IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

JAC'QUANN (ADMIRE) HARVARD, et al.,

Plaintiffs,

vs. **Case No. 4:19cv212-MW-MAF**

MARK S. INCH, and the FLORIDA DEPARTMENT OF CORRECTIONS,

Defendants.
_____/

O R D E R

This civil rights action challenges the Florida Department of Corrections' practice of placing inmates in isolation or solitary confinement. The amended complaint, ECF No. 13, alleged that the Department "uses different names for isolation in its facilities such as close management or confinement, but no matter the name," the effect is the same - inmates are isolated from the general prison population. ECF No. 13 at 4. Plaintiffs claimed that the isolation "practice violates constitutional standards."

Discovery has been underway pursuant to the Initial Scheduling Order, ECF No. 24, and a subsequent Order modifying that Order, ECF

No. 165. As part of discovery, Plaintiffs have been conducting Rule 34 facility inspections "to assess all aspects of the operations of restrictive housing." ECF No. 157. The parties entered into a stipulation to facilitate the inspections and guide "confidential interviews of Plaintiffs and putative class members." *Id.* at 1. During the first three facility inspections,[1] issues arose which led to Plaintiffs filing a motion for a protective order, ECF No. 183, to protect "putative class members from retaliatory, chilling, or harassing conduct" and to prohibit "Defendants from improperly communicating with putative class members about this lawsuit." *Id.* at 1-2. The motion was supported by twenty declarations, although six have since been withdrawn. *See* ECF Nos. 212-213, 216, and 228. Plaintiffs seek issuance of a protective order pursuant to Federal Rules of Civil Procedure 23(d) and 26(c) and argue that the Court has the inherent equitable power to issue "appropriate orders governing the conduct of counsel and the parties." *Id.* at 11 (quoting Gulf Oil Co. v. Bernard, 452 U.S. 89, 100, 101 S. Ct. 2193, 2200, 68 L. Ed. 2d 693 (1981) (stating "a district court has both

1998) (pointing out that "an evidentiary hearing is normally required to decide credibility issues")). After five days of testimony, twenty-three witnesses, and the submission of numerous exhibits, the parties were provided an opportunity to submit proposed orders. They did so, *see* ECF Nos. 237, 238, and their submissions have been considered.

Notably, Plaintiffs seek a protective order under Rule 23(d) and have not requested an injunction under Rule 65. This matter was referred to the undersigned, *see* ECF No. 200, and may be ruled on in an Order as a pre-trial discovery issue; a Report and Recommendation is not required. *See* 28 U.S.C. § 636(b)(1).

Relevant Evidence

Inmate Gilday provided credible testimony in which he explained that an officer who escorted him to meet with Plaintiffs' legal team questioned him about why he was seeing the lawyers, what they were asking about, and what he was telling them. ECF No. 229 at 175-176, 179-180. Other officers in his dormitory did so as well. *Id.* at 175. Although he did not feel the questing was "threatening," he did say that it was "intimidating" and made him anxious. *Id.* at 176; *see also* ECF No. 229 at 197. He testified that he feared retaliation, and that he felt the officers were generally

discouraging him from participating. *Id.* at 180-181, 199-200. Inmate Gilday said the officers also made little comments undermining the reasons for the litigation, saying things like the lawyers were "just trying to line their pockets" and they were "not trying to look out for none of the inmates." *Id.*

Inmate Cruz was also asked by an officer what he had spoken to counsel about, comments which made him feel "intimidated and offended." ECF No. 229 at 12. Similarly, inmate Williams also testified that a sergeant told him that he should not talk with Plaintiff's legal team "because they are really against y'all." ECF No. 230 at 10. Inmate Williams said that Lt. McCrainie told the inmates to be on their "best behavior," and a third officer told the inmates that they needed to make "them look good and don't talk to the visitors that's coming." *Id.* at 9-10; *see also* at 39-40. He testified that as many as five or six officers made similar comments. *Id.* at 11. In addition, after making a "legal call," he said that officers "tried to intimidate" him and were asking what he had said on the telephone. *Id.* at 27. At another time, inmate Williams said that officers were trying to talk him out of going to a legal visit by offering him extra food trays and "extra soap and extra things" that inmates don't get in confinement. *Id.* at 28.

Inmate Milo also testified that the officer who escorted him to the gymnasium to be interviewed by Plaintiffs' legal team "threatened" him to "not say anything." ECF No. 230 at 155, 157. He said that the threat was that he would not get fed or he would "get jumped on." *Id.* at 157. Inmate Milo also testified that he felt threatened by the warden whose greeting and harsh pat on the shoulder seemed more like a warning than a genuine greeting. *Id.* at 159-160. He also indicated that the officers who escorted him to be interviewed were asked by counsel to back up "a little bit because they were too close, they were hearing the conversation," but the officers refused to move. *Id.* at 160-161. Additionally, once he was returned to his cell, other officers called him "a snitch," a word serious "enough to get you killed." *Id.* at 162-163. Inmate Milo also said that he was not fed his evening meal or given a shower that night. *Id.* at 165. Instead, he was given "an air bag." *Id.* He testified that he was also given an "air bag" the following day and did not take a shower because he feared that "they would jump on" him if he did. *Id.* at 167-168.

Inmate McDaniel testified that she also feared retaliation due to speaking with Plaintiffs' legal team. ECF No. 229 at 121-123. She testified that Officer Botticello told her that she could not speak to the lawyers, but a

higher ranking officer (Lt. Brown) said that she could do so. *Id.* at 126. Inmate McDaniel was able to speak with Plaintiffs' legal team, but she expressed fear of being written up for disobeying the verbal order given to her by the officer. *Id.* at 122. She explained that disciplinary action could have been taken against her by the officer, and disciplinary infractions could, in turn, keep her in confinement longer. *Id.* at 123-124, 130.

Similarly, inmate Lethco testified that she wanted to speak with Plaintiffs' legal team, but feared getting in trouble. *Id.* at 100. She testified that Lt. Brown told one inmate that "if she spoke she would be written up." *Id.*

Gresham encountered the same behavior.[3] ECF No. 230 at 87. The officers refused to close the door and the legal call was forced to end prematurely. *Id.* Moreover, officers reported that inmate Gresham "told on them about not closing the door for [her] legal call," which prompted another officer to yell on the wing "that he did not like snitches" and he yelled that inmate Gresham was "a snitch."[4] *Id.* at 87.

Inmate Broadnax testified to a similar experience, stating that a sergeant came to his cell and told him that he "was a snitch now" because the sergeant heard that he had been talking to a lawyer. ECF No. 230 at 186. The sergeant told inmate Broadnax not to worry, that he would be back and had "something for" him. *Id.* Inmate Broadnax said that another sergeant told him that "he had heard what [he] did" and called him a snitch. *Id.* at 188.

Inmate Grantley testified that while he was speaking to Plaintiffs' legal team at his cell front, the assistant warden began shaking "his head no" as though he were trying tell him not to speak to Plaintiffs' team. ECF

[3] Further, inmate Gresham testified that officers refused to provide her with a grievance form because she spoke to the lawyers. ECF No. 230 at 105.

[4] Being label a "snitch" is "a bad label to have" and makes an inmate more vulnerable to physical attack. ECF No. 230 at 88.

No. 230 at 117-118. Inmate Grantley interpreted this action as a direction not to talk with the lawyers. *Id.* at 118.

Inmate Lethco testified that she feared retaliation from prison staff. ECF No. 229 at 109-110. Although Defendants questioned whether inmate Lethco feared retaliation because she spoke to Plaintiffs' legal team or because of a grievance she had filed, the questioning highlighted that she feared retaliation due to engaging in protected First Amendment activities.[5] *Id.* at 110-112. Ms. Lethco acknowledged that she had filed two grievances complaining about two different acts of retaliation. *Id.* at 112. Such testimony points out the perception of inmates that they may suffer retaliation for the simple act of filing a grievance or taking other protected actions.

That perception was shared by inmate Milo who testified that he did not want to file a grievance about issues he experienced because "all it does is add more – more fire to the fuel." ECF No. 230 at 169. He said that officers would just "shoot at you even harder" by not serving a meal,

[5] Filing a grievance is a constitutionally protected activity. Pittman v. Tucker, 213 F. App'x 867, 870 (11th Cir. 2007).

failing to provide a shower or shave, or by "jumping" on an inmate. *Id.* at 169.

In addition to inmate Lethco's fear of being written a disciplinary report as an act of retaliation, there was testimony about other retaliatory actions which are taken. Inmate Williams testified that after he spoke to Plaintiffs' legal team, he was placed on property restriction and given "management loaf." *Id.* at 16-18. Inmate Williams testified that Lt. McCrainie told him that he was going on property restriction because he "made them look bad." *Id.* at 16. He further testified that he had gotten into trouble previously for not having his bed made or not being in his "class A uniform," but he was never placed on property restriction or given the special management loaf meal. *Id.* at 22-23; 50-51. His perception was that the true reason underlying the disciplinary action was retaliation.

Inmate Broadnax testified that an officer questioned him about a legal call, asking what it "was about." ECF No. 230 at 189. Inmate Broadnax answered that "it was none of his business." *Id.* Later that day, inmate Broadnax needed to request that the toilet in his cell be flushed, but when he asked the officer to do so, the officer told him "that it was none of his business" and refused to flush his toilet. *Id.* at 189-190. In addition, Inmate

Broadnax testified that Sergeant Prock threatened him because of legal mail he sent out, and he believed the threat was for "some type of physical harm," more than just an "air tray." ECF No. 230 at 189.

Likewise, inmate Cruz testified that an officer threatened to put him on his head if he did not "act right" during his legal visit. ECF No. 229 at 10. He said that the comment made him fear for his physical well being since he was testifying against the Department of Corrections. *Id.* at 14; *see also* ECF No. 229 at 32. Inmate Johnson also testified that he was physically threatened by the officers who escorted him to his interview with Plaintiffs' legal team. ECF No. 229 at 46. He had a broken arm at the time of his interview, and a "white shirt" officer said that if he said anything to those "people," that "possibly [his] other arm [could] be broken too." *Id.*

Inmate Broadnax also related an incident where a foreign substance had been put on his food tray. ECF No. 230 at 190. He said that inmate orderlies who pass out the food trays told them that a sergeant did it. *Id.* at 190-191. Furthermore, inmate Broadnax testified that at another time, he was told that disciplinary reports could "disappear" if he "quit talking to those lawyers." *Id.* at 192. He said that the officer refused to take him to "DR court" (a disciplinary hearing). *Id.* at 191-192.

Several inmates also testified to receiving an "air tray" or "air bag" which is a food tray delivered to an inmate which has the appearance of the inmate receiving a meal but which is empty. *See, e.g.,* ECF No. 230 at 83, 106, and 184. An empty bag or tray is delivered to the inmate instead. Inmate Gresham gave credible testimony that she was served "air trays" after speaking to Plaintiffs' legal team, but had never received one before. *Id.* at 84. Inmate Broadnax testified that prior to giving testimony in the hearing, he was threatened by Sergeant Fowler that if he testified, he would not "eat another tray." ECF No. 230 at 184, 201. At one time, inmate Broadnax reported to a Sergeant that he did not have any food on his tray, and the Sergeant told inmate Broadnax "that that wasn't from him; it was from Sergeant G." *Id.* at 192. Inmate Broadnax testified to receiving "four to five, maybe six" "air trays" and explaining that when he complained about it, an officer told him that "next time" he would "know not to talk to those lawyers, run [his] mouth to those lawyers." *Id.* at 195.[6]

[6] Remarkably, three officers with significant time working in the Department of Corrections testified that they had never heard of that practice and said they were unfamiliar with the term "air tray" or air bag." *See* ECF No. 232 at 114-115; ECF No. 232 at 133-134; ECF No. 231 at 179. Other officers at least acknowledged they were aware of the term, even if they denied ever refusing an inmate his or her food. ECF No. 232 at 23

There was also testimony which revealed that inmates were taken to holding or shower cells prior to being interviewed by Plaintiffs' legal team. Some of the inmates were left in those cells for as much as an hour or two while in restraints. *See* ECF No. 229 at 46-47, 53, 86, 89-90, 137-139, 150; ECF No. 230 at 77; ECF No. 234 at 61. Some indicated in their declarations that it was longer, and they were in full restraints. *See* ECF No. 183-10; ECF No. 183-11. Such conduct is, presumptively, against the rules[7] of the Department but, more importantly, it is reasonably viewed as retaliatory. Leaving inmates in restraints for a lengthy period of time, unable to sit down in a chair, is reasonably construed as punishment or harassment for an inmate's willingness to speak with counsel.

Inmate Gresham testified that she experienced harassment while waiting in the "shower cell" to be taken for her confidential interview. ECF No. 120 at 78. She said that lunch was served while she was in the shower holding cell, but her request for a tray was refused. She was told that if she wanted to eat lunch, she would have to go back to her cell and

[7] Assistant Warden Jeffrey Smith testified that the Department has a holding cell policy that specifies the time frames individuals may be kept in a holding cell. ECF No. 231 at 107. He recalled the policy as specifying "up to two hours continuous, four hours with the approval of a chief, but not to exceed six hours a day." *Id.*

refuse the legal call. *Id.* Similarly, inmate Gresham was denied water unless she refused the legal call and went back to her cell. *Id.* That was inconsistent with an earlier experience in which she was given a meal while held in the shower cell, and she was not kept in full restraints. *Id.* at 79-80.

Inmate Gresham also testified that after being returned to her cell she requested a dinner tray. *Id.* at 80-81. That request was also refused because she "had spoken to the attorneys." *Id.* at 81.

Notably, Defendants questioned whether inmate Gresham felt that the retaliation and harassment she described was directly related to this case (speaking with Plaintiffs' legal team) or was for reporting a PREA [Prison Rape Elimination Act] complaint or even due to her gender identity. *Id.* at 96; *see also id.* at 97-98. Inmate Gresham acknowledged filing several grievances for "continued reprisal" for using the grievance system and reporting sexual assault. *Id.* at 96-102. The Court concludes that such a distinction in the basis for retaliation is immaterial; suffering harassment for reporting an unlawful sexual assault in a grievance or for participating in a lawsuit is, in either case, retaliation which violates the First Amendment.

Inmate Gresham further testified that she feared retaliation after testifying during the evidentiary hearing. ECF No. 230 at 88. Specifically,

she expected that she would "be put on strip," that is stripped of her property and left with nothing "but boxers[8] and a mattress." *Id.*

That same concern was expressed by Inmate Grantley who feared that by speaking with Plaintiffs' legal team he would be "put on strip or gassed or" continued on close management without cause. ECF No. 230 at 118. Inmate Grantley testified that it was "common practice" for inmates to "get retaliated against whenever they cooperate with attorneys pertaining to situations that goes on within the prison [sic]." *Id.* at 119. He said that he felt like assistant warden McClellan was "upset and angry" that he continue to speak with counsel and was expecting that there would be "consequences" for doing so. *Id.* at 122-123. Inmate Grantley testified that he did receive a consequence - despite the recommendation from his classification officer to be released to general population and the agreement of two persons on the ICT (Institutional Classification Team), he was kept on CM-III by Mr. McClellan. *Id.* at 125-129, 133.

Mr. Pacholke participated in the prison inspections at issue. ECF No. 234 at 11. He said that he spoke with approximately 150 of the inmates at cell front, and had 40 confidential interviews at four separate facilities. *Id.*

[8] Ms. Gresham is "a transgender woman" housed in a male institution. *Id.* at 88.

at 14. He explained that it is important to talk to as many people as possible, "especially in separate locations," to get a "sense of how the institution operates, at least from their perspective," and "some sense of the consistency in their testimony." *Id.* at 15.

Mr. Pacholke testified that on the first day of the inspection, during the cell front interviews, there were as many as seventeen staff present. *Id.* at 18. In other prison facilities, only four to five staff were present. *Id.* at 18-19. The large number of staff present during the facility inspection was likely to create an atmosphere of intimidation, and having less "presence" while "doing the cell-side interviews" would improve the situation. *Id.* at 36. Mr. Pacholke expressed his belief that the prisoners were nervous with so many staff present and the "presence of ranking staff members." *Id.* at 20-

21.[9] He indicated that, at times, staff were too close during those cell front interviews but would move away when asked. *Id.* at 57-58.

During the confidential interviews at FSP, Mr. Pacholke said that the first several inmate interviewees indicated they were nervous to talk with officers "20 to 25 feet away with no physical separation." ECF No. 234 at 30. One inmate wrote a note to Mr. Pacholke "because he didn't want anyone to hear." *Id.* He further said that at one point, a member of the Plaintiffs' legal team asked the officers if they would move further up the bleachers because they were "making people nervous." *Id.* After checking with a supervisor, the officers refused to move. *Id.*

Similarly, the interviews at Santa Rosa began in a visiting park room where officers were sitting approximately 20 feet or less away. ECF No.

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[9] Defense counsel pointed out that the stipulation, ECF No. 157, prohibited discussions between staff and Mr. Pacholke. ECF No. 234 at 37. That appears to conflict with the testimony of Assistant Warden Smith who testified that they had their "command staff" or "leadership staff at the institution level" present "to provide any respons or aex oftiany.y.y.y.4 at
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234 at 30. The inmates "expressed concerns, once again, about staff being so close and being able to listen." *Id.* at 31. At that location, the interviews were halted and moved to offices in the Classification area where they could at least close a door and have "some degree of privacy." *Id.* at 31. In general, the escorting officers sat in the hallway approximately six or seven feet away from the door. *Id.* However, Mr. Pacholke testified that one officer "literally sat on the other side of the door window within maybe an inch or two, I mean, literally almost had his nose pressing up against the window and was looking directly at the offender." ECF No. 234 at 32. Mr. Pacholke asked the officer to move across the hallway as the other officers had done, but he "indicated he could not and stayed there." *Id.*

While the office provided some privacy, he testified that he could hear the "chatter" between the officers on the other side of the door. ECF No. 234 at 32-33. Because Mr. Pacholke could hear them, he assumed that the officers could also hear him. *Id.* at 33. He testified that the interview situation made the inmates "uncomfortable" and it had "a chilling effect" as the inmates would, "on many, many occasions" ask him to keep his voice down. *Id.* He explained that the interviews held at Lowell and Suwannee

Correctional Institutions were "better because [they] were in private offices and there seemed to be a greater degree of separation." *Id.* at 36. Mr. Pacholke said that the third and fourth interviews which were conducted at Lowell C.I. and Suwannee C.I. were much better than at FSP and Santa Rosa C.I. ECF No. 234 at 75. He related that there was more separation between staff and the inmates members which alleviated concerns. *Id.* at 76-77, 81.

Balanced against the testimony of the inmates called in this case was testimony from a number of prison officials. Warden Leavens testified that when correctional officers are hired, they go through an orientation process which educates them on ethics and legal topics, which covers "reprisal and retaliation." ECF No. 231 at 14. The Department of Corrections already has "policies and procedures" in place to protect inmates from retaliation by staff. *Id.* at 13-14. In addition to those policies, Secretary Inch issued a memorandum "in regards to this specific lawsuit" on February 13, 2020. *Id.* at 15-16. The memo went to all staff, and, according to Warden Leavins, the memo was "placed on all of the staff bulletin boards," and is reviewed in orientation, through "in-service training, through our on-boarding program,

during our staff briefings, and during our shift supervisor meetings." *Id.* at 16. Warden Leavins read the memo which, in relevant part, states:

> The Florida Department of Corrections has a zero tolerance for retaliation of any kind. As secretary, it is my commitment to the members of the Department that any individual who comes forward with an issue or concern does not face retaliation. This commitment extends to the Department, inmate and offender population. Under no circumstances should any inmate who brings a lawsuit or communicates with counsel be subject to the fear and anxiety associated with possible retaliation. Anything less would be contradictory to our character and commitment as . . . corrections professionals.

Id. at 16.

Warden Leavens testified that if an inmate submitted a grievance which alleged "improper conduct or misconduct by" staff, it would be accepted as true and the grievance referred "to the Inspector General's Office through the MINS system." ECF No. 231 at 26. The Inspector General's Office investigates to determine "if there is any substantial evidence to validate the allegations." *Id.* If the allegations are not substantiated, the grievance is returned to the institution and then denied, although the chief of security could review the allegations and conduct his or her own investigation. *Id.* at 27, 28. If validated, it would be referred to the warden and to Human Resources at Central Office to begin a

disciplinary process for the staff involved. *Id.* at 27. He acknowledged that Santa Rosa Correctional Institution receives "a lot of retaliation grievances." *Id.* at 31.

Furthermore, a protective order was previously issued in this case by the Chief Judge of the Northern District of Florida to protect named Plaintiff Johnny Hill, but Warden Leavins was unaware of that order. *Id.* at 44-45. Notably, "Johnny Hill was housed at Santa Rosa" C.I. as recently as two months ago, and Warden Leavins has been at that institution since July 10, 2020. *Id.* at 13, 45.

Assistant Warden Jeffrey Smith also testified at the hearing. ECF No. 231 at 68. He was present when the inmates at Santa Rosa had cell front interviews with Plaintiffs' team. The cells either had "holes cut in the window" so an inmate could communicate to a person outside his cell, or the inmates had to stand by a "seam[10] at the back of the door" to talk with the team. *Id.* at 81. Officers were present during those interviews and "were told to stay back a reasonable amount of feet where they could at least maintain a visual observation, but provide some level of confidentiality

[10] The "seam" is "along the back of the cell doors" where the door "slides along a track." ECF No. 231 at 83. The crack "goes between the door and the wall." *Id.* The food flap/mail slot or "cuffing portal" was not opened for interviews. *Id.* at 83-84.

and privacy for the conversation." *Id.* Mr. Smith explained the need for the officers' positioning was for safety, to "maintain visual contact" during the interviews because in 2020, there were seventy-seven recorded batteries by inmates in the confinement cells using "liquid expulsion." *Id.* at 82; *see also* at 85-86.

Assistant Warden Smith also explained that he was present on the following two days when the personal interviews took place. ECF No. 231 at 94, 97. He said the interviews started in the "visiting park" but were stopped and moved to a different location because Plaintiffs' team had privacy concerns about the confidential interviews taking place in the visiting park, which was the original location selected.[11] ECF No. 231 at 93-94. The interviews were moved to two conference rooms in the Classification building. *Id.* at 94-95. That move caused delay, *see id.* at 99-100, as did the failure to communicate that Plaintiffs' legal team wanted to interview inmates in a particular order. *Id.* at 97; *see also* at 126-128.

Mr. Smith explained that certain cells were used as "holding cells," where inmates were taken prior to going into the interview room. ECF No.

[11] Major Richter testified that Plaintiffs' legal team was "under the impression that staff members, you know, [were] possibly hearing their conversations, so they wanted to move everything to Classification . . . ." ECF No. 231 at 128.

231 at 101. Some holding cells were available in the Classification building,[12] but the shower cells within each housing unit were also "used to prepare and stage inmates for appointments." *Id.* at 101-102, 105-106. Testimony from Major Richter clarified that they used two holding cells which were close to the interview area and they "left two open for medical emergencies that may occur in the compound or psychological emergencies, you know." ECF No. 231 at 130-131. The inmates were taken out of their individual cells, placed in the shower cell in the dorm, and then eventually taken to the holding cells in the Classification building. *Id.*

Mr. Smith acknowledged the possibility that some inmates may have been in the holding cells restrained for a considerable length of time because, for example, "count took an exceptionally long time" one morning. *Id.* at 107. But Mr. Smith added that, "we don't typically leave them in those cells restrained for any length of time. It's designed to be placed in there and the restraints to be removed while they're waiting." *Id.* at 107-108. Major Richter was unaware of how long inmates "sat in the showers." *Id.* at 131.

[12] Five holding cells are located in the Classification, but some of them would have also been used for inmates being brought for dental services. ECF No. 231 at 105.

Assistant Warden Smith was aware of the prior protective order entered in this case on behalf of inmate Johnny Hill. ECF No. 231 at 114. He also was familiar with the February 2020 memorandum Secretary Inch

plaintiffs' inspection" in any dorm. *Id.* at 144-145, 150. He said that a property restriction should be noted on an inmate's DC6-229 form, but he is aware of "times that someone was on property restrictions and it was not listed on their DC6-229" form. *Id.* at 146, 148, 153, 155.

Major Richter also testified that usually only one officer remains with an inmate to monitor him during a legal call. ECF No. 231 at 136-137. When the call is finished, officers "call for assistance, if needed, to escort the inmate back" to his cell, "but it only takes one officer to escort an inmate." *Id.* at 137-138. He clarified that two officers are required to remove an inmate from a cell, "but only one officer to escort the inmate." *Id.* at 138.

Lt. McCrainie, assigned to Santa Rosa C.I., was also present during the inspections. ECF No. 231 at 161. She said she did not communicate with any inmate and tell them they should not speak with Plaintiffs' legal team. *Id.* at 161. She further testified that inmates "have to have their beds made at a certain time every day." ECF No. 213 at 166. On week days, beds must be made by 7 a.m., but the time is later on the weekends so they can "sleep in a little bit." *Id.* at 166. She did not recall whether inmate Curley Williams had his bed made during the inspections or not, nor

did she recall whether he went on property restriction in the days following the inspection. *Id.* at 166-167. Lt. McCrainie said it was possible that it happened, but she did not "remember placing anybody on property restriction." *Id.* at 167.

Lt. McCrainie also testified that inmate Williams would have legal calls in her office. ECF No. 231 at 167-168. When asked whether Mr. Williams could sit down during the legal calls, Lt. McCrainie responded that neither she nor her "staff ever told him he could not sit down." *Id.* at 169; *see also* at 170. She further testified that no one ever advised her that Mr. Williams "remained standing during his legal calls." *Id.* at 169. Additionally, Lt. McCrainie said she did not "recall ever placing inmate Williams on the loaf,[13] or management meal." *Id.* at 170. It was possible that another colleague did so, but she was unaware of that happening. *Id.* at 172. Lt. McCrainie clarified that only an "officer in charge [OIC]" or someone on that level could place an inmate on the special management meal. *Id.* at 171.

[13] Lt. McCrainie explained that an inmate gets "placed on loaf" for the "misuse of food service items or bodily fluids." ECF No. 231 at 171. For example "if the attempt to spit on staff, they get placed on management meal, or throw urine or feces on a staffilizerin03 Tc.0025

Inmate Curley Williams testified that within 20 minutes after the inspections, four to five inmates were "put on property restriction, strip." ECF No. 230 at 11-13. Inmate Williams said that Lt. McCrainie also put him on property restriction because he did not have his bed made and was not in "a Class A" uniform. *Id.* at 14. He testified that the reasons for the restriction were "bogus because that was the day that we could lay in, and we didn't have to have our bed made, or we didn't have to have our Class A on that day." *Id.* Inmate Williams said that Lt. McCrainie would give "a speech" saying what days they could "lay in and not be in Class A." *Id.* at 15. He said that would happen "three days out of the week." *Id.* Inmate Williams further testified that Lt. McCrainie told him that he was going on property restriction because he "made them look bad" and had "snitched them out." ECF No. 230 at 16. That testimony conflicted with inmate Williams' written declaration in which he said that Sergeant Cade told him he was going on strip. *See* ECF No. 230 at 37;

Mr. Williams' testimony was not credible, especially in light of his testimony that he was also put "on management loaf." *See* ECF No. 230 at 18. He said that his weight was fluctuating between 160 pounds before the management loaf and 146 pounds afterwards because he did not eat the

management loaf (which lasted for seven days). *Id.* at 21-22. Yet he

delivery" is one of his responsibilities. *Id.* at 176. He had no recollection of failing to deliver a meal to inmate Johnny Milo. *Id.* He said there was "no reason that [he] would not deliver a meal to Mr. Milo" and added, "I would not do that." *Id.* at 176-177. He said that if he were "on the wing and the meals were delivered, yes, [he] would give him the meal." *Id.* at 182. He also testified that he had "never really heard of an air bag."[14] *Id.* at 179. He testified that he had "never heard of it" and does not "know things like that." *Id.* That testimony from a 33-year veteran was not credible.

Sergeant Alexander also said he did not "recall" ever calling inmate Milo a "snitch." ECF No. 231 at 177. He said that they might "have been talking sometime and joking around and maybe something like that was said, but" he was "not sure." *Id.* That, also, is not believable. Whether it was said in jest or not, use of the word "snitch" has obvious real world implications for an inmate, and this is known to the officers who provide direct supervision of the inmates.

Sergeant Fowler has worked at FSP for eight years, with five of those years on the close management wing. ECF No. 232 at 5-6. Part of his

[14] Sergeant Alexander explained that when a "food cart gets on the wing, [they] get it organized and feed chow." ECF No. 231 at 180.

duties include delivering meals to the inmates on C-Wing. *Id.* at 9. That task involves two inmates known as "orderlies" or "runarounds," another officer, and himself. *Id.* Sergeant Fowler stands in front of the food cart and hands the orderly a tray who then gives it to the inmate in the cell. *Id.* Sergeant Fowler said that he inspects "the food tray first," making "sure everything is there;" and then the inmate behind him gives out the juice, and the second officer "shuts the flap." *Id.*

Sergeant Fowler denied ever threatening inmate Broadnax for testifying in this case, and said he had never discussed inmate Broadnax's declaration with him. *Id.* at 12. He also said that he never refused to feed him "because he was talking to lawyers," never threatened to do so, and never called him a "snitch." *Id.* at 12-13. He further acknowledged that inmate Broadnax would "claim retaliation" whenever he "got in trouble." *Id.* at 14-15. Sergeant Fowler did say that he knew "what an air bag or an air tray" was, explaining that it is "when an inmate doesn't get any food." ECF No. 232 at 23. Although he had "heard of it," he said he was not aware of it happening at FSP. *Id.* at 23-24.

Lt. Brown was working at Lowell C.I. during the inspection by Plaintiffs' team. ECF No. 232 at 29. She directed the inmates to "get

inspection ready," meaning make sure their bunks were made and they had on their "Class As," and put masks on (face coverings) in case anyone wanted to talk to them. *Id.* at 31-32. She explained that "normally the inmates are told to stand against the wall across from their bunks, stand up so we can make sure that they are properly dressed, the beds are made, the hygiene product is visible so we can make sure they have everything they need." *Id.* at 32. However, on the day of the inspections they were told to "stay on their bunks" because they "didn't want them to have to stand and wait so long for the lawyers to come around." *Id.* at 33. It was not intended that the inmates were required to "sit on their bunks and not move for seven hours." *Id.* at 50-51.

Colonel Cannon has worked in the Department of Corrections for over twenty-five years and is currently assigned to Santa Rosa Correctional Institution. ECF No. 232 at 54. He explained that during the inspections, staff who were normally assigned to "run outside work crews" were utilized to provide security in the close management units. *Id.* at 55. The outside staff were also used to assist with the escorting, searching and restraining the inmates. *Id.* at 75-76.

Further, Colonel Cannon said that after receiving the list of inmates to be interviewed, staff had planned to pull inmates from one dormitory at a time to be taken to the interviews. *Id.* at 57-58. They planned to pull inmates about a half hour before an interview was scheduled and temporarily house the inmates "in the shower/holding cells in" the dormitories while awaiting the interviews. *Id.* at 58-60. However, Colonel Cannon testified that they pulled all the inmates from Bravo dorm at the same time and put them in the temporary holding cells. *Id.* at 60. He said that they were pulled based on the assumption that "the interviews would take, you know, 30, 45 minutes, something like that." *Id.* at 61. Thus, it was anticipated that the inmates would be held in the shower cells for approximately 30 minutes. *Id.* at 66. This testimony is nonsensical. If all the inmates were pulled at the same time, and the interviews were expected to last 30-45 minutes, it is simply not possible that the inmates would be in the holding cells/showers for a mere 30 minutes. Some of them would necessarily be in the holding areas/show said that after reeis. Somldingr6 T

him. *Id.* at 61-62. Moreover, if an inmate held in the holding cell said he needed to use the restroom, he would be removed from the holding cell, re-restrained, and escorted back to his housing cell. ECF No. 232 at 62. It does not appear that the inmates were ever asked if they needed water or to use the restroom on any regular basis, but instead were merely offered such necessities if the inmate raised the issue first. ECF No. 232 at 92-93.

Colonel Cannon provided somewhat confusing testimony as to the manner in which inmates were escorted from their cells for the confidential interviews. He testified that the inmates were escorted to the holding areas "in handcuffs" and then the restraints were removed. *Id.* at 63. However, he also said that the inmates "were secured in the shower cells in restraints." *Id.* His answers were not clear or consistent as to whether inmates were left in the temporary holding cells in restraints, *see* ECF No. 232 at 62-63, but he did state that "no inmate had restraints on while he received his meal." *Id.* at 63.

Colonel Cannon also said that the plan was for the inmates to "wear the basic restraints from their cell to the shower cell," but once in the shower cell "the restraints would be removed and inmates would remain in the shower unrestrained awaiting notification that it was their interview

time." ECF No. 232 at 86-87. That suggests that inmates were only in basic restraints, yet he further said that inmates were restrained "behind the back for removal from the cell, but the black box requires handcuffs to be placed in the front." *Id.*

the shower, her cell was searched pursuant to policy and items of contraband were thrown away. *Id.* at 110, 113.

Although Captain Raben has worked with the Department of Corrections for eight years and responds to grievances, he testified that he never heard of the term "air tray" before. *Id.* at 114-115. Further, he said that when receiving inmate Gresham's grievance about not receiving a shower, which she alleged was due to retaliation, he acted to resolve the issue with the shower but took no action to forward the grievance to the Inspector General's Office concerning the retaliation allegation. ECF No. 232 at 121-124. Thus, Captain Raben did not simply accept the allegation of retaliation as true and submit it to the Inspector General. *Id.* at 123-124.

Finally, testimony was provided by Mr. Kirkland, the Deputy Director of Institutional Operations with the Florida Department of Corrections. ECF No. 234 at 94. He testified that inmates are able to have legal telephone calls in a "designated room" with a closed door. *Id.* at 96. "The door has a window on it" so officers can visually monitor the inmate, but officers remain outside the room. *Id.* at 96-97. Staff are "not supposed to position themselves in a way to be able to listen to the call, only to observe in the

room . . . for security concerns." *Id.* at 97. The process is the same for inmates in close management. *Id.* at 97-98.

When cell front interviews occur, which happen on a daily basis as medical staff make "sick call rounds," staff are present but "position themselves far enough away to allow for the confidentiality of that conversation." *Id.* at 106. There are, however, no distance requirements which guide prison staff in such instances; it is up to the officer to determine for himself the distance from which he could react if necessary, but maintain confidentiality. *Id.*

Analysis

As a preliminary matter, the issues raised in the underlying motion for a protective order have arisen in the context of existing litigation. No statute or rule prevents Plaintiffs from raising these issues, nor is the Court precluded from resolving these issues, despite the fact that specific allegations of retaliation may not have been first presented to prison officials through the inmate grievance procedure. The exhaustion requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), is relevant for case initiation procedures, but is immaterial when presented in the context of ongoing litigation. This process and protective order are not

intended to supplant or replace the grievance process that currently exists.

Second, Federal Rule of Civil Procedure 26(c) permits a party to file a motion for a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Fed. R. Civ. P. 26(c) (quoted in Ekokotu v. Fed. Exp. Corp., 408 F. App'x 331, 335 (11th Cir. 2011)). A protective order may be issued if "good cause" is shown through a "particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." United States v. Garrett, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978) (quoted in Ekokotu, 408 F. App'x at 335-36). In addition to the good cause[16] requirement, a court must "balance the interests of those requesting the order" and those opposing it. Ekokotu, 408 F. App'x at 336; In re: Chiquita Brands Int'l, Inc., 965 F.3d 1238, 1250 (11th Cir. 2020); Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985). Threats of physical violence and retaliation have been sufficient to show "good cause" for issuance of a protective order. Does v. Swearingen, No. 618cv1731-ORL-41LRH, 2019 WL 4386936, at *3 (M.D. Fla. Sept. 13, 2019) (noting that threats of

[16] "'Good cause' is a well established legal phrase. Although difficult to define in absolute terms, it generally signifies a sound basis or legitimate need to take judicial action." In re Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987).

physical violence and retaliation supported allowing plaintiffs to proceed anonymously and requiring the parties to "confer and file a motion for protective order that satisfies Plaintiffs' confidentiality concerns"). The Court concludes that it has authority to enter a protective order under Rule 26, as well as having the inherent authority to control discovery and protect the integrity of litigation. Peer v. Lewis, 606 F.3d 1306, 1315 (11th Cir. 2010) (noting that a "'court may safely rely on its inherent power' to sanction bad faith conduct in the course of litigation") (citations omitted).

It is well established that retaliation by prison officials for an inmate's participation in a lawsuit violates the First Amendment. Redd v. Conway, 160 F. App'x 858, 862 (11th Cir. 2005) (citing Wright v. Newsome, 795 F.2d 964, 968 (11th Cir. 1986), and Mitchell v. Farcass, 112 F.3d 1483, 1490 (11th Cir. 1997)). A plausible retaliation claim is presented when an inmate shows that he or she suffered adverse action, causally connected to the exercise of First Amendment rights, such that a prison official's conduct "would likely deter a person of ordinary firmness from engaging in" the protected speech. Smith v. Mosley, 532 F.3d 1270, 1276 (11th Cir. 2008); *see* Bennett v. Hendrix, 423 F.3d 1247, 1254 (11th Cir. 2005) (concluding that "[a] plaintiff suffers adverse action if the defendant's allegedly

retaliatory conduct would likely deter a person of ordinary firmness from the

and indeed the lawsuit — will not result in any negative backlash. Only through a clear order from the court guaranteeing these protections against retaliation and laying out how discovery shall proceed will they receive such an assurance.

Notably, Defendant Mark S. Inch, Secretary of the Florida Department of Corrections, previously issued a memorandum to all Departmental employees on February 13, 2020. Defendants' Ex. D29. In relevant part, the memorandum stated:

The Florida Department of Corrections has zero tolerance for

is also committed to ensuring that witnesses and members of Plaintiffs' class do not face retaliation for their participation in this lawsuit.

inmates, take the inmates to the shower cells, take them outside for recreation, and accompany them anytime they come outside their cell. ECF No. 231 at 41. In some cases, inmates lack the ability to even flush the toilet in their c1st Tw(the th)TjTe th

most people; all but the toughest or most stubborn among us would refuse to be involved in an endeavor which is likely to cause greater harm than the potential good promised. Plaintiffs have sufficiently shown the need for issuance of another protective order, and the motion is granted.

The stipulation previously entered in this case was to specify the "time, place, and manner for the inspections" pursuant to Rule 34(b). *See* ECF No. 157. The stipulation provided for "confidential interviews of Plaintiffs' and putative class members by Plaintiffs' experts and representatives." *Id.* at 1. While permitting Plaintiffs' team "to speak with putative class members at cell front who consent to such conversations," *see*

To avoid any confusion and to lessen the potential for conflict between the parties regarding the appropriateness of actions during these inspections, the Court will attempt to specifically provide guidelines for the upcoming interviews, both the cell-front interviews and the more private legal callouts. This order is necessarily prophylactic – it is intended to prevent a harm which may never occur. Moreover, the requirements of safety and security at the facilities requires that these guidelines remain somewhat flexible, as the input and experience of the line personnel is essential in maintaining the safety of the inmates, the officers and the interviewing parties, as well as the general security of the facilities. This Court is certainly not intending to dictate protocols in such areas. With this understanding, the following are the areas of concern as identified by the Court:

Statements and Interactions Between Correctional Officers and Inmates regarding Inspections/Interviews. Discussions between correctional officers and the Inmates regarding the inspection/interviews, the experts/interviewers, or the claims at issue in this case should be limited to information sharing regarding the timing of such events and should not involve any discussion regarding the purpose of the

inspections/interviews or the wisdom or propriety of participating in the process. If inquiry is made by an inmate with a correctional officer regarding the reason for the inspection/interview the simple response should be that the inmate should feel free to discuss the matter with the interviewers if they have any questions. Under no circumstances should a correctional officer discourage an inmate's participation in the process. In the event Plaintiffs believe there is an issue with such improper statements during the inspection/interview process they must raise such issues as soon as practicable, but should certainly not delay raising such issues until after the interview/inspection is completed.

Presence and Proximity of Correctional Officers – Obviously line staff will necessarily be present during the inspections. The number and proximity of this staff is an issue which must be addressed. The inmates should be permitted to have confidential conversations with the interviewers. The correctional officers should take steps to ensure this. In the absence of an agreement between the parties, the Court will arbitrarily select a "safe distance" which has no basis in fact or law, but which will at least provide clear direction for the parties. The officers are directed to maintain at least a ten (10) foot distance from the inmate/witness and

plan and schedule should be agreed to prior to the inspections/ interviews occurring so there is no basis for confusion regarding how and where the inspection/interview will proceed. The interviews at the Lowell and Suwannee facilities should serve as a model for the interviews going forward. Private offices or cubicles are to be preferred to gymnasiums or visitation centers.

Use of Holding Cells Prior to or after Private Interviews. It is contemplated that inmates may be placed in holding cells prior to their confidential interviews. However, they should not be forced to remain in those cells for a period of time in excess of two (2) hours. Also, holding cells are preferred to shower cells, and holding cells should be used if they are available. While it may be entirely appropriate to use a shower cell for a short period of time (15 to 30 minutes), using such an uncomfortable area as a holding cell could be perceived as retaliation even if it was not intended as such. Additionally, the inmates will not be improperly restrained in the holding cells so that they may sit down while they wait. If the restraints can be removed, or at least limited, while they are in the holding areas they should be so that the inmates can be as comfortable as possible while maintaining the safety and security of the facility and all of

those involved. Moreover, to the extent they are in the cell during mealtime they will be provided with food/water and will not be improperly restrained while they eat. At least one time every forty-five minutes correctional staff will inquire whether the inmate needs to use the bathroom or if they need something to drink. The inmates should not be required to "call out" in order to receive such necessities, especially when "calling out" may be considered a violation of policy.

In order to prevent the unnecessary use of holding cells, Plaintiffs will provide the list and order of inmates they wish to interview, and will work with correctional staff to insure that such order does not change. The Court acknowledges that much of the inordinate use of holding cells at the prior inspections was driven by the failure by Plaintiffs' counsel to timely address the order of the interviews and the lack of clear direction to the line staff. That problem should not be repeated.

Denial of Food and/or Other Necessities. It should go without saying that an inmate should not be denied any right or necessity because of their participation in the inspections/interviews. Toward that end, correctional staff will specifically confirm that participants are fed and are otherwise provided with their necessities during the process. If there is a

Accordingly, it is

ORDERED:

1. Plaintiffs' motion for a protective order, ECF No. 183, is **GRANTED**.

2. Retaliation and threats of retaliation of any kind relating to an inmate's participation in the ongoing discovery and/or civil litigation will not be tolerated.

3. In order to ensure an orderly and efficient inspection and interview process the parties shall abide by the guidelines addressed above.

4. To the extent there is a deviation from the guidelines above the parties are directed to raise such issues immediately, but certainly before the conclusion of the process at the specific facility. Failure to timely raise such issues may result in a waiver of the ability to claim a violation of this Order, especially where the failure to timely raise the issue has resulted in the loss of evidence which would either confirm or refute the alleged violation.

5. In the event the parties are not able to resolve any dispute arising from the inspections/interviews they are directed to file an appropriate Motion with this Court and the matter will be resolved expeditiously. Again,

this process is not intended to supplant or replace the grievance process, which process should proceed on a separate and parallel process.

DONE AND ORDERED on February 8, 2021.

S/ Martin A. Fitzpatrick
MARTIN A. FITZPATRICK