No. 09-11730-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEWIS MARTIN MOTON, JR.,

Plaintiff-Appellant,

v.

COLONEL B.E. COWART, LIEUTENANT RODRIEGO PRIETO, CLASSIFICATION OFFICER W.O. SHEETZ,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Florida
Case No. 8:06-cv-02163-JSM-EAJ, Judge James S. Moody, Jr.

APPELLANT'S ADDITIONAL BRIEF

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AMENDED 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. Additions are in bold and italicized typeface.

1. Burns, Thomas A., Hill, Ward & Henderson, P.A. – Counsel for Plaintiff-Appellant;
2. Cowart, Colonel B.E. – Defendant-Appellee;
3. Fouse, Helen Brewer, Assistant Attorney General with Civil Litigation Division of the Office of the Attorney General of Florida – Counsel for Defendant-Appellee;
4. Hill, Ward & Henderson, P.A. – Counsel for Plaintiff-Appellant;
5. Jenkins, Honorable Elizabeth A. – United States Magistrate Judge;
6. McCollum, Bill, Attorney General of Florida – Counsel for Defendant-Appellee;
7. Moody, Jr., Honorable James S. – United States District Judge;
8. Moton, Jr., Lewis Martin – Plaintiff-Appellant;
9. Office of the Attorney General of Florida, Civil Litigation Division – Counsel for Defendant-Appellee;
10. ***Prieto, Lieutenant Rodriego – Defendant-Appellee***;
11. ***Sheetz, Classification Officer W.O. – Defendant-Appellee***.

/s/ Thomas Burns
Thomas A. Burns

STATEMENT REGARDING ORAL ARGUMENT

The Court has classed this civil appeal for oral argument and appointed counsel pursuant to its authority under Addendum Five to represent Plaintiff-Appellant Lewis Martin Moton, Jr. Because there are fact-intensive claims involving four parties and five legal issues to be resolved on appeal, Moton requests that this Court grant counsel for Plaintiff-Appellant and Defendants-Appellees 30 minutes each for oral argument.

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TABLE OF ABBREVIATIONS

AB__	Appellee Col. Cowart's Answer Brief filed August 4, 2009 page number.
DE__	Docket entry number for document cited from the District Court's record.
DR	Disciplinary Report.
FDOC	Florida Department of Corrections.
PLRA	Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.*

STATEMENT OF JURISDICTION

This is a direct appeal of a final judgment from the Middle District of Florida, Orlando Division. The parties did not previously address two potential record discrepancies regarding the timeliness and scope of the Notice Of Appeal, so counsel wishes to dispel any such possible jurisdictional questions before they arise.

First, the Notice Of Appeal (DE81) is timely. Although Moton did not file it until 34 days after the District Court granted summary judgment to Defendant-Appellee Col. B.E. Cowart (DE75), that does not render it untimely for two reasons. As an inmate, Moton gets the benefit of the "mailbox rule." Moton deposited the Notice Of Appeal in the correctional institution's internal mail system on the last day for filing, and it was ultimately filed electronically by prison personnel four days later. *See* Fed. R. App. P. 4(c)(1); 11th Cir. R. 4 I.O.P. Also, Moton's Motion For Reconsideration (DE79) sought relief under Rules 59(e) and 60(b), so the 30-day period did not begin to run until the District Court denied that motion by written order (DE80). Fed. R. App. P. 4(a)(4)(A)(iv), (vi).

Second, the Court should liberally construe Moton's *pro se* Notice Of Appeal as designating not only the District Court's Summary Judgment Order (DE75), but also its Reconsideration Order (DE80), Dismissal Order (DE48), and Final Judgment (DE76). Ordinarily, notices of appeal must "designate the

judgment, order, or part thereof being appealed." Fed. R. App. P. 3(c)(B). But the Supreme Court has cautioned that Rule 3 is "meant only to facilitate, not to impede, access to an appeal," so "imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court." *Becker* v. *Montgomery*, 532 U.S. 757, 767, 121 S. Ct. 1801, 1807-08 (2001); *see also McAninch* v. *Traders Nat'l Bank of Kansas City*, 779 F.2d 466, 467 n.2. (8th Cir. 1985) (applying "'policy of liberal construction of notices of an appeal in situations where intent is apparent and there is no prejudice to the adverse party'" (citation omitted)).

STATEMENT OF THE ISSUES

1. At summary judgment, courts cannot draw inferences or resolve material factual disputes against nonmovants. Viewed in Moton's favor, the facts and all reasonable inferences drawn therefrom show that Col. Cowart retaliated against him for filing grievances because, shortly thereafter, she filed false disciplinary reports against him—which the prison ultimately rejected on administrative appeal for lack of evidence. Did the District Court err when it drew inferences and resolved material factual disputes against Moton and in Col. Cowart's favor, despite expressly conceding they were "close question[s]" resting "in the eye of the beholder" that "could be reasonably construed" either way?

2. Although the grant of summary judgment may be affirmed on any adequate ground supported by the record, it may also be vacated and remanded whenever a district court has not explicitly addressed an issue. The District Court assumed but never analyzed whether Moton satisfied the retaliation test's first and second elements. Should the Court resolve these summary judgment issues without the benefit of the District Court's analysis, or remand for further proceedings so the District Court may address them in the first instance?

3. Prison guards cannot cloak themselves in qualified immunity when they violate clearly established constitutional rights. For decades, it has been clearly established in the Eleventh Circuit that prison guards violate First Amendment free speech rights whenever they retaliate against prisoners who file grievances. Did the District Court properly reject Col. Cowart's claim of qualified immunity from Moton's First Amendment retaliation claim?

4. The PLRA bars prisoners from recovering for "mental or emotional injury" absent a prior showing of greater than *de minimis* physical injury. Without the benefit of briefing, the District Court *sua sponte* granted summary judgment limiting Moton to recovery of only nominal damages, even though Moton claimed that during his retaliatory 30 days' disciplinary confinement he suffered "assault and battery." On remand, should the District Court revisit this ruling and direct the parties to brief any physical injuries Moton may have suffered?

5. Ordinarily, the PLRA requires prisoners to exhaust all administrative remedies before filing suit. Moton exhausted all administrative remedies against Col. Cowart, but did not exhaust remedies against Lt. Prieto or C.O. Sheetz. Should the District Court have permitted Moton's virtually identical claims against Lt. Prieto and C.O. Sheetz to proceed because it would have been futile to exhaust administrative remedies against them under the unique circumstances of this case?

STATEMENT OF THE CASE

The District Court granted summary judgment against Moton, an inmate currently incarcerated in Florida state prison. This appeal primarily presents straightforward questions of civil procedure and qualified immunity regarding a routine misapplication of the summary judgment standard.

A. FDOC's Grievance And Discipline Frameworks

To fully comprehend the issues on appeal, it is important to understand Florida's intricate frameworks for inmate grievances and discipline. By statute, the Florida Legislature commanded the Florida Department of Corrections ("FDOC") to promulgate rules, including in relevant part those relating to the "rights of inmates," "[d]isciplinary procedures and punishment," and "[g]rievance procedures which shall conform to 42 U.S.C. § 1997e." Fla. Stat. § 944.09(1)(a), (c), (d). With respect to grievance procedures, the Florida Legislature commanded that FDOC "shall establish by rule an inmate grievance procedure that must conform to

the Minimum Standards for Inmate Grievance Procedures as promulgated by the United States Department of Justice pursuant to 42 U.S.C. § 1997e." *Id.* § 944.331. Accordingly, FDOC promulgated administrative rules to handle inmate grievances and inmate discipline. *See* Fla. Admin. Code § 33-103.001-.019 (grievances); *id.* § 33-601.301-.314 (discipline). For the Court's convenience, these administrative code provisions are reproduced in their entirety as they existed at the time of the events in question (September-December 2004) in Addendums A (grievances) and B (discipline).

1. FDOC's Grievance Procedures

In March 1992, the U.S. Department of Justice "fully certified" FDOC's grievance procedures. *Id.* § 33-103.001(1). The express purposes animating these grievance procedures were fourfold: (1) to "provid[e] the inmate with the opportunity of having a grievance heard and considered"; (2) to "provid[e] additional means for internal resolution of problems"; (3) to "improv[e] lines of communication" between inmates and prison personnel; and (4) to "provide a written record in the event of subsequent judicial or administrative review." *Id.*

To accomplish these purposes, the grievance procedures permit grievances regarding (1) the "substance, interpretation, and application of rules and procedures of the department that affect them personally," (2) the "interpretation and application of state and federal laws and regulations that affect them

personally," (3) any "[r]eprisals against inmates for filing a complaint or appeal under the inmate grievance procedure, or for participating in an inmate grievance proceeding," (4) any "[i]ncidents occurring within the institution that affect them personally," or (5) any "[c]onditions of care or supervision within [FDOC's] authority." *Id.* § 33-103.001(3)(a)-(e). But inmates cannot file grievances regarding the substance of state or federal court decisions, laws, regulations, parole decisions, or other matters beyond FDOC's control. *Id.* § 33-103.001(4)(a)-(d).

Ordinarily, inmates "shall utilize the informal grievance process prior to initiating a formal grievance." *Id.* § 33-103.005(1). When completing an informal grievance form, inmates "shall ensure that the form is legible, that included facts are accurately stated, and that only one issue or complaint is addressed." *Id.* § 33-103.005(2)(b)(2). Upon receipt of an informal grievance, prison personnel "shall respond to the inmate following investigation and evaluation of the Verified Complaint within 10 days." *Id.* § 33-103.005(4). Such response "shall" be "written"—"even if an interview with the inmate has occurred concerning the subject matter of the grievance"—and "shall state that the grievance is either approved, denied, or returned without action" along with the "reason or reasons for the approval, denial, or return." *Id.* § 33-103.005(4)(a)-(b). "It is the policy of the department that all inmate request forms be answered." *Id.* § 33-103.005(5).

Among the many exceptions to the default rule that inmates must start with informal grievances, however, inmates may dispense with that requirement and begin proceedings with a formal grievance for a "grievance of reprisal" or when the grievance "involv[es] disciplinary action (does not include corrective consultations) governed by Rules 33-601.301-.314." *Id.* § 33-103.005(1). A grievance of reprisal is defined as any "grievance submitted by an inmate alleging that staff have or are threatening to take retaliatory action against the inmate for good faith participation in the inmate grievance procedure." *Id.* § 33-103.002(9).

The primary difference between informal and formal grievances is the person to whom they are sent. To wit, inmates must send informal grievances to lower-level prison personnel, *see id.* § 33-103.005(1), whereas inmates must send formal grievances typically to the warden or assistant warden, *id.* § 33-103.006(1)(a)-(b). "Following investigation and evaluation" by the warden or assistant warden, "a response shall be provided to the inmate" "within 20 calendar days of receipt of the grievance," which "shall state whether the grievance is approved, denied, or being returned and shall also state the reasons for the approval, denial or return." *Id.* § 33-103.006(6).

In addition to informal and formal grievances, FDOC's grievance procedures also provide administrative appeal "to the Office of the Secretary without interference from staff" "[i]n the event that an inmate feels that the

grievance has not been satisfactorily resolved." *Id.* § 33-103.007(1). "Following appropriate investigation and evaluation by staff of the Bureau of Inmate Grievance Appeals, a response shall be provided to the inmate" that "shall state whether the grievance is approved, denied, or being returned and shall also state the reasons for the approval, denial or return." *Id.* § 33-103.007(5)(e)-(f).

The grievance procedures explain that grievances of any kind "may be returned to the inmate without further processing" if one or more listed conditions are met, but the grievance procedures emphasize the "reasons listed" are the "***only reasons***" for returning grievances "without a response on the merits." *Id.* § 33-103.014(1) (emphasis added). Additionally, the grievance procedures explain that "good faith" use of or participation in the grievance process "shall not result in reprisal against the inmate." *Id.* § 33-103.017(1). But an inmate "shall be subject to disciplinary action" if he or she "***knowingly includes false, threatening, obscene, or profane statements*** in the grievance or any of its attachments." *Id.* § 33-103.017(2) (emphasis added). The grievance procedures provide no authority to discipline inmates for filing grievances that contain no "false, threatening, obscene, or profane statements," but nevertheless may or may not be, in the recipient's view, somehow "disrespectful." *See id.* In any event, notwithstanding any such disciplinary action, such grievance still "shall be responded to on its merits." *Id.*

The grievance procedures also include various timeframes within which to file informal grievances ("within a reasonable time of when the incident or action being grieved occurred"), formal grievances ("no later than 15 calendar days from" the grievance response or incident or action being grieved occurred), and grievance appeals ("within 15 calendar days from the date of the response to the formal grievance"). *Id.* § 33-103.011(1)(a), (b), (c). These timeframes can be extended if the inmate "clearly demonstrate[s]" it "was not feasible to file the grievance within the relevant time periods" and that the inmate "made a good faith effort to file in a timely manner." *Id.* § 33-103.011(2).

Finally, to ensure prisons keep proper records of inmate grievances, prison personnel must make and retain for "a minimum of 4 years" a log of "each formal grievance or appeal" that "shall contain, at minimum," the inmate's name, prison number, date grievance or appeal was received, its nature, disposition, reasons for disposition, and date of disposition. *Id.* § 33-103.012(1)(a)-(g).

2. FDOC's Discipline Procedures

The FDOC's discipline procedures provide correctional staff with a menu of options to correct inmate behavior. *See id.* § 33-601.301(1)-(3). More specifically, correctional staff have at their disposal the ability—in order of increasing severity—to discipline a disobedient inmate with a "verbal reprimand," to issue a "Corrective Consultation," or file a formal "Disciplinary Report." *Id.* § 33-

601.303(1)(a)-(b), (2).[1] A verbal reprimand is "any employee's verbal counseling to the inmate designed to motivate the inmate to comply with, or to clarify the rules of prohibited conduct, departmental rules or procedures or institutional regulations," which "will be documented on the inmate's contact card." *Id.* § 33-601.303(1)(a). Next in severity is a Corrective Consultation, which is a "written reprimand for a violation of rules of such a minor nature that no disciplinary report is necessary." *Id.* § 33-601.302(3). Finally, a Disciplinary Report, or DR, is the most severe "formal method of charging an inmate with a rule violation." *Id.* § 33-601.302(7).

Under the discipline procedures, Disciplinary Reports are a measure of last resort that are filed only "[i]f the employee cannot resolve the matter through a verbal reprimand or corrective consultation." *Id.* § 33-601.303(2). Once reduced to writing, Disciplinary Reports "shall include" a "description of the violation, including date, time, and place," the "specific rules violated," a "formal statement of the charge," "[a]ny unusual inmate behavior," "[a]ny physical evidence and its disposition," "[a]ny immediate action taken," and "[a]ny other specific facts necessary for an understanding of the charge." *Id.* § 33-601.304(2)(a)-(h).

[1] Although the discipline procedures refer to "verbal" reprimands, the context makes clear it actually refers to "oral" reprimands.

In part, the discipline procedures allow correctional staff to discipline inmates for violations of Section 1-3, "[s]poken or written threats" (30 days' maximum disciplinary confinement and 90 days' maximum lost gain time), or violations of Section 1-4, "[d]isrespect to officials, employees, or other persons of constituted authority expressed by means of words, gestures, and the like" (30 days' maximum disciplinary confinement and 60 days' maximum lost gain time). *Id.* § 33-601.314. "Any portion of either penalty may be applied." *Id.*

Upon writing the DR, the investigating officer shall initiate investigation within 24 hours. *Id.* § 33-601.305. Once the investigation concludes, an inmate is entitled to a hearing to determine whether to dismiss the charge, find the inmate not guilty, or find the inmate guilty. *Id.* § 33-601.308(2)(a)-(c). Following the hearing, either the warden or the regional director of institutions typically reviews the disciplinary action and "shall approve, modify downward or disapprove" it. *Id.* § 33-601.309(2)-(4). Whenever "an error is discovered at any time after an inmate has been found guilty of a disciplinary infraction, the warden" or other senior prison official "is authorized to cause a rehearing to take place within 30 days of the discovery of the error or the receipt of a successful grievance or appeal." *Id.* § 33-601.310(1). "The individual ordering the rehearing shall note the specific reasons for the rehearing on the disciplinary report." *Id.*

B. Background Facts And Procedural History

The convoluted record on appeal reveals the difficulty with which the District Court and the parties have discerned the underlying facts. Neither the parties nor the District Court undertook the time or effort to assemble the pertinent documentary evidence in chronological order. For the Court's convenience, counsel does so here for the first time in Addendum C.

1. The Verified Complaint

On November 7, 2006, Moton filed the Verified Complaint. DE1. It asserted First Amendment retaliation claims against Defendants-Appellees in their individual and official capacities: "My First Amendment right under the United States Constitution was violated when I was arbitrarily confined and punished for the submission of an informal grievance." *Id.* at 8.

More specifically, the Verified Complaint alleged Col. B.E. Cowart "out of reprisal" wrote Moton "a Disciplinary Report (1-4, Disrespect to Officials) for his submission of an informal grievance." *Id.* Moreover, Col. Cowart "knew or should have known of the violation of Plaintiff's First Amendment right" to "file a grievance without reprisal." *Id.*

Similarly, C.O. W.O. Sheetz and Lt. Rodriego Prieto "deprived Plaintiff of his First Amendment right to file a grievance without reprisal" on November 9, 2004, by "sentencing him" after hearing to "30 days Disciplinary Confinement and

taking 60 days of gaintime"—the maximum punishment for such an offense. *Id.* at 9. This erroneous sentence and punishment "was not fixed" until a rehearing on December 9, 2004, at which Moton "was found Not Guilty after having spent approximately 30 days in Disciplinary Confinement." *Id.*

For relief, Moton prayed for "$5,000 in damages as a result of the injury sustained by the violation of his First Amendment right . . . per each Defendant" plus attorneys' fees and costs. *Id.* at 10. Under penalty of perjury, Moton swore the Verified Complaint's claims and allegations were true and correct. *Id.*

Moton attached an array of exhibits regarding his informal and formal grievances, DRs, and administrative appeals. *Id.* at 11-38. Rather than attaching these exhibits to the Verified Complaint in chronological order or providing a chronological narrative explanation of the events, the Verified Complaint ordered the exhibits like a shuffled deck of cards. *See id.* As such, it was concededly difficult for the District Court or Defendants-Appellees to determine precisely what Moton was alleging had happened or whether he had exhausted his administrative remedies under the PLRA. *See id.*

2. Screening The Verified Complaint

Three weeks later on November 30, 2006, the District Court screened the Verified Complaint pursuant to 28 U.S.C. § 1915A. DE6. The District Court concluded Moton had not exhausted his administrative remedies as required by the

Prison Litigation Reform Act ("PLRA") and accordingly entered an order of dismissal with prejudice. *Id.* at 7. The next day, the District Court entered judgment against Moton. DE7. On December 14, 2006, Moton moved the District Court for reconsideration, contending he had in fact exhausted his administrative remedies. DE8. Approximately two months later, the District Court denied that reconsideration motion by written order. DE9. Moton timely appealed. DE10.

By written order dated May 14, 2007, however, the District Court stated *sua sponte* that "[i]n light of the Supreme Court's recent holding" in *Jones* v. *Bock*, 549 U.S. 199, 127 S. Ct. 910 (2007), that "exhaustion is an affirmative defense which must be plead by the defendant," it was "inclined to vacate its order denying the motion for reconsideration and grant Plaintiff's request that this matter be reopened." DE12. Accordingly, one month later on June 21, 2007, this Court remanded Moton's case in full to the District Court. DE14.

The next month, the District Court once again screened the Verified Complaint, dismissing it without prejudice as "premature" and simultaneously entering judgment. DE19 at 3; DE20. The District Court, however, granted Moton's reconsideration motion (DE21) by written order (DE22), and subsequently vacated both its prior dismissal order (DE19) and its entry of judgment (DE20). Moton then issued summons upon Defendants-Appellees (DE32), which were executed and returned by February 2008 (DE41-43).

3. Dismissal Order

On February 15, 2008, Defendants-Appellees moved to dismiss, contending Moton failed to exhaust his administrative remedies or state a claim and asserting Eleventh Amendment and qualified immunity. DE44. The District Court dismissed the claims against Lt. Prieto and C.O. Sheetz, but allowed the claim against Col. Cowart to proceed. DE48.[2]

Specifically, the District Court concluded Moton "fully and properly exhausted his available administrative remedies as to his claim that Captain Cowart violated his First Amendment rights when Captain Cowart retaliated against him for filing grievances." *Id.* at 11. Moreover, the District Court found Moton sufficiently stated a claim, because the "***temporal proximity*** of the discipline and harassment to the filing of the grievances raises a 'colorable suspicion' or ***'plausible inference' of retaliation***." *Id.* at 15 (emphases added). Also, the District Court expressly denied qualified immunity to Col. Cowart, because "pre-existing law gave Defendant Cowart clear warning that charging Plaintiff with a false disciplinary infraction in retaliation for Plaintiff filing grievances was unlawful." *Id.* at 18. Accordingly, the District Court denied the Motion To

[2] The District Court ruled that all Defendants-Appellees were entitled to Eleventh Amendment immunity for claims asserted against them in their official capacities. *Id.* at 16.

Dismiss (DE44) with respect to Col. Cowart in her personal capacity. DE48 at 18-19.

Nevertheless, the District Court dismissed all claims against Lt. Prieto and C.O. Sheetz for three reasons. ***First***, Moton "failed to exhaust his administrative remedies as to his claims against" Lt. Prieto and C.O. Sheetz because he did not identify them in his November 4, 2004, formal grievance of reprisal to the Warden. *Id.* The District Court concluded that although some of Moton's other grievances mentioned them, Moton either never followed through on them or they were untimely for administrative exhaustion purposes. *Id.* at 11-12. ***Second***, the District Court dismissed for failure to state a claim, because it found the Verified Complaint's allegations were "inadequate to suggest a retaliatory motive" on their part. *Id.* at 15. ***Third***, the District Court ruled that Lt. Prieto and C.O. Sheetz were entitled to qualified immunity because they were "acting within their discretionary authority as to disciplining Plaintiff," and Moton "fail[ed] to establish Defendants Sheetz and Prieto violated his constitutional rights." *Id.* at 18.

4. Answer And Discovery

Col. Cowart's Answer generally denied the Verified Complaint's allegations, except to admit that Col. Cowart "was a correctional officer for the Florida Department of Corrections and assigned to Hardee Correctional Institution." DE49 at 1. Further, Col. Cowart demanded a trial by jury and

asserted four affirmative defenses in conclusory form: failure to state a claim; failure to exhaust administrative remedies per the PLRA; a defense that "Plaintiff is not entitled to any kind of monetary relief"; and various immunities from liability (sovereign, Eleventh Amendment, and qualified). *Id.* at 2. Moton never replied to these defenses.

The District Court then issued a Case Management Order (DE51), opened discovery, and set the case for bench trial. Col. Cowart deposed Moton, collected affidavits from other guards and herself, and moved for summary judgment. DE58. Moton opposed. DE67-68.

5. Summary Judgment Evidence

The entire four-month episode at issue started on September 13, 2004, when Moton filed an informal grievance asking to identify and reprimand an unidentified male officer who ordered him to "keep your eyes to yourself!" when in the presence of a female officer. DE67 at 34.[3] After investigation, Col. Cowart identified the officer as Officer Funk, but denied Moton's informal grievance on

[3] Col. Cowart swore an affidavit that Moton had "written several inmate requests demanding a staff member, CO Funk, be ***terminated*** for counseling Inmate Moton concerning his behavior." Cowart Aff. (DE58-3) ¶ 2 (emphasis added). Likewise, Sgt. Duane Gardner averred Moton filed grievances seeking "***termination*** of employment action of another officer." Gardner Aff. (DE58-4) ¶ 4 (emphasis added). There is no documentary support for these averments. *See* Sheats Aff. (DE58-5) ¶¶ 3-4 (stating "I did not find copies of any" of "Inmate Moton's requests regarding the termination of a DOC employee CO Funk filed during October, 2004"). Additionally, Moton disputed these averments. DE67 at 22.

September 21. *Id.* Officer Funk informed Col. Cowart that "[w]hile walking by the cells [Moton was] staring in a suggestive and disrespectful manner" at a female officer, so he "told [Moton] to come to him where he informed [Moton] that you need to keep your eyes to yourself." *Id.* Moreover, Col. Cowart explained Moton was "very disrespectful to [Officer Funk] throughout this process as well." *Id.*

Shortly thereafter on September 25, Moton submitted another informal grievance regarding this episode in which he stated "Ma'am, I'd like to know what type of correctional atmosphere you are running when you permit staff to tell inmates to keep their eyes to themselves." *Id.* at 35. Moton stated Officer Funk had "no authority whatsoever" to issue the "keep your eyes to yourself" order. *Id.* Moton further disputed Officer Funk's report that he was "disrespectful" as "false," because Moton "simply asked the officer for his name and ID card." *Id.*

On October 4,[4] Moton submitted a forceful informal grievance to Col. Cowart, in which he asked her to verify that she had asked Sgt. Gardner to wake him at 2:00 A.M. that morning and bring him to the dorm's barber shop where Col. Cowart "confronted" him about his September 25 grievance and "showed me a piece of paper with the infraction of 1-4, saying you could write me a DR for my request." DE67 at 38. Additionally, that same day, Moton wrote and dispatched a letter to Florida Governor Jeb Bush, FDOC Regional Director of Institutions Marta

[4] Moton mistakenly dated this informal grievance October 3. *See* DE67 at 3.

Villacorta, U.S. Senator Bill Nelson, U.S. Attorney General John Ashcroft, and FDOC Secretary James V. Crosby, Jr., to make them "understand that if I am retaliated against because of" his October 4 informal grievance, "you will know the reason why." DE67 at 36-37. In part, Moton stated he "should not be threatened or intimidated by staff just because I utilize the inmate grievance or request system," because "[t]his is a First Amendment violation." *Id.* at 37. "I simply wish to exercise my rights without fear of retribution or intimidation." *Id.* But "[s]taff at Hardee have the false impression that I am wrong for exercising my rights and seek to discourage me. That is wrong." *Id.*

Shortly thereafter on October 6, Col. Cowart responded in writing to Moton's September 25 grievance (without stating whether she was returning, denying, or approving the grievance). DE67 at 35. She stated that "[a]s explained to you on October 4, 2004 at approximately 2:00 AM, staff does have the authority to utilize progressive discipline including verbal warnings." *Id.* Additionally, Col. Cowart stated Moton's September 25 request "violates FAC 33-601 Inmate Discipline 1-4, Disrespect to officials," because its "written contents are disrespectful in the terminology and your statements against staff warrant additional disciplinary action." *Id.*

Moton's October 13 informal grievance requested Col. Cowart to respond to his September 25 grievance "in its entirety" and return its attachments. DE67 at

74. Col. Cowart responded that this request "was not in my inbox," so "some unidentified person(s) must have removed your particularly vulgar and disrespectful correspondence and not replaced it." *Id.*

Moton filed another informal grievance on October 15 (which apparently was not made part of the record below), in which he asked Col. Cowart to clarify some statements she made in their early morning meeting on October 4, 2004. *See* DE1 at 20. Col. Cowart did not respond to this grievance.

Accordingly, on October 30, Moton filed another informal grievance with Col. Cowart, which stated:

> YOU HAVE FAILED TO ANSWER MY REQUEST DATED 10-15-04 WITHIN THE TEN (10) DAYS AS REQUIRED. THIS IS THE SAME REQUEST YOU HAD SGT. GARDNER TALK WITH ME ABOUT ON 10-18-04 AT APPROXIMATELY 1 A.M. ***REMEDY: RETURN MY REQUEST DATED 10-15-04 WITH APPROPRIATE ANSWER AS REQU[I]RED***.

DE1 at 34 (emphasis in original).

At deposition, Moton explained that he wrote this informal grievance in large capital letters not to disrespect or yell at Col. Cowart, but rather to fill the remaining space, make it easy to understand, and convey urgency:

> Q. Now, tell me why you changed the size of the writing at the bottom.
>
> A. Why I changed the size of the writing?
>
> Q. Well, yeah. If you look here, this up here is written within that space and then you kind of take two spaces, the letters get larger.

A. I just killed the rest of the space.

Q. Okay.

A. There was no more to add. That was my grievance.

Q. So why didn't you just keep writing the same way and draw a line through the rest of it?

A. The remedy is the same as the grievance.

Q. Well, I'm a little confused, because your other grievances that you filed, you don't do that.

A. Don't do what?

Q. You don't change the size of the letters. Let me find one here. Let's look at page 30. That's all the same size.

A. That's all full.

Q. And then you added it on the next page and that's still all the same size.

A. And it's all full.

Q. So what was the purpose of increasing the letter size?

A. There is no purpose for it, ma'am. I stated the grievance. I wrote it out to where it won't be difficult for her to understand. I know she wears glasses. All previous requests or whatever, you know, documents weren't coming back.

Moton Dep. (DE58-2) at 34:19-35:22.

In any event, by response dated November 1, Col. Cowart wrote below Moton's informal grievance that because "the act of asking questions or seeking information, guidance, or assistance is not considered to be a grievance," his grievance was "denied." DE1 at 34.

That same day, Col. Cowart issued two Disciplinary Reports—instead of less severe verbal reprimands or Corrective Consultations—to Moton. DE1 at 28; DE67 at 69. The DR for disrespect to officials (written at 3:05 A.M.) stated:

> ON NOVEMBER 1, 2004 AT APPROXIMATELY 2:15AM, I RECEIVED AN INMATE REQUEST FROM INMATE MOTON, LEWIS DC#706021 DEMANDING THAT I RESPOND TO AN INMATE REQUEST DATED OCTOBER 15, 2004 AND THAT I ADHERE TO THE 10 DAY RESPONSE RULE. AS PREVIOUSLY RESPONDED IN WRITING THE INMATE GRIEVANCE WAS REMOVED FROM MY IN BOX AND UPON RETURNING TO DUTY I WAS UNABLE TO LOCATE THE REQUEST AND ADVISED INMATE MOTON OF SUCH. I REQUESTED IN WRITING THAT INMATE MOTON RESUBMIT HIS REQUEST THAT WAS BOTH DISRESPECTFUL AND OFFENSIVE IN NATURE. WHILE PRESENT IN MY OFFICE, I EXPLAINED TO INMATE MOTON THAT HIS MOST RECENT REQUEST DATED 10-30-2004 WAS DISRESPECTFUL AND I WAS PLACING HIM INTO ADMINISTRATIVE CONFINEMENT FOR 1-4 DISRESPECT TO OFFICIALS. INMATE MOTON STATED "YOU WILL ANSWER THESE GRIEVANCES." PRESENT DURING THIS INTERVIEW WERE SERGEANTS GARDNER AND BOND AND OFFICER D. FLORES. SEE ATTACHED INMATE REQUESTS.

DE1 at 28. The DR for spoken threats (written 15 minutes later) provided:

> ON NOVEMBER 01, 2004 AT APPROXIMATELY 2:40AM I WAS PRESENT IN THE OIC'S OFFICE WITH SERGEANT D.GARDNER, SERGEANT F.BOND AND OFFICER D.FLORES IN ADDITION [TO] INMATE MOTON, LEWIS DC#706021. I ADVISED INMATE MOTON THAT HE WAS BEING PLACED INTO ADMINISTRATIVE CONFINEMENT FOR 1-4 DISRESPECT TO OFFICIALS DUE TO AN INMATE REQUEST SUBMITTED BY HIM TO ME, DEMANDING I COMPLY AND RESPOND TO HIS INMATE REQUEST. AT THIS TIME INMATE MOTON STATED TO ME "YOU WILL ANSWER THE GRIEVANCE AND YOU WILL HEAR FROM MY LAWYER AND

> SUBPOENA." INMATE MOTON'S COMMENTS WERE MADE IN A THREAT[EN]ING AND DEMANDING DEMEANOR.

DE67 at 69.

In her affidavit, Col. Cowart averred that Moton threatened her with a "subpoena." Cowart Aff. (DE58-3) ¶ 4. Col. Cowart also averred that Moton "continued his demands and his disrespectful attitude towards me," and then "became loud and belligerent and in a disrespectful tone stated 'You will answer these grievances.'" *Id.* ¶ 5. Additionally, Col. Cowart averred that she advised Moton that she could not recommend termination of Officer Funk, even though her contemporaneously written DRs made no mention of Officer Funk. *Id.* ¶ 6. Finally, Col. Cowart averred that she "placed Inmate Moton in administrative confinement pending disciplinary action" for disrespect to officials "***due to his behavior during the interview***," not because the October 30 informal grievance used capital letters. *Id.* ¶ 7 (emphasis added); *see also id.* ¶ 10 ("DRs were issued to Inmate Moton ***as a direct result of Inmate Moton's behavior during the interview*** and not as a result of his participation in the inmate grievance procedure" (emphasis added)). Sgt. Gardner's affidavit corroborated Col. Cowart's averments. *See* Gardner Aff. (DE58-4) ¶¶ 6-9.

At deposition, however, Moton disputed Col. Cowart's and Sgt. Gardner's description of the early morning meeting they had on November 1 and explained how her prior conduct on October 4 indicated a retaliatory motive:

Q. I asked you, did Capt[ai]n Cowart say anything to you that would make you believe that she was filing this grievance or filing your DR in retaliation?

A. She came to me at two o'clock one morning [on October 4] after filing—excuse me—and threatened me with a DR for disrespect.

Q. What were her exact words?

A. She said that she found my request offensive because she's a Native American and worked so many years in the department and, basically, just threatened me.

Q. How did she threaten you? I'm not clear on that.

A. ***She was all in my face with the paper, telling me, you understand me and I'll write you a DR right now for disrespect, I could write you a DR for disrespect.*** You know what I mean? ***That's trying to intimidate me***, you know, ***all in my face***.

. . . .

Q. Did you tell her, you will answer my questions, in a harsh tone?

A. No, I didn't.

Q. No, you didn't say that?

A. No, I didn't.

Moton Dep. (DE58-2) at 38:21-39:5, 41:13-17 (emphases added). Moreover, Moton also explained what happened when Col. Cowart issued him a DR for spoken threats:

Q. Okay. And the spoken threats, what did that involve?

A. When she called me, had me brought to her office—

Q. Uh-huh.

> A. —on that day, she asked me if I had anything to say after she told me she was confining me in administrative confinement for disrespect to officials, and I told her my lawyer would be hearing about it, and she wrote me a DR for spoken threats.

Id. at 29:9-25; *see also id.* at 40:22-25; DE67 at 11, DE68 at 4. The record on appeal does not reflect a single instance in which Moton ever admitted saying his lawyer would "subpoena" or otherwise contact Col. Cowart or any other prison guard. Additionally, notwithstanding that Col. Cowart and her colleagues worked the graveyard shift from 12:00 A.M. to 8:00 A.M., Moton made clear that these early morning meetings at 1:00 or 2:00 A.M. "could have occurred at a more reasonable hour such as 6:00 A.M. or 7:00 A.M., which would be around breakfast time, rather than the intentionally annoying and harassing 2:00 A.M. and 1:00 A.M. times." DE67 at 18.

In any event, on November 2, Moton filed another informal grievance with Col. Cowart—again in all capital letters—in which he stated:

> CAPTAIN COWART YOU HAVE FAILED TO ANSWER MY REQUEST DATED 10-3-04 WITHIN THE TEN (10) DAY TIMEFRAME AS REQUIRED BY 33-103.011(3)(a). THIS IS THE REQUEST WHICH I SENT COPIES TO U.S. ATTORNEY GENERAL JOHN ASHCROFT, SENATOR BILL NELSON, GOVERNOR JEB BUSH, SECRETARY JAMES V. CROSBY, JR., AND REGIONAL DIRECTOR MARTA VILLACORTA, ALONG WITH A COVER LETTER ADVISING THEM ALL OF MY PRESENT SITUATION IN ANTICIPATION OF YOUR RETALIATION AGAINST ME FOR EXPRESSING AND EXERCISING MY FIRST AMENDMENT RIGHT. REMEDY: RETURN MY REQUEST DATED 10-3-04 WITH APPROPRIATE RESPONSE AS REQUIRED BY RULE.

DE67 at 61. Moton was never disciplined for this grievance. Instead, on November 4, the same day the DRs from the November 1, 2:00 A.M. meeting were delivered to Moton (DE1 at 28; DE67 at 69), Col. Cowart returned Moton's November 2 informal grievance without substantive response and instructed him to "advance your grievance to the next step if the time limit has passed for response at the current step." DE67 at 61.

Additionally, that same day, Moton bypassed the informal grievance procedure and filed a formal grievance of reprisal directly with Warden Watson. DE1 at 14. Moton explained:

> SUBJECT: Captain Cowart writing me a DR for my use of capitalization in a grievance, which she called disrespectful. Prior to receiving 2 retaliatory DR's and being confined by Captain Cowart I was unduly harassed by Captain Cowart and Sgt. Gardner, who both woke me up during early morning hours, depriving me of sleep, in order to intimidate me concerning requests I wrote. Then, when I write a grievance for Capt. Cowart's failure to respond to my requests within ten (10) days, she writes me a DR for disrespect and threats. REMEDY: Release me and remove DR's from my record.

Id.

At a hearing on November 9, Moton was found guilty of Col. Cowart's DRs for disrespect to officials and spoken threats. DE67 at 75-76. As grounds for the disrespect DR, the hearing team explained:

> BASED ON THE WRITTEN TESTIMONY OF CAPT COWART WHO SAID THE INMATE TALKED DISRESPECTFULLY TO HER WHEN SHE WAS COUNSELING WITH THE INMATE AND POINTED OUT TO THE INMATE THAT HIS INMATE REQUEST

> DATED 10/30/04 STRUCK AN INAPPROPRIATE TONE BY DEMANDING THAT SHE RESPOND TO HIS EARLIER REQUEST, BY THEN TELLING HER, "YOU WILL ANSWER THESE GRIEVANCES!"

Id. Likewise, the hearing team found Moton guilty of the spoken threats DR, because he said "YOU WILL HEAR FROM MY LAWYER AND SUBPOENA!" DE67 at 76. The hearing team "FEELS THIS WAS A THREAT IN THAT HE CLEARLY INTENDED TO INTIMIDATE THE CAPTAIN." *Id.*

As punishment for disrespect to officials, Moton was then sentenced to 30 days' disciplinary confinement and 60 days' lost gain time—the maximum punishment for the offense. Likewise, Moton was sentenced to 30 days' disciplinary confinement for spoken threats. The record is not entirely clear, but it appears Moton began serving this disciplinary confinement shortly thereafter.

On November 13, Moton filed an administrative appeal of the November 9 hearing team's decisions directly with Warden Watson. DE1 at 30. In this administrative appeal, Moton stated "it is apparent the DR team based their decision on information that did not serve as the basis for the DR," because it "misapprehended" the DR's scope as including the conversation between Col. Cowart and Moton, when in reality the DR was based exclusively on the format of his October 30 informal grievance. *Id.* at 30-31. Moton noted that his informal grievance "contained the truth, no lies, no disrespectful language or punctuation" and was thus "in compliance with departmental rules" governing grievances. DE1

at 31. Additionally, Moton stated that Col. Cowart's explanation why this grievance was "disrespectful" was "vague and insufficient," especially in light of the fact that the grievance "contained no foul language." *Id.* Rather, Moton stated the "real reason" Col. Cowart put him in administrative confinement was her "belief that capital / large letters are disrespectful." *Id.* Finally, Moton also quibbled with some procedural irregularities at the hearing. *See id.* at 32.

On November 24, Warden Watson denied Moton's November 4 formal grievance of reprisal, because "[y]ou appear to be grieving an issue that cannot be addressed since the disciplinary report has been ordered to be reheard at this time." DE1 at 16. As such, the formal grievance was "neither approve[ed] nor den[ied]," but rather "returned" without response. *Id.*

Three days later, on November 27, Moton filed an appeal of Warden Watson's denial of his November 4 formal grievance of reprisal directly with the FDOC Secretary. DE1 at 11-12. In this appeal, Moton contended that Warden Watson's denial was "erroneous" because it "should have been responded to on its merits despite the DR (1-4) being ordered reheard." *Id.* at 11. Additionally, Moton explained the nature of his grievance of reprisal:

> The retaliation is due to having filed several requests / grievances which caused Captain Cowart to attempt to intimidate me by threatening me with a DR for filing the request, then Captain Cowart sent Sgt. Gardner to harass and intimidate me concerning a subsequent request. Both incidents occurred during early morning hours, Captain Cowart waking me at 2:00 A.M., Sgt. Gardner waking

> me at 1:00 A.M. and keeping me up until 3:00 A.M. The intimidation did not work, I continued to file requests and grievances, then Captain Cowart locked me up for filing a grievance she called "disrespectful" due to the grievance being wr[itten] in capital large letters, which does not fit the criteria of the exception [when] an inmate includes false, threatening, obscene, or profane statements in the grievance or any of its attachments. My grievance contained true and factual statements, was not threatening, obscene, or profane. Therefore, there is no violation of D.O.C. rules for writing a grievance in capital / large letters, and my confinement is [unlawful].

Id. at 12 (citations omitted).

On November 29, Moton filed a request to Col. Cowart in which he asked if she was "off duty and on vacation" as she claimed "during the time frame of October 3, 2004 to October 15, 2004." DE67 at 73. Col. Cowart responded, "As responded to, ***Yes!*** I was on vacation," *id.* (emphasis in original), even though she personally met with Moton at 2:00 A.M. on October 4 and signed her response to Moton's September 25 informal grievance on October 6. *See* DE67 at 35.

On December 1, Warden Watson responded to Moton's November 13 administrative appeal of the November 9 hearing. DE1 at 35. Warden Watson stated he was "neither approving nor denying this grievance," but rather merely "return[ing]" it. *Id.* More specifically, "there is no grievable issue at this time," since the DR finding of guilt at the November 9 hearing "has been ordered to be reheard." *Id.*

On December 3, the FDOC Secretary "returned without action" Moton's November 27 "request for administrative appeal," because Warden Watson

previously "determined [it] to be in non-compliance with the requirements of the rule resulting in your appeal to this office being in non-compliance." DE1 at 13.

On December 4, 2004, Moton wrote an informal grievance to Sgt. Gardner asking, "Sir, is my being written DR's and placed in confinement a method used to persuade me not to write requests and grievances, or is it a method being employed to change the way I write them? Please, help me understand." DE67 at 59.

In light of the rehearing of the November 9 DR hearing, on December 6, Col. Cowart rewrote her original DR for disrespect to officials. DE1 at 36. Although this DR was similar to the original DR, it contained some important differences. Notably, Col. Cowart changed the date of grievance about which she was meeting with Moton from October 15 to October 30, termed this filing a "request" rather than a "grievance," changed the punctuation of her quotation of Moton from a period to an exclamation mark, and added the new fact that Moton made this statement "in a disrespectful and threatening tone of voice." *Id.* There is no documentary evidence in the record regarding how Col. Cowart rewrote the DR for spoken threats.

On December 8, Sgt. Gardner's hand-written response to Moton's December 4 grievance stated "CAPT. COWART PLACED YOU IN CONFINEMENT BECAUSE IN YOUR REQUEST YOU ARE DISRESPECTFUL IN YOUR WRITING. USING ALL CAPS WHEN YOU WRITE IS YELLING AT THE

RECIPIENT. BUT WHEN SHE BROUGHT YOU TO HER OFFICE I WAS JUST A WITNESS NOTHING MORE." DE67 at 59.

On December 9, the hearing team reheard the DR guilty findings from the earlier November 9 hearing. DE1 at 77-78. This time, the hearing team found Moton not guilty of either DR, because the "STATEMENT OF FACTS DON'T SUPPORT THE CHARGE." *Id.*

Several months after this episode concluded, Moton filed a lengthy informal grievance dated May 5, 2005. DE1 at 18-22. In this informal grievance, Moton summarized some of the events that took place before October 30, 2004. *Id.* Notably, he grieved that during his retaliatory 30 days' administrative confinement, he "suffered more arbitrary and retaliatory treatment (***assault and battery by C/O Slaughter***)"—an apparent physical injury. DE1 at 22 (emphasis added). Official Brazil, however, denied this grievance as untimely on May 24, 2005. *Id.* at 18. Moton then filed a formal grievance with Warden Watson on June 7, 2005. *Id.* at 23. On June 21, 2005, Warden Watson likewise denied this grievance as untimely. *Id.* at 24. Finally, Moton administratively appealed that decision to the FDOC Secretary on June 30, 2005. *Id.* at 25. The Secretary denied this administrative appeal on July 15, 2005, as untimely. *Id.* at 27.

6. Disputes Of Fact That Emerged In Discovery

Upon conclusion of discovery and summary judgment practice, several disputes of fact crystallized, including but not limited to:

- Whether during the early morning meeting of November 1, 2004, Moton ever spoke to Col. Cowart or other officers in a disrespectful, threatening tone. *Compare* DE1 at 28, *with* Moton Dep. (DE58-2) at 41:13-17.

- Whether Moton threatened to have his lawyer "subpoena" or otherwise contact Col. Cowart or any other prison guard in any way, or merely stated he would inform his lawyer about his DR for disrespect to officials and his looming administrative confinement. *Compare* DE67 at 69, *with* Moton Dep. (DE58-2) at 29:9-25, 40:22-25.

- Whether Moton's use of large capital letters in his October 30 informal grievance to Col. Cowart constituted disrespectful yelling, or whether it merely connoted urgency, was done for ease of reading or understanding, to use up remaining space, or had no purpose whatsoever. *Compare* DE67 at 59, *with* Moton Dep. (DE58-2) at 34:19-35:22.

- Whether Col. Cowart and other officers could wake Moton to discuss his grievances only between the hours of 1:00 and 3:00 A.M., or whether they could have instead woken him between the hours of 6:00 and 8:00 A.M. *Compare* Cowart Aff. (DE58-3) ¶ 4, *with* DE67 at 18.

- Whether Moton had ever filed any grievances requesting that Officer Funk be terminated rather than merely reprimanded. *See supra* note 3.

- Whether Col. Cowart failed to respond to Moton's October 4 informal grievance because she was on vacation from October 3-15 or for some other reason. *Compare* DE67 at 73, *with* DE67 at 35.

7. Summary Judgment Order

Despite conceding the facts and inferences therefrom raised "close question[s]" "in the eye of the beholder" that "could be reasonably construed" either way, the District Court reversed course from its prior dismissal rulings

(DE48) and granted summary judgment to Col. Cowart. DE75 at 13 & n.8. The District Court "assume[d] without finding" that Moton satisfied the first two elements of his First Amendment retaliation claim, but nevertheless concluded he could not "establish a causal connection between his filing the grievance and the discipline he received." *Id.* at 9-10.

Specifically, the District Court held Col. Cowart would have issued a DR for spoken threats without regard to the October 30 informal grievance. *Id.* at 11. During the November 1 meeting, Moton "'told her my lawyer was going to hear about it.'" Moton Dep. (DE58-2) at 29:9-25. When summarizing the facts, however, the District Court stated in the main text that Moton told Col. Cowart "'you will answer for these grievances!'" during the early morning November 1 meeting, downplaying in a footnote that Moton actually "denie[d]" this fact. *Id.* at 7 & n.2. Moreover, the District Court recharacterized Moton's statement to Col. Cowart at the November 1 meeting as "***she*** would be ***hearing from*** his lawyer," *id.* at 13 n.8 (emphases added), when Moton actually testified "***my*** lawyer was going to hear about" his administrative confinement without regard to Col. Cowart. Accordingly, as paraphrased, the District Court found it "could be reasonably construed as a spoken threat." *Id.* at 11, 13 n.8 (citation omitted).

Additionally, the District Court further held that Col. Cowart would still have issued Moton a DR for disrespect to officials. *Id.* at 11. The District Court

found "there is no evidence to suggest Plaintiff was disciplined simply because he wrote the grievance," but rather "because of the ***way*** he wrote his grievance" in all capital letters. *Id.* at 11 (emphasis in original). Accordingly, although this was "***a close question***" that "***could reasonably be construed***" either way, the District Court inferred that Moton's informal grievance of October 30 was disrespectful and that Col. Cowart had a legitimate penological objective in issuing a DR per *Turner* v. *Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987). *Id.* at 13 (emphasis added).

Finally, the District Court ruled *sua sponte* without briefing that Moton was limited to "nominal damages only" because he did not satisfy the PLRA's physical-injury requirement, 42 U.S.C. § 1997e(e), by "alleg[ing] or demonstrat[ing] any physical injury, monetary loss, or other actual injury related to the retaliation claim." *Id.* at 14. In so ruling, the District Court did not mention Moton's grievance that during his 30 days' administrative confinement, he suffered "assault and battery by C/O Slaughter." DE1 at 22. The District Court entered final judgment the next day. DE76. Moton moved for reconsideration (DE79), which was denied (DE80).

8. Appellate Proceedings

Moton timely appealed. DE81. After Moton and Col. Cowart filed and served appellate briefs, this Court classed this case for oral argument and appointed undersigned counsel to represent Moton on appeal.

SUMMARY OF THE ARGUMENT

1. The District Court made a routine misapplication of the summary judgment standard when it resolved factual disputes and drew inferences against Moton, the nonmovant. Even the District Court itself recognized this, when it candidly observed its factual determinations were "close question[s]" resting "in the eye of the beholder" that "could be reasonably construed" either way. Had the District Court correctly applied the summary judgment standard, it would have identified several genuine disputes of material fact, including what Moton said at the November 1 meeting, Moton's demeanor during the November 1 meeting, and why Moton used capital letters in his October 30 informal grievance, among others. Properly viewed in Moton's favor, the documentary evidence, event chronology, reversal on administrative appeal of DRs for lack of evidence, and other facts and inferences drawn therefrom show—for summary judgment purposes—that Col. Cowart retaliated against Moton for filing grievances.

2. To correct this error, the Court should vacate the judgment below and remand with instructions to consider the remaining summary judgment issues. Otherwise, the Court would waste judicial resources by ruling on remaining summary judgment issues on a blank slate—without the benefit of the District Court's analysis. But either way, Moton met his burden of establishing genuine disputes of material fact on the retaliation test's first two elements.

3. Additionally, the Court should affirm the District Court's correct ruling that Col. Cowart is not protected by qualified immunity. It has been clearly established under Eleventh Circuit law for decades that prison personnel violate the First Amendment when they retaliate against inmates for filing grievances.

4. The District Court erred when it *sua sponte* rendered summary judgment (without briefing) that Moton was limited to nominal damages for failure to satisfy the PLRA's physical-injury requirement. This ruling overlooked Moton's allegation of "assault and battery." On remand, the Court should instruct the District Court to consider whether Moton has in fact alleged a physical injury sufficient under the PLRA to recover compensatory damages. And even if such allegations were insufficient, the PLRA bars recovery for only "mental or emotion injury" absent physical injury, nothing more.

5. The Court should also vacate the dismissal of Moton's claims against Lt. Prieto and C.O. Sheetz. Under the unique circumstances of this case, it would have been futile to exhaust administrative remedies against them, because Moton had already exhausted his similar administrative remedies against Col. Cowart to no avail. Moreover, Lt. Prieto and C.O. Sheetz are no more entitled to qualified immunity from Moton's First Amendment retaliation claims than Col. Cowart. Finally, when the District Court dismissed those claims for failure to state a claim, it should have granted Moton at least one opportunity to replead.

STANDARD OF REVIEW

The Court reviews *de novo* the grant of summary judgment, qualified immunity rulings, and the grant of a motion to dismiss. *Capone* v. *Aetna Life Ins. Co.*, 592 F.3d 1189, 1194 (11th Cir. 2010) (summary judgment); *Harper* v. *Lawrence County, Ala.*, 592 F.3d 1227, 1232 n.10 (11th Cir. 2010) (immunity dismissal); *Oliver* v. *Fiorino*, 586 F.3d 898, 901 (11th Cir. 2009) (immunity summary judgment); *Clark* v. *Riley*, 595 F.3d 1258, 1264 (11th Cir. 2010) (dismissal).

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT DREW INFERENCES AND RESOLVED FACTUAL DISPUTES AT SUMMARY JUDGMENT AGAINST MOTON

A. First Amendment Retaliation Claims Must Satisfy A Three-Part Test

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, prisoners "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, such retaliation claims are established whenever a prisoner's "discipline was the result of his having filed a grievance concerning the conditions of his imprisonment." *Wildeberger* v.

Bracknell, 869 F.2d 1467, 1468 (11th Cir. 1989). One way to state such claims is to prove "a chronology of events from which retaliation may plausibly be inferred." *Cain* v. *Lane*, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988).

It has always been "implicit in prisoner retaliation cases" that such claims are subject to a three-part test by which an inmate must establish "(1) his speech was constitutionally protected," "(2) the inmate suffered adverse action such that the administrator's allegedly retaliatory conduct would likely deter a person of ordinary firmness from engaging in such speech," and "(3) there is a causal relationship between the retaliatory conduct and the protected speech." *Smith* v. *Mosley*, 532 F.3d 1270, 1276 & n.16 (11th Cir. 2008). The parties agree this is the operative legal standard, but disagree how to apply it here.

B. Per This Test, This Court Routinely Reverses Or Vacates Judgments Against First Amendment Retaliation Claims When There Are Genuine Disputes Of Material Fact

Notably, the Eleventh Circuit has routinely reversed or vacated judgments when a prisoner has shown "he had been disciplined . . . in retaliation for his having filed several grievances under the state's grievance procedures," *Wildeberger*, 869 F.2d at 1467, or "he was punished for complaining through the established grievance system about his treatment," *Boxer X* v. *Harris*, 437 F.3d 1107, 1112 (11th Cir. 2006), or the prisoner claims "mental abuse, physical intimidation, harassment, and verbal threats of injury and punishment,"

"unfounded disciplinary reports," or "more severe confinement" in "retaliation for the grievance" filed. *Douglas* v. *Yates*, 535 F.3d 1316, 1321 (11th Cir. 2008).[5]

This is especially true at summary judgment when the issue of retaliatory or "discriminatory intent" is at play, because intent is the quintessential "question for the trier of fact." *Harris* v. *Ostrout*, 65 F.3d 912, 917 (11th Cir. 1995). With respect to the retaliation test's third causation element, the "causal inquiry asks whether the defendants were ***subjectively motivated*** to discipline because [the inmate] complained of the conditions of his confinement." *Mosley*, 532 F.3d at 1278 (emphasis added).

Applying this subjective-motivation causation standard, it matters not if a district court "believes that all the evidence presented by one side is of doubtful

[5] *See also Williams* v. *Brown*, 347 Fed. App'x 429, 435 (11th Cir. 2009) (reversing dismissal where "facts provide ***circumstantial evidence*** that Brown transferred Williams in retaliation for his filing a grievance against him" (emphasis added)); *Hale* v. *Sec'y for the Dep't of Corr.*, 345 Fed. App'x 489, 492 (11th Cir. 2009) (partially vacating dismissal because inmate "alleged that prison officials retaliated against him because of his filing grievances"); *Shaw* v. *Cowart*, 300 Fed. App'x 640, 644-46 (11th Cir. 2008) (vacating summary judgment in light of "genuine issue of material fact as to whether Dodson and Cowart created false disciplinary reports, and whether Dodson closed Shaw in his cell door, in retaliation for Shaw filing grievances against them and speaking on their improper dealings with inmates"); *Smith* v. *Villapando*, 286 Fed. App'x 682, 685-86 (11th Cir. 2008) (vacating dismissal where verified complaint denied statements attributed to him in a disciplinary report); *Nichols* v. *Riley*, 141 Fed. App'x 868, 870 (11th Cir. 2005) (vacating summary judgment where guard's affidavit was contradicted by prisoner's averment that "he was not transferred for disciplinary reasons, but rather, solely because he had filed his § 1983 complaint").

veracity," because summary judgment cannot be supported by such "credibility choices." *Harris*, 65 F.3d at 917. Rather, even the testimony of a "single witness" is sufficient to "create a genuine issue of fact and preclude summary judgment." *Id.* In *Harris*, this Court reversed such a summary judgment on intent grounds against an inmate, because "two inmate affidavits, if credited by the trier of fact, provide evidence to support [the] allegation of retaliation in violation of the First Amendment." *Id.* Indeed, summary judgment should also be denied even on the basis of circumstantial evidence, *Damon* v. *Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1366 (11th Cir. 1999), or a verified complaint's allegations, *Perry* v. *Thompson*, 786 F.2d 1093, 1095 (11th Cir. 1986).

As in *Harris*, the Court also reversed summary judgment on causal intent grounds in *Sepulveda* v. *Burnside*, concluding there was sufficient "evidence to support a causal connection between [the prison guard's] actions and [the inmate's] protected activity." 170 Fed. App'x 119, 123 (11th Cir. 2006).[6] There, Sepulveda sued a prison guard for intentionally releasing Small, a violent prisoner, into the common area in violation of prison policy to attack Sepulveda in retaliation for having filed "three grievances against officers at the jail, the last just two weeks before the assault." *Id.* The *Sepulveda* court recognized the "undisputed facts

[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.

alone raise a suspicion in [the guard's] involvement in the attack" given the event chronology. *Id.* at 121. Further, the guard admitted by affidavit that he "'made the wrong decision'" in releasing the inmates together, but claimed he thought the two inmates got along. *Id.* at 122. Sepulveda, however, swore he "overheard [the guard] telling Small that Sepulveda was 'the piece of [excrement] who's suing [another guard],' who 'didn't learn nothing when they shackled [him].'" *Id.* at 123. This presented "genuine issues of material fact concerning whether such statements were made and what inferences can be drawn from them." *Id.*

C. The District Court Misapplied The Retaliation Test's Third Element When It Erroneously Resolved Factual Disputes And Drew Inferences Against Moton At Summary Judgment

The District Court erroneously resolved factual disputes and drew inferences against Moton, the summary judgment nonmovant, even though it candidly conceded such issues were "close question[s]" resting "in the eye of the beholder" that "could be reasonably construed" either way. In doing so, the District Court mistakenly reversed course from its prior ruling that the "***temporal proximity*** of the discipline and harassment to the filing of the grievances raises a 'colorable suspicion' or ***'plausible inference' of retaliation***." DE48 at 15 (emphases added). As such, the District Court made improper credibility determinations,

misconceived the summary judgment evidence, and overlooked numerous genuine disputes of material fact.[7]

For instance, the District Court misconceived the disputed facts when it inaccurately paraphrased the statement Moton made about informing his lawyer regarding the DR for disrespect to officials as a threat to subpoena or harass Col. Cowart or other prison guards. *See supra* Part B.7. Moreover, the District Court misapplied the law when it failed to recognize that this statement was itself another grievance entitled to First Amendment protection, the exercise of which Col. Cowart ***immediately*** retaliated against by issuing a DR for spoken threats. *E.g.*, *Mosley*, 532 F.3d at 1276 n.17 (First Amendment protects inmate speech even if it "did not formally invoke the DOC's grievance procedures").

The District Court's resolution of the spoken threats issue is also suspect because it treated as an undisputed fact Col. Cowart's contention that Moton spoke to her in a disrespectful, threatening tone, notwithstanding Moton's denial of this assertion. *See supra* Part B.7. It makes no difference that Col. Cowart corroborated her version of events through witnesses or contemporaneous

[7] Col. Cowart herself continues to report inaccurately many disputed facts as undisputed. *E.g.*, AB5 (Moton repeatedly sought Officer Funk's termination); AB6 (Moton was "loud and belligerent"); AB12 (discussing Moton's "dissatisfaction with the fact that [Officer Funk] had not been terminated as he had demanded").

documentation—courts cannot make credibility determinations at summary judgment.

Likewise, the District Court drew the wrong inferences when it held Moton's October 30 informal grievance was disrespectful for using capital letters, even though it repeatedly noted this was a close decision. In doing so, the District Court overlooked the fact that Moton repeatedly disputed Col. Cowart's contention that his October 30 informal grievance was intended to be disrespectful. Instead, Moton explained it was done to connote urgency, for ease of reading or understanding, to use up remaining space, or had no purpose whatsoever. Although Moton's different explanations may present a credibility problem for him at trial, such issues cannot be resolved at summary judgment.

Additionally, as the summary judgment nonmovant, Moton is entitled to all reasonable inferences of fact. Thus, it is also relevant that Moton used capital letters in many of his grievances without receiving discipline for being disrespectful. Indeed, the guards themselves used capital letters in many of their reports and responses. Moreover, Moton received the most severe punishment allowed by the disciplinary rule, even though at best any disciplinary infraction would have been exceedingly minor. And perhaps most important, the prison itself discredited Col. Cowart's DRs for lack of evidence. Although that does not

necessarily equate to retaliatory motive, *see* AB19, a reasonable inference at summary judgment should be drawn therefrom in Moton's favor.

The District Court also failed to recognize other genuine disputes of material fact indicating retaliatory pretext, such as whether Col. Cowart and other prison guards intentionally harassed Moton by waking him between 1:00 and 3:00 A.M. instead of more reasonable hours between 6:00 and 8:00 A.M., whether Moton ever sought to have Officer Funk terminated as opposed to reprimanded, and whether Col. Cowart was as she claimed—contrary to documentary evidence—on vacation from October 3-15. *See supra* p. 32.

Finally, this Court's decision in *Smith* v. *Mosley*, 532 F.3d 1270 (11th Cir. 2008), does not change any of the above analysis. As an initial matter, the inmate in *Mosley* pled guilty to the insubordination charge and was found guilty of making false statements, *id.* at 1275, whereas here, the prison ***overturned*** guilty findings against Moton for insufficiency of evidence. Additionally, the letter in *Mosley* was obviously disrespectful for insinuating that the prison was a "test-bed for human experimentation," just like the "infamous Tuskegee Study," among many other comments, *id.* at 1272-73, 1275, whereas here the sole possible instance of disrespect was the grievance's use of capital letters. Finally, the letter in *Mosley* contained legitimate grievances that were separable from its disrespectful contents,

see id. at 1272-73, whereas that is not possible here. Together, these facts constitute evidence of pretext that was not present in *Mosley*.

D. Col. Cowart Cannot Rescue The Improper Summary Judgment Below By Claiming Her Discredited Professional Judgment Is Entitled To Deference

Nor can Col. Cowart salvage the District Court's erroneous grant of summary judgment as founded on deference to her ***rejected*** professional judgment.

When assessing prison ***regulations'*** constitutionality at summary judgment, courts "must distinguish between evidence of disputed facts and disputed matters of professional judgment." *Beard* v. *Banks*, 548 U.S. 521, 530, 126 S. Ct. 2572, 2578 (2006). Accordingly, such summary judgment "inferences must accord deference to the views of prison authorities." *Id.* But this rule is inapplicable here for three reasons.

First, there can be no deference to "professional judgment" in a he-said-she-said ***retaliation*** case as here, because the issues in dispute here are pure questions of fact for which no professional judgment is necessary or even helpful. Col. Cowart claims Moton said certain things in a disrespectful, threatening tone. Moton denies this. Instead, he claims Col. Cowart's version of the facts is retaliation for the series of grievances he filed. Such credibility questions cannot be resolved at summary judgment because they are committed to the factfinder.

Second, the *Beard* rule is inapplicable outside the context of reviewing the constitutionality of prison ***regulations***. It is no help whatever in analyzing—as here—whether a prison guard's application of an otherwise constitutional regulation was retaliatory. Such deference would be circular, because by definition there can be no "legitimate penological interests" related to retaliation. *Turner* v. *Safley*, 482 U.S. 78, 87, 107 S. Ct. 2254, 2261 (1987). As such, cases that involve the constitutionality of regulations as opposed to retaliatory conduct are easily harmonized with the required result here. *E.g.*, *Singer* v. *Raemisch*, 593 F.3d 529, 534-38 (7th Cir. 2010) (drawing factual inferences in prison's favor at summary judgment in deference to regulation that forbade prisoners from playing Dungeons & Dragons, because in prison's professional judgment such games would lead to gang activities). Perhaps for this reason, although the professional judgment animating prison regulations is entitled to such deference when their proper application is undisputed, *e.g.*, *Mosley*, 532 F.3d at 1277 (holding prison regulations were "reasonably related to legitimate penological interests" per *Turner* where inmate pled guilty to one charge and was found guilty to the other), this Court has never applied *Beard* or *Turner* in a First Amendment retaliation case to shield prison guards' otherwise retaliatory conduct in a mixed-motive situation.

Third, after the December 9 rehearing of Moton's DRs, FDOC ***discredited*** Col. Cowart's disciplinary choices because the "FACTS DON'T SUPPORT THE

CHARGE." DE67 at 75-76. Col. Cowart notes that mere "reversal does not equate to a retaliatory motive," (AB19), but that observation confuses the procedural posture of summary judgment. As the nonmovant, Moton is entitled to precisely such a reasonable inference in his favor, which the factfinder is free to accept or reject at trial. In any event, Col. Cowart cannot claim her professional judgment is entitled to ***any deference*** after the ***prison itself*** explicitly rejects her exercise of it.

II. ALL REMAINING SUMMARY JUDGMENT ISSUES SHOULD RETURN TO THE DISTRICT COURT FOR ANALYSIS IN THE FIRST INSTANCE

Rather than applying the first and second elements of the three-part retaliation test without the benefit of the District Court's analysis in the first instance, the Court should remand those questions to the District Court to preserve judicial resources. If, however, the Court declines to remand and prefers to analyze those questions itself without the benefit of the District Court's initial analysis, the Court should rule that Moton carried his burden at summary judgment on those remaining elements of the retaliation test.

A. The Court Should Remand All Remaining Summary Judgment Issues To Preserve Judicial Resources And Ensure It Does Not Rule Without The Benefit Of The District Court's Analysis

To preserve judicial resources and ensure it has the benefit of the District Court's analysis before rendering constitutional rulings, the Court should remand all remaining summary judgment issues for analysis in the first instance.

It has long been true that the Court "may affirm a district court's grant of summary judgment if it is correct for any reason, even if not relied upon below." *MCC-Marble Ceramic Ctr., Inc.* v. *Ceramica Nuova d'Agostino, S.p.A.*, 144 F.3d 1384, 1392 n.21 (11th Cir. 1998). Nevertheless, this purely discretionary decision whether to do so is the quintessential judgment call.

In Florida law, this venerable principle is known by the "delightful title" of the "'tipsy coachman' doctrine." *Rodriguez* v. *Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1269-70 & n.6 (11th Cir. 2008) (collecting cases). The notion is that so long as the passengers arrive safely at their chosen destination, it matters not if the coachman was tipsy. *See id.* at 1269 n.6 ("[t]he coachman was tipsy, the chariot drove home" (quoting Oliver Goldsmith, *Retaliation: A Poem* (1774))). In *Rodriguez*, the Court declined to affirm via the tipsy coachman doctrine, because there the record reminded the Court "less of a tipsy coachman arriving at the right destination than of a blind one who ends up at the wrong place." *Id.* at 1270.

At best, the District Court's erroneous causation ruling was "tipsy." *See supra* Argument I. Moreover, its journey is not yet complete, because it has yet to rule whether Moton was engaging in protected speech when he made his grievances (the first element) or whether Col. Cowart's conduct would have chilled such speech in a person of ordinary firmness (the second). In short, the District Court has not yet arrived at any destination, much less the right one. Given the open road that remains ahead, much authority commends the proposition that "[w]hen the district court does not address an issue, the proper course of action often is to vacate the order of the district court and remand." *In re Prudential of Fla. Leasing, Inc.* 478 F.3d 1291, 1303 (11th Cir. 2007).[8]

Indeed, this Court has long recognized such remands—especially when they involve summary judgment rulings—preserve judicial resources and promote

[8] *See also Sierra Club* v. *Van Antwerp*, 526 F.3d 1353, 1363 n.8 (11th Cir. 2008) ("we think the better course is to vacate the [summary] judgment and remand for the district court to address the issues . . . in the first instance"); *Byars* v. *Coca-Cola Co.*, 517 F.3d 1256, 1267-68 (11th Cir. 2008) ("we refuse to consider the merits of this issue" because the "summary judgment opinion did not discuss" it); *Sierra Club, Inc.* v. *Leavitt*, 488 F.3d 904, 918 (11th Cir. 2007) ("[w]e believe that the district court should consider the question in the first instance, particularly in light of the factual matters that it raises"); *Wilkerson* v. *Grinnell Corp.*, 270 F.3d 1314, 1322 (11th Cir. 2001) ("[w]e decline to consider whether summary judgment is otherwise appropriate on Wilkerson's Title VII claim" and therefore "vacate summary judgment and remand the case so the district court may consider [that question] in the first instance"); *Beavers* v. *Am. Cast Iron Pipe Co.*, 975 F.2d 792, 800 (11th Cir. 1992) (vacating and remanding summary judgment because "district court's opinion did not explicitly address this issue").

judicial economy: "[r]emand after reversal of summary judgment does not seriously impair judicial economy, because, unlike remand after a full trial, it does not involve the district court in redundant proceedings." *Roofing & Sheet Metal Servs., Inc.* v. *La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982). And even though appellate review of summary judgment orders is *de novo*, absent the "benefit if the district court's reasoning," the Court necessarily "commence[s] [such] analysis on appeal at a 'decided disadvantage,'" much akin to the "'proverbial blind hog, scrambling through the record in search of an acorn.'" *Hulsey* v. *Pride Restaurants, LLC*, 367 F.3d 1238, 1243-44 (11th Cir. 2004) (citations omitted).

As such, the Court should exercise its discretion to remand all remaining summary judgment issues to the District Court to analyze in the first instance and thereby preserve judicial resources.

B. Absent Remand, Moton Still Carried His Burden Of Opposing Summary Judgment Regarding The Retaliation Test's Remaining Elements

Even without remanding all remaining summary judgment issues, the record shows Moton properly opposed summary judgment on these bases.

First, Moton satisfied the first retaliation element because he was engaged in protected speech. This Court has repeatedly held that an inmate's use of FDOC's grievance procedures is entitled to First Amendment protection. *See infra*

Argument III. Col. Cowart's contrary argument that Moton is not entitled to engage in disrespectful or threatening speech is both circular and a straw man. *See* AB13. Moton does not and has never asserted the right to engage in such speech. Rather, he contends Col. Cowart pretextually retaliated against his legitimate, respectful grievances by filing false discipline charges against him. Likewise, Col. Cowart's suggestion that she could retaliate to her heart's content against Moton's October 30 informal grievance because it did "not address the conditions of Appellant's confinement" is a stilted view that does not recognize Moton was engaged in a ***series*** of grievances that ***collectively*** challenged the conditions of his confinement and the application of prison regulations, all of which are entitled to First Amendment protection.

Second, Moton satisfied the second retaliation element's "objective standard and factual inquiry" because the discipline he received would have dissuaded a person of ordinary firmness from utilizing the grievance procedures. *E.g.*, *Mosley*, 532 F.3d at 1277; *Douglas*, 535 F.3d at 1321-22. It is of no moment that Moton has continued to file grievances, because the test is objective, not subjective.

III. THE DISTRICT COURT PROPERLY REJECTED COL. COWART'S CLAIM OF QUALIFIED IMMUNITY FROM FIRST AMENDMENT RETALIATION CLAIMS

The Court should follow the District Court's lead and once again reject Col. Cowart's claim that qualified immunity shields her from Moton's First

Amendment retaliation claim, which has been clearly established under Eleventh Circuit law for decades.

Initially, the District Court rejected Col. Cowart's qualified immunity claim, because "pre-existing law gave Defendant Cowart clear warning that charging Plaintiff with a false disciplinary infraction in retaliation for Plaintiff filing grievances was unlawful." DE48 at 18 (citing *Farrow* v. *West*, 320 F.3d 1235, 1248 (11th Cir. 2003)). Indeed, when proceeding before the District Court, even Defendants-Appellees conceded Eleventh Circuit law had so held since the 1980s. DE44 at 5 ("[r]etaliation by prison officials against an inmate for filing lawsuits and administrative grievances is cognizable in a civil rights suit for damages" (citing *Wildberger* v. *Bracknell*, 869 F.2d 1467 (11th Cir. 1989), and *Adams* v. *Wainwright*, 875 F.2d 1536 (11th Cir. 1989))).

Nevertheless, Col. Cowart continues to extensively brief this issue (AB20-24), but to no avail. Specifically, Col. Cowart contends she is entitled to qualified immunity from Moton's claims because (she claims) "the law must have been developed in such a ***concrete and factually defined context*** to make it obvious to all governmental actors" in Col. Cowart's position "that their actions violated federal law." AB23 (emphasis added) (citing *Lassiter* v. *Ala. A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994), *Post* v. *City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified* 14 F.3d 583 (11th Cir. 1994), and *Kelly* v. *Curtis*, 21

F.3d 1544, 1544 (11th Cir. 1994)); *see also* DE44 at 11 (claiming "no case law exists requiring corrections personnel to avoid sending an inmate into disciplinary confinement when that inmate allegedly made disrespectful comments"). But Col. Cowart invites the Court to apply an unlawful and outdated test for qualified immunity, because she does not appreciate the sea change that has occurred on this front in recent years.

It is noteworthy that Col. Cowart's argument relies primarily on Eleventh Circuit precedent from the 1990s, because the Supreme Court swept aside such fact-bound tests (whatever their merit as a practical or policy matter) not long thereafter in its landmark civil rights decision in *Hope* v. *Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002). Although Col. Cowart cites *Hope* (AB24), she does not grasp its significance.

Hope involved the Alabama penitentiary system's practice of disciplining prisoners in chain gangs by handcuffing them to hitching posts. *See id.* at 733, 122 S. Ct. at 2512. The Eleventh Circuit ruled this practice unconstitutional. *Id.* Applying circuit precedent, however, this Court held that the prison guards were nevertheless entitled to qualified immunity, because this Eighth Amendment ruling "was not supported by earlier cases with 'materially similar' facts." *Id.*

But the Supreme Court rejected this Circuit's test as a "rigid gloss on the qualified immunity standard" that "is not consistent with our cases." *Id.* at 739,

122 S. Ct. at 2515. Accordingly, it laid to rest this Court's prior fact-bound test—which Col. Cowart apparently now seeks to resuscitate—and reversed. *Id.* at 748, 122 S. Ct. at 2519.

Instead, the Supreme Court recognized that the real question is rather whether officials had "'fair warning'" that their conduct was unconstitutional. *Id.* at 740, 122 S. Ct. at 2515. Under this considerably more flexible metric, "officials can still be on notice that their conduct violates established law ***even in novel factual circumstances***." *Id.* at 741, 122 S. Ct. at 2516 (emphasis added). Although prior cases with "'fundamentally similar' facts" or "'materially similar' facts" may "provide ***especially strong support*** for a conclusion that the law is clearly established," the Supreme Court emphatically held "they are ***not necessary*** to such a finding." *Id.* (emphases added). Rather, the "salient question" is merely "whether the state of the law" at the time of the conduct gave officials "fair warning" that their actions "w[ere] unconstitutional." *Id.*

It should come as little surprise, then, that this Court has repeatedly held that prison guards violate inmates' First Amendment free speech rights when they retaliate against them for filing grievances, starting at least as early as 1986. *Bridges* v. *Russell*, 757 F.2d 1155, 1156 (11th Cir. 1986) (reversing dismissal of complaint that alleged First Amendment retaliation claim); *Wildeberger*, 869 F.2d at 1468 ("[i]t seems clear that if appellant is able to establish that his discipline was

the result of his having filed a grievance concerning the conditions of his imprisonment, he will have raised a constitutional issue"); *Thomas*, 880 F.2d at 1242 ("gist of a retaliation claim is that a prisoner is penalized for exercising the right of free speech"); *see also Hicks* v. *Ferrero*, 241 Fed. App'x 595, 598-99 (11th Cir. 2007) ("[w]e concluded as early as 1989—well before this decision was made—that a prisoner's First Amendment free speech rights are violated when prison officials retaliate against him or her for filing a grievance"). Indeed, even Defendants-Appellees themselves previously conceded as much. *See* DE44 at 5.

As such, the District Court correctly rejected Col. Cowart's qualified immunity claim. Moton's right to be free from retaliation for exercising his First Amendment free speech rights—without regard to any unique or novel facts in this case—has been clearly established under Eleventh Circuit law for decades. It really is that simple.

IV. THE DISTRICT COURT ERRED WHEN IT RULED *SUA SPONTE* THAT THE PLRA'S PHYSICAL-INJURY REQUIREMENT LIMITED MOTON TO NOMINAL DAMAGES

The District Court's *sua sponte* ruling that Moton did not satisfy the PLRA's physical-injury requirement was error.

The PLRA bars recovery for "mental or emotional injury" absent a "prior showing of physical injury" that is "greater than *de minimis*." 42 U.S.C. § 1997e(e); *Mitchell* v. *Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1313

(11th Cir. 2002). But liberally construed, the Verified Complaint alleged that during Moton's retaliatory 30 days' administrative confinement, he suffered "assault and battery by C/O Slaughter." DE1 at 22. At the very least, the "assault and battery" allegation suggests Moton sustained a greater than *de minimis* physical injury stemming from Defendants-Appellees' retaliatory conduct. Rather than *sua sponte* rejecting Moton's damages claims—without briefing and contrary to a liberal reading of the *pro se* pleadings and evidence—on remand the District Court should direct the parties to address any physical injuries Moton may have suffered from Defendants-Appellees' retaliatory conduct.

And even if this physical injury were somehow insufficient under the PLRA, the District Court still erred. The plain terms of the PLRA's physical-injury requirement do not bar recovery of ***all*** compensatory or punitive damages, but only recovery for "mental or emotional injury." 42 U.S.C. § 1997e(e).

Admittedly, unless rejected as *dicta*, the prior-panel-precedent rule would obligate this Court to rule that, absent a prior showing of physical injury, all "compensatory" and all "punitive" damages "are precluded under the PLRA." *Smith* v. *Allen*, 502 F.3d 1255, 1271 (11th Cir. 2007) (citing *Napier* v. *Preslicka*, 314 F.3d 528, 532 (11th Cir. 2002)); *see also Harris* v. *Garner*, 216 F.3d 970, 984-85 (11th Cir. 2000) (en banc) (PLRA "does apply to constitutional claims").

But *Smith*'s overexpansive statement was mistaken for three reasons. ***First***, it misreads the PLRA's plain language by inaccurately paraphrasing its ambit. ***Second***, it misreads the *Napier* decision on which it relied, because *Napier* did not involve punitive damages. ***Third***, it is contrary to the weight of authority in sister circuits. The Second, Third, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits allow prisoners—without regard to the PLRA's physical-injury requirement—to recover punitive damages for First Amendment claims.[9] Likewise, the Seventh and Ninth Circuits allow prisoners, absent physical injury, to recover limited categories of compensatory damages other than "mental or emotional injury."[10] As such, the *en banc* Court should reconsider *Smith*. *See Groves* v. *Ring Screw Works*, 498 U.S. 168, 172 n.8 (1990) ("Given the panel's expressed doubt about the correctness of the Circuit precedent that it was following, together with the fact that there was a square conflict in the Circuits, it might have been appropriate for the panel to request a rehearing en banc.").

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[9] *Thompson* v. *Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Allah* v. *Al-Hafeez*, 226 F.3d 247, 252 (3d Cir. 2000); *Calhoun* v. *Detella*, 319 F.3d 936, 942 (7th Cir. 2003); *Royal* v. *Kautzky*, 375 F.3d 720, 723 (8th Cir. 2004); *Canell* v. *Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998); *Searles* v. *Van Bebber*, 251 F.3d 869, 881 (10th Cir. 2001); *see also Williams* v. *Ollis*, 230 F.3d 1361, 2000 WL 1434459, at *2 (6th Cir. 2000) (unpublished).

[10] *Canell*, 143 F.3d at 1213; *Calhoun*, 319 F.3d at 940; *see also Ollis*, 230 F.3d 1261, 2000 WL 1434459, at *2.

V. THE DISTRICT COURT ERRONEOUSLY DISMISSED C.O. SHEETZ AND LT. PRIETO FROM THE ACTION WITHOUT GRANTING MOTON EVEN A SINGLE OPPORTUNITY TO AMEND

The District Court should not have dismissed C.O. Sheetz and Lt. Prieto from this action for qualified immunity, failure to state a claim, or failure to exhaust administrative remedies.

As an initial matter, C.O. Sheetz and Lt. Prieto are no more entitled to qualified immunity than Col. Cowart—First Amendment retaliation claims have been clearly established for decades. *See supra* Argument III. Moreover, the District Court's dismissal for failure to state a claim did not grant Moton even one opportunity to correct any pleading deficiencies, contrary to this Court's precedent. *E.g.*, *Bryant* v. *Dupree*, 252 F.3d 1161, 1163 (11th Cir. 2001) ("where a more carefully drafted complaint might state a claim, a plaintiff ***must be given at least one chance to amend*** the complaint before the district court dismisses the action with prejudice" (internal punctuation and quotation omitted) (emphasis added)). Leave to amend would not have been "futile" here, *id.*, because it is possible that Moton could amend the Verified Complaint to explain why C.O. Sheetz and Lt. Prieto would have been motivated to retaliate against him for exercising his First Amendment rights. Moton is entitled to at least one such opportunity.

The more difficult question here is whether the PLRA required Moton to exhaust all administrative remedies against C.O. Sheetz and Lt. Prieto under the

unique circumstances of this case.[11] Specifically, Moton exhausted all administrative remedies against Col. Cowart (against whom he has a virtually identical, but if anything ***better*** claim of retaliation) to no avail, so it would have been futile to also exhaust administrative remedies against C.O. Sheetz and Lt. Prieto.

Ordinarily, the PLRA requires prisoners to exhaust all administrative remedies before commencing suit. *Woodford* v. *Ngo*, 548 U.S. 81, 84, 126 S. Ct. 2378, 2382 (2006) ("proper exhaustion of administrative remedies is necessary"); *Johnson* v. *Meadows*, 418 F.3d 1152, 1154 (11th Cir. 2005) ("an untimely administrative grievance does not satisfy the exhaustion requirement of the PLRA"). But neither *Woodford* nor *Johnson* involved the situation present here, in which a prisoner exhausted all administrative remedies stemming from one episode with respect to one defendant, but did not exhaust such remedies against other defendants who were less centrally involved in the same episode.

Indeed, requiring administrative exhaustion here would not have served either of its "two main purposes" regarding protection of FDOC authority or promoting efficiency. *Woodford*, 548 U.S. at 88-89, 126 S. Ct. at 2384-85. Nor would it have given FDOC officials any different or better "'opportunity'" to

[11] Although Moton did not raise this argument below, the Court has discretion to consider it if found meritorious. *See Dean Witter Reynolds, Inc.* v. *Fernandez*, 741 F.2d 355, 360-61 (11th Cir. 1984).

"'take corrective action that may satisfy inmates and reduce the need for litigation,'" to "'filter out frivolous claims,'" or to "'create an administrative record that would facilitate subsequent judicial review." *Johnson*, 418 F.3d at 1186 (citation omitted); *see also Alexander* v. *Hawk*, 159 F.3d 1321, 1327 (11th Cir. 1998) (describing seven policy reasons for exhaustion requirements, inapplicable here).

As such, the Court should distinguish *Woodford* and *Johnson*, vacate the dismissal of C.O. Sheetz and Lt. Prieto, and direct the District Court to grant Moton leave for one opportunity to replead his claims against them.

CONCLUSION

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

April 9, 2010

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Federal Rule of Appellate Procedure 32(a)(7)(B), because this brief contains 13,965 words, as determined by the word-count function of Microsoft Word 2003, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

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Dated: April 9, 2010.

/s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused the original and six copies of the foregoing Appellant's Additional Brief and Appellant's Record Excerpts to be filed with the Clerk of Court by overnight commercial carrier on this 9th day of April, 2010, to:

John Ley
Clerk of Court
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I FURTHER CERTIFY that I caused a true and correct copy of the foregoing Appellant's Additional Brief and Appellant's Record Excerpts to be furnished by overnight commercial carrier on this 9th day of April, 2010, to:

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