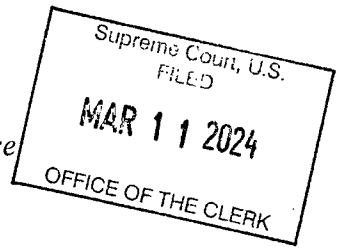
No. 24-5636

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT MOCO,

Petitioner, Pro-se



-v-

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Robert Moco respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Secound Circuit, rendered and entered in cases number 22-307-pr (L); 22-348-pr (Con) in that court on 12th day of October, 2023.wich affirmed the judgment and commitment of the United States District Court for the Southern District of New York.

Official and unofficial reports of opinions and order entered in the cases

Defendants also assert that they did not know plaintiff had been injured, and therefore he connot establish the subjective prong of a denial of medical care claim. The Court reject this argument. After using force on Plaintiff twice, force that was extreme enough to break Plaintiff's rib, it is unlikely that Defendants did not know Plaintiff suffered adverse consequenses without him specifically complaining. Plaintiff's assertions that Defendants took him elsewhere and beat him instead of taking him to get medical treatment after the assaults sufficiently allege Defendants' deliberate indifference to his health.

For all of these reasons, Plaintiff has stated denial of medical care claims and therefore Defendants' motion in this regard is **DENIED.**

Defendants' Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

Specifically, Plaintiff's excessive force and denial of medical care claims related to Defendants applying tight handcuffs on January 27, 2016 is **DISMISSED.**

For claims will proceed to discovery: rwo for excessive force during the alleged assaults on January 27 and January 29 or 30, 2016 and two for denial of medical care after both incidents.

By separate order, the Court will refer this case to a United States Magistrate Judge for pretrial proceedings.

IT IS SO ORDERED.

Dated: August 8, 2019.[1]
Rochester, New York.

Appendix—1

Counter claim for battery, alleging that during the January 30, 2016 incident, Moco struct Janik "in The eye with his elbow."ECF No.56 at 4. Citing Janik's deposition testimony that he did not know ehether Moco's action occurred "by way of a reflex," ECF No.75-3 at 5, Moco contends that he lacked "the requisite intent to sustain" a claim for battery. ECF No. 75-9 at 14; se also *Doe v. Alaaud*, 224 F. Supp. 3d 286,294 (S.D..N.Y. 2016). (noting that battery requires a harmful or offensive bodily contact "made with intent"). The Court concludes that summary judgment is inapproproate, as a reasonable jury could find that Moco acted Janik intentionally. Janik testified that, as he was performing a pat frisk on Moco, Moco "come off the wall," ECF No70-5 at 10, and "spun" his body around as he struck Janik in the eye with his elbow. ECF No. 75-3 at 4-5 The record evidence, including this testimony, does not compel the conclusion that Moco's action was involuntary. Moco's motion for summary judgment is therefore denied.[4]

For the foregoing reasons, Defendants' motion for summary judgment (ECF No.70) is **GRANTED,** and Moco's cross-motion for summary judgment (ECF No.75) is **DENIED**. All claims against Defendants are dismissed with prejudice. The oly remaining claim is Janik's counterclaim for battery against Moco. By separate order, the Court will schedule a status conference to hear from the parties on the progress of this action.

IT IS SO ORDERED.[2]

Dated: November 15, 2021.
Rochester, New York

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4. Moco also points out that, at the deposition Janik was semingly unaware that he had raised a counterclaim against Moco, See ECF No. 75-3 at 4. Moco posits that this means the counterclaim has been "voluntarily withdrawn," ECF No. 75-9 at 14, but he presents no legal authority to support that argument. See United States v. Zannino, 895 F. 2d 1, 17 (1st Cir. 1990) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."). regardless, Janik has since clarified that he was simply confused by the question and does, in fact, wish to pursue a counterclaim. ECF No. 77-1 at 2.

(See Appendix—2)

STATEMENT OF JURISDICTION

Subject-matter Jurisdiction is proper under 28 U.S. C. §§ 1331 (federal question), 1343(a)(3) (civil rights), Also This Court (Supreme Court of the United States) has Jurisdiction in this Petition for Certiorari under rule 10 of this Court. See rule 10,(a)(b)(c), Because the decision and then Mandated in this case conflict with many different Circuit Court's Decisions as the Seven Circuit, hold in *Ramirez v. Young*, 906 F. 3d 530 (7th Cir. 2018) (which it cites for the proposition that a remedy is sufficiently "available" to a prisoner under the PLRA when the prison, aware of the prisoner's language barrier, takes "reasonable steps" to inform him of the grievance procedures. *See Ramirez v. Young*, 906 F. 3d 530 (7th Cir. 2018).

Jurisdiction of this Court is invoked under 28 U.S. C. § 1254(1) and PART !!! of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on October 12,th 2023. This petition is timely filed pursuant to SUP. CT. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

Th Supreme Court had subject matter jurisdiction over this action under 28 U.S.C.§ 1331, as the action arose under 42 U.S.C.§1983.This Court has jurisdiction to review the district's court's final judgment pursuant to 28 U.S.C. § 1291. the district court entered final judgment on January 27,2022. (JA-529). Moco timely filed a notice of appeal on February 14, 2022. (JA-530). See Fed. R.App. P 4(a)(1).[2]

1. Appeal for the Second Circuit court entered judgment on October 12,th 2023
2. Petition for panel rehearing entered judgment on January 18th 2024.

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2. Presumably in error or in an abundance of caution, Moco filed a second timely notice of appeal on February 22, 2022. (JA-534). "The second notice of appeal raises no new issues in terms of the ultimate relief sought and may be considered superflous and thus [be] consolidated with the first notice of appeal." *Bradley v.Coughlin*, 671 F.2d 689, 690 (2d Cir. 1982).

CONSTITUTIONAL PROVISIONS

1). Eighth Amendment To The United States Constitution.

2). Fourth Amendment "Unnecessary handcuff tightening...Can Constitute excessive force"

The workers at NYDOCCS at Gowanda Correctional Facility ("GCF") as Correction officer Jay Janik, and Philp Voltz used excessive force against Inmate Mr, Robert Moco on January 27, 2016 and/or again on January 30,2016, and then denied Mr, Moco necessary medical care afterwards, in violation of Plaintiff's right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.

STATEMENT OF THE CASE

On May 10, 2017, Moco, proceeding pro se and in forma pauperis, filed a complaint under 42 U.S.C. § 1983 against Correction Officer Janik. (JA-11). On November 13, 2017, Moco, still proceedind pro se, filed an Amended Complaint maintaining Janik as a defendant, and adding a John Doe later indentified as Correction Officer Voltz. (JA-23).

On September 5, 2018, the Officers moved to partially dismiss Moco's Amended Complaint pursuant to Rule 12(b)(6) of the federal Rules of Civil Procedure (JA-57). The district court granted the motion in part on August 8, 2019, isolating and dismissing Moco's claims for excessive force and denial of medical care as to the handcuffing portion of the alleged attack. (JA-90)

By order dated January 15, 2020, and following Moco's submission of evidence of his limited comprehension of English as an Albanian speaker, the Court appointed counsel to represent Moco in the district court. (JA-107-109). on July 26, 2021, the officers moved for

summary judgment against Moco, seeking dismissal of the entire Amended Complaint on failure-to-exhaust grounds. (JA-120). The district court granted the motion on November 15, 2021, (JA-518), entering final judgment in favor of the Officers and against Moco on January 27, 2022,(JA-529). Moco timely appealed.(JA-533; JA-533).

REASONS FOR GRANTING THE WRIT

The district court made two reversible errors:

First, the district court improperly resolved disputed factual issues in favor of the Officers on Summary judgment by impermissibly drawing inferences in the Officers' favor, rather than Moco's. The PLRA requires prisoners to exhaust "such administrative remedirs as are available." 42 U.S.C. § 1997e(a). To be "available," a grievance process must be accessible to a reasonable prisoner, accounting for language comprehension. Moco argued that Gowanda staff never made the grievance process available to him because they provided him with only written materials about process that Moco, due to his limited understanding of english, could not comprehend. (JA-447-448,¶ 40. Moco submitted a sworn declaration along with portions of his deposition to support this position. But the district court set this evidence aside, instead using evidence submitted by the officers to infer that Moco could, in fact, sufficiently understand English. That was improper on summary judgment. The district court should have construed Moco's evidence in the light most favorable to him and given him the benefit of every reasonable inference. Moco is entitled to try these issues to the bench on remand.

Second, the district court erred in isolating and dismissing Moco's claim of cruel and painful handcuffing by the Officers. As an initial matter, the district court was mistaken in concluding that handcuffing, even when maliciously done to cause harm, cannot cause an Eighth Amendment violation without serious injury. But controlling precedent holds that handcuffing

rises to the level of an Eighth Amendment violation where officers improperly seek to inflict pain, regardless of the significance of the injury. Moco's complaint, particularly when read with the solicitude due to *pro se.* pleadings, alleges that the Officers cruelly bullied him by handcuffing him and raising his arms to hurt him just after learning that he was sick and after taunting and humiliating him. Such malicious and gratuitous violence states an Einhth Amendment violation. In any event, the district court should not have separated handcuffing from the remainder of the assault, moments tater; instead, the overall assault should have been considered as a constitutional violation.

Besed upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Second Circuit.

OPINION BELOW

1. United States District Court Western District Court
Robert Moco v. J.M.Janik. et.al. No: 17-cv-398-FPG
(November 15, 2021 See Appendix—2)

CONCLUSION

For The foregoing reasons, Defendant's motion for summary judgment (ECF No.70) is GRANTED, and Moco's cross-motion for summary judgment (ECF No. 75) is DENIED. ALL claims against Defendants are dismissed with prejudice. The only remaining claim is janik's counterclaim for battery against Moco. By separate order, the Court will schedule a status conference to hear from the parties on the progrees of this action.

2. United States Court of Appeal For the Secound Circuit
Robert Moco v. J.M. Janik. et.al. No: 22-307-pr(L); 22-348-pr(Con)
(October 12, 2023 See. Appendix—7)

Accordingly, Moco's failure to exhaust available administrative remedies under the PLRA is not excused, and summary judgment was warranted in favor of defendants on all claims.

Because we conclude that summary judgment was warranted for failure to exhause administrative remedies on all claims related to the events on the two dates at issue, including the handcuffing claim, we need not address the district court's dismissal of the handcuffing claim under Rule 12(b)(6) for failure to allege a sufficient injury. *See Nat'l R.R. Passenger Corp. v. McDonald*, 779 F.3d 97, 100 (2d Cir. 2015) ("We may affirm on any ground with support in the record.")

***

We Have Considered Moco's remaining arguments and conclude that they are without merit. For the foregoing reasons,we **AFFIRM** the judgment of the district court.

3. United States Court of Appeal For the Secound Circuit (Rehearing)
Robert Moco v. J.M. Janik. et.al. No: 22-307-pr(L); 22-348-pr(Con)
(January 18, 2024 See. Appendix—8)

Plaintiff-Appellant Robert Moco, having filed a petition for panel rehearing and the panel that determined the appeal having considered the request,

IT IS HEREBY ORDERED that the petition is **DENIED.**

STATORY PROVISION INVOLVED

Petitioner intends to rely on the following constitutional and statutory provisions:

42 U.S.C. § 1997e(a)

This appeal construes the meaning of "available" under Section 7(a) of the Civil Rights of Institutionalized Persons Act, as amended by the Prison Litigation Reform Act of 1995 (the PLRA), Pub. L. 104-134, title VIII, § 803(d), 110 Stat. 1321-66, 1321-77 (Apr. 26, 1996), codified as amended at 42 U.S.C. § 1997e(a).[3] That subsection is reprinted in the Appendix—4

3. In keeping with the practice of this Court, *see,e.g., Williams v. Priatno*, 829 F.3d 118, 119(2d Cir. 2016), this brief refers to the codified provisions of Title 42,42 U.S.C. § 1997e,even though Title42 of the United States Code has not been enacted into positive law.*See generally* 1U.S.C.§ 204.

Preliminary Statement

Plaintiff-Appellant Robert Moco (Moco) appeals from a judgment of the United States District Court for the Western District of New York (Hon. Frank P. Geraci, J) entered on January 27, 2022, in favor of defendants- Appellees correction Officers Janik and Correction Officer Voltz (together, the Officers). (JA-529).[2]

Moco, a native-born Albanian and then-incarcerated New York State prisoner, filed *Pro-se*claims under 42 U.S.C. § 1983 alleging the Officers injured him and denied him medical care at the Gowanda Correctional Facility (Gowanda).(JA-23).

Moco complained that, one evening in early 2016, the officers bullied and attacked him, tightly handcuffing him to cause severe pain and then—while handcuffed and facing a wall—brutally assaulting him. (JA-23). Moco described two more attacks from the officers over the next days and their repeated refusals of medical care. (JA-23; JA-464-465).

Moco's case never reached the merits. the district court entered judgment for the Officers, granting summary judgment for a failure to exhaust and dismissing the handcuffing part of the first attack as not actionable. Both decisions were in error. The district court erred in adopting the officers' exhaustion defense. To exhaust administrative remedies, prisoners must use "such administrative remedies as are available." 42 U.S.C. § 1997e(a). remedies are available to a prisoner only to the extent they are understandable to a reasonable prisoner in the same circumstances. Moco, as a native Albanian speaker, introduced evidence that, at the time of the attacks, his English skills were insufficient for him to read and understand the requirements of the grievance procedure. while the district court recognized that language barriers may make administrative remedies unavailable, the court improperly resolved genuinely disputed material

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2. This brief uses JA and to refer to the Joint Appendix and , respectively.

facts by finding that Moco "[b]y all appearances, could speak and communicate English in a manner sufficient to understand the written grievance procedure." (JA-525). That finding impermissibly granted favorable inferences to the Officers rather than to Moco. On remand, Moco is entitled to try the issue.

In addition, the district court erroneously carved out part Moco's Eighth Amendment claim under Rule 12(b)(6) by improperly isolating the handcuffing portion of the first attack and reasoning that inflicting pain through handcuffing does not violate the Eighth Amendment. (JA-92). As an initial matter, such reasoning ignored controlling case law, which holds that the malicious use of force violates the Eighth Amendment even in the absence of significant injury. Moco's complaint, when read with the solicitude due to a pro se litigant, alleged excessive force by detailing how the Officers inflicted pain on him, a sick prisoner, by handcuffing him and raising his arms for no reason aside from a malicious intent to see him suffer.

Such malicious conduct states an Eighth Amendment claim . In any event, the district court improperly excised the handcuffing part of the attack from the remainder of the attack, when there was no reason to do so. This Court should vacate the judgment and remand for further proceedings.

Statement of Facts

A. Moco's Evidence

1. Moco,an Albanian speaker, arrived at Gowanda with little comprehension of English

Moco was born and raisedm in Albania. (JA-447, ¶ ;3; JA-397). His native language is Albanian, and prior to moving to the United States, he spoke only Albanian (JA-447, ¶ 3). Moco was admitted to Gowanda in 2016. (JA-447, ¶ 3). At that time, his understanding of the English language was very limited. (JA-447, ¶ 3). Upon his admission to Gowanda, none of the

corrections officers or other prison employees explained the PLRA or the grievance process to Moco, let alone in a language he could reasonably understand. (JA-447-448, ¶ 4). Gowanda merely provided Moco with English. (Id.). Because of his limited grasp of the English language, the written materials that written materials that included the grievance process, but these materials were provided only in were provide to him were beyond his ability to comprehend. (Id.).

2. The Officers Brutally Assaulted Moco.

On the evening of January 27, 2016, Moco was experiencing jaw pain. (JA-399). He approached the Officers to request medical attention.[4] (JA-399). Cruelly, instead of giving him medical attention, the Officers began mocking him. (JA-400). They told Moco a news story of how someone had "killed [a] Mexican that ran from jail" and threatened Moco that "the same thing was going to happen to you" and he was told he would be sent "back to Albania." (JA-399-JA-400). Moco found himself "insult[ed] in front of . . . almost 30 people." (JA-400). "The whole dorm saw it." (JA-401).

The Officers then escorted Moco to an adjoining hallway without cameras (JA-402), where they ordered Moco to face the wall, patted Moco down, and—to the extreme degree of causing him severe pain. (JA-402; JA-404). "As soon as they put the handcuffs on, they started

4. Moco testified at deposition that both Officers assaulted him on January 27, 2016. (JA-300-400, JA-403-407, JA-421-428). Throughout his deposition, Moco referred to one Officer as the officer "with the hair" and another as the "bald guy." (*See, e.g.*, JA-403). As the Officers themselves acknowledge (JA-136-137 n.3) (JA-136-137 n.3), Officer Voltz was the one "with the hair" and Officer Janik was the "bald guy," as reflected in the photographs (JA-319). However, in an apparent oversight, Moco marked as "undisputed" the Officers' claim, in their summary judgment statement of material facts, that "Janik was not working at Gowanda on January 27, 2016." (JA-476, ¶ 16). Regardless of whether Janik was on duty or not, Moco has always identified both Officers as there that evening and culpable, consistent with his deposition testimony. (JA-464-465, JA-300-400, JA-403-407, JA-421-428). That remains Moco's position today.

hitting" Moco. (JA-405). The Officers punched Moco in the ribs. (JA-404; JA-405). Moco estimates that he was punched at least five times before other officers intervened to break up assault. (JA-407; without apparent reason other to than to cause gratuitous harm—handcuffed Moco JA-407). Only after being assaulted, while handcuffed, was Moco finally taken to the nurse's station. (JA-409). While being escorted to the nurse' station, the officer continued twisting the chain on the handcuff and lifting his arms up to inflict pain. (JA-409).

That was not the end of the cruelty. After a brief interaction with the nurse, Moco was sent to the Special Housing Unit. (JA-413; JA-414; JA-415). There, the Officers assaulted him again, this time with multiple punches to his back and ribs, as well as baton strikes to the upper part of his legs. (JA-415; JA-417). The Officers struck Moco so many times that he lost count, and all he could do was scream from pain. (JA-417. Following this additional assault, Moco returned to his cell. (JA-418).

A few days later, the Officers attacked Moco again. Specifically, on January 30, 2016, Moco was attempting to make a phone call when he was surprised by Voltz. (JA-421; JA-422). Voltz escorted Moco into the hallway and ordered him to face the wall. (JA-423). There, Voltz was joined by Janik, and, together, they forced Moco onto the floor and handcuffed him again. (JA-425). They then brutally assaulted him again. (JA-425). Immobilized under the weight of Janik and facing the floor, Moco was—yet again—punched in the ribs until other officers intervened. (JA-425; JA-426). While one of the intervening officers went to make a phone call, Voltz attempted to break Moco's thumbs, only ceasing when the intervening officer returned and escorted Moco to the infirmary. (JA-428).

3. Moco Lacked Sufficient English Comprehension to Understand The Grievance Process.

As result of these brutal assaults and tight handcuffing, Moco sustained numerous injuries, including to his back, legs, wrists, and ribcage. (JA- 448, ¶ 6). However, due to his very limited understanding of the English language, Moco was not familiar with the written material governing the grievance procedure, nor was he familiar with the specificities of the grievance process. (JA-447-448, ¶ 4).Those grievance material, incomprehensible to Moco, explained when and haw to exhaust administrative remedies and that exhaustion was required.(Ja-342-359). Moco did not understand what grievance form was required until more than six months later, after being transferred to another correction facility.(JA-449, ¶ 9).

B. District Court Proceedings

1. Moco filed a complaint under Section 1983.

By complaint dated May 10, 2017, Moco commenced this pro se action under 42 U.S.C. § 1983 against officer Janik. (JA-11). Moco amended his complaint on November 13, 2017, and added officer Voltz. (JA-23).

2. The district court isolated and dismissed the handcuff portion of the first attack.

The officers moved for partial dismissal on September 5, 2018, arguing that Moco's tight handcuffing allegations failed to state any constitutional violation because Moco never alleged "any physical injury related to the tight handcuffing beyond temporary pain." (JA-63). The officers further argued that Moco has not alleged "a sufficient level of wantonness to state a violation of the Eighth Amendment either."(JA-63-64).

The district court viewed the tight handcuffing claims in insulation from the surrounding assault on Moco and ruled that the claims were insufficient as a matter of law. (JA-92). The district court acknowledged Moco's allegation that he 'experienced pain and requested medical

attention, "but faulted the complaint for failing to " allege that he suffered any other injury." (Id.). The court did not address case law holding that 'unnecessary handcuff tightening... can constitute excessive force." *Ketcham v. City of Mt. Vernon*, 992 f.3d 144, 150 (2d Cir. 2021). Instead, relying on a " consensus among courts in this circuit that tight handcuffing does not constitute excessive force unless it causes some injury beyond temporary discomfort," the district court dismissed what it characterized as Moco's handcuffing excessive force claims. (A-92 (quoting *Usavage v. Port Auth. of New York & New Jersey*, 932 F. Supp. 2d 575, 592 (S.D.N.Y. 2013))).

3. The district court appointed counsel.

On December 6, 2019, with the help of a Legal assistance Program, Moco applied for assignment of counsel and an interpreter. (Ja-96). The grounds for this application were, among others, that he had very limited understanding of the English language and that he only had on eighth-grade Albanian education, which prevented him from fully understanding the proceedings. (Id.).

Moco supported his application with his own sworn statement (JA-97-98) and a sworn Affidavit from Anthony H. Linnen. 9JA-104-105). Linnen was an inmate Law Library clerk at Clinton Correction Facility, where Moco was transferred following the brutal assault by Janik and Voltz. (JA-1040. Linnen attested that "[i]mmediately upon [his] assignment [to Moco], [he] noticed that Mr. Moco was constantly in need of explanation of the most basic legal terms and procedures. This was made more difficult by the fact that Mr. Moco speaks Albanian, and has very limited comprehension of the English language." (Id.). Furthermore, Linnen attested that he had " a hard time interpreting what [Moco] is saying in his unique brand of broken English."(Id.).

The court granted Moco's application for counsel by order dated January 15,2020. (JA-107-109).

4. The district court granted the Officers summary judgment for Moco's purported failure to exhaust.

On July 26, 2021, the Officers moved for summary judgment seeking the dismissal of all Moco's remaining claims. (JA-120-121). According to the Officers, the claims were barred by the PLRA because Moco did not Exhaust all available administrative remedies. (JA-126-JA-134). Specifically, the officers argued that Moco did not file a grievance about the alleged assault or the deliberate indifference to his medical needs, and that his failure to exhaust was not excused. (Id.).

On September 23, 2021, Moco opposed the motion, arguing that administrative remedies were unavailable because his very limited understanding of English prevented him from understanding and using those remedies, which were never explained to him in a manner he could comprehend. (JA-468). Moco filed a statement of additional material facts with his opposition and cross-motion for summary judgment.(JA-474). The statement laid out the facts supporting his assertions that a language barrier impeded him access to the administrative remedies, such as that his native language is Albanian, that prior to moving to the United states he spoke only Albanian, that at the time of his admission to Gowanda his understanding of English was limited, that no one at Gowanda explained the grievance procedures to him, and that he was not able to understand the written guidance he was provided with because of his limited understanding of counterstatement of facts.

By decision and order dated November 15, 2021, the district court granted the officers' summary judgment motion, reasoning that it "cannot be reasonably disputed that Moco failed to exhaust his administrative remedies,"and that "there is no genuine issue of material fact that Moco failed to fully exhaust his administrative remedies," (JA-522-523). The court rejected Moco's argument

that a linguistic barrier prevented him from exhausting his administrative remedies on factual grounds.(JA-524-525). In doing so, the Court gave weight to circumstantial evidence from the officers to the exclusion of direct evidence from Moco. First, the court noted that "Moco had been in the United States for approximately 14 years when he entered DOCCS custody," JA-525). and that Moco had verbally "communicated in English with prison personnel, including Defendants" (Id.). observations not inconsistent with limited English reading skill. As to written English, the court noted that "[w]ithin two months after the January 2016 incidents, Moco was able to write two coherent letters in English to DOCCS staff about the incidents." (Id.).

The court drew this conclusion without any evidence as to whether Moco penned the letter himself, whether he received any assistance in composing the letters, or other evidence as to Moco's English reading or writing skills at the time of the assaults. Nor did the district court address the obvious handwriting differences throughout Moco's letters and other submissions, strongly evidencing ghost-writing by different people, not Moco. E.g.,JA-11; JA-23; JA-253-254, JA-256-261; JA-363; JA-530; JA-533). Relying on letters sent after the relevant grievance period, the court found that, "[b]y all appearances, Moco could speak and understand English in a manner sufficient to understand the written grievance-procedure materials, to make requests, and to protect his rights." (JA-525).

In finding Moco's English reading and writing skills indisputably sufficient, the court set aside Moco's sworn declaration attesting that he had a very limited understanding of English (JA-447, ¶ 3) and his deposition testimony that he did not speak to anyone because he did not speak much English (JA-413). Nor did the court consider Moco's sworn statement, as late as December 2019, that he still lacked a "good grasp on the English language." (JA-97, ¶ 7). Instead, and apparently in reliance on circumstantial evidence, the Court concluded that "Moco

does not marshal any evidence that Gowanda officials were or should have been aware of his difficulties with the English language, such that they should have translated the grievance procedures into Albanian even without a request." (JA-525).

The district court granted the officers' motion without an evidentiary hearing to determine whether Moco did,in fact, understand English sufficiently at the time to appreciate and navigate the grievance process.

The District Court Erred in Granting Summary Judgment for a Purported Failure to Exhaust Available Remedies

A. Standard of review

"[T]he issue of '[w]hether a plaintiff has exhausted remedies under the [PLRA] is also a question reviewed de novo,'" *Williams v. Priatno*, 829 F.3d 118, 121-22 (2d Cir. 2016) (quoting *Amador v. Andrews*, 655 F. 3d 86, 94-95 (2d Cir. 2011)). Likewise, this Court reviews "a grant of summary judgment de novo, and in so doing, [the Court] construe[s] the evidence in the light most favorable to the nonmoving party and draw[s] all reasonable inferences in that party's favor." Ketcham, 992 F.3d at 148. A party may oppose summary judgment by "citing to particular parts of materials in the record, including depositions,... affidavits or declarations." Fed. R.Civ. P. 56I(1)(A). "The role of the court in deciding a motion for summary judgment ' is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried.'" *Wilson v. Nw. Mut. Ins. Co.*, 625 F 3d 54, 60 (2d Cir. 2010) (quoting *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 11 (2d Cir. 1986)).

B. A, grievance process is not available under the PLRA if it is Incomprehensible because of a language barrier

The PLRA states that "[n]o action shall be brought with respect to prison conditions...by a prisoner....until such administrative remedies as are available are exhausted."42 U.S.C.§1997e(a) (emphasis added). The plain language of the statute thus "contains its own, textual exception to mandatory exhaustion," *Ross v. Blake*, 578 U.S.632,642 (2016).This bar applies if and only if administrative remedies were available to the prisoner, but the prisoner failed to exhaust them. Id. As stated by the Supreme Court, the meaning of the word "available" is "'capable of use for the accomplishment of a purpose,' and that which 'is accessible or may be obtained.'" Id. at 642 (relying an Webster's Third New International Dictionary 150 (1993) definitions)

To be within a prisoner's reach, an administrative remedy must be comprehensible to the prisoner. "Available, "according to Ross, means "accessible," id. at 642, which in turn means "apable of being understood or appreciated," Accessible, Merriam-Webster.com Dictionary **(2023).** to be available under the PLRA, a grievance process needs to be, as per another dictionary definition quoted by the Ross Court, "at one's disposal [and] within one's reach." Ross, 578 U.S. at 642 (relying on 1 Oxford English Dictionary 812 (2d ed. 1989)). "[R]emedies are available only if a prisoner has been notified of their existence." *Ramirez v, Young,* 906 F. 3d 530, 535 (7th cir. 2018). A remedy is not available if a prisoner cannot "ascertain whether and haw he could pursue his grievance." *Williams*, 829 f. 3d at 124.The comprehensibility of agrievance procedure is assessed from the shoes of an ordinary prisoner in similar circumstances to the plaintiff. See Ross, 578 U.S.. at 648. this court has held that "the test for deciding whether the ordinary grievance procedures were available must be an objective one: that is, would a similarly situated individual of ordinary firmness have deemed them available. ' *Lucente v. Cnty. of Suffolk*, 980 F. 3d 284, 311-12 (2d Cir. 2020) (alteration marks omitted) (emphasis added); see

also *Williams,* 829 F. 3d at 126 (considering the prisoner's situation in determining unavailability).

That analysis must account for individual capabilities. See Ramirez, 906 F.3d at 535 ("That analysis must also account for individual capabilities."). In *Rucker v. Giffen*, 997 F. 3d 88, 94 (2d Cir. 2021), this Court thus found administrative remedies unavailable where personal circumstances "imposed a substantial obstacle to filing a grievance." There, the 'substantial obstacle" was the inmate's "medical distress." Id. at 94. The general principle, as the Seventh Circuit has recently articulated, is that, "when assessing whether the grievance process could have been understood by a particular prisoner, the inquiry must consider individual capabilities.' *Smallwood v. Williams*, 59 F 4th 306, 314 (7th Cir. 2023); cf. *Days v Johnson*, 322 F. 3d 863, 867 (5th Cir. 2003) (holding remedies not "available" where they are"personally unobtainable").Consequently,administrative remedies are unavailable to a prisoner who cannot comprehend a grievance process because of a language deficit. "Prisons must affirmatively provide the information needed to file a grievance," *Ramirez,* 906 f. 3d at 538, "in a way reasonably likely to be understood," id. at 535. "Prisoners are not expected to divine the availability of grievance procedures," id. (quotation marks ND alterations omitted), as the PLRA "does not invite prison and jail staff to pose guessing games for prisoners," id. at 538. "Before dismissing a prisoner's complaint for failure to exhaust, the district court should be able to point to evidence that the relevant administrative procedures were explained 'in terms intelligible to lay persons,'" taking into account "individual capabilities," such as language skills. Id. at 535. "[I]f every form of notice is in a language one does not speak or read, no notice at all has been conveyed." Id.at 537.

Thus, administrative remedies are not available under the PLRA to an inmate who obtains

no explanation of a grievance procedure in a language the inmate can understand. See id.; see also *Reyes-Martinez v. Woosley*, No. 21-5125, 2021 U.S. App, LEXIS 26203, at *6. (6th Cir. Aug. 30, 2021) (unpublished decision) (holding that "[a] reasonable jury could thus concludes that [the facility's] failure to provide *Reyes-Martinez* a Spanish-language version of the prison's grievance procedures rendered those procedures unavailable to him.").

C. Moco Created a genuine issue of fact as to his ability to understand the grievance process

Moco introduced facts creating a genuine issue as to his inability to comprehend the grievance process in January 2016, due to his lack of English reading skills. The district court erred in granting summary judgment.

Moco introduced testimony, through deposition transcripts and declarations, that the grievance process was unavailable to him because, due to Moco's limited English comprehension, he did not understand the grievance process. See generally Fed. R. Civ .P. 56(a)(1)(a) (permitting opposing party to defeat summary judgment with "depositions" and "declarations"). Moco submitted sworn evidence that:

- He was a native Albanian speaker, born and raised in Albania, exclusively speaking Albanian before coming to the United States. (JA-447,¶ 3).
- Upon his arrival at Gowanda in 2016, he had a very limited understanding of the English language. (Id). His "ability to read English" was "extremely limited," (Id).
- Moco could not understand the grievance procedures because of his very limited understanding of the English language (JA-447-48,¶ 4).
- Prison staff never explained the grievance procedures to him, (Id.).
- At the time of the late January assaults, he "didn't speak much English so I didn't speak to anyone."(JA-491, ¶ 92; JA-413).

Even as of 2019, he lacked a good grasp on the English language." (JA-97, ¶ 7).

As part of his summary judgment opposition, Moco submitted a statement of material fact as to his limited understanding of English, the failure of staff to inform him of the grievance procedures, and lack of understanding of the specific requirements. (JA-491-492, ¶ 93). This evidence was sufficient to show that grievance process was unavailable to Moco. *See Ramirez*, 906 F. 3d at 535-37; *Reyes-Martinez*, 2021 U.S.App. LEXIS 26203,at *6.

The Officers did not rebut Moco's evidence but presented circumstantial evidence to impeach Moco's sworn statements. The district court relied on two different sets of evidence. First, the district court cited evidence that Moco could speak English by the time of the incidents.(JA-525). But that evidence did not reveal whether Moco could comprehend written English to read and understand the grievance procedures. Second, the court cited a letter signed by Moco at some point after the incident (and after the grievance deadlines expired) to suggest that Moco could write in English. (Id.). But there was no evidence in the record as to whether Moco wrote that letter himself or to the extent to which his English had improved over time.

To the contrary obvious differences in handwriting within Moco's papers strongly suggest the letter and other materials were written by different people, not by Moco. (JA-11; JA-23; JA253-254, JA-256-261; JA-363; JA-530; JA533).

By granting summary judgment on this contested record, the district court "erred in its application of the well-settled standards for deciding a motion for summary judgment." *Darnell v. Pineiro*, 849 F.3d 17, 38 (2d Cir.2017). "The District Court did not construe the evidence in the light most favorable to the plaintiff[], nor did it draw all reasonable inferences in [his] favor." Id. Rather, the court impermissibly discounted Moco's testimony about his English skills at the relevant time, inferring from ambiguous and later-in -time materials that Moco could competently read and write English. *See Frost v. N.Y.C. Police Dep't,* 980 F. 3d 231, 246 (2d Cir.

2020) ("[T]he general rule remains that a district court may not discredit a witness's deposition testimony or declaration on a motion for summary judgment, because the assessment of a witness's credibility is a function reserved for the [factfinder]."(quotation marks and alterations omitted)). "Summary judgment is inappropriate when the admissible materials in the record 'make it arguable' that the claim has merit." *Proctor v. LeClaire*, 846 F.3d 597, 607 (2d Cir. 2017). Moco's evidence readily met that standard here.

Indeed, the Officers effectively conceded Moco's position by failing to contradict his pertinent statement of material facts. Rule 56(e) of the Federal Rules of Civil Procedure provides that "[i]f a party fails... to properly address another party's assertion of fact as required by Rule 56(c0, the court may" among other things "consider the fact undisputed for purposes of the motion." Fed. R. Civ. P. 56(e)(2); see also W.D.N.Y. Loc. R. Civ. P. 56(a)(2). Moco asserted, in his statement of fact, that he had a limited understanding of English, that staff never informed him of the grievance procedures, and that he did not understand the specific grievance requirements. (JA-491-492, ¶ 93). The Officers never addressed those assertions to contradict them. The district court thus erred in granting summary judgment, and this Court should vacate that decision.

D. Moco is entitled to try the issue on remand

Moco is entitled to a trial on the question of whether the grievance process was available to him. On remand, the district court should thus take evidence and make proper findings of fact and conclusions of law. *See Messa v. Goord*, 652 F. 3d 305, 310 (2d Cir. 2011) (holding that PLRA exhaustion is subject to bench factfinding); see generally Fed. R. Civ. P.52(a). Sitting as the finder of fact, the district court can hear testimony directly from Moco and the Officers' witnesses and make credibility determinations. *See Messa*, 652 F. 3d at 305; *Pavey v. Conley*,

544 F.3d 739, 742 (7th Cir. 2008). If the factfinder determines that Moco never received an explanation of the grievance procedure in a manner he could understand (e.g., because the process was outlined in written English that he could not comprehend), then it should conclude that administrative remedies were not available to Moco. *See Ramirez*, 906 F.3d at 537.

The District Court Erred in Isolating and Dismissing the Handcuffing Portion of the Attack

A. Standard of Review

This Court reviews Rule 12(b)(6) dismissals de novo. *Hill v. Curcione*, 657 f. 3d 116, 122 (2d Cir. 2011). the court must accept all of Moco's factual allegations as true. *See Erickson v. Pardus*, 551 U.S. 89, (2007); hill, 657 F. 3d at 122. Moreover, because Moco filed this action pro-se, the Court is "Constrained to conduct [its] examination with special solicitude, interpreting the complaint to raise the strongest claims that it suggests." *Hill*, 657 f. 3d at 122 (quotation marks and alterations omitted). A pro se complaint, like Moco's must be " liberally construed," "particularly so when the pro se plaintiff alleges that his civil rights have been violated." *Ahlers v. Rabinowitz*, 684 F. 3d 53, 60 (2d Cir. 2012) (quotation marks and alterations omitted). Thus, "The dismissal of a pro se claim as insufficiently pleaded is appropriate only in the most unsustainable of cases." *Sealed Plaintiff v. Sealed Defendant* # 1, 537 f. 3d 185, 191 (2d Cir. 2008) (quotation marks omitted).

B. Malicious Handcuffing Violates the Eighth Amendment

Overly tight handcuffing can constitute excessive force for purposes of Eighth Amendment claims. See, e.g., *Kerman v. City of New York*, 261 F. 3d 229, 239-40 (2d Cir. 2001); *Davidson v. Flynn*, 32 F. 3d 27, 30 (2d Cir. 1994); see also *Horace v. Gibbs,* 802 Fed. app 'x. 11, 15-16 (2d Cir. 2020); cf. *Ketcham,* 992 f. 3d at 150 (2d Cir. 2021). (under Fourth amendment, "unnecessary handcuff tightening... can constitute excessive force"). a violation

occurs if " an officer reasonably should have known during handcuffing that his use of force was excessive," because, inter alia, the "unreasonableness of the force used was apparent under the circumstances." Gugini v. *City of New York*, 941 F. 3d 604, 613 92d Cir. 2019) (Fourth Amendment context); see Horace, 802 Fed. App 'x. at 15 (Eighth Amendment context).

Moreover, if a prisoner alleges malicious injury, that injury need not be significant to nevertheless violate the Eighth Amendment. *See Hudson v. McMillian,* 503 U.S. 1, 9 (1992); Davidson, 32 F. 3d at 29; *Griffin v. Crippen*, 193 F. 3d 89, 92 (2d Cir. 1999). "The test of whether use of force in prison constitutes excessive force contrary to the eighth Amendment is whether the force was used in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Scott v. Coughlin*, 344 F. 3d 282, 291 (2dCir. 2003). "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated," "whether or not significant injury is evident." See *Hudson,* 503 U.S. at 9; *See United States v. walsh*, 194 F. 3d 37, 50 (2d Cir. 1999) ("[E]ven if the conduct at issue were deemed de minimize, it would fall within Hudson's explicit exception that even de minimize uses of force are unconstitutional if they are 'repugnant to the conscience of mankind.'"). So long as a prisoner alleges "that corrections officers used force maliciously and sadistically," the claim should not be dismissed, "even where the plaintiff's evidence of injury was slight and the proof of excessive force was weak." *Wright v. Goord* 554 F. 3d 255, 269 (2d Cir. 2009) (summary judgment context). an Eighth Amendment handcuffing claim does not turn 'on the use of [the] handcuffs" but, rather "on their deliberate and improperly motivated application so tightly as to injure." *Davidson*, 32 F.3d at 30.

C. The complaint sufficiently alleged malicious handcuffing

Moco, proceeding *pro se*, sufficiently pled an Eighth Amendment violation.

The Amended Complaint describes violent handcuffing as part of a bullying session, in which the Officers gratuitously threatened, humiliated, and assaulted Moco. Moco states that the Officers ordered him to do work and that he told them he was ill. (JA-27). The Officers maliciously mocked Moco in front of a room of other inmates by recounting a news story of an inmate that had been murdered, telling Moco the "same thing was going to happen" to him, and likewise taunting that he would be "sent back to Albania," (JA-399-401). The Officers then moved Moco into a hallway without camera (JA-402, "placed handcuffs very Tight" on him, and then proceeded to lift his arms "to cause severe pain." (JA-27).

Because Moco was then proceeding pro se, the district court should have extended Moco special solicitude to interpret this pleading to raise the strongest claims suggested. Particularly with such solicitude, Moco's Amended Complaint pleads unnecessary handcuffing with malicious intent–that, after learning Moco's was ill, the officers bullied him, mocked him in front of others, threatened him, and then gratuitously handcuffed him and lifted his arms, with no purpose other then bullying and 'to cause severe pain." In such cruel circumstances, this gratuitous application of handcuffs to a sick prisoner, followed by arm- lifting intended to inflict pain ---as a fair reading of the Amended Complaint alleges here----is exactly the type of malicious and sadistic use of force that violates the Eighth Amendment. *See Hudson,* 503 U.S. at 9; *Wright*, 554 f. 3d at 269; Walsh, 194 F. 3d at 50; *Davidson,* 32 F.3d at 30.

D. In any event, the district court erred in isolating and dismissing the handcuffing portion of the overall assault

Moreover, the handcuffing incident in this cases need not stand alone as an Eighth Amendment violation because it was part and parcel of an overall, uninterrupted assault on

Moco. According to Moco's account, "[a]s soon as they put the handcuffs on" Moco, the rest of the assault began. (JA-405).

The district court erred in viewing the handcuffing incident in isolation. it was improper to "slice [the assault] into individual pieces to determine whether any of those pieces standing alone constituted excessive force." *Rasmussen v. City of New York*, 766 F. Supp. 2d 399, 404 (E.D.N.Y. 2011). "What is critical here is not whether one act or another constituted excessive force, but [whether a] jury [finds] that the used under the circumstances was unreasonable." *Edwards v. Cornell*, No. 3: 13-cv-878, 2017 U.S. Dist LEXIS 195146, at *13 (*D.Conn. Nov.* 28,2017). The district court erred by "dissect[ing]" the "encounter into its separate components" to "view each act" in 'isolation." *Rickettes v. Turton*, 12-cv-6427, 2015 U.S. Dist. LEXIS 81396, at * 20 (E.D.N.Y. June 23, 2015).

That For all these reasons, the district court erred in isolating the handcuffing portion of the attack from the remainder and dismissing it under Rule 12(b)(6).

CONCLUSION

Besed upon the foregoing petition, the the Court should grant a writ of certiorari to the Court of Appeals for the Secound Circuit.

Executive and signed Dated: September / 16/ 2024
County of Geneses, New York

Respectfully Submitted.

Statement Pursuant to 28 U.S.C. & 1746, I Declare, under the penalty of Perjury under the laws of the United States of America, that the foregoing is True and Correct.

By: _____

Robert Moco (A-095-862-068)
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Dated: September 16, 2024