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.

BRIEF OF DEFENDANTS-APPELLEES

FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
(No. 5:16-CT-3109-FL)

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 18-7227 Caption: Willie James Dean, Jr. v. Johnnie Jones; Charles C. Hobgood, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Johnnie Jones
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/Mary Carla Babb Date: 23 December 2019

Counsel for: Johnnie Jones

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

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No. 18-7227 Caption: Willie James Dean, Jr. v. Johnnie Jones; Charles C. Hobgood, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Charles C. Hobgood
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
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Signature: s/Mary Carla Babb Date: 23 December 2019

Counsel for: Charles C. Hobgood

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BRIEF OF DEFENDANTS-APPELLEES

FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
(No. 5:16-CT-3109-FL)

JURISDICTIONAL STATEMENT

This is an appeal by plaintiff Willie James Dean, Jr. ("Dean") from the 27 September 2018 final order of the United States District Court for the Eastern District of North Carolina ("the District Court"), granting defendants' summary judgment motion in Dean's civil action brought pursuant to 42 U.S.C. § 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. **WHETHER THE DISTRICT COURT WAS CORRECT IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON DEAN'S CLAIM ALLEGING THAT CORRECTIONAL OFFICER CHARLES HOBGOOD'S USE OF PEPPER SPRAY WAS EXCESSIVE.**

II. **WHETHER THE DISTRICT COURT WAS CORRECT IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON DEAN'S CLAIM ASSERTING THAT CORRECTIONAL SERGEANT JOHNNIE JONES' ALLEGED USE OF FORCE IN THE JANITOR'S CLOSET WAS EXCESSIVE.**

STATEMENT OF CASE

A. Procedural History

Dean is and has been at all relevant times an inmate in the custody of the North Carolina Department of Public Safety ("the Department of Public Safety"). He is incarcerated based upon state-court convictions for second-degree murder, armed robbery, assault with a deadly weapon inflicting serious injury, and malicious conduct by a prisoner. Dean v. Joyner, No. 5:15-HC-2146-D, 2017 U.S. Dist. LEXIS 16140, at *2-3 (E.D.N.C. Feb. 6, 2017) (unpublished order).

On 6 May 2016, Dean, proceeding pro se, filed a civil action under 42 U.S.C. § 1983 in the District Court, alleging Eighth Amendment violations regarding two incidents, both occurring on 12 December 2015 while Dean was housed in Unit One at North Carolina's Central Prison. J.A. 2, 16, 157. He named as defendants Sergeant Johnnie Jones; Correctional Officer Charles C. Hobgood; the Department of Public

Safety Director of Prisons George T. Solomon; and Carlton Joyner and S. Waddell, Wardens of Central Prison. J.A. 2.

On 23 May 2016, Dean filed a motion to amend his complaint, along with the amended complaint. J.A. 2, 8-12. Following frivolity review, on 15 November 2016, the District Court, the Honorable Louise Wood Flanagan presiding, allowed Dean's action against Sergeant Jones and Officer Hobgood to proceed, but dismissed the other defendants. J.A. 3, 157. The court also allowed Dean's motion to file the amended complaint. J.A. 3.

In the amended complaint, Dean alleged that Sergeant Jones and Officer Hobgood used excessive force against him in the 12 December 2015 incidents and that, as a result, they violated his Eighth Amendment right to be free from cruel and unusual punishment. J.A. 8-12. Dean requested a jury trial, and prayed for declaratory relief, compensatory damages, and punitive damages, among other forms of relief. J.A. 11.

The case proceeded in the District Court with discovery and the filing of several pleadings by the parties. J.A. 2-7. Relevant to the instant appeal, defendants answered Dean's complaint and moved for summary judgment. J.A. 13-14. On 27 September 2018, the District Court granted defendants' motion and dismissed Dean's claims with prejudice. J.A. 157-67. On 4 October 2018, Dean noticed an appeal to this Court. J.A. 168.

B. Summary of the Facts

Dean alleged two, separate excessive force claims, one concerning Officer Hobgood pepper-spraying him in the face, and the other concerning Sergeant Jones' alleged use of physical force against him in a Central Prison janitor's closet. Dean alleged the following in his amended complaint to support his claims:

On 12 December 2015, he had a "physical altercation" with Officer Hobgood, after which Correctional Officer Dustin Gipson jumped on Dean and subdued him. J.A. 9. Officer Hobgood then sprayed Dean's face with pepper spray. J.A. 9. During the incident, Dean was in handcuffs. J.A. 9. After Officer Hobgood pepper-sprayed Dean, Sergeant Jones and other officers began escorting Dean to the nurses' station for decontamination. J.A. 9.

During the escort, the officers forced Dean into a room, where Sergeant Jones started punching him in the face, and another officer grabbed his legs so he could not get free. J.A. 9. The officers' actions caused Dean to fall, and they prevented him from fending off the officers' blows by curling up his hands, which were still shackled behind his back. J.A. 9. Sergeant Jones, Officer Hobgood, and the other officers continued to punch and kick Dean in the head and face, and used their batons on him. J.A. 9. Dean then blacked out, and when he came to, the officers pulled him to his feet and escorted him to the nurses' station. J.A. 9. From there, medical staff

sent Dean to the Central Prison Urgent Care Center, then on to Wake Medical Center. J.A. 10.

Dean alleged that as a result of the incident in the closet, he had, among other injuries, a fractured nose, a busted and swollen lip, two black eyes, and multiple bruises and contusions all over his body. J.A. 10. Dean further alleged he had permanent injuries, including a gash to his forehead, a cyst which later formed near his nasal fracture, requiring surgery, breathing complications which required continuing treatment, extreme anxiety attacks, and elevated bouts of PTSD and depression. J.A. 10.

Dean averred the following in his verified Statement of Material Facts submitted in opposition to defendants' motion for summary judgment. Where appropriate to given context to Dean's evidence, evidence presented by defendants is also detailed below. Unless otherwise noted, defendants' evidence provided here was not contested by Dean.

Dean admitted that on 12 December 2015, at around 11:20 a.m., he head-butted Officer Hobgood, causing the officer to fall, while the officer was escorting him from the prison barbershop to his cell. J.A. 110. Dean stated that Officer Gipson then subdued him by kneeling on him and placing his weight on Dean's chest, such that Dean "could offer minimal resistance." J.A. 111, 120. According to Dean, while Officer Gipson had him subdued, Officer Hobgood pepper-spray him in his face for

three seconds or longer. J.A. 111. Dean acknowledged, contrary to what he alleged in his amended complaint, Officer Hobgood had no further physical or verbal contact with him that day. J.A. 112.

Central Prison staff issued a code calling for "[a]ll available officers" to respond after Dean assaulted Officer Hobgood, and twelve officers, including Sergeant Jones, responded. J.A. 17, 25, 41-54, 99, 105. Sergeant Jones took control of Dean's right arm, and Sergeant Luis Rivera took control of his left. J.A. 17, 25, 38-39, 41-42, 105. The officers then began escorting Dean to the nurses' station for decontamination. J.A. 17, 25, 38-39, 41-42, 105.

Dean claimed that he offered no resistance while being escorted to the nurses' station for decontamination until the officers "maliciously slammed" him, for no reason, into two sets of closed slider doors during the escort. J.A. 112, (citing J.A. Vol. II, C11:25:05-11:25:10).[1] Dean explained he started fearing for his wellbeing, noting he was partially blind from the pepper spray and in the control of Sergeant Jones and the other officers escorting him. J.A. 113. He stated "[s]elf-preservation,

[1] Central Prison staff attempted to obtain the video surveillance footage of Officer Hobgood pepper-spraying Dean, but a search for the footage "indicated 'no meta data results.'" J.A. 55. Several Unit One surveillance cameras captured officers and Dean en route to the decontamination room. Staff recovered that footage, and Defendants submitted footage from these cameras to the District Court in support of their summary judgment motion. For ease of reference, defendants refer and cite to the footage here using the individual camera's Central Prison unit designated number. The parties have provided this Court with a CD of the footage as Volume II of the Joint Appendix.

naturally, kick[ed] in, but running [was] not an option" because he was physically restrained. J.A. 113.

Dean and the officers walked by Central Prison Unit One Camera 148 without incident. J.A. 113 (citing J.A. Vol. II, C148@11:25:35-11:25:50). According Dean, however, Sergeant Jones was bending his wrist, causing it to go numb and to hurt. J.A. 113. Dean said he panicked upon reaching the entrance to what he thought was the decontamination room, where it was known there were no cameras. J.A. 113. As a result, Dean head-butted the officer who was holding his wrist "severely," referring to Sergeant Jones. J.A. 113; J.A. Vol. II, C144@11:25:56. Sergeant Jones and other officers then placed Dean against the wall for several seconds. J.A. 114; J.A. Vol. II, C144@11:25:58. In doing so, the officers were executing a maneuver, consistent with their training, designed to allow them to regain physical control of a resisting inmate by moving him to the nearest hard surface. J.A. 18-19, 25, 27, 42-43, 45, 105-06. Dean claimed he was not resisting at this point, and he could not resist even if he wanted to because he was being "held by up to four officers." J.A. 114.

Dean averred Sergeant Jones told the other officers to "get him in there," and the officers then "pushed" Dean into a nearby janitor's supply closet. J.A. 114. The closet consists of shelves stocked with supplies and cardboard boxes stacked on the floor, with one shelf on the left side protruding farther out than the others. J.A. 19, 75-78, 106.

Dean asserted that when he was in the closet, Sergeant Jones and other officers "maliciously" beat him until he was unconscious. J.A. 115. According to Dean, at some point, the officers' blows caused him to drop to the floor. J.A. 115. Dean averred that, as the officers continued to assault him, he tried to protect himself by curling up, but the officers grabbed his legs. J.A. 115. Dean claimed that during the incident in the closet, Sergeant Jones declared several times, "You done f****d up!" J.A. 115.

According to Dean, for just over a minute, officers beat him "using fist, feet, and upon information and belief batons." J.A. 116 (citing J.A. Vol. II, C144@11:25:58-11:27:10). While Dean was in the janitor's closet, a hallway camera, Camera 144, captured cardboard boxes sliding out of the closet. J.A. 19, 107; J.A. Vol. II, C144@11:25:00-11:27:08. The inside of the closet was out of view of any camera. No officer reported observing any fellow staff member punching or kicking Dean or striking him with a baton. J.A. 22, 108.

Dean contended Officer Gipson and another officer stepped into the doorway of the closet, held his legs, and moved boxes out of the way, giving Sergeant Jones better access to Dean while he was on the floor. J.A. 117. Dean further contended that after the officers beat him, they "toss[ed]" him outside the closet while he was "semi-conscious." J.A. 116-17.

Officer Watkins and Sergeant Rivera escorted Dean to the nurses' station. J.A. 20, 107; J.A. Vol. II, C144@11:27:09-11:27:19. Camera 144 depicted Dean leaving the area with blood on his forehead. J.A. 20, 107; J.A. Vol. II, C144@11:27:09-11:27:19. At the nurses' station, staff observed that Dean had blood coming from his forehead and nose, but noted he was conscious, alert, oriented, and agitated. J.A. 20, 60, 107. According to written statements submitted by the medial staff, Dean did not report being punched, kicked, or hit with batons. J.A. 20, 60-61, 107. Staff cleaned and dressed the cut to Dean's face and sent him to the Central Prison Urgent Care Center for evaluation and treatment. J.A. 20, 60-61, 107.

Dean made averments in his Statement of Material Facts about the injuries he sustained similar to the allegations in his amended complaint and provided medical records documenting a number of those injuries. J.A. 117-18, 124-54.

The use of force continuum in the Department of Public Safety's applicable Use of Force policy encouraged the use of pepper spray as "the first level of response" if any use of force is believed to be necessary. J.A. 21, 87-88, 100, 106. Under that same policy, pepper spray was to be administered directly into the inmate's eyes. J.A. 21, 87-88, 100, 106. Moreover, the policy prohibited staff from using force gratuitously or for punishment. J.A. 21, 87, 108.

Central Prison Correctional Lieutenant William T. Elderdice was assigned to investigate the two above-noted uses of force. J.A. 103. He concluded both uses of

force were necessary under the circumstances, complied with Department of Public Safety policy, and were not excessive. J.A. 22, 33, 103, 108. Lieutenant Elderdice also recommended disciplinary action against Dean for assaulting the officers. J.A. 33.

Dean filed an administrative grievance regarding the above-noted incidents. The grievance and appeals therefrom were rejected, with the Department of Public Safety Inmate Grievance Resolution Board dismissing Dean's grievance for "lack of supporting evidence" on 12 February 2016. J.A. 79-81, 156.

C. The District Court's Order

In granting summary judgment, the District Court concluded that, to the extent Dean was seeking compensatory damages, both Officer Hobgood and Sergeant Jones were entitled to qualified immunity, because his evidence failed to establish either defendant's use of force was excessive. J.A. 164, 167. The court also concluded Dean was not entitled to declaratory or injunctive relief. J.A. 167 n.5.

Specifically regarding Dean's pepper-spray claim, the District Court recognized Dean was in handcuffs when Officer Hobgood deployed his pepper spray, and accepted Dean's statement that Officer Gipson already had him "subdu[ed]." J.A. 163. Nonetheless, the court found Dean had not established Officer Hobson's use of pepper spray was excessive. J.A. 164. This was because Officer Hobgood's "three-second burst of pepper spray" was proportionate,

considering the safety risk Officer Hobgood believed Dean still posed, and given the circumstances in which the officer found himself. J.A. 163. Those circumstances included having just been head-butted by Dean. J.A. 163. In addition, the District Court "not[ed]" Dean failed to provide any admissible evidence showing he suffered an injury from being pepper-sprayed. J.A. 164.

The District Court also concluded Sergeant Jones' alleged use of force in the janitor's closet was not excessive. J.A. 167. This was because the officers applied the challenged force immediately after Dean head-butted Sergeant Jones, the second officer Dean assaulted; the officers did so at a time when they was in reasonable fear of their safety; the officers' use of force reflected an effort "to ensure the significant threat [Dean] posed to officer safety was contained"; the circumstances the officers found themselves in created a clear need for the use of force; attempts to temper their response would have been futile, given "prior, less intrusive uses of force had not been successful"; and the removal of Dean from the closet after being in there for approximately one minute did not suggest the use of force was disproportionate. J.A. 167. The court reached these conclusions while accepting as true Dean's averment that he did not resist after head-butting Sergeant Jones. J.A. 167. Finally, the court determined, to the extent Dean was alleging officers used excessive force by pushing

him into the door, Dean had not demonstrated entitlement to relief on such a claim.[2] J.A. 166.

SUMMARY OF ARGUMENT

The District Court was correct in granting defendants' motion for summary judgment on Dean's two Eighth Amendment excessive force claims. On appeal, Dean challenges the District Court's ruling on the two claims separately, but the arguments he presents in support are essentially the same for both.

First, Dean contends the District Court misapplied the standard governing summary judgment by crediting only defendants' evidence and construing it in their favor. However, a review of the court's ruling reveals it properly credited only Dean's evidence, construing it in his favor and making reasonable inferences in his favor. Any other assumptions the District Court made about that evidence were based on well-established law governing Eighth Amendment excessive force claims. Those cases dictate correctional officers are owed "wide-ranging deference in their determinations that force is required to induce compliance with policies important to institutional security." Brooks v. Johnson, 924 F.3d 104, 113 (4th Cir. 2019).[3]

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[2] Dean does not raise an issue about this portion of the District Court's order on appeal.

[3] Internal quotation marks and citations are omitted from quotations in this brief, where existing, unless indicated otherwise.

Second, Dean argues, if his evidence is viewed correctly, a reasonable jury would not conclude he posed a threat when either defendant employed the challenged uses of force. But Dean's evidence, properly viewed, defeats this argument. Defendants' uses of force constituted good faith efforts to maintain, restore, and ensure order, discipline, and officer safety. As the District Court concluded, both were proportional and were not malicious, sadistic, or done to cause harm or in retaliation. The District Court correctly applied the law, including the factors in Whitley v. Albers, 475 U.S. 312 (1986). To the extent the court analyzed Dean's pepper-spray claim under prior, now-abrogated circuit precedent, any error is not reversible. Finally, defendants were entitled to qualified immunity, even if the District Court erred in finding no constitutional violations, given the lack of clearly established law.

For these reasons, as detailed below, this Court should affirm the District Court's order granting summary judgment.

STANDARD OF REVIEW AND SUBSTANTIVE LAW

A. Standard of Review

Entitlement to summary judgment is a question of law this Court considers de novo "using the same standard applied by the district court." Henry v. Purnell, 652 F.3d 524, 531 (4th Cir. 2011) (en banc). "Summary judgment is appropriate only if taking the evidence and all reasonable inferences drawn therefrom in the light most

favorable to the nonmoving party, no material facts are disputed and the moving party is entitled to judgment as a matter of law." Id.; accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); see also Fed. R. Civ. P. 56(c).

In response to a properly supported motion for summary judgment, the nonmoving party must present evidence "on which the jury could reasonably find" in his favor. Anderson, 477 U.S. at 252. The non-moving party "must identify affirmative evidence from which a jury could find that [he] has carried his or her burden of proving the pertinent motive." Crawford-El v. Britton, 523 U.S. 574, 600 (1998). "Conclusory or speculative allegations do not suffice, nor does a mere scintilla of evidence in support of [the non-moving party's] case." Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 (4th Cir. 2002). And courts "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Eastern Shore Mkts., Inc. v. J.D. Assocs., LLP, 213 F. 3d 175, 180 (4th Cir. 2000).

B. Applicable Law

1. Qualified Immunity

Qualified immunity protects all government officials performing discretionary functions but for the "plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986); see also Braun v. Maynard, 652 F.3d 557, 560 (4th Cir. 2011) (providing qualified immunity protects those who make "bad guesses in gray areas"). It thus protects conduct which "does

not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

A two-prong analysis governs whether a state actor is entitled to qualified immunity, which "focuses on the objective legal reasonableness of an official's acts." Id. at 819. Under the analysis, the actor is not entitled to immunity if (1) there was a constitutional violation, and (2) the right violated was clearly established. Henry, 652 F.3d at 531. Although the Supreme Court has made it clear that courts performing the two-prong qualified immunity analysis need not start with the first prong, see Pearson v. Callahan, 555 U.S. 223, 236 (2009), where a state actor does "not violate any right, he is hardly in need of any immunity and the analysis ends right then and there," Abney v. Coe, 493 F.3d 412, 415 (4th Cir. 2007).

2. The Eighth Amendment and Excessive Force

The Eighth Amendment prohibition on the infliction of "cruel and unusual punishments" protects against the "unnecessary and wanton infliction of pain . . . not inadvertence or error in good faith." Whitley, 475 U.S. at 319. In the context of prison disturbances, the wantonness prohibited is prison officials acting "maliciously and sadistically for the very purpose of causing harm." Wilson v. Seitler, 501 U.S. 294, 302 (1991). Thus, where an inmate raises an Eighth Amendment claim alleging excessive force, the core judicial inquiry is "whether force was applied in a good faith effort to maintain or restore discipline, or

maliciously and sadistically" to cause harm. Hudson v. McMillian, 503 U.S. 1, 6 (1992). This inquiry is governed by both an objective component – requiring an inmate establish that "the alleged wrongdoing was objectively harmful enough to establish a constitutional violation" -- and a subjective component – requiring him to establish the prison official acted with "a sufficiently culpable state of mind." Id. at 8; see also Brooks, 924 F.3d at 112; Williams v. Benjamin, 77 F.3d 756, 761 (4th Cir. 1996).

The objective component is "contextual and responsive to contemporary standards of decency." Hudson, 503 U.S. at 8. Under the objective component, an inmate must show that "the alleged wrongdoing was objectively harmful enough to establish a constitutional violation," id. at 8, meaning that he must establish the force applied was "sufficiently serious," Brooks, 924 F.3d at 112; accord Wilkins v. Gaddy, 559 U.S. 34, 39 (2010) (per curiam) (referring to the requisite amount of force as "nontrivial"). This requires a showing of "something more than de minimis force." Brooks, 924 F.3d at 112. Under this component, it is "the nature of the force, rather than the extent of the injury, [which] is the relevant inquiry." Hill v. Crum, 727 F.3d 312, 321 (4th Cir. 2013); Wilkins, 559 U.S. at 39; Hudson, 503 U.S. at 9. Accordingly, even where an inmate suffers de miminis injury, he can still satisfy the objective component, depending on the circumstances. See Wilkins, 559 U.S. at 39.

Under the subjective component, the relevant culpable state of mind required is "wantonness in the infliction of pain," Whitley, 475 U.S. at 322, which in the prison disturbance context manifests itself through malicious and sadistic conduct done specifically to cause harm, Wilson, 501 U.S. at 302. Whether the challenged conduct can be characterized as malicious and sadistic depends not on the effects upon the inmate, but on "the constraints facing the official." Id. at 303 (emphasis in original).

The standard governing the subjective component is demanding. Brooks, 924 F.3d at 112. It requires courts to evaluate the evidence in light of what has commonly been referred to as the Whitley factors, which are as follows: (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 the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials," and (4) "any efforts made to temper the severity of a forceful response." Whitley, 475 U.S. at 321.

As indicated above, the Supreme Court has made it clear that the lack of a serious injury is not a threshold requirement for an excessive force claim. Wilkins, 559 U.S. at 39. Nonetheless, it is still relevant, id., and, in fact, can be considered as an additional factor in the subjective component analysis, Williams, 77 F.3d at 762. This is because the extent of the injury could inform "whether the use of force could plausibly have been thought necessary in a particular situation, or instead evinced

such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." Hudson, 503 U.S. at 7. "The extent of injury may also provide some indication of the amount of force applied." Wilkins, 559 U.S. at 37.

Correctional officers "cross the line into an impermissible motive" and act unconstitutionally when they "punish an inmate for intransigence or . . . retaliate for insubordination." Brooks, 924 F.3d at 113. However, not "every malevolent touch by a [correctional officer]," later determined in the calm of a judge's chambers be gratuitous, "gives rise to a federal cause of action." Hudson, 503 U.S. at 9. Indeed, as the above analysis demonstrates, the Eighth Amendment "excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind." Id. at 9-10.

Moreover, prisons present an "ever-present potential for violent confrontation." Whitley, 475 U.S. at 321. It follows that correctional officials shoulder a heavy yoke. They are the government officials who maintain and restore prison order, and protect themselves, other correctional officers, non-law-enforcement prison staff, and inmates. Id. at 321. When confronted with any type of prison disturbance, these officers are forced to balance their duties with "the harm inmates may suffer if [they] use force. Despite the weight of these competing

concerns, corrections officials must make their decisions in haste, under pressure, and frequently without the luxury of a second chance." Hudson, 503 U.S. at 6.

It is well established that given these circumstances, courts "owe officers wide-ranging deference in their determinations that force is required to induce compliance with policies important to institutional security." Brooks, 924 F.3d at 113; see also Hudson, 503 U.S. at 10; Bell v. Wolfish, 441 U.S. 520, 547 (1979); cf. Graham v. Connor, 490 U.S. 386, 396-97 (1989) (concluding, in the Fourth Amendment context, "[t]he calculus of reasonableness must embody allowance for the fact 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"). To hold otherwise would "give encouragement to insubordination in an environment which is already volatile enough." Grayson v. Peed, 195 F.3d 692, 697 (4th Cir. 1999).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON DEAN'S CLAIM ALLEGING THAT OFFICER HOBGOOD'S USE OF PEPPER SPRAY WAS EXCESSIVE.

Dean first contends the District Court erred in granting summary judgment on his claim that Officer Hobgood's use of pepper spray constituted excessive force and thus violated his rights under the Eighth Amendment. This Court should reject Dean's argument and affirm the decision below. The District Court correctly

determined Dean's own evidence showed Officer Hobgood acted in good faith to maintain and restore discipline and ensure officer safety.

A. The District Court Credited Dean's Evidence, Not Defendants', And Construed the Evidence in Dean's Favor.

Dean first contends the District Court credited defendants' account of the pepper-spray incident and did not view the evidence in his favor, as required by the standards applicable to summary judgment. At the summary judgment stage, where, as here, the parties present two different versions of events, "[t]he evidence of the nonmovant is to be believed." Anderson, 477 U.S. at 255. Contrary to Dean's argument, this is exactly what the District Court did in his case. Defendants' version of events showed that, after Dean head-butted Officer Hobgood, he lunged at the officer a second time and tried to climb on top of him. J.A. 16, 99, 103-04. Dean then struggled with Officer Gipson to get away as the officer attempted to subdue him. J.A. 17, 99, 104. It was at that moment when Officer Hobgood administered a single burst of pepper spray. J.A. 17, 38, 104. The District Court, however, did not rely on these facts. Instead, it accepted as true the version of events Dean presented in his Statement of Material Fact in support of his use-of-pepper-spray claim and analyzed the claim based upon those facts alone. J.A. 159-64.

The same is true concerning the District Court's decision in regards to Dean's claim, discussed infra, in which he alleged that Sergeant Jones used excessive force against him in the janitor's closet. Defendants' evidence showed that, two seconds

after the officers restrained Dean using the wall, Dean and three of the officers fell through the janitor's closet doorway. J.A. 19, 25, 27, 39-43, 45-46, 49-54, 106; J.A. Vol. II, C144 @11:26:00. Nonetheless, the District Court credited Dean's account, in which he averred the officers "pushed" him into the closet. J.A. 165, 165 n.4. Also, defendant's evidence established Dean struck the right side of his head on a protruding shelf in the closet and his face on the concrete floor, and despite suffering injuries from the fall, he continued to resist. J.A. 19, 40-43, 106. But the District Court accepted as true Dean's evidence that he was kicked, punched, and possibly hit with batons while in the closet, and that he stopped resisting after head-butting Sergeant Jones. J.A 164-66.

A review of the District Court's order reveals Dean's contention that the court relied upon defendants' evidence is manifestly incorrect.

B. Because the Whitley Factors All Weigh in Officer Hobgood's Favor, the District Court Was Correct in Concluding that Dean's Evidence Failed to Establish the Subjective Component of His Excessive Force Claim.

Dean next contends a correct analysis of his evidence demonstrates a reasonable jury could find the force used by Officer Hobgood was unnecessary and disproportionate, as it showed Dean posed no threat at the time the officer deployed the pepper spray. An examination of the Whitley factors, however, renders Dean's contentions meritless, and proves the District Court was correct in concluding his evidence did not establish the subjective component of Dean's excessive force claim.

1. As the district court correctly determined, Whitley factors one, two, and three weighed in Officer Hobgood's favor.

As concluded by the District Court, when applying Whitley factors one, two, and three to Dean's evidence, those factors all weighed in Officer Hobgood's favor. J.A. 163. Dean admitted in his Statement of Material Facts that shortly before Officer Hobgood deployed the pepper spray, he head-butted the officer, causing him to fall. J.A. 110. The officer sustained bruising to his right check and required pain medication. J.A. 18, 99. Given the situation Officer Hobgood found himself in, his use of the pepper spray was necessary. Whitley, 475 U.S. at 321. It was proportional to the need. This is particularly true considering pepper spray is "the first level of response" for officers on the Department of Public Safety's use of force continuum. J.A. 21, 88, 100, 104-05. Officer Hobgood was reasonable in perceiving a threat to his and Officer Gipson's safety. The force was plainly intended to prevent further assaultive behavior and was narrowly tailored to achieve that correctional objective.

This Court has long recognized non-physical uses of force, like chemical agents and pepper spray, can be constitutionally employed to control an inmate, even where, unlike here, the inmate is recalcitrant or refuses to obey an order but poses no physical threat. See generally Bailey v. Turner, 736 F.2d 963, 970 (4th Cir. 1984) (concerning the use of mace). Certainly, the use of pepper spray here on a violent inmate like Dean does not offend the constitution.

Moreover, the District Court's conclusion that the above-noted Whitley factors weighed in defendants' favor does not, as Dean argues, evince adoption of defendants' evidence. To the contrary, it reflects that in its analysis, the District Court properly accounted for the well-established law applicable to excessive force claims, particularly those arising in the context of the prison environment. Dean's argument reflects his belief that the District Court was to assume from his evidence that, upon rising to his feet in the immediate aftermath of being head-butted, Officer Hobgood had the luxury of time to calmly observe Dean and Officer Gipson, do the calculus, and determine some use of force was unnecessary.

However, such an assumption is belied not only by the standard governing summary judgment, but also is inconsistent with the substantive law which applies to excessive force claims. Dean's assumption is at best an unreasonable inference and would have therefore been insufficient to defeat defendants' motion for summary judgment. See Eastern Shore Mkts., 213 F.3d at 180 (providing that courts "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments").

More importantly, as indicated supra, a correctional officer's decision to use force is often a split-second one, or at the very least needs to be made in haste, as it obviously was here. That decision is therefore entitled to deference, particularly where unruly inmates like Dean heighten the inherent volatility in the prison

environment with acts of violence. Brooks, 924 F.3d at 113; accord Bell, 441 U.S. at 547. As Lieutenant Elderdice swore in his affidavit, "[a]t facilities like Central Prison, where many of the inmates are maintained on a control custody status due to their assaultive or dangerous behaviors in prison, the environment can be volatile." J.A. 103. To not afford officers like Officer Hobgood deference "giv[es] encouragement to insubordination in an environment which is already volatile enough." Grayson, 195 F.3d at 697.

Dean also argues the District Court ignored key evidence in analyzing Whitley factors one, two, and three. Dean primarily refers to averments in his Statement of Material Facts that Officer Hobgood used pepper spray on him when he was handcuffed behind his back, subdued by Officer Gipson, and "'could offer minimal resistance.'" (Dean's Br. at 24-25 (quoting J.A. 111)) But the District Court fully acknowledged that this was the set of facts with which it was concerned and took those facts as true. J.A. 163 (quoting J.A. 111).

Moreover, courts must assess the threat posed as it was "reasonably perceived by the responsible officials." Whitley, 475 U.S. at 321; see, e.g., Tedder v. Johnson, 527 F. App'x 269, 273 (4th Cir. 2013) (unpublished) (providing that "[i]n applying the third Whitley factor, [this Court] must consider the extent of any threat posed by [the inmate] to the staff or other inmates, as reasonably perceived by [the officer-defendant] based on the facts known to him at the time"). With that, courts do not

simply determine per Whitley "whether the use of force was absolutely necessary in hindsight, but 'whether the use of force could plausibly have been thought necessary.'" Griffin v. Hardrick, 604 F.3d 949, 954 (6th Cir. 2010) (quoting Whitley, 475 U.S. at 321).

From Officer Hobgood's perspective, he deployed pepper spray immediately after Dean assaulted him with a head-butt, an assault which Dean perpetrated even while he was handcuffed. Also, Dean's legs were not in restraints, and only one other officer, Officer Gipson, was subduing Dean. Dean was outside the confines of his cell at the time of the assault, and Officer Hobgood did not use any physical force in addition to the pepper spray in response to the assault. Immediately afterwards, the officers began escorting Dean to the decontamination area and even offered decontamination after Dean assaulted Sergeant Jones, although Dean refused. J.A. 40-43, 46, 49. Courts, including this one, have recognized that the existence of these circumstances weighs against the conclusion that use of pepper spray and other, similar non-physical types of forces was excessive. See, e.g., Williams, 77 F.3d at 764 n.4 ("[T]he fact that prisoners were permitted to wash off mace shortly after its application has been a significant factor in upholding the use of mace."); Burns v. Eaton, 752 F.3d 1136, 1140 (8th Cir. 2014) ("[T]he few cases where we denied summary judgment in Eighth Amendment excessive force claims based on pepper spraying have involved no warning this force would be used, no apparent purpose

other than inflicting pain, use of unnecessary 'super-soaker' quantities of the chemical, refusal to allow the victim to wash off the painful chemical for days, and/or use of additional physical force."). As the District Court correctly determined here, by emphasizing that he was not resisting, Dean "downplay[ed] the safety risk he posed," particularly as Officer Hobgood would have perceived that risk. J.A. 163. Dean himself demonstrated the extent of the risk he posed by later assaulting a second officer, Sergeant Jones, also with a head-butt.

Given the safety concerns, the situation facing Officer Hobgood, and the balance of Whitley factors one, two, and three, this is undoubtedly a case "in which a manifest and immediate need for the protective use of force [gave] rise to a powerful logical inference that [the officer] in fact used force for just that reason." Brooks, 924 F.3d at 116.

2. Whitley factor four weighed in Officer Hobgood's favor, despite the District Court's contrary determination, because the officer tempered his response.

The fourth Whitley factor also weighed in Dean's favor. Contrary to the District Court's conclusion concerning this factor, Officer Hobgood's use of the pepper spray did evince an effort "to temper the severity of a forceful response." Whitley, 475 U.S. at 321; J.A. 163. The use of pepper spray was the approved and recommended minimum amount of force authorized by the Department of Public Safety's use of force continuum. J.A. 21, 88, 100, 104-05. Officer Hobgood used

this "first level of response," even though the Use of Force Policy permitted him to use "whatever degree of force that reasonably appear[ed] to be necessary to defend the officer or a third party from imminent assault." J.A. 86, 104.

In addition, here, officers escorted Dean to be decontaminated immediately afterwards. Whether not officers make efforts to secure decontamination is a factor this Court has found significant in assessing the fourth Whitley factor. See Iko v. Shreve, 535 F.3d 225, 240 (4th Cir. 2008). Considered correctly, the fourth factor weighed in favor of defendants and provides further support for the District Court's ultimate conclusion that Dean's evidence did not establish the subjective component of his claim.

C. To the Extent the District Court Erred by Relying on Prior Circuit Precedent in Analyzing the Eighth Amendment Objective Component of Dean's Claim, Its Order Is Still Not Reversible.

Dean argues the District Court erred in concluding his evidence failed to establish the objective component of his excessive force claim. According to Dean, this is because, in making that determination, the court relied upon this Circuit's prior case law, now abrogated by the Supreme Court in Wilkins. That prior law dictated that, to state an excessive force claim, a plaintiff had to show more than de minimis injury. See Wilkins, 559 U.S. at 36.

A review of the District Court's order reveals it is unclear whether the court was actually concluding that Dean's evidence failed to establish the objective

component of the pepper-spray claim. J.A. 164. Although the Court did cite the prior circuit law, it reached no conclusion per se, only "not[ing]" that Dean failed to provide evidence of any injury. J.A. 164. Nonetheless, even if the court did err, its order is not reversible on appeal for a variety of reasons.

First, the objective and subjective components of an Eighth Amendment claim require two, independent inquiries. See Hudson, 503 U.S. at 8; Williams, 77 F.3d at 761. Thus, if the District Court erroneously concluded Dean failed to establish the objective component, because he did not establish the subjective component, as discussed above, his use-of-pepper-spray claim is still meritless.

Second, Dean's failure to allege or present evidence showing he suffered an injury from the pepper spray did subject his claim to summary judgment, but upon a different basis than the one cited by the District Court. It is well established that "a decision of the district court is not to be reversed if it has reached the correct result, even though the reason assigned by it may not be sustained." Stern v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 603 F.2d 1073, 1093 (4th Cir. 1979); cf. United States v. Smith, 395 F.3d 516, 519 (4th Cir. 2005) ("We are not limited to evaluation of the grounds offered by the district court to support its decision, but may affirm on any grounds apparent from the record."). Civil actions for compensatory damages under 42 U.S.C. § 1983 redressing constitutional violations are at their core torts, and, thus, require proof of some injury. See Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S.

299, 307 (1986) ("Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests . . . . Where no injury was present, no compensatory damages could be awarded."). It follows that where a plaintiff, such as Dean, does not allege any injury, de minimis or otherwise, or provide evidence of one to defeat a summary judgment motion, he cannot sustain his claim for compensatory damages. Such a conclusion is not inconsistent with Wilkins. This is because the Supreme Court in Wilkins expressly stated, "[A]n inmate who complains of a push or shove that causes no discernible injury almost certainly fails to state a valid excessive force claim."[4] Wilkins, 559 U.S. at 38.

At the very least, the lack of any allegation of a discernable injury resulting from the pepper spray bolsters the District Court's conclusion that Dean did not establish the subjective component of his claim. Although the absence of more than a de minimis injury is not by itself fatal, the extent of the injury can inform whether, under the Whitley analysis, "the use of force could plausibly have been thought necessary in a particular situation." Hudson, 503 U.S. at 7.

[4] To the extent Dean was contending the psychological injuries he alleged in his amended complaint resulted from being pepper-sprayed, his claim would still fail. 42 U.S.C.S. § 1997e(e) (Lexis through Pub. L. No. 116-90) (proving that inmates cannot bring civil actions for mental or emotional injury without showing physical injury).

Despite having little or no time to consider his options, Officer Hobgood quickly chose the minimal option on the Department of Public Safety's use of force continuum to maintain and restore order and to ensure officer safety, which in Dean's case caused no injury. In context, the lack of any injury buttresses substantially the District Court's conclusion that the balance of the Whitley factors weighed in defendants' favor.

Finally, if the District Court was indeed concluding that Dean's evidence did not establish the objective component, that conclusion was still correct, despite the court's citation to prior circuit precedent. As noted supra, the Supreme Court made it clear in Wilkins that "[t]he extent of injury may also provide some indication of the amount of force applied." Wilkins, 559 U.S. at 37 (emphasis added). According to Dean, Officer Hobgood administrated a burst of pepper spray lasting three seconds or more. J.A. 110. But the officers immediately began escorting Dean to the decontamination area. The only reason Dean did not then receive treatment was because he assaulted another officer. Also, officers again offered decontamination after the second assault, but Dean refused treatment. J.A. 40-43, 46, 49. At least one circuit, the Tenth Circuit, has recognized, "Whether defendants' use of the spray was objectively harmful enough to violate plaintiff's Eighth Amendment rights turns in part on how long plaintiff was sprayed and whether he was adequately irrigated afterwards or left to suffer unnecessarily." Norton v. City of Marietta, 432 F.3d 1145,

1154 (10th Cir. 2005). Moreover, as pointed out by the District Court, none of Dean's alleged injuries concerned the use of the pepper spray. Compare Tedder, 527 F. App'x at 274 (concluding, post-Wilkins, the plaintiff created a genuine issue of material fact as to the objective component, given that his "adverse physical reaction to the pepper spray—gagging, breathing difficulty, and vomiting— establishes that the nature of the force [the officer] used against [him] was nontrivial"). Considering these circumstances, to the extent the District Court was specifically determining that Dean's evidence did not establish the objective component of his claim, that conclusion was correct despite the possible flaw in its reasoning. Accordingly, the error Dean alleges does not require reversal. See Stern, 603 F.2d at 1093.

D. The Cases Dean Relies upon Are Distinguishable.

Dean relies upon several cases to support his argument that Officer Hobgood's use of pepper spray on an already physically restrained and handcuffed inmate was excessive. These cases are, however, readily distinguishable.

Unlike Dean, the inmates in Brooks v. Johnson and Iko v. Shreve did not heighten the volatility of the prison environment by perpetrating violence against the correctional officers in those cases. Officers used force against the inmate in Brooks after and solely because he refused to hold still for an identification photograph and was being verbally aggressive. Brooks, 924 F.3d at 108-09. While in handcuffs and in the presence of six officers, the inmate was tasered thrice, in

rapid succession, for his recalcitrance. Id. at 109. As a result, he "thrash[ed] in pain" and sustained permanent injury to his knee. Id. This Court concluded the district court in Brooks erred in granting summary judgment because, on those facts, a reasonable trier of fact could infer malicious intent. Id. at 116.

Reaching a similar conclusion on similar facts, the Court affirmed the denial of summary judgment in Iko. In Iko, while executing a cell extraction, correctional officers sprayed the inmate's cell using several bursts of a fogging-type pepper spray lasting a total of seven to fourteen seconds. Iko, 535 F.3d at 231-32. The officers did so because the inmate disobeyed an initial command to allow himself to be handcuffed. Id. at 231. During the extraction, the inmate attempted to comply with the officers' commands, and he was never violent. Id. at 231-32. After the incident, the inmate was not treated for the exposure, which the medical examiner suggested could have contributed to his death. Id. at 239-40. This Court concluded the use of five different bursts of pepper spray on an inmate who remained nonconfrontational, "docile[,] and passive" showed malicious intent. Id. at 239-40 & 240 n.11; see also Meyers v. Baltimore Cty., 713 F.3d 723, 728 & 732-34 (4th Cir. 2013) (reversing summary judgment where a police officer thrice tasered an arrestee who was holding a bat and coming towards him, then tasered the arrestee, who later died, seven more times after he had dropped the bat, had started convulsing, was restrained by several officers sitting on his back, and was crying, "I give up. I give up. Stop. Stop. I give

up"); Williams, 77 F.3d at 763 (recognizing, generally, it violates "the Eighth Amendment for prison officials to use mace, tear gas or other chemical agents in quantities greater than necessary or for the sole purpose of infliction of pain," in a case where guards sprayed an inmate with mace for throwing water out of his cell, restrained him in four-point restraints for eight-hours, and did not allow him to use the bathroom or wash off the mace, despite his pleas of pain).

None of the above-noted cases involved plaintiffs, like Dean, who actually assaulted the officers, or heightened the volatility of the prison environment by perpetrating violence against them, almost immediately prior to the time the officers used force to restore order. Dean proved himself violent, despite being restrained in handcuffs, and he can hardly be described as "docile." Iko, 535 F.3d at 239. The uses of force in the above cases were undoubtedly disproportionate, and the officers used force, or continued to use force, after the plaintiffs manifestly complied or attempted to comply with an order, and/or verbally expressed his submission.

Dean additionally relies upon the unpublished decision in Boone v. Stallings, 583 F. App'x 174 (4th Cir. 2014) (unpublished), which also presented circumstances distinguishable from those here. Unlike Dean, the inmate in Boone did not admit to using violence against the correctional officer, only using vulgar language. Id. at 176. Also distinguishable, assuming the evidence presented by the inmate in Boone was true, the correctional officer in that case not only pepper-sprayed the inmate

after he was in handcuffs and was on the ground, the officer also "beat" him. Id. at 176-77.

Finally, Dean cites several cases holding or noting that district courts should rarely grant summary judgment where a defendant's state of mind is at issue. (Dean's Br. at 29-30, & 30 n.5) Notably, none of those cases concerned Eighth Amendment excessive force claims. More specifically, none analyzed such claims using the Whitley factors, which provide the proper framework to discern a state official's state of mind in excessive force cases. Nonetheless, to the extent the cases Dean cites have applicability here, this is a case where summary judgment was appropriate. As correctly determined by the District Court, the balance of the Whitley factors weighed in favor of Officer Hobgood, showing his intent was not malicious and sadistic. As such, this Court should affirm the District Court's order granting summary judgment in defendants' favor on Dean's use-of-pepper-spray claim.

E. Even Assuming the District Court Erred in Finding No Constitutional Violation, Its Order Granting Summary Judgment on Qualified Immunity Grounds Was Still Correct.

As discussed above, the District Court correctly concluded Officer Hobgood was entitled to qualified immunity because his actions were not malicious and sadistic, and therefore did not violate the Eighth Amendment. J.A. 164. Accordingly, the court did not need to analyze the evidence under the second prong in the qualified immunity analysis, which assesses whether a government official's conduct

"violat[ed] clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. However, even if this Court decides the District Court erred in concluding that Dean cannot establish a constitutional violation on his evidence, Officer Hobgood is still entitled to qualified immunity because the clearly established law did not prohibit his conduct.

In determining the contours of the clearly established law against which to judge Officer Hobgood's conduct, this Court must not "assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense." Williams v. Strickland, 917 F.3d 763, 770 (4th Cir. 2019). Without question, "novel factual circumstances" can violate clearly established law. Hope v. Pelzer, 536 U.S. 730, 741 (2002). Nonetheless, determining what constitutes the clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198 (2004). Courts are "not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." Plumhoff v. Rickard, 572 U.S. 765, 779 (2014); see also City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (providing that the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality"). "Although the exact conduct at issue need not have been held unlawful in order for the law

governing an officer's actions to be clearly established, the existing authority must be such that the unlawfulness of the conduct is manifest." Waterman v. Batton, 393 F.3d 471, 476 (4th Cir. 2005).

The published cases Dean cites in his brief indicate the use of pepper spray in a prison environment can violate the Eighth Amendment in certain circumstances. See cases discussed supra. The circumstances here are not even close to the circumstances in those cases. The officers in those cases used nonphysical force, i.e., pepper spray, chemical agents and mutations, and tasers, on recalcitrant but mostly nonviolent inmates, and continued doing so after they complied and/or evinced clear nonresistance. See id.

The relevant question here is whether a reasonable correctional officer facing the circumstances Officer Hobgood found himself in understood, based upon the existing law, that his actions were illegal. Here, the officer pepper-sprayed a handcuffed inmate while he was restrained by another officer, but did so almost immediately after the inmate physically assaulted the first officer. Moreover, officers immediately began escorting the inmate to the nurses' station for decontamination. Dean's contention that, based on these circumstances, Officer Hobgood violated clearly established law, asks this Court to "define clearly established law at a high level of generality," which it cannot do. Plumhoff, 572 U.S. at 779. Moreover, this is not "an obvious case exhibiting a violation of a core [Eighth] Amendment right."

Betton v. Belue, 942 F.3d 184, ___, 2019 U.S. App. LEXIS 33034, at *19 (4th Cir. 2019). Accordingly, to the extent Dean seeks compensatory damages, Officer Hobgood is entitled to qualified immunity on Dean's evidence, even if this Court determines the District Court erred in finding no constitutional violation.[5] See Stern, 603 F.2d at 1093; Smith, 395 F.3d at 519.

The District Court was correct in granting defendants' summary judgment motion on Dean's claim alleging Officer Hobgood's use of pepper spray violated the Eighth Amendment.

II. THE DISTRICT COURT WAS CORRECT IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON DEAN'S CLAIM ASSERTING THAT SERGEANT JONES' ALLEGED USE OF FORCE IN THE JANITOR'S CLOSET WAS EXCESSIVE.

Dean contends the District Court erred in granting summary judgment on his claim asserting that Sergeant Jones' alleged use of force in the janitor's closet was excessive, given his evidence showed he was not resisting and posed no threat. This Court should reject Dean's argument and affirm the decision below. The District Court correctly determined Dean's own evidence showed Sergeant Jones acted in good faith to maintain and restore discipline and ensure officer safety.

[5] Dean was also not entitled to a jury trial on punitive damages because he did not sufficiently allege any purported recklessness, carelessness, or evil intent. See Cooper v. Dyke, 814 F.2d 941, 948 (4th Cir. 1987).

A. The District Court Did Not Ignore Dean's Averments about What He Contended Sergeant Jones Said, Nor Did Sergeant Jones' Alleged Statements Constitute Admissions of Malicious Intent.

Dean averred in his Statement of Material Facts that while he was being restrained in the hallway by multiple officers, Sergeant Jones instructed the officers to "get him in there," and thereafter, the officers "pushed" him into the closet. J.A. 114-15. Dean further averred that, while he was in the closet, Sergeant Jones repeatedly exclaimed, "[Y]ou done f***ed up!" J.A. 114. Dean characterizes the alleged statements as direct evidence of Sergeant Jones' malicious and sadistic intent, and argues on appeal the District Court erred by ignoring them. He further argues, or at least suggests, that in light of Sergeant Jones' statements, it was unnecessary for the District Court to examine the Whitley factors to discern the officer's intent.

Addressing Dean's arguments in turn, first, the District Court did not ignore Sergeant Jones' alleged statements. In accordance with the officer's alleged directive to the other officers to "get [Dean] in [the closet]," the District Court adopted Dean's version of events for the purpose ruling on defendants' summary judgment motion. J.A. 114-15, 165 & 165 n.4. More specifically, 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." J.A. 165 & 165 n.4.

Second, Sergeant Jones' alleged statements do not constitute direct evidence of malicious intent, nor can malicious intent be inferred from their content. Compare Mann v. Failey, 578 F. App'x 267, 275 (4th Cir. 2014) (unpublished) (concluding summary judgment in excessive force case against an officer was improper, where the inmate's evidence showed malicious intent could be inferred from the officer's statements said to the inmate, telling the inmate "Im'a fix you, white boy"; "threatening to 'kick [his] ass'"; "calling [the inmate] a 'crybaby'"; and saying "that 'she was going to beat [him] like [his] mama should've'" (first, third, and fourth alteration in original)). Examining specifically Sergeant Jones' alleged statement to Dean, "[Y]ou done f***ed up[,]" at best, it evinces a neutral truth. J.A. 114. Unquestionably, Dean did mess up. He head-butted no less than two officers within a period of minutes, despite having been pepper-sprayed, and while being surrounded by multiple officers. In fact, if the District Court had construed the alleged statements as malicious, it would have done so based upon speculation, making it an improper inference at the summary judgment stage. See Othentec Ltd. v. Phelan, 526 F.3d 135, 141 (4th Cir. 2008) (providing that the nonmovant cannot create a dispute of fact "through mere speculation or the building of one inference upon another").

Finally, Dean provides no authority actually supporting his argument or suggestion that certain statements by officers can, in-and-of-themselves, defeat a

motion for summary judgment and render the Whitley analysis unnecessary. The cases Dean does cite are distinguishable. They do not concern statements by officers from which this Court concluded a jury could infer malicious intent. Rather, those cases involve statements by plaintiffs from which the Court found a jury could infer the officers' use of force was retaliatory. See, e.g., Brooks, 924 F.3d at 115; Orem v. Rephann, 523 F.3d 442, 446 (4th Cir. 2008). Also, in those cases, this Court still analyzed the evidence presented under the relevant test, despite the existence of the plaintiffs' statements. Id.

As indicated supra, this Court has in at least one opinion concluded a jury can infer malicious intent from an officer's statements. See Mann, 578 F. App'x 267. Despite the existence of such statements, however, the Court in Mann still analyzed all the evidence in the case using the Whitley framework. Id. at 275. More to the point, a comparison of Sergeant Jones' supposed statements in this case with those of the officer in Mann reveal the alleged statements here did not constitute evidence of malicious intent, id., nor were they ignored by the District Court, as explained above. Dean's argument to the contrary fails accordingly.

B. The District Court Correctly Applied the Whitley Factors.

The District Court correctly applied the Whitley factors to Dean's evidence in concluding that Sergeant Jones acted in good faith to restore order and discipline and to ensure officer safety.

1. Whitley factors one and three weighed in Sergeant Jones' favor, as there was a clear and urgent need for the application of force and a reasonably perceived threat created by Dean.

The District Court's assessment of Whitley factors one and three was correct. The use of force in the closet, which according to Dean's evidence included kicks and punches,[6] was needed to restore discipline and order and to ensure the safety of officers, as well as the safety of non-law-enforcement prison staff. Dean created a reasonably perceived threat for that need. He assaulted two officers, head-butting them within a period of minutes. He was not cowed by being handcuffed, being pepper sprayed, having two officers holding his wrists "severely" during the escort, as he himself averred, or the presence of thirteen officers. J.A. 113. As noted by the District Court, Sergeant Jones and the other officers with him knew that Dean had just assaulted Officer Hobgood and that Officer Hobgood had pepper-sprayed him. J.A. 165 & 165 n.3. This is because they were escorting Dean to the decontamination

[6] As indicated by the District Court, Dean alleged in his amended complaint he was beaten with batons but expressed uncertainly about that in his Statement of Material Facts. J.A. 9, 116, 164 n.2. It is defendants' contention on appeal, given Dean's uncertainly on this point, that his evidence did not support his original allegation about the use of batons. Cf. Fed. R. Civ. P. 56(c)(4) (providing that declarations "must be made on personal knowledge"). Also, no officers can be seen removing or replacing their batons on the video footage. J.A. Vol. II, C144@11:26:00-11:27:19. And the photographs of the closet indicate it was far too small for the officers to remove, use, and replace their batons therein or, for that matter, use the other types of force Dean claimed. J.A. 75-78. Even if the force used did include the use of batons, it was still not excessive.

room after responding to the all-officer call. J.A. 165 & 165 n.3. When Dean head-butted Sergeant Jones, he was not in a confined area, like his cell, which would have minimized the threat he posed. He was in a facility hallway, close to the Central Prison Unit One nurses' station. In fact, nurses can be seen in the hallway on the footage from Camera 144 shortly before Dean is shown forcefully head-butting Sergeant Jones. J.A. Vol. II, C144@11:25:19-11:25:22.

The officers knew, as it was manifested by the circumstances, that they were dealing with a violent and volatile inmate, in an inherently volatile place. They were obviously concerned, not only for their own safety, but also for the safety of other facility employees, including the nearby nurses. Regarding Whitley factors one and three, the District Court properly considered "whether the use of force could plausibly have been thought necessary," not "whether the use of force was absolutely necessary in hindsight," as Dean is asking this Court to do now. Griffin, 604 F.3d at 954 (quoting Whitley, 475 U.S. at 321).

Dean contends the District Court erred in evaluating Whitley factors one and three, arguing that a reasonable jury could have determined he posed no threat after head-butting Sergeant Jones, given the circumstances in which he found himself. In support, Dean points out, according to his evidence, he was feeling the effects after having just been pepper-sprayed, was restrained by four officers, was outnumbered thirteen to one, and was handcuffed behind his back.

Dean's argument holds no sway, particularly given it is erroneously premised on a view of his evidence in a vacuum. As the District Court recognized, making inferences in a vacuum is prohibited at the summary judgment stage. J.A. 165; Sylvia Dev. Corp. v. Calvert County, 48 F.3d 810, 818 (4th Cir. 1995) (providing that "[p]ermissible inferences must still be within the range of reasonable probability," and explaining that "[w]hether an inference is reasonable cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary").

Viewing Dean's evidence correctly, no reasonable juror would have concluded Dean posed no threat. In fact, the evidence establishes, as the District Court saw it, Dean posed a "significant threat," despite being restrained by officers and being handcuffed. J.A. 164-65. Just seconds earlier, Dean was in circumstances similar to those he points to in contending he posed no threat, head-butting Sergeant Jones. In other words, Dean already proved himself violent, even though he was restrained and surrounded by multiple officers, was feeling the effects of the pepper spray, and was handcuffed with his hands behind his back.

Also, Dean's argument fails to acknowledge that handcuffed inmates can pose a threat. It is well established that handcuffs are "not fail-safe." United States v. Shakir, 616 F.3d 315, 320-21 (3d Cir. 2010) (discussing at length the threat a handcuffed suspect can pose and providing links to information about officers killed

by handcuffed suspects). Even in handcuffs, inmates can still bite, kick, and head-butt.

The threat posed by the handcuffed inmate here was far from theoretical. There was positive evidence that Dean posed a significant threat, even though his hands were in restraints. That fact, among others, distinguishes this case from Jones v. Buchanan, 325 F.3d 520 (4th Cir. 2003), cited by Dean, in which this Court stated, "[I]f [the detainee] was handcuffed behind his back in a locked room, we find it hard to see how he would pose an immediate threat to anyone." Id. at 529; compare also Brooks, 924 F.3d 104, discussed supra.

Also, Dean argues that, although his initial restraint at the wall may have been justified, the continued use of force in the closet, along with its extent and degree, supported an inference of impermissible motive. What Dean fails to acknowledge is what the video shows irrefutably: This was one continuous transaction, with a period of approximately four seconds between the moment Dean head-butted Sergeant Jones and when Dean went into the closet. J.A. Vol. II, C144@11:25:56-11:26:00; see Scott v. Harris, 550 U.S. 372, 380 (2007) (concerning the significance of objective evidence at the summary judgment stage). During that time, the officers were making split-second decisions. In doing so, they would have perceived any movement on Dean's part as continued resistance, necessitating the need for

continued and greater degrees of force, as were sanctioned by the Department of Public Safety's Use of Force policy. See J.A. 86.

As the above discussion demonstrates, the District Court properly analyzed Whitley factors one and three to conclude the use of force was needed and there was a threat reasonably perceived by officers.

2. Whitley factor two weighed in Sergeant Jones' favor, given the need for and the amount of force used were proportional.

Per Whitley factor two, the amount of force used by Sergeant Jones in the closet was proportional to the threat Dean posed, as correctly concluded by the District Court. J.A. 165-66. For reasons discussed above, Dean posed a significant threat to the safety of the officers and other Central Prison personnel. Defendants acknowledge that Dean was handcuffed and that his evidence showed he was lying on the floor of the closet. But he had previously found a way to assault two officers while in handcuffs, and his legs were unrestrained. Given the existing circumstances, the officers reasonably perceived any movement on Dean's part in the closet, including curling or drawing up his legs, as a threat. This was supported by the record. In his affidavit, Sergeant Jones averred Dean continued "to struggle and resist [the officers'] efforts to regain physical control[.]" J.A. 25. Although Sergeant Jones denied ever striking Dean, he acknowledged that, if he had used his hands and feet to strike the inmate, the applicable Use of Force policy "would not have prohibited [him] from doing so as long as [Dean] continued to exhibit resistance or

was not effectively restrained." J.A. 28; see also J.A. 88-89. The officers' use of physical force to control and restrain Dean was limited to a period of just over a minute and was done to regain physical control of a volatile, unpredictable, and violent inmate. This was not excessive force. If the District Court had concluded otherwise, it would have "giv[en] encouragement to insubordination in an environment which is already volatile enough." Grayson, 195 F.3d at 697.

Dean argues the District Court's assessment of Whitley factor two was defective because the court failed to credit his averment in his Statement of Material Facts that he was not resisting when in the closet, erroneously characterizing that averment as conclusory. Dean's argument is unpersuasive.

Dean's assertion that he was not resisting was, as the District Court characterized it, conclusory. J.A. 166. It was thus insufficient to defeat defendants' motion for summary judgment. See Thompson, 312 F.3d at 649; see also Boone v. Everett, 671 F. App'x 864, 866 (4th Cir. 2016) (unpublished) (providing that an inmate's conclusory allegations, paired with a conclusory affidavit from another inmate, offered only "a mere scintilla of evidence," which was insufficient to survive summary judgment). Moreover, this is not the only reason the District Court found Whitley factor two weighed in defendants' favor. The court also considered Dean's admissions that his legs were unrestrained and that he curled up while in the closet to protect himself. J.A. 166. Regarding these admissions, the court properly found

the officers reasonably could have interpreted Dean curling up as an attempt to kick them. J.A. 166. In fact, as discussed above, 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. Compare Meyers, 713 F.3d at 728 (concluding that force was disproportionate where police continued tasering an arrestee after he started to convulse and cried, "I give up. I give up. Stop. Stop. I give up").

Dean contends the District Court erred in making the inference that, upon seeing him curl up his legs, the officers could have thought he intended to kick them. Dean's argument in this regard is flawed, as it fails to give deference to the officers, does not account for a view the circumstances from the officers' perspectives, and as pointed out by the District Court, is based upon an evaluation of the evidence in a vacuum. J.A. 165; Sylvia Dev. Corp., 48 F.3d at 818.

Also, despite Dean's argument in his brief to the contrary, there was evidence in the record supporting the District Court's assessment of how the officers could have perceived his movement, including Sergeant Jones' own averments noted supra. In addition to Sergeant Jones, other officers wrote in their written statements collected soon after the challenged use of force that Dean continued to resist, pull away from, and/or struggle with them while in the closet. J.A. 40-43, 45, 49, 54. The investigating officer, Lieutenant Elderdice, noted in his incident report that, while in

the closet, Dean "continued to try to kick and turn over." J.A. 31; see also J.A. 79 (rejecting grievance and noting that Dean "continued to resist staff vigorously by kicking at them"). Moreover, the District Court was not assuming evidence favorable to defendants without regard given to what was in the record. The court was assessing how the officers would have viewed Dean's movements in light of the deference owed to them in the excessive force analysis.

Finally, as the discussion above indicates, the District Court's proportionality analysis and assessment of the on-going need for force did not rest entirely on the amount of time Dean spent in the closet, contrary to what Dean argues in his brief. The court also considered the circumstances as they existed during that time, including the significant, obvious threat Dean posed. J.A. 165.

3. Whitley factor four weighed in Sergeant Jones' favor, given that less intrusive uses of force had proven unsuccessful at restoring order.

The District Court correctly determined Whitley factor four also weighed in Sergeant Jones favor. For the reasons discussed above, it was manifest, even from Dean's evidence, that he posed a significant threat to officer safety, as well as to the safety of non-law-enforcement Central Prison personnel. The officers undoubtedly perceived any movement on Dean's part as continued resistance. See discussion infra. The officer, including Sergeant Jones, had responded to the all-officer call made because of Dean's violence and, thus, knew less intense methods on the

Department of Public Safety's use of force continuum had been previously been inadequate in restoring justice. J.A. 113, 165; see also J.A. 88 (providing in the Department of Public Safety's Use of Force policy, Chapter F § .1504(a)(2), that "[h]ands-on physical force" can be used "[t]o subdue an aggressive inmate when pepper spray is not effective or is not feasible"). Dean was not cowed by the use of pepper spray or being restrained by Officer Gipson, or by the presence of Sergeant Jones and the twelve other officers during the escort. Given that prior, less intense uses of force were unsuccessful, an attempt to calibrate a response would have been an exercise in futility. As such, Whitley factor four, whether the evidence shows that efforts were made to temper the severity of the response, weighed in Sergeant Jones' favor, as concluded by the District Court. J.A. 165. To the extent this Court would disagree, it is of no moment because the balance of the other factors, as shown here, weighed in Sergeant Jones' favor.

A balancing of the Whitley factors leads to the conclusion that this is a case "in which a manifest and immediate need for the protective use of force [gave] rise to a powerful logical inference that [the officer] in fact used force for just that reason." Brooks, 924 F.3d at 116.

C. The Opinion in Grayson v. Peed supported the District Court's Decision.

Dean discounts the District Court's reliance on Grayson v. Peed. Although analyzed under the Fourteenth Amendment, not the Eighth Amendment, and

admittedly not on all fours with the situation presented by the instant case, this Court's opinion in Grayson still supports the District Court's decision and is instructive. When the detainee in Grayson attempted to escape and caused a struggle with officers, the officers subdued him with pepper spray. Grayson, 195 F.3d at 694. The next day, five officers performed a cell extraction because the detainee was acting "belligerently," and was sticking his arm in the cell food slot and his foot in the cell doorway. Id. During the extraction, officers pinned the detainee to the floor, and as he continued to struggle with them, they punched him "seven to nine times." Id. When the detainee persisted in acting violently, the officers put him in restraints, and he eventually died. Id.

This Court affirmed the grant of summary judgment in Grayson, concluding that the officers' "restraining measures were necessary to subdue [the detainee]." Id. at 696. In so doing, the Court noted, "In dealing with such agitated detainees prison officials must not be forced to walk a tightrope and face the prospect of a lawsuit no matter which way they turn." Id.

Even taking Dean's evidence as true, the officers here, like the officers in Grayson, "felt the obvious need to subdue [Dean]" by placing him in the confines of the closet and using physical force, including punches and kicks, as it would have been their perception that Dean's actions showed continuing resistance. Id. at 697. The officers' perceptions were based, not only upon what Dean was doing at the

time, but also upon what he had done previously. Like the detainee in Grayson, a prior use of pepper spray in no way cowed Dean. Nor did being handcuffed. Also, like the officers in Grayson, the officers here took the actions they do to "calm the general environment" and to ensure officer and Central Prison personnel safety. Id.

In contrast to Grayson, the facts here are not analogous to the facts in the cases Dean cites. The majority of those cases concern, not the use of force against violent and volatile inmates, but instead the use of force against inmates who disobeyed commands or abused correctional officers verbally. See Brooks and Boone, discussed supra. Such is not the case here where Dean's actions continued to be violent in a highly volatile environment.

D. Dean's Argument Regarding Defendants' Evidence Is Irrelevant.

In his brief, Dean undertakes an analysis of defendants' evidence, pointing out what he contends are material inconsistencies. However, on appeal, this Court is assessing the District Court's decision to grant summary judgment, and that court properly credited only the evidence of the non-moving party, Dean. It follows that his analysis of any inconsistencies in defendants' evidence is irrelevant.

Nonetheless, it is worth noting that Dean himself has presented inconsistent versions of the events underlying his claims. For example, in a written statement given the day he claims defendants used excessive force, Dean asserted only that he "had an episode" resulting from his PTSD and "ended up doing something to an

officer, from what [he] was told." J.A. 16, 56, 104. In his amended complaint, Dean alleged only that he had a physical altercation with Officer Hobgood. J.A. 9. Then, in his Statement of Material Facts, Dean admitted head-butting Officer Hobgood, causing him fall. J.A. 110.

Moreover, for the most part, the differences in the officers' accounts regarding how Dean and the officers ended up in, and who fell into, the closet were not significantly different. J.A. 38-54. Most of the variations in the accounts can easily be explained by differences in the officers' points of view, and the differences in the level of detail each officer provided in the statements. The most important aspect of the accounts is that not one officer reported observing any fellow officers punching, kicking, or striking Dean with their batons. J.A. 62-72. Dean contends in his brief the officers' assertions in this regard are contradicted by video evidence showing an officer making a kicking motion inside the closet's doorframe. (Dean's Br. at 42 (citing J.A. Vol. II, C144@11:26:14-11:26:24)) Instead, in the footage, officers appear to be kicking boxes as they slide out of the closet. In any regard, like many of Dean's assertions on appeal about what this Court should infer from the footage, Dean's above-noted assertion about what the video shows constitutes speculation, at best. (Dean's Br. at 36, 42)

Dean also argues that Sergeant Jones' averment that Dean hit the right side of his head on the protruding shelf in the closet was inconsistent with Dean's medical

evidence showing most of his injuries were to the left side of his face. But Sergeant Jones also noted that Dean hit his face on the concrete floor J.A. 25, which could have of course caused the injuries Dean sustained to left side of his face. Notably, the photographs of Dean following the incident show injuries to both sides of his face. J.A. 73-74.

At bottom, the application of the Whitley factors to Dean's evidence demonstrated that Sergeant Jones used force in a good faith effort to restore discipline and order and to ensure safety. Accordingly, the District Court was correct in determining there was no constitutional violation, concluding Sergeant Jones was entitled to qualified immunity, and granting summary judgment in defendants' favor.

E. Even Assuming that the District Court Erred in Finding No Constitutional Violation, Its Order Granting Summary Judgment on Qualified Immunity Grounds Was Still Correct.

As discussed above, the District Court correctly concluded Sergeant Jones was entitled to qualified immunity because his actions did not violate the Eighth Amendment. J.A. 167. Even if this Court concludes Dean can establish a constitutional violation, the District Court's ultimate conclusion that Sergeant Jones was entitled to qualified immunity is still correct because the clearly established law did not prohibit Sergeant Jones' conduct.

Dean has failed to cite, and undersigned counsel is unable to find, any clearly established law dictating that an officer in Sergeant Jones' position, faced with a

violent, volatile, and unpredictable inmate, would understand the use of force Dean alleges the officer undertook was illegal. Nor is this "an obvious case exhibiting a violation of a core [Eighth] Amendment right." Betton, 942 F.3d at ___, 2019 U.S. App. LEXIS 33034, *19. Accordingly, Sergeant Jones was entitled to qualified immunity. As such, the District Court's order granting summary judgment on that ground is correct, even if the court erred in not finding a constitutional violation. See Stern, 603 F.2d at 1093.

The District Court was correct in granting defendants' summary judgment motion on Dean's claim alleging that Sergeant Jones used excessive force against him in the janitor's closet in violation of the Eighth Amendment.

CONCLUSION

Defendants respectfully request that the Court affirm the District Court's order granting summary judgment.

Respectfully submitted, this the 23rd day of December, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on 23 December 2019, I electronically filled the foregoing with the Clerk of Court using the CM/ECF system which will send notification to the following:

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Respectfully submitted this the 23rd day of December, 2019.

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