No. 12-10431-B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KENNETH FORD,

Plaintiff-Appellant,

v.

MARK HUNTER, Sheriff,
BENNIE COLEMAN, Captain, Jail Administrator,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 3:11-cv-01261-RBD-JBT, Judge Roy B. Dalton, Jr.

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PERSONS

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. Bondi, Pamela J., Attorney General of Florida—Counsel for Defendants-Appellees;

2. Burns, P.A.—Counsel for Plaintiff-Appellant;

3. Burns, Thomas A., Burns, P.A.—Counsel for Plaintiff-Appellant;

4. Coleman, Bennie, Captain, Jail Administrator—Defendant-Appellee;

5. Dalton, Jr., Honorable Roy B.—United States District Judge;

6. Ford, Kenneth—Plaintiff-Appellant;

7. Hunter, Mark, Sheriff—Defendant-Appellee;

8. Toomey, Honorable Joel B.—United States Magistrate Judge.

November 5, 2012

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

This Court appointed counsel to represent Plaintiff-Appellant Kenneth Ford pursuant to its Addendum Five authority and classed this civil appeal for oral argument. This appeal involves a question of first impression and several other novel issues in this Circuit. Ford therefore respectfully asks the Court to grant counsel for Plaintiff-Appellant and Defendants-Appellees 15 minutes each for oral argument.

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TABLE OF ABBREVIATIONS

Add.	Addendum that includes the Motion Of Additional Statement Of Facts filed in this Court on March 23, 2012.
DE__	Docket entry number for document cited from the District Court's record.
PLRA	Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e *et seq.*

STATEMENT OF JURISDICTION

This is a direct appeal from the Middle District of Florida, Orlando Division, of a judgment entered "without prejudice." The District Court sent conflicting finality signals by using the phrase "without prejudice" ambiguously. Nevertheless, the Order Of Dismissal (DE4) and accompanying Judgment (DE5) are final and appealable. The District Court did not enter an interlocutory order dismissing only the Complaint (DE1) "without prejudice" and with leave to amend. Rather, it entered a final order dismissing the entire case "without prejudice," perhaps under a mistaken belief that, despite reaching the merits, it would have no res judicata effect. As such, appellate jurisdiction exists here.

This Court has "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. Ordinarily, a "dismissal without prejudice, which is not appealable, is distinguished from a dismissal with prejudice, which is appealable." *Versa Prods.* v. *Home Depot, USA, Inc.*, 387 F.3d 1325, 1327 (11th Cir. 2004). But sometimes a "dismissal without prejudice can be appealed," so long as it otherwise is "a final order." *Liberty Nat'l Ins. Holding Co.* v. *Charter Co.*, 734 F.2d 545, 553 n.18 (11th Cir. 1984). For instance, a dismissal "without prejudice" can be

"nevertheless 'final'" when the district court "f[inds] the defendants immune from all claims" and "close[s] the case without granting the plaintiff permission to amend or refile." *Samco Global Arms, Inc.* v. *Arita*, 395 F.3d 1212, 1213 n.2 (11th Cir. 2005).

Dismissals "without prejudice" that expressly grant leave to amend are interlocutory and unappealable. Such dismissals "without prejudice to refiling are not 'final' for purposes of appeal," *Grayson* v. *K Mart Corp.*, 79 F.3d 1086, 1094 n.7 (11th Cir. 1996), at least until the time period within which to amend has expired, *Bost* v. *Fed. Express Corp.*, 372 F.3d 1233, 1242 (11th Cir. 2004), because otherwise a litigant would be free to amend his pleading and continue the litigation.

By contrast, dismissals labeled "without prejudice" because they do not reach the merits, and thus lack res judicata effect, can be final and appealable. Occasionally, "dismissal 'without prejudice' refers to the fact that the dismissal is not on the merits, not whether the dismissal is final and appealable." *Grayson*, 79 F.3d at 1094 n.7. That is because dismissal without prejudice permits a new action, assuming the statute of limitations has not run, without regard to res judicata principles. *Hughes* v. *Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003).

In § 1983 prison litigation, district courts typically enter final dismissal orders "without prejudice" to res judicata effect when the claim has a procedural defect. *E.g.*, *id.* For instance, district courts generally dismiss "without prejudice" before reaching the merits when a favorable judgment would necessarily imply the invalidity of a conviction in violation of the rule of *Heck* v. *Humphrey*, 512 U.S. 477, 114 S. Ct. 2364 (1994), *e.g.*, *Hughes*, 350 F.3d at 1161, or when prisoners do not exhaust administrative remedies, *e.g.*, *Bryant* v. *Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008). Res judicata would not bar such claims in subsequent habeas or § 1983 litigation, because their dismissal was not "on the merits." *Hughes*, 350 F.3d at 1161. But once a district court reaches the merits, as with dismissal for failure to state a claim or frivolousness, a dismissal has res judicata effect, and appropriate reasons should be assigned for dismissal with prejudice. *See Harmon* v. *Webster*, 263 Fed. Appx. 844, 845-46 (11th Cir. 2008).[1]

Here, the dismissal's finality is ambiguous because the District Court reached the merits, yet incongruously dismissed "without prejudice." In

[1] Unpublished Eleventh Circuit opinions are "not binding precedent," *Bravo* v. *United States*, 532 F.3d 1154, 1164 n.5 (11th Cir. 2008), but "may be cited as persuasive authority," 11th Cir. R. 36-2.

fact, this ambiguity is much like the paradox in René Magritte's iconic painting, *Ceci n'est pas une pipe*. *See* MICHEL FOUCAULT, THIS IS NOT A PIPE (1983). Specifically, the District Court reached the merits when it dismissed the Complaint for failure to state a claim and frivolousness. DE4 at 5-7. Yet, contrary to the dismissal's basis, the District Court irreconcilably labeled it "without prejudice." Hence, resolution of this finality issue ultimately turns on what the ambiguous phrase "without prejudice" meant here: (1) leave to amend; or (2) no res judicata effect.

On one hand, the District Court indicated three times that the dismissal was merely interlocutory. First, the Order Of Dismissal's conclusion stated the dismissal applied merely to the "Complaint," not the entire case. DE4 at 7. Second, the District Court dismissed Ford's Fourth Amendment claim solely "under the circumstances presented in the Complaint." DE4 at 7. Third, both the Order Of Dismissal and the Judgment stated that the dismissal was "without prejudice," even though by all indications the dismissal appeared to be on the merits. DE4 at 7; DE5 at 1. By process of elimination, these signals suggest Ford might amend his pleading and continue the litigation.

On the other hand, the District Court sent four contrary signals that the dismissal was final. First, the District Court repeatedly stated it was not merely dismissing the Complaint, but rather the entire case. Namely, the Order Of Dismissal twice stated it had "screened Plaintiff's case," not merely the Complaint, and found that its entirety "should be dismissed pursuant to 28 U.S.C. § 1915A." DE4 at 2, 7. The District Court thus ordered the Clerk of Court to "enter judgment accordingly and close this case." DE4 at 7. In turn, the Judgment not only stated that the District Court had dismissed "the case" upon having "heard" the entire "action," but also attached a civil appeals jurisdiction check-list, which suggested it was final. DE5 at 1-2.

Second, the Clerk "closed the case without granting the plaintiff permission to amend or refile," *Arita*, 395 F.3d at 1213 n.2, by entering the Judgment the very next day, before Ford could have received the Order Of Dismissal through the prison mail system and amended.

Third, the District Court implied amendment would be futile. Specifically, the District Court dismissed Ford's library-access claim for lack of actual injury because he conceded he had a public defender. DE4 at 5. Likewise, the District Court rejected Ford's access-to-courts claim as

"frivolous" because the "minor and short-lived" opening of his legal mail led to no "ultimate prejudice or disadvantage." DE4 at 6. These twin decisions suggest no room for amendment.

Finally, had the District Court entered an interlocutory order granting leave to amend, it would have explained to Ford, a layman proceeding *pro se*, precisely what the phrase "without prejudice" meant here. *Cf. Grayson*, 79 F.3d at 1094 n.7 (discussing ambiguity in phrase "without prejudice"). Perhaps the District Court simply made a typographical error. Or perhaps the District Court meant Ford might still pursue his otherwise-never-mentioned Florida Model Jail Standards claim in state court, despite reaching the merits of his other claims. But the District Court never explained when or how Ford might amend, even though this Court has long instructed that district courts "should be particularly careful to ensure" *pro se* litigants' rights "will not be extinguished merely through failure to appreciate the subtleties of modern motion practice." *Griffith* v. *Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985).

"Understandably perplexed" by the District Court's "inconsistent signals" whether the dismissal was final or interlocutory, Ford appealed. *Hoskins* v. *Poelstra*, 320 F.3d 761, 763 (7th Cir. 2003) (Easterbrook, J.).

In these circumstances, "the only safe route is to treat [the dismissal] as final." *Id.* at 763-64. This prophylactic rule is necessary because the "alternative lays a trap for unwary (or even wary) litigants, who may forego appeal in reliance on the 'without prejudice' language only to learn later, and to their sorrow, that the original order was appealable and the time for appellate review has lapsed." *Id.*

Perhaps the District Court should have prevented this jurisdictional odyssey by expressly dismissing Ford's federal claims with prejudice to amendment and for res judicata purposes, and his state claim without prejudice to refiling in state court.[2] In any event, the Order Of Dismissal and Judgment are final, and this Court therefore has jurisdiction.

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[2] To be fair, the District Court is not alone in ambiguously dismissing § 1983 prisoner cases for failure to state a claim under § 1915A "without prejudice." In fact, some district courts apparently do so as a matter of course. *E.g.*, *Wells* v. *Bondi*, 2011 U.S. Dist. LEXIS 101611, at *5 (M.D. Fla. Sept. 7, 2011); *Lehder* v. *Mueller*, 2007 U.S. Dist. LEXIS 98843, at *15 (M.D. Fla. July 17, 2007); *Moores* v. *Erik*, 2005 U.S. Dist. LEXIS 32719, at *10 (M.D. Fla. July 18, 2005). The most likely explanation for this practice is that these district courts have carried over their pre-PLRA practice of dismissing *in forma pauperis* petitions without prejudice under old 28 U.S.C. § 1915(d) into their post-PLRA screening dismissals under new 28 U.S.C. § 1915A. But the two statutory provisions are starkly different. § 1915(d) dismissals for failure to state a claim reached only the *in forma pauperis* petition's merits and therefore had no res judicata effect on the ability to file subsequent paid complaints alleging the same claims. *Denton* v. *Hernandez*, 504 U.S. 25, 34, 112

STATEMENT OF THE ISSUES

1. The Supreme Court has long held that pretrial detainees necessarily retain all constitutional rights enjoyed by convicted prisoners. Several cases, including *Al-Amin* v. *Smith*, 511 F.3d 1317 (11th Cir. 2008), hold that opening a convicted prisoner's incoming privileged and legal mail outside his presence, even absent any other actual injury, violates his First Amendment right to freedom of speech. Does opening a pretrial detainee's incoming privileged and legal mail outside his presence, which then negatively impacts his protected communications with his attorney, violate his First Amendment right to freedom of speech?[3]

2. Unlike access-to-courts claims, Sixth Amendment claims need not establish any actual injury apart from the deprivation itself. Upon learning the prison was opening Ford's privileged and legal mail, his public defender stopped sending him legal records and mail. Did the

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S. Ct. 1728, 1734 (1992). In contrast, § 1915A dismissals for failure to state a claim do reach the claim's merits (except for procedural defects) and therefore do have res judicata effect whether the subsequent complaint is paid or not. *See Harmon*, 263 Fed. Appx. at 845-46. This Court should therefore instruct these district courts they are doing it wrong, this misconception has carried on long enough, and it needs to stop.

[3] The Court framed this issue as "Whether the opening of a pretrial detainee's incoming mail outside of his presence, which then negatively impacts the detainee's protected communications with his attorney, violates the detainee's First Amendment right to freedom of speech."

District Court err when it misconceived Ford's Sixth Amendment claim as an access-to-courts claim that failed for lack of actual injury?

3. The First Amendment prohibits prison officials from retaliating against prisoners for exercising the right of free speech. Ford alleged Captain Coleman threatened him to "stop complaining" about his privileged and legal mail lest he "stop" delivery and "give it to [him] at his convenience." Did the District Court err when it failed to liberally construe the Complaint to state a First Amendment retaliation claim?

4. The *Cohen* exception protects pretrial detainees from investigatory searches ordered by nonprison officials. If given the opportunity, Ford might be able to allege plausibly that the sheriff or prosecutor ordered prison officials to read his privileged and legal mail to bolster their prosecution. Did the District Court err when it dismissed Ford's Fourth Amendment claim without leave to amend?

5. This Court routinely vacates dismissals to permit district courts to address legal issues in the first instance. The District did not address numerous issues identified in this appeal for the first time. At minimum, should this Court vacate the screening dismissal to permit the District Court to address those legal issues in the first instance?

STATEMENT OF THE CASE

The District Court entered a final judgment dismissing the case without leave to amend. This appeal presents a question of first impression whether the First Amendment forbids prisons from opening and reading pretrial detainees' incoming privileged and legal mail outside their presence. Additionally, this appeal presents issues regarding whether Sixth Amendment claims need to establish any actual injury apart from the deprivation itself, the liberal construction of *pro se* allegations regarding a First Amendment retaliation claim, and whether the Fourth Amendment forbids nonprison officials from ordering investigatory searches of pretrial detainees' privileged and legal mail.

A. The *Pro Se* Complaint

As a layman proceeding *pro se*, Plaintiff-Appellant Kenneth Ford claimed the prison repeatedly "opened and read" his "[l]egal mail," then "taped [it] back together and made [it] look like it ha[d] not been tampered with." DE1 at 11. Ford sued Defendants-Appellees Sheriff Mark Hunter and Captain Bennie Coleman, expressly claiming his legal mail rights were violated under the Fourth Amendment and the Florida Model Jail Standards because "proper mail procedures state that mail

will be opened in front of [the] inmate." DE1 at 1, 11. Additionally, Ford claimed he had been deprived of library access. DE1 at 7, 11. The Complaint did not, however, expressly identify any access-to-courts, First Amendment free speech, Sixth Amendment right-to-counsel, or First Amendment retaliation legal theories. *See* DE1.

As remedies, Ford requested that (1) "the Sheriff office or the State Attorney does not use any information they obtain from my legal mail or legal papers against me in the court of law," (2) "the Sheriff to install secure box for legal mail," (3) Ford be "allow[ed] access to the law library," and (4) Defendants-Appellees "pay all filing fees." DE1 at 11. Ford did not say whether he sued defendants in their personal or official capacities. *See* DE1.

In support, Ford stated the factual basis for his claims succinctly. Ford was arrested on June 8, 2009. DE1 at 7. Because Ford was unable to post bail (DE1.1 at 9), he has been held as a pretrial detainee since that time. DE1 at 7. Nine months later, Ford began receiving discovery in his criminal matter. DE1 at 7.

At that time, Ford began requesting access to the prison's law library. DE1 at 7. The prison denied his requests because he already had

a public defender. DE1 at 7. During May 2011, Ford "started writing outside sources" for legal assistance. DE1 at 7. Thereafter, Ford alleged three instances of his privileged and legal mail being opened outside his presence.

On July 8, 2011, Ford received a letter from the Florida Bar. DE1 at 7. The Complaint did not state whether or not it was marked as legal mail. *See* DE1 at 7. Nevertheless, it "had been opened and taped back together" before being "put under [Ford's] door" while he slept. DE1 at 7-8. When Ford "asked about it," an unnamed prison official told him "it was too late to do anything" because Ford "didn't know who put it under the door" and "had no proof that it had been opened." DE1 at 8.

On August 15, 2011, Corporal D. Cole again "came to the door with legal mail." DE1 at 7. Once again, the legal mail "had been opened and taped back together" even though "it was clearly marked legal mail and had the ACLU logo on it." DE1 at 7. Corporal Cole told Ford the mail "was that way when she got it from Mr. Collins." DE1 at 7. When Ford complained, an unnamed prison official initially told him that he "didn't have proof" and "was a trouble maker." DE1 at 9. Thereafter, Ford obtained a witness and filed an informal grievance. DE1 at 7; DE1.1 at 17-

18. Captain Coleman "approved" this grievance and "remind[ed] the staff that legal mail would be opened in front of" Ford. DE1 at 7-8; DE1.1 at 17.

On August 24, 2011, Officer Lents tried, for the third time, to give Ford "legal mail that had been opened and taped back together." DE1 at 9. On this occasion, the "letter was from Ronald N. Toward Attorney at Law and was clearly marked legal mail." DE1 at 9. Once again, Ford obtained a witness and informed Officer Lents that he "needed some kind of documentation to this." DE1 at 9. Officer Lents left, and Sergeant T. Green "came back with the letter, on which he had written that it was opened by mistake and had not been read." DE1 at 9.

When Ford had the temerity to write a "grievance about the mail again," Captain Coleman threatened that if he "didn't stop complaining," he "would stop [Ford's] legal mail and give it to [him] at his convenience." DE1 at 9. Recognizing he "need[ed] [his] legal mail" as a pretrial detainee facing serious criminal charges, including potentially the death penalty, Ford "left the issue alone" rather than risk further retaliation. DE1 at 10.

Almost three months later, Ford wrote Captain Coleman "to see if there was any way to appeal his decisions." DE1 at 10. But Ford was told that he had "exhausted all [his] grievances at the jail." DE1 at 9. To this end, numerous exhibits attached to the Complaint demonstrated Ford's exhaustion of administrative remedies regarding his library-access claims (DE1.1 at 1-16) and his legal-mail claims (DE1.1 at 17-25). Although Ford "saved the three [legal mail] envelope[s] that were opened and taped together," the Complaint did not explain these letters' precise contents. DE1 at 10. Finally, Ford verified the Complaint and its attachments under penalty of perjury. DE1 at 11.

B. The Order Of Dismissal

The District Court screened the Complaint pursuant to 28 U.S.C. § 1915A.[4] DE4. Without granting leave to amend, the District Court *sua sponte* dismissed Ford's claims regarding library access, legal mail, and the Fourth Amendment. DE4 at 5-7. In doing so, the District Court nev-

[4] The District Court was required to screen the Complaint even though Ford paid the full $350 filing fee. 28 U.S.C. § 1915(d) had always required district courts to screen *in forma pauperis* petitions. But the PLRA's revision now requires district courts to screen all prisoner complaints, because it "does not distinguish between *in forma pauperis* plaintiffs and plaintiffs who pay the filing fee." *Thompson* v. *Hicks*, 213 Fed. Appx. 939, 942 (11th Cir. 2007).

er considered whether Ford stated a First Amendment free speech claim, a Sixth Amendment right-to-counsel claim, or a First Amendment retaliation claim. DE4 at 1-7. Moreover, the District Court never mentioned that, despite its *pro se* origin, the Complaint was entitled to liberal construction. *See* DE4.

The District Court found Ford's library-access claim failed to state a claim because it did not show he was deprived of meaningful access to the courts under *Bounds* v. *Smith*, 430 U.S. 817, 97 S. Ct. 1491 (1977). Specifically, the District Court found Ford failed to demonstrate the "constitutional prerequisite" of an "actual injury" per *Lewis* v. *Casey*, 518 U.S. 343, 116 S. Ct. 2174 (1996). In that regard, the District Court explained that *Bounds* required prisons to "'provid[e] prisoners with adequate law libraries or adequate assistance from persons trained in the law,'" but not both. DE4 at 4 (citation omitted). Accordingly, the District Court ruled that, despite Ford's denial of library access, he received meaningful access to the courts because he admitted he had a public defender. DE4 at 5.

The District Court dismissed Ford's legal-mail claims as "frivolous." DE4 at 5. Rather than considering whether Ford had stated a First

Amendment free speech claim, an access-to-courts claim, or a Sixth Amendment right-to-counsel claim, the District Court analyzed Ford's legal-mail claims under a "due process" rubric. *See* DE4 at 6.

In summarizing Ford's legal-mail allegations, the District Court paraphrased, based on its own guesswork rather than ordering a more definite statement of the claim pursuant to Federal Rule of Civil Procedure 12(e), that "[a]pparently" the third letter was "inadvertently" opened outside Ford's presence. DE4 at 6. Ford, however, never alleged that any prison official "inadvertently" opened his legal mail; rather, he alleged his legal mail had been repeatedly "opened and read" outside his presence. DE1 at 11. In any event, having inaccurately paraphrased its own version of the alleged facts and narrowly construed the claim as arising solely under the Due Process Clause, the District Court concluded that due process was "not implicated by a negligent act." DE4 at 6.

Notwithstanding Ford's allegation that Captain Coleman had threatened him to stop filing grievances about his legal mail, the District Court also did not consider whether, liberally construed, the *pro se* Complaint stated a First Amendment retaliation claim. DE1 at 9. Indeed, the District Court never mentioned Captain Coleman's threat.

Then, in one sentence bereft of legal analysis or citation to authority, the District Court ruled it was "not convinced" "under the circumstances presented in the Complaint" that Ford had stated a Fourth Amendment claim. DE4 at 7. The District Court did not consider whether Ford might be able to amend the Complaint consistent with the exception announced in *United States* v. *Cohen*, 796 F.2d 20 (2d Cir. 1986), that nonprison officials had improperly ordered prison officials to open and read Ford's privileged and legal mail for the improper investigatory purpose of bolstering the prosecution.

Finally, the District Court never mentioned Ford's claim under the Florida Model Jail Standards. It is unclear whether the District Court declined to exercise supplemental jurisdiction over it, *see* 28 U.S.C. § 1367(c)(3), or resolved it some other way.

The District Court thus dismissed the entire case without leave to amend (DE4 at 7) and entered the Judgment (DE5) the next day.

C. Appellate Proceedings

Ford timely filed his Notice Of Appeal (DE6). Shortly thereafter, Ford filed in the District Court a Motion For Extension (DE7) and a Motion For Leave To Proceed *In Forma Pauperis* (DE8). The District Court

entered an order granting the extension of time, but denying leave to proceed on appeal *in forma pauperis*. DE9 at 1. Because the District Court felt it had "properly dismissed" the case, it found Ford's appeal was "not taken in good faith." DE9 at 1. Instead, the District Court ordered Ford either to fill out an affidavit of indigency or to pay the $455 appellate filing fee. DE9 at 1-2. Ford subsequently filed an Affidavit Of Indigency (DE10), averring that his prison account had only $300.12.

Meanwhile, Ford filed in this Court a Motion For Court-Appointed Counsel and a Motion Of Additional Statement Of Facts. In the latter Motion, Ford explained that "[b]efore the legal mail situation my public defender was willing to give me cop[ies] of all records in my case, but now that he has become aware of the jail staff opening my legal mail he says that he will not t[ur]n over sensitive records for fear of jail staff rummaging through them to 'quote' him." Add. at 1-2. In support, Ford attached to the Motion a letter from his public defender, which stated he was "not going to turn [mental health records] over to you at the jail because I don't want the cops rummaging through them." Add. at 4. As such, Ford was made to "feel that I am being deprived of my right to

participate in my own defense and to be secure in my legal correspondence." Add. at 2.

Additionally, this Motion provided further factual detail regarding the legal mail incidents, which suggested the prison officials' "claim of them not reading my mail is hard to believe after the inconsistenc[ies] in Corporal Cole's story." Add. at 2. Specifically, Ford questioned Corporal Cole's claim that she received Ford's legal mail already opened from Mr. Collins. Add. at 2. Ford explained her claim was "a little hard to understand" because Corporal Cole gave him the legal mail at 6:00 A.M. on a Monday, but prison mail does not run on Sunday, and Mr. Collins does not work weekends. Add. at 2. Furthermore, even though the prison prepared an incident report documenting this instance, it did not share that report with Ford. Add. at 2.

On April 2, 2012, this Court entered an order informing Ford that the District Court had denied him leave to proceed on appeal *in forma pauperis* and instructing him to file a motion for leave to proceed within 30 days lest his appeal be dismissed without further notice.

On June 1, 2012, Ford filed in the District Court a Motion To Inquire (DE12), in which he requested a status update about his request to pro-

ceed on appeal *in forma pauperis*. On July 5, 2012, Ford filed in this Court another Motion To Inquire, which requested a similar status update. On July 11, 2012, the District Court entered an order granting the Motion To Inquire to the extent of sending Ford a copy of its February 22 Order. DE13 at 1. Further, the District Court informed Ford that $98.08 of the appellate filing fee had been received, leaving a balance of $356.92. DE13 at 1.

On July 31, 2012, this Court entered an order that expressly rejected the District Court's finding that Ford's appeal was frivolous. DE14 at 2. Rather, this Court stated it "now finds that the appeal is not frivolous and GRANTS leave to proceed." DE14 at 2. Additionally, this Court granted both Ford's Motion For Court-Appointed Counsel and his Motion Of Additional Statement Of Facts, which it "construed as a motion to supplement the record on appeal." DE14 at 2.

On September 17, 2012, this Court entered an order appointing undersigned counsel to represent Ford on appeal. The appointment order directed counsel to brief (1) "Whether the opening of a pretrial detainee's incoming mail outside of his presence, which then negatively impacts the detainee's protected communications with his attorney, vio-

lates the detainee's First Amendment right to freedom of speech," and (2) "any other issue counsel wishes to brief."

SUMMARY OF THE ARGUMENT

1. The District Court erred when it failed to consider whether Ford stated a First Amendment free speech right to have his privileged and legal mail opened but not read in his presence. As a pretrial detainee, Ford is presumed innocent of all criminal charges. As such, the Supreme Court has long held that "*[a] fortiori*, pretrial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Bell* v. *Wolfish*, 441 U.S. 520, 545, 99 S. Ct. 1861, 1877 (1979).

In a line of cases stretching almost four decades, including *Al-Amin* v. *Smith*, 511 F.3d 1317 (11th Cir. 2008), this Court held convicted prisoners have a First Amendment free speech right to have their privileged and legal mail opened but not read in their presence. Specifically, "a state prison's 'pattern and practice' of opening attorney mail outside the inmate's presence 'interferes with protected communications, strips those protected communications of their confidentiality, and accordingly

impinges upon the inmate's right to freedom of speech.'" *Id.* at 1334 (citation omitted).

Here, Ford alleged the prison "opened and read" his privileged and legal mail three times outside his presence. Yet contrary to *Bell*, *Al-Amin*, and other cases, the District Court never considered whether Ford—a pretrial detainee who *a fortiori* retains the First Amendment free speech right enjoyed by a convicted prisoner to have privileged and legal mail opened but not read in his presence—stated a First Amendment free speech claim. The District Court therefore erred.

2. Additionally, the District Court erred when it dismissed Ford's Sixth Amendment right-to-counsel claim. Upon learning the prison was opening Ford's privileged and legal mail, his public defender stopped sending him legal records and mail. Ordinarily, this allegation alone would not state an access-to-courts claim, because it does not establish any "actual injury" to his court access. But much like his First Amendment free speech claim, Ford's right-to-counsel claim did not need to establish any actual injury apart from the Sixth Amendment deprivation itself.

3. The District Court also erred when it overlooked Ford's First Amendment retaliation claim. The gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech. When Ford grieved about his legal mail, Captain Coleman threatened him to stop filing grievances lest he stop Ford's legal mail and deliver it only at his convenience. Liberally construed, these allegations state a First Amendment retaliation claim.

4. The District Court should not have dismissed Ford's Fourth Amendment claim without leave to amend. Ordinarily, the Fourth Amendment permits searches motivated by institutional security needs. The *Cohen* exception, however, protects pretrial detainees from investigatory searches ordered by nonprison officials. If given the opportunity, Ford might plausibly allege that the sheriff or prosecutor ordered prison officials to read his privileged and legal mail to bolster the prosecution. As such, the District Court should have granted Ford leave to amend.

5. At minimum, the Court should vacate the judgment so the District Court can analyze all these issues in the first instance.

STANDARD OF REVIEW

This Court reviews screening dismissals pursuant to 28 U.S.C. § 1915A de novo. *Leal* v. *Ga. Dep't of Corrs.*, 254 F.3d 1276, 1278-79 (11th Cir. 2001). In doing so, the Court applies Rule 12(b)(6) standards. *Id.* "*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will, therefore, be liberally construed." *Tannenbaum* v. *United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

ARGUMENT

I. THE DISTRICT COURT OVERLOOKED FORD'S FIRST AMENDMENT FREE SPEECH CLAIM

The District Court disregarded almost four decades of this Court's precedent and the Supreme Court's admonition that pretrial detainees retain at least those rights enjoyed by convicted prisoners when it overlooked Ford's First Amendment free speech claim.

A. Pretrial Detainees Retain At Least Those Rights Enjoyed By Convicted Prisoners

The Supreme Court has long held that pretrial detainees retain at least those rights enjoyed by convicted prisoners.

In *Bell* v. *Wolfish*, the Supreme Court "examine[d] the constitutional rights of pretrial detainees—those persons who have been charged with a crime but who have not yet been tried on the charge." 441 U.S. 520,

523, 99 S. Ct. 1861, 1865 (1979). It was undisputed that to "ensure their presence at trial," the government may "legitimately" incarcerate pre-trial detainees "prior to a determination of their guilt or innocence." *Id.* Nevertheless, "the scope of their rights during this period of confinement prior to trial" was not then established. *Id.* The court of appeals had held that, given the presumption of innocence, due process could not tolerate deprivations that failed a "compelling-necessity standard." *Id.* at 531, 99 S. Ct. at 1870 (punctuation omitted).

The *Bell* Court, however, rejected this test. *Id.* Rather, "under the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." *Id.* at 535, 99 S. Ct. at 1872. As such, "inherent incidents" of pretrial detention include some loss of "freedom of choice and privacy." *Id.* at 537, 99 S. Ct. at 1873. Put otherwise, a "detainee simply does not possess the full range of freedoms of an unincarcerated individual." *Id.* at 546, 99 S. Ct. at 1878.

Nevertheless, this analysis inexorably led to the conclusion that "*[a] fortiori*, pretrial detainees, who have not been convicted of any crimes,

retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." *Id.* at 545, 99 S. Ct. at 1877.

B. The First Amendment Forbids Prisons From Opening Or Reading Convicted Prisoners' Privileged And Legal Mail Outside Their Presence

In an unbroken line of cases stretching back almost four decades, the old Fifth Circuit and this Court have explored the interplay between inmates' First Amendment free speech and access-to-courts rights as they relate to privileged and legal mail. Pertinent here, these cases make clear that convicted prisoners have a First Amendment free speech right that (1) forbids prisons from opening or reading their privileged and legal mail outside their presence, and (2) does not require a showing of any other actual injury.

1. *Taylor* Forbade Prisons From Opening Or Reading Pretrial Detainees' Privileged And Legal Mail Outside Their Presence

In *Taylor* v. *Sterrett*, 532 F.2d 462 (5th Cir. 1976),[5] the old Fifth Circuit held that convicted prisoners and pretrial detainees have (1) an access-to-courts right to have their privileged and legal mail opened but

[5] In *Bonner* v. *City of Prichard*, this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down by close of business on September 30, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

not read in their presence, and (2) an identical First Amendment right when corresponding with government agencies and the press.

Specifically, *Taylor* involved a class of convicted prisoners and pre-trial detainees who sued prison officials to prevent their privileged and legal mail from being censored. *Id.* at 464, 478. After a prior remand, the district court entered an amended permanent injunction that directed the sheriff "not to open or censor mail transmitted between inmates of the jail and the following persons: courts, prosecuting attorneys, probation and parole officers, governmental agencies, lawyers and the press." *Id.* at 464. The amended permanent injunction also contained a caveat that provided that "[i]f . . . there is a reasonable possibility that contraband is included in the mail, it may be opened, but only in the presence of the inmates." *Id.*

On appeal, the prison officials broadly claimed "they may open, inspect, and read all prisoner correspondence." *Id.* at 468. *Taylor*, however, rejected this unqualified contention and affirmed. *Id.* at 484. Casting aside the amended permanent injunction's unnecessary "reasonable possibility" gloss, *Taylor* upheld its remainder as "compelled" by the inmates' access-to-courts and First Amendment free speech rights. *Id.*

at 469. As such, *Taylor* ultimately permits prisons to open inmates' privileged and legal mail in their presence, but not to read it. *Id.* at 475.

In analyzing the access-to-courts right, *Taylor* balanced prisons' interest in institutional security against prisoners' interest in access to courts. *Id.* Specifically, prisoners have a "vital need" to "uninhibited communication with attorneys, courts, prosecuting attorneys, and probation or parole officers." *Id.* As such, "[r]estrictions may not be placed upon the attorney-client relationship which effectively diminish a prisoner's access to the courts." *Id.* at 473. To wit, the "controlling factor is that attorneys or prisoners may fear that a prison employee who reads inmate correspondence will abuse the sensitive information to which they have access." *Id.* at 476. These and other fears unconstitutionally "may diminish an inmate's lawful access to the courts." *Id.* As such, inmates have a "substantial" interest in "unread" privileged and legal mail. *Id.*

In counterbalance to the prisoners' interest, *Taylor* considered the prison's similarly "substantial" interest in prison security. *Id.* at 475. Despite accepting the prison's stated "inten[tion] to read inmate mail only for information affecting jail security," *Taylor* held the "fact that

prison officials are entirely trustworthy is irrelevant." *Id.* at 475-76. Moreover, *Taylor* rejected the prison's contrary security interest in reading privileged and legal mail as merely "hypothetical," because the prison documented only instances of finding contraband in letters, not harmful information. *Id.* at 479. As such, the balance tipped in favor of prisoners' access-to-courts right. *Id.* at 477-78.

Additionally, *Taylor* recognized that the inmates' "right to send and receive mail exists under the First Amendment." *Id.* at 480. But *Taylor* did not explicitly hold the First Amendment protects inmates' correspondence with "identifiable attorneys, prosecuting attorneys, and parole or probation officers." *Id.* at 480. Rather, *Taylor* held the First Amendment protects inmates' correspondence with "government agencies and the press." *Id.* at 478, 480. Despite recognizing the prison's "substantial" interest in security, *Taylor* found the "opening and reading of outgoing mail to government agencies is not significantly related to the advancement of jail security." *Id.* at 480. As such, *Taylor* held that under the First Amendment, the reading or opening of privileged (but not legal) mail outside inmates' presence is "not essential or necessary to the interest of jail security." *Id.*

2. *Guajardo* Reaffirmed *Taylor*'s Access-To-Courts Holdings

The old Fifth Circuit did not revisit *Taylor*'s First Amendment holdings in *Guajardo* v. *Estelle*, 580 F.2d 748 (5th Cir. 1978).[6] Rather, *Guajardo* reaffirmed that *Taylor*'s access-to-courts holdings (1) apply to convicted prisoners and pretrial detainees, and (2) extend to legal and privileged mail.

In *Guajardo*, a class of convicted prisoners challenged the constitutionality of a prison's correspondence rules. *Id.* at 751, 758. Regarding legal mail, the district court entered a permanent injunction that provided in part that "incoming mail would be opened and inspected for contraband in the presence of the inmate," and "outgoing mail was required to be sent uninspected." *Id.* at 757-58.

On cross-appeal, *Guajardo* affirmed this part of the permanent injunction. *Id.* at 758-59. In doing so, *Guajardo* reaffirmed *Taylor*'s holdings that "outgoing mail to licensed attorneys must be sent unopened," and "incoming mail could be opened only to inspect for contraband and in the presence of the inmate recipient." *Id.* at 758. Further, *Guajardo*

[6] *See supra* note 5.

also explained that *Taylor*'s holdings derive from the access-to-courts right, not the First Amendment. *See id.*

In any event, the prison attempted to "distinguish *Taylor* factually on the ground that it involved a jail in which a small population of pre-trial detainees rather than a large population of convicted felons were housed." *Id. Guajardo*, however, rejected this distinction as "not persuasive" because an attorney always remains an "officer of the court" who could be "sanctioned by criminal law as well as professional rules." *Id.*

Additionally, *Guajardo* once again held *Taylor*'s access-to-courts right extends to both legal and privileged mail, because the "same rules that apply to attorneys apply to government agencies and to courts." *Id.* at 759. In sum, *Guajardo* reaffirmed *Taylor*'s access-to-courts holding that prisons must open privileged or legal mail in inmates' presence, regardless whether they are convicted prisoners or pretrial detainees.

3. *Lemon* Held Prisons Cannot Read Convicted Prisoners' Incoming Legal Mail

In *Lemon* v. *Dugger*, 931 F.2d 1465 (11th Cir. 1991), this Court made clear once again that prisons cannot read convicted prisoners' incoming legal mail.

Lemon involved a convicted prisoner who claimed the prison opened his incoming legal mail in his presence, then read it. *Id.* at 1466. Specifically, the prison "opened" the legal mail, "removed the contents," "unfold[ed] it," and "examin[ed] it page-by-page." *Id.* At trial, the prisoner testified that the prison guard "stood in front of his cell and read his mail," whereas the prison guard testified that he "had only 'scanned' the mail" by "'glancing across'" its words. *Id.* The jury, however, "found that the prison officials had actually read [the] legal mail." *Id.* at 1468. The prison appealed, and this Court affirmed. *Id.* at 1466.

At the outset, *Lemon* explained that prisoners have a "legal right" to "receive mail from their counsel uncensored by prison officials." *Id.* at 1467. Although prisons might therefore open such mail in inmates' presence, *Taylor* had "held that it was a violation of an inmate's constitutional rights for the prison officials to read legal mail." *Id. Lemon* rejected the prison's argument that it had probable cause to read the mail as stated in its motion for judgment on the pleadings, because that question was put to the jury. *Id.* at 1468. Moreover, because probable cause was a question of fact, it was harmless error for the district court to deny the prison's second summary judgment motion directed to the

same issue as untimely. *Id.* at 1469. *Lemon* therefore holds that prisons cannot read incoming legal mail.

4. *Al-Amin* Held Convicted Prisoners Have A First Amendment Free Speech Right To Have Legal Mail Opened In Their Presence, Yet Need Not Establish Actual Injury

In *Al-Amin* v. *Smith*, 511 F.3d 1317 (11th Cir. 2008), this Court put to rest any questions about the continued vitality of *Taylor*, *Guajardo*, and *Lemon* in light of the Supreme Court's intervening decisions in *Turner* v. *Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), and *Lewis* v. *Casey*, 518 U.S. 343, 116 S. Ct. 2174 (1996). Ultimately, this Court held that (1) access-to-courts claims fail absent actual injury, (2) convicted prisoners have a distinct First Amendment free speech right to have their legal mail opened in their presence, and (3) such First Amendment claims need not establish any other actual injury.

In *Al-Amin*, a convicted prisoner named Jamil Al-Amin alleged the prison "repeatedly opened his privileged attorney mail outside of his presence." *Id.* at 1320. The district court denied the defendants' summary judgment motion for qualified immunity. *Id.* On appeal, this Court reversed the denial of qualified immunity as to the prisoner's ac-

cess-to-courts claim, but affirmed the denial of qualified immunity as to his First Amendment free speech claim. *Id.*

Jamil's wife, Karima, was a licensed attorney. *Id.* Karima began sending Jamil correspondence marked "legal mail." *Id.* In April 2002, defendant Martin "accidentally" opened one of Karima's letters. *Id.* The prison then asked for a list of his attorneys, but Jamil did not identify Karima at that time. *Id.*

In 2003, a prison official informed Jamil that defendant Martin was opening his legal mail. *Id.* at 1321. Jamil filed a grievance and identified Karima as one of his attorneys. *Id.* Following a grievance appeal and an internal investigation, the prison took action to ensure Jamil's legal mail would not be opened outside his presence again. *Id.*

After the prison's corrective action, defendant Martin averred that any opening of Jamil's legal mail would have been "inadvertently done by the mail room sorter." *Id.* at 1322 & n.16. Nevertheless, Jamil averred the prison subsequently opened thirteen more pieces of his legal mail outside his presence. *Id.* Jamil sued. *Id.* at 1322.

The district court denied the parties' cross-motions for summary judgment because it rejected defendants' qualified immunity conten-

tions and identified material fact issues. *Id.* at 1323. On reconsideration, the district court again rejected defendants' qualified immunity contentions because the complaint "stated claims for violations of his rights to access to the courts and free speech." *Id.* Defendants took an interlocutory appeal from both orders. *Id.*

On appeal, this Court made clear that "the sole question is whether defendants are entitled to qualified immunity on Al-Amin's access-to-courts and free speech claims." *Id.* As such, the first inquiry was whether Jamil's "claims establish any constitutional violations." *Id.* at 1325. In the end, this Court held that Jamil would have stated an access-to-courts claim but for the actual injury requirement, but nevertheless stated a distinct First Amendment free speech claim. *Id.* at 1332.

With respect to Jamil's access-to-courts claim, the defendants argued "the law was not clearly established that opening attorney mail outside an inmate's presence violates his constitutional right to access to the courts." *Id.* at 1325. As such, this Court first had to determine whether *Taylor* and *Guajardo* remained good law after the Supreme Court's intervening decision in *Turner*. *Id.* at 1326. This Court confirmed that

Taylor's and *Guajardo*'s holdings were "not changed by *Turner*" and therefore "remain well-established law in this circuit." *Id.*

Taylor and *Guajardo* held "a prisoner's constitutional right of access to the courts requires that incoming legal mail from his attorneys, properly marked as such, may be opened only in the inmate's presence and only to inspect for contraband." *Id.* at 1325. Indeed, this Court recognized that *Taylor* and *Guajardo* also held that this right of access commands that certain classes of privileged yet nonlegal mail must also be opened in pretrial detainees' and convicted prisoners' presence. *See id.* at 1326 n.19.

But in *Turner*, the Supreme Court subsequently "adopted a more deferential, 'reasonably related' test for determining whether prison practices impermissibly burden inmates' constitutional rights." *Id.* at 1327. Even though *Turner* addressed censorship of only inmate-to-inmate correspondence, the new Fifth Circuit in *Brewer* v. *Wilkinson*, 3 F.3d 816 (5th Cir.1993), "reconsidered *Taylor* and *Guajardo* and rejected their holdings under *Turner*'s 'reasonably related' test." *Al-Amin*, 511 F.3d at 1328. The new Fifth Circuit's ruling was a distinct minority position, however, rejected by the Second, Third, Sixth, Seventh, and

Eighth Circuits. *Id.* at 1329 (collecting cases). Unsurprisingly, then, this Court rejected *Brewer* and harmonized *Turner*'s four-factor test with *Taylor*'s and *Guajardo*'s holdings. *Id.* at 1330-31. Likewise, this Court explained *Lemon*'s holding that inmates have a "constitutional right to receive unread attorney mail" also remained good law. *Id.* at 1331.

In short, this Court concluded *Taylor*, *Guajardo*, and *Lemon* remained well-established law after *Turner* and would have put a reasonable official on notice that "opening properly marked, incoming attorney mail outside the inmate's presence is unlawful and unconstitutional." *Id.* at 1332. As such, Jamil "would be home free on his access-to-courts claim but for the Supreme Court's actual injury decision in *Casey*." *Id.*

In *Casey*, the Supreme Court "clarified that 'actual injury' is a constitutional prerequisite to an inmate's access-to-courts claim." *Id.* at 1332. Specifically, to show actual injury, "'a plaintiff must provide evidence of such deterrence, such as a denial or dismissal of a direct appeal, habeas petition, or civil rights case that results from actions of prison officials.'" *Id.* (citation omitted).

Under the *Casey* test, Jamil established no actual injury other than insufficient conclusory assertions. *Id.* at 1333. Rather, Jamil's affidavit

"does not identify how any legal matters specifically were damaged," and Karima's affidavit "provides no specific cases or claims being pursued, nor any deadlines missed, nor any effect on Al-Amin's legal claims." *Id.* at 1333. As such, this Court reversed the district court's denial of qualified immunity as to Jamil's access-to-courts claim. *Id.*

Nevertheless, this Court affirmed the district court's denial of qualified immunity as to Jamil's First Amendment free speech claim. *Id.* That First Amendment right was "distinct" from his access-to-courts claim and therefore did not need to establish any actual injury. *Id.*

At the outset, this Court had no trouble identifying Jamil's "First Amendment free speech right to communicate with his attorneys by mail, separate and apart from his constitutional right to access to the courts." *Id.* at 1334. The "closer question" was "whether defendants' pattern and practice of opening (but not reading)" Jamil's legal mail outside his presence "sufficiently chill[ed], inhibit[ed], or interfere[d] with Al-Amin's ability to speak, protest, and complain openly to his attorney so as to infringe his right to free speech." *Id.*

Persuaded by the Third Circuit's decision in *Jones* v. *Brown*, 461 F.3d 353 (3d Cir. 2006), this Court held that the mere opening of legal

mail outside a prisoner's presence chills his protected First Amendment right to speak freely with his attorney. *Al-Amin*, 511 F.3d at 1334. Moreover, again relying on *Jones*, this Court also held such free speech claims need not establish any "actual injury" other than the First Amendment violation itself. *Id.* at 1334. Because this right was "clearly established" at the time in question, this Court affirmed the district court's denial of qualified immunity regarding Jamil's First Amendment free speech claim. *Id.* at 1335-36.

C. The First Amendment Thus Forbids Prisons From Opening Or Reading Pretrial Detainees' Privileged And Legal Mail Outside Their Presence

To sum up the pertinent holdings here, *Bell* holds that pretrial detainees necessarily retain all rights that convicted prisoners enjoy. 441 U.S. at 545, 99 S. Ct. at 1877. *Taylor* holds that convicted prisoners and pretrial detainees have a First Amendment free speech right that forbids prisons from opening their privileged mail outside their presence. 532 F.2d at 480. *Guajardo* reaffirms that *Taylor* applies both to convicted prisoners and pretrial detainees. 580 F.2d at 758-59. *Lemon* holds that prisons cannot read convicted prisoners' incoming legal mail. 931 F.2d at 1467-68. Finally, *Al-Amin* holds that convicted prisoners have a

First Amendment free speech right that forbids prisons from opening or reading their legal mail outside their presence. 511 F.3d at 1334.

Given these holdings, a pretrial detainee like Ford necessarily retains the First Amendment free speech right to have his privileged and legal mail opened but not read in his presence.

D. Ford Stated A First Amendment Free Speech Claim

Ford stated a First Amendment free speech claim as a pretrial detainee under *Bell*, *Taylor*, *Guajardo*, *Lemon*, and *Al-Amin*: the Complaint alleged prison officials "opened and read" his privileged and legal mail outside his presence. Unlike an access-to-courts claim, Ford did not need to establish any actual injury. And contrary to the District Court, the First Amendment prohibits prisons from opening such mail "inadvertently" (DE4 at 6), never mind that the Complaint alleged his mail was "read" in any event (DE1 at 11).

1. The Complaint Alleged Prison Officials "Opened And Read" Ford's Privileged And Legal Mail Outside His Presence

As an initial matter, the Complaint clearly and succinctly alleged prison officials[7] repeatedly "opened and read" Ford's privileged and legal mail outside his presence. DE4 at 7-11. Moreover, all three of Ford's letters were privileged or legal mail. The Florida Bar letter was privileged mail, Fla. Admin. Code § 33-210.103(1), whereas the letters from the ACLU and Ronald Toward were legal mail, *id.* § 33-210.102(2). As such, all three pieces of mail were required to "be opened in the presence of the inmate to determine that the correspondence is [legal or privileged] mail and that it contains no unauthorized items," and "[o]nly the signature and letterhead may be read." *Id.* § 33-210.103(5)(a); *id.* § 33-210.102(8)(d).

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[7] On remand, the District Court may need to resolve issues regarding the scope of Sheriff Hunter's and Captain Coleman's personal involvement in or supervisory liability for the opening and reading of Ford's privileged and legal mail. *E.g.*, *Mathews* v. *Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007) (no § 1983 supervisory liability attaches unless supervisor "personally participates" or there is a "causal connection between the actions of the supervising official and the alleged constitutional deprivation"); *Terry* v. *Cook*, 866 F.2d 373, 379 (11th Cir. 1989) (§ 1983 liability attaches for "personal involvement"). The District Court did not address these issues in the first instance, however, so they are beyond the scope of this appeal. *See infra* Argument V.

2. Unlike An Access-To-Courts Claim, Ford Did Not Need To Establish Any Actual Injury

As this Court held in *Al-Amin*, Ford's First Amendment free speech claim need not establish any actual injury apart from the deprivation itself. Rather, *Lewis*'s actual-injury requirement applies only to access-to-courts claims. Here, the mere opening of Ford's privileged and legal mail was sufficient injury to chill his First Amendment rights.

3. The First Amendment Prohibits Prisons From Opening Privileged And Legal Mail "Inadvertently," And The Complaint Alleged Ford's Mail Was "Read" In Any Event

The District Court mistakenly dismissed Ford's legal-mail claim because the "Due Process Clause is not implicated by a negligent act of an official." DE4 at 6-7 (collecting cases). To the contrary, due process law regarding negligence is irrelevant to Ford's First Amendment claim.

As an initial matter, *Al-Amin* rejected the notion that prisons could escape First Amendment liability merely because a "mail room sorter" had opened inmates' legal mail negligently or "inadvertently." 511 F.3d at 1322, 1325 n.16. Moreover, Ford established the prison's "pattern and practice" of opening his privileged and legal mail, *id.* at 1334, because he identified three instances of mail interference. Indeed, merely

"two separate incidents of interference with mail" can be sufficient to "indicate[] an alleged continuing activity rather than a single isolated instance." *Washington* v. *James*, 782 F.2d 1134, 1139 (2d Cir. 1986).

Finally, even if some negligence exception applied, Ford alleged his legal mail was not merely "opened," but deliberately "read." DE1 at 11. Indeed, the supplemented record on appeal makes clear that his mail was treated in a highly unusual fashion, which suggests it was read. Add. at 2.

4. The Complaint Does Not Present Any *Younger* Abstention Or *Lyons* Standing Problems

There is no *Younger* abstention problem here. In *Younger* v. *Harris*, the Supreme Court held that federal courts should abstain from issuing injunctions that render unconstitutional a state statute that is the basis of a state prosecution. 401 U.S. 37, 43-45, 91 S. Ct. 746, 750-51 (1971). But Ford does not seek such an injunction. Rather, he seeks a federal injunction merely to ensure remedial measures at his detention facility and to forbid the introduction of evidence at his criminal trial regarding the interception of his privileged and legal mail.

Nor is there any *Lyons* standing problem. In *City of Los Angeles* v. *Lyons*, the Supreme Court held that injunctive relief is unavailable absent a "showing of any real or immediate threat that the plaintiff will be wronged again." 461 U.S. 95, 111, 103 S. Ct. 1660, 1670 (1983). There is no showing that the prison has remedied its mail problems. Furthermore, Ford continues to suffer the same injury to his First Amendment free speech right, because his protected communication with his attorney has been and continues to be chilled. Finally, on remand Ford would likely amend the Complaint to state a claim for damages.

* * *

In short, as this Court anticipated (DE14 at 2), the District Court erred when it overlooked Ford's First Amendment free speech claim.

II. THE DISTRICT COURT MISCONCEIVED FORD'S SIXTH AMENDMENT RIGHT-TO-COUNSEL CLAIM

The District Court misconceived Ford's Sixth Amendment right-to-counsel claim as an ordinary access-to-courts claim that failed for lack of actual injury. To the contrary, much like his First Amendment free speech claim, Ford's Sixth Amendment claim did not need to establish any actual injury apart from the deprivation itself.

A. Ordinary Access-To-Courts Claims Must Establish Some Actual Injury To An Underlying Claim

Access-to-courts claims must establish some actual injury apart from the deprivation itself.

Convicted prisoners have long had a "constitutional right of access to the courts" that must be "adequate, effective, and meaningful." *Bounds* v. *Smith*, 430 U.S. 817, 821, 97 S. Ct. 1491, 1494 (1977). As such, prisons typically must "provid[e] prisoners with adequate law libraries or adequate assistance from persons trained in the law." *Id.* at 828, 97 S. Ct. at 1498. Pretrial detainees like Ford have an identical *Bounds* right with respect to civil claims. *Straub* v. *Monge*, 815 F.2d 1467, 1469-70 (11th Cir. 1987). But it is an open question in this Circuit whether *Bounds* even applies to pretrial detainees in the criminal setting. *Smith* v. *Hutchins*, 426 Fed. Appx. 785, 789 n.5 (11th Cir. 2011).[8] In any event, the Supreme Court clarified the scope of this access-to-courts right in *Lewis* v. *Casey*, 518 U.S. 343, 116 S. Ct. 2174 (1996), and *Christopher* v. *Harbury*, 536 U.S. 403, 122 S. Ct. 2179 (2002).

Lewis holds that access-to-courts claims are not justiciable absent an actual injury apart from the deprivation itself. In *Lewis*, a class of state

[8] *See supra* note 1.

prisoners decried their lack of court access per *Bounds* because of inadequate law libraries and access to legal counsel. *Id.* at 346-47, 116 S. Ct. at 2177-78. The district court entered a broad injunction, and the court of appeals affirmed. *Id.* at 347-48, 116 S. Ct. at 2178. The Supreme Court, however, reversed and remanded. *Id.* at 364, 116 S. Ct. at 2178.

With two exceptions, the Supreme Court held the class representatives had not demonstrated any "actual injury." *Id.* at 349, 116 S. Ct. at 2179. The requirement that *Bounds* claims must demonstrate actual injury "derives ultimately from the doctrine of standing." *Id.* Absent the bulwark of this "constitutional principle," little might "prevent[] courts of law from undertaking tasks assigned to the political branches." *Id.*

Given this standing requirement, *Bounds* "did not create an abstract, free-standing right to a law library or legal assistance." *Id.* at 351, 116 S. Ct. at 2180. Consequently, an inmate "cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense." *Id.* Rather, "'meaningful access to the courts is the touchstone.'" *Id.* (quoting *Bounds*, 430 U.S. at 823, 97 S. Ct. at 1495). As such, the actual-injury requirement requires that an inmate "therefore must go one step fur-

ther and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." *Id.*

Moreover, inmates cannot demonstrate actual injury as to "just any type of frustrated legal claim." *Id.* at 354, 116 S. Ct. at 2181. Indeed, *Bounds* "does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims." *Id.* at 355, 116 S. Ct. at 2182. Rather, *Bounds* merely provides the "tools" that "inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement."[9] *Id.* "Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Id.* (emphasis in original). As such, the district court's classwide remedy was too broad. *Id.* at 356-64, 116 S. Ct. at 2182-86.

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[9] This Court subsequently clarified *Lewis* as holding "the legal claim must be an appeal from a conviction for which the inmate was incarcerated, a habeas petition, or a civil rights action." *Bass* v. *Singletary*, 143 F.3d 1442, 1445 (11th Cir. 1998) (citing *Lewis*, 518 U.S. at 354-55, 116 S. Ct. at 2181-82). As such, the only actionable actual injuries are those in the form of "a denial or dismissal of a direct appeal, habeas petition, or civil rights case that results from actions of prison officials." *Wilson* v. *Blankenship*, 163 F.3d 1284, 1290-91 (11th Cir. 1998).

Applying this actual-injury standard, the Supreme Court found that only two inmates had demonstrated actual injury. *Id.* at 356, 116 S. Ct. at 2182. Specifically, notwithstanding their "physical access to excellent libraries, plus help from legal assistants and law clerks," two "illiterate and non-English-speaking" inmates were deprived of meaningful court access. *Id.*

Relevant here, *Christopher* clarifies that an access-to-courts claim is not an end in itself, but rather is merely a vehicle for some other underlying claim. To wit, no matter how "unsettled the basis of the constitutional right of access to courts," the access-to-courts right "is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court." *Christopher*, 536 U.S. at 415, 122 S. Ct. at 2186-87. It is for that reason that *Lewis* required plaintiffs to "identify a 'nonfrivolous,' 'arguable' underlying claim." *Id.*

Collectively, *Lewis* and *Christopher* hold that the "touchstone" of an access-to-courts claim is "actual injury" to some "underlying claim."

B. In Contrast, Sixth Amendment Right-To-Counsel Claims Need Not Establish Any Actual Injury Apart From The Underlying Deprivation Itself

Ordinarily, an access-to-courts claim is inchoate until a litigant has missed a deadline or lost a case. Not so with Sixth Amendment right-to-counsel claims. Much like a First Amendment free speech claim, the underlying deprivation itself, apart from any other ancillary injury, constitutes an "actual injury" within the meaning of *Lewis*.

1. The Sixth Amendment Right To Counsel Is Critically Important, Especially Before Criminal Trial Commences

The right to counsel enshrined in the Sixth Amendment is among the most important protections from tyranny we have. And it assumes even greater constitutional significance before criminal trial commences.

The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. Naturally, it "protect[s] the attorney-client relationship from intrusion in the criminal setting." *Wolff* v. *McDonnell*, 418 U.S. 539, 576, 94 S. Ct. 2963, 2984 (1974).

To that end, the Sixth Amendment "embodies a realistic recognition of the obvious truth that the average defendant does not have the pro-

fessional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst*, 304 U.S. 458, 462-463, 58 S. Ct. 1019, 1022 (1938). In an oft-quoted passage, the Supreme Court explained why this obvious truth necessitates criminal counsel:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Powell v. *Alabama*, 287 U.S. 45, 68-69, 53 S. Ct. 55, 64 (1932).

Famously, the Supreme Court thus held that in "our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon* v. *Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 796 (1963).

But interference with a pretrial detainee's *Gideon* right before criminal trial commences portends catastrophic consequences. Truth be told, to "deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself." *Maine* v. *Moulton*, 474 U.S. 159, 170, 106 S. Ct. 477, 484 (1985). In that regard, sister circuits have recognized that "one of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense," *Wolfish* v. *Levi*, 573 F.2d 118, 133 (2d Cir. 1978), *rev'd on other grounds*, *Bell* v. *Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979), which can "compromise[]" the "ultimate fairness of [his] eventual trial," *Johnson-El* v. *Schoemehl*, 878 F.2d 1043, 1051 (8th Cir. 1989).

2. Unlike Ordinary Access-To-Courts Claims, Sixth Amendment Right-To-Counsel Claims Need Not Establish Any Other Actual Injury

Right-to-counsel claims, unlike ordinary access-to-courts claims, need not establish any actual injury apart from the underlying Sixth Amendment deprivation itself.

Ordinarily, it is "unnecessary to consider separately the Sixth Amendment rights of" pretrial detainees in access-to-courts claims. *Tay-*

lor v. *Sterrett*, 532 F.2d 462, 472 (5th Cir. 1976).[10] Rather, "[a]ny infringement of the right to effective counsel by the reading of an inmate's correspondence with an attorney is included within a concurrent abridgment of the right of access to the courts." *Id.*

But that does not mean the rights are identical. To be sure, it is imperative to recognize the Sixth Amendment right to counsel is not a spring from which the access-to-courts right flowers. Rather, the access-to-courts right is "grounded in the First Amendment, the Article IV Privileges and Immunities Clause, the Fifth Amendment, and/or the Fourteenth Amendment." *Al-Amin* v. *Smith*, 511 F.3d 1317, 1325 n.17 (11th Cir. 2008). As such, notwithstanding the "actual injury" lock on ordinary access-to-courts claims, pretrial detainees like Ford have an independent Sixth Amendment key to open the courthouse doors.

The Second Circuit demolished the argument that *Lewis*'s actual-injury requirement can bar pretrial detainees' Sixth Amendment claims in *Benjamin* v. *Fraser*, 264 F.3d 175 (2d Cir. 2003). There, a prison appealed the district court's denial of their motion to terminate a consent decree ordering prospective relief regarding attorney visits. *Id.* at 184.

[10] *See supra* note 5.

On appeal, the prison contended the district court erred in rejecting its argument that *Lewis*'s actual-injury requirement "applies to claims brought under the Sixth Amendment." *Id.* at 184. But the Second Circuit rejected these arguments and affirmed. *Id.*

Even though the access-to-courts right and the Sixth Amendment right to counsel are "interrelated," they nevertheless "are not the same." *Id.* at 186. As such, "*Lewis* is inapplicable to Sixth Amendment claims of pretrial detainees." *Id.* at 185. Rather, "*Lewis*'s reasoning is premised on the distinction between the standing required to assert direct constitutional rights versus the standing required to assert claims that are derivative of those rights." *Id.*

Complaints about "law libraries and legal assistance programs" are derivative because they "do not represent constitutional rights in and of themselves." *Id.* Instead, they merely constitute a "means to ensure 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.'" *Id.* (quoting *Lewis*, 518 U.S. at 351). Hence, such claims require prisoners to demonstrate actual injury. *Id.*

"By contrast, where the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an 'actual injury.'" *Id.* (quoting *Lewis*, 518 U.S. at 349). The Sixth Amendment, of course, is exactly such a direct constitutional right. *Id.*

Thus, *Benjamin* explained, an inmate "complaining of poor law libraries" per *Bounds* and *Lewis* "does not have standing unless he can demonstrate that a direct right—namely his right of access to the courts—has been impaired." *Id.* But "in the context of the right to counsel, unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right." *Id.* at 185.

The reasoning employed in *Benjamin* is much akin to the reasoning and result in *Al-Amin*. In *Al-Amin*, this Court found the First Amendment free speech right was "distinct" from the access-to-courts right, in part because it flowed from a separate constitutional source. 511 F.3d at 1333. So too here: because the Sixth Amendment right to counsel does not share any constitutional lineage with the access-to-courts right, the actual injury limitation is inapplicable.

C. Ford Stated A Sixth Amendment Right-To-Counsel Claim

The supplemented record on appeal makes clear that Ford stated a Sixth Amendment right-to-counsel claim. Ford explained that upon learning the prison was opening his privileged and legal mail, his public defender stopped sending him legal records and mail. This made Ford "feel that I am being deprived of my right to participate in my own defense and to be secure in my legal correspondence." Add. at 2. As *Maine*, *Levi*, and *Johnson-El* make clear, interference with a pretrial detainee's right to counsel before criminal trial is a serious deprivation that compromises the ultimate fairness of an eventual trial. The District Court therefore erred when it misconceived Ford's Sixth Amendment claim.

III. The District Court Also Overlooked Ford's First Amendment Retaliation Claim

The District Court erred when it overlooked Ford's First Amendment retaliation claim. Liberally construed, the *pro se* Complaint alleged Captain Coleman threatened Ford to stop filing grievances about the opening of his privileged and legal mail lest he stop it and deliver it only at his convenience.

A. The First Amendment Prohibits Retaliation Against Protected Speech

The First Amendment has long "prohibit[ed] state officials from retaliating against prisoners for exercising the right of free speech." *Thomas* v. *Evans*, 880 F.2d 1235, 1241 (11th Cir. 1989). In asserting First Amendment retaliation claims, inmates "need not allege violation of a separate and distinct constitutional right." *Id.* at 1242. Rather, the "gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech." *Id.* Accordingly, retaliation is established whenever the adverse effect on an inmate's speech "was the result of his having filed a grievance concerning the conditions of his imprisonment." *Wildberger* v. *Bracknell*, 869 F.2d 1467, 1468 (11th Cir. 1989).

To "prevail on a retaliation claim," Ford "must establish three elements": (1) "his speech or act was constitutionally protected"; (2) "the defendant's retaliatory conduct adversely affected the protected speech"; and (3) "there is a causal connection between the retaliatory actions and the adverse effect on speech." *Moton* v. *Cowart*, 631 F.3d 1337, 1341 (11th Cir. 2011) (citation and punctuation omitted).

B. Ford Stated A First Amendment Retaliation Claim

The *pro se* Complaint stated a First Amendment retaliation claim: when Ford wrote a second "grievance about the mail," Captain Coleman threatened him to "stop complaining" lest he "stop [Ford's] legal mail and give it to [him] at his convenience." DE1 at 9. Fearing further reprisal, Ford "left the issue alone." DE1 at 10. Liberally construed, these allegations satisfy all three elements of the *Moton* test.

First, Ford engaged in "constitutionally protected" speech. This Court has long held that the First Amendment protects an inmate's use of grievance procedures. *E.g.*, *Smith* v. *Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008); *Farrow* v. *West*, 320 F.3d 1235, 1249 (11th Cir. 2003); *Wildberger*, 869 F.2d at 1468. Here, Ford grieved that the prison was opening and reading his privileged and legal mail.

Second, Captain Coleman's threat "adversely affected" Ford's speech. As an initial matter, even if never "carried out," Captain Coleman's "threat itself" is actionable. *Pittman* v. *Tucker*, 213 Fed. Appx. 867, 871 (11th Cir. 2007).[11] Consistent with *Pittman*, the Sixth, Eighth, and Ninth Circuits also find in prison litigation that threats alone are ac-

[11] *See supra* note 1.

tionable.[12] Similarly, the Second, Fourth, and Seventh Circuits have so held in the employment and public protest contexts.[13] Applying this Court's "objective standard," the threat to stop all legal mail would dissuade a pretrial detainee of ordinary firmness who needs his attorney to

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[12] *Hill* v. *Lappin*, 630 F.3d 468, 475 (6th Cir. 2009) ("threats alone can constitute an adverse action if the threat is capable of deterring a person of ordinary firmness from engaging in protected conduct"); *Burgess* v. *Moore*, 39 F.3d 216, 218 (8th Cir. 1994) ("threat of retaliation is sufficient injury if made in retaliation for an inmate's use of prison grievance procedures"); *Brodheim* v. *Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) ("mere threat of harm can be an adverse action, regardless of whether it is carried out because the threat itself can have a chilling effect").

[13] *Washington* v. *County of Rockland*, 373 F.3d 310, 320 (2d Cir. 2004) ("threat of administrative disciplinary proceedings . . . could have a deterrent effect on other officers who wished to protest the Department's allegedly discriminatory practices and policies"); *Ridpath* v. *Bd. of Governors of Marshall Univ.*, 447 F.3d 292, 319 (4th Cir. 2006) ("chilling claim is essentially the derivative of a retaliation claim: if a public employer cannot fire, demote, or similarly punish a public employee for engaging in protected speech, the employer also cannot intimidate the employee into silence by threatening impermissible retribution"); *Surita* v. *Hyde*, 665 F.3d 860, 878 (7th Cir. 2011) ("First Amendment prohibits threats of punishment designed to discourage future protected speech"); *see also Fairley* v. *Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) ("[t]hreatening penalties for future speech goes by the name 'prior restraint,' and a prior restraint is the quintessential first-amendment violation"). *But see Breaux* v. *City of Garland*, 205 F.3d 150, 160 (5th Cir. 2000) (as "law stands now, retaliatory threats are just hot air unless the public employer is willing to endure a lawsuit over a termination").

defend serious criminal charges from using the grievance procedures. *Mosley*, 532 F.3d at 1277.

Third, there was a "causal connection" between Ford's protected speech and Captain Coleman's threat. Indeed, the "retaliation may plausibly be inferred" from the "chronology of events." *Cain* v. *Lane*, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988). Here, Captain Coleman's threat to "stop" Ford's legal mail immediately followed and expressly referenced Ford's grievance. As such, Ford's grievance was a "'substantial' or 'motivating' factor" in "subjectively motivat[ing]" Captain Coleman to issue his retaliatory threat. *Gattis* v. *Brice*, 136 F.3d 724, 726 (11th Cir. 1998); *Mosley*, 532 F.3d at 1278.

Liberally construed, these *pro se* allegations satisfy the *Moton* test. The District Court therefore erred when it disregarded Ford's First Amendment retaliation claim.

IV. THE DISTRICT COURT SHOULD HAVE APPLIED THE *COHEN* EXCEPTION AND *SUA SPONTE* GRANTED FORD LEAVE TO AMEND HIS FOURTH AMENDMENT CLAIM

The District Court erred when it dismissed Ford's Fourth Amendment claim without leave to amend. Per the *Cohen* exception, Ford could amend the Complaint to allege that nonprison officials ordered

prison officials to open and read his privileged and legal mail for an impermissible investigatory purpose.

A. Pretrial Detainees Ordinarily Have No Legitimate Expectation Of Privacy From Searches Motivated By Institutional Security Needs

Pretrial detainees like Ford generally have no legitimate expectation of privacy from searches that are motivated by security needs.

The Fourth Amendment forbids unreasonable searches and seizures of those who "claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action." *Smith* v. *Maryland*, 442 U.S. 735, 740, 99 S. Ct. 2577, 2580 (1979) (citations omitted). An "expectation of privacy is 'justifiable' if the person concerned has 'exhibited an actual (subjective) expectation of privacy' and the expectation is one that 'society is prepared to recognize as 'reasonable.'" *Hudson* v. *Palmer*, 468 U.S. 517, 525 n.7, 104 S. Ct. 3194, 3199 n.7 (1984) (quoting *Katz* v. *United States*, 389 U.S. 347, 360-61, 88 S Ct. 507, 516 (1967) (Harlan, J., concurring)).

Given this subjective-objective framework, the Fourth Amendment ordinarily "does not apply within the confines of the prison cell." *Id.* at 526, 104 S. Ct. at 3200. That is because "society is not prepared to rec-

ognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell." *Id.* Rather, the "recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions." *Id.*

Moreover, the principle of prisons' institutional security needs "applies equally to pretrial detainees and convicted prisoners." *Bell* v. *Wolfish*, 441 U.S. 520, 546, 99 S. Ct. 1861, 1878 (1979). As such, courts often hold that the Fourth Amendment does not forbid prisons from opening or reading privileged or legal mail discovered during routine security searches. *E.g.*, *Foster* v. *Helling*, 2000 U.S. App. LEXIS 5457, at *3 (8th Cir. Mar. 29, 2000); *Rix* v. *Wells*, 2008 U.S. Dist. LEXIS 76944, at *6 (M.D. Fla. Sept. 16, 2008); *O'Connor* v. *Sec'y of Fla. Dep't of Corrs.*, 2006 U.S. Dist. LEXIS 67705, at *12 (N.D. Fla. Sept. 21, 2006); *Giba* v. *Cook*, 232 F. Supp. 2d 1171, 1186 (D. Or. 2002).

Here, Ford undoubtedly had a subjective expectation that his privileged and legal mail would remain private. *See* Fla. Admin. Code §§ 33-210.102-.103. Yet he ordinarily would have no legitimate expectation of privacy from routine security searches.

B. The *Cohen* Exception Protects Pretrial Detainees Like Ford From Investigatory Searches

The *Cohen* exception, however, protects pretrial detainees like Ford from any search instigated by nonprison officials for any reason other than institutional security.

In *United States* v. *Cohen*, the Second Circuit addressed whether the Fourth Amendment barred prison officials from reading a pretrial detainee's written materials. 796 F.2d 20, 21 (2d Cir. 1986). Critically, the search was not based on any institutional security concern. *Id.* at 23. Rather, a federal prosecutor had ordered the search for his own investigatory need to bolster the prosecution's case. *Id.* at 21-22.

After canvassing Supreme Court precedent leading up to *Hudson*, the *Cohen* court concluded the pretrial detainee "retains an expectation of privacy within his cell sufficient to challenge the investigatory search ordered by the prosecutor." *Id.* at 24. The *Hudson* Court simply "did not contemplate a cell search intended solely to bolster the prosecution's case against a pre-trial detainee awaiting his day in court." *Id.* at 23. Rather, it envisioned that "*prison officials* are presumed to do their best to evaluate and monitor objectively the security needs of the institution and the inmates in their custody, and then to determine whether and

when such concerns necessitate a search of a prison cell." *Id.* at 23 (emphasis in original).

As such, the *Cohen* exception protects pretrial detainees from all "searche[s] at the instigation of non-prison officials for non-institutional security related reasons." *Id.* at 24.

C. This Court Should Adopt The *Cohen* Exception

The *Cohen* exception as it applies to reading inmates' legal mail is consistent with this Circuit's precedent, so the Court should adopt it.

Neither this Court nor any sister circuit has formally considered the *Cohen* exception. The Eighth Circuit has noted its existence, but held it applies only to searches "intended solely to bolster the prosecution's case." *United States* v. *Hogan*, 539 F.3d 916, 923 (8th Cir. 2008).

Nevertheless, the *Cohen* exception is consistent with this Court's four-factor test for determining the scope of pretrial detainees' Fourth Amendment rights. Specifically, that test requires consideration of "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Powell* v. *Barrett*, 541 F.3d 1298, 1305 (11th Cir. 2008) (citation and punctuation omitted). Importantly, this test is "more detainee friendly"

than the test of *Turner* v. *Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987). *Powell*, 541 F.3d at 1302.

Here, opening and reading Ford's legal mail is highly intrusive and has no legitimate penological justification: it undermines institutional security, *see Al-Amin* v. *Smith*, 511 F.3d 1317, 1333 (11th Cir. 2008), and unconstitutionally punishes a pretrial detainee, *see Bell* v. *Wolfish*, 441 U.S. 520, 535, 99 S. Ct. 1861, 1872 (1979). Because the *Cohen* exception is consistent with *Powell*, this Court should adopt it.

D. Per The *Cohen* Exception, The District Court Should Have *Sua Sponte* Granted Ford Leave To Amend

The District Court should have *sua sponte* granted Ford, a layman proceeding *pro se*, at least one opportunity to amend.

In *Bank* v. *Pitt*, this Court held that district courts must *sua sponte* grant plaintiffs "at least one chance to amend the complaint before the district court dismisses the action with prejudice." 928 F.2d 1108, 1112 (11th Cir. 1991). A decade later in *Wagner* v. *Daewoo Heavy Industries American Corp.*, however, this Court overruled *Banks* in part and held district courts need not grant leave to amend *sua sponte* "when the plaintiff, who is represented by counsel, never filed a motion to amend

nor requested leave to amend before the district court." 314 F.3d 541, 542 (11th Cir. 2002) (en banc).

Importantly, however, *Wagner* "decide[d] and intimate[d] nothing about a party proceeding *pro se*." *Id.* at 542 n.1. As such, district courts must still *sua sponte* grant *pro se* litigants leave to amend any claim that is not futile. *Clark* v. *Maldonado*, 288 Fed. Appx. 645, 647 (11th Cir. 2008); *Spear* v. *Nix*, 215 Fed. Appx. 896, 902 (11th Cir. 2007).[14]

Here, the District Court erred when it failed to *sua sponte* grant Ford, a litigant proceeding *pro se*, leave to amend. Had the District Court applied the *Cohen* exception, Ford might have been able to allege entirely "plausible," not "speculative" facts that show the county sheriff or state prosecutor had asked prison officials to search Ford's legal mail for an investigative purpose. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 1965 (2007).

Ford is not facing some run-of-the-mill, minor criminal charge. Rather, the State of Florida has charged him with first-degree murder and arson and is seeking the death penalty. *See State* v. *Allen*, No.

[14] *See supra* note 1.

09000710CFAXMX (Columbia County Cir. Ct. filed Sept. 9, 2009). Given this prosecution's high priority, Ford might easily allege sufficient facts to "nudge[]" his claims "across the line from conceivable to plausible" that an overzealous state prosecutor or law enforcement officer tried to bolster the prosecution by reading Ford's privileged and legal mail.[15] *Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974. Indeed, perhaps this explains why Ford's mail was delayed over a weekend. Add. at 2.

V. At Minimum, The Court Should Vacate The Judgment And Direct The District Court To Analyze These Issues In The First Instance

This Court routinely vacates judgments to permit district courts to address legal issues "in the first instance." *Hughes* v. *Lott*, 350 F.3d 1157, 1162-63 (11th Cir. 2003). Because this Court generally does not consider issues raised for the first time on appeal, this rule is especially pertinent in appeals from screening dismissals. *Leal* v. *Ga. Dep't of Corrs.*, 254 F.3d 1276, 1280 (11th Cir. 2001).

The District Court never considered whether, liberally construed, the *pro se* Complaint stated claims of First Amendment free speech under

[15] Alternatively, the Court could simply vacate the judgment and let the District Court develop the facts and resolve the *Cohen* issue in the first instance. *See infra* Argument V.

Al-Amin and its forerunners, Sixth Amendment right to counsel in light of the supplemented record on appeal, First Amendment retaliation given Captain Coleman's threat, or Fourth Amendment violation per the *Cohen* exception. *See supra* Arguments I-IV. At minimum, this Court should vacate the judgment and direct the District Court to consider "in the first instance" whether the "pro se complaint should be liberally construed" to encompass those claims. *Williams* v. *Brown*, 347 Fed. Appx. 429, 436 (11th Cir. 2009).[16]

CONCLUSION

For the foregoing reasons, the Court should vacate the District Court's entry of judgment and remand for further proceedings.

November 5, 2012

Respectfully submitted,

/s/ Thomas Burns

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[16] *See supra* note 1.

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 13,451 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.

November 5, 2012

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing Appellant's Opening Brief and Appellant's Record Excerpts with the Clerk of Court via overnight commercial carrier on this 5th day of November, 2012, 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 Appellant's Opening Brief and Appellant's Record Excerpts via overnight commercial carrier on this 5th day of November, 2012, to:

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November 5, 2012

/s/ Thomas Burns
Thomas A. Burns

ADDENDUM

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KENNETH FORD
Plaintiff,

-V-

APPeal Number 12-10431-B

MARK HUNTER, et al.,
Defendants

MOTION OF ADDITIONAL STATEMENT OF FACTS

IN THE Order of dismissal from THE U.S. District Court JACKSONVille division. STATed THAT I had no Chance of SUCCESS ON a Claim because I didiNT Show INJury. (see Attached Copy's) The three legal mail INCident's happen in JUNE and AUGUST of 2011. I failed to mention the frist INCIDENT to my public defender when he Came to VisT me around THE frist weeK of AUGUST. So after that VIST in the FrisT week of AUGUST I received the other two letter's. I didiNT receive aNother VIST from my public defender UNTill November of 2011 because of Court CaNCelations. So my public defender was NOT aware of the legal mail Situation UNTill that VIST iN November. Before the

legal mail situation my public defender was willing to give me Copy's of all records in my Case. but Now that he has become aware of the jail staff opening my legal mail he say's that he will not trun over sensitive records for fear of jail staff rummaging through them to "quote" him. I feel that I'am being deprived of my right to participate in my own defense and to be Secure in my legal Correspondence. even after I wrote a greivance about this situation and the greivance was approved This behavior Still Continue with the jail Staff. Further more I didn't go in to enough detail about the legal mail that I received on 8-15-11. IT was giving to me at around 6:00 A.M. in the morining at shift change which also was a Monday and as we know mail does not run on Sunday. Also Corporal Cole's Claim that She received the mail from MR. Collins is a little hard to understand because he's the Inmate services specialist at the jail and works Monday thur Friday and as for as my Knowledge go's he is not here at 6:00 A.M. in the morining. I have Inmate Anthony Britt as a witness to the time of delivery. There explanation of them not reading my mail is hard to belive after the Inconsistencys in Corporal Cole's Story. I was told that a Incidant report was filed about this Issue but I was not allowed to review it. Please ask the Sheriff to produce this report because Corporal Cole's Story just does not add up.

I DECLARE THAT the FOREGoing is TURE and Correct

PUBLIC DEFENDER

TO: Kenneth Ford

FROM: Blair Payne, APD

DATE: Oct. 31, 2011

Enclosed are you records from Peace River Community Mental Health.
Once all the records are received from Northeast Florida State Hospital I will send them to you.
I have a call in to the head person at 911. As soon as I hear back from her I will let you know.

MEMORANDUM

TO: Kenneth Ford

FROM: Blair Payne

DATE: 1/13/2012

Here is the Federal Rules of Appellate Procedure Form 1. Still working on the 911 call. I have talked to the lady in charge and she has looked and thinks they have the calls for that range. I have a stack of your mental health records that are about a foot thick.. I am not going to turn them over to you at the jail because I don't want the cops rummaging through them. I am in hopes of getting the records off to a psychologist Monday.

P.S. The judge has not ruled on the motions. He told me earlier today he was going to get on it next week.

BP