No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

BRANDON S. LAVERGNE
Petitioner

vs.

RANDY LAVESPERE, ET AL
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRANDON LAVERGNE, #424229
PRO SE PETITIONER
MAIN PRISON WEST, WALNUT -3
LOUISIANA STATE PENITENTIARY
ANGOLA, LOUISIANA 70712

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QUESTIONS PRESENTED

(1) Should an appeals court panel be allowed to raise a defense for a defendant sua sponte that the defendant never themselves raised and deny an appeal of the plaintiff without ever giving the plaintiff a chance to respond to this new defense?

(2) Should the U.S. 5th Circuit Court of Appeals be forced to adopt electronics filing for prisoners based on the fact the court denied the plaintiff in this case a rehearing after it took nearly two weeks for the plaintiff to receive the denial of his appeal?

(3) Did the U.S. 5th Circuit abuse its discretion when it denied an extension of time to file for a rehearing when I sent an affidavit to the court swearing under the penalty of perjury I did not receive the denial of my appeal from 11 April 2025 until 22 April 2025 and filed for the rehearing on 24 April 2025?

(4) Should an appeals court be allowed to deny a tort claim for a medical injury based simply on the fact that particular set of facts had never been before that court before?

(5) Should a court be allowed to issue an unpublished opinion that violates its own precedent and this U.S. Supreme Court's precedent? Should the abuse of unpublished opinions be allowed to continue?

LIST OF PARTIES

RANDY LAVESPERE
Doctor-Louisiana State penitentiary

CINDY PARK
Nurse Practitioner- Louisiana State Penitentiary

BRADY BOUDIN
Respiratory Specialist- Louisiana State Penitentiary

JACOB C. JOHNSON
Hospital Administrator-Louisiana State Penitentiary

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI....1
OPINIONS BELOW....1
JURISDICTION....1
STATEMENT OF CASE....1
REASONS FOR GRANTING THE WRIT....3
CONCLUSION....11

INDEX OF APPENDIX

A- Magistrate's Report and Recommendation....15
B- District Court's Denial....27
1. C- U.S. 5th Circuit Court of Appeal Denial....29
D- Order Refusing to Allow Rehearing....47

TABLE OF AUTHORITIES CITED

U.S. Constitutional Provisions

Fifth Amendment to the United States Constitution....2,3,45,11
Sixth Amendment to the United States Constitution....3,5
Fourteenth Amendment to the United States Constitution....3,5

Cases

Lavergne v. Cain Et Al, M.D. of La. 13-233 (2016)....6
Cuadra v. Hous. Indep. Sch. Dist., 626 F.3d 808, 812 (5th Cir. 2010)....6
Wantou v. Wal-Mart Stores, Tex. L.L.C. 23 F.4th 422 (5th Cir. 2022)....6
Alanson v. Concordia Par. Corr. Facility, 848 F.3d 415, 422 (5th Cir. 2017)....7
Easter v. Powell, 467 F.3d 459, 464 (5th Cir. 2006)....7,8,9,10
Petzola v. Rostollan, 946 F.3d 242, 249 (5th Cir. 2019)....7,8
Austin v. City of Pasadena, 74 F. 4th 312, 328 (5th Cir. 2023)....8
Thomas v. Mills, 614 F. App'x, 777, 777-78 (5th Cir. 2015)....8
Mullenix v. Luna, 577 U.S. 7, 11 (2015)....9
Brosseau v. Haugen, 543 U.S. 194, 198 (2004)....9
Morgan v. Swanson, 659 F.3d 359, 372 (5th Cir. 2011)....9
Trammell v. Fruge, 888 F.3d 332, 339 (5th Cir. 2017)....9
Ramirez v. Martinez, 716 F.3d 369, 379 (5th Cir. 2013....9
Washington v. Thomas, 264 F.3d 1140 (5th Cir. 2001)....10

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

For cases from Federal Courts: The opinion of the U.S. District Court appears as Appendix "A" and final ruling "B". it is reported as *Lavergne v. Lavespere,* M.D. of La. 21-344. It is unknown if it was published.

The opinion of the U.S. Court of Appeals appears as Appendix "C" and it is an unpublished opinion.

JURISDICTION

For cases from the Federal Court

The date the U.S. Court of Appeals decided my case was 11 April 2025. A timely petition for rehearing was filed but the appeals court disputed its timeliness and denied an extension of time to file for rehearing on 30 May 2025.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

In 2012 before I came to prison I was diagnosed with obstructive sleep aprea and given a C-PAP for treatment. Later in 2012, I was arrested and came to prison. When I arrived at the Louisiana State Penitentiary my C-PAP was taken from me by then

Warden N. Burl Cain. I sued Cain in federal court and won a pro se jury trial in 2016 [*Lavergne v. Cain Et Al*, M.D. of La., 13-233 (2016)]. The prison doctor, Randy Lavespere, was a witness at that trial and knew the jury had found the denial of a C-PAP for sleep apnea was an 8th Amendment violation.

Yet, despite those facts, randy Lavespere refused to give me my C-PAP or test me for sleep apnea even though I continued to complain I had sleep apnea.

In 2018, a "stop bang" questionnaire shown I had a high probability of having sleep apnea and a sleep study was ordered. No test was given to me. In 2019, another test was ordered and no test was given to me. So I filed an Administrative Remedy Procedure ("ARP") that was not answered for a year. In 2020 and 2021 more test were ordered including from the ARP response. Still no test was given to me.

Finally, after the defendants were served with this lawsuit, ONE MONTH later, I was ordered a sleep study by the defendants, Randy Lavespere and Brady Boudin. I was given that sleep study in January 2022, that showed unequivocally I did have sleep apnea and had gone untreated for nearly 10 years.

Later the district court ruled Randy Lavespere did not violate my rights and had qualified immunity. The court did find Brady Boudin was deliberately indifferent, but since I was not harmed, in the court's opinion by Boudin's actions, he also had qualified immunity. Both Cindy Park and Jacob Johnson were dismissed from the case.

I appeal those findings to the U.S. 5th Circuit, who delivered a 2-1 ruling denying

the appeal, upholding the qualified immunity ruling based in part that neither I nor the court, itself, could find a case dealing with the particular facts in this case and therefore could not determine if I was "substantially harmed" by the defendant's actions.

In the dissenting opinion, Circuit Court Judge James L. Dennis, correctly cites the majority opinions denial is based on an issue never raised in the district court or on appeal by the defendant. The majority took it upon itself to raise a defense sua sponte that the substantial harm was not clearly established. And that the majority violated precedent in its denial.

This denial was issued on 11 April 2025. I did not receive it until 22 April 2025. on 24 April 2025 I placed a Motion for Rehearing En Banc, in the mail box. The court claimed it did not receive that rehearing until 5 May 2025, saying it was filed late. I then filed a challenge to that claim that the rehearing was filed late and provided an affidavit confirming when I received the denial and when I filed for the rehearing. The court denied the extension of time to file when I was timely in the first place.

REASONS FOR GRANTING THE PETITION

(1) The majority in this case is hiding behind their "unpublished" opinion to shield themselves from the clear violation of precedent. That practice must end. This Court must declare an end to unpublished opinions. They are a vehicle to judicial abuses and violations of equal protection and due process vested in the 5th, 6th, and 14th Amendments of the U.S. Constitution.

What is the purpose of precedent if it can be violated by a court designating a ruling as unpublished that flies in the face of common law and fairness. In this case, even circuit Judge James Dennis called out the majority for violating precedent. Yet, the majority knew they simply needed to designate thisas unpublished and called it a day while violating my rights. That can not be allowed. If I am held accountable to every letter of the law and procedure. Then so should the very court I must come to in order to seek justice. In this case I was faulted for not arguing against a defense that was never raised by either the defendants themselves or the federal district court. Then I was not allowed to rebut the majorities opinion before it was issued.

I was also faulted as a pro se incarcerated plaintiff for not locating a case with the same facts as this case to show "substantial harm". Not only am I in prison, but I am being illegally held in administrative segregation with no law library access at all. Yet, none of that matters to the greater body of law, because, this case is unpublished and not considered precedent. When every single case should always be held to the equal standard and considered precedent, unpublished opinions undermine the very premise of an orderly judicial system built upon a shared history of case law. All rulings, all judicial opinions, all cases should be held to the exact same standard and carry the exact same weight when decided. Unpublished opinions undermines all that. This Court must order the end of that practice.

(2)This court must order the U.S. 5th Circuit Court of Appeals to adopt electronic

filing. My appeal was denied on 11 April 2025. its all documented. I placed my motion for a rehearing in the mail on 24 April 2025. Within the 15 days allowed. The court claims to not have received that motion until 5 May 2025, which is within 15 days of me actually receiving the denial on 22 April 2025. Yet, none of that mattered to the court and I was denied a chance to ask for a rehearing on a split 2-1 ruling. Had I been allowed to send and receive the U.S. 5th Circuit's documents electronically this violation of my 5th, 6th, and 14th Amendment rights would not have been allowed to take place.

(3) How can I be faulted and denied relief on a defense the majority raised for the very first time in their ruling without ever giving me a chance to rebut and then denying me a chance to ask for a rehearing to rebut that abuse of the court? Further, how can I be faulted for not being able to locate a case to support my "substantial harm' claim when the majority admitted they also could not locate such a case. In my rebuttal to these actions I will adopted the opinion of Circuit Court Judge James L. Dennis almost word for word, starting on pg. 11 of Appendix "C".

"The majority opinions affirmation of summary judgment for Dr. Lavespere and Boudin on Lavergne's delayed medical treatment deliberate indifference claim fails as a matter of procedure and law. I respectfully dissent in part."

"First, the majority opinion erroneously affirms the district court's judgment most on a ground heretofore never raised in this litigation-and then continue to err by faulting Lavergne (who is self-represented and incarcerated) (AND I WILL ADD IN

ADMINISTRATIVE SEGREATION WITH NO LAW LIBRARY ACCESS) for failing to brief the issue that only the majority has raised."

Specifically, the majority concludes Dr. Lavespere and Boudin are entitled to qualified immunity on the second prong because "Lavergne has not cited . . . a published opinion in which we previously addressed whether some of all of Lavergne's symptoms constitute substantial harm." Anto, at 8 (I WILL ADD THE MAJORITY IGNORED THE FACT I CITED MY 2016 July trial in *Lavergne vs. Cain Et Al,* M.D. of La., 13-233 (2016), where the jury did consider qualified immunity and the exact same symptoms and ruled in my favor.)

"Yet, that is not why the district court found those defendants were entitled to qualified immunity." The district court found the first step of the qualified immunity analysis was not satisfied since Lavergne did not prove the conduct of Dr. Lavespere and Brady Boudin violated his 8th Amendment Rights."

""For good reason: No one argued in the court below that the substantial harm issue was not clearly established. And no one argues otherwise on appeal. True enough, we (the court) 'may affirm a grant of summary judgment on any ground supported by the record', but only when that ground was 'presented to the district court'". *Curdra v. Hous. Indep. Sch. Dist.,* 626 F.3d 808, 812 (5th Cir. 2010) (Haynes, J.); *Wantou v. Wal-Mart Stores, Tex, LLC*, 23 F.4th 422, 430 (5th Cir. 2022) (Engelhardt, J.) It is therefore both unfair and incorrect to affirm the entry of summary judgment on a ground the majority

has raised sua sponte for the first time in its opinion."

(I WOULD LIKE TO ADD I AM NOT ALLOWED TO RAISE A CLAIM ON APPEAL I DID NOT OBJECT TO IN THE LOWER COURT SO HOW IS IT FAIR OR JUST FOR A COURT OF LAW TO DO THE SAME AND NOT GIVE ME A CHANCE TO REBUT IT.)

"Second, beyond the glaring procedural infirmity, the majority opinion is mistaken that the substantial harm issue is not clearly established." To establish liability based on a delay in medical treatment, a plaintiff must show deliberate indifference to serious medical needs that resulted in substantial harm." *Alderson v. Concordia Parish Correctional Facility*, 848 F.3d 415 (5th Cir. 2017) (citing, *Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006).

Since at least 2006, it has been clearly established in the Fifth Circuit that any additional pain attributable to delayed medical treatment constitutes "substantial harm". See, *e.g. Id.* (relying on *Easter*, in a 2006 published opinion, and noting "Fifth Circuit precedent does not limit substantial harm to life long handicap or permanent loss"); id. (again, relying on *Easter* and emphasizing that "our precedent allows recovery for pain suffered during a delay in treatment caused by deliberate indifference." and "pain suffered during a delay in treatment can constitute a substantial harm and form the basis for an award and damages"); *Petzold v. Rostollan*, 946 F.3d 242 (5th Cir. 2019) (relying on *Alderson* and stating that "prisoner" must prove that the delay in or denial of medical

treatment resulted in substantial harm, such as suffering additional pain"; *Austin v. City of Pasadena*, 74 F.4th 312, 328 (5th Cir. 2023) ("the detainee need not die, or be permanently injured, before an actionable claim arises for delayed [medical] treatment; rather, a plaintiff may recover for pain suffered during a delay in treatment caused by deliberate indifference."); *Thomas v. Mills,* 614 F. App'x. 777, 777-78 (5th Cir. 2015) (vacating dismissal of § 1983 deliberate indifference claim based on the defendant's failure to replace an individual's C-PAP machine for five months; noting the delay caused the detainee to suffer "choking and gasping for air throughout the night.") Because the "substantial harm" bar is not particularly high, our court has found the argument satisfied when an inmate suffered chest pain, *Easter,* 467 F.3d 465, and in another case, "pain over the weekend", *Petzold,* 946 F.3d at 250 n.30.

Here, Lavergne presented evidence that the delayed medical treatment caused him, in 2018 and later, (AND I WILL ADD 2012-2022) to suffer disrupted sleep, extreme exhaustion, gasping for air, day time fatigue, blurred vision, headaches, body aches, increased heart rate and blood pressure, and depression.

"The majority opinion counters that it is unable to locate a published opinion (emphasis added) specifically dealing with these symptoms. But the notion that the law can only be clearly established when there is published opinion concerning an inmate's particular symptoms contradicts precedents dictating that the "focus" of the qualified immunity analysis is whether the official had "fair notice" that his conduct was

unlawful. *Mullenix v. Luna,* 577 U.S. 7, 11 (2015); *Brousseau v. Haugen,* 543 U.S. 194, 198 (2004) (explaining that the "focus" of qualified immunity analysis is "whether the official had "fair notice that her conduct was unlawful"); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc) ("The sine qua non of the clearly-established inquiry is "fair warning.")"

(I MUST ADD HERE THE DEFENDANTS IN THIS CASE HAD THAT "FAIR NOTICE' IN 2016 WHEN THE JURY FOUND IN MY FAVOR IN *LAVERGNE V. CAIN ET AL,* M.D. Of La. 13-233 (2016) BASED ON THE DEFENDANTS REFUSAL TO GIVE ME MY C-PAP)

"As we held in *Easter*, the clearly established-law requirement does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it [does mean] that in the light of pre-existing law the unlawfulness must be apparent." 487 F.3d at 463 (quotation omitted) (emphasis added). "the law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Trammell v. Fruge,* 868 F.3d 332, 339 (5th Cir. 2017) (quoting *Ramirez v. Martinez,* 716 F.3d 369, 379 (5th Cir. 2013)).

Applying those precepts here, if "pain over the weekend" (*Petzold*, 946 F.3d at 250 n.30) and "chest pain" (*Easter*, 467 F.3d at 465)- and, more broadly, any "additional

pain" attributable to delayed treatment (*Petzold*, 946 F.3d at 247)- is "substantial harm", than a reasonable official should know that disrupted sleep, extreme exhaustion, gasping for air, daytime fatigue, blurred vision, headaches, body aches, increased hearth rate and blood pressure, and depression constitutes substantial harm too. *Easter,* 467 F.3d at 465." As Judge Dennis points out the majority is relying on *Washington v. Thomas,* 264 F.3d 1140 (5th Cir. 2001), in which an inmate made no claim of substantial harm in connection to denial of his C-PAP where I in fact did in footnote #3 of Appendix "C", pg. 14.

Then Judge Dennis concludes with, "Turning to the prong of qualified immunity that the district court did reach-whether there was a violation of a constitutional right-the lower court simply concluded that Lavergne's sleep apnea symptoms did not constitute "substantial harm" because he did not suffer lasting symptoms like congestive heart failure. Not so. As the above cited cases illustrate, the substantial-harm-bar is cleared when delayed medical treatment causes any additional pain to the inmate. That is exactly what we have here.

At bottom, of course "Lavergne has not cited . . .a published opinion in which we have previously addressed whether some or all of Lavergne's symptoms constitute substantial harm. Ante, at 8. It is not an issue properly before this Court. In any event, the law is clearly established. I would reverse the district court's judgment with respect to Dr. Lavespere and Boudin and remand for further proceedings. I respectfully, but

emphatically dissent in part."

I choose to highlight and adopt most of Judge Dennis' words for the simple fact he used U.S. 5th Circuit cases to show a U.S. 5th Circuit majority they were violating their own precedent in their ruling against me. I was in fact substantial harmed by the actions and deliberate indifference of Dr. Levespere and Boudin and I add the inaction of Cindy Park and Jacob Johnson, who could have ordered Boudin to give me a sleep study as early as 2019 and did not . Yet the majority took these actions, knowing they were protected by unpublished opinions. Again that must end today.

CONCLUSION

This petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

Brandon S. Lavergne, #424229
Pro Se Petitioner
Main Prison West, Walnut Three
Louisiana State Penitentiary
Angola, Louisiana 70712

Date: 7-7-, 2025

No._____

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INDEX OF APPENDICES

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MAIN PRISON WEST, WALNUT -3
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ANGOLA, LOUISIANA 70712

APPENDIX-A

MAGISTRATE'S REPORT AND RECOMMENDATION

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BRANDON S. LAVERGNE (#424229)

VERSUS

RANDY LAVESPERE, ET AL.

CIVIL ACTION

NO. 21-344-JWD-RLB

NOTICE

Please take notice that the attached Magistrate Judge's Report has been filed with the Clerk of the U. S. District Court.

In accordance with 28 U.S.C. § 636(b)(1), you have 14 days after being served with the attached report to file written objections to the proposed findings of fact, conclusions of law, and recommendations set forth therein. Failure to file written objections to the proposed findings, conclusions, and recommendations within 14 days after being served will bar you, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.

ABSOLUTELY NO EXTENSION OF TIME SHALL BE GRANTED TO FILE WRITTEN OBJECTIONS TO THE MAGISTRATE JUDGE'S REPORT.

Signed in Baton Rouge, Louisiana, on April 17, 2024.

RICHARD L. BOURGEOIS, JR.
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BRANDON S. LAVERGNE (#424229)

VERSUS

RANDY LAVESPERE, ET AL.

CIVIL ACTION

NO. 21-344-JWD-RLB

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court are the cross Motions for Summary Judgment filed on behalf of Plaintiff (R. Doc. 115) and remaining Defendants Brady Baudin and Randy Lavespere (R. Doc. 118). Defendants have filed an Opposition. *See* R. Doc. 117.

The *pro se* Plaintiff, an inmate incarcerated at Louisiana State Penitentiary ("LSP"), filed this proceeding pursuant to 42 U.S.C. § 1983, complaining that his constitutional rights were violated due deliberate indifference to his serious medical needs. Plaintiff's remaining claims are for monetary damages against defendants Brady Baudin and Randy Lavespere in their individual capacities.[1]

Plaintiff moves for summary judgment relying upon the pleadings, a Statement of Disputed Facts, a Statement of Undisputed Facts, his declarations titled, "Affidavit A," "Affidavit B," and "Affidavit C," excerpts of the plaintiff's medical records, excerpts of administrative remedy procedure number LSP-2019-2018, articles from *Web*MD titled, "Mild Sleep Apnea May Raise Heart Risk" and "Sleep Apnea and Depression: 3 Facts You Should Know," excerpts of articles from www.hopkinsmedicine.org, and an excerpt of an article from WebMD titled, "11 Ways Sleep Apnea Can Hurt Your Health." Defendants move for summary judgment relying upon the pleadings, a Statement of Undisputed Facts, the Affidavit of Dr.

[1] *See* R. Doc. 61 dismissing (1) the Plaintiff's claim for monetary damages asserted against the Defendants in their official capacities; (2) the Plaintiff's claim for injunctive relief; (3) the Plaintiff's claims against Defendants Cindy Park and Jacob Johnson in their entirety; and (4) the Plaintiff's claim asserted against Defendant Dr. Randy Lavespere for failure to respond to informal complaints.

Lavespere, the Affidavit of Brady Baudin, a certified copy of the plaintiff's medical records, and a copy of administrative remedy procedure number LSP-2019-2018.

Summary Judgment Standard

Pursuant to well-established legal principles, summary judgment is appropriate where there is no genuine disputed issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A party moving for summary judgment must inform the Court of the basis for the motion and identify those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, that show that there is no such genuine issue of material fact. *Celotex Corp. v. Catrett, supra*, 477 U.S. at 323. If the moving party carries its burden of proof under Rule 56, the opposing party must direct the Court's attention to specific evidence in the record which demonstrates that the non-moving party can satisfy a reasonable jury that it is entitled to a verdict in its favor. *Anderson v. Liberty Lobby, Inc., supra*, 477 U.S. at 248. This burden is not satisfied by some metaphysical doubt as to alleged material facts, by unsworn and unsubstantiated assertions, by conclusory allegations, or by a mere scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Rather, Rule 56 mandates that summary judgment be entered against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett, supra*, 477 U.S. at 323.

Summary judgment is appropriate in any case where the evidence is so weak or tenuous on essential facts that the evidence could not support a judgment in favor of the non-moving party. *Little v. Liquid Air Corp., supra*, 37 F.3d at 1075. In resolving a motion for summary judgment, the Court must review the facts and inferences in the light most favorable to the non-

moving party, and the Court may not evaluate the credibility of witnesses, weigh the evidence, or resolve factual disputes. *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991).

Plaintiff's Allegations

In his Complaint, as supplemented, Plaintiff alleges the following: After complaining for several years about sleep apnea, a sleep study was ordered in 2018. The plaintiff was seen by defendant Brady Baudin for a pre-study checkup, but a sleep study was not scheduled. In October of 2018, the plaintiff was placed in CCR which resulted in him gaining 40 pounds, which in turn worsened his sleep apnea. A sleep study was again ordered in 2019 but was never scheduled. The plaintiff filed a grievance which was granted by defendant Johnson in 2020. The plaintiff was then seen by defendant Baudin for another pre-study checkup, but a sleep study was not scheduled. The plaintiff was informed by Dr. Hal MacMurdo that, for an unknown reason, defendant Dr. Lavespere was blocking the plaintiff's sleep study.

On April 15, 2021, the plaintiff was told by defendant Park that she would make sure his sleep study was completed within two weeks. She called defendant Baudin but a sleep study was never scheduled. What defendant Park was trying to schedule was not an actual sleep study at a sleep center, but rather someone simply watching the plaintiff sleep.

Due to sleep apnea, the plaintiff would wake up coughing and gasping for air, and his vision is blurry. His heart rate and blood pressure increased. The plaintiff's memory and mental focus were also affected.

The plaintiff wrote several letters to defendant Dr. Lavespere and defendant Johnson asking for medical assistance. The plaintiff previously filed suit regarding a former warden's failure to allow the plaintiff to have a CPAP (continuous positive airway pressure) machine. Defendant Dr. Lavespere testified at the trial, and the jury found that the plaintiff's Eighth

Amendment rights had been violated. The plaintiff asserts that it should have been clear to defendant Lavespere that denial of a sleep study is also a violation of the plaintiff's Eighth Amendment rights.

The plaintiff did not undergo a sleep study until January of 2022. The study was conducted by defendant Baudin, and the plaintiff wore a harness that measured his sleep position, breathing, heart rate, and oxygen levels while sleeping. Defendant Baudin informed the plaintiff that this method had been available for five years. On February 10, 2022, the plaintiff's results showed that he has obstructive sleep apnea. Defendant Baudin gave the plaintiff a VPAP (variable positive airway pressure) machine, which the plaintiff was able to wear and then sleep normally.

Qualified Immunity

Defendants asserts, *inter alia*, that they are entitled to qualified immunity in connection with Plaintiff's claims. The qualified immunity defense is a familiar one and, employing a two-step process, operates to protect public officials who are performing discretionary tasks. *Huff v. Crites*, 473 F. App'x. 398 (5th Cir. 2012). As enunciated in *Saucier v. Katz*, 533 U.S. 194 (2001), the first step in the analysis is to consider whether, taking the facts as alleged in the light most favorable to the plaintiff, the defendant's conduct violated the plaintiff's constitutional rights. *Id.* at 201. Second, the district court looks to whether the rights allegedly violated were clearly established. *Id.* This inquiry, the Court stated, is undertaken in light of the specific context of the case, not as a broad, general proposition. *Id.* The relevant, dispositive inquiry in determining whether a constitutional right was clearly established is whether it would have been clear to a reasonable state official that his conduct was unlawful in the situation which he confronted. *Id.*

Undertaking the qualified immunity analysis, the Court finds that Defendants' motion should be granted. Defendants are entitled to summary judgment.

Deliberate Indifference

A prison official violates the Eighth Amendment's prohibition of cruel and unusual punishment if the official shows deliberate indifference to a prisoner's serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 103–06 (1976). The official must "know[ ] of and disregard[ ] an excessive risk to inmate health or safety" and "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists". *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The official also must draw that inference. *Id.*

Failed treatments, negligence, and medical malpractice are insufficient to give rise to a claim of deliberate indifference. *Gobert v. Caldwell*, 463 F.3d 339, 346 (5th Cir. 2006). A prisoner who disagrees with the course of treatment or alleges that he should have received further treatment also does not raise a claim of deliberate indifference. *Domino v. Tex. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). Instead, an inmate must show that prison officials denied him treatment, purposefully provided him improper treatment, or ignored his medical complaints. *Id.* A delay in treatment may violate the Eighth Amendment if the delay was the result of the prison official's deliberate indifference and substantial harm—including suffering—occurred during the delay. *Easter v. Powell*, 467 F.3d 459, 464–65 (5th Cir. 2006).

Defendant Dr. Lavespere

With regards to defendant Dr. Lavespere, the plaintiff asserts in his Declaration that Dr. Hal McMurdo told the plaintiff that defendant Dr. Lavespere was stopping the plaintiff from getting a sleep study after 2014. *See* R. Doc. 115-3. What Dr. McMurdo allegedly told the plaintiff is hearsay and is not competent summary judgment evidence. "[H]earsay cannot create a genuine issue of material fact" on a summary judgment motion. *Porter v. Lear*, 751 F. App'x

422, 430 (5th Cir. 2018). *See also Fowler v. Smith*, 68 F.3d 124, 126 (5th Cir. 1995) ("Evidence on summary judgment may be considered to the extent not based on hearsay or other information excludable at trial."); and *Goodwin v. Johnson,* 132 F.3d 162, 168 (5th Cir. 1997) (hearsay statements in affidavit submitted in opposition to motion for summary judgment were "incompetent summary judgment evidence").

Nor does the record support the plaintiff's allegation that defendant Dr. Lavespere was somehow blocking the plaintiff's sleep study. A review of the record reveals that a referral to a respiratory therapist for a sleep study was ordered in January of 2018 and the consultation form was completed in February of 2018. In the meantime, the plaintiff was seen by a different provider who doubted that the plaintiff had sleep apnea and advised him to exercise and lose weight. *See* R. Doc. 119-4, p. 11, 13, and 14. The plaintiff did not complain about symptoms of sleep apnea again until March 13, 2019, by which time defendant Dr. Lavespere was on leave due to cancer treatment. *See* R. Doc. 119-3, p. 273, and R. Doc. 121. On April 10, 2019, the plaintiff was seen by a different provider who recommended a sleep study, but upon discussing the matter with defendant Baudin learned that the plaintiff was already on the list for a sleep study. *See* R. Doc. 119-3, p. 272.

The plaintiff did not complain of sleep apnea again until October 1, 2019. *See* R. Doc. 119-3, p. 268. On January 31, 2020, the plaintiff complained that a sleep study had been ordered almost a year earlier and had not been conducted. *See* R. Doc. 119-3, p. 266. The provider who followed up with the plaintiff checked on the status of the sleep study on March 3, 2020, and noted that the plaintiff was on the list per defendant Baudin. *See* R. Doc. 119-3, p. 265.

It is important to note that around this time COVID-19 and its related restrictions became a factor in daily life and in the scheduling of medical services. While COVID-19 may not have

accounted for the entire delay, the Court takes judicial notice of COVID-related restrictions and how they may have affected the scheduling of medical procedures.

On October 8, 2020, the provider ordered a sleep study in the Skilled Nursing Unit at the prison. *See* R. Doc. 119-3, p. 261. By January 25, 2021, defendant Dr. Lavespere was no longer the medical director at LSP and had only limited knowledge of the day-to-day activities at LSP. *See* R. Doc. 121. On April 15, 2021, the provider noted that they had spoken to defendant Baudin and that they would try to do the sleep study in the skilled nursing unit the following week. *See* Doc. 119-3, p. 254.

On May 13, 2021, the plaintiff was referred to an ENT for obstructive sleep apnea. *See* R. Doc. 119-3, p. 248. The plaintiff was seen by an ENT on July 1, 2021, who recommended a sleep study and a CPAP machine. It was noted that defendant Dr. Lavespere stated that, per defendant Baudin, a sleep study machine/test would be ordered. The sleep study and an endoscopy were okayed on August 18, 2021. *See* R. Doc. 119-3, p. 244.

The endoscopy was performed on October 11, 2021, and Dr. Bolk recommended a sleep study and, if the plaintiff had obstructive sleep apnea, that he be given a CPAP machine. *See* R. Doc. 119-3, p. 234. On January 20, 2022, a sleep study was completed and was consistent with mild obstructive sleep apnea. *See* R. Doc. 119-3, p. 212-213. A CPAP[2] machine was provided the following month. *See* R. Doc. 119-3, p. 211. In the next two months, the plaintiff's symptoms resolved, and he was sleeping better. *See* R. Doc. 119-3, p. 214 and 220.

As such, the record shows that for a large part of the time in question defendant Dr. Lavespere was not involved with the plaintiff's day to day medical care. Furthermore, nothing in the records shows that defendant Dr. Lavespere did anything to prevent or delay the plaintiff's

[2] The Supplemental Complaint refers to this as a VPAP device. (R. Doc. 23 at 2).

sleep study. The record shows that all or most providers seemed to be relying upon defendant Baudin to have the sleep study completed.

Defendant Brady Baudin

Defendant Baudin is a registered respiratory specialist. *See* R. Doc. 120, p. 1. As noted above, a Consultant Referral Form was competed on February 7, 2018, for Respiratory Therapy to evaluate the plaintiff for obstructive sleep apnea. *See* R. Doc. 119-4, p. 13. The Court has not been directed to any documentation of this evaluation but assumes the evaluation consisted of the STOP BANG Questionnaire which indicated that the plaintiff had a high risk of obstructive sleep apnea. *See* R. Doc. 119-4, p. 12. It is unclear what occurred between this time and April 10, 2019, when a provider ordered a sleep study for the plaintiff only to be informed by defendant Baudin that the plaintiff was already on the list to have a sleep study completed. *See* R. Doc. 119-3, p. 272. According to defendant Baudin, a treating physician must order sleep apnea testing. *See* R. doc. 120, p. 1. As such, sometime between February 7, 2018, and April 10, 2019, a sleep study had been ordered for the plaintiff since defendant Baudin informed the provider that the plaintiff was on the list for sleep apnea testing.

Plaintiff still remained on the list until March 3, 2020, when a provider again contacted defendant Baudin about the status of the plaintiff's sleep study. *See* R. Doc. 119-3, p. 265. Understandably, at this point COVID-19 may have begun to account for some, but not all, of the delay in obtaining the sleep study.

On October 8, 2020, the provider ordered a sleep study in the Skilled Nursing Unit at the prison. *See* R. Doc. 119-3, p. 261. On April 15, 2021, the provider contacted defendant Baudin who stated that they would try to do the sleep study in the skilled nursing unit the following week. *See* Doc. 119-3, p. 254.

The plaintiff was seen by an ENT on July 1, 2021, who recommended a sleep study and a CPAP machine. It was noted that defendant Dr. Lavespere stated that, per defendant Baudin, a sleep study machine/test would be ordered. The sleep study and an endoscopy were okayed on August 18, 2021. *See* R. Doc. 119-3, p. 244.

The endoscopy was performed on October 11, 2021. Dr. Bolk recommended a sleep study, and if the plaintiff had obstructive sleep apnea, that he be given a CPAP machine. *See* R. Doc. 119-3, p. 234. On January 20, 2022, a sleep study was finally completed by defendant Baudin and was consistent with mild obstructive sleep apnea. *See* R. Doc. 119-3, p. 212-213. A CPAP machine was provided by defendant Baudin the following month. *See* R. Doc. 119-3, p. 211.

It is clear from the records that a sleep study had been ordered for the plaintiff and that the various providers were relying on defendant Baudin to arrange the study. Defendant Baudin has offered no explanation for his failure to act which resulted in a delay of testing for several years. Without any other explanation, the Court cannot conclude that defendant Baudin's failure to act was due to anything other than deliberate indifference.

However, a delay in medical care violates the Eighth Amendment only if it results in substantial harm. Despite the long delay, the plaintiff has not alleged to have suffered substantial harm. Plaintiff alleges only that sometimes he would wake up coughing and gasping for air, and his vision was blurry. His heart rate and blood pressure had increased, and he sometimes had headaches and body aches. The plaintiff's memory and mental focus were also affected. By March 7, 2022, it was noted that the plaintiff's symptoms had resolved. *See* R. Doc. 119-4, p. 220. As such, the plaintiff did not suffer any substantial harm from the delay in testing.

Other courts have concluded the same under similar circumstances. *See Kapordelis v. Autin,* 2019 WL 7500820, (W.D. La. Dec. 16, 2019) (No "substantial harm" from the delay

where plaintiff suffered only from temporary severe headaches and an alleged loss of consciousness, did not allege that his medical condition worsened as a result of the delay, did not make a claim of any lasting complications resulting from the delay, and conceded that all pain and suffering ended when the CPAP therapy was restored); *Bolling v. Colorado Department of Correctios,* 2023 WL 2467336, (D. Colo. Mar. 2, 2023) (allegations of shortness of breath, chronic headaches, and stopping breathing several times during sleep do not constitute substantial harm); *Santana v. Watson*, 2014 WL 1803308, at *5 (S.D.N.Y. May 6, 2014) (failure to show that delay or interruption in the provision of a CPAP machine was sufficiently serious to constitute an Eighth Amendment violation where there was "no indication that [plaintiff's] health declined during the time he was without a CPAP machine, or that the temporary deprivation significantly affected his daily activities or caused him chronic or substantial pain"); *Nesmith v. Southern Health Partners*, 2012 WL 426606, at *4 (W.D. Pa. Jan. 10, 2012) (recommending dismissal with prejudice where even if plaintiff's sleep apnea was a serious medical condition, his section 1983 claim for delay in receiving a CPAP machine failed where his claims were limited to not sleeping well and occasional headaches and chest pains in the morning).

As such, there is nothing in the record to show that defendant Baudin's failure to act resulted in substantial harm to the plaintiff. Defendants are entitled to summary judgment.

RECOMMENDATION

It is recommended that the plaintiff's Motion for Summary Judgment (R. Doc. 115) be denied, and that defendants' Motion for Summary Judgment (R. Doc. 118), be granted, dismissing plaintiff's claims with prejudice.

Signed in Baton Rouge, Louisiana, on April 17, 2024.

RICHARD L. BOURGEOIS, JR.
UNITED STATES MAGISTRATE JUDGE

APPENDIX-B

FEDERAL DISTRICT COURT DENIAL

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BRANDON S. LAVERGNE (#424229)

VERSUS

RANDY LAVESPERE, ET AL.

CIVIL ACTION

NO. 21-344-JWD-RLB

JUDGMENT

IT IS ORDERED, ADJUDGED, AND DECREED that judgment is hereby entered dismissing plaintiff's claims with prejudice.

Signed in Baton Rouge, Louisiana, on May 9, 2024.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

BRANDON S. LAVERGNE (#424229)

VERSUS

RANDY LAVESPERE, ET AL.

CIVIL ACTION

NO. 21-344-JWD-RLB

OPINION

On April 17, 2024, the Magistrate Judge issued a Report and Recommendation (R. Doc. 122) recommending that the plaintiff's Motion for Summary Judgment (R. Doc. 115) be denied, and that the defendants' Motion for Summary Judgment (R. Doc. 118) be granted, dismissing the plaintiff's claims with prejudice. The plaintiff objected to the Magistrate Judge's recommended disposition on several grounds. *See* R. Doc. 123. The Court now makes a determination, de novo, as to the objected to portions of the Report and Recommendation as required by Federal Rule of Civil Procedure 72(b)(3).

Relevant Time Period

Plaintiff's objection, in part, relies on events occurring as early as 2012. However, the sole grievance before the Court as well as the Complaint, as supplemented, pertain to events occurring in 2018 and later. In the plaintiff's grievance, filed on August 31, 2019, he relays the history of his prior litigation and states that he has not been treated for sleep apnea for 7 years. The plaintiff then specifically complains that a sleep study was ordered in 2018 and again in 2019 and had not yet been completed. As relief, the plaintiff sought a sleep study, a CPAP machine, compensatory damages, and injunctive relief. *See* R. Doc. 98-1, p 8.

In his original Complaint the plaintiff complains that he had not received a sleep study despite one being ordered in 2018. The plaintiff sought similar relief, except specified that he

was seeking monetary damages for the inaction of the defendants beginning in 2018. *See* R. Doc. 1. In his Supplemental Complaint, the plaintiff again complains that he was not given a sleep study despite orders for the same in 2018, 2019, 2020, and 2021. *See* R. Doc. 23. Despite the inclusion of some extraneous allegations, the claim before the Court is limited to 2018 until the plaintiff received a sleep study and CPAP machine in 2022. As such, the Magistrate Judge did not err in considering the defendants' actions during this period and not prior to this time.

Dr. McMurdo's Statement

Plaintiff asserts that the Magistrate Judge wrongly concluded that the statement of Dr. McMurdo in the plaintiff's Affidavit/Declaration was not competent summary judgment evidence. "Hearsay is not competent summary judgment evidence, unless its proponent can show that the statement can be presented in an admissible form at trial." *Miller v. Michael's Stores, Inc.*, 98 F. 4th 211, 218. In *Miller,* the plaintiff slipped and fell in a Michael's store. In support of her Motion for Summary Judgment, Miller submitted an affidavit containing a statement from a Michael's employee about the placement and location of a floor mat and "wet floor" sign. The district court concluded that the statement was hearsay and was thus inadmissible at summary judgment. The Fifth Circuit concluded that the statement did not meet any exception to the hearsay rule and could not be made admissible at trial; therefore, the district court's exclusion of the statement was not an abuse of discretion. The Court additionally concluded that even if the statement was admissible based on a hearsay exception or could be made admissible at trial, it would still be inadmissible due to lack of relevance since the statement did not pertain to the condition of the floor where Miller slipped.

In the instant matter, plaintiff argues in his objection that Dr. McMurdo's statement is not hearsay, and that Dr. McMurdo will be called to testify at the trial of this matter. Even if Dr.

McMurdo's statement, that Dr. Lavespere was stopping the plaintiff from getting a sleep study after 2014, would be admissible based on a hearsay exception or could be made admissible at trial, the plaintiff offers no information about when the statement was made. As such, it may not be relevant to the time period to which the plaintiff's claims are confined. Regardless, as explained more fully below, the plaintiff has not shown that he suffered any substantial harm during the delay in obtaining a sleep study and CPAP machine.

Substantial Harm

Plaintiff asserts that the Magistrate Judge wrongly concluded that the plaintiff did not suffer a substantial harm during the delay between 2018 and 2022. Specifically, that the Magistrate Judge failed to consider the plaintiff's exhaustion, headaches, body aches, and depression during this time. As noted in the cases cited by the Magistrate Judge, none of the plaintiff's physical or mental complaints constitute substantial harm. Substantial harms resulting from untreated sleep apnea are of the kinds noted in the articles attached to the plaintiff's Motion for Summary Judgment, for example cardiovascular disease and metabolic health problems like high blood pressure and stroke. *See* R. Docs. 115-19 and 115-21. As noted by the Court in *Edwards v. Abbett*, 2020 WL 6395454, (M.D. Ala. Nov. 2, 2020), "many risks from sleep apnea appear to be longer term: it increases the risk of several serious medical conditions, such as cancer, hypertension, and Type II diabetes. *See Sleep Apnea*, National Heart, Lung, and Blood Institute, National Institutes of Health (Nov. 1, 2020), https://www.nhlbi.nih.gov/health-topics/sleep-apnea." Though the delay in this matter is long, the plaintiff still suffered no substantial harm akin to the kinds noted above during the delay.

Compare *Zepeda v. Jeffreys*, 2022 WL 17551812 (S.D. Ill. Dec. 9, 2022) where the Court found that the plaintiff had stated a claim for the delay in conducting a sleep study and the

provision of a CPAP where the plaintiff sustained congestive heart failure due to the prolonged delay. In *Zepada,* the plaintiff similarly alleged that prior to entering custody he was diagnosed with sleep apnea and prescribed a CPAP machine. Upon intake he informed the medical staff of his condition and at the time of intake, the plaintiff's blood pressure was high. From August of 2018 through November 30, 2020, the plaintiff continued to have high blood pressure, as well as headaches, dizziness, heart palpitations, swelling in his legs, and difficulty swallowing. On numerous occasions he informed the defendants of his prior diagnosis and need for a CPAP, and that the CPAP would help control some of the symptoms he was having. Each defendant told him he would be referred for a sleep study, but Zepeda never received the study. In March of 2021, a sleep study was finally conducted which confirmed that the plaintiff had sleep apnea. However, by that time, the plaintiff was suffering from congestive heart failure due to the prolonged delay. *See also McDonald v. Gilyani,* 2020 WL 1169972 (E.D. Wis. Mar. 11. 2020) (plaintiff stated a claim for deliberate indifference due to being hospitalized for high blood pressure caused by untreated sleep apnea).

Nor has the plaintiff alleged "unnecessary suffering ... inconsistent with contemporary standards of decency" that the Supreme Court had in mind when it developed the deliberate indifference standard. *Estelle v. Gamble*, 429 U.S. at 103. For example, severe chest pain due to a delay in receiving nitroglycerin may constitute substantial harm (*see Easter v. Powell*, 467 F.3d. 459 (5th Cir. 2006)), while a lengthy delay in failing to provide catheters does not where the plaintiff suffered no lasting complications (*see McGiffon v. Clayton*, 2009 WL 577721 (5th Cir. 2009). *See also Westfall v. Luna*, 903 F.3d 534 (5th Cir. 2018) (no substantial harm resulted from delay though plaintiff alleged she was moaning in pain due to a spinal injury while waiting for medical care, particularly where the plaintiff failed to allege more details as to the severity of her

pain.) Compare with *Alderson v. Concordia Parish Correctional Facility*, 848 F.3d 415 (5th Cir. 2017) (plaintiff suffered substantial harm due to delay in receipt of pain medication for bruised or broken ribs where plaintiff alleged that he suffered a tremendous amount of pain.)

Additionally, at least one Court in this circuit has found that sleep apnea that is not severe does not even constitute a serious medical need. *See Hicks v. Wilkinson,* 2011 WL 2117609 (W.D. La. Apr. 28, 2011). In the instant matter, the plaintiff was diagnosed with mild, not severe, sleep apnea which the Court in *Hicks* noted does not always require a CPAP for treatment. Nevertheless, assuming that deliberate indifference resulted in a delay in the diagnosis and treatment of the plaintiff's sleep apnea, the plaintiff has not shown that he suffered a substantial harm due to the delay. Rather, the plaintiff complains only of symptoms of sleep apnea, none of which constitute a substantial harm.

After independently reviewing the entire record in this case and for the reasons set forth in the Magistrate Judge's Report dated April 17, 2024 (R. Doc. 122), to which an objection (R. Doc. 123) was filed and considered;

IT IS ORDERED that the plaintiff's Motion for Summary Judgment (R. Doc. 115) is denied, and that defendants' Motion for Summary Judgment (R. Doc. 118), is granted, dismissing plaintiff's claims with prejudice.

Judgment shall be entered accordingly.

Signed in Baton Rouge, Louisiana, on May 9, 2024.

JUDGE JOHN W. deGRAVELLES
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX-C

U.S. FIFTH CIRCUIT COURT DENIAL

United States Court of Appeals
for the Fifth Circuit

No. 24-30317

United States Court of Appeals
Fifth Circuit
FILED
April 11, 2025
Lyle W. Cayce
Clerk

BRANDON SCOTT LAVERGNE,

Plaintiff—Appellant,

versus

RANDY LAVESPERE, *Doctor/Medical Director- Louisiana State Penitentiary*; CINDY PARK, *Nurse Practitioner- Louisiana State Penitentiary*; BRADY BOUDIN, *Respiratory Specialist* - LOUISIANA STATE PENITENTIARY; JACOB C. JOHNSON, *Hospital Administrator - Louisiana State Penitentiary*,

Defendants—Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:21-CV-344

Before DENNIS, HAYNES, and ENGELHARDT, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the district court's dismissal of the claims against Park and Johnson and its grant of summary judgment to Baudin and Dr. Lavespere is AFFIRMED.

The judgment or mandate of this court shall issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. See Fed. R. App. P. 41(b). The court may shorten or extend the time by order. See 5th Cir. R. 41 I.O.P.

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part.



Certified as a true copy and issued as the mandate on May 05, 2025

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals for the Fifth Circuit

No. 24-30317

United States Court of Appeals
Fifth Circuit
FILED
April 11, 2025
Lyle W. Cayce
Clerk

BRANDON SCOTT LAVERGNE,

Plaintiff—Appellant,

versus

RANDY LAVESPERE, *Doctor/Medical Director- Louisiana State Penitentiary*; CINDY PARK, *Nurse Practitioner*- LOUISIANA STATE PENITENTIARY; BRADY BOUDIN, *Respiratory Specialist* - LOUISIANA STATE PENITENTIARY; JACOB C. JOHNSON, *Hospital Administrator* - *Louisiana State Penitentiary*,

Defendants—Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:21-CV-344

Before DENNIS, HAYNES, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:*

Brandon Scott Lavergne filed a pro se 42 U.S.C. § 1983 suit against medical personnel at the Louisiana State Penitentiary ("LSP"); namely, Dr. Randy Lavespere, a former LSP medical director; hospital administrator

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Jacob C. Johnson; nurse practitioner Cindy Park; and respiratory specialist Brady Baudin. Alleging that the defendants acted with deliberate indifference to his serious medical needs by failing to treat his sleep apnea, Lavergne requested injunctive relief and damages. The district court dismissed some of the claims and granted the defendants' motion for summary judgment on the remaining claims. We AFFIRM.

I. Background

Lavergne filed his complaint in 2021 and supplemented it with a verified statement in February 2022.[1] Lavergne arrived at LSP in 2012 with a continuous positive airway pressure machine ("CPAP") for treating sleep apnea, a condition with which he had recently been diagnosed. LSP apparently denied Lavergne use of the CPAP machine, which led him to file a separate lawsuit in 2013 against LSP personnel alleging a violation of his Eighth Amendment rights.[2] In August 2014, Dr. Lavespere ordered a sleep study for Lavergne, which apparently showed that he did not have obstructive sleep apnea. Afterward, Dr. Lavespere informed Lavergne that he would not receive a new CPAP based on the results of the sleep study. According to Lavergne, the 2014 study was flawed.

Between 2015 and 2017, Lavergne sporadically complained about sleep apnea. Each time, LSP medical staff evaluated him and determined that either Lavergne denied specific symptoms of sleep apnea or his physical examinations were unremarkable.

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[1] The magistrate judge later struck an amended complaint that Lavergne filed in November 2021.

[2] A jury found that Lavergne's constitutional rights were violated. *See generally Lavergne v. Cain*, No. 13-233 (M.D. La. Sept. 28, 2016). But the defendants in that case did not raise a qualified immunity defense, and the case never reached us on appeal.

Eventually, a new sleep study was ordered for Lavergne in 2018, and he received a pre-study checkup with Baudin.

Later that year, Lavergne was placed in solitary confinement, which caused him to gain weight and allegedly worsened his sleep apnea. Prison officials knew that weight gain could have this effect, as evidenced by their responding to grievances about untreated sleep apnea by advising Lavergne to maintain a healthy weight.

Another sleep study was ordered for Lavergne in 2019, but it did not occur. Johnson ordered a sleep study in 2020 in response to an administrative remedy procedure, but this resulted only in another checkup with Baudin. Dr. Hal MacMurdo,[3] a doctor at LSP, allegedly told Lavergne that Dr. Lavespere was blocking his sleep studies, but that Dr. MacMurdo did not know why. Although Park told Lavergne in April 2021 that she would ensure he underwent a sleep study within two weeks, that assurance proved hollow. Lavergne allegedly sent several letters to Dr. Lavespere and Johnson requesting assistance but received no response. Meanwhile, he allegedly suffered from symptoms such as chronic fatigue, blurry vision, coughing at night, and decreased focus.

Finally, in January 2022, Baudin gave Lavergne a harness he could use to perform an "at home" sleep study. Lavergne used the harness as instructed, and the results indicated that he had obstructive sleep apnea. Baudin provided a variable positive airway pressure machine as treatment. Baudin allegedly admitted to Lavergne that the "at home" test had been available for at least five years. Lavergne then filed suit.

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[3] Lavergne and the magistrate judge spelled his name as "McMurdo." Because the defendants, with whom he is more closely associated, spell his name as "MacMurdo," that is the spelling we use.

In the current lawsuit, Dr. Lavespere, Johnson, and Park filed a motion to dismiss the claims against them; Baudin had not yet been served with the complaint. The district court granted the motion in part, dismissing Lavergne's claims against Johnson and Park as well as his claim for injunctive relief and his official-capacity claims for money damages. The district court also held that Lavergne failed to state a claim to the extent he alleged that he was entitled to a response to his informal complaints about untreated sleep apnea. It declined to dismiss the claim that Dr. Lavespere acted with deliberate indifference.

The remaining parties—Dr. Lavespere and Baudin—filed cross motions for summary judgment. The magistrate judge recommended denying Lavergne's motion and granting that of Dr. Lavespere and Baudin, concluding that they were entitled to qualified immunity. The district court adopted the magistrate judge's recommendation, overruled Lavergne's objections, and dismissed the case with prejudice. Lavergne timely appealed.

II. Jurisdiction & Standard of Review

The district court had subject matter jurisdiction over this § 1983 case pursuant to 28 U.S.C. § 1331. Because the district court's summary judgment order was a final order, we have jurisdiction over Lavergne's appeal. 28 U.S.C. § 1291; *see also Meadaa v. K.A.P. Enters., L.L.C.*, 756 F.3d 875, 879 (5th Cir. 2014) (explaining that when a final judgment is appealed "all interlocutory orders of the district court leading up to the judgment merge into the final judgment and become appealable at that time" (quotation omitted)).

We review de novo the district court's partial dismissal under Federal Rule of Civil Procedure 12(b)(6). *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (per curiam). Orders granting summary judgment are also reviewed de novo. *Nickell v. Beau View of Biloxi, L.L.C.*, 636 F.3d 752, 754

(5th Cir. 2011). Because Lavergne is pro se, we construe his filings liberally. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

III. Discussion

"A prison official violates the Eighth Amendment's prohibition against cruel and unusual punishment when his conduct demonstrates deliberate indifference to a prisoner's serious medical needs, constituting an unnecessary and wanton infliction of pain." *Easter v. Powell*, 467 F.3d 459, 463 (5th Cir. 2006) (per curiam) (internal quotation marks and citation omitted). A state actor is deliberately indifferent to a serious medical need or risk of serious harm if he is "actually aware of the risk, yet consciously disregard[s] it." *Lawson v. Dallas County*, 286 F.3d 257, 262 (5th Cir. 2002). A plaintiff must show that "officials refused to treat him, ignored his complaints, intentionally treated him incorrectly," or otherwise "clearly evince[d] a wanton disregard for any serious medical needs." *Domino v. Tex. Dep't of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001) (quotation omitted). This "is an extremely high standard to meet." *Id.* In addition, where a claim of deliberate indifference is based on a delay in medical care, the plaintiff must show that the delay "result[ed] in substantial harm." *Easter*, 467 F.3d at 463 (quotation omitted).

A. Partial dismissal under Rule 12(b)(6)

Lavergne first challenges the district court's dismissal of his deliberate indifference claim against Park and Johnson.[4]

[4] Even construing Lavergne's appellate brief liberally, he does not seem to challenge the district court's dismissal under Rule 12(b)(1) of his § 1983 claim for money damages against defendants in their official capacities. We therefore need not address that holding.

On a Rule 12(b)(6) motion to dismiss for failure to state a claim, we accept all well-pleaded facts as true, construing all reasonable inferences in the light most favorable to the plaintiff. *White v. U.S. Corrs., L.L.C.*, 996 F.3d 302, 306–07 (5th Cir. 2021). "But we do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Id.* at 307 (quotation omitted). "To survive a Rule 12(b)(6) motion to dismiss, a complaint does not need detailed factual allegations, but must prove the plaintiff's grounds for entitlement to relief—including factual allegations in a complaint that when assumed to be true raise a right to relief above the speculative level." *Id.* (quotations omitted).

The magistrate judge concluded that, with regards to Park and Johnson, Lavergne "failed to allege any action or inaction on the part of either defendant that shows that either defendant refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for his serious medical needs." To the contrary, Lavergne alleged that Park called Baudin to schedule a sleep study, and Johnson ordered a sleep study in response to Lavergne's grievance.

Lavergne argues that Park and Johnson "had a chance to force" Baudin "to give [him] a sleep study in 2018 and 2019 and did not." He cites *Inmates of Occoquan v. Barry*, 717 F. Supp. 854 (D.D.C. 1989) for support. But that case is different. It involved a prison's systemic failure "in the areas of sanitation, bathroom facilities, fire safety, health care, and staffing" that rose to the level of an Eighth Amendment violation. *Id.* at 869. Even if we were bound by *Inmates of Occoquan*, which we are not, nowhere does it say that acting in response to an inmate's medical needs but neglecting to force those in charge to take further action meets the "extremely high standard" of deliberate indifference. *Domino*, 239 F.3d at 756; *see Lawson*, 286 F.3d at 262–63 ("Deliberate indifference cannot be inferred from a prison official's

mere failure to act reasonably, i.e., it cannot be inferred from negligence alone."). Accordingly, we agree with the district court's dismissal of Lavergne's deliberate indifference claims against Park and Johnson.

B. Summary judgment

We turn next to the district court's grant of summary judgment to Dr. Lavespere and Baudin based on qualified immunity.

On a motion for summary judgment, we view the evidence in the light most favorable to the nonmoving party, although "conclusional allegations and unsubstantiated assertions may not be relied on as evidence." *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011). Summary judgment is properly granted when "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). A fact dispute is "material" if the evidence would allow a reasonable jury to find in favor of the nonmoving party. *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 812 (5th Cir. 2010). If a moving party meets its initial burden, the burden shifts to the nonmoving party to "identify specific evidence in the record and articulate the manner in which that evidence supports that party's claim." *Duffie v. United States*, 600 F.3d 362, 371 (5th Cir. 2010) (quotation omitted).

"A qualified immunity defense alters the typical summary judgment burden of proof" because the plaintiff has the burden of rebutting it. *Luna v. Davis*, 59 F.4th 713, 715 (5th Cir. 2023) (per curiam). "The defense has two prongs, both of which must be rebutted to overcome qualified immunity: whether an official's conduct violated a constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation." *Id.* (internal quotation marks and citation omitted).

For qualified immunity, "a law is clearly established if it is sufficiently clear that a reasonable official would understand that what he or she is doing

violates that right." *Easter*, 467 F.3d at 465 (cleaned up) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

The district court granted summary judgment to Baudin and Dr. Lavespere because, among other things, Lavergne did not adequately rebut the defendants' qualified immunity defense as to the substantial harm requirement. On appeal, Lavergne argues that he demonstrated substantial harm because he suffered from "headaches, body aches, mental confusion, and extreme exhaustion" allegedly caused by sleep apnea.

Lavergne has not cited, nor have we independently located, a published opinion in which we have previously addressed whether some or all of Lavergne's symptoms constitute substantial harm. We do, however, have one unpublished opinion in which we dismissed a plaintiff's deliberate indifference appeal because the record evidence failed to "reflect[] that [the plaintiff] suffered substantial harm as a result of not receiving CPAP treatment" for his sleep apnea. *Washington v. Thomas*, 264 F.3d 1140 (5th Cir. June 18, 2021) (per curiam) (unpublished). The district court and the defendants also cite a handful of lower court opinions holding that symptoms from moderate sleep apnea caused by a delay in receiving a CPAP do not constitute substantial harm in the Eighth Amendment context.[5] Accordingly, as to the substantial harm requirement, we are unable to say that the remaining defendants' "conduct was objectively unreasonable in the

[5] *See, e.g.*, *Bollig v. Colo. Dep't of Corrs.*, No. 1:20-cv-01004-DDD-SKC, 2023 WL 2467336, at *3 (D. Colo. Mar. 2, 2023); *Santana v. Watson*, No. 13 Civ. 1549(SAS), 2014 WL 1803308, at *5 (S.D.N.Y. May 6, 2014); *Nesmith v. S. Health Partners*, No. 11-425, 2012 WL 426606, at *4 (W.D. Pa. Jan. 10, 2012).

light of the clearly established law at the time of the incident." *Domino*, 239 F.3d at 755 (quotation omitted); *see also Easter*, 467 F.3d at 465 (explaining that "in the light of pre-existing law the unlawfulness must be *apparent*" (emphasis added)).[6]

The dissenting opinion would hold otherwise. Citing *Easter*, it argues that if chest pain was enough for substantial harm in that case, it is clearly established that Lavergne's symptoms constituted substantial harm. But the dissenting opinion's description of *Easter* leaves out some important details. There, the plaintiff was denied treatment despite having a "history of serious heart problems"—including a previous heart attack—and suffering "*severe* chest pain" to the point that "blood vessels in his left eye had burst, causing it to fill with blood." *Easter*, 467 F.3d at 461 (emphasis added). That is a different situation than the one we have here.[7]

The dissenting opinion also states that we should not affirm on this basis in part because this precise issue wasn't fully briefed below. But the briefing below placed the full qualified immunity issue squarely before the district court. As stated above, it is the plaintiff's burden to rebut both prongs of qualified immunity at the summary judgment stage. *Luna*, 59 F.4th at 715.

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[6] Lavergne raises several other issues that we need not discuss because they do not affect our affirmance on these grounds.

[7] The dissent's reliance on *Petzgold v. Rostollan*, 946 F.3d 242 (5th Cir. 2019) is also unconvincing. First, *Petzgold*'s substantial harm discussion was dicta located in a footnote. *Id.* at 249 n.30. Second, the plaintiff in that case had to live with an untreated broken ankle, which again, is different from the situation here. *Id.* Finally, contrary to the dissenting opinion's contention, we have never said that *any* additional pain equals substantial harm. *See id.* at 249 ("[T]he prisoner must prove that the delay in or denial of medical treatment resulted in substantial harm, *such as* additional pain." (emphasis added)); *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 422 (5th Cir. 2017) (per curiam) ("The pain suffered during a delay in treatment *can* constitute a substantial harm." (emphasis added)). "*Any* pain" and "*substantial* harm" are plainly not synonymous.

Because Lavergne did not meet that burden, we affirm the district court's grant of summary judgment based on qualified immunity rather than delay that conclusion. *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam) ("[W]e repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); *Pearson v. Callahan*, 555 U.S. 223, 237 (2009) (noting that qualified immunity is "an immunity from suit rather than a mere defense to liability").

IV. Conclusion

For the reasons discussed, we AFFIRM the district court's dismissal of the claims against Park and Johnson and its grant of summary judgment to Baudin and Dr. Lavespere.

JAMES L. DENNIS, *Circuit Judge*, concurring in part and dissenting in part:

The majority opinion's affirmation of summary judgment for Dr. Lavespere and Baudin on Lavergne's delayed medical treatment deliberate indifference claim fails as a matter of procedure and law. I respectfully dissent in part.[1]

First, the majority opinion erroneously affirms the district court's judgment on a ground heretofore never raised in this litigation—and then continues to err by faulting Lavergne (who is self-represented and incarcerated) for failing to brief the issue that only the majority has raised. Specifically, the majority concludes Dr. Lavespere and Baudin are entitled to qualified immunity on the second prong[2] because "Lavergne has not cited . . . a published opinion in which we have previously addressed whether some or all of Lavergne's symptoms constitute substantial harm." *Ante*, at 8. Yet that is not why the district court found these defendants were entitled to qualified immunity. "[T]he district court found the first step of the qualified immunity analysis was not satisfied since Lavergne did not prove the conduct of Dr. Lavespere and Brady Baudin violated his Eighth Amendment rights." The district court said exactly nothing about the second qualified immunity prong. For good reason: no one argued in the court below that the substantial harm issue was not clearly established. And no one argues otherwise on appeal. True enough, we "may affirm a grant of summary judgment on any

[1] I concur only to the extent the majority opinion affirms the Federal Rule of Civil Procedure 12(b)(6) dismissal of Parker and Johnson.

[2] "Public officials are entitled to qualified immunity unless the plaintiff can plead specific allegations, demonstrating (1) the violation of a constitutional right that (2) was clearly established at the time of the alleged misconduct." *Linicomn v. Hill*, 902 F.3d 529, 533 (5th Cir. 2018).

ground[] supported by the record," but *only* when that ground was "presented to the district court." *Cuadra v. Hous. Indep. Sch. Dist.*, 626 F.3d 808, 812 (5th Cir. 2010) (HAYNES, J.); *Wantou v. Wal-Mart Stores Tex., L.L.C.*, 23 F.4th 422, 430 (5th Cir. 2022) (ENGELHARDT, J.). It is therefore both unfair and incorrect to affirm the entry of summary judgment on a ground the majority has raised *sua sponte* for the first time in its opinion.

Second, beyond the glaring procedural infirmity, the majority opinion is mistaken that the substantial harm issue is not clearly established. "To establish liability based on a delay in medical treatment, a plaintiff must show deliberate indifference to serious medical needs *that resulted in substantial harm.*" *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 422 (5th Cir. 2017) (emphasis added) (citing *Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006)). Since at least 2006, it has been clearly established in the Fifth Circuit that any additional pain attributable to delayed medical treatment constitutes "substantial harm." *See, e.g.*, *id.* (relying on *Easter*, a 2006 published opinion, and noting "Fifth Circuit precedent does not limit substantial harm to lifelong handicap or permanent loss"); *id.* (again relying on *Easter* and emphasizing that "our precedent allows recovery for pain suffered during a delay in treatment caused by deliberate indifference" and "[t]he pain suffered during a delay in treatment can constitute a substantial harm and form the basis for an award of damages"); *Petzold v. Rostollan*, 946 F.3d 242, 249 (5th Cir. 2019) (relying on *Alderson* and stating that "the prisoner must prove that the delay in or denial of medical treatment resulted in substantial harm, such as suffering additional pain"); *Austin v. City of Pasadena*, 74 F.4th 312, 328 (5th Cir. 2023) ("The detainee need not die, or be permanently injured, before an actionable claim arises for delayed [medical] treatment; rather, a plaintiff may recover for pain suffered during a delay in treatment caused by deliberate indifference."); *Thomas v. Mills*, 614 F. App'x 777, 777–78 (5th Cir. 2015) (vacating dismissal of § 1983 deliberate indifference claim

based on the defendant's failure to replace an individual's CPAP machine for five months; noting the delay caused the detainee to suffer "choking and gasping for air throughout the night"). Because the "substantial harm" bar is not particularly high, our court has found the requirement satisfied when an inmate suffered chest pain, *Easter*, 467 F.3d at 465, and, in another case, "pain over the weekend," *Petzold*, 946 F.3d at 250 n.30.

Here, Lavergne presented evidence that the delayed medical treatment caused him, in 2018 and later, to suffer disrupted sleep, extreme exhaustion, gasping for air, daytime fatigue, blurred vision, headaches, body aches, increased heart rate and blood pressure, and depression. The majority opinion counters that it is unable to locate a published opinion specifically dealing with these symptoms. But the notion that the law can only be clearly established when there is a published opinion concerning an inmate's particular symptoms contradicts precedents dictating that the "focus" of the qualified immunity analysis is whether the official had "fair notice" that his conduct was unlawful. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (explaining that the "focus" of qualified immunity analysis is "whether the offic[ial] had fair notice that her conduct was unlawful"); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (en banc) ("The *sine qua non* of the clearly-established inquiry is 'fair warning.'"). As we held in *Easter*, the clearly-established-law requirement does not mean "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it [does mean] that in the light of pre-existing law the unlawfulness must be apparent." 467 F.3d at 465 (quotation omitted) (emphasis added). "The law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated

constitutional rights.'" *Trammell v. Fruge*, 868 F.3d 332, 339 (5th Cir. 2017) (quoting *Ramirez v. Martinez*, 716 F.3d 369, 379 (5th Cir. 2013)).

Applying those precepts here, if "pain over the weekend" (*Petzold*, 946 F.3d at 250 n.30) and "chest pain" (*Easter*, 467 F.3d at 465)—and, more broadly, any "additional pain" attributable to delayed treatment (*Petzold*, 946 F.3d at 249)—is "substantial harm," then a reasonable official should know that disrupted sleep, extreme exhaustion, gasping for air, daytime fatigue, blurred vision, headaches, body aches, increased heart rate and blood pressure, and depression constitutes substantial harm too. *Easter*, 467 F.3d at 465.[3]

Turning to the prong of qualified immunity that the district court did reach—whether there was a violation of a constitutional right—the lower court simply concluded that Lavergne's sleep apnea symptoms did not constitute "substantial harm" because he didn't suffer lasting symptoms like congestive heart failure. Not so. As the above-cited cases illustrate, the substantial-harm-bar is cleared when delayed medical treatment causes any additional pain to the inmate. That is exactly what we have here.

* * *

At bottom, of course "Lavergne has not cited . . . a published opinion in which we have previously addressed whether some or all of Lavergne's

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[3] The majority opinion relies on *Washington v. Thomas*, 264 F.3d 1140 (5th Cir. 2001) (unpublished), to support that the substantial harm issue is not clearly established. *Washington* provides no succor. That roughly two-paragraph unpublished opinion concerned a "without merit and therefore frivolous appeal" of an inmate's claim that "defendants were deliberately indifferent to his serious medical needs by failing to provide him with a CPAP . . . machine for his sleep apnea." *Id.* at *1. Unlike Lavergne, the plaintiff in *Washington* did not even allege that he "suffered substantial harm as a result of not receiving CPAP treatment," so the panel found no error in the district court's Rule 12(b)(6) dismissal. *Id.*

symptoms constitute substantial harm." *Ante*, at 8. It is not an issue properly before this court. In any event, the law is clearly established. I would reverse the district court's judgment with respect to Dr. Lavespere and Baudin and remand for further proceedings.

I respectfully but emphatically dissent in part.

APPENDIX-D

ORDER REFUSING TO ALLOW REHEARING

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 30, 2025

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 24-30317 Lavergne v. Lavespere
USDC No. 3:21-CV-344

The court has taken the following action in this case: denying Appellant's motion to extend time to file a petition for rehearing.

Sincerely,

LYLE W. CAYCE, Clerk

Rebecca Andry

By: _____
Rebecca Andry, Deputy Clerk
504-310-7638

Ms. Alex Barthelemy Hayes
Mr. Brandon Scott Lavergne
Ms. Karen D. Murphy

Brandon S. LaVergne
Verses
Randy Lavespere ET AL

12 Feb. 2026
Docket # 21-470
Middle District of La.
Baton Rouge Division

Notice of Compliance for Word Count

This petition is about 3600 words. Well within the limits set out by this court.

12 Feb. 2026

Brandon S. LaVergne Pro Se

Brandon LaVergne
Wal-1 424229
Louisiana State Penitentiary
Angola La. 70712

Brandon S. LaVergne
Verses
Randy Lavespere ET AL

12 Feb. 2026
Docket # 21-470
Middle District of La.
Baton Rouge Division

Notice of Compliance to December 16th Memorandum

This court gave me 60 days to make corrections to my petition starting from 16 December 2026. This court said my booklets must be within 6 1/8 by 9 ¼ and in fact my booklets are not bigger then that. Therefore I am in compliance with that directive.

This court said I needed to include the order adopting the Magistrates Report and Recommendation. I did in Appendix B of both the full size petition and on page 44 of the booklet also listed as appendix B. Therefore I am in compliance with that directive.

This court said I needed to state how many words are in my petition. I thought I had did that and I am including a new word compliance certificate with this filing.

This court said I had to either ask for a veteran waiver or file the filing fee with the petition. Since my electronic account has been shut down by the prison this past weekend without notice or explaining to me why. I can not receive the finds to cover the filing fee. I can only receive funds through that account. I am therefore forced to ask for the waiver at no fault of my own. Therefore I am in compliance with that directive.

I have in fact sent 3 copies of this petition twice now to the defendants through their counsel. Therefore I am in compliance with that directive.

This Petition is being placed in the mail today 12 Feb. 2026 within the 60 days this court gave me to refile. I had asked to use the computers yesterday to type up these documents (11 Feb. 2026) but was not placed on the list to be given computer access until today(12 Feb. 2026). I only waited until the last min. because of the issue with my account and waiting to see if the account would be reestablished in time to allow me to receive the funds to send the $300.00 filing fee with this petition. Therefore I am in compliance with this courts directive.

Affidavit: I Brandon S. LaVergne do declare under the penalty of perjury these facts are true and correct.

12 Feb. 2026

Brandon S. LaVergne Pro Se

Brandon LaVergne
Wal-1 424229
Louisiana State Penitentiary
Angola La. 70712

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

December 16, 2025

Brandon S. LaVergne
#424229
Louisiana State Penitentiary
Main Prison West, Walnut 3
Angola, LA 70712

RE: Lavergne v. Lavespere
USAP5 No. 24-30317

Dear Mr. LaVergne:

Returned are all booklets in the above-entitled case originally postmarked on July 7, 2025 and received again on November 12, 2025, which fails to comply with the Rules of this Court.

It is unclear if you are attempting to file a paid petition in compliance with Rule 33.1 or if you are motioning for leave to proceed as a veteran and filing under Rule 33.2. Filing a paid petition and filing a motion for leave to proceed as a veteran are mutually exclusive. If you are wishing to motion for leave to proceed as a veteran, no check should be included in your submission.

Alternatively, if you are attempting to file a paid petition, you must submit 40 copies of the petition and appendix in booklet format on paper that measures 6 1/8 by 9 1/4 inches. Rule 33.1(a). Additionally, the certificate of compliance with the word limitation must state the number of words in the document. Rule 33.1(h).

The opinion adopting the report and recommendation dated May 9, 2024 in case No. 3:21-cv-00344 at the United States District Court for the Middle District of Louisiana must be included in the appendix as required by Rule 14.1(i).

Your petitions and check in the amount of $300.00 are herewith returned.

Kindly correct the petition and appendix so that it complies in all respects with the Rules of this Court and return it to this Office promptly so that it may be docketed. Unless the petition is submitted to this Office in corrected form within 60 days of the date of this letter, the petition will not be filed. Rule 14.5.

Three copies of the corrected petition must be served on opposing counsel. Rule 29.3.

RECEIVED
FEB 20 2026
OFFICE OF THE CLERK
SUPREME COURT, U.S.

When making the required corrections to a petition, no change to the substance of the petition may be made.

Sincerely,
Scott S. Harris, Clerk
By:
Katie Heidrick
(202) 479-3038

Enclosures