No. _____

In the
Supreme Court of the United States

KEVIN HARDAWAY,
Petitioner,

v.

DWIGHT HAMILTON, ET AL.,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This is a Section 1983 case, based on Eighth Amendment violations stemming from the DeKalb County, Georgia Sheriff's Office's custom and policy of permitting, encouraging, and directing a sergeant at the County Jail to excessively tase inmates, including Petitioner, without penological justification. Petitioner prevailed on his individual capacity claims at trial and was awarded compensatory and punitive damages. The evidence presented at trial was also sufficient for the jury to find that the violation of Petitioner's constitutional rights occurred as the result of a custom or policy at DeKalb County Sheriff's Office. However, Petitioner was not able to present his official capacity claims to the jury because his claims were dismissed as barred by Eleventh Amendment immunity pursuant to the Eleventh Circuit's decision in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

The question presented is:

Whether existing Eleventh Circuit precedent of *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), holding that a Georgia sheriff is an "arm of the state" when establishing use of force policies at a jail and training and disciplining employees as to use of force, and thus, entitled to Eleventh Amendment Immunity, can bar the Section 1983 official capacity claims of a prisoner seeking to vindicate the violation of his Eighth Amendment rights where such claims satisfy the standards established by this Court in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978), and where such an outcome frustrates the purposes of the Eighth Amendment and 42 U.S.C. § 1983, and creates both a disincentive to protecting the Constitutional

rights of prisoners in county jails in Georgia, as well as a bar to prisoners seeking adequate redress when such Constitutional violations occur?

PARTIES TO THE PROCEEDINGS

The following was plaintiff in the district court, plaintiff-appellant in the Eleventh Circuit, and is Petitioner in this Court:

Kevin Hardaway.

The following were defendants in the district court:

Sergeant Dwight Hamilton and Lieutenant Leonard Dreyer, in their individual and official capacities for DeKalb County Sheriff's Office.

The following were defendants-appellees in the Eleventh Circuit, and are Respondents in this Court:

Sergeant Dwight Hamilton and Lieutenant Leonard Dreyer, in their official capacities for DeKalb County Sheriff's Office.

RELATED PROCEEDINGS

Kevin Hardaway v. Sgt. Dwight Hamilton and Leonard Dreyer
U.S.D.C. (N.D. Ga. - Atlanta Div.) Civil Action No. 1:14-cv-0542-AJB

Kevin Hardaway v. Dwight Hamilton, et al.
Eleventh Circuit Case No. 22-14320

Kevin Hardaway v. Dwight Hamilton, et al.
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Kevin Hardaway v. Dwight Hamilton, et al.
Eleventh Circuit Case No. 20-14190

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Hardaway respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1) is available at 2023 WL 8752938. The district court's order (Pet. App. 3) is unpublished but is available at 2020 WL 6576165.

JURISDICTION

The Court of Appeals entered its judgment on December 19, 2023. Pet. App. 1. The court denied a timely Petition for Rehearing En Banc on March 13, 2024. *Id*. 11. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The appendix to this petition reproduces the relevant provisions of 42 U.S.C. § 1983. Pet. App. 6.

INTRODUCTION

This is a Section 1983 case, based on Eighth Amendment violations stemming from the DeKalb County, Georgia Sheriff's Office's ("DKSO") custom and policy of permitting, encouraging, and directing a sergeant at the DeKalb County Jail ("Jail") to excessively tase inmates without penological justification. This custom and policy resulted in Sergeant Dwight Hamilton's excessive tasing of Plaintiff-Appellant Hardaway at the direction and encouragement of his supervisor, Lieutenant Leonard Dreyer, without any penological justification on January 27, 2012, while Hardaway was confined at the Jail, resulting in significant emotional and physical harm.

At the trial of Hardaway's individual capacity claims against Hamilton and Dreyer, the jury found both Defendants liable for violating Hardaway's Eighth Amendment rights and awarded compensatory and punitive damages.

The evidence presented at trial was also sufficient for the jury to find that the violation of Hardaway's constitutional rights occurred as the result of a custom or policy at DKSO. However, Hardaway was not able to present his official capacity claims to the jury or develop his claims during discovery. Instead, his claims were dismissed as barred by Eleventh Amendment immunity. (Doc. 114.) The District Court held the Eleventh Circuit's decision in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003), compelled dismissal of Hardaway's official capacity claims.

The year 2023 marked the 20th anniversary of *Manders*. In *Manders*, the Eleventh Circuit Court of Appeals deviated from prior Eleventh Circuit precedent and, by judicial fiat, held, in a 6-5 decision, that a county sheriff functioned as an "arm of the state" when "establishing a use-of-force policy at the jail and in training and disciplining his deputies in that regard," and was thus entitled to Eleventh Amendment immunity. *Id.*

Petitioner submits that, as exemplified by his own case, *Manders* allows county sheriffs in Georgia to tolerate or even perpetrate with impunity a custom or policy of violating constitutional rights, including the Eighth Amendment right to be free from cruel and unusual punishment. Further, *Manders* leaves inmates in county jails with no recourse should such violations occur. This outcome conflicts with this Court's decision in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978); prevents realization of the original intent of the Eighth Amendment; frustrates the purpose of Congress in enacting Section 1983, and has significant public policy implications.

Petitioner further submits that *Manders* cannot be relied on to bar Section 1983 claims because it was wrongly decided by the Eleventh Circuit. The proper sheriff "function" to analyze was "operation of a county jail," clearly not a state function, as opposed to "establishing a use of force policy." The decision also deviates from those of other circuit courts and has created a body of arbitrary decisions. Further, developments since the decision have highlighted significant public policy concerns. Finally, there is no legitimate concern about detrimental reliance, nor

would overruling *Manders* "open the floodgates" to excessive force claims, given existing legal safeguards.

The dissent in *Manders* predicted the majority's "arbitrary" decision would result in "a substantial blow to established law assuring citizens' ability to hold local governments accountable for violations of the United States Constitution." 338 F.3d at 1347 (Barkett, J., dissenting) (citing *Jinks v. Richland Cty.*, 538 U.S. 456, 46l-66 (2003), and *Monell*, 436 U.S. at 690-91). Petitioner submits that his case is an example of this prediction come true.

This Court should grant certiorari and allow Petitioner to proceed with his official capacity claims, thereby overruling *Manders*.

STATEMENT OF THE CASE

a. Legal background

The Eleventh Amendment protects a State from being sued in federal court without the State's Consent. U.S. Const. Amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). It is well-established that immunity afforded by the Eleventh Amendment extends to "arm[s] of the State." *Manders*, 338 F.3d at 1308 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)).

This Court, however, has not articulated a standard for determining when a defendant is an "arm of the State." Prior to *Manders*, the Eleventh Circuit

applied various tests, with varying factors, to determine whether a defendant was an "arm of the State." *See, e.g.*, *Lake v. Skelton*, 840 F.3d 1334, 1337 (11th Cir. 2016) (collecting cases). In *Manders*, the Eleventh Circuit clarified the applicable test.

In *Manders*, deputies of the Clinch County Sheriff's Office beat plaintiff Willie Manders by repeatedly striking him across the head, neck, and face and banging his head against a wall. 338 F.3d at 1306. Manders brought Section 1983 official capacity claims against the Sheriff claiming that the Sheriff failed to provide deputies proper training regarding the use of force and failed to promulgate adequate rules to regulate deputies' conduct. *Id.* at 1307.

The Eleventh Circuit set out four factors for courts to consider when addressing whether an entity is an arm of the state: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Id.* at 1309. Crucially, the Eleventh Circuit determined, "[w]hether a defendant is an 'arm of the State' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Id.* at 1308.

Analyzing those factors, the Eleventh Circuit concluded that the Clinch County Sheriff acted as an arm of the state when carrying out the particular "function" the Court identified—"promulgating force policy and training and disciplining deputies in that regard." *Id.* at 1309, 1328. Accordingly, the Sheriff was entitled to Eleventh Amendment immunity. *Id.* No

constitutional provision, no statute, and no Supreme Court authority compelled this result. Instead, the Eleventh Circuit arrived at its decision by judicial fiat.

Congress created 42 U.S.C. § 1983 to, in relevant part, provide prisoners with an avenue for vindicating violations of their constitutional rights, including the Eighth Amendment to the United States Constitution. Further, in *Monell*, 436 U.S. at 694, this Court held that "a local government body can be held liable under 42 U.S.C. § 1983 'when execution of a government's policy or custom inflicts the injury.'"

b. The present controversy

DKSO operates the Jail. (Doc. 273, 392:17-18.) In January 2012, Dreyer was a Lieutenant at the Jail. (*Id*., 391:18-392:13.) Dreyer directly supervised Hamilton. (*Id*., 396:18-397:9; Doc. 274, 467:2-468:17, 469:6-24.)

By January 2012, Dreyer was aware of Hamilton's "propensity for tasing inmates." (Doc. 273, 400:4-6.) Dreyer knew that Hamilton kept track of the number of inmates he tased. (*Id*., 400:10-11.) Dreyer had heard Hamilton brag about tasing at least thirteen inmates and say something about "making inmates see Jesus" when tasing them. (*Id*., 400:7-14.) Dreyer joked with Hamilton about tasing inmates. (*Id*., 400:15-18.) However, Dreyer never formally disciplined Hamilton. (*Id*., 398:25-399:3.)

Instead, Dreyer routinely sought to cover up Hamilton's unjustified tasings. Dreyer asked witnesses to "soften" or change tasing incident reports to make Hamilton's uses of force appear justified when they were not. (Doc. 273, 420:19-421:10.)

While reporting to Dreyer, Hamilton unjustly tased numerous other inmates before Hardaway, including (1) Stargell (Doc. 252-13; Doc. 273, 402:19-23, 403:18-23, 404:10-13); (2) Little (Doc. 252-14; Doc. 273, 406:24-407:4); and (3) Perry (Doc. 252-15; Doc. 273, 409:13-19). Dreyer was not present for any of these tasings. (Doc. 273, 404:17-20, 407:5-8, 409:25-410:3.) Nevertheless, in each report, Dreyer indicated the inmates were being noncompliant and exhibiting "Aggressive Physical Resistance," when, in fact, they were not. (Doc. 252-13, 2; Doc. 252-14, 2; Doc. 252-15, 2; Doc. 273, 402:19-23, 404:21-405:7, 406:24-407:4, 409:20-24.) Weeks before tasing Hardaway, Hamilton also tased Reed without penological justification. (Doc. 252-3; Doc. 252-9.) On the night of Reed's tasing, Dreyer witnessed guards dragging Reed by his feet through flooded toilet water on Hamilton's orders, but neither disciplined nor reported Hamilton. (Doc. 273, 412:14-22, 413:6-415:2-8.)

On the night of January 27, 2012, inmates caused a flood in the pod where Hardaway was housed by overflowing toilets. (Doc. 272, 141:21-22, 146:10-12, 148:18-22, 149:13-20, 151:1-8.) Hamilton punished the inmates by making them leave their cells every hour and stand barefoot in the flooded toilet water, facing the wall with their hands on their heads. (*Id.*, 149:3-12, 151:9-152:22.) That night, Dreyer went to the pod to lecture the inmates. (Doc. 273, 417:6-21.) There was no disturbance, the inmates were not aggressive, and Dreyer had no reason to believe any inmates had weapons. (*Id.*, 418:5-18.) Nevertheless, Dreyer became frustrated when Hardaway interrupted Dreyer during his lecture. (*Id.*, 418:19-419:2.) Dreyer then instructed Hamilton to **"tase that big motherfucker the first**

chance you get." (*Id.*, 400:4-6, 419:3-12.) Later, Dreyer told Hamilton, "make sure [Hardaway] gives you a good reason to tase him." (*Id.*, 419:13-21.) Dreyer had also given Hamilton the means to tase Hardaway by giving Hamilton his personally-assigned taser to use for the night. (Doc. 274, 513:11-14.)

Around 4:00 a.m., after Hardaway refused to eat breakfast while standing in toilet water (Doc. 272, 153:22-24, 154:6-17, 154:23-155:5), Hamilton, without provocation, shot Hardaway in the back with the taser, causing Hardaway to fall against the wall (Doc. 252-2; Doc. 272, 155:6-17, 158:8-15, 160:4-8, 161:22-23, 162:8-13). Hamilton then approached Hardaway and began repeatedly "drive-stunning" Hardaway, holding the taser prongs directly against Hardaway's back. (Doc. 252-2; Doc. 272, 155:24-156:1, 159:2-6.) When Hardaway was on the ground, Hamilton got on top of him, pulled up his shirt, and continued drive-stunning his bare skin. (Doc. 272, 156:1-10, 159:7-11, 162:3-7, 163:17-24.) Hamilton tased Hardaway nine to ten times until Hardaway passed out. (*Id.*, 159:12-18, 162:5-7.) When Hamilton next saw Dreyer he told Dreyer, "I got him for you," and the two high-fived. (Doc. 273, 420:11-18.)

Baptiste, an investigator with DKSO's Office of Professional Standards, investigated Hamilton's tasings and concluded that Hamilton used "unnecessary and excessive ... force and may have committed criminal assault." (Doc. 252-4, 17; Doc. 273, 344:11-20.) DKSO terminated Hamilton on February 3, 2012, but did not refer him for prosecution. (Doc. 252-4, 17, 139; Doc. 273, 349:14-18; Doc. 274, 321:5-322:12, 352:15-25, 479:19-480:15.) Baptiste later

reported Hamilton's tasings of Hardaway and Reed, as well as other incidents at the Jail, to the U.S. Attorney. (Doc. 273, 353:1-354:1.) Hamilton was indicted and pled guilty to one count of Deprivation of Rights Under Color of Law in violation of 18 U.S.C. § 242 for tasing Perry—a tasing Dreyer previously reported as justified. (Doc. 252-16, 11; Doc. 252-17; Doc. 273, 380:18, 431:25-433:18, 434:2-14.) Hamilton was sentenced to one year imprisonment and three years supervised release. (Doc. 252-17; Doc. 273, 433:23-434:1.)

Dreyer was not terminated or disciplined in connection with Hardaway's tasing, but was promoted to Captain. (Doc. 273, 422:7-12.) When the U.S. Attorney later brought criminal charges against Dreyer, Dreyer was placed on paid administrative leave until he pled guilty to making false statements to the FBI in connection with tasings by Hamilton; he then chose to retire, receiving a final promotion to Major and his full pension. (*Id*., 380:19-381:1, 423:17-22, 427:25-428:10; Doc. 252-16, 4-5; Doc. 252-18.)

Following his unjustified tasing while in the Jail, Hardaway filed an administrative grievance. (Doc. 272, 172:22-173:1.) Hardaway was then transferred to prison and his grievance was not resolved. (*Id.*, 173:2-12.)

Hardaway filed his Complaint *pro se* on February 24, 2014, alleging Hamilton and others violated 42 U.S.C. § 1983 ("Section 1983") by using excessive force. (Doc. 1.) The District Court dismissed Hardaway's claims against each defendant except Hamilton. (Doc. 12.) The case was then stayed until May 2019, pending resolution of Hamilton's criminal

case arising, in part, from the same underlying incident. (Docs. 27, 55.) In September 2019, the District Court appointed Hardaway pro bono counsel. (Doc. 59.) On May 13, 2020, Hardaway amended his Complaint adding Dreyer individually, and Hamilton and Dreyer in their official capacities for the DKSO. (Doc. 87.) On October 7, 2020, the District Court dismissed Hardaway's official capacity claims against Hamilton and Dreyer on Eleventh Amendment immunity grounds. (Doc. 114.)

In November 2022, Hardaway obtained jury verdicts against Hamilton and Dreyer in their individual capacities, and the District Court entered judgment against them. (Docs. 250, 251.) The District Court later granted Dreyer's Renewed Motion for Judgment as a Matter of Law on procedural grounds, finding Hardaway's individual capacity claims against Dreyer were time barred. (Docs. 281, 282.)

Hardaway appealed the District Court's October 2020 dismissal of Hardaway's official capacity claims on December 27, 2022. On December 19, 2023, a panel of the Eleventh Circuit Court of Appeals affirmed, noting that as a panel, it was bound by *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003). On March 13, 2024, the Eleventh Circuit denied Hardaway's Petition for Rehearing En Banc. (Pet. App. 11.)

REASONS FOR GRANTING THE PETITION

This case satisfies all of this Court's traditional certiorari criteria. *Manders* was wrongly decided and is currently operating to bar Section 1983 official capacity claims against sheriffs in Georgia, even where this Court's standards for asserting such claims under *Monell* are fully satisfied. Further, other courts of appeal have reached a different conclusion and are allowing official capacity claims for inmates in other states to move forward, where they cannot in Georgia. Resolving this dispute and defining the scope of Eleventh Amendment Immunity for Georgia Sheriffs operating county jails is critical for protecting the Constitutional rights of inmates in Georgia. The question is also squarely and cleanly presented here, which makes this case an ideal vehicle for resolving the split. Furthermore, barring Section 1983 claims against sheriffs in their official capacities in federal court for excessive use of force within the jails they operate will significantly undermine public policy and federal civil rights laws by denying any meaningful remedy to many incarcerated victims of abuse. Review is warranted.

1. Evidence at Trial Proved a DKSO Custom or Policy Resulted in the Violation of Hardaway's Eighth Amendment Rights.

At trial, the jury found Hamilton and Dreyer liable in their individual capacities for violating Hardaway's Eighth Amendment rights. The evidence at trial was also sufficient for Hardaway to have prevailed on his official capacity claims.

To prevail on his official capacity claims, Hardaway had to prove a "policy or custom" of DKSO resulted in the violation of his Eighth Amendment rights. *See Carter v. DeKalb Cty.*, 521 F. App'x 725, 728 (11th Cir. 2013) (per curiam). Hardaway introduced evidence sufficient to meet his burden, including that Hamilton engaged in excessive and unjustified tasings "without penological justification but maliciously and sadistically for the very purpose of causing harm." *See Thomas v. Bryant*, 614 F.3d 1288, 1305 (11th Cir. 2010). The evidence also proved Dreyer knew of Hamilton's unjustified tasings and not only failed to stop Hamilton, but actively encouraged Hamilton and falsified reports to cover them up.

As demonstrated at trial, Hamilton and Dreyer's conduct was open and notorious and a "widespread practice so permanent and well-settled as to constitute a custom" at the Jail. *See Carter*, 521 F. App'x at 729. However, Petitioner was not allowed to present his official capacity claims to the jury to seek redress from DKSO. Instead, the District Court dismissed those claims in response to DKSO's motion to dismiss, holding *Manders* compelled the conclusion that DKSO is entitled to Eleventh Amendment immunity. (Doc. 114.) The Eleventh Circuit panel affirmed, noting that although some judges on the Eleventh Circuit had recently called for re-evaluation of the 6-5 *Manders* decision, as a panel it was bound by *Manders*. *See Andrews v. Biggers*, 996 F.3d 1235, 1236 (11th Cir. 2021) ("[A] panel cannot overrule a prior one's holding even if convinced it is wrong.").

2. *Manders* should be overruled.

i. *Manders* was wrongly decided.

For reasons raised in the *Manders* dissent, and as established through the application and effect of the *Manders* majority decision in subsequent civil rights cases, *Manders* was wrongly decided.

Manders set out a four-factor test for determining Eleventh Amendment immunity: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Lake*, 840 F.3d at 1337-38 (quoting *Manders*, 338 F.3d at 1309). *Manders* specified that this test must be assessed in light of the specific "function" the sheriff was engaged in when taking the actions out of which liability is alleged. *Id.*

a. The function inquiry.

In *Manders*, the majority arbitrarily selected "establishing a use of force policy and training and disciplining his deputies in that regard" as the operative "function" of the sheriff when analyzing the four-factor test for Eleventh Amendment immunity. 338 F.3d at 1319. Applying the four-factor analysis to this function, *Manders* concluded the sheriff was acting as an arm of the state. However, the *Manders* majority misidentified the operative function, which should have been "operating the county jail."

In the context of a Section 1983 claim asserted by an inmate in a county jail against a county sheriff,

the function from which liability is alleged is operating the jail. The unjustified beating of Manders, like the unjustified tasing of Hardaway, was not brought on by the sheriff's lawful authority to use force and set policies. Such attacks are, by their nature, an abuse of the authority derived as a jailer in operating the county jail.

As illuminated by the *Manders* dissent, "[w]hen confronted in the past with § 1983 claims based on a jail inmate's treatment while in custody, we have always defined the relevant function as 'operating a county jail.'" 338 F.3d at 1333. Prior to *Manders*, the Eleventh Circuit "always treated a claim against a Georgia county sheriff for operating a county jail as a claim against the county." *Lake v. Skelton*, 871 F.3d 1340, 1344-45 (11th Cir. 2017) (citing *Wayne v. Jarvis*, 197 F.3d 1098, 1105 (11th Cir. 1999) (overruled by *Manders*) (Section 1983 claim against sheriff "in his official capacity is a claim against DeKalb County")). Applying the four-factor test to the appropriate sheriff function – operating a county jail – would yield the correct conclusion that a county sheriff is *not* acting as an arm of the state when operating a county jail or otherwise exceeding the scope of the sheriff's legislative and Constitutional duties, and thus, Eleventh Amendment immunity does not apply.

b. The four-factor test.

The *Manders* majority held the first factor – how state law defines the sheriff – "weigh[ed] heavily in favor of immunity" because the sheriff's authority to "use of force and creating force policy" are quintessential policing functions, which are directly derived from the State. 338 F.3d at 1336. When

applying the appropriate sheriff function, however – operating the county jail – state law weighs heavily *against* immunity.

The Georgia Constitution defines sheriffs as county officers, and they are elected by county voters, Ga. Const. art. 9, § 1, ¶ III, with operations limited primarily to within their county borders. *See Grech v. Clayton Cty.*, 335 F.3d 1326, 1344 (11th Cir. 2003). Georgia jails are county institutions, and Georgia sheriffs are tasked with managing jails for their respective counties, subject to county supervision, including "maintain[ing] the inmate[s]" in the county's custody and provid[ing] certain basic care on behalf of the county. *See* O.C.G.A. §§ 42-4-1(a) & 42-5-2(a). When a sheriff deprives an inmate of his or her constitutionally protected civil rights, the sheriff is plainly functioning (albeit failing) in this role: operating the jail and maintaining the inmates.

Under the second factor – control – state law also weighs heavily against immunity with regard to operating the county jail. County jails are managed by the sheriff and subject to county supervision. *See* O.C.G.A. § 42-4-1(a). It is the express duty of the sheriff to "take from the outgoing sheriff custody of the jail and the bodies of such persons as are confined therein." *See* O.C.G.A. §§ 42-4-4(a)(1) & 42-5-51(a)-(b). Further, the county "shall have the sole responsibility of executing the sentence and of providing for the care, maintenance, and upkeep of the inmate while serving such sentence." *Id.*

Under the third factor – funds – the law also weighs heavily against immunity because, as recognized by the *Manders* majority, the county "bears

the major burden of funding" the sheriff's office and the jail. *Manders*, 338 F.3d at 1323. The county pays the sheriff's salary. O.C.G.A. § 15-16-20. The county also funds the building, repair, and furnishing of its jails. O.C.G.A. § 36-9-5.

The fourth factor – responsibility for judgments – also weighs heavily against immunity because the state is not liable for an adverse judgment against the sheriff. The *Manders* majority recognized the clear absence of any Georgia law requiring the state to pay an adverse judgment against a sheriff and determined such payment would come out of the sheriff's budget. *See* 338 F.3d at 1327; *see also Grech*, 335 F.3d at 1337. Because the state treasury would not be directly responsible for the sheriff's liabilities, Eleventh Amendment immunity should not apply.

ii. *Manders* is inconsistent with Supreme Court precedent and creates a circuit split.

The inconsistency with related circuit court decisions also points to *Manders* being overturned, because other circuits have reached a different conclusion when applying the correct "function" of operating a county jail. *See, e.g.*, *DeGenova v. Sheriff of DuPage Cty.*, 209 F.3d 973, 977 (7th Cir. 2000); *Cortez v. Cty. of Los Angeles*, 294 F.3d 1186, 1187 (9th Cir. 2002). The ability to vindicate Constitutional violations via federal cause of action, *i.e.*, 42 U.S.C. § 1983, should not differ based on the state in which the alleged violations occur.

Further, prior to *Manders*, the Eleventh Circuit also defined the relevant function as "operating a

county jail," and imposed liability upon sheriffs for constitutional rights violations, consistent with other circuits. *See Manders*, 338 F.3d at 1332-33 (Barkett, C.J., dissenting); *Turquitt v. Jefferson Cty.*, 137 F.3d 1285, 1288 (11th Cir. 1998) (en banc).

Most significantly, the holding in *Manders*, which the Eleventh Circuit imposed via judicial fiat, cannot be squared with the purposes and intent of the Eighth Amendment and Section 1983, nor can it be squared with this Court's decision in *Monell*, which sets forth the standards for bringing official capacity claims under 42 U.S.C. § 1983. The evidence presented at trial demonstrates that Petitioner was able to fully satisfy those standards, yet he was denied the ability to pursue his claims and seek redress from the DeKalb County Sheriff's Office.

Because this case squarely and cleanly presents these questions of significant importance and impact, this case is an ideal vehicle for defining the scope of Eleventh Amendment immunity with respect to official capacity claims under Section 1983 seeking redress for violations of the Eighth Amendment.

iii. *Manders* undermines public policy and federal civil rights laws.

Public policy implications concerning "whether a prior decision 'causes more harm than good'" are important and courts are to "'evaluate a range of consequences.'" *Corporación AIC, S.A. v. Hidroelectrica Santa Rita S.A.*, 66 F.4th 876, 889 (11th Cir. 2023) (en banc) (quoting *SmileDirectClub,*

LLC v. Battle, 4 F.4th 1274, 1285 (11th Cir. 2021) (en banc) (Pryor, C.J., concurring)).

Manders left courts in the Eleventh Circuit to play a "guessing game" when defining the particular sheriff "function" for determining whether a sheriff is an "arm of the state." For example, a sheriff is considered an "arm of the state" when administering a use of force policy, *see Manders*, but not necessarily when caring for the medical needs of an inmate. *See, e.g.*, *Dukes v. Georgia*, 428 F. Supp. 2d 1298, 1322 (N.D. Ga.), *aff'd*, 212 F. App'x 916 (11th Cir. 2006) (per curiam).

By creating the opportunity to arbitrarily define "functions" of a sheriff's office in a county jail, *Manders* created an opportunity for arbitrary, ad hoc results. This impacts the lives of real people and their guaranteed rights under the United States Constitution. *See, e.g.*, *Lake*, 840 F.3d at 1339 (sheriff function when denying inmate's dietary request was "provision of food"); *Andrews*, 996 F.3d at 1235 (sheriff function when allowing cross-gender supervision of inmates without safeguards was "promulgating policies and procedures governing conditions of confinement at the county jail").

The public policy implications of *Manders* are dire. Scholars have observed "[t]he aftermath of *Manders* means that a citizen will not be able to bring a § 1983 claim against a sheriff in his official capacity in federal court if the sheriff's action at issue was done while executing an application of force[.] The overall effect of *Manders* then is to eradicate any remedy that was available under § 1983 when the constitutionally violative conduct was a sheriff's use of force." Ward,

Thomas B., "Finding Immunity: *Manders v. Lee* and the Erosion of § 1983 Liability," *Mercer Law Review*: Vol. 55:4, Article 19, at 1520 (2004). Available at: https://digitalcommons.law.mercer.edu/jour_mlr/vol55/iss4/19 (last visited June 5, 2023).

Here, as proved at trial, Hamilton repeatedly violated inmates' constitutional rights with the knowledge and encouragement of his supervisor, in a way that was open and notorious and rose to the level of a custom or policy at DKSO. The decision in *Manders* to characterize such abuse as "establishing a use of force policy" affording Eleventh Amendment immunity has and may continue to allow Georgia sheriffs to turn a blind eye to such constitutional violations with impunity.

iv. Overturning *Manders* would not raise detrimental reliance concerns and there would be no "opening of the floodgates."

Overturning *Manders* would not involve any detrimental reliance concerns. To the extent any Georgia sheriffs are relying on *Manders* to avoid liability for constitutional rights violations, such reliance is not legitimate and, as exemplified by Hardaway's case, has created a strong disincentive for protecting such rights.

Similarly, overturning *Manders* creates no concern about an "opening of the floodgates" with respect to excessive force claims, given existing legal standards. To bring an official capacity claim under

Section 1983 for Eighth Amendment violations, a prisoner must (1) satisfy the Prison Litigation Reform Act prerequisites, *see Thomas*, 614 F.3d at 1305 & n.15; (2) prove an intentional violation of his Eighth Amendment rights – *i.e.*, that the defendants applied force "maliciously and sadistically for the very purpose of causing harm," *see id.*, and (3) prove the violation resulted from a "custom or policy" of the county sheriff, *see Cooper v. Dillon*, 403 F.3d 1208, 1221 (11th Cir. 2005). Not every minor push or shove (or even a single egregious incident) will satisfy these standards. But, when the standards are met, accountability and redress (and the accompanying deterrence) are warranted and appropriate and should be sanctioned by this Court consistent with the purposes of the Eighth Amendment to the Constitution, 42 U.S.C. § 1983, and this Court's decision in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Attorneys for Petitioner Kevin Hardaway

June 11, 2024

APPENDIX

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-14320
Non-Argument Calendar

[Filed December 19, 2023]

KEVIN HARDAWAY, Plaintiff-Appellee,	)
versus	)
DWIGHT HAMILTON, et al., Defendant-Appellant.	)

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:14-CV-0542-CAP

Opinion of the Court

Before JORDAN, NEWSOM, and GRANT, Circuit Judges.

PER CURIAM:

Kevin Hardaway appeals the district court's dismissal of his Eighth Amendment official-capacity

claims, brought pursuant to 42 U.S.C. § 1983, against Dekalb County and its sheriff. We affirm.

The district premised its dismissal order on this circuit's decision in *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (en banc) (holding that a Georgia sheriff is an arm of the state when establishing use of force policies at a jail and training and disciplinary employees as to use of force). Mr. Hardaway acknowledges *Manders* and its applicability, but argues that it was wrongly decided and should be overruled by the court sitting en banc. *See* Appellant's Br. at 18-42.

Manders was a 6-5 decision, and some judges on our court have recently called for its re-evaluation. *See Andrews v. Biggers*, 996 F.3d 1235, 1236 (11th Cir. 2021) (Wilson, J., and Rosenbaum, J., each separately concurring). But as a panel we are bound by *Manders* and therefore affirm the district court's order.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:14-CV-0542-CAP

[Filed October 7, 2020]

KEVIN HARDAWAY,
Plaintiff,

v.

SGT. DWIGHT HAMILTON, Individually and in his official capacity, and LEONARD DRYER, Individually and in his official capacity,
Defendants.

ORDER

This matter is before the court on the motion to dismiss the official capacity claims against the defendants [Doc. No. 92]. The plaintiff has filed a brief in opposition, and the defendants have filed a reply brief. Therefore, the motion is ripe for adjudication.

I. Background

The plaintiff, acting pro se, filed this action in February 2014 raising claims under 42 U.S.C. § 1983

based on events that occurred when while he was incarcerated at the DeKalb County Jail [Doc. No. 1]. On November 21, 2014, this court issued an order pursuant to 28 U.S.C. § 1915A dismissing all claims except the excessive force claims against Dwight Hamilton. [Doc. No. 12]. After being served and filing an answer, Hamilton moved to stay this case pending the outcome of his federal criminal charges related to his alleged use of excessive force against the plaintiff [Doc. No. 26]. On August 11, 2015, the court granted the motion to stay until judgment was entered in the criminal case [Doc. No. 27]. Ultimately, Hamilton entered a guilty plea and was sentenced to twelve-months imprisonment. *United States v. Hamilton*, Criminal Action No. 1:15-CR-TCB-LTW (N.D. Ga. Feb. 8, 2018).

On May 22, 2019, this court granted the plaintiff's motion to lift the stay because the criminal proceedings had terminated. On September 13, 2019, the court granted the plaintiff's motion for appointment of counsel when Attorneys Jeffrey J. Costolnick and Lauren Zeldin of the law firm of Ogletree, Deakins, Nash, Smoak & Stewart accepted the appointment pro bono [Doc. No. 59]. At the request of Hamilton, the court sought pro bono counsel to represent him as well. After months of efforts to locate volunteer counsel to represent Hamilton pro bono, the court appointed Attorney Davin Cheng [Doc. No. 67]. The court is appreciative of the volunteer efforts of the pro bono counsel in this matter.

Upon appearance of pro bono counsel, the court extended the discovery period through May 21, 2020.

Meanwhile, on April 23, 2020, with the consent of Hamilton and leave of court [Doc. No. 86], the plaintiff filed an amended complaint [Doc. No. 87]. The amended complaint added individual and official capacity claims against Leonard Dreyer, who was Hamilton's co-defendant in the criminal action. Also, the amended complaint added official capacity claims against Hamilton. A motion to dismiss the official capacity claims—against both Hamilton and Dreyer—has been filed by the DeKalb County Attorney's office [Doc. No. 92]. No responsive pleading has been filed by Dreyer with respect to the individual capacity claims against him.

II. Rule 12(b)(6) Motion to Dismiss Standard

When evaluating a motion to dismiss pursuant to Rule 12(b)(6), the court must take the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff. *Resnick v. AvMed, Inc.*, 693 F.3d 1317, 1321-22 (11th Cir. 2012). To survive Rule 12(b)(6) scrutiny, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

III. Analysis

The motion to dismiss the official capacity claims against Hamilton and Dreyer argues that Eleventh Amendment immunity bars the claims because Dreyer and Hamilton were state actors administering jail policies and practice. In response, the plaintiff contends that Hamilton and Dreyer, in their official capacities, were not arms of the state when they allegedly used excessive force against the plaintiff, and therefore, the Eleventh Amendment does not apply.

Under 42 U.S.C. § 1983,

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

In order to state a claim for relief under 42 U.S.C. § 1983, a plaintiff must allege: "(1) that the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of law." *Marshall Cty. Bd. of Educ. v. Marshall Cty. Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993) (internal quotes and citation omitted).

The United States Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). On the contrary, states and their officials, acting in official capacities, are immune from suit under § 1983 pursuant to the Eleventh Amendment, which, absent congressional abrogation, "protects a State from being sued in federal court without the State's consent." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003). Eleventh Amendment immunity from suit in federal court applies not only when the state itself is sued, but also when an "arm of the state" is sued. *Id.*

In this case, the parties dispute whether Hamilton and Dreyer, when acting in their official capacities, were arms of the state. This court is bound to follow the Eleventh Circuit's decision in *Manders*,[1] which holds that a Georgia sheriff in his official capacity "is an arm of the state . . . in establishing use-of-force policy at the jail and in training and disciplining his deputies in that regard . . . ." *Id.* at 1328. Courts in the Eleventh Circuit have routinely determined that when a sheriff is acting as an arm of the state, his deputies are also entitled to Eleventh Amendment immunity from suits for money damages in their official capacities. *Morgan v. Fulton Cty. Sheriff's Dep't*, No. CIVA 1:05CV1576 JOF, 2007 WL 1810217, at *5 (N.D. Ga. June 21, 2007) (citing *Gates v. Jolley*, No. 4:06-CV-50(CDL), 2007 WL 106533,

[1] The plaintiff argues that there is a good faith basis to overrule *Manders*. However, this argument is misplaced before this court. Rather, the plaintiff must raise this argument with the Eleventh Circuit as this court has no power to overrule the higher court.

*3 (M.D. Ga. Jan. 8, 2007); *Slater v. Henderson*, No. Civ.A. 5:03-CV-241, 2006 WL 1517068, *1 (M.D. Ga. May 24, 2006); *Bunyon v. Burke County*, 306 F.Supp.2d 1240, 1255 (S.D. Ga. 2004); *Mladek v. Day*, 293 F.Supp.2d 1297, 1304 (M.D. Ga. 2003)). Therefore, this court cannot reach any conclusion other than Hamilton and Dreyer, as sheriff's employees supervising and administering the DeKalb County Jail, are entitled to Eleventh Amendment immunity. Accordingly, the official capacity claims against Hamilton and Dreyer are barred by the Eleventh Amendment.

IV. Conclusion

Based on the foregoing, the motion to dismiss the official capacity claims against Hamilton and Dreyer [Doc. No. 92] is GRANTED.

Despite being served with the amended complaint on May 13, 2020, Defendant Dreyer has not responded to the individual capacity claims against him. In deference to his pro se status, the court will afford him 21 days from the date of this order to file his answer. If no answer is filed, the plaintiff shall be free to seek a clerk's entry of default as to the individual capacity claims against Dreyer.

The clerk is DIRECTED to mail a copy of this order, return receipt requested, to Leonard Dreyer at 757 Arcadia Ave., Decatur, GA 30030.

SO ORDERED this 7th day of October, 2020.

/s/CHARLES A. PANNELL, JR.
CHARLES A. PANNELL, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

CIVIL ACTION 1:14-cv-00542-AJB

[Filed November 28, 2022]

KEVIN HARDAWAY,
Plaintiff,

v.

SGT. DWIGHT HAMILTON, *individually and in his official capacity for the DeKalb County Sheriff' Office*, and LIEUTENANT LEONARD DREYER, *individually and in his official capacity for the DeKalb County Sherriff' Office*,
Defendants.

JUDGMENT

This action having come before the court for a jury trial, the Honorable Alan J. Baverman presiding, on the 42 U.S.C. § 1983 claim for the alleged use of excessive force by the defendants, having been tried, and the jury verdict having been reached in favor of the plaintiff against the defendants, it is

Ordered and Adjudged that the plaintiff is entitled to recover the following damages from the defendants:

Sgt. Dwight Hamilton
Compensatory Damages: $60,020.00
Punitive Damages: $100,000.00
Lieutenant Leonard Dreyer
Compensatory Damages: $20,000.00
Punitive Damages: $75,000.00

This 28th day of November, 2022.

/s/ B. Walker
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION NO. 1:14-CV-0542-AJB

[Filed March 27, 2023]

KEVIN HARDAWAY,
Plaintiff,

v.

SGT. DWIGHT HAMILTON, Individually and in his official capacity, and LEONARD DREYER, Individually and in his official capacity,
Defendants.

ORDER

This action is before the Court on Defendant Leonard Dreyer's renewed motion for judgment as a matter of law and alternative motion for new trial [Doc. No. 260].

I. Factual and Procedural Background

Plaintiff, acting *pro se*, filed this action on February 24, 2014, raising claims under 42 U.S.C. § 1983 based on events that occurred when while he

was incarcerated at the DeKalb County Jail [Doc. No. 1]. On November 21, 2014, this Court issued an order pursuant to 28 U.S.C. § 1915A dismissing all claims except the excessive force claims against Dwight Hamilton [Doc. No. 12].[1] After being served and filing an answer, Hamilton moved to stay this case pending the outcome of his federal criminal charges related to his alleged use of excessive force against Plaintiff [Doc. No. 26]. On August 11, 2015, the Court granted the motion to stay until judgment was entered in the criminal case [Doc. No. 27]. Ultimately, Hamilton entered a guilty plea and was sentenced to twelve-months imprisonment. *United States v. Hamilton*, Criminal Action No. 1:15-CR-TCB-LTW (N.D. Ga. Feb. 8, 2018).

On May 22, 2019, this Court granted Plaintiff's motion to lift the stay because the criminal proceedings had terminated [Doc. No. 55].[2] On September 13, 2019, the Court granted Plaintiff's motion for appointment of counsel when Attorneys Jeffrey J. Costolnick, Lauren Zeldin, and Katherine Krouse accepted the appointment *pro bono* [Doc. No. 59]. At Hamilton's request, the Court sought *pro bono* counsel to represent him as well. After months of efforts to locate volunteer counsel to represent Hamilton *pro bono*, on

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[1] While the initial complaint listed defendants other than Hamilton [Doc. No. 1], Dreyer was not one of them.

[2] This was Plaintiff's third motion to remove the stay [Doc. No. 54]. The prior two motions were not served on Hamilton [Doc. Nos. 34, 38] and were denied by the Court [Doc. Nos. 42, 52].

December 19, 2019, the Court appointed Attorney David Cheng [Doc. No. 67].

Upon appearance of *pro bono* counsel, the Court extended the discovery period through May 21, 2020 [Doc. No. 67]. Meanwhile, on April 23, 2020, with the consent of Hamilton and leave of court [Doc. No. 86], Plaintiff filed an amended complaint [Doc. No. 87]. The amended complaint added individual and official capacity claims against Dreyer, who was Hamilton's supervisor at the DeKalb County Jail on the date of the incident. This was the first time Plaintiff properly asserted claims against Dreyer. Also, the amended complaint added official capacity claims against Hamilton. A motion to dismiss the official capacity claims against both defendants was filed by counsel for the DeKalb County Sheriff [Doc. No. 92].[3] On October 7, 2020, the Court granted the motion to dismiss the official capacity claims against Hamilton and Dreyer [Doc. No. 114].

Acting *pro se*, Dreyer filed an answer, and he asked this Court to appoint counsel to represent him [Doc. Nos. 115, 134]. After finding counsel willing to take on Dreyer's representation *pro bono*, the Court appointed attorneys Michael Kohler, Lynsey Barron, and Elizabeth Marquardt to represent Dreyer [Doc. No. 139].

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[3] It is well-established that claims against a public official in his or her official capacity are simply claims against the entity for which the public official is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985).

The parties sought and the Court granted an additional 90 days to complete discovery [Doc Nos. 141, 142]. Upon the expiration of that discovery period, Dreyer moved for summary judgment as to the individual capacity claims against him arguing that the claims were not timely filed and that qualified immunity barred them [Doc. No. 155]. Finding that Dreyer failed to assert his timeliness and immunity defenses in his answer, the Court denied the motion for summary judgment [Doc. No. 162].

Over Plaintiff's objections, the Court allowed Dreyer to amend his answer to assert the affirmative defenses of statute of limitations and qualified immunity [Doc. No. 179 at 1-2]. In the same order, the Court allowed Hamilton to amend his answer to correct a scrivener's error and to clarify that his good faith defense was actually an assertion of qualified immunity. *Id.* The Court then allowed a 60-day discovery period limited in scope to Defendants' qualified immunity defenses and Dreyer's statute of limitations defense. *Id.*

The case was tried to a jury November 14 through November 17, 2022.[4] At the close of Plaintiff's case and again at the close of the evidence, Dreyer moved for judgment as a matter of law, arguing that the claims against him were untimely. Tr. at 436, 570 [Doc. Nos. 273, 274]. The Court deferred ruling on the motion at that time and allowed the case to be decided by the jury. *Id.* The jury returned a verdict in favor of Plaintiff

[4] The parties consented to the undersigned's jurisdiction on July 6, 2022 [Doc. No. 195].

against both Defendants in the total amount of $255,020 [Doc. No. 155].[5]

Dreyer filed a motion for judgment as a matter of law and an alternative motion for new trial on December 26, 2022 [Doc. No. 260]. Plaintiff filed a brief in opposition [Doc. No. 277] and Dreyer filed a reply brief [Doc. No. 279]. The motion is now ripe for review by the Court.

II. Analysis

In his motion for judgment as a matter of law, Dreyer argues that Plaintiff's claims against him, brought more than eight years after the conduct at issue occurred and more than six years after the lawsuit was filed, are barred by the statute of limitations. In addition, Dreyer argues that the claims do not relate back to the original complaint under Federal Rule of Civil Procedure 15.

In response, Plaintiff contends that the statute of limitation was tolled because the grievance he filed shortly after the incident that forms the subject matter of this suit was never addressed by DeKalb County Jail officials. He further asserts that Dreyer waived his timeliness argument by failing to renew his motion for summary judgment after he was allowed to amend his answer to raise the statute of limitation defense.

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[5] Specifically, the Judgment provided that Plaintiff was to recover $60,020.00 in compensatory damages and $100,000.00 in punitive damages against Hamilton and $20,000.00 in compensatory damages and $75,000.00 in punitive damages against Dreyer [Doc. No. 251].

The parties agree that the applicable statute of limitations as to Plaintiff's 42 U.S.C. § 1983 claims is two years. A murkier issue is precisely when the statute of limitations as to Dreyer began to run.

A. When did limitations period begin and end as to Dreyer?

As a general rule, "the statute of limitations does not begin to run until the facts which would support a cause of action are apparent or should be apparent to a person with a reasonably prudent regard for his rights." *Lovett v. Ray*, 327 F.3d 1181, 1182 (11th Cir. 2003). With respect to Dreyer, Plaintiff alleged that he directed, authorized, and encouraged Hamilton to use excessive force against him and to deprive him of the right to be free from cruel and unusual punishment. Am. Compl. at ¶ 43 [Doc. No. 87]. Thus, the statute of limitations as to the claim against Dreyer began to run when the facts regarding Dreyer's alleged direction, authorization, and encouragement of Hamilton became apparent or should have become apparent to Plaintiff.

At trial, Plaintiff testified that he didn't know anything about Dreyer until 2017. Tr. at 200 [Doc. No. 272]. He explained that he learned that Dreyer was implicated in the events from the Department of Justice and, that after that point, he sought to add claims against Dreyer to the lawsuit. *Id.* Plaintiff first sought to add claims against Dreyer by motion on February 17, 2017 [Doc. No. 33]. The motion to amend did not explain what claims Plaintiff sought to raise against Dreyer; it merely stated that the federal government added Dreyer to the criminal case against Hamilton and therefore, he should be allowed to add

him to this civil case as well. Despite the Court's clear instruction to Plaintiff in the early stages of the case [Doc. No. 13], he failed to serve Hamilton with the motion, and there is no indication that Plaintiff sent a copy of the motion to Dreyer. The Court denied the motion to amend the complaint [Doc. No. 37]. While the stay remained in place, Plaintiff filed two more motions seeking leave to add claims against Dreyer [Doc. Nos. 44, 46]. The Court denied the motions because the case remained stayed and also because Plaintiff again failed to properly serve the motions on Hamilton [Doc. No. 52].

Based on Plaintiff's testimony at trial, he became aware of Dreyer and his role in Hamilton's use of excessive force in 2017. It is apparent that he had such knowledge by February 2, 2017—the date he signed his first motion to amend seeking to add Dreyer as a defendant in this suit [Doc. No. 33].[6] Therefore, the latest possible date for Plaintiff to file a claim against Dreyer was February 2, 2019. He did not file a

[6] There is evidence in the record that Plaintiff learned of Dreyer prior to Dreyer's indictment in October 2015. In his deposition, Plaintiff describes his meeting with officials from the Department of Justice when he was told of pending indictments against Hamilton and Dreyer. Hardaway Dep. at 55 [Doc. No. 155-4]. Hamilton was initially indicted in June 2015. *See United States v. Hamilton*, No. 1:15CR0240-TCB (N.D. Ga. June 17, 2015) (docket entry number 1). Dreyer was indicted in the superseding indictment under the same case number on October 20, 2015 (docket entry 25). However, even if the Court relies on the date Plaintiff demonstrated his knowledge of Dreyer in writing, the claims against Dreyer were not timely filed. Therefore, finding that the statute of limitation began to run even earlier does not alter the outcome on this issue.

procedurally proper motion to do so until April 23, 2020 [Doc. No. 84].

B. Did this court's stay affect the statute of limitations?

It is true that this action was stayed until May 22, 2019. However, the stay in this action did not prevent Plaintiff from filing a new civil action against Dreyer. Moreover, the criminal proceedings with respect to Hamilton terminated as of February 8, 2018; it was at this point that Plaintiff was able to seek removal of the stay. Yet he did not do so through a procedurally proper motion until April 29, 2019 [Doc. No. 54].

At the time of the deficient filings Plaintiff was acting *pro se*. While the Court must construe *pro se* pleadings liberally, *see Haines v. Kerner*, 404 U.S. 519 (1972), *pro se* litigants are still required to comply with federal and local procedural rules because strictly enforcing procedural requirements is "the best guarantee of evenhanded administration of the law." *See Members v. Paige*, 140 F.3d 699, 702 (7th Cir. 1998) (internal quotations omitted); *see also Sun v. United States*, 342 F. Supp. 2d 1120, 1123 (N.D. Ga. 2004) ("In construing their pleadings, the courts afford *pro se* litigants some leniency. Nevertheless, *pro se* litigants have been consistently required to comply strictly with procedural rules.") (footnote omitted); *Watkis v. Payless ShoeSource, Inc.*, 174 F.R.D. 113, 118 (M.D. Fla. 1997) (citing *Moon v. Newsome*, 863 F.2d 835, 837 (11th Cir. 1989)) ("[O]nce a *pro se* litigant is in court, he is subject to the relevant law and rules of court, including the Federal Rules of Civil Procedure.")).

In deference to Plaintiff's *pro se* status, the Court on February 27, 2018, provided Plaintiff with information on how to determine the place of confinement for Hamilton such that he could be served with the motions Plaintiff sought to file [Doc. No. 42]. Waiting nearly a year, Plaintiff again filed motions without properly serving Hamilton [Doc. Nos. 43, 44, 45]. Ultimately, on April 10, 2019—14 months after the stay was ripe for removal—the Court provided Plaintiff with an address to serve Hamilton with any motions he sought to file [Doc. No. 52]. It was only then that Plaintiff filed a procedurally proper motion to remove the stay [Doc. No. 54]. These efforts by the Court demonstrate the more than adequate deference afforded to Plaintiff as a *pro se* litigant. Therefore, Plaintiff cannot explain away his failure to timely assert claims against Dreyer by pointing to his *pro se* status.

C. Did the amended complaint relate back to the initial complaint?

The timeline discussed above establishes that the May 13, 2020 amended complaint [Doc. No. 87] raising claims against Dreyer was outside of the two-year limitation period—even using the most liberal accrual date. In the motion for leave to file the amended complaint, Plaintiff argued that it related back to the date of filing the original complaint pursuant to Federal Rule of Civil Procedure 15(c) [Doc. No. 84]. The motion asserts without citation to evidence that Dreyer received notice of the suit before the statute of limitation expired. [*Id.* at 4].

In the currently pending motion for judgment as a matter of law, Dreyer argues that the evidence developed at trial precludes application of Rule 15(c). Under Federal Rule of Civil Procedure 15(c)(1)(C),

> an amendment that changes the party or the naming of a party against whom a claim is asserted relates back if the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading, and, within the period provided by Fed. R. Civ. P. 4(m) for serving the summons and complaint, the party to be brought in by an amendment both (1) received notice of the action, such that it would not be prejudiced in defending on the merits, and (2) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

At the time Plaintiff filed his complaint, Federal Rule of Civil Procedure 4(m) required a plaintiff to serve a defendant with process within 120 days after filing the complaint. Fed. R. Civ. P. 4(m).[7] Plaintiff filed this lawsuit on February 24, 2014 [Doc. No. 1], and the 120-day period for serving process expired on June 24, 2014. Here, the proposed claims against Dreyer arise out of the same conduct or occurrence as the claims in

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[7] Effective December 1, 2015, Rule 4(m) was amended by reducing the time within which to perfect service from 120 days to 90 days. Fed. R. Civ. P. 4(m). However, as this matter was filed on February 2, 2014, the 2014 Rules apply.

the original complaint and the amended complaint. Plaintiff, however, still must show that Dreyer received notice of the action within 120 days after Plaintiff filed the complaint, and he also must show that Dreyer knew or should have known that, but for a mistake concerning his identity, the action would have been brought against him. Fed. R. Civ. P. 15(c)(1)(C).

There is no evidence that Dreyer learned of this action by February 24, 2014. At trial, Dreyer testified that he first learned of the suit in May 2020 when he was served with the amended complaint. Tr. at 506 [Doc. No. 274]. In response to the motion, Plaintiff points to no contrary evidence. In fact, Plaintiff does not address the relation back theory at all in his response brief [Doc. No. 277]. Because the undisputed evidence establishes that Dreyer did not know about this action until well after the time established by Rule 15(c), that rule has no applicability here.

D. Was the statute of limitations as to Dreyer tolled?

In response to Dreyer's motion for judgment as a matter of law, Plaintiff argues that the 2012 grievance that he filed with the DeKalb County Jail regarding the excessive force used against him tolled the statute of limitations as to Dreyer. In support of this argument, the plaintiff cites to several district court cases within the Eleventh Circuit. *See Clark v. Fry*, No. 5:18-CV-71, 2019 WL 1354405 at *2 (M.D. Ga. Mar. 26, 2019) (the "time taken to pursue administrative remedies can toll the statute of limitations"); *Watkins v. Haynes*, No. CV212-050, 2013 WL 1289312, at *6 (S.D. Ga. Mar. 27, 2013) ("Plaintiff is entitled to

equitable tolling of the limitations period for the time in which he was required to pursue administrative remedies."); *Baldwin v. Benjamin*, No. 5:09-CV-372 (CAR), 2010 WL 1654937, at *1 (M.D. Ga. Apr. 23, 2010) ("Plaintiff's filing of a grievance may have operated to toll the statute of limitations in this case."); *Dunn v. Hart*, No. CV513-131, 2014 WL 8098447, at *8 (S.D. Ga. Dec. 16, 2014), report and recommendation adopted, No. CV513-131, 2015 WL 1032959 (S.D. Ga. Mar. 9, 2015) ("Plaintiff's completion of the mandatory exhaustion requirement tolled the two-year statute of limitations period."); *Jenkins v. Hutcheson*, No. CV614-081, 2015 WL 588819, at *1 (S.D. Ga. Feb. 11, 2015) ("It would be inherently unfair for inmates if the applicable statute of limitations period did not toll while the inmates completed a process which is mandatory before those inmates can file suit in federal court.") Plaintiff recognizes that the Eleventh Circuit has expressly declined to rule on whether the Prison Litigation Reform Act's exhaustion requirement operates to toll the limitations period. *See Zamudio v. Haskins*, 775 F. App'x 614, 616 (11th Cir. 2019); *Leal v. Georgia Dep't of Corr.*, 254 F.3d 1276, 1280 (11th Cir. 2001).

Even if this Court is persuaded by the other district court opinions that find tolling is appropriate when exhaustion of administrative remedies is mandatory, the facts of this case do not support tolling. First, the grievance that Plaintiff filed with the DeKalb County Jail did not include Dreyer—Plaintiff is clear that he didn't know of Dreyer's existence until he met with representatives from the Department of Justice. Tr. at 200 [Doc. No. 272]. While the exact date of that

meeting is not in the record, Plaintiff explains that it occurred when he was in State custody about two and a half years after he left the DeKalb County Jail. Tr. at 175 [Doc. No. 272]. As set forth above, the limitations period as to Dreyer did not begin to run until Plaintiff knew or should have known of facts giving rise to the cause of action against Dreyer. The evidence at trial establishes that Plaintiff was provided information regarding Dreyer for the first time after he left the DeKalb County Jail. Thus, the limitations period as to Dreyer had not accrued at the time Plaintiff filed a grievance while incarcerated in the DeKalb County Jail. Accordingly, there was nothing to toll at that time with respect to Dreyer. And there is simply no authority for preventing the start of a limitations period as to one party due to a prior filing of a grievance against another party. *Cf. 151 Foods, LLC v. Tromp Grp. Americas, LLC*, No. 1:21-CV-03724-LMM, 2022 WL 18459844, at *5 (N.D. Ga. Oct. 13, 2022) ("[T]he Court is not persuaded that an administrative stay agreed upon between Defendant AMF and Plaintiff could toll the statute of limitations between Plaintiff and Defendant Cummings Atlanta, which was not yet a party to the lawsuit and did not consent to the stay.")

Furthermore, "[e]quitable tolling is a remedy that is applied sparingly and only in extraordinary circumstances beyond the plaintiff's control that are unavoidable even with diligence." *Gilmore v. Levett*, No. 1:18-CV-3259-SCJ-CMS, 2018 WL 10550751, at *2 (N.D. Ga. Nov. 9, 2018), report and recommendation adopted, No. 1:18-CV-3259-SCJ, 2018 WL 10550627 (N.D. Ga. Dec. 14, 2018) (quoting *Arce v. Garcia*, 434

F.3d 1254, 1261 (11th Cir. 2006)). In Part II.D above, the Court detailed the lack of diligence that Plaintiff exhibited in moving to lift the stay and add Dreyer to the complaint. Thus, even if a grievance filed before Plaintiff had any reason to know about Dreyer's role in the excessive force used against him, which grievance remains unanswered today, could form a basis to apply equitable tolling to the statute of limitation applicable to Dreyer, Plaintiff's own lack of diligence since he learned of Dreyer's involvement prevents such tolling.

E. Did Dreyer's failure to file a second motion for summary judgment on the timeliness defense operate as a waiver of the defense?

Next, Plaintiff contends that Dreyer waived his statute of limitations defense by not filing a motion for summary judgment on the issue after he was granted leave to amend his answer to assert the defense. The only authority from within the Eleventh Circuit cited by the plaintiff to support this argument is *Day v. Liberty Nat. Life Ins. Co.*, 122 F.3d 1012, 1014 (11th Cir. 1997). However, in *Day*, the defendant did not raise the statute of limitation defense at all until after a jury returned a verdict. *Id.* The Eleventh Circuit concluded that failure to raise it as an affirmative defense pursuant to Federal Rule of Civil Procedure 8(c) resulted in a waiver. Notably, this is the same ruling this Court made on Dreyer's motion for summary judgment [Doc. No. 162]. However, after that ruling, the Court allowed Dreyer to amend his answer to assert the statute of limitation defense [Doc. No. 179]. Moreover, Dreyer did not wait until after the jury

rendered its verdict to move for judgment on his statute of limitations defense. He did so at the close of Plaintiff's case and at the close of evidence as well. Tr. at 436, 570 [Doc. Nos. 273, 274].

III. Conclusion

Because Plaintiff's claims against Dreyer are barred by the applicable statute of limitations, Dreyer's motion for judgment as a matter of law [Doc. No. 260] is **GRANTED**. Dreyer's alternative motion for new trial is dismissed as **MOOT**. The Clerk is **DIRECTED** to enter an amended judgment in favor of Dreyer and against Plaintiff. The judgment as to Hamilton shall remain the same.

IT IS SO ORDERED and DIRECTED, this 27th day of March, 2023.

/s/ Alan J. Baverman
ALAN J. BAVERMAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 1:14-cv-00542-AJB

[Filed March 28, 2023]

KEVIN HARDAWAY,
Plaintiff,

vs.

SGT. DWIGHT HAMILTON and
LIEUTENANT LEONARD DREYER,
Defendants.

J U D G M E N T

This action having come before the court, Honorable Alan J. Baverman, United States Magistrate Judge, for consideration of Defendant Leonard Dreyer's renewed motion for judgment as a matter of law, and the Court having granted said motion, it is

Ordered and Adjudged that judgment is hereby entered in favor of Defendant Dreyer against Plaintiff.

Dated at Atlanta, Georgia, this 28th day of March, 2023.

KEVIN P. WEIMER
CLERK OF COURT

By: s/Ciarra Oduka
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
March 28, 2023
Kevin P. Weimer
Clerk of Court

By: s/Ciarra Oduka
Deputy Clerk

APPENDIX F

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-14320

[Filed March 13, 2024]

KEVIN HARDAWAY, Plaintiff-Appellant, *versus* SGT. DWIGHT HAMILTON, individually and in his official capacity for the DeKalb County Sherriff's Office, LIEUTENANT LEONARD DREYER, individually and in his official capacity for the DeKalb County Sherriff's Office, Defendants-Appellees.	)

Order of the Court

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:14-cv-00542-AJB

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before JORDAN, NEWSOM, and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.