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, POLK, Warden, and PARRISH, 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 REPLY 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

Sharma, Ravi N.

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: July 1, 2022

/s/ David F. Oyer
DAVID F. OYER

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INTRODUCTION

Plaintiff-Appellant Dytrell Jones filed a complaint alleging that Defendants kept him in disgusting conditions: he had "limit[ed] opportunities to urinate or defecate" because his toilet rarely worked; his sink emitted a "foul sicken[ing] smell"; his drain had insects crawling out of it; rodents streamed under his cell door; and his faucet, his sole source of drinking water, was covered in green mold. Doc. 1 at 5, 7.

The district court dismissed Mr. Jones' Eighth Amendment claim arising from these conditions on two grounds. First, it said, Mr. Jones failed to state a claim because the conditions he alleged were not sufficiently serious and because he had been provided with cleaning supplies. Second, it said, Mr. Jones' access to compensatory damages was barred by a provision of the Prison Litigation Reform Act, section 1997e(e), that requires a showing of physical harm.

Mr. Jones' opening brief explained why these two rationales failed. Mr. Jones showed that his allegations sat comfortably within this Court's Eighth Amendment jurisprudence; that dismissing based on a stray reference in his complaint to "caustics" was an indefensible application of the motion-to-dismiss standard; and that section 1997e(e) did not

support dismissal because it does not even apply to his case and would not foreclose his claims even if it did. Appellant's Br. 12-25, 31-48.

Defendants' response brief barely touches on any of these issues. As to the Eighth Amendment claims, all Defendants have to say is that Mr. Jones was provided cleaning supplies—without explaining why this forecloses his claims or how Mr. Jones' many arguments about the cleaning supplies in his opening brief fail. Defendants' Br. 15-17. And as to section 1997e(e), Defendants argue—incorrectly—that the issue is not even properly before this Court, apparently conceding that it could not have supported dismissal if it were. Defendants' Br. 17-18.

The remaining issues in this case are also easily resolved. Mr. Jones raised an Eighth Amendment excessive-force claim and a First Amendment retaliation claim; Defendants object to these claims almost exclusively on procedural grounds, but their argument is wrong and overlooks this Court's well-established rules on construing *pro se* complaints. Finally, even if Mr. Jones' claims were to be properly dismissed—which they cannot be at this juncture—he would be entitled to amend his complaint under this Court's black-letter law.

ARGUMENT

I. Mr. Jones Stated An Eighth Amendment Conditions-of-Confinement Claim.

The parties here agree that "the deprivation of basic sanitary conditions can constitute an Eighth Amendment violation." Defendants' Br. 15. Defendants also do not contest that a conditions-of-confinement claim prevails if it satisfies a two-part test: the plaintiff was subjected to a sufficiently serious deprivation; and the defendants were deliberately indifferent to his plight. *See Thomas v. Bryant*, 614 F.3d 1288, 1306-07 (11th Cir. 2010). Likewise, Defendants do not explain how the complaint failed to described either a sufficiently serious deprivation and deliberate indifference. *See* Defendants' Br. 15-17 (not mentioning either prong of the test). Nor could they.

As to the deprivation, Mr. Jones alleged that he was held in highly unsanitary conditions for five months in one disgusting cell and five weeks in another. In his first cell, his toilet "continuously clog[ged], limiting [his] opportunities to urinate and/or defecate"; his sink had a "foul sicken[ing] smell"; his drain had insects crawling out of it "throughout the day"; and his spigot was covered in black, white, and green mold. Doc. 1 at 5. The second cell was so overridden by pests that

Mr. Jones "ha[d] to use his uniform and bed linen to block open areas of the cell door to prevent rodents and insects from entering," and Mr. Jones constantly "inhaled" mold and mildew that was "caked up in the window and cell vent." *Id.* at 6-7. Those allegations are more severe, and cover a longer duration, than those of other plaintiffs whose unsanitary-conditions claims have been approved by this Court and others. *See, e.g.*, *Goodson v. City of Atlanta*, 763 F.2d 1381, 1387-88 (11th Cir. 1985) (holding that three days with a backed-up toilet and no shower and fifteen hours without water violated the Eighth Amendment); *see also Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam) (holding that spending only six days in a "frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes" violated the Eighth Amendment); Appellant's Br. 17 (collecting cases). Defendants do not explain how this caselaw fails to support Mr. Jones' claim, nor do they cite any caselaw of their own to the contrary.

As to deliberate indifference, Mr. Jones alleged that he repeatedly "attempted to address [his] concerns" about his cell with the individual Defendants, and that Defendants punished him instead of helping him. Doc. 1 at 6. Those allegations unquestionably support a reasonable

inference that Defendants were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [drew] the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Again, Defendants do not challenge Mr. Jones' reasoning; their brief does not mention deliberate indifference.

Instead, Defendants devote four sentences to analyzing this entire claim, arguing—without citation—that Mr. Jones' conditions-of-confinement claim fails because he was provided with unspecified "caustics." Defendants' Br. 17-18; Doc. 1 at 5. Mr. Jones addressed this argument in depth in his opening brief, offering three contentions to which Defendants declined to respond at all.

First, Mr. Jones explained that, even if cleaning supplies were material to his claims, he only received them in his first disgusting cell. But Mr. Jones also predicated his conditions claim on an equally disgusting second cell, where he spent five weeks, for which he expressly alleged he had not received cleaning supplies. Doc. 1 at 7. Indeed, Mr. Jones only mentioned "caustics" with respect to his first cell. Doc. 1 at 7. Thus, no reading of the complaint would support dismissal of the

conditions claim as to the second cell on the cleaning-supplies basis.[1] Defendants do not address this point.

Second, Mr. Jones explained that no proper reading of his complaint would support a conclusion that he was provided with cleaning supplies adequate to clean his putrid cell. The parties agree that Mr. Jones was, at best, provided with "caustics." Doc. 1 at 5, 14. The motion-to-dismiss standard required the district court to interpret this allegation, like all others, in the light most favorable to Mr. Jones and draw all reasonable inferences in his favor. *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016). Viewed in the light most favorable to Mr. Jones, that allegation would be understood to suggest that whatever cleaning supplies were provided could not remediate the unconstitutional conditions of Mr. Jones' cell. Neither the district court nor Defendants attempt to explain how basic cleaning supplies could remediate insect and rodent infestations, smells emerging from the pipes, a clogged toilet,

[1] In fact, Mr. Jones' response to the motion to dismiss—which Defendants elsewhere urge should be accorded significance, *see* Defendants' Br. 20—confirmed that he had no cleaning supplies in his second cell: "It has been nearly 2 months if not more, that cell clean up has not been conducted. No caustics were brought to the Plaintiff['s] cell for cleaning. The caustics are used outside the cell[s] for inspection and after chow/meal feeding." Doc. 36 at 3.

and widespread molding. At the very least, it is a reasonable inference that whatever cleaning supplies Mr. Jones was provided could not in fact do so. Defendants do not respond to this point either.

Finally, Mr. Jones explained that the cleaning-supplies argument is unsupported by caselaw. Indeed, Defendants cite none.[2] Yet, as Mr. Jones has demonstrated, several circuits have held that the presence of cleaning supplies is generally irrelevant to a conditions-of-confinement claim. *See* Appellant's Br. 19-20.

In short, Defendants offer only one basis for dismissing Mr. Jones' conditions-of-confinement claim on the merits—the suggestion that he was provided with "caustics," which cannot reasonably be read as defeating his claim when construed in the light most favorable to him.[3]

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[2] Defendants seem to think that Mr. Jones had the burden to "allege[] or raise[] the issue . . . that the prison failed to provide cleaning him [sic] supplies." Defendants' Br. 16. No case supports this proposition, and this Court has of course repeatedly recognized conditions-of-confinement claims without citing to any allegation regarding the absence of cleaning supplies. *See, e.g.*, *Goodson*, 763 F.2d at 1387-88; *Jordan v. Doe*, 38 F.3d 1559, 1565 (11th Cir. 1994).

[3] The district court also suggested that Mr. Jones' claim might fail because "[r]odents and insects are something the general public deals with on a regular basis in their own homes" and Mr. Jones did not "allege[] an infestation." Doc. 40 at 15. Of course, the general public

Mr. Jones' conditions-of-confinement claim should therefore be reinstated.

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

The district court was also wrong to hold that section 1997e(e) barred Mr. Jones' recovery of compensatory damages. *See* Doc. 40 at 11 (holding that the motion to dismiss "is due to be granted to the extent Jones is not entitled to compensatory damages").

Defendants' sole position on the issue is that it "is not properly before this Court at this time," Defendants' Br. 18, even though the district court reached this holding in its dismissal decision, *see* Doc. 40 at 9, and Mr. Jones devoted a substantial portion of his opening brief to the matter, Appellant's Br. 32-46. To the extent Defendants mean that Mr. Jones has raised the issue improperly, they are demonstrably wrong: This Court regularly considers the application of section 1997e(e) at the motion-to-dismiss stage. *See, e.g.*, *Hoever v. Marks*, 993 F.3d 1353, 1356 (11th Cir. 2021) (en banc) (reviewing section 1997e(e) damages issue that

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would not tolerate rodent and insect problems to the extent described in the complaint, and has unimpeded access to pest control solutions. Moreover, no caselaw supports a requirement that Mr. Jones allege an "infestation," and even if it did, the complaint clearly does so. Defendants do not defend the district court's reasoning on this point.

was resolved on motion to dismiss); *Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1315 (11th Cir. 2002) (same); *Harris v. Garner*, 216 F.3d 970, 972-73 (11th Cir. 2000) (en banc) (same); *Mann v. McNeil*, 360 F. App'x 31, 32 (11th Cir. 2010) (per curiam) (same); *Quinlan v. Personal Transp. Servs. Co.*, 329 F. App'x 246, 248 (11th Cir. 2009) (per curiam) (same).

Of course, to the extent Defendants' contention that consideration of section 1997e(e) is "premature" means that the district court erred in deciding that the face of the complaint somehow triggered section 1997e(e), Mr. Jones agrees. But that is a reason for reversal, not for ignoring the issue. Defendants leave Mr. Jones' arguments about the applicability of section 1997e(e) entirely unopposed—they do not offer one word in defense of the district court's conclusion. And Mr. Jones has explained why the district court's section 1997e(e) holding must be reversed: the construction of section 1997e(e) that the district court applied is indefensible and has been undermined by subsequent Supreme Court precedent; and even under that construction, Mr. Jones surmounted section 1997e(e)'s requirements.

First, Mr. Jones has explained that this Court's precedent interpreting section 1997e(e) is unsupportable. Appellant's Br. 32-37. Section 1997e(e) requires that compensatory damages "for mental or emotional injury suffered while in custody" be predicated merely on a "prior showing of physical injury," 42 U.S.C. § 1997e(e), but this Court has previously read it to require that the physical injury be "more than de minimis." *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 interpretation flies in the face of textualist principles by creating a substantial limitation on the statutory language from whole cloth. It is also undermined by the PLRA's structure, which demonstrates that Congress knew how to require a "*serious* physical injury" when it wanted to. *See* Public L. 104–134, April 26, 1996, 110 Stat. 1321 §804(d) (codified as 28 U.S.C. § 1915(g)) (emphasis added). And, as Mr. Jones has explained, a panel of this Court is empowered to overrule the atextual "more than de minimis" requirement because intervening Supreme Court precedent has undermined its rule to the point of abrogation. *See Harris*, 190 F.3d at 1286 (reaching "more than de minimis" requirement by "fusing the physical injury analysis under section 1997e(e) with the

framework set out by the Supreme Court in *Hudson* [*v. McMillian*, 503 U.S. 1 (1992)]"); *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (holding that a "strained reading of *Hudson*" to include a more-than-*de-minimis* standard was "not defensible"); Appellant's Br. 39.

Even if Mr. Jones was required to plead more-than-*de-minimis* physical injury, he did. Appellant's Br. 43-46. Mr. Jones alleged that he "submitted a sick call for a skin infection contracted from the filth of his cell," and that the infection caused him "excruciating pain in the infected areas of his skin." Doc. 1 at 7-8. That "excruciating[ly] pain[ful]" infection, particularly when construed in the light most favorable to Mr. Jones, constituted a more-than-*de-minimis* injury. *See Stallworth v. Wilkins*, 802 F. App'x 435, 441 (11th Cir. 2020) (per curiam) (holding that upset stomach, fever, and constipation caused by moldy cell conditions constituted more-than-*de-minimis* injury). Moreover, Mr. Jones alleged that he was "assault[ed]" by Defendants' use of "chemical agents" after he complained about the conditions of his cell. Doc. 1 at 7. This allegation, too, easily surmounted the more-than-*de-minimis* standard. *See Thompson v. Smith*, 805 F. App'x 893, 905 (11th Cir. 2020) (holding that

burning and difficulty breathing induced by pepper spray constituted more-than-*de-minimis* injury).

On top of all that, Mr. Jones is entitled to some monetary damages even if section 1997e(e) forecloses any damages for "mental or emotional injury." Appellant's Br. 47-48. For one, Mr. Jones is entitled to compensatory damages for his physical injuries, no matter how *de minimis* the district court believed them to be; nothing in section 1997e(e) says otherwise. Moreover, Mr. Jones is entitled to seek nominal and punitive damages, both of which he expressly requested in the complaint. Doc. 1 at 11.

In short, dismissal of Mr. Jones' claim for compensatory damages was improper: consideration of the issue at this stage is appropriate; section 1997e(e) does not authorize a "more-than-*de-minimis*" limitation on its physical-injury requirement and so this Court's precedent to the contrary can and should be overruled; Mr. Jones pled more-than-*de-minimis* injuries anyhow; and Defendants do not respond to these points. Therefore, Mr. Jones' request for compensatory damages should be reinstated.

III. Mr. Jones Stated Two More Claims.

In addition to his Eighth Amendment conditions-of-confinement claim, Mr. Jones stated two more claims: an Eighth Amendment excessive-force claim and a First Amendment retaliation claim. Defendants have little to say about the substance of these claims, and instead contend that they are procedurally barred. That is wrong—given Mr. Jones' *pro se* status and the clear factual predicate for both claims alleged in his complaint, Mr. Jones did more than enough to preserve his claims below. And Mr. Jones' allegations unquestionably state claims on the merits. Accordingly, those claims, too, should be reinstated.

A. Defendants' Procedural Objection To Mr. Jones' Additional Claims Fails.

Defendants' primary response to Mr. Jones' excessive-force and retaliation claims is that Mr. Jones is seeking to raise them "for the first time on appeal." Defendants' Br. 11. But that contention fails.

Mr. Jones' argument is not that this Court should apply an exception to the rule that claims must be raised in the district court in the first instance. Defendants' Br. 11-14. Rather, his argument is that he *did* raise those claims below by describing a fact pattern well within the mainstream of excessive-force and retaliation jurisprudence that the

district court was required to recognize. *See Torres v. Miami-Dade Cnty.*, 734 F. App'x 688, 691 (11th Cir. 2018) (per curiam) (collecting cases on district court's obligation to review *pro se* complaints for cognizable claims). Because the district court should have understood that Mr. Jones was raising both an excessive-force and a retaliation claim, those claims should be reinstated so long as they succeed on the merits—which Defendants hardly even contest.

Pro se pleadings like the complaint here are construed "liberally" and held "to less stringent standards than formal pleadings drafted by lawyers." *Campbell v. Air Jamaica Ltd.*, 760 F.3d 1165, 1168 (11th Cir. 2014). A "complaint may not be dismissed because the plaintiff's claims do not support the legal theory he relies upon since the court must determine if the allegations provide for relief on *any* possible theory." *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997); *see also Means v. Alabama*, 209 F.3d 1241, 1242 (11th Cir. 2000) (noting that courts must "look beyond the labels of motions filed by pro se inmates to interpret them under whatever statute would provide relief"). Other circuits are in accord. *See Ambrose v. Roeckeman*, 749 F.3d 615, 618 (7th Cir. 2014) ("The question [in a *pro se* case] is whether the

petition adequately presents the legal and factual basis for the claim, even if the precise legal theory is inartfully articulated or more difficult to discern."); *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 recent decision of this Court's is illustrative. *Torres*, 734 F. App'x at 691. There, the *pro se* plaintiff advanced a claim based solely on a federal statute that lacked a private right of action. *Id.* at 690. The district court therefore dismissed: The complaint cited only the unactionable statute, and the only sign the plaintiff sought to raise a constitutional claim was a single citation in his response to the motion to dismiss. *Id.* at 691. But this Court reversed, finding that a "liberal construction of [the] complaint reveals that [the plaintiff] attempts to raise a First Amendment retaliation claim." *Id.* That conclusion followed from this Court's prerogative to "look beyond the labels used in a *pro se* party's complaint and focus on the content and substance of the allegations." *Id.*

As in *Torres*, Mr. Jones' allegations led inexorably to cognizable claims. Here, the "content and substance" of Mr. Jones' allegations

plainly supported an Eighth Amendment claim: he alleged that Defendants pepper-sprayed him without any valid reason. *See infra* at 16-18. Likewise, the "content and substance" of his allegations plainly supported a First Amendment claim: he alleged that he engaged in protected speech, was subjected to retaliatory discipline, and that the latter was caused by the former. *See infra* at 18-20. And, just like in *Torres*, Mr. Jones cited an excessive-force case, *Hudson v. McMillian*, 503 U.S. 1, 10 (1992), in his response to the motion to dismiss. Doc. 36 at 5. Defendants do not give any reason to treat this case differently from *Torres*.

B. Mr. Jones Stated An Eighth Amendment Excessive-Force Claim.

To establish his Eighth Amendment excessive-force claim on the merits, Mr. Jones had to plead that Defendants deployed pepper spray against him without a legitimate penological purpose. *See Sconiers v. Lockhart*, 946 F.3d 1256, 1268 (11th Cir. 2020); *Williams v. Rickman*, 759 F. App'x 849, 852 (11th Cir. 2019) (per curiam); *Stallworth v. Tyson*, 578 F. App'x 948, 953 (11th Cir. 2014) (per curiam). Mr. Jones alleged twice in his complaint that Defendants deployed "chemical agents"—i.e., pepper spray—against him when he attempted to speak with them about

the conditions of his cell. Doc. 1 at 6-7. And Mr. Jones further alleged that the pepper spray was used for a non-penological purpose—i.e., as a response to his requests that the unsanitary conditions of his cell be addressed. *See id.* Under this Court's clear precedent, that use of pepper-spray violated the Eighth Amendment. *Sconiers*, 946 F.3d at 1268.

Defendants suggest, in a footnote, that this claim fails on the merits because "there was no evidence presented to indicate that the Defendants unlawfully deployed the chemical agent." Defendants' Br. 11 n.3. Of course, at the motion-to-dismiss stage, "evidence" could be neither "presented" nor considered. To the extent Defendants argue that the complaint failed to allege factual support for an excessive-force claim, they are simply wrong: physically assaulting a prisoner for protesting prison policy "as a reprisal for his comment[s]" lacks penological justification, *Stewart v. Lyles*, 66 F. App'x 18, 21 (7th Cir. 2003), and the complaint states that Defendants deployed "chemical agents" against Mr. Jones after he attempted to speak with them about the conditions of his cell, Doc. 1 at 6-7.

Defendants also argue that the complaint alleges that the use of chemical agents was precipitated by Mr. Jones' "psychotic episode"—

which Defendants apparently believe would constitute a valid penological purpose—but that argument fails too. The complaint states that the alleged "psychotic episode" consisted of "yelling 'I can get sick drinking from this mildew infested sink, I am a human and deserve[] to be treated like one.'" Doc. 1 at 7. Mr. Jones did not at any point allege that he was physically resistant or otherwise presented any other legitimate penological reason to meet his psychotic episode with force. *See Sconiers*, 946 F.3d at 1264 (reversing dismissal of excessive-force pepper-spray claim where district court improperly accepted defendant's version of events that plaintiff was disobedient). He therefore stated an excessive-force claim.

C. Mr. Jones Stated A First Amendment Retaliation Claim.

To state a First Amendment retaliation claim on the merits, Mr. Jones had to plead that he engaged in constitutionally protected speech, that Defendants' retaliatory conduct would have chilled a person of ordinary firmness from speaking, and that his protected speech and Defendants' retaliatory conduct were causally connected. *Bailey v. Wheeler*, 843 F.3d 473, 480-81 (11th Cir. 2016).

Mr. Jones pled all three elements of a retaliation claim. First, Mr. Jones engaged in protected speech when he "attempted to address [his] concerns" about his conditions of confinement with the individual Defendants. Doc. 1 at 6; *see Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008). Second, Defendants' retaliatory conduct—pepper-spraying him and holding him in another cell in only his boxers and without moveable property for five days, Doc. 1 at 6—would have chilled a person of ordinary firmness from speaking. *See Stallworth*, 802 F. App'x at 440-41. And third, Defendants' punishments were caused by Mr. Jones' objections: immediately after he raised his objections, he was punished by being forced to "stand under the cell light," causing him to psychologically decompose, and he was soon after sprayed with "chemical agents" and held without property or clothes for days. Doc. 1 at 6; *see Moton v. Cowart,* 631 F.3d 1337, 1341-42 (11th Cir. 2011). Defendants do not challenge any portion of this argument.

Defendants appear to oppose the First Amendment claim on the merits in passing by suggesting again that their retaliatory actions were a response to Mr. Jones' "psychotic episodes" rather than his objections regarding cell conditions. Defendants' Br. 12. But Mr. Jones' psychotic

episode, as described in the complaint, consisted entirely of protected speech. To wit, Mr. Jones pled that his psychotic episode consisted of "yelling 'I can get sick drinking from this mildew infested sink.'" Doc. 1 at 7. Any action by Defendants in response to the psychotic episode, then, was inherently a reaction to Mr. Jones' protected speech.[4] Mr. Jones therefore stated a First Amendment claim.

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

Finally, and in the alternative, Mr. Jones should at the very least have been given leave to amend his complaint. This Court squarely requires that every *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 the plaintiff does not "clearly indicate[]" a desire to forgo amendment and "a more carefully drafted complaint might state a

[4] Defendants also argue that Mr. Jones "attempt[ed] to show such use of force against a person of 'or[]dinary firmness' as opposed to an individual in the midst of a psychotic episode." Defendants' Br. 12. But a "person of ordinary firmness" is merely a hypothetical reasonable person, *see Echols v. Lawton*, 913 F.3d 1313, 1323 (11th Cir. 2019), and that hypothetical person is deterred by as little as being provided dirty meal trays, *Stallworth*, 802 F. App'x at 440-41. Obviously, being pepper-sprayed and deprived of clothing and property for five days surmounts that bar. That Mr. Jones suffered from mental illness is immaterial to the analysis.

claim."[5] *Woldeab v. DeKalb Cnty. Bd. of Ed.*, 885 F.3d 1289, 1291 (11th Cir. 2018) (citation omitted). In determining whether a more carefully drafted complaint might state a claim, the district court must give proper deference to the plaintiff's *pro se* status. *See id.* at 1292.

There is no serious question that the district court's dismissal with prejudice ran afoul of this rule. Mr. Jones was never given "one chance to amend the complaint"—his original complaint was dismissed with prejudice. Doc. 40 at 16. Nor did he ever indicate, "clearly" or otherwise, a desire to forego amendment. *See Woldeab*, 885 F.3d at 1291. And a "more carefully drafted complaint" undoubtedly "might state a claim." *See id.*

Indeed, the objections that Defendants and the district court have raised to Mr. Jones' claims are highly technical and easily remedied. For instance, to the extent that his excessive-force and retaliation claims fail because he did not use the words "excessive force" and "retaliation" in his complaint, he could amend his complaint to expressly articulate those theories.

[5] This rule is equally applicable in PLRA cases as it is in non-prisoner cases. *Riddick v. United States*, 832 F. App'x 607, 614 (11th Cir. 2020).

Defendants argue that amendment is not required here because "the facts [of *Woldeab*] are fundamentally different than those in [this case]." Defendants' Br. 19. But the distinctions Defendants offer make no difference. Defendants point out that the complaint in *Woldeab* was dismissed on procedural grounds, while Mr. Jones' claims were dismissed on the merits, but *Woldeab*'s rule has been applied to dismissals on the merits. *See Strange v. J-Pay Corp.*, 854 F. App'x 325, 327 (11th Cir. 2021) (applying *Woldeab* where district court dismissed for failure to state a meritorious claim).

Defendants also contend that Mr. Jones should be penalized because he "never inquired or motioned the Court that he even *wanted* to amend his initial complaint" between "when [he] filed his initial complaint" to "when final judgment was entered." Defendants' Br. 20. But *Woldeab* expressly stated that its rule applies "even when the plaintiff does not seek leave to amend the complaint until after final judgment," 885 F.3d at 1291, and indeed the plaintiff in *Woldeab* never sought leave to amend at all, *see Woldeab v. DeKalb Cnty. Sch. Dist.*, No. 1:16-cv-01030-CAP (N.D. Ga. 2016); *see also Turks v. Bank of Am.*, 742 F. App'x 470, 474 (11th Cir. 2018) (per curiam) (holding that district court

"should have *sua sponte* offered [*pro se* plaintiff] an opportunity to amend her complaint").

Finally, Defendants argue that Mr. Jones "blemishe[d]" his recourse to the "'unsophisticated litigant' assumption under which *pro se* parties are given latitude" by filing "seven distinct motions" in this case. Defendants' Br. 20. But the "seven distinct motions" were four motions requesting permission to proceeding without paying the filing fee, Docs. 2, 12, 14, and 17, two motions for extension of time, Docs. 9 and 34, and a motion to appoint counsel, Doc. 38. In short, then, Defendants argue that Mr. Jones is as sophisticated as a lawyer because he filed seven purely procedural motions, one of which was a motion to obtain a lawyer.[6] Even if this characterization were remotely accurate, it would be irrelevant—this Court recently applied the *Woldeab* rule to a litigant who

[6] Defendants cite three prior lawsuits by Mr. Jones and argue that through them he gained "extensive federal court experience." Defendants' Br. 21-22. Two of the cases settled before any substantive motions were filed. *Jones v. Fla. Dep't of Corr.*, No. 1:16-cv-24786-CMA, Doc. 30 (S.D. Fla. Mar. 28, 2017); *Jones v. Jefferson*, No. 9:17-cv-81046-RLR, Doc. 88 (S.D. Fla. Sept. 14, 2018). The third was dismissed *sua sponte*, before the defendants appeared, for failure to pay the filing fee. *Jones v. Maddock*, 5:19-cv-256-TKW-MJF, Doc. 13 (M.D. Fla. Feb. 3, 2020). Mr. Jones filed exactly zero substantive motions across all of those cases.

had filed four other appeals within a year. *Phillips v. DeKalb Cnty. Detention Officer*, No. 21-12308, 2022 WL 2134316, at *2-3 (11th Cir. June 14, 2022) (per curiam); *see Phillips v. Aponte*, No. 21-10869 (11th Cir. 2021); *Phillips v. Maddox*, No. 21-10897 (11th Cir. 2021); *Phillips v. Doe*, No. 21-12514 (11th Cir. 2021); *Phillips v. Sheriff*, No. 22-11137 (11th Cir. 2022).

There is no genuine dispute that Mr. Jones was entitled to the benefit of the *Woldeab* rule. Thus, even if his claims were properly subject to dismissal, he is entitled to an opportunity to amend.

CONCLUSION

This Court should reverse and remand for further proceedings.

Dated: June 30, 2022

Respectfully submitted,

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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 11th Circuit Rule 32-4 because, according to the word count function of Microsoft Word 2019, the Brief contains 4,867 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 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: June 30, 2022 */s/ David Oyer*

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 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 Oyer