

Appendix A

FARID FATA, Plaintiff - Appellant, v. UNITED STATES OF AMERICA, Defendant - Appellee.
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
2024 U.S. App. LEXIS 9789
No. 23-7310
April 23, 2024, Decided
April 15, 2024, Submitted

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2024 U.S. App. LEXIS 1}Appeal from the United States District Court for the District of South Carolina, at Charleston. (2:22-cv-04399-MGL). Mary G. Lewis, District Judge.Fata v. United States, 2023 U.S. Dist. LEXIS 217034, 2023 WL 8455256 (D.S.C., Dec. 6, 2023)

Disposition:

AFFIRMED.

Counsel

Farid Fata, Appellant, Pro se.

Christie Valerie Newman, Assistant United States Attorney,
OFFICE OF THE UNITED STATES ATTORNEY, Columbia, South Carolina, for Appellee.

Judges: Before AGEE, THACKER, and HEYTENS, Circuit Judges.

Opinion

PER CURIAM:

Farid Fata appeals the district court's order accepting the recommendation of the magistrate judge and dismissing Fata's complaint filed under the Federal Torts Claim Act (FTCA), 28 U.S.C. §§ 1346, 2671-2680. The district court dismissed Fata's medical claims for failure to exhaust and applied the FTCA's discretionary function exception to Fata's COVID-19 claims. We have reviewed the record and conclude that Fata failed to exhaust his medical claims, as he did not provide sufficient notice of the specific claims in his Bureau of Prisons grievances prior to filing his federal complaint. Additionally, our review leads us to conclude that Fata's remaining claims fall under the discretionary function exception because the cited authority involved discretion by prison personnel, as well as an element of policy judgment. Accordingly, we affirm the district court's judgment.**{2024 U.S. App. LEXIS 2}** *Fata v. United States*, No. 2:22-cv-04399-MGL, 2023 U.S. Dist. LEXIS 217034 (D.S.C. Dec. 6, 2023). We also deny as moot Fata's motion to expedite. 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

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7310
(2:22-cv-04399-MGL)

FARID FATA

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA

Defendant - Appellee

O R D E R

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

FARID FATA, Plaintiff, vs. UNITED STATES OF AMERICA, Defendants.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON
DIVISION
2023 U.S. Dist. LEXIS 217034
Civil Action No.: 2:22-4399-MGL
December 6, 2023, Decided
December 6, 2023, Filed

Editorial Information: Subsequent History

Affirmed by, Motion denied by, As moot Fata v. United States, 2024 U.S. App. LEXIS 9789 (4th Cir. S.C., Apr. 23, 2024)

Editorial Information: Prior History

Fata v. United States, 2023 U.S. Dist. LEXIS 219093, 2023 WL 8456142 (D.S.C., Aug. 15, 2023)

Counsel {2023 U.S. Dist. LEXIS 1} **Farid Fata**, Plaintiff, Pro se, Salters, SC.
For United States of America, Defendant: Christie V Newman,
LEAD ATTORNEY, US Attorneys Office, Columbia, SC.

Judges: MARY GEIGER LEWIS, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: MARY GEIGER LEWIS

Opinion

ORDER ADOPTING THE REPORT AND RECOMMENDATION AND GRANTING DEFENDANT'S MOTION TO DISMISS

Plaintiff **Farid Fata** (Fata) filed a complaint against Defendant United States of America (United States) under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671, *et seq.*

This matter is before the Court for review of the Report and Recommendation of the Magistrate Judge (Report) recommending the Court grant the United States's motion to dismiss. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270, 96 S. Ct. 549, 46 L. Ed. 2d 483 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on August 15, 2023. The {2023 U.S. Dist. LEXIS 2} Clerk's Office docketed Fata's objections on August 25, 2023, and the United States replied on September 8, 2023. The Clerk's Office then docketed Fata's a surreply on September 12, 2023, and notices from Fata with additional documents on October 16, 2023, and November 2, 2023. The Court has

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reviewed the objections, as well as his arguments in his other filings, but holds them to be without merit. It will therefore enter judgment accordingly.

Fata contends prison officials failed to protect him from COVID-19 because they neglected to implement required mitigation measures, resulting in him contracting the virus (COVID claims). He also alleges prison officials failed to schedule him for urgent consultations with medical specialists (medical claim). The Report sets forth a thorough recitation of the facts of this case, which the Court will repeat only to the extent necessary to its analysis in this order.

For the most part, Fata makes nothing more than non-specific objections to the Report. Nevertheless, in an abundance of caution, the Court has teased out several arguments, which it will briefly address below.

First, Fata contends the Magistrate Judge erred by reasoning the discretionary{2023 U.S. Dist. LEXIS 3} function exception, which the Court describes below, bars his COVID claims through sovereign immunity. The United States insists his COVID claims fall squarely into the exception and thus preclude jurisdiction.

The FTCA provides for a limited waiver of the United States' sovereign immunity by allowing "the United States to be held liable in tort in the same respect as a private person would be liable under the law of the place where the act occurred." *Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001).

But, this waiver fails to extend to

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.28 U.S.C. § 2680(a). In other words, the United States fails to waive immunity where an action involves choice by a government actor concerning public policy. This is known as the discretionary function exception.

When determining whether the discretionary function exception applies to a claim, the Court considers{2023 U.S. Dist. LEXIS 4} whether the action or omission giving rise to the claim involves choice by the government actor or if it was mandated by statute, regulation, or policy. *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). This is the first prong of the analysis. Then, if the action or omission involves choice, the Court considers the second prong: whether it is "of the kind the discretionary function was designed to shield." *Id.*

Fata lists various statutes, regulations, and policies he alleges the United States to have violated, including the American Rescue Plan Act, P.L. 117-2 § 2401, 135 Stat. 4, 40 (2021); the Affordable Care Act, 42 U.S.C. § 18114; Presidential Executive Order No. 13996, 86 F.R. 7197 (Jan. 21, 2021), *reprinted in* 42 U.S.C. § 247(d) app; Coronavirus (COVID-19) Phase Nine Action Plan Memorandum, Bureau of Prisons (BOP) (Aug. 5, 2020); BOP Program Statement No. 6270.01; and BOP Program Statement No. 3420.11.

He correctly notes "federal officials do not possess discretion to violate constitutional rights or federal statutes." *Medina*, 259 F.3d at 225 (alteration omitted) (citation omitted). Yet, as the Magistrate Judge reasoned, each of the sources Fata cites merely provide guidance and bestow discretion upon federal actors to implement the policy goals in the appropriate manner.

Thus, the first prong of the discretionary function exception applies to Fata's COVID claims.

Moreover, the Court determines the freedom to implement COVID prevention{2023 U.S. Dist. LEXIS 5} protocols is exactly the kind of choice the discretionary function exception to the waiver of sovereign immunity was meant to protect. Indeed, COVID protocols implicate public policy considerations, such as balancing the goals of rehabilitation with the safety of the prison community. See *Holbrook v. United States*, 673 F.3d 341, 345 (4th Cir. 2012) ("[T]he exception preserves separation of powers by 'preventing judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.'" (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984)) (internal quotation marks omitted) (alterations omitted)).

Therefore, the second prong of the discretionary function exception also applies here.

The Court thus has no jurisdiction to hear Fata's COVID claims. See *Williams v. United States*, 50 F.3d 299, 304-05 (4th Cir. 1995) (explaining federal courts lack jurisdiction over FTCA claims when the discretionary function exception applies).

The Court will overrule this objection. Because this issue is dispositive, the Court need not delve into Fata's remaining objections regarding Fata's COVID claims. See *Karsten v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc.*, 36 F.3d 8, 11 (4th Cir. 1994) ("If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest dicta.").

Second, Fata objects{2023 U.S. Dist. LEXIS 6} to the Magistrate Judge's determination that he failed to exhaust his administrative remedies as to his medical claim. The United States maintains Fata's administrative claims were insufficient to allow it to investigate Fata's medical claim.

As an initial matter, the Fourth Circuit has held that failure to exhaust remedies in an FTCA case requires dismissal for lack of subject matter jurisdiction. *Plyler v. United States*, 900 F.2d 41, 42 (4th Cir. 1990) (holding filing an administrative claim is "jurisdictional and may not be waived" (quoting *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986))).

When considering a motion to dismiss for lack of subject matter jurisdiction, "may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999)

Federal regulations deem a claim "to have been presented when a Federal agency receives from a claimant . . . an executed Standard Form 95 [(SF-95)] or other written notification of an incident, accompanied by a claim for money damages in a sum certain." 28 C.F.R. § 14.2(a). The notice must be "sufficient to cause the agency to investigate[.]" *Ahmed v. United States*, 30 F.3d 514, 517 (4th Cir. 1994).

Fata submitted two SF-95 requests. The evidence indicates neither request explicitly raised Fata's medical claim. Fata contends the medical records attached to the second request suffice. But,{2023 U.S. Dist. LEXIS 7} as the Magistrate Judge determined, Fata's mere attachment of medical records, without explanation, failed to adequately provide the United States notice of his claim.

To the extent that Fata argues his administrative filings under the Prison Litigation Reform Act suffice under the FTCA, that contention fails. The exhaustion requirement for a *Bivens* cause of action differs from the FTCA exhaustion procedure. Consistent with the FTCA, the BOP has adopted Program Statement 1320.06, which explains the administrative procedure for FTCA claims that arise while incarcerated. See BOP Program Statement 1320.06 ¶7(b) (explaining inmates should file and SF-95 form or, in the alternative, a document containing all the listed information).

Fata has failed to show his administrative filings meet those listed requirements as to his medical claim. In other words, he has failed to show he provided the United States with notice sufficient to prompt investigation.

Therefore, Fata failed to exhaust his administrative remedies as to his medical claim and the Court thus lacks jurisdiction over this claim. Accordingly, the Court will overrule this objection, as well. Because this issue is dispositive, the Court need not delve into{2023 U.S. Dist. LEXIS 8} Fata's remaining objections regarding Fata's medical claim. See *Karsten*, 36 F.3d at 11 ("If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest dicta.").

After a thorough review of the Report and the record in this case under the standard set forth above, the Court overrules the objections, adopts the Report to the extent it does not contradict this order, and incorporates it herein. Therefore, it is the judgment of the Court the United States's motion to dismiss is **GRANTED**, the COVID claims are **DISMISSED WITH PREJUDICE**, and the medical claim is **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

Signed this 6th day of December 2023, in Columbia, South Carolina.

/s/ Mary Geiger Lewis

MARY GEIGER LEWIS

UNITED STATES DISTRICT JUDGE

Appendix C

Farid Fata, Plaintiff, v. United States of America, Defendant.
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, CHARLESTON
DIVISION
2023 U.S. Dist. LEXIS 219093
Case No. 2:22-cv-04399-MGL-MGB
August 15, 2023, Decided
August 15, 2023, Filed

Counsel {2023 U.S. Dist. LEXIS 1} **Farid Fata**, Plaintiff, Pro se, Salters, SC.
For United States of America, Defendant: Christie V Newman,
LEAD ATTORNEY, US Attorneys Office, Columbia, SC.
Judges: MARY GEIGER LEWIS, UNITED STATES MAGISTRATE JUDGE.

Opinion

Opinion by: MARY GEIGER LEWIS

Opinion

REPORT AND RECOMMENDATION

Plaintiff, proceeding *pro se* and *in forma pauperis*, brought this action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, raising claims of negligence against the Federal Bureau of Prisons ("BOP") for failing to protect him from COVID-19. (Dkt. No. 1; see 28 U.S.C. § 1346.) This matter is before the Court upon a Motion to Dismiss filed by the United States.¹ (Dkt. No. 21.) For the reasons set forth herein, the undersigned recommends granting Defendant's motion.

BACKGROUND

Plaintiff, currently a detainee at FCI Williamsburg, alleges negligence claims against the BOP for failing to protect Plaintiff from COVID-19 by refusing to adhere to various statutes, regulations, and policies. (Dkt. No. 1 at 4.) Plaintiff claims that the policies "BOP Memoranda-Action Plans and BOP COVID-19 response plan" prescribed specific conduct for BOP officials to follow, and he alleges prison officials failed to follow the policies. (*Id.*) He alleges the United States failed to implement "contact tracing and surveillance{2023 U.S. Dist. LEXIS 2} testing" at FCI Williamsburg, as well as enhanced staff screening, all of which he claims were mandatory. (*Id.* at 5.) Plaintiff specifically lists the general duty of care found under 18 U.S.C. § 4042. (*Id.* at 2-3.).

Additionally, Plaintiff claims "administrative negligence" in failing to timely schedule him for outside "urgent" consultations with medical specialists, which he claims led to "prolonged pelvic pain from recurrent active prostatitis." (*Id.* at p. 5.) Plaintiff claims this is not a medical malpractice claim, but rather that the actions were a breach of a mandatory duty under BOP COVID-19 policies, which stated that "outside 'urgent' consultations should not be delayed or postponed." (*Id.* at 5-6.) He further alleges FCI Williamsburg's Warden and Associate Warden failed to restrict staff and inmate movement between housing units, that inmates were transferred to the institution from other facilities without proper testing or separation, that the screening process for staff was abandoned, and that officers were no longer screened for symptoms outside the facility. (*Id.* at 7-8.) Plaintiff also alleges that Medical Director of Health Services Dr. Stephen Hoey, and Health Services Administrator{2023

U.S. Dist. LEXIS 3} K. Nolte failed to take adequate precautions to protect the inmates from the spread of COVID-19, resulting in Plaintiff contracting the virus.² (*Id.* at 9-10.) Plaintiff alleges he contracted COVID-19 on December 18, 2020. (*Id.* at 9.) He seeks compensatory damages of \$300,000. (*Id.* at 17.)

On May 15, 2023, Defendant filed a Motion to Dismiss. (Dkt. No. 21.) By Order filed that same day, pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Plaintiff was advised of the dismissal procedure and the possible consequences if he failed to adequately respond to the motion. (Dkt. No. 22.) Plaintiff filed a response in opposition on May 26, 2023 (Dkt. No. 24), and Defendant did not file a reply brief. Defendant's motion is ready for the Court's review.

STANDARDS

A. Liberal Construction of Pro Se Complaint

Plaintiff brought this action pro se, which requires the Court to liberally construe his pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (per curiam); *Loe v. Armistead*, 582 F.2d 1291, 1295 (4th Cir. 1978); *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978). Pro se pleadings are held to a less stringent standard than those drafted by attorneys. *Haines*, 404 U.S. at 520. Even under this less stringent standard, however, a pro se complaint is still subject to summary dismissal. *Id.* at 520-21. The mandated liberal construction means that only if the court can reasonably read the {2023 U.S. Dist. LEXIS 4} pleadings to state a valid claim on which the complainant could prevail, it should do so. *Barnett v. Hargett*, 174 F.3d 1128, 1133 (10th Cir. 1999). A court may not construct the complainant's legal arguments for him. *Small v. Endicott*, 998 F.2d 411, 417-18 (7th Cir. 1993). Nor should a court "conjure up questions never squarely presented." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985).

B. Rule 12(b)(1) Dismissal Standard

Defendant seeks dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure. (Dkt. No. 21 at 3.) A motion to dismiss pursuant to Rule 12(b)(1) asks whether a court has the ability to hear and adjudicate the claims brought before it. Federal courts are courts of limited jurisdiction and can act only in those specific instances authorized by Congress. See *Bowman v. White*, 388 F.2d 756, 760 (4th Cir. 1968). The plaintiff bears the burden of proving the existence of subject matter jurisdiction. See *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Further, a party who brings an action against the United States pursuant to the FTCA "bears the burden of pointing to ... an unequivocal waiver of immunity." *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (quoting *Holloman v. Watt*, 708 F.2d 1399, 1401 (9th Cir. 1983)).

When considering a motion to dismiss under Rule 12(b)(1), "the court may consider the evidence beyond the scope of the pleadings to resolve factual disputes concerning jurisdiction." *Williams*, 50 F.3d at 304 (citing 2A James W. Moore, Moore's Federal Practice ¶ 12.07 at 12-49-12-50 (2d ed. 1994)); see also *Evans*, 166 F.3d at 647 ("When a defendant challenges subject matter jurisdiction pursuant to Rule 12(b)(1), 'the district court is to regard the pleadings as mere evidence on the issue, and {2023 U.S. Dist. LEXIS 5} may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.'") (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)).

DISCUSSION

In its Motion to Dismiss, Defendant contends that Plaintiff failed to exhaust his administrative remedies with respect to all of his claims, other than his claim that the BOP failed to protect him by

abandoning the screening process of officers and new arriving inmates and that the institution staff failed to implement policies that adopted CDC guidance on contact tracing and testing. (Dkt. No. 21 at 6.) Defendant further argues, *inter alia*, that the court does not have subject matter jurisdiction over any of Plaintiff's claims because they fall within the discretionary function exception to the FTCA. (*Id.* at 8.)

A. Exhaustion

Defendant first asserts that the following claims should be dismissed for lack of exhaustion: (1) a general failure to follow the "BOP Memoranda-Action Plans and BOP COVID-19 response plan"; and (2) a failure to schedule Plaintiff for consultations with specialists. (Dkt. No. 21 at 6.) Defendant asserts these claims were not presented at the administrative tort claim stage. (*Id.* at 8.) Plaintiff disputes that he has failed to exhaust{2023 U.S. Dist. LEXIS 6} any of his claims, claiming that the updated medical records he attached to his "amended" tort claim "flagged the 'urgent' referral for outside specialty consultations requested on November 30, 2021, and February 24, 2022." (Dkt. No. 24 at 1-3.)

Pursuant to the FTCA, a plaintiff is required to exhaust his or her administrative remedies prior to bringing suit. Specifically, 28 U.S.C. § 2675 states in relevant part,

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail.28 U.S.C. § 2675(a). Exhaustion of administrative remedies is a jurisdictional requirement; if the plaintiff has not exhausted his or her administrative remedies, the court must dismiss for lack of subject matter jurisdiction.3 See *Plyler v. United States*, 900 F.2d 41, 42 (4th Cir. 1990); see also *McNeil v. United States*, 508 U.S. 106, 113, 113 S. Ct. 1980, 124 L. Ed. 2d 21 (1993); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986); *Rodgers v. Glenn*, Case No. 1:16-cv-16-RMG, 2017 U.S. Dist. LEXIS 40745, 2017 WL 1051011, at *4 (D.S.C. Mar. 20, 2017) ("Inmates must exhaust the FTCA administrative process before suing").

Federal regulations deem a claim "to have been presented when a Federal agency receives from a claimant... an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain" 28 C.F.R. § 14.2. The notice must be "sufficient to cause the agency to investigate" the incident in order to determine its exposure to liability. *Rudisill v. United States*, No. 5:13-cv-110-F, 2014 U.S. Dist. LEXIS 122043, 2014 WL 4352114, at *1 (E.D.N.C. Sept.2, 2014) (quoting *Ahmed v. United States*, 30 F.3d 514, 516 (4th Cir. 1994)). However, a claimant need not give the government notice of "every possible theory of recovery." *Id.* at *1 (internal quotation omitted).

Defendant has put forth evidence to argue that Plaintiff did not exhaust his administrative remedies with respect to certain claims. (Dkt. No. 21-1.) Specifically, the Declaration from J. Carter, a Paralegal Specialist for the BOP, states that the BOP maintains a "computer database, which tracks the ... administrative tort claim files of BOP inmates" and that the database shows Plaintiff filed an SF-95 administrative tort claim with the BOP on May 17, 2022. (*Id.* at 1.) J. Carter has attached this tort claim to his declaration and states that the BOP denied the administrative claim by letter on April 26, 2023. (*Id.*) In his summary of the attachments, J. Carter notes{2023 U.S. Dist. LEXIS 8} that the administrative tort claim is included "without attached medical records." (*Id.* at 2.)

Under "Basis of Claim," the SF-95 form states:

The United States (Warden Brian K. Dobbs) of FCI Williamsburg had a duty to keep Fata safe and protect him from unreasonable risks or harm. Mr. Dobbs & AW A. Mendoza breached said duty when they abandoned the screening process of officers and new arriving inmates that were set in place for COVID and as a result of the United States doing so, Petitioner contracted COVID-19 & suffered bodily injury; Both Warden and AW failed to implement prison policies that adopted CDC Guidance of contact tracing and testing in early Dec. 2020, May 6, 2021 & June 16, 2021. (*Id.* at 3.) Under "the Nature and Extent of Each Injury," the form states, "Petitioner has contracted COVID-19 plus physical injury that caused Fata pain and bodily injury as shown in his medical records attached (long Covid-brain fog, headaches, muscle and bone pains. Plus recurrent infections being immune compromised)." (*Id.*) The form shows a receipt date of May 17, 2022 and another receipt date of May 31, 2022. (*Id.*)

In his brief, Plaintiff asserts that in "May 2022, [he] discovered that the {2023 U.S. Dist. LEXIS 9} assurances of the prison health services officials toward scheduling Fata for 'urgent outside consultations did not materialize." (Dkt. No. 24 at 1.) Plaintiff claims that he then

filed an amended "Second Request" SF-95 that attached Fata's medical records since after September 2020 to May 2022, related to contracting Covid-19, long Covid, and the post-Covid recurrent infections where Fata stated the failure to timely schedule outside specialist consultations, and flagged the clinical encounters of November 30, 2021 for "urgent" urology referral and February 24, 2022, for "urgent" hematology referral. (*Id.* at 1-2.) The record shows the BOP responded on July 18, 2022, stating the "Second Request" was viewed as a "duplicate claim," and no action would be taken "for the duplicate claim." (Dkt. No. 24-3 at 2.)

Here, Plaintiff appears to rely on the medical records attached to his "Second Request" as a basis to find he exhausted his claim concerning a failure to schedule Plaintiff for consultations with specialists. (Dkt. No. 24 at 2.) Notably, his administrative tort claim focuses on the BOP's failure to conduct proper tracing and testing for COVID-19 in accordance with "prison policies." {2023 U.S. Dist. LEXIS 10} It does not mention any failure to schedule Plaintiff for consultations with specialists or otherwise reference this specific issue. Even with the inclusion of the medical records cited by Plaintiff, the Court cannot find the scope of a reasonable investigation into the allegations made in the administrative tort claim would have caused the BOP to discover the essence of Plaintiff's claim as to his alleged ignored consultation referrals. Further, Plaintiff does not offer any argument specific to the exhaustion of his claim alleging a general failure to follow the "BOP Memoranda-Action Plans and BOP COVID-1 response plan."

Based on the foregoing, the undersigned recommends Plaintiff has failed to exhaust his administrative remedies with respect to his allegations of a (1) a general failure to follow the "BOP Memoranda-Action Plans and BOP COVID-1 response plan"; and (2) a failure to schedule Plaintiff for consultations with specialists. (Dkt. No. 21 at 6.) Accordingly, those claims should be dismissed for lack of subject matter jurisdiction. *See, e.g., Terrell v. United States*, Case No. 4:08-cv-2228-HFF-TER, 2009 U.S. Dist. LEXIS 76878, 2009 WL 2762516, at *7 (D.S.C. Aug. 27, 2009) (dismissing claims of deficient medical care under the FTCA where plaintiff failed to file any administrative remedies with the BOP {2023 U.S. Dist. LEXIS 11} regarding those claims); *Davis v. United States*, No. 7:10-cv-00005, 2010 U.S. Dist. LEXIS 69016, 2010 WL 2754321, at *5 (W.D. Va. July 12, 2010) (finding only certain FTCA claims were exhausted; "Davis' administrative tort claim did not give the BOP sufficient notice of a need to investigate his current complaints").

B. Merits

Defendant also argues that the discretionary function exception to the FTCA deprives this court of

jurisdiction over this action, and it should be dismissed in its entirety. (Dkt. No. 21 at 8.) The FTCA provides for a limited waiver of the United States' sovereign immunity from suit by allowing a plaintiff to recover damages in a civil action for loss of property or personal injuries caused by the "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b)(1); see also *Medina v. United States*, 259 F.3d 220, 223 (4th Cir. 2001) ("The statute permits the United States to be held liable in tort in the same respect as a private person would be liable under the law of the place where the act occurred.").

However, the FTCA does not waive the United States' sovereign immunity for

[a]ny claim based{2023 U.S. Dist. LEXIS 12} upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 28 U.S.C. § 2680(a). The purpose of this "discretionary function exception" is to protect the discretion of the executive branch to make policy judgments. *Blanco Ayala v. United States*, 982 F.3d 209, 214 (4th Cir. 2020); see also *Wood v. United States*, 845 F.3d 123, 128 (4th Cir. 2017) ("In short, the discretionary function exception is driven by separation of powers concerns, shielding decisions of a government entity made within the scope of any regulatory policy expressed in statute, regulation, or policy guidance, even when made negligently."). Crucially, the burden is on the plaintiff to establish that the discretionary function exception does not foreclose his claim and deprive the court of subject matter jurisdiction. *Blanco Ayala*, 982 F.3d at 214 (quoting *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009); *Seaside Farm, Inc. v. United States*, 842 F.3d 853, 857 (4th Cir. 2016)).

To determine whether the discretionary function exception applies, the court must undertake a two-step inquiry. *Sanders v. United States*, 937 F.3d 316, 328 (4th Cir. 2019); *Rich v. United States*, 811 F.3d 140, 145 (4th Cir. 2015). First, the court must determine whether the nature of the defendant's{2023 U.S. Dist. LEXIS 13} actions is discretionary—that is, whether the actions involve an element of judgment or choice. *United States v. Gaubert*, 499 U.S. 315, 322, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991); *Berkovitz by Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988). The action is not considered discretionary if "a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow" because "the employee has no rightful option but to adhere to the directive." *Gaubert*, 499 U.S. at 322. Second, if the actions are discretionary, the court must then determine whether the defendant's decision was made based on considerations of public policy. *Id.* at 322-23; *Berkovitz*, 486 U.S. at 536-37.

As an initial matter, Plaintiff appears to concede that he cannot show the FCI Williamsburg officials were acting under mandatory direction from the BOP. (Dkt. No. 24 at 9.) Indeed, the record indicates that these officials' handling of COVID-19 and the protective measures they put into place involved an element of judgment or choice. (Dkt. Nos. 21-2; 21-3; 21-4.) Likewise, there is no evidence that any statute, regulation, or policy required that FCI Williamsburg officials immediately refer Plaintiff to outside specialists based on his medical record. At minimum, it is Plaintiff's burden to put forth evidence that shows the policies and procedures imposed mandatory duties on the FCI Williamsburg{2023 U.S. Dist. LEXIS 14} officials, and he has failed to do so here. Accordingly, the undersigned finds the nature of the FCI Williamsburg officials' conduct here is discretionary. See, e.g., *Hatten v. United States*, No. 4:21-cv-2912-JFA-TER, 2023 U.S. Dist. LEXIS 44856, 2023 WL 2815335, at *6 (D.S.C. Jan. 24, 2023) (finding FTCA claim concerning response to COVID-19 barred

by discretionary function exception, "Plaintiff has not presented evidence that would show that the memoranda or policies amounted to official policy that '[p]rescribes a course of action for an employee to follow'" (quoting *Gaubert*, 499 U.S. at 322), *adopted by*, 2023 U.S. Dist. LEXIS 43516, 2023 WL 2495870 (D.S.C. Mar. 14, 2023); *Santiago v. United States*, No. 7:21-cv-00436, 2022 U.S. Dist. LEXIS 44566, 2022 WL 790805, at *2 (W.D. Va. Mar. 14, 2022) (finding discretionary function exception applies to FTCA claim involving response to COVID-19 where plaintiff "has pointed to no federal statute, regulation, or policy that was binding on BOP or USP Lee officials"; noting that CDC guidance and 18 U.S.C. § 4042(a)(2) were not mandatory), *appeal dismissed*, 2022 U.S. App. LEXIS 18899, 2022 WL 9721500 (4th Cir. July 8, 2022), and *aff'd*, 2023 U.S. App. LEXIS 6993, 2023 WL 2610240 (4th Cir. Mar. 23, 2023).

Plaintiff focuses his argument on the second inquiry—he asserts "there are no policy considerations implied" in the conduct of the FCI Williamsburg officials. (Dkt. No. 24 at 5.) Defendant disagrees, arguing that the "BOP's response to COVID-19 is a complex, multi-faceted decision that required significant policy analysis." (Dkt. No. 21 at 20.) Indeed, "the development and implementation of safety protocols in federal prisons is{2023 U.S. Dist. LEXIS 15} unquestionably based on considerations of public policy." *Santiago*, 2022 U.S. Dist. LEXIS 44566, 2022 WL 790805, at *3. Courts in this circuit confronted with similar FTCA claims concerning the BOP's response to COVID-19 have uniformly found that the conduct at issue involves public policy judgments. See, e.g., *Hatten*, 2023 U.S. Dist. LEXIS 44856, 2023 WL 2815335, at *6 (finding plaintiff's "negligence claim based on the BOP's failure to follow its own COVID-19 protocol is barred by the discretionary function exception"; noting public policy concerns); *Santiago*, 2022 U.S. Dist. LEXIS 44566, 2022 WL 790805, at *2 (finding the BOP's handling of COVID-19 involves considerations of public policy; "The BOP must balance its duty to protect inmates from COVID-19 with its duty to protect inmates from each other, to safeguard staff, and to protect the public").

Based on the foregoing, Plaintiff's FCTA claims are barred by the discretionary function exception, and the entire action should be dismissed on this basis.⁴

CONCLUSION

It is therefore RECOMMENDED, for the foregoing reasons, that Defendant's Motion to Dismiss (Dkt. No. 21) be GRANTED. Specifically, the undersigned recommends that the following claims should be dismissed for lack of exhaustion: (1) a general failure to follow the BOP Memoranda-Action Plans and BOP COVID-1 response plan; and (2) a failure to schedule{2023 U.S. Dist. LEXIS 16} Plaintiff for consultations with specialists. The undersigned further recommends that Plaintiff's FCTA claims are barred by the discretionary function exception, and the entire action should be dismissed on this basis.

IT IS SO RECOMMENDED.

August 15, 2023

Charleston, South Carolina

/s/ Mary Gordon Baker

MARY GORDON BAKER

UNITED STATES MAGISTRATE JUDGE

Footnotes

1

Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1) and Local Rule 73.02(B)(2)(e), D.S.C., all pretrial matters in cases involving *pro se* litigants are referred to a United States Magistrate Judge for consideration.

2

Plaintiff previously brought a *Bivens* action against the individual employees of FCI Williamsburg, arising from the same allegations. His *Bivens* action was dismissed on July 20, 2023. *Fata v. Dobbs et al* 2:22-cv-01368-MGL, Dkt. No. 32.

3

The BOP has a three-tiered formal administrative grievance process, in addition to an informal resolution process, as set out at 28 C.F.R. §§ 542 et seq. An inmate may complain about any aspect of his confinement by first seeking to informally resolve the complaint at the institution level. 28 C.F.R. § 542.13. If the matter cannot be resolved informally, the inmate may file a formal written complaint to the warden within 20 calendar days after the date upon which the basis for the request occurred. 28 C.F.R. § 542.14. The matter will be investigated, and a written response provided to the inmate. *Id.* If dissatisfied with the response, the inmate may appeal to the Regional Director within 20 days of the date of the Warden's response. 28 C.F.R. § 542.15(a). If dissatisfied with the regional response, the inmate may appeal to the General Counsel within 30 days of the Regional Director's response. {2023 U.S. Dist. LEXIS 7} *Id.* Appeal to the General Counsel is the final level of agency review. *Id.*

4

In light of this recommendation, the undersigned does not address Defendant's argument that Plaintiff's claims are barred by the FTCA's quarantine exception. (Dkt. No. 21 at 22-25.)



Privacy Act Statement. In accordance with 28 CFR Section 16.41(d) personal data sufficient to identify the individuals submitting requests by mail under the Privacy Act of 1974, 5 U.S.C. Section 552a, is required. The purpose of this solicitation is to ensure that the records of individuals who are the subject of U.S. Department of Justice systems of records are not wrongfully disclosed by the Department. Failure to furnish this information will result in no action being taken on the request. False information on this form may subject the requester to criminal penalties under 18 U.S.C. Section 1001 and/or 5 U.S.C. Section 552a(i)(3).

Public reporting burden for this collection of information is estimated to average 0.50 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Suggestions for reducing this burden may be submitted to Director, Facilities and Administrative Services Staff, Justice Management Division, U.S. Department of Justice, Washington, DC 20530 and the Office of Information and Regulatory Affairs, Office of Management and Budget, Public Use Reports Project (1103-0016), Washington, DC 20503.

Full Name of Requester ¹ FARID FATA . BOP Reg. No. 488 60-039

Citizenship Status ² United States Social Security Number ³ _____

Current Address FCI Williamsburg, P.O. Box 340, Salters, SC 29590

Date of Birth April 9, 1965 Place of Birth Lebanon

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that I am the person named above, and I understand that any falsification of this statement is punishable under the provisions of 18 U.S.C. Section 1001 by a fine of not more than \$10,000 or by imprisonment of not more than five years or both, and that requesting or obtaining any record(s) under false pretenses is punishable under the provisions of 5 U.S.C. 552a(i)(3) by a fine of not more than \$5,000.

Signature ⁴ Farid Fata Date July 29, 2024

OPTIONAL: Authorization to Release Information to Another Person

This form is also to be completed by a requester who is authorizing information relating to himself or herself to be released to another person.

Further, pursuant to 5 U.S.C. Section 552a(b), I authorize the U.S. Department of Justice to release any and all information relating to me to:

Print or Type Name

¹ Name of individual who is the subject of the record sought.

² Individual submitting a request under the Privacy Act of 1974 must be either "a citizen of the United States or an alien lawfully admitted for permanent residence," pursuant to 5 U.S.C. Section 552a(a)(2). Requests will be processed as Freedom of Information Act requests pursuant to 5 U.S.C. Section 552, rather than Privacy Act requests, for individuals who are not United States citizens or aliens lawfully admitted for permanent residence.

³ Providing your social security number is voluntary. You are asked to provide your social security number only to facilitate the identification of records relating to you. Without your social security number, the Department may be unable to locate any or all records pertaining to you.

⁴ Signature of individual who is the subject of the record sought.

[Signature], Case Manager.
Authorized by the Act of July 7,
1955, as amended to administer
oaths (18 USC 4004).

↑ Vending ↑

FATA
FARID



Eye: BN Ht: 5'09"

INMATE

48860-039

U.S. Department of Justice
Federal Bureau of Prisons

Farid fata

7-29-24