



Washington University in St. Louis

SCHOOL OF LAW

Appellate Clinic

October 6, 2022

Patricia S. Connor, Clerk
United States Court of Appeals for the Fourth Circuit
110 East Main Street, Suite 501
Richmond, VA 23219

**Re: *Tate v. Harmon*, No. 21-6109
Response to Appellees' 28(j) letter filed October 5, 2022**

Dear Ms. Connor,

In a 28(j) letter, Appellees flag the Tenth Circuit case *Silva v. United States*, 45 F.4th 1134 (10th Cir. 2022). *Silva* does not adequately address the issues in this appeal.

First, *Silva* dealt with an Eighth Amendment excessive force claim, not an Eighth Amendment deliberate indifference claim—the claims at issue here. *Silva* held that “the distinction between an excessive force claim like the one Plaintiff brings and a deliberate indifference to medical needs claim—which the Supreme Court recognized as a valid *Bivens* action in *Carlson*—is sufficient to conclude that Plaintiff’s claim would require an expansion of *Bivens*.” *Silva*, 45 F.4th at 1137.¹ As the opening brief explains, *see* Opening Br. 22-28, Mr. Tate’s Eighth Amendment deliberate indifference claims do not “differ in a *meaningful way*” from the Eighth Amendment deliberate indifference claim recognized in *Carlson*. *Ziglar*, 137 S. Ct. at 1860 (emphasis added). Unlike *Silva*, this case does not require this Court to expand the *Bivens* remedy at all.

Second, *Silva* held the BOP grievance process was an alternative remedial structure that foreclosed the expansion of *Bivens*. In reaching that conclusion, *Silva* focused on appellant’s argument that *Congress* did not create the BOP program, and held that such an argument “cannot stand in the wake of” *Egbert v. Boule*, 142 S. Ct. 1793 (2022). *Silva*, 45 F.4th at 1143. *Silva* did not address the fact that both

¹ In so holding, the Tenth Circuit did not analyze any of the factors outlined in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017).

the Third and Ninth Circuits have rejected the argument that the BOP grievance process is an alternative remedy foreclosing a *Bivens* claim. Nor did it address the fact that the Supreme Court has expressly recognized the parallel existence of a *Bivens* deliberate indifference claim and the BOP remedial program. *See* Reply Br. at 15-18. Thus, even if this Court holds Mr. Tate's Eighth Amendment deliberate indifference claims arise in a new context, the BOP grievance process is not a remedial structure that forecloses this Court from recognizing them.

Sincerely,

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