UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

ASHLEY DIAMOND,

Plaintiff,

v.

TIMOTHY WARD, *et al*.,

Defendants.

No. 5:20-CV-00453-MTT

PLAINTIFF ASHLEY DIAMOND'S MOTION IN LIMINE TO EXCLUDE PREJUDICIAL AND IRRELEVANT EVIDENCE

In advance of the trial in this matter currently set for the Court's January 17, 2023 trial term, Plaintiff Ashley Diamond moves to limit the evidence considered by the jury to events occurring before the filing of her Amended Complaint on February 16, 2021, and also to exclude at trial: (1) reference to consensual sexual or romantic activity or relationships, and sexually suggestive content recovered from any cellular device; (2) use of male pronouns to describe Ms. Diamond and attempts to describe her as a male, beyond recognizing that she was assigned male at birth; (3) reference to the prior criminal convictions of Ms. Diamond and incarcerated witnesses; (4) reference to disciplinary reports from Ms. Diamond's incarceration; (5) reference to Ms. Diamond's alleged recreational drug use; (6) reference to the amount of her prior settlement against GDC and her fundraising efforts; (7) reference to the amount of money Ms. Diamond spent on gender dysphoria treatment prior to incarceration; (8) reference to the illegality of Ms. Diamond's alleged cell phone possession in prison, and the phone's contents; and (9) reference to the voluntary dismissal of certain Defendants from this action and the grant of summary judgment to Defendant

Arneika Smith in a related case. Ms. Diamond seeks to exclude these matters from the jury's consideration as inadmissible, irrelevant to the causes of action still at issue in this case, and more prejudicial than probative. For the reasons set forth in the attached Memorandum, the Court should grant Ms. Diamond's Motion and so limit the evidence and argument at trial.

This 16th day of December, 2022.

Respectfully submitted,

/s/ Scott D. McCoy

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UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

ASHLEY DIAMOND, Plaintiff, v. TIMOTHY WARD, *et al*., Defendants.	NO. 5:20-CV-00453-MTT

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF ASHLEY DIAMOND'S MOTION IN LIMINE TO EXCLUDE PREJUDICIAL AND IRRELEVANT EVIDENCE

Plaintiff Ashley Diamond submits this Memorandum of Law in support of her Motion in Limine. For the reasons set out below, Ms. Diamond seeks to limit the evidence considered by the jury to events occurring before the filing of her Amended Complaint on February 16, 2021, and also to exclude at trial: (1) reference to consensual sexual or romantic activity or relationships, and sexually suggestive content recovered from any cellular device; (2) use of male pronouns to describe Ms. Diamond at trial and attempts to describe her as a male, beyond recognizing that she was assigned male at birth; (3) reference to the prior criminal convictions of Ms. Diamond and incarcerated witnesses; (4) reference to disciplinary reports from Ms. Diamond's incarceration; (5) reference to Ms. Diamond's alleged recreational drug use; (6) reference to the amount of her prior settlement against GDC and her fundraising efforts; (7) reference to the amount of money Ms. Diamond spent on gender dysphoria treatment prior to incarceration; (8) reference to the illegality of Ms. Diamond's alleged cell phone possession in prison, and the phone's contents; and (9)

reference to the voluntary dismissal of certain Defendants from this action and the grant of summary judgment to Defendant Arneika Smith in a related case. Ms. Diamond seeks to exclude these matters from the jury's consideration as inadmissible, irrelevant to the causes of action still at issue in this case, and more prejudicial than probative.

BACKGROUND

Plaintiff Ashley Diamond is a transgender woman with Post-Traumatic Stress Disorder ("PTSD") and Gender Dysphoria. Between October 29, 2019 and August 1, 2022, Ms. Diamond was incarcerated in the Georgia Department of Corrections ("GDC"); first, at the Georgia Diagnostic and Classification Prison ("GDCP") from October 29, 2019 until June 3, 2020, and, then, at Coastal State Prison ("Coastal") from June 4, 2020 until her release.

In her Amended Complaint, filed on February 16, 2021 (ECF No. 36), which is the operative Complaint in this action, Ms. Diamond contends that Defendant Brooks Benton, the warden of Coastal State Prison; Defendant Grace Atchison, GDC's Statewide Prison Rape Elimination Act ("PREA") Coordinator; Defendant LaChesha Smith, the PREA Compliance Manager for GDCP; Defendant Ahmed Holt, the Assistant Commissioner of GDC's Facilities Division; and Defendant Robert Toole, Director of GDC Field Operations, failed to protect her from sexual abuse in violation of the Eighth Amendment during the time period up to the filing of the Amended Complaint. Ms. Diamond also contends that Defendant Sharon Lewis, GDC's Statewide Medical Director, failed to provide Ms. Diamond adequate healthcare in violation of the Eighth Amendment during the same time span.

Ms. Diamond alleges that Defendants' constitutional violations—individually and collectively—caused her physical injury, illness, and emotional distress, including, without limitation, worsening Gender Dysphoria and related symptoms, such as auto-penectomy and auto-

castration attempts; PTSD; complex PTSD; Major Depressive Disorder; suicidal ideation; and multiple suicide attempts.

Following Ms. Diamond's release from custody, no claims for injunctive relief remain in this case. Ms. Diamond will limit her remaining damages claims to incidents that occurred between October 29, 2019, when Ms. Diamond entered custody, and February 16, 2021, when the Amended Complaint against Defendants was filed.

ARGUMENT

Ms. Diamond moves for an order precluding introduction of evidence concerning the matters set forth in her Motion, or mention of same, as detailed below. Trial judges are authorized to rule on motions in limine "pursuant to the district court's inherent authority to manage the course of trials," and have broad discretion when ruling on such motions. *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1104-05 (11th Cir. 2005). The purpose of a motion in limine is "to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence, which may irretrievably affect the fairness of the trial." *Hodgetts v. City of Venice*, No. 8:11-cv-00144-EAK-EAJ, 2011 WL 2192810, at *1 (M.D. Fla. June 6, 2011) (citation omitted).

"'Relevant evidence' is 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *United States v. Carson*, 447 F. App'x 925, 928 (11th Cir. 2011) (citing Fed. R. Evid. 401). Irrelevant evidence is inadmissible under Federal Rule of Evidence 402. Fed. R. Evid. 402; *Carson*, 447 F. App'x at 928. Moreover, even relevant evidence under Rule 403 "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay,

waste of time, or needless presentation of cumulative evidence." *Lane v. McKeithen*, 423 F. App'x 903, 905 (11th Cir. 2011) (citing Fed. R. Evid. 403). "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly though not necessarily, an emotional one." *Old Chief v. United States*, 519 U.S. 172, 180 (1997) (quoting Fed. R. Evid. 403 advisory committee's note to 1972 proposed rules). The major function of Rule 403 is to "exclud[e] matter[s] of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect." *United States v. Cross*, 928 F.2d 1030, 1048 (11th Cir. 1991) (quoting *United States v. Sawyer*, 799 F.2d 1494, 1506 (11th Cir. 1986)).

Rule 404 "governs the general use of character evidence to circumstantially prove a fact." *Bailey v. Final Touch Acrylic Spray Decks, Inc.*, No. 06-cv-1578-Orl-19JGG, 2008 WL 351694, at *1 (M.D. Fla. Feb. 7, 2008). Rule 404(a) provides that evidence of a person's character is inadmissible as propensity evidence. *See* Fed. R. Evid. 404(a)(1) ("[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."). Likewise, Rule 404(b) precludes the admission of evidence of purported crimes or prior bad acts except in limited circumstances. Fed. R. Evid. 404(b).

Rule 412 provides that "evidence that a victim engaged in other sexual behavior or to show that the victim has a sexual predisposition is generally inadmissible in a civil case involving sexual misconduct" unless "the victim has put his or her reputation in controversy and the probative value of the evidence outweighs its prejudicial nature." *United States v. Bahr*, No. 2:08-CV-573-MEF, 2011 WL 2516702, at *2 (M.D. Ala. June 23, 2011); *see also* Fed. R. Evid. 412.

Rule 608(b) largely precludes the admission of extrinsic evidence to attack a witness's character for truthfulness or to prove specific instance of a witness's conduct. Fed. R. Evid. 608(b).

Finally, Rule 609(a) provides that "a witness's character for truthfulness" may be impeached on cross-examination by introduction of the *fact* of a prior conviction punishable by more than a year's imprisonment, but only "subject to Rule 403['s]" general prohibition on evidence that is more prejudicial than probative. Fed. R. Evid. 609(a)(1)(A).

A. All Evidence Relating to the Parties' Conduct After the Filing of the Amended Complaint Should Be Excluded

The two extant claims in this matter, a failure to protect claim and a denial of adequate medical care claim, are damages claims concerning the period beginning on October 29, 2019, when Ms. Diamond was placed in GDC custody, and ending on February 16, 2021, when the Amended Complaint was filed (ECF No. 36). Following the dismissal of her injunctive relief claims on mootness grounds after her August 1, 2022 release from custody (ECF No. 163), Ms. Diamond does not advance claims related to events taking place from the Amended Complaint filing to present. As such, the Parties' conduct following the filing of her February 16, 2021 Amended Complaint is not relevant to the resolution of her remaining damages claims and therefore should be treated as inadmissible. *See Fla. Found. Seed Producers, Inc. v. Ga. Farms Servs., LLC*, No. 1:10-cv-125 (WLS), 2013 WL 5348086, at *2 (M.D. Ga. Sept. 23, 2013) (citing Fed. R. Evid. 401) (holding that evidence is relevant if it "has any tendency to make a fact more or less probative than it would be without the evidence; and *the fact is of consequence in determining the action*." (emphasis added)); Fed. R. Civ. P. 15(b)(1) (presuming that evidence "not within the issues raised in the pleadings" is not admissible at trial *unless* the complaint has been amended). This admissibility rule applies reciprocally to Ms. Diamond and to Defendants' alleged post-Amended Complaint conduct because although some of the harms inflicted by

Defendants are ongoing, the incidents establishing Defendants' liability for past constitutional violations are not.[1]

B. Evidence Relating to Nine Specific Categories Should Be Excluded

Additionally, and in the alternative, the evidence in the following nine categories should be excluded. Overall, evidence in these categories poses an unacceptably high risk of persuading the jury to violate its oath and find against Ms. Diamond based on a belief that Ms. Diamond is an "unworthy" plaintiff rather than based on the law as explained by the Court and on the evidence directly relevant to the claims at issue in this lawsuit.

1. Consensual Sexual or Romantic Activity or Relationships, and Sexually Suggestive Content Allegedly Recovered from Any Cellular Device

Information concerning Ms. Diamond's intimate consensual relationships or her consensual sexual history, including any such content allegedly recovered from a cell phone, should be excluded from presentation to the jury. To begin with, any such evidence is inadmissible under Federal Rules of Evidence 401 and 402 insofar as it is irrelevant to the Eighth Amendment claims that are specifically at issue here—the failure of officials to protect Ms. Diamond from sexual abuse, and their failure to provide Ms. Diamond adequate healthcare during her incarceration. *See Harris v. Davis*, 874 F.2d 461, 464 (7th Cir. 1989) ("the presence of suggestive photographs was completely irrelevant" to the procedural due process claim related to prison discipline). In addition, Federal Rule of Evidence 412 prohibits introduction of "evidence that a victim engaged in other sexual behavior or to show that the victim has a sexual predisposition" unless "the victim has put his or her reputation in controversy and the probative value of the

[1] Ms. Diamond would only seek leave under Federal Rule of Civil Procedure 15(b) to amend in order to present evidence of post-Amended Complaint events to be considered at trial in the event this Motion is denied.

evidence outweighs its prejudicial nature." *Bahr*, 2011 WL 2516702, at *2 (citing Fed. R. Evid. 412).

Defendants may want to interrogate Ms. Diamond's sexuality and sexual conduct. But the fact that she endured sexual abuse and assaults at the hands of other incarcerated individuals does not make evidence bearing on her *consensual* sexual conduct relevant—especially when it is evidence used to impugn Ms. Diamond's character, imply misconduct, or confuse the issues at trial. In this context, the "Rape Shield" law of Federal Rule of Evidence 412 creates an even higher bar to admissibility. The rule "aims to safeguard the alleged victim against . . . sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process." Fed. R. Evid. 412, advisory committee's note to 1994 amendments. In the instant case, Ms. Diamond is the victim of repeated sexual assaults and deserves the full protection of this shield.

Rule 412 states that neither "evidence offered to prove that a victim engaged in other sexual behavior" nor "evidence offered to prove a victim's sexual predisposition" is "admissible in a civil or criminal proceeding involving alleged sexual misconduct." Fed. R. Evid. 412(a). Instead, such evidence is only admissible "if its probative value *substantially* outweighs the danger of harm to any victim and of unfair prejudice to any party." Fed. R. Evid. 412(b)(2) (emphasis added). This standard is not met here. Because "[t]he admission of such evidence would . . . confuse[] the jury and harass[]" the victim—Ms. Diamond—and would be irrelevant to the actual issues at hand, it should be excluded. *Cf. United States v. Culver*, 598 F.3d 740, 749-50 (11th Cir. 2010) (so holding under Rule 412 in a criminal proceeding).

To the extent that Defendants attempt to use earlier or subsequent consensual behavior to show that the sexual abuse Ms. Diamond alleges did not occur or might have been consensual,

such use would be barred by both Rule 412 and Rule 404, which provide for exclusion of character evidence as proof of propensity. *See, e.g., United States v. Lewis*, 762 F. App'x 786, 800 (11th Cir.), *vacated on other grounds*, 140 S. Ct. 613 (2019) (excluding evidence of prostitution activity by victim that defendant "assert[ed] was relevant to show that their relationship was consensual," holding "danger of unfair prejudice substantially outweighed any probative value that the evidence or discussion of the incident may have had"). Rule 412 forbids evidence of both prior and subsequent sexual behavior. *See United States v. Rivera*, No. 13-CR-149 (KAM), 2015 WL 1886967, at *5 (E.D.N.Y. Apr. 24, 2015) (sexual behavior of the victims either "before or after" defendants' arrest was irrelevant to the jury's determination of whether the defendants committed the charged sexual misconduct); *United States v. Brown*, No. 3-CR-17-396, 2019 WL 1227427, at *1 (M.D. Pa. Mar. 15, 2019) (in sex-trafficking case, court precluded evidence of other acts of prostitution by government witnesses as "prior or subsequent" or "other" sexual behavior). As amended, Rule 412 excludes even "evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder." Fed. R. Evid. 412, advisory committee's note to 1994 amendments. As such, sexually suggestive evidence should also be treated as inadmissible under the rule. Further, the evidence is inadmissible to the extent it constitutes extrinsic evidence used merely to attack a witness's character for truthfulness. Fed. R. Evid. 608(b).

2. Attempts to Describe Ms. Diamond as Male or Using Male Pronouns to Describe Her

Ms. Diamond seeks to prohibit arguments or questions referring to herself by her sex assigned at birth (male); by her former pronouns ("he," "him"); as a "biological male," "biological man," or "genetic man"; or referencing her "biological sex" as male. While her transgender status will necessarily be before the jury, requiring an explanation that Ms. Diamond was assigned the

sex of male at birth based on her external genitalia, any further references would create the appearance that the trial was in part a contest over acceptance of the legitimacy of Ms. Diamond's transgender status, and would be confusing, misleading, and prejudicial under Rule 403. The Eleventh Circuit has recognized that transgender individuals are often the subject of intense discrimination, *see Glenn v. Brumby*, 663 F.3d 1312, 1315-18 (11th Cir. 2011) (collecting cases), making clear the magnitude of the risk of evoking jury prejudice on this issue. *Id*. at 1316 ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes.").

3. Prior Criminal Convictions of Ms. Diamond and Other Incarcerated Witnesses

This Court should prohibit Defendants from making any reference to prior criminal convictions of Ms. Diamond and other incarcerated witnesses, including introducing the facts or evidence surrounding those underlying convictions.

Because the law is clear that the Eighth Amendment applies to incarcerated people regardless of their criminal history, Ms. Diamond's prior convictions are irrelevant to the Eighth Amendment claims at issue here. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotations omitted) ("Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society."). Such evidence is also improper under Rule 403. "Prior convictions . . . are highly prejudicial," *United States v. Schmitt*, 770 F.3d 524, 536 (7th Cir. 2014), and this Circuit has vacated convictions for serious crimes when the trial court improperly admitted evidence of a prior conviction, even when the crime of conviction bore more than a passing resemblance to the issues before the trial court. *See United States v. Young*, 574 F. App'x 896, 905 (11th Cir. 2014) (vacating conviction and 327-month sentence and finding that, even in trial for possession with intent to distribute cocaine, past conviction for dealing crack had

"almost no probative value"). The same considerations apply to Ms. Diamond and incarcerated witnesses.

"[A] witness's character for truthfulness" may be impeached on cross-examination by introduction of the *fact* of a prior conviction punishable by more than a year's imprisonment, but only "subject to Rule 403['s]" general prohibition on evidence that is more prejudicial than probative. Fed. R. Evid. 609(a)(1)(A). This Court has recently taken a very cautious approach to admissibility of the underlying facts of past convictions in similar circumstances. *See Robbins v. Robertson*, No. 7:15-CV-00124 (WLS), 2022 WL 2987890, at *4 (M.D. Ga. July 28, 2022) ("Whether Plaintiff was convicted of a crime of violence, and the facts surrounding that conviction, have little bearing on whether Defendants violated Plaintiff's First and Eighth Amendment rights while incarcerated."). Moreover, such caution regarding the details of a conviction is warranted since the fact of a prior conviction is plain in the context of a prison case. *Id.* at *3-4.

4. Alleged Recreational Drug Use and Alleged Drug Distribution

Ms. Diamond seeks to prohibit the introduction of any evidence relating to her alleged recreational drug use and alleged drug distribution, whether inside or outside of prison. Any such evidence would be inadmissible under Rules 402 and 403 because it is irrelevant to any issue in this case, yet highly prejudicial insofar as it would tarnish the jury's view of Ms. Diamond and prejudice the jury against her while confusing case issues. *Cf. Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 602 (9th Cir. 2016) ("no jury could properly compartmentalize" evidence of victim's drug use, which was "minimally probative of damages, and was highly likely to influence improperly the jury's evaluation of" official conduct); *Woodard v. Ford Motor Co.*, No. 1:06-cv-2191-TWT, 2008 WL 8791705, at *1 (N.D. Ga. June 27, 2008) ("Any marginal relevance of [decedent's] drug use the night before the accident is outweighed by the danger of unfair prejudice

and confusion of the issues."); *Bozeman v. Orum*, No. 2:00-cv-1368-UWC-SRW, 2006 WL 5086619, at *1 (M.D. Ala. Dec. 7, 2006) (granting motion in limine to exclude "any evidence relating to drugs or drug use on the part of [decedent] or inmate witnesses").

Further, such evidence is precisely the kind of improper character evidence and extrinsic evidence of bad acts precluded by Rules 404(a), 404(b), and 608(b). *See, e.g.*, *United States v. Sellers*, 906 F.2d 597, 602 (11th Cir. 1990) (noting "extreme potential for unfair prejudice flowing from evidence of drug use" irrelevant to specific offenses at issue, or ability to perceive events and testify lucidly); *United States v. Rubin*, 733 F.2d 837, 841-42 (11th Cir. 1984) (trial court properly restricted questions regarding two witnesses' drug use); *United States v. McDonald*, 905 F.2d 871, 875 (5th Cir. 1990) (citing *United States v. Williams*, 822 F.2d 512, 516-17 (5th Cir. 1987)) ("drug use is not probative of truthfulness" and is inadmissible as character evidence for unrelated offenses); *United States v. Corsmeier*, 617 F.3d 417, 420-22 (6th Cir. 2010) (remanding for new trial due to prejudicial admission of cocaine use as evidence of motive and propensity to break rules under Rule 404(b)).

5. Disciplinary Reports During Incarceration

This court should exclude all references to disciplinary reports that Ms. Diamond received while incarcerated. At issue in this trial are state officials' failure to protect Ms. Diamond from sexual abuse and failure to provide her adequate medical care. Ms. Diamond's prison disciplinary history is not relevant to these claims, and as a general matter the reports will be more prejudicial than probative. The disciplinary reports fall into a number of general categories, as described below:

(a) Most of Ms. Diamond's disciplinary reports concern alleged conduct that postdates the Amended Complaint, and they should be excluded under Rules 402 and 403 for

that reason alone. *See Harris*, 874 F.2d at 464-65 (holding that references to disciplinary ticket issued to plaintiff for possessing contraband after the defendants' conduct plaintiff alleged violated the Eighth Amendment should have been excluded as having remote probative value that was substantially outweighed by its prejudicial effect).

(b) A few disciplinary reports relate to alleged drug possession and/or usage within the prison, and should be excluded under Rules 403, 404(a), 404(b), and 608(b) for the reasons set forth above in Section 4.

(c) A number of the reports involve violations that are so minor and routine within a prison context that they lack any relevance or probative value for any purposes related to the claims remaining at issue in the case under Rules 402 and 403.

(c) One of the disciplinary reports refers to sexual behavior and should be excluded under Rules 402, 403, 404, 412, and 608(b) for the reasons set forth in Section 1, above.

Even if some such evidence was determined to be relevant to the remaining Eighth Amendment claims, it should still be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. All those dangers are plainly present here. "Proof of prior accidents or occurrences are not easily admitted into evidence, since they can often result in unfair prejudice, consumption of time and distraction of the jury to collateral matters." *Uitts v. Gen. Motors Corp.*, 411 F. Supp. 1380, 1383 (E.D. Pa. 1974) (citation omitted), *aff'd*, 513 F.2d 626 (3d Cir. 1975). As explained in *Uitts*,

> Defendant, in order to minimize the prejudicial effect of [the evidence of other incidents], would have had to go through each one individually with the jury. The

> result would have been a mini-trial on each of the thirty-five reports offered by plaintiffs. This would lengthen the trial considerably and the minds of the jurors would be diverted from the claim of the plaintiffs. . . .

Id. Further, admitting evidence of this type carries the tremendous risk of misleading the jury, confusing the issues, and introducing unfair prejudice into these proceedings. The law is clear that the Eighth Amendment's protections are not limited to only incarcerated people without disciplinary records. *Farmer*, 511 U.S. at 833-34.

Even as character evidence under Rule 404, these disciplinary reports should be inadmissible. The party offering evidence under Rule 404(b) "bears the burden of showing that the proffered evidence is relevant to an issue other than character," *United States v. Youts*, 229 F.3d 1312, 1317 (10th Cir. 2000) (citing *United States v. Biswell*, 700 F.2d 1310, 1317 (10th Cir. 1983)); *see also Williams v. Asplundh Tree Expert Co.*, No. 3:05-cv-479-J-33MCR, 2006 WL 2868923, at *2 (M.D. Fla. Oct. 6, 2006), and "must 'articulate precisely the evidentiary hypothesis by which a fact of consequence may be inferred' from the other acts [sic] evidence." *Id*. (quoting *United States v. Kendall*, 766 F.2d 1426, 1436 (10th Cir. 1985)).

6. Ms. Diamond's Prior Settlement and Public Fundraising

This Court should exclude from evidence all information concerning the amount that Ms. Diamond received as settlement in her prior lawsuit against Georgia corrections officials, any information concerning a "GoFundMe" fundraiser administered by third parties to provide Ms. Diamond financial support, and any information or argument regarding how Ms. Diamond spent money obtained from either source.

Ms. Diamond's prior settlement amount, any fundraising done on her behalf, and how she spent any such funds are irrelevant to the resolution of any of the causes of action in this case. Further, such evidence is impermissible character evidence that is far more prejudicial than

probative as it unfairly serves to suggest venal motivations for Ms. Diamond's Complaint or that she is making opportunistic use of the civil legal system. Both implications would require the introduction of further irrelevant information by Ms. Diamond (regarding her need and use of the funds, and so forth) in order to dispel the misperception, effectively creating a mini-trial on inadmissible character evidence that is cumulative and serves to waste time. As such, evidence of these matters should be deemed inadmissible under Rules 402, 403, 404, and 608(b).

7. Ms. Diamond's Healthcare Expenditures Prior to Prison

The Court should also exclude from evidence information concerning the amount of money that Ms. Diamond spent on gender dysphoria healthcare prior to her GDC incarceration. It is well-settled that prison officials have a duty to provide medically necessary care to incarcerated people pursuant to the Eighth Amendment, and that such care is not dictated by the medical treatment (or lack thereof) that the individual received prior to prison. *See, e.g. Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Keohane v. Fla. Dep't of Corr. Sec'y*, 952 F.3d 1257, 1266-67 (11th Cir. 2020), *cert. denied sub nom. Keohane v. Inch*, 142 S. Ct. 81 (2021) (acknowledging that "freeze-frame" policies which seek to limit prison healthcare to treatment that an inmate received prior to prison are presumptively unconstitutional); Statement of Interest of the United States at 14-16, *Diamond v. Owens*, 131 F. Supp. 3d 1346 (M.D. Ga. 2015) (No. 5:15-cv-00050-MTT), ECF No. 29 (Treadwell, J.) (collecting related cases). The amount Ms. Diamond spent on medical and mental health treatment is even more irrelevant under this caselaw, as it does not relate to any "fact . . . of consequence" to this action. Fed. R. Evid. 401(b). It will merely serve to stoke confusion and unfair prejudice among jurors by suggesting, contrary to law, that prison healthcare should not be a taxpayer expenditure unless a plaintiff incurred similar costs in the outside world. Fed. R. Evid. 403 (authorizing the exclusion of evidence that risks "confusing the issues" or "misleading the jury.")

Accordingly, information concerning Ms. Diamond's healthcare expenditures should be excluded under Rules 401, 402 and 403 of the Federal Rules of Evidence.

8. Alleged Cell Phone Possession and Contents

Defendants have produced an enormous quantity of data[2] extracted from a cell phone alleged to have been used by Ms. Diamond during her incarceration. The data spans the time period from May 2021 to November 2021. As such, all of the data postdates the events pertinent to the February 16, 2021 Amended Complaint and, for that reason alone, the data should be excluded as irrelevant to the resolution of the claims remaining at issue in this case.

Moreover, as possession of a phone in prison is not simply a disciplinary violation but also a felony under Ga. Code Ann. § 42-5-18, the introduction of this data risks producing the same sort of prejudice as the introduction of evidence regarding prior crimes of conviction discussed in Section 3, above. Because the crime of possessing a cell phone bears no relation to the Eighth Amendment issues being adjudicated at trial, and because introduction of such evidence is "highly prejudicial," as noted in Section 3, above, reference to its irrelevant contents such as text messages should be excluded under Rules 402, 403, 404(a) and 404(b), 608, and 609 so as to avoid tainting the jury with the allegation that Ms. Diamond committed a felony offense while incarcerated when she has never been convicted of such conduct. *See Harris*, 874 F.2d at 464-65.

Even if *categorical* exclusion of the contents of the phone in question were not required by Rules 401, 402, 403, 608, and 609, Defendants should be precluded from asking Ms. Diamond whether she possessed a cell phone in violation of prison rules, or presenting evidence that Ms. Diamond's alleged cell phone possession was a violation of law pursuant to the admissibility rules

[2] More than 100,000 text and email messages were produced in discovery following Defendants' counsel's March 2022 revelation that information had been extracted from a cell phone allegedly found in Ms. Diamond's cell in November 2021.

laid out in Rules 402, 403, 404(a), 404(b), 608, and 609. These rules, taken together, serve an important gatekeeping function in the federal judiciary as they are designed to preclude witnesses from having their character assailed through extrinsic evidence, including alleged conduct that has not been previously adjudicated by a criminal tribunal. *Cf. Michelson v. United States*, 335 U.S. 469, 482 (1948) ("Arrest without more does not, in law any more than in reason, impeach the integrity or impair the credibility of a witness. It happens to the innocent as well as the guilty."); *United States v. Collins*, 472 F.2d 1017, 1019 (5th Cir. 1972);[3] *United States v. Maynard*, 476 F.2d 1170, 1174 (D.C. Cir. 1973) ("As a general rule it is improper to impeach a witness by showing an outstanding indictment without a final conviction. The reasons behind this rule are that the mere fact of arrest or indictment is still consistent with innocence; an indictment involves repetition of someone else's assertion of the witness' guilt; and it raises a confusing, collateral issue to the case at trial.").

In the event the Court concludes that categorical exclusion is not required, Ms. Diamond requests that the following specific categories of particularly prejudicial evidence from the phone be excluded from presentation to the jury:

> ***Sexually suggestive images:*** Sexually explicit or suggestive content such as videos, web searches, text messages, and images should be excluded under Rules 402, 403, 404, and 412 for the same reasons as the material relating to consensual sexual activity, set forth in Section 1, above: They are irrelevant to the claims remaining at issue in the case, potentially confusing to the jury, and potentially harassing to Ms. Diamond. As noted previously, the

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

federal "Rape Shield" provision, Rule 412, is designed to exclude even "evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder." Fed. R. Evid. 412, advisory committee's note to 1994 amendments.

Financial transactions: Information and argument about financial transactions and what Ms. Diamond purchased with the donations to her cause should be excluded for the same reasons as the material relating to public fundraising, described in Section 6, above: it is inadmissible because it is irrelevant to the claims remaining at issue in the case under Rule 402, potentially confusing and prejudicial to the jury under Rule 403, and improper character evidence under Rule 404.

Recreational drug use or sales: Messages suggesting that Ms. Diamond used or sold drugs should be excluded for the same reason as the material relating to recreational drug use, described in Section 4, above: They are irrelevant to the claims remaining at issue in the case under Rule 402, unduly prejudicial under Rule 403, and violative of Rule 404(b), 608, and 609 to the extent they concern alleged conduct for which Ms. Diamond has no prior criminal conviction.

Finally, to the extent that Defendants seek to introduce extrinsic evidence to suggest that Ms. Diamond engaged in witness tampering or otherwise manufactured evidence in the case at bar, Rules 403, 404, 608, and 609 all counsel against admission due to the undeniable severity and undue prejudice of any such allegations and the lack of any existing criminal conviction. To the extent the Defendants can articulate a good-faith basis to explain why such evidence is sufficiently probative to overcome its highly prejudicial nature, Ms. Diamond respectfully requests a pre-trial evidentiary hearing to challenge the implication that this evidence supports the inference that she

attempted to obstruct justice. Ms. Diamond avers that the Defendants will not be able to make a *prima facie* showing that this evidence is sufficient to support an inference of obstruction, and in exercising its gatekeeping function this Court should not allow the implication to be made to the jury.

9. Voluntary Dismissal of Certain Defendants and the Grant of Summary Judgment in Favor of Arneika Smith

This Court should prohibit Defendants from making reference to the voluntary dismissal of certain Defendants, and the September 7, 2022 grant of summary judgment in favor of one individual Defendant, GDCP Corrections Officer Arneika Smith, in a related case. Ms. Diamond's voluntary dismissals were not a resolution of Ms. Diamond's claims on the merits, but a responsible litigation decision based on evidence of culpability adduced in discovery and an attempt to winnow the matters set for trial. Likewise, in the case of Officer Smith, the Court did not reach the ultimate issue of whether Officer Smith's actions were unlawful under the Constitution, but it ruled instead that she was entitled to qualified immunity because the constitutional rights Ms. Diamond sought to vindicate were not yet clearly established based on the discrete sexual abuse alleged to have been engaged in by Officer Smith. *See Diamond v. Smith*, No. 5:21-cv-378 (MTT), 2022 WL 4097333, at *5-6 (M.D. Ga. Sept. 7, 2022); *see also id*. at *6 (citing *Hope v. Pelzer*, 536 U.S. 730 (2002)) ("while Smith's actions are despicable, they are not so egregiously unconstitutional as to fall within the purview of *Hope*. . . . Diamond's real argument seems to be a practical one—all correctional officers know without a doubt that sexual contact with inmates is a serious criminal offense and they don't need a court decision to spell that out for them. As a practical matter, that is likely true. But, for better or worse, that is not how qualified immunity analysis works.").

Voluntary dismissals and dismissals on the basis that the law prohibiting egregious sexual assault and forced nudity was not sufficiently well-established simply have no relevance to the particular Eighth Amendment issues set for trial. Indeed, merely explaining the concept of qualified immunity to jury members threatens to create unnecessary confusion and reversible error. *Id*. at *6 ("Whatever could be said about the judge-made doctrine of qualified immunity, no one would call it practical."); *see also Cottrell v. Caldwell*, 85 F.3d 1480, 1488 (11th Cir. 1996). On grounds of irrelevance and prejudice to Ms. Diamond, all references to Ms. Diamond's voluntary dismissal of certain Defendants and this Court's dismissal of claims against Arneika Smith should be precluded.

CONCLUSION

For the foregoing reasons, this Court should exclude reference at trial to the nine categories of evidence described above and exclude reference to evidence of conduct on the part of any party that postdates the filing of Ms. Diamond's February 16, 2021 Amended Complaint.

This 16th day of December, 2022.

Respectfully submitted,

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