No._____

In the Supreme Court of the United States

BENJAMIN SCHWARZ,

Petitioner,

v.

ERWIN MEINBERG, *et al.,*

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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Counsel for Petitioner, Benjamin Schwarz

August 2019

No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

BENJAMIN SCHWARZ PETITIONER
(Your Name)

VS.

ERWIN MEINBERG — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

C.D. CA

9th Circuit, U.S. Sup. Ct.

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____

_____, or

☐ a copy of the order of appointment is appended.

_____
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, BENJAMIN SCHWARZ, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse 1/	You	Spouse 1/
Employment	$ 2000	$	$ 2000	$
Self-employment	$ 0	$	$ 0	$
Income from real property (such as rental income)	$ 0	$	$ 0	$
Interest and dividends	$ 0	$	$ 0	$
Gifts	$ 0	$	$ 0	$
Alimony	$ 0	$	$ 0	$
Child Support	$ 0	$	$ 0	$
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$	$ 0	$
Disability (such as social security, insurance payments)	$ 0	$	$ 0	$
Unemployment payments	$ 0	$	$ 0	$
Public-assistance (such as welfare)	$ 0	$	$ 0	$
Other (specify): _____	$ 0	$	$ 0	$
Total monthly income:	$ 2000	$	$ 2000	$

1/ There is no spouse.

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Panel plus	1761 Fandosy St	Jan 2017 - current	$ 2,000
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
There is no spouse			$
			$
			$

4. How much cash do you ~~and your spouse~~ have? $ 11
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
chequing	$ 500	$
Saving	$ 12	$
	$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value _____

☐ Other real estate
Value _____

☒ Motor Vehicle #1
Year, make & model 2016 F150
Value - 15,000

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	$ Ø	$ Ø
	$	$
	$	$

7. State the persons who rely on you ~~or your spouse~~ for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
H.L. (age 10)	daughter	10

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☒ No Is property insurance included? ☐ Yes ☒ No	$ 400	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 400	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 100	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 100	$
Other: _____	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ 0	$
Installment payments		
Motor Vehicle	$ 500	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: _____	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): _____	$ 0	$
Total monthly expenses:	$ 2000	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? 0

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? 0

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I dont make enough money to keep pay to have my case reinstated after it's wrongly dismissed

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: _____ 08/20, 2019

Ben Schoop

(Signature)

QUESTIONS PRESENTED

1. Is there a federal right, under the Eighth Amendment to the U.S. Constitution and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal prison inmate to sue prison officers whom he alleges have subjected him to grossly unsanitary conditions of confinement, in light of the Court's decision in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017), because such a claim does not present a new *Bivens* context and is not different in any meaningful way from previous *Bivens* cases decided by the Court, *viz*., *Carlson v. Green*, 446 U.S. 14, 19 (1980)?

2. Is there a federal right, under the U.S. Constitution and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal prison inmate to sue prison officers whom he alleges have denied him consideration for a lower security classification -- and hence eligibility for prison camp placement -- based solely on his Canadian citizenship, thus a national origin discrimination claim, in light of the Court's decision in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017), because such a claim does not present a new *Bivens* context and is not different in any meaningful way from previous *Bivens* cases decided by the Court, *viz.*, *Davis v. Passman*, 442 U.S. 228, 248-49 (1970); *Univ. of Texas v. Nassar*, 570 U.S. 338 (2013); *Graham v. Richardson*, 403 U.S. 365, 372 (1971)?

3. Is there a federal right, under the First Amendment and the Fifth Amendment's due process clause, and *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), for a federal prison inmate to sue prison officers whom he alleges refused to follow the Federal Bureau of Prison's own, published administrative grievance appeal process, when their refusal results in the inmate ultimately being locked out of court, for failure to exhaust, in light of

the Court's decision in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017), *viz*., *Christopher v. Harbury*, 536 U.S. 403, 413-15, 415 n. 12 (2002)?

PARTIES TO THE PROCEEDINGS

Petitioner, former Federal Bureau of Prison ("BOP") inmate Benjamin Schwarz, who at all times was a Canadian citizen and resident, was the plaintiff in two actions below in the district court and the appellant in the two, consolidated appeals in the court below. Respondents were BOP officials and were defendants in the district court and appellees in the court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Benjamin Schwarz ("petitioner" or "Schwarz"), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, in this case.

OPINION BELOW

The memorandum disposition of the Ninth Circuit is reported at *Schwarz v. Meinberg*, 761 Fed.Appx. 732 (9th Cir. 2019), and is set forth the Appendix at 3-7. The two minute orders of the District Court for the Central District of California are reported at 2017 WL 416421 (C.D.Cal. 2017), and 2017 WL 4581887 (C.D.Cal. 2017), and are set forth in the Appendix at a 8-18 and 19-24, respectively. The memorandum disposition of the prior, 2014 appeal, is set forth in the Appendix at 25-26.

JURISDICTION

The judgment of the Ninth Circuit was rendered on February 13, 2019, App. at 3. Petitioner timely filed a petition for rehearing with a suggestion for rehearing en banc, which was denied on April 29, 2017. App. at 1-2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This timely petition for certiorari is filed within 90 days of the April 29, 2019 denial of rehearing en banc. App. at 1-2.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment V of the Constitution provides that "nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

Amendment VIII of the Constitution provides that "nor [shall] cruel and unusual punishments be inflicted."

For 40 years, federal courts have interpreted these amendments to provide remedies for a prisoner's constitutional right not to be subjected to unsanitary prison conditions, a person's right not to be subjected to discrimination based on national origin, and a person's right not to be deprived of access to the federal courts, each of which is a basis for one of petitioner's *Bivens* claims.

Now, unless this Court grants certiorari and affirmative answers the three questions presented, that (1) there is a *Bivens* right not to be subjected to unsanitary conditions of confinement, (2) there is a *Bivens* right not to suffer discrimination based on national origin, and (3) there is a *Bivens* right not to be denied access to the federal courts, then these rights will be dead letters, a law that has not been repealed but is ineffectual or defunct in practice. This must not happen.

INTRODUCTION

In in *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017), the Court ruled against extending private, implied rights of action under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), to rights that "present a new *Bivens* context." *Id*. at 1859. In order for a *Bivens* claim to be barred under *Abbasi*, it needs to "differ in a meaningful way" from previous *Bivens* cases. *Ibid*.[1]

[1] The Court's hesitance in *Abbasi* was against extending implied rights of action and creating new rights, not against continuing to enforce long-established rights of action. *Abbasi* mandates caution and disfavor only when courts would extend *Bivens* into a new context, and a case presents a new context only whenever it is "different in a meaningful way from previous *Bivens* cases decided by the Court. *Abbasi*, *passim.*

Here, because none of petitioner's three claims -- under the Eighth Amendment, for unsanitary prison cell conditions, under the Fifth Amendment, for national origin discrimination, and under the Fifth Amendment, for denial of due process and access to the federal courts -- "differs in a meaningful way" from previous *Bivens* actions, therefore the court below erred when it refused to recognize petitioner's three claims.

This Court described its term of art, "different in a meaningful way" as follows:

> The proper test for determining whether a case presents a new *Bivens* context is as follows. If the case is *different in a meaningful* way from previous *Bivens* cases decided by this Court, then the context is new. Without endeavoring to create an exhaustive list of differences that are meaningful enough to make a given context a new one, some examples might prove instructive. A case might differ in a meaningful way because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Abbasi, 137 S.Ct. at 1857-60.

Because none of the indicia/descriptions of "different in a meaningful way" as between prior *Bivens* actions and any of petitioner's three *Bivens* claims are applicable, therefore, petitioner's claims properly are cognizable under *Bivens*, because they "do not provide a new *Bivens* context." *Ibid*. None of the illustrative, concrete examples of ways in which an action could

be "different in a meaningful way, as set forth in *Abbasi* here are applicable: *viz*., the rank of the officers involved is not a factor; the constitutional rights at issue are the same as in prior *Bivens* actions; the generality or specificity of the official action is not a factor because the claims are neither more general nor more specific than in prior *Bivens* actions; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted is not in issue, since the judicial guidance as to the law has been in place for nearly 40 years -- the relevant law has been clearly established; the statutory or other legal mandate under which the officer was operating is not in issue and has been in place for nearly 40 years; the risk of disruptive intrusion by the Judiciary into the functioning of other branches is not in issue since the actions are only for damages remedies and do not seek any equitable relief; and, there is no presence of potential special factors that previous *Bivens* cases did not consider, since the cases are based on basic almost formulaic rights.

The Court of Appeals, therefore, erroneously held that petitioner's three *Bivens* claims that are barred by *Abbasi* and dismissed them; but it should have held that petitioner's claims were not new *Bivens* contexts. Had it done so, it would have recognized that petitioner's damages claims should have proceeded towards disposition on their merits and appropriate remedies.

STATEMENT OF THE CASE

A. Federal Law

Bivens provides a damages remedy against federal officers who violate federal constitutional rights.

Petitioner was subjected to filthy, inhumane conditions of his confinement, in violation of the Eighth Amendment and has a *Bivens* remedy because that remedy previously existed.

"A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (citing *Helling v. McKinney*, 509 U.S. 25 (1993); *Disability Rights Montana v. Batista*, ___F.3d___, 2019 WL 3242038, *5 (9th Cir. Jul. 19, 2019) (same); *see also Parsons v. Ryan*, 754 F.3d 657, 677 (9th Cir. 2014); *Graves v. Arpaio*, 623 F.3d1043, 1049 (9th Cir. 2010); *Wallis v. Baldwin*, 70 F.3d1074, 1076 (9th Cir. 1995).

The BOP's "Administrative Remedy Program," 28 C.F.R. Part 542, §§ 542.10, *et seq*., App. at 27-30, provides both procedural and substantive due process rights to a prisoner, to file grievances, to have grievances timely adjudicated, and that when there has not been a timely response to a grievance the right to proceed to the next administrative remedy level. Once a prisoner's "administrative remedies as are available are exhausted," 42 U.S.C. § 1997e(a), the prisoner then has a right to bring his claim to federal court, under *Bivens*. Prisoners have a substantive right for the grievances they file not to be blocked by prison officials and not to have their *Bivens* actions dismissed when prison officials set up failure to exhaust as an affirmative defense, when those same officials have blocked and rendered

impossible the adjudications at all levels of grievances, which is precisely what respondents here did.

On its face and in its texts, the BOP's Administrative Remedy Program creates an appearance that it is simple to navigate and that its requirements easily are satisfied, as this Court observed in *Woodford v. Ngo*, 548 U.S. 81, 103 (2006), noting "the informality and relative simplicity of prison grievance systems." In the real world of the federal BOP, such is not the case. *See infra*. Grievances are not used to adjudicate or ameliorate problems but instead and mucked with a blocked so that failure to exhaust can be used as a affirmative defense to block *Bivens* claims.

PROCEEDINGS BELOW

Petitioner, Benjamin Schwarz is a Canadian national and was a prisoner at the BOP's prison facility in Los Angeles, California, the Metropolitan Detention Center ("MDC-LA"), from about March 20, 2009 to October 20, 2010, for 19 months.

Petitioner for over a year and a half was confined in a cell in which the toilet backed-up, spewing the urine and feces from the adjacent cell, every time the toilet was flushed in the adjacent cell, and thus was subjected to extremely unsanitary conditions. Petitioner's cell was a literal sewer, a broken sewer that was reported to the warden, respondent Meinberg (and others), but about which Meinberg refused to take any corrective action.

As a prisoner who was serving a less-than-10-year sentence, petitioner was eligible to be designed at the lowest security level and, based thereon, to be considered for placement in a prison camp, but he was advised in writing

that he had been denied eligibility for consideration for prison camp placement solely because he was a Canadian citizen.

Petitioner's access to the federal district court was blocked by respondents' denial of petitioner's access to the BOP administrative grievance process, the court below in its prior disposition stated that "[t]he district court erred in dismissing Schwarz's equal protection claim as insufficiently pleaded. Schwarz has plausibly pleaded factual matter sufficient to claim that the policy of the Bureau of Prisons discriminated against him as a non-citizen." *Schwarz v. Meinberg*, 637 Fed.Appx. 374, 375 (9th Cir. 2016).

All of petitioner's *Bivens* claims were dismissed by the district court on grounds other than the grounds for dismissal stated by the court below. In the time between those district court dismissals and the time at which the second appeal was rendered, on June 19, 2017, this Court decided *Abbasi*, the court below did not consider any of the district court's grounds for dismissal, and instead upheld the dismissals based on *Abbasi*, holding, under *Abbasi*, that all of petitioner's *Bivens* claims were barred, because they presented "new *Bivens* contexts." *Abbasi*, 137 S.Ct. at 1857.

Thus, the only legal issues now presented to this Court are whether, as to each of petitioner's three claims, the claim is or is not a proper *Bivens* claim, based on other *Bivens* actions that had been decided before *Abbasi* was decided.

The district court dismissed petitioner's claims in the two minute orders that are set forth in the Appendix at 6a-23a, respectively, the appeals court's second unpublished memorandum is set forth in the Appendix at 1a-

5a, and its first unpublished memorandum is set forth in the Appendix at 24a-25a.

REASONS FOR GRANTING THE PETITION

PETITIONER'S UNSANITARY CELL CLAIM WAS NOT A NEW *BIVENS* CLAIM OR A NEW *BIVENS* CONTEXT.

In *Brown v. Plata*, 563 U.S. 493 (2011), the Court held:

> [T]he law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. Respect for that dignity animates the Eighth Amendment prohibition against cruel and unusual punishment. "'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.' " *Atkins v. Virginia,* 536 U.S. 304, 311, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (quoting *Trop v. Dulles,* 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion)).
>
> A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.
>
> If government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation. See *Hutto v. Finney*, 437 U.S. 678, 687 . . . (1978). . . . Courts nevertheless must not shrink from their obligation to "enforce the constitutional rights of all 'persons,' including prisoners." *Cruz v. Beto,* 405 U.S. 319, 321, 92 S.Ct. 1079, 31 L.Ed.2d 263 (1972) *(per curiam).*

Id. at 510-11.

Brown puts on notice all prison authorities that they may not place prisoners in urine- and feces-filled cells, and this is not a new *Bivens* context because it is not different in any meaningful way from prior Eighth Amendment-based *Bivens* claims. Thus, *Abbasi* does not bar this claim.

In the fundamental, controlling case on this issue, the Court held the law to be that in Eighth Amendment cases (and expanded the *Bivens* right from the Fourth Amendment and due process issues, *see Davis v. Passman*, to the Eighth Amendment), in *Carlson v. Green*, 446 U.S. 14, 18 (1980), that "law . . . [cannot be] applied . . . [to] 'subvert' 'the policy of allowing complete vindication of constitutional rights . . . ." It explained its ruling as follows:

> *Bivens* established that the victims of a constitutional violation by a federal agent have a right to recover *damages* against the official in federal court despite the absence of any statute conferring such a right. Such a cause of action may be defeated in a particular case, however, in two situations. The first is when defendants demonstrate "special factors counselling [*sic*] hesitation in the absence of affirmative action by Congress" 403 U.S., at 396, 91 S.Ct., at 2004; *Davis v. Passman*, 442 U.S. 228, 245, 99 S.Ct. 2264, 2277, 60 L.Ed.2d 846 (1979). The second is when defendants show that Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective. *Bivens, supra*, at 397, 91 S.Ct., at 2005; *Davis v. Passman, supra*, at 245–247, 99 S.Ct., at 2277–2278.
>
> Neither situation obtains in this case. First, the case involves no special factors counselling [*sic*] hesitation in the absence of affirmative action by Congress.
>
> [W]e have here no explicit congressional declaration that persons injured by federal officers' violations of the Eighth Amendment may not recover money damages from the agents but must be remitted to another remedy, equally effective in the view of Congress.

Id. at 18-19 (first emphasis added, second emphasis in original). Petitioner clearly has an Eighth Amendment, *Bivens* remedy. *Bivens* since 1980, via *Carlson*, has provided for the Eighth Amendment right on which petitioner

bases his unsanitary conditions of confinement claim, and it also provides his remedy -- damages.

The court below has recognized that right over and over, and almost always in unpublished dispositions since 1985, when it first recognized the Eighth Amendment remedy as to unsanitary conditions of confinement, in *Hoptowit v. Spellman*, 753 F.2d 779, 783 (9th Cir. 1985). "Plumbing [as here] at the penitentiary is in such disrepair as to deprive inmates of basic elements of hygiene and seriously threaten their physical and mental well-being. Such conditions amount to cruel and unusual punishment under the Eighth Amendment. . . . [U]nsanitary conditions such as standing water, *flooded toilets* [as here] . . . is an unnecessary and wanton infliction of pain proscribed by the Eighth Amendment." *See Anderson v. County of Kern*, 45 F.3d 1310, 1314 (9th Cir. 1995) (emphasis added; "subjection of a prisoner to lack of sanitation that is severe or prolonged [here, for 19 months, notwithstanding that complaints regularly and repeatedly were made to prison officials] can constitute an infliction of pain within the meaning of the Eighth Amendment." (citations omitted)); *Arellano v. Ojeda*, 660 Fed.Appx. 552, 552-53 (9th Cir. 2016) (same, quoting *Anderson*); *Sawyer v. Cole*, 563 Fed.Appx. 589, 590 (9th Cir. 2014) ("Eighth Amendment violations arising from unsanitary conditions of confinement . . . [caused by] exposing [plaintiff] to unsanitary conditions in his cell"); *Mizzoni v. Brooks*, 548 Fed.Appx. 468 (9th Cir. 2013) (recognizing right not to be subjected to "deliberate indifference . . . related to unsanitary conditions in [plaintiff's] cell"); *Meneweather v. Powell*, 417 Fed.Appx. 656 (9th Cir. 2011) (recognizing "Eighth Amendment violations arising from unsanitary

conditions of confinement . . . [when] it would have been clear to a reasonable correctional officers in defendants' positions that their failure to address the unsanitary conditions of [plaintiff's] cell were unlawful."); *Dean v. Arpaio*, 382 Fed.Appx. 585 (9th Cir. 2010) (recognizing claim of "unsanitary conditions at the jail in violation of the Eighth Amendment."); *Whittington v. King County Dep't of Corrections*, 308 Fed.Appx. 218 (9th Cir. 2008) (recognizing claim of "unsanitary conditions in jail"); *Lafaele v. Largent*, 255 Fed.Appx. 245 (9th Cir. 2007) (recognizing claim for "unsanitary housing conditions"); *Apollo v. County of Sacramento*, 234 Fed.Appx. 565 (9th Cir. 2007) (recognizing claim for "unsanitary conditions"). Petitioner is unaware of any published disposition by the court below after 1995 on the issue of unsanitary cell conditions, and surmises that the reason for that is that, post-1995, the law was so clearly established that all of the post-1995 dispositions were by unpublished memoranda because they set no precedent.

Of course, it is the right, and not the form of the remedy that sets the rule and governs, and since 42 U.S.C. § 1983 and *Bivens* are construed in the same manner, *Ward v. Caulk*, 650 F.2d 1144 (9th Cir. 1981) (discussing the right under *Carlson*, at 1147), the existence of the right under § 1983 means that the same right and remedy both exist under *Bivens*.

The court below held that "[t]he Court stressed that allowing *Bivens* suits against federal officials serves the purpose of subjecting them [the federal officials] to the same liability state officers face under § 1983. . . . [Section] 1983 serves the same purpose for state officials as do *Bivens* suits for federal officials." *Id*. at 1148 (citing *Carlson*, 446 U.S. at 22). *See also*

Butz v. Economou, 438 U.S. 478, 504 (1978) (suggesting that the "constitutional design" would be stood on its head if federal officials did not face *at least the same liability* as state officials guilty of the same constitutional transgressions); *Van Strum v. Lawn*, 940 F.2d 406, 409 (9th Cir. 1991) ("Actions under § 1983 and those under *Bivens* are identical save for the replacement of a state actor under § 1983 by a federal actor under *Bivens*."). Thus, the § 1983 and *Bivens* rights and remedies are coextensive as to content and availability, and therefore under *Abbasi* petitioner's Eighth Amendment claim does not present a new *Bivens* action.

In America, we respect toe sanctity of life, including the lives of those persons confined in prisons, *Walsh v. Mellas,* 837 F.2d 789, 798 (7th Cir. 1988), and the standards of decency in modern society do not permit the imposition of needless harm on those prisoners. *Jordan v. Gardner,* 986 F.2d 1521 (9th Cir. 1993). Because of these principles, the Eighth Amendment has been held to impose a duty on prison officials to provide for humane conditions of confinement and to take reasonable steps to guarantee the proper living conditions of prisoners. *Osolinski v. Kane,* 92 F.3d 934, 936-37 (9th Cir. 1996).

A claim of deprivation of the minimal civilized measures of life's necessities – here, sanitation – states a conditions of confinement claim under the Eighth Amendment. *Frost v. Agnos,* 152 F.3d 1124, 1130 (9th Cir. 1998) (quoting *Hudson v. McMillian,* 503 U.S. 1, 9 (1992)).

The Eighth Amendment's ban on cruel and unusual punishments prohibits conditions of confinement that pose unreasonable threats to a

prisoner's health, *McKinney v. Anderson,* 924 F.2d 1500, 1507 (9th Cir. 1991), such as being forced to live in an actual cesspool.

With these long-standing and black-letter principles in mind, it is clear that petitioner's allegations with respect to unsanitary conditions, his confinement in a cell with a toilet backed up with feces and urine for 19 months, *see supra*, clearly and unquestionably state an Eighth Amendment claim. Respondents had an Eighth Amendment, well-established constitutional duty to protect petitioner from harm and serious risks of harm, and their failures to do so state an Eighth Amendment claim. *Farmer,* 511 U.S. at 833; *Helling,* 509 U.S. at 33-35.

The Court has held that corrections officials must provide "humane conditions" of confinement. *Farmer,* 511 U.S. at 832-34. This right extends to preventing "unreasonable risk of serious damage to [a prisoner's] future health[.]" *Helling,* 509 U.S. 32-34. This does not present a new *Bivens* context.

The Court stated in *Wilson v. Seiter*, 501 U.S. 294, 298 (1991), that:

> those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation." *Id.* (quoting *Rhodes v. Chapman,* 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)). *Prison officials have a duty to ensure that prisoners are provided adequate* shelter, food, clothing, *sanitation*, medical care, and personal safety. *See Farmer v. Brennan,* 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994); *Keenan v. Hall,* 83 F.3d 1083, 1089 (9th Cir. 1996); *Hoptowit v. Ray,* 682 F.2d 1237, 1246 (9th Cir. 1982).

(Emphasis added.) *See Johnson v. Lewis,* 217 F.3d 726, 731-32 (9th Cir. 2000) (same). This also shows that petitioner's claim is not in a new *Bivens* context, nor is it a new *Bivens* claim.

As to deprivation of the necessities of life, "[t]he more basic the need, the shorter the time it can be withheld." *Hoptowit v. Ray,,* 682 F.2d 1237, 1259 (9th Cir. 1982), *abrogated on other grounds by Sandin v. Connor,* 515 U.S. 472 (1995); *see also Anderson v. County of Kern,* 45 F.3d 1310, 1314, *as amended,* 75 F.3d 448 (9th Cir. 1995) ("[A] lack of sanitation that is severe or prolonged can constitute an infliction of pain within the meaning of the Eighth Amendment."). Here, it was for over a year: March 20, 2009 to October 20, 2010, in fact 19 months. Living in a veritable sewer for 19 months is 19-months too long, and is "prolonged."

Respondents had a constitutional duty to ensure that conditions in the MDC-LA constituted adequate shelter and to maintain sufficient sanitation for prisoners, *Johnson,* 217 F.3d at 731-32. Indeed, even "modest deprivations can also form the objective basis of a violation, but only if such deprivations are lengthy or ongoing," *id.* at 732, as here they were. *See Keenan v. Hall,,* 83 F.3d 1083, 1090–91 (9th Cir. 1996) (same). Because it is alleged that respondents failed to their constitutional duty, therefore an unsanitary-conditions-of-confinement claim was stated under the Eighth Amendment, notwithstanding *Abbasi*, since the following *Bivens* actions in this Court each, and all together, established petitioner's right to sue: *Cruz v. Beto* (1972), *Hutto v. Finney* (1978), *Butz v. Economou* (1978), *Carlson v. Green* (1980), *Wilson v. Seiter* (1991), *Hudson v. McMillan* (1992), *Helling*

v. McKinney (1992), *Farmer v. Brennan* (1994), and *Brown v. Plata* (2011), all *supra*.

PETITIONER'S NATIONALITY-BASED CLAIM IS NOT DIFFERENT IN A MEANINGFUL WAY FROM PRIOR, COGNIZABLE *BIVENS* CLAIMS, AND THIS CLAIM DOES NOT CALL FOR A NEW REMEDY.

It was the law of this case that plaintiff stated a nationality-based discrimination claim. In its memorandum disposition of plaintiff's prior appeal, the court below, in *Schwarz v. Meinberg*, 637 Fed.Appx. 374, 375 (9th Cir. 2016), App. at 27a, held that "Schwarz has plausibly pleaded factual matter sufficient to claim that the policy of the Bureau of Prisons discrimination against him as a non-citizen." "Since *Bivens*, the Supreme Court has extended its holding to two additional scenarios: a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause and a violation of the Fifth Amendment's Due Process Clause [which includes a right to equal protection]." *Jerra v. United States*, 2018 WL 1605563, * 3 (C.D.Cal. 2018) (citing *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) ("allowing *Bivens* claim under Fifth Amendment's Due Process Clause where Congressman fired plaintiff because she was a woman."). (Nationality-based claims are fully supported by the prior existence of gender-based *Bivens* claims, and are not new *Bivens* claims under *Abbasi*.).

Petitioner did have a right not to be removed from placement consideration based on his nationality, just as an African American prisoner has a right not to be subject to prison placement based on his race. *Johnson v. California*, 543 U.S. 499 (2005) (strict scrutiny standard of review is to

be applied to corrections officers who followed unwritten policy of placing inmates in cells based on race). There certainly is a right not to be discriminated against in prison placement based on nationality, whether that right is violated is to be judged based on strict scrutiny review, and this remains a mixed issue of fact and law in this action. There must be a compelling government interest to do this, *ibid.*, and respondents never have addressed this issue. "[*A*]*ll* racial classifications [imposed by government] . . . must be analyzed . . . under strict scrutiny," *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227 (1995), in order to "'smoke out' illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant [such] a highly suspect tool." *Richmond v. J. A. Croson Co.,* 488 U.S. 469, 493 (1989). *Cf. Illinois v. Wardlow,* 528 U.S. 119, 135 (2000) (Stevens, J., dissenting) (arresting persons based on racial or ethnic stereotypes is unconstitutional); *Choi v. Gaston,* 220 F.3d 1010, 1016 (9th Cir. 2000) (Noonan, CJ, concurring).

Petitioner's claim is that he was subjected to unconstitutional, nationality-based discrimination because of *defendants' refusal to consider* him, *based on his nationality*.

Defendants admitted that "[t]he actions of the federal government are judged under the Fifth Amendment by the same standards applicable to state actions challenged under the Equal Protection Clause of the Fourteenth Amendment[]" and that "[t]he government is only required to show a rational basis for its actions unless the actions involve a suspect class or a fundamental right." (Citations omitted.) But here, the actions involved a suspect class, nationality, and a fundamental right, and thus, as respondents have admitted,

strict scrutiny is to be applied. Respondents' contention that inmate housing does not implicate a fundamental right misses the point that petitioner does not claim that he had a right to specific housing, and instead contends that he had a *right not to be excluded from consideration based on nationality*. Respondents' implied contention that their discretion is boundless is unsupported by any legal authority, and it is incorrect. *See generally Univ. of Texas v. Nassar,* 570 U.S. 338 (2013). "[C]lassifications based on . . . nationality . . . are inherently suspect and subject to close [meaning strict] judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate." *Graham v. Richardson,* 403 U.S. 365, 372 (1971) (footnotes and citations omitted). Only rarely are statutes sustained in the face of strict scrutiny. As one commentator observed, strict-scrutiny review is "strict" in theory but usually "fatal" in fact. Gunther, Gerald, "The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection," 86 Harv.L.Rev. 1, 8 (1972). Here, there was no basis at all for dismissal of petitioner's nationality-based constitutional claim, because it did not differ in any meaningful was from prior claims and it did not provide a new context for a *Bivens* claim.

Because it is alleged that respondents discriminated against petitioner based on petitioner's Canadian nationality, notwithstanding *Abbasi*, since the *Bivens* actions in *Davis v. Passman*, 442 U.S. 228, 248-49 (1979), established petitioner's right to sue petitioner's claim is not foreclosed or affected by *Abbasi*.

PETITIONER'S ACCESS TO COURTS CLAIM IS NOT DIFFERENT IN A MEANGINFUL WAY FROM PRIOR, COGNIZABLE *BIVENS* CLAIMS, THIS CLAIM IS NOT A NEW REMEDY.

Petitioner contended that respondents thwarted the exercise of his right to utilize respondents' administrative remedy (grievance) process and then used its denial against petitioner by setting up as their affirmative defense petitioner's alleged failure to exhaust to get his first two claims dismissed on that ground, thus blocking petitioner's access to the courts.

Petitioner's denial of access to court's claim was pleaded in his second action, after his first two claims, *see supra*, were dismissed from his first action. This type of *Bivens* claim long has been cognizable, at least since 1941, 30 years before *Bivens* expressly made it available. *Ex parte Hull*, 312 U.S. 546 (1941) ("the state and its officers may not abridge or impair petitioner's right to apply to a federal court . . . ."). *See Christopher v. Harbury*, 536 U.S. 403 (2002) (recognizing availability of a *Bivens* action for denial of access to courts by federal officers). This claim did not, could not have accrued, until plaintiff was out of court in the first action, after remand on the first appeal, and once he was out of court on the first two claims, he filed the second, new action, based on being knocked out of court in the first action.

In *Woodford*, 548 U.S. at 103, the Court (Justice Alito) held that "Respondent argues that requiring proper exhaustion [of prison administrative remedies] is harsh for prisoners, who generally are untrained in the law and are often poorly educated[] [but t]his argument overlooks the informality and relative simplicity of prison grievance systems." As

petitioner here demonstrates, there is no "relative simplicity of the [BOP] prison grievance system."

In actual fact and its unwritten policy and practice, the BOP chronically, habitually, and systematically misuses its grievance system, not as a tool to attempt to resolve administratively prisoners' grievances, but instead it uses the system inappropriately delay and to attempt to block, most often successfully, actions brought pursuant to *Bivens*, as here was the case.

The question on this petition is whether, when the BOP both delays and denies a prisoner the due process that he is due under the Fifth Amendment due process clause, *Bivens* provides a damages remedy when because of the BOP's actions a petitioner is thrown out of court for failure to exhaust. Ironically, the district court and the court below answered this question by holding that when a prisoner is thrown out of court for failure to exhaust and then files a second action in which he claims he was barred from court, this constitutes a new type of *Bivens* claim, and it may not be pursued under *Abbasi*. They both were wrong, sanctioning bad conduct and rendering redress for it impossible.

The BOP's flagrant disregard of its own, published administrative remedy process, discredited and severely undermine a factual underpinning and the spirit of this Court's opinion in *Woodford*, and also created three inter-circuit conflicts between the Second, Seventh, and Eighth Circuits, on one side, and the Ninth Circuit on the other side.

Because it is alleged that respondents denied petitioner access to the federal court, notwithstanding *Abbasi*, since the *Bivens* actions in *Ex parte Hull* (1941), *Bounds v. Smith* (1977), *Lewis v. Casey* (1996), *Christopher v.*

Harbury (2002), and *Woodford v. Ngo* (2006), each and all together established petitioner's right to sue on his denial of access to the federal courts claim, that claim is not foreclosed or affected by *Abbasi*.

Because a denial of access to the federal courts claim pre-existed *Abbasi*, therefore *Abbasi* does not foreclose this of petitioner's claims.

THE DECISION BELOW CREATES A CONFLICT WITH THREE CIRCUIT COURTS OF APPEALS.

Wycoff v. Nichols, 94 F.3d 1187, 1189 (8th Cir. 1996), holds that "the [administrative] reversal of the case against Wycoff constituted part of the due process Wycoff received, and it cured the alleged due process violation based on the [prison] disciplinary committee's initial decision to sanction Wycoff." This entails that its converse is true, to wit: when the prison administrative process *does not cure the alleged due process violation*, then *a due process violation is stated*, so that the Ninth Circuit disposition creates a conflict between the Ninth Circuit and the Eighth Circuit.

Morissette v. Peters, 45 F.3d 1119, 1122 (7th Cir.1995) (per curiam), holds that "[t]here is no denial of due process if the error the inmate complains of is corrected in the administrative appeal process. The administrative appeal process is part of the due process afforded prisoners." (Citation omitted.) This entails that *there is a denial of due process when the inmate's complaint is not corrected by the administrative appeal process*, so that the Ninth Circuit disposition creates a conflict with the Seventh Circuit.

Young v. Hoffman, 970 F.2d 1154, 1156 (2d Cir.1992) (per curiam), holds that "we need not decide whether Young suffered a denial of due

process in connection with his disciplinary hearing, because . . . [t]he administrative reversal constituted part of the due process protection he received, and it cured any procedural defect that may have occurred." This entails that *there may be a denial of due process when there has been* ***no*** *administrative reversal that has cured any defect in the process*, so that the Ninth Circuit disposition creates a conflict with the Second Circuit.

THE NINTH CIRCUIT'S DISPOSITION IS LEGALLY INCORRECT, CONSTITUTES A REFUSAL TO APPLY THIS COURT'S PRECEDENTS, AND CONFLICTS WITH *WOODFORD V. NGO*.

The BOP violated this Court's opinion in *Woodford v. Ngo*, that the "the informality and relative simplicity of prison grievance systems" was a basis for requiring that prisoners always must adhere strictly to prison grievance systems, or be subject to their cases being thrown out of federal courts. *Id*. at 548 U.S. 103.

The actual, real world reality of how the BOP's grievance system operates is evidenced by how the BOP manipulated its grievance system to try to keep petitioner out of federal court, so that surely it was "informal" but just as surely it was not "simple." In a two-step process, the BOP's lawyers then routinely took advantage of the BOP's shenanigans and moved to dismiss and got petitioner's first *Bivens* action dismissed, based on petitioner's alleged failure to exhaust, with the district court simply ignoring 28 C.F.R. § 542.18's curing provision, App. at 27-30, that when there has been no timely response from a BOP grievance level a grievant may proceed

to the next level. That is what happened here -- no timely response, proceeding to the next level, and then the next level denying the grievance because no disposition from the prior level was attached, because none existed. The BOP routinely, successfully prevents grievants from proceeding to a next level grievance when the grievant has not attached to his or her appeal the disposition from the prior level, even though there has been no prior level response. What they do is a *Catch 22*-like scam, the result of which is that prisoners never get to complete the process and fulfill its condition-precedent requirements to filing a *Bivens* action, and when a *Bivens* action nevertheless is filed, then the BOP moves to dismiss based on failure to exhaust and gets the action thrown out, thus denying prisoners access to federal courts.

A prisoner in petitioner's shoes should be able to state a *Bivens* due process claim when the BOP itself refuses to follow its own, published grievance procedures, because it thereby violates a grievant-prisoner's due process rights under the Fifth Amendment, impairs his or her First Amendment right "to petition Government for a redress of grievances[,]" and "the fundamental constitutional right of access to the courts" under *Bounds v. Smith*, 430 U.S. 817, 828 (1977).

In *Bounds*, 430 U.S. at 822, the Court held:

> It is now established beyond doubt that prisoners have a constitutional right of access to the courts. This Court recognized that right more than 35 years ago [now 77 years] when it struck down a regulation prohibiting state prisoners from filing petitions for habeas corpus unless they were found "'properly drawn'" by the "'legal investigator'" for the parole board. Ex parte Hull, 312 U.S. 546, 61 S.Ct. 640, 85

> L.Ed. 1034 (1941). We held this violated the principle that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." Id., at 549, 61 S.Ct. at 641. See also Cochran v. Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453 (1942).

See also Lewis v. Casey, 518 U.S. 343, 350 (1996) ("The right that *Bounds* acknowledged was the (already well-established) right of *access to the courts*." (Emphasis in original.) Respondents violated this right of access to the courts by their actions with respect to petitioner's grievances.

The way in which the right of access to the courts is violated is that there is a denial of due process when BOP employees do not provide back to a prisoner-grievant a response at each grievance level, unit counselor, warden, BOP region, and then the BOP office of general counsel. When at any point in the process there has been no timely response, then the prisoner-grievant, as here, may proceed to the next administrative level, but without the response from the prior level, as is permitted under the procedure and by the courts. But then the next administrative level routinely denies the grievance at that level, based on the grievant's failure to attach the response from the prior level. This sets up a real Catch 22 that defeats both procedural and substantive due process, since the courts then dismiss the claim based on failure to exhaust. That is what happened here.

Indeed, petitioner was not provided receipts for the grievances he filed, in summer and fall 2010, until November ***2012***. The grievances evidenced by those receipts never were adjudicated, and this must have been because petitioner no longer was in BOP custody. And, once he was in Canada, as of December 19, 2012, pursuant to a treaty transfer, petitioner no longer had any means to obtain the BOP grievance forms that strictly were

required to proceed to the next level, or to file BOP grievances.[2] Petitioner's prior habeas petition was dismissed for failure to exhaust, although the failure to exhaust was based on BOP rejections of petitioner's grievances, on the ground that he failed to satisfy a lower level grievance – to which there was no timely response, that permitted him to proceed to the next level – so that defendants prevented petitioner from exhausting by failing timely to respond to his grievances. This ultimately resulted in petitioner being denied access to the courts, which violated his right of to access to the courts.

At the bottom of these games are defendants' refusals to consider grievances without the results of any prior level being attached, even though it is the law that when there is no timely response a grievant then may proceed to the next level. 28 C.F.R. § 542.18 ("If the inmate does not receive a response within the time allotted for reply . . . the inmate may consider the absence of a response to be a denial at that level [and therefore, may proceed to the next level].") App. at 27-30. Petitioner did everything he could to try to proceed, always proceeding to the next level when he did not receive a timely response; yet, respondents routinely refused to consider any of his next-level grievances when he did not attach a lower-level response, even though he had not received one.

Petitioner in fact always exhausted administrative remedies, as is evidenced by the Declaration of Benjamin Schwarz.

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[2] When he had not timely received responses in 2010, petitioner did go to the next level, but those grievance appeals were denied based on the ground that petitioner had not attached to them the results from the prior levels, which he did not have because they never were provided to him.

As a matter of law, petitioner was not required to exhaust administrative remedies because exhaustion under the is required only when a person who files an action is a prisoner *at the time* the action is filed, and petitioner was released from BOP custody on December 19, 2012, so that he was not required to exhaust as of the date he filed his first action, on January 17, 2013.

Petitioner's claim that his right of access to the court was violated stated a cognizable constitutional claim that is not precluded by *Abbasi*.

THE NINTH CIRCUIT COURT OF APPEALS DECIDED IMPORTANT FEDERAL QUESTIONS IN WAYS THAT CONFLICT WITH RELEVANT DECISIONS OF THIS COURT AND CONTRARY TO PRECEDENTS AND PRINCIPLES ESTABLISHED BY THIS COURT.

As set forth hereinabove, the Ninth Circuit Court of Appeals decided the matters presented in the instant petition on the important federal questions concerning whether there are *Bivens* remedies for alleged Eighth Amendment, unsanitary cell conditions, whether consistent with the equal protection clause of the Fifth Amendment a federal prison inmate may be subjected to detriment based solely on his nationality, and whether denial of a federal right to a prisoner is actionable in a way that is in conflict with the assumption of *Woodford* that navigation of the prison grievance process is "simple," and contrary to this Court's decision in *Bounds v. Smith* that prohibited impairing "the fundamental constitutional right of access to the courts."

CONCLUSION

Since prior to *Abbasi* it had been established that there were rights to bring *Bivens* actions (1) under the Eighth Amendment, based on unsanitary prison cell conditions, (2) under the Fifth Amendment, for discrimination based on national origin, and (3) under the Fifth Amendment, for denial of access to the federal courts, and because this Court pre-*Abbasi* allowed all three types of *Bivens* actions to proceed as remedies for these types of alleged misconduct, the court below erred by disallowing these three claims, and its disposition should be vacated and reversed.

For the foregoing reasons, the petition for a writ of certiorari should be granted or the Court of Appeals disposition summarily should be vacated.

Respectfully submitted,

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July 25, 2019

CERTIFICATE OF SERVICE

I certify that I caused the foregoing petition for a writ of certiorari to be served by USPS on respondents' counsel, whose address is set forth below, by placing three copies of it in an envelope with postage fully prepaid on July 25, 2019, at Los Angeles, California.

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BENJAMIN R. SCHWARZ, in his individual and class representative capacities, Plaintiff-Appellant, v. ERWIN MEINBERG; et al., Defendants-Appellees.	No. 17-55298 D.C. No. 2:13-cv-00356-BRO-PLA Central District of California, Los Angeles ORDER

BENJAMIN R. SCHWARZ, in his individual and class representative capacities, Plaintiff-Appellant, v. ERWIN MEINBERG; et al., Defendants-Appellees.	No. 17-56216 D.C. No. 2:17-cv-00330-BRO-PLA Central District of California, Los Angeles

Before: D.W. NELSON, CALLAHAN, and OWENS, Circuit Judges.

The members of the panel that decided this case voted unanimously to deny the petition for rehearing. Judges Callahan and Owens voted to deny the petition

for rehearing en banc. Judge Nelson recommended denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed.R. App. P. 35.)

The petition for rehearing and the petition for rehearing en banc are denied.

761 Fed.Appx. 732
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Benjamin R. SCHWARZ, in his individual and class representative capacities, Plaintiff-Appellant,
v.
Erwin MEINBERG; et al., Defendants-Appellees.
Benjamin R. Schwarz, in his individual and class representative capacities, Plaintiff-Appellant,
v.
Erwin Meinberg; et al., Defendants-Appellees.

No. 17-55298, No. 17-56216
|
Submitted February 11, 2019* Pasadena, California
|
Filed February 13, 2019

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Synopsis

Background: Prisoner brought *Bivens* action against prison officials and regional and national Bureau of Prisons (BOP) officials, alleging they subjected him to unsanitary cell conditions, denied him access to the courts, and ignored his request for placement in a camp facility in violation of his constitutional rights. The United States District Court for the Central District of California, Beverly Reid O'Connell, J., 2017 WL 4581887, dismissed action. Prisoner appealed.

[Holding:] The Court of Appeals held that it would not extend a *Bivens* remedy to prisoner's claims.

Affirmed.

West Headnotes (5)

[1] United States
Prisons

Prisoner's Eighth Amendment claim regarding unsanitary cell conditions due to a nonfunctioning toilet presented a new *Bivens* context, thus requiring special factors analysis to determine if prisoner's claim against regional and national Bureau of Prisons (BOP) officials could proceed. U.S. Const. Amend. 8.

Cases that cite this headnote

[2] United States
Prisons

Prisoner's claim that prison officials denied him access to

the courts in violation of First and Fifth Amendments presented a new *Bivens* context, thus requiring special factors analysis to determine if prisoner's claim against regional and national Bureau of Prisons (BOP) officials could proceed. U.S. Const. Amends. 1, 5.

Cases that cite this headnote

[3] **United States**
Prisons

Prisoner's Fifth Amendment claim alleging national origin discrimination arising out of Bureau of Prisons' (BOP) denial of his request for a camp placement presented a new *Bivens* context, thus requiring special factors analysis to determine if prisoner's claim against regional and national BOP officials could proceed. U.S. Const. Amend. 5.

Cases that cite this headnote

[4] **United States**
Prisons

Court would not extend a *Bivens* remedy to prisoner's claims against prison officials and regional and national Bureau of Prisons (BOP) officials, which alleged that he was subjected to unsanitary cell conditions in violation of Eighth Amendment, that he was denied access to the courts in violation of First and Fifth Amendments, and that he was discriminated on the basis of his national origin in violation of Fifth Amendment, where prisoner could have sought a remedy under Prison Litigation Reform Act, Federal Tort Claims Act, or through injunctive remedies, and *Bivens'* purpose of deterring individual government actors would not have been fulfilled by making regional and national BOP officials, who lacked a direct connection to prisoner, liable. U.S. Const. Amends. 1, 5, 8; 28 U.S.C.A. § 1346(b); Civil Rights of Institutionalized Persons Act § 7, 42 U.S.C.A. § 1997e.

Cases that cite this headnote

[5] **United States**
Time for proceedings; limitations

Two-year statute of limitations applicable to personal injury claims in California applied to prisoner's *Bivens* claim against prison officials. Cal. Civ. Proc. Code §§ 335.1, 352.1.

Cases that cite this headnote

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Appeal from the United States District Court for the Central District of California, Beverly Reid O'Connell, District Judge, Presiding, D.C. No. 2:13-cv-00356-BRO-PLA, D.C. No. 2:17-cv-00330-BRO-PLA

Before: D.W. NELSON, CALLAHAN, and OWENS, Circuit Judges.

MEMORANDUM **

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Plaintiff-Appellant Benjamin Schwarz challenges, in two appeals, the district court's dismissal of his claims alleging violations of the Fifth and Eighth Amendments by Bureau of Prisons (BOP) officials related to his incarceration at the Los Angeles Metropolitan Detention Center (MDC). Both *Schwarz I* and *Schwarz II* involve the same set of facts and claims —that BOP officials subjected Schwarz to unsanitary cell conditions, denied him access to the courts, and ignored his request for placement in a camp facility in violation of his constitutional rights. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review de novo a district court's grant of summary judgment and dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1015 (9th Cir. 2016); *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 866 (9th Cir. 2013).

We decline to extend *Bivens* remedies to Schwarz's claims—unsanitary cell conditions, *734 access to courts, and request for placement in a camp facility —because these claims do not fall within claims authorized by the Supreme Court. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

In *Ziglar v. Abbasi*, the Court cautioned lower courts not to expand *Bivens* remedies outside the three previously recognized *Bivens* claims. — U.S. —, 137 S.Ct. 1843, 1854–55, 1857–61, 198 L.Ed.2d 290 (2017) (*citing Bivens*, 403 U.S. at 396, 91 S.Ct. 1999 (recognizing a damages remedy for an unreasonable search and seizure under the Fourth Amendment); *Davis v. Passman*, 442 U.S. 228, 248–49, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979) (permitting a damages remedy for gender discrimination under the Fifth Amendment Due Process Clause); *Carlson v. Green*, 446 U.S. 14, 19, 100 S.Ct. 1468, 64 L.Ed.2d 15 (1980) (allowing a damages remedy for an Eighth Amendment violation for failure to provide adequate medical treatment)). While there is some similarity in the constitutional basis of Schwarz's claims with previously recognized *Bivens* claims, Schwarz's claims nevertheless "arise[ ] in a

new *Bivens* context." *Vega v. United States*, 881 F.3d 1146, 1153 (9th Cir. 2018) (*quoting Abbasi*, 137 S.Ct. at 1864). In other words, the claims are "different in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]." *Id.*

[1] Schwarz's Eighth Amendment claim regarding unsanitary cell conditions presents a new *Bivens* context because Schwarz does not allege a failure to treat a serious medical condition, which was the issue in *Carlson*, 446 U.S. at 16, 100 S.Ct. 1468. Rather, the basis of Schwarz's claim —a nonfunctioning toilet—resembles the conditions of the confinement claim the Supreme Court rejected in *Abbasi*. *See Abbasi*, 137 S.Ct. at 1862.

[2] [3] Schwarz's access to courts claim under the First and Fifth Amendments and his Fifth Amendment claim that the BOP unlawfully denied his request for a camp placement also constitute new *Bivens* contexts. First, the Supreme Court has never recognized a *Bivens* claim under the First Amendment. *See Reichle v. Howards*, 566 U.S. 658, 663 n.4, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). Second, we recently held that both a First Amendment access to courts and a Fifth Amendment procedural due process claims presented new *Bivens* contexts. *See, e.g., Vega*, 881 F.3d at 1153. Third, while *Davis* recognized a Fifth Amendment due process claim for gender discrimination, 442 U.S. at 248–49, 99 S.Ct. 2264, Schwarz's due process claim is a new context because it alleges national origin discrimination.

[4] If a proposed claim arises in a new context, courts must conduct a special factors analysis to determine whether to extend a *Bivens* remedy to that claim. *Vega*, 881 F.3d at 1153. However, the Supreme Court makes "clear that a *Bivens* remedy will not be available if there are 'special factors counseling hesitation in the absence of affirmative action by Congress.' " *Abbasi*, 137 S.Ct. at 1857 (quoting *Carlson*, 446 U.S. at 18, 100 S.Ct. 1468). One such "hesitation" is "if there is an alternative remedial structure present" which "alone may limit the power of the Judiciary to infer a new *Bivens* cause of action." *Id.* at 1858; *see also Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007) (holding that courts should refrain from providing new remedies when alternative processes exist). Here, Schwarz had alternative processes by which to pursue his claims and remedies. For example, he could have sought a remedy under the Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e, under the Federal Tort *735 Claims Act, 28 U.S.C. §§ 1346(b), or through injunctive remedies.

Furthermore, we find that extending *Bivens* remedies to Schwarz's claims against regional and national BOP officials, individuals who lack direct connection to Schwarz's grievances, undermines the purpose of *Bivens* liability—to deter individual government officers, not their supervisors or the agency, from engaging in unconstitutional conduct. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70–71, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001) (declining to extend *Bivens* liability when it would not

advance *Bivens*' purpose). We also find that extending *Bivens* to Schwarz's claims would substantially affect government operations and unduly burden BOP officials who must defend against this suit in their personal capacities.

[5] We reject Schwarz's challenge to the district court's application of a two-year statute of limitations period in *Schwarz II*. The statute of limitations for a *Bivens* claim is equivalent to a personal injury claim in the forum state. *See Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); *Van Strum v. Lawn*, 940 F.2d 406, 410 (9th Cir. 1991). Personal injury claims in California have a two-year statute of limitations, which a court may toll for up to two years during a prisoner's incarceration. *See* Cal. Code Civ. P. §§ 335.1, 352.1. We have previously interpreted California law to hold that pendency of a claim in one forum does not toll the statute of limitation for a later claim in the same forum.[1] Schwarz fails, furthermore, to meet California's equitable tolling requirements. *See generally Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999).

1 *See Mitchell v. Snowden*, 700 F. App'x 719, 720 (9th Cir. 2017) (unpublished).

Finally, the district court previously dismissed Schwarz's due process claims with prejudice, rejecting his argument relating to the nonfunctioning grievance system. We affirmed on those grounds.[2] Because we decline to reconsider our prior ruling, Schwarz's due process claims are foreclosed.

2 *See* ***Schwarz v. Meinberg***, 637 F. App'x 374 (9th Cir. 2016) (unpublished).

AFFIRMED.

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Benjamin SCHWARZ et al.
v.
Erwin MEINBERG et al.

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ORDER RE EVIDENTIARY HEARING REGARDING EXHAUSTION OF ADMINISTRATIVE REMEDIES [129]

BEVERLY REID O'CONNELL, United States District Judge

I. INTRODUCTION

*1 On August 29, 2016, Defendants[1] filed a Motion for Summary Judgment on the grounds that Plaintiff Benjamin Schwarz ("Plaintiff") failed to exhaust his administrative remedies before bringing this action. (*See* Dkt. No. 90.) On October 11, 2016, the Court denied Defendants' Motion, identifying two disputed issues of material fact: (1) when the underlying alleged constitutional violations giving rise to Plaintiff's claims occurred and whether Plaintiff was able to exhaust his administrative remedies; and, (2) whether Plaintiff received the Office of the General Counsel's rejection of his BP-11 appeals. (*See* Dkt. No. 110 (hereinafter, "Order").) On December 20, 2016, the Court held an evidentiary hearing to determine these two disputed issues of fact. (*See* Dkt. No. 129.) For the following reasons, the Court finds that Plaintiff failed to exhaust his administrative remedies and, accordingly, finds that his action cannot proceed.

1 The Defendants consist of the following: Erwin Meinberg who was acting Warden at MDCLA during Plaintiff's time there; Brenda Burch who was a Counselor at Los Angeles Metropolitan Detention Center ("MDCLA") between July 2, 2010 and November 8, 2010; Robert G. McFadden who was the BOP Western Regional Director between July 2, 2010 and November 8, 2010; Susan G. McClintock who was acting Warden at MDCLA on August 17, 2012; Kathleen M. Kenney who was the BOP General Counsel from June 2004 to present; Harley G. Lappin, Jr. who was the BOP Director from 2003 to 2011; Charles E. Samuels who was the BOP Director from 2011 to present; Thomas R. Kane who is presently BOP Deputy Director; William F. Dalius, Jr. who is presently the BOP Assistant Director of the Administrative Division; Juan D. Castillo who is presently the BOP Western Regional Director; Linda Thomas who is presently MDCLA Warden; and Tammy Jones who is presently MDCLA Associate Warden for facilities. (FAC ¶ 12.)

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and Claims

Plaintiff was a federal inmate incarcerated at MDCLA beginning on August 11, 2009. (Dkt. No. 80 (hereinafter, "FAC") ¶ 10.) Plaintiff was released from the Bureau of Prisons' ("BOP") custody on December 12, 2012, (FAC ¶ 11), and was then transferred into the custody of the Canadian government, after which he was held in a Canadian prison beginning on December 19, 2012, where he has remained since, (*see* Declaration of Eliezer Ben-Shmuel (Dkt. No. 101-2) (hereinafter, "Ben-Shmuel Decl.") ¶ 2). Plaintiff alleges Defendants violated his Fifth and Eighth Amendment constitutional rights during his incarceration at MDCLA. (FAC ¶¶ 116–21.) His FAC seeks damages, injunctive relief, and declaratory relief. (FAC at 14–15.) Additionally, Plaintiff alleges he is a member of and represents three discrete classes of persons. (FAC ¶¶ 122–31.)

Plaintiff claims that he was deprived of his Fifth Amendment Due Process rights because the administrative remedies available within MDCLA were illusory and the system to file grievances was defunct. (FAC ¶¶ 109–15.) Additionally, Plaintiff, who is a Canadian citizen, alleges that Defendants unconstitutionally discriminated against him because he was denied transfer to a BOP camp due to his national origin. (FAC ¶¶ 120–21.) Plaintiff also claims he was subjected to cruel and unusual punishment in violation of the Eighth Amendment because he was forced to spend twelve hours a day inside a cell with nonfunctioning toilets. (FAC ¶ 118.)

B. The Administrative Grievance Process

*2 The BOP administrative grievance process consists of four levels: (1) informal resolution by submitting "an issue of concern informally to staff" (commonly referred to as a BP-229), *see* 28 C.F.R. § 542.13; (2) a formal written administrative request that is submitted to the relevant institution's Warden (commonly referred to as a BP-9), *see* 28 C.F.R. § 542.14; (3) an appeal to the Regional Director (commonly referred to as a BP-10), *see* 28 C.F.R. § 542.15(a); and, (4) an appeal to the Office of the General Counsel, located in Washington, D.C. (commonly referred to as a BP-11), *see id.* Each level of appeal is completed once the inmate's filing is accepted[2] and receives a response; or, if the inmate does not receive a response, the failure to respond within the allowed time period may be considered a denial at that level and that level of appeal is completed. *See* 28 C.F.R. § 542.18. The Warden has twenty days in which to respond to a BP-9; the Regional Director has thirty days to respond; and, the Office of the General Counsel has forty days.[3] *See id.*

2 Under 28 C.F.R. § 542.17(a), an inmate's filing may be rejected for any failure to comply with procedural requirements. *See* 28 C.F.R. § 542.17(a). If a prisoner's filing is rejected, the inmate should receive a written notice explaining the reason for the rejection, and, so long as the reason for rejection is correctable, the inmate is provided additional time to correct any failure. *See* 28 C.F.R. § 542.17(b).

3 The regulations also provide that, so long as the inmate is given written notice, there may be an extension of time for the authority to respond at each level of appeal. *See* 28 C.F.R. § 542.18.

During Plaintiff's incarceration at MDCLA he filed several administrative remedy requests regarding the alleged conditions of his cell (that a toilet was not working)

and regarding his belief that the BOP was violating his equal protection rights by refusing his requested transfer to a BOP camp facility based on his foreign citizenship. (*See* Dkt. No. 91 (hereinafter, "Defs.' SUF") ¶ 4.)

In late August 2010,[4] Plaintiff filed an administrative remedy request to the BOP Regional Director's Office regarding his unsanitary cell conditions, which was rejected on the same day because, according to Defendants, Plaintiff should have first filed his request with MDCLA's Warden. (*See* SUF ¶¶ 5–6.) Plaintiff, however, claims that he submitted a BP-9 form regarding the defective toilets to the Warden on August 5, 2010, and never received a response. (*See* Schwarz Decl. ¶ 2.) Defendants claim that, after his BP-10 was rejected, Plaintiff never refiled his request at any level of appeal, (*see* Defs.' SUF ¶ 7), while Plaintiff alleges that, after the Regional Director rejected his BP-10, he then submitted a BP-11 form to the Office of the General Counsel, with copies of his BP-9 and BP-10 forms attached, (Pl.'s SUF ¶ 8; Schwarz Decl. ¶ 2).[5]

4 Defendants allege that it was August 30, 2010, (Defs.' SUF ¶ 5), while Plaintiff claims it was either August 26, 2010, (*see* Declaration of Benjamin R. Schwarz (Dkt. No. 101-1 (hereinafter, "Schwarz Decl.") ¶ 2)), or August 28, 2010, (Dkt. No. 102 (hereinafter, "Pl.'s SUF") ¶ 5). The date Plaintiff's request was filed is immaterial to the Court's decision.

5 If Plaintiff did not include an Undisputed Fact with a number correlating to Defendants' Statement of Undisputed Facts, the Court considers Defendants' proffered fact to be undisputed.

On August 13, 2010, the MDCLA Warden received a BP-9 form from Plaintiff regarding his request to be designated to a BOP camp facility. (Defs.' SUF ¶ 9; *see also* Declaration of Sarah Schuh Quist (Dkt. No. 90-1) (hereinafter, "Schuh Quist Decl."), Ex. C at 17.)[6] According to Defendants, Plaintiff's BP-9 request was denied on August 17, 2010. (Defs.' SUF ¶ 10.) Plaintiff claims that as of August 23, 2010, he had not yet received the Warden's response, and so he filed a BP-10. (Pl.'s SUF ¶ 10; Schwarz Decl. ¶ 3.) On August 25, 2010, the Regional Director's Office received Plaintiff's BP-10 form, which was rejected for failure to attach his BP-9 form or the Warden's response. (Defs.' SUF ¶¶ 11–12; Pl.'s SUF ¶ 11.) On the same day, Plaintiff received the Warden's response to his BP-9 and resubmitted his BP-10 form to the Regional Director, this time with the BP-9 response attached. (Defs.' SUF ¶ 13; Pl.'s SUF ¶ 11; Schwarz Decl. ¶ 3.) On September 7, 2010, the Regional Director denied Plaintiff's BP-10 request on the merits. (Defs.' SUF ¶ 14.) On September 16, 2010, the Office of the General Counsel received Plaintiff's BP-11 form. (Defs.' SUF ¶ 15.) On October 12, 2010, the Office of the General Counsel rejected Plaintiff's BP-11 request, because Plaintiff failed to attach copies of the Warden's and Regional Director's responses. (Defs.' SUF ¶ 16.) On September 29, 2010, the Office of the General Counsel received Plaintiff's second BP-11 submission, which was again rejected on October 27, 2010, because he failed to include a copy of the Warden's response to his BP-9. (Defs.' SUF ¶¶ 17–18.) Plaintiff claims he never received any response from the Office of the General Counsel. (Pl.'s SUF ¶ 16; Schwarz Decl. ¶ 3.)

6 Plaintiff claims that he submitted this request on August 2, 2010. (Pl's SUF ¶ 9.) According to the records that Defendants provide, however, regardless of what day the request was submitted, the Warden received it on August 13, 2010. (*See* Schuh Quist Decl., Ex. C at 17.)

C. Procedural History

*3 Schwarz filed his Original Complaint on January 1, 2013. (*See* Dkt. No. 1 (hereinafter, "Compl.").) On June 10, 2013, Defendants filed a Motion to Dismiss, which Plaintiff opposed. (*See* Dkt. Nos. 24, 25.) On December 23, 2013, the Court granted Defendants' Motion to Dismiss. (*See* Dkt. No. 32.) The Court dismissed Plaintiff's Fifth Amendment Due Process claim with prejudice and, relying on *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003), dismissed his Fifth Amendment Equal Protection and Eighth Amendment claims without prejudice based on his failure to exhaust administrative remedies. (*See* Order at 5–13.) On appeal, the Ninth Circuit affirmed the Court's dismissal of Plaintiff's due process claim (and the associated class claim), but reversed and remanded the dismissal of his equal protection and Eighth Amendment claims so the Court could reevaluate its decision in light of the Ninth Circuit's decision in *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), decided after this Court issued its dismissal. *See* ***Schwarz v. Meinberg***, 637 Fed.Appx. 374, 374–75 (9th Cir. 2016).

On remand, Plaintiff immediately filed a Motion for Class Certification of his equal protection and Eighth Amendment claims, which Defendants opposed. (*See* Dkt. Nos. 54, 61.) On June 13, 2016, Defendants filed their Answer to the Complaint, which included eighteen affirmative defenses. (*See* Dkt. No. 59.) On June 20, 2016, Plaintiff filed a Motion to Strike the Affirmative Defenses from Defendants' Answer. (*See* Dkt. No. 63.) On June 22, 2016, Defendants filed an Amended Answer to the Complaint. (*See* Dkt. No. 64.) On June 27, 2016, Plaintiff filed a Motion to Strike the Affirmative Defenses from the Amended Answer. (*See* Dkt. No. 71.) On July 15, 2016, the Court stayed the class action proceedings pending the outcome of Defendants' forthcoming Motion for Summary Judgment.[7] (Dkt. No. 78.) On the same day, the Court granted Plaintiff's Motion to Strike in part, striking nine of Defendants' eighteen affirmative defenses from their First Amended Answer. (Dkt. No. 79.)

7 The Court required that the Motion for Summary Judgment be limited to the issue of the exhaustion of administrative remedies and that it be filed by August 29, 2016. (*See* Dkt. No. 78 at 5.)

On July 16, 2016, Plaintiff filed his FAC. (*See* FAC.) Plaintiff's FAC was practically identical to his Original Complaint, except that it removed all causes of action brought by former co-plaintiff, Stephen Yagman.[8] (*Compare* Compl. *with* FAC.) On August 1, 2016, Defendants filed a Motion to Dismiss several causes of action from Plaintiff's Complaint, (*see* Dkt. No. 86), which the Court granted, (*see* MTD Order).

8 The only amendments the Court can identify in Plaintiff's FAC, other than the removal of all claims brought by Mr. Yagman, are: (1) the re-numbering of all paragraphs; (2) Plaintiff's reference to Paragraph 27 in Paragraph 28; and, (3) Plaintiff's addition in

Paragraph 130 of an estimate of the size of the proposed classes. (*See* FAC.)

On August 29, 2016, Defendants filed their Motion for Summary Judgment relating to the exhaustion of administrative remedies. (*See* Dkt. No. 90.) On October 11, 2016, the Court denied Defendants' Motion and, as noted above, identified two disputed issues of fact: (1) when the underlying alleged constitutional violations giving rise to Plaintiff's claims occurred and whether Plaintiff was able to exhaust his administrative remedies; and, (2) whether Plaintiff received the Office of the General Counsel's rejection of his BP-11 appeals. (*See* Order.) Accordingly, the Court held an evidentiary hearing on December 20, 2016. (*See* Dkt. No. 129.) The morning of the evidentiary hearing, Plaintiff filed two declarations by Stephen Yagman and Plaintiff. (*See* Dkt. No. 128.) At the hearing, defense counsel argued that the declarations were untimely, leading Plaintiff's counsel to withdraw Plaintiff's declaration. (*See* Dkt. No. 131.) Plaintiff provided live testimony from Stephen Yagman and Defendants provided the live testimony of Sarah Schuh-Quist and Brenda Burch.

III. LEGAL STANDARD

***4** A plaintiff bringing a Prisoner Litigation Reform Act ("PLRA") claim must first exhaust his administrative remedies. *See* 42 U.S.C. § 1997e. The proper procedural mechanism for the court to determine whether he has adequately exhausted his administrative remedies is, "[t]o the extent evidence in the record permits," a motion for summary judgment. *See Albino v. Baca*, 747 F.3d 1162, 1168 (9th Cir. 2014). "If summary judgment is not appropriate, the district judge may decide disputed questions of fact in a preliminary proceeding." *Id.* "When feasible, such questions of fact should be decided before addressing the merits of the claim." *Hamilton v. Hart*, No. 1:10-cv-00272-LJO-EPG-PC, 2016 WL 1090109, at *4 (E.D. Cal. Mar. 21, 2016).

IV. DISCUSSION

As addressed above, the Court found that two questions of fact remained undecided when determining Defendants' Motion for Summary Judgment: first, the date on which the allegedly unlawful conduct giving rise to Plaintiff's claims occurred, and, depending on the answer to that question, whether Plaintiff was capable of exhausting his administrative remedies; and, second, whether Plaintiff actually *received* the rejection of his BP-11 appeal from the Office of the General Counsel. (*See* Order.) The Court will address each question of fact in turn.

A. The Date on Which the Underlying Events Occurred and Whether the Grievance Procedure was Available to Plaintiff

Under the PLRA, a "prisoner" is defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquently for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). In his Opposition to Defendants' Motion for Summary Judgment, Plaintiff argued that he was not a "prisoner" as

defined under the PLRA, because he was in Canadian custody—rather than BOP custody—at the time he filed this action. (*See* Dkt. No. 101 at 7.) The Court held that the jurisdiction in which Plaintiff was a prisoner, however, was not dispositive; rather, the fact that he was still in custody—albeit Canadian custody—controlled, and he fell within the PLRA's definition of "prisoner." (*See* Order at 11.) But the Court explained that the exhaustion requirement "applies only if the inmate is capable of filing a grievance with his prior facility after transfer" to a different facility. (Order at 11–12 (citing *Howard v. Baca*, No. CV 10-5081-JFW (OP), 2011 WL 5570086, at *5 (C.D. Cal. Sept. 27, 2011); *Roman v. Washington*, No. CIV S-11-0284 EFB P, 2011 WL 1331962, at *2 (E.D. Cal. Apr. 5, 2011); *Flournoy v. Navarro*, No. CV 05-7708 PA (FFM), 2008 WL 4184650, at *7 (C.D. Cal. Sept. 10, 2008)).)

Pursuant to 28 C.F.R. § 542.14, Plaintiff had twenty days from the time the alleged constitutional violations occurred to file his administrative grievances. *See* 28 C.F.R. § 542.14. Thus, in the Court's view, the dispositive inquiry in this case that remained unresolved is whether Plaintiff had adequate opportunity to exhaust his administrative remedies before the time to file a grievance had expired. In other words, if the underlying violations occurred on, for instance, Plaintiff's last day in BOP custody and Plaintiff was prevented from exhausting his administrative remedies upon transfer out of MDCLA, then Plaintiff may have been incapable of exhausting his administrative remedies and the exhaustion requirement could be waived. *See Ross v. Blake*, 136 S. Ct. 1850, 1858 (2016) (holding that a PLRA plaintiff "must exhaust available remedies, but need not exhaust unavailable ones").

*5 At the evidentiary hearing, neither party presented evidence as to the exact date on which the alleged underlying violations occurred or whether they were continuing violations. Regardless, even assuming they were continuing violations, meaning they continued to occur up until the last day Plaintiff was held at MDCLA, the Court finds that Plaintiff was capable of exhausting his administrative remedies despite his transfer out of MDCLA. At the evidentiary hearing, Mr. Yagman, Plaintiff's cellmate during his time at MDCLA, testified that Plaintiff left that facility on October 20, 2010—a fact later confirmed by Defendants' witness, Ms. Sarah Schuh-Quist. At the hearing, the parties presented testimony that when Plaintiff left MDCLA, he was placed first into "transfer" status and eventually transferred to the custody of a private prison in Ohio—not directly into Canadian custody. In fact, Plaintiff was not transferred into Canadian custody until December 2012, over two years after he left MDCLA.

Mr. Yagman testified that he believed Plaintiff was incapable of exhausting his administrative remedies while at the prison facility in Ohio. He based this belief on having apparently seen grievances that Plaintiff submitted at the Ohio facility indicating that he was not permitted to submit BOP grievances, though he could submit grievances to the Office of the General Counsel.

At the evidentiary hearing, Ms. Schuh-Quist, a senior attorney with the BOP, testified that she is familiar with and frequently uses the BOP's "Sentry" database, which holds information about inmates on issues such as their sentencing history, their administrative remedy history, discipline history, and inmate history on admission release. According to Ms. Schuh-Quist, after leaving MDCLA, Plaintiff remained in "transfer status for some time." Transfer status occurs when an inmate has left one designated institution, is on the way to a different designated institution, and is housed either at a BOP or a contract location while they await transfer.[9] Specifically, Ms. Schuh-Quist explained that Plaintiff was held in transfer status from October 20, 2010 (when he left MDLCA), until February 14, 2011. After he left transfer status, Ms. Schuh-Quist confirmed that Plaintiff was transferred to a BOP contract facility in Northeast Ohio. Contrary to Mr. Yagman's testimony, Ms. Schuh-Quist testified that Plaintiff had access to BOP remedies, including BP-9, BP-10, and BP-11 forms while he was at the Ohio contract facility and that, in fact, according to the Sentry database, he submitted several administrative grievances while he was held there.

9 According to Ms. Schuh-Quist, inmates are often held in transfer status until there are enough inmates also awaiting transfer to make it worthwhile for the BOP to send them via a bus or a plane to their next facility.

Where, as here, there is conflicting testimony, the Court is required to resolve issues of credibility. *See S.E.C. v. M & A W., Inc.*, 538 F.3d 1043, 1055 (9th Cir. 2008) (noting that assessment of credibility is appropriate at an evidentiary hearing). The Ninth Circuit Model Jury Instructions provide eight factors the Court may consider when making a credibility determination: (1) the witness's opportunity and ability to observe the things testified to; (2) the witness's memory; (3) the witness's manner while testifying; (4) the witness's interest in the outcome of the case, if any; (5) the witness's bias or prejudice, if any; (6) whether other evidence contradicted the testimony; (7) the reasonableness of the witness's testimony in light of all the evidence; and, (8) any other factors bearing on believability. *See* 9th Cir. Model Civ. Jury Inst. 1.11.

Here, the Court finds Ms. Schuh-Quist's testimony more credible than Mr. Yagman's. Mr. Yagman admitted that he was basing his belief that Plaintiff could not file a BOP grievance while at the Ohio facility only on having seen a copy of an administrative grievance that he believed stated BOP grievances were unavailable. Ms. Schuh-Quist, on the other hand, explained that based on her extensive experience with BOP procedures and regulations, BOP grievances *were* available at the Ohio facility and that Plaintiff filed multiple grievances while he was detained there. The Court finds that Ms. Schuh-Quist had a more credible basis of knowledge for her testimony and that her memories were more accurate than Mr. Yagman's as she testified that she is familiar with the BOP's Sentry system and the BOP's procedures, that she had reviewed Plaintiff's Sentry file, and that she was aware of several BOP grievances Plaintiff filed while at the Ohio facility. Mr. Yagman's testimony was

based only on vague memories of having apparently seen a grievance from Plaintiff submitted while at the Ohio facility. Further, Ms. Schuh-Quist had less of an interest in the outcome of this proceeding as a BOP attorney than Mr. Yagman, a former party to this proceeding. In addition, Mr. Yagman appeared combative at the hearing and appeared to have harbored bias, as he stated that he would "never agree" to anything stated by defense counsel and that "[i]f [defense counsel] want[ed] to ask a proper question, I'll be happy to answer it." Based on these factors, the Court finds Ms. Schuh-Quist's testimony more credible than Mr. Yagman's and finds that Plaintiff had the opportunity to submit BOP grievances while he was confined at the Ohio facility.

***6** Even assuming the underlying alleged constitutional violations were continuing violations, meaning they occurred through Plaintiff's final day at MDCLA, October 20, 2010, under the regulations Plaintiff had only twenty days to submit a valid BP-9 form. *See* 28 C.F.R. § 542.14(a). It is still unclear whether Plaintiff had the ability to file BOP grievances while he was in transfer status. Nonetheless, as determined above, the Court finds that Plaintiff had the ability to submit BP forms upon his arrival at the Ohio facility. The regulations provide that "[w]hen the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed." *Id.* As defined in the regulations, a valid reason for delay includes "an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal." 28 C.F.R. § 542.14(b). Thus, even if Plaintiff was incapable of filing a grievance while he was held in transfer status, he could have filed a grievance upon arriving in Ohio and cited the reason for delay. But it is undisputed that Plaintiff did not attempt to submit a BP form regarding his treatment at MDCLA upon his arrival at the Ohio facility and did not attempt to provide a "valid reason" for any delay in filing. *See id.*

Therefore, the Court finds that there is no evidence that the BOP administrative grievances were effectively unavailable to Plaintiff and that he could have exhausted his administrative remedies regarding any complaints about his treatment at MDCLA. The fact that Plaintiff was in Canadian custody at the time he filed this suit is not dispositive. Moreover, as the Court determined in its Order, it is undisputed that Plaintiff failed to complete the administrative grievance procedure regarding his unsanitary cell conditions claim. (*See* Order at 18.) As such, the Court finds that Plaintiff failed to exhaust his administrative remedies as to his unsanitary cell conditions claim and his claim cannot proceed.

B. Whether Plaintiff Received the BP-11 Rejection

Next, the Court must determine whether Plaintiff received the Office of the General Counsel's rejection of Plaintiff's BP-11 appeal regarding his camp facility transfer claim. As the Court explained in its Order, Defendants presented evidence that the Office of the General Counsel received Plaintiff's BP-11 appeals and rejected them due to Plaintiff's failure to attach his

lower appeals forms and responses, and that, according to the BOP's procedures, the Office of the General Counsel would have returned the BP-11 forms to Plaintiff along with a reason for the rejection. (*See* Order at 19.) Plaintiff, however, submitted a declaration in which he stated that he never received any such rejection. (*See id.*) Accordingly, the Court found the fact was in dispute.

At the evidentiary hearing, Ms. Schuh-Quist reiterated that, based on her review of Plaintiff's Sentry file, Plaintiff twice submitted BP-11 forms to the Office of the General Counsel, but that they were rejected for procedural filing errors. Ms. Schuh-Quist then explained the timing of, and procedure for, returning those rejections: the first BP-11 rejection occurred on October 12, 2010, while Plaintiff was still at MDCLA, while the second rejected occurred later in October after he had already been placed in transfer status. However, according to Ms. Schuh-Quist, the second, post-transfer rejection would have been given to MDCLA's Warden's secretary, who would then check periodically to see whether Plaintiff had arrived at his next designated institution and then would send the response to that institution once he had arrived. Thus, MDCLA's Warden's secretary would have kept the rejection and would have sent it to the Ohio facility after he arrived there.

In addition, Ms. Schuh-Quist noted that Plaintiff would have received notice of the BP-11 rejections through a declaration that Ms. Schuh-Quist submitted during a habeas proceeding brought by Plaintiff. According to Ms. Schuh-Quist, she submitted a declaration detailing the rejections that Plaintiff received in January 2011 (while he was still in transfer status) in connection with the habeas proceeding. Plaintiff filed a response based, in part, on Ms. Schuh-Quist's declaration in May 2011, indicating that he had, in fact, received it.

*7 At the evidentiary hearing, Plaintiff submitted no additional evidence supporting his assertion that he had not received the BP-11 rejections.[10] Moreover, to the extent the Court considers Plaintiff's declaration submitted along with his Opposition to Defendants' Motion for Summary Judgment in which he states that he "never received any response" to his BP-11 appeals, (*see* Schwarz Decl.), the Court finds Ms. Schuh-Quist's testimony about the procedures by which Plaintiff would have received the rejections more credible. The Court considers the same factors enumerated above from the Ninth Circuit's Model Jury Instructions. *See* 9th Cir. Civ. Model Jury Inst. 1.11. The Court finds that Ms. Schuh-Quist had adequate opportunity to develop her knowledge of BOP procedures in responding to BP-11 appeals as she testified that she previously worked in the Office of the General Counsel. Further, Ms. Schuh-Quist's memory appeared clear, and while the Court did not have the benefit of observing Plaintiff's demeanor at the evidentiary hearing (as he did not testify), *see United States v. Mejia*, 69 F.3d 309, 316 (9th Cir. 1995) (noting the "importance of live testimony to credibility determinations"), the Court finds Ms. Schuh-Quist's demeanor was calm and

forthright and her testimony detailed and thorough. Further, as noted above, Ms. Schuh-Quist has no interest in the outcome of this case and did not appear biased, while Plaintiff clearly has a significant interest in the outcome. Therefore, the Court finds Ms. Schuh-Quist's testimony more credible than Plaintiff's declaration, and finds that Defendant has met its burden of establishing that it is more likely than not that Plaintiff received notice of his BP-11 rejections upon his arrival at the Ohio facility.

10 As noted above, Plaintiff initially submitted a declaration the morning of the evidentiary hearing, but that declaration was later withdrawn. (*See* Dkt. No. 131.)

Further, as Ms. Schuh-Quist explained in her declaration attached to Defendants' Motion for Summary Judgment, Plaintiff was given fifteen days in which to correct his deficiencies. (*See* Dkt. No. 90-1 ¶ 10.D.) As Ms. Schuh-Quist explained at the hearing, even if Plaintiff did not receive his final BP-11 rejection until he arrived at the Ohio facility, under § 542.14(b), Plaintiff could have sought to resubmit his BP-11 form and sought an extension of time due to his time in transit. *See* 28 C.F.R. § 542.15(a); *see also* 28 C.F.R. § 542.14(b) (explaining that "[v]alid reasons for delay" include "an extended period in-transit during which the inmate was separated from documents needed to prepare the Request or Appeal"). It is undisputed that Plaintiff failed to do so. *See Newborn v. Quintana*, No. EDCV 11-0046-SJO (DTB), 2012 WL 1325407, at *4 n.5 (C.D. Cal. Mar. 2, 2012) (holding that PLRA plaintiff failed to exhaust his administrative remedies where "plaintiff apparently chose to ignore the unambiguous written instructions to resubmit a properly formatted appeal to the Regional Office within 15 days of its initial denial"); *Davis v. Cal. Dept' of Corr. & Rehab.*, No. 1:09-cv-01171-OWW-GBC PC, 2011 WL 529401, at *3 (E.D. Cal. Jan. 31, 2011) (finding that plaintiff failed to exhaust his administrative remedies where plaintiff "submitted his appeal and was given specific instructions" on how to resubmit the documents, but failed to so).

Moreover, even if Plaintiff did not receive the notices upon his transfer to the Ohio facility, the Court finds that Plaintiff was on notice of the BP-11 rejections based on Ms. Schuh-Quist's declaration that was submitted in the habeas proceeding and was served upon him in January 2011 while he was in transit. Despite being placed on notice that his BP-11 forms were rejected, Plaintiff made no attempt (untimely or not) to resubmit his BP-11 appeal. Therefore, the Court concludes that Plaintiff failed to exhaust his administrative remedies as to his camp facility transfer claim, as well.

Because the time has long passed for Plaintiff to file his administrative grievances and to exhaust his administrative remedies, the Court **GRANTS** summary judgment in favor of Defendants as to Plaintiff's unsanitary cell conditions and camp facility transfer claims. In addition, Plaintiff's stayed Motion for Class Certification is currently still pending before the Court. (*See* Dkt. No. 54.) "[T]he district court has no need to entertain [Plaintiff's] attempt to certify a class without a claim." *See Corbin v. Time Warner Entm't-Advancel*

Newhouse P'ship, 821 F.3d 1069, 1085 (9th Cir. 2016). As Plaintiff currently has no active claims before this Court, the Court **DENIES as moot** Plaintiff's Motion for Class Certification.

V. CONCLUSION

***8** Therefore, for the foregoing reasons, the Court finds that Plaintiff failed to exhaust his administrative remedies and **GRANTS** summary judgment in favor of Defendants as to Plaintiff's unsanitary cell conditions and camp facility transfer claims. In addition, Plaintiff's Motion for Class Certification is **DENIED as moot.** Defendants are ORDERED to file a proposed judgment in accordance with this Order no later than Friday, January 27, 2017, at 4:00 p.m.

IT IS SO ORDERED.

All Citations

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End of Document

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United States District
Court, C.D. California.

Benjamin SCHWARZ et al.
v.
Erwin MEINBERG et al.

Case No. CV 17-00330-BRO (PLAx)
|
Filed 06/21/2017

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ORDER RE DEFENDANTS' MOTION TO DISMISS [19]

BEVERLY REID O'CONNELL, United States District Judge

I. INTRODUCTION

*1 Pending before the Court is Defendants' Motion to Dismiss Plaintiff Benjamin R. Schwarz's First Amended Complaint ("FAC"). (Dkt. No. 19 (hereinafter, "Mot.").) After considering the papers filed in support of and in opposition to the instant Motion, the Court deems this matter appropriate for resolution without oral argument of counsel. Fed. R. Civ. P. 78; C.D. Cal. L. R. 7-15. For the following reasons, the Court **GRANTS** Defendants' Motion.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties and Claims

The instant action is substantively identical to a previously-filed case that proceeded before this Court, *Benjamin Schwarz et al. v. Erwin Meinberg et al.*, No. 13-cv-00356 (hereinafter, "*Schwarz I*"). Plaintiff Benjamin Schwarz ("Plaintiff") was a federal inmate incarcerated in the Los Angeles Metropolitan Detention Center ("MDCLA") in California beginning on August 11, 2009. (Dkt. No. 15 (hereinafter, "FAC") ¶ 10.) Plaintiff was released from the Bureau of Prisons' ("BOP") custody on December 12, 2012, at which point he was transferred to Canadian custody. (*Id.*) He was released from Canadian custody on September 19, 2013. (*Id.*) Plaintiff alleges Defendants [1] violated his Fifth and Eighth Amendment constitutional rights during his incarceration at MDCLA. (FAC ¶¶ 116–30.) His FAC seeks general damages, punitive damages, and declaratory relief. (FAC at 17.) Additionally, Plaintiff alleges he is a member of and represents three discrete classes of persons. (FAC ¶¶ 131–32.)

1 The Defendants consist of the following: Erwin Meinberg who was acting Warden at MDCLA during Plaintiff's time there; Brenda Burch who was a Counselor at MDCLA from July 2, 2010 to November 8, 2010; Robert G. McFadden who was the BOP Western Regional Direct between July 2, 2010 and November 8, 2010; Susan G. McClintock

> who was acting Warden at MDCLA on August 17, 2010; Kathleen M. Kenney who was the BOP General Counsel from June 2004 to present; Harley G. Lappin, Jr. who was the BOP Director from 2003 to 2011; Charles E. Samuels who has been the BOP Director from 2011 to present; Thomas R. Kane who is presently BOP Deputy Director; William F. Dalius, Jr. who is presently the BOP Assistant Director of the Administrative Division; Juan D. Castillo who is presently the BOP Western Region Director; Linda Thomas who is presently MDCLA Warden; Tammy Jones who is presently MDCLA Associate Warden for facilities; and Eliezer Ben-Shmuel and Sarah Shuh-Quist who worked for BOP during the relevant time period. (FAC ¶ 12.)

Plaintiff claims that he was deprived of his Fifth Amendment Due Process rights because the administrative remedies available within MDCLA were illusory and the system to file grievances was defunct. (FAC ¶¶ 119, 123–30.) Additionally, Plaintiff, who is a Canadian citizen, alleges that Defendants unconstitutionally discriminated against him because he was denied transfer to a BOP camp due to his national origin. (FAC ¶ 120.) Plaintiff also claims he was subjected to cruel and unusual punishment in violation of the Eighth Amendment because he was forced to spend twelve hours a day inside a cell with nonfunctioning toilets. (FAC ¶ 121.)

B. Procedural History

2** In *Schwarz I*, Plaintiff first filed his Complaint on January 17, 2013. (*See Schwarz I*, ECF No. 1.) On December 23, 2013, the Court dismissed Plaintiff's claims with prejudice for failure to exhaust his administrative remedies. (*See Schwarz I*, ECF No. 32.) On appeal, the Ninth Circuit affirmed in part and reversed in part, permitting the Court to reevaluate its decision in light of the Ninth Circuit's intervening decision in *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014), regarding the proper procedure for determining whether a plaintiff exhausted his administratie remedies under the Prisoner Litigation Reform Act ("PLRA"). *See* ***Schwarz v. Meinberg, 637 Fed.Appx. 374, 374–75 (9th Cir. 2016). On remand, Defendants moved for summary judgment on exhaustion grounds, (*see Schwarz I*, ECF No. 90), which the Court denied, (*see Schwarz I*, ECF No. 110). Instead, on December 20, 2016, the Court held an evidentiary hearing to determine whether Plaintiff had adequately exhausted his administrative remedies. (*See Schwarz I*, ECF No. 129.) On January 13, 2017, the Court issued an order determining that Plaintiff failed to exhaust his administrative remedies and granting summary judgment in favor of Defendants. (*See Schwarz I*, ECF No. 132.) The Court entered judgment in favor of Defendants on January 30, 2017, (*see Schwarz I*, ECF No. 134), and Plaintiff filed a Notice of Appeal on March 6, 2017,[2] (*see Schwarz I*, ECF No. 135).

2 Plaintiff filed a First Amended Notice of Appeal on March 31, 2017. (*See Schwarz I*, ECF No. 140.)

Despite his claims reaching resolution in *Schwarz I*, Plaintiff filed the instant action in this Court on January 14, 2017. (*See* Dkt. No. 1.) Defendants filed a Motion to Dismiss on March 15, 2017. (*See* Dkt. No. 14.) Rather than opposing Defendants' Motion, Plaintiff filed the operative FAC on April 4, 2017. (*See* Dkt. No. 15.) Defendants filed the instant Motion to Dismiss on May 2, 2017. (*See* Mot.) Plaintiff opposed Defendants' Motion on June 5, 2017. (*See* Dkt. No. 20

(hereinafter, "Opp'n").) Defendants replied on June 12, 2017. (*See* Dkt. No. 21.)

III. LEGAL STANDARD

Under Rule 8(a), a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief." Fed. R. Civ. P. 8(a). Otherwise, the defendant may move to dismiss it under Rule 12(b)(6). Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). A claim is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, there must be "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility' " that the plaintiff is entitled to relief. *Id.* (quoting *Twombly*, 550 U.S. at 557).

In ruling on a motion to dismiss for failure to state a claim, a court should follow a two-pronged approach: first, the court must discount conclusory statements, which are not presumed to be true; and then, assuming any factual allegations are true, the court shall determine "whether they plausibly give rise to entitlement to relief." *See id.* at 679; *accord Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012). A court should consider the contents of the complaint and its attached exhibits, documents incorporated into the complaint by reference, and matters properly subject to judicial notice. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322–23 (2007); *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).

Where a district court grants a motion to dismiss, it should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008) ("Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment."). Leave to amend, however, "is properly denied ... if amendment would be futile." *Carrico v. City & County of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).

IV. DISCUSSION

*3 Defendants argue that Plaintiff's claims should be dismissed for three primary reasons: (1) Plaintiff's claims are time-barred; (2) this Court has already determined, and the Ninth Circuit has affirmed, that Plaintiff's due process claim lacks merit; and, (3) qualified immunity requires dismissal of the claims against Defendants in their personal capacity. (*See* Mot. at 1.) Because the Court agrees with Defendants that Plaintiff's claims are time-barred, it does not reach Defendants' other arguments.

As a threshold matter, in his Opposition, Plaintiff misstates the law. He contends that it is inappropriate to decide affirmative defenses, including statute of limitations, on a motion to dismiss. (*See* Opp'n at 2.) The authority Plaintiff cites, however, explains that it is inappropriate to decide exhaustion of administrative remedies under the PLRA on a motion to dismiss; instead, exhaustion should be decided on a motion for summary judgment. *See Schwarz*, 637 Fed.Appx. at 374; *Albino*, 747 F.3d at 1166. "A claim may be dismissed under Rule 12(b)(6) on the ground that it is barred by the applicable statute of limitations," so long as "the running of the statute is apparent on the face of the complaint." *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010) (quoting *Huynh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir. 2006)). Thus, Defendants may raise a statute of limitations defense through a 12(b)(6) motion to dismiss.

The parties agree that the applicable statute of limitations for Plaintiff's claims is two years. (*See* Mot. at 2; Opp'n at 3.) For claims brought pursuant to 42 U.S.C. § 1983, "courts apply the forum state's statute of limitations for personal injury actions." *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004). In California, personal injury actions have a statute of limitations of two years. *See* Cal. Civ. Proc. Code § 335.1. In addition, district courts also apply "the forum state's law regarding tolling, including equitable tolling, except to the extent any of these laws is inconsistent with federal law." *Jones*, 393 F.3d at 927. As Plaintiff was released from custody on September 19, 2013, Defendants contend that the statute of limitations on Plaintiff's claims ran on September 19, 2015. (*See* Mot. at 2.) Plaintiff argues, however, that the statute of limitations was tolled during the pendency of *Schwarz I*.

First, while Plaintiff argues in his Opposition that his claims are tolled, Plaintiff includes no allegations in his FAC indicating that tolling applies. Thus, on the face of Plaintiff's FAC it appears that his claims are time-barred. *See Biotechnology Value Fund, L.P. v. Celera Corp.*, 12 F. Supp. 3d 1194, 1206 (N.D. Cal. 2013) (granting motion to dismiss on statute of limitations grounds because "although plaintiffs' current arguments may well support equitable tolling, those arguments are not found within the amended complaint").

Moreover, even assuming Plaintiff had pleaded the facts he provides in his Opposition, the Court finds that equitable tolling still does not apply. In *Mitchell v. Snowden*, No. 2:15-cv-1167 TLN AC P, 2016 WL 5407858, at *5 (E.D. Cal. June 10, 2016), the Court addressed a similar factual scenario as that presented here. The plaintiff filed a civil rights action in federal district court in 2015 pursuing identical claims against the same defendants as an action that he had originally pursued in the same court beginning in 2008. *Id.* at *1. The 2008 action was eventually dismissed without prejudice based on the plaintiff's failure to prosecute and the Ninth Circuit affirmed the district court's decision in 2014. *Id.* Approximately five months after the

Ninth Circuit's decision, the plaintiff filed a new complaint in the same court. *Id.*

*4 The court explained that, "[i]n California, when a plaintiff pursues identical claims in two different actions, equitable tolling applies during the pendency of the prior action only if it was filed in a different forum; successive identical claims pursued in the same forum are not entitled to equitable tolling." *Id.* at *4. Thus, "when a plaintiff pursues the same claim in the same forum, ... the statute of limitations may be tolled under California law only under a 'general equitable rule' known as the '*Bollinger* rule.' " *Id.* at *5 (citing *Bollinger v. Nat'l Fire Ins. Co.*, 25 Cal. 2d 399, 410 (Cal. 1944)). The *Bollinger* rule applies where three circumstances are present: (1) the trial court erroneously granted the first dismissal; (2) the defendant's dilatory tactics prevented the timely filing of the second action; and, (3) the plaintiff at all times proceeded in a diligent manner. *Id.* The court determined that because the plaintiff filed the same claims in the same forum, equitable tolling —outside of *Bollinger*—did not apply. *Id.* at *6. Moreover, and as is the case here, the *Bollinger* requirements were not satisfied. *Id.* Thus, because the plaintiff filed his action in 2015 and his claims had accrued in 2011, the court held that the plaintiff's claims were barred by the statute of limitations and granted the defendant's motion to dismiss. *Id.* at *6–7.

Likewise, here, Plaintiff filed the instant action in the same forum as his earlier action. Plaintiff provides no authority—and the Court is unaware of any—indicating that the filing of an action within the same forum tolls the statute of limitations; in fact, as the Eastern District of California addressed in *Mitchell*, California authority holds the opposite. *See, e.g., Martell v. Antelope Valley Hosp. Med. Ctr.*, 67 Cal. App. 4th 978, 985 (Cal. Ct. App. 1998) ("Under equitable tolling, the statute of limitations in one forum is tolled as a claim is being pursued in another forum. Here, however, appellants pursued successive claims in the *same* forum, and therefore equitable tolling did not apply." (emphasis in original) (citation omitted)); *see also Baldhosky v. Sanchez*, 656 Fed.Appx. 867, 868 (9th Cir. 2016) (recognizing that "California law generally prohibits equitable tolling for successive claims in the same forum"); *Naylor v. Flavan*, No. CV 08-03746 GAF (AJW), 2009 WL 1468708, at *6 (C.D. Cal. May 19, 2009) (refusing to apply equitable tolling where the plaintiff filed successive claims in the same forum); *Evans v. City of Santa Rosa*, No. C 99-4336, 2000 WL 365054, at *2 (N.D. Cal. Apr. 4, 2000) ("When a party pursues successive claims in the same forum, however, the doctrine [of equitable tolling] does not apply."). Moreover, even assuming *Bollinger* may toll the statute in some cases where a plaintiff files successive claims in the same forum, the Court finds that *Bollinger* is inapplicable here. Though Plaintiff diligently pursued his claims, the Court did not erroneously dismiss Plaintiff's first case and any accrual of the statute of limitations was not due to Defendants' dilatory tactics. *See Gonzalez v. Gamberg*, No. 2:14-cv-0737-KJM-CKD, 2016 WL 823568, at *2 (E.D. Cal. Mar. 3, 2016) ("There is nothing in the record

before this court to show the prior dismissal of the battery claims for improper joinder was erroneous, nor was the time that elapsed prior to that dismissal attributable in any way to defendants. For these reasons, the *Bollinger* rule does not apply here.").

Accordingly, the Court finds that the statute of limitations bars Plaintiff's claims here. Moreover, this is a scenario where it is appropriate to grant a motion to dismiss on statute of limitations grounds as there is no indication on the face of Plaintiff's FAC that tolling may be applicable. Therefore, the Court **GRANTS** Defendants' Motion and does not reach the remainder of Defendants' arguments. Because it does not appear that Plaintiff could cure the untimeliness of his claims with amendment, his claims are **DISMISSED with prejudice**. *See Porter v. Los Angeles County*, No. CV 15-5646 PA (AJW), 2016 WL 8732091, at *8 (C.D. Cal. Aug. 9, 2016) (dismissing untimely claims with prejudice because the plaintiff "had the opportunity and the burden to demonstrate that tolling applied and rendered those claims timely, but he has not done so"); *see also O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1112 (9th Cir. 2006) (affirming district court's dismissal with prejudice of untimely claims).

V. CONCLUSION

*5 For the foregoing reasons, the Court **GRANTS** Defendants' Motion. Because Plaintiff's claims are untimely and he has failed to meet his burden of establishing the applicability of equitable tolling, they are **DISMISSED with prejudice.**

The hearing set for June 26, 2016 is VACATED.

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 4581887

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637 Fed.Appx. 374
This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 9th Cir. Rule 36-3.
United States Court of Appeals, Ninth Circuit.

Benjamin R. SCHWARZ; et al., Plaintiffs–Appellants,
v.
Erwin MEINBERG; et al., Defendants–Appellees.

No. 14–55062.
|
Argued and Submitted Feb. 8, 2016.
|
Filed Feb. 19, 2016.

Attorneys and Law Firms

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Appeal from the United States District Court for the Central District of California, Beverly Reid O'Connell, District Judge, Presiding.

Before: FARRIS, CLIFTON, and BEA, Circuit Judges.

MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36–3.

Benjamin Schwarz and Stephen Yagman appeal the dismissal of their *Bivens* action alleging violations of their Fifth and Eighth Amendment rights while they were inmates at the Metropolitan Detention Center in Los Angeles, California.

After the district court issued its order dismissing Schwarz's claims for failure to exhaust administrative remedies, an en banc decision of this Court held that disputed facts related to exhaustion are not properly resolved on a motion to dismiss. *Albino v. Baca,* 747 F.3d 1162, 1166 (9th Cir.2014) (en banc). Schwarz has pleaded facts adequate to place in dispute whether exhaustion should be excused because the prison grievance process was functionally unavailable. *See Nunez v. Duncan,* 591 F.3d 1217, 1224 (9th Cir.2010). *Albino* therefore controls, notwithstanding this Court's prior exhaustion determination in ***Schwarz v. Meinberg,*** 478 Fed.Appx. 394 (9th Cir.2012). We vacate the district court's exhaustion ruling and remand on an open record so that the district court ***375** can address this issue with the benefit of *Albino.* We express no opinion on whether 42 U.S.C. § 1997e applies to Schwarz, who remains incarcerated in a Canadian prison.

The district court erred in dismissing Schwarz's equal protection claim as insufficiently pleaded. Schwarz has plausibly pleaded factual matter sufficient to claim that the policy of the Bureau of Prisons discriminated against him as a non-citizen. *See Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). We express no opinion as to the validity of his allegations or as to any contention by the government that a deportable alien is not similarly situated to a citizen for this purpose.

The district court did not err in dismissing Schwarz's due process claim with prejudice. To state a cognizable due process claim, a plaintiff must first identify a protected life, liberty, or property interest of which he has been deprived. *Board of Regents v. Roth,* 408 U.S. 564, 570–71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). Schwarz's argument that the grievance process deprived him of access to the courts fails, given that exhaustion is excused under § 1997e when a grievance process is unavailable. *See Sapp v. Kimbrell,* 623 F.3d 813, 823 (9th Cir.2010).

The district court did not err in dismissing Yagman's claims as time-barred. The statute of limitations for a *Bivens* action follows that of an action under 42 U.S.C. § 1983. *Van Strum v. Lawn,* 940 F.2d 406, 410 (9th Cir.1991). The two-year statute of limitations provided by California Civil Procedure Code § 335.1 applies in § 1983 actions. *Maldonado v. Harris,* 370 F.3d 945, 954 (9th Cir.2004). Yagman filed this action on January 17, 2013, over two years after he was released from Bureau custody on November 8, 2010.

AFFIRMED in part, **VACATED** in part and **REMANDED.**

Each party shall bear their own costs.

All Citations

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from controlled housing to the Regional Director within five working days of receipt of that decision.

(d) Upon recommendation of the Warden, or upon appeal from the inmate, the Regional Director may decide whether or not to release the inmate to general population from controlled housing status.

(e) An inmate may appeal a decision of the Regional Director, through the Administrative Remedy Program, directly to the National Inmate Appeals Administrator, Office of General Counsel, within 30 calendar days of the Regional Director's decision (see 28 CFR 542.15).

[54 FR 11323, Mar. 17, 1989; 54 FR 18198, Apr. 27, 1989, as amended at 63 FR 5218, Jan. 30, 1998]

§ 541.65 Release from controlled housing status.

(a) Only the Regional Director may release an inmate from controlled housing status. The following factors are considered in the evaluation of an inmate's readiness for return to the general population:

(1) Relationship with other inmates and staff members, which demonstrate that the inmate is able to function in a less restrictive environment without posing a health threat to others or to the orderly operation of the institution;

(2) Involvement in work and recreational activities and assignments or other programs; and

(3) Adherence to institution guidelines and Bureau of Prisons rules and policy.

(b) An inmate released from a controlled housing status may be returned to the general population of that institution, or to another federal or non-federal institution.

PART 542—ADMINISTRATIVE REMEDY

Subpart A [Reserved]

Subpart B—Administrative Remedy Program

Sec.

AUTHORITY: 5 U.S.C. 301; 18 U.S.C. 3621, 3622, 3624, 4001, 4042, 4081, 4082 (Repealed in part as to offenses committed on or after November 1, 1987), 5006–5024 (Repealed October 12, 1984, as to offenses committed after that date), 5039; 28 U.S.C. 509, 510.

SOURCE: 61 FR 88, Jan. 2, 1996, unless otherwise noted.

Subpart A [Reserved]

Subpart B—Administrative Remedy Program

§ 542.10 Purpose and scope.

(a) *Purpose.* The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement. An inmate may not submit a Request or Appeal on behalf of another inmate.

(b) *Scope.* This Program applies to all inmates in institutions operated by the Bureau of Prisons, to inmates designated to contract Community Corrections Centers (CCCs) under Bureau of Prisons responsibility, and to former inmates for issues that arose during their confinement. This Program does not apply to inmates confined in other non-federal facilities.

(c) *Statutorily-mandated procedures.* There are statutorily-mandated procedures in place for tort claims (28 CFR part 543, subpart C), Inmate Accident Compensation claims (28 CFR part 301), and Freedom of Information Act or Privacy Act requests (28 CFR part 513, subpart D). If an inmate raises an issue in a request or appeal that cannot be resolved through the Administrative Remedy Program, the Bureau will refer the inmate to the appropriate statutorily-mandated procedures.

[67 FR 50805, Aug. 6, 2002]

§ 542.11 Responsibility.

(a) The Community Corrections Manager (CCM), Warden, Regional Director, and General Counsel are responsible for the implementation and operation of the Administrative Remedy Program at the Community Corrections Center (CCC), institution, regional and Central Office levels, respectively, and shall:

(1) Establish procedures for receiving, recording, reviewing, investigating, and responding to Administrative Remedy Requests (Requests) or Appeals (Appeals) submitted by an inmate;

(2) Acknowledge receipt of a Request or Appeal by returning a receipt to the inmate;

(3) Conduct an investigation into each Request or Appeal;

(4) Respond to and sign all Requests or Appeals filed at their levels. At the regional level, signatory authority may be delegated to the Deputy Regional Director. At the Central Office level, signatory authority may be delegated to the National Inmate Appeals Administrator. Signatory authority extends to staff designated as acting in the capacities specified in this §542.11, but may not be further delegated without the written approval of the General Counsel.

(b) Inmates have the responsibility to use this Program in good faith and in an honest and straightforward manner.

§ 542.12 [Reserved]

§ 542.13 Informal resolution.

(a) *Informal resolution.* Except as provided in §542.13(b), an inmate shall first present an issue of concern informally to staff, and staff shall attempt to informally resolve the issue before an inmate submits a Request for Administrative Remedy. Each Warden shall establish procedures to allow for the informal resolution of inmate complaints.

(b) *Exceptions.* Inmates in CCCs are not required to attempt informal resolution. An informal resolution attempt is not required prior to submission to the Regional or Central Office as provided for in §542.14(d) of this part. An informal resolution attempt may be waived in individual cases at the Warden or institution Administrative Remedy Coordinator's discretion when the inmate demonstrates an acceptable reason for bypassing informal resolution.

§ 542.14 Initial filing.

(a) *Submission.* The deadline for completion of informal resolution and submission of a formal written Administrative Remedy Request, on the appropriate form (BP–9), is 20 calendar days following the date on which the basis for the Request occurred.

(b) *Extension.* Where the inmate demonstrates a valid reason for delay, an extension in filing time may be allowed. In general, valid reason for delay means a situation which prevented the inmate from submitting the request within the established time frame. Valid reasons for delay include the following: an extended period in transit during which the inmate was separated from documents needed to prepare the Request or Appeal; an extended period of time during which the inmate was physically incapable of preparing a Request or Appeal; an unusually long period taken for informal resolution attempts; indication by an inmate, verified by staff, that a response to the inmate's request for copies of dispositions requested under §542.19 of this part was delayed.

(c) *Form.* (1) The inmate shall obtain the appropriate form from CCC staff or institution staff (ordinarily, the correctional counselor).

(2) The inmate shall place a single complaint or a reasonable number of closely related issues on the form. If the inmate includes on a single form multiple unrelated issues, the submission shall be rejected and returned without response, and the inmate shall be advised to use a separate form for each unrelated issue. For DHO and UDC appeals, each separate incident report number must be appealed on a separate form.

(3) The inmate shall complete the form with all requested identifying information and shall state the complaint in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8½" by 11") continuation page. The inmate must provide an additional copy of any continuation page. The inmate

must submit one copy of supporting exhibits. Exhibits will not be returned with the response. Because copies of exhibits must be filed for any appeal (see §542.15(b)(3)), the inmate is encouraged to retain a copy of all exhibits for his or her personal records.

(4) The inmate shall date and sign the Request and submit it to the institution staff member designated to receive such Requests (ordinarily a correctional counselor). CCC inmates may mail their Requests to the CCM.

(d) *Exceptions to initial filing at institution*—(1) *Sensitive issues.* If the inmate reasonably believes the issue is sensitive and the inmate's safety or wellbeing would be placed in danger if the Request became known at the institution, the inmate may submit the Request directly to the appropriate Regional Director. The inmate shall clearly mark "Sensitive" upon the Request and explain, in writing, the reason for not submitting the Request at the institution. If the Regional Administrative Remedy Coordinator agrees that the Request is sensitive, the Request shall be accepted. Otherwise, the Request will not be accepted, and the inmate shall be advised in writing of that determination, without a return of the Request. The inmate may pursue the matter by submitting an Administrative Remedy Request locally to the Warden. The Warden shall allow a reasonable extension of time for such a resubmission.

(2) *DHO appeals.* DHO appeals shall be submitted initially to the Regional Director for the region where the inmate is currently located.

(3) *Control Unit appeals.* Appeals related to Executive Panel Reviews of Control Unit placement shall be submitted directly to the General Counsel.

(4) *Controlled housing status appeals.* Appeals related to the Regional Director's review of controlled housing status placement may be filed directly with the General Counsel.

§542.15 Appeals.

(a) *Submission.* An inmate who is not satisfied with the Warden's response may submit an Appeal on the appropriate form (BP–10) to the appropriate Regional Director within 20 calendar days of the date the Warden signed the response. An inmate who is not satisfied with the Regional Director's response may submit an Appeal on the appropriate form (BP–11) to the General Counsel within 30 calendar days of the date the Regional Director signed the response. When the inmate demonstrates a valid reason for delay, these time limits may be extended. Valid reasons for delay include those situations described in §542.14(b) of this part. Appeal to the General Counsel is the final administrative appeal.

(b) *Form.* (1) Appeals to the Regional Director shall be submitted on the form designed for regional Appeals (BP–10) and accompanied by one complete copy or duplicate original of the institution Request and response. Appeals to the General Counsel shall be submitted on the form designed for Central Office Appeals (BP–11) and accompanied by one complete copy or duplicate original of the institution and regional filings and their responses. Appeals shall state specifically the reason for appeal.

(2) An inmate may not raise in an Appeal issues not raised in the lower level filings. An inmate may not combine Appeals of separate lower level responses (different case numbers) into a single Appeal.

(3) An inmate shall complete the appropriate form with all requested identifying information and shall state the reasons for the Appeal in the space provided on the form. If more space is needed, the inmate may use up to one letter-size (8½"×11") continuation page. The inmate shall provide two additional copies of any continuation page and exhibits with the regional Appeal, and three additional copies with an Appeal to the Central Office (the inmate is also to provide copies of exhibits used at the prior level(s) of appeal). The inmate shall date and sign the Appeal and mail it to the appropriate Regional Director, if a Regional Appeal, or to the National Inmate Appeals Administrator, Office of General Counsel, if a Central Office Appeal (see 28 CFR part 503 for information on locating Bureau addresses).

[61 FR 88, Jan. 2, 1996, as amended at 70 FR 67091, Nov. 4, 2005]

§ 542.16 Assistance.

(a) An inmate may obtain assistance from another inmate or from institution staff in preparing a Request or an Appeal. An inmate may also obtain assistance from outside sources, such as family members or attorneys. However, no person may submit a Request or Appeal on the inmate's behalf, and obtaining assistance will not be considered a valid reason for exceeding a time limit for submission unless the delay was caused by staff.

(b) Wardens shall ensure that assistance is available for inmates who are illiterate, disabled, or who are not functionally literate in English. Such assistance includes provision of reasonable accommodation in order for an inmate with a disability to prepare and process a Request or an Appeal.

§ 542.17 Resubmission.

(a) *Rejections.* The Coordinator at any level (CCM, institution, region, Central Office) may reject and return to the inmate without response a Request or an Appeal that is written by an inmate in a manner that is obscene or abusive, or does not meet any other requirement of this part.

(b) *Notice.* When a submission is rejected, the inmate shall be provided a written notice, signed by the Administrative Remedy Coordinator, explaining the reason for rejection. If the defect on which the rejection is based is correctable, the notice shall inform the inmate of a reasonable time extension within which to correct the defect and resubmit the Request or Appeal.

(c) *Appeal of rejections.* When a Request or Appeal is rejected and the inmate is not given an opportunity to correct the defect and resubmit, the inmate may appeal the rejection, including a rejection on the basis of an exception as described in §542.14(d), to the next appeal level. The Coordinator at that level may affirm the rejection, may direct that the submission be accepted at the lower level (either upon the inmate's resubmission or direct return to that lower level), or may accept the submission for filing. The inmate shall be informed of the decision by delivery of either a receipt or rejection notice.

§ 542.18 Response time.

If accepted, a Request or Appeal is considered filed on the date it is logged into the Administrative Remedy Index as received. Once filed, response shall be made by the Warden or CCM within 20 calendar days; by the Regional Director within 30 calendar days; and by the General Counsel within 40 calendar days. If the Request is determined to be of an emergency nature which threatens the inmate's immediate health or welfare, the Warden shall respond not later than the third calendar day after filing. If the time period for response to a Request or Appeal is insufficient to make an appropriate decision, the time for response may be extended once by 20 days at the institution level, 30 days at the regional level, or 20 days at the Central Office level. Staff shall inform the inmate of this extension in writing. Staff shall respond in writing to all filed Requests or Appeals. If the inmate does not receive a response within the time allotted for reply, including extension, the inmate may consider the absence of a response to be a denial at that level.

§ 542.19 Access to indexes and responses.

Inmates and members of the public may request access to Administrative Remedy indexes and responses, for which inmate names and Register Numbers have been removed, as indicated below. Each institution shall make available its index, and the indexes of its regional office and the Central Office. Each regional office shall make available its index, the indexes of all institutions in its region, and the index of the Central Office. The Central Office shall make available its index and the indexes of all institutions and regional offices. Responses may be requested from the location where they are maintained and must be identified by Remedy ID number as indicated on an index. Copies of indexes or responses may be inspected during regular office hours at the locations indicated above, or may be purchased in accordance with the regular fees established for copies furnished under the Freedom of Information Act (FOIA).

CERTIFICATE OF SERVICE

I certify that I caused the foregoing petition for a writ of certiorari to be served by USPS on respondents' counsel, whose address is set forth below, by placing three copies of it in an envelope with postage fully prepaid on August 20, 2019, at Los Angeles, California.

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