

21-650

IN THE
United States Court of Appeals for the Second Circuit

TYRONE WALKER,

Plaintiff-Appellant,

– v. –

DEPUTY COMMISSIONER JOSEPH BELLNIER, SUPERINTENDENT DONALD
UHLER, UPSTATE CORRECTIONAL FACILITY, DEPUTY SUPERINTENDENT OF
SECURITY PAUL P. WOODRUFF, UPSTATE CORRECTIONAL FACILITY,
DEPUTY SUPERINTENDENT OF PROGRAMS JOANNE FITCHETTE,
UPSTATE CORRECTIONAL FACILITY, OFFENDER REHABILITATOR
COORDINATOR MELISSA A. COOK, UPSTATE CORRECTIONAL FACILITY,
JAMES A. O’GORMAN,

Defendants.

On Appeal from the United States District Court
for the Northern District of New York
No. 9:17-cv-01108-GTS-CFH, Hon. Glenn T. Suddaby

**BRIEF AND SPECIAL APPENDIX FOR
PLAINTIFF-APPELLANT**

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INTRODUCTION

Plaintiff-Appellant Tyrone Walker has been in solitary confinement for the past 21 years and counting. He spent the first 13 years of that confinement in “disciplinary segregation” as punishment for an attack on correctional officers. When his term of disciplinary segregation ended in early 2014, prison officials immediately placed him in “administrative segregation,” a nearly identical form of solitary confinement meant to ensure prison security rather than to punish for past misconduct. He has remained there ever since.

Federal and state law require that Mr. Walker’s continued confinement in administrative segregation must be evaluated regularly to determine whether, based on current facts, he remains a security risk. The Due Process Clause requires that these periodic reviews must be meaningful to ensure that administrative segregation is not used as “a pretext for indefinite confinement of an inmate” as punishment for past acts. *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983), *abrogated in part on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

Despite this command, the officials at Mr. Walker’s prison provided the exact same justification, which relied on past misconduct,

to recommend his continued administrative segregation in all 47 reports they prepared from 2014 to 2019, when the record closed in this case. During that time, Mr. Walker did not commit a single violent act—in fact, he has not committed a violent act since 2000. And in the eyes of prison officials themselves, he maintained appropriate behavior during 45 of the 47 review periods. He set goals and achieved them, including reestablishing contact with his family, engaging in academic study, and completing anger management programs. Yet, like clockwork, prison officials made the same recommendation every review period: administrative segregation remains appropriate at this time.

If this sounds familiar it is: The fact pattern and legal issues here are materially indistinguishable from those this Court confronted in *Proctor v. LeClaire*, 846 F.3d 597 (2d Cir. 2017). Mr. Walker resides in the same solitary housing unit (SHU) that housed Patrick Proctor for 22 years. Both had a similar prior history of violent acts leading to a term of disciplinary segregation followed immediately by many more years of administrative segregation, which was indistinguishable from their already served terms of disciplinary segregation. Both alleged a violation of their due process rights based on the failure to receive

meaningful periodic reviews of their continued administrative segregation, citing similar evidence of rote repetition and reliance on past misconduct that had already been punished. One of the defendants is even the same. And there, as here, the district court granted summary judgment to defendants despite evidence creating a genuine dispute of material fact as to whether the periodic reviews had been meaningful.

Because the record would permit a reasonable jury to conclude that Mr. Walker, like Mr. Proctor, did not receive meaningful reviews of his prolonged administrative segregation, he respectfully asks for the same narrow relief granted in *Proctor*: Vacate the grant of summary judgment and remand for further proceedings.

JURISDICTION

The District Court had jurisdiction over Mr. Walker's 42 U.S.C. § 1983 claim under 28 U.S.C. § 1331. The District Court entered final judgment on March 8, 2021, SPA44,¹ and Mr. Walker timely filed a

¹ "SPA[Page]" refers to the Special Appendix; "JA[Page]" to the Joint Appendix; "Dkt. [No.]" to the district court docket; and "2d Cir. Dkt. [No.]" to the Second Circuit docket.

notice of appeal on March 23, 2021, A1101. This Court therefore has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Due process requires meaningful periodic reviews of administrative segregation, which must evaluate current evidence of an inmate's safety and security risk and cannot be based solely on past misconduct that has already been punished. Mr. Walker has a nearly unblemished record in administrative segregation, yet, relying on past misconduct, Defendants consistently recommended his continued segregation in 47 virtually identical reports over more than 5 years. Did the District Court err in holding that no reasonable jury could find Defendants failed to provide meaningful reviews?

2. Defendants are entitled to qualified immunity only if (1) the facts show they did not violate a federal right or (2) the right was not clearly established at the time of the alleged violation. Precedent clearly established that due process requires that inmates must receive meaningful reviews of their continued administrative segregation, and Mr. Walker raised a triable question as to whether his reviews were

meaningful. Did the District Court err in granting summary judgment to Defendants on qualified immunity?

STATEMENT OF THE CASE

In September 2017, after more than three years in administrative segregation, Mr. Walker filed suit *pro se* under § 1983, alleging violations of his rights under the Eighth and Fourteenth Amendments. A14–35. He ultimately named as Defendants Donald Uhler, Paul P. Woodruff, Joanne Fitchette, Melissa Cook, Joseph Bellnier, and James O’Gorman, all of whom were involved in the periodic reviews of his administrative segregation. After initial screening and amendment, the District Court (Suddaby, C.J.) permitted Mr. Walker to proceed with claims for money damages against Defendants in their personal capacities for continuing violations of the Due Process Clause based on his prolonged administrative segregation. Dkt. 5, 9.

Mr. Walker’s complaint survived Defendants’ motion to dismiss, and the parties then proceeded to discovery and cross-motions for summary judgment. A Magistrate Judge (Hummel, M.J.) later issued a report recommending that the District Court deny Mr. Walker’s motion and grant Defendants’ motion. SPA1–35; *see also Walker v. Bellnier*, No.

17-cv-1008, 2020 WL 9264839 (N.D.N.Y. Dec. 1, 2020). Over Mr. Walker's objections, the District Court agreed with the Magistrate Judge and entered judgment in Defendants' favor. SPA36–43; *see also Walker v. Bellnier*, No. 17-cv-1008, 2021 WL 855842 (N.D.N.Y. Mar. 8, 2021).

This appeal follows.

Mr. Walker commits the offenses of conviction in 1993.

To be sure, Mr. Walker has a violent past. His criminal history began in 1986 when he received a youth offender adjudication at the age of 17, and he had two more convictions by 1992. A561; A328–29 ¶¶ 3–4; A1075 ¶¶ 3–4. But his present incarceration stems from three offenses of conviction that all occurred within days of each other in 1993.

The first occurred on February 18, 1993, when Mr. Walker and two others allegedly murdered a rival drug dealer while attempting to rob him of cocaine and narcotics proceeds. *See United States v. Walker*, 142 F.3d 103 (2d Cir. 1998); *United States v. Walker*, 910 F. Supp. 837 (N.D.N.Y. 1995). For this offense and related drug trafficking charges, Mr. Walker was convicted in federal court of nine counts, including

commission of murder while engaged in a continuing criminal enterprise and conspiracy, *Walker*, 142 F.3d at 108, and, in 1996, he received a life sentence without the possibility of parole, A328 ¶ 2; A1075 ¶ 2.

The second offense occurred on February 23, 1993, when Mr. Walker allegedly robbed a woman in Manhattan and shot her during an ensuing struggle, leading to the woman's death eight days later. A561; A563. For this offense, Mr. Walker was convicted in state court of murder, robbery, and criminal possession of a weapon, and, in 1997, he received a sentence of 25 years to life in prison. A563–65.

The third offense occurred the same day as the second, when Mr. Walker allegedly tried to rob a man in Brooklyn and shot at him as he fled. A563; A943. For this offense, Mr. Walker was convicted in state court of robbery and criminal possession of a weapon, and, in 1994, he received a sentence of 7 years 6 months to 15 years in prison. A563.

Mr. Walker entered the custody of the New York State Department of Corrections and Community Supervision (DOCCS) in 1994, following his conviction for the Brooklyn attempted robbery. A328 ¶ 1; A1075 ¶ 1. Since entering DOCCS custody, he has been found

guilty at 26 misbehavior hearings, including for weapons possession, smuggling, drugs, possession of altered items, threats, and assaults on staff. A568–71; A546 ¶ 26; A329 ¶ 5; A331 ¶¶ 17–18; A1076–77 ¶¶ 5, 17–18. The incidents giving rise to the first 14 hearings occurred between September 1996 and September 2000. A568–71.

The most serious incident occurred on September 27, 2000, while Mr. Walker was housed at Green Haven Correctional Facility. A329 ¶ 6; A1076 ¶ 6. On this day, Mr. Walker stabbed two correctional officers, A329 ¶¶ 7–9; A1076 ¶¶ 7–9, and, while being taken to the SHU, he punched a third officer in the head, A596. Mr. Walker later pleaded guilty in state court to one count of attempted murder and received an additional sentence of 15 years to life in prison. A565; A329 ¶ 10; A1076 ¶ 10. And as punishment for all three assaults, Mr. Walker received a total of 146 months and 661 days in disciplinary segregation. A569–70; A330 ¶ 11; A1076 ¶ 11.

Mr. Walker fully serves his term of disciplinary segregation from 2000 to 2014.

“Disciplinary segregation, as its name suggests,” is a form of solitary confinement that “is designed to discipline an inmate found guilty of a ‘Tier III’ violation, the most serious of three infraction levels

in the DOCCS system.” *Proctor*, 846 F.3d at 601 (citing N.Y. Comp. Codes R. & Regs. tit. 7, §§ 270.2, 270.3(a)(3), 301.2 (2017)). A term of disciplinary segregation “lasts ‘for a designated period of time as specified by the hearing officer.’” *Id.* (quoting § 301.2(a) (2017)). “Once that time elapses,” however, “the statute does not empower DOCCS to punish the inmate doubly for the same infraction by imposing further Disciplinary Segregation.” *Id.*

Inmates confined in the SHU, whether under disciplinary or administrative segregation, spend 23 hours a day in their cell, A438, and are closely supervised: Prison staff monitor and interact with SHU inmates on rounds conducted every 30 minutes, A331 ¶¶ 20, 22; A1077 ¶¶ 20, 22, and other staff, including the Offender Rehabilitation Counselor (ORC), also make regular rounds, A331 ¶ 21; A1077 ¶ 21; *see also Palmer v. Richards*, 364 F.3d 60, 65 n.3 (2d Cir. 2004) (describing SHU conditions).

While in disciplinary segregation from September 2000 to January 2014, Mr. Walker was found guilty at 10 more misbehavior hearings, all between August 2005 and March 2012. A568–69. As punishment for these violations, Mr. Walker received several different sanctions,

including “keeplock” time,² additional SHU time, and the loss of privileges and good time credits. A568–69. But he also received reductions in the length of his disciplinary segregation as a reward for good behavior. A123–32. And he did not receive any misbehavior reports for the last almost two years of his disciplinary segregation, from March 2012 to January 2014. A568.

After his disciplinary segregation ends, Mr. Walker is immediately placed in administrative segregation.

On January 17, 2014, the day before his disciplinary segregation was to end, Mr. Walker received an administrative segregation recommendation from the Clinton Correctional Facility, where he was then housed. A596–97; A1024; A568; A330 ¶ 14; A1076–77 ¶ 14.

Although administrative segregation, like disciplinary segregation, is a form of solitary confinement, it “serves a different purpose.” *Proctor*, 846 F.3d at 601. Rather than punishment, administrative segregation serves to “remove[] an inmate from the general population when he ‘pose[s] a threat to the safety and security

² The meaning of keeplock for inmates already in solitary confinement is unclear. See A1060 (addressing keeplock admission).

of the [prison] facility.” *Id.* (quoting § 301.4(b) (2017));³ *see also* A332 ¶ 26; A1078 ¶ 26. Unlike terms of disciplinary segregation, terms of administrative segregation “are open-ended and do not require that DOCCS predetermine when it will release an inmate.” *Id.*

To justify Mr. Walker’s administrative segregation, prison officials cited his past convictions and related sentences, his September 2000 assaults, and the 24 misbehavior reports he had incurred between 1996 and 2012. A596–97. They also cited a confidential letter from the U.S. Attorney’s Office around the time of his federal trial, which asserted that he had a “history of escape plots/attempts, attempts to hire a ‘hitman’ to kill a governmental witness, assaulting a Deputy and attempting to take his keys, smuggling a razor blade to Federal Court as well as assaulting another inmate by stabbing him 18 times.” A597; A613–14. Prison officials further cited a May 13, 2010 intercepted letter from Mr. Walker, stating, “I’m considered one of the most dangerous prisoners in the state.” A597; A621–24. In conclusion, the

³ The version of Section 301.4 cited in *Proctor* is not readily available online but appears to be the version reproduced at A1059–60; the version currently available on Westlaw contains post-*Proctor* amendments discussed below.

recommendation stated: “Inmate Walker has shown a penchant for serious violence both in the correctional setting and in the community. His willingness to enact extreme violence on staff, the community and other inmates has proven his presence in general confinement of any correctional facility is an extreme risk to staff and inmates as well as the safety, security and good order of the facility.” A597.

Prison officials held a hearing on the recommendation and accepted it in February 2014. A594; A330 ¶ 15; A1077 ¶ 15. Mr. Walker appealed and received a rehearing, but prison officials accepted the recommendation on rehearing in June 2014. A330 ¶ 16; A1077 ¶ 16. Although Mr. Walker continues to dispute some of the recommendation’s assertions—for example, he contends he did not stab another inmate while in county jail (and the record indicates he was never convicted of such an offense, A561–67)—he does not challenge his initial placement in administrative segregation.

According to Mr. Walker, the day after prison officials accepted his administrative segregation recommendation in February 2014, he found a contraband item that was not a weapon near his cell, picked it up, and tried to hand it to an officer as a sign of good behavior, but he had not

made it or intended to use it. A876. Apparently disbelieving Mr. Walker, prison officials gave him a Tier 3 misbehavior report for possession of a weapon, altered item, possession of an article in an unauthorized area, and bribery. A233; A1024; A331 ¶ 17; A1077 ¶ 17. As punishment, Mr. Walker received three additional months in solitary confinement; lost three months of phone, commissary, and package privileges; and lost three months of good time credit. A568; A653. He has not received another Tier 3 misbehavior report since this incident in February 2014. A568.

A few weeks later, Mr. Walker was transferred from Clinton Correctional Facility to Upstate Correctional Facility, and he has remained in administrative segregation at Upstate for the past seven years. A1024; A331 ¶ 19; A1077 ¶ 19. From the time he arrived at Upstate until the record closed in this case over five years later, Mr. Walker received only one minor misbehavior report (on June 1, 2017), which is discussed below.

The Facility, Central Office, and Deputy Commissioner must review administrative segregation every 60 or 30 days.

Under state regulations, administrative segregation must be reviewed regularly “to determine whether [the inmate’s] release to

general population would pose an unreasonable and demonstrable risk to the safety and security of staff, incarcerated individuals or the facility, or present an unreasonable risk of escape.” § 301.4(c) (2022); A1059. When Mr. Walker entered administrative segregation, state regulations required reviews every 60 days, *see Proctor*, 846 F.3d at 601; *see also* A332 ¶ 29; A1078 ¶ 29, but the regulations were amended in 2017 to require reviews every 30 days, A332 ¶ 30; A1078 ¶ 30.⁴

For inmates like Mr. Walker who have been designated for Central Office review, these “Ad-Seg” reviews must follow the same three-step process described in *Proctor*. A332 ¶ 31; A1078 ¶ 31.

“First, a committee commonly referred to as the ‘Facility Committee,’ consisting of ‘a representative of the facility executive staff, a security supervisor, and a member of the guidance and counseling staff,’ convenes to review the inmate’s institutional record.” *Proctor*, 846 F.3d at 601–02 (quoting § 301.4(d) (2017)); *see also* A333 ¶ 32; A1078–

⁴ In 2021, New York enacted the Humane Alternatives to Long-Term Solitary Confinement (HALT) Act, which will take effect in 2022 and, among several other reforms, will restrict prisons and jails from holding people in segregation—disciplinary or administrative—for more than 15 consecutive days or 20 total days over a two-month period. *See* S. S2836, 2021-2022 Leg., Reg. Sess. (N.Y. 2021).

79 ¶ 32. The Facility Committee prepares a Facility Report with three sections, addressing: “(i) reasons why the individual was initially determined to be appropriate for administrative segregation; (ii) information on the individual’s subsequent behavior and attitude; and (iii) any other factors that [the Facility Committee] believe[s] may favor retaining the individual in or releasing the individual from administrative segregation.” § 301.4(c)(1) (2022); A1059.

At Upstate, the assigned ORC completes the Facility Report after speaking with the inmate and relevant staff and after gathering all necessary information, including any documentation the inmate may wish to submit for consideration. A333 ¶¶ 33–34; A1079 ¶¶ 33–34. The ORC then circulates the Facility Report to the other members of the Facility Committee for review and approval. A333 ¶ 35; A1079 ¶ 35. Each member has an equal say and signs the form. A333 ¶¶ 36–37; A1079 ¶¶ 36–37; A1051–52 ¶¶ 16–20. Defendants Uhler, Woodruff, Fitchette, and Cook served on the Facility Committee at various times during Mr. Walker’s administrative segregation. A334 ¶ 39; A1079 ¶ 39.

“Second, the superintendent [of the prison] forwards the Facility Committee’s report and any written response that the inmate submits

to a ‘Central Office Committee’ located at DOCCS headquarters in Albany, New York, for ‘Central Office Review.’” *Proctor*, 846 F.3d at 602. The Central Office Committee, which consists “of a representative from the office of facility operations, a member of [the DOCCS] inspector general’s staff, and an attorney from the office of counsel,’ reviews the Facility Committee’s Report, develops its own recommendation whether the inmate continues to pose a safety threat to the facility, and forwards the paperwork to the deputy commissioner of DOCCS.” *Id.* (quoting § 301.4(d)(3) (2017)); *see also* A334–35 ¶¶ 41–45; A1080 ¶¶ 41–45; A1052–54 ¶¶ 21–30; A1059.

Finally, “the deputy commissioner reviews the two committees’ recommendations, as well as the inmate’s written statement when applicable, and decides whether to continue the inmate in Ad Seg.” *Id.* (citing § 301.4(d)(3) (2017)); *see also* A336 ¶¶ 52, 54; A1082 ¶¶ 52, 54; A1059. The deputy commissioner then must inform “the superintendent of the inmate’s prison facility, who [must] provide[] written notice to the inmate of the decision and its ‘reason(s),’ and a statement notifying the inmate of his right to submit a written statement in the next section 301.4(d) review.” *Id.* (quoting § 301.4(d)(4) (2017)); A1059. Defendant

Bellnier was the Deputy Commissioner from November 2011 to September 2017, A542 ¶ 6; A336–37 ¶¶ 56–57; A1082 ¶¶ 56–57, when Defendant O’Gorman replaced him, A550 ¶ 1.

The Facility gives Mr. Walker positive behavior assessments in 45 of 47 reports from 2014 to 2019.

The Facility Report for Mr. Walker’s first Ad-Seg review period observed in March 2014 that he had a Tier 3 misbehavior report pending for the February 2014 incident discussed above. A1024. It further stated that “the Administrative Segregation Pilot Incentive was discussed, and it was agreed that [t]his would be reviewed again when Walker finished serving his disciplinary sanctions.” A1024. Mr. Walker completed his disciplinary sanctions for the February 2014 incident on May 27, 2014, A1017; A568, and he began participating in the Pilot Incentive Program shortly thereafter, A1009; A1011.

Under the Pilot Incentive Program, Mr. Walker began receiving an additional hour of exercise; one additional weekly visit; sneakers, shorts, and sweatpants; and one telephone call per week. A1010. He continued participating in the program for nearly three years until it abruptly ended for unknown reasons around April 2017. A854. During that time, he did not incur any misbehavior reports or disciplinary

sanctions and progressively received increased privileges (e.g., an increase from one 10-minute call to one 15-minute call, A958, to one 30-minute call per week, A927; additional out-of-cell time to view TV programming, A896; and additional food items from the commissary, A896). By June 2016, Mr. Walker appears to have earned all of the available privileges of the program, A896, which he then retained until the program ended around April 2017, A874; A865; A861. Mr. Walker earned and maintained these privileges because he had an unblemished record in administrative segregation from March 2014 to June 2017.

More specifically, after his initial Ad-Seg review in March 2014, Mr. Walker received uniformly positive comments in the second section of the Facility Report addressing his current behavior and attitude for the rest of 2014, as seen in the excerpts here:

- May 5, 2014. “Inmate Walker is adjusting well to his new setting and there is nothing new to report.” A1017.
- July 5, 2014. “Since last review Walker has finished serving his disciplinary sanctions and is now participating in the Pilot Incentive Program.” A1009.

- Aug. 20, 2014. “Since his last review Walker has maintained a positive disciplinary record.” A992.
- Oct. 7, 2014. “Since his last review Walker has maintained a positive disciplinary record. . . . His interaction with staff has been appropriate.” A983.
- Nov. 21, 2014. Same. A974.

These positive reports continued in 2015 as Mr. Walker entered his second year of administrative segregation:

- Mar. 2, 2015: “Since his last review Walker has maintained a positive disciplinary record. . . . His interaction with staff in the last review period has been appropriate. . . . Walker is currently receiving bi-weekly phone calls and was emphatic in stating how important telephone contacts with his family have become.” A966.
- Apr. 28, 2015. “Since his last review Walker has maintained a positive disciplinary record. . . . His interaction with staff in the last review period has been appropriate. . . . Walker continues to receive weekly family phone calls which he states he is very grateful for.” A957.

- June 18, 2015. “Since his last review Walker has maintained a positive disciplinary record. . . . His interaction with staff in the last review period has been appropriate. . . . Inmate is appropriate with all staff and there is no additional information to report.” A949.
- Aug. 11, 2015. Same. A942.
- Oct. 5, 2015. “Although Mr. Walker has a High School Diploma from 1987, he continues with Academic Cell Study for academic enrichment and is currently studying Psychology. Since his last review Walker has maintained a positive disciplinary record. His interaction with staff in the last review period has been appropriate. Acting DSS [Deputy Superintendent of Security] Zerniak met with Walker daily on rounds, and states that his demeanor was appropriate. Security staff for Walker indicate that he is quiet and causes no problems. . . . Inmate is appropriate with all staff and there is no additional information to report.” A935.
- Dec. 4, 2015. “[H]e continues with Academic Cell Study Since his last review Walker has maintained a positive

disciplinary record. His interaction with staff in the last review period has been appropriate. . . . Security staff for Walker indicate that he is quiet and causes no problems. . . . Inmate is appropriate with all staff and there is no additional information to report.” A928.

Mr. Walker maintained the consistent positive reports going into his third year of administrative segregation:

- Jan. 25, 2016. “[H]e continues with Academic Cell Study Since his last review Walker has maintained a positive disciplinary record. His interaction with staff in the last review period has been appropriate. . . . Walker implemented his case plan this review period and he identified two goals. The first goal was to maintain/improve family contact and he supported this goal by writing letters and weekly phone calls. His second goal was to further his education.” A920.
- Mar. 16, 2016. “[H]e continues with Academic Cell Study for academic enrichment Since his last review Walker has maintained a positive disciplinary record. Mr. Walker’s interactions with staff in the last review period has [sic]

been appropriate. . . . Mr. Walker has been receiving weekly phone calls from his daughter and has successfully re-established his relationship with her.” A913.

- May 5, 2016. “[H]e continues with Academic Cell Study Since his last review Walker has maintained a positive disciplinary record. Mr. Walker’s interactions with staff in the last review period has [sic] been appropriate. . . . Walker continue[s] to work [on] his identified two goals in his case plan.” A905.
- June 27, 2016: “[H]e continues with Academic Cell Study Since his last review Walker has maintained a positive disciplinary record. Mr. Walker’s interactions with staff in the last review period has [sic] been appropriate. . . . Walker continue[s] to work on his identified two goals in his case plan. . . . Inmate Walker has been participating in the ‘call home’ program and has been speaking to his daughter and his two brothers.” A895.
- Aug. 17, 2016: “[H]e continues with Academic Cell Study Since his last review Walker has maintained a positive

disciplinary record. Mr. Walker's interactions with staff in the last review period has [sic] been appropriate. . . . Walker continue[s] to work on his identified goals in his case plan. . . . All staff sate [sic] that Walkers [sic] overall behavior has been satisfactory and there is nothing new to report." A873.

- Oct. 13, 2016. "[H]e continues with Academic Cell Study Since his last review Walker has maintained a positive disciplinary record. Mr. Walker's interactions with staff in the last review period has [sic] been appropriate. . . . Walker continue[s] to work on his identified goals in his case plan. . . . Inmate Walker has been participating in the 'call home' program and has been speaking to his daughter weekly. All[] staff state[] that Walkers [sic] overall behavior has been satisfactory and there is nothing new to report." A863.

Mr. Walker maintained his consistent good behavior going into his fourth year of administrative segregation, receiving uniformly positive assessments of his behavior and attitude until June 2017. A860 (Jan. 30, 2017) ("Mr. Walker's interactions with staff in the last review period

have been appropriate. . . . All staff state that Walker’s overall behavior has been satisfactory.”); A858 (Apr. 13, 2017) (same).

On June 1, 2017, however, Mr. Walker received a Tier 2 misbehavior report for interference, harassment, and refusal to obey a direct order for his refusal to hang up the phone during a call with his daughter and for swearing at Defendant Cook, who had ordered him to end the call. A853; A717; A331 ¶ 18; A1077 ¶ 18. As a Central Office Report later explained, Mr. Walker “and this particular ORC [Cook] do not get along. Inmate Walker anticipates phone calls with his daughter and looks forward to them. . . . He is no longer assigned to that ORC, and there have been no issues with the new ORC assigned.” A846. As punishment, Mr. Walker received 30 days keeplock, which ended on July 3, 2017, A845, and a reduction in his privileges from “PIMS” Level III to Level II, A846.⁵ (His privileges were restored to PIMS Level III by October 2017. A841.) The Central Office Report for the following month noted that, “[b]esides the above incident, inmate Walker has had [sic] maintained appropriate behavior and it is reported that he continues

⁵ The Uniform Progressive Inmate Movement System (PIMS) Program appears to have replaced the Pilot Incentive Program. See N.Y. Comp. Codes R. & Regs. tit. 7, § 255.03 (2022).

his self-studies, his goal of writing a book and his communication with family members.” A846.

Mr. Walker did not receive another misbehavior report from June 1, 2017, until the record closed in this case two years later. A568. And aside from the incident on June 1, 2017, Mr. Walker received uniformly positive assessments of his current behavior and attitude in the Facility Reports throughout the rest of 2017, all of 2018, and all of 2019 (until the record closed). *See* A842 (Sept. 12, 2017) (“Mr. Walker’s interactions with staff in the last review period have been appropriate.”); A839 (Oct. 10, 2017) (same); A836 (Nov. 7, 2017) (same); A833 (Dec. 5, 2017) (same); A819 (Jan. 3, 2018) (same); A815 (Jan. 31, 2018) (same); A812 (Feb. 28, 2018) (same); A808 (Mar. 27, 2018) (no discussion of improper behavior);⁶ A804 (May 22, 2018) (same);⁷ A801 (June 19, 2018) (same);

⁶ *See also* A810 (Mar. 27, 2018 Central Office Report) (“During this review period Inmate Walker continued to interact in an appropriate manner with executive, line staff and inmates.”).

⁷ *See also* A806 (May 22, 2018 Central Office Report) (“During this last reporting period, Inmate Walker has maintained good interactions with staff.”).

A798 (July 17, 2018) (same); A795 (Aug. 14, 2018);⁸ A790 (Sept. 11, 2018) (same);⁹ A787 (Oct. 10, 2018) (same); A781 (Nov. 6, 2018) (same); A777 (Dec. 4, 2018) (same); A770 (Jan. 2, 2019) (same);¹⁰ A767 (Jan. 29, 2019) (same);¹¹ A760 (Feb. 26, 2019) (same);¹² A755 (Mar. 26, 2019) (same); A752 (Apr. 23, 2019) (same); A749 (May 21, 2019) (same); A739 (June 17, 2019) (same); A736 (July 16, 2019) (same).

Mr. Walker was not aware of what many of these reports said at the time, however, because prison officials often provided them to him many months late. *See, e.g.*, A854 (“The last Ad-Seg review I received is for 8-17-16, but I didn’t get it until after February when it was completed and signed by you on 2-10-17.”); A821 (“I received my 8-11-17

⁸ *See also* A797 (Aug. 16, 2018 Central Office Report) (“During this review period Inmate Walker’s interactions with staff were appropriate when seen on rounds and during his Administrative Segregation review.”).

⁹ *See also* A794 (Sept. 11, 2018 Central Office Report) (“Inmate Walker’s interactions with staff are appropriate.”).

¹⁰ *See also* A776 (Jan. 3, 2019 Central Office Report) (“Inmate Walker’s interactions with staff have been appropriate during this reporting period. No issues have been raised by security staff.”).

¹¹ *See also* A769 (Jan. 29, 2019 Central Office Report) (“As is consistent for him, his interactions with staff are appropriate.”).

¹² *See also* A765 (Feb. 26, 2019 Central Office Report) (“Inmate Walker’s interactions with staff are appropriate.”).

Ad-Seg review on 12-21-17.”); *see also* SPA7–8. In fact, Mr. Walker does not appear to have received *any* of his reports from around September or December 2017 until approximately December 2018. *See, e.g.*, A762 (“On January 24, 19, I received 9 Ad-Seg reviews that was late.”).

Several of the Facility Reports even noted that Mr. Walker had told prison officials that he had not received his reports since late 2017 and that he “would like them because he would like to respond to them in the next Administrative Segregation Interview”—as he was entitled to do. A804; *see also* A801; A798; A795. He appears to have received nine of the missing 2017–2018 reports on January 22 or 24, 2019—just days after the Magistrate Judge recommended denying Defendants’ motion to dismiss Mr. Walker’s complaint. A762; *see also* A842; A839; A836; A833; A815; A812; A808; A804 (all stamped “Jan 22’19”).

In December 2018, the Central Office Committee also suggested for the first time that Mr. Walker request “being added to the waitlist for the ART [aggression replacement training] and ASAT [alcohol/substance abuse treatment] workbook programs,” stating this “[p]rogramming may better prepare [him] for eventual transition to a less restrictive environment.” A780. Mr. Walker promptly requested “to

participate in the ART and ASAT workbook programs” that same month, A770, and he interpreted the recommendation as advice on what he should do to be released from administrative segregation, A741; A772; A775. The Central Office Committee later acknowledged that there was actually no ASAT workbook program that Mr. Walker could participate in, A747, but he dutifully progressed through the ART workbook program and completed it on May 19, 2019, A752; A749; A739.

Relying on past misconduct, the Facility offers the same justification for continued segregation in all 47 reports.

Despite his successful participation in the Pilot Incentive and PIMS Programs, academic cell study, reengagement with family, successful completion of the ART workbook program, and positive behavior assessments in 45 of 47 Facility Reports for over five years, the Facility Committee recommended his continued administrative segregation every single review period.

In the reports, the Facility Committee never explained how Mr. Walker’s positive behavior factored into its recommendations, which relied exclusively on his past misconduct and thus did not change over time. In fact, the third section of the Facility Reports included a

virtually identical justification for his continued administrative segregation in *all* 47 reports in the record: “Inmate Walker has demonstrated a propensity for assaultive and dangerous behavior in the correctional facility and the community. Walker’s willingness to enact extreme violence on staff and other inmates has proven his presence in general confinement of any correctional facility an extreme risk to staff and inmates, as well as the safety and security and good order of the facility.” A1024; *see also* A1017; A1009; A992; A983; A974;¹³ A957; A949; A942; A935; A928; A920; A913; A905; A895; A873; A863; A860; A858; A853; A845; A842; A839; A836; A833; A819; A815; A812; A808; A804; A801; A798; A795; A790; A787; A781; A777; A770; A767; A760; A755; A752; A749; A739; A736.

In substance, the Facility Committee copied and pasted this same justification from one report to the next, even though it slightly varied the wording. *Compare, e.g.*, A858; A853; A845; A842 (“Walker’s ability to enact extreme violence on staff and other inmates has shown that his placement in Administrative Segregation is appropriate and greatly reduces the risk his behavior presents to staff and inmates, as well as

¹³ A page is missing from the March 2, 2015 Facility Report. A966.

the safety and security and good order of the facility.”), *with* A839; A836; A833; A819; A815; A812; A808; A804; A801; A798; A795; A790; A787; A781; A777; A770; A767; A760; A755; A752; A749; A739; A736 (“Walker’s ability to enact extreme violence on staff and other inmates has shown that his placement in Administrative Segregation is appropriate and greatly reduces the risk his behavior presents to staff and inmates, as well as the safety and security of the facility.”). The Facility Committee also occasionally moved some historical points previously found in the first section (addressing why Mr. Walker was initially placed in administrative segregation) to the third section. *Compare, e.g.*, A736 (July 16, 2019), *with* A1024 (March 13, 2014). Aside from these minor changes, the analyses and recommendations in the Facility Reports’ third section did not vary across the 47 reports.

The Central Office also recommends continued segregation in all 47 review periods.

As noted, the next level of Ad-Seg review occurs in the Central Office in Albany, where a three-person committee reviews the Facility Report and consults by telephone with facility staff before issuing a Central Office Report. A334–36 ¶¶ 44, 46, 48, 51; A1080–82 ¶¶ 44, 46, 48, 51.

Although the Central Office Committee did not copy and paste to the same level as the Facility Committee, it also relied principally if not entirely on past misconduct to recommend Mr. Walker's continued segregation. *See, e.g.*, A995 (Sept. 8, 2014) (“[A]t this time, Walker’s release from the restricted setting of Administrative Segregation would pose a serious threat to staff and inmates due to the nature of the vicious attack on the officers in the yard at Green Haven Correctional Facility for which he was just released from SHU confinement and his entire criminal and custodial history.”); A751 (May 21, 2019) (“His propensity for building weapons and committing severe violence make him a high risk to staff and other inmates if he [were] in a less restrictive environment. Administrative segregation remains appropriate at this time.”); *see also* A984; A959; A943; A936; A929; A914; A906; A897; A887–88; A866; A862; A859; A846–47; A844; A841; A838; A835; A817–18; A810–11; A806–07; A800; A797; A794; A789; A780; A769; A765–66; A754; A751; A738.

Much like the Facility Reports, however, the Central Office Reports from 2014 to 2019 also contained a nearly uniformly positive assessment of Mr. Walker’s current behavior. *See* A995; A984; A959;

A943; A936; A929; A914; A906; A897; A887; A866; A862; A859; A846; A844; A841; A838; A835; A817; A810; A806; A800; A797; A794; A789; A769 (“As is consistent for him, his interactions with staff are appropriate.”); A765; A754; A751; A738.

But the Central Office Reports also contained criticisms of Mr. Walker’s current behavior, which had no support, or even mention, in the Facility Reports. Defendants (understandably) did not reference these unsupported assertions in their summary judgment brief. Dkt. 96. Five sets of these unsupported assertions nonetheless featured prominently in the Magistrate Judge’s report and recommendation, some because Mr. Walker pointed to them in support of his own motion for summary judgment (as instances of erroneous information in his Ad-Seg reviews) and some seemingly because the Magistrate Judge *sua sponte* deemed them relevant:

1. Drag lines. Three Central Office Reports contained the exact same sentence about “drag lines”: “On rounds inmate Walker smiles, talks, and interacts appropriately with managerial and line staff, although he has been found using drag lines (used to smuggle contraband) which he turns over readily.” A921 (Feb. 16, 2016); A856

(June 6, 2017); A838 (Nov. 7, 2017). Yet there is no evidence Mr. Walker received a misbehavior report or lost privileges for using drag lines while in administrative segregation at Upstate, much less during the three review periods when this identical sentence appeared. A568.

2. Lack of remorse. Four Central Office Reports said that Mr. Walker “shows no remorse for any of his many instances of previous violence.” A841 (Oct. 10, 2017); *see also* A832 (Jan. 3, 2018); A786 (Nov. 6, 2018); A748 (June 17, 2019). Yet Mr. Walker expressed remorse in at least three separate submissions to the Committees and the Deputy Commissioners. A1026 (Mar. 12, 2014) (“My act of violence 13 years ago was an act of poor judgment. I have learned to address my grievances through the litigation process.”); A821–22 (Dec. 27, 2017) (“For starters, I regret what I did in my past in respect to assaulting correctional staff and I have never done it again Like I said, that wasn’t the answer and regret what I’ve done, never did it again and don’t want any problems.”); A741 (June 13, 2019) (“I committed an act of severe violence over 19 years ago, that I’ve regretted and refrained from any acts of violence for over 19 years[.]”).

3. Entitlement and anger. Several Central Office Reports stated that Mr. Walker demonstrates a sense of “entitlement and anger.” A841 (Oct. 10, 2017); A814 (Feb. 28, 2018); A807 (May 22, 2018); A800 (July 17, 2018); A780 (Dec. 4, 2018); A748 (June 17, 2019). Again, none of the Facility Reports from 2014 to 2019 included a similar observation. Nearly all stated that he had appropriate behavior and some even offered affirmative references to his gratitude. *See* A957 (Apr. 28, 2015) (noting Mr. Walker “is very grateful for” his phone privileges).

One of the later Central Office Reports even noted that Mr. Walker’s “current counselor (ORC) spoke with the committee and stated that he has not observed any anger issues or sense of frustration and entitlement from inmate Walker,” but the Central Office Committee dismissed this evidence because it said Mr. Walker “had significant issues with his prior counselor” who had to be reassigned. A748 (June 17, 2019). This statement presumably refers to Defendant Cook and the June 1, 2017 phone incident (when she told him to hang up on his daughter and he used expletives in response), as there is no evidence that Mr. Walker had issues with any other counselor.

In that same report, the only other thing the Central Office Committee cited for Mr. Walker's "entitlement and anger" was Mr. Walker's own submission, dated June 13, 2019, which exhibited frustration at having been detained in administrative segregation for over five years even after having completed the ART workbook program, consistent with the Committee's recommendations. A741-42.

4. Package incident. Two Central Office Reports also referenced an isolated incident involving a package. According to the Central Office Committee: "In one recent incident, when he had a visitor who failed to take a package that Walker had left for him, Walker blamed the Department, and when the Department declined to send the package at Department expense, he demonstrated rage, suggesting that he would have assaulted the DSS if given the opportunity." A814 (Feb. 28, 2018); A807 (May 22, 2018).

Mr. Walker was not aware at the time that the Central Office Committee was relying on this isolated incident to justify his continued administrative segregation, however, because, as noted, he did not receive most of his 2018 reports until early in 2019. He responded to the accusation on March 13, 2019, noting that it was "not supported by

facts” and that, far from exhibiting rage, he had expressed gratitude because the DSS had stepped in to ensure Mr. Walker’s package would not be discarded until someone else could pick it up on a later visit. A756–58. Mr. Walker further noted that threatening the DSS would have resulted in a misbehavior report, but he received no misbehavior report related to this incident. *See id.*; *see also* A568–71. And when asked, the DSS in question, Defendant Woodruff, did not deny that Mr. Walker expressed gratitude for how he handled the incident. A307–08; A1065 ¶ 30. The Central Office Reports did not mention the incident again after Mr. Walker’s clarifying letter on March 13, 2019.

5. Transfer manipulation. Several of the Central Office Reports also asserted Mr. Walker intentionally incurred the February 2014 Tier 3 misbehavior report to avoid his transfer from Clinton to Upstate and pointed to the assertion as evidence of his manipulative behavior. A929 (Dec. 22, 2015); A921 (Feb. 16, 2016); A906 (May 7, 2016); A856 (June 16, 2017); A838 (Nov. 7, 2017); A835 (Dec. 5, 2017). Notably, after one of Mr. Walker’s submissions pointed out the assertion was false and illogical as he would not have known of the transfer in advance and

disliked Clinton, A823 (Dec. 27, 2017), the Central Office Reports stopped making this unsupported assertion.

Aside from those five sets of assertions, which are not found in the Facility Reports (prepared by the staff at Mr. Walker's prison), the Central Office Reports appear to cite only past misconduct (for which Mr. Walker had already been punished) to support his continued segregation. *See, e.g.*, A862 (Feb. 24, 2017) ("Inmate Walker's ability to obtain and fashion extremely dangerous weapons, his attempt to manipulate the system, and his unpredictable and most extreme violence all indicate that he poses a continued threat to the security and safety of himself, the facility and the population therein if placed in general population at this time."); A780 (similar); A769 (similar); A765 (similar).

In one of the last Central Office Reports in the record, the Central Office Committee acknowledged that Mr. Walker "rightly point[ed] out his notable instances of violence (the underlying offense for his conviction, conspiring to murder a witness, and his assault on Correctional staff) all occurred more than 20 years ago." A747 (June 17, 2019). "However," the Committee stated, "his close supervision over the

subsequent years has arguably prevented continued violence.” A747.

The Committee concluded by noting it “recognizes the conundrum inherent in requiring a demonstration of growth and non-violent problem-solving while continuing administrative segregation,” but “due to the risk of violence ‘inherent’ in the subject, we are unable to recommend step-down to a less restrictive environment.” A748.

The Deputy Commissioner tersely endorses the Committees’ recommendations in all 47 review periods.

While serving as Deputy Commissioner, Defendants Bellnier and O’Gorman were required to review the Facility Reports, the Central Office Reports, and Mr. Walker’s submissions (if offered) to make the final determination as to his continued administrative segregation each review period. A543–45 ¶¶ 11, 18, 20; A552 ¶ 18; § 301.4(d)(3); A1059.

Defendants Bellnier and O’Gorman both acknowledged that, “in recent years,” Mr. Walker’s “misconduct became less frequent and much less serious than the acts which led to his placement in Ad Seg.” A547 ¶ 31; A555 ¶ 34. They nonetheless endorsed the Facility and Central Office Committees’ uniform recommendations in every single review period with rote, perfunctory, and usually one-sentence explanations. *See, e.g.*, A737 (July 22, 2019) (“Inmate Walker’s placement in

administrative segregation is appropriate at this time.”); *see also* A1024; A1017; A1009; A992; A983; A974; A960; A957; A949; A942; A935; A928; A920; A913; A905; A895; A873; A863; A860; A853; A843; A840; A837; A834; A820; A816; A813; A809; A805; A802; A799; A796; A791; A788; A782; A778; A771; A768; A761; A753; A750; A740. The record also suggests that someone else supplied the terse explanations and the Deputy Commissioners just rubberstamped the reports. *See, e.g.*, A737 (cursive writing); A740 (block writing); A768 (typed writing).

The District Court grants summary judgment in Defendants’ favor.

After more than three years in administrative segregation, Mr. Walker filed his *pro se* complaint against Defendants Uhler, Woodruff, Fitchette, Cook, and Bellnier on September 11, 2017, asserting claims for damages and injunctive relief under § 1983 for alleged violations of his rights under the Eighth and Fourteenth Amendments. A14–35.

After amendment and initial screening under 28 U.S.C. §§ 1915(e) and 1915A, the District Court permitted Mr. Walker’s case to proceed with claims for money damages against the Defendants in their personal capacities for alleged continuing due process violations based on his prolonged administrative segregation. Dkt. 5; 9.

Defendants thereafter moved to dismiss for failure to state a claim. Dkt. 14. The Magistrate Judge later issued a report recommending that the District Court deny Defendants' motion to dismiss, noting that, "absent any indication . . . that Walker's assaultive and dangerous behavior continued for three years and necessitat[ed] administrative segregation for that entire time, . . . it [is] inappropriate to dismiss these claims at this juncture." Dkt. 18 at 19. The Magistrate Judge also rejected the argument from Defendants Uhler, Woodruff, Fitchette, and Cook that the complaint failed to allege their personal involvement merely because they did not have final authority over Mr. Walker's continued administrative segregation. Dkt. 18 at 20–22. The District Court adopted the report. Dkt. 23.

The Magistrate Judge later permitted Mr. Walker to amend his complaint to add O'Gorman, but the claims and parties were otherwise unchanged. Dkt. 26; 30.

After completing discovery, the parties filed cross-motions for summary judgment. Dkt. 79; 86–96; 100. On December 1, 2020, the Magistrate Judge issued a report recommending that the District Court deny Mr. Walker's motion and grant the Defendants' motion, but he

declined to reach their assertion of qualified immunity. SPA35. Mr. Walker filed objections to the report, arguing, among other things, that the Magistrate Judge “overlook[ed] [his] issues concerning Ad-Seg reviews being a sham, rote, perfunctory and a fraud” and that “years of late reviews undermines the review process and is tantamount to no review.” A1087; *see also* A1089–99.

On March 8, 2021, the District Court rejected Mr. Walker’s objections and adopted the Magistrate Judge’s report and recommendations in full. SPA42. The District Court also found that “qualified immunity constitutes an alternative ground on which to base the dismissal of [Mr. Walker’s] claims for the reasons stated in Defendants’ memorandum of law.” SPA42 (citing Dkt. 96 at 10–11).

Mr. Walker timely filed a notice of appeal on March 23, 2021. A1101. This Court later granted Mr. Walker’s motion for *in forma pauperis* status and appointment of counsel. 2d Cir. Dkt. 56. In that order, the Court instructed Mr. Walker’s counsel “to brief, among any other issues, whether: (1) a reasonable jury could conclude that Appellant was denied constitutionally meaningful review of the appropriateness of his continued confinement in administrative

segregation, see *Proctor v. LeClaire*, 846 F.3d 597, 601, 610–14 (2d Cir. 2017); and (2) the district court erred in reaching a conclusion that the defendants were entitled to qualified immunity.” *Id.* The Court later appointed the undersigned as counsel for Mr. Walker. 2d Cir. Dkt. 61–62.

SUMMARY OF ARGUMENT

The District Court erred in granting summary judgment in Defendants’ favor on the merits of Mr. Walker’s due process claim and on qualified immunity.

I. On the merits, there are triable questions regarding the meaningfulness of the administrative segregation reviews conducted by Defendants. As this Court has explained, “[r]eviews are meaningful only when they involve real evaluations of the administrative justification for confinement, they consider all of the relevant evidence that bears on whether that administrative justification remains valid, and they ensure that Ad Seg is used as neither a form of punishment nor a pretext for indefinite confinement.” *Proctor*, 846 F.3d at 614.

A. Based on the record here, a reasonable jury could conclude that Defendants did not actually evaluate whether Mr. Walker’s

continued administrative segregation was justified based on current evidence for at least three reasons.

First, the virtually identical reports each review period—most notably, the virtually identical justifications in all 47 Facility Reports in the record and the rote and terse explanations from the Deputy Commissioners—suggest that Defendants reached preordained conclusions each review period.

Second, the lengthy delays in providing reports suggest that Defendants were nominally conducting the reviews but not bothering to provide the reports to Mr. Walker so that he could timely respond to them because it did not matter what he said or did.

Third, when stacked against the Defendants' heavy reliance on past misconduct, the nearly uniformly positive assessments of Mr. Walker's current behavior for years on end suggest that there is nothing Mr. Walker could do to be released from administrative segregation.

B. Relying on much of the same evidence, a reasonable jury could conclude that Defendants were using administrative segregation as a charade in the name of prison security to mask indefinite (and necessarily improper) punishment for past transgressions. Other

evidence in the record could bolster this conclusion, including: (1) inexplicable or circular logic in the reports, such as the suggestion that Mr. Walker's good behavior was of limited relevance in determining whether he should be released from solitary confinement because it was a result of his solitary confinement; and (2) bizarre and unsupported assertions in the reports, such as statements copied verbatim from prior reports that make little sense in current reports.

II. The District Court also erred in granting summary judgment in Defendants' favor on qualified immunity because of the same triable questions regarding the meaningfulness of Mr. Walker's reviews. Summary judgment on qualified immunity is appropriate only if (1) the facts, taken in the light most favorable to the plaintiff, show the defendant officer's conduct did not violate a federal right or, (2) even if it did, the right in question was not clearly established at the time of the alleged violation.

A. The first basis fails because there is a genuine dispute of material fact as to whether Defendants provided Mr. Walker with meaningful reviews.

B. And the second fails because it was clearly established by no later than the Supreme Court’s 1983 decision in *Hewitt* that periodic Ad-Seg reviews must be meaningful, which necessarily means they cannot be rote, perfunctory, or a sham. Even if Defendants were correct that the law did not become clear until *Proctor*—an argument other courts have rejected—this Court decided *Proctor* in 2017, so qualified immunity would not shield Defendants’ failure to provide meaningful reviews in the many years since.

For these reasons, Mr. Walker respectfully asks the Court to vacate and remand for further proceedings.

STANDARD OF REVIEW

When a party raises specific objections to a magistrate judge’s report and recommendation, review of the portions of the report and recommendation to which objection is made is *de novo*. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). Here, the District Court acknowledged that Mr. Walker raised specific objections to the Magistrate Judge’s report and recommendation, SPA41, and it addressed his arguments regarding “untimeliness” and “meaninglessness,” indicating it reviewed those issues *de novo*, SPA41–42. The District Court *sua sponte*

addressed qualified immunity, indicating it also reviewed that issue *de novo*. SPA42; *see, e.g., Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) (applying *de novo* review to issues district court addresses *sua sponte*). To the extent there is any uncertainty as to the standard applied below, however, the uncertainty favors *de novo* review on appeal. *Cf. Mario*, 313 F.3d at 766 (applying *de novo* review on appeal where “it [was] not clear” what standard the district court applied).¹⁴

On *de novo* review of a grant of summary judgment, this Court “affirm[s] ‘only where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.’”

Proctor, 846 F.3d at 607 (quoting *Willey v. Kirkpatrick*, 801 F.3d 51, 62 (2d Cir. 2015)). As this Court has stressed, “[s]ummary judgment is inappropriate when the admissible materials in the record ‘make it

¹⁴ If a party fails to properly object, courts typically review for clear error and may find further review waived. *See, e.g., Moss v. Colvin*, 845 F.3d 516, 519 n.2 (2d Cir. 2017); *Colvin v. Berryhill*, 734 F. App’x 756, 758 (2d Cir. 2018) (summary order). But this Court has discretion to excuse the failure to properly object and often does so for meritorious claims. *See, e.g., United States v. Male Juvenile*, 121 F.3d 34, 39 (2d Cir. 1997); *Mayanduenas v. Bigelow*, 849 F. App’x 308, 310 n.2 (2d Cir. 2021) (summary order).

arguable’ that the claim has merit.” *Id.* (quoting *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010)). Stated differently, the reviewing court’s task “is to determine whether the complete factual record is so one-sided that the defendants are entitled to summary judgment.” *Selby v. Caruso*, 734 F.3d 554, 560 (6th Cir. 2013).

In conducting this review, the Court “construe[s] the evidence and draw[s] all reasonable inferences in the light most favorable to the non-moving party,” and does “not make credibility determinations or weigh the evidence,” which “are jury functions.” *Proctor*, 846 F.3d at 607–08 (citations omitted). It is also “well established that a court is ordinarily obligated to afford a special solicitude to *pro se* litigants, particularly where motions for summary judgment are concerned.” *Harris v. Miller*, 818 F.3d 49, 57 (2d Cir. 2016) (*per curiam*) (citations and quotation marks omitted).

Finally, “[w]hether a given process is meaningful for the purposes of the Due Process Clause is a question of fact.” *Selby*, 734 F.3d at 560 (quoting *Williams v. Hobbs*, 662 F.3d 994, 1000 (8th Cir. 2011)). The touchstone of the summary judgment inquiry as it relates to Mr. Walker’s due process claim is thus whether he “has raised triable

factual questions as to whether his . . . reviews have been constitutionally meaningful.” *Proctor*, 846 F.3d at 612.

ARGUMENT

I. The District Court Erred In Granting Summary Judgment Because There Are Triable Questions As To Whether Mr. Walker’s Reviews Were Meaningful.

To prevail on his due process claim, Mr. Walker must “demonstrate (1) that Defendants deprived him of a cognizable interest in ‘life, liberty, or property,’ (2) without affording him constitutionally sufficient process.” *Proctor*, 846 F.3d at 608 (quoting U.S. Const. amend. XIV, § 1) (citation omitted).

The first requirement is not in dispute. Court after court has recognized that multi-year confinements in administrative segregation give rise to a cognizable liberty interest. *See Proctor*, 846 F.3d at 608; *Isby v. Brown*, 856 F.3d 508, 524 (7th Cir. 2017); *Incumaa v. Stirling*, 791 F.3d 517, 520 (4th Cir. 2015); *Selby*, 734 F.3d at 559. Defendants have conceded as much here. SPA16; Dkt. 96 at 3.

As for the second requirement, “[i]t is well established that whenever process is constitutionally due, no matter the context, ‘[i]t . . . must be granted at a meaningful time and in a meaningful manner.’”

Proctor, 846 F.3d at 609 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). And “[t]o ensure that a state prison facility does not use Ad Seg as a pretext to commit an inmate to the SHU indefinitely,” *id.* at 601, “meaningful periodic reviews of Ad Seg must at least satisfy” three separate criteria, *id.* at 610–11.

“First, the reviewing prison officials must actually evaluate whether the inmate’s continued Ad Seg confinement is justified.” *Id.* at 610 (citing *Hewitt*, 459 U.S. at 477 n.9). They cannot simply “go through the motions of nominally conducting a review meeting when they have developed a pre-review conclusion that the inmate will be confined in Ad Seg no matter what the evidence shows.” *Id.*

“Second, the reviewing officials must evaluate whether the justification for Ad Seg exists at the time of the review or will exist in the future, and consider new relevant evidence as it becomes available.” *Id.* at 611. This second criteria recognizes that “Ad Seg reviews may not be frozen in time, forever rehashing information addressed at the inmate’s initial Ad Seg determination.” *Id.*¹⁵

¹⁵ At times, the Magistrate Judge appeared to apply the wrong standard, asking whether “some evidence” supported Mr. Walker’s

“Third and finally, the reviewing officials must maintain institutional safety and security (or another valid administrative justification) as their guiding principles throughout an inmate’s Ad Seg term.” *Id.* This means the “state may not use Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions.” *Id.*

When applying these constitutional criteria, courts are mindful that an inmate’s due process challenge “cannot serve as an appeal” of the decision itself because “due process does not permit a court to review the substance of Defendants’ decision to confine [an inmate] in Ad Seg.” *Id.* at 608. Rather, the “Due Process Clause permits only an evaluation of whether Defendants’ method for coming to their Ad Seg determinations is sufficient.” *Id.* Courts are similarly mindful of the

administrative segregation. SPA27–29. Courts apply that standard to the *initial* decision to place an inmate in administrative segregation, which is not at issue here. *See, e.g., Taylor v. Rodriguez*, 238 F.3d 188, 194 (2d Cir. 2001). But the Magistrate Judge elsewhere correctly identified *Hewitt* and *Proctor* as the relevant precedent and “meaningfulness” as the relevant standard governing periodic reviews of ongoing administrative segregation. SPA21–23; SPA30–32. Although it is unclear how the Magistrate Judge viewed the relationship between the two standards, they are not interchangeable and may conflict if the evidence initially relied on has “grown stale.” *Proctor*, 846 F.3d at 609.

“deference [they] owe prison officials in carrying out their daily tasks.”

Id.

That being said, this Court and many others have not hesitated to reverse grants of summary judgment in favor of prison officials on due process claims when the record would permit a reasonable jury to conclude that an inmate had been deprived of meaningful reviews of his prolonged administrative segregation. *See Proctor*, 846 F.3d at 615; *see also Isby*, 856 F.3d at 529; *Incumaa*, 791 F.3d at 520; *Selby*, 734 F.3d at 559–60; *Kelly v. Brewer*, 525 F.2d 394, 402 (8th Cir. 1975).

Courts have enforced this established constitutional requirement even where the inmate had a violent history, including murders, escapes, and violent assaults on correctional staff. *See, e.g., Isby*, 856 F.3d at 512 (inmate had “stabbed two correctional officers—one in the neck, and the other in the head, through a helmet”); *Incumaa*, 791 F.3d at 520 (inmate had organized a prison riot and took three correctional staff hostage for 11 hours); *Selby*, 734 F.3d at 556 (inmate was serving sentences for murder and attempted escape); *Proctor*, 846 F.3d at 602 (same); *Kelly*, 525 F.2d at 401 (inmate had attacked and killed a correctional officer).

A. A reasonable jury could conclude that Defendants did not actually evaluate whether continued segregation was justified based on current facts.

On the record here, the *Proctor* criteria largely overlap: Much of the evidence indicating Defendants reached preordained conclusions each review period also indicates they relied on past misconduct alone rather than an assessment of current facts and did so to mask indefinite punishment. Regardless of how one categorizes the evidence in relation to the criteria, the bottom line is that a reasonable jury could find, based on this record, that Mr. Walker did not receive meaningful reviews of his prolonged administrative segregation.

That Defendants have made self-serving statements to the contrary¹⁶ does not support granting summary judgment here. A jury would not be “required to credit . . . subjective representations or the testimony of . . . an interested witness,” such as the Defendants, particularly when that testimony conflicts with evidence in the record.

¹⁶ See, e.g., A544 ¶ 19 (Bellnier); A553 ¶ 22 (O’Gorman); A1035 ¶ 20 (Uhler); A1040 ¶ 20 (Woodruff); A1043 ¶ 18 (Fitchette); A1047 ¶ 22 (Cook).

Kerman v. City of New York, 374 F.3d 93, 123 (2d Cir. 2004).¹⁷ And it is of course the province of the jury—not the court—to make credibility judgments and weigh competing evidence. *See, e.g., Proctor*, 846 F.3d at 607–08.

A reasonable jury could well decide not to credit Defendants’ statements and find, based on the record evidence discussed below, that Defendants did not actually evaluate whether Mr. Walker’s continued administrative segregation was justified based on current facts for at least three separate reasons.

- 1. The virtually identical reports each review period suggest that Defendants reached preordained conclusions.**

First, the rote and perfunctory reports suggest that Defendants reached a preordained conclusion each review period.

¹⁷ For example, Defendant Cook stated, “there were several times when [she] had interactions with” Mr. Walker, who “was frequently verbally abusive and displayed negative behavior.” A1045 ¶ 11. She also noted that “[o]n every occasion that [she] completed the review forms”—12 times from March 2014 to January 2018—she “would . . . recount [any] interactions with Tyrone Walker during the pertinent time frame.” A1046 ¶¶ 13, 16. Aside from the June 1, 2017 phone incident, however, the Facility Reports never mention verbally abusive or negative behavior from Mr. Walker. Given the conflict between Defendant Cook’s declaration and the Facility Reports, a jury could decide not to credit her testimony.

Most notably, in all 47 Facility Reports in the record, the Facility Committee provided a virtually identical justification for Mr. Walker's continued administrative segregation. *See supra* 28–30. The boilerplate explanations in all 47 Facility Reports are all the more glaring because they appear in a section that was supposed to address factors that may favor retaining or releasing Mr. Walker from solitary confinement, but the only facts cited in that section involved long past misconduct largely copied and pasted from previous reports. *See e. g.*, A736 (July 16, 2019) (“Inmate Walker has demonstrated a propensity for assaultive and dangerous behavior during his incarceration and in his criminal history. Walker’s ability to enact extreme violence on staff and other inmates has shown that his placement in Administrative Segregation is appropriate and greatly reduces the risk his behavior presents to staff and inmates, as well as the safety and security of the facility.”).

While not copying and pasting to the same degree as the Facility Committee, the Central Office Committee also repeated similar justifications each review period that relied on long past misconduct. *See supra* 31, 37; *see also, e.g.*, A751 (May 21, 2019) (“His propensity for building weapons and committing severe violence make him a high risk

to staff and other inmates if he [were] in a less restrictive environment. Administrative segregation remains appropriate at this time.”).

For their part, the Deputy Commissioners unquestioningly endorsed the Facility and Central Office Committees’ rote recommendations with similar, terse explanations for years on end. *See supra* 38–39; *see also, e.g.*, A737 (July 22, 2019) (“Inmate Walker’s placement in administrative segregation is appropriate at this time.”). In addition, as in *Proctor*, “[i]t appears that the portion of the Section 301.4(d) review report indicating the deputy commissioner’s final decision is filled out for Bellnier [and O’Gorman] by” someone else. 846 F.3d at 613. For example, in many of the forms, the Deputy Commissioner’s justification appears to be pre-typed by someone else, *see, e.g.*, A768, or handwritten by different people with different handwriting, *compare, e.g.*, A737 (cursive writing), *with* A740 (block writing), with the Deputy Commissioners merely signing the form. “A reasonable jury could justifiably view” this evidence “as the illustration of a rubber stamp.” *Proctor*, 846 F.3d at 612–13.

As this Court found in *Proctor*, the “years of virtually identical reports may suggest to a reasonable jury that [Mr. Walker’s] reviewers

treated the process as satisfied by boilerplate explanations instead of a forthright review.” *Proctor*, 846 F.3d at 613. This Court is not alone: Many others have similarly found that years of virtually identical reports could permit a reasonable jury to find the reviews were not meaningful. *See Isby*, 856 F.3d at 527–28; *Incumaa*, 791 F.3d at 534. Courts have reached this conclusion namely because, when prison officials offer virtually identical justifications that rely on past misconduct, it suggests that “criminal history alone” is sufficient to support indefinite administrative segregation, which “would obviate the need to conduct periodic reviews of Ad Seg and make a mockery of *Hewitt’s* admonition against indefinite confinement, as it would permit the continuation of Ad Seg based solely on past events that will never change.” *Proctor*, 846 F.3d at 612.

2. The lengthy delays in providing reports suggest Defendants were just going through the motions of nominally conducting the reviews.

Second, even though Defendants contend they conducted most of the Ad-Seg reviews roughly every 60 or 30 days as required, there is no dispute that Mr. Walker often received the reports many months or even a year late, despite regulations requiring them to be provided in

time for him to respond before the next review period in 60 or 30 days. *See supra* 26–27; *see also, e.g.*, A1060 (“Prior to your next . . . review, you may . . . make a statement regarding the need for continued administrative segregation.”). The many lengthy delays in providing the reports to Mr. Walker—including the failure to provide them for an entire year—could suggest to a reasonable jury that Defendants were just “go[ing] through the motions.” *Proctor*, 846 F.3d at 610.

In response, Defendants argued and the Magistrate Judge agreed that the failure to timely provide the reports is irrelevant because due process requires only “periodic” reviews and, relatedly, a mere violation of state regulations does not rise to the level of a due process violation. Dkt. 96 at 7–8; SPA25. These arguments miss the point.

The issue is not whether Defendants’ admitted failure to follow the regulations states a claim on its own. The issue is whether, combined with other evidence in the record, a reasonable jury could infer from the repeated and often lengthy delays in providing the reports that Mr. Walker did not receive meaningful reviews. Among other things, a reasonable jury could infer from the repeated failure to provide the reports on time that Mr. Walker did not timely receive the

reports, and thus could not timely respond to them, because it did not matter what he said or did—he was going to be kept in administrative segregation “no matter what the evidence show[ed]” and the prison officials were just “go[ing] through the motions of nominally conducting a review meeting” every 60 or 30 days. *Proctor*, 846 F.3d at 610. A reasonable jury could further find it suspect that Mr. Walker belatedly received nine of his reports all at once just days after the Magistrate Judge recommended denying Defendants’ motion to dismiss his complaint. *Cf. H’Shaka v. O’Gorman (H’Shaka II)*, 444 F. Supp. 3d 355, 375 (N.D.N.Y. 2020) (“Although this increase in detailed reports [after plaintiff filed his complaint] would not, by itself, create a genuine dispute of material fact for trial, it strengthens the genuine dispute of material fact previously identified by the Court.”).

3. Years of positive behavior stacked against long past misconduct further suggest that the review process was not meaningful.

Third, while Defendants provided virtually identical justifications that relied on past misconduct every review period, Mr. Walker garnered years of positive assessments of his current behavior and attitude. *See supra* 18–26, 31–32. From the time he received an

administrative segregation recommendation in 2014 until the record closed in this case in 2019, he did not commit an act of violence—as noted, he has not committed an act of violence since 2000—and incurred only two misbehavior reports, a Tier 3 in February 2014 and a Tier 2 in June 2017. A568. During that time, he also participated in the Pilot Incentive Program, steadily earning all apparently available privileges, which he then retained for a year before the Program ended; he then participated in the PIMS program, steadily earning and then maintaining privileges with only a temporary reduction in privileges for a few months in mid-2017. *See supra* 17–18, 24. He also participated in academic cell study, reestablished relationships with his family, and completed the ART workbook program at the Central Office Committee’s suggestion. *See supra* 19–25, 27–28. Yet none of this had any effect on the Committees’ or Commissioners’ analyses or recommendations. *See supra* 28–30, 31, 37–39.

Much as the Court observed in *Proctor*, “[o]ne comes away from these [reviews] with nagging skepticism about whether there is anything [Mr. Walker] could ever do to be released from Ad Seg.” *Proctor*, 846 F.3d at 613. Other courts have similarly found it relevant

to a reasonable jury's assessment that an inmate maintained nearly uniformly positive behavior and yet received virtually identical recommendations based on past misconduct for months or years on end. *See Isby*, 856 F.3d at 528 (“On the record at summary judgment, there is a genuine dispute of fact as to whether the thirty-day reviews take into account any updated circumstances in evaluating the need for continued confinement, given the length of Isby’s segregation, his long stretches of time without any disciplinary issues, and the rote repetition of the same two boilerplate sentences following each review.”); *Incumaa*, 791 F.3d at 534 (“The ICC has merely rubber-stamped Appellant’s incarceration in [solitary confinement] (figuratively and sometimes literally), listing in rote repetition the same justification every 30 days the ICC’s ongoing classification of Appellant is especially wanting for explanation in light of his nearly perfect disciplinary record while in security detention.”) (citation and quotation marks omitted); *see also H’Shaka v. O’Gorman (H’Shaka I)*, 758 F. App’x 196, 201 (2d Cir. 2019) (summary order) (“H’Shaka has raised serious grounds for concern about the authenticity of defendants’ review He has done nothing

violent for 20 years and prison officials regularly praise his behavior and attitude.”).

The Magistrate Judge downplayed the references to Mr. Walker’s positive behavior in the reports because they were included in the reports themselves. SPA30. But the Magistrate Judge did not acknowledge that, despite Mr. Walker’s long stretches of good behavior, the reports’ justifications were virtually identical in all 47 reports in the record. *See supra* 28–30. So while it is true that the reports reference his positive behavior, none of this behavior appears to have had any effect on the Committees’ or Commissioners’ analyses.

As in *Proctor*, “when process is nominally afforded to inmates over a significant period of time without any hint of success it may raise questions in a reasonable jury’s mind about whether that process has been meaningful.” 846 F.3d at 612. Indeed, as the same District Court judge here observed in a different case with indistinguishable facts, “it is not clear how much good behavior Plaintiff would have been required to engage in before Defendants would have considered that good behavior sufficient.” *H’Shaka II*, 444 F. Supp. 3d at 374. And when stacking Mr. Walker’s *years* of good behavior against Defendants’ heavy

reliance on past facts, “a reasonable fact finder could conclude that Defendants used Plaintiff’s remote violent conduct prior to being placed in Ad Seg (and his sporadic, relatively minor non-violent incidents while in Ad Seg) as a pretext for their desire to keep him in Ad Seg in order to punish him for past conduct.” *Id.*

B. A reasonable jury could conclude that Defendants are using administrative segregation to mask indefinite punishment for past transgressions.

As the District Court’s analysis in *H’Shaka II* suggests, *see id.*, much of the evidence discussed above regarding Defendants’ failure to actually evaluate Mr. Walker’s continued confinement based on current facts would also permit a reasonable jury to conclude that Defendants are using “Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions.” *Proctor*, 846 F.3d at 611. Additional evidence would only bolster this conclusion, including questionable or unsupported assertions in the Central Office Reports that the Magistrate Judge latched on to as supporting Defendants’ motion, even though Defendants themselves understandably did not reference them. SPA29–34. Far from helping Defendants, the assertions the Magistrate Judge cited only further indicate there is a genuine

dispute of material fact as to whether Mr. Walker's reviews were meaningful.

First, “inexplicable logic” in the reports “raises red flags about whether the underlying reviews were conducted genuinely,” *Proctor*, 846 F.3d at 613, and suggest Mr. Walker's administrative segregation had “morph[ed] into confinement that persists for improper purposes,” *id.* at 611. Most notably, after acknowledging that Mr. Walker's violent acts all occurred nearly two decades ago, the Central Office Committee stated “his close supervision over the subsequent years has arguably prevented continued violence.” A747–48; *see also* SPA29 (highlighting that though Mr. Walker “has not been charged with possessing a weapon since 2014,” “he has been on A[d]-Seg status” during that time). Defendant O’Gorman similarly commented that “the opportunity for Tyrone Walker to commit violent acts has been greatly reduced by his Ad Seg placement,” A556 ¶ 37, and Defendant Bellnier likewise believed Mr. Walker's improved behavior “was likely affected by the restrictions placed upon his movement,” A546 ¶ 29.

A reasonable jury could infer from these statements that there is nothing Mr. Walker could do to demonstrate his improved behavior to

be released from administrative segregation—prison officials will just attribute his positive behavior to his continued segregation. Once again, this Court reached a similar conclusion in *Proctor*, noting that the “dismissal of [the inmate’s] good behavior as irrelevant because the SHU is so restricting that it precludes opportunities for misbehavior is patently circular.” *Proctor*, 846 F.3d at 613–14. What is more, Mr. Walker’s 10 misbehavior reports between 2005 and 2012 when he was in disciplinary segregation undermines the circular logic. A568–69. Clearly it is possible to violate prison rules even when under close supervision, and yet Mr. Walker has incurred only two misbehavior reports since 2012, demonstrating improved behavior.

Second, the Central Office Reports are also filled with “bizarre and unsupported” assertions. *Proctor*, 846 F.3d at 613. For example, the Magistrate Judge noted the Central Office Reports stated Mr. Walker had been caught using “drag lines.” SPA31. This drag-line statement is copied verbatim in three different Central Office Reports spaced many months apart. *See supra* 32–33. Yet Mr. Walker never received a misbehavior report or the loss of privileges for such misconduct while in administrative segregation at Upstate, nor is there so much as a

passing reference to such misconduct in the assessment of his current behavior and attitude in the Facility Reports.

Some of the Central Office Reports are also illogical or internally contradictory. For example, the May 22, 2018 Central Office Report stated, “[s]taff report that *none* of inmate Walker’s requests is inappropriate or out of the ordinary.” A806 (emphasis added). Yet the same Report goes on to state, without citing any support, that Mr. Walker “has expressed a sense of entitlement to anything he wants, and when he does not get what he wants, he demonstrates significant anger.” A807. The incoherence of these two observations may be due to the fact that the latter sentence was copied and pasted from a prior report (that also cited nothing in support). *See* A814 (Feb. 28, 2018). As with the patently circular logic noted above, the frequent use of verbatim statements copied and pasted from previous reports that are unsupported or illogical in a given review period could raise for a reasonable jury “red flags about whether the underlying reviews were conducted genuinely.” *Proctor*, 846 F.3d at 613.

The Magistrate Judge also highlighted Mr. Walker’s June 13, 2019 submission, when he noted he passed the ART workbook program

“with ease,” which the Central Office Committee said “demonstrated a sense of entitlement and anger toward the committee and review process.” SPA30. But the Magistrate Judge overlooked the context of Mr. Walker’s statement or what a reasonable jury could infer from this evidence.

By the time of Mr. Walker’s June 13, 2019 submission, he had been in administrative segregation for over 5 years and had been in solitary confinement for nearly 19 years. *See supra* 8, 10–13. He had successfully participated in the Pilot Incentive Program and then the PIMS Program. *See supra* 17–18, 24. He had continued his academic study and reestablished a connection with his family. *See supra* 19–25, 27–28. He had incurred only one minor misbehavior report since his transfer to Upstate in March 2014. A568. He was then urged in December 2018 to sign up for the ART workbook program—a suggestion he interpreted, rightly or wrongly, as advice as to how he could be released from administrative segregation—and completed it by May 2019. *See supra* 28. Yet none of this good behavior had any effect on the Committees’ or the Commissioners’ analyses.

Mr. Walker then expressed what a reasonable jury could infer was understandable frustration in his June 2019 submission. Rather than infer that the reviews were meaningful, a reasonable jury could infer the opposite: By using Mr. Walker’s expressions of understandable frustration as yet more reason to continue his administrative segregation, a reasonable jury could infer that “[i]t is as if DOCCS officials are not just moving the goalposts on Ad Seg inmates like [Mr. Walker]—there are no goalposts at all.” *Proctor*, 846 F.3d at 613.

II. The District Court Erred In Granting Summary Judgment On Qualified Immunity Because Of The Same Triable Questions As To Whether The Reviews Were Meaningful.

The District Court further erred in holding, in the alternative, that Defendants are entitled to qualified immunity. Courts in this Circuit “evaluate claims of qualified immunity at summary judgment using a two-part inquiry: (1) ‘whether the facts, taken in the light most favorable to the party asserting the injury, show the officer’s conduct violated a federal right’ and (2) ‘whether the right in question was clearly established at the time of the violation.’” *Sloley v. Vanbramer*, 945 F.3d 30, 36 (2d Cir. 2019) (citing *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014)). Although “[c]ourts have discretion in deciding the order

in which to analyze the two prongs,” *id.*, “under either [prong], they ‘may not resolve genuine disputes of material fact,’” *id.* (quoting *Tolan*, 572 U.S. at 656).

Even though the Magistrate Judge declined to reach Defendants’ assertion of qualified immunity, SPA34, the District Court *sua sponte* ruled that Defendants were entitled to qualified immunity for the same reasons stated in their summary judgment brief, SPA42. Defendants’ brief argued they were entitled to qualified immunity under both prongs of the analysis: (1) they did not violate Mr. Walker’s rights; and (2) even if they did, his rights were not clearly established to a degree that they would have understood the errors of their ways. Dkt. 96 at 9–10. They are wrong on both counts.

A. There are triable questions as to whether Mr. Walker received meaningful reviews.

As for the first prong, for the reasons stated in Part I, *supra*, there is a genuine dispute of material fact as to whether Mr. Walker received meaningful reviews of his administrative segregation. And a court cannot resolve that dispute on summary judgment to grant Defendants qualified immunity. *See Sloley*, 945 F.3d at 36.

B. It was clearly established that periodic reviews of administrative segregation must be meaningful.

Nor can Defendants prevail under the second prong of the qualified-immunity analysis. Although their brief is less than clear, it seems to suggest that they did not understand that Ad-Seg reviews could not be rote or pretextual until this Court decided *Proctor*. See Dkt. 96 at 4, 10. Other Courts of Appeals have rejected similar arguments, holding that “prison officials have been on notice since *Hewitt* that periodic reviews of administrative segregation are constitutionally required, and it is self-evident that they cannot be a sham.” *Isby*, 856 F.3d at 530; see also *Selby*, 734 F.3d at 560 (finding right to meaningful periodic reviews clearly established since *Hewitt*). Even the same District Court judge here has elsewhere relied on an even earlier decision to deny summary judgment on qualified immunity grounds where a factfinder could “conclude that the Ad Seg reviews were guided by a pre-determined conclusion rather than a fair assessment of the facts.” *H’Shaka II*, 444 F. Supp. 3d at 389–90 (citing *Armstrong*, 380 U.S. at 552).

Accepting Defendants’ argument would require the Court to reach the odd conclusion that, until *Proctor*, Defendants did not realize that a

meaningful review must “involve real evaluations” that “consider all of the relevant evidence” and that “ensure that Ad Seg is used as neither a form of punishment nor a pretext.” 846 F.3d at 614. To state the obvious, these requirements should have been obvious. *Cf. Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (“Although earlier cases involving ‘fundamentally similar’ facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.”). Moreover, most of *Proctor*’s analysis draws directly from *Hewitt*’s explanation that prison officials must “engage in some sort of periodic review of” continued confinement in administrative segregation to ensure that the inmate “remains a security risk” and that administrative segregation is not used as a “pretext for indefinite confinement of [the] inmate.” 459 U.S. at 477 n.9; *see also Proctor*, 846 F.3d at 610–11.

Regardless, even if Defendants were correct that the law was not clearly established until *Proctor*, this does not get them very far. The District Court correctly concluded that Mr. Walker’s procedural due process claim asserts a continuing wrong, running from 2014 throughout his administrative segregation, which remains ongoing.

Dkt. 5 at 24. This Court decided *Proctor* in January 2017. So even if Defendants' argument had legs (it doesn't), it would shield only their conduct predating *Proctor*, not the many years of conduct since.

* * *

Simply put, it was clearly established after *Hewitt* and certainly after *Proctor* that periodic reviews of administrative segregation must be meaningful, but there is a genuine dispute of material fact as to whether Mr. Walker's reviews were, in fact, meaningful. Thus, "[t]he same factual question that prevents [a court] from determining whether" Mr. Walker's constitutional rights were violated, also prevents it "from deciding whether [Defendants are] entitled to qualified immunity." *Palmer*, 364 F.3d at 67; *see also Isby*, 856 F.3d at 530 (finding genuine disputes of material fact as to whether inmate's administrative segregation reviews were meaningful "preclude summary judgment on the basis of qualified immunity"); *H'Shaka II*, 444 F. Supp. 3d at 390 (same).

CONCLUSION

For the foregoing reasons, this Court should vacate the grant of summary judgment and remand for further proceedings.

February 1, 2022

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Second Circuit Local Rule 32.1(a)(4) because this brief contains 13,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Century Schoolbook 14-point font.

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SPECIAL APPENDIX

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SPAI

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

TYRONE WALKER,

Plaintiff,

v.

BELLNIER, et al.,

Defendants.

No. 9:17-CV-1008
(GTS/CFH)

APPEARANCES:

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**CHRISTIAN F. HUMMEL
U.S. MAGISTRATE JUDGE**

REPORT-RECOMMENDATION AND ORDER¹

Plaintiff pro se Tyrone Walker (“plaintiff”), who was, at all relevant times, in the custody of the New York State Department of Corrections and Community Supervision (“DOCCS”), brings this action pursuant to 42 U.S.C. § 1983, alleging that defendants Joseph Bellnier (“Bellnier”), former Deputy Commissioner for Correctional Facilities for

¹ This matter was referred to the undersigned for Report-Recommendation and Order pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

DOCCS; James A. O’Gorman (“O’Gorman”), current Deputy Commissioner for Correctional Facilities for DOCCS; Donald Ulher (“Uhler”), Superintendent of Upstate Correctional Facility (“Upstate CF”); Paul P. Woodruff (“Woodruff”), Deputy Superintendent of Security at Upstate CF; Joanne Fichette (“Fichette”), Deputy Superintendent of Programs at Upstate CF; and Melissa A. Cook (“Cook”), Offender Rehabilitation Coordinator at Upstate CF, violated his constitutional rights under the Fourteenth Amendment. See Dkt. No. 31 (“SAC”). Presently pending before the Court are plaintiff’s motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (“Fed. R. Civ. P.”), see Dkt. No. 79, and defendants’ cross motion for summary judgment. See Dkt. No. 86. Defendants also opposed plaintiff’s motion. See id. Plaintiff filed a response to defendants’ cross motion. See Dkt. No. 100. For the reasons that follow, it is recommended that plaintiff’s motion be denied in its entirety, defendants’ motion be granted in its entirety, and plaintiff’s complaint be dismissed with prejudice.

I. Background

A. Relevant Regulatory Background

“Administrative segregation admission results from a determination by the facility that the inmate[s] presence in general population would pose a threat to the safety and security of the facility.” N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(b). Section 301.4(d) provides that “[a]n inmate in administrative segregation status shall have such status reviewed every 60 days.” However, the parties agree that, in April 2017, 7 N.Y. C.R.R. § 301.4(d) was amended, as demonstrated in DOCCS Directive No. 4933, to

require that such reviews “shall” occur “every seven days for the first two months and at least every 30 days thereafter.” DOCCS Directive No. 4933 (Apr. 18, 2017), available at <https://doccs.ny.gov/system/files/documents/2020/11/4933.pdf> (last accessed Nov. 21, 2020). O’Gorman further explained that, “[u]ntil July 2017, the reviews took place every 60 days. Since then, the reviews take place every 30 days.” Dkt. No. 90 at 4 ¶

20. The regulations provide the procedure for conducting Ad-Seg review as follows:

(1) A three-member committee consisting of a representative of the facility executive staff, a security supervisor, and a member of the guidance and counseling staff shall examine the inmate’s institutional record and prepare and submit to the superintendent or designee a report setting forth the following:

- (i) reasons why the inmate was initially determined to be appropriate for administrative segregation;
- (ii) information on the inmate’s subsequent behavior and attitude; and
- (iii) any other factors that they believe may favor retaining the inmate in or releasing the inmate from administrative segregation.

N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(d)(1)(i)-(iii).

“Upon receipt of the report and any written statement from the inmate, the superintendent shall . . . make a determination to retain or release the inmate.” N.Y. COMP. CODES R. & REGS. tit. 7, § 301.4(d)(2). In cases, such as plaintiff’s, where the

Deputy Commissioner for Correctional Facilities has notified the superintendent that the subject inmate shall receive Central Office review, the superintendent will refer the report and inmate statement to a three-member Central Office committee. See id. at § 301(d)(3). The committee completes a review and forwards the paperwork, along with its recommendation, to the Deputy Commissioner for Correctional Facilities, who “shall make the determination to retain the inmate in or release the inmate from [Ad-Seg].” Id.

[W]henver a determination is made to continue the inmate in administrative segregation, the superintendent or, as applicable, the deputy commissioner for correctional facilities, shall provide a notice to the inmate that states the reason(s) for the determination and includes the following statement:

“A determination has been made to continue your administrative segregation status for the reason(s) stated in this notice. Prior to your next . . . review, you may write to the superintendent or designee to make a statement regarding the need for continued administrative segregation. The reason(s) stated in this notice, any written statement that you submit, as well as your overall custodial adjustment will be considered during the next scheduled review.”

Id. at § 301.4(d)(4).

B. Relevant Facts

Plaintiff is an inmate currently incarcerated at Upstate CF, housed in the facility's Special Housing Unit (“SHU”) on Administrative Segregation (“Ad-Seg”) status. See SAC at 1. Plaintiff has been in DOCCS' custody since 1994, serving a sentence of 47½ years to life for a conviction in New York State court for first degree attempted robbery, second degree criminal possession of a weapon, and two counts of murder in the second degree. See Dkt. No. 90 at 4-5 ¶ 26. In 1996, plaintiff was convicted in federal court for capital murder and narcotic related offenses and received a life sentence without the possibility of parole. See id. at 5 ¶ 27. While plaintiff was in custody in county jail awaiting his federal trial, he plotted an escape, smuggled a razor blade into court, attempted to hire a hit man to kill witnesses, assaulted a deputy in an attempt to steal his keys, and assaulted another inmate by stabling him 18 times. See Dkt. No. 90-5 at 257. On September 27, 2000, while in DOCCS' custody at Green Haven

Correctional Facility (“Green Haven CF”), plaintiff attacked and stabbed the Deputy Superintendent of Security (“DSS”) and a correction officer with homemade weapons that were secured to his hands with leather thongs, causing serious personal injuries to both individuals. See Dkt. No. 90 at 5 ¶ 29. As a result of his September 2000 assaults at Green Haven CF, plaintiff pleaded guilty in Dutchess County Court to attempted murder in the first degree and received an additional sentence of 15 years to life. See id. at ¶ 30. As of August 2014, plaintiff had incurred 27 misbehavior reports for violations of DOCCS rules, including weapons possession, drugs, smuggling, assault on staff, altered items, creating a disturbance, and threats. See Dkt. No. 90-5 at 257.

On January 17, 2014, while incarcerated at Clinton CF, plaintiff was placed on Ad-Seg status, and an Ad-Seg review hearing was held on February 26, 2014. See Dkt. No. 90-5 at 289. Plaintiff was transferred from Clinton CF to Upstate CF on March 4, 2014. See id. On March 13, 2014, the facility three-member committee at Upstate CF (“the facility committee”) conducted a 60-day Ad-Seg review. See id. The facility committee observed that, as of March 13, 2014, the date of its report, plaintiff had a Tier III misbehavior report pending for possessing a weapon, altered item, bribery/extortion, and property unauthorized location stemming from an incident at Clinton CF. See id. Plaintiff was ultimately found guilty of those charges. See Dkt. No. 90-5 at 100. In its summary report, the facility committee noted plaintiff’s criminal history and history of DOCCS disciplinary infractions, as recited above, and indicated that “[t]his type of history in conjunction with [plaintiff’s] propensity for violence cannot be taken lightly.” Id. The facility committee observed that plaintiff “ha[d] spent the majority of his time [while

incarcerated] in SHU confinement and ha[d] not completed any of his recommended programs.” Id. Further, the facility committee noted that, on March 11, 2014, Cook met with plaintiff and conducted an interview in which “the [Ad-Seg] Pilot incentive was discussed, and it was agreed that [plaintiff’s status] would be reviewed again when [he] finished serving his disciplinary sanctions.” Id. The committee determined to continue plaintiff’s Ad-Seg status “[f]or the safety, security[,] and good order of the facility.” Id.

Moreover, the committee provided the following assessment

Clearly, [plaintiff] has demonstrated a propensity for assaultive and dangerous behavior in the correctional facility and the community. [Plaintiff]’s willingness to enact extreme violence on staff and other inmates has proven his presence in general confinement of any correctional facility an extreme risk to staff and as well as the safety and security and good order of the facility.

Id. The Central Office three-member committee (“the Central Office committee”) agreed with the facility committee’s determination to keep plaintiff on Ag-Seg status on Mach 20, 2014, and Bellnier concurred with the Central Office committee’s recommendation on May 11, 2014. See id. Another 60-day Ag-Seg review was conducted by the Upstate CF facility committee on May 5, 2014. See id. at 282. As relevant here, the facility committee’s report indicated that plaintiff’s disciplinary sanction would be complete on May 27, 2014, after which he would be entitled to the Ad-Seg Pilot Program privileges, and recommended continuing plaintiff on Ag-Seg status. See id. The Central Office committee also recommended continuing plaintiff’s Ag-Seg status on May 13, 2014, and Bellnier concurred with that recommendation on July 25, 2014. See id. Following plaintiff’s completion of his disciplinary sanctions, the Upstate CF facility committee conducted an Ad-Seg review for plaintiff on July 5, 2014, and generated a

report that indicated that plaintiff was “now participating in the Pilot Incentive Program,” and recommended continuing his Ad-Seg status. See id. at 274. The Central Office committee also recommended continuing plaintiff on Ag-Seg status, and Bellnier concurred with the recommendation on August 19, 2014. See id. Thereafter, the Upstate CF facility committee conducted Ag-Seg reviews for plaintiff and recommended continuing his Ad-Seg status, as did the Central Office committee and the Deputy Commissioner for Correctional Facilities concurred, on the following dates:

Ag-Seg Review by Facility Committee	Central Office Committee	Deputy Commissioner for Correctional Facilities	Record Cite
8/20/14	9/8/14	10/8/14	Dkt. No. 90-5 at 257
10/7/14	10/21/14	12/8/14	Dkt. No. 90-5 at 248
11/21/14	12/12/14	2/13/15	Dkt. No. 90-5 at 239
3/2/15	3/18/15	3/19/15	Dkt. No. 90-5 at 231
4/28/15	4/29/15	6/30/15	Dkt. No. 90-5 at 222
6/18/15	6/19/15	9/15/15	Dkt. No. 90-5 at 214
8/11/15	8/12/15	10/6/15	Dkt. No. 90-5 at 207
10/5/15	12/16/15	12/17/15	Dkt. No. 90-5 at 200
12/4/15	4/4/16	4/6/16	Dkt. No. 90-5 at 193
1/25/16	4/4/16	4/6/16	Dkt. No. 90-5 at 185
3/16/16	6/22/16	6/27/16	Dkt. No. 90-5 at 178
5/5/16	6/14/16	6/14/16	Dkt. No. 90-5 at 170
6/27/16	10/18/16	10/19/16	Dkt. No. 90-5 at 160
8/17/16	undated	2/10/17	Dkt. No. 90-5 at 138
10/13/16	11/29/16	12/2/16	Dkt. No. 90-5 at 128
1/30/17	7/2/17	7/31/17	Dkt. No. 90-5 at 125
4/13/17	8/30/17	9/6/17	Dkt. No. 90-5 at 123
6/12/17	9/21/17	9/25/17	Dkt. No. 90-5 at 118
8/11/17	undated	12/12/17	Dkt. No. 90-5 at 110
9/12/17	9/12/17	9/26/17	Dkt. No. 90-5 at 107-08
10/10/17	10/10/17	10/24/17	Dkt. No. 90-5 at 104-05
11/7/17	11/7/17	11/27/17	Dkt. No. 90-5 at 101-02
12/5/17	12/5/17	12/28/17	Dkt. No. 90-5 at 98-99
1/3/18	1/3/18	1/25/18	Dkt. No. 90-5 at 84-85
1/31/18	1/31/18	2/12/18	Dkt. No. 90-5 at 80-81
2/28/18	2/28/18	3/15/18	Dkt. No. 90-5 at 77-78
3/27/17	3/27/18	3/29/18	Dkt. No. 90-5 at 73-74

5/22/18	5/22/18	5/29/18	Dkt. No. 90-5 at 69-70
6/19/18	6/19/18	7/16/18	Dkt. No. 90-5 at 66-67
7/17/18	7/17/18	8/2/18	Dkt. No. 90-5 at 63-64
8/14/18	8/16/18	9/5/18	Dkt. No. 90-5 at 60-61
9/11/18	9/11/18	9/25/18	Dkt. No. 90-5 at 55-56
10/10/18	10/10/18	11/6/18	Dkt. No. 90-5 at 52-53
11/6/18	11/6/18	12/4/18	Dkt. No. 90-5 at 46-47
12/4/18	12/4/18	12/14/18	Dkt. No. 90-5 at 42-43
1/2/19	1/3/19	1/28/19	Dkt. No. 90-5 at 35-36
1/29/19	1/29/19	2/5/19	Dkt. No. 90-5 at 32-33
2/26/19	2/28/19	3/26/19	Dkt. No. 90-5 at 25-26
3/26/19	pages not included	pages not included	Dkt. No. 90-5 at 20
4/23/19	4/25/19	4/25/19	Dkt. No. 90-5 at 17-18
5/21/19	5/21/19	6/5/19	Dkt. No. 90-5 at 14-15
6/17/19	6/17/19	7/3/19	Dkt. No. 90-5 at 4-5
7/16/19	7/16/19	7/22/19	Dkt. No. 90-5 at 1-2

II. Present Motions

A. Plaintiff's Motion for Summary Judgment

Plaintiff contends that defendants subjected him to atypical and significant hardship in violation of his Fourteenth Amendment due process rights by failing to provide him with meaningful Ad-Seg reviews. See Dkt. No. 79-2 at 1. Plaintiff states that, "at times the reviews don't exist at all, or they are so late they undermine the process," and have prevented his "issues from being heard." Id. In particular, plaintiff posits that his August 17, 2016 Ad-Seg review was completed on February 10, 2017, but that he did not receive it until February 17, 2017; his January 30, 2017 review was completed on July 31, 2017, which he received on August 4, 2017; his June 12, 2017 review was completed on September 25, 2017, but he did not receive it until December 27, 2017; and from August 17, 2016, to December 27, 2017, plaintiff "either received over a year of late reviews or no reviews at all." Id. at 5. Plaintiff states that, "[o]n

January] 24, 2019[, he] would receive 9 Ad-Seg reviews dated 9-12-17, 10-10-17, 11-07-17, 12-05-17, 1-03-18, 1-31-18, 2-28-18, 3-27-18 and 5-22-18,” which are “all stamped Upstate [CF] Executive Office Jan. 22, 2019.” Id. Plaintiff argues that the date stamp “indicate[s] when the facility received them.” Id. He notes that he raised the issue of late receipt of his Ad-Seg reviews in his January 26, 2019 statement, but contends that “it was never responded to.” Id. Plaintiff contend that his late receipt of Ad-Seg reviews “clearly establishes a due process liberty interest violation.” Id. at 13. Plaintiff cites Tellier v. Scott, 49 F. Supp. 2d 607 (1998) in support of this contention. See id. Plaintiff also avers that his belated receipt of his Ad-Seg reviews obstructed his right to be heard, because it prevented him from addressing issues in subsequent reviews, including that his “debilitating health issues” prevent him from being a threat. Id. at 24.

Further, plaintiff posits that the criteria for meaningful review, as set forth in Proctor, “has not been met” because defendants “inserted” “blatantly false information . . . into [his Ad-Seg] reviews” to “bolster and magnif[y] the security threat plaintiff posed, making the reviews “a pretextual sham process.” Dkt. No. 79-2 at 14 (plaintiff arguing that his Ad-Seg reviews were “a sham, rote, perfunctory[,] and a fraud.” (capitalization omitted)). In particular, plaintiff contends that his “12-4-15, 1-25-16, 6-27-16, 1-30-17, 6-16-17, 8-11-17, 11-7-17[,] and 12-05-17 Ad-Seg reviews” contain the false statement that he “assaulted the Deputy Superintendent of Security” at Green Haven in September 2000, “for no reason in blind rage.” Id. Plaintiff argues that defendants used this false statement “to support [his] continued confinement” on the basis that plaintiff is “unpredictable and . . . filled with rage.” Id. at 15. In support of this argument, plaintiff

submits several exhibits, which he posits establishes that defendants acknowledged that the reason he attacked the Deputy Superintendent “was based on religious reasons and the blind rage was a lie.” Id. Plaintiff cites several Ad-Seg reviews that indicate that he “violently assaulted Deputy Superintendent of Security Schneider and Corrections Officer Mitchetti” at Green Haven CF on September 22, 2000, with “two homemade weapons” that “were secured to each hand by leather throngs.” Dkt. No. 90-5² at 118 (June 12, 2017 Ad-Seg review); 101 (Nov. 7, 2017 Ad-Seg review); 98 (Dec. 5, 2017 Ad-Seg review); 193 (Dec. 4, 2015 Ad-Seg review); 185 (Jan. 25, 2016 Ad-Seg review)³; 125 (Jan. 30, 2017 Ad-Seg Review); 160 (June 27, 2016 Ad-Seg review). Plaintiff also points to his December 27, 2000 Huntley notice relating to his criminal trial for his September 2000 assault of Deputy Superintendent Schneider and Correction Officer Mitchetti. See Dkt. No. 79-2 at 14. The Huntly notice states that plaintiff gave the following reasons for his September 2000 assaults: “I stabbed Dep. Schneider[] because he was fucking with Muslims. He was oppressing the Muslim brothers. I stabbed Mitchetti[] because he was an asshole and he deserved it.” Dkt. No. 90-5 at 93. The Huntly notice further provides that plaintiff subsequently stated that “[s]omebody else is going to die.” Id. Further, plaintiff points to defendants’ memorandum of law in support of their motion to dismiss in which defendants noted that “it does appear that plaintiff was motivated by religious complaints when he brutally assaulted the Green Haven Deputy of Security,” and that “despite this information, in

² For the sake of ease, the Court will make all reference to plaintiff’s Ad-Seg reviews to Dkt. No. 90-5, as that document contains all of plaintiff’s Ad-Seg reviews in chronological order.

³ Plaintiff erroneously refers to his January 25, 2016 Ad-Seg review as the “2-16-16” Ad-Seg review. See Dkt. No. 79-2 at 14; Dkt. No. 79-4 at 103 (Plaintiff’s Exhibit 6 referring to “2-16-16 Ad Seg Review[]”); 106 (Jan. 25, 2016 Ad-Seg review).

two of four [Ad-Seg] reviews . . . , the central office committee indicated that plaintiff's attack was blind rage," but argued that, "[w]hile plaintiff makes much of this misstatement, this detail is of no consequence." Dkt. No. 14 at 15. Defendants further contended that, "[r]egardless of plaintiff's motive, his attack at Green Haven involved the deliberate creation of two improvised weapons, the fastening of those weapons to his arms to prevent him from being disarmed . . . , and the repeated stabbing of both staff members . . . resulting in numerous puncture wounds, multiple facial fractures, and an attempted murder conviction." Id. Moreover, plaintiff contends, as further evidence that defendants' Ad-Seg reviews were a sham, he "only acquired 1 tier II misbehavior report in the 6 years he was been in the Ad-Seg, so they created the false narratives in [his] Ad-Seg reviews that [he] is a person enraged, filled with so much rage that he attacked the DSS for no reason, it was blind rage." Dkt. No. 79-2 at 18.

Plaintiff also asserts that defendants manufactured a "lie" that his September 2000 attack was based on the Deputy Superintendent's refusal to transfer his property. Dkt. No. 79-2 at 15. Plaintiff points to his February 28, 2018 and May 22, 2018 Central Office committee Ad-Seg reports and recommendations, which states

Inmate Walker remains a serious risk for violence. He has expressed a sense of entitlement to anything he wants, and when he does not get what he wants, he demonstrates significant anger. In one recent incident, when he had a visitor who failed to take a package that Walker had left for him, Walker blamed the Department, and when the Department declined to send the package at Department expense, he demonstrated rage, suggesting that he would have assaulted the DSS if given the opportunity. Both his propensity and high ability to fashion weapons and commit sever violence make him a high risk to staff and other inmates if he were given an opportunity to commit such violence. He should not be given such an opportunity. Consequently, [Ad-Seg] remains appropriate at this time.

Dkt. No. 90-5 at 71 (May 22, 2018); 79 (Feb. 28, 2018). Plaintiff posits that this characterization is false, and states that he expressed gratitude when the DSS extended the time to hold plaintiff's property when his daughter forgot to take his property until his brother was able to receive it when he visited plaintiff. See Dkt. No. 79-2 at 15-16. Plaintiff denies threatening anyone over this incident and notes Woodruff's affirmative response to his interrogatory question: "If . . . [p]laintiff threatened to cause physical harm to any correctional staff, would [he] have been issued a misbehavior report?" Dkt. No. 79-4 at 113; see Dkt. No. 79-2 at 16. Plaintiff also cites to the visitor's log at Upstate CF dated February 6, 2010, and his disposal of property form dated April 10, 2017, which indicates that plaintiff was sending three draft bags full of books with his brother. See Dkt. No. 79-4 at 83, 144.

Moreover, plaintiff contends that his Ad-Seg reviews include false statements indicating that he has the ability to manipulate his environment, as evidenced by his purposeful violation of DOCCS rules to stay at Clinton, and his ability and propensity to create weapons. See Dkt. No. 79-2 at 16. Plaintiff cites to numerous Ad-Seg reviews which contain the following statement in support of continuation of his Ad-Seg status:

Walker has proven his ability to obtain and craft weapons and to manipulate his environment: he purposefully obtained or created a weapon in February 2014, while still at Clinton [CF] after he found out he was being transferred to Upstate [CF]. He knew possession of such contraband would result in a Tier III disciplinary action and believed that this would cause his transfer to be cancelled.

Dkt. No. 90-5 at 121 (Central Office committee's report and recommendation dated June 16, 2017, following plaintiff's June 12, 2017 Ad-Seg review); see id. at 194 (Central Office committee's report and recommendation dated Dec. 22, 2015, following

plaintiff's Dec. 4, 2015 Ad-Seg review); 127 (Central Office committee's report and recommendation dated February 24, 2017, following plaintiff's January 30, 2017 Ad-Seg hearing); 162 (Central Office committee's report and recommendation dated July 5, 2016, following plaintiff's June 27, 2016 Ad-Seg review). Plaintiff states that "[t]he idea of [him] being notified in advance that he was being transferred is false because based on plaintiff's security classification and central monitoring case designation . . . [he] is never notified in advance when he is being transferred outside the facility." Dkt. No. 79-2 at 17. He also posits that such a statement is belied by his own experiences of seeing other inmates with weapons charges transferred to different facilities and being "transferred himself with a weapon [sic] charge in Greenhaven [sic]." Id. Plaintiff posits that "obtaining a weapon on purpose to obtain a Tier III is contradicted by the misbehavior report itself." Id. Plaintiff has included his February 27, 2014 misbehavior report from Clinton in his list of exhibits. See Dkt. No. 79-4 at 137. The misbehavior report provides, in relevant part, that, on February 27, 2014, plaintiff stopped the authoring correction officer while he was making rounds in plaintiff's housing unit and that plaintiff stated that he found a 1¼ by 1/8 inch "half[-]moon shaped piece of metal that had been sharpened to a point" while plaintiff was cleaning his cell. Id. Plaintiff told the correction officer that he had found the object on the floor and that, "since he did a good deed their [sic] should be an award for his good behavior." Id. Plaintiff was charged and ultimately found guilty of possession of a weapon, altered item, possession of an article in an unauthorized area, and bribery. See id. at 152. Plaintiff argues that "seeking . . . a reward for a good deed do [sic] not mean obtaining a weapon charge." Dkt. No. 79-2 at 17. He also argues that he "do [sic] not like getting misbehavior reports

. . . , nor never [sic] was a mental health patient.” Id. In addition, plaintiff contends that the statement that he purposefully attempted to remain at Clinton by obtaining a weapons charge is “contradicted by the fact that [he] hated Clinton and sought a transfer from the facility whenever he was eligible, [and] was repeatedly placed on restraint orders, that required . . . plaintiff to remain in restraints in the visiting area and . . . plaintiff accused the administration of being white racist savage act . . . to make plaintiff’s life a living hell.” Id. at 17-18.

Moreover, plaintiff notes his June 17, 2019 Ad-Seg report and recommendation, in which the Central Office committee noted that plaintiff had completed the Aggression Replacement Training (“ART”) program, which it stated “was “a positive step for [him], but by no means justifies release from [Ad-Seg] in itself.” Dkt. No. 90-5 at 12; see Dkt. No. 79-2 at 19. The Central Office committee noted plaintiff’s letter dated June 13, 2019 to the Review Committee in which plaintiff sought to rebut “the assertion that he expresses entitlement and anger.” Dkt. No. 90-5 at 12; see id. at 6-7 (Plaintiff’s June 13, 2019 Ad-Seg Statement). The Central Office committee also noted that plaintiff’s letter took issue with the inclusion of his skill at building weapons and inclination towards violence in his Ad-Seg reviews. See id. The Central Office Three-member committee stated that plaintiff “rightly point[ed] out his notable instances of violence . . . all occurred more than 20 years ago[.]” but posited that “his close supervision over the subsequent years has arguably prevented continued violence.” Id. Further, “[r]ather than reflect on the lessons of ART,” plaintiff stated in his letter to the Central Office committee that he “passed [the ART program] ‘with ease.’” Id. (quoting id. at 6). In addition, the Central Office committee noted that “[t]he only staff member [plaintiff]

named in his letter was derided as corrupt—a sign that he has a problem communicating respectfully[.]” and noted that plaintiff “closed his letter with the entitled inference that if he received a meaningful review he would be released from [Ad-Seg].” Id. at 12-13. Moreover, the Central Office committee noted that plaintiff “had significant issues with his prior [Offender Rehabilitation C]ounselor and his supervision had to be reassigned last year”; that “staff noted that [plaintiff] is smart enough to communicate appropriately when he wants something, and that he is capable of manipulation”; and that, “[d]espite that ability, [plaintiff] repeatedly misses the mark when communicating with this committee.” Id. at 13. The Central Office committee stated that “[r]elease from [Ad-Seg] . . . will require a level of humility and remorse that has thus far not been demonstrated[.]” and concluded with the following:

There is no formula or benchmark for such a demonstration—only personal growth. This is a high bar to demand for release from [sic] administrative segregation, but the cost of an untimely release could be the lives of other inmates or correctional staff.

While the Committee recognizes the conundrum inherent in requiring a demonstration of growth and non-violent problem-solving while continuing [Ad-Seg] due to the risk of violence inherent in the subject, we are unable to recommend a step-down to a less restrictive environment. [Plaintiff] should remain in [Ad-Seg] at this time.

Id. Plaintiff posits that this assessment is flawed, because in his December 27, 2017 Ad-Seg statement, he stated that he “regret[s] what [he] did in [his] past in respect to assaulting correctional staff (a show of remorse) and . . . ha[s] never done it again.”

Dkt. No. 79-2 at 20 (quoting Dkt. No. 95-5 at 86 (plaintiff’s Dec. 27, 2017 Ad-Seg

Statement)). Finally, plaintiff argues that defendants are not entitled to qualified immunity. See id. at 26.⁴

B. Defendants Cross Motion for Summary Judgment and Opposition

As an initial matter, defendants concede that, for the purpose of plaintiff's motion and defendants' cross motion, plaintiff has established a liberty interest in avoiding lengthy and restrictive confinement based on his placement in SHU on Ad-Seg status. See Dkt. No. 96 at 4. "However," defendants contend, "[p]laintiff has not established, and cannot establish, that the process he was afforded was constitutionally defective." Id. Insofar as plaintiff contends that the Ad-Seg review process was a sham because he received late reviews or, at times, no reviews at all, defendants counter that plaintiff's argument is meritless and belied by their admissible evidence. See id. at 8. In particular, defendants point to the "[c]opies of [plaintiff] Ad[-]Seg reviews from 2014 [to] 2019," attached to O'Gorman's declaration, which they contend "demonstrate that [p]laintiff has, in fact, always received periodic reviews since his initial Ad[-]seg placement." Id. Further, defendants posit, "[a] delay in providing [p]laintiff with copies of the signed [Ad-Seg] reviews is not a violation of his right to due process[.]" as "[t]here is no [c]onstitutionally mandated time-period in which the periodic reviews must be conducted, nor is there a [c]onstitutionally mandated time-period for providing copies of the signed periodic reviews." Id. To the extent that plaintiff's argument is premised on a

⁴ Plaintiff's argument, although titled "Defendant's [sic] Are Not Entitled to Qualified Immunity," is a restatement of the Court's discussion of personal involvement contained in the January 2019 Order denying defendants' motion to dismiss. See Dkt. No. 79-2 at 26-27; Walker v. Bellnier, No. 9:17-CV-1008 (GTS/CFH), 2019 WL 2479612, at *9-10 (N.D.N.Y. Jan. 15, 2019).

violation of DOCCS Directive No. 4933, defendants contend that “his argument has no merit in federal court.” Id.

In addition, defendants argue that plaintiff’s contention that he has been deprived the right to be heard and that his Ad-Seg review process was a sham lacks merit and is contradicted by the documentary evidence. See Dkt. No. 96 at 9. In particular, defendants posit that, “[a]t the facility level, [p]laintiff is given an opportunity to submit documentation for his periodic Ad[-]Seg reviews, and the documents that [p]laintiff has submitted are included in the[ir] supporting papers.” Id. In this regard, defendants point to plaintiff’s various Ad-Seg statements. See Dkt. No. 90-5 at 57-59 (Sept. 6, 2018 Ad-Seg Statement); 48 (Nov. 1, 2018 Ad-Seg Statement); 44 (Nov. 30, 2018 Ad-Seg Statement); 37-40 (Dec. 25, 2018 Ad-Seg Statement); 27-29 (Jan. 26, 2019 Ad-Seg Statement); 21-23 (Mar. 13, 2019 Ad-Seg Statement); 6 (June 13, 2019 Ad-Seg Statement). Defendants also note that plaintiff’s comments to Upstate CF staff are reported to the Central Office Ad-Seg Review Committee during telephone conferences as part of his periodic Ad-Seg reviews. See id.

Finally, defendants contend that they are entitled to qualified immunity, because “[p]laintiff received the requisite periodic reviews as required by law” “using the three-tier system, by seven individual members of DOCCS staff.” Dkt. No. 96 at 10. Therefore, defendants argue, “[i]t was objectively reasonable for all of [d]efendants to believe that they were not violating [p]laintiff’s due process rights.” Id. at 11. Moreover, defendants argue, “reasonable officials, similarly situated to . . . [d]efendants, would not have comprehended that their conduct in reviewing Plaintiff’s Ad[-]Seg status” pursuant to the three-tier review system “violated any of [p]laintiff’s rights.” Id.

C. Plaintiff's Response in Opposition to Defendants' Cross-Motion

Plaintiff posits that defendants' argument that he was afforded adequate due process through his three-tiered Ad-Seg reviews "is based solely on . . . [d]efendants [sic] declaration and claims that they complied with the review process." Dkt. No. 100 at 3. Plaintiff states that the Ad-Seg review documents from 2014 to 2019 attached to O'Gorman's declaration "contradict his claims, and these documents support plaintiff's claims [that] he has not had reviews for over a year." Id. Plaintiff also contends that defendants' argument in this regard was previously rejected by the Court on defendants' motion to dismiss because "there was [sic] years of no reviews, which has not changed one document." Id. at 4. Further, plaintiff states that the documents attached to O'Gorman's declaration establish that "years [of reviews] are missing." Id. Plaintiff also argues that, pursuant to DOCCS Directive No. 4933, the 30-day timeline for periodic Ag-Seg reviews includes "receiving reviews every 30 days." Id. Moreover, plaintiff contends that defendants are not entitled to qualified immunity because "all of them are fully aware of the constitutional violation, and . . . of the Proctor case." Id. at 5.

III. Discussion⁵

A. Legal Standard

Summary judgment may be granted only if the submissions of the parties taken together "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). "The party moving for summary

⁵ All unpublished opinions cited in this Report-Recommendation and Order, unless otherwise noted, have been provided to plaintiff.

judgment bears the initial burden of showing, through the production of admissible evidence, that no genuine issue of material fact exists.” Price v. Oropallo, No. 9:13-CV-0563 (GTS/TWD), 2014 WL 4146276, at *4 (N.D.N.Y. Aug. 19, 2014) (citing Salahuddin v. Goord, 467 F.3d 263, 272-73 (2d Cir. 2006)). Facts are material if they may affect the outcome of the case as determined by substantive law. See Anderson, 477 U.S. at 248. A dispute of fact is “genuine” if “the [record] evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Id. “In determining whether summary judgment is appropriate, [the Court will] resolve all ambiguities and draw all reasonable inferences against the moving party.” Skubel v. Fuoroli, 113 F.3d 330, 334 (2d Cir. 1997).

Only after the moving party has met this burden is the nonmoving party required to produce evidence demonstrating that genuine issues of material fact exist. See Salahuddin, 467 F.3d at 272-73. The nonmoving party must do more than “simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). “Conclusory allegations, conjecture and speculation . . . are insufficient to create a genuine issue of fact.” Kerzer v. Kingly Mfg., 156 F.3d 396, 400 (2d Cir. 1998).

A party opposing summary judgment is required to submit admissible evidence. See Spiegel v. Schulmann, 604 F.3d 72, 81 (2d Cir. 2010) (“It is well established that in determining the appropriateness of a grant of summary judgment, [the court] . . . may rely only on admissible evidence.”) (internal quotation marks and citation omitted). A plaintiff’s verified complaint is to be treated as an affidavit.⁶ See Colon v. Coughlin, 58

⁶ Plaintiff’s SAC in this case was not properly verified. See SAC at 12.

F.3d 865, 872 (2d Cir. 1995) (“A verified complaint is to be treated as an affidavit . . . and therefore will be considered in determining whether material issues of fact exist . . .”). “To satisfy Rule 56(e), affidavits must be based upon concrete particulars, not conclusory allegations.” Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997) (internal quotation marks and citation omitted). “Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment.” Bickerstaff v. Vassar Coll., 196 F.3d 435, 452 (2d Cir. 1999). “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could *reasonably* find for the plaintiff.” Jeffreys v. City of New York, 426 F.3d 549, 554 (2d Cir. 2005) (brackets omitted) (quoting Anderson, 477 U.S. at 252).

Where, as here, a party seeks judgment against a pro se litigant, a court must afford the non-movant special solicitude. See Treistman v. Fed. Bureau of Prisons, 470 F.3d 471, 477 (2d Cir. 2006). As the Second Circuit stated,

[t]here are many cases in which we have said that a *pro se* litigant is entitled to special solicitude, that a *pro se* litigant’s submissions must be construed liberally, and that such submissions must be read to raise the strongest arguments that they suggest. At the same time, our cases have also indicated that we cannot read into *pro se* submissions claims that are not consistent with the *pro se* litigant’s allegations, or arguments that the submissions themselves do not suggest, that we should not excuse frivolous or vexatious filings by *pro se* litigants, and that *pro se* status does not exempt a party from compliance with relevant rules of procedural and substantive law . . .

Id. (internal quotation marks, citations, and footnote omitted); see also Sealed Plaintiff v. Sealed Defendant, 537 F.3d 185, 191 (2d Cir. 2008) (“On occasions too numerous to count, we have reminded district courts that when [a] plaintiff proceeds *pro se*, . . . a

court is obligated to construe his pleadings liberally.”) (internal quotation marks and citations omitted).

When considering cross-motions for summary judgment, a court “must evaluate each party’s motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration.” Hotel Employees & Rest. Employees Union, Local 100 of New York, New York & Vicinity, AFL CIO v. City of New York Dep’t of Parks & Recreation, 311 F.3d 534, 543 (2d Cir. 2002) (quoting Heublein, Inc. v. United States, 996 F.2d 1455, 1461 (2d Cir. 1993)). “[N]either side is barred from asserting that there are issues of fact, sufficient to prevent the entry of judgment, as a matter of law, against it [and] a district court is not required to grant judgment as a matter of law for one side or the other.” Heublein, 996 F.2d at 1461.

B. Analysis

Administrative Segregation is not punitive and is, therefore, governed by less restrictive procedural protections than those required when the “sole purpose of confinement is punishment.” Proctor v. LeClaire, 846 F.3d 597, 609 n.5 (2d Cir. 2017) (quoting Patterson v. Coughlin, 761 F.2d 886, 891 (2d Cir. 1985); see Wolff v. McDonnell, 418 U.S. 539, 558, 564-66 (1974) (setting forth the procedural due process required for an inmate facing disciplinary charges that may result in punitive segregation); see also Bolden v. Alston, 810 F.2d 353, 357 (2d Cir. 1987) (“[T]he level of procedural protection differs according to the purpose of the confinement.”). In Hewitt v. Helms, 459 U.S. 460 (1983), the Supreme Court explained that an inmate confined for administrative reasons need receive only minimal due process rights. See Hewitt,

459 U.S. at 476, abrogated in part on other grounds by Sandin v. Conner, 515 U.S. 472, (1995). Before confining an inmate in Ad-Seg, prison officials must provide “some notice of the charges against him and an opportunity to present his views to the prison official charged with deciding whether to transfer him to [Ad-Seg],” although not necessarily a full hearing. Id. Once that has occurred, prison officials need only conduct “an informal, nonadversary evidentiary review” of whether the confinement is justified. Id. Under Hewitt, “periodic review of the confinement” is meant to verify that the inmate “remains a security risk” throughout his term. Id. at 477 n.9. Said another way, “[t]he purpose of these periodic reviews is to ensure that the state’s institutional interest justifying the deprivation of the confined inmate’s liberty has not grown stale and that prison officials are not using Ad Seg as ‘a pretext for indefinite confinement of an inmate.’” Proctor, 846 F.3d at 609 (quoting Hewitt, 459 U.S. at 477 n.9). “Periodic Ad-]Seg reviews are also flexible and may be based on ‘a wide range of administrative considerations,’ including but not limited to observations of the inmate in Ad-Seg, ‘general knowledge of prison conditions,’ misconduct charges, ongoing tensions in the prison, and any ongoing investigations.” Id. (quoting Hewitt, 459 U.S. at 477 n.9). Prison officials’ final Ad-Seg decision may “turn[] largely on purely subjective evaluations and on predictions of future behavior.” Hewitt, 459 U.S. at 474 (internal quotation marks and citation omitted).

“It is well established that whenever process is constitutionally due, no matter the context, ‘[i]t . . . must be granted at a meaningful time and in a meaningful manner.’” Proctor, 846 F.3d at 609 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). In

Proctor, the Second Circuit identified the following three criteria that prison officials must satisfy in order to provide “meaningful” periodic Ad-Seg reviews:

C
First, the reviewing prison officials must actually evaluate whether the inmate’s continued Ad Seg confinement is justified. It is not sufficient for officials to go through the motions of nominally conducting a review meeting when they have developed a pre-review conclusion that the inmate will be confined in Ad Seg no matter what the evidence shows. Review with a pre-ordained outcome is tantamount to no review at all.

F
Second, the reviewing officials must evaluate whether the justification for Ad Seg exists at the time of the review or will exist in the future, and consider new relevant evidence as it becomes available. [O]ngoing Ad Seg reviews may not be frozen in time, forever rehashing information addressed at the inmate’s initial Ad Seg determination. Rather, reviews must take into account prison conditions and inmate behavior as they change over time; those changes may modify the calculus of whether the inmate presents a current threat to the safety of the facility. This is not to say that prison officials are barred from according significant weight to events that occurred in the past. Neither do we suggest that recent events categorically ought to be more salient in periodic reviews than those that occurred long ago. We conclude merely that prison officials must look to the inmate’s present and future behavior and consider new events to some degree to ensure that prison officials do not use past events alone to justify indefinite confinement.

H
Third . . . , the reviewing officials must maintain institutional safety and security (or another valid administrative justification) as their guiding principles throughout an inmate’s Ad Seg term. SHU confinement that began for proper Ad Seg purposes may not morph into confinement that persists for improper purposes. The state is entitled to the procedural flexibility that Hewitt allows because of its manifest interest in maintaining safe detention facilities and other similar administrative concerns The state may not use Ad Seg as a charade in the name of prison security to mask indefinite punishment for past transgressions.

Proctor, 846 F.3d at 610-11 (internal quotation marks and citations omitted).

1. Timeliness of Reviews

As an initial matter, to the extent that plaintiff argues that he was not afforded timely periodic reviews, his contention is belied defendants' admissible evidence consisting of plaintiff's periodic Ag-Seg reviews. See generally Dkt. No. 90-5; Chart contained in subsection I.B., supra (dates of plaintiff's Ad-Seg reviews between August 2014, and July 2019). As defendants posit, contrary to plaintiff's contention and aside from several minor delays, his periodic facility committee reviews were timely conducted every 60 days until August 2017, after which plaintiff received Ad-Seg reviews every 30 days. See Chart contained in subsection I.B., supra. Further, plaintiff has failed to controvert defendants' admissible evidence, and his response in opposition proffers only conclusory arguments that are insufficient to raise a triable issue of fact. See Batista v. Union of Needleworkers, No. 97-CV-4247 (HB), 2000 WL 1760923, at *3 (S.D.N.Y. Nov. 30, 2000) (holding that the plaintiff's "conclusory statements" offered "in response to [the] defendant's evidence" were "insufficient as a matter of law to raise an issue of fact."); see also Scott v. Coughlin, 344 F.3d 282, 287 (2d Cir. 2003) ("Conclusory allegations or denials are ordinarily not sufficient to defeat a motion for summary judgment when the moving party has set out a documentary case."). Indeed, plaintiff fails to provide any explanation for his statements that O'Gorman's declaration "contradict [plaintiff's] claims, [that] th[o]se documents support plaintiff's claims [that] he has not had reviews for over a year," or that those documents establish that "years [of reviews] are missing." Dkt. No. 100 at 3, 4. As set forth in detail in the chart contained in subsection I.B., supra, plaintiff's statements are wholly contradicted by defendants' admissible evidence.

Moreover, although plaintiff heavily emphasizes that some of his reviews appear to have been completed with less frequency than every 30 or 60 days and without adequate notice for him to submit objections to the reviews, as required by pursuant to 7 N.Y. C.R.R. § 301.4 and DOCCS Directive No. 4933, “such failures to adhere strictly to state or institutional policy are not sufficient to establish a constitutional violation.”

H’Shaka v. O’Gorman, 444 F. Supp. 3d 355, 373 (N.D.N.Y. 2020); see Soto v. Walker, 44 F.3d 169, 173 (2d Cir. 1995) (noting that a violation of a state procedural statute alone, without a due process violation, “would not be enough generally to establish a constitutional claim”); Sanders v. Gifford, 9:11-CV-0326 (LEK/RFT), 2014 WL 5662775, at *4 (N.D.N.Y. Nov. 4, 2014) (“[E]ven assuming that [the d]efendant . . . deviated from state procedures or DOCCS Directives, a violation of such rules and regulations does not, standing alone give rise to liability under § 1983.”); Ahlers v. Nowicki, 9:12-CV-0539 (DNH/RFT), 2014 WL 1056935, at *4 (N.D.N.Y. Mar. 18, 2014) (“[C]laims involving the improper adherence to proprietary facility policies are incognizable under § 1983; only rights secured by the Constitution and federal law are actionable under § 1983.”).

Further, even the minor delays between reviews does not give rise to a constitutional violation. See Proctor v. Kelly, No. 9:05-CV-0692 (GTS/GJD), 2008 WL 5243925, at *7 (N.D.N.Y. Dec. 17, 2008) (“an inadvertent denial of a periodic review does not give rise to a due process violation.”). Rather, as explained in Hewitt and Proctor, “the Due Process Clause requires that the [Ad-Seg] reviews be conducted only “periodically.” H’Shaka, 444 F. Supp. 3d at 373 (quoting Proctor, 846 F.3d at 601); see Hewitt, 459 U.S. at 477 n.9. As discussed in detail above, the record establishes that the facility committee reviews were conducted every 60 days until August 2017, and then every 30

days thereafter; accordingly, the undersigned concludes that defendants have established that reviews were conducted periodically in satisfaction of constitutional due process requirements, in opposition to which plaintiff has failed to establish a genuine issue of material fact. See H'Shacka, 444 F. Supp. 3d at 373 (“The record establishes that the facility-level committee reviews were completed approximately every two months; therefore, the Court finds that there is no issue of fact that these reviews were conducted at least periodically and that they thus satisfy the constitutional requirement in that respect.”).

In addition, plaintiff’s reliance on Tellier v. Scott, 49 F. Supp. 2d 607 (1998) is misplaced, as that case is factually distinguishable. In Tellier, the plaintiff alleged that “he never received an administrative detention order specifying the reasons for his confinement” and “that no hearing was held concerning his detention status until . . . after he had served almost six months in the SHU.” Tellier, 49 F. Supp. 2d at 614. Finally, plaintiff’s contention that his belated receipt of his Ad-Seg reviews obstructed his right to be heard because it prevented him from addressing issues in subsequent reviews, including that his “debilitating health issues” that prevent him from being a threat, is belied by the record. Dkt. No. 79-2 at 24. Plaintiff was able to raise issues, including his allegedly deteriorating health, in numerous Ad-Seg statements. See Dkt. No. 90-5 at 37-38, 48, 89. In addition, plaintiff’s contention that his complaints regarding non-receipt of Ad-Seg reviews was specifically considered and addressed by the Central Office committee, after which plaintiff received his Ad-Seg reviews. See Dkt. No. 90-5 at 60 (August 14, 2018 facility committee report, noting that, during his interview with his ORC, plaintiff “wanted to make sure that i[t] was known that he still

has not received any of his [Ad-Seg] Responses since 2017.”); 69 (same); Dkt. No. 79-2 at 5 (acknowledging receipt of nine Ad-Seg reviews from September 12, 2017, to May 22, 2018). Thus, it is recommended that plaintiff’s motion insofar as it seeks summary judgment on his Fourteenth Amendment due process claim based on untimely Ad-Seg reviews be denied, and defendants’ cross-motion for summary judgment be granted, and plaintiff’s claim in this regard be dismissed with prejudice.

2. Meaningful Review

Plaintiff’s contention that his periodic reviews were a sham, rote, perfunctory, and a fraud is unsupported by the admissible record evidence. See Dkt. No. 79-2 at 14. Courts determine whether an initial Ad-Seg placement and/or subsequent periodic reviews comply with Due Process by assessing whether such determinations are supported by “some evidence.” Parson v. Miller, No. 9:16-CV-167 (DNH/CFH), 2018 WL 4233810, at *9 (N.D.N.Y. May 25, 2018) (quoting Sup’t Mass. Corr. Inst., Walpole v. Hill, 472 U.S. 445, 455 (1985) (additional citation omitted)), report and recommendation adopted, No. 9:16-CV-167 (DNH/CFH), 2018 WL 4228427 (N.D.N.Y. Sept. 5, 2018); see also Davis v. Barrett, No. 02-CV-545 (KS), 2011 WL 2421109, at *3 (W.D.N.Y. June 13, 2011) (“[T]he Court must find ‘some evidence’ in the record that could support the hearing officer’s conclusion that placement in [Ad-Seg] was warranted.” (quoting Taylor v. Rodriguez, 238 F.3d 188, 194 (2d Cir. 2001))). “Ascertaining whether [the some evidence] standard is satisfied does not require examination of the entire record, independent assessment of the credibility of witnesses, or weighing of the evidence. Instead, the relevant question is whether there is any evidence in the record that could

support the conclusion reached.” Hill, 472 U.S. at 455-56. Further, “[p]rocedural due process does not permit a court to review the substance of [d]efendants’ decision to confine [an inmate] in Ad Seg[,]” Proctor, 846 F.3d at 608 (citation omitted). A reviewing court “may not substitute [its] judgment for [d]efendants’, nor may [it] rebalance the section 301.4(d) criteria.” Id. (internal citation omitted). Rather, “[t]he Due Process Clause permits only an evaluation of whether [d]efendants’ method for coming to their Ad Seg determinations is sufficient.” Id. Courts afford significant deference to prison officials’ Ad Seg determinations. See id.

Here, plaintiff does not dispute that his initial placement in Ad-Seg was unsupported by sufficient evidence. See generally SAC; Dkt. No. 79-2. Indeed, as the record evidence demonstrates, plaintiff was initially placed in Ad-Seg because he incurred a misbehavior report on February 27, 2014, for possession of a weapon, altered item, possession of an article in an unauthorized area, and bribery. See Dkt. No. 79-4 at 137; Dkt. No. 90-5 at 289 (plaintiff’s Mar. 13, 2014 Ad-Seg review). Plaintiff does not controvert that he was found guilty of these Tier III charges. See Dkt. No. 90-5 at 152. In subsequent Ad-Seg periodic reviews, the Central Office committee consistently noted plaintiff’s “propensity and high ability to fashion weapons and commit sever violence,” which the committee concluded “make[s] him a high risk to staff and other inmates if he were given an opportunity to commit such violence.” Dkt. No. 90-5 at 71 (May 22, 2018); 79 (Feb. 28, 2018); see 201 (Dec. 16, 2018) (“[P]laintiff’s past ability to get weapons, or an altered item . . . indicates his dedication to and success at breaking the rules and obtaining contraband items sometimes ending in violent outcomes.”).

Further, the facility three-member committee routinely noted plaintiff's past criminal activity in its summary reports, which, as discussed in detail above, included a violent assault on two DOCCS employees with homemade blade-type weapons, the smuggling of a razor blade into federal court, and assaulted another inmate by stabbing him 18 times. See, e.g., Dkt. No. 90-5 at 200 (Oct. 5, 2015 Ad-Seg review). In addition, plaintiff notes that he was issued restraint orders while incarcerated at Clinton CF. See Dkt. No. 79-2 at 17-18. However, plaintiff's own documentary evidence establishes that the reason for the restraint orders was that DOCCS personnel at Clinton CF discovered, through a confidential informant, that, in February 2011, plaintiff was "planning to assault staff" and that, on December 19, 2011, plaintiff was "found to have a weapon in his possession during a cell search[, which] was taped to the bottom of his foot." Dkt. No. 79-4 at 69, 71. Although plaintiff has not been charged with possessing a weapon since 2014—during which time he has been on Ag-Seg status—the review committees' conclusion that plaintiff remained a security risk based on his ability to fashion and/or obtain weapons and commit violent assaults on staff was supported by sufficient evidence, and the committees were not "barred from according significant weight to [these past] events." Proctor, 864 F.3d at 611; see Parson, 2018 WL 4233810, at *9 (concluding that the review committee's recommendation to continue the plaintiff on Ad-Seg status "were supported by sufficient evidence" where they referenced plaintiff's history of "assaultive and disruptive behavior" against staff that served as the basis for his initial Ad-Seg placement and indicated that they "remained concerned by these incidents when approving the continuation of [his] confinement.").

Moreover, that the facility committees' reports routinely note that plaintiff had "maintained a positive disciplinary record" and exhibited "appropriate" interactions with staff does not, as plaintiff suggests, establish that the emphasis placed on his history of repeated weapons possession and extreme violence toward staff and other inmates was inappropriate. See Proctor, 864 F.3d at 611 ("Neither do we suggest that recent events categorically ought to be more salient in periodic reviews than those that occurred long ago."). In addition, the record evidence does not support plaintiff's contention that his reviews were "a pretextual sham process," Dkt. No. 79-2 at 14, or that the reviewing officials "use[d] past events alone to justify indefinite confinement," such that they would have recommended his continued Ad-Seg status "no matter what evidence was shown." Proctor, 864 F.3d at 611. Both the facility committee and Central Office committee considered plaintiff's recent behavior and reports from his ORC, as well as plaintiff's completion of the ART program in their periodic review determinations. See, e.g., Dkt. No. 90-5 at 12 (June 17, 2019 Central Office report). Although, as the committee recognized, plaintiff's completion of the ART program was a "positive step for [plaintiff]," plaintiff's significant history of extreme violence and his attitude toward the review process provides some evidence that his release from Ad-Seg was not yet justified. Id. Further, as the Central Office committee observed, plaintiff's Ad-Seg statements demonstrated a sense of entitlement and anger toward the committee and review process. See id. For instance, in his June 13, 2019 Ad-Seg statement, plaintiff stated

I've completed the ART program and passed it with ease, please enlighten me and tell me an example of this sense of entitlement and demonstration of significant anger. Furthermore, I'd appreciate it if you can give me an example

of propensity . . . for building weapons and committing severe violence. I never made a weapon ever, and I committed an act of severe violence over 19 years ago, that I've regretted ever since and refrained from any acts of violence for over 19 years, so your statement is baseless.

Id. at 6. He also argued that at least one of his past weapons charges was erroneous, and suggested that "corrupt Captain Lucia" fabricated the related misbehavior report.

See id. at 6-7. The Central Office committee noted plaintiff's statement that he passed the ART program "with ease," that "[t]he only staff member he named in his letter was derided as corrupt," and that "[h]e closed his letter with the entitled inference that if he received meaningful review he would be released from [Ad-Seg]." Id. at 12-13.

In addition, the committees properly considered plaintiff's disciplinary record while on Ag-Seg status, which included a June 1, 2017 misbehavior report for interference, harassment, and failure to follow a direct order, for which he was found guilty and received a sanction of 30-days of keeplock. See id. at 110, 118. Further, the committees noted that plaintiff "smiles, talks, and interacts appropriately with managerial and line staff, [but that] he has been found using drag lines (used to smuggle contraband) which he turns over readily." Id. at 121. The Central Office committee observed that, "[s]ecurity staff continues to express concern that [plaintiff] has a short fuse and only with great effort restrains himself when angry," and that, although his current ORC indicated that "he has not observed any anger issues or sense of frustration and entitlement from [plaintiff,] plaintiff had significant issues with his prior counselor and his supervision had to be reassigned [in 2018]." Id. at 13. Therefore, not only is plaintiff's claim that the committees refused to consider his Ad-Seg statements belied by the record, the committees appropriately took into account plaintiff's recent

attitude and behavior in determining whether he “remain[ed] a security risk” at the time of his periodic reviews. Proctor, 846 F.3d at 611 (quoting Hewitt, 459 U.S. at 477 n.9).⁷ Thus, contrary to plaintiff’s suggestion, the mere “fact that the reports contain similar language does not necessarily mean that the reviews were a sham,” Zimmerman v. Seyfert, No. 9:03-CV-1389 (TJM), 2007 WL 2080517, at *20 (N.D.N.Y. July 19, 2007), and the record establishes that DOCCS officials’ method for reaching their periodic review determinations was sufficient. See Proctor, 846 F.3d at 608. Moreover, aside from plaintiff’s conclusory and self-serving statements to the contrary, the documentary evidence establishes that the decisions to continue plaintiff’s Ag-Seg status were based on concerns of institutional safety, as required under the third prong of the Proctor analysis. See id.

Next, the undersigned finds unpersuasive plaintiff’s attempts to establish that his periodic Ag-Seg reviews contain mischaracterizations of his past offenses. For instance, plaintiff heavily emphasizes that his September 2000 assault was not committed out of “blind rage,” as indicated in his Ad-Seg reviews, but that it was done for “religious reasons.” Dkt. No. 79-2 at 15. Plaintiff relies on his Huntley notice relating to his September 2000 assaults, which states, “I stabbed Dep. Schneider[] because he was fucking with Muslims. He was oppressing the Muslim brothers. I stabbed Mitchetti[] because he was an asshole and he deserved it.” Dkt. No. 90-5 at 93. The Huntly notice further provides that plaintiff subsequently stated that “[s]omebody else is going to die.” Id. However, plaintiff fails to demonstrate how “blind rage” is a

⁷ To the extent plaintiff’s motion may be read as arguing that the committees did not consider his Ad-Seg statements because the committees did not provide an itemized list of responses to all of the complaints raised therein, see Dkt. No. 79-2 at , plaintiff has not produced any authority requiring such a response in Ad-Seg report summaries.

mischaracterization for describing his unprovoked attack of two DOCCS employees, even if done for his stated purpose of “religious reasons.” Id. If anything, this evidences that plaintiff committed the assault with forethought—in which case, the undersigned is perplexed as to how that should undercut the review committees’ conclusions. In any event, regardless of motive, the undisputed facts of the September 2000 assault—that plaintiff attacked two DOCCS employees with sharpened objects that were secured to his wrists by leather thongs—along with plaintiff’s extensive history of violence, supports the committees’ continued recommendation of Ag-Seg status to “reduce[] the risk his behavior presents to staff and inmates, as well as the safety of the facility.” Dkt. No. 90-5 at 98. Moreover, the undersigned finds equally unpersuasive plaintiff’s arguments that his reviews falsely state that he purposefully obtained weapons charges at Clinton CF in an attempt to prevent his transfer, or that plaintiff displayed rage towards staff when personnel at Upstate CF refused to ship his property at the facility’s expense. See Dkt. No. 79-2 at 15, 16. The documentation plaintiff references in relation to these arguments, including his disposal of property form and Woodruff’s response to plaintiff’s interrogatory, do not support his argument and/or are unrelated to the specific incidents at issue, and his conclusory and self-serving statements that this information is false are insufficient to defeat defendants’ documentary case. See Dkt. No. 79-4 at 83, 113, 144; Scott, 344 F.3d at 287.

As a final matter, to the extent that plaintiff claims that defendants have failed to provide him with adequate guidance as to how he might be released from Ad-Seg, see Dkt. No. 79-2 at 19-22, this Court has recently rejected a similar argument that “*Proctor* requires the establishment of unambiguously clear and concrete goalposts” for an

inmate's release from Ag-Seg. H'Shaka, 444 F. Supp. 3d at 374. Although the Central Office committee stated that "[t]here is no formula or benchmark" for obtaining a release from Ad-Seg, it explained that plaintiff must exhibit "personal growth." Dkt. No. 90-5 at 13. Contrary to plaintiff's position, the committee's instruction in this regard was not without any guidance, as it indicated that his personal growth must consist of properly communicating to the committee and demonstrating humility and remorse. See id. The record supports the Central Office committee's conclusion that plaintiff has failed to meet these requirements, as his Ad-Seg statements are replete with combative critiques of the Ad-Seg review process, instances in which plaintiff attempts to minimize his history of violence by focusing solely on his September 2000 assault, and his denial of his extensive history of weapons-making and possession. See, e.g., id. at 6-7; 21-23.

In sum, the undersigned finds that the periodic reviews of plaintiff's Ad-Seg placement satisfied the three criteria for review set forth in Proctor, and that there was no violation of plaintiff's procedural due process rights. Consequently, it is recommended that plaintiff's motion for summary judgment be denied in its entirety, defendants' motion for summary judgment be granted in its entirety, and plaintiff's Fourteenth Amendment due process claims be dismissed with prejudice. Based on the foregoing, the undersigned declines to consider the parties' alternative arguments, including those addressing qualified immunity.

IV. Conclusion

WHEREFORE, based on the findings set forth above, it is hereby:

RECOMMENDED, that plaintiff's Motion for Summary Judgment (Dkt. No. 79) be **DENIED IN ITS ENTIRETY**; and it is further

RECOMMENDED, that defendants' Cross Motion for Summary Judgment (Dkt. No. 86) be **GRANTED IN ITS ENTIRETY** and that plaintiff's claims be **DISMISSED WITH PREJUDICE**; and it is further

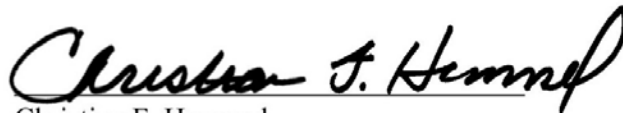
ORDERED, that the Clerk of the Court serve a copy of this Report-Recommendation and Order on all parties in accordance with Local Rules.

IT IS SO ORDERED.

Pursuant to 28 U.S.C. § 636(b)(1) and Local Rule 72.1(c), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN (14) DAYS WILL PRECLUDE APPELLATE REVIEW.**

Roldan v. Racette, 984 F.2d 85, 89 (2d Cir. 1993) (citing Small v. Secretary of Health and Human Servs., 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); Fed R. Civ. P. 6(a), 6(e), 72.⁸

Dated: December 1, 2020
Albany, New York



Christian F. Hummel
U.S. Magistrate Judge

⁸ If you are proceeding pro se and are served with this Order by mail, three additional days will be added to the fourteen-day period, meaning that you have seventeen days from the date the Report-Recommendation & Order was mailed to you to serve and file objections. FED. R. CIV. P. 6(d). If the last day of that prescribed period falls on a Saturday, Sunday, or legal holiday, then the deadline is extended until the end of the next day that is not a Saturday, Sunday, or legal holiday. Id. § 6(a)(1)(C).

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

TYRONE WALKER,

Plaintiff,

9:17-CV-1008
(GTS/CFH)

v.

JOSEPH BELLNIER, Dep. Comm'r.; DONALD UHLER,
Super., Upstate Corr. Fac.; PAUL P. WOODRUFF, Dep.
Super. of Sec., Upstate Corr. Fac.; JOANNE FITCHETTE,
Dep. Super. of Programs, Upstate Corr. Fac.; MELISSA A.
COOK, Offender Rehab. Coordinator, Upstate Corr. Fac.;
and JAMES A. O'GORMAN,

Defendants.

APPEARANCES:

OF COUNSEL:

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GLENN T. SUDDABY, Chief United States District Judge

DECISION and ORDER

Currently before the Court, in this *pro se* prisoner civil rights action filed by Tyrone Walker ("Plaintiff") against the six above-captioned employees of the New York State Department of Corrections and Community Supervision ("Defendants" or "DOCCS") pursuant to 42 U.S.C. § 1983, are (1) United States Magistrate Judge Christian F. Hummel's

Report-Recommendation recommending that Plaintiff's motion for summary judgment be denied, Defendants' cross-motion for summary judgment be granted, and Plaintiff's Second Amended Complaint (Dkt. No. 31) be dismissed in its entirety, and (2) Plaintiff's Objections to the Report-Recommendation. (Dkt. Nos. 102, 103.) For the reasons set forth below, the Report-Recommendation is accepted and adopted in its entirety.

I. RELEVANT BACKGROUND

A. Magistrate Judge Hummel's Report-Recommendation

Generally in his Report-Recommendation, Magistrate Judge Hummel rendered the following three findings of fact and conclusions of law: (1) to the extent that Plaintiff asserts a Fourteenth Amendment due process claim based on the alleged untimeliness of his periodic administrative-segregation reviews, that claim should be dismissed because of the lack of admissible record evidence from which a rational fact finder could conclude that those reviews were indeed untimely; (2) to the extent that Plaintiff asserts a Fourteenth Amendment due process claim based on the alleged meaninglessness of his periodic administrative-segregation reviews, that claim should be dismissed because of the lack of admissible record evidence from which a rational fact finder could conclude that those reviews were indeed untimely; and (3) because adequate grounds exists upon which to base a dismissal of the claims in Plaintiff's Second Amended Complaint, the Court need not reach the merits of Defendants' alternative argument that, based on the admissible record evidence, they are protected from liability as a matter of law by the doctrine of qualified immunity. (Dkt. No. 102, at Part III.B.)

B. Plaintiff's Objections to the Report-Recommendation

Liberally construed, Plaintiff's Objections assert the following two arguments: (1)

Plaintiff's Fourteenth Amendment due process claim based on the untimeliness of his periodic administrative-segregation reviews should not be dismissed because (a) admissible evidence supporting the claim does exist (most notably, the fact that the reviews were never provided by Defendants in support of their previous motion to dismiss combined with the fact that gaps of two to six months exist between when the reviews were allegedly conducted and allegedly completed, from which a rational fact finder could reasonably infer that they were fraudulently completed), and (b) Magistrate Judge Hummel is incorrect that Defendants' violation of DOCCS Directive No. 4933 (specifically, the Directive's requirement that the reviews be provided to the inmate in a timely fashion) cannot, and does not, constitute a violation of the Fourteenth Amendment; and (2) Plaintiff's Fourteenth Amendment due process claim based on the meaninglessness of his periodic administrative-segregation reviews should not be dismissed because Magistrate Judge Hummel ignores Plaintiff's record evidence that the reviews were "a sham, rote, perfunctory and a fraud" (most notably, the lack of the issuance of misbehavior reports to charge Plaintiff with some of the misconduct asserted in the reviews, and the above-referenced evidence that the reviews were fraudulently created and backdated). (Dkt. No. 103, at Points I-III.)

II. STANDARD OF REVIEW

When a *specific* objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to a *de novo* review. Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C). To be "specific," the objection must, with particularity, "identify [1] the portions of the proposed findings, recommendations, or report to which it has an objection and [2] the basis for the objection." N.D.N.Y. L.R. 72.1(c).¹

¹ See also *Mario v. P&C Food Markets, Inc.*, 313 F.3d 758, 766 (2d Cir. 2002) ("Although

When performing such a *de novo* review, “[t]he judge may . . . receive further evidence. . . .” 28 U.S.C. § 636(b)(1). However, a district court will ordinarily refuse to consider evidentiary material that could have been, but was not, presented to the magistrate judge in the first instance.² Similarly, a district court will ordinarily refuse to consider argument that could have been, but was not, presented to the magistrate judge in the first instance. *See Zhao v. State Univ. of N.Y.*, 04-CV-0210, 2011 WL 3610717, at *1 (E.D.N.Y. Aug. 15, 2011) (“[I]t is established law that a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation that could have been raised before the magistrate but were not.”) (internal quotation marks and citation omitted); *Hubbard v. Kelley*, 752 F. Supp.2d 311, 312-13 (W.D.N.Y. 2009) (“In this circuit, it is established law that a district judge will not consider new arguments raised in objections to a magistrate judge's report and recommendation

Mario filed objections to the magistrate's report and recommendation, the statement with respect to his Title VII claim was not specific enough to preserve this claim for review. The only reference made to the Title VII claim was one sentence on the last page of his objections, where he stated that it was error to deny his motion on the Title VII claim ‘[f]or the reasons set forth in Plaintiff's Memorandum of Law in Support of Motion for Partial Summary Judgment.’ This bare statement, devoid of any reference to specific findings or recommendations to which he objected and why, and unsupported by legal authority, was not sufficient to preserve the Title VII claim.”).

² *See Paddington Partners v. Bouchard*, 34 F.3d 1132, 1137-38 (2d Cir. 1994) (“In objecting to a magistrate's report before the district court, a party has no right to present further testimony when it offers no justification for not offering the testimony at the hearing before the magistrate.”) [internal quotation marks and citations omitted]; *Pan Am. World Airways, Inc. v. Int'l Bhd. of Teamsters*, 894 F.2d 36, 40, n.3 (2d Cir. 1990) (finding that district court did not abuse its discretion in denying plaintiff's request to present additional testimony where plaintiff “offered no justification for not offering the testimony at the hearing before the magistrate”); *cf. U. S. v. Raddatz*, 447 U.S. 667, 676, n.3 (1980) (“We conclude that to construe § 636(b)(1) to require the district court to conduct a second hearing whenever either party objected to the magistrate's credibility findings would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district courts.”); Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition (“The term ‘de novo’ does not indicate that a secondary evidentiary hearing is required.”).

that could have been raised before the magistrate but were not.”) (internal quotation marks omitted).

When only a *general* objection is made to a portion of a magistrate judge's report-recommendation, the Court subjects that portion of the report-recommendation to only a *clear error* review. Fed. R. Civ. P. 72(b)(2),(3); Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition; *see also Brown v. Peters*, 95-CV-1641, 1997 WL 599355, at *2-3 (N.D.N.Y. Sept. 22, 1997) (Pooler, J.) [collecting cases], *aff'd without opinion*, 175 F.3d 1007 (2d Cir. 1999). Similarly, when an objection merely reiterates the *same arguments* made by the objecting party in its original papers submitted to the magistrate judge, the Court subjects that portion of the report-recommendation challenged by those arguments to only a *clear error* review.³ Finally, when *no* objection is made to a portion of a report-recommendation, the Court subjects that portion of the report-recommendation to only a *clear error* review. Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983 Addition. When performing such a “clear error” review, “the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.” *Id.*⁴

³ *See Mario*, 313 F.3d at 766 (“Merely referring the court to previously filed papers or arguments does not constitute an adequate objection under either Fed. R. Civ. P. 72(b) or Local Civil Rule 72.3(a)(3).”); *Camardo v. Gen. Motors Hourly-Rate Emp. Pension Plan*, 806 F. Supp. 380, 382 (W.D.N.Y. 1992) (explaining that court need not consider objections that merely constitute a “rehashing” of the same arguments and positions taken in original papers submitted to the magistrate judge); *accord, Praileau v. Cnty. of Schenectady*, 09-CV-0924, 2010 WL 3761902, at *1, n.1 (N.D.N.Y. Sept. 20, 2010) (McAvoy, J.); *Hickman ex rel. M.A.H. v. Astrue*, 07-CV-1077, 2010 WL 2985968, at *3 & n.3 (N.D.N.Y. July 27, 2010) (Mordue, C.J.); *Almonte v. N.Y.S. Div. of Parole*, 04-CV-0484, 2006 WL 149049, at *4 (N.D.N.Y. Jan. 18, 2006) (Sharpe, J.).

⁴ *See also Batista v. Walker*, 94-CV-2826, 1995 WL 453299, at *1 (S.D.N.Y. July 31, 1995) (Sotomayor, J.) (“I am permitted to adopt those sections of [a magistrate judge's] report to which no specific objection is made, so long as those sections are not facially erroneous.”) (internal quotation marks and citations omitted).

After conducting the appropriate review, the Court may “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.” 28 U.S.C. § 636(b)(1)(C)).

III. ANALYSIS

After carefully reviewing the relevant papers herein, including Magistrate Judge Hummel’s thorough Report-Recommendation, the Court can find no error in those portions of the Report-Recommendation to which Plaintiff has specifically objected, and no clear error in the remaining portions of the Report-Recommendation. Magistrate Judge Hummel employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. As a result, the Report-Recommendation is accepted and adopted in its entirety for the reasons set forth therein. To those reasons, the Court adds only four points.

First, for the sake of brevity, the Court will assume that the arguments asserted in Plaintiff’s Objections are not simply repetitions (albeit elaborations) of arguments that he made to Magistrate Judge Hummel, despite the indication to the contrary. (*Compare* Dkt. No. 100, at 3-5 [Plf.’s Opp’n to Defs.’ Cross-Motion] *with* Dkt. No. 15, at 3-14 [Plf.’s Objections].)

Second, the Court rejects the first argument in Plaintiff’s Objections (i.e., regarding Magistrate Judge Hummel’s findings and conclusions regarding Plaintiff’s Fourteenth Amendment due process claim based on untimeliness) as unpersuasive. The Court notes that Defendants had no duty to provide the reviews in support of their previous motion to dismiss, and indeed would have been unable to do so unless they established that the reviews were incorporated by reference in (or integral to) Plaintiff’s Second Amended Complaint. Moreover, Plaintiff’s tenacious reliance on the delays in the completion of the reviews, and on a purported

violation of a DOCCS directive, are to no avail. The former is a mere speculation of fraud, and the latter is not a constitutional violation, as explained by Magistrate Judge Hummel. (Dkt. No. 102, at 25.)

Third, the Court rejects the second argument in Plaintiff's Objections (i.e., regarding Magistrate Judge Hummel's findings and conclusions regarding Plaintiff's Fourteenth Amendment due process claim based on meaninglessness) as also unpersuasive. The purported lack of issuance of some misbehavior reports, even if true, does not constitute a ground on which the Court may substitute its own judgment for that of Defendants. Moreover, the Court has already dispensed with Plaintiff's argument that the reviews were fraudulently backdated.

Fourth, and finally, in the alternative, the Court finds that qualified immunity constitutes an alternative ground on which to base the dismissal of Plaintiff's claims for the reasons stated in Defendants' memorandum of law. (Dkt. No. 96, at 10-11 [attaching pages "9" and "10" of Defs.' Memo. of Law].)

ACCORDINGLY, it is

ORDERED that Magistrate Hummel's Report-Recommendation (Dkt. No. 102) is **ACCEPTED** and **ADOPTED** in its entirety; and it is further

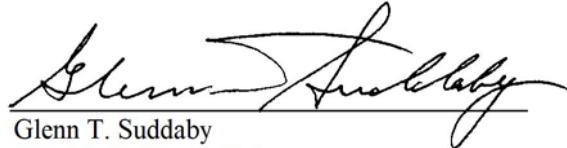
ORDERED that Plaintiff's motion for summary judgment (Dkt. No. 79) is **DENIED**; and it is further

ORDERED that Defendants' cross-motion for summary judgment (Dkt. No. 86) is **GRANTED**; and it is further

ORDERED that Plaintiff's Second Amended Complaint (Dkt. No. 31) is **DISMISSED** in its entirety.

The Court certifies that an appeal from this Decision and Order would not be taken in good faith.

Dated: March 8, 2021
Syracuse, New York



Glenn T. Suddaby
Chief U.S. District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

JUDGMENT IN A CIVIL CASE

TYRONE WALKER

v.

9:17-CV-1008 (GTS/CFH)

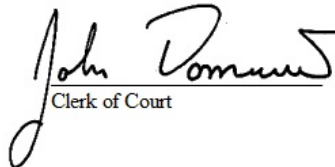
**JOSEPH BELLNIER, Deputy Commissioner;
DONALD UHLER, Superintendent, Upstate
Correctional Facility; PAUL P. WOODRUFF,
Deputy Superintendent of Security, Upstate
Correctional Facility; JOANNE FITCHETTE,
Deputy Superintendent of Programs, Upstate
Correctional Facility; MELISSA A. COOK, Offender
Rehabilitator Coordinator, Upstate Correctional
Facility; JAMES A. O’GORMAN**

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that, pursuant to the Decision and Order issued on March 8, 2021 (Dkt. No. 105) by the Honorable Glenn T. Suddaby, Magistrate Hummel’s Report-Recommendation (Dkt. No. 102) is ACCEPTED and ADOPTED in its entirety. Plaintiff’s motion for summary judgment (Dkt. No. 79) is DENIED. Defendants’ cross-motion for summary judgment (Dkt. No. 86) is GRANTED. Plaintiff’s Second Amended Complaint (Dkt. No. 31) is DISMISSED in its entirety. The Court certifies that an appeal from this Decision and Order would not be taken in good faith. The Clerk is directed to CLOSE this action.

All of the above pursuant to the Decision and Order issued by the Honorable Glenn T. Suddaby, dated March 8, 2021. Dkt. No. 105.

DATED: March 8, 2021


Clerk of Court



s/ Shelly Muller

Shelly Muller
Courtroom Deputy Clerk

Federal Rules of Appellate Procedure

Rule 4. Appeal as of Right

(a) Appeal in a Civil Case.

1. (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

- (i) the United States;
- (ii) a United States agency;
- (iii) a United States officer or employee sued in an official capacity; or
- (iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

- (i) for judgment under Rule 50(b);
- (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
- (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
- (iv) to alter or amend the judgment under Rule 59;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice

of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

- (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
- (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

- (A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;
- (B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and
- (C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

- (i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or
- (ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.