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 REPLY BRIEF

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AAB__	Appellees Col. Cowart, Lt. Prieto, and C.O. Sheetz's Additional Answer Brief filed July 2, 2010 page number.
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.
Add'l Br. __	Appellant Moton's Additional Brief filed April 9, 2010 page number.
PLRA	Prison Litigation Reform Act, 42 U.S.C. § 1997e *et seq.*

SUMMARY OF THE ARGUMENT

In his Additional Brief, Moton explained in painstaking detail how the District Court's ruling against Moton's First Amendment retaliation claim was nothing more than a routine misapplication of the summary judgment standard. Specifically, in granting summary judgment against Moton, the District Court improperly made credibility determinations, drew inferences, and resolved material factual disputes, all in Col. Cowart's favor, despite expressly conceding—in its own words, no less—that all such issues were "close question[s]" of fact resting "in the eye of the beholder" that "could be reasonably construed" either way. That is not and never has been how summary judgment works.

Appellees offer no defense of the District Court's opinion's candid and revealing language. Nor could they. Rather than joining that debate, Appellees try to change its terms. Specifically, Appellees (1) argue this Court should affirm on grounds the District Court explicitly declined to reach (*i.e.*, the protected speech and ordinary-person deterrence elements of the three-part retaliation test), (2) present a skewed and inaccurate version of the undisputed facts, and (3) likewise misconceive the summary judgment standard. None of these tactics has any merit. Instead, they merely confirm summary judgment was improper.

In retreat, Appellees seek cover under the shield of qualified immunity. Appellees invite the Court to apply an outdated and unlawful test that would

require case law to have developed in a concrete and factually defined context. Unfortunately for Appellees, they still do not recognize the U.S. Supreme Court ***explicitly*** rejected such a test in *Hope* v. *Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002). Try as they might, Appellees cannot change the fact that First Amendment retaliation claims have been clearly established law in this Court for decades. As such, whether viewed at the motion to dismiss or summary judgment stage, the result is the same: Appellees can stake no claim to qualified immunity.

Additionally, Appellees attempt to buttress the District Court's *sua sponte* ruling that the PLRA's physical-injury requirement bars Moton from recovering anything but nominal damages. Again, this is not an accurate statement of the law or the facts. The District Court overlooked Moton's allegation that he suffered an "assault and battery." And in any event, the ruling below is inconsistent with the PLRA's plain language and would, if affirmed, deepen a circuit split. On remand, the District Court should inquire what happened and properly apply the PLRA.

Finally, Appellees mistakenly contend that this Court lacks jurisdiction or discretion to consider Moton's claims against Lt. Prieto and C.O. Sheetz. But Appellees ignore both binding precedent regarding the liberal construction of a notice of appeal and Moton's argument that the PLRA did not require him to name Lt. Prieto and C.O. Sheetz in all exhausted grievances when he already exhausted his virtually identical grievance against Col. Cowart.

ARGUMENT

I. APPELLEES HAVE NO RESPONSE TO MANY OF MOTON'S FACTUAL CONTENTIONS AND LEGAL ARGUMENTS

The parties apparently share significant common ground. Like a ship passing in the night, Appellees' Additional Answer Brief failed to engage, dispute, or otherwise respond to almost two dozen of Moton's factual contentions and legal arguments—all of which were clearly raised in his Additional Brief. For instance, Appellees have no response to Moton's arguments that:

- There was a genuine dispute of material fact 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* Add'l Br. 32, 41-44 & n.7, *with* AAB9, 15, 16, 20, 21, 24, 25 (repeatedly and inaccurately representing Moton's "loud and belligerent manner," "disrespectful behavior," and "threatening" tone as undisputed facts).

- There was a genuine dispute of material fact 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. Add'l Br. 32, 41-44 & n.7.

- There was a genuine dispute of material fact 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* Add'l Br. 32, 41-44 & n.7, *with* AAB15, 20 (repeatedly and inaccurately representing that Moton's "use of larger sized capitalization" indicated "he was 'yelling at me'" was an undisputed fact).

- There was a genuine dispute of material fact 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. Add'l Br. 32, 41-44 & n.7.

- There was a genuine dispute of material fact whether Moton had ever filed any grievances requesting that Officer Funk be terminated rather than merely reprimanded. *Compare* Add'l Br. 32, 41-44 & n.7, *with* AAB8, 17 (repeatedly and inaccurately representing Moton's desire that an officer be terminated as an undisputed fact).

- There was a genuine dispute of material fact 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. Add'l Br. 32, 41-44 & n.7.

- This Court routinely reverses or vacates judgments against First Amendment retaliation claims when there are genuine disputes of material fact—even from circumstantial or inferential evidence, the sworn allegations of a verified complaint, or the testimony of only one individual—especially whenever retaliatory or discriminatory intent is at play. Add'l Br. 38-41.

- The District Court misconceived the summary judgment standard when it made credibility determinations, drew inferences, and resolved material factual disputes in the movant's favor despite expressly conceding that all such issues were "close question[s]" of fact resting "in the eye of the beholder" that "could be reasonably construed" either way. Add'l Br. 41-44 & n.7.

- This Court's holding in *Smith* v. *Mosley*, 532 F.3d 1270 (11th Cir. 2008), is distinguishable, because the facts here constitute evidence of pretext that was not present in *Mosley*. Add'l Br. 44-45.

- Col. Cowart's discredited professional judgment is entitled to no deference at summary judgment, because such deference is improper in a he-said-she-said case as here, inapplicable outside the context of reviewing the constitutionality of prison regulations, and the prison itself rejected her exercise of it. Add'l Br. 45-47.

- If Moton carries his summary judgment burden regarding the retaliatory motive element, the Court should remand remaining issues regarding the protected-speech and ordinary-person-deterrence elements of the retaliation test to the District Court for analysis in the first instance to preserve judicial resources. Add'l Br. 47-50 & n.8.

- In any event, Moton was engaged in protected speech because, among other things, he made a series of grievances for which Appellees retaliated, not an isolated grievance. Add'l Br. 51.

- Moton also satisfied the ordinary-person-deterrence element even though he continues to file grievances, because the test is not subjective, but objective. *Compare* Add'l Br. 51, *with* AAB21 (Moton "has not offered any evidence as to how the exercise of his First Amendment rights has been affected").

- First Amendment retaliation claims are not subject to qualified immunity protections because they have been clearly established law in this Circuit for decades. Add'l Br. 51-55.

- The qualified immunity cases from the 1980s and 1990s on which Appellees rely are no longer good law for the proposition that constitutional rights are not clearly established unless they were developed in a concrete and factually defined context. *Compare* Add'l Br. 51-55, *with* AAB27-30.

- The PLRA's plain language bars nothing more than recovery of damages for "mental or emotional injury" absent physical injury. Add'l Br. 56-57.

- Any contrary holding regarding the PLRA's physical-injury requirement would deepen a circuit split with sister circuits. Add'l Br. 56-57 & nn.9-10.

- It was unnecessary for Moton to name Lt. Prieto and C.O. Sheetz in all his exhausted grievances, given that he obtained no administrative relief despite exhausting his virtually identical claims against Col. Cowart without success. Add'l Br. 59-60.

- Naming Lt. Prieto and C.O. Sheetz in all of Moton's exhausted grievances would not have served a single one of the policy goals of exhaustion noted in *Woodford* v. *Ngo*, 548 U.S. 81, 126 S. Ct. 2378 (2006), or *Johnson* v. *Meadows*, 418 F.3d 1152 (11th Cir. 2005). Add'l Br. 59-60.

- Assuming the PLRA does not require Moton to name Lt. Prieto and C.O. Sheetz, the District Court should have given Moton at least one chance to amend his claims against C.O. Sheetz and Lt. Prieto. *Compare* Add'l Br. 58, *with* AAB34 (making circular argument that amendment would be futile because Moton did not exhaust administrative remedies).

Appellees' failure to address these arguments speaks for itself. *Cf. La Grasta* v. *First Union Sec., Inc.*, 358 F.3d 840, 847 n.4 (11th Cir. 2004) (appellee "waived the argument by failing to discuss it in the answer brief"). Because these central arguments remain unchallenged, the Court should reverse and remand on that basis alone. Moreover, should Appellees posit some alternative theories in response to these arguments at oral argument, the Court should take care to note that Moton would not have had any prior opportunity—to which he is entitled under Federal Rule of Appellate Procedure 28(c)—to respond to them in writing.

II. LIKE THE DISTRICT COURT, APPELLEES CONTINUE TO MISCONCEIVE THE FUNCTION OF SUMMARY JUDGMENT

Appellees, like the District Court, continue to misunderstand the summary judgment rubric. At Appellees' behest, the District Court improperly made credibility determinations, drew inferences, and resolved material factual disputes, despite expressly conceding that all such issues were "close question[s]" of fact resting "in the eye of the beholder" that "could be reasonably construed" either way. That is not how summary judgment works.

This mistaken ruling was all the more striking, because the District Court itself had previously recognized that—based on the Verified Complaint's ***sworn allegations***—the "temporal proximity of the discipline and harassment to the filing of the grievances raise[d] a 'colorable suspicion' or 'plausible inference' of retaliation." DE48 at 15. And as Moton took pains to show (Add'l Br. 32, 42-44),

discovery illuminated no less than six genuine disputes of material fact. *See supra* Argument I. Properly understood, Moton demonstrated genuine disputes of material fact that foreclose the propriety of summary judgment.

A. Summary Judgment Must Be Reversed Whenever The Facts Or Inferences Therefrom, Viewed In The Nonmovant's Favor, Demonstrate A Genuine Issue Of Material Fact

Summary judgment cannot stand when the facts or inferences therefrom, viewed in the nonmovant's favor, demonstrate a genuine issue of material fact. *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). And it is not the nonmovant, but the movant—here, Col. Cowart—that "bears the burden of demonstrating that there is no dispute as to any material fact in the case." *Warrior Tombiqbee Transp. Co.* v. *M/V Nan Fung*, 695 F.2d 1294, 1296 (11th Cir. 1983). In making this determination, it is elementary that summary judgment cannot weigh competing evidence, but rather only tests its sufficiency. 10A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2712, at 205-06 (1998) ("summary judgment is not a substitute for the trial of disputed fact issues," so a district court "cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried").

But rather than defending the District Court's ruling on its own terms, or even accurately viewing the facts through the summary judgment rubric, Appellees

instead contend the District Court properly ***rejected*** Moton's sworn testimony regarding these issues of fact—notwithstanding the procedural posture at summary judgment. In Appellees' view, summary judgment against Moton was proper because he "[l]ack[ed] any ***competent corroborating evidence*** [for his] ***unsubstantiated assertions*** that [Appellees] filed false disciplinary reports" and therefore "has not provided any evidence, ***other than his own declarations that his claims are true***, to support any element of his suit." AAB13, 30 (emphases added). But in making this very argument, Appellees merely confirm that summary judgment was improper because there remain genuine disputes of material fact for resolution at trial.

Indeed, Appellees' positions are inaccurate statements that cannot be reconciled with the law of summary judgment or the particular facts of this case. As Moton previously explained—and Appellees failed to contest—this Court has repeatedly and emphatically held that summary judgment cannot rest on such naked credibility choices. *See* Add'l Br. 38-41; *Harris* v. *Ostrout*, 65 F.3d 912, 917 (11th Cir. 1995) (even if district court "believes that all the evidence presented by one side is of doubtful veracity," summary judgment cannot rest on "credibility choices"). Nor is there any basis for a "competent corroborating evidence" requirement in opposing summary judgment, when circumstantial or inferential evidence is more than sufficient. *See* Add'l Br. 38-41; *Damon* v. *Fleming*

Supermarkets of Fla., Inc., 196 F.3d 1354, 1366 (11th Cir. 1999) (circumstantial evidence required reversal of summary judgment); *Sepulveda* v. *Burnside*, 170 Fed. App'x 119, 123 (11th Cir. 2006) (inferential evidence required reversal of summary judgment).[1] As such, Appellees cannot justify the District Court's (or their own) repeated and improper adherence to the Cowart Affidavit's factual assertions when they were directly contradicted by Moton's sworn testimony, the undisputed sequence of events, and inferences therefrom. *See, e.g.*, DE75 at 7, 11, 13 (adopting Cowart Affidavit's factual assertions); AB5, 12 (touting Cowart Affidavit's factual assertions); AAB8, 15, 16, 17, 20, 21, 24, 25 (same); *see also* Add'l Br. 17 n.3, 32, 42-44 & n.7 (explaining how Cowart Affidavit's factual assertions were disputed).

And in fact, there is good reason why district courts are never permitted to find facts at summary judgment: as a matter of constitutional law, summary judgment cannot constitute such a fact-finding miniature bench trial, lest it violate the Seventh Amendment's Trial By Jury Clause. *See* 10A Wright, Miller & Kane, *supra*, § 2714 (Rule 56 "was not intended to deprive a party of a jury trial," because by definition it comes into play only where there is no issue of fact to be tried). Here, it is notable that in her Answer, Col. Cowart demanded a trial by jury.

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

DE49 at 2. "Once a demand has been made, other parties may rely on it, and it cannot be withdrawn without the consent of all parties." 20 Wright & Kane, *supra*, § 98, at 895 (2002).

B. Col. Cowart's Subjective Intent Presents The Quintessential Question Of Fact

Of particular relevance here, the issue of Col. Cowart's subjective intent presents the quintessential question of fact that forecloses summary judgment. To succeed in his First Amendment retaliation claim, Moton "must show that his speech was a 'substantial' or 'motivating' factor in Col. Cowart's retaliatory decision." *Gattis* v. *Brice*, 136 F.3d 724, 726 (11th Cir. 1998) (citing *Mount Healthy City Sch. Dist. Bd. of Educ.* v. *Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576 (1977), and *Bryson* v. *City of Waycross*, 888 F.2d 1562, 1565-66 (11th Cir. 1989)). This is the "causation" element of a retaliation claim, and it puts at issue "whether the defendants were subjectively motivated to discipline" Moton because of his constitutionally protected speech. *Smith* v. *Mosley*, 532 F.3d 1270, 1278 (11th Cir. 2008). Critically, the "question of whether the plaintiff has established this element is one for the fact-finder" alone. *Gattis*, 136 F.3d at 726 (citations omitted).

Under the *Mount Healthy* burden-shifting test for causation, the burden is initially placed on Moton to show that his conduct was constitutionally protected and a "motivating factor" in Col. Cowart's retaliatory action. 429 U.S. at 287. As

this Court has made clear, this burden "is not a heavy one." *Walker* v. *Schwalbe*, 112 F.3d 1127, 1131 (11th Cir. 1997) (citing *Beckwith* v. *City of Daytona Beach Shores*, 58 F.3d 1554, 1563-64 (11th Cir. 1995)).

To survive a summary judgment motion on this element, therefore, Moton need merely make a showing "sufficient to permit a reasonable jury to find that his protected speech was ***a***"—not necessarily ***the***—"substantial or motivating factor behind" the retaliation. *Gattis*, 136 F.3d at 726 (emphasis added). Upon Moton making this showing, the burden shifts to Col. Cowart, who must then show by a preponderance of the evidence that she would have engaged in ***precisely*** the same conduct absent the protected speech. *Walker*, 112 F.3d at 1131. That means Col. Cowart must show that the extent of discipline she imposed would have been ***identical*** absent the protected speech. Critically, at no point is the plaintiff required to present direct evidence of this causation element; rather, the district court must evaluate "whether the record permits the ***inference*** that speech played ***a*** role"—any role—in the defendant's decision or action. *Id.* at 726 n.4 (emphases added).

Where, as here, a party's state of mind is at issue, however, district courts "should be cautious in granting" summary judgment, because "[m]uch depends on the credibility of the witnesses testifying as to their own states of mind"—hence the "jury should be given an opportunity to observe the demeanor, during direct

and cross-examination, of the witnesses whose states of mind are at issue." *Croley* v. *Matson Navigation Co.*, 434 F.2d 73, 77 (5th Cir. 1970) (Wisdom, J.)[2]; *see also* 10A Wright, Miller & Kane, *supra*, § 2726, at 446 ("if the credibility of the movant's witnesses is challenged by the opposing party and specific bases for possible impeachment are shown, summary judgment should be denied and the case allowed to proceed to trial"); *id.* § 2727, at 485 ("if the evidence contained in the moving party's affidavit raises subjective questions such as motive, intent, or conscience, there may have to be a trial inasmuch as cross-examination is the best means of testing the credibility of this kind of evidence"); *id.* § 2728, at 518-23 ("summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits").[3] "Inasmuch as a determination of someone's state of mind usually entails the drawing of factual inferences as to which reasonable people might differ—a function traditionally left to the jury—summary judgment often will be an inappropriate means of resolving an issue of this character." *Id.* § 2730, at 4-5. Indeed, the Advisory Committee note to the 1963 amendment of Rule 56(e) stated that "[w]here an issue as to a

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

[3] Additionally, the fact that Moton did not oppose summary judgment with counter-affidavits makes no difference, because he was proceeding *pro se*. 10A Wright, Miller & Kane, *supra*, § 2728, at 527-28.

material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate." Fed. R. Civ. P. 56(e) cmt.

C. Moton Showed A Genuine Dispute Of Material Fact Whether The Filing Of His Series Of Grievances Was A Substantial Or Motivating Factor Behind Col. Cowart's Retaliation

Careful application of these principles demonstrates that Moton showed a genuine dispute of material fact whether the filing of his series of grievances was a substantial or motivating factor behind Col. Cowart's retaliatory conduct.

At this point, it is clear that the parties wish to present two very different factual stories to the jury. Appellees' story is plain enough. They contend that Moton made inappropriate comments and lewd looks or gestures at a female guard, was ordered not to do so by C.O. Funk, wrote several inmate requests demanding that C.O. Funk be terminated, then wrote a grievance in capital letters in order to yell at Col. Cowart, then attended a meeting with Col. Cowart and other guards during which he made demands and threats in a loud and belligerent manner, for which he was disciplined. *See* AAB9. And it is, of course, possible that this narrative may prevail at trial.

But Moton's version of events is sharply different. He denies making inappropriate comments or lewd looks or gestures at a female guard. He denies—and there is no documentary evidence of—writing any inmate requests demanding

that C.O. Funk be terminated. He denies that his October 15 grievance indicated he was yelling at Col. Cowart, instead explaining that his use of capital letters had other purposes. And he denies that he made any demands or threats during his early morning November 1 meeting in a loud or belligerent manner.

And the differences do not end with Moton's denial's of Appellees' narrative. Instead, they continue with the sequence of events, background facts, and inferences drawn therefrom. *See* Add'l Br. 43-44. Specifically, a jury could reasonably infer that Col. Cowart, because of her seniority or background, felt like she no longer needed to put up with inmate grievances from what she viewed as an uppity inmate and therefore pretextually retaliated—in the most severe way possible—against one of Moton's grievances to silence him. Indeed, a reasonable inference to this end can be drawn simply from the fact that the prison itself discredited Col. Cowart's DRs for lack of evidence. Rather than address these unfavorable but reasonable inferences, Appellees have chosen to ignore them.

It should go without saying that even though this case may not involve horrific facts like a brutal physical beating, *Sepulveda*, 170 Fed. App'x at 123, that would not justify succumbing to the temptation—as perhaps the District Court did unconsciously—of deciding issues of fact. And even though the vast majority of police and prison guards fulfill their responsibilities honestly and admirably, it is not unheard of that they may gin up paperwork to cover their tracks when mistakes

have been made. *E.g.*, Ruben Castaneda, *Beating of University of Maryland Student by Police Probed by County Prosecutors*, Wash. Post, Apr. 13, 2010, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/04/12/AR2010041204377_pf.html (describing criminal investigation against officers who prepared documents charging student whom they beat with batons for attacking officers on horseback, because YouTube video contradicted officers' report); John Eligon, *Ex-Officer Convicted of Lying About Confrontation with Cyclist*, N.Y. Times, Apr. 29, 2010, *available at* http://www.nytimes.com/2010/04/30/nyregion/30pogan.html (describing criminal conviction of officer who filed criminal report that was proven false by YouTube video). No more and no less than other people, when it is in their perceived self-interest, sometimes police officers' and guards' written reports do not tell the truth. In our judicial system, when intent and credibility are at issue, only the crucible of trial with cross-examination can suss out the true course of events.

D. The Court Should Remand Remaining Issues Regarding The Retaliation Test Or Reject Them Out Of Hand

Aside from their misconceived view of the summary judgment standard, Appellees also contend this Court should affirm on grounds that the District Court explicitly declined to reach: to wit, the protected speech and ordinary-person deterrence elements of the retaliation test. AAB16-22. But Appellees have no response to Moton's argument that these never-before-analyzed issues should be

remanded to the District Court to conserve judicial resources. *See* Add'l Br. 48-50 & n.8 (collecting cases). And even absent remand, case law is quite clear that Moton met his summary judgment burden on both of these prongs of the retaliation test. *See id.* 50-51 (collecting cases).

Appellees appear to make three arguments why Moton was not engaged in protected speech. None has merit. ***First***, they contend there is no right to engage in disrespectful speech, and Moton's speech was disrespectful. AAB18. This argument is obviously circular and a straw man—Moton has never claimed the right to engage in disrespectful speech, and there is a genuine dispute of material fact whether his speech was respectful. *See* Add'l Br. 51. ***Second***, Appellees contend Moton "does not have the right to argue with a direct instruction." AAB17. But Appellees never identify any direct instruction with which Moton supposedly argued. ***Third***, Appellees contend that the "act of asking questions or seeking information, guidance, or assistance is not considered to be a grievance." AAB18. But this argument ignores that Moton was engaged in a series of grievances that demanded Col. Cowart and other guards to evenhandedly apply the regulations that govern the conditions of his confinement. For these reasons, Moton's grievances constitute protected speech.

Appellees further contend Moton cannot show that Col. Cowart's retaliatory actions did not adversely affect Moton's use of the grievance system, because he

continues to file grievances. AAB21-22. But this argument incorrectly focuses exclusively on Moton's subjective behavior, even though this Court has repeatedly held the test is objective. Add'l Br. 51; *Mosley*, 532 F.3d at 1277; *Douglas*, 535 F.3d at 1321-22. Moton was sentenced to 60 days' solitary confinement and lost gain time—the maximum punishment allowed by the pertinent regulations. It makes no difference whether the prison ultimately expunged this punishment; Moton served time in solitary confinement, and in any event, as the saying goes, once bitten, twice shy. Under any objective test, the discipline Moton received would have dissuaded a person of ordinary firmness from utilizing the grievance procedures. As such, it matters not whether Moton ***subjectively*** continues to file grievances, because the test is ***objective***.

And any alternative holding would unfairly put prisoners in an untenable position—either they would have to stop filing grievances and risk having future cases dismissed for failure to exhaust administrative remedies under the PLRA, or they could continue filing grievances and risk having present cases dismissed for lack of adverse effect on speech rights. The law does not ordinarily countenance such Catch-22, "heads I win, tails you lose" rules.

III. THE COURT SHOULD REJECT APPELLEES' PERSISTENT INVITATION TO APPLY THEIR UNLAWFUL AND OUTDATED QUALIFIED IMMUNITY TEST

As a final backstop, Appellees persist in claiming they are entitled to qualified immunity. But not one of the dozen qualified immunity cases dating from the late 1980s through the 1990s on which Appellees rely can support the unlawful and outdated proposition that qualified immunity protects them unless the law "developed in such a ***concrete and factually defined context*** to make it obvious to all governmental actors, in Defendants' place, that their actions violated federal law." AAB29 (emphasis added) (citing *Lassiter* v. *Ala. A&M Univ.*, 28 F.3d 1146, 1149 (11th Cir. 1994)); *see also* Add'l Br. 52-55. The Supreme Court, however, explicitly rejected this test in *Hope* v. *Pelzer*, 536 U.S. 730, 122 S. Ct. 2508 (2002), which this Court shortly thereafter recognized in *Vinyard* v. *Wilson*, 311 F.3d 1340, 1350-52 (11th Cir. 2002).

And Appellees are not entitled to qualified immunity whether it is determined at the motion to dismiss or summary judgment stage, because Moton filed a verified complaint. That is, the Verified Complaint contains ***sworn allegations***, much like an affidavit. As such, Appellees cannot contend that at the summary judgment stage, this Court "is not required to take all of Appellant's allegations as true" (AAB27), because they were sworn under oath and therefore constitute evidence.

IV. ON REMAND, THE DISTRICT COURT SHOULD REVISIT ITS QUESTIONABLE RULING THAT THE PLRA LIMITS MOTON TO NOMINAL DAMAGES IN LIGHT OF MOTON'S "ASSAULT AND BATTERY" ALLEGATION

Although Appellees technically brief the issue whether the District Court erred when it ruled *sua sponte* that Moton could recover only nominal damages, they do not, in fact, respond to Moton's actual arguments. Instead, Appellees take the position that even though Moton did allege an "assault and battery," that does not mean that "any physical injury occurred." AAB31. Appellees cannot be serious.

The purpose of the PLRA's physical-injury rule was to replicate the traditional physical-impact rule of tort law, by which tort victims ordinarily could not recover any compensatory damages for mental or emotional injuries absent some threshold physical impact. *E.g.*, *Zehner* v. *Trigg*, 952 F. Supp. 1318, 1325 (S.D. Ind. 1997) ("by enacting § 1997e(e), Congress took a page from the common law by limiting claims for mental and emotional injuries, which can easily be feigned or exaggerated, in the absence of physical injury").[4] The notion espoused

[4] *See also* Stacey Heather O'Bryan, Note, *Closing the Courthouse Door: The Impact of the Prison Litigation Reform Act's Physical Injury Requirement on the Constitutional Rights of Prisoners*, 83 Va. L. Rev. 1189, 1196 (1997) (PLRA's "physical injury requirement closely parallels, and in fact virtually paraphrases, the physical impact rule that guided common law tort recovery throughout the late nineteenth and early twentieth centuries"); *id.* at 1197 ("[c]ommon law courts relied on the physical impact rule because they feared that compensating mental and emotional harms would lead to imagined injuries and fictitious claims," and

by Appellees—that Moton could have been assaulted and ***battered*** absent some threshold *de minimis* physical injury or impact—is, quite simply, logically impossible to square with the very definition of common law battery from time immemorial. *See Paul* v. *Holbrook*, 696 So. 2d 1311, 1312 (Fla. 5th DCA 1997) ("battery consists of the infliction of a harmful or offensive contact upon another with the intent to cause such contact"); *Sullivan* v. *Atl. Fed. Sav. & Loan Ass'n*, 454 So. 2d 52, 54 (Fla. 4th DCA 1984) ("battery consists of the intentional infliction of a harmful or offensive contact upon the person of another"). Indeed, the distinguishing characteristic between an assault and a battery is a physical impact, however slight. *Doe* v. *Epstein*, 611 F. Supp. 2d 1339, 1343 (S.D. Fla. 2009) ("assault and battery are separate and distinct legal concepts, assault being the beginning of an act which, if consummated, constitutes battery," whereas the "'essential element of an assault is the violence offered, and not the actual physical contact'" (quoting *McDonald* v. *Ford*, 223 So. 2d 553, 555 (Fla. 2d DCA 1969))). Because the District Court ruled without the benefit of briefing, the record is unclear about the precise nature of the physical impact or the extent of physical injuries Moton may have suffered. But what is clear on this sparse record—for

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the "legislative history of the PLRA reveals that the bill's sponsors were motivated by the same concerns in imposing a physical injury requirement"); *see also* W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 54, at 359-67 (5th ed. 1984) (describing tort's traditional threshold impact requirement as exceedingly slight).

summary judgment purposes—is that Moton was physically impacted by some harmful or offensive conduct.

Appellees cite no legal authority for their contention that any such physical injury suffered by Moton would be irrelevant in any case, because "[a]ny damages for any actions by Correctional Officer Slaughter would need to be addressed in an action in which he was a defendant," as he "is not a defendant in this case." AAB31. But Appellees have never at any time raised any contention that C.O. Slaughter was a necessary party under Federal Rule of Civil Procedure 19(a), so as the plaintiff who is the master of his claim, it is Moton's prerogative in determining whom to sue. *Myles* v. *United States*, 416 F.3d 551, 553 (7th Cir. 2005) ("pro se litigants are masters of their own complaints and may choose who to sue—or not to sue"); 16 James William Moore *et al.*, *Moore's Federal Practice* § 107.14(2)(c), at 107-67 (3d ed. 2005) ("In general, the plaintiff is the master of the complaint and has the option of naming only those parties the plaintiff chooses to sue, subject only to the rules of joinder [of] necessary parties."). In any event, the important point is that based on these allegations, the District Court should not have cavalierly issued a *sua sponte* ruling, but instead should have cautiously requested briefing in light of the Verified Complaint's sworn allegations.

And aside from these primarily factual issues, Appellees have no response at all to Moton's legal argument that the District Court's ruling applied a test that is

inconsistent with both the PLRA's express language and the square holdings of sister circuits. *See* Add'l Br. 56-57 & nn.9-10. Indeed, if it were Congress' far-reaching intention to bar all compensatory damages, as the District Court held, it is certainly odd that it chose the circuitous route of narrowly circumscribing the PLRA's physical-injury requirement to for recovery of damages only to "***mental or emotional*** injury," instead of "***any*** injury." *See, e.g.*, *Hartford Underwriters Ins. Co.* v. *Union Planters Bank, N.A.*, 530 U.S. 1, 7, 120 S. Ct. 1942, 1947 (2000) ("[h]ad that been Congress's intention, it could easily have used the formulation just suggested"); *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 197, 105 S. Ct. 658, 663 (1985) ("Congress could easily have [so provided] had that been its intention"); *United States* v. *Rodgers*, 461 U.S. 677, 707, 103 S. Ct. 2132, 2150 (1983) (rejecting statutory interpretation where Congress "could have easily expressed that intention more clearly by [more direct] language"). As such, it follows that—at most—absent some physical injury, the PLRA bars damages arising solely from "mental or emotional injury," but does not bar damages arising from any other source. For example, Moton should be able to recover lost pay from any inmate work he was unable to perform while in solitary confinement.

V. THE COURT CAN AND SHOULD CONSIDER MOTON'S CLAIMS AGAINST LT. PRIETO AND C.O. SHEETZ

As Moton previously explained, this Court has both the jurisdiction and the discretion to consider Moton's claims against Lt. Prieto and C.O. Sheetz. *See*

Add'l Br. 1-2, 58-60 & n.11. Moreover, Appellees have no response to Moton's argument that there was no need to exhaust administrative remedies by naming Lt. Prieto and C.O. Sheetz in grievances when Col. Cowart was already named. As such, the exhaustion requirement does not bar Moton's claims against Lt. Prieto and C.O. Sheetz, and the District Court should have given Moton at least one opportunity to amend the Verified Complaint.

A. The Court Has Both The Jurisdiction And The Discretion To Consider Moton's Claims Against Lt. Prieto And C.O. Sheetz

As an initial matter, contrary to Appellees' contentions, there is little question that this Court has appellate jurisdiction over Moton's claims against Lt. Prieto and C.O. Sheetz. This Court has long embraced "a policy of liberal construction of notices of appeal in situations where the intent to appeal an unmentioned or mislabeled ruling is apparent and there is no prejudice to the adverse party." *C.A. May Marine Supply Co.* v. *Brunswick Corp.*, 649 F.2d 1049, 1056 (5th Cir. 1981) (collecting cases).[5] Indeed, this Court's precedent "tends to be ***more lenient*** than other circuits in this respect." *Id.* (emphasis added). Accordingly, even a *pro se* litigant's principal brief may be considered a *de facto* notice of appeal. *See Fisher* v. *Office of State Attorney 13th Judicial Circuit Fla.*,

[5] *See supra* note 2.

162 Fed. App'x 937, 941-42 (11th Cir. 2006).[6] This Court's lenient approach is especially apt whenever "(1) unnoticed claims or issues are inextricably intertwined with noticed ones and (2) the adverse party is not prejudiced." *Hill* v. *BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1313 (11th Cir. 2004).

Here, the Court exercised its authority under Addendum Five to appoint undersigned counsel to prepare for Moton, a *pro se* litigant, a replacement brief. *See* 11th Circuit Rule 31-6 ("[w]hen an attorney is appointed to represent a pro se party in an appeal in which the party has filed a pro se brief, the attorney must file a new brief that will ***replace*** the brief filed by the pro se party, unless otherwise directed by the court" (emphasis added)). This Additional Brief raised issues involving Moton's claims against Lt. Prieto and C.O. Sheetz quite clearly. *See* Add'l Br. 1-2, 58-60. As such, Moton's intent to appeal the dismissal of his claims against Lt. Prieto and C.O. Sheetz could not be more apparent, and the Court should as always apply its lenient, liberal policy of notice-of-appeal construction.

In any event, even if Moton's appellate intentions were somehow unclear, Appellees still do not even bother to explain how the appeal of these claims would in any way "prejudice" them for the ***sole reason*** that they were not technically mentioned in Moton's *pro se* Notice Of Appeal. *See* AAB1-2, 32-33. Instead, Appellees circularly contend Moton "abandoned" these issues by not including

[6] *See supra* note 1.

them in the *pro se* Notice Of Appeal or his *pro se* Initial Brief. But Appellees' argument about the Notice Of Appeal ignores this Court's longstanding precedent, and Appellees' argument regarding the *pro se* Initial Brief conflates this Court's appellate ***jurisdiction*** with this Court's appellate ***discretion*** to refuse to consider certain issues or arguments abandoned by the briefs.

For that reason, Appellees reliance (AAB2, 33) on *Irwin* v. *Hawk*, 40 F.3d 347 (11th Cir. 1994), is misplaced. That case merely declined to exercise discretion to consider an issue—over which the court had appellate jurisdiction—merely because a *pro se* litigant had abandoned it in the initial brief. *Id.* at 347 n.1. Even if Moton had abandoned the issue in his appellate briefs, that would have no effect on this Court's jurisdiction, only its discretion.

And because 11th Circuit Rule 31-6 and the Court's order pursuant to Addendum Five appointing undersigned counsel are both quite clear that the Additional Brief is a "***replacement*** brief" that is supposed to raise all meritorious issues, and not a "***do-over-brief-limited-to-the-four-corners-of-the-original-initial-brief*** brief," the Court should reject Appellees' appellate jurisdictional arguments and exercise its discretion to consider Moton's claims against Lt. Prieto and C.O. Sheetz.

B. It Was Unnecessary For Moton To Name All Defendants In His Grievances Given The Unique Circumstances Of This Case

Appellees have no response to Moton's argument that the District Court's dismissal of Moton's claims against C.O. Sheetz and Lt. Prieto for failure to exhaust administrative remedies misapplied administrative-exhaustion law. *See* Add'l Br. 58-60.

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"). Presumably attempting to apply these rules, the District Court ruled that Moton "fully and properly exhausted his available administrative remedies" against Col. Cowart, but "failed to exhaust his administrative remedies" against Lt. Prieto and C.O. Sheetz. *See* DE48 at 11. Specifically, despite conceding some of Moton's grievances mentioned Lt. Prieto and C.O. Sheetz, the District Court ruled that Moton did not satisfy the requirement of exhausting his remedies against those particular defendants because his November 4, 2004, grievance to the Warden "did not identify" them, "did not claim that their actions were in retaliation" for his filing of grievances, and did not claim "they knew or should have known" that Col.

Cowart "was retaliating against Plaintiff by writing the disciplinary report." DE48 at 11.

But the PLRA contains no such requirement that a prisoner name all prospective defendants in all exhausted grievances upon which he or she later brings suit. Although the PLRA "requires exhaustion of 'such administrative remedies as are available,'" the Supreme Court held that "***nothing in the statute imposes a 'name all defendants' requirement***." *Jones* v. *Bock*, 549 U.S. 199, 217, 127 S. Ct. 910, 922 (2007) (quoting 42 U.S.C. § 1997e(a)) (emphasis added). In other words, "exhaustion is not *per se* inadequate simply because an individual later sued was not named in the grievances." *Id.* at 219, 127 S. Ct. at 923.

Instead, exhaustion depends not on the PLRA's language, but rather on the particular State's prison regulations. *Id.* at 218, 127 S. Ct. at 922-23. Specifically, "it is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion," because exhaustion "rules are defined not by the PLRA, but by the prison grievance process itself." *Id.* As such, the "level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim," but where—as here—prison regulations "make no mention of naming particular officials," there is no basis for a district court to apply such a "rule imposing such a prerequisite to proper exhaustion." *Id.* at 218, 127 S. Ct. at 923.

In the case at bar, the FDOC's grievance framework does not contain any such name-all-defendants exhaustion requirement. *See* Fla. Admin. Code § 33-103.001-.019. And in any event, such hypertechnical exhaustion requirements would not advance the PLRA's policy goals. *See* Add'l Br. 58-60. For these reasons, the District Court's dismissal of Moton's claims against Lt. Prieto and C.O. Sheetz was inconsistent with *Jones*'s explication of administrative-exhaustion law and must be reversed.

CONCLUSION

For the foregoing reasons, and those previously stated in Appellant's Additional Brief, the Court should vacate the District Court's entry of judgment and remand for further proceedings.

July 26, 2010

Respectfully submitted,

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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 6,851 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.

2. This brief further complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because its text has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14-point Times New Roman font.

Dated: July 26, 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 Reply Brief to be filed with the Clerk of Court by overnight commercial carrier on this 26th day of July, 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 Reply Brief to be furnished by overnight commercial carrier on this 26th day of July, 2010, to:

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