UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6709

GENUINE TRUTH BANNER,

Plaintiff - Appellant,

v.

MR. TISDALE, Associate Warden Lee Correctional in official and individual capacities; LIEUTENANT BURLEY; MRS. TUCKER, Contraband Lee Correctional Institution in official and individual capacities; OFFICER MCKISSACK; BRANDEN DAVIS; VERNON ADAMS, Sergeant,

Defendants - Appellees.

Appeal from the United States District Court for the District of South Carolina, at Greenville. Joseph Dawson, III, District Judge. (6:21-cv-03456-JD)

Submitted: May 21, 2024 Decided: May 23, 2024

Before WYNN and BENJAMIN, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Genuine Truth Banner, Appellant Pro Se. David Cornwell Holler, SMITH ROBINSON HOLLER DUBOSE & MORGAN, LLC, Sumter, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

Appendix A

PER CURIAM:

Genuine Truth Banner appeals the district court's order adopting the magistrate judge's recommendation to grant Defendants summary judgment on Banner's 42 U.S.C. § 1983 excessive force and state law assault and negligence claims. We have reviewed the record and find no reversible error. Accordingly, we affirm the district court's order. *Banner v. Tisdale*, No. 6:21-cv-03456-JD (D.S.C. June 23, 2023). We deny Banner's motion for default judgment and deny as moot Banner's motion asking us to compel completion of his trust account statement, which has been filed. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: May 23, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6709
(6:21-cv-03456-JD)

GENUINE TRUTH BANNER

Plaintiff - Appellant

v.

MR. TISDALE, Associate Warden Lee Correctional in official and individual capacities; LIEUTENANT BURLEY; MRS. TUCKER, Contraband Lee Correctional Institution in official and individual capacities; OFFICER MCKISSACK; BRANDEN DAVIS; VERNON ADAMS, Sergeant

Defendants - Appellees

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ NWAMAKA ANOWI, CLERK

FILED: June 21, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-6709
(6:21-cv-03456-JD)

GENUINE TRUTH BANNER

Plaintiff - Appellant

v.

MR. TISDALE, Associate Warden Lee Correctional in official and individual capacities; LIEUTENANT BURLEY; MRS. TUCKER, Contraband Lee Correctional Institution in official and individual capacities; OFFICER MCKISSACK; BRANDEN DAVIS; VERNON ADAMS, Sergeant

Defendants - Appellees

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

Appendix B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Genuine Truth Banner
Petitioner
v.
Mrs Trsdale, et al
Defendants

No. 23-6709
C/A No. 6:21-CV-03456-JD-KFM
Motion to Reinstate Appeal or Otherwise Vacate final Order

July 9th, 2024

Petitioner submits that the defendants have committed fraud on the courts by intentionally misleading the courts to believe that Petitioner failed to exhaust his administrative remedies, though they knew and had access to information proving their claims regarding exhaustion as false.

Specifically, the defendants used the affidavit of Felecia McKie, [Ex. A], [ECF 168-2, pg 9, #23] to mislead the courts into thinking that Petitioner only ever filed an RTSM to General Counsel on November 3rd, 2020 reporting the incident described. Mrs. McKie then argued that the November 3rd 2020 RTSM was untimely (as the incident described occurred on April 2nd, 2020) and therefore Petitioner "failed to exhaust his administrative remedies."

However, Petitioner now presents never before considered and newly discovered evidence proving his contention that he in fact filed an RTSM on April 2nd 2020 reporting the incident to Jana Hollis (the deputy warden) which she claimed to have forwarded to police services, now known as the Office of Intelligence and Investigations (OII), [Ex. B]. Hollis claims to have never received a response from police services, which would explain Petitioner's contention that she never answered or returned his RTSM.

This evidence proves Petitioner's claims regarding exhaustion as true and was only received on July 3rd, 2024. It also proves the defendants claims regarding exhaustion as patently false and intentionally misleading. Petitioner submits that this evidence, [Ex. B] stands as express proof of MANIFEST INJUSTICE where courts were fraudulently led to believe that Petitioner failed to exhaust administrative remedies and did dismiss the case on those grounds. [Ex. B] further shows that the defendants knew and/or had direct access to the knowledge that their statements to the courts were false and/or misleading and yet made them anyway. For these reasons, Petitioner respectfully requests the appeal be reinstated or the final order be otherwise vacated.

A copy of this motion, exhibits, declaration and affidavit has been served on the following by depositing the same into the institutional mail, for delivery into the U.S. mail, postage prepaid:

U.S. Court of Appeals
4th Circuit
1100 E. Main St., Suite 501
Richmond, VA 23219

U.S. District Court
250 E. North St.
Greenville, SC 29601

David C. Holler
Attorney for Defendants
P.O. Box 580
Sumter, SC 29151-0580

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Genuine Truth Banner,
Petitioner
v
Mr. Trsdale, et al
Defendants

No. 23-6709
CIA No. 6:21-CV-03456-JD-KFM
Affidavit of Genuine Truth Banner

July 9th, 2024

I declare under penalty of perjury that:

1. I am of sound mind, over the age of 18 and am competent to testify in the matters herein.
2. On April 2nd, 2020, I reported being physically assaulted by various officers to Jana Hollis via RTSM.
3. Hollis never responded to that RTSM, claiming she forwarded it to police services.
4. During litigation of this case, I made multiple attempts to obtain proof of my April 2nd, 2020 filed RTSM reporting the physical assault via affidavits or otherwise but various staff refused to participate and I was denied the request to depose various staff who may have potentially been privy to this information.
5. On July 3rd, 2024, I finally obtained proof of my filing of an April 2nd, 2020 RTSM reporting the physical assault to Hollis, and therefore, proof that I did not fail to exhaust my administrative remedies.
6. In the July 3rd, 2024 dated document, when asked about the April 2nd, 2020 dated RTSM that she claimed to have forwarded to police services, Hollis responded: "I never received a response back".
7. The July 3rd, 2024 dated document is authentic and had I previously had this document, I would have presented it to the courts at my earliest convenience.

Further affiant sayeth not.

7.9.24
Genuine Truth Banner

9 July, 2024
Michelberger Notary Public
Exp 8/30/2026

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Genuine Truth Banner,
Petitioner
v.
Mr. Tisdale, et al
Defendants

No. 23-6709
C/A No. 6:21-CV-03456-JD-KFM
Declaration of Genuine Truth Banner

July 3rd, 2024

Genuine Truth Banner hereby declares:

On April 2nd, 2020, I was physically assaulted by various officers at Lee Correctional and reported the incident via RTSM to Jana Hollis (the deputy warden) on the very same day (4.2.20). Hollis never responded to or returned that RTSM, later claiming that she forwarded that RTSM to police services (now known as the Office of Intelligence and Investigations (OII)). After months of no answer to my RTSM to Hollis, on November 3rd, 2020, I filed an RTSM to General Counsel reporting the assault. No one answered or returned any RTSM on the issue though an ANSWERED RTSM is a requirement of proper exhaustion of administrative remedies.

After filing the above captioned case, I attempted to obtain proof of my claim that I timely filed an RTSM reporting the physical assault via affidavits or otherwise but various staff refused to participate, or in the case of depositions, I was denied the opportunity by the court.

On July 3rd, 2024, I finally obtained proof of my filing of an April 2nd, 2020 RTSM reporting the physical assault to Jana Hollis. It shows that she did receive that April 2nd, 2020 RTSM and that she did forward it to police services (OII) but that she "never received a response back from police services (OII). This evidence and information has never been presented to the court as it was only received by me on July 3rd, 2024. That said, it patently shows that I did NOT fail to exhaust my administrative remedies and was instead prevented from exhausting.

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 3rd, 2024, at: BRSF, Saluda #218-B, 4460 Broad River Rd, Columbia, SC 29210.

Genuine Truth Banner

Ex. A1

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA

Genuine Truth Banner, Case No. 6:21-cv-03456-JD-KFM

v.

Mr. Tisdale, Brandon Davis,
Lt. Burley, Mrs. Tucker,
Officer McKissack and Adams

AFFIDAVIT OF FELECIA MCKIE

Personally appearing before me, Felecia McKie, who first being duly sworn, deposes and says:

1. I am of sound mind and over eighteen years of age.

2. I, Felecia McKie, serve as Chief of SCDC's Inmate Grievance Branch and have been employed here for nine (9) years. My duties include overseeing and monitoring the inmate grievance process at all facilities. I have read Plaintiff's complaint [ECF 1], and I am familiar with the allegations therein.

3. At all times described in the Complaint [ECF 1], Genuine Banner was lawfully confined in the South Carolina Department of Corrections and was assigned inmate #375165.

4. Every inmate entering the South Carolina Department of Corrections is instructed and oriented to the grievance process by oral explanation during Inmate Orientation, which includes using the mandatory Inmate Grievance System and the request to staff member ("RTSM") and automated request to staff member ("ARTSM" or "kiosk") system (collectively referred to as the "grievance system"). Each time an inmate is transferred from one correctional

Ex. A2

facility to another, inmates are again advised of the mandatory grievance process. SCDC Policy/Procedure GA-01.12, ' 2.1 and 2.2, or exhibit A. "The grievance system is available to all inmates, regardless of custody level, classification, disciplinary status, disability, non-English speaking status, or illiteracy.@ SCDC Policy/Procedure GA-01.12, ' 1.3.

5. SCDC"s Inmate Grievance System policy [GA-01.12] is available for review by every inmate in SCDC custody, through the assistance of library staff. All non-restricted policies are available to inmates for review.

6. SCDC has an established inmate grievance procedure that allows inmates to seek formal review of complaints related to their conditions of confinement, disciplinary concerns, medical concerns, classification concerns, etc., as well as provides a vehicle for internal solutions at the level having most contact with inmates and allows for management to review decisions and policies /procedures that may be a source for complaint.

7. Inmate grievances are not arbitrarily destroyed nor discarded, rather, inmate records are managed according to an established and authorized Records Retention Schedule. For Step 1 and Step 2 Grievances, original copies are kept for seven (7) years after an inmate's release. Written grievances are collected on business days by a specific person (the Designee) designated by the Warden. SCDC Policy/Procedure GA-01.12, ' 13.3 (exhibit A). To maintain the autonomy of the grievance process, the Designee works for the Warden but is not employed within the grievance department. Id. Each business day, the Designee is required to deliver all written grievances to an Institutional Inmate Grievance Coordinator (IGC), a non-uniformed employee at each SCDC institution. SCDC Policy/Procedure GA-01.12, ' 5.1. It is the IGC's responsibility to make certain that all inmates at that institution have access to the grievance

Ex. A3

procedure regardless of any disciplinary, classification, disability, or other administrative decision concerning them. Id.

8. Since 2014, SCDC has utilized a kiosk system (automated request to staff member or "ARTSM") to improve/facilitate communication between inmates and staff members, in addition to written Requests to Staff Members (RTSM), thereby reducing potential misunderstandings and allowing for the exchange of information. The purpose of ARTSM/RTSM is as follows: 1) serve as inmate's attempt at an informal resolution pursuant to the grievance policy; 2) available to address non-grievable issues; and 3) cover basic complaints, i.e. legal materials, cold food, law books, getting questions answered B max out date, etc. Proper and effective communication between inmates and staff is essential to the safe, secure, and orderly operation of facilities. Inmates and staff are jointly responsible for ensuring communication methods are appropriate to properly and effectively convey intended information and ideas to others. SCDC Policy GA-06.04 (exhibit B).

9. Pursuant to SCDC's Grievance Policy, GA-01.12, inmates must first make an effort to resolve grievances informally by utilizing written RTSM or electronically [ARTSM – Kiosk] and then submitting to a staff member responsible for that particular area within eight (8) working days. For example, if an inmate wants to complain about food, he will submit his request to Food Services and not to Classification, Security, or Law Library as those departments are not responsible for food served to inmates and would therefore have no impact regarding food. The timeframe enacted by SCDC for written/electronic requests is important to ensure issues are addressed as soon as possible and changes/solutions can be implemented immediately, if applicable. By utilizing kiosks, inmates themselves *control to which department their kiosk*

Ex. A4

request is submitted. Once submitted through the electronic kiosk system, no staff member may thereafter interfere, erase, destroy, stop, delay, or otherwise intercept a kiosk submission. SCDC Policy/Procedure GA-06.04, ' 1.4 (X B).

10. Not every SCDC employee has access to the ARTSM system. Only designated employees, approved by the appropriate Warden, Division Director (or his/her designee) and General Counsel (or his/her designee) will have access to the ARTSM system. SCDC Policy/Procedure GA-06.04, ' 3.8. Therefore, front line employees/officers do not have access to the ARTSM system.

11. Regardless of the of the contents of any grievances submitted by Banner, every grievance retrieved by the Designee would have been stamped with the date of receipt, assigned a grievance reference number, and entered or recorded into a logbook maintained in a confidential area by the Designee within an Administrative secured area. SCDC utilizes a grievance system promulgated to ensure a confidential and independent process. All grievances are numbered and entered into the automated system (regardless of whether the issue is grievable or non-grievable) within three (3) working days by the Designee or Designee backup, designated by the Warden (not the IGC). SCDC Policy/Procedure GA-01.12, ' 13.3. Employees assigned to this role must receive select approval to be granted access to this portion of the Inmate Grievance System access screens. After every grievance has been entered into the automated grievance system and assigned a grievance number, the IGC will initiate a review to determine proper coding of the grievance and to determine if the grievance is to be elevated to full investigation status which would include, but not limited to, talking with the appropriate staff and/or inmate(s) and reviewing documents and/or reports. If elevated beyond review status, the IGC will compose

Ex. A5

a written recommendation to the Warden concerning disposition of the matter. All recommendations may be monitored, reviewed and/or modified by Inmate Grievance Administrators or Branch Chief to ensure recommendations reflect supporting documentation and comply with all processes and/or procedures prior to presenting to the institution Warden for Step 1 Grievance approval.

12. The SCDC grievance process is autonomous and separate from the day-to-day operations of the correctional facility. Grievances are confidential and maintained in secured Grievance offices. SCDC Policy/Procedure GA-01.12, ' 4 (exhibit A). "No inmate may be punished for filing a request to staff or grievance regardless of the subject matter." See exhibit A, SCDC Policy/Procedure GA-01.12, ' 3. Emergency grievances are addressed in § 14.

13. "No inmate will be subjected to reprisal, retaliation, harassment, or disciplinary action for filing a grievance or participating in the resolution of a grievance." See exhibit A, SCDC Policy/Procedure GA-01.12,' 3. "Grievance forms and accompanying documents will be treated as confidential." SCDC Policy/Procedure GA-01.12,' 4.1. "No employee involved or addressed in a grievance will be assigned to conduct any investigation regarding the same." SCDC Policy/Procedure GA-01.12, '13.3. "No inmate or employee (other than those specified in this policy/procedure) will be given a copy of a grievance." SCDC Policy/Procedure GA-01.12, ' 13.2. "Statements made by, or information received from, a grievant or other affected inmate relating to a grievance will not be used to initiate internal disciplinary action against an inmate(s), (unless the inmate has written a direct threat to an employee)." SCDC Policy/Procedure GA-01.12, ' 4.1.

Ex. A6

14. In cases where Informal Resolution is not required, an inmate must file their grievance within five (5) working days of the alleged incident, the time frame set forth in the grievance policy. "If informal resolution is not possible, the grievant will complete Form 10-5, Step 1, which is located in common areas, i.e., living areas, libraries, etc. and will place the form in a designated grievance drop box within five (5) working days of the alleged incident." SCDC Policy/Procedure GA-01.12, ' 13.2. Inmates can even request Step 1 grievance forms through the kiosk system (to the Grievance department). Inmate Grievance Coordinators at the institutions will either deliver the Step 1 grievance forms or place the forms in the mail to the inmate. An example of an informal resolution deemed "not possible" would include when a matter involves allegations of criminal activity. Therefore, if an inmate believes an informal resolution is 'not possible', the inmate may then explain why an informal resolution is 'not possible' within a grievance that is filed. Note, inmates utilizing the automated kiosk system (ARTSM) or written request to staff member (RTSM) procedure, personally designate the recipient of the request, which may include someone outside the individual(s) for whom the inmate may have concerns. Whomever receives the ARTSM or RTSM must review the content of the request to determine where the request is best suited to be answered by the appropriate staff.

15. According to records, Banner entered SCDC around January 2018 and has been assigned to only two (2) institutions, Kirkland, and Lee. Banner has two (2) signed orientation forms from both facilities. See exhibit C, signed orientation forms. Upon signing these orientation forms at each facility, Banner acknowledges he has been instructed and is knowledgeable of the mandatory Inmate Grievance System.

Ex. A-1

16. Note that medical/mental health and dental RTSM's must be in writing, in part due to personal privacy concerns of the inmate. Although ARTSM's may not be used to address medical, mental health, and dental concerns, opportunity exists to communicate concerns with staff, which could consequently be forwarded to the appropriate department for further review.

17. Since his incarceration, Banner has filed at least twelve (12) Step 1 Grievances and has used SCDC's kiosk (ARTSM) system/written RTSM's at least fifty (50) times. See exhibit D and E. Banner, as well as all other inmates, choose to whom (or which department) their kiosk requests/written requests are submitted. Additionally, for any medical/mental/dental health, Banner would have submitted those in written form. Banner has successfully utilized the ARTSM/RTSM and grievance system while incarcerated in SCDC. See exhibit D and E.

18. Banner asserts the following in his complaint: [ECF 1, p 7]

> On April 2, 2020...I was taken to lock-up, put into a strip cell, maced, stripped naked and then violently assaulted by three officers....one officer recorded the entire incident.....
> I informed "Police Services" Agent Horne of the incident before I was transported. When I arrived in maximum security I immediately wrote Deputy Warden Hollis, Wallace and police services here and never received an answered complaint back. I did inform the medical staff here and they arranged for me to have an MRI and multiple ear exams.

19. Pursuant to SCDC's Inmate Grievance System, "informing" Agent Horne (or verbally informing any other staff member) of the alleged incident is not part of SCDC's procedure for submitting a Step 1 Grievance. Step 1 Grievances must be in writing and all information must be placed on SCDC Form 10-5, "Inmate Grievance Form". Furthermore, the grievance must contain a brief statement of the circumstances of the grievance, to include the date and time, why the grievant believes s/he is entitled to relief, and a brief statement of the

Ex A8

action(s) requested for which relief may be available through the grievance procedure. According to Banner's grievance records, he has submitted two (2) Step 1 Grievances prior to his alleged incident, demonstrating his knowledge of SCDC's grievance system.

20. Under SCDC grievance system, Banner should have submitted his grievance within five (5) working days of his alleged incident, or by April 9, 2020. Since Banner was alleging staff misconduct/criminal activity, an attempt at informal resolution was not required. See Policy/Procedure GA-01.12, '13.2, or exhibit A.

21. Grievances alleging staff misconduct/criminal activity, no matter the length of time passed, may be forwarded to Police Services/OII for further review to determine if an investigation is warranted. For example, if an inmate submits a grievance alleging excessive use of force and/or criminal activity that happened in 2001, that grievance, while untimely, will be forwarded to designated review teams, which may include the OIG/OII/Police Services for further review/investigation. Untimely grievances alleging staff misconduct/criminal activity are still addressed appropriately.

22. On July 12, 2020, Banner submitted a written request to staff, to General Counsel, alleging that male officers are "homosexual" and receiving "sexual gratification" during strip searches and pat downs. See Exhibit e, kiosk 8054-8055. This indicates that Banner was provided with documents he requested (such as written request forms/paper/writing utensils), while assigned to Kirkland after April 2, 2020, and thus confirming he had access to both written requests and grievances. Furthermore, in this particular instance, Banner's action of submitting a written RTSM directed to General Counsel demonstrates an effort to circumvent the Informal Resolution and Inmate Grievance System processes and procedures by not complying with SCDC Policy GA-06.04 Request To Staff Member, which states, "The RTSM must be submitted

Ex. Aq

to the appropriate supervisor/staff withing eight (8) working days of the incident. **3.3** The responsible area will review the issue in the ARTSM/RTSM and determine if it can be handled at the institutional level or if it needs to be forwarded to the Head Quarters' Clearing House (HQCH). Complaints alleging criminal activity by an employee will be immediately forwarded to the Office of Investigations and Intelligence's (OII) HQCH..." Banner failed to inform institution staff of his allegation(s) as such.

23. On November 3, 2020, Banner submitted a written request to General Counsel department alleging the same facts in his complaint. As stated above in paragraph 9, inmates control the department they submit requests (both electronically and written). This request was untimely and therefore as more fully discussed throughout, Banner failed to exhaust his administrative remedies. This untimely written RTSM was submitted more than two hundred (200) days after his alleged incident, well outside the timeframe enacted by SCDC. Timeframes enacted by SCDC is extremely crucial in addressing issues.

24. Despite the fact his written request was untimely, Banner's request was processed because of his allegations of employee misconduct. All complaints, regardless of whether they are timely or not, alleging employee misconduct may be reviewed by designated teams, independent of the inmate grievance process. The fact that an inmate's untimely request is processed does not revive or reinstate the timeliness within the context of the grievance process. Solely based upon the nature of the complaint, here employee misconduct, Banner's request/complaint was processed.

25. As stated above in paragraphs 20-21, an informal attempt was not required due to Banner alleging staff misconduct/criminal activity. Banner submitted his request to SCDC's General Counsel, which was the incorrect department. Banner's untimely November 3, 2020,

Ex. A, 10

request was *still* forwarded to Police Services/OII/OIG due to his allegations. See exhibit e, kiosk 8056 and kiosk 8034.

26. According to his grievance records, on April 20, 2021, Banner submitted a grievance that was initially titled KCI-0221-21. This untimely grievance was forwarded to Lee Correctional and re-titled LeeCI-0267-21 due to his complaint regarding the Lee staff. Banner's untimely grievance was submitted more than three hundred sixty-five (365) days after his alleged incident that is the subject of his complaint, well outside the timeframe allowed under the grievance process. Pursuant to SCDC's Inmate Grievance System, Banner should have filed his grievance within five (5) working days of his alleged incident, or by April 9, 2020. Or at the latest within eight (8) working days, or by April 14, 2020, pursuant to SCDC GA-01.12, § 13.2. See exhibit F, physical grievance LeeCI-0267-21. Note, grievance filing timeframes are extended when an inmate has been transferred to a different institution to take into consideration mail transfer time, thus, extending the time to receive an appeal with the originating institution. Again, Banner's grievance was untimely, and therefore he concomitantly failed to exhaust his administrative remedies. As stated above, untimely grievances alleging staff misconduct/criminal activity are forwarded to, but not limited to, Police Services/OII/OIG for review and/or investigation, no matter the length of time that has passed since the alleged activity occurred.

27. According to other documentation, Banner acknowledges he did not submit a grievance until more than a year later after the alleged incident. See Banner's response to Interrogatory #9, Banner's complaint ECF 1, p. 9-10, and his deposition p. 73, l. 8-20, found at exhibit G.

Ex. A11

28. Banner filed this lawsuit on October 21, 2021, raising issues for which he failed to exhaust his administrative remedies.

29. Banner's grievance LeeCI – 0267-21 was forwarded to Office of Investigations and Intelligence ("OII" or otherwise known as Police Services) for a formal review/investigation. An investigation of the alleged assault still occurred even though Banner's grievance was untimely by more than one year. Grievances forwarded to OII will be held in abeyance *until the investigation is completed*. See GA-01.12, § 15.

30. According to SCDC documentation, Banner's disciplinary history indicates his participation of unacceptable behavior and actions as an inmate. Inmates are expected to follow the policies and procedures of SCDC. Banner has a history of participating in rule breaking behavior resulting in sanctions levied against him. During Banner's short time at SCDC, Banner has several administrative convictions to include striking an employee with/without a weapon; inciting/creating a disturbance; refusing or failing to obey orders and; assault and battery of an employee, with intent to injure/kill, all between April 2019 and 2020. See exhibit H, public details. Furthermore, Banner has demonstrated understanding of the Inmate Grievance System policies and procedures. Pursuant to SCDC Policy OP-22.14 Inmate Disciplinary System, at the conclusion of each Disciplinary Hearing conviction, inmates are informed of their right to file an appeal through the Inmate Grievance System, offering access to Inmate Grievance Forms. Records indicate Banner appropriately utilized the Inmate Grievance System by filing a Disciplinary appeal within the proper timeframe.

31. Based upon information available in this case, including his grievances and Banner's own admissions in his complaint, his interrogatories, and his deposition, as well as SCDC records, Banner failed to exhaust his administrative remedies for the matters asserted in

Ex. A12

his complaint [ECF 1-1] as required by SCDC's grievance policies and the Prisoners' Litigation Reform Act.

Further your Affiant saith not.

Felecia McKie

Sworn to before me this the 12th
day of October, 2022.
Elizabeth Mackey Tidwell (L.S)
NOTARY PUBLIC FOR SOUTH
CAROLINA MY COMMISSION
EXPIRES: 4-29-2031

Ex. B

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
REQUEST TO STAFF MEMBER

TO: STAFF NAME:	STAFF TITLE:	DATE:
Jana Hollis	MSU/SSR Deputy Warden	May 29th, 2024
INMATE NAME: Genuine Truth Banner		**SCDC #:** 375165
INSTITUTION: BRSF	**DORM/SIDE/BED:** Saluda #218	**HOUSING TYPE:** ☐ RHU ☐ R&E ☐ INFIRMARY ☑ SSR ☐ DEATH ROW ☐ ASSISTED LIVING UNIT (ALU) ☐ N/A

REASON FOR PAPER REQUEST: ☐ PREA ☐ MEDICAL ☐ MENTAL HEALTH ☐ DENTAL ☐ MEDICAL COPAY ☐ MEDICAL RECORDS ☐ KIOSK INACCESSIBLE (EXPLAIN): _____

YOU MUST USE THE KIOSK IF YOUR PAPER REQUEST DOES NOT MEET ANY OF THE CRITERIA ABOVE.

Hi,

On April 2nd, 2020 I sent you an RTSM reporting officers at Lee Correctional having assaulted me just prior to my Move to SSR. I know you said you were sending it to police services/OII and were waiting on a response but I have never heard back. If they gave you a response, could you please provide me a copy of that documentation?

Thanks!

DISPOSITION BY STAFF MEMBER:

I never received a response back from Police Services.

DATE: 7.3.24 **STAFF SIGNATURE:** [signature]

SCDC FORM 19-11 (REV.JULY 2020)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Genuine Truth Banner, Plaintiff, vs. Mr. Tisdale, Branden Davis, Lt. Burley, Mrs. Tucker, Officer McKissack, and Sgt. Vernon Adams, Defendants.	Case No.: 6:21-cv-03456-JD-KFM **OPINION & ORDER**

This matter is before the Court with the Report and Recommendation of United States Magistrate Kevin F. McDonald ("Report and Recommendation" or "Report") (DE 197), made in accordance with 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2)(d) of the District of South Carolina.[1] Plaintiff Genuine Truth Banner ("Banner" or "Plaintiff"), proceeding *pro se*, filed this Complaint seeking relief pursuant to 42 U.S.C. § 1983 for alleged excessive use of force on April 2, 2020, while he was housed at Lee Correctional Institution ("Lee") in the custody of the South Carolina Department of Corrections ("SCDC"). (DE 1.) In addition, Plaintiff has alleged an assault and negligence State law claims.

On October 12, 2022, Defendants Mr. Tisdale ("Tisdale"), Branden Davis ("Davis"), Lt. Burley ("Burley"), Mrs. Tucker ("Tucker"), Officer McKissack ("McKissack"), and Sgt. Vernon Adams ("Adams") (collectively "Defendants"), filed their Motion for Summary Judgment (DE

[1] The recommendation has no presumptive weight, and the responsibility for making a final determination remains with the United States District Court. See Mathews v. Weber, 423 U.S. 261, 270-71 (1976). The Court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The Court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

167). This Court issued an Order pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), which advised Plaintiff of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately to Defendants' motion. (DE 169.) Plaintiff filed his Response in opposition to the Motion for Summary Judgment on November 14, 2022. (DE 183.)

On April 13, 2023, the Magistrate Judge issued the Report (DE 197), recommending Defendants' Motion for Summary Judgement (DE 167) be granted based upon Plaintiff's failure to properly exhaust his administrative remedies and that this Court should decline to exercise supplemental jurisdiction over Plaintiff's State law claims, among other matters.[2] For the reasons stated below, the Court adopts the Report as to its recommendations regarding Plaintiff's failure to exhaust administrative remedies and supplemental jurisdiction.

BACKGROUND

The Report sets forth the relevant facts and legal standards, which this Court incorporates herein without a full recitation. However, as a brief background relating to the objections raised by Banner, the Court provides this summary.

Banner testified that, after an assault on SCDC employee Lt. Bethea on April 2, 2020, he and several other inmates were suspected of being the persons who stabbed Lt. Bethea.[3] (DE 167-2, p. 11.) Banner testified that Defendant Associate Warden Tisdale questioned him outside the door of the F1 B side dorm, and then Tisdale directed officers "take [the plaintiff] to lock up, put

[2] The Report alternatively recommends disposition on the merits regarding several claims and defenses by the parties. However, the Court declines to reach these matters given the Court's decision herein.

[3] Plaintiff was charged with attempted murder following the attack on Lt. Bethea, and a jury found him not guilty in October 2021. (DE 167-2, pp 7-8.)

him in a strip cell and deal with him." (Id. at 11-1.) Banner also alleges that McKissick and another officer he did not know stood him up and walked him in a "peaceful . . . sort of transition" toward the administrative building. (Id. at 15-16.) Banner further testified that, prior to being taken from the F1 dorm to the Restrictive Housing Unit ("RHU"), all of his clothes were removed except his boxers and socks. (DE 167-2, pp. 22-23.) After he was placed in an individual RHU cell, he testified that officers patted him down and took his socks. (Id. at 27.) Banner claims that at that point McKissick was outside the door of the cell, and Davis told him, "Hey, I need your boxers" and that Davis told him there was blood on the boxers. (Id.) Banner claims he and Davis proceeded to argue back and forth and that he refused to give Davis his boxers. (Id. at 28.) Banner testified, "I took my boxers off, and I'll admit, to really just kind of spite him, instead of just giving them to him, I flushed them down the toilet." (Id. at 29.) Banner claims that Davis then "opened the food flap to the door, he grabbed his mace, he reached in and he put his hand through the food flap and maced me." (Id.)

Banner further testified that Davis left and came back with a riot shield and riot helmet along with Settles and Defendant Burley and another unknown officer, while McKissick was still outside the door. (Id. at 39-40.) Banner claims Davis jumped on his back, grabbed his left arm and twisted it, and slammed his head into the ground. (Id. at 42.) He further testified that Settles kicked him in the head, and Davis stomped on his knee. (Id. at 43-44.) Banner alleges that Tucker was "in the cell recording the whole incident and at this point, McKissick is still in the door watching." (Id. at 45.)

Banner claims that after the altercation, the officers stood him up, put a jumpsuit and handcuffs on him and took him to medical. (DE 167-2, p. 47.) However, Banner testified that he would not let the nurse evaluate him as he was "pretty hysterical" and "obviously agitated and

upset." (Id. at 48.) Banner also indicated that he did not feel like he was in his "right state of mind" after being assaulted, but he did not think there were any physical injuries that the nurse would have noticed other than the mace that was on him. (Id. at 49.)

Defendants submitted an affidavit from Davis who testified that Banner was not stripped down to boxers and socks prior to being escorted to RHU. (DE 168-1, ¶ 6.) Rather, Davis testified that Banner was still wearing his orange uniform as he was escorted to RHU. (Id.) Davis further testified that he observed blood on Banner's orange uniform shirt (rather than on his boxers) and directed Banner to hand over the bloody shirt as it was "evidence of a serious crime and needed to be preserved." (Id. at ¶ 7.) Davis testified that he gave Banner at least three directives, and Banner refused to comply and began flushing the shirt down the toilet. (Id.) Davis attempted to prevent Banner from doing this by using one burst of chemical munitions (23 grams) while repeating the directives. (Id.) Davis testified that he did not assault Banner in any way and at no time observed any officers assaulting him or using any excessive force against him while he was in RHU. (Id.)

Banner further testified in his deposition that at around the same time as he saw the nurse in medical, he was interviewed by Agent Thomas E. Horne, Jr., of Police Services ("Agent Horne" or "Horne").[4] (DE 167-2, pp. 50-51.) According to Banner, Agent Horne attempted to question him about the attack on Lt. Bethea, but he "was raving and ranting about the assault."[5] (Id. at 51-52). Banner testified that Agent Horne "kept trying to question" him about the assault on Lt. Bethea, but he "didn't really have much to say about that incident." (Id.) Instead, he testified that he wanted to talk to Agent Horne about the assault by the officers on him, and he told Agent Horne,

[4] Agent Horne served as an agent for Police Services for the SCDC from 2017 to February 2022. (DE 168-11, ¶ 2.)

[5] Although Banner claims one of the officers recorded the assault, Defendants state that no video exists regarding the use of force by the officers against Banner. (DE 48, p. 3.)

"You know, I don't even have to say anything. Go look at the cameras. . . . There's camera footage." (Id. at 52-54.) Banner claims that Agent Horne wrote a report while he was talking to him, he signed an acknowledgment of his Miranda rights, and that this was the only document he signed. (Id. at 83-84.)

Agent Horne testified that, on April 2, 2020, he investigated a report of an officer assault with serious injuries at Lee. (DE 168-11, ¶ 4.) Agent Horne testified that he attempted to interview Banner regarding the assault on Lt. Bethea, and that Banner was advised of and acknowledged his Miranda rights, initialing and signing the document. (Id. ¶ 8, DE 168-12, p. 26). Agent Horne prepared a report of interview detailing his interaction with Banner. (Id.; DE 168-12, p. 27). Agent Horne testified that Banner only spoke about a previous incident involving Lt. Bethea from March 2020 and would not talk about the assault of Lt. Bethea, repeatedly stating that it was all on camera. (Id. at ¶ 9.) Agent Horne testified that at no time did Banner inform him that he had been assaulted by officers, and if he had done so, he would have documented Banner's statement. (Id. at ¶¶ 9, 14). Agent Horne further attested that if he had observed any visible injuries to Banner, he would have documented them. (Id. at ¶ 12.)

Banner was transferred later the same day from Lee to Kirkland. (DE 168-7, ¶ 3.) According to the affidavits of Lt. Aaron Lockhart and Sgt. Melvin Camacho, who serve at the Central Bus Terminal for the SCDC and were dispatched to transport Banner, the transport vehicle for Banner left Lee at approximately 1:30 p.m. on April 2, 2020. (Id. at ¶¶ 2-4; DE 168-8, ¶¶ 3-4.) Lt. Lockhart and Sgt. Camacho testified that they do not recall seeing any injuries on Banner, and Banner did not mention any injuries during the transport to Kirkland. (DE 168-7, ¶¶ 5-6; DE 168-8, ¶ 5.)

Upon Banner's arrival at Kirkland, he was supposed to be assessed by medical staff. (DE 167-2, pp. 49-50, 63-64.) However, Banner testified that he refused to let the nurse at Kirkland evaluate him and refused any medical care. (Id. at 64.) Banner's SCDC medical records indicate that upon his arrival at Kirkland, Jacquetta Riley, LPN, noted that she observed Banner walking with chains and in no acute distress, his vital signs were recorded as all in the normal range, and Banner reported that he did not need medical attention at that time. (DE 168-9, M.D. ¶ 10; DE 168-10, p. 58.) The first time Banner made a written request for medical attention for the injuries he alleges he received as a result of the alleged assault by Defendants was over a year later on April 20, 2021, when he sent in a request to staff member ("RTSM"). (DE 167-2, pp. 65-67.) Thereafter, as a result of his RTSM, several outside medical examinations were scheduled, including examinations in May and June 2021, for his complaints of ringing in his ears. Banner testified that he was diagnosed with tinnitus and sensorineural hearing loss. (Id. at 70-73.)

DISCUSSION

Banner has filed an objection to the Report (DE 205); however, to be actionable, objections to the Reports must be specific. Failure to file specific objections constitutes a waiver of a party's right to further judicial review, including appellate review, if the recommendation is accepted by the district judge. See United States v. Schronce, 727 F.2d 91, 94 & n.4 (4th Cir. 1984). "The Supreme Court has expressly upheld the validity of such a waiver rule, explaining that 'the filing of objections to a magistrate's report enables the district judge to focus attention on those issues -- factual and legal -- *that are at the heart of the parties' dispute.*'" Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315 (2005) (citing Thomas v. Arn, 474 U.S. 140 (1985) (emphasis added)). "A general objection to the entirety of the magistrate judge's report is tantamount to a failure to object." Tyler v. Wates, 84 F. App'x 289, 290 (4th Cir. 2003). In the absence of specific

objections to the Report and Recommendation of the magistrate judge, this court is not required to give any explanation for adopting the recommendation. See Camby v. Davis, 718 F.2d 198, 199 (4th Cir. 1983).

Upon review, the Court has identified the following specific objections, which will be addressed herein, regarding the Report's finding that Banner failed to exhaust his administrative remedies. Ostensibly, Banner alleges a genuine issue of material fact is in dispute regarding whether his grievance was untimely filed. (DE 205, p. 2.) Banner's objection states "[t]he evidence shows Plaintiff timely (on the same day the incident happened) filed an RTSM that went unanswered and unreturned." (Id.) However, the record shows Banner's testimony on this issue is at best inconsistent and it contradicts his own objection. See Barwick v. Celotex Corp., 736 F.2d 946, 960 (4th Cir. 1984) ("A genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct.") For instance, Banner was asked at his deposition, "[d]id you ever fill out a request to a staff member or a written request to be medically evaluated after arriving in Kirkland on April the 2nd of 2020?" (DE 183-1, p. 66.) Banner responded, "[s]pecifically for those reasons, no. I was still of the mind that those issues would heal on their own." (Id.) On the other hand, "Plaintiff maintains that he did report the incident to Agent Horne of Police Services . . . before [he] even left Lee Correctional." (DE 183, p. 5.) Banner claims he "verbally gave the complaint which was transcribed by Agent Horne. He then read his transcription aloud and when I agreed, I signed the best I could in chains. Agent Horne subsequently made an official report of our interaction where he specially notes in it: 'He would not talk about the assault, only saying it was all on camera.'" (DE 183, p. 5; citing DE 183-1, pp. 97-98.) Notwithstanding, Banner's contradictions, he contends "SCDC staff namely (Jana Hollis) the Deputy Warden at Kirkland Correctional's Maximum

Security Unit prevented [him] from exhausting his administrative remedies when she failed to respond to his RTSM reporting the incident." (Id.)

The Prison Litigation Reform Act ("PLRA") (codified as amended at 42 U.S.C. § 1997e(a) (1996)), mandates, among other things, that prisoners exhaust their administrative remedies prior to filing civil actions concerning prison conditions under Section 1983 or any other federal law. See Jones v. Bock, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court"). "[T]he PLRA's exhaustion requirement is mandatory," Anderson v. XYZ Corr. Health Servs., Inc., 407 F.3d 674, 677 (4th Cir. 2005), and "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong," Porter v. Nussle, 534 U.S. 516, 532 (2002).

The PLRA requires "proper exhaustion" of available administrative remedies prior to filing suit. Woodford v. Ngo, 548 U.S. 81, 93-94 (2006). As the Supreme Court has noted, "[a]ggrieved parties may prefer not to exhaust administrative remedies for a variety of reasons," whether it be concerns about efficiency or "bad faith." Id. at 89-90. This is especially true in a prison context. Id. at 90 n.1. Nevertheless, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Id. at 90-91. "[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." Moore v. Bennette, 517 F.3d 717, 725 (4th Cir. 2008). Thus, an administrative remedy is considered unavailable when: (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) "prison

administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." Ross v. Blake, 578 U.S. 632, 643-44 (2016).

Banner points to one instance in the record where he claims he verbally informed Agent Horne of his grievance, (DE 183, p. 5), and that nothing was done after he informed Agent Horne. Banner argues by implication that, since nothing was done, he was prevented from taking advantage of the grievance process. (DE 205, p. 2; citing Moore, 517 F.3d at 725 (". . . an administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.").) Although Defendants dispute whether Banner informed Agent Horne of the alleged assault and injuries (DE 168-11, ¶¶ 9, 14), at summary judgment, "[the court] must view the evidence in the light most favorable to the nonmoving party and refrain from weighing the evidence or making credibility determinations." Variety Stores, Inc. v. Wal-Mart Stores, Inc., 888 F.3d 651, 659 (4th Cir. 2018). Accepting Banner's assertions as true, however, does not help Banner defeat summary judgment. SCDC's Inmate Grievance System does not recognize "verbally informing" a staff member as part of the procedure of submitting a Step 1 grievance. (DE 168-2, ¶ 19.) As noted above, the PLRA requires "proper exhaustion" of available administrative remedies prior to filing suit, and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." Woodford, 548 U.S. at 90-91, 93-94.

Although Banner has identified other documents where he, in fact, filed a written complaint regarding the alleged incident, the documents filed on November 3, 2020, and April 20, 2021, were far beyond the time to comply with SCDC deadlines.[6] Based upon the foregoing, Banner has

[6] On November 3, 2020, Banner submitted an RTSM to General Counsel alleging the same facts as in his complaint in this case. Ms. McKie testified that despite the fact that the request was untimely and

failed to properly exhaust his administrative remedies under the SCDC grievance process regarding the events on April 2, 2020, and therefore, his objection is overruled. Given Banner's failure to exhaust administrative remedies, his Federal law claims must be dismissed. In addition, since this Court no longer has original jurisdiction, the Court declines to exercise supplemental jurisdiction over Banner's State law claims pursuant to 28 U.S.C. § 1367(c)(3). See Archie v. Nagle & Zaller, P.C., 790 F. App'x 502, 506 (4th Cir. 2019) ("[C]ourts have consistently held that a district court has wide latitude in determining whether to retain, remand, or dismiss state law claims pursuant to § 1367(c)).[7]

Accordingly, after a thorough review of the Report and Recommendation and the record in this case, the Court adopts the Report and Recommendation and incorporates it herein.

It is, therefore, **ORDERED** that Plaintiff's Federal law claims are dismissed for failure to exhaust administrative remedies, and this Court declines to exercise supplemental jurisdiction over Plaintiff's State law claim, and therefore, dismisses this action without prejudice.

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sent to the incorrect department, because the RTSM alleged employee misconduct, the request was processed and forwarded to Police Services/OII. (DE 168-2, ¶¶ 23-25; DE 168-2, pp. 89, 111.) Similarly, on April 20, 2021, Banner submitted a Step 1 grievance that was initially titled KCI-0221-21, alleging the same facts as in his complaint. This grievance was forwarded to Lee and re-titled Lee CI-0267-21 because the complaint involved Lee staff. (DE 168-2, ¶ 26; DE 168-2, p. 121.) Ms. McKie testified that, despite the untimeliness of the grievance by more than a year, it was still forwarded to Police Services/OII for a formal review and investigation of the alleged assault. (Id. at ¶ 29.)

Nevertheless, based on evidence submitted by Banner, the OII ultimately determined that there was insufficient evidence to pursue any criminal charges or corroborate his allegations, and the investigative case was administratively closed. The Warden denied Banner's Step 1 grievance. (DE 183-1, p. 37, ¶ 33; DE 183-1, p. 78.)

[7] The Court notes that Banner objects to the Report's recommendation that this Court should not exercise supplemental jurisdiction because Defendants were sued in their official and individual capacities. (DE 205, p. 4.) However, Banner's objection does not address the factors by which this Court addresses whether to exercise supplemental jurisdiction under 28 U.S.C.S. § 1367 (i.e., "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction."). Since this Court has dismissed all claims over which it has original jurisdiction, Banner's objection is overruled.

IT IS SO ORDERED.

S/ Joseph Dawson III
Joseph Dawson, III
United States District Judge

Florence, South Carolina
June 23, 2023

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF SOUTH CAROLINA

GREENVILLE DIVISION

Genuine Truth Banner,

Plaintiff,

vs.

Mr. Tisdale, Branden Davis, Lt. Burley, Mrs. Tucker, Officer McKissack, and Sgt. Vernon Adams,

Defendants.

Civil Action No. 6:21-cv-3456-JD-KFM

REPORT OF MAGISTRATE JUDGE

This matter is before the court on the defendants' motion for summary judgment (doc. 167). The plaintiff, a state prisoner proceeding *pro se*, seeks relief pursuant to 42 U.S.C. § 1983. Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Civil Rule 73.02(B)(2)(d) (D.S.C.), this magistrate judge is authorized to review all pretrial matters in cases filed under Section 1983 and submit findings and recommendations to the district court.

I. PROCEDURAL HISTORY

In this action, the plaintiff seeks damages for alleged excessive use of force on April 2, 2020, while he was housed at Lee Correctional Institution ("Lee") in the custody of the South Carolina Department of Corrections ("SCDC") (doc. 1).The plaintiff is now incarcerated in Kirkland Correctional Institution ("Kirkland"). The plaintiff filed his original complaint on October 21, 2021 (doc. 1), and he has since been granted leave to amend his complaint numerous times (see docs. 12, 13, 15, 66, 77, 85, 113, 129, 137, 153). The plaintiff has also filed several motions to compel (docs. 44, 63, 95, 111, 119, 176, 188).

On October 12, 2022, the defendants filed their motion for summary judgment (docs. 167, 168). By order filed on October 13, 2022, pursuant to *Roseboro v. Garrison*, 528 F.2d309 (4th Cir. 1975), the plaintiff was advised of the motion for summary judgment procedure and the possible consequences if he failed to respond adequately to the defendants' motion (doc. 169). On November 2, 2022, the undersigned granted the plaintiff's motion for extension of time to respond to the defendants' motion because the plaintiff had not yet received responses to certain discovery requests and because certain pages were missing from an exhibit to the motion for summary judgment (doc. 180). In addition, the undersigned directed the Clerk of Court to mail the plaintiff a copy of the missing pages of the defendants' exhibit (*id.*). The plaintiff filed his response in opposition to the motion for summary judgment on November 14, 2022 (doc. 183). On November 21, 2022, the plaintiff filed a notice stating that he had received the missing pages and wished to proceed with his previously filed response to the motion for summary judgment (*see* doc. 183), but he wanted to add a statement that he had not had access to relevant discovery including defendant Davis' answered interrogatories (doc. 189 at 1).[1]

II. ALLEGATIONS

In his original complaint, the plaintiff alleged that on April 2, 2020, "after an incident at Lee . . . occurred," defendant Associate Warden Tisdale told officers to "take [him] to lock-up, put [him] in a strip cell and deal with him" (doc. 1 at 7). He further asserted that he was placed in lock-up, which is also called the restricted housing unit ("RHU"), and he was stripped naked, maced, and then violently assaulted by three officers while another

[1] The plaintiff has filed two motions to compel regarding these interrogatories since the filing of the defendants' motion for summary judgment (docs. 176, 188). The undersigned will address these nondispositive motions by separate order. The defendants state in their responses to these motions that they served the plaintiff with defendant Davis' responses to the interrogatories on October 19, 2022 (doc. 182 at 2; *see* doc. 182-2, Davis resp. to interrogs.). In a filing on November 21, 2022, the plaintiff stated that he received the responses to the interrogatories on November 17, 2022, though he still complains that the responses are inadequate (doc. 188).

officer recorded the incident (*id.*). He alleged that the three officers who assaulted him were former defendant "Mr. Settles"[2] and defendants Burley and Davis[3] (*id.*). The plaintiff alleged that Settles kicked him in the head repeatedly; Burley stomped on his torso, legs, and knees; and Davis twisted his arms and slammed him around (*id.*). The plaintiff alleged that defendant Tucker recorded the entire incident while two other unknown officers watched (*id.*). He alleged that one of the officers "had the courage to tell" the others to stop assaulting him because the plaintiff was offering no resistance (*id.*).

The plaintiff alleged that he informed Police Services Agent Horne of this incident prior to being transported to another institution (doc. 1 at 7). He further alleged that when he arrived in maximum security at Kirkland, he immediately wrote Deputy Wardens Hollis and Wallace and Police Services, but he did not receive a response (*id.*). He claimed that he was seen by the medical staff at Kirkland at some point after which he had an MRI and multiple ear examinations (*id.*). The plaintiff alleged that it was determined that he suffers from tinnitus and hearing loss as a result of the assault and that he needs a hearing aid (*id.*). He alleged that he filed a grievance that was processed on April 28, 2021, but he was informed that the incident is still under investigation (*id.*). The plaintiff claimed that this is a "stall tactic as the statute of limitations for a civil suit is fast approaching" (*id.*).

In his original complaint, the plaintiff alleged claims for cruel and unusual punishment in violation of his Eighth Amendment rights, criminal assault, negligence, and deliberate indifference (doc. 1 at 5). The plaintiff later sought and was granted leave to

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[2] On December 1, 2021, the plaintiff moved to amend his complaint to dismiss Mr. Settles as a defendant, which the undersigned granted on December 20, 2021 (docs. 12, 13, 15).

[3] Lieutenant Branden Davis submitted an affidavit in support of the defendants' motion for summary judgment (doc. 168-1, B. Davis aff.). Based on that affidavit, it appears that defendant Davis' first name is misspelled on the docket of this case. Accordingly, the undersigned will direct the Clerk of Court to correct the spelling as indicated in the caption of this report and recommendation.

amend his complaint to add Officer McKissick[4] and Sgt. Vernon Adams as defendants (docs. 66, 85, 129, 153). The plaintiff did not allege that these defendants engaged in the assault against him but rather alleged that they failed to act in any way to stop it, which the plaintiff alleged amounts to deliberate indifference.[5]

III. FACTS PRESENTED

The defendants submitted excerpts of the plaintiff's deposition in support of their motion for summary judgment (doc. 167-2, pl. dep.). In his deposition, the plaintiff testified that after an assault on SCDC employee Lt. Bethea on April 2, 2020, the plaintiff along with several other inmates were suspected of being the persons who stabbed Lt. Bethea (*id.* 11).[6] The plaintiff testified that defendant Associate Warden Tisdale questioned him outside the door of the F1 B side dorm, and then Tisdale directed officers "take [the plaintiff] to lock up, put him in a strip cell and deal with him" (*id.* 11-15). The plaintiff testified that McKissick and another officer he did not know stood the plaintiff up and walked him in a "peaceful . . . sort of transition" toward the administrative building (*id.* 15-16). There was no unnecessary or excessive force during this transfer (*id.* 16). According to the plaintiff's testimony, as he was escorted past the administration building, he saw Lt. Bethea being loaded into an ambulance, and he could see that Lt. Bethea had serious injuries (*id.* 18).

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[4] Correctional Emergency Response Team ("CERT") Commander Jeremiah McKissack submitted an affidavit in support of the defendants' motion for summary judgment (doc. 168-6, McKissack aff.). Based on that affidavit, it appears that this defendant's last name is misspelled on the docket of this case. Accordingly, the undersigned will direct the Clerk of Court to correct the spelling as indicated in the caption of this report and recommendation. However, for consistency purposes, the undersigned will refer to this defendant as "McKissick" throughout the remainder of this report.

[5] The undersigned has construed the plaintiff's "deliberate indifference" claim, which is alleged against officers he claims failed to intervene when other officers assaulted him, as a Section 1983 bystander liability claim.

[6] The plaintiff was charged with attempted murder in regard to the attack on Lt. Bethea, and a jury found him not guilty in October 2021 (doc. 167-2, pl. dep. 7-8).

The plaintiff testified that as they neared RHU some of the officers who were escorting him changed (doc. 167-2, pl. dep. 19-20). He testified, "I believe McKissick was there the whole time in the yard, and then the two other officers switched, but don't quote me on that because I'm not entirely sure on that. It's a little bit fuzzy" (*id.* 20). The plaintiff further testified that, prior to being taken from the F1 dorm to RHU, all of his clothes were removed except his boxers and socks (doc. 167-2, pl. dep. 22-23). After he was placed in an individual RHU cell, the plaintiff testified that officers patted him down and took his socks (*id.* 27). The plaintiff testified that at that point McKissick was outside the door of the cell, and Davis told the plaintiff, "Hey, I need your boxers" (*id.*). Davis told the plaintiff that there was blood on the boxers, and he and Davis proceeded to argue back and forth with the plaintiff refusing to give Davis his boxers (*id.* 28). The plaintiff testified that he was "sort of trying to figure out my role in all of this and at the same time, seeing everything that's on, seeing how the officers are acting, seeing the ambulance in front of the building, I'm assuming that they're pointing the blame at me for this [the attack on Lt. Bethea]" (*id.* 29). According to the plaintiff, Davis gave him a "look" that said if the plaintiff did not give him the boxers, he would come in and get them by force (*id.* 28). The plaintiff testified, "I took my boxers off, and I'll admit, to really just kind of spite him, instead of just giving them to him, I flushed them down the toilet" (*id.* 29). The plaintiff testified that Davis then "opened the food flap to the door, he grabbed his mace, he reached in and he put his hand through the food flap and maced me" (*id.*).

The plaintiff testified that Davis then left, and McKissick stayed to watch the door (doc. 167-2, pl. dep. 35). The plaintiff said that he was "hysterical" and "agitated" at that point because he felt like they were "pretty much pointing the blame at [him] for the incident with [Lt.] Bethea" (*id.*). The plaintiff testified that he "calm[ed] down" and knew "Officer McKissick to be a fairly reasonable person" (*id.*). Davis later came back and tried to give the plaintiff a jumpsuit, but the plaintiff refused it (*id.* 38-39). The plaintiff testified

that Davis told him to put the jumpsuit on so that he could take the plaintiff to medical, but the plaintiff refused (*id.*). The plaintiff further testified that Davis left and came back with a riot shield and riot helmet along with Settles and defendant Burley and another unknown officer, while McKissick was still outside the door (*id.* 39-40). According to the plaintiff, defendant Tucker had a camera and was outside the cell (*id.*). The plaintiff testified that he laid face down and "offered full submission" because he "kind of knew what was going to happen next" (*id.* 41). The plaintiff testified that Davis jumped on his back, grabbed his left arm and twisted it, and slammed his head into the ground (*id.* 42). He further testified that Settles kicked him in the head, and Davis stomped on his knee (*id.* 43-44). The plaintiff testified that Tucker was "in the cell recording the whole incident and at this point, McKissick is still in the door watching" (*id.* 45). The plaintiff testified that the three officers who were physically involved in assaulting him were Davis, Settles, and Burley (*id.* 46).

The plaintiff testified that after the altercation, the officers then stood the plaintiff up, put a jumpsuit and handcuffs on him, and took him to medical (doc. 167-2, pl. dep. 47). However, the plaintiff admitted in his deposition that he would not let the nurse evaluate him as he was "pretty hysterical" and "obviously agitated and upset" (*id.* 48). The plaintiff testified that he did not feel like he was in his "right state of mind" after being assaulted, but he did not think there were any physical injuries that the nurse would have noticed other than the mace that was on him (*id.* 49). The plaintiff further testified that he did not notice any physical injuries at that point but noticed some a couple of hours later when he arrived at another institution (*id.*).

In his affidavit submitted in support of the motion for summary judgment, Davis testified that the plaintiff was not stripped down to boxers and socks prior to being escorted to RHU (doc. 168-1, B. Davis aff. ¶ 6). Rather, Davis testified that the plaintiff was still wearing his orange uniform as he was escorted to RHU (*id.*). Davis further testified that he observed blood on the plaintiff's orange uniform shirt (rather than on the plaintiff's

boxers) and directed the plaintiff to hand over the bloody shirt as it was "evidence of a serious crime and needed to be preserved" (*id.* ¶ 7). Davis testified that he gave the plaintiff at least three directives, and the plaintiff refused to comply and began flushing the shirt down the toilet (*id.*). Davis attempted to prevent the plaintiff from doing this by using one burst of chemical munitions (23 grams) while repeating the directives (*id.*). Nonetheless, the plaintiff was able to flush the shirt, and no more chemical munitions were utilized (*id.*). Davis also disputes retrieving riot gear as alleged by the plaintiff (*id.* ¶¶ 8-9). Davis testified that riot gear is locked and secured in another area of the facility, and only certain upper management personnel/ shift supervisors are authorized to access this area (*id.* ¶ 9). Davis testified that he did not have access to riot gear, and it is only retrieved and authorized for certain planned uses of force and/or other emergencies (*id.*). Davis testified that he did not assault the plaintiff in any way and at no time observed any officers assaulting the plaintiff or using any excessive force against him while he was in RHU (*id.*).

The plaintiff further testified in his deposition that at around the same time as he saw the nurse in medical, he was interviewed by Agent Thomas E. Horne, Jr., of Police Services (doc. 167-2, pl. dep. 50-51).[7] According to the plaintiff, Agent Horne attempted to question him about the attack on Lt. Bethea, but the plaintiff "was raving and ranting about the assault" (*id.* 51-52). The plaintiff testified that Agent Horne "kept trying to question" him about the assault on Lt. Bethea, but the plaintiff "didn't really have much to say about that incident" (*id.*). Instead, he testified that he wanted to talk to Agent Horne about the assault by the officers on him, and he told Agent Horne, "You know, I don't even have to say anything. Go look at the cameras. . . . There's camera footage" (*id.* 52-54).[8] The

[7] The plaintiff could not remember if he spoke with the nurse or Police Services first (doc. 167-2, pl. dep. 50-51).

[8] The defendants state that no video exists regarding the use of force by the officers alleged by the plaintiff (doc. 48 at 3).

plaintiff further testified that Agent Horne wrote a report while he was talking to him (*id.* 82-83). The plaintiff testified that he knew he signed an acknowledgment of his *Miranda* rights, and he "want[ed] to say" this was the only document he signed (*id.* 83-84). The plaintiff discussed his prior dealings with Lt. Bethea, but he would not answer any of Agent Horne's questions about the assault against Lt. Bethea (*id.* 85). The plaintiff testified that he "also mentioned the assault that just happened with the other officers and that was it" (*id.*).

Agent Horne submitted an affidavit in support of the motion for summary judgment, stating that he served as an agent for Police Services for the SCDC from 2017 to February 2022 (doc. 168-11, Horne aff. ¶ 2). Agent Horne testified that on April 2, 2020, he investigated a report of an officer assault with serious injuries at Lee (*id.* ¶ 4). Agent Horne testified that he attempted to interview the plaintiff regarding the assault on Lt. Bethea, and the plaintiff was advised of and acknowledged his *Miranda* rights, initialing and signing the document (*id.* ¶ 8, & doc. 168-12 at 26, Horne aff., ex. C). Agent Horne prepared a report of interview detailing his interaction with the plaintiff, which he attached to his affidavit (*id.* & doc. 168-12 at 27, Horne aff., ex. C). Agent Horne testified that the plaintiff only spoke about a previous incident involving Lt. Bethea from March 2020 and would not talk about the assault of Lt. Bethea, repeatedly stating that it was all on camera (*id.* ¶ 9). Agent Horne testified that at no time did the plaintiff inform him that he had been assaulted by officers, and if the plaintiff had so informed him, he would have documented the plaintiff's statement (*id.* ¶¶ 9, 14). Agent Horne further testified that if the plaintiff had been hysterical or "raving and ranting" as the plaintiff claims, he would not have attempted to interview the plaintiff, as people actively in distress are in no condition to provide information (*id.* ¶¶ 10-11). Agent Horne further attested that if he had observed any visible injuries to the plaintiff, he would have documented them (*id.* ¶ 12).

The plaintiff was transferred later the same day from Lee to Kirkland (doc. 168-7, Lockhart aff. ¶ 3). According to the affidavits of Lt. Aaron Lockhart and Sgt. Melvin

Camacho, who serve at the Central Bus Terminal for the SCDC and were dispatched to transport the plaintiff, the transport vehicle for the plaintiff left Lee at approximately 1:30 p.m. on April 2, 2020 (*id.* ¶¶ 2-4; doc. 168-8, Camacho aff. ¶¶ 3-4). Lt. Lockhart and Sgt. Camacho testified that they do not recall seeing any injuries on the plaintiff, and the plaintiff did not mention any injuries during the transport to Kirkland (doc. 168-7, Lockhart aff. ¶¶ 5-6; doc. 168-8, Camacho aff. ¶ 5).

Upon the plaintiff's arrival at Kirkland, he was supposed to be assessed by medical staff (doc. 167-2, pl. dep. 49-50, 63-64). However, the plaintiff testified that he refused to let the nurse at Kirkland evaluate him and refused any medical care (*id.* 64). The plaintiff's SCDC medical records indicate that upon his arrival at Kirkland, Jacquetta Riley, LPN, noted that she observed the plaintiff walking with chains and in no acute distress, his vital signs were recorded as all in the normal range, and the plaintiff reported that he did not need medical attention at that time (doc. 168-9, Stacy Smith, M.D. aff. ¶ 10 & doc. 168-10 at 58, Smith aff., ex. A). The first time the plaintiff requested medical attention for the injuries he alleges he received as a result of the alleged assault by the defendants in this case was over a year later on April 20, 2021, when he sent in a request to staff member ("RTSM") (doc. 167-2, pl. dep. 65-67). Thereafter, as a result of his RTSM, several outside medical examinations were scheduled, including examinations in May and June 2021 for the plaintiff's complaints of ringing in his ears. The plaintiff testified that he was diagnosed with tinnitus and sensorineural hearing loss (*id.* 70-73).

IV. APPLICABLE LAW AND ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 states, as to a party who has moved for summary judgment: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As to the first of these determinations, a fact is

deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. *Id.* at 257. In determining whether a genuine issue has been raised, the court must construe all inferences and ambiguities against the movant and in favor of the non-moving party. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962).

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in his pleadings; rather, he must demonstrate that specific, material facts exist that give rise to a genuine issue. *Id.* at 324. Under this standard, the existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. *Anderson*, 477 U.S. at 252. Likewise, conclusory allegations or denials, without more, are insufficient to preclude the granting of the summary judgment motion. *Id.* at 248. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Failure to Exhaust Administrative Remedies

The defendants first argue that the plaintiff has failed to exhaust his administrative remedies with regard to his Section 1983 excessive force claim. The undersigned agrees.

The Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (codified as amended at 42 U.S.C. § 1997e(a) (1996)), mandates, among other things, that prisoners exhaust their administrative remedies prior to filing civil actions

concerning prison conditions under Section 1983 or any other federal law. *See Jones v. Bock*, 549 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court"). "[T]he PLRA's exhaustion requirement is mandatory," *Anderson v. XYZ Corr. Health Servs., Inc.*, 407 F.3d 674, 677 (4th Cir. 2005), and "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter v. Nussle,* 534 U.S. 516, 532 (2002).

The PLRA requires "proper exhaustion" of available administrative remedies prior to filing suit. *Woodford v. Ngo*, 548 U.S. 81, 93-94 (2006). As the Supreme Court has noted, "Aggrieved parties may prefer not to exhaust administrative remedies for a variety of reasons," whether it be concerns about efficiency or "bad faith." *Id.* at 89-90. This is especially true in a prison context. *Id.* at 90 n.1. Nevertheless, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Id.* at 90-91.

"[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it." *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008). Thus, an administrative remedy is considered unavailable when: (1) "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates"; (2) it is "so opaque that it becomes, practically speaking, incapable of use"; or (3) "prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross v. Blake*, 578 U.S. 632, 643-44 (2016).

"The court may take judicial notice of the SCDC grievance process, specifically, SCDC Policy GA-01.12." *Malik v. Ward*, C/A 8:08-cv-1886-RBH, 2010 WL

936777, at *2 n.4 (D.S.C. Mar. 16, 2010). The SCDC Policy GA-01.12 states as follows, in pertinent part:

> 13. STEPS IN THE GRIEVANCE PROCESS:
>
> 13.1 Inmates will be allowed to file five (5) grievances per month, which shall include all grievances that are returned unprocessed. After the five (5) grievances have been accepted, all others will be returned unprocessed, with the exception of a disciplinary conviction appeal or a classification reduction in custody level review. Grievances alleging criminal activity will be forwarded to the Division of Investigation (DOI), and if found to be without merit by DOI, will be returned unprocessed if the inmate has already had five (5) grievances accepted for the month. . . .
>
> 13.2 Inmates must make an effort to informally resolve a grievance by submitting a Request to Staff Member Form to the appropriate supervisor/staff within eight (8) working days of the incident. However, in certain cases, informal resolution may not be appropriate or possible (e.g., when the matter involves allegations of criminal activity). An informal resolution is not necessary when appealing a disciplinary conviction or a custody reduction. If informal resolution is not possible, the grievant will complete Form 10- 5, Step 1, which is located in common areas, . . . , and will place the form in a designated grievance drop box within five (5) working days of the alleged incident. . . . .
>
> ***
>
> 13.3 All grievances will be picked up on a daily basis, during normal working hours, by an employee designated by the Warden (not the IGC). All grievances will be numbered and entered into the automated system (regardless of whether the issue is grievable or non-grievable) within three (3) working days by an employee designated by the Warden (not the IGC). The employee designated by the Warden will give the grievances to the IGC after the grievance has been entered into the automated system. Upon receipt of a grievance, the IGC will, within three (3) working days, complete the additional text for the grievance into the CRT screen and enter the grievance information in the grievance log book. The time frame for responding to the grievance will begin once the text for the grievance has been entered into the OMS system. The IGC will conduct an investigation (i.e., talking with the appropriate staff and/or inmate(s), reviewing all documents and/or reports, etc.) into the situation and will make recommendations to the

Warden concerning disposition of the matter. No employee involved or addressed in a grievance will be assigned to conduct any investigation regarding the same. If the IGC determines that the grievance will not be processed, the IGC will note this on the SCDC Form 10-5, Step 1, under "Action Taken by the IGC," maintain the original for the inmate grievance file, enter "non-grievable" into the automated system, and mail a copy of the SCDC Form 10-5, Step 1, to the inmate in a sealed envelope. Unprocessed grievances may only be appealed by utilizing SCDC Form 19-11, " Inmate Request To Staff Member," (RTSM) to the Branch Chief within ten (10) days of the grievance being returned to the inmate. The inmate must provide a copy of the unprocessed grievance with the RTSM. The inmate cannot file a grievance against the IGC for un-processing the grievance. If the inmate has failed to provide necessary information, or has not signed and dated the grievance, s/he will be given five (5) calendar days to re-file a properly filled out grievance; this will be noted on the Step 1 form with a due back date included. This information will also be entered into the CRT narrative when the grievance is closed as unprocessed. Unprocessed grievances that have been given five (5) days to re-file cannot be appealed to the Branch Chief.

13.4 Any grievance which is sent directly to Central Office Headquarters by the grievant will be returned unprocessed by the Inmate Grievance Branch Staff.

13.5 The Warden will respond to the grievant in writing (in the space provided on SCDC Form 10-5, Step 1), indicating in detail the rationale for the decision rendered and any recommended remedies. The grievant will also be informed of his/her rights to appeal to the next level. The Warden will respond to the grievant no later than 45 days from the date the grievance was formally entered into the OMS system by the IGC. The response will be served by the IGC to the grievant, within ten (10) calendar days, and the grievant will sign and date the response acknowledging receipt. The IGC will maintain the original grievance for the inmate's grievance file and a copy will be given to the inmate.

13.6 Appeals to the Responsible Official: If the grievant is not satisfied with the decision of the Warden, the grievant may next appeal to the Deputy Director of Operations for final resolution of the grievance. Matters under the administrative jurisdiction of the Department Director and which do not come within the scope of authority/responsibility of the Deputy Director of Operations may be appealed to the appropriate Office Director or Deputy Director for final review of the grievance. All reviews

and/or appeals of any inmate grievance will be allowed automatically without interference from any Department personnel.

13.7 Appeal Process: The grievant may appeal by completing the SCDC Form 10-5a, Step 2 to the IGC within five (5) calendar days of the receipt of the response by the grievant, by placing the Step 2 form in the designated institutional grievance box. Additional pages will not be permitted. All information must be placed on the 10-5a Inmate Grievance Form. The grievant will not write on the back of any Step 1 or Step 2 form. The IGC will forward the original Step 2, a clear copy of the Step 1 grievance, and copies of necessary documentation to the Inmate Grievance Branch within five (5) calendar days. The Inmate Grievance Branch will confirm receipt of the appeal, conduct any further investigation necessary, prepare a report, and present all available information to the responsible official. The responsible official will render the final decision on the grievance within 90 days from the date that the IGC received the appeal of the Warden's decision. The responsible official's decision will be returned to the IGC. The IGC will then serve the response to the grievant within ten (10) working days and have him/her sign and date it acknowledging receipt. The IGC will maintain the original grievance for the inmate's grievance file and a copy will be given to the inmate. The response of the responsible official will be the Department's final response in the matter. Any action required to implement the Department's final response will require no additional signatures/approval.

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15. GRIEVANCES ALLEGING CRIMINAL ACTIVITY: Any grievance which alleges criminal activity will be referred immediately to the Chief/designee, Inmate Grievance Branch. The IGC will note on the grievance tracking CRT screen that the grievance has been forwarded to the Inmate Grievance Branch for possible investigation by the Division of Investigations and the date on which the grievance was forwarded. The Chief/Designee, Inmate Grievance Branch, will consult with the Division of Investigations to determine if a criminal investigation would be appropriate. If deemed appropriate, the grievance will be forwarded to the Division of Investigations, to be handled in accordance with applicable SCDC policies/procedures. The grievance will be held in abeyance until the Division of Investigations completes their review/investigation. If it is determined that a criminal investigation is not required, the grievance will be processed in accordance with the procedures contained herein.

> 15.1 If it is determined by the Division of Investigations that the grievance will be referred to SLED for review/investigation, the grievant will be notified in a Step 1 Warden's response that the grievance has been forwarded to SLED. As the time frame for SLED to conduct an investigation is out of the control of SCDC, the IGC will forward the original grievance to the Inmate Grievance Branch and the grievance will be administratively closed until SCDC receives the final report. The grievant will then receive a Step 2 response to the investigation and will be given an opportunity to appeal to the next level if dissatisfied with the response.

(Doc. 168-2 at 14-27, McKie aff., ex. A, SCDC Policy/ Procedure, Inmate Grievance System, GA–01.12 §§ 13, 15 (May 12, 2014)).

The defendants have the burden of showing that the plaintiff failed to exhaust his administrative remedies. *See Anderson*, 407 F.3d at 683 (inmate's failure to exhaust administrative remedies is an affirmative defense to be both pled and proven by the defendant); *Jones*, 549 U.S. 199. To meet this burden, the defendants submitted the affidavit of Felecia McKie, Chief of SCDC's Inmate Grievance Branch (doc. 168-2, McKie aff.). Ms. McKie testified in her affidavit that since his incarceration in SCDC in January 2018, the plaintiff has filed at least twelve Step 1 grievances and has used SCDC's kiosk system or written RTSMs at least 50 times (*id.* ¶¶ 15, 17 & doc. 168-2 at 39-119, McKie aff., ex. D, E). Ms. McKie further testified that while the plaintiff alleged that he "informed" Agent Horne of the alleged assault by officers at Lee, verbally informing a staff member of an alleged incident is not part of the SCDC procedure for submitting a Step 1 grievance (*id.* ¶ 19). Prior to this incident, the plaintiff had submitted two Step 1 grievances, demonstrating his knowledge of the grievance system at the time of the incident (*id.*). Ms. McKie attested that because the plaintiff's allegations here involve staff misconduct/criminal activity, an attempt at informal resolution was not required, and under the grievance system, the plaintiff should have submitted a Step 1 grievance within five working days of the alleged

incident, which would have been by April 9, 2020 (*id.* ¶ 20).[9] Ms. McKie further testified that grievances alleging staff misconduct/criminal activity, no matter the length of time that has passed, may be forwarded to Police Services/ Office of Investigations and Intelligence ("OII") for further review or investigation independent of the inmate grievance process (*id.* ¶ 21).

On July 12, 2020, the plaintiff submitted a written RTSM addressed to General Counsel, alleging that male officers are "homosexual" and receiving "sexual gratification" during strip searches and pat downs (doc. 168-2 at 110, McKie aff., ex. E). Ms. McKie testified in her affidavit that this indicates that the plaintiff was provided with documents he requested, such as written request forms, paper, and writing utensils, while assigned to Kirkland after April 2, 2020, and confirms that he had access to written grievances (*id.* ¶ 22). Moreover, Ms. McKie noted that the RTSM directed to General Counsel demonstrates the plaintiff's effort to circumvent the informal resolution and inmate grievance system processes and procedures by not complying with the SCDC grievance procedure by submitting the RTSM to the appropriate supervisor/staff within eight working days of the incident and instead directing the RTSM to the General Counsel (*id.*).

On November 3, 2020, the plaintiff submitted an RTSM to General Counsel alleging the same facts as in his complaint in this case. Ms. McKie testified that despite the fact that the request was untimely and sent to the incorrect department, because the RTSM alleged employee misconduct, the request was processed and forwarded to Police Services/OII (doc. 168-2, McKie aff. ¶¶ 23-25 & doc. 168-2 at 89, 111, McKie aff. ex. E). On April 20, 2021, the plaintiff submitted a Step 1 grievance that was initially titled KCI-0221-21, alleging the same facts as in his complaint. This grievance was forwarded to Lee and re-titled LeeCI-0267-21, due to the plaintiff's complaint regarding Lee staff (doc. 168-2,

[9] The plaintiff alleged that the use of excessive force occurred on April 2, 2020, which was a Thursday.

McKie aff. ¶ 26 & doc. 168-2 at 121, McKie aff., ex. F). Ms. McKie testified that despite the untimeliness of the grievance by more than a year, it was still forwarded to Police Services/OII for a formal review and investigation of the alleged assault (*id.* ¶ 29).[10] Ms. McKie testified that based upon SCDC records, the plaintiff failed to properly exhaust his administrative remedies as required under SCDC's grievance policy and the PLRA (doc. 168-2, McKie aff. ¶ 31).

In his affidavit submitted in response to the motion for summary judgment, the plaintiff stated that after being transported to Kirkland and "some time in the cell," he "did fill out a[n] RTSM and was told to address it to Deputy Warden Jana Hollis . . . reporting the assault" (doc. 183-1 at 36, pl. aff. ¶ 23). He claimed that "over the course of some days and weeks, when [he] hadn't heard back, [he] sent out multiple other RTSMs to Police Services and the Warden Terrie Wallace to no avail" (*id.* ¶ 24). The plaintiff further testified in his affidavit that on November 3, 2020, he "eventually went over everyone's head and wrote to [G]eneral [C]ounsel reporting the incident" (doc. 183-1, pl. aff. ¶ 24). Like the defendants, the plaintiff included a copy of this November 3rd RTSM, which included the following statement prior to the plaintiff's allegations regarding the assault on April 2, 2020: "I had previously sent a staff request and have yet to hear back about the following issue" (doc. 183-1 at 74, pl. ex. F). However, the plaintiff failed to include any evidence supporting his claim that he submitted an RTSM on some unknown date prior to the RTSM sent on November 3, 2020, to General Counsel. The plaintiff's unsubstantiated and self-serving affidavit is insufficient to avoid summary judgment in light of the contrary documentary evidence provided to this court. *See* Fed. R. Civ. P. 56(e) (mere allegations without specific

[10] Based on evidence submitted by the plaintiff, the OII ultimately determined that there was insufficient evidence to pursue any criminal charges or corroborate the plaintiff's allegations, and the investigative case was administratively closed. The Warden denied the plaintiff's Step 1 grievance, which decision was served on the plaintiff on July 21, 2022 (doc. 183-1 at 37, pl. aff. ¶ 33; doc. 183-1 at 78).

facts showing that there is a genuine issue for trial are insufficient to defeat defendant's summary judgment motion); *Larken v. Perkins*, 22 F. App'x 114, 115 n.* (4th Cir.2001) (noting that non-movant's "own, self-serving affidavit containing conclusory assertions and unsubstantiated speculation, ... [is] insufficient to stave off summary judgment" (citation omitted)); *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985), *overruled on other grounds*, 490 U.S. 228 (1989) (holding conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion). Further, the November 3rd RTSM was submitted more than 200 days after the alleged incident and thus was clearly untimely under the SCDC grievance procedure. Moreover, the fact that the plaintiff's untimely RTSM was processed by SCDC since it alleged employee misconduct/criminal activity, does not reinstate its timeliness within the grievance process (doc. 168-2, McKie aff. ¶¶ 23-25). The plaintiff also included a copy of the Step 1 grievance dated April 20, 2021, in his exhibits submitted in opposition to the motion for summary judgment (*see* doc. 183-1 at 76-78, pl. ex. G, H). This Step 1 grievance was filed over a year after the alleged incident and thus was well outside the time frame allowed under the SCDC grievance process. Like the November 3rd RTSM, the fact that the untimely grievance was processed and forwarded to Police Services for investigation because it alleged employee misconduct/criminal activity does not reinstate its timeliness within the grievance process (doc. 168-2, McKie aff. ¶¶ 26, 29).

In his response in opposition to the motion for summary judgment, the plaintiff also argues that "he did report the incident to Agent Horne of Police Services" before he left Lee on April 2, 2020 (doc. 183 at 5). He claims that while he could not physically write the complaint because of his restraints, he "verbally gave the complaint which was then transcribed by Agent Horne," who then read the transcription back to the plaintiff, who signed as best as he "could in chains" (*id.*). However, in his deposition, the plaintiff specifically testified that he knew he signed an acknowledgment of his *Miranda* rights, and

he "want[ed] to say" this was the only document he signed (doc. 167-2, pl. dep. 83-84). The plaintiff further argues that Agent Horne noted in his report that the plaintiff "would not talk about the assault, only saying it was all on camera," referring to the alleged assault by the officers on the plaintiff (doc. 183 at 5; *see* doc. 183-1 at 97, pl. ex. K). Again, the documentary evidence of Agent Horne's report does not support the plaintiff's contention, as it does not reference any mention by the plaintiff of an assault on him by officers (doc. 168-12 at 27, Horne aff., ex. C). As set out above, Agent Horne testified that he spoke with the plaintiff on April 2, 2020, in investigating the attack on Lt. Bethea, and the plaintiff only spoke about a previous incident involving Lt. Bethea from March 2020 and would not talk about the assault of Lt. Bethea – only repeatedly stating that it was all on camera – and at no time did the plaintiff inform Agent Horne that he had been assaulted by officers (doc. 168-11, Horne aff. ¶¶ 2, 9, 14 & doc. 168-12 at 26-27, Horne aff., ex. C). Furthermore, viewing the evidence in a light most favorable to the plaintiff and assuming for purposes of this motion that the plaintiff "mentioned the assault that just happened" to Agent Horne, as the plaintiff testified in his deposition (doc. 167-2, pl. dep. 85), SCDC's Inmate Grievance System does not recognize "verbally informing" a staff member as part of the procedure of submitting a Step 1 grievance (doc. 168-2, McKie aff. ¶ 19). As noted above, the PLRA requires "proper exhaustion" of available administrative remedies prior to filing suit, and "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules because no adjudicative system can function effectively without imposing some orderly structure on the course of its proceedings." *Woodford*, 548 U.S. at 90-91, 93-94.

Based upon the foregoing, the undersigned recommends that the district court find that the plaintiff failed to properly exhaust his administrative remedies under the SCDC grievance process regarding the events on April 2, 2020, and grant the defendants' motion for summary judgment on the plaintiff's Section 1983 excessive force claim on this basis.

If the district court adopts this recommendation, the undersigned further recommends that the district court decline to exercise supplemental jurisdiction over the plaintiff's state law claims pursuant to 28 U.S.C. § 1367(c)(3). *See Archie v. Nagle & Zaller, P.C.*, 790 F. App'x 502, 506 (4th Cir. 2019) ("[C]ourts have consistently held that a district court has wide latitude in determining whether to retain, remand, or dismiss state law claims pursuant to § 1367(c)." (citation omitted)).

C. Merits

Should the district court find that issues of material fact remain regarding exhaustion, the undersigned has considered the merits of the plaintiff's claims and makes the following alternative findings.

1. Eleventh Amendment Immunity

The defendants argue that the plaintiff's claims against them in their official capacities for monetary damages are barred by Eleventh Amendment immunity (doc. 167-1 at 12-13).[11] The undersigned agrees. The Eleventh Amendment prohibits federal courts from entertaining an action against a state. *See, e.g.*, *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) (citations omitted). Further, Eleventh Amendment immunity "extends to 'arm[s] of the State,' including state agencies and state officers acting in their official capacity," *Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996) (alteration in original) (internal citations omitted), because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office . . . [and] is no different from a suit against the State itself," *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (internal citation omitted). At the time of the incident alleged by the plaintiff on April 2, 2020, the defendants were all SCDC employees, and their purported

[11] The plaintiff has sued all the named defendants in their official as well as individual capacities (doc. 1 at 3-5). In his prayer for relief, the plaintiff seeks only money damages (doc. 1 at 8; doc. 85 at 4).

wrongful conduct is alleged to have occurred while they were engaged in their work. Accordingly, summary judgment should be entered for the defendants as to the plaintiff's claims against them in their official capacities.

2. Personal Liability

"To establish personal liability under [42 U.S.C.] § 1983 . . . the plaintiff must affirmatively show that the official charged acted personally in the deprivation of the plaintiff's rights." *Williamson v. Stirling*, 912 F.3d 154, 171 (4th Cir. 2018) (alteration and internal quotation marks omitted). In addition, "a plaintiff must show that he suffered a specific injury as a result of specific conduct of a defendant, and an affirmative link between the injury and that conduct." *Birch v. Marion Cnty. Sheriff Office*, C.A. No. 4:12-930-TLW-KDW, 2012 WL 3877680, at *2 (D.S.C. 2012) (citation omitted), *R&R adopted by* 2012 WL 3877725 (D.S.C. Sept. 6, 2012).

a. Officer McKissick (CERT Commander McKissack)

As noted, the plaintiff testified that Officer McKissick was present but did not participate in the alleged use of excessive force against him (doc. 167-2, pl. dep. 77-78). Further, the plaintiff's deposition testimony regarding Officer McKissick's presence at different points on April 2, 2020, was equivocal: "I want to say Officer McKissick was one of the ones who escorted me [to RHU] but don't quote me on that, I'm not 100% certain" (doc. 167-2, Banner dep. 14). Even though the officers had switched mid-trip, the plaintiff "assume[d] it was still McKissick" who was present with him in RHU (*id.* 20). The plaintiff later testified that when he was placed in a cell in RHU, "McKissick was there" (*id.* 24). He testified that McKissick remained outside the door of his cell when the other officers used excessive force against him (*id.* 27, 39-46).

In his affidavit submitted in support of the motion for summary judgment, Officer McKissick testified that on April 2, 2020, he was working at Kershaw Correctional Institution ("Kershaw"), which is about 40 miles from Lee (doc. 168-6, McKissack aff. ¶¶ 3-

4). He arrived at Kershaw on April 2, 2020, at around 7:30 a.m., and he left around 4:00 p.m. (*id.* ¶ 3). Officer McKissick's sign-in report for that date is included as an exhibit to his affidavit (*id.*, ex. A). Officer McKissick further testified that he was not assigned to work at Lee until May 2020, approximately one month after the alleged use of excessive force against the plaintiff (*id.* ¶ 6).

In his response to the motion for summary judgment, the plaintiff states, "McKissick appears to have been misidentified and Plaintiff does not oppose his dismissal from the case" (doc. 183 at 1). Accordingly, the defendants' motion should be granted as to all claims against defendant McKissick, and he should be dismissed from this case.

b. Sgt. Vernon Adams

As set out above, following the plaintiff's deposition in June 2022, the plaintiff requested and was granted leave to amend his complaint to add Sgt. Vernon Adams as a defendant (docs. 129, 153). The plaintiff alleged that while defendant Adams "did not engage in the assault himself," he along with defendant Tucker and "the officer believed to be McKissick" failed to protect the plaintiff from being assaulted in RHU by other officers (doc. 129). Sgt. Adams submitted an affidavit in support of the motion for summary judgment in which he testified that on April 2, 2020, he responded to an emergency call regarding an inmate assault on an employee in the F1 B dorm (doc. 168-3, Adams aff. ¶ 3). He observed Lt. Bethea holding an inmate against a railing, and Lt. Bethea was covered in blood (*id.*). Adams testified that he and Sgt. Moore took Lt. Bethea to medical, after which Adams returned to F1 B dorm to assist other officers in securing inmates (*id.* ¶¶ 3-5). Adams testified that he did not enter RHU during the time that the plaintiff was there after Lt. Bethea was assaulted, and he did not observe any officers using excessive force against the plaintiff in RHU (*id.* ¶ 7). Further, Davis, who testified that he was present with the plaintiff in RHU, testified that he recalled the other officers present were "Major Greggs, [O]fficer Settles, and some RHU officers" (doc. 168-1, B. Davis aff. ¶ 12).

In his response to the motion for summary judgment, the plaintiff summarily contends that Adams was "physically present during the assault/lynching and yet failed to stop or even report it" (doc. 183 at 7), and, in his affidavit submitted in support of his response, the plaintiff testified that defendant Adams "simply watched" while Officers Davis, Settles, and Burley beat him (doc. 183-1 at 35, pl. aff. ¶ 17). The undersigned recommends that the district court find that the plaintiff's conclusory allegations are insufficient to demonstrate that specific, material facts exist that give rise to a genuine issue. *Celotex Corp.*, 477 U.S. at 324. To the extent the plaintiff has alleged a claim of excessive force against Adams, the claim clearly fails as the plaintiff concedes that Adams did not participate in any use of force against him. Further, to the extent the plaintiff has alleged a claim of bystander liability[12] against Adams, the plaintiff has failed to forecast evidence sufficient to show that Adams had a reasonable opportunity to prevent the harm to the plaintiff. Accordingly, even if the court was to assume that Adams knew that other officers were violating the plaintiff's constitutional rights, the plaintiff has not shown that Adams had a reasonable opportunity to prevent the allegedly unconstitutional harm. *See Dukes v. Richards*, C.A. No. 5:06-CT-3094-D, 2009 WL 9056101, at *5 (E.D.N.C. Aug. 27, 2009) (granting summary judgment on a bystander liability claim where the testimony in the record indicated that "even if [the defendant officer] was standing next to [the plaintiff] during the alleged incident, [the defendant] would not have had a reasonable opportunity to prevent some other officer's sudden decision to kick [the plaintiff]"), aff'd, 366 F. App'x 467 (4th Cir. 2010). Based upon the foregoing, the undersigned recommends that the district court grant

[12] In *Randall v. Prince George's County*, the Court of Appeals for the Fourth Circuit stated that to succeed on a theory of bystander liability, a plaintiff must demonstrate that a law enforcement officer "(1) [knew] that a fellow officer [was] violating an individual's constitutional rights; (2) ha[d] a reasonable opportunity to prevent the harm; and (3) cho[se] not to act." 302 F.3d 188, 204 (4th Cir. 2002) (footnote omitted).

the defendants' motion as any claim for violation of the plaintiff's constitutional rights against defendant Adams.

c. Lt. Burley

As noted, in his deposition, the plaintiff testified that defendant Lt. Burley was one of the officers who physically assaulted him while in RHU (doc. 167-2, pl. dep. 46). Lt. Burley submitted an affidavit in support of the motion for summary judgment in which he testified that on April 2, 2020, he was serving as the Lieutenant of EHSO (Environmental, Safety, and Health Officer) at Lee (doc. 168-4, Burley aff. ¶ 3). Part of his responsibilities in that role was responding to incidents of employee injuries, as well as gathering important information for any medical treatment that was rendered (*id.*). Burley testified that on April 2, 2020, he responded to an emergency call of an inmate assault on an employee, Lt. Bethea (*id.* ¶ 4). Lt. Bethea was escorted to medical for assessment and treatment, and Burley met Lt. Bethea in medical, where it was determined that Lt. Bethea needed outside treatment (*id.*). EMS was called, and while waiting for the ambulance, Burley went to his office to retrieve Lt. Bethea's personal information and SCDC's insurance information (*id.* ¶¶ 4-5). Burley testified that he then followed the ambulance[13] in an SCDC vehicle, while Lt. John Davis rode inside the ambulance with Lt. Bethea (*id.* ¶ 6). Burley testified that he left Lee at approximately 11:00 a.m. and did not return until after 5:00 p.m. when he retrieved Lt. Bethea's personal cell phone from Lt. Bethea's vehicle; however, Burley did not enter the facility at that time (*id.*). Burley further testified that he did not observe the plaintiff being escorted to RHU, he did not enter RHU after the plaintiff was escorted there, and he was not present and did not participate in the alleged assault on the plaintiff in his RHU cell (*id.* ¶ 7). Further, it is defendant Burley's understanding that the plaintiff was

[13] As noted above, in his deposition, the plaintiff testified that as he was escorted past the administration building toward RHU he saw Lt. Bethea being loaded into an ambulance (doc. 167-2, pl. dep. 18).

transported out of Lee prior to his return from the hospital (*id.* ¶ 8). Lt. John Davis also submitted an affidavit fully corroborating Burley's testimony and attesting that Burley was with him at the hospital awaiting assessment and treatment of Lt. Bethea's injuries during the plaintiff's time in RHU (doc. 168-13, J. Davis aff. ¶¶ 5-9). Also included as an exhibit to Lt. John Davis' affidavit is an SCDC MINs report stating that EMS arrived at Lee at 10:49 a.m. to transport Lt. Bethea to McLeod Regional Hospital with Lt. John Davis inside the ambulance and "Lt. William Burley . . . inside of the chase vehicle" (*id.*, ex. A). In addition, Associate Warden Tisdale testified in his affidavit that Burley escorted Lt. Bethea to the hospital and was not present at the facility during the time the plaintiff claims he was assaulted (doc. 168, Tisdale aff. ¶ 18). Associate Warden Tisdale included as an exhibit to his affidavit an entry from a logbook for the Front Gate Area on April 2, 2020, showing that at 11:02 a.m. the EMS vehicle exited with Lt. Davis and Lt. Bethea in the ambulance and Burley in the chase vehicle (doc. 168 at 17, Tisdale aff., ex. D).

In response to the motion for summary judgment, the plaintiff continues to argue that Burley was "directly involved" (doc. 183 at 7), and, in his affidavit, he summarily contends that Burley – along with Settles and Davis – came into his cell and violently assaulted him (doc. 183-1 at 35, pl. aff. ¶ 16). The plaintiff does not address or even acknowledge the testimonial and documentary evidence indicating that Burley was following the ambulance with Lt. Bethea to the hospital or was at the hospital at the time of the assault alleged by the plaintiff.[14] The plaintiff's unsubstantiated and self-serving affidavit is insufficient to avoid summary judgment in light of the contrary documentary and testimonial evidence provided to this court. *See* Fed. R. Civ. P. 56(e) (mere allegations without specific facts showing that there is a genuine issue for trial are insufficient to defeat defendant's summary judgment motion); *Larken*, 22 F. App'x at 115 n.* (noting that

[14] The plaintiff alleged that the assault occurred at approximately 11:30 a.m. (doc. 1 at 8).

non-movant's "own, self-serving affidavit containing conclusory assertions and unsubstantiated speculation, ... [is] insufficient to stave off summary judgment" (citation omitted)); *Ross*, 759 F.2d at 365 (holding conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion). Based upon the foregoing, the undersigned recommends that the district court grant the defendants' motion as to any claim for violation of the plaintiff's constitutional rights against defendant Burley.

d. Mrs. Tucker (Contraband Lt. Tucker)

As noted, the plaintiff testified that defendant Tucker was present but did not participate in the alleged use of excessive force against him (doc. 167-2, pl. dep. 77-78). Contraband Lieutenant Teniesha Tucker[15] submitted an affidavit in support of the motion for summary judgment, testifying that on April 2, 2020, she along with other officers responded to the incident involving an inmate assault on Lt. Bethea in F1 B dorm at Lee (doc. 168-5, Tucker aff. ¶ 4). At that time, she was in possession of a 37 mm weapon, and, as such, she remained in the common area, away from inmates and to provide back up to the other officers securing inmates in their cells (*id.* ¶ 5). After F1 B dorm was secure, Tucker testified that she proceeded to enter the F1 A side to help secure inmates there (*id.* ¶ 6). After completion of the lockdown, Tucker secured her weapon in her office and began reviewing video surveillance of the incident, which she recalled took a few hours (*id.* ¶¶ 7-8). Tucker testified that she was not present when the plaintiff was escorted to RHU as she was in the F1 dorm securing inmates in both sides. She did not recall seeing the plaintiff at any time after his removal from F1 B dorm (*id.* ¶ 9). She further testified that she was not in possession of any video camera that day and did not record anything (*id.* ¶ 10). Defendant Davis testified in his affidavit, "As far as I am aware, Lt. Tucker was not present

[15] The plaintiff identified this defendant as "Mrs. Tucker" in the complaint (doc. 1 at 4).

in RHU when I was in RHU with Banner. I recall Major Greggs, [O]fficer Settles, and some RHU officers" (doc. 168-1, B. Davis aff. ¶ 12).

In his response to the motion for summary judgment, the plaintiff again asserts that Tucker was "physically present during the assault/lynching and yet failed to stop or even report it" (doc. 183 at 7), and, in his affidavit submitted in support of his response, the plaintiff relies on the allegations asserted in his complaint that Tucker "simply watched" while Officers Davis, Settles, and Burley beat him and "recorded the entire incident with a hand held video camera" (doc. 183-1 at 35, pl. aff. ¶ 17; *see* doc. 1 at 7). The plaintiff has failed to come forward with any evidence to refute Tucker's evidence that she was not present in RHU with the plaintiff on April 2, 2020. The undersigned recommends that the district court find that the plaintiff's conclusory allegations are insufficient to demonstrate that specific, material facts exist that give rise to a genuine issue. *Celotex Corp.,* 477 U.S. at 324. To the extent the plaintiff has alleged a claim of excessive force against defendant Tucker, the claim clearly fails as the plaintiff concedes that Tucker did not participate in any use of force against him. Further, to the extent the plaintiff has alleged a claim of bystander liability against Tucker, the plaintiff has failed to forecast evidence sufficient to show that Tucker had a reasonable opportunity to prevent the harm to the plaintiff. Accordingly, even if the court was to assume that Tucker knew that other officers were violating the plaintiff's constitutional rights, the plaintiff has not shown that Tucker had a reasonable opportunity to prevent the allegedly unconstitutional harm. Based upon the foregoing, the undersigned recommends that the district court grant the defendants' motion as to any claim for violation of the plaintiff's constitutional rights against defendant Tucker.

e. Mr. Tisdale (Associate Warden Tisdale)

The plaintiff testified that defendant Associate Warden Tisdale was not present during the alleged use of excessive force (doc. 167-2, pl. dep. 74). Rather, the

plaintiff alleged that Tisdale "gave the command" for the use of excessive force while he was questioning the plaintiff about the incident concerning Lt. Bethea (*id.*). The plaintiff alleged that when he would not answer Tisdale's questions, Tisdale told the officers to "take him to lockup, put him in a strip cell and deal with him"; the plaintiff's interpretation of the statement was that the officers were directed to use excessive force against him (*id.* 74-75). The plaintiff testified that he had no knowledge of Tisdale having any further communication with the officers after making that comment (*id.*).

Defendant Rudy Tisdale, the Associate Warden of Operations at Lee, submitted an affidavit in support of the motion for summary judgment (doc. 168, Tisdale aff.). Tisdale testified that he reviewed archived video of his interaction with the plaintiff following the attack on Lt. Bethea and the resulting institutional lockdown that was initiated following the attack (*id.* ¶¶ 4-6). The plaintiff was also given the opportunity to review the video (*id.* ¶ 6). Tisdale testified that he attempted to speak with the plaintiff while the plaintiff was laying face down outside the F1 B side door (*id.* ¶ 7). He does not recall specifically what was said, but he believed that the plaintiff remained silent (*id.*). Tisdale testified that he then instructed defendant Davis and Settles to take the plaintiff to RHU based on the assault on Lt. Bethea, as inmates who do not follow rules or commit criminal acts are removed from general population to a more restricted and secured environment (*id.* ¶¶ 8-9). He further testified that every inmate entering RHU is "stripped" of their general population uniform and provided an RHU uniform (*id.* ¶ 9). Tisdale testified that he did not instruct any SCDC employee to assault the plaintiff (*id.* ¶¶ 9, 15). He further testified that a review of the video discounts the plaintiff's claim that officers stripped the plaintiff down to his socks and boxers while he was still in the yard and then escorted him to RHU while he was wearing only his boxers and socks as the video shows the plaintiff in his orange

general population uniform as he is escorted away from the F1 dorm to RHU (*id.* ¶¶ 10-14; doc. 168 at 4, Tisdale aff. ex. A, video).[16]

In his response in opposition to the motion for summary judgment, the plaintiff notes that Tisdale "by his own admission" directed Davis and Settles to take the plaintiff to RHU, and while defendant Tisdale "claims he cannot remember what he himself said," the plaintiff "asserts that he told those officers (rather ominously) to 'take him to a strip cell and deal with him'" (doc. 183 at 7). The plaintiff contends that he was "maced and assaulted . . . because Tisdale directed officers to" (*id.*). The plaintiff, however, has submitted absolutely no evidence supporting his conclusory allegation that Tisdale directed officers to assault him. The plaintiff's unsubstantiated and self-serving affidavit is insufficient to avoid summary judgment in light of the contrary evidence provided to this court. *See* Fed. R. Civ. P. 56(e) (mere allegations without specific facts showing that there is a genuine issue for trial are insufficient to defeat defendant's summary judgment motion); *Larken*, 22 F. App'x at 115 n.* (noting that non-movant's "own, self-serving affidavit containing conclusory assertions and unsubstantiated speculation, ... [is] insufficient to stave off summary judgment" (citation omitted)); *Ross*, 759 F.2d at 365 (holding conclusory allegations or denials, without more, are insufficient to preclude granting the summary judgment motion). The plaintiff has presented absolutely no evidence that Tisdale had any personal involvement in or actual or constructive knowledge of any violation of the plaintiff's constitutional rights. To the extent the plaintiff has alleged a claim of excessive force against Tisdale, the claim clearly fails as the plaintiff concedes that Tisdale did not participate in any use of force against him. Further, to the extent the plaintiff has alleged a

[16] The court has reviewed the video exhibit submitted by the defendants as Exhibit A to defendant Tisdale's affidavit. However, it appears that the exhibit does not contain the correct camera footage, as the description of events as articulated by Associate Warden Tisdale in his affidavit does not correspond with the video provided to the court (*see* doc. 168, Tisdale aff. ¶¶ 7, 11).

claim of bystander liability against Tisdale, there is no evidence before the court that Tisdale had a reasonable opportunity to prevent the harm to the plaintiff. Based upon the foregoing, the undersigned recommends that the district court grant the defendants' motion as to any claim for violation of the plaintiff's constitutional rights against defendant Tisdale.

3. Excessive Force

The Eighth Amendment to the United States Constitution expressly prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. To proceed with his claim under the Eighth Amendment, the plaintiff must demonstrate: (1) objectively, the deprivation suffered or injury inflicted was "sufficiently serious," and (2) subjectively, the prison officials acted with a "sufficiently culpable state of mind." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994); *Williams v. Benjamin*, 77 F.3d 756, 761 (4th Cir. 1996). "These requirements spring from the text of the amendment itself; absent intentionality, a condition imposed on an inmate cannot properly be called 'punishment,' and absent severity, such punishment cannot be called 'cruel and unusual.'" *Iko v. Shreve*, 535 F.3d 225, 238 (4th Cir. 2008) (citing *Wilson v. Seiter*, 501 U.S. 294, 298-300 (1991)). "What must be established with regard to each component 'varies according to the nature of the alleged constitutional violation.'" *Williams*, 77 F.3d at 761 (quoting *Hudson v. McMillian*, 503 U.S. 1, 5 (1992)).

The "core judicial inquiry" in an excessive force claim under the Eighth Amendment is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (quoting *Hudson*, 503 U.S. at 7). "[N]ot ... every malevolent touch by a prison guard gives rise to a federal cause of action." *Hudson*, 503 U.S. at 9. However, the objective component is "contextual and responsive to 'contemporary standards of decency.'" *Id.* at 8 (quoting *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). Accordingly, "'the extent of injury suffered by an inmate is one factor that may suggest whether the use of force could plausibly have been thought

necessary in a particular situation,'" and it may also provide an indication of the amount of force that was applied. *Wilkins*, 559 U.S. at 37 (quoting *Hudson*, 503 U.S. at 7). In an excessive force analysis, "'[w]hen prison officials maliciously and sadistically use force to cause harm, ... contemporary standards of decency always are violated ... whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.'" *Wilkins*, 559 U.S. at 37 (quoting *Hudson*, 503 U.S. at 9).

When analyzing the subjective element of excessive force claims, courts must determine if the defendant showed "wantonness in the infliction of pain." *Whitley v. Albers*, 475 U.S. 312, 322 (1986). To that end, they should consider factors such as (1) the necessity for the application of force;(2) the relationship between the need for force and the amount of force used; (3) the extent of the injury actually inflicted; (4) the extent of the threat to the safety of the staff and prisoners, as reasonably perceived by the responsible officials on the basis of the facts known to them; and (5) the efforts taken by the officials, if any, to temper the severity of the force applied. *Id.* at 321 (citations omitted). Courts must give "'wide-ranging deference'" to the execution of policies and practices that in the judgment of the prison officials are necessary "'to preserve internal order and discipline and to maintain institutional security.'" *Id.* at 321-22 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)). The Supreme Court has recognized that prison officials work in an environment where there is an ever present potential for violence and unrest, and that courts should not substitute their judgment for that of the officials who must make a choice at the moment when the application of force is needed. *Id.* The deference owed to prison administrators extends to "prophylactic or preventive measures intended to reduce the incidence of . . . breaches of prison discipline." *Id.* at 322.

Here, there is no dispute that defendant Davis was present with the plaintiff in RHU at the time of the alleged use of excessive force. Moreover, there is no dispute that

once the plaintiff was in an individual RHU cell, Davis told the plaintiff to hand over a piece of his clothing because there was blood on it (doc. 167-2, pl. dep. 27-28; doc. 168-1, B. Davis aff. ¶ 7).[17] Further, there is no dispute that the plaintiff refused to comply with multiple directives to hand over the clothing, the plaintiff began flushing the piece of clothing down the toilet, and Davis then used one burst of chemical munitions (23 grams) against the plaintiff (doc. 167-2, pl. dep. 29, 32-34; doc. 168-1, B. Davis aff. ¶ 7). The plaintiff alleges that it was following the use of the chemical munitions by Davis that the use of excessive force[18] took place when Davis (along with Settles and Burley) assaulted him. However, the plaintiff's and Davis' versions of these events differ greatly. The plaintiff alleges that he was hysterical and agitated and refused to put on a jumpsuit when told to do so by Davis; Davis left and came back with a riot shield, riot helmet, and other officers; the plaintiff laid face down and "offered full submission" because he "kind of knew what was going to happen next"; and Davis jumped on his back, grabbed his left arm and twisted it, slammed his head into the ground, and stomped on his knee (doc. 167-2, pl. dep. 35-44). Davis, however,

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[17] The plaintiff testified the piece of clothing was his boxers, and Davis testified it was the plaintiff's "bloody shirt."

[18] On August 17 and October 3, 2022, the undersigned denied the plaintiff's motions to amend his complaint to allege that the use of chemical munitions by Davis was also an excessive use of force (docs. 137, 165). The plaintiff acknowledged in his original complaint that he was "maced," but he alleged only that the physical assault was an excessive use of force (doc. 1 at 7). As the undersigned noted in the order denying the first motion to amend, the plaintiff had previously been given three opportunities to amend his complaint, and it appeared that he was attempting to gain an unfair tactical advantage by continuously changing his allegations after receiving adverse rulings from the court (doc. 137 at 2-4). The plaintiff filed objections to this court's orders denying the motions to amend (docs. 148, 173), and those objections remain pending before the district court. Should the district court find that the rulings were clearly erroneous or contrary to law pursuant to Rule 72(a), the undersigned recommends that the defendants be allowed to amend their motion for summary judgment to include argument on the chemical munitions issue. *See Bailey v. Turner*, 736 F.2d 963, 969 (4th Cir. 1984) ("Whether the use of chemical munitions on an inmate constitutes excessive force depends upon "the totality of the circumstances, the provocation, the amount of gas used, and the purposes for which the gas was used . . . ."); *Robinson v. S.C. Dep't of Corrs.*, C.A. No. 5:10-2593-HMH-KDW, 2012 WL 851042, at *7 (D.S.C. Mar. 23, 2012) (finding "two short bursts of chemical munitions" totaling 31 grams to be a "relatively small amount" that was not unconstitutionally excessive).

testified that he did not retrieve any riot gear, he did not assault the plaintiff in any way, and he did not observe any other officers assault the plaintiff (doc. 168-1, B. Davis ¶ 9). "So long as the force used is more than de minimis, the objective component is satisfied, regardless of the extent of the injury." *Dean v. Jones*, 984 F.3d 295, 303 (4th Cir. 2021). Accordingly, the undersigned must consider the above factors in determining whether, subjectively, Davis acted with a "sufficiently culpable state of mind." While Davis maintains that no force, much less excessive force, was used, the undersigned is tasked with construing the facts in the light most favorable to the plaintiff. Here, under the plaintiff's version of the events, he claims he was in "full submission" when Davis jumped on his back, grabbed his left arm and twisted it, slammed his head into the ground, and stomped on his knee (doc. 167-2, pl. dep. 35-44), testimony which, if credited by a jury, would weigh the first, second, fourth, and fifth factors in favor of the plaintiff. However, the third factor appears to weigh in favor of Davis given the plaintiff's failure to request medical assistance for any injuries for over a year and medical records indicating no injuries were seen when the plaintiff arrived at Kirkland on the same day of the incident, as well as the testimony of multiple witnesses that no visible injuries were seen. Based upon the foregoing, as issues of material fact remain, the undersigned recommends that the district court deny the defendants' motion on the plaintiff's excessive force claim alleged against defendant Davis.

4. Assault and Negligence

The plaintiff has also alleged state law claims against the defendants for assault and negligence (doc. 1 at 5). Such claims fall under the South Carolina Tort Claims Act ("SCTCA"), which acts as a partial waiver of South Carolina's sovereign immunity. *See* S.C. Code Ann. § 15-78-20. The SCTCA governs all tort claims against state governmental entities and is the exclusive civil remedy available in an action against a state governmental entity or its employees, with a few exceptions not relevant here. *See id.* Under the SCTCA, an employee of a state agency who commits a tort while acting within the scope of his

official duty is generally not liable, and the plaintiff must sue the agency itself. *See* S.C. Code § 15-78-70(a), (c). Here, the plaintiff did not name the SCDC as a defendant, and thus the plaintiff's SCTCA claims alleged against the defendants are barred. *See Cutner v. Johnson*, C.A. No. 9:20-cv-4119-JMC-MHC, 2022 WL 2503611, at *11 (D.S.C. June 3, 2022) (recommending dismissal of SCTCA claim alleged against individual defendant employee), *R&R adopted by* 2022 WL 2353066 (D.S.C. June 30, 2022); *Faile v. S.C. Dep't of Juv. Just.*, 566 S.E.2d 536, 539 n.1 (S.C. 2002) ("When a plaintiff claims an employee of a state agency acted negligently in the performance of his job, the [SCTCA] requires a plaintiff to sue the agency for which an employee works, rather than suing the employee directly." (citation omitted)).

V. CONCLUSION AND RECOMMENDATION

Wherefore, based upon the foregoing, the undersigned recommends that the district court grant the defendants' motion for summary judgment (doc. 167) based upon the plaintiff's failure to properly exhaust his administrative remedies. Should the district court find that issues of material fact remain on the exhaustion issue, the undersigned alternatively recommends that summary judgment be granted on the merits to defendants Officer McKissick, Sgt. Vernon Adams, Lt. Burley, Mrs. Tucker, and Mr. Tisdale on all claims and that these defendants be dismissed from the case; that summary judgment be granted in favor of defendant Davis in his official capacity based upon Eleventh Amendment immunity; that summary judgment be granted in favor of defendant Davis on the SCTCA claims; and that summary judgment be denied on the excessive force claim alleged against defendant Davis in his individual capacity.

The Clerk of Court is directed to correct the spellings of defendant Davis' first name and defendant McKissick's last name on the docket of the case as indicated in the caption of this report and recommendation.

IT IS SO RECOMMENDED.

s/Kevin F. McDonald
United States Magistrate Judge

April 13, 2023
Greenville, South Carolina

The attention of the parties is directed to the important notice on the following page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Robin L. Blume, Clerk
United States District Court
250 East North Street, Suite 2300
Greenville, South Carolina 29601

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).