23-6557

IN THE

United States Court of Appeals for the Second Circuit

CARLTON WALKER

Plaintiff-Appellant,

v.

OFFICER RICHARD SENECAL, OFFICER BRIAN BENWARE,

Defendants-Appellees,

ANDREW M. CUOMO, LETITIA JAMES, HON. JANET M. DEFIORE, HON. JENNEY RIVERA, LESLIE E. STEIN, HON. EUGENE M. FAHEY, HON. MICHAEL J. GARCIA, HON. ROWAN WILSON, ANTHONY J. ANNUCCI, CARL J. KOENIGSMANN, BRUCE S. YELICH, S. BARTON, JANE DOES 1-3, D. RANNEY,

Defendants.

On Appeal from the United States District Court for the Northern District of New York, No. 9:20-cv-00082-AMN-CFH
District Judge Anne M. Nardacci

BRIEF OF PLAINTIFF-APPELLANT CARLTON WALKER

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INTRODUCTION

Carlton Walker, incarcerated at the Bare Hill Correctional Facility ("Bare Hill") in New York, was carrying a draft civil rights complaint—alleging deplorable, dangerous, and sexually violent conditions at Bare Hill and other New York prisons—when Officer Richard Senecal stopped him outside the mess hall and examined the complaint. Angered by its contents, Officer Senecal destroyed the in-progress draft. Officer Senecal told Mr. Walker that he did so because Mr. Walker was complaining about prison conditions and suing prison personnel. When Mr. Walker told Officer Senecal that he planned to file a grievance against him, Officer Senecal responded in no uncertain terms that doing so would land him in restrictive housing or the morgue.

What follows is a simple story. Mr. Walker filed grievances against Officer Senecal. Officer Senecal was infuriated and eager to end Mr. Walker's complaining. So, he punished and sought to intimidate Mr. Walker by launching a months-long course of retaliation against him (which included physical violence and restrictive housing) and recruited other corrections staff, including Officer Benware, to do the same. There is no doubt that Officers Senecal and Benware retaliated against Mr. Walker for his complaint and grievances because Officer Senecal clearly stated, on multiple occasions, that he was retaliating against Mr. Walker *because of* his grievances and complaint. Furthermore, Officer Benware flat-out admitted to

retaliating against Mr. Walker at Officer Senecal's behest, and even went so far as to apologize to Mr. Walker. On these facts, every element of a First Amendment retaliation claim is easily satisfied. The district court's decisions to the contrary are plainly incorrect; this Court should reverse and remand.

JURISDICTIONAL STATEMENT

Plaintiff Carlton Walker brought this civil rights action under 42 U.S.C. § 1983 alleging several violations of his federal constitutional rights. JA1.[1] The district court had jurisdiction under 28 U.S.C. § 1331.

Pursuant to 28 U.S.C. § 1915A, the district court screened the complaint prior to service. SA1. It ordered some of Mr. Walker's claims severed and transferred to the Southern District of New York, dismissed Mr. Walker's conditions-of-confinement, excessive force, and religious freedom claims without prejudice, and dismissed Mr. Walker's Fourteenth Amendment due process and equal protection claims with prejudice. SA41. Only Mr. Walker's First Amendment retaliation claims against Defendants Senecal and Benware survived screening. SA40.

Subsequently, the district court granted Defendant Benware's motion to dismiss in full and Defendant Senecal's motion to dismiss in part. JA69. On April 24, 2023, the district court granted Defendant Senecal's motion for summary

[1] This brief will refer to the Joint Appendix as "JA," and the Special Appendix as "SA," followed by the appropriate page number.

judgment. SA104. That same day, the district court entered a final judgment and ordered the case closed. SA105. Mr. Walker timely filed a notice of appeal from the district court order on May 22, 2023. JA418. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The issues presented are:

1. Whether the district court erred in dismissing in part, and then granting summary judgment on, Mr. Walker's First Amendment retaliation claim against Officer Senecal, who, after discovering Mr. Walker's draft civil rights complaint alleging unsafe conditions in the prison unit where Officer Senecal worked along with unchecked sexual violence and drug use throughout the DOCCS, attempted to silence Mr. Walker by orchestrating a campaign of retaliation against him that included: (1) repeated threats to kill Mr. Walker; (2) repeated threats to throw Mr. Walker into restrictive housing; (3) repeated physical assaults of Mr. Walker by Officer Senecal and others; (4) the termination of Mr. Walker from his job in the prison law library; and (5) the fabrication of a misbehavior report that landed Mr. Walker in restrictive housing.

2. Whether the district court erred in dismissing Mr. Walker's First Amendment retaliation claim against Officer Benware, who, at Officer Senecal's behest, retaliated against Mr. Walker by firing him from the law library and then

fabricating a misbehavior report, which resulted in Mr. Walker's placement in restrictive housing.

3. Whether the district court erred in dismissing with prejudice Mr. Walker's Fourteenth Amendment equal protection and due process claims.

STATEMENT OF THE CASE

After Officer Senecal discovered Mr. Walker's draft civil rights complaint challenging, among other things, conditions of confinement at Bare Hill, Officer Senecal orchestrated a campaign of retaliation intended to silence Mr. Walker. Raising First Amendment retaliation claims under 42 U.S.C. § 1983, Mr. Walker filed suit against Officer Senecal and his colleague, Officer Benware, for attempting to chill his speech through violence, intimidation, and harassment. Officers Senecal and Benware filed a joint motion to dismiss after those claims survived initial pre-service screening. The district court (Hon. David N. Hurd, District Judge) granted Officer Benware's motion in full and granted Officer Senecal's motion in part. Officer Senecal then moved for summary judgment, and the district court (Hon. Anne M. Nardacci, District Judge) granted the motion.

Mr. Walker also raised Eighth Amendment claims alleging inadequate medical care, excessive force, and unsafe conditions of confinement; Fourteenth Amendment due process and equal protection claims alleging a failure to provide him with "a forum with [a] full and fair opportunity" to litigate claims of actual

innocence; and a claim arising under the First Amendment alleging interference with religious worship. The district court (Hon. David N. Hurd, District Judge) dismissed those claims prior to service. On appeal, Mr. Walker presses only the First Amendment retaliation claims and the Fourteenth Amendment due process and equal protection claims.

I. Factual Background[2]

A. Officer Senecal Discovers Mr. Walker's Draft Complaint Alleging Abuses at Bare Hill and Other New York Prisons.

In late September of 2017, Mr. Walker, was making revisions to a recently filed amended federal civil rights complaint.[3] JA238, SA80, n. 4; *see* JA258 (amended complaint) and ECF 39 (second amended complaint), *Walker v. Cuomo*, No. 9:17-cv-00650-TJM-DJS (N.D.N.Y.). Within the second amended complaint that he was working on at the time, Mr. Walker alleged that dangerous and

[2] The facts are presented in the light most favorable to Mr. Walker, the non-movant. *Weinstock v. Columbia University*, 224 F.3d 33, 40 (2d Cir. 2000). The facts are drawn, in part, from Mr. Walker's verified complaint. A verified complaint is equivalent to an affidavit for summary judgment purposes. *Colon v. Coughlin*, 58 F.3d 865, 872 (2d Cir. 1995), *abrogated on other grounds by Tangreti v. Bachmann,* 983 F.3d 609 (2d Cir. 2020).

[3] Mr. Walker filed the amended civil rights complaint on September 11, 2017. *Walker v. Cuomo*, No. 9:17-cv-00650-TJM-DJS, ECF 10 (N.D.N.Y.). After Mr. Walker filed the amended complaint, he began working on a second amended complaint, which Officer Senecal destroyed. JA105. Mr. Walker subsequently filed the Second Amended complaint in September of 2018, nearly a year after Officer Senecal ripped up the draft. *Walker v. Cuomo*, No. 9:17-cv-00650-TJM-DJS, ECF 39 (N.D.N.Y.).

unconstitutional conditions of confinement were endemic at Bare Hill and other prisons maintained by the New York State Department of Corrections (DOCCS). ECF 39, *Walker v. Cuomo*, No. 9:17-cv-00650-TJM-DJS (N.D.N.Y. 2018).

For example, Mr. Walker complained that DOCCS facilities are "chronically overcrowded and short-staffed," ECF 39 at 7, *Walker v. Cuomo*, No. 9:17-cv-00650-TJM-DJS (N.D.N.Y. 2018), that "[i]llegal mind altering drugs" are "rampant," *id*., and that he was "sexually abused and physically assaulted" by DOCCS personnel on multiple occasions. *Id*. at 10. Mr. Walker reserved some of his harshest criticisms for the Bare Hill mess hall, where Officer Senecal worked. Mr. Walker's allegations included that the mess hall exposed incarcerated people to "dangerous and serious contagious diseases"; lacked proper cleaning equipment, which resulted in "filthy" cutlery, trays, and glasses; and served food that was "contaminated" and "not worthy for human consumption." *Walker v. Cuomo*, No. 9:17-cv-00650-TJM-DJS (N.D.N.Y. 2018). Officer Senecal is among the defendants named in the amended complaint Mr. Walker was drafting. ECF 39 at 1, *Walker v. Cuomo*, No. 9:17-cv-00650-TJM-DJS (N.D.N.Y. 2018); *see also* JA240.

One evening, with a draft of his second amended complaint and other legal documents in hand, Mr. Walker left the law library and headed to the mess hall. JA104; JA235-36; JA375-77. Outside the mess hall, Officer Senecal stopped Mr. Walker and asked why he was carrying so many documents. JA104. Mr. Walker

explained that he had an upcoming parole hearing. JA239. Officer Senecal then took Mr. Walker's legal materials and carefully inspected them. JA104; JA404-05. After "zero[ing] in" on the draft second amended civil rights complaint, Officer Senecal ripped up its first 18 pages, which contained, among others, Mr. Walker's allegations about the Bare Hill mess hall. JA105 at ¶440; JA239-40. When Mr. Walker asked for an explanation, Officer Senecal berated Mr. Walker for complaining about prison conditions and suing DOCCS personnel. JA240, JA242.

Mr. Walker ultimately re-wrote the in-progress second amended complaint that Officer Senecal destroyed, but doing so was time-consuming and difficult. JA238. Mr. Walker alleges that the pages Officer Senecal destroyed "cost [him his case]." SA94, (quoting JA105 at ¶440).

B. Officer Senecal Threatens to Murder Mr. Walker or Send Him to Restrictive Housing if He Complains About the Destruction of the Draft Civil Rights Complaint.

Shortly thereafter, on October 2, Officer Senecal once again stopped Mr. Walker outside of the mess hall for carrying legal materials, this time ordering him to return to his dorm hungry. JA106 at ¶ 448. Before heading back to his cell, Mr. Walker informed Officer Senecal that he planned to file an administrative grievance concerning the recent destruction of his draft complaint. *Id.* at ¶ 449. In a "very nasty tone," Officer Senecal responded with a threat, telling Mr. Walker that if he ever filed such a grievance, "he would make sure that [Mr. Walker] would end up dead

or in the box"—a reference to solitary confinement and restrictive housing. *Id.*; JA242-43. Officer Senecal was "very clear" and repeated this threat to Mr. Walker "more than once." JA243. Emphasizing that this was no idle threat, Officer Senecal promised that Mr. Walker would soon "find out" what he is capable of. JA106 at ¶ 449. As Mr. Walker was leaving the mess hall, another officer cautioned that "Officer Senecal is crazy, and mean[t] what he said" about "kill[ing] [Mr. Walker] or put[ting] [him] in the box." JA106 at ¶ 450. Mr. Walker described Officer Senecal's threats as "psychological" "torture[]" because he was left wondering when or how Officer Senecal or "his cronies" would try to harm or kill him; the fact that Officer Senecal had authority over Mr. Walker only compounded this fear. JA111 at ¶ 483; JA246.

C. Mr. Walker Files Several Grievances Implicating Officer Senecal.

Mr. Walker was terrified of Officer Senecal's threats, but he did file several grievances.[4] In one grievance, Mr. Walker complained that Officer Senecal had destroyed his in-progress second amended complaint. JA106-07. In another grievance, Mr. Walker complained that Officer Senecal had denied him his evening meal. JA105-06. Mr. Walker also filed a grievance complaining that Officer Senecal

[4] Mr. Walker's sworn affidavit explains that he omitted the fact that Officer Senecal destroyed his complaint from one of his grievances because of Officer Senecal's threats. As he put it, Officer Senecal "made specific threats which prevented me from making a grievance complaint forthwith" rather than "waiting over an extended period after other incidents of his misconduct against me" had transpired. JA379-80.

was retaliating against him—and directing other staff to do the same. JA196; SA46, SA63-64 & n.11.

D. To Punish Mr. Walker For Engaging in Protected Conduct, Officer Senecal And Others Repeatedly Assault and Harass Mr. Walker.

Starting within seconds of their mess-hall interaction and largely concentrated within weeks, Officer Senecal and other officers abused Mr. Walker—through physical violence and other means—for complaining about conditions at Bare Hill and naming Officer Senecal in grievances. *See* JA110-13. In fact, for months thereafter *every time* Officer Senecal saw Mr. Walker he reminded him of his threat to murder Mr. Walker or throw him into restrictive housing. JA244.

1. Physical Violence

- On October 2, Officer Senecal threatened to murder Mr. Walker and that night Mr. Walker drafted a grievance. One day later on October 3, Mr. Walker was in the bathroom outside of the law library when two officers rushed in. JA106-07 at ¶ 452. The officers reminded Mr. Walker "how easily he could get kill[ed] for filing grievances against Officer Senecal." *Id*. Underscoring the point, they "slapped [Mr. Walker] around, pushed him, [and] roughed him up." *Id.* at ¶¶ 452-453. They then threatened Mr. Walker that he would be "going to the box or end up dead" if he failed to withdraw his grievance. JA107.

- Later, after Mr. Walker had filed additional grievances against Officer Senecal, Officer Senecal continued to direct his colleagues to abuse Mr. Walker. On March 23, 2018, for example, Officer Senecal told another officer that Mr. Walker was an "asshole," and instructed him to give Mr. Walker a "rough search." JA110-11 at ¶¶ 479-480. Following Officer Senecal's orders, the officer "kicked" Mr. Walker and then subjected him to a "vicious assault." JA111 at ¶ 480.
- On June 23, 2018, much the same occurred after Officer Senecal spotted Mr. Walker walking to religious services. JA112 at ¶¶ 486-488. After directing officers to rifle through Mr. Walker's bible and perform another "rough search," Officer Senecal himself "vicious[ly] assault[ed]" Mr. Walker. JA112 at ¶ 488.
- And on June 29, 2018, Officer Senecal stopped Mr. Walker—this time intercepting him on the way to recreation—and ordered other officers to perform a "rough search." JA112-13 at ¶¶ 489-90. As a result, Mr. Walker was subjected to another "vicious assault." JA113 ¶ at 490. As before, Officer Senecal warned Mr. Walker that complaining would

result in unpleasant consequences—this time, Officer Senecal promised a ban on recreation should Mr. Walker file a grievance.[5] JA113 at ¶ 491.

2. Other Retaliatory Acts

After spreading the news that Mr. Walker was filing lawsuits and grievances implicating Officer Senecal and others, Officer Senecal directed his colleagues to interfere with Mr. Walker's well-being in other ways to dissuade him from filing grievances and civil rights lawsuits. JA110 at ¶ 476. The abuse below occurred within days and weeks of Officer Senecal's threat to murder Mr. Walker or throw him into solitary.

- For example, on October 9, 2017 as Mr. Walker was returning from yard time, one officer warned him, "Walker, you can't come here using the Law Library and its stationary to file suit against the Superintendent and grievances against Officer Senecal." JA108 at ¶ 459. In addition, the two officers who physically attacked Mr. Walker outside the law library also mentioned Mr. Walker's grievance against Officer Senecal. JA106-07 at ¶¶ 452-453. It is highly likely that the other officers that Officer Senecal recruited to "vicious[ly] assault" Mr. Walker also knew that Mr. Walker filed grievances and lawsuits against the facility. JA110-13.

[5] Ultimately, Mr. Walker did lose access to recreation when he was subjected to 30 days of restrictive housing. JA110 at ¶ 475.

- Then, in the afternoon of October 10, 2017—eight days after Mr. Walker filed his first grievance against Officer Senecal—Mr. Walker asked Officer Benware, the supervisor at the law library where Mr. Walker worked, for permission to photocopy several legal documents that were due to be filed in court. JA108 at ¶ 460. After examining Mr. Walker's legal documents, Officer Benware left the library to consult with Officer Senecal, who was waiting nearby. *Id.* at ¶ 464. Officer Senecal then directed Officer Benware to fire Mr. Walker. JA109 at ¶ 472; JA245-46. A few hours later, Officer Benware fired Mr. Walker from the law library. JA109 at ¶ 472. When Mr. Walker asked for an explanation, Officer Benware said the decision was "above him" and "out of his hand[s]," and that he did not "want to speak about it." *Id*. Mr. Walker had worked in the law library without incident since March of 2017. JA191-92. Later, after Officer Senecal was no longer employed in the facility, Officer Benware apologized to Mr. Walker and expressed remorse for firing him. He admitted that he made a "mistake" in firing Mr. Walker, and noted that he only did so because he was "trying to help out [Officer] Senecal" who "orchestrated" the campaign of retaliation against Mr. Walker. JA245-46.[6]

[6] Mr. Walker also presented the names and inmate numbers of six witnesses who could testify to Officers Benware and Senecal's retaliation. JA245-46.

- Also on October 10, 2017, Officer Benware fabricated a misbehavior report against Mr. Walker. JA110 at ¶ 474; JA196. Based on Officer Benware's report, Mr. Walker was found guilty of refusing an order to mop and was sentenced to 30 days of "cube confinement," JA110 at ¶ 475, a form of restrictive housing that is "equivalent to keeplock." *Waters v. Gallagher*, No. 9:15-cv-0804-LEK-DEP, 2017 WL 9511163, at *6 (N.D.N.Y. Aug. 7, 2017), *report and recommendation adopted in part*, No. 9:15-cv-804-LEK-DEP, 2017 WL 3913282 (N.D.N.Y. Sept. 7, 2017). Officer Benware issued the fabricated misbehavior report to "help[]" Officer Senecal and because Officer Senecal told him to. JA245-46.
- And approximately three weeks later, Mr. Walker was demoted to dorm porter. JA196; JA246. When Officer Senecal supervised Mr. Walker's work as a porter, he forced Mr. Walker to work all day, like "a machine," going so far as to forbid him from "sit[ting] down even for a minute." JA234, JA244. While supervising Mr. Walker, Officer Senecal kept "complaining about Walker" filing complaints against him and the facility.[7] JA244.

[7] Officer Senecal filed a declaration disputing Mr. Walker's allegations. *See* JA351. Specifically, he asserts that he "did not confiscate, destroy, or remove any of Mr. Walker's legal materials." *Id*. He also asserts that he "never threatened or harassed Carlton Walker, verbally or otherwise." *Id*. Finally, he denies that he "use[d] abusive language toward Carlton Walker or engage[d] in retaliation against him." *Id*.

II. Procedural History

Mr. Walker filed a pro se complaint under 42 U.S.C. § 1983 against Officers Senecal and Benware, alleging a violation of the First Amendment. Specifically, Mr. Walker claimed that Officer Senecal retaliated against him—and recruited others, including Officer Benware, to participate in his campaign of retaliatory abuse—for the dual purposes of dissuading him from filing a civil rights complaint implicating him and to discourage him for filing grievances complaining of his misconduct. JA104-08; JA109-13. Mr. Walker also alleged Eighth Amendment conditions of confinement, excessive force, and inadequate medical care claims, *e.g.*, JA85-98; JA121-22 at ¶¶ 539-540, a First Amendment religious liberty claim, *e.g.*, JA113-17, JA121 at ¶ 539, and Fourteenth Amendment due process and equal protection claims seeking equitable relief for the alleged deprivation of a full and fair opportunity to litigate his claims of actual innocence, an alleged failing that Mr. Walker describes as the genesis of the other claimed constitutional violations, *e.g.*, JA9 at ¶ 43, JA11 at ¶ 54; JA121-22 at ¶¶ 534-537.

Mr. Walker's complaint was screened pursuant to 28 U.S.C. § 1915A. SA1. The district court dismissed Mr. Walker's Eighth Amendment and Free Exercise claims without prejudice for failure to state a claim. SA27-33, SA35-39. The district court dismissed Mr. Walker's Fourteenth Amendment claims with prejudice after concluding that Mr. Walker sought equitable relief that was only cognizable in a

habeas action.[8] SA25-26. And it permitted the retaliation claims raised against Officers Senecal and Benware to proceed.[9] SA34-35, SA40-41.

Defendants Senecal and Benware then filed a motion to dismiss all claims. JA204. A magistrate judge reviewed the complaint and recommended dismissal in part as to Officer Senecal and in full as to Officer Benware. SA65-66.

Officer Senecal: To start, the magistrate judge excluded some of Officer Senecal's conduct from its review, including that, at Officer Senecal's behest, other officers physically assaulted and threatened to kill Mr. Walker or place him in restrictive housing, SA60, n.8, and that Officer Senecal made good on his threat to send Mr. Walker to restrictive housing and deprive Mr. Walker of recreation, all of which was designed to deter Mr. Walker from filing additional grievances, SA59, n.7; *see* JA112-13. It then analyzed the remainder of Officer Senecal's conduct as separate First Amendment *claims* rather than, as Mr. Walker pleaded them, a course of conduct comprising a single retaliation claim. *E.g.*, SA53. Applying that lens, the magistrate judge concluded that some of Officer Senecal's conduct, including, his alleged campaign of "vicious assaults"—which the magistrate judge referred to as

[8] The district court also concluded that associated compensatory damages claims would run afoul of *Heck v. Humphrey*, 512 U.S. 477 (1994), though Mr. Walker sought only equitable relief in connection with his Fourteenth Amendment claims. *See* SA26-27.

[9] The district court also severed several claims concerning his confinement at Woodbourne Correctional Facility, and transferred those to the Southern District of New York. SA21-23.

"pat frisks"— failed to satisfy the adverse action element of a First Amendment claim. SA53-61, SA65-66; SA69.

Ultimately, the magistrate judge concluded that only two instances from Mr. Walker's course of conduct plausibly made out claims. SA65-66. Those two instances were (1) destroying Mr. Walker's in-progress second amended draft complaint and (2) Officer Senecal's threat to murder Mr. Walker or throw him into restrictive housing. *Id*. It thus granted Officer Senecal's motion to dismiss in part. *Id.*

Officer Benware: The magistrate judge recommended dismissal in full as to Officer Benware. First, it concluded that, contrary to Mr. Walker's allegation, Officer Benware did not fabricate the misconduct report that sent Mr. Walker to restrictive housing, and accordingly that Officer Benware's conduct did not constitute adverse action. SA61-63. It reached this result based on the fact that the allegedly fabricated misconduct report was upheld at the initial review stage and affirmed on appeal. *Id*. Second, as to Officer Benware's firing of Mr. Walker from the law library, the magistrate judge concluded that Mr. Walker had failed to plead facts "plausibly suggesting a connection" between Officer Benware and Officer Senecal that "would allow the Court to infer that Benware was motivated by his relationship to Senecal to retaliate." SA64. The magistrate judge did not consider Mr. Walker's allegations that Officer Benware filed the fabricated misconduct report

and fired Mr. Walker after being encouraged by Officer Senecal to retaliate against Mr. Walker. *See, e.g.*, JA109-10 at ¶¶ 472, 476; JA372-73.

After the district court adopted the magistrate judge's recommendations in full, SA69, Officer Senecal moved for summary judgment. JA218. Consistent with its previous analyses, the magistrate judge analyzed the two remaining instances of conduct implicating Officer Senecal as if they were separate retaliation claims.

To start, the magistrate judge concluded that Mr. Walker failed to show that the destruction of his in-progress draft second amended complaint satisfied both the adverse action and causation elements of a First Amendment retaliation claim. SA80-81, SA85-86. With respect to adverse action, the magistrate judge concluded that Mr. Walker's characterization of the impact of Officer Senecal's destruction of the draft complaint—*e.g.*, it "cost him the case" because it "invalidated" or otherwise negatively affected the case—was "too vague and conclusory to defeat summary judgment." SA80. The magistrate judge also gave weight to its erroneous view that Mr. Walker was able to immediately file an amended complaint notwithstanding Officer Senecal's destruction and confiscation.[10] SA81.

In the alternative, the magistrate judge found that Mr. Walker "fail[ed] to clearly establish that [Officer Senecal] had a motive to retaliate against plaintiff due

[10] In fact, it wasn't until one year later that Mr. Walker was able to file a second amended complaint after Senecal destroyed his draft that he was working on. *See supra,* at 8, n.3.

to his claims in the civil rights lawsuit." SA83. In reaching this result, the magistrate judge gave significant weight to its erroneous conclusion that Officer Senecal was not "named as a defendant in the complaint/case in question." *Id*. The magistrate judge also relied upon the fact that Officer Senecal was not personally responsible for the cleanliness of the mess hall, but instead patrolled the entrance to the mess hall. SA84.

Separately examining Officer Senecal's "threat" to "make sure" that Mr. Walker "end[ed] up dead or in the Box" if he were to complain about the complaint destruction, the magistrate judge deemed that language too "vague and de minimis in nature" to constitute adverse action. SA86-88. It erroneously concluded that Mr. Walker neither suffered "any physical injury" nor experienced "disciplinary confinement" subsequent to Officer Senecal's threat.[11] *Id*. The magistrate judge also heavily weighed that Mr. Walker did in fact complain about Officer Senecal's conduct in a grievance. SA88.

In the alternative, the magistrate judge concluded that Mr. Walker failed to demonstrate a causal connection between his protected conduct (*i.e.*, drafting a federal civil rights complaint and filing grievances, both implicating Officer

[11] Mr. Walker alleged that Officer Senecal and several other officers did in fact physically assault him. *See* JA107 at ¶ 453. Separately, Mr. Walker alleged that he was subjected to "cube confinement," which is a restrictive housing status similar to disciplinary and solitary confinement. JA247.

Senecal) and Officer Senecal's alleged adverse action (*i.e.*, threatening to kill Mr. Walker or subject him to restrictive housing). SA88. In reaching this conclusion, the magistrate judge relied on its erroneous view that Mr. Walker had supplied neither evidence of a retaliatory motive nor evidence of an injury "close in time" to the verbal threat. SA88-89.

Like the magistrate judge, the district court analyzed each allegedly retaliatory incident as a separate claim rather than a course of retaliatory conduct. SA92, SA98, SA101. But the district judge went even further in parsing the incidents, "analyz[ing] the alleged threat that Plaintiff 'would end up dead' separately from the threat to place him in keeplock confinement." SA101. In the district court's view, neither Officer Senecal's alleged destruction of Mr. Walker's complaint, nor Officer Senecal's threats to kill or isolate Mr. Walker constituted adverse action.[12] SA100-3. The threat to kill Mr. Walker was, in the district court's view, "insufficiently direct and specific" to constitute adverse action. SA101-2. The threat to subject Mr. Walker to restrictive housing did not amount to adverse action in the district court's view because it found that "[Mr. Walker] does not contend that he was placed in keeplock confinement as a result of his interaction with defendant," and that the threat was

[12] Like the magistrate judge, the district court also mistakenly thought that Mr. Walker was not subjected to disciplinary confinement after Officer Senecal threatened the punishment. SA103.

purportedly "unaccompanied by subsequent action."[13] SA103. Accordingly, the district court adopted the magistrate judge's recommended and granted Officer Senecal's motion for summary judgment. SA104.

SUMMARY OF ARGUMENT

I. The district court erred in both partially granting Officer Senecal's motion to dismiss and then later granting his motion for summary judgment. Officer Senecal destroyed Mr. Walker's draft civil rights complaint, which implicated him and his colleagues; threatened Mr. Walker with death or solitary confinement if he failed to keep quiet about the destruction of his draft complaint; "orchestrated" a multi-officer campaign to silence Mr. Walker—which included physical violence, intimidation, the loss of employment, and the loneliness of restrictive housing; and admitted—on multiple occasions—that he was doing so *because of* Mr. Walker's protected activity.

That is textbook retaliation—the course of abuse followed protected conduct, it would deter an ordinary prisoner from exercising his constitutional rights, and it was admittedly designed to discourage Mr. Walker from doing so. The district court could only hold otherwise by making three fundamental errors at both the motion to dismiss and summary judgment stages.

[13] The district court did not reach the causation prong.

First, beginning at the motion to dismiss stage and continuing through summary judgment, the district court omitted important facts. For example, at the motion to dismiss stage the magistrate judge omitted the fact that one day after Officer Senecal threatened to murder Mr. Walker that Officer Senecal sent other officers to physically attack Mr. Walker and threaten him for filing grievances. In addition, it entirely ignored that Officer Senecal consummated his threat to throw Mr. Walker into restrictive housing because Mr. Walker was in fact subjected to 30 days of restrictive housing. The district court's error of omitting facts was compounded at summary judgment because not only had the magistrate judge already dismissed a chunk of Mr. Walker's retaliation claim against Officer Senecal at the motion to dismiss phase, but it also ignored many relevant facts that arose at summary judgment. Notably, the district court ignored the fact that Officer Benware admitted to retaliating against Mr. Walker for Officer Senecal.

Second, also beginning at the motion to dismiss stage and continuing through summary judgment, the district court examined each of Officer Senecal's acts of misconduct as discrete First Amendment *claims* rather than as a course of conduct for one retaliation claim. For example, at the motion to dismiss stage, the magistrate judge specifically broke apart each act of misconduct and analyzed whether each separately satisfied the adverse action element. SA53. That was error. This Court requires acts in a course of retaliation to be analyzed together, and that a retaliation

claim be analyzed in the full context in which it arose. *Kotler v. Boley*, No. 21-1630, 2022 WL 4589678, at *2 (2d Cir. 2022); *Hayes v. Dahlke*, 976 F.3d 259, 272 (2d Cir. 2020). This error persisted at summary judgment where the district court broke apart Officer Senecal's threat and said that it "…analyzes the alleged threat that Plaintiff 'would end up dead' separately from the threat to place him in keeplock confinement." SA101. It concluded that each part of the threat, analyzed alone, failed to state adverse action. *Id*.

Third, from the motion to dismiss stage to summary judgment, the district court ignored how quickly Officer Senecal retaliated against Mr. Walker after discovering Mr. Walker's protected conduct. The temporal proximity of seconds, days, and weeks was more than sufficient to satisfy causation, but the district failed to consider that both at the motion to dismiss and at summary judgment. That was error. This Court has held that circumstantial evidence of temporal proximity can satisfy the causation element. *Bennett v. Goord*, 343 F.3d 133, 138 (2d Cir. 2003). Mr. Walker presented more than enough evidence from which a reasonable jury could conclude that all three elements of a First Amendment retaliation claim were satisfied.

II. Mr. Walker alleged a plausible First Amendment retaliation claim against Officer Benware. His complaint explains that Officer Benware, at Officer Senecal's behest, fired Mr. Walker from his job in the law library and fabricated a misbehavior

report against him that landed him in restrictive housing for 30 days. These punitive measures would deter a prisoner of ordinary firmness from exercising his constitutional rights, and they thus satisfy the adverse action element.

Furthermore, the temporal proximity of mere days and weeks here is sufficient to satisfy the causation element. First, Officer Senecal destroyed Mr. Walker's civil rights complaint seconds after reading it and told Mr. Walker that he did so because Mr. Walker was trying to challenge prison conditions and sue prison officials. Second, Mr. Walker alleged that on October 2, 2017, Officer Senecal threatened to murder him or throw him into restrictive housing if Mr. Walker filed any grievances against him. Then, a mere eight days later, and both on the same day of October 10, Officer Benware fired Mr. Walker from the law library and fabricated a misbehavior report against him that sent him to restrictive housing. It is no coincidence that both retaliatory actions took place a mere eight days after Officer Senecal's threat, when Mr. Walker had worked in the law library without incident since March of 2017.

The district court made two fundamental errors. First, it omitted information and failed to view Mr. Walker's retaliation claim against Officer Benware in the entire context that it arose in—which it was required to do. *Kotler v. Boley*, No. 21-1630, 2022 WL 4589678, at *2 (2d Cir. 2022); *Hayes*, 976 F.3d at 272. This means the district court should have, but failed to consider, that eight days before Officer Benware's retaliation Officer Senecal threatened to murder Mr. Walker if he filed a

grievance, and that one day later Mr. Walker was physically attacked by officers reiterating Officer Senecal's threat. Officer Senecal's concurrent course of retaliation is an essential part of the context in which Officer Benware's retaliation arose.

Second, it failed to view the record in the light most favorable to Mr. Walker—a pro se litigant. At the motion to dismiss stage, Mr. Walker's allegations were to be believed. Mr. Walker clearly alleged in his complaint that Officer Senecal recruited Officer Benware to retaliate against him, but the district court failed to take Mr. Walker's statement as true and appropriately weigh this fact in its analysis. In fact, it did the opposite. It concluded that there was no plausible way to link Officer Benware to Officer Senecal's retaliation. That was error. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 191 (2d Cir. 2008) ("[T]he 'dismissal of a pro se claim as insufficiently pleaded is appropriate only in the most unsustainable of cases.'") (quoting *Boykin v. Keycorp*, 521 F.3d 202, 216 (2d Cir. 2008)).

III. The district court erred in dismissing with prejudice at the screening stage Mr. Walker's equal protection and due process claims, which complain of the failure to provide a forum in which to litigate claims of actual innocence, on the basis that they are only cognizable in habeas. Because "habeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of . . . state confinement," *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005), dismissal with prejudice and without leave to amend was inappropriate.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir. 2003). Summary judgment must be denied if there is any "genuine issue as to any material fact." Fed. R. Civ. P. 56(a). The Court "may not make credibility determinations" and "must disregard all evidence favorable to the moving party that the jury is not required to believe." *Mickle v. Morin*, 297 F.3d 114, 120 (2d Cir. 2002) (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-51 (2000)).

This Court reviews a district court's Rule 12(b)(6) dismissal of a complaint de novo, "construing the complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Because Mr. Walker appeared pro se in the district court, this Court must liberally construe his pleadings and interpret them "to raise the strongest arguments that they suggest." *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994). "Accordingly, the dismissal of a pro se claim as insufficiently pleaded is appropriate only in the most unsustainable of cases." *Sealed Plaintiff*, 537 F.3d at 191 (internal citation and quotations omitted).

ARGUMENT

I. The District Court Erred In Partially Dismissing Mr. Walker's Claim And Thereafter Granting Summary Judgment In Favor Of Officer Senecal.

A First Amendment retaliation claim has three elements: "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009) (internal citations and quotations omitted).

As both the district court and Officer Senecal correctly recognized, Mr. Walker satisfied the first element because "there is no dispute" that his draft second amended federal civil rights complaint and grievances amount to protected speech. SA98-99; *see Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996). Therefore, the remaining questions are (1) whether Officer Senecal's conduct constituted "adverse action" and (2) whether the adverse action was substantially motivated by Mr. Walker's protected conduct.[14] The answer to both questions is undoubtedly "yes."

[14] Although the district court did not reach causation prong of the analysis, Mr. Walker briefs the causation prong for the sake of completeness.

A. Mr. Walker Alleged, And A Reasonable Jury Could Find, That Officer Senecal's Months-Long Campaign Of Harassment Against Mr. Walker Constituted Adverse Action.

The sole ground on which the district court rejected Mr. Walker's claim against Officer Senecal at summary judgment was its conclusion that Officer Senecal's actions did not rise to the level of "adverse action." *See* SA100, SA103-4. That was an error. Similarly, at the motion to dismiss stage, the district court held that Officer Senecal's actions failed to state adverse action except for Officer Senecal's threat and complaint destruction. SA64-65. That was also error.

Adverse action is that which would deter "a similarly situated individual of ordinary firmness from exercising his or her constitutional rights." *Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003) (internal quotations omitted). Because the analysis proceeds through an objective lens, it is immaterial that "a particular plaintiff was not himself subjectively deterred; that is, where he continued to file grievances and lawsuits." *Gill v. Pilypchak*, 389 F.3d 379, 381 (2d Cir. 2004).[15] In evaluating adverse action, this Court must consider the totality of "the specific circumstances in which retaliation claims arise." *Hayes*, 976 F.3d at 272.

Officer Senecal's campaign of abuse directed against Mr. Walker—perpetrated by Officer Senecal himself and others at his direction—included, among

[15] Although actual chilling is not required under *Gill,* there is record evidence that Mr. Walker was chilled and refrained from grieving Officer Senecal's complaint destruction in one of his grievances. *See supra,* footnote 4.

other acts, physical violence, threats to kill Mr. Walker, intimidation, the loss of employment, and a restrictive housing sanction.[16] *See supra*, I.B & I.D. Whether considered collectively as a course of retaliatory conduct (which this Court requires, *Hayes*, 976 F.3d at 272) or a series of discrete actions (as the district court erroneously did) the law is clear—such conduct more than suffices to establish adverse action.

1. **At Both The Motion To Dismiss And Summary Judgment Stages, The District Court Reviewed Officer Senecal's Conduct As A Series Of Discrete Claims, Rather Than As A Single Claim Challenging A Course Of Conduct, As Is Required; Reviewed Collectively, Officer Senecal's Conduct Amounts to Adverse Action**.

Courts are to assess adverse action by looking to the full set of circumstances in which the retaliation claims arise. *Hayes*, 976 F.3d at 272; *Ford v. Palmer*, 539 Fed. Appx. 5, 7 (2d Cir. 2013) (internal citation omitted). Accordingly, when a retaliation claim is based on a course of conduct instead of a single action, this Court takes the approach of analyzing all the actions together to determine whether they collectively constitute adverse action. *Kotler v. Boley*, No. 21-1630, 2022 WL 4589678, at *2 (2d Cir. 2022) (holding that adverse action was satisfied after analyzing the entire course of retaliation). The district court did the opposite, treating—at both the motion to dismiss and summary judgment stages—Officer

[16] At summary judgment, the district court failed to consider many instances of Officer Senecal's retaliation because the district court either ignored it or disposed of it at the motion to dismiss phase. *See infra,* 33-35.

Senecal's conduct as discrete retaliation "claims," reviewing each in a vacuum, and thereafter concluding that each, on its own, did not constitute adverse action. *See* SA100, SA103-4; SA56-58.

At the motion to dismiss stage, the district court made two major errors. First, it excluded material facts from its analysis. Second, and related to the first error, it failed to view Mr. Walker's course of retaliation in the full context in which it arose.

Start with the first error. The magistrate judge ignored the following facts at the motion to dismiss stage: (1) two officers, at Senecal's behest, physically attacked Mr. Walker in the bathroom, asking Mr. Walker if he saw how easily he could be killed for filing grievances against Officer Senecal, one day after Officer Senecal threatened Mr. Walker with death or restrictive housing, JA106-7 at ¶¶ 452-453; (2) Mr. Walker was in fact thrown into restrictive housing for an entire month, JA110 at ¶ 475; (3) the temporal proximity between the protected conduct and the adverse action including, that Mr. Walker was physically attacked *one day* after Officer Senecal threatened harm, and *eight days* after Officer Senecal promised consequences Mr. Walker was both fired from his job and issued a fabricated misbehavior report.[17] *See infra,* 34-36.

[17] Emphasizing the district court's disregard for these facts, it concluded that no adverse conduct "follow[ed] close in time" to Officer Senecal's threats. SA59.

Next consider the fact that the district court sliced and diced Mr. Walker's entire course of retaliation—already narrowed substantially by the first error—into separate claims before neglecting to analyze how all the actions together could deter a prisoner of ordinary firmness from exercising his constitutional rights. That, too, was error. The district court was not to slice and dice Officer Senecal's course of conduct into discrete claims. *See Kotler v. Boley*, 2022 WL 4589678, at *2 (2d Cir. Sept. 30, 2022). In *Kotler*, for example, this Court recognized correctly that the plaintiff had alleged a course of retaliation and not just one instance of misconduct. Specifically, it stated that the plaintiff did not only allege that his cell was improperly searched; but that the plaintiff also alleged that defendants created a false report, gave false testimony at a hearing, and as a result the plaintiff was subjected to a stint in disciplinary confinement. *Id.* at *2. This Court held that all of these actions taken together could deter a prisoner of ordinary firmness from exercising their constitutional rights. *Id.*

Here, Mr. Walker alleged a course of action far more extensive than the plaintiff in *Kotler*. The full picture of facts present at the motion to dismiss stage were that: (1) Officer Senecal destroyed Mr. Walkers civil rights complaint seconds after he read it, JA105 at ¶ 440; (2) mere weeks later Officer Senecal threatened to murder Mr. Walker or throw him into restrictive housing if he filed grievances, JA106 at ¶ 449; (3) right after Officer Senecal threatened Mr. Walker another officer

nearby warned Mr. Walker "that Officer Senecal is crazy, and mean[s] what he said" that if Mr. Walker ever mentioned that Officer Senecal destroyed his complaint that Officer Senecal would kill Mr. Walker or throw him into solitary, JA106 at ¶ 450; (4) one day after this threat Officer Senecal sent officers to physically attack Mr. Walker in the bathroom and remind Mr. Walker of how easily he could be killed for filing grievances against Officer Senecal, JA106-7 at ¶¶ 452-453; (5) seven days after being physically attacked Officer Benware, at Officer Senecal's behest, fired Mr. Walker from the law library and fabricated a misbehavior report against him, JA110 at ¶ 476; (6) this fabricated misbehavior report landed Mr. Walker 30 days of restrictive housing, *Id.*; (7) Officer Senecal himself physically attacked Mr. Walker calling him an "asshole," JA112 at ¶ 488; (8) Officer Senecal made many officers around the prison aware of Mr. Walker's grievances, and they harassed and physically assaulted him for it, and (9) Officer Senecal threatened that Mr. Walker would never be allowed recreation time when Officer Senecal was working, JA113 at ¶ 491. On these facts, and on this tight of a timeline, adverse action and causation were more than satisfied and Officer Senecal's motion to dismiss should have been denied.

And, the facts present at the motion for summary judgment stage include all of the above plus: (1) that Officer Senecal reminded Mr. Walker of his threat to kill him or throw him into solitary *every time* he searched Mr. Walker, JA244, (2) that

Officer Senecal was at some point Mr. Walker's supervisor when he was fired from his law library job and demoted to dorm porter and forced Mr. Walker into nonstop menial labor while complaining about Mr. Walker filling grievances, JA234, JA244; (3) that Officer Benware admitted to and apologized for retaliating against Mr. Walker explaining that he fired Mr. Walker to "help out" Officer Senecal, JA245; (4) that Mr. Walker presented full names and inmate numbers of witnesses who could testify as to Officer Senecal and Benware's retaliation against him, *Id.*; (5) that Officer Senecal made multiple additional statements clearly indicating that he was retaliating against Mr. Walker *because of* his grievances and complaint, JA241, JA244.

But, this Court has held that the adverse action element was satisfied on fewer instances of misconduct. For example, in *Gill*, this Court held that the allegation of filing false misbehavior reports and a sentence of three weeks in keeplock "would deter a prisoner of ordinary firmness" from exercising their constitutional right to file grievances and lawsuits. *Gill v. Pidlypchak*, 389 F.3d 379, 381 (2d Cir. 2004) (internal quotations and citations omitted). Mr. Walker stated that the fabricated misbehavior report sentenced him to an even longer stay in restrictive housing—30 days instead of the 21 in *Gill*—plus the entire course of retaliation set forth above which includes death threats and physical violence. JA110 at ¶ 475.

And, in *Hayes v. Dahlke,* this Court held that the plaintiff's allegation that a fabricated misbehavior report landed them in restrictive housing was enough to satisfy the adverse action element. 976 F.3d at 273. This Court found that the plaintiff's allegation of spending one day in keeplock and some unknown portion of time in a segregated housing unit was sufficient to deter an ordinary prisoner from filing grievances. *Id.* In *Hayes*, the fact that the record was unclear about the length of time that the plaintiff spent in restrictive housing weighed in favor of finding adverse action because "the limited nature of the record" could not "preclude a finding of adverse action." *Id*. The record in Mr. Walker's case demonstrates that he spent 30 days in restrictive housing, plus the entire course of retaliation detailed above. JA110 at ¶ 475. The course of retaliation Mr. Walker suffered far exceeds the plaintiff's in *Kotler, Gill,* and *Hayes,* and therefore more than satisfies the adverse action element. The district court's findings to the contrary were in error.

2. Even Viewed Incorrectly, Officer Senecal's Conduct Easily Amounts To Adverse Action.

Even if it were permissible to chop Officer Senecal's course of retaliation into discrete claims, the district court would have gotten it wrong. This Court has long held that the types of conduct Officer Senecal engaged in constitute adverse action.

a. Violence

Start with the violence that Mr. Walker endured from Officer Senecal and others at Officer Senecal's direction. The district court entirely ignored the fact that

Mr. Walker was physically assaulted by two officers in a bathroom who re-iterated Officer Senecal's threats a single day after Officer Senecal threatened to murder Mr. Walker or throw him into solitary confinement. JA106-7 at ¶¶ 452-453. Additionally, the district court recast as "pat frisks" what Mr. Walker described as "vicious assaults." JA57-58. At summary judgment, that was error—as the non-movant, Mr. Walker's evidence controls.

This Court has held that a physical assault alone can satisfy the adverse action element. *Espinal v. Goord*, 558 F. 3d 119, 129 (2d Cir. 2009). The plaintiff in *Espinal* was punched, kicked, and slammed into the wall by officers. This Court held that "…we have no trouble finding on the record in this case that there is a triable issue of fact as to whether a severe beating by officers over the course of 30 minutes would deter a person of ordinary firmness from exercising his rights." *Id*. (citing *Gill*, 389 F.3d at 384). Here, Officer Senecal sent two officers to physically attack Mr. Walker in the bathroom where they beat him including by slapping him, shoving him, and roughing him up while threatening him that if he signed a grievance against Officer Senecal he would end up dead or in the box. JA107 at ¶ 453; JA110 at ¶ 476. The violence unleashed upon Mr. Walker was similar; but, here in contrast Officer Senecal and "his cronies" not only physically harmed Mr. Walker once, they did so on at least five occasions. JA106-7 at ¶¶ 452-453; JA110-13 at ¶¶ 479, 480, 483, 487, 490.

The district court improperly declared a categorical rule that "pat frisks," *even if conducted for retaliatory reasons,* cannot constitute adverse action. SA58 (emphasis added). The magistrate judge cobbled together this rule from a series of district court decisions interpreting the Supreme Court's decision in *Hudson v. Palmer*, 468 U.S. 517 (1984).[18] SA58. In *Hudson,* the Court held that prisoners do not have a reasonable expectation of privacy in their cells, and that therefore "the Fourth Amendment has no applicability to a prison cell." *Id*. at 536. But district courts in this Circuit are misreading *Hudson* to mean that pat frisks and other searches in prison cannot violate any constitutional rights, such as the First Amendment, "even if conducted for retaliatory reasons." SA58.

That rule is wrong. This Court has made abundantly clear that "an act of retaliation for the exercise of a constitutional right is actionable under section 1983 even if the act, when taken for different reasons, would have been proper." *Franco v. Kelley,* 854 F.2d 584, 590 (2d Cir. 1988) (internal quotations and citations omitted). Based on that principle, multiple circuits have held that cell searches can constitute adverse action, even if they cannot violate the Fourth Amendment. *See*

[18] The magistrate judge principally relied on *Amaker v. Fisher*, No. 10-CV-0977A, 2014 WL 8663246, at *9 (W.D.N.Y. Aug. 27, 2014). It also cited: (1) *Henry v. Annetts*, 08 Civ. 286 (LAP), 2010 WL 3220332, at *2 (S.D.N.Y. July 22, 2010), (2) *Morgan v. Luft*, 9:15-CV-0024 (GTS/DJS), 2017 WL 9511158, *8 (N.D.N.Y. Jun. 22, 2017), (3) *Woodward v. Afify*, No. 14-CV-00856, 2018 WL 9875253, at *11 (W.D.N.Y. Sept. 28, 2018), report and recommendation adopted, 2019 WL 5394217 (W.D.N.Y. Oct. 22, 2019).

Bell v. Johnson, 308 F.3d 594, 604 (6th Cir. 2002); *Whitfield v. Spiller*, 76 F.4th 698, 712 (7th Cir. 2023); *Lyons v. Dicus*, 663 F. App'x 498, 500 (9th Cir. 2016); *Williams v. Radford*, 64 F.4th 1185, 1192-93 (11th Cir. 2023).

Moreover, the Second Circuit has expressly held that an allegedly improper cell search, with fabricated testimony and reports, satisfied the adverse action of a First Amendment retaliation claim. *Kotler v. Boley,* 2022 WL 4589678, at *2 (2d Cir. Sept. 30, 2022). And in regards to "pat frisks," this Court expressly treated a pat frisk as adverse action in *Gunn v. Beschler,* 2023 WL 2781295, at *3 (2d Cir. 2023). It held that "a reasonable jury could find a causal connection between Gunn's grievance…and the June 11, 2013 pat frisk," and therefore vacated the grant of summary judgment. *Id.*

This Court need not decide that "pat frisks" alone can never constitute adverse action, because Mr. Walker alleged that he was subjected to "vicious" "assault[s]" and not "pat frisks." JA111 at ¶ 480, JA112-13 at ¶ 488, 490. Moreover, Mr. Walker's retaliation claim against Officer Senecal included an entire course of conduct that far exceeded a singular "pat frisk." However, reading the cases that the district court relied on to declare this sweeping rule reveals that its reasoning is not only faulty but directly contradicts this Court's precedent.

b. Threats

Next consider the threats—of violence and other harm. The district court concluded that such threats did not amount to adverse action for two reasons. First, it held that an "isolated threat" to subject Mr. Walker to restrictive housing, "unaccompanied by subsequent action, does not amount to an adverse action." SA103. Second, it concluded that Officer Senecal's threat to kill Mr. Walker was "insufficiently direct and specific" to constitute adverse action. SA101. The district court is wrong on both counts.

There is no need to belabor the first error. Officer Senecal's threat to subject Mr. Walker to restrictive housing was "accompanied by subsequent action"—Mr. Walker was placed in restrictive housing at Officer Senecal's behest. *See supra,* 15. Mr. Walker languished there in cube confinement for 30 days. JA110 at ¶ 475; JA247. *Id*. This consummated threat undeniably amounts to adverse action. *E.g.*, *Hayes*, 976 F.3d at 274 ("Threats accompanied by some action . . . surely constitutes adverse action."). Standing alone, the threat of restrictive housing is potent enough to chill a person of ordinary firmness. As Mr. Walker explained, that threat terrified him because restrictive housing is a "most severe punishment." JA243. JA110 at ¶ 475; *see also, e.g.*, *Davis v. Ayala*, 576 U.S. 257, 288 (2015) (Kennedy, J., concurring) (noting that "…the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself."). And, what's

more, this was no "isolated threat"—it was also accompanied by a threat to murder Mr. Walker and a months-long campaign of physical violence and intimidation. *See supra,* I.B. & I.D.

Turning to the second error, Officer Senecal threatened to kill Mr. Walker if he filed a grievance. JA106 at ¶ 449; JA242-43. Officer Senecal repeated that threat "more than once." JA243. His colleagues disseminated the same message. JA106-7 at ¶ 452. Such threats were more direct and specific than the "vague" threats this Court has held sufficient.

In *Ford v. Palmer,* for example, an officer threatened to put "some kind of substance" in the plaintiff's water in retaliation for the plaintiff's filed grievances. 539 Fed. Appx. 5, 7. This Court held that these statements could be construed as a threat to poison the plaintiff. *Id*. The Court specifically noted that the "the vague nature of the alleged threat—*i.e.*, not telling Ford when or how Officer Law planned to poison him—could have enhanced its effectiveness as a threat and increased the likelihood that a person of ordinary firmness would be deterred from filing additional grievances." *Id*. (emphasis added).

Here, Senecal's threats were explicitly about harming Mr. Walker. Like the threat in *Ford*, Senecal's threats were vague only in the sense that they did not specify how or when exactly Mr. Walker might be killed. As in *Ford*, the absence of knowledge as to timing would enhance, not diminish, the coercive effect the

threats would have on a person of ordinary firmness. In fact, Mr. Walker explained that not "know[ing] when" Officer Senecal, "his inmate friends," or colleagues would "put [him] in the box or kill [him]" amplified his fear to such a degree that it amounted to "psychological punishment" and "tortur[e]." JA246.

c. Destruction of The Second Amended Complaint

Next consider that Officer Senecal destroyed Mr. Walker's draft second amended complaint. The Supreme Court has described the right to seek redress from the courts and file grievances as "among the most precious of liberties safeguarded by the Bill of Rights." *See United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1976). Bearing that in mind, this Court has held that the "intentional obstruction of a prisoner's access to the courts is precisely the sort of oppression that the Fourteenth Amendment and section 1983 are intended to remedy." *Morello v. James*, 810 F.2d 344, 347 (2d Cir. 1987).

The magistrate judge correctly concluded that "intentional" and "retaliatory" destruction of legal papers can amount to adverse action. SA54-55 (citing *Jean-Laurent v. Lane,* No. 9:11-cv-186, 2013 WL 600213, at *10) (N.D.N.Y. Jan. 24, 2013)). It further noted that this is "especially true" when a plaintiff alleges that the destruction was specifically designed to deter a plaintiff from exercising their constitutional rights—which we know to be true because Officer Senecal said so multiple times. SA54-55; JA246. That conduct has been found to deter an ordinary

prisoner from exercising his constitutional rights. *E.g.*, *Bell v. Johnson*, 308 F.3d 594, 604 (6th Cir. 2002) (finding that inmate's allegations that his legal papers were confiscated, cell left in disarray, and medical snacks were stolen satisfied adverse action); *Penrod v. Zavaras*, 94 F.3d 1399, 1404 (10th Cir. 1996) (reversing grant of summary judgment to defendants on inmate's claim that guards conducted harassing cell searches, seized legal materials, refused to provide inmate with hygiene items, and transferred inmate to segregation in retaliation for suit against prison officials); *Green v. Johnson*, 977 F.2d 1383, 1389-91 (10th Cir. 1992) (holding that inmate's allegations that guards destroyed his legal materials in retaliation for filing suits and grievances and being denied access to the law library stated a cognizable First Amendment claim); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986) (holding that inmate stated a cognizable First Amendment claim because his legal pleadings, law books, and other legal papers were confiscated and plaintiff alleged that they were done so in retaliation for filing lawsuits and administrative grievances). And, of course, Officer Senecal's conduct did not stand alone—it was the opening salvo in a long campaign of abuse.

d. Fabricated Misbehavior Report and Firing

Finally, fabricating a misconduct report—which landed Mr. Walker in solitary confinement—and firing him from the law library, both of which occurred at the

direction of Officer Senecal, constitute adverse action. *See Davis v. Goord*, 320 F.3d 346, 353 (2d Cir. 2003); *Hayes*, 976 F.3d at 272–73.

In *Gill v. Pidlypchak*, this Court held that the plaintiff's allegation that a defendant filed false misbehavior reports that landed the plaintiff in keeplock confinement for three weeks satisfied the adverse action element. 389 F.3d 379, 384 (2d Cir. 2004). This Court held the same in *Hayes* even on a record that did not clearly indicate how many days beyond one single day the plaintiff actually spent in restrictive housing. 976 F.3d at 273. Mr. Walker clearly stated that he was sentenced to thirty days in restrictive housing as a result of the fabricated misbehavior report which is more than what the *Gill* plaintiff suffered, and more than the one day in keeplock that the record clearly demonstrated in *Hayes*. JA110 at ¶ 475. If anything, the false misbehavior report and loss of gainful employment are even more severe than those acts previously found by this Court to constitute adverse action. That is so because not only were these acts accompanied by an entire course of retaliation that included physical violence, but the fabricated misbehavior report which led to Mr. Walker's cube confinement consummated Officer Senecal's threat to throw Mr. Walker into restrictive housing. Once Officer Senecal consummated his threat to throw Mr. Walker into restrictive housing, all that was left of his threat was to kill Mr. Walker. JA106 at ¶ 449. During and after Mr. Walker's stint in restrictive housing, he was left wondering when Officer Senecal and "his cronies" might try to

kill him, and this dark cloud of fear hanging over Mr. Walker's head, which he described as "psychological" "tortur[e]," would deter an ordinary prisoner from exercising his constitutional rights. JA246; JA111 at ¶ 483.

* * *

Officer Senecal's conduct amounts to adverse action. Mr. Walker's pleadings established that an ordinary prisoner would be deterred from exercising his constitutional rights, and a reasonable jury could find the same on the summary judgment record.

B. Mr. Walker Alleged, And A Reasonable Jury Could Find, That Officer Senecal's Adverse Actions Were Causally Related to Mr. Walker's Protected Speech.

The third element of a First Amendment retaliation claims requires "a causal connection between he protected conduct and the adverse action." *Hayes,* 976 F.3d at 272. The causation element is satisfied when the plaintiff shows the protected conduct was a substantial or motivating factor in the retaliation. *Bennett,* 343 F.3d at 137.

To establish that Mr. Walker's protected conduct was a substantial or motivating factor in Officer Senecal's course of abuse, Mr. Walker may rely on direct or circumstantial evidence. *Gayle v. Gonyea*, 313 F.3d 677, 683-684 (2d Cir. 2002). Direct evidence can include statements. *Washington v. Afify*, 681 Fed. Appx. 43,46 (2d Cir. 2017); *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) (finding

that plaintiff's allegation that defendant admitted to retaliatory scheme constituted direct evidence of retaliation), *abrogated on other grounds by Tangreti v. Bachmann*, 983 F.3d 609 (2d Cir. 2020). Circumstantial evidence can include temporal proximity. *Gayle,* 313 F.3d at 683-684; *Brandon v. Kinter*, 938 F.3d 21, 40 (2d Cir. 2019) (internal citations omitted). Mr. Walker's direct and circumstantial evidence of motive easily clears the bar at both the motion to dismiss stage and summary judgment.

1. Direct Evidence

Where, as here, "circumstantial evidence of a retaliatory motive is sufficiently compelling, direct evidence is not invariably required." *Bennett,* 343 F.3d at 139; *see Hayes,* 976 F.3d at 273. But Mr. Walker has direct evidence in spades: Officer Senecal's statements. It is reasonable to conclude that Officer Senecal launched a course of retaliation against Mr. Walker *because of* his protected activity. Mainly—because he said so multiple times. So did Officer Benware and other officers. Specifically, Officer Senecal destroyed the complaint, "because Mr. Walker was challenging the prison conditions" and "bringing actions against employees of the state." JA238, JA241. The causation element is satisfied when the plaintiff shows the protected conduct was a substantial or motivating factor in the retaliation. *Bennett,* 343 F.3d at 137. Officer Senecal saying that he destroyed Mr. Walker's

complaint for challenging the prison conditions and suing state officials is textbook causation. And, that isn't even Officer Senecal's only statement.

When Mr. Walker told Officer Senecal that he planned to file a grievance about Officer Senecal destroying his complaint, Officer Senecal immediately responded that *if Mr. Walker ever did so* he would murder him or throw him into restrictive housing. JA106 ¶ at 449. Officer Senecal even repeated his death threat "more than once," ending it with a promise to hurt Mr. Walker. JA243. And, if the threat were not clear enough, Officer Senecal's colleagues repeated it to Mr. Walker while they were subjecting him to physical violence. JA106-7 at ¶ ¶ 452-453. Officer Senecal's death threat and threat to subject Mr. Walker to restrictive housing, which terrified him, is yet another example of textbook causation and an independent ground to satisfy the causation element.

In addition, when as part of Officer Senecal's retaliatory campaign he forced Mr. Walker to do hours of menial labor nonstop, he kept "complaining about Walker grieving him and filing complaint[s] against the facility." JA244. And, for months every time Officer Senecal searched Mr. Walker he would remind Mr. Walker about his threat to murder Mr. Walker and throw him into restrictive housing. *Id*.

But, there's more. Officer Benware flatly admitted that Officer Senecal recruited him to retaliate against Mr. Walker. JA245. Officer Benware even expressed remorse and apologized to Mr. Walker for retaliating against him. *Id*.

Once Officer Senecal was no longer employed at Bare Hill, Officer Benware told Mr. Walker that he "made a mistake" in firing him from the law library, but that he did it because "he was just trying to help out [Officer] Senecal." *Id*. This Court held in *Colon v. Coughlin* that the very same evidence, an "alleged admission of the existence of a retaliatory scheme," constituted direct evidence. 58 F.3d 865, 873 (2d Cir. 1995) *abrogated on other grounds by Tangreti v. Bachmann*, 983 F.3d 609 (2d Cir. 2020). It further reasoned that even though the defendant submitted an affidavit denying making any such statement, the disparity in sworn statements between parties created "a credibility issue that is not readily amenable to resolution on summary judgment." 58 F.3d at 873 (2d Cir. 1995).

In his complaint, deposition, and sworn affidavits, Mr. Walker's alleged that Officer Senecal, Officer Senecal's colleagues, and Officer Benware directly made these statements. JA106 at ¶ 449; JA106-7 at ¶¶ 452-453; JA244, and JA245. That is enough to survive a motion to dismiss and summary judgment on the causation prong. In fact, even if defendants were to credibly deny at trial having made these statements, a reasonable juror could still draw the inference that Officer Senecal "took action in response to" Mr. Walker's grievances and in-progress complaint. There is clear precedent on this point. In *Washington v. Afify*, the plaintiff alleged that the corrections officers defendants "directly confronted him" about his protected activity—in that case, filing grievances against them—before those corrections

officers filed misbehavior reports against the plaintiff. 681 F. App'x 43, 46 (2d Cir. 2017). This Court held that those allegations constituted direct evidence notwithstanding the lack of an explicit statement that adverse action was taken *in response to* protected conduct. *Id*. Mr. Walker's evidence is that Officer Senecal *did* make many such explicit statements. *See supra,* page 41-42. But even if he had not so alleged, the sequence of events here—*i.e*., Mr. Walker states that he intends to engage in protected conduct, Officer Senecal threatens with repercussions if Mr. Walker carries out his protected conduct, Officer Senecal and others working at his direction impose repercussions, rinse and repeat—would be sufficient direct evidence of causation under this Court's jurisprudence. *See Washington*, 681 F. App'x at 46.

2. Circumstantial Evidence

The temporal proximity of adverse action after protected conduct can serve as circumstantial evidence of causation. *Gayle v. Gonyea*, 313 F.3d 677, 683-684 (2d Cir. 2002); *Brandon v. Kinter*, 938 F.3d 21, 40 (2d Cir. 2019) (internal citations omitted). Though this Court has declined to identify a "bright line," it has held that gaps of one and six *months* between the protected conduct and adverse action amount to compelling circumstantial evidence of causation. *Hayes,* 976 F.3d at 273; *Espinal v. Goord*, 558 F.3d 119, 129-130 (2d Cir. 2009). Here, Officer Senecal's adverse actions started within *seconds,* was largely concentrated in weeks, and continued for

months. Like Officer Senecal's repeated admissions, the timeline present at both the motion to dismiss stage and summary judgment makes this an easy case.

To start, Officer Senecal ripped up Mr. Walker's in-progress complaint—raising serious allegations of officer-led sexual violence, rampant drug smuggling, and dangerous conditions of confinement, including in the unit where Officer Senecal was working—*seconds after* he read it. *See supra,* Section I.A. & JA105 at ¶ 440. Then, when Mr. Walker told Senecal that he intended file a grievance against him for destroying his complaint, again *seconds later,* Officer Senecal threatened to murder Mr. Walker or throw him into restrictive housing. *See supra,* Section I. B. & JA106 at ¶ 449.

Next, *one day* later, after Mr. Walker filed a grievance naming Officer Senecal, other officers acting on his behalf physically attacked Mr. Walker *because*, as they explained, Mr. Walker had disregarded Officer Senecal's warning about filing a grievance. *See supra,* Section I.D & JA106-7 at ¶¶ 452-453. Then, *seven days* after that attack, Officer Benware fired Mr. Walker from the law library and fabricated a misbehavior report against him, both at Officer Senecal's behest. *See supra,* Section I.D & JA110 at ¶ 476. Finally, months of intimidation, violence, and harassment followed. *See supra,* I.D. This timeline fits comfortably within the range that this Court has deemed appropriate to support a finding of causation.

For example, in *Espinal v. Goord,* this Court held that the passing of "only six months between the protected conduct and the retaliation sufficed to support and inference of causation."[19] 558 F.3d 119, 129-130 (2d Cir. 2009). There, this Court explained that it has declined to draw "a bright line" to define the outer limits of temporal proximity because it is critical to allow the Court to exercise its judgment based on the context of particular cases. *Id.* The Court found that in *Espinal,* it was plausible that officers would wait for an "opportune" moment to retaliate to ensure that they have an excuse for their behavior. *Id.* Here, the temporal proximity of Officer Senecal's most egregious retaliatory acts against Mr. Walker—which began within seconds and were mostly conducted within a few months —is far shorter than the six months deemed sufficiently proximate in *Espinal*. And with respect to the adverse action that persisted over the course of the following months—*e.g.*, Officer Senecal eventually making good on his threat to ensure that Mr. Walker was sent to restrictive housing—this was just a matter of Officer Senecal, like the defendants in *Espinal*, waiting for his "opportune" moment to strike.

In *Brandon v. Kinter*, this Court found that two months between protected activity and adverse action along with statements from a defendant supported an inference of causation. 938 F.3d 21, 43 (2d Cir. 2019). The plaintiff in *Brandon* filed

[19] This Court did not deem six months to be very long, as evidenced by its characterization of the timeline in *Espinal v. Goord* as being "only" six months. 558 F.3d 119, 129-130 (2d Cir. 2009).

grievances between September 15 and November 17, and then shortly thereafter was exposed to assault. *Id*. He also alleged that defendants' statements demonstrated retaliatory animus. *Id*. For example, the plaintiff alleged that one defendant said, "Give me a break Brandon, you know what you had coming." *Id*. Here, Mr. Walker has presented even stronger temporal proximity—of only seconds, days, and weeks—combined with even more robust direct statements that are more than sufficient to create a genuine dispute of material fact as to causation.

As but one additional example, in *Hayes*, one month passed between the protected activity and the fabricated misbehavior report. *Hayes*, 976 F.3d 273. Here, Officer Senecal's course of retaliation began the same day he discovered Mr. Walker's in-progress civil rights complaint. JA105 at ¶ 440.

Mr. Walker's pleadings established a temporal proximity of mere seconds, days, and weeks that clearly constituted circumstantial evidence and satisfied the causation element. Furthermore, based on this evidence, a reasonable jury could find a causal relationship between Mr. Walker's protected speech and Officer Senecal's retaliatory actions.

II. The District Court Erred In Granting Officer Benware's Motion To Dismiss Because Mr. Walker's Pro Se Complaint Stated A Plausible First Amendment Retaliation Claim.

The magistrate judge recommended, and the district court granted, dismissal of Mr. Walker's claim against Officer Benware on two bases. First, that filing a false

misconduct report at the behest of Officer Senecal, resulting in Mr. Walker's placement in restrictive housing, did not constitute adverse action because Mr. Walker "was found guilty of the charges" and, "[a]ccordingly, the [c]ourt [wa]s left with no basis to infer that Benware fabricated the misbehavior report." SA61-62. Second, that Mr. Walker had not "plausibly suggest[ed] a connection" between his firing from the law library by Officer Benware and Officer Senecal's campaign of retaliation against Mr. Walker. SA64. The district court erred in both respects.

A. The Fabricated Misbehavior Report

Citing two district court cases, the magistrate judge concluded that, as a matter of law, Mr. Walker's allegation that Officer Benware falsified a misconduct report at the behest of Officer Senecal could not amount to adverse action because Mr. Walker was later found guilty of the charges. SA61. But Mr. Walker clearly alleged that this misbehavior report was fabricated. JA110 at ¶ 476. And the district court was required to take Mr. Walker's allegations as true. *Washington v. Gonyea*, 538 Fed. Appx. 23, 24 (2d Cir. 2013). Furthermore, Mr. Walker alleged that Officer Senecal encouraged Officer Benware and other officers to participate in a campaign retaliatory campaign against Mr. Walker. That such a campaign might extend to filing and affirming a baseless misconduct report is not difficult to imagine. On remand, of course, Officer Benware would be entitled to present his side of the story—*i.e.*, that he did not file a false misconduct report (in order to punish Mr.

Walker at the direction of Officer Senecal) and that its affirmance was based on evidence and not additional pressure from Officer Senecal. At the pleading stage, though, the district court erred in concluding that Mr. Walker had failed to allege adverse conduct. That is because the district court was required to liberally construe Mr. Walker's pleadings and interpret them "to raise the strongest arguments that they suggest," which includes taking Mr. Walker's allegations as true. *See Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994).

B. Mr. Walker's Termination

Having narrowed the factual basis of Mr. Walker's claim against Officer Benware, the magistrate judge concluded that Mr. Walker's termination from the law library could not state a claim. Specifically, it concluded that Mr. Walker had not "plausibly suggest[ed] a connection" between the protected conduct he engaged in—*i.e.*, filing grievances implicating Officer Senecal and others—and his termination from the law library.[20] SA64. That was error for at least two related reasons: First, the magistrate judge artificially limited the factual basis of Mr. Walker's claim against Officer Benware to the library termination. But this Court has made clear that instances of allegedly retaliatory conduct are to be examined in context, not in a vacuum. *See supra*, 24-26. Thus, the district court should have

[20] The magistrate judge correctly concluded that Mr. Walker's termination could amount to adverse action. SA63.

examined Officer Benware's actions within the context of Officer Senecal's campaign of retaliation against Mr. Walker. Examining the termination in context renders unavoidable the causal link between Officer Benware's actions and Mr. Walker's protected conduct. Second, there is substantial additional circumstantial evidence that Officer Benware fired Mr. Walker *because* he lodged complaints against Officer Senecal.

Start with the circumstantial evidence of causation provided by temporal proximity. On October 2, after Mr. Walker told Officer Senecal that he planned to file a grievance against him for destroying his civil rights complaint, Officer Senecal responded by threatening to murder Mr. Walker or throw him into restrictive housing. JA106 at ¶ 449, JA106-7 at ¶¶ 452-453, JA108 at ¶¶ 459, 464; JA118 at ¶ 524. Then, the next day two prison officers physically attacked Mr. Walker outside the law library. JA106-7 at ¶¶ 452-452. On October 10, eight days after Officer Senecal threatened to murder Mr. Walker, Officer Benware, at Senecal's behest, fired Mr. Walker from the law library. JA106 at ¶ 449; JA109 at ¶ 472, JA110 at ¶ 476. Hours before firing Mr. Walker, Officer Benware met with Officer Senecal. JA108 at ¶¶ 464-465. When Mr. Walker asked Officer Benware why he was firing him, Officer Benware stated that it was "out of his hand[s]," and that he "did not

want to speak about it." JA109 at ¶ 472.[21] That same day, Officer Benware fabricated a misbehavior report against Mr. Walker. JA110 at ¶ 474. As a result, Mr. Walker was sentenced to restrictive housing, the very punishment Officer Senecal had threatened to inflict on Mr. Walker. *Id*.

There is even more circumstantial evidence of temporal proximity. Before the sequence of events that culminated in Mr. Walker's termination, he had worked in the law library since March of 2017 without incident. JA191-92. Yet, eight days after Officer Senecal launched a campaign of retaliation that began with a promise of physical violence and restrictive housing and seven days after Mr. Walker was attacked outside of the law library at Officer Senecal's direction, Officer Benware fired Mr. Walker and filed a false report that sent him to restrictive housing. This Court has found causation on far more protracted timelines than Mr. Walker's.

In *Espinal v. Goord*, for example, this Court held that "the passage of only six months" between protected activity and retaliation satisfied causation. 558 F.3d 119, 130 (2d Cir. 2009). In *Hayes,* this Court found that one month between protected activity and adverse conduct stated sufficient temporal proximity to support a finding of causation. 976 F.3d at 273. Even taking this broad range of timing into

[21] Because Officer Benware's admission that he fired Mr. Walker at the direction of Officer Senecal was not introduced until summary judgment, JA245, it is not relevant to this Court's review of the grant of Officer Benware's motion to dismiss.

account, Mr. Walker's range of barely over one week fits comfortably within this Court's precedent.

That Mr. Walker's protected activity was directed at Officer Senecal is immaterial. *Davis v. Goord*, 320 F.3d 346, 354 (2d Cir. 2003). That is because "causation may be established even if a prisoner's protected conduct was not directed at the defendant." *Kotler v. Boley*, 2022 WL 4589678, at *2 (2d Cir. Sep. 30, 2022); *see also Davis*, 320 F.3d at 354. The magistrate judge also gave weight to its view that Mr. Walker had failed to specifically allege that Officer Benware was aware of the grievances he filed against Officer Senecal. SA64. But this Court has held that causation can be satisfied even absent direct evidence of knowledge of protected conduct. *Espinal v. Goord*, 558 F.3d 119, 130 (2d Cir. 2009). Rather, it is reasonable to infer that one correctional officer may learn of protected conduct from another correctional officer. *E.g.*, *Espinal*, 558 F.3d at 130 (2d Cir. 2009); *Gunn v. Beschler*, 2023 WL 2781295, No. 22-971 at *3.

That is the case here. Officers around the prison were aware of Mr. Walker's grievances, and it can reasonably be inferred from Mr. Walker's pleadings that Officer Benware learned of Mr. Walker's grievances from any of these officers who knew about them, including Officer Senecal. Multiple officers were apparently aware of Mr. Walker's grievances against Officer Senecal. *See* JA106-7 at ¶¶ 452-453. One officer specifically told Mr. Walker, "Walker, you can't come here using

the Law Library and its stationary to file suit against the Superintendent and grievances against Officer Senecal." JA108 at ¶ 459. The two officers who physically attacked Mr. Walker in the bathroom also mentioned Mr. Walker's grievances against Officer Senecal. JA106-7 at ¶¶ 452-453. Other officers physically assaulted Mr. Walker at Officer Senecal's direction during "rough pat frisks." JA110-11 at ¶¶ 479-480, JA112 at ¶¶486-489, JA113 at ¶¶490-491. And Officer Benware fired Mr. Walker and filed a false report against him that resulted in restrictive housing, the very same day after meeting with Officer Senecal. JA110 at ¶ 476.

These allegations combined with a mere eight-day gap between Officer Senecal's threats and Officer Benware firing Mr. Walker and fabricating a misbehavior report against him are sufficient to support an inference of retaliatory motive at the motion to dismiss stage.

III. The District Court Erred In Dismissing With Prejudice Mr. Walker's Due Process Claims At The Screening Stage.

Mr. Walker also raised Fourteenth Amendment equal protection and due process claims for injunctive and declaratory relief against New York state officials whom he alleges are responsible for denying him "a forum with full and fair opportunity" to litigate his claims of actual innocence. JA120-21 at ¶¶ 534-537. At the screening stage, the district court misinterpreted Mr. Walker's claim as one "for 'a determination that he is entitled to a . . . speedier release from imprisonment."

SA26 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973)). Having misconstrued the nature of Mr. Walker's claims, the district court held that they were only cognizable under habeas. SA26. Accordingly, the district court dismissed Mr. Walker's equal protection and due process claims with prejudice for failure to state a claim. SA26, SA41.

That was error. "[H]abeas remedies do not displace § 1983 actions where success in the civil rights suit would not necessarily vitiate the legality of . . . state confinement." *Wilkinson v. Dotson*, 544 U.S. 74, 81-82 (2005). Mr. Walker's claims fault officials for failing to provide him with an opportunity to present his claims of actual innocence. Success on this claim would entail a chance to litigate such claims. No more and no less. As such, Mr. Walker's Fourteenth Amendment claims for equitable relief are properly brought under § 1983. *Wilkinson*, 418 U.S. at 81.

Particularly considering the special solicitude that must be accorded to *pro se* prisoner plaintiffs, *e.g.*, *Sealed Plaintiff*, 537 F.3d at 191, it was an error to dismiss those claims with prejudice and without an opportunity to amend. Mr. Walker should be afforded such an opportunity on remand.

CONCLUSION

For the aforementioned reasons, this Court should reverse the district court's orders partially granting Officer Senecal's motion to dismiss, granting Officer Benware's motion to dismiss in full, and granting Officer Senecal's motion for summary judgment.

Date: January 31, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2024, I electronically filed the foregoing final opening brief with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: January 31, 2024

/s/Mehwish Shaukat
Mehwish Shaukat

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that this brief complies with the type-volume limitation of L.R. 32.1(a)(4)(A) because this brief contains 13,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 and Times New Roman 14-point font.

Date: January 31, 2024

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