USCA No. 17-13999-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CARTER DAVENPORT,

Defendant-Appellant
v.

THE ESTATE OF MARQUETTE CUMMINGS,

Plaintiff-Appellee

UPON ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, DC CASE NO. 2:15-cv-02274-JEO

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CERTIFICATE OF INTERESTED PERSONS AND ENTITIES

The undersigned counsel of record for Appellant certifies that the following persons or entities have an interest in the outcome of this case:

1. Bailey, Matthew A.- Attorney for Plaintiffs-Appellees;
2. Brasher, Andrew-Solicitor General for the State of Alabama, Attorney for Defendant/Appellant;
3. Brown, II., H. Lanier- Attorney for Defendant;
4. Davenport, Carter-Defendant-Appellant;
5. Dunn, Jefferson S.-Defendant;
6. Estate of Marquette F. Cummins, Jr.- Plaintiff-Appellee;
7. Gaines, Angela-Plaintiff-Appellee;
8. Garcia, Megan N.- Attorney for Plaintiffs-Appellees;
9. Harmon, Bart- Attorney for Defendant-Appellant;

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10. Hill, Anne A.- Attorney for Defendant-Appellant;
11. Marshall, Steve- Attorney General of Alabama, Attorney for Defendant-Appellant;
12. Mellon, David R.- Attorney for Defendant;
13. Melton, Sherry-Defendant;
14. Mitchell, Justin A.- Attorney for Plaintiffs-Appellee;
15. Ott, John E.- United States Magistrate Judge for the Northern District of Alabama;
16. Sees, Elizabeth- Attorney for Defendant-Appellant;
17. Strubel, J. Patrick- Attorney for Defendant;
18. Thomas, Kim- Defendant;
19. University of Alabama at Birmingham Hospital-Defendant;
20. Wahlheim, Cary T- Attorney for Defendant.

/s/Bart Harmon
Attorney for Defendant-Appellant

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STATEMENT REGARDING ORAL ARGUMENT

Because of the novelty and importance of the issues presented, and because Appellant thinks the decisional process of the Court would be aided by the opportunity for the Court to ask questions of and obtain responses from counsel, oral argument is requested.

CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is Times New Roman 14 point.

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STATEMENT OF JURISDICTION

The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

This Court has addressed and confirmed that it possesses appellate jurisdiction in this context.

> Our jurisdiction is limited to appeals from "final decisions" of the district court, 28 U.S.C. § 1291, and a district court's denial of a motion to dismiss ordinarily is not a "final decision[ ]." *See In re Hubbard*, 803 F.3d 1298, 1305 (11th Cir. 2015). But there exists a "small class of collateral rulings that, although they do not end the litigation, are appropriately deemed 'final.' " *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1355 (11th Cir. 2014) (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009)). The Supreme Court "has been careful to say that a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a 'final decision' within the meaning of § 1291." *Ashcroft v. Iqbal*, 556 U.S. 662, 672, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). We thus have jurisdiction to review appellants' interlocutory appeal.

Carollo v. Boria, 833 F.3d 1322, 1327–28 (11th Cir. 2016). See *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

STATEMENT OF THE ISSUES

This case primarily presents one issue: Whether Warden Davenport is entitled to the protection afforded by qualified immunity? Within that issue are three critical sub-issues each having to do with the respective prongs of qualified immunity analysis .

(1) ***Failure to State a Constitutional Claim*.** The most readily available basis to find qualified immunity in this case is the conclusion that the Amended Complaint simply failed to state an Eighth Amendment deliberate indifference to serious medical needs claim.

(2) ***Discretionary Authority*.** This Court has on numerous occasions described the initial prong of qualified immunity as being a fairly low threshold to overcome. The relevant question is simply whether the governmental defendant was acting generally with the bounds of his job description. In this case, was Warden Davenport relating to inmate Cummings in a way wardens could normally be expected to act toward inmates? The District Court erred in concluding that Davenport's actions toward Cummings went outside the normal discretionary authority given prison wardens.

(3) ***Lack of clearly established law.*** Once the Court has found that the governmental defendant was acting within his discretionary authority, the next aspect of analysis becomes whether the governmental defendant's action violated clearly established constitutional law? The District Court erred in failing to conclude Warden Davenport actions transgressed no clearly established contours of Eighth Amendment law.

STATEMENT OF THE CASE

A. Alleged facts

Applying the appropriate standard of review to a challenge of the District Court's denial of a motion to dismiss, the facts alleged in the Amended Complaint are deemed to be true for purposes of this interlocutory appeal. Appellant Davenport of course reserves the right to contest these allegations if unsuccessful on this appeal. The allegations of the Amended Compliant are summarized below.

In January of 2014, Marquette Cummings and Timothy Gayle were inmates at St. Clair Correctional Facility in Springville, Alabama, where Warden Carter Davenport was the chief warden. Doc. 29 at ¶¶ 2,3,4. On January 6, 2014, at approximately 7:40 a.m., Gayle stabbed Cummings in the eye with a prison-made knife (or "shank") causing him to bleed profusely. *Id*. at ¶ 7. After Cummings' condition was made known to security and medical staff, Cummings was airlifted to the hospital at University of Alabama at Birmingham (UAB). *Id*. at ¶¶ 7,8,9. As Cummings was en route to UAB, Cummings' mother, Angela Gaines, was informed that her son had been stabbed. *Id*. at ¶ 9.

Ms. Gaines had difficulty getting further information about her son until Warden Davenport told her, after she had been waiting for hours, that her son had been stabbed in a prison incident and was in a local hospital receiving medical treatment. *Id. at* ¶¶ 10,11. A few hours later, Davenport informed Gaines that her son was

being treated at UAB. *Id*. at ¶ 12. When Gaines arrived at UAB, despite all the prior delays, she was made to wait another hour and a half to see her son. *Id*. at ¶ 13.

Shortly after Cummings arrived, UAB medical staff declared Cummings a "non-survivor" and put instructions in the medical records to take no "heroic measures" to save him.[1] *Id*. at ¶ 16. As Gaines waited to see her son, she was told by the hospital staff that "[he] had been stabbed in the eye and that, due to his injuries, he was only operating with 10% of normal brain functioning." *Id*. at ¶ 14. (Emphasis in original). Nonetheless, Gaines later claims to have seen Cummings respond to her requests for him to blink his eyes. *Id*. at ¶ 15.

At approximately 9:17 a.m. January 6, 2017, the UAB medical staff went even further and placed an explicit "DNR" designation on Cummings' chart, meaning "do not resuscitate." *Id.* at ¶ 18. In doing so, the staff relied upon the statements of Warden Davenport, rather than checking with (or even informing) members of Ms. Gaines or other members of Cummings' family. *Id*. The family was given no input into this decision. *Id.*

The complaint alleges that this reliance by UAB staff on Warden Davenport's position rather than the wishes of the family was contrary to hospital policy. *Id.* at

[1] Based on earlier allegations, this apparently would have occurred shortly after 8:00 a.m on January 6, 2014. *See id*. at ¶ 9.

¶ 27. Additionally, the complaint alleges that the DNR coding came 24 hours *before* a "brain study" had been ordered. *Id*. at ¶ 19.

At some point, UAB medical staff informed Ms. Gaines that Warden Davenport had authorized medical personnel to stop giving Cummings medication and to disconnect the artificial breathing apparatus. *Id*. at ¶¶ 20, 21.

Undeterred, Ms. Gaines continued to make her case that life support should not be withdrawn because her son was still breathing and responding to verbal commands. Id. at ¶ 23. In response, the UAB medical personnel repeatedly conveyed to her that "it was not her call" because the State had legal custody over Cummings, and that the decision to let her son die was the warden's. *Id.* at ¶ 24.

As a consequence, Cummings was in fact taken off of all artificial life support and soon thereafter died. *Id.* at ¶¶ 24-25. Cummings stopped breathing at 7:05 p.m. on January 7, 2014—nearly 36 hours after he was admitted to UAB for care. *Id.*

The Amended Complaint nowhere alleges that Cummings suffered as a result of life support being withdrawn, or that he would have survived long-term but for the decision to end artificial means of prolonging his organ function.

B. Proceedings below

This appeal ultimately arises out of a Complaint filed by The Estate of Marquette F. Cummings, Jr. and Angela Gains ("Appellees") on December 15, 2015. Doc. 1. The Complaint asserted claims against Alabama Department of Corrections Defendants Kim Thomas, Jefferson S. Dunn, and Carter Davenport, along with several unnamed ADOC Defendants, unnamed Medical Defendants, the University of Alabama at Birmingham Hospital, and Dr. Sherry Melton. *Id*. The Appellees' five-count complaint raised state and federal law claims against the ADOC Defendants in their individual and official capacities. *Id*. Specifically, the claims against Carter Davenport ("Appellant") were violations of the Eighth Amendment/deliberate indifference, Negligent Training and Supervision, Wrongful Death, and the tort of Outrage. *Id*.

The ADOC Defendants, including the Appellant, filed a Motion to Dismiss the official capacity claims pursuant to Rule 12(b)(1) and Rule 12(b)(6), Fed. R. Civ. P. based on the Court's lack of subject matter jurisdiction, failure to state a claim on which relief could be granted, and because of the entitlement to sovereign immunity, qualified immunity, and Eleventh Amendment immunity. Doc. 8. The motion was granted in part and denied in part, leaving only the individual capacity claim of deliberate indifference again the Appellant. Doc. 28.

Following the entry of the Court's order, Appellees filed an Amended Complaint raising the original claims against the ADOC Defendants which were previously dismissed with prejudice. Doc. 29. The complaint also included several new allegations regarding violations of ADOC policies and the Appellant's knowledge of a threat to Cummings's safety. Id. The Court construed the Amended Complaint as a motion to alter or amend a judgment under Rule 59(e), Fed. R. Civ. P. and reconsidered Appellant's motion to dismiss and Appellees' opposition to the motion, along with Appellant's newly filed motion to dismiss challenging the Amended Complaint (Doc. 32) and Plaintiff's opposition. Doc. 35. The Court again however found the Appellant was not entitled to dismissal on the grounds of qualified immunity relying primarily on Alabama Code §22-8A-1 et seq. to conclude that Warden Davenport acted outside of his discretionary authority. Doc. 35. The Appellant then filed timely notice of appeal. Doc. 40.

C. Standard of review

The standard of review is de novo. *See generally Griesel v. Hamlin*, 963 F.2d 338, 341 (11th Cir. 1992). This Court should therefore apply the standard of review applied by the District Court below.

> At the motion to dismiss stage in the litigation, "the qualified immunity inquiry and the Rule 12(b)(6) standard become intertwined." *Id*. "[W]hether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts

> pleaded." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1946, 173 L.Ed.2d 868 (2009).

Keating v. City of Miami, 598 F.3d 753, 760 (11th Cir. 2010).

SUMMARY OF THE ARGUMENT

This case presents some very interesting questions concerning qualified immunity. The facts and the law should have coalesced to give Warden Davenport two very easy ways to obtain the protection of qualified immunity. One the front end of the analysis, even a brief review of the amended complaint reveals that the alleged facts do not describe your typical Eighth Amendment deliberate indifference scenario. There is no viable claim that the warden could have prevented the inmate's horrific stabbing, nor is there a contention that the inmate would have lived had mechanical ventilation not been removed. It seems the heart of the complaint centers on who was the proper person to authorize removal of the life support apparatus, whether medical staff and the warden followed end-of-life protocols, and whether the family's role was shown sufficient respect in the process. That is simply not the "stuff" of Eighth Amendment conditions of confinement jurisprudence.

On the back end of qualified immunity analysis, there seems to be no credible argument that clearly established law drew a "bright line" arising out of Eighth Amendment cases indicating to someone in Warden Davenport's shoes that he could not constitutionally okay the cessation of futile treatment for an inmate within his legal custody.

But the District Court traveled down neither of these readily available routes to the granting of qualified immunity. Instead, it combined an overly broad reading of

discretionary authority law with an over-reliance on obscure state statutes describing advance healthcare directives, living wills, proxies, and surrogates. Yet, the complaint does not allege the inmate or his family utilized any of these provisions. Nor do any of these statutes address the prison custodian-prisoner context.

Instead, the District Court should have found that, as tragic as these facts may be, this complaint simply is not one that is able to overcome Warden Davenport's qualified immunity defense. To the extent it is even necessary to perform a discretionary authority analysis, it should have been carried out on a very general level—is making healthcare decisions something normally within a prison warden's sphere of authority? —and the conclusion should have been an easy one to reach: Yes.

ARGUMENT

I. The Plaintiff's failure to state an Eighth Amendment "deliberate indifference" claim justified, all by itself, the granting of qualified immunity.

If the facts alleged in the complaint do not state a constitutional claim, the defendant public official should be dismissed. One of the purposes behind qualified immunity is to quickly weed-out claims that lack a sure foundation in constitutional law.

A. Stating a constitutional claim is a precondition the Plaintiff must overcome to defeat the qualified immunity defense.

Determining whether the complaint has stated a constitutional claim is a threshold that a Plaintiff must overcome in defeating a public official's qualified immunity defense: "[A] court must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation. *Conn v. Gabbert*, 526 U.S. 286, 290, 119 S. Ct. 1292, 1295 (1999). (Emphasis added). *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001) ("[D]o the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry."), *Marsh v. Butler Cty., Ala.*, 268 F.3d 1014, 1028 (11th Cir. 2001) (holding that "[i]n the qualified immunity analysis, we generally first determine

whether a plaintiff has stated a claim for a constitutional violation at all.") (abrogated in part by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-63 (2007).[2]

Although a subsequent Supreme Court case withdrew *Saucier's* hard-and-fast requirement that the reviewing court *first* decide whether a constitutional claim has been stated[3], the Court has never wavered from its mandate that stating a constitutional claim is an absolute prerequisite to denying the protection of qualified immunity to a defendant public official.

> Although we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial. For one thing, there are cases in which there would be little if any conservation of judicial resources to be had by beginning and ending with a discussion of the "clearly established" prong. "[I]t often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Lyons v. Xenia*, 417 F.3d 565, 581 (C.A.6 2005) (Sutton, J., concurring). In some cases, a discussion of why the relevant facts do not violate clearly established law may make it apparent that in fact the relevant facts do not make out a constitutional violation at all.

Pearson v. Callahan, 555 U.S. 223, 236, 129 S. Ct. 808, 818 (2009).

The majority in *Pearson* was concerned that lower federal courts had erected unnecessary obstacles to what should be clear-cut qualified immunity cases. The Court reasoned that since qualified immunity is not just an immunity from damages,

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[2] *Twombley* abrogated *Marsh* only to the extent *Marsh* applied the "heightened pleading standard" once required by Eleventh Circuit authority in qualified immunity cases.

[3]The Court's primary objection to the district court's analysis was what it perceived to be an unnecessarily rigid *ordo arbitrium*; its holding granted the defendant officers qualified immunity.

but also an immunity from the burdens of litigation, if a reviewing court sees an easy path to immunity—whether via failure to state a claim or via lack of clearly established law, it should go there first.

> Unnecessary litigation of constitutional issues also wastes the parties' resources. Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell*, 472 U.S., at 526, 105 S.Ct. 2806 (emphasis deleted). *Saucier's* two-step protocol "disserve[s] the purpose of qualified immunity" when it "forces the parties to endure additional burdens of suit—such as the costs of litigating constitutional questions and delays attributable to resolving them—when the suit otherwise could be disposed of more readily." *Brief for National Association of Criminal Defense Lawyers as Amicus Curiae* 30.

555 U.S. 223, 237, 129 S. Ct. 808, 818.

B. Gaines' Complaint fails to state an Eighth Amendment Claim.

In the instant case, the "more read[y]" disposition comes from the Plaintiff's obvious failure to state an Eighth Amendment deliberate indifference to serious medical needs claim. Whatever the amended complaint alleges, it is not your typical Eighth Amendment claim. There is no viable argument that Warden Davenport unconstitutionally failed to protect Cummings from the January 6, 2014 stabbing by fellow inmate Timothy Gayle.[4] *See, e.g., Farmer v. Brennan* 511 U.S. 825, 833, 114 S.Ct. 1970 (1994).

[4] The District Court found that the facts alleged in the complaint failed to state a failure to protect claim against Davenport. Doc. 35 at pp. 10-13.

Nor does the complaint sufficiently allege Cummings was denied by Davenport (or anyone else) immediate and extensive medical care in an effort to save Cummings' life. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 105-06, 97 S.Ct. 285 (1976). To the contrary, the complaint alleges the injured inmate was immediately airlifted to UAB hospital in Birmingham and there abundant medical resources were utilized from a facility recognized as one of the premier hospitals in the nation.[5]

Moreover, the complaint alleges that early-on the medical professionals at UAB deemed Cummings' wounds to be "fatal", described Cummings to be a "non-survivor," and determined that he was functioning with only 10% of his brain capacity. Any fair reading of the Complaint compels the conclusion that Cummings was essentially dead on arrival when he got to UAB; he had no plausible hope of recovery.

What Ms. Gaines appears to describe in her Complaint then is *not* an Eighth Amendment failure to provide medical care claim at all, but instead a claim that Warden Davenport was *not the proper party to decide* when Cummings should be "no-coded" and later removed from artificial means of life support. She nowhere alleges that Cummings suffered as a result of Davenport's decisions, or that Cummings would have survived but for the decisions to end artificial means of support. Ms. Gaines thus fails to allege facts to support a plausible allegation of proximate

[5] The District Court below appropriately described the Eighth Amendment legal standard with respect to failure to provide medical care, but it never really grappled with how the facts of this case do not fit within that standard. *See* Doc. 28 at 17.

and but-for causation—both of which are necessary elements of a § 1983 claim. *See Greffey v. State of Ala. Dept. of Corrs*., 996 F. Supp. 1368, 1377 n. 19 (N.D. Ala. 1998) ("Causation—both causation in fact and proximate causation—is an essential element of a § 1983 claim.") (*citing Reimer v. Smith*, 663 F.2d 1316, 1322 & n. 4 (5th Cir. Dec. 14, 1981)).

A large part of the complaint is dedicated to allegations that medical providers at UAB violated their own policies and procedures or state law with respect to whom should be consulted in end-of-life decisions. But there are at least two problems with the "plausibility" of this line of attack as it applies to Davenport. First, failure to follow internal hospital policy or "final directives" state law is not an Eighth Amendment violation. Second, there is a huge causation hole with these facts as they pertain to Davenport: He was not the party whose job it was to construe and apply hospital policy or state law in this context, nor did he play any role in the actual removal of life-sustaining devices. Further, the Complaint describes a fairly lengthy period of time between when Davenport allegedly okayed the removal of life-sustaining machines and the time those instructions were executed and Cummings died. During these hours, Ms. Gaines made her case to hospital authorities that she and not Davenport was the proper party to make end-of-life decisions, yet to no avail. Under these facts, the decision to look to Davenport, to ignore Gaines' pleas, and then to actually remove life support were the real cause of Gaines' loss or offense,

not Davenport's statements to UAB medical staff which, according to the complaint, should have been given no weight.

II. Warden Davenport, in making decisions related to an inmate's medical care, acted within his discretionary authority and was therefore entitled to qualified immunity.

The conduct of Warden Davenport described in the complaint—making decisions about the health-care (including cessation of it) of an inmate within his legal custody—is clearly within a warden's discretionary authority. The District Court erred in concluding otherwise.

A. The discretionary authority analysis should look *generally* at the defendant official's duties; the analysis should not be performed in an "overly narrow" manner or rely on tautology.

In order to establish that he was acting within his "discretionary capacity," a public official asserting qualified immunity need only show "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." Rich v. Dollar, 841 F.2d 1558, 1564 (11th Cir. 1988) (quoting Barker v. Norman, 651 F.2d 1107, 1121 (5th Cir.1981)). Courts should not be "overly narrow" in interpreting this requirement. Jordan v. Doe, 38 F.3d 1559, 1566 (11th Cir. 1994). In fact, the discretionary authority "burden" is normally so light and easily met by defendants

that often plaintiffs or courts simply assume it has been met and move on, justifiably so. As one district judge observed, "[s]kipping over it is not the result of mere laziness or negligence[;] Courts ignore the issue because the hurdle that the defendant must meet in showing that he was acting within his discretionary authority is a low, indeed almost invisible, one." *Williams v. Goldsmith*, 4 F. Supp. 2d 1112, 1123 (M.D. Ala. 1998) (Albritton, J.) *See Godby v. Montgomery County Bd. of Educ*., 996 F. Supp. 1390, 1401 (M.D. Ala. 1999) (noting that, "the determination that an officer was acting within his discretionary authority is quite a low hurdle to clear.").[6]

Even if a defendant official's actions are alleged to have been executed in a wrongful manner, motivated by a wrongful purpose, or carried out to a wrongful degree, that is insufficient to support a finding he was acting outside his discretionary authority: "In applying each prong of this test, we look to the general nature of the defendant's action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Mikko v. City of Atlanta, Georgia*, 857 F.3d 1136, 1144 (11th Cir. 2017) (quoting *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004)).

[6] While the requirement that the defendant public official establish that he was acting within his discretionary authority is ubiquitous in Eleventh Circuit authority, interestingly, such a requirement is nowhere to be found in Supreme Court qualified immunity cases.

In *Harbert Int'l v. James*, 157 F.3d 1271 (11th Cir. 1998), the Court went into great detail explaining how broad and generalized the discretionary authority calculus should be. It stressed that only "[w]hen a government official goes completely outside the scope of his discretionary authority, [and therefore] *ceases to act as a government official and instead acts on his own behalf*" does that official lose his qualified immunity. *Id*. at 1281. (Emphasis added).

> To determine whether the defendant has discharged his burden, it is critical to define properly the inquiry. The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act. Framed that way, the inquiry is no more than an "untenable" tautology. … "Instead, a court must ask whether the act complained of, if done for a proper purpose, would be within, or reasonably related to, *the outer perimeter* of an official's discretionary duties. The scope of immunity 'should be determined by the relation of the [injury] complained of to the duties entrusted to the officer.' " …

Harbert, Int'l, 157 F.3d at 1282 (citations omitted) (emphasis added).

Harbert Int'l is also instructive because it gives helpful examples from this Circuit's case law on how the discretionary authority analysis should be framed:

> Examples from our previous decisions are helpful to an understanding of the proper application of these principles. In *Jordan v. Doe*, 38 F.3d 1559 (11th Cir.1994), the plaintiff was an inmate who alleged that the defendants, United States Marshals, transported him to jails where they knew unconstitutional conditions existed and released him into state custody in violation of an agreement governing federal detainees. To determine whether the defendants had acted within the scope of their discretionary authority, we did not ask whether the defendants could

> place the plaintiff into unconstitutional conditions or improperly transfer him; instead, we asked whether their duties included transporting and delivering prisoners. *See id*. at 1566.
>
> In *Sims*, the plaintiff alleged that the defendants unlawfully suspended him from his state government job for exercising his First Amendment rights. *See* 972 F.2d at 1236. Addressing the discretionary authority issue, we did not ask whether it was within the defendants' authority to suspend an employee for an improper reason; instead, we asked whether their discretionary duties included the administration of discipline. *See id.* Finally, in *Rich*, the plaintiff alleged that the defendant, an investigator for the state attorney's office, unlawfully initiated a criminal investigation against him by filing an affidavit of probable cause when none existed. *See* 841 F.2d at 1561. We concluded that the defendant had acted within his discretionary authority not because that authority included filing unfounded probable cause affidavits, but because his duties included writing and submitting probable cause affidavits. *See id*. at 1564.

157 F.3d at 1282–83.

Applying this Circuit's description of what consideration of discretionary authority should look like, it becomes clear that Warden Davenport was indeed acting within his sphere of discretionary authority, and the District Court erred to conclude otherwise.

B. A proper application of the law on discretionary authority based upon the "objective circumstances" of this case would have found Warden Davenport's actions to be well within that authority.

Davenport easily clears the "low hurdle" of demonstrating that any dealings he had with Inmate Cummings were within his discretionary authority. Everything

alleged in the Complaint describes Warden Davenport doing what correctional officials do: supervising and controlling the care and custody of inmates including their medical care. The custodial relationship between correctional officials and inmates has existed as long as Alabama has been a state and survives to this day: "The Board of Corrections shall superintend the management of convicts… It has the general oversight of all the officers, agents, and employees of board and all matters related to convicts. " *Ala. Code 1975*, § 14-3-1. *See Ex parte Rogers*, 17 Ala. App. 172, 172, 82 So. 785, 785 (Ala. Ct. App. 1919), (concluding that "there is left no room for doubt that the convict is in the legal custody of the warden of the penitentiary…until the expiration of the maximum sentence."). *See generally Rumsfeld v. Padilla*, 542 U.S. 426, 438, 124 S. Ct. 2711, 2719, (2004) (recognizing Alabama warden as the "immediate physical custodian" of a detainee assigned to his supervision). [7]

The fact that Warden Davenport's supervision was exercised in a medical context does not detract from the basic nature of the custodial relationship. *See Edwards v. Alabama Dep't of Corr*., 81 F. Supp. 2d 1242, 1252 (M.D. Ala. 2000) (holding that, "[d]ecision-making related to the provision of medical care for inmates thus fell

[7] *Black's Law Dictionary* defines custody as "[t]he care and control of a thing or person. The keeping, guarding, care, watch, inspection, preservation or security of a thing, carrying with it the idea of the thing being within the immediate personal care and control of the person to whose custody it is subjected." (Sixth Edition, 1981).

soundly within [prison administrators'] discretion."); *Daniels v. Prison Health Servs., Inc.*, No. 8:05CV1392T30TBM, 2006 WL 319260, at *3 (M.D. Fla. Feb. 10, 2006) (explaining that "[c]ase law makes it plain that the decision to bestow or deny medical services to pre-trial detainees is a discretionary function for purposes of the qualified immunity analysis.") (quoting *Nelson v. Prison Health Services, Inc.*, 991 F.Supp. 1452, 1460 (M.D.Fla.1997)). *See also Ala. Code*, 1975 §14-3-30(b) (making the Department of Corrections financially responsible for inmate medical care).

Of course the Plaintiff may allege that Davenport carried out his duties negligently, incompetently or even unconstitutionally, but making decisions (even ultimate decisions) about the health care of an inmate is a duty normally associated with what correctional officials do—and that is the standard for a finding of discretionary authority. *See Harbert Int'l*, 157 F.3d at 1282 (stating that "[t]he scope of immunity should be determined by the relation of the [injury] complained of to the duties entrusted to the officer.") (internal quotation and citation omitted).

Reasoning from the examples described in *Harbert* compels the conclusion that Warden Davenport acted within his discretionary authority in the instant case. Just as the question in *Jordan* was whether the marshals had discretionary authority to transport prisoners (rather than to *improperly* transport them to a prison with unconstitutional conditions), the question here is whether Warden Davenport had the discretionary authority to make health care decisions for Inmate Cummings while in

custody, not whether his decision regarding end-of-life care was proper in the absence of an advance directive. *See Jordan*, 38 F.3d at 1566. Similarly, the question in *Sims* and *Rich* was whether the defendants had the authority to administer discipline or to initiate criminal charges, not whether the defendants had the authority to do these thing improperly. *See Sims*, 972 F.2d at 1236; *Rich*, 841 F.2d at 1561. As these cases show, the District Court erred by inquiring whether it was proper for Warden Davenport to make end-of-life decisions rather than inquiring whether it was within Warden Davenport's authority to provide medical care to inmate Cummings. *See Harbert Int'l*, 157 F.3d at 1282 ("The inquiry is not whether it was within the defendant's authority to commit the allegedly illegal act."). Because it is clear that providing medical care to inmates is a legal duty of a prison warden, Warden Davenport met his initial burden of showing that he was acting within his discretionary authority, and the burden thus shifted to plaintiff to show that he was not entitled to qualified immunity.

Finally, the allegations in the complaint make it clear that Warden Davenport never "cease[d] to act as a government official and instead act[ed] on his own behalf." *See Harbert Int'l*, 157 F.3d at 1281. Cummings' medical providers looked to Warden Davenport based on the very fact that he was there acting as a government official--prison warden and custodian of the inmate in this case. Carter Davenport

as an individual private citizen would never had been present at the hospital, let alone consulted by the medical staff on matters related to Cummings' medical care.

C. The District Court's over-reliance on an obscure "last directives" state statute having no direct application to wardens and inmates was improper.

Instead of applying this Circuit's principles on discretionary authority, the District Court chose to rely almost exclusively on a complex state-law statutory scheme that in fact had no application to the facts of this case.[8] Although Alabama in *Alabama Code* §22-8A-*1et seq*. has indeed constructed a legal frame-work for the use of an "Advance Directive for Health Care," "a living will," and "a health care proxy," *see Ala. Code* §22-8A-1, there is one glaring problem for the Plaintiff here: There is no or allegation that any of these provisions had become operative in Cummings' case. Plaintiff does not allege that her or the deceased had signed an advanced directive, executed a living will, or designated another person as healthcare proxy. A similar problem exists in trying to apply the provisions of *Alabama Code* §22-8A-11 to this scenario. While it is conceivable Ms. Gaines *could have* been made a surrogate under this provision, there is no allegation that she *was made* a

[8] In addition, the District Court conducted this analysis *sua sponte*. The potential applicability of Alabama's provisions concerning advance directives to an inmate in custody was not raised by either party or argued in their briefs.

surrogate according to this provision. *See Twombly*, 550 U.S. at 570 (stating dismissal of complaint was required because the plaintiffs "have not nudged their complaint across the line from conceivable to plausible . . . ."); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (stating that Rule 8's requirement that a pleading contain a "'short and plain statement of the claim showing that the pleader is entitled to relief' . . . asks for more than a sheer possibility that a defendant has acted unlawfully."). Consequently, since plaintiff failed to allege facts to support the existence of a legally viable advance directive, living will, proxy designee, or surrogate, the law leaves Warden Davenport as custodian over Cummings and empowered him, at least in a general sense, to make health care decisions on behalf of Cummings, an inmate within his charge. He acted well within his discretionary authority.

Even if Gaines could stretch the facts or law in some way so as to argue the provisions of §22-8A-*1et seq* have been met in some way, the reasoning of the District Court still resulted in a "tail-wagging-the-dog" scenario not favored by qualified immunity jurisprudence. Claims that clearly fail to state a constitutional claim (or fail to allege violation of clearly established law) should not be redeemed by a hyper-focus on discretionary authority sub-analysis, especially like here where the Court relied upon state statutes having no direct or obvious application to Eighth Amendment issues common to the prison management context.

III. Gaines' failure to meet her burden of showing that Warden Davenport's alleged actions exceeded clearly established law means Davenport was entitled to qualified immunity.

If the Court finds that Warden Davenport was acting within his discretionary authority and that Davenport's alleged actions violated Inmate Cummings' Eighth Amendment rights, then the qualified immunity inquiry proceeds to the "clearly established" stage of analysis. In that stage of inquiry, the Plaintiff must meet her burden of showing that clearly established law would have indicated to the Defendant, under the circumstances of this case, that his conduct was unlawful. This Court has recently articulated how law may be clearly established for purposes of qualified immunity:

> There are three methods to show that the government official had fair warning:
>
> > *First*, the plaintiffs may show that a materially similar case has already been decided. *Second*, the plaintiffs can point to a broader, clearly established principle that should control the novel facts of the situation. *Finally*, the conduct involved in the case may so obviously violate the constitution that prior case law is unnecessary. Under controlling law, the plaintiffs must carry their burden by looking to the law as interpreted at the time by the United States Supreme Court, the Eleventh Circuit, or the [relevant State Supreme Court].

> *Terrell v. Smith*, 668 F.3d 1244, 1255–56 (11th Cir. 2012) (citations, quotation marks, and alterations omitted); *id.* at 1256–58 (discussing the three methods in *1209 detail); *Vinyard v. Wilson*, 311 F.3d 1340, 1350–53 (11th Cir. 2002) (same).
>
> The second and third methods are generally known as "obvious clarity" cases. *See Vinyard*, 311 F.3d at 1350–51. They exist where the words of the federal statute or constitutional provision at issue are "so clear and the conduct so bad that case law is not needed to establish that the conduct cannot be lawful," or where the case law that does exist is so clear and broad (and "not tied to particularized facts") that "every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." *See id. Cases do not often arise under the second and third methods.*

Gaines v. Wardynski, 871 F.3d 1203, 1208–09 (11th Cir. 2017) (emphasis added). Plaintiff has no authority for the conclusion that Warden Davenport should have known with "obvious clarity" that it was unconstitutional to approve the cessation of life support to Inmate Cummings, given that he exercised general supervision over the inmate's health while in custody.

This leaves the first method for clearly establishing law, that of showing a "materially similar case" of controlling precedent exists. Although existing case law does not necessarily have to be "directly on point," it must be close enough to have put "the statutory or constitutional question beyond debate." *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). "*If reasonable people can differ on the lawfulness of a*

government official's actions despite existing case law, he did not have fair warning and is entitled to qualified immunity." *Gaines*, 871 F.3d at 1210 (emphasis added). There simply is no case law or bright-line constitutional principles out there that would have indicated to someone in Warden Davenport's shoes that his actions violated a contour of Eighth Amendment deliberate indifference law. The fact that neither the Appellee below nor the District Court itself could find and cite such a case or principle compels the conclusion there was a lack of clearly established law. No reasonable warden, under these very unusual circumstances, would have known a decision to approve cessation of life support violated either the inmate 's Eighth Amendment rights. As a result, Warden Davenport is entitled to qualified immunity because plaintiff fails to allege he violated clearly established law.

CONCLUSION

A proper application of qualified immunity law should have resulted in a finding that the Amended Complaint failed to state a constitutional claim, Warden Davenport was acting within his discretionary authority as a prison official, and that his alleged actions did not violate clearly established law. The Court should accordingly reverse the District Court's judgment which erred in denying Warden Davenport qualified immunity.

Respectfully submitted this the 29th day of November, 2017.

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

The undersigned attorney certifies that this principal brief, filed on behalf of Appellees, complies with Rule 32(a)(7)(b) in that it contains no more than 13,000 words. The brief, beginning with the page entitled "Statement Regarding Jurisdiction," contains 6,242 words. The Brief is also under the 30 page limit of Rule 32.

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of November, 2017, I electronically filed the foregoing with the Clerk of the Court using the Eleventh Circuit Court of Appeals e-filing system which will send notification of such filing to the following (or by U.S. Mail to the non-electronic participants):

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