[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-13359

Non-Argument Calendar

BRANDON CRAIG WOOD,

Plaintiff-Appellant

versus

WARDEN ERIC SELLERS,

Defendant,

SAMUELANDREWS,
C.E.R.T Officer,
MUBARAK BIN ASADI,
C.E.R.T Officer,
QUINTON RICHARDSON,

C.E.R.T Officer,
CHARLES WILLIAMS,
C.E.R.T Officer,
BENJAMIN BROWN,
C.E.R.T Officer, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Georgia
D.C. Docket No. 5:20-cv-00124-MTT-TQL

Before JILL PRYOR, BRANCH, and BRASHER, Circuit Judges.

PER CURIAM:

The issue in this appeal is whether the district court properly dismissed Brandon Wood's second lawsuit based on an alleged assault. Wood's first lawsuit alleged that he was attacked and injured by various prison officials while he was imprisoned in Georgia. *Wood v. Sellers*, No. 5:20-cv-00124 (M.D. Ga. filed May 27, 2020) ("*Wood I*"). The district court dismissed that suit because Wood failed to exhaust the administrative remedies available to him prior to filing it, as required by the Prison Litigation Reform Act. 42 U.S.C. § 1997e. Wood subsequently filed the present suit based on

the same contentions, and the district court dismissed it for failure to exhaust, explaining that Wood was precluded from relitigating the issue. For the reasons that follow, we affirm.

I. BACKGROUND

Wood alleges that he was attacked by prison guards in 2018 while he was being transported between prison facilities. Wood contends that during a stop, the transportation team directed the emergency response team to attack him. As a result, Wood was ultimately treated for facial nerve damage, hearing loss, a torn stomach muscle, and vision loss. A deputy warden also reported the incident to the Georgia Department of Corrections' Office of Professional Standards, and an agent from the office spoke with Wood at the hospital. Wood did not submit a grievance about the incident.

In *Wood I*, Wood filed a *pro se* complaint against corrections officers under the Eighth Amendment for excessive use of force. The Corrections officers moved to dismiss the suit, contending that Wood failed to exhaust all administrative remedies before filing suit. *See* 42 U.S.C. § 1997e(a). Wood responded that administrative remedies were unavailable to him for several reasons: he was in the hospital during the ten-day grievance filing window; he could not "easily or quickly" determine the Corrections officers' names; the assault was not a proper subject matter for a grievance; he submitted a written statement to a deputy warden in lieu of filing a grievance; and an agent from the standards office allegedly

told him that her investigation supplanted the normal grievance procedure (which she denied). The district court disagreed with Wood, concluded that he had failed to exhaust available administrative remedies, and dismissed the case without prejudice.

Two months later, Wood filed this suit, which also alleged excessive force under the Eighth Amendment against the same defendants. But he did not allege that he did anything new to exhaust administrative remedies between his first suit and the second suit. The defendants again moved to dismiss, arguing that Wood was precluded from re-arguing the issue of whether he had exhausted available administrative remedies. The district court appointed counsel to assist Wood with filing a response. In his response, Wood argued both that he had complied with the exhaustion requirement before his first suit and, alternatively, that no administrative remedies were available to him. The district court held that Wood was precluded from relitigating whether he had exhausted available administrative remedies and, once again, dismissed the case without prejudice. Wood timely appealed.

II. STANDARD OF REVIEW

The district court's application of issue preclusion is a question of law which we review *de novo*. *Griswold v. Cnty. of Hillsborough*, 598 F.3d 1289, 1292 (11th Cir. 2010).

III. DISCUSSION

Wood contends that he should have been allowed to relitigate whether he had exhausted available administrative remedies. He makes two arguments for this result. First, he argues that issue preclusion does not apply to matters not decided on the merits, and that the district court's dismissal without prejudice entitles him to relitigate the issue of exhaustion. Second, he contends that the elements of issue preclusion are not met here. We consider each of these arguments in turn.

Wood's first argument confuses issue preclusion with claim preclusion. The doctrine of issue preclusion prevents a losing party from relitigating a specific issue that was decided in a prior action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 324 (1979). The doctrine of claim preclusion is much broader; it bars the refiling of a claim that was raised, or that could have been raised, in a prior action. *See Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1187 (11th Cir. 2003). Here, the district court dismissed *Wood I* "without prejudice" because it concluded that it lacked jurisdiction due to Wood's failure to exhaust available administrative remedies. *See Alexander v. Hawk*, 159 F.3d 1321, 1326 (11th Cir. 1998) (citing *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975)). Such a without-prejudice jurisdictional dismissal does not preclude the same claims from being refiled. *See Davila*, 326 F.3d at 1188; *see also Howard v. Gee*, 297 F. App'x 939, 940 (11th Cir. 2008) (dismissal of a prisoner's first lawsuit on exhaustion grounds did not prevent him from raising the same claims in a subsequent suit). But the question

here is whether Wood may relitigate the *issue* of exhaustion, not whether he may bring the same, or similar, Eighth Amendment claims. And it is hornbook law that, when a suit is dismissed on jurisdictional grounds, such as "a requirement of prior resort to an administrative agency," "[t]he judgment remains effective to preclude relitigation of the precise issue of jurisdiction . . . that led to the initial dismissal." Wright & Miller, Federal Practice and Procedure § 4436.

Moving to Wood's second argument, we must address whether the district court was correct in holding that the elements for issue preclusion are satisfied. Under our issue prelusion precedents, an issue is precluded when: (1) the issue in the current and prior actions is identical; (2) the issue was actually litigated in the prior suit; (3) the determination of the issue was critical and necessary to the judgment in the prior action; and (4) the party against whom the doctrine is invoked had a full and fair opportunity to litigate the issue in the prior proceeding. *Hart v. Yamaha-Parts Distributors, Inc.*, 787 F.2d 1468, 1473 (11th Cir. 1986) (citing *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352, 1360 (11th Cir.1985)). Each of these requirements are satisfied here.

First, the issue here is identical to the issue in *Wood I*. An issue is identical to one that has already been litigated when the same facts and rule of law from the prior proceeding apply. *See generally B&B Hardware, Inc. v. Hargis Indus.*, 575 U.S. 138 (2015); *see also CSX Transp., Inc. v. Bhd. of Maint. of Way Emps.*, 327 F.3d 1309, 1317 (11th Cir. 2003) (explaining that issue preclusion "directs

our attention to the relative similarity of the facts of each case"). Wood argues that he has presented additional facts and context in this action that "lend credibility" to his arguments from the first action. But we do not see any daylight between the issues. As the district court explained, Wood did not take any alleged steps to exhaust between filing the two actions; he is simply arguing that the district court's initial ruling was wrong. Although some allegations are different between the two complaints, these factual differences are not materially significant to the exhaustion analysis. *See CSX Transp., Inc.*, 327 F.3d at 1318 (emphasizing that a "material difference in fact" is necessary).

Second, the issue was actually litigated in *Wood I*. An issue is actually litigated when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1267-1268 (2011) (quoting Restatement of Judgments § 27, cmt. d). The defendant raised the issue of whether Wood had exhausted available remedies in their motion to dismiss in *Wood I*. And Wood argued that no administrative remedies were available in his response to the motion to dismiss in *Wood I*. The district court expressly held that Wood had not exhausted available administrative remedies when it granted the motion to dismiss the prior suit.

Third, the issue was critical and necessary to the judgment in *Wood I*. The district court, quoting its own order from *Wood I*, stated that it "dismissed Wood's case for failure to exhaust available administrative remedies." Because the issue was integral to the

district court's dismissal determination, it was critical and necessary. *Cf. Lary v. Ansari*, 817 F.2d 1521, 1524 (11th Cir. 1987) (declining to conclude that an issue was necessary and critical because the prior judgment was too general).

Fourth, Wood had a full and fair opportunity to litigate the issue in *Wood I*. Wood argues to the contrary, complaining that the district court in *Wood I* did not appoint counsel, hold an evidentiary hearing, or give him a "sufficient opportunity to develop the record." He cites a passage from our decision in *Gjellum v. City of Birmingham*, where we explained that relitigation of otherwise precluded claims "may nevertheless be warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." 829 F.2d 1056, 1063 (11th Cir. 1987) (cleaned up). We believe the district court applied fundamentally fair procedures in ruling on the issue of exhaustion. Fairness did not require the district court to hold an evidentiary hearing or appoint counsel. And the district court did not prevent Wood from developing a record on exhaustion. Among other things, the district court forgave procedural improprieties relating to documents presented by Wood on the issue of availability, accepting two procedurally improper documents and allowing him to include additional factual allegations in his objection to the magistrate judge's report. *See Gorin v. Osborne*, 756 F.2d 834, 837 (11th Cir. 1985) (explaining that plaintiff had a full and fair opportunity to litigate because he was offered a "panoply of procedures" at the administrative level, "complemented by administrative as well as judicial

review" (quotation omitted)). The district court correctly determined that its previous dismissal for lack of exhaustion precluded relitigating the issue in a second suit.

IV. CONCLUSION

For the foregoing reasons, the district court's judgment is **AFFIRMED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

BRANDON CRAIG WOOD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:20-CV-124 (MTT)**
	)	
ERIC SELLERS, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

The defendants[1] have moved to dismiss Plaintiff Brandon Craig Wood's claims. Docs. 32; 36. In a previous lawsuit involving the same claims alleged here, the Court found that Wood failed to exhaust his available administrative remedies before filing suit and dismissed his lawsuit without prejudice. In this case, Wood raises no new facts to establish exhaustion; rather, he argues that the same facts now establish that he exhausted his available administrative remedies. Because collateral estoppel bars the relitigation of that issue, the defendants' motions are **GRANTED**.

I. PROCEDURAL AND FACTUAL BACKGROUND

Wood, a state prisoner, filed this lawsuit on March 27, 2020, alleging that he was beaten by various prison guards. Doc. 1 at 8-9. Wood alleges that the Transport

[1] There are two sets of defendants. The first set consists of Joseph Baxley and Sean Free ("Transport Defendants"), Henry County Sheriff's Deputies. The second set consists of Mubarak Bin Asadi, Miguel Josephs, Brian Walcott, Lekendrick Harden, Charles Williams, Samuel Andrews, Benjamin Brown, and Quinton Richardson ("CERT Defendants"), members of the Corrections Emergency Response Team ("CERT Team") at Georgia Diagnostic and Classification Prison. Both sets of defendants filed motions to dismiss.

Defendants, while transporting him from the Henry County Jail to Washington State Prison on May 3, 2018, stopped at Georgia Diagnostic and Classification Prison to drop off another prisoner. *Id.* at 8. While at Georgia Diagnostic and Classification Prison, Wood contends that the CERT Team Defendants, apparently at the Transport Defendants' instruction, attacked and injured Wood. *Id.*

United States Magistrate Judge Thomas Q. Langstaff screened Wood's complaint and recommended dismissing Wood's claims against Defendant Eric Sellers but allowing Wood's claims against the other defendants to proceed. Doc. 5. Wood did not object to his claims against Defendant Sellers being dismissed, and the Court adopted the Magistrate Judge's Recommendation. Doc. 21.

In July 2020, the defendants filed motions to dismiss arguing, among other things, that issue preclusion bars Wood's claims because he previously brought an identical lawsuit and, in that case, the Court found that Wood had not exhausted his available administrative remedies. Docs. 32 at 2; 36-1 at 9 n.3. On August 6, 2020, the Magistrate Judge ordered Wood to respond to the defendants' motions to dismiss within twenty-one days. Doc. 46. Wood requested more time to respond to the defendants' motions, and the Court granted Wood's request, extending his response deadline to October 26, 2020. Docs. 47; 48. Wood did not timely respond, so on January 6, 2021, the Court ordered him to show cause by January 27 why his case should not be dismissed for failure to prosecute. Doc. 49. Wood again did not timely respond, and the Magistrate Judge recommended dismissing Wood's action. Doc. 50. Finally, on February 17, 2021, Wood communicated with the Court. Doc. 51. Wood stated that he can no longer read or write because he is practically blind, and he requested that the

Court appoint him an attorney, which the Court did.[2] *Id.*; Doc. 52. Wood, through his attorney, responded to the defendants' motions to dismiss, and the defendants replied. Docs. 55; 59; 60.

II. STANDARD

The Federal Rules of Civil Procedure require that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). To avoid dismissal pursuant to Rule12(b)(6), a complaint must contain sufficient factual matter to "'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is facially plausible when "the court [can] draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "Factual allegations that are merely consistent with a defendant's liability fall short of being facially plausible." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012) (internal quotation marks and citations omitted).

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." *FindWhat Inv'r Grp. v. FindWhat.com.*, 658 F.3d 1282, 1296 (11th Cir. 2011) (internal quotation marks and citations omitted). But "conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Wiersum v. U.S. Bank, N.A.,* 785 F.3d 483, 485 (11th Cir. 2015) (internal quotation marks and citation omitted). The complaint must "give the defendant

[2] Joe Patrick Reynolds of the firm Kilpatrick Townsend & Stockton LLP represented Mr. Wood pro bono. On short notice, Mr. Reynolds stepped up and provided Mr. Wood excellent legal assistance, consistent with the highest traditions of the Bar. The Court expresses its sincere appreciation to Mr. Reynolds and the firm Kilpatrick Townsend & Stockton LLP.

fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (internal quotation marks and citation omitted). Where there are dispositive issues of law, a court may dismiss a claim regardless of the alleged facts. *Patel v. Specialized Loan Servicing, LLC*, 904 F.3d 1314, 1321 (11th Cir. 2018) (citations omitted).

III. DISCUSSION

The defendants argue that Wood failed to exhaust his administrative remedies before bringing this action. Docs. 32-1 at 2; 36-1 at 3. "[D]eciding a motion to dismiss for failure to exhaust administrative remedies is a two-step process." *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). "First, the court looks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, takes the plaintiff's versions of the facts as true." *Id.* If, taking plaintiff's facts as true, the defendant is entitled to dismissal for failure to exhaust, then the complaint should be dismissed. *Id.* "If the complaint is not subject to dismissal at the first step ... the court then proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion." *Id.* The defendant bears the burden of proof during this second step. *Id.* Like other matters in abatement, the Court may consider facts outside of the pleadings to resolve factual disputes about whether a plaintiff has exhausted available administrative remedies. *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008).

The defendants further argue that because the Court previously found that Wood failed to exhaust his available administrative remedies for the incident he alleges in his complaint, collateral estoppel requires dismissal his claims. Docs. 32-1 at 2; 59 at 7-9.

Wood's prior lawsuit was based on the same facts as his current lawsuit. In the former case, Wood alleged that while being transported from the Henry County Jail to Washington State Prison on May 3, 2018, the Transport Defendants stopped at Georgia Diagnostic and Classification Prison.[3] *Wood v. Sellers*, No. 5:19-cv-41 MTT-CHW (M.D. Ga.) ("*Wood I*") Docs. 1 at 3-4; 42 at 1-3. In *Wood I*, Wood alleged that the Transport Defendants allowed the CERT Defendants to take him out of the transport vehicle and into an area that was off camera. *Wood I*, Docs. 1 at 2; 42 at 2. Once out of sight, Wood alleged that the CERT Defendants beat him severely, causing a busted ear drum, eye damage, and a torn stomach muscle. *Wood I*, Docs. 1 at 2; 42 at 2-3. In this case, Wood's complaint is based on the same events. Doc. 1 at 8-9.

In *Wood I*, the Court found that Wood had failed to exhaust his available administrative remedies. Specifically, the Court found that "the record refutes [Wood's] arguments that the prison grievance process was not available to him, and [Wood] acknowledges that he did not in fact exhaust the grievance process prior to filing suit." *Wood I*, Doc. 66 at 12 (Recommendation adopted at Doc. 68). In sum, the Court previously found that Wood had not exhausted his available administrative remedies before filing suit, and now he has filed suit again based on the same allegations as before.

"Collateral estoppel bars relitigation of a previously decided issue when the parties are the same (or in privity) if the party against whom the issue was decided had

[3] The Court may take judicial notice of the record in a prior case when considering a motion to dismiss based on collateral estoppel. *Lozman v. City of Rivera Beach*, 713 F.3d 1066, 1075 n.9 (11th Cir. 2013); *Horne v. Potter*, 392 F. App'x 800, 802 (11th Cir. 2010).

a full and fair opportunity to litigate the issue in the earlier proceeding." *In re Se. Banking Corp.*, 69 F.3d 1539, 1552 (11th Cir. 1995). For collateral estoppel to apply:

> (1) the issue at stake must be identical to the one decided in the prior litigation; (2) the issue must have been actually litigated in the prior proceeding; (3) the prior determination of the issue must have been a critical and necessary part of the judgment in that earlier decision; and (4) the standard of proof in the prior action must have been at least as stringent as the standard of proof in the later case.

Id. (citation omitted).

Each of the elements of collateral estoppel, or issue preclusion, is satisfied here. First, the issue in this case, whether Wood exhausted his available administrative remedies for the defendants' alleged actions on May 3, 2018, is the identical issue the Court decided in *Wood I*.[4] *Wood I*, Docs. 66 at 10-13; 68. Second, this issue was actually litigated in the first lawsuit. In *Wood I*, three motions to dismiss were filed, and failure to exhaust administrative remedies was argued in each motion. *Wood I*, Docs. 37-1 at 3-4; 43-1 at 5-13; 60-1 at 4. In response to these motions, Wood argued that the grievance process was not available to him because Agent Tomekia Jordan told him the normal process was inapplicable to his situation, so, according to Wood, his case should not be dismissed for failure to exhaust administrative remedies. *Wood I*, Docs. 51 at 1-2; 62 at 2-3; 64 at 1-2. Accordingly, this issue was actually litigated in *Wood I*. Third, the Court's determination of this issue was critical and necessary to the judgment in *Wood I* because the Court dismissed Wood's case for failure to exhaust available administrative remedies. *Wood I*, Docs. 66 at 12; 68. Finally, the standard of proof in the prior action was the same as the standard of proof here.

[4] Because *Wood I* was dismissed without prejudice, Wood *conceivably* could have taken steps to exhaust—although it's unlikely he could have *timely* exhausted at that point—and then refiled. But that is not what he did. He is simply arguing the same facts he argued before.

In response to the defendants' argument that issue preclusion bars the relitigation of the exhaustion issue, Wood contends that he did not have a "full and fair opportunity to litigate the issue in the earlier proceeding."[5] Doc. 55 at 14 (quoting *In re Se. Banking Corp.*, 69 F.3d at 1552). Wood argues that in *Wood I* he was not allowed to "develop the factual record on the disputed factual issue related to exhaustion." *Id.* at 16. But Wood filed an amended complaint, multiple responsive filings, and affidavits in response to the defendants' exhaustion defense. *Wood I*, Docs. 42; 51; 62; 64; 67; 42-1; 51-1; 51-2. Moreover, after the first motion to dismiss in *Wood I*, the Court explicitly informed Wood that "this is his opportunity to 'develop the record,'" and that he may "submit any affidavits and/or documents showing he has exhausted." *Wood I*, Doc. 39 at 2 (citing *Bryant v. Rich*, 530 F.3d 1368, 1376 (11th Cir. 2008)). The Court reviewed each of Wood's responses before concluding that Wood had failed to exhaust his available administrative remedies. *Wood I*, Docs. 66; 68. Accordingly, the Court finds that Wood had a full and fair opportunity to develop the record and that the issue of exhaustion was actually litigated in *Wood I*.

Wood also argues that he was not given the opportunity to develop the record because he did not receive an evidentiary hearing. Doc. 55 at 17. But Wood did not request an evidentiary hearing in *Wood I*. *Wood I*, Docs. 51; 62; 64.

Finally, Wood argues that because in *Wood I* his objection to the Magistrate Judge's Recommendation was construed as a motion to amend the complaint, and the Court granted that motion to amend, he should have been allowed to develop the record

[5] Wood also states that the defendants did not argue in their original motion briefs that Wood had a full and fair opportunity to litigate the issue of exhaustion. Doc. 55 at 15. Although the defendants may not have individually addressed and argued each element of their issue preclusion defense, they did raise the defense and at least argued that the doctrine applies. Docs. 32-1 at 2-3; 36-1 at 9 n.3.

as to the newly alleged facts. Doc. 55 at 17 n. 7. However, Wood did not allege materially new facts concerning exhaustion, and the Court noted this by describing Wood's facts concerning exhaustion as his "latest version of his conversation with Office of Professional Standards Agent Jordan[.]" *Wood I*, Doc. 68 at 1 n.1. In the objection, Wood realleged that Agent Jordan told him that because she was involved, normal administrative remedies were inapplicable to his situation—the same allegation that Wood hinged his availability argument on throughout the litigation of *Wood I* and that the Magistrate Court's Recommendation thoroughly addressed and found to be not credible.[6] *Wood I*, Docs. 1 at 4; 42 at 5; 42-1; 51 at 1; 64 at 2; 66 at 11-12. Because Wood merely reiterated the same theory that he was not required to exhaust, Wood was not entitled to yet another opportunity to present evidence or to develop the record.

Because in *Wood I* the Court found that Wood failed to exhaust his available administrative remedies arising out of the May 3, 2018 incident and each element of collateral estoppel is satisfied, Wood may not relitigate that issue.

IV. CONCLUSION

For the reasons stated above, the defendants' motions to dismiss (Docs. 32; 36) are **GRANTED**, and Wood's complaint is **DISMISSED** without prejudice.

SO ORDERED, this 27th day of August, 2021.

S/ Marc T. Treadwell
MARC T. TREADWELL, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[6] In the objection, Wood detailed a conversation he had with Agent Jordan. Wood alleged Jordan told him that "now that she was involved she superseded any normal administrative remedies." *Wood I*, Doc. 67 at 5. This is nearly identical to Wood's allegation in his amended complaint: "I was met by Special Agent Tomekia Jordan who ... informed me that ... normal administrative remedies would not work[.]" *Wood I*, Doc. 42 at 3.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

BRANDON CRAIG WOOD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:20-CV-124 (MTT)**
	)	
Warden ERIC SELLERS, *et al.*,	)	
	)	
Defendants.	)	
	)	

ORDER

After reviewing Plaintiff Brandon Wood's complaint (Doc. 1) pursuant to 28 U.S.C. § 1915A, United States Magistrate Judge Thomas Q. Langstaff allowed the Plaintiff's excessive force claims against Defendants Samuel Andrews, Mubarak Bing Asadi, Quinton Richardson, Charles Williams, Benjamin Brown, Miguel Josephs, Lekendrick Harden, and Brian Walcott; failure to intervene claims, deliberate indifference to safety, and retaliation against Sean Free and Joseph Baxley; and deliberate indifference to a serious medical need claim against Andrews, Bin Asadi, Richardson, Williams, Brown, Josephs, Harden, Walcott, Free, and Baxley to go forward. Doc. 5. Judge Langstaff also recommends that the Plaintiff's claims against Defendant Warden Eric Sellers be dismissed without prejudice. *Id.* The Plaintiff has not objected to the Recommendation. The Court has reviewed the Recommendation and accepts and adopts the Magistrate Judge's findings, conclusions, and recommendations. The Recommendation (Doc. 5) is **ADOPTED** and made the order of

this Court. Accordingly, the Plaintiff's claims against Sellers are **DISMISSED without prejudice**, and Sellers is **TERMINATED** as a party in this suit.

SO ORDERED, this 9th day of June, 2020.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

BRANDON CRAIG WOOD,	:	
	:	
Plaintiff,	:	
	:	
v.	:	
	:	**No. 5:20-cv-00124-MTT-TQL**
WARDEN ERIC SELLERS, *et al.*,	:	
	:	
Defendants.	:	
	:	

ORDER & RECOMMENDATION

Plaintiff Brandon Craig Wood, a prisoner in Washington State Prison in Davisboro, Georgia, has filed a complaint in this Court pursuant to 42 U.S.C. § 1983. Compl., ECF No. 1. He has also moved for leave to proceed in this action without prepayment of the Court's filing fees. Mot. for Leave to Proceed *In Forma Pauperis*, ECF No. 2. As discussed below, Plaintiff's motion for leave to proceed *in forma pauperis* is **GRANTED**, and thus, Plaintiff's complaint is ripe for preliminary review.

On preliminary review, Plaintiff will be allowed to proceed for further factual development on his claims for excessive force against Defendant CERT Team Officers Samuel Andrews, Mubarak Bin Asadi, Quinton Richardson, Charles Williams, Benjamin Brown, Miguel Josephs, Lekendrick Harden, and Brian Walcott; failure to intervene, deliberate indifference to safety, and retaliation against Henry County Sheriff's Deputies Sean Free and Joseph Baxley; and deliberate indifference to a serious medical need against Andrews, Bin Asadi, Richardson, Williams, Brown, Josephs, Harden, Walcott, Free, and Baxley. Conversely, it is **RECOMMENDED** that Plaintiff's claims against Defendant

Warden Eric Sellers be **DISMISSED WITHOUT PREJUDICE** for failure to state a claim.

I. Motion to Proceed *In Forma Pauperis*

Any court of the United States may authorize the commencement a civil action, without prepayment of the required filing fee (*in forma pauperis*), if the plaintiff shows that he is indigent and financially unable to pay the court's filing fee. *See* 28 U.S.C. § 1915(a). A prisoner wishing to proceed under § 1915 must provide the district court with both (1) an affidavit in support of his claim of indigence, and (2) a certified copy of his prison "trust fund account statement (or institutional equivalent) for the 6-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(1)-(2).

As permitted by this provision, Plaintiff has moved for leave to proceed *in forma pauperis* in this case. Mot. for Leave to Proceed *In Forma Pauperis*, ECF No. 2. Upon review of his submissions, it appears that Plaintiff is unable to prepay any portion of the Court's filing fee. Therefore, Plaintiff's motion for leave to proceed *in forma pauperis* is **GRANTED**, and Plaintiff's complaint is ripe for preliminary screening.[1] Plaintiff is, however, still obligated to eventually pay the full balance of the filing fee, in installments, as set forth in § 1915(b). The district court's filing fee is not refundable, regardless of the outcome of the case, and must therefore be paid in full even if Plaintiff's complaint is dismissed prior to service.

[1]A review of court records on the U.S. District Web PACER Docket Report reveals that Plaintiff has accrued no strikes for the purposes of 28 U.S.C. § 1915(g).

For this reason, the **CLERK** is **DIRECTED** to forward a copy of this Order to the business manager of the facility in which Plaintiff is incarcerated so that withdrawals from his account may commence as payment towards the filing fee, as explained below.

A. Directions to Plaintiff's Custodian

Because Plaintiff has now been granted leave to proceed *in forma pauperis* in the above-captioned case, it is hereby **ORDERED** that the warden of the institution wherein Plaintiff is incarcerated, or the Sheriff of any county wherein he is held in custody, and any successor custodians, each month cause to be remitted to the **CLERK** of this Court twenty percent (20%) of the preceding month's income credited to Plaintiff's trust account at said institution until the $350.00 filing fee has been paid in full. The funds shall be collected and withheld by the prison account custodian who shall, on a monthly basis, forward the amount collected as payment towards the filing fee, provided the amount in the prisoner's account exceeds $10.00. The custodian's collection of payments shall continue until the entire fee has been collected, notwithstanding the dismissal of Plaintiff's lawsuit or the granting of judgment against him prior to the collection of the full filing fee.

B. Plaintiff's Obligations Upon Release

An individual's release from prison does not excuse his prior noncompliance with the provisions of the PLRA. Thus, in the event Plaintiff is hereafter released from the custody of the State of Georgia or any county thereof, he shall remain obligated to pay those installments justified by the income to his prisoner trust account while he was still incarcerated. The Court hereby authorizes collection from Plaintiff of any balance due on

these payments by any means permitted by law in the event Plaintiff is released from custody and fails to remit such payments. Plaintiff's Complaint may be dismissed if he is able to make payments but fails to do so or if he otherwise fails to comply with the provisions of the PLRA.

II. Preliminary Review of Plaintiff's Complaint

Because Plaintiff is a prisoner "seeking redress from a governmental entity or [an] officer or employee of a governmental entity," the Court is required to conduct a preliminary review of Plaintiff's complaint. See 28 U.S.C. § 1915A(a) (requiring the screening of prisoner cases) & 28 U.S.C. § 1915(e) (regarding *in forma pauperis* proceedings). When performing this review, the district court must accept all factual allegations in the complaint as true. *Brown v. Johnson*, 387 F.3d 1344, 1347 (11th Cir. 2004). *Pro se* pleadings are also "held to a less stringent standard than pleadings drafted by attorneys," and thus, *pro se* claims are "liberally construed." *Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998). Still, the Court must dismiss a prisoner complaint if it "(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. §1915A(b).

A claim is frivolous if it "lacks an arguable basis either in law or in fact." *Miller v. Donald*, 541 F.3d 1091, 1100 (11th Cir. 2008) (internal quotation marks omitted). The Court may dismiss claims that are based on "indisputably meritless legal" theories and "claims whose factual contentions are clearly baseless." *Id.* (internal quotation marks

omitted). A complaint fails to state a claim if it does not include "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The factual allegations in a complaint "must be enough to raise a right to relief above the speculative level" and cannot "merely create[] a suspicion [of] a legally cognizable right of action." *Twombly*, 550 U.S. at 555 (first alteration in original). In other words, the complaint must allege enough facts "to raise a reasonable expectation that discovery will reveal evidence" supporting a claim. *Id.* at 556. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678.

To state a claim for relief under §1983, a plaintiff must allege that (1) an act or omission deprived him of a right, privilege, or immunity secured by the Constitution or a statute of the United States; and (2) the act or omission was committed by a person acting under color of state law. *Hale v. Tallapoosa Cty.*, 50 F.3d 1579, 1582 (11th Cir. 1995). If a litigant cannot satisfy these requirements or fails to provide factual allegations in support of his claim or claims, the complaint is subject to dismissal. *See Chappell v. Rich*, 340 F.3d 1279, 1282-84 (11th Cir. 2003).

A. Plaintiff's Complaint

In his complaint, Plaintiff asserts that, on May 3, 2018, Plaintiff was at the Henry County Jail, and there was some confusion as to whether he was to remain there or return to Washington State Prison, where he is generally housed. Compl. 8, ECF No. 1. When

the confusion was cleared up, it was determined that Plaintiff would be taken with another inmate to Washington State Prison by Defendants Henry County Sheriff's Deputies Sean Free and Joseph Baxley. *Id.* Before leaving, the other inmate had said that he needed his medications, and Plaintiff jokingly suggested that jail staff was trying to kill the other inmate. *Id.* In response, Free and Baxley said that they had "something" planned for Plaintiff for "trying to start something." *Id.*

During the transport, the patrol car smelled strongly of vodka and the officer drove erratically, scaring Plaintiff and the other inmate. *Id.* Rather than take Plaintiff directly to Washington State Prison, the officers took Plaintiff to the Georgia Diagnostic and Classification Prison ("GDCP"), where they were met by Defendants CERT team officers Samuel Andrews, Mubarak Bin Asadi, Quinton Richardson, Charles Williams, Benjamin Brown, Miguel Josephs, Lekendrick Harden, and Brian Walcott. *Id.* Free and Baxley said to the CERT team officers, "that's them, get them, 'cause we can't touch them." *Id.* at 8-9. One of the officers responded, "you can't, but we can." *Id.* at 9.

Plaintiff and the other inmate were then escorted, in handcuffs, to an area in GDCP where they were not on camera. *Id.* Once inside, the officers severely beat Plaintiff with their fists, a metal rod, and a baton. *Id.* Plaintiff was knocked unconscious, his eye was injured, and he was bleeding. *Id.* When Plaintiff woke up, Free and Baxley were in the room asking for jumpsuits and handcuffs. *Id.* At that point, Plaintiff needed medical attention for his injuries, which were visible and obvious, but no one would take Plaintiff for medical attention. *Id.* Instead, hours later, Plaintiff was put on a bus back to

Washington State Prison. *Id.*

At Washington State Prison, Plaintiff told officers what had happened, and they reported it to the Deputy Warden of Security, who took pictures of Plaintiff's injuries. *Id.* at 9-10. Plaintiff was given medical attention and made a written statement. *Id.* at 10. Thereafter, it was determined that Plaintiff would need outside medical treatment. *Id.* At the hospital, Plaintiff was interviewed by an internal affairs officer before being evaluated and treated for his injuries. *Id.* at 10-11. The medical staff found that Plaintiff had a busted eardrum, a torn stomach muscle, and a laceration in his eyebrow. *Id.* at 11. He was given pain medication and sent back to Washington State Prison. *Id.* After his return, GDCP Warden Eric Sellers attempted to call Plaintiff, but Plaintiff declined to speak to Warden Sellers, noting that he had given a written statement. *Id.* at 12.

Thereafter, Plaintiff continued to have medical visits for ongoing problems with his ear and eye. *Id.* Plaintiff still has ringing in his ear and hearing loss. *Id.* He has also needed surgery on his eye, which continues to lose vision and is sensitive to light, such that Plaintiff will have to wear sunglasses for the rest of his life. *Id.* at 12-13. Additionally, Plaintiff has seen a neurologist, who determined that Plaintiff had been suffering from a concussion for more than a year. *Id.* Plaintiff will have to continue to take medicine and have doctor appointments for the conditions caused by the beating. *Id.* Most recently Plaintiff has had unexplained bleeding, for which he is trying to get an appointment with a throat specialist. *Id.*

Plaintiff filed this complaint alleging that all of the CERT team members violated

his Eighth Amendment rights by beating him. *Id.* at 14. Additionally, Plaintiff asserts that Free and Baxley violated his Eighth Amendment rights by allowing the beating to happen and retaliated against him for making a comment to the other inmate. *Id.* at 13-14. Plaintiff further contends that Free, Baxley, and the CERT team members further violated Plaintiff's Eighth Amendment rights by denying him medical treatment. *Id.* Finally, he asserts that Sellers is responsible for allowing the beating to happen. *Id.* at 14.

1. Excessive Force

Plaintiff's allegations that the CERT team officers beat Plaintiff with their fists and weapons potentially raise a claim for excessive force. The Eighth Amendment clearly prohibits the unnecessary and wanton infliction of pain, the infliction of pain without penological justification, and the infliction of pain grossly disproportionate to the severity of the offense. *Ort v. White*, 813 F.2d 318, 321 (11th Cir. 1987) (citing *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). To state an Eighth Amendment claim in this context, a plaintiff must allege conduct by a defendant that was objectively harmful enough to establish a constitutional violation and that the defendant acted with a sufficiently culpable state of mind, *i.e.*, that the defendant acted maliciously and sadistically to cause harm. *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992).

Accepting Plaintiff's allegations as true, they suggest that the officers severely beat him in response to making an offhand joke regarding another inmate's treatment, which appears to be infliction of pain without penological justification or infliction of pain grossly disproportionate to the offense. Thus, Plaintiff's allegations are sufficient to allow him to

proceed on an excessive force claim against CERT team officers Samuel Andrews, Mubarak Bin Asadi, Quinton Richardson, Charles Williams, Benjamin Brown, Miguel Josephs, Lekendrick Harden, and Brian Walcott.

2. Failure to Intervene and Deliberate Indifference to Safety

Plaintiff's claims relating to Free and Baxley's involvement in the beating could be construed as claims for deliberate indifference to safety, and failure to intervene. To state an Eighth Amendment claim for exposure to unsafe conditions, a prisoner must allege facts to show the existence of a prison condition that is extreme and poses an unreasonable risk the prisoner's health or safety. *See Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004). Additionally, the prisoner must allege facts to show that the defendant acted with deliberate indifference to the condition, which requires that the defendant knew that an excessive risk to health or safety existed but disregarded that risk. *Id.* at 1289-90. An officer who is present and in a position to intervene to prevent another officer's use of excessive force may be held liable for the failure to take reasonable steps to protect a victim of excessive force. *Hadley v. Gutierrez*, 526 F.3d 1324, 1331 (11th Cir. 2008).

Here, Plaintiff's allegations that Free and Baxley brought Plaintiff to GDCP and handed him over to the CERT Team, along with the comments they made at the handoff, suggest that Free and Baxley knew that they were putting Plaintiff in a situation where his health and safety were at risk. Additionally, it appears that Free and Baxley may have been in a position to prevent the beating from occurring, but intentionally did not do so. Accordingly, Plaintiff will be allowed to proceed against Free and Baxley for further

factual development on his claims for deliberate indifference to safety and failure to intervene.

3. Retaliation

Plaintiff also suggests that Free and Baxley orchestrated the beating in retaliation for the remark Plaintiff made to the other inmate that jail staff was trying to kill him. "The First Amendment forbids prison officials from retaliating against prisoners for exercising the right of free speech." *Farrow*, 320 F.3d at 1248. Thus, a prisoner litigant may state a claim for retaliation by alleging that he engaged in constitutionally protected speech, he suffered an adverse action likely to "deter a person of ordinary firmness from engaging in such speech," and there was a causal relationship between the speech and the retaliatory action. *Smith v. Mosley*, 532 F.3d 1270, 1276 (11th Cir. 2008).

Here, accepting the allegations as true and construing them broadly in Plaintiff's favor, Plaintiff's allegations suggest that Free and Baxley arranged for Plaintiff to be severely beaten as a consequence for him jokingly suggesting that prison officials were trying to kill another inmate by denying him his medication. These facts arguably show an adverse action taken in response to Plaintiff's speech. At this stage, it is not clear whether Plaintiff's speech rose to the level of constitutionally protected speech. Generally, prisoner speech lodging grievances relating to prison conditions has been held to be constitutionally protected speech, whereas "false and insubordinate remarks" have not been considered to be protected. *See Smith v. Mosley*, 532 F.3d 1270, 1276-77 (11th Cir. 2008).

Plaintiff's comments in this regard appear to potentially fall somewhere in between these two extremes. Construing the allegations in Plaintiff's favor, he was jokingly making a comment about another inmate's treatment by prison officials. While this does not appear to rise to the level of an actual grievance, even an informal one, it could be considered speech relating to the conditions of the prison. Moreover, on the other end of the spectrum, the speech does not appear, on the face of the complaint, to have been insubordination or otherwise against a prison rule. Thus, the Court cannot say at this stage of the proceedings that this claim is frivolous, and Plaintiff will also be permitted to proceed for further factual development on his retaliation claim against Free and Baxley.

4. Deliberate Indifference to a Serious Medical Need

Plaintiff next alleges that Free, Baxley, Andrews, Bin Asadi, Richardson, Williams, Brown, Josephs, Harden, and Walcott were deliberately indifferent to his serious medical needs following the beating. In order to state such a claim, a prisoner must allege facts to show that he had a medical need that was objectively serious and that the defendant was deliberately indifferent to that need. *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003). 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." *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir. 1994) (quotation marks and citation omitted). Further, the condition must be one that would pose a "substantial risk of serious harm" if left unattended. *Farrow*, 40 F.3d at 1243.

An official acts with deliberate indifference when he or she "knows of and disregards an excessive risk to inmate health and safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Additionally, the disregard of risk must be "by conduct that is more than mere negligence." *Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011). "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.*

Here, Plaintiff alleges that he sustained injuries in the beating that required medical attention at the hospital and that continue to create health issues for him. Moreover, he alleges that it was clear immediately following the beating that he had sustained severe injuries that required medical attention, but no one got Plaintiff such attention until hours later, after he was returned to Washington State Prison. Accepting these allegations as true, Plaintiff's allegations are sufficient to allow his deliberate indifference to his serious medical need claims to proceed for further factual development as to Free, Baxley, Andrews, Bin Asadi, Richardson, Williams, Brown, Josephs, Harden, and Walcott.

5. Warden Eric Sellers

Finally, Plaintiff asserts that Defendant GDCP Warden Eric Sellers is responsible for allowing the beating to occur. In his statement of facts, Plaintiff's only specific

allegation with regard to Warden Sellers is that he tried to call Plaintiff after the beating occurred and Plaintiff had returned to Washington State Prison.

"[S]ection 1983 requires proof of an affirmative causal connection between the actions taken by a particular person under color of state law and the constitutional deprivation." *LaMarca v. Turner*, 995 F.2d 1526, 1538 (11th Cir. 1993) (internal quotation marks and citations omitted). A district court properly dismisses a defendant where a prisoner, other than naming the defendant in the caption of the complaint, fails to state any allegations that connect the defendant with the alleged constitutional violation. *Douglas v. Yates*, 535 F.3d 1316, 1322 (11th Cir. 2008) (citing *Pamel Corp. v. P.R. Highway Auth.*, 621 F.2d 33, 36 (1st Cir. 1980)). Insofar as Plaintiff has not alleged facts connecting Warden Sellers to the beating, he has not stated a claim for relief against this defendant.

Moreover, to the extent that Plaintiff may be attempting to state a claim against Warden Sellers based on his supervisory position, a prisoner cannot state a § 1983 claim based on a theory of respondeat superior or vicarious liability. *Miller v. King*, 384 F.3d 1248, 1261 (11th Cir. 2004). Instead, to state a claim against a supervisory official, a prisoner must allege facts showing either that the supervisor personally participated in the alleged constitutional violation or that there is a causal connection between the actions of the supervising official and the alleged constitutional deprivation. *H.C. by Hewett v. Jarrard*, 786 F.2d 1080, 1086-87 (11th Cir. 1986). This may be done by alleging that the official either "(1) instituted a custom or policy which resulted in a violation of the

plaintiff's constitutional rights; (2) directed his subordinates to act unlawfully; or (3) failed to stop his subordinates from acting unlawfully when he knew they would." *Gross v. White*, 340 F. App'x 527, 531 (11th Cir. 2009) (per curiam) (citing *Goebert v. Lee County*, 510 F.3d 1312, 1331 (11th Cir. 2007)).

Here, Plaintiff alleges no facts suggesting that Warden Sellers personally participated in any violation of Plaintiff's constitutional rights. Further, Plaintiff does not allege any facts suggesting that Warden Sellers knew that the beating was going to occur or was responsible for a custom or policy that led to the attack on Plaintiff. Accordingly, Plaintiff has not stated a claim against this defendant, and it is **RECOMMENDED** that the claim against Defendant Warden Eric Sellers be **DISMISSED WITHOUT PREJUDICE** for failure to state a claim.

B. Conclusion

Thus, for the reasons discussed above, Plaintiff will be allowed to proceed for further factual development on his claims for excessive force against Defendant CERT Team Officers Samuel Andrews, Mubarak Bin Asadi, Quinton Richardson, Charles Williams, Benjamin Brown, Miguel Josephs, Lekendrick Harden, and Brian Walcott; failure to intervene, deliberate indifference to safety, and retaliation against Henry County Sheriff's Deputies Sean Free and Joseph Baxley; and deliberate indifference to a serious medical need against Andrews, Bin Asadi, Richardson, Williams, Brown, Josephs, Harden, Walcott, Free, and Baxley. Conversely, it is **RECOMMENDED** that Plaintiff's claim against Defendant Warden Eric Sellers be **DISMISSED WITHOUT PREJUDICE** for

failure to state a claim.

III. Right to File Objections

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to any recommendation with the United States District Judge to whom this case is assigned **WITHIN FOURTEEN (14) DAYS** after being served with a copy of this Order and Recommendation. The parties may seek an extension of time in which to file written objections, provided a request for an extension is filed prior to the deadline for filing written objections. Failure to object in accordance with the provisions of § 636(b)(1) waives the right to challenge on appeal the district judge's order based on factual and legal conclusions to which no objection was timely made. *See* 11th Cir. R. 3-1.

IV. Order for Service

For those reasons discussed above, it is hereby **ORDERED** that service be made on **DEFENDANTS SAMUEL ANDREWS, MUBARAK BIN ASADI, QUINTON RICHARDSON, CHARLES WILLIAMS, BENJAMIN BROWN, MIGUEL JOSEPHS, LEKENDRICK HARDEN, BRIAN WALCOTT, SEAN FREE and JOSEPH BAXLEY**, and that they file an Answer, or other response as appropriate under the Federal Rules, 28 U.S.C. § 1915, and the Prison Litigation Reform Act. Defendants are also reminded of the duty to avoid unnecessary service expenses, and the possible imposition of expenses for failure to waive service.

DUTY TO ADVISE OF ADDRESS CHANGE

During this action, all parties shall at all times keep the Clerk of this Court and all

opposing attorneys and/or parties advised of their current address. Failure to promptly advise the Clerk of any change of address may result in the dismissal of a party's pleadings.

DUTY TO PROSECUTE ACTION

Plaintiff must diligently prosecute his Complaint or face the possibility that it will be dismissed under Rule 41(b) for failure to prosecute. Defendants are advised that they are expected to diligently defend all allegations made against them and to file timely dispositive motions as hereinafter directed. This matter will be set down for trial when the Court determines that discovery has been completed and that all motions have been disposed of or the time for filing dispositive motions has passed.

FILING AND SERVICE OF MOTIONS, PLEADINGS, AND CORRESPONDENCE

It is the responsibility of each party to file original motions, pleadings, and correspondence with the Clerk of Court. A party need not serve the opposing party by mail if the opposing party is represented by counsel. In such cases, any motions, pleadings, or correspondence shall be served electronically at the time of filing with the Court. If any party is not represented by counsel, however, it is the responsibility of each opposing party to serve copies of all motions, pleadings, and correspondence upon the unrepresented party and to attach to said original motions, pleadings, and correspondence filed with the Clerk of Court a certificate of service indicating who has been served and where (i.e., at what address), when service was made, and how service was accomplished (i.e., by U.S. Mail, by personal service, etc.).

DISCOVERY

Plaintiff shall not commence discovery until an answer or dispositive motion has been filed on behalf of Defendant from whom discovery is sought by Plaintiff. Defendants shall not commence discovery until such time as an answer or dispositive motion has been filed. Once an answer or dispositive motion has been filed, the parties are authorized to seek discovery from one another as provided in the Federal Rules of Civil Procedure. Plaintiff's deposition may be taken at any time during the time period hereinafter set out, provided that prior arrangements are made with his custodian. Plaintiff is hereby advised that failure to submit to a deposition may result in the dismissal of his lawsuit under Fed. R. Civ. P. 37 of the Federal Rules of Civil Procedure.

IT IS HEREBY ORDERED that discovery (including depositions and the service of written discovery requests) shall be completed within 90 days of the date of filing of an answer or dispositive motion by Defendants (whichever comes first) unless an extension is otherwise granted by the Court upon a showing of good cause therefor or a protective order is sought by Defendants and granted by the Court. This 90-day period shall run separately as to each Defendant beginning on the date of filing of each Defendant's answer or dispositive motion (whichever comes first). The scheduling of a trial may be advanced upon notification from the parties that no further discovery is contemplated or that discovery has been completed prior to the deadline.

Discovery materials shall <u>not</u> be filed with the Clerk of Court. No party shall be required to respond to any discovery not directed to him or served upon him by the

opposing counsel/party. The undersigned incorporates herein those parts of the Local Rules imposing the following limitations on discovery: except with written permission of the Court first obtained, INTERROGATORIES may not exceed TWENTY-FIVE (25) to each party, REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS under Rule 34 of the Federal Rules of Civil Procedure may not exceed TEN (10) requests to each party, and REQUESTS FOR ADMISSIONS under Rule 36 of the Federal Rules of Civil Procedure may not exceed FIFTEEN (15) requests to each party. No party is required to respond to any request which exceed these limitations.

REQUESTS FOR DISMISSAL AND/OR JUDGMENT

Dismissal of this action or requests for judgment will not be considered by the Court in the absence of a separate motion accompanied by a brief/memorandum of law citing supporting authorities. Dispositive motions should be filed at the earliest time possible, but no later than one hundred-twenty (120) days from when the discovery period begins.

CONCLUSION

Thus, for the reasons discussed above, Plaintiff will be allowed to proceed for further factual development on his claims for excessive force against Defendant CERT Team Officers Samuel Andrews, Mubarak Bin Asadi, Quinton Richardson, Charles Williams, Benjamin Brown, Miguel Josephs, Lekendrick Harden, and Brian Walcott; failure to intervene, deliberate indifference to safety, and retaliation against Henry County Sheriff's Deputies Sean Free and Joseph Baxley; and deliberate indifference to a serious medical need against Andrews, Bin Asadi, Richardson, Williams, Brown, Josephs, Harden,

Walcott, Free, and Baxley. Conversely, it is **RECOMMENDED** that Plaintiff's claims against Defendant Warden Eric Sellers be **DISMISSED WITHOUT PREJUDICE** for failure to state a claim.

SO ORDERED and RECOMMENDED, this 30th day of April, 2020.

s/***Thomas Q. Langstaff***
UNITED STATES MAGISTRATE JUDGE