“APPENDIX A”

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 15-11369

District Court Docket No.
9:15-cv-80102-KLR

JOEL BARCELONA,

Plaintiff - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
WARDEN, SOUTH BAY CORRECTIONAL FACILITY,
CORRECTIONS HEALTH CARE (C.H.C.),

Defendants - Appellees.

Appeal from the United States District Court for the
Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: August 03, 2016
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna Clark

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-11369
Non-Argument Calendar

D.C. Docket No. 9:15-cv-80102-KLR

JOEL BARCELONA,

Plaintiff - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
WARDEN, SOUTH BAY CORRECTIONAL FACILITY,
CORRECTIONS HEALTH CARE (C.H.C.),

Defendants - Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(August 3, 2016)

Before HULL, MARCUS and DUBINA, Circuit Judges.

PER CURIAM:

I. BACKGROUND

Appellant, Joel Barcelona ("Barcelona") a Florida state prisoner, filed a *pro se* 42 U.S.C. § 1983 complaint against state prison officials, alleging that the officials denied him adequate medical care. More specifically, Barcelona alleged that he had lost all hearing in his right ear; that a prison doctor conducted tests and recommended that he be fitted for a hearing aid; and that a non-medical corrections official had refused to authorize payment for the hearing aid because Barcelona could still hear from his left ear. Barcelona also alleged that he had been denied adequate medical treatment for a fungal disease, which caused him to suffer with a swollen nail.

The case was referred to a magistrate judge who screened Barcelona's complaint pursuant to 28 U.S.C. § 1915(e)(2)(B). Subsequently, the magistrate judge issued a report and recommendation ("R&R"), recommending dismissal of Barcelona's complaint for failure to state a claim. The magistrate judge first concluded that Barcelona's loss of hearing in his right ear was not a serious medical need for purposes of a § 1983 claim because Barcelona still had hearing in his left ear. The magistrate judge then noted that the record contradicted Barcelona's claim of deliberate indifference by prison personnel because he had been attended by a prison doctor and had undergone medical tests on multiple

occasions. Finally, the magistrate judge concluded that Barcelona's sparse, one-sentence allegation of a fungal disease did not state a plausible claim because it did not establish a serious medical condition.

Barcelona objected to the R&R regarding the district court's disposition of his hearing aid claim, but he did not object with regard to the district court's dismissal of his alleged fungal disease claim.[1] The district court overruled Barcelona's objections, adopted the R&R, and dismissed Barcelona's complaint for failure to state a claim. Barcelona then perfected this appeal.

II. ISSUE

Whether the district court erred in its *sua sponte* dismissal of Barcelona's complaint for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B).

III. STANDARD OF REVIEW

This court reviews de novo a district court's *sua sponte* dismissal for failure to state a claim under § 1915(e)(2)(B), viewing all of the allegations in the complaint as true and liberally construing *pro se* pleadings. *Alba v. Montford*, 517 F.3d 1249, 1252 (11th Cir. 2008).

[1] Not only did Barcelona not address the nail fungal disease in his objections to the magistrate judge's R&R but he also makes no argument in his initial briefs to this court regarding the alleged nail fungus. Accordingly, we decline to consider this issue because we deem it abandoned. *See Timson v. Sampson*, 518 F.3d 870, 874 (11th Cir. 2008) (issues not briefed on appeal by a *pro se* litigant are deemed abandoned).

IV. DISCUSSION

Deliberate indifference to an inmate's serious medical needs violates the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S. Ct. 285, 291 (1976). "[A] serious medical need is considered one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (internal quotation marks omitted). "Medical treatment violates the [E]ighth [A]mendment only when it is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (internal quotation marks omitted).

Deliberate indifference has three components the plaintiff must satisfy: he must show a prison official's "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." *Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011) (internal quotation marks omitted). "Conduct that is more than mere negligence includes: (1) grossly inadequate care; (2) a decision to take an easier but less efficacious course of treatment; and (3) medical care that is so cursory as to amount to no treatment at all." *Id.* A prison official "who delays necessary treatment for non-medical

reasons may exhibit deliberate indifference." *Id.* Finally, "[a]n Eighth Amendment violation may also occur when state officials knowingly interfere with a physician's prescribed course of treatment. *Id.*

We conclude from this record that the district court erred in dismissing Barcelona's complaint before the state filed a response or the parties had conducted any discovery in this case. We have opined that "[s]ubstantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical need." *Gilmore v. Hodges*, 738 F.3d 266, 276 (11th Cir. 2013). In *Gilmore*, we concluded that correctional officers could be deemed deliberately indifferent for failing to provide hearing aid batteries to a prisoner who the officers knew required a hearing aid to treat his hearing impediment. *Id.* Even so, "not all hearing loss amounts to a serious medical condition." *Id.* In particular, this court reasoned, that where hearing loss does not prevent a plaintiff from carrying on a conversation or hearing and following directions without a hearing aid, "a court would be hard pressed to classify the plaintiff's impairment as a serious medical need." *Id.* at 276-77.

In his complaint, Barcelona alleged that he had lost hearing in his right ear and that two doctors who examined him prescribed a hearing aid to treat his hearing loss. Assuming the truth of these allegations, which we must, it appears

that Barcelona has stated a non-frivolous claim and that the district court erred in dismissing his complaint under § 1915(e)(2)(B). *Alba*, 517 F.3d at 1252. Though Barcelona might not ultimately succeed on his claim because "not all hearing loss amounts to a serious medical condition," that is not the issue before us. The only issue before us in this appeal is whether the district court erred in *sua sponte* dismissing Barcelona's complaint for failure to state a claim. Barcelona's allegations indicate that although he retains some ability to hear from his left ear, it is not clear from the present undeveloped record that his hearing loss does not prevent him from carrying on a conversation or hearing and following directions from correctional officers. We deem the allegations in Barcelona's complaint as falling between the two sets of circumstances described in *Gilmore* – substantial hearing loss that can be remedied by a hearing aid, and hearing loss that does not prevent a prisoner from carrying on a conversation or hearing directions from correctional officers without a hearing aid – and this court has not yet addressed whether a prisoner's loss of hearing in one ear, which leads a doctor to prescribe a hearing aid, is insufficient to constitute a serious medical need where the prisoner retains some level of hearing in his other ear.

Regarding his claim of deliberate indifference, Barcelona alleged in his complaint that prison officials became aware of his hearing loss after providing

him multiple medical consultations, but failed to provide him with a hearing aid. Again, accepting the truth of these allegations, which we must, we conclude that Barcelona has made a non-frivolous argument that the failure to provide him a hearing aid was "more than mere negligence" because, although the medical care he was provided was sufficient to diagnose his hearing loss, it could plausibly be argued that the failure to provide him a hearing aid "amount[ed] to no treatment at all" because a hearing aid was the only prescribed treatment for his impediment. *Bingham*, 654 F.3d at 1176. His assertion that a non-medical official denied him a hearing aid for non-medical reasons does not preclude his present claim because this court has noted that a prison official's interference with, or delay of, prescribed medical treatment can constitute deliberate indifference. *Id.* Therefore, we conclude the district court erred by *sua sponte* dismissing Barcelona's complaint under § 1915(e)(2)(B) before a response from the state and any discovery.

Accordingly, for the aforementioned reasons, we vacate the district court's order adopting the magistrate judge's R&R and remand this case for further proceedings consistent with this opinion.

VACATED and REMANDED.

APPENDIX – B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:15-CV-80102-ROSENBERG/REID

JOEL BARCELONA,

Plaintiff,

v.

JULIE L. JONES, et al.,

Defendants.
_____/

ORDER REFERRING CASE TO VOLUNTEER ATTORNEY PROGRAM

This matter is before the Court *sua sponte*. The Court has discretion to appoint counsel in cases where a litigant is proceeding pro se. 28 U.S.C. § 1915(d); *see also Dean v. Barber*, 951 F.2d 1210, 1216 (11th Cir. 1992). The Court has reviewed the case file and has determined that there is good cause to refer this case to the Court's Volunteer Attorney Program, given the advanced stage of this litigation.

Accordingly, it is **ORDERED** that this matter is hereby referred to the Court's Volunteer Attorney Program, where a volunteer attorney may accept the representation on a *pro bono* basis, if so desired. It is

FURTHER ORDERED that the Clerk of Court will obtain a description of the case and contact information to post on the Court's website of available *pro bono* cases seeking volunteer lawyers. It is

FURTHER ORDERED that if the representation is accepted, the volunteer attorney shall enter an appearance in the case and thereafter will be eligible for reimbursement of reasonable litigation expenses pursuant to the Court's Reimbursement Guidelines for Volunteer Counsel. It is

FURTHER ORDERED that this Order has no effect on the status of this case. Plaintiff is proceeding pro se, and must comply with all requirements and Orders of this Court, unless and until an attorney appears on his behalf.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 19th day of June, 2019.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record, Clerk of Court, and

Joel Barcelona
M50331
Northwest Florida Reception Center
Inmate Mail/Parcels
4455 Sam Mitchell Drive
Chipley, FL 32428
PRO SE

APPENDIX - C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:15-CV-80102-ROSENBERG/REID

JOEL BARCELONA,

Plaintiff,

v.

JULIE L. JONES, et al.,

Defendants.
_____/

ORDER SETTING STATUS
CONFERENCE, TRIAL DATE, AND PRETRIAL DEADLINES

This Court enters the following Order to apprise the parties of the trial date in this case and to establish certain pretrial procedures. The Court is aware that Magistrate Judge Reid has recently issued a Report and Recommendations ("Report") on the Defendants' Motions for Summary Judgment, DE 125, and the parties have not yet had an opportunity to file any objections to that Report. Once the parties have had an opportunity to object to the Report, this Court will endeavor to expeditiously resolve the Report and the Motions. In the interim, the Court issues this Order setting trial in fairness to all parties so that the parties are fully aware of the trial schedule in the event that the Motions for Summary Judgment are denied and this case proceeds to trial.

Many of the procedures delineated in this Order are unique to the undersigned and, as a result, the parties should carefully review this Order. This Order establishes pretrial deadlines. It is the Court's intention that this Order will provide the parties with all of the information they need to litigate before this Court.

The parties shall comply with the undersigned's rules as follows:

1. **TRIAL, CALENDAR CALL, AND STATUS CONFERENCE**

PLEASE TAKE NOTICE that the above-captioned cause is hereby set for **Trial** before the Honorable Robin L. Rosenberg, United States District Judge, at the United States District Court at 701 Clematis Street, Fourth Floor, Courtroom 2, West Palm Beach, Florida, on **September 11, 2019** at 9:00 a.m., or as soon thereafter as the case may be called.

PLEASE TAKE FURTHER NOTICE that a **Status Conference** will be held on July 31, 2019 at 9:30 a.m., and a **Calendar Call** will be held on August 14, 2019 at 9:00 a.m.

2. **PRETRIAL DEADLINES**

July 12, 2019: All Pretrial Motions, including *Daubert* motions, and motions *in limine* shall be filed.

August 12, 2019: Joint Pretrial Stipulation shall be filed. Designations of deposition testimony shall be made. Parties shall also exchange Rule 26(a)(3) witness and exhibit lists. The parties' joint trial plan is also due (see below for details).

August 19, 2019: Counter-designations of deposition testimony and objections to designations of deposition testimony shall be filed. Late designations shall not be admissible absent exigent circumstances.

August 26, 2019: Objections to counter-designations of deposition testimony and responses to objections to designations of deposition testimony shall be filed.

September 3, 2019: Jury Instructions or Proposed Findings of Fact and Conclusions of Law shall be filed. The parties' deposition designation notebook, if applicable, is also due. The parties' obligation to deliver a deposition designation notebook, together with legal argument on all pending objections, does not relieve the parties of their obligation to file the documents outlined above. *See* section 14.

In the event the parties are concerned with their ability to meet all pretrial deadlines and to be fully prepared to be able to try this case at the scheduled time, the parties may consider consenting to magistrate judge jurisdiction as a magistrate judge may be able to afford the parties greater latitude with respect to these deadlines. However, nothing in this Order shall preclude any party from moving for an extension of pretrial deadlines or a continuance of trial.

3. JURY TRIALS

In addition to filing their proposed jury instructions with the Clerk (the date for filing the proposed jury instructions is set forth in the pretrial scheduling order), the parties shall also submit A SINGLE JOINT SET of proposed jury instructions and verdict form in Word format directly to Rosenberg@flsd.uscourts.gov.[1] To the extent these instructions are based upon the Eleventh Circuit pattern jury instructions, counsel shall indicate the appropriate Eleventh Circuit pattern jury instruction upon which their instruction is modeled. All other instructions shall include citations to relevant supporting case law.

The parties need not agree on the proposed language of each instruction or question on the verdict form. Where the parties do agree on a proposed instruction or question, that instruction or question shall be set forth in Times New Roman 14 point typeface. Instructions and questions proposed only by the plaintiff(s) to which the defendant(s) object shall be italicized. Instructions and questions proposed only by defendant(s) to which plaintiff(s) object shall be bold-faced. Each jury instruction shall be typed on a separate page and, except for Eleventh Circuit pattern instructions clearly identified as such, must be supported by citations to authority. In preparing the requested jury instructions, the parties shall use as a guide the pattern jury instructions for civil cases approved by the Eleventh Circuit, including the directions to counsel contained therein.

[1] The joint set of proposed jury instructions should include both preliminary jury instructions (from the appropriate Eleventh Circuit pattern instructions) as well as final jury instructions. Proposed voir dire questions and verdict forms should be e-mailed in Word format to this e-mail address as well.

4. BENCH TRIALS

An additional copy of all proposed Findings of Fact and Conclusions of Law (the date for filing the proposed Findings of Fact and Conclusion of Law is set forth in the pretrial scheduling order) shall be sent in Word format to the chambers e-mail account listed above. Proposed Conclusions of Law must be supported by citations to authority.

5. EXHIBIT AND WITNESS LISTS

Counsel shall submit to the Court a typed list of proposed witnesses and/or exhibits (the date for filing the proposed witnesses and/or exhibit lists is set forth in the pretrial scheduling order). All exhibits shall be pre-labeled in accordance with the proposed exhibit list, and only numerical sequences are permitted—alphabetical designations shall not be used. Exhibit labels must include the case number, the exhibit number, and the party offering the exhibit. A typewritten exhibit list setting forth the number, or letter, and description of each exhibit must be submitted prior to trial. Any composite exhibits should be listed separately, i.e. 1A, 1B, 1C, etc. The parties shall submit said exhibit list on AO Form 187, which is available from the Clerk's office and at http://www.uscourts.gov/services-forms/forms. At trial, the parties shall deliver to the Court a USB flash drive that contains digital copies of the exhibits. The parties must also comply with Local Rule 5.3.

6. TRIAL PLAN AND STATUS CONFERENCE

At the Status Conference, the Court will require all parties to estimate the total number of witnesses each party intends to call at trial and to estimate the total amount of time requested for trial. The Court will also discuss with the parties whether a second mediation or a settlement conference should be required in this case.

The parties shall file a joint trial plan no later than two (2) business days prior to Calendar Call. By way of example, if Calendar Call falls on a Wednesday, the joint trial plan shall be filed

no later than the preceding Monday at 11:59 p.m. Also by way of example, if Calendar Call falls on a Wednesday and the preceding Monday is a federal holiday, the joint trial plan shall be filed no later than the preceding Friday at 11:59 p.m. The joint trial plan shall set forth the following information: (1) the anticipated length of time required for each party's opening statement; (2) the witnesses each party intends to call at trial, listed in the order in which these witnesses will be called;[2] (3) a *brief* description of each witness (*e.g.*, the identity of the witness and the relationship of the witness to any parties in the case); (4) whether the witness is an expert and, if so, the area of expertise of the witness; (5) whether each witness will testify live, by video deposition, or by reading of deposition testimony; (6) the anticipated length of time required for direct examination, cross examination, and redirect examination of each witness; (7) the anticipated length of time required for each party's closing argument; (8) any additional matters that may affect the course of trial; and (9) **an accurate summation of the total time allocated in the trial plan**.

The Court prefers the trial plan to be submitted using the following format:

[redacted] **Opening Statement (estimated time)**			15 min		
[redacted] **Opening Statement (estimated time)**			15 min		
[redacted] **Proposed Witnesses (in proposed sequence)**	**Relationship to Party(s)**	**Live / Depo / Video ***	**Time Estimate for**		
			Direct	**Cross**	**Redirect**
1. [redacted]	Chief Operating Officer and General Counsel [redacted]	L	15 min	20 min	5 min

[2] If adjustments become necessary during trial, the Court will not require the parties to call their witnesses in the order in which they are listed in the joint trial plan, as long as sufficient advance notice of the adjustments is provided to the Court and opposing counsel. However, the Court expects very little deviation from the joint trial plan in all other respects.

Prior to filing the joint trial plan, the parties shall meet and confer regarding the matters outlined therein. The parties shall certify in the joint trial plan that they have complied with this requirement.

7. MOTIONS IN LIMINE

Each party is limited to filing one motion in limine that contains no more than three requests for relief. Any party may move for a modification of this limitation at least one week in advance of the deadline for filing motions in limine and must provide a detailed basis to support the requested relief. Motions in limine that request for the Court to order the opposing party to comply with the Federal Rules of Evidence are improper and may be denied immediately.

8. DEPOSITION DESIGNATIONS AND OBJECTIONS TO EXHIBITS

In the experience of this Court, only a small fraction of deposition designations are utilized at trial. Juxtaposed to the small amount of deposition designation testimony utilized at trial is the large amount of time and expense that deposition designations entail: the proponent must study a deposition to designate relevant testimony, the opposing party must prepare objections to designated testimony, the proponent must thereafter respond to the opposing party's objections, the parties must confer on all objections, the Court must hear argument on unresolved, contested objections, and the Court must, in many cases, review extensive portions of deposition transcripts. The Court's review of deposition transcripts is complicated by the fact that the Court is often without the benefit—unlike the parties—of the context of the entire scope of evidence that will be introduced at trial. The foregoing impacts the amount of time the parties have to prepare for the trial and the amount of time that jurors may spend hearing evidence on a given trial day. In summary, the foregoing affects the Court's and the parties' obligations under Rule 1 of the Federal Rules of Civil Procedure. Rule 1 requires that the Federal Rules be "construed, administered, and employed by

the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." In accordance with its obligations under Rule 1, the Court orders the following.

First, the parties are ordered to provide the Court with a deposition designation notebook. This notebook must be delivered to Chambers on the same day that the parties' jury instructions or proposed findings and conclusions are due. Second, the notebook (or notebooks) must contain the full deposition transcript for each designated witness. Third, the designated (or counter-designated) testimony for each witness must be highlighted and easy to locate and identify. Fourth, objections to the designated testimony must be supplemented with an appendix that contains detailed legal argument explaining the objections, together with a response from the opposing party. Fifth and finally, an objection to designated testimony may only be raised after a full, reasonable conferral between the parties on the issue in dispute as more fully set forth below.

Deposition designation objections must be accompanied by a certification, by the party objecting, that: (i) the parties have conferred on the objection, (ii) the objection is raised in good faith, (iii) the objection raises an issue that the parties, working together as professionals, cannot resolve without court intervention, and (iv) the expenditure of judicial labor is the only avenue by which the dispute may be resolved. The Court will carefully consider all of the objections brought to its attention. In the event the Court concludes that a designating party or counsel, or an objecting party or counsel, has failed "to secure the just, speedy, and inexpensive determination of every action and proceeding," the Court may consider sanctions, as appropriate. Similarly, if the Court concludes that objections to designations must be ruled upon contemporaneously with the reading of designated testimony[3] at trial because of a party or counsel's failure to comply with this Order, the Court may consider sanctions, as appropriate.

[3] Such a ruling may mean that a transcript of a video deposition must be read in lieu of presentation of the video recording.

Finally, the requirements in the preceding paragraph apply to the parties' objections to exhibits. The parties are expected to fully and reasonably confer on every objection to an exhibit. In the event the Court determines that objections to exhibits are objections that could have been resolved through a full, reasonable, and professional conferral, the Court may consider sanctions, as appropriate.

9. PRETRIAL STIPULATION

The Joint Pretrial Stipulation shall conform to S.D. Fla. L.R. 16.1(e). The Court will not accept unilateral pretrial stipulations, and will strike *sua sponte* any such submissions. Should any of the parties fail to cooperate in preparing the Joint Pretrial Stipulation, all parties shall file (by the date the pretrial stipulation was due) a certification with the Court stating the circumstances. Upon receipt of such certifications, the Court may issue an order requiring the non-cooperating party or parties to show cause why such party or parties, or their respective attorneys, should not be sanctioned for the failure to comply with the Court's order. The pretrial disclosures and objections required under Fed. R. Civ. P. 26(a)(3) should be served, but not filed with the Clerk's Office, as the same information is required to be attached to the parties' Joint Pretrial Stipulation. The filing of a motion to continue trial shall not stay the requirement for the filing of a Pretrial Stipulation.

10. COMPUTERS AND OTHER EQUIPMENT

Counsel desiring to utilize laptop computers or other electronic equipment in the courtroom shall file a motion and submit a proposed order granting such use one week prior to the commencement of trial. The motion and proposed order should describe with specificity (1) the equipment, (2) the make and model of the equipment, and (3) the identity of the person who will bring the proposed equipment. A sample order permitting electronic equipment into the courtroom is available for viewing on the Court's website at: http://www.flsd.uscourts.gov / content / judge-

robin-l-rosenberg. Counsel shall contact the courtroom deputy at least one week prior to trial to discuss any special equipment (video monitor, etc.) that may require special arrangements.

11. NON-COMPLIANCE WITH THIS ORDER

Intentional or repeated non-compliance with any provision of this Order may subject the non-complying party or counsel to appropriate sanctions. It is the duty of all counsel to enforce the timetable set forth herein in order to ensure an expeditious resolution of this cause.

12. COMMUNICATION WITH CHAMBERS

Rules regarding communication with Chambers are available for viewing at http://www.flsd.uscourts.gov / content / judge-robin-l-rosenberg.

DONE and ORDERED in Chambers, West Palm Beach, Florida, this 19th day of June, 2019.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

Copies to: Counsel of Record, Clerk of Court, and

Joel Barcelona
M50331
Northwest Florida Reception Center
Inmate Mail/Parcels
4455 Sam Mitchell Drive
Chipley, FL 32428
PRO SE

Provided to Madison C.I. on
6-12-21 for mailing by
Date Initials

APPENDIX - D

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-14305
Non-Argument Calendar

D.C. Docket No. 9:15-cv-80102-RLR

JOEL BARCELONA,

Plaintiff-Appellant,

versus

SECRETARY, DEPARTMENT OF CORRECTIONS,
WARDEN, SOUTH BAY CF,
EWOOD FNU,
Corrections Health Care,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(March 2, 2021)

Before NEWSOM, BRANCH, and ANDERSON, Circuit Judges.

PER CURIAM:

Joel Barcelona, a prisoner in the custody of the Florida Department of Corrections ("FDOC"), appeals from the district court's grant of summary judgment against him in a 42 U.S.C. § 1983 lawsuit. Barcelona claims that prison officials were deliberately indifferent to his serious medical needs, in violation of the Eighth Amendment, because they refused to provide him with a hearing aid for his right ear. The district court found that the officials were entitled to qualified immunity because Barcelona only suffered from hearing loss in one ear and did not have a clearly established right to a hearing aid under *Gilmore v. Hodges*, 738 F.3d 266 (11th Cir. 2013). Because Barcelona did not have a clearly established right to a hearing aid, we affirm.

I. Background

A. Facts

Barcelona has been in the custody of the FDOC since March 21, 2005. On June 6, 2014, after he reported that he had experienced hearing loss to prison officials, Barcelona was seen by Dr. Arthur G. Zinaman, an audiologist. Dr. Zinaman found that Barcelona had asymmetrical hearing loss—"a profound

hearing loss in the right ear and only mild hearing loss in the left ear."[1] Based on his observations, Dr. Zinaman noted that "Barcelona's left ear would be a candidate for a hearing aid for overall hearing due to the lack of hearing in the right ear." On August 12, 2014, Dr. Zinaman issued a second report noting that "[a] mild gain device for the left ear may be beneficial . . . . Alternatively, a power instrument for the right ear may provide speech and environmental awareness with possible transcranial effect."

On August 22, 2014, Dr. Raymond Herr, the Chief Medical Officer for Corrections Healthcare Companies, reviewed Barcelona's request for a hearing aid for his right ear. Dr. Herr denied Barcelona's request, finding that:

> Based on the audiometry results and the adequacy of the hearing levels in Mr. Barcelona's left ear, he did not meet the medical criteria guidelines for bilateral hearing loss under HSB 15.03.27(G)(2)(a)-(b)[2] and therefore Mr. Barcelona was not a candidate for a hearing aid. Additionally, based upon the audiometry results for the right ear, and the profound hearing loss, it was not medically probable that a power instrument device for the right ear could have remedied Mr. Barcelona's conditions.

On September 24, 2014, Barcelona filed a formal grievance with prison officials, asserting that the decision not to provide him with a hearing aid was

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[1] "Profound" hearing loss is the most impaired level; "mild" hearing loss is the least impaired level.

[2] Health Services Bulletin No. 15.03.27 provided that a hearing aid recipient "must have a bilateral (both ears) hearing loss. A recipient who has a unilateral (one ear) hearing loss is not eligible for services."

inadequate medical care in violation of the Eighth Amendment and requesting that the prison provide him a hearing aid for his right ear. Dr. Jules Heller, the medical director for the prison, prepared a response, noting that:

> Records indicate you only have hearing loss in your right ear. Per policies and procedures, in order to be eligible for services, the recipient must have a bilateral (both ears) hearing loss. A referral was submitted, but denied because you do not meet this criteria based on your evaluation with the audiologist. Based on the above information your grievance is denied.

The Warden signed off on the response and denied Barcelona's grievance. Barcelona submitted an administrative appeal to the Secretary of the Department of Corrections, but the appeal was returned "without action" because it was untimely. On November 16, 2014, Barcelona filed another formal grievance regarding the decision, which was also denied, as was the subsequent appeal.

B. Procedural History

On January 29, 2015, Barcelona filed a *pro se* complaint against the Secretary of the Florida Department of Corrections and the Warden, alleging that prison officials had violated his Eighth Amendment rights by denying him a hearing aid for his right ear, which had profound hearing loss.[3] Barcelona's

[3] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII; *see Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010) (noting that "[t]he Eighth Amendment's prohibition against cruel and unusual punishment" was made applicable to the States "through the Due Process Clause of the Fourteenth Amendment"). "In the prison context . . . [t]he Eighth Amendment can give rise to claims challenging . . . the deliberate indifference to a prisoner's serious medical needs." *Thomas*, 614 F.3d at 1303–04. "To prevail on a claim of deliberate

On remand, Barcelona filed an amended complaint, alleging that Herr,[4] the Secretary of the Department of Corrections, and the Warden (the "defendants") violated his Eighth Amendment rights, in both their individual and official capacities, through deliberate indifference to his serious medical needs. As relief, Barcelona sought compensatory damages against each defendant. After discovery, the defendants moved for summary judgment, arguing that Barcelona failed to show that they were deliberately indifferent to his serious medical needs, that they were entitled to absolute immunity for the claims against them in their official capacities, and that they were entitled to qualified immunity for the claims against them in their individual capacities. Barcelona opposed the motion.

The district court granted the defendants' motion for summary judgment. As relevant to this appeal, it found that the defendants were "protected by qualified immunity" in their individual capacities.[5] First, the district court noted that Barcelona did "not dispute that the [d]efendants were acting within their discretionary authority in declining to authorize a hearing aid." Second, the district court determined that "the constitutional question of whether [Barcelona's]

[4] Barcelona's complaint initially identified Herr as "FNU Ewood." When it was subsequently determined that Herr was "FNU Enwood," Herr was substituted in his place.

[5] The district court also found that the defendants were "absolutely immune from suits for damages" in their official capacities due to state sovereign immunity, but we do not address this issue because Barcelona does not challenge the district court's grant of summary judgment to the defendants on his official capacity claims.

asymmetrical hearing loss constituted a serious medical need" was not clearly established in 2014 when Barcelona's hearing aid request was denied. Barcelona timely appealed.

II. Analysis

We review the district court's grant of summary judgment on qualified immunity grounds *de novo*, "drawing all inferences and viewing all of the evidence in a light most favorable to the nonmoving party." *Gilmore*, 738 F.3d at 272. "To establish the defense of qualified immunity, the burden is first on the defendant to establish that the allegedly unconstitutional conduct occurred while he was acting within the scope of his discretionary authority."[6] *Estate of Cummings v. Davenport*, 906 F.3d 934, 940 (11th Cir. 2018) (quoting *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir. 1998)).

Once an official has proved that he acted within the scope of his discretionary authority, "the burden shifts to the plaintiff to satisfy the following two-pronged inquiry: (1) whether the facts that a plaintiff has shown make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendant's alleged misconduct." *Gilmore*, 738 F.3d

[6] "To establish that the challenged actions were within the scope of his discretionary authority, a defendant must show that those actions were (1) undertaken pursuant to the performance of his duties, and (2) within the scope of his authority." *Estate of Cummings*, 906 F.3d at 940 (quotin

at 272. We may consider the two prongs in any order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotation omitted). "[T]o determine whether the right in question was clearly established at the time of the violation," we look to "cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose." *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011). Although "[w]e do not require a case directly on point . . . existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The precedent "must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). In other words, "[t]he salient question . . . is whether the state of the law gave the defendants fair warning that their alleged conduct was unconstitutional." *Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003) (quotation omitted).

A. Scope of the Defendants' Discretionary Authority

Barcelona argues that the defendants were not acting within the scope of their discretionary authority when they denied his requests for a hearing aid for his right ear. But he failed to raise this argument below in his response to the

defendants' motion for summary judgment and has thus forfeited the argument.[7] *See Hall v. Flournoy*, 975 F.3d 1269, 1277 n.3 (11th Cir. 2020).

B. Clearly Established Law

Barcelona next argues that it was clearly established by *Gilmore* that asymmetrical hearing loss is a serious medical need. Although we held in *Gilmore* that "significant and substantial hearing loss that can be remedied by a hearing aid is a serious medical need," that case involved bilateral hearing loss, not asymmetrical hearing loss. 738 F.3d at 269, 278. Barcelona does not dispute that *Gilmore* can be distinguished from this case on those grounds; instead, he claims that the difference between the two cases "is trivial at best." We disagree.

As we previously noted in this case, the Eleventh Circuit "[has] not yet addressed whether a prisoner's loss of hearing in one ear, which leads a doctor to prescribe a hearing aid, is insufficient to constitute a serious medical need where the prisoner retains some level of hearing in his other ear." *Barcelona*, 657 F. App'x at 898–99. Nevertheless, even without regard to our previous statement,

[7] Even if he had not forfeited this argument, "objective circumstances . . . compel the conclusion that [the defendants'] actions were undertaken pursuant to the performance of [their] duties and within the scope of [their] authority." *Estate of Cummings*, 906 F.3d at 940 (quotation omitted). Namely, Barcelona claims that the defendants violated his constitutional rights by denying his requests for a hearing aid. Supervising the medical care of inmates and resolving prison grievances are actions that are plainly within the duties and the authority of the defendants. *See, e.g.*, Fla. Stat. § 944.14 ("Subject to the orders, policies, and regulations established by the department, it shall be the duty of the wardens to supervise the government, discipline, and policy of the state correctional institutions, and to enforce all orders, rules and regulations."); *see also Estate of Cummings*, 906 F.3d at 940.

we independently conclude that *Gilmore* did not give the defendants fair warning that their alleged conduct was unconstitutional because asymmetrical hearing loss is a substantively different impairment from bilateral hearing loss. *See Gilmore*, 738 F.3d at 276–77 ("Thus, for instance, if a plaintiff can 'carry on a normal conversation' and hear and follow directions without the use of a hearing aid, a court would be hard pressed to classify the plaintiff's impairment as a serious medical need." (quotation omitted)). Barcelona does not point to any other precedent that would have put the defendants on notice that their failure to provide a hearing aid to him for his asymmetrical hearing loss was unconstitutional. Accordingly, Barcelona has failed to show that the defendants violated a clearly established right because "existing precedent [has not] placed the . . . constitutional question beyond debate." *Ashcroft*, 563 U.S. at 741. Consequently, the defendants are entitled to qualified immunity.

III. Conclusion

For these reasons, we affirm the district court's grant of summary judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 9:15-CV-80102-ROSENBERG/REID

JOEL BARCELONA,

Plaintiff,

v.

JULIE L. JONES, et al.,

Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is before the Court on Defendants Raymond Herr, MD, Julie L. Jones, and D.L. Stine's (collectively, the "Defendants") Motion for Summary Judgment (the "Motion").[1] The Motion is fully briefed and ripe for review.

Plaintiff Joel Barcelona brought this *pro se* case pursuant to 42 U.S.C. § 1983 after he was denied a hearing aid by prison officials in 2014. *See* Am. Compl., DE 36. Plaintiff's Amended Complaint alleges that the Defendants violated Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment through Defendants' deliberate indifference to his serious medical need for a hearing aid. *See id.*

In considering this Motion, the Court has reviewed the following briefing: Defendants filed a Statement of Facts in support of their Motion ("SOF"). DE 146. Plaintiff responded to the Motion. Pl. Resp., DE 153. With his Response, Plaintiff also filed exhibits, including his medical

[1] This case was previously referred to Magistrate Judge Reid for a Report and Recommendation on all dispositive matters. *See* DE 2; DE 102. The Court vacates that referral for the limited purpose of considering the Motion for Summary Judgment, consistent with the Court's dialogue with the parties at the Calendar Call held before the undersigned on August 14, 2019. *See* DE 149.

records, grievances, and relevant Department of Corrections policies. *See* DE 153-1, 153-2. However, Plaintiff did not respond to Defendants' SOF, in violation of Federal Rule of Civil Procedure 56(c) and Local Rule 56.1, despite being apprised of Rule 56's requirements in Judge Reid's Order Instructing Pro Se Plaintiff to Respond, which quoted the language of Rule 56(e). DE 115. Defendants filed a Reply in support of their Motion. *See* Reply, DE 154.

In light of Plaintiff's *pro se* status and failure to file a responsive SOF, the Court has carefully reviewed all of the attachments to Plaintiff's Response at DE 153, pursuant to Federal Rule of Civil Procedure 56(e). The Court has also reviewed Plaintiff's filings that were submitted in briefing the first Motion for Summary Judgment in this case, because Plaintiff's Response to the instant Motion references the documents he submitted with his prior Response.[2] *See* Pl. Resp., DE 153; *see also* Pl. 1st Resp., DE 120. Almost all of Plaintiff's filed evidence has also been submitted by Defendants and is cited to in Defendants' SOF. *See* DE 112; Def. SOF, DE 146. The parties' understanding of the facts and the relevant medical records are substantially consistent, as evidenced by their production, during the course of briefing two summary judgment motions, of the same records. The exception is Plaintiff's sworn affidavit which was filed in response to the first summary judgment motion at DE 120 and Plaintiff's deposition testimony. *See* DE 120, DE 24; Pl. Dep., DE 144-1. While Plaintiff's arguments in his responses are not evidence, his sworn affidavit and his deposition testimony are. *See Sears v. Roberts*, 922 F.3d 1199, 1206 (11th Cir. 2019) (finding a plaintiff's sworn affidavit "should have been treated as testimony by the district court").

[2] This is the second Motion for Summary Judgment briefed in this case. The first Motion resulted in a Report and Recommendations issued by Magistrate Judge Reid, which was ultimately vacated to allow for additional discovery and rebriefing of the motion for summary judgment. *See* Mot., DE 114; Report, DE 125; Order Vacating, DE 131; Order allowing discovery and rebriefing, DE 133.

Finally, the Court held a pretrial Calendar Call with defense counsel and Plaintiff Barcelona physically present in the courtroom on August 14, 2019. DE 149.

I. FACTS

Plaintiff has been in the custody of the Florida Department of Corrections ("FDOC") since March 21, 2005. Def. SOF., DE 146 ¶ 1. Plaintiff suffers from asymmetrical hearing loss, and he brought this case against various prison officials after he was denied a hearing aid in 2014. *See* Am. Compl., DE 35; *see also* 6/6/14 Letter, DE 112-1, 11 (identifying Plaintiff's hearing impairment).

On June 6, 2014, Plaintiff was seen by Dr. Arthur G. Zinaman, an audiologist with his doctorate in audiology and who has been in practice since 1988. Def. SOF, DE 146 ¶ 3; *see also* 6/6/14 Report, DE 112-1, 11; Zinaman Dep., DE 139, 24. Dr. Zinaman reported that Plaintiff had "profound" hearing loss in the right ear and "mild" hearing loss in the left ear. *See* 6/6/14 Report, DE 112-1, 11. Based on this diagnosis, Dr. Zinaman reported that "[a]mplification is not specifically recommended on the right side due to the severity of the hearing loss and poor word discrimination exhibited. However, the left ear is a candidate for a hearing aid to improve overall hearing due to the lack of such in the right ear." *Id.*, *see also* Def. SOF, DE 146 ¶ 3. Accordingly, "[u]pon medical clearance and (South Bay Correctional) facility authorization, a hearing aid for the left ear would be beneficial." *Id.*; *see also* Def. SOF ¶ 3. Dr. Zinaman also recommended an MRI to better understand the source of Plaintiff's right ear hearing loss. *See id.* The MRI was completed at Lakeside Medical Center, and the reviewing physician concluded that the results were "unremarkable." MRI Report, DE 112-1, 22.

Plaintiff in his affidavit swears that "Dr. J. Heller ordered that Plaintiff transport [sic] to Lakeside M.C. to get a mold for a hearing aid by Dr. Zinaman. The hearing aid was ordered." Pl.

Aff., DE 120, 24. Plaintiff repeats in his November grievance that an unnamed doctor at Palm West Hospital ordered a hearing aid mold to be made for Plaintiff and that he was transported outside of the prison for the same. Nov. Grievance, DE 112-2, 7 ("On July 11, 2014, I was taken to Palm West Hospital to get an MRI. The doctor there ordered that I be scheduled to get a mold for a 'hearing aid.' On August 5, 2014, I was taken to Lakeside Hospital to get a mold for a hearing aid."). *See also* Pl. Dep., DE 144-1, 9, 11. Defendants do not address whether Plaintiff was transported for a hearing aid mold, and none of the submitted medical records from either party supports Plaintiff's assertion that a mold was ordered. *See* Def. SOF, DE 146; DE 153; DE 112.

On August 12, 2014, Dr. Zinaman issued a second report. *See* 8/12/14 Report, DE 112-1, 26. The Report states that a "mild gain device for the left ear may be beneficial, but this is declined by patient. Alternatively, a power instrument for the right ear may provide speech and environmental awareness with possible transcranial effect. Mr. Barcelona is agreeable to this plan." *Id.*; *see also* Def. SOF., DE 146 ¶ 5. At his deposition, Plaintiff did not recall being offered a device for his left ear. Pl. Dep., DE 144, 11 ("Q: Did [Dr. Zinaman] offer you a device for your left ear? A: No. Q: Was there any discussion regarding your left ear? A: No.").[3]

On August 18, 2014, there is a notation in Plaintiff's Chronological Record of Health Care (the "Health Record"), by Dr. J. Heller (South Bay's Medical Director), which appears to indicate "Await [illegible] status of hearing aid approval." 8/18/14 Health Record Note, DE 112-1, 25. By August 22, 2014, the Health Record indicates that "Audiology referral deferred by UM [Utilization Management]. Due to adequate hearing in one ear, not a candidate for hearing aid." *Id.* *See also* Def. SOF, DE 146 ¶ 6. The same was indicated in October 2014. *See* 10/2/14 Health Record Note,

[3] In addition, in his unsworn responses, Plaintiff contests whether he was seen a second time by Dr. Zinaman after his MRI was completed. See Pl. Resp., DE 153, 3. *See also* Zinaman Dep., DE 139, 27. Plaintiff further denies that he ever declined the left ear gain device suggested by Dr. Zinaman. See Pl. Resp., DE 154, 9.

grievance, Dr. Heller and Warden Stine signed a response stating, "Records indicate you only have hearing loss in your right ear, per policies and procedures, in order to be eligible for services, the recipient must have a bilateral (both ears) hearing loss. A referral was submitted but denied because you do not meet this criteria." *Id.* at 3. Plaintiff's October, November, and December grievances repeated the arguments he raised in his September grievance. *See id.* at 4-6, 7-8, 10-12. In response to the November grievance, Dr. Heller and a different warden signed a response stating:

> Records indicate you were seen by audiologist on 8/12/14 and it was determined your hearing loss in the right ear. [sic] A referral request for hearing aid was ordered on 8/19/14. The referral was submitted to the Utilization Department for a decision and the consult was deferred by utilization management. Per Florida Department of Corrections Guidelines a recipient for hearing aids must have a bilateral (both ears) hearing loss. A person who has unilateral (one ear) hearing loss is not eligible for services. Based on the above information, your grievance is denied.

Id. at 9.

Plaintiff then initiated this § 1983 action in January of 2015. Compl., DE 1.

In November 2018, while this action was still pending, Plaintiff was fitted for a hearing aid for his left ear by Ariana Wascher, a licensed hearing aid specialist. Def. SOF, DE 146 ¶ 42, 46. Although his hearing in both ears had remained stable in the intervening years, the Health Services Guidelines had changed as of November 1, 2018, so that Plaintiff qualified for a left ear hearing aid. *See id.* ¶¶ 47-51. *See also* Wascher Dep., DE 139, 8 (characterizing both ears' hearing loss as "stable" between 2014 and 2018 tests in spite of "very slight" or "slight" changes in the left ear). *Contra* Pl. Dep., DE 144, 14 ("Q: Was your hearing different in 2018 when you saw Dr. Arian? A: Yes, it's different. . . . I had a hard time hearing about it. Q: It had gotten worse over the last four years? A: Yes, yes, That's why I said it's almost damaged, so— Q: Is it worse than it was in 2016 when you were transferred? A: Yes.").

DE 112-1, 29 ("UM denied based on [Health Services Bulletin] 15.03.27. Must have bilateral hearing loss.").

Health Services Bulletin No. 15.03.27 was issued on April 9, 2014 for the purpose of establishing "uniform procedures for the provision of auditory care to inmates." Bulletin, DE 112-3, 1-3. The Bulletin specifies that "A recipient [of a hearing aid] who has a unilateral (one ear) hearing loss is not eligible for services. Exceptions to this policy may be granted on a case-by-case basis as recommended by an otolaryngologist or otologist, with approval of the regional medical director." *Id. See also* Def. SOF, DE 146 ¶ 8.

On August 22, 2014, "Dr. Herr, the Chief Medical Officer for Correction Healthcare Companies in Utilization Management, reviewed the request for hearing aid along with the June 2, 2014 audiometry results." Def. SOF, DE 146 ¶ 6. According to Dr. Herr, "[b]ased on the audiometry results and the adequacy of the hearing level in Mr. Barcelona's left ear, he did not meet the medical criteria guidelines for bilateral hearing loss under [Health Services Bulletin] 15.03.27(G)(2)(a)-(b) and therefore Mr. Barcelona was not a candidate for a hearing aid. Additionally, based upon the audiometry results for the right ear, and the profound hearing loss, it was not medically probable that a power instrument device for the right ear could have remedied Mr. Barcelona's condition. Based on the foregoing, I deferred further audiology consultation and did not authorize a hearing aid for Mr. Barcelona at that time." Herr Aff., DE 145-1 ¶ 15; *see also* Def. SOF ¶¶ 11-14.

Plaintiff formally grieved this determination on September 24, 2014; October 21, 2014; November 16, 2014; and December 8, 2014. DE 112-2. In his September grievance, Plaintiff claims that his "condition could have easily been treated with a hearing aid. A hearing aid was ordered by not one but two separate doctors." *Id.* at 1-2. In response to Plaintiff's September

In her deposition, Ms. Wascher stated that Plaintiff's hearing in the left ear improved with the hearing aid. *See id.* at 14 ("[U]pon fitting it and testing it and programming it I determined that it was a good fit for his ear and that he was hearing speech crisp and clear, hearing better."). However, even with his hearing aid, Plaintiff states that as of August of 2019, he "cannot hear T.V., loud speaker, mail calls, meal calls, or [if] somebody is calling behind me where the voice came from." Pl. Resp., DE 153, 13. He states that the left ear hearing aid "is only for face to face, close and quite [sic] room." *Id.*

II. SUMMARY JUDGMENT STANDARD

Under Rule 56, the summary judgment movant must demonstrate that "there is no genuine issue of material fact and that the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Grayson v. Warden, Comm'r, Ala. Dep't of Corr.*, 869 F.3d 1204, 1220 (11th Cir. 2017) (quoting Celotex, 477 U.S. at 322). The existence of a factual dispute is not by itself sufficient grounds to defeat a motion for summary judgment; rather, "the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A dispute is genuine if "a reasonable trier of fact could return judgment for the non-moving party." *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008) (citing *Anderson*, 477 U.S. at 247–48). A fact is material if "it would affect the outcome of the suit under the governing law." *Id.* (citing *Anderson*, 477 U.S. at 247–48).

In deciding a summary judgment motion, the Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). The Court does not weigh conflicting evidence. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1140 (11th Cir. 2007). Thus, upon discovering a genuine dispute of material fact, the Court must deny summary judgment. *See id.*

The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *See Shiver v. Chertoff*, 549 F.3d 1342, 1343 (11th Cir. 2008). However, once the moving party satisfies this burden, "the nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Ray v. Equifax Info. Servs., LLC*, 327 F. App'x 819, 825 (11th Cir. 2009) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). Instead, "[t]he non-moving party must make a sufficient showing on each essential element of the case for which he has the burden of proof." *Id.* (citing *Celotex*, 477 U.S. at 322). Accordingly, the non-moving party must produce evidence, going beyond the pleadings, to show that a reasonable jury could find in favor of that party. *See Shiver*, 549 F.3d at 1343.

III. PLAINTIFF'S EIGHTH AMENDMENT CLAIM

"The Eighth Amendment's prohibition against cruel and unusual punishment, applicable to the State of Florida through the Due Process Clause of the Fourteenth Amendment, prohibits the 'unnecessary and wanton infliction of pain.'" *Thomas v. Bryant*, 614 F.3d 1288, 1303 (11th Cir. 2010) (citing *Robinson v. California*, 370 U.S. 660 (1962); quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992). In the prison context, the "Eighth Amendment can give rise to claims challenging the specific conditions of confinement, excessive use of force, and the deliberate indifference to a prisoner's serious medical needs." *Id.* at 1303-04.

"To prevail on a claim of deliberate indifference to [a] serious medical need in violation of the Fourteenth Amendment, a plaintiff must show: '(1) a serious medical need; (2) the defendant['s] deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury." *Youmans v. Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010) (quoting *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1306–07 (11th Cir. 2009)).

> This analysis contains both an objective and a subjective component. A plaintiff must first show an objectively serious medical need that, if unattended, posed a substantial risk of serious harm, and that the official's response to that need was objectively insufficient. Second, the plaintiff must establish that the official acted with deliberate indifference, i.e., the official subjectively knew of and disregarded the risk of serious harm, and acted with more than mere negligence.

Gilmore v. Hodges, 738 F.3d 266, 274 (11th Cir. 2013) (citing *Thomas*, 614 F.3d at 1304 (11th Cir. 2010); *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir.2000)).

A. Serious Medical Need

"A serious medical need is 'one that has been diagnosed by a physician as *mandating* treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Youmans v. Gagnon*, 626 F.3d 557, 564 (11th Cir. 2010) (emphasis added) (citations omitted). "Medical treatment violates the Eighth Amendment only when it is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness." *Hernandez v. Sec'y Fla. Dep't of Corr.*, 611 F. App'x 582, 584 (11th Cir. 2015) (citing *Estelle v. Gamble*, 429 U.S. 97, 108 (1976)). "[N]either a difference in medical opinion between the inmate and the care provider, nor the exercise of medical judgment by the care provider, constitutes deliberate indifference." *Id.*

In *Gilmore v. Hodges*, the Eleventh Circuit considered for the first time "whether a substantial hearing impairment that can be remedied by a hearing aid may amount to a serious medical need for purposes of the Eighth or Fourteenth Amendments." 738 F.3d 266, 273 (11th

Cir. 2013). Prior to *Gilmore*, there was "precious little case law addressing an official's failure to supply a severely hearing impaired inmate with hearing aids." *Id.* at 275. The *Gilmore* court concluded that "[S]ubstantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical need." *Id.* at 276. The court emphasized two elements for a deliberate indifference claim based on an official's failure to provide hearing aids: First, the prisoner must suffer from *significant*, *substantial* or *severe* hearing loss and (2) the hearing loss must be able to be *remedied* by a hearing aid. *Id.* at 274 ("whether severe, treatable hearing loss amounts to an objectively serious medical need"); 276 ("Substantial hearing loss that can be remedied"); 277 ("not all hearing loss that amounts to a serious medical condition can be *remedied*"). Importantly, the *Gilmore* court "caution[ed] ... that not all hearing loss amounts to a serious medical condition." *Id.* at 276. And, "not all hearing loss that amounts to a serious medical condition can be *remedied* with a hearing aid, and thus an official could hardly be faulted for failing to provide an inmate with a hearing aid in that circumstance." *Id.* at 277.

Here, the record makes clear that Plaintiff suffers from severe hearing loss in his right ear. Every medical professional who has examined Plaintiff determined that Plaintiff's right ear had "profound" hearing loss, the most extreme classification of hearing loss. *See, e.g.*, 6/6/14 Report, DE 112-1, 11; 6/25/14 Health Record, DE 112-1, 16; 11/26/18 Consultation Report, DE 144-3. *See also* Zinaman Dep., DE 139, 25 ("The profession recognizes different levels of hearing loss going from normal, mild, moderate, severe and profound. Profound is the worst hearing loss scenario."). Plaintiff does not refute this evidence. *See* Pl. Dep., DE 144-12 ("I lost my hearing in my right ear in 2014."). However, it is not clear from the record that a hearing aid, or any other device, could have remedied Plaintiff's *right* ear hearing loss. In June of 2014, Dr. Zinaman reported that "[A]mplification is *not* specifically recommended on the right side due to the severity

of the hearing loss and poor word discrimination exhibited." 6/6/14 Report, DE 112-1, 11 (emphasis added). In August of 2014, Dr. Zinaman stated that "a power instrument for the right ear *may* provide speech and environmental awareness with possible transcranial effect." *See* 8/12/14 Report, DE 112-1, 26. Dr. Zinaman made this recommendation *after*, he understood[4] Plaintiff to have declined a hearing aid for his *left* ear. *See* 8/12/14 Report, DE 112-1, 26. In his sworn affidavit, Dr. Herr stated that "based upon the audiometry results for the right ear, and the profound hearing loss, it was not medically probable that a power instrument device for the right ear could have remedied Mr. Barcelona's condition." Herr Aff., DE 145-1 ¶ 15. Plaintiff has not refuted Dr. Herr's medical opinion.

As to Plaintiff's left ear hearing loss, the record is undisputed that Plaintiff's hearing loss was "mild." *See* 6/6/14 Report, DE 112-1, 11 ("mild in left ear"); *see also* Pl. Dep., DE 144, 13 ("Q: Have you ever had a complete hearing loss in both ears? A: No."). This remained true in 2018. *See* Wascher Dep., DE 139, 7-8. Based on the undisputed record evidence from Plaintiff's medical providers, Plaintiff's left ear hearing loss fails the test articulated in *Gilmore* because his left ear hearing loss was only mild, which by definition, is not severe, substantial, or significant.

Nevertheless, when considering Plaintiff's overall hearing capacity, the Court's analysis of the plaintiff's hearing loss under the *Gilbert* framework changes. With regard to the magnitude of his hearing loss, the medical records and Plaintiff's subjective experiences are consistent with a finding of substantial hearing loss. *See, e.g.*, Pl. Dep., DE 144-1, 7. *See also* Pl. Resp., DE 153, 13 ("I cannot hear T.V., loud speaker, mail calls, meal calls, or somebody is calling behind me where

[4] In his Response, which is not a sworn statement, Plaintiff disputes that he declined the left ear hearing aid. Pl. Resp., DE 153, 20. In his sworn deposition testimony, Plaintiff could not remember whether Dr. Zinaman made the recommendation for a mild gain device for his left ear. Pl. Dep., DE 144-1, 11. Even if Plaintiff did not decline the left ear hearing aid in August of 2014, this dispute is immaterial to the Court's conclusion that the Defendants did not act with deliberate indifference. *See infra* Section III.B.

the voice came from."); Am. Compl., DE 36, 5 (same). Plaintiff identifies verbatim the kind of hearing difficulties that the *Gilmore* court recognized as potentially leading to serious harm to physical and mental health. *Cf. Gilmore*, 738 F.3d at 275-76 (describing that the plaintiff was unable to hear the TV and "could have had trouble hearing a fire or other alarm, responding to commands issued by guards, and reacting to a fight behind him or to prisoners threatening his safety."). The Court finds that due to the total loss of hearing in his right ear, coupled with even mild hearing loss in his left ear, a reasonable jury could conclude that Plaintiff has severe, substantial, or significant hearing loss.

However, it is less clear whether or not Plaintiff's overall hearing loss could be remedied by hearing aids. In 2014, Dr. Zinaman *suggested* various devices that *might* be able to help him. *See* 6/6/14 Report, DE 112-1, 11 ("[T]he left ear is a candidate for a hearing aid to improve overall hearing due to the lack of such in the right ear."); 8/12/14 Report, DE 112-1, 26 ("A mild gain device for the left ear *may* be beneficial, but this is declined by the patient. Alternatively, a power instrument for the right ear *may* provide speech and environmental awareness.") (emphasis added). *See also* Herr Aff., DE 145-1 ¶ 15 ("Additionally, based upon the audiometry results for the right ear, and the profound hearing loss, it was not medically probable that a power instrument device for the right ear could have remedied Mr. Barcelona's condition.").[5] Considering this evidence in the light most favorable to Plaintiff, the Court finds that there is a genuine issue of fact regarding whether any kind of hearing assistance device could have remedied his substantial hearing loss in

[5] The Court notes that although Plaintiff's claim must be analyzed based on the facts known at the time he was denied a hearing aid in 2014, Plaintiff struggled with the same hearing problems in 2018 after he had been given a hearing aid for his left ear as he had before he received his left ear hearing aid. *See* Pl. Resp., DE 153 ("The hearing aid on my left ear is only for face to face, close and quite [sic] room. At present, I cannot hear T.V., loud speaker, mail calls, meal calls, or somebody is calling behind me where the voice came from.").

2014. Based on the doctors' *suggestions* of a hearing aid or power instrument, a reasonable jury *could* conclude that Plaintiff's hearing loss could be remedied with one of these devices.

B. Deliberate Indifference

"To establish deliberate indifference, [a plaintiff] must prove (1) subjective knowledge of a risk of serious harm; and (2) disregard of that risk (3) by conduct that is more than mere negligence." *Nam Dang by & through Vina Dang v. Sheriff, Seminole Cty. Fla.*, 871 F.3d 1272, 1280 (11th Cir. 2017) (citing *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)). "Deliberate indifference must be more than an inadvertent failure to provide adequate medical care, negligence in diagnosis or treatment, or medical malpractice." *Sifford v. Ford*, 701 F. App'x 794, 795 (11th Cir. 2017). "[A] 'simple difference in medical opinion' does not constitute deliberate indifference." *Ciccone v. Sapp*, 238 F. App'x 487, 489 (11th Cir. 2007) (quoting *Waldrop v. Evans*, 871 F.2d 1030, 1033 (11th Cir. 1989)). "[N]either a difference in medical opinion between the inmate and the care provider, nor the exercise of medical judgment by the care provider, constitutes deliberate indifference." *Hernandez v. Sec'y Fla. Dep't of Corr.*, 611 F. App'x 582, 584 (11th Cir. 2015). *See also West v. Higgins*, 346 F. App'x 423, 427 (11th Cir. 2009) ("[Plaintiff's] claims rest on a difference of opinion regarding the care that he needed and received, and the evidence does not establish deliberate indifference to a serious medical need."). Importantly, "[m]edical treatment violates the [E]ighth [A]mendment only when it is 'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.'" *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir. 1991) (quoting *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir. 1986). Thus, "[w]hether governmental actors should have employed 'additional diagnostic techniques or forms of treatment' is a 'classic example of a matter for medical judgment' and, therefore, is not an appropriate basis for liability under the Eighth

Amendment." *Sifford*, 701 F. App'x at 796 (citing *Estelle v. Gamble*, 429 U.S. 97, 107 (1976)). *See also Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1575 (11th Cir. 1985) (citing *Westlake v. Lucas*, 537 F.2d 857, 860 n.5 (1st Cir. 1981) ("Where a prisoner has received ... medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims that sound in tort law.")).

Here, Plaintiff has sued three prison officials: Dr. Raymond Herr, the Utilization Management director who denied Plaintiff's request for a hearing aid; D.L. Stine, the prison warden; and Julie Jones, the Secretary of the Florida Department of Corrections. *See* Am. Compl., DE 36; *see also* Order, DE 141 ("Therefore, the operative Amended Complaint is amended by interlineation to identify Dr. Raymond Herr, as the individual in Utilization Management who denied authorization for the Plaintiff's hearing aid.").

1. Dr. Herr

As the Chief Medical Officer for Corrections Healthcare Companies in Utilization Management, Dr. Herr "reviewed the request for hearing aid" with Plaintiff's 2014 audiometry results. Def. SOF, DE 146 ¶ 6. Throughout this litigation, Plaintiff has maintained that a "non medical officer" denied his request for a hearing aid. *See, e.g.*, Am. Compl., DE 36. And, the Court and the parties struggled to identify exactly who that individual was. *See, e.g.*, DE 47, DE 48, DE 76, DE 77, DE 109, DE 117. However, after many inquiries, defense counsel identified the individual as Dr. Raymond Herr, M.D., CCHP. Notice, DE 140. As a result, Plaintiff's Amended Complaint was amended by interlineation to include Dr. Herr. Order, DE 141. Plaintiff did not object to this procedure.

Once Dr. Herr was identified as the individual official who denied Plaintiff's hearing aid request, Dr. Herr provided an affidavit regarding that decision. "Based on the audiometry results

and the adequacy of the hearing levels in Barcelona's left ear, he did not meet the *medical* criteria guidelines for bilateral hearing loss... and therefore Barcelona was not a candidate for a hearing aid. *It was not medically probable* that a power instrument for the right ear could have remedied Barcelona's condition." Def. SOF, DE 146, ¶ 11 (emphasis added); *see also* Herr Aff., DE 145-1. Plaintiff has not refuted this evidence. In his Response, he continues to refer to his sworn affidavit at DE 120, which assumed, based on the information available to him at the time, that a "non-medical official" denied his hearing aid request. In his Response, Plaintiff repeats that he was told that Dr. Herr "refused to authorize payment for hearing aid because the plaintiff could hear from one ear." Resp., DE 153, 25. Indeed, Plaintiff appears plainly aware that the hearing aid request was denied because he had sufficient hearing in his left ear. *See* Pl. Aff., DE 120, 24. Plaintiff's insistence that Dr. Herr was deliberately indifferent to his need for a hearing aid amounts to a disagreement in Dr. Herr's medical judgment, which is not sufficient for a deliberate indifference claim. *Cf. Sifford*, 701 F. App'x at 796; *Waldrop*, 871 F.2d at 1033.

Here, it is not disputed that Dr. Herr denied Plaintiff's hearing aid request, and that he did so based on Plaintiff's ability to hear in his left ear and his medical opinion that "it was not medically probable that a power instrument device for the right ear could have remedied" Plaintiff's condition. *See* Herr Aff., DE 145-1, 4. This decision does not amount to deliberate indifference by Dr. Herr, nor was it "so grossly incompetent, inadequate, or excessive as to shock the conscience." *Harris v. Thigpen*, 941 F.2d at 1505. And, Plaintiff's disagreement with Dr. Herr's medical judgment is insufficient to create a genuine issue of material fact as to whether Dr. Herr was deliberately indifferent to his medical condition. To the contrary, the record is clear that Dr. Herr concluded that, in his medical judgment, a hearing aid was not appropriate or necessary for Plaintiff. *See* Def. SOF, DE 146, ¶ 11-15; *see also* Herr Aff., DE 145-1.

Furthermore, to the extent Dr. Heller may have disagreed with Dr. Herr's denial of the hearing aid, *see* Def. SOF, DE 146 ¶ 17, such a disagreement *between doctors* does not provide evidence of deliberate indifference to a serious medical need. *See Whitehead v. Burnside*, 403 F. App'x 401, 403-404 (11th Cir. 2010) (affirming summary judgment in favor of prison officials where plaintiff's physician disagreed with prison medical staff regarding appropriate treatment: "[plaintiff] has established, at best, a difference of medical opinion as to the appropriate treatment for his injured knee. His personal belief regarding the severity of his injury is not sufficient to overcome the medical opinions of [prison medical officials]."); *see also Waldrop*, 871 F.2d at 1033.

Accordingly, Dr. Herr is entitled to summary judgment, because Defendants have shown that there is no genuine dispute of material fact that Dr. Herr denied Plaintiff's hearing aid request based on his medical judgment, which is insufficient to support Plaintiff's claim for deliberate indifference.

2. *Warden Stine and Secretary Jones*

Plaintiff has also sued Warden Stine and Secretary Jones for deliberate indifference to his serious medical need. Warden Stine was only involved in Plaintiff's medical treatment to the extent that he signed off on Dr. Heller's October 2014 response to Plaintiff's grievance. *See* Def. SOF, DE 146 ¶¶ 22-24; October Resp., DE 112-2, 3. Similarly, Secretary Jones was only involved in Plaintiff's treatment to the extent that her representative responded to Plaintiff's grievances. *See* Def. SOF, DE 146, ¶¶ 24-31. In this circumstance, where the Warden and Secretary are "not [] medical professional[s], nor [] directly involved in [plaintiff's] medical care," the plaintiff "must establish that [the defendants were] responsible for his constitutional deprivation in a supervisory capacity." *Sealey v. Pastrana*, 399 F. App'x 548, 552 (11th Cir. 2010)

"[S]upervisors can be held liable for subordinates' constitutional violations on the basis of supervisory liability under" Section 1983. *Mathews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007). "Supervisory liability under § 1983 occurs 'when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation.'" *Id.* (quoting *Cottone v. Jenne*, 326 F.3d 1352, 1360 (11th Cir.2003)).

> A causal connection may be established when: 1) a "history of widespread abuse" puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he or she fails to do so; 2) a supervisor's custom or policy results in deliberate indifference to constitutional rights; or 3) facts support an inference that the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so.

Id.

Nonetheless, "supervisory officials are entitled to rely on medical judgments made by medical professionals responsible for prisoner care." *Williams v. Limestone Cty., Ala.*, 198 F. App'x 893, 897 (11th Cir. 2006) (citing *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993); *White v. Farrier*, 849 F.2d 322, 327 (8th Cir. 1988)).

Here, there are no allegations of widespread abuse that would put Warden Stine or Secretary Jones on notice of the need to correct the deprivation of hearing aids, and the facts do not support an inference that they directed subordinates to act unlawfully. The record is clear that Plaintiff was denied a hearing aid based on Dr. Herr's medical judgment and on the Health Services bulletin in effect in 2014, which made Plaintiff ineligible for a hearing aid. Indeed, Plaintiff has not disputed that the only reason a hearing aid was not authorized was because of the policy – he repeats throughout his pleadings, responses, sworn affidavit, and deposition that he was denied a hearing aid because "one ear is good enough to hear" based on the Health Services bulletin. *See, e.g.*, Pl. Dep., DE 144, 12 ("Q: It wasn't that folks weren't going to buy you a hearing aid because

of some kind of discipline issue or some kind of retaliation? A: No. The only reason that they refused to pay for that is because what they are saying is one ear is enough to hear. That's what they are saying.").

As non-medical supervisors, both Warden Stine and Secretary Jones were entitled to rely on Dr. Herr's medical judgment. Accordingly, they are entitled to summary judgment, because Defendants have shown that there is no genuine dispute of material fact that they were not deliberately indifferent to Plaintiff's serious medical need.

IV. DEFENDANTS' IMMUNITY

Alternatively, even if Defendants were deliberately indifferent to Plaintiff's serious medical need, the Court finds that all three Defendants are immune from suit.

A. Official Capacity Claims

Defendants argue that to the extent Plaintiff attempted to sue the three defendants in their official capacities as prison officials, they are immune from suit pursuant to the Eleventh Amendment to the Constitution. *See* Def. Mot., DE 147, 21.

Plaintiff's Amended Complaint alleges that he is suing Defendants in their "official capacity." *See* Am. Compl., DE 36, 4, 14. Plaintiff seeks monetary damages for relief against these Defendants. *Id.* at 6.

The Eleventh Amendment absolutely bars suits for damages against state actors. *See, e.g.*, *Gamble v. Florida Dep't of Health & Rehab. Servs.*, 779 F.2d 1509, 1511 (11th Cir. 1986). Here, there is no dispute that the Florida Department of Correction, and its employees, are state actors. Accordingly, Defendants are entitled to sovereign immunity for monetary damages that Plaintiff seeks from Defendants in their *official* capacity.

B. Individual Capacity Claims

To the extent the Amended Complaint seeks monetary damages against Defendants in their *individual* capacities, "qualified immunity shields government officials from individual-capacity suits for actions taken while performing a discretionary function so long as their conduct does not violate a 'clearly established' constitutional right." *Montanez v. Carvajal*, 889 F.3d 1202, 1207 (11th Cir. 2018). This shield allows officials to carry out their discretionary duties without the fear of personal liability or harassing litigation. *Manners v. Cannella*, 891 F.3d 959, 967 (11th Cir. 2018). Qualified immunity protects from suit "all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (quotation marks omitted). The applicability of qualified immunity presents a question of law for a court to decide. *Sims v. Metro. Dade Cty.*, 972 F.2d 1230, 1234 (11th Cir. 1992).

To be entitled to qualified immunity, an officer must establish that he was acting within his discretionary authority during the incident. *Manners*, 891 F.3d at 967. The officer proves that he acted within his discretionary authority "by showing objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Roberts v. Spielman*, 643 F.3d 899, 903 (11th Cir. 2011) (quotation marks omitted). Here, Plaintiff does not dispute that the Defendants were acting within their discretionary authority in declining to authorize a hearing aid.

If an officer establishes that he was acting within his discretionary authority, the burden shifts to the plaintiff to show that the officer violated a constitutional right, *and* that the constitutional right was clearly established at the time of the alleged deprivation of the right. *Montanez*, 889 F.3d at 1207.

The Eleventh Circuit employs two methods for determining whether a reasonable officer would know that his conduct is unconstitutional. *Id.* at 1291. First, a right is clearly established if, under the relevant caselaw at the time of the violation, "a concrete factual context exists so as to make it obvious to a reasonable government actor that his actions violate federal law." *Id.* (quotation marks omitted). Relevant caselaw is limited to the case law Supreme Court of the United States, published case law by the Eleventh Circuit Court of Appeals, and the highest court of the state under which the claim arose. *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011). Alternatively, the Court may examine the officer's conduct to determine "whether that conduct lies so obviously at the very core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the officer, notwithstanding the lack of fact-specific case law." *Fils*, 647 F.3d at 1291 (quotation marks omitted). This second method, known as obvious clarity, is a narrow exception to the general rule that only caselaw and specific factual scenarios can clearly establish a constitutional violation. *Id.*; *see also Coffin*, 642 F.3d at 1015 (stating that obvious clarity cases are rare).

Clearly established law "should not be defined at a high level of generality" and "must be particularized to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quotation marks omitted). Although there need not be a case directly on point for a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* at 551 (quotation marks omitted). While "general statements of the law are not inherently incapable of giving fair and clear warning to officers," the unlawfulness must be apparent in the light of pre-existing law. *Id.* at 552 (quotation marks omitted); *see also Vaughan v. Cox*, 343 F.3d 1323, 1332 (11th Cir. 2003) (stating that the "salient question . . . is whether the state of the law gave the defendants fair warning that their alleged conduct was unconstitutional")

(quotation marks omitted)). "[I]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009). The Eleventh Circuit "has often been reluctant to reject qualified immunity for deliberate indifference to medical need claims that 'are highly fact-specific.'" *Gilmore v. Hodges*, 738 F.3d 266, 280 (11th Cir. 2013).

In 2013, the Eleventh Circuit acknowledged that "there was precious little case law addressing an official's failure to supply a severely hearing impaired inmate with hearing aids." *Gilmore*, 738 F.3d at 275 (11th Cir. 2013) (citing three unpublished circuit opinions and one district court opinion). Other cases had addressed deprivations of dentures, eyeglasses, and prostheses, but "these cases stopped short of stating a general principle applicable to all medical devices, including hearing aids." *Id.* at 279. Accordingly, the Court determined that there was no clearly established law regarding the provision of hearing aid batteries where the plaintiff had clearly been prescribed a hearing aid for severe, bilateral hearing loss. *See id.* at 269-70.

Here, the Court has the benefit of the Eleventh Circuit's guidance in this case, in the form of the appellate review of the Court's initial dismissal of this case. In the Eleventh Circuit's order vacating the dismissal of Plaintiff's Complaint, the court observed:

> We deem the allegations in Barcelona's complaint as falling between the two sets of circumstances described in *Gilmore*—substantial hearing loss that can be remedied by a hearing aid, and hearing loss that does not prevent a prisoner from carrying on a conversation or hearing directions from correctional officers without a hearing aid – and *this court has not yet addressed whether a prisoner's loss of hearing in one ear, which leads a doctor to prescribe a hearing aid, is insufficient to constitute a serious medical need where the prisoner retains some level of hearing in his other ear.*

Barcelona v. Sec'y, Fla. Dep't of Corr., 657 F. App'x 896, 898–99 (11th Cir. 2016) (emphasis added). The Eleventh Circuit opinion unambiguously recognized that its court *has not addressed* whether the *Gilmore* standard extends to asymmetrical hearing loss. As a result, this Court cannot

conclude that Plaintiff had a "clearly established" right to a hearing aid, when he suffered asymmetrical hearing loss with only mild hearing loss in one ear (as opposed to the plaintiff's severe, bilateral hearing loss as in *Gilmore*).

In addition, at the time of the Eleventh Circuit's opinion, the parties were under the erroneous impression that Plaintiff's hearing aid request had been denied by a non-medical officer, which the Eleventh Circuit assumed to be true at that stage of litigation. *See id.* at 898. However, the record is now clear that it was *not* a non-medical officer, but a *medical doctor*, Dr. Herr, who denied Plaintiff's request. *See discussion supra*, Section III.B.1. This fact is critical to assessing whether any of the defendants were on notice that their conduct was unconstitutional.

This Court concludes that even if the Eleventh Circuit had not *explicitly* stated in its opinion *in this case* that it had not addressed this question presented by this case, the Defendants here still were not on notice that their conduct was unconstitutional in 2014. *Gilmore* did not give the Defendants fair warning that their alleged conduct was unconstitutional, based on the facts of *this* case, where: (a) the prisoner has asymmetrical hearing loss, (b) an outside doctor *suggested* treatment options, (c) the prison-employed *medical doctor* did not ultimately agree with the outside doctor's treatment recommendation, and (d) the prison doctor's determination was based on the likelihood that such treatments would produce medically significant mitigation of the prisoner's hearing loss. This is a very different situation from the facts in *Gilmore*, where: (1) the prisoner had already been *prescribed* hearing aids, (2) the prisoner suffered from bilateral hearing loss, (3) the prisoner's doctor "noted that binaural amplification is *strongly* recommended," but (4) prison officials, who were not medical doctors, had failed to provide the prisoner with batteries for his hearing aids. *See Gilmore*, 738 F.3d at 269 (emphasis in opinion). *Contra* 6/6/14 Report, DE 112-11 ("Amplification is not specifically recommended...However, the left ear *is a candidate* for a

hearing aid..."); 8/12/14 Report, DE 112-1, 26 ("Amplification is an option...A mild gain device for the left ear *may* be beneficial.").

Put simply, the constitutional question of whether Plaintiff's asymmetrical hearing loss constituted a serious medical need was not beyond debate in 2014 when Plaintiff's hearing aid request was denied. Therefore, Defendants are entitled to qualified immunity from this suit and summary judgment must be entered in their favor.

V. CONCLUSIONS

The Court concludes that Defendants are entitled to summary judgment. The Court finds that as a matter of law, Defendants were not deliberately indifferent to Plaintiff's alleged serious medical need. Dr. Herr made a medical judgment about Plaintiff's suitability for, and the appropriateness of, a hearing aid, and determined that Plaintiff was not eligible for one. Medical judgments, even those that prisoners and other medical professionals disagree with, do not rise to the level of a constitutional violation. Warden Stine and Secretary Jones were then entitled to rely on the medical judgment of the doctors charged with the medical care of prisoners in their care.

Additionally, the Defendants are immune from this suit. The Defendants, in their official capacities, are absolutely immune from suits for damages under the Eleventh Amendment. The Defendants, in their individual capacities, are protected by qualified immunity because the alleged unconstitutionality of their conduct was not clearly established at the time of the events giving rise to this suit.

Accordingly it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendants' Motion for Summary Judgment [DE 147] is hereby **GRANTED**.
2. The Clerk of the Court is directed to **CLOSE** this case.
3. All pending motions are hereby **DENIED AS MOOT**. All deadlines are **TERMINATED**. All hearings are **CANCELLED**.

4. Defendant is **ORDERED** to file and email to the Court (Rosenberg@flsd.uscourts.gov) a proposed Final Judgment Order within three business days of the rendition of this Order.

DONE AND ORDERED in Chambers at West Palm Beach, Florida, this 10th day of September, 2019.

ROBIN L. ROSENBERG
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 15-80102-CV-ROSENBERG
MAGISTRATE JUDGE REID

JOEL BARCELONA,

Plaintiff,

vs.

JULIE JONES, *et al.*,

Defendants.
_____/

REPORT OF MAGISTRATE JUDGE RE JOINT MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS, JULIE L. JONES AND D. L. STINE
[ECF No. 114]

I. Introduction

This matter is currently before the court on the joint motion for summary judgment filed by the defendants, Julie L. Jones and D. L. Stine. [ECF No. 114]. For the reasons discussed below, the defendants' motion should be denied.

The *pro se* plaintiff, **Joel Barcelona,** a convicted felon, filed an amended *pro se* civil rights complaint, pursuant to 42 U.S.C. §1983, suing Julie L. Jones, D. L. Stein, and a non-medical provider employed by Corrections Health Care, arising from a claim of deliberate indifference to a serious medical need due to the failure to provide the plaintiff with a hearing aid. [ECF No. 36]. The plaintiff was previously granted *in forma pauperis* status. [ECF No. 7].

This case has been referred to the undersigned for the issuance of all preliminary orders and any recommendations to the district court regarding dispositive motions. *See* 28 U.S.C. § 636(b)(1)(B), (C); Fed. R. Civ. P. 72(b), S.D. Fla. Local Rule 1(f) governing Magistrate Judges, and S.D. Fla. Admin. Order 2019-02.

II. Relevant Procedural History

Initially, the Plaintiff's original civil rights complaint [ECF No. 1] was reviewed, in accordance with the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. 1997e, a report was entered, recommending that the claim of deliberate indifference to plaintiff's serious medical needs be dismissed for failure to state a claim upon which relief can be granted. [ECF No. 8]. Following plaintiff's objections [ECF No. 9], the district court entered an order [ECF No. 10] adopting the report and dismissing the case.

Petitioner appealed, and the Eleventh Circuit reversed and remanded, finding in pertinent part, that the district court erred in dismissing the case "before the state filed a response or the parties had conducted any discovery. . . " [ECF No. 26, p.7]. In so ruling, the Eleventh Circuit noted that the allegations in the complaint indicated that the plaintiff had "lost hearing in his right ear and that two doctors who examined him had prescribed a hearing aid to treat his hearing loss." *Id.* The court explained that a "[s]ubstantial hearing loss that can be remedied by a hearing aid can present

an objectively serious medical need." *Id.* (quoting *Gilmore v. Hodges,* 738 F.3d 266, 276 (11th Cir. 2013))(concluding correctional officers could be deemed deliberately indifferent for failing to provide hearing aid batteries to a prisoner who the officers knew required a hearing aid to treat his hearing impairment). As applied, the Eleventh Circuit deemed the plaintiff's allegations to "fall between two sets of circumstances described in *Gilmore*--substantial hearing loss that can be remedied by a hearing aid, and hearing loss that does not prevent a prisoner from carrying on a conversation or hearing directions from correctional officers without a hearing aid." *Id.* at p. 8. The Eleventh Circuit noted that it had yet to address "whether a prisoner's loss of hearing in one ear, which leads a doctor to prescribe a hearing aid, is insufficient to constitute a serious medical need where the prisoner retains some level of hearing in his other ear." *Id.*

Following issuance of the mandate, because the plaintiff's initial complaint did not set forth specific allegations against each named defendant, the plaintiff was ordered to file and did file, an amended complaint, setting forth a claim of deliberate indifference against Julie Jones, D. L. Stine, and the non-medical provider who denied the plaintiff's prescribed hearing aid. [ECF No. 36].

The amended complaint was screened and allowed to proceed on plaintiff's claim of deliberate indifference against the three defendants. [ECF Nos. 40, 41]. After service was perfected and motions to dismiss denied, the defendants, Julie

Jones, D. L. Stine, and the non-medical provider, later identified as Ewood, filed answers and affirmative defenses. *See* [ECF Nos. 70, 75, 90, 92, 96].

The defendants, Julie Jones and D. L. Stine (jointly "the defendants"), have now filed a joint motion for summary judgment [ECF No. 114] with supporting statement of material facts [ECF No. 113] and exhibits [ECF No. 112], raising the following arguments:

(1) the defendants are entitled to judgment as a matter of law because the plaintiff cannot show that the defendants were deliberately indifferent to a serious medical need [ECF No. 114] p.7; and,

(2) the defendants are entitled to qualified immunity because the plaintiff has not demonstrated that there was a violation of a constitutional right and that the right was clearly established at the time of the alleged misconduct. [ECF No. 114] p.19.

Plaintiff has filed a response [ECF No. 120] with supporting affidavit [ECF No. 120] p.24, and exhibits [ECF Nos. 120-1, 120-2] in opposition to the defendants' motion.

III. General Legal Principles

A. Civil Rights Standard

To state a claim under 42 U.S.C. § 1983, the plaintiff must allege: (1) defendant(s) deprived him of a right secured under the United States Constitution or federal law, and (2) such deprivation occurred under color of state law. *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1288 (11th Cir. 2001). In addition, the plaintiff

must also establish an affirmative causal connection between the defendants' conduct and the constitutional deprivation. *Marsh v. Butler County,* 268 F.3d 1014, 1039 (11th Cir. 2001).

B. Law Governing Motion for Summary Judgment

A motion for summary judgment looks to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Under Fed. R. Civ. P. 56(a), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Grayson v. Warden, Comm'r, Ala. Dep't of Corr.*, 869 F.3d 1204, 1220 (11th Cir. 2017) (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). In reviewing a motion for summary judgment, this court must "view all of the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Furcron v. Mail Centers Plus, LLC,* 843 F.3d 1295, 1304 (11th Cir. 2016) (quoting *FindWhat Investor Grp. v. FindWhat.com,* 658 F.3d 1282, 1307 (11th Cir. 2011)).

A district court "'may not weigh conflicting evidence or make credibility determinations'" when reviewing a motion for summary judgment. *Jones v. UPS Ground Freight,* 683 F.3d 1283, 1292 (11th Cir. 2012) (citing *FindWhat,* 658 F.3d

at 1307). As such, where the facts specifically averred by the non-moving party contradict facts specifically averred by the movant, the motion must be denied, assuming those facts involve a genuine issue of material fact. *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 888 (1990). However, "[w]hen 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).

The moving party necessarily carries the burden of proof. *Great Am. All. Ins. Co. v. Anderson,* 847 F.3d 1327, 1331 (11th Cir. 2017). In meeting that burden, nonmoving parties may rely on materials enumerated in Fed. R. Civ. P. 56(c), meaning there are some materials that may be relied upon to avoid summary judgment even though they would not be admissible at trial. *Owen v. Wille,* 117 F.3d 1235, 1236 (11th Cir. 1997) (quoting *Celotex,* 477 U.S. at 324). The court must also consider any "specific facts" pled in the plaintiff's sworn complaint, based on personal knowledge, and executed under penalty of perjury, in opposition to summary judgment. *See* Fed. R. Civ. P. 56(e); *Caldwell v. Warden, FCI Talladega,* 748 F.3d 1090, 1098 (11th Cir. 2014).

Issues are genuine if there is sufficient evidence for a reasonable jury to return a verdict for either party. *Great Am.,* 847 F.3d at 1331 (relying upon *Anderson v.*

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). In a similar vein, "an issue is material if it may affect the outcome of the suit under governing law." *Great Am.*, 847 F.3d at 1331 (relying upon *Anderson,* 477 U.S. at 248). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby,* 911 F.2d 1573, 1577 (11th Cir. 1990) (citing *Anderson,* 477 U.S. at 242). In sum, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party, courts should deny summary judgment." *Penley v. Eslinger,* 605 F.3d 843, 848 (11th Cir. 2010).

IV. Relevant Facts

A. Uncontroverted Medical Evidence

The plaintiff was confined at South Bay Correctional Facility ("South Bay") from approximately May 2014 until August 2016. In May 2014, the plaintiff was examined by South Bay registered nurse, J. Desmaris, who referred the plaintiff to a clinician for a follow-up regarding right ear pain. [ECF No. 120-1, p. 20]. Thereafter, he was seen by South Bay's Medical Director, Dr. Heller, who documented plaintiff's complaints that he could not hear the correction officers' directions, especially when surrounding noises were present. [ECF No. 120-2, p. 2]. As a result, he referred the plaintiff for a hearing evaluation. [ECF No. 120-1, p. 21].

On June 6, 2014, the plaintiff was seen by Dr. Arthur G. Zinaman ("Dr. Zinaman"), an audiologist, who noted that the plaintiff presented a :"history of right-side hearing loss of questionable etiology." [ECF No. 120-2, p.1]. Upon examination, Dr. Zinaman found plaintiff suffered from "bilateral sensorineural hearing loss," that is "mild in the left and profound in the right ear." [*Id.*]. Dr. Zinaman opined, at the time, that "[a]mplification is not specifically recommended on the right side due to the severity of the hearing loss and poor word discrimination exhibited." [*Id.*]. Dr. Zinaman determined that, "[U]pon medical clearance and (South Bay Correctional) facility authorization, a hearing aid for the left ear would be beneficial." [*Id.*]. He found the A Starkey X Series ITC to be an appropriate device for the plaintiff. [*Id.*]. The doctor also recommended a medical follow-up to rule out retrocochlear pathology secondary to asymmetrical hearing loss. [*Id.*]. It appears from the June 6, 2014 audiometry test that the plaintiff had an average of 30 dB between the levels of 1,000 Hz and 2,000 Hz, and 30 dB air conduction level at 500 Hz and 1,000 Hz. [ECF No. 120-2, p. 30], [ECF No. 112-1, p.13].

Dr. Heller's June 25, 2014 Chronological Record of Health Care notation reveals the plaintiff was suffering from "mild" hearing loss in the left ear, and "profound loss" in the right ear. [ECF No. 120-2. p. 3]; [ECF No. 112-1, p. 16].

After Dr. Zinaman's recommendation for an MRI consultation was approved and performed by Dr. Scott Ruehrmund, the doctor found the MRI of the brain and

internal auditory canals to be "unremarkable." [ECF No. 120-2, p. 9], [ECF No. 112-1, p. 22].

Post-MRI, the plaintiff was seen by Dr. Zinaman on August 12, 2014. [ECF No. 120-2, p. 3], [ECF No. 112-1, p. 26]. At that time, Dr. Zinaman found as follows:

> **Amplification is an option for patient.** A mild gain device for the left ear **may** be beneficial, but this is **declined** by the patient. **Alternatively**, a power instrument for the right ear **may** provide speech and environmental awareness with possible transcranial effect. Mr. Barcelona **is agreeable to this plan.**
>
> **Appropriate amplification deemed for the right ear** is Starkey 3 Series 110 BTE 13. . . .

[ECF No. 120-2, p. 13], [ECF No. 112-1, p. 26] (emphasis added)

Following Dr. Zinaman's report, Dr. Heller saw the plaintiff on August 18th, noting in the Chronological Record of Health Care "status of hearing aid approval," and in further indistinguishable writing, noted "writte[n] for right hearing aid. . ." [ECF No. 120-2, p.12], [ECF No. 112-1, p. 25].

Thereafter, notations made by C. Steele, the South Bay Consult Coordinator, in the plaintiff's Chronological Record of Health Care, reveals that, after the audiologist's report was sent to the "UM for review," the referral was "deferred by

UM" because the plaintiff had "adequate hearing in one ear," and as such, was "not a candidate for [a] hearing aid." [*Id.*].[1]

The notations by Dr. Heller in plaintiff's Chronological Record of Health Care for September 2014 reveals that he reviewed the report recommending a hearing aid, and explained to the plaintiff that "CHC 'deferred'"[2] its authorization. [ECF No. 120-2, p. 14], [ECF No. 112-1, p. 27]. On September 11, 2014, Dr. Heller again noted that he had discussed the "hearing issue" with the plaintiff, and noted "I/M [inmate] to write grievance." [ECF No. 120-2, p.16], [ECF No. 112-1, p. 29].

On October 2, 2014, the South Bay Health Services Administrator, Nancy Finisse, noted on the plaintiff's Chronological Record of Health Care that she had reviewed formal grievance "062" regarding "hearing aid device," but "UM denied based on 15.03.27" because the plaintiff only suffered from "right hearing loss" and he "must have bilateral hearing loss," to be a qualifying candidate for the device. [ECF No. 120-2, p. 16], [ECF No. 112-1, p. 29].

The purpose of the Florida Department of Corrections ("FDOC"), Health Services Bulletin No. 15.03.27 ("HSB 15.03.27"), regarding Auditory Care Services in Institutions, effective April 9, 2014, "is to establish uniform procedures for the

[1]Utilization Management is commonly abbreviated in the Chronological Record of Health Care as "UM."

[2]The abbreviation on the inmate's account "CHC" arguably refers to the medical provider of the facility.

provision of auditory care to inmates. This shall include the treatment and/or provision of appropriate corrective systems to inmates; proper evaluation services to those inmates who experience a hearing problem or deficiency; and to attempt to prevent or minimize further deterioration to hearing acuity." [ECF No. 120-2, p. 37], [ECF No. 112-1 Ex.3, p.1.

Pursuant to HSB 15.03.27(G)(1), the hearing loss criteria requires:

1. The recipient must have a bilateral (both ears) hearing loss. A recipient who has a unilateral (one ear) hearing loss is not eligible for services. **Exceptions to this policy may be granted on a case-by-case basis as recommended by an otolaryngologist or otologist, with approval of the regional medical director.**

2. A simple screening test shall be performed to determine if the recipient has a bilateral hearing loss and meets the following criteria:

    a. Tests of the better ear after treatment of any condition contributing to the hearing loss reveal an average hearing loss level of 40 dB or greater (current ANSI standards) for 500, 1,000, and 2,000 Hz by puretone air conduction; **OR,**

    b. The difference between the level of 1,000 Hz and 2,000 Hz is 20 dB or more while the average of the air conduction level (current ANSI standards) at 500 Hz and 1,000 Hz is 30 dB or greater.

[ECF No. 120-2, p. 38]; [ECF No. 112-3, p. 2] (emphasis added).

B. Relevant Uncontroverted Grievance Evidence

In October 2014, Dr. Heller prepared and signed a response to plaintiff's grievance, **no. 1409-405-062,** stating:

> RECORDS INDICATE YOU ONLY HAVE HEARING LOSS IN YOUR RIGHT EAR. PER POLICIES AND PROCEDURES, IN ORDER TO BE ELIGIBLE FOR SERVICES, THE RECIPIENT MUST HAVE A BILATERAL (BOTH EARS) HEARING LOSS. A REFERRAL WAS SUBMITTED, BUT DENIED BECAUSE YOU DO NOT MEET THIS CRITERIA BASED ON YOUR EVALUATION FROM THE AUDIOLOGIST.
>
> BASED ON THE ABOVE INFORMATION YOUR GRIEVANCE IS DENIED. . . .

[ECF No. 120-1, pp. 4, 10]; [ECF No. 112-2, p. 3].

On December 29, 2014, Ebony O. Harvey, IISC, an employee of the FDOC, Inmate Grievance Appeals, denied the plaintiff's appeal, finding:

> Your request for administrative remedy was received at this office and it was carefully evaluated. Records available at this office were also reviewed.
>
> **It is determined that the response made to you by Dr. Heller on 11/25/14 appropriately addresses the issues you presented.**
>
> **It is the responsibility of your health care staff to determine the appropriate treatment regime for the condition you are experiencing. . . .**

[ECF No. 120-1, p. 14] (emphasis added).

C. Plaintiff's Facts-[ECF No. 120]

The plaintiff's sworn facts, as set forth in his Affidavit in opposition to summary judgment, reveal that, starting in May 2014, he complained to Dr. Heller, the Medical Director at South Bay, that he was suffering from hearing loss in his right ear. [ECF No. 120, p. 24]. Plaintiff alleges that he cannot hear South Bay's "loud speaker, the television, mail calls, nor when other inmates are yelling behind him." [ECF No. 120, p.11].

The plaintiff states Dr. Heller agreed with the recommendations of two physicians that he be provided a hearing aid. [*Id.,* p.11, 24:¶3]. However, on September 4, 2014, Dr. Heller informed him that "a non-medical official employed at C.H.C., the medical provider at South Bay C.F.," later identified by the plaintiff as FNU Ewood, refused to authorize payment for the hearing aid. [*Id.*] ¶4. On September 11, 2014, Dr. Heller advised plaintiff that "Ewood" refused to authorize the hearing aid because the plaintiff could hear from one ear. [*Id.,* ¶5].

Plaintiff alleges that Ewood and D. L. Stine, both non-medical providers, violated his constitutional rights by ignoring the prescriptions of two physicians who opined that a hearing aid was medically necessary. [*Id.,* p.25, ¶6]. He claims Stine was deliberately indifferent in determining the plaintiff did not meet the criteria for a hearing aid, because the plaintiff only suffered from hearing loss in his right ear.

[*Id.*, ¶7]; *see also* [ECF No. 120-1, Ex. A, p. 4-*Grievance Log No.* 1409-405-062, dated October 8, 2014, signed by Stine].

Plaintiff also states that, on November 16, 2014, he appealed to Defendant, Julie L. Jones ("Jones""), then acting Secretary for the Florida Department of Corrections ("FDOC"), again requesting re-authorization for the hearing aid prescribed by two physicians and recommended by Dr. Heller. [ECF No. 120, p. 27, ¶8]. He states Jones, and/or someone acting on her behalf, denied the request, relying upon Dr. Heller's November 25, 2014 response to plaintiff's grievance. [*Id.*]. Plaintiff states that Jones has personally participated or otherwise learned of the violation of plaintiff's rights and has failed to correct the problem. [*Id.*, p.14]. He further states that Jones has created a policy or custom that allows or encourages the violation of prisoner's rights, or is otherwise grossly negligent in managing or supervising her subordinates. [*Id.*].

According to the plaintiff, the South Bay and FDOC policies and procedures relied upon by the defendants to reject the authorization for payment of plaintiff's right ear hearing aid for an inmate like him, suffering from severe hearing loss in one ear and mild hearing loss in the other, violates the Eighth Amendment. [ECF No. 120, p. 27]. He maintains the hearing device is medically necessary, that Dr. Heller, the Medical Director at South Bay, agreed to provide him with the hearing

aid, but that the named defendants failed or refused to authorize its payment. [ECF No. 120, pp.27-28].

D. Defendants' Facts-[ECF No. 113]

On the other hand, the Defendants present the following facts, derived from their Joint Statement of Material Facts [ECF No. 113], together with the Affidavits from D. L. Stine and Dr. Timothy E. Whalen, medical and grievance records, and FDOC Health Services Bulletin 15.03.27. *See* [ECF No. 113]; [ECF No. 112, Exs. 1-5].

Stine, the South Bay Warden from June 2013 through July 2016, states he deferred to medical providers at South Bay and "Utilization Management" regarding inmate medical treatment and authorizations for medical devices. [ECF No. 112-4, ¶10]. Stine maintains he was not in a position to override the recommendation of medical staff or Utilization Management regarding the authorization for medical devices or medical treatment. [*Id.*, ¶11]. As the South Bay Warden, he signed responses to grievances prepared by medical staff at South Bay and then "signed by a physician, or for administrative issues, by a Health Services Administrator." [*Id.*, ¶13]. Although he would ensure that medical reviewed the inmate's concern and provided a full response to the inmate's complaint/grievance," he "would not disagree with" or "change" the medical provider's response as he was not a medical person and did not have medical training. [*Id.*]. Stine admits he reviewed Dr. Heller's

October 8, 2014 response to plaintiff's grievance no. 1409-405-062, but denies interfering with or altering Dr. Heller's response. [*Id.*, ¶14].

Although Jones and Stine agree that grievance appeal no. 14-6-40126 was submitted to Jones, as the FDOC Secretary, Ebony O. Harvey, IISC, responded to the grievance and Jones did not personally review it. [ECF No. 113, ¶¶21-23].

Timothy E. Whalen, M.D. ("Dr. Whalen"), the Chief Clinical Advisor for the FDOC has provided an affidavit in which he states that he has reviewed the plaintiff's South Bay medical records, and is familiar with the criteria required for FDOC inmates to obtain hearing aids. [ECF No. 112-5, ¶4]. He also states he is familiar with FDOC, HSB 15.03.27, which was established to provide uniform procedures for the provision of auditory care to inmates until its replacement on November 1, 2018 by HSB 15.03.25.01. [*Id.*, ¶5]. He maintains that under HSB 15.03.27(G)(1), the inmate must have a bilateral hearing loss to qualify for a hearing aid. [*Id.*, ¶5]. He states that an inmate with hearing loss in only one ear will not be eligible for auditory services. [*Id.*].

Dr. Whalen states he reviewed the plaintiff's June 2, 2014 audiometry testing results. [*Id.*, ¶6]. According to Dr. Whalen, under 15.03.27(G)(1), testing of the plaintiff's better ear--the left ear--"did not demonstrate an average hearing loss of 40 dB or greater at the frequencies of 500, 1,000 and 2,000 Hz." [*Id.*]. Although Dr. Whalen does not state whether the plaintiff would qualify under 15.03.27(G)(2), the

doctor concludes that "Barcelona's results demonstrate that there was no objective hearing loss above 35 dB for any frequency tested." [*Id.*]. Dr. Whalen concludes that, based on his interpretation of the audiometry results, the plaintiff "did not meet the medical criteria guidelines for bilateral hearing loss under HSB 15.03.27 and was therefore not eligible for services." [*Id.*, ¶7]. Without explanation, Dr. Whalen also concluded that "Mr. Barcelona did not meet an exception under HSB 15.03.27." [*Id.*, ¶9]. Dr. Whalen does admit he "did not make any decisions regarding to [sic] the medical basis for Barcelona's hearing, the policies and procedures for authorizing payment for hearing aids or Barcelona's eligibility for medical services or a hearing device." [*Id.*, ¶10]. He further denies that there was any directive by the FDOC regarding cost saving measures on medical care by delaying or denying medical care or hearing aid devices to FDOC inmates. [*Id.*, ¶11]. He denies that cost was a factor in determining whether the plaintiff met the criteria for a hearing aid. [*Id.*, ¶12].

V. Discussion & Analysis

The defendants have claimed that they are entitled to summary judgment as a matter of law, pursuant to Fed. R. Civ. P. 56, because the pleadings and record evidence show that there is no genuine dispute as to any material fact on the deliberate indifference claim. [ECF No. 114]. Defendants also argue that they are entitled to qualified immunity. *Id.*

Plaintiff opposes the grant of summary judgment. [ECF No. 120]. For the reasons discussed below, summary judgment should be DENIED.

A. Deliberate Indifference Standard

1. Applicable Law Regarding Deliberate Indifference

The Eighth Amendment of the United States Constitution forbids "cruel and unusual punishments." U.S. Const. amend. VIII. "The Eighth Amendment is applicable to the states through the Fourteenth Amendment." *Bingham v. Thomas,* 654 F.3d 1171, 1175 (11th Cir. 2011) (quoting *Chandler v. Crosby,* 379 F.3d 1278, 1288, n. 20 (11th Cir. 2004)). The United States Supreme Court has made clear that the Eighth Amendment proscribes a state actor's "deliberate indifference to serious medical needs of prisoners." *See Bingham v. Thomas,* 654 F.3d at 1175 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (internal citation omitted)).

"[A] serious medical need is considered one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *See Farrow v. West,* 320 F.3d 1235, 1243 (11th Cir. 2003)(internal quotation marks omitted). The term "deliberate indifference" includes the intentional denial or delay of access to medical care. *See Estelle v. Gamble,* 429 U.S. at 104. Deliberate indifference to serious medical needs is also exhibited by intentional interference with treatment already prescribed. *Id.* at 105. But not every claim by a prisoner that he did not receive

adequate medical treatment articulates an Eighth Amendment violation. *Id.* at 105-06.

To establish an Eighth Amendment claim for deliberate indifference to serious medical needs, a plaintiff must satisfy an objective and subjective requirement. *See Bingham v. Thomas,* 654 F.3d 1171, 1175-1176 (11th Cir. 2011)(citing *Taylor v. Adams,* 221 F.3d 1254, 1258 (11th Cir. 2000)). To satisfy the objective component, the plaintiff must demonstrate "(1) 'an objectively serious medical need. . . that, if left unattended, poses a substantial risk of serious harm,' and (2) that the prison official's response 'to that need was poor enough to constitute an unnecessary and wanton infliction of pain, and not merely accidental inadequacy, negligence in diagnosis or treatment, or even medical malpractice actionable under state law.'" *Id.,* 654 F.3d at 1176 (quoting *Taylor v. Adams,* 221 F.3d at 1258).

To satisfy the subjective component, the plaintiff must show "a prison official's subjective intent to punish by demonstrating that the official acted with deliberate indifference." *Id.,* 654 F.3d at 1176 (citing *Taylor v. Adams,* 221 F.3d at 1258). "To satisfy this requirement, a prisoner must show the prison official's: '(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence.'" *Id.,* 654 F.3d at 1176 (quoting *Brown v. Johnson,* 387 F.3d 1344, 1351 (11th Cir. 2004)). "Conduct that is more than mere negligence includes: (1) grossly inadequate care; (2) a decision to take an

easier but less efficacious course of treatment; and (3) medical care that is so cursory as to amount to no treatment at all." *Id.,* 654 F.3d at 1176 (quoting *Brown v. Johnson,* 387 F.3d at 1351). A prison official "who delays necessary treatment for non-medical reasons may exhibit deliberate indifference." *Id.,* 654 F.3d at 1176 (quoting *Hill v. Dekalb Reg'l Youth Det. Ctr.,* 40 F.3d 1176, 1187 (11th Cir. 1994), *abrogated on other grounds by Hope v. Pelzer,* 536 U.S. 730 (2002)). Further, and as relevant here, an Eighth Amendment violation "may also occur when state officials knowingly interfere with a physician's prescribed course of treatment." *Id.,* 654 F.3d at 1176 (citing *Young v. City of Augusta, Ga.,* 59 F.3d 1160, 1169, n. 17 (11th Cir. 1995)).

2. Analysis

a. *Objective Standard-Serious Medical Need*

The plaintiff alleges that he suffers from a serious medical need. It is uncontroverted that the plaintiff has severe hearing loss in his right ear, and a mild hearing loss in his left ear. As a result of this hearing loss, the plaintiff maintains that he cannot hear the television, loud speaker, correctional officers' mail calls, or other inmates. The Eleventh Circuit has made clear that a "[s]ubstantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical need." *Barcelona v. Sec'y, Fla. Dep't of Corr's,* 657 F. App'x 896, 898 (quoting *Gilmore v. Hodges,* 738 F.3d 266, 276 (11th Cir. 2013)). The Eleventh Circuit has cautioned,

however, that not all hearing loss amounts to a serious medical condition. *Barcelona v. Sec'y, Fla. Dep't of Corr's,* 657 F. App'x at 898 (quoting *Gilmore v. Hodges,* 738 F.3d at 276). If a prisoner can carry on a conversation or hear and follow directions without a hearing aid, then courts "would be hard pressed to classify the plaintiff's impairment as a serious medical need." *Barcelona v. Sec'y, Fla. Dep't of Corr's,* 657 F. App'x at 898 (quoting *Gilmore v. Hodges,* 738 F.3d at 276-77).

As applied, there remains a genuine issue of material fact regarding whether the plaintiff suffers from an objectively serious medical need. Dr. Zinaman's report revealed that the plaintiff has a profound hearing loss in the right ear, and a mild hearing loss in the left, requiring treatment. The plaintiff alleges he cannot hear the loud speaker, commands from correctional officials, and other inmates. When viewing the evidence in the light most favorable to the plaintiff, as the non-movant, the court finds that the plaintiff suffers from "[A] serious medical" which "has been diagnosed by a physician as mandating treatment. . . ." *See cf. Mann v. Taser Int'l, Inc.,* 588 F.3d 1291, 1307 (11th Cir. 2009)). "[A]n inmate's inability to hear may render him exceedingly vulnerable to danger and harm from unperceived surroundings." *See Gilmore v. Hodges,* 738 F.3d at 275 (citing *Koehl v. Dalsheim,* 85 F.3d 86, 87-88 (2d Cir. 1996)(finding inmate's unmet need for prescription eyeglasses constituted serious medical need where inmate suffered headaches, vision and depth perception deterioration, and visual deficiencies causing him to fall or

walk into objects)).

b. *Subjective Element*

Jones and Stine next argue that the plaintiff cannot prove they had subjective knowledge of a risk of harm, that they disregarded the risk, or engaged in conduct that was more than negligent. [ECF No. 114, p. 9]. They argue that Dr. Heller advised the plaintiff that he did not meet the FDOC guidelines based on the audiologist's reports, which they maintain confirm the plaintiff could hear out of one ear. [ECF No. 114, p.15]. They suggest that Dr. Heller's medical decision does not "give rise to liability" for them. [*Id.*]. Jones and Stine also argue they did not participate in the authorization or denial of the plaintiff's hearing aid request. [ECF No. 114, p. 9]. The defendants claim there has been no evidence that they exhibited a course or custom of delaying medical care or administering cheaper care to the detriment of South Bay inmates. [*Id.*].

It is uncontroverted that, in denying plaintiff's grievance, regarding the denial of the authorization for a right ear hearing device, Dr. Heller responded and Stine affirmed, as evidenced by his signature, that a "referral was made," but it was "denied" on the basis that the plaintiff did not meet the criteria according to the audiologists' evaluation. [ECF No. 120-1, p. 4]. The plaintiff's Chronological Record of Health Care, however, reveals that the "audiology referral deferred by UM" because of "adequate hearing in one ear," finding the plaintiff "was not a

candidate" for a hearing aid. [ECF No. 120-2, p.12]. In fact, Dr. Heller himself noted in plaintiff's chart that "CHC deferred"' the audiologist's referral. [*Id.*, p.14].

The uncontroverted evidence further reveals that, following the results of an MRI, Dr. Zinaman found that a "mild gain device for the **left ear may** be beneficial," but alternatively, "a power instrument for the **right ear may** provide speech and environmental awareness with possible transcranial effect." [DE#112-2, p. 13] (emphasis added). Plaintiff declined the left ear device, but agreed with the doctor's recommendation for the right ear. [*Id.*].

The plaintiff has alleged that Jones and Stine were aware, through plaintiff's grievances and the responses generated by them or on their behalf, that he was being denied a much needed hearing device. The plaintiff has provided evidence showing that his grievance appeal was denied by Jones' subordinate based on a policy that she is unjustly enforcing, or is misapplying, without considering the doctor's recommendations.

Jones and Stine have provided an affidavit from Jones' employee, Dr. Whalen, in which he concludes that Dr. Zinaman's audiometry test results confirmed that the plaintiff did not meet the criteria for bilateral hearing loss under HSB 15.03.27. [ECF No. 112-5, p. 2]. He does not specify which subsection of that bulletin he is relying upon to arrive at this general conclusion. Further, there is nothing in the denials of plaintiff's grievances to indicate whether or not the plaintiff met the criteria for a

hearing device under HSB 15.03.27(G)(2)(b).

In any event, when viewing the evidence in the light most favorable to the plaintiff, as the non-movant, the plaintiff has alleged sufficient facts to support a jury finding that the defendants were aware that the plaintiff was suffering from a serious medical need, that they ignored that need, or otherwise engaged in conduct that was more than mere negligence, in light of Dr. Zinaman's recommendations. The plaintiff has alleged and Dr. Zinaman's records support a finding that he suffers from severe hearing loss in his right ear, and mild hearing loss from his left ear, for which he opined that the plaintiff could benefit from a "power instrument" for the right ear because it "may provide speech and environmental awareness with possible transcranial effect." [ECF No. 120-2, p.13]. Given the plaintiff's allegations, together with Dr. Zinaman's report, there is a genuine issue of fact regarding whether the defendants were aware of the risk of harm and purposefully ignored the condition, thereby violating plaintiff's constitutional rights.

3. Conclusion

For all of the foregoing reasons, the motion for summary judgment [ECF No. 114], based on a failure to state a deliberate indifference claim, should be DENIED.

B. Qualified Immunity

1. Applicable Law

A state actor, sued in his or her individual capacity, pursuant to 42 U.S.C.

§ 1983, is entitled to raise qualified immunity as a defense. *See Wilson v. Strong,* 156 F.3d 1131, 1135 (11th Cir. 1998). To prevail on a qualified immunity defense, the defendants must demonstrate that the conduct complained of took place while they were performing a discretionary function. *See Johnson v. Boyd,* 701 F. App'x 841, 848 (11th Cir. 2017). Once this showing has been made, the burden then shifts to the Plaintiff to demonstrate that: "(1) the officers violated a constitutional right; and, (2) the right was clearly established at the time of the violation." *Johnson v. Boyd, supra.; Pearson v. Callahan,* 555 U.S. 223, 232 (2009). The constitutional right must be sufficiently clear for a reasonable official to understand that what he is doing violates that right. *Hope v. Pelzer,* 536 U.S. 730, 739 (2002); *Vinyard v. Wilson*, 311 F.3d 1340, 1353 (11th Cir. 2002)(citations omitted).

a. *Discretionary Function*

The defendants argue they are entitled to qualified immunity because they were performing a discretionary function. [ECF No. 114, p.19]. Plaintiff argues they are not entitled to qualified immunity.

"'To establish that the challenged actions were within the scope of their discretionary authority, the defendants must show that those actions were (1) undertaken pursuant to the performance of his [their] duties, and (2) within the scope of his [their] authority.'" *See Estate of Cummings v. Davenport,* 906 F.3d 934, 940 (11th Cir. 2018), *pet. for cert. docketed by Davenport v. Estate of Cummings*,

No. 18-1191 (May 23, 2019)(quoting *Harbert Int'l, Inc. v. James,* 157 F.3d 1271, 1281 (11th Cir. 1998)). Courts must determine "whether the government employee was (a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize." *See Id.* at 940 (quoting *Holloman ex rel. Holloman v. Harland,* 370 F.3d 1252, 1265 (11th Cir. 2004)). To apply each prong of the test, courts "look to the general nature of the defendant's action, temporarily putting aside the fact that it may have been committed for an unconstitutional purpose, in an unconstitutional manner, to an unconstitutional extent, or under constitutionally inappropriate circumstances." *Id.* at 940 (quoting *Mikko v. City of Atlanta,* 857 F.3d 1136, 1144 (11th Cir. 2017) (quoting *Holloman v. Harland,* 370 F.3d at 1266)).

However, "[A] government official can prove he acted within the scope of his discretionary authority by showing 'objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority'" *Id.* at 940 (quoting *Rich v. Dollar,* 841 F.2d 1558, 1564 (11th Cir. 1988) (quoting *Barker v. Norman,* 651 F.2d 1107, 1121 (5th Cir. Unit A July 1981)).

In any event, as is the case here, the defendants' conclusory or "bald assertion" that "the complained-of actions were. . . within the scope of his discretionary authority" is insufficient to demonstrate that they were acting within the scope of

their discretionary authority. *See Id.* at 940 (quoting *Barker v. Norman,* 651 F.2d at 1124–25). When viewing the evidence in the light most favorable to the plaintiff, as the non-movant, the defendants have not demonstrated that they were acting within the scope of their discretionary function.

b. *Clearly Established Constitutional Violation*

Even assuming, without deciding, that the defendants' argument established they were acting within their discretionary authority, the burden would then shift to the plaintiff to establish (1) whether the facts that the plaintiff has shown make out a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the defendants' alleged misconduct. *See Gilmore v. Hodges,* 738 F.3d at 272 (citing *Pearson v. Callahan,* 555 U.S. 223, 232 (2009)).

In 2014, when the defendants denied the recommended hearing aid, the law was well settled that the failure to provide an inmate with a medical device necessary to remedy a "significant and substantial hearing loss is a serious medical need," thereby providing the defendants with fair warning that their actions violated the plaintiff's constitutional rights. *See Barcelona v. Sec'y, Fla. Dep't of Corr's,* 657 F. App'x at 898 (citing *Gilmore v. Hodges,* 738 F.3d 266 (11th Cir. 2013) (finding a "[s]ubstantial hearing loss that can be remedied by a hearing aid can present an objectively serious medical need")).

2. Conclusion

Given the foregoing, when viewing the evidence in the light most favorable to the plaintiff, the defendants have not demonstrated that they are entitled to judgment as a matter of law based on qualified immunity.

VI. Recommendation

Based upon the foregoing, the undersigned recommends that the motion for summary judgment (DE#114) filed by defendants, Julie Jones and D.L. Stine, be DENIED.

Any party who objects to this recommendation or anything in it must, within fourteen (14) days of the date of service of this document, file specific written objections with the Clerk of this court. Failure to do so will bar a *de novo* determination by the district judge of anything in the recommendation and will bar an attack, on appeal, of the factual findings of the Magistrate Judge. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn,* 474 U.S. 140, 149 (1985); *RTC v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir. 1993).

Signed this 18th day of June, 2019.

UNITED STATES MAGISTRATE JUDGE

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RE: Joel Barcelona

08/12/14

To whom it may concern,

Joel Barcelona was seen at our office status post MRI conducted to rule out retrocochlear pathology. The radiologist's impression is that of an "unremarkable" MRI.

Amplification is an option for patient. A mild gain device for the left ear may be beneficial, but this is declined by patient. Alternatively, a power instrument for the right ear may provide speech and environmental awareness with possible transcranial effect. Mr. Barcelona is agreeable to this plan.

Appropriate amplification deemed for the right ear is Starkey 3 Series I110 BTE 13. This device includes earmold, 3 year warranty/insurance, and all follow-up services. The cost of this instrument is $3499.00

We would be happy to assist this patient toward this end upon facility authorization or approval for such. If you have any questions, please contact us at any time.

Sincerely,

Dr. Arthur G. Zinaman
Audiologist

WADE, ARNP, B.C.F.
4/16/14

Reply to:
Poinciana Professional Center
3540 Forest Hill Blvd.
Ste. 205
West Palm Beach, FL 33406

Gardens Medical Park
3385 Burns Rd.
Ste. 103
Palm Beach Gardens, FL 33410

Palm Beach
241 Sunrise Ave.
Palm Beach, FL 33480

Jupiter
50 S. US Hwy. One
Ste. 210
Jupiter, FL 33477

Loxahatchee
13005 Southern Blvd.
Ste. 131
Loxahatchee, FL 33470

Phone: (561) 649-4006 - Fax (561) 969-6621

DEPARTMENT OF CORRECTIONS

Chronological Record of Health Care

Allergies: NKDA

DATE/TIME	
	Incidental note: F/U - Refusal of Hearing Aid
9/4/14	T = 97.5 P = 88 R - 16 BP - 96/68
@	Wt - 134lbs [signature] RN S.B.C.F
9/4/14 1330	S: Review of request for hearing aid via CAC "deferred"
	Explained to inmate
	[signature] J. Heller, M.D. S.B.C.F

Inmate Name Barcelona, Joel
DC# M50331 Race/Sex W/M
Date of Birth 06-08-54
Institution SBCF

S- Subjective Data
O- Objective Data
A- Assessment of S and O Data
P- Plan
E-Education

DC4-701 (Effective 4/8/10) Incorporated by Reference in Rule 33-602.210