no current misconduct and the Department never made out or proved a rule violation associated with gang membership." Pet.App. 74a.

Once at OSP, both in 2000 and 2001 Roe was recommended by the classification committee for transfer out of OSP, and was approved for transfer by the warden. Nevertheless, in both years Roe was retained at high maximum security classification by the Bureau of Classification because he was alleged to have been involved in conduct that resulted in disturbance at SOCF. Pet.App. 75a-76a, citing Pl.Ex. Roe-6 and -10, JA 227-32. The district court itself reviewed the evidence for Roe's retention *in camera*

and found in it "nothing to support" that assertion. Pet.App. 76a.

There was "even less evidence" for the placement and retention of prisoner Lahray Thompson, the court found. Pet.App. 77a. Thompson "was not given notice that he might be classified to high maximum or an opportunity to defend" against specific charges. *Id.* 78a.

> Justifying the process used to send Thompson to the OSP, the defendants first say that Thompson indicated affiliation with the Crips while in his early teens living in California. Second, the defendants presented evidence Thompson once had a tattoo often associated with the Crips. Third, the defendants offered evidence that Thompson once wrote a letter using the letter "b" in a fashion sometimes used by Crips members to disrespect rival gangs. Finally, the defendants produced a summary report that said Thompson was present at the time of the January 1999 fight [at SOCF involving members of antagonistic gangs]. The report did not further describe his role, if any, in the incident.

Id. 79a.

At OSP, Thompson (like Roe) was recommended for security classification reduction by the OSP committee in two successive years: indeed, the committee observed that "it appears he has been mixed up w/Inmate Capone . . . who is Id'ed as Crip Leader." Pl.Ex. Thompson-4, JA 234, offered and admitted Tr. 699. In his case, however, the warden approved the recommendation for security reduction in 2000 (only to be overruled by the Bureau of Classification), but disagreed with the same recommendation the next year "even though nothing about Thompson's

situation had changed." Pet.App. 79a n.19, citing Pl.Ex. Thompson-3 to -6, JA 233-38.

The facts found by the district court illustrate the commonly recognized risk of error in subjective decision-making that New Policy 111-07 permits. In a survey of supermax prison problems offered by Ohio as an exhibit at trial, Ohio's expert, Chase Riveland, stated:

> Attempting to use subjective criteria based on subjective information has led historically to unsatisfactory and possibly indefensible results. . . . Most prison systems have evolved over the last two decades from very subjective means of classifying inmates to relatively objective systems. This move toward objectivity has occurred mainly to avoid unbridled discretion. . . .

Chase Riveland, Supermax Prisons: Overview and General Considerations (1999), Def.Ex. R at 7-8, offered and received Tr. 1184. See also, illustrating risk of erroneous decisionmaking: *Koch v. Lewis*, 96 F.Supp.2d 949 (D.Ariz. 2000), 216 F.Supp.2d 994, 1003-04 (D.Ariz. 2001), *appeal dismissed sub nom. Koch v. Ryan*, 335 F.3d 993 (9th Cir. 2003) (prisoner released); *Wright v. Enomoto*, 462 F.Supp. 397, 399-402 (N.D.Cal. 1976), *summarily aff'd*, 434 U.S. 1052 (1978).

The obvious risk of error in these prisoners' cases is one that cries out for better procedural safeguards than they received, and, according to Ohio, would continue to receive under New Policy 111-07. At a minimum, Ohio should fully inform a prisoner of the charges and evidence against him (to the extent not threatening to prison security), afford him an opportunity to respond, and require that the ultimate decisionmaker justify and

explain his decision: none of which New Policy 111-07 requires. While conceivably prison officials might have reached the same conclusion about Roe and Thompson had they utilized such procedures, at least they would have had to consider the prisoner's version of the facts and been compelled to explain their own position.

b. Central To The District Court's Concerns About Arbitrary Placement Was Systemic Evidence That The Bureau Of Classification Was Overruling Its Own Classification Committees And Wardens In Placing And Retaining Inmates At OSP

The Roe and Thompson cases are exceptional only in degree. In a one-year period prior to trial, 86 prisoners, more than 50% of the prisoners recommended by the classification committee for transfer out of OSP, were retained at OSP by the ultimate decisionmaker. Pet.App. 81a-82a. These recommendations were reversed without the prisoner ever having an opportunity to address the person who, in fact, made the decision on his reclassification. *Id.* 111a. Equally disturbing, the ultimate decisionmaker "frequently made decisions on an inmate's classification based on evidence and arguments never disclosed to the inmate." *Id.* 116a-117a.

The "risk of erroneous deprivation of rights is real when a decider of fact has not heard and observed the crucial witnesses." *United States v. Raddatz*, 447 U.S. 667, 687 (1980) (Powell, J., concurring in part, dissenting in part). In *Raddatz*, the Court recognized that when a district court rejects a magistrate's proposed findings on credibility without seeing and hearing the witnesses

whose credibility is in question, "serious questions" arise. *Id.*, 447 U.S. at 681 n.7. See also *id.* at 684 (Blackmun, J., concurring) (citing "practical concern for accurate results"). Here, the purpose of affording a prisoner the opportunity to explain why he is not a security risk is an inquiry similar to the credibility determinations at issue in *Raddatz*.

In other contexts, lower courts have required that the ultimate decisionmaker first provide notice and a hearing to an individual before reversing a favorable recommendation from a committee that has met with that person. *Mattox v. Disciplinary Panel of United States District Court*, 758 F.2d 1362, 1368-69 (10th Cir. 1985); *In re Berkan*, 648 F.2d 1386, 1390 (1st Cir. 1981); *Sheley v. Dugger*, 833 F.2d 1420, 1427 (11th Cir. 1987) (remanding to determine, *inter alia*, whether decisionmaker reversed the committee's recommendation of removal from close management without holding a hearing or explaining his reasons); *Toussaint v. McCarthy*, 926 F.2d 800, 803 (9th Cir. 1990); *Ballard v. Commissioner of Internal Revenue*, 321 F.3d 1037, 1042 (11th Cir. 2003), *cert. granted,* 124 S.Ct. 2065 (2004) (serious concerns over propriety of process if Tax Court had reached a conclusion contrary to the Special Trial Judge without rehearing the evidence.)

The district court did not require the decisionmaker to provide a new hearing before reversing a favorable recommendation. Rather, because the persons who hear do not decide, and the person who decides does not hear from the prisoner, the decisionmaker should at least be required to tell the prisoner the reasons and evidence for the decision. As the court of appeals noted, "many of the procedures ordered by the district court are an attempt to reconcile an elaborate administrative appeals scheme

created by the ODRC Officials with the requirement that the inmate know the reason for any decision made about his fate. . . . " Pet.App. 24a.

2. The Procedural Requirements The District Court Ordered Were Designed To Reduce The Risk Of Erroneous Decisionmaking Found To Exist At OSP

Where the factual record demonstrates a substantial risk of erroneous decisionmaking, courts have imposed significant procedural requirements designed to reduce that risk. *M.L.B. v. S.L.J.*, 519 U.S. 102, 121-22 (1996) (only a transcript can reveal sufficiency of evidence); *Connecticut v. Doehr*, 501 U.S. 1, 14-16 (1991) (risk of error requires pre-deprivation hearing); *Furlong v. Shalala*, 238 F.3d 227, 237 (2d Cir. 2001) (high rate of reversal by administrative agency requires agency review of decisions by private carriers concerning Medicare reimbursement); *Hensley v. Wilson*, 850 F.2d 269, 282-83 (6th Cir. 1988) (risk of error entailed by informant's testimony supports contemporaneous recording of evidence).

The district court found that New Policy 111-07 does not require Ohio to inform a prisoner of all the reasons for placement at OSP, and therefore directed the Department to provide written notice 48 hours in advance of the hearing of "all the grounds believed to justify his placement at Level 5 and a summary of the evidence that the defendants will rely upon for the placement." Order of Mar. 26, 2002, Pet.App. 40a. Ohio concedes that, in contrast, New Policy 111-07 requires only a "brief summary of the event triggering the proceedings." Pet.Br. at 8.

Basic notions of due process require that prisoners have notice of all the reasons for placement so that they are afforded an opportunity to respond to all of those reasons. New Policy 111-07 would not pass muster even under *Hewitt v. Helms* which held that due process requires "some notice of the charges against him," not notice of some of the charges. 459 U.S. at 476.

The requirement that the Department confine its decisions to the reasons and summary of evidence listed in the notice is directly linked to one of the central problems the district court uncovered at trial: that the Central Office frequently overturned classification committee recommendations based on evidence and arguments never disclosed to the inmates. Limiting consideration to the reasons and evidence provided in the notice is carefully tailored to cure that deficiency. Ohio erroneously claims that the notice requirement "can act only to exclude relevant information," Pet.Br. at 38. Rather it functions to exclude information that the prisoner never knows about and has no opportunity to rebut.

The court's order that the final classification decision should set out all the grounds justifying the prisoner's placement, together with the facts and reasoning relied upon, addressed the same risk of erroneous decisionmaking. The Department's practice of considering factors and evidence not known to the prisoner, or even to the initial classification committee, caused a wide disparity between recommendations of the committee and decisions of the Bureau of Classification.

The requirement of meaningful notice, and of nonconclusory, more than boilerplate reasons, was also designed to cure the problem of cursory decisionmaking.

Detailed notice and, more importantly, reasoned decision-making induce the official to think through the issues and examine the facts more carefully. This is especially important here, where the district court "question[ed] how much consideration is given to the review of each inmate's reclassification recommendation" by busy officials with a multitude of other tasks. Pet.App. 60a-61a. "[A]'reasons' requirement promotes thought by the [decisionmaker] and compels him to cover the relevant points and eschew irrelevancies," and addresses "the need to assure careful administrative consideration." *Dunlop v. Bachowski*, 421 U.S. 560, 572 (1975). See also *Penson v. Ohio*, 488 U.S. 75, 81-82 n.4 (1988) (requirement to give reasons provides an inducement to make careful decisions and resist temptation to discharge an obligation in summary fashion); *Jackson v. Ward*, 458 F.Supp. 546, 565 (W.D.N.Y. 1978) (reason requirement promotes thought by the decision-maker, and protects against arbitrary and capricious decisions grounded upon impermissible or erroneous considerations); *Chavis v. Rowe*, 643 F.2d 1281, 1287 (7th Cir. 1981), *cert. den.*, 454 U.S. 907 (1981) (had hearing committee made detailed findings in first place, prisoner might not have been wrongfully placed in segregation for five months).

Kevin Roe's case illustrates the pressing need for the relief ordered by the courts below. Roe was sent to OSP without any notice of the reasons for the transfer nor an opportunity to challenge it.

> [T]he reclassification committee recommended raising his security classification from maximum to high maximum even though the board's behavior worksheet indicated he should be considered for a security level decrease. The committee's

> justification for its recommendation was that Roe was a longtime member of a gang and had participated in a racial disturbance over five years ago. . . . Roe was not given notice that these issues would be used to increase his security classification.

Pet.App. 72a-73a, citing Pl.Ex. Roe-2, JA 223. The Bureau of Classification's rationale in approving Roe's transfer to OSP was conclusory and boilerplate. In its entirety it reads: "Meets Criteria for High Max Placement." Pl.Ex. Roe-2, JA 226, offered and admitted Tr. 699-700.

Security Threat Group Coordinator Matthew Meyer testified at trial that Roe had been transferred to OSP for a different reason: because the Department believed that he was involved in gang disturbances in 1999 at SOCF. Pet.App. 74a-75a. The only specific event Meyer was able to cite was an incident in which Roe was hit on the head from behind with a spatula and did not fight back. *Id.* 73a-74a. The district court reviewed all of the Department's records on Roe and found "nothing to support [the] assertion he was involved in the 1999 incidents at the Southern Ohio Correctional Facility." *Id.* 76a.

Roe was never informed of exactly why he was sent to OSP. The Security Threat Group Coordinator communicated neither with Roe nor with the committees that recommended him for release, but only with the Bureau of Classification leadership. Pet.App. 74a. Indeed, the 2000 reclassification committee did not know the real reason for Roe's transfer to OSP, because it stated that "[i]t appears he was assigned to OSP based on history in 97." *Id.* 75a. Due process is meaningless when neither the prisoner nor even the committee that conducts the classification hearing

knows exactly why the inmate is being deprived of his liberty interest.

Ohio claims that the prisoners' concerns are "fully answered by the fact . . . that Ohio's inmates *already receive* full *Wolff* procedures in any RIB [Rules Infraction Board hearing] that might provide predicate facts for any later placement decision."[7] Pet.Br. at 39 (emphasis in original). The factual record makes clear that some prisoners, particularly those accused of being gang members or leaders (like Roe and Thompson), never received any disciplinary, RIB hearings on the predicate facts before transfer to OSP. Ohio transfers others for reasons that include both conduct subject to disciplinary proceedings, and conduct which is not so subject (e.g., "chronic inability to adjust," "impact on other inmates," New Policy 111-07, Pet.App. 131a).

Moreover, New Policy 111-07 does not require an independent finding by a Rules Infraction Board to initiate a classification review. Ohio claims that as a practical matter, officials generally initiate classification review only after an RIB finding or the prisoner's conviction for a new crime committed while the inmate is in prison, Pet.Br. at 7, but that "practice," if it exists, is nowhere in the record. Moreover, Ohio's claim that a prisoner can be transferred to Level 5 at OSP based solely on the unilateral and unchallengeable determination of the Security

[7] One court has recently found that Ohio's statement that the Department's disciplinary proceedings comport with *Wolff v. McDonnell*, 418 U.S. 539 (1974) is inaccurate: while the "written policies" may comply with the mandates of *Wolff*, the "unwritten policies" do not. *Williams v. Wilkinson*, 132 F.Supp.2d 601, 603 (S.D.Ohio 2001), *rev'd on other grounds,* 51 Fed.Appx. 553 (6th Cir. 2002) (no atypical and significant hardship under *Sandin*).

Threat Group Coordinator that he is a gang leader, Pet.Br. at 35, directly contradicts Ohio's assertion that it only transfers prisoners to OSP after the facts have been determined by an RIB or court hearing that complies with *Wolff* procedures.

Furthermore, far from basing classification decisions on the decisions of outside courts as Ohio claims, Pet.Br. at 7, the Department has routinely declined even to consider judicial proceedings that exonerated the prisoner. Prisoner Charles Austin was found Not Guilty of felonious assault, Pl.Ex. Austin-5, JA 159-64, but was retained at OSP regardless because the "verdict of an outside court case does not affect . . . the classification action which prompted your placement at OSP," Pl.Ex. Austin-8, JA 175-76. (Austin's exhibits were offered and admitted Tr. 694.) See to the same effect Pl.Ex. Gardner-1A, -1B, -1C, JA 192-96, Pl.Ex. Lane-1, Tolliver-9, JA 210-11, 241-43, offered and admitted Tr. 694-98.

Finally, even in those cases where the inmate's misconduct has been determined by an RIB that does follow *Wolff* procedures, a classification hearing is still necessary, because, just as in a parole revocation hearing, it is important "to know not only that some violation was committed but also to know accurately how many and how serious the violations were." *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972). Both prison officials and the prisoner have a strong interest that inmates not be transferred to very costly and extraordinarily restrictive conditions "because of erroneous evaluation of the need" to do so, even when a violation has been established. *Id.* at 484. The evaluation of whether a prisoner requires transfer to OSP often involves complex factual questions that explain, mitigate or put

into context admitted violations even where the basic misconduct is not disputed.

For that reason, the United States government uses the very procedures at issue in this appeal for placement of prisoners in its control units, even though the purpose of the hearing is "not to go over the factual basis for prior actions which have been decided" and the Hearing Officer "may not consider an attempt to reverse or repeal a prior finding of a disciplinary violation." 28 C.F.R. §§ 541.43(b)(4)(i) and (ii). For similar reasons, this Court upheld the application of *Morrissey* due process procedures to probation revocation decisions, even though it recognized that the fact of misconduct was generally not in dispute because "[i]n most cases, the probationer or parolee has been convicted of committing another crime or has admitted the charges against him." *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973).

Due process protections simply are non-existent where the decisionmaker has unfettered discretion to deprive a person of his liberty based on the assertion of facts that cannot be challenged. *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2647 (2004) (plurality opinion). Because New Policy 111-07 allows arbitrary and factually unsupported decisionmaking, the district court correctly recognized the need for an appropriate remedy.

Where, as here, there is specific evidence of widespread arbitrary and haphazard decisionmaking on the part of prison officials in the exercise of their discretion, courts must be accorded the equitable authority to fashion appropriate procedural remedies, as the district court did here. In the absence of a constitutional violation, courts ordinarily accord wide discretion to prison officials; but

where those officials have been found to have acted arbitrarily and in violation of due process rights, a court is authorized to provide appropriate relief. *Hutto v. Finney*, 437 U.S. 678 (1978).

C. Third *Mathews* Factor: Revised Policy 111-07 Does Not Harm The State's Interest

1. The Federal Government And Other State Governments Utilize Procedures To Place Prisoners In Their Most Restrictive Units Or Facilities Identical To Those Imposed By The District Court

Ohio claims that the procedures imposed in this case will lead to "bad decisions, which will impose significant potential harm on both prison staff and other inmates," Pet.Br. at 3. In support of this claim, Ohio states: "At least 32 States and the federal government operate supermax prisons, and to the best of our knowledge, not one provides procedures even close to what the courts below ordered here." Pet.Br. at 41.

Ohio could not be more mistaken. The federal government's experience with its control units, into which prisoners are placed by substantially the same procedures that the district court ordered here, and similar experiences of various state governments with supermax or high security facilities, directly contradict Ohio's claim.

The most restrictive non-punitive housing unit in the federal prison system is the Control Unit at ADX Florence.

Brief for the United States as *Amicus Curiae* at 2.[8] The nature of the decision to place a prisoner in the Florence Control Unit is the same as the decision to place a prisoner on Level 5 at OSP: an evaluation of the threat posed by the prisoner based on objective facts. The procedures used by Ohio for placement on Level 5 at OSP should be compared to the procedures used by the Bureau of Prisons for placement at its most restrictive setting, the ADX Florence Control Unit.

The federal placement procedure begins with a warden's recommendation after consideration of seven enumerated, objective factors. 28 C.F.R. § 541.41. The prisoner must then be given a notice that "will advise the inmate of the specific act(s) or other evidence which forms the basis for a recommendation that the inmate be transferred to a control unit. . . . " § 541.43(b)(1). At the hearing the prisoner must have an opportunity "to present documentary evidence and have witnesses appear." § 541.43(b)(4). Going beyond anything required by the courts below in this case, the federal Hearing Administrator "shall provide an inmate the service of a full-time staff member to represent the inmate, if the inmate so desires." § 541.43(b)(2). Finally, the Hearing Administrator is to prepare "a summary of

[8] The privileges and services available to prisoners in the Control Unit at ADX Florence are comparable or superior to those available to Level 5 prisoners at OSP. Bureau of Prisons, Control Unit Programs, PS 5212.07 at http://www.bop.gov/, pages 11 *et seq*. For example, federal control units at ADX Florence and Marion ordinarily provide study courses "for all levels; i.e., adult basic education, GED programs, correspondence courses, areas of special interest, and college courses," a "basic law library," and "the opportunity to receive a minimum of seven hours weekly recreation and exercise out of the cell." *Id.* Except for basic education and GED programs, none of these opportunities exist for prisoners in high maximum security (Level 5) at OSP.

the hearing and of all information presented upon which the decision is based," to "indicate the specific reasons for the decision, to include a description of the act, or series of acts, or evidence, on which the decision is based," and to provide this written information to the prisoner unless there is a specific security reason for withholding particular "limited information." § 541.44(a) and (b).

Thus the due process mandated by the Bureau of Prisons for assignment to a control unit at a federal prison is essentially identical to, and in one important respect greater than, the due process required by Revised Policy 111-07. The federal Bureau of Prisons has maintained these procedures for its most restrictive units for over 20 years since they were adopted in 1984. 49 Fed. Reg. 32991, Aug. 17, 1984. That fact alone refutes Ohio's contention that adoption of similar procedures in Ohio will undermine legitimate state interests.

Similarly, Ohio's statement that no state supermax uses procedures like those at issue here also is incorrect. In fact, there are other states which operate supermaximum or high security facilities or units utilizing procedures identical to or more elaborate than those ordered by the courts below.[9] (Some of these states, such as Colorado, are listed on the *amicus* "Brief of the States" filed in this case.)

[9] E.g., Alaska Department of Corrections Policy #735.03 E-H; Colorado Department of Corrections, Administrative Regulation No. 600-02 available at http://www.doc.state.co.us/admin_reg/PDFs/0600_02.pdf; Massachusetts Code of Regulations, Title 103, §§ 421.09-15; Michigan Administrative Code, R791.3301 Rule 301(b), R791.3315 Rule 315; New Jersey Administrative Code, Title 10A:5-2.4, 5-2.6; Wisconsin Administrative Code, Department of Corrections, § 308.04.

Colorado's procedures are illustrative. OSP was modeled after the Colorado State Penitentiary, Colorado's supermaximum prison which houses high-security risk offenders. Colorado Department of Corrections Regulation 600-02 requires that an inmate shall receive a notice prior to a hearing "setting forth the facts relied upon and reason(s) why the offender should be considered for placement" in the most restrictive custody level, including the "general substance of any confidential information." Regulation 600-02, IV F(1) and (3). A hearing is then held at which both the prisoner and classification committee can call witnesses. The Department has the "burden of proof to show that the offender should be or continue to be placed in" the most restrictive custody level (in Colorado termed "administrative segregation") and must meet a "*substantial* evidence standard." *Id.* at I(1) (emphasis in original). The classification committee then "shall prepare a written statement of the evidence relied upon, findings of fact, and the reasons for the decision," including the "general substance" of any evidence deemed "confidential." *Id.* at N(2). The procedures contemplate that a decision of the classification committee against placement of the inmate at the most restrictive custody level is final; however, where the decision is to place the offender in the most restrictive custody level it is reviewed by the administrative head and may be reversed. *Id.* at L(5), (6), O. The placement in the most restrictive custody level is thereafter reviewed every seven days for the first two months and every thirty days thereafter. *Id.* at Q. All of these procedures are either identical to, or significantly more protective than, those ordered by the district court here.

This federal and state experience suggests that objective criteria and the procedures in Revised Policy 111-07 aid, rather than hinder, the decisionmaking process.

Respondents do not claim that these federal and state government procedures, substantially identical to those ordered by the district court here, represent a constitutionally mandated minimal national standard for placement in all supermax prisons. First, supermax prisons come in all shapes and sizes. Second, other state systems may provide other procedural safeguards than those ordered by the district court below that reduce the risk of erroneous decisionmaking found to exist in Ohio. For example, a number of states can and do provide more frequent review of high security placements than Ohio's annual review: a few states set evidentiary thresholds for such placements; and others establish procedures to test the reliability of official identification of prisoners as "gang leaders."[10]

[10] States that provide more frequent review of high security placement than does Ohio include:

– North Dakota (30 days), see North Dakota Dept. of Corrections Policies and Procedures Manual, Special Management Inmates, (V)(C)(2)(a);

– Nebraska (monthly), see Nebraska Department of Correctional Services, Administrative Regulation 201.05, IV(E)(6);

– Georgia (30 days), see Georgia Rules and Regulations, § 125-3-1-.03(5)(a);

– Pennsylvania (90 days), see Pennsylvania Department of Corrections, Administrative Custody Procedures, DC-ADM 802(VI)(E)(5);

– Nevada (30 days), see Nevada Dept. of Corrections, Administrative Regulation 507.02, 1.5.9;

– Iowa (31 days), see Iowa Dept. of Corrections, Policy IN-V-05, V(4);

(Continued on following page)

Respondents do not seek to deny states flexibility to adopt their own procedures to reduce the risk of erroneous decisionmaking. But lower federal courts must also have the flexibility to apply the *Mathews v. Eldridge* factors to remedy process that demonstrably leads to erroneous and haphazard decisionmaking. The experience of the federal government and states such as Colorado simply establishes that the procedures set forth by the district court in this case are not out of step with current penological

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– Washington (6 months), see Washington Administrative Code, § 137-32-025(3); and,

– Arizona (180 days), see Arizona Dept. of Corrections, Department Order 801, 1.1.1.

States that define the threshold of evidence required for placement in high security include:

– Vermont (preponderance of evidence), see Vermont Dept. of Corrections, Directive No. 410.03, 4.3.8.1;

– Massachusetts (substantial evidence), see Massachusetts Code of Regulations, Title 103, § 421.15(1); and,

– Colorado (substantial evidence), see Colorado Dept. of Corrections, Administrative Regulation 600-02, IV(I)(1).

States with explicit procedures for use of evidence from confidential informants include:

– Arizona (to determine the reliability of the informant), see Arizona Dept. of Corrections, Department Order 801, 1.4.1.3;

– Nevada (procedure to test reliability of confidential informant), see Nevada Dept. of Corrections, Administrative Regulation 507.02, 1.5.5.1; and,

– New Jersey (prisoner must be provided with a summary of facts upon which the committee concluded that the informant was credible or his information reliable), see New Jersey Administrative Code, 10A:5-2.6(i) and (t).

In addition, according to LIS Inc., Supermax Housing: A Survey of Current Practice (1997) at 4, twenty-six states have "fixed systems" for determining the release date of prisoners in supermax confinement, while five do not.

practice and will not lead to the dire results that Ohio predicts.

2. Ohio's Objections Do Not Demonstrate That Revised Policy 111-07 Imposes Any Significant Burdens On The State

In the court of appeals, Ohio, both in its brief and at oral argument, did not point to any of the procedural requirements imposed by the district court "as being particularly burdensome," except for the notice provision. Pet.App. 24a. There, as here, Ohio relied primarily on its abstract, theoretical argument that the district court's modifications of Policy 111-07 are inconsistent with predictive decisions.

In its brief to this Court, Ohio does offer some concrete objections to the district court's orders, but all have a manufactured quality. For example, Ohio erroneously claims that the court ordered notice of "every possible piece of information" to be considered at hearing. Pet.Br. at 37. In fact, the court ordered the Department to provide "a *summary* of the evidence that the defendants will rely upon for the placement." Pet.App. 40a (emphasis added). Nor are "the officials' hands tied" if some new, critical or important information surfaces in the 48 hours between the provision of notice and the classification hearing or the relatively short period of time during which the warden and Bureau of Classification consider the placement. Pet.Br. at 37. In that hypothetical situation, the officials could simply amend the notice and issue a new one.

Ohio misreads the district court's order to require the disclosure of confidential information that could have deadly implications for informants. The court "recognizes

that prison officials have discretion regarding sensitive information," Pet.App. 116a, and in that light requires disclosure of "as much of the substance of the information as possible," *id.* 40a-41a. A fair reading of the court's orders requires only disclosure of information that can be provided without disclosing the identity or jeopardizing the safety of the confidential source. Ohio already requires similar disclosure in disciplinary proceedings. Ohio Administrative Rule 5120-9-08(G).

Ohio's claim that the requirement of a non-boilerplate statement of reasons will pile more work on an official the court already found overburdened fundamentally misunderstands the role of due process. The Department's responsibility is to determine how to manage and assign its staff and resources appropriately to ensure careful and nonarbitrary decisions. The court merely held that due process requires a showing that a careful decision was made before a person is placed or retained at OSP.

This Court has rejected absolute deference to government warnings of "dire impact" even where the government interest is normally accorded great deference. For "as critical as the government interest may be in detaining those who actually pose an immediate threat . . . history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat." *Hamdi*, 124 S.Ct. at 2647.

II. This Case Is Dramatically Different From *Hewitt V. Helms*, And That Decision Does Not Govern

Ohio argues that this Court has established a "categorical" distinction between retrospective, fact-based

decisions, for which formal procedures are appropriate, and predictive, subjective judgments. Pet.Br. at 14, 22. According to this view, once a prison decision incorporates "subjective" and "predictive" elements, due process calls only for the informal procedures of *Hewitt v. Helms* regardless of the nature of the harm suffered by the prisoners, and the risk of arbitrary decisionmaking found here by the court and required to be weighed under *Mathews v. Eldridge*. Ohio says this case should be governed by the statement in *Hewitt* which held that due process was satisfied by "an informal, nonadversary review of the information supporting [the prisoner's] administrative confinement," 459 U.S. at 472, and that there is no reason to apply a different rule here. Ohio is wrong.

A. Ohio's "Supermax" Confinement Is Far More Burdensome Than The Temporary Administrative Segregation At Issue In *Hewitt*

The prisoner in *Hewitt* was held in administrative segregation for approximately seven weeks during investigation of disciplinary and criminal charges against him. 459 U.S. at 463-65. *Hewitt* said that placement in administrative segregation was "not one of great consequence" because the prisoner was "merely transferred from one extremely restricted environment to an even more confined situation. Unlike disciplinary confinement the stigma of wrongdoing or misconduct does not attach to administrative segregation. . . . Finally, there is no indication that administrative segregation will have any significant effect on parole opportunities." 459 U.S. at 473; see *id.* at 476 n.8 (noting "the relatively insubstantial private interest at stake").

Level 5 at OSP is not simply Ohio's way of implementing the kind of confinement addressed in *Hewitt*. The court of appeals found that Ohio had a *Hewitt*-like administrative segregation procedure, with review every 30 days, completely separate from and much less draconian than supermax placement. Pet.App. 22a (administrative segregation is "a mechanism to ensure safety, one which does not require extensive process, and which, unlike OSP placement, is easily and swiftly reversible in the case of error"). Supermax confinement at OSP differs from the administrative segregation reviewed in *Hewitt* in nearly every respect.

The district court found that the hardship of incarceration, the duration of confinement, and the foreclosure of parole opportunities, make OSP significantly more restrictive than other Ohio prisons. Further, supermax confinement, unlike the segregation in *Hewitt*, does carry the "stigma of wrongdoing or misconduct." The district court found that placement on Level 5 at OSP is explicitly intended for "the most predatory and dangerous prisoners," or more colloquially "the worst of the worst." Pet.App. 49a, 52a.

Thus it is simply not true that Level 5 confinement at OSP is "not of great consequence."

B. The Retrospective Component In Supermax Placement Decisions Is Far Stronger Than In A Probable Cause Hearing Preceding Investigation Of Alleged Misconduct

The nature of the decisionmaking process at issue here is materially distinct from that in *Hewitt*, and as a result the need for additional procedural safeguards is

much more substantial. Prisoner Helms was confined to administrative segregation "pending completion of the investigation of the disciplinary charges against him." 459 U.S. at 475. The closest analogue in the world outside prisons, the Court observed, was a hearing about the pretrial detention of a person charged with criminal acts. *Id.* *Hewitt* held that relatively informal administrative segregation procedures met due process standards because the matters to be decided would not have been "materially assisted by a detailed adversary proceeding." 459 U.S. at 474.

The *Hewitt* holding may have made practical sense in its context. In that case, prison officials were not yet sure what, if anything, the prisoner had done: they were trying to find out. They made the judgment that safety and security counseled keeping him in administrative segregation while awaiting information concerning his actions. Once they got this information, they issued a disciplinary charge, gave Helms a disciplinary hearing, and sent him to disciplinary segregation upon his conviction. 459 U.S. at 465. The regulation the officials relied on provided that prisoners accused of serious misconduct could be placed in administrative segregation "based upon [an] assessment of the situation and the need for control" pending further proceedings, or "where it has been determined that there is a threat of a serious disturbance or a serious threat to the individual or others." *Id.* at 470 n.6 (quoting regulations). The Court characterized such decisions as turning on "purely subjective evaluations and on predictions of future behavior," and held that informal process was appropriate for purposes of "a reasonably accurate assessment of probable cause." *Id.* at 474, 476.

Unlike *Hewitt*, which addressed temporary predictive judgments made in a situation of factual uncertainty, the decisions at issue here rest principally on factual determinations. The criteria for placement on Level 5 at OSP under New Policy 111-07 include assaultive and/or predatory behavior; the nature of the inmate's conviction; leadership roles in riots or disturbances; the possession of contraband; the identification of the inmate as a leader of a "security threat group" (prison gang); escape attempts; "an ability to compromise the integrity of [prison] staff"; knowing exposure of others to HIV or hepatitis; or a chronic inability to adjust to a lower security level. JA 20-22. These criteria refer to or depend on the existence of historical facts.

The court of appeals stressed that the Department's own regulations require it to establish certain "factual predicates, all of which are historical in nature," before a prisoner can be placed at OSP. Thus, the court reasoned, having

> set out a detailed and restricted list of reasons why inmates can be put at OSP, the ODRC cannot turn around and argue that the district court's order decreases their ability to rely on "rumor, reputation, and even more imponderable factors," for those factors are illegitimate under their own placement scheme.

Pet.App. 23a. The court reiterated that:

> In order to be placed at OSP, an inmate must fulfill one of those discrete, substantive historical predicates; the district court correctly required that ODRC Officials place an inmate on notice of what historical events will be used to demonstrate his fulfillment of one of those predicates.

Id. at 23a n.13.

C. This Court Requires Careful Fact-Finding Pursuant To *Mathews v. Eldridge* Even In "Predictive" Decisions

Ohio's inflexible "one size fits all" approach is unsupported by this Court's decisions. For example, preventive detention decisions are based on a predictive judgment as to the dangerousness of the individual. Nonetheless, this Court has upheld such preventive detention "only when limited to specially dangerous individuals and subject to strong procedural protections." *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001). In *United States v. Salerno*, 481 U.S. 739, 739-51 (1987), the Court explicitly found that certain formal fact-finding procedures, similar to those that Ohio objects to as ill-suited for predictive decisions, were "specifically designed to further the accuracy of the [bail] determination [of dangerousness]." The procedures required included the rights to proffer evidence, to cross-examine witnesses, and to receive from the decisionmaker "written findings of fact and a written statement of the reasons for a decision to detain." *Id.* at 752.

These cases also firmly refute Ohio's argument that "where the decision is predictive, the other *Mathews* factors, especially the private interest affected, carry very little weight, if any." Pet.Br. at 19. The duration of detention has often been emphasized by this Court as a critical factor in deciding what procedural protections must accompany preventive detention. *Zadvydas*, 533 U.S. at 691 (detention at issue is not limited, but potentially permanent); *Salerno*, 481 U.S. at 747 n.4; *Foucha v. Louisiana*, 504 U.S. 71, 82 (1992), and 87-88 (O'Connor, J., concurring: case might be different if detention had different "duration").

The decisions involved here are much closer to the parole and probation revocation decisions analyzed in *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), than to the "purely subjective evaluations" involved in *Hewitt*, 459 U.S. at 474. Despite the strong predictive element involved in *Morrissey* and *Gagnon*, the Court required due process protections analogous to those Ohio objects to here: (a) written notice of the claimed violations and the evidence; (b) right to present witnesses and documentary evidence; and (c) a written statement by the fact-finders as to the evidence relied on and reasons for revoking parole. 408 U.S. at 489.

Perhaps the closest analogy to the OSP case is *Vitek v. Jones*, 445 U.S. 480 (1980), involving a decision to transfer a prisoner to a mental hospital. That decision is clearly not one based on a straightforward factual question of whether the prisoner committed the act alleged. Rather, the inquiry is "essentially medical" and "turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists." 445 U.S. at 495, quoting *Addington v. Texas*, 441 U.S. 418, 429 (1979). Ohio's theory would accord that transfer decision only the most informal, *Hewitt*-type protections because the decision is predictive and subjective. However, this Court in *Vitek* required the same due process protections that the district court ordered here, and more.[11] It did so because the inmate's private interest – avoiding involuntary transfer

[11] In addition to the basic requirements the district court ordered here – written notice of charges and evidence, right to have witnesses at hearing, and a reasoned decision – the *Vitek* Court also required that the inmate be afforded the opportunity to cross-examine witnesses, that legal counsel be provided if the inmate is poor, and that the decision-maker be independent. 445 U.S. at 494-95.

to a mental hospital – is not within the ordinary "range of conditions of confinement to which a prison sentence subjects an individual." *Id.* at 493.

Ohio relies heavily on *Board of Curators v. Horowitz*, 435 U.S. 78 (1978), and *Greenholtz v. Inmates of the Nebraska Penal and Correction Complex*, 442 U.S. 1 (1979), to support its argument that so long as the nature of the decision is predictive, the gravity of the private interest affected matters little. However, closer examination shows that the nature of the interest affected and the risk of erroneous decisionmaking were important factors in those decisions.

In *Horowitz* the Court found that a medical school's decision to dismiss a student for academic reasons did not violate due process where (a) the school "fully informed" the student of the faculty's dissatisfaction with her clinical progress, (b) the ultimate decision to dismiss the student "was careful and deliberate," and (c) she was afforded the opportunity to be examined by seven independent physicians in order to be absolutely certain that the decision was correct. 435 U.S. at 85. The Court's description of the process afforded makes clear the wide gulf between the "careful," "deliberate" and "informed" predictive decisionmaking upon which the Court relied in *Horowitz,* and the decisions based on "exceedingly weak evidence," made by a process with "great potential for error," which the district court found here. Pet.App. 80a, 102a. *Horowitz* contrasts sharply with this case, in which the ultimate decisionmaker repeatedly rejected, without explanation, the unanimous recommendations of the classification committees appointed by prison officials. *Id.* 81a, 110a-111a.

Ohio also claims that *Horowitz* and *Goss v. Lopez*, 419 U.S. 565 (1975), taken together, demonstrate that the nature of the affected individual's interest is irrelevant, since Goss received more formal process for his 10-day suspension than Horowitz did for her expulsion. Ohio's argument fails adequately to understand the nature of the interests at issue in these cases. In *Goss*, the Court held that a 10-day suspension deprived a student of a not insubstantial protected property and liberty interest. 419 U.S. at 574-75. In *Horowitz*, the student clearly had no property interest, and the Court expressed doubt that she had any liberty interest because the medical school had not damaged her reputation by publicly disclosing the reasons for the dismissal. 435 U.S. at 83-84, citing *Bishop v. Wood*, 426 U.S. 341 (1976). The Court merely assumed, without deciding, that a liberty interest existed, en route to its decision about process. Had a clearer and weightier liberty interest been at issue, the process due would likely have been different, as the Court acknowledged in citing with approval *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975), in which a medical school not only dismissed a student for academic reasons but also publicized the reasons behind the dismissal, and the court held that a hearing was required. 435 U.S. at 86 n.2.

Similarly, in *Greenholtz* the Court found that the nature of the liberty interest was not substantial. The Court asserted that a "crucial distinction" existed between losing what one has and not getting what one wants. 442 U.S. at 9. To the Court, "the general interest asserted here is no more substantial than the inmate's hope that he will not be transferred to another prison, a hope which is not protected by due process." *Id*. at 11. The Court parsed the state's statutory scheme to determine that a liberty

interest existed, but as in *Hewitt* the Court clearly believed that the interest was not of great consequence and held only that the inmates were "entitled to some measure of constitutional protection." *Id.* at 12. *Greenholtz* provides no support for Ohio's argument that the nature of the liberty interest at issue carries no weight in the determination of what process is due.

Thus Ohio's proposed principle that where a decision is predictive, the other *Mathews* factors, especially the private interest affected, carry very little weight, is unsupported by this Court's decisions. Rather, the cases reflect the common sense proposition that the nature of the hardship, particularly its duration, generally does matter and that the Court must carefully analyze the *Mathews* factors to determine what procedures are due in a particular situation.

CONCLUSION

For the above-stated reasons, the decision of the court of appeals should be affirmed.

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March 4, 2005