22-6074

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

TERRY EUGENE SEARS --- PETITIONER

vs.

VERNIA ROBERTS, et al --- RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TERRY E. SEARS #B-083117

MARTIN CORRECTIONAL INSTITUTION
1150 S.W. Allapattah Road
Indiantown, Florida 34956

QUESTION(S) PRESENTED

1. WHETHER THE PROCEDURES REQUIRED TO INSTITUTE UNUSUAL SECURITY MEASURES APPLY IN CIVIL CASES BROUGHT BY PRISONER - PLAINTIFFS?

2. WHETHER DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO CONDUCT A HEARING ON ADVERSE SECURITY MEASURES AND BY FAILING TO STATE ON THE RECORD ANY REASONS FOR THE SECURITY MEASURES?

3. WHETHER DISTRICT COURT ABUSED ITS DISCRETION BY REQUIRING PLAINTIFF TO REMAIN SHACKLED AND BY ALLOWING THREE (3) UNIFORMED CORRECTIONAL OFFICERS TO SIT DIRECTLY BEHIND HIM THROUGHOUT THE TRIAL?

4. WHETHER DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO CONDUCT AN EVIDENTIARY HEARING ON DEFENDANT'S BAD-FAITH IN SPOLIATING THE VIDEOTAPE FOOTAGE OF THE USE OF FORCE INCIDENT?

5. WHETHER DISTRICT COURT ABUSED IT S DISCRETION BY ALLOWING DEFENDANTS TO ELICIT IMPROPER EXPERT TESTIMONY FROM SAMUEL PACCHIOLI ABOUT APPROVING THE USE OF FORCE?

6. WHETHER DEFENSE COUNSEL'S CLOSING ARGUMENTS IMPROPERLY EXPRESSED PERSONAL OPINIONS ON THE HONESTY AND CREDIBILITY OF THE WITNESSES?

7. WHETHER THE EIGHTH AMENDMENT WAS VIOLATED WHEN PRISON OFFICIALS ASSAULTED PLAINTIFF AND SPRAYED CHEMICAL AGENTS ON HIM WHILE HANDCUFFED AND SHACKLED AND LYING FACE DOWN ON THE GROUND AND SUPERVISORY OFFICIALS STOOD BY WATCHING AND FAILED TO INTERVENE?

8. WHETHER THE FOURTEENTH AMENDMENT WAS VIOLATED WHEN THE ACCUMULATION OF ERRORS THROUGHOUT TRIAL IMPAIRED HIS DUE PROCESS RIGHT TO A FAIR TRIAL?

9. WHETHER A FINDING OF PLAIN ERROR IS JUSTIFIED IN REVIEWING CLOSING ARGUMENTS OF COUNSEL IN A CIVIL CASE?

10. WHETHER JURY'S VERDICT WENT AGAINST THE WEIGHT OF THE EVIDENCE?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[x] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petitioner is as follows:

Balitzky, Joe - Counsel for Appellee
Covington, Hon. Virginia M. - U.S. District Judge
Dexter, Felisha - Appellee
Durham, Shirley - Counsel for Appellee
Goerin, Ryan M. - Counsel for Appellant
Hart, Jeffery - Appellee
Kerr, Lauren D. - Trial counsel
Lee, Heather A. Trial Counsel
Morphy, J. Logan - Counsel for Appellant
Prince, David - Appellee
Roberts, Vernia - Appellee
Sears, Terry E. - Appellant
Wilson, Hon. Thomas G. - Magistrate
Wolfson, Mark - Trial Counsel

RELATED CASES

Terry E. Sears v. Eduardo Rivero, et al., No. 12-cv-00288, U.S. District Court for the Middle District of Florida, Judgment entered October 30, 2015.

Terry E. Sears v. Eduardo Rivero, et al., No. 15-15080, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered April 24, 2019.

Terry E. Sears v. Vernia Roberts, et al., No. 12-cv-00288, U.S. District Court for the Middle District of Florida, Judgment entered August 15, 2019.

Terry E. Sears v. Vernia Roberts, et al., No 19-13668, U.S. Court of Appeals, for the Eleventh Circuit, Judgment entered June 24, 2022.

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

OTHER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[x] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to The petition and is

[ ] reported at _____; or
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

The opinion of the United States district court appears at Appendix B to The petitioner and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[x] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appeaers at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____court appears at Appendix ___ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was June 24, 2022.

[x] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the Order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted To and including _____ (date) on _____(date) In Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

[ ] A timely petitioner for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing Appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted To and including _____ (date) on _____(date) In Application No. __A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment of the United States Constitution

Fourteenth Amendment of the United States Constitution

42 U.S.C. § 1983

701 of the Federal Rules of Evidence

702 of the Federal Rules of Evidence

75A American Jurisprudence 2nd Trial § 575 (West August 2020)

STATEMENT OF THE CASE

Petitioner, Terry Sears sued correctional officers at Polk Correctional Institution under 42 U.S.C. § 1983 for violating his First, Eighth, and Fourteenth Amendment rights by Assaulting and pepper-spraying him while handcuffed and shackled while supervisory officers stood by watching and failed to intervene. (Doc. 1 at 8-14). The Respondents moved to dismiss the complaint (Doc. 69), which the District Court denied without prejudice after construing it as a motion for summary judgment. (Doc. 86), (Appx. B)

After further consideration, the District Court dismissed all defendant's except six individual officers. (Doc. 101). Respondents David Prince, Felisha Dexter, Vernia Roberts and Jeffrey Hart answered the complaint (Doc. 102) and moved for summary judgment. (Doc. 143, 161). The District Court granted the motion (Doc. 163) because Sears could not challenge the veracity of a disciplinary report finding him guilty of battery or attempted battery on a correctional officer. (Doc. 162 at 10 n. 6).

Petitioner appealed (Doc. 164), and the Eleventh Circuit vacated the order. **Sears v. Roberts**, 922 F.3d 1199 (11th Cir. 2019). On remand, The District Court appointed pro bono counsel and set the case for trial. (Doc. 175, 184).

After a three- day trial on the excessive force and deliberate indifference claims (Docs. 302-304), the jury returned a verdict for Respondents. (Doc. 269).

Petitioner moved for a New trial (Doc. 275), which the District Court denied. (Doc. 286) Appeal was taken and Eleventh Circuit deviated from controlling precedent and affirmed. (Docs. 284, 292).

PROCEDURAL HISTORY

On March 18, 2010, Petitioner was sprayed with pepper-spray and assaulted for sixteen minutes while handcuffed and shackled and supervisor officials stood by and watched and failed to intervene on two (2) separate occasions.

In this Eighth Amendment excessive force case, the overarching question of whether Mr. Sears was deprived of a fair trial comes into play. Given the fundamental errors below and how they abridged due process, the answer is yes.

During the three day trial, Sears was shackled at the ankles and three (3) uniformed correctional officers sat immediately behind him. The due process implication of shackling and conspicuous security apply equally to civil cases. Shackling is an inherently prejudicial security measure and a conspicuous security presence requires close judicial scrutiny on a case- by-case basis.

The District Court delegated this security decision to an unnamed, unsworn correctional officer who escorted Mr. Sears to the trial.

Defendants called an employee from the Inspector General's office as their final witness, Petitioner objected because the only relevant testimony Samuel Pacchioli could give would concern his approval of the use of force. Mr. Pacchioli had no personal first-hand knowledge of the incident and was not present at Polk Correctional Institution.

He simply reviewed the Report of force used document prepared by the correctional officers involved and the videotaped footage of the incident that was eventually destroyed after his review. "Over constant objections, Samuel Pacchioli built his expert

credentials and testified that he approved the use of force-implying the force was reasonable and invaded the province of the jury."

By order of the District Court, no expert witnesses could be called. (Doc 221). Defendants skirted the order by calling Pacchioli a lay witness.

Sergeant Scott Voorhees filmed some portion of the aftermath of the incident. But when Sears requested the videotape, defendants responded that no video-footage existed. (Doc. 130-4 at 10, 19). They later admitted they had video which arbitrarily disappeared.

Petitioner moved for an adverse jury instruction for Defendants' bad-faith spoliation of the video and the District Court denied the motion and refused to conduct an evidentiary hearing on bad-faith.

Improper closing arguments by Defendants' counsel irreversibly prejudiced Petitioner. Defendants' counsel maliciously expressed personal opinions about Sears' credibility throughout the trial; he bolstered the credibility of his own witnesses; and even testified in front of the jury about evidence not in the record. Considered collectively, these statements deprived Sears of a fair trial. Thus, it is fundamentally improper for counsel to express a personal belief in the honesty or credibility of a witness. And this rule manifests in the prohibition against vouching, which extends to § 1983 trials. "Where there has been calculated sustained improper conduct producing biased issues as they went to the jury, the party is deprived of his due process right to a fair trial..."

Under the Eighth Amendment, force is deemed legitimate in a custodial setting if it is applied in a good-faith effort to maintain or restore discipline and not maliciously and

sadistically to cause harm. The focus of any Eighth Amendment inquiry is on the nature of the force applied, not on the extent of the injury inflicted. And officers present at the scene who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance.

A new trial is warranted in the interest of substantial justice.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ALLOWING THREE UNIFORMED SECURITY OFFICERS TO SIT IMMEDIATELY BEHIND SEARS AND BY REQUIRING SEARS TO REMAIN SHACKLED THROUGHOUT THE TRIAL.

Shackled at the ankles, Mr. Sears was closely guarded during trial by three (3) uniformed correctional officers seated immediately behind him. "When Sears objected, the District Court refused to consider the issue and delegated the decision to correctional officer(s)". Shackling is an "extreme", "inherently prejudicial" measure that must be subjected to "close judicial scrutiny." **Estelle v. Williams**, 425 U.S. 501, 503-04 (1976); **Deck v. Missouri** 544 U.S. 622, 635 (2005); **Elledge v. Dugger**, 823 F.2d 1439, 1451 (11th Cir. 1987); **United States v. Theriault**, 531 F.2d 281 F.2d 281, 284 (5th Cir. 1976).

Shackling is a fundamental affront to the integrity of trial and should be a last result. Thus, allowing three uniformed guards to sit directly behind Sears implied to the jury that Mr. Sears was violent and impaired Sears' right to communicate with counsel and participate in trial.

In a credibility contest, like this one, where Defendants' allegations about Sears' violent inclinations were central to their trial strategy, the District Court should have

conducted a hearing and made findings on the record before allowing shackling or hovering guards.

Constitutional skepticism of shackling is rooted in three fundamental concerns. **Deck**, 544 U.S. at 630; **United States v. Moore**, 954 F.3d 1322,_1329 (11th Cir. 2020). **First**, shackling undermines the fairness of fact-finding. **Deck**, 544 U.S. 630; **Moore**, 454 F.3d at 1329. **Second**, shackling impairs ones "ability to communicate with their lawyers and participate in their defense." **Deck**, 544 U.S. at 631; **Moore**, 454 F.3d at 1329.

Third, shackling diminishes the integrity of the judicial process. **Deck**, 544 U.S. at 631; **Illinois v. Allen**, 397 U.S. 337, 344 (1970). Because of these concerns, shackles should be used "as rarely as possible." **United States v. Durham**, 287 F.3d 1297, 1304 (11th Cir. 2002).

Mr. Sears pointed out that his shackles was seen by two (2) jurors during *voir dire*. (Doc. 275 at 5). But it's not just the arresting, draconian sight of a prisoner in shackles that offends the Bill of Rights. "Hidden shackles implicate the same due process concerns, and the same rules should apply."

Like shackling, a conspicuous security presence around a party needs "close judicial scrutiny" because it may pose "a threat to the fairness of the fact-finds process." **Holbrook v. Flynn**, 475 U.S. 560, 568 (1986) quoting **Estelle**, 425 U.S. at 503-04).

The outcome properly rests within the District Court's on-the-scene judgment... There is some optional range of security that protects courtroom personnel and Mr. Sears' constitutional rights. It is within the District Court's discretion to choose a point within that range, but making that choice requires taking steps indispensable to

safeguarding due process. The District Court never took those steps, once again short-circuiting Sears' argument, relying on unsworn evidence, and delegating the decision to an unnamed correctional officer - consequently depriving Mr. Sears of his constitutional right to due process.

Defendants do not contest how shackling and conspicuous security implicate Mr. Sears' due process rights; Defendants do not dispute that both shackling and conspicuous security can impair a party's right to a fair trial and to communicate with counsel; and Defendants do not contest Mr. Sears' allegation that the District Court did not follow the process required by this court when implementing security measures.

Instead, Defendant argue that the security measures furthered an essential state interest under **Holbrook v. Flynn**, 475 U.S. 560 (1986). But Defendants failed to consider one of **Holbrook's** main takeaways: location matters. Id. at 569. Officers seated further away, as they were in **Holbrook**, "may well be perceived more as elements of an impressing drama than as reminders of the [party's] special status." By contrast, correctional officers was seated closely behind Sears and his lawyers (arm-length in distance) where they "create the impression in the minds of the jury that Sears is dangerous or untrustworthy." Id (quoting **Kennedy v. Cardwell**, 487 F.2d 101, 108 (6th Cir. 1973).

In **Holbrook**, this Court considered whether the noticeable deployment of security personnel in a courtroom is inherently prejudicial such that it must be justified by an essential state interests. This court said, "**No**", finding no constitutional infirmity with the four uniformed guards seated in the first row of the gallery - separated by the bar from the defendants and counsel. Id. at 562. The location of the guards mattered, because

"[if] they are placed at some distance from the accused, the security officers may well be perceived more as elements of an impressive drama than as constant reminders of the defendant's special status." Id.

When Sears asked for the officers to move to the gallery, as in **Holbrook**, the District Court deferred to the correctional officer's decision on where to sit, instead of evaluating whether it was necessary. (Doc. 302 at 8-9). That is not the "particularized determination of the security needs" that this Court mandated. And it infringes on this Court's directive that a district court may not defer to correctional officers and courtroom guards when making his decision. **United States v. Moore**, 9554 F.3d 1322, 1329 (11th Cir. 2020); **United States v. Durham**, 287 F.3d 1297, 1307 (11th Cir. 2002); **Davidson v. Riley**, 44 F.3d 1118, 1120 (2nd Cir. 1995); **United States v. Theriault**, 531 F.2d 281, 285 (5th Cir. 1976).

Defendants disregarded the argument that the District Court must hold an evidentiary hearing and make findings on the record concerning its security determination. This Court requires district courts to "take account of the circumstances of the particular case" and make "a case-specific, individualized assessment of each [party] in the particular trial." **Deck v. Missouri**, 544 U.S. 622, 632 (2005). The affected party must be given an opportunity to respond and persuade the court that measures are unnecessary. "If the factual basis for security is challenged, the court must hold an evidentiary hearing." Id. After a hearing, the court is required to state, on the record, the degree of restraint imposed, the reasons, and whether less prejudicial means were considered. **Moore**, 954 F.3d at 1330; **Durham**, 287 F.3d 1304; **Theriault**, 531 F.2d at 285. The District Court did not follow this procedure.

To the contrary, "it is possible that the sight of a security force within the courtroom might under certain conditions create the impression in the minds of the jury that the defendant is dangerous or untrustworthy". Id. (quoting **Kennedy v. Cardwell**, 487 F.2d 101, 108 (6th Cir. 1973). **Kennedy** warned that seating guards around the defendant is troubling not only because the jury will perceive the defendant as dangerous and untrustworthy, but also because it could materially "interfere with [the party's] ability to consult with counsel". 487 F.3d a t 108. The District Court must ensure the defendant's "right to be tried in an atmosphere free of partiality created by the use of excessive guards except where special circumstances dictate added security precautions."

This is the same caution required by **Deck** for shackles. And this Court has decided whether the cautious process required by **Deck** and **Holbrook** applies in civil cases... "The right to a fair trial is fundamental" in criminal and civil cases. **Davidson v. Riley**, 44 F.3d 1118, 1122 (2nd Cir. 1995). And the Due Process Clause protects the right to an impartial tribunal in civil cases, too. **Warger v. Shauers**, 574 U.S. 40, 50 (2014).

Moreover, the concerns requiring caution in criminal cases also apply in civil cases. "Unnecessary and conspicuous security still vitiates the integrity of the judicial process and undermines fair fact-finding." **Deck**, 544 U.S. at 630-31; **Allen**, 397 U.S. at 344. The latter concern is particularly apt when a prisoner-plaintiff brings excessive force claims against correctional officers. **Satterwhite v. Texas**, 486 U.S. 249, 256 (1988); **Woods v. Dugger**, 923 F.2d 1454, 1460 (11th Cir. 1991).

In excessive force cases, courts find inherent prejudice in security errors because the show of force is "**pertinent to the substance of the plaintiff's claims**." **Davidson**,

44 F.3d at 1125; **Claiborne v. Blauser**, 934 F.3d 885, 899 (9th Cir. 2019)[1] In a "swearing contest" over the use of force, unfounded security measures unfairly bolster the Defendants' credibility, "a grave injustice" depriving Mr. Sears of a meaningful opportunity to seek redress for constitutional violations. **Claiborne**, 934 F.3d at 900.

[If] the jury observes the plaintiff shackled or surrounded by guards, they will be less inclined to believe the officers' use of force was unreasonable." Liability, like criminal guilt, should be decided solely on the basis of evidence developed at trial, rather than other circumstances not adduced as proof at trial.." **United States v. Wilson**, 634 Fed. Appx. 718, 730 (11th Cir. 2015) (quoting **Holbrook**, 475 U.S. at 567) **Spivey v. Head**, 207 F.3d 1263, 1272 (11th Cir. 2000).

In the case at bar, Mr. Sears has demonstrated inherent prejudice where the District Court's abuse of discretion was blatant and was not harmless. **Woods v. Dugger**, 923 F.2d 1454, 1460 (11th Cir. 1991). Prejudice should be presumed in this cause. **Deck**, 544 U.S. at 632, 635.

II. THE DISTRICT COURT ERRED BY REFUSING TO CONDUCT AN EVIDENTIARY HEARING ON DEFENDANTS' BAD-FAITH IN SPOLIATING THE VIDEOTAPE OF THE USE-OF-FORCE INCIDENT.

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[1] Compare a recent Ninth Circuit case in which the prisoner-plaintiff brought first Amendment retaliation claims. **Garcia v. Cluck**, No. 14-56631, 2020 WL 5249132, at 2 (9th Cir. Sept. 3, 2020). Because the prisoner's dangerousness was not at issue there, the court held that the district court did not plainly err. Id. But in **Claiborne v. Blauser**, 934 F.3d 885 (9th Cir. 2019), the mistake was clear error because the issue at trial was an excessive force claim and the litigant's dangerousness was at issue. See: **Claiborne,** 934 F.3d at 898-99.

From the very beginning, Defendants was cagey about the videotaped footage taken by Sergeant Scott Voorhees. They first told Mr. Sears that no video existed in efforts to conceal official misconduct, then admitted one existed for some portion of the incident. (Doc. 130-4 at 10,19; Doc. 303 at 5).

Despite active litigation, the video-footage inexplicably disappeared after Defendants' witnesses reviewed it and, unsurprisingly, approved the use of force. When Sears moves for spoliation sanctions, Defendants offered nothing more than unsupported protestations and unwarranted attacks on Mr. Sears' pro bono counsel. (Doc. 242, 243, 306 at 41-44).

The District Court abused its discretion by refusing to hold an evidentiary hearing and by accepting Defense Counsel's unsworn reasoning in concluding that the video-footage disappeared because of negligence, rather than bad-faith. (Doc. 306 at 50-51)

Defendant's do not dispute any of the following facts:

(1) Sergeant S. Voorhees filmed some portion of the encounter at issue-including the post use-of-force exam. (Doc. 303 at 136-37).

(2) Defendants and their witnesses (including the prison Warden and S. Pacchioli) reviewed the video. (Doc. 303 at 5).

(3) The video was lost or destroyed after Defendants and their witnesses reviewed it. (Doc. 306 at 41).

(4) The video likely contained incriminating evidence. (Doc. 303 at 136-37).

(5) Defendants had common law and regulatory obligations to preserve evidence from the use-of-force incident. Fla. Admin. Code §§ 33-602.210(10)(f), 1B-24.003(9)(a); Doc. 211-3 at 1.

(6) Defendants denied that video-footage ever existed when Sears first requested it in discovery, even though they took the video and later reviewed it. (Doc. 130-4 at 7).

(7) Defendants failed to produce any retention policies or schedules in discovery. (Doc. 246 913; Doc. 239 at 5 n.3.)

(8) Defendants presented no sworn evidence before trial establishing how the video-footage was lost or destroyed. (Doc. 306 at 41-44).

(9) Defendants suggested the videotape may have been destroyed while Mr. Sears' case was first on Appeal in the Eleventh Circuit. (Doc. 306 at 42-43).

Spoliation can lead to an adverse Jury instruction. **Tesoriero v. Carnival Corp.,** 965 F.3d 1170, 1184 (11th Cir. 2020). Factors relevant to the appropriate sanction for spoliation include:

> **(1)** - Whether the party seeking sanctions was prejudice as a result of the destruction and whether that prejudice could be cured;
> **(2)** - The practical importance of the evidence;
> **(3)** - Whether the spoliating party acted in bad-faith; and
> **(4)** - The potential for abuse if sanctions are not imposed. Id.

"The Third element - **bad faith** - is required for an adverse inference." **Mann v. Taser Int'l Inc.,** 588 F.3d at 1310 (quoting **Bashir v. Amtrak**, 119 F.3d 929, 931 (11th Cir. 1997)(per curiam)).

On the first two factors, there is little doubt that Mr. Sears was highly prejudiced by the loss of the video... "There is no way to cure that prejudice, because no pictures exist of Sears injuries and there are no independent, neutral witnesses of the encounter."

Video-footage is compelling evidence in a jury trial, and it would have supported Sears' testimony concerning his injuries.

But the third factor - bad faith - is the most important, and the one the District Court decided during the pretrial hearing. "Bad faith is a question fact..." **Tesoriero**, 804 F.3d at1188 (citing **Bracey v.Grondin**, 713 F.3d 1012, 1019 (7th Cir. 2013)[2] In the context of spoliation, bad faith "generally means destruction for the purpose of hiding adverse evidence." Id. at 1184 (quoting **Guzman v. Jones**, 804 F.3d 707, 715 (5th Cir. 2015))

On the fourth factor, failing to impose sanctions would encourage Florida Department of Corrections to ignore its retention protocols and dispose of relevant, potentially harmful evidence in future cases.

These hallmarks of bad-faith spoliation were more than enough to require an evidentiary hearing. Defendants aimlessly excuse these facts and disclaim spoliation by arguing that Sears "could have inquired of the other Defendants" during trial about the video and Mr. Sears did not meet his burden to prove spoliation.

[T]he point is that the District Court precluded Sears from being able to demonstrate bad faith spoliation before trial. Thus, short-circuiting his efforts to demonstrate spoliation. The District Court erred by not holding an evidentiary hearing and by finding negligence base on only unsworn statements by Defense Counsel.

Mr. Sears has the burden to prove spoliation. But his burden only goes so far as showing "that the missing evidence existed at one time; that the alleged spoliator had a duty to preserve the evidence; and that the evidence was crucial to his case." **Eli Lilly**

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[2] See also Beecher v. Baxley, 549 F.2d 974, 977 (5th Cir. 1977)("Because the issue of bad-faith or harassment is a question fact, depending on the circumstances of the particular case...").

& Co. v. Air Express Int'l USA, Inc,. 615 F.3d 1305, 1318 (11th Cir. 2010); **Flury v. Daimler Chrysler Corp.,** 427 F.3d 939, 945 (11th. Cir. 2005). The District Court was to then evaluate whether sanctions were appropriate by considering the four (4) **Flury** factors. Id.

The [key] factor is bad faith, without which sanctions cannot be imposed. And it was this factor the District Court decided in Defendants' favor when she ruled. "**This is nothing more than negligence**" and "**somebody just messed up.**" (Doc. 306 at 50-51).

The District Courts error is not only in the ultimate finding; the error is in not allowing the story to unfold. When there is evidence of bad-faith, as there is here, the burden shifts to the spoliating party to show a lack of prejudice to the movant because "in such a situation, only the party that engaged in the destruction knows how much prejudice has been caused (or potentially caused) by the destruction. See: **Brown v. Chertoff**, 563 F. Supp. 2d 1372, 1379 (S. D. Ga. 2008)("To require party to show, before obtaining sanctions, that unproduced evidence contains damaging information would simply turn 'spoliation law' on its head").

Furthermore, Sears clearly demonstrated that video-footage once existed, and Defendants admitted that they lost the videotape during active litigation. Defendant also knew or should have know of their duty to preserve the evidence. "They had a common law duty to preserve evidence in ongoing litigation, and they had a regulatory obligation to ensure the office of Inspector General retain the video".

Florida Administrative Code § 33-602.210(10)(f) contains explicit mandatory language: ["All video recordings submitted with Report of Force used **shall** be retained

and maintained by the Office of Inspector General in accordance with records retention statutes."][3]

The Eleventh Circuit had found bad-faith when [A] plaintiff was "fully aware that defendant wished to examine" the evidence, yet he allowed the evidence "to be sold without notification to defendant of its planned removal." **Flury v. Daimler Chrysler Corp.,** 427 F.3d 939, 945 (11th Cir. 2005).

Once Mr. Sears requested the videotape as part of his administrative hearing (Doc. 211-3 at 1). Defendants were on notice that the video-footage was relevant, yet they allowed it to be destroyed without notifying Sears. Id.

To the contrary, Defendants have not provide a credible explanation, supported by evidence, for the video's disappearance. They never even produced any retention policies or schedules when Mr. Sears requested. (Doc. 246 913; Doc. 239 at 5 n. 3). "The video-footage was destroyed in the middle of contentious litigation, when Defendants [knew] Sears needed the video."

The Warden criticized the improper procedure used in taking the video and discovered 'a long, unexplained amount of time' between Sears' injuries and medical care. (Doc. 274-1). These circumstances create an inference of bad-faith on its face...

The District Court should have tested that inference in an evidentiary hearing. "Defendants do not address inherent prejudice at all". They simply contend that any prejudice caused by procedural shortcomings was harmless because a stipulation was read at trial: ["Officer Dexter was aware that Mr. Sears was an aggressive inmate."]

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[3] See also Fla. Admin. Code § 1B-24.003(9)(a)("Public Record may be destroyed or otherwise disposed of only in accordance with retention schedules established by the Division.")

(Doc. 304 at 11). But this stipulation related to information Captain Dexter knew about Sears in 2010. It is unrelated to the District Court's security determinations, which should be based on the State's present or current interests in security. Defendants have only retroactive justification of the security decision that fails to incorporate the procedural steps required to safeguard an inmate's right to due process in a civil trial. That's not enough..."

Under a Harmless Error analysis, Sears need only demonstrate inherent prejudice, showing (1) - whether there is an impermissible factor coming into play, and (2) - whether it poses an unacceptable risk. **United States v. Wilson**, 634 Fed. Appx. 718, 730 (11th Cir. 2015)(citing **Woods v. Dugger**, 923 F.2d 1454, 1457 (11th Cir. 1991)[4] Those element were met.

III THE DISTRICT COURT ABUSED ITS DISCRETION BY ALLOWING DEFENDANT'S TO ELICIT IMPROPER TESTIMONY FROM SAMUEL PACCHIOLI ABOUT APPROVING THE USE OF FORCE.

At trial, Defendants repeatedly elicited improper testimony from Samuel Pacchioli. Though the District Court sustained Sears' persistent objections and issued a curative instruction, the instruction did not cover all of the improper testimony and did not cure

[4] When deciding whether to impose sanctions, a number of factors are relevant" '(1) - whether the party seeking sanctions was prejudiced as a result of the destruction of evidence and whether any prejudice could be cured, (2) - the practical importance of the evidence, (3) - whether the spoliating party acted in bad-faith, and (4) - the potential for abuse if sanctions are not imposed. Tesoriero, 965 F.3d at 1184 (quoting ML Heath Serv. L.L.C. v. Publix Super Mkts, 881 F.3d 1293, 1307 (11th Cir. 2018).

the prejudice of Mr. Pacchioli testifying that the force used against Sears was "approved.'

In a case where the District Court barred expert testimony, Pacchioli's testimony that he "approved" the use of force against Sears was unfairly prejudicial and ultimately devastating. By court order, defendants could not call an expert witness. (Doc. 221). They skirted that order by calling Pacchioli as their last witness.

Samuel Pacchioli came to the jury as Aesop's wolf in sheep's clothing to circumvent the District Court's ruling that barred expert testimony. "Defendants draped a lay skin over Mr. Pacchioli and presented him to the jury as an ordinary fact witness". Trouble is, Mr. S. Pacchioli had no first-hand knowledge of the encounter... All he did was [review] the use of force report and opined on whether the "type and amount" of force defendants used was appropriate based on his training and experience. (Doc. 304 at 92 ,93, 101) "That is exactly what an expert witness does, and Rule 701 forbids the admission of expert testimony dressed in lay witness clothing." **United States v. Perkins**, 470 F.3d 150, 156 (4th Cir. 2006).

Defendant argue that Pacchioli was a lay witness entitled to testify about his review of the use of force report while in his inspector general role. But they produce no compelling reasoning showing he was indeed a lay witness, as opposed to an expert, and the nature of his testimony belies ipse dixit.

The critical distinction between a lay witness and an expert is the latter possesses "some specialized knowledge or skill or education that is not in possession of the jurors". **United States v. Johnson**, 617 F.3d. 286, 293 (4th Cir. 2010)(quoting **Certain Underwriters at Lloyd's London v. Sinkovich**, 232 F.3d 200, 203 (4th Cir. 2000)) See:

Fed. R. Evid. 702 (a); **Barfield v. Orange County**, 911 F.2d 644, 6651 n. 8 (11th Cir. 1990).

Defendants spent the first four pages of Mr. Pacchioli's testimony establishing his education, credentials, experience, and knowledge - the calling cards of an expert. (Doc. 304 at 89-92). And this line of inquiry was designed to establish him as particularly knowledgeable about using force - just as one would with an expert witness. Mr. Pacchioli's ultimate conclusion on the reasonableness of the use of force is likewise a harbinger of expert testimony. (Doc. 304 at 101). Witness testimony that "reaches beyond first-hand knowledge or observation and requires an 'inferential leap" becomes impermissible expert opinion. **Zamboni v. R. J. Tobacco Co.,**, no 3:09-cf-11957, 2015 WL 221150, at *2 (M.D. Fla. Jan. 13, 2015).

An assessment of the reasonableness - or here, the "appropriate[ness]" - of force is exactly that inferential leap transmuting a lay witness into an expert. **Roja Mamani v. Sachez Berzain**, No. 07-22459-CIV, 2018 WL 2980371, at *2 (S.D. Fla. Feb. 26, 2018)(citing **Samples v. City of Atlanta**, 916 F.2d 1548, 1551 (11th Cir. 1990); **Ayers v. Harrison**, 650 Fed. Appx 709, 719 (11th Cir. 2016)(per curiam); **Flint v. Scott,** No. 4:16-cv-159, 2018 WL 327166, at *1 (M.D. Ga. Jan. 8, 2018).

Defendants rely heavily on United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011), to justify calling S. Pacchioli and eliciting his opinion. Their reliance is misplaced and capricious. **Jayyousi'** stands for the unremarkable proposition that a lay witness may give opinion testimony if based on first-hand knowledge (perception). Id. at 1102-04. The opining officer in **Jayyousi'** investigated the case for five (5) years, read thousands or wiretap summaries, reviewed hundreds of verbatim transcripts, and he listened to the

intercepted calls in two (2) different languages. Id. at 1102. And all Mr. Pacchioli did was review a summary of the use-of-force report! "He had no independent, first-hand knowledge or observation of the incident, period."

While a lay witness may testify based on their review of business records not in evidence, he cannot "deliver a jury argument from the witness stand." Id. at 1103 (quoting **United States v. Cano**, 289 F.3d 1354, 1363 (11th Cir. 2002).

Samuel Pacchioli's testimony is less like Agent Kavanaugh's in **Jayyousi'** and more like Agent Smith's in **Johnson**. There, the Fourth Circuit rejected lay opinion testimony from a witness who did not participate in the investigation, but "gleaned information from interviews with suspects and charged members of the conspiracy after listening to the phone calls." Johnson, 617 F.3d at 293.

Because Agent Smith did not perceive the conduct in question first-hand, his "post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Fed. R. Evid. 701." Id. Accord **Perkins**, 420 F.3d at 156 (finding error, albeit harmless, in admitting lay witness testimony on the reasonableness of the use of force when the witness did not observe the encounter).

[A] lay witness can offer opinion testimony **only** when the opinion is "(a)- rationally based on the witness's perception; (b) - helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) - not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. The **Jayyousi'** testimony conformed to these requirements. Mr. Pacchioli's did not...

His allegedly lay opinion also violates the general rule that testimony by use-of-force experts is only admissible "regarding prevailing standards in the field of law

enforcement." **Ayers**, 650 Fed. Appx. at 719 (quoting Samples, 916 F.2d at 1551). "Pacchioli's testimony was not so limited." He invaded the province of the jury and delivered an impermissible opinion on whether the use of force was justified. **United States v. Myers**, 972 F.2d 1566, 1577 (11th Cir. 1992); **Samples**, 916 F.2d at 1551.

Sears correctly asserts that Defendants solicited an expert opinion from Mr. Pacchioli so they could have a witness experienced in the use of force tell the jury what result to reach. And they did so without warning Sears, facing an order barring expert testimony. "Witnesses cannot tell the jury what result to reach." **Commodores Entertainment Corp. v. McClary**, 879 F.3d 1114, 1128-29 (11th Cir. 2018)(quoting **Montgomery v. AETNA Cag. & Sur. Co.,** 898 F.2d 1537, 1541 (11th Cir. 1990). And Defendants cannot show that the testimony would have otherwise been admitted as expert testimony.

An expert is someone qualified through specialized knowledge or experience to help the jury understand a fact in issue. Fed. R. Evid. 702(a). Though listed as a lay witness, Defendants started Pacchioli's examination by asking about his experience, training, and credentials building to a crescendo of expert opinion. (Doc. 304 at 90-92) Sears objected, twice. (Id. at 92,93) The District Court warned Defendants not to stray into expert testimony, twice. (Id. at 92-93, 94-96).

Defendants still elicited Pacchioli's opinion on the use of force in a series of leading questions:

> **Q.** Mr. Pacchioli, do you have Defendant's Exhibit 2-001, which is the Report of Force used?
> **A.** Yes, I do.
> **Q.** And I see your signature at the bottom?
> **A.** Yes, sir.

Q. And it says, inspector general, and there is a box marked, checked approved?

A. Yes, sir.

(Id. at 99-100)

This testimony was allowed over an early objection. (Doc. 304 at 887).

A few minutes later more leading questions about Pacchioli's opinion:

Q. Now, in your review of the use of force, did you consider what type of force had been used by the officers involved in the incident?

A. Yes sir, type and amount.

Q. And you found that during your review to be appropriate?

A. yes, sir.

Q. And you understood that that included a use of chemical agent.

A. Yes, sir.

(Id. at 101)

Sears again objected, and the District Court called the questioning "absolutely inappropriate", striking the last few questions and answers. (Id. at 102). But the improper questioning did not stop:

Q. Based on your review, Mr. Pacchioli, did you find anything inappropriate according to your checklist that had occurred during the use of force?

A. No, sir.

Q. Now, had there been times during your duties as the use of force reviewer that you did find other reports without talking about specifics, where you disapproved.

Mr. Sears again objected, and the District Court again called the questioning "inappropriate", striking "the last five or six questions" and instructing the jury not to consider them. (Id. at 103).

But the damage had been done. On three occasions, the Defendants had elicited Mr. Pacchioli's testimony that the use of force was "approved".

Any jury would translate this to an expert opinion that Defendants' use of force was reasonable. And that is an inadmissible expert opinion... **United States v. Myers** 972 F.2d 1566, 1577 (11th Cir. `992) ("Asking whether force was "reasonable" or "justified" invades the province of the jury."); **Samples v. City of Atlanta**, 916 F.2d 1548, 1551 (11th Cir. 1990)(holding expert opinion on reasonableness of an officer's use of force "invaded the province of the jury...").

The unfair prejudice of Samuel Pacchioli testifying that he "approved" the use of force substantially outweighed its probative value. He should not have been permitted to testify in the first place. "The only competent testimony Pacchioli could give was his approval of Defendants' use of force..."

Moreover, Mr. Pacchioli have [A] work - relationship with the Defendants in Florida Department of Corrections. In denying Sears' motion for new trial, the District Court found no issues with Samuel Pacchioli's testimony because "the use-of-force report related to the March 18, 2010 incident had already been admitted into evidence." (Doc. 286 at 5, 9). The District Court is referring to defense Exhibit DX-2001, admitted during Sergeant Prince's testimony. (Do. 274-1). "...Defendants offered only that portion of the report written by Sergeant D. Prince - the transcript contains no foundation for or evaluation of the Inspector General's Review at the end of the Exhibit. And just as the

district court redacted later exhibits displaying Sears was found "guilty" in Administrative proceedings, it should have redacted that portion of Exhibit 2 "approving" the use of force. (Doc. 303 at 90-93).

The District Court found no error because the portion of testimony Sears objected to "was stricken from the record and the jury was instructed to disregard it." (Doc. 286 at 9) But Mr. Pacchioli's first answer confirming that he approved the use of force was not stricken. (Doc. 309 at 99-100) And "instructing the jury not to consider" "**the last few**" and "**the last five or six questions**" was not sufficient to remedy the error of allowing S. Pacchioli to testify, in the first place. Id. at 102-103.

A reasonable juror would not have included within "the last five or six questions" the earlier examination into Pacchioli's approval. Id. at 100-01.

To the contrary, the instruction still allowed the jury to consider several pages of Pacchioli's testimony - much of which included expert - like questions and answers storing up Pacchioli's credentials and positioning his approval to displace the jury's fact-finding prerogative. The District Court should have stricken **all** of Samuel Pacchioli's testimony after it became apparent that he could offer only expert testimony on the ultimate issue retained by the jury.

By allowing Pacchioli to testify, the District Court permitted Defendants to circumvent Rule 702 by offering expert testimony as lay testimony. See: Fed. R. Evid. 701 adv. Comm. note (2000); **James River Ins. Co. v. Rapid Funding, L.L.C.**, 658 F. 3d 1207, 1216 (10th Cir. 2011).

"Curative instructions do not always eradicate the prejudice resulting from an improper argument..." **McWhorter v. City of Birmingham**, 906 F.2d 674, 678 (11th Cir.

1990); **Maus v. Baker**, 747 F.3d 926, 928 (7th Cir. 2014). Despite the instruction, the jury remained concerned with Mr. Pacchioli's opinions.

After his testimony, the District Court allowed Pacchioli to answer a jury question - **over Sears' objection**- about his " final finding, recommendation or outcome about use of force." (Doc. 304 at 108)

Thus, Appellate Courts "normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it." **Greer v. Miller**, 483 U.S. 756, 766 n. 8 (1987).

But reversal is appropriate if there is (1) - an "**overwhelming probability**" that the jury did not or could not follow the instruction, and (2) - a strong likelihood that the effect of the evidence was "**devastating**." **Hughes v. Priderock Cap. Partners**, 812 Fed. Appx 828, 836 (11th Cir. 2020).

Defendant framed S. Pacchioli as an expert by reviewing his qualifications, thus encouraging the jury to substitute his conclusions for their own when evaluating the use of force - [a question that is the prerogative of the jury]. **United States v. Evans**, 910 F.2d 790, 803 (11th Cir. 1990); **In Re Delta/Airtan Baggage Fee Antitrust Litig.,** 245 F. Supp. 3d 1343, 1362-63 (N.D. Ga. 2017); **Samples**, 916 F.2d 1548, 1551.

In addition, Pacchioli's testimony is particularly devastating to Sears' case when considered with the disciplinary reports the District Court allowed Defendants to use for impeachment. Defendants elicited testimony from Sears that he had been "found guilty" and "convicted" in prison disciplinary hearings. (Doc. 302 at 109, 122, 123)

"[N]o evidentiary rule allows disciplinary reports to be introduced for general impeachment." **Petersen v. Smith**, 762 Fed. App 585, 589 (11th Cir. 2019). Allowing

such testimony conflicts with Eleventh Circuit precedent not to allow evidence showing Sears was found "guilty" in administrative hearings. (Doc. 303 at 90-93, 101) Considering this evidence, the jury was even more likely to substitute Mr. Pacchioli's opinion for their own. The District Court abused its discretion by allowing Pacchioli to testify, "an error the Instruction did not cure.

IV. DEFENSE COUNSEL'S IMPROPER CLOSING ARGUMENTS IRREVERSIBLY PREJUDICED SEARS

Defense counsel maliciously made improper statements in closing argument and expressed personal opinions about Mr. Sears credibility throughout the trial.

Defense counsel's closing argument violated fundamental rules against expressing a personal opinion about a witness's credibility and against "conscience of the community" arguments designed to inflame the jury's emotions and supplant fact-finding with moral indignation.

Defense counsel improperly expressed personal opinions and attacked Sears' credibility; he bolstered the credibility of his own witnesses; and even testified in front of the jury about evidence not in the record. Considered collectively, these statements deprived Mr. Sears of a fair trial. **Westbrook v. General Tire & Rubber Company**, 754 F.2d 1233, 1234 (5th Cir. 1985); **United States v. Kopituk**, 690 F.2d 1289, 1342-43 (11th Cir. 1983).

"It is fundamentally improper for counsel to express a personal belief in the honesty or credibility of a witness." **United States v. Young**, 470 U.S. 1, 18 (1985); **United States v. Garza**, 608 F.2d 659 663 (5th Cir. 1979); **Muhammad v. Toys R Us, Inc.,** 668 So. 2d 254, 258 (Fla. 1 DCA 1996). This rule manifests in the prohibition against

vouching, which extends to § 1983 trials. **Draper v. Rosario**, 836 F.3d 1072, 1084 (9th Cir. 2016) See: 75A Am. Jur. 2d Trial § 575 (West August 2020)("It is improper for counsel in a civil action to vouch for the credibility of witnesses...").

"Attempts to bolster a witness by vouching for his credibility are normally improper and error." **United States v. Ellis**, 547 F.2d 863, 869 (5th Cir. 1977).

Disregarding this elementary prohibition, defense counsel recounted Sears' testimony and told the jury, "**That to me is totally incredible**," then characterized Sears' testimony as "**totally unbelievable**" and "**incredulous**." (Doc. 304 at 166-67) Defense counsel also told the jury that Mr. Sears "**was not candid with you**" and questioned the veracity of Sears' evidence. Id. at 169-70. He even cautioned the jury, "**We can't believe everything Mr. Sears says**", because Sears "**falsely accused**" Sergeant Prince "**of something he didn't do**." Id. at 170, 171.

Defense counsel took the opposite tack with his own witnesses, bolstering their credibility through personal opinion. He vouched for Sergeant Prince by saying, "**I don't blame him for raising his voice, He's being falsely accused of something he didn't do**." Counsel told the jury Colonel Roberts had a "**very humble demeanor**" and "**suggested**" that Nurse Cooper "**was pretty forthright**." Id. at 171, 172, 179. The vouching culminated in defense counsel's troubling statement that in order to find in Sears' favor, the jury would have to conclude that the Defendants and their witnesses were "**all liars**." Id. at 176.

Defense counsel ended his closing argument by telling the jury that the defendant's "**have a moral right not to be falsely accused of something which they did not do...**" Id. t 179-80.

"[C]onscience of the community" arguments like this serve no proper purpose and are impermissible if they are "designed to inflame the jury". **United States v. Kopituk**, 690 F.2d 1289, 1342-43 (11th Cir. 1983); **Westbrook v. General Tire & Rubber Company**, 754 F.2d 1233, 12239 (5th Cir. 1985). Such argument invoking the jury's morality was plainly intended to pique the religious and emotional tendencies of jurors, encouraging them to make a decision based on moral obligation instead of facts.

Besides the improper closing argument, defense counsel made several improper statements in front of the jury. First, Defense Counsel improperly testified to the jury during what should have been a legal colloquy concerning an objection. Defense Counsel struggled to admit Sears' grievances and disciplinary reports into evidence.

Defendant Counsel implied Sears was lying, saying - in front of the jury -"He said it's not on here, and it is, your Honor." (Doc. 302 at 95). That reference was to an Exhibit not in evidence, turning Defense Counsel into a witness.

During another colloquy, Defense Counsel was trying to elicit testimony concerning disciplinary hearings. After Sears objected, Defense Counsel blurted out, "**They're told that they have to give him certain due process rights. This is what they're told at the hearing.**" (Doc. 304 at 54). Mr. Sears rightly objected to Defense Counsel essentially testifying to the procedures in prison disciplinary hearings.

In another exchange, the District Court pointed out that Defense Counsel had not shared Exhibits they intended to introduce at trial. (Doc. 303 at 69). Defense Counsel retorted - in front of the jury - "**We gave then the exhibits. I just can't get everything in because they objected to it.** (Id.) This is a form of bolstering, implying that defendants had more evidence supporting their case, but Sears' lawyers hid it from the

jury. And in yet another exchange related to impeachment, the District Court asked Defense Counsel how she intended to elicit testimony from Mr. Sears concerning a particular document. She responded - in front of the jury - "**He's being a difficult witness.**" (Id. at 111).

It is well settled, "where there has been calculated sustained improper conduct producing biased issues as they went to the jury", the party is deprived of his due process right to a fair trial. **O'Rear v. Fruehauf Corp.,** 554 F.2d 1304, 1309 (5th Cir. 1977)(quoting **Straub v. Reading Company**, 220 F.2d 177, 182 (3rd Cir. 1955).

By constantly questioning Sears' credibility to the jury, by bolstering their own witnesses, by testifying to the jury, and by implying that Mr. Sears' counsel was interfering with their ability to introduce evidence. Defendants deprived Sears of his right to a fair trial. See: **United States v. Acosta**, 924 F.3d 288, 298 (6th Cir. 2019)("Between his cross-examination of Morales - Montanez and his closing argument, the prosecutor made nine (9) improper and prejudicial remarks and questions that resulted in a fundamentally unfair trial."); **Sacred Heart Hospital of Pensacola v. Stone**, 650 So.3d 676, 679-80 (Fla. 1 DCA 1995)(Reversing on plain error where counsel repeatedly characterized the opposing party's testimony as "ridiculous" and commented on the justness of his client's cause).

This Court may find plain error where the improper argument was "plainly unwarranted and clearly injurious." **Sowers & R.J. Reynolds Tobacco Company**, 975 F.3d 1112, 1124 (11th Cir. 2020)(quoting **Cote v. R.J. Reynolds Tobacco Co.,** 909 F.3d 1094,1104 (11th Cir 2018); **Oxford Furniture**, 984 F.2d at 1128 (citing **McWhorter**, 906 F.2d at 677).

The evidence must be "so obviously inadmissible and prejudicial" that the district court should have *sua sponte* excluded it...**ML Healthcare Services**, 881 F.3d at 1305.

Thus, Eleventh Circuit review of improper closing argument is limited to plain error. For there to be plain error; (1) - there must be error; (2) - that is plain; (3) - that affects the substantial rights of the party; and (4) - that seriously affects the fairness, integrity, or public, reputation of a judicial proceeding. **Ruiz v. Wing** __ F.3d __, No. 18-10912, 2021 WL 382071, at *6 (11th Cir. Feb. 4, 2021). These elements are met. Such plainly unwarranted commentary that included calculated sustained improper conduct producing biased issues as they went to the jury clearly demonstrate denial of due process and the right to a fair trial. **Woods v. Dugger** 423 F.2d 1434, 1460 (11th Cir. 1991); **Satterwhite v. Texas**, 486 U.S. 249, 256 (1988).

Moreover, Defense Counsel's statements here did not just comment on testimony; they told the jury how to assess credibility. "That function is uniquely for the jury..." **Hammer v. Slater**, 20 F.3d 1137, 1143 (11th Cir. 1994).

Errors, improper opinions, and imprudent statements compounded throughout the trial that resulted in a jaundiced perception of Mr. Sears as a dangerous, untrustworthy person, ultimately destroying his credibility, and scutting his case. The combined errors deprive Sears of his constitutional due process right to a fair trial, a right harmless error cannot impede. **Woods v. Dugger**, 923 F.2d at 1460.

V. THE EVIDENCE DEMONSTRATED THAT SEARS SUFFERED MORE THAN A *DE MINIMIS* INJURY

Under the Eighth Amendment, force is deemed legitimate in a custodial setting if it is "applied in a good-faith effort to maintain or restore discipline" and not "maliciously and

sadistically to cause harm." **Hudson v. McMillian**, 503 U.S. 1, 7, 112 S.Ct. 995, 999 (1992).

In determining whether force was used "maliciously and sadistically" this Court considered: (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 injury inflicted upon prisoner"; (4) - the extent of the threat to the safety of staff and inmates"; (5) - and "any efforts made to temper the severity of a forceful response." **Cockrell v. Sparks**, 510 F.3d 1307, 1311 (11th Cir. 2007).

The focus of our Eighth Amendment inquiry is on the nature of the force applied, not on the extent of the injury inflicted. **Wilkins v. Gaddy**, 559 U.S. 34, 37-38, 130 S.Ct. 1175, 1178-79 (2010).

Defendant s argued that all of these errors were harmless because Sears did not produce enough evidence that Defendants' use of force was unreasonable and that Mr. Sears was injured as a result. To the contrary, Sears presented evidence of both, and these errors were not harmless...

"Mr. Sears testified and the evidence supported that he suffered more than *de minimus* injuries from the excessive use of pepper-spray and physical assault." (Doc. 302 at 54-60, 65-66, 69); Docs. 274-9, 274-10).

[T]he video-footage revealed a long, unexplained amount of time between deploying pepper-spray and treating Sears for his injuries. "Suffering through the effects of pepper spray for a "**long**" time is more than a *de minimus* injury ..." See: **Thompson v. Smith**, 305 Fed. App'x 893,905 (11th Cir. 2020)(concluding injuries from pepper spray could be more than *de minimus*). Cf. **Vinyard v. Wilson**, 311 F.3d 1340, 1348 n. 13 (11th Cir.

2002)("What distinguishes Stanfield's force during the jail ride from the *de minimis* force and injury cases is the use of pepper spray.").

Additionally, "an officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance." **Skrtich v. Thornton**, 280 F.3d 1295, 1301 (11th Cir. 2002).

In this Eighth Amendment excessive force case, the overarching question is whether Plaintiff, Terry Sears was deprived of a fair trial, as a result of the adverse security measures arbitrarily imposed.

In **Hudson**, this Honorable Court has reached the majority consensus on the standard for determining the application for excessive use of force against prisoners. Id. 503 U.S. at 7. And the focal point of Eighth Amendment inquiry is on the nature of the [force] applied, not on the extent of the injury inflected. **Wilkins v. Gaddy**, 599 U.S. at 37-38.

This case is of such imperative public importance as to justify the exercise of this Court's discretionary review to impose immediate determination and resolution. 28 U.S.C. § 2101(e)

REASONS FOR GRANTING THE PETITION

This Honorable Court should exercise its supervisory discretion and grant certiorari in this case to rectify the indifference concerning the constitutional violations of established law.

Eleventh Circuit has so far departed from the accepted and usual course of judicial discretion in a way that directly and expressly conflicts with this Court's precedents, and other relevant decisions of the U.S. Court of Appeal, Eleventh Circuit on the same important federal questions. And the great public importance of deciding whether the cautious process required by **Deck v. Missouri**, 544 U.S. 622 (2005) and **Holbrook v. Flynn**, 475 U.S. 560 (1986) applies in civil cases...

"Like shackling, a conspicuous security presence around a party need close judicial scrutiny because it may pose a threat to the fairness of the fact-finding process." In efforts to maintain uniformity and for all others similarly - situated, this Court should address due process concerns where district courts abuse their discretion and failed to make independent determinations on the record for adverse security measures. **Satterwhite v. Texas**, 486 U.S. 249, 256 (1988); **Woods v. Dugger**, 923 F.3d 1354, 1460 (11th Cir. 1991); **Warger v. Shauers**, 574 U.S. 40, 50 (2014).

"Shackling a plaintiff surrounded by a coterie of guards creates constitutional skepticism in the minds of the jury and undermines the fairness of fact-finding and impairs one's ability to communicate with their lawyers and participate in their defense."

[A] national consensus is most warranted to rectify discrepancies concerning spoliation of the evidence where retention protocols are in place; district courts deferring to correctional officers about security measures; failing to state its reasons for allowing

shackling and guards on the record; failing to consider less restrictive means of security; lay witness(s) giving expert testimony; and improper closing arguments where counsel expressed personal opinions about Sears' credibility and honesty, bolstered the credibility of his own witnesses, and invoking a conscience of the community argument to the jury.

Wherefore, compelling reasons exist for the exercise of this Court's discretionary jurisdiction to both maintain uniformity and to resolve or clarify said discrepancies concerning the important questions of federal law that seems to confuse our district courts even more today than it did when they was decided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ Terry E. Sears
Terry E. Sears
Date: November 7th, 2022.