No. 19-6655

United States Court of Appeals

FOR THE FOURTH CIRCUIT

VERNON EARLE,
Appellant,

v.

SHREVES, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of West Virginia

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APPELLANT'S REPLY BRIEF

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ARGUMENT

Defendants have almost completely abandoned the district court's rationale for granting them summary judgment. Their remaining arguments do not support affirmance. This Court's decision in *Booker v. South Carolina Department of Corrections*, 855 F.3d 533 (4th Cir. 2017), makes clear that defendants are not entitled to qualified immunity. Defendants, like the district court, ignore the genuine factual dispute about their motive that goes to the core of Mr. Earle's First Amendment retaliation claim. Further, defendants cannot justify the district court's decision to grant summary judgment without providing Mr. Earle any of the discovery he requested—including his grievances, which defendants rely on to explain their motive. And although the district court did not address the issue, defendants try but fail to rebut Mr. Earle's argument that he has a *Bivens* remedy against prison officials, just as the plaintiff did in *Carlson v. Green*, 446 U.S. 14 (1980). For those reasons, this Court should vacate summary judgment and remand for further proceedings, including, if appropriate, analysis of the *Bivens* issue in the first instance.

I. A *Bivens* remedy is available to Mr. Earle.

As Mr. Earle explained in his opening brief, the logic of *Carlson* supports a damages remedy for his First Amendment retaliation claim against Bureau of Prisons (BOP) officials. Defendants are unable—indeed, they do not even try—to distinguish *Carlson*. Instead, they recite generic language from other cases about how *Bivens* remedies are disfavored, but they identify no special factors that foreclose a remedy in *this* case. And they point to a supposed alternative remedy—the very grievance process that defendants retaliated against Mr. Earle for using—that is no alternative at all.

Courts conduct a two-step analysis to determine whether a *Bivens* remedy is available. *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020). The parties agree on the first step: Mr. Earle's First Amendment retaliation claim satisfies the Supreme Court's expansive conception of a "new context." Blue Br. 17 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1859 (2017)); Red Br. 17.

But the inquiry does not end there. Recent Supreme Court decisions make clear that courts may recognize *Bivens* remedies even in new contexts. *See Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at

1859–60. That is why, at the second step, courts examine whether special factors counsel hesitation in recognizing a damages remedy in a new context. *See Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1860. If the new context presents no special factors, a *Bivens* remedy is appropriate.

Defendants falter at this second step. They present no reason courts should hesitate to recognize a *Bivens* remedy for Mr. Earle's claim—neither separation-of-powers concerns nor an alternative remedial scheme suggest Congress is uniquely equipped to decide the issue. To the contrary, the judiciary is particularly well suited to recognize a damages remedy for this First Amendment retaliation claim because the right to file grievances free from retaliation protects prisoners' access to courts.

A. First Amendment retaliation claims by prisoners do not present separation-of-powers concerns.

Defendants concede that separation-of-powers principles are central to whether a *Bivens* remedy is appropriate. Red Br. 19. Separation-of-powers principles can create "special factors counselling hesitation" when judicial action would "require courts to interfere in an intrusive way with sensitive functions of the Executive Branch," *Abbasi*,

137 S. Ct. at 1861, like the military, national security, foreign policy, or immigration.[1] No such functions are implicated here.

So defendants propose different factors that supposedly counsel hesitation: courts' deference to prison administrators, the risk of chilling BOP officials, the potential for a flood of prisoner claims, and congressional silence about a damages remedy. Red Br. 19–22. But these factors have either been rejected by *Carlson* or neutralized by Congress. In short, none forecloses a *Bivens* remedy.

Defendants' brief entirely avoids *Carlson*, the Supreme Court case allowing a *Bivens* remedy against BOP officials for certain Eighth Amendment violations. The failure to distinguish *Carlson* from Mr. Earle's case dooms their argument. First, defendants assert that Congress's delegation of prison management to BOP and principles of judicial deference to prison policies on institutional security are special factors. Red Br. 20–21. But both delegation and deference existed when *Carlson* found no factors counseling hesitation and recognized a *Bivens* remedy. And the Supreme Court has not wavered on this point. Since

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[1] *See, e.g.*, *Hernandez*, 140 S. Ct. at 744; *Abbasi*, 137 S. Ct. at 1861; *Chappell v. Wallace*, 462 U.S. 296, 305 (1983); *Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019).

Carlson, it has never identified prison administration as a special factor. *See, e.g.*, *Abbasi*, 137 S. Ct. at 1864–65; *Minneci v. Pollard*, 565 U.S. 118, 127 (2012); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70, 74 (2001); *McCarthy*, 503 U.S. at 151. Defendants "appear to confuse the presence of *special* factors with *any* factors counseling hesitation." *See McCarthy v. Madigan*, 503 U.S. 140, 151 (1992).

Carlson also refutes defendants' suggestion that a *Bivens* remedy would chill prison employees from taking urgent, lawful actions for fear of damages liability. Red Br. 21. There, the Supreme Court held that qualified immunity "provides adequate protection" "even if requiring [BOP officials] to defend [a prisoner's] suit might inhibit their efforts to perform their official duties." *Carlson*, 446 U.S. at 19. There is no reason to disturb that sound logic. The only actions chilled by a *Bivens* remedy in this context would be ones that so clearly violate prisoners' constitutional rights that the defendants would not be entitled to qualified immunity.

Similarly, defendants' claim that recognizing a *Bivens* remedy would "open the floodgates" and "result in increased litigation costs to the Government," Red Br. 20–21, is not a special factor. *See* Blue Br. 19–20

(damages remedies against low-level officials who perform routine functions do not implicate separation-of-powers principles). Their claim is even less persuasive after the passage of the Prison Litigation Reform Act (PLRA), *see* 42 U.S.C. § 1997e. As defendants themselves acknowledge, Red Br. 20, Congress has created manageable standards to limit prisoner litigation with the PLRA. The PLRA's gatekeeping provisions (along with qualified immunity) allow courts to dismiss all but exhausted, nonfrivolous claims of misconduct by BOP officials that violate clearly established constitutional rights. *See id.* Defendants fail to explain how these existing safeguards would be overrun if *Bivens* provides a remedy here. Indeed, the PLRA limits burdensome litigation against *state* prison officials by people who have a damages remedy for First Amendment retaliation claims under 42 U.S.C. § 1983—and state prisoners outnumber federal prisoners seven to one.[2] A *Bivens* remedy would simply put people in federal custody on the same footing.

The only other factor defendants raise is the absence of a standalone damages remedy against BOP officials in the PLRA. *See* Red

[2] U.S. Dep't of Justice, Bureau of Justice Statistics, *Prisoners in 2018* at 3, tbl. 1 (2020), https://www.bjs.gov/content/pub/pdf/p18.pdf.

Br. 20. Congressional silence is a given in *Bivens* actions; there would be no need for courts to recognize a remedy otherwise. The question is whether the absence of a damages remedy is intentional, which may counsel courts to hesitate in recognizing one. *See Abbasi*, 137 S. Ct. at 1862.

Defendants' argument again supports Mr. Earle, not defendants. When the PLRA was enacted, it had been the law for more than fifteen years that BOP officials "do not enjoy such independent status in our constitutional scheme as to suggest that judicially created remedies against them might be inappropriate." *Carlson*, 446 U.S. at 19. The Congress that passed the PLRA was fully aware prisoners could pursue damages against BOP officials, but chose not to foreclose any damages remedies. Instead, Congress enacted only specific, targeted changes to the preexisting regime of prisoner litigation. *See, e.g.*, 42 U.S.C. § 1997e(e) (limiting recovery for certain kinds of claims). With *Carlson* as established precedent, Congress's silence on damages remedies does not "counsel hesitation."

B. For Mr. Earle, there is no alternative remedy—it is "damages or nothing."

In place of a damages remedy, defendants offer the very grievance process that resulted in Mr. Earle's retaliation claim. But BOP's "Administrative Remedy Program"—the grievance process—is not the kind of alternative remedy that forecloses a *Bivens* action. Indeed, it is barely a remedy at all.

The grievance process cannot replace a *Bivens* remedy. As this Court has explained, a *Bivens* remedy may be inappropriate "where *Congress* has provided 'an alternative remedial structure.'" *Tun-Cos v. Perrotte*, 922 F.3d 514, 526 (4th Cir. 2019) (quoting *Abbasi*, 137 S. Ct. at 1858) (emphasis added). Congress has not done so here; the grievance process was created by the BOP. *Compare, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 385–88 (1983) (explaining that the comprehensive protections and layers of review provided by statute to federal civil servants are an alternative remedy). Defendants' proposed alternative does not help their argument because it does not suggest that Congress, rather than the courts, should decide whether to recognize a damages remedy. *See Abbasi*, 137 S. Ct. at 1858.

Worse still, the grievance process requires prisoners alleging retaliation to expose themselves to further retaliation by filing a grievance that, as in Mr. Earle's case, may land in the hands of the BOP official whose behavior is being challenged. *See* 28 C.F.R. § 542.13(a) (requiring informal request for resolution first be presented to staff). A remedial system that prisoners are deterred from using is not a reasonable alternative to a damages remedy in federal court. And the judiciary has a special interest in stamping out the sort of retaliation that could prevent litigants from accessing courts—which makes it particularly well suited to recognize a damages remedy for this First Amendment retaliation claim.

Finally, defendants suggest without any authority that BOP officials are sufficiently deterred from unconstitutional conduct by the threat of prosecutions and internal investigations. Red Br. 22. Such optimism is not warranted. It is difficult to envision how prosecutions or internal investigations will even be initiated if prisoners do not report unconstitutional conduct for fear of retaliation. The core purpose of a *Bivens* remedy is to deter individual officials, as defendants acknowledge.

Red. Br. 14. But that deterrence is a dead letter if prisoners' fear of retaliation restricts their ability to file grievances.

Mr. Earle is not merely "dissatisfied with a response to his grievances," as defendants suggest. Red Br. 19. He alleges his constitutional rights were violated because he tried to engage with the very system defendants now offer as an alternative. Without a *Bivens* action, he is left with no remedy at all. *See Abbasi*, 137 S. Ct. at 1862 ("It is of central importance, too, that this is not a case like *Bivens* or *Davis* in which it is 'damages or nothing.'").

II. This Court should remand because the district court misapplied the summary judgment standard and failed to address Mr. Earle's discovery request.

Whether this Court recognizes a *Bivens* remedy itself or allows the district court to analyze that question in the first instance, it should vacate summary judgment and remand for further proceedings. The district court's reasons for granting summary judgment on Mr. Earle's First Amendment retaliation claim—that he had no constitutional right to file grievances and that no juror could reasonably conclude defendants acted with a retaliatory motive—fail as a matter of law. Alternatively,

this Court should remand because the district court abused its discretion by granting summary judgment before allowing Mr. Earle any discovery.

A. Mr. Earle's right to file grievances without retaliation was clearly established and a genuine dispute of fact remains.

1. The district court's conclusion that defendants are entitled to qualified immunity is wrong.

Defendants concede error in the district court's holding that defendants are entitled to qualified immunity because prisoners have no constitutional right to file grievances. Red Br. 25 (citing *Booker v. South Carolina Dep't of Corr.*, 855 F.3d 533 (4th Cir. 2017) (holding that prisoners do have a constitutional right to file grievances without retaliation)). Defendants instead claim qualified immunity because *Booker* was decided after the events in this case. Red. Br. 24. But the *date* of the decision is irrelevant. *Booker* held that a prisoner's right to file grievances free from retaliation has been clearly established since at least *2010*, long before defendants' actions here.[3] 855 F.3d at 536, 546;

[3] *Booker*, which involved a 42 U.S.C. § 1983 claim, applies equally to Mr. Earle's *Bivens* claim because "the qualified immunity analysis is identical under either cause of action." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

see also Martin v. Duffy, 858 F.3d 239, 251 (4th Cir. 2017) (confirming this Court recognized the right "at least as far back in time as 2010").

Defendants also suggest the right was not clearly established because the Supreme Court has not previously recognized a *Bivens* remedy in this context. *See* Red Br. 25. But they cite no law—and there is none—to support such a novel understanding of qualified immunity. Whether a constitutional *right* is clearly established for qualified immunity purposes is separate from whether a *remedy* is available under *Bivens*. *See Hernandez v. Mesa*, 137 S. Ct. 2003, 2006–07 (2017) (addressing the qualified immunity and *Bivens* questions separately and suggesting no overlap in analysis between the two); *see also Cleveland-Purdue v. Brutsche*, 881 F.2d 427, 431–32 (7th Cir. 1989), *cert. denied* 498 U.S. 949 (1990) (holding, on remand from the Supreme Court in *Carlson*, that defendants were not entitled to qualified immunity even though *Carlson* recognized a *Bivens* remedy for the first time).

Binding circuit precedent holds that Mr. Earle's right was clearly established years before defendants received his grievances, and a *remedy* need not be recognized to find a *right* clearly established. Defendants are therefore not entitled to qualified immunity.

2. Summary judgment was improper because there is a genuine factual dispute about defendants' motive.

Defendants' alternative argument—that summary judgment was proper because no reasonable juror could conclude that their motivation was retaliatory—fails too. That argument relies on resolving a genuine factual dispute in favor of the nonmoving party, which the district court erred in doing at summary judgment. *See Tolan v. Cotton*, 572 U.S. 650, 659 (2014).

Much of Mr. Earle's claim is *not* disputed. Defendants do not dispute Mr. Earle was engaged in the constitutionally protected activity of filing prison grievances. *See* Red Br. 25. Nor do they dispute that they placed him in the SHU just days after he had filed two grievances, kept him there for thirty days, and, upon his release, transferred him to another housing unit and increased his custody classification points. Red Br. 6–7; *see also* J.A. 173, 186. And they do not dispute that their actions were objectively likely to adversely affect exercise of constitutionally protected activity. *See* Blue Br. 26–27.[4]

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[4] Defendants invoke Mr. Earle's grievance filing history to suggest that retaliation claims may disrupt prison officials' duties, Red Br. 28, but that is irrelevant to his First Amendment claim. *See Martin*, 858 F.3d at

Defendants dispute only *why* they took these actions against Mr. Earle, asking the Court to accept their stated reason and ignore sworn allegations and evidence to the contrary. *See* Red Br. 26–27. But that argument misunderstands the summary judgment standard. At summary judgment, all facts must be construed in the light most favorable to the nonmoving party and courts must "refrain from weighing the evidence or making credibility determinations." *United States v. Turner Constr. Co.*, 946 F.3d 201, 206 (4th Cir. 2019). And summary judgment is improper where a genuine factual dispute exists. *See id.*

Such a dispute exists here. Defendants allege they placed Mr. Earle in the SHU for the "legitimate reason of investigating the statements made in his informal grievances and determin[ing] whether they contained threats." Red Br. 27. But Mr. Earle has marshalled facts to allow a reasonable juror to conclude the opposite—defendants' true

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249–50 (explaining that a plaintiff's actual response to retaliation is not dispositive because the standard is whether a defendant's conduct would likely deter "a person of ordinary firmness" from exercising their First Amendment rights)

motive was retaliation for his grievances describing defendant Shreves's use of force. JA 20–21; Blue Br. 27–32.[5]

Specifically, Mr. Earle avers he delivered the grievances to defendant Rivera five days before defendants placed him in the SHU. J.A. 20. This delay is inconsistent with defendants' allegation that Mr. Earle's grievances were threatening on their face. But, consistent with his claim of retaliation, another inmate who filed grievances concerning the same incident was placed in the SHU the same day as Mr. Earle—which was also the same day Shreves read the grievances. J.A. 20, 28. Mr. Earle further alleges he was told by several prison officials he was in the SHU for filing grievances, and that he was never under investigation while there. JA 20–21. Defendants have produced no documentation—no investigation report or copies of the grievances—to show an investigation occurred or was even justified.

Finally, defendants allege they increased Mr. Earle's custody classification points because defendant Gyorko "noticed that he had a

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[5] Defendants do not dispute that Mr. Earle's sworn verified complaint serves as a Rule 56(c) affidavit for the purpose of opposing summary judgment. *See World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507, 516 (4th Cir. 2015) (sworn verified complaint equivalent to an opposing affidavit at the summary judgment stage).

non-immigration detainer on file." J.A. 185; *see also* Red Br. 7. But Mr. Earle's account points to a different motivation—when Gyorko increased his points, she told him it was because he "love[d] to file," J.A. 21.

At minimum, this conflicting evidence concerning defendants' motive creates a genuine, material factual dispute about *why* defendants took adverse action against Mr. Earle. That is sufficient to defeat summary judgment and warrants a remand for further proceedings. *See Brooks v. Johnson*, 924 F.3d 104, 111–12 (4th Cir. 2019).[6]

B. Alternatively, the district court abused its discretion by granting summary judgment without addressing Mr. Earle's discovery request.

Even if the existing evidence does not show a genuine dispute, remand is nonetheless required because the district court granted summary judgment without addressing Mr. Earle's request for crucial discovery. *See Putney v. Likin*, 656 F. App'x 632, 638 (4th Cir. 2016) ("[S]imply ruling on [a] summary judgment motion without addressing [a] discovery request" is "an abuse of discretion."). Defendants maintain

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[6] Defendants point to a gap between Mr. Earle's November 2015 grievances and his transfer to a higher security prison as evidence the transfer was not retaliatory. Red Br. 27–28. Mr. Earle has not alleged that the prison transfer was retaliation for those grievances.

that the district court had boundless discretion to disregard this request because it was not made in a "formal motion." Red Br. 29–30. That position is unsupported by law. Defendants also assert that Mr. Earle did not describe the evidence he sought. Red Br. 30. The record shows the opposite. Mr. Earle adequately opposed summary judgment on the ground that discovery was needed and is entitled to a remand.

Challenging only the procedural adequacy of Mr. Earle's discovery request, defendants do not dispute that multiple factors weighed in favor of authorizing discovery prior to summary judgment. They do not deny this "case involves complex factual questions about . . . motive" and "relevant facts are exclusively in [their] control." *Harrods Ltd. v. Sixty Internet Domain Names*, 302 F.3d 214, 247 (4th Cir. 2002). Nor do they dispute that Mr. Earle "was not dilatory in pursuing discovery," *id.* at 246, had "no opportunity to conduct discovery," *id.* at 244, and proceeded pro se, *see Putney*, 656 F. App'x at 638. *See* Blue Br. 32–36. In short, this case unquestionably involves circumstances that call for discovery. *Harrods*, 302 F.3d at 247.

Attempting to avoid that obvious result, defendants argue that the district court could disregard Mr. Earle's request because it was not made

in a “formal motion for discovery.” Red Br. 30. They rely on two inapposite authorities. One is a local rule requiring prisoner litigants to obtain “leave of the Court” before conducting discovery. Local Rule 7, Prisoner Litigation Procedure, N.D. W. Va.; Red Br. 29. Mr. Earle complied with this rule by directing every discovery request to the district court instead of to defendants. *See, e.g.*, J.A. 219 (requesting the court “order limited discovery”).

Defendants’ other authority is this Court’s holding that appellants objecting to a lack of discovery must have “made an attempt” to oppose summary judgment “on the grounds that more time was needed for discovery.” *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 961 (4th Cir. 1996); Red Br. 29. But nothing requires that such attempts be accompanied by formal discovery motions. It is sufficient to present a Rule 56(d) affidavit or declaration describing why the nonmovant cannot present facts essential to justify its opposition. *See* Fed. R. Civ. P. 56(d). Courts also accept the “functional equivalent” of a Rule 56(d) affidavit where “the nonmoving party has adequately informed the district court that the motion is premature and that more discovery is necessary.” *Putney*, 656 F. App’x at 638 (quoting *Harrods*, 302 F.3d at 244).

Mr. Earle's objection to summary judgment easily satisfies this standard. While defendants acknowledge one sentence in Mr. Earle's objection concluding that the "Court should order limited discovery," Red Br. 29 (citing J.A. 219), they ignore the numerous other requests for discovery that populate his objection from beginning to end. The title made it immediately apparent that discovery was a central focus: "PLAINTIFF OBJECTION TO DEFENDANTS MOTION . . . *AS BEING PREMATURE AT THIS EARLY STAGE*, AND WITHOUT MERIT." J.A. 200 (emphasis added). Mr. Earle maintained this position throughout his opposition. *See, e.g.*, J.A. 200 (describing defendant's motion as "premature"); J.A. 203 (same); J.A. 207 ("Plaintiff has set forth facts necessary to go to the discovery stage of this [l]itigation."). And he argued that "[s]ummary judgment without any chance of discovery would omit[] the needed facts to hand down a just judgment." J.A. 208. Because Mr. Earle's objection firmly "oppose[d] the motion on the grounds that more time was needed for discovery," *Evans*, 80 F.3d at 961, it served as the "functional equivalent" to a Rule 56(d) affidavit, *see Harrods*, 302 F.3d at 245.

Defendants also deem Mr. Earle's objection insufficient because they claim it did not "describe[] what discovery he would seek." Red Br. 30. Contrary to defendants' assertion, Mr. Earle did specify the evidence he sought. Addressing the elephant in the room, he insisted "[t]he grievance[s] . . . should be in the record[]." J.A. 216. And he asked for discovery of "e[v]idence[] which will show" that defendants were "well aware" of Shreves's and others' potential for retaliatory behavior. J.A. 208. Consistent with this Court's holding in *Putney*, 656 F. App'x at 638–39, those requests, along with Mr. Earle's numerous statements stressing the need for discovery, satisfy the modest showing *Evans* requires. *See Evans*, 80 F.3d at 961.

The district court did not rule on the sufficiency of Mr. Earle's discovery request because it granted summary judgment without acknowledging the request at all. It did so even though his case involves circumstances that make summary judgment prior to discovery "particularly inappropriate," *Harrods*, 302 F.3d at 247, including the glaring absence of key evidence. This was an abuse of discretion warranting vacatur and remand. *See Putney*, 656 F. App'x at 641.

CONCLUSION

For the foregoing reasons, the Court should vacate the district court's grant of summary judgment and remand for further proceedings, including, if appropriate, analysis of the availability of a *Bivens* remedy in the first instance.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 3,945 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I, Marcella Coburn, certify that on May 26, 2020, a copy of Appellant's Reply Brief was served on counsel for Appellees via the court's ECF system.

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