CASE NO. 18-7392

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

SCOTT TYREE,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
AT RALEIGH

OPENING BRIEF OF APPELLANT SCOTT TYREE

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Jurisdictional Statement

The United States District Court for the Eastern District of North Carolina had jurisdiction pursuant to 28 U.S.C. § 1346(b)(1) over this Federal Torts Claim Act ("FTCA") complaint against the United States. This Court has jurisdiction over the appeal from that court's final order under 28 U.S.C. § 1291. The district court entered final judgment on September 11, 2018, resolving all issues in the litigation. Scott Tyree timely filed his notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B) on November 15, 2018.

Issues Presented for Review

Mr. Tyree's complaint alleges that officers did not arrive for more than ten minutes after an emergency alarm was triggered in his cell while he was being attacked by his cellmate, despite Bureau of Prisons policy requiring an immediate response to emergencies. Tyree suffered serious injuries as a result.

The issue presented is whether the district court erred in granting a facial motion to dismiss the complaint for lack of jurisdiction under the "discretionary function" exception to the United States' waiver of sovereign immunity in the Federal Tort Claims Act, 28 U.S.C. § 2680(a).

Statement of the Case

This is the second trip to this Court for a tort case that was filed more than five years ago but remains stuck at the pleadings stage. Plaintiff-Appellant Scott

Tyree ("Tyree") alleges that he suffered severe injuries during an assault by his cellmate at the Low Security Correctional Institution in Butner, North Carolina, when guards failed to respond to an emergency duress alarm for more than ten minutes. His complaint alleges that their delay was due to negligence or deliberate indifference and violated Bureau of Prisons ("BOP") policy.

This case was last before this Court more than three years ago, after the district court granted summary judgment against Tyree on the pleadings and without any discovery. The district court credited statements from prison officials that they had responded immediately to the alarm, and dismissed Tyree's contrary allegations as unfounded and speculative. This Court vacated that decision as a clear abuse of discretion, and remanded with instructions that the district court must permit Tyree discovery on his claims.

After a limited discovery process in which the government again identified no reason for any delay in responding to the alarm and withheld much of what Tyree had requested on the basis of security concerns, the government filed a renewed motion to dismiss Tyree's complaint on its face under Federal Rule of Civil Procedure 12(b)(1). While still maintaining that the guards had responded immediately, the government argued that the "discretionary function" exception ("DFE") to the United States' waiver of sovereign immunity in the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680(a), requires dismissal of Tyree's complaint *on its face*

because, the government argues, the policy requiring an immediate response to emergencies implicitly permits BOP guards the discretion to delay their response because of competing prison priorities.

The district court agreed with the government. The court analogized to cases holding that officers implicitly have discretion to wait for a safe moment before breaking up a fight and held, in effect, that any delay here must have reflected a discretionary policy choice as a matter of law.

That holding reflects an important misunderstanding of the applicable law and a failure to credit the well-pled allegations of Tyree's complaint, and it should be reversed. The FTCA was intended to broadly waive the United States' sovereign immunity for torts committed by government employees, including in cases alleging simple negligence. The DFE establishes an exception to that broad waiver, which protects the separation of powers by preventing judicial "second-guessing of legislative and administrative decisions grounded in social, economic, and political policy" through tort suits challenging genuinely discretionary and policy-based decisions. *United States v. S. A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (internal quotations omitted). Courts applying the DFE ask first whether the governmental action complained of "involves an element of judgment or choice," and second whether the decision was "based on considerations of public policy." *Berkovitz v. United States*, 486 U.S. 531, 536-37 (1988).

Because both prongs must be met for the DFE to apply, actions that the employee had no discretion to take, or that are based in negligence, laziness or inattention rather than policy considerations, cannot qualify for protection.

Tyree's complaint states a more than plausible claim under those principles. BOP guards have a "mandatory" non-discretionary duty to respond to emergencies "immediately." FED. BUREAU OF PRISONS, BOP PS § 3420.09(10), STANDARDS OF EMPLOYEE CONDUCT (amended on December 6, 2013 and now at § 3420.11(6)). A delay of at least ten minutes in responding to an emergency alarm is a facial violation of that directive, most naturally explained by the inattention or negligence that Tyree alleged. The mere possibility that guards instead may have made a discretionary decision to delay their response because of some competing, policy-based priority cannot be enough to justify a facial dismissal of Tyree's complaint—particularly when the government has never identified such a decision and all of the facts are in its exclusive possession. In *Rich v. United States*, this Court rejected the government's position that everything prison guards do is discretionary—noting that the government's argument supplied "no limiting principle," meaning that "the discretionary function exception would always apply." 811 F.3d 140, 147 n.7 (4th Cir. 2015). Here too, the government's arguments would cause the DFE to swallow the FTCA's explicit waiver of sovereign immunity, even in cases plausibly alleging violations of specific and facially nondiscretionary duties.

Statement of Facts

Because the district court granted a facial motion to dismiss for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), which argues that the "complaint simply fails to allege facts upon which subject matter jurisdiction can be based," the factual summary below assumes the truth of the well-pleaded allegations of Tyree's complaint. *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)) (internal quotations omitted). As a pro se complaint, Tyree's complaint should be construed liberally. *Hill v. Braxton*, 277 F.3d 701, 707 (4th Cir. 2002). Although the government's motion challenged the facial sufficiency of Tyree's complaint, this section summarizes some information exchanged in discovery for context.

On July 19, 2012, while in the custody of the BOP and confined at the Low Security Correctional Institution located in Butner, North Carolina, Tyree was violently assaulted by his cellmate. JA 13. Early on in the assault, the "duress alarm" was activated from Tyree's cell. *Id.* This alarm, which is only meant for serious emergencies, presents a visual and audio alert to make prison staff aware of an emergency in the cell. JA 75. If the alarm is not acknowledged within 90 seconds, it is reported to the Control Center. *Id.* After the alarm was activated, Tyree's cellmate assaulted him for at least ten more minutes before guards arrived to investigate the source of the duress alarm. JA 17.

During the ten minutes after the duress alarm was activated, Tyree's attacker repeatedly struck him in the head and face with Tyree's Continuous Positive Airway Pressure medical device before dragging him to the front of the cell and resuming the assault with his fists. JA 13. The guard who responded to the duress alarm found Tyree in this position. JA 14. The guard then called for assistance and intervened. *Id*.

Tyree's complaint alleges that the delay of at least ten minutes in responding to his alarm was the result of negligence or deliberate indifference. JA 17. There were two guards on duty in the Special Housing Unit ("SHU") at the time Tyree was assaulted. JA 23. According to their sworn affidavits, one of the guards was conducting rounds of the SHU while the other remained in the SHU office. Their affidavits conflict on how the guard who actually arrived at Tyree's cell was notified of the emergency. The guard making rounds stated that, while conducting rounds in each of the four ranges of the SHU, he observed the red light outside Tyree's cell and responded "immediately." JA 24. The other guard stated that he was in the SHU office when he observed the duress alarm indication light and responded "immediately" by walking out of the SHU office and over to the guard conducting rounds, and alerting him of the alarm. JA 27.

Tyree's injuries were so extensive that he was taken by ambulance to a local emergency room for treatment. JA 14. Tyree suffered a laceration above one eye which required nine stitches, in addition to "numerous contusions, cuts, and scrapes." *Id.* Doctors also conducted a CT-scan to check for skull fractures. *Id.* Following this attack, Tyree developed a seizure disorder, requiring him to take anti-seizure medications and remain under the care of a neurologist for the foreseeable future. JA 15.

Statement of Procedural History

On June 5, 2013, Tyree filed an administrative tort claim as required by the FTCA. He exhausted his administrative remedies and commenced the present suit in the Eastern District of North Carolina on June 16, 2014. At all times throughout the district court litigation, Tyree appeared pro se. The district court denied multiple requests for appointment of counsel. *See* JA 1 (ECF 9); JA 5 (ECF 43); JA 7 (ECF 71).

Prior to discovery, the government submitted a motion to dismiss or in the alternative for summary judgment, accompanied by the involved guards' sworn declarations that they saw Tyree's emergency light at 11:27 pm and responded immediately. JA 24, 27. The district court granted that motion on the grounds that the officers' testimony established that they had exercised due care in responding immediately. JA 33. Despite the fact that no discovery had occurred, the district court

discounted Tyree's contrary allegation that the guards' arrival was delayed as "unsupported," "speculative," and "not supported by any facts." *Id.*

On appeal, this Court held that the district court had clearly abused its discretion in granting summary judgment prior to discovery. JA 38-39. Recognizing that federal prison guards owe a duty to "'exercise … ordinary diligence to keep prisoners safe and free from harm,'" JA 36-37 (citations omitted), this Court held that the district court had ruled against Tyree "based solely on the government's disputed timeline" and that discovery could reveal whether the alleged delay occurred and was reasonable. JA 38-39. This Court cited with approval the Seventh Circuit's decision in *Palay,* as "providing scenarios whereby failure to respond in timely manner could constitute negligence" that would be actionable despite the discretionary function exception. *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003) ("Perhaps the correctional officer monitoring the holdover unit at the time that the gang altercation broke out was simply asleep, for example."), cited at JA 38-39.

On remand, Tyree asked for several relevant documents and exhibits, including rules about SHU staff duties (JA 44), information about the required response times (JA 41, 45), information about duress alarm response training (JA 45), video recordings of the incident (JA 73), and relevant Post Orders (JA 72-73). Post Orders are specific instructions for each particular staff position that describe how the job should be executed. The government declined to provide the relevant Post Orders,

asserting security concerns, *id*., but reportedly submitted them for *in camera* review.[1] The government also maintained that video footage from the SHU did not exist. JA 73. The government did provide inspection reports for the alarm system, but with significant omissions and redactions. JA 74-76.

In the midst of a contentious discovery dispute, the government filed a second motion to dismiss Tyree's complaint on its face, asking the district court to apply the DFE and dismiss the case for lack of jurisdiction. JA 50. While preserving the argument that the officers responded without delay, JA 60, the government argued that the mandatory BOP policy requiring guards to respond "immediately" to emergency alarms in fact gives them essentially unconstrained discretion to delay responding as they see fit. JA 59-60. As support for that proposition, the government cited cases affirming guards' discretion to delay intervention in inmate altercations or riots, out of concern for inmate or officer safety. *Id.*

The district court agreed and granted the motion. The court stated that the first step in DFE analysis was "identifying 'the conduct at issue' that led to the alleged injury," which it concluded was "ensur[ing] an inmate's safety from attack by another inmate." JA 117, 119. The court acknowledged that "emergency response is

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[1] Undersigned counsel was informed of the *in camera* submission in conversations with counsel for the government about the joint appendix. The district court's Order does not discuss any such submission or the content of the Post Orders, and the relevant entry (ECF 92) is invisible on the public docket.

governed by. . . BOP Program Statement § 3420.09(10)," which directs that "it is mandatory that employees respond immediately, effectively, and appropriately during all emergency situations." JA 120. Nevertheless, the court cited cases concerning inmate altercations or riots for the proposition that the guards have "discretion to choose how to respond 'immediately.'" JA 121. The court also held that, because "officers are permitted the discretion to determine the appropriate time to intervene" in an altercation between inmates, the officers' delay in responding to this emergency alarm necessarily was a policy-based decision. JA 122.

Summary of the Argument

The district court erred by misapplying both prongs of the DFE analysis in a way that provides the government near-complete immunity from FTCA claims for negligent inattention to official duties.

Under this Court's settled law, the DFE requires a two-step analysis. The first step looks to the authority of the relevant officer, and if "a statute, regulation, or policy prescribes a specific course of action, there is no discretion and the exception does not apply." *Rich*, 811 F.3d at 144. If the first prong is satisfied, the second prong further requires that "the judgment [must be] one that the exception was designed to protect, namely, a judgment based on considerations of public policy." *Id.*

The district court began by mischaracterizing the conduct that Tyree alleged. Instead of analyzing the guards' mandatory duty to respond immediately to emergency alarms, the court invoked case law holding that guards have discretion to decide how to intervene in a riot or an ongoing fight between inmates. Those cases are about obviously deliberate safety choices that guards have to make—and that are implicitly permitted by the governing regulations—in the immediate presence of a known altercation. But here, Tyree's allegation is that guards simply failed to show up in response to an emergency alarm, and therefore did not even know the assault was underway. There can be no serious argument that the policy gives guards implicit discretion to ignore an alarm or to be negligent in discharging their duty to show up and discover what is happening. The policies expressly *forbid* negligence and inattention in emergency response situations and require a response in no more than four minutes to medical emergencies. And the more specific Post Orders, which Tyree was never permitted to see, may impose further specific obligations that the guards in this case failed to follow.

In applying the second prong, the district court essentially presumed that guards made a deliberate decision to delay responding, and that their (speculated) decision was within an implicit exception to the immediate response rule for delays required by competing prison needs. This is, if anything, an even more extreme version of the argument the government advanced in *Rich*, which this Court rejected as

supplying "no limiting principle." 811 F.3d at 147 n. 7. When this case was last here, this Court pointed the district court to case law explaining that response delays in a prison context *may* involve implicitly acceptable discretionary policy choices, but that a failure to respond may also reflect that prison "officials behaved in a negligent fashion, but without making the types of discretionary judgments that the statutory exception was intended to exempt from liability." *Palay*, 349 F.3d at 432 (cited at JA 38-39). "Perhaps the corrections officer monitoring the holdover unit at the time that the gang altercation broke out was simply asleep, for example," or "perhaps he left the unit unattended in order to enjoy a cigarette or a snack." *Id.*

Tyree was locked in a cell and being viciously assaulted when, for whatever reason, guards failed to respond in a timely fashion to his emergency alarm. His complaint alleges negligence or deliberate indifference in the performance of a function that is ordinarily nondiscretionary. Under the circumstances, that allegation is more than plausible. Nothing more should be required to survive a facial motion to dismiss, particularly when all of the relevant facts are under the government's control. The district court's decision should again be vacated, and this case remanded for merits discovery and trial.

Argument

This Court reviews *de novo* a district court's decision to grant a facial motion to dismiss under Federal Rule of Civil Procedure 12(b)(1). *Hawes v. United*

States, 409 F.3d 213, 216 (4th Cir. 2005). Such a motion accepts as true the allegations of the complaint and tests whether those allegations, if credited, plausibly state a claim over which the court would have jurisdiction. *Kerns*, 585 F.3d at 192. Because this Court has held that district courts lack jurisdiction when the challenged conduct is protected by the DFE, *Indem. Ins. Co. of N. Am. v. United States*, 569 F.3d 175, 180 (4th Cir. 2009), the core issue on this appeal is whether Tyree's pro se complaint plausibly stated a claim falling outside that exception. Properly construed, Tyree's claim alleges simple negligence or deliberate indifference in the performance of nondiscretionary duties, and is more than sufficient to state a claim that is not barred by the DFE.

I. TYREE ALLEGED A NEGLIGENT DELAY IN RESPONDING TO THE ALARM, NOT A POTENTIALLY DISCRETIONARY DECISION TO DELAY INTERVENTION IN THE ASSAULT

As the district court recognized, "[a]pplying the discretionary function exception initially requires identifying the 'conduct at issue' that led to the alleged injury." JA 117 (quoting *S.R.P. ex rel. Abunabba v. United States*, 676 F.3d 329, 332 (3d Cir. 2012)). Then the two prongs of the test require an analysis of whether relevant policies give officials any discretion concerning that "conduct at issue" and, if so, whether that discretion is policy-driven in the way the DFE protects.

Throughout its Order, the district court's reasoning rests on a mischaracterization of the "conduct at issue" alleged in Tyree's complaint. The district court held

that "there is no requirement that an officer immediately intervene in an altercation between inmates" and that officers are instead "permitted the discretion to determine the appropriate time to intervene in consideration of inmate and staff safety, the size of the correctional facility, and any other incidents or events occurring at the facility." *Id.* at 122. The district court relied on that characterization to hold that both the first and second prongs of the DFE are satisfied, *see id.* at 121-122, resting both prongs on case law holding that, despite clear policies requiring an "immediate" response to emergencies, officers implicitly have discretion to wait for an appropriately safe moment to physically intervene in an inmate fight or a riot.

The cases the district court cited for the proposition that officers have discretion to delay responding to an emergency do not actually involve delays in responding to uninvestigated emergency alarms. They involve one of two distinct kinds of discretionary decisions. The first kind is a decision to wait for the right moment to

intervene in an assault.[2] The second kind is an inmate-assignment decision that allegedly exposed the plaintiff to danger.[3]

Tyree's complaint does not allege that guards made a deliberate and potentially discretionary decision to delay intervening in the assault or to assign him a dangerous cellmate, but instead that the guards simply did not respond to an emergency alarm "in the time-frame mandated by internal FBOP policy and procedures" because of "deliberate indifference and negligence." JA 17. The distinction between

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[2] *See Norris v. United States*, No. 5:10-CT-3026-FL, 2013 WL 756293, at *3 (E.D.N.C. Feb. 28, 2013) (claim for delay in interfering when guards were "physically present and witnessed the assault"), *Jones v. United States*, No. 2:11-CV-94, 2013 WL 12159102, at *6 (N.D. W. Va. Oct. 23, 2013) (applying DFE to aspect of a complaint that alleged a tardy response to a known, ongoing prison riot), *Rivera v. United States*, No. 3:12-CV-1339, 2013 WL 5492483, at *1, *10 (M.D. Pa. Oct. 2, 2013) (claim that "staff unreasonably delayed in breaking up the assault" on the inmate), *Young v. United States*, No. 12-CV-2342 ARR SG, 2014 WL 1153911, at *2 (E.D.N.Y. Mar. 20, 2014) (claim for delay in responding when officers waited for more staff members), *Davis v. United States*, No. 7:10CV00005, 2010 WL 2754321, at *6 (W.D. Va. July 12, 2010) (same), *Little v. United States*, No. 5:11CV41, 2014 WL 4102377, at *7 (N.D.W. Va. Aug. 18, 2014) (same), *Addison v. United States*, No. CV211-176, 2012 WL 2863434, at *4 (S.D. Ga. Apr. 16, 2012) (same).

[3] *See Donaldson v. United States*, 281 F. App'x 75, 77 (3d Cir. 2008) (claim for decision to return inmate to general prison population despite threat), *Dykstra v. U.S. Bureau of Prisons*, 140 F.3d 791, 795 (8th Cir. 1998) (claim for "decision not to place [plaintiff] in protective custody"), *Byrd v. United States*, No. 1:09CV1208, 2010 WL 4922519, *1 (E.D. Va. Nov. 29, 2010) (claim for decision to not provide requested protection against particular inmate), *Taveras v. Hasty*, No. CIV.A.CV-02-1307(DGT, 2005 WL 1594330, at *4 (E.D.N.Y. July 7, 2005) (claim that guards "should not have put [plaintiff] in the rec cell with [attacker]").

an indifferent or negligent delay in responding to an emergency alarm and a deliberate decision by officers already on the scene to delay intervening in a fight for safety reasons is critical to the proper analysis of every part of this case. The district court's decision to recast Tyree's complaint as if it alleged a failure to intervene promptly in a known altercation was error, and drove the court to incorrect conclusions throughout.

II. TYREE PLAUSIBLY ALLEGED THAT THE GUARDS VIOLATED MANDATORY, NONDISCRETIONARY DUTIES BY FAILING TO RESPOND PROMPTLY TO THE ALARM

The DFE analysis in this case should have stopped at this first prong, because Tyree plausibly alleged that guards acted in a manner inconsistent with mandatory, nondiscretionary duties.

The DFE does not protect acts in derogation of official duties. Officials cannot claim to exercise "judgment or choice" when they have "no rightful option but to adhere" to a relevant "statute, regulation, or policy" and yet act contrary to that instruction. *United States v. Gaubert*, 499 U.S. 315, 322 (1991) (citing *Berkovitz*, 486 U.S. at 536 (internal quotation marks removed)). In *Sanders v. United States*, for example, this Court held that the DFE did not block FTCA liability when an NICS Examiner failed to follow a "mandatory directive" to complete a required background check designed to prevent illegal gun sales. 937 F.3d 316, 325, 329 (4th Cir.

2019). The directive at issue stated that examiners "will contact" particular departments and agencies for incident reports, language which this Court held went beyond "providing mere guidance or information to consider" and instead gave "clear directives" that "remov[ed] any discretion from the Examiner." *Id.* at 329-30. And in *Staton v. United States*, this Court held that a park ranger did not have rightful discretion to shoot three hunting dogs, even though discretion appeared on the face of the regulation, when "higher officials had indicated that dogs were to be tranquilized or captured by hand" rather than killed. 685 F.2d 117, 121 (4th Cir. 1982).

Various policies, Program Statements, and orders impose mandatory directives on BOP guards, and the case law frequently holds that prisoners have stated plausible FTCA claims when those duties are violated. While Tyree does not have access to all of the policies and orders constraining the conduct of the officers in this case, his complaint states a fully plausible claim that the guards involved violated official policy, and that claim is bolstered by materials that are undisputed and appropriate for judicial notice and by the policies already identified in discovery.

A. Program Statements Mandate Attentiveness and Immediate Response to Emergencies

The BOP Standards of Employee Conduct ("Conduct Standard"), under a section titled "Responsiveness," states that "[b]ecause failure to respond to an emergency may jeopardize the security of the institution, as well as the lives of staff or

inmates, it is *mandatory* that employees respond immediately, effectively, and appropriately during all emergency situations." FED. BUREAU OF PRISONS, BOP PS § 3420.09(10) at 8, STANDARDS OF EMPLOYEE CONDUCT (amended on December 6, 2013 and now at § 3420.11(6)) (emphasis added).[4] Directly thereafter, the Conduct Standard states that employees are required to "remain fully alert and attentive during duty hours." *Id*. The policy rationale behind this directive is explained: "Inattention to duty in a correctional environment can result in escapes, assaults, and other incidents." *Id*. Tyree's complaint specifically alleges that "had the SHU officers responded to the 'distress' alarm in the time-frame mandated by internal FBOP policy and procedures," his injuries would have been far less severe. JA 17. The district court did not fault Tyree's pleading as to the existence of these policies, and it would not be reasonable to require any more of an incarcerated pro se litigant.

The government has argued that the policy language encompasses some implicit discretion for guards to decide *how* to respond immediately, effectively, and appropriately—to decide, for example, that the nature of a particular emergency requires a brief delay or detour to assemble other guards, notify other prison officials,

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[4] The Program Statements are publicly available on the BOP's web site, *see* https://www.bop.gov/policy/progstat/3420_011.pdf, and were discussed in the district court's opinion, *see* JA 119-20, and by the parties in briefing and discovery, *see, e.g.*, JA 44, 56, 64, 85-109, 113. We believe they are appropriate for judicial notice and that the government does not dispute their existence.

or pick up specialized equipment. But the existence of such penumbral discretion cannot be allowed to swallow the employee's duty whole and insulate the government from responsibility in every case. In *Rich* this Court acknowledged that "[t]here is always some level of discretion regarding the performance of even the most specific of mandates," but rejected the government's implicit suggestion that the possibility of policy-based discretion insulated from review conduct "marked by individual carelessness or laziness." 811 F.3d at 147, 147 n.7. This Court recognized that the government's arguments supplied "no limiting principle" and "would mean that the discretionary function exception would always apply." *Id.* at 147 n.7.

Sanders is also instructive. There, this Court held that a claim was not barred by the DFE when plaintiffs alleged a violation of the examiner's facially nondiscretionary duty to follow up with the Columbia Police Department about Dylan Roof's prior arrest. 937 F.3d at 321. This Court reached that conclusion even while acknowledging that the follow-up policy implicitly gave examiners discretion to make a deliberate decision *not* to follow up or to delay that action indefinitely—to, instead, "set aside the research and process other transactions"—if there was some policy-infused reason for doing so. *Id.* at 330-31. This Court recognized that an actual policy-based decision not to follow up on the arrest report would be protected by the DFE. *Id*. Nonetheless, this Court held that plaintiffs had stated a claim not facially barred by the DFE because the mere possibility that the examiner *could* exercise

some implicitly reserved policy discretion did not require dismissal of that case on the pleadings.

Tyree has plausibly alleged conduct that the guards did something that they had no discretion, implicit or explicit, to do. Whatever discretion is permitted by the words "immediately, effectively, and appropriately" does not extend to any "discretion" to be inattentive, careless, or lazy, under the plain language of Defendant's own policies. Put another way, BOP officials have already made the relevant policy decisions and have explained that a failure to respond immediately due to inattention violates official policy.

Tyree also pointed the district court to BOP Program Statements that impose a distinct mandatory duty to respond in no more than four minutes to medical emergencies. *See* JA 92, 119-20; FED. BUREAU OF PRISONS, BOP PS § 6031.04, PATIENT CARE ("ACA standards require a four-minute response to life- or limb-threatening medical emergencies"); FED. BUREAU OF PRISONS, BOP PS § 6010.05 at 18, HEALTH SERVICES ADMINISTRATION ("All institutions will maintain ACA accreditation in the operation of the HSU."). [5] The district court held those policies inapplicable because "plaintiff was not a patient declaring a medical emergency at the time the distress

[5] The Program Statements are publicly available on the BOP's web site, *see* https://www.bop.gov/PublicInfo/execute/policysearch#.

button in his cell was pushed" but instead "the distress button was activated in plaintiff's cell due to the alleged assault." JA 120. But the actual event was, in fact, *both* an assault and a medical emergency for which Tyree required immediate and extensive medical treatment, and guards had no idea of the nature of the emergency until they arrived, after a lengthy delay. Tyree's complaint therefore states a plausible violation of those policies as well.

B. Post Orders Provide Further Directives

It also is more than plausible that the ten-minute delay alleged by Tyree violated the Post Orders giving specific guidance to the officers on duty in this SHU. According to the Justice Department's public website, the Department of Justice Correctional Services Procedures Manual requires prisons to use Post Orders, which "will contain instructions regarding the immediate action staff should take in an emergency particular to the particular post or location of the post they occupy." FED. BUREAU OF PRISONS, BOP PS § 5500.14, CORRECTIONAL SERVICES PROCEDURES MANUAL, at 1, and at ch. 1, p. 3. The Department of Justice mandates that these "'first responder' instructions" have "specific action steps" including, among other things, "[p]articular requirements regarding assaultive inmates." *Id*. at Chapter 1, page 3.

This Court recognized in *Rich* that actions in violation of Post Orders and other instructions are not covered by the DFE, reversing the facial dismissal of a

claim against prison officials for a knife attack caused by alleged failure to properly search inmates. 811 F.3d at 142. Because the parties contested whether or not the guards had actually searched the inmates as required before releasing them into the recreational cage, facial dismissal was improper. *Id.* at 146. And even if the officials had performed the search, this Court held that a viable claim could be based on "whether the officials performed those patdowns properly." *Id*. at 147. This Court pointed to a BOP Program Statement indicating that the Correctional Services Manual gave instructions on how to conduct pat down searches, and also noted the specific Post Orders that might have supplied mandatory instructions for the officers conducting those searches. *Id.*

Other circuits hold that it is error to dismiss an FTCA complaint when the Post Orders may supply a nondiscretionary duty. In *Keller v. United States*, for example, the plaintiff alleged that prison guards were negligent and inattentive in failing to monitor their assigned areas, allowing another inmate to assault the plaintiff for several minutes. 771 F.3d 1021, 1022 (7th Cir. 2014). The Seventh Circuit held that the record was insufficient to conclude that the DFE applied because, although no regulations specifically governing the guards' monitoring responsibilities appeared in the record, the heavily redacted portions of documents that did appear seemed to contradict the government's assertion that no specific instructions existed. *Id*. at 1025 (citing a BOP Program Statement requirement that relevant institutions

develop local procedures); *see also, e.g., Ashford v. United States,* 511 F.3d 501, 505 (5th Cir. 2007) (reversing a DFE dismissal because the plaintiff alleged that prison officials had violated prison policy when deciding where to place the plaintiff inmate).

The Post Orders governing officers in this housing unit are not publicly available, and therefore Tyree could not have pled their contents with any greater specificity. Tyree did request production of the Post Orders in the limited discovery that the district court permitted after this Court's remand. The government refused to produce them, citing prison security concerns, and the district court declined to compel their production. JA 72-73; JA 81. Defendants have, however, represented to undersigned counsel that the Post Orders were provided to the district court *in camera* (apparently attached to sealed docket entry 92) and that they should be included within the record transmitted to this Court.

We have no way to evaluate or contest Defendants' stated security concerns except to note that seemingly equivalent Post Orders apparently have been disclosed by the BOP in other similar cases, and have played a prominent role in their resolution. *See, e.g., Brembry v. United States,* No. 7:10-cv-388, 2011 U.S. Dist. LEXIS 3302, at *12-17 (W.D. Va. Jan. 13, 2011) (holding that the relevant Post Orders were not discretionary), *Jones v. United States*, No. 2:11-CV-94, 2013 WL 12159102, at *6 (N.D.W. Va. Oct. 23, 2013) (citing the Fifth Circuit's use of Post Orders in *Garza*

v. United States, 161 Fed. Appx. 341, 344, 346 (5th Cir. 2005)). We respectfully submit that they should have been produced, and that if producing them directly to Tyree would have posed genuine security risks, then counsel should have been appointed as he requested. JA 6 (ECF 65). At a minimum, the district court should have explained why its *in camera* review of those documents did not affect the court's conclusions. *Cf. Parrott v. United States*, 536 F.3d 629, 638 (7th Cir. 2008) (holding that the district court should have conducted an *in camera* inspection of Post Orders or "entered a protective order or granted one of Mr. Parrott's many motions for appointment of counsel, and then ordered the production of documents subject to an attorneys' eyes only restriction.").

We trust that this Court will review the Post Orders in its sealed record and evaluate their significance to the issues presented, cognizant that Tyree and his appellate counsel have had no access to those materials. We stand ready to assist the Court in any other way the Court thinks appropriate. If, for example, this Court thought it appropriate to authorize their release to undersigned counsel subject to an attorneys'-eyes-only restriction, then we would be pleased to submit a short supplemental brief about their significance, if any. (The government has asked us to make clear that it would oppose any such relief).

Although Post Orders routinely include introductory disclaimers indicating that officers should use good judgment in performing their duties, courts have not

understood such language to negate the mandatory duties contained in the Post Orders. And they certainly have not understood that language to authorize negligent violations of those duties. In *Brembry v. United States*, for example, a prison official submitted a declaration stating that Post Orders are meant to provide "flexible guidance" to prison staff, but the court held that "such a notion contradicts the mandatory language of the post order at issue." Civil Action No. 7:10cv00388, 2011 U.S. Dist. LEXIS 105573, at *22-23 (W.D. Va. Sep. 19, 2011). The court further explained that "[g]iven the carefully-hedged language of the Post Order Review Sheet, the court cannot read the applicable post orders as providing . . . the amount of carte blanche necessary to trigger the discretionary function exception." *Id.* at *13. If attaching discretionary boilerplate disclaimers made all guards' actions "discretionary" regardless of how flagrantly they violated their Post Orders, the FTCA would be easily circumvented and Congress' intentions would be effectively thwarted.

III. TYREE ALSO PLED A PLAUSIBLE CLAIM THAT THE GUARDS' DELAY DID NOT REFLECT ANY EXERCISE OF THE KIND OF DISCRETION THE DFE IS MEANT TO PROTECT

Even when a government employee's action does not violate a mandatory policy, the second prong of the test provides that the employee's action is not sheltered by the DFE unless it reflects an exercise of the kind of discretion that the DFE is designed to protect—namely, "legislative and administrative decisions grounded in social, economic, and political policy," such that "judicial second-

guessing" through tort actions would impinge on the separation of powers. *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537 (internal quotation marks omitted)).

The government's invocation of the DFE in this case should have been rejected under this second prong as well. Tyree adequately pled that the delay at issue was the result of indifference or negligence, and a policy-based justification for that delay cannot simply be presumed in the government's favor. Failing to respond to an emergency alarm is not the sort of action that *inherently and necessarily* reflects an exercise of policy-based discretion. And a dismissal at this stage cannot sensibly be justified by putting any further burden of pleading or proof on Tyree, who was locked in a cell and under assault at the time and has no access to the facts concerning what the guards were doing.

A. Tyree's Complaint Pled A Plausible Claim of Negligence or Deliberate Indifference

Tyree pled that the guards' delay in responding to his alarm was due to "deliberate indifference and negligence," JA 17, and the surrounding facts and circumstances he pled make that allegation eminently plausible. Indeed, in the absence of any other explanation for such a lengthy delay in responding to an emergency alarm, negligence or indifference are the most natural explanations. *See Ho v. United States*, No. 12-126, 2012 U.S. Dist. LEXIS 184578, at *51 (D. Minn. Dec.

11, 2012) (holding that allegations "that employees of the United States did not immediately respond, and that he was injured by their delay" are "sufficient for this claim to survive the Defendants' motion to dismiss"). And even after discovery, the government still has not identified any discretionary decision that accounts for this delay, or what the basis of that decision might be. It continues to maintain that both of the guards responded immediately, and that, in any event, the government is entitled to DFE protection without providing a reason for the delay. JA 25, 27.

The fact that officers have some discretion to tailor their responses to the circumstances does not and cannot mean that everything they do is presumed to reflect an exercise of discretion sheltered by the DFE. In *Gaubert*, for example, the Supreme Court was clear that "[t]here are obviously discretionary acts performed by a Government agent that are within the scope of his employment but not within the discretionary function exception because these acts cannot be said to be based on the purposes that the regulatory regime seeks to accomplish." *Gaubert*, 499 U.S. at 325 n.7. The Court gave as an example a government official driving a car who, despite enjoying the "constant exercise of discretion" in steering and accelerating, would not be covered by the DFE for negligent driving because "that discretion can hardly be said to be grounded in regulatory policy." *Id.* Of course one can imagine a government employee making a deliberate policy-based choice to speed or run a red light in certain circumstances, but the fact that such a choice might be implicitly permitted

by the governing regulations and protected by the DFE does not mean that every instance of negligent driving is sheltered by the exception.

Significant case law recognizes that cases may not be dismissed under the DFE at the pleading stage merely because officials took an action that *could have* involved a genuine public policy choice, when the plaintiff alleges that in fact their action reflected negligence or inattention. In *Coulthurst*, 214 F.3d 106, 110 (2d Cir. 2000), for example, the Second Circuit reversed a facial 12(b)(1) dismissal of a claim against an official assigned to inspect weight machines. Insofar as the complaint included allegations of negligence caused by "laziness or haste" or being "distracted or inattentive," the acts alleged involved neither "an element of judgment or choice" nor "considerations of governmental policy." *Id.* at 109. The Second Circuit explained that interpreting the DFE to protect "lazy or careless failure to perform his or her discretionary duties with due care" would produce "absurd results" and "effectively shield almost all government negligence from suit," thereby "undercut[ting] the policy aims at the heart of the FTCA." *Id*. at 110. Similarly, in *Triestman v. Federal Bureau of Prisons*, the Second Circuit held that, insofar as the complaint alleged that "the officer on duty when the incident occurred failed to patrol or respond diligently to an emergency situation out of laziness or inattentiveness," it raised a viable "negligent guard theory" claim "over which the district court clearly has subject matter jurisdiction." 470 F.3d 471, 475-76 (2d Cir. 2006).

In *Palay v. United States*, which this Court cited with approval on this exact point the last time this case was here, JA 38-39, the Seventh Circuit discussed *Coulthurst* and explained that a claim based on prison officials' failure to prevent a fight among inmates may or may not be covered by the DFE, depending on the reasons that officials failed to act. 349 F.3d at 432. The Seventh Circuit stressed that at the pleading stage it "cannot say that this failure necessarily arose from discretionary judgments rendered in furtherance of prison policy" or even "whether the actions (or inactions) leading up to the altercation in which Palay was injured involved judgment" at all. *Id.* at 431. The Seventh Circuit explained that the government wrongly "presume[d]" that the circumstances "were the result of discretionary decisions by prison officials charged with making such choices," when "one can also imagine negligence having nothing whatever to do with discretionary judgments" as the cause. *Id.* "Perhaps the corrections officer monitoring the holdover unit … was simply asleep, for example," or "left the unit unattended in order to enjoy a cigarette or a snack." *Id.* at 432. "That type of carelessness would not be covered by the discretionary function exception," the Seventh Circuit explained, "as it involves no element of choice or judgment grounded in public policy considerations." *Id.*

This Court's precedents are consistent with those principles. This Court held in *Sanders* that plaintiffs had stated a plausible claim that the examiner had violated a facially nondiscretionary duty, while nonetheless recognizing that the examiner

might have had implicit discretion to diverge from that policy if she had made an actual policy-based decision to do so. 937 F.3d at 330-31. This Court similarly recognized in *Rich* that actions "marked by individual carelessness or laziness" should not enjoy immunity "because no policy considerations would be implicated," even though a genuine policy decision about "the manner in which prison officials perform patdowns" would be protected. 811 F.3d at 147. This Court's remand order from three years ago also indicated agreement with *Palay*'s explanation that the mere possibility of a policy-based decision for delay does not insulate from review unexplained delays that do not obviously reflect any exercise of policy judgment. JA 38-39. The district court committed precisely the error that this Court keeps warning against: it effectively presumed that because an unexplained delay *might have* been the result of a deliberate policy-based choice, the court must treat it as such a choice.

B. Claims of Negligent Delay in Emergency Response Do Not Implicate Inherently Policy-Based Decisions

The district court cited case law holding that the DFE analysis focuses on the type of decision challenged by the lawsuit and whether that decision *ordinarily* reflects an exercise of policy-based discretion, rather than on the official's subjective state of mind when making the particular decision under review. But that principle must be applied with care. None of the cited cases understand that rule to preclude suits alleging negligent failure to comply with facially nondiscretionary duties, simply because some policy-based reason for that noncompliance is *possible*. To the

contrary, the cases refusing to consider the possibility of official negligence involve challenges to obviously deliberate choices made by government employees, in contexts where the choice ordinarily and inherently involves policy tradeoffs.

The district court's reliance on this Court's decision in *Baum* is instructive. *Baum* considered a tort claim contending that the Park Service should have chosen more expensive steel rather than cheaper cast iron for guardrail posts lining the Baltimore-Washington Parkway. 986 F.2d at 721. Drawing from the Supreme Court's decision in *Gaubert*, this Court recognized that the choice between materials was "fundamentally. . . a question of how to allocate limited resources among competing needs" and therefore "inherently bound up in economic and political policy considerations." *Id.* at 722, 724. In that context, this Court thought it inappropriate to entertain a claim that officials charged with tasks "of the type normally thought to involve policy choices" in fact acted "arbitrarily or on whim" when some damage resulted from their policy judgments. *Id.* at 721. This Court applied the same principle to dismiss a separate claim for negligent maintenance of the guardrails in *Baum*, but—critically—only because the only negligence in "maintenance" that the plaintiffs actually alleged was that the Park Service should have torn out the cast iron posts and replaced them with steel. In context, therefore, the "maintenance" at issue in that case was, "like the decisions involving design and construction, at bottom a question of how best to allocate resources." *Id.* at 724. This Court's reasoning makes

clear that the analysis would have been very different if, for example, plaintiffs had alleged negligence in failing to appropriately maintain the cast iron posts or to replace posts that had corroded. *Id.* at 723-24.

The district court appears to have extrapolated from *Baum* and *Gaubert* a holding that, because running a prison and adopting appropriate security policies inherently involve resource and policy tradeoffs, there is a "strong presumption" that everything guards do within a prison while implementing those policies reflects an exercise of policy discretion immune from question under the DFE. JA 122. That approach substantially over-reads *Gaubert* and *Baum*, and would cause the DFE to engulf the FTCA's general waiver of sovereign immunity in the manner this Court warned of in *Rich*. As this Court recognized in *Baum*, not "every maintenance decision of every government actor is so policy-based as to fall within the discretionary function exception." *Baum*, 986 F.2d at 724. There are, of course, plenty of cases in which a claim alleging negligence in the performance of some governmental function can be dismissed on its face. But those are cases that, like *Baum*, challenge deliberate decisions "which we would expect inherently to be grounded in considerations of policy." *Id.* at 721. Or as this Court put it in *Sanders*, they are cases "where the alleged negligence turns on Governmental action involving the permissible exercise of discretion taken pursuant to a broad delegation of discretion to effectuate the purpose of a statutory scheme," such as an FDA decision to issue a salmonella

contamination warning, an FAA inspector's decision to certify a plane as airworthy, or the Defense Department's decision about how to deal with an unknown aircraft intercept. 937 F.3d at 331 (collecting cases).

A prison guard's failure to show up in response to an emergency alarm is not, without more, the sort of decision that is "inherently bound up in considerations of economic and political policy" such that further inquiry into what actually happened is unnecessary or inappropriate. *Baum*, 986 F.2d at 724. To the contrary, it is the sort of failure that ordinarily reflects inattention, negligence, or some sort of technical failure rather than a deliberate policy choice. This reality should not be subverted through a rule effectively presuming that because prison guards can *sometimes* make discretionary decisions to delay responding to an emergency for policy-grounded reasons, *every* delay is "inherently discretionary" and immune from challenge.

This may be the point at which the district court's mischaracterization of Tyree's claims matters the most, because the deliberate choices that guards make about the appropriate moment to intervene in a riot or altercation may indeed be "inherently bound up in … policy considerations" of inmate and staff safety in a manner sufficiently analogous to the choice of guardrail materials at issue in *Baum.* But there certainly is nothing *inherently discretionary* about failing to respond to an emergency alarm when the cause for the delay may be nothing more than negligent disregard.

C. Tyree Does Not Have To Plead Or Prove Facts Negating The Possibility Of A Policy-Based Reason For What Appears, On Its Face, To Be A Simple Neglect Of Duty

The district court invoked case law holding that the DFE "must be strictly construed in the United States' favor" and that an FTCA claim "'must be dismissed'" unless the plaintiff "'meets [his] burden'" to "'show that an unequivocal waiver of sovereign immunity exists.'" JA 116 (citing *United States Dept. of Energy v. Ohio*, 503 U.S. 607, 615 (1992), and *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005)). This Court has held that the plaintiff bears the burden of proving the inapplicability of the DFE. But this Court has not applied that principle to require plaintiffs to disprove, at the pleadings stage, the possibility of any discretionary policy justification for conduct that reasonably appears, on its face, to be simple neglect of ordinary job duties.

This case is closely analogous to the claim that this Court allowed to proceed in *Sanders.* 937 F.3d at 316. BOP regulations require guards to remain attentive and respond immediately to emergencies, just as the regulations required NICS examiners to follow up on arrest reports. As in *Sanders*, the government argues that the response policy nonetheless implicitly leaves some discretion to delay emergency responses for policy-based reasons. And, as in *Sanders*, the mere *possibility* that the employee could have made such a decision does not destroy jurisdiction over a claim plausibly alleging inattentiveness and neglect of duty.

Put another way, if the government wants to contend that the policy facially requiring an immediate response to emergencies contains an implicit reservation of discretion to delay response because of other prison priorities, then that reservation will apply only when the delay was actually attributable to other prison priorities. Requiring Tyree to disprove that possibility, at the pleading stage, in order to establish *jurisdiction* to pursue his claim, would stretch the burden of pleading and proof beyond all reason. This Court acknowledged in *Sanders* that "the general rule that waivers of sovereign immunity should be strictly construed 'is unhelpful in the FTCA context, where unduly generous interpretations of the exceptions run the risk of defeating the central purpose of the statute, which waives the Government's immunity from suit in sweeping language.'" 937 F.3d at 327 (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 491-92 (2006)). The Supreme Court's decision in *Dolan* drew on decades of precedent for that proposition, citing *Kosak v. United States*, 465 U.S. 848, 853 n.9 (1984), *United States v. Yellow Cab Co.*, 340 U.S. 543, 547 (1951), *United States v. Nordic Vill. Inc.*, 503 U.S. 30, 34 (1992), and *Dalehite v. United States*, 346 U.S. 15, 31 (1953). Absent an unusually harsh application of strict construction principles, the general rule that a plaintiff bears the burden of establishing jurisdiction over his own claim cannot sensibly be understood to require a plaintiff in Tyree's position to plead and prove facts that he has no access to, and to preempt

and disprove every possible policy-based explanation for what on its face appears to be simple negligence.

We do not believe this Court's decisions placing the burden of proof on plaintiffs with regard to FTCA exceptions require or justify the facial dismissal of Tyree's complaint in these circumstances. If this Court disagrees, it should qualify or reconsider those holdings—*en banc* if necessary. This Court's original holdings placing the burden on plaintiffs rested on nothing more than the usual rule that waivers of sovereign immunity are to be strictly construed against the government, *see, e.g.*, *Welch*, 409 F.3d at 650-51, a premise firmly rejected by the Supreme Court's intervening decision in *Dolan*, and by this Court's recent decision in *Sanders*, *see* 937 F.3d at 327.

Several other circuits have recognized that assigning the burden to the plaintiff in cases like this one would be unfair and even absurd. For example, the Seventh Circuit acknowledges the "universal rule" that "a party who invokes the jurisdiction of a federal court must allege all facts necessary to give the court jurisdiction of the subject matter." *Stewart v. United States*, 199 F.2d 517, 520 (7th Cir. 1952). Nonetheless, the Seventh Circuit thought it would "border on the preposterous" to "require a plaintiff in his complaint, in order to show jurisdiction," to negate all of the exceptions to the FTCA. *Id.* Instead, the court thought it more appropriate to require the government, if it wants to raise an exception, to plead and prove that exception

as a defense. *Id.* The Third Circuit similarly has held that "the burden of proving the applicability of the discretionary function exception is most appropriately placed on the Government." *S.R.P. v. United States*, 676 F.3d 329, 333 n.2 (3d Cir. 2012). The Third Circuit explained that the FTCA exceptions are "analogous to an affirmative defense," and that it would be unusual to require a plaintiff to "disprove every affirmative defense that a defendant could potentially raise." *Id.* The court also explained that because the government will "generally be in the best position to prove facts relevant to the applicability of the discretionary function exception," such as internal policies and employee records, it is more appropriate to ask the government to identify the facts underlying its claim to immunity. *Id.* The Ninth Circuit also treats the DFE and other FTCA waivers as "analogous to an affirmative defense" and will not grant summary judgment to the United States "until it has established that the actionable conduct was the result of a choice grounded in social, economic or political policy." *Prescott v. United States*, 973 F.2d 696, 702 (9th Cir. 1992). This puts the burden on the United States, as "the party which benefits from the defense," to show why the exception should apply. *Id.*

The Sixth Circuit has articulated a middle ground position that also would require reversal in this case: requiring FTCA plaintiffs to plead a cause of action that is "facially outside" the DFE (or other applicable § 2680 exception). *Carlyle v. U.S., Dep't of Army*, 674 F.2d 554, 556 (6th Cir. 1982). If the plaintiff submits a "pleading

that facially alleges matters not excepted by § 2680," the burden shifts to the government "to prove the applicability of a specific provision of § 2680." *Id.* That burden-shifting approach avoids forcing the plaintiff to "disprove every [FTCA] exception under § 2680 to establish jurisdiction" while also not allowing plaintiffs to claim federal jurisdiction when their claims "clearly fall within the exceptions." *Id.* Under that approach, Tyree pled facts that facially fall outside the DFE's coverage, and the burden should shift to the government to plead and prove facts showing that the DFE applies. And that approach appears to be consistent in substance with what this Court contemplated in *Sanders*. The plaintiff pleads a plausible claim of jurisdiction by alleging an apparent violation of a facially nondiscretionary policy, and if the government wants to say that the employee's actions nonetheless were permitted by some implicit exception for policy-driven choices then it should have to identify that choice and prove it.

Even if Tyree must bear the ultimate burden of persuasion regarding the nature and reasons for the guards' actions, those issues are inextricably intertwined with the merits and should not be resolved against him on a facial Rule 12(b)(1) motion unless they are "clearly immaterial, made solely for the purpose of obtaining jurisdiction." *Kerns*, 585 F.3d at 193 (cleaned up) (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)). *Kerns* stressed that a trial court assessing questions that implicate both jurisdiction and the merits of the case should "afford the plaintiff the procedural

safeguards -- such as discovery -- that would apply were the plaintiff facing a direct attack on the merits." Because Tyree's allegations of unauthorized and negligent actions by the guards goes to both the application of the DFE and the "existence of [his] cause of action," the district court should not have treated his facial motion as deficient without affording the "procedural safeguard" of either a presumption of truthfulness or a full consideration of discovery materials. *Id.* Because the district court effectively denied both safeguards by putting the burden of proof on Tyree but refusing to look into the discovery materials, Tyree was denied the safeguards that *Kerns* emphasized as required in cases where the jurisdictional challenge touches on the merits. *Id.*

Even if the district court had looked into discovery, the security-based redactions and withholding of information did not satisfy the intent of the *Kerns* discovery requirement. The government's responses to discovery withheld or heavily redacted all of the information that Tyree might have used to bolster his pleading, citing security concerns. *See* JA 72-76. Tyree requested the rules about SHU staff duties (JA 44), information about the required response times (JA 45), information about duress alarm response training (*Id.*), and relevant Post Orders (JA 72-73). The government withheld or redacted substantial evidence that might have shown whether BOP officials had authority to use discretion and whether a policy-based discretionary decision was made. JA 72-73, 81.

Congress did not intend for FTCA litigation to be a Catch-22 for plaintiffs, in which the government escapes responsibility for its negligence because of the hypothetical possibility of discretionary policy choices that it refuses to confirm or deny. To the contrary, the FTCA was intended to provide a meaningful remedy for those injured by official negligence across a wide range of settings.

Conclusion

For the reasons stated above, we ask this court to reverse the judgment of the lower court and remand for further proceedings.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 9,647 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word or line printout.

s/ JAMES SCOTT BALLENGER
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CERTIFICATE OF SERVICE

I certify that on November 6th, 2019, I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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