NO. _____

In the
Supreme Court of the United States

LAQUAN STEDERICK JOHNSON,

Petitioner,

v.

ELAINE TERRY, OFFICER BURGESS, DR. MARTIN, DR. WINSTON, NURSE GARCIA, DR. NWUDE, MS. HARRIS, LIEUTENANT AVERY, OFFICER HOBBS, OFFICER MACKINBERG, OFFICER WILLIS, OFFICER FAYAD, and DARLENE DREW,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

J. Matthew Brigman
Logan R. Hobson
Joseph B. Hendricks
KING & SPALDING LLP
1180 Peachtree St. NE
Suite 1600
Atlanta, Ga 30309

Amy R. Upshaw
Counsel of Record
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
aupshaw@kslaw.com

Counsel for Petitioner

May 13, 2025

QUESTION PRESENTED

An individual may be entitled to pursue a *Bivens* remedy against a federal official who violated his constitutional rights, unless there are special factors indicating that such a remedy would interfere with the authority of other branches of government. *Egbert v. Boule*, 596 U.S. 482, 492 (2022). Where a prisoner has "full access to remedial mechanisms established by the [Bureau of Prisons], including suits in federal court for injunctive relief and grievances filed through the BOP's Administrative Remedy Program," the special-factors test is satisfied, foreclosing a *Bivens* remedy. *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001). But where a plaintiff "lack[s] *any alternative remedy* for harms caused by an individual officer's unconstitutional conduct," a *Bivens* remedy is appropriate. *Id.* at 70. Here, the Eleventh Circuit held that the mere existence of the BOP's Administrative Remedy Program satisfied the special-factors test, even though "plaintiff himself was denied access" to that program. App.37.

The question presented is

Does the existence of the BOP's Administrative Remedy Program foreclose a *Bivens* action where prison officials prevent the inmate from accessing that program, as the Eleventh Circuit held below, or does barring a prisoner from accessing that alternative remedy allow a prisoner to pursue a *Bivens* claim, as the Fourth Circuit held in *Fields v. Federal Bureau of Prisons*, 109 F.4th 264 (4th Cir. 2024)?

PARTIES TO THE PROCEEDING*

Petitioner LaQuan Johnson was plaintiff in district court and appellant in the court of appeals in No. 23-11394.

Respondents Elaine Terry, Officer Burgess, Dr. Martin, Dr. Winston, Nurse Garcia, Dr. Nwude, Ms. Harris, Lieutenant Avery, Officer Hobbs, Officer Mackinberg, Officer Willis, Officer Fayad, and Darlene Drew were defendants in the district court and appellees in the court of appeals in No. 23-11394.

* Parties listed as terminated in the district court include Defendants D.J. Harmon, BOP, John Does, Jane Does, Dr. Peterson, Officer Johnson, Warden Harmon.

RELATED PROCEEDINGS

The following proceedings are directly related to this petition under Rule 14.1(b)(iii):

United States Court of Appeals for the Eleventh Circuit:

Johnson v. Terry, No. 23-11394 (Feb. 20, 2025)

United States District Court for the Northern District of Georgia:

Johnson v. Terry, No. 1:18-cv-01899-AT (Mar. 23, 2023)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes & Regulations

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioner LaQuan Johnson ("Petitioner" or "Mr. Johnson") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Eleventh Circuit is published at 112 F.4th 995 (11th Cir. 2024) and reproduced at App.43–83. The subsequent, corrected decision is published at 119 F.4th 840 (11th Cir. 2024) and reproduced at App.1–42. The decisions of the United States District Court of the Northern District of Georgia are unpublished. The March 23, 2023 judgment is reproduced at App.84–85. The March 22, 2023 summary judgment opinion is available at 2023 WL 3215366 and reproduced at App.88–101. The August 16, 2021 order denying Defendants' motion to dismiss is available at 2021 WL 11718228 and reproduced at App.163–188.

JURISDICTION

The Eleventh Circuit issued its opinion on August 12, 2024. A timely petition for rehearing led the court to issue a substitute opinion on October 3, 2024, but the petition for panel and en banc rehearing was ultimately denied on February 12, 2025. App.86–87. The opinion was entered as the judgment of the Eleventh Circuit on February 20, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, reproduced at App.221, provides as follows:

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

The Eighth Amendment to the United States Constitution, reproduced at App.221, provides as follows:

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

INTRODUCTION

A foundational principle dating back to the English common law is "that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quotation marks omitted)

(citing Blackstone's *Commentaries*). The Founding Fathers held some rights so dear that they enshrined them into the Constitution. But the federal courts of appeals are intractably divided over whether it is appropriate to deny *any* remedy to individuals when a federal official violates those rights. The decision below expressly acknowledged this circuit split in holding that a damages remedy is unavailable, even where government officials affirmatively prevent an individual from accessing any other remedy. That holding erodes this Nation's most cherished rights, gives government officials carte blanche to ignore the Constitution, and leaves the vindication of constitutional rights to geographic happenstance. This Court's review on this issue of serious importance is needed.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court recognized that an individual may, in certain circumstances, recover damages from a federal officer who has violated his constitutional rights. To determine whether such a remedy is available in a new context, the Court considers whether "there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Egbert v. Boule*, 596 U.S. 482, 492 (2022) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 136 (2017)). What counts as a "special factor" has led to a sharp disagreement in the courts of appeal. The Eleventh Circuit held that the existence of an alternative remedial process alone qualifies as a "special factor," even if that process is impossible to access. In reaching that holding, the court acknowledged that it was

departing from the Fourth Circuit, which has held that the same alternative remedial process is a "special factor" only when it is available to access. Left undisturbed, this split will remain unresolved and give rise to further confusion in the district courts.

The split results in grave inequities in the protection of constitutional rights. Today, prisoners who suffer the same violation of the same constitutional right receive markedly different remedies depending on the circuit in which their prison sits. Not only that, but prisoners will also now face vastly different conditions because of this legal divide. As this Court has recognized, "[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). For prisons in the Fourth Circuit, this deterrent effect remains in full force. But for prisons in the Eleventh Circuit, prison officials who have acted unlawfully now have a map to avoid any repercussions—just prevent prisoners from accessing the administrative remedy program in the first instance.

In short, this case involves a clear and acknowledged circuit conflict on a vitally important question of remedies for the violation of constitutional rights. The petition should be granted.

STATEMENT OF THE CASE

A. Legal Background

The Court in *Bivens* held that an individual may recover damages where a federal officer has violated his constitutional rights. Although remedies initially exploded under *Bivens*, this Court has trimmed

Bivens's "outer reaches" in recent years while taking "great care" to confirm that the "core of *Bivens*" remains intact. *Jacobs v. Alam*, 915 F.3d 1028, 1037 (6th Cir. 2019) (citing *Abbasi*, 582 U.S. at 133–34). Although there have been calls for the Court to overturn *Bivens* entirely, *see, e.g.*, Petition for Writ of Certiorari at *i*, *Egbert*, 596 U.S. 482 (No. 21-147), 2021 WL 3409109, the Court has declined the invitation. Instead, it has made clear that it is not "dispens[ing] with *Bivens* altogether." *Egbert*, 596 U.S. at 491.

To determine whether a damages remedy under *Bivens* is appropriate, the Court has articulated a two-part test. *Abbasi*, 582 U.S. at 138; *Egbert*, 596 U.S. at 492. First, the Court determines "whether the case presents 'a new *Bivens* context'—*i.e.*, is it 'meaningful[ly]' different from the three cases in which the Court has implied a damages action." *Egbert*, 596 U.S. at 492 (alteration in *Egbert*) (quoting *Abbasi*, 582 U.S. at 139). "Second, if a claim arises in a new context, a *Bivens* remedy is unavailable if there are 'special factors' indicating that the Judiciary is at least arguably less equipped than Congress to 'weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* (quoting *Abbasi*, 582 U.S. at 136). While the Court has not expressly defined "special factors," it has stated that "the 'inquiry must concentrate on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed.'" *Id.* at 513 (Sotomayor, J., concurring in part) (quoting *Abbasi*, 582 U.S. at 136). Such special factors can include whether the remedy touches on matters in which the Executive Branch exercises considerable deference, as in national

security. *Abbasi*, 582 U.S. at 142. And special factors also include whether "alternative methods of relief are available." *Id.* at 137, 145.

In the context of litigation by prisoners, the Bureau of Prisons has established an Administrative Remedy Program or "ARP." *See* 28 C.F.R. § 542.10. The purpose of this program "is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." *Id.* "[F]ull access to [these] remedial mechanisms established by the BOP" is a special factor that counsels against a *Bivens* remedy. *Malesko*, 534 U.S. at 74; *see Egbert*, 596 U.S. at 497 ("In *Malesko*, we explained that *Bivens* relief was unavailable because federal prisoners could, among other options, file grievances through an 'Administrative Remedy Program.'").

B. Facts and Procedural History

LaQuan Johnson was incarcerated at USP-Atlanta from September 2015 to April 2019. Mr. Johnson repeatedly attempted to seek relief for harms he suffered in prison through the BOP's ARP. But prison officials repeatedly blocked him from doing so. Following years of abuse and neglect, which resulted in severe injuries, including a shattered jaw, Mr. Johnson filed his *Bivens* claims in the U.S. District Court for the Northern District of Georgia. App.9. The operative complaint alleged, among other things, failure-to-protect claims and medical indifference claims. App.21–23. Because the events in question took place before and after Mr. Johnson's conviction in April 2017, Mr. Johnson sought relief under both the Fifth and Eighth Amendments of the U.S. Constitution. App.21–23.

Defendants moved to dismiss Mr. Johnson's complaint for failure to exhaust his administrative remedies under the Prison Litigation Reform Act of 1995 ("PLRA"). App.164. The district court denied Defendants' motion without prejudice and ordered the parties to conduct targeted discovery on the exhaustion issue. App.165. After discovery closed, Defendants renewed their motion to dismiss. App.165. The Magistrate found that Mr. Johnson was denied access to the administrative remedy program at USP-Atlanta and recommended that the district court deny Defendants' motion to dismiss. Specifically, the Magistrate found, based on the evidence presented, that Mr. Johnson had sufficiently established that (1) he "never received the Handbook containing the particulars of the [ARP]"; (2) "he was refused grievance forms or those forms were not turned in"; (3) "he often did not receive any responses to his grievances or he received denials after the deadline for appeal, so that he could not correct the technical errors on which the denials were based"; (4) "the counselor and officers upon whom Plaintiff was to rely to provide him with forms and/or forward his remedy requests were not trained in connection with the ARP and were not familiar with the ARP's requirements"; and most troublingly (5) "when Plaintiff did attempt to file remedy requests he was assaulted, placed in the [special housing unit], placed in shackles, his cell ransacked, and threatened and intimidated." App.215.

Over Defendants' objections, the district court adopted the Magistrate's R&R, citing the Magistrate's specific findings above, and denied Defendants' motion. App.186–187. The district court explicitly noted that Mr. Johnson "presented an abundance of

record evidence . . . that the generally available remedies were not available to him because the administrative review process was both a 'dead end' and because prison administrators thwarted his attempts to grieve in a number of ways." App.179. The district court further observed that Plaintiff had encountered "consistent and multi-front blocking of the ARP." App.179.

Defendants later moved for summary judgment, arguing in part that Mr. Johnson's *Bivens* claims were not cognizable. Dkt.109. Shortly thereafter, the Supreme Court issued its *Egbert* decision. Following the close of summary judgment briefing, the district court requested additional argument specific to *Egbert* and its potential impact on Mr. Johnson's claims. Dkt.194. The Magistrate recommended that the district court grant Defendants' motions for summary judgment because each of Johnson's *Bivens* claims presented a new context, and because special factors (*i.e.*, the ARP) counseled against recognizing such claims. App.114–124. The district court reluctantly agreed and granted the Defendants' motions for summary judgment, concluding that Mr. Johnson's claims did not entitle him to a *Bivens* remedy. App.101.

The Eleventh Circuit affirmed the district court's decision on August 12, 2024. App.83. Relevant here, the panel found that the mere existence of the BOP's administrative remedy program—even if totally unavailable to Mr. Johnson—was a "special factor" that counseled against recognition of Mr. Johnson's *Bivens* claims. App.78–83. While the panel acknowledged the district court's finding that the

administrative remedy program was completely unavailable to Mr. Johnson due to Defendants' intentional interference, it nonetheless concluded that actual access "is not the question." App.78. What matters instead, according to the panel, is whether the program exists in the abstract. *See* App.81 ("Although Johnson believes he was, in essence, not allowed to access the grievance procedure, that is not enough to disqualify it as a special factor and authorize the creation of a new *Bivens* remedy.").

Mr. Johnson filed a petition for rehearing en banc on September 3, 2024. Among the questions presented was "whether the BOP's administrative remedy process can preclude recognizing a *Bivens* claim when that process is completely unavailable to Plaintiff." COA.Dkt.46 at *iv*. While the panel corrected its initial opinion to remove improper references to the Fourteenth Amendment, the Eleventh Circuit denied the petition. Thus, in the Eleventh Circuit, no *Bivens* remedy will be available to federal prisoners who suffer the deprivation of their constitutional rights, even if they have no access to any other alternative remedy. *See Carrin v. Smiledge*, --- F. Supp. 3d ---, 2025 WL 1199445, at *4 (N.D. Fla. Mar. 26, 2025) ("Though the Eleventh Circuit acknowledged that prison officials may have prevented the plaintiff from accessing the BOP ARP, it nonetheless held that this was 'not enough to disqualify [the BOP ARP] as a special factor.'" (quoting App.40)), *appeal docketed*, No. 25-11330 (11th Cir. Apr. 22, 2025); *Victoria v. Withers*, No. 5:24-CV-358-TJC-PRL, 2025 WL 417560, at *3 (M.D. Fla. Feb. 6, 2025) ("As noted by the Eleventh Circuit, 'Congress already has provided, or has authorized the Executive to provide, an

alternative remedial structure in the form of a grievance procedure for use by federal inmates. And it is in place. That by itself is a single reason to pause before applying *Bivens* in [a] new context[.]'" (quoting App.42)).

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision Creates a Circuit Split.

The United States Courts of Appeals have answered the question presented in conflicting ways. Addressing materially similar facts, the Fourth Circuit held that a *Bivens* claim remains available where a prison official bars the plaintiff from accessing any alternative remedy. In *Fields v. Federal Bureau of Prisons*, a prisoner filed a *Bivens* claims, claiming he was the victim of excessive force, in violation of the Eighth Amendment. 109 F.4th 264, 268 (4th Cir. 2024). The plaintiff specifically alleged that various officers physically assaulted him while he was restrained in an observation cell. *Id.* The plaintiff further alleged that he attempted to utilize the BOP's administrative grievance procedure, but staff denied him access to the requisite forms. *Id.* After his unsuccessful attempts to avail himself of the BOP's program, plaintiff filed a pro se case. *Id.* The U.S. District Court for the Western District Virginia dismissed plaintiff's claims under the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915A(b). *Id.* Plaintiff appealed.

The Fourth Circuit reversed, holding that "alternative remedies" are a "special factor" only when an individual has *access* to those remedies. Although

alternative remedies can preclude a *Bivens* remedy when they are available, that precedent did not apply where a plaintiff "lacked access to alternative remedies because prison officials *deliberately* thwarted his access to them." *Fields*, 109 F.4th at 274. The relevant inquiry, explained the court, "is whether the ARP is operational, such that it can provide any remedy to any prisoner at all." *Id.* The panel further found that, because it was the rogue officers who thwarted plaintiff's access to alternative remedies, the separation-of-powers concerns did not weigh against the *Bivens* remedy. The Court was not "second-guess[ing the] calibration" effected by the coordinate branches because that calibration has already been disrupted. *Id.* (quotation marks omitted). Accordingly, "[i]n such a case, where an inmate brings a claim against individual, front-line officers who personally subjected the plaintiff to excessive force in clear violation of prison policy, and where rogue officers subsequently thwarted the inmate's access to alternative remedies, no special factors counsel against providing a judicial remedy." *Id.* at 272.

Judge Richardson dissented, adopting an analysis more in line with the Eleventh Circuit. *Id.* at 276. According to the dissent, in relevant part, the mere existence of an alternative remedial scheme should have been enough to deny a *Bivens* remedy. *Id.* at 280. Although "'Fields lacked access to alternative remedies because prison officials *deliberately* thwarted his access to them,'" the dissent called it "myopic[]" to focus on the availability of alternative remedies. *Id.*

Fields and *Johnson* are uniquely similar cases that reached diametrically opposite results. The differing results cannot be explained by different facts. If anything, Mr. Johnson's case presents a stronger case factually. While Fields's claim that he was thwarted from accessing the BOP's administrative grievance procedure was only an allegation, *Fields*, 109 F.4th at 272, Mr. Johnson's was a finding of fact by the district court after benefit of discovery, App.167–168. The differing results can only be explained by the differing interpretations of this Court's precedent. And only this Court can resolve that clear divide.

II. The Eleventh Circuit's Approach Is Incorrect.

A. The Eleventh Circuit Misapplied *Egbert*.

The Eleventh Circuit's decision is not only in tension with Fourth Circuit precedent but also with this Court's precedent. Although the Eleventh Circuit cited *Egbert* in reaching its decision, that decision cuts the other way. In *Egbert*, the Court held that a plaintiff bed-and-breakfast operator could not bring *Bivens* claims against a United States Border Patrol agent for excessive force under the Fourth Amendment and for retaliation under the First Amendment. 596 U.S. at 502. The Court applied the two-part analysis from *Abbasi* regarding when courts may imply a Bivens remedy. *Id.* at 494–501. At step two, the Court rejected plaintiff's argument that the Border Patrol's grievance process was inadequate because, under the existing framework, he had "no right to judicial review of an adverse determination." *Id.* at 497. Emphasizing that petitioner "took

advantage of [the] grievance procedure, prompting a year-long internal investigation," the Court found that the grievance process "secured adequate deterrence and afforded [petitioner] an alternative remedy." *Id.* at 497–98. The Court therefore refused to "second-guess" the Border Patrol's procedure by "superimposing a *Bivens* remedy." *Id.* at 498.

But here, unlike the plaintiff in *Egbert*, Mr. Johnson is not challenging the appellate court's alternative remedial structure analysis based on the "adequacy or efficacy" of the ARP. App.39. When operated as Congress and the Executive intend, the ARP can provide adequate relief to federal inmates. Mr. Johnson readily concedes that point. Indeed, Mr. Johnson sought relief under the ARP before turning to federal court as a last resort after he was blocked by prison officials from accessing the program.

Mr. Johnson is instead seeking relief in court because the ARP was illusory—he could not access that alternative remedy at all. The district court determined exactly this, finding that prison officials at USP-Atlanta actively prevented Mr. Johnson from accessing the ARP. App.167–169. This situation presents a very different scenario from the one considered in *Egbert*—and the *Bivens* decisions which preceded it—because they all relied on the *availability* of alternative procedures. *See Hernandez v. Mesa*, 589 U.S. 93, 105–06 (2020) (declining to authorize a *Bivens* remedy, in part, because the Executive Branch already had investigated alleged misconduct by the defendant Border Patrol agent); *Malesko*, 534 U.S. at 74 (explaining that plaintiff's lack of alternative tort remedies was due to "strategic choice" and providing

that plaintiff also had "full access" to the BOP's Administrative Remedy Program).

Availability of an alternative remedy matters. In a similar context, this Court has explained that prisoners cannot be bound by administrative remedy regimes where prisoners cannot access those remedies. The PLRA prohibits inmates from bringing a legal challenge without first exhausting "such administrative remedies as . . . available." 42 U.S.C. § 1997e(a). This Court has found that an administrative remedy is unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 578 U.S. 632, 644 (2016); *see also Little v. Jones*, 607 F.3d 1245, 1250 (10th Cir. 2010) ("Where prison officials prevent, thwart, or hinder a prisoner's efforts to avail himself of an administrative remedy, they render that remedy 'unavailable' and a court will excuse the prisoner's failure to exhaust."); *Miller v. Norris*, 247 F.3d 736, 740 (8th Cir. 2001) ("We believe that a remedy that prison officials prevent a prisoner from 'utiliz[ing]' is not an 'available' remedy . . . .").

If a remedy is not "available" to a prisoner, then it is no alternative at all. "Alternative," when used as an adjective, means "offering or expressing a choice." Merriam-Webster (2025). Here, Mr. Johnson had no other remedial offering or choice—he had no alternative. His only recourse was the *Bivens* action he filed.

Even the panel acknowledged that "the alternative remedies in *Hernandez* and *Egbert* were actually available to the plaintiffs in those cases,"

distinguishing them from the case at hand. App.40 n.7. Instead of following *Hernandez* and *Egbert* to determine whether any alternative remedy was available, the panel simply labeled the Court's language as dicta. *Id.* That approach was wrong. As a matter of first principles, and as a matter of precedent, the Eleventh Circuit should have looked to whether the alternative remedy was actually available to Mr. Johnson. This Court should grant review and correct the Eleventh Circuit's error.

B. The Eleventh Circuit's Approach Infringes on Congress's Policy-Making Responsibility and Threatens the Separation of Powers.

Separation-of-powers concerns likewise weigh against the Eleventh Circuit's approach. The Eleventh Circuit justified its decision, in part, by its obligation to defer to the legislative branch on policy matters. App.20 ("The inquiry focuses on 'the risk of interfering with the authority of the other branches, and . . . ask[s] whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy.'" (quoting *Hernandez*, 589 U.S. at 102))." In reality, however, the Eleventh Circuit's decision disrupts the delicate policy decision that Congress and the Executive set forth. The political branches chose to allow inmates to pursue remedies for the violation of rights that occur during federal confinement. Under the Eleventh Circuit's approach, that policy choice has been wholly disregarded.

The Eleventh Circuit's decision to allow prison officials to disrupt the ARP and *Bivens* claims by preventing prisoners from accessing any alternative

remedy fundamentally redesigns the BOP's remedial framework. The BOP's chosen remedial process is a four-level program to "allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. § 542.10(a); *see also* App.6–7. The Eleventh Circuit, while saying that it does not want to second-guess that remedial design, has effectively changed the system to allow prison personnel to play a gatekeeping role and determine whether they should even allow prisoners to access the grievance process in the first instance. App.37–38 ("[W]hether the plaintiff himself was denied access to an alternative remedy is not the question. . . . The only consideration is whether there is a remedial process in place . . . ."). But that process is not one that Congress or the Executive Branch adopted.

The Eleventh Circuit's decision to *deny* Mr. Johnson any remedy precisely because the Executive Branch *afforded* a remedy turns separation-of-powers on its head. The alternative remedy put in place by the Executive does not allow prison officials to deny prisoners access to remedies, as the officials did here. So, while it is important for courts to defer to the remedial schemes crafted by the political branches, here, neither Congress nor the Executive thought the process afforded to Mr. Johnson was "appropriate and adequate." App.40.

C. The Eleventh Circuit's Approach Does Not Take Adequate Account of This Court's Emphasis on Deterrence.

The Eleventh Circuit further went astray by failing to meaningfully consider deterrence, which is at the heart of the *Bivens* inquiry. *See Malesko*, 534

U.S. at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations."). Far from deterring prison officials from committing constitutional violations, the Eleventh Circuit's opinion gives prison officials a roadmap on how to mistreat inmates without any potential repercussion—just bar them from accessing administrative remedy procedures.

By deciding to ignore all factual context whenever a remedial process exists in the abstract, the Eleventh Circuit's opinion empowers prison officials to cut off a prisoner's access to the remedial processes intended to deter those very officials from improper actions. Prison officials will feel emboldened to do what the officials here did to Mr. Johnson—block prisoners from using the BOP's remedial process to insulate themselves from the consequences of their own, prior misconduct. Absent a *Bivens* action, prisoners in these conditions will have no remedy and prison officials who engage in grave misconduct will face no consequence.

III. This Case Is an Ideal Vehicle for Resolving an Important Legal Issue.

This petition allows the Court to cleanly address a clear circuit split on an important question of law. The Eleventh Circuit acknowledged that the Fourth Circuit's decision in *Fields* cut the other way but ignored it as "a far-afield outlier." App.18. The difference between the outcomes of these two decisions is based purely on law; there is no relevant factual distinction. Nor is there any dispute about the facts here—the district court found, and the Eleventh Circuit acknowledged, that prison officials denied

Mr. Johnson access to any alternative remedy. App.40 n.7, App.93–94.

The importance of this issue cannot be overstated. There are nearly 150,000 federal prisoners in the United States.[1] Whether those individuals will have any recourse when their constitutional rights have been violated is a serious—and sometimes life-or-death—matter. This Court should not stand by. The Eleventh Circuit should not be permitted to deny Mr. Johnson a remedy for the violation of his rights, when the Executive, Congress, and this Court are all in accord that a remedy is needed.

[1] *Statistics*, BOP.gov (May 8, 2025), https://www.bop.gov/about/statistics/population_statistics.jsp#:~:text=156%2C254%20Total%20Federal%20Inmates%20*%20143%2C675%20federal,federal%20inmates%20in%20other%20types%20of%20facilities.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

J. Matthew Brigman
Logan R. Hobson
Joseph B. Hendricks
KING & SPALDING LLP
1180 Peachtree St. NE
Suite 1600
Atlanta, Ga 30309

Amy R. Upshaw
Counsel of Record
KING & SPALDING LLP
1700 Pennsylvania Ave. NW
Washington, DC 20006
(202) 737-0500
aupshaw@kslaw.com

Counsel for Petitioner

May 13, 2025

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-11394

LAQUAN JOHNSON,

Plaintiff-Appellant,

v.

ELAINE TERRY, OFFICER BURGESS,
DR. MARTIN, DR. WINSTON, MS. GARCIA, *et al.*,

Defendants-Appellees,

DARLENE DREW, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:18-cv-01899-AT

[PUBLISH]
Filed October 3, 2024
Document No. 50

[CORRECTED] OPINION

Before BRANCH, GRANT, and ED CARNES, Circuit Judges.

ED CARNES, Circuit Judge:

LaQuan Johnson has filed a petition for rehearing en banc, which under our rules also functions as a

petition for rehearing before the panel. *See* 11th Cir. R. 35, I.O.P. 2 ("A petition for rehearing en banc will also be treated as a petition for rehearing before the original panel."). At this stage, we as a panel are free to modify our earlier opinion. *See Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1218 (11th Cir. 2017) ("At least until an order granting or denying the petition for rehearing en banc is issued, a panel retains authority to modify its decision and opinion."). And that is what we now do, vacating our earlier opinion, *Johnson v. Terry*, 112 F.4th 995 (11th Cir. 2024), and issuing this one in its place. The analysis and result remain the same.

Johnson's petition for rehearing en banc remains pending. In light of this revised panel opinion, he is granted 21 days to file a supplement to that petition, if he chooses to do so. *See* Fed. R. App. P. 40(a)(4)(C); *see also Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1337 (11th Cir. 2019). If he does file a supplemental petition, the government may not file a response unless the court requests one. *See* 11th Cir. R. 35-6 ("A response to a petition for en banc consideration may not be filed unless requested by the court."). This is our revised opinion.

Johnson is a federal prisoner who filed a complaint asserting claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He sought money damages from federal prison officials, doctors, a nurse, and a kitchen supervisor alleging that they violated his constitutional rights by using excessive force, by failing to protect him from other inmates, and by being deliberately indifferent to his serious medical needs.

The Supreme Court has decided that "in all but the most unusual circumstances," we should not use *Bivens* to recognize new constitutional-claim causes of action for damages against federal officials. *See Egbert v. Boule*, 596 U.S. 482, 486, 491 (2022). The Court has instructed us that the reason we aren't free to use *Bivens* to "fashion[] new causes of action," *id.* at 490, is that "prescribing a cause of action is a job for Congress, not the courts," *id.* at 486. The claims Johnson has asserted would require new *Bivens* causes of action, which we are forbidden to create except in the "most unusual circumstances," if then. *Id.* at 486.

I. Facts and Procedural History

LaQuan Johnson is a federal prisoner who was housed at the United States Penitentiary in Atlanta, Georgia, which we'll call USP-Atlanta, from September 2015 to April 2019. He was a pretrial detainee until he was tried and convicted on April 14, 2017.[1]

According to USP-Atlanta's policy while Johnson was housed there, pretrial detainees and convicted inmates were usually housed in separate units. In mid-June 2016, while Johnson was still a pretrial

[1] Johnson appeals the district court's grant of the defendants' motion for summary judgment. Given that, we are required to view the facts as drawn from the pleadings, affidavits, and depositions, in the light most favorable to him. *E.g., Hardin v. Hayes,* 957 F.2d 845, 848 (11th Cir.1992); *Stewart v. Baldwin County Bd. of Educ.,* 908 F.2d 1499, 1503 (11th Cir.1990). What we state as "facts" in this opinion may not be the actual facts. They are, however, the facts for summary judgment purposes. *Swint v. City of Wadley, Ala.*, 51 F.3d 988, 992 (11th Cir. 1995).

detainee, an inmate he knew as "Phillip" moved into his cell in the pretrial unit. Phillip was not a pretrial detainee; instead, he was being confined because he had been convicted. Johnson told an officer that as a pretrial detainee, he should not be housed in the same unit as Phillip, let alone in the same cell. Phillip was moved out of Johnson's cell, but soon after, Elaine Terry, a correctional counselor at USP-Atlanta and one of the defendants, moved Phillip back into Johnson's cell in the pretrial unit and moved Johnson to a different cell in the same unit. Johnson complained to Terry that Phillip was not supposed to be housed in a pretrial unit, but she ignored his complaint.

A week later, Phillip got into an argument with Lewis Mobley, a different pretrial detainee housed in the pretrial unit. Johnson intervened to try and keep the two from fighting. That resulted in Phillip hitting Johnson and pushing him into a toilet, which fractured bones in Johnson's right hand (the first attack).

Later that day Johnson went to "health services," which is the prison's medical clinic, to get his hand evaluated. He was treated by a nurse who x-rayed, splinted, and wrapped his hand. The x-rays indicated that Johnson had fractured a bone in his hand. Johnson claims that Dr. Darren Martin, who viewed the x-rays, instructed someone named Ms. Robinson to tell Johnson his hand wasn't broken, and then the medical providers gave him ibuprofen. All of that happened in mid-to-late June 2016.

Johnson again complained about his hand injury in July 2016 and in October 2017. In July of 2016 he

was seen by a nurse practitioner, who offered to x-ray and bandage Johnson's hand, but he refused. He was also seen by a nurse practitioner in October 2017 who x-rayed his hand and found that the fracture had healed. Dr. James Winston reviewed and cosigned both nurse practitioners' notes from their interaction with Johnson.

In or around October 2016, Johnson informed Warden Darlene Drew that he was being housed with convicted prisoners when he was a pretrial detainee. Drew did nothing to correct the problem.

In March 2018 a convicted inmate named Walter Bush attacked Johnson (the second attack). (At this point, Johnson had been convicted and was no longer a pretrial detainee.) Bush injured Johnson's right hand during the attack. Johnson went to health services a couple of days later and was seen by a nurse practitioner. The nurse practitioner ordered an x-ray of Johnson's hand, found that there were no new fractures, and offered Johnson pain medication. He declined it, stating that he already had some. The nurse practitioner told Johnson that a doctor would be contacted to come check on him, but none of the doctors on staff ever spoke to Johnson about his injury. Dr. Winston reviewed the nurse practitioner's notes from the encounter and signed off on the assessment.

In April 2018 Johnson was once again attacked by another inmate (the third attack). He says that he was watching TV when a convicted inmate named Cedric Brown punched him in the face and fractured his jaw. Johnson was seen by a dentist, who then referred him to an oral surgeon. The oral surgeon operated on Johnson's jaw, then wired his mouth closed to help

with the healing process. The surgeon directed that Johnson consume a liquid diet for six weeks while his mouth was wired shut.

Johnson contends that Carolina Garcia, a kitchen supervisor, was in charge of giving him his liquid diet, and she provided it as directed for two weeks; but then she stopped. After not receiving his liquid diet for two days, Johnson cut the wires out of his mouth with fingernail clippers so that he could eat. He then began chewing regular food with his fractured jaw. The food got stuck in the wound in his mouth and began to rot. Once the food rotted, one of Johnson's teeth also rotted and needed to be removed.

A few months later, in August 2018, a group of prisoners were playing basketball in an outdoor recreation area when the ball got stuck in the rim. Because Johnson is tall, they asked him if he could get the ball down. He jumped up and landed on a screw when he came down; the screw punctured his foot and caused severe bleeding. Johnson went inside to find help and saw Nurse Terrisha Harris passing out medicine. He asked her for help, but she refused to treat his foot. He then explained his predicament to an unidentified officer, who brought him two pairs of socks to help stop the bleeding.

Two days later, Johnson reported to health services and was seen by Dr. Winston, the same doctor who had reviewed Johnson's medical records after Bush had injured Johnson's hand. Dr. Winston gave Johnson a tetanus shot and took some x-rays. The radiologist's report determined that the x-ray showed no acute fracture or "joint space malalignment," and that no "foreign body" remained in Johnson's foot. Dr.

Winston told Johnson that he would follow up with him to see how his foot was healing, but Johnson never saw him again. Johnson tried reaching out to Dr. Winston about a follow-up, but he was not able to get in touch with him.

When he was unable to get in touch with Dr. Winston, Johnson mentioned his injury to Dr. Michael Nwude while the doctor was walking through Johnson's unit. Dr. Nwude told Johnson that he would "call [him] up to the health service" so that he could be provided with arch support for his shoes to help with his foot injury. But Dr. Nwude did not do that, and the next time Johnson saw Dr. Nwude walking through the unit, the doctor refused to talk to him. At the time he filed this lawsuit, Johnson still walked with a limp because of his foot injury.

Johnson attempted to file complaints with the Bureau of Prisons (BOP) about the attacks he had experienced and the lack of adequate medical care he had received while at USP-Atlanta. To resolve inmate complaints that arise at USP-Atlanta and other federal prisons, the BOP uses a four-level administrative remedy program. The purpose of the program "is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. § 542.10(a); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[The administrative remedy program] provides [a] means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring.").

The first step is an "informal resolution" process within individual institutions. *See* 28 C.F.R.

§ 542.13(a). To begin this process, a prisoner may present his complaint to prison staff on a grievance form known as a BP-8 form. *See id.* In addition to (or instead of) informal resolution, the inmate can submit a formal grievance on a BP-9 form to staff at the institution where he is located. *See id.* § 542.14(a), (c)(4); *see also id.* § 542.13(b) (providing that the inmate is "not required to attempt informal resolution"). If the inmate feels that submission of a formal grievance at his institution will compromise his "safety or well-being," he may bypass that process and submit his formal request to the regional director. *See id.* § 542.14(d)(1). If he is unsatisfied with the warden's response to his complaint, he may appeal to the regional director (on a BP-10 form), and then to the office of general counsel (on a BP-11 form). *See id.* § 542.15(a). Johnson testified in his deposition that Terry (the correctional counselor) either would refuse to give him any of the various informal or formal grievance forms when he asked, or would give Johnson a form but refuse to file it after Johnson had filled it out. He swore in an affidavit that when he was eventually able to obtain and file grievance forms, he did not receive any response. Johnson also testified that "if you get no response it[']s like a denial," so he then appealed those "denials." But he says that when he filed an appeal, he would be notified that he had failed to comply with an earlier step in the four-level program.

Johnson claims that the officers at USP-Atlanta purposefully sabotaged his grievances, by either: (1) failing to file his initial grievances; (2) failing to return the responses to his grievances so that if Johnson appealed, he would not know why the

grievance was initially denied; or (3) waiting until his appeal deadline had passed before sending him rejection notices, which would result in his appeals being untimely.

Johnson filed suit in federal district court, bringing failure to protect, deliberate indifference, and excessive force claims against a number of officers, medical staff, and an employee at USP-Atlanta. The defendants filed a motion to dismiss his complaint for failure to exhaust his administrative remedies because he did not comply with the BOP's administrative remedy program before filing his complaint. The district court denied the motion without prejudice and provided the parties with a limited discovery period to determine whether Johnson had exhausted his administrative remedies. After discovery closed, the defendants renewed their motion to dismiss. The magistrate judge assigned to the case found that Johnson was denied access to the administrative remedy program at USP-Atlanta and recommended that the court deny the motion to dismiss. Over the defendants' objections, the court adopted that report and recommendation and denied the motion.

After additional discovery the defendants moved for summary judgment, arguing in part that Johnson's *Bivens* claims are not cognizable. The magistrate judge recommended that the court grant the defendants' motions for summary judgment because his *Bivens* claims presented a new context and special factors counseled against extending *Bivens* to that new context. The district court agreed and granted the defendants' motions for summary judgment,

concluding that Johnson's claims did not entitle him to a *Bivens* remedy. Johnson appeals that judgment.

II. *Bivens* Law Through the Years and Today

Claims for money damages against federal officials and employees who have committed constitutional violations are known as *Bivens* claims, after the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

When it enacted 42 U.S.C. § 1983, Congress allowed an injured person to sue for money damages claiming that a *state* official had violated his constitutional rights. Congress has never enacted a corresponding statute providing a damages remedy to plaintiffs whose constitutional rights have been violated by a *federal* official. *See Ziglar v. Abbasi*, 582 U.S. 120, 130 (2017). Nevertheless, in *Bivens*, the Supreme Court created for the first time an implied private right of action for damages against federal agents, at least for a violation of the Fourth Amendment. *See* 403 U.S. at 397. The Court concluded that it had the authority to do so because "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392 (quotation marks omitted).

In the decade after *Bivens*, the Court created two more causes of action for violations of constitutional rights by federal officials. One was against a Congressman under the Fifth Amendment for sex discrimination after he fired his secretary because she was a woman; another was against federal prison

officials under the Eighth Amendment for failing to treat an inmate's asthma, resulting in his death. *See Davis v. Passman*, 442 U.S. 228, 230–31 (1979); *Carlson v. Green*, 446 U.S. 14, 16 & n.1, 18 (1980). As in *Bivens*, the Supreme Court stated that the purpose behind those decisions was "to deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70. But there the Supreme Court's creative decision-making that had birthed the *Bivens* doctrine stopped.

In the 44 years since *Carlson*, the Supreme Court has over and over again "refused to extend *Bivens* to any new context or new category of defendants." *Ziglar*, 582 U.S. at 135 (quotation marks omitted); *see Bush v. Lucas*, 462 U.S. 367, 368 (1983) (holding there is no *Bivens* action for "federal employees whose First Amendment rights are violated by their superiors"); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (declining to create *Bivens* action for enlisted military personnel against their superior officers); *United States v. Stanley*, 483 U.S. 669, 684 (1987) ("We hold that no *Bivens* remedy is available for injuries that arise out of or are in the course of activity incident to [military] service.") (quotation marks omitted); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (declining to recognize *Bivens* action for due process violations resulting from denial of Social Security disability benefits); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994) (holding there can be no *Bivens* action against a federal agency); *Malesko*, 534 U.S. at 63 (declining to create a *Bivens* remedy against "a private corporation operating a halfway house under contract with the Bureau of Prisons"); *Wilkie v. Robbins*, 551 U.S. 537, 541 (2007) (declining to recognize *Bivens*

action against "[o]fficials of the Bureau of Land Management . . . accused of harassment and intimidation aimed at extracting an easement across private property"); *Hui v. Castaneda*, 559 U.S. 799, 801–02 (2010) (disallowing *Bivens* remedy against U.S. Public Health Service employees for "constitutional violations arising out of their official duties"); *Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (finding no *Bivens* remedy when prisoner sued "privately employed personnel working at a privately operated federal prison" under the Eighth Amendment); *Ziglar*, 582 U.S. at 125, 146 (declining to extend *Bivens* to conditions-of-confinement claim against group of executive officials); *Hernandez v. Mesa*, 589 U.S. 93, 96–97 (2020) (declining to recognize *Bivens* remedy for cross-border shooting by border patrol agent); *Egbert*, 596 U.S. at 486 (declining to allow excessive force and First Amendment retaliation *Bivens* claims against a U.S. Border Patrol agent to proceed).

The Supreme Court has explained that its nearly complete about-face in the *Bivens* area after *Davis* and *Carlson* results from its having "come to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert*, 596 U.S. at 491 (quotation marks omitted). The Court understands that "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Ziglar*, 582 U.S. at 133. And because the power to create causes of action is legislative, "[i]n most

instances . . . the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 135–36 (quotation marks omitted); *see also Egbert*, 596 U.S. at 492 (explaining that unless a court exhibits the "utmost deference to Congress' preeminent authority in" creating a cause of action, it "arrogate[s] legislative power") (alteration accepted) (quotation marks omitted).

Creating causes of action involves complex policy considerations, including "economic and governmental concerns, administrative costs, and the impact on governmental operations systemwide." *Egbert*, 596 U.S at 491 (quotation marks omitted). The ability of courts to weigh those considerations is "at best, uncertain." *Id.* Thus "recognizing a cause of action under *Bivens*" outside of the three contexts already allowed by the Supreme Court "is a disfavored judicial activity" and should be avoided "in all but the most unusual circumstances." *Id.* at 486, 491 (quotation marks omitted). Judging from the Court's decisions in the last four-and-a-half decades, those "most unusual circumstances" are as rare as the ivory-billed woodpecker.[2]

---

[2] So rare is the ivory-billed woodpecker that many experts have come to believe it is extinct. As one expert wrote in 2017: "The last bird, a female, was seen in 1944 . . . . Sadly, most ornithologists now think the bird is gone forever." Andy Kratter, *Ivory-billed Woodpecker*, Florida Museum (2017), https://www.floridamuseum.ufl.edu/100-years/object/ivory-billed-woodpecker. In 2021 the Fish and Wildlife Service, which is in charge of such determinations, proposed declaring that the big woodpecker is extinct. *See* Endangered and Threatened Wildlife and Plants; Removal of 23 Extinct Species from the Lists of

Remarkably, the Supreme Court has even "gone so far as to observe that if 'the Court's three *Bivens* cases had been decided today,' it is doubtful that we would have reached the same result." *Hernandez*, 589 U.S. at 101 (cleaned up) (quoting *Ziglar*, 582 U.S. at 134). And even more pointedly, just two years ago the Court told us that "we have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502. In other words, today the Court would decide the *Bivens* case, as well as its two progeny, *Davis* and *Carlson*, differently. *See also Malesko*, 534 U.S. at 75 (concurring opinion of Scalia, J., joined by Thomas, J.) ("*Bivens* is a relic of the heady days in which this Court assumed common-

---

Endangered and Threatened Wildlife and Plants, 86 Fed. Reg. 54298-01 (Sept. 30, 2021) (to be codified at 50 C.F.R. 17). But in 2022 the Service pulled back from that proposal and extended the period for public comment, recognizing "substantial disagreement among experts regarding the status of the species." Ian Fischer, *Service Announces 6-Month Extension on Final Decision for the Ivory-billed Woodpecker*, U.S. Fish & Wildlife Service (July 6, 2022), https://www.fws.gov/press-release/2022-07/service-announces-6-month-extension-final-decision-ivory-billed1-woodpecker. More recently, a research team, after searching over a period of several years in the dense bottomland forests of Louisiana, reported evidence that three of the ivory-bills (as ornithologists call them) still exist. Steven C. Latta et al., *Multiple lines of evidence suggest the persistence of the Ivory-billed Woodpecker (Campephilus principalis) in Louisiana*, ECOLOGY AND EVOLUTION (May 18, 2023), https://doi.org/10.1002/ece3.10017. If that's true, the number of the birds that exist will exactly match the number of Supreme Court decisions that have confirmed and applied *Bivens* in the last forty-three years: three live ivory-billed woodpeckers and three live *Bivens* decisions. A coincidence of rarity.

law powers to create causes of action — decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.").

The Supreme Court has been clear, however, that it has not yet overruled the *Bivens* decision insofar as the decision itself goes. *See Ziglar*, 582 U.S. at 134 ("[T]his opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context . . . ."); *see also Egbert*, 596 U.S. at 502 ("[T]o decide the case before us, we need not reconsider *Bivens* itself."). But it has also been clear that when courts are thinking about recognizing a new *Bivens* claim, the "watchword" is "caution" — so much caution that it has not found a new *Bivens* claim worth recognizing in 44 years. *Egbert*, 596 U.S. at 491 (quotation marks omitted); *Malesko*, 534 U.S. at 68 ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."); *see also id.* at 74 ("The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades [now more than four decades], forecloses such an extension here.") (bracketed words added).

As Justice Gorsuch aptly put it when calling on the Court to forthrightly overrule *Bivens*, what the Court has done is "leave[] a door ajar and hold[] out the possibility that someone, someday, might walk through it even as it [has] devise[d] a rule that ensures no one ever will." *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring) (quotation marks and ellipsis omitted); *see also Hernandez*, 589 U.S. at 118 (Thomas, J., concurring) ("The analysis underlying *Bivens* cannot be defended. We have cabined the doctrine's scope,

undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether.").

Taking to heart what the Supreme Court has done to limit *Bivens*' precedential value and drastically restrict its reach, we recently refused to extend *Bivens* to a Fourth Amendment excessive force claim against United States Marshals and county police officers conducting a joint state and federal task force to apprehend fugitives. *See Robinson v. Sauls*, 102 F.4th 1337, 1339, 1347 (11th Cir. 2024).

We are not the only court to have taken to heart what the Supreme Court has said on this subject. All of our sister circuits have also stressed the need for caution, hesitancy, and reluctance when it comes to extending the *Bivens* decision. *See Gonzalez v. Velez*, 864 F.3d 45, 52 (1st Cir. 2017) ("While the boundaries of *Bivens*-type liability are hazy, the Supreme Court . . . [has] made plain its reluctance to extend the *Bivens* doctrine to new settings."); *Doe v. Hagenbeck*, 870 F.3d 36, 43 (2d Cir. 2017) (acknowledging that "[t]he Court has . . . made clear that it is reluctant to extend *Bivens* liability to any new context or new category of defendants" and that "expanding the *Bivens* remedy is now a disfavored judicial activity") (quotation marks omitted); *Xi v. Haugen*, 68 F.4th 824, 833 (3d Cir. 2023) ("Most recently, in *Egbert* . . . , the Court went so far as to suggest that any extension to a new context may be *ultra vires*."); *Dyer v. Smith*, 56 F.4th 271, 277 (4th Cir. 2022) ("And this year [in *Egbert*], the Supreme Court all but closed the door on *Bivens* remedies."); *Cantú v. Moody*, 933 F.3d 414, 421–22 (5th Cir. 2019) (explaining that the Court has

"admonished [courts] to exercise caution in the disfavored judiciary activity of extending *Bivens* to any new set of facts") (quotation marks omitted); *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020) ("[The Court] has renounced the method of *Bivens*, *Davis*, and *Carlson*. When asked 'who should decide' whether a cause of action exists for violations of the Constitution, 'the answer most often will be Congress.'") (alteration accepted) (quoting *Ziglar*, 582 U.S. at 135); *Effex Cap., LLC v. Nat'l Futures Ass'n*, 933 F.3d 882, 891 (7th Cir. 2019) (stating that the Supreme Court has "limited the application" of *Bivens* and "made very clear that the expansion of the *Bivens* remedy to other constitutional provisions is a disfavored judicial activity") (quotation marks omitted); *Ahmed v. Weyker*, 984 F.3d 564, 571 (8th Cir. 2020) (explaining that its conclusion not to extend *Bivens* "should [not] be surprising" because "the Supreme Court has not recognized a new *Bivens* action for almost 40 years") (quotation marks omitted); *Chambers v. Herrera*, 78 F.4th 1100, 1105 (9th Cir. 2023) ("Essentially . . . future extensions of *Bivens* are dead on arrival.") (quotation marks omitted); *Silva v. United States*, 45 F.4th 1134, 1136 (10th Cir. 2022) ("The Supreme Court's message [in *Egbert*] could not be clearer — lower courts expand *Bivens* claims at their own peril. We heed the Supreme Court's warning and decline Plaintiff's invitation to curry the Supreme Court's disfavor by expanding *Bivens* to cover [this] claim."); *Loumiet v. United States*, 948 F.3d 376, 381 (D.C. Cir. 2020) (recognizing that "expanding the *Bivens* remedy is now a disfavored judicial activity" that requires "caution

before extending *Bivens* remedies into any new context") (quotation marks omitted).

Theoretically, we may someday see more Supreme Court decisions confirming and extending *Bivens*. Barring that unlikely event, for the time being the decision will remain on the judiciary's equivalent of an endangered species list, just like its natural history analogue, the ivory-billed woodpecker. Both the decision and the bird are staring extinction in the face.

Meanwhile, rarity doesn't foreclose false sightings. *See Fields v. Fed. Bureau of Prisons*, 109 F.4th 264 (4th Cir. 2024). In the recent *Fields* case, a divided Fourth Circuit panel extended *Bivens* to a new context, allowing a federal prisoner's claims of excessive force in violation of the Eighth Amendment to proceed against individual prison officers. *See id.* at 267. A vigorous and cogent dissent rejected the "wiggle room" the *Fields* majority "purport[ed] to detect" in the Supreme Court's repeated warnings that courts should not extend *Bivens*. *Id.* at 276 (Richardson, J., dissenting).

The decision in *Fields*, a far-afield outlier, may lead to en banc reconsideration or to the Supreme Court finally rendering *Bivens* cases extinct. *See id.* at 283 (Richardson, J., dissenting) (predicting it may encourage the Court to finally "shut the *Bivens* door completely"). After all, the Supreme Court has stated as clearly as the English language permits: "[I]f we were called on to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502; *see also id.*at 502–04 (Gorsuch, J., concurring in the judgment) (urging the Court to overrule *Bivens* and "forthrightly

return the power to create new causes of action to the people's representatives in Congress"). That "called on to decide *Bivens*" call may be coming if the panel decision in *Fields* manages to duck en banc correction. *Id.* at 502.

Until then, determining whether a new *Bivens* claim can be recognized involves a two-step analysis. *Egbert*, 596 U.S. at 492. To begin the analysis, courts first "ask 'whether the case presents a new *Bivens* context — *i.e.*, is it meaningfully different from the three cases in which the Court has implied a damages action.'" *Robinson*, 102 F.4th at 1342 (quoting *Egbert*, 592 U.S. at 492). The question is not a superficial one; for a case to arise in a previously recognized *Bivens* context, it is not enough that the case involves the same constitutional right and "mechanism of injury." *Ziglar*, 582 U.S. at 138–39. "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Id.* at 139. And there are a lot of meaningful ways for cases to differ, as the examples the Court has supplied show:

> A case might differ in . . . meaningful way[s] because of the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special

> factors that previous *Bivens* cases did not consider.

Id. at 139–40.

"[I]f a claim arises in a new context," the second step in the analysis will make "a *Bivens* remedy . . . unavailable if there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed." *Egbert*, 596 U.S. at 492 (quotation marks omitted). Central to this special-factors analysis "are separation-of-powers principles." *Hernandez*, 589 U.S. at 102 (quotation marks omitted). The inquiry focuses on "the risk of interfering with the authority of the other branches, and . . . ask[s] whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* (quotation marks omitted).

That analysis should not be applied at "a narrow level of generality," and it "does not invite federal courts to independently assess the costs and benefits of implying a cause of action." *Egbert*, 596 U.S. at 496 (cleaned up). Instead, while conducting the special factors analysis, "a court must ask more broadly if there is any reason to think that judicial intrusion into a given field might be harmful or inappropriate." *Id.* (cleaned up). "If there are [any special factors] — that is, if we have reason to pause before applying *Bivens* in a new context or to a new class of defendants — we reject the request." *Hernandez*, 589 U.S. at 102; *see also Egbert*, 596 U.S. at 496 (explaining that even a "potential" for improper "judicial intrusion" into the legislative realm is enough to refuse a plaintiff a *Bivens* remedy) (cleaned up); *Robinson*, 102 F.4th at

1342–43 ("If there is even a single reason to pause before applying *Bivens* to a new context, a court may not recognize a *Bivens* remedy.") (quotation marks omitted).

III. *Bivens* Should Not Be Extended Here

Johnson asks us to extend *Bivens* to allow him to bring three types of *Bivens* claims: his excessive force claim, his failure to protect claim, and his deliberate indifference to serious medical needs claims.

But the first of those claims is not properly before us. Johnson did not mention his excessive force claim in any of his briefing or otherwise make any arguments about it on appeal. So that claim is abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (concluding that a claim not adequately briefed was abandoned, explaining: "A party fails to adequately brief a claim when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims") (quotation marks omitted).[3] That

[3] At oral argument, Johnson contended that he had raised his excessive force claim in his briefs to this Court by arguing that special factors did not preclude extending *Bivens* to all of his claims, including his excessive force one. But in his briefs Johnson never discussed the excessive force claim specifically and only referred to his "claims." Other than that general reference, the excessive force claim is mentioned just once in his brief, and that was only to note that Johnson had included the claim in his complaint. Even after the defendants asserted in their response brief that Johnson had abandoned the excessive force claim by not raising it, he did not address that claim or the abandonment issue involving it in his reply brief. So his attempt to revive the claim at oral argument is unsuccessful. *See Sapuppo*, 739 F.3d at 681; *Holland v. Gee*, 677 F.3d 1047, 1066

leaves his failure to protect claim and his deliberate indifference to serious medical needs claims.[4]

In his complaint, Johnson asserted that those two sets of claims were being brought under the "Fifth and/or Eighth Amendments." When Johnson was attacked by Phillip in June 2016, he was a pretrial detainee. As a result, his failure to protect and deliberate indifference claims stemming from that incident arise under the Due Process Clause of the Fifth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). The factual predicates for the remainder of his failure to protect and deliberate indifference claims occurred after Johnson was convicted, so those claims arise under the Eighth Amendment. *See Cox v. Nobles*, 15 F.4th 1350, 1357 (11th Cir. 2021) (failure to protect); *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (deliberate indifference).

Johnson's failure to protect claim is against Terry, a corrections counselor, and Warden Drew. He alleges that he informed the two of them that he was being

---

(11th Cir. 2012) ("[W]e do not consider arguments not raised in a party's initial brief and made for the first time at oral argument.") (quotation marks omitted); *McFarlin v. Conseco Servs., LLC,* 381 F.3d 1251, 1263 (11th Cir. 2004) ("A party is not allowed to raise at oral argument a new issue for review.").

[4] The defendants argue that Johnson forfeited any challenge to the district court's dismissal of his deliberate indifference claims because his objections to the magistrate judge's findings and his briefing of the issue to us are insufficient. *See, e.g.*, *Roy v. Ivy*, 53 F.4th 1338, 1351 (11th Cir. 2022); *Singh v. U.S. Att'y Gen.*, 61 F.3d 1275, 1278 (11th Cir. 2009). We disagree. Johnson's objections to the report and recommendation and discussion in his appellate briefs adequately challenge whether his deliberate indifference claims present a new context for *Bivens* claims.

housed with convicted inmates in violation of BOP policy, but they did nothing to correct the situation, which led to Johnson being attacked by convicted inmates three times: in June 2016, March 2018, and April 2018.[5] Johnson's deliberate indifference claims are based on four different incidents, and they involve five defendants and the treatment they gave or failed to give him: (1) Winston and Martin's treatment of the first injury to Johnson's hand; (2) Winston's treatment of the second injury to his hand; (3) Winston and Martin's treatment of his jaw injury and Garcia's failure to continue to provide his liquid diet; and (4) Winston, Martin, Nwude, and Harris' treatment of his left foot injury.

We will begin by explaining why Johnson's failure to protect claim and his deliberate indifference claims both arise in new contexts. Then we will discuss why special factors counsel against recognizing either set of claims here.

A. Johnson's failure to protect claim "presents a new *Bivens* context"

Instead of arguing that his failure to protect claim does not present a new *Bivens* context because it is not meaningfully different from *Bivens*, *Davis*, or *Carlson*, Johnson contends that the failure to protect claim is similar to the *Bivens* claim in *Farmer v. Brennan*, 511 U.S. 825 (1994), and for that reason does not present a new *Bivens* context.

---

[5] Johnson himself was a convicted inmate when the last two attacks occurred.

That argument fails because the Supreme Court has made clear that *Farmer* is not one of its decisions creating a *Bivens* cause of action. In 2017 the Court stated in *Ziglar*, that "[t]hese three cases — *Bivens*, *Davis*, and *Carlson* — represent the *only* instances in which the Court has approved of an implied damages remedy under the Constitution itself." 582 U.S. at 131 (emphasis added). That those three cases are the only ones in which the Court had approved of a *Bivens* remedy as of 2017 means that it did not approve of one in *Farmer,* which was decided in 1994. If the Court had actually approved of a *Bivens* remedy in *Farmer,* it would have said in *Ziglar* that it had approved of a *Bivens* remedy only four times and would have included *Farmer* in its list with the other three decisions. But it didn't say or do that.

The same is true of what the Court stated and didn't state just four years ago in *Hernandez*, where it referred to *Bivens*, *Davis*, and *Carlson* as "the Court's three *Bivens* cases." 589 U.S. at 101 (quotation marks omitted). It made similar statements in *Egbert* in 2022, *Minneci* in 2012, and *Malesko* in 2001. *See Egbert*, 596 U.S. at 490–91 ("Since [*Bivens*, *Davis*, and *Carlson*], the Court has not implied additional causes of action under the Constitution."); *Minneci*, 565 U.S. at 124 ("Since *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action."); *Malesko*, 534 U.S. at 68 ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). The Court's conspicuous omission of *Farmer* from the list of *Bivens* decisions it recognized in its *Ziglar*, *Hernandez*, *Egbert*, *Minneci*, and

Malesko opinions rules out *Farmer* as a *Bivens* decision. We agree with the Seventh Circuit's reasoning in *Sargeant v. Barfield* that "[n]ot once has the Supreme Court mentioned *Farmer* alongside [its three listed *Bivens*] cases, and we think it would have if *Farmer* created a new context or clarified the scope of an existing one." 87 F.4th 358, 365 (7th Cir. 2023).

Johnson argues that the Supreme Court's failure to include *Farmer* in any of its listings of *Bivens* decisions is not determinative because the Court has told us not to "conclude [its] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). The Court has declared generally that when a later case suggests that an earlier *holding* is no longer applicable, we "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (quotation marks omitted). Johnson's argument is basically that even though the Court has never listed *Farmer* as one of its *Bivens* remedy cases, it has never explicitly overruled *Farmer* either, so *Farmer* established a new context of *Bivens* remedies to which we can compare Johnson's claim.

That argument might be successful but for the insurmountable fact that the Court did not hold in *Farmer* that the *Bivens* claim was a cognizable cause of action. It never engaged with or decided the *Bivens* issue. At most, it assumed that *Bivens* could apply but, as we will explain below, assumptions are not holdings and do not establish precedents. *See infra* at 27–29.

In *Farmer*, a transgender woman who "project[ed] feminine characteristics" was placed in the general population of the federal men's prison where she was

housed. 511 U.S. at 829–30. Within two weeks she was beaten and raped by another inmate in her cell. *Id.* at 830. She sued multiple federal prison officials under *Bivens* alleging that by placing her in the general population where she "would be particularly vulnerable to sexual attack" due to her appearance, they acted with deliberate indifference to her safety. *Id.* at 829–31. The sole issue before the Supreme Court was how to define what constitutes deliberate indifference in the Eighth Amendment context. *Id.* at 829, 832. The Court's entire discussion in *Farmer* revolved around resolving that one issue. *See id.* at 835–47. The Court did not address whether a *Bivens* cause of action existed for the prisoner's claim. *See id.* at 832–51. It was not an issue before the Court. *See id.*

It is no wonder that the Court did not decide the *Bivens* issue in *Farmer*. It was not mentioned by either party at oral argument. *See* Transcript of Oral Argument, *Farmer*, 511 U.S. 825 (No. 92-7247), 1994 WL 662567. It was not mentioned in either party's briefs. *See* Brief for Petitioner, *Farmer*, 511 U.S. 825 (No. 92-7247), 1993 WL 625980; Brief for Respondents, *Farmer*, 511 U.S. 825 (No. 92-7247), 1993 WL 657282; Reply Brief for Petitioner, *Farmer*, 511 U.S. 825 (No. 92-7247), 1994 WL 190959. It was not mentioned in the petition for certiorari. Petition for Writ of Certiorari., *Farmer*, 511 U.S. 825 (No. 92-7247). And it was not mentioned in the opinion of the Seventh Circuit, whose judgment was being reviewed. *See Farmer v. Brennan*, 11 F.3d 668 (Mem.) (7th Cir. 1992). So the issue of whether a *Bivens* cause of action existed was about as absent from the *Farmer* case as it could have been.

The Supreme Court has long and consistently told us that issues not raised by the parties and not discussed in opinions are not holdings. *Cooper Indus., Inc., v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedent.") (quotation marks omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (holding that the Court is not bound by assumptions in previous cases); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions . . . are not binding in future cases that directly raise the questions.") (citations omitted); *Edelman v. Jordan*, 415 U.S. 651, 670 (1974) (concluding that the Court was not bound by a previous decision because that decision "did not in its opinion refer to or substantively treat the [relevant] argument"); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *The Edward*, 14 U.S. (1 Wheat.) 261, 276 (1816) ("[T]he [issue] alluded to passed *sub silentio*, without bringing the point distinctly to our view, and is, therefore, no precedent."). To sum up all of those Supreme Court decisions about what are not

holdings: "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions . . . are not binding in future cases that directly raise the questions." *Verdugo-Urquidez*, 494 U.S. at 272 (citations omitted).

We have held the same thing. *See, e.g.*, *United States v. Penn*, 63 F.4th 1305, 1310 (11th Cir. 2023) ("[A]ssumptions are not holdings. And any 'answers' to questions neither presented nor decided are not precedent.") (citations and quotation marks omitted); *see also United States v. Hurtado*, 89 F.4th 881, 902 n.1 (11th Cir. 2023) ("[A]ssumptions are not holdings.") (Carnes, J., concurring) (quotation marks omitted).

Farmer is not the only occasion on which the Supreme Court has assumed for purposes of argument, either explicitly, or implicitly as in *Farmer*, that a *Bivens* cause of action was cognizable. *See Wilson v. Layne*, 526 U.S. 603, 609, 618 (1999) (implicitly assuming that a *Bivens* remedy was available for the plaintiff's Fourth Amendment claim but holding that the officers were entitled to qualified immunity); *Wood v. Moss*, 572 U.S. 744, 757, 764 (2014) ("assum[ing] without deciding that *Bivens* extends to [the plaintiffs'] First Amendment claim[]," but ordering dismissal of the claim on qualified immunity grounds); *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012) (same, except reversing the denial of summary judgment for the defendants on qualified immunity grounds); *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 687 (2009) (explicitly assuming without deciding that a First Amendment claim was actionable under

Bivens, but holding that the plaintiff did not plausibly allege a constitutional violation); *Christopher v. Harbury*, 536 U.S. 403, 405, 412 n.6 (2002) (holding that the complaint failed to state an actionable claim, and noting: "The petitioners did not challenge below the existence of a cause of action under *Bivens* . . . , and we express no opinion on the matter in deciding this case."). If Johnson were correct most, if not all, of those cases should be listed with *Bivens*, *Davis*, and *Carlson* as "*Bivens* cases." But they are not and never have been. Not by the Supreme Court and not by our Court.

Our sister circuits that have addressed whether *Farmer* created or recognized an implied *Bivens* remedy in that context have determined that it did not. *See Fisher v. Hollingsworth*, No. 22-2846, 2024 WL 3820969, at *6 (3d Cir. Aug. 15, 2024) (agreeing with the other circuits "that plaintiffs cannot invoke *Bivens* by analogizing their cases to *Farmer*" because the Supreme Court hasn't recognized *Farmer* as a *Bivens* action and "[a]lthough it might not have seemed so before, the *Egbert* Court has now made it clear that *Bivens*, *Davis*, and *Carlson* are the only three cases in which the Supreme Court has recognized a constitutional damages action against federal officials"); *Tate v. Harmon*, 54 F.4th 839, 847 (4th Cir. 2022) ("[W]hile the Court allowed the action [in *Farmer*] to proceed, it never addressed whether the claim was properly a *Bivens* claim."); *Sargeant*, 87 F.4th at 365 (holding that *Farmer* did not create a *Bivens* remedy because "[t]he Court never held — just assumed — that a *Bivens* remedy was available to the plaintiff"); *Marquez v. Rodriguez*, 81 F.4th 1027, 1030–31 (9th Cir. 2023) ("The Supreme Court's *Bivens*

jurisprudence squarely forecloses [the plaintiff]'s argument that *Farmer* established a cognizable *Bivens* context."). We agree with the Third, Fourth, Seventh, and Ninth Circuits' holdings that *Farmer* did not create a *Bivens* remedy and thus cannot serve as a comparator case in the new context inquiry.[6]

As we have mentioned, Johnson does not contend that his failure to protect claim is similar to the claims in *Bivens*, *Davis*, or *Carlson*. Having put all of his argument eggs in *Farmer*'s basket, Johnson loses the first stage-issue of whether his failure to protect claim presents a new *Bivens* context. It does.

Instead of turning now to the second-stage issue involving Johnson's failure to protect claim, we will defer discussion of that issue until we decide the first-stage issue involving the deliberate indifference claims. Doing so will enable us to address the second-stage issue involving both categories of claims together.

---

[6] Johnson also argues that our opinion in *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090 (11th Cir. 2014), recognized a *Bivens* failure to protect claim against prison officials. But, as we have already discussed, the only decisions that count in step one of the *Bivens* analysis are the three that the Supreme Court has explicitly listed as counting. *See supra* at 24–26. And *Caldwell*, like *Farmer*, does not hold that the plaintiff's failure to protect claim is a recognized *Bivens* cause of action but instead only assumes that it is, and as we have explained, we are not bound by assumptions. *See supra* at 27–29. We also note that *Caldwell* predates the Supreme Court's decision in *Egbert*.

B. Johnson's deliberate indifference to serious medical needs claims present a new *Bivens* context

Johnson contends that his deliberate indifference claims are sufficiently analogous to *Carlson* that they do not present a new *Bivens* context. We disagree.

In *Carlson* a prisoner's estate sued a group of federal prison officials for violating the prisoner's due process, equal protection, and Eighth Amendment rights. 446 U.S. at 16. The complaint alleged that the officials knew that the prisoner had chronic asthma, that the facility he was housed in had grossly inadequate medical facilities and staff, and also that the officials:

> kept [the prisoner] in that facility against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthma attack, administered contra-indicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital.

Id. at 16 n.1. The complaint contended that these failures caused the prisoner's death. *Id.* Applying the relevant standard at the time, the Court concluded that the estate's *Bivens* claims were cognizable because there were no special factors counseling hesitation by the Court nor any substitute remedy for the estate's harm. *Id.* at 18–23.

In deciding whether Johnson's deliberate indifference claims present a new context as compared to the Eighth Amendment claim in *Carlson*, we look to

Ziglar, 582 U.S. 120, for guidance. In *Ziglar*, the Court analyzed whether six prisoners' claim that a warden violated the Fifth Amendment by allowing prison guards to abuse the men during their detention presented a context different from *Carlson*. 582 U.S. at 146–47. The complaint alleged that the instances of abuse constituted excessive force and were "serious violations of Bureau of Prisons policy." *Id.* at 147.

After acknowledging that the claim in *Ziglar* "ha[d] significant parallels to . . . *Carlson*," the Court held that recognizing the prisoners' Fifth Amendment claim would still constitute an extension of *Bivens*. *Id.* It determined that the claim in *Ziglar* differed from the Eighth Amendment claim in *Carlson* in at least three meaningful ways: (1) "*Carlson* was predicated on the Eighth Amendment and [the claim in *Ziglar*] is predicated on the Fifth"; (2) the "judicial guidance" surrounding the standard for the claim in *Ziglar* (that the warden allowed guards to abuse detainees) was less developed than the precedent for the claim in *Carlson* (that the officials failed to provide medical treatment to a prisoner); and (3) *Ziglar* had "certain features that were not considered in the Court's previous *Bivens* cases," such as "the existence of alternative remedies" and "legislative action suggesting that Congress does not want a damages remedy." *Id.* at 147–49. In its conclusion, the *Ziglar* Court again recognized that *Carlson* and *Ziglar* were similar but ultimately held that "[g]iven this Court's expressed caution about extending the *Bivens* remedy, . . . the new-context inquiry is easily satisfied." *Id.* at 149.

As the Supreme Court did with the claim in *Ziglar*, we acknowledge that Johnson's deliberate indifference to serious medical needs claims have "significant parallels" to *Carlson*'s Eighth Amendment claim. But also as the Supreme Court did with the claim in *Ziglar*, we conclude that Johnson's claims present a new context. First, Johnson's claim based on the medical care he received after being attacked by Phillip is predicated on a different constitutional right than the one in *Carlson* (Fifth Amendment instead of Eighth Amendment). That alone is enough for the claim to present a new context. *See id.* at 148 ("[A] case can present a new context for *Bivens* purposes if it implicates a different constitutional right . . . ."). And that is so even though the same analysis applies to deliberate indifference claims under both amendments. *See Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1574 (11th Cir. 1985).

While Johnson's other deliberate indifference claims arise under the Eighth Amendment as the claim did in *Carlson*, that is not enough to prevent the context of those claims from being a new one for *Bivens* purposes. *See Hernandez*, 589 U.S. at 103 ("A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.").

As the Court found in *Ziglar*, we find that the context of these claims is different from the context of the claim in *Carlson* because there the Court did not consider whether there were alternative remedies under the current alternative remedy analysis. *See Ziglar*, 582 U.S. at 148 ("This case also has certain

features that were not considered in [*Carlson*] and that might discourage a court from authorizing a *Bivens* remedy" such as "the existence of alternative remedies"); *Egbert*, 596 U.S. at 492 ("[W]e have explained that a new context arises when there are 'potential special factors that previous *Bivens* cases did not consider.'") (quoting *Ziglar*, 582 U.S. at 140). In *Carlson*, the Court asked whether there were "alternative remed[ies] which [Congress] explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," and it found that the Federal Tort Claims Act did not meet that standard. *Carlson*, 446 U.S. at 18–19.

Now as part of the special factors analysis that we consider, *see infra* at 37–43, we ask whether *any* alternative remedy exists that Congress or the Executive believed to be sufficient to remedy the type of harm Johnson allegedly suffered. *Egbert*, 596 U.S. at 498 (explaining that the existence of any "remedial process" that Congress or the Executive "finds sufficient" prohibits the creation of a *Bivens* remedy). The fact that *Carlson* did not consider the existence of alternative remedies under the framework explained in *Egbert* renders Johnson's claim different from the one in *Carlson*. *See Ziglar*, 582 U.S. at 148; *see also Egbert*, 596 U.S. at 500–01 (distinguishing *Davis* from the claim in *Egbert* because *Davis* "predates our current approach to implied causes of action and diverges from the prevailing framework," and explaining that "a plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with *Bivens*, [*Davis*], or *Carlson* unless he also satisfies the 'analytic framework' prescribed by the last four

decades of intervening case law") (quoting *Ziglar*, 582 U.S. at 139).

As we will discuss in more detail later, alternative remedies existed for prisoners in Johnson's position besides bringing a *Bivens* action, namely submission of a grievance form though the BOP administrative remedy program. *See infra* at 37–43; *Malesko*, 534 U.S. at 74 (explaining that the BOP administrative remedy program is a "means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring"). Because an alternative remedy existed to remedy the type of harm Johnson allegedly suffered, and because the *Carlson* Court did not consider the existence of such remedies under the Supreme Court's current analytical framework, Johnson's case is different from *Carlson*.

Also relevant is the fact that the injury in this case is different from the one in *Carlson*. There the prisoner died from an asthma attack when officials failed to provide the medical care required to treat it. Here Johnson suffered severe but ultimately non-lethal physical injuries to his body that were eventually treated by the defendants. The severity, type, and treatment of Johnson's injuries differ significantly from those of the prisoner in *Carlson*.

Johnson lists some similarities between his deliberate indifference claim and the one in *Carlson* that he believes should be enough to satisfy the new context inquiry. He contends that both claims involve prison officials, medical officers in the prison, and the deprivation of "medically necessary assistance," including the treatment prescribed by a doctor. To

that extent, the claims in the two cases are similar on their face. But the first-stage new context inquiry requires more than "superficial similarities." *Egbert*, 596 U.S. at 495; *see Ziglar*, 582 U.S. at 147–49 (holding that a claim that presented "significant parallels" to *Carlson* still presented a new context).

We look at whether the two cases have *any* relevant differences, not whether they are mostly the same. As the Court decided in *Ziglar*, "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." 582 U.S. at 139. And even small differences can "easily satisf[y]" the new context inquiry so long as they are meaningful. *See id.* at 149. This case is different from *Carlson* in several meaningful ways. As we have noted, one of Johnson's claims involved a different constitutional claim than in *Carlson*. And the Court in *Carlson* did not apply the current alternative remedies analysis to the claim there. The severity, type, and treatment of Johnson's injuries were different from those of the plaintiff in *Carlson.* Those differences make this a new context under the first-stage inquiry.

C. Special factors argue against extending *Bivens* to this new context

Because Johnson's failure to protect and his deliberate indifference to serious medical needs claims arise in a new context, the next step — stage two — is determining whether there are any special factors that would cause us to hesitate before extending *Bivens* to those new contexts. "If there is even a single reason to pause before applying *Bivens* in a new

context, a court may not recognize a *Bivens* remedy. *Egbert*, 596 U.S. at 492 (quotation marks omitted).

One notable special factor is the existence of an alternative remedial structure to remedy the harm the plaintiff has allegedly faced. "[I]f Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure" to address a plaintiff's allegations, there is no need for an additional *Bivens* remedy. *Id.* at 493 (quotation marks omitted). In other words, if there is "*any* alternative, existing process for protecting the injured party's interest," *Ziglar*, 582 U.S. at 137 (cleaned up) (emphasis added), the purpose of creating *Bivens* actions has already been realized by another means, *Egbert*, 596 U.S. at 498. Courts are not to "second-guess that calibration by superimposing a *Bivens* remedy." *Id.*

Congress, through the Executive Branch, has authorized an alternative remedy that applies here: the BOP's administrative remedy program. The Supreme Court has pointed that out. *See Malesko*, 534 U.S. at 74 (finding that the BOP's administrative remedy program was an appropriate alternative remedy to a *Bivens* claim). It's not our place to "second-guess that calibration." *Egbert*, 596 U.S. at 498.

Johnson contends that the BOP's administrative remedy program should not be considered a sufficient alternative remedy for him, and hence not a special factor, because the district court found that he was denied access to the program. But whether the plaintiff himself was denied access to an alternative remedy is not the question. The question is "whether the Government has put in place safeguards to

prevent constitutional violations from recurring." *Egbert*, 596 U.S. at 498 (alteration accepted) (quotation marks omitted); *see id.* at 493 ("Importantly, the relevant question is not . . . whether the court should provide for a wrong that would otherwise go unredressed . . . .") (quotation marks omitted); *see also id.* at 497 (declining to create a *Bivens* remedy because "Congress has provided alternative remedies *for aggrieved parties in* [*the plaintiff*]*'s position*") (emphasis added). The alternative remedy question is a general one, not a specific one; a macro focus, not a micro focus.

That means it does not matter whether we think the administrative remedy program adequately addressed Johnson's complaints. It doesn't matter because the Supreme Court has held that: "the question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts." *Id.* at 498; *see also id.* at 493 (explaining that it "does [not] matter that existing remedies do not provide complete relief") (quotation marks omitted). The only consideration is whether there is a remedial process in place that is intended to redress the kind of harm faced by those like the plaintiff. And there is one here. The BOP's administrative remedy program.

Egbert makes clear that an alternative remedy need not satisfactorily address every plaintiff's complaints to be sufficient. In that case the plaintiff argued that the Border Patrol's grievance process was not an adequate alternative remedy because, while he was able to file a claim that was investigated by Border Patrol, he was not able to participate in the

proceedings after his complaint was filed, nor was there a right to judicial review of an adverse decision. *Id.* at 489–90, 497. The Supreme Court rejected that argument, explaining that it had "never held that a *Bivens* alternative must afford rights to participation or appeal." *Id.* at 497–98. Because "*Bivens* is concerned solely with deterring the unconstitutional acts of individual officers," the purpose of the alternative remedy special factor analysis is to avoid encroaching on a process or remedy that Congress or the Executive has put in place. *Id.* at 498 (quotation marks omitted). "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.*

Because the Court has told us that the ultimate question is whether Congress or the Executive created an alternative remedy, we can't look at the adequacy or efficacy of the alternative remedy in general or in relation to a specific plaintiff. The inquiry can be criticized as toe-deep, superficial, and cursory, but if Congress or the Executive has acted, we are to presume that they deemed their action sufficient to achieve its purpose, and that bars creation of a *Bivens* cause of action.

Here, Congress through the Executive Branch put the BOP administrative remedy program in place to address prisoner grievances, including those involving alleged constitutional violations. *See* 28 C.F.R. § 542.10(a) ("The purpose of the Administrative Remedy Program is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own

confinement."); *see also Malesko*, 534 U.S. at 74. In doing so, Congress through the Executive Branch found that remedial process to be appropriate and adequate. We cannot second-guess that judgment and superimpose a *Bivens* remedy on top of the administrative remedy, which would allow prisoners to bypass the grievance process. *See Egbert*, 596 U.S. at 497–98. Although Johnson believes he was, in essence, not allowed to access the grievance procedure, that is not enough to disqualify it as a special factor and authorize the creation of a new *Bivens* remedy.[7]

---

[7] Johnson also asserts that because the Court in *Egbert* and *Hernandez* pointed out that the plaintiffs in those cases were actually able to take advantage of the relevant grievance procedure, those decisions establish that an alternative remedial process cannot be a relevant special factor unless it is actually available to the plaintiff himself. *See Hernandez*, 589 U.S. at 104–06 (explaining that because the Executive Branch has already determined that there was no misconduct and because the case implicated foreign relations, there was no need for the judicial branch to create a cause of action); *Egbert*, 596 U.S. at 497 ("As noted, [the plaintiff] took advantage of this grievance procedure, prompting a year-long internal investigation into [the defendant's] conduct."); *see also id.* ("In *Hernandez*, we declined to authorize a *Bivens* remedy, in part, because the Executive Branch already had investigated alleged misconduct by the defendant Border Patrol agent."). Although the alternative remedies in *Hernandez* and *Egbert* were actually available to the plaintiffs in those cases, the Supreme Court in *Egbert* made clear that is not a requirement. *See supra* at 38–39; *Egbert*, 596 U.S. at 493, 497–98.

True, those clear statements in *Egbert* are dicta. But, as we stated in *Schwab* about some other dicta: "[T]here is dicta and then there is dicta, and then there is Supreme Court dicta. This is not subordinate clause, negative pregnant, devoid-of-analysis, throw-away kind of dicta. It is well thought out, thoroughly

The Supreme Court has instructed us that the existence of a grievance procedure is a special factor that by itself is enough to rule out inferring a *Bivens* cause of action. This is what the Court said about that in *Egbert*, its latest decision on the subject:

> Finally, our cases hold that a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure. If there are alternative remedial structures in place, that alone, like any special factor, is reason enough to limit the power of the Judiciary to infer a new *Bivens* cause of action. Importantly, the relevant question is not whether a *Bivens* action would disrupt a remedial scheme, or whether the court should provide for a wrong that would otherwise go unredressed. Nor does it matter that existing remedies do not provide complete relief. Rather, the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies should be augmented by the creation of a new

---

reasoned, and carefully articulated analysis by the Supreme Court . . . ." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006); *see also Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997) ("[D]icta from the Supreme Court is not something to be lightly cast aside."); *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) ("Even though that statement by the Supreme Court . . . was dictum, it is of considerable persuasive value, especially because it interprets the Court's own precedent.").

> judicial remedy. [T]he question is who should decide.

596 U.S. at 493 (cleaned up); *see also id.* at 492 ("If there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy.") (quotation marks omitted).

As we have noted, Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure in the form of a grievance procedure for use by federal prison inmates. And it is in place. That by itself is "a single reason to pause before applying *Bivens"* in the new context of this case, and the Supreme Court has instructed us that means we may not recognize a *Bivens* remedy in a case like this one. *Egbert*, 596 U.S. at 492 (quotation marks omitted). We cannot extend *Bivens* here because doing so would "arrogate legislative power" and allow federal prisoners to bypass the grievance process put in place by Congress through the Executive Branch. *See Egbert*, 596 U.S. at 492 (alteration accepted) (quotation marks omitted).

IV. Conclusion

We follow the Supreme Court's instructions and will not venture beyond the boundaries it has staked out. We will not infer any new *Bivens* causes of action in this case.

AFFIRMED.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-11394

LAQUAN JOHNSON,

Plaintiff-Appellant,

v.

ELAINE TERRY, OFFICER BURGESS,
DR. MARTIN, DR. WINSTON, MS. GARCIA, *et al.*,

Defendants-Appellees,

DARLENE DREW, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:18-cv-01899-AT

[PUBLISH]
Filed August 12, 2024
Document No. 43

[VACATED] OPINION

Before BRANCH, GRANT, and ED CARNES, Circuit Judges.

ED CARNES, Circuit Judge:

LaQuan Johnson is a federal prisoner who filed a complaint asserting claims under *Bivens v. Six*

Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). He sought money damages from federal prison officials, doctors, a nurse, and a kitchen supervisor alleging that they violated his constitutional rights by using excessive force, by failing to protect him from other inmates, and by being deliberately indifferent to his serious medical needs.

The Supreme Court has decided that "in all but the most unusual circumstances," we should not use *Bivens* to recognize new constitutional-claim causes of action for damages against federal officials. *See Egbert v. Boule*, 596 U.S. 482, 486, 491 (2022). The Court has instructed us that the reason we aren't free to use *Bivens* to "fashion[] new causes of action," *id.* at 490, is that "prescribing a cause of action is a job for Congress, not the courts," *id.* at 486. The claims Johnson has asserted would require new *Bivens* causes of action, which we are forbidden to create except in the "most unusual circumstances," if then. *Id.* at 486.

I. Facts and Procedural History

LaQuan Johnson is a federal prisoner who was housed at the United States Penitentiary in Atlanta, Georgia, which we'll call USP-Atlanta, from September 2015 to April 2019. He was a pretrial detainee until he was tried and convicted on April 14, 2017.[1]

---

[1] Johnson appeals the district court's grant of the defendants' motion for summary judgment. Given that, we are required to view the facts as drawn from the pleadings, affidavits, and depositions, in the light most favorable to him. *E.g., Hardin v. Hayes,* 957 F.2d 845, 848 (11th Cir.1992); *Stewart v. Baldwin*

According to USP-Atlanta's policy while Johnson was housed there, pretrial detainees and convicted inmates were usually housed in separate units. In mid-June 2016, while Johnson was still a pretrial detainee, an inmate he knew as "Phillip" moved into his cell in the pretrial unit. Phillip was not a pretrial detainee; instead, he was being confined because he had been convicted. Johnson told an officer that as a pretrial detainee, he should not be housed in the same unit as Phillip, let alone in the same cell. Phillip was moved out of Johnson's cell, but soon after, Elaine Terry, a correctional counselor at USP-Atlanta and one of the defendants, moved Phillip back into Johnson's cell in the pretrial unit and moved Johnson to a different cell in the same unit. Johnson complained to Terry that Phillip was not supposed to be housed in a pretrial unit, but she ignored his complaint.

A week later, Phillip got into an argument with Lewis Mobley, a different pretrial detainee housed in the pretrial unit. Johnson intervened to try and keep the two from fighting. That resulted in Phillip hitting Johnson and pushing him into a toilet, which fractured bones in Johnson's right hand (the first attack).

Later that day Johnson went to "health services," which is the prison's medical clinic, to get his hand evaluated. He was treated by a nurse who x-rayed,

---

County Bd. of Educ., 908 F.2d 1499, 1503 (11th Cir.1990). What we state as "facts" in this opinion may not be the actual facts. They are, however, the facts for summary judgment purposes. *Swint v. City of Wadley, Ala.*, 51 F.3d 988, 992 (11th Cir. 1995).

splinted, and wrapped his hand. The x-rays indicated that Johnson had fractured a bone in his hand. Johnson claims that Dr. Darren Martin, who viewed the x-rays, instructed someone named Ms. Robinson to tell Johnson his hand wasn't broken, and then the medical providers gave him ibuprofen. All of that happened in mid-to-late June 2016.

Johnson again complained about his hand injury in July 2016 and in October 2017. In July of 2016 he was seen by a nurse practitioner, who offered to x-ray and bandage Johnson's hand, but he refused. He was also seen by a nurse practitioner in October 2017 who x-rayed his hand and found that the fracture had healed. Dr. James Winston reviewed and cosigned both nurse practitioners' notes from their interaction with Johnson.

In or around October 2016, Johnson informed Warden Darlene Drew that he was being housed with convicted prisoners when he was a pretrial detainee. Drew did nothing to correct the problem.

In March 2018 a convicted inmate named Walter Bush attacked Johnson (the second attack). (At this point, Johnson had been convicted and was no longer a pretrial detainee.) Bush injured Johnson's right hand during the attack. Johnson went to health services a couple of days later and was seen by a nurse practitioner. The nurse practitioner ordered an x-ray of Johnson's hand, found that there were no new fractures, and offered Johnson pain medication. He declined it, stating that he already had some. The nurse practitioner told Johnson that a doctor would be contacted to come check on him, but none of the doctors on staff ever spoke to Johnson about his injury.

Dr. Winston reviewed the nurse practitioner's notes from the encounter and signed off on the assessment.

In April 2018 Johnson was once again attacked by another inmate (the third attack). He says that he was watching TV when a convicted inmate named Cedric Brown punched him in the face and fractured his jaw. Johnson was seen by a dentist, who then referred him to an oral surgeon. The oral surgeon operated on Johnson's jaw, then wired his mouth closed to help with the healing process. The surgeon directed that Johnson consume a liquid diet for six weeks while his mouth was wired shut.

Johnson contends that Carolina Garcia, a kitchen supervisor, was in charge of giving him his liquid diet, and she provided it as directed for two weeks; but then she stopped. After not receiving his liquid diet for two days, Johnson cut the wires out of his mouth with fingernail clippers so that he could eat. He then began chewing regular food with his fractured jaw. The food got stuck in the wound in his mouth and began to rot. Once the food rotted, one of Johnson's teeth also rotted and needed to be removed.

A few months later, in August 2018, a group of prisoners were playing basketball in an outdoor recreation area when the ball got stuck in the rim. Because Johnson is tall, they asked him if he could get the ball down. He jumped up and landed on a screw when he came down; the screw punctured his foot and caused severe bleeding. Johnson went inside to find help and saw Nurse Terrisha Harris passing out medicine. He asked her for help, but she refused to treat his foot. He then explained his predicament to an

unidentified officer, who brought him two pairs of socks to help stop the bleeding.

Two days later, Johnson reported to health services and was seen by Dr. Winston, the same doctor who had reviewed Johnson's medical records after Bush had injured Johnson's hand. Dr. Winston gave Johnson a tetanus shot and took some x-rays. The radiologist's report determined that the x-ray showed no acute fracture or "joint space malalignment," and that no "foreign body" remained in Johnson's foot. Dr. Winston told Johnson that he would follow up with him to see how his foot was healing, but Johnson never saw him again. Johnson tried reaching out to Dr. Winston about a follow-up, but he was not able to get in touch with him.

When he was unable to get in touch with Dr. Winston, Johnson mentioned his injury to Dr. Michael Nwude while the doctor was walking through Johnson's unit. Dr. Nwude told Johnson that he would "call [him] up to the health service" so that he could be provided with arch support for his shoes to help with his foot injury. But Dr. Nwude did not do that, and the next time Johnson saw Dr. Nwude walking through the unit, the doctor refused to talk to him. At the time he filed this lawsuit, Johnson still walked with a limp because of his foot injury.

Johnson attempted to file complaints with the Bureau of Prisons (BOP) about the attacks he had experienced and the lack of adequate medical care he had received while at USP-Atlanta. To resolve inmate complaints that arise at USP-Atlanta and other federal prisons, the BOP uses a four-level administrative remedy program. The purpose of the

program "is to allow an inmate to seek formal review of an issue relating to any aspect of his/her own confinement." 28 C.F.R. § 542.10(a); *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001) ("[The administrative remedy program] provides [a] means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring.").

The first step is an "informal resolution" process within individual institutions. *See* 28 C.F.R. § 542.13(a). To begin this process, a prisoner may present his complaint to prison staff on a grievance form known as a BP-8 form. *See id.* In addition to (or instead of) informal resolution, the inmate can submit a formal grievance on a BP-9 form to staff at the institution where he is located. *See id.* § 542.14(a), (c)(4); *see also id.* § 542.13(b) (providing that the inmate is "not required to attempt informal resolution"). If the inmate feels that submission of a formal grievance at his institution will compromise his "safety or well-being," he may bypass that process and submit his formal request to the regional director. *See id.* § 542.14(d)(1). If he is unsatisfied with the warden's response to his complaint, he may appeal to the regional director (on a BP-10 form), and then to the office of general counsel (on a BP-11 form). *See id.* § 542.15(a). Johnson testified in his deposition that Terry (the correctional counselor) either would refuse to give him any of the various informal or formal grievance forms when he asked, or would give Johnson a form but refuse to file it after Johnson had filled it out. He swore in an affidavit that when he was eventually able to obtain and file grievance forms, he did not receive any response. Johnson also testified

that "if you get no response it[']s like a denial," so he then appealed those "denials." But he says that when he filed an appeal, he would be notified that he had failed to comply with an earlier step in the four-level program.

Johnson claims that the officers at USP-Atlanta purposefully sabotaged his grievances, by either: (1) failing to file his initial grievances; (2) failing to return the responses to his grievances so that if Johnson appealed, he would not know why the grievance was initially denied; or (3) waiting until his appeal deadline had passed before sending him rejection notices, which would result in his appeals being untimely.

Johnson filed suit in federal district court, bringing failure to protect, deliberate indifference, and excessive force claims against a number of officers, medical staff, and an employee at USP-Atlanta. The defendants filed a motion to dismiss his complaint for failure to exhaust his administrative remedies because he did not comply with the BOP's administrative remedy program before filing his complaint. The district court denied the motion without prejudice and provided the parties with a limited discovery period to determine whether Johnson had exhausted his administrative remedies. After discovery closed, the defendants renewed their motion to dismiss. The magistrate judge assigned to the case found that Johnson was denied access to the administrative remedy program at USP-Atlanta and recommended that the court deny the motion to dismiss. Over the defendants' objections, the court

adopted that report and recommendation and denied the motion.

After additional discovery the defendants moved for summary judgment, arguing in part that Johnson's *Bivens* claims are not cognizable. The magistrate judge recommended that the court grant the defendants' motions for summary judgment because his *Bivens* claims presented a new context and special factors counseled against extending *Bivens* to that new context. The district court agreed and granted the defendants' motions for summary judgment, concluding that Johnson's claims did not entitle him to a *Bivens* remedy. Johnson appeals that judgment.

II. *Bivens* Law Through the Years and Today

Claims for money damages against federal officials and employees who have committed constitutional violations are known as *Bivens* claims, after the Supreme Court's decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

When it enacted 42 U.S.C. § 1983, Congress allowed an injured person to sue for money damages claiming that a *state* official had violated his constitutional rights. Congress has never enacted a corresponding statute providing a damages remedy to plaintiffs whose constitutional rights have been violated by a *federal* official. *See Ziglar v. Abbasi*, 582 U.S. 120, 130 (2017). Nevertheless, in *Bivens*, the Supreme Court created for the first time an implied private right of action for damages against federal agents, at least for a violation of the Fourth Amendment. *See* 403 U.S. at 397. The Court concluded

that it had the authority to do so because "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392 (quotation marks omitted).

In the decade after *Bivens*, the Court created two more causes of action for violations of constitutional rights by federal officials. One was against a Congressman under the Fifth Amendment for sex discrimination after he fired his secretary because she was a woman; another was against federal prison officials under the Eighth Amendment for failing to treat an inmate's asthma, resulting in his death. *See Davis v. Passman*, 442 U.S. 228, 230–31 (1979); *Carlson v. Green*, 446 U.S. 14, 16 & n.1, 18 (1980). As in *Bivens*, the Supreme Court stated that the purpose behind those decisions was "to deter individual federal officers from committing constitutional violations." *Malesko*, 534 U.S. at 70. But there the Supreme Court's creative decision-making that had birthed the *Bivens* doctrine stopped.

In the 44 years since *Carlson*, the Supreme Court has over and over again "refused to extend *Bivens* to any new context or new category of defendants." *Ziglar*, 582 U.S. at 135 (quotation marks omitted); *see Bush v. Lucas*, 462 U.S. 367, 368 (1983) (holding there is no *Bivens* action for "federal employees whose First Amendment rights are violated by their superiors"); *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (declining to create *Bivens* action for enlisted military personnel against their superior officers); *United States v. Stanley*, 483 U.S. 669, 684 (1987) ("We hold that no *Bivens* remedy is available for injuries that

arise out of or are in the course of activity incident to [military] service.") (quotation marks omitted); *Schweiker v. Chilicky*, 487 U.S. 412, 414 (1988) (declining to recognize *Bivens* action for due process violations resulting from denial of Social Security disability benefits); *FDIC v. Meyer*, 510 U.S. 471, 473 (1994) (holding there can be no *Bivens* action against a federal agency); *Malesko*, 534 U.S. at 63 (declining to create a *Bivens* remedy against "a private corporation operating a halfway house under contract with the Bureau of Prisons"); *Wilkie v. Robbins*, 551 U.S. 537, 541 (2007) (declining to recognize *Bivens* action against "[o]fficials of the Bureau of Land Management . . . accused of harassment and intimidation aimed at extracting an easement across private property"); *Hui v. Castaneda*, 559 U.S. 799, 801–02 (2010) (disallowing *Bivens* remedy against U.S. Public Health Service employees for "constitutional violations arising out of their official duties"); *Minneci v. Pollard*, 565 U.S. 118, 131 (2012) (finding no *Bivens* remedy when prisoner sued "privately employed personnel working at a privately operated federal prison" under the Eighth Amendment); *Ziglar*, 582 U.S. at 125, 146 (declining to extend *Bivens* to conditions-of-confinement claim against group of executive officials); *Hernandez v. Mesa*, 589 U.S. 93, 96–97 (2020) (declining to recognize *Bivens* remedy for cross-border shooting by border patrol agent); *Egbert*, 596 U.S. at 486 (declining to allow excessive force and First Amendment retaliation *Bivens* claims against a U.S. Border Patrol agent to proceed).

The Supreme Court has explained that its nearly complete about-face in the *Bivens* area after *Davis* and

Carlson results from its having "come to appreciate more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert*, 596 U.S. at 491 (quotation marks omitted). The Court understands that "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Ziglar*, 582 U.S. at 133. And because the power to create causes of action is legislative, "[i]n most instances . . . the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* at 135–36 (quotation marks omitted); *see also Egbert*, 596 U.S. at 492 (explaining that unless a court exhibits the "utmost deference to Congress' preeminent authority in" creating a cause of action, it "arrogate[s] legislative power") (alteration accepted) (quotation marks omitted).

Creating causes of action involves complex policy considerations, including "economic and governmental concerns, administrative costs, and the impact on governmental operations systemwide." *Egbert*, 596 U.S at 491 (quotation marks omitted). The ability of courts to weigh those considerations is "at best, uncertain." *Id.* Thus "recognizing a cause of action under *Bivens*" outside of the three contexts already allowed by the Supreme Court "is a disfavored judicial activity" and should be avoided "in all but the most unusual circumstances." *Id.* at 486, 491 (quotation marks omitted). Judging from the Court's decisions in the last four-and-a-half decades, those

"most unusual circumstances" are as rare as the ivory-billed woodpecker.[2]

Remarkably, the Supreme Court has even "gone so far as to observe that if 'the Court's three *Bivens* cases had been decided today,' it is doubtful that we would have reached the same result." *Hernandez*, 589

---

[2] So rare is the ivory-billed woodpecker that many experts have come to believe it is extinct. As one expert wrote in 2017: "The last bird, a female, was seen in 1944 . . . . Sadly, most ornithologists now think the bird is gone forever." Andy Kratter, *Ivory-billed Woodpecker*, Florida Museum (2017), https://www.floridamuseum.ufl.edu/100-years/object/ivory-billed-woodpecker. In 2021 the Fish and Wildlife Service, which is in charge of such determinations, proposed declaring that the big woodpecker is extinct. *See* Endangered and Threatened Wildlife and Plants; Removal of 23 Extinct Species from the Lists of Endangered and Threatened Wildlife and Plants, 86 Fed. Reg. 54298-01 (Sept. 30, 2021) (to be codified at 50 C.F.R. 17). But in 2022 the Service pulled back from that proposal and extended the period for public comment, recognizing "substantial disagreement among experts regarding the status of the species." Ian Fischer, *Service Announces 6-Month Extension on Final Decision for the Ivory-billed Woodpecker*, U.S. Fish & Wildlife Service (July 6, 2022), https://www.fws.gov/press-release/2022-07/service-announces-6-month-extension-final-decision-ivory-billed-woodpecker. More recently, a research team, after searching over a period of several years in the dense bottomland forests of Louisiana, reported evidence that three of the ivory-bills (as ornithologists call them) still exist. Steven C. Latta et al., *Multiple lines of evidence suggest the persistence of the Ivory-billed Woodpecker (Campephilus principalis) in Louisiana*, ECOLOGY AND EVOLUTION (May 18, 2023), https://doi.org/10.1002/ece3.10017. If that's true, the number of the birds that exist will exactly match the number of Supreme Court decisions that have confirmed and applied *Bivens* in the last forty-three years: three live ivory-billed woodpeckers and three live *Bivens* decisions. A coincidence of rarity.

U.S. at 101 (cleaned up) (quoting *Ziglar*, 582 U.S. at 134). And even more pointedly, just two years ago the Court told us that "we have indicated that if we were called to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502. In other words, today the Court would decide the *Bivens* case, as well as its two progeny, *Davis* and *Carlson*, differently. *See also Malesko*, 534 U.S. at 75 (concurring opinion of Scalia, J., joined by Thomas, J.) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action — decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition.").

The Supreme Court has been clear, however, that it has not yet overruled the *Bivens* decision insofar as the decision itself goes. *See Ziglar*, 582 U.S. at 134 ("[T]his opinion is not intended to cast doubt on the continued force, or even the necessity, of *Bivens* in the search-and-seizure context . . . ."); *see also Egbert*, 596 U.S. at 502 ("[T]o decide the case before us, we need not reconsider *Bivens* itself."). But it has also been clear that when courts are thinking about recognizing a new *Bivens* claim, the "watchword" is "caution" — so much caution that it has not found a new *Bivens* claim worth recognizing in 44 years. *Egbert*, 596 U.S. at 491 (quotation marks omitted); *Malesko*, 534 U.S. at 68 ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."); *see also id.* at 74 ("The caution toward extending *Bivens* remedies into any new context, a caution consistently and repeatedly recognized for three decades [now more than four decades], forecloses such an extension here.") (bracketed words added).

As Justice Gorsuch aptly put it when calling on the Court to forthrightly overrule *Bivens*, what the Court has done is "leave[] a door ajar and hold[] out the possibility that someone, someday, might walk through it even as it [has] devise[d] a rule that ensures no one ever will." *Egbert*, 596 U.S. at 504 (Gorsuch, J., concurring) (quotation marks and ellipsis omitted); *see also Hernandez*, 589 U.S. at 118 (Thomas, J., concurring) ("The analysis underlying *Bivens* cannot be defended. We have cabined the doctrine's scope, undermined its foundation, and limited its precedential value. It is time to correct this Court's error and abandon the doctrine altogether.").

Taking to heart what the Supreme Court has done to limit *Bivens*' precedential value and drastically restrict its reach, we recently refused to extend *Bivens* to a Fourth Amendment excessive force claim against United States Marshals and county police officers conducting a joint state and federal task force to apprehend fugitives. *See Robinson v. Sauls*, 102 F.4th 1337, 1339, 1347 (11th Cir. 2024).

We are not the only court to have taken to heart what the Supreme Court has said on this subject. All of our sister circuits have also stressed the need for caution, hesitancy, and reluctance when it comes to extending the *Bivens* decision. *See Gonzalez v. Velez*, 864 F.3d 45, 52 (1st Cir. 2017) ("While the boundaries of *Bivens*-type liability are hazy, the Supreme Court . . . [has] made plain its reluctance to extend the *Bivens* doctrine to new settings."); *Doe v. Hagenbeck*, 870 F.3d 36, 43 (2d Cir. 2017) (acknowledging that "[t]he Court has . . . made clear that it is reluctant to extend *Bivens* liability to any new context or new

category of defendants" and that "expanding the *Bivens* remedy is now a disfavored judicial activity") (quotation marks omitted); *Xi v. Haugen*, 68 F.4th 824, 833 (3d Cir. 2023) ("Most recently, in *Egbert* . . . , the Court went so far as to suggest that any extension to a new context may be *ultra vires*."); *Dyer v. Smith*, 56 F.4th 271, 277 (4th Cir. 2022) ("And this year [in *Egbert*], the Supreme Court all but closed the door on *Bivens* remedies."); *Cantú v. Moody*, 933 F.3d 414, 421–22 (5th Cir. 2019) (explaining that the Court has "admonished [courts] to exercise caution in the disfavored judiciary activity of extending *Bivens* to any new set of facts") (quotation marks omitted); *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020) ("[The Court] has renounced the method of *Bivens*, *Davis*, and *Carlson*. When asked 'who should decide' whether a cause of action exists for violations of the Constitution, 'the answer most often will be Congress.'") (alteration accepted) (quoting *Ziglar*, 582 U.S. at 135); *Effex Cap., LLC v. Nat'l Futures Ass'n*, 933 F.3d 882, 891 (7th Cir. 2019) (stating that the Supreme Court has "limited the application" of *Bivens* and "made very clear that the expansion of the *Bivens* remedy to other constitutional provisions is a disfavored judicial activity") (quotation marks omitted); *Ahmed v. Weyker*, 984 F.3d 564, 571 (8th Cir. 2020) (explaining that its conclusion not to extend *Bivens* "should [not] be surprising" because "the Supreme Court has not recognized a new *Bivens* action for almost 40 years") (quotation marks omitted); *Chambers v. Herrera*, 78 F.4th 1100, 1105 (9th Cir. 2023) ("Essentially . . . future extensions of *Bivens* are dead on arrival.") (quotation marks omitted); *Silva v. United States*, 45 F.4th 1134, 1136

(10th Cir. 2022) ("The Supreme Court's message [in *Egbert*] could not be clearer — lower courts expand *Bivens* claims at their own peril. We heed the Supreme Court's warning and decline Plaintiff's invitation to curry the Supreme Court's disfavor by expanding *Bivens* to cover [this] claim."); *Loumiet v. United States*, 948 F.3d 376, 381 (D.C. Cir. 2020) (recognizing that "expanding the *Bivens* remedy is now a disfavored judicial activity" that requires "caution before extending *Bivens* remedies into any new context") (quotation marks omitted).

Theoretically, we may someday see more Supreme Court decisions confirming and extending *Bivens*. Barring that unlikely event, for the time being the decision will remain on the judiciary's equivalent of an endangered species list, just like its natural history analogue, the ivory-billed woodpecker. Both the decision and the bird are staring extinction in the face.

Meanwhile, rarity doesn't foreclose false sightings. *See Fields v. Fed. Bureau of Prisons*, No. 23-6246, 2024 WL 3529034 (4th Cir. July 25, 2024). In the recent *Fields* case, a divided Fourth Circuit panel extended *Bivens* to a new context, allowing a federal prisoner's claims of excessive force in violation of the Eighth Amendment to proceed against individual prison officers. *See id.* at *1. A vigorous and cogent dissent rejected the "wiggle room" the *Fields* majority "purport[ed] to detect" in the Supreme Court's repeated warnings that courts should not extend *Bivens*. *Id.* at *9 (Richardson, J., dissenting).

The decision in *Fields*, a far-afield outlier, may lead to en banc reconsideration or to the Supreme Court finally rendering *Bivens* cases extinct. *See id.* at

*14 (Richardson, J., dissenting) (predicting it may encourage the Court to finally "shut the *Bivens* door completely"). After all, the Supreme Court has stated as clearly as the English language permits: "[I]f we were called on to decide *Bivens* today, we would decline to discover any implied causes of action in the Constitution." *Egbert*, 596 U.S. at 502; *see also id.* at 502–04 (Gorsuch, J., concurring in the judgment) (urging the Court to overrule *Bivens* and "forthrightly return the power to create new causes of action to the people's representatives in Congress"). That "called on to decide *Bivens*" call may be coming if the panel decision in *Fields* manages to duck en banc correction. *Id.* at 502.

Until then, determining whether a new *Bivens* claim can be recognized involves a two-step analysis. *Egbert*, 596 U.S. at 492. To begin the analysis, courts first "ask 'whether the case presents a new *Bivens* context — *i.e.*, is it meaningfully different from the three cases in which the Court has implied a damages action.'" *Robinson*, 102 F.4th at 1342 (quoting *Egbert*, 592 U.S. at 492). The question is not a superficial one; for a case to arise in a previously recognized *Bivens* context, it is not enough that the case involves the same constitutional right and "mechanism of injury." *Ziglar*, 582 U.S. at 138–39. "If the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." *Id.* at 139. And there are a lot of meaningful ways for cases to differ, as the examples the Court has supplied show:

> A case might differ in . . . meaningful way[s] because of the rank of the officers involved; the constitutional right at issue; the

> generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

Id. at 139–40.

"[I]f a claim arises in a new context," the second step in the analysis will make "a *Bivens* remedy . . . unavailable if there are special factors indicating that the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed." *Egbert*, 596 U.S. at 492 (quotation marks omitted). Central to this special-factors analysis "are separation-of-powers principles." *Hernandez*, 589 U.S. at 102 (quotation marks omitted). The inquiry focuses on "the risk of interfering with the authority of the other branches, and . . . ask[s] whether there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy." *Id.* (quotation marks omitted).

That analysis should not be applied at "a narrow level of generality," and it "does not invite federal courts to independently assess the costs and benefits of implying a cause of action." *Egbert*, 596 U.S. at 496 (cleaned up). Instead, while conducting the special factors analysis, "a court must ask more broadly if there is any reason to think that judicial intrusion into a given field might be harmful or inappropriate." *Id.*

(cleaned up). "If there are [any special factors] — that is, if we have reason to pause before applying *Bivens* in a new context or to a new class of defendants — we reject the request." *Hernandez*, 589 U.S. at 102; *see also Egbert*, 596 U.S. at 496 (explaining that even a "potential" for improper "judicial intrusion" into the legislative realm is enough to refuse a plaintiff a *Bivens* remedy) (cleaned up); *Robinson*, 102 F.4th at 1342–43 ("If there is even a single reason to pause before applying *Bivens* to a new context, a court may not recognize a *Bivens* remedy.") (quotation marks omitted).

III. *Bivens* Should Not Be Extended Here

Johnson asks us to extend *Bivens* to allow him to bring three types of *Bivens* claims: his excessive force claim, his failure to protect claim, and his deliberate indifference to serious medical needs claims.

But the first of those claims is not properly before us. Johnson did not mention his excessive force claim in any of his briefing or otherwise make any arguments about it on appeal. So that claim is abandoned. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (concluding that a claim not adequately briefed was abandoned, explaining: "A party fails to adequately brief a claim when he does not plainly and prominently raise it, for instance by devoting a discrete section of his argument to those claims") (quotation marks omitted).[3] That

[3] At oral argument, Johnson contended that he had raised his excessive force claim in his briefs to this Court by arguing that special factors did not preclude extending *Bivens* to all of his claims, including his excessive force one. But in his briefs Johnson never discussed the excessive force claim specifically

leaves his failure to protect claim and his deliberate indifference to serious medical needs claims.[4]

In his complaint, Johnson asserted that those two sets of claims were being brought under the "Fifth and/or Eighth Amendments." Actually, those claims arise, if at all, under the Eighth and Fourteenth Amendments. When Johnson was attacked by Phillip in June 2016, he was a pretrial detainee. As a result, his failure to protect and deliberate indifference claims stemming from that incident arise under the Due Process Clause of the Fourteenth Amendment. *See Goodman v. Kimbrough*, 718 F.3d 1325, 1331 n.1 (11th Cir. 2013). The factual predicates for the

---

and only referred to his "claims." Other than that general reference, the excessive force claim is mentioned just once in his brief, and that was only to note that Johnson had included the claim in his complaint. Even after the defendants asserted in their response brief that Johnson had abandoned the excessive force claim by not raising it, he did not address that claim or the abandonment issue involving it in his reply brief. So his attempt to revive the claim at oral argument is unsuccessful. *See Sapuppo*, 739 F.3d at 681; *Holland v. Gee*, 677 F.3d 1047, 1066 (11th Cir. 2012) ("[W]e do not consider arguments not raised in a party's initial brief and made for the first time at oral argument.") (quotation marks omitted); *McFarlin v. Conseco Servs., LLC,* 381 F.3d 1251, 1263 (11th Cir. 2004) ("A party is not allowed to raise at oral argument a new issue for review.").

[4] The defendants argue that Johnson forfeited any challenge to the district court's dismissal of his deliberate indifference claims because his objections to the magistrate judge's findings and his briefing of the issue to us are insufficient. *See, e.g.*, *Roy v. Ivy*, 53 F.4th 1338, 1351 (11th Cir. 2022); *Singh v. U.S. Att'y Gen.*, 61 F.3d 1275, 1278 (11th Cir. 2009). We disagree. Johnson's objections to the report and recommendation and discussion in his appellate briefs adequately challenge whether his deliberate indifference claims present a new context for *Bivens* claims.

remainder of his failure to protect and deliberate indifference claims occurred after Johnson was convicted, so those claims arise under the Eighth Amendment. *See Cox v. Nobles*, 15 F.4th 1350, 1357 (11th Cir. 2021) (failure to protect); *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003) (deliberate indifference).

Johnson's failure to protect claim is against Terry, a corrections counselor, and Warden Drew. He alleges that he informed the two of them that he was being housed with convicted inmates in violation of BOP policy, but they did nothing to correct the situation, which led to Johnson being attacked by convicted inmates three times: in June 2016, March 2018, and April 2018.[5] Johnson's deliberate indifference claims are based on four different incidents, and they involve five defendants and the treatment they gave or failed to give him: (1) Winston and Martin's treatment of the first injury to Johnson's hand; (2) Winston's treatment of the second injury to his hand; (3) Winston and Martin's treatment of his jaw injury and Garcia's failure to continue to provide his liquid diet; and (4) Winston, Martin, Nwude, and Harris' treatment of his left foot injury.

We will begin by explaining why Johnson's failure to protect claim and his deliberate indifference claims both arise in new contexts. Then we will discuss why special factors counsel against recognizing either set of claims here.

---

[5] Johnson himself was a convicted inmate when the last two attacks occurred.

A. Johnson's failure to protect claim "presents a new *Bivens* context"

Instead of arguing that his failure to protect claim does not present a new *Bivens* context because it is not meaningfully different from *Bivens*, *Davis*, or *Carlson*, Johnson contends that the failure to protect claim is similar to the *Bivens* claim in *Farmer v. Brennan*, 511 U.S. 825 (1994), and for that reason does not present a new *Bivens* context.

That argument fails because the Supreme Court has made clear that *Farmer* is not one of its decisions creating a *Bivens* cause of action. In 2017 the Court stated in *Ziglar*, that "[t]hese three cases — *Bivens*, *Davis*, and *Carlson* — represent the *only* instances in which the Court has approved of an implied damages remedy under the Constitution itself." 582 U.S. at 131 (emphasis added). That those three cases are the only ones in which the Court had approved of a *Bivens* remedy as of 2017 means that it did not approve of one in *Farmer,* which was decided in 1994. If the Court had actually approved of a *Bivens* remedy in *Farmer,* it would have said in *Ziglar* that it had approved of a *Bivens* remedy only four times and would have included *Farmer* in its list with the other three decisions. But it didn't say or do that.

The same is true of what the Court stated and didn't state just four years ago in *Hernandez*, where it referred to *Bivens*, *Davis*, and *Carlson* as "the Court's three *Bivens* cases." 589 U.S. at 101 (quotation marks omitted). It made similar statements in *Egbert* in 2022, *Minneci* in 2012, and *Malesko* in 2001. *See Egbert*, 596 U.S. at 490–91 ("Since [*Bivens*, *Davis*, and *Carlson*], the Court has not implied additional causes

of action under the Constitution."); *Minneci*, 565 U.S. at 124 ("Since *Carlson*, the Court has had to decide in several different instances whether to imply a *Bivens* action. And in each instance it has decided against the existence of such an action."); *Malesko*, 534 U.S. at 68 ("Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants."). The Court's conspicuous omission of *Farmer* from the list of *Bivens* decisions it recognized in its *Ziglar*, *Hernandez*, *Egbert*, *Minneci*, and *Malesko* opinions rules out *Farmer* as a *Bivens* decision. We agree with the Seventh Circuit's reasoning in *Sargeant v. Barfield* that "[n]ot once has the Supreme Court mentioned *Farmer* alongside [its three listed *Bivens*] cases, and we think it would have if *Farmer* created a new context or clarified the scope of an existing one." 87 F.4th 358, 365 (7th Cir. 2023).

Johnson argues that the Supreme Court's failure to include *Farmer* in any of its listings of *Bivens* decisions is not determinative because the Court has told us not to "conclude [its] more recent cases have, by implication, overruled an earlier precedent." *Agostini v. Felton*, 521 U.S. 203, 237 (1997). The Court has declared generally that when a later case suggests that an earlier *holding* is no longer applicable, we "should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Id.* (quotation marks omitted). Johnson's argument is basically that even though the Court has never listed *Farmer* as one of its *Bivens* remedy cases, it has never explicitly overruled *Farmer* either, so *Farmer* established a new context of *Bivens* remedies to which we can compare Johnson's claim.

That argument might be successful but for the insurmountable fact that the Court did not hold in *Farmer* that the *Bivens* claim was a cognizable cause of action. It never engaged with or decided the *Bivens* issue. At most, it assumed that *Bivens* could apply but, as we will explain below, assumptions are not holdings and do not establish precedents. *See infra* at 27–28.

In *Farmer*, a transgender woman who "project[ed] feminine characteristics" was placed in the general population of the federal men's prison where she was housed. 511 U.S. at 829–30. Within two weeks she was beaten and raped by another inmate in her cell. *Id.* at 830. She sued multiple federal prison officials under *Bivens* alleging that by placing her in the general population where she "would be particularly vulnerable to sexual attack" due to her appearance, they acted with deliberate indifference to her safety. *Id.* at 829–31. The sole issue before the Supreme Court was how to define what constitutes deliberate indifference in the Eighth Amendment context. *Id.* at 829, 832. The Court's entire discussion in *Farmer* revolved around resolving that one issue. *See id.* at 835–47. The Court did not address whether a *Bivens* cause of action existed for the prisoner's claim. *See id.* at 832–51. It was not an issue before the Court. *See id.*

It is no wonder that the Court did not decide the *Bivens* issue in *Farmer*. It was not mentioned by either party at oral argument. *See* Transcript of Oral Argument, *Farmer*, 511 U.S. 825 (No. 92-7247), 1994 WL 662567. It was not mentioned in either party's briefs. *See* Brief for Petitioner, *Farmer*, 511 U.S. 825 (No. 92-7247), 1993 WL 625980; Brief for Respondents, *Farmer*, 511 U.S. 825 (No. 92-7247),

1993 WL 657282; Reply Brief for Petitioner, *Farmer*, 511 U.S. 825 (No. 92-7247), 1994 WL 190959. It was not mentioned in the petition for certiorari. Petition for Writ of Certiorari., *Farmer*, 511 U.S. 825 (No. 92-7247). And it was not mentioned in the opinion of the Seventh Circuit, whose judgment was being reviewed. *See Farmer v. Brennan*, 11 F.3d 668 (Mem.) (7th Cir. 1992). So the issue of whether a *Bivens* cause of action existed was about as absent from the *Farmer* case as it could have been.

The Supreme Court has long and consistently told us that issues not raised by the parties and not discussed in opinions are not holdings. *Cooper Indus., Inc., v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedent.") (quotation marks omitted); *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (holding that the Court is not bound by assumptions in previous cases); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions . . . are not binding in future cases that directly raise the questions.") (citations omitted); *Edelman v. Jordan*, 415 U.S. 651, 670 (1974) (concluding that the Court was not bound by a previous decision because that decision "did not in its opinion refer to or substantively treat the [relevant] argument"); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) ("The [issue] was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the

case is not a binding precedent on this point."); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."); *The Edward*, 14 U.S. (1 Wheat.) 261, 276 (1816) ("[T]he [issue] alluded to passed *sub silentio*, without bringing the point distinctly to our view, and is, therefore, no precedent."). To sum up all of those Supreme Court decisions about what are not holdings: "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions . . . are not binding in future cases that directly raise the questions." *Verdugo-Urquidez*, 494 U.S. at 272 (citations omitted).

We have held the same thing. *See, e.g.*, *United States v. Penn*, 63 F.4th 1305, 1310 (11th Cir. 2023) ("[A]ssumptions are not holdings. And any 'answers' to questions neither presented nor decided are not precedent.") (citations and quotation marks omitted); *see also United States v. Hurtado*, 89 F.4th 881, 902 n.1 (11th Cir. 2023) ("[A]ssumptions are not holdings.") (Carnes, J., concurring) (quotation marks omitted).

Farmer is not the only occasion on which the Supreme Court has assumed for purposes of argument, either explicitly, or implicitly as in *Farmer*, that a *Bivens* cause of action was cognizable. *See Wilson v. Layne*, 526 U.S. 603, 609, 618 (1999) (implicitly assuming that a *Bivens* remedy was available for the plaintiff's Fourth Amendment claim but holding that the officers were entitled to qualified

immunity); *Wood v. Moss*, 572 U.S. 744, 757, 764 (2014) ("assum[ing] without deciding that *Bivens* extends to [the plaintiffs'] First Amendment claim[]," but ordering dismissal of the claim on qualified immunity grounds); *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012) (same, except reversing the denial of summary judgment for the defendants on qualified immunity grounds); *Ashcroft v. Iqbal*, 556 U.S. 662, 675, 687 (2009) (explicitly assuming without deciding that a First Amendment claim was actionable under *Bivens*, but holding that the plaintiff did not plausibly allege a constitutional violation); *Christopher v. Harbury*, 536 U.S. 403, 405, 412 n.6 (2002) (holding that the complaint failed to state an actionable claim, and noting: "The petitioners did not challenge below the existence of a cause of action under *Bivens* . . . , and we express no opinion on the matter in deciding this case."). If Johnson were correct most, if not all, of those cases should be listed with *Bivens*, *Davis*, and *Carlson* as "*Bivens* cases." But they are not and never have been. Not by the Supreme Court and not by our Court.

Most of our sister circuits that have addressed whether *Farmer* created or recognized an implied *Bivens* remedy in that context have determined that it did not. *See Tate v. Harmon*, 54 F.4th 839, 847 (4th Cir. 2022) ("[W]hile the Court allowed the action [in *Farmer*] to proceed, it never addressed whether the claim was properly a *Bivens* claim."); *Sargeant*, 87 F.4th at 365 (holding that *Farmer* did not create a *Bivens* remedy because "[t]he Court never held — just assumed — that a *Bivens* remedy was available to the plaintiff"); *Marquez v. Rodriguez*, 81 F.4th 1027, 1030–31 (9th Cir. 2023) ("The Supreme Court's *Bivens*

jurisprudence squarely forecloses [the plaintiff]'s argument that *Farmer* established a cognizable *Bivens* context."); *but see Bistrian v. Levi*, 912 F.3d 79, 91 (3d Cir. 2018) (relying on *Farmer* to find failure to protect claim did not present a new context). We agree with the Fourth, Seventh, and Ninth Circuits' holdings that *Farmer* did not create a *Bivens* remedy and thus cannot serve as a comparator case in the new context inquiry; we disagree with the Third Circuit's holding that it did and can.[6]

As we have mentioned, Johnson does not contend that his failure to protect claim is similar to the claims in *Bivens*, *Davis*, or *Carlson*. Having put all of his argument eggs in *Farmer*'s basket, Johnson loses the first stage-issue of whether his failure to protect claim presents a new *Bivens* context. It does.

Instead of turning now to the second-stage issue involving Johnson's failure to protect claim, we will defer discussion of that issue until we decide the first-stage issue involving the deliberate indifference claims. Doing so will enable us to address the second-stage issue involving both categories of claims together.

---

[6] Johnson also argues that our opinion in *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090 (11th Cir. 2014), recognized a *Bivens* failure to protect claim against prison officials. But, as we have already discussed, the only decisions that count in step one of the *Bivens* analysis are the three that the Supreme Court has explicitly listed as counting. *See supra* at 24–25.

B. Johnson's deliberate indifference to serious medical needs claims present a new *Bivens* context

Johnson contends that his deliberate indifference claims are sufficiently analogous to *Carlson* that they do not present a new *Bivens* context. We disagree.

In *Carlson* a prisoner's estate sued a group of federal prison officials for violating the prisoner's due process, equal protection, and Eighth Amendment rights. 446 U.S. at 16. The complaint alleged that the officials knew that the prisoner had chronic asthma, that the facility he was housed in had grossly inadequate medical facilities and staff, and also that the officials:

> kept [the prisoner] in that facility against the advice of doctors, failed to give him competent medical attention for some eight hours after he had an asthma attack, administered contra-indicated drugs which made his attack more severe, attempted to use a respirator known to be inoperative which further impeded his breathing, and delayed for too long a time his transfer to an outside hospital.

Id. at 16 n.1. The complaint contended that these failures caused the prisoner's death. *Id.* Applying the relevant standard at the time, the Court concluded that the estate's *Bivens* claims were cognizable because there were no special factors counseling hesitation by the Court nor any substitute remedy for the estate's harm. *Id.* at 18–23.

In deciding whether Johnson's deliberate indifference claims present a new context as compared to the Eighth Amendment claim in *Carlson*, we look to

Ziglar, 582 U.S. 120, for guidance. In *Ziglar*, the Court analyzed whether six prisoners' claim that a warden violated the Fifth Amendment by allowing prison guards to abuse the men during their detention presented a context different from *Carlson*. 582 U.S. at 146–47. The complaint alleged that the instances of abuse constituted excessive force and were "serious violations of Bureau of Prisons policy." *Id.* at 147.

After acknowledging that the claim in *Ziglar* "ha[d] significant parallels to . . . *Carlson*," the Court held that recognizing the prisoners' Fifth Amendment claim would still constitute an extension of *Bivens*. *Id.* It determined that the claim in *Ziglar* differed from the Eighth Amendment claim in *Carlson* in at least three meaningful ways: (1) "*Carlson* was predicated on the Eighth Amendment and [the claim in *Ziglar*] is predicated on the Fifth"; (2) the "judicial guidance" surrounding the standard for the claim in *Ziglar* (that the warden allowed guards to abuse detainees) was less developed than the precedent for the claim in *Carlson* (that the officials failed to provide medical treatment to a prisoner); and (3) *Ziglar* had "certain features that were not considered in the Court's previous *Bivens* cases," such as "the existence of alternative remedies" and "legislative action suggesting that Congress does not want a damages remedy." *Id.* at 147–49. In its conclusion, the *Ziglar* Court again recognized that *Carlson* and *Ziglar* were similar but ultimately held that "[g]iven this Court's expressed caution about extending the *Bivens* remedy, . . . the new-context inquiry is easily satisfied." *Id.* at 149.

As the Supreme Court did with the claim in *Ziglar*, we acknowledge that Johnson's deliberate indifference to serious medical needs claims have "significant parallels" to *Carlson*'s Eighth Amendment claim. But also as the Supreme Court did with the claim in *Ziglar*, we conclude that Johnson's claims present a new context. First, Johnson's claim based on the medical care he received after being attacked by Phillip is predicated on a different constitutional right than the one in *Carlson* (Fourteenth Amendment instead of Eighth Amendment). That alone is enough for the claim to present a new context. *See id.* at 148 ("[A] case can present a new context for *Bivens* purposes if it implicates a different constitutional right . . . ."). And that is so even though the same analysis applies to deliberate indifference claims under both amendments. *See Goodman*, 718 F.3d at 1331 n.1 (explaining that "the standards [for analyzing deliberate indifference claims] under the Fourteenth Amendment are identical to those under the Eighth") (quotation marks omitted).

While Johnson's other deliberate indifference claims arise under the Eighth Amendment as the claim did in *Carlson*, that is not enough to prevent the context of those claims from being a new one for *Bivens* purposes. *See Hernandez*, 589 U.S. at 103 ("A claim may arise in a new context even if it is based on the same constitutional provision as a claim in a case in which a damages remedy was previously recognized.").

As the Court found in *Ziglar*, we find that the context of these claims is different from the context of the claim in *Carlson* because there the Court did not

consider whether there were alternative remedies under the current alternative remedy analysis. *See Ziglar*, 582 U.S. at 148 ("This case also has certain features that were not considered in [*Carlson*] and that might discourage a court from authorizing a *Bivens* remedy" such as "the existence of alternative remedies"); *Egbert*, 596 U.S. at 492 ("[W]e have explained that a new context arises when there are 'potential special factors that previous *Bivens* cases did not consider.'") (quoting *Ziglar*, 582 U.S. at 140). In *Carlson*, the Court asked whether there were "alternative remed[ies] which [Congress] explicitly declared to be a *substitute* for recovery directly under the Constitution and viewed as equally effective," and it found that the Federal Tort Claims Act did not meet that standard. *Carlson*, 446 U.S. at 18–19.

Now as part of the special factors analysis that we consider, *see infra* at 36–42, we ask whether *any* alternative remedy exists that Congress or the Executive believed to be sufficient to remedy the type of harm Johnson allegedly suffered. *Egbert*, 596 U.S. at 498 (explaining that the existence of any "remedial process" that Congress or the Executive "finds sufficient" prohibits the creation of a *Bivens* remedy). The fact that *Carlson* did not consider the existence of alternative remedies under the framework explained in *Egbert* renders Johnson's claim different from the one in *Carlson*. *See Ziglar*, 582 U.S. at 148; *see also Egbert*, 596 U.S. at 500–01 (distinguishing *Davis* from the claim in *Egbert* because *Davis* "predates our current approach to implied causes of action and diverges from the prevailing framework," and explaining that "a plaintiff cannot justify a *Bivens* extension based on 'parallel circumstances' with

Bivens, [*Davis*], or *Carlson* unless he also satisfies the 'analytic framework' prescribed by the last four decades of intervening case law") (quoting *Ziglar*, 582 U.S. at 139).

As we will discuss in more detail later, alternative remedies existed for prisoners in Johnson's position besides bringing a *Bivens* action, namely submission of a grievance form though the BOP administrative remedy program. *See infra* at 37–42; *Malesko*, 534 U.S. at 74 (explaining that the BOP administrative remedy program is a "means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP and prevented from recurring"). Because an alternative remedy existed to remedy the type of harm Johnson allegedly suffered, and because the *Carlson* Court did not consider the existence of such remedies under the Supreme Court's current analytical framework, Johnson's case is different from *Carlson*.

Also relevant is the fact that the injury in this case is different from the one in *Carlson*. There the prisoner died from an asthma attack when officials failed to provide the medical care required to treat it. Here Johnson suffered severe but ultimately non-lethal physical injuries to his body that were eventually treated by the defendants. The severity, type, and treatment of Johnson's injuries differ significantly from those of the prisoner in *Carlson*.

Johnson lists some similarities between his deliberate indifference claim and the one in *Carlson* that he believes should be enough to satisfy the new context inquiry. He contends that both claims involve prison officials, medical officers in the prison, and the

deprivation of "medically necessary assistance," including the treatment prescribed by a doctor. To that extent, the claims in the two cases are similar on their face. But the first-stage new context inquiry requires more than "superficial similarities." *Egbert*, 596 U.S. at 495; *see Ziglar*, 582 U.S. at 147–49 (holding that a claim that presented "significant parallels" to *Carlson* still presented a new context).

We look at whether the two cases have *any* relevant differences, not whether they are mostly the same. As the Court decided in *Ziglar*, "[i]f the case is different in a meaningful way from previous *Bivens* cases decided by this Court, then the context is new." 582 U.S. at 139. And even small differences can "easily satisf[y]" the new context inquiry so long as they are meaningful. *See id.* at 149. This case is different from *Carlson* in several meaningful ways. As we have noted, one of Johnson's claims involved a different constitutional claim than in *Carlson*. And the Court in *Carlson* did not apply the current alternative remedies analysis to the claim there. The severity, type, and treatment of Johnson's injuries were different from those of the plaintiff in *Carlson.* Those differences make this a new context under the first-stage inquiry.

C. Special factors argue against extending *Bivens* to this new context

Because Johnson's failure to protect and his deliberate indifference to serious medical needs claims arise in a new context, the next step — stage two — is determining whether there are any special factors that would cause us to hesitate before extending *Bivens* to those new contexts. "If there is even a single

reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy. *Egbert*, 596 U.S. at 492 (quotation marks omitted).

One notable special factor is the existence of an alternative remedial structure to remedy the harm the plaintiff has allegedly faced. "[I]f Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure" to address a plaintiff's allegations, there is no need for an additional *Bivens* remedy. *Id.* at 493 (quotation marks omitted). In other words, if there is "*any* alternative, existing process for protecting the injured party's interest," *Ziglar*, 582 U.S. at 137 (cleaned up) (emphasis added), the purpose of creating *Bivens* actions has already been realized by another means, *Egbert*, 596 U.S. at 498. Courts are not to "second-guess that calibration by superimposing a *Bivens* remedy." *Id.*

Congress, through the Executive Branch, has authorized an alternative remedy that applies here: the BOP's administrative remedy program. The Supreme Court has pointed that out. *See Malesko*, 534 U.S. at 74 (finding that the BOP's administrative remedy program was an appropriate alternative remedy to a *Bivens* claim). It's not our place to "second-guess that calibration." *Egbert*, 596 U.S. at 498.

Johnson contends that the BOP's administrative remedy program should not be considered a sufficient alternative remedy for him, and hence not a special factor, because the district court found that he was denied access to the program. But whether the plaintiff himself was denied access to an alternative remedy is not the question. The question is "whether

the Government has put in place safeguards to prevent constitutional violations from recurring." *Egbert*, 596 U.S. at 498 (alteration accepted) (quotation marks omitted); *see id.* at 493 ("Importantly, the relevant question is not . . . whether the court should provide for a wrong that would otherwise go unredressed . . . .") (quotation marks omitted); *see also id.* at 497 (declining to create a *Bivens* remedy because "Congress has provided alternative remedies *for aggrieved parties in* [*the plaintiff*]*'s position*") (emphasis added). The alternative remedy question is a general one, not a specific one; a macro focus, not a micro focus.

That means it does not matter whether we think the administrative remedy program adequately addressed Johnson's complaints. It doesn't matter because the Supreme Court has held that: "the question whether a given remedy is adequate is a legislative determination that must be left to Congress, not the federal courts." *Id.* at 498; *see also id.* at 493 (explaining that it "does [not] matter that existing remedies do not provide complete relief") (quotation marks omitted). The only consideration is whether there is a remedial process in place that is intended to redress the kind of harm faced by those like the plaintiff. And there is one here. The BOP's administrative remedy program.

Egbert makes clear that an alternative remedy need not satisfactorily address every plaintiff's complaints to be sufficient. In that case the plaintiff argued that the Border Patrol's grievance process was not an adequate alternative remedy because, while he was able to file a claim that was investigated by

Border Patrol, he was not able to participate in the proceedings after his complaint was filed, nor was there a right to judicial review of an adverse decision. *Id.* at 489–90, 497. The Supreme Court rejected that argument, explaining that it had "never held that a *Bivens* alternative must afford rights to participation or appeal." *Id.* at 497–98. Because "*Bivens* is concerned solely with deterring the unconstitutional acts of individual officers," the purpose of the alternative remedy special factor analysis is to avoid encroaching on a process or remedy that Congress or the Executive has put in place. *Id.* at 498 (quotation marks omitted). "So long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Id.*

Because the Court has told us that the ultimate question is whether Congress or the Executive created an alternative remedy, we can't look at the adequacy or efficacy of the alternative remedy in general or in relation to a specific plaintiff. The inquiry can be criticized as toe-deep, superficial, and cursory, but if Congress or the Executive has acted, we are to presume that they deemed their action sufficient to achieve its purpose, and that bars creation of a *Bivens* cause of action.

Here, Congress through the Executive Branch put the BOP administrative remedy program in place to address prisoner grievances, including those involving alleged constitutional violations. *See* 28 C.F.R. § 542.10(a) ("The purpose of the Administrative Remedy Program is to allow an inmate to seek formal

review of an issue relating to any aspect of his/her own confinement."); *see also Malesko*, 534 U.S. at 74. In doing so, Congress through the Executive Branch found that remedial process to be appropriate and adequate. We cannot second-guess that judgment and superimpose a *Bivens* remedy on top of the administrative remedy, which would allow prisoners to bypass the grievance process. *See Egbert*, 596 U.S. at 497–98. Although Johnson believes he was, in essence, not allowed to access the grievance procedure, that is not enough to disqualify it as a special factor and authorize the creation of a new *Bivens* remedy.[7]

---

[7] Johnson also asserts that because the Court in *Egbert* and *Hernandez* pointed out that the plaintiffs in those cases were actually able to take advantage of the relevant grievance procedure, those decisions establish that an alternative remedial process cannot be a relevant special factor unless it is actually available to the plaintiff himself. *See Hernandez*, 589 U.S. at 104–06 (explaining that because the Executive Branch has already determined that there was no misconduct and because the case implicated foreign relations, there was no need for the judicial branch to create a cause of action); *Egbert*, 596 U.S. at 497 ("As noted, [the plaintiff] took advantage of this grievance procedure, prompting a year-long internal investigation into [the defendant's] conduct."); *see also id.* ("In *Hernandez*, we declined to authorize a *Bivens* remedy, in part, because the Executive Branch already had investigated alleged misconduct by the defendant Border Patrol agent."). Although the alternative remedies in *Hernandez* and *Egbert* were actually available to the plaintiffs in those cases, the Supreme Court in *Egbert* made clear that is not a requirement. *See supra* at 38–39; *Egbert*, 596 U.S. at 493, 497–98.

True, those clear statements in *Egbert* are dicta. But, as we stated in *Schwab* about some other dicta: "[T]here is dicta and then there is dicta, and then there is Supreme Court dicta. This is not subordinate clause, negative pregnant, devoid-of-analysis,

The Supreme Court has instructed us that the existence of a grievance procedure is a special factor that by itself is enough to rule out inferring a *Bivens* cause of action. This is what the Court said about that in *Egbert*, its latest decision on the subject:

> Finally, our cases hold that a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure. If there are alternative remedial structures in place, that alone, like any special factor, is reason enough to limit the power of the Judiciary to infer a new *Bivens* cause of action. Importantly, the relevant question is not whether a *Bivens* action would disrupt a remedial scheme, or whether the court should provide for a wrong that would otherwise go unredressed. Nor does it matter that existing remedies do not provide complete relief. Rather, the court must ask only whether it, rather than the political branches, is better equipped to decide whether existing remedies should be augmented by the creation of a new

---

throw-away kind of dicta. It is well thought out, thoroughly reasoned, and carefully articulated analysis by the Supreme Court . . . ." *Schwab v. Crosby*, 451 F.3d 1308, 1325 (11th Cir. 2006); *see also Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n.4 (11th Cir. 1997) ("[D]icta from the Supreme Court is not something to be lightly cast aside."); *United States v. City of Hialeah*, 140 F.3d 968, 974 (11th Cir. 1998) ("Even though that statement by the Supreme Court . . . was dictum, it is of considerable persuasive value, especially because it interprets the Court's own precedent.").

> judicial remedy. [T]he question is who should decide.

596 U.S. at 493 (cleaned up); *see also id.* at 492 ("If there is even a single reason to pause before applying *Bivens* in a new context, a court may not recognize a *Bivens* remedy.") (quotation marks omitted).

As we have noted, Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure in the form of a grievance procedure for use by federal prison inmates. And it is in place. That by itself is "a single reason to pause before applying *Bivens"* in the new context of this case, and the Supreme Court has instructed us that means we may not recognize a *Bivens* remedy in a case like this one. *Egbert*, 596 U.S. at 492 (quotation marks omitted). We cannot extend *Bivens* here because doing so would "arrogate legislative power" and allow federal prisoners to bypass the grievance process put in place by Congress through the Executive Branch. *See Egbert*, 596 U.S. at 492 (alteration accepted) (quotation marks omitted).

IV. Conclusion

We follow the Supreme Court's instructions and will not venture beyond the boundaries it has staked out. We will not infer any new *Bivens* causes of action in this case.

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:18-cv-01899-AT

LAQUAN STEDERICK JOHNSON,

Plaintiff,

v.

ELAINE TERRY, OFFICER BURGESS, DR. MARTIN, DR. WINSTON, ATLANTA USP, BOP, DR. PETERSON, MS. GARCIA, DR. NWUDE, NURSE HARRIS, LIEUTENANT AVERY, OFFICER JOHNSON, OFFICER HOBBS, OFFICER MACKINBURG, OFFICER WILLIS, OFFICER FAYAD, WARDEN DREW,

Defendants.

Filed March 23, 2023
Document No. 203

JUDGMENT

This action having come before the court, the Honorable Amy Totenberg, United States District Judge, for consideration of the magistrate judge's report and recommendations of 2/20/2019, 6/8/2020, 11/5/2021, and 1/30/2023, of defendant Peterson's Motion to Dismiss, and of defendants Terry, Burgess, Martin, Winston, Garcia, Nwude, Harris, Avery, Johnson, Hobbs, Mackinburg, Willis, Fayad, and Drew's Motions for Summary Judgment, with the

court having adopted said recommendations and granted said motions in whole or in part, it is

Ordered and Adjudged that the action be, and the same hereby is, DISMISSED as to defendants USP Atlanta, BOP, and Peterson, it is also

Ordered and Adjudged that that the plaintiff take nothing; that defendants recover costs of this action, and that the action be, and the same hereby, is DISMISSED as to defendants Terry, Burgess, Martin, Winston, Garcia, Nwude, Harris, Avery, Johnson, Hobbs, Mackinburg, Willis, Fayad, and Drew.

Dated at Atlanta, Georgia, this 23rd day of March, 2023.

KEVIN P. WEIMER
CLERK OF COURT

By: s/ T. Frazier
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk=s Office
March 23, 2023
Kevin P. Weimer
Clerk of Court

By: s/ T. Frazier
Deputy Clerk

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-11394

LAQUAN JOHNSON,

Plaintiff-Appellant,

v.

ELAINE TERRY, OFFICER BURGESS,
DR. MARTIN, DR. WINSTON, MS. GARCIA, *et al.*,

Defendants-Appellees,

DARLENE DREW, *et al.*,

Defendants.

Appeal from the United States District Court
for the Northern District of Georgia
D.C. Docket No. 1:18-cv-01899-AT

Filed February 12, 2025
Document No. 53

ORDER OF THE COURT

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before BRANCH, GRANT, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 40.

Appendix E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:18-cv-01899-AT

LAQUAN STEDERICK JOHNSON,
Plaintiff,
v.
ELAINE TERRY, *et al.*,
Defendants.

Filed March 22, 2023
Document No. 202

ORDER

I. Background and Legal Standard

Presently before the Court is Magistrate Judge Justin S. Anand's Report and Recommendation ("R&R") [Doc. 198] recommending that the Court grant that the remaining Defendants' motions for summary judgment [Docs. 162, 163, 164, 165, 167, 169, 170, 172, 173, 174] and that this action be dismissed. Plaintiff LaQuan Johnson has filed objections in response to the R&R [Doc. 201].

A district judge has broad discretion to accept, reject, or modify a magistrate judge's proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 680 (1980). Pursuant to 28

U.S.C. § 636(b)(1), the Court reviews any portion of the R&R that is the subject of a proper objection on a *de novo* basis and any non-objected portion on a "clearly erroneous" standard. "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive or general objections need not be considered by the district court." *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988).

The Court adopts the procedural background and factual discussion in the R&R to which no party has objected. Briefly, Plaintiff alleges first that officials at the United States Penitentiary in Atlanta, Georgia (USP-A) housed him with dangerous inmates, despite his repeated protests, ultimately resulting in serious injury to Plaintiff, including a broken wrist and related nerve damage as well as a fractured jaw that had to be wired shut. Plaintiff further alleges that, when he complained about these housing decisions, he was placed in the Special Housing Unit ("SHU") and attacked by a guard. According to Plaintiff, he did not receive adequate medical care for his fractured jaw for over a month. Some time thereafter, prison staff stopped providing Plaintiff a liquid diet in connection with his fractured jaw, forcing him to cut the jaw wires with a fingernail clipper to allow him to eat to the extent he was able to do so. Plaintiff next alleges that he later stepped on an exposed screw and was not provided adequate medical treatment for this injury either. Finally, Plaintiff alleges that, after filing this lawsuit, he was threatened, placed in the SHU, attacked by guards, shackled for hours, and had his cell ransacked. Based on these events, Plaintiff's surviving claims are for excessive force, for failure to

protect from other inmates, and for deliberate indifference to his various medical needs.

The Magistrate Judge determined that all Defendants are entitled to summary judgment. First, all of Plaintiff's claims are brought pursuant to 28 U.S.C. § 1331/*Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and the Magistrate Judge determined that, under the somewhat recent Supreme Court cases of *Egbert v. Boule*, 142 S. Ct. 1793 (2022), and *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), Plaintiff's *Bivens* claims are not cognizable. Second, the Magistrate Judge reviewed the undisputed facts and determined that Defendants are entitled to judgment with respect to Plaintiff's medical/deliberate indifference claims because the record shows that he was simply dissatisfied with the substantial medical treatment he received, and he cannot demonstrate that the treatment he received amounted to more than gross negligence. *See Goebert v. Lee County*, 510 F.3d 1312, 1326 (11th Cir. 2007) (indicating that claims of gross negligence are insufficient to establish deliberate indifference to serious medical needs).

II. Discussion

In his objections, Plaintiff first disputes the Magistrate Judge's view of *Egbert* as all but signaling the demise of actions brought under *Bivens*. Instead, Plaintiff insists that, while *Egbert* "may have closed the door for some plaintiffs operating on the margins of the analysis, . . . it did not foreclose Plaintiff's claims here." [Doc. 201 at 2]. Having studied the matter, the Court must reluctantly agree with the Magistrate Judge.

A. Evolution of the *Bivens* Remedy

In *Bivens*, the Supreme Court recognized an implied damages remedy for a Fourth Amendment violation committed by federal officials similar to the statutory remedy available against state actors under 42 U.S.C. § 1983. *See Bivens*, 403 U.S. at 397. In the more than fifty years since, the Court has expressly extended the *Bivens* remedy only twice: first, to a claim for gender discrimination under the Fifth Amendment's Due Process Clause, *see Davis v. Passman*, 442 U.S. 228, 248-49 (1979), and later to a claim for deliberate indifference to a serious medical need by an inmate, *see Carlson v. Green*, 446 U.S. 14, 18-23 (1980).

Since 1983, the Supreme Court has been less receptive to expansion of the *Bivens* remedy. *See Silva v. United States*, 45 F.4th 1134, 1138 (10th Cir. 2022) (citing *Bush v. Lucas*, 462 U.S. 367, 374-80 (1983); *Chappell v. Wallace*, 462 U.S. 296, 298-305 (1983); *United States v. Stanley*, 483 U.S. 669 (1987)). In *Abbasi* and *Egbert*, that reticence morphed into a major contraction of the *Bivens* remedy and transformation of *Bivens* jurisprudence. In *Abbasi* the Court announced a two-part test for determining whether a *Bivens* claim should be recognized. First, courts must ascertain whether the case presents a new *Bivens* context. *See Abbasi*, 137 S. Ct. at 1859. If the case differs "in a meaningful way" from the three recognized *Bivens* cases decided by the Supreme Court, "then the context is new." *Id.* The meaning of "new context" is "broad." *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (quotation and citation omitted). Second, if the case presents a "new context," the court

must then consider whether "special factors" counsel against extending the *Bivens* remedy. *See id.* This "special factors" inquiry asks whether "the Judiciary is at least arguably less equipped than Congress to weigh the costs and benefits of allowing a damages action to proceed." *Abbasi*, 137 S. Ct. at 1858. If a court concludes that there is a reason to pause before applying *Bivens* in a "new context" or to a new class of defendants, the court should reject the request. *Hernandez*, 140 S. Ct. 735 743 (2020).

The Court's decision in *Egbert*, "appeared to alter the existing two-step *Bivens* framework by stating that 'those steps often resolve to a single question: whether there is any reason to think that Congress might be better equipped to create a damages remedy.'" *Silva*, 45 F.4th 1134, 1139 (quoting *Egbert*, 142 S. Ct. at 1803). Indeed, "in all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." *Egbert*, 142 S. Ct. at 1800. The case law following *Abbasi* and *Egbert* demonstrates that even slight differences with established *Bivens* claims means that the context is "new" under the framework, and there is virtually no basis to conclude that the courts are better equipped than Congress to fashion a damages remedy. As the Supreme Court has now repeatedly stated, recognizing a new *Bivens* cause of action is "a disfavored judicial activity." *Abbasi*, 137 S. Ct. at 1857; Hernandez, 140 S. Ct. at 742.

B. Plaintiff's Deliberate Indifference Claims

In *Carlson*—the case most analogous to Plaintiff's medical deliberate indifference claims—the estate of a federal inmate who died following an asthma attack

sued claiming that officials had been deliberately indifferent to the inmate's serious medical needs in violation of the Eighth Amendment. *Carlson*, 446 U.S. at 16-17 n.1. The plaintiff alleged that prison officials were aware of the inmate's chronic asthma condition and the prison's inadequate medical facilities when they chose to keep him in the facility against the advice of doctors and without competent medical attention for eight hours after an asthma attack. *Id.* The Supreme Court held that the *Bivens* remedy was available under those circumstances. *Id.* at 24.

The Magistrate Judge determined that Plaintiff's deliberate indifference claims here differ in meaningful ways from *Carlson*, and thus constitute new *Bivens* contexts. Notably, Plaintiff's medical maladies were not life-threatening, there was no medical emergency, and he did not die. An important aspect of the Supreme Court's test in determining whether a *Bivens* remedy should be extended is the availability of alternative remedies to plaintiffs who could potentially raise a particular claim, *Egbert*, 142 S. Ct. at 1798, 1804, and the *Carlson* plaintiff, having died, could not take advantage of the administrative grievance procedures made available to federal prisoners. *Accord Washington v. Fed. Bureau of Prisons*, CV 5:16-3913-BHH, 2022 WL 3701577, at *5 (D.S.C. Aug. 26, 2022) ("[A]dministrative and injunctive relief would have a completely different application to Plaintiff's claims than to the claims in *Carlson*, where the failure to properly address a medical emergency proved fatal.").

Moreover, the Magistrate Judge cited to numerous cases in which courts have determined that

medical deliberate indifference claims that differ from the claim raised in *Carlson* have been deemed to be "new contexts." [Doc. 198 at 21-22]. While Plaintiff has also cited to cases which allowed medical deliberate indifference claims to proceed under *Bivens*, this Court's reading of *Egbert* indicates that those courts did not reach a result consistent with current, controlling Supreme Court jurisprudence.

The Magistrate Judge further determined, consistent with current governing Supreme Court precedent, that Congress is better suited to create a damages remedy. Federal prisoners have access to an administrative remedy program, and Congress has not expanded that remedy by creating a cause of action to pursue claims of constitutional violations and associated damages relief.

Plaintiff raises a legitimate point in noting that this Court has determined that, in this case, the administrative remedy procedures were not available to him because they acted as a dead end and/or prison administrators thwarted Plaintiff from taking advantage of them. [Doc. 107 at 27]. However, the fact that the administrative remedy process was unavailable in an isolated incident because of the incompetence or malfeasance of individual prison staff members does not persuade the Court that it would be legally authorized to recognize a new damages action at this juncture based on *Egbert*'s restrictive remedial approach. As *Egbert* has stressed, Congress is generally better suited to recognize new causes of action, and it is beyond the Court's purview to question the suitability or reliability of the alternative remedy procedures that have been authorized. "So

long as Congress or the Executive has created a remedial process that it finds sufficient to secure an adequate level of deterrence, the courts cannot second-guess that calibration by superimposing a *Bivens* remedy." *Egbert*, 142 S. Ct. at 1807; *c.f. Earle v. Shreves*, 990 F.3d 774, 780 (4th Cir. 2021) ("While these alternate remedies do not permit an award of money damages, they nonetheless offer the possibility of meaningful relief and therefore remain relevant to [the court's] analysis."). The Court continues to recognize, though, that there are instances, as in this case, where the record, construed in the light most favorable to the Plaintiff, shows that Plaintiff was thwarted from effective access to an administrative remedy or any related relief.

That said, the Court also must note that the Supreme Court has held that "it is irrelevant to a special factors analysis whether the laws currently on the books afford [a plaintiff] . . . an adequate federal remedy for his injuries." *United States v. Stanley*, 483 U.S. 669, 681 (1987) (internal quotation marks omitted). Given the Supreme Court's mandated deference to Congress on the issue of creating a damages remedy, it is all but impossible to conclude that this Court is in a better position to create a remedy here. Put simply, even without the availability of an alternative remedy, this Court is not as well equipped as Congress to create a new cause of action. The Congressional legislative process is specifically designed to promote consideration of a range of opinions and legislative remedial alternatives. *See Egbert*, 142 S. Ct. at 1803 (discussing the range of policy considerations that must be made in determining whether to create a new cause of action

and concluding that "Congress is far more competent than the Judiciary to weigh such policy considerations"). However, the Court recognizes, as a matter of reality, that Congress often has great difficulty in reaching consensus regarding new legislative measures and remedies — and that difficulty translates into *no* legislative action. And in turn, this vacuum of legislative action or judicial authority impacts the capacity of federal inmates who may have suffered grievous injuries of constitutional magnitude from obtaining any meaningful relief.

C. Plaintiff's Excessive Force and Failure to Protect Claims

Plaintiff's claims other than his medical deliberate indifference claims are also not viable under *Bivens*. The Court agrees with the Magistrate Judge that Plaintiff's excessive force claim proposes to extend *Bivens* to a "new context." In *Bivens*, the plaintiff claimed that federal agents used excessive force when they manacled him and threatened his family while arresting him for narcotics violations. *Bivens*, 403 U.S. at 397. Here, Plaintiff claims that a prison official gratuitously applied force by twisting Plaintiff's injured wrist while he was fully compliant. In *Egbert*, the Supreme Court rejected applying *Bivens* to an excessive force claim against a border control agent "for two independent reasons: Congress is better positioned to create remedies in the border-security context, and the Government already has provided alternative remedies that protect plaintiffs like" the one in *Egbert*. *Egbert*, 142 S. Ct. at 1804. Here, the same reasoning applies as discussed above: Congress should be the one to create remedies in the

federal prison setting, and an alternative remedy exists in the prison grievance process. Under *Egbert*, Plaintiff's excessive force claim thus must be dismissed.

Plaintiff contends that his failure to protect claim is not unlike the failure-to-protect claim in the case of *Farmer v. Brennan*, 511 U.S. 825 (1994). However, in Egbert, the Court explained that it had recognized a *Bivens* claim in only three contexts, *see Egbert*, 142 S. Ct. at 1802 — these three contexts do not include Farmer or a failure-to-protect claim. The Court acknowledges that, after *Abbasi*, at least the Third Circuit[1] has recognized a *Bivens* claim for a federal prison official's failure to protect an inmate from an attack by another inmate. In *Bistrian v. Levi*, 912 F.3d 79 (3rd Cir. 2018), the Third Circuit held that the Supreme Court in *Farmer v. Brennan*, 511 U.S. 825 (1994), "recognized a failure-to-protect claim under the Eighth Amendment" for a *Bivens* claim. The Third Circuit noted that the Court in Farmer "not only vacated the grant of summary judgment in favor of the prison officials but discussed at length 'deliberate indifference' as the legal standard to assess a *Bivens* claim." *Bistrian*, 912 F.3d at 90 (citing *Farmer*, 511 U.S. at 832-849). The Third Circuit determined that holding otherwise would have the effect of overruling

[1] As far as this Court can determine, the Eleventh Circuit has not directly addressed this issue post-*Abbasi*. The closest case found was *Trevari v. Robert A. Deyton Detention Ctr.*, 729 F. App'x 748, 751 (11th Cir. 2018), where the Eleventh Circuit tangentially addressed the question of whether a prisoner in a private prison could raise a failure-to-protect *Bivens* claim when alternative remedies existed.

Farmer, and courts are admonished not to "conclude [that the Supreme Court's] more recent cases have, by implication, overruled an earlier precedent." *Bistrian*, 912 F.3d at 91 (quoting *Agostini v. Felton*, 521 U.S. 203, 237 (1997)).

However, there are substantial reasons to doubt the current vitality of the Third Circuit's analysis. Notably, as indicated above, the Supreme Court itself does not recognize *Farmer* as creating a *Bivens* action. Additionally, the *Bivens* issue was not before the Court in *Farmer*. Rather, the Court was concerned with the standard for determining whether an official had been deliberately indifferent. *See Farmer*, 511 U.S. at 832 ("We granted certiorari because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference.'") (citations omitted). Rather than approving an extension of *Bivens*, the Supreme Court's opinion in *Farmer* is akin to "assuming without deciding" the *Bivens* issue to focus on the question presented on appeal.

In *Hartman v. Moore*, 547 U.S. 250 (2006), the Supreme Court analyzed First Amendment issues in the context of a *Bivens* claim. Specifically, the Court held that in order to state a *Bivens* claim for a wrongful prosecution in retaliation for the exercise of free speech rights, the Plaintiff must plead the absence of probable cause. *Id.* at 256-57. Nonetheless, courts, *including* the Third Circuit, routinely hold that the Supreme Court has not recognized a First Amendment *Bivens* claim. *See, e.g., Mack v. Yost*, 968 F.3d 311, 314 (3d Cir. 2020) ("In light of *Abbasi* and our recent precedents, we decline to expand *Bivens* to create a damages remedy for [the plaintiff]'s First

Amendment retaliation claim."); *Loumiet v. United States*, 948 F.3d 376, 382 (D.C. Cir. 2020) (holding that despite *Hartman* assuming a First Amendment *Bivens* claims existed, the Supreme Court has not recognized a First Amendment *Bivens* claims); *Johnson v. Burden*, 781 F. App'x 833, 836 (11th Cir. 2019) (rejecting argument that Hartman recognized a *Bivens* First Amendment retaliation claim). In fact, the Supreme Court itself has stated it has "never held that *Bivens* extends to First Amendment claims." *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012). The Court in *Abbasi* reiterated that "*Bivens*, *Davis*, and *Carlson* . . . represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself," *Abbasi*, 137 S. Ct. at 1855, clearly indicating that *Farmer* does not stand for the proposition that a *Bivens* remedy should extend to a failure-to-protect claim.

The absence of any analysis in *Farmer* regarding whether to recognize a "conditions of confinement" *Bivens* claim also strongly suggests that the Supreme Court had no intention of recognizing such a claim. In other *Bivens* cases, the Court underwent an extensive analysis before extending *Bivens* or declining to do so. *See, e.g., Bush v. Lucas*, 462 U.S. 367, 380-390 (1983) (examining in detail remedial structure put in place by Congress that precluded recognizing a *Bivens* claim); *F.D.I.C. v. Meyer*, 510 U.S. 471, 485-486 (1994) (explaining why *Bivens* remedies are unavailable against federal agencies); *Carlson*, 446 U.S. at 19-23 (stating why the Federal Torts Claim Act did not preclude recognizing a *Bivens* claim). Such analysis is notably absent from the Court's discussion in *Farmer*.

For these reasons, this Court is not swayed by the Third Circuit's determination in *Bistrain*.

In any event, the Third Circuit's decision in *Bistrian* predates *Egbert*. The Ninth Circuit in *Hoffman v. Preston*, 26 F.4th 1059, 1065 (9th Cir. 2022), acknowledged that a prisoner's failure-to-protect claim created a new *Bivens* context, but initially decided, based on its analysis of the factors discussed in *Abbasi*, that such claims should be recognized under *Bivens*. However, after the Supreme Court issued its opinion in *Ebgert*, the Ninth Circuit superseded its opinion and affirmed the district court's dismissal of the complaint after determining that the "Supreme Court's decision in *Egbert v. Boule* precludes recognizing a *Bivens* remedy for [a prisoner's failure-to-protect] allegations." *Hoffman v. Preston*, 20-15396, 2022 WL 6685254, at *1 (9th Cir. Oct. 11, 2022).

In summary, the Court concludes that the Magistrate Judge is correct. Under *Egbert*, none of Plaintiff's *Bivens* claims are cognizable. Having so determined, the Court declines to consider whether the Magistrate Judge erred in concluding that Defendants are entitled to summary judgment regarding Plaintiff's claims of deliberate indifference to his serious medical needs.

III. Conclusion

For the reasons stated, this Court agrees with the Magistrate Judge that Defendants are entitled to summary judgment on Plaintiff's *Bivens* claims.

The Court notes the lamentable position this decision puts Plaintiff in, and others like him, who

allege they have suffered serious assaults and injuries in institutions where they are often powerless. To have the right to freedom from extreme intentional physical abuse or maltreatment without access to any realistic remedy is not consistent with fundamental principles of justice, in the Court's view. Under the circumstances, however, the Court's hands are tied and it must apply governing law.

Accordingly, the R&R, [Doc. 198], is ADOPTED in part, and Defendants' motions for summary judgment, [Docs. 162 163, 164, 165, 167, 169, 170, 172, 173, 174], are GRANTED IN FULL. The Clerk is DIRECTED to enter judgment in favor of Defendants. The Court is further DIRECTED to close this action.

It is SO ORDERED this 22nd day of March, 2023.

HONORABLE AMY TOTENBERG
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:18-cv-01899-AT-JSA

LAQUAN STEDERICK JOHNSON,
Plaintiff,
v.
ELAINE TERRY, *et al.*,
Defendants.

BIVENS
U.S.C. § 1331

Filed January 30, 2023
Document No. 198

MAGISTRATE JUDGE'S FINAL REPORT AND RECOMMENDATION

The matter is before the Court on: the motions for summary judgment, statements of material fact, briefs in support, and attached exhibits filed by Defendant Drew [Doc. 162], Defendant Terry [Doc. 163], Defendant Nwude [Doc. 164], Defendant Winston [Doc. 165], Defendant Martin [Doc. 167], Defendant Harris [Doc. 169], Defendant Burgess [Doc. 170], Defendant Garcia [Doc. 172], Defendants Avery and Willis [Doc. 173], and Defendants Fayad, Hobbs, and Mackinburg [Doc. 174]; Defendants' Joint Notice of Supplemental Authority [Doc. 183];

Plaintiff's omnibus responses to the motions for summary judgment and statements of material fact, brief in opposition, and attached exhibits [Docs. 184, 185, 186, 187]; Plaintiff's statement of additional material facts [Doc. 184]; Defendants' joint reply brief and response to Plaintiff's statement of additional material facts [Doc. 192]; and Plaintiff's supplemental brief [Doc. 195]. For the following reasons, the undersigned RECOMMENDS that Defendants' motions for summary judgment be GRANTED.

I. Background

A. The First And Amended Complaints

Plaintiff executed a *pro se Bivens* complaint[1] in this Court on April 30, 2018, in which he complained about events that occurred while he was being held at the United States Penitentiary in Atlanta, Georgia ("USP-Atlanta"). (Doc. 1). On June 21, 2018, he filed a motion to stay the case while he exhausted his administrative remedies, which the Court granted on July 13, 2018. (Docs. 5, 6). Plaintiff filed a motion to reopen the case and to amend the complaint on November 6, 2018, and he filed a second motion to amend on January 22, 2019. (Docs. 7, 9, 10). The Court

---

[1] In *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), the Supreme Court inferred a private cause of action for damages against federal officials brought pursuant to 28 U.S.C. § 1331. *Bivens*, 403 U.S. at 397. More recently, however, and as will discussed more thoroughly herein in Section II.B., the Supreme Court has cautioned lower courts that expanding the *Bivens* remedy is now a "disfavored judicial activity." *See Egbert v. Boule*, __ U.S. __, 142 S. Ct. 1793 (June 8, 2022); *Ziglar v. Abbasi*, 582 U.S. ---, ---, 137 S. Ct. 1843, 1857 (June 19, 2017).

subsequently granted the motion to reopen, lifted the stay, and granted Plaintiff's first motion to amend the complaint so that Plaintiff could substitute Dr. Alan Peterson and Ms. Garcia for John and Jane Doe. (Docs. 11, 12).

In the *pro se* complaint as amended, Plaintiff named as Defendants the following USP-Atlanta current and former employees: (1) retired Counselor Elaine Terry; (2) former Warden Darlene Drew; (3) then-current Warden D.J. Harmon; (4) Lt. Burgess; (5) Dr. Martin; (6) Dr. Winston; (7) Dr. Nwude; (8) Nurse Harris; (9) Dentist Dr. Peterson; (10) Food Services Supervisor Ms. Garcia; (11) USP-Atlanta; and (12) the Federal Bureau of Prisons ("BOP").[2]

Plaintiff raised medical claims against Defendants Winston, Martin, Nwude, Peterson, Harris, and Garcia. (Doc. 9). First, Plaintiff alleged that after his hand was broken in June of 2016, Defendants Winston and Martin failed to provide him with adequate medical care. (*Id.*). Plaintiff further alleged that later when his jaw was broken and after he received surgery therefor, Dr. Peterson and Defendants Martin, Winston, and Garcia provided him with inadequate medical care. (*Id.*). Specifically, Plaintiff alleged that those Defendants refused to

---

[2] Plaintiff actually named Dr. Nwude and Nurse Harris in his proposed second amended complaint, and the Court added those Defendants to this action. (Doc. 10-1; Doc. 12). But because he also named at least twelve additional Defendants and claims that were not related to the original and first amended complaint, the Court directed the Clerk to file those claims in a separate lawsuit. (*Id.*; Doc. 12).

provide him with the liquid diet ordered by the outside surgeon, forcing him to consume a regular diet that negated the effect of the surgery, and leaving him no choice but to cut the wires that had been placed in his mouth to allow his jaw time to heal. (Doc. 1 at 7, 28-29, 31-32, 38, 85-86, 88-89, 176-77; Doc. 9 at 3-5; Doc. 9-1 at 6, 13-18, 22-26). And finally, Plaintiff alleged that Defendants Martin, Winston, Nwude, and Harris ignored his pleas for adequate and timely medical care when he injured his foot. (Doc. 9-1 at 4-6, 11-12).

In connection with Warden Drew, Warden Harmon and Counselor Terry, Plaintiff claimed that: while he was still a pre-trial detainee they placed him in harm's way by housing him with a medium-security inmate who later attacked Plaintiff and broke his hand; Terry sent him to the Special Housing Unit ("SHU"), ostensibly in retaliation for complaining about being replaced in his prison work assignment by the same inmate who later attacked him; and Wardens Drew and Harmon ignored his pleas not to be housed with dangerous inmates. (Doc. 1 at 4-5).

As to Lt. Burgess, Plaintiff claimed that when escorting Plaintiff from the pretrial detainee dorm, Burgess "jacked [him] up into [a] wall twisting [his] broken hand" and told Plaintiff, "I told you I don't like you so give me a reason to put you back in [the] SHU." (Doc. 1 at 5).

In a report and recommendation ("R&R") dated February 20, 2019, the undersigned engaged in a frivolity screening pursuant to 28 U.S.C. § 1915A. (Doc. 12). Therein, the undersigned recommended that the following claims proceed under *Bivens*: medical

deliberate indifference claims against Defendants Martin, Winston, Peterson, Nwude, Harris, and Garcia; a failure to protect claim against Counselor Terry; and an excessive force claim against Defendant Burgess. (*Id.*). The undersigned further recommended that Plaintiff's claims against Defendants Drew and Harmon be dismissed because Plaintiff had not alleged enough for a supervisory claim to proceed, and that the BOP and USP-Atlanta be dismissed since they are not entities capable of being sued under *Bivens*. (*Id.*).

U.S. District Judge Amy Totenberg adopted the R&R over Plaintiff's objections [Docs. 14, 15] on April 15, 2019. (Doc. 20). Judge Totenberg then resubmitted the action to the undersigned with instructions to appoint counsel for Plaintiff and to direct appointed counsel to file an amended complaint. (*Id.*). Judge Totenberg noted that the dismissal of Defendants Drew and Harmon was without prejudice because it was possible that appointed counsel could raise viable claims against them. (*Id.*).

Newly appointed counsel for Plaintiff submitted a consolidated amended complaint under *Bivens* on July 15, 2019, which is the operative pleading in this case. (Doc. 29). In the counseled amended complaint Plaintiff named the same Defendants as before, including Wardens Drew and Harmon, and added Lt. Avery, Officer Johnson, Officer Hobbs, Officer Mackinburg, Officer Willis, and Officer Fayad. (*Id.*). The amended complaint delineated six counts for relief: (1) failure to protect against Defendants Terry, Drew, and Harmon; (2) medical deliberate indifference against Defendants Winston, Martin, Nwude,

Peterson, Harris, and Garcia; (3) unconstitutional course of medical treatment against Defendants Winston, Martin, Nwude, Peterson, Harris, and Garcia; (4) unconstitutional delay in treating pain against Defendants Winston, Martin, Nwude, Peterson, Harris, and Garcia; (5) excessive force against Defendants Avery, Burgess, Johnson, Hobbs, Mackinburg, Willis, and Fayad; and (6) ratification of constitutional violations against Defendants Drew and Harmon. (*Id.*).

B. Post-Frivolity Proceedings

On October 22, 2019, all of the Defendants filed a motion to dismiss the claims against them in their official capacities based on sovereign immunity [Doc. 37], which the Court granted [Docs. 50, 52].[3] Thereafter, Defendants filed a motion to dismiss the complaint against them in their individual capacities for Plaintiff's failure to exhaust administrative remedies. (Doc. 54). In that same motion, Dr. Peterson sought dismissal because he has absolute immunity as a commissioned officer of the United States Public Health Service. (*Id.*). The Court granted Dr. Peterson's motion to dismiss; however, insofar as Defendants argued that Plaintiff did not exhaust his administrative remedies, the Court denied the motion without prejudice. (Docs. 67, 75). To that end, on July 24, 2020, Judge Totenberg provided the parties with a three-month discovery period limited solely to the

[3] Defendants also sought dismissal based on Plaintiff's failure to serve some of the Defendants; however, the Court denied that request as moot since the parties had been served in the interim. (Docs. 37, 45, 46, 47, 50, 52). And Defendants also sought a more definite statement, which the Court denied. (Doc. 75).

issue of whether Plaintiff exhausted his administrative remedies [Doc. 75], and the Court later granted three extensions thereof. (Docs. 80, 87, 94). In the interim, on July 13, 2020, Defendants notified the Court that Warden Harmon had passed away on June 16, 2020. (Doc. 74).

On February 16, 2021, Defendants filed a renewed motion to dismiss the complaint for lack of exhaustion. (Doc. 100). The undersigned entered a non-final R&R on June 24, 2021, found that Plaintiff had demonstrated that USP-Atlanta's administrative remedy procedure was unavailable to him, and recommended denying the motion to dismiss. (Doc. 107). On August 16, 2021, Judge Totenberg adopted the R&R over Defendants' objections [Doc. 111] and referred the case back to the undersigned for further proceedings, including entering a scheduling order specifying the length of discovery on merits issues. (Doc. 118).

Meanwhile, on June 25, 2021, Officer Johnson filed a motion to dismiss the complaint or in the alternative, for summary judgment. (Doc. 109). Because, *inter alia*, Officer Johnson submitted matters outside of the pleadings, the Court converted the motion into that for summary judgment [Doc. 133], granted the motion [Docs. 146, 159], and entered judgment for Officer Johnson. (Doc. 159).

Defendants Drew, Terry, Nwude, and Winston filed separate summary judgment motions on March 23, 2022. (Docs. 162, 163, 164, 165). On March 28, 2022, Defendant Martin filed a motion for summary judgment. (Doc. 167). On April 13, 2022, Defendants Harris, Burgess, and Garcia filed separate summary

judgment motions. (Docs. 169, 170, 171, 171). Defendants Avery and Willis filed a joint motion for summary judgment on April 23, 2022 [Doc. 173], as did Defendants Fayad, Hobbs, and Mackinburg [Docs. 173, 174]. Plaintiff filed an omnibus response to the summary judgment motions on July 15, 2022 [Doc. 185], and Defendants filed their reply on September 16, 2022 [Doc. 192]. For ease of reference and discussion, the undersigned will refer to Defendants Drew and Terry as the "Administrative Defendants," Defendants Winston, Martin, Nwude, Harris, and Garcia as the "Medical Defendants," Defendants Winston, Martin, and Nwude collectively as the "Doctor Defendants," and Defendants Avery, Burgess, Fayad, Hobbs, Willis, and Mackinburg as the "USP Defendants."

II. Discussion

A. Standard Of Review

Summary judgment is authorized when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Burger King Corp. v. E-Z Eating*, 572 F.3d 1306, 1313 (11th Cir. 2009); Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the burden of demonstrating the absence of a genuine dispute as to any material fact. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 175 (1970); *Bingham, Ltd. v. United States*, 724 F.2d 921, 924 (11th Cir. 1984). Here, Defendants carry this burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317,

325 (1986). In making its determination, the court must view the evidence and all factual inferences in the light most favorable to the nonmoving party.

Once the moving party has adequately supported its motion, the nonmoving party must go beyond the pleadings and come forward with specific facts that demonstrate the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Celotex*, 477 U.S. at 324 (quoting Fed. R. Civ. P. 56(e)); *Sandoval v. Fla. Paradise Lawn Maint., Inc.*, 303 F. App'x 802, 804 (11th Cir. 2008); *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991). Unsupported factual allegations and/or speculation are legally insufficient to defeat a summary judgment motion. *Collins v. Ensley*, 498 F. App'x 908, 909 (11th Cir. 2012); *Ellis v. England*, 432 F.3d 1321, 1326 (11th Cir. 2005); *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005). *See also Celotex*, 477 U.S. at 324 ("Rule 56(e) . . . requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"); *accord Owen v. Wille*, 117 F.3d 1235 (11th Cir. 1997). "The mere scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

B. The *Bivens* Framework

As aptly stated by the Tenth Circuit, "[t]he story of *Bivens* is a saga played out in three acts: creation, expansion, and restriction." *Silva v. United States*, 45

F.4th 1134, 1138 (10th Cir. 2022). In *Bivens*, the Supreme Court inferred a private cause of action for damages against federal officials for Fourth Amendment claims challenging, *inter alia*, FBI agents' alleged unlawful seizure and use of unreasonable force. *Bivens*, 403 U.S. at 397. The Court later extended that remedy in two other contexts: (1) a Fifth Amendment Due Process Clause claim alleging gender discrimination after a Congressman fired his female secretary, *Davis v. Passman*, 442 U.S. 228 (1979); and (2) the Eighth Amendment's prohibition against cruel and unusual punishment where prison officials fatally failed to treat an inmate's asthma, *Carlson v. Green*, 446 U.S. 14 (1980).

More recently, however, the Supreme Court changed the landscape and made clear that lower courts should exercise caution in expanding *Bivens* into a new context, which is now a "disfavored judicial activity." *Egbert v. Boule*, __ U.S. __, 142 S. Ct. 1793, 1803 (June 28, 2022); *Ziglar v. Abbasi*, 582 U.S. ---, 137 S. Ct. 1843, 1859 (2017). The "new-context inquiry is easily satisfied," *Ziglar*, 582 U.S. at ---, 137 S. Ct. at 1864-65, and even the smallest differences between a claim and the previously recognized *Bivens* claim can constitute a new context. *See Egbert*, 142 S. Ct. at 1805 (stating that even if a case presents almost "parallel circumstances" and the claims are similar, such "superficial similarities are not enough to support the judicial creation of a cause of action") (quotation marks and citations omitted); *see also Hernandez v. Mesa*, 589 U.S. ---, 140 S. Ct. 735, 743 (Feb. 25, 2020) (stating that a new context is "broad"); *Choice v. Michalak*, No. 21-cv-0080, 2022 WL 4079577, at *4 (N.D. Ill. Sept. 6, 2022) ("[E]ven arguably small

differences between a claim and the previously recognized *Bivens* claims can satisfy the new-context inquiry."). And if there are "'potential special factors that previous *Bivens* cases did not consider,' a new context arises. *Egbert*, 142 S. Ct. at 1803 (quoting *Ziglar*, 582 U.S. at ---, 137 S. Ct. at 1859).

Now a court analyzing a *Bivens* claim must ask one question: "whether there is any reason to think that Congress might be better equipped to create a damages remedy." *Egbert*, 142 S. Ct. at 1803. Notably, "in all but the most unusual circumstances," the answer to this single question is "yes." *Id.* at 1800, 1803. Indeed, "[i]f there is a rational reason to think that the answer is 'Congress' — as it will be *in most every case* — no *Bivens* action may lie." *Id.* at 1803 (emphasis added).

To that end, a court may dispose of a *Bivens* claim for "two independent reasons: Congress is better positioned to create remedies in the [context considered by the court], and the Government already has provided alternative remedies that protect plaintiffs." *Egbert*, 142 S. Ct. at 1804; *see also Silva*, 45 F.4th at 1141. If a court can find "even one" reason to believe Congress would be better equipped to create a damages remedy than the courts, a *Bivens* action may not proceed. *Egbert*, 142 S. Ct. at 1805. And if there is a *Bivens* alternative remedy that is designed to deter unconstitutional acts of individual officers, that alternative remedy alone provides courts with a sufficient reason not to expand *Bivens* into new contexts — even if that alternative remedy is not adequate. *Egbert*, 142 S. Ct. at 1806-07; *Ziglar*, 542 U.S. at ---, 137 S. Ct. at 1858.

Indeed, in *Egbert*, the Supreme Court declined to extend *Bivens* to a First Amendment retaliation claim because "[t]here are many reasons to think that Congress, not the courts, is better suited to authorize such a damages remedy." *Id.* at 1807. And the fact that the BOP has provided an alternative remedy through the administrative remedy program was enough to decline to extend *Bivens* to an excessive force claim by a Border Patrol Agent — even though the facts presented "parallel circumstances" to *Bivens* itself, and despite the fact that the plaintiff argued that any such remedy was inadequate. *Id.*; *see also Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 71, 74 (2001) (stating that the BOP administrative remedy process is a "means through which allegedly unconstitutional actions and policies can be brought to the attention of the BOP *and prevented from recurring*.") (emphasis added); *Silva*, 45 F.4th at 1141 ("[T]he Supreme Court has long since described the BOP Administrative Remedy Program as an adequate remedy.").

The Supreme Court has noted that it would decline to discover *any* implied causes of action in the Constitution if it were called to decide *Bivens* today. *Egbert*, 142 S. Ct. at 1809. Thus, as the Tenth Circuit stated: "The Supreme Court's message could not be clearer — lower courts expand *Bivens* claims at their own peril." *Silva*, 45 F.4th at 1136. *Egbert* therefore appears to dictate that "expanding *Bivens* is not just a 'disfavored judicial activity,' . . . it is an action that is impermissible in virtually all circumstances." *Silva*, 45 F.4th at 1140; *see also Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523 (6th Cir. 2020) ("What started out as a presumption in favor of implied rights of action has become a firm presumption against

them."); *Cohen v. United States*, __ F. Supp. 3d __, 2022 WL 16925984, at *6 (S.D. N.Y. Nov. 14, 2022) ("[T]he Court all but held that *no* case would ever be able to satisfy th[e] analytic framework" in *Egbert*); *Senatus v. Lopez*, No. 20-cv-60818-SMITH/REID, 2022 WL 16964153, at *3 (S.D. Fla. Oct. 12, 2022) ("In short, *Egbert* . . . makes an action under *Bivens* virtually unavailable to litigants.").

C. Defendants Are Entitled To Summary Judgment Since A *Bivens* Remedy Is Not Available For Plaintiff's Claims.

1. Failure To Protect

Plaintiff's failure to protect claim against the Administrative Defendants is not a viable *Bivens* claim. Indeed, a failure to protect "bear[s] little resemblance to the three *Bivens* claims the Court has approved in the past." *Ziglar*, 582 U.S. at ---, 137 S. Ct. at 1860.

In *Ziglar* itself, the plaintiff essentially raised a failure to protect claim — that is, that the warden allowed prison guards to physically and verbally abuse the plaintiffs. *Id.* at 1863-64. Despite the fact that the claim of prisoner abuse had "small differences" from, and "significant parallels" to, the deliberate indifference claim in *Carlson*, the Supreme found it to be a new *Bivens* context. *Id.* Just as with *Ziglar*, Plaintiff's failure to protect claims against the Administrative Defendants also is a different type of mistreatment than in *Carlson* and, therefore, also constitutes a new *Bivens* context. *See, e.g., Hower v. Damron*, No. 21-5996 at Doc. No. 25, pp. 4-5 (6th Cir. Aug. 31, 2022) (PACER) (finding failure to protect

claim new *Bivens* context); *Johnson v. Santiago*, __ F. Supp. 3d __, 2022 WL 3643591, at *3 (E.D. N.Y. Aug. 24, 2022) ("'[A] claim for failure to protect based on the allegation that [Defendant] was present during the attack on Plaintiff but did not help Plaintiff or intervene' presents a new *Bivens* context.") (citations omitted); *Dudley v. United States*, No. 4:19-CV-317-0, 2020 WL 532338, at *5 (N.D. Tex. Feb. 3, 2020) (finding warden's failure to protect plaintiff from abuse by other inmates and officers to be a new *Bivens* context).

The fact that Congress has provided alternative remedies through the BOP's administrative remedy procedure, the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. §1997e, and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§1346(b) & 2671 et seq., provides sufficient reason to counsel against expanding *Bivens* to this new context. *See Egbert*, 142 S. Ct. at 1807 (finding BOP administrative remedy process enough to decline extending *Bivens*); *Ziglar*, 582 U.S. at ---, 137 S. Ct. at 1865 ("But the [PLRA] itself does not provide for a standalone damages remedy against federal jailers. It could be argued that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of prisoner mistreatment."); *Silva*, 45 F.4th at 1141 ("[T]he Supreme Court has long since described the BOP Administrative Remedy Program as an adequate remedy."); *Hower*, No. 21-5996 at Doc. No. 25 (finding "substantial" the BOP grievance process and the PLRA such that both counsel hesitation to expand *Bivens* to a failure to protect claim); *Johnson*, 2022 WL 3643591, at *3 (finding the existence of alternative remedies such as the FTCA and the BOP's

administrative remedy program counsel hesitation in expanding *Bivens* to a failure to protect claim); *Woods v. Rivera*, No. 2:17cv00098-DMP-JJV, 2018 WL 3371581, at *3 (E.D. Ark. June 25) (stating that by enacting the PLRA, "Congress did not wish to extend *Bivens* damages remedies beyond what has already been recognized."), *report and recommendation rejected on other grounds sub nom. by Woods v. Williams*, 2018 WL 4473585 (E.D. Ark. Sept. 18, 2018).

Additionally, cases involving prison administration "would stray from the Supreme Court's guidance that '[p]rison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline to maintain institutional security." *Johnson*, 2022 WL 3643591, at *3 (citations omitted). Thus, applying a damages remedy here, "in an area that is uniquely within the province and professional expertise of corrections officials," also counsels hesitation. *Id.* (internal quotation marks and citations omitted). As a result, there is a rational basis to believe that Congress is better equipped to provide a damages remedy for a failure to protect claim, and Plaintiff does not have a viable *Bivens* claim against the Administrative Defendants. Accordingly, the Administrative Defendants are entitled to summary judgment.

2. Excessive Force

The USP Defendants also are entitled to summary judgment. Indeed, the Supreme Court in *Egbert* itself declined to expand *Bivens* to an excessive

force claim, albeit in the context of border security. But the same rationale applies here, that is, that even though Plaintiff's excessive force claim presents "almost parallel circumstances" to *Bivens* itself, Plaintiff's claim for excessive force against the USP Defendants constitutes a new *Bivens* context. And the availability of alternative remedies — *i.e.,* the BOP administrative remedy program, the FTCA, and the PLRA — provide sufficient reason not to expand *Bivens* into this new context. *See Silva*, 45 F.4th at 1141 (declining to expand *Bivens* to prisoner's excessive force claim against officer because "the availability of the BOP's Administrative Remedy Program offers an independently sufficient ground to foreclose Plaintiff's *Bivens* claim."); *Greene v. United States*, No. 21-5398, 2022 WL 13638916, at *3 (6th Cir. Sept. 13, 2022) (finding *Bivens* remedy unavailable for excessive force claim and affirming dismissal thereof); *Morel v. Dep't of Justice*, No. 7:22-015-DCR, 2022 WL 4125070, at *3 (E.D. Ky. Sept. 9, 2022) (granting motion to dismiss *Bivens* excessive force claim because the BOP's grievance system and the FTCA are sufficient alternative remedies, and expanding *Bivens* would present a risk of interfering with prison administration); *Landis v. Moyer*, __ F. Supp. 3d __, 2022 WL 2677472, at *7 (M.D. Pa. July 11) (dismissing excessive force claim as new context under *Bivens* and factors such as interfering in prison administration as well as the PLRA counsel hesitation), *appeal filed*, No. 22-2421 (3d Cir. Aug. 5, 2022); *see also Bivens v. Blaike*, No. 21-cv-00783-PAB-NYW, 2022 WL 2158984, at *6 (D. Colo. June 15, 2022) (finding the Prison Rape Elimination Act created by Congress provided an alternative remedy and thus

independently foreclosed plaintiff's excessive force claim related to officer's sexual assault). Accordingly, the USP Defendants should be granted summary judgment on Plaintiff's excessive force claims.

3. Deliberate Indifference

Defendants also argue that Plaintiff's medical deliberate indifference claims cannot be brought under *Bivens* after *Egbert*. The undersigned agrees.

Of the three previously recognized *Bivens* actions, Plaintiff's medical deliberate indifference claims are most like *Carlson* because they involve alleged inadequate medical care.[4] Under the new landscape of *Egbert*, however, any such similarity "carries little weight" because *Carlson* "predates [the Supreme Court's] current approach to implied causes of action and diverges from the prevailing framework[.] . . ." *Id.* at 1808.

To that end, following *Egbert*, several courts have found that even slight differences from *Carlson* were sufficient to create a new context. *See, e.g., Cross v. Buschman*, No. 1:22-cv-98, 2022 WL 6250647, at *3

[4] As noted by the parties, Plaintiff was a pre-trial detainee until he was convicted in April of 2017; therefore, his claims before that date are brought under the Due Process Clause of the Fifth Amendment instead of the Cruel and Unusual Punishments Clause of the Eighth Amendment. *Daniel v. U.S. Marshall Serv.*, 188 F. App'x 954, 961-62 (11th Cir. 2006) ("The Due Process Clause of the Fifth Amendment, rather [than] the Fourteenth Amendment, governs Daniel's *Bivens* claim because federal action is at issue."). However, "[t]he standard for providing basic human needs to those incarcerated or in detention is the same under both the Eighth Amendment and the Fifth Amendment's Due Process Clause." *Id.*

(M.D. Pa. Oct. 7) (finding deliberate indifference claim for failing to treat inmate's diabetes during a thirteen month period new context from *Carlson* because, *inter alia*, in *Carlson* the prisoner died), *appeal filed*, No. 22-3194 (3d Cir. Nov. 21, 2022); *Vaughn v. Bassett*, No. 1:19-cv-00129-C, 2022 WL 4399720, at *3 (N.D. Tex. Sept. 19) (finding failure to treat inmate whose cheekbone was visibly caved in and caused permanent disfigurement was new context from *Carlson* because inmate did not have untreated asthma and his injury was measurably less serious since the failure of the medical system did not lead to his death), *appeal filed*, No. 22-10962 (5th Cir. Oct. 6, 2022); *Choice*, 2022 WL 4079577, at *4 (finding failure to treat pretrial detainee for fractured thumb new context); *Washington v. Fed. Bureau of Prisons*, No. 5:16-3913-BHH, 2022 WL 3701577, at *5 (D. S.C. Aug. 26, 2022) (finding prisoner's deliberate indifference claim for failure to provide or properly administer medications and ignoring instructions of ophthalmologists new context because the issues "do not involve a medical emergency, as did *Carlson*, but rather focus on a long term and ongoing course of medical treatment of Plaintiff's chronic, non-fatal condition"); *see also Martinez v. U.S. Bureau of Prisons*, No. 5:15-cv-2160, 2019 WL 5432052, at *10 (C.D. Cal. Aug. 20) (pre-*Egbert* finding deliberate indifference for failing to treat hypertension new context because "demonstrably different in kind and severity from *Carlson*"), *report and recommendation adopted*, 2019 WL 5424414 (C.D. Cal. Oct. 22, 2019), *aff'd*, 830 F. App'x 234 (9th Cir. 2020); *Standard v. Dy*, No. C19-1400, 2021 WL 1341082, at *6 (W.D. Wash. Mar. 10,

2021) (pre-*Egbert* finding that denial of treatment for Hepatitis C presented new context).

Applying the Supreme Court's admonishments that the new context inquiry is easily met, and must arise from even the slightest differences, the Court is forced to find that this case presents a "new context" to that in *Carlson* for several reasons. First, Plaintiff's medical deliberate indifference claims regarding his hand, jaw, diet, and foot are demonstrably different in kind and severity from *Carlson,* as some of Plaintiff's ailments were chronic, none were fatal, and Plaintiff received significant treatment for all of his complaints but he simply is unsatisfied with the adequacy thereof. In *Carlson*, by contrast, the plaintiff's estate alleged that prison officials did not comply with the medical treatment orders that were given, and that the decedent received no medical care (except for contraindicated care by a non-licensed assistant) during the acute emergency that led to his death because of the absence of licensed providers. *See Green v. Carlson*, 581 F.2d 669, 670-671 (7th Cir. 1978). Second, the fact that the prisoner in *Carlson* died presents significant differences in the relevant "special factors" to consider. As noted above, the courts have found the availability of BOP's Administrative Remedy Program to foreclose *Bivens* claims in various contexts. This Program and was not considered by the Court in *Carlson* (and may not have even been available given that the inmate had died and could not have benefited from any administrative remedy). Third, certain of Plaintiff's claim arise under the Fifth Amendment, as opposed to the Eighth Amendment as was exclusively at issue in *Carlson*. Fourth, the classes of defendants in these two cases include

significant differences. *Carlson* did not involve claims against food service employees. *Carlson* primarily involved claims against a non-licensed prison medical assistant for rendering the wrong care, and against the doctors and prison administrators for being absent and not following ordered prescriptions. *Id.* These circumstances and classes of Defendants are different from what appears in this case.

The Eleventh Circuit has yet to interpret the Supreme Court's language in *Egbert* in connection with medical deliberate indifference claims. However, several courts have found that even those claims cannot survive the new "analytical framework" as delineated in *Egbert* because federal prisoners have several alternative remedies available — including, but not limited to, the BOP administrative remedy procedure, the PLRA, and the FTCA — all of which alone would provide sufficient reason to foreclose a *Bivens* claim. *See, e.g., Noe v. U.S. Gov't*, No. 1:21-cv-01589-CNS-STV, 2023 WL 179929, at *3 (D. Colo. Jan. 13, 2023) (finding Eighth Amendment medical deliberate indifference claim against medical staff no longer viable after *Egbert* since the BOP administrative remedy program is an adequate alternative remedy foreclosing *Bivens* claim); *McNeal v. Hutchinson*, No. 2:21-cv-3431-JFA-MGB, 2022 WL 17418060, at *8 (D. S.C. Sept. 19) (recommending the court decline to expand *Bivens* remedy because the plaintiff's Eighth Amendment claim was new context, Congress was better positioned to create remedies in the context of chronic medical care in federal prisons, and there are alternative remedies such as the BOP administrative remedy program and the PLRA), *report and recommendation adopted*, 2022 WL

17418060 (Nov. 2), *appeal filed*, No. 22-7319 (4th Cir. Nov. 15, 2022); *Cross*, 2022 WL 6250647, at *3 (dismissing plaintiff's medical deliberate indifference claim because it was a new context and BOP administrative remedy program was an available alternative remedy); *Vaughn*, 2022 WL 4299720, at *3-4 (finding no *Bivens* deliberate indifference claim where new context and the BOP's administrative remedy program and FTCA are alternative remedies).

Plaintiff's reliance on *Montalban v. Samuels*, No. 21-11431, 2022 WL 4362800 (11th Cir. Sept. 21, 2022) (per curiam) for his argument that a *Bivens* deliberate indifference claim is still viable after *Egbert* as is unavailing. In *Montalban*, the prisoner alleged *Bivens* claims for retaliation, deliberate indifference to his medical needs, deprivation of his liberty and property, and violations of his First, Sixth, Fifth, and Fourteenth Amendments, based on events which occurred while he was in two different prison facilities. *Id.* at *1. The lower court dismissed the prisoner's claims because he failed to exhaust his administrative remedies. *Id.* Alternatively, the court found that the claims were without merit because the plaintiff had no *Bivens* remedy for his First, Fifth, Sixth, and Fourteenth Amendment claims under *Ziglar*, and the defendants were entitled to qualified immunity as to his Eighth Amendment deliberate indifference claim. *Id.* at *2-4. The Eleventh Circuit affirmed the district court's decision. *Id.* But *Montalban* does not change this Court's rationale here for at least two reasons.

First, the *Montalban* decision is unpublished and thus is not binding precedent. *See* 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding

precedent, but they may be cited as persuasive authority.") and IOP 7 ("The court generally does not cite to its 'unpublished' decisions because they are not binding precedent."). Second, the availability of a *Bivens* remedy, after *Egbert* or otherwise, was not an issue litigated on appeal. Indeed, the *Bivens* issue was moot because the deliberate indifference claims were dismissed on other grounds, and the Court's discussion focused entirely on those other grounds (which the Court found were a proper basis for dismissal).

While the decision summarily stated, in providing general background, that the Supreme Court "has … recognized a *Bivens* action for deliberate indifference to serious medical needs under the Eighth Amendment," citing *Carlson*, *id.* at 3, this issue was uncontested in that case and the Court of Appeals did not discuss the issue in any depth or even cite *Egbert* at all. Notably, the district court issued the order on appeal, and the defendant/appellees completed their briefing in the Eleventh Circuit, all before *Egbert* was decided. *See Montalban*, Appellate Action No. 21-11431 at Docket No. 35 (January 28, 2022) (Appellees' Response Brief) (PACER).

Thus, at most, the Eleventh Circuit in this non-binding decision appeared to presume without deciding that a prisoner medical deliberate indifference claim would still be viable after *Ziglar* and *Egbert*, which was a moot issue not actually being appealed in that case. The Court cannot find that the Eleventh Circuit's silence on the *Egbert* issue in these circumstances carries any persuasive value.

The undersigned finds persuasive the rationale that after *Egbert* medical deliberate indifference claims also do not survive the new analytical framework, and as a result, Plaintiff's medical deliberate indifference claims also are no longer viable under *Bivens*. Indeed, it is clear that the PLRA, FTCA, and the BOP's administrative remedy program are sufficient for this Court to hold that *Bivens* does not extend to Plaintiff's medical deliberate indifference claims.

Out of an abundance of caution, however, the undersigned will analyze on the merits the deliberate indifference claims against the Medical Defendants. To that end, the Medical Defendants each argue that they are entitled to summary judgment. The undersigned agrees.

D. The Medical Defendants Are Entitled to Summary Judgment On Plaintiff's Medical Deliberate Indifference Claims.

1. Material Facts[5]

Plaintiff was housed at USP-Atlanta from September 28, 2015, through April 23, 2019. (DMSMF

[5] In preparing the factual recitation below, the Court has considered Defendant Martin's Statement of Material Facts ("DMSMF") and Plaintiff's responses thereto ("R-DMSMF"), Defendant Winston's Statement of Material Facts ("DWSMF") and Plaintiff's responses thereto ("R-DWSMF"), Defendant Nwude's Statement of Material Facts ("DNSMF") and Plaintiff's responses thereto ("R-DNSMF"), Defendant Harris's Statement of Material Facts ("DHSMF") and Plaintiff's responses thereto ("R-DHSMF"), Defendant Garcia's Statement of Material Facts ("DGSMF") and Plaintiff's responses thereto ("R-DGSMF"), Plaintiff's Statement of Additional Facts ("PSAMF") and

Defendants' responses thereto ("R-PSAMF"), and the depositions and affidavits in the record, as well as Plaintiff's medical records. The facts are undisputed unless otherwise indicated, and the disputed facts are viewed in the light most favorable to Plaintiff.

The undersigned notes that Plaintiff supports many of his "facts" with emails he sent via USP-Atlanta's TRULINCS messaging system, which are hearsay for purposes of proving the truth of the assertions in those emails. (*See*, *e.g.,* PSAMF ¶¶84, 85, 87). Many of those unsupported and inadmissible statements also are belied by the record. While this Court must view the evidence and all factual inferences in Plaintiff's favor, *Tolan v. Cotton*, 572 U.S. 650, 657 (2014), the Court may disregard a non-moving party's facts that are not supported by admissible evidence and are refuted by the clear record. *See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the fact[s] . . . .").

Likewise, throughout his response Plaintiff makes conclusory unsworn statements about his medical problems and causes thereof, none of which are supported by admissible evidence. Even if Plaintiff had provided sworn statements regarding those medical causes or diagnoses, however, any such lay-witness testimony would be improper and cannot be used to defeat summary judgment. *See, e.g.,* Fed. R. Evid. 701, 702; *Rhiner v. Sec'y, Fla. Dept of Corr.*, 817 F. App'x 769, 778 (11th Cir. 2020) (finding prisoner's statement that he personally believed his cuts were caused by a razor could not be used to defeat summary judgment because "it was improper lay-witness testimony regarding the medical cause of his cuts"); *see also United States v. Goodman*, 699 F. App'x 860, 863 (11th Cir. 2017) (finding district court did not abuse its discretion when it held that the issue of paralysis was a question for an expert witness and precluded defendant from presenting testimony from lay witnesses regarding his paralysis). Plaintiff has not submitted any medical expert testimony or other proper evidence to support these statements; therefore, the Court will not consider them on summary judgment.

¶2; DWSMF ¶2; DNSMF ¶2; DHSMF ¶2; DGSMF ¶2). He was a pretrial detainee until he was convicted on April 14, 2017. (DMSMF ¶3; DWSMF ¶3; DNSMF ¶3; DHSMF ¶3; DGSMF ¶3). Plaintiff has been incarcerated at USP-McCreary since April 25, 2019. (DMSMF ¶5; DWSMF ¶5; DNSMF ¶5; DHSMF ¶5; DGSMF ¶5]).

Defendant Martin was the Clinical Director of Medical Services at USP-Atlanta during the time that Plaintiff was incarcerated there. (DNSMF ¶60; DHSMF ¶40; PSAMF ¶57). In that role, Defendant Martin oversaw the medical treatment of USP-Atlanta's entire prison population, including pretrial detainees and holdover inmates. (PSAMF ¶58). Defendant Martin also treated patients himself and was the chair of the committee that determined whether inmates should seek outside treatment. (*Id.* ¶59). And prior to becoming the Clinical Director, Defendant Martin served as a physician at USP-Atlanta from 2011 until October of 2021. (Doc. 167-10 ("Martin Decl." ¶3).

Defendant Nwude provided medical care to inmates at USP-Atlanta from May 14, 2018, to December of 2019. (DNSMF ¶43; PSAMF ¶¶62, 63). Inmate medical and dental care at USP-Atlanta was guided by Program Statement ("PS") 6031.04 and Institution Supplement ("IS") 6031.04B. (DNSMF ¶61; DHSMF ¶41; Martin Decl., Attach. 1 at 18-21); *see also* PS6031.04, *available at* https://www.bop.gov/policy/progstate/6031_004.pdf (last visited Dec. 7, 2022).

a. Plaintiff's June 21, 2016, Injury

On or around June 21, 2016, Plaintiff's cellmate attacked Plaintiff. (DMSMF ¶8). Plaintiff went to medical that evening and complained that he had sharp pain in, and broke, his right hand. (DMSMF ¶¶10; DWSMF ¶10; DNSMF ¶9; PSAMF ¶72). He was examined by RN Smith, who consulted Defendant Martin, entered Martin's verbal orders for an x-ray of Plaintiff's hand to rule out a fracture as well as a Ketoralac injection, wrapped and splinted Plaintiff's right hand, and provided a cold compress.[6] (DMSMF ¶¶11, 13; DWSMF ¶11; DNSMF ¶10). Although he never personally examined Plaintiff's hand, the next day Defendant Martin cosigned RN Smith's order and entered a new administrative encounter note ordering additional imaging of Plaintiff's arm and fingers. (DMSMF ¶¶12, 13; R-DMSMF ¶¶14, 16; DWSMF ¶12, 13; R-DWSMF¶ ¶12, 14).

Later that day the radiology report indicated that Plaintiff had an old injury to his hand — *i.e.,* "an old fracture deformity of the fifth metacarpal shaft" and "a mild volar curvature of the fifth metacarpal shaft related to an old posttraumatic injury."[7] (DMSMF ¶15; DWSMF ¶15; DNSMF ¶11). The report also noted a new injury, described as "a faint hairline nondisplaced acute fracture of the midshaft of the fifth

---

[6] According to Plaintiff, he never received an actual brace; instead, it was temporary wrapping, which included "cardboard" and "Scotch tape." (R-DMSMF ¶17; R-DWSMF ¶17).

[7] Metacarpals are the five bones of the hand, and the fifth metacarpal is the one located between the wrist and pinky finger. (Martin Decl. ¶6).

metacarpal without significant displacement" and "soft tissue swelling." (DMSMF ¶15; DWSMF ¶15; DNSMF ¶11; PSAMF ¶75). The location of the new fracture apparently was in the setting of the old fracture that had previously healed. (Plaintiff's Medical Records, Doc. 167-7 ("MR") at 88). Plaintiff testified that he broke his hand in 2014 before he was incarcerated, and that at that time he was advised that he needed surgery. (Doc. 184-3 at 13-14).[8] According to the Doctor Defendants, Defendant Martin reviewed the radiology report that same day, noted the injury was already splinted, and entered an analgesic script. (DMSMF ¶16; DWSMF ¶16; DNSMF ¶12). Plaintiff states that despite the x-rays confirming the break Defendant Martin instructed Ms. Robinson to tell Plaintiff that his hand was not broken and that no further treatment was needed. (R-DMSMF ¶16; R-DWSMF ¶16; R-DNSMF ¶12). It is not clear why Defendant Martin would have instructed Ms. Robinson to tell Plaintiff his hand was not broken. Regardless, the fact that Plaintiff did not need further treatment for the non-displaced fracture was accurate, as the only treatment for a non-displaced fracture is a splint and an analgesic — treatment which Plaintiff already had received. (Doc. 187-7 ("Martin Dep.") at 63). On the other hand, had the fracture instead been displaced, Plaintiff would have required more treatment. (*Id.*).

Plaintiff went to sick call on July 19, 2016, complaining about throbbing pain in his right hand in

---

[8] Although Defendant Martin states that Plaintiff never had the recommended surgery [DMSMF ¶95], Plaintiff's cited deposition testimony does not indicate one way or the other.

which a bone was broken or bent, and reported that he had worn the "hand brace" for only two weeks and discarded it because the temporary wrapping got wet in the shower. (DMSMF ¶17; DWSMF ¶17; PSAMF ¶73). His medical records, however, show that he told MLP Curry that he threw the brace out because it was not going to "fix his hand." (MR at 49, 88). Regardless, MLP Curry noted that his previous x-ray showed an old fracture, told Plaintiff that his hand was functional and offered to, and did, order another x-ray to assess the healing of the newer hairline fracture. (DMSMF ¶18; DWSMF ¶18). Plaintiff first refused the follow-up x-ray and an ace bandage wrap and told MLP Curry that he just wanted his hand "fixed." (DMSMF ¶18; DWSMF ¶18; MR at 23). Defendant Winston cosigned MLP Curry's encounter note the next day. (DMSMF ¶19; DWSMF ¶19).

That same day, however, Plaintiff did receive another x-ray, which showed that "[t]here is interval partial healing of midshaft fracture of the fifth metacarpal without change in alignment. There is again an old fracture injury also of the fifth metacarpal shaft with mild volar curvature." (DMSMF ¶20; DWSMF ¶20; DNSMF ¶13).[9] Dr. Winston reviewed the radiology report on July 21, 2016, and MLP Curry met with Plaintiff to review

[9] Plaintiff disputes the fact that he obtained the additional x-rays and states that it has no support in the record. (R-DMSMF ¶20; R-DWSMF ¶20). But Plaintiff's medical records support the fact that Plaintiff did, in fact, receive a follow up film of his right hand and the radiologist compared the results with the x-ray taken on June 22, 2016. (MR at 71-72).

those x-ray results on September 7, 2016.[10] (DMSMF ¶¶21, 22; DWSMF ¶¶21, 22

Over one year later on October 31, 2017, Plaintiff saw MLP Moore, complained about his right hand again, and asked for an MRI.[11] (DMSMF ¶23; DWSMF ¶23; DNSMF ¶14). MLP Moore instead ordered more x-rays to reassess how the June 21, 2016, hairline fracture of the fifth metacarpal was healing. (DMSMF ¶24; DWSMF ¶24; DNSMF ¶15). Plaintiff received x-rays the next day on November 1, 2017, the results of which the radiologist indicated that the newer fracture had completely healed since the last x-ray. (DMSMF ¶25; DWSMF ¶25; DNSMF ¶16). Defendant Winston reviewed the radiology report, and MLP Moore reviewed the results with Plaintiff on November 21, 2017, and discharged him to his housing unit with no restrictions. (DMSMF ¶¶26, 27; DWSMF ¶¶26, 27). Defendant Winston cosigned the note of that encounter. (DMSMF ¶27; DWSMF ¶27).

Plaintiff went to sick call on December 18, 2017, complaining that for the last month he had tingling and numbness pain in his right hand. (DMSMF ¶28; DWSMF ¶28; DNSMF ¶17). MLP Moore assessed Plaintiff with mononeuropathy of upper limb and prescribed Duloxetine (Cymbalta). (DMSMF ¶28; DWSMF ¶28; DNSMF ¶18).

---

[10] It is not clear from the record why MLP Curry reviewed the x-ray results with Plaintiff over a month after the x-ray results were reviewed by Defendant Winston.

[11] Plaintiff refers to this date as October 31, 2016; however, the medical records indicate that it was actually October 31, 2017. (MR at 88-90).

Defendant Winston saw Plaintiff for a chronic care clinic on January 10, 2018, when Plaintiff reported that the Cymbalta did not help. (DMSMF ¶¶29, 30; DWSMF ¶¶29, 30; DNSMF ¶19). As a result, Defendant Winston changed Plaintiff's medicine for treatment of the mononeuropathy to Amitriptyline (Elavil). (DMSMF ¶30; DWSMF ¶30; DNSMF ¶19). That dose was gradually increased until October 11, 2018, and Plaintiff was prescribed Amitriptyline until he left USP-Atlanta. (DMSMF ¶31; DWSMF ¶31; DNSMF ¶20). Specifically, Defendant Martin and MLP Qadri increased Plaintiff's daily dose to 25 mg on February 21, 2018; MLP Moore and Defendant Winston increased the dose to 50 mg on April 11, 2018; and MLP Moore and Defendant Nwude increased the dose to 75 mg on October 11, 2018. (DMSMF ¶32; DWSMF ¶32; DNSMF ¶21). On March 18, 2019, after Plaintiff complained that the medicine made him drowsy, Defendant Martin reduced the dose back to 50 mg per day. (DMSMF ¶32; DWSMF ¶32; DNSMF ¶21).

2. Plaintiff's March 22, 2018, Injury

On March 28, 2018, Plaintiff went to sick call for pain in his right hand, claiming he injured it after he "knocked" his cellmate. (DMSMF ¶33; DWSMF ¶33; DNSMF ¶22). According to Plaintiff, he was forced to strike the inmate after the inmate, high on a substance called "K2," allegedly attacked Plaintiff. (R-DMSMF ¶33; R-DWSMF ¶33; R-DNSMF ¶22). MLP Moore ordered x-rays and noted that Plaintiff refused pain medications because he already had some. (DMSMF ¶34; DWSMF ¶34). Plaintiff received the x-rays, and the radiologist noted that although there

were "old fractures of the right fifth metacarpal bone area," there was no evidence of a new acute injury, joint space malalignment, or soft tissue abnormality. (R-DMSMF ¶36; R-DWSMF ¶36; R-DNSMF ¶23; DMSMF ¶¶35, 36; DWSMF ¶¶35, 36; DNSMF ¶23). Dr. Winston reviewed the radiology report that same day. (DMSMF ¶35; DWSMF ¶35).[12]

b. Plaintiff's Jaw Injury

On April 5, 2018, Plaintiff reported to the dental clinic with complaints of tooth and facial pain. (DMSMF ¶45; DWSMF ¶45; DNSMF ¶27; DGSMF ¶9). According to the encounter note, Plaintiff reported that he fell and hit his face on a table, but Plaintiff disputes that statement and claims that his jaw injury was the result of Inmate Cedric Brown punching him.[13] (DMSMF ¶45; DWSMF ¶45; DNSMF ¶27; DGSMF ¶9; R-DMSMF ¶45; R-DWSMF ¶45; R-DNSMF ¶27; RDGSMF ¶9; PASMF ¶56). Dr. Peterson took x-rays, diagnosed a mandibular fracture, prescribed pain medication, and requested an offsite consult with an oral surgeon to occur on or before April 12, 2018. (DMSMF ¶46; DWSMF ¶46; DNSMF ¶28; DGSMF ¶10).

---

[12] On two occasions Plaintiff also complained of pain and numbness in his left hand, for which he was twice examined and received x-rays. (DMSMF ¶¶37-39; DWSMF ¶¶37-39; DNSMF ¶34; MR at 319). Plaintiff, however, does not raise a claim for medical deliberate indifference in connection with this injury.

[13] Plaintiff did report to the oral surgeon that he was attacked. (MR at 263). This fact, however, is not material to Plaintiff's claim of medical deliberate indifference.

On April 11, 2018, MLP Moore saw Plaintiff for a request to refill pain medication while awaiting the surgical consult, Dr. Winston cosigned the encounter note, and Plaintiff's pain medication was refilled. (DMSMF ¶47; DWSMF ¶47). Plaintiff saw the oral surgeon on April 20 and was diagnosed with fractures on both sides of his jaw and mobile bone segments noted between two of his teeth. (DMSMF ¶48; DWSMF ¶48; DGSMF ¶11). The surgeon recommended close reduction with arch bars and a liquid diet for three to four weeks. (DMSMF ¶49; DWSMF ¶49; DGSMF ¶12).[14] The surgeon prepared a second encounter note which recommended the liquid diet for four to six weeks.[15] (DMSMF ¶50; DWSMF ¶50). After Plaintiff consented to the treatment he underwent surgery that same day. (DMSMF ¶51; DWSMF ¶51; DGSMF ¶13). In the post-operation note, the surgeon prescribed amoxicillin, liquid ibuprofen, and Tylenol #3. (DMSMF ¶52; DWSMF ¶52; DGSMF ¶13).[16]

---

[14] Plaintiff responds that the initial encounter note was not signed by the surgeon [R-DMSMF ¶49; R-DWSMF ¶49; R-DGSMF ¶12]; however, the note is on the letterhead of the surgeon's practice containing his name in print. (MR at 267-68).

[15] It is not clear from the record why there were two different recommendations for how long the surgeon recommended Plaintiff be on a liquid diet.

[16] The parties dispute whether the post-operation instructions included a liquid diet. (DMSMF ¶52; R-DMSMF ¶52; DWSMF ¶52; R-DGSMF ¶13). Regardless, the initial note encounter includes that instruction. (DMSMF ¶¶49, 50; DWSMF ¶¶49, 50; DGSMF ¶12).

Plaintiff returned to USP-Atlanta at 8:30 p.m. that evening and was seen by the duty nurse. (DMSMF ¶53; DWSMF ¶53; DGSMF ¶14). Dr. Peterson gave oral orders for amoxicillin, acetaminophen/codeine, Tylenol #3, and a liquid nutritional supplement for three days. (DMSMF ¶54; DWSMF ¶54; DGSMF ¶15).

According to Plaintiff, the supplement — *i.e.,* Ensure — was prescribed as just that, a supplement, and not a meal replacement. (R-DMSMF ¶54; R-DWSMF ¶54; R-DGSMF ¶15; PSAMF ¶83). In support of this argument, Plaintiff points to Dr. Winston's testimony that the fact that Ensure was prescribed twice a day indicates that it only was supposed to serve as a meal supplement, not a meal replacement. (PSAMF ¶82). But Defendants point out that at different times Plaintiff also was prescribed Ensure three times a day, and that any such amount may be used for a short-term sole source of nutrition. (R-PSAMF ¶82; Martin Decl. ¶43).

Dr. Peterson saw Plaintiff three days later, continued the three prescriptions through April 26, and prescribed a mouth rinse. (DMSMF ¶55; DWSMF ¶55; DGSMF ¶16). On April 24, Dr. Peterson renewed the ibuprofen and ordered a pureed diet from the Food Service Administrator ("FSA").[17] (DMSMF ¶56; DWSMF ¶56; DGSMF ¶17).

---

[17] It is not clear for how long Dr. Peterson ordered the pureed diet. Construing the facts in Plaintiff's favor, presumably Dr. Peterson followed the outside surgeon's recommendation of four to six weeks.

On April 27, Plaintiff saw a nurse, complained that his Tylenol #3 and Ensure orders had expired, and explained that he needed the Ensure because he was unable to eat. (DMSMF ¶58; DWSMF ¶58; DGSMF ¶19). That same day, Dr. Peterson cosigned the encounter note and ordered that the acetaminophen/codeine be continued for ten days and that Ensure be continued for fourteen days — *i.e.*, two cans three times a day. (DMSMF ¶59; DWSMF ¶59; DGSMF ¶20).[18] Dr. Peterson also requested a follow-up consult with the surgeon. (DMSMF ¶57; DWSMF ¶57; DGSMF ¶18).

Defendant Winston saw Plaintiff on May 2, 2018, for orthopedic/rheumatology chronic care clinic, noted that Plaintiff was post-jaw fracture and old hand injury, that he did not complain of pain, and that his jaw was wired shut, and issued Plaintiff a bottom bunk pass for a year. (DMSMF ¶¶60, 61; DWSMF ¶¶60, 61; DGSMF ¶¶21, 22). Dr. Peterson saw Plaintiff again on May 16, 2018 — twenty-six days after surgery — and noted that Plaintiff's jaw was healing within normal limits. (DMSMF ¶62; DWSMF ¶62; DGSMF ¶23). On May 21, 2018, Dr. Peterson prescribed Ensure to be taken twice a day through

[18] In response to these statements of fact, Plaintiff again states that the Ensure was intended to be a supplement and was not sufficient to serve as Plaintiff's liquid diet or otherwise satisfied his meal requirements, but he simply cites to his own testimony in support of that statement. (R-DMSMF ¶59; R-DWSMF ¶59; RDGSMF ¶20; PSAMF ¶83). As discussed previously herein, however, if taken three times a day Ensure can be a short-term sole source of nutrition. And Plaintiff admitted that he did, in fact, always receive the Ensure. (Pl. Dep. at 112-13).

November 17, 2018. (DMSMF ¶63; DWSMF ¶63; DGSMF ¶24).

On June 6, 2018, Plaintiff returned to see Dr. Peterson, told Dr. Peterson that he had removed his arch wires with fingernail clippers because he could not eat, and Dr. Peterson requested a consult with the oral surgeon to determine whether the wires needed to be replaced. (DMSMF ¶¶64, 65; DWSMF ¶¶64, 65; DGSMF ¶¶25, 26). Dr. Peterson then saw Plaintiff on July 9, when he again noted that Plaintiff had removed the arch wires in June, he found minor swelling with slight tenderness, and he ordered antibiotics and ibuprofen. (DMSMF ¶66; DWSMF ¶66; DGSMF ¶27).

Plaintiff saw the oral surgeon again ten days later on July 19, 2018. (DMSMF ¶67; DWSMF ¶67). During that appointment the surgeon did a CT scan and found a non-restorable tooth in line with the right-side fracture. (DMSMF ¶68; DWSMF ¶68; DGSMF ¶28). The surgeon noted that Plaintiff had removed the wires, but the only recommended treatment was removal of the tooth, which was extracted during that same visit. (DMSMF ¶69; DWSMF ¶69; DGSMF ¶29). The surgeon recommended a post-operation soft food (non-chewing) diet for three weeks and prescriptions for pain. (DMSMF ¶70; DWSMF ¶70; DGSMF ¶30).

On July 21, 2018, MLP Moore saw Plaintiff to evaluate the tooth extraction, noted the surgeon's recommendations, and ordered pain medication and a mechanical soft diet for three weeks — from July 21 to August 10, 2018. (DMSMF ¶¶71, 72; DWSMF ¶¶71, 72; DGSMF ¶32). Defendant Winston cosigned the encounter note. (DMSMF ¶73; DWSMF ¶73; DGSMF

¶33). Plaintiff was seen by Dr. Peterson on July 23 complaining about pain due to the tooth extraction, but Dr. Peterson determined that Plaintiff did not need any changes in his medications. (DMSMF ¶73; DWSMF ¶73; DGSMF ¶34). On July 27, 2018, however, Dr. Peterson renewed the blended diet order for six weeks and conferred with the surgeon to verify that Motrin was appropriate for pain. (DMSMF ¶74; DWSMF ¶74; DGSMF ¶35). Dr. Peterson sent the blended diet order to T. Hill, FSA. (MR at 260).

Plaintiff returned to the surgeon on August 16, 2018, for removal of the arch bars. (DMSMF ¶75; DWSMF ¶75; DGSMF ¶36). The surgeon used sutures for closure and recommended Tylenol #3, ibuprofen, and amoxicillin for one week. (DMSMF ¶76; DWSMF ¶76; DGSMF ¶36). The next day Plaintiff followed up with Dr. Peterson and reported that he had no pain. (DMSMF ¶76; DWSMF ¶76; DGSMF ¶37).

Plaintiff saw Dr. Peterson again over two months later on October 25, 2018, complaining of intermittent jaw pain and inability to chew food. (DMSMF ¶77; DWSMF ¶77; DGSMF ¶38). Dr. Peterson conducted another consult with the oral surgeon. (DMSMF ¶78; DWSMF ¶78; DGSMF ¶39).

In November of 2018 Plaintiff went back to the surgeon, who took another CT scan and determined that Plaintiff had temporomandibular ("TMJ") joint disfunction,[19] that no surgical intervention was

[19] There is one TMJ on each side of the jaw and together they allow opening and closing of the mouth. (DMSMF ¶80).

necessary, and he recommended an occlusal guard.[20] (DMSMF ¶¶79-81; DWSMF ¶¶79, 80; DNSMF ¶29; DGSMF ¶¶39, 40). Defendants Martin, Winston, and Garcia claim that Plaintiff made no further complaints about pain in his jaw or tooth before he was transferred from USP-Atlanta. (DMSMF ¶82; DWSMF ¶81; DGSMF ¶41). Plaintiff disputes this statement and indicates that he sent a TRULINCS message to Health Services on December 10, 2018, complaining of jaw pain. (R-DMSMF ¶82; R-DWSMF ¶81; R-DGSMF ¶41).[21]

BOP policy provides that the FSA directly supervises the Food Service Department at the institutional level. (DGSMF ¶69). The FSA has oversight and direction of Food Service functions at the institution, and ensures compliance with BOP policies relating to food service. (*Id.* ¶70). As part of the FSA's duties, the FSA provides medical diets ordered by Health Services staff. (*Id.* ¶71).

Plaintiff named Garcia as a Defendant because he was told Garcia was the kitchen supervisor. (DGSMF ¶56). Defendant Garcia was the Assistant FSA from October 2016 to September 2019. (DGSMF ¶42; PSAMF ¶65). In that role, Garcia helped oversee the kitchen staff, supervised the cook supervisors, and

---

[20] It is not clear if Plaintiff ever used an occlusal guard for the TMJ disfunction.

[21] In this TRULINCS message to Dr. Peterson, Plaintiff asked that Dr. Peterson require the person in charge of commissary allow him to be able to purchase soft food. (Doc. 184-18 at 228). This request was long after Dr. Peterson's last request for a six-week blended diet, which ended on September 7, 2018.

helped the FSA ensure that inmates received medical diets as directed by Health Services. (DGSMF ¶45; PSAMF ¶66). The cook supervisors were those persons directly supervising the cooks, which included letting the cooks know what they needed to accomplish daily, how many meals, what meals, how, and what menu to follow. (DGSMF ¶¶45, 46).

Glenn Harmon or T. Hill was the FSA in 2018, and thus the person responsible for keeping track of medical diets. (DGSMF ¶¶43, 44). Plaintiff disputes this fact since Defendant Garcia testified that once Health Services passed along a medical diet instruction to the kitchen, the note would be discussed informally among staff to make sure the diet was properly administered. (R-DGSMF ¶44). Plaintiff also disputes this fact because Defendant Garcia testified that between herself and the FSA, "we'll make sure it gets followed if we had the order[.] . . ." (*Id.*).

Once Food Service received a special diet from a doctor, the department would distribute it to the cook supervisors so they understood and knew what it entailed, discuss it with the cook supervisor as to whether the diet was to be pureed or liquid and/or a low-fiber diet, and the order would be kept in the cook supervisor's office until it expired. (DGSMF ¶52). Inmate cooks prepared a medical diet, such as a pureed meal, and would pre-plate it and place it on the feeding cart. (*Id.* ¶53). A pureed diet involved blending food so that it was soft. (*Id.* ¶54). The inmate cook in the religious diets room prepared medically ordered soft or liquid diets. (*Id.* ¶47).

Inmates always receive three meals a day, but it is an inmate's decision whether to eat each meal.

(DGSMF ¶48). Meal times at USP-Atlanta occurred between 6:00 a.m. and 7:00 a.m. for breakfast, between 10:30 a.m. and noon for lunch, and from 5:00 p.m. to 6:00 p.m. for dinner. (*Id.* ¶49). Notably, Defendant Garcia worked from 7:30 a.m. to 4:00 p.m. and generally was not at work for breakfast and dinner. (DGMSF ¶50).

Plaintiff's medical records show that Health Services sent liquid and soft diet orders to the kitchen on multiple occasions. (PSAMF ¶82). Specifically: (1) on April 20, 2018, when Plaintiff returned from surgery for his jaw Dr. Peterson ordered Ensure for three days [MR at 162-66]; (2) on April 23, 2018, Dr. Peterson saw Plaintiff and continued the Ensure prescription through April 26, 2018 [*Id.* at 221-25, 236]; (3) on April 24, 2018, Dr. Peterson ordered a pureed diet from the FSA, which the oral surgeon had recommended to continue for four to six weeks [MR at 235]; (4) on April 27, 2018, Dr. Peterson entered an order continuing Ensure for fourteen days — two cans three times a day — because Plaintiff requested renewal thereof [MR at 235, 251-52]; (5) on May 21, 2018, Dr. Peterson extended the Ensure — this time one can twice a day — through November 17, 2018 [MR at 194, 221]; (6) after the surgeon extracted Plaintiff's tooth on July 19, 2018, he recommended a soft food diet for three weeks, which MLP Moore ordered on July 21, 2018, upon Plaintiff's return [MR at 150-51]; and (7) on July 27, 2018, Dr. Peterson renewed the blended diet for six weeks [MR at 260].

Plaintiff states that "despite the order from Health Services," Defendant Garcia "refused to provide Plaintiff with the appropriate liquid diet."

(PSAMF ¶84). Defendant Garcia objects to this statement, as Plaintiff only supports it with his unsworn and self-serving TRULINCS messages that are not corroborated by any admissible evidence. (R-PSAMF ¶84). As discussed previously herein in Footnote 9, *supra,* the undersigned agrees that Plaintiff's unsworn TRULINCS statements, containing hearsay and not corroborated by any admissible evidence, should not be considered on summary judgment. *See Simpson v. Jones*, 316 F. App'x 807, 811-12 (10th Cir. 2009) ("In the absence of other evidence, an unsworn allegation does not meet the evidentiary requirements of Fed. R. Civ. P. 56."); *cf. Gustavia Home, LLC v. Rice*, No. 16 Civ. 2353 (BMC), 2016 WL 6683473, at *3 (E.D. N.Y. Nov. 14, 2016) (finding conclusory allegations supported by self-serving emails that would not be admissible at trial are insufficient to create a material issue). Any of those TRULINCS statements therefore fail to create a genuine factual dispute for summary judgment purposes.

Additionally, Plaintiff sent messages forwarded to "Food Service" through TRULINCS on March 8, 27, 29, and 30, 2018, as well as April 2, 4, and 11, 2018, before any doctor recommended or entered an order for a modified diet, and none of those grievances actually involved issues with Food Service. (DGSMF ¶¶57-59). Instead, those messages contained draft litigation documents. (*Id.* ¶59).[22]

---

[22] While Plaintiff disputes that these messages were "draft litigation documents," they all contain: a caption with Plaintiff's name and several defendants he subsequently named in this case; a blank line labelled "Case No.;" a reference to specific rules

Moreover, while Plaintiff did send six messages sent to "Food Service" that concerned his diet, only two of those messages were sent during the six weeks following his jaw surgery: on April 21, 2018, Plaintiff complained that he could not eat his grits through a straw; and on May 30, 2018 — five weeks and five days after surgery — Plaintiff complained about problems with his evening meal for the past three weeks, that an Officer Griffen was working in the kitchen every time Plaintiff did not get his "proper food," and that on May 29 and May 30 he did not get any food for dinner. (R-PSAMF ¶85). And more than six weeks after his jaw surgery Plaintiff sent four messages to Food Service that concerned his diet. (DGSMF ¶60).

Specifically, Plaintiff sent a message to Food Service on June 25, 2018, that he had not been receiving the food he was prescribed from the doctor for about a month. (DGSMF ¶63; Doc. 172-7 ("Pl.'s Dep.") at 298). He sent his next message to Food Service about his diet on July 25, 2018, indicating that the intended recipient was Defendant Garcia, in which he complained again that he did not receive the proper diet after he had surgery, which, according to Plaintiff, forced him to cut his wires, and that after he returned from his tooth being extracted he was "being forced to chew on regular food again." (DGSMF ¶64; Pl.'s Dep. at 292).

---

of the Federal Rules of Civil Procedure; and requests for information usually obtained in discovery that he specifically labelled as interrogatories and admissions. (*See* Doc. 172-7 at 315-21, 326-37, 338-41, 346-48).

Plaintiff's next message to Food Service, again indicating that the intended recipient was Defendant Garcia, was sent on August 4, 2018, in which he complained that he only was receiving his soft food diet once a day. (DGSMF ¶65; Pl.'s Dep. at 287). And Plaintiff's last message to Food Service, again purportedly to Ms. Garcia and sent three days after the last message on August 8, 2018, complained that he was only receiving the soft food diet at lunch and not for breakfast or dinner. (DGSMF ¶66; Pl.'s Dep. at 286).

Plaintiff appears to impute Defendant Garcia's knowledge and alleged refusal to provide him with the requested diet on the fact that he sent those complaints to the kitchen — addressed directly to Garcia — via TRULINCS messages. (PSAMF ¶85). But Defendant Garcia did not read TRULINCS messages that inmates sent to Food Service, she does not know who would have read those messages or if the messages were even being read by anyone, and no messages from Plaintiff were brought to her attention. (DGSAMF ¶55; R-PSAMF ¶67; Doc. 187-10 ("Garcia Dep.") at 58-59).

c. Plaintiff's Left Foot Injury

On August 12, 2018, MLP Crossley saw Plaintiff for an injury to his left foot, which he claimed occurred the night before when a screw went through his foot on the basketball court. (DSMF ¶83; DWSMF ¶83; DNSMF ¶32; DHSMF ¶11; PSAMF ¶88). Plaintiff testified that after he injured his foot: he changed into crocs and was bleeding inside the crocs; he showed his "foot with blood leaking out" to a guard, who Plaintiff believed was in the military; and the guard instructed

Plaintiff to make a ball of one sock to place against his foot and put another sock over the balled-up sock and his foot to stop the bleeding.[23] (DMSMF ¶¶113-15; DWSMF ¶¶105-07; DNSMF ¶¶45-47; DHSMF ¶¶25-27).

Defendant Harris was the duty nurse that evening. (DHSMF ¶55). While Plaintiff contends that he made Defendant Harris aware of his injury immediately and she refused to treat him [PSAMF ¶90], Defendant Harris states that the only interaction she would have had with Plaintiff that evening would have been to give Plaintiff his medicine, but Nurse Smith conducted the evening pill line for Plaintiff's dorm and provided Plaintiff with his evening can of Ensure at 2:51 p.m. (DHSMF ¶¶9, 10, 24). At some point, Defendant Harris responded to a medical emergency for an inmate in a different building, where she remained until the inmate was transferred to the local emergency department, but the parties disagree as to the timing of that response. (DHSMF ¶¶30, 55; R-DHSMF ¶¶24, 55).

Although Plaintiff states that Defendant Harris knew of his injury the night before, Defendant Martin

---

[23] Plaintiff disputes that his deposition testimony supports these two statements — that is, that he showed the officer his "foot with blood leaking out of it[.] . . ." and that the officer told him how to stop the bleeding using his socks. (R-DMSMF ¶¶114, 115; R-DWSMF ¶¶114, 115; R-DNSMF ¶¶46, 47; R-DHSMF ¶¶26, 27). Plaintiff did, in fact, testify to those facts during his deposition. (Pl.'s Dep. at 84). Regardless, it is undisputed that the bleeding had stopped when he was seen the next morning, and Plaintiff has placed no verifying medical evidence in the record to demonstrate that his injury was an emergency or life- or limb-threatening.

attests that Plaintiff's medical records show that the first time medical staff was made aware of Plaintiff's injury was, in fact, the morning of August 12, and that the records do not show that the injury was an emergency or life- or limb- threatening because the bleeding was controlled on site. (DHSMF ¶¶56, 57; DNSMF ¶59). To that end, MLP Crossley's encounter note on the morning of August 12, 2018, states that Plaintiff's foot showed a 2 cm puncture wound to the sole of his left foot, but it was not bleeding, swelling, or draining when she examined Plaintiff. (DMSMF ¶84; DWSMF ¶84; DNSMF ¶34; DHSMF ¶12). Plaintiff confirmed during his deposition that when Crossley examined him the bleeding had, in fact, stopped. (DMSMF ¶116; DWSMF ¶116; DNSMF ¶48; DHSMF ¶28).

Crossley rinsed Plaintiff's wound, applied antibiotic ointment and a Band-Aid, and gave Plaintiff supplies for self-care. (DMSMF ¶85; DWSMF ¶85; DNSMF ¶35; DHSMF ¶13). Crossley also prescribed an oral antibiotic and ibuprofen, and ordered an x-ray. (DMSMF ¶86; DWSMF ¶86; DNSMF ¶35; DHSMF ¶14). Defendant Winston cosigned the original and amended encounter notes. (DMSMF ¶87; DWSMF ¶87; DNSMF ¶36; DHSMF ¶15). In Defendant Winston's medical opinion, MLP Crossley provided the proper care for Plaintiff's foot injury.[24] (Doc. 166-1 ("Winston Decl.") ¶54).

---

[24] The Court will not consider Plaintiff's unsupported characterization that MLP Crossley "haphazardly treated Plaintiff's injury by spraying his foot and placing a Band-aid over the wound" [Doc. 185 at 19] because Plaintiff has provided no expert medical testimony to support that characterization or

Defendant Winston saw Plaintiff the next day for wound care. (DMSMF ¶88; DWSMF ¶88; DNSMF ¶37). Because Defendant Winston's examination revealed swelling and tenderness, he changed the prescribed antibiotic and ordered that Plaintiff receive a tetanus shot. (DMSMF ¶88; DWSMF ¶88; DNSMF ¶37; DHSMF ¶16). Plaintiff underwent an x-ray that same day, and Defendant Winston reviewed the radiology report which found no evidence of fracture, joint space malalignment, or any foreign body in Plaintiff's left foot. (DMSMF ¶89; DWSMF ¶89; DNSMF ¶38; DHSMF ¶17). Under Defendant Winston's orders, Defendant Harris administered a tetanus shot to Plaintiff on August 13, 2018. (DHSMF ¶18).

Plaintiff returned to sick call on October 11, 2018, where he was seen by MLP Moore. (DMSMF ¶90; DWSMF ¶90; DNSMF ¶39; DHSMF ¶19). During that visit Plaintiff complained about continued pain in his left foot and shooting pain down his leg, and reported that the Elavil that he had been taking for the mononeuropathy helped but did not completely alleviate the pain. (DMSMF ¶90; DWSMF ¶90; DNSMF ¶39; DHSMF ¶19). Plaintiff's Elavil dose was increased to 75 mg per day, and Defendant Nwude signed the encounter note. (DMSMF ¶¶91, 92; DWSMF ¶¶91, 92; DNSMF ¶40; DHSMF ¶¶20, 35).

Defendant Nwude's only encounter with Plaintiff was on October 19, 2018, for an orthopedic/ rheumatology chronic care clinic, where he continued

---

dispute Defendant Winston's medical opinion that Crossley provided Plaintiff with the proper care.

Plaintiff on the Elavil.[25] (DMSMF ¶¶92, 93; DWSMF ¶¶92, 93; DNSMF ¶¶40, 41; DHSMF ¶¶20, 21). He noted that Plaintiff's foot wound was totally healed, that they discussed Plaintiff's displeasure about his right-hand deformity, and that Plaintiff complained about pain in his foot but not his hand. (DMSMF ¶93; DWSMF ¶93; DNSMF ¶41; DHSMF ¶21). Plaintiff disputes that his foot was healed at that time, but does not support this dispute with any medical evidence or expert testimony. (RDMSMF ¶93; R-DMSMF ¶93; R-DHSMF ¶21). Defendant Nwude testified that he was totally unaware that Plaintiff was sending electronic messages through TRULINCS in which Plaintiff complained that he was not being seen for his foot injury. (Nwude Dep. at 106).

While Defendants Martin, Winston, Nwude, and Harris state that Plaintiff never complained at any medical encounter about his foot after October 19, 2018 [DMSMF ¶94; DWSMF ¶94; DNSMF ¶42; DHSMF ¶22], Plaintiff sent one TRULINCS message to Defendant Nwude on November 30, 2018, and another to Defendants Winston and Martin on December 10, 2018, about the pain in his foot,

---

[25] The undersigned notes that there is scant evidence in the record of Dr. Nwude's involvement in any of Plaintiff's care. Plaintiff now apparently attempts to link Defendant Nwude's alleged refusal to care for Plaintiff — which has no basis in the record — by stating that any such refusal is "consistent with" Nwude's "poor annual reviews" that allegedly document Nwude's refusal to treat inmates. (Doc. 185 at 23). Aside from the fact that Plaintiff's representation of those reviews is less than accurate, Plaintiff has not pointed to any evidence that Defendant Nwude actually refused to treat Plaintiff, and thus any such reviews are not relevant.

although it is not clear from the record whether any Defendant read those messages. (Doc. 194-18 at 227, 230). Although Plaintiff states that Defendant Martin personally reviewed TRULINCS messages sent by inmates to Health Services [PSAMF ¶60], Defendant Martin testified that reading the messages was a "joint venture" between the Health Services Administrator, Assistant Health Services Administrator, and himself, such that any one of those three persons would forward the email to the appropriate person. (Martin Dep. at 68-70). Defendant Martin also testified that he did not receive a notification when someone received an email, he did not know how often emails were reviewed, and that even if an inmate included a person's name on the email it would go to the prisoner's unit first. (Martin Dep. at 46, 68-71).

2. The Law Regarding Deliberate Indifference

To overcome a motion for summary judgment, a plaintiff must raise a genuine issue of material fact on the three components that make up a deliberate indifference claim: (1) the existence of an objectively serious medical need; (2) the defendant's subjective deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury. *Patel v. Lanier Cnty., Ga.*, 969 F.3d 1173, 1188 (11th Cir. 2020); *Taylor v. Hughes*, 920 F.3d 729, 733 (11th Cir. 2019); *Hinson v. Bias*, 927 F.3d 1103, 1121 (11th Cir. 2019).

Deliberate indifference requires subjective knowledge of a risk of serious harm due to the medical need, and disregard for that risk amounting to more than gross negligence. *Swain v. Junior*, 961 F.3d 1276,

1285 (11th Cir. 2020). For the subjective component, the plaintiff must show that the defendant had "knowledge of the need for medical care and intentional refusal to provide that care." *Hill v. DeKalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1186 (11th Cir. 2019), *abrogated on other grounds by Hope v. Peltzer*, 536 U.S. 730 (2002). "The plaintiff must prove that the defendant 'actually knew' of the risk — '[p]roof that the defendant should have perceived the risk, but did not, is insufficient.'" *Kruse v. Williams*, 592 F. App'x 848, 856 (11th Cir. 2014) (quoting *Campbell v. Sikes*, 169 F.3d 1353, 1364 (11th Cir. 1999)).

A disagreement over the course of treatment does not constitute deliberate indifference. *See McLeod v. Sec'y, Fla. Dep't of Corr.*, 679 F. App'x 840, 843 (11th Cir. 2017) ("Where an inmate receives medical treatment but desires different modes of treatment, the care provided does not amount to deliberate indifference."); *Adams v. Poag*, 61 F.3d 1537, 1545 (11th Cir. 1995) (stating that an inmate's mere disagreement with the treatment a physician provides him is not sufficient to establish deliberate indifference). And "[c]laims concerning the doctor's medical judgment, such as whether the doctor should have used another form of medical treatment or a different diagnostic test, are inappropriate claims under the Eighth Amendment." *Wallace v. Hammontree*, 615 F. App'x 666, 668 (11th Cir. 2015). Stated differently, "neither a difference in medical opinion between the inmate and the care provider, nor the exercise of medical judgment by the care provider, constitutes deliberate indifference." *Hernandez v. Sec'y, Fla. Dep't of Corr.*, 611 F. App'x 582, 584 (11th

Cir. 2015); *see also Harris v. Thigpen*, 941 F.2d 1495, 1504-05 (11th Cir. 1991) ("[A] simple difference in medical opinion between the prison's medical staff and the inmate as to the latter's diagnosis or course of treatment" does not support "a claim of cruel and unusual punishment."). As long as the medical treatment is "minimally adequate," a prisoner's preference for different treatment does not give rise to a constitutional claim. *Harris*, 941 F.2d at 1504; *see also Hamm v. DeKalb Cnty.*, 774 F.2d 1567, 1575 (11th Cir. 1985) (explaining that where an inmate's health complaints received significant medical care, a mere desire for a different method of treatment does not usually amount to deliberate indifference).

In determining whether a delay in treatment rises to the level of deliberate indifference, relevant factors include: "(1) the seriousness of the medical need; (2) whether the delay worsened the medical condition; and (3) the reason for the delay." *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1327 (11th Cir. 2007). "[T]he delay of treatment for obviously serious conditions [rises to the level of deliberate indifference] where 'it is apparent that the delay would detrimentally exacerbate the medical problem,' the delay does seriously exacerbate the medical problem, and the delay is medically unjustified." *Taylor v. Adams*, 221 F.3d 1254, 1259-60 (11th Cir. 2000) (citations omitted).

Finally, "[a]n inmate who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed." *Hill*, 40 F.3d at 1188 (citations omitted); *see also Sims v. Figueroa*, No. 21-10647,

2022 WL 188485, at *5 (11th Cir. Jan. 21, 2022). In other words, the inmate must show — through verifying medical evidence — that the official's deliberate indifference caused his injury. *Hill*, 40 F.3d at 1188; *Goebert*, 510 F.3d at 1326.

3. Analysis

Plaintiff throws out terms describing the Medical Defendants' actions as, *inter alia*, "egregious," "vicious," and "vindictive," and he complains that they hid information from him, ignored his complaints, refused to provide him with treatment, and "outright failed" to treat his broken bones and serious lacerations. (Doc. 185). Plaintiff's hyberbolic and conclusory statements notwithstanding, he simply has failed to point to any evidence to support his argument that the Medical Defendants acted with deliberate indifference.[26]

---

[26] Throughout his response, Plaintiff consistently argues that medical staff refused to properly treat him "because Plaintiff had filed repeated administrative grievances and a lawsuit against members of Health Services." (Doc. 185 at 20). But his pure speculation of any such motives are uncorroborated by any admissible evidence. Additionally, Plaintiff cannot raise a retaliation claim for the first time in response to a motion for summary judgment. *See Gilmour v. Gates, McDonald and Co.*, 382 F.3d 1312, 1315 (11th Cir. 2004) ("A plaintiff may not amend her complaint through argument in a brief opposing summary judgment."). Even if he could do so, however, retaliation claims are not viable under *Bivens*. *Egbert*, 142 S. Ct. at 1805, 1807-08; *see also Johnson v. Cooke*, No. 21-12096, 2022 WL 6960974, at *1-2 (11th Cir. Oct. 12, 2022) (affirming dismissal of retaliation claim against BOP staff "given the Supreme Court's recent, express refusal to extend *Bivens* to First Amendment retaliation claims"). And finally, the evidence shows that Plaintiff was continually treated for his ailments, and that such treatment

a. Plaintiff's Right Hand (Defendants Martin And Winston)

Importantly, Plaintiff was told he needed surgery when he had broken his hand before he was in BOP custody, and that break healed with a deformity — *i.e.,* a "curvature," of his fifth metacarpal shaft. While Plaintiff injured his right hand on two occasions at USP-Atlanta — the first of which he suffered a hairline fracture in the same spot as his previous injury — the record is devoid of any evidence that Defendants Martin or Winston disregarded a known risk of harm to Plaintiff which constituted more than gross negligence.[27]

The undersigned first notes that Plaintiff must prove that Defendants acted with deliberate indifference to his serious medical need and that he suffered an injury *caused by* that indifference. *See Patel v. Lanier Cnty., Ga.*, 969 F.3d 1173, 1188 (11th Cir. 2020). Although Plaintiff appears to argue that Defendants Martin and Winston's actions resulted in Plaintiff having a "permanent curve" in his metacarpal bone, the medical records indicate that the curve was, in fact, a result of his previous injury and that his new injury was treated and his hand was functional. Plaintiff cannot demonstrate that Defendants acted with deliberate indifference simply

---

constituted much more than that which would have been "minimally adequate."

[27] Even if, as Plaintiff claims, both Defendants Martin and Winston refused to tell Plaintiff that his hand was broken, it is not clear how this fact would be relevant since Plaintiff received treatment therefor.

because they did not "fix" his old injury. *Cf. Dickson v. Coleman*, 569 F.2d 1310, 1311-12 (5th Cir. 1978) (finding no deliberate indifference where prison doctors did not treat plaintiff's complaint of pain from three-year old shoulder injury because defendants found he had satisfactory and full range of motion).

Moreover, the medical treatment Plaintiff received for his right hand was far better than minimally adequate. Indeed, Plaintiff was examined by providers on no less than eight occasions, he received five x-rays, an injection, and several medications for pain, including for mononeuropathy. And his medical records indicate that the new fracture had completely healed by November 21, 2017. Moreover, whenever Plaintiff notified the medical staff that any medication was not helping or that he was having side effects such as drowsiness, Defendants Martin, Winston, or another practitioner responded by increasing or changing the medication.

While Plaintiff renders his own lay opinion that the treatment he received was inadequate, he has provided no expert testimony that would dispute Defendants Martin's and Winston's medical judgment that the treatment Plaintiff received was appropriate.[28] Consequently, Plaintiff's argument

---

[28] As this Court previously noted, here Plaintiff simply relies on his own deposition lay testimony that "Defendants' failures to treat Plaintiff's right hand resulted in neuropathy that persists to this day" [PSAMF ¶79], which is insufficient to support his medical conclusions. *See* Fed. R. Evid. 701(c); *cf. Whittaker v. Sanchez*, No. 2021 WL 4495808, at *3 (11th Cir. Oct. 1, 2021) (stating that in cases alleging medical negligence "where the method of treatment is challenged, expert testimony is required[.] . . . because neither the court nor the jury can or

simply constitutes a disagreement with the course of treatment, which does not amount to deliberate indifference. *See McLeod*, 679 F. App'x at 843; *Wallace*, 615 F. App'x at 668; *Hernandez*, 611 F. App'x at 584; *Hamm*, 774 F.2d at 1575. In short, the record is entirely devoid of evidence that the treatment for Plaintiff's right hand was "'so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness.'" *Hoffer v. Sec'y, Fla. Dep't of Corr.*, 973 F.3d 1263, 1271-72 (11th Cir. 2020) ("[W]e have recognized that '[w]here a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law.'") (citations omitted). Thus, there is no genuine issue for trial, and Defendants Martin and Winston are entitled to summary judgment regarding Plaintiff's claim that they were deliberately indifferent to his right hand injury.

b. Plaintiff's Jaw (Defendants Martin and Garcia)[29]

In connection with Plaintiff's jaw injury, the undisputed evidence shows that Plaintiff was seen by

---

should be permitted to decide . . . what is or is not a proper diagnosis or an acceptable method of treatment.") (citations and internal quotation marks omitted).

[29] Although Plaintiff initially also alleged that Defendant Winston was deliberately indifferent to his broken jaw, he does not provide any facts or argument in his response regarding what actions he claims constituted Winston's deliberate indifference. Indeed, Defendant Winston's only involvement with Plaintiff's jaw was on two occasions when he cosigned an encounter note of

medical staff on thirteen occasions, had five visits with the offsite oral surgeon, two CT scans, two surgeries, and several pain medications. The only action Plaintiff attributes to Defendant Martin is that Plaintiff repeatedly lodged complaints in TRULINCS about not receiving the appropriate diet, which, according to Plaintiff, Defendant Martin ignored. But those TRULINCS messages were directed to Dr Peterson — indisputably the main person providing Plaintiff's care in connection with his jaw — or Food Service, and Martin did not read all TRULINCS messages.[30]

Even Plaintiff testified that he knew Dr. Peterson was supposed to be responsible for the treatment of his jaw after surgery and that he did not have any claim against Defendant Martin regarding that treatment. (Pl. Dep. at 72). Thus, any claim by Plaintiff that Defendant Martin knew that the kitchen allegedly refused to provide him with the "proper diet" is pure speculation, unsupported in the record, and does not create an issue of fact. *See Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir. 2005) ("Speculation does not create a genuine issue of fact; instead, it creates a false issue, the demolition of which is a primary goal of summary judgment."). Because there is no evidence whatsoever that Defendant Martin was deliberately indifferent to Plaintiff's jaw injury,

---

a lower level practitioner. In contrast, Dr. Peterson was the main person involved in almost all of the medical care Plaintiff received for his jaw, and Dr. Peterson has been dismissed from this case.

[30] Again without any medical expert testimony Plaintiff concludes that he developed "complications" of a rotted tooth and TMJ because Defendants ignored his fractured jaw [PSAMF ¶87; Doc. 185 at 22), which the Court will not consider.

Defendant Martin is entitled to summary judgment with regard thereto.

Likewise, Plaintiff has pointed to no admissible evidence to show that Defendant Garcia — who is not a medical professional — had the requisite state of mind, that is, subjective awareness, to support Plaintiff's claim that she acted with deliberate indifference to his diet. Indeed, it appears that the only knowledge he attributes to Defendant Garcia is through his TRULINCS messages, which she did not read and of which she was not even aware. Even if Plaintiff could demonstrate that Defendant Garcia was aware of any of his TRULINCS messages, however, Plaintiff still fails to show that she was subjectively aware that Plaintiff's medical needs were not being met or that she disregarded a significant risk to those needs.

To that end, the first of Plaintiff's messages complaining about his diet was actually sent three days *before* Dr. Peterson even ordered it from the FSA. In the only messages Plaintiff sent within the six-week time frame post-surgery he complained that he was unable to eat grits through a straw and that he was not receiving his *evening* meal. Defendant Garcia does not work in the evening, and there is no evidence that she was aware that Plaintiff was not receiving the proper diet during the evening meal. The same holds true for the time after Plaintiff had his tooth extracted and was prescribed a soft diet for six weeks, when his only complaint was that although he was receiving the soft diet during lunch, he was not being provided with the proper diet during breakfast or dinner when Garcia was not there. And finally, it is undisputed that

Plaintiff always received Ensure, which, as a nonmedical professional, Garcia could have thought was sufficient to satisfy Plaintiff's dietary needs.

Plaintiff simply has failed to show that Defendant Garcia had subjective knowledge of a serious risk of harm to Plaintiff and a disregard to that risk that would have constituted more than gross negligence, or that she caused any injury to Plaintiff. Consequently, Plaintiff has not demonstrated that Defendant Garcia was deliberately indifferent to his medical needs, and she is entitled to summary judgment.

c. Plaintiff's Foot (Defendants Martin, Winston, Nwude, And Harris

The Doctor Defendants and Defendant Harris also are entitled to summary judgment in connection with Plaintiff's left foot injury. First, despite Plaintiff's depiction to the contrary, it is not even clear that the puncture wound Plaintiff suffered constituted a serious medical need such that an overnight delay in examining him could have constituted deliberate indifference.[31] *See, e.g., Crichlow v. Doccs*, No. 18-CV-03222(PMH), 2022 WL 6167135, at *12 (S.D. N.Y. Oct. 7, 2022) (finding puncture wound from ice pick not a serious medical need to which defendants could have been deliberately indifferent); *Roberts v. Samardvich*, 909 F. Supp. 594, 605-06 (N.D. Ind. 1995) (finding no deliberate indifference where defendant cleaned small puncture wound with hydrogen peroxide and a Band-

[31] As discussed previously herein, there is no support for Plaintiff's characterization of MLP Crossley's treatment of his foot wound as "haphazard;" therefore, the Court only considers the overnight delay and not the two-day delay as Plaintiff argues.

Aid since the wound was not life-threatening and did not pose a risk of needless pain or lingering disability); *see also Gonzalez v. Monty*, 89 F. Supp. 2d 1347, 1354 (S.D. Fla. 2000) (finding one-day delay in medical treatment did not rise to a constitutional deprivation where plaintiff did not have serious medical need).

Even if the Court could construe the puncture wound as a serious medical need, Plaintiff has failed to demonstrate that anyone was deliberately indifferent thereto. Indeed, while it is disputed whether Defendant Harris "refused" to examine his foot that night and/or when medical staff became aware of Plaintiff's injury, there is no evidence to establish that the overnight delay of treatment for his foot exacerbated, or detrimentally affected, any such injury. In fact, the record clearly demonstrates the opposite, as it is undisputed that the next morning the bleeding had stopped and that there was no swelling or drainage. In short, Plaintiff simply has not demonstrated that the small delay in examining his foot constituted deliberate indifference.

Along those lines, when MLP Crossley examined Plaintiff's foot, Crossley found no bleeding or swelling, applied an antibiotic and a Band-aid, provided Plaintiff with supplies to continue to clean the wound, prescribed ibuprofen, and ordered an x-ray. Although the next day Defendant Winston reviewed the x-ray — which revealed no fracture, joint malalignment or a foreign body in Plaintiff's foot — because Winston noted swelling and tenderness when he examined Plaintiff's foot he changed the antibiotic and ordered a tetanus shot. Other than Plaintiff's conclusory statement that the delay allowed his wound to "fester"

— a characterization that does not have any support in Plaintiff's medical records — Plaintiff has failed to provide any evidence, let alone verifying medical evidence, to demonstrate that this minor delay worsened his condition so as to rise to a constitutional violation. *Cf. Cannon v. Corizon Med. Servs.*, 795 F. App'x 692, 694 (11th Cir. 2019) (finding two-day delay to receive x-ray and pain medication after prisoner fell and broke his leg not deliberate indifference where the plaintiff received Tylenol and a bandage prior to that time and there was nothing to indicate that staff was subjectively aware that his leg was broken or of a risk that serious harm would result from delaying an x-ray until radiologist became available).

Likewise, Plaintiff's statement that the Doctor Defendants and Defendant Harris "unnecessarily prolonged his foot injury for several months," also is unsupported by any admissible evidence — including verifying medical evidence — and is belied by his medical records. To that end, Plaintiff was seen at least two times a few months after his foot injury in October of 2018, his mononeuropathy medication was increased based on his complaint that he still had pain in his foot and shooting pain down his leg, and while Plaintiff claims that he was in excruciating pain and disputes that his foot was healed, he was receiving pain medication continuously. Consequently, Plaintiff has by no means shown that the treatment he received was "so grossly incompetent, inadequate, or excessive as to shock the conscience" and accordingly, the Doctor Defendants and Defendant Harris are entitled to summary judgment in connection with Plaintiff's claim that they were deliberately indifferent to his foot injury. *See Jackson v. Burnside*, No. 5:10-CV-73

(MTT), 2013 WL 829813, at *5 (M.D. Ga. Feb. 12) (holding no deliberate indifference despite plaintiff's complaints of constant pain when treatment was provided and results of x-rays were normal), *report and recommendation adopted,* 2013 WL 829737 (M.D. Ga. Mar. 6, 2013).

In sum, all of the evidence simply shows that Plaintiff was unsatisfied with the significant medical care he received for all of his ailments at USP-Atlanta. But unlike that which Plaintiff apparently feels entitled, it is not constitutionally required that health care provided to prisoners be "perfect, the best obtainable, or even very good." *Harris v. Thigpen*, 941 F.2d 1495, 1510 (11th Cir. 1991) (quotation marks and citations omitted). Indeed, "[a]lthough Plaintiff may personally believe he should have been treated differently, his personal disagreement with the treatment administered by his nurses and doctors is 'a classic example of a matter for medical judgment' — not a constitutional violation." *Rutledge v. Alabama*, 724 F. App'x 731, 736 (11th Cir. 2018) (quoting *Adams*, 61 F.3d at 1545).

When measured against the evidence, Plaintiff's conclusory allegations — in addition to his own self-serving characterizations of his medical ailments — that his treatment was insufficient and that Defendants were deliberately indifferent to his medical needs do not create a genuine issue of material fact. *See, e.g., Bennett v. Parker*, 898 F.2d 1530, 1533-34 (11th Cir. 1990) (holding prisoner's self-serving "conclusory allegation, unsupported by any physical evidence, [or] medical records" about the seriousness of his injury was insufficient to create a

genuine issue of material fact when prisoner's medical records showed no injury). As a result, Plaintiff has not shown that his treatment was so "grossly contrary to accepted medical practices" that it amounted to more than gross negligence, *see Hoffer*, 973 F.3d at 1271, and the Medical Defendants are entitled to summary judgment. *See Mountjoy v. Centurion of Fla.*, No. 21-11276-C, 2021 WL 8155695, at *1 (11th Cir. Dec. 29, 2021) (finding no deliberate indifference where prisoner admitted he was seen by a medical professional numerous times related to his medical complaints); *Owen v. Corizon Health, Inc.*, 703 F. App'x 844, 848-49 (11th Cir. 2017) (affirming summary judgment on deliberate indifference claim where defendant doctor assessed plaintiff's injuries, ordered an x-ray, changed his medication, prescribed him a back brace and walker, and ordered him an MRI); *Adams*, 61 F.3d at 1544-45 (reversing denial of summary judgment where defendant doctor discontinued and substituted medications for asthma, because generally a "failure to administer stronger medication" was a classic example of medical judgment and not an appropriate basis for liability under the Eighth Amendment); *Hamm*, 774 F.2d at 1575 (finding no deliberate indifference where prisoner received significant medical care and medical staff entertained a wide variety of complaints from the prisoner and prescribed several types of medication); *cf. Scott v. Corizon Health, Inc.*, No. 21-10923, 2022 WL 3352063, at *1 (11th Cir. Aug. 15, 2022) (finding no deliberate indifference where doctors changed prescribed pain medication in response to plaintiff's complaints that the previous medications were not helping, because, *inter alia*, plaintiff did not explain

what other medications the doctor should have prescribed for him); *Pounds v. Dieguez*, 850 F. App'x 738, 741 (11th Cir. 2021) (finding complaint about delay of referral to gastroenterologist constituted disagreement with course of treatment and not deliberate indifference where doctors and medical staff continued to examine and treat plaintiff by, *inter alia*, providing him with medications and trying out other medications).[32]

IV. Conclusion

Based on the foregoing reasons,

IT IS HEREBY RECOMMENDED that Defendants' motions for summary judgment [Docs. 162, 163, 164, 165, 167, 169, 170, 172, 173, 174] be GRANTED and that this action be DISMISSED.

The Clerk is DIRECTED to withdraw the reference to the undersigned Magistrate Judge.

IT IS SO RECOMMENDED this 30th day of January, 2023.

[handwritten signature]
JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE

[32] Because the Court finds that the Medical Defendants were not deliberately indifferent to Plaintiff's medical needs, the Court does not discuss whether any of them are entitled to qualified immunity.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:18-cv-01899-AT

LAQUAN STEDERICK JOHNSON,
Plaintiff,
v.
ELAINE TERRY, *et al.*,
Defendants.

Filed August 16, 2021
Document No. 118

ORDER

In this *Bivens* action, Plaintiff LaQuan Stederick Johnson brings claims for injuries he suffered while he was a pre-trial detainee at the United States Penitentiary in Atlanta, Georgia ("USP-Atlanta"). In his Amended Complaint (Doc. 29), Mr. Johnson alleges a long list of harrowing harms: he was housed with medium and high security inmates, despite his repeated protests, and was attacked three different times, resulting in a broken wrist and related nerve damage as well as a fractured jaw that had to be wired shut. When he complained that these housing decisions violated BOP policy, he was placed in the Special Housing Unit ("SHU") and attacked by a guard. He did not receive the requisite medical treatment or medication for his fractured jaw for over

a month. Because prison staff at some point stopped providing Mr. Johnson with a liquid diet, he had to cut his jaw wires with a fingernail clipper to chew regular food with his fractured jaw in order to eat, which resulted in a painful infection in his mouth. Plaintiff later stepped on an exposed screw on the basketball court and, as alleged, was not provided adequate medical treatment in response. After Mr. Johnson initially filed this lawsuit, he was allegedly threatened, placed in the SHU, attacked by guards, shackled for more than ten hours, and his cell was ransacked.

Defendants' Renewed Motion to Dismiss (Doc. 100), currently before the Court, does not concern these substantive allegations but rather Defendants' arguments that Plaintiff's Amended Complaint should be dismissed because Mr. Johnson did not adequately exhaust his administrative remedies as required by the Prison Litigation Reform Act ("PLRA"). Defendants previously moved to dismiss Mr. Johnson's Amended Complaint for failure to exhaust his administrative remedies on January 22, 2020. (Second Motion to Dismiss, Doc. 54-1.) On June 8, 2020, the Magistrate Judge recommended the denial of Defendants' Motion as to the exhaustion issue, after concluding that Mr. Johnson demonstrated that USP-Atlanta's administrative remedies were unavailable to him. (June 8 R&R, Doc. 67.)[1] Upon review of that

[1] In the same report, the Magistrate Judge recommended granting Defendants' request to dismiss Defendant Peterson based on absolute immunity. The Court adopted this recommendation and dismissed Defendant Peterson from the action. (Doc. 75.)

R&R, this Court denied Defendants' Motion without prejudice and granted the Parties a three-month discovery period to explore facts related to whether Plaintiff exhausted his administrative remedies. (July 24 Order, Doc. 75.) After that discovery period, which was extended multiple times, Defendants filed the instant Renewed Motion to Dismiss (Doc. 100)[2] and later a supplemental brief in support of their Motion (Doc. 104)[3]. Mr. Johnson filed responses which include citations to a significant amount of evidence gleaned through discovery. (Docs. 102, 105.) After this fulsome briefing, this case was submitted to the Magistrate Judge for review. Accordingly, the Magistrate Judge's Non-Final Report and Recommendation ("R&R") (Doc. 107), Defendants' Objections (Doc. 111), and Mr. Johnson's Response (Doc. 113) are currently before the Court.

I. Report and Recommendation of the Magistrate Judge

After diligently detailing the relevant allegations and supporting evidence related to exhaustion, as well as the Parties' arguments, the Magistrate Judge

---

[2] In their Renewed Motion to Dismiss (Doc. 100), Defendants incorporated and attached their previously filed, pre-discovery motion to dismiss brief, reply, and evidence. However, Defendants did not include any evidence gleaned from the discovery period and did not file a new substantive brief at that time.

[3] The supplemental brief (Doc. 104) includes only an eleven-page brief with argument and two evidentiary exhibits: a portion of Plaintiff's deposition testimony and a Trulincs message he sent regarding Defendant Turner's refusal to pass along his administrative requests.

recommends that Defendants' Renewed Motion to Dismiss [Doc. 100] be denied. (R&R, Doc. 107 at 31.) In so finding, the Magistrate Judge assessed Mr. Johnson's claims under the two-step analysis courts undertake in deciding a motion to dismiss for lack of exhaustion under the PLRA, 42 U.S.C. § 1997e(a), as articulated by the Eleventh Circuit in *Turner v. Burnside*, 541 F.3d 1077 (11th Cir. 2008). Through this lens, the Magistrate Judge determined that, under *Turner*'s first step, Defendants adequately demonstrated that an administrative review process ("ARP") existed at USP-Atlanta and that Mr. Johnson did not fully exhaust his administrative remedies as required by the ARP. (R&R at 25.)[4] Continuing with the analysis, the Magistrate Judge found that,

---

[4] Though the Magistrate Judge recounts the ARP thoroughly in the R&R, its complex and labyrinth-like requirements bear repeating here. To property exhaust, an inmate must first attempt informal resolution with prison staff via a BP-8. If this fails to resolve the issue, he must second file a formal request, or a BP-9, with the warden at his institution, to which the warden has 20 days to respond. Third, if the inmate is not satisfied with the warden's response, he then must then file a BP-10 appeal to the appropriate regional director within 20 days of the date the warden signed the response. Fourth, if the inmate is not satisfied with the regional director's response, he must then submit a BP-11 to the General Counsel/Central Office within 30 days of the date the regional director signed the previous response. Further complicating this process, where the inmate does not receive a response at the second or third step — from the warden or regional director — within the allotted time period, he may consider the silence a denial, and must appeal that lack of response. The administrative process is not complete until the General Counsel/Central Office replies on the merits to an inmate's BP-11. (R&R at 9-10) (outlining administrative review process) (citing 28 C.F.R. § 542 *et seq.*).

accepting Mr. Johnson's facts as true as required under *Turner*'s first step, Plaintiff met his burden to demonstrate that the administrative review process was unavailable to him because *inter alia*: he did not receive the handbook outlining the ARP and was not informed of the appropriate process to follow; he was refused grievance forms or prison staff did not turn in his forms; he did not receive responses to his filed grievances or received them after the deadline for appeal; counselors and staff were not trained in the ARP; he was retaliated against for filing grievances when he was assaulted, placed in the SHU, placed in shackles, his cell was ransacked, and was threatened and intimidated. (R&R at 26.) These allegations therefore sufficiently showed that the administrative process was unavailable to Plaintiff, taking his allegations as true.

Under the second step of the *Turner* analysis, in weighing the facts presented by the Parties, the Magistrate Judge found that Mr. Johnson demonstrated, based on record evidence, that the administrative process was unavailable to him for two separate reasons: because (1) the administrative process operated as a "dead end" and (2) prison administrators and staff thwarted Plaintiff from taking advantage of the grievance process. (R&R at 27) (citing *Ross v. Blake*, 578 U.S. 1174, 126 S. Ct. 1850, 1859-60 (2016) (explaining that a prison administrative procedure is unavailable for purposes of the PLRA's exhaustion requirement where, despite what regulations may promise, (1) it operates as a "dead end" with officers unable or consistently unwilling to provide relief to aggrieved inmates; (2) it is so opaque that it becomes incapable of use; or

(3) where prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation)).

The Magistrate Judge specifically explained that, while Defendants argued that Mr. Johnson in fact did receive a handbook outlining the ARP and thus understood the appropriate administrative process to follow, Defendants did not provide facts to dispute the rest of Plaintiff's evidence showing that the administrative process operated as a dead end or that administrators thwarted his attempts to file grievances. (R&R at 26-27.) For example, Defendants provided no evidence to contradict Plaintiff's testimony or other evidence showing that: prison staff at times refused to provide Mr. Johnson with B-9 forms, did not turn in those forms once he had completed them, or delayed or failed to provide him with a copy of the rejections until it was past the deadline to respond; Mr. Johnson was threatened, assaulted, sent to the SHU, or had his cell ransacked as a result of his complaints about and attempts to access the ARP; and counselors and staff were not themselves adequately trained in the ARP. (*Id.*) For these reasons, the Magistrate Judge found that, based on the evidence presented, the administrative process was unavailable to Mr. Johnson, warranting the denial of Defendants' Motion.

II. Standard of Review

After conducting a careful and complete review of a magistrate judge's findings and recommendations, a district judge may accept, reject, or modify a magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1)(C); *Williams v. Wainwright*, 681

F.2d 732, 732 (11th Cir. 1982). Pursuant to 28 U.S.C. § 636(b)(1), the Court reviews any portion of the R&R that is the subject of a proper objection on a de novo basis and any non-objected portion for plain error. 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140, 154 (1985). The district judge must "give fresh consideration to those issues to which specific objection has been made by a party." *Jeffrey S. v. State Bd. Of Educ. Of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990).

III. Review of Objections to the R&R

Defendants' overarching objection to the R&R is that the Magistrate Judge erred at step two of the *Turner* analysis. To refresh, *Turner* describes step two of the analysis as follows:

> If the complaint is not subject to dismissal at the first step, where the plaintiff's allegations are assumed to be true, the court then proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion. *Bryant*, 530 F.3d at 1373-74, 1376; *cf. Lawrence*, 919 F.2d at 1529. The defendants bear the burden of proving that the plaintiff has failed to exhaust his available administrative remedies. *See Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 921, 166 L.E.2d 798 (2007) ("We conclude that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints."); *Dixon v. United States*, 548 U.S. 1, 8, 126 S.Ct. 2437, 2443, 165 L.E.2d 299 (2006) (stating that, as a "general

> evidentiary rule," the burdens of production and persuasion are given to the same party); *Roberts v. Barreras*, 484 F.3d 1236, 1240 (10th Cir. 2007) ("*Jones* does not spell out the proper burden of proof to use in evaluating exhaustion claims, but circuits that treated exhaustion as an affirmative defense prior to *Jones* have all put the burden of proof on defendants, to the extent that they addressed the issue"); *id.* (citing cases). Once the court makes findings on the disputed issues of fact, it then decides whether under those findings the prisoner has exhausted his available administrative remedies.

Turner, 541 F.3d at 1082-83. Defendants assert an array of specific objections that fall under the umbrella of step two, as detailed below.

1. Objection that the Magistrate Judge "improperly shifted the burden of proof" to Defendants

Defendants first contend that the Magistrate Judge, at step two, improperly "shifted the burden of proof to the defendant to disprove Plaintiff's self-serving allegations that are wholly unsupported with any corroborating [sic] but were accepted as true." (Def. Obj., Doc. 111 at 8.)

This argument rests on a misunderstanding of the value of Plaintiff's cited evidence. Specifically, at the root of the first objection is Defendants' contention that all of Plaintiff's testimony is self-serving and thus cannot be compelling evidence, and therefore the Magistrate Judge was wrong to consider it. But the

legal authority and federal rules "make no such distinction" and do not "assign different weights to different types of evidence." *Strickland v. Norfolk Southern Ry. Co.*, 692 F.3d 1151, 1160 (11th Cir. 2012) ("Our case law recognizes that, even in the absence of collaborative evidence, a plaintiff's own testimony may be sufficient to withstand summary judgment.[5]"); *United States v. Stein*, 881 F.3d 853, 854 (11th Cir. 2018) (holding that "an affidavit which satisfies Rule 56 of the Federal Rules of Civil Procedure may create an issue of material fact and preclude summary judgment even if it is self-serving and uncorroborated."). By the very nature of this case, much of the relevant evidence is comprised of Plaintiff's own testimony. This sworn testimony — whether in Mr. Johnson's declaration or at his deposition — is admissible record evidence. In addition, despite Defendants' assertions to the contrary, Plaintiff's testimony is in fact corroborated by a plethora of other evidence. To state a few examples, Plaintiff relies on contemporaneous letters to Warden Drew complaining of being denied grievance forms, (*see* R&R at 17) (citing July 19, 2016 Letter to Warden Drew, Doc. 102-8), as well as an administrative remedy request that was allegedly rejected on June 18, 2019 but was not postmarked until July 15, 2019. (R&R at n.9) (citing Docs. 54-4 at 24, 36; 57 at 39.) Plaintiff also presented the testimony

[5] While the Court does not technically engage in summary judgment review here, it is tasked with making factual findings based on the evidence in the same manner as with a review on summary judgment. *See Bryant v. Rich*, 530 F.3d 1368, 1375-76 (11th Cir. 2008).

from Defendant Terry that correctional counselors did not receive training on the ARP and had to seek out handbooks outlining the ARP on their own, (*see* R&R at 21) (citing Excerpts of Deposition of Elaine Terry ("Excerpts of Terry Dep."), Doc. 102-1 pp. 33:3-34:13), as well as testimony from three correctional officers that they were not trained and were unfamiliar with the ARP process.[6] The record includes additional examples of corroborative extrinsic evidence as well.[7] Put simply, Plaintiff's cited evidence is no less valuable because it is his own testimony.

Upon acknowledging this reality, it is plain that the R&R did not "improperly shift the burden" to Defendants but instead correctly considered Plaintiff's evidence — which includes his declaration, his deposition testimony, other documentary evidence, and the deposition testimony of other individuals — as evidence demonstrating that the administrative review process was unavailable to Mr. Johnson.

After thoroughly recounting the evidence propounded by Mr. Johnson, the Magistrate Judge

---

[6] (R&R at 21-22) (citing Deposition of Anthony Johnson, Doc. 102-3, p. 66:9-21; Deposition of Walter Willis, Doc. 102-4, p. 19:6-15; Deposition of Matthew Avery, Doc. 102-5, pp. 16:13-17; 35:23-25-36:1-7; 36:19-22.)

[7] Plaintiff also presents evidence that calls into question the accuracy of Defendants' reliance on the BOP SENTRY Administrative Remedy Generalized Retrieval document, which allegedly lists all of Plaintiff's administrative grievances. This SENTRY list indicates that Plaintiff's first remedy request was received on March 22, 2018 (*see* Doc. 54-4 Ex. 1 at 1) but Plaintiff presented a grievance form submitted two months earlier, on January 22, 2018. (Doc. 1 at 37.)

found that Defendants failed to present contrary evidence in response to nearly all of Plaintiff's evidence. Accordingly, the Magistrate Judge did in fact make extensive specific factual findings, as described below. That the Defendants failed to cite to facts contradicting Plaintiff's evidence does not render the Magistrate Judge's analysis erroneous, and the Magistrate Judge was under no obligation to "scour the record" for facts favorable to Defendants that were not put before the Court. *Taylor v. Screening Reports, Inc.*, 15 F.Supp.3d 1360, 1363 n.3 (N.D. Ga. 2014). This objection is OVERRULED.

2. Objection to the R&R's determination that the only disputed fact was whether Plaintiff received a handbook and knew of the ARP and the Magistrate Judge's treatment of this disputed fact

While Defendants agree with the R&R's finding that whether and when Mr. Johnson received a handbook detailing the ARP is indeed a disputed fact, they argue that this issue is "a part of the more important issue, still unresolved, of whether Plaintiff in fact did know how to navigate the remedy process." (Def. Obj. at 8-9.) Defendants contend that the Magistrate Judge accepted Plaintiff's assertion that he was not provided a handbook as true "without analysis of the evidence refuting the statement." (*Id.* at 9.)

Defendants misconstrue the Magistrate Judge's analysis. While the Magistrate Judge did not specifically make a factual determination as to whether Plaintiff received the handbook in question, the R&R finds that, even if Mr. Johnson had received

the handbook and been familiar with the ARP, the evidence showed that any such knowledge would have been futile given the other ways in which Plaintiff's attempts to engage with the grievance process were stymied. (R&R at 26-27.) The Magistrate specifically found that Plaintiff's efforts to engage in the grievance process were thwarted through retaliation (the ransacking of his cell, placement in the SHU, threats); defendants' own lack of understanding of the ARP process and thus inability to comply with it; and defendants' intentional interference and refusal to participate in the ARP process (withholding BP forms from Plaintiff, refusing to pass along Plaintiff's remedy requests or put them in the legal mail box, and late delivery of denials). (*Id.* at 13-14, 17-22, 26-27.) Under the circumstances, a finding that Mr. Johnson had been sufficiently informed of the APR process — by virtue of access to the handbook or otherwise — would not change the conclusion that the administrative process was not available to him.

Even so, the Court herein addresses and decides the factual dispute that the Magistrate Judge did not definitively rule on: whether Mr. Johnson was provided a handbook such that he had sufficient tools to properly exhaust his administrative remedies in accordance with the complex and technical requirements of the ARP. As the factfinder on this issue, the Court determines that the evidence demonstrates that Plaintiff did not in fact receive the handbook in question and the BOP did not provide him information as to how to properly engage in the ARP. Defendant provides Mr. Johnson's standard Intake Screening Form where he indicated that he had received a BOP Orientation Booklet:

1)	Do you know of any reason that you should not be placed in general population?	Yes __	No ✓
2)	Have you assisted law enforcement agents in any way?	Yes __	No ✓
3)	Are you a CIM case?	Yes __	No ✓
4)	Have you testified against anyone in court?	Yes __	No ✓
5)	Are you a member/associate of any gang?	Yes __	No ✓
6A)	Have you ever been sexually assaulted?	Yes __	No ✓
6B)	Have you recently been sexually assaulted?	Yes __	No ✓

Interviewer Comments: You have had the opportunity to receive/review the rights and responsibilities [. . . illegible text . . .] as the information handbook

Circle one:

I (have) / have not received a Bureau of Prison "Admissions && Orientation Booklet" defining my "Rights && Responsibilities" and the "Prohibited Acts and Disciplinary Severity Scale".

Inmate Signature: *[handwritten signature]* Date: Sep 23 2015

Interviewer: *[handwritten initials]* Date: Sep 23 2015
Title: CSO

(Doc. 60-1). However, Plaintiff stated, in his sworn deposition testimony, that

> What I remember, sir, is that when I came to the interview, they told me to sign this, and it said I would receive a booklet, once I get in the unit, from the counselor.
>
> And Ms. Terry, I believe, was the counselor. I didn't know that at the time. She was the counselor for DCU-1. But she told me I would receive a booklet once I get to the unit and she just told me to sign it.

(Deposition of LaQuan Johnson ("Johnson Dep."), Doc. 106-1 p. 16:18-25-17:1.) Further, Mr. Johnson testified that, while at USP-Atlanta, he "never saw an inmate handbook." (*Id.* p. 37:8-9.) The Court finds this to be a logical explanation. Moreover, the Court is persuaded by Plaintiff's argument that "the fact that Plaintiff kept submitting faulty grievance requests demonstrates his misunderstanding of — not familiarity with — the applicable grievance procedures." (Pl. Response to Def. Obj., Doc. 113 at 8.)

Indeed, the evidence Defendants rely on only bolsters the conclusion that Plaintiff *did not* understand the ARP and that the BOP had not taken steps to inform him as to the proper processes. For example, in his deposition, Mr. Johnson explains that he learned about the process from another inmate, Mr. Tyler, who (incorrectly) "showed me that if I'm having problems with the process at the institution with the Administrative Remedy, I can file a tort claim and that's also considered exhausting my remedy." (Johnson Dep. p. 24:13-18.) Defendants also point to a

Trulincs message Mr. Johnson sent in September of 2016 where he complains that he is trying to turn in a BP-9 to Ms. Terry but she refuses to take it because the BP-9 complaint is about her. (Trulincs Message, Doc. 104-2.) While this message is in fact contemporaneous evidence that Mr. Johnson was being blocked in his attempts to file grievances, it does not demonstrate that he understood the multi-step grievance process and its technical elements, including timeliness and content requirements.

As final support, the Court finds it relevant that multiple correctional officer defendants — Defendants Johnson, Willis, and Avery — testified that they were never trained about, or received documents or manuals in connection the ARP, and thus were unfamiliar with the process. (See R&R at 22) (citing Deposition of Anthony Johnson, Doc. 102-3, p. 66:9-21; Deposition of Walter Willis, Doc. 102-4, p. 19:6-15; Deposition of Matthew Avery, Doc. 102-5, pp. 16:13-17; 35:23-25-36:1-7; 36:19-22.)[8] That some correctional officers themselves were not familiar with the ARP undermines Defendants' emphatic position that Plaintiff was sufficiently familiar with the detailed requirements of the ARP to effectively utilize it. Indeed, expecting Mr. Johnson to understand and comply with the technical requirements of the ARP when BOP staff did not understand those

[8] As noted above, Defendant Terry testified that correctional counselors were also not trained on the ARP and were not provided documents outlining the ARP. (*See* Excerpts of Terry Dep. Doc. 102-1 pp. 33:3-34:13.)

requirements, and could not functionally administer it, borders on Kafkaesque.

Taking into account all of this evidence, the Court finds that Plaintiff did not know and was not provided tools to understand how to properly exhaust his administrative remedies. Further, as the Magistrate Judge found, even if he had been, it "would not have mattered" because of the other ways in which defendants interfered and blocked his efforts to grieve. (R&R at 26-27.) This objection is OVERRULED.

3. Objection to the R&R's finding that Defendants provided no other evidence to contradict Plaintiff's facts

Defendants' third objection is in part a repetition of its first objection that the Magistrate Judge considered Plaintiff's testimony as evidence and in doing so "improperly shifted the burden to Defendants." (Def. Obj. at 10.) For the reasons cited in Section 1, Plaintiff's cited evidence is not worth less simply because it is his own testimony, especially in light of other corroborative evidence referenced above.

In arguing that the R&R improperly shifted the burden to them, Defendants rely on *Wright v. Georgia Department of Corrections*, 820 F. App'x 841, 845 (11th Cir. 2020) and *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014). But Defendants misapply these cases to the instant facts. *Wright* and *Albino* explain that, where a defendant has shown that an administrative remedy is generally available, the plaintiff must come forward with evidence showing that the generally available remedies were not available to *him*. That is precisely what the R&R found in determining that

Plaintiff presented an abundance of record evidence, recounted in the R&R and repeated in part herein, that the generally available remedies were not available to him because the administrative review process was both a "dead end" and because prison administrators thwarted his attempts to grieve in a number of ways. (R&R at 27.) Accordingly, *Wright* and *Albino* — both of which arise under wholly distinguishable facts that do not involve the level of consistent and multi-front blocking of the ARP that Plaintiff encountered here — do not support Defendants' position that the Magistrate Judge improperly shifted the burden to them.

Defendants next contend that the R&R is erroneous in finding that Plaintiff was blocked from pursuing administrative remedies after Defendant Terry retired and her replacement was assigned. (Def. Obj. at 11) ("Even if the record could support a finding that Defendant Terry impeded Plaintiff's efforts to exhaust administrative remedies before May 2017, a finding Defendants dispute, the R&R does not evaluate evidence to support a finding that Plaintiff was impeded from pursuing timely remedy requests after May 2017 (or at the latest early 2018)").

This argument ignores large portions of the R&R and also, again, improperly discounts Plaintiff's testimony. Indeed, the R&R details at length Plaintiff's evidence that members of the BOP misrepresented the dates that they delivered administrative decisions to Plaintiff on the relevant forms, including, for example, (1) a request that was allegedly rejected on June 18, 2019 but not postmarked until July 15, 2019 (after Ms. Terry was

gone) and (2) a Disciplinary Hearing Officer Report that was allegedly delivered to Plaintiff on April 30, 2019, which is impossible as Plaintiff was transferred out of USP-Atlanta on April 23, 2019. (R&R at n.9) (citing Docs. 54-4 at 25, 36; 57 at 39; 57 at 31-34; Pl. Decl., Doc. 57 at 22-27 ¶¶ 7-8.)[9] Moreover, the R&R recounts evidence that, when Mr. Johnson complained about the grievance process or Defendants' attempts to block his requests, he was threatened, intimidated, placed in the SHU, and/or shackled. (R&R at 14) (citing Pl. Decl., Doc. 57 at 22-27.) The R&R also details Plaintiff's evidence that he was retaliated against when, for example, Defendant Johnson refused to put his legal mail in the mailbox when Plaintiff was on lockdown and when Plaintiff's cell was ransacked. (R&R at 19, n.12.) Under the circumstances, Defendants' position that there is no evidence that Plaintiff's efforts to grieve were blocked after Defendant Terry was out of the picture is unfounded and belied by the record evidence.[10]

---

[9] After Ms. Turner retired, there was no counselor assigned to Plaintiff's unit for a number of months; to access the ARP, Plaintiff had to go through correctional officers. But, as noted above, three correctional officers testified that they were never trained on, or received documentation about, the ARP and were unfamiliar with it. (R&R at 22.) The officers' testimony, plus the above documentary evidence indicating that administrative decisions were not timely relayed to Plaintiff, together paint a picture of staff members that, at least for a time, were unfamiliar with the ARP process and were at times unable to provide inmates with adequate access to this process.

[10] Defendants' argument that Plaintiff's filed grievances in 2018 and 2019 demonstrate that he had effective access to the remedy program (Def. Obj. at 18) also misses the mark. That Mr. Johnson was able to file some grievances at certain stages does

Defendants next attempt to highlight facts to show that Plaintiff knowingly and/or intentionally "rejected the requirements of the remedy process and instructions in the rejections" he had received by pointing to errors Plaintiff made in filing his grievances: for example, by raising multiple issues in a single grievance instead of separate ones or by failing to first seek informal resolution (BP-8) before filing his BP-9 at the institution level. (Def. Obj. at 15-17.) But first, as Plaintiff points out in his response to Defendants' Objections, these arguments are not ones Defendants made in their initial motion before the Magistrate Judge. It is well established that "a district court has discretion to decline to consider a party's argument when that argument was not first presented to the magistrate judge." *Williams v. McNeil*, 557 F.3d 1287, 1291-92 (11th Cir. 2009) (explaining that requiring district courts to consider new arguments raised in objections would "eliminate efficiencies gained through the Magistrates Act and would unfairly benefit litigants who could change their tactics after issuance of the magistrate judge's report and recommendation"). Here, the Court declines to consider Defendants' previously unraised arguments that Plaintiff knowingly rejected the requirements of the remedy process. The Court notes however, that even if it were to consider this argument, Defendants'

---

not show that the full ARP was available to him. In order for the process to be available, it must be available at every level of the multi-step process. Indeed, a barrier at any level blocks an ultimate review of a grievance on the merits. Put another way, the ability to file a grievance generally at one stage does not demonstrate an understanding of, or ability to avail oneself of, the full four-level ARP.

position is not sufficient to overcome the overwhelming amount of evidence recounted in the R&R showing that the administrative process was not available to Plaintiff because *inter alia*: BOP staff withheld BP forms from Plaintiff; Plaintiff's requests were denied on technical grounds but he would not receive a copy of those denials and did not know how to rectify them; Defendant Terry and others refused to pass along Mr. Johnson's remedy requests; members of BOP would misrepresent the dates they delivered administrative decisions to Mr. Johnson; and that when Plaintiff raised these grievances, he was threatened intimidated, placed ion SHU, and/or shackled. (R&R at 13-14.) Further, as reasoned above, the Court has determined that Plaintiff was not afforded the tools or knowledge and did not understand how to properly comply with the ARP and thus could not have *intentionally* rejected its requirements. This objection is OVERRULED.

4. Objection to the finding that Defendant Terry admitted that administrative remedy forms were not available in the SHU

The Magistrate Judge found that Defendant Terry admitted that administrative remedy forms were not readily available in the SHU, where she sent Plaintiff on more than one occasion. (R&R at n.11.) Defendants object to this finding as erroneous because Defendant Terry allegedly "testified that the allegation is untrue, she was not at work that day, she found out Plaintiff was in the SHU when she returned to work from others, and she was informed that he was placed in the SHU for fighting." (Def. Obj. at 19.) Defendants also argue that Defendant Terry "did not

admit that administrative remedy forms were not readily available in the SHU" and that the finding in footnote 11 is therefore erroneous. (*Id.*) In making this argument in their objections, Defendants cite to Ms. Terry's deposition testimony but do not identify Ms. Terry's deposition by document number in the record. The R&R also does not identify Ms. Terry's deposition by document number. The Court has reviewed Defendants' Motion to Dismiss (Doc. 100) and supplementary brief (Doc. 104) and all attached exhibits, none of which are Defendant Terry's deposition. Plaintiff has attached a portion of Defendant Terry's deposition to its response brief (Doc. 102-1) but this document includes only excerpts of Defendant Terry's deposition and does not include the pages cited by Defendants in their objections.

The portion of Ms. Terry's deposition cited in the R&R involves a discussion of access to administrative remedy forms. (R&R at n.11) (citing Excerpts of Terry Dep., Doc. 102-1 p. 31:1-10.)[11] While it is difficult to place the discussion in context, since the preceding page is absent, counsel asks Defendant Terry whether she had heard

> from inmates that i[t] was difficult to obtain the remedy forms?
>
> A. No.
>
> Q. Has any inmate ever told you that?

---

[11] The R&R identifies this discussion as "Terry Dep. at 12" but page 12 appears to refer to page 31 of Ms. Terry's deposition, which is the twelfth page of the filing at Doc. 102-1, the excerpts of Defendant Terry's deposition.

> A. *Maybe in the SHU.* Inmates — see, inmates from they might say, "Ms. Terry, can you get me an administrative remedy. I haven't seen my unit team or whatever. It's hard for me." They might have said it, so I'll just give them one in SHU.

(Excerpts of Terry Dep. p. 31:1-10) (emphasis added.)

This exchange — the only relevant portion of Defendant Terry's testimony on this issue that was actually in the record at the time of submission of Defendants' Motion — indicates that Defendant Terry admitted that inmates complained that it was difficult to obtain remedy forms in the SHU but not that she agreed with those complaints, as she said she would give them the forms herself. (*Id.*)

Accordingly, the Court takes this testimony as evidence of just that — that inmates complained of lack of access to grievance forms in the SHU but that Ms. Terry indicated that she would provide the forms to those inmates. The Court therefore does not wholly adopt the R&R's factual finding on this specific item, *i.e.*, to the extent it does not fully reflect Ms. Terry's deposition testimony. That said, the Court notes that the reliability of this assertion by Defendant Terry is weakened by other evidence that she did not provide Plaintiff with grievance forms when he requested those forms in other contexts. Regardless, this revised factual determination does not call into question the R&R's overall conclusion that the administrative process was not available to Plaintiff, which is supported by an abundance of evidence not at all related to access to grievance forms in the SHU.

5. Objection to the R&R's determination that on-the-job training was inadequate

Defendants argue that "[t]here is nothing in the record evidence showing, or even suggesting, that this method of hands-on training of staff working in a prison unit was inadequate or that it is relevant to Plaintiff's haphazard use of the administrative remedy process." (Def. Obj. at 20.)

This argument strains credulity. Realistically, the effective functioning of the ARP depends on prison staff performing their duties as defined by the process and doing so competently and in a timely manner. A refusal of prison staff to participate in the process — by failing to provide forms, failing to turn in forms, returning forms late or after deadlines have passed, or failing to respond to grievances at all — constitutes a breakdown of the process and precludes an inmate from using it in practice. It is therefore entirely relevant whether the staff in a prison unit understands and complies with the requirements of the process and facilitates an inmate's access to it. Here, Plaintiff's evidence that correctional officers were not trained and did not understand the ARP (see *supra* at n.6) is especially relevant because, after Defendant Terry retired, there was no counselor on Plaintiff's unit for months and inmates depended on correctional officers to provide access to and participate in the grievance process. (R&R at 21.) In addition, Defendant Terry's testimony that her only training was "on-the-job training," (*see*, Excerpts of Terry Dep. pp. 33:3-34:13), is congruent with Plaintiff's other evidence (his testimony, contemporaneous letters and Trulincs messages)

showing that Defendant Terry did not comply with the requirements of the ARP. This objection is OVERRULED.

6. Objection to the R&R's analysis of *Abram* and *Bryant*

In their Motion, Defendants relied on *Abram v. Leu*, 848 F. App'x 868 (11th Cir. 2021) and *Bryant v. Rich*, 530 F.3d 1368, 1378 (11th Cir. 2008) for the proposition that temporary obstacles that prevent a prisoner from submitting a timely grievance do not make administrative remedies unavailable where a prisoner may request consideration of untimely grievances for good cause. (Def. Obj. at 21-22.) According to Defendants, Mr. Johnson's obstacles here were temporary and thus administrative remedies were not unavailable to Mr. Johnson since he could have submitted an out-of-time grievance form by at least early 2018. (*Id.* at 22-23) ("There is nothing to support a finding that Plaintiff faced any obstacles to exhausting remedies for his 2018 and 2019 claims, or if any obstacles could be established, they were temporary and non-existent following his transfer in April 2019.").

In the R&R, the Magistrate Judge found that *Abram* and *Bryant* were distinguishable because, in both cases, the refusal to provide the plaintiff with the necessary grievance forms was the only obstacle to plaintiff's ability to file a grievance and because the obstacle was temporary; whereas, here, the facts demonstrate that the obstacles Mr. Johnson faced were "constant and pervasive." (R&R at 29-30.)

The Court agrees with the Magistrate Judge's reasoning and conclusion. Defendants' position here once again ignores evidence of the barriers Plaintiff faced in attempting to avail himself of the ARP, from physical harm and cell ransacking to dependence on individuals who did not understand the administrative process they were required to make available to inmates. In addition, Defendants have not pointed to evidence in the record that Plaintiff was aware that he could submit an out-of-time grievance (or the process by which to do so). *See Brown v. Drew*, 452 F. App'x 906, 908 (11th Cir. 2012) (finding that all administrative remedies were not available to plaintiff where "nothing in the record establishe[d] that [the plaintiff] was aware or could readily become aware of his right to request an extension of time to resubmit his appeal[,]" distinguishing *Bryant*).

IV. Conclusion

For all of the reasons cited above, the Court ADOPTS AS AMENDED the R&R [Doc. 107]. Defendants' objections [Doc. 111] are OVERRULED. Defendants' Renewed Motion to Dismiss [Doc. 100] is DENIED. The Court REFERS the case back to Magistrate Judge Anand for further proceedings, including the entry of a scheduling order specifying the length of discovery on merits issues. The scheduling order should attempt to balance the challenges of conducting prison-related discovery in the midst of a pandemic with the need for swift movement of this case, considering how long it has already been pending. Although merits discovery is typically not authorized in *pro se* prisoner cases, here, the Court anticipates the need for further discovery

and notes that Plaintiff here is represented by able counsel. In light of the Court's determination that discovery should proceed as a whole in this case, Magistrate Judge Anand should determine if there are valid reasons or not to initially exempt Defendant Johnson from discovery based on Defendant Johnson's pending Motion for Summary Judgment or Motion to Dismiss (Doc. 109) and Plaintiff's responses thereto. Judge Anand is not required to have issued a formal R&R as a predicate or prerequisite for making such a determination.

IT IS SO ORDERED this 16th day of August 2021.

Amy Totenberg
United States District Judge

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

No. 1:18-cv-01899-AT-JSA

LAQUAN STEDERICK JOHNSON,
Plaintiff,
v.
ELAINE TERRY, *et al.*,
Defendants.

BIVENS
U.S.C. § 1331

Filed June 24, 2021
Document No. 107

MAGISTRATE JUDGE'S NON-FINAL REPORT AND RECOMMENDATION

The matter is currently before the Court on Defendants' renewed motion to dismiss the complaint [Docs. 100, 104] and Plaintiff's responses thereto [Docs. 102, 105]. Plaintiff's action is based on events that occurred while he was a pre-trial detainee at the United States Penitentiary in Atlanta, Georgia ("USP-Atlanta").

I. Relevant Factual And Procedural History[1]

A. Facts Alleged In The Amended Complaint

Plaintiff complains that while he was a pretrial detainee, former Correctional Counselor Elaine Terry housed him with medium and high security inmates against Federal Bureau of Prisons ("BOP") policy, and as a result he was attacked on three different occasions. On the first occasion, on or about June 21, 2016, Plaintiff suffered a broken wrist and a deformed fifth metacarpal in his right hand. Despite the fact that the inmate attacked Plaintiff, however, Defendant Terry refused to move that inmate out of the dorm and when Plaintiff asked her why she was violating BOP policy she ordered him to the Special Housing Unit ("SHU"). Officer Burgess, who was tasked with walking Plaintiff from the pretrial dorm to the SHU, threw Plaintiff against the wall and twisted his fractured wrist when Plaintiff continually asked him why medium and high security convicted inmates were being housed in the pretrial dorm.

For approximately a year and nine months Plaintiff repeatedly complained to USP-Atlanta staff, including Dr. Martin and Dr. Winston, of severe pain in his wrist, and requested to see a doctor through electronic requests and administrative remedies. When Plaintiff finally was examined by a doctor months after sustaining the injuries to his wrist, he had acquired nerve damage on his upper limb and his

[1] The operative pleading in this case is Plaintiff's counseled amended complaint, which was filed on July 15, 2019. (Doc. 29).

wrist, hands, and fingers had decreased range of motion.

After the first attack Plaintiff had a face-to-face conversation with then-Warden Drew, and later Warden Harmon, about how he was afraid for his safety because of the fact that Defendant Terry housed medium and high security inmates in the pretrial dorm in violation of BOP policy. According to Plaintiff, Drew appeared to listen to his complaint but did nothing. After Plaintiff subsequently asked Warden Harmon if housing those inmates together did, in fact, violate BOP policy, Warden Harmon threatened to transfer Plaintiff out of USP-Atlanta if he continued to talk to Harmon.

On or around March 22, 2018, Plaintiff suffered another attack, this time from a high security inmate named Walter Bush, who has a violent history and was high on K2 when he attacked Plaintiff.[2] Despite being on notice that Plaintiff had been attacked twice before by medium and high security inmates, at the direction of Warden Harmon, BOP staff housed yet another high security inmate, Cedric Brown, with Plaintiff in his cell. On or around April 4, 2018, Brown punched Plaintiff in the face causing Plaintiff a fractured jaw.

Plaintiff requested treatment from Dr. Peterson, a dentist, but instead of immediately treating Plaintiff Dr. Peterson referred him to an outside doctor for

---

[2] K2 is a synthetic cannabinoid. *See K2/Spice: What to Know About These Dangerous Drugs*, available at https://www.webmd.com/mentalhealth/addiction/news/20180910/k2-spice-what-to-know-about-these-dangerousdrugs.

surgery that did not occur until a month after the attack. Over that month, Plaintiff was forced to chew regular food with neither proper treatment nor medication. When Plaintiff did see the outside doctor, he had to wire Plaintiff's jaw shut so that the fracture would heal. Because Plaintiff's jaw was wired shut, the doctor ordered a liquid diet for Plaintiff until Plaintiff's follow-up appointment when the wiring would be removed.

The food supervisor, Ms. Garcia, however, only provided Plaintiff with the liquid diet for two weeks but refused to do so after that time period, despite the fact that Plaintiff's jaw still visibly was wired shut. Because Plaintiff had not had food for almost two days he was forced to cut his wires open with a fingernail clipper and thereafter had to chew regular food with his fractured jaw. As a result, Plaintiff's gums were constantly swollen and bleeding, and food had gotten underneath the tooth where the fracture was located, causing a painful infection. Despite the medical order and Plaintiff's repeated requests, however, Dr. Peterson failed to examine Plaintiff's tooth or give him proper medication. Plaintiff submitted the original complaint, *pro se*, to the Court on May 1, 2018. (Doc. 1).

Thereafter, on or around August 11, 2018, Plaintiff was on the basketball court and landed on an exposed screw which punctured his foot. Plaintiff's foot was bleeding profusely and he could not stop the bleeding. He immediately approached Nurse Harris, informed her of his injury, and asked her to help him to stop the bleeding and prevent an infection. Nurse Harris, however, ignored Plaintiff's pleas for help.

Shortly thereafter, Plaintiff also made repeated electronic requests and asked Dr. Nwude in person for medical assistance because he was experiencing severe pain, swelling in his foot, and was having trouble walking. Dr. Nwude also refused to provide Plaintiff with any treatment for his injuries.

On or about January 1, 2019, Officer Anthony Johnson approached Plaintiff in his cell, threatened him because of the lawsuit Plaintiff had filed, and placed Plaintiff on lockdown. Plaintiff asked Defendant Johnson why he was being placed on lockdown, to which Johnson responded that he felt like it. When Plaintiff asked Defendant Johnson if he could please take Plaintiff's legal mail to the mailbox since Plaintiff was locked down and he could not do it himself, Defendant Johnson refused to do so and told Plaintiff "it looks like you can't write anyone up today." After Plaintiff complained, Johnson told him "wait until tomorrow I have something for you."

The next day Plaintiff was removed from his cell for several hours, and when he returned his cell had been ransacked and his mattress, sheets, and medication were missing. Plaintiff asked another officer what had happened, to which the officer replied, "looks like you pissed somebody off." Plaintiff believes Defendant Johnson was responsible for ransacking his cell and taking his mattress, sheets, and medication in retaliation for Plaintiff filing complaints against him.

On or around February 20, 2019, Ms. Tamia Allen, an administrator at the prison, delivered some paperwork to Plaintiff that apparently had been held by the prison for an extended period of time before that

day. When Plaintiff asked Ms. Allen why she had waited so long to deliver his paperwork, Ms. Allen told Officer Willis that Plaintiff was following and harassing her. Plaintiff told Defendant Willis that he was frustrated that Ms. Allen had been sitting on his mail and Willis responded, "you think I'm going to help you when you filed a lawsuit on me?" Plaintiff then informed both of them that he was going to file a grievance against them for intentionally sitting on his mail.

That afternoon Defendant Willis informed Plaintiff that he was being moved to the SHU as punishment for his complaints to Ms. Allen. Plaintiff asked to speak to the shift supervisor so they could review the cameras to show that Plaintiff was cordial and appropriate, but Willis refused. When Plaintiff continued to plead with Willis to investigate before sending him to the SHU, Willis declared a lockdown, returned to Plaintiff's cell with Lieutenant Avery, and both officers immediately attacked Plaintiff. Defendant Avery threw Plaintiff against the bed and tried to choke Plaintiff with his firearm, and when Plaintiff tried to get away he slammed Plaintiff face-first into the wall and then onto the floor. Both officers held Plaintiff's legs down and, despite Plaintiff's compliance, Willis continued to punch Plaintiff in the stomach and pull his sweatshirt over his face so that Plaintiff could not breathe.

Thereafter, Plaintiff was brought to the SHU, where Lieutenant Hobbs made him strip out of his clothes and put on a jumpsuit, after which Hobbs shackled him with leg, waist, and wrist restraints. Plaintiff was not at all combative, but informed Hobbs

that the use of shackles in this manner violated BOP policy, that the Warden's approval was required, and that if he was shackled for an extended period of time the BOP Regional Office should be notified. In response, Hobbs shoved Plaintiff to the ground of the cell which was covered with human waste, and because Plaintiff was shackled he could not stand up and was forced to remain in that position for several hours. Plaintiff later asked Officer Mackinberg and Officer Fayad to remove him from the shackles and both refused to do so. All told, Plaintiff was shackled this way for ten and a half hours.

Plaintiff raises failure to protect claims against Counselor Terry and former Warden Darlene Drew; claims against Dr. Winston, Dr. Martin, Dr. Nwude, Nurse Harris, and Food Service Supervisor Ms. Garcia for (a) deliberate indifference to Plaintiff's serious medical needs; (b) unconstitutional course of medical treatment; and (c) unconstitutional delay in treating pain;[3] excessive force against Correctional Officers Avery, Burgess, Johnson, Hobbs, Mackinberg, Willis, and Fayad; and "ratification of constitutional violations" against Drew.[4] (Doc. 29).

---

[3] Although Plaintiff states these three medical claims as different causes of action, all three would fall within a claim for deliberate indifference to Plaintiff's serious medical needs.

[4] Plaintiff also originally was allowed to proceed against former Warden D.J. Harmon and Dr. Peterson. Dr. Peterson, however, was dismissed from the case [Doc. 75], and D.J. Harmon is now deceased [Doc. 74].

B. Defendants' First Motion To Dismiss

On October 22, 2019, Defendants filed a motion to dismiss the complaint and argued that the claims against them in their official capacity are barred by sovereign immunity. (Doc. 37-1). On December 11, 2019, the undersigned entered a report and recommendation ("R&R"), which recommended, *inter alia*, granting Defendants' motion insofar as dismissing the claims against Defendants in their official capacities.[5] (Doc. 50). U.S. District Judge Amy Totenberg adopted the R&R on December 19, 2020. (Doc. 52).

C. Defendants' Second Motion To Dismiss

On January 22, 2020, Defendants filed another motion to dismiss the amended complaint against Defendants, this time in their individual capacities, arguing that: (1) Plaintiff's claims against Defendant Peterson must be dismissed because he is immune from liability as an employee with the United States Public Health Service ("PHS"); and (2) Plaintiff failed to exhaust his administrative remedies. (Doc. 54-1). Alternatively, Defendants argued that Plaintiff's amended complaint is a "shotgun pleading" and that

---

[5] Defendants also sought dismissal for Plaintiff's failure to serve most of the Defendants, and alternatively requested a motion for a more definite statement under Fed. R. Civ. P. 12(e). (Doc. 37-1). After the Court granted Plaintiff's motion for appointment of counsel [Doc. 21], counsel filed an amended complaint and served all of the parties. (Doc. 29; Docs. 30, 31, 45-47). Consequently, in the December 11, 2019, R&R, the undersigned recommended denying as moot that portion of Defendant's motion to dismiss for lack of service and for a more definite statement. (Doc. 50).

they are entitled to a more definite statement under Fed. R. Civ. P. 12(e). (*Id.*).

1. Defendants' Exhaustion Facts Set Forth In The Second Motion To Dismiss

In support of their argument that the complaint should be dismissed for Plaintiff's failure to exhaust, Defendants mostly relied upon the declaration of BOP Senior Attorney at USP-Atlanta S. Allison-Armstrong. (Doc. 54-4, ("Allison-Armstrong Decl.")).

a. The Administrative Remedy Procedure ("ARP")

The BOP has established a four-level ARP. (Allison-Armstrong Decl. ¶8); 28 C.F.R. §542.10 *et seq*. An inmate must first present his complaint informally to prison staff, commonly referred to as a BP-8. (*Id.* ¶8(a)); 28 C.F.R. §542.13. If the issue cannot be resolved informally, the inmate must then file a formal administrative remedy request, or a BP-9, at the institutional level to the Warden, to which the Warden has twenty (20) calendar days to respond. (*Id.* ¶8(b)); 28 C.F.R. §§542.14(a), 542.18. An inmate "who is not satisfied with the Warden's response" to such a formal request may submit an appeal, a BP-10, to the appropriate Regional Director within twenty (20) days of the date the Warden signed his response. (Allison-Armstrong Decl. ¶8(c)); 28 C.F.R. §542.15(a). An inmate "who is not satisfied with the Regional Director's response" may then submit an appeal, or a BP-11, to the General Counsel (also referred to as the "Central Office") within thirty (30) days of the date the

Regional Director signed the response.[6] (Allison-Armstrong Decl. ¶8(d)); 28 C.F.R. §542.15(a). If an inmate does not receive a response within the allotted time period, the inmate may consider the absence of any such response to be a denial at that level. 28 C.F.R. §542.18; (Allison-Armstrong Decl. ¶8(i)).

A federal inmate must appeal through all three levels following the informal attempt in order to satisfy the exhaustion requirement. *Irwin v. Hawk*, 40 F.3d 347, 349 n.2 (11th Cir. 1994). Thus, the administrative process is not complete until the General Counsel replies, on the merits, to the inmate's BP-11, or if a response is not made within the time allotted for reply. (Allison-Armstrong Decl. ¶8(j)); 28 C.F.R. §542.18.

b. Exhaustion Facts

In addition to the requirements of USP-Atlanta's ARP, in the first motion to dismiss Defendants stated that Plaintiff did not file his first administrative remedy request until March 22, 2018, and then argued that the only relevant remedy requests were as follows:

---

[6] The inmate's time limits for filing these requests may be extended if the inmate "demonstrates a valid reason for delay[.]" 28 C.F.R. §542.15(a); (Allison-Armstrong Decl. ¶8(e)). Likewise, the time period for responses to grievances at the institutional level may be extended once by twenty (20) days, at the regional level once by thirty (30) days, and once at the Central Office level by forty (40) days if the time period is insufficient to make an appropriate decision. (Allison-Armstrong Decl. ¶8(h)); 28 C.F.R. §542.18.

Failure To Protect

* Remedy No. 935509-R1, submitted on March 29, 2021, in which Plaintiff requested a change of housing assignment and cellmate. The remedy was rejected because Plaintiff did not file a BP-9. Thereafter, Plaintiff did not file a BP-9 or other remedy request regarding the failure to protect. (Allison-Armstrong Decl. ¶¶13-14 & at 28 & Attaches.; Doc. 54-4 at 28, 39).

Medical Deliberate Indifference After The First Attack

* Remedy No. 934579-F1, in which Plaintiff filed a BP-9 on March 22, 2018, seeking medical care to have a bone set and cast. The remedy was rejected because Plaintiff had not attempted informal resolution. Plaintiff filed a BP-10 appeal (Remedy No. 934579-R1) to the Regional Office instead of trying to informally resolve the issue, which was rejected because he had not followed instructions in the BP-9 rejection, attempted informal resolution, or submitted the required number of copies, and the appeal was untimely. Plaintiff did not resubmit the remedy. (Allison-Armstrong Decl. ¶¶21, 22, 23; Doc. 54-4 at 28, 30, 41-43).

* Remedy No. 945058-F1, BP-9 submitted on June 27, 2018, seeking the same medical treatment — that his bone be set and cast, and to receive a copy of his x-rays, which was denied as untimely from 2016 and because

Plaintiff included more than one issue on the form. (Allison-Armstrong Decl. ¶¶21-23; Doc. 54-4 at 28, 30, 42-43). Plaintiff did not appeal this remedy.

After The Second And Third Attack

* Remedy No. 939278-R1, on March 28, 2018, Plaintiff sought medical relief for pain and swelling in his hand after inmate Bush attacked him on March 22, 2018, reporting that he hurt his hand knocking Bush out. On April 17, 2018, Plaintiff submitted a BP-10 appeal to the Regional Office concerning "medical matters." That remedy was rejected because he had not first submitted a BP-9 with the Warden. Plaintiff did not submit a BP-9 or file any further appeals. (Allison-Armstrong Decl. ¶¶28-29; Doc. 54-5; Doc. 54-4 at 24, 29, 40).

Issues With Staff/Food

* Remedy No. 943789-F1, on June 14, 2018, Plaintiff complained about issues with staff and commissary and requested special meals. The remedy was rejected because Plaintiff raised more than one issue therein. Plaintiff filed a BP-10 appeal to the Regional Office and then a BP-11 to the Central Office, both of which were rejected for essentially the same reasons as the BP-9, and both appeals were untimely filed. (Allison-Armstrong Decl. ¶¶31-32, 33-39; Doc. 54-1 at 12-13; Doc. 54-4 at 24, 29, 31, 33).

Plaintiff's Foot

* Remedy No. 951154-F1, Plaintiff submitted a BP-9 on August 11, 2018, after he stepped on a screw on the basketball court, seeking an examination by a specialist for his foot injury. The Warden provided Plaintiff with an "informational response" eight months later on March 6, 2019, noting the treatment Plaintiff had received for the injury, concluding that the injury was properly treated and had healed, and advising Plaintiff to report to medical with any further concerns. According to Defendants, Plaintiff then bypassed the Regional Office and appealed directly to the Central Office, which rejected the appeal, concurred with the Warden's response, and advised Plaintiff that he needed to follow the Warden's instructions to file any appeal to the Regional Office.[7] (Allison-Armstrong Decl. ¶¶40-44; Doc. 54-4 at 31, 33, 50-51).

* Remedy No. 960996-R1, on October 26, 2018, Plaintiff submitted a BP-10 with the Regional Office requesting a soft shoe pass. The appeal was rejected because Plaintiff had not first filed a BP-9 request with the Warden. Plaintiff did not file anything further in connection with this remedy request. (Allison-Armstrong Decl. ¶¶46-47; Doc. 54-4 at 24, 32, 52).

---

[7] According to Plaintiff, he did, in fact, file a BP-10 with the Regional Office. Pl.'s Decl. ¶14).

Other Medical Complaints

> * Remedy No. 968150-R2, Plaintiff filed another appeal complaining that he was denied medical treatment in retaliation for exercising his freedom of speech and of staff misconduct by "non-Defendants." The remedy was rejected because Plaintiff did not first file a BP-9 request. Plaintiff filed an appeal to the Central Office, which was rejected because he submitted his request at the wrong level, but the Central Office noted that his allegations were being forwarded to another department for review. (Allison-Armstrong Decl. ¶¶50-53; Doc. 54-4 at 24, 34-36).

2. Plaintiff's Facts

Plaintiff set forth the following facts in the response to Defendants' second motion to dismiss, which relied mostly on Plaintiff's sworn declaration. (Doc. 57 at 22-27 ("Pl.'s Decl.")):

> BOP staff, especially Defendant Terry, often withheld the BP forms that Plaintiff needed in order to file his administrative remedy requests [Doc. 1; Pl.'s Decl. ¶1]; his administrative remedy requests were continually denied on technical grounds, but he would not receive a copy of those denials and thus did not know how to rectify the technical issues [*Id.* ¶¶4, 5]; it was only after Plaintiff filed a Standard 95 form that staff started providing him with BP forms when he

asked[8] [Pl.'s Decl. ¶3]; Defendant Terry and others still thwarted Plaintiff's efforts to utilize the grievance process, however, by refusing to pass along Plaintiff's remedy requests to the appropriate parties [Doc. 1 at 2, 9]; BOP staff also purposely withheld administrative decisions so that Plaintiff could not respond before the deadline expired [Pl.'s Decl. ¶¶6-8]; members of the BOP also would misrepresent the dates that they delivered the administrative decisions to Plaintiff on the relevant forms [*Id.* ¶7];[9] after Plaintiff discovered that if he did not receive a response he could consider it a denial, his appeal would be rejected for issues at the institutional level for which he had never received a response and thus had no knowledge how to rectify [*Id.* ¶¶4-7]; and according to Plaintiff, whenever he raised any of these issues he was threatened,

---

[8] A Standard Form 95 is the form used to present claims against the United States under the Federal Tort Claims Act ("FTCA"). *See* Documents and Forms, Department of Justice Website, *available at* https://www.justice.gov/civil/documents-and-forms-0.

[9] Plaintiff provides several examples of these practices, including an administrative remedy request (apparently No. 981428-R1) that was allegedly rejected on June 18, 2019, but not postmarked until July 15, 2019. (Doc. 54-4 at 25, 36; Doc. 57 at 39). Another example provided by Plaintiff is when he received a disciplinary hearing on April 18, 2019, was transferred five days later on April 23, 2019, but the Disciplinary Hearing Officer falsely documented that he had delivered the report to Plaintiff on April 30, 2019. (Pl.'s Decl. ¶¶7-8; Doc. 57 at 31-34).

intimidated, placed in the SHU, and/or shackled [*Id.* ¶¶52, 60, 81, 91, 93, 100].

3. Disposition Of The Motion

On June 8, 2020, the undersigned entered an R&R which recommended granting the motion to dismiss Dr. Peterson from the complaint and denying the motion to dismiss for Plaintiff's failure to exhaust. (Doc. 67). Specifically, the undersigned concluded that Plaintiff had demonstrated that USP-Atlanta's administrative remedies were unavailable to Plaintiff. (*Id.*).

Judge Totenberg adopted the R&R's recommendation to grant Defendant Peterson's motion to dismiss, but based on Defendants' objections [Doc. 70], declined to adopt that part of the R&R that recommended denying Defendants' motion to dismiss for Plaintiff's lack of exhaustion. (Doc. 75). Instead, Judge Totenberg granted the parties a three-month discovery period limited solely to the exhaustion issue. (*Id.*). That discovery period was extended three times [Docs. 83, 87, 94], Defendants renewed their motion to dismiss on February 16, 2021 [Doc. 100], and the Court granted their request for an extension of time to file a supplemental brief and evidence in connection therewith [Doc. 103].

The matter is now before the Court on Defendants' renewed motion to dismiss and supplemental brief in support thereof [Docs. 100, 104] and Plaintiff's responses thereto [Docs. 102, 105]. The Court adopts and incorporates by reference the facts related to exhaustion from the June 8, 2020, R&R set forth above. [Doc. 67].

III. Discussion

A. Standard of Review

When considering a motion to dismiss pursuant to Rule 12(b)(6), the complaint is construed in the light most favorable to the plaintiff and its allegations are taken as true. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007); *American United Life Ins. Co. v. Martinez,* 480 F.3d 1043, 1057 (11th Cir. 2007). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations," something "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action" is necessary. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting Fed. R. Civ. P. 8(a)(2)).

B. The Exhaustion Issue

Defendants have filed a supplemental brief in support of their renewed motion to dismiss, and incorporate by reference their initial brief, reply, and evidence filed in support thereof. (Docs. 54, 60, 100, 104). Defendants argue that even after the discovery period Plaintiff has failed to demonstrate that the motion to dismiss should be denied. The undersigned disagrees.

1. Additional Exhaustion Facts From Defendants

Defendants rely upon the facts in their original motion to dismiss, set forth in Section I.C.1., *supra*, to demonstrate that Plaintiff did not exhaust his administrative remedies. Additionally, Defendants now cite to Plaintiff's deposition and a form signed by Plaintiff acknowledging that he received a copy of the Admissions and Orientation Handbook ("Handbook") upon his arrival on September 23, 2015, which contains information regarding the steps inmates must take to exhaust administrative remedies. (Doc. 104 at 4-5; Doc. 106-1 ("Pl.'s Dep.") at 34; Doc. 60-1). Defendants argue that in addition to the original evidence they provided, this evidence indicates that Plaintiff had a "working knowledge" of USP-Atlanta's APR at the very latest by the beginning of 2017, and because he failed to exhaust those remedies his complaint should be dismissed.

2. Additional Facts And Evidentiary Support From Plaintiff

a. Additional Evidentiary Support

Plaintiff also relies on the facts he set forth previously in his original response to the motion to dismiss [Doc. 57], *vis á vis* his sworn declaration, and adds additional support from the record to further underscore his argument that Defendant Terry often withheld the forms Plaintiff needed to file his administrative remedy requests. (*See* Doc. 102-8 at 2 - July 19, 2016 letter from Plaintiff to Warden Drew) ("I've been asking Ms. Terry to give me a grievance but she keeps refusing."); (Doc. 102-9 - Form 95 dated

October 31, 2017) ("I had to get a BP-9 from another inmate, but I still had to turn it in to process it. Obviously she refused to take it and told me to turn it in to whomever I got it from."); (Doc. 1 at 27 – December 17, 2017, message on Trulincs[10] by Plaintiff) ("I attempted to write a BP-9 on here pertaining to this issue. However, since [Terry] is the person you have to go thru to turn in the BP-9 she denied me the privilege of my rights of turning it in" and "I asked Ms. Terry for BP-9 & BP-10, but she refused to give me one because she knew the nature of my complaint was her unprofessional behavior."); (Pl.'s Dep. at 48) ("Ms. Terry wasn't turning them in, or she wasn't even giving me one" and "[W]hat I'm saying is that prior to what — that March one that's in the system, that Ms. Terry was the issue with me filing anything, any BP-9s or 8s. . . ."); (Pl.'s Dep. at 106) ("Yes, the one when Ms. Terry was there. She didn't turn any over. The ones that she did give me, she didn't turn them in."); (Pl.'s Dep. at 173) ("I already explained, Ms. Terry wouldn't give me anything.").

Plaintiff also provides more support for his argument that Defendant Terry and other BOP staff not only refused to provide Plaintiff with forms and pass the forms onto the proper parties, but also purposely withheld administrative decisions so that Plaintiff could not respond before the deadlines expired. (Pl.'s Dep. at 52) ("[T]hey would take the BP-9 and respond to it, but not give me a response"); (Pl.'s

[10] Trulincs is considered to be similar to a BP-8 because an inmate can get on the computer and send a message to anyone in the institution. (Pl.'s Dep. at 59).

Dep. at 117) ("[T]heir remedy process at that prison was manipulated to where I couldn't file my remedies the correct way. . . . They were throwing them away and making it like I wasn't filing them, or maybe they was [sic] keeping them, giving them to me at a later date."). Plaintiff's administrative remedy requests continually were denied on technical grounds, but because he did not receive the decisions in a timely manner or at all, his appeal would be denied because he could not correct the problems at the lower level about which he did not know. (Pl.'s Dep. at 52-53). Plaintiff also testified during his deposition that whenever he would raise any of these issues he would be threatened, intimidated, placed in the SHU,[11] shackled, and his cell ransacked.[12] (Pl.'s Dep. at 132-33, 136-39, 174-75, 180-81; Doc. 102-8 at 2; Doc. 102-10). And it was only after he filed his Standard 95 tort

---

[11] Notably, even Defendant Terry admitted that administrative remedy forms were not readily available in the SHU, where she sent Plaintiff on more than one occasion. (Terry Dep. at 12).

[12] Plaintiff's examples of these acts of retaliation are set forth Section I.A., *i.e.,* that: Terry fired him from his prison job after he repeatedly complained about being housed with an inmate who eventually attacked and injured him [Pl.'s Dep. at 175]; when Plaintiff again complained that pretrial detainees should not be housed in the same unit as convicted inmates Terry sent him to the SHU [*Id.* at 174]; Defendant Burgess assaulted Plaintiff on the way to the SHU when Plaintiff complained about the housing practices [Doc. 102-8 at 2]; upon his return from the SHU Defendant Terry placed him in a portion of the unit reserved for convicted medium and high security inmates [Pl.'s Dep. at 180-81]; Defendant Johnson refused to put Plaintiff's legal mail in the mailbox while Plaintiff was on lockdown because of his lawsuit [Doc. 102-10; Pl.'s Dep. at 132-33]; and Plaintiff's cell was ransacked [Pl.'s Dep. at 136-39].

claim form that BOP staff started providing Plaintiff with BP forms when he asked. (Pl.'s Dep. at 48).

b. More Facts From The Record

During discovery, Plaintiff also acquired more evidence to demonstrate that USP-Atlanta's ARP were not available to him. First, contrary to Defendant's assertions, Plaintiff testified that he only signed the form acknowledging that he received the Handbook during intake back in 2015 because Defendant Terry told Plaintiff to do so, and she informed him that he would receive the Handbook once he arrived in his unit; however, Plaintiff never did receive the Handbook. (Pl.'s Dep. at 16-21, 37). In fact, Plaintiff testified that pretrial detainees as a whole did not receive the Handbook during his time at USP-Atlanta. (*Id.* at 37). And although Defendants indicate that Plaintiff filed his first administrative remedy request on March 22, 2018, Plaintiff submitted requests before that time which were never filed. (*See, e.g.,* Doc. 1 at 27 – BP-9 dated January 22, 2018).

Two documents — P.S. 1330.18 and USP-Atlanta's Institutional Supplement — establish how officials should catalogue administrative grievance forms, that is, upon receiving a request or appeal the administrative remedy clerk must stamp the form with the date received, log it into the SENTRY[13] index as received on that date, and write the "Remedy ID"

[13] SENTRY is the BOP's computer system which, *inter alia*, contains applications for processing inmate information, including tracking information of administrative remedies for inmates. (Allison-Armstrong Decl. ¶¶3-4).

as assigned by SENTRY on the form. (Doc. 102-6 at 9). Likewise, the USP-Atlanta Institutional Supplement requires a counselor to date and initial when the BP-9 is forwarded to the administrative remedy clerk, who must log the administrative remedy within forty-eight hours of receipt. (Doc. 102-2 at 3-4). P.S. 1330.18 and the Institutional Supplement tasks unit teams with retrieving, printing, and delivering administrative remedy notices generated from the SENTRY system on a daily basis. (Doc. 102-2 at 2; Doc. 102-6 at 4). These notices were the primary means by which an inmate could discern whether his remedy had been rejected and the reason therefor.

Although Defendant Terry was the correctional counselor for Plaintiff's unit from the time Plaintiff arrived until her retirement in May 2017, and thus was his primary contact on the unit team (which was in charge of administering the ARP for the unit), Terry was never trained — other than "on the job" training - with regard to the administrative remedies. (Terry Dep. at 5, 7-8, 12-13; Doc. 102-2 at 3). Additionally, correctional counselors were not provided with P.S. 1330.18 or the operative USP-Atlanta Institutional Supplement — both of which set forth the ARP requirements — and instead had to seek out manuals and supplements on their own. (*Id.* at 14).

Defendant Terry also indicated that unit teams did not receive updates each time a new notice on SENTRY was ready for printing and delivery, and instead of retrieving, printing, and delivering administrative remedy notices daily as required, unit teams only periodically checked SENTRY to see if anything new appeared — usually only after an

inmate requested it. (Terry Dep. at 18-19). And the unit team had no way of tracking notices that were delivered to the inmates. (*Id.* at 30).

After Defendant Terry retired, Plaintiff's unit had no counselor for approximately eight or nine months. (Pl.'s Dep. at 48-50). During the time that there was no counselor on the unit, Plaintiff was forced to rely on correctional officers or other team members for any complaints or issues he may have had. But Defendants Johnson, Avery, and Willis — all of whom were correctional officers who rotated through Plaintiff's unit or the SHU during the relevant time — testified that they were never trained about, or received documents or manuals in connection with, the ARP, and all three were unfamiliar therewith. (Doc. 102-3 ("Johnson Dep.") at 9; Doc. 102-4 ("Willis Dep.") at 10; Doc. 102-5 ("Avery Dep.") at 15-17). As a result, it was not until the new correctional counselor arrived in early 2018 that Plaintiff finally received the appropriate grievance forms that were properly entered into the system. (Pl.'s Dep. at 48-50).

3. The Relevant Law Regarding Exhaustion

a. The Prison Litigation Reform Act ("PLRA")

Under the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner confined in any jail . . . until such administrative remedies as are available are exhausted." 42 U.S.C. §1997e(a). In other words, "a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to

bringing suit in federal court[,]" *Woodford v. Ngo*, 548 U.S. 81, 88, 93 (2006), by "'properly tak[ing] each step within the administrative process.'" *Bryant v. Rich*, 530 F.3d 1368, 1378 (11th Cir. 2008) (quoting *Johnson v. Meadows*, 418 F.3d 1152, 1158 (11th Cir. 2005)). "[I]t is the prison's requirements, and not the PLRA, that define the boundaries of proper exhaustion." *Jones v. Bock*, 549 U.S. 199, 218 (2007). Thus, "[t]o exhaust remedies, a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." *Johnson*, 418 F.3d at 1158 (internal quotation marks omitted) (alteration in original). Exhaustion is mandatory, and courts do not have the discretion to waive it. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

b. The Eleventh Circuit's Two-Step Determination

In *Turner v. Burnside,* 541 F.3d 1077 (11th Cir. 2008), the Eleventh Circuit set forth the following two-step process that courts should follow in deciding a motion to dismiss for lack of exhaustion. First, the Court must look at the factual allegations in the motion to dismiss, compare them with those facts in the plaintiff's response, and if they conflict, the Court must take Plaintiff's facts as true. *Turner*, 541 F.3d at 1082. "If, in that light, the defendant is entitled to have the complaint dismissed for failure to exhaust administrative remedies, it must be dismissed." *Id.*

Defendants bear the burden of proving that the plaintiff has failed to exhaust his *available* remedies, which includes showing that a remedy is generally available — *i.e.,* that an administrative remedy exists. *Turner*, 541 F.3d at 1082; *Wright v. Ga. Dep't of Corr.*,

820 F. App'x 841, 845. Thus, at *Turner*'s first step, Defendants must show that the administrative remedies were generally available, and that Plaintiff did not exhaust those administrative remedies before filing his complaint. *See Turner*, 541 F.3d at 1082; *Wright*, 820 F. App'x at 845; *Goebert v. Lee Cnty.*, 510 F.3d 1312, 1324 (11th Cir. 2007). If Defendants meet that burden, the burden then shifts to Plaintiff to show that the grievance procedure was "subjectively" or "objectively" unavailable to him. *See Geter v. Baldwin State Prison*, 974 F.3d 1348, 1356 (11th Cir. 2020). *See also Turner*, 541 F.3d at 1084 ("In response, the plaintiff may defeat the failure-to-exhaust argument by showing that the general remedy was effectively unavailable to him.").

The Supreme Court has set forth three circumstances in which administrative remedies are not available, that is, when: (1) regardless of what the regulations and guidance may promise, the administrative process operates as a dead end, with officers unable or consistently unwilling to provide any relief to grieved inmates; (2) the administrative process is so opaque that it becomes, practically speaking, incapable of use; and/or (3) prison administrators thwart prisoners from taking advantage of the grievance process through machination, misrepresentations, or intimidation. *Ross v. Blake*, __ U.S. __, 136 S. Ct. 1850, 1859 (2016); *Wright*, 820 F. App'x at 843. "Remedies that rational inmates cannot be expected to use are not capable of accomplishing their purposes and so are not available." *Turner*, 541 F.3d at 1084. *See also Dimanche v. Brown*, 783 F.3d 1204, 1214 (11th Cir. 2015) ("The PLRA does not 'require[] an inmate to

grieve a breakdown in the grievance process."); *Whatley v. Warden, Ware State Prison*, 802 F.3d 1205, 1208 (11th Cir. 2015) ("[D]istrict courts may not find a lack of exhaustion by enforcing procedural bars that the prison declined to enforce."). And, in adhering to *Turner*'s first step, this Court must accept as true the inmate's facts regarding availability. *Goebert*, 510 F.3d at 1324.

If the complaint is not dismissed at the first step, then *Turner*'s second step requires the Court to make specific findings to resolve the factual issues related to exhaustion, and then, based on these findings, decide whether the prisoner has exhausted his available administrative remedies. *Id.* "A district court may properly consider facts outside of the pleadings to resolve a factual dispute regarding exhaustion where the factual dispute does not decide the merits and the parties have a sufficient opportunity to develop the record." *Singleton v. Dep't of Corr.*, 323 F. App'x 783, 785 (11th Cir. 2009) (per curiam) (citing *Bryant*, 530 F.3d at 1376).

c. Analysis

Under *Turner*'s first step, Defendants have, in fact, demonstrated that an ARP exists at USP-Atlanta; therefore, they have shown that there is an administrative procedure that is generally available. Defendants' facts also show that during intake, inmates receive a Handbook, which includes information about the ARP, including the requirements thereof. Finally, Defendants' evidence indicates that Plaintiff did not fully exhaust his administrative remedies as required by the ARP — by first attempting informal resolution with a BP-8, then

filing a BP-9 with the Warden, filing a BP-10 appeal to the Regional Office, and finally filing a BP-11 appeal to the Central Office regarding all of his claims. Defendants have satisfied their burden as to the first *Turner* step, and now the Court must determine whether, accepting Plaintiff's facts as true, he has met his burden of demonstrating that the ARP was unavailable to him. The undersigned finds that Plaintiff has done so.

Indeed, Plaintiff's facts — which this Court must assume to be true — indicate that: he never received the Handbook containing the particulars of the APR; he was refused grievance forms or those forms were not turned in; he often did not receive any responses to his grievances or he received denials after the deadline for appeal, so that he could not correct the technical errors on which the denials were based; the counselor and officers upon whom Plaintiff was to rely to provide him with forms and/or forward his remedy requests to the proper parties were not trained in connection with the ARP and were not familiar with the ARP's requirements; and when Plaintiff did attempt to file remedy requests he was assaulted, placed in the SHU, placed in shackles, his cell ransacked, and threatened and intimidated. Taking Plaintiff's facts to be true, under the first step of *Turner* Defendants are not entitled to dismissal for Plaintiff's failure to exhaust.

Turning to *Turner*'s second step, the only disputed fact is whether or when Plaintiff received a handbook and knew about the ARP; all of Plaintiff's other facts remain uncontradicted. Indeed, Defendants have provided no evidence to contradict Plaintiff's facts that

BOP staff either refused to provide him with BP-9 forms or did not turn those forms in for him, if his BP-9 forms actually were turned in and his remedy rejected for purely technical reasons staff did not give him a copy of those rejections or delayed providing him with any such copy until it was too late for him to rectify the alleged technical problems, and he was threatened, assaulted, or sent to the SHU as a result of his complaints. To be sure, even if, as Defendants argue, Plaintiff had received the Handbook and had any such "working knowledge" of the requirements of the ARP, any such knowledge apparently would not have mattered.

As a result, the Court finds that Plaintiff has, in fact, demonstrated two out of the three circumstances which the Supreme Court in *Ross* indicated rendered the administrative process unavailable — *i.e,*. that the administrative process operated as a dead end, with officers unable or consistently unwilling to provide any relief to Plaintiff, and/or that prison administrators thwarted Plaintiff from taking advantage of the grievance process through machination, misrepresentations, or intimidation. Thus, Defendants' motion to dismiss for Plaintiff's lack of exhaustion should be denied. *See, e.g., Ross*, 136 S. Ct. at 1862 (finding, *inter alia*, that if there is "persuasive evidence that Maryland officials thwarted the effective invocation of the administrative process through threats, game-playing, or misrepresentations, either on a system-wide basis or in the individual case" the court should find that the plaintiff's suit should proceed even though he did not file an ARP complaint); *Presley v. Scott*, 679 F. App'x 910, 912 (11th Cir. 2017) (finding plaintiff not

required to exhaust because "[w]e cannot condone defendants limiting access to a procedure and then protecting themselves from a suit by alleging the prisoner failed to use that specific procedure."); *Brown v. Drew*, 452 F. App'x 906, 908 (11th Cir. 2012) (finding the plaintiff was excused from the exhaustion requirements since "the administrative process was rendered unavailable to Brown because the delay in delivering the response from the Regional Office to Brown prevented him from being able to timely resubmit his appeal to the Regional Office as required.").

Defendants cite to the Eleventh Circuit decisions in *Abram v. Leu*, 848 F. App'x 868 (11th Cir. 2021) and *Bryant*, *supra*, in support of their argument that Plaintiff's remedies were not unavailable because Plaintiff could have requested to file an untimely grievance under the ARP — even after he was transferred — if he demonstrated a "valid reason" for the delay. (Doc. 104 at 6-7). In *Bryant*, the Eleventh Circuit affirmed the district court's conclusion that both plaintiffs had failed to demonstrate that the administrative remedies were unavailable to them even though prison officials failed to provide them with grievance forms. *Bryant*, 530 F.3d at 1372-79. Specifically, because Georgia's grievance system allowed the plaintiffs to file untimely remedy requests if they showed good cause, and because they did not attempt to do so, the Eleventh Circuit found that they had not exhausted their administrative remedies. *Bryant*, 530 F.3d at 1372-79.

The plaintiff in *Abram* also argued that the ARP was unavailable because prison officials refused to

provide him with grievance forms. *Abram*, 848 F. App'x at 869. The Eleventh Circuit found that: *Bryant* governed the case; the ARP was similar to Georgia's administrative remedy program in that it allowed prisoners to file an untimely grievance for a "valid reason;" and because the plaintiff had not attempted to do so he failed to demonstrate that he had exhausted his administrative remedies. *Id.* at 871-72.

Defendants' reliance on *Bryant* and *Abram*, however, is misplaced. Indeed, in both cases the refusal to provide the plaintiff with the necessary forms was the only obstacle to the plaintiff's ability to file a grievance, and was temporary. *See Abram*, 848 F. App'x at 871 ("In *Bryant v. Rich*, however, we indicated that temporary obstacles that prevent the submission of a timely grievance — such as a lockdown, a transfer, or a refusal by prison officials to provide the necessary forms — do not make administrative remedies unavailable where prisoners may 'request consideration of untimely grievances for good cause.'") (quoting *Bryant*, 530 F.3d at 1373). Unlike those cases, however, the Court agrees with Plaintiff that the facts here constitute far more than one instance of being refused the necessary forms amounting to a temporary obstacle to Plaintiff exhausting his administrative remedies. Instead, Plaintiff has shown that the obstacles were constant and pervasive, and certainly would deter a reasonable inmate from resubmitting any furrther grievances and appeals. As a result, Plaintiff's case is distinguishable from both *Bryant* and *Abram*, and instead clearly falls within two out of the three circumstances that the Supreme Court found rendered the administrative process unavailable in *Ross*. *See, e.g., Geter*, 974 F.3d

at 1353, 1357-58 (holding plaintiff's allegations sufficient to raise the issue of unavailability of the administrative remedies where he stated, and the record contained evidence to support that a particular prison official falsely represented to him that she was the grievance coordinator and asked plaintiff to turn over his papers for her to complete, she negligently filled out the form, and the form was rejected on procedural grounds); *Blevins v. FCI Hazelton Warden*, 819 F. App'x 853, 859 (11th Cir. 2020) (reversing and remanding dismissal for lack of exhaustion to resolve facts under *Turner*'s second step because plaintiff's allegations could encompass all three *Ross* circumstances of unavailability: her appeal was rejected as illegible even though it was legible, and her only option was to file the same appeal over and over to the same regional director; the disciplinary hearing officer refused to provide her with the necessary materials to appeal her disciplinary sanctions; prison officials stopped inmates' mail when inmates tried to appeal; and the assistant warden suddenly changed the mail rules and otherwise used her power to prevent the plaintiff from sending her appeal to the Regional Director). Accordingly, Defendant's motion to dismiss should be denied.

III. Conclusion

For the foregoing reasons,

IT IS THEREFORE RECOMMENDED that Defendants' renewed motion to dismiss [Doc. 100] be DENIED.

IT IS SO RECOMMENDED this 24th day of June, 2021.

[handwritten signature]
JUSTIN S. ANAND
UNITED STATES MAGISTRATE JUDGE

Appendix F

Relevant Constitutional Provisions

U.S. Const. amend. V

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

U.S. Const. amend. VIII

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