

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH RANDOLPH MAYS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

Please check the appropriate boxes:

☒ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court for the Northern District of West Virginia
United States Court of Appeals for the Fourth Circuit

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

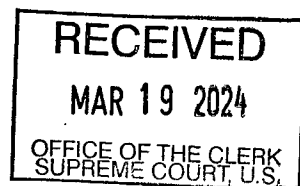
☒ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____, or

☐ a copy of the order of appointment is appended.


(Signature)



2-8-2024
Page 1 of 5

AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Joseph Randolph Nays, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse <u>NAYN</u>	You	Spouse <u>NAYN</u>
Employment	\$ <u>3.09</u>	\$ <u>0</u>	\$ <u>15.00</u>	\$ <u>0</u>
Self-employment	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Income from real property (such as rental income)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
★ Interest and dividends <i>See 5. Other Assets</i>	⊛ \$ <u>0.30</u>	\$ <u>0</u>	⊛ \$ <u>0.10</u>	\$ <u>0</u>
Gifts	⊛ \$ <u>44.17</u>	\$ <u>0</u>	⊛ \$ <u>0</u>	\$ <u>0</u>
Alimony	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Child Support	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Retirement (such as social security, pensions, annuities, insurance)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Disability (such as social security, insurance payments)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Unemployment payments	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Public-assistance (such as welfare)	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Other (specify): <u>N/A</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>	\$ <u>0</u>
Total monthly income:	\$ <u>47.56</u>	\$ <u>0</u>	\$ <u>15.10</u>	\$ <u>0</u>

⊛ Dividends are paid quarterly (NOTE: I do NOT receive them - they are reinvested to buy more shares)

⊛ Won't know until it happens, if it happens; IS NOT guaranteed!!! See Page 5 of 5 "★"

- 2-8-2024
Page 2 of 5
2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Bureau of Prisons	FCI Victorville II Medium PO Box 3850 Adelanto, CA 92301	9-1-2023 to Present	\$ 15.00
N/A	N/A	N/A	\$ 0 (N/A) Jem
N/A	N/A	N/A	\$ 0 (N/A) Jem

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.) N/A Jem

Employer	Address	Dates of Employment	Gross monthly pay
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A
N/A	N/A	N/A	\$ N/A

4. How much cash do you and your spouse have? \$ N/A Jem
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
* Checking Account - Blue Eagle Credit Union (Roanoke, VA)	\$ 20.00 (or less)	\$ 0 (N/A) Jem
* Savings Account - Blue Eagle Credit Union (Roanoke, VA)	\$ 20.00 (or less)	\$ 0 (N/A)
N/A	\$ 0	\$ 0 (N/A)

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. N/A Jem

☒ Home
Value \$ 0 N/A Jem

☒ Other real estate
Value \$ 0 N/A Jem

☒ Motor Vehicle #1
Year, make & model N/A Jem
Value \$ 0

☒ Motor Vehicle #2
Year, make & model N/A Jem
Value \$ 0 N/A Jem

☒ Other assets
Description Hanes Brand Inc. Dividend Reinvestment Plan
Value \$ 13.05 (2.449319 Shares) Closing Value as of 01 Aug 2023

* - May be closed See Page 5 of 5 12. "4"

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NIA <i>Jan</i>	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
NIA	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
NIA	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
NIA <i>Jan</i>	NIA <i>Jan</i>	NIA <i>Jan</i>
NIA <i>Jan</i>	NIA <i>Jan</i>	NIA <i>Jan</i>
NIA <i>Jan</i>	NIA <i>Jan</i>	NIA <i>Jan</i>

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home)	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
Are real estate taxes included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Is property insurance included? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No		
Utilities (electricity, heating fuel, water, sewer, and telephone)	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
Home maintenance (repairs and upkeep)	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
Food	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
Clothing	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
Laundry and dry-cleaning	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>
Medical and dental expenses	\$ <u>0</u>	\$ <u>0 (NIA) Jan</u>

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Your spouse *N/A Jem*

You

Transportation (not including motor vehicle payments) \$ 0 \$ 0Recreation, entertainment, newspapers, magazines, etc. \$ 0 \$ 0

Insurance (not deducted from wages or included in mortgage payments)

Homeowner's or renter's \$ 0 \$ 0Life \$ 0 \$ 0Health \$ 0 \$ 0Motor Vehicle \$ 0 \$ 0Other: N/A Jem \$ 0 \$ 0

Taxes (not deducted from wages or included in mortgage payments)

(specify): N/A Jem \$ 0 \$ 0

Installment payments

Motor Vehicle \$ 0 \$ 0Credit card(s) \$ 0 \$ 0Department store(s) \$ 0 \$ 0Other: N/A Jem \$ 0 \$ 0Alimony, maintenance, and support paid to others \$ 0 \$ 0Regular expenses for operation of business, profession,
or farm (attach detailed statement) \$ 0 \$ 0Other (specify): Student loan (\$30,000 + off at this time) *Unable to pay on! \$ 5.00 \$ 0

★ ★ Hygiene (soap, toothpaste, shampoo, etc.), stamps, envelopes (have to depend on the generosity of others like God, etc.)

① Total monthly expenses: \$ 5.00 ② \$ 5.00 \$ 0

- ① Can be verified by the absence of cemetery purchases
- Majority of the money I DO HAVE is used to maintain
an emergency communication channel, through email (CORRELINKS)
and to print out documents and case law, regulations, and
statutes

- ② For school loan payment- CANNOT pay at this time and the hygiene
and other items aren't listed because of the LACK OF FUNDS.

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No

If yes, describe on an attached sheet.

* Dependent on outcome (favorable) of this case *JM*

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number: *N/A JM*

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? N/A JM

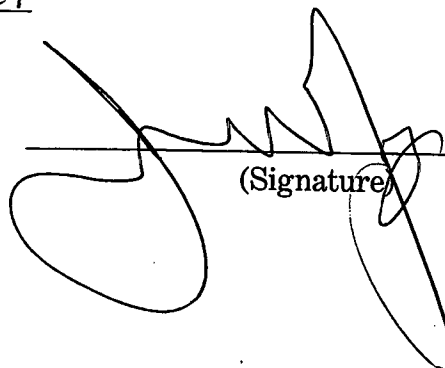
If yes, state the person's name, address, and telephone number: *N/A JM*

12. Provide any other information that will help explain why you cannot pay the costs of this case.

*1- Repeated retaliatory transfers and the corresponding loss of my \$200/month job in UNICOR at FCI Butner and FCI Gilmer, respectively, and the FBOP's and the lower courts' failure to hold them accountable
 *2- Administrative costs (stamps, paper, court costs, etc.) to try to correct those injustices
 *3- Loss of family members who used to send money to help me - unsolicited (out of love)
 *4- Loss of financial accounts (checking and savings accounts) due to *1 and *2

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 8, 2024


 (Signature)

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH RANDOLPH MAYS — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

JOSEPH RANDOLPH MAYS
(Your Name)

FCI VICTORVILLE II MEDIUM PO BOX 3850
(Address)

ADELANTO, CA 92301
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

1. Should a District Court deny pro se indigent/informa pauperis plaintiffs an opportunity at an alternate remedy (FTCA), as opposed to Bivens, WITHOUT allowing for the safeguard of discovery to prove their case?
2. Should a District Court be allowed to dismiss an [FTCA] action of pro se indigent/informa pauperis plaintiffs without giving consideration to established state law (e.g. "continuing violation doctrine") and liberally construing it?
3. Should plaintiffs be permitted to have their FTCA claims tolled under the "continuing violation doctrine" when available and/or discoverable evidence will show that the negligent acts and omissions continued beyond the time the statutory limitations ran? In other words, do these "continuing violations" (repeated acts like those within the limitations period) "restart" the statute of limitations clock?
4. Are plaintiffs required to put legal theories in their administrative claims?
5. Should a District Court require that Defendants include a plaintiff's grievances and all attachments (memorandums, emails, messages, exhibits, etc.) as well as the SF-95 (Notice of Claim Form), when investigating, to determine the liability of the United States? Can those grievances and attached documents serve as notice, too?
6. Should pro se indigent/informa pauperis plaintiffs be denied justice when they, due to misconduct by (a) defendant(s), are forced to make a choice that creates a conflict - Morton's Fork - that will result in negative consequences either way for the plaintiffs?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- Mays v. United States, U.S. Dist. LEXIS 189043, U.S. District Court for the Northern District of West Virginia. Judgment entered Sept. 6, 2022.
- Mays v. United States, U.S. App. LEXIS 12975, U.S. Court of Appeals for the Fourth Circuit. Judgment entered March 25, 2023.
- Mays v. United States, U.S. App. LEXIS 24233, U.S. Court of Appeal for the Fourth Circuit. Judgment entered September 11, 2023.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 2023 U.S. App. LEXIS 12975 (4th Cir. 2023); or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at 2022 U.S. Dist. LEXIS 189043 (N.D. W.Va. Sept. 6, 2022); or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 25, 2023.

☐ 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: September 11, 2023, and a copy of the order denying rehearing appears at Appendix C.

☒ An extension of time to file the petition for a writ of certiorari was granted to and including January 2, 2024 (date) on February 8, 2024 (date) in Application No. 23 A 594.

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).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- 18 U.S.C. § 3553(a)(2)(D) - to provide the defendant (Petitioner) with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.
- 18 U.S.C. § 4042(a)(2) - provide suitable quarters and provide for the safe-keeping, [and] care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses otherwise;
- 28 U.S.C. § 1746 - Unsworn declarations under penalty of perjury - Appendix D
- 28 U.S.C. § 2675 - Disposition by federal agency as prerequisite; evidence - Appendix E
- 42 U.S.C. § 233 - Civil actions or proceedings against commissioned officers or employees - Appendix F
- 28 C.F.R. § 14.2 - Administrative claims, when presented (FTCA) - Appendix G
- Fed. R. Civ. P. 6(b)(1)(B) - Extending Time (Time for Motion Papers)

+ (b) Extending Time

(1) In General. When an act may or must be done within a specified time, the court may, for good cause [shown], extend the time:

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

- Fed. R. Civ. P. 60 - Relief from a Judgment or Order - Appendix H

+ (b)(1)

+ (b)(3)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- Fed. R. Civ. P. 60 (cont'd...) - Appendix H
 - + (b)(6) any other reason that justifies relief
 - + (d) Other Powers to Grant Relief
 - (d)(1)

STATEMENT OF THE CASE

A. Factual Background

The Petitioner is a DC inmate incarcerated in the Federal Bureau of Prisons, currently housed at FCI Victorville II, in Adelanto, California, but was incarcerated at FCI Gilmer, in Glenville, West Virginia, from November 1, 2016 to September 28, 2021, which was where the events herein took place.

In February 2018, the Petitioner was subjected to a lockdown, in C-1 Unit, at FCI Gilmer, WV, from February 15, 2018 to February 28, 2018. He began to experience stomach/abdominal and kidney pain after eating spoiled bologna and taking Ibuprofen 200 mg tablets, which were prescribed to him by PA Wilson on February 20, 2018, during the one Sick Call that was performed during that period/lockdown. The Petitioner asked Health Services to consider the possibility of food poisoning. He was prescribed Motrin (800 mg Ibuprofen) on March 1, 2018, despite questions, by the Petitioner, about pain when taking the 200 mg tablets, and how 400% MORE would affect him.

The Petitioner had submitted multiple "Requests to Staff" and Sick Call Requests to address his worsening pain. He sent paper "Request to Staff" on 2-20-2018, 2-21-2018, 2-23-2018, and 2-28-2018. He sent Sick Call Requests, via institutional mail, from C-1 Unit, on 2-22-2018, 2-23-2018, 2-26-2018/2-27-2018, 3-2-2018, and 3-5-2018. He sent electronic "Request to Staff" on 2-26-2018 (10:42:02 AM), 2-26-2018 (08:53:39 PM), 2-27-2018 (7:33:15 AM), 3-1-2018 (09:42:02 PM), 3-1-2018 (06:30:55 PM) and 3-5-2018 (08:12:02 AM). The Petitioner had also sent an electronic "Request to Staff" to Health Services on 3-4-2018, but PA Alicia Wilson told him to "stop sending [daily] emails," despite Petitioner's complaints of worsening abdominal pain.

The Petitioner filed a BP-9 (Remedy ID#: 936342-F1) for the denial/delay of medical care/attention. He noted that he was STILL experiencing pain in his right kidney area regularly and on both sides shortly after eating meals.

Assistant Health Services Administrator Rebecca Grove had claimed

in her BP-8 Response to this grievance, that, "at no time was the Petitioner in distress," yet she was NEVER around to respond to the Petitioner's requests for help nor was she present, at his room, during the Petitioner's headaches and/or stomach, abdominal or kidney pain.

The Petitioner was seen, in Health Services, by EMT Jessica Houchin, on March 26, 2018, who stated/assessed that he may have ulcers. She directed the Petitioner to purchase an acid reducer (Zantac). This contradicts and/or does not take into account the fact that he was ALREADY on an acid reducer (omeprazole). The Zantac package/instructions/warnings stated that it SHOULD NOT be taken with other acid reducers.

Warden Saad responded to the Petitioner's grievance (Remedy ID#: 936342-F1) on 4-24-2018. She [falsely] states the Petitioner had been evaluated and treated. However, the Petitioner CONTINUED to suffer in pain. Warden Saad made no mention of the possibility of food poisoning. She stated that all lab tests were normal or negative, which was not true. The Petitioner's White Blood Cell (WBC) count was LOW at 2.9 (NORMAL = 4.0 - 11.0). Additionally, the Petitioner's Red Blood Cell (RBC) count, hemoglobin, and hematocrit levels were at/near the lower limit of normal (i.e. suggestive of anemia).

As to the "ulcer assessment", on March 26, 2018, and the lab test results, these WERE NOT made known to the Petitioner until he received his medical records on 4-11-2018.

The Petitioner, in a BP-10 (Remedy ID#: 936342-R1), dated 5-2-2018, appealed to the Regional Office who concurred with the Warden's Office at FCI Gilmer, WV and stated that the Petitioner's conditions had been addressed. However, the Petitioner was going through his SIXTH MONTH of abdominal, stomach, and kidney area pain. The Petitioner had also LOST THIRTY POUNDS in TWO MONTHS with NO EXPLANATION.

PA Wilson refused to consider an EGD, on 5-31-2018, when she responded to the Petitioner's "Request to Staff." She had stated, "You don't know for sure that you have ulcers." "Specialized tests are needed

for that," thereby acknowledging the NEED for those tests to back up/ CONFIRM what her coworker - EMT Jessica Houchin - had ascertained (ulcers) at the Clinical Encounter with the Petitioner on March 26, 2018.

The Petitioner had appealed to the Central Office (936342-A1) on 7-20-2018 (BP-11) who claimed the Petitioner's treatment plan was adequate and ongoing and deferred it back to Health Services at FCI Gilmer, WV and to follow up at Sick Call as need. They also stated that a CT Scan was pending.

The Petitioner had a CT Scan performed on 9-18-2018, which revealed a 4.3 cm (1.6 INCHES) diameter cyst in the lower pole of his left kidney, fatty liver, and BPH (Benign Prostatic Hypertrophy (Enlarged Prostate)). However, no follow-up care was initiated on the first two findings and it would be close to two years before any consideration was given for treating the BPH.

The Petitioner filed another grievance (Remedy ID#: 986154-F1) dated 6-27-2019 for ONGOING delay/denial of medical treatment. In that grievance (BP-9), the Petitioner referred to PA Wilson's comments, on 5-31-2018, about EMT Houchin's assessment of ulcers for the Petitioner. The Petitioner had underwent a CT Scan on 9-18-2018, and submitted Sick Call Requests on 11-9-2018, 12-21-2018, and 12-28-2018, and complained about CONTINUED stomach/abdominal and kidney pain. However, despite following the direction of the Central Office (report to Sick Call) in my last grievance (936342-A1), no effort was made by Dr. Anderson, PA Wilson, EMT Jessica Houchin, and others, to expedite a consultation with an outside specialist.

The Petitioner had requested a nephrologist to determine the cause of the severe pain in the Petitioner's kidney area. But, PA Wilson told the Petitioner to tell the GI specialist about it when he saw them. He asked PA Wilson, "did the GI specialist have dual disciplines (i.e. gastroenterology and nephrology or urology)?" She said, "No." She refused to give the following considerations as to the Petitioner's cyst: 1) that it is INSIDE the Petitioner's kidney, which, if inside a kidney, can destroy kidney tissue due to compression, and 2) the

SIZE of the cyst, which, at 4.3 cm (1.6 INCHES) in diameter, is nearly 1/3 to almost 1/2 of the average size of an ENTIRE KIDNEY, which is around 11 cm. And, that was the cyst's size on 9-18-2018, which was nearly FIVE and a HALF YEARS AGO today. There were also issues with excessive albumin (protein) in the Petitioner's urine (47 on 10-12-2018. (NORMAL (19 or less))), but he WAS NOT informed of this. He found out through a request for his medical records. A follow-up urinalysis WAS NOT performed right away.

The Petitioner appealed the response of Acting Warden R. Thompson, dated 8-13-2019, with a BP-10 (Remedy ID#: 986454-R1). She was acting in place of Warden Richard Hodgins. She stated that I had been seen through Sick Call and [Routine] Chronic Care appointments regularly and timely. But, she failed to mention the multiple times that the Petitioner had been turned away from Health Services and allowed to suffer - to CONTINUE to suffer - in pain for over a year and a half. She stated that it was the Petitioner's right kidney when it was it his LEFT kidney with the 4.3 cm (1.6 inches) diameter cyst inside. She gave NO consideration for the possibility, with advice from Health Services, of the INCREASED SIZE of the Petitioner's cyst, hydronephrosis, and/or urinary tract infections as the cause of the Petitioner's kidney pain, especially after urination.

Acting Warden R. Thompson stated that the cyst was benign (non-cancerous). However, as to the latter, PA Wilson and Dr. Anderson NEVER took steps, after September 18, 2018, to CONFIRM that the cyst was benign. The CT Scan technician had stated that the cyst "APPEARS" benign. Additionally, there was/is an issue of a "dark spot" on the X-rays in June 2019; on two out of three of them. PA Wilson stated that it was either gas or stool, but science says otherwise. Gas should show up as "dark areas" because its molecules are spaced far apart. Stool, on the other hand, is a solid, whose molecules are packed close together and will appear in some shade of gray or white on the x-ray films. The issue is whether gas would appear black ("dark spot") and round and in the same place on two DIFFERENT exposures, if it was gas, as opposed to the cyst in the left kidney. The Petitioner discussed this in "Requests to Staff" dated

5-31-2018 (2 pgs), 12-3-2018 (2 pgs), 6-20-2019 (2 pgs), and an electronic "Request to Staff" dated 6-24-2019 (07:31:46 AM (2 pgs)).

It should be noted that Dr. Anderson DID NOT prescribe Sucralose (for deers) until on or about 7-25-2019, which was AFTER his grievance (BP-9-Remedy ID#: 906154-F1) dated 6-27-2019.

The Petitioner appealed Acting Warden R. Thompson's responses above to the FBOP Mid-Atlantic Regional Office in appeal (BP-10-Remedy ID#: 906154-R1) dated 8-28-2019. The Regional Office concurred with Acting Warden R. Thompson's response, and, along with her, they ignored the FACT that the Petitioner had been suffering in pain for nearly TWO YEARS and that Dr. Anderson and/or PA Wilson had failed to order an ultrasound to more accurately determine the CURRENT status of the Petitioner's kidneys and the CURRENT SIZE of the cyst in the Petitioner's left kidney.

The Petitioner was sent out to see the GI specialist, on 9-17-2019, at the Charleston Gastroenterology Clinic, in Charleston, West Virginia, by FBOP/FCI Gilmer, WV Correctional Officers Hudnall and Turner. She recommended that the Petitioner stop taking Metformin (re: effects on Petitioner's stomach), to watch his diet, to take fiber tablets to help with constipation, and to take Dicyclomine (Bentyl) for intestinal/abdominal [crude] spasms/cramps. She directed Officers Hudnall and Turner to get the Petitioner's blood drawn for labs, but they failed/refused to do so. The Dicyclomine was NEVER prescribed at FCI Gilmer, WV Health Services and would not be, until March 2020, at USP Lompoc, CA. The labs were for the *Saccharomyces Cerevisiae* IgG and IgA antibody tests, which would not be performed/reported until October 26, 2020 - THIRTEEN MONTHS LATER (See Page 15 of 39). The Petitioner was seen on a follow-up appointment on 9-23-2019 by EMT Brenner. EMT Brenner advised him about diet choices, of which the Petitioner had/hus very little control over what is served to him and how it is cooked. He told EMT Brenner about onions and peppers in his/hus (inmate's) food; cooked into it. EMT Brenner replied by telling the Petitioner to "pick the onions and peppers out of the food." That doesn't work because the oils, chemicals, and enzymes in onions and peppers were COOKED INTO the food and mixed in so even if you remove the onions and pepper physically, they are still there.

Officers Hudnall and Tanner confirmed the lack of Petitioner's meal choices and options with the GI specialist who noted it in the record on 9-17-2019.

The Petitioner purchased and took the fiber tablets, as recommended by the GI specialist, from 9-29-2019 to 10-15-2019. The Petitioner had to stop taking them because his stomach/abdominal pain increased (up to 9-10 on a scale of 1 to 10) and he started having chest pains. The Petitioner went to Sick Call on 10-18-2019, but, despite chest pains being an urgent care issue, he was put on the collout for 1230 on 10-21-2019!!! This was done in spite of the recommendations in the Patient Information/Instructions to call 9-1-1 if the Petitioner experienced chest pains after taking the tablets (possible allergic reaction to pryllium Fiber). An EKG was done, but ONLY after the Petitioner pressed the issue. The EKG revealed bradycardia (abnormally slow heartbeat) and right bundle branch block (RBBB), which makes it harder for the Petitioner's heart to pump blood efficiently throughout his body. The Petitioner had also been experiencing cyanosis ("blue hands and feet due to a lack of properly oxygenated blood").

The Petitioner informed Warden Richard Urdyins of the chest pain issues in "Requests to Staff" dated 11-5-2019, and 11-10-2019. He made him aware of Health Services Administrator Moore's discriminatory comments about old age [with NO diagnostic tests - troponin I blood tests, follow-up EKGs - performed to HELP the Petitioner], after the Petitioner told her about the right bundle branch block and cyanosis. The Petitioner reported to Sick Call on 11-8-2019, as she directed, but despite writing "chest pains" and "cyanosis" (blue hands) - URGENT CARE ISSUES - on the form and in the Sick Call Log Book, the Petitioner was not seen that day and was told he would be placed on the collout. He WAS NOT placed on the collout the following week nor was a follow-up conducted during the lockdown which occurred from 11-16-2019 to 11-24-2019. The Petitioner was still experiencing chest pains.

The Petitioner appealed Regional Office's failure to address the Petitioner's ongoing stomach/abdominal and kidney pain in a BP-11 (Remedy ID#: 986154-A1) dated 11-24-2019 to the FBOP Central Office. The Petitioner notated the latter to the Central Office with an emphasis on the degradation of the Petitioner's health due to their failure to properly and expeditiously address his serious medical needs, which included

cyanosis (blue hands due to a lack of oxygen) and the right bundle branch block, which, more likely than not, was the cause of the cyanosis.

The Petitioner filed a THIRD grievance, dated 9-11-2019 (BP-9 - Remedy ID#: 992661-F1) for new delays and denials of the treatment of his left kidney area pain. This grievance piggybacked on and noted the failure of Dr. Anderson to prescribe Sucralate PRIOR to the filing of the SECOND grievance (Remedy ID#: 986154-F1) dated 6-27-2019.

The Petitioner had traces of ketones in his urine, which are a symptom of ketoacidosis, which, if left untreated, can become fatal. Yet, PA Wilson, EMT Jessica Houchin, and AHSA Rebecca Grove failed to follow-up on this despite complaints of kidney pain from the Petitioner. AHSA Grove acknowledges this through her denial of the BP-8 for this grievance WITHOUT an investigation, which should include seeing and retesting the Petitioner, to determine the cause of his pain. She nor PA Wilson or EMT Houchin make any reference to the ketones, which are acids in the Petitioner's blood which result from the breakdown of fats in his body. The Petitioner also SPECIFICALLY stated their duties to him under 18 USC § 4042(a)(2) (i.e. to provide for his safe-keeping and care.) The Petitioner had stated that this is because he is helpless to provide medical care for himself, due to his incarceration, and MUST DEPEND on prison staff to do so. PA Wilson, EMT Jessica Houchin, and AHSA Rebecca Grove ALL failed to address the issue with the ketones, which, as stated above, can be FATAL. The Petitioner will also state that the staff above have NO DISCRETION to refuse to treat the Petitioner's pain.

Warden Hrdgins, in his response (Remedy ID#: 992661-F1) dated 10-21-2019, spoke about portion control. But, he NEVER gave any indication that he talked to Dr. Anderson, who was the Clinical Director of Health Services at FCI Gilmer WV and who was in a position of authority to talk to Food Service to prescribe medical diets, which also take into account portion control. As the Petitioner noted above, HE MUST rely on prison staff for his needs such as food and medical care. When the

Petitioner goes to the dining hall at BOP institutions, he must eat what he is going to eat at one time or not at all. We are not allowed to carry out uneaten portions of our regular meals. [to eat the other 'portions' later]. Neither Dr. Anderson or Warden Hudgins saw fit to prescribe a medical diet for the Petitioner despite regulations that allow it. See Page 9 of 39 (RE: EMT Brenar).

The Petitioner noted that Warden Hudgins made no mention of treatments or consultations to diagnose the cause of and treat the Petitioner's ongoing kidney pain.

The Petitioner addressed those responses to the FBOP Mid-Atlantic Regional Office in his appeal (BL-10 - Remedy ID#: 992661-R1) dated 12-5-2019. It should be noted that Unit Manager Richard Clem was responsible for the final delay in mailing out the BL-10 when he intentionally refused to approve the purchase of extra stamps for his legal mail.

The Regional Administrative Remedy Coordinator Howard Williams, in his response, failed to perform his ministerial duties when he 1) physically split the Petitioner's grievance into **TWO GRIEVANCES**. (25 pages and 26 pages - ORIGINAL **SINGLE GRIEVANCE** (Remedy ID#: 992661-R1 - Certified Mail Receipt #: 2018 2290 0000 1198 7362) - 51 Pages); 2) **INTENTIONALLY** assigned an incorrect Case/Remedy ID#: (1002171-R1) to the second part of the split grievance; 3) **INTENTIONALLY FALSIFIED** the Rejection of the Regional Appeal by using Warden Hudgins' response to grievance (BL-9 992661-F1 dated 9-11-2019) and changing the top "f" (above the dashed line and to the right of Case Number to an "R" at the bottom of the form); 4) rejected the grievances (992661-R1 and 1002171-R1 (FALSE GRIEVANCE)) and, methodically, told the Petitioner to "get help from Unit Team" to place blame for HIS DEEDS on the Petitioner; 5) as a result of "1)" to "4)", thwarted/interfered with the Petitioner's attempts to get help for his serious medical needs, which resulted in the Petitioner having a heart attack on 4-17-2020 and with the Petitioner's attempts to exhaust his administrative remedies at the Regional level.

The Petitioner filed an appeal (Remedy ID#: 992661-A1), dated

2-5-2020, to the Central Office Inmate Appeals Administrator Ian Connors, in a last ditch effort to get help for his serious medical needs (e.g. severe kidney area pain, cyanosis (blue hands due to lack of properly oxygenated blood)), and to have Ian Connors hold Howard Williams (Administrative Remedy Coordinator) accountable for his misconduct with the Petitioner's grievance. But, Ian Connors continued the same pattern of misconduct that ARC Howard Williams engaged in against the Petitioner.

Ian Connors tacitly authorized/sanctioned ARC Howard Williams' conduct, when HE failed to perform his ministerial duties when HE 1) INTENTIONALLY and PHYSICALLY split the BP-11 (Central Office Appeal - Pink Form - 4 Parts) into (2) 2-part forms; 2) INTENTIONALLY assigned the correct Remedy ID#: (992661-A1) to the "ORIGINAL" and "FIRST COPY" and the INCORRECT Remedy ID#: 1002171-A1 to the "SECOND" and "THIRD" copies of the BP-11 Form (NOTE: Incorrect ID# generated by ARC Howard Williams); 3) rejected the Petitioner's grievance based upon ARC Howard Williams' FALSE grounds for rejection; and 4) as a result of "1)" to "3)", thwarted/interfered with the Petitioner's attempts to get help for his serious medical needs, which resulted in the Plaintiff having a heart attack on 4-17-2020 and with the Petitioner's attempts to exhaust his remedies (administrative) at the Central Office level.

The Petitioner spoke with Warden Richard Hodgins, on 3-26-2020, about his ongoing stomach, abdominal, and kidney pain and cyanosis (blue hands) and acknowledged it through an electronic "Request to Staff" dated 3-26-2020.

The Petitioner attempted, on March 31, 2020, to show Warden Richard Hodgins, outside the entrance to the FLI Gilmer, UN dining hall at the noon mainline, his BLUE HANDS. The Petitioner was prevented from doing so by C-Unit Manager Richard Clem, who FAILED to consider the Petitioner's request from a MEDICAL standpoint, and told the Petitioner to, "go on inside and see him (Warden Hodgins) when you come back out." The Petitioner was also prevented from talking to Warden Hodgins by A-Unit Manager Dodrill, who told the Petitioner to, "give them some space." The latter was unnecessary because he was not and will not come within a certain distance of staff. Additionally, HE (Dodrill) NEVER gave any consideration to

the MEDICAL aspect of the Petitioner's request. The other party that was present, Associate Warden Thompson, along with Warden Richard Hrdgins failed to intervene or take three to five SECONDS to confirm or deny the Plaintiff's issue. As to Unit Manager Richard Allen's order, the Petitioner went in, but was unable to see Warden Hrdgins because a fight occurred in C-Unit and the compound was closed/locked. After it was handled, the institution went on lockdown, for COVID-19 (Day 1 of many), and the Petitioner NEVER got the chance to see the Warden.

The Plaintiff sent an electronic "Request to Staff" on or about April 16, 2020, to complain about CONTINUED stomach/abdominal and kidney pain. PA Wilson responded by telling the Petitioner to stop sending emails ("Requests to Staff") and NOT TO SEND anymore unless it was something acute.

The Petitioner awoke to crushing chest pain on April 17, 2020 - the NEXT DAY - and had to be taken to the emergency room at Stonewall Jackson Memorial Hospital in Weston, West Virginia, where they diagnosed it as an NSTEMI (Non-ST Elevation Myocardial Infarction (Heart Attack)). He had to be transported to a critical care (cardiology) unit at West Virginia University United Hospital Center, in Bridgeport, West Virginia, where his troponin level (cardiac enzyme indicative of heart tissue damage) ROSE from 0.05 at Stonewall Jackson Memorial Hospital on April 17, 2020 at/ around 9:30AM - 9:45AM (approx) and up to 3.87 at WVU United Hospital Center on 4-19-2020 at 0740, which was EIGHT HOURS BEFORE DISCHARGE at 1540 (3:40PM) on 4-19-2020. It should be SIGNIFICANTLY and JUDICIALLY NOTED that the Petitioner, nor the available record (to the Petitioner) has (a) Troponin - I blood test result(s) with NORMAL READINGS PRIOR TO DISCHARGE. NORMAL Troponin - I levels are LESS THAN 0.04.

Warden Richard Hrdgins, Unit Manager Richard Allen, Clinical Director Dr. Eddie Anderson, Health Services Administrator Kelly Moore, and PA Wilson ALL FAILED to notify the Petitioner's family (his sister) that he had a heart attack on 4-17-2020.

Dr. Eddie Anderson had/has knowledge of the significance of the enzyme (Troponin - I), in his Clinical Encounter - Administrative Note dated 4-17-2020 10:35AM,

DID NOT, along with PA Wilson, provide the Petitioner the medical records for the Petitioner's heart attack from Stonewall Jackson Memorial Hospital and WVU United Hospital nor did they follow up on the Petitioner's heart attack with a cardiology consultation to see if the Petitioner's myocarditis was resolved. Dr. Anderson and Nurse Valdivieso (Lunsford) both acknowledge CONTINUING chest pain in their Clinical Encounters on 7-24-2020 at 13:50 (Page 1 of 5 - Complaint 1) and on 7-31-2020 20:20 (Page 1 of 2 - Complaint 1), respectively. And, Dr. Anderson acknowledges the LACK OF FOLLOW-UP on the Petitioner's heart attack in a Clinical Encounter dated 8-16-2021 (Page 1 of 4 - Chief Complaint (Dizziness)), but failed to set up any consultations.

The Petitioner filed a Tort Claim (SF-95-Notice of Claim Form), with the Federal Bureau of Prisons, for Remedy ID #: 936342, dated 2-26-2020, and mailed it out at/around 2-27-2020 (Certified Mail Receipt #: 7019 0700 0000 5734 3990; Return Receipt #: 9590 9402 4305 0190 5988 24). It was received by the FBOP Mid-Atlantic Regional Counsel on 3-2-2020.

The Petitioner attempted multiple times to get records of the/his heart attack, but, from May 21, 2020 to September 16, 2020, he was unable to get access to his own records. The Petitioner was able to get the records, from Stonewall Jackson Memorial Hospital and West Virginia University United Hospital Center, for April 17, 2020 to April 19, 2020, on September 16, 2020. This happened because the Petitioner had written to Mr. Vanita Gupta of the Civil Rights Division of the US Department of Justice shortly after the George Floyd hearings in Congress (she was second to speak). However, NO follow-up was conducted by the Civil Rights Division and the negligence continues to THIS DAY (2-14-2024). See Receipt (CNR: 7019 0700 0000 5734 4140).

The Petitioner filed another Tort Claim (SF-95 Form) dated 7-9-2020, with the Federal Bureau of Prisons, for Remedy ID #: 992661, and mailed it out on 7-10-2020 (Certified Mail Receipt #: 2019 0700 0000 5734 4010). The FBOP Tort Claim Numbers for the one above in March 2020 is TRT-MXR-2020-03021 and this one is: TRT-MXR-2020-05948.

The Petitioner's labs for *Saccharomyces Cerevisiae* IgG and IgA antibodies, that was supposed to be performed on 9-17-2019 (Officers Tanner and Arnold REFUSED to take the Petitioner to the lab at the Charles-

for Gastroenterology Clinic) was performed and reported on 10-25-2020 with
ABNORMAL RESULTS which WERE NOT RECORDED in the "Health Problems"
section of the Bureau of Arizona [Medical] Intergovernmental Information and the
specific section labeled "Health Problems". The IGA was 51.1 and the IGA
antibody titer count was 37.5. The notation on the lab report stated, "High
antibody titer increase the likelihood of the disease, especially Crohn's disease,
and are associated with more aggressive disease." Normal values are LESS
THAN 20. See Complaint (FTCA) Page 12C P22 (Quest Diagnostics Lab
Report - Reported 10/25/2020 12:01 EDT Specimen: PG192729H Client#:69062999
Patient ID#:43487-007 Pages 3 and 4 of 4. ***NOTE: THIS HAS NOT BEEN
Followed up on at USF Lompoc, CA or FCI Victorville, CA (i.e. OUTGOING
VIOLATION).

The Petitioner was taken to St. Joseph's Hospital in Buckhannon
West Virginia, on January 29, 2021, where EAT Jessica Davidson's assess-
ment of ulcers - MULTIPLE ULCERS - was CONFIRMED. The Petitioner had
waited since March 26, 2018 - NEARLY THREE YEARS - for his confirmation
and had suffered in pain during that time. A follow-up appointment for an
EGD was scheduled, on June 17, 2021, for September 21, 2021, but the Petitioner
was transferred TWICE - on September 28, 2021 from FCI Gilmer, WV and
nearly EIGHTEEN (18) MONTHS LATER on May 8, 2023 from USF Lompoc,
CA - WITHOUT following through on the Petitioner MEDICALLY NECESSARY
procedures.

The Petitioner had been placed in the SHU, on 5-24-2021, and
was unable to access his legal property/papers/work until August 6, 2021 or would
that date because his Unit Manager Richard Cien would not and did not release
it until two and a half months later. The Petitioner was unable to get the
FTCA Court forms until/around September 20, 2021 (9-20-2021). See Page 7
and two dates - 9-20-2021 and 1-31-2022 - at the top of the page]. The Petitioner
lost close to four months to be in position to get the FTCA Complaint form, then
he was transferred EIGHT DAYS LATER and had to wait until January
2022 to receive his property. The Petitioner resumed writing the Complaint
and mailed it out on 2-18-2022.

B. Procedural History

1. The Petitioner filed a Federal Tort Claims Act (FTCA) Complaint on February 10, 2022 (prison mailbox rule), which was filed in the United States District Court for the Northern District of West Virginia on March 1, 2022 (Case No. 5:22-cv-00036-JPB-JEM).
2. On March 9, 2022, the United States District Court issued an Order Notifying the Petitioner of Potential Consequences of Pursuing both a Federal Tort Claim and Bivens Action. (Doc 10)
3. On April 7, 2022 (prison mailbox rule), the Petitioner filed a Motion to Submit Notification, indicating that he wished to proceed with both claims (Doc 15), which was filed with the District Court on April 7, 2022.
4. On April 20, 2022, the District Court for the Northern District of West Virginia GRANTED the Petitioner's Application and Affidavit to Proceed Without Prepayment of Fees noting "the plaintiff's (Petitioner's) low account balance." (Doc 16 P 3)
5. On May 3, 2022, the United States District Court for the Northern District of West Virginia issued a paperless order (Doc 17) GRANTING Petitioner's Motion to File Out of Time and Instructing Plaintiff to file his FTCA Complaint within twenty-one (21) days of receipt of this Order. The Court also GRANTED Plaintiff's Motion to Submit Notification (Doc. 15) and noted election to pursue both a Bivens and FTCA Complaint. *** It should be judicially noted that the Petitioner had ALREADY submitted his FTCA Complaint (Court Forms - Joseph Randolph Mays v. United States of America) on March 1, 2022. (See Doc. 3 Page 1 of 2)
6. On May 3, 2022, the United States District Court for the Northern District of West Virginia issued an Order to Answer to the Defendant, United States of America, and noted that the Petitioner alleged that BOP officials were negligent and deliberately indifferent to his medical needs (Doc. 18).
7. On July 12, 2022, the Petitioner received the Order and Roseboro Notice (Doc. 28 4 Pages) and Magistrate Consent Form (Doc. 29 1 Page) ONLY (Certified Mail Receipt #: 2021 0350 0001 2474 6024), from the United States Attorney's Office, at 1153 from the Legal Mail

7. (cont'd...) Officer at the F-Unit Officer's office, at USP Lompoc, CA. The Petitioner DID NOT RECEIVE the Defendant's Answer (Doc. 27) and NO investigation, by FBOP staff, the District Court, or the US Attorney's Office in the Northern District of West Virginia and Los Angeles, California, took place. This cost the Petitioner time and stamps he COULD NOT AFFORD to lose. He does not know who received the FIRST/ ORIGINAL Answer.
8. On July 25, 2022, the Petitioner filed a Motion for an Extension of Time to File a Response to Defendant's Motion (Answer (Doc. 22) due to the receipt of the Roseboro Notice and Order, which starts the clock running, but NOT the Defendant's Answer. This prevented the Petitioner from STARTING because he DID NOT have their responses to allow him to defend against. (Certified Mail Receipt #: 2018 2090 0002 0747 2800). It also cost him stamps that he COULD NOT AFFORD to waste. See "4." above.
9. On August 6, 2022, the Petitioner received the SECOND COPY of the Defendant's Answer (Doc. 27) 58 Pages (Certified Mail Receipt #: 2016 2010 0000 2041 5186) This is ONE MONTH AFTER he was originally supposed to receive the Defendant's Answer. It should be judicially noticed that staff at FCI Gilmer, WV attempted to interfere with the Petitioner's receipt of the Defendant's Answer in this same District Court (NDWV - Case No.: 5:20-cv-00212 - Mays v. United States (4th Cir. 2021)).
10. On August , 2022 (prison mailbox rule), the Petitioner filed a Motion for Extension of Time to File Motion in Opposition to Defendant's Motion to Dismiss (Doc. 26), which was filed, by the District Court, on August 29, 2022, and GRANTED until August 31, 2022. (Doc. 27)
11. On September 6, 2022, the United States District Court filed an Order Dismissing the Case (Doc. 28) citing multiple extensions of which ONLY the last/second extension was an ACTUAL extension due to the withholding of the Defendant's Answer from the Petitioner by staff at USP Lompoc, CA. The Court DISMISSED the case WITH PREJUDICE.
12. On September 12, 2022 (prison mailbox rule), the Petitioner filed a Motion to File Out of Time due to his inability to meet that deadline due to 1) a lack of sufficient funds (See "4." above and "8.") to purchase copy cards to duplicate his documents (Commissary Receipt dated 9-2-2022 (Transaction #: 8545096 81 (1) Copy Card \$5.00); 2) a lack of

12. (contid...) stamps/postage for both this case and a pending injunction in the 9th Circuit (Case No.: 2:22-cv-05524-SVW-PVC - Mays v. Birkholz, et al., to primarily address (immediately, as opposed to YEARS) the Petitioner's atrial fibrillation, which was discovered five (5) months AFTER transferring from FCI Gilmer, WV (re: no follow-up on myocarditis); 3) as to the injunction, it created a Morton's Fork situation for the Petitioner because if he had never responded to the District Court in California, he would not have received his echocardiogram on November 3, 2022 (atrial fibrillation can be life-threatening) and he would not have his case open (Amended Complaint submitted (prison mailbox rule) on 2-5-2024). And, because he responded to the Injunction Order first, he was penalized with a dismissal, which was UNFAIR because the stamps were purchased on September 14, 2022 (Transaction #: 8558718 79) and the Motion was mailed out the NEXT DAY - September 15, 2022 (i.e. NO HESITATION.). It is also unfair because a show cause hearing or discovery was not conducted to validate the Petitioner's claims. (See Doc. 45 (MTFOOT), and Motion for Reconsideration (14. below). Relief under 60(b)(1)(3)(b), 60(d)(1), and Fed. R. Civ. P. 6(b)(1)(B) requested (See Doc. 45 Page 5 of 5).
13. On September 22, 2022, the United States District Court for the Northern District of West Virginia filed an Order DENYING the Plaintiff's/ Petitioner's Motion to File Out of Time and Permission to File Excessive Pages (Doc. 45 and 47, respectively) without giving any consideration to the Plaintiff's reasons and evidence for the delay or serious consideration of the Plaintiff's ONGOING medical issues (stomach, abdominal, and kidney area pain) that the Defendant failed to address pursuant to 18 USC § 4042 and 18 USC § 3553(a)(2)(D) and West Virginia State Law.
14. The Petitioner filed a Motion for Reconsideration of Motion to File Out of Time or, In the Alternative Request for Appeal of Case/Dismissal Order and Denials on October 4, 2022 (Certified Mail Receipt #: 7018 3090 0002 0747 2737 - 17 Pages) to contest the District Court's denials of his Motions and, in the alternative, to request an appeal to the Fourth Circuit Court of Appeals. The Petitioner had provided exhibits (D - Motion to Show Cause 2:22-cv-05524-SVW-PVC Mays v. Birkholz, et. al (Preliminary Injunction - Medical Care) • Certified Mail Receipt #: 7019 0700 0000 5925 5913 (21/28 PAGES) and E - Commisary Receipt (See "12." above)) to prove his case and allow the proceedings to move forward, but was DENIED JUSTICE.

15. On October 12, 2022, the Fourth Circuit Court of Appeals placed the Petitioner's case (5:22-cv-00036-JPB-JEM) on the Court's docket under Case No.: 22-7177 and filed it with the Court and mailed it to the Petitioner the same day. It was not received by the Petitioner until 10-25-2022, at USP Lampoc, CA, from C-Unit Comsolator Ms. Peterson. The latter is significant because the PLRA Application was due on 10-27-2022 - TWO DAYS LATER.
16. On November 1, 2022 (prison mailbox rule), the Petitioner filed a Motion for an Extension of Time to File IFP for Appeal and Informal Brief (4 Pages) - Certified Mail Receipt #: 7020 1290 0002 2623 4723 - to the Clerk of Court for the Fourth Circuit Court of Appeals.
17. On November 9, 2022 (prison mailbox rule), the Petitioner filed his IFP Application (3 Pages) and his Informal Brief (13 Pages) and supporting documentation (46 Pages total) to the Fourth Circuit Court of Appeals for Case No.: 22-7177 - Mays v. United States (FTCA Complaint Appeal). Certified Mail Receipt #: 7020 1290 0002 2623 4624.
18. On March 25, 2023, the Fourth Circuit Court of Appeals affirmed the decision of the District Court for the Northern District of West Virginia in Case No.: 5:22-cv-00036-JPB-JEM dated September 6, 2022 and September 22, 2022. The Fourth Circuit Court of Appeals entered judgment on this case (22-7177 - Mays v. United States) on May 23, 2023.
19. The Petitioner filed a Motion for a Rehearing, dated 7-9-2023, with the Fourth Circuit Court of Appeals (Case No.: 22-7177 - Mays v. United States) - Certified Mail Receipt #: 7019 0200 0000 5734 4009.
20. The Petitioner, on July 17, 2023, was GRANTED a Temporary Stay of Mandate, pursuant to Fed. R. App. P. 41, by the Fourth Circuit Court of Appeals, until the court rules on the Petition for Rehearing.
21. On September 11, 2023, the Fourth Circuit Court of Appeals denies the Petitioner's Petition for a Rehearing.
22. The Petitioner, on December 4, 2023, filed for an Extension of Time to File a Writ of Certiorari for Case No.: 22-7177 (Mays v. United States) - Certified Mail Receipt #: 7020 2450 0000 6490 0818
- * 23. The Petitioner, on December 12, 2023, filed for an Extension of Time to File Informal Brief and IFP Application to Fourth Circuit Court of Appeals for Case No.: 23-7127 (Mays v. Saad) - Certified Mail Receipt #: 7020 2450 0000 6490 0788

* REASON(S) FOR DELAY - SEE NEXT PAGE ALSO

- ★ 24. On January 2, 2024, the Petitioner completed and filed (prison mailbox rule) his Informal Brief and IFP Application (58 Pages) for the Circuit Court of Appeals (Case No.: 23-7127 - Mays v. Saad) - Certified Mail Receipt #: 9589 0710 5270 1463 8039 45.
- ★ 25. On January 10, 2024, the Petitioner filed (prison mailbox rule) his Motion in Opposition to the Defendants Renewed Motion For Summary Judgment in the District Court for the District of Columbia (Case No.: 1:20-cv-02197-CKK - Mays v. Federal Bureau of Prisons, et al. (FOIA) 30 Pages - Certified Mail Receipt #: 9589 0710 5270 0170 6706 28
- ★ 26. On January 10, 2024, the Petitioner filed (prison mailbox rule) his Motions for Extensions of Time to file 1) Second Amended Complaint (Bivens - 2:22-cv-05524-SVW-EVC (15 Pages) - Mays v. Birkholz, et al.) and 2) Motion in Response to Respondent's Answer to 2241 Petition (3 Pages) - 2:23-cv-03427-SVW-EVC - Mays v. Birkholz, Warden - Certified Mail Receipt #: 9589 0710 5270 0170 6706 04
- ★ 27. On January 16, 2024, the Petitioner received a letter from the Office of the Clerk of the Supreme Court of the United States, dated January 2, 2024, stating that an extension to file a writ of certiorari (Application No.: 23AS94) was extended, by the Chief Justice on January 2, 2024, to and including February 8, 2024.
- ★ 28. On February 5, 2024, the Petitioner filed (prison mailbox rule) his Second Amended Complaint (Bivens - 156 Pages - 2:22-cv-05524-SVW-EVC - Mays v. Birkholz, et al.,) and his Response to Respondent's Answer to his 2241 Petition - 2:23-cv-03427-SVW-EVC (47 Pages) Certified Mail Receipt #: 9589 0710 5270 0170 6706 11 *** Was on SECOND EXTENSION due to heavy case load, school (college), and cleaning showers in AM on Monday through Wednesday. *** Only THREE DAYS LEFT UNTIL CERTIORARI DEADLINE - Research completed but no rough draft of certiorari on this day.
- ★ 29. On February 9, 2024, attempted to call Supreme Court Clerk from institution phone, but unable to get through. Had my sister call, to explain delays (reasons) above, which are All verifiable through USPS.com, on this day. I also asked her to call on February 12, 2024 and to let him (Scott Harris) know that FCI Victorville II was going on lockdown as we spoke. I, as of 2-15-2024, DO NOT/HAVE NOT HAD ACCESS to the Inmate Copier. And, it is impossible to write out/complete a Writ of Certiorari in THREE DAYS. Barring any unforeseen events it will be mailed out next week.

REASONS FOR GRANTING THE PETITION

1. The Decision of the Lower Courts Conflicts With this Court's Precedents

a. The Lower Courts' Decision Conflicts With this Court's Precedent Requiring Discovery as a Safeguard to Give Parties a Fair Opportunity to Present the Basic Facts and Issues (Question 1)

- (1) The District Court abused its discretion and created a conflict with this Court when it failed to allow the Petitioner an opportunity for discovery. This was not only for the SF-95 Form and statute of limitations issue, but also as to whether or not the Defendants withheld their Answer from the Petitioner, in July 2022, costing him time to respond and wasted postage. The District Court was ALREADY aware of the Petitioner's financial situation ("low account balance - Doc. 16 4/28/2022). Yet, they abused their discretion by denying an opportunity for discovery to validate it. See *United States v. Proctor & Gamble*, 356 U.S. 677, 683, 78 S. Ct. 983, 2 L. Ed. 2d 1077 (1958) ("The purpose of discovery is to make trial 'less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent possible.'")
- (2) The District Court DID NOT allow the Petitioner a fair opportunity to expand the record and marshal necessary facts for the defense of his FTCA claim. See *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947) ("[The purpose of discovery is also] 'to narrow and clarify the basic issues [in dispute] between the parties.'") As to the latter, there were TWO (2) Tort Claim (SF-95) Forms presented to the FBOP, but the United States (Defendant) failed to mention the second claim that was a part of this action. See FTCA (Court) Complaint Form Page 10 - The Defendant withheld critical medical records (heart attack and myocarditis and HIGH Troponin levels (4-17-2020 to 4-19-2020)) from the Petitioner, from May 2020 to September 16, 2020, which relate back to the first claim and are tied into the second claim as well.
- (3) The District Court's failure to allow discovery is central and key to ALL

plaintiffs, especially pro se plaintiffs. Here, it is essential to show WHO knew WHAT about the Petitioner's Troponin I levels and WHEN and whether or not the Petitioner's Troponin levels were NORMAL (less than 0.04) BEFORE he was discharged on April 19, 2020. This issue is CRITICAL because it relates to heart tissue damage as evidenced by CONTINUING chest pains THREE MONTHS later and a diagnosis of atrial fibrillation on February 18, 2022 (EKG Report), which was kept from the Petitioner and on April 21, 2022.

- (4) This issue is important to all pro se indigent/informa pauperis inmate plaintiffs in federal and state prisons due to restrictions imposed by the PLRA. (Prison Litigation Reform Act). The PLRA greatly reduced the opportunity for those inmates to retain counsel, who would be able to assist them with discovery. Additionally, many pro se inmate plaintiffs were not lawyers on the street and are unable to afford counsel and had/have to learn how to litigate unsuccessfully, in many cases. They often lose their cases at the summary judgment stage. This is because, in many cases, the evidence they need to defeat summary judgment is in the hands of the defendant(s). The financial status of those pro se inmates also prevents them from being able to litigate effectively.
- (5) Therefore, based on the lower court's conflict with this Honorable Court precedent as to the safeguard of discovery, the District Court's decision should be reversed and remanded for discovery and further proceedings. The reversal of the lower court's decision will ensure that pro se inmates have a FAIR chance to litigate their case. This is also applicable and important to pro se [private] civilian litigants, who may be up against government agencies. Discovery is an important process for them as well due to their limitations in gathering evidence for summary judgment. It could be due to, for example, sexual harassment, and the plaintiff has been blacklisted or even fired for not giving in. Discovery, as a safeguard, as dictated by this Honorable Court's rulings in *United States v. Proctor & Gamble*, 356 U.S. at 683, and *Hickman v. Taylor*, 329 U.S. at 501, would ensure that pro se civilian litigants and pro se indigent/informa pauperis inmate litigants get a FAIR opportunity to present evidence for discovery to support their case against the United

(5) (cont'd...) States, who has unlimited resources. And, in conclusion of this argument/reason, the PUBLIC has a RIGHT to know what their government is up to and discovery is the REQUIRED tool to do so.

b. The Lower Courts Decision Conflicts With this Courts Precedent on the Continuing Violation Doctrine (Questions 2 and 3)

(1) The District Court abused its discretion and created a conflict with this Court when it erred by failing to consider the "continuing violation doctrine" for the Petitioner's FTCA claims of ONGOING negligent acts and omissions. The Petitioner through the filing of THREE (3) grievances (ID#s: 936342, 986354, and 992661) over a period of seventeen (17) months from the filing of the first BP-9 to the filing of the last (March 2018, September 11, 2019) for this action, for ONGOING (and untreated) medical problems, constitutes "continuing violations" for the purposes of this [FTCA] claim. Therefore, the claim accrued at a later date than that which was presented by the Defendant. See *McDonough v. Smith*, — U.S. —, 139 S. Ct. 2149, 2155. (2019) ("Where, for example, a particular claim may not realistically be brought while a violation is ongoing, such a claim may accrue at a later date.")

(2) In the Petitioner's case, he was assessed with ulcers in March 2016, but NEVER sent out to PHYSICALLY CONFIRM IT, with an EGD. This was denied, until January 29, 2021, despite CONTINUED PAIN even after being prescribed MULTIPLE medications with NO improvement. In fact, some of the medications made the Petitioner hurt more. That clock kept restarting because the Petitioner has been denied follow-up on that EGD since that day; January 29, 2021. (See [Court] FTCA Complaint Page 12A ¶ "9." and "10."). The Petitioner has also had ONGOING pain in his abdominal area after defecation since 2020. (See [Court] FTCA Complaint Pages 12D, 12E ¶ "20." to "23." See also ¶ "24." to "43." (ONGOING kidney pain); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117, 122 S. Ct. 2061, 153 L. Ed. 2d 106 (2002) ("Claims that are 'composed of a series of separate acts that collectively constitute one unlawful... practice,' then as long as one of these acts falls within the applicable time

b. (2) (cont'd.) period, the court may consider acts that occur outside of it.)

(3) This issue is of national and public importance, especially as it pertains to federal inmates and the efficient operation of the federal prison system and the federal government as a whole. The federal government (i.e. the United States of America) has a duty, under 18 USC § 4042, to provide for the safekeeping and care of all federal inmates charged with offenses against the United States. See *United States v. Muniz*, 374 U.S. 150, 83 S. Ct. 1050, 10 L. Ed. 2d 805 (1963) ("The Supreme Court has determined that the duty of care owed by the BOP is fixed by 18 USC § 4042, independent of an inconsistent state rule.) By taking the petitioner into custody, the United States obligates itself to provide safekeeping and care to him under 18 USC § 4042. See *Estelle v. Gamble*, 429 U.S. 97, 103 (1976) ("The Supreme Court held that the government has an obligation to provide medical care for those whom it is punishing by incarceration.")

(4) As to the latter, negligence, by its employees, in employing that care, runs counter to this and results in unnecessary costs that are incurred by the government, but passed on to the taxpayers. This cost is reflected, only partially, to the public, by the Cost of Insurance "estimates" each year. However, that cost DOES NOT SHOW the needless suffering and resultant deaths, in some cases, of inmates due to the negligent failure to address continuing violations. This includes, but is not limited to: negligent medical care, assaults, rapes, retaliation, and more. And, in the federal government itself, its employees may face continuing acts of sexual assaults, harassment, and rape. But, due to intimidation, interference by the Defendants, or a lack of accountability of the defendants within the agency, the plaintiff(s) cannot file an FTCA complaint on time and is/are subjected to related acts OUTSIDE of the limitations period and, through defendant's counsel, are told they are time-barred. This is counter to this Court's precedent in *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 117 (2002).

b. (5) Therefore, based on the foregoing, the District Court's decision should be reversed and remanded for discovery and further proceedings due to an abuse of discretion, to prevent a gross miscarriage of justice to the Petitioner and similarly situated plaintiffs, and to conform to the moral and ethical principles of fundamental fairness and procedural due process of law.

c. The Decision of the Lower Courts are in Conflict With this Court's Precedent as to the Requirement of Legal Theories in the SF-95 Form and the Liability of the United States in the Petitioner's Claim.
(Questions 4 and 5)

(1) The District Court abused its discretion when it denied the Petitioner an opportunity for discovery to prove that he HAD put the United States on notice as to its duties of care to him under 18 USC § 4042. This was done via grievances (Renedy ID#s 905342, 906154, and 992661), "Requests to Staff" (copouts), and through BOTH tort claims. See *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S. Ct. 374, 376, 1 L. Ed. 2d 354 (1957) ("[T]he test established by the [FTCA] for determining the United States liability is whether a private person would be responsible for similar negligence under the laws of the state where the acts occurred.")

(2) The Petitioner put sufficient information in his grievances, correspondence about the grievances, and in BOTH of his administrative tort claims to put the United States on notice as to their liabilities. It should be judicially noted that the Defendant only talked about ONE administrative claim, NOT two (2), which infers concealment. See [Court] FTCA Complaint Form (Page 10). The allegations in all of the Petitioner's documentation that was submitted to the Defendant could be/should have been construed as ongoing violations under the "continuing violations doctrine" or negligence, which is less than deliberate indifference, which is a higher standard. Especially when the Petitioner noted that the FBOP employees, who work for the Defendant (the United States of America), had a duty of care to him under 18 USC § 4042. See *Jones v. United States*, U.S. Dist. LEXIS 122382, at *16-17 (4th Cir. 2012) (citing *Setser v. Browning*, 234 W. Va. 504, 590 S.E.2d 697, 701 (W. Va. 2003)) ("A long standing premise of the law of [West Virginia] is that negligence

C. (2)(contd...) is the violation of the duty of care under the given circumstances. It is not absolute, but it is always relative to some circumstances of time, place, manner, or person. ") Accordingly, the duty of care owed to an inmate under West Virginia law is consistent with 18 USC § 4042); Id at 18 ("Because the FTCA renders the United States liable for negligently failing to protect a prisoner, negligence, in the opinion of the undersigned, includes failure to respond to a risk which a reasonable person would have known, whether or not he or she was actually apprised of it. See *Farmer v. Brennan*, 511 U.S. 825, 847, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) (an 8th Amendment claim for deliberate indifference requires actual notice); *Del Raine v. Williford*, 32 F.3d 1024, 1032 (7th Cir. 1994) (comparing constitutional and negligence standards).

(3) As to the latter, PA Wilton, EMT Brenner, Dr. Anderson, EMT Houchins, Warden Hudgins, HSA Moore, Nurse Valdiviezo (Lunsford), and Nurse Weaver were all aware of the Petitioner's cyanosis (blue hands and feet) and the first five were aware of the Petitioner's chest pains from October 15, 2019 onward and the EKG report of right bundle branch block (RBBB) and bradycardia (abnormally slow heart beat) on October 21, 2019. However, blood tests for troponins were not performed, nitroglycerin was not prescribed, a cardiologist was never summoned, and 9-1-1 was not called for an ambulance to take the Petitioner to an emergency room (since he CANNOT do it himself), as per the GI specialist's Patient Instructions received on 9-17-2019, due to a possible allergic reaction to psyllium fiber. On April 17, 2020, the Petitioner had a heart attack that could have been prevented were it not for the negligence of the employees above. This made/makes the United States liable for injuries suffered (myocarditis and heart attack), by the Petitioner, at the hands of the Defendant's employees. This is because a reasonable person and a lay person would know that chest pains and blue skin color can be severe and life-threatening. These facts can be liberally construed from the Petitioner's grievances, attached documents, and BOTH administrative tort claims (SF-95). See *Murray v. United States*, 73 F.3d 1448, 1452 (7th Cir. 1996) ("But as no statement of

c. (3) (contid...) legal theories is required [on Standard Form 95], only facts plus a demand for money, the claim encompasses any cause of action fairly implicit in the facts." In the Petitioner's case, the United States "investigation" SHOULD include administrative remedies, complaints, "Requests to Staff" (copouts), administrative tort claims (SF-95), medical records, and even letters written directly to them (See Motion for Rehearing dated 7-9-2023, Exhibit RH10 (Letter to USDOJ Civil Rights Division dated 9-11-2019) and RH11 (Letter to USDOJ Civil Rights Division - Varita Gupta dated 6-14-2020 (~~BEFORE~~ SECOND tort claim was filed) See Pages 7 AND 8). See *Burchfield v. United States*, 168 F.3d 1252, 1256 (5th and 11th Cir. 1999) ("An agency cannot use an overly technical reading of the language of a claim as a reason to turn a blind eye to facts that become obvious when it investigates the alleged events.")

(4) Therefore, based on the foregoing, the District Court's decision should be reversed and remanded for discovery and further proceedings. Since many plaintiffs are not lawyers, they should not be penalized and have their case dismissed for not putting "legal theories" in their administrative claims, when the federal regulations (28 CFR § 14.2) and statutes (28 USC § 2675) DO NOT specifically state so. The Petitioner DOES CONCUR that the appropriate elements of a particular claim should be presented on the Court Complaint form(s). This is analogous to criminal law where conviction is on the elements of the crime. It is in keeping with fundamental fairness for BOTH SIDES. However, plaintiffs should be given FAIR and PROPER notice of these requirements in the instructions for filling out the Court-approved forms [and the SF-95 Form, if necessary]. To do otherwise will set many a plaintiff up for failure and it DOES NOT EQUATE to the EFFICIENT USE of the judicial system.

2. The Decision of the Lower Courts Conflicts With Decisions in Other Circuits

a. The Lower Courts' Decision Conflicts With other Circuits Precedent Requiring Discovery as a Safeguard to Give Parties a Fair Opportunity to Present Basic Facts and Issues (Question 1)

(1) The District Court abused its discretion [and the Appellate Court affirmed it], when they refused to allow the Petitioner an opportunity for

a. (1) (continued) discovery to defend himself against summary judgment. Their decisions are in conflict with other circuits. See *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 678 (9th Cir. 2018) ("The whole point of discovery is to learn what a party does not know or, without further information, cannot prove.") As to the latter, the Petitioner received the Roseboro Notice and Order to respond but DID NOT RECEIVE the Defendant's Answer. The District Court, the Appellate Court, the US Attorney's Office for the Central District of California (Los Angeles) and the Northern District of West Virginia (Wheeling, WV) nor FBOF staff raised any questions or gave any response as to WHO received and signed for the original Defendant's Answer but FAILED to provide it to the Petitioner. The United States was capable of providing that Answer to those questions. A log for Legal Mail, just like the copy of the log at FCI Gilmer, WV (Defendant Exhibit 1, Attachment E, FCI Gilmer Mail Log (Entry #10)), was needed by the Plaintiff to prove his case as to the receipt (failure to receive) of the Defendant's Answer at USP Lompoc, CA. And, it should be noted that the Petitioner DID NOT receive the Administrative Claim denial letter until August 18, 2020. It is impossible for the people on lines 1-9 and lines 11-16 to have signed for mail at the same time - 2:00 PM - as the Petitioner on line 10. The people on lines 1-9 are in DIFFERENT UNITS/BUILDINGS.

(2) The interference with the receipt of the original Answer and resulting delay caused the Petitioner's case to be DISMISSED WITH PREJUDICE. The District Court was ALREADY AWARE of the Petitioner's financial situation (i.e. "plaintiff's low account balance" Doc. 16 Page 2 **P 3** 4-28-2022). The District Court also failed to give any merits to the Petitioner's dilemma (Morton's Fork - See Page 38 of this document). See *Pac Fisheries, Inc. v. United States*, 404 F.3d 1103, 1111 (9th Cir. 2007) ("The purpose of discovery is to aid a party in the preparation of its case.") As to the latter, the Petitioner WAS NOT made aware of his myocarditis or his elevated troponin levels by Dr. Anderson or PA Wilson. As to the troponin levels (indicate heart muscle tissue damage), there are NO RECORDS that show NORMAL troponin levels (0.04 or less) PRIOR to the Petitioner's discharge. His troponin levels were elevated (CRITICAL HIGH) EIGHT HOURS PRIOR to his discharge. Nor did they, or others, contact his family (his sister)

a. (2)(cont'd...) about his heart attack.

- (3) Discovery would give the Petitioner an opportunity to learn WHO knew WHAT and WHEN and WHY (e.g. subjective state of mind) those FBOP (government) employees DID NOT fulfill their duty to the Petitioner to inform him AND his family, as per their own statutes and regulations, about his serious medical conditions and act on them to relieve his pain and suffering. The principle that the Petitioner should have had an opportunity for discovery is further supported by this Honorable Court's decision in Celotex Corp. v. Caltrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) ("Stating a general rule that summary judgment should only be granted after adequate time for discovery.")
- (4) It is also of national/public importance to GRANT this petition because the Federal Bureau of Prisons, as noted by Congress in related hearings in recent years, has refused to make its officers [that are responsible for this negligence/misconduct] accountable and federal inmates are caught in a [justice] system with few, if any, means of ACTUAL relief (e.g. We CANNOT take ourselves to the hospital and/or outside doctor/specialist.). And, as a result, many similarly-situated inmates, like the Petitioner, continue to suffer in pain; sometimes, like the Petitioner, for YEARS!!! And, as the Petitioner has seen for himself, gone on to experience further injury (cancer, surgery) and/or death. Allowing discovery to PROVE THIS is the right thing to do to help inmates, who CANNOT provide care for themselves, GET the CARE they SHOULD HAVE ALREADY had as per 18 USC §§4042 and 3553(a)(2)(D).
- (5) Therefore, due to conflicts with the decisions of other circuits and this Honorable Court's precedent, the District Court's decision should be reversed and remanded for discovery and further proceeding in the interest of the FAIR application of justice, the public interest to know what their government is up to, because it is still a live controversy and the Petitioner CONTINUES TO SUFFER as a result of the negligent acts and omissions of the Defendant, to prevent a gross miscarriage of justice resulting in further injury to the Petitioner, who has NO OTHER MEANS of resolving this if his petition is denied.

b. The Lower Courts' Decision Conflicts With the Precedent in Other Circuits as to the "Continuing Violation" Doctrine and Properly Construing Pro Se Plaintiffs' Claims Under that Doctrine. (Questions 2 and 3)

- (1) The Petitioner alleged, on multiple occasions throughout all his grievances, administrative claims, and the Court [FTCA] Complaint, ONGOING denial/ delays of medical care. This includes ONGOING, to this day, stomach/ abdominal pain, pain in the Petitioner's kidney areas with emphasis on the left kidney, which has a 4.3 cm (1.6 inches) diameter cyst in it (size as of 9-18-2018 - NO follow-up on this), and heart problems to include atrial fibrillation, whose cause has yet to be determined and/or revealed to him. See *Torres-Estrada v. Cases*, U.S. App 32226, at *16-17 (1st Cir 2023) ("But the district court erred in failing to address Torres-Estrada's 'continuing violation theory.' ... the district court erred by finding Torres-Estrada's Bivens claims time-barred without considering the 'continuing violation' doctrine."); See *Louniet*, 828 F.2d at 948-49 ("recognizing and applying the 'continuing violation' doctrine to Bivens and FTCA claim.") *Torres-Estrada* at *14 (1st Cir 2023)
- (2) The Petitioner's medical care was in the hands of FBOP officials at FCI Gilmer, WV, until September 28, 2021, which would be the date of the "last injury/injuries" inflicted upon the Petitioner at FCI Gilmer, WV. He was transferred on this day to USP Lompoc, CA via Federal Transfer Center (FTC) Oklahoma and FCI Victorville II, CA and arrived at USP Lompoc, CA on December 6, 2021. See *Michel v. Fed. Bureau of Prisons FCI*, U.S. Dist. LEXIS 211178, at n.11 (11th Cir. 2018) ("... See, e.g. 54 C.J.S. Limitations of Actions § 223 ('A continuing violation of tort is occasioned by continuing unlawful acts and conduct; not by continued ill effects from an initial violation.');
- 54 C.J.S. Limitations of Actions § 132. ("[U]nder the continuing tort or 'continuing violation rule,' where a tort involves a continuity of a repeated injury, the limitations period does not begin to run until the date of the last injury or the date on which the tortious acts cease.") See also *Ward v. Cavitt*, 650 F.2d 1144 (9th Cir. 1981) ("A continuing violation sufficient to toll a statute of limitations is occasioned by continued unlawful acts not by continued ill effects from an original violation."); *Gross v. United States*, 676 F.2d 295 (8th Cir. 1982) (An FTCA agricultural claim that pled the

b. (2)(Contd...) continuing violation doctrine, which based the accrual date of the claim on the date of the last tortious act.)

(3) This issue is of importance to the national and public interest, because similarly situated plaintiffs SHOULD NOT be deprived of the opportunity to have a FAIR opportunity to present their facts to the Court. This is especially true when evidence on the available record, discoverable evidence, and/or verified allegations under penalty of perjury under 28 USC § 1746 is/are submitted to the Court, but are dismissed due to an abuse of discretion at the District Court level. This includes the failure to liberally construe those allegations in the light most favorable to the plaintiff(s). And, in situations involving the ongoing lack of medical care, harassment, assaults, and/or other violations that had harmed or will continue to harm (a) plaintiff(s), the defendant will escape liability for the negligent acts and omissions of its employees. See *Smith v. Bowers*, 813 F.2d 1299, 1303 (4th Cir. 1987) ("The Court is invested with broad equitable powers and simply should not be compelled to operate in a punishment or nothing atmosphere." *Alexander v. Hill*, supra, 707 F.2d at 703."); *Faretta v. California*, 422 U.S. 806, 824, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975) ("As the Supreme Court has pointed out, personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.") In a similar analogy, that is applied to the reasons for GRANTING this petition on behalf of similarly situated plaintiffs, of the denial of this petition or inaction are MORE suffering and MORE violations. The Defendants HAVE NOT BEEN DETERRED from the latter. It CONTINUES ON AS THIS is written. The reason this is important is because THIS Honorable Court is the end of the road and its say is FINAL unless it overrules its own decision in the future.

(4) Therefore, based on the foregoing, the District Court's decision, which is in conflict with other circuits [and this Honorable Court's precedents], should be reversed and remanded for discovery and further proceedings in the interest of the FAIR administration of justice, the public interest and their right to know what their government is up to, and to prevent a gross miscarriage of justice [and CONTINUED PAIN AND SUFFERING] to the

b. (4)(cont'd...) Petitioner and similarly situated plaintiffs.

c. The Lower Courts' Decision Conflicts With the Precedent in Other Circuits as to the Requirement of Legal Theories in the SF-95 Form and the Liability of the United States in the Petitioner's Claim (Questions 4 and 5)

(1) The District Court abused its discretion when it denied the Petitioner an opportunity for discovery to prove that he DID put the United States on notice as to its duty of care to him under 18 USC § 4042.

(2) To avoid redundancy and due to petition page limitations please see Section 1. c. (2) and (3) - Legal Theories/Liability of the United States - on Pages 26 to 28. (See *Del Raine v. Williford*, 32 F.3d 1024, 1032 (7th Cir. 1994) (Comparing constitutional and negligence standards); *Murray v. United States*, 73 F.3d 1448, 1452 (7th Cir. 1996) ("... no statement of legal theories is required."))

(3) Plaintiffs ARE NOT required to put legal theories in their SF-95 Forms. Block B, (Basis of Claim) on the SF-95 (Claim for Damage, Injury, or Death) as Prescribed by Dept. of Justice 28 CFR 14.2 states, "State in detail the known facts and circumstances attending the damage, injury, or death, identifying persons and property involved, the place of occurrence, and the cause thereof. Use additional pages if necessary." However, the Petitioner DID put in language (e.g. 18 USC § 4042 - Duties of Bureau of Prisons (government)) as to their employees duties to him, on MULTIPLE documents, thereby putting the government (United States of America) on notice as to the theory of negligence [under West Virginia state law]. See *Jones v. United States*, U.S. Dist. LEXIS 122302, at *16-17 (4th Cir. 2012) ("... Accordingly, the duty of care owed to an inmate under West Virginia law is consistent with 18 USC § 4042."); See Court [ETCA] Complaint Pages 10 (Section V. B.), 11 (Section V. E.) and 12; See also Page 28 of this document (RE: Section 1. c. (3) - Motion for Rehearing dated 7-9-2023 Exhibits RH10 and RH11 (Letters to USDOJ Civil Rights Division 9/11/2019 and 6/14/2020)).

(4) Therefore, based on the foregoing, and the reasons in Section 1. c. (4) the District Court's decision should be reversed and remanded for discovery and further proceedings in the interest of the FAIR administration of justice, the public's interest and their RIGHT to know

c. (4)(cont'd...) what their government is up to, and to prevent miscarriages of justice for the Petitioner and other similarly situated plaintiffs. See Section 1. c. (3) (RE: (Page 28 of this document) Burchfield v. United States, 168 F.3d at 1256 (5th and 11th Cir. 1999)).

3. The Decision of the Lower Courts Conflicts With Their Own Circuit and State Law
a. The District Court's and the Appellate Court's Decision Conflicts With the Fourth Circuit [and West Virginia State Law], as it Pertains to (Fourth Circuit) the Safeguard of Discovery to Give Parties a Fair Opportunity to Present the Basic Facts and Issues (Question 1).

(1) The District Court abused its discretion when it DISMISSED the Petitioner's case WITH PREJUDICE WITHOUT allowing an opportunity for discovery 1) as to the delayed filing and 2) to be able to obtain information that a) is in the sole possession of the Defendant and b) was intentionally withheld by the Defendant, that could have aided/will aid the Petitioner's case. As to 1), See Motion for Rehearing dated 7-9-2023 Exhibits RH15 A and B. Exhibit B [for USP Lompoc, CA on or about 7-11-2022] is in the possession of the Defendant and asks the question "WHO signed for the Defendant's Answer on or about that date?" See also Exhibits RH17 and RH18, with EMPHASIS on RH17D (Page 4 of 5 - minimal to no funds) and RH18C (Doc. 16 Page 2 4/28/2022 - "Given the plaintiff's low account balance).

(2) The District Court also erred when it failed to consider the Petitioner's allegations that his medical records and FBOP Health Services Job Descriptions had been withheld by the Defendant. See Exhibits RH11D to RH13B. The date on the latter was the date the Petitioner was finally able to see his medical records for his heart attack and myocarditis. See also RH13D (FBOP Health Services Division (as opposed to the Public Health Service) Job Descriptions. These documents had been withheld from the Petitioner since 2019. These documents were critical because of the relevancy of whether Dr. Eddie Anderson and PA Alicia Wilson were FBOP Health Services Division employees or Public Health Service employees. See Bransgaard v. United Bureau of Prisons Health Serv. Staff, U.S. Dist. LEXIS 122007, at *19-20 (4th Cir. 2012) ("McCukey and Hopper submitted declarations stating that, ... they were commissioned officers in the United States Public Health Service employed by the Health Services Division of the Federal Bureau of Prisons.") The latter

a. (2)(contd...) makes a difference because, pursuant to 42 USC § 200, a suit against Public Health Service employees may only be brought pursuant to the FTCA (i.e. exclusive remedy).

(3) The Petitioner was misled by Dr. Anderson and, subsequently, PA Wilson, into thinking they were Public Health Service employees due to the District Court's decision in *Mays v. Hudgins*, 3:20-cv-181 (ND WV 4th Cir. 2021) where the District Court declared them members of the Public Health Service. Without proof to the contrary, which did not come until August 10, 2022 (THREE YEARS AFTER initially requesting it), the Petitioner had NO CHOICE but to amend his Bivens and FTCA Complaints to reflect those changes based upon the District Court's ruling. The District Court refused to allow discovery to prove the Petitioner's allegations. See *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 244 (4th Cir. 2002) ("Generally, summary judgment must be refused when the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Id.* at 244 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, n. 5 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1985))); See also *Pledger v. Lynch*, 5 F.4th 511, 526 (4th Cir. 2021) (citing *Harrods*, 302 F.3d at 244-45) ("Such premature summary judgment is particularly disfavored in the context of pro se litigation, and when 'facts bearing on the subjective knowledge' of defendants are exclusively in the control of the opposing party.") See *Id.* at 246-247 ("Judgment prior to discovery can be particularly inappropriate when a case involves complex factual questions about intent and motive).

(4) Therefore, based on the foregoing, conflicts within the District Court's own circuit, and the reasons previously specified in Section 1. a. (5) (Pages 23 and 24 of this document) and Section 2. a. (5) (Page 30 of this document), the District Court's decision should be reversed and remanded and this petition GRANTED for discovery and further proceedings to gather evidence to support the Petitioner's allegations, to ensure similarly situated plaintiffs are not deprived of the safeguard of discovery to gather evidence, exclusively in the Defendants' control and possession, that would have aided their defense against summary judgment, for the FAIR administration of justice, the public interest and their RIGHT to know what their government is up to, and to prevent a gross miscarriage of justice against the Petitioner NOW and against similarly situated plaintiffs in the future.

- b. The District Court's and the Appellate Court's Decisions Conflict With the Fourth Circuit AND West Virginia State Law as it Pertains to the "Continuing Violation" Doctrine and Properly Construing Pro Se Plaintiffs' Claims under that Doctrine, (Questions 2 and 3)

(1) The District Court abused its discretion and created conflict within its own circuit (Fourth) when it considered the Petitioner's ~~FTCA~~ claim time-barred without considering the "continuing violation" doctrine. The Petitioner had pled ongoing denials/delays in medical care (i.e., omissions and acts) for his stomach and abdominal pain and refusals to consult a cardiologist before and after his heart attack. See *Green v. Rubenstein*, 644 F. Supp. 2d 723, 747 (4th Cir. 2009) ("When harm results from a series of acts and omissions, Courts have found that the continuing violation doctrine applies.") *Id.* citing *Heard v. Sheahan*, 253 F.3d at 318 ("... This refusal (to treat the plaintiff's pain) continued for as long as the defendants had the power to do something about his condition, which is to say until he left the jail. Every day that they prolonged his agony by not treating his painful condition marked a fresh infliction of punishment that caused the statute of limitations to start running anew.") *Green v. Rubenstein*, 643 F. Supp. 2d at 747 ("Thus, the limitation period begins to run on the last day of the delay.") As to the latter, it should be noted that the Petitioner HAS NOT seen a gastroenterologist since June 17, 2021 and he CONTINUES to suffer in pain (6-8) after defecation since 2020.

(2) The District Court and the Appellate Court's decisions conflict with state as it relates to the "continuing violation" doctrine. See *Roberts v. West Virginia American Water Company*, 221 W. Va. 373, 379, 655 S.E. 2d 119 (W. Va. 2007) (quoting *Graham v. Beverage*, 211 W. Va. 456, 566 S.E. 2d 603 (2002)) ("The law in West Virginia is that "[w]here a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease."); See *Roberts*, *supra* at 379 ("The West Virginia Supreme Court of Appeals noted that the distinguishing aspect of a continuing tort with respect to negligence actions is continuing tortious conduct, that is a continuing violation of a duty owed the person alleging injury, rather than continuing

b. (2)(continued) damages emanating from a discrete tortious act. It is the continuing misconduct which serves to toll the statute of limitations under the continuing tort doctrine.")

(3) The chest pains are tied into the Petitioner's stomach and abdominal pain problems because they began AFTER taking the fiber tablets at the end of September 2019. The continuing acts and omissions include the failure to call 9-1-1 despite instructions from the GI specialist (Patient Instructions) that were made known to EMT Brenner and others on/around September 23, 2019. The chest pains began in October 2019. An EKG was performed on October 21, 2019, but a cardiologist was NEVER consulted despite a multiple number of Sick Call Requests reporting chest pain. These omissions are the tortious acts defined above. Because they are/were repeated acts, they fell into the criteria in Roberts. And, they occurred during AND after the normal statutory time period, which should allow the Petitioner's claim (FTCA) to be tolled under the "continuing violation" doctrine.

(4) Therefore, based on the foregoing reasons, and the reasons previously stated in Section 1. b. (5) on page 26 of this document and Section 2. b. (3) and (4) on Pages 32 and 33 of this document, the District Court's decision should be reversed and remanded for discovery and further proceedings to allow the Petitioner to prove that his FTCA claim IS NOT/WAS NOT time-barred under the "continuing violation" doctrine due to the failure of the District Court to properly/liberally construe his claim in a light favorable to him based on FACTS not speculation.

C. The Lower Courts' Decision Conflicts With Their Own Circuit (Fourth) as to the Requirement of Legal Theories in the SF-95 Form and the Liability of the United States (Questions 4 and 5)

(1) The District Court's decision is in conflict with its own circuit. Due to space limitations and to avoid redundancy, the reasons for GRANTING this petition on this ground are explained in Section 2. C. (1)-(4) on pages 33 and 34 of this document. See *Ahmed v. United States*, 30 F.3d 514, 517 (4th Cir. 1994) (RE: elements of claim)

4. The Lower Courts Abused Their Discretion when they refused to take the Petitioner's Financial and Medical Situation Into Account as it Related to the Dismissal.

a. The District Court abused their discretion when they failed to take into account the Plaintiff's financial situation that they are aware of (See Doc. 16 Page 2 ¶ 4/20/2022 "Plaintiff's low account balance") in April 2022 and the Petitioner reemphasized this in his Motion to file Out of Time and for Reconsideration and attached commissary receipts for stamps and copy cards in September 2022.

(1) The Petitioner was put into that position by the Defendant when they FAILED to provide him with the Defendants answer. It cost the Petitioner more than half a book of stamps to ask the court for another copy, which is not really an extension because the Petitioner was unable to START on his reply without knowing WHAT was in the Answer, due to their INTENTIONAL withholding of the Answer. This same tactic was, unsuccessfully, employed at FCI Gilmer, WV for Case No.: 5:20-cv-00212, Mays v. United States (NDWV 4th Cir. 2021 (August 31, 2021))

(2) This put the Petitioner in a bad position; two choices with a negative outcome either way he chose (Morton's Fork). He had to choose between losing out on an injunction to get an echocardiogram, that had been due - follow-up on for heart attack - TWO YEARS PRIOR or lose this case and get NO JUSTICE for the delays that CAUSED the heart attack. The Petitioner HAD to RESPOND to the 9th Circuit (Case No.: 2:22-cv-05524-SVW-PVC Mays v. Birkholz, et al.) AND the 4th Circuit (Case No.: 5:22-cv-36 Mays v. United States). AT THE SAME TIME, See Braun v. Colvin, U.S. Dist. LEXIS 25850, n.2 (4th Cir. 2015) (A choice between something or nothing. Or maybe it is a simple dilemma or the more treacherous Morton's Fork.); See also Moore v. Czerniak, 574 F.3d 1092, 1166 (9th Cir. 2005) ("... where defense counsel is faced with a "Morton's Fork" -- a choice between two equally unpleasant alternatives."); A choice created by the Defendant's (United States) conduct against the Petitioner.

(3) Therefore, for the foregoing reasons, the District Court's decision should be reversed and remanded for discovery and further proceedings to prove that the Petitioner was FORCED to make that choice and DID NOT do so out of willful contempt for the Court, for the FAIR administration of justice, the public interest, and to prevent a gross miscarriage of justice.

Therefore, for the foregoing reasons and to prevent a gross miscarriage of justice against the Petitioner, this Honorable Court should not affirm the dismissal with prejudice of the Petitioner's FTCA negligence claims on the grounds that he was time-barred, that he failed to plead the elements in his Court [FTCA] Complaint, that he did not provide the United States with notice of those claims, and that he PURPOSEFULLY failed to respond (contempt) to the District Court on time in September 2022.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
Joseph R. Mays, 43807-007, pro se
FCI Victorville II Medium Po Box 3050 Adelanto, CA 92301

Date: February 29, 2024

Appendix A

JOSEPH RANDOLPH MAYS, Plaintiff - Appellant, v. UNITED STATES OF AMERICA, Defendant - Appellee.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

2023 U.S. App. LEXIS 12975

No. 22-7177

March 25, 2023, Decided

May 23, 2023, Submitted

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Subsequent History

As Corrected May 30, 2023 Rehearing denied by Mays v. United States, 2023 U.S. App. LEXIS 24233 (4th Cir., Sept. 11, 2023)

Editorial Information: Prior History

{2023 U.S. App. LEXIS 1} Appeal from the United States District Court for the Northern District of West Virginia, at Wheeling. (5:22-cv-00036-JPB-JPM). John Preston Bailey, District Judge. Mays v. United States, 2022 U.S. Dist. LEXIS 189043, 2022 WL 7376302 (N.D. W. Va., Sept. 6, 2022)

Disposition:

AFFIRMED.

Counsel

Joseph Randolph Mays, Appellant, Pro se.

Judges: Before AGEE, WYNN, and QUATTLEBAUM, Circuit Judges.

Opinion

PER CURIAM:

Joseph Randolph Mays appeals the district court's orders dismissing with prejudice his action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680, and denying his motion to file an out-of-time response to the United States' motion to dismiss. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's orders. *Mays v. United States*, No. 5:22-cv-00036-JPB-JPM (N.D.W. Va. Sept. 6, 2022; Sept. 22, 2022). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

Appendix B

JOSEPH RANDOLPH MAYS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
2022 U.S. Dist. LEXIS 189043
Civil Action No. 5:22-CV-36
September 6, 2022, Decided
September 6, 2022, Filed

Editorial Information: Subsequent History

Affirmed by Mays v. United States, 2023 U.S. App. LEXIS 12975 (4th Cir. W. Va., Mar. 25, 2023)

Counsel {2022 U.S. Dist. LEXIS 1} **Joseph Randolph Mays**, Plaintiff, Pro se,
Lompoc, CA USA.

For United States of America, Defendant: Morgan McKee
(USA), LEAD ATTORNEY, U.S. Attorney's Office - Wheeling, Wheeling, WV USA.

Judges: JOHN PRESTON BAILEY, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: JOHN PRESTON BAILEY

Opinion

ORDER DISMISSING CASE

Pending before this Court is Defendant's Motion to Dismiss, Or in the Alternative, Motion for Summary Judgment [Doc. 27]. The plaintiff received extensions of time to file his response to the motion, more recently requesting and being granted an extension until August 31, 2022. No response has been received.

Plaintiff, **Joseph Randolph Mays**, is a federal inmate who was previously incarcerated at the Federal Correctional Institution ("FCI") Gilmer in West Virginia from November 1, 2016 to September 28, 2021. Mr. Mays filed this action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671, et seq., alleging deliberate indifference to his serious medical needs while at FCI Gilmer. Mr. Mays requests this Court to declare that the United States violated his rights, enter an Order to provide medical treatment, award actual and compensatory damages, and award attorney fees.

On July 20, 2020, Plaintiff filed an administrative claim with the Federal Bureau of Prisons ("BOP") {2022 U.S. Dist. LEXIS 2} alleging government liability in the amount of \$10,000,000 for "[d]eliberate indifference to the Plaintiff's (Joseph R. Mays) serious medical needs . . ." Specifically, plaintiff alleged that he did not receive treatment for kidney, stomach, and abdominal pain other than in a visit with a Gastroenterologist Specialist in September of 2019. As a result, plaintiff alleged that he suffered a heart attack on April 17, 2020 and received follow-up care only once within the three months prior to filing the administrative claim with the BOP on July 20, 2020.

Plaintiff's administrative claim was assigned reference number TRT-MXR-2020-05948. In response, the BOP denied plaintiff's administrative claim by letter dated July 22, 2020, finding that Constitutional claims are not cognizable under the FTCA pursuant to **FDIC v. Meyer**, 510 U.S. 471,

475-76, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994).

The BOP explained in its letter to plaintiff that in *Meyer*, the Supreme Court found: [T]hat to be actionable under the Tort Claims Act, a claim must allege that the United States would be liable to the claimant as a private person in accordance with the law of the place where the act or omission occurred. Because by definition federal law, not state law, provides the source of liability for{2022 U.S. Dist. LEXIS 3} a claim alleging the deprivation of a federal constitutional right, the United States has not rendered itself liable under the tort claim provisions for constitutional tort claims. Plaintiff signed for and received the denial letter at FCI Gilmer on August 17, 2020.

Though the FTCA does waive the government's sovereign immunity under certain conditions, strict compliance with the FTCA's conditions must be observed. See *McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993) (affirming dismissal where *pro se* plaintiff failed to strictly adhere to FTCA's procedural and timing requirements). Pursuant to 28 U.S.C. § 2401(b), a tort claim against the United States is barred unless "begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b); see also *Henderson v. United States*, 785 F.2d 121 (4th Cir. 1986) (civil action must be commenced within six months after final denial of the claim by the agency). This time requirement is strictly construed, such that filing a complaint even one day beyond the six-month time frame will result in dismissal of the action. *Gibbs v. United States*, 34 F.Supp.2d 405, 406 (S.D. W.Va. 1999) (Haden, CJ); *McClain v. United States*, No. 2005 U.S. Dist. LEXIS 51550, 2005 WL 2148929, at *3 (W.D. N.C. Sept. 7, 2005) (Horn, MJ.) (unpublished) ("having failed to strictly adhere to FTCA's filing requirements,{2022 U.S. Dist. LEXIS 4} even by a single day, the Plaintiffs claim is 'forever barred'").

Here, Mr. Mays' administrative tort claim filed with the BOP was denied by letter dated July 22, 2020. The denial letter was sent via certified mail, and it was received by plaintiff the same day of delivery on August 17, 2020. The denial letter contained a statement that if plaintiff was dissatisfied with the BOP's determination, he could file suit in an appropriate United States District Court within six months of the date of the letter. See 28 C.F.R. § 14.9; *Johnson v. United States*, 652 F. Supp. 407 (E.D. Va. 1987) (Cacheris, J.). Therefore, the six month period began to run on the date of the denial, July 22, 2020, and plaintiff was required to file his Complaint with this Court by January 22, 2021 or at the latest February 17, 2021. However, Mr. Mays did not file the instant action until March 1, 2022, over a year after the statute of limitations had expired. Thus, plaintiff's claims against the United States under the FTCA are time barred and must be dismissed.

Inasmuch as Mr. Mays already has a *Bivens* claim under the Eighth Amendment pending in this District - *Mays v. Saad*, Civil Action No. 3:20-CV-199-GMG-RWT, this case cannot be morphed into a *Bivens* case, and a *Bivens* case does not lie against{2022 U.S. Dist. LEXIS 5} the United States.

For the reasons stated above, Defendant's Motion to Dismiss, Or in the Alternative, Motion for Summary Judgment [Doc. 27] is **GRANTED** and this action is **DISMISSED WITH PREJUDICE**.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: September 6, 2022.

/s/ John Preston Bailey

JOHN PRESTON BAILEY

UNITED STATES DISTRICT JUDGE

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Appendix C

JOSEPH RANDOLPH MAYS, Plaintiff - Appellant v. UNITED STATES OF AMERICA, Defendant -
Appellee
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
2023 U.S. App. LEXIS 24233
No. 22-7177
September 11, 2023, Filed

Editorial Information: Prior History

{2023 U.S. App. LEXIS 1}(5:22-cv-00036-JPB-JPM). Mays v. United States, 2023 U.S. App. LEXIS 12975, 2023 WL 3645572 (4th Cir. W. Va., Mar. 25, 2023)

Counsel JOSEPH RANDOLPH MAYS, Plaintiff - Appellant, Pro se, Lompoc, CA.
For UNITED STATES OF AMERICA, Defendant - Appellee:
Morgan Schafer McKee, Assistant U. S. Attorney, OFFICE OF THE UNITED STATES
ATTORNEY, Wheeling, WV.

Judges: Entered at the direction of the panel: Judge Agee, Judge Wynn, and Judge Quattlebaum.

Opinion

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Agee, Judge Wynn, and Judge Quattlebaum.

Appendix D

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1)

If executed without the United States: “I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)”.

(2)

If executed within the United States, its territories, possessions, or commonwealths: “I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)”.

HISTORY:

Added Oct. 18, 1976, P. L. 94-550, § 1(a), 90 Stat. 2534.

Appendix E

§ 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

HISTORY:

June 25, 1948, ch 646, 62 Stat. 983; May 24, 1949, ch 139, § 126, 63 Stat. 107; July 18, 1966, P. L. 89-506, § 2, 80 Stat. 306.

Appendix F

§ 233. Civil actions or proceedings against commissioned officers or employees

(a) Exclusiveness of remedy. The remedy against the United States provided by sections 1346(b) and 2672 of title 28 [28 USCS §§ 1346(b) and 2672], or by alternative benefits provided by the United States where the availability of such benefits precludes a remedy under section 1346(b) of title 28 [28 USCS § 1346(b)], for damage for personal injury, including death, resulting from the performance of medical, surgical, dental, or related functions, including the conduct of clinical studies or investigation, by any commissioned officer or employee of the Public Health Service while acting within the scope of his office or employment, shall be exclusive of any other civil action or proceeding by reason of the same subject-matter against the officer or employee (or his estate) whose act or omission gave rise to the claim.

Appendix G

§ 14.2 Administrative claim; when presented.

(a) For purposes of the provisions of 28 U.S.C. 2401(b), 2672, and 2675, a claim shall be deemed to have been presented when a Federal agency receives from a claimant, his duly authorized agent or legal representative, an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain for injury to or loss of property, personal injury, or death alleged to have occurred by reason of the incident; and the title or legal capacity of the person signing, and is accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

(b) (1) A claim shall be presented to the Federal agency whose activities gave rise to the claim. When a claim is presented to any other Federal agency, that agency shall transfer it forthwith to the appropriate agency, if the proper agency can be identified from the claim, and advise the claimant of the transfer. If transfer is not feasible the claim shall be returned to the claimant. The fact of transfer shall not, in itself, preclude further transfer, return of the claim to the claimant or other appropriate disposition of the claim. A claim shall be presented as required by 28 U.S.C. 2401(b) as of the date it is received by the appropriate agency.

(2) When more than one Federal agency is or may be involved in the events giving rise to the claim, an agency with which the claim is filed shall contact all other affected agencies in order to designate the single agency which will thereafter investigate and decide the merits of the claim. In the event that an agreed upon designation cannot be made by the affected agencies, the Department of Justice shall be consulted and will thereafter designate an agency to investigate and decide the merits of the claim. Once a determination has been made, the designated agency shall notify the claimant that all future correspondence concerning the claim shall be directed to that Federal agency. All involved Federal agencies may agree either to conduct their own administrative reviews and to coordinate the results or to have the investigations conducted by the designated Federal agency, but, in either event, the designated Federal agency will be responsible for the final determination of the claim.

(3) A claimant presenting a claim arising from an incident to more than one agency should identify each agency to which the claim is submitted at the time each claim is presented. Where a claim arising from an incident is presented to more than one Federal agency without any indication that more than one agency is involved, and any one of the concerned Federal agencies takes final action on that claim, the final action thus taken is conclusive on the claims presented to the other agencies in regard to the time required for filing suit set forth in 28 U.S.C. 2401(b). However, if a second involved Federal agency subsequently desires to take further action with a

view towards settling the claim the second Federal agency may treat the matter as a request for reconsideration of the final denial under 28 CFR 14.9(b), unless suit has been filed in the interim, and so advise the claimant.

(4) If, after an agency final denial, the claimant files a claim arising out of the same incident with a different Federal agency, the new submission of the claim will not toll the requirement of 28 U.S.C. 2401(b) that suit must be filed within six months of the final denial by the first agency, unless the second agency specifically and explicitly treats the second submission as a request for reconsideration under 28 CFR 14.9(b) and so advises the claimant.

(c) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final agency action or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the agency shall have six months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after the filing of an amendment.

HISTORY: [Order No. 870-79, 45 FR 2650, Jan. 14, 1980, as amended by Order No. 960-81, 46 FR 52355, Oct. 27, 1981; Order No. 1179-87, 52 FR 7411, Mar. 11, 1987]

Appendix H

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise, or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

- (1) entertain an independent action to relieve a party from a judgment, order, or proceeding;
- (2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or
- (3) set aside a judgment for fraud on the court.