No. 15-13791-AA

In the United States Court of Appeals for the Eleventh Circuit

FRANKLIN HARRIS,
Plaintiff-Appellant,

v.

PRISON HEALTH SERVICES, a Florida Corporation, *et al.*,
Defendants,

WILLIAM NEILDS, Doctor, RICKY ALLEN,
Sergeant, and JAMES BUNTING, Nurse,
Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida, Jacksonville Division
Case No. 3:12-cv-999, Hon. Timothy J. Corrigan

REPLY BRIEF OF FRANKLIN HARRIS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 and 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, and firms with any known interest in the outcome of this case. Addition(s) are noted in italicized text.

1. Allen, Ricky – Defendant-Appellee;
2. Bunting, James – Defendant-Appellee;
3. Burns, P.A. – Appellate counsel for Plaintiff-Appellant;
4. Burns, Thomas A. – Appellate counsel for Plaintiff-Appellant;
5. Corrigan, Hon. Timothy J. – United States District Judge;
6. Garland, Cedell Ian – Assistant Attorney General;
7. Hill, Ward & Henderson, P.A. – Appellate counsel for Plaintiff-Appellant;
8. Harris, Franklin – Plaintiff-Appellant;
9. Kowalchyk, Dean Clinton – Assistant Attorney General;
10. Murphy, J. Logan – Appellate counsel for Plaintiff-Appellant;
11. *Neff, Lance Eric – Senior Assistant Attorney General;*
12. Neiberger, Eric – Assistant Attorney General;
13. Neilds, William – Defendant-Appellee;
14. Prison Health Services – Defendant;
15. Richardson, Hon. Monte C. – United States Magistrate Judge;

16. Simcox, Holly Noel – Assistant Attorney General.

No publicly traded company or corporation has an interest in the outcome of this appeal.

May 26, 2016

/s/ Thomas Burns
Thomas A. Burns

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For over three decades, it has been black letter law that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). This holding is the North Star of summary judgment.

Yet Dr. Neilds and Nurse Bunting do not follow it. Instead, they build only their own evidence into the equation, exclude Mr. Harris's sworn allegations and testimony, and assert it is Mr. Harris who has misconceived the substantive law, the summary judgment rubric, and the evidence. They are mistaken. Properly viewing the facts and all reasonable inferences therefrom in Mr. Harris' favor,[1] genuine issues of material fact emerge.

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[1] The summary judgment standard *requires* evidence to be "shad[ed]" (Answer Br. 2) in the light most favorable to nonmovants. Instead of coming to grips with that standard, Dr. Neilds and Nurse Bunting repeatedly succumb to the siren call of engaging in overheated rhetoric and *ad hominem* attacks by accusing Mr. Harris's counsel of "sophistry," "misrepresentation," "[m]uddying the water in [a] simple" case, "laughable" arguments, and "ethically problematic" conduct. Answer Br. 6 n.7, 16, 16 n.12, 21. Mr. Harris will not fall prey to the same temptation. Instead, Mr. Harris merely notes all his arguments and characterizations of fact are consistent with the record and the summary judgment standard Dr. Neilds and Nurse Bunting ignore: construing all facts in the light most favorable to Mr. Harris, making all inferences in his favor, and resolving all factual doubt to his benefit.

I. APPELLEES NEVER DEFEND THE DISTRICT COURT'S MISGUIDED "MORE THAN GROSS NEGLIGENCE" STANDARD OR ESTABLISH IT WAS HARMLESS

Appellees never defend the District Court's application of its incorrect "more than gross negligence" standard and fail to establish the error was harmless.

A. Appellees Effectively Concede The District Court Applied The Wrong Legal Standard

In his appellant's brief, Mr. Harris argued the District Court applied an erroneously high standard by requiring Mr. Harris to demonstrate Appellees' conduct was "more than gross negligence." Harris Br. 16. Despite promising to address Mr. Harris's "masterful work of sophistry" (Answer Br. 16), Appellees never explain how Mr. Harris is wrong. In breaking their promise, they concede Mr. Harris's point. *See Hamilton* v. *Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318-19 (11th Cir. 2012) (appellee waived argument when it failed to include it in answer brief), *overruled in irrelevant part by United States* v. *Durham*, 795 F.3d 1329, 1330-31 (11th Cir. 2015); *La Grasta* v. *First Union Sec., Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004) (appellee "waived the argument by failing to discuss it in the answer brief").

The appellate remedy is for this Court to vacate the judgment and remand for the District Court to reassess the summary judgment papers under the appropriate standard. *E.g.*, *Turner* v. *Burnside*, 541 F.3d 1077, 1086 (11th Cir. 2008). Remand would "not seriously impair judicial economy" because it would "not involve the district court in redundant proceedings." *Roofing & Sheet Metal Servs., Inc.* v. *La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982). And it would be inefficient for this Court to measure the evidence against the correct legal standard de novo absent the "benefit if the district court's reasoning," because this Court necessarily "commence[s] [such] analysis on appeal at a 'decided disadvantage,'" much akin to the "'proverbial blind hog, scrambling through the record in search of an acorn.'" *Hulsey* v. *Pride Restaurants, LLC*, 367 F.3d 1238, 1243-44 (11th Cir. 2004).

B. The District Court's Application Of The Wrong Legal Standard Was Not Harmless

Rather than addressing the legal argument head-on, Appellees apparently argue misapplication of the standard was harmless, *see* Fed. R. Civ. P. 61, because Mr. Harris cannot satisfy other elements of his deliberate indifference claim. *See* Answer Br. 17. This argument is mistaken for at least three reasons.

First, the legal standard matters very much, and if applied incorrectly, remand is almost always appropriate to allow a district court to resolve the issues on the proper standard. *See, e.g.*, *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240-41 (1988) ("Because the standard of materiality we have adopted differs from that used by both courts below, we remand the case for reconsideration of the question whether a grant of summary judgment is appropriate on this record."); *Southway Theatres, Inc.* v. *Ga. Theatre Co.*, 672 F.2d 485, 487 (5th Cir. Unit B 1982) ("We reverse based on the district court's use of a standard which overstated the burden which Southway must meet in order to survive a motion for summary judgment, and we remand for the application of the proper standard.").[2]

Second, remand is particularly important here because where actions fall on the spectrum between negligence, gross negligence, and recklessness is almost always a question of fact for a jury. *Hammer* v. *Slater*, 20 F.3d 1137, 1143 (11th Cir. 1994) ("Whether such conduct is

[2] Decisions by Unit B panels of the Former Fifth Circuit are binding precedent. *Stein* v. *Reynolds Secs., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

merely negligent or rises to the level of recklessness is an issue for the jury.").

Third, in his appellant's brief, Mr. Harris demonstrated a dispute of fact exists as to each element of deliberate indifference. Harris Br. 37-47. Without citation to Mr. Harris's brief, Dr. Neilds and Nurse Bunting argue, "[t]here is no record evidence of such conduct in this case." Answer Br. 18. But ignoring the evidence is not a valid basis for Appellees' argument: "The ostrich is a noble animal, but not a proper model for . . . appellate advoca[cy]." *Gonzalez-Servin* v. *Ford Motor Co.*, 662 F.3d 931, 934 (7th Cir. 2011) (Posner, J.). To the contrary, Mr. Harris demonstrated throughout his appellant's brief, with extensive citations to the record, that a dispute of fact exists as to each element of deliberate indifference. *See* Harris Br. 37-47. Appellees' misapplication of the summary judgment standard[3] likely led to their belief that no record evidence supports Mr. Harris's position, despite the evidence reviewed at length.

[3] For example, Appellees claim they are entitled to an evidentiary inference because it is "not unreasonable." Answer Br. 3 n.2. But that is precisely the opposite of how the summary judgment standard works.

II. APPELLEES MISCONCEIVE THE SUBSTANTIVE LAW AND IMPROPERLY CONSTRUE THE FACTS AGAINST MR. HARRIS

Appellees misconceive the operative legal framework and do not hew to the summary judgment standard when assessing the record.

A. *Estelle* v. *Gamble* Does Not Control When Medical Personnel Provide So Little Treatment It Amounts To No Treatment At All

Mr. Harris agrees with Appellees (*see* Answer Br. 23) that *Estelle* v. *Gamble* teaches plaintiffs cannot prove deliberate indifference by quibbling with medical treatment. 429 U.S. 97, 107 (1976).[4] But when so little treatment is provided that it amounts to no treatment at all, the environment is ripe for deliberate indifference. *McElligott* v. *Foley*, 182 F.3d 1248, 1259 (11th Cir. 1999). *Estelle* does not apply in that situation, and that is where the rubber meets the road in this appeal.

Dr. Neilds and Nurse Bunting argue summary judgment was appropriate because they did not see any outward manifestation of injury and their prescription of a pain reliever amounted to treatment. Answer Br. 14-16. With only one exception, that argument relies exclusively on

[4] Appellees cite *McLeod* v. *Secretary, Florida Department of Corrections*, 2017 WL 541398 (11th Cir. 2017) (unpublished), as a summary of the relevant law. But *McLeod* is unpublished and therefore not binding. *United States* v. *Futrell*, 209 F.3d 1286, 1289 (11th Cir. 2000); 11th Cir. R. 36-2.

Appellees' own records and testimony. Answer Br. 14. In fact, in the entirety of Appellees' argument section, Mr. Harris's sworn, verified allegations—which must be accepted as true—are cited a grand total of two times. Answer Br. 14, 20.[5]

The District Court exhibited the same myopia. As a result, the question in this appeal is not whether Appellees' own medical records demonstrate deliberate indifference. Instead, the proper question is whether Appellees' medical records, the independent medical records, and Mr. Harris's sworn testimony, all construed to favor Mr. Harris, create a genuine issue whether Dr. Neilds and Nurse Bunting were deliberately indifferent to Mr. Harris's serious medical need. That question was not answered by the District Court or by Appellees because they both misapplied the summary judgment standard.

[5] And neither citation construes the evidence in Mr. Harris's favor. Both were characterizations of Mr. Harris's allegations favoring Appellees. *See* Answer Br. 14 ("All examined him, though he disagrees with the conclusions of Dr. Neilds and Nurse Bunting for not immediately ordering X-rays."), 20 ("After all, the only visible injury to Mr. Harris was a small bump on his head so minor the skin was not broken or bleeding.").

B. Like The District Court, Appellees Repeatedly Misconstrue The Facts Against Mr. Harris

Appellees repeatedly misconstrue the facts against Mr. Harris when they misapply existing legal standards and invent new ones.

1. Appellees' Novel Deliberate Indifference Requirements Find No Support In Authority

By invoking *Estelle*, Dr. Neilds and Nurse Bunting are not arguing there was no evidence of deliberate indifference. What they are truly arguing is: "where treatment is given, as it was here, the standard of misconduct to find liability is even higher," and Mr. Harris cannot meet that standard. Answer Br. 18. This argument misses the mark legally and factually. Mr. Harris contends, as *McElligott* teaches, that Dr. Neilds's and Nurse Bunting's conduct was so cursory and deficient it amounted to no treatment at all. In which case, *Estelle* does not apply.

Appellees argue Mr. Harris must present evidence "showing Dr. Neilds or Nurse Bunting exhibited a prolonged indifference to Mr. Harris' pain or delivered grossly inadequate care that resulted in conscience shocking consequences for Mr. Harris (*e.g.*, extreme weight loss)." Answer Br. 20. They purport to draw this extraordinarily burdensome

standard from *McElligott* and *Carswell* v. *Bay County*, 854 F.2d 454 (11th Cir. 1988).

It appears they have drawn the "grossly inadequate care" part of this new standard from *McElligott*, 182 F.3d at 1255. But "grossly inadequate care" is just one of five possible showings through which *McElligott* acknowledged a plaintiff may demonstrate deliberate indifference. Deliberate indifference may also exist:

1. when the official knows the inmate is in serious need of medical care, but fails or refuses to obtain medical treatment;

2. by delaying the treatment of serious medical needs, even for a period of hours;

3. by a decision to take an easier but less efficacious course of treatment; and

4. when medical care is so cursory as to amount to no treatment at all.

Id. These four categories more accurately describe Dr. Neilds's and Nurse Bunting's conduct toward Mr. Harris.

Appellees' suggestion that Mr. Harris must also provide evidence of "conscience shocking consequences," apparently derived from *Carswell*, likewise lacks support. Even delayed treatment for injuries of a lesser degree than bleeding cuts can give rise to constitutional claims. *Harris* v. *Coweta County*, 21 F.3d 388, 394 (11th Cir. 1994). Dr. Neilds

and Nurse Bunting are trying to bootstrap Mr. Carswell's extreme suffering into an unsupportable baseline for deliberate indifference.

To the contrary, many cases hold deliberate indifference can exist when persistent pain or danger results from cursory or no treatment—even when the consequences seem mundane. *See, e.g.*, *Miller* v. *Campanella*, 794 F.3d 878, 880 (7th Cir. 2015) (severe heartburn); *Williams* v. *Curtin*, 631 F.3d 380, 384 (6th Cir. 2011) (coughing and shortage of oxygen); *Norfleet* v. *Webster*, 439 F.3d 392, 394-95 (7th Cir. 2006) (chronic arthritis); *Talal* v. *White*, 403 F.3d 423, 427 (6th Cir. 2005) (sinus problems and dizziness); *Koehl* v. *Dalsheim*, 85 F.3d 86, 88 (2d Cir. 1996) (failure to provide eyeglasses to treat double vision); *Murphy* v. *Walker*, 51 F.3d 714, 719 (7th Cir.1995) (pain from head injury); *Barnett* v. *Luttrell*, 414 Fed. App'x 784, 788 (6th Cir. 2011) (headaches and dizziness from head injury).

Perhaps Appellees' actual objection is that Mr. Harris was not hurt badly enough to warrant actual treatment. But that "rub some dirt on it" argument presents a factual question for a jury, rather than a legal question for a district judge. *See Aldridge* v. *Montgomery*, 753 F.2d 970, 974 (11th Cir. 1985) (finding jury issue as to whether plaintiff had

a serious medical need). And even "delayed treatment for injuries that are of a lesser degree may also give rise to constitutional claims." *Farrow* v. *West*, 320 F.3d 1235, 1247 (11th Cir. 2003) (quoting *Harris*, 21 F.3d at 394) (internal alterations omitted).

2. As A Matter of Law, Mr. Harris's Head Trauma Was A Serious Medical Need

Trivializing head injuries is dangerous territory. Yet Appellees do not hesitate:

> Mr. Harris had a bump on his head that, although swollen, did not even break the skin or bleed whatsoever. Any person with a toddler learning to walk knows how often such minor bumps occur. No person takes their toddler to the emergency room for every minor bump achieved during the toddler's effort to ambulate on her own.

Answer Br. 15 n.11.

This is not a toddler who tumbled to the tile; instead, this is the case of an elderly man who required a wheelchair falling face-first out of a large vehicle and hitting his head on pavement without bracing. Not only are the physics of such falls different (including mass, distance, and speed), but "[o]lder age has long been recognized as an independent predictor of worse outcome from [traumatic brain injury]." Hilaire J. Thompson *et al.*, *Traumatic Brain Injury in Older Adults: Epidemiolo-*

gy, Outcomes, and Future Implications, 54 J. AM. GERIATRIC SOC'Y 1590, 1593 (2006). Mr. Harris suffered from pain to his head, jaw, and right eye (Docs. 23 ¶ 48; 81-3 at 12), untreated dizziness (Doc. 23 ¶ 43), and visible swelling above his right eye "the size of a jawbreaker" (Doc. 81-3 at 13).[6]

Appellees repeatedly call Mr. Harris's injury "minor." Answer Br. 11, 15, 15 n.11, 20. They contend the lack of external bleeding meant the injury was not serious, despite swelling the size of a jawbreaker and Mr. Harris's sworn allegations of pain and dizziness.[7] But concussions

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[6] Without any evidentiary support whatsoever, Appellees contend this must mean the swelling was only half an inch in circumference. Answer Br. 8. Jawbreakers vary in size, and because they range between 1 and 8 centimeters in diameter, they are always larger than a half-inch in circumference (diameter multiplied by π). *See* Gobstopper, https://en.wikipedia.org/wiki/Gobstopper (last visited May 22, 2017). Ordinarily, Wikipedia "is not a source that warrants judicial notice." *Stein* v. *Ala. Sec'y of State*, 774 F.3d 689, 698 n.10 (11th Cir. 2014). *But see Boim* v. *Fulton County Sch. Dist.*, 494 F.3d 978, 983 (11th Cir. 2007) (citing Wikipedia). But Mr. Harris cites Wikipedia to illustrate that Appellees once again shade the facts in their favor, and not Mr. Harris's. *See generally Stein*, 774 F.3d at 698 n.10 (citing Wikipedia "only to illustrate the sort of fact that would have been helpful in determining the level of voter interest last March").

[7] Appellees argue statements by nonparty correctional officers supporting the seriousness of the injury are inadmissible hearsay. Answer Br. 5 n.5. To the extent Mr. Harris invokes the statements in support of his arguments, they can be considered on summary judgment because they fall within the present sense impression and then-existing

and other traumatic brain injuries, which are usually silent and invisible, are not often accompanied by external bleeding. *See Martineau* v. *Angelone*, 25 F.3d 734, 742 n.17 (9th Cir. 1994) (expert noting it would be possible for a seemingly minor head injury to produce "serious symptoms at some later time," that head injuries and concussions are "distinctive," and that "a seemingly minor injury could herald the beginning of what could progress to be a severe injury"). This is yet another example of Appellees failing to construe the facts in the light most favorable to Mr. Harris. Doing so reveals a serious medical need.

Head trauma is a serious medical need because of the potential for serious harm to arise. *See* Harris Br. 21 n.5 (listing cases in which head trauma constituted a serious medical need); *Barnett*, 414 Fed. App'x at 788 (superficial head injury causing headaches and pain is sufficiently

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mental state exceptions to the hearsay rule. *See* Fed. R. Evid. 803(1), 803(3); *see also Macuba* v. *Deboer*, 193 F.3d 1316, 1323 (11th Cir. 1999) (permitting consideration of hearsay statements that can be reduced to admissible form, such as those falling within an exception). In any event, Appellees did not contest consideration of the statements in the District Court and therefore waived this argument. *Cf. Hamilton*, 680 F.3d at 1318 ("'an appellee may rely upon any matter *appearing in the record* in support of the judgment below'" (emphasis added) (citation omitted)), *overruled in irrelevant part by Durham*, 795 F.3d at 1330-31.

serious). It requires attention that Dr. Neilds and Nurse Bunting never gave to Mr. Harris.

3. Appellees' Unpublished Standard For Causation Does Not Apply

Finally, Appellees argue Mr. Harris did not marshal adequate causation evidence and used the wrong legal standard in arguing that the District Court erred by concluding that Dr. Neilds and Nurse Bunting did not cause Mr. Harris's harm. Answer Br. 21. They quote from *McDaniels* v. *Lee*, 405 Fed. App'x 456 (11th Cir. 2010), a nonbinding, unpublished decision holding that "a plaintiff must show that the delay attributable to defendant's indifference likely caused the plaintiff's injury" by placing "verifying medical evidence" in the record. *Id.* at 458-59. Appellees are mistaken.

First, a prior panel's published deliberate-indifference decision held "[c]ausation, of course, can be shown by personal participation in the constitutional violation." *Goebert* v. *Lee County*, 510 F.3d 1312, 1327 (11th Cir. 2007). To the extent *McDaniels* imposes an additional requirement in such claims, *Goebert* renders that decision null.

Second, even if *McDaniels* established a new burden, there is substantial "verifying medical evidence" in the record. Other medical pro-

fessionals documented the exacerbation of Mr. Harris's conditions, which began worsening with his fall. *See* Harris Br. 6-7. Because Mr. Harris was *pro se* throughout the trial proceedings, his sworn allegations and the evidence construed in his favor should be afforded a liberal construction. *Brown* v. *Crawford*, 906 F.2d 667, 670 (11th Cir. 1990).

Third, Appellees focus only on harm arising from Mr. Harris's surgery. Even if no causal connection could be drawn Appellees' indifference and the required surgical intervention, a jury could still conclude that Appellees' caused nominal harm, which requires a trial. *See Hughes* v. *Lott*, 350 F.3d 1157, 1162 (11th Cir. 2003) (reversing order dismissing constitutional claim because the complaint "could be liberally construed to request nominal damages").

4. Mr. Harris Did Not Need To Present Expert Testimony About Medical Causation

Finally, Appellees suggest Mr. Harris cannot demonstrate causation as a matter of law because a "'medical causation issue . . . requires the specialized knowledge of an expert witness.'" Answer Br. 22 (quoting *Wingster* v. *Head*, 318 Fed. App'x 809, 815 (11th Cir. 2009) (unpublished)). Not only do Appellees draw that supposed requirement from nonbinding authority, but that is not a ground upon which the

District Court based its summary judgment ruling. *See* Doc. 90. Accordingly, at best, Appellees' argument amounts to an alternative ground for affirming the judgment[8] that is better left for the District Court to address on remand in the first instance. *See Turner*, 541 F.3d at 1086; *Roofing & Sheet Metal Servs., Inc.*, 689 F.2d at 990; *Hulsey*, 367 F.3d at 1243-44.

At any rate, even if this Court were to address this alternative argument, it is mistaken. Mr. Harris is a *pro se*, indigent plaintiff bereft of the knowledge or resources to retain an expert or place expert testimony in the record; he cannot possibly be expected to prove expert causation on his own. And that is not for lack of trying. Three times he requested court-appointed counsel to assist him. Docs. 4, 47, 54. In two of his motions, Mr. Harris pointed out the potential need for expert testimony. Doc. 4 at 2 ("it will probably be necessary to present expert medical witness [*sic*] or to cross-examine medical witnesses called by the de-

[8] For that reason, Mr. Harris did not need to address this alternative argument in his appellant's brief. *See Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) ("When an appellant fails to challenge properly on appeal one of the grounds *on which the district court based its judgment*, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed." (emphasis added)).

fendants"); 47 at 2 ("[w]ill expert testimony be needed"). Each time, the District Court deferred or denied the motion as premature (Doc. 7 at 5) or for lack of "exceptional circumstances" (Docs. 48 at 1-2; 57 at 1).

If expert medical testimony were required and the District Court was not inclined to appoint counsel, the District Court should have appointed an impartial expert witness under Federal Rule of Evidence 706(a). *See Steele* v. *Shah*, 87 F.3d 1266, 1271 (11th Cir. 1996) (finding expert opinion "might be important to the finder of fact" in a deliberate indifference case, and the plaintiff's indigent status "could provide further reason to appoint an expert to avoid a wholly one-sided presentation of opinions"); *Gorton* v. *Todd*, 793 F. Supp. 2d 1171, 1185 (E.D. Cal. 2011) ("courts should consider *sua sponte* whether an expert witness would promote accurate factfinding at any stage of litigation where evidence evaluated"). On remand, the District Court should consider the necessity for expert medical testimony and exercise its discretion whether to appoint such an expert. *See Steele*, 87 F.3d at 1271 (vacating district court's refusal to appoint expert, which provided "no explanation," because exercise of discretion requires a "reasoned ruling").

CONCLUSION

The Court should vacate the judgment in favor of Dr. Neilds and Mr. Bunting and remand for further proceedings, including a jury trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with Federal Rule of Appellate Procedure 32(a)(7)(B)'s type-volume requirement. As determined by Microsoft Word 2010's word-count function, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, this brief contains 3,664 words.

2. This brief further complies with Federal Rule of Appellate Procedure 32(a)(5)'s typeface requirements and with Federal Rule of Appellate Procedure 32(a)(6)'s type-style requirements. Its text has been prepared in a proportionally spaced serif typeface in roman style using Microsoft Word 2010's 14-point Century font.

May 26, 2017

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 26th day of May, 2017, to:

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I FURTHER CERTIFY that I served a true and correct copy of the foregoing brief via CM/ECF on this 26th day of May, 2017, to:

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May 26, 2017

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