No. 12-13694-B

# IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOLIERE DIMANCHE, JR.,

*Plaintiff-Appellant*,

v.

JERRY BROWN *et al.*,

*Defendants-Appellants*.

On Appeal from the United States District Court
for the Northern District of Florida, Tallahassee Division
Case No. 4:11-cv-533-SPM-CAS, Hon. Stephan P. Mickle

## ADDITIONAL BRIEF

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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.

1. Atkins, Assistant Warden C. – Defendant-Appellee;
2. Barton, Captain J.S. – Defendant-Appellee;
3. Bennett, Sergeant A.C. – Defendant-Appellee;
4. Bondi, Pamela Jo – Attorney General of Florida;
5. Brown, Assistant Warden W. – Defendant-Appellee;
6. Brown, Captain Jerry – Defendant-Appellee;
7. Burns, P.A. – Appellate counsel for Plaintiff-Appellant Moliere Dimanche, Jr.;
8. Burns, Thomas A. – Appellate counsel for Plaintiff-Appellant Moliere Dimanche, Jr.;
9. Clark, Sergeant Matthew – Defendant-Appellee;
10. Cook, Classification Officer B.W. – Defendant-Appellee;
11. Crews, Secretary of the Florida Department of Corrections Michael D. – Defendant-Appellee;
12. Dimanche, Jr., Moliere – Plaintiff-Appellant;
13. Johnson, Daniel A. –Assistant Attorney General;

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14. Jordan, Officer D. – Defendant-Appellee;
15. Leroy, Nurse – Defendant-Appellee;
16. McDonough, Anne – Assistant Attorney General;
17. Mickle, Hon. Stephan P. – Senior United States District Judge;
18. Peddie, Sergeant Chad– Defendant-Appellee;
19. Smith, Inspector R. – Defendant-Appellee;
20. Solano, M. – Defendant-Appellee;
21. Stampelos, Hon. Charles A. – United States Magistrate Judge;
22. Thomas, Officer Z. – Defendant-Appellee;
23. Troemper, Officer J.W. – Defendant-Appellee;
24. Whitfield, Officer D. – Defendant-Appellee;
25. Yaney, Officer – Defendant-Appellee.

October 10, 2013

/s/ Thomas Burns
Thomas A. Burns

## STATEMENT REGARDING ORAL ARGUMENT

This Addendum Five appeal is already classed for oral argument.

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## TABLE OF ABBREVIATIONS

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|---|---|
| PLRA | Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.* |
| The Guards | Defendants-Appellees Assistant Warden C. Atkins, Captain J.S. Barton, Sergeant A.C. Bennett, Assistant Warden W. Brown, Captain Jerry Brown, Sergeant Matthew Clark, Classification Officer B.W. Cook, Secretary of the Florida Department of Corrections Michael D. Crews, Officer D. Jordan, Nurse Leroy, Sergeant Chad Peddie, Inspector R. Smith, M. Solano, Officer Z. Thomas, Officer J.W. Troemper, Officer D. Whitfield, Officer Yaney. |

## STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This is a direct appeal of a final judgment. The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3) because the Amended Complaint raised federal constitutional claims pursuant to 42 U.S.C. § 1983. Doc. 8 at 16. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the District Court entered a final judgment (Doc. 84), which Dimanche timely appealed (Doc. 85) by virtue of the prisoner "mailbox rule." *See* Fed. R. App. P. 4(c)(1); 11th Cir. R. 4 I.O.P. The notice of appeal did not designate any order, but there is no ambiguity: Dimanche intended to appeal the District Court's Order (Doc. 83) adopting the Magistrate Judge's Report And Recommendation (Doc. 81). *See Becker* v. *Montgomery*, 532 U.S. 757, 767, 121 S. Ct. 1801, 1807-08 (2001) ("imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court").

## STATEMENT OF THE ISSUES

1. Did Dimanche's grievance of reprisal or grievance of a sensitive nature filed directly with the Secretary of the Florida Department of Corrections exhaust his administrative remedies?

2. If not, was dismissal for failure to exhaust administrative remedies contrary to this Court's holding in *Turner* v. *Burnside*, 541 F.3d 1077 (11th Cir. 2008), that threats of substantial retaliation against inmates for lodging grievances in good faith make administrative remedies "unavailable," and thus lift the exhaustion requirement?

3. Was *sua sponte* dismissal for failure to state a claim wrong?

## STATEMENT OF THE CASE

### *Course Of Proceedings*

In this prisoner litigation, the District Court entered an Order (Doc. 83) that overruled Dimanche's Objection To Recommendation (Doc. 82) and adopted the Magistrate Judge's Recommendation And Report (Doc. 81) that the Amended Complaint (Doc. 8) should be dismissed for failure to exhaust all available administrative remedies.

### *Statement Of Facts*

#### A. The Florida Department Of Corrections' Requirements For Direct Grievances

"[G]rievances of reprisals, or grievances of a sensitive nature may be filed directly with the Office of the Secretary." Fla. Admin. Code § 33-103.007(6)(a). "The inmate shall state at the beginning of Part A of Form DC1-303 that the grievance concerns either . . . a grievance of a

reprisal, or a grievance of a sensitive nature." *Id.* § 33-103.007(6)(a)(1). "The inmate must clearly state the reason for not initially bringing the complaint to the attention of institutional staff and by-passing the informal and formal grievance steps of the institution or facility . . . ." *Id.* § 33-103.007(6)(a)(2).

### B. The Amended Complaint

In an eloquent Amended Complaint, Dimanche alleged numerous prison officials ("Defendants-Appellees" or "the Guards") conspired to isolate and gas him with potentially lethal chemicals in retaliation for his prior filing of grievances. Doc. 8 at 6-11. Specifically, Dimanche alleged: "On July 3rd, the Plaintiff Moliere Dimanche Jr. was unlawfully gassed with an overwhelming amount of the chemical irritant agent Orthochlorobenzylidene Malononitrile, (or CS for short), and was nearly killed by Department of Corrections staff members in retaliation for the Plaintiff's good faith use of the inmate grievance process while the Plaintiff was in confinement, at Liberty C.I." Doc. 8 at 6, ¶ 1.

Dimanche explained how the Guards isolated him during his confinement and staged several minor disturbances for confinement surveillance (which does not record audio) to make it look like Dimanche

was being disruptive. Doc. 8 at 6-8, ¶¶ 2-6. Captain J.S. Barton and Officer Yaney came to Dimanche's cell with a video camera that was not yet turned on. Doc. 8 at 8, ¶ 7. Captain Barton then "explained to the Plaintiff, off the record, that the Plaintiff was about to be gassed for writing grievances." Doc. 8 at 8, ¶ 7. Captain Barton "further explained that every grievance the Plaintiff filed would equate to another gassing until Captain Barton could have the Plaintiff 'C.M.'d,' which is to have the Plaintiff committed to a Close Management facility, and further advised the Plaintiff that the Plaintiff would be 'gassed to death' on C.M. before the Plaintiff 'disappears.'" Doc. 8 at 8, ¶ 7. Officer Yaney then video recorded Dimanche "'at ease.'" Doc. 8 at 10, ¶ 9. "The video will show the Plaintiff praying." Doc. 8 at 9, ¶ 7.

Dimanche explained that the Florida Administrative Code contains a loophole by which guards may gas inmates without a recording camera if the inmate "allegedly ceases disruptive behavior for the camera, but becomes disruptive again after the camera has been put away." Doc. 8 at 9, ¶ 8. After the guards complied with this prerequisite, Captain Barton then ordered Sergeant Clark "to gas the Plaintiff by stating 'Gas that juice,' to Sergeant Clark." Doc. 8 at 9, ¶ 8.

Instead of using a 3-4 ounce dispenser of pepper spray applied in three one-second bursts, Sergeant Clark "pulled out an enormous can about the size of a tea kettle" "full of the more potent chemical irritant agent Orthochlorobenzylidene Malononitrile, or CS for short which is more dangerous than" pepper spray. Doc. 8 at 9, ¶ 9. "CS is an irritant agent as opposed to the simple inflammatory agent of pepper spray and is deadly when applied in a careless, reckless and unwarranted quantity." Doc. 8 at 9-10, ¶ 9. Moreover, CS "is meant to quell riots and groups of disorderly inmates and is prohibited for indoor use." Doc. 8 at 10, ¶ 9. Sergeant Clark "applied three direct bursts to the Plaintiff, each burst longer than five seconds." Doc. 8 at 10, ¶ 9. Given the "poorly ventilated cell" in which he was gassed, Dimanche "attempted to get some oxygen by desperately putting his head in the toilet and began repeatedly flushing for suction before he passed out." Doc. 8 at 10, ¶ 10.

After he was gassed, Dimanche alleged he received deliberately indifferent medical care and that the Guards failed to report his abuse, as they were required to do. Doc. 8 at 10-11, ¶¶ 10-12. Moreover, Dimanche described the burning he experienced as a result of his gassing, which repeatedly forced him, contrary to human decency and basic hy-

giene, to "splash[] toilet water all over his naked body" and "in his eyes, which he could not open at times due to the spontaneous burning." Doc. 8 at 11, ¶¶ 13-14. Moreover, Sergeant Clark then "file[d] a false disciplinary report on the Plaintiff for 'Participating in a Minor Disturbance' and the Plaintiff was sentenced to 30 more agonizing days in confinement for something he did not do." Doc. 8 at 11-12, ¶ 15. After Dimanche was released from confinement, he "was so terrified of the staff members at Liberty C.I. that he did not even inform his family of the abuse at visitation." Doc. 8 at 12, ¶ 16.

Six months later in January 2011, Dimanche was transferred to Quincy Annex, a separate facility overseen by Liberty C.I. Doc. 8 at 12, ¶ 16. "As he was at a facility away from most of the defendants, the Plaintiff felt safe enough to finally do something about the abuse." Doc. 8 at 12, ¶ 16. Among other things, Dimanche "wrote a grievance of reprisal, put it in a sealed envelope and filed the grievance of reprisal with the Office of the Secretary of the Department of Corrections and explained how he was abused and retaliated against for his good faith use of the grievance process." Doc. 8 at 12, ¶ 16.

The Secretary did not respond to that grievance; instead, "M. Solano was the respondent." Doc. 8 at 12, ¶ 17. M. Solano "works at this institution as she oversees a program and Quincy Annex and works among the staff members and is therefore a conflicting interest." Doc. 8 at 12, ¶ 17. Moreover, even though Dimanche mailed his grievance of reprisal in a sealed envelope through the U.S. Postal Service, "M. Solano returned the grievance through the Institutional Mail channel without using an envelope," "which exposed the Plaintiff to more potential abuse because he used the grievance process again." Doc. 8 at 12-13, ¶ 17. "M. Solano gave the Plaintiff 15 days from the date of her response to report this abuse to the inspector, but due to M. Solano's careless and irresponsible return of the grievance and response, it was not delivered to the Plaintiff until well after the 15 days had expired." Doc. 8 at 13, ¶ 18. "Ironically, before the Plaintiff received the grievance and response from M. Solano, he was transferred back to Liberty C.I. for reasons unknown," perhaps "at the order of M. Solano." Doc. 8 at 12, ¶ 17.

Shortly after Dimanche's return to Liberty C.I., "he was sent to confinement but never received a disciplinary report." Doc. 8 at 13,

¶ 19. Assistant Warden W. Brown and Inspector R. Smith both visited Dimanche in confinement and threatened him to stop pursuing his prior abuse any further lest he be kept "in confinement 'until Christmas'" or "spend at least 'six months in confinement under investigation.'" Doc. 8 at 13-14, ¶ 19. Similarly, Classification Officer B.W. Cook and Assistant Warden C. Atkins also threatened Dimanche to stop writing grievances lest he "be 'C.M.'d' for something 'major.'" Doc. 8 at 14, ¶ 20.

In his Statement Of Claims, Dimanche expressly stated federal constitutional claims of cruel and unusual punishment, due process, and First Amendment retaliation. As remedies, Dimanche sought installation of surveillance "equipped with audio recording," that "each cell in confinement be individually monitored," that the District Court "denounce the actions of the defendants as criminal and recommend that a criminal investigation be initiated," that injunctions be issued against each defendant, and that $100,000 in punitive damages be awarded against each defendant totaling $1.6 million. Doc. 8 at 16.

### C. The Direct Grievance

Before filing the Amended Complaint, Dimanche had previously attached to the original Complaint the grievance of reprisal or grievance

of a sensitive nature he filed directly with the Secretary. That direct grievance explained:

> I am in fear for my life here at Quincy Annex and at Liberty C.I. On July 3rd, 2010 I was gassed in confinement for grievances that I wrote. I had already been in confinement for 60 days and I was supposed to be released the day before along with several other inmates that came to confinement on May 2nd, 2010 just like me and had been in confinement for 60 days such as Travis Evans, Fredrick McKinney, and Shawn Zapata. But, as my gassing was planned, the confinement officers called the colonel who told them to hold me until I was gassed. After I was gassed I was served a false D.R. for Participating in a Minor Disturbance and Captain Barton promised me that I would be sent to C.M. and gassed to death if I wrote another grievance. Out of fear for my life I plead No Contest to the D.R., did more time in confinement for it, and remained silent until now. I didn't even tell my family about it at visitation.
>
> After confinement I was transferred to Quincy Annex and I recently had a situation with Officer Bryant when my mattress and sheets were taken from me and I had to sleep on steel. I decided to grieve the situation even though it was a gamble of my safety. I was consulted by the major, who said that he would properly resolve the situation and today I was served a false D.R. from Officer Bryant for not making my bed on the day of the incident. While I was there, the officer that served me the D.R. reminded me what happened the last time I wrote grievances and warned me not to lose my life over something so stupid. Now, I fear that my next mistake will get me killed here.
>
> I am requesting to be removed from this Institution completely and moved closer to my family in Orlando. This false D.R. will stop me from putting in my good adjustment transfer to C.F.R.C. in Orlando by my family. It is only a

> matter of time before I am set up for another false D.R. and I am sent to C.M. to be gassed to death. Please remove me from this institution, both Quincy Annex and Liberty C.I.[1]

Doc. 1 at 15. In the lower right hand corner of the grievance, in large letters, Dimanche wrote "Reprisal for grievances wrote." Doc. 1 at 15.

The Secretary did not respond to this direct grievance; instead, it was "returned without action" for supposed noncompliance with Florida Administrative Code § 33-103. Doc. 1 at 14.

### D. The Motion To Dismiss For Failure To Exhaust Remedies

The Guards filed a Motion To Dismiss For Failure To Exhaust Remedies (Doc. 74). This Motion argued Dimanche's grievance was not a grievance of reprisal or a grievance of a sensitive nature because (1) the "nature of Plaintiff's claims" "would not qualify for a direct grievance," and (2) Dimanche "did not state at the beginning of Part A of Form DC1-303 that the grievance concerned either an emergency, or is a grievance of a reprisal, or a grievance of a sensitive nature, and did not clearly state the reason for not initially bringing the complaint to the attention of institutional staff and by-passing the informal and formal grievance steps of the institution or facility." Doc. 74 at 12. The Mo-

[1] Counsel has broken Dimanche's grievance of reprisal into several paragraphs to make it more readable.

tion provided no further explanation for these general assertions other than to cite two declarations. Doc 74 at 12.

The first declaration conceded that although Dimanche filed 12 formal grievances (which are not part of the record on appeal) about either the Guards or the July 3, 2010 incident, all 12 were filed after he was transferred to Madison C.I., not while he was housed at Liberty C.I. or Quincy Annex. Doc. 74-1 at 2, ¶ 5. The second declaration contained uninformative, conclusory averments and pure legal conclusions (which parroted the language of Florida Administrative Code § 33-103.007(6)(a)(1)-(2), and which the Motion To Dismiss had itself also parroted) that Dimanche had not complied with administrative exhaustion requirements:

> Mr. Dimanche could not skip the institutional filing requirements in this case, because [the direct grievance] was not a direct grievance under F.A.C. § 33-103.007(6). The nature of Mr. Dimanche's claims in [the direct grievance] would not qualify for a direct grievance under F.A.C. § 33-103.007(6). Moreover, Mr. Dimanche did not state at the beginning of Part A of Form DC1-303 that the grievance concerned either an emergency, or is a grievance of a reprisal, or a grievance of a sensitive nature, and did not clearly state the reason for not initially bringing the complaint to the attention of institutional staff and by-passing the informal and formal grievance steps of the institution or facility.

Doc. 74-1 at 6-7, ¶¶ 8-12. Aside from these unhelpful, conclusory assertions and pure legal conclusions, nowhere did the Guards provide any legal analysis explaining why Dimanche's direct grievance did not qualify as a grievance of reprisal or a grievance of a sensitive nature.

Dimanche filed a Reply To Defendant's Motion To Dismiss. Doc. 77. Dimanche argued his direct grievance qualified as a grievance of reprisal and a grievance of a sensitive nature because it stated he feared for his life due to the reprisal the Guards had taken against him for filing previous grievances at Liberty C.I. and Quincy Annex. Doc. 77 at 2.

### E. The Report And Recommendation

The Magistrate Judge's Report And Recommendation (Doc. 81) recommended dismissal of the Amended Complaint (Doc. 8) for failure to exhaust administrative remedies for three primary reasons.

First, the Magistrate Judge asserted Dimanche could not satisfy the first prong of *Turner* v. *Burnside*, 541 F.3d 1077 (11th Cir. 2008), because "the fact that Plaintiff filed 12 grievances indicates that Plaintiff was not so threatened as he initially claimed." Doc. 81 at 8. The Magistrate Judge paid no heed to the fact that even the Guards had conceded that Dimanche had filed all 12 of these grievances after he

had been transferred from Liberty C.I. and Quincy Annex to Madison C.I. *See* Doc. 81 at 8; Doc. 74-1 at 2, ¶ 5.

Second, the Magistrate Judge stated "Plaintiff did not identify" the grievance of reprisal "as a direct grievance" or "present any reasons for not initially bringing the complaint to the attention of institutional staff." Doc. 81 at 9. Rather, "[c]ontrary to Plaintiff's argument, he did not indicate anywhere on the form that it was a direct grievance" and "did not specifically identify the grievance as one of either a reprisal, or an emergency, or of a sensitive nature." Doc. 81 at 9. In these regards, the Magistrate Judge did not explain why it was inadequate for the grievance of reprisal to describe the Guards' reprisal in the second sentence that he "was gassed in confinement for grievances that I wrote," to repeatedly explain throughout the grievance's body that he was filing the grievance directly with the Secretary because the staff of Liberty C.I. and Quincy Annex caused him to fear for his life, and to clarify in the lower right hand corner in large letters that the grievance was for "Reprisal for grievances wrote." Doc. 1 at 15. Instead, the Magistrate Judge enigmatically stated, "Plaintiff cannot expect prison officials to read his mind." Doc. 81 at 9.

Third, the Magistrate Judge contended it did not matter that the grievance was returned to Dimanche without action after the 15-day deadline had expired because he "has not clearly stated when he received it" and "does not explain why he could not have requested additional time in which to pursue administrative remedies if he had in fact received it beyond the time period." Doc. 81 at 9-10. The Magistrate Judge made no mention of the fact that this Court had rejected precisely this extension-of-time argument in *Turner*.

### F. The Objection To Recommendation

Dimanche filed an Objection To Recommendation (Doc. 82) that raised two objections. First, Dimanche objected that, as the Guards had already conceded, all 12 formal grievances were filed after Dimanche was transferred to a third prison facility called Madison C.I., not while Dimanche was still housed at Liberty C.I. or Quincy Annex. Doc. 82 at 1. Second, Dimanche objected that he was not "afforded a fair opportunity to re-file the grievance because of Defendant Solano's mishandling of the grievance, and a response to this allegation should be required of the Defendant." Doc. 82 at 1.

### G. The Dismissal Order, Entry Of Judgment, And Notice Of Appeal

The District Court entered an Order (Doc. 83) that overruled Dimanche's Objection To Recommendation (Doc. 82) and adopted the Report And Recommendation (Doc. 81). In particular, the District Court stated the Amended Complaint was being "dismissed for failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997(e) and for failure to state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)." Doc. 83 at 2. The District Court did not explain how it could dismiss a complaint for failure to state a claim when it had already survived the PLRA screening process, and its allegations' sufficiency had not yet been briefed. *See* Doc. 83.

## STANDARD OF REVIEW

This Court reviews a dismissal for failure to exhaust all available administrative remedies de novo. *Alexander* v. *Hawk*, 159 F.3d 1321, 1323 (11th Cir. 1998).

## SUMMARY OF THE ARGUMENT

The District Court erred when it dismissed the Amended Complaint for failure to exhaust all available administrative remedies for two principal reasons.

First, Dimanche exhausted all available administrative remedies when he filed a grievance of reprisal or grievance of a sensitive nature directly with the Secretary. *See* Argument I. Dimanche's grievance satisfied both procedural requirements for such direct grievances.

It satisfied the first requirement because it stated at the beginning of Part A that it was a grievance of reprisal or a grievance of a sensitive nature when the second sentence, starting on the first line, stated, "On July 3rd, 2010 I was gassed in confinement for grievances that I wrote." Doc. 1 at 15. Moreover, it repeatedly explained how Dimanche feared for his life from staff at Quincy Annex and Liberty C.I. Lest there was any lingering confusion, the direct grievance also stated in the lower right hand corner "Reprisal for grievances wrote." Doc. 1 at 15.

It satisfied the second requirement because it clearly stated numerous reasons for not initially bringing the complaint to the attention of institutional staff and bypassing the informal and formal grievance steps of the institution or facility. Dimanche explained the guards' history of retaliation against him at both Liberty C.I. and Quincy Annex and stated, "Now, I fear that my next mistake will get me killed here." Doc. 1 at 15. Dimanche also explained more bluntly why only the Secre-

tary, and not institutional staff, could solve his direct grievance: "It is only a matter of time before I am set up for another false D.R. and I am sent to C.M. to be gassed to death." Doc. 1 at 15.

The fact that the prison returned Dimanche's direct grievance without action is beside the point, because there is no requirement that an inmate grieve a breakdown in the grievance process, and prison officials' failure to respond to a properly filed grievance makes remedies "unavailable" and therefore excuses a failure to exhaust.

Second, even if the direct grievance to the Secretary were not a proper grievance of reprisal or grievance of a sensitive nature, Dimanche still exhausted all "available" administrative remedies. *See* Argument II. Under *Turner* v. *Burnside*, 541 F.3d 1077 (11th Cir. 2008), Dimanche was required to exhaust only "available" administrative remedies. A "prison official's serious threats of substantial retaliation against an inmate for lodging in good faith a grievance make the administrative remedy 'unavailable,' and thus lift the exhaustion requirement." *Id.* at 1085.

Here, Dimanche met both of *Turner*'s requirements because numerous threats of retaliation (1) "actually did deter [him] from lodging a

grievance," and (2) also "would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance." *Id.* The District Court mistakenly concluded Dimanche was not actually deterred because he filed 12 formal grievances (which are not part of the record on appeal and may have been about entirely different issues). But what the District Court failed to recognize is this: Dimanche filed these grievances only after he was transferred to a third prison facility called Madison C.I., not while he was previously housed at Liberty C.I. or Quincy Annex. As such, Dimanche's administrative remedies remained "unavailable" so long as he was housed in Liberty C.I. and Quincy Annex. The District Court's contrary ruling was error.

Accordingly, this Court must reverse the dismissal and remand for further proceedings.

## ARGUMENT AND CITATIONS OF AUTHORITY

### I. DIMANCHE'S DIRECT GRIEVANCE EXHAUSTED ALL AVAILABLE ADMINISTRATIVE REMEDIES

Dimanche exhausted all available administrative remedies when he filed his grievance of reprisal or grievance of a sensitive nature directly with the Secretary.

### A. The Prison Litigation Reform Act Requires Prisoners To Exhaust All Available Administrative Remedies Before Filing An Action

The Prison Litigation Reform Act ("PLRA") provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Accordingly, Dimanche was required to exhaust all "administrative remedies as are available." *Id.*

Given the PLRA's language, the "judicially created futility and inadequacy doctrines do not survive the PLRA's mandatory exhaustion requirement." *Alexander* v. *Hawk*, 159 F.3d 1321, 1328 (11th Cir. 1998). Rather, administrative exhaustion requires "proper exhaustion." *Woodford* v. *Ngo*, 548 U.S. 81, 93, 126 S. Ct. 2378, 2387 (2006). Nevertheless, defendants always "bear the burden of proving that the plaintiff has failed to exhaust his available administrative remedies." *Turner* v. *Burnside*, 541 F.3d 1077, 1082-83 (11th Cir. 2008).

### B. Florida Administrative Code § 33-103.007(6)(a) Imposes Only Two Procedural Requirements For Grievances Of Reprisal Or Grievances Of A Sensitive Nature

Ordinarily, inmates are required to file informal or formal grievances and then exhaust their appeals before filings a lawsuit. Fla. Admin. Code § 33-103.005-.006; *id.* § 33-103.007(1)-(5). Inmates may, however, bypass informal and formal grievances if they file "grievances of reprisals" or "grievances of a sensitive nature" "directly with the Office of the Secretary using the Request for Administrative Remedy or Appeal, Form DC1-303." *Id.* § 33-103.007(6)(a).[2]

There are only two procedural requirements for filing a grievance of reprisal or a grievance of a sensitive nature directly with the Secretary. First, the inmate "shall state at the beginning of Part A of Form DC1-303 that the grievance . . . is a grievance of a reprisal, or a grievance of a sensitive nature." *Id.* § 33-103.007(6)(a)(1). Second, the inmate "must clearly state the reason for not initially bringing the complaint to the attention of institutional staff and by-passing the informal and for-

[2] After the events in this case, Florida Administrative Code § 33-103.007(6)(a) was amended on November 7, 2012 to eliminate "grievances of a sensitive nature" from the list of permissible direct grievances to the Secretary.

mal grievance steps of the institution or facility." *Id.* § 33-103.007(6)(a)(2).

In both of these regards, the Florida Administrative Code imposes no requirement that inmates must incant any magic words that have talismanic significance. Rather, "[t]he law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman, and every slip was fatal." *Wood* v. *Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.).

### C. Dimanche's Direct Grievance Was A Grievance Of Reprisal Or A Grievance Of A Sensitive Nature, And It Exhausted All Of His Available Administrative Remedies

Dimanche satisfied both of these procedural requirements when he filed his grievance of reprisal or grievance of a sensitive nature directly with the Secretary.

First, Dimanche "state[d] at the beginning of Part A of Form DC1-303 that the grievance . . . is a grievance of a reprisal, or a grievance of a sensitive nature." Fla. Admin. Code § 33-103.007(6)(a)(1). In the first sentence, Dimanche stated, "I am in fear for my life here at Quincy Annex and at Liberty C.I." Doc. 1 at 15. This qualified Dimanche's grievance as a grievance of a sensitive nature. In the grievance's second sen-

tence, which began on the first line, Dimanche stated, "On July 3rd, 2010 I was gassed in confinement for grievances that I wrote." Doc. 1 at 15. Lest there was any confusion, Dimanche also wrote in large letters in the grievance's lower right hand corner, "Reprisal for grievances wrote." Doc. 1 at 15. This qualified Dimanche's grievance as a grievance of reprisal.

Second, Dimanche "clearly state[d]" numerous "reason[s] for not initially bringing the complaint to the attention of institutional staff and by-passing the informal and formal grievance steps of the institution or facility." Fla. Admin. Code § 33-103.007(6)(a)(2). Throughout the grievance, Dimanche repeatedly explained his prior "gassing was planned," that he was "promised . . . I would be sent to C.M. and gassed to death if I wrote another grievance," that after he filed a grievance "when my mattress and sheets were taken from me and I had to sleep on steel" he in reprisal "was served a false D.R. from Officer Bryant for not making my bed on the day of the incident," that "the officer that served me the D.R. reminded me what happened the last time I wrote grievances and warned me not to lose my life over something so stupid," and that "[i]t is only a matter of time before I am set up for another

false D.R. and I am sent to C.M. to be gassed to death." Doc. 1 at 15. Each of these "reason[s]" "clearly state[d]" why Dimanche could not initially bring the complaint to the attention of institutional staff and instead needed to bypass the informal and formal grievance steps of the institution or facility: institutional staff were taking reprisal against Dimanche for filing grievances.

The fact that Dimanche did not incant any magic words such as "grievance of reprisal" or "grievance of a sensitive nature" or otherwise regurgitate the language of the Florida Administrative Code when clearly stating numerous reasons why he needed to bypass informal and formal grievance steps of Liberty C.I. and Quincy Annex is beside the point. The law outgrew that "primitive stage of formalism" almost a century ago. *Wood*, 118 N.E. at 214. It is the substance of Dimanche's grievance that matters, and that substance indicates that Dimanche's grievance qualified both as a grievance of reprisal and as a grievance of a sensitive nature. And even if this Court were to resurrect that "primitive stage of formalism" and hold magic words were somehow required, Dimanche wrote, in large letters no less, that he was filing the grievance due to "Reprisal for grievances wrote." Doc. 1 at 15.

Finally, the fact that the prison system miscategorized Dimanche's direct grievance as a grievance appeal and returned it without action (Doc. 1 at 14) is beside the point. "Nothing in [the Florida Administrative Code] requires an inmate to grieve a breakdown in the grievance process." *Turner* v. *Burnside*, 541 F.3d 1077, 1083 (11th Cir. 2008). Moreover, when "prison officials [are] responsible for the mishandling of [a] grievance, it cannot be said that [an inmate] failed to exhaust his remedies." *Dole* v. *Chandler*, 438 F.3d 804, 811 (7th Cir. 2006).

In their prior Answer Brief, the Guards devote only one paragraph to this threshold issue whether Dimanche's direct grievance qualified as a grievance of reprisal or grievance of a sensitive nature. Answer Br. at 19-20. As in their Motion To Dismiss (Doc. 74 at 12), the Guards argue Dimanche's grievance did not qualify as a direct grievance. Answer Br. at 19-20. But once again, the Guards merely parrot the language of Florida Administrative Code § 33-103.007(6) and point the Court to a declaration that does the same without providing any real legal analysis. Answer Br. at 19-20. This is unhelpful. The Guards need to come forward with a legal argument rather than a blanket and conclusory assertion.

## II. ALTERNATIVELY, THREATS OF SUBSTANTIAL RETALIATION AGAINST DIMANCHE MADE ADMINISTRATIVE REMEDIES "UNAVAILABLE" AND THUS LIFTED THE EXHAUSTION REQUIREMENT

Dimanche's administrative remedies were rendered "unavailable" when the Guards made threats of substantial retaliation against him for filing grievances and transferred him back to Liberty C.I. Dimanche was therefore excused from the exhaustion requirement under the holding of *Turner* v. *Burnside*, 541 F.3d 1077 (11th Cir. 2008).

### A. Administrative Remedies Are "Unavailable" And Need Not Be Exhausted When Prison Officials Make Threats Of Substantial Retaliation Against Inmates For Lodging Grievances In Good Faith

In *Turner*, this Court held inmates are excused from the exhaustion requirement when "a prison official's serious threats of substantial retaliation against an inmate for lodging in good faith a grievance make the administrative remedy 'unavailable.'" *Id.* at 1085.

*Turner* involved an inmate who sued for cruel and unusual punishment. *Id.* at 1080. He alleged that a prison employee forced him to clean an oven despite his protestation that "it was not safe to do so because the oven was sparking electricity and the floor was wet." *Id.* When the inmate touched the oven, he "received an electrical shock that

knocked him to the ground and permanently damaged his leg." *Id.* "Instead of turning off the power or sympathizing with [the inmate], the supervisor joked about what had happened, called [the inmate] stupid, and filed a disciplinary report against him." *Id.* The inmate then alleged he received deliberately indifferent medical treatment. *Id.*

When the inmate filed a formal grievance, the warden called him to his office, told the inmate "that if I didn't like the way they did things around here he would put my ass in the van with inmate Johnson and transfer me so far south that I would never be able to see my family again till I got out of the Georgia Prison System," tore up the formal grievance in front of him, and stated he "had better not hear of another grievance or lawsuit pertaining to [the inmate] getting shocked." *Id.* at 1081.

*Turner* explained that under the PLRA, a "remedy has to be available before it must be exhausted, and to be 'available' a remedy must be 'capable of use for the accomplishment of [its] purpose.'" *Id.* at 1084. In this regard, *Turner* explained what it means under the PLRA for an administrative remedy to be "available":

> One of the purposes of administrative remedies is to give prisoners a way of attempting to improve prison conditions

> without having to file a lawsuit. That purpose is thwarted if the prisoner is told that lodging a grievance will result in his overall condition becoming worse instead of better. Where cost outweighs benefit a rational decision maker will forego the benefit. When an inmate foregoes administrative remedies because prison officials have made it irrational for him to pursue them, the inmate loses a benefit that Congress intended to bestow on him. The corrections and judicial systems also lose the substantial benefits that administrative remedies were intended to provide them.

*Id.* at 1084-85 (citation omitted).

In other words, "at least some threats disrupt the operation and frustrate the purposes of the administrative remedies process enough that the PLRA's exhaustion requirement does not allow them." *Id.* at 1085. Accordingly, *Turner* concluded its "construction of 'availability'" would be "beneficial because it reduces any incentive that prison officials otherwise might have to use threats to prevent inmates from exhausting their administrative remedies, and it thereby safeguards the benefits of the administrative review process for everyone." *Id.*

Given this construction of "availability," *Turner* adopted the following standard on a going-forward basis:

> [A] prison official's serious threats of substantial retaliation against an inmate for lodging in good faith a grievance make the administrative remedy "unavailable," and thus lift the exhaustion requirement as to the affected parts of the process if both of these conditions are met: (1) the threat actual-

> ly did deter the plaintiff inmate from lodging a grievance or pursuing a particular part of the process; and (2) the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust.

*Id.* Rather than apply that new standard to the inmate's circumstances, *Turner* remanded for the district court to apply it in the first instance. *Id.* at 1086.

### B. Dimanche's Administrative Remedies Were Rendered "Unavailable," And He Was Therefore Excused From The PLRA's Exhaustion Requirement

Dimanche satisfied both the subjective and the objective prong of *Turner*'s holding. As such, his administrative remedies were rendered "unavailable," and he was therefore excused from the PLRA's exhaustion requirement.

#### 1. Dimanche Satisfied *Turner*'s Subjective Prong

Dimanche satisfied *Turner*'s subjective prong because "the threat actually did deter [him] from lodging a grievance or pursuing a particular part of the process." *Id.* at 1085. The Amended Complaint (Doc. 8) and Dimanche's direct grievance (Doc. 1 at 15) referenced numerous implicit and explicit threats. First, the initial life-threatening gas attack was taken in reprisal for his prior filing of grievances. Doc. 8 at 6,

¶ 1. Additionally, after Dimanche was transferred from Quincy Annex back to Liberty C.I., Assistant Warden W. Brown and Inspector R. Smith both visited Dimanche in confinement and threatened him to stop pursing his prior abuse any further lest he be kept "in confinement 'until Christmas'" or "spend at least 'six months in confinement under investigation.'" Doc. 8 at 13-14, ¶ 19. Similarly, Classification Officer B.W. Cook and Assistant Warden C. Atkins also threatened Dimanche to stop writing grievances lest he "be 'C.M.'d' for something 'major.'" Doc. 8 at 14, ¶ 20.

These threats actually did deter Dimanche from lodging a grievance or pursuing a particular part of the process, because he feared for his life, feared for being held in confinement for months at a time, and feared that he might be sent to Close Management for something major. Moreover, the Magistrate Judge and the District Court misconceived the basic facts when they concluded Dimanche was not actually deterred because he happened to have filed 12 formal grievances. *See* Doc. 81 at 9. The Guards themselves conceded that Dimanche did not file these grievances until after he was transferred from Quincy Annex and

Liberty C.I. to Madison C.I., so they are irrelevant to the question whether Dimanche was actually deterred during the time in question.

In their prior Answer Brief, the Guards address in only one generalized sentence why they believe Dimanche did not satisfy *Turner*'s subjective prong: "The District Court's conclusion that Appellant failed to satisfy the first prong of the *Turner* analysis is correct in that Appellant was not deterred from filing grievances." Answer Br. at 24. Again, this general assertion without legal analysis is unhelpful. The Guards, like the Magistrate Judge and the District Court before them, do not adequately take account of the fact that Dimanche did not file any informal or formal grievances until after he was transferred from Liberty C.I. and Quincy Annex (the institutions in question) to Madison C.I. *See* Answer Br. at 24. This shortcoming is why the Guards' argument must fail.

In this regard, the Guards' reliance on *Cox* v. *Grayer*, 2010 U.S. Dist. LEXIS 30753 (N.D. Ga. 2010), is difficult to understand. *See* Answer Br. at 25-26. That case involved an inmate who failed to bypass the local institution by filing a sensitive grievance with Georgia's Regional Director, which presumably is analogous to sending a direct

grievance to the Secretary of the Florida Department of Corrections. Here, however, Dimanche did precisely what the *Cox* plaintiff did not.

Alternatively, the Guards also contend that when his direct grievance was returned, Dimanche should have filed a formal grievance of reprisal with Liberty C.I.'s staff. Answer Br. at 26. If Dimanche had done so, the Guards contend, it "would have been responded to by the Warden or Assistant Warden and would not have been handled by any of the people who allegedly threatened Plaintiff." Answer Br. at 25. But the facts contradict the Guards' argument: it was Liberty C.I.'s Assistant Wardens W. Brown and C. Atkins who threatened Dimanche in the first place with months-long confinement and transfer to Close Management for pursuing his prior abuse. Doc. 8 at 13-14, ¶ 19.

Furthermore, by the point Dimanche's direct grievance was returned, the 15-day deadline by which M. Solano had commanded Dimanche to submit an informal or formal grievance regarding the gas attack had long since passed. Doc. 1 at 14. Indeed, this 15-day deadline had already passed because "due to M. Solano's careless and irresponsible return of the grievance and response, it was not delivered to the Plaintiff until well after the 15 days had expired." Doc. 8 at 13, ¶ 18.

For the first time on appeal, the Guards speculate that Dimanche could have filed untimely grievances, sought extensions, and sought once again to exhaust his administrative remedies. Answer Br. at 27-28. But the *Turner* court rejected precisely this argument: "We reject the defendants' arguments that Turner was required to file an additional grievance or to seek leave to file an out-of-time grievance." 541 F.3d at 1083. Rather, it was not Dimanche's burden to "grieve a breakdown in the grievance process" because inmates are not required to "craft new procedures when prison officials demonstrate . . . that they will refuse to abide by the established ones." *Id.*

Moreover, the Guards' attempt to distinguish *Turner* on the basis that it involved a warden, not assistant wardens or other prison officials, also falls flat. *See* Answer Br. at 24. Under the Florida Administrative Code, Dimanche has no control over whether a formal grievance of reprisal will be read by the Warden, an Assistant Warden, classification staff, or the grievance coordinator. Rather, access to the "locked grievance box" is provided to any "staff person from classification, the grievance coordinator's office, or the assistant warden's office . . . responsible for the key." Fla. Admin. Code § 33-103.006(2)(h).

Finally, it is too late in the day for the Guards to raise their policy arguments that applying *Turner* to Dimanche's situation renders the exhaustion requirement "beyond useless," "gut[s] the PLRA," does not "allow a record beneficial to defendant prison guards and administrators to be created," and will encourage "smart" prisoners to not file grievances. Answer Br. at 28-29. First of all, the *Turner* court carefully considered policy when it concluded its construction of availability would be "beneficial because it reduces any incentive that prison officials otherwise might have to use threats to prevent inmates from exhausting their administrative remedies, and it thereby safeguards the benefits of the administrative review process for everyone." 541 F.3d at 1085. Under the prior-panel-precedent rule, that holding cannot be unsettled without en banc or Supreme Court intervention. *Smith* v. *GTE Corp.*, 236 F.3d 1292, 1302-03 & n.11 (11th Cir. 2001). Relatedly, the Guards also misconceive the basic purposes of administrative exhaustion: it is not to create a record that is "beneficial to prison guards and administrators." Answer Br. at 28. Rather, its primary purposes are "to give prisoners a way of attempting to improve prison conditions without having to file a lawsuit," *Turner*, 541 F.3d at 1084, to "improve[] the

quality of those prisoner suits that are eventually filed," and to create "an administrative record that is helpful to the court," *Woodford* v. *Ngo*, 548 U.S. 81, 95, 126 S. Ct. 2378, 2388 (2006), whether that record is good or bad for prison officials.

### 2. Dimanche Satisfied *Turner*'s Objective Prong

Dimanche also satisfied *Turner*'s objective prong because "the threat is one that would deter a reasonable inmate of ordinary firmness and fortitude from lodging a grievance or pursuing the part of the grievance process that the inmate failed to exhaust." 541 F.3d at 1085.

The Guards threatened Dimanche's life, threatened him with solitary confinement, and threatened him with being sent to a Close Management facility. *See supra* Argument II.B.1. Any one of these threats would have been sufficient to objectively deter an inmate of ordinary firmness and fortitude from pursuing the grievance process.

## III. At Minimum, Dimanche Stated Claims Of Cruel And Unusual Punishment And First Amendment Retaliation

The District Court's *sua sponte* dismissal of the Amended Complaint for failure to state a claim (Doc. 83 at 2) is most curious. Previously, the District Court had recognized Dimanche's "allegations are

generally sufficient to state a claim." Doc. 5 at 2. Specifically, Dimanche alleged the Guards gassed him as punishment, gave him deliberately indifferent medical care, and repeatedly threatened him—all for using the grievance system. At the very least, these allegations suffice to state claims for cruel and unusual punishment and First Amendment retaliation. *Ort* v. *White*, 813 F.2d 318, 324 (11th Cir. 1987) ("it is a violation of the Eighth Amendment for prison officials to use mace or other chemical agents in quantities greater than necessary for the sole purpose of punishment or the infliction of pain"); *Waldrop* v. *Evans*, 871 F.2d 1030, 1035 (11th Cir. 1989); ("grossly incompetent medical care or choice of an easier but less efficacious course of treatment can constitute deliberate indifference"); *Thomas* v. *Evans*, 880 F.2d 1235, 1241 (11th Cir. 1989) (First Amendment "prohibits state officials from retaliating against prisoners for exercising the right of free speech").

## CONCLUSION

For the foregoing reasons, this Court must vacate the Judgment and remand for further proceedings.

October 10, 2013

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 7,250 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.

October 10, 2013

/s/ Thomas Burns
Thomas A. Burns

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing Additional Brief with the Clerk of Court via regular mail on this 10th day of October, 2013, to:

John Ley, Clerk of Court
U.S. COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT
56 Forsyth Street N.W.
Atlanta, GA 30303

I FURTHER CERTIFY that I served a true and correct copy of the foregoing Additional Brief via regular mail on this 10th day of October, 2013, to:

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