

No. 99-

In the Supreme Court of the United States
OCTOBER TERM, 1999

WILLIE HORNE,

Petitioner,

v.

THOMAS A. COUGHLIN, III, Commissioner, New York State Department of Correctional Services; PHILIP COOMBE, former Superintendent, Eastern Correctional Facility; DONALD SELSKY, Coordinator, Inmate Discipline; ARTHUR KRACKE, Lieutenant, Eastern Correctional Facility; and JOSEPH A. DEMSKIE, Captain, Sullivan Correctional Facility, in their individual and official capacities,

Respondents.

**Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit**

PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	(i)
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	2
A. Factual Background	3
B. Proceedings Below	6
REASONS FOR GRANTING THE PETITION	11
I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT’S DIRECTIVES REGARDING THE PROPER PROCEDURE FOR RESOLVING CLAIMS OF QUALIFIED IMMUNITY AND CONTRIBUTES TO A SPLIT AMONG THE CIRCUITS CONCERNING THE ISSUE	13
A. The Decision Below Conflicts With This Court’s Rulings	13
B. The Lower Courts Disagree Regarding Whether The Rule Articulated In <i>Sacramento</i> and <i>Wilson</i> Is Mandatory	20
II. THE COURT OF APPEALS’ DECISION THAT HORNE’S SECOND HEARING EXTINGUISHED HIS CAUSE OF ACTION CONFLICTS WITH THIS COURT’S PRECEDENTS	22
A. Horne Did Not Receive Due Process At His First Hearing	23
B. The Majority’s Decision That The Second Hearing Nullified The First One Conflicts With Rulings Of This Court And Other Courts	24
CONCLUSION	29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>B.C. v. Plumas Unified School District</i> , No. 97-17287, 1999 WL 729168 (9th Cir. Sept. 20, 1999)	20
<i>Brooks v. DiFasi</i> , 112 F.3d 46 (2d Cir. 1997)	24
<i>Brown v. Cochran</i> , 171 F.3d 1329 (11th Cir. 1999)	22
<i>Carey v. Piphus</i> , 435 U.S. 247 (1978)	12, 26, 27, 29
<i>Clayton-El v. Fisher</i> , 96 F.3d 236 (7th Cir. 1996)	28
<i>Conn v. Gabbert</i> , 119 S. Ct. 1292 (1999)	11, 13, 16, 22
<i>Crosby v. Paulk</i> , No. 97-8585, 1999 WL 703193 (11th Cir. Sept. 10, 1999)	22
<i>County of Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	<i>passim</i>
<i>Edwards v. Balisok</i> , 520 U.S. 641 (1997)	12, 27, 29
<i>Heck v. Humphrey</i> , 512 U.S. 477 (1994)	27
<i>Hewitt v. Helms</i> , 459 U.S. 465 (1983)	7, 19, 25
<i>Hudson v. Palmer</i> , 468 U.S. 517 (1984)	26
<i>Jurasek v. Utah State Hosp.</i> , 158 F.3d 506 (10th Cir. 1998)	20
<i>King v. Beavers</i> , 148 F.3d 1031 (8th Cir.), <i>cert. denied</i> , 119 S. Ct. 513 (1998)	20

Table of Authorities - Continued

	Page(s)
<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982)	26
<i>Lynch v. City of Boston</i> , 180 F.3d 1 (1st. Cir. 1999)	20
<i>Marbury v. Madison</i> , 5 U.S. (1 Cranch) 137 (1803)	14
<i>Matter of Rahman v. Coughlin</i> , 492 N.Y.S. 2d 116 (N.Y. App. Div. 1985)	20
<i>McElligott v. Foley</i> , 182 F.3d 1248 (11th Cir. 1999)	22
<i>McVey v. Stacy</i> , 157 F.3d 271 (4th Cir. 1998)	20
<i>Miller v. Selsky</i> , 111 F.3d 7 (2d Cir. 1997)	24
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	25
<i>Parratt v. Taylor</i> , 451 U.S. 527 (1981)	26
<i>Ron v. Wilkinson</i> , 565 F.2d 1254 (2d Cir. 1977)	7, 19, 24, 25
<i>Sandin v. Conner</i> , 515 U.S. 472 (1995)	6, 24
<i>Santamorena v. Georgia Military College</i> , 147 F.3d 1337 (11th Cir. 1998)	21
<i>Siegert v. Gilley</i> , 500 U.S. 226 (1991)	13, 14, 15, 16
<i>Sound Aircraft Serv., Inc. v. Town of East Hampton</i> , No. 98-9339, 1999 WL 734926 (Sept. 22, 1999)	17, 21

Table of Authorities - Continued

	Page(s)
<i>Superintendent, Massachusetts Correctional Inst., Walpole v. Hill</i> , 472 U.S. 445 (1985)	24
<i>Systems Contractors Corp. v. Orleans Parish Sch. Bd., et al.</i> , 148 F.3d 571 (5th Cir. 1998)	20
<i>Torres v. McLaughlin</i> , 163 F.3d 169 (3d.Cir. 1998)	20
<i>Vitek v. Jones</i> , 445 U.S. 480 (1980)	7
<i>Welch v. Bartlett</i> , No. 98-2075, 1999 WL 734696 (2d Cir. Sept. 17, 1999)	24
<i>Whitlock v. Johnson</i> , 153 F.3d 380 (7th Cir. 1998)	24
<i>Wilson v. Layne</i> , 119 S. Ct. 1692 (1999)	<i>passim</i>
<i>Wolff v. McDonnell</i> , 418 U.S. 539 (1974)	<i>passim</i>
<i>Zinermon v. Burch</i> , 494 U.S. 113 (1990)	26
Statutes, Rules and Regulations	
7 N.Y.C.R.R. § 251-5.1 (1983)	26
28 U.S.C. § 1254(1)	1
42 U.S.C. § 1983	2, 3, 6
Miscellaneous	
John M. M. Greabe, <i>Mirabile Dictum! The Case For “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions</i> , 74 NOTRE DAME L. REV. 403 (Jan. 1999)	18

QUESTION PRESENTED

Whether a court, when confronted with a qualified immunity defense in an action under 42 U.S.C. § 1983, must first determine whether the plaintiff's constitutional rights have been violated before deciding whether the defendant has raised a valid defense of qualified immunity.

Whether a due process violation at an initial disciplinary hearing may be "cured" by a second hearing, thus extinguishing a plaintiff's right under 42 U.S.C. § 1983 to seek nominal and other damages for the denial of due process at the initial hearing.

PETITION FOR A WRIT OF CERTIORARI

Willie Horne respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The original opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 155 F.3d 26 (2d Cir. 1998) (“*Horne I*”). The opinion of the court of appeals on petition for rehearing (App., *infra*, 24a-31a) is reported at 178 F.3d 603 (2d Cir. 1999) (“*Horne II*”). The amended opinion of the court of appeals on petition for rehearing (App., *infra*, 32a-41a) is reported at 1999 WL 701867 (2d Cir. Aug. 25, 1999) (“*Horne III*”). The decision of the magistrate judge (App., *infra*, 42a-54a) is reported at 949 F. Supp. 112 (N.D.N.Y. 1996).

JURISDICTION

The judgment of the court of appeals on petition for rehearing was entered on May 21, 1999. App., *infra*, 24a-31a. On August 10, 1999, Justice Ginsburg granted an extension of time in which to file a petition for a writ of certiorari to and including September 19, 1999. App., *infra*, 57a-58a. On September 10, 1999, Justice Ginsburg granted a second extension of time in which to file a petition for writ of certiorari to and including October 18, 1999. App., *infra*, 59a-60a.^{1/} The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

^{1/} It is petitioner’s position that the time for filing a petition for writ of certiorari should run from August 25, 1999, when the court of appeals issued its amended decision after consideration of petitioner’s second rehearing petition. To avoid raising issues concerning the expiration of the filing period, however, petitioner sought an extension of time within which to file his petition until sixty days after the date that the court of appeals disposed of his *first* rehearing petition, and has filed this petition within that time period.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part that:

No State * * * shall * * * deprive any person of life, liberty, or property, without due process of law.

42 U.S.C. § 1983, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * * subjects, or causes to be subjected, any citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT

In this case, the Second Circuit flatly refused to follow this Court's repeated directives concerning the proper procedure for analyzing claims of constitutional violations that are subject to a defense of qualified immunity. Characterizing as a mere "suggestion" this Court's statements that a court "must" determine whether the plaintiff's constitutional rights have been violated before deciding whether the defendant has qualified immunity, the court of appeals never decided whether the petitioner — a mentally retarded and illiterate inmate — was denied due process when he was thrown into solitary confinement for five and one-half months following a disciplinary hearing at which he received no assistance whatsoever. Instead, the court ruled that the petitioner was entitled to no relief because his *clearly established* rights were not violated when the punishment the petitioner suffered as a result of the first hearing was imposed at a second hearing held after the punishment was nearly complete.

The Second Circuit's ruling conflicts dramatically with the rulings of this Court and the majority of the courts of appeals. Not only did the lower court refuse to apply this Court's directives concerning the

proper procedure for analyzing claims of qualified immunity, it also violated the principles articulated by this Court, and applied by the lower courts, concerning the circumstances under which later proceedings can “cure” a due process violation. In holding that the second disciplinary hearing “nullified” the first one even though the bulk of the punishment had already been suffered, the court of appeals disregarded that a cause of action under 42 U.S.C. § 1983 arises in this setting unless pre-deprivation process is provided. It also ignored the generally recognized principle that, although the *ex post facto* re-imposition of punishment after adequate process may rebut a plaintiff’s claim for damages flowing from the discipline itself, it does not extinguish the plaintiff’s cause of action or defeat his right to recover other categories of damages. Further review is therefore warranted.

A. Factual Background.

At the time of the events giving rise to this case, Petitioner Willie Horne — currently an inmate in New York State’s correctional system — was serving a ten-year sentence at the Eastern Correctional Facility in New York State (“the prison”). When he entered the state prison system in 1984, a prison psychologist determined that Horne was mentally retarded, with an I.Q. of 65, and functionally illiterate. App., *infra*, 3a, 15a. Accordingly, Horne was enrolled in remedial education classes at the prison. *Id.* at 3a.

On December 13, 1984, a volunteer teacher in the remedial program (who was the wife of the prison Chaplain) complained that Horne had asked her for “a little kiss on the cheek” and made other inappropriate remarks. *Id.* at 3a, 15a, 44a. Although the teacher escorted Horne out of the classroom without further incident, she claimed that his request had frightened her. *Id.* at 3a, 15a. Horne was charged with violating prison rules against verbal interference, threats, and encouraging sexual acts. That

same day, Horne was served with a disciplinary report concerning the alleged offenses. Because of his mental disabilities and illiteracy, however, he was unable to read it. C.A. App. 180-183, 215-220.^{2/}

On December 14, 1984, defendant Arthur Kracke, a prison official, held a “Tier III” disciplinary hearing concerning Horne’s alleged offenses. Tier III hearings are reserved for the most serious infractions of prison rules. Under the regulations governing the disciplinary process, Horne faced the recommended loss of good time credits and confinement for an unlimited period in the prison’s Special Housing Unit (SHU) — where prisoners are confined alone in their cells twenty-three hours per day, fed through a slot in the door, and spend one hour a day in a small outdoor cage. App., *infra*, 16a.

Despite his documented disabilities and the severity of the potential penalties, Horne received no assistance whatsoever at the Tier III hearing. *Id.* at 4a. Horne did not understand the nature of the proceedings and could not follow what the hearing officer was saying. He was found guilty and sentenced to one year’s confinement in the SHU and the recommended loss of one year of good time credit. *Ibid.* With the assistance of another inmate, Horne appealed this sentence to defendant Donald Selsky, the Director of Special Housing and Inmate Discipline, who in January 1985 reduced the sentence to eight months’ confinement in the SHU and loss of eight months’ good time credit. *Ibid.*; C.A. App. 32.

In April 1985, Horne brought an action in New York State Supreme Court pursuant to Article 78 of the New York Civil Practice Law and Rules (the “Article 78 proceeding”) in which he sought to void the results of the Tier III hearing because he had received inadequate assistance. *Id.* at 44a. While the Article 78 proceeding was pending, defendant Selsky vacated the results of the first hearing and ordered that

^{2/} “C.A. App.” refers to the Joint Appendix in the court of appeals. “Ex. P- ” refers to trial exhibits not contained in the Joint Appendix.

a second hearing be held with an assistant present. *Ibid*; C.A. App. 345. On May 9, 1985 — after Horne had been confined to the SHU for more than five months — prison officials conducted a second Tier III hearing. App., *infra*, 4a. This time, Horne was provided with an employee assistant who was ignorant of the hearing procedures, did not know what his role was, and lacked even basic knowledge about Horne’s rights at the disciplinary hearing. C.A. App. 304-307, 313, 458-472. The employee assistant did not assist Horne in presenting a defense; his role was limited to explaining to Horne, who had great difficulty understanding the proceedings, what the hearing officer was saying. App, *infra*, 45a.^{3/} Horne was again found guilty, and was sentenced to three hundred days in the SHU and the recommended loss of 300 days of good time credit. App. *infra*, 45a. Horne appealed, and on May 28, 1995, defendant Selsky modified Horne’s sentence to six months in the SHU and loss of six months’ good time credit. *Ibid*. Thirteen days later, his sentence complete, Horne was released into the general prison population. A leading expert submitted an affidavit at trial stating that, because of Horne’s mental disabilities, there is a substantial likelihood his 180-day confinement in the SHU caused him severe harm. C.A. App. 79-83.

In November 1985, the New York Attorney General’s Office withdrew its opposition to Horne’s still-pending Article 78 proceeding, conceding that Horne’s due process rights had been violated at the first hearing.^{4/} App. *infra*, 5a; C.A. App. 352-353. As a result, the New York State Supreme Court ordered that the determinations of both the first and second hearings be annulled and vacated and the charges

^{3/} The regulations in effect at the time provided only for pre-hearing assistance. Under the prison’s policies, assistants provided to retarded inmates during disciplinary hearings could not speak or advocate on their behalf. App., *infra*, 4a; C.A. App. 261-264, 266, 300.

^{4/} The defendants also admitted in the course of the state court litigation that, pursuant to New York state law, they did not have the authority to hold a second hearing because the Article 78 proceeding had already been filed prior to the administrative reversal of the first hearing. Ex. P-34.

dismissed with prejudice. *Ibid.* Horne’s good time credits were restored, and references to the disciplinary proceedings were expunged from his record. *Ibid.*

B. Proceedings Below.

1. Horne brought this action under 42 U.S.C. § 1983 in the United States District Court for the Northern District of New York, claiming, among other things, that the defendant prison officials had violated his due process rights by subjecting him to punishment without providing him with adequate assistance at either disciplinary hearing. The district court rejected the defendants’ motion for summary judgment based on qualified immunity, C.A. App. 489-497, and a magistrate judge conducted a 4-day bench trial on the merits of Horne’s claims. C.A. App. 6

Before the magistrate judge rendered his decision, this Court ruled in *Sandin v. Conner*, 515 U.S. 472 (1995), that a prison inmate does not have a liberty interest in avoiding solitary confinement — and thus no right to due process before such confinement can be imposed — unless the confinement involves “atypical and significant hardship.” *Id.* at 484. After soliciting additional briefing on the application of *Sandin*, the magistrate judge ruled that *Sandin* defeated Horne’s claims because his confinement in the SHU was not “atypical and significant.”^{5/} App., *infra*, 53a. The magistrate judge did not address the question of whether Horne’s potential and actual (although vacated) loss of good time credits created a liberty interest that invoked the protections of the Due Process Clause.

^{5/} In his post-trial brief, Horne submitted statistical evidence that only 1% of inmates in the custody of the New York State Department of Correctional Services (DOCS) were confined to the SHU for as long as six months, and that sentences of that length were imposed in only 2.8% of all disciplinary cases.

2. A divided panel of the Second Circuit affirmed. *Horne I*, App., *infra*, 1a.-23a. The majority neither reached the *Sandin* issue nor determined what assistance Horne was due at either of his two disciplinary hearings. Instead, the majority ruled that the defendants were entitled to qualified immunity because they had not violated Horne’s clearly established constitutional rights. In reaching that conclusion, the majority entirely discounted the first hearing; in its view, that hearing “became a nullity” because “[a]ll findings and penalties imposed at the first hearing were vacated * * * and all the penalties Horne suffered were imposed at the second hearing.” *Id.* at 13a. The majority then ruled that Horne did not have a **clearly established** right to more assistance than he received at the second hearing — rejecting Horne’s arguments that this Court’s rulings in *Wolff v. McDonnell*, 418 U.S. 539 (1974), *Vitek v. Jones*, 445 U.S. 480 (1980), and *Hewitt v. Helms*, 459 U.S. 465 (1983), along with the Second Circuit’s ruling in *Ron v. Wilkinson*, 565 F.2d 1254 (2d Cir. 1977), and numerous district rulings clearly established such a right. App., *infra*, 7a-13a.

Judge Cardamone dissented. He reasoned that, if the first hearing were truly a “nullity,” then Horne’s clearly established due process rights were violated by his 148-day confinement **before** the second hearing. *Id.* at 17a-20a. Alternatively, he argued, Horne served his sentence as a result of the first hearing, at which he had been deprived of a clearly established right to “some form of assistance.” *Id.* at 20a-22a. Judge Cardamone declared that he was not persuaded by “the defendants’ attempt to rationalize Horne’s confinement by holding a hearing after the relevant confinement already occurred.” *Id.* at 20a n.1.

3. Horne filed a timely petition for rehearing, arguing that the court of appeals had erred in deeming the plainly inadequate first hearing (after which he was confined to the SHU for 148 days) to be a nullity. On rehearing, however, the court of appeals addressed only a single issue: whether this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), required it to decide whether Horne's constitutional rights had been violated before turning to the question of whether defendants were entitled to immunity. *Horne II*, App., *infra*, 24a-31a. A majority of the panel rejected the suggestion.

In the majority's view, the relevant discussion in *Sacramento* was not a "holding" and did not, in any event, "purport to establish a rigid rule." *Id.* at 25a. In so concluding, the majority noted that the "Court placed the tentatively worded suggestion in a footnote — scarcely the placement one would expect had the Court intended to command the lower courts to abandon widespread practice and a generally recognized precept of avoiding unnecessary adjudication." *Id.* at 26a. It also opined that a mandatory rule would "require courts to declare new constitutional rights in dictum," which declarations "would run a high risk of error." *Id.* at 25a. Such a rule, the majority contended, also would impose undue burdens on the lower federal courts, which are over-burdened, often receive poor briefing, and do not have time to "make a carefully crafted opinion in each case." *Id.* at 26a. Thus, the majority concluded, *Sacramento* was no more than "a suggestion that the lower courts should be mindful lest the repeated failure to consider constitutional issues allow 'standards of official conduct * * * to remain uncertain' without clarifying adjudication." *Ibid.* (quoting *Sacramento*, 118 S. Ct. at 1714 n.5). The majority concluded that this "key motivating factor" was not applicable here because "[t]here is no reason to believe that the questioned regulation will repeatedly, or over a substantial time, escape judicial review by reason of qualified

immunity.” *Id.* The majority premised this conclusion on a prisoner’s right to seek injunctive relief, to which qualified immunity is not a defense. *Ibid.*

Judge Cardamone again dissented, noting that the majority’s reasons for refusing to apply *Sacramento* — “the policy of avoidance, the remote possibility of injunctive suits” — had been squarely rejected by *Sacramento*. *Id.* at 30a. Judge Cardamone found the majority’s concern about declaring “new constitutional rights in dictum” inapplicable in a case where qualified immunity is raised as a defense, arguing that “such adjudication cannot readily be dismissed as ‘dictum’ unless one is also prepared to characterize as dictum the High Court’s holding regarding the constitutional question in *Sacramento* itself.” *Id.* at 29a. According to Judge Cardamone, “[t]o suggest seriously that the Supreme Court did not mean what it said either in footnote five or on the merits of *Sacramento* would render the decision superfluous.” *Ibid.* Finally, he rejected the majority’s argument that the federal courts “haven’t the time to make a carefully crafted opinion in each case,” classifying that as “more of an excuse and less of a good reason * * * for circumventing the fundamental duty of the judicial department to say what the law is.” *Id.* at 30a (internal quotation marks omitted).

The next business day after the court of appeals ruled on the rehearing petition, this Court decided *Wilson v. Layne*, 119 S. Ct. 1692 (1999). In *Wilson*, this Court stated that “[a] court evaluating a claim of qualified immunity *must* first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.” *Id.* at 1697 (internal quotation marks omitted; emphasis added). This Court further added that this approach “promote[d] clarity in the legal standards for official conduct, to the benefit of both the officers and the general public.” *Ibid.* Relying on *Wilson*, Horne moved for permission to

reargue his rehearing petition, contending that the court of appeals had erred in concluding that it need not spell out Horne’s constitutional rights. The court of appeals granted the motion, App., *infra*, 56a, and issued an amended decision that reaffirmed its reading of *Sacramento*. *Horne III*, App., *infra*, 32a-41a. The majority acknowledged this Court’s use of mandatory language in *Wilson*, but concluded that *Wilson* did not “purport[] to abandon the measured position adopted in *Sacramento*.” *Id.* at 34a. The majority then set forth what it called the “powerful arguments” against adopting *Sacramento*’s approach in most cases. *Id.* at 33a. In addition to reiterating the rationale it proffered in *Horne II*, the majority stated that “declarations of rights in dictum” would cause serious problems because “government defendants, as the prevailing parties, will have no opportunity to appeal for review of the newly declared constitutional right in the higher courts.” *Id.* at 34a. Thus, “[i]f those government actors defer to the courts’ declarations and modify their procedures accordingly, new constitutional rights have effectively been established by the dicta of lower court [sic] without the defendants having the right to appellate review.” *Ibid.*

The majority conceded that addressing the constitutional question first might be preferable where there is a “likelihood that the question will escape federal court review over a lengthy period” or the “constitutional violation is especially outrageous.” *Id.* at 35a. It determined, however, that the constitutional violation alleged in this case did not merit such consideration, because it was not particularly “egregious or outrageous” and would not “repeatedly, or over a substantial time, escape judicial review.” *Ibid.*

Judge Cardamone again dissented. He noted that this Court had now articulated the rule at issue in “unqualified terms, and in the main text of its majority opinion.” *Id.* at 37a. Addressing the majority’s concerns that declarations of new constitutional rights by lower federal courts would go unreviewed if dismissed on qualified immunity grounds, Judge Cardamone stated:

[T]here is no indication that a plaintiff whose suit is so dismissed will lack incentive to appeal, and even if such appeal is limited on its face to the qualified immunity question, the appellate court will be required under *Sacramento* to review the existence of the constitutional right before reaching that question.”

Id. at 38a. Finally, Judge Cardamone opined that “[t]he majority’s approach does a disservice to future plaintiffs and to the public insofar as it undermines the duty of the courts to explicate and give force to the values embodied in [] the Constitution * * * thereby encourag[ing] repeat[ed] unlawful conduct without accountability on the part of state actors.” *Id.* at 39a (internal quotation marks and citations omitted).

REASONS FOR GRANTING THE PETITION

This case presents a recurring issue of great practical and jurisprudential importance: whether a court may avoid articulating the contours of the plaintiff’s constitutional rights by deciding only that the defendants are entitled to qualified immunity because they violated no *clearly established* rights. In *Sacramento*, this Court stated that “the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all.” 118 S. Ct. at 1714 n.5. In *Wilson*, this Court confirmed the mandatory nature of that rule, stating that “[a] court evaluating a claim of qualified immunity *must* first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.” 119 S. Ct. at 1697 (internal quotation marks omitted; emphasis added) (quoting *Conn v. Gabbert*, 119 S. Ct. 1292, 1295 (1999)). Despite this, there remains a dispute among the courts of appeals concerning whether the procedure described in *Sacramento* must be followed in every case. Because the court below has flatly refused to follow *Sacramento* and

Wilson, in a manner that conflicts with the views of most of the other circuits and that will thwart the goal of clarifying the scope of constitutional rights, review by this Court plainly is warranted.

Further review is also necessary to address the important and recurring issue of whether, and when, a due process violation can be “cured” by a later proceeding and thus extinguish a cause of action under Section 1983. The court below determined that it need not address whether Horne’s due process rights were violated when he was subjected to punishment following his first disciplinary hearing because that hearing became a “nullity” after the second hearing. That ruling, however, is inconsistent with this Court’s precedents. As a functionally illiterate, mentally retarded individual, Horne clearly was entitled to some assistance at his first disciplinary hearing; Horne’s punishment subsequent to the first hearing thus violated his due process rights and gave rise to a claim under Section 1983. *See, e.g. Wolfe v. McDonnell*, 418 U.S. at 570. Under this Court’s decisions, a second, constitutionally adequate proceeding might prove that Horne would have suffered the same punishment absent the due process violations, and thus defeat an effort to recover damages flowing from the discipline imposed, but it would not defeat his claim for damages attributable to the due process violation itself or, if there were none, for nominal damages. *See Carey v. Piphus*, 435 U.S. 247, 266 (1978); *Edwards v. Balisok*, 520 U.S. 641, 645 (1997).

It bears emphasis that the controversy between the parties remains a live one notwithstanding the court of appeals’ holding that respondents are entitled to qualified immunity for their conduct at the *second* disciplinary hearing. Because the court of appeals contented itself with determining that petitioner’s *clearly established* due process rights were not violated at the second hearing, that court never determined whether petitioner *in fact* received due process at the second hearing. But if that second hearing was

constitutionally defective, it necessarily could not have “nullified” the patent constitutional violation that occurred at the first hearing. Petitioner therefore is entitled to — and can directly benefit from — a holding that courts must determine whether the plaintiff’s constitutional rights have been violated before deciding whether the defendant has qualified immunity; if it is determined that petitioner’s rights in this case *actually* were violated at the second hearing, that proceeding cannot have cured the clear constitutional violation that occurred at petitioner’s first hearing and petitioner accordingly will be entitled to damages.

Because the court of appeals refused to follow this Court’s directives in *Sacramento* and *Wilson*, and rendered a demonstrably erroneous decision as a direct result, further review by this Court is warranted.

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT’S DIRECTIVES REGARDING THE PROPER PROCEDURE FOR RESOLVING CLAIMS OF QUALIFIED IMMUNITY AND CONTRIBUTES TO A SPLIT AMONG THE CIRCUITS CONCERNING THE ISSUE

On no less than four occasions, this Court has stated that the proper procedure for analyzing a civil rights claim in which a defense of qualified immunity is raised is first to determine whether there has been a constitutional violation and only then to determine whether the defendants are entitled to qualified immunity. See *Wilson*, 119 S. Ct. at 1697; *Conn*, 119 S. Ct. at 1292; *Sacramento*, 118 S. Ct. at 1714 n.5; *Siegert v. Gilley*, 500 U.S. 226, 231 (1991). Although the majority of courts of appeals have adopted the practice mandated by this Court, both the court below and the Eleventh Circuit have declined to do so, insisting that it should be followed only in unusual circumstances. Review is warranted to respond to the Second Circuit’s considered and unambiguous rejection of this Court’s pronouncements in

Sacramento and other cases and to resolve a split in the Circuit's concerning the application of those decisions.

A. The Decision Below Conflicts With This Court's Rulings

The decision below cannot be reconciled with this Court's pronouncements concerning the proper procedure for addressing constitutional claims subject to a defense of qualified immunity. The court of appeals has simply refused to follow a procedure that this Court has said is mandatory, and has offered as justification for its refusal arguments that this Court has already expressly or implicitly rejected. The Second Circuit's strong reluctance to fulfill its "fundamental duty" to "say what the law is" (*Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), despite this Court's repeated directives, warrants review.

1. This Court has repeatedly stated that courts adjudicating constitutional claims should determine whether the plaintiff's constitutional rights have been violated before ruling on a defense of qualified immunity. The Court first articulated this preference in *Siegert*, 500 U.S. 226 (1991). In *Siegert*, the Court of Appeals for the District of Columbia found, without determining whether there had been a constitutional violation, that the petitioner's allegations were insufficient to overcome the defendant's assertion of a qualified immunity defense. *Id.* at 230. The Court granted certiorari "to clarify the analytical structure under which a claim of qualified immunity should be addressed." *Id.* at 231. This Court held that the petitioner had "failed to satisfy the first inquiry in the examination of such a claim; he failed to allege the violation of a clearly established constitutional right." *Ibid.* It then explained that "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Id.* at 232.

This Court reiterated its support for that procedure in *Sacramento, supra*. In *Sacramento*, the Court held that a high speed police chase conducted without the intent to harm the suspects or to worsen their legal circumstances did not give rise to liability under the Fourteenth Amendment for a substantive due process violation. 118 S. Ct. at 1720. In so holding, the Court noted that the district court had granted summary judgment to the defendants on the basis of qualified immunity, without first determining whether there had been a constitutional violation. The Court criticized the district court's procedure, explaining:

We do not analyze this case in a similar fashion because, as we have held, the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all. Normally, it is only then that a court should ask whether the right allegedly implicated was clearly established at the time of the events in question.

Id. at 1714 n.5 (citing *Siegert*, 500 U.S. at 232). Explaining the rationale for this procedure, the Court stated:

[T]he generally sound rule of avoiding determination of constitutional issues does not readily fit the situation presented here; when liability is claimed on the basis of a constitutional violation, even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted. What is more significant is that if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or non-constitutional. In practical terms, escape from uncertainty would require the issue to arise in a suit to enjoin future conduct, in an action against a municipality, or in litigating a suppression motion in a criminal proceeding; in none of these instances would qualified immunity be available to block a determination of law. But these avenues would not necessarily be open, and therefore the better approach is to determine the right before determining whether it was previously established with clarity.

Ibid. (citations omitted).

Since *Sacramento*, this Court has articulated this requirement even more forcefully, stating in two cases that the courts “*must*” follow this procedure. See *Conn*, 119 S.Ct. at 1295 (emphasis added) (citing *Siegert*, 500 U.S. at 232-233; *Sacramento*, 118 S. Ct. at 1714 n.5); *Wilson*, 119 S. Ct. at 1697 (emphasis added). This Court’s decision in *Wilson* is particularly relevant here. In *Wilson*, the Court was presented with the question of whether a “media ride along” incident to the arrest of a private citizen violated the Fourth Amendment. *Wilson, supra*. The Ninth Circuit had concluded that the defendants were entitled to qualified immunity without determining whether the plaintiff’s constitutional rights had been violated. *Id.* at 1696. Once again, this Court rejected that procedure; stating:

A court evaluating a claim of qualified immunity “*must* first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.” [*Conn*, 119 S. Ct. at 1295.] This order of procedure is designed to “spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit.” [*Siegert*, 500 U.S. at 232.] Deciding the constitutional question before addressing the qualified immunity question also promotes clarity in the legal standards for official conduct, to the benefit of both the officers and the general public. [See *Sacramento*, 118 S. Ct. at 1714 n.5.]

Id. at 1697. The Court then reached the question the court of appeals had avoided, and ruled that the “media ride along” *did* violate the Fourth Amendment. It found, however, that the arresting officers were entitled to qualified immunity because the law was not clearly established at the time of the search. *Id.* at 1695.

Despite these clear precedents, the Second Circuit nonetheless declined to follow the procedure outlined by the Court. Yet each aspect of the court of appeals’ rationale is foreclosed or undermined by this Court’s reasoning in prior cases. First, the majority below contended that this Court “has for generations warned against reaching out to adjudicate constitutional matters unnecessarily.” App., *infra*, 33a. But this justification for deciding claims of qualified immunity without defining the constitutional rights

at issue was squarely rejected in *Sacramento*. There, the Court stated that “the generally sound rule of avoiding determination of constitutional issues” did not apply to the situation at hand, since “even a finding of qualified immunity requires some determination about the state of constitutional law at the time the officer acted.” *Sacramento*, 118 S. Ct. at 1714 n.5.

Second, in *Horne II*, the court of appeals majority suggested that the procedure set forth in *Sacramento* should only be followed “where it is clear the new constitutional right claimed by the plaintiff does not exist.” Under those circumstances, the court could “dismiss on that basis rather than leave the law unclear,” but would not be drawn “into declaring new constitutional rights in dictum.” App., *infra*, 25a. But *Wilson* makes clear that this Court intended no preference for articulating *limits* on constitutional rights rather than expansions of them. To the contrary, *Wilson* demonstrates that courts must reach the merits of constitutional claims without regard to the outcome of those rulings, and even when the constitutional question, as in *Wilson*, is not “open and shut.” *Wilson*, 119 S. Ct. at 1700.

Third, the court of appeals suggested that courts need reach the constitutional question first in a qualified immunity case only when there is a “danger of sustained uncertainty” in the law. See App., *infra*, 26a, 35a; see also *Sound Aircraft Servs, Inc.. v. Town of East Hampton*, No. 98-9339, 1999 WL 734926, *4 (2nd Cir. Sept. 22, 1999). Pointing to the *possibility* that a prisoner could file a suit for injunctive relief while a disciplinary hearing is pending or while serving out his punishment, the court of appeals found that danger to be absent here. App., *infra*, 26a, 35a. As Judge Cardamone noted in his dissent below, however, “the prospect of future suits for injunctive relief is no less remote in this context than it was in *Sacramento*, where the Court expressly declined to rely on such a possibility.” App. *infra*, 30a. Indeed, as a practical matter, the possibility that a mentally retarded inmate in disciplinary segregation would have the opportunity to file a suit seeking injunctive relief is extremely remote.

Finally, the court of appeals contended that a heavily burdened judiciary should not be forced to “untangle a difficult, complex issue” whose determination is not necessary to the outcome of the case. See App., *infra*, 35a. But the suggestion that determining the scope of constitutional rights in such cases is not worth the trouble ignores the important systemic need to clarify the standards for official conduct. As this Court explained in *Sacramento*, “if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.” 118 S. Ct. at 1714 n.5. As one commentator has noted, unless the contours of constitutional rights are defined, public officials may be reluctant to engage in lawful, and perhaps warranted, conduct for fear of potential lawsuits. See John M. M. Greabe, *Mirabile Dictum!: The Case For “Unnecessary” Constitutional Rulings in Civil Rights Damages Actions*, 74 NOTRE DAME L. REV. 403, 426 (Jan. 1999). Moreover, the failure to explicate constitutional rules gives public officials the opportunity to repeatedly engage in illegal conduct without fear of liability. *Id.* at 429-430. As Judge Cardamone noted in his dissent below, “[i]f the majority’s approach becomes the law of this Circuit, constitutional standards of official conduct will be frozen in uncertainty, a result at odds with government under the rule of law.” App., *infra*, 38a. To avoid that result, review of the decision below is warranted.

Reaching the constitutional question at issue here — whether Horne received all the process he was due at his second hearing — is not merely an academic exercise. Even assuming that a later proceeding can cure an initial, constitutionally defective one (and, as we discuss in Section II, *infra*, it can do so only under certain circumstances and in certain ways), logically a cure can be effected only if the later proceeding complies with due process requirements. In this case, however, the court never determined

that the second hearing was constitutionally adequate. Rather, in its rush to avoid reaching the constitutional question, it leaped right to the issue of qualified immunity. Because the court never determined that the initial due process violation was ever fully remedied, there was no basis for its determination that the second hearing “nullified” the first, plainly inadequate one. Had the court below reached the constitutional question, it might well have found that, in fact, Horne did not receive all the process he was due at his second hearing.^{6/} This would have made patent the defect in the court’s ruling that the second hearing extinguished Horne’s claims.^{7/}

In sum, the court of appeals flatly repudiated this Court’s directives concerning the proper method of adjudicating constitutional claims subject to the defense of qualified immunity — and it made

^{6/} Horne, a mentally retarded, functionally illiterate inmate, was provided with an assistant who was ignorant of the hearing procedures, did not know or understand his role at the hearing, and lacked even basic knowledge regarding Horne’s rights at the disciplinary hearing. He did nothing to help Horne present a defense and his only role at the hearing was to explain what the hearing officer was saying. Even then, as the magistrate judge below acknowledged, Horne had great difficulty understanding the proceedings. App. *infra*, 45a. Under this Court’s precedents and the precedents of the Second Circuit, Horne was clearly entitled to more than this passive and ineffectual assistance. See *Wolff*, 418 U.S. at 570 (ruling that prisoners are entitled to “adequate substitute aid” at a disciplinary hearing “[w]here an illiterate inmate is involved * * * or [where] the complexity of the issues makes it unlikely that the inmate will be able to collect and **present** the evidence necessary for an adequate comprehension of the case”) (emphasis added); *Hewitt*, 459 U.S. at 465 (“*Wolff* requires * * * the aid of a staff member or inmate in **presenting** a defense”) (emphasis added); *Ron*, 565 F.2d at 1258 (prisoners falling within the special circumstances of *Wolff* “are entitled to **representation** at a disciplinary hearing”) (emphasis added)

^{7/} Indeed, the second hearing itself was annulled — without any objection from the State Attorney General’s office — as a result of Horne’s appeal to the New York state courts. Under New York state law, the prison lacked the authority to hold the hearing because an Article 78 proceeding had already been filed. See *Matter of Rahman v. Coughlin*, 492 N.Y.S. 2d 116 (N.Y. App. Div. 1985) (holding that second disciplinary held in order to correct procedural defects in first disciplinary hearing was a nullity because once Article 78 proceeding commenced in state court, jurisdiction over the matter reposed with the courts, and prison authorities were not at liberty to unilaterally reconvene the matter). Because this second hearing was thus itself a “legal nullity,” it could not remedy the constitutional violations at the first hearing.

a serious error as a result. It is difficult to imagine a vehicle more appropriate than this petition, therefore, for this Court to clarify that the *Sacramento* rule is mandatory and should be applied in cases such as this one.

B. The Lower Courts Disagree Regarding Whether The Rule Articulated In *Sacramento* And *Wilson* Is Mandatory.

Since this Court decided *Sacramento*, the majority of the courts of appeals — including the First, Third, Fourth, Fifth, Eighth, Ninth, and Tenth Circuits — have followed the procedure it recommends as a matter of course, and have identified no exceptions to it. See, e.g., *B.C. v. Plumas Unified School District*, No. 97-17287, 1999 WL 729168, *6-7 (9th Cir. Sept. 20, 1999); *Lynch v. City of Boston*, 180 F.3d 1, 10 (1st Cir. 1999); *Torres v. McLaughlin*, 163 F.3d 169, 172 (3d Cir. 1998); *Jurasek v. Utah State Hosp.*, 158 F.3d 506, 515 (10th Cir. 1998); *McVey v. Stacy*, 157 F.3d 271, 276-277 (4th Cir. 1998); *Systems Contractors Corp. v. Orleans Parish Sch. Bd., et al.*, 148 F.3d 571, 574 (5th Cir. 1998); *King v. Beavers*, 148 F.3d 1031, 1034 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 513 (1998). As a result, these courts have clarified the bounds of constitutional protections, even in cases where the defendants raise valid claims of qualified immunity. See *B.C. v. Plumas Unified School District*, *supra* (holding that defendants violated plaintiff’s Fourth Amendment right to be free from unreasonable searches and seizures when they conducted a “dog sniff” of high school students, but that defendants were entitled to qualified immunity because the right was not clearly established at the time of the violation).

By contrast, as discussed above, the court below opined forcefully that the procedure recommended in *Sacramento* was not mandatory, and indeed could not prudently be followed in most circumstances. Stating that *Sacramento*’s recommended approach would “require courts to declare new

constitutional rights in dictum,” the court of appeals warned that this practice would “run a high risk of error,” increase the strain on already overburdened courts, and encourage the declaration of new rights in settings where the defendants would have no incentive to appeal. App., *infra*, 33a-35a. Thus, the court concluded, *Sacramento* should be followed only in the limited circumstances where the violation was outrageous or the issue would otherwise evade review over an extended period. *Id.* at 35a; See also *Sound Aircraft Serv., Inc.*, 1999 WL 734926 at *5 (Sept. 22, 1999) (citing *Wilson* and *Horne II* for proposition that if the “district court deems it appropriate” the “constitutional issue *may* be addressed first when there is a danger of sustained uncertainty as to whether the facts of the case constitute a constitutional deprivation”) (emphasis added; internal quotation marks omitted)

The Eleventh Circuit has reached the same conclusion. In *Santamorena v. Georgia Military College*, 147 F.3d 1337 (11th Cir. 1998), the court determined that *Sacramento*’s discussion of the proper framework for analyzing claims of qualified immunity did not create a mandatory rule. While acknowledging this Court’s power to “supervise lower federal courts through special statements that go beyond the holding of a case,” it questioned whether the statement in *Sacramento* was a “binding judicial pronouncement” and, even if so, rejected the view that it was a “strict rule with no exceptions.” *Id.* at 1434. n.14. The court then found that, in the case before it, deciding the qualified immunity question first was “appropriate,” and perhaps “preferable,” because it posed a “perplexing question” as to the existence of a constitutional right, the alleged right was clearly not established, and the qualified immunity determination ended the entire case. *Id.* at 1343; see also *Brown v. Cochran*, 171 F.3d 1329, 1332 (11th Cir. 1999) (stating that *Sacramento* articulates only a suggestion, not an absolute rule); but see *McElligott v. Foley*, 182 F.3d 1248, 1254 (11th Cir. 1999) (quoting *Conn*, 119 S. Ct. at 1295, and stating that the court “must

first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation.”); *Crosby v. Paulk*, No. 97-8585, 1999 WL 703193, *3 (11th Cir. Sept. 10, 1999) (same).

Whether or not the courts will follow the procedure outlined in *Sacramento* is a question of considerable significance. As this Court has recognized, that procedure prevents the “Catch 22” situation in which constitutional claims fail because the rights they seek to vindicate are not “clearly established,” but those rights never become “clearly established” because the courts dismiss claims on the basis of qualified immunity without articulating the scope of the rights asserted. Despite this Court’s repeated pronouncements on this issue, some lower courts still doubt that the rule articulated in *Sacramento* and *Wilson* is mandatory — and they have identified strong institutional interests in refusing to follow that rule. Further review is warranted so that this Court may clarify the application of the *Sacramento* rule.

II. THE COURT OF APPEALS’ DECISION THAT HORNE’S SECOND HEARING EXTINGUISHED HIS CAUSE OF ACTION CONFLICTS WITH THIS COURT’S PRECEDENTS

As the dissenting judge observed, it was clearly established that the *first* hearing, at which Horne received *no* assistance whatsoever, did not comport with due process. Nevertheless, in its eagerness to decide this case solely on the grounds of qualified immunity, the court of appeals treated the first hearing as though it were entirely irrelevant to Horne’s claims, stating conclusorily that the second hearing rendered the first one a “nullity.” In essence, the majority ruled that any claim arising from the due process violation that Horne suffered at his first hearing was completely extinguished because the penalties he suffered were imposed at the second hearing. The court of appeals made this determination despite the fact that (1) the second hearing was not held until after Horne had already been in the SHU for more than five months; (2)

Horne contended that he was also denied due process at the second hearing; and (3) the second hearing itself was annulled as a result of Horne's appeal to the New York state courts.

The court of appeals' ruling presents significant and recurring questions concerning the circumstances under which a procedural due process violation can be "cured" by later proceedings. The ruling conflicts with several decisions of this Court and other courts applying this Court's precedents. Accordingly, further review by this Court is warranted.

A. Horne Did Not Receive Due Process At His First Hearing

We note as a preliminary matter that, had the court of appeals reached this issue, Horne would have established that his due process rights were violated at his first disciplinary hearing. In *Wolff v. McDonnell*, this Court held that prisoners are entitled to assistance at a disciplinary hearing "[w]here an illiterate inmate is involved * * * or where the complexity of the issue makes it unlikely that the inmate will be able to collect and present the evidence necessary for an adequate comprehension of the case." 418 U.S. at 570. Following *Wolff*, the Second Circuit decided in *Ron*, 565 F.2d at 1258 (2d Cir. 1977), that in such circumstances prisoners are entitled to representation at a disciplinary hearing. Horne was functionally illiterate and mentally retarded, with an I.Q. of 65; thus, under *Wolff* and *Wilkinson*, he clearly was entitled to *some* form of assistance at his Tier III disciplinary hearing. When he was convicted of serious offenses after a hearing at which he received no assistance at all, Horne's due process rights were violated.^{8/}

^{8/} As a threshold matter, we note that Horne had a protected liberty interest in avoiding confinement in the SHU, and the magistrate court's decision that he did not was plainly wrong. Under this Court's ruling in *Sandin*, a prisoner has a liberty interest in freedom from restraint which poses "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." 515 U.S. at 484. The Second Circuit has held that *Sandin* "did not create a per se blanket rule that disciplinary confinement may never

Those rights, moreover, were clearly established at the time of the disciplinary hearing. See, e.g., *Wolff*, 418 U.S. at 570; *Hewitt v. Helms*, 459 U.S. 465, 465 (1983) (“*Wolff* requires * * * the aid of a staff member or inmate in presenting a defense”); *Ron*, 565 F.2d at 1258 (prisoners falling within the special circumstances of *Wolff* “are entitled to representation at a disciplinary hearing”). Thus, if Horne’s claims arising from the violation of his rights at the first hearing were recognized, then qualified immunity would not have been a valid defense.

B. The Majority’s Decision That The Second Hearing Nullified The First One Conflicts With Rulings Of This Court And Other Courts

In ruling that the first hearing was a “nullity,” the court of appeals departed from this Court’s precedents in several respects. First, this Court has made clear that a person subjected to a punitive

implicate a liberty interest.” *Miller v. Selsky*, 111 F.3d 7, 9 (2d Cir. 1997). It has also ruled that the district court must make specific factual findings concerning the atypicality and significance of the deprivation at issue, considering factors such as the length of the confinement, its restrictiveness, and its conditions as compared with those in the prison in general. *Brooks v. DiFasi*, 112 F.3d 46, 48-49 (2d Cir. 1997); *Miller*, 111 F.3d at 9. Thus, the Second Circuit recently found that an inmate who was sentenced to ninety days in the SHU raised a genuine issue of material fact as to whether his punishment constituted atypical and significant hardship. *Welch v. Bartlett*, No. 98-2705, 1999 WL 734696 (2d Cir. Sept. 17, 1999). In particular, the court found that the conditions of confinement for SHU prisoners were qualitatively different from the conditions in the general prison population and that the difference in restrictiveness was “enormous.” *Id.* at *3-4. The court remanded for additional findings of fact concerning whether the duration of confinement was atypical. *Id.* at *4. In this case, Horne submitted statistical proof that only about 1% of all prisoners in the custody of DOCS suffered confinement as long as six months. His confinement was thus sufficiently atypical and significant to trigger a right to due process.

Horne also had a protected liberty interest in avoiding the loss of good time credits *Sandin*, 515 U.S. at 483-484. That is true even though his lost good time credits were later restored. See, e.g., *Superintendent, Massachusetts Correctional Inst., Walpole v. Hill*, 472 U.S. 445, 454 (1985) (“[w]here a prison disciplinary hearing *may* result in the loss of good time credits,” an inmate “must receive” *Wolff’s* procedural protections) (emphasis added); *Whitlock v. Johnson*, 153 F.3d 380, 385 (7th Cir. 1998) (“due process requires that an inmate faced with the *possible* revocation of good-time credits be afforded the right to call witnesses in his defense”) (emphasis added).

deprivation of the kind involved in this case is entitled to due process *before* the deprivation is imposed. Second, this Court has ruled that a person subjected to discipline without due process may recover nominal damages and damages for any emotional or other harms caused by the deprivation of due process itself, even if it could be proven that the same punishment would have been imposed had due process been afforded. These principles — which establish the framework for determining whether and in what sense a due process violation is “cured” by a later proceeding — cannot be reconciled with the decision in this case.

1. Under this Court’s rulings, the state may not deprive a person of a protected liberty interest without first affording the person procedural due process. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (due process clause requires that deprivation of life, liberty, or property be “preceded by notice and opportunity for hearing appropriate to the nature of the case.”). Post-deprivation process is sufficient in circumstances where it is not practicable to provide pre-deprivation process — for example, in the case of random and unauthorized deprivations of liberty. See *Hudson v. Palmer*, 468 U.S. 517, 533-34 (1984); *Parratt v. Taylor*, 451 U.S. 527, 543-44 (1981), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986). Deprivations effected pursuant to policy or established procedure, however, are neither unforeseeable nor random and unauthorized, and a post-deprivation remedy hence will not suffice. See *Zinermon v. Burch*, 494 U.S. 113, 136-139 (1990); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982).

The deprivation to which Horne was subjected here was entirely foreseeable. Thus, Horne was entitled to receive constitutionally adequate process *before* the deprivation. Indeed, New York state law mandates that a hearing be held before a prisoner may be subjected to punitive segregation. 7 N.Y.C.R.R. § 251-5.1 (1983) (Superintendent’s hearing must be commenced with seven days of inmates confinement).

In ruling that the second hearing completely nullified the first one, the court of appeals disregarded the important distinction between pre-deprivation and post-deprivation proceedings. Even assuming that the second hearing was in all other respects adequate, it did not satisfy the due process clause because it did not occur until Horne had already suffered his punishment for more than five months. Thus, it could not “cure” the due process violation that had already occurred, and could not extinguish Horne’s cause of action.

2. The court of appeals may have concluded that the second hearing “nullified” the first one because the punishment Horne suffered as a result of the first hearing was also imposed at the second hearing. But that ruling again misunderstands this Court’s rulings, justifying review.

In *Carey*, 435 U.S. 247 (1978), this Court ruled that a plaintiff alleging a due process violation in a disciplinary setting may not obtain damages flowing from the discipline inflicted unless it can be shown that “but for” the due process violation, the punishment would not have been imposed. 435 U.S. at 260. However, this Court also made it clear that two kinds of damages would still be available to a plaintiff where a “deprivation is justified but procedures are deficient”: nominal damages for the due process violation, and any damages that flow from the deprivation of due process itself.^{9/} *Id.* at 263-266.

Under the rule announced in *Carey*, where a plaintiff brings an action under § 1983 alleging the imposition of punishment pursuant to constitutionally inadequate procedures, evidence that the same punishment was again imposed after later, satisfactory procedures might prove that the earlier due process

^{9/} The Court underscored that view in *Edwards*. There, the Court implicitly recognized a prisoner’s right to bring an action for damages under § 1983 for the unconstitutional deprivation of good time credits in a case where the good time credits had been restored — eliminating the possibility of recovering anything other than nominal damages or damages flowing directly from the due process violation. 520 U.S. at 645; *see also, Heck v. Humphrey*, 512 U.S. 477 (1994).

violation did not cause harm in the form of unjustified punishment. The subsequent hearing, however, would neither extinguish the plaintiff's cause of action nor affect his or her right to receive nominal damages and damages flowing from the due process violation itself. With respect to the latter form of damages, this Court requires that the plaintiff prove that such damage "actually was caused." *Id.* at 263. With respect to the former, however, this Court has stated:

Because the right to procedural due process is "absolute" in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed, we believe that the denial of procedural due process should be actionable for nominal damages without proof of actual injury.

Id. at 266 (internal citations and footnote omitted).

The Second Circuit's ruling that Horne had no cause of action arising from the procedural due process violations in his first hearing conflicts with the approach taken by other courts applying *Carey*. In circumstances quite similar to those here, for example, the Seventh Circuit found that an inmate was entitled to nominal damages and damages flowing from the due process violations that occurred at an initial disciplinary hearing, even though a later hearing at which the same penalty was imposed was constitutionally adequate. *Clayton-El v. Fisher*, 96 F.3d 236 (7th Cir. 1996). In *Clayton-El*, the plaintiff was sentenced to disciplinary segregation and loss of good time credits pursuant to a disciplinary hearing that was constitutionally inadequate. *Id.* at 238-239. After a state court overturned that hearing, a new hearing was held in which the plaintiff received the same sentence imposed at the first hearing. *Id.* at 240. The plaintiff filed an action under § 1983 claiming that both the first and second hearing were procedurally deficient. The district court found that there was no due process violation in the second hearing and that he was not entitled to damages under § 1983 because he received the same sentence at both hearings. *Id.* at 240-241.

The Seventh Circuit reversed. The court noted that there were two different categories of injuries for which a plaintiff may collect damages under § 1983. *Id.* at 242-243. The first were those injuries arising from the “simple occurrence of a constitutional violation” and the “mental and emotional pain and suffering from the deprivation of [a plaintiff’s] constitutional rights to due process.” *Id.* at 242. As the court stated, “[i]f these injuries occurred, they would have been complete as soon as [the plaintiff] discovered that he had been deprived of notice. Their existence would not depend upon anything that happened at a disciplinary hearing.” *Id.* at 242-243. The second category of injuries were those caused by the plaintiff’s actual confinement in disciplinary segregation. *Id.* at 243. The court ruled that the plaintiff could recover the damages of the former sort, even if damages of the latter sort were unavailable. Citing *Carey*, the court stated:

The district court concluded that the outcome of the second disciplinary hearing somehow invalidated these claims. This conclusion was error because, as we have noted, these claims did not depend upon finding any facts about the outcome of the disciplinary process. The essential factual question for all of these claims is whether [the official] withheld notice of the disciplinary hearing. If [the plaintiff] can resolve this question in his favor, he can collect nominal damages. *Carey*, 435 U.S. at 266. If he can also prove that the withholding itself — regardless of its consequences for disciplinary sanctions — caused him to suffer emotional and mental pain and suffering, he can collect compensatory damages. * * * The outcome of the disciplinary process sheds no light on any of these factual issues, and they can be adjudicated without regard to any questions about the sanctions imposed upon [the plaintiff].

Id. at 243-244.

That precise reasoning applies here. Under *Carey*, the second hearing cannot completely nullify the constitutional violations committed at the first hearing nor can it extinguish a cause of action for damages under § 1983 flowing from these constitutional violations. Even assuming that the second hearing was constitutionally adequate and demonstrated that Horne would have received the same punishment absent the initial due process violation, this Court’s precedents show that Horne was entitled, at the very least, to

damages for mental and emotional distress flowing from the denial of procedural due process itself, or, if there were none, to nominal damages. See *Carey*, 435 U.S. at 266; *Edwards*, 520 U.S. at 645. Accordingly, had it applied *Carey* in the same manner as the Seventh Circuit, the court below would not have determined that the first hearing was a nullity. Because the decision below conflicts with this Court's rulings and will create confusion concerning the application of those rulings in the context of prison discipline, further review is warranted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1999