

No. 16-6411

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

GREGORY CARTER,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of West Virginia

BRIEF FOR THE UNITED STATES

CHAD A. READLER

Acting Assistant Attorney General

CAROL A. CASTO

United States Attorney

MARK B. STERN

NICOLAS Y. RILEY

Attorneys, Appellate Staff

Civil Division, Room 7231

U.S. Department of Justice

950 Pennsylvania Avenue NW

Washington, DC 20530

(202) 514-4814

TABLE OF CONTENTS

	<u>Page(s)</u>
STATEMENT OF JURISDICTION	1
STATEMENT OF THE ISSUES.....	1
PERTINENT STATUTES AND REGULATIONS	1
STATEMENT OF THE CASE.....	2
A. Statutory Background.....	2
B. Factual and Procedural Background.....	4
1. Plaintiff’s Pre-Incarceration Injuries	4
2. Plaintiff’s Alleged Fall at FCI-Beckley	5
3. Prior Proceedings.....	6
SUMMARY OF ARGUMENT.....	7
STANDARD OF REVIEW	9
ARGUMENT	10
I. Plaintiff must show that he suffered more than de minimis harm to proceed on his FTCA claim.....	10
A. In order to satisfy section 1346(b)(2)’s “physical injury” requirement, a prisoner must show that his asserted injuries are not merely de minimis.....	10
B. The FTCA’s “physical injury” requirement is jurisdictional	13
II. The district court correctly found that Plaintiff’s asserted injuries were de minimis.....	15
CONCLUSION	18
CERTIFICATES & STATUTORY ADDENDUM	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Al Shimari v. CACI Premier Tech., Inc.</i> , 840 F.3d 147 (4th Cir. 2016).....	9, 10
<i>Antonelli v. Crow</i> , No. 08-261, 2012 WL 4215024 (E.D. Ky. Sept. 19, 2012)	14
<i>Association of Admin. Law Judges v. FLRA</i> , 397 F.3d 957 (D.C. Cir. 2005)	13
<i>Brooks v. Warden</i> , 800 F.3d 1295 (11th Cir. 2015).....	11
<i>Calderon v. Foster</i> , No. 05-0696, 2007 WL 1010383 (S.D.W. Va. Mar. 30, 2007), <i>aff'd</i> , 264 F. App'x 286 (4th Cir. 2008)	12
<i>Dockery v. United States</i> , No. 08-80031, 2008 WL 345545 (S.D. Fla. Feb. 6, 2008).....	14
<i>Flanory v. Bonn</i> , 604 F.3d 249 (6th Cir. 2010).....	11
<i>Godbey v. Wilson</i> , No. 12-1302, 2014 WL 794274 (E.D. Va. Feb. 26, 2014).....	14
<i>McLean v. United States</i> , 566 F.3d 391 (4th Cir. 2009).....	10
<i>Mitchell v. Horn</i> , 318 F.3d 523 (3rd Cir. 2003).....	12, 17
<i>Oliver v. Keller</i> , 289 F.3d 623 (9th Cir. 2002).....	10, 11, 17
<i>Schultz v. Pugh</i> , 728 F.3d 619 (7th Cir. 2013).....	11

Sublet v. Million,
451 F. App'x 458 (5th Cir. 2011) 12, 14

Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.,
505 U.S. 214 (1992)13

Statutes:

Federal Torts Claims Act:

28 U.S.C. § 1346(b) 1, 13, 14
28 U.S.C. § 1346(b)(1)..... 2
28 U.S.C. § 1346(b)(2)..... 1, 2, 3, 7, 8, 10, 12, 13, 14
28 U.S.C. § 2674 2
28 U.S.C. § 2680 13

Prison Litigation Reform Act,

Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321 (1996) 3
42 U.S.C. § 1997e(e)..... 10, 11, 12, 14, 17

28 U.S.C. § 1291 1

42 U.S.C. § 1983 10, 14

Rules:

Fed. R. App. P. 4(a)..... 1

Fed. R. Civ. P. 12(b)(1) 9

Legislative Materials:

141 Cong. Rec. S14,418 (daily ed. Sept. 27,1995)..... 10

141 Cong. Rec. 27,042 (1995)..... 3

H.R. Rep. No. 104-21 (1995)..... 3

H.R. Rep. No. 104-378 (1995) (Conf. Rep.)..... 3

Other Authorities:

Black's Law Dictionary (10th ed. 2014) 12

STATEMENT OF JURISDICTION

Plaintiff Gregory Carter brought this action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), while he was incarcerated at a federal prison in West Virginia. The district court dismissed his complaint for lack of subject-matter jurisdiction and entered final judgment in the government's favor on March 8, 2016. JA 222. Plaintiff filed a timely notice of appeal on March 17, 2016. JA 224-28; Fed. R. App. P. 4(a). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The Prison Litigation Reform Act precludes any prisoner from bringing a civil action against the United States “for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 28 U.S.C. § 1346(b)(2). The questions presented are:

1. Whether a prisoner may bring a claim against the United States under the FTCA if the only physical injuries he has suffered are de minimis.
2. Whether the district court correctly found that the injuries plaintiff alleged in this case were de minimis.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE¹

Plaintiff brought this negligence suit against the United States while he was incarcerated at the Federal Correctional Institution (FCI) in Beckley, West Virginia. In his complaint, he alleged that he slipped and fell in his cell, causing injuries to his right ankle, neck, and back. He sought damages under the Federal Tort Claims Act (FTCA) for those injuries, as well as “pain and suffering” and “emotional distress.” JA 10. The district court dismissed plaintiff’s complaint, holding that it lacked jurisdiction under a provision of the FTCA that bars suits by prisoners “for mental or emotional injury suffered while in custody without a prior showing of physical injury.” 28 U.S.C. § 1346(b)(2).

A. Statutory Background

The FTCA waives the United States’ sovereign immunity and creates a cause of action for certain torts committed by federal employees acting within the scope of their employment. 28 U.S.C. § 2674. The statute grants federal district courts exclusive jurisdiction over these tort claims “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1).

¹ Citations to the Joint Appendix appear as “JA ___.” Citations to entries on the district court’s docket appear as “Dist. Ct. Dkt. No. ___.” Citations to entries on this Court’s docket appear as “CA4 Dkt. No. ___.”

In 1996, Congress amended the FTCA by enacting the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321 (1996), which was designed to “discourage frivolous and abusive prison lawsuits.” H.R. Rep. No. 104-378, at 166 (1995) (Conf. Rep.). The PLRA’s legislative history reflects Congress’s concern that the growing volume of prisoner litigation was imposing significant costs on state and federal courts and prisons. *See* H.R. Rep. No. 104-21, at 7 (1995) (“Too many frivolous lawsuits are clogging the courts, seriously undermining the administration of justice.”); 141 Cong. Rec. 27,042 (1995) (statement of Sen. Hatch) (“The crushing burden of these frivolous suits makes it difficult for courts to consider meritorious claims.”).

As relevant here, the PLRA established new limits on “prisoner suits against the Federal government for mental or emotional injury under the Federal Tort Claims Act.” H.R. Conf. Rep. 104-378, at 167. In particular, it amended the FTCA to provide that:

[n]o person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury[.]

Pub. L. No. 104-134, § 806, 110 Stat. 1321-75 (codified at 28 U.S.C. § 1346(b)(2)).

B. Factual and Procedural Background

1. Plaintiff's Pre-Incarceration Injuries

Plaintiff arrived at FCI-Beckley in December 2013. Shortly after his arrival, he underwent an “initial preventive health screening” with the prison’s medical staff to assess his overall health. JA 46. During that screening, plaintiff complained of “back and neck pain and right ankle pain” caused by a pair of injuries that he suffered prior to his incarceration. *Id.* As he explained to the medical staff, he had injured his ankle when he “fell down” while “drinking” a few weeks earlier, JA 42, and had been suffering from “chronic neck and back pain” for about two months due to an earlier “compensation injury from the state of Ohio,” JA 48. The medical staff, which observed “significant swelling to [plaintiff’s] right ankle” and “decreased [range of motion],” prescribed ibuprofen and scheduled a radiology exam for the following week. JA 49-51. The results of that exam were negative. JA 56, 119.

Over the next four months, plaintiff continued to suffer from the same symptoms he displayed at his initial health screening, for which he received ongoing treatment. In early January 2014, a week and a half after his initial screening (and nearly a month after he arrived at FCI-Beckley), plaintiff met with a prison doctor who observed that he “has continued to have significant pain and swelling to the ankle with no improvement.” JA 56. The doctor prescribed a new anti-inflammatory medication and scheduled plaintiff for a follow-up exam “due to the chronicity of the issue.” JA 53, 56.

Two weeks later, another member of the prison’s medical staff observed that plaintiff “[c]ontinues to have swelling and pain in [his] right ankle,” even though he had been wearing an orthopedic brace, taking anti-inflammatories, and using a crutch. JA 53, 58. During that exam, plaintiff reported his pain level as a “6” on a scale from 1 to 10. JA 58.

Three weeks later, in mid-February 2014, plaintiff met with an orthopedic surgeon who observed that he continued “to have pain and discomfort in his right ankle” and had been experiencing “increasing pain especially when he is up and around.” JA 129. Although the surgeon noted that plaintiff’s x-ray results were “essentially unremarkable,” his report suggested that prison staff could consider an injection to the ankle if the pain persists. *Id.*

More than a month after that report was filed – and nearly four months after his initial fall – plaintiff continued to exhibit the same symptoms. During a follow-up exam in late March 2014, a prison doctor observed that plaintiff’s “[r]ight ankle remains swollen and painful,” JA 65, and described the condition in his report as “Not Improved/Same,” JA 66.

2. *Plaintiff’s Alleged Fall at FCI-Beckley*

On the morning of May 3, 2014, plaintiff notified prison officials about a leak in his cell, which had caused about two inches of water to accumulate on the cell’s floor. JA 8-9, 145. He alleges that, as he was walking across the cell that morning, his “cane slipped out from under him,” causing him to fall and injure “his ankle and

back.” JA 9. Prison records indicate that plaintiff called for help at around 6:15 a.m. and that he was removed from his cell at around 6:20 a.m. JA 18, 145, 150. Plaintiff claims that, as he was being removed from his cell, he fell a second time and “injur[ed] his neck.” JA 9.

Plaintiff’s medical records show that he was examined by the prison’s medical staff later that morning. JA 70. The nurse who performed the exam noted in his report that he observed “[n]o redness,” abrasions, or contusions to plaintiff’s head or neck, and “no bruising or redness” to plaintiff’s ankle. *Id.* His assessment concluded: “No Significant Findings/No Apparent Distress Other than chronic swelling to right ankle. Will re-order xray to right ankle to [rule out] any new injuries.” *Id.* Subsequent x-rays of plaintiff’s ankle and back, both performed within a few weeks of the alleged incident, came back negative. JA 131-34. Although plaintiff continued to seek treatment over the next several months, subsequent examinations (including an MRI) all revealed the same symptoms that plaintiff had exhibited since he first arrived at FCI-Beckley. *See* JA 73-142.

3. *Prior Proceedings*

In May 2014, plaintiff filed an administrative complaint with the Bureau of Prisons seeking \$70,000 in compensatory and punitive damages for the injuries he allegedly suffered from falling in his cell. JA 21-27. The Bureau performed an investigation of his allegations and denied his claim in October 2014. JA 30-31.

Plaintiff then filed this FTCA action in the Southern District of West Virginia, where the matter was referred to a magistrate judge. JA 7-11. The government moved to dismiss for lack of subject-matter jurisdiction, arguing that plaintiff had failed to identify the requisite physical injury to proceed on his FTCA claim, as required by 28 U.S.C. § 1346(b)(2). The government also submitted various prison records with its motion, including plaintiff's medical reports, to challenge plaintiff's allegation that his ankle, neck, and back injuries resulted from slipping in his cell. JA 17-151. Plaintiff attached additional records to his response to the government's motion.² JA 152-65.

After reviewing all of these records, the magistrate judge issued an order setting forth her proposed findings and recommending that the government's motion be granted. JA 167-85. The district judge adopted the magistrate judge's proposed findings and recommendation, over plaintiff's objections and submissions of additional evidence, and dismissed the complaint. JA 212-20.

In its order of dismissal, the district court explained that the injuries plaintiff alleged in this case were all relatively minor and stemmed from his pre-incarceration injuries. JA 217-19. The court concluded that all of the physical injuries that plaintiff claimed to have suffered at FCI-Beckley were de minimis and not sufficient to satisfy

² Although plaintiff had initially retained counsel to represent him during district court proceedings, his counsel withdrew while the government's motion to dismiss was pending. JA 161.

section 1346(b)(2)'s "physical injury" requirement. JA 218-19. Accordingly, the court entered final judgment in favor of the government. JA 222.

Plaintiff filed this appeal the following week. JA 224. Although the district court initially granted him leave to appeal in forma pauperis, *see* Dist. Ct. Dkt. No. 32, it vacated that order (without explanation) four days later, *see* Dist. Ct. Dkt. No. 36. After this Court docketed the appeal, it issued a notice directing plaintiff either to pay his filing fee or to submit an application to proceed in forma pauperis. CA4 Dkt. No. 3. Plaintiff has yet to respond to that notice.

In November 2016, while this appeal was pending, plaintiff was transferred from FCI-Beckley to a halfway house in Ohio, where he continues to reside. CA4 Dkt. No. 8.

SUMMARY OF ARGUMENT

In amending the FTCA as part of the Prison Litigation Reform Act, Congress provided that no prisoner may bring an FTCA claim against the federal government without first showing that he or she suffered some "physical injury." 28 U.S.C. § 1346(b)(2).

1. The district court properly relied on that requirement in dismissing this action. Every court of appeals to construe the meaning of "physical injury" under the PLRA has held that it requires a prisoner to show that he or she suffered more than *de minimis* harm. As those courts recognized, allowing prisoners to pursue claims for *de minimis* physical injuries would undermine Congress's fundamental purpose in

enacting the PLRA – namely, preventing frivolous prisoner litigation. Moreover, permitting such claims to proceed would contravene the longstanding canon of statutory construction, *de minimis non curat lex*, which counsels against construing statutes so broadly as to vindicate even the most insignificant harms.

2. The district court correctly determined that plaintiff’s alleged injuries fall within this category of de minimis harm. Plaintiff complains of a swollen ankle and chronic pain in his neck and back. All of those symptoms, however, stem from injuries that plaintiff suffered before he ever arrived at FCI-Beckley. Plaintiff has not identified any new injuries or symptoms that arose after May 2014, when he allegedly fell inside his cell. Furthermore, even if plaintiff had shown that the ankle, neck, and back injuries that he has alleged were actually caused by falling in his cell, they would still be properly characterized as de minimis because they do not rise above the level of ordinary pain and swelling.

STANDARD OF REVIEW

In reviewing a district court’s dismissal of a claim for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(1), this Court reviews the district court’s factual findings for clear error and its legal conclusions de novo. *Al Shimari v. CACI Premier Tech., Inc.*, 840 F.3d 147, 154 (4th Cir. 2016). Where the parties have submitted evidence concerning a jurisdictional issue, this Court “may consider the plaintiffs’ pleadings as ‘mere evidence’ on the question of jurisdiction, and may also consider

evidence outside the pleadings without converting the motion to dismiss into a motion for summary judgment.” *Id.* (citations omitted).

ARGUMENT

I. Plaintiff must show that he suffered more than de minimis harm to proceed on his FTCA claim.

A. In order to satisfy section 1346(b)(2)’s “physical injury” requirement, a prisoner must show that his asserted injuries are not merely de minimis.

“The impetus behind the enactment of the PLRA was a concern about the ‘endless flood of frivolous litigation’ brought by inmates.” *McLean v. United States*, 566 F.3d 391, 397 (4th Cir. 2009) (quoting 141 Cong. Rec. S14,418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch)). The PLRA’s requirement that every prisoner who seeks to bring a claim under the FTCA must first make a showing of “physical injury” was designed specifically to address this problem. 28 U.S.C. § 1346(b)(2).

Every court of appeals to consider the meaning of “physical injury” under the PLRA has held that it requires a prisoner to show that he suffered more than de minimis harm. In *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002), for example, the Ninth Circuit examined the “physical injury” requirement in 42 U.S.C. § 1997e(e), a PLRA provision governing claims brought by state prisoners under 42 U.S.C. § 1983 that contains language nearly identical to section 1346(b)(2).³ The court held that, to

³ Section 1997e(e) provides that “[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or

satisfy this requirement, a prisoner must make “a prior showing of physical injury that need not be significant but must be more than *de minimis*.” 289 F.3d at 627. The court reasoned that “[t]his interpretation reflects Congress’s intent in passing the PLRA” and comports with the “consistent application of the *de minimis* approach” adopted by other courts of appeals. *Id.* In reaching this conclusion, the court expressly rejected the plaintiff’s contention that “any” physical injury, no matter how minor, is sufficient to satisfy the PLRA. *Id.* at 628 (noting that the plaintiff’s interpretation would “ignore the intent behind the statute,” which was to prevent frivolous prisoner suits).

Every other circuit to consider the issue has taken the same approach. *See Brooks v. Warden*, 800 F.3d 1295, 1307 (11th Cir. 2015) (“[A]n incarcerated plaintiff cannot recover either compensatory or punitive damages for constitutional violations [under section 1997e(e)] unless he can demonstrate a (more than *de minimis*) physical injury.”); *Schultz v. Pugh*, 728 F.3d 619, 621 (7th Cir. 2013) (noting that in determining “whether some wrongful act of prison personnel had inflicted a compensable injury on the prisoner plaintiff,” “courts rightly require that the injury be more than *de minimis*”); *Flanory v. Bonn*, 604 F.3d 249, 254 (6th Cir. 2010) (“[E]ven though the physical injury required by § 1997e(e) for a § 1983 claim need not be significant, it

emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).” 42 U.S.C. § 1997e(e).

must be more than *de minimis*[.]”); *Mitchell v. Horn*, 318 F.3d 523, 536 (3rd Cir. 2003) (“We therefore follow the approach of the Fifth, Ninth, and Eleventh Circuits in requiring a less-than-significant-but-more-than-*de minimis* physical injury as a predicate to allegations of emotional injury.”). Although these cases all concern the “physical injury” requirement in section 1997e(e), several district courts and at least one court of appeals have held that section 1346(b)(2) likewise requires a showing of more than *de minimis* injury. *See, e.g., Sublet v. Million*, 451 F. App’x 458, 459 (5th Cir. 2011) (per curiam) (“Because his physical injury was *de minimis*, his compensatory-damages claim [under the FTCA] was properly dismissed.”); *Calderon v. Foster*, No. 05-0696, 2007 WL 1010383, at *8 (S.D.W. Va. Mar. 30, 2007) (dismissing prisoner’s claim because his injuries were “*de minimis* for purposes of the FTCA’s physical injury requirement”), *aff’d*, 264 F. App’x 286 (4th Cir. 2008) (per curiam).

This interpretation of the PLRA’s “physical injury” requirement is firmly rooted in the statute’s text and purpose. Permitting a prisoner to satisfy this requirement with a showing of only *de minimis* harm would run “counter to Congress’s intent ‘to curtail frivolous and abusive prisoner litigation.’” *Mitchell*, 318 F.3d at 535 (citations omitted). Moreover, it would contravene the doctrine of *de minimis non curat lex*, which provides that the law generally “does not concern itself with trifles.” Black’s Law Dictionary 524 (10th ed. 2014). That doctrine is “part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.”

Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 231 (1992) (rejecting petitioner's argument that the "plain language" of a federal statute "bars th[e] recognition of a *de minimis* exception" where the statute's text does not explicitly mention such an exception); *see also Association of Admin. Law Judges v. FLRA*, 397 F.3d 957, 962 (D.C. Cir. 2005) ("[W]e have repeatedly recognized that a *de minimis* exception is generally not express; rather, it is 'inherent in most statutory schemes,' by implication." (citations omitted)). Ignoring that maxim would be especially inappropriate here, given that Congress's central purpose in amending section 1346(b)(2) was to narrow the universe of injuries that could support a prisoner's claim under the FTCA.

B. The FTCA's "physical injury" requirement is jurisdictional.

As explained above, section 1346(b) grants federal district courts exclusive jurisdiction over certain tort claims for which the United States has waived its sovereign immunity. That grant of jurisdiction, however, is subject to various limitations and exceptions. *See* 28 U.S.C. § 2680. When Congress added the "physical injury" requirement to section 1346(b) as part of the PLRA, it sought to further limit the scope of FTCA jurisdiction. Consistent with that goal, courts have generally treated section 1346(b)(2)'s "physical injury" requirement as jurisdictional. *See, e.g.,*

Sublet, 451 F. App'x at 459 (affirming district court's dismissal under Rule 12(b)(1) because the plaintiff's "physical injury was de minimis").⁴

Plaintiff contends, however, that section 1346(b)'s "physical injury" requirement does not limit district courts' FTCA jurisdiction but, rather, merely limits "the availability of *damages* for mental and emotional distress." Carter Br. 31 (emphasis in original). To support this contention, plaintiff relies on cases holding that section 1997e(e)'s "physical injury" requirement is not a jurisdictional barrier. All of those cases are inapposite. As previously noted, section 1997e(e) governs claims brought by state prisoners under 42 U.S.C. § 1983. Section 1983 – unlike section 1346(b) – does not create federal jurisdiction and claims brought under section 1983 do not require a waiver of the United States' sovereign immunity. Thus, whether section 1997e(e) deprives federal courts of jurisdiction over state prisoners' section 1983 claims has no bearing on whether section 1346(b)(2) deprives federal courts of jurisdiction over federal prisoners' tort claims.

⁴ See also, e.g., *Godbey v. Wilson*, No. 12-1302, 2014 WL 794274, at *4 (E.D. Va. Feb. 26, 2014) (dismissing for lack of subject-matter jurisdiction because prisoner failed to "allege that he suffered any physical injury"); *Antonelli v. Crow*, No. 08-261, 2012 WL 4215024, at *3 (E.D. Ky. Sept. 19, 2012) ("Prisoner suits for purely emotional harm therefore do not fall within the limited waiver of sovereign immunity provided by the FTCA, and the Court lacks subject matter jurisdiction to entertain them."); *Dockery v. United States*, No. 08-80031, 2008 WL 345545, at *3 (S.D. Fla. Feb. 6, 2008) ("Plaintiff has made no showing that he has suffered any physical injury. Thus, per § 1346(b)(2) this Court does not have subject matter jurisdiction over Plaintiff's claims against the United States.").

II. The district court correctly found that plaintiff's asserted injuries were de minimis.

All of the physical injuries plaintiff has asserted in this suit predate his incarceration at FCI-Beckley. As noted above, plaintiff himself told the prison's medical staff when he first arrived in December 2013 that he hurt his right ankle in a fall two days before he entered the facility and had been suffering from "chronic neck and back pain" for two months "prior to being incarcerated." JA 48.

Although plaintiff contends that his ankle was improving and "on the road to recovery" by the time he allegedly slipped and fell in May 2014, JA 156, his medical records tell a different story. The prison's medical staff examined plaintiff several times during the three and a half months preceding the May 2014 incident and, at every exam, documented his ankle's lack of improvement. *See* JA 56 (Jan. 9, 2014 report: "[Plaintiff] has continued to have significant pain and swelling to the ankle with no improvement"); JA 58 (Jan. 22, 2014 report: "Continues to have swelling and pain in right ankle"); JA 129 (Feb. 6, 2014 report: "[P]atient persists to have pain and discomfort in his right ankle" and "has been having increasing pain especially when he is up and around"); JA 65-66 (Mar. 28, 2014 report: "Right ankle remains swollen and painful," "Not Improved/Same"). Moreover, plaintiff's own account of the incident illustrates that, on the morning of his alleged fall, he was still relying on a cane to walk even the short distance across his cell. *See* JA 9 (alleging that when he "attempted to

make his way across the cell to the toilet, Plaintiff's cane slipped out from under him").

Consistent with that account, the nurse who examined plaintiff on the morning of the incident did not observe any new injuries or symptoms resulting from his alleged fall. JA 70 (May 3, 2014 report: "No Significant Findings/No Apparent Distress Other than chronic swelling to right ankle."). The x-rays taken a few weeks after the incident confirmed the nurse's initial assessment. JA 131-34 (June 2014 reports showing that ankle x-rays were negative and back x-rays were "negative except for mild degenerative disc disease").

Plaintiff has not identified any significant difference in the symptoms he experienced before his alleged fall and those he experienced afterward. Although he notes that his ankle swelling lasted for several months following the incident, the prison's medical staff had already diagnosed the swelling as a "chronic" condition and treated it as such. JA 56 (Jan. 9, 2014 report: recommending further evaluation "due to the chronicity of the [ankle] issue"); JA 66 (Mar. 28, 2014 report: describing ankle injury as "Chronic"); *see also* JA 48 (Dec. 30, 2013 report: referring to plaintiff's "chronic neck and back pain"). Accordingly, the district court properly concluded that the record did not contain any evidence suggesting that the May 2014 incident caused plaintiff to suffer more than de minimis harm.

Even if plaintiff’s post-May 2014 symptoms had been caused by the alleged incident in his cell, those injuries would still likely fall short of the PLRA’s *de minimis* threshold. Plaintiff’s medical records indicate that his neck pain had dissipated within a couple of months of his alleged fall – much more rapidly than the neck pain he reported when he first arrived at FCI-Beckley – and that his ankle swelling had also decreased to “minimal” levels. JA 88; *see also* JA 92 (Sept. 2014 reports: observing that plaintiff’s neck appeared “Within Normal Limits”). In short, none of his post-May 2014 symptoms appeared out of the ordinary, particularly for someone of his age and medical history. *See* JA 102 (Jan. 15, 2015 report: describing plaintiff’s “history of arthritis in multiple joints” and “history of hypertension”). These types of ordinary pain and swelling are not sufficient to satisfy the PLRA’s “physical injury” requirement. *See Oliver*, 289 F.3d at 629 (holding that “back and leg pain” and a “painful canker sore” were “not more than *de minimis*” under section 1997e(e)); *Mitchell*, 318 F.3d at 535 (explaining that section 1997e(e) requires a showing of more than the “routine discomfort [that] is part of the penalty that criminal offenders pay for their offenses against society” (citations omitted)).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

CHAD A. READLER
Acting Assistant Attorney General

CAROL A. CASTO
United States Attorney

MARK B. STERN

/s/ Nicolas Y. Riley

NICOLAS Y. RILEY

*Attorneys, Appellate Staff
Civil Division, Room 7231
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530
(202) 514-4814
nicolas.y.riley@usdoj.gov*

FEBRUARY 2017

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was written in 14-point Garamond font and complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 4,150 words.

/s/ Nicolas Y. Riley

NICOLAS Y. RILEY

CERTIFICATE OF SERVICE

I hereby certify that on February 2, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Nicolas Y. Riley

NICOLAS Y. RILEY

STATUTORY ADDENDUM

STATUTORY ADDENDUM

TABLE OF CONTENTS

28 U.S.C. § 1346(b)A1

28 U.S.C. § 2674A2

42 U.S.C. § 1997e(e)A3

28 U.S.C. § 1346(b) – United States as defendant

- (b)(1)** Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
- (2)** No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).

28 U.S.C. § 2674 – Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. § 1997e(e) – Suits by prisoners

(e) Limitation on recovery

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act (as defined in section 2246 of Title 18).