Petitioner's

Appendix

A

4th Circuit Opinion
#19-7450

FILED: March 16, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7450
(5:17-ct-03048-BO)

BOBBY BURGHART

Plaintiff - Appellant

v.

SARAH BEYER

Defendant - Appellee

and

THOMAS KANE; J. F. CARAWAY; J. ANDREWS; ERIC W. GIBSON; T. PALUCH; B. NEAGLE; KIRKPATRICK; BRADFORD, Unicore Plant Manager; BELLAS, Unit Supervisor; R. SIMMONS; S. COX; L. LINDSAY; PHYSICIAN ASSISTANT DERRY; WILLIAM O'DONNELL; STEPHANIE MARTIN

Defendants

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7450

BOBBY BURGHART,

Plaintiff - Appellant,

v.

SARA BEYER,

Defendant - Appellee,

and

THOMAS KANE; J. F. CARAWAY; J. ANDREWS; ERIC W. GIBSON; T. PALUCH; B. NEAGLE; KIRKPATRICK; BRADFORD, Unicore Plant Manager; BELLAS, Unit Supervisor; R. SIMMONS; S. COX; L. LINDSAY; PHYSICIAN ASSISTANT DERRY; WILLIAM O'DONNELL; STEPHANIE MARTIN,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, Chief District Judge. (5:17-ct-03048-BO)

Submitted: March 12, 2020 Decided: March 16, 2020

Before KING, KEENAN, and FLOYD, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Bobby Burghart, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Bobby Burghart appeals the district court's order dismissing his claims pursuant to the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (2018), under 28 U.S.C. § 1915(e)(2)(B) (2018), and granting summary judgment on some of his claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for failure to exhaust or on the merits, and a subsequent order granting summary judgment to Defendants on the remaining deliberate indifference claims. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Burghart v. Beyer*, No. 5:17-ct-03048-BO (E.D.N.C. Sept. 28, 2018; Sept. 17, 2019). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: June 3, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7450
(5:17-ct-03048-BO)

BOBBY BURGHART

Plaintiff - Appellant

v.

SARAH BEYER

Defendant - Appellee

and

THOMAS KANE; J. F. CARAWAY; J. ANDREWS; ERIC W. GIBSON; T. PALUCH; B. NEAGLE; KIRKPATRICK; BRADFORD, Unicore Plant Manager; BELLAS, Unit Supervisor; R. SIMMONS; S. COX; L. LINDSAY; PHYSICIAN ASSISTANT DERRY; WILLIAM O'DONNELL; STEPHANIE MARTIN

Defendants

MANDATE

The judgment of this court, entered March 16, 2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule

41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

Petitioner's Appendix B

District Court's Opinions

Order dated Sept. 28, 2018 (ECF# 62)

Order dated Sept. 17, 2019 (ECF# 81 & 82)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CT-3048-BO

BOBBY BURGHART,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
THOMAS KANE, *et al.*,	)	
	)	
Defendants.	)	

Plaintiff, a federal inmate proceeding pro se, filed this civil rights action *pro se* pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671–2680. This matter is before the court upon the following motions: (1) plaintiff's motions to serve additional defendants [DE-31, 32]; (2) plaintiff's motion for entry of default [DE-47]; (3) defendants' motion to dismiss, or in the alternative, for summary judgment[1] [DE-43]; (4) plaintiff's motions for copies [DE-52]; (5) plaintiff's motion to appoint counsel [DE-56]; (6) plaintiff's motion to exceed page limitation [DE-59]; and (7) plaintiff's motion for judicial notice [DE-61].

I. Statement of the Case

On February 21, 2017, plaintiff filed a Bivens complaint, alleging 17 claims against 14 defendants. [DE-1]. Among other things, plaintiff alleged defendants were deliberately indifferent

[1] The court treats defendant's motion as one for summary judgment because it relies on matters outside the pleadings. See Fed. R. Civ. P. 12(d).

to his serious medical needs. On the face of his complaint, plaintiff concedes that he did not fully exhaust his administrative remedies prior to filing suit. Id. at p. 17. However, plaintiff also alleges defendants' actions rendered the administrative remedy procedure unavailable to him. Id. at pp. 17, 46.

Along with his complaint, plaintiff also filed a motion to proceed without prepayment of fees and a motion requesting a copy of complaint. [DE-2, 3]. Plaintiff's motion to proceed without prepayment of fees was allowed. [DE-11]. In retrospect, allowing this motion was premature at the time, because plaintiff is subject to the "three strikes" provision of 28 U.S.C. § 1915(g).[2] See Burghart v. United States, Case No. 5:16-CT-3332-FL [DE-12] (listing cases and finding that Burghart's FTCA claim was barred pursuant to§ 1915(g)).

In response to order allowing him to proceed without the prepayment of fees, plaintiff filed the first of several submissions requesting that the court take judicial notice that he is unable to pay the filing fee. [DE-12]. These filings request a full waiver of the filing fee, rather than simply waiver of prepayment. Likewise, on July 11, 2017, plaintiff moved to amend his complaint. [DE-21]. Plaintiff's proposed amendments did not assert new claims or name new defendants. Instead, plaintiff set out to establish he was under imminent danger of serious physical injury.

On August 15, 2017, the court allowed plaintiff's request for a copy of his complaint and accompanying exhibits. [DE-22], pp. 1-2. However, the court notified plaintiff that he would be

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[2] Under the Prisoner Litigation Reform Act ("PLRA"), a prisoner cannot proceed without the prepayment of fees "if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." 28 U.S.C. § 1915(g).

required to pay for any additional copies. Id. In addition, the court denied plaintiff's request for a full waiver of the filing fee. Id. at p. 2. Plaintiff's motion to amend was allowed as a matter of course. Id. at pp. 2-3.

After addressing these motions, the court then conducted a frivolity review of plaintiff's claims. The court dismissed plaintiff's claim alleging he has been denied access to the Federal Bureau of Prisons' ("BOP") Administrative Remedy Procedure ("ARP") and that he was denied due process when he lost his prison work assignment. Id. His remaining claims survived frivolity review. Id. at pp. 4-5. Moreover, plaintiff alleged that defendants refused to treat his lower back injuries. Due to this alleged lack of treatment, plaintiff argues that he is at serious risk of falling. Am. Compl. [DE-21], pp. 3-4. In light of that allegation, the court found that plaintiff was under imminent danger of serious physical injury, and allowed plaintiff to proceed without the prepayment of fees. [DE-22], p. 3. Summons were returned executed for each of the defendants named in plaintiff's original complaint. [DE-28, 29].

Plaintiff filed a second motion to amend his complaint on September 1, 2017. [DE-27]. Given the liberal standard in favor of amendment, the court allowed plaintiff's motion, and directed the clerk of court to docket the filing as plaintiff's operative complaint. [DE-30]. In large part, the amended complaint simply elaborated upon his original claims. However, plaintiff added claims against William O'Donnell and Stephanie Martin. Second Am. Compl. [DE-27], pp. 2, 4. In addition, plaintiff purported to proceed under both Bivens and the FTCA. Id. at p. 1. O'Donnell and Martin were added as parties to this action, but the United States was not.[3]

[3] The only proper defendant in an FTCA claim is the United States. See F.D.I.C. v. Meyer, 510 U.S. 471, 477 (1994); Jackson v. Kotter, 541 F.3d 688, 693 (7th Cir. 2008); Maron v. United States, 126 F.3d 317, 321–22 (4th Cir. 1997); 28 U.S.C. §1346(b).

In September, 2017, plaintiff filed two motions requesting that the court serve O'Donnell and Martin. [DE-31, 32]. On October 30, 2017, the court issued summons to O'Donnell and Martin, and these summons were returned executed in November, 2017. [DE-34, 38, 39].

In October, 2017 and December, 2017, defendants received extensions of time to answer plaintiff's second amended complaint. [DE-36, 42]. After the second extension, defendants' answer was due by January 5, 2018. [DE-42]. On January 2, 2018, plaintiff filed a motion for entry of default, arguing defendants failed to timely answer his claims. [DE-47]. Defendants filed the instant motion for summary judgment on January 4, 2018. [DE-43]. Pursuant to Roseboro v. Garrison, 528 F.2d 309, 310 (4th Cir. 1975) (per curiam), the court notified plaintiff about the motion for summary judgment, the consequences of failing to respond, and the response deadline [DE-48]. After receiving two extensions of time [DE-51, 55], plaintiff filed two timely responses. [DE-58, 60]. At the time he filed his responses, plaintiff also sought leave to exceed the page limitation of Local Civil Rule 7.2(f).

On February, 2018 plaintiff sought court provided copies of all his previous filings and the appointment of counsel. [DE-52, 56]. Finally, on May 4, 2018, plaintiff filed a motion requesting the court take judicial notice of certain facts. [DE-61]. Although the filing contains no explicit request for relief, the tenor of the filing is that plaintiff again seeks either court provided copies and/or full waiver of the filing fee.

These matters are now ripe for adjudication.

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II. Statement of the Facts

In his first, third, and fourth claims[4], plaintiff contends defendants violated his First Amendment rights by "hamper[ing] . . . [his] right of free speech and access to the Court." Second Am. Compl. [DE-27], pp. 7-12. In support of these claims, he asserts these defendants did not provide plaintiff's with adequate paper "to do legal research, draft legal papers or briefs, and/or hand write their motions and/or briefs." Id. at 7. He also claims they deprived him of legal research materials. Id. at p. 9. Plaintiff also complains that defendants "turn off and/or unplug the law library copier at 6:30 p.m." Id. at p. 11.

In his sixth and twelfth claims for relief, plaintiff contends defendant Lindsay violated his First Amendment rights by inspecting his outgoing legal mail on May 24, 2016.[5] Id. at pp. 14-15, 27-29. He alleges this also occurred on other occasions, but he does not provide any further dates or descriptions. Id. Plaintiff's complaint does not identify a legal claim that was frustrated or impeded based on Lindsay's inspection of his outgoing mail.

In his seventh and ninth claims, plaintiff contends that defendants retaliated against him for exercising his First Amendment rights. Id. at pp. 16-18, 20-21. Specifically, in his seventh and ninth claims, plaintiff contends that, on January 6, 2017, he "was placed in the . . . Special Housing Unit

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[4] Plaintiff's second, fifth, fifteenth, and twenty-fourth claims were dismissed by the court on frivolity review. [DE-22]. In his second amended complaint plaintiff still describes these claims, but then strikes through them with the notation "dismissed by the court." Second Am. Compl. [DE-27], pp. 8-9, 13-14, 32-34, 51-53. The court specifically denied plaintiff's motion to amend to the extent it sought to restore these claims. [DE-30].

[5] Plaintiff alternately describes this incident as occurring on May 24, 2016 and May 24, 2017. Second Am. Compl. [DE-27], p. 15, 27. This appears to be a typographical error, as plaintiff is clearly describing the same occurrence. Moreover, if the incident occurred on May 24, 2017, it took place after plaintiff filed suit and is therefore unexhausted.

(SHU) for inciting a work stopage." Id. at p. 16. Plaintiff alleges that he obtained information on Unicor work contracts through a Freedom of Information Act ("FOIA") request. Id. at p. 17, 20-21. Plaintiff asserts he was falsely accused of disseminating that information in hopes of encouraging other prisoners to stop working. Id. Similarly, in his thirteenth and twenty-sixth claim, plaintiff alleges defendants denied him procedural due process prior to placing him in the SHU, in violation of the Fifth Amendment.[6] Id. at pp. 29-30, 56-57. Plaintiff does not describe the conditions he faced in the SHU. Finally, in his nineteenth claim, plaintiff alleges that his placement in the SHU violated the Eighth Amendment. Id. at pp. 39-41. Plaintiff does not allege that the conditions in the SHU were inhumane. Rather, he asserts his placement in the SHU created "a situation that could have had a negative result to his safety, welfare, and health . . . [because a] charge of inciting a work stoppage could have caused the plaintiff's security points to be raised and/or to be transferred . . . to a high security facility." Id. at p. 40.

In his eighth, eighteenth, and twenty-third claims, plaintiff contends defendants violated the Eighth amendment because they were deliberately indifferent to his severe back and shoulder pain.[7] Id. at pp. 18-19, 37-39, 49-51. In his eighth claim, plaintiff alleges defendants were deliberately indifferent to his back pain beginning in October 3, 2016. Id. at 18-19. In his eighteenth claim, plaintiff contends that from April, 2015 through August, 2015 defendants were deliberately

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[6] In his twenty-sixth claim, plaintiff brings his procedural due process claim under the Fourteenth Amendment. Second Am. Compl. [DE-27], pp. 56-57. Because plaintiff alleges a claim against federal actors, the Fifth Amendment is applicable. Davis v. Passman, 442 U.S. 228, 239 n. 18 (1979) (extending Bivens to allow citizen's recovery of damages resulting from a federal agent's violation of the Due Process Clause of the Fifth Amendment).

[7] Although plaintiff couches his eighth claim as a retaliation claim, his allegations clearly sound in deliberate indifference. Second Am. Compl. [DE-27], pp. 18-19.

indifferent to his lower back pain. Id. at pp. 37-39. In his twenty third-claim, plaintiff contends defendants were deliberately indifferent to his back pain since June, 2016. Id. at pp. 49-51,

In his tenth and twenty-first claims, plaintiff contends defendants violated his First Amendment rights when they retaliated against him by denying him a prison job. Id. at pp. 21-23,44-47. Plaintiff claims they retaliated against him based on the numerous actions he has filed in federal court, and also because of his FOIA request. Id.

In his eleventh claim, plaintiff asserts defendants violated his Fourth Amendments rights by withdrawing funds from his prison account to pay plaintiff's numerous court filing fees. Id. at pp. 24-27. This court, and others, have entered orders stating that "[i]f an inmate has been ordered to make payments in more than one action or appeal in the federal courts, the total amount collected for all cases cannot exceed 20 percent of the inmate's preceding monthly income or trust account balance, as calculated under 28 U.S.C. § 1915(b)(l) & (2)." See, e.g., [DE-11], p. 2. Plaintiff alleges defendants have violated this order by, at times, withdrawing more than 20 percent. Second Am. Compl. [DE-27], pp. 24-27.

In his fourteenth claim, plaintiff contends defendants violated his Fifth Amendment right to due process. Id. at pp. 30-31. Specifically, when plaintiff was placed in the SHU on January 6, 2017, these defendants confiscated a plastic bottle of mayonnaise. Id. at 31. Plaintiff contends the mayonnaise was never returned. Id.

In his sixteenth claim, plaintiff alleges that defendants Fifth Amendment right to due process. Id. at pp. 34-36. Specifically, plaintiff contends he purchased a copy card providing access to the law library copier. Id. The card reader on the copier malfunctioned and was replaced. Id. at p. 35. Plaintiff's copy card did not work with the new reader, and plaintiff contends he was not refunded.

Id. In turn, in his seventeenth claim, he claims this deprivation also violated his Eighth Amendment rights, because he "became stressed and frustrated which resulted in severe migraines." Id. at p. 36.

In his twentieth claim, plaintiff alleges defendants violated the Eighth Amendment because Butner's implementation of the BOP's nutritional plan is inadequate. Id. at 41-44.

In his twenty-second claim, plaintiff alleges defendants violated the Eighth Amendment because they refuse to place "sex offenders in the same housing unit along with inmates that do not have a problem with sex offenders." Id. at p. 49.

Finally, in his twenty-fifth claim, plaintiff alleges a Fourteenth Amendment Equal Protection Violation. Id. at pp. 53-56. He does not allege that he has been treated differently from others who are similarly situated.

Defendants' summary judgment materials elaborate upon plaintiff's claims.[8] On June 13, 2014, the United States District Court for the Western District of Oklahoma convicted plaintiff of possession of child pornography and sentenced him to a term of 151-months' imprisonment. Petre Aff. [DE-46-1] ¶ 4. He has been incarcerated at Butner since November 5, 2014. Id. ¶ 5. During his incarceration, plaintiff has filed 17 grievances through the BOP's ARP. Id. ¶ 6. Of the claims

[8] Plaintiff responded to defendants' motion and his response included declarations and exhibits. His exhibits are largely duplicative of materials and records already supplied by defendants. His own declaration simply restates his deliberate indifference claim and does not refer to any medical records. See, e.g., Def. Ex. [DE-60-2], pp. 3-4. He has also provided the declarations of two other inmates. Id. at pp. 68-70. These declarations establish plaintiff has access to the ARP and that these inmates saw him utilize it numerous times. Id. The declarations do not assert personal knowledge of how any of plaintiff's specifically grievances were resolved, or if they were fully exhausted. Id. Likewise, while plaintiff's exhibits establish he initiated the BOP's ARP several times, none of his filings establish he fully exhausted any grievances other than those described by defendants. In sum, plaintiff's filings are insufficient to create a material issue of fact. See Thompson v. Potomac Elec. Power Co., 312 F.3d 645, 649 (4th Cir. 2002).

described above, only plaintiff claims related to his medical care have been fully exhausted under the BOP's ARP. Id. ¶¶ 9-28.

Plaintiff complained of back pain on June 2, 2015. Beyer Aff. [DE-46-13] ¶ 6. Defendants Sarah Beyer[9] and Jeff Derry[10] examined plaintiff on June 9, 2015. Id. ¶ 7. Beyer administered a Toradol injection to manage plaintiff's pain and ordered an x-ray of plaintiff's lumbar spine. Id. The x-rays showed some degenerative changes, but no evidence of fracture, pars defects, or subluxation. Id. ¶ 8

On June 16, 2015 plaintiff reported that he still had back pain, and that the Toradol injection did not provide relief. Id. ¶ 9. Derry examined plaintiff the next day. Id. ¶ 10. Plaintiff reported low back pain that radiated down his left leg, and requested a walker. Id. Derry prescribed Elavil for pain relief, and referred plaintiff to physical therapy. Id. On June 22, 2015, plaintiff was notified that he would be evaluated by physical therapy staff as soon as possible, and that he should go to sick call if he had more immediate needs. Id. ¶ 11.

Plaintiff reported to sick call on June 26, 2015, repeating his complaints of back pain radiating down his left leg. Id. ¶ 12. A non-defendant registered nurse examined plaintiff, and then scheduled a follow up appointment. Def. Ex. 7 [DE-46-20], p. 3. Plaintiff was instructed to return immediately if his condition worsened. Id.

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[9] Beyer is a licensed physician employed by the BOP. Beyer Aff. [DE-46-13] ¶¶ 1-2.

[10] Derry was Commissioned Officer in the United States Public Health Service ("PHS"), and was assigned to Butner as a nurse practitioner. Derry Aff. [DE-46-11] ¶¶ 1-2. He has since retired. Id. ¶ 1.

On July 9, 2015, plaintiff complained that his referral to physical therapy was taking too long. Beyer Aff. [DE-46-13] ¶ 13. Plaintiff was notified the next day that it generally takes three to four weeks for new patients to be seen by physical therapy. Id.

Derry examined plaintiff again on July 13, 2015. Id. ¶ 14. Plaintiff repeated his complaints of back pain, stating that it was worsened by standing and relieved by sitting. Def. Ex. 9 [DE-46-22], p. 2. Plaintiff also indicated that Elavil helped control the pain. Id. Derry instructed plaintiff to follow-up with sick call as needed and to "watch callout" for his pending physical therapy referral. Id.

On August 5, 2015, plaintiff again complained of the delay in being seen by physical therapy. Beyer Aff. [DE-46-13] ¶ 15. Petitioner was informed that the current wait time for initial physical therapy evaluations was now six to eight weeks. Id.

A physical therapist evaluated plaintiff on August 14, 2015. Id. ¶ 16. Plaintiff reported pain that started in his back and traveled down his left leg. Id. The pain worsened with standing and improved with walking. Id. At the time, plaintiff served as an inmate companion, which involved assisting another inmate confined to a wheelchair. Id. Plaintiff denied any functional limitations that would prevent him from serving as an inmate companion. Id. Plaintiff was encouraged to lose weight, and placed on an exercise and rehabilitation plan. Id. Plaintiff was scheduled for re-evaluation in September, 2015. Id.

was never asked

On August 25, 2015, plaintiff reported to physical therapy staff that he was complying with the exercise and rehabilitation plan, but still experienced pain when he walked distances or had to stand. Def. Ex. 12 [DE-46-25], p. 2. His pain was now affecting his sleep. Id. He requested "any devices or items to help less[en] the pain I suffer, i.e. back brace, walker, additional mattress wedge."

Id. He did not want "to take a powerful medication to deal with the pain because of the addiction possibilities." Id. The physical therapist reviewed this note and indicated he would discuss these matters with plaintiff at his follow up. Id. In addition, the physical therapist noted that a recent fall likely exacerbated plaintiff's symptoms, and that, in the future, plaintiff should immediately follow up with sick call after a fall. Id.

The physical therapist examined plaintiff again on September 17, 2015. Beyer Aff. [DE-46-13] ¶ 19. Plaintiff reported compliance with his exercise and rehabilitation program, but little relief in his pain. Id. After his examination, the physical therapist noted some objective improvement in plaintiff's pain management and ambulation tolerance. Def. Ex. 14 [DE-46-27], p. 3. Another 30 days of physical therapy was recommended. Id.

On October 2, 2015, Derry renewed plaintiff's prescription for Ibuprofen. Def. Ex. 15 [DE-46-28], p. 2.

On October 6, 2015, plaintiff reported to the physical therapist that his left leg felt weaker, and that walking had become more painful. Def. Ex. 16 [DE-46-29], p. 2. Because of this pain, plaintiff noted that he was only partially compliant with his exercise and rehabilitation regimen. Id. Plaintiff again requested the provision of a walker or some other assistive device. Id. The physical therapist reviewed plaintiff's note and indicated he would discuss these matters with plaintiff at his next appointment. Id.

NO call-outs

Plaintiff failed to report to a scheduled physical therapy session on October 8, 2015. Beyer Aff. [DE-46-13] ¶¶ 22. On October 15, 2015, plaintiff reported for a physical therapy session, but asked to be excused due to a headache. Id. ¶ 24.

migraine

Derry examined plaintiff on October 16, 2015, based on his complaints of right leg pain, right shoulder pain, and migraines. Id. ¶ 25. Derry prescribed Propranolol for plaintiff's migraines, and ordered x-rays of plaintiff's hip and shoulder. Id. In addition, Derry discontinued plaintiff's prescription for Elavil. Id. The Elavil prescription was discontinued because plaintiff routinely declined to pick this medication up from Butner's pill line. Id. ¶ 26.

The summary judgment record does not include medical records dated later than October, 2015.

III. Discussion

A. Motions to Serve Addition Defendants

Plaintiff filed two motions requesting that the court serve his complaint upon O'Donnell and Martin. [DE-31, 32]. The court thereafter issued summons to O'Donnell and Martin, and they were returned executed. [DE-34, 38, 39]. Accordingly, these motions are DENIED as moot.

B. Motion for Entry of Default

Plaintiff seeks an entry of default against defendants. [DE-47]. However, defendants responded to plaintiff's second amended complaint in a timely fashion. [DE-43]. Accordingly, plaintiff's motion for entry of default [DE-47] is DENIED.

C. Motion for Copies

Plaintiff seeks copies of the documents he has filed with the court. [DE-52]. The court allowed one request for copies as a courtesy. [DE-22]. However, in the same order, plaintiff was advised that a pro se litigant is generally responsible for properly maintaining legal records. See Clegg-Ars v. Wiggins, No. 5:15-CT-3060-D, 2015 WL 4760705, at * 3 (E.D.N.C. Aug. 12, 2015). Accordingly, the court notified plaintiff that he would be required to pay for any further copies. [DE-

22], pp. 1-2; see also 28 U.S.C. § 1914 n. 4 (District Court Miscellaneous Fee Schedule). Accordingly, plaintiff's renewed request for copies [DE-52] is DENIED.

D. Motion to Appoint Counsel

There is no constitutional right to counsel in civil cases, and courts should exercise their discretion to appoint counsel for pro se civil litigants "only in exceptional cases." Cook v. Bounds, 518 F.2d 779, 780 (4th Cir. 1975). The existence of exceptional circumstances justifying appointment of counsel depends upon "the type and complexity of the case, and the abilities of the individuals bringing it." Whisenant v. Yuam, 739 F.2d 160, 163 (4th Cir. 1984), abrogated on other grounds by Mallard v. U.S. Dist. Court for the S. Dist. of Iowa, 490 U.S. 296 (1989) (quoting Branch v. Cole, 686 F.2d 264 (5th Cir. 1982)); see also Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir. 1978) ("If it is apparent . . . that a pro se litigant has a colorable claim but lacks capacity to present it, the district court should appoint counsel to assist him."). Because plaintiff's claims are not complex, and where he has demonstrated through the detail of his filings he is capable of proceeding pro se, this case is not one in which exceptional circumstances merit appointment of counsel. Cf. Evans v. Kuplinski, No. 16–6136, 2017 WL 5513206, at *3 (4th Cir. Nov. 17, 2017) (finding a case presented exceptional circumstances when it implicated a legally complex tolling argument and when plaintiff was severely mentally ill). Therefore, plaintiff's motion to appoint counsel [DE-56] is DENIED.

E. Motion to Exceed Page Limitation

Plaintiff requests leave for his summary judgment responses to exceed the page limitation of Local Civil Rule 7.2(f). This request is ALLOWED, and the court has considered all the summary judgment materials filed by plaintiff.

F. Motion for Judicial Notice

As noted, the court construes this filing as either a renewed request for copies or a renewed request to waive the filing fee. Plaintiff's request for copies is DENIED for the reasons explained above. Moreover, as the court previously stated [DE-22], the PLRA provides that "prisoner[s] shall be required to pay the full amount of a filing fee." 28 U.S.C. § 1915(b) (emphasis added); see Torres v. O'Quinn, 612 F.3d 237, 241 (4th Cir. 2010) ("Congress [has] required that indigent prisoners filing lawsuits be held responsible for the full amount of filing fees."), abrogated on other grounds by Bruce v. Samuels, 136 S. Ct. 627 (2016)). Thus, the PLRA permits a prisoner to file a civil action without prepayment of fees or security, but requires the prisoner to pay the full amount of the filing fee as funds are available. McDaniels v. Wright, No. 1:14-CV-03728-TLW, 2015 WL 10710269, at *2 (D.S.C. Jan. 12, 2015). Accordingly, any relief sought in plaintiff's motion for judicial notice [DE-61] is DENIED.

G. Motion for Summary Judgment

1. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party

for a jury to return a verdict for that party. Anderson, 477 U.S. at 250. "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).

2. Failure to Exhaust

Defendants allege that plaintiff has largely failed to exhaust his administrative remedies. The Prison Litigation Reform Act of 1995 ("PLRA") states that "[n]o action shall be brought with respect to prison conditions under section 1983 . . . , or any other Federal law, by a prisoner . . . until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a); see Ross v. Blake, 136 S. Ct. 1850, 1856 (2016); Woodford v. Ngo, 548 U.S. 81, 83–85 (2006); Porter v. Nussle, 534 U.S. 516, 524 (2002). "[T]he PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Porter, 534 U.S. at 532. The PLRA requires a prisoner to exhaust administrative remedies "regardless of the relief offered through administrative procedures." Booth v. Churner, 532 U.S. 731, 741 (2001). "[E]xhaustion is mandatory under the PLRA and . . . unexhausted claims cannot be brought in court." Jones v. Bock, 549 U.S. 199, 211 (2007); see Ross, 136 S. Ct. at 1856–57. Failure to exhaust administrative remedies is an affirmative defense that a defendant must generally plead and prove. See Jones, 549 U.S. at 216; Wilcox v. Brown, 877 F.3d 161, 167 (4th Cir. 2017); Custis v. Davis, 851 F.3d 358, 361 (4th Cir. 2017).

The BOP provides a four-step, sequential administrative process to address prisoner complaints. See 28 C.F.R. §§ 542.13–.15.

> First, an inmate normally must present his complaint informally to prison staff using a BP-8 form. If the informal complaint does not resolve the dispute, the inmate may make an "Administrative Remedy Request" to the prison Warden using a BP-9 form. The BP-8 and BP-9 forms are linked. Both forms involve a complaint arising out of the same incident and both must be submitted within twenty calendar days of the date of that incident. 28 C.F.R. § 542.14(a). If the Warden renders an adverse decision on the BP-9, the inmate may appeal to the Regional Director within twenty calendar days of the date the Warden signed the response, using a BP-10 form. 28 C.F.R. § 542.15(a). The inmate may appeal an adverse decision by the Regional Director to the Central Office of the BOP using a BP-11 form. Id.

Hill v. Haynes, 380 F. App'x 268, 269 n.1 (4th Cir. 2010) (per curiam) (unpublished).

The summary judgment record indicates plaintiff only fully exhausted the claims related to his medical care. See Petre Aff. [DE-46-1]. However, plaintiff alleges the ARP was made unavailable to him. In Ross, the Supreme Court emphasized the PLRA's "mandatory language" concerning exhaustion. Ross, 136 S. Ct. at 1856–57 (stating that "mandatory exhaustion statutes like the PLRA establish mandatory exhaustion regimes, foreclosing judicial discretion"). Nevertheless, the Court identified "three kinds of circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." Id. at 1859. First, an administrative remedy may be unavailable when "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." Id. Second, a remedy might be "so opaque that it becomes, practically speaking, incapable of use" because "no ordinary prisoner can discern or navigate it" or "make sense of what it demands." Id. (citations omitted). Third, an administrative remedy may be unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." Id. at 1860; see Hill, 380 F. App'x at 270.

Here, plaintiff allegations are insufficient to indicate that the BOP's ARP was unavailable. On the contrary, plaintiff was able to use the ARP at least 17 times. Petre Aff. [DE-46-1] ¶ 6. Accordingly, plaintiff's claims, other than those related to his medical care, are DISMISSED for failure to exhaust. The court will nonetheless alternatively address the merits of plaintiff's claims.

3. Ziglar's Limitation on Further Extension of Bivens

> In Bivens, the Supreme Court implied a private right of action under the Fourth Amendment for an unreasonable search and seizure claim against FBI agents for handcuffing a man in his home without a warrant. Since then, the Supreme Court has recognized Bivens claims in only two other circumstances: (1) under the Fifth Amendment's Due Process Clause for gender discrimination against a Congressman for firing his female secretary, Davis, 442 U.S. 228; and (2) under the Eighth Amendment's prohibition against cruel and unusual punishment against prison officials for failing to treat a federal inmate's asthma, which led to his death[.] Carlson v. Green, 446 U.S. 14 (1980). The Supreme Court has recently re-emphasized that the courts should not imply rights and remedies as a matter of course "no matter how desirable that might be as a policy matter, or how compatible with the statute [or constitutional provision]." Ziglar v. Abbasi, 137 S.Ct. 1843, 1856 (2017). The Court has made clear that "expanding the Bivens remedy is now a 'disfavored' judicial activity." Id. at 1857 (quoting Ashcroft v. Iqbal, 556 U.S. 662, 675 (2009)). Now the only recognized implied rights of action are the narrow situations presented in Bivens, Davis, and Carlson. If the asserted Bivens claim is not one of the three Bivens-type actions previously recognized by the Supreme Court, closer scrutiny is required. Id. Even though the Supreme Court has recognized causes of action under the Fourth Amendment in Bivens, the Fifth Amendment in Davis, and the Eighth Amendment in Carlson, "those cases do not guarantee that any cause of action may lie under those amendments." Sanford v. Bruno, 2018 WL 2198759 at *4 (E.D.N.Y. May 14, 2018).

Michelson v. Duncan, No. 1:17-CV-50-FDW, 2018 WL 4474661, at *3 (W.D.N.C. Sept. 18, 2018).

Only plaintiff's claims related to a denial of medical care squarely fall into a previously recognized category. Given the rambling and disjointed nature of plaintiff's allegations, it seems unlikely his other claims would survive the heightened scrutiny now required by Ziglar. This provides an alternative basis for dismissing his non-medical care related claims.

4. Claims One, Three, and Four: Denial of Access to the Courts

Plaintiff alleges defendants denied him access to the courts. As noted, this claim is unexhausted. Moreover, as with most prison functions, prison officials retain wide latitude in administering programs and resources related to the right of access to the courts. Lewis, 518 U.S. at 356-57; Gaston v. Taylor, 946 F.2d 340, 343 (4th Cir. 1991) (en banc). To prevail on a claim that prison officials have denied him access to the courts, petitioner must "demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Lewis, 518 U.S. at 351 (establishing an actual injury requirement for legal access claims). Plaintiff's allegation that he was not provided all the writing materials and copies that he sought do not meet this standard. Id. ("an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense"). In addition, petitioner fails to identify any specific injury as a result of this alleged deprivation. See Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996) (holding that, when alleging denial of access to the courts, a prisoner must make specific allegations and must also identify an actual injury resulting from official conduct). On the contrary, plaintiff's numerous filings in this case, and his extensive use of the ARP, belie his assertion that defendants denied him access to the courts. Accordingly, defendants are entitled to summary judgment on these claims.

5. Claims Six and 12: Improper Handling of Legal Mail

Similarly, plaintiff alleges defendants examined his outgoing legal mail. This claim is unexhausted. Furthermore, isolated incidents of mail mishandling, while not to be condoned, do not rise to the level of a constitutional violation. See Davis v. Goord, 320 F.3d 346, 351 (2d Cir. 2003) (noting that "an isolated incident of mail tampering is usually insufficient to establish a constitutional

violation."); Gardner v. Howard, 109 F.3d 427, 430–31 (8th Cir. 1997) (holding that isolated, inadvertent instances of legal mail being opened outside of an inmate's presence are not actionable); Pearson v. Simms, 345 F.Supp.2d 515, 519 (D. Md. 2003) (holding that "occasional incidents of delay or non-delivery of mail" are not actionable under § 1983), aff'd, 88 F. App'x 639 (4th Cir. 2004); Bryant v. Winston, 750 F.Supp. 733, 734 (E.D.Va.1990) (holding that an isolated incident of mail mishandling, which is not part of any pattern or practice, is not actionable under § 1983). Furthermore, to the extent the mail at issue was legal mail, which may not be opened outside of the presence of the prisoner-addressee, see, e.g., Wolff v. McDonnell, 418 U.S. 539, 575–77 (1974), to state a claim for a constitutional violation, a plaintiff must show actual injury. See Lewis v. Casey, 518 U.S. 343, 350–54 (1996); Buie v. Jones, 717 F.2d 925, 926 (4th Cir.1983) (stating that "a few isolated instances of plaintiff's mail being opened out of his presence" that were "either accidental or the result of unauthorized subordinate conduct . . . were not of constitutional mandate"). To show actual injury, an inmate must "demonstrate that a nonfrivolous legal claim had been frustrated or was being impeded." Casey, 518 U.S. at 353 (footnote omitted); Michau v. Charleston Cnty., 434 F.3d 725, 728 (4th Cir. 2006); Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996) (en banc).

Plaintiff's allegations fall short of this standard. First, plaintiff only describes one incident with any specificity, and therefore has not established a practice or pattern. Moreover, plaintiff has not identified a nonfrivolous legal claim that was frustrated or impeded by the inspection of his outgoing legal mail. As noted above, plaintiff's filings in this case and his frequent use of the ARP belie any assertion that prison officials set out to impede his pursuit of legal claims. Accordingly, defendants are entitled to summary judgment on these claims.

6. Claim Seven, Nine, 13, 19, and 26: SHU related claims

Plaintiff raises a number of claims based on his placement in the SHU. The court reiterates these claims could be dismissed solely due to plaintiff's failure to exhaust.

Regardless, plaintiff first alleges that his placement in the SHU violated his right to procedural due process. To prevail on a due process claim, plaintiff must demonstrate that he was deprived of "life, liberty, or property" by governmental action. Beverati v. Smith, 120 F.3d 500, 502 (4th Cir.1997). In Wolff v. McDonnell, 418 U.S. 539 (1974), the United States Supreme Court has set forth the minimal procedural protections that must be provided to an inmate deprived of a constitutionally protected liberty interest. Id. at 556–72. The due process procedures required by Wolff are not required unless the challenged discipline "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Sandin v. Conner, 515 U.S. 472(1995). Here, plaintiff alleges defendants' actions led to his placement in the SHU, which does not implicate a constitutionally protected liberty interest.[11] See Sandin v. Conner, 515 U.S. 472, 483–84 (1995); Backey v. South Carolina Dep't. of Corrections, No. 94-7495, 1996 WL 1737, at *1 (4th Cir. Jan. 3, 1996) (allegations of wrongful placement in administrative segregation do not involve the kind of significant or atypical hardship necessary to invoke due process rights).

Plaintiff also contends he was placed in the SHU in retaliation for exercising his constitutional rights. A claim of retaliation is treated with skepticism in the prison context. Cochran v. Morris, 73 F.3d 1310, 1317 (4th Cir. 1996) (noting that "[e]very act of discipline by prison

[11] The court notes that an inmate may have a liberty interest associated with disciplinary segregation if inmate alleges that the restraints "'impose[ ] atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.'" Beverati v. Smith, 120 F.3d 500, 502 (4th Cir.1997) (quoting Sandin, 515 U.S. at 484). Here, as noted, plaintiff does not describe the conditions in the SHU, and therefore has not established the conditions there posed an atypical or significant hardship.

officials is by definition 'retaliatory' in the sense that it responds directly to prison misconduct") (citation omitted). For an inmate to state a colorable claim of retaliation, the alleged retaliatory action must have been taken with regard to the exercise of some constitutionally protected right, or the retaliatory action itself must violate such a right. Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994). A plaintiff must allege specific facts supporting the claim of retaliation because bare assertions of retaliation do not establish a claim of constitutional dimension. Id. at 74-75. Mere "temporal proximity" between the inmate's protected activity and the official's allegedly retaliatory act "is simply too slender a reed on which to rest" a retaliation claim. Wagner v. Wheller, 13 F.3d 86, 90-91 (4th Cir. 1993) (requiring plaintiff to show "a causal relationship between the protected expression and the retaliatory action"). Here, as noted above, plaintiff's placement in the SHU did not present an atypical hardship. Thus, plaintiff has not established that the alleged retaliatory action violated a constitutional right.

Finally, plaintiff's placement in the SHU did not violate the Eighth Amendment. Plaintiff does not directly challenge the conditions in the SHU. Rather, he asserts that his placement in the SHU "could have" affected his security classification and place of confinement. It is well established that an inmate does not possess a liberty interest arising from an assignment to a particular custody level or security classification or a place of confinement. See Wilkinson v. Austin, 545 U.S. 209, 221–222 (2005); Olim v. Wakinekona, 461 U.S. 238, 245 (1983); Meachum v. Fano, 427 U.S. 215, 224–25 (1976). Even if he plaintiff did possess some interest in his security classification and place of confinement, his allegation that placement in the SHU "could have had" negative consequences does not satisfy the objective component of an Eighth Amendment claim. See Strickler, 989 F.2d at 1379.

For these reasons, defendants are entitled to summary judgment on plaintiff's claims related to his placement in the SHU.

7. Claim Eight and 23: Deliberate Indifference to Serious Medical Needs

In his eighth and twenty-third claims, plaintiff contends defendants Beyer, Derry, Kilpatrick, Kane, Caraway, and Andrews were deliberately indifferent to his back pain from approximately June to October, 2016. Second Am. Compl. [DE-27], pp. 18-19, 49-51.

These claims are exhausted. As noted, plaintiff has fully exhausted a grievance, initially filed in December, 2015, complaining the prison officials were ignoring his back pain. See Def. Ex. 6 [DE-46-7]. This grievance focuses primarily, although not exclusively, on the delay in the scheduling of his physical therapy. Id. "[E]xhaustion is not per se inadequate simply because an individual later sued was not named in the grievance." Jones, 549 U.S. at 219. To satisfy the exhaustion requirement, grievances must be sufficient in detail to alert the prison to the nature of the wrong for which redress is sought. See Moore v. Bennette, 517 F.3d 717, 726 (4th Cir. 2008); Strong v. David, 297 F.3d 646, 650 (7th Cir. 2002). The court finds that the December, 2015 grievance was sufficient to alert BOP officials that plaintiff sought redress for deliberate indifference to his severe back pain. Accordingly, the court will not dismiss claims Eight and 23 for failure to exhaust.

"In order to make out a *prima facie* case that prison conditions violate the Eighth Amendment, a plaintiff must show both '(1) a serious deprivation of a basic human need; and (2) deliberate indifference to prison conditions on the part of prison officials.' " Strickler v. Waters, 989 F.2d 1375, 1379 (4th Cir. 1993) (quoting Wilson v. Seiter, 501 U.S. 294, 298 (1991)). The first prong is an objective one–the prisoner must show that "the deprivation of [a] basic human need was objectively sufficiently serious"–and the second prong is subjective–the prisoner must show that

"subjectively the officials act[ed] with a sufficiently culpable state of mind." Id. (quotations omitted).

Plaintiff's medical conditions satisfy the objective prong of the Eighth Amendment test. Therefore, the court focuses on the subjective prong–whether defendant acted with deliberate indifference to plaintiff's serious medical needs. "[D]eliberate indifference entails something more than negligence, . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." Farmer v. Brennan, 511 U.S. 825, 835 (1994). It requires that a prison official actually know of and disregard an objectively serious condition, medical need, or risk of harm. Id. at 837; Shakka v. Smith, 71 F.3d 162, 166 (4th Cir. 1995). An inmate is not entitled to choose his course of treatment. See Russell v. Sheffer, 528 F.2d 318, 318-19 (4th Cir. 1975) (per curiam). Likewise, mere negligence or malpractice in diagnosis or treatment does not state a constitutional claim. Estelle v. Gamble, 429 U.S. 97, 105-106 (1976); Johnson v. Quinones, 145 F.3d 164, 168 (4th Cir. 1998). In determining whether a prison official is deliberately indifferent to a prisoner's serious medical needs, the court generally may rely on medical records concerning examination and treatment of the inmate. See Bennett v. Reed, 534 F. Supp. 83, 87 (E.D.N.C. 1981), aff'd, 676 F.2d 690 (4th Cir. 1982); see also, Dulany v. Carnahan, 132 F.3d 1234, 1240 (8th Cir. 1997) ("In the face of medical records indicating that treatment was provided and physician affidavits indicating that the care provided was adequate, an inmate cannot create a question of fact by merely stating that she did not feel she received adequate treatment.").

As an initial matter, during the time relevant to plaintiff's complaint, defendants Derry and Kilpatrick were active duty Commissioned Officers of the PHS. Derry Aff. [DE-46-11] ¶ 4; Kilpatrick Aff. [DE-46-12] ¶ 1. The Public Health Service Act grants Derry and Kilpatrick absolute

immunity from a Bivens claim. See 42 U.S.C. § 233(a); see also Hui v. Castaneda, 559 U.S. 799, 812 (2010) ("[T]he immunity provided by § 233(a) precludes Bivens actions against individual PHS officers or employees for harms arising out of conduct described in that section."); Rylee v. Johns, No. 5:11-CT-3010-BO, 2012 WL 2154023, at *2 (E.D.N.C. June 13, 2012) ("As a commissioned officer in the Public Health Service ("PHS") one is entitled to absolute immunity from suit other than under the Federal Tort Claims Act"). Accordingly, plaintiff's Bivens claims against Derry and Kilpatrick are DISMISSED.

Likewise, plaintiff fails to describe any specific personal involvement of Kane, Caraway, Kane, or Andrews with regard to these claims. Accordingly, plaintiff's Bivens claims against Kane, Caraway, Kane, and Andrews are similarly DISMISSED.

With regard to plaintiff's deliberate indifference claims against Beyer in claims eight and 23, the medical record submitted by defendants only addresses plaintiff's medical care through October, 2015, and these claims allege denials of care that occurred in 2016. On this record, Beyer is not entitled to summary judgment.

Nor is Beyer entitled to qualified immunity at this stage of the proceedings. The doctrine of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); see Brandon v. Holt, 469 U.S. 464, 472–73 (1985). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986); see Pearson v. Callahan, ___ U.S. ___, 129 S. Ct. 808, 815 (2009). Qualified immunity protects law enforcement officers from "bad guesses in

gray areas" and ensures that they are only "liable for transgressing bright lines." Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992). The purpose of qualified immunity is to "remove most civil liability actions, except those where the official clearly broke the law" Slattery v. Rizzo, 939 F.2d 213, 216 (4th Cir. 1991).

In evaluating qualified immunity, a court initially may determine whether the plaintiff has alleged or shown a violation of a constitutional right at all. See Pearson, 129 S. Ct. at 818. If the court determines that no constitutional right was violated, "that ends the matter, and the official is entitled to immunity." Saucier v. Katz, 533 U.S. 194, 199 (2001), overruled on other grounds by Pearson, 129 S. Ct. 808. If the court determines that a constitutional right was violated, the court proceeds to determine if that right was clearly established at the time of the alleged violation. As for the "clearly established right" prong,

> the right the official is alleged to have violated . . . must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.

Saucier, 533 U.S. at 202 (quotations and citations omitted); see, e.g., Cloaninger ex rel. Estate of Cloaninger v. McDevitt, 555 F.3d 324, 331 (4th Cir. 2009). The right is defined "at a high level of particularity." Edwards v. City of Goldsboro, 178 F.3d 231, 250–51 (4th Cir. 1999). For a right to be clearly established, it must "be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 202. Here, plaintiff has plausibly alleged the violation of a clearly established right, and Beyer is not entitled to qualified immunity on this record.

Accordingly, the court ALLOWS in part and DENIES in part defendants' motion for summary judgment with regard to plaintiff's eighth and twenty-third claims. Plaintiff's claims

against Derry, Kilpatrick, Kane, Carraway, and Andrews are DISMISSED. Defendants' motion for summary judgment is DENIED, without prejudice, with regard to plaintiff's eighth and twenty-third claims against Beyer. In this posture, Beyer may file a renewed motion for summary judgment no later than 21 days after the entry of this order.

8. Claim 10 and 21: Retaliation

Plaintiff also contends defendants retaliated against him by denying him a prison job. These claims are unexhausted. Furthermore, plaintiff has no constitutionally protected interest in obtaining a prison work assignment. See, e.g., McKune v. Lile, 536 U.S. 24, 38 (2002) (a prisoner has no constitutional right to the opportunity to participate in vocational, educational, recreational, and rehabilitative programs); O'Bar v. Pinion, 953 F.2d 74, 84 (4th Cir. 1991); Backus v. Ward, No. 98-6331, 1998 WL 372377, at *1 (4th Cir. June 8, 1998) (per curiam) (unpublished) (citing Sandin v. Conner, 515 U.S. 472, 486–87 (1995); Bulger v. U.S. Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995) (finding that federal prisoner did not have a legitimate claim of entitlement to continuing his Federal Prison Industries employment); Laroque v. Beck, No. 5:09-CT-3025-H, 2009 WL 6617608, at *1 (E.D.N.C. Mar. 3, 2009) (rejecting prisoner's § 1983 "claim[] that because he does not have a job assignment, he has lost 14 days 'earned time credit' which would have been deducted from his maximum sentence"). Accordingly, the alleged retaliatory action did not violate a constitutional right, and defendants are entitled to summary judgment on these claims. Adams, 40 F.3d at 75.

9. Claim 11: Fourth Amendment Violation

Plaintiff alleges defendants violated the Fourth Amendment in the manner they collected various filing fees from him. This claim is unexhausted.

Furthermore, the Supreme Court addressed the collection of inmate filing fee payments, pursuant to 28 U.S.C. § 1915(b)(2), in Bruce v. Samuels, 136 S. Ct. 627 (2016). In Bruce, the Supreme Court concluded that § 1915(b)(2) orders a "a per-case approach under which a prisoner would pay 20 percent of his monthly income for each case he has filed." Bruce, 136 S. Ct. at 629 ("We hold that monthly installment payments, like the initial partial payment, are to be assessed on a per-case basis. Nothing in § 1915's current design supports treating a prisoner's second or third action unlike his first lawsuit."). Thus, notwithstanding the language of this court's order, plaintiff does not identify a violation of constitutional dimensions. Even if defendants' collection of the filing fee was unconstitutional, the Fourth Circuit has held the remedy for such a violation is an abatement in the collection of filing fees from an inmate's trust account. Torres, 612 F.3d at 252; Nunn v. Keller, 5:10-CT-3211-FL, 2012 WL 1802076, at *1 (E.D.N.C. May 17, 2012) (declining to refund filing fee). In this posture, defendants are entitled to summary judgment on this claim.

10. Claim 14 and 16:Due Process Violation Based on Deprivation of Property

Plaintiff alleges that he was deprived of his personal property without due process of law in violation of the Fifth Amendment. These claims are unexhausted.

Moreover, the United States Supreme Court has held that prisoner claims for loss or confiscation of personal property are not cognizable as constitutional due process claims where sufficient post-deprivation remedies are available. See Hudson v. Palmer, 468 U.S. 517, 533 (1984). Although the United States Court of Appeals for the Fourth Circuit has not specifically addressed this issue, numerous courts have found that BOP's ARP provides sufficient post-deprivation remedies for federal prisoners such that a Bivens Fifth Amendment due process claim is not available to them for wrongful detention or loss of personal property. See, e.g., Hidalgo v. Fed.

Bureau of Prisons, No. 11-153, 2014 WL 37050, at *4 (S.D.W. Va. Jan. 6, 2014) (finding BOP's ARP sufficient post-deprivation remedy); Manning v. Booth, No. 04-2730, 2005 WL 1200122, at *2 (D.Md. May 20, 2005) (same); Bigbee v. United States, 359 F. Supp. 2d 806, 809-10 (W.D.Wis.2005) (same). Thus, because plaintiff has sufficient post-deprivation remedies available through BOP's ARP, and because plaintiff is clearly able to use the ARP, defendants are entitled to summary judgment on these claims.

11. Claim 17: Eighth Amendment Violation

Plaintiff contends that defendants violated the Eighth amendment when they denied him a refund for his copy card, because the denial caused him stress. He further alleges that this stress led to migraine headaches. This claim is unexhausted.

Regardless, the Eighth Amendment "protects inmates from inhumane treatment and conditions while imprisoned." Williams v. Benjamin, 77 F.3d 756, 761 (1996). As noted above, to make out an Eighth Amendment claim, plaintiff must demonstrate a serious deprivation and deliberate indifference on the part of defendants. Strickler, 989 F.2d at 1379.

The court will assume without deciding that deprivation plaintiff describes is objectively serious. Nonetheless, plaintiff has failed to demonstrate that these defendants acted with a sufficiently culpable state of mind. Plaintiff does not allege, and the summary judgment record does not indicate, that these defendants had actual subjective knowledge that the denial of a refund would cause plaintiff migraines. See Farmer, 511 U.S. at 837; Shakka, 71 F.3d at 166. Accordingly, defendants are entitled to summary judgment on this claim.

12. Claim 18: Deliberate Indifference to Serious Medical Needs

In his eighteenth claim, plaintiff contends that from April, 2015 through August, 2015 defendants were deliberately indifferent to his lower back pain. Id. at pp. 37-39. Plaintiff exhausted his administrative remedies regarding this claim. Petre Aff. [DE-46-1] ¶ 18.

The crux of this claim is that defendants delayed unnecessarily in scheduling his physical therapy sessions. This allegation fails to establish deliberate indifference. As noted above, while plaintiff awaited physical therapy, he was routinely examined, underwent diagnostic testing, and provided with medication to alleviate his pain. The medical record establishes that no defendant actively disregarded plaintiff's medical conditions during this time period. Accordingly, defendants are entitled to summary judgment on plaintiff's eighteenth claim.

13. Claim 20: Inadequate Nutrition

Plaintiff alleges that Bunter's implementation of the BOP's nutritional plan is inadequate. "Allegations of inadequate food for human nutritional needs or unsanitary food service facilities are sufficient to state a cognizable constitutional claim, so long as the deprivation is serious and the defendant is deliberately indifferent to the need." Wilson v. Johnson, 385 F. App'x 319, 320 (4th Cir. 2010) (per curiam) (unpublished); Shrader v. White, 761 F.2d 975, 986 (4th Cir. 1985); Bolding v. Holshouser, 575 F.2d 461, 465 (4th Cir. 1978); see Wilson v. Seiter, 501 U.S. 294, 298 (1991); Brown v. Brock, 632 F. App'x 744, 747 (4th Cir. 2015) (per curiam) (unpublished). However, prisoners are not entitled to be served particular foods, so long as the diets they receive are nutritionally adequate. See Escalante v. Huffman, 2011 WL 3107751, at *9 (W.D. Va. July 26, 2011).

Plaintiff has not exhausted this claim. Petre Aff. [DE-46-1] ¶¶ 27-28. Because the summary judgment record alone would not entitle defendants to judgment in their favor, this claim is dismissed solely based on plaintiff's failure to exhaust.

14. Claim 22: Failure to Properly House Sex Offenders

In his twenty-second claim, plaintiff identifies a host of potential problems that correspond with the stigma of being identified as a sex offender. These claims are unexhausted. Other than noting these problems could potentially occur, he does not identify any objective harm he has sustained, nor does he allege that the named defendants were subjectively aware of any specific risk of harm.

Moreover, the relief plaintiff seeks for this claim is different housing. As noted, plaintiff has no constitutional entitlement to a specific security classification or housing situation. See Wilkinson, 545 U.S. at 221–222; Olim, 461 U.S. at 245; Meachum, 427 U.S. at 224–25. Accordingly, defendants are entitled to summary judgment on this claim.

15. Claim 25: Equal Protection

Plaintiff alleges defendants denied him equal protection, although he does not describe precisely how. This claim is unexhausted.

Furthermore, the Equal Protection Clause provides that a state may not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To that end, the Equal Protection Clause provides that "all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985). Generally, in order to establish an equal protection claim, a plaintiff "must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional

or purposeful discrimination. If a plaintiff makes this showing, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." Veney v. Wyche, 293 F.3d 726, 730–31 (4th Cir. 2002) (internal quotation omitted); Morrison v. Garraghty, 239 F.3d 648, 654 (4th Cir. 2001).

Plaintiff has not made the requisite showing to establish an equal protection claim. Plaintiff has produced no competent summary judgment evidence showing that any BOP policy was selectively enforced against him, or that similarly-situated inmates were treated differently. Plaintiff's only evidence supporting his equal protection claims are his conclusory assertions with little elaboration. Such evidence is not sufficient to withstand summary judgment. See Causey v. Balog, 162 F.3d 795, 802 (4th Cir. 1998) (holding plaintiff's "conclusory statements [alleging discrimination], without specific evidentiary support" were insufficient to withstand motion for summary judgment); Carter v. Ball, 33 F.3d 450, 461-62 (4th Cir. 1994) (holding "vague allegations" of discrimination that are "not substantiated" by record evidence are not sufficient to create triable issue of fact). Accordingly, defendants are entitled to summary judgment on this claim.

16. Qualified Immunity

The standard for qualified immunity was summarized above. With the exception of plaintiff's eighth, twentieth, and twenty-third claims, plaintiff has failed to demonstrate the violation of a clearly established constitutional right. Therefore, defendants are alternatively entitled to qualified immunity on all claims other than plaintiff's eighth, twentieth, and twenty-third claims.

17. Plaintiff's FTCA claims

Plaintiff amended his complaint to allege FTCA claims. Second Am. Compl. [DE-27], p. 1. The United States has not been served, and plaintiff's FTCA claims were not addressed in defendants' summary judgment motion.

However, § 1915(e)(2) provides that the court "shall dismiss the case **at any time** if the court determines that . . . the action . . . fails to state a claim on which relief may be granted." Id. (emphasis added); see also De'Lonta v. Angelone, 330 F.3d 630, 633 (4th Cir. 2003). Because a complaint can be reviewed for frivolity at any time, the court revisits its initial review of plaintiff's FTCA claims.

A complaint states a claim if it contains "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)); see also De'Lonta, 330 F.3d at 633 (holding district court's review under § 1915(e)(2) for failure to state a claim uses same standard applicable to motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)). "Facial plausibility is established [where] the factual content of a complaint 'allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 256 (4th Cir. 2009) (quoting Iqbal, 556 U.S. at 678).

All of plaintiff's claims are based on alleged constitutional violations. Federal inmates may file claims of liability against the United States under the FTCA but may not assert claims of personal liability against prison officials for violations of their constitutional rights. See Carlson v. Green, 446 U.S. 14, 21-23 (1980); Kaufman v. United States, No. CV 1:12-0237, 2012 WL 12930837, at *2 (S.D.W. Va. Mar. 20, 2012). Therefore, Supreme Court has held that federal constitutional tort claims are not cognizable under the FTCA. FDIC v. Meyer, 510 U.S. 471, 477-78

(1994) ("By definition, federal law, not state law, provides the source of liability for a claim alleging the deprivation of a federal constitutional right.... [T]he United States simply has not rendered itself liable under § 1346(b) for constitutional tort claims."); Harris v. United States, No. 3:10CV27, 2010 WL 2733448, at *3 (E.D. Va. June 8, 2010) ("The United States Supreme Court has held that federal constitutional tort claims are not cognizable under the FTCA"), report and recommendation adopted, No. 3:10CV27, 2010 WL 11566022 (E.D. Va. July 9, 2010), aff'd, 417 F. App'x 285 (4th Cir. 2011).

To the extent plaintiff's claims can be construed as a claim that defendants negligently handled his property, the FTCA does not apply to "[a]ny claim arising in respect of . . . the detention of any goods, merchandise, or other property by an officer of customs or excise or any other law enforcement officer." 28 U.S.C. § 2680(c). This exclusion applies to all law enforcement officers, including BOP officers. Ali v. Fed. Bureau of Prisons, 552 U.S. 214, 228 (2008). It extends to any claim "arising out of" a detention of property, including "a claim resulting from negligent handling or storage of detained property." Kosak v. United States, 465 U.S. 848, 854 (1984). "[E]ven intentional torts committed by law enforcement officers are exempt from FTCA suits when such torts were committed during circumstances that would warrant a detention-of-goods exception." Davila v. United States, 713 F.3d 248, 256 (5th Cir. 2013). Thus, if a BOP employee's actions are "related to [his] duties in inspecting and inventorying prisoner property," there is no waiver of sovereign immunity even if the employee's possession of the property is "tortious" and "wrongful." Krug v. United States, 442 Fed. App'x. 950, 951 (5th Cir. 2011) (per curiam) (unpublished). Accordingly, the government's alleged mishandling of plaintiff's personal property fails to state a claim. See Padilla v. Morgan, No. 4:14-CV-04045-RMG, 2015 WL 5996181, at *2 (D.S.C. Oct. 13, 2015) (unpublished) (dismissing FTCA claim where "the alleged intentional destruction of property

occurred during a routine search of Plaintiff's cell."); Szymanski v. Fed. Bureau of Prisons, No. CV 5:15-11621, 2015 WL 6125256, at *2 (S.D. W. Va. Sept. 21, 2015) (unpublished) ("FTCA actions involving the detention or mishandling of personal property by prison officials are subject to dismissal."), report and recommendation adopted, No. 5:15-CV-11621, 2015 WL 6126842 (S.D. W. Va. Oct. 16, 2015) (unpublished).

Plaintiff's claims based upon his placement in the SHU and related matters likewise cannot support a FTCA claim. Pursuant to the discretionary function exception, the United States is not liable under the FTCA for "[a]ny claim based upon . . . the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). "The discretionary function exception 'marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals.'" Holbrook v. United States, 673 F.3d 341, 345 (4th Cir. 2012) (quoting United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 808 (1984)).

Courts have routinely held that decisions regarding inmate placement and classification fall within the discretionary function exception to the FTCA. See Santana-Rosa v. United States, 335 F.3d 39, 44 (1st Cir. 2003); Little v. United States, Civil Action No. 5:11CV41, 2014 WL 4102377, at *6 (N.D. W. Va. Aug. 18, 2014); Hernandez v. United States, Civil No. 1:12-CV-647, 2013 WL 5508010, at *9 (M.D. Penn. June 18, 2013) ("BOP's actions in transferring, classifying, and placing prisoners . . . are acts that come within the discretionary function exception."); Zander v. United States, No. 1:12CV700, 2016 WL 1312029, at *7 (M.D.N.C. Mar. 31, 2016), aff'd, 671 F. App'x

80 (4th Cir. 2016), cert. denied, 137 S. Ct. 1594 (2017). Likewise, the FTCA is not the proper vehicle for challenging disciplinary proceedings. Evans v. United States, No. 3:15CV64, 2016 WL 11431652, at *7 (N.D.W. Va. Apr. 11, 2016) (finding that attempt to overturn disciplinary action not appropriately brought in a FTCA action), report and recommendation adopted, No. 3:15-CV-64, 2016 WL 4581339 (N.D.W. Va. Sept. 2, 2016), aff'd, 671 F. App'x 186 (4th Cir. 2016), cert. denied, 138 S. Ct. 189 (2017).

Any claim that plaintiff was negligently denied a prison work assignment is likewise covered by the discretionary function exception. Courts have consistently held that the decision to assign or remove an inmate from a prison job is subject to the discretionary function exception. See Middleton v. United States Federal Bureau of Prisons, 658 F. App'x. 167, 170 (3rd Cir. 2016)(finding that the act of assigning an inmate to a prison job is covered by the discretionary function exception); Santana-Rosa v. United States, 335 F.3d 39, 44 (1st Cir. 2003) (same); Vickers v. United States, 228 F.3d 944, 950-51 (9th Cir. 2000)(noting various courts have held that decisions relating to the hiring, training, and supervision of employees usually involve policy judgments of the type Congress intended the discretionary function exception to shield); Richman v. Straley, 48 F.3d 1139, 1146 (10th Cir. 1995) ("Decisions regarding employment and termination are inherently discretionary."); Tonelli v. United States, 60 F.3d 492, 496 (8th Cir.1995) ("Issues of employee supervision and retention generally involve the permissible exercise of policy judgment and fall within the discretionary function exception."); Radford v. United States, 264 F.2d 709, 711 (5th Cir.1959) ("It is well settled that the federal government has the unquestioned right to choose its own employees and is therefore not liable for acts done in the exercise of that right.").

Finally, any attempt by plaintiff to re-cast his deliberate indifference claim as a medical malpractice claim also fails. A plaintiff alleging medical malpractice must comply with North Carolina Rule of Civil Procedure 9(j). Rule 9(j) applies to claims of medical malpractice against health care providers, as defined in North Carolina General Statute § 90-21.11(1). Rule 9(j) requires, in part, that a complaint include assertions from an individual, who has reviewed all relevant medical records and who will be expected to testify at trial as an expert, that the medical care provided to the plaintiff fell below the applicable standard of care. The North Carolina General Assembly enacted Rule 9(j) "in part, to protect defendants from having to defend frivolous medical malpractice actions by ensuring that before a complaint for medical malpractice is filed, a competent medical professional has reviewed the conduct of the defendants and concluded that the conduct did not meet the applicable standard of care." Estate of Waters v. Jarman, 144 N.C. App. 98, 100, 547 S.E.2d 142, 144 (2001) (quotation omitted). Failure to comply with Rule 9(j) is a ground for dismissal of a state medical-malpractice claim filed in federal court. See, e.g., Estate of Williams-Moore v. Alliance One Receivables Mgmt., Inc., 335 F. Supp. 2d 636, 649 (M.D.N.C. 2004).

Rule 9(j) provides one narrow exception to its medical certification requirement: a litigant is excused from Rule 9(j)'s pre-filing certification requirement if negligence may be established under the doctrine of *res ipsa loquitur*. See N.C. R. Civ. P. 9(j)(3). This doctrine applies "only when the occurrence clearly speaks for itself." Diehl v. Koffer, 140 N.C. App. 375, 378, 536 S.E.2d 359, 362 (2000) (quotation and emphases omitted). Here, plaintiff has not complied with Rule 9(j), and plaintiff's allegations are insufficient to state a claim of *res ipsa loquitur*.

For these reasons, plaintiff's FTCA claims are dismissed for failure to state a claim.

IV. Conclusion

In sum, for the aforementioned reasons, the court rules as follows:

(1) Plaintiff's motions to Serve Additional Defendants [DE-31, 32] are DENIED as moot;

(2) Plaintiff's motion for entry of default [DE-47] is DENIED;

(3) Plaintiff's renewed requests for copies [DE-52, 61] are DENIED;

(4) Plaintiff's motion to appoint counsel [DE-56] is DENIED;

(5) Plaintiff's motion to exceed the page limitation [DE-59] is ALLOWED;

(6) Plaintiff's motion for judicial notice [DE-61] is DENIED; and

(7) Defendants' motion for summary judgment [DE-43] is ALLOWED in PART and DENIED in PART. Specifically, it is DENIED without prejudice with regard to plaintiff's eighth and twenty-third claims alleging deliberate indifference against Beyer. It is ALLOWED in all other respects. All claims and defendants other than plaintiff's eighth and twenty-third claims against Beyer are DISMISSED from this action.[12] In this posture, Beyer may file a renewed motion for summary judgment no later than 21 days after the entry of this order.

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[12] As noted, plaintiff's Bivens claims, other than his claims related to his medical care and to Butner's implementation of the BOP's nutritional plan, are dismissed for failure to exhaust, or, alternatively on the merits. Plaintiff's eighteenth claim related to his medical care is dismissed on the merits. Plaintiff's Bivens claim related to Butner's implementation of the BOP's nutritional plan is dismissed solely for failure to exhaust. Finally, plaintiff's FTCA claims are dismissed under § 1915(e)(2).

SO ORDERED, this the 27 day of September, 2018.

TERRENCE W. BOYLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:17-CT-3048-BO

BOBBY BURGHART,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
THOMAS KANE, et al,,	)	
	)	
Defendants.	)	

The matter now comes before the court on plaintiff's motion for reconsideration (DE 66), motion for a ruling on his motion for reconsideration (DE 76), and motion to expedite (DE 78). Also before the court is defendant's second motion for summary judgment (DE 68). The issues raised are ripe for adjudication. For the following reasons, the court grants defendant's motion for summary judgment, denies plaintiff's motion for reconsideration, and denies as moot plaintiff's remaining motions.

STATEMENT OF THE CASE

On February 21, 2017, plaintiff Bobby Burghart ("plaintiff"), a federal inmate, filed this civil rights action *pro se* pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), and the Federal Torts Claim Act ("FTCA") 28 U.S.C. § 2672, *et seq.* On September 28, 2018, the court disposed of all plaintiff's claims, with the exception of two Bivens claims against defendant Dr. Sara Beyer ("Beyer")–the Federal Bureau of Prison's ("BOP") Clinical Director for the Federal Correctional Complex in Butner, North Carolina ("Butner"). (Def. Appx.

p. 153). Plaintiff's remaining claims include the following: (1) defendant Beyer acted with deliberate indifference to plaintiff's serious medical needs in violation of the Eighth Amendment to the United States Constitution when she ordered the removal of plaintiff's lower bunk pass in October 2016; and (2) Beyer denied plaintiff appropriate medical care in response to his complaints of lower back and shoulder pain beginning in June 2016. On October 22, 2018, plaintiff moved for reconsideration of the court's September 28, 2018, order.

On October 25, 2018, Beyer filed a second motion for summary judgment addressing plaintiff's remaining Eighth Amendment Bivens claims. The motion was fully briefed. Plaintiff subsequently filed a motion requesting that the court rule upon his previously filed motion for reconsideration, as well as a motion to expedite. Defendants did not respond to plaintiff's motions.

STATEMENT OF FACTS

Plaintiff's claims arose out of medical care he received for his lower back and shoulder pain at Butner beginning in June 2016. (Def. Appx. p. 216, ¶ 5; Am. Compl. (DE 27), pp. 18-19; 49-51). On March 3, 2016, plaintiff made a sick call request complaining of lower back pain, and was scheduled for an appointment with his mid-level provider. (Id. p. 155, ¶ 9 and p. 166). Then, on March 9, 2016, Nurse Practitioner Jeff Derry ("Derry") examined plaintiff, and issued him a lower bunk pass, imposed the restriction of "no prolonged standing," and scheduled a follow-up appointment. (Id. p. 155, ¶ 10 and pp. 169, 171). Defendant Beyer cosigned Derry's medical note on March 10, 2016. (Id. p. 170).

Derry again examined plaintiff two days later, and noted plaintiff still was experiencing pain. (Id. p. 173). Plaintiff requested that he be prescribed a pain medication "not on [the] pill line," which Derry noted "may be difficult to do." (Id.) Derry, however, did provide plaintiff a pass so that

plaintiff would be housed on a lower tier of the housing unit. (Id. pp. 173-4). Plaintiff again complained of back pain on April 12, 2016, and saw Derry and Beyer on April 19, 2016. (Id. pp. 176-77, 179-80; p. 157, ¶ 13). At his April 19, 2016, appointment, plaintiff complained of back pain, headaches, shoulder pain, and reiterated a desire for a medication which would not require him to stand in the pill line. (Id. p. 157, ¶ 13; pp. 179-80). Plaintiff was prescribed Ibuprofen as needed, up to three times per day, and a lower bunk pass until April 19, 2017.[1] (Id. pp. 180, 182).

On June 11, 2016, plaintiff submitted an electronic message requesting a copy of the BOP's eligibility requirements for a "bottom [tier] pass." (Id. p. 184). In response, T. Kilpatrick, Butner's Assistant Health Services Administrator, stated that such information was not available to inmates, and explained that plaintiff's physician had the final authority to make such determinations. (Id. p. 184). On June 18, 2016, plaintiff submitted a hand-written "inmate request to staff" directed to defendant Beyer, again requesting the criteria for an inmate to qualify for a lower tier restriction. (Id. p. 157, ¶ 15 and p. 186). Defendant Beyer was not provided plaintiff's request. (Id. p. 157, ¶ 15). Instead, an administrative Health Services staff member responded that all requests to staff must be submitted electronically, or that plaintiff could submit a sick call request. (Id. p. 186). On July 16, 2013, plaintiff emailed Health Services requesting the status of his hand-written request to staff, and again was instructed to submit his request electronically. (Id. p. 188).

On October 3, 2016, Beyer reviewed plaintiff's medical chart to determine whether he required a bottom bunk pass. (Id. p. 158, ¶ 19 and p. 190). Defendant Beyer noted plaintiff did not have any condition which would warrant a mandatory or temporary lower bunk pass, and removed plaintiff's lower bunk pass. (Id. p. 160, ¶ 22 and pp. 190-91). Then, on October 6, 2016, plaintiff

[1] Plaintiff's lower tier pass was not continued. See (Def. Appx p. 182).

saw a nurse in response to a sick call complaining of back and shoulder pain. (Id. p. 193). The nurse noted: "No Significant Findings/No Apparent Distress . . . Inmate with complaint of chronic pain and wants to discuss alternatives to Ibuprofen for pain relief as he states it upsets his stomach." (Id.) Derry subsequently examined plaintiff, and renewed plaintiff's prescription for Ibuprofen at plaintiff's request. (Id. pp. 196-197). Defendant Beyer reviewed and cosigned Derry's provider note. (Id. p. 198).

On November 23, 2016, Derry again examined plaintiff. (Id. p. 200). During the examination, plaintiff requested a lower bunk pass and a back brace, which Derry provided plaintiff. (Id. pp. 200, 202). Plaintiff received the back brace on December 10, 2016. (Id. p. 204). On December 19, 2016, plaintiff emailed Derry, requesting a copy of the paperwork verifying his prescription for the back brace, and that Derry re-issue the "no prolonged standing" restriction. (Id. p. 207). Plaintiff was instructed that he would be provided with a copy of his pass for his back brace, but that he must submit a sick call request to be evaluated for the medical restriction. (Id. p. 162, ¶ 26 and pp. 206-207). Defendant Beyer had no further involvement with plaintiff's medical treatment from January 1, 2017, through the end of 2017. (Id. p 162, ¶ 27).

DISCUSSION

A. Motion for Reconsideration

Pursuant to Federal Rule of Civil Procedure 54(b), in the absence of an express order directing final judgment as to certain claims or parties:

> [A]ny order or other decision, however designated, that adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b). Under this rule, "a district court retains the power to reconsider and modify its interlocutory judgments, including partial summary judgments, at any time prior to final judgment when such is warranted." Am. Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514-515 (4th Cir. 2003) (citing Fayetteville Investors v. Commercial Builders, Inc., 936 F.2d 1462, 1469 (4th Cir. 1991)).

Plaintiff seeks reconsideration of the court's determination on September 28, 2018, that he failed to exhaust his administrative remedies prior to bringing this action, and that certain of his claims did not survive the heightened scrutiny of Ziglar v. Abbasi, 137 S. Ct. 1843 (2017). While the court determined that plaintiff's claims could be subject to dismissal on these grounds, it alternatively addressed the merits for each of the claims dismissed in the September 28, 2018, order. As for the remainder of plaintiff's motion for reconsideration, the court has reviewed the record and finds its original determination with respect to its September 28, 2018, order appropriate. Based upon the foregoing, plaintiff's motion for reconsideration is DENIED.

B. Motion for Summary Judgment

1. Standard of Review

Summary judgment is appropriate when there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Anderson v. Liberty Lobby, 477 U.S. 242, 247 (1986). The party seeking summary judgment bears the burden of initially coming forward and demonstrating an absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there exists a genuine issue of material

fact requiring trial. Matsushita Elec. Industrial Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Anderson, 477 U.S. at 250.

2. Analysis

a. Deliberate Indifference to Medical Needs

Defendant Beyer raised the affirmative defense of qualified immunity in this Bivens action. Government officials are entitled to qualified immunity from civil damages so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In other words, a government official is entitled to qualified immunity when (1) the plaintiff has not demonstrated a violation of a constitutional right, or (2) the court concludes that the right at issue was not clearly established at the time of the official's alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 236 (2009).

Deliberate indifference to a prisoner's serious medical needs violates the prisoner's Eighth Amendment rights. Estelle v. Gamble, 429 U.S. 97, 104 (1976); Scinto v. Stansberry, 841 F.3d 219, 225 (4th Cir. 2016). To prove such a claim, a plaintiff "must demonstrate that the officers acted with deliberate indifference (subjective) to [his] serious medical needs (objective)." Iko v. Shreve, 535 F.3d 225, 241 (4th Cir. 2008) (internal quotations omitted). Although "deliberate indifference entails something more than mere negligence, . . . it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." Farmer v. Brennan, 511 U.S. 825, 835 (1994); Parrish ex rel. Lee v. Cleveland, 372 F.3d 294, 303 (4th Cir. 2004). The court focuses its inquiry on the subjective prong of the Eighth Amendment test–whether defendants acted with deliberate indifference.

Deliberate indifference "sets a particularly high bar to recovery." Iko, 535 F.3d at 241. Deliberate indifference requires that an official actually know of and disregard an objectively serious condition, medical need, or risk of harm. See De'lonta v. Johnson, 708 F.3d 520, 525 (4th Cir. 2013). "[T]he official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837; see Makdessi v. Fields, 789 F.3d 126, 133–35 (4th Cir. 2015). A prisoner's failure to give advance warning of, or protest exposure to, the risk does not conclusively show that a prison official lacked actual knowledge. See Makdessi, 789 F.3d at 134. Instead, "[a] prison official's subjective actual knowledge can be proven through circumstantial evidence." Id. at 133. "[A]n injury might be so obvious that the fact finder could conclude that the guard did know of it because he could not have failed to know of it." Id. In addition, the prison official "must also have recognized that his actions were insufficient to mitigate" the objectively serious condition, medical need, or risk of harm. Iko, 535 F.3d at 241 (quotation and emphasis omitted).

The court begins with plaintiff's Eighth Amendment claim regarding Beyer's removal of plaintiff's lower bunk pass. As an initial matter, the record reflects that despite Beyer's removal of plaintiff's lower bunk pass on October 3, 2016, plaintiff still was assigned to a bottom bunk continuously for the time period of January 26, 2016 through October 1, 2018.[2] (Def. Appx. p. 216, ¶ 7 and p. 218). To the extent plaintiff asserts that defendant Beyer acted with deliberate indifference to his medical condition when she ordered the removal of his lower bunk pass on October 3, 2016, plaintiff's disagreement with Beyer's decisions with respect to plaintiff's treatment does not rise to

[2] The record reflects that plaintiff initially was assigned an upper bunk on January 17, 2017, but that the assignment was changed to a lower bunk that same day. (Def. Appx. p. 218).

a level of deliberate indifference. See Jackson v. Lightsey, 775 F.3d 170, 178 (4th Cir. 2014); (Def. Appx. p. 160, ¶ 22). Further, the fact that another medical provider came to a different conclusion than Beyer with respect to the assignment of a bottom bunk pass is insufficient to establish a constitutional violation. See Whitfield v. Craven Corr. Inst., No. 5:12-CT-3064, 2015 WL 1383613, *12 (E.D.N.C. Mar. 25, 2015). Finally, any negligence on behalf of defendant Beyer is insufficient to establish an Eighth Amendment claim. See King v. United States, 536 F. App'x 358, 361 (4th Cir. 2013) (citation omitted). Thus, plaintiff failed to establish that Beyer acted with deliberate indifference to his medical needs with respect to this claim.

The court next considers plaintiff's contention that defendant Beyer acted with deliberate indifference to his back or shoulder pain beginning in June 2016. The record reflects that Butner medical staff provided plaintiff responsive medical care for his back and shoulder pain, including Ibuprofen[3] and a back brace, during the relevant time period. As for Beyer specifically, she saw plaintiff on only one occasion during the time period at issue, but periodically reviewed plaintiff's medical chart. (Def. Appx. p. 157, ¶ 13 and pp. 162-63, ¶ 27). As stated, plaintiff's disagreement with the decisions of Beyer, or any other Butner medical provider, with respect to plaintiff's treatment for his back or shoulder pain does not rise to a level of deliberate indifference. See Jackson, 775 F.3d at 178. Finally, plaintiff has not provided sufficient factual or evidentiary support to defeat summary judgment with respect to this claim. See Matsushita Elec. Industrial Co. Ltd., 475 U.S. at 587. Thus, plaintiff failed to establish that Beyer acted with deliberate indifference to plaintiff's back or shoulder pain.

[3] Plaintiff admits the Butner medical staff has told plaintiff they could provide stronger pain medications, but plaintiff declined. See ((DE 27), p. 50; (DE 1), p. 23).

b. Retaliation

Plaintiff makes conclusory allegations that Beyer acted with deliberate indifference to his back and shoulder pain in retaliation for plaintiff making complaints and utilizing the administrative remedy process. (Compl. (DE 1), p. 24). "The First Amendment grants the rights to free speech and to seek redress of grievances. These rights, to a limited extent, exist in a prison setting." Gullet v. Wilt, No. 88-6797, 1989 WL 14614, at *2 (4th Cir. 1989) (per curiam) (unpublished table decision).

> For his claim of retaliation to survive summary judgment, [plaintiff must] . . . produce sufficient evidence "that (1) [he] engaged in protected First Amendment activity, (2) [defendants] took some action that adversely affected [his] First Amendment rights, and (3) there was a causal relationship between [his] protected activity and [defendants'] conduct." Constantine v. Rectors & Visitors of George Mason Univ., 411 F.3d 474, 499 (4th Cir. 2005). With respect to the second element, [plaintiff must] . . . "show that [defendants'] conduct resulted in something more than a de minimis inconvenience to [his] exercise of First Amendment rights." Id. at 500 (internal quotation marks omitted).

Booker v. S. Carolina Dep't of Corr., 583 F. Appx 43, 44 (4th Cir. 2014) (per curiam) (alterations in original omitted).

In this case, plaintiff failed to establish that defendants' medical decisions were related to plaintiff making complaints or using the administrative remedy process. Plaintiff, instead, makes only conclusory and speculative allegations, which is insufficient to state a constitutional violation. See Adams v. Rice, 40 F.3d 72, 74 (4th Cir. 1994); Wagner v. Wheeler, 13 F.3d 86, 91 (4th Cir.1993) ("Temporal proximity . . . is simply too slender a reed on which to rest a Section 1983" a retaliation claim); Thomas v. Fed. Med. Ctr., No. 5:14-CT-3261-BO, 2015 WL 2193787, at *2 (E.D.N.C. May 11, 2015) ("[C]onclusory assertions of retaliation, discrimination, and conspiracy do not state actionable claims."). Thus, plaintiff fails to establish a constitutional violation, and Beyer is entitled to qualified immunity for this claim.

CONCLUSION

For the foregoing reasons, plaintiff's motion for reconsideration (DE 66) is DENIED. Beyer's second motion for summary judgment (DE 68) is GRANTED. Because the court has ruled upon the pending motions, plaintiff's motion requesting a ruling on his motion for reconsideration (DE 76) and motion to expedite (DE 78) are DENIED as MOOT. The Clerk of Court is DIRECTED to close this case.

SO ORDERED, this the 16 day of September, 2019.

Terrence W. Boyle

TERRENCE W. BOYLE
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

BOBBY BURGHART,
Plaintiff,
v.
THOMAS KANE, J.F. CARAWAY, J. ANDREWS, ERIC W. GIBSON, T. PALUCH, B. NEAGLE, KIRKPATRICK, BRADFORD, BELLAS, R. SIMMONS, S. COX, L. LINDSAY, SARA BEYER, PHYSICIAN ASSISTANT DERRY, WILLIAM O'DONNELL, and STEPHANIE MARTIN,
Defendants.

Judgment in a Civil Case

Civil Case Number: 5:17-CT-3048-BO

Decision by Court.
This case came before the Honorable Terrence W. Boyle, Chief United States District Judge, for review of defendant Beyer's second motion for summary judgment.

IT IS ORDERED AND ADJUDGED that defendant Beyer's second motion for summary judgment is granted.

IT IS FURTHER ORDERED AND ADJUDGED that, pursuant to this Court's order entered September 28, 2018, all claims and defendants other than plaintiff's eighth and twenty-third claims against Beyer are dismissed.

This Judgment Filed and Entered on September 17, 2019, with service on:
Bobby Burghart 28733-064, Butner Medium II - F.C.I., P.O. Box 1500, Butner, NC 27509. (via U.S. Mail)

Christina A. Kelley, Federal Bureau of Prisons, Legal Department, P. O. Box 1600, Butner, NC 27509.
(via CM/ECF Notice of Electronic Filing)

September 17, 2019

/s/ Peter A. Moore, Jr.
Clerk of Court

By: Laura Lee
Deputy Clerk

Petitioner's Appendix C

Petition for rehearing en banc denied May 26, 2020

FILED: May 26, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7450
(5:17-ct-03048-BO)

BOBBY BURGHART

Plaintiff - Appellant

v.

SARAH BEYER

Defendant - Appellee

and

THOMAS KANE; J. F. CARAWAY; J. ANDREWS; ERIC W. GIBSON; T. PALUCH; B. NEAGLE; KIRKPATRICK; BRADFORD, Unicore Plant Manager; BELLAS, Unit Supervisor; R. SIMMONS; S. COX; L. LINDSAY; PHYSICIAN ASSISTANT DERRY; WILLIAM O'DONNELL; STEPHANIE MARTIN

Defendants

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

C-2

Petitioner's

Appendix

D

Petitioners Material Facts
& Undisputed Facts

Material Facts

Listed here are the material facts that have been asserted, claimed, or raised in either a claim or defense. The facts list who asserted, claimed, or raised the fact (P = petitioner or R = respondents), followed by any objections, challenge or defense and where in the record the fact and/or any evidence may be found.
Abbreviations = PA = petitioner's Appendix, DA = respondent's Appendix, FRCP = Federal Rules of Civil Procedure, ECF = Electronic Court File, ARP = Administrative Remedy Program

In violation of FRCP 56(c)(1)(A) or (B) respondents filed a motion for summary judgment, and FRCP 56(a). Respondents did not assert that each of petitioner's claims or facts was not a genuine issue of fact, nor disputed said claims or facts by assertion by citing specific material(s) in the record or that petitioner did not establish the presense of a fact.

The respondents filed a motion to dismiss, or in the alternative motion for summary judgment (ECF 43-46). Respondents raised four (4) defenses: (1) failure to exhaust; (2) absolute immunity for Kirkpatrick & Derry; (3) personal involvement of respondents Kane, Caraway, Andrews, Paluch, Simmons, Martin, & O'Donnell; (4) failure to establish constitutional violation.
Fact = respondents did not raise personal involvement for respondents Gibson, Kirkpatrick, Neagle, Cox, Derry, Beyer, Lindsay, Bradford, & Bellas.

Petitioner objected to respondents defense of failure to exhaust. Petitioner asserted he exhausted all available remedies. Assertions found at ECF 27, page 59; ECF 58, page 1-4 & 21-25; ECF 60, page 1-4 & 7-9; ECF 66, page 1-4.
Evidence = P.A 18-42, 65-86 & D.A. = 36-41.

Petitioner objected to respondents defense of absolute immunity for Kirkpatrick & Derry. Objection found ECF 58, page 8. Petitioner dropped all monetary damages against

Kirkpatrict & Derry, solely seeking declaratory judgment, therefore 42 USC § 233(6) does not grant immunity for declaratory judgment.

Petitioner asserted personal involvement of respondents Kane, Caraway, Andrews, Paluch, Simmons, Martin & O'Donnell. Assertion found at ECF 27, page 7-58; ECF 58, page 9-27; ECF 60, page 9, para. 39-42, declaration of Bobby Burghart, para. 46. Evidence = ECF 27, page 7-58; ~~[illegible]~~ P.A. 44-58 for Kane, Caraway, Andrews & O'Donnell For Kirkpatrick, Derry, & Beyer both P.A & D.A shows involvement.

Petitioner asserts that he had asserted constitutional violations, yet respondents point to no specific claim or assertions where petitioner did not establish the presense of of a violation. Respondents made no claim or assert that any specific claim or assertion of petitioner was not a fact.

Below petitioner shows each claim or assertion of fact, where it can be found in the record, including any evidence, followed by and defense or dispute raised by respondents.

Claims, assertions, Facts & defenses

(1) P= asserted respondents deliberately and with malicious intent deprived, hampered and/or attempted to stop petitioner's right of Free Speech and access to the Courts by denying petitioner paper to research and prepare legal filings (ECF 27, page 7) Exhaustion proof (ECF 58, page 23, D-1 & P.A. 29). Assertion & evidence (ECF 58, page 9-10) Involvement (P.A. 49-58)

R= defense - failure to exhaust (ECF 44-46), personal involvement (ECF 44-46), failed to establish constitutional violation (ECF 44-46)

(2) P= asserted respondents deliberately and with malicious intent deprived, hampered, and/or attempted to stop petitioner from seeking redress from the Courts. (ECF 27, page 8). Claim dismissed by the Court.

③ P= asserted respondents willfully, deliberately and with malicious intent deprived petitioner of needed legal research materials. (ECF 27, page 9). Exhaustion proof (ECF 58, page 23, D-1 & P.A 31). Assertion & evidence (ECF 58, page 10, C-3 & P.A. 32). Personal involvement (PA 49-58).

R= defense - Failure to exhaust (ECF 44-46), personal involvement (ECF 44-46), failed to establish constitutional violation (ECF 44-46).

④ P= asserted respondents willfully and with malicious intent violated access to the courts and right to petition the Court for redress. (ECF 27, page 11). Exhaustion proof (ECF 58, page 23, D-1 & P.A. 31). Assertion & evidence (ECF 58, page 10, C-3 & P.A. 32). Personal involvement (ECF PA 49-58).

R= defense - Failure to exhaust (ECF 44, page 3, 14-20) (ECF 45, page 1-6) (ECF 46, DA 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3)

⑤ P= asserted respondents willfully and with malicious intent by thwarting his use of the ARP, access to the Court and right to petition the Court. (ECF 27, page 13). Claim dismissed by the Court.

⑥ P= asserted respondents deliberately and willfully violate petitioner's 1st Amendment rights. (ECF 27, page 14-15). Exhaustion proof (ECF 58, page 23, D-1 & P.A 27) Assertions & evidence (ECF 58, page 11, C-6). Personal involvement (ECF 27, page 14-16)

R= defense - failure to exhaust (ECF 44, page 3 & 14-20) (ECF 45, page 1-6) (ECF 46, DA 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3)

⑦ P= asserted respondents violated petitioner's 1st Amendment rights when they retaliated when petitioner engaged in a protected right (ECF 27, page 16). Exhaustion Proof (ECF 58, page 23-24, D-1 & P.A. 36). Assertions & evidence (ECF 58, page 11-12, C-7 & P.A. 49-58). Personal involvement (PA 49-58).

R= defense - failure to exhaust (ECF 44, page 3 & 14-20) (ECF 45, page 1-6) (ECF 46, D.A.

1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(8) P: asserted respondents violated petitioner's retained and protected constitutional rights by retaliating for engaging in a protected right. (ECF 27, page 18) Exhaustion proof (ECF 58, page 24, D-1 & P.A. 19). Assertions & evidence (ECF 58, page 12, C-8 & P.A. 49-58). personal involvement (ECF 58 & PA 49-58).

R: defense - failure to exhaust (ECF 44, page 3 & 14-20) (ECF 45, page 1-6) (ECF 46, D.A. 1-63) (ECF 69, page 2-3), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(9) P: asserted respondents violated petitioner's 1st Amendment rights when they retaliated for engaging in a protected right (ECF 27, page 20). Exhaustion Proof (ECF 58, page 24, D-1 & P.A. 36). Assertions & evidence (ECF 58, page 12, C-9, & P.A 49-58). Personal involvement (P.A. 49-58).

R: defense - failed to exhaust (ECF 44, page 3 & 14-20) (ECF 45, page 1-6) (ECF 46, D.A 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(10) P: asserted respondents violated petitioner's 1st Amendment rights when they retaliated for engaging in a protected right. (ECF 27, page 21). Exhaustion Proof (ECF 58, page 24, D-1 & P.A. 21). Assertions & evidence (ECF 58, page 13, C-10. & PA 49-58) Personal involvement (P.A. 49-58).

R: defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), Personal involvement (ECF 44, page 3), Failed to establish constitutional violations (ECF 44, page 3)

(11) P: asserted respondents violated petitioner's 4th Amendment rights when they violated a District Court's order, and seized more than 20% of deposit. (ECF 27, page 24) Exhaustion proof (ECF 58, page 24, D-1 & P.A. 70). Assertions & evidence (ECF 58, page 13, C-11 & P.A. 60-79). Personal involvement (PA 49-58)

R= defense - Failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), Personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(12) P= asserted respondents violated petitioner's 4th Amendment rights when they illegally searched petitioner's outgoing legal/special mail without probable cause. (ECF 27, page 27), Exhaustion proof (ECF 58, page 24, D-1 & P.A. 70), Assertions & evidence (ECF 58, page 13-14, C-12 & P.A. 49-58), Personal involvement (P.A. 49-58).

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(13) P= asserted respondents violated petitioner's 5th Amendment rights of due process (ECF 27, page 29), Exhaustion proof (ECF 58, page 24, D-1 & P.A. 36), Assertions & evidence (ECF 58, page 14, C-13 & P.A. 49-58), personal involvement (P.A. 49-58)

R= defense - failed to exhaust (ECF 44, page 3 & 14-20) (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(14) P= asserted respondents violated petitioner's 5th Amendment rights of due process (ECF 27, page 30), Exhaustion proof (ECF 58, page 24, D-1 & P.A. 23), Assertions & evidence (ECF 58, page 14-15, C-14 & P.A 49-50) personal involvement (PA 49-58).

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(15) P= asserted respondents violated petitioner's 5th Amendment rights of due process (ECF 27, page 32), Claim dismissed by the Court.

(16) P= asserted respondents violated petitioner's 5th Amendment rights of due process (ECF 27, page 35), Exhaustion proof (ECF 58, page 24, D-1 & P.A. 84-86), Assertions & evidence (ECF 58, page 15, C-16 & P.A. 49-60 & 84-86), personal involvement (PA 49-58).

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(17) P= asserts respondents violated petitioner's 8th Amendment rights to not suffer cruel and unusual punishment. (ECF 27, page 36). Exhaustion proof (ECF 58, page 24, D-1 & P.A. 84-86), Assertions & evidence (ECF 58, page 15-16, C-17 & P.A. 49-58 & 84-86), personal involvement (P.A. 49-58).

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(18) P= asserted respondents violated petitioner's 8th Amendment rights not to suffer cruel and unusual punishment (deliberate indifference to a serious medical need) (ECF 27, page 37) Exhaustion proof (ECF 58, page 24, D-1 & P.A. 38), Assertions & evidence (ECF 58, page 14, C-18 & P.A. 49-58 & 16-17) (ECF 75, page 1-4), personal involvement (ECF 27) (ECF 58) (ECF 60) (ECF 64) (ECF 75) (P.A. 49-58).

R= defense - Respondents admit claim exhausted, absolute immunity Derry (ECF 44, page 3), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(19) P= asserted respondents violated petitioner's 8th Amendment rights not to suffer cruel and unusual punishment (ECF 27, page 39). Exhaustion proof (ECF 58, page 24, D-1 & P.A. 36), Assertions & evidence (ECF 58, page 16-17, C-19 & P.A. 49-58), personal involvement (P.A. 49-58)

R= defense - failed to exhaust (ECF 44, page 3), (ECF 45, page 1-6), (ECF 46, DA 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3)

(20) P= asserted respondents violated petitioner's 8th Amendment rights not to suffer cruel and unusual punishment (ECF 27, page 41). Exhaustion proof (ECF 58, page 24-25, D-1 & P.A. 36 & 40-42). Assertions & evidence (ECF 58, page 17, C-20 & P.A. 44-58),

personal involvement (P.A. 49-58).

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 44, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(21) P= asserted respondents violated petitioner's 8th Amendment rights not to suffer cruel and unusual punishment (ECF 27, page 44). Exhaustion proof (ECF 58, page 25, D-1 & P.A. 38), Assertions & evidence (ECF 58, page 18, C-21 & P.A. 49-58), personal involvement (P.A. 49-58)

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(22) P= asserts respondents violated petitioner's 8th Amendment rights not to suffer cruel and unusual punishment (ECF 27, page 47). Exhaustion proof (ECF 58, page 25, D-1 & P.A. 25), Assertions & evidence (ECF 58, page 19, C-22 & P.A. 49-58), personal involvement (P.A. 49-58).

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3)

(23) P= asserted respondents violated petitioner's 8th Amendment rights not to suffer cruel and unusual punishment (deliberate indifference to a serious medical need) (ECF 27, page 49). Exhaustion proof (ECF 58, page 25, D-1 & P.A. 80-93). Assertions & evidence (ECF 58, page 19-20, C-23 & P.A. 10-17 & 49-58), personal involvement (P.A. 49-58).

R= defense - failed to exhaust (ECF 44, page 3 & 14-20) Respondents admit petitioner exhausted this claim (ECF 44, page 14), absolute immunity Deery & Kirkpatrick (ECF 44, page 3), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3)

(24) P= asserted respondents violated petitioner's 14th Amendment rights of equal protection (ECF 27, page 51). claim dismissed by the Court.

(25) P= asserted respondents violated petitioner's 14th Amendment rights of equal protection (ECF 27, page 53). Exhaustion proof (ECF 58, page 25, D-1 & P.A. 31). Assertions & evidence (ECF 58, page 20, C-25 & P.A. 32 & 44-58), personal involvement (P.A. 49-58)

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), failed to establish constitutional violation (ECF 44, page 3).

(26) P= asserted respondents violated petitioner's 14th Amendment rights of due process (ECF 27, page 56). Exhaustion proof (ECF 58, page 25, D-1 & P.A. 23, 31 & 36). Assertions & evidence (ECF 58, page 20-21, C-26 & P.A. 49-58), personal involvement (P.A. 49-58),

R= defense - failed to exhaust (ECF 44, page 3 & 14-20), (ECF 45, page 1-6), (ECF 46, D.A. 1-63), personal involvement (ECF 44, page 3), Failed to establish constitutional violation (ECF 44, page 3).

Genuine Issues of material Facts

Below here are issues of material facts that must be decided upon the trier of Facts. The District Court, with the Fourth Circuit Court of Appeals approval, failed to properly analyze the case, failed to require respondents to show there is no issue of genuine material Facts, and they were entitled to a judgment as a matter of law, Failed inference of Facts in the light most favorable to nonmoving party

(27) Respondents claim petitioner failed to exhaust administrative remedies for all claims, except 18 & 23 (ECF 44, page 3 & 11-20) (ECF 45 page 1-6) (ECF 46, D.A 1-63) Petitioner asserted he had exhausted all available remedies (ECF 58, page 23-25, D-1 & P.A. 19-42, 70, & 80-84)

(28) Respondent claims petitioner failed to show personal involvement of respondents Kone, Coreway, Andrews, O'Donnell, Paluch, Martin, & Simmons (ECF 44, page 3 & 12) Petitioner asserted that Paluch, Martin, & Simmons were direct actors, and respondents Kone, Coreway, Andrews, & O'Donnell were notified in writing of constitutional rights violation, and that they failed to correct the violations (ECF 58, page 17, C-20 & P.A 44-58)

(29) Petitioner asserted deliberate indifference to a serious medical need in the delayed receipt of diagnostic evaluation & treatment, causing the unnecessary and wanton infliction of pain

Respondents allege petitioner received adequate and timely medical care

(30) Respondent claims that respondent Derry and Kirkpatrick are absolutely immune under Bivens, pursuant to 42 USC §233(a).

Petitioner in his "opposition and reply to defendant's motion to dismiss" dropped all monetary demages against respondents Derry & Kirkpatrick, seeking only declaratory judgment. Petitioner assert that that §2336) produces a remedy under §1346(b) for demages.

(31) Petitioner asserted one claimed that BOF by and through respondent Gibson did deprive and/or illegally convert petitioner's property without compensation. Respondents never defended against this other than failure to exhaust and failure to establish constitutional rights.

(32) Petitioner asserted & claimed respondents hampered, or restricted his access to the Courts, by denying needed supplies (paper), access to copirs, and access to research material. Petitioners litigation before the Oklahoma Supreme Court was dismissed because petitioner could not answer and respond.

Respondents never defended against this, other than failure to exhaust,

· & Failure to establish constitutional rights violation.

(33) Petitioner asserted & claimed respondents inflicted unnecessary and wanton pain by the unnecessary delay of medical care.
Respondents claim petitioner received adequate and timely medical care.

(34) Respondents claim petitioner failed to satisfy the objective elements of his medical condition was not timely or properly treated (ECF 44, page 23)
Petitioner asserted that he visited health services multiple times complaining of back pain and loss of feeling in left leg, and shown that his expected Physical Therapy consult was pushed back for over nine (9) weeks (PA. (9-17) (DA 101, 106, 109, 113)
Genuine issue of material Fact(s) as to whether petitioner received adequate, timely & proper medical care.

(35) Respondents claim petitioner Failed to satisfy the subjective element of his medical claim (ECF 44, page 24-25)
Petitioner asserted that respondents had culpable state of mind. Petitioner's medical records shows that respondent Bexer sign off on or approved petitioner's treatment (DA. 97-98, 109, 141-142, 169, 180-181, 197-198) & (PA 217-~~219~~ 209) Shows genuine issue of material Facts Also se (PA 49-58) For other respondents involvement.

(36) Respondents claim qualified immunity (ECF 44, page 26)
Petitioner asserted a violation of one or more constitutional rights, and that the right was clearly established. Petitioner has also asserted and shown that respondents in supervisory position had constructive Knowledge of the rights violation and through silent approval" allowed the violation(s) to continue, or failed to investigate.

(37) Petitioner asserted that FCI 2 staff and administrators thwarted, hampered, or stopped him from using the ARP, in an effect to block him from the Courts.
Respondents rely solely upon those administrative remedies that were allowed to proceed, and officially entered into the BOP Sentry system.
(38) Petitioner asserted denial of access to court claim by respondents' refusal to provide needed legal research material to answer a show cause order from the Oklahoma Supreme Court.
Respondents' asserted failed to establish constitutional rights violation.

Undisputed Facts

(39) Petitioner sent repondents Kane, Caraway & Andrews copies of a 10 page letter describing constitutional rights violations.
(40) Petitioner sent respondents O'Donnell & Paluch copies of letters describing rights violations and failure of FCI 2 Food Service to comply with mandate BOP policies.
(41) FCI 2 Trust Fund refused to refund petitioner for cost of copy card he had purchase, that because of a change of card readers would not work any longer.
(42) Petitioner's need of legal research material to be able to answer a Show Cause order from the ~~Oklahoma~~ Oklahoma Supreme Court. Case was dismissed because could not answer.
(43) Staff and administrators have a pattern of behavior of not answering Request to Staffs, electronic Cop-outs, or BP-8's.
(44) Petitioner suffers, and has continued to suffer from lower back pain, loss of feeling in left leg, loss of mobility and quality of life.

(45) Petitioner faled a formal complaint of false/misleading information in his medical records with the Office of Inspector General.

(46) No diagnostic testing of petitioner, except x-rays, have been done for his back pain.

(47) Petitioner's medical records, radiological reports, show petitioner's lower back condition continues to worsen.

(48) It took over 9 weeks for petitioner to be seen by Physical Therapy once consult was ordered.

(49) Respondents failed to raise any special factors counselling hesitation of implied damages, or that the Court should not extend a new context under Bivens actions.

(50) Respondents Derry & Kirkpatrick are only immune from monetary damages pursuant to 42 USC §233(a).

(51) FCI 2 Food Service intentionally Fails and/or refuses to comply with mandated BOP National Menu, Scaled Recipes, & serves food that is cold and potentially hazardous.

(52) FCI 2 Education Dept has a policy and/or procedure of denying inmates legal research material, i.e. paper, pens or pencils, etc.

(53) FCI 2 Education Dept has a policy and/or procedure of forcing of the law library copier at 6:30pm, even though library remains open until 8:30pm.

(54) Respondent Lindsey did illegally inspect sealed outgoing legal/special mail and used extortion to be able to screen such mail.

(55) Respondents Bellas & Bradford made false and unfounded allegations of inciting a work stoppage as a result of information petitioner legally received through FOIA.

(56) Respondents Belles & Bradford made false statements in government records, and did so in retaliation.

(57) Respondent Beyer did cosign and approve petitioner's mid level providers course of medical treatment, including granting lower bunk pass.

(58) Petitioner was denied prison jobs because staff feer that petitioner would write them up.

(59) FCI 2 & Fed Butner Trust Fund disobeyed a Court order to only collect 20% of all deposits, no matter number of cases pending.

(60) Petitioner was placed in SHU without notice of why, nor did he receive any hearing while in SHU.

(61) Petitioner loss personal property as a result of being placed in SHU.

(62) Petitioner suffered many acts of retaliation for engaging in a protected right.

(63) FCI 2 staff and administrators have a pattern of behavior of ignoring inmates electronic cop-out, written request to staff, & BP-8.

(64) Because Petitioner was denied needed legal research material to answer a show cause order by the Oklahoma Supreme Court his litigation was dismissed.

(65) Because of respondent's action (#64 above) petitioner was denied the ability to litigate his civil rights claim and loss of personal property valued at more then $30,000.

(66) Petitioner submitted to the Court copies (his only copies) of attempts to use the ARP (BP-8's).

(67) Petitioner sought entry of default because respondents had not defended certain claims or respondents.

(68) Petitioner request Counsel because of the complexitive of the claims and for discovery purposes.

(69) Delay of medical treatment can constitute cruel & unusual punishment.

(70) As a result of respondent's action(s) and/or inaction(s) that violated petitioner's retained constitutional rights he has and continues to suffer anxiety, depression, harassment, and migraines.

I, Bobby Burghart, hereby certify under penalty of perjury that the Foregoing is true and correct to the best of my Knowledge, Sworn/certified pursuant to 28 USC § 1746, executed this 22nd day of Aug. 2020.

Bobby Burghart

Petitioner's Appendix

E

Errors

Errors

Petitioner asserts that the following errors occurred during the litigation of this instant cause of action, and that these errors effected his substantive rights, deprived him of a fair and impartial trial, and created a miscarriage of justice.

The following are errors committed by the District Court.

(1) District Court in its Sept 28, 2018, order (ECF 62) stated "Plaintiff's proposed amendments did not assert new claims or name new defendants."

In petitioner's original filing (ECF 1), he named 14 defendants and raised 17 claims, in petitioner's amended complaint (ECF 27), he named 16 defendants and raised 26 claims Later the District Court changes its stance

(2) District Court converted petitioner's claim 12 (4th Amendment violation) into a 1st Amendment violation (ECF 62, page 5)

(3) District Court converted petitioner's claim 8 (1st Amendment - retaliation) into an 8th Amendment deliberate indifference (ECF 62, page 7)

(4) District Court converted petitioner's claim 21 8th Amendment - cruel & unusual) into a 1st Amendment violations

(5) District Court erred when it did not accept petitioners declaration, and declarations of 2 other inmates, as evidence to show pattern of behavior of FCI 2 staff refusing to answer BP-8, (BOP ARP) (ECF 62, page 8 Fn 8)

(6) District Court erred by not accepting as true that petitioner had exhausted all available administrative remedies, ignoring evidence submitted by petitioner showing copies of BP-8 submitted do staff by never answered, ignored respondents evidence that I had filed grievance about staff not answering BP-8 (See DA. 36-41). District Court weighed the evidence and determined credibility in his decision to rule petitioner failed to exhaust his remedies. (ECF 62, page 9)

(7) District Court created evidence that did not exist. Petitioner was seen only by respondent Derry on June 9, 2015. Respondent Beyer only cosigned treatment plan, but never saw petitioner. (ECF 62, page 9). Beyer did not give the injection, this is false and incorrect.

(8) District Court erred when it wrote, "Elavil helped control the pain" (ECF 62, page 10), this is not what petitioner told respondent Berry. The (incorrect) medical records the court relied upon stated "Elavil helping some", District Court reading more into what the records shows.

(9) District Court erred when it ignored petitioner's evidence of being thwarted from using the ARP, and he had exhausted all available remedies, (See Appendix D, page 1 - 8). The District Court decided because petitioner had been able to use the ARP at least 17 times then it was always available (ECF 62, page 17)

(10) District Court erred in deciding Zigler provided an alternate basis for dismissing petitioner's non-medical care related claims. (ECF 62, page 17). No analysis was done as to new context, or if special factors were involved.

(11) District Court erred in not taking claim 1 as true that respondents hindered his effort to prosue a legal claim by refusing to provide petitioner with needed paper to do legal research and prepare motions, briefs, etc. (ECF 62, page 18).

(12) District Court erred in not taking claim 3 as true that respondents deprived petitioner needed legal research material to answer a show cause order from the Oklahoma Supreme Court, including evidence to support this claim (ECF 62, page 18).

(13) District Court erred when it decided petitioner failed to identify any specific injury (claim 3). (ECF 62, page 18), Petitioner asserted and showed the Oklahoma Supreme Court's dismissal as a result of not being able to answer the show cause order. Petitioner's litigation in Oklahoma state Court was dismissed, this was his injury.

(14) District Court erred in weighing the evidence and determining credibility of petitioner's being denied access to the Courts (ECF 62, page 18) The Court states, "plaintiff's numerous filings in this case, and his extensive use of the ARP belie his assertion that defendants denied him access to the courts.

(15) District Court erred in not taking as true petitioner's assertion in claim 6 of a pattern of behavior of illegally inspecting outgoing legal mail by respondent Lindsey (ECF 62, page 18). Respondents offered no evidence to refute this. Petitioner describe one incident, but asserted there were

many others. (Petitioner need discovery to get dates of other events)

(16) District Court erred converting petitioner's 4th Amendment rights violation into a 1st Amendment violation (Claim 12), District Court analyzed this claim under 1st Amendment standards,

(17) District Court erred by not accepting as true petitioner's claims in claim 12, instead the Court states, "plaintiff's filing in this case and his frequent use of the ARP belie any assertion that prison officials set out to impede his pursuit of legal claims." Petitioner asks what does in filing one use of ARP have to do with illegal search?

(18) District Court erred in converting petitioner's claim 7 (1st Amendment retaliation) into a 5th Amendment due process (EE: G2, page 20), then analyzing it under the improper standard.

(19) District Court erred in converting petitioner's claim 9 (1st Amendment retaliation) into a 5th Amendment due process (EE: G2, page 18), then analyzing it under the improper standard.

(20) District Court erred in converting petitioner's claim 14 (8th Amendment cruel&unusual) into a 5th Amendment due process (EE: G2, page 18), then analyzing it under the improper standard.

(21) ~~District Court erred in converting petitioner's claim 26 (8th Amendment)~~

(21) District Court erred in not taking as true petitioner's assertions that he lost his liberty (placed in SHU) without proper notification or reason why, and placement in SHU is not typical incidents of ordinary prison life.

(22) District Court erred in not taking as true petitioner's assertion that respondents made false allegations against petitioner for his engaging in a protected right, receiving information through FOIA request. Respondent's action were directly coordinated as a result of engaging in protected right.

(23) District Court erred by not examing all of the record, when petitioner asserted that his status as a sex offender would place him in extreme danger if he had been transferred because of the false allegations, petitioner was sent to FCI 2 because of the danger of being a sex offender.

(24) District Court erred in ~~petitioner~~ ignoring petitioner's request to drop all monetary damage against respondents Derry & Kirkpatrick, and only seek declaratory judgment.

(25) District Court erred in granting absolute immunity to respondents Derry & Kirkpatrick under 42 USC §233(a). Section 2336) states in part, "... for damages for personal injury." Petitioner was no longer seeking monetary demages from these respondents. (See ECF 58, page 8)

(26) District Court erred in not accepting as true petitioner's assertions that respondents Kane, Caraway & Andrews had constructive knowledge of the constitutional rights violations and by taking no action, gave silent approval to the violations. (See P.A. 49-58)

(27) District Court erred in converting petitioner's claim 8 (1st Amendment - retaliation) into a deliberate indifference claim (ECF 62, page 22), then analyzing it under the improper standard.

(28) District Court erred by misconstruing petitioner's claim of retaliation (claim 10), when petitioner asserted that respondents and FCI 2 staff retaliated against petitioner for engaging in a protected right. Petitioner was told by Unit manager must get a job, even though staff would not hire petitioner because they feared he would write them up.

(29) District Court erred in converting petitioner's claim 21 (8th Amendment - cruel & unusual) into a 1st Amendment retaliation. (ECF 62, page 26) Petitioner asserted cruel & unusual punishment deriving from the harassment and retaliation against petitioner by several respondents and staff. Petitioner asserted how the respondents's action(s) were cruel & unusual punishment.

(30) District Court erred in its assessment that petitioner had sufficient post-deprivation remedies through the ARP, when petitioner had shown that staff refused to answer his BP-8 grievances, therefore, depriving petitioner of post-deprivation remedies. Petitioner's claim 14.

(31) District Court erred in its assessment of claim 16 that petitioner had sufficient post-deprivation remedies through the ARP. Like error #30, the ARP was denied to petitioner by staff's refusal to answer.

(32) District Court erred, and appears work on behalf of respondents, when it states petitioner failed to demonstrate culpable state of mind (ECF 62, page 28). Petitioner submitted evidence that showed BOP, and therefore respondents where aware of the illegal conversion of property. (PA 84-86)

(33) District Court erred, and appears to work on behalf of respondents, when it refused to accept as true petitioner's assertion about delayed medical treatment, and the fact(s) that respondent's treatment plan was ineffective, leaving petitioner to needlessly suffer. Petitioner had raised issue of medical records being incorrect and/or false and misleading, Court ignored the multiple times petitioner seen by health services, and that he was provided not treatment or diagnostic testing, but had to wait 9+ weeks before being seen by Physical Therapy, and until seen by P.T., could receive no other medical treatment.

(34) District Court erred in dismissing claim 20 solely for failure to exhaust. Petitioner asserted, and explained that when he filed his petition, he had never received an answer to his BP-9 grievance, and that appeals were denied him because he could not provide an answer to the BP-9. The record shows this but the Court ignored it.

(35) District Court erred by what appears as if the Court had not actually read petitioner's claim 25. Petitioner asserted he was denied need legal research material, and he tried to show he was deprived property without due process, by unequal treatment of inmates who have access to Oklahoma laws, statutes, and court rulings.

(36) District Court erred in its assessment that petitioner failed to demonstrate violations of clearly established constitutional rights. (ECF 62, page 31). The Court did not accept as true petitioner's assertions and claims, did not review all evidence, or lack thereof, in the light most favorable to petitioner, and acted in behalf of the respondents.

(37) District Court erred in recasting petitioner's claims against respondent Derry and Kirkpatrick as medical malpractice, when petitioner attempted to file as negligence. (ECF 62, page 34)

(38) District Court erred, and petitioner has no knowledge of North Carolina Rule of Civil Procedure 9(j), as it is not available to inmates. Petitioner did not know how to properly raise his Tort Claims against respondents Derry and Kirkpatrick, which is part of reason he asked for appointment of counsel. Also, petitioner

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had dropped all monetary demages against Derry and Kirkpatrick so that 42 usc 3233(k) would not apply.

(39) District Court erred by not accepting as true petitioner's assertion that respondent Beyer's action was in retaliation for engaging in a protected right, and that the respondent had co-signed petitioner's bottom bunk pass. (ECF 81, page 3)

(40) District Court erred, and works on behalf of respondents, by reviewing evidence in light most favorable to respondents. The Court's footnote 1 on page 3, states, "Plaintiff's lower tier pass was not continued." (ECF 81, page 3). This was not the issue, it was respondent Beyer's action(s) of later retaliating by removing a bottom bunk pass, that she had approved of.

(41) District Court erred, and worked on behalf of respondents, in its deliberate indifference review. Nowhere in petitioner's claims 18 and 23, did petitioner raise issue of the lower bunk pass. Instead, petitioner asserted unnecessary infliction of pain as a result of delayed medical treatment. (See ECF 81, page 7)

(42) District Court erred when it wrote, "plaintiff's Eighth Amendment claim regarding Beyer's removal of plaintiff's lower bunk pass." (ECF 81, page 7) This had nothing to do with claims 8 & 23, infact, this issue had already been dismissed.

(43) District Court erred, its' judgment that Beyer's came to a different conclusion as to the bottom bunk pass (ECF 81, page 8). Beyer co-signed the bottom bunk pass to begin with, so there was no different conclusion.

(44) District Court erred, by not granting all inferences to petitioner, in that respondent Beyer, who had review all clinical encounters and signed off on, and so knew of the pain petitioner was suffering, and constructive knowledge of the delay to being seen by physical therapy, is more than negligence, but deliberate indifference (a genuine issue of material fact to be decided by a jury).

(45) District Court erred, and ignored evidence, so as to be able to rule for respondents. If petitioner's assertions and claims had been accepted as true about Beyer's

acting on orders from someone else to remove petitioner's bottom bunk pass, a pass she okayed, as a result of petitioner engaging in a protect right.

(16) District Court erred in granting summary judgment, after petitioner had asked for Counsel, so as to be able to acquire needed evidentiary evidence and documents to support and prove his claims.

(17) District Court failed to accept as true petitioner's assertions, claims, and evidence.

(18) District Court did not grant all reasonable inferences

(19) District Court deprived petitioner of his due process rights by depriving him of a Fair and impartial trial.

Petitioner's

Appendix

F

Full text of Constitutional Provisions

Amendment 1 Religious and political freedom.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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Amendment 4 Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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Amendment 5 Criminal actions—Provisions concerning—Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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Amendment 8 Bail—Punishment.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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Amendment 14

Sec. 1. [Citizens of the United States.] All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense - or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) *Supporting Factual Positions.* A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

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(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

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Rule 56.1. Motions for Summary Judgment.

(a) Statement of Material Facts on Motion for **Summary Judgment**.

(1) Movant's Statement. Any motion for **summary judgment** pursuant to Federal Rule of Civil Procedure 56 shall be supported by a separate statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine dispute.

(2) Opposing Statement. The memorandum opposing a motion for **summary judgment** shall be supported by a separate statement including a response to each numbered paragraph in the moving party's statement, in correspondingly numbered paragraphs, and if necessary, additional paragraphs containing a statement of additional material facts as to which the opposing party contends there is a genuine dispute. Each numbered paragraph in the moving party's statement of material facts will be deemed admitted for purposes of the motion unless it is specifically controverted by a correspondingly numbered paragraph in the opposing statement.

(3) Reply Statement. When a party opposing **summary judgment** submits a statement of additional material facts as to which it contends there is a genuine dispute, the moving party may submit a reply statement of additional facts limited to the additional facts referenced in the statement submitted by the party opposing **summary judgment**.

(4) Citations. Each statement by the movant or opponent pursuant to this Local Civil Rule must be followed by citation to evidence that would be admissible, as required by Federal Rule of Civil Procedure 56(c). Citations shall identify with specificity the relevant page and paragraph or line number of the evidence cited.

(5) Appendix. All evidence cited in moving or opposing statements, such as affidavits, relevant deposition testimony, responses to discovery requests, or other documents shall be filed as an appendix to the statement of facts prescribed by subsections (1) or (2) and denominated "Plaintiff's/Defendant's Appendix to Local Civil Rule 56.1 Statement of Material Facts."

(b) Exceptional cases. Where a party believes that compliance with this Local Civil Rule will be exceptionally burdensome or is otherwise inappropriate, the party may include a request for modification or exemption from its requirements as part of the Rule 26(f) report or by separate motion.

(c) Cross-referencing. Memoranda in support of or in opposition to a motion for **summary judgment** as required by Local Civil Rule 7.1 or 7.2 may cross-reference or cite to the statement and appendix prescribed by this Local Civil Rule without repeating the contents thereof.

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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