No. 21-13961

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

DYTRELL JONES,

*Plaintiff-Appellant*,

v.

FLORIDA DEPARTMENT OF CORRECTIONS, J. M. CARTER, Major, WARDEN, ASSISTANT WARDEN,

*Defendants-Appellees*.

On Appeal from the United States District Court for the Middle District of Florida, No. 3:21-cv-00179-MMH-JBT
Before the Hon. Marcia M. Howard

# PLAINTIFF-APPELLANT'S OPENING BRIEF


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# CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned hereby certifies the following list of trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that may have an interest in the outcome of this appeal:

Anand, Easha

Bixby, Elizabeth

Carter, J.M.

Famada, Omar J.

Florida Department of Corrections

Howard, Marcia M., U.S. District Judge

Jones, Dytrell

Oyer, David

Parrish, Assistant Warden

Polk, Warden

Roderick & Solange MacArthur Justice Center

Toomey, Joel Barry, U.S. Magistrate Judge

Pursuant to Eleventh Circuit Rule 26.1-3, the undersigned further certifies that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Respectfully submitted,

Date: January 25, 2022

*/s/ David F. Oyer*
DAVID F. OYER

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Dytrell Jones, through *pro bono* counsel, respectfully urges this Court to hold oral argument in this case for two reasons.

First, this case raises an important statutory question: Does 42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act, require that a prisoner plead a "more than *de minimis*" physical injury to recover damages for mental or emotional injury? District courts apply this rule against prisoner-plaintiffs regularly in this Circuit, yet this Court has never ascertained whether the text of the statute can justify such a rule.

Second, this case raises an important constitutional issue on the merits. Mr. Jones pled in his *pro se* complaint that he was confined in cells that were without usable toilets, caked in multi-colored mold and mildew, infested by insects and rodents, and had only a sickening-smelling and moldy sink to drink from. The district court concluded that these facts did not support an Eighth Amendment violation. Given the implications of that holding for the health and safety of prisoners, Mr. Jones respectfully requests oral argument.

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## STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. Final judgment was entered on October 13, 2021. Plaintiff-Appellant Dytrell Jones timely filed a notice of appeal on November 4, 2021, which was received by the district court and docketed on November 10, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF ISSUES

Plaintiff-Appellant Dytrell Jones was kept in a cell infested with insects and mold, and which contained a perpetually backed-up toilet and a sickening-smelling sink, for over five months. He was punished with pepper spray and "strip"/property restrictions any time he complained about these conditions. And he was moved to another cell covered in even more mold and infested with rodents and greater amounts of insects for at least five weeks. As a result, he sustained an excruciatingly painful skin infection and suffered serious psychological harm. The issues on appeal are:

**I.** A. Does a prisoner who is held for several months in two cells, both infested with insects and caked with mold, one also without adequate plumbing, and the other with a rodent infestation, state an Eighth Amendment conditions-of-confinement claim?

B. Does a prisoner who is pepper-sprayed for complaining about his cell conditions state an Eighth Amendment excessive-force claim?

C. Does a prisoner who is pepper-sprayed, extracted from his cell, and housed with no property or clothes other than boxers for complaining about his cell conditions state a First Amendment retaliation claim?

**II.** A. Does 42 U.S.C. § 1997e(e), which requires only that a prisoner plead a "physical injury" to recover damages for "mental or emotional injury," incorporate an atextual requirement that the physical injury be more than *de minimis*?

B. If so, is a skin infection causing "excruciating pain" or a pepper-spraying more than *de minimis*?

C. Regardless, does 42 U.S.C. § 1997e(e) foreclose recovery of compensatory damages for Mr. Jones's physical injuries, nominal damages, and punitive damages?

**III.** Where a *pro se* prisoner's original complaint is not frivolous and does not indicate a desire to forgo amendment, does a district court err in dismissing it with prejudice?

## STATEMENT OF THE CASE

### I. Factual Background

Plaintiff-Appellant Dytrell Jones is an inmate in the custody of Defendant Florida Department of Corrections. Beginning in February 2020, Defendants—the Department, Major Carter, Warden Parrish, and Assistant Warden Polk—housed Mr. Jones in disgusting, dehumanizing conditions. Mr. Jones's toilet clogged "continuously," which "limit[ed] [his] opportunities to urinate or defecate." D.E. 1 at 5. His sink emitted a "foul sicken[ing] smell." *Id.* His drain had insects crawling out of it. *Id.* And his faucet—Mr. Jones's only source of drinking water for most of the day—was covered in "green, white, and black mold." *Id.*

Those disgusting cell conditions persisted for more than five months, despite nominal weekly—and sometimes less than weekly—cell clean-ups. D.E. 1 at 5-6. Instead of undertaking a serious effort to remediate the hazards in Mr. Jones's cell, Defendants gave Mr. Jones "caustics" to somehow fix his clogged toilet, sickening-smelling sink, faucet caked in mold, and insect-infested drain. *Id.* at 5. Unsurprisingly,

Mr. Jones did not allege that those "caustics" meaningfully improved the condition of his cell.[1] *See id.*

Defendants were uninterested in helping Mr. Jones obtain more sanitary housing. Although they conducted "continuous" inspections, Defendants refused to heed Mr. Jones's complaints about his cell. D.E. 1 at 5-6. Instead, they responded with one of several punishments: forcing Mr. Jones to stand under his cell light;[2] extracting him from his cell; restricting his access to his property; forcing him to remain in his cell with only his boxers; placing him in a "mildew-infested shower" for eight

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[1] Mr. Jones is hardly alone in alleging that Florida allows its inmates to suffer unbearably inhumane cell conditions. The state's oldest newspaper has described the Florida prison system as "the worst prison system in the nation." Times-Union Editorial Board, *Reform state prisons now*, Florida Times-Union (July 17, 2019, 2:01 a.m.), https://www.jacksonville.com/story/opinion/editorials/2019/07/17/wednesday-editorial-reform-floridas-prisons-now/4676479007/. Recently smuggled footage "revealed an unkempt and decaying environment and demonstrates a lack of attention by some corrections officers." Deanna Paul, *An inmate's secretly recorded film shows the gruesome reality of life in prison*, Washington Post (Oct. 17, 2019), https://www.washingtonpost.com/nation/2019/10/07/an-inmates-secretly-recorded-film-shows-gruesome-reality-life-prison/.

[2] Mr. Jones suffers from serious mental illness and has had spontaneous psychotic episodes when forced to stand under a light in this manner. D.E. 1 at 6. Defendants observed this behavior and continued to order Mr. Jones to engage in it. *Id.* at 6, 8.

hours; and even deploying "chemical agents"—i.e., pepper spray—against him. D.E. 1 at 6.

After several months, Mr. Jones was transferred to a different cell, but conditions hardly improved. This cell, too, was "caked" with mold and mildew from floor to ceiling. *Id.* at 6. In this cell, insects and rodents streamed under the cell door and through the walls, and Mr. Jones had to resort to blocking the insects' entry by stuffing toothpaste, soap, clothes, and bed linens into the cracks. *Id.* at 7. Despite these abominable conditions, Defendants had not cleaned Mr. Jones's cell for five weeks when he drafted his complaint in September 2020. *Id.* And they gave Mr. Jones no materials with which he could attempt to clean the cell himself. *See* D.E. 1 at 6-7 (no allegation of cleaning supplies in second cell); D.E. 36 at 3 (confirming omission was intentional).

Mr. Jones attempted to address the conditions of his new cell with Defendants, but these attempts were again brutally rebuffed. Mr. Jones complained that he would get sick from drinking mold-infested water and that he deserved to be treated like a human; Defendants responded by pepper-spraying him and then confining him to his cell with nothing but underwear for five days. D.E. 1 at 7; D.E. 36 at 3.

Mr. Jones suffered greatly from the dehumanizing conditions of his cell and Defendants' conduct. First, Mr. Jones sustained a skin infection from the "filth," which caused him "excruciating pain." D.E. 1 at 7-8. Second, Mr. Jones experienced "psychotic outburst episodes" caused by his "not being able to cope" with the revolting conditions of his cell. *Id.* at 8. Third, Mr. Jones was pepper-sprayed by Defendants after he objected to his cell conditions. *Id.* at 7. And fourth, Mr. Jones was repeatedly placed in his cell with nothing but his boxers in response to his raising the same objections. *Id.*

## II. Procedural Background

Mr. Jones filed suit *pro se*. He alleged that Defendants violated his Eighth Amendment rights by holding him in "inhumane living conditions." D.E. 1 at 10. Defendants moved to dismiss. D.E. 40 at 2. The district court granted the motion. *Id.* at 16. As relevant here, the district court gave two reasons for dismissal.[3]

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[3] The district court dismissed any request for damages against the Defendants in their official capacities as barred by state sovereign immunity. D.E. 40 at 7. The district court also held that Mr. Jones's request for injunctive relief was mooted when he was transferred to a new prison. *Id.* at 8. Mr. Jones does not contest either holding on appeal.

First, the district court held that Mr. Jones's request for compensatory relief was barred by 42 U.S.C. § 1997e(e), an affirmative defense that forecloses a prisoner-plaintiff from recovering damages for mental or emotional injury without "a prior showing of physical injury." *See Douglas v. Yates*, 535 F.3d 1316, 1320 (11th Cir. 2008). The district court explained that Eleventh Circuit precedent interprets § 1997e(e) to require a prisoner seeking compensatory damages for mental or emotional injury to plead a "more than *de minimis*" physical injury. D.E. 40 at 9. Applying that rule, the district court concluded that the skin infection that caused Mr. Jones excruciating pain was not "more than *de minimis*." *Id.* The district court explained that the infection could not have been serious because the prison treated it with calamine lotion and therapeutic shampoo—even though Mr. Jones never alleged that this treatment cured the infection—and those products are available over the counter.[4] *Id.* at 11. For that reason alone, the district court concluded that the infection was *de minimis*.

[4] The district court entirely ignored injuries that resulted from Defendants' use of "chemical agents" against Mr. Jones.

Second, the district court dismissed the Eighth Amendment claim on the merits. To do so, it adopted Defendants' theory, unsupported by either record evidence or caselaw, that the cleanliness of Mr. Jones's cell was his own responsibility. D.E. 40 at 14-15. The district court apparently thought that it was impossible for the filthy conditions of Mr. Jones's cell to support an Eighth Amendment claim because (a) Mr. Jones is a prisoner and therefore not entitled to expect perfect living conditions and (b) the prison provided him with "caustics" to clean one of his cells (though they provided no cleaning supplies for the five weeks he was in the other). Thus, despite the severity of conditions in Mr. Jones's cell, the prison had done enough, per the district court, to comply with the Eighth Amendment. *See id.*

Properly construed, the allegations in Mr. Jones's complaint raised two other claims, but the district court did not address them. Although Mr. Jones alleged he was sprayed with chemical agents and was injured as a result, the district court did not conduct an Eighth Amendment excessive-force analysis. Likewise, although Mr. Jones alleged that he was repeatedly punished for raising concerns about his cell conditions, the district court did not conduct a First Amendment retaliation analysis.

And while Mr. Jones had not amended his complaint and had not disclaimed his intent to do so, the district court—without explanation—dismissed his case with prejudice. D.E. 40 at 16. This appeal followed.

## SUMMARY OF ARGUMENT

**I.** Mr. Jones not only stated a claim, he stated three. **A.** First, Mr. Jones pled an Eighth Amendment conditions-of-confinement claim: he alleged that he was held in cells that were covered in mold and mildew and infested with insects and rodents, one of which also had a perpetually clogged toilet and sickening-smelling drain. **B.** Second, Mr. Jones pled an Eighth Amendment excessive-force claim: he alleged that he was pepper-sprayed without penological justification. **C.** And third, Mr. Jones pled a First Amendment retaliation claim: he alleged that Defendants responded to objections to his cell conditions by imposing numerous disciplinary sanctions upon him, including confining him in a cell with no moveable property and only his boxers to wear for five days.

**II.** The district court erred in holding that 42 U.S.C. § 1997e(e), which bars incarcerated plaintiffs from seeking compensatory damages for mental or emotional injury suffered in custody without "a prior showing of a physical injury," foreclosed Mr. Jones's right to

compensatory damages. **A.** Mr. Jones alleged a physical injury: a skin infection that caused "excruciating pain." The district court, however, held that § 1997e(e) requires not just a physical injury, but a physical injury that is "more than *de minimis*," and that a skin infection causing "excruciating pain" is not. **1.** Imposing a "more-than-*de-minimis*" requirement is incompatible with basic principles of statutory interpretation; it finds no support in the statute's text, structure, or history. **2.** This Court's previous adoption of a more-than-*de-minimis* requirement is incompatible with current Supreme Court precedent. That holding relied on reasoning that the Supreme Court has since explicitly overruled. **B.** Even if a more-than-*de-minimis* injury is required, Mr. Jones's injury was not *de minimis*. The district court's contrary reasoning was spurious and required it to violate the applicable standard of review by drawing several inferences against Mr. Jones. **C.** Even if § 1997e(e) did apply, Mr. Jones would be eligible for several forms of relief: compensatory damages for his physical injuries; nominal damages; and punitive damages.

**III.** The district court, at the very least, erred in dismissing Mr. Jones's complaint with prejudice. Mr. Jones was never given a chance to amend his complaint even though this Court's precedent requires it.

## STANDARD OF REVIEW

This Court reviews *de novo* a district court's dismissal for failure to state a claim, viewing the complaint "in the light most favorable to the plaintiff" and accepting all well-pleaded factual allegations as true. *Young Apartments, Inc. v. Town of Jupiter*, 529 F.3d 1027, 1037 (11th Cir. 2008). *Pro se* complaints, like the one here, are "liberally construed" and "held to a less stringent standard than pleadings drafted by attorneys." *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008). This Court also reviews *de novo* questions of statutory interpretation, including of the Prison Litigation Reform Act. *See Jackson v. State Bd. of Pardons & Paroles*, 331 F.3d 790, 794 n.7 (11th Cir. 2003).

## ARGUMENT

The district court committed two cardinal errors below. First, it erred in holding that Mr. Jones failed to state an Eighth Amendment conditions-of-confinement claim, an Eighth Amendment excessive-force claim, or a First Amendment claim on the merits. Second, it erred in holding that Mr. Jones could not recover compensatory damages under

42 U.S.C. § 1997e(e). Additionally, even if the district court decided both questions correctly, it made a third error: failing to grant Mr. Jones leave to amend his complaint. Its decision is reversible on any of these grounds.

## I. Mr. Jones Stated Three Claims On The Merits.

To begin with, the district court erred in holding that Mr. Jones failed to state a claim. Under the liberal construction that Mr. Jones's *pro se* complaint is due, Mr. Jones stated three cognizable claims: an Eighth Amendment conditions-of-confinement claim; an Eighth Amendment excessive-force claim; and a First Amendment retaliation claim.

### A. Mr. Jones's Allegations That His Cells Were Infested With Rodents And Insects, Caked In Mold and Mildew, And Lacked Working Plumbing Stated A Conditions-Of-Confinement Claim.

Begin with the claim that the district court focused on: Mr. Jones's conditions-of-confinement claim. "[W]hile the Constitution does not require prisons to be comfortable, it also does not permit them to be inhumane, and it is now settled that the conditions under which a prisoner is confined are subject to scrutiny under the Eighth Amendment." *Jordan v. Doe*, 38 F.3d 1559, 1564 (11th Cir. 1994) (internal quotation marks, alteration, and citation omitted). A prisoner states an Eighth Amendment conditions-of-confinement claim when he

alleges that (a) the poor conditions were "sufficiently serious" to trigger Eighth Amendment protection under contemporary standards of decency, and (b) the defendants were deliberately indifferent to those unconstitutional conditions. *Thomas v. Bryant*, 614 F.3d 1288, 1306-07 (11th Cir. 2010). Mr. Jones alleged facts supporting both prongs.

### 1. The Disgusting Conditions In Mr. Jones's Cells Were Sufficiently Serious To Trigger Eighth Amendment Protection.

First, Mr. Jones alleged a sufficiently serious deprivation. As this Court has noted, "every sister circuit (except the Federal Circuit) has recognized that the deprivation of basic sanitary conditions can constitute an Eighth Amendment violation." *Brooks v. Warden*, 800 F.3d 1295, 1304 (11th Cir. 2015) (collecting cases). This rule makes sense because sanitation is one of the "minimal civilized measure[s] of life's necessities." *See id.* (citation omitted). Indeed, as far back as fifty years ago, the former Fifth Circuit recognized that the "common thread" running through successful prison-conditions cases was "the deprivation of basic elements of hygiene." *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971). Under this Court's and the Supreme Court's precedent, the allegations here state a claim for that fundamental deprivation.

In *Goodson v. City of Atlanta*, this Court upheld a jury verdict for a pretrial detainee who alleged he was briefly held in unsanitary conditions.[5] 763 F.2d 1381, 1383-84 (11th Cir. 1985). There, the plaintiff was confined for three days in a cell with a backed-up toilet that sometimes leaked onto the floor. *Id.* at 1386. He was not allowed to shower for the same three-day period. *Id.* He was forced to go roughly fifteen hours without water. *Id.* at 1385. And a roach infestation resulted in his being served inedible food. *Id.* This Court held that these "unsanitary conditions" "endanger[ed] his health" and therefore violated the Eighth Amendment. *Id.* at 1387.

In a similar vein, the Supreme Court recently confronted the case of a prisoner who was kept for two days in a cell that had a clogged drain in the floor instead of a toilet, and then kept for another four days in a

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[5] Although *Goodson* was a pretrial-detainee case, this Court expressly noted that, like pretrial detainees, "sentenced prisoners are to be furnished . . . with adequate food, clothing, shelter, sanitation facilities, medical care and personal safety." 763 F.2d at 1387; *see also id.* at 1386 (affirming jury's finding of Eighth Amendment violation).

cell with feces coating the walls.[6] *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam). The Court held not only that those conditions were unconstitutional, but that they were so unconstitutional that the violation should have been obvious to any reasonable correctional officer. *Id.* at 53-54.

Mr. Jones's allegations are comparable. As in both cases, he was deprived of a toilet or other means of disposing of his bodily waste—his toilet was perpetually clogged. As in *Goodson*, he was deprived of drinking water—his only source of putatively potable water was his "sickening-smelling" spigot that was itself caked in mold. D.E. 1 at 5. As in *Goodson*, too, he was plagued by vermin—insects crawled up through the drain of his first cell, and both insects and rodents came under the door and through the walls of his second cell so frequently that Mr. Jones had to "block areas of the wall" and "block open areas of the cell door to prevent [them] from entering." D.E. 1 at 7. And as in *Taylor*, he was placed in a cell with a disgusting substance coating the walls—

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[6] The cell was also frigidly cold, though that fact appeared to play no role in the Court's analysis. *See Taylor,* 141 S. Ct. at 53 (holding that "deplorably unsanitary conditions" constituted an obvious violation without mentioning temperature).

multicolored mold and mildew was "caked up in the window and cell vent," "on the walls," and even "on the floor." *Id.* at 6-7.

Going further, Mr. Jones's allegations were *worse* than those of the plaintiffs in *Goodson* and *Taylor* in a critical respect: Mr. Jones's deprivation was far longer. "[T]he length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Hutto v. Finney*, 437 U.S. 678, 686 (1978). Here, Mr. Jones was in his first disgusting cell for at least five months and his second disgusting cell for at least five weeks. Compare this period of deprivation to three days in *Goodson* and six days in *Taylor*. Because Mr. Jones alleged similarly noxious deprivations lasting longer than the deprivations in those two cases, he stated an Eighth Amendment claim.

Defendants' liability is confirmed by the sheer breadth of their violations. Recall the full extent of Mr. Jones's allegations: his toilet "continuously clog[ged], limiting [his] ability to urinate and/or defecate"; his sink had a "sicken[ing] foul smell"; his first cell's drain had insects crawling out of it "throughout the day," and both insects and rodents crawled under his second cell's door and through its walls at such frequency that he had to use his clothes and hygiene products to block

them out; and his first cell's spigot was covered in black, white, and green mold. D.E. 1 at 6-7. Any one of those allegations, standing alone, would violate the Eighth Amendment. *Willey v. Kirkpatrick*, 801 F.3d 51, 68 (2d Cir. 2015) (backed-up toilet); *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 663-66 (7th Cir. 2012) (smell); *Kost v. Kozakiewicz*, 1 F.3d 176, 188 (3d Cir. 1993) (insect infestations); *Hope v. Harris*, 861 F. App'x 571, 584 (5th Cir. 2021) (mold).

Regardless, they certainly amount to an Eighth Amendment violation in combination. "[C]onditions of confinement may establish an Eighth Amendment violation in combination when each would not do so alone . . . when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson v. Seiter*, 501 U.S. 294, 304 (1991). The conditions Mr. Jones alleged combined to deprive him of a "single, identifiable human need": basic sanitation. *See id*. Indeed, this Court has routinely held that a confluence of unpleasant sanitary conditions, in combination, violates the Eighth Amendment. *See, e.g.*, *Jordan*, 38 F.3d at 1565 (contaminated food, fire hazards, and vermin infestations); *Chandler v. Baird*, 926 F.2d 1057, 1063 (11th Cir.

1991) (lack of clothing, filth, cold temperature). This case requires this Court to go no further.

The district court's contrary conclusion was unsupportable. It held in a single sentence that Mr. Jones's allegations did "not rise to an unconstitutional level, especially considering the cleaning supplies he received." D.E. 40 at 14-15. That holding was erroneous in three ways.

First, the district court entirely ignored Mr. Jones's allegations about his second cell. That cell, Mr. Jones alleged, was caked with mold and mildew and overflowing with insects and rodents. Mr. Jones was confined in it for at least five weeks. And Mr. Jones never alleged that he was provided with any cleaning supplies while confined in that cell. Thus, the district court's reasoning cannot possibly reach this set of allegations.[7]

Second, no reasonable reading of Mr. Jones's complaint could support the conclusion that the supplies provided to him sufficiently

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[7] Mr. Jones attempted to raise the lack of cleaning supplies in his second cell in his Opposition to the Motion to Dismiss. D.E. 36 at 3. But the District Court, compounding its mistake, found that this explanation "contradict[ed] the allegations in the Complaint." D.E. 40 at 14. That was wrong; the Complaint alleged only that Mr. Jones was provided cleaning supplies in his first cell, not in his second.

remediated the appalling conditions he complained of. The district court talked of "cleaning supplies," which might suggest a diverse selection of materials. But the complaint only alleges that Mr. Jones was provided with unspecified "caustics," perhaps no more than a small amount of all-purpose cleaner. Reading the complaint properly—i.e., in the light most favorable to Mr. Jones—it is clear that "caustics" could not possibly have remediated a serious insect infestation or a perpetually backed-up toilet. Imagine, for instance, attempting to exterminate a cockroach infestation with a bar of lye. Or imagine trying to unclog a toilet by pouring a small amount of Clorox into it. Those tactics would obviously fail to cure the unsanitary conditions at which they were aimed. So too here: Mr. Jones's Complaint gave no reason to think that the "caustics" he was given were adequate to the task of cleaning his cells. For that reason, too, the district court's rationale for dismissal fails.

Finally, the district court's reasoning was unsupported by caselaw. Unsurprisingly, courts have held that the provision of some cleaning supplies does not relieve officials of liability for conditions where the cleaning supplies cannot actually clean up the cell. Prison officials, not prisoners, bear ultimate responsibility for ensuring that cells satisfy

"basic sanitary conditions." *Brooks*, 800 F.3d at 1304. Thus, prison officials who fail to provide cleaning supplies that ensure basic sanitation violate the Eighth Amendment. *Darnell v. Pineiro*, 849 F.3d 17, 39 (2nd Cir. 2017) ("The fact of thrice daily visits by cleaning crews, even if undisputed, would not eliminate the force of the plaintiffs' testimony that the cleaning crews did not do what was needed to clean the cells, or remedy the non-functioning toilets."); *see also Ramos v. Lamm*, 639 F.2d 559, 568 (10th Cir. 1980) (holding that Eighth Amendment violation occurred despite defendants' argument "that many of the sanitation problems . . . are a direct result of the inmates' absolute refusal to help keep the prison clean"); *Kirby v. Blackledge*, 530 F.2d 583, 587 (4th Cir. 1976) (holding that Eighth Amendment violation occurred despite defendants' insistence "that inmates are furnished with materials to clean their own cells as well as disinfect them").

Disregarding these cases, the district court cited only this Court's unpublished decision in *Alfred v. Bryant*, 378 F. App'x 977 (11th Cir. 2010), in support of its holding. But the district court's reliance on *Alfred* was fundamentally flawed. There, the plaintiff's primary allegation was that his mattress was uncomfortable. 378 F. App'x at 978. He also alleged

that his toilet occasionally overflowed, producing runoff that he was able to clean with soap and water provided by the prison. *Id.* In the course of dismissing the plaintiff's claim, this Court observed that "[a]ny unsanitary conditions caused by the toilet here were mitigated by the provision of cleaning supplies to Alfred." *Id.* at 980.

But Alfred affirmatively alleged that he was able to clean his cell with the supplies provided by the prison, supporting this Court's conclusion that "[a]ny unsanitary conditions . . . were mitigated by the provision of cleaning supplies." 378 F. App'x at 980. Mr. Jones, on the other hand, alleged no such thing; indeed, it is unlikely that the "caustics" provided to Mr. Jones could have cleaned, for example, an insect-infested drain. D.E. 1 at 5. And while it is true that this case and *Alfred* both involved malfunctioning toilets, Mr. Jones further alleged disgusting conditions wholly absent from Alfred's complaint: a moldy drain, insect and rodent infestations, and a "sicken[ing] smell[ing]" sink. In short, *Alfred* and this case share allegations of plumbing issues and the provision of cleaning supplies by prison officials—but the similarities end there. *Alfred* therefore cannot support dismissal here.

The only other reason the district court gave for dismissal was its observation, offered without citation, that "[r]odents and insects are something the general public deals with on a regular basis in their own homes." D.E. 40 at 15. But that is true only at a level so general as to be irrelevant. In reality, the public deals with sanitation problems that are neither so grave nor so difficult to remediate. Mr. Jones did not allege that he saw a spare mouse or cockroach—he alleged that insects crawled up his drain "throughout the day" and that rodents and insects streamed under his door and through the walls unless he blocked them with his linens and toothpaste. Members of the public rarely deal with infestations that severe. And when they do, they have easy recourses: set a rat trap; buy a can of Raid; call an exterminator. Mr. Jones, by contrast, could only complain to prison guards, who in turn punished and ridiculed him. On top of those obvious distinctions, the district court did not suggest—and could not have suggested—that the general public often deals with toilets that are backed up for months; or with mold and mildew that is caked over every wall, vent, and floor; or with a sole source of drinking water that is covered in multi-colored mold and smells "sickening." For all these reasons, the district court's suggestion that Mr.

Jones's allegations amounted to nothing more than standard home maintenance issues cannot stand.

### 2. Defendants Were Deliberately Indifferent To Mr. Jones's Cell Conditions Because They Knew Of Them And Chose To Take No Action.

Turning, then, to the second prong of his conditions-of-confinement claim, Mr. Jones adequately alleged deliberate indifference. An official is deliberately indifferent when he is "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he [draws] the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Here, Mr. Jones alleged that he repeatedly "attempted to address [his] concerns" about his cells with the individual Defendants. D.E. 1 at 6. In the first cell, Defendants performed "inspection[s] on a continuous basis," and Mr. Jones sought to speak with Defendants during these regular inspections. D.E. 1 at 5. But, rather than fix the evident issues, Defendants responded harshly—for example, by forcing Mr. Jones to stand under his cell light, causing him to "experience spontaneous psychotic episodes." *Id.* at 6. Likewise, in the second cell, Defendants did "regular rounds," during which Mr. Jones "attempt[ed] to address the issues of his living conditions," but he was "ignored." D.E. 1 at 6-7.

Those allegations plainly establish the individual Defendants' awareness of Mr. Jones's complaints. *See McNeeley v. Wilson*, 649 F. App'x 717, 722-23 (11th Cir. 2016) (holding that inmate complaints put jailers on notice for deliberate-indifference purposes). And they directly contradict the district court's conclusion that Defendants could not have been deliberately indifferent because they performed "regular inspections." D.E. 40 at 15. Rather, the Complaint, taken as true at this stage, clearly explains that Mr. Jones's complaints were not only ignored during these supposed inspections but that he was punished for making them.[8] *See Richko v. Wayne Cnty.*, 819 F.3d 907, 920 (6th Cir. 2016) (holding that prison nurse was deliberately indifferent because she ignored signs of constitutional violation during routine rounds). Moreover, Defendants were on notice that the conditions to which they subjected Mr. Jones posed a risk to his health and safety because the nature of Mr. Jones's complaints—that his cell was covered in mold and

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[8] The district court also suggested that Defendants could not have been deliberately indifferent because they provided Mr. Jones with cleaning supplies. This argument fails because it ignores that Mr. Jones did not receive cleaning supplies in his second cell and improperly assumes that the cleaning supplies provided in the first cell were adequate to remediate Mr. Jones's cell conditions. *See supra* p. 18-22.

mildew, that his toilet was perpetually clogged, that insects were continually crawling through his drain and walls and under his door, that his only source of potable water was covered in mold and smelled sickening—would have been observable to Defendants' naked eyes. Thus, Defendants were deliberately indifferent to Mr. Jones's needs.

### B. Mr. Jones's Allegation That He Was Pepper-Sprayed For Complaining About His Cell Stated An Eighth Amendment Excessive-Force Claim.

Mr. Jones also stated an Eighth Amendment excessive-force claim. A correctional officer violates the Eighth Amendment when he uses force beyond what might be "plausibly . . . thought necessary in a particular situation." *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010) (internal quotation marks and citation omitted). Applying this standard, this Court has, for instance, held that pepper spraying a prisoner for questioning an officer's orders violates the Eighth Amendment. *Sconiers v. Lockhart*, 946 F.3d 1256, 1268 (11th Cir. 2020); *see also Williams v. Rickman*, 759 F. App'x 849, 852 (11th Cir. 2019) (stating that "[c]orrectional officers in a prison setting can use pepper spray on an inmate, but there must be a valid penological reason for such a use of force," and holding that factual dispute over validity of reason for use of pepper spray defeated summary

judgment); *Stallworth v. Tyson*, 578 F. App'x 948, 953 (11th Cir. 2014) (similar).

Here, Mr. Jones alleged that "chemical agents" were used against him not only to a greater degree than might be "plausibly . . . thought necessary," *Wilkins*, 559 U.S. at 38, but in fact for no reason whatsoever. According to Mr. Jones's complaint, accepted as true at this stage, Defendants deployed "chemical agents"—i.e., pepper spray—against him when he posed no threat and was only attempting to alert officers to the conditions of his cell. D.E. 1 at 6, 7. Indeed, Mr. Jones alleged that the pepper spray was used for an entirely illegitimate purpose—to quiet his requests that the unsanitary conditions of his cell be addressed. Under black-letter law, that use of pepper spray violated the Eighth Amendment. *Sconiers*, 946 F.3d at 1268. Mr. Jones thus stated an excessive-force claim.

### C. Mr. Jones's Allegation That He Was Punished For Complaining About His Cell Stated A First Amendment Retaliation Claim.

Finally, Mr. Jones pled a First Amendment retaliation claim.[9] "The First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech." *Farrow v. West*, 320 F.3d 1235, 1248 (11th Cir. 2003). A prisoner establishes a retaliation claim by showing that: (1) his speech was constitutionally protected; (2) the defendant's retaliatory conduct would deter a person of ordinary firmness from speaking; and (3) there is a causal connection between the retaliatory actions and the adverse effect on speech. *Bailey v. Wheeler*, 843 F.3d 473, 480-81 (11th Cir. 2016). Mr. Jones adequately alleged all three elements: he engaged in protected speech by complaining about the conditions of his confinement to Defendants; Defendants responded with

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[9] Because Mr. Jones was litigating *pro se*, it is immaterial whether he invoked this precise legal theory in his complaint. The question is merely whether, liberally construed, the facts he alleged support recovery. *See Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998); *see also Norfleet v. Walker*, 684 F.3d 688, 690 (7th Cir. 2012) ("[C]ourts are supposed to analyze a litigant's claims and not just the legal theories that he propounds—especially when he is litigating pro se." (citations omitted)); *McManus v. Fleetwood Enters., Inc.*, 320 F.3d 545, 551 (5th Cir. 2003) ("The plaintiff need not correctly specify the legal theory, so long as [he] alleges facts upon which relief can be granted.").

a bevy of retaliatory conduct, not least placing him under a "strip"/property restriction, that would chill a person of ordinary firmness; and Defendants took these actions as the direct result of Mr. Jones's complaints about his cells.

First, Mr. Jones engaged in protected speech. "It is an established principle of constitutional law that an inmate is considered to be exercising his First Amendment right of freedom of speech when he complains to the prison's administrators about the conditions of his confinement." *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008). Here, Mr. Jones alleged that he "attempted to address [his] concerns" about his conditions of confinement with the individual Defendants. D.E. 1 at 6. For instance, he alleges that he stated to Defendants Polk, Parrish, and Carter, "I can get sick drinking from this mildew-infested sink, I am a human and deserve to be treated like one, what are yall inspecting every week… Yall walk by like yall are scientist[s] studying lab rats that are being tested." *Id.* at 7. Thus, he exercised his First Amendment right of freedom of speech. *Smith*, 532 F.3d at 1272.

Second, Mr. Jones alleged that Defendants' retaliatory conduct affected his protected speech. To demonstrate this element, Mr. Jones

must only show that a "person of ordinary firmness"—not Mr. Jones himself—would be chilled from speaking by Defendants' conduct. *Bailey*, 843 F.3d at 481. Applying that rule, this Court has held that a person of ordinary firmness would be chilled by a prison official's mere refusal to provide him with clean meal trays in retaliation for his filing of grievances. *See Stallworth v. Wilkins*, 802 F. App'x 435, 440-41 (11th Cir. 2020). Here, Mr. Jones alleged that Defendants responded to his objections to the conditions of his cell by, *inter alia*, pepper-spraying him, extracting him from his cell, and holding him in another cell in only his boxers and without moveable property for three days. That conduct rises well above the refusal to provide clean meal trays in *Stallworth*; thus, Defendants engaged in conduct sufficient to chill a person of ordinary firmness.

Finally, Mr. Jones's complaint adequately pled causation. At this stage, Mr. Jones need only show that his protected speech was a "motivating factor" in causing Defendants' adverse actions. *See Moton v. Cowart,* 631 F.3d 1337, 1341-42 (11th Cir. 2011). Here, Mr. Jones pled more: he expressly alleged that Defendants' retaliatory actions—"administering chemical agents, cell extraction, strip/property restriction

(placing an inmate in just boxers, nothing moveable in the cell)"—were the "results" of his protected speech. D.E. 1 at 6. Likewise, Mr. Jones alleged that after he complained that he "could get sick" from drinking mildew-infested water and that Defendants did not take their inspection duties seriously enough, Defendants determined that it was "of more importance to discipline [Mr. Jones] than to adhere to his concerns." D.E. 1 at 7. Both of those allegations easily establish causation. *See, e.g.*, *Stallworth*, 802 F. App'x at 440 ("Because Stallworth alleges that he requested help for the dirty meal trays and, in response, two prison officials denied help while expressing displeasure with Stallworth's grievances, there is a sufficient causal link between the grievances and the denial of a clean meal tray."). Notably, Mr. Jones alleged no other reason, other than his protected speech, for Defendants to have taken these actions. *See Bumpus v. Watts*, 448 F. App'x 3, 6 (11th Cir. 2011) (holding retaliation claim "plausible on its face because there were no reasons provided for those [adverse] actions alleged in the complaint"). Therefore, Mr. Jones adequately pled causation, and thus stated a First Amendment retaliation claim.

## II. Section 1997e(e) Does Not Bar Mr. Jones's Claims.

The district court also erred in holding that 42 U.S.C. § 1997e(e), a provision of the Prison Litigation Reform Act, barred Mr. Jones from seeking compensatory damages. Section 1997e(e) provides that:

> No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

This provision does not foreclose Mr. Jones's request for compensatory damages: Mr. Jones satisfied the plain language of § 1997e(e) by making "a prior showing of physical injury." To wit, Mr. Jones pled that, as a consequence of the conditions of his cell, he sustained a skin infection causing "excruciating pain." Likewise, Mr. Jones pled that Defendants sprayed him with chemical agents, an inherently painful experience. Yet the district court held that the infection was *de minimis*, and thus did not qualify as a physical injury under the statute—and it did not even mention the chemical agents.

The district court's holding was erroneous. The district court erred in imposing a more-than-*de-minimis* injury requirement: such a requirement is atextual and at odds with basic principles of statutory

interpretation, and this Court's endorsement of it does not survive the Supreme Court's decision in *Wilkins v. Gaddy*, 559 U.S. 34 (2010). And even if such a requirement applies, Mr. Jones adequately pled an injury that was more than *de minimis*, particularly considering the liberal construction afforded to *pro se* pleadings, the early stage of these proceedings, and the fact that it is Defendants' burden to show an absence of physical injury. Moreover, even if Mr. Jones was barred from recovering damages for "mental or emotional injury" under § 1997e(e), he was entitled to seek various other forms of relief.

### A. Section 1997e(e) Requires Only A Physical Injury, Not A Serious Physical Injury.

Mr. Jones's allegations that he suffered an excruciatingly painful skin infection and that he was pepper-sprayed suffice to make out the "prior showing of physical injury" required by § 1997e(e). The only reason the district court thought otherwise was this Court's precedent requiring a prisoner to plead a "more than *de minimis*" physical injury as a predicate to recovering compensatory damages for mental or emotional injury. But that precedent has been clearly overruled by intervening Supreme Court caselaw. And for good reason: the "more-than-*de-minimis*" requirement can be found absolutely nowhere in the statutory

text—and even if the text did not resolve the inquiry, applicable statutory interpretation principles cut against the "more than *de minimis*" gloss on § 1997e(e). For those reasons, this Court should overrule its precedent requiring a "more than *de minimis*" physical injury under § 1997e(e) and adopt the only interpretation of the statute that the text can bear.

### 1. Basic Principles Of Statutory Interpretation Foreclose Imposing An Atextual *De Minimis* Physical Injury Requirement.

The text, structure, and history of § 1997e(e) make clear that the provision requires only a showing of physical harm or damage to one's body, not an injury that is "more than *de minimis*."

The ordinary meaning of "physical injury" in 1996, when the PLRA was passed, included bodily injury of *any* severity. Black's Law Dictionary defined "physical injury" as: "[b]odily harm or hurt, excluding mental distress, fright, or emotional disturbance"—no particular level of severity necessary. BLACK'S LAW DICTIONARY 1147 (6th ed. 1990). "Injury," moreover, reads "[a]ny wrong or damage done to another, either

in his person, rights, reputation, or property." *Id.* at 785.[10] Non-legal dictionaries are similarly inclusive. In one, for instance, "injury" is defined in relevant part as "an act that damages or hurts." *Injury*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 602 (10th ed. 1993).[11]

The structure of the PLRA confirms that § 1997e(e) imposes no "more-than-*de-minimis*" requirement. Courts should not infer a requirement outside a statute's text "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. Imm. & Customs Enf't*, 543 U.S. 335, 341 (2005). And where Congress wanted to require an injury of a particular degree of severity in the PLRA, it knew how to do so: in a separate portion of the PLRA, Congress required a showing of a "*serious* physical injury" to exempt a litigant from the PLRA's "three strikes" rule. Public L. 104–

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[10] *See also Bodily Injuries*, BALLENTINE'S LAW DICTIONARY (William S. Anderson ed., 3d ed.) (encompasses "various degrees of harm").

[11] *See also Injury*, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("Hurt or loss caused to or sustained by a person or thing."); *Injury*, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d unabridged ed. 1987) ("[H]arm or damage that is done or sustained.").

134, April 26, 1996, 110 Stat. 1321 §804(d) (codified as 28 U.S.C. § 1915(g)) (emphasis added).

This argument is bolstered by Congress's 2013 amendment to § 1997e(e), which added "or the commission of a sexual act (as defined in section 2246 of Title 18)" to the end of the provision. Defining "sexual act" by reference to 18 U.S.C. § 2246 made the definition relatively narrow, excluding most non-penetrative contact. *Id.* If Congress had wanted to similarly narrow the "physical injury" language, it could have done so. Indeed, the very provision that Congress was looking at when it incorporated the "sexual act" definition—§ 2246—has a subsection defining the term "*serious* bodily injury." 18 U.S.C. § 2246(4) (emphasis added). Congress could easily have incorporated this definition into § 1997e(e) when it added the reference to the definition of "sexual act," but it chose not to. That evinces "a deliberate congressional choice"—one that should be respected. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994).

This understanding of the PLRA is also consistent with the way the phrase "physical injury" is used in other settings. Under common-law tort principles, an "injury" is "the invasion of any legally protected interest."

Restatement (Second) of Torts § 7(1). In that context, the term "injury" is specifically distinguished from the term "harm": An injury can occur with *no* showing of any harm, let alone more-than-*de-minimis* harm. *Id.* § 7 cmt. a. Similarly, the Model Penal Code defines "bodily injury"—synonymous, per Black's Law Dictionary, with "physical injury," *see* BLACK'S LAW DICTIONARY 175, 1147—as "physical pain, illness or any impairment of physical condition," and does not require any particular severity. Model Penal Code § 210.0. And the term "bodily injury" is defined in various federal statutes to include such minor injuries as "a cut, abrasion, bruise" or "any other injury to the body, no matter how temporary." *See, e.g.*, 18 U.S.C. §§ 831(g)(5); 1365(h)(4); 1515(a)(5); 1864(d)(2). In other settings, too, drafters routinely distinguish between "physical injury"—read capaciously to include any bodily harm, however minor—and "serious" or "significant" physical injuries.[12]

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[12] *See, e.g.*, Model Penal Code § 210.0 (distinguishing between "bodily injury" and "serious bodily injury"); Tenn. Code Ann. § 39-11-106 (separately defining "bodily injury" and "serious bodily injury"); *cf. United States v. Singleton*, 917 F.2d 411, 413-14 (9th Cir. 1990) ("[I]t is clear that a 'significant' physical injury . . . must mean something more than 'physical injury' standing alone. Surely, not just any damage or hurt of a physical kind can satisfy the [Sentencing] Guidelines, for that would encompass every physical injury.").

### 2. This Court's Prior Indication That § 1997e(e) Imposes A More-Than-*De-Minimis* Requirement Is Incompatible With Intervening Supreme Court Precedent.

Notwithstanding the mountain of evidence making clear that "physical injury" in § 1997e(e) just means physical injury, this Court held several decades ago that it means "more than *de minimis*" injury. *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999), *vacated in part on other grounds*, 216 F.3d 970 (11th Cir. 2000) (en banc). That holding has been undermined by intervening Supreme Court precedent. This Court's reasoning in adopting the more-than-*de-minimis* standard for § 1997e(e) makes clear why. Confronting the question soon after § 1997e(e) was adopted, this Court determined that it should "fus[e] the physical injury analysis under section 1997e(e) with the framework set out by the Supreme Court in *Hudson* [*v. McMillan*, 503 U.S. 1 (1992)] for analyzing claims brought under the Eighth Amendment for cruel and unusual punishment." *Harris*, 190 F.3d at 1286. This Court therefore held "that in order to satisfy section 1997e(e) the physical injury must be more than de minimis, but need not be significant." *Id.*

But there is a glaring problem with *Harris*'s logic: *Harris* assumed that "Eighth Amendment standards" require an injury that is more than

*de minimis* to be actionable.[13] Twenty years later, in *Wilkins v. Gaddy*, the Supreme Court made clear that understanding was dead wrong. 559 U.S. at 35, 39. *Wilkins* held that an injury viewed as *de minimis* by the lower court could still support a claim of excessive force under the Eighth Amendment. 559 U.S. at 39. Indeed, the Court described the more-than-*de-minimis* requirement as "not defensible" and a "strained reading of *Hudson*." *Id.* at 39.

It is therefore clear that *Wilkins* overruled the proposition on which *Harris* relied: that a prisoner must suffer a more-than-*de-minimis* injury

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[13] Whether *Harris* was good law even at the time it was decided is questionable. For one, *Harris* did not explain why Congress would incorporate the Eighth Amendment test for "cruel and unusual punishment" into § 1997e(e) by using the phrase "physical injury." It made no attempt to tie that requirement to the text of the statute and instead jumped straight to "the statute's essential purpose." 190 F.3d at 1286; *cf. United States v. Garcon*, 997 F.3d 1301, 1304 (11th Cir. 2021) (explaining that this Court "begin[s] with the text"). Moreover, *Harris* cited *Hudson* for the proposition that the Eighth Amendment did not recognize *de minimis* injuries, but the court in *Hudson* noted only that "*de minimis* uses of physical *force*" are not cognizable. 503 U.S. at 10 (emphasis added). In fact, *Hudson* made clear that "[t]he absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it." *Id.* at 7. And Justice Blackmun's concurrence lauded the Court for "put[ting] to rest a seriously misguided view that pain inflicted by an excessive use of force is actionable under the Eighth Amendment only when coupled with 'significant injury.'" *Id.* at 13 (Blackmun, J., concurring).

to state an Eighth Amendment excessive-force claim. To wit, simply consider the full holding of *Wilkins*: "In this case, the District Court dismissed a prisoner's excessive force claim based entirely on its determination that his injuries were '*de minimis*.' Because the District Court's approach . . . is at odds with *Hudson*'s direction to decide excessive force claims based on the nature of the force rather than the extent of the injury, the petition for certiorari is granted, and the judgment is reversed." 559 U.S. at 34. That language could not be clearer. And if any doubt lingers, consider too that it would have been odd for the Court to go to the trouble of deciding *Wilkins*—which dealt with prisoner excessive-force claims involving *de minimis* injuries—if it understood §1997e(e) to effectively bar prisoner claims involving *de minimis* injuries regardless.

In light of *Wilkins*, this Court can and should overrule *Harris*.[14] In this Circuit, "prior precedent is no longer binding once it has been

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[14] Notably, the Fifth Circuit—upon whose caselaw this Court relied in adopting the "more than *de minimis*" physical injury requirement, *see Harris*, 190 F.3d at 1286 (citing *Gomez v. Chandler*, 163 F.3d 921 (5th Cir. 1999))—recently indicated that the "more than *de minimis*" rule is irreconcilable with *Wilkins*. *Buchanan v. Harris*, No. 20-20408, 2021 WL 4514694, at *2 (5th Cir. Oct. 1, 2021).

substantially undermined or overruled by either a change in statutory law or Supreme Court jurisprudence or if it is in conflict with existing Supreme Court precedent." *United States v. Gallo*, 195 F.3d 1278, 1284 (11th Cir. 1999). This Court has previously applied that standard to cases, like this one, where the intervening Supreme Court opinion was not squarely on point but undermined a key premise on which the overruled case relied.

For example, in *United States v. Madden*, 733 F.3d 1314 (11th Cir. 2013), this Court considered whether *United States v. Olano*, 507 U.S. 725 (1993), had overruled *United States v. Carroll*, 582 F.2d 942 (5th Cir. 1978). *Olano* was a broad case that clarified the plain-error standard of review and suggested that a court of appeals was always vested with discretion in whether to correct such an error. *See Madden*, 733 F. 3d at 1320 (citing *Olano*, 507 U.S. at 731). *Olano* did not purport to address, or even mention, the specific issue decided in *Carroll*—whether a district court's amendment of an indictment always requires reversal. *See Madden*, 733 F.3d at 1319 (citing *Caroll*, 582 F.2d at 933-34). Nonetheless, this Court had no trouble concluding that "*Carroll* ha[d] been undermined to the point of abrogation by *Olano*" because *Olano*

implied that no plain errors—including those involving a district court's amendment of an indictment—required reversal. *Id.* at 1320. Thus, this Court concluded that it was "no longer bound by *Carroll*." *Id.*; *see also United States v. Chafin*, 808 F.3d 1263, 1274 (11th Cir. 2015) (similar).

This case likewise involves a holding (*Harris*) that has become indisputably untenable in light of subsequent Supreme Court precedent (*Wilkins*), even though that issue does not speak directly to the issue at hand. To be sure, *Wilkins* did not interpret the meaning of "physical injury" for § 1997e(e) purposes, just as *Olano* did not speak to the standard for reviewing district courts' amendments of indictments. But, just as *Carroll*'s rule could not be justified after *Olano*, *Harris*'s rationale is entirely untenable after *Wilkins*. Recall that *Harris* adopted a more-than-*de-minimis* physical injury requirement under § 1997e(e) to "fus[e] the physical injury analysis under section 1997e(e) with the framework set out by the Supreme Court in *Hudson* for analyzing claims brought under the Eighth Amendment for cruel and unusual punishment." 190 F.3d at 1286. *Wilkins*, then, made clear that "the framework set out by the Supreme Court in *Hudson* for analyzing claims brought under the Eighth Amendment," *Harris*, 190 F.3d at 1286, included no such more-

than-*de-minimis* rule, 559 U.S. at 34. Thus, just as it followed from *Olano*'s clarified plain-error standard that *Carroll*'s mandatory-reversal rule for amended indictments was no longer tenable, it follows from *Wilkins*'s clarified Eighth Amendment standard that *Harris*'s endorsement of a more-than-*de-minimis* requirement by reference to the Eighth Amendment standard is no longer tenable. This Court should therefore take this opportunity to clarify that the PLRA contains no such requirement.[15]

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[15] To the extent this Court concludes that *Harris* cannot be overruled by a panel, this issue is appropriate for *en banc* consideration. This Court's interpretation of § 1997e(e) is not just legally incorrect but also a barrier to relief in serious cases: for instance, one where officers "shoved [the] plaintiff face first onto a cement floor" and then "rammed their knees into [the] plaintiff's lower back," causing "a black eye, a bloody lip, scrapes, an abrasion to his face, and 'chronic backpains,'" *Parker v. Dubose*, No. 3:12cv204/MCR/CJK, 2013 WL 4735173, at *1 (N.D. Fla. Sept. 3, 2013); and another where officers hit the plaintiff "six or seven times in the abdomen, three or four times in the back of his head, and once on his left ear," causing "bruising and minimal edema of the lower left ear lobe and a red line approximately one centimeter long behind the left ear on the scalp near the hairline," *Borroto v. McDonald*, No. 5:04cv165-RH/WCS, 2006 WL 2789152, at *3, *5-6 (N.D. Fla. Sept. 26, 2006). In both of those cases—and indeed, several times each year in this Circuit—the district court concluded that the alleged physical injuries were *de minimis* and barred compensatory relief.

### B. Even If A More-Than-*De-Minimis* Requirement Exists, A Skin Infection Causing "Excruciating Pain" And Spraying By "Chemical Agents" Are More Than *De Minimis* Injuries.

Even if a more-than-*de-minimis* physical injury requirement applies, the district court still erred in finding that §1997e(e) foreclosed compensatory damages for mental or emotional injury. Mr. Jones's complaint alleged two more-than-*de-minimis* physical injuries: a skin infection that caused him "excruciating pain" and being sprayed with "chemical agents." In concluding that Mr. Jones's skin infection was not more than *de minimis*, and failing to even discuss his pepper-spraying, the district court did not take all facts as true or draw inferences in Mr. Jones's favor. Nor did it recognize that §1997e(e) is an affirmative defense whose applicability must be obvious from the face of the complaint. *Douglas*, 535 F.3d at 1320-21. Under the appropriate standard, the district court could only have held §1997e(e) applicable if Mr. Jones's allegations, construed in the light most favorable to him, facially established that §1997e(e) applied. *See id.* They did not.

Consider Mr. Jones's "excruciating[ly] pain[ful]" skin infection first. Properly framed, that infection was more than *de minimis*. An injury is more than *de minimis* if it involves "an observable or diagnosable medical

condition requiring treatment by a medical care professional." *Thompson v. Sec'y, Fla. Dep't of Corr.*, 551 F. App'x 555, 557 n.3 (11th Cir. 2014). Applying that rule, this Court recently held in *Stallworth* that a plaintiff alleged more than *de minimis* injuries stemming from moldy, fetid cell conditions. 802 F. App'x at 441. There, the plaintiff claimed that these conditions had caused him to develop an upset stomach, fever, and constipation; this Court held that those injuries were more than *de minimis* because he had to "go to sick call." *Id.*

Like the plaintiff in *Stallworth*, Mr. Jones sustained an observable medical condition from disgusting cell conditions: here, a skin infection that caused "excruciating pain in the infected areas of his skin." D.E. 1 at 7-8. And, like the plaintiff in *Stallworth*, Mr. Jones had to put in a sick call request due to the severity of his injury. *Id.* at 7. Thus, Mr. Jones, like the plaintiff in *Stallworth*, alleged a more-than-*de-minimis* injury.

The district court disagreed, but in support of its conclusion, offered only the following explanation: "Medical staff treated the alleged infection with calamine lotion and therapeutic shampoo, products that a free citizen could obtain over the counter. Jones does not allege he needed

antibiotics or any further treatment. As such, the alleged injury was de minimis." D.E. 40 at 11.

That analysis blatantly flouted both the motion-to-dismiss standard of review and this Court's caselaw regarding what suffices to state a more-than-*de-minimis* injury. Mr. Jones's complaint said the infection caused him "excruciating pain"—but the district court did not even acknowledge this allegation. Mr. Jones said that he was provided with "calamine lotion and therapeutic shampoo" without specifying whether these products successfully treated his infection—but the district court assumed, without justification, that they had. And Mr. Jones, it is true, did not allege whether "he needed antibiotics or any further treatment"—but that silence gives rise to an ambiguity that must be resolved in *Mr. Jones's* favor, not Defendants', because at this stage the district court should have assumed that Mr. Jones *did* need further treatment but did not receive it. Indeed, the complaint could easily be understood as mentioning "calamine lotion and therapeutic shampoo" to emphasize the lack of seriousness with which Defendants treated Mr. Jones's injury—not the lack of seriousness of the injury itself. And regardless, no case of this Court has even hinted that a need for

antibiotics, or any other particular level of treatment, is required to demonstrate a more-than-*de-minimis* injury. *See Stallworth*, 802 F. App'x at 441 (not specifying plaintiff's course of treatment).

Separately, consider Defendants' use of pepper spray against Mr. Jones. Mr. Jones alleged that he was "assaulted" by Defendants' use of "chemical agents" after he complained about the conditions of his cell. D.E. 1 at 6. This Court recently held that the burning and difficulty breathing induced by a routine pepper-spraying is more than *de minimis*. *Thompson v. Smith*, 805 F. App'x 893, 905 (11th Cir. 2020). So, under this Court's clear rule, the district court also erred in failing to recognize that Mr. Jones's pepper-spraying constituted a more-than-*de-minimis* physical injury.

In short, if the district court had taken Mr. Jones's allegations as true and drawn reasonable inferences in his favor, it would have had to conclude that both his "excruciating[ly] pain[ful]" skin infection and the use of "chemical agents" on him were more than *de minimis*. Therefore, even if this Court cannot or does not overrule *Harris*, Mr. Jones surmounted § 1997e(e)'s bar on the recovery of compensatory damages.

### C. Even If Mr. Jones Failed To Plead A Physical Injury Under § 1997e(e), He Is Entitled To Other Relief.

Out of an abundance of caution, it is worth noting that Mr. Jones is entitled to relief regardless of whether he can show a physical injury under § 1997e(e). That is because § 1997e(e) is, as this Court recently reaffirmed, only a limitation on compensatory damages "for mental or emotional injury . . . without a prior showing of physical injury." *Hoever v. Marks*, 993 F.3d 1353, 1358 (11th Cir. 2021) (en banc). Therefore, Mr. Jones can recover compensatory damages (even if only for *de minimis* injury), punitive damages, and nominal damages.

First, compensatory damages. Nothing in § 1997e(e) bars recovery of compensatory damages for physical injury; rather, the statute only limits compensatory damages for "mental or emotional injury." As detailed above, Mr. Jones unquestionably pled at least two injuries that were not "mental or emotional": he sustained a skin infection and was pepper-sprayed. Because those injuries were not "mental or emotional," they are themselves compensable, even if they are found *de minimis* and deemed to bar Mr. Jones's access to damages for "mental or emotional injury." Mr. Jones is thus eligible for compensatory damages for his physical injuries, whether *de minimis* or not.

Second, nominal damages. "[T]he rule in this circuit is that § 1997e(e) does not bar prisoners from seeking nominal damages because a nominal damages claim is not brought for mental or emotional injury." *Hoever*, 993 F.3d at 1361 (internal quotation marks and citation omitted). Mr. Jones expressly sought nominal damages. D.E. 1 at 11. Therefore, because Mr. Jones stated a claim, he is entitled to recover nominal damages irrespective of whether he pled a physical injury within the meaning of § 1997e(e).

Finally, punitive damages. In *Hoever*, this Court joined the vast majority of other Courts of Appeals in holding that a plaintiff whose compensatory damages are barred under § 1997e(e) can still recover punitive damages. 993 F.3d at 1355-56. Mr. Jones expressly sought punitive damages. D.E. 1 at 11. Therefore, he is entitled to recover punitive damages irrespective of whether he pled a physical injury within the meaning of § 1997e(e).

## III. The District Court Should At Least Have Given Mr. Jones Leave To Amend.

Even if this Court determines that Mr. Jones did not state a claim on the merits or that his complaint failed to clear § 1997e(e)'s bar on

compensatory damages for mental or emotional injury, Mr. Jones is still entitled to leave to amend his complaint.

The district court dismissed Mr. Jones's complaint with prejudice, but that dismissal violated this Court's black-letter law. A *pro se* plaintiff "must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice," so long as "a more carefully drafted complaint might state a claim" and the plaintiff does not "clearly indicate[]" a desire to forgo amendment. *Woldeab v. DeKalb Cnty. Bd. of Ed.*, 885 F.3d 1289, 1291 (11th Cir. 2018) (citation omitted). And in determining whether a more carefully drafted complaint might state a complaint, the district court must give proper deference to the plaintiff's *pro se* status. *See id.* at 1292. These rules apply in PLRA cases no differently than in other cases. *Riddick v. United States*, 832 F. App'x 607, 614 (11th Cir. 2020).

Here, at the very least, Mr. Jones could have more carefully drafted an amended complaint to state a claim. "Where more specific allegations would have remedied the pleading problems found by the district court, the court was required to give a pro se plaintiff the opportunity to amend his complaint." *Woldeab*, 885 F.3d at 1292 (internal quotation marks,

alterations, and citation omitted); *see, e.g.*, *Maglio v. Bhadja*, 257 F. App'x 234, 236 (11th Cir. 2007) (holding that district court abused discretion in denying *pro se* prisoner leave to amend). And Mr. Jones never "clearly indicate[d]" he did not wish to amend. Indeed, the district court never found that amendment would be futile or otherwise explained its decision to dismiss with prejudice. *See Woldeab*, 884 F.3d at 1291 ("Neither the magistrate judge nor the district court held that repleading the factual allegations . . . would be futile."). Therefore, Mr. Jones was at least entitled to leave to amend his complaint.

## CONCLUSION

This Court should reverse and remand for further proceedings.

Dated: January 25, 2022

Respectfully submitted,

*/s/ David F. Oyer*

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**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)**

1. This Brief complies with type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because, according to the word count function of Microsoft Word 2019, the Brief contains 10,229 words excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

2. This Brief complies with the typeface and type style requirements of Rule 32(a)(5) and (6) of the Federal Rules of Appellate Procedure and Circuit Rule 32(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook font for the main text and 14-point Century Schoolbook font for footnotes.

Dated: January 25, 2022 */s/ David F. Oyer*

## CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2022, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

*/s/ David F. Oyer*