Nos. 13-10268-DD & 13-10828-DD

In the United States Court of Appeals for the Eleventh Circuit

JOHNNIE FITZGERALD HOWARD,

Plaintiff-Appellant and Cross-Appellee,

v.

C. KRAUS *et al.*,

Defendants-Appellees and Cross-Appellants.

On Appeal from the United States District Court
for the Middle District of Florida, Fort Myers Division
Case No. 2:10-cv-434-UA-SPC, Hon. G. Kendall Sharp

RESPONSE AND REPLY BRIEF OF JOHNNIE FITZGERALD HOWARD

Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for Johnnie Fitzgerald Howard

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes **Page(s)**

Rules **Page(s)**

Other Authorities **Page(s)**

STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and § 1343(a)(3)[1] because the complaint (Doc. 1) raised federal constitutional claims pursuant to 42 U.S.C. § 1983. This Court has appellate jurisdiction of the cross-appeal under 28 U.S.C. § 1291[2] because the District Court entered orders granting a motion for relief from judgment (Doc. 70), denying a motion for reconsideration (Doc. 75), and dismissing the complaint (Doc. 91), all concerning the Prison Litigation Reform Act's "three strikes" provision, which were rendered final when the District Court entered judgment (Doc. 97).[3] The cross-appeal was timely filed 32 days later (after President's Day weekend). Doc. 106.

---

[1] Cross-Appellants ("the Guards") do not mention the District Court also had subject-matter jurisdiction under 28 U.S.C. § 1343(a)(3).

[2] The Guards incorrectly state this Court has appellate jurisdiction of the cross-appeal under 28 U.S.C. § 1292. This is a final judgment appeal, not an interlocutory appeal.

[3] The Court previously concluded the Guards were aggrieved by and therefore had standing to appeal the grant of Johnnie Fitzgerald Howard's motion for relief from judgment (Doc. 70), the denial of their motion for reconsideration (Doc. 75), and the order of dismissal (Doc. 91), even though they had obtained a judgment (Doc. 97) in their favor. *See* Order of August 6, 2014 (citing *United States* v. *Am. Ry. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560, 564 (1924), and *Agripost, Inc.* v. *Miami-Dade County*, 195 F.3d 1225, 1230 (11th Cir. 1999)). This Court therefore denied Howard's motion to dismiss the cross-appeal. *Id.*

STATEMENT OF THE ISSUES

The District Court ruled Cross-Appellee Johnnie Fitzgerald Howard had one strike for the dismissal of Case No. 8:07-cv-1915 and one strike for the dismissal of Case No. 09-15496. In the cross-appeal, Cross-Appellants ("the Guards") now contend Howard actually has three additional strikes for the dismissal of Case No. 06-10707 (one strike), the dismissal of Case No. 8:07-cv-1915 (which was consolidated with Case No. 8:04-cv-312) (two strikes), and the dismissal of Case No. 8:10-cv-994 (one strike).[1] Notably, the Guards raised their arguments that the dismissal of Case No. 8:07-cv-1915 should count as two strikes and the dismissal of Case No. 8:10-cv-994 should count as one strike for the first time in motions for reconsideration pursuant to Federal Rule of Civil Procedure 60(b). Accordingly, the issues in the cross-appeal are:

---

[1] In *Coleman-Bey* v. *Tollefson*, No. 13-1333, the Supreme Court is now considering "[w]hether, under the 'three strikes' provision of the Prison Litigation Reform Act, 28 U.S.C. 1915(g), a district court's dismissal of a lawsuit counts as a strike while it is still pending on appeal or before the time for seeking appellate review has passed." The Supreme Court heard oral argument on February 23, 2015. When *Coleman-Bey* is decided, it may shed some light on what does and does not qualify as a strike. Accordingly, this Court may wish to delay convening oral argument or issuing its opinion until after *Coleman-Bey* is decided. At that point, the Court could also request supplemental briefing. *See* 11th Cir. I.O.P. 28-5.

1. Did the District Court abuse its discretion when it denied a second Rule 60(b) motion for reconsideration that contended the dismissal expressly without prejudice for failure to amend in Case No. 8:10-cv-994 should count as one strike?

2. Did the District Court abuse its discretion when it denied two Rule 60(b) motions for reconsideration that contended the dismissal with prejudice for failure to state a claim in Case No. 8:07-cv-1915 should count as two strikes?

3. Did the District Court err when it ruled this Court's order dismissing Howard's appeal as frivolous in Case No. 06-10707 did not count as a strike because the judgment from which the appeal arose was subsequently vacated due to an intervening change in the law?

STATEMENT OF THE CASE

For the most part, the Guards have accurately stated the case. Nevertheless, Howard highlights a few points about the cross-appeal.

Course Of Proceedings

When the Guards initially moved to dismiss the complaint, they contended Howard had three (not five) strikes:

> On July 14, 2006, Plaintiff's appeal to the Eleventh Circuit Court of Appeals (appeal number 06-10707-H) was dismissed

> as frivolous. On September 22, 2009, Plaintiff's civil rights complaint was dismissed for failure to state a claim upon which relief may be granted in Middle District case number 8:07-CV-1915. On February 17, 2010, Plaintiff's appeal to the Eleventh Circuit Court of Appeals (appeal number 09-15496-H) was dismissed as frivolous.

Doc. 47 at 3-4. In particular, the Guards did not ask the District Court to consider the dismissal with prejudice of the two consolidated cases in Case No. 8:07-cv-1915 (i.e., Case Nos. 8:04-cv-312 and 8:07-cv-1915) as two strikes or the dismissal without prejudice of Case No. 8:10-cv-994 as one strike. *See* Doc. 47. Based on the three supposed strikes the Guards identified, the District Court then dismissed the complaint without prejudice pursuant to the "three strikes" provision of the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(g) and entered judgment. Doc. 52 at 3-4; Doc. 53.

Howard filed a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b), in which he contended the dismissal of Case No. 06-10707 was "null and void" because this Court subsequently recognized in Case No. 07-15513 that there had been an intervening change in the law. Doc. 63 at 2. The Guards opposed. Doc. 64. In their response, the Guards again did not ask the District Court to consider the dismissal with prejudice of the two consolidated cases in Case

No. 8:07-cv-1915 (i.e., Case Nos. 8:04-cv-312 and 8:07-cv-1915) as two strikes. *See* Doc. 64. Nor did the Guards ask the District Court to consider the dismissal without prejudice of Case No. 8:10-cv-994 as a strike. *See* Doc. 64.

The District Court granted Howard relief from the judgment. Doc. 70. In doing so, the District Court noted the Guards had not asked it to consider the dismissal of Case No. 8:07-cv-1915 as two strikes: "Nor does Defendant request that the Court count the consolidated cases and appeals thereof as four strikes." Doc. 70 at 5-6 n.4.

The Guards moved for reconsideration. Doc. 71. In that motion, the Guards suggested (indirectly) for the first time that the dismissal of the consolidated cases in Case No. 8:07-cv-1915 counted as two strikes. *See* Doc. 71 at 4-5 n.1. Additionally, the Guards still did not contend the dismissal without prejudice of Case No. 8:10-cv-994 was a strike. *See* Doc. 71.

The District Court construed the Guards' motion for reconsideration as arising under Rule 60(b) and denied it. Doc. 75 at 1, 6. Again, the District Court noted the Guards had not previously asked it to consider the dismissal of Case No. 8:07-cv-1915 as two strikes: "Defendants

fail to mention that the Court noted that Defendants did *not* argue that Plaintiff should receive four strikes for the orders entered in this consolidated action." Doc. 75 at 2 n.2 (emphasis in original).

The Guards then filed a motion to dismiss. Doc. 79. Once again, the Guards asked the District Court to reconsider its ruling that Howard did not have three strikes. *See* Doc. 79 at 25-27. In this portion of the motion to dismiss (which again was really a second motion for reconsideration pursuant to Rule 60(b)), the Guards contended for the first time that the dismissal without prejudice of Case No. 8:10-cv-994 should also count as a strike. Doc. 79 at 26.

Although the District Court dismissed the complaint with prejudice for failure to state a claim, it again declined to reconsider its prior rulings that Howard had only two strikes. Doc. 91 at 19 & n.10. Instead, the District Court ruled the dismissal without prejudice of Case No. 8:10-cv-994 was not a strike. Doc. 91 at 19 & n.10. Specifically, the District Court reached this conclusion because it believed there was both an "absence of binding Eleventh Circuit precedent" and a circuit split between the Fourth and Seventh Circuits on the question whether a dismissal without prejudice can count as a strike. Doc. 19 at 19 & n.10

(citing *Paul* v. *Marberry*, 658 F.3d 702, 705 (7th Cir. 2011), and *McLean* v. *United States*, 566 F.3d 391, 396 (4th Cir. 2009)). Accordingly, the District Court did not reconsider its prior rulings. Doc. 91 at 19 & n.10.

The Guards timely took this cross-appeal. Doc. 106. They designated the District Court's orders granting Howard's motion for relief from judgment (Doc. 70), denying their motion for reconsideration (Doc. 75), and dismissing the complaint with prejudice (Doc. 91).

Statement Of Facts

Before filing the case from which this appeal is taken (i.e., Case No. 2:10-cv-434), Howard litigated several other federal cases in the Middle District of Florida.

In 2004, Howard filed Case No. 8:04-cv-312. App. B1. Howard then amended his complaint. App. B63. That district court dismissed the amended complaint for failure to plead exhaustion of administrative remedies (App. B63) and entered judgment (App. B64).[2] Howard appealed. App. B65. In Case No. 06-10707, this Court dismissed the appeal as frivolous. App. B72.

[2] By law, this dismissal was not on the merits; rather, it was without prejudice to filing a new case. *Bryant* v. *Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008).

Thereafter, in 2007, Howard filed Case No. 8:07-cv-1915. App. C1. Initially, that district court determined Howard "ha[d] previously sued these Defendants under § 1983 seeking relief based on the same nucleus of operative facts" in Case No. 8:04-cv-312. App. C3. Accordingly, that district court dismissed the complaint in Case No. 8:07-cv-1915 on res judicata grounds (App. C3) and entered judgment (App. C4). Howard appealed. App. C7. In Case No. 07-15513, this Court vacated the order of dismissal and remanded for further proceedings because (1) res judicata did not apply, and (2) there had been an intervening change in the law by which prisoners no longer needed to plead administrative exhaustion; instead, it was an affirmative defense. App. C14 at 3-4.

On remand, that district court vacated the prior dismissal in Case No. 8:04-cv-312 (App. B63) and consolidated that case with Case No. 8:07-cv-1915 because both cases involved the same defendants and the same nucleus of operative facts. App. C24, B75. Thereafter, that district court again dismissed the consolidated cases (App. C29, B77), this time with prejudice for failure to state a claim, and entered judgment (App. C30, B78). Howard appealed. App. C31, B79. In Case No. 09-15469, this

Court dismissed the appeal of both cases as frivolous (App. C36, B84) and denied reconsideration (App. C37).

On the same day this Court denied reconsideration (App. C37), in 2010, Howard filed Case No. 8:10-cv-994. App. D1. Upon *sua sponte* review of the complaint, the district court ordered Howard to file an amended complaint using the customary civil rights complaint form. App. D4. When Howard failed to comply with this order, the district court dismissed the complaint "without prejudice." App. D5. To this day, that district court has not entered judgment.[3] Howard never appealed.[4]

About a month later, Howard filed Case No. 2:10-cv-434 (i.e., the case from which this appeal was taken). Doc. 1. Case No. 2:10-cv-434 involves different defendants and a different nucleus of operative facts from the prior litigations. *Compare* Doc. 1, *with* App. B1, B63, C1, D1.

---

[3] *See* Fed. R. Civ. P. 58(a) ("[e]very judgment and amended judgment must be set out in a separate document"); *Fogade* v. *ENB Revocable Trust*, 263 F.3d 1274, 1286 (11th Cir. 2001) (litigants "'safely may defer the appeal until Judgment Day if that is how long it takes to enter the [Rule 58] document'" (quoting *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987))).

[4] *See Bank* v. *Pitt*, 928 F.2d 1108, 1110 (11th Cir. 1991) (Rule 58 is waivable), *overruled on other grounds by Wagner* v. *Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc)

Standard Of Review

The Guards mistakenly contend the Court's review is exclusively de novo. Guards Br. at 14-15. To the contrary, with respect to Issues Nos. 1 and 2, "[m]otions made under Rule 60(b) are within the sound discretion of the trial court."[5] *Turner* v. *Sec'y of Air Force*, 944 F.2d 804, 807 (11th Cir. 1991). Accordingly, "[w]e review a district court's denial of a Rule 60(b) motion for an abuse of discretion." *Arthur* v. *Thomas*, 739 F.3d 611, 628 (11th Cir. 2014). "Under the abuse-of-discretion standard, 'we will leave undisturbed a district court's ruling unless we find that the district court has made a clear error of judgment, or has applied the wrong legal standard.'" *Id.* (citation omitted). It is only when an issue has been preserved outside the Rule 60(b) context (i.e., Issue No. 3) that "we review the district court's determination of qualifying strikes de novo." *Rivera* v. *Allin*, 144 F.3d 719, 723 (11th Cir. 1998), *overruled on other grounds by Jones* v. *Bock*, 549 U.S. 199, 215, 127 S. Ct. 910, 920 (2007).

[5] A Rule 60(b)(1) motion "encompasses [a district court's] mistakes in the application of the law." *Parks* v. *U.S. Life & Credit Corp.*, 677 F.2d 838, 840 (11th Cir. 1982) (citing *Oliver* v. *Home Indemnity Co.*, 470 F.2d 329, 331 (5th Cir. 1972)).

Under either standard of review, however, all issues presented in the cross-appeal concern legal determinations of what is and is not a strike. Accordingly, "[t]he disagreement is perhaps more apparent than real, for even under an abuse of discretion standard, errors of law receive no deference." *United States* v. *Barner*, 441 F.3d 1310, 1315 n.5 (11th Cir. 2006).

SUMMARY OF THE ARGUMENT

Appeal

The dismissal with prejudice of Howard's Eighth Amendment claim was error because Howard could have remedied any pleading defect in an amended complaint. *Pro se* litigants like Howard are never required to seek leave to amend. Rather, before dismissing a *pro se* complaint with prejudice, district courts must *sua sponte* grant at least one opportunity to amend. Nor would an amended complaint have been futile: Howard could have alleged the lengthy delay in providing him medical treatment was deliberately indifferent and caused him to suffer a heart attack.

For related reasons, the Guards incorrectly demand qualified immunity because they ask and answer the wrong question. The question

is not whether the District Court correctly determined the Guards had qualified immunity from the complaint as it was alleged. Rather, the question is whether the Guards would have had qualified immunity from an amended complaint that properly alleged an Eighth Amendment claim. In that circumstance, dismissal on qualified-immunity grounds at the pleading stage would still be error.

Cross-Appeal

The Guards focus much of their fire on the District Court's language that it "d[id] not find it equitable" to rule the dismissal of Case No. 06-10707 was a strike or the dismissal of Case No. 8:07-cv-1915 was two strikes. Doc. 70 at 6 & n.4. From the Guards' perspective, the District Court disobeyed the PLRA's plain language when it created an equitable exception to the "three strikes" rule. Truly, the Guards' plain-language statutory-interpretation arguments have much force, and the District Court's language was unfortunate. In fact, had the District Court judicially created an equitable exception to the "three strikes" rule, there is no question it would have disobeyed the plain language of the PLRA, and this Court would have no choice but to reverse. But, read correctly, that is not what the District Court actually did.

To the contrary, aside from identifying the District Court's unfortunate choice of words, the Guards have missed the point. To wit, the Guards assume the answers to the questions this appeal presents: i.e., whether the supposed strikes the Guards identified were in fact strikes to which the District Court declined to give effect simply because it was not "equitable" to do so. In fact, that is not at all what the District Court did. Instead, the District Court merely ruled those supposed strikes were not strikes in the first place. And, for the following reasons, it did so correctly:

1. **Issue No. 1:** The District Court acted within its discretion when it ruled the dismissal without prejudice of Case No. 8:10-cv-994 did not count as a strike. This Court has never addressed the issue whether dismissals that are expressly "without prejudice" qualify as strikes. As it happens, there is a circuit split between the Fourth and Seventh Circuits on one hand and the Eighth Circuit on the other regarding this question. The better rule is that of the Fourth and Seventh Circuits: i.e., dismissals expressly without prejudice do not count as strikes. This Court should adopt the majority rule. Additionally, there is

no authority for the proposition that a dismissal without prejudice when no judgment has been entered can count as a strike.

2. **Issue No. 2:** The District Court acted within its discretion when it ruled the dismissal of Case No. 8:07-cv-1915 counted as only one strike, not two. Ordinarily, when two cases are consolidated and then dismissed, that would count as two strikes. In the unique circumstances presented here, however, Case No. 8:07-cv-1915 and Case No. 8:04-cv-312 involved the same defendants and the same nucleus of operative facts. Therefore, they were identical. And the filing of the second case was necessitated by the district court's error, not Howard's error. Accordingly, the dismissal does not count as two strikes, but rather one.

3. **Issue No. 3:** The District Court correctly ruled the dismissal of Case No. 06-10707 did not count as a strike. Although the Guards contend otherwise, they cite literally no legal authority in support of their position. Because the dismissal of Case No. 06-10707 is incorrect now (and was incorrect then) due to an intervening change in the law, it cannot qualify as a strike under the plain language of the PLRA's "three strikes" provision.

ARGUMENT AND CITATIONS OF AUTHORITY

Appeal

I. THERE IS NO REQUIREMENT FOR *PRO SE* LITIGANTS LIKE HOWARD TO SEEK LEAVE TO AMEND, AND THE GUARDS WOULD NOT HAVE BEEN ENTITLED TO QUALIFIED IMMUNITY FROM AN AMENDED EIGHTH AMENDMENT CLAIM

The dismissal of the Eighth Amendment claim with prejudice was error. Howard could have amended his Eighth Amendment claim, and that amended claim would not have been futile because the Guards would not have qualified immunity from it.

A. The District Court Should Have Granted Leave To Amend *Sua Sponte* Because An Amended Eighth Amendment Claim Would Not Be Futile

The parties appear to agree that *pro se* litigants are entitled to at least one opportunity to replead their claims before they are dismissed with prejudice so long as an amended complaint would not be futile. *Compare* Howard Br. at 7-9, *with* Guards Br. at 18-19. "When it appears that a pro se plaintiff's complaint, if more carefully drafted, might state a claim, the district court should give the pro se plaintiff an opportunity to amend his complaint instead of dismissing it." *Watkins* v. *Hudson*, 560 Fed. App'x 908, 911 (11th Cir. 2014) (citing *Bank* v. *Pitt*, 928 F.2d 1108, 1112 (11th Cir. 1991), *overruled in part by Wagner* v.

Daewoo Heavy Indus. Am. Corp., 314 F.3d 541, 542 (11th Cir. 2002) (en banc)); *accord Clark* v. *Maldonado*, 288 Fed. App'x 645, 647 (11th Cir. 2008); *Spear* v. *Nix*, 215 Fed. App'x 896, 902 (11th Cir. 2007).[6] The only exceptions are when "the plaintiff expresses a desire not to amend or an amendment would be futile." *Watkins*, 560 Fed. App'x at 911. The Guards nowhere argue Howard expressed a desire not to amend, so they have "waived th[at] argument by failing to discuss it in the answer brief." *La Grasta* v. *First Union Sec., Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004). Accordingly, the only remaining issue concerns whether amendment would be futile.

In this regard, the parties' sticking point is whether or not, assuming Howard amended his complaint to state an Eighth Amendment claim, the Guards would still be entitled to qualified immunity. Previously, Howard argued it would be premature to decide whether the Guards have qualified immunity from an amended complaint until that amended complaint is actually filed. Howard Br. at 9-10. In contrast, the Guards contended they would be entitled to qualified immunity

[6] 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.

from an amended complaint because the complaint, as it was originally alleged, failed to state an Eighth Amendment claim. Guards Br. at 19-25. The Guards are incorrect.

To understand why, it is necessary to engage in a counterfactual analysis. Suppose Howard amended the complaint to allege (1) "I had severe chest pains";[7] (2) "the Guards responded with deliberate indifference when they waited several hours before providing me with medical care"; and (3) "this deliberately indifferent medical care caused me injury because I suffered a heart attack during the delay."[8] If Howard could so allege, he would state an Eighth Amendment claim, and the Guards would not have qualified immunity.

To state an Eighth Amendment claim, prisoners need to allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle* v. *Gamble*, 429 U.S. 97, 106, 97

---

[7] In fact, it appears this was what Howard meant to allege in the first place. *See* Doc. 90 at 10-11 (explaining "very moderate chest pains" meant "more than minor or moderate chest pains").

[8] The Guards speculate it would be "rather incredible that anyone would inadvertently omit a heart attack" in documents attached to the complaint. Guards Br. at 18 n.3. But that is not the metric for measuring the sufficiency of a complaint. Rather, a claim must merely be "plausible." *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). A heart attack is plausible. People have them every day.

S. Ct. 285, 292 (1976). "To show that a prison official acted with deliberate indifference to serious medical needs, a plaintiff must satisfy both an objective and a subjective inquiry." *Farrow* v. *West*, 320 F.3d 1235, 1243 (11th Cir. 2003). "First, a plaintiff must set forth evidence of an objectively serious medical need." *Id.* "Second, a plaintiff must prove that the prison official acted with an attitude of 'deliberate indifference' to that serious medical need." *Id.* Third, if a prison official was deliberately indifferent to a serious medical need, a prisoner must also establish "causation between that indifference and the plaintiff's injury." *Youmans* v. *Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010).

The hypothetical allegations described above would meet all three elements. First, "severe chest pain, a symptom consistent with a heart attack, is a serious medical condition under the objective prong of the Eighth Amendment's deliberate indifference standard." *Mata* v. *Saiz*, 427 F.3d 745, 754 (10th Cir. 2005); *accord Williams* v. *Limestone County*, 198 Fed. App'x 893, 896 (11th Cir. 2006).[9] Second, a delay of "several hours" in providing medical treatment to a prisoner suffering "severe chest pain" satisfies the subjective prong. *Sealock* v. *Colorado*, 218 F.3d

[9] *See supra* note 6.

1205, 1210 (10th Cir. 2000) ("Barrett was informed that appellant might be having a heart attack," "was present when appellant displayed symptoms consistent with a heart attack," "refused to drive appellant to the hospital," and "told appellant not to die on his shift"); *accord Easter* v. *Powell*, 467 F.3d 459, 463 (5th Cir. 2006) (given the prisoner's heart condition, "it can be inferred from the circumstances that Powell was subjectively aware of a substantial risk of harm to Easter's health"). Third, a delay in providing medical treatment that results in a heart attack constitutes causation. *See Youmans*, 626 F.3d at 563.

In short, because Howard's Eighth Amendment claim, "if more carefully drafted, might state a claim," the District Court was required to give him at least one "opportunity to amend his complaint instead of dismissing it." *Watkins*, 560 Fed. App'x at 911 (citations omitted).[10] The automatic dismissal with prejudice and without leave to amend, therefore, was an elementary procedural error.

B. The Guards Would Not Have Qualified Immunity From An Amended Eighth Amendment Claim

Moreover, because that amended complaint would state an Eighth Amendment claim under clearly established law, the Guards would also

[10] *See supra* note 6.

not be entitled to qualified immunity. *See Gilmore* v. *Hodges*, 738 F.3d 266, 276 (11th Cir. 2013) ("for purposes of qualified immunity, we have little difficulty concluding that the evidence allows the inference that the officers' response to Weinberg's medical need was objectively insufficient, that the officers acted with deliberate indifference, and that their actions caused Weinberg's harm").

Howard has no quarrel with the Guards' extensive description of this Court's qualified-immunity precedents. Guards Br. at 19-25. The problem for the Guards is that they have set up a straw man when they argue they did have qualified immunity from the original complaint. That analysis is neither here nor there, because the original complaint did not sufficiently state a constitutional violation in the first place.

Instead, the true question is whether the law was clearly established on or before July 31, 2006 that "a government official who intentionally delays providing medical care to an inmate, knowing that the inmate had a serious medical condition that could be exacerbated by the delay, acts with deliberate indifference." Guards Br. at 21. That is precisely what an amended complaint could allege. *See supra* Argument

I.A. And as it turns out, the Guards concede such law was clearly established at that time. Guards Br. at 21.

Indeed, it is quite obvious that delaying medical treatment for a prisoner who appears to be suffering a heart attack is deliberately indifferent. Some cases, like this one, are "easy," because the conduct is "so obviously unconstitutional that no prior case would be needed to make the holding explicit." *Edwards* v. *Shanley*, 666 F.3d 1289, 1298 (11th Cir. 2012); *accord United States* v. *Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227-28 (1997) ("The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability."). Accordingly, further discussion serves no purpose.

Cross-Appeal

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THE DISMISSAL OF CASE NO. 8:10-CV-994 WAS NOT A STRIKE

It was not an abuse of discretion when the District Court ruled the dismissal of Case No. 8:10-cv-994, which was expressly "without prejudice" and not followed by the entry of judgment, was not a strike.

The Guards contend the dismissal of Case No. 8:10-cv-994 qualifies as a strike. They do not mention the dismissal was expressly without prejudice (because Howard merely failed to use the customary civil rights complaint form), nor do they mention the order of dismissal was never followed by the entry of judgment. *See* App. D4, D5. It is for these reasons that the Guards are mistaken.

The PLRA's "three strikes" provision provides:

> In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is *frivolous, malicious, or fails to state a claim upon which relief may be granted*, unless the prisoner is under imminent danger of serious physical injury.

28 U.S.C. § 1915(g) (emphasis added). In Case No. 8:10-cv-994, that district court made no finding that the complaint was "frivolous" or "malicious." *Id.* Nor have the Guards so argued. *See Sapuppo* v. *Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) ("A party fails to adequately 'brief' a claim when he does not 'plainly and prominently' raise it, 'for instance by devoting a discrete section of his argument to those

claims.'" (citation omitted)).[11] Accordingly, the only question here concerns whether a dismissal made expressly "without prejudice" for failure to use the customary civil rights form, which has never been followed by the entry of judgment, can qualify as the kind of dismissal for "fail[ure] to state a claim upon which relief may be granted" that qualifies as a strike for purposes of 28 U.S.C. § 1915(g).

As it happens, this Court has never resolved this issue, and there appears at first blush to be a circuit split between the Fourth Circuit on one hand and Seventh and Eighth Circuits on the other.[12] But in How-

---

[11] In one sentence of their brief, the Guards state, "Judge Posner's opinion [in *Paul* v. *Marberry*, 658 F.3d 702 (7th Cir. 2011)] also suggested the possibility of such cases being dismissed as malicious." Guards Br. at 35. This passing reference is not sufficient to preserve any argument that the dismissal of Case No. 8:10-cv-994 qualifies as a strike because it was dismissed as malicious. *See Sapuppo*, 739 F.3d at 681 ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

[12] As with many things in life, circuit splits are often difficult to categorize. *Cf.* MICHEL FOUCAULT, THE ORDER OF THINGS xv (7th ed. 1997) (describing with amusement a passage from "'a certain Chinese encyclopedia' in which it is written that 'animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies'").

ard's appeal, this supposed circuit split is more apparent than real, because Howard actually prevails under both the Fourth and Seventh Circuit's approach. It is only if the Court were to adopt the Eighth Circuit's approach that Howard would lose. (For that reason, and despite initial appearances to the contrary, in the context of this appeal and this issue, the actual circuit split is between the Fourth and Seventh Circuits on one hand and the Eighth Circuit on the other.) But the Eighth Circuit's minority rule is unsound because, unlike the majority rule, it does not

---

Given the numerous taxonomical possibilities and complexities this supposed circuit split presents, Howard believes this and other circuits have not quite addressed this precise question. Truly, this and those other circuits have come close. *See, e.g.*, *O'Neal* v. *Price*, 531 F.3d 1146, 1154 (9th Cir. 2008) ("Because § 1915(g) of the current PLRA does not distinguish between dismissals with and without prejudice, [our prior precedent] does not detract from the conclusion that a dismissal without prejudice may count as a strike."); *Day* v. *Maynard*, 200 F.3d 665, 667 (10th Cir. 1999) ("a dismissal without prejudice counts as a strike, so long as the dismissal is made because the action is frivolous, malicious, or fails to state a claim" (citations omitted)); *Rivera*, 144 F.3d at 731, *overruled on other grounds by Jones*, 549 U.S. at 215, 127 S. Ct. at 920; *Patton* v. *Jefferson Corr. Ctr.*, 136 F.3d 458, 463-64 (5th Cir. 1998) (counting dismissal partially as frivolous and partially without prejudice as strike). But *Rivera* and *Patton* involved dismissals partially based on frivolity (plus, *Rivera* was expressly overruled by *Jones*), and *Day* and *O'Neal* do not address the question presented for the reasons explained in *McLean* v. *United States*, 566 F.3d 391, 398-99 (4th Cir. 2009). Accordingly, the Fifth, Ninth, Tenth, and Eleventh Circuits are not properly included in this particular circuit split. Rather, only the Fourth, Seventh, and Eighth Circuits are properly included.

take account of the realities of *pro se* prisoner litigation and is incompatible with this Court's precedent.

A. Howard Would Prevail Under The Majority Rule Of The Fourth And Seventh Circuits, By Which Dismissals That Are Expressly "Without Prejudice" Do Not Qualify As Strikes

Howard would prevail under the majority rule of the Fourth and Seventh Circuits. Under that majority rule, dismissals that are expressly "without prejudice" do not qualify as strikes.

According to the Fourth Circuit, "the type of prior dismissal for failure to state a claim contemplated by § 1915(g) is one that constituted an adjudication on the merits and prejudiced the filing of a subsequent complaint with the same allegations." *McLean* v. *United States*, 566 F.3d 391, 396 (4th Cir. 2009). "In contrast, a dismissal without prejudice for failure to state a claim is not an adjudication on the merits, and 'permits a plaintiff to refile the complaint as though it had never been filed.'" *Id.* (citations omitted). "Consequently, a dismissal without prejudice for failure to state a claim does not fall within the plain and unambiguous meaning of § 1915(g)'s unqualified phrase 'dismissed . . . [for] fail[ure] to state a claim.'" *Id.* at 397. "As a result, a dismissal without prejudice for failure to state a claim does not count as a strike."

Id. *McLean* therefore held a prisoner who had four previous actions dismissed without prejudice was not a three striker. *Id.* at 401.

The Seventh Circuit, however, appeared to reach the opposite conclusion in dictum, but still reversed that district court because it concluded the prisoner was not a three striker. *Paul* v. *Marberry*, 658 F.3d 702, 704-06 (7th Cir. 2011). *Paul* involved a prisoner who filed a series of incomprehensible complaints. *Id.* at 703-04. "In each case the district judge had rightly found the complaint to be 'unintelligible' and dismissed it on the basis of [Rule] 8(a)(2), which requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 703. After doing so in each of those cases, "the judge had granted leave to the plaintiff to file an amended complaint that would be intelligible, but the plaintiff had neither filed an amended complaint nor otherwise responded." *Id.* at 704. "[T]he judge had then dismissed [each] case for want of prosecution, but without prejudice." *Id.*

Addressing these facts, the Seventh Circuit explained that dismissals for want of prosecution are deemed with prejudice under Rule

41(b).[13] *Id.* Even though it was dealing only with prior dismissals that should have been with prejudice, not dismissals without prejudice, the Seventh Circuit nevertheless proceeded to state in dictum, "[a] dismissal is a dismissal, and provided that it is on one of the grounds specified in section 1915(g) it counts as a strike, whether or not it's with prejudice." *Id.* (dictum) (citation omitted).

Notwithstanding all that discussion, the Seventh Circuit nevertheless recognized that the prisoner's three prior dismissals were expressly "without prejudice." *Id.* at 704, 706. Given that circumstance, the Seventh Circuit explained, "we think the plaintiff was entitled to take the previous dismissals at face value, and since none of them was based on any of the grounds specified in section 1915(g), to infer that he was not incurring strikes by the repeated dismissals." *Id.* at 706. "The statute is explicit, and the case law confirms, that classifying a dismissal as a strike depends on the grounds given for it; since most prisoners

[13] "If the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) and any dismissal not under this rule—except one for lack of jurisdiction, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits." Fed. R. Civ. P. 41(b).

litigate their civil claims pro se, they should not be required to speculate on the grounds the judge could or even should have based the dismissal on." *Id.* (citations omitted). Accordingly, the Seventh Circuit actually reversed the district court's determination that the prisoner was a three striker and remanded for further proceedings. *Id.*

Despite the apparently different general approaches to dismissals with and without prejudice taken by the Fourth Circuit (in a holding) and the Seventh Circuit (in dictum), this Court need not resolve that circuit split here. Under either circuit's actual holdings, Howard would prevail because the order of dismissal in Case No. 8:10-cv-994 expressly states, "[t]he dismissal is *without prejudice* to Plaintiff filing a new action under a new case number." App. D4 (emphasis added). As such, according to both *McLean* and *Paul*, the District Court did not abuse its discretion when it determined the dismissal "without prejudice" of Case No. 8:10-cv-994 was not a strike. *See* Doc. 91 at 19 & n.10.

B. Although Howard Would Not Prevail Under The Minority Rule Of The Eighth Circuit, That Draconian Rule Is Both Bad Policy And Incompatible With This Court's Precedent

But this does not end the analysis, because under the Eighth Circuit's approach, Howard would lose. Specifically, the Eighth Circuit de-

cided a prisoner appeal in which "[a]ll three [prior] actions were dismissed without prejudice." *Orr* v. *Clements*, 688 F.3d 463, 465 (8th Cir. 2012). The question in *Orr*, therefore, was whether those dismissals, which expressly stated they were without prejudice, should count as strikes. *See id.* Without addressing *Paul*'s actual holding (i.e., that the prisoner "was entitled to take the previous dismissals [without prejudice] at face value, and since none of them was based on any of the grounds specified in section 1915(g), to infer that he was not incurring strikes by the repeated dismissals," 658 F.3d at 706), the Eighth Circuit abruptly held, "we see no reason why a dismissal without prejudice should not count as a strike under § 1915(g)." 688 F.3d at 465.

Respectfully, the Eighth Circuit's holding in this regard is unsound. As the Seventh Circuit noted, prisoners almost always litigate their civil rights complaints *pro se*. *Paul*, 658 F.3d at 706. Given that reality, "they should not be required to speculate on the grounds the judge could or even should have based the dismissal on." *Id.*

In addition to being unrealistic and bad policy, *Orr* is also incompatible with this Court's precedent. In this Court, "especial care . . . must be exercised when an action is brought alleging denial of basic

constitutional liberties by an indigent prisoner lacking formal legal training." *Griffith* v. *Wainwright*, 772 F.2d 822, 825 (11th Cir. 1985). That solicitude is necessary "so that any rights that such a litigant might have will not be extinguished merely through failure to appreciate the subtleties of modern motion practice." *Id.* And this laudable purpose is accomplished only by giving *pro se* prisoners "notice" of the consequences of orders and rules. *Id.* & n.6.

C. The Court Should Adopt The Majority Rule, Reject The Minority Rule, And Affirm The District Court's Ruling That The Dismissal Of Case No. 8:10-cv-994 Was Not A Strike

If the Court were to adopt *Orr*, it would allow the rights of *pro se* litigants to be extinguished not only because they do not appreciate the subtleties of motions practice, but actually because they took a district court at its word when it stated a dismissal was "without prejudice." But *Griffith* does not allow this. Rather, *pro se* prisoners are entitled to notice on which they can rely when making future litigation tactical and strategic decisions. *See id.* & n.6. Accordingly, *Orr* is incompatible with this Court's precedent. Instead, it is only the Seventh Circuit's specific holding in *Paul* and the Fourth Circuit's more general holding in *McLean* that grasp the realities of *pro se* prisoner litigation and comply

with *Griffith*. Accordingly, this Court has no choice and must follow the majority rule of *McLean* and *Paul* instead of the minority rule of *Orr*.

In short, this Court should reject *Orr*'s holding that prisoners cannot take district courts at their word, apply the relevant (and mutually compatible) holdings of *McLean* and *Paul*, and affirm the District Court's ruling that the dismissal "without prejudice" of Case No. 8:10-cv-994 was not a strike.[14]

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT RULED THE DISMISSAL OF CASE NO. 8:07-CV-1915 WAS ONLY ONE STRIKE, NOT TWO

The District Court did not abuse its discretion when it denied the Guards' Rule 60(b) motions for reconsideration (Docs. 71 at 4-5 n.1, 79 at 25-27) and instead concluded the dismissal with prejudice of Case No. 8:07-cv-1915 (App. B77) qualified as only one strike, not two.

In Case No. 8:04-cv-312, that district court initially dismissed the amended complaint for failure to plead exhaustion of administrative remedies. App. B63 at 2, 10 (citing *Steele* v. *Fed. Bureau of Prisons*, 355 F.3d 1204, 1209-10 (10th Cir. 2003), and *Brown* v. *Toombs*, 139 F.3d

[14] Again, in doing so, it would not be necessary to address the supposed circuit split between *McLean* on one hand and *Paul* and *Orr* on the other regarding whether dismissals without prejudice qualify as strikes as a general matter. That issue simply is not presented here.

1102, 1104 (6th Cir. 1998), for the proposition that prisoners must plead administrative exhaustion). By law, this dismissal was not on the merits; rather, it was without prejudice to filing a new case. *Bryant* v. *Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008). Importantly, after this dismissal, the Supreme Court subsequently interpreted the PLRA as not requiring prisoners to plead administrative exhaustion because it is instead an affirmative defense that defendants must plead. *Jones* v. *Bock*, 549 U.S. 199, 211-12, 127 S. Ct. 910, 919 (2007). "Where the Supreme Court provides an authoritative judicial interpretation" of a statute, as in *Jones*, "the Court does not change the meaning of the law," "but rather establishes what the law has always meant." *Bryant* v. *Warden*, 738 F.3d 1253, 1292 (11th Cir. 2013) (collecting cases). For that reason, when the Supreme Court interpreted the PLRA in *Jones*, it ascribed to it a meaning that it had always had. *See id.*

If the district court in Case No. 8:04-cv-312 had recognized the meaning the PLRA always had and thus the error of its way, it would not have dismissed the amended complaint for failure to plead exhaustion of administrative remedies at all. *See Jones*, 549 U.S. at 211-12, 127 S. Ct. at 919; *Bryant*, 738 F.3d at 1292. Instead, it would have pro-

ceeded to address the merits at that time. *See Jones*, 549 U.S. at 211-12, 127 S. Ct. at 919; *Bryant*, 738 F.3d at 1292.

But that was not what happened. Because that district court instead dismissed Case No. 8:04-cv-312, and that dismissal was without prejudice, Howard was forced to file a new complaint in Case No. 8:07-cv-1915, which that district court immediately recognized as suing the same defendants and "seeking relief based on the same nucleus of operative facts." App. C3.

Relying primarily on *Orr*, the Guards contend this chain of events does not matter. Guards Br. at 29-32. But the Guards have misplaced their reliance on *Orr*,[15] because it is wrong and easily distinguishable. *Orr* involved a prisoner whose initial suit was dismissed without preju-

[15] The Guards also misplace reliance on *Palmer* v. *N.Y. State Dep't of Corr.*, 342 Fed. App'x 654, 655 (2d Cir. 2009) (unpublished), and *Powells* v. *Minnehaha County Sheriff Dep't*, 198 F.3d 711, 712-13 (8th Cir. 1999). *Palmer* "assume[d] the parties' familiarity with the underlying facts, procedural history, and specification of issues on appeal," 342 Fed. App'x at 655, so it is impossible to assess its persuasive value. *Powells* simply stands for the general proposition that the dismissal of a consolidated case counts as strikes for each case consolidated. Howard does not dispute that general proposition. But the question is whether, in the unique circumstances presented here, the dismissal of Case No. 8:07-cv-1915 qualifies as two strikes when the only reason it was filed in the first place was because the district court in Case No. 8:04-cv-312 mistakenly dismissed the amended complaint without prejudice. App. B63.

dice for a pleading deficiency. 688 F.3d at 465. The district court ordered the prisoner to file an amended complaint. *Id.* When he "missed the deadline," the district court "dismissed his complaint without prejudice, both because it failed to state a claim upon which relief may be granted and because Orr failed to comply with a court order." *Id.* at 465-66. When the prisoner attempted to file an amended complaint after the deadline, the district court struck it, but explained he could file it under a new case number. *Id.* at 466. The prisoner did so. *Id.* Ultimately, the district court dismissed that amended complaint in the new action with prejudice for failure to state a claim. *Id.* On appeal, the Eighth Circuit concluded the dismissal of both actions meant the prisoner had earned two strikes. *Id.*

With this background, *Orr* does not control Howard's appeal for two reasons. First, there is no question, under any circuit's precedent, that the second dismissal with prejudice properly qualified as a strike. *See* 28 U.S.C. § 1915(g) ("dismissed on the grounds that it . . . fails to state a claim upon which relief may be granted"). But, contrary to *Orr*, the first dismissal should not have qualified as a strike, because it expressly stated it was without prejudice. *See supra* Argument I (discuss-

ing *McLean*, *Paul*, and *Griffith*). Simply put, the minority approach espoused in *Orr* is wrong. The Court should reject it.[16]

Second, *Orr* is factually distinguishable, because there it was at least arguable that the first dismissal for failure to state a claim and failure to comply with a court order qualified as a strike because it should have been with prejudice. *See* Fed. R. Civ. P. 41(b); *Paul*, 658 F.3d at 704. But here, the Guards cannot muster any such argument. Rather, the dismissal of Case No. 8:04-cv-312 (App. B77) was both without prejudice, *Bryant*, 530 F.3d at 1374-75, and wrong, *Jones*, 549 U.S. at 211-12, 127 S. Ct. at 919; *Bryant*, 738 F.3d at 1292. Had that district court not malfunctioned and mistakenly dismissed the case, it would not have been necessary for Howard to file Case No. 8:07-cv-1915 to begin with.[17] In contrast, the prisoner in *Orr* had to file the refile the

---

[16] Moreover, assuming the Court were to reject *Orr*'s minority rule, it would be anomalous to hold a never-appealed dismissal without prejudice became a strike simply because it later happened to be consolidated with another case, which was subsequently dismissed for failure to state a claim.

[17] The Guards' contention below (Doc. 71 at 4-5 n.1) that Case No. 8:04-cv-312 and Case No. 8:07-cv-1915 were different because they alleged different legal theories is belied by the liberal manner in which this Court reads *pro se* complaints. *E.g.*, *Tannenbaum* v. *United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) ("*Pro se* pleadings are held to a less stringent standard than pleadings drafted by attorneys and will,

amended complaint under a new case number because he missed his deadline. In other words, *Orr* punished a prisoner for his mistake (i.e., failing to amend his complaint on or before the deadline), but here the Guards are asking this Court to punish Howard for a district court's mistake (i.e., dismissing Case No. 8:04-cv-312). Accordingly, Howard's case is unlike *Orr*.

For those reasons, the Guards misplace their reliance on *Orr*, and the District Court did not abuse its discretion when it denied the Guards' motions for reconsideration and instead ruled the dismissal of Case No. 8:07-cv-1915 qualified as only one strike, not two.

III. THE DISTRICT COURT DID NOT ERR WHEN IT RULED THE DISMISSAL OF CASE NO. 06-10707 WAS NOT A STRIKE

Without citation to any authority, the Guards contend this Court's dismissal of Case No. 06-10707 was also a strike because this Court "has never . . . expressly invalidated" that order of dismissal. Guards

---

therefore, be liberally construed."). Accordingly, because both *pro se* complaints sued the same defendants and alleged the same nucleus of operative facts, they both alleged the same legal theories. *See id.* In any event, the Guards abandoned that argument when they failed to raise it here. *See Sapuppo*, 739 F.3d at 680 ("When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed.").

Br. at 28. The Guards further assert, again without authority, "[s]urely the fact that a federal district court chose to vacate its own order of dismissal underlying Howard's appeal does not invalidate an order of this Court." *Id.* The Guards are mistaken.

As previously explained, "[w]here the Supreme Court provides an authoritative judicial interpretation" of a statute, "the Court does not change the meaning of the law," "but rather establishes what the law has always meant." *Bryant*, 738 F.3d at 1292 (collecting cases). In Case No. 06-10707, this Court dismissed Howard's appeal as frivolous (App. B72) because that district court had dismissed his complaint without prejudice for failure to plead administrative exhaustion (App. B63). As it turns out, both the district court and this Court were wrong. *See Jones*, 549 U.S. at 211-12, 127 S. Ct. at 919. In fact, this Court implicitly recognized its dismissal was wrong when it concluded the district court's subsequent dismissal in Case No. 8:07-1915 on res judicata grounds (App. C3) was incorrect because there had been an intervening change in the law (App. C14 at 3-4). For the same reason that district court's dismissal was "at odds with current Supreme Court case law" (App. C14 at 4), this Court's dismissal of Howard's appeal in Case No.

8:04-cv-312 (App. B65) was also at odds with *Jones*. It therefore no longer qualifies as a strike.[18]

In fact, the plain language of the PLRA's three strikes provision anticipated precisely this problem. "Statutory interpretation begins and ends with the text of the statute so long as the text's meaning is clear." *Reeves* v. *Astrue*, 526 F.3d 732, 734 (11th Cir. 2008). "Absent clear legislative intent to the contrary," the use of "tense[s]" in a statute "is conclusive." *Alabama* v. *U.S. EPA*, 871 F.2d 1548, 1557 (11th Cir. 1989). In relevant part, the PLRA's three strikes provision applies to any appeal that "*was* dismissed on the grounds that it *is* frivolous." 28 U.S.C. § 1915(g) (emphases added). There is no question that Case No. 06-10707 "*was* dismissed." *Id.* (emphasis added). But it is simply impossible, in light of *Jones*, for the Guards to establish that appeal "*is* frivolous" today. *Id.* (emphasis added). To the contrary, after *Jones*, Case No. 06-10707, if it were brought today, certainly is not frivolous. And, because *Jones* gave the PLRA the meaning it always had, *Bryant*, 738 F.3d at 1292, it also was not properly considered frivolous at that time.

[18] Howard's research has not identified any federal court that has addressed the issue whether an appellate court's prior dismissal of an appeal as frivolous still qualifies as a strike when an intervening change in the law has rendered that frivolity dismissal incorrect.

Finally, the Guards' complaint that this Court's frivolity dismissal in Case No. 06-10707 "has never been expressly invalidated" (Guards Br. at 28) is easily rectified in this appeal. All the Court has to do in this appeal is rule that *Jones* invalidated the frivolity dismissal of Case No. 06-10707. Problem solved.

For these reasons, the District Court did not err when it ruled this Court's dismissal of Case No. 06-10707 was not a strike.

IV. THE DISTRICT COURT DID NOT INVENT AN EQUITABLE EXCEPTION TO THE PRISON LITIGATION REFORM ACT'S "THREE STRIKES" RULE

Focusing on the District Court's language that it "d[id] not find it equitable" to rule the dismissal of Case No. 06-10707 was a strike or the dismissal of Case No. 8:07-cv-1915 was two strikes (Doc. 70 at 6 & n.4), the Guards argue the District Court disobeyed the PLRA's plain language (Guards Br. at 32-34). Truly, the Guards' plain-language statutory-interpretation arguments have much force, and the District Court's language was unfortunate. In fact, had the District Court judicially created an equitable exception to the "three strikes" rule, there is no question it would have disobeyed the plain language of the PLRA, and this Court would have no choice but to reverse.

But this Court often reads district courts' language charitably, and it should do so here. *E.g.*, *MDS (Can.), Inc.* v. *RAD Source Techs., Inc.*, 720 F.3d 833, 852-53 (11th Cir. 2013) ("[w]e acknowledge some inconsistent language in the district court's opinion," but "construe" it differently); *Glenn* v. *Gen. Motors Corp.*, 841 F.2d 1567, 1570 n.8 (11th Cir. 1988) ("[w]e do not read the district court's language" as appellant contends; "[r]ather, we read the district court" differently (citation omitted)); *Brown* v. *Sec'y, Fla. Dep't of Corr.*, 580 Fed. App'x 721, 727 (11th Cir. 2014) ("[a]lthough the district court referred once to the [wrong] standard," it also "stated repeatedly" it considered what it was supposed to consider).[19]

In this appeal, despite identifying the District Court's unfortunate choice of words, the Guards have not demonstrated its rulings were wrong. Instead, the Guards assume the answer to the question they claim this appeal presents: i.e., whether the supposed strikes they identified were in fact strikes to which the District Court declined to give effect simply because it was not "equitable" to do so. *See supra* Arguments I-III. In fact, that is not at all what the District Court did. *See id.*

[19] *See supra* note 6.

Rather, the District Court merely ruled those supposed strikes were not strikes in the first place. *See id.* And, as explained, it did so correctly. *See id.* Accordingly, the Court should affirm the cross-appeal.

CONCLUSION

For the foregoing reasons, in Howard's appeal, the Court should vacate the judgment with respect to Howard's Eighth Amendment claim against Kraus, Snider, and Meier, affirm the judgment in all other respects, and remand for further proceedings; in the Guards' cross-appeal, the Court should affirm the orders (Docs. 70, 75, 91) insofar as they conclude Howard has only two strikes.

Respectfully submitted,

/s/ Thomas Burns
Thomas A. Burns
BURNS, P.A.
301 West Platt Street, Suite 137
Tampa, FL 33606
(813) 642-6350 T
(813) 642-6350 F
tburns@burnslawpa.com

Court-Appointed Counsel for Johnnie Fitzgerald Howard

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 8,758 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.

April 14, 2015

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I filed the original and six copies of the foregoing brief with the Clerk of Court via CM/ECF and regular mail on this 14th day of April, 2015, to:

Douglas J. Mincher, 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 brief via CM/ECF on this 14th day of April, 2015, to:

Florida Attorney General

AAG C. Ian Garland
AAG Jay Vail

April 14, 2015

/s/ Thomas Burns
Thomas A. Burns