No. 19-6410

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IN THE SUPREME COURT OF THE UNITED STATES

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DONALD W. RAGER, PETITIONER

v.

PAIGE AUGUSTINE, WARDEN, ET AL.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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# BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioner's claims under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), as barred by the applicable statute of limitations.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (11th Cir.):

Rager v. Marianna, 17-11026 (May 11, 2017)

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is not published in the Federal Reporter but is reprinted at 760 Fed. Appx. 947. The order of the district court dismissing certain of petitioner's claims as barred by the statute of limitations (Pet. App. C1-C3) is not published in the Federal Supplement but is available at 2017 WL 102969. The report and recommendation of the magistrate judge (Pet. App. D1-D39), which was adopted by the district court in relevant part, is not published in the Federal Supplement but is available at 2016 WL 7670070.

## JURISDICTION

The judgment of the court of appeals was entered on February 1, 2019. A petition for rehearing was denied on May 23, 2019 (Pet. App. B1). The petition for a writ of certiorari was filed on August 20, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner is a federal inmate who was housed at the Federal Correctional Institution in Marianna, Florida during the relevant period. Pet. App. D2.[1] Petitioner alleges that on July 13, 2010, he was assaulted by respondent Keith Buford, a correctional officer, after complaining to Buford that another officer had improperly confiscated food from him. Id. at D3. Petitioner further alleges that both Buford and another officer subsequently denied petitioner medical treatment for injuries to his back, wrists, and face suffered during the assault. Id. at D4.

Petitioner claims that Buford then detained him in the special housing unit (SHU) pending an investigation into a possible violation of Federal Bureau of Prison (BOP) rules. Pet. App. D5. Buford also allegedly filed a false disciplinary report against petitioner, which was designed to extend petitioner's time in the SHU and thwart any efforts to report the assault.

[1] Petitioner was subsequently transferred to a different federal correctional facility.

Ibid. Nevertheless, while in the SHU, petitioner filed various administrative grievances regarding the incident. Id. at D5, D8. Petitioner alleges that the warden responded by extending his stay in the SHU, and that various prison employees informed him that he would remain in the SHU and then be transferred to another institution unless he dropped his grievances. Id. at D6-D7. Petitioner alleges he was eventually released from the SHU after 127 days. Id. at D6.

Following his release, petitioner filed additional grievances relating to his detention in the SHU. Pet. App. D8. Petitioner alleges that prison officials continued to threaten him in an effort to persuade him to drop his grievances. Id. at D7-D8. Petitioner further claims that after his grievances were denied at the institutional level, regional and national BOP remedy coordinators rejected his administrative appeals for "fraudulent, fictitious, or factually incorrect reasons," and failed to respond within the time limits set forth in BOP regulations. Id. at 8-9 (citation omitted).

2. On February 24, 2015, petitioner filed this lawsuit against the BOP and ten individual BOP officials, seeking redress for the alleged misconduct described above. Pet. App. D1. He asserted claims under the First, Fourth, Fifth, Eighth, and Fourteenth Amendments, and sought monetary relief against the officials in their individual capacities under Bivens v. Six

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Pet. App. D9.

As relevant here, the district court dismissed petitioner's claims relating to the alleged assault and subsequent detention in the SHU as barred by the statute of limitations. See Pet. App. C1-C3 (adopting magistrate judge's report and recommendation on the limitations issue); see also id. at D10-D29 (report and recommendation limitations analysis). The court explained that the forum state's statute of limitations for personal-injury claims applies to Bivens actions. Id. at D11. Here, the forum state was Florida, which provides a four-year limitations period. Ibid. The court further explained that petitioner's claims accrued between July 13, 2010 (the date of the alleged assault) and November 17, 2010 (the date of his release from the SHU). Id. at D12-D13. Because petitioner did not file his complaint until February 24, 2015, his claims fell outside the four-year period. Id. at D15.

The district court rejected petitioner's argument that the statute of limitations was tolled while he exhausted administrative remedies as required by the Prison Litigation Reform Act of 1995 (PLRA), 42 U.S.C. 1997e.[2] The court observed that tolling in a Bivens suit is also presumptively governed by

[2] The PLRA provides that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. 1997e(a).

the law of the forum state. Pet. App. D16 (citing Wallace v. Kato, 549 U.S. 384, 394 (2007)). But the court concluded that Florida's tolling rules did not suspend the statute of limitations during the period of exhaustion in this case. Id. at D16-D18, D24.

The district court recognized that federal common law may displace state tolling rules when the latter are "inconsistent with the Constitution and laws of the United States," Pet. App. D16 (quoting Board of Regents of the Univ. of the State of N.Y. v. Tomanio, 446 U.S. 478, 484-485 (1980)), and noted that the Eleventh Circuit had previously declined to decide whether the application of federal tolling was appropriate in the PLRA context, id. at D20. It reasoned that it need not resolve that question in this case, however. In light of BOP regulations entitling petitioner to treat an untimely response to an administrative grievance as a denial, id. at D26 (citing 28 C.F.R. 542.18), the court concluded that petitioner could have completed exhaustion and filed suit (at the latest) over a year before the limitations period expired on any of his claims -- despite the alleged administrative delays in processing his grievances, id. at D27. In the court's view, because exhaustion did not actually prevent petitioner from filing on time, he could not invoke equitable tolling under federal law. Id. at D20, D25, D27 (citing, e.g., Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1231-1232 (2014)).

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A1-A15. It agreed with the district court that Florida's four-year statute of limitations applied, and that petitioner failed to file his lawsuit within four years of the date his claims accrued. Id. at A5-A8. The court also agreed that petitioner was not entitled to equitable tolling under Florida law. Id. at A8.

As to federal tolling, the court of appeals reiterated that it had "expressly declined to address the question of whether the statute of limitations can be tolled while a prisoner is in the process of exhausting his administrative remedies as a mandatory prerequisite for filing a federal lawsuit." Pet. App. A6 (citing Leal v. Georgia Dep't of Corr., 254 F.3d 1276, 1280 (11th Cir. 2001) (per curiam)). Rather than decide that question, the court concluded that, even if tolling were available, petitioner "does [not] meet the standard for equitable tolling under the law of this Court, since he has failed to prove that he diligently pursued his administrative remedies or that the exhaustion of his administrative remedies prevented him from timely filing a federal claim." Id. at A8.

4. The court of appeals denied the petition for panel rehearing and rehearing en banc without recorded dissent. Pet. App. B1.

ARGUMENT

Petitioner argues that the court of appeals erred in declining to find his complaint timely under federal equitable tolling rules, and that its decision conflicts with the decisions of other courts of appeals that have applied federal tolling to PLRA exhaustion. The decision below was correct and any tension in the circuits does not warrant this Court's intervention. In any event, this case is a poor vehicle for addressing the question presented. Further review is not warranted.

1. The court of appeals correctly affirmed the district court's dismissal of petitioner's claims as time-barred, both because petitioner does not satisfy the requirements for equitable tolling under federal law and because federal tolling does not apply in this context in the first place.

a. Petitioner's claims are untimely even if federal tolling rules apply. Under federal law, a plaintiff must show that he "has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action." Lozano v. Montoya Alvarez, 572 U.S. 1, 10 (2014). Petitioner cannot satisfy either prong of that standard. As to diligence, BOP regulations provide precise, and limited, periods of time for each step of the administrative review process. See 28 C.F.R. 542.14-542.18.[3] Although petitioner contends that the

[3] As a general matter, BOP regulations provide for three levels of review. Subject to the availability of limited extensions, the warden has 20 days to respond to a grievance; the

exhaustion process in this case far exceeded the period contemplated by the regulations because administrators rejected his grievances "beyond the due date in nearly every instance," Pet. 16-17, BOP policy provides that "[i]f 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," 28 C.F.R. 542.18. The alleged non-responses thus could not have hampered petitioner's ability to exhaust in a timely fashion.

Moreover, exhaustion did not prevent petitioner from filing suit within the limitations period. By petitioner's own calculations, prison administrators were required to provide a final response to all of his grievances by February 9, 2013, at the latest. Pet. 17. Because petitioner was entitled to treat any non-response as a denial, he could have filed his complaint the following day, well before the expiration of the four-year limitations period in July 2014 (for his assault claim) and November 2014 (for his detention claim). Pet. App. D15. But he nevertheless waited to file until February 24, 2015 -- over two years later. Id. at D27. That lengthy delay had nothing to do with the exhaustion requirement.

b. Although the court of appeals did not reach the question, it would have been justified in denying relief on the

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regional director has 30 days to answer an appeal; and the general counsel has 40 days to answer a further appeal. 28 C.F.R. 542.18.

additional ground that federal tolling is not available in this context. Courts have generally held that actions under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), like actions under 42 U.S.C. 1983, are presumptively subject to the forum state's personal-injury statute of limitations, see Wilson v. Garcia, 471 U.S. 261, 275 (1985); Kelly v. Serna, 87 F.3d 1235, 1238 (11th Cir. 1996), "includ[ing] rules of tolling," Board of Regents of the Univ. of the State of N.Y. v. Tomanio, 446 U.S. 478, 485 (1980). A federal common-law tolling rule can conceivably displace state law only when the latter is "inconsistent with the federal policy underlying the cause of action under consideration." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975).

There is no inconsistency here. In light of the grievance timelines provided in BOP regulations and the rule entitling prisoners to treat non-responses as denials, Florida's four-year period provides ample time for a prisoner to exhaust administrative remedies and still file suit, even in the absence of tolling. This case confirms the point, as petitioner would have had, at the least, well over a year to file his complaint had he acted diligently. See p. 8, supra; cf. Heimeshoff v. Hartford Life & Accident Ins. Co., 571 U.S. 99, 102, 109-115 (2013) (noting that "the administrative exhaustion requirement will, in practice, shorten the contractual limitations period," but upholding that period as reasonable and consistent with the

statutory scheme where it would typically leave adequate time to exhaust and, in fact, left adequate time for plaintiff in that case to do so). Thus, in contrast to cases where this Court has applied a federal tolling rule, this is not a situation where prisoners would have "little chance of bringing a claim not barred by the State's statute of limitations." Heimeshoff, 571 U.S. at 110 (discussing Occidental Life Ins. Co. v. EEOC, 432 U.S. 355 (1977)).

In any event, even if the Court concluded that the PLRA exhaustion requirement conflicts with the applicable state limitations period, the fact that this case involves the implied Bivens right of action would still militate against recognizing a federal tolling rule. For nearly 40 years, this Court has "consistently refused to extend Bivens to any new context," Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017) (citation omitted), as it has come "to appreciate more fully the tension between [implying causes of action] and the Constitution's separation of legislative and judicial power," Hernandez v. Mesa, No. 17-1678 (Feb. 25, 2020), slip op. 5. To be sure, the question presented here is not whether to recognize a new private right of action. But the same principles articulated in Abbasi and Hernandez caution hesitation in expanding the judicially implied Bivens remedy by adopting a judicially created tolling rule.

2. Petitioner errs in contending (Pet. i-ii) that the court of appeals' decision created a circuit conflict over the availability of federal tolling during PLRA exhaustion. Many of the cases that petitioner cites merely recognized tolling under state law. See Pearson v. Secretary Dep't of Corr., 775 F.3d 598, 602-604 (3d Cir. 2015) (Pennsylvania law); Roberts v. Barreras, 484 F.3d 1236, 1242-1243 (10th Cir. 2007) (New Mexico law); Johnson v. Rivera, 272 F.3d 519, 522 (7th Cir. 2001) (Illinois law); Harris v. Hegmann, 198 F.3d 153, 158 (5th Cir. 1999) (per curiam) (Louisiana law).[4] Petitioner does not dispute that tolling pursuant to Florida law is unavailable here. See Pet. App. A8.

To the extent other decisions cited by petitioner held that federal tolling is available for PLRA exhaustion, see Battle v. Ledford, 912 F.3d 708, 717 (4th Cir. 2019); Gonzalez v. Hasty, 651 F.3d 318, 323-324 (2d Cir. 2011); Brown v. Morgan, 209 F.3d 595, 596 (6th Cir. 2000); see also Brown v. Valoff, 422 F.3d 926, 943 (9th Cir. 2005) (dicta), they also do not conflict with the opinion below. As petitioner concedes (see, e.g., Pet. 4), the Eleventh Circuit declined to resolve that issue. See Pet. App. A6, A8. And even if the court had rejected tolling categorically, its holding would still be distinguishable from

[4] Petitioner also cites Williams v. Pulaski Cty. Det. Facility, 278 Fed. Appx. 695 (8th Cir. 2008) (per curiam), but that decision merely remanded for the district court to decide whether tolling was available. See id. at 695-696.

the decisions on which petitioner relies. Each of those cases involved a state statute of limitations materially shorter than Florida's four-year period. See Battle, 912 F.3d at 712 (two years); Gonzalez, 651 F.3d at 321 (three years); Valoff, 422 F.3d at 942 (two years); Morgan, 209 F.3d at 596 (one year). As a result, each presented a substantially greater risk that a prisoner would not have time to exhaust and file suit before the limitations period expired. Here, there is no similar risk of conflict between state and federal law, and thus no basis for imposing a federal tolling rule. See pp. 9-10, supra.

Apart from the availability of federal tolling, there is arguably some tension in the courts of appeals over the proper application of tolling doctrine in the PLRA context. Compare, e.g., Battle, 912 F.3d at 720 ("All a court must do is determine the point of exhaustion and run the limitations period from that date."), with Gonzales, 651 F.3d at 322 n.2 (tolling does not apply to the "time period in between the accrual of the claim and when the prisoner initiated the administrative remedy process"). Because the court of appeals in this case did not resolve the question of whether tolling was even available, however, it could not have meaningfully contributed to any conflict over the application of federal tolling. Moreover, one of the grounds for the court's rejection of petitioner's tolling claim was lack of diligence, Pet. App. A8, and none of the cited decisions denies that diligence is a relevant factor. See

Battle, 912 F.3d at 718 ("Battle showed reasonable diligence during the 83-day exhaustion period."); Gonzalez, 651 F.3d at 322 ("Equitable tolling is an extraordinary measure that applies only when plaintiff is prevented from filing despite exercising that level of diligence which could reasonably be expected in the circumstances.") (citation omitted).

Even were the Court to conclude that some tension exists in the circuits over the availability and application of federal tolling in this context, additional percolation would be warranted. According to petitioner, the Eleventh Circuit's approach differs from that of nine other courts of appeals. Pet. i-ii. But the decision below -- a nonprecedential opinion that merely assumed the availability of tolling -- hardly establishes a definitive stance on the issue. And as petitioner points out (Pet. ii), the Eleventh Circuit has suggested in published opinions that tolling may apply to PLRA exhaustion. See, e.g., Napier v. Preslicka, 314 F.3d 528, 534 n.3 (2002) ("We proffer, but do not hold, as that issue is not before us, that such a result may be mitigated by the doctrine of equitable tolling, as other circuits have applied that doctrine to the administrative exhaustion requirement for prison condition suits."), cert. denied, 540 U.S. 1112 (2004). There is no reason for this Court to intervene now when a future decision will either eliminate or meaningfully sharpen any arguable conflict.

3. In any event, this case is a poor vehicle for answering the question presented, because it involves a Bivens claim rather than a Section 1983 claim. For the reasons discussed above, see p. 10, supra, the Court's reluctance to recognize implied rights of action militates against adopting an expansive tolling rule for Bivens claims. At the very least, Bivens' status as an implied right -- particularly given the strong likelihood that Bivens does not even apply on these facts, see pp. 14-16, infra -- would complicate the inquiry into whether application of state law is "inconsistent with the federal policy underlying the cause of action under consideration." Johnson, 421 U.S. at 465.

Moreover, because petitioner's Bivens claims plainly fail on the merits, reversing the court below on statute-of-limitations grounds would have no effect on the ultimate outcome. The first step in assessing a Bivens claim is to determine whether it arises in a new context. "If the case is different in a meaningful way from previous Bivens cases decided by this Court, then the context is new." Abbasi, 137 S. Ct. at 1859. The only remotely analogous prior case is Carlson v. Green, 446 U.S. 14 (1980), which involved "a claim against prison officials for failure to treat an inmate's asthma," Abbasi, 137 S. Ct. at 1860. But Carlson addressed the denial of emergency medical care resulting in a loss of life, see 446 U.S. at 16, as opposed to the temporary denial of care for non-life threatening

conditions, see Pet. App. D9. Furthermore, the PLRA has changed the legal landscape since Carlson was decided. These considerations are sufficient to render this case a new context for Bivens purposes. See Abbasi, 137 S. Ct. at 1864-1865 (distinguishing prisoner mistreatment claim from Carlson and explaining that "even a modest extension is still an extension").

Because extending Bivens to "any new context or new category of defendants" is "disfavored," courts decline to do so if there are "special factors counselling hesitation in the absence of affirmative action by Congress." Abbasi, 137 S. Ct. at 1857 (citations omitted). Such factors abound in this case. Although the PLRA "made comprehensive changes to the way prisoner abuse claims must be brought in federal court," "the Act itself does not provide for a standalone damages remedy against federal jailers," thus suggesting that Congress did not desire a damages remedy in this context. Id. at 1865; see Hernandez, slip op. 14 (surveying "what Congress has done in statutes addressing related matters"). In addition, administrative and injunctive relief may have been available for many of petitioner's claims. See Abbasi, 137 S. Ct. at 1858 ("[I]f there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new Bivens cause of action."). These considerations make clear that "congressionally uninvited intrusion is [an] inappropriate

action for the Judiciary to take" in this case. Id. at 1862 (citation and internal quotation marks omitted).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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