No. 20-1766

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DONTE PARRISH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
For the Northern District of West Virginia at Clarksburg

BRIEF FOR DEFENDANT-APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

JURISDICTIONAL STATEMENT

The United States agrees with Appellant's jurisdictional statement as presented.

ISSUES PRESENTED

(1) Does a district court's grant of a reopening of the time to file an appeal under FRAP 4(a)(6) validate an appellant's earlier filed notice of appeal without the need for a second notice?

(2) Did Parrish properly present and timely file his Federal Tort Claims Act claims?

(3) Does 28 U.S.C. § 2401(b) require a plaintiff to both file a claim before the appropriate agency within two years of the accrual of the cause of action and bring an action within six months of the agency's denial of the claim?

(4) Did the district court err in its dismissal of Parrish's claims of negligence, malicious prosecution, and abuse of process?

STATEMENT OF THE CASE

This appeal arises out of a Federal Tort Claims Act ("FTCA") suit brought by Donte Parrish ("Appellant" or "Parrish"). Parrish's claims encompass a variety of allegations that the Federal Bureau of Prisons ("BOP") harmed him while incarcerated. Parrish brought allegations of negligence, abuse of process, malicious prosecution, false imprisonment, and intentional infliction of emotional distress.

Parrish's suit was dismissed by the district court on limitations and exhaustion grounds.

Statement of Facts

On January 22, 2007, the United States District Court for the Middle District of Pennsylvania sentenced Appellant Donte Parrish to one-hundred eighty (180) months in federal prison for using a firearm in furtherance of drug trafficking. JA141.

Parrish arrived at the United States Penitentiary in Bruceton Mills, West Virginia ("USP Hazelton") on June 5, 2007. JA141-42. On December 27, 2009, Parrish received BOP Incident Report 1959677, which charged him with Code 100 (Killing) and Code 316 (Being in an Unauthorized Area) in violation of BOP policy. *See* JA174-75.

The BOP referred the incident report to federal authorities for investigation and potential criminal prosecution. *Id*. Pursuant to federal regulations and BOP policy, the BOP suspends internal BOP disciplinary investigations and processes when inmate misconduct allegations are referred and reviewed for possible criminal prosecution by a prosecuting authority. *See* JA202-205; JA208-11.

Each federal correctional facility has a special housing unit ("SHU"), which is a separate housing unit utilized to securely separate inmates from the general prisoner population. *See* JA242-43. Pursuant to federal regulations and BOP policy,

the BOP is authorized to segregate an inmate in the SHU when the inmate is under investigation or awaiting transfer to a different location. See JA245.

The BOP operates a special management unit ("SMU") program at certain federal correctional facilities for inmates who present unique security concerns. *See* JA261. Being assigned to a SMU is not punitive. *Id*. An inmate may be designated to a SMU when enhanced management is necessary to ensure the safety, security, or orderly operation of BOP facilities, or protection of the public. *Id*. Essentially, being assigned to a SMU is a nonpunitive transfer to a correctional facility with a highly structured program for inmates who require more intensive management due to their behaviors while incarcerated. *See generally*, JA261-275.

In November 2010, the BOP conducted an administrative hearing to determine whether Parrish met the criteria to be assigned to the SMU program. JA177-78. The hearing administrator considered Parrish's history of violent behavior and his disciplinary history. *Id*. The hearing administrator concluded that Parrish presented a threat to both staff and other prisoners and recommended that Parrish be assigned to the SMU program. *Id*. A BOP regional director agreed and recommended that Parrish be assigned to the SMU program. *Id*.

On June 15, 2015, federal authorities decided not to pursue criminal charges related to Incident Report 1959677 and released the incident report back to the BOP to process through the BOP internal discipline process. *See* JA174-75. Initially, a

BOP disciplinary hearing officer determined that Parrish had committed the prohibited acts of killing and being in an unauthorized area in violation of BOP policy. *See Id*.

On April 13, 2016, Parrish filed grievance 858505-R1 with the BOP Mid-Atlantic Regional Office to appeal Incident Report 1959677. JA143. On June 3, 2016, the BOP Mid-Atlantic Regional Director partially granted grievance 858505-R1 by remanding the incident report for a re-hearing. *Id*. Although the regional director remanded the report for a re-hearing, the order did not vacate the findings of responsibility or otherwise clear his record thus, Parrish's administrative remedy remained pending. Without waiting for a final determination of his administrative remedy, Parrish filed two administrative tort claims with the BOP.

On September 1, 2016, Parrish filed administrative tort claim TRT-MXR-2016-06283 ("Claim '283") with the BOP, making a claim of abuse of process. JA92. In relief he requested $15,000 for alleged personal injury. *Id*. Parrish did not allege any physical injury. *See Id*. Instead, Parrish explained that the "gist" of his claim was the fact that the BOP remanded Incident Report 1959677 for a new hearing for the charge of assisting in a killing rather than the original charge of killing. *Id*. On September 14, 2016, BOP denied administrative tort claim TRT-MXR-2016-06283 because Parrish failed to demonstrate that he suffered a physical

injury or to explain why he believed that the BOP was responsible for any such physical injury. JA69.

On September 23, 2016, Parrish filed administrative tort claim TRT-MXR-2016-06710 ("Claim '710"). JA70. In claim '710, Plaintiff alleged Wrongful Confinement/False Imprisonment, causing various alleged injuries. The BOP denied administrative tort claim TRT-MXR-2016-06710 on October 7, 2016. JA75.

On January 25, 2017, a BOP disciplinary hearing officer conducted a new disciplinary hearing to address the allegations contained in Incident Report 1959677. JA76-77; 175. The disciplinary hearing officer found insufficient evidence to conclude that Parrish violated BOP policy as charged, noted no prohibited act occurred and ordered the incident report be expunged. *Id*. The Discipline Hearing Officer Report was executed on October 18, 2017. JA77.

Procedural History

Parrish's original Complaint in this lawsuit was postmarked on May 1, 2017, and filed with the district court on May 3, 2017. JA25. The original Complaint contains a handwritten notation indicating a "4/7/17" date of verification. JA23. Parrish amended his Complaint on December 18, 2017. *See* JA31-34.

After several procedural filings were made, the United States moved to dismiss for lack of subject matter jurisdiction under F.R.Civ.P. 12(b)(1). JA126–127. The United States argued that Parrish's suit was barred under the FTCA's

statute of limitations because his Complaint had not been filed within six months of BOP's denial of his administrative claims. JA126–128. As Claim '283 was denied on September 14, 2016, and Claim '710 was denied on October 7, 2016, Parrish's time to file suit expired by March 14, 2017 and April 7, 2017, respectively. JA69, JA75. As the Complaint was not postmarked until May 1, 2017 and was not filed with the district court until May 3, 2017, Parrish filed his lawsuit after the deadlines to challenge the denials had already expired. The United States provided affidavits to its Motion to Dismiss detailing the daily mail collection process and where it is transported, concluding that the earliest Parrish could have added his complaint to the outgoing mail was April 28, 2017. JA103–104.

In response, Parrish argued that his original Complaint was mailed on April 7, 2017, and applying the "prison mailbox rule," the date he deposited the Complaint in the mail system should satisfy the strict reading of the 28 U.S.C. § 2401. JA132–134. Parrish provided a declaration with his response which swears (somewhat contradictory) he deposited the complaint in his "door as the officer made rounds" and that "I placed it in the officers [*sic*] hands" on April 7, 2017. Parrish's declaration contains complaints about the mailing procedure at the BOP and fails to contain a statement as to how the mail was packaged or if postage was prepaid. JA106-8.

Furthermore, up to this point in time, Parrish had repeatedly pled June 3, 2016, as the date of his expungement. JA70; 72-73; 92; 94; 118-119. However, in his Response to the United States' Motion to Dismiss, Parrish pivoted, and decided that the statute of limitations should run not from the denials of his administrative claims, but rather from January 25, 2017, the date he "got the rehearing charges thrown out and expunged from [his] record." JA131.

Despite Parrish's argument, the district court held that Parrish's claims "accrued on June 3, 2016"—the date on which the Regional Director granted Parrish's administrative appeal and remanded for a new disciplinary hearing. JA131–132. The court then held that "the [prison] mailbox rule does not apply to Parrish's FTCA claims," noting that the majority of courts have determined the mailbox rule does not apply to FTCA claims and because "waiver of immunity must be strictly construed." JA134 (citations omitted). The court thus considered it immaterial whether Parrish mailed his Complaint on April 7, as it "was not received by this Court until…May 3, 2017." JA132. The district court also found that Parrish's contention that he "gave his complaint to prison officials for mailing no later than April 7, 2017, [was] belied by the fact that the envelope containing the complaint was not postmarked until May 1, 2017." JA134. The district court detailed the procedure laid out by The United States in handling the mail and came to the conclusion that it "appears Parrish forwarded his complaint to the staff…at the

earliest…on Friday April 28, 2017, after outgoing mail had been collected for the day" JA135. Finally, the court held there were no "extraordinary circumstances" entitling Parrish "to equitable tolling with regard to the '710 Claims." JA138.

Though the United States' motion was granted as to Claim '710, the district court denied the government's motion to dismiss Parrish's claims on timeliness grounds to the extent those claims were exhausted in the '283 administrative filing. BOP's letter denying those claims "did not advise Plaintiff of the six-month deadline in which he was required to file suit," which "prevent[ed] this communication from being a proper final agency denial." JA117, JA128–129.

The United States then filed a second motion to dismiss, which the court granted. JA322. Parrish's amended Complaint asserted five FTCA claims against the government: false imprisonment, abuse of process, intentional infliction of emotional distress, negligence, and malicious prosecution. JA31–34. The district court agreed none of these counts were fairly alleged in the '283 filing and thus dismissed them. JA318–322.

The court entered judgment in favor of the government on March 24, 2020, but Parrish was "being transferred from federal to state custody" at that time and he "did not receive [the court's] order until" three months later. JA324–325. He promptly prepared a notice of appeal within two weeks, but still after the sixty-day window established by FRAP 4(a)(1)(B). JA324–325. This Court construed

Parrish's notice of appeal as a motion to reopen the time to appeal and remanded to the district court to determine if Parrish satisfied FRAP 4(a)(6)'s requirements. JA327. The district court concluded that "the time for [Parrish] to file an appeal should be reopened," as "service of the Court's Order was not completed until, at the earliest, June 25, 2020, ninety-eight (93) (sic) days after its entry." JA330. The court further observed that Parrish "filed his Notice of Appeal within fourteen (14) days after he received that Order" and that "no party will be prejudiced if Parrish is allowed to refile his appeal." JA330–331.

SUMMARY OF THE ARGUMENT

This appeal raises three primary issues for this court. The first issue has two parts: (1) on what date did Parrish's claims become cognizable, and depending on which date is correct, (2) were the claims properly presented. As this court will see, under any potential accrual date, Parrish's claims fail. If it is determined he filed his administrative tort claims properly, then the district court correctly concluded Parrish's complaint was not timely filed as to one of his administrative tort claims; furthermore the prison mailbox rule does not save Parrish's claims as it was not properly complied with. Alternatively, if it is determined he filed his administrative tort claims too early (using the accrual date Parrish and The United States agree with), then his claims fail as he filed the complaint prematurely. In either scenario—Parrish's claims fail.

The second issue is whether every circuit court of appeals—including this court—has interpreted 28 U.S.C. § 2401(b) incorrectly. The United States maintains that all of the circuit courts are correct, and that the statute requires a plaintiff to both file a claim before the appropriate agency within two years of the accrual of the cause of action and bring an action within six months of the agency's denial of the claim. Parrish argues that all of the courts are wrong, and Section 2401(b) should be read in the disjunctive, meaning a plaintiff must either present his claim to the agency within two years **or** bring an action within six months of a final agency denial.

Third and finally, is whether the district court erred in determining that certain claims of Parrish were not encompassed in one of his administrative tort claims, meaning they were not exhausted for the purposes of filing a complaint.

ARGUMENT

I) The United States Does Not Dispute that Parrish Was Not Required to File a Second Notice of Appeal

A) Standard of Review

A district court's decision to grant a reopening of the time to appeal under FRAP 4(a)(6) is reviewed for abuse of discretion. *Barreto v. Affluence Edu*, 824 F. App'x 194 (4th Cir. 2020) (citing *Herman v. Lackey*, 309 F. App'x 778, 781 (4th Cir. 2009) (argued but unpublished).

B) Argument

The United States does not dispute that Parrish's appeal should be considered timely. This Court has held that the practice of "construing notices of appeal liberally applies "especially" to pro se filings." *United States v. Garcia*, 65 F.3d 17, 19 (4th Cir. 1995). Moreover, given this Court's determination that even a pro se motion for an extension of time to file an appeal should be construed as an implicit notice of appeal, it seems to follow that in a case where the Appellee files an actual notice of appeal, as in the present case, that Appellee need not file a second as the Appellee's intent to seek appellate review has been communicated and notice has been provided to the other parties and the court as required by FRAP 3. *See Clark v. Cartledge*, 829 F.3d 303, 305 (4th Cir. 2016). The United States does not dispute the timeliness of this appeal.

II) At Least Some Portions of Parrish's Complaint Fail to Satisfy the Statute of Limitations

A) Standard of Review

The district court's dismissals were all pursuant to Federal Rule of Civil Procedure 12(b)(1). This Court's review is de novo. *Evans v. B.F. Perkins Co*., 166 F.3d 642, 647 (4th Cir.1999).

This same standard applies to the remaining issues presented.

B) Parrish's Claim Was Either Prematurely Presented or Untimely Filed

1) Parrish's Administrative Tort Claims were Premature

An FTCA action "shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). As Parrish acknowledges, however, *Heck v. Humphrey* applies in this context, *see* Appellant Br. at 23, which means that Parrish's tort claims were not cognizable until his disciplinary record was expunged.

There are three possible dates that Parrish's claims accrued: (1) June 3, 2016 (when a rehearing was ordered); (2) January 25, 2017 (when the rehearing occurred); or October 18, 2017 (when the report from the rehearing was executed).

The United States contends that his administrative claim grievance 858505-R1 was pending until October 18, 2017, when the rehearing report was executed, or, at the earliest, January 25, 2017, when the rehearing occurred. While Parrish originally argued that the accrual date was June 3, 2016, he argues in this Court that January 25, 2017 is the correct accrual date. Under either accrual date, his case fails.

If this Court adopts the position that Parrish's claims become cognizable on January 25, 2017, the date of his rehearing, then he improperly presented the '710 claim before it was administratively exhausted under the Prison Litigation Reform Act, and thus accrued under *Heck*.

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), requires that inmates exhaust available administrative remedies prior to filing civil actions though the administrative process may not afford them the relief they might obtain through civil proceedings. *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2382–83, 165 L.Ed.2d 368 (2006); *Porter v. Nussle*, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)(The Prison Litigation Reform Act's exhaustion requirement applies to all inmate suits about prison life whether they involve general circumstances or particular episodes and whether they allege excessive force or some other wrong .); *Booth v. Churner*, 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed .2d 958 (2001)("Under 42 U.S.C. § 1997e(a), an inmate seeking only money damages must complete any prison administrative process capable of addressing the inmate's complaint and providing some form of relief, even if the process does not make specific provision for monetary relief.").

Here, under Parrish's own argument, his claims did not accrue until January 25, 2017, when the rehearing took place—thus his prison administrative remedy was pending until this time and not exhausted. As Parrish filed his SF-95's prior to January 25, 2017, they must be considered premature as his administrative remedy was still pending.

The FTCA's presentment requirement is intended to enable the agency to investigate and place a sum certain value on the claim, and allow them to initiate a

settlement procedure. *E.g., Ahmed v. United States*, 30 F.3d 514, 516-17 (4th Cir. 1994). But an agency cannot investigate or settle a claim that is barred by law. Parrish presented his claim before it had accrued, and because he did not properly present it, he was not entitled to bring it before a federal court. *Cf., e.g.*, *Alvarez-Machain v. United States*, 96 F.3d 1246, 1250 (9th Cir. 1996) ("[H]ad he filed an administrative claim for these torts prior to obtaining his acquittal, the claim should have been dismissed as premature" under *Heck*), *opinion amended and superseded*, 107 F.3d 696 (9th Cir. 1996).[1]

2) In The Alternative, Parrish's Complaint was Untimely

Notwithstanding the above, the district court found that the '710 claim accrued on June 3, 2016. The United States agrees with Parrish that this aspect of the district court's reasoning was likely incorrect; re-hearing was ordered on that date, but Parrish's disciplinary record had not yet been expunged. But even if the district court was correct that Parrish's claim accrued on June 3, 2016 (i.e., prior to the filing of the '710 claim), that would not render Parrish's complaint timely filed, as he would still have needed to file it within six months of the October 7, 2016 denial of the claim—by April 7, 2017.

[1] Although nothing turns on it, it appears that Parrish's claims actually did not become cognizable until even later—October 18, 2017, when his disciplinary record was formally expunged. *See* JA77. If that is correct, Parrish improperly both exhausted his claim *and* initiated this lawsuit while subject to the *Heck* bar.

Parrish had six (6) months to file a lawsuit after the BOP denied the aforementioned administrative claims. 28 U.S.C. § 2401(b). Thus, if the accrual date was June 3, 2016, and his administrative tort claims properly presented, his opportunity to file a lawsuit with respect to administrative tort claim TRT-MXR-2016-06283 expired on March 14, 2017, six (6) months after the BOP denied that claim on September 14, 2016.[2] Likewise, his opportunity to file a lawsuit with respect to administrative tort claim TRT-MXR-2016-06710 expired on April 7, 2017, six (6) months after the BOP denied that claim on October 7, 2016.

It is undisputed that Parrish's complaint was not actually marked as filed in district court until May 3, 2017. Parrish nevertheless argues that prison mailbox rule renders his claim timely. [*See* A. Br. 3, 4.] But even assuming that the prison mailbox rule governs the timely filing of FTCA litigation, it would not help Parrish here.

The prison mailbox rule provides that a court filing is "deemed filed at the moment the prisoner places it in the prison mail system, rather than when it reaches the court clerk." *Taylor v. Brown*, 787 F.3d 851, 858 (7th Cir. 2015) (citation omitted). In this case, however, the district court determined that it "appears Parrish forwarded his complaint to the staff…at the earliest…on Friday April 28, 2017, after outgoing mail had been collected for the day" JA135. Nor is that surprising; the government made a significant evidentiary presentation concerning the handling of

[2] The '283 filing was timely for other reasons.

inmate mail at the facility, *see supra*, and Parrish's own declaration was woefully deficient. *See* JA106-108. The declaration was internally contradictory about whether he had put the filing in his "door" or "in the officers hands," JA106, and it never indicated that Parrish had pre-paid postage (or even placed the filing in an addressed envelope).

In the two places where the prison mailbox rule is codified—Federal Rule of Appellate Procedure 4(c)(1) and Rule 3(d) of the Rules Governing § 2255 cases—it expressly requires a declaration indicating that first-class postage has been prepaid. Courts have extended that requirement to other inmate filings that benefit from the prison mailbox rule, and this Court should do the same. *See, e.g.*, *Price v. Philpot*, 420 F.3d 1158, 1165 (10th Cir. 2005) (applying this requirement to § 1983 claim given "obvious practical reasons for imposing a uniform rule to all inmate filings"); *Gaines v. U.S. Marshals Serv.*, 291 F. App'x 134, 136 (10th Cir. 2008) (similar). Either way, the district court did not err in finding that Parrish did not mail his complaint by April 7.

Finally, Parrish contends that at a minimum, he was entitled to discovery about when his complaint was mailed. That contention fails because the district court advised Plaintiff that it would treat the motion as seeking summary judgment, and Plaintiff did not invoke Rule 56(f). *See* D. Ct. Dkt. 104 at 2 ("When a motion to dismiss is accompanied by affidavits, exhibits and other documents, the motion

will be construed as a motion for summary judgment."). Having failed to seek relief under Rule 56(f), Plaintiff cannot now complaint that he was wrongfully denied discovery.

III) Every Circuit Court in the United States is Correct in its Application of the FTCA's "Present and Notice" Requirements

Congress enacted the FTCA to "waive[] the United States' sovereign immunity for claims" for money damages "arising out of torts committed by federal employees." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 217-18 (2008). As a "condition" of that waiver, Congress required plaintiffs to sue on such claims within specified periods of time, *see United States v. Kubrick*, 444 U.S. 111, 117 (1979), or else the claim "shall be forever barred." 28 U.S.C. § 2401(b). As a waiver of sovereign immunity, "the Act's established procedures have been strictly construed." *Livera v. First Nat'l Bank*, 879 F.2d 1186, 1194 (3d Cir. 1989); *see also Roma v. United States*, 344 F.3d 352, 362 (3d Cir. 2003) ("mandatory language" of the FTCA has been given "strict construction").

As relevant here, a plaintiff who seeks to recover from the United States under the FTCA must comply with two statutes of limitations. First, a plaintiff must present his claim in writing to "the appropriate federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). Second, the plaintiff must file a lawsuit "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented." *Id.*

The Sixth Circuit most squarely addressed Parrish's argument in a 2008 case, *Ellison v. United States*, and the Court's clear work and rationale there cannot be improved upon:

> [Appellant's] principal response is to say that § 2401 is "disjunctive," "allow[ing] a claimant to proceed ... by either presenting the claim to an agency within two years of accrual or by filing a legal action with[in] six months of a final denial," No doubt that is one way to read the provision, and we credit [Appellant's] effort to focus on the text at hand. But the fact that the statute uses the disjunctive does not by itself tell us anything. The question remains whether the statute sets forth alternative ways of barring a claim or alternative ways of preserving a claim. A statute that precludes an action if the claimant (disjunctively) fails to meet either of two requirements generally will come to the same end as a statute that requires the claimant (conjunctively) to fulfill both requirements. In barring an action if the claimant fails to meet the agency-filing deadline (because it is not "presented in writing to the appropriate Federal agency within two years after such claim accrues") "or" if the claimant fails to meet the court-filing deadline (because it is not "begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented"), the statute bars claims that fail to meet either deadline. And because [Appellant] failed to meet the second deadline, that dooms the action.
>
> Nor, for similar reasons, is [Appellant] correct that this reading of the statute transforms "or" into "and." While we will not pretend that the statute is a model of draftsmanship, the use of "or" together with the statutory imperative that actions be filed in a specific order signals that there are two different ways to file a claim late—by waiting more than two years to file a claim with the agency or, having filed that claim, waiting more than six months to file a claim with the court—not two conjunctive requirements for filing a claim late. Had Congress used "and" in writing this statute (or had we adopted "and" in construing it), that would mean that a claim would be barred only if the plaintiff filed the action late in the agency and filed the action late in court. That is not a traditional way to formulate a limitations rule.

Ellison v. United States, 531 F.3d 359, 362–63 (6th Cir. 2008)(Internal citations to the briefs omitted).

This rationale aligns with every other circuit to have considered this issue, all of which have held that both conditions must be satisfied. *See Sconiers v. United States*, 896 F.3d 595, 598 (3d Cir. 2018)("both conditions must be satisfied in order for a plaintiff to properly bring a claim under the FTCA"); *Sanchez v. United States*, 740 F.3d 47, 50 n.6 (1st Cir. 2014) ("We read this disjunctive language [of § 2401(b)] as setting out two deadlines, both (not just either) of which must be satisfied."); *Houston v. U.S. Postal Serv.*, 823 F.2d 896, 902 (5th Cir. 1987) ("Though phrased in the disjunctive, this statute requires a claimant to file an administrative claim within two years *and* file suit within six months of its denial."); *Dyniewicz v. United States*, 742 F.2d 484, 485 (9th Cir. 1984) ("Under the Federal Tort Claims Act a claim must be filed with the appropriate federal agency within two years of its accrual and suit must be commenced within six months of the agency's denial of the claim.") (Kennedy, J.); *Willis v. United States*, 719 F.2d 608 (2d Cir. 1983) (considering the legislative history and concluding that § 2401(b) requires that both deadlines must be met); *Schuler v. United States*, 628 F.2d 199, 201-02 (D.C. Cir. 1980) (en banc) (per curiam) (same).

In addition to every appeals court reaching the same conclusion, the Fourth Circuit has interpreted the statute the same way. *Henderson v. United States*,785

F.2d 121, 123 (4th Cir. 1986). The United States concedes that the *Henderson* Court was not required to squarely address this issue, but it concluded all the same—28 U.S.C. § 2401 "provides that a claim must be 'presented in writing to the appropriate federal agency within two years after such claim accrues' and that a civil action must be commenced within six months after the final denial of the claim by the agency." *Id* at 123.

Apart from the cases cited above, the legislative history of the FTCA supports the notion that a plaintiff must comply with both prongs of § 2401(b). *See* H.R. Rep. No. 89-1532, at 5 (1966) ("The amendments have the effect of simplifying the language of section 2401 to require that a claimant must file a claim in writing to the appropriate Federal agency within 2 years after the claim accrues, and to further require the filing of a court action within 6 months of notice ... of a final decision of the claim by the agency to which it was presented."); *see also Willis*, 719 F.2d at 613 (discussing legislative history).

Finally, to the extent that Congress's use of the word "or" in § 2401(b) could be construed to be ambiguous, the Supreme Court has instructed time and again that any ambiguity in a statute that waives sovereign immunity must be construed in favor of the United States. *See, e.g., F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012) ("Any ambiguities in the statutory language are to be construed in favor of immunity."); *United States v. Williams*, 514 U.S. 527, 520 (1995) ("Our task is to

discern the unequivocally expressed intent of Congress, construing ambiguities in favor of immunity."); *BP America Prod. Co. v. Burton*, 549 U.S. 84, 96 (2006) ("the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous"); *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 34 (1992) ("the Government's consent to be sued must be construed strictly in favor of the sovereign"); *see also Clarke v. INS*, 904 F.2d 172, 177 (3d Cir. 1990) (ambiguity had to be construed in favor of Government "in view of the limited nature of statutory exceptions to sovereign immunity"). "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Cooper*, 132 S. Ct. at 1448.

IV) The District Court Correctly Dismissed All Claims in the Amended Complaint

The United States concedes that regardless of the procedural aspects of the Parrish's case addresses *supra*, his claims in this case would still be timely to the extent that they are encompassed by the Claim'283 administrative filing. However, the district court correctly determined that all five of the Plaintiff's claims should be dismissed for lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted.

The United States disputes Parrish's allegation that the district court's reading of the Parrish's '283 claim was "narrow."

The FTCA requires a plaintiff to file an administrative claim prior to commencing a suit against the United States. 28 U.S.C. § 2675. First, a plaintiff must timely file his claim with the appropriate federal agency, which then has the power to settle or deny it. § 2401(b). The plaintiff may file a civil action against the United States only if the agency has denied the claim. § 2675(a). Alternatively, "[t]he failure of an agency to make final disposition of a claim within six months after it is filed shall . . . be deemed a final denial of the claim" for the purposes of fulfilling the requirement. *Id.*

A) Exhaustion Requirements are Jurisdictional

The FTCA's administrative exhaustion requirement is fulfilled when the agency "receives from a claimant . . . an executed Standard Form 95 or other written notification of an incident, accompanied by a claim for money damages in a sum certain." 28 C.F.R. § 14.2 (emphasis added). The purpose of this notice is to enable the agency to investigate and place a sum certain value on the claim. *Ahmed v. United States*, 30 F.3d 514, 516-17 (4th Cir. 1994); *cf. Henderson v. United States*, 785 F.2d 121, 124 (4th Cir. 1986) (quoting *Meeker v. United States*, 435 F.2d 1219, 1222 (8th Cir. 1970) (explaining that Congress intended to "improve and expedite disposition of monetary claims against the Government by establishing a system for prelitigation settlement, to enable consideration of claims by the agency having the best information concerning the incident, and to ease court congestion and avoid

unnecessary litigation"). Consequently, a plaintiff cannot present an administrative claim based on one theory of relief and then maintain an FTCA suit based a different cause of action or set of facts. *Deloria v. Veterans Admin.*, 927 F.2d 1009, 1012 (7th Cir. 1991) (finding administrative notice of conspiracy to alter medical records was not sufficient notice of subsequent FTCA claims of medical malpractice and negligence because the "allegations involve wholly different incidents").

In light of the district court's other holdings, the district court correctly dismissed Parrish's amended Complaint for lack of jurisdiction based on his failure to exhaust administrative remedies as to all of his claims JA309-23. Indeed, the Fourth Circuit considers this requirement to be jurisdictional in nature. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (affirming district court's denial of a motion to amend when there is "no jurisdiction to hear the case because [Plaintiff] failed to first submit those claims as administrative claims and exhaust her administrative remedies"); *Henderson v. United States*, 785 F.2d 121, 123 (4th Cir. 1986) ("It is well-settled that the requirement of filing an administrative claim is jurisdictional and may not be waived."); *Kielwien v. United States*, 540 F.2d 676, 679 (4th Cir. 1976) (stating that the "requirement is jurisdictional and is not waivable.").

Supreme Court precedent and the language of the FTCA confirm this line of authority. Recently, in *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), a

unanimous Supreme Court clarified that administrative requirements are jurisdictional in two instances: (1) When Congress clearly makes it so; or 2) when a "long line of Supreme Court decisions left undisturbed by Congress has attached a jurisdictional label to a prescription." *Id*. at 1849-50 (internal quotation marks omitted).

B) Each of Parrish's Causes of Action were Properly Dismissed

Parrish and the district court denote five specific claims raised in the Amended Complaint: false imprisonment, intentional infliction of emotional distress, negligence, malicious prosecution, and abuse of process. JA31–34; Appellant's Opening Brief, p. 44. Parrish concedes that only the negligence, malicious prosecution, and abuse of process claims were presented in the '283 filing—but each of these claims was properly disposed of by the district court.

1) Parrish's Negligence Claims were Properly Dismissed

The district court correctly held that the '283 claim "contains one allegation that a BOP regional director "abused the process" when he remanded for rehearing a DHO's decision on a charge related to the 2009 incident at USP Hazelton." JA318. Though Parrish contends the negligence claim is somehow gleanable from the '283 claim, the term "negligence" appears nowhere, and the entire claim is couched in the context of "abuse of process" related to the procedure of his charges. JA92-94.

In West Virginia, negligence is "always determined by assessing whether or not the alleged negligent actor exercised reasonable care under the facts and

circumstances of the case, with reasonable care being that level of care a person of ordinary prudence would take in like circumstances." *Strahin v. Cleavenger*, 603 S.E.2d 197, 205 (W.Va. 2004) (citations omitted). Plaintiff has not alleged any duty, breach, or standard for what a reasonable correctional officer or BOP employee should have done in similar circumstances. Thus, the negligence claim was correctly dismissed for lack of subject matter jurisdiction.

2) Parrish's Malicious Prosecution Claims were Properly Dismissed

In order to prevail on a claim for malicious prosecution under West Virginia law, the Plaintiff must show: "(1) that the prosecution was set on foot and conducted to its termination, resulting in plaintiff's discharge; (2) that it was caused or procured by defendant; (3) that it was without probable cause; and (4) that it was malicious." *See Goodwin v. Shepherd Univ. Police*, 2018 W.V. Cir. LEXIS 13 (W.Va. 2018) *quoting* Syl. Pt. 3, *Norfolk S. Ry. Co. v. Higginbotham*, 228 W.Va. 522, 721 S.E.2d 541 (2011) (citations omitted).

The district court properly determined that a malicious persecution claim was not raised in the '283 claim. JA319. While Plaintiff's tort claim '283 did allege that "a direct misuse of legal process" occurred when the rehearing was issued for the charge of 100(A) "assisting in a killing," this not the *same* claim that Plaintiff raises here in his amended Complaint, i.e., a claim of malicious prosecution. The allegations in the '283 claim may be colorable as an abuse of process claim

(addressed *infra*), but he never alleged facts related to at least elements 1 or 4 under West Virginia law, and thus his claim was properly dismissed.

3) Parrish's Abuse of Process Claims were Properly Dismissed

The district court determined that Parrish's surviving '283 claim did contain a claim for abuse of process. JA320-22. However, the facts and allegations surrounding the abuse of process claim in the Amended Complaint clearly relate to the previously dismissed '710 case. *Id*. The '283 claim solely relates to complaint of the procedure of his administrative appeal and how the charges were changed after remand. JA92. The amended Complaint (and all related attachments) couches the abuse of process claim in the context of illegal confinement. JA31-32. The district court rightly determined that,

> Although both are labeled abuse of process, any commonality between the '283 and FTCA claims ends there. Each sets forth a different theory of relief; each is based on a different set of facts; and each involves different BOP employees. Because these allegations "involve wholly different incidents," *Deloria*, 927 F.2d involve "whole different incidents" at 1012, the '283 Claim failed to provide proper notice for the government to undertake an investigation and evaluation of the abuse of process claim alleged in Parrish's amended complaint.

JA 321-22.

To contest this decision Parrish depends on the liberality afforded to *pro se* litigants by relying on Appellant's Memorandum of Evidence, which includes fleeting reference to a rewrite of his charge. He does this all while on the one hand arguing that he did not always draw a bright line between the two different abuse of

process claims in his filings, and at the same time arguing that the '283 claim is squarely raised in the Complaint. *See* Appellant's Opening Brief, p.48. However, any review of these materials shows a disconnect between the Amended Complaint and the '283 claim, and Parrish cannot present an administrative claim based on one theory of relief and then maintain an FTCA suit based a different cause of action or set of facts. *Deloria*, 927 F.2d 1009, 1012.

CONCLUSION

For the reasons set forth above, this Court should uphold the district court's orders dismissing Parrish's Complaint. In the event that the court remands this case for further proceedings, the district court did not reach the merits of all of the justifications for dismissing Parrish's claims, and any remand should be to the responsive pleading state of litigation.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The United States avers that the facts and legal contentions are adequately presented in the materials before this Court, and oral argument would not aid the decisional process.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 6,601 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

/s/ Jordan V. Palmer

CERTIFICATE OF SERVICE

I hereby certify that, on this 13th day of January, 2023, I electronically filed the foregoing with the Clerk of the Court using the appellate CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jordan V. Palmer