No. 21-5817

IN THE

SUPREME COURT OF THE UNITED STATES

Brandon Craig Wood — PETITIONER
(Your Name)

vs.

Eric Sellers, et al., — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Brandon Craig Wood 129960
(Your Name)

3001 Gordon Hwy
(Address)

Grovetown, GA 30813-3808
(City, State, Zip Code)

N/A
(Phone Number)

In The Supreme court of The United states

Brandon Craig Wood
Plaintiff-Appellant

V.

Eric Sellers, et al.,
Defendant-Appellee

Appeal from the United States court of Appeals
For The Eleventh circuit
NO. 21-13359

Brief of Appellant Brandon Wood

pro-se Brandon Craig Wood
GDC# 1299960
3001 Gordon Hwy
Grovetown, GA 30813

STATEMENT OF THE ISSUES

(1) Does collateral estoppel bar a Plaintiff from challenging the Defendants' failure to exhaust administrative remedies defense when exhaustion is a matter of abatement not on the merits of the Plaintiff's claim and the district court dismissed the Plaintiff's first action without prejudice?

(2) Did the district court err applying collateral estoppel because the Plaintiff's second action alleged materially different facts undermining the Defendants' exhaustion defense and the Plaintiff did not have a full and fair opportunity in the first action to obtain discovery and present evidence on exhaustion?

Plaintiff Asserts he still has vision problems caused by Defendants. Plaintiff has Adopted the Brief from December Where Attorney's took facts from plaintiff and wrote a Definative and comprehensive Brief. Plaintiff asserts he should not be disquilified from the courts for his disability which was bestowed upon him by the Defendants in this case. If given the opprotunity the plaintiff can show where the remedies were followed. In Wood I plaintiff lost his vision and could not continue. The A.D.A Allows people to have help with legal matters but when an inmate needs help its very hard to obtain.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-2(a), the following people and entities have an interest in the outcome of this appeal:

Andrews, Samuel, Defendant-Appellee

Asadi, Mubarak Bin, Defendant-Appellee

Baxley, Joseph, Defendant-Appellee

Brown, Benjamin, Defendant-Appellee

Carr, Christopher Michael, Attorney General for the State of Georgia, Appellate Counsel for Defendant-Appellees

Cusimano, Angela Ellen, Assistant Attorney General for the State of Georgia, Appellate Counsel for Defendant-Appellees

Free, Sean, Defendant-Appellee

Georgia Department of Corrections

Goldberg, Brian Edward, District Court Counsel for Defendant-Appellees Andrews, Bin Asadi, Richardson, Williams, Brown, Josephs, Harden, Walcott

Harden, Lekendrick, Defendant

Henry County Sheriff's Department

Jett, John P., Counsel for Plaintiff-Appellant

Josephs, Miguel, Defendant

Langstaff, Hon. Thomas Q., United States Magistrate Judge

Reynolds, Joe P., Counsel for Plaintiff-Appellant

Richardson, Quinton, Defendant-Appellee

Treadwell, Hon. Marc T., United States District Court Judge

Walcott, Brian, Defendant

Waymire, Jason C., District Court Counsel for Defendant-Appellees Baxley and Free

Weigle, Hon. Charles H., United States Magistrate Judge

Williams, Charles, Defendant-Appellee

Wood, Brandon Craig, Plaintiff-Appellant

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Brandon Wood respectfully requests oral argument. Although the issues and Mr. Wood's positions are presented in the record and this brief, this case considers multiple issues of law without binding, published precedent from this Court. The application of this Court's complicated law on preclusion would also benefit from oral argument considering the specific circumstances of the two district court actions relevant here.

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JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was July 1, 2022.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

STATEMENT OF JURISDICTION

(A) *District Court's Subject Matter Jurisdiction.* The district court has original jurisdiction over the underlying action in accordance with 28 U.S.C. § 1331, as the action was brought pursuant to 42 U.S.C. § 1983 for the Defendant-Appellees' excessive use of force in violation of the Eighth Amendment.

(B) *Appellate Jurisdiction.* This Court has jurisdiction over this appeal under 28 U.S.C. § 1291 as an appeal from a final decision rendered by the district court, granting the Defendant-Appellees' Motions to Dismiss.

(C) *Timeliness of Appeal.* The notice of appeal was timely filed on September 24, 2021, within thirty days of the entry of the district court's order on August 27, 2021.

(D) *Finality of Order.* This appeal is from a final order or judgment by the district court granting the Defendant-Appellees' Motions to Dismiss that disposes of all parties' claims.

STATEMENT OF THE CASE

The district court dismissed the Plaintiff's excessive-force claim based on one procedural ground—collateral estoppel (sometimes called issue preclusion). Plaintiff appeals, arguing collateral estoppel should not apply.

Plaintiff's excessive-force claim involves an incident in 2018 between Plaintiff, a Georgia State Inmate, and the Defendants, officers with the Henry County (Georgia) Sherriff's Office and the Georgia Department of Corrections. Plaintiff alleges that, during transport between facilities, a group of the Defendant-officers beat Plaintiff at the request of the other Defendant-officers.[1] Defendants beat Plaintiff so severely that, soon after intake, the Deputy Warden at Plaintiff's new facility had Plaintiff taken to an outside hospital and then he contacted the Georgia Department of Corrections' Office of Professional Standards.

At the hospital, Plaintiff was interviewed by a Special Agent for the Office of Professional Standards—starting an investigation that by policy

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[1]Plaintiff's claims separate the Defendants into two categories: CERT Defendants and Transport Defendants. The CERT Defendants—members of the Corrections Emergency Response Team—were the officers that beat Plaintiff with their fists, a metal rod, and a baton. Dkt. 1 at 4, 9. The Transport Defendants (two Henry County Sheriff's Deputies) were the officers that transported Plaintiff and directed the CERT Defendants to beat him. *Id.* at 8-9. These categories are not material for the issues on appeal, so Plaintiff refers to all Defendants collectively.

superseded other administrative actions. Plaintiff also alleges that the Special Agent told Plaintiff, "now that [the Office of Professional Standards] was involved she superseded any normal administrative remedies." *Wood v. Sellers*, No. 5:20-cv-00124-MTT-TQL (M.D. Ga. filed May 27, 2020) ("*Wood II*"), Dkt. 1 at 11. Plaintiff was also treated for major facial nerve damage, a busted eardrum, a torn stomach muscle, hearing loss, and vision loss. *Id.* at 11–13. Years after the beating, Plaintiff still "is practically blind" and "can no longer read or write." Dkt. 61 at 2.

Plaintiff later filed this lawsuit, and although Plaintiff was told that the internal investigation eclipsed the standard grievance process, the Defendants moved to dismiss Plaintiff's claims because he did not file an administrative grievance. Dkt. 32; Dkt. 36. Without significant discovery or holding an evidentiary hearing on the exhaustion issue—including the effect of an investigation by the Office of Professional Standards—the district court granted the Defendants' Motions to Dismiss. *See* Dkt. 61. Specifically, the district court concluded that, in a prior action filed by Plaintiff in 2018 based on this attack, the court ruled that Plaintiff did not exhaust all administrative remedies before filing the first action, so Plaintiff was now collaterally estopped from challenging the Defendants' exhaustion

defense in this subsequent action. *Id.* at 5–8. The district court was wrong to apply collateral estoppel and should be reversed.

I. STATEMENT OF FACTS

Plaintiff's pro se Complaint makes the following allegations, which should be liberally construed in his favor. *See Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998).

A. The Assault.

Plaintiff alleges that a group of the Defendant-officers brutally assaulted Plaintiff while Plaintiff was in transit from the Henry County Jail to his assigned facility, Washington State Prison (WSP) in Washington County, Georgia. Dkt. 1 at 8. Plaintiff alleges the remaining Defendant-officers who were transporting him asked the other Defendants to beat Plaintiff. *Id.*

While Plaintiff was transported to WSP, Defendants stopped at the Georgia Diagnostic and Classification Prison (GDCP) to drop off another inmate. *Id.* At the GDCP, the Defendants transporting Plaintiff "handed [him] over" to the Defendants at the GDCP for a beating. *Id.* Plaintiff's Complaint alleges two possible motivations for the beating: (1) before leaving the Henry County Jail, Plaintiff made a joke to another inmate that the Defendants were trying to kill him by withholding medicine; and (2) during his transport, Plaintiff complained that the Defendant driving the

transport vehicle was driving erratically and that the transport van smelled of alcohol. *Id.*

After the Plaintiff's joke regarding the other inmate's medicine, Defendants told Plaintiff, "we got something for you trying to start something." *Id.* Plaintiff later witnessed the Defendants transporting Plaintiff talking to the Defendants at the GDCP. Referring to Plaintiff and the other inmate, the Defendants transporting Plaintiff said: "That's them get them cause we can't touch them." *Id.* at 8–9. The Defendants at the GDCP responded, "You can't, but we can." *Id.* at 9. Plaintiff and the other inmate were then escorted, in handcuffs, to an area in the GDCP where they were not on camera. *Id.*

Once inside the GDCP, Defendants severely beat Plaintiff with their fists, a metal rod, and a baton. *Id.* Defendants knocked Plaintiff unconscious, causing his left eye to be "busted open" and "badly bleeding." *Id.* Once Plaintiff regained consciousness, the Defendants who transported Plaintiff from Henry County Jail were in the room. *Id.* Plaintiff had visible and obvious injuries needing medical attention, but Defendants refused to take Plaintiff for treatment. *Id.* Instead, Defendants forced Plaintiff to take a shower to "wash all the blood off." *Id.* Plaintiff was bussed to WSP hours later. *Id.*

B. Treatment at Washington State Prison.

Struggling to get off the bus at Washington State Prison, Plaintiff told the officers, "please be careful[;] I'm badly hurt." Dkt. 1 at 9. Prison officials immediately recognized that Plaintiff needed medical care and called the "unit manager over medical," Ms. James. *Id.* Ms. James immediately sent Plaintiff to Deputy Warden Karl Fort, who used his phone to take photographs of Plaintiff's face, head, stomach, and knees. *Id.* at 10. Deputy Warden Fort then called Georgia Department of Corrections' Office of Professional Standards and arranged for Plaintiff to be transported to the medical unit. *Id.*

While Plaintiff was being examined at the medical unit, Ms. James told Plaintiff that he "needed to fill out a witness statement form." *Id.* Plaintiff was told the form needed to be completed immediately, even though Plaintiff said he could not see and was in severe pain, so a second prison official helped Plaintiff complete the statement form, including by helping Plaintiff "stay[] on the paper and spac[e] [his] words out seeing as how [he] could not see." *Id.* Plaintiff completed the statement form and returned it to Ms. James, who brought it to Deputy Warden Fort. *Id.* The medical unit then determined that Plaintiff needed to be transferred to an outside hospital for treatment. *Id.*

C. Investigation by the Office of Professional Standards.

At the hospital, Plaintiff was met by Special Agent Tomekia Jordan from the Office of Professional Standards, who was "awaiting" Plaintiff's arrival and told him she was "internal affairs." Dkt. 1 at 10, 11. Special Agent Jordan told the officers who transported Plaintiff to the hospital that they could not be present for her interview of Plaintiff. *Id.* at 10–11. She took pictures of Plaintiff's injuries, and Plaintiff informed her that he could not see out of his left eye or hear out of his left ear. *Id.* at 11. Special Agent Jordan then recorded Plaintiff's statement using her phone and asked him to repeat his statement twice. *Id.* She also told Plaintiff he "did real good and said if all of what [he] said was true then the C.E.R.T[.] officers could be fired just for carrying [him] inside 'GDCP.'" *Id.* Plaintiff asked how long the investigation would take, and Special Agent Jordan responded, "it could take up to 2 years or more." *Id.* She also told Plaintiff she was going to obtain the video footage from both the GDCP and the Henry County Jail. *Id.* Finally, Special Agent Jordan told Plaintiff "now that she was involved, she superseded any normal administrative remedies." *Id.* And, after "being beat to near death, [Plaintiff] trusted Ms. Jordan." *Id.*

D. Plaintiff's Injuries.

At the hospital, Plaintiff was diagnosed as having a burst eardrum, torn stomach muscle, and facial laceration. Dkt. 1 at 11. Plaintiff visited an

ophthalmologist in August 2018, an ear specialist in October 2018, had surgeries in November 2018 and January 2019, and was sent to an outside hospital in February 2019 for vision loss in both eyes. *Id.* at 12–13. Plaintiff's doctors told him that he has "facial nerve damage to the left side of [his] head and face" and there is nothing they can do "to fix [his] nerve problems or eardrum." *Id.* at 12. Plaintiff has been diagnosed with major nerve damage to both sides of his left-eye retina, is extremely light sensitive, and must regularly wear sunglasses for the rest of his life. *Id.* at 13. Plaintiff's neurologist also informed him that he has "been suffering a concussion for over a year." *Id.*

E. Plaintiff's Attempts to Discover Facts About the Investigation.

After returning to Washington State Prison from the hospital, Plaintiff spoke with the Warden, Mr. Brooks, and asked him if he could obtain a copy of the statement he filled out at the request of Ms. James on May 3, 2018. Dkt. 1 at 12. Warden Brooks responded "that would be no problem at all" and represented that he would "personally give" Plaintiff a copy of the statement when he returned from court (to which Plaintiff had to leave for on May 17, 2018). *Id.* By the time Plaintiff returned from court, over a month later, Warden Brooks "was no longer there" and the new warden "knew nothing of the incident that had occurred" on May 3, 2018.

[redacted]

Id. To date and despite his efforts, Plaintiff has not received either a copy of his written statement to Ms. James or the results of the investigation by Special Agent Jordan (the "OPS investigation" or "internal investigation").

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Plaintiff filed his first excessive-force claim pro se on December 11, 2018. *See Wood v. Sellers*, No. 5:19-cv-00041 MTT-CHW (M.D. Ga. filed Dec. 11, 2018) ("*Wood I*"), Dkt. 1.[2] Plaintiff's first action arose from the May 3, 2018 beating that he suffered at the hands and direction of Defendants. *Id.* at 3–4. On screening under 28 U.S.C. § 1915A, the district court determined that Plaintiff's allegations that Defendants violated the Eighth Amendment were sufficient to move forward. *Wood I*, Dkt. 66 at 2. Plaintiff later filed an Amended Complaint, dated July 17, 2019, expanding on his allegations surrounding the assault. *Wood I*, Dkt. 42. Plaintiff's Initial and Amended Complaint in *Wood I*, however, did not include a full explanation of the facts surrounding and reasons for not filing a standard administrative grievance related to the assault after Plaintiff returned to WSP from the hospital. *See Wood I*, Dkt. 1 at 2 (§ II.D.2.), 3–4; Dkt. 42 at 3.

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[2] In this brief, Plaintiff cites to the district court's dockets for *Wood I* and *Wood II*. As this appeal is from the district court's dismissal in *Wood II*, Plaintiff cites the district court docket in that action without specifying. Where Plaintiff cites the district court docket in *Wood I*, the citation specifically refers to *Wood I*.

The Amended Complaint, for the most part, added details about the circumstances leading to the assault (*Wood I*, Dkt. 42 at 2) and added that the Special Agent for the Office of Professional Standards told Plaintiff in the hospital that since multiple jurisdictions were involved the normal administrative remedies "would not work." *Id.* at 3.

Defendants moved to dismiss Plaintiff's claims in *Wood I*, arguing in part that Plaintiff did not file an administrative grievance within 10 days of the incident (*Wood I*, Dkt. 37; Dkt. 43; Dkt. 60), and a magistrate court judge issued a report and recommendation (R&R) that the Defendants' Motions to Dismiss be granted. *Wood I*, Dkt. 66. Plaintiff objected to the magistrate judge's R&R, providing additional detail regarding his efforts to exhaust the available administrative remedies (*Wood I*, Dkt. 67), but the district court adopted the R&R and granted the Defendants' Motions to Dismiss. *Wood I*, Dkt. 68. Important here, the district court in *Wood I* construed Plaintiff's objection to the R&R as a motion to amend for facts not alleged in the pleadings and dismissed Plaintiff's claims "without prejudice." *Id.*

Because his initial claims were dismissed without prejudice, Plaintiff filed this action, alleging he was beaten by or at the direction of Defendants on May 3, 2018. Dkt. 1 at 8–14. In his *Wood II* Complaint, Plaintiff also

believed that the normal grievance procedure was not applicable after the Office of Professional Standards started its investigation. *See e.g.*, Dkt. 1 at 4, 10; *see also infra.* pp. 25–28.

The Defendants moved to dismiss Plaintiff's Complaint for failure to exhaust administrative remedies, sovereign immunity, failure to state a claim, lack of physical injury, and qualified immunity. Dkt. 32; Dkt. 36. The Defendants added (in a footnote) that the district court's adoption of the R&R in *Wood I* dismissed Plaintiff's claims on exhaustion grounds, so Plaintiff is collaterally estopped from arguing that he exhausted the available administrative remedies in *Wood II*. Dkt. 36-1 at 9 n.3; Dkt. 32-1 at 2-3. Plaintiff responded that collateral estoppel should not apply to matters of abatement and does not apply here because Plaintiff did not have a full and fair opportunity to develop the record on exhaustion in *Wood I*. *See* Dkt. 55 at 14–17. The district court granted the Defendants' Motions to Dismiss, ruling that Plaintiff was precluded from challenging the Defendants' exhaustion defense based on the dismissal in *Wood I*. *See* Dkt. 61 at 6.

III. STANDARD OF REVIEW

"[A] district court's collateral estoppel rulings are subject to de novo review by this court," *United States v. Quintero*, 165 F.3d 831, 834 (11th

Cir. 1999), while "[a] district court's factual determinations underlying its legal conclusion are upheld unless clearly erroneous." *Quinn v. Monroe County*, 330 F.3d 1320, 1328 (11th Cir. 2003). Applied here, this Court reviews de novo the district court's conclusions as to whether the facts and circumstances of *Wood I* and *Wood II* meet the legal requirements for collateral estoppel. *Compare id.* at 1333 (reversing a district court's application of Florida's collateral estoppel requirements), *with McGowan v. Comm'r*, 187 F. App'x 915, 917 (11th Cir. 2006) (reviewing the first court's finding that defendant lacked intent for clear error).

SUMMARY OF ARGUMENT

This Court should reverse the district court's applying collateral estoppel for four, independent reasons.

First, collateral estoppel does not apply to matters of abatement because rulings on such defenses are not on the merits, and "exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits." *Howard v. Gee*, 297 F. App'x 939, 940–41 (11th Cir. 2008); *see also Sheet Metal Workers' Int'l Ass'n Local 15 v. L. Fabrication, LLC*, 237 F. App'x 543, 548–49 (11th Cir. 2007).

Second, to apply collateral estoppel, the current issue must be "identical" to the issue decided in the first action and the current issue must

have been "actually litigated" in the first action. *CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F.3d 1309, 1317 (11th Cir. 2003) (citation omitted). Because Plaintiff's Complaint in *Wood II* alleged at least "one material differentiating fact that would alter the legal inquiry here," Defendants cannot prove the "identical" and "actually litigated" requirements for collateral estoppel. *Id.*

Third, Plaintiff must have had "a full and fair opportunity to litigate" the exhaustion issue in the first action to preclude Plaintiff's exhaustion argument in this case. *Allen v. McCurry*, 449 U.S. 90, 101 (1980). Plaintiff requested records and information from the Defendants related to exhaustion and sought appointed counsel to discover information supporting his exhaustion argument, but those attempts and requests were denied. *See* Dkt. 1 at 12; *Wood I*, Dkt. 30; Dkt. 54. Because the district court in *Wood I* did not give Plaintiff a "sufficient opportunity to develop a record," Plaintiff had neither a full nor fair opportunity to litigate the exhaustion issue in *Wood I*. *Bryant v. Rich*, 530 F.3d 1368, 1376, 1376 n.13 (11th Cir. 2008).

Fourth, collateral estoppel does not apply where "special considerations of fairness, relative judicial authority, changes of law, or the like, . . . warrant remission of the ordinary rules of preclusion." *Gjellum v.*

City of Birmingham, 829 F.2d 1056, 1059 n.4 (11th Cir. 1987) (citation omitted). In *Wood I*, Plaintiff was pro se, physically disabled, and repeatedly denied counsel to help develop the record on the very issue now being precluded—exhaustion. *See Wood I*, Dkt. 30; Dkt. 54. The district court adopted the magistrate judge's R&R, construed the Plaintiff's objections to the R&R as a Motion to Amend in a footnote, and then dismissed Plaintiff's claims without prejudice. *Wood I,* Dkt. 68. As opposed to appealing his initial action—and under the belief that *Wood I*'s dismissal would not be enforced with prejudice—Plaintiff filed a second action alleging new and materially different facts related to exhaustion. Dkt. 1. The unique and unfair procedural facts surrounding the dismissal in *Wood I* and the lack of factual development on exhaustion warrant remission of the ordinary rules of preclusion. *See Gjellum*, 829 F.2d at 1059 n.4.

ARGUMENT AND CITATIONS OF AUTHORITY

Collateral estoppel, also called issue preclusion, "forecloses relitigation of an issue of fact or law that has been litigated and decided in a prior suit." *CSX Transp.*, 327 F.3d at 1317 (quoting *I.A. Durbin, Inc. v. Jefferson Nat'l Bank*, 793 F.2d 1541, 1549 (11th Cir. 1986)). To determine the preclusive effect of a prior judgment of this Court, the Court applies federal preclusion principles. *Id.* at 1316. Under federal law, collateral estoppel applies when:

> 1) the issue is identical to the issue involved in prior litigation;
>
> 2) the issue was actually litigated in the prior suit;
>
> 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment; and
>
> 4) the party against whom the earlier decision is asserted had a full and fair opportunity to litigate the issue in the earlier proceeding.

Id. at 1317.

Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation." *Id.* at 1317 (citation omitted). However, "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *In re Repetitive Stress Inj. Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (alteration in original) (citation omitted).

Explained below, collateral estoppel does not apply to a failure-to-exhaust defense where: (1) exhaustion is a matter of abatement; (2) the alleged facts relevant to exhaustion are materially different in the second action; (3) Plaintiff was not given a full and fair opportunity to develop the facts relevant to exhaustion; and (4) the district court dismissed Plaintiff's claims without prejudice.

I. COLLATERAL ESTOPPEL DOES NOT APPLY TO MATTERS OF ABATEMENT LIKE EXHAUSTION.

Under the Prison Litigation Reform Act, an inmate must exhaust the available administrative remedies before bringing an action in federal court. 42 U.S.C. § 1997e(a). If a plaintiff fails to exhaust the available administrative remedies, the defendant can state an exhaustion defense. *See Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008) ("The defendants bear the burden of proving that the plaintiff has failed to exhaust his available administrative remedies."). An exhaustion defense is properly raised in a motion to dismiss brought under Fed. R. Civ. P. 12(b)(1) "[b]ecause exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits." *Bryant*, 530 F.3d at 1374 (emphasis added) (stating "exhaustion is nothing more than a precondition to an adjudication on the merits" under the language of the PLRA).

Because a dismissal for failure to exhaust is only a ruling on a matter of abatement—and does not touch on the merits—this Court has ruled in at least two unpublished opinions that preclusion does not apply. *See Howard*, 297 F. App'x at 940–41 ("Since a finding of exhaustion is not an adjudication on the merits, the dismissal of Howard's 2005 action fails to satisfy the 'final judgment on the merits' element of res judicata."); *Sheet Metal Workers'*, 237 F. App'x at 548–49 ("For purposes of this action, it is clear that the prior dismissal had no preclusive effect. Doctrines of claim and issue preclusion do not apply because no judgment was rendered on the merits.").

The Supreme Court explained succinctly why collateral estoppel does not apply to matters of abatement in *United States v. International Building Co.*, 345 U.S. 502, 506 (1953). "[U]nless we can say that [the prior decisions] were an adjudication of the merits, the doctrine of estoppel by judgment [i.e., collateral estoppel] would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." *Id.*; *see also Balbirer v. Austin*, 790 F.2d 1524, 1527 (11th Cir. 1986) (applying the Supreme Court's decision

See 18 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4423 (3d ed. 2021) (stating a party may defeat preclusion by "demonstrat[ing] a substantial procedural limitation in the first litigation"). The district court's exhaustion analysis presents exactly that kind of departure from standard fact-finding procedures.

Under *Turner*, 541 F.3d at 1082–83, there is a two-step analysis whereby the district court judge—not a jury—makes determinative findings of fact related to exhaustion without full discovery or merits-like litigation. In fact, the trial judge is only permitted to make these findings to the extent that "the factual disputes do not decide the merits." *Bryant*, 530 F.3d at 1376. In the exhaustion context—where the judicially created procedure allows the trial judge to resolve contested issues of fact prior to complete discovery—the unordinary procedure renders collateral estoppel inappropriate. This is doubly true in the Eleventh Circuit, which treats exhaustion as a matter of abatement under Rule 12 permitting the trial judge to decide issues of disputed fact while other circuits review factual disputes concerning exhaustion as a motion for summary judgment because "the nonmoving party should be granted the protections of Rule 56." *Dillon v. Rogers*, 596 F.3d 260, 271 (5th Cir. 2010); *see also Albino v. Baca*, 747 F.3d 1162, 1170 (9th Cir. 2014).

Defendants may argue that the "on the merits" requirement for preclusion applies to res judicata and does not apply to collateral estoppel. That is wrong for a few reasons. First, this Court has repeatedly included the "on the merits" language in listing "the requirements for issue preclusion." *See e.g.*, *Gjellum*, 829 F.2d at 1059 n.4 (quoting Wright & Miller, *supra*, § 4416 (1981)). Second, like an "on the merits" requirement, collateral estoppel only applies where the Plaintiff's claims were "actually litigated" in the prior action. *See Hart v. Yamaha-Parts Distribs., Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986). Third, this Court has explained the differences between collateral estoppel (issue preclusion) and res judicata (claim preclusion)—such as that "[c]ollateral estoppel, unlike res judicata, is not limited to parties and their privies." *Id.* But this Court has not held that res judicata requires a decision on the merits while collateral estoppel can apply to matters of abatement not on the merits.

The district court's dismissal of Plaintiff's claims in *Wood I* was on a matter of abatement, was not on the merits, and was granted without prejudice. Thus, collateral estoppel did not apply.

II. THE EXHAUSTION ANALYSIS IN *WOOD I* WAS NOT IDENTICAL TO *WOOD II*, AND PLAINTIFF'S EXHAUSTION ARGUMENT WAS NOT ACTUALLY LITIGATED IN THE PRIOR ACTION.

To affirm the district court's application of collateral estoppel, Defendants must show that the issue in *Wood II* is "identical" to the issue involved in *Wood I* and that *Wood I* "actually litigated" Plaintiff's argument. *See CSX Transp.*, 327 F.3d at 1317 (citation omitted). Applying these elements together, this Court has ruled that the issue is not identical and was not actually litigated in the prior action if the second action is based on "[a] material difference in fact." *Id.* at 1318. It is not enough that the first and second action involve identical parties and the issues "are substantially similar." *Id.* Plaintiff "need only point to one material differentiating fact that would alter the legal inquiry here" to defeat collateral estoppel. *Id.* (citing *Sewell v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 94 F.3d 1514, 1519 (11th Cir. 1996)).

In *Sewell*, 94 F.3d at 1519, collateral estoppel did not apply when the second action relied on a materially different piece of evidence to decide an arbitration issue. The first case considered where a claimant could proceed in arbitration, rather than whether the claimant was *required* to proceed in arbitration. *Id.* Because whether the claimant signed the relevant customer agreement (and the effect of that agreement) was not actually litigated

deciding whether the claimant was required to proceed in arbitration in the first action, preclusion did not apply in the second action. *Id.* Citing *Sewell*, this Court came to basically the same conclusion in *CSX Transportation*, where the plaintiff argued that the arbitration issue in the second action was affected by the new factual allegation—that there was "no notice . . . that a strike was impending." 327 F.3d at 1317–18; *see similarly In re MDL-1824 Tri-State Water Rts. Litig.*, 644 F.3d 1160, 1204 (11th Cir. 2011) (although both actions revolved around the parties' water storage requirements, the second action relied on a different statute and thus presented "[a] wholly different issue"). In these cases, preclusion did not apply based on differences in fact applied to a similar issue.

For the same reason, the fact that *Wood I* and *Wood II* both analyzed exhaustion is not enough to satisfy the "identical" and "actually litigated" requirements for collateral estoppel. "Framing the issues to be decided at such a remote level of abstraction is, however, outside the scope of the purposes of collateral estoppel." *Wright v. JPMorgan Chase Bank, N.A.*, No. 1:11-CV-4422-JEC-ECS, 2012 WL 13012809, at *4 (N.D. Ga. Aug. 1, 2012), *report and recommendation adopted* 2012 WL 13013632 (N.D. Ga. Sept. 13, 2012).

This Court has stringently required identical issues before precluding a plaintiff from litigating their claims. For example, in *Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation*, 768 F.2d 1558, 1580 (11th Cir. 1985), the first action found that a pilot was not negligent focusing "almost exclusively" on one set of facts leading up to an accident. The second action, however, included factual allegations showing negligence not litigated in the first action. This Court found that, "while the legal issue [of] negligence, may have been similar," the added facts in the second action made collateral estoppel inappropriate. *Id.*; *see also Boone v. Rumsfeld*, 172 F. App'x 268, 271 (11th Cir. 2006) (although reasonable accommodation was at issue in both cases, the second action involved "new evidence").

Whether the normal grievance procedure applied in this case is similar to the arbitrability issues in *Sewell* and *CSX Transportation* and the negligence issue in *Hercules Carriers*. Like those cases, Plaintiff's Complaint in *Wood II* states additional facts material to exhaustion.

In *Wood I*, Plaintiff relied heavily on his allegation that Special Agent Jordan verbally told Plaintiff that, since there was an OPS investigation and multiple jurisdictions involved, the normal administrative remedies "would not work." *Wood I*, Dkt. 42 at 3. The district court in *Wood I* case relied

explicitly on the magistrate judge's credibility determination against Plaintiff's claim that he was told not to proceed with the normal grievance process. *Wood I*, Dkt. 66; Dkt. 68.

In *Wood II*, Plaintiff's Complaint cites additional evidence that the internal investigation supplanted the normal grievance process. The *Wood II* Complaint explicitly cites the GDC Policy (Dkt. 1 at 3) which contains a separate section addressing a "Referral to the Office of Professional Standards." Dkt. 36-2 at 15 (§ (IV)(c)(1)(h)(ii)). It states that, once the Office of Professional Standards informed Plaintiff that it was investigating the attack, the internal investigation "effectively closes the grievance" and that "[t]his decision is not appealable." *Id.* at 15–16.

Neither the magistrate court nor the district court in *Wood I* actually decided whether the GDC Policy's section on OPS investigations rendered the grievance procedure inapplicable. *Cf. I.A. Durbin, Inc.*, 793 F.2d at 1550 (refusing to apply collateral estoppel where the two cases "do not involve identical issues"). And the fact that *Wood I* ruled "without thoroughly examining" this policy language directly undermines any preclusive effect of that ruling. *See Tri-State Water Rts. Litig.*, 644 F.3d at 1203 (citing *A.J. Taft Coal Co. v. Connors*, 829 F.2d 1577, 1581 (11th Cir. 1987)) (declining to apply collateral estoppel under the fully litigated requirement where the

first court reached its conclusion "without thoroughly examining" the issue to be precluded).

The Plaintiff's Complaint in *Wood II* also includes additional facts that lend credibility to Plaintiff's argument that the OPS investigation supplanted the normal grievance process. Plaintiff alleges the following facts in *Wood II* that were not included in his Initial or Amended Complaints in *Wood I*.

Special Agent Jordan was "awaiting" Plaintiff's arrival, told Plaintiff she was "internal affairs," and told the officers who transported Plaintiff to the hospital that they could not be present for her interview. Dkt. 1 at 10–11. Special Agent Jordan recorded Plaintiff's statement in his own words and asked him to repeat his story twice. *Id.* She then discussed the length of the investigation—"up to 2 years or more"—along with the potential that the officers would be fired. *Id.*

Plaintiff then alleges he "trusted" Special Agent Jordan that the internal investigation replaced the normal grievance process. *Id.* After the meeting with Special Agent Jordan, Plaintiff met with a WSP Warden Brooks, where he requested a copy of his statement to Special Agent Jordan and was told that would be "no problem." *Id.* at 12. This is also consistent with the Georgia DOC policy for investigations referred to the Office of

Plaintiff's belief that an OPS investigation superseded the standard grievance process. The same is true of Plaintiff's allegations that Special Agent Jordan told Plaintiff that the investigation could take years or more—longer than a standard grievance process—and that the officers may be fired. Special Agent Jordan recording Plaintiff's recollection of the attack and asking for it to be repeated supports Plaintiff's conclusion that the OPS would investigate and determine the veracity of Plaintiffs allegations. Finally, Plaintiff's actions upon his return from the hospital show that he relied on the understanding that the OPS investigation would adjudicate Plaintiff's claims. Instead of filing a new administrative grievance, Plaintiff asked the WSP Warden for copies of his statements to Ms. James and Special Agent Jordan.

Because Plaintiff relies on the GDC Policy in addition to Special Agent Jordan's verbal statement that the OPS Investigation replaces the normal grievance process, and Plaintiff alleged additional facts in *Wood II* that lend credibility to his argument that the normal grievance procedure did not apply, the district court erred in applying collateral estoppel. Based on these materially different facts, the exhaustion issue in *Wood I* and *Wood II* were not "identical" and Plaintiff's argument that the normal procedure did

not apply was not "actually litigated" in *Wood I*. *See CSX Transp.*, 327 F.3d at 1317 (citation omitted).

III. PLAINTIFF WAS NOT AFFORDED A FULL AND FAIR OPPORTUNITY TO LITIGATE THE EXHAUSTION ISSUE IN THE PRIOR ACTION.

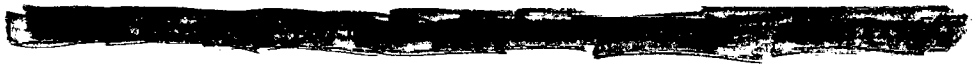
"Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court." *Allen*, 449 U.S. at 101. The party arguing for collateral estoppel has the burden to establish this "prerequisite[]" for collateral estoppel. *CSX Transp.*, 327 F.3d at 1317. However, this Court went further with the "full and fair opportunity" requirement, saying it is "the most significant consideration in determining whether to invoke collateral estoppel." *Hercules Carriers*, 768 F.2d at 1580.

The full and fair opportunity requirement considers whether Plaintiff had a sufficient "opportunity to procedurally, substantively, and evidentially to pursue his claim the first time." *Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 333 (1971). The court's decision on whether a party has had a full and fair opportunity to litigate "will necessarily rest on the trial court's sense of justice and equity." *Id.* at 334. Courts also consider whether there were significant procedural limitations in the first action. *See* Wright & Miller, *supra*, § 4423 ("A second general

concern reflected in the full and fair opportunity limitation of issue preclusion is that there may be substantial differences in the procedures available in different actions. . . . [D]ifferences in the rules of discovery or inability to make full use of discovery or evidence in the first forum may justify subsequent relitigation.").

Where there are disputed factual issues related to exhaustion, like here, the parties must be allowed to develop the record and present evidence, such as with an evidentiary hearing. *See Bryant*, 530 F.3d at 1376, 1376 n.14; *McIlwain v. Burnside*, 830 F. App'x 606, 611 (11th Cir. 2020); *see also Bradley v. Nagle*, 212 F.3d 559, 565 (11th Cir. 2000) (ruling "full and fair" opportunity to litigate a post-conviction Fourth Amendment claim also requires "at least one evidentiary hearing in a trial court").

This record on exhaustion was significantly less developed than other cases where this Court has found that the precluded party had a full and fair opportunity to litigate the issue in the previous case. *See, e.g., Hamze v. Cummings*, 652 F. App'x 876, 879 (11th Cir. 2016) (finding full and fair opportunity because the inmate "had ample opportunity to amass evidence and argue on summary judgment why his claims should survive the defendants' exhaustion defense"); *see also Hines v. Nazaire*, No. 5:15-CV-421 (MTT), 2017 WL 1156740, at *2-3 (M.D. Ga. Mar. 28, 2017) (finding the



inmate "had every opportunity to introduce credible evidence of the formal grievance that she claims to have submitted and claimed to have a receipt for").

In *Wood I*, Plaintiff twice requested the court appoint counsel to help Plaintiff obtain specific evidence, including the audio recording of Special Agent Jordan's interview of Plaintiff (which very well could settle the factual dispute about what she told Plaintiff regarding the grievance process), and to address "conflicting testimony" and "present evidence and cross examine expert witnesses." *Wood I*, Dkt. 54 at 2; *see also Wood I*, Dkt. 30. Plaintiff specifically tried to attack Special Agent Jordan's credibility given she may "share a common goal" with other GDC employees, who "may lie or even cover up for one another" or "could even mislead someone into not doing something like not filing a grievance." *Wood I*, Dkt. 62 at 3. Both of Plaintiff's requests for counsel were denied. *Wood I*, Dkt. 31; Dkt. 66.

With respect to Plaintiff's allegations against Special Agent Jordan, the magistrate judge in *Wood I* made a "credibility" determination—without any form of evidentiary hearing or adverse questioning—and the court concluded that Plaintiff's allegations are "not credible" because Special Agent's affidavit "contradicts Plaintiff's allegations of

misrepresentation." *Wood I*, Dkt. 66 at 12. The district court adopted the magistrate's credibility determination, but neither permitted Plaintiff counsel to review evidence or challenge the Defendants' claims and neither court held a hearing to evaluate the evidence of exhaustion.[6]

Because the court in *Wood I* refused to allow Plaintiff to develop the record by appointing counsel and did not hold any form of evidentiary hearing to test Defendants' allegations related to Special Agent Jordan, Plaintiff did not have a full and fair opportunity to litigate its exhaustion argument in *Wood I*.

IV. THERE IS REASON TO DOUBT THE QUALITY, EXTENSIVENESS, AND FAIRNESS OF PROCEDURES FOLLOWED IN THE PRIOR ACTION.

Collateral estoppel only applies where "there are no special considerations of fairness, relative judicial authority, changes of law, or the like, that warrant remission of the ordinary rules of preclusion." *Gjellum*, 829 F.2d at 1059 n.4 (citation omitted). "Redetermination of issues is

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[6] In applying collateral estoppel in *Wood II*, the district court noted that Plaintiff did not request an evidentiary hearing in *Wood I*. *See* Dkt. 61 at 7. Although Plaintiff did not specifically move for an evidentiary hearing, Plaintiff's filings—including but not limited to his two Motions to Appoint Counsel—sought to further discover evidence, challenge the Defendants' allegations on exhaustion, and further develop the record. The fact that Plaintiff, proceeding pro se and partially disabled, did not formally move for an evidentiary hearing does not mean that his other efforts to develop the record were meaningless.

warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979). A combination of factors here gives reason to doubt the quality and the fairness of applying collateral estoppel.

First, being a matter of abatement, to preclude Plaintiff from arguing the issue of exhaustion is essentially the same as precluding Plaintiff's entire suit. The punitive effect of applying collateral estoppel is a "consideration[] of fairness" against applying preclusion here. *Gjellum*, 829 F.2d at 1059 n.4 (citation omitted).

Second, the district court in *Wood I* concluded that Plaintiff did not exhaust his administrative remedies after denying Plaintiff's multiple requests to appoint counsel, without permitting the Plaintiff to develop the record, and without holding any evidentiary hearing to challenge Defendants' evidence on exhaustion. Because the procedures applied in *Wood I* were insufficient to allow Plaintiff to develop the record on exhaustion, the quality, extensiveness, and fairness of the court's ruling on exhaustion are likewise in doubt. *Montana*, 440 U.S. at 164 n.11.

Third, because the court in *Wood I* dismissed Plaintiff's claims "without prejudice," Plaintiff reasonably believed that he could file a new complaint with additional facts to combat the Defendants' exhaustion

defense. An underlying basis to apply collateral estoppel is that the precluded party could have appealed the adverse decision in the first action, but the court's dismissal *without prejudice* should not prevent Plaintiff from re-filing his claims alleging additional material facts. One factor for collateral estoppel is the incentive the estopped party had in fully litigating the prior action, *Johnson v. United States*, 576 F.2d 606, 614-15 (5th Cir. 1978), and the court dismissing *Wood I* without prejudice surely affected Plaintiff's incentive on appeal.

Fourth, this Court has twice held that preclusion does not apply in a case like this where the first decision was on a matter of abatement and not the merits. *See Howard*, 297 F. App'x at 940–41; *Sheet Metal Workers'*, 237 F. App'x at 548–49. To the extent this Court intends to clarify its rule in this case, Plaintiff was entitled to rely on the decisions above in electing to re-file his claim with additional facts disproving Defendants' exhaustion argument.

Finally, this Court should not interpret and apply collateral estoppel in a way "that will serve as a trap for the unwary pro se or poorly represented complainant." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 506 (1982) (Blackmun, J. dissenting). This appeal presents multiple difficult issues to determine whether collateral estoppel should apply to

Defendants' exhaustion defense. Courts (including this one) have inconsistently described the elements for collateral estoppel and other forms of preclusion, and there has been "continuing confusion over proper use of terms related to the preclusive effects of a prior adjudication." *Gjellum*, 829 F.2d at 1059 n.3. This Court has specifically warned of the difficulty "tread[ing] into the bramble bush of collateral estoppel." *Quinn*, 330 F.3d at 1328 (emphasis added).

By applying collateral estoppel in *Wood II*, the district court effectively charged Plaintiff, who is partially disabled, with navigating the "varying and, at times, seemingly conflicting terminology" on preclusion right after refusing to appoint counsel. *Gjellum*, 829 F.2d at 1059 n.3. Compounding with the issues in terminology, this case also raises additional questions specific to the application of collateral estoppel to exhaustion—i.e., whether matters of abatement or dismissals without prejudice lead to collateral estoppel. The fact that Plaintiff was not on notice that the determination in *Wood I* would be preclusive in *Wood II* invokes the principles of fairness that "warrant remission of the ordinary rules of preclusion." *Id.* at n.4 (citation omitted).

The paragraphs above outline several reasons this Court should refrain from applying collateral estoppel. On the other side of the scale, the

two purposes supporting collateral estoppel in most cases do not support preclusion here. Collateral estoppel "has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party . . . and of promoting judicial economy by preventing needless litigation." *CSX Transp.*, 327 F.3d at 1317 (citation omitted). Neither purpose supports precluding Plaintiff's claims here. Other than briefing on the Motions to Dismiss, the Defendants were not required to present evidence or submit to discovery on the exhaustion issue in *Wood I*, so allowing such an investigation and evidentiary hearing would not be duplicative. *See Westlands Water Dist.*, 850 F. Supp. at 1400. Moreover, judicial economy does not require dismissal. The district court dismissed Plaintiff's claims without prejudice in *Wood I*, seemingly recognizing Plaintiff should be able to re-state his claims with additional facts. Moreover, "[c]onsiderations of convenience and economy [supporting preclusion] must yield to a paramount concern for a fair and impartial trial." *In re Repetitive Stress Inj. Litig.*, 11 F.3d at 373 (alteration in original) (citation omitted).

There is reason to doubt the quality, extensiveness, and fairness of the procedures followed in *Wood I*, and there are special considerations of fairness, changes of law, or the like, that warrant remission of the ordinary

rules of preclusion. This court should exercise its discretion and permit Plaintiff his first real opportunity to make his case.

Conclusion

This court should reverse the district court's order dismissing Plaintiff's claims and remand for further proceedings to develop the factual record and present argument on exhaustion.

Respectfully submitted, this 20th day of September, 2022

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