No. 22-11738

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Germaine Smart,
Plaintiff-Appellant,

v.

Ronald England, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Case No. 4:19-cv-00471-MHH-JHE

BRIEF OF PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, the NAACP Legal Defense and Educational Fund, Inc., states that it has no parent corporation, nor has it issued shares or debt securities to the public. The organization is not a subsidiary or affiliate of any publicly owned corporation, and no publicly held corporation holds ten percent of its stock. Counsel hereby certifies that the following is a complete list of interested persons:

1. Alabama Attorney General's Office, *Attorneys for Defendants-Appellees*
2. Albritton, Benjamin H., *Attorney for Defendants-Appellees*
3. Baker, Larry, *Defendant-Appellee*
4. Chandran, Ashok, *Attorney for Plaintiff-Appellant*
5. England, John H., *Magistrate Judge*
6. England, Ronald, *Defendant-Appellee*
7. Haikala, Madeline H., *District Court Judge*
8. Kemmitt, Christopher, *Attorney for Plaintiff-Appellant*
9. LaCour Jr., Edmund G., *Alabama Solicitor General*
10. Malone, Gary, *Defendant-Appellee*

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15. Smart, Germaine, *Plaintiff-Appellant*
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant respectfully requests that the Court hear oral argument in this case. The case implicates important questions regarding the protection of federal constitutional rights and warrants oral argument to ensure their full and fair resolution.

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INTRODUCTION

On or about the evening of September 6, 2016, Plaintiff Germaine Smart was lying on the bunk in his cell when correctional officers entered his cell block to search a neighboring cell. Although Mr. Smart had done nothing wrong, Defendant England ordered Mr. Smart to strip down to his boxer shorts and then handcuffed Mr. Smart's hands behind his back. After Mr. Smart was restrained, Defendant England frisked him and then "began to fondle [Mr.] Smart['s] penis and scrotum." Doc 1 - Pg 5. Mr. Smart shouted in protest, and Defendant England "snickered" and then "stopped groping [Mr.] Smart['s] genitals." *Id.*

Upset by the assault, Mr. Smart filed a formal complaint with Defendant Malone. Mr. Smart's allegations were supported by two incarcerated witnesses and corroborated, in part, by a corrections official who admitted hearing Mr. Smart protest the assault. Nonetheless, the prison official assigned to investigate Mr. Smart's complaint credited the testimony of Defendant England—without explanation—over the testimony of the three incarcerated men.

Two days after the investigation deemed Mr. Smart's complaint "unfounded," Defendant England retaliated against Mr. Smart, filing a

disciplinary report against him based on the sexual assault complaint. Although the Alabama Department of Corrections ("ADOC") Administrative Regulation 454 § V(H)(2) (hereinafter "ADOC AR 454") declared that "an inmate reporting sexual abuse . . . shall not be issued a disciplinary report for lying based solely on the fact that their allegations were unfounded," Defendant England admitted that the disciplinary report was based entirely on the "unfounded" finding. His report explained: "Disposition Showed this case 'Unfounded and Closed'. Therefore, you are being charged for Lying." Doc 41-4 - Pg 1.

At the unauthorized hearing that followed Defendant England's unauthorized disciplinary report, Defendant Baker found Mr. Smart guilty of lying and recommended that Mr. Smart be placed in disciplinary segregation for 21 days and lose his right to the canteen, telephone, and visitors for 30 days. Defendant Malone approved the punishment that violated the ADOC's own regulations.

Proceeding pro se, Mr. Smart sued Defendant England—and later amended his complaint to add Defendants Baker and Malone—alleging that Defendant England "retaliated against the Plaintiff . . . for reporting the incident of sexual assault, by falsely accusing, and charging Smart in

a prison disciplinary report with violating Rule 512 (Lying) . . . .” Doc 1 - Pg 6. On summary judgment, the District Court ruled that Mr. Smart had presented sufficient evidence to advance a claim that Defendants had retaliated against him in violation of the First Amendment. Doc 57 - Pg 7. The court further ruled that “reasonable officers in the [D]efendants’ positions would know that they violated ADOC [AR] 454” by charging and convicting Mr. Smart of lying. Doc 57 - Pg 6. Yet the court ultimately granted the Defendants summary judgment on qualified immunity grounds, ruling that no reasonable factfinder could conclude Defendants’ violation of ADOC AR 454 violated clearly established federal law.

In so doing, the District Court erred in three separate respects. First, because ADOC AR 454 expressly prohibited Defendants from charging and punishing Mr. Smart for “Lying,” the Defendants acted outside of their discretionary authority when they did so. Defendants who act outside their discretionary authority cannot invoke the defense of qualified immunity and thus the District Court erred by ruling that Defendants were entitled to qualified immunity. Because the District Court ruled for Mr. Smart on the merits of his First Amendment claim,

it should have denied the Defendants' motion for summary judgment and allowed this case to proceed to discovery and then trial.

Second, the District Court erred by ruling that Defendants were entitled to qualified immunity because several binding, materially similar cases clearly established the unconstitutionality of the Defendants' conduct. By the time of Defendants' misconduct in 2017, this Circuit had repeatedly held that "First Amendment rights to free speech and to petition the government for a redress of grievances are violated when a prisoner is punished for filing a grievance concerning the conditions of his imprisonment." *Boxer X v. Harris*, 437 F.3d 1107, 1112 (11th Cir. 2006), *abrogated in part on other grounds by Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam). That is precisely what a reasonable jury could determine happened here.

Third, even if none of this Circuit's cases were sufficiently factually analogous to establish the law, the District Court still erred by granting Defendants qualified immunity because the unconstitutional character of their conduct was obvious in 2017. By that point, this Court had issued at least eight published opinions stating that prison officials could not punish incarcerated individuals for filing grievances. Furthermore,

ADOC AR 454 provided unusually specific guidance about retaliation following a sexual assault complaint, forbidding prison officials from charging incarcerated individuals with "lying" based solely on an investigative determination that the claim was "unfounded." Between the legal principles set out in the decisions of this Court and the specific dictates of ADOC AR 454, no reasonable official would think that they could punish Mr. Smart for lying because he filed a sexual assault grievance that an investigator deemed "unfounded."

The District Court's contrary ruling was error, and this Court should reverse.

STATEMENT OF JURISDICTION

The District Court properly exercised jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. § 1331, as those claims arise under 42 U.S.C. § 1983 and the First Amendment to the United States Constitution. In an opinion and order dated April 26, 2022, the District Court entered summary judgment in favor of Defendants on all claims. That order constituted a final judgment over which this Court has jurisdiction pursuant to 28 U.S.C. § 1291. Plaintiff timely filed a notice of appeal on May 23, 2022, properly invoking this Court's jurisdiction.

STATEMENT OF ISSUES PRESENTED

1. ADOC AR 454 states that "an inmate reporting sexual abuse" "shall not be issued a disciplinary report for lying based solely on the fact that their allegations were unfounded." Did the Defendants act outside their discretionary authority—and therefore lose their entitlement to qualified immunity—when they violated this rule and issued Mr. Smart a disciplinary report and then punished him for lying based solely on the fact that an ADOC investigation deemed his allegation unfounded?

2. This Circuit has decided several cases holding that prison guards violate the First Amendment when they punish incarcerated individuals for filing grievances concerning the conditions of their confinement. In light of those cases, did the District Court err by granting Defendants qualified immunity on the ground that no cases from the Eleventh Circuit clearly established that Defendants violated federal law when they placed Mr. Smart in disciplinary segregation to punish him for filing a complaint about Defendant England sexually assaulting him?

3. Was the Defendants' violation of Mr. Smart's First Amendment rights also clearly established by the confluence of overwhelming precedent forbidding such retaliation and ADOC AR 454,

an unambiguous state regulation that prohibited the Defendants' exact conduct?

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[1]

A. Defendant England Sexually Assaults Mr. Smart.

Plaintiff Germaine Smart is a 47-year-old man who has been incarcerated at the St. Clair Correctional Facility,[2] a prison operated by the Alabama Department of Corrections, since December 12, 2005. At about 9:00 p.m. on the evening of September 6, 2016, as Mr. Smart was lying down in his assigned cell, he heard several other people on the block stating that correctional officers were entering the cell block. Doc 1 - Pg 5. Defendant Gary Malone had ordered Defendant Ronald England to

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[1] Because Mr. Smart's claims were decided on the Defendants' motion for summary judgment, the facts must be taken in the light most favorable to Mr. Smart, the non-movant. Those facts include the allegations in Mr. Smart's complaint, which he swore to under penalty of perjury. *Sconiers v. Lockhart*, 946 F.3d 1256, 1262 (11th Cir. 2020).

[2] "St. Clair is the most violent prison in Alabama, which has the country's highest homicide rate . . . ." Shaila Dawan, *Inside America's Black Box: A Rare Look at the Violence of Incarceration*, N.Y. Times, Mar. 30, 2019, https://www.nytimes.com/2019/03/30/us/inside-americas-black-box.html; *see also* Campbell Robertson, *An Alabama Prison's Unrelenting Descent Into Violence*, N.Y. Times, Mar. 28, 2017, https://www.nytimes.com/2017/03/28/us/alabama-prison-violence.html ("In recent years, even by the standards of one of the nation's most dysfunctional prison systems, St. Clair stood out for its violence.").

search the block to determine if another prisoner, Frankie Johnson, had any "escape device or equipment to compromise his cell door." Doc 41-1 - Pg 1. Defendant England came with four other correctional officers who spread across the block upon entry: Lieutenant Russell Jones, Officer Justin Guthery, Officer Brandon Burns, and Officer Cameron Smith. Doc 41-3 - Pg 2. Although Defendant England had been sent to the cell block to search Mr. Johnson's cell, he went to Mr. Smart's cell first. Doc 1 - Pg 5; Doc 41-1 - Pg 1 (noting that Mr. Smart is in neighboring cell).

Defendant England knocked on the cell door and, without explanation, ordered Mr. Smart to strip down to his boxers to be frisked. Doc 1 - Pg 5. After Mr. Smart was dressed in nothing but his underwear, Defendant England handcuffed him behind his back and instructed him to exit the cell. Doc 1 - Pg 5. Mr. Smart complied. Doc 1 - Pg 5. Defendant England moved behind Mr. Smart and began to frisk him around his boxers. Doc 41-3 - Pg 2; Doc 1 - Pg 5. This included "checking [Mr. Smart's] groin area, genital area and waistband area." Doc 41-3 - Pg 1. He then checked Mr. Smart's "buttock area." Doc 41-3 - Pg 2.

The parties sharply dispute what happened next. According to Mr. Smart's testimony, Defendant England "began to fondle [Mr.] Smart['s]

penis and scrotum." Doc 1 - Pg 5. Shocked, Mr. Smart protested, "What the fuck are you doing grabbing my dick and nuts?" Doc 1 - Pg 5. Defendant England "snickered" and then "stopped groping [Mr.] Smart['s] genitals." Doc 1 - Pg 5. In contrast, Defendant England testified that "[a]t no time did [he] fondle the groin of [Mr.] Smart, nor did [he] sniker [sic] at [Mr.] Smart for his false accusations." Doc 41-1 - Pg 2. Defendant England claimed that Mr. Smart "began acting Surreptitious [sic]" at the beginning of the search and that England then "completed a procedural pat search as trained," at which point Mr. Smart began "making loud gestures and accusations that [Defendant England] had searched him incorrectly." Doc 41-1 - Pg 1.

B. Mr. Smart Files a Complaint.

On September 8, 2016,[3] Mr. Smart made a formal complaint to Defendant Malone, the captain on the unit, accusing Defendant England

[3] Defendants' submissions are, at times, conflicting about the dates on which the assault and the report occurred. For example, the Intelligence and Investigations Division ("I&I") investigation report states that the assault took place on September 8, 2016, and Mr. Smart reported it on September 9, 2016. The subsequent disciplinary hearing report, however, is consistent with Mr. Smart's recollection that the assault occurred on September 6, 2016, and was reported on September 8, 2016.

of sexual misconduct for the inappropriate fondling of his genitals. Doc 1 - Pg 6. Defendant Malone reported the complaint to the ADOC Inspections and Investigations Division, and an investigator was assigned to review the complaint. Doc 1 - Pg 6. The investigator began by accepting a written statement from Mr. Smart. Doc 41-3 - Pg 1. In that statement, Mr. Smart identified three other witnesses: Frankie Johnson and Timothy Gayle, who occupied the cells directly next to and across from Mr. Smart's and had a clear view of the assault, and Officer Smith, who overheard Mr. Smart's contemporaneous protest. Doc 1 - Pg 6; Doc 41-3 - Pg 1.

The investigator then interviewed Defendant England and Mr. Smart on October 7, 2016. Doc 41-3 - Pg 1. Mr. Smart restated his allegations, which remained consistent with his written statement. Doc 41-3 - Pg 1. Defendant England admitted that he "check[ed] [Mr. Smart's] groin area, genital area and waistband area" but contended that he "was doing his job and not for sexual gratification." Doc 41-3 - Pg 1. On October 11, 2016, the investigator interviewed Mr. Johnson and Mr. Gayle, the two neighbors who witnessed the assault. Doc 41-3 - Pg 2. Both corroborated Mr. Smart's allegations, testifying that they directly

observed Defendant England grab Mr. Smart's penis, "massag[ing]" and "pull[ing]" it. Doc 41-3 - Pg 2.

Three months later, on January 12, 2017, the investigator interviewed Lieutenant Jones and Officer Guthery, two of the correctional officers who had been present on September 6. Both testified that they were on a different level of the block at the time Defendant England frisked Mr. Smart, approximately eight to ten feet away. Doc 41-3 - Pg 2. The investigator's summary of these interviews—just a few sentences long—does not indicate whether either Lieutenant Jones or Officer Guthery observed the assault. Doc 41-3 - Pg 2. A month after that, on February 24, 2017, the investigator interviewed Officer Smith. While the summary of Officer Smith's interview does not reflect whether Officer Smith observed the fondling, Officer Smith did hear Mr. Smart "be loud and boisterous," Doc 41-3 - Pg 2—which, as he later clarified, referred to Mr. Smart's contemporaneous protest about the assault. Doc 41-4 - Pg 10.

The I&I investigator did not interview Officer Burns, the fifth officer who was present.[4] Two weeks after interviewing Officer Smith, on March 6, 2017, the investigator issued a one-sentence disposition of the complaint, marking it as "unfounded" because "Sergeant England properly patted down [Mr.] Smart over the outside of his boxer shorts, following Standard Operating Procedure #110 for performing a Shakedown/Pat Search or Frisk."[5] Doc 41-3 - Pg 3. That disposition was reviewed and approved one week later, on March 13, 2017. Doc 41-3 - Pg 3.

C. Defendant England Charges Mr. Smart With "Lying" Solely Because His Grievance Was Deemed Unfounded.

Despite admitting that he had checked Mr. Smart's "groin area, genital area and waistband area," Doc 41-3 - Pg 1, Defendant England

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[4] In the related context of inmate-on-inmate sexual assault allegations, the Department of Justice reported that "ADOC's sexual abuse investigations are incomplete and inadequate." U.S. Dep't of Just. C. R. Div., *Investigation of Alabama's State Prisons for Men*, at 41 (Apr. 2, 2019), available at justice.gov/crt/case-document/file/1149971/download.

[5] The Department of Justice also reported that ADOC investigations almost never sustained these complaints: "In its Survey of Sexual Victimization data for 2017, ADOC reported substantiating only 1 out of 162 allegations of 'inmate-on-inmate nonconsensual sexual act' and only 1 out of 65 allegations of 'inmate-on-inmate abusive sexual contact.'" *Id.* at 35.

served a disciplinary report on Mr. Smart charging him with "512 – Lying."[6] Doc 41-4 - Pg 1. Defendant England stated the basis for the charge—which he filed just two days after the final approval of the I&I investigation—in two sentences: "Disposition Showed this case 'Unfounded and Closed'. Therefore, you are being charged for Lying." Doc 41-4 - Pg 1. The officer who served Mr. Smart with the report informed Mr. Smart that a disciplinary hearing had been scheduled to take place before Defendant Larry Baker five days later—March 20, 2017. Doc 41-4 - Pg 2. Mr. Smart refused to sign the disciplinary charge but denied guilt and indicated that he wished to have three witnesses testify at the hearing: Frankie Johnson, Timothy Gayle, and Officer Smith. Doc 41-4 - Pg 2–3.

Before the hearing, Mr. Smart submitted four questions for his three witnesses: two to Mr. Gayle, one to Mr. Johnson, and one to Officer Smith. Doc 41-4 - Pg 10. In responding to those questions, both Mr.

[6] ADOC Regulation 403 contains a list of all rules which can support issuance of a disciplinary charge. Rule 512 defines the offense of "lying" as "[g]iving false testimony or making a false charge to an employee with the intent to deceive the employee or to prejudice another person." Ala. Dep't of Corr., *Administrative Regulation 403: Procedures for Inmate Rule Violations* (Aug. 1, 2024), http://doc.state.al.us/docs/AdminRegs/AR403-2.pdf.

Johnson and Mr. Gayle reaffirmed their prior statements that they personally observed Sergeant England "grab" and "fumble" with Mr. Smart's genitals. Doc 41-4 - Pg 10. Officer Smith also confirmed that he heard Mr. Smart's contemporaneous protestations "about Sergeant England grabbing and fondling with [Mr. Smart's] penis." Doc 41-4 - Pg 10. At the hearing, Mr. Smart reaffirmed his initial statement to investigators. Doc 41-4 - Pg 7.

In support of the charge, Defendant England provided three sentences of testimony: "On September 9, 2016, I Sergeant Ronald England conducted a pat search of [Mr.] Germaine Smart . . . . After the search, [Mr.] Smart alleged that I Sgt. England grabbed his genitals inappropriately. I&I conducted an investigation into the incident and found that the allegations were unfounded." Doc 41-4 - Pg 7. The record does not suggest that the I&I investigator's report was submitted to Defendant Baker. Doc 49-1 - Pg 1. Nor did Defendant Baker elicit testimony from any of the other officers who had been on the block during the assault.

At the end of the hearing, based on Defendant England's sworn testimony and the I&I determination, Defendant Baker made a single

factual finding: "[Mr.] Smart['s] allegation against Sgt. England is unfounded." Doc 41-4 - Pg 3. And based on that factual finding, Defendant Baker found Mr. Smart guilty of lying. Doc 41-4 - Pg 3. He recommended that Mr. Smart be placed in disciplinary segregation for 21 days and lose telephone, canteen, and visitation privileges for 30 days. Doc 41-4 - Pg 3. That same day, Defendant Malone approved the hearing determination and adopted Defendant Baker's recommended sentence. Doc 41-4 - Pg 3. Mr. Smart stated that this was an unusually fast approval and imposition of sentence. Doc 1 - Pg 7.

II. PROCEDURAL HISTORY

On March 21, 2019, Mr. Smart filed a *pro se* Verified Complaint against Defendant England,[7] raising two claims. Doc 1. First, Mr. Smart alleged that Defendant England's conduct in grabbing and fondling Mr. Smart's genitals violated the Eighth Amendment. Doc 1 - Pg 5–6. Second, Mr. Smart alleged that Defendant England's decision to file a disciplinary charge against Mr. Smart constituted retaliation in violation

[7] Mr. Smart also named ADOC as a defendant in his initial pleading. The District Court granted summary judgment to ADOC, finding that it was a state entity entitled to sovereign immunity. That portion of the District Court's order is not before this Court.

of the First Amendment. Doc 1 - Pg 6–7. Mr. Smart attached the disciplinary hearing report to his complaint. Doc 1 - Pg 8–10.

Pursuant to the Prison Litigation Reform Act, Mr. Smart's pleading was referred to a Magistrate Judge for frivolity screening. On May 22, 2020, the Magistrate Judge recommended dismissal of Mr. Smart's complaint, not because any of his claims was frivolous, but because, in the Magistrate Judge's view, he failed to state a claim upon which relief could be granted. The Magistrate Judge held that Mr. Smart's Eighth Amendment claim was time-barred by the applicable two-year statute of limitations, and that Mr. Smart's First Amendment claim was barred because of the outcome of his administrative proceedings on the charge of lying. Doc 10 - Pg 5–8.

On June 25, 2020, Mr. Smart filed an objection to the dismissal of his First Amendment claim. Doc 13. There, he cited ADOC AR 454 § V(H)(2), which details the narrow circumstances under which inmates reporting sexual misconduct may be disciplined for lying. Doc 13 - Pg 3. As relevant here, those regulations unequivocally state that "an inmate reporting sexual abuse . . . shall not be issued a disciplinary report for lying based solely on the fact that their allegations were unfounded. . ."

ADOC AR 454 § V(H)(2)(c); Doc 13 - Pg 3. This unambiguous proscription, Mr. Smart argued, "allowed Defendant Ronald England no leeway or authority to do the exact opposite." Nor did the regulation "give authority to support . . . Lieutenant Larry R. Baker and Captain Gary Malone in finding [Mr. Smart] guilty of the illegal disciplinary process." Doc 13 - Pg 3.

On March 5, 2021, the District Court sustained the objections and allowed Mr. Smart's retaliation claim to proceed. In relevant part, the District Court reasoned that the discipline against Mr. Smart was arbitrary, since Defendant England's charge rested entirely on conduct protected by ADOC AR 454. Doc 15 - Pg 7. The District Court then referred Mr. Smart's retaliation claim back to the Magistrate Judge for further discovery.

On March 8, 2021, the Magistrate Judge directed Defendant England to file a special report and "sworn statement[s] of all persons having knowledge of the facts relevant to the claims or any subsequent investigation undertaken with respect to the claims." Doc 16 - Pg 3–4. That report, the Magistrate Judge's order continued, could be treated as a motion for summary judgment. Doc 16 - Pg 7. The Magistrate Judge

barred the parties from engaging in further discovery absent express leave of the court. Doc 16 - Pg 5. That order was mailed, along with Mr. Smart's Verified Complaint, to Defendant England.

On April 1, 2021, Mr. Smart moved to amend his complaint to add Defendant Baker and Defendant Malone as Defendants. Doc 21. On April 9, 2021, Mr. Smart sought leave of the court to issue two document requests, both seeking information about prior lawsuits or disciplinary proceedings in which Defendant England had been involved. Doc 22, Doc 23. This evidence was needed, Mr. Smart asserted, because "there are previous misconduct of sexual acts in [Defendant] England['s] work history profile that will show . . . [Defendant] England ha[s] receive[d] disciplinary action for sexual misbehavior towards a former [ADOC] employee, who[se] penis [Defendant] England fondle[d] with." Doc 23 - Pg 1–2. The Magistrate Judge granted Mr. Smart's amendment but denied his request to conduct discovery. Doc 25, Doc 27.

On July 21, 2021, Defendant England and Defendant Malone filed their special report in response to the Magistrate Judge's order, asserting qualified immunity with respect to Mr. Smart's retaliation claim. Doc 41. In support of their motion, they provided: (1) a copy of the disciplinary

hearing report, which Mr. Smart had already appended to his Verified Complaint; (2) a copy of the I&I investigation report; and (3) written affidavits from Defendant England and Defendant Malone. Doc 41-1, Doc 41-2, Doc 41-3, Doc 41-4. They did not provide any testimony from Lieutenant Jones, Officer Guthery, or Officer Smith. Mr. Smart opposed the motion on August 27, 2021, again citing the unambiguous language of ADOC AR 454 § V(H)(2). Doc 42. Defendant Baker also moved for summary judgment on qualified immunity grounds, raising the same arguments as Defendants England and Malone. Doc 49. In support of that motion, he too submitted his own affidavit without providing affidavits from the other officers present. Doc 49-1. Mr. Smart opposed the motion, though his opposition was not docketed until after the Magistrate Judge issued a report and recommendation,[8] again arguing

[8] On November 21, 2021, the Magistrate Judge entered an order directing Mr. Smart to respond within 21 days. Doc 50. That order did not reach Mr. Smart, who had been transferred by ADOC to W.E. Donaldson Correctional Facility. On January 31, 2021, the Magistrate Judge issued another order directing Mr. Smart to update his address and file a response to Lieutenant Baker's motion within 14 days under threat of dismissal. Doc 51. Mr. Smart sent his response opposing Lieutenant Baker's motion on February 12, 2022, but it was not docketed until February 22, 2022. Doc 53. The Magistrate Judge entered his report and recommendation on February 16, 2022—after Mr. Smart had mailed

that "the mandatory language [of ADOC AR 454 § V(H)(2)] . . . [did not] allow defendant England and Defendant Baker [] leeway or authority" to issue the disciplinary charges. Doc 53 - Pg 4.

On February 16, 2022, the Magistrate Judge issued another report and recommendation. There, the Magistrate Judge found that Defendant England did not dispute that his only basis for charging Mr. Smart with lying was the I&I investigation's conclusion that Mr. Smart's allegations were unfounded. Doc 52 - Pg 12. And the Magistrate Judge further held that the ADOC AR 454 prevented Defendant England from filing the charges for any legitimate purpose, bolstering the inference that Defendant England did so in retaliation. Doc 52 - Pg 12. Thus, the Magistrate Judge determined, Mr. Smart's ultimate conviction on the charge of lying did not preclude his First Amendment retaliation claim.

Nonetheless, the Magistrate Judge recommended that Defendants England, Malone, and Baker be granted qualified immunity. The Magistrate Judge did not analyze whether Defendants established that they were exercising discretionary authority—the threshold inquiry in

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his response but before it had been filed on the docket by the clerk of court.

assessing qualified immunity. Rather, the Magistrate Judge mistakenly claimed that "[Mr.] Smart does not dispute that [Defendants] were acting within the scope of their discretionary authority when they participated in the disciplinary proceedings," Doc 52 - Pg 14, ignoring Mr. Smart's repeated argument that ADOC regulations "allowed [them] no leeway or authority" to initiate or conduct the proceedings. Doc 13 - Pg 3; *accord* Doc 53 - Pg 4. Then, in a two-paragraph analysis, the Magistrate Judge stated that no Supreme Court or Eleventh Circuit case law addressed the specific context of retaliatory filing of disciplinary charges against a person who files a grievance. Doc 52 - Pg 14. Rather, the Magistrate Judge asserted that Mr. Smart could only identify a "general principal [sic]" that "prison officials are prohibited from retaliating against an inmate for exercising his constitutional rights," which, in the Magistrate's view, did not apply with obvious clarity to Defendant England's conduct. Doc 52 - Pg 15 The Magistrate Judge did not separately analyze the liability of Defendants Malone or Baker.

Mr. Smart filed objections to the report and recommendation on March 28, 2022. In an opinion and order dated April 26, 2022, the District Court overruled those objections and granted summary judgment to

Defendants, largely adopting the Magistrate Judge's reasoning. While the District Court found that "the evidence relating to the merits of [Mr. Smart's] retaliation claim is persuasive as is the logic of his argument concerning notice [of their unlawful conduct] to officers by virtue of ADOC [AR] 454," it nonetheless determined that absent case law from the Supreme Court or Eleventh Circuit, Mr. Smart had not carried his burden for qualified immunity purposes. Doc 57 - Pg 7.

Mr. Smart timely filed a notice of appeal on May 23, 2022.

SUMMARY OF THE ARGUMENT

The District Court granted summary judgment to the Defendants on qualified immunity grounds despite ruling that: (a) Defendants had violated Mr. Smart's First Amendment rights when they charged and convicted him of an unwarranted disciplinary infraction in retaliation for Mr. Smart filing a sexual assault grievance against Defendant England, *see* Doc 57 - Pg 2–3 (noting that "the Magistrate Judge's analysis of the merits of Mr. Smart's claim is favorable to Mr. Smart," and "[t]he Court finds no error in that analysis"); and (b) "reasonable officers in the defendants' position would know that" ADOC AR 454 prohibited them from charging and convicting Mr. Smart of "lying" for filing his grievance,

see id. at 6. The Court's First Amendment ruling was correct, but its qualified immunity ruling erred for two separate reasons.

First, Defendants were ineligible for the protections of qualified immunity because they acted outside their discretionary authority when they charged, convicted, and punished Mr. Smart for "lying" about Defendant England's sexual assault. Qualified immunity protects government officials from liability only when the officials perform duties within the scope and authority of their job. Because ADOC policy specifically bars officers from issuing a disciplinary infraction for "lying" about a sexual assault based solely on the allegation being deemed "unfounded," and because Defendants concededly did just that, they acted beyond the scope of their authority and cannot invoke qualified immunity. Thus, the District Court should have rejected Defendants' motions for summary judgment after determining that Mr. Smart adduced sufficient evidence to state a First Amendment claim against them.

Second, even if Defendants were engaged in a "discretionary function," they would still not be entitled to qualified immunity. When a Defendant has acted within his discretionary authority, a Plaintiff can

still establish that qualified immunity does not apply by showing that "the officer's conduct amounted to a constitutional violation" and that the Plaintiff's "right was 'clearly established' at the time of the violation." *T.R. by and through Brock v. Lamar Cnty. Bd. of Educ.*, 25 F.4th 877, 882–883 (11th Cir. 2022).

Here, as the Magistrate Judge determined and the District Court affirmed, Defendants violated Mr. Smart's First Amendment rights. "'First Amendment rights to free speech and to petition the government for a redress of grievances are violated when a prisoner is punished for filing a grievance concerning the conditions of his imprisonment.'" Doc 52 - Pg 11 (quoting *Douglas v. Yates*, 535 F.3d 1316, 1321 (11th Cir. 2008) (internal quotations and citation omitted)). That is precisely what Mr. Smart alleged here: Mr. Smart petitioned the government for redress by filing a grievance about Defendant England's sexual assault, and the three Defendants punished him for doing so by charging and convicting him of "lying" and placing him in disciplinary segregation, among other things.

Furthermore, Mr. Smart's right to be free from such retaliation was clearly established at the time of Defendants' conduct. This Court has

decided myriad cases with materially indistinguishable facts stretching back decades. And even if this Court viewed those cases as insufficiently similar—which they are not—the combination of this Court's decisions and the unequivocal dictates of ADOC AR 454 rendered the Defendants' violation obvious to any reasonable state official.

STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment de novo. *See Burton v. Tampa Hous. Auth.*, 271 F.3d 1274, 1276–77 (11th Cir. 2001). In doing so, this Court "accept[s] [Mr. Smart's] version of the facts as true, affording all justifiable inferences to [him]." *Sconiers v. Lockhart*, 946 F.3d 1256, 1260 (11th Cir. 2020). Further, "[b]ecause [Mr. Smart] proceeded pro se in the district court, [this Court] liberally construe[s] his pleadings, *id.* at 1262, including his "objection to the R & R." *Jemison v. Mitchell*, 380 F. App'x 904, 907 (11th Cir. 2010); *see also Salley v. Goldstein*, 727 F. App'x 981, 984 & n.4 (11th Cir. 2018). This Court must also ensure that the district court "conduct[] a true de novo review of the objected-to portions of the [Magistrate's] report." *Jeffrey S. by Ernest S. v. State Bd. of Educ. of State of Ga.*, 896 F.2d 507, 512–13 (11th Cir. 1990). The "de novo review requirement is essential to the

constitutionality of [28 U.S.C.] Section 636." *Id.* at 512. For "unobjected-to factual and legal conclusions" to a "magistrate judge's report and recommendation," this Court "may still review for plain error if necessary in the interests of justice." *Preston v. CSX Transp., Inc.*, No. 21-11601, 2022 WL 973418, at *1 (11th Cir. Mar. 31, 2022) (quoting 11th Cir. R. 3-1) (internal quotations omitted).

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

A. Because Defendants Acted Outside the Scope of Their Discretionary Authority by Violating Unambiguous ADOC Regulations, They Cannot Invoke Qualified Immunity.

Qualified immunity protects government officials from suit "only when exercising powers that legitimately form a part of their jobs." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1266–67 (11th Cir. 2004). In order to prove that challenged conduct "legitimately form[s] a part of their jobs," Defendants must establish that they were "(a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within [their] power to utilize." *Id.* at 1265, 1267. "If, *and only if*, [Defendants] do[] that will the burden

shift to the plaintiff to establish that the defendant violated clearly established law." *Est. of Cummings v. Davenport*, 906 F.3d 934, 940 (11th Cir. 2018) (emphasis in original) (citations omitted). Thus, Defendants bore the initial burden to show *both* that issuing Mr. Smart a disciplinary infraction for "lying" involved a job-related goal *and* that doing so based solely on a finding that his sexual assault grievance was "unfounded" was within their power. Defendants failed to meet this burden because the mandatory language of ADOC AR 454 explicitly prohibited the disciplinary charge and the ensuing disciplinary proceeding.

Nevertheless, the District Court granted summary judgment to Defendants by assuming that they had acted within the scope of their discretionary authority and then ruling that Mr. Smart failed to present clearly established law; even though the District Court agreed that Defendants violated Mr. Smart's First Amendment rights. Doc 57 - 2–7. In that decision, the District Court simply assumed that Defendants had acted with discretionary authority. Doc 57 - Pg 3–5. That assumption was wrong in two related respects. First, Defendants did not even argue—much less establish—that they were acting within their discretionary authority when it was their burden to do so. By failing to even argue that

they were acting within the scope of their authority, Defendants by definition did not meet their burden. Second, even if Defendants had made the argument, they acted entirely outside their discretionary authority by issuing Mr. Smart a disciplinary charge for "lying" and finding him guilty of that charge because he had filed a grievance that was deemed "unfounded." Doc 57 - Pg 5. Had the District Court decided the discretionary authority issue correctly, it would have denied Defendants' motion for summary judgment because, as the District Court ruled, Defendants violated Mr. Smart's First Amendment rights. Doc 57 - Pg 2–3.

As this Court has repeatedly held, officials are not entitled to qualified immunity when they pursue legitimate job-related goals through means that fall outside of their authority. *See Davenport*, 906 F.3d at 941–42 (denying qualified immunity to prison warden pursuing the legitimate job-related goal of "decision-making related to the provision of medical care of inmates" by entering a do-not-resuscitate order for an inmate, which he lacked authority to do under Alabama law); *Holloman*, 370 F.2d at 1283 (denying qualified immunity to teacher that pursued "the legitimate job-related function of fostering her students'

character education" through classroom prayer because prayer "is not within the range of tools among which teachers are empowered to select in furtherance of their pedagogical duties"); *Lenz v. Winburn*, 51 F.3d 1540, 1547 (11th Cir. 1995) (denying qualified immunity to guardian ad litem where she pursued the legitimate job-related goal of acting in her assigned child's best interest by providing care directly to the child because acting "as the child's caretaker or guardian" fell "outside the scope of her authority").

As revealed by Defendants' submissions, Defendants did not (and could not) satisfy their burden of proving that they acted within their discretionary authority—and did not even argue that they met this burden. Doc 49; Doc 41; *see also Davenport*, 906 F.3d at 940. Although Defendants recognized in passing that to "obtain a dismissal on qualified immunity, a government official must establish that he was acting within the scope of his discretionary authority when the alleged act occurred" Doc 41; Doc 49 - Pg 9–10) (internal quotes omitted) (citation omitted), their submissions said nothing more. They did not advance any argument or put forth any evidence that they were acting within the scope of their authority, and therefore did not meet the threshold burden that they

needed to meet to "burden shift to the plaintiff to establish that the defendant violated clearly established law." *Davenport*, 906 F.3d at 940 (citations omitted).

Even if they had raised the argument, Defendants would have fallen short of their burden because ADOC AR 454, "INMATE SEXUAL ABUSE AND HARASSMENT (Prison Rape Elimination Act [PREA]," unequivocally states that an incarcerated person reporting sexual harassment "shall not be issued a disciplinary report for *lying* based solely on the fact that their allegations were *unfounded*." Doc 15 - Pg 4 (quoting ADOC AR 454, § V(H)(2)(c)) (emphasis added).[9] Yet the disciplinary report issued to Mr. Smart by Defendant England expressly admitted that the only basis for charging Mr. Smart with "lying" was the I&I investigator's conclusion that Mr. Smart's claim was "unfounded" Doc 52 - Pg 12; Doc 57 - Pg 5: "You inmate Germaine Smart B/M 193127 made an allegation against Sergeant Ronald England on 09/09/2016. Further [i]nvestigation by I & I Investigator George Bynum completed . . . on 03/06/2017. Disposition [s]howed this case 'Unfounded and Closed.'

[9] Mr. Smart cited ADOC Standard Operating Procedure 229, (Doc. 42 - Pg 10–12), which was later revised and listed as ADOC AR 454. (Doc. 15 - Pg 3 n. 1).

Therefore, you are being charged for Lying." Doc 41-4 - Pg 1). And after Defendant Baker conducted a disciplinary hearing on the charge of "lying," his lone factual finding was that "inmate Smart [sic] allegation against Sgt. England is unfounded" and on that basis he deemed Mr. Smart guilty of "lying." Doc 41-4 - Pg 3.

Thus, as Mr. Smart explained in several pleadings (*see, e.g.*, Doc 13 - Pg 3; Doc 42 - Pg 7–8, 10–11; Doc 53 - Pg 4, 7–8), Defendants acted with "no leeway or authority" when charging and finding him guilty of "lying." Since ADOC AR 454 expressly barred the conduct here—a fact recognized by the District Court and Magistrate Judge and not disputed below (Doc 52 - Pg 12; Doc 57 - Pg 5)—Defendants acted in a manner that fell outside of their authority, and the District Court erred in shifting the burden to Mr. Smart to "show that '(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation.'" Doc 52 - Pg 13 (quoting *Holloman,* 370 F.3d at 1264 (footnote and citation omitted)).

Because Mr. Smart—repeatedly—argued that Defendants acted outside their discretionary authority and because Defendants did act outside their discretionary authority and never even argued that they

met this burden, the District Court erred by granting Defendants summary judgment on qualified immunity grounds.[10] Defendants were ineligible for qualified immunity and thus this case must proceed to trial given that a reasonable juror could find a violation of Mr. Smart's First Amendment rights.

B. Even If Defendants Acted Within Their Discretionary Authority, They Are Not Entitled to Qualified Immunity Because Decades of Materially Similar Case Law Clearly Established the Unlawfulness of Their Conduct.

If Defendants successfully established that they acted within their discretionary authority (which they cannot in this case), the burden would shift to the Plaintiff to show that qualified immunity does not apply. *T.R. by and through Brock*, 25 F.4th at 882. To meet that burden, the Plaintiff must show (1) that the Defendants' conduct violated a constitutional right, and (2) that the constitutional right was clearly

[10] The District Court even had the benefit of reviewing Mr. Smart's "response to Defendants' motion for summary judgment," Doc 57 - Pg 3, which was docketed "after the Magistrate Judge entered his February 16, 2022, report and recommendation," Doc 57 - Pg 1 n. 1, and which the District Court explicitly "considered" in its Memorandum Opinion. Doc 57 - Pg 1 n. 1. In that filing, Mr. Smart, a pro-se litigant, continued to argue that Defendants acted without discretionary authority. Doc 53 - Pg 4, 7–8.

established at the time of the violation. *Id.* at 882-83. Mr. Smart satisfies both prongs of that inquiry.

i. Defendants violated Mr. Smart's First Amendment rights by punishing him for filing a grievance about Defendant England's sexual assault.

"First Amendment rights to free speech and to petition the government for a redress of grievances are violated when a prisoner is punished for filing a grievance concerning the conditions of his imprisonment." *Boxer X*, 437 F.3d at 1112 (finding that prison guard violated First Amendment rights of incarcerated individual by punishing him for filing a sexual assault grievance against her). In order to state a retaliation claim, a "plaintiff must establish first, that his speech or act was constitutionally protected; second, that the defendant's retaliatory conduct adversely affected the protected speech; and third, that there is a causal connection between the retaliatory actions and the adverse effect on speech." *Bennett v. Hendrix,* 423 F.3d 1247, 1250 (11th Cir. 2005). As the District Court determined, Mr. Smart established all three of these requirements. Doc 52 - Pg 11–12 (analyzing all three factors and determining that Mr. Smart satisfied each one); Doc 57 - Pg 2–3

(reviewing the Magistrate Judge's First Amendment ruling and "find[ing] no error in that analysis").

First, Mr. Smart established that his speech was constitutionally protected. On September 8, 2016, Mr. Smart made a formal complaint to Defendant Malone regarding the incident with Defendant England. Doc. 1 at 6. "It is an established principle of constitutional law that an inmate is considered to be exercising his First Amendment right of freedom of speech when he complains to the prison's administrators about the conditions of his confinement." *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008). As this Court's decisional law—and common sense—make clear, this principle includes grievances concerning sexual abuse of incarcerated people by prison guards. *See Boxer X*, 437 F.3d at 1112. Thus, by making a formal complaint to Defendant Malone, Mr. "Smart satisfie[d] the first element of his retaliation claim that he was engaged in a protected activity." Doc 52 - Pg 11.

The second element of the retaliation test requires a Plaintiff to show that "the discipline he received 'would likely deter a [prisoner] of ordinary firmness' from complaining about the conditions of his confinement." *Smith*, 532 F.3d at 1277 (quoting *Bennett*, 423 F.3d at

1254). Mr. Smart "satisfies [this] element of his retaliation claim because the threat of disciplinary action could adversely affect whether an inmate reports an officer's alleged sexual misconduct." Doc 52 - Pg 11–12. As punishment for raising a grievance about Defendant England, Defendant Baker recommended that Mr. Smart be placed in disciplinary segregation for 21 days and lose canteen, visiting, and telephone privileges for 30 days. Doc. 1 - Pg 9. In a break from normal prison practices, Defendant Malone approved the recommended punishment on the same date as the hearing. This Court has consistently ruled that similar punishments support a retaliation claim. *See, e.g.*, *Smith*, 532 at 1275 & n.10, 1277 (finding that the second element satisfied where plaintiff sentenced to 45 days of disciplinary segregation and loss of privileges); *Wildberger v. Bracknell*, 869 F.2d 1467 (11th Cir. 1989) (finding retaliation claim where plaintiff placed in disciplinary segregation as punishment).

To satisfy the third prong of the retaliation test—causation—the "plaintiff must show that the defendant was 'subjectively motivated to discipline' the plaintiff for exercising his First Amendment rights." *Moton v. Cowart*, 631 F.3d 1337, 1341 (11th Cir. 2011) (quoting *Smith*, 532 F.3d at 1278). That showing is particularly straightforward because the

disciplinary report issued to Mr. Smart by Defendant England states expressly that Mr. Smart is being charged because he "made an allegation against Sergeant Ronald England on 09/09/2016" in "Captain Malone's office."[11] Doc. 1 - Pg 8. Put otherwise, Defendant England has already conceded that he punished Mr. Smart for exercising his First Amendment rights. Defendant Baker then issued a sentence punishing Mr. Smart for exercising his First Amendment rights. *See id.* at 9. And Defendant Malone approved the issuance of the sentence punishing Mr. Smart for exercising his First Amendment rights. *See id.*

Additionally, viewing the facts in the light most favorable to Mr. Smart, Defendant England did, in fact, sexually assault Mr. Smart, and then retaliated against Mr. Smart by issuing a disciplinary report based on the "false[] accus[ation]" that Mr. Smart had lied in his formal complaint. Doc 1 - Pg 5–6. The illicit motive of the three Defendants is

[11] In most retaliation cases, once the plaintiff establishes that their protected conduct was a motivating factor behind any harm, the burden shifts to the defendant to "show that he would have taken the same action in the absence of the protected activity." *Moton*, 631 F.3d at 1341-42. Here, however, Defendants have not shown and could never show that they would have taken the same action in the absence of Mr. Smart's protected activity because they concededly punished him for that very activity.

further confirmed by the fact that they issued Mr. Smart a disciplinary report that prison regulations forbade them from issuing and then imposed a punishment that those regulations forbade them from imposing. *See* ADOC AR 454, § V(H)(2). The causal nexus between Mr. Smart's constitutionally protected speech and Defendants' misconduct would be clear in any litigation posture, but it is particularly plain on a motion for summary judgment, where this Court must draw all reasonable inferences in Mr. Smart's favor.

ii. Decades of binding, materially similar case law clearly establish that Defendants violated Mr. Smart's First Amendment rights.

For qualified immunity, "'the salient question . . . is whether the state of the law . . . gave [the officers] fair warning that their alleged treatment of [the plaintiff] was unconstitutional.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). This Court recognizes three paths to defeating qualified immunity, once it is properly invoked. A plaintiff may show that a right was clearly established on the basis of (1) "binding precedent that is materially similar," *Jones v. Fransen*, 857 F.3d 843, 851–52 (11th Cir. 2017); "(2) a broad statement of principle within the Constitution,

statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *T.R. by and through Brock*, 25 F.4th at 883.

The Defendants are not entitled to qualified immunity in this case because when Defendants engaged in the relevant behavior, three decades of binding, materially similar precedent made clear that such conduct violated the First Amendment. Viewing the record in the light most favorable to Plaintiff, Defendant England sexually assaulted Mr. Smart in the presence of multiple witnesses. After Mr. Smart exercised his First Amendment rights and filed a formal complaint against Defendant England for the assault, the three Defendants retaliated against Mr. Smart by placing him in disciplinary segregation and revoking his rights to receive visitors, use the telephone, or access the canteen. They did so by filing disciplinary charges that were factually false; that ADOC AR 454 § V(H)(2)(c) expressly forbade them from filing; and that rested on factual allegations that could not support punishment

even if true.[12] *See* ADOC AR 454, § V(H)(2)(c). No reasonable prison guard or official could view such conduct as constitutional in 2017 given this Court's precedent in factually indistinguishable cases.

Beginning in the mid-1980's, this Court issued a series of opinions holding that where, as here, prison officials punish an incarcerated person for filing a grievance or lawsuit about their conditions of confinement, that retaliatory conduct violates the First Amendment. For instance, in *Bridges v. Russell*, 757 F.2d 1155 (11th Cir. 1985), an incarcerated person sued prison officials, alleging that they transferred him to a new facility as punishment for 1) filing a grievance protesting racial discrimination in his job assignment; 2) encouraging other incarcerated individuals to sign a petition protesting the same discriminatory conduct; and 3) preparing, upon request, a similar grievance for another incarcerated individual to sign. *See id.* at 1156–57. The district court dismissed the claim, ruling that the plaintiff had no protected liberty interest in remaining at his former facility. This Court reversed, ruling that the plaintiff's allegations supported a claim under

[12] Because an "unfounded" finding cannot even support a disciplinary report, *see* ADOC AR 454 § V(H)(2)(c), by extension, an individual cannot be convicted and punished based on such a report.

the First Amendment and that prison officials can deprive an incarcerated individual of their First Amendment rights "regardless of whatever interests a prisoner may have under state law." *Id.*; *accord Hall v. Sutton*, 755 F.2d 786, 788 (11th Cir. 1985) (ruling that an incarcerated individual stated a retaliation claim where he alleged that prison officials confiscated his tennis shoes in retaliation for suing them).

This Court addressed a similar factual scenario the following year in *Wright v. Newsome*, 795 F.2d 964 (11th Cir. 1986). There, an incarcerated person alleged, among other things, that prison officials violated his First Amendment rights by searching his cell and seizing and destroying seven of his photographs in retaliation for filing lawsuits and administrative grievances. *See id.* at 965, 968. Relying on *Bridges*, this Court ruled that "[t]his type of retaliation violates . . . the inmate's First Amendment rights." *Id.* at 968 (citing *Bridges*, 757 F.2d 1155).

Three years later, in *Wildberger*, 869 F.2d 1467, the Court addressed a situation where the incarcerated plaintiff alleged that prison officials punished him by placing him in segregation as retaliation for filing grievances through the prison grievance system. As in *Bridges* and *Wright*, the district court had dismissed Mr. Wildberger's suit. This Court

reversed, noting that it "ha[d] decided a number of cases dealing with quite similar constitutional issues" and, expressly relying on *Bridges* and *Wright*, explained: "It seems clear that if appellant is able to establish that his discipline was the result of his having filed a grievance concerning the conditions of his imprisonment, he will have raised a constitutional issue, under the authority of these cases." *Id.* at 1468.

In the intervening years, this Court has continued to decide materially similar cases that clearly established the unconstitutionality of Defendants' conduct here. In *Boxer X*, 437 F.3d 1107, an incarcerated plaintiff filed suit, alleging that a prison official forced him to expose himself to her and then punished him when he filed a grievance about her conduct. *See id.* at 1109, 1112. The district court dismissed his claim, and this Court reversed, stating that "First Amendment rights to free speech and to petition the government for a redress of grievances are violated when a prisoner is punished for filing a grievance concerning the conditions of his imprisonment." *Id.* at 1112 (citing *Wildberger*, 869 F.2d at 1468). Because "Boxer expressly claim[ed] that he was punished for complaining through the established grievance system about his

treatment by [the offending prison official]," he stated a cognizable retaliation claim. *See id.*

Finally, this Court decided another materially similar case in *Moton*, 631 F.3d 1337. In that case, the incarcerated plaintiff, Mr. Moton, filed a grievance against Officer Cowart, a prison official, requesting that she reply to a previous grievance that he had filed. *See id.* at 1339. In response, Officer Cowart told Mr. Moton that she was going to issue a disciplinary report against him for "disrespecting prison officials" based on the grievance, and Mr. Moton replied that his "lawyer would be hearing about this." *Id* at 1340. Officer Cowart then issued disciplinary reports against Mr. Moton for both the grievance and the statement regarding his lawyer. *Id.* Mr. Moton sued, alleging that Officer Cowart had retaliated against him, and the district court granted summary judgment to Officer Cowart. *Id.* This Court reversed, ruling that the record, viewed in the light most favorable to Mr. Moton, supported a claim that Officer Cowart had violated Mr. Moton's First Amendment rights by issuing him disciplinary reports to punish him for filing a grievance against her. *Id.* at 1342. And *Moton* and *Boxer X* are not the only decisions that should have provided Defendants with fair notice that

their conduct violated Mr. Smart's First Amendment rights. *See also Dimanche v. Brown*, 783 F.3d 1204, 1213 (11th Cir. 2015) (ruling that incarcerated plaintiff stated a claim for First Amendment retaliation by alleging that defendants punished him in various respects, including by filing unfounded disciplinary reports, for filing grievances); *Douglas* at 1321 (same).

Every one of these cases presents materially similar facts to this case. Here, as in each case discussed above, Mr. Smart filed a formal complaint about the conditions of his confinement. And here, as in each case discussed above, prison officials retaliated by punishing Mr. Smart for lodging a formal complaint. *Wildberger* observed that it was "clear" in 1989 that a plaintiff has raised a valid First Amendment claim where prison officials disciplining him "was the result of his having filed a grievance concerning the conditions of confinement." 869 F.2d at 1468. That conclusion has only become clearer as this Court has reaffirmed the decisions of *Wildberger*, *Bridges*, and *Wright* in subsequent cases. Consequently, no reasonable prison official could fail to understand in 2017 that the First Amendment forbade them from punishing Mr. Smart because he filed a grievance regarding the conditions of his confinement.

Despite the wealth of case law that clearly established the unconstitutionality of Defendants' conduct, the District Court ruled that Defendants were protected by qualified immunity and granted them summary judgment. In the District Court's view, Mr. Smart needed to show "that the defendants' conduct violated a clearly established federal right when the defendants violated ADOC [AR] 454." ECF 57 at 4. Put otherwise, the District Court believed that qualified immunity required case law establishing that the violation of a state regulation—here, ADOC AR 454, which Defendants violated by charging Mr. Smart with lying—amounted to a violation of federal law. *See id.* at 5. This conclusion rests on a fundamental misapprehension of the law and of Mr. Smart's claim.

The "clearly established federal right" for which Defendants "require[d] notice" was *not* Defendants' violation of ADOC AR 454. Yes, the Defendants violated ADOC AR 454. Yes, Mr. Smart referred to ADOC AR 454 in his complaint and filings. And, yes, that violation is relevant to this appeal in multiple respects.[13] But the "clearly established federal

[13] At a minimum, the violation of ADOC AR 454 is relevant in three ways. First, by expressly prohibiting Defendant England from filing the

right" for which Defendants "require[d] notice" was Mr. Smart's First Amendment right to file a grievance regarding the conditions of his confinement without being punished for doing so. *See, e.g.*, *Wildberger*, 869 F.2d at 1468. As demonstrated above, Defendants had fair notice of *that* right.

In sum, this Court has decided several binding, materially similar cases that clearly established the right at issue in this case, and the District Court erred by concluding otherwise.

C. The Unlawfulness of Defendants' Conduct Was Sufficiently Obvious That Defendants Are Not Entitled to Qualified Immunity.

Even if this Court had not decided the factually congruous cases discussed above, the well-established prohibition on retaliating against

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disciplinary report in this case and, by extension, prohibiting Defendants Malone and Baker for punishing Mr. Smart based on that illegal report, ADOC AR 454 shows that the three Defendants acted outside their discretionary authority when they punished Mr. Smart. Consequently, they are categorically ineligible for the protections of qualified immunity. *See supra* section I.A. Second, the fact that the three Defendants illegally punished Mr. Smart is relevant evidence, at summary judgment, of their illicit motives for punishing Mr. Smart. Because Defendants had no legitimate reason to discipline Mr. Smart, a fact-finder could reasonably infer that the punishment was retaliatory. Third, the existence of ADOC AR 454 is relevant because, along with this Court's body of decisional law on retaliation, it establishes that the Defendants' conduct was obviously unconstitutional. *See infra* section I.C.

inmates for filing grievances applied with obvious clarity to prohibit Defendants' conduct here.

This Court, and the Supreme Court, "do not always 'require a case directly on point before concluding that the law is clearly established.'" *Gennusa v. Canova*, 748 F.3d 1103, 1113 (11th Cir. 2014) (quoting *Stanton v. Sims*, 571 U.S. 3, 5 (2013)). A "constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question" to defeat qualified immunity. *Id.* (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)); *see also Holloman*, 370 F.3d at 1278 ("Our precedents would be of little value if government officials were free to disregard fairly specific statements of principle they contain and focus their attention solely on the particular factual scenarios in which they arose."). Moreover, a defendant's egregious conduct can be clearly illegal, even in the absence of case law. *T.R. by and through Brock*, 25 F.4th at 883.

At least twice, this Court has invoked the constitutional principle that state officials may not retaliate against private citizens for their speech to defeat qualified immunity, notwithstanding the absence of a case with materially similar facts. In *Bennett v. Hendrix*, the Court

denied qualified immunity to sheriff's deputies who subjected private citizens to a campaign of harassment in retaliation for their support of a ballot proposition that would have diminished the power of the Sheriff's Department. The Court reasoned that the Eleventh Circuit and Supreme Court have "long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights"; that principle applied with obvious clarity to the facts of the case and defeated qualified immunity. 423 F.3d at 1255–56.

The Court then invoked *Bennett*'s reasoning and the anti-retaliatory principle it stands for to deny qualified immunity to a police officer who retaliated against a former officer who complained of civil rights abuses by the police department. *See Bailey v. Wheeler*, 843 F.3d 473, 484–86 (11th Cir. 2016). Officer Bailey, while employed by the Douglasville, Georgia, Police Department, reported that other officers as well as deputies in the Douglasville Sheriff's Office, were "racially profiling minority citizens and committing other constitutional violations." *Id.* at 478. Officer Bailey was terminated. *Id.* at 478. He appealed his termination, where he re-raised his allegations of departmental constitutional violations. *Id.* In response, Officer Wheeler,

a Major in the Sheriff's Office, put out an alert to law enforcement that Officer Bailey was a "loose cannon," labeling him dangerous to any law enforcement officer that he might encounter, and warning officers to "act accordingly." *Id*. In doing so, Officer Wheeler "gave all Douglas County law-enforcement officers a reasonable basis for using force—including deadly force—against Bailey." *Id* at 482. Officer Bailey sued and Officer Wheeler resisted liability arguing, among other things, that qualified immunity applied. This Court rejected that argument, finding that the "reasoning . . . and the broad principle" articulated in *Bennett* put Officer Wheeler on notice that he could not retaliate against Bailey in this way. *Id*. at 484.[14]

This Court also regularly applies the "obvious clarity" principle outside the retaliation context. For instance, the Court has held that the longstanding requirement that law enforcement obtain a warrant before intercepting private phone calls put officers on notice that they could not lawfully electronically monitor a non-custodial suspect's conversation with his attorney at the sheriff's office without a warrant, *Gennusa*, 748

[14] The Court also held in the alternative that the conduct was so egregious it was clearly unconstitutional without reference to decisional law. *See Bailey*, 843 F.3d at 485.

F.3d at 1113; that school officials should reasonably have known that punishing a student for raising his fist during the Pledge of Allegiance violated the First Amendment, based on the general principle that students' expressive activity that does not materially interfere with the school's educational mission is protected, *Holloman*, 370 F.3d at 1278–79; that any reasonable officer should have known that seizing a witness's iPhone without a warrant was an obvious Fourth Amendment violation based on the general principle that a seizure of personal property without a warrant is unreasonable, *Crocker v. Beatty*, 886 F.3d 1132, 1138 (11th Cir. 2018) (per curiam); and that an officer was on notice that handcuffing an arrestee, who was not resisting, for more than five hours in a manner intended to cause pain violated the clear legal principle that an officer may not inflict "gratuitous and substantial injury using ordinary arrest tactics" when "an arrestee demonstrates compliance," *Sebastian v. Ortiz*, 918 F.3d 1301, 1311 (11th Cir. 2019).

In this case, the Eleventh Circuit's well-established prohibition on official retaliation against inmates who file grievances applied with obvious clarity to notify the defendants that their conduct was unconstitutional. As detailed above, the Eleventh Circuit has held since

1985 that prisoners have a right to be free from retaliation for complaining about the conditions of their confinement, *see Bridges*, 757 F.2d at 1156; *see also Wright*, 795 F.2d at 968 (recognizing that retaliation for filing lawsuits and administrative grievances violates "the inmate's First Amendment rights"), including, on many occasions, that it is illegal for a prison official to retaliate against an inmate because the inmate filed a grievance, *see Bridges*, 757 F.2d at 1156 (reversing dismissal of complaint alleging retaliation based in part on a grievance); *Wright*, 795 F.2d at 968 (same); *Dimanche*, 783 F.3d at 1214 (reversing dismissal of First Amendment claim alleging retaliation for filing grievances); *Douglas*, 535 F.3d at 1321 (prisoner stated plausible allegation of retaliation for grievance filing); *Moton*, 631 F.3d at 1342 (reversing summary judgment to defendants on prisoner's claim that he was retaliated against for filing a grievance). Even when the Court has ruled against a prisoner on the merits of a retaliation claim, it has acknowledged the clear constitutional principle that discipline for the mere fact that an inmate has filed a grievance violates the First Amendment. *See, e.g.*, *Smith*, 532 F.3d at 1276 (finding a lack of causal connection between protected speech and retaliatory conduct); *Farrow v.*

West, 320 F.3d 1235 (11th Cir. 2003) (acknowledging availability of retaliation claim, but finding lack of evidence that allegedly retaliating official was aware of the inmate's complaints). Protection against retaliation for complaining specifically of sexual abuse falls comfortably within the well-established rule. *See Boxer X*, 437 F.3d at 1112.

The principle that prison officials may not retaliate against prisoners for filing grievances, and specifically for complaining of sexual abuse, applies with obvious clarity to the circumstances in this case. Any reasonable official would have known that Defendants' conduct violated the constitution.

Moreover, the obviousness of Defendants' constitutional violation, in light of the case law discussed above, is buttressed by their direct violation of ADOC AR 454, which explicitly prohibits the very conduct at issue. Taking the case law and the regulation together proves beyond any doubt that Defendants were on notice that their conduct was unconstitutional.

The Supreme Court's decision in *Hope v. Pelzer*, 536 U.S. 730, in which the Court held that prison official defendants violated the plaintiff's clearly established Eighth Amendment right, despite the

absence of precedent with materially similar facts, is instructive on this point.

In *Hope*, the Supreme Court held that twice handcuffing a prisoner to a hitching post to punish him for disruptive behavior was clearly unconstitutional, even in the absence of precedent with "materially similar" facts. *Id*. at 733. On appeal, this Court had held that the plaintiff suffered a violation of his Eighth Amendment right, but that the defendants were entitled to qualified immunity because the plaintiff could point to no case with "materially similar" facts that would have sufficiently notified the defendants of the illegality of their conduct. *See Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001). The Supreme Court reversed, explaining that officers can have "fair warning" that their conduct is unconstitutional absent a case with materially similar facts. *Hope*, 536 U.S. at 739–41.

The defendants in *Hope* were on notice that their conduct violated the constitution based on the confluence of Eleventh Circuit precedent, an ADOC regulation, and a Department of Justice advisory report to the ADOC warning that its use of the hitching post was unconstitutional. *Id*. at 743–45. The precedent, while not factually similar to the facts of *Hope*,

sufficiently established that handcuffing an inmate to a stationary object for prolonged periods was unlawful and that physical punishment of a prisoner who is no longer resisting authority is unlawful. *See id.* at 742–43 (citing *Gates v. Collier*, 501 F.2d 1291 (5th Cir. 1974); *Ort v. White*, 813 F.2d 318 (11th Cir. 1987)). An ADOC regulation permitted the use of a hitching post for certain coercive purposes, but required periodic offers of water and breaks, termination of the punishment after it met its coercive purpose, and documentation of compliance with these terms. *Id.* at 744. The officers had fallen short of the regulation's requirements as to Mr. Hope. *Id.* And finally, the conclusion that the officers "violated clearly established law" was "buttressed" by the fact that the Department of Justice notified the ADOC in 1994 that its systematic use of the hitching post for relatively trivial offenses was unconstitutional. *Id.* at 744–45. Although the record did not show that the DOJ's view was communicated to the respondents in *Hope*, it lent "support to the view that reasonable officials in the ADOC should have realized that the use of the hitching post under the circumstances . . . violated the Eighth Amendment." *Id.* at 745

Since the Court's decision in *Hope*, this Court has acknowledged that "regulations themselves do not constitute constitutional law, [but can] undermine any claim by defendants that they were unaware of their legal obligations." *Al-Amin v. Smith*, 511 F.3d 1317, 1336 n.37 (11th Cir. 2008). Several other federal appellate courts have also recognized that, although a state regulation alone would not put a reasonable officer on notice that his conduct violated the law, courts may properly "examine statutory or administrative provisions in conjunction with prevailing circuit or Supreme Court law to determine whether an individual had fair warning that his or her behavior would violate the victim's constitutional rights." *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 433–34 (2d Cir. 2009); *accord Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 546 (4th Cir. 2017) (stating and applying same principle); *Barker v. Goodrich*, 649 F.3d 428, 436 (6th Cir. 2011) ("A defendant's deviation from normal practice and prison policies can also provide notice that his actions are improper."); *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002) ("Prison regulations governing the conduct of correctional officers are also relevant in determining whether an inmate's right was clearly established.").

Like the defendants in *Hope*, the Defendants in this case were on clear notice that their conduct was unlawful. First, as discussed above, the case law in the Eleventh Circuit establishes beyond any doubt that it is unlawful for prison officials to retaliate against inmates for filing grievances, including in the specific context of grieving sexual abuse.

And second, Defendants acted in violation not only of the case law described above, but also in direct violation of ADOC AR 454, which specifically prohibits the conduct at issue in this case. The regulation says, "an inmate reporting sexual abuse or sexual harassment, shall not be issued a disciplinary report for lying based solely on the fact that their allegations were unfounded or that the inmate later decides to withdraw his/her allegation." ADOC AR § V(H)(2). The regulation was promulgated to comply with the Department's obligations under federal law, which require it to "establish a policy to protect all inmates and staff who report sexual abuse or sexual harassment." 28 C.F.R. § 115.67(a). This federal regulation in turn was promulgated to effectuate the federal Prison Rape Elimination Act of 2003, Pub L. 108-79, 117 Stat. 974 (2003).

The confluence of this Court's precedential commitment to safeguarding prisoners for retaliation for filing grievances, with the

ADOC's regulation expressly prohibiting the retaliation at issue here, put beyond doubt the unconstitutionality of the Defendants' conduct and precludes them from claiming qualified immunity.

CONCLUSION

For the reasons cited above, the District Court's decision granting summary judgment to Defendants England, Baker, and Malone should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as the brief contains 11,340 words, excluding those parts exempted by Fed. R. App. P. 32(f) and 11th Cir. R. 32-4.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type styles requirements of Fed. R. App. P. 32(a)(6), as this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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