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SUMMARY OF ARGUMENT

Dean's opening brief explained that a reasonable trier of fact could conclude that two distinct applications of force against him—the initial pepper spray and the later use of force in the closet—were not "applied in a good faith effort to maintain or restore discipline" but instead "maliciously and sadistically for the very purpose of causing harm," and therefore violated the Eighth Amendment under well-settled law. *Whitley v. Albers*, 475 U.S. 312, 320–21 (1986) (citations omitted). Appellees' responsive brief presents no persuasive contrary argument.

Appellees' brief repeatedly asserts that Dean "heighten[ed] the inherent volatility in the prison environment with acts of violence" against correctional officers and that officers must be granted substantial deference in how they respond to such actions lest they (and the law) "'give encouragement to insubordination in an environment which is already volatile enough.'" (Appellee Br. at 23–24) (citing *Grayson v. Peed*, 195 F.3d 692, 697 (4th Cir. 1999)). The unmistakable implication is that some responsive use of force is necessary to deter future insubordination and to set an appropriate tone for the prison environment. If that were the law, then the issue in this case would be whether Dean was, so to speak, asking for it or had it coming. Under this Court's precedent, however, force can be used *only* to get a prisoner under control and restore order, *not* to retaliate for insubordination or send a message to other prisoners. *Brooks v. Johnson*, 924 F.3d 104, 113 (4th Cir. 2019).

To the extent officers believe it is necessary to use force to "punish an inmate for intransigence or to retaliate for insubordination," that belief is unlawful and entitled to no deference. *Brooks*, 924 F.3d at 113; *see also Williams v. Benjamin*, 77 F.3d 756, 765 (4th Cir. 1996) (summary judgment to prison officials improper where evidence "supports an inference that the guards were acting to punish, rather than to quell the disturbance"). This Court has repeatedly reversed grants of summary judgment for prison officials when there is evidence that they continued using force even after the prisoner stopped resisting. *See, e.g.*, *Mann v. Failey*, 578 F. App'x 267, 275 (4th Cir. 2014). Appellees' brief asks this Court to "create a harmful precedent" by weakening that settled law. *Williams*, 77 F.3d at 765.

Appellees' qualified immunity arguments fail for similar reasons. This Court has repeatedly rejected arguments that officers are still entitled to qualified immunity in excessive force cases simply because there is no prior precedent with closely analogous facts. *See Brooks*, 924 F.3d at 118–19; *Thompson v. Virginia*, 878 F.3d 89, 102–03 (4th Cir. 2017). It is clearly established that "that inmates have a 'right to be free from' the 'malicious' infliction of pain," and that "a corrections officer who acts with that culpable state of mind reasonably should know that she is violating the law," regardless of the factual circumstances. *Brooks*, 924 F.3d at 118–19 (quoting *Thompson*, 878 F.3d at 102, 106).

Appellees gamely argue that the District Court accepted Dean's account of the facts. But a closer examination of the record reveals that the District Court failed to adequately address critical evidence that would permit a reasonable trier of fact, on this record and after appropriately weighing live testimony, to infer that officers acted with the forbidden motive here. Like the District Court, Appellees do not genuinely accept as true Dean's testimony that he was incapacitated and unresisting at the time of the initial pepper spray, or while being kicked and beaten with batons on the floor of a broom closet. And, like the District Court, they simply refuse to acknowledge the inferences a reasonable trier of fact could draw from the officers' statements before shoving Dean into that closet. Dean is entitled to a trial under the *Whitley* factors, but Appellees also inappropriately treat those factors as talismanic requirements. Those factors provide guideposts for when retaliatory intent can be inferred from purely circumstantial evidence; they are not an excuse for ignoring direct evidence of retaliatory intent that is staring us in the face.

ARGUMENT

I. PRISON OFFICIALS ARE NOT PERMITTED TO USE FORCE IN ORDER TO DETER INSUBORDINATION OR TO SEND A MESSAGE TO OTHER PRISONERS

To the extent that Appellees seek "deference" to prison officials' judgments that prolonged applications of force are necessary to avoid giving "encouragement to insubordination" when prisoners assault an officer, this Court should decline that

invitation. (Appellee Br. at 23–24). This case boils down entirely to whether Dean has presented a triable case that officers used force beyond what they sincerely believed to be necessary to bring him under control in the moment. It is clearly settled law that officers cannot use force for deterrence or any other reason, and any contrary beliefs would be entitled to no deference.

A. Prison Officials Are Not Permitted to Use Force in Order to Deter Insubordination or to Send a Message to Other Prisoners

Appellees contend that Defendants are entitled to deference regarding their use of force against Dean, who asserts he was subdued and no longer resisting when he was pepper-sprayed and beaten in the janitor's closet, (JA 111, 116), because Dean "heighten[ed] the inherent volatility in the prison environment with acts of violence" against officers. (Appellee Br. at 23–24). While this Court appropriately recognizes that the difficult job they are asked to do calls for appropriate deference to officers' good-faith judgments, "the Supreme Court has specifically reminded us that the 'deference' that is afforded to prison administrators 'does not insulate from review actions taken in bad faith and for no legitimate purpose.'" *Williams*, 77 F.3d at 765 (citing *Whitley*, 475 U.S. at 322).

There is no exception to those principles for situations where an inmate is "unruly" or "heightens the inherent volatility in the prison environment." Appellees imply that cases like *Brooks v. Johnson* and *Iko v. Shreve*, 535 F.3d 225 (4th Cir. 2008), are inapposite here, *see* (Appellee Br. at 31, 33, 51), because Defendants were

"dealing with a violent and volatile inmate, in an inherently violent place," (Appellee Br. at 42). But this Court's precedents are very clear that 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 force was used for malicious or punitive purposes." *Brooks*, 924 F.3d at 114; *see also Iko*, 535 F.3d at 239–40, 240 n.11 (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 the floor, gave rise to reasonable inference that force was applied maliciously); *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*).

Appellees cite *Grayson v. Peed*, 195 F.3d at 697, for the proposition that deference is necessary to prison officials' judgment about what is necessary to avoid "'giv[ing] encouragement to insubordination in an environment which is already volatile enough.'" (Appellee Br. at 24). But *Grayson* discussed appropriate deference to officers' choice to use force to *subdue* an inmate who was not under control and continued to act "violently." 195 F.3d at 694. This Court noted that "the officers obviously felt the need to subdue Collins, either to calm the general environment or to prevent Collins from hurting himself," and in that context recognized that failing to accord appropriate deference to their judgment could encourage insubordination. *Id.* at 697. This Court has not deferred to any judgment

by officers to use force for reasons other than restraint, even when the inmate was violent, and has recognized that the officers' actual motives in any prolonged or repeated application of force present a factual issue for the trier of fact.

This Court's unpublished opinion in *Mann v. Failey* illustrates how this Court's precedent works. 578 F. App'x 267, 275 (4th Cir. 2014). In *Mann*, the inmate also experienced several uses of force. One came after the inmate roundhouse kicked a correctional officer in the neck, sending her falling down a flight of stairs. *Id.* at 270. This Court nonetheless reversed summary judgment for the officer—who climbed back up the stairs and began kicking the inmate—because the officer acted aggressively and continued to assault the inmate after he was fully restrained. *Id.* at 275. Approximately a month later, the inmate actively resisted extraction from his cell by propping his mattress against the door and "began pelting the officers with approximately 13–18 bottles of fecal matter from his position on the top bunk," hitting some of the officers in the face. *Mann*, 578 F. App'x at 270–271. The inmate was then "punched, kneed, kicked, and choked [] until he lost consciousness." *Id.* at 271. There, too, this Court held the officers were not entitled to summary judgment, "[n]otwithstanding Mann's egregiously offensive and abusive behavior in spattering the extraction team with feces as they entered his cell," because "a jury could find that the officers on the extraction team continued to apply force against Mann well after he had ceased his resistance." *Id.* at 274.

In *Mann* the district court had emphasized the need for "wide-ranging deference to the judgment of prison officials" and stated that "[a] court should not retrospectively attempt, in the calmness of a federal courthouse years after a volatile incident initiated by a disobedient and violent prisoner, to second guess the exact moment the prisoner was under control and no further use of force was necessary." *Id.* at 274–75. This Court held, instead, that "while some degree of forceful officer action was undoubtedly required to contain Mann in the instant situations, courts may not 'insulate from review [those] actions taken in bad faith and for no legitimate purpose.'" *Mann*, 578 F. App'x at 275 (quoting *Whitley*, 475 U.S. at 321). This Court held that Mann's testimony that the force continued after he stopped resisting supported "an inference that 'summary, informal, unofficial and unsanctioned corporal punishment' was employed in retaliation for Mann's attack," and reversed the lower court's holding of summary judgment for the officers. *Id.* at 275 (quoting *Ort v. White*, 813 F.2d 318, 324 (11th Cir. 1987)). Importantly, this Court stated that "[i]t may very well be the case that Mann is violent, volatile, and engaged in flagrantly provocative behavior . . . But where, as here, a prisoner has duly filed the necessary briefs, affidavits, and corroborative evidence to support his claims, such disputes of credibility are reserved for a fact finder . . . a jury." *Mann*, 578 F. App'x at 275.

As in *Mann*, Dean's prior violence does not authorize a court to ignore, under the banner of "deference," Dean's testimony (and corroborating objective evidence) that the officers' use of force continued well beyond any genuine need to restrain him and was not subjectively motivated by any such need. (JA 111, 116). When Dean was pepper sprayed, he was laying on his back, with his hands handcuffed behind his back, with a different officer kneeling on his chest. (JA 111). And Dean was beaten for a full minute in the closet, surrounded by thirteen officers, *see* (Ex. B, Camera 148 at 11:25:44 – 11:25:54; Camera 144 at 11:26:00 – 11:27:11), after he was subdued when he was placed against the wall. Just as in *Mann*, here "a jury could infer from these facts that the officers wantonly administered serious force to [Dean] in retaliation for his conduct rather than for the purpose of bringing him under control." *Mann*, 578 F. App'x at 274.

B. The Relevant Law Is Clearly Established and Qualified Immunity Does Not Provide a Defense

Appellees contend that even if Dean has raised a triable issue of fact concerning a violation of the Eighth Amendment, Appellees nonetheless should be entitled to qualified immunity "because the clearly established law did not prohibit [their] conduct." (Appellee Br. at 35, 53). That suggestion is unfounded. If Dean has a triable case that officers used force for purposes of punishment or retaliation, qualified immunity would not provide a defense.

It is clearly established law that "inmates have a 'right to be free from' the 'malicious' infliction of pain," *Brooks*, 924 F.3d at 119 (quoting *Thompson*, 878 F.3d at 102), and this Court has repeatedly recognized that officers have no qualified immunity if they used force in bad faith to punish or retaliate against 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.").

Defendants in these cases always argue that they are entitled to qualified immunity because there is no prior case with precisely similar facts. *See Brooks*, 924 F.3d at 118–19; *Thompson*, 878 F.3d at 102–03. Such arguments miss the point. "Because 'the case law is intent-specific' . . . a corrections officer who acts with that culpable state of mind reasonably should know that she is violating the law," even if the issue has never arisen in a similar factual setting. *Brooks*, 924 F.3d at 118–19 (quoting *Thompson*, 878 F.3d at 106); *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."). Put another way, Appellees' suggestion that "this is not 'an obvious case exhibiting a violation of a core [Eighth] Amendment right" (Appellee Br. at 36–37) either misunderstands the nature of the constitutional prohibition or assumes that Dean cannot prove his case on the merits. The constitutional violation here is not

that officers used objectively greater force than the law permits in this situation—it is, instead, that officers subjectively acted out of forbidden motives. If Dean can prove that, qualified immunity has no further role to play in the case.

Appellees' confusion is displayed most clearly by their repeated and explicit reliance on qualified immunity precedents from the Fourth Amendment context. This Court explained the error in that reasoning in *Brooks*. "As we have emphasized before, this [Eighth Amendment] subjective standard is unlike the 'objective reasonableness' test we apply under the Fourth Amendment: The 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; *see also, e.g., 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).

II. THE *WHITLEY* FRAMEWORK IS NOT THE ONLY WAY TO PROVE THE MOTIVE THE EIGHTH AMENDMENT FORBIDS

Dean's opening brief explained that the District Court erred by failing to consider the inferences that a reasonable trier of fact could draw from the statements made by Sergeant Jones to Dean during the closet incident. In particular, the District Court did not address Dean's testimony that Jones repeatedly shouted "[Y]ou done fucked up!" at Dean. (JA 115). A reasonable trier of fact could conclude that that statement was evidence (perhaps even a direct admission) that the use of force

against Dean was retaliatory in nature. The opposition brief argues that Jones's statement is nothing more than a simple statement of fact. *See* (Appellee Br. at 39). But when the statement is considered in its full context—Jones and other officers shoving Dean into a closet out of view of the hallway cameras and beating him for more than a minute—a reasonable trier of fact could certainly reach a different conclusion.

More broadly, Appellees' brief appears to argue that a trier of fact cannot infer retaliatory intent from statements like these, but instead is bound to consider the intent issue through the lens of the *Whitley* factors. (Appellee Br. 38–40). Of course a reviewing court must consider the record as a whole when evaluating whether a triable issue has been raised. But to the extent Appellees argue that statements directly evincing retaliatory intent cannot create a triable issue unless the *Whitley* factors point the same way, we do not believe that is correct. The *Whitley* factors identify considerations that will frequently be relevant and helpful to a fact-finder's efforts to divine an officer's state of mind from circumstantial evidence. But the ultimate core inquiry of an excessive force claim is always whether the officer "acted with a sufficiently culpable state of mind." *Williams*, 77 F.3d at 761. This Court has recognized that the *Whitley* framework is not exclusive to those four factors; "[w]e evaluate whether [defendant prison official] acted maliciously or 'wantonly' by applying a *non-exclusive*, four factor balancing test." *Thompson*, 878 F.3d at 99

(emphasis added); *see also, e.g.*, *Iko*, 535 F.3d at 239 (noting that the *Whitley* factors are "non-exclusive"); *Parker v. Stevenson*, 625 F. App'x 196, 198 (4th Cir. 2015) (unpublished) (same).

Brooks illustrates the point. Prior to assessing the *Whitley* factors, this Court discussed statements by prison officials complaining of the inmate's "disrespectful" attitude and concluded that "we think a reasonable jury could take those statements into account in deciding whether [force was used] in a good faith effort to induce [inmate's] cooperation, or maliciously and in retaliation for insubordination and threats to sue." *Brooks*, 924 F.3d at 116. When it moved on to the *Whitley* factors, the *Brooks* panel explained that direct and circumstantial evidence are *alternative* pathways to proving retaliatory intent. *See Brooks*, 924 F.3d at 116 ("Even without direct evidence of malicious intent, that is, we may 'infer the existence of th[e] subjective state of mind' . . . from the *Whitley* factors." (quoting *Hope v. Pelzer*, 536 U.S. 730, 738 (2002))).

Appellees acknowledge that "this Court has in at least one opinion concluded a jury can infer malicious intent from an officer's statements," but argue that "[d]espite the existence of such statements, however, the Court in *Mann* still analyzed all the evidence in the case using the *Whitley* framework." (Appellee Br. at 40) (citing *Mann*, 578 F. App'x at 275). To be sure, the *Mann* court first found that "[m]any of the *Whitley* factors support a holding in favor of [the inmate]." 578 F.

App'x at 275. But this Court went on to note that "[t]his is *especially* true in light of [the defendant prison official]'s statements to [inmate] before and during the incidents, from which malicious intent could be readily inferred," indicating that the evidence was relevant and potentially sufficient, independent from the *Whitley* analysis. *See id.* (emphasis added). The *Mann* court also noted that "the record [can] defeat summary judgment even if the evidence consist[s] exclusively of so-called 'self-serving' declarations from [the plaintiff]." *Mann*, 578 F. App'x at 272 n.2. That is because credibility determinations are improper at the summary judgment stage, and "[i]t is well settled that [courts] may not, at summary judgment, discount viable, material evidence on the ground that it was offered by a plaintiff with a troubled past." *Id.* This principle is "acutely necessary in cases with pro se prisoner plaintiffs"—as is the case here—due to a lack of potential third-party observers and limited means for prisoners to establish and collect evidence "other than recounting evidence himself." *Id.*

Regardless, this case does not genuinely present the rather abstract question of whether statements like Officer Jones's can raise a triable issue even if all the *Whitley* factors point the other way. Like *Mann*, this is a case where the plaintiff would have a strong case under the *Whitley* factors even without the officers' statements that a trier of fact could understand as direct evidence of malice.

For example, the *Mann* court found that the *Whitley* factors fell in favor of the inmate because the use of force "occurred after Mann had been restrained, and in that sense was unnecessary to preserve order." *Mann*, 578 F. App'x at 275; *see also supra* at p. 6–7. Similarly, a reasonable trier of fact could readily find the *Whitley* factors to favor Dean even before considering Sergeant Jones's inculpatory statements. *See* (Appellant Br. 38–44). As in *Mann*, the District Court was required to accept Dean's sworn declaration that he was not resisting prior to and during his minute-long beating in the janitor's closet. *See Mann*, 578 F. App'x at 272 n.2. After Dean ceased resisting by curling up in a ball on the floor, "the picture changes" and "a reasonable jury could question" whether the continued use of force was actually "intended to punish" Dean for his earlier transgression. *Brooks*, 924 F.3d at 114; *see also Williams*, 77 F.3d at 765. Indeed, a reasonable trier of fact could infer that at some point during the minute-long beating of Dean, it was no longer reasonable to infer that the officers perceived a genuine ongoing "clear need for the application of force," especially when Dean was not resisting and remained handcuffed. *See Whitley*, 475 U.S. at 321; *see also* (JA 115–16, ¶ 25–27). Moreover, Dean was surrounded by *thirteen* officers while being escorted in handcuffs, and those officers who could not fit inside the closet remained outside. *See* (Ex. B., Camera 148 at 11:25:44 – 11:25:54; Camera 144 at 11:26:00 – 11:27:11).

Taken together, the fact that Dean was not resisting during the minute-long beating, remained handcuffed behind his back, and was outnumbered 13:1 creates a triable issue that the use of force against Dean was disproportionate, even without Jones's statement. *See Brooks*, 924 F.3d at 116 ("This 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 that force for just that reason."). Just as in *Mann*, a reasonable jury could find that:

> The force applied by [the officer] occurred after [the inmate] had been restrained [so it] was unnecessary to preserve order. It would appear that there was not a significant "need for the application of force" and that [the inmate] was not a serious threat as "reasonably perceived by the responsible officials.

Mann, 578 F. App'x at 275. And finally, a reasonable jury could conclude that the officers made no appropriate efforts to calibrate their response to the scale of any danger during the minute-long beating, even if *some* additional force was initially necessary and justified. *See Mann*, 578 F. App'x at 274 ("[A] jury could find that the officers on the extraction team continued to apply force against Mann well after he had ceased his resistance."). Accordingly, this case does not require this Court to decide whether the *Whitley* factors could sustain summary judgment in spite of direct evidence of subjective intent.

In failing to address Sergeant Jones's statements to Dean, the District Court either ignored key direct evidence of impermissible retaliatory intent or it found

Dean's allegation of those statements to be unconvincing by engaging in an improper credibility determination at the summary judgement stage. Regardless, it was clear error for the lower court to fail to credit or even address Sergeant Jones's statements.

III. CONTRARY TO APPELLEES' SUGGESTION, THE DISTRICT COURT FAILED TO ACCEPT DEAN'S FACTS AS PRESENTED AND DREW IMPERMISSIBLE INFERENCES IN FAVOR OF DEFENDANTS

Regarding both uses of force, Appellees argue that the District Court did, in fact, accept Dean's facts as presented in his sworn Statement of Material Facts. (Appellee Br. at 20, 37). They further assert that "[a]ny other assumptions the District Court made about that evidence were based on well-established law governing Eighth Amendment excessive force claims." (Appellee Br. at 12).

The District Court's factual findings did cite to Dean's Statement of Material Facts, and the court purported to draw all reasonable inferences in favor of Dean to the extent his account was not plainly contradicted by video evidence. (JA 159–61). However, the District Court failed to address or even mention several pieces of key evidence in Dean's favor, and drew several inferences in favor of Defendants in the course of applying its factual findings to law. The District Court's grant of summary judgment is accordingly flawed and should be reversed.

A. The District Court Failed to Credit Key Evidence in Favor of Dean and Failed to Draw All Inferences in His Favor Regarding the Pepper-Spray Incident.

The District Court failed to fully credit Dean's account of the pepper-spray incident and drew impermissible inferences in favor Officer Hobgood. The District Court's "Statement of Facts" did incorporate aspects of Dean's testimony, stating:

> During the escort, plaintiff "head-butted" defendant Hobgood, causing both plaintiff and Hobgood to fall to the ground. Correctional officer Gipson then subdued plaintiff by holding plaintiff's knees to his chest. According to plaintiff, "[defendant] Hobgood got to his feet, and although [plaintiff] was subdued and still handcuffed with c/o Gipson's weight on his chest and could offer minimal resistance, [defendant Hobgood] administered one long burst [of pepper spray] to [plaintiff's] face, lasting over 3 seconds."

(JA 159) (internal citations omitted). This account, however, overlooks several key details presented by Dean's sworn Statement of Material Facts.

First, the District Court's account fails to recognize that when Officer Gipson subdued him, Dean was laying *on top* of his arms which were still handcuffed under his body. (JA 111, ¶ 6); *see also* (Ex. B, Camera 149 at 11:25:30 – 11:25:49) (showing Dean's arms handcuffed behind his back as he exited the cell block). Second, the District Court erroneously asserted that Officer Gipson was "holding plaintiff's knees to his chest," (JA 159), when, in fact, Dean testified that "Gipson ha[d] him subdued with his knees in affiant's [Dean's] chest." (JA 111, ¶ 6). In other words, prior to the use of pepper spray by Officer Hobgood, Officer Gipson was on top of Dean and driving his (Gipson's) knees into Dean's chest, while Dean lay on top of his arms—which were handcuffed behind his back. The District Court's account paints a different picture in which Dean is lying on his back, with his

handcuffed arms in front of him while Officer Gipson tried to push Dean's knees into his chest.

Although seemingly minor errors, these discrepancies would be important to a trier of fact evaluating the ultimate issue: whether Officer Hobgood genuinely believed that an extended burst of pepper spray directly in Dean's eyes was still necessary to restrain him. Indeed, the District Court's reason for concluding that "Plaintiff downplays the safety risk he posed in these circumstances" was that "Plaintiff [sic] legs were also not restrained, and officer Gipson was the sole officer 'subduing' plaintiff by holding his unrestrained legs to his chest." (JA 163). The Court's holding rests, in other words, on an assumption that Dean's legs posed a threat because they were unrestrained and being pressed into his chest by Officer Gipson. Dean's actual testimony is that Officer Gipson was kneeling on Dean's chest and pressing his own legs into Dean's chest. (JA 111, ¶ 6). In that scenario Dean's legs would be behind Officer Gipson's body and no threat to anyone. The District Court's misunderstanding of Dean's testimony therefore manufactured the "safety risk" the Court relied upon to grant summary judgment.

The District Court also improperly drew inferences in favor of Officer Hobgood when it concluded 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) (emphasis added). That italicized assumption may rest on the District Court's incorrect belief that Dean's legs were in front of Officer Gipson and being pressed by Officer Gipson into Dean's chest. Regardless, it effectively assumes the central state of mind issue in Officer Hobgood's favor. Dean's case is that Officer Hobgood *did not* reasonably believe that Dean still posed a threat, and could not have believed that, because Dean was completely incapacitated and not resisting before the pepper spray was used. A trier of fact crediting Dean's testimony about the situation certainly would not be required to conclude that Officer Hobgood reasonably (or subjectively) believed that Dean still posed a threat. The District Court's reasoning therefore improperly resolves a central issue of witness credibility against Dean. No permissible "deference" to prison officials justifies distorting the summary judgment standard in that fashion.[1]

B. The District Court Failed to Credit Key Evidence in Favor of Dean and Draw All Inferences in His Favor Regarding the Use of Force in the Closet.

[1] Additionally, it is hard to understand Appellees' suggestion that the physical injury and pain and suffering associated with being subjected to a prolonged, close range discharge of pepper spray directly to the eyes does not clear the "actual injury" threshold. *See* (Appellee Br. at 29). *Cf. Krakauer v. Dish Network*, 925 F.3d 643, 653 (4th Cir. 2019) (finding injury in fact threshold met where class comprised of persons who had received two or more calls within one year to residential telephone number listed on national Do-Not-Call registry sustained injury in fact, as required for standing to bring action against provider of satellite television services for violation of Telephone Consumer Protection Act).

The District Court also failed to fully credit Dean's testimony and the permissible inferences therefrom when evaluating the later use of force in the closet. As discussed above, prior to and throughout the closet incident Sergeant Jones made several statements which, if credited by a jury, would provide a sufficient basis for concluding malicious or retaliatory intent. The District Court failed to address or even acknowledge those statements when granting summary judgment for the officers. The District Court also construed Dean's own evidence against him by drawing improper inferences in favor of the officers.

Dean's sworn Statement of Material Facts avers that several statements were made by Sergeant Jones prior to and during the closet incident. Sergeant Jones shouted "get him in there" to the thirteen officers in Dean's convoy prior to Dean being pushed into the janitor's closet. (JA 114, ¶ 22). Sergeant Jones then repeatedly shouted "you done fucked up!" at Dean while the officers continued to beat him for over a minute in the closet. (JA 115, ¶¶ 25–26; *see also* Ex. B, Camera 144 at 11:26:00 – 11:27:11 (soundless video showing Dean and the officers disappearing into the janitor's closet)).

As the District Court noted early in its opinion, the presence of video evidence regarding this incident required the court to rely on the recording "to the extent it directly contradicts plaintiff's version of events." (JA 159) (citing *Scott v. Harris*, 550 U.S. 372, 380–81 (2007)). Yet the video footage provided by Defendants

contains no audio of the incident, and the District Court was therefore required to accept Dean's testimony about Sergeant Jones's statements as true. *See Brooks*, 924 F.3d at 108. The District Court failed, however, to consider or even mention Sergeant Jones's statements in its analysis of the summary judgment issue. (JA 160, 164–66).

Appellees contend that the District Court did not ignore Sergeant Jones's statements because "the court construed Camera 144's footage to show Dean 'was "pushed" into the janitor's closet almost immediately after he head butted [Sergeant] Jones.'" (Appellee Br. at 38) (quoting and citing JA 165 & 165 n.4). That argument fails to recognize the conclusory and incomplete nature of the court's finding. To be clear, the District Court did conclude that Dean was "pushed" into the closet, and further noted that Dean's account was not clearly contradicted by the video recording. (JA 165 & 165 n.4). But the District Court's acknowledgment that Dean was "pushed" does not, as Appellees would have it, prove that the District Court also credited and appropriately considered Dean's testimony about Sergeant Jones's statements. To the contrary, the District Court's use of quotes around "pushed" and its failure to even acknowledge the statements by Sergeant Jones strongly suggests that the District Court engaged in an impermissible credibility determination regarding Dean's Statement of Material Facts. *See Mann*, 578 F. App'x at 272 n.2 ("It is well settled that [courts] may not, at summary judgment, discount viable,

material evidence on the ground that it was offered by a plaintiff with a troubled past.").

The District Court's analysis of what happened next further illustrates that point. The District Court noted Dean's testimony that he "was trying to curl his legs up to 'protect' himself after he fell into the janitor's closet." (JA 166). Dean explained in his sworn Statement of Material Facts that he was not resisting while in the closet and tried to curl up to protect himself from the minute-long beating. (JA 115–16, ¶ 26–27). Yet the District Court then concluded that "the officers 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).

Appellees defend that inference, reasoning that "the court properly found the officers reasonably could have interpreted Dean curling up as an attempt to kick them," because "under no view of the evidence can it be concluded that the officers would have perceived Dean curling up his legs or making any movement as a clear sign of submission." (Appellee Br. at 46–47). With respect, the assertion that no officer, and no trier of fact, could understand curling up into a ball while being beaten as a sign of submission is hard to understand—particularly when the beating lasted for more than a minute. That movement might be momentarily ambiguous, but any ambiguity would dissipate quickly unless it morphed into an attempt by Dean to kick officers. And indeed, Appellees conspicuously point as support to the written

statements collected from officers which allege that Dean continued to resist while in the closet. (JA 38–54). And it is true that the investigation report of Lt. Elderdice noted that Dean "continued to try to kick and turn over." (JA 31). Appellees' interpretation of events, like the District Court's, plainly draws inferences in favor of the officers' testimony and Lt. Elderdice's report, and disregard's Dean's testimony that he never offered any resistance while in the closet. Notably, Lt. Elderdice was not present for the incident but his report was the first and only time Dean was ever alleged to have tried to kick officers, because *none* of the initial witness statements averred such conduct. *Compare* (JA 31–33) *with* (JA 38–54). A reasonable trier of fact could easily discredit Lt. Elderdice's report regarding the kicking.

Appellees defend the District Court's assertion that Dean's testimony that he was not resisting was "conclusory." (Appellee Br. at 46) (citing JA 166). That characterization is misplaced. Dean did not offer a *legal conclusion* but a simply-stated fact about what happened in the closet: He did not resist, yet he was beaten for more than a minute. It is not clear how Appellees or the District Court think Dean could or should have elaborated on that straightforward testimony in order for it to be credited at summary judgment. And a reasonable trier of fact crediting that testimony certainly could infer that officers who continued to beat Dean for more than a minute were, at some point, motivated by a desire to punish or retaliate rather

than to restrain him. As noted above, "the record [can] defeat summary judgment even if the evidence consist[s] exclusively of so-called 'self-serving' declarations from [the plaintiff]." *Mann*, 578 F. App'x at 272 n.2. When the litigant is a prisoner—as is the case here—this principle is "acutely necessary" because the cards are often stacked against prisoners who neither have the benefit of third-party observers nor reliable means to collect evidence. *Id.*

C. Inferences drawn in favor of Defendants by the District Court cannot be justified as appropriate deference to prison officials

Appellees assert that any inferences drawn in favor of Defendants were "based on well-established law governing Eighth Amendment excessive force claims" (Appellee Br. at 12) and argue that the District Court's interpretation of "how the officers would have viewed Dean's movements" was reasonable "in light of the deference owed to them in the excessive force analysis" (Appellee Br. at 48). Appellees' effort to recast the summary judgment standard should be rejected. Officers are indeed "owed 'wide-ranging deference in their determinations that force is required to induce compliance with policies important to institutional security.'" (Appellee Br. at 12) (citing *Brooks*, 924 F.3d at 113). As explained *supra* at I.A., however, this Court meant in *Brooks* that officers were entitled to deference in their judgment that force was an appropriate response to an actively resisting and noncompliant prisoner. This Court has never suggested that officers would get "deference" to a decision to continue using force against a compliant and unresisting

prisoner; to the contrary, it has indicated that such applications of force violate the Eighth Amendment almost by definition. And this Court certainly has never suggested that officers get "deference," at the summary judgment stage, in the resolution of *disputed issues of historical fact* such as whether the prisoner was resisting or not—or on the ultimate issue of officers' subjective intent.

To the contrary, this Court has explained that inmates alleging excessive force are to "have the credibility of [their] evidence as forecast assumed, [their] version of all that is in dispute accepted, [and] all internal conflicts . . . resolved favorably to [them]." *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990) (internal citations omitted). As the Seventh Circuit recently explained, the deference afforded to prison officials does not require or permit courts to "simply credit" prison officials' claims that their use of force was believed to be necessary and in good faith, particularly when the inmate's version of the facts calls into question the state of mind of the prison officials. *McCottrell v. White*, 933 F.3d 651, 671 (7th Cir. 2019). The *McCottrell* court further noted that "[s]ummary judgment is notoriously inappropriate for determination of claims in which issues of intent, good faith and other subjective feelings play a dominant role," *id.* (citation omitted), refuting Appellees' suggestion that that general principle has no role to play in Eighth Amendment excessive force cases. *Compare* (Appellee Br. at 34).

Invoking "deference" to resolve factual disputes concerning subjective intent in favor of prison officials is inconsistent with fundamental summary judgment principles which apply in prisoner civil rights litigation the same way as in other types of litigation. The resolution of factual disputes, and in particular conflicts of witness credibility, is reserved to the trier of fact.

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,

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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 6,483 words.
3. I understand that a material misrepresentation can result in the Court 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
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