CASE NO. 18-7227

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

WILLIE JAMES DEAN, JR.,

Plaintiff - Appellant,

v.

JOHNNIE JONES; CHARLES C. HOBGOOD,

Defendants - Appellees,

and

GEORGE T. SOLOMON; CARLTON JOYNER; S. WADDELL,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH

OPENING BRIEF OF APPELLANT WILLIE JAMES DEAN, JR.

James S. Ballenger
Molly M. Cain (Third Year Law Student)
Read W. Mills (Third Year Law Student)
Appellate Litigation Clinic
UNIVERSITY OF VIRGINIA SCHOOL OF LAW
580 Massie Road
Charlottesville, VA 22903
202-701-4925
sballenger@law.virginia.edu

Counsel for Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

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JURISDICTIONAL STATEMENT

This is a 42 U.S.C. § 1983 case filed by an inmate in the North Carolina correctional system, alleging the use of excessive force in violation of the Eighth Amendment. The District Court had jurisdiction under 28 U.S.C. § 1331. On September 27, 2018, the U.S. District Court for the Eastern District of North Carolina granted summary judgment to Defendants Johnnie Jones and Charles Hobgood, finally resolving all issues in the litigation. (JA 157). Mr. Dean filed a timely notice of appeal on October 4, 2018. (JA 168). This Court has jurisdiction to review Mr. Dean's appeal under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting summary judgment to Defendants on Plaintiff's claims related to the use of pepper spray, when a reasonable trier of fact could conclude that Plaintiff was subdued by an officer and posed no threat and that an officer used the pepper spray maliciously as retaliation for an earlier physical altercation.

2. Whether the District Court erred in granting summary judgment to Defendants on Plaintiff's claims relating to injuries he sustained in a separate incident in a janitorial closet, when a reasonable trier of fact could credit Plaintiff's

testimony that he was subdued by an officer and posed no threat, but nonetheless was severely beaten by multiple officers in retaliation for an earlier physical altercation.

STATEMENT OF THE CASE

This case is about two distinct uses of force against Plaintiff-Appellant Willie James Dean, Jr. ("Dean") while he was being escorted, in handcuffs, by multiple officers employed by the North Carolina Department of Public Safety ("NCDPS") within Central Prison in Raleigh, North Carolina. Mr. Dean acknowledges that he struck officers with his head. But it is settled law that "the Eighth Amendment does not permit a correctional officer to respond to a misbehaving inmate in kind." *Boone v. Stallings*, 583 F. App'x 174, 177 (4th Cir. 2014). Inmates have a "right to be free from malicious or penologically unjustified infliction of pain and suffering," meaning any pain inflicted for the subjective purpose of punishment or retaliation. *Thompson v. Virginia*, 878 F.3d 89, 102 (4th Cir. 2017) (internal quotations omitted); *see also Brooks v. Johnson*, 924 F.3d 104, 119 (4th Cir. 2019). The central issue in this case, therefore, is whether the force Defendants-Appellees ("Defendants") subsequently used against Dean, causing him severe injuries, was employed in a genuine effort to subdue him or was, instead, retaliatory.

A reasonable trier of fact, crediting Dean's testimony and reasonable inferences therefrom, certainly could conclude that the injuries inflicted on Dean were retaliatory, malicious, and unnecessary. The District Court nonetheless improperly granted summary judgment to Defendants. For the objective prong of an excessive force claim, the court employed an incorrect and outdated standard that the Supreme Court explicitly rejected in 2010. And in applying the subjective prong, the court improperly credited the officers' accounts and disregarded Dean's contrary testimony—which was corroborated on significant points by video evidence.

This case involves textbook conflicts of witness credibility, regarding both what happened and why. Dean was entitled to present his evidence, cross-examine the Defendants about the inconsistencies in their accounts, and have those conflicts resolved by a trier of fact. The District Court's grant of summary judgment should be reversed, and the case remanded for trial.

Statement of Facts

Because the District Court granted summary judgment against Dean, the following summary appropriately credits Dean's account of disputed events and the inferences a trier of fact could reasonably draw in his favor. The officers' conflicting testimony, and certain undisputed or objective evidence (such as the videotape) are discussed for appropriate context.

On December 12, 2015, Dean was escorted back to his cell, while handcuffed behind his back, by correctional officers Charles Hobgood and Dustin Gipson. (JA 16, 99, 110). Dean acknowledges that during the escort he headbutted Officer Hobgood, who then lost his balance and fell to the floor. (JA 99, 110). Officer Gipson then climbed on top of Dean and kneeled on his chest to subdue him. (JA 111). Officer Hobgood returned to his feet and proceeded to administer what Dean describes as a "long burst" of pepper spray, "lasting over 3 seconds," directly into Dean's eyes while Dean was lying on the ground, handcuffed behind his back, with Officer Gipson kneeling on his chest. (JA 111). This incident should have been captured by the cell block camera. (JA 55). But NCDPS staff reported that a search for video footage of this incident yielded "no meta data results" and no video footage was ever produced. (JA 55).

"[A]ll available officers" were then called to the cell block, and eight additional officers responded to assist, including Sergeants Johnnie Jones and Luis Rivera. (JA 31). After bringing Dean to his feet, Sergeants Jones and Rivera took control of Dean's right and left arms, respectively, while he was still handcuffed. (JA 31). At this point, four additional officers arrived on the cell block to assist in escorting Dean, bringing the escort to fourteen officers. (JA 31). Officer Hobgood left to visit the prison's urgent care center, which prescribed Ibuprofen. (JA 99).

Dean was then escorted out of the cell block by the remaining thirteen officers to be decontaminated from the pepper spray. At that point, Dean's escort came into view of the video cameras located in the cell block's lobby.[1] (JA 105; Ex. B, Camera 149 at 11:25:05). Unlike the footage from the cell block's internal cameras, that footage was produced and provides a partial view of the remainder of Dean's escort out of the cell block. (JA 105). There is, unfortunately, no sound.

Dean testified that after the pepper spray he offered no resistance until he was "maliciously slammed into two sets of obviously closed slider doors without reason." (JA 112). One of those incidents was captured on the video footage, which shows officers slamming Dean into the sliding door that opens into the lobby, where he remains for several seconds. (Ex. B, Camera 149 at 11:25:09 – 11:25:30). While against the sliding door, Dean "can be seen squinting, likely from the effects of the pepper spray." (JA 105). Dean testified that the officers were also "bending [his] right wrist to the point it [was] going numb, and hurting." (JA 113). Eventually, the door opened and Defendant Jones and Sergeant Rivera escorted Dean through the lobby, holding his handcuffed arms behind his back. (Ex. B, Camera 149 at 11:25:30 – 11:25:49; Camera 148 at 11:25:30 – 11:25:52). As Dean and thirteen officers

[1] A CD copy of the video footage has been mailed to the Court, as found in the exhibit addendum to the joint appendix, as Exhibit B. Citations to the video footage will follow the naming convention used by the District Court below (*e.g.*, "Camera 149 at 11:25:38").

proceeded down the hallway into another lobby, Dean "start[ed] to fear for his well being," causing him to "panic[ ]" and jerk his head to the right, striking Defendant Jones. (JA 113; Ex. B, Camera 144 at 11:25:55 – 11:25:57). Defendant Jones and Sergeant Rivera then "attempted to place inmate Dean against the wall," (JA 42), and video footage appears to show Dean making contact with the wall and his body rebounding off the surface for a brief moment. (Ex. B, Camera 144 at 11:25:57 – 11:26:00).

Defendant Jones and Sergeant Rivera then shoved Dean through a doorway into a janitor's closet, off-camera, with several other officers pushing from behind. (Ex. B, Camera 144 at 11:26:00 – 11:26:05). Dean testified that he "was not resisting, and could not due to his being held by up to four officers." (JA 114). The camera footage confirms that at one point at least six officers were in the closet with Dean, while four more officers stood outside. (Ex. B, Camera 144 at 11:26:00 – 11:26:11). Dean and the officers remained in the closet for over a minute before Dean was thrown back into the hallway by his shirt collar. (Ex. B, Camera 144 at 11:26:00 – 11:27:11).

According to Dean's verified statement of material facts, Defendant Jones shouted "get him in there" to the other officers before shoving Dean into the janitor's closet. (JA 114). Dean asserts that he "did not strike the right side of his face and head on the protruding shelf and floor, but was maliciously beaten by respondent

Jones and other officers until broken, bleeding, and unconscious while still handcuffed." (JA 115). Dean testified that he tried to curl up and protect himself, while Defendant Jones kept yelling "you done fucked up!" as officers punched, kicked, and hit Dean with batons inside the closet. (JA 115–16).

Following the incident, each involved officer provided a witness statement to the investigating officer, Lieutenant William Elderdice. Of the ten reports which describe what happened with the janitor's closet, six different accounts emerge regarding how Dean ended up in the closet. Several officers recalled Dean falling into the closet with other officers, ranging from one to four officers. (JA 40, 42, 43, 45, 49). Other officers described Dean losing his balance or tripping before falling into the closet by himself. (JA 41, 51–54). One report does not mention anyone falling. (JA 50) ("Inmate Dean continued to resist Sgt. Rivera and Sgt. Jones placed inmate Dean face down on the floor in the janitor's closet.").

It is undisputed that "the janitor's supply closet consists of shelves stocked with supplies and cardboard boxes stacked on the floor, with one particular shelf on the *left* side which sticks out from the other shelving unit." (JA 106) (emphasis added). According to Defendant Jones's affidavit, Dean "struck the *right* side of his head on a protruding shelf and his face on the concrete floor" while falling into the closet. (JA 25) (emphasis added). Defendant Jones asserts that Dean "continued to struggle and resist our efforts to regain physical control." (JA 25). According to the

incident report created by supervising officer Lieutenant Elderdice, "inmate Dean continued to try to kick and turn over" while officers attempted to gain control of Dean by using the bent-wrist technique, while another officer tried to gain control of Dean's legs. (JA 31). However, none of the witness statements collected immediately after the incident mentioned Dean kicking while in the closet. (JA 38–54). "All staff present stated that at no time did they kick, punch or hit inmate Dean with a baton." (JA 33, 107).

Very little of what happened in the closet can be seen from the hallway camera other than the remaining officers standing in the hallway while looking in. But a trier of fact could conclude that the video shows at least one officer making a kicking motion inside the doorway of the closet, contrary to their denials. (Ex. B, Camera 144 at 11:26:17 – 11:26:22). Shortly thereafter, boxes were thrown into the hallway and Dean's shoe flew out from the closet. (Ex. B, Camera 144 at 11:26:22 – 11:26:43).

Eventually, Dean was thrown back into the hallway, in full view of cameras, where officers had to pull him to his feet since Dean was still handcuffed. (Ex. B, Camera 144 at 11:27:09 – 11:27:17). With his face covered in blood, Dean stumbled down the hallway with ten officers following behind. (Ex. B, Camera 144 at 11:27:17 – 11:27:32). Officers then led Dean into the nurse's station, where he remained for several minutes and was given a medical screening. (JA 32; Ex. B,

Camera 144 at 11:27:32 – 11:35:02). While in the nurse's station, a "1-2 inch laceration in the center of [Dean's] forehead" was cleaned before he was led out of the nurse's station by nine officers. (JA 32, 33; Ex. B, Camera 144 at 11:35:02 – 11:35:15). Dean was eventually taken to the Wake Medical Center for additional care, where doctors noted the swelling around his left eye and a "[l]ikely acute fracture at the base of the left nasal bone." (JA 129). Upon return to the prison, medical staff also noted that Dean's left eye was swollen shut with multiple abrasions and bruising to his face, and a closed fracture of the nasal bone. (JA 132, 134).

Four days after the incident, medical officials noted that Dean suffered from "erythremia sclera"[2] in both eyes, with complaints of seeing "spots in his left eye." (JA 138). Almost a week later, "blurred vision and white spots to the left eye," in addition to Dean's complaint that "he can't see anything out of his left eye," led to his transfer to Duke Hospital for evaluation. (JA 130, 144). A doctor at Duke concluded that Dean suffered from a subconjunctival hemorrhage—internal bleeding in his eyes. (JA 130, 146). A few months later, medical screening at the

[2] Erythema Sclera is the reddening of the eyes, caused by blood vessels becoming "congested with blood" in the "white of the eye." *See* BLACK'S MEDICAL DICTIONARY 255, 261 (36th ed. 1990) (defining "Erythema" and "Sclera"); see also Subconjunctival Heamorrhage BLACK'S MEDICAL DICTIONARY 265 (36th ed. 1990) (describing the same and specifically mentioned in Dean's medical record from Duke Medicine (JA 130)).

University of North Carolina at Chapel Hill revealed that a nasal cyst had formed in the same area as Dean's nasal fracture. (JA 150). An operation was later performed on Dean's nose to remove the cyst. (JA 152). As summarized by the District Court, Dean's injuries ultimately included a "fractured nasal cavity, deep laceration on his forehead, and his left eye was swollen shut with protruding bloody discharge," and an "X-ray revealed that a cyst developed along plaintiff's nasal fracture, which required surgical removal." (JA 160–61).

Statement of Procedural History

On December 17, 2015, Dean filed an excessive force grievance with the NCDPS. (JA 156). On February 12, 2016, the Inmate Grievance Resolution Board dismissed Dean's grievance "for lack of supporting evidence." (JA 156).

Dean commenced the present suit in the United States District Court for the Eastern District of North Carolina on May 6, 2016, and subsequently amended his complaint on May 23, 2016, requesting a jury trial. (JA 8, 157). At all times throughout litigation in the District Court, Dean appeared *pro se* after the District Court denied Plaintiff's motion to appoint counsel. (JA 158).

The District Court completed frivolity review on November 15, 2016, dismissing Dean's claims against then-named defendants Solomon (North Carolina's Director of Prisons), Joyner (Central Prison's Warden when the event occurred), and Waddell (Central Prison's Warden at the time of filing), but allowed

the complaint to proceed against Sergeant Jones and Officer Hobgood. (JA 157). Defendants Jones and Hobgood filed their answer on March 20, 2017. (JA 3).

After discovery concluded, Defendants moved for summary judgment and the District Court granted their motion. The court held that Defendants Hobgood and Jones were entitled to qualified immunity because Dean failed to establish that either the use of pepper spray or the use of force in the closet amounted to excessive force in violation of the Eighth Amendment. (JA 164, 167).

Regarding the pepper spray, the District Court held that "[t]he use of force was clearly necessary, as it was deployed almost immediately after plaintiff assaulted defendant Hobgood and at a time when defendant Hobgood reasonably feared for his own and officer Gipson's safety." (JA 163). Asserting that "[p]laintiff downplays the safety risk he posed in these circumstances," the court held that "the fact plaintiff was not resisting at the moment defendant Hobgood deployed the pepper spray does not make the use of force excessive, particularly where the officers reasonably believed he still posed a threat to them." (JA 163). The court cited no record evidence for its assertion that the officers reasonably feared for their safety at the time. The court also held that "plaintiff has not provided admissible evidence establishing that he was injured by the pepper spray." (JA 164). Finding that all of Dean's injuries "appear related to the second use of force incident," the court held that Dean failed to satisfy the objective component of an excessive force

claim, which it thought requires the plaintiff to show that "his injuries rise above the level of de minimus [sic] harm." (JA 164) (citing *Hudson v. McMillian*, 503 U.S. 1, 9–10 (1992); *Iko v. Shreve*, 535 F.3d 225, 238 (4th Cir. 2008)).

Regarding the use of force in the closet, the District Court held that Defendant Jones was entitled to qualified immunity because Dean failed to show that Jones's actions constituted an "unnecessary and wanton infliction of pain." (JA 162, 164–167). The District Court held that "there was a clear need for the application of force, the officers reasonably feared for their safety, and prior, less intrusive uses of force had not been successful." (JA 165). Once again, the court did not cite to any record evidence in reaching these conclusions. The District Court went on to hold that "even if plaintiff stopped resisting after he head butted defendant Jones, the officers were justified in using additional force immediately after the incident to ensure the significant threat plaintiff posed to officer safety was contained." (JA 165). According to the District Court, "plaintiff alleges in conclusory fashion that he was not resisting at the time defendant Jones applied force, he also admits that his legs were not restrained, and that he was trying to curl his legs up to 'protect' himself after he fell into the janitor's closet." (JA 166). Without citing to any of the officer reports, the court held that "the officers reasonably could have interpreted plaintiff's actions as attempts to kick them after he was on the floor, which further justifies the use of force in these circumstances." (JA 166). The District Court held that Jones

was entitled to qualified immunity because Dean failed to satisfy the subjective component of an excessive force claim requiring an "unnecessary and wanton infliction of pain." (JA 162, 164–167) (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)).

On October 4, 2018, Dean filed a timely notice of appeal to this Court. (JA 168).

SUMMARY OF THE ARGUMENT

When the facts are viewed in the light most favorable to Dean and all inferences are drawn in his favor, there are genuine and material factual disputes in this case which should have precluded summary judgment.

Eighth Amendment excessive force claims require proof of an application of force that was objectively more than de minimis and subjectively applied "in bad faith—not to preserve order or induce compliance, but to punish through the 'wanton infliction of pain.'" *Brooks*, 924 F.3d at 119 (citations omitted). Malicious or retaliatory intent can be proved either directly or by inference from the factors the Supreme Court outlined in *Whitley*: (1) the need for the application of force; (2) the relationship between the need and the amount of force that was used; (3) the extent of any reasonably perceived threat that the application of force was intended to quell; and (4) any efforts made to temper the severity of a forceful response. Both incidents

here clearly meet the objective prong, and a reasonable trier of fact crediting Dean's testimony and reasonable inferences therefrom also could find that both uses of force were subjectively motivated by a desire to retaliate and punish rather than to restrain.

In evaluating the pepper spray incident, the District Court clearly erred in requiring proof of greater than de minimis injuries to establish the objective component of an Eighth Amendment excessive force claim. That used to be the law of this Circuit, but it was forcefully rejected by the Supreme Court nearly a decade ago. It has been settled for years that the objective prong requires only a more than de minimis *application of force*—a standard which is clearly satisfied here. And under the subjective component of the standard, a reasonable trier of fact could conclude that Officer Hobgood's use of pepper spray was retaliatory and for the purpose of causing harm. According to Dean, he was handcuffed behind his back, lying on his back, and subdued with Officer Gipson kneeling on his chest when he was pepper sprayed directly in the eyes for three seconds or more. A reasonable trier of fact could conclude that Dean posed no ongoing danger and that Officer Hobgood did not genuinely perceive an ongoing danger, but instead was motivated by a desire to punish Dean for attempting to harm him.

When evaluating the closet incident, the District Court failed to credit Dean's testimony about Defendant Jones's statements, such as "get him in there" (JA 114) and "you done fucked up!" (JA 115), which a reasonable trier of fact could find to

be direct evidence of malicious and retaliatory intent. This Court held in *Brooks* and *Orem v. Rephann*, 523 F.3d 442, 447 (4th Cir. 2008), that summary judgment was improper where *the plaintiff's statements* to officers would support an inference that the officers' actions were, in part, retaliating against the inmate for those statements. If Dean's testimony is credited, Defendant Jones's own statements here would provide stronger and more direct evidence of his intent. And with the facts properly construed in the light most favorable to Dean, the *Whitley* factors also support a triable claim. The District Court improperly drew inferences in favor of the moving parties by asserting that officers "reasonably feared for their safety" and "reasonably believed that pepper spray would not be effective," in order to conclude that Dean posed a "significant threat" to the officers' safety and that "there was a clear need for the application of force." (JA 164–65). A reasonable trier of fact could conclude otherwise.

ARGUMENT

This Court reviews a district court's grant of summary judgment *de novo*, "applying the same legal standards as the district court, and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Hupp v. Cook*, 931 F.3d 307, 317 (4th Cir. 2019) (quoting *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 208 (4th Cir. 2017)). Summary judgment is appropriate when the moving party demonstrates there is "no genuine dispute as to *any* material fact

and the movant is entitled to judgment as a matter of law." *Hupp*, 931 F.3d at 317 (quoting FED. R. CIV. P. 56(a)) (emphasis added).

Properly viewing the facts and reasonable inferences in Dean's favor, the District Court erred in granting summary judgment to Defendants. A reasonable trier of fact could conclude that both the pepper spray and the force used against him in the closet were actionable violations of the Eighth Amendment, for which Defendants have no qualified immunity.

I. IT IS CLEARLY ESTABLISHED LAW THAT PRISON OFFICIALS MAY USE PHYSICAL FORCE FOR SECURITY PURPOSES, BUT NOT AS PUNISHMENT OR RETALIATION, OR FOR THE PURPOSE OF INFLICTING HARM ON THE PRISONER.

The legal principles governing Dean's claims in this case are well-settled. Correctional officers violate an inmate's Eighth Amendment rights when they use excessive force. *See* U.S. CONST. amend. VIII. An Eighth Amendment claim involves an objective and subjective component. *Brooks*, 924 F.3d at 112. The "objective component asks whether the force applied was sufficiently serious to establish a cause of action. This is not a high bar, requiring only something more than '*de minimis*' force." *Id.* (citing *Hudson*, 503 U.S. at 10; *Wilkins v. Gaddy*, 559 U.S. 34, 39 (2010) (per curiam) (holding that "nontrivial" force is sufficient ground for Eighth Amendment excessive force claim)).

Because the objective component only requires something more than de minimis force, the "core inquiry" in Eighth Amendment excessive force cases is the subjective prong, which asks whether the officers "acted with a sufficiently culpable state of mind." *Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996). A sufficiently culpable state of mind is demonstrated by showing evidence of "wantonness in the infliction of pain." *Whitley*, 475 U.S. at 322. Whether such wantonness can be established "ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320–21; *see also Iko v. Shreve*, 535 F.3d 225, 239 (4th Cir. 2008). "Under the Eighth Amendment, prisoners have the right to be free from malicious or penologically unjustified infliction of pain and suffering." *Thompson*, 878 F.3d at 102 (citations omitted); *see also Brooks*, 924 F.3d at 119 (same). Corrections officers "cross the line into an impermissible motive . . . when they inflict pain not to induce compliance, but to punish an inmate for intransigence or to retaliate for insubordination." *Brooks*, 924 F.3d at 113 (citing *Williams*, 77 F.3d at 765 (holding summary judgment to prison officials improper where evidence "supports an inference that the guards were acting to punish, rather than to quell the disturbance")). And even when an initial use of force is justified and necessary to restrain the inmate, "the continued application of force may give rise to an inference that the force was used for malicious or punitive purposes." *Brooks*, 924 F.3d at 114.

The Supreme Court has stated that while prison officials "should be accorded wide-ranging deference" towards practices "that in their judgment are needed to preserve internal order and discipline and to maintain institutional security," *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), that deference "does not insulate from review actions taken in bad faith and for no legitimate purpose." *Whitley*, 475 U.S. at 322. The key question for the subjective component of the Eighth Amendment inquiry "is not whether a reasonable officer *could* have used force to maintain discipline, but whether these particular officers *did* use force for that reason." *Brooks*, 924 F.3d at 113 (citing *Orem*, 523 F.3d at 446–47 (discussing importance of motive to excessive force claims under *Whitley*), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015)); *see also Graham v. Connor*, 490 U.S. 386, 397–98 (1989) (contrasting standards and emphasizing focus on "subjective motivations of the individual officers" under the Eighth Amendment).

The subjective component can be proven either through direct evidence of malicious intent or through circumstantial evidence of the officers' subjective state of mind, as inferred from the *Whitley* factors. *Brooks*, 924 F.3d at 116 (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002); *Villegas v. Metro. Gov't of Nashville*, 709 F.3d 563, 569 (6th Cir. 2013) (explaining that "[d]irect evidence . . . is not necessary" to prevail on the subjective element of an Eighth Amendment claim)). The *Whitley* factors are:

> (1) 'the need for the application of force'; (2) 'the relationship between the need and the amount of force that was used'; (3) the extent of any reasonably perceived threat that the application of force was intended to quell; and (4) 'any efforts made to temper the severity of a forceful response.'

Iko, 535 F.3d at 239 (quoting *Whitley*, 475 U.S. at 321). In a recent case similar to the one presented here, this Court vacated a grant of summary judgment for prison officials, noting that "the proper inferences to be drawn from these [*Whitley*] factors, too, is a matter for the jury." *Brooks*, 924 F.3d at 116.

To overcome an officer's qualified immunity, a § 1983 claim requires more than proof that the Constitution was violated. The plaintiff also must prove that the right in question was clearly established at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009). But this Court has repeatedly recognized that it is clearly established, for qualified immunity purposes, that officers cannot use force in bad faith to punish inmates. *See Tedder v. Johnson*, 527 F. App'x 269, 274 (4th Cir. 2013) ("[officer] cannot claim qualified immunity because malicious and sadistic use of force for the very purpose of causing pain is always in violation of clearly established law."). "'[T]he case law is intent-specific,' clearly establishing that the bad faith and malicious use of force violates the Eighth Amendment rights of prison inmates." *Brooks*, 924 F.3d at 119 (quoting *Thompson*, 878 F.3d at 106). Accordingly, "a corrections officer who acts with that culpable state of mind reasonably should know that she is violating the law." *Id.*; *see also Thompson*, 878

F.3d at 106 ("For claims where intent is an element, an official's state of mind is a reference point by which she can reasonably assess conformity to the law because the case law is intent-specific.").

It also is clearly established that these principles extend to the use of chemical agents like pepper spray. "It has long been established that prison officials violate the Eighth Amendment by using 'mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain.'" *Greene v. Feaster*, 733 F. App'x 80, 82 (4th Cir. 2018) (quoting *Williams*, 77 F.3d at 763 (internal quotation marks omitted)); *see also Iko*, 535 F.3d at 239–40 (finding use of pepper spray during cell extraction of non-confrontational inmate constituted excessive force).

Additionally, corrections officers in North Carolina are specifically instructed not to use force as a punishment. The North Carolina Department of Corrections use of force policy confirms that "[i]n no event is physical force justifiable as punishment. . . . Staff shall be instructed to use only the amount of force that is reasonably necessary to accomplish the correctional objective." (JA 87).

II. THERE WAS A TRIABLE ISSUE ABOUT WHETHER OFFICER HOBGOOD'S USE OF PEPPER SPRAY VIOLATED THE EIGHTH AMENDMENT.

Regarding Officer Hobgood's use of pepper spray against Dean, there was a genuine triable issue on both the objective and subjective prongs of an Eighth Amendment excessive force claim. Summary judgment should not have been granted.

A. The District Court Improperly Held That Dean Failed to Satisfy the Objective "De Minimis" Force Component of an Eighth Amendment Claim by Relying on an Abrogated Standard.

In rejecting Dean's excessive force claim regarding Officer Hobgood's use of pepper spray, the District Court improperly stated that Dean had to suffer greater than de minimis *injuries* to establish the objective component of an Eighth Amendment excessive force claim. (JA 164) ("To establish the objective component of an Eighth Amendment excessive force claim, plaintiff must show that his injuries rise above the level of de minimus [sic] harm."). The District Court cited *Iko* for that requirement. (JA 164) (citing 523 F.3d 442). When *Iko* was decided, this Court followed the standard from *Norman v. Taylor*, which had held that, "absent the most extraordinary circumstances, a plaintiff cannot prevail on an Eighth Amendment excessive force claim if his injury is *de minimis*." 25 F.3d 1259, 1263 (4th Cir. 1994) (en banc).

However, the Supreme Court specifically rejected this Court's precedent on that issue in *Wilkins*. 559 U.S. 34. The Supreme Court explained that this Court's requirement of significant *injuries* in *Norman* had "strayed from the clear holding of this Court in *Hudson*." 559 U.S. at 36. The Supreme Court further explained that under *Hudson* the key issue is not "the extent of the injury" but "the nature of the force—specifically, whether it was nontrivial and 'was applied . . . maliciously and sadistically to cause harm.'" *Id.* at 39. The Supreme Court could not have been more clear in rejecting the *Norman* standard, which the Court called a "strained" and "not defensible" reading of Supreme Court precedent. *Id.*

This Court has already recognized, several times, that *Wilkins* abrogated this Court's prior precedent requiring proof of more than de minimis injuries in excessive force cases. In *Hill v. Crum*, this Court acknowledged that "there is no *de minimis* injury threshold for an excessive force claim." 727 F.3d 312, 316 (4th Cir. 2013). In *Thompson*, this Court explained that "[t]he extent of [plaintiff's] injury is not one of the relevant factors and does not, contrary to the government's suggestion, preclude a violation of the Eighth Amendment." 878 F.3d at 100. Accordingly, "when use of force is malicious or repugnant, a plaintiff need not suffer anything significant to establish an excessive force claim." *Id.* at 101. And most recently, this Court explained in *Brooks* that "[t]he objective component asks whether the force applied was sufficiently serious to establish a cause of action. This is not a high bar, requiring

only something more than '*de minimis*' force." 924 F.3d at 112. This Court also has vacated dismissals of excessive force claims that were based on the *Norman* standard requiring more than de minimis *injury*. *See Hill v. O'Brien*, 387 F. App'x 396 (4th Cir. 2010).

In light of that precedent, the District Court clearly erred in holding that Dean cannot establish the objective component of his Eighth Amendment excessive force claim because he "has not provided admissible evidence establishing that he was injured by the pepper spray" and "[t]he injuries plaintiff alleges he sustained all appear related to the second use of force incident." (JA 164).

Under the correct standard, a reasonable trier of fact certainly could conclude that a sustained blast of pepper spray directly to the eyes constitutes "more than '*de minimis*' force," *Brooks*, 924 F.3d at 112, because "it has long been established that prison officials violate the Eighth Amendment by using 'mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain.'" *Greene*, 733 F. App'x at 82 (quoting *Williams*, 77 F.3d 763 (internal quotation marks omitted)). In evaluating Dean's claim under the now-abrogated standard requiring a threshold inquiry into de minimis injuries, the District Court failed to recognize that "a prisoner who suffers a minor, but malicious, injury may be able to prevail on an excessive force claim." *Thompson*, 878 F.3d at 98; *see also Rios v. Veale*, 648 F. App'x 369 (4th Cir. 2016) (holding that inmate adequately

pled an excessive force claim where prison guard closed a small trap within a cell door used to receive meal trays on inmate's arm).

B. A Reasonable Jury Could Conclude That Officer Hobgood's Use of Pepper Spray Was Retaliatory and for the Purpose of Causing Harm, Thus Satisfying the Subjective Component of an Excessive Force Claim.

A reasonable trier of fact also could conclude, on this record and after appropriately weighing testimony from Dean and the officers, that the pepper spray was not "applied in a good faith effort to maintain or restore discipline" but instead "maliciously and sadistically for the very purpose of causing harm." *Whitley*, 475 U.S. at 320–21; *see also Williams*, 77 F.3d at 765 (holding that summary judgment to prison officials was improper where evidence "supports an inference that the guards were acting to punish, rather than to quell the disturbance"). The District Court's holding that the pepper spray "was clearly necessary" and "obviously a proportionate response, given the safety risk the plaintiff posed," (JA 163), "lead[s] to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Tolan v. Cotton*, 572 U.S. 650, 660 (2014).

A reasonable trier of fact could credit Dean's unequivocal testimony that he had been subdued and was not resisting at the time Officer Hobgood applied pepper

spray, and therefore could infer that Officer Hobgood intended to punish Dean rather than subdue him. Dean's verified statement of material facts stated that he was:

> laying on his back and arms, handcuffed, and C/O Gipson has [Dean] subdued with his knees in [Dean's] chest. Respondent Hobgood got to his feet, and although [Dean] was subdued and still handcuffed with C/O Gipson's weight on his chest and could offer minimal resistance, he administered one long burst [of pepper spray] to [Dean's] face, lasting over 3 seconds.

(JA 111).[3] Under these facts, it is not clear that the "need for the use of force in this degree—the subject of the first two [*Whitley*] factors—[is] so self-evident that no reasonable jury could infer a malicious motive." *Brooks*, 924 F.3d at 116. Similarly, a reasonable trier of fact could conclude that the use of pepper spray was excessive and disproportionate to any "reasonably perceived" threat to officer safety, under the third *Whitley* factor.

This Court has directly confronted the boundaries of permissible use of pepper spray on a handcuffed inmate, albeit in an unpublished opinion. This Court stated in *Boone v. Stallings* that "[o]ur precedent establishes that the use of pepper spray on a docile prisoner could qualify as excessive force." 583 F. App'x at 176 ((citing *Iko*, 535 F.3d at 239–40) (finding genuine issue of material fact when prison guard

[3] Dean declared under penalty of perjury that the information contained in his complaint and statement of material facts in opposition to the summary judgment motion, (JA 12, 123), was true and accurate, thus making their allegations "the equivalent of an opposing affidavit for summary judgment purposes." *World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507, 516 (4th Cir. 2015) (internal quotation marks omitted).

deployed several bursts of pepper spray on docile prisoner)). The *Boone* court vacated a grant of summary judgment for prison officials because of a factual dispute as to whether the plaintiff was handcuffed before or after the pepper spray. 583 F. App'x at 176. This Court explained that "if a jury were to believe Boone's allegation that he was on the ground, already restrained in handcuffs when Officer Murray deployed the pepper spray, the jury could conclude that Boone was subjected to unconstitutionally excessive force." *Id.* Similarly, this Court held in *Brooks* that a reasonable trier of fact could infer malicious intent from the fact that "at the time Johnston subjected Brooks to multiple taser shocks, Brooks was handcuffed and surrounded by officers, and presented 'no immediate physical safety risk.'" 924 F.3d at 116.

Taking the facts in the light most favorable to Dean, a reasonable trier of fact could certainly conclude that the pepper spray was unnecessary under the circumstances. The District Court's reasoning that Dean "downplays the safety risk he posed in these circumstances," (JA 163), gives insufficient credit to Dean's account of what the factual circumstances *were*—that he was lying on his back, with his hands restrained by handcuffs behind his back, not resisting, and with another officer kneeling on his chest. (JA 111). Because disputed questions of fact must be resolved in favor of Dean, the "ultimate inferences to be drawn from [the] *Whitley* factor[s]" are not so "plain that they may be resolved as a matter of law at this stage

of the litigation." *Brooks*, 924 F.3d at 117. As in *Brooks,* "[t]his is not a case . . . in which a manifest and immediate need for the protective use of force gives rise to a powerful logical inference that officers in fact used force for just that reason." *Id.* at 116 (citing *Whitley*, 475 U.S. at 322–26 (noting that prison guards' use of force was in response to an inmate riot where hostages were taken by inmates)). A reasonable jury could infer, instead, that the use of pepper spray was unnecessary and disproportionate to any genuine threat to officer safety under the first three *Whitley* factors and therefore that Officer Hobgood was subjectively motivated by a desire to retaliate against Dean for his earlier headbutting.

The District Court reasoned that "the fact that [Dean] was not resisting at the moment Defendant Hobgood deployed the pepper spray does not make the use of force excessive, particularly where the officers believed he still posed a threat to them." (JA 163). But, of course, whether Officer Hobgood genuinely believed that Dean still posed a threat, lying on the ground with his hands handcuffed behind his back and another officer on his chest, is precisely the disputed issue that should have been resolved by the trier of fact on the basis of conflicting testimony at a trial. The District Court cited *Graham*, which explained that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." 490 U.S. at 397. But on these facts a reasonable trier of fact could

conclude that Officer Hobgood's use of pepper spray was not, in fact, a good faith split second decision about the amount of force necessary to restrain Dean, but instead calculated punishment or retaliation for the headbutting he had just experienced, at a time when an earlier application of force by Officer Gipson had *already* restrained Dean. Regardless of whether an initial use of force can be justified, this Court has repeatedly held that summary judgment is inappropriate in cases where a jury could still find the *continued* application of force to be excessive. Even when an initial use of force is not excessive, "the continued application of force may give rise to an inference that the force was used for malicious or punitive purposes." *Brooks*, 924 F.3d at 114.[4]

The fourth *Whitley* factor also favors an inference that Hobgood's use of pepper spray was motivated by a desire to punish, not restrain. As even the District Court noted, "defendant Hobgood does not appear to have made efforts to temper the severity of the response." (JA 163). And Dean testified that Officer Hobgood sprayed him in the eyes for at least three seconds—indeed, that it seemed like Hobgood emptied the entire can into his eyes before stopping. (JA 111).

[4] *See, e.g.*, *Iko*, 535 F.3d at 239–40, 240 n.11 (4th Cir. 2011) (though initial use of pepper spray to carry out cell extraction appeared warranted, four additional bursts of pepper spray, including one when inmate was lying on floor, gave rise to reasonable inference that force was applied maliciously); *see also Meyers v. Baltimore County*, 713 F.3d 723, 732–34 (4th Cir. 2013) (finding that the officer's first three uses of the taser did not amount to excessive force because the individual posed a threat to the officer's safety, but that subsequent tasings were excessive).

The fact that this incident was not caught on camera further underscores the need for a trial. (JA 55). Taking the facts in the light most favorable to Dean, as the court must when "video cannot resolve inconsistencies on [a] point," genuine issues of material fact exist that make "the proper inferences to be drawn from these factors . . . a matter for the jury." *Brooks*, 924 F.3d at 108, 116. The key questions here are classic questions of witness credibility and subjective motivation that should be decided by a trier of fact after hearing Dean's testimony and that of the officers involved, and cross-examination. This Court has repeatedly recognized, across a wide range of contexts, that summary judgment is rarely appropriate when the ultimate issue is the defendant's state of mind. *See, e.g.*, *Denny v. Seaboard Lacquer, Inc.*, 487 F.2d 485, 491 (4th Cir. 1973) ("Where state of mind is at issue, summary disposition should be sparingly used.").[5] In particular, regarding an Eighth

[5] *See also, e.g., Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988) ("Determination of motive is ordinarily a function within the purview of the fact finder because so much depends on assessment of the credibility of the witnesses."); *Magill v. Gulf & Western Industries, Inc.*, 736 F.2d 976, 979 (4th Cir. 1984) ("Summary judgment is seldom appropriate in cases in which particular states of mind are decisive elements of claim or defense, because state of mind is so often proved by inferences from circumstantial evidence and by self-serving direct evidence.") (citing *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979)); *Miller v. Premier Corp.*, 608 F.2d 973, 982 (4th Cir. 1979) (finding for fraud claims that "reliance and its reasonableness, going as they do to subjective states of mind and applications of objective standards of reasonableness, are preeminently factual issues for the trier of fact. We conclude that on the evidence they were

Amendment deliberate indifference claim, this Court has said that "[w]here states of mind are decisive as elements of a claim or defense, summary judgment ordinarily will not lie." *Gordon v. Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992).

III. THE DISTRICT COURT IMPROPERLY ACCEPTED DEFENDANT'S VERSION OF DISPUTED EVENTS WHEN GRANTING SUMMARY JUDGMENT ON DEAN'S CLAIMS FOR INJURIES SUSTAINED WHEN OFFICERS SHOVED HIM INTO A CLOSET.

The District Court also improperly dismissed Dean's excessive force claim regarding the use of force incident in the janitor's closet, during which Dean sustained multiple serious injuries including a nasal bone fracture that later developed complications which required surgery.

For this claim, Dean's injuries clearly indicate that more than de minimis force was used, thus satisfying the objective prong. Accordingly, the "critical Eighth Amendment question in this case is one of motive: whether corrections officers" used force against Dean "in a good faith effort to maintain or restore discipline,' or 'maliciously' and 'for the very purpose of causing harm.'" *Brooks*, 924 F.3d at 108

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properly submitted to the jury."); *Nat'l Life Ins. Co. v. Phillips Pub., Inc.*, 793 F. Supp. 627, 632 (D. Md. 1992) ("[W]here possibly subjective evaluations are at issue, as here where a determination of whether Defendants acted with actual malice is at issue, the Fourth Circuit has cautioned against a Court taking those determinations away from a jury.").

(quoting *Whitley*, 475 U.S. at 320–21). This subjective state of mind can be determined from direct evidence of malicious or retaliatory intent or inferred using the *Whitley* factors. *Whitley*, 475 U.S. at 321. The District Court erred in accepting the Defendants' version of disputed events and in drawing inferences in their favor. Crediting Dean's testimony and reasonable inferences therefrom, Dean presented direct evidence of the officers' improper motive as well as triable issues of fact under the *Whitley* factors.

A. The District Court Failed to Credit Dean's Testimony About Defendant's Statements, Which a Reasonable Trier of Fact Could Find to Be Direct Evidence of Malicious and Retaliatory Intent.

The District Court failed to acknowledge Dean's testimony that the Defendant Jones made statements which, if properly credited as required at the summary judgment stage, *see Brooks*, 924 F.3d at 115, would be *direct* evidence of malicious intent and permit the trier of fact to find in Dean's favor without any need to rely on inferences from the *Whitley* factors.

According to Dean, he "was placed against the wall by multiple officers for multiple seconds. After the conflict passed, Respondent Jones told the officers restraining [Dean] to 'get him in there' and [Dean] was pushed into the janitor's closet." (JA 114). Dean also testified that Jones *repeatedly* said "you done fucked

up!" throughout the assault—if credited, effectively an admission of malicious and retaliatory intent. (JA 115).

A reasonable jury crediting that testimony could easily conclude that Defendant Jones's statements demonstrate bad faith. This Court recently explained in *Brooks* that "corrections officers cross the line into an impermissible motive when they inflict pain not to induce compliance, but to punish an inmate for intransigence or to retaliate for insubordination." *Brooks*, 924 F.3d at 113 (citing *Williams*, 77 F.3d at 765 (summary judgment to prison officials improper where evidence "supports an inference that the guards were acting to punish, rather than to quell the disturbance")). Officer Jones's alleged statements could lead a reasonable jury to conclude that the force used in the closet, which fractured Dean's nasal bone and required subsequent surgery, was inflicted to punish Dean for his earlier resistance.

This Court has even held that summary judgment was improper in cases where *the plaintiff's statements to officers* would support an inference that the officers' actions were, in part, retaliating against the inmate for those statements. *See Orem*, 523 F.3d at 447 (holding that that use of a taser against a detainee just after she "forcefully stated 'fuck you'" to an officer could support an inference under *Whitley* that force was used not to restore order, but "for the very purpose of harming and embarrassing" the detainee in response); *see also Sawyer v. Asbury*, 537 F. App'x 283, 286, 294 (4th Cir. 2013) (finding that use of force against detainee after

"'abrasive' and inappropriate language"—including profanity and threats of violence—was "provoked by the detainee's verbal tirade and/or his intransigence" rather than by good faith effort to compel cooperation with picture-taking).

In *Brooks*, the question of whether an inmate made threatening statements was so material that summary judgment was precluded, even though much of the use of force incident and the events leading up to it were captured on video, because "a reasonable jury could take those statements into account in deciding whether [the officer] administered multiple taser shocks to [the inmate] in a good faith effort to induce his cooperation, or maliciously and in retaliation for his insubordination and threats to sue." 924 F.3d at 116. Because the "soundless video cannot resolve inconsistencies" concerning how "aggressive" the plaintiff's alleged resistance was, this Court vacated summary judgment for the officers and held that a trier of fact should resolve the ultimate issue of the officers' subjective motive. *Brooks*, 924 F.3d at 108.

Because the video footage in this case cannot resolve the factual dispute about whether Defendant Jones yelled "get him in there" and "you done fucked up," the District Court was required to accept these assertions as true at the summary judgment stage and the factual dispute should have been resolved by a trier of fact. *See Brooks*, 924 F.3d at 108. Nor can Defendant Jones dismiss those statements as hearsay, since they are not being offered for the truth of the matter asserted but for

what they reveal about the speaker's intent. *See* FED. R. EVID. 801; *see also* FED. R. EVID. 803(3). A reasonable jury could easily find that such statements were indicative of bad faith on the officers' part and thus conclude that the use of force in the closet did not serve a legitimate penological objective, but rather a retaliatory one.

B. With the Facts Properly Construed in the Light Most Favorable to Dean, the *Whitley* Factors Support a Triable Claim.

In addition to the direct evidence of retaliatory intent, a reasonable trier of fact crediting Dean's testimony could *infer* retaliatory intent from the overall circumstances using factors outlined by the Supreme Court in *Whitley*. This Court has repeatedly recognized that "the proper inferences to be drawn from [the *Whitley*] factors" are "a matter for the jury" except in the most extreme cases. *Brooks*, 924 F.3d at 116. Moreover, because the video does not show Dean after he was pushed into the closet by the officers, the "video cannot resolve inconsistencies on this point" and the District Court was required to "take the view more favorable to [the party opposing summary judgment.]" *Brooks*, 924 F.3d at 108; *see also Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011) (en banc).

Instead of letting a trier of fact draw inferences, the District Court itself improperly drew several inferences *in favor of the moving party* to conclude that three of the *Whitley* factors weighed in favor of the Defendants.

i. The District Court's conclusion that the force used against Dean in the closet was justified because Dean posed a "significant threat . . . to officer safety" improperly assumed Defendant's version of contested events on multiple issues.

The District Court improperly drew inferences in favor of the moving parties by asserting that officers "reasonably feared for their safety" and "reasonably believed that pepper spray would not be effective" in order to conclude that Dean posed a "significant threat" to the officers' safety. (JA 164–65).

The District Court improperly dismissed Dean's statement that he was no longer resisting while in the closet. (JA 116). Dean testified in a verified statement that after being shoved into the closet he did not resist in any way, that he was completely restrained by at least four officers, and that officers proceeded to beat him to the point of unconsciousness by kicking him, hitting him, and maybe even striking him with batons for approximately a full minute. (JA 114, 116). The District Court does not appear to have credited any of those allegations, acknowledging only that "plaintiff alleges in conclusory fashion that he was not resisting at the time defendant Jones applied force," (JA 166), while reaching conclusions incompatible with Dean's testimony—or, at a minimum, conclusions that a reasonable trier of fact would not be required to reach.

For example, Dean stated that he tried to "curl up to protect himself as he was further assaulted." (JA 115). The District Court concluded that "in light of plaintiff's

prior conduct, the officers reasonably could have interpreted plaintiff's actions as attempts to kick them after he was on the floor, which further justifies the use of force in these circumstances." (JA 166). But a reasonable trier of fact could also reach the opposite conclusion—that officers interpreted Dean's attempt to curl up into a ball as a sign of submission and self-protection. Indeed, the District Court's conclusion strains to draw inferences that the witness statements collected immediately after the incident never suggested, which according to this Court is "impermissible at the summary judgment stage." *Bacon v. Wood*, 616 F. App'x 601, 602 (4th Cir. 2015) (holding that the district court's viewing of evidence in moving party's favor by presuming the existence of evidence favorable to that party is impermissible at summary judgment stage). None of the witness statements included in the incident report, nor the affidavit of Defendant Jones, asserted that Dean ever kicked or attempted to kick officers inside the closet.

The District Court also failed to engage with the inferences a reasonable trier of fact could draw from what the video shows in the hallway while Dean was in the closet. The video shows, for example, that Dean's shoe was thrown out of the closet, and a reasonable trier of fact could infer that officers were trying to drag him out after he curled up to protect himself. (Ex. B, Camera 144 at 11:26:40 – 11:26:45).

The video also shows that there were *thirteen* officers in the convoy following Dean. (Ex. B, Camera 148 at 11:25:44 – 11:25:54). A reasonable trier of fact could

conclude that Dean posed no genuine threat, and infer that no one genuinely perceived any reasonable threat, while Dean was half-blind, handcuffed behind his back, and outnumbered 13:1. *See Brooks*, 924 F.3d at 116 (noting that the inmate, while handcuffed and surrounded by up to six officers, "posed no physical safety risk"); *see also Jones v. Buchanan*, 325 F.3d 520, 529 (finding a genuine issue of fact about whether the detainee was handcuffed material because, "if [the detainee] was handcuffed behind his back," it was "hard to see how he would pose an immediate threat to anyone").

The video shows that four or five officers remained in the hallway while Dean was in the closet—all while the rest of the officers followed Dean into the closet. (Ex. B, Camera 144 at 11:25:58 – 11:26:40). It also shows the reactions of the officers who remained outside. A reasonable jury could conclude that they appear to be meandering in the hallway and infer that they were not immediately concerned that the officers in the closet were in any danger. The video shows Dean being thrown out of the closet in handcuffs, and two officers emerge from the closet behind Dean. (Ex. B, Camera 144 at 11:26:45 – 11:27:20).

At the summary judgment stage, a court cannot "credit[ ] the evidence of the party seeking summary judgment and fail[ ] properly to acknowledge key evidence offered by the party opposing that motion." *Tolan*, 572 U.S. at 660; *see also Boone v. Everett*, 671 F. App'x 864, 866 (4th Cir. 2016) (vacating summary judgment for

correctional officer in an excessive force case when the district court adopted the defendant's version of the facts without crediting the plaintiff's allegations). The District Court not only failed to credit Dean's testimony and draw inferences in his favor; it improperly drew countervailing inferences in favor of Defendants.

ii. Under the correctly construed facts, there are triable issues of fact about whether the officers' use of force was disproportionate under the *Whitley* factors.

After drawing inferences in the Defendants' favor to conclude that Dean posed a "significant threat" to the officers, the District Court found that the first, second, and fourth *Whitley* factors favored Defendant Jones because, in the court's opinion, "there was a clear need for the application of force." (JA 164–65). Of course, the question is not whether *some* force was needed to restrain Dean at that point, but whether the *extent* of the force actually applied was genuinely necessary or so excessive as to support an inference of malicious or retaliatory intent. A reasonable trier of fact accepting Dean's account of events could conclude that the *Whitley* factors support that inference.

Though the initial use of force of pushing Dean against the wall may have been warranted to subdue him, Dean testified that he was no longer resisting after being shoved into the closet. (JA 116). A reasonable trier of fact could conclude that pushing Dean into the closet, (Ex. B, Camera 144 at 11:26:01), and the alleged use

of force inside the closet, were unnecessary and disproportionate if Dean was no longer resisting. (Ex. B, Camera 144 at 11:25:58 – 11:26:40). After Dean ceased resisting and was curled up in a ball on the floor, "the picture changes" and "a reasonable jury could question" whether the continued use of force against Dean was "intended to punish" Dean for his earlier transgression. *Brooks*, 924 F.3d at 114; *see also Williams*, 77 F.3d at 765 (finding that the infliction of continued force after initial use of force supports an inference of impermissible punitive motive under *Whitley*).

The District Court's analysis of proportionality and the ongoing need for force rested entirely on the amount of time Dean and the officers were in the closet. The court stated that: "The officers also removed plaintiff from the janitor's closet approximately one minute after the incident began, which does not suggest defendants used a disproportionate amount of force under the circumstances." (JA 165). But there is no principle of law stating that excessive force claims present no triable issue unless a prisoner is beaten for more than a minute. Officers are required to reassess the situation and continuing need for force on a far shorter timeframe than that. *See, e.g.*, *Iko*, 535 F.3d at 239–40, 240 n.11. Put differently, a reasonable trier of fact could infer that at some point in a brutal minute-long beating of a handcuffed inmate, resulting in serious injuries, it is no longer reasonable to infer

that the officers perceived a genuine ongoing "clear need for the application of force." (JA 164–65).

The District Court relied on *Grayson v. Peed*, in which this Court held that officers did not violate the Eighth Amendment when a five-man cell extraction team pinned the plaintiff down and punched the plaintiff seven to nine times. 195 F.3d 692, 696 (4th Cir. 1999). But in *Grayson* the inmate was acting belligerently, was not restrained in his cell, and was jamming the door with his foot while officers attempted to extract him. *Grayson*, 195 F.3d at 694. The seven to nine blows were administered "[d]uring the course of the struggle" to extract him. *Id.* Properly viewing the facts and inferences in the light most favorable to the non-moving party here, Dean was not resisting, was handcuffed behind his back, and was being subdued by a greater number of officers than the inmate in *Grayson*. (Ex. B, Camera 144 at 11:25:55 – 11:27:11). Dean was surrounded by thirteen officers while handcuffed, *see* (Ex. B, Camera 148 at 11:25:44 – 11:25:54), which significantly reduces any physical safety risk. *See Brooks*, 924 F.3d at 116. As in *Brooks*, "[t]his is not a case . . . in which a manifest and immediate need for the protective use of force gives rise to a powerful logical inference that officers in fact used force for just that reason." *Id*. A trier of fact could reasonably conclude that the beating described by Dean supported an inference of retaliatory intent under the first three *Whitley* factors.

Finally, the District Court improperly concluded that the fourth *Whitley* factor favored the officers because the "officers reasonably believed that pepper spray would not be effective" and "[t]hus, there was a clear need for the application of force, [as] the officers reasonably feared for their safety, and prior, less intrusive uses of force had not been successful." (JA 164–65). The district court cited no testimony that any officer believed pepper spray would have been ineffective at that stage. Again, even if it were clear that *some* additional force was necessary and justified, a reasonable trier of fact crediting Dean's testimony about everything he experienced in that closet could conclude that officers made no appropriate efforts to calibrate their response to the scale of any danger—and could draw the inferences permitted by *Whitley*.

At a trial, the trier of fact also would have an opportunity to assess the credibility of witnesses subject to cross-examination. The District Court did not cite any of the witness statements or affidavits in drawing its inferences under *Whitley*, but those documents do not present a clear and consistent account of what happened in the closet. Ten individual witness statements were made by officers just hours after the incidents occurred, describing both uses of force. (JA 38–54). Regarding the janitor's closet, there are six different versions of who ended up in the closet and how. According to Officer Watkins, he fell in the closet along with Dean, Sgt. Jones, and Sgt. Rivera. (JA 45). Yet Sgt. Rivera and Officer Gipson do not remember

Watkins falling into the closet with them, as their reports only state that Dean, Jones, and Rivera fell. (JA 40, 42). Two other witness reports only state that one officer fell into the closet with Dean, as Jones's report states he fell, (JA 43), and Officer Leitner states that Sgt. Rivera fell with Dean, (JA 49). On the other hand, several reports describe only Dean losing his balance or tripping before falling into the closet *by himself*. (JA 41, 51–54). One report does not even mention anyone falling. (JA 50) ("Inmate Dean continued to resist Sgt. Rivera and Sgt. Jones placed inmate Dean face down on the floor in the janitors closet.").

A reasonable trier of fact could also find that that the video footage is inconsistent with the officers' witness reports. A second round of witness statements were collected from the officers just three days later. (JA 62–72). All of the statements deny that Dean was punched, kicked, or beaten with batons while in the closet. (JA 62–72). Yet the video evidence shows an officer making a kicking motion inside the doorframe to the closet. (Ex. B, Camera 144 at 11:26:14 – 11:26:24).

Furthermore, all of Defendant Jones's statements assert that the injuries to Dean's face occurred when Dean fell and hit the *right* side of his face on the shelf inside the closet. (JA 24, 43). Yet the bulk of Dean's injuries occurred to the left side of his face. *See, e.g.*, (JA 129). These inconsistencies could have severely weakened the credibility of his statements, making summary judgment inappropriate. *See Magill v. Gulf & W. Indus., Inc.*, 736 F.2d 976, 979 (4th Cir. 1984) ("Summary

judgment also is inappropriate if an issue depends upon the credibility of witnesses, because such credibility can best be determined after the trier of fact observes the witnesses' demeanor.") (citing *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4th Cir. 1979)).

Finally, Dean's earlier provocations are themselves evidence that a reasonable trier of fact would fairly evaluate when assessing Defendants' likely subjective motivations. As noted above, in several cases this Court has held that summary judgment should not have been granted because of evidence that the plaintiff inmate said provocative things to the defendant officers—permitting an inference that the force subsequently employed was retaliatory. A reasonable trier of fact would, of course, consider here whether Dean's physical provocations support a similar inference. Nothing is more natural and consistent with human nature than to meet force with force, but "the Eighth Amendment does not permit a correctional officer to respond to a misbehaving inmate in kind." *Boone*, 583 F. App'x at 177.

For the subjective component of the Eighth Amendment inquiry, "[t]he question is not whether a reasonable officer *could* have used force to maintain discipline, but whether these particular officers *did* use force for that reason." *Brooks*, 924 F.3d at 113. As in *Brooks*, "[t]his is not a case . . . in which a manifest and immediate need for the protective use of force gives rise to a powerful logical inference that officers in fact used force for just that reason." *Id.* at 116. The District

Court prematurely granted summary judgment by failing to credit Dean's testimony and improperly drawing inferences in favor of Defendants—the moving party. For these reasons, the District Court's grant of summary judgment should be reversed.

CONCLUSION

For the foregoing reasons, appellant respectfully asks this Court to reverse the District Court's grant of summary judgment and remand this case for trial. In the alternative, this court should vacate the District Court's grant of summary judgment and remand for reconsideration under the proper standards articulated herein.

Respectfully submitted,

JAMES SCOTT BALLENGER
MOLLY M. CAIN – Third Year Law Student
READ W. MILLS – Third Year Law Student
APPELLATE LITIGATION CLINIC
University of Virginia School of Law
580 Massie Rd.,
Charlottesville, VA 22903
(434) 924-7582
sballenger@law.virginia.edu

Counsel for Appellant

CERTIFICATION OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.
2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 10,884 words.
3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word or line printout.

s/ JAMES SCOTT BALLENGER
Counsel for Appellant

CERTIFICATE OF SERVICE

I certify that on October 28, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/ JAMES SCOTT BALLENGER
Counsel for Appellant