No. 21-1463

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD V. SNOWDEN

***Plaintiff-Appellant*,**

v.

JEREMY HENNING,

***Defendant-Appellee*.**

Appeal From The United States District Court
For The Southern District of Illinois
Case No. 3:19-cv-01322-JPG
The Honorable Judge J. Phil Gilbert

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFF-APPELLANT DONALD V. SNOWDEN

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Appellate Court No: 21-1463

Short Caption: Donald Snowden v. Jeremy Henning

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Attorney's Signature: /s/ Eric Chung Date: 06/13/2021

Attorney's Printed Name: Eric Yan Hang Chung

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Attorney's Signature: /s/ David Zionts Date: 06/13/2021

Attorney's Printed Name: David Meir Zionts

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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INTRODUCTION

Donald Snowden alleges that a federal drug agent physically beat him for no reason. Mr. Snowden left his hotel room after a cashier called him downstairs to make a payment. When Mr. Snowden arrived at the front desk, Officer Henning ran through the entrance, shoved Mr. Snowden into a door, and then pushed him onto the ground. Despite Mr. Snowden offering no resistance, Officer Henning then punched Mr. Snowden several times in the face, causing him two black eyes and a left eye socket fracture, before arresting him. Officer Henning does not and could not deny that these allegations establish an unreasonable use of force in violation of the Fourth Amendment, and he does not and could not contend that he has qualified immunity for such a clearly established violation. The only issue presented in this appeal is whether a remedy is available for this serious breach of the Constitution.

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971), answered this question in the affirmative. In *Bivens*, the Supreme Court held that a plaintiff who alleges "that unreasonable force was employed in making [an] arrest" by individual federal drug agents "states a cause of action under the Fourth Amendment," and that the plaintiff is "entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." *Id.* at 389, 397. After initially extending *Bivens* more freely, the Court has more recently placed limits on extending *Bivens* to new contexts. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017). Even as it did so, the Court reaffirmed "the continued force" and "necessity" of *Bivens* as "settled law" to "vindicate the Constitution by allowing some redress for injuries" and "provide[] instruction and guidance to federal law

enforcement officers" in a "common and recurrent sphere of law enforcement." *Id.* at 1856–57.

That settled law applies here. Mr. Snowden alleges a violation of the Fourth Amendment in the same context that Webster Bivens alleged—the use of unreasonable force by a federal drug agent in the course of an arrest. The district court erred by misunderstanding *Bivens* and relying on trivial factual differences to reach a contrary conclusion. The allegations here are narrower than those in *Bivens* as they concern only one of the two Fourth Amendment violations at issue there, but that does not make this case an extension of *Bivens* to a new context. Rather, it confirms that this case falls squarely within *Bivens*, as the Sixth Circuit concluded in a recent, post-*Abbasi* decision. *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019) (holding that a Fourth Amendment claim against law enforcement officers for the use of unreasonable force falls within the context of *Bivens*). Furthermore, the factual differences relied on by the district court—the number of federal drug agents, whether the arrest was made in public, and whether there was a warrant—are far from "meaningful." *See Abbasi*, 137 S. Ct. at 1859. They are not material to whether an individual agent used unreasonable force, and are far afield from the kind of factual differences that the Supreme Court and other circuits have indicated *do* present a new *Bivens* context, such as when the unconstitutional conduct occurred outside of the United States by border patrol agents tasked with protecting national security. *See Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020).

Alternatively, even if these differences were material, any extension of *Bivens* would be exceedingly modest and present no special factors counseling hesitation. Here, again, the district court erred, in this instance concluding that an alternative remedy, the Federal Tort Claims Act ("FTCA"), and legislative action counsel hesitation. Given the deterrence purpose of *Bivens*, the FTCA and *Bivens* are complementary, not alternatives—a square holding of the Supreme Court that has never been disturbed. *Carlson v. Green*, 446 U.S. 14, 19–20 (1980); *see also Abbasi*, 137 S. Ct. at 1860, 1863; *Hernandez*, 140 S. Ct. at 748 n.9. The district court's conclusion conflicts not just with the Supreme Court precedent, but also recent post-*Abbasi* decisions of the Third and Ninth Circuits. *See Boule v. Egbert*, 980 F.3d 1309 (9th Cir. 2020), *amended* 2021 WL 2171832, at *18 (May 20, 2021); *Bistrian v. Levi*, 912 F.3d 79, 92 (3d Cir. 2018). Nor has Congress indicated its intent to limit *Bivens*, let alone in the context presented by this case. There is simply no governmental interest in a federal drug agent beating up an individual who does not resist arrest or otherwise pose a threat. The use of excessive force is prohibited not only by the Constitution but also the policies published by the agency that employed the agent in this case, and does not further, but rather undermines, public safety.

For all these reasons, Mr. Snowden's claim should be allowed to proceed under *Bivens*. To conclude otherwise would contravene *Bivens* itself and forty years of precedent upholding the decision in the same context upon which *Bivens* and this case both arise. Even if *Bivens* were strictly limited to its exact facts, which the Supreme Court has repeatedly rejected, *Bivens* clearly applies to this case. Mr.

Snowden alleges the same unconstitutional conduct by the same type of officer as *Bivens*. There is no reason to treat the two cases differently, and the cases subsequently applying *Bivens* instruct that they not be. This Court should reverse the district court's dismissal of Mr. Snowden's claim.

STATEMENT OF JURISDICTION

The district court had jurisdiction over Mr. Snowden's claims pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the district court's final judgment dismissing Mr. Snowden's complaint pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the use of unreasonable force during an arrest by a federal drug agent in violation of the Fourth Amendment falls within the recognized context of *Bivens* itself, which recognized a cause of action for Fourth Amendment violations by federal drug agents who used unreasonable force during an arrest.

2. In the alternative, whether any special factors counsel hesitation in recognizing a *Bivens* remedy against a federal drug agent who uses unreasonable force to arrest an individual.

STATEMENT OF THE CASE

A. Officer Henning Repeatedly Punched and Seriously Injured Mr. Snowden Even Though Mr. Snowden Never Resisted Arrest.

The facts presented here are based on the factual allegations in the complaint, which must be treated as true at the motion to dismiss stage. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Donald Snowden is currently a detainee at the Jackson County Jail in Murphysboro, Illinois. Officer Jeremy Henning is an agent of the Drug Enforcement Administration, a federal agency under the U.S. Department of Justice.

On September 12, 2019, Mr. Snowden was staying in a room at the Quality Inn Hotel in Carbondale, Illinois. SA21, SA29 ¶ 1.[1] A cashier at the front desk, knowing there was someone waiting to arrest Mr. Snowden, called and asked him to come downstairs to make a payment. SA26, SA29 ¶¶ 2, 4. When Mr. Snowden arrived, Officer Henning rushed through an entrance, shoved Mr. Snowden into a door, and then pushed him onto the ground. SA26, SA29 ¶ 2. Officer Henning then punched Mr. Snowden several times in the face, causing him two black eyes and a left eye socket fracture, before arresting him. SA26, SA29 ¶ 2, SA30 ¶ 7. At no point did Mr. Snowden resist arrest. SA26, SA29 ¶ 4. Video evidence is available to confirm this account. SA26, SA29 ¶¶ 3–4.

B. Mr. Snowden Filed a *Bivens* Lawsuit, But the District Court Held that No Remedy Is Available for Officer Henning's Constitutional Violation.

Mr. Snowden initiated this lawsuit on December 2, 2019, while in federal pre-trial detention. SA1; SA21. In addition to other claims against other defendants, Mr. Snowden sued Officer Henning for excessive force in violation of the Fourth Amendment, the Fourteenth Amendment, and Illinois law. SA21. He requested judgment against Officer Henning with an order that Officer Henning pay

[1] Citations to documents in the Short Appendix are "SA_." Citations to the documents in the Record on Appeal are "ECF __," referencing the Document Number in the CM/ECF system in the district court docket.

compensatory and punitive damages in the amount of $100,000. SA27, SA29–SA32. The district court screened the matter pursuant to 28 U.S.C. § 1915A and allowed Mr. Snowden to proceed with an excessive force claim under the Fourth Amendment pursuant to *Bivens* and an Illinois battery claim pursuant to 28 U.S.C. § 1367(a). SA36; SA1.[2]

On July 8, 2020, Officer Henning filed a motion to dismiss the excessive force claim pursuant to Federal Rule of Civil Procedure 12(b)(6), arguing only that the complaint failed to state a cause of action for the alleged Fourth Amendment violation under *Bivens*, and attaching a warrant dated September 10, 2019, for Mr. Snowden's arrest. ECF 24.[3] The warrant is based on an indictment for a drug distribution charge, and not for any violent crime that could suggest a risk of violence. ECF 24-1; ECF 24-2. Officer Henning did not claim qualified immunity at the pleading stage, nor did he dispute that the conduct alleged, if true, would be a violation of Mr. Snowden's clearly established constitutional rights under the Fourth Amendment. On the same day, Officer Henning also filed a motion to substitute the United States

[2] The district court also allowed the claim to proceed under the Fourteenth Amendment during screening as well, but later issued a correction to recognize the claim as arising under "under the Fourth *or Fifth* Amendment" because the Fourteenth Amendment "does not apply to federal actors." SA2 n.1. The district court did not address either the Fifth or Fourteenth Amendment further, and any claim under either amendment is outside the scope of this appeal.

[3] Plaintiff-Appellant does not concede and reserves the right to challenge the validity of the attached warrant. Whether there was a valid warrant is not relevant to the issue presented in this case and outside the scope of this appeal.

of America as a defendant for the Illinois battery claim. ECF 25.[4] Mr. Snowden filed an opposition on August 11, 2020, arguing that his claim is allowed under *Bivens*. ECF 29 at 1–2.

On March 3, 2021, the district court granted Officer Henning's motion to dismiss the excessive force claim without leave to amend for failure to state a cause of action, dismissed without prejudice the Illinois battery claim because no federal claim remained (and denied Officer Henning's motion to substitute because Mr. Snowden indicated he had only wished to sue Officer Henning at this time), and dismissed the action. SA1–SA13. The district court recognized that "*Bivens* has the most overlap with the instant case" and that the facts are "similar." SA6. Nonetheless, the district court concluded that the case presents a new *Bivens* context based on minor factual distinctions: "*Bivens* involved six federal drug agents entering a home without a warrant, arresting the plaintiff in the presence of his family, and visually searching him," while the "instant case involves a single federal drug agent's arrest of the plaintiff in public pursuant to a warrant issued two days earlier upon a finding of probable cause." SA6. The district court added that the "constitutional right at issue in the cases is also different" because "*Bivens* tested the

[4] The FTCA establishes a "remedy against the United States" for injuries "resulting from" violations of state law "of any employee of the [Federal] Government while acting within the scope of his office or employment" and requires that remedy "be exclusive." 28 U.S.C. § 2679(b)(1). "Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment," the FTCA requires that "any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant." *Id.* § 2679(d)(1).

constitutionality of the home entry, arrest, and search without a warrant,"—rights, according to the district court, primarily of privacy—while the right at issue in this case is "the right to be free from excessive force incident to an otherwise lawful arrest." SA6. The district court did not address the aspect of *Bivens* that involved a claim of excessive force in violation of the Fourth Amendment.

Having decided that this case presents a new context, the district court also concluded that special factors counseled hesitation before implying a *Bivens* remedy. The district court posited that Mr. Snowden had alternative remedies available under the FTCA, and that legislative action under the FTCA and the Prison Litigation Reform Act ("PLRA") suggests Congress did not want an implied damages remedy to be available for excessive force claims such as Mr. Snowden's. SA7–SA9.

Mr. Snowden timely filed a notice of appeal on March 15, 2021. ECF 40–41.

SUMMARY OF ARGUMENT

1. Mr. Snowden's claim arises in a familiar, well-established *Bivens* context—*Bivens* itself. In *Bivens*, the Supreme Court recognized a cause of action for claims that individual federal drug agents violated the Fourth Amendment by using unreasonable force in the course of an arrest. Here, Mr. Snowden claims a federal drug agent used unreasonable force in the course of arresting him, *i.e.*, by wantonly shoving him onto the ground and punching him several times in the face, even though he never resisted arrest. This claim falls squarely within this recognized *Bivens* context.

Nothing in *Abbasi* or *Hernandez* casts doubt on the continued vitality of *Bivens* claims in such a context—to the contrary, these recent decisions reinforce the "settled

law" of *Bivens* to "vindicate the Constitution by allowing some redress for injuries" and "provid[e] instruction and guidance to federal law enforcement officers" in "this common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1856–57. The reasons provided by the district court for ruling otherwise—such as the number of federal agents involved—focus not on "meaningful" differences between *Bivens* and the present case, as *Abbasi* contemplates, but on inaccurate and immaterial differences that would limit *Bivens* to its exact facts. The Supreme Court and other circuits, including the Sixth Circuit which squarely addressed a *Bivens* claim for use of excessive force in effecting an arrest in violation of the Fourth Amendment, have repeatedly rejected that approach, and this Court should do the same here. *See Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019).

2. Alternatively, even if Mr. Snowden's claim arose in a new *Bivens* context, no special factors counsel hesitation before recognizing what would be, at most, an exceedingly modest extension of *Bivens*. The district court's conclusion that the FTCA provides an alternative remedy counseling hesitation is inconsistent with the FTCA's text; the Supreme Court's decisions in *Carlson* and *Abbasi*; and the post-*Abbasi* decisions of the Third and Ninth Circuit, all establishing that the FTCA is not an alternative remedy because it allows suits only against the United States government, not individual officers, and therefore does not provide the deterrence against individual officers that is central to the purpose of *Bivens*. As the Supreme Court observed most recently in *Abbasi*, a *Bivens* remedy is necessary to instruct and

deter individual law enforcement officers from committing constitutional violations, which can only be redressed after the fact through damages.

The district court's conclusion that legislative action, namely the FTCA and PLRA, suggests Congress did not want a damages remedy and therefore counsels hesitation is also incorrect. The FTCA's law enforcement proviso, which was added after *Bivens* was decided and allows claims against the United States for assault, battery, and other tortious actions by law enforcement officers, does not suggest that Congress intended to foreclose a damages remedy against individual federal agents. Rather, the proviso suggests that Congress *approved* of *Bivens* and wanted to extend liability even further, to the United States itself, for such egregious actions. Indeed, Congress later amended the FTCA to require that the statute be the exclusive remedy for such claims, but specifically excepted constitutional violations, indicating that Congress intended to leave *Bivens* remedies as an available complement to the FTCA. Meanwhile, the PLRA cannot plausibly be read as disfavoring a *Bivens* remedy for an arresting officer's use of excessive force. That statute, which concerns *prison administration*, establishes procedural requirements for prison inmates to bring lawsuits but does not suggest any intent to foreclose a remedy for constitutional violations by law enforcement officers, and certainly not for such violations *outside of prisons* having nothing to do with prison administration.

No other statute indicates that Congress wished to foreclose such a remedy, which would in any case not hinder any governmental operations. The Drug Enforcement Administration's own policies forbid Officer Henning's conduct in this

case. A *Bivens* remedy is available to challenge the actions of an individual officer, not a general policy, and does not implicate the national security, foreign relations, or other separation-of-powers concerns that have foreclosed extending *Bivens* in other contexts. If recognizing a cause of action against a federal drug agent who unconstitutionally uses excessive force in effecting an arrest is somehow an extension of *Bivens*, recognizing such an exceedingly modest extension is appropriate here.

STANDARD OF REVIEW

This Court reviews *de novo* an order granting a motion to dismiss for failure to state a claim. *See Cheli v. Taylorville Cmty. Sch. Dist.*, 986 F.3d 1035, 1038 (7th Cir. 2021). In reviewing a motion to dismiss, courts must take all factual allegations in a complaint as true, and deny the motion to dismiss if the complaint contains sufficient factual allegations to state a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). *Pro se* complaints like Mr. Snowden's are construed liberally at the motion to dismiss stage and are "held to less stringent standards than formal pleadings drafted by lawyers." *Beal v. Beller*, 847 F.3d 898, 902 (7th Cir. 2017) (quoting *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam)).

ARGUMENT

I. Mr. Snowden's Claim that a Federal Drug Agent Violated His Fourth Amendment Rights by Using Unreasonable Force While Arresting Him Falls Within an Existing *Bivens* Context.

There is no question that it is a clearly established violation of the Fourth Amendment for a federal law enforcement officer to beat up a non-resisting criminal suspect in the course of an arrest. *See, e.g.*, *Holmes v. Vill. of Hoffman Est.*, 511 F.3d 673, 686–87 (7th Cir. 2007) (jury may conclude that continued use of force, including

slamming a suspect's head and kneeing him in the face, is excessive when the suspect is not resisting arrest); *Lester v. City of Chicago*, 830 F.2d 706, 709 (7th Cir. 1987) ("police officer has the right to use such force as is *reasonably necessary* under the circumstances to effect an arrest" (emphasis added)). Officer Henning has not argued otherwise or claimed he is entitled to qualified immunity, at least at the pleading stage. The sole issue before this Court is thus whether a cause of action exists for Mr. Snowden to seek a remedy for the serious Fourth Amendment violation he suffered. There is. *Bivens* itself concerned a federal law enforcement officer—indeed, like Officer Henning, a federal drug agent—who violated the Fourth Amendment by using unreasonable force in effecting an arrest. This case arises in exactly the same context.

A. *Bivens* Recognized a Cause of Action for a Federal Drug Agent's Use of Unreasonable Force.

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), a plaintiff sued six federal drug officers who carried out an "an arrest and search" by "enter[ing] his apartment and arrest[ing] him for alleged narcotics violations." *Id.* at 389. "The agents manacled [the plaintiff] in front of his wife and children, and threatened to arrest the entire family. They searched the apartment from stem to stern." *Id.* at 389. In his complaint, the plaintiff "asserted that the arrest and search were effected without a warrant, *and that unreasonable force was employed in making the arrest*." *Id.* at 389 (emphasis added). Recognizing the "Fourth Amendment's protection against unreasonable searches and seizures by federal agents," and the limits of state law to vindicate such protection, the Supreme

Court held "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials." *Id.* at 391, 395. The Court concluded that the plaintiff's "complaint states a cause of action under the Fourth Amendment," and that the plaintiff "is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Amendment." *Id.* at 397.

The Court subsequently extended *Bivens* in other contexts, including a public employee's claim of gender discrimination in violation of the Fifth Amendment's right to due process and a prisoner's claim of deliberate indifference to a substantial risk of harm in violation of the Eighth Amendment. *See Carlson v. Green*, 446 U.S. 14 (1980); *Davis v. Passman*, 442 U.S. 228 (1979).[5] More recently, the Court reaffirmed the continuing force of *Bivens* in these recognized contexts, but placed limitations on extending *Bivens* further by adopting a two-step inquiry to determine whether a federal officer can be sued for damages under *Bivens*. *See Hernandez v. Mesa*, 140 S. Ct. 735 (2020); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). First, courts must determine whether the claim arises in a "new context" or involves a "new category of defendants" from a previous *Bivens* case decided by the Supreme Court. *Hernandez*, 140 S. Ct. at 743, *Abbasi*, 137 S. Ct. at 1859. If the case presents a new context, courts must consider whether "special factors" counsel hesitation in implying a *Bivens* remedy.

[5] Other courts have recognized that the Supreme Court also extended *Bivens* to a failure-to-protect claim under the Eighth Amendment in *Farmer v. Brennan*, 511 U.S. 825 (1994). *See Bistrian v. Levi*, 912 F.3d 79, 90–91 (3d Cir. 2018); *see also Earle v. Shreves*, 990 F.3d 774, 778 n.1 (4th Cir. 2021) (treating "*Farmer's* precise status" after *Abbasi* as an open issue). No issue is raised in this appeal concerning that *Bivens* context.

Hernandez, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1857. Even as it articulated this two-step inquiry, *Abbasi* reaffirmed the "continued force" and "necessity" of *Bivens* as "settled law" to "vindicate the Constitution by allowing some redress for injuries" and "provide[] instruction and guidance to federal law enforcement officers" in a "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1856–57.

B. Mr. Snowden's Claim Arises Within the Same Context as *Bivens*.

Mr. Snowden claims that Officer Henning, a federal drug agent, violated the Fourth Amendment because he used unreasonable force in the course of an arrest. Mr. Snowden's claim falls squarely within the allegations that the Supreme Court found actionable in *Bivens*.

A case presents a new *Bivens* context if it is "different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1859; *see also Hernandez*, 140 S. Ct. at 743. The Supreme Court in *Abbasi* identified several factors that may create a meaningful difference between two cases, including:

> the rank of officers involved; constitutional right at issue; generality or specificity of the official action; extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; statutory or other legal mandate under which the officer was operating; risk of disruptive intrusion by the judiciary into the functioning of other branches; or the presence of potential special factors that previous *Bivens* cases did not consider.

137 S. Ct. at 1859–60.

Each of these factors confirms that Mr. Snowden's case is not meaningfully different from the context in which *Bivens* arose. Both *Bivens* and Mr. Snowden's case involve claims against individual federal law enforcement officers—indeed, both

cases involve individual federal drug agents specifically, though *Bivens* has never been construed as being limited to one particular type of federal law enforcement officer. *See, e.g.*, *Boule*, 2021 WL 2171832, at *14 (Fourth Amendment excessive force claims "are routinely brought under *Bivens* against F.B.I. agents"); *Jacobs*, 915 F.3d at 1038 (Fourth Amendment excessive force claims "against three individual officers for their alleged overreach in effectuating a standard law enforcement operation" was the same *Bivens* context even though the officers were U.S. Marshals (internal citations and quotation marks omitted)). Both cases involve an allegation that individual agents violated the plaintiff's Fourth Amendment rights because "unreasonable force was employed in making [an] arrest." *See Bivens*, 403 U.S. at 389. Indeed, the arrests in *Bivens* and this case both involved suspected drug-related crimes, *see id.*, though again, *Bivens* has never been so limited.

Moreover, the alleged Fourth Amendment violation in both cases involves an issue for which there is extensive judicial guidance—the amount of force that a law enforcement officer can use in the course of an arrest—and the same legal mandate—the officer's authority to make an arrest for alleged violations of criminal law. *See, e.g.*, *Holmes*, 511 F.3d at 686–87; *Lester*, 830 F.2d at 709; *cf. Tun-Cos v. Perrotte*, 922 F.3d 514, 524 (4th Cir. 2019) (different legal mandate when officers "were not enforcing the criminal law, as in *Bivens*, but rather were enforcing the immigration law of the" Immigration and Nationality Act). Meanwhile, neither *Bivens* nor this case presents a risk of disrupting the functioning of the Executive Branch because the claims target specific acts of line-level federal drug agents that violate not only

the Constitution but the agency's own policies, rather than challenging general policies formulated by high-level Executive Branch officials.

The district court acknowledged that the facts in *Bivens* and the present case are "similar"—but failed to discuss any of these similarities on each of the criteria *Abbasi* raised as relevant to the new context inquiry. SA6. Instead, the district court summarily disregarded those similarities and concluded that the two cases were "different" by misinterpreting *Bivens* and invoking trivial factual differences that cannot possibly be considered "meaningful." SA6–SA7. This erroneous conclusion was based on two related errors.

First, the district court misconstrued *Bivens* as a case that only "tested the constitutionality of the home entry, arrest, and search without a warrant," whereas "the instant matter tests the amount of force that can reasonably be used during an arrest"—or "the right to be free from excessive force incident to an otherwise lawful arrest." SA6. According to the district court, the rights at issue in *Bivens* were therefore "primarily rights of privacy," whereas the right at issue in the present case is "the right to be free from excessive force incident to an otherwise lawful arrest." SA6. The district court's crimped reading of *Bivens* is wrong. *Bivens* held that a complaint, which alleged (1) that "the arrest and search were effected without a warrant," *and* (2) "that unreasonable force was employed in making the arrest," stated a cause of action under the Fourth Amendment. 403 U.S. at 389. The district court disregarded the second Fourth Amendment violation in *Bivens*, and on that basis failed to apprehend that this case falls squarely within a context that *Bivens*

itself recognizes. That *Bivens* involved two types of Fourth Amendment violations does not indicate that this case seeks to extend *Bivens*; rather, it confirms that this case does *not* extend *Bivens* because it is narrower and nested entirely within a Fourth Amendment context that *Bivens* recognizes. This case thus falls squarely within *Bivens* and its "continued force" and "necessity" to "vindicate the Constitution by allowing some redress for injuries" and to "provide[] instruction and guidance to federal law enforcement officers" in a "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1856–57.

Second, the district court also concluded that the two cases "are different" because (1) *Bivens* involved six federal drug agents whereas this case involved only one, (2) *Bivens* involved an arrest at the plaintiff's home in the presence of his family whereas this case involves an arrest in public, and (3) *Bivens* involved a warrantless arrest whereas this case involves a warrant. SA6. The district court did not explain how these are "meaningful" differences to create a new context. They are not.

In *Abbasi*, the Supreme Court held that new *Bivens* contexts depend not just on facts being different, but facts being "different in a meaningful way from previous *Bivens* cases decided by th[e] Court." *Abbasi*, 137 S. Ct. at 1859–60. Although the Court did not explicitly define what is "meaningful enough," it provided a list of illustrative examples. *See id.* Not one of the differences identified by the district court is included in that list. But more importantly, the differences identified by the district court do not remotely fit the consistent theme shared by the examples: differences that are relevant to the constitutional violation at issue or separation-of-

powers considerations. The differences identified by the district court are irrelevant to the constitutional violation, whether an officer used unreasonable force or not, and do not implicate separation-of-powers concerns in any different way than *Bivens* itself.

Accepting the district court's approach would therefore conflict with *Abbasi* and a host of decisions by the Supreme Court and other circuits both before and after *Abbasi*. For instance, in *Groh v. Ramirez*, the Supreme Court recognized a Fourth Amendment claim of an unconstitutional search based on an invalid warrant as a *Bivens* action. 540 U.S. 551, 557–65 (2004). The Court treated the case as a *Bivens* action because both cases involved an unconstitutional search, regardless of whether there was a warrant or not, given that a search can still be unconstitutional despite the issuance of a warrant. Applying *Groh,* the Fifth and Ninth Circuits reached the same conclusion in two post-*Abbasi* decisions applying *Bivens* to unconstitutional search claims, including one that involved a valid warrant. *Ioane v. Hodges*, 939 F.3d 945, 954 n.4 (9th Cir. 2018) (observing that claim of a Fourth Amendment violation during the execution of valid warrant fell within *Bivens*); *Evans v. Davis*, 875 F.3d 210, 220 (5th Cir. 2017) (recognizing *Groh* as a *Bivens* action). And the Supreme Court and various circuits have examined factual differences that implicate different constitutional violations or separation-of-powers concerns, while passing on others that merely represent different facts. *See, e.g.*, *Hernandez*, 140 S. Ct. at 743–44 (cross-border shooting is a meaningful difference because "the risk of disruptive intrusion into the functioning of other branches" is significant); *Boule*, 2021 WL

2171832, at *14 (innkeeper's excessive force claim for actions in public was only meaningfully different because the defendant is "an agent of the border patrol rather than of the F.B.I.," which may implicate national security considerations not at issue in *Bivens*); *Bistrian*, 912 F.3d at 91–92, 94 (pretrial detainee's Fifth Amendment claim that prison officials failed to protect the detainee from risk of violence by other inmates for being an informant was not meaningfully different from post-conviction prisoner's Eighth Amendment claim recognized by the Supreme Court that prison officials failed to protect the prisoner from risk of violence by other inmates for being transgender).

The district court's identification of three irrelevant factual differences to declare this a new context is well out of step with this consistent authority and the proper inquiry established by the Supreme Court.

1. The number of federal agents. The specific number of federal drug agents who violated the Fourth Amendment by using excessive force to effect an arrest is patently not meaningful. Neither *Bivens* nor *Abbasi* placed any significance on the number of agents, which would make little sense given that *Bivens* is premised on suits against individuals. *Bivens* makes clear that the relevant context is Fourth Amendment violations by federal agents, and that the plaintiff had a cause of action against *each* officer. *Abbasi* reaffirmed the context in *Bivens* as "the search-and-seizure context" involving "law enforcement officers," without regard to number. If anything, *Abbasi* suggests that a lawsuit against one individual officer is the quintessential example of a *Bivens* action because it is least likely to involve any

challenge to a broader policy. 137 S. Ct. at 1860 (a *Bivens* action is meant to be "brought against *the* individual official for his or her own acts" and is not "a proper vehicle for altering an entity's policy" (internal quotation marks omitted) (emphasis added)). The fact that the Fourth Amendment violation here was carried out by *fewer* federal drug agents cannot possibly make this case meaningfully different from *Bivens* from a separation-of-powers perspective.

2. Location of arrest. The fact that both cases involve arrests is a similarity rather than a difference, and whether that arrest occurs in a home or a hotel is not at all meaningful to the specific legal violation or any separation-of-powers consideration. In both cases, the Fourth Amendment still prohibits a law enforcement officer from using excessive force, and whether the officer used unreasonable force does not turn on whether the arrest occurred in a home or a hotel. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) (explaining that the reasonableness of force turns on relevant facts and circumstances such as "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight," without mentioning the specific location of the arrest). Nor does this difference in location implicate different separation-of-powers considerations to remove the claim from the traditional "search-and-seizure context" in which *Bivens* applies. *Abbasi*, 137 S. Ct. at 1856. Indeed, neither *Abbasi* nor *Hernandez* identified the location of the search and seizure as meaningful enough to create a new context. *See Hernandez*, 140 S. Ct. at 744 ("*Bivens* concerned an allegedly unconstitutional

arrest and search carried out in New York City" with no reference to where exactly it occurred).

A scenario in which the location does matter is when the incident happened *abroad*, which would implicate different separation-of-powers considerations, such as "foreign relations and national security implications" involved with a cross-border shooting. *See id.* at 739 ("the Constitution's separation of powers requires us to exercise caution before extending *Bivens* to a new 'context,' and a claim based on a cross-border shooting arises in a context that is markedly new."). The district court identified no such implications that make excessive force in a hotel lobby in Carbondale meaningfully different from excessive force in an apartment in Brooklyn, because there are none.

3. Presence of a warrant. Even assuming that there is a valid warrant in this case, *but see supra* page 6, note 3, the presence of a warrant is also not a meaningful difference, as post-*Abbasi* case law confirms. As explained above, *Bivens* recognized a remedy for two distinct Fourth Amendment violations: the warrantless search of the house, and the unreasonable use of force in effecting an arrest. Whether a warrant exists bears on the reasonableness of a search, but has nothing to do with the question of how much force can be used in effecting an arrest. That part of *Bivens* stands by itself without regard to the presence of a warrant or not. The legal mandate at issue is the authority to make an arrest, which as discussed above, does not include any right to use excessive force. To the contrary, this Court has squarely held that whether officers had a "warrant [is] irrelevant to whether they used excessive force."

Clarett v. Roberts, 657 F.3d 664, 672 (7th Cir. 2011). Just as the Supreme Court and other circuits have treated unconstitutional searches that violate the Fourth Amendment as falling within the same context as *Bivens* regardless of whether there is a valid warrant, given that a search can still be unconstitutional despite the issuance of a warrant, this Court should do the same for excessive force claims, which have even less to do with the existence of a valid warrant. *See Groh*, 540 U.S. at 557–65; *Ioane*, 939 F.3d at 954 n.4; *Evans*, 875 F.3d at 220.

C. The District Court's Decision Conflicts with the Post-*Abbasi* Decisions of Other Circuits.

The district court's conclusion is also inconsistent with decisions of three circuits applying *Bivens* to claims of unreasonable force after *Abbasi* and *Hernandez*. The Fifth, Sixth, and Ninth Circuits are all in agreement that *Bivens* includes Fourth Amendment claims of unreasonable force. *Boule v. Egbert*, 980 F.3d 1309, 1314 (9th Cir. 2020), *amended* 2021 WL 2171832, at *14 (May 20, 2021); *Oliva v. Nivar*, 973 F.3d 438, 442–43 (5th Cir. 2020); *Jacobs v. Alam*, 915 F.3d 1028, 1038 (6th Cir. 2019). This Court should follow the same approach and reject the district court's misunderstanding of *Bivens*.

The district court's decision here is flatly inconsistent with the Sixth Circuit's holding that a Fourth Amendment excessive force claim continues to be a recognized *Bivens* context. In a case involving U.S. Marshals shooting at a fleeing criminal fugitive, the Sixth Circuit concluded that the plaintiff's "action against [two of the] law enforcement officials, alleging excessive force," stated a claim under *Bivens* because Fourth Amendment unreasonable force claims "are run-of-the-mill

challenges to 'standard law enforcement operations' that fall well within *Bivens* itself." *Jacobs*, 915 F.3d at 1033, 1035, 1038. The Sixth Circuit rejected "factual differences" between the case and *Bivens* as "not meaningful" because regardless of those differences, the cases "deal[t] not with overarching challenges to federal policy in claims brought against top executives, but with claims against three individual officers for their alleged 'overreach,' in effectuating a 'standard law enforcement operation.'" *Id.* at 1038–39 (quoting *Abbasi*, 137 S. Ct. at 1861–62) (internal quotation marks and alterations omitted). The present case, involving the same exact type of officer as in *Bivens* (federal drug agent) and the same kind of suspected criminal activity as in *Bivens* (narcotics), is even closer to the facts of *Bivens*.

The Ninth Circuit applied similar reasoning in its discussion of a *Bivens* cause of action in a lawsuit by an innkeeper against a border patrol agent. *Boule v. Egbert*, 980 F.3d 1309 (9th Cir. 2020), *amended* 2021 WL 2171832 (May 20, 2021). The innkeeper alleged that a border patrol agent used excessive force in violation of the Fourth Amendment when he shoved the innkeeper into a car and pushed him onto the ground during an investigation in front of the inn. *Boule*, 2021 WL 2171832, at *13–*14. The Ninth Circuit recognized that the excessive force claim was "a conventional Fourth Amendment claim, indistinguishable from countless such claims brought against federal, state, and local law enforcement officials," and fell directly within *Bivens*, except that the defendant "is an agent of the border patrol rather than of the F.B.I." *Id.* at *14–*15; *cf. Tun-Cos*, 922 F.3d at 523 (immigration officers "were not enforcing the criminal law, as in *Bivens*, but rather were enforcing the

immigration law"). The Ninth Circuit's recognition that this was the only material difference that made the case a "modest" extension illustrates that in the non-border context, a Fourth Amendment excessive force claim would otherwise fall squarely in the established context of *Bivens*. *Boule*, 2021 WL 2171832, at *14.[6]

These decisions from other circuits demonstrate that Fourth Amendment unreasonable force claims fall squarely within *Bivens*. The district court's failure to recognize that both *Bivens* and the present case involve the same Fourth Amendment claim—"unreasonable force was employed in making [an] arrest," *Bivens*, 403 U.S. at 389—is sufficient ground for reversal. Furthermore, the decisions show that trivial factual differences, such as how many officers were involved, do not count as meaningful differences to create a new *Bivens* context. What may do so are considerations such as the legal mandate of a different kind officer—a border patrol agent in *Boule*, an immigration officer in *Tun-Cos*, and Veterans Affairs ("VA") police in *Oliva*—or a setting with different governmental interests—running a VA hospital in *Oliva*. No such differences are at issue in this case, and the district court's focus on immaterial factual differences conflicts with the Sixth Circuit's holding and is in tension with the Fifth and Ninth Circuit's reasoning. This Court should conclude, in

[6] Meanwhile, the Fifth Circuit declined to extend *Bivens* to a case involving Veterans Affairs ("VA") officers patrolling the metal detectors at the entrance of a VA hospital. *Oliva*, 973 F.3d at 444. The Fifth Circuit's decision relied on differences from *Bivens*, including that officers were guarding the metal detectors at the entrance of a government building and responding to an "altercation involv[ing] the hospital's ID policy," rather than an arrest during "a narcotics investigation." *Id.* at 443. The difference between the force used in making an arrest versus force used in guarding a government building is plainly more meaningful, and more material to separation-of-powers considerations, than any of the trivial factual distinctions the district court noted between this case and *Bivens*.

line with its sister circuits, that a domestic law enforcement officer's use of excessive force in the course of conducting an arrest falls within an existing *Bivens* context.

II. Even if this Case Presents a Modest Extension of *Bivens*, No Special Factors Counsel Hesitation Before Recognizing a Remedy for a Rogue Federal Drug Agent's Beating of an Individual Not Resisting Arrest.

Because Mr. Snowden's claim does not present a new *Bivens* context, there is no need to address the second step of the *Abbasi* framework and consider whether there are special factors counseling hesitation. *See Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1860.

But even if this Court concludes that the present case does not fall within an existing *Bivens* context, it should recognize a cause of action in this case as an exceedingly modest extension of *Bivens* because there are no special factors counseling hesitation. As discussed in the preceding section, the present case and *Bivens* are identical in every relevant respect: both involve an alleged Fourth Amendment violation by individual federal drug agents, specifically a violation of the Fourth Amendment right to be free from excessive force in the course of an arrest. Any of the minor differences identified by the district court would at most present a modest extension of *Bivens* that would not implicate any different special factors than those already considered and disposed of by the Supreme Court. There is no sound basis for denying a *Bivens* remedy to the victim of an unprovoked, unjustified attack by a federal drug agent. The Supreme Court's recent *Bivens* decisions demand caution, but nowhere do they foreclose the recognition of new *Bivens* causes of action in narrow and appropriate settings like this one. Other circuits have accordingly recognized limited extensions of *Bivens*, even where the extensions were more novel

than this one. *See, e.g.*, *Boule*, 2021 WL 2171832, at *14 (recognizing extension of *Bivens* to a Fourth Amendment excessive force claim against a border patrol agent); *Bistrian*, 912 F.3d at 91–92, 94 (holding that a claim that prison officials failed to protect a detainee from a risk of violence under the Eighth Amendment fell within an existing *Bivens* context, but even if did not, extending *Bivens* was appropriate); *Lanuza v. Love*, 899 F.3d 1019, 1033–34 (9th Cir. 2018) (recognizing extension of *Bivens* to a Fifth Amendment right to due process claim against an immigration officer who falsified evidence).

The special factors inquiry focuses on whether the judiciary is well-suited, absent congressional action or intrusion, to consider and weigh the costs and benefits of allowing a damages action to proceed. *Abbasi*, 137 S. Ct. at 1857–58. Although the Supreme Court has not identified an exhaustive list of special factors, the analysis focuses on separation-of-powers principles such as the rank of the officer involved, whether *Bivens* is used as a vehicle to alter an agency's policy, the burden on the government if such claims are recognized, whether litigation will reveal sensitive information, whether there are alternative avenues of relief available, and whether there is adequate deterrence absent a damages remedy. *See Hernandez*, 140 S. Ct. at 743; *Abbasi*, 137 S. Ct. at 1857. None of these special factors are present here.

As the Supreme Court explained in *Abbasi*, a cause of action under *Bivens* is "necessary" to instruct and deter federal drug agents from flouting constitutional requirements and using excessive force with impunity. 137 S. Ct. at 1856–57. The Court has squarely held that other remedies, including the Federal Tort Claims Act,

are insufficient for this purpose. *Carlson v. Green*, 446 U.S. 14, 19 (1980). Meanwhile, Congress has repeatedly indicated at least tacit approval of a *Bivens* remedy in this context, including by waiving federal government immunity for the violations of law enforcement officers under the FTCA while leaving in place the availability of constitutional tort actions. Mr. Snowden's claim would not raise any separation-of-powers concerns or have any negative "impact on governmental operations systemwide." *Abbasi*, 137 S. Ct. at 1858. He challenges the actions of an individual federal drug agent who failed to follow not only judicial guidance but his own agency's policy making clear that law enforcement officers should not use force unless and only to the extent reasonably necessary during the course of an arrest.

Despite these well-settled principles, the district court concluded that there are two special factors counseling hesitation: (1) "the existence of the FTCA as a potential remedy," and (2) "[l]egislative action" (specifically the FTCA and PLRA) "suggest[ing] that Congress did not want a damages remedy." SA9. Notably, the district court did not conclude that there would be any other separation-of-powers or other concerns with recognizing a *Bivens* remedy in this context. The district court's conclusions directly conflict with the text and purpose of these two statutes, as well as the Supreme Court's precedents applying them. Nor would recognizing a *Bivens* remedy in this context raise any separation-of-powers or any other concerns counseling hesitation.

A. Under Binding Supreme Court Precedent, the FTCA Is Not an Alternative to a *Bivens* Remedy, Which Is Necessary to Deter Individual Federal Drug Agents from Using Excessive Force in Violation of the Fourth Amendment.

Mr. Snowden seeks relief for injuries he received at the hands of a federal drug agent who shoved him to the ground and punched him in the face several times, even though he never resisted arrest. His challenge to an "individual instance" of misconduct by an individual agent is "difficult to address except by way of [a] damages action[] after the fact." *Abbasi*, 137 S. Ct. at 1862. Damages are "the ordinary remedy for the invasion of personal liberty interests" in this context. *Bivens*, 403 U.S. at 395. "[I]n addition to compensating victims," damages from the individual agent "serves a deterrent purpose." *Carlson*, 446 U.S. at 20–21; *see also Abbasi*, 137 S. Ct. at 1860 ("The purpose of *Bivens* is to deter the *officer*."). "There is a persisting concern . . . that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution." *Abbasi*, 137 S. Ct. at 1863. A *Bivens* remedy against the individual agent is accordingly necessary to "vindicate the Constitution by allowing some redress for injuries" and to "provide[] instruction and guidance to federal law enforcement officers" in a "common and recurrent sphere of law enforcement." *Abbasi*, 137 S. Ct. at 1856–57.

Nevertheless, the district court concluded that a *Bivens* remedy was unavailable because the Federal Tort Claims Act is a "potential remedy" counseling hesitation before recognizing a damages remedy under the Fourth Amendment. SA9. The district court did not consider the longstanding deterrence purpose of *Bivens* and merely echoed generic warnings about not expanding *Bivens*, without discussing how

the FTCA is a sufficient alternative remedy even under the Supreme Court's most recent precedents. SA8. The FTCA is not.

As the Supreme Court held in *Carlson*, the Federal Tort Claims Act is not an alternative to *Bivens* because the FTCA provides liability against the United States government, not individual federal officers. As the Court explained, "nothing in the [FTCA] or its legislative history . . . show[s] that Congress meant to pre-empt a *Bivens* remedy or to create an equally effective remedy for constitutional violations." *Carlson*, 446 U.S. at 19. Rather, though Congress designated the FTCA as the exclusive remedy for civil actions against federal employees, it explicitly exempted from this exclusivity suits against individual federal officers for constitutional violations. *See* 28 U.S.C. § 2679(b)(2)(A). The Court also observed that the "FTCA was enacted long before *Bivens* was decided, but when Congress amended [the] FTCA in 1974 to create a cause of action against the United States for intentional torts committed by federal law enforcement officers," *see* 28 U.S.C. § 2680(h), Congress was "crystal clear that [it] views [the] FTCA and *Bivens* as parallel, compensatory causes of action." *Carlson*, 446 U.S. at 19–20. Liability against the United States government will not deter constitutional violations because it does not give individual officers an incentive to change their conduct. *See id.* at 20–21 ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy."); *see also Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) ("We reasoned that the threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals."). The Court concluded that

"[p]lainly [the] FTCA is not a sufficient protector of . . . citizens' constitutional rights, and without a clear congressional mandate [the Court] cannot hold that Congress relegated [citizens] exclusively to the FTCA remedy." *Carlson*, 446 U.S. at 23.[7]

Carlson remains binding law and squarely controls. The Supreme Court has directed that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (*quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)). But the Supreme Court's subsequent decisions have not rejected, or even called into question, the holding of *Carlson* concerning the relationship between *Bivens* claims and the FTCA. Rather, *Abbasi* and *Hernandez* are consistent with *Carlson*'s reasoning in this respect. *Abbasi*, 137 S. Ct. at 1860, 1863 ("The purpose of *Bivens* is to deter the officer . . . [and] [t]here is a persisting concern . . . that absent a *Bivens* remedy there will be insufficient deterrence to prevent officers from violating the Constitution."); *Hernandez*, 140 S. Ct. at 748 n.9 (FTCA "simply left *Bivens* where it found it").

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[7] For similar reasons, any state law tort remedies are also not an alternative. As explained *supra* page 7, note 4, the FTCA requires a remedy against the United States for state tort claims to be "exclusive." 28 U.S.C. § 2679(b)(1). The United States would therefore substitute itself as the defendant for these claims, as it tried to do in this case. *See* ECF 25. As explained here, a suit against the United States would not provide the deterrence against individual officers provided by a *Bivens* remedy and is therefore not an alternative. *See Minneci v. Pollard*, 565 U.S. 118, 126 (2012) (explaining that, for purposes of "the potential existence of an adequate 'alternative, existing process'" to remedy a violation, an individual "ordinarily cannot bring state-law tort actions against employees of the Federal Government").

The Third and Ninth Circuits have accordingly applied *Carlson* in post-*Abbasi* decisions to hold that that the FTCA is not an alternative remedy to a *Bivens* action. In *Bistrian*, the Third Circuit recognized that "the existence of an FTCA remedy does not foreclose an analogous remedy under *Bivens*." 912 F.3d at 92. The Third Circuit adhered to *Carlson* and added that "[if] that precedent were not enough, the FTCA itself appears to recognize the complementary existence of *Bivens* actions by creating an exception for suits against individual federal officers for constitutional violations." *Id.* at 92. For those reasons, "the prospect of relief under the FTCA is plainly not a special factor counseling hesitation in allowing a *Bivens* remedy." *Id.* And in *Boule*, the Ninth Circuit similarly recognized that the FTCA does not "defeat[] a *Bivens* action," explaining that the Supreme Court "specifically addressed the relationship between *Bivens* and [the FTCA], holding that the existence of a remedy under [the FTCA] does not foreclose a *Bivens* action." 2021 WL 2171832, at *18. The Ninth Circuit accordingly confirmed that there are no alternative remedies available for a Fourth Amendment excessive force claim against an individual officer. *Id.* at *18–*19. Compelled by the text of the FTCA and Supreme Court precedent, and consistent with the decisions of two other circuits, this Court should conclude that the FTCA is not an alternative to a *Bivens* remedy and does not counsel hesitation before extending *Bivens* in this context.[8]

[8] The Fifth Circuit reached a diverging conclusion in a distinguishable case concerning alleged misconduct by VA officers at a VA hospital, but that decision failed to consider *Carlson* or explain why its holding on the FTCA would no longer be good law, and should not be followed. *See Oliva*, 973 F.3d at 444.

B. Congress Has Not Indicated an Intent to Foreclose the Availability of a *Bivens* Remedy in this Context.

There is also no indication that Congress aimed to foreclose a *Bivens* remedy in this context. Rather, Congress has indicated its acceptance of *Bivens* suits against individual federal agents for the alleged misconduct at issue here. The district court's contrary conclusions misread two congressional statutes, the aforementioned FTCA and the Prison Litigation Reform Act.

First, the district court erroneously observed that "[by] enacting the law enforcement proviso [in the FTCA], Congress signaled that it does not want a damages remedy against individual federal agents." SA9. The proviso actually suggests the opposite. Enacted in 1974 after *Bivens* was decided in 1971, the proviso extends FTCA liability against the United States government "to any claim arising . . . out of assault, battery, false imprisonment, false arrest, abuse of process or malicious prosecution" by "any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law." 28 U.S.C. § 2680(h). As explained *supra* Section II.A, Congress understood the FTCA and *Bivens* as "parallel, complementary causes of action," and Section 2680(h) "contemplates that victims of the kind of intentional wrongdoing alleged in this complaint shall have an action under [the] FTCA against the United States as well as a *Bivens* action against the individual officials alleged to have infringed their constitutional rights." *Carlson*, 446 U.S. at 20. Furthermore, Congress amended the FTCA again in 1988 to require the FTCA be the exclusive remedy for actions against law enforcement officers, *except* in certain instances including an action "brought for

a violation of the Constitution of the United States," a further demonstration that Congress intended to maintain *Bivens* suits. 28 U.S.C. § 2679(b). In other words, long after both *Bivens* and *Carlson*, Congress amended the FTCA to expressly preserve its status as complementary to *Bivens* actions.

Second, the district court observed that "Congress also did not provide a 'standalone' damages remedy against federal officers when it enacted the Prison Litigation Reform Act." SA9 (citing *Abbasi*, 137 S. Ct. at 1865). But the PLRA is wholly irrelevant to a Fourth Amendment claim of excessive use of force in effecting an arrest *outside of prison*. The PLRA applies only to actions "with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility." 42 U.S.C. § 1997(e). As the Supreme Court explained, "Congress passed the Prison Litigation Reform Act of 1995, which made comprehensive changes to the way *prisoner abuse claims* must be brought in federal court." *Abbasi*, 137 S. Ct. at 1865; *see also Woodford v. Ngo*, 548 U.S. 81, 93–94 (2006) (PLRA enacted "to eliminate unwarranted federal-court interference with the administration of prisons" and "to reduce the quantity and improve the quality of prisoner suits"); *Porter v. Nussle*, 534 U.S. 516, 532 (2002) (PLRA applies to "inmate suits about prison life"). This case is not a prisoner abuse claim, and the lack of a cause of action in the PLRA for prisoner abuse claims is beside the point.

Even in cases that concern what happens within a prison, the relevance of the PLRA is doubtful. In *Abbasi*, the Supreme Court noted that "Congress had specific occasion to consider the matter of *prisoner abuse* and to consider the proper way to

remedy *those wrongs*," so "[i]t *could be argued* that this suggests Congress chose not to extend the *Carlson* damages remedy to cases involving other types of *prisoner mistreatment*." *Abbasi*, 137 S. Ct. at 1865 (emphases added) (internal citations omitted). As the Third Circuit observed, however, "[i]t is equally, if not more, likely . . . that Congress simply wanted to reduce the volume of prisoner suits by imposing exhaustion requirements, rather to eliminate whole categories of claims through silence and implication." *Bistrian*, 912 F.3d at 93 n.22. The Third Circuit also "reject[ed] the argument that Congressional silence within the PLRA suggests that Congress did not want a damages remedy against prison officials for constitutional violations" because it "would arguably foreclose all *Bivens* claims brought in the prison context, which would run counter to the Supreme Court's ruling in *Carlson*." *Mack v. Yost*, 968 F.3d 311, 323–24 (3d Cir. 2020). Indeed, the PLRA does not foreclose *Bivens* lawsuits at all, but rather requires procedures that must be followed before those lawsuits may be brought. But this Court has no reason to wade into the question of whether the PLRA could ever be a relevant special factor counseling hesitation. There is certainly no basis to infer from silence in a statute about *prison administration* that Congress meant to foreclose a remedy for constitutional violations by law enforcement officers *outside of prisons*.

Congress has otherwise indicated its approval for a damages remedy to be available when the actions of an individual officer result in physical harm (or a substantial risk of physical harm) to an individual. *See Hernandez*, 140 S. Ct. at 747 (looking at "analogous statutes for guidance on the appropriate boundaries of judge-

made causes of action"). Congress has continued to allow individuals—including inmates—to recover for physical injuries in analogous statutes. For example, Congress has prohibited inmates who are convicted of a felony from bringing suits against the federal government based on purely mental or emotional injury, but allows inmates to bring suits based on physical injury against the United States. *See* 28 U.S.C. § 1346(b)(2). There is thus no support for the district court's brief suggestion that Congress has attempted to foreclose a *Bivens* remedy in this case closely resembling *Bivens* itself.

C. Applying a *Bivens* Remedy when a Drug Agent Who Beats an Individual Who Is Not Resisting Arrest Would Not Cause Unwarranted Interference with Government Operations.

Apart from the misplaced suggestion that the FTCA and PLRA counsel hesitation, the district court did not identify any separation-of-powers or other concerns that counsel hesitation. This case does not present any such concerns that have counseled hesitation in other cases. Mr. Snowden's suit seeks to hold a low-level individual officer liable "for his or her own acts, not the acts of others." *Abbasi*, 137 S. Ct. at 1860. It does not concern and will not interfere with the formulation and implementation of general policy. Additionally, unlike *Abbasi* and *Hernandez*, this case does not require the judiciary to interfere with sensitive functions of the Executive Branch, including preserving national security and foreign relations. *Abbasi*, 137 S. Ct. at 1861; *Hernandez*, 140 S. Ct. at 744–36; *see Boule*, 2021 WL 2171832 at *15–*16 (recognizing *Bivens* cause of action for Fourth Amendment excessive force claim against a border patrol agent, who was not "tasked with policing the border and preventing illegal entry of goods and people," because the claim "is

part and parcel of the 'common and recurrent sphere of law enforcement' which, under [*Abbasi*], is a permissible area for *Bivens* claim"); *cf. Tun-Cos*, 922 F.3d at 527 (plaintiffs "specifically targeted the Trump Administration's immigration enforcement policy with the purpose of altering it"). Instead, this case falls under "the settled law of *Bivens*" and "the undoubted reliance upon it as a fixed principle in the law." *Abbasi*, 137 S. Ct. at 1857; *see Jacobs*, 915 F.3d at 1038 ("[the] plaintiff's [excessive force] claims are run-of-the-mill challenges to 'standard law enforcement operations' that fall well within *Bivens* itself").

Providing a *Bivens* remedy could not interfere with governmental operations within the law enforcement context presented here. Allowing a drug agent to beat a suspect who is not resisting arrest serves no legitimate governmental objective; to the contrary, it undermines public trust and safety. There is also no concern that a *Bivens* remedy will interfere with the decisions of law enforcement officials and make them second-guess actions during the course of an arrest. As indicated by an instruction manual published by the Drug Enforcement Administration ("DEA") that employs Officer Henning, his alleged conduct is prohibited by the agency. *See* U.S. Department of Justice, DEA, DEA Agents Manual (1999), 6641.11, at 327–28 ("reasonable force" only permitted if "the defendant resist[s] arrest, attempt[s] to flee, or attempt[s] to destroy evidence"; "use of 'unreasonable force' may lead to the dismissal of the charges, as well as civil and/or criminal action against the officers").[9]

[9] The DEA Agents Manual is available at https://nick-mail.net/marginalia/DEA%20Agents%20Manual%202002.pdf.

Even then, an individual officer will not be liable unless the plaintiff can show a violation of clearly established law. *Carlson*, 446 U.S. at 19 ("even if requiring [officers] to defend [a plaintiff's] suit might inhibit their efforts to perform their official duties, the qualified immunity accorded them . . . provides adequate protection"). Here, Officer Henning used excessive force and caused great bodily harm while arresting Mr. Snowden even though Mr. Snowden did not resist arrest or otherwise show any threat to safety. If this is an extension of *Bivens* at all, *but see supra* Section I, there are no special factors counseling hesitation to recognize this exceedingly modest extension.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully submitted,

June 13, 2021

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CERTIFICATE OF COMPLIANCE WITH
FRAP RULE 32(a)(7), FRAP RULE 32(g), AND CIRCUIT RULE 32(c)

The undersigned, counsel for Plaintiff-Appellant Donald V. Snowden, furnishes the following in compliance with Fed. R. App. P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is: 11,364 words (including footnotes), as counted by Microsoft Word, the word-processing software used to prepare this brief.

June 13, 2021

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CIRCUIT RULE 31(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

June 13, 2021

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No. 21-1463

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DONALD V. SNOWDEN

***Plaintiff-Appellant*,**

v.

JEREMY HENNING,

***Defendant-Appellee*.**

Appeal From The United States District Court
For The Southern District of Illinois
Case No. 3:19-cv-01322-JPG
The Honorable Judge J. Phil Gilbert

SHORT APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DONALD V. SNOWDEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 19-cv-01322-JPG**
	)	
JEREMY HENNING,	)	
	)	
Defendant.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

This matter is now before the Court for a decision on Defendant Jeremy Henning's Motion to Dismiss for Failure to State a Claim (Doc. 24) and Motion to Substitute Party (Doc. 25). Plaintiff Donald Snowden filed this *pro se* action pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), claiming that he was subjected to the unauthorized use of force incident to his arrest without a warrant by Special Agent Jeremy Henning ("Agent Henning") of the Drug Enforcement Administration on September 12, 2019. (Doc. 1). He seeks money damages. (*Id*. at 7). The Court screened this matter pursuant to 28 U.S.C. § 1915A and allowed Plaintiff to proceed with an excessive force claim (Count 1) pursuant to *Bivens* and an Illinois battery claim (Count 4) pursuant to 28 U.S.C. § 1367(a). (Doc. 15).

In lieu of an answer, Agent Henning filed a Motion to Dismiss *Bivens* Claim in Count 1 (Doc. 24) and a Motion to Substitute the United States as Defendant in Count 4 and convert the action to one brought pursuant to the Federal Tort Claims Act ("FTCA") (Doc. 25). Plaintiff opposes both motions on the ground that he specifically intended to file a *Bivens* action, not an FTCA claim, and he wishes to proceed with his damages claim against Agent Henning under *Bivens*. The Motion to Dismiss is **GRANTED**, and the Motion to Substitute is **DENIED**.

BACKGROUND

Plaintiff filed this action during his federal pretrial detention on a methamphetamine distribution charge. *See United States v. Snowden*, No. 19-cv-40081-JPG (S.D. Ill. 2019). In the Complaint, Plaintiff alleges that he was subjected to the unauthorized use of force incident to his arrest without a warrant on September 12, 2019. (Doc. 1, pp. 6, 9). As Plaintiff stood at the front desk of the Quality Inn located in Carbondale, Illinois, Agent Henning approached him and repeatedly punched him in the face, injuring his left eye socket. (*Id*. at 6, 9-10). Plaintiff claims that the force was unauthorized and unprovoked. (*Id*.).

The Court screened the Complaint pursuant to Section 1915A on March 9, 2020. (Doc. 15). Plaintiff was allowed to proceed with a claim against Agent Henning for the unauthorized use of force during his arrest without a warrant on September 12, 2019, in violation of his rights under the Fourth and/or Fourteenth Amendments[1] and pursuant to *Bivens*. (Count 1). He was also allowed to proceed with a supplemental state law battery claim. (Count 4).

On July 8, 2020, Agent Henning filed a Motion to Dismiss Count 1. (Doc. 24). Along with the Motion, Agent Henning filed a copy of the arrest warrant issued after a finding of probable cause on September 10, 2019—two days prior to Plaintiff's arrest. (Docs. 24-1 and 24-2). Citing the United States Supreme Court's decision in *Ziglar v. Abbasi*, -- U.S. --, 137 S.Ct. 1843 (2017), Agent Henning argues that Count 1 presents a new context and an unauthorized expansion of the remedy contemplated in *Bivens*. (*Id*.). He asks the Court to dismiss Count 1 pursuant to

[1] The Court's reference to the Fourteenth Amendment Due Process Clause in the Screening Order was in error. The Fourteenth Amendment Due Process Clause does not apply to federal actors, but the Fifth Amendment Due Process Clause does. This is a distinction that makes no difference here. *See Bowles v. Willingham*, 321 U.S. 504 (1994) (noting that the "restraints imposed on the national government . . . by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth."). The Court simply notes that Count 1 involves a claim against Agent Henning under the Fourth or *Fifth* Amendment, rather than the Fourth or Fourteenth Amendment.

Rule 12(b)(6) of the Federal Rules of Civil Procedure. (*Id.*). He also filed a Motion to Substitute the United States as a defendant in Count 4 pursuant to the Westfall Act and allow the claim to proceed under the Federal Tort Claims Act. (Doc. 25).

On August 11, 2020, Plaintiff filed a Response in Opposition to Defendant's Motion to Dismiss for Failure to State a Claim on Count 1. (Doc. 29). Plaintiff asserts that he intended to pursue relief against Agent Henning under *Bivens* and not against the United States under the Federal Tort Claims Act. (*Id.*). Plaintiff argues that his claim presents no new *Bivens* context and no special factors weigh against an implied damages remedy here. (*Id.*). Moreover, the FTCA provides an inadequate remedy. (*Id.*).

DISCUSSION

A. Count 1

The purpose of a motion to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Rule 12(b)(6)") is to decide the adequacy of the complaint. *Gibson v. City of Chicago*, 910 F.2d 1510, 1520 (7th Cir. 1990). In order to survive a Rule 12(b)(6) motion, the complaint must allege enough factual information to "state a claim to relief that is plausible on its face" and "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A claim is plausible when the plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A Plaintiff need not plead detailed factual allegations, but he or she must provide "more than labels and conclusions, and a formulaic recitation of the elements." *Twombly*, 550 U.S. at 570.

When considering a motion to dismiss filed pursuant to Rule 12(b)(6), the Court must accept well-pleaded facts as true and draw all possible inferences in favor of the plaintiff.

McReynolds v. Merrill Lynch & Co., Inc., 694 F.3d 873, 879 (7th Cir. 2012). The Court must "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Markor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Ordinarily, to the extent a motion filed under Rule 12(b)(6) presents matters outside of the pleadings which the Court opts to consider, the Court must treat the motion as one for summary judgment pursuant to Rule 12(d) and 56 of the Federal Rules of Civil Procedure. However, the Court may take judicial notice of matters that are in the public record when deciding a motion to dismiss. *Palay v. United States*, 349 F.3d 418, 425 n. 5 (7th Cir. 2003).

In *Bivens*, the United States Supreme Court recognized an implied damages action against federal officers who violated the Fourth Amendment prohibition against unreasonable searches and seizures. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Bivens alleged that federal drug agents entered his home and arrested him for federal drug violations apparently without probable cause or a warrant. *Id*. at 389-90, n. 1. They cuffed him within view of his wife and children, threatened to arrest his family, and searched his apartment before interrogating, booking, and visually searching him. *Id*. at 389. When Bivens sued, the trial court dismissed the case for failure to state a claim, and the court of appeals affirmed. *Id*. at 390.

The Supreme Court rejected the argument that his remedy for this misconduct should be limited to a state court damages claim. *Id*. The Court instead concluded that "the Fourth Amendment operates as a limitation upon the exercise of federal power regardless of whether the State in whose jurisdiction that power is exercised would prohibit or penalize the identical act if engaged in by a private citizen." *Id*. at 392. The Court went on to find that Bivens stated a cause

of action under the Fourth Amendment and that he was "entitled to recover money damages for injuries he . . . suffered as a result of the Agent's violation of the Amendment." *Id*. at 397.

In the decade that followed, the Supreme Court recognized an implied damages remedy under the Constitution only twice—in a Fifth Amendment gender discrimination case, *Davis v. Passman*, 442 U.S. 228 (1979), and an Eighth Amendment Cruel and Unusual Punishments Clause case, *Carlson v. Green*, 446 U.S. 14 (1980). At the time the Court decided *Bivens*, *Davis*, and *Carlson*, the Court implied causes of action to provide remedies that were not explicitly available in statutory texts "as a routine matter." *Ziglar v. Abbasi*, -- U.S. --, 137 S.Ct. 1843, 1855 (2017).

In the past three decades, however, the Court has taken a more cautious approach. *Ashcroft v. Iqbal*, 556 U.S. at 675. In *Abbasi*, the Supreme Court warned that "it is a significant step under separation-of-powers principles for a court to determine that it has authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation." *Abbasi*, 137 S.Ct. at 1856. While recognizing that *Bivens* remains good law, the *Abbasi* Court made clear that the Supreme Court has consistently declined to extend *Bivens* "to any new context or new category of defendants," and further expansion of the *Bivens* remedy is "disfavored" judicial activity. *Id*. at 1857 (citing *Iqbal*, 556 U.S. at 675). When asked to extend *Bivens*, courts should first consider whether the request involves a claim that arises in a new context or involves a new category of defendants and then proceed to ask whether any special factors counsel hesitation in granting the extension absent affirmative action by Congress. *Id*. at 1857. Defendant's motion to dismiss thus presents the question of whether extension of the *Bivens* remedy to a claim of excessive force against a federal agent who used force while executing an arrest warrant issued after a finding of probable cause presents a new *Bivens* context or involves a new category of defendants and, if so, whether special factors counsel hesitation about granting

the extension. For the reasons discussed herein, the Court finds that Count 1 does present a new context, and special factors counsel against expansion of the *Bivens* remedy here.

1. New Context

A claim arises in a new *Bivens* context where a case differs in a meaningful way from a previous *Bivens* case decided by the Court. *Abbasi*, 137 S.Ct. at 1859-60. Differences may include the constitutional right at issue, the rank of the officer involved, the extent of judicial guidance for the official conduct, the risk of disruptive intrusion by the Judiciary into the functioning of other government branches, or the other special factors not considered in previous *Bivens* cases. *Id*. This list is not exhaustive. *Id*.

Of the three Supreme Court cases recognizing an implied damages remedy under the Constitution (*i.e.*, *Bivens*, *Davis*, and *Carlson*), *Bivens* has the most overlap with the instant case. Although similar, the underlying facts of the two cases are different. *Bivens* involved six federal drug agents entering a home without a warrant, arresting the plaintiff in the presence of his family, and visually searching him. The instant case involves a single federal drug agent's arrest of the plaintiff in public pursuant to a warrant issued two days earlier upon a finding of probable cause. (*See* Doc. 24-1 and 24-2).

The constitutional right at issue in the cases is also different. *Abbasi*, 137 S.Ct. at 1859-60. While *Bivens* tested the constitutionality of the home entry, arrest, and search without a warrant, the instant matter tests the amount of force that can reasonably be used during an arrest. *Bivens*, 403 U.S. at 389-90. In *Bivens*, the rights at issue were "primarily rights of privacy." *Id*. Here, the right at issue is primarily the right to be free from excessive force incident to an otherwise lawful arrest. (*See* Docs. 24-1 and Doc. 24-2).

In addition, the officers were acting pursuant to different mandates. In *Bivens*, the officers lacked a warrant and probable cause to make the arrest. *Bivens*, 403 U.S. at 389-90, n. 1. In the instant case, the officer acted pursuant to a warrant issued after a finding of probable cause. (Doc. 24-1 and 24-2). The officers' legal mandate in *Bivens* thus differed from the officer's legal mandate here. When determining whether a claim presents a new context, the *Abbasi* Court instructs lower courts to read *Bivens* narrowly. *Id*. at 1856-57. Consistent with this instruction, the Court finds that the differences noted here are meaningful, and Count 1 presents a new *Bivens* context.

2. Special Factors

When determining whether special factors counsel hesitation in expansion of an implied damages remedy here, the analysis boils down to whether Congress or the courts should decide to authorize a damages suit. *Abbasi*, 137 S.Ct. at 1857 (citing *Bush v. Lucas*, 462 U.S. 367 (1983)). Courts must refrain from creating a remedy where there are reasons to think that Congress might question the necessity of a damages remedy as part of the system for correcting a wrong and enforcing the law. *Abbasi*, 137 S.Ct. at 1858. Therefore, when presented with the question of whether Congress or the Court should decide to authorize a damages suit, the answer is usually Congress. *Id*.

Defendant argues that the availability of the Federal Tort Claims Act as a potential alternative remedy militates against expansion of a *Bivens* remedy here. The FTCA waives the Government's sovereign immunity from tort suits, but it excepts from the waiver certain intentional torts. 28 U.S.C. § 2680(h). However, Section 2680(h) contains a proviso that *extends* the waiver of sovereign immunity to claims for six intentional torts, including assault and battery, that are based on the "acts or omissions" of an "investigative or law enforcement officer," *i.e.*, a

federal officer "who is empowered by law to execute searches, to seize evidence, or to make arrests." *Id*. This proviso applies to law enforcement officers' acts or omissions that arise within the scope of their employment, regardless of whether the officers are engaged in investigative or law enforcement activity or are executing a search, seizing evidence, or making an arrest." *Millbrook v. United States*, 569 U.S. 50 (2013). Although the FTCA does not authorize suit against the United States for the constitutional torts of its employees, the availability of this statutory remedy for the underlying conduct at issue provides an alternative avenue to relief. *See* 28 U.S.C. § 2679(b)(2)(A); *Schweiker v. Chilicky*, 487 U.S. 412, 425, 427 (1988).

Plaintiff argues that the Supreme Court squarely rejected this position in *Carlson* when it found that the FTCA provides an insufficient remedy for constitutional violations by individual officers. *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (citing *Carlson*, 446 U.S. at 21) ("Because the *Bivens* remedy is recoverable against individuals, it is a more effective deterrent than the FTCA remedy."). Plaintiff disregards the thirty years of precedent that has since limited expansion of the *Bivens* remedy where no other remedy was available. In *Malesko*, for example, the Supreme Court observed that it has since "rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court. . . . So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69. More recently, the Supreme Court observed that alternative remedies "need not be perfectly congruent" to preclude a *Bivens* remedy. *Minneci v. Pollard*, 556 U.S. 118, 129 (2012). Since then, the *Abbasi* Court has pointed out that "when alternative methods of relief are available, a *Bivens* remedy usually is not." *Abbasi*, 137 S.Ct. at 1863. And just last week, the Supreme Court observed that the FTCA "opened a new path to relief (suits against the United States) while

narrowing the earlier one (suits against employees)." *Brownback v. King*, -- S.Ct. --, 2021 WL 726222 (Feb. 25, 2021).

The existence of the FTCA as a potential remedy counsels hesitation in recognizing an implied damages remedy for the constitutional violation alleged in this case. Legislative action suggests that Congress did not want a damages remedy is a factor counseling hesitation. *Abbasi*, 137 S.Ct. at 1865. By enacting the law enforcement proviso, Congress signaled that it does not want a damages remedy against individual federal agents. Congress also did not provide a "standalone" damages remedy against federal officers when it enacted the Prison Litigation Reform Act. *Id*. In light of the Supreme Court's expressed caution about extending the *Bivens* remedy, this context must be regarded as new, and special factors counsel hesitation in extending the *Bivens* remedy to include Plaintiff's claim. Accordingly, Defendant's Motion to Dismiss Pursuant to Rule 12(b)(6) or, alternatively Rule 12(d) and 56 (Doc. 24), shall be granted, and Count 1 shall be dismissed.

B. Count 4

The only other claim remaining in this action is an Illinois battery claim against Agent Henning. (Doc. 15). Generally speaking "when a court has dismissed all the federal claims in a lawsuit before trial, it should relinquish jurisdiction over supplemental state law claims rather than resolve them on the merits." 28 U.S.C. § 1367(c)(3); *Cortezano v. Salin Bank & Trust Co.*, 680 F.3d 936, 941 (7th Cir. 2012); *Wright v. Associated Ins. Cos. Inc.*, 29 F.3d 1244, 1252 (7th Cir. 1994) ("[W]hen all federal-law claims are dismissed before trial, the pendant claims should be left to the state courts."). There are exceptions to this general rule. For example, the Court may retain jurisdiction when: "(1) the statute of limitations has run on the pendant claim, precluding the filing of a separate suit in state court; (2) substantial judicial resources have already been committed, so

that sending the case to another court will cause a substantial duplication of effort; or (3) it is absolutely clear how the pendant claims can be decided." *Sharp Elecs. Corp. v. Metro Life Ins. Co.*, 578 F.3d 505, 514-15 (7th Cir. 2009) (quoting *Wright*, 29 F.3d at 1251) (internal quotations omitted). None of these exceptions warrants retention of jurisdiction over the supplemental claim, as the battery claim is not time-barred under the applicable two-year statute of limitations, the case remains in its infancy, and it is not clear how the claim should be decided. Accordingly, the Court shall relinquish jurisdiction over the battery claim in Count 4, and this claim shall be dismissed without prejudice. Plaintiff may pursue his battery claim in state court, if he wishes to do so.

The Court declines to substitute the United States in place of Agent Henning and convert this matter to an action brought pursuant to the FTCA. (Doc. 25). Plaintiff chose to bring this action pursuant to 28 U.S.C. § 1331 and *Bivens*—not the FTCA. (*See* Doc. 1, p. 1). In his Response, Plaintiff states that he intended to pursue a claim against Agent Henning and not the United States. (Doc. 27). Litigants are free to bring separate suits against joint tortfeasors. *Sterling v. United States*, 85 F.3d 1225, 1228 (7th Cir. 1996). Plaintiff has made clear that he does not wish to name the United States in this lawsuit or bring an FTCA claim against the United States here. There may be many good reasons for this. For one thing, the FTCA forbids a victim to file suit against the United States until first presenting an administrative claim to the appropriate federal agency in an attempt to resolve it without litigation. 28 U.S.C. § 2672. Failure to do so can cost the plaintiff the opportunity to recover damages. *McNeil v. United States*, 508 U.S. 106 (1993). Plaintiff is in the best position to decide whether and when to bring an FTCA claim against the United States. Accordingly, the Motion for Substitution (Doc. 25) shall be **DENIED**.

Disposition

IT IS ORDERED that Defendant Henning's Motion to Dismiss Count 1 Pursuant to Rule 12(b)(6) or, Alternatively Rule 12(d) and 56 (Doc. 24), is **GRANTED**, and Defendant Henning's Motion to Substitute Party in Count 4 and Dismiss Defendant Henning (Doc. 25) is **DENIED**.

IT IS ORDERED that **COUNT 1** is **DISMISSED** with prejudice against Defendant **HENNING** because the claim presents a new context and an unauthorized expansion of the implied damages remedy under *Bivens*; **COUNT 4** is **DISMISSED** without prejudice against Defendant **HENNING** because the Court relinquishes jurisdiction over the supplemental state law battery claim pursuant to 28 U.S.C. § 1367(c)(3).

This action is **DISMISSED** with prejudice for failure to state a claim upon which relief may be granted under 28 U.S.C. § 1331 and *Bivens*.

If Plaintiff wishes to appeal this Order, he may file a notice of appeal with this Court within thirty days of the entry of judgment. FED. R. APP. 4(a)(1)(A). If Plaintiff does choose to appeal, he will be liable for the $505.00 appellate filing fee irrespective of the outcome of the appeal. *See* FED. R. APP. 3(e); 28 U.S.C. § 1915(e)(2); *Ammons v. Gerlinger*, 547 F.3d 724, 725-26 (7th Cir. 2008). He must list each of the issues he intends to appeal in the notice of appeal. A proper and timely motion filed pursuant to Federal Rule of Civil Procedure 59(e) may toll the 30-day appeal deadline. FED. R. APP. P. 4(a)(4). A Rule 59(e) motion must be filed no more than twenty-eight (28) days after the entry of judgment, and this 28-day deadline cannot be extended.

The Clerk's Office is **DIRECTED** to close this case and enter judgment accordingly.

IT IS SO ORDERED.

DATED: March 3, 2021

s/J. Phil Gilbert
J. PHIL GILBERT
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DONALD V. SNOWDEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 19-cv-01322-JPG**
	)	
JEREMY HENNING, CASHIER CINDY, QUALITY INN HOTEL, and DEA,	)	
	)	
Defendants.	)	

JUDGMENT

GILBERT, District Judge:

This matter having come before the Court and the issues having been heard, and the Court having rendered a decision,

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of defendants and against plaintiff on the following claims:

Count I, a claim against Henning for subjecting Plaintiff to the unauthorized use of force during his arrest at the Quality Inn Hotel on September 12, 2019, in violation of his rights under the Fourth and/or Fifth Amendments and *Bivens* is **DISMISSED with prejudice**.

Count II, a claim against Cindy and Quality Inn Hotel for obstructing justice by luring Plaintiff to the front desk and asking him to pay for his room on September 12, 2019, in violation of Plaintiff's rights under the Fourth and/or Fifth Amendments and *Bivens* is **DISMISSED with prejudice**.

Count III, a claim against the Drug Enforcement Agency (DEA) of Carbondale, Illinois for failing to train, investigate, discipline, and terminate Henning for his misconduct, in violation of Plaintiff's rights under the Fourth and/or Fifth Amendments and *Bivens* is **DISMISSED with prejudice**.

Count IV, a claim against Henning for committing battery against Plaintiff in violation of his rights under Illinois state law is **DISMISSED without prejudice**.

DATED: 3/3/2021

MARGARET M. ROBERTIE, CLERK

By: s/ Tanya Kelley
Deputy Clerk

APPROVED: s/ J. Phil Gilbert
J. PHIL GILBERT
United States District Judge

U.S. District Court
Southern District of Illinois (East St. Louis)
CIVIL DOCKET FOR CASE #: 3:19-cv-01322-JPG

Snowden v. Henning et al
Assigned to: Judge J. Phil Gilbert
Case in other court: USCA 7, 21-01463
Cause: 28:1331 Federal Question: Bivens Act

Date Filed: 12/02/2019
Date Terminated: 03/03/2021
Jury Demand: Plaintiff
Nature of Suit: 550 Prisoner: Civil Rights
Jurisdiction: Federal Question

Plaintiff

Donald V. Snowden

represented by **Donald V. Snowden**
JACKSON COUNTY JAIL
1001 Mulberry Street
Murphysboro, IL 62966
PRO SE

V.

Defendant

Jeremy Henning
DEA Agent

represented by **Suzanne M. Garrison**
Assistant U.S. Attorney - Fairview Heights
Generally Admitted
9 Executive Drive
Suite 300
Fairview Heights, IL 62208
618-628-3700
Email: Suzanne.Garrison@usdoj.gov
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Quality Inn Hotel
Carbondale, IL
TERMINATED: 03/09/2020

Defendant

Cashier Cindy
Quality Inn Hotel, Carbondale, IL
TERMINATED: 03/09/2020

Defendant

DEA
Carbondale, IL
TERMINATED: 03/09/2020

Date Filed	#	Docket Text
12/02/2019	1	COMPLAINT against All Defendants, filed by Donald V. Snowden.(jsm2) (Entered: 12/02/2019)
12/02/2019	2	MOTION for Leave to Proceed in forma pauperis by Donald V. Snowden. (jsm2) (Entered: 12/02/2019)
12/02/2019	3	MOTION for Recruitment of Counsel by Donald V. Snowden. (jsm2) (Entered: 12/02/2019)
12/02/2019	4	NOTICE AND ORDER: The Court has received your complaint and your motion to proceed without prepayment of the filing fee. Your case number is 19-cv-1322-JPG. The following is some information you should know regarding the initial stages of your lawsuit. After your filing fee status is determined, the Court will review your complaint to identify legally sufficient claims and defendants and dismiss any legally insufficient claims. See: 28 U.S.C. Sec. 1915A. The Court will conduct this review within the next 60 days and inform you of the findings in a Merit Review Order. No other action will be taken in your case during this time, absent extraordinary circumstances. Therefore, you do not need to submit any evidence, argument, motions, or other documents. If you filed a motion for recruitment of counsel along with your complaint, it will not be considered until the merit review is complete. Please note that any motion for recruitment of counsel must include evidence of your own efforts to find counsel, such as a list of the attorneys you contacted and copies of letters you sent or received. See Pruitt v. Mote, 503 F.3d 647, 654-55 (7th Cir. 2007). If you do not receive a Merit Review Order within the next 60 days, you may file a motion requesting the status of your case. In the event your claim(s) survive the merit review, further information and instruction will be provided to you at that time. In addition, several administrative matters warrant mention. Any communication directed to the Court should be in the form of a motion or other pleading and not a letter. All mail should be sent to: Clerk's Office, U.S. District Court, 750 Missouri Avenue, East St. Louis, IL 62201. A copy of the Notice and Consent to Proceed Before a Magistrate Judge form is attached to this Order. Finally, you are advised that if your address changes, you must notify the Court within seven days of the change by filing a Notice of Change of Address. Failure to do so could result in the dismissal of your case. Signed by Judge J. Phil Gilbert on 12/2/2019. (jsm2) (Entered: 12/02/2019)
12/05/2019	5	ORDER: Plaintiff has filed a Motion for Leave to Proceed in Forma Pauperis ("IFP") in this case (see Doc. 2), but has failed to provide the

		necessary prisoner trust fund account information as required by the PLRA to determine whether the inmate is entitled to proceed without prepaying fees and costs. Pursuant to 28 U.S.C. Section 1915(b)(1), the Court must review the prisoner trust fund account statement for the 6 month period immediately preceding the filing of this action. IT IS THEREFORE ORDERED that Plaintiff shall provide the Clerk of Court with the attached certification completed by the Trust Fund Officer at the facility and a copy of his/her trust fund account statement (or institutional equivalent) for the period 6/1/2019 to 12/2/2019 no later than 45 days from the date of this order. Failure to do so will result in dismissal of this action for failure to comply with an Order of this Court. Fed. R. Civ. P. 41(b). See generally Ladien v. Astrachan, 128 F.3d 1051 (7th Cir. 1997); Johnson v. Kamminga, 34 F.3d 466 (7th Cir. 1994). The Clerk is DIRECTED to mail a copy of this Order and the certification form to the Trust Fund Officer at Williamson County Sheriff's Department. (Trust Fund Statement due on or before 1/21/2020). Signed by Judge J. Phil Gilbert on 12/5/2019. (tjk) (Entered: 12/05/2019)
12/09/2019	6	CONSENT/NON-CONSENT TO U.S. MAGISTRATE JUDGE - sealed pending receipt from all parties. (jsm2) (Entered: 12/09/2019)
12/09/2019	7	Notice of Declination to Consent: A party to this action has declined to consent to magistrate judge jurisdiction. Accordingly, pursuant to Administrative Order 257, this case shall REMAIN with District Judge J. Phil Gilbert. (jsm2)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 12/09/2019)
12/13/2019	8	EXHIBIT by Donald V. Snowden. Exhibit to 3 Motion for Recruitment of Counsel. (jsm2) (Entered: 12/13/2019)
12/13/2019	9	Prisoner Trust Fund Account Statement. (jsm2) (Entered: 12/13/2019)
12/13/2019	10	Prisoner Trust Fund Account Statement by Donald V. Snowden. (jsm2) (Entered: 12/13/2019)
12/19/2019	11	ORDER GRANTING Plaintiff's motion to proceed in forma pauperis ("IFP") (Doc. 2). Pursuant to 28 U.S.C. Section 1915(b)(1), Plaintiff is assessed an initial partial filing fee of $121.48. The agency having custody of Plaintiff is directed to forward the initial partial filing fee from Plaintiff's account to the Clerk of Court upon receipt of this Order. Plaintiff shall make monthly payments of 20% of the preceding month's income credited to Plaintiff's prison trust fund account (including all deposits to the inmate account from any source) until the $350.00 filing fee is paid in full. The agency having custody of Plaintiff shall forward payments from Plaintiff's account to the Clerk of this Court each time the amount in the account exceeds $10 until the $350.00 filing fee is paid.In addition, Plaintiff shall note that the filing fees for multiple cases cumulate. See Newlin v. Helman, 123 F.3d 429, 436 (7th Cir. 1997), overruled in part on

		other grounds by Lee v. Clinton, 209 F.3d 1025 (7th Cir. 2000); Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000). A prisoner who files one suit must remit 20% of his monthly income to the Clerk of the Court until his fees have been paid; a prisoner who files a second suit or an appeal must remit 40%; and so on. Newlin, 123 F.3d at 436. "Five suits or appeals mean that the prisoner's entire monthly income must be turned over to the court until the fees have been paid." Id. Payments shall be mailed to: Clerk of the Court, United States District Court for the Southern District of Illinois, 750 Missouri Avenue, East St. Louis, Illinois 62201. The Clerk is DIRECTED to mail a copy of this Order to the Trust Fund Officer at the Williamson County Sheriff's Department upon entry of this Order. Signed by Judge J. Phil Gilbert on 12/19/2019. (tjk)THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 12/19/2019)
01/21/2020		Initial Prisoner Filing Fee: $ 3.50 received, receipt number 34625098972 (amv) (Entered: 01/21/2020)
01/30/2020	12	MOTION for status of case and 3 MOTION for Recruitment of Counsel by Donald V. Snowden. (jaj) (Entered: 01/30/2020)
01/31/2020	13	ORDER GRANTING 12 Motion for Status. Plaintiff's Complaint and Motion for Recruitment of Counsel (Doc. 3) are currently under review pursuant to 28 U.S.C. 1915A. Once review is complete, Plaintiff will be provided with a copy of the Court's screening order. Signed by Judge J. Phil Gilbert on 1/31/2020. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 01/31/2020)
02/26/2020	14	NOTICE of Change of Address by Donald V. Snowden. (jsm2) (Entered: 02/26/2020)
03/09/2020	15	ORDER FOR SERVICE OF PROCESS on Defendant HENNING; DENYING 3 Motion for Recruitment of Counsel without prejudice. COUNTS 1 and 4 will proceed against Defendant HENNING; COUNT 2 is DISMISSED with prejudice against Defendants CINDY and QUALITY INN HOTEL, and COUNT 3 is DISMISSED with prejudice against Defendant DRUG ENFORCEMENT AGENCY OF SOUTHERN ILLINOIS. Pursuant to Administrative Order No. 244, Defendant should only respond to the issues in this Merits Review Order. The Clerk of Court is DIRECTED to TERMINATE Defendants CINDY, QUALITY INN HOTEL, and DEA as parties to this action in CM/ECF and ENTER the standard qualified protective order under the Health Insurance Portability and Accountability Act. Signed by Judge J. Phil Gilbert on 3/9/2020. (jsy) (Entered: 03/09/2020)
03/09/2020	16	Summons Issued as to Jeremy Henning. (tjk) (Entered: 03/09/2020)
03/10/2020	17	HIPAA Qualified Protective Order. Signed by Judge J. Phil Gilbert on 3/10/2020. (lmb) (Entered: 03/10/2020)

03/17/2020	18	RETURN OF SERVICE on US Attorney for Doc. 16. (jsm2) (Entered: 03/17/2020)
03/26/2020	19	RETURN OF SERVICE on Attorney General for Doc. 16. (jsm2) (Entered: 03/26/2020)
06/09/2020	20	MOTION for Status by Donald V. Snowden. (jsm2) (Entered: 06/09/2020)
06/10/2020	21	STRICKEN per ORDER at doc 22 ORDER GRANTING 20 Motion for Status. The Complaint is currently under review pursuant to 28 U.S.C. 1915A. Plaintiff will be provided with a copy of the Court's screening order once this review is complete. Signed by Judge J. Phil Gilbert on 6/10/2020. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. Modified on 6/16/2020 (tba). (Entered: 06/10/2020)
06/15/2020	22	ORDER: On June 9, 2020, Plaintiff filed a 20 Motion for Status of Complaint. The Court's Order (Doc. 21) granting the Motion is STRICKEN, and Plaintiff's 20 Motion for Status is GRANTED, as follows: Plaintiff's Complaint survived screening against Defendant Jeremy Henning on March 9, 2020, and Summons was issued as to this defendant. (See Docs. 15 and 16). However, the Summons is not yet executed, and Defendant Henning's answer is not yet due. Signed by Judge J. Phil Gilbert on 6/15/2020. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 06/15/2020)
07/08/2020	23	NOTICE of Appearance by Suzanne M. Garrison on behalf of Jeremy Henning (Garrison, Suzanne) (Entered: 07/08/2020)
07/08/2020	24	First MOTION to Dismiss for Failure to State a Claim *on Count 1* by Jeremy Henning. Responses due by 8/10/2020 (Attachments: # 1 Exhibit Arrest Warrant, # 2 Exhibit Indictment)(Garrison, Suzanne) (Entered: 07/08/2020)
07/08/2020	25	MOTION to Substitute Party by Jeremy Henning. (Attachments: # 1 Certification)(Garrison, Suzanne) (Entered: 07/08/2020)
07/23/2020	26	SUMMONS Returned Executed Jeremy Henning served on 5/19/2020, answer due 6/9/2020. (tba) (Entered: 07/23/2020)
08/03/2020	27	MOTION for Clarification by Donald V. Snowden. (jsm2) (Entered: 08/03/2020)
08/04/2020	28	ORDER GRANTING 27 Motion for Clarification filed by Donald Snowden. Plaintiff seeks clarification about the status of service of this suit on defendant and the deadline for defendant's answer. This suit has now been served on Defendant Jeremy Henning. In lieu of an Answer, Defendant filed a Motion to Dismiss Count 1 (Doc. 24) and Motion to Substitute Party in Count 4 (Doc. 25) on July 8, 2020. Plaintiff's deadline to file a written response is AUGUST 8, 2020. Until the Motion to Dismiss

		is decided, no answer is due. Signed by Judge J. Phil Gilbert on 8/4/2020. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 08/04/2020)
08/11/2020	29	RESPONSE in Opposition re 24 First MOTION to Dismiss for Failure to State a Claim *on Count 1* filed by Donald V. Snowden. (jsm2) (Entered: 08/11/2020)
01/06/2021	30	MOTION for status by Donald V. Snowden. (kare) (Entered: 01/06/2021)
01/07/2021	31	ORDER GRANTING 30 Motion for Status. Defendant's 24 First Motion to Dismiss For Failure to State a Claim on Count 1 and 25 Motion to Substitute Party are currently under review. The Court will provide the parties with a copy of the order addressing these motions, once this review process is complete. Signed by Judge J. Phil Gilbert on 1/7/2021. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 01/07/2021)
02/18/2021	32	MOTION to Produce Full Authentic Arrest Video by Donald V. Snowden. (kare) (Entered: 02/19/2021)
02/18/2021	33	MOTION for Recruitment of Counsel by Donald V. Snowden. (kare) (Entered: 02/19/2021)
02/18/2021	34	MOTION for Grand Jury Transcripts from arresat warrant. by Donald V. Snowden. (kare) (Entered: 02/19/2021)
02/18/2021	35	MOTION for Private Investigator by Donald V. Snowden. (kare) (Entered: 02/19/2021)
02/22/2021	36	ORDER DENYING 32 MOTION to Produce Full Authentic Arrest Video; 34 MOTION for Grand Jury Transcripts from arrest warrant; and 35 MOTION for Private Investigator. Plaintiff's motions pertain to discovery on the merits of his claim. However, this case remains in its infancy, and no discovery on the merits has yet occurred. Before the case proceeds to discovery on the merits, the Court must first address the pending 24 Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(b), and Defendant must answer the Complaint. The Court will then enter an Initial Scheduling Order that sets forth instructions and deadlines for discovery. Signed by Judge J. Phil Gilbert on 2/22/2021. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/22/2021)
02/22/2021	37	ORDER DENYING 33 Second Motion for Recruitment of Counsel without prejudice. See Pruitt v. Mote, 503 F.3d 647, 654 (7th Cir. 2007) (articulating factors district court must consider when presented with request for counsel by indigent litigant). Plaintiff has still failed to demonstrate reasonable efforts to locate counsel on his own or to show the court that he is effectively precluded from searching. In addition, Plaintiff has not shown the Court that he requires the assistance of counsel at this

		point. Plaintiff is a college graduate who cites no physical, mental, medical, educational, or language barriers to self-representation. (Docs. 3 and 33). This case focuses on a single legal claim arising from the use of unauthorized force against him, and the claim is not overly complicated. The case is still in its early stages, with a pending 24 Motion to Dismiss Under Federal Rule of Civil Procedure 12(b)(b). Given all of these considerations, the Court deems it inappropriate to recruit counsel on Plaintiff's behalf at this time. Should his situation change as the case progresses, Plaintiff may file a new motion requesting court-recruited counsel after first demonstrating reasonable efforts to find an attorney on his own. Signed by Judge J. Phil Gilbert on 2/22/2021. (jsy) THIS TEXT ENTRY IS AN ORDER OF THE COURT. NO FURTHER DOCUMENTATION WILL BE MAILED. (Entered: 02/22/2021)
03/03/2021	38	ORDER DISMISSING CASE, GRANTING 24 Motion to Dismiss Count 1, and DENYING 25 Motion to Substitute Party in Count 4. COUNT 1 is DISMISSED with prejudice against Defendant HENNING, and COUNT 4 is DISMISSED without prejudice. Because no other claims are pending, the action is DISMISSED with prejudice. Signed by Judge J. Phil Gilbert on 3/3/2021. (jsy) (Entered: 03/03/2021)
03/04/2021	39	JUDGMENT. Approved by Judge J. Phil Gilbert on 3/3/2021. (tjk) (Entered: 03/04/2021)
03/15/2021	40	NOTICE OF APPEAL by Donald V. Snowden. (kare) (Entered: 03/15/2021)
03/15/2021	41	AMENDED NOTICE OF APPEAL by Donald V. Snowden. (kare) (Entered: 03/15/2021)
03/15/2021	42	Transmission of Short Record to US Court of Appeals re 41 Notice of Appeal, 40 Notice of Appeal (tba) (Entered: 03/15/2021)
03/15/2021	43	Rule 10 Letter (tba) (Entered: 03/15/2021)
03/16/2021	44	USCA Case Number 21-1463 for 41 Notice of Appeal filed by Donald V. Snowden, 40 Notice of Appeal filed by Donald V. Snowden. (Attachments: # 1 Notice of Case Opening, # 2 PLRA Fee Notice and Order)(tba) (Entered: 03/16/2021)
03/22/2021		USCA Appeal Fees received $ 505 receipt number 34625107303 re 41 Notice of Appeal filed by Donald V. Snowden, 40 Notice of Appeal filed by Donald V. Snowden (amv) (Entered: 03/22/2021)
04/14/2021	45	BRIEFING ORDER of USCA as to 41 Notice of Appeal filed by Donald V. Snowden (tba) (Entered: 04/14/2021)

UNITED STATES DISTRICT COURT

for the
Southern District of Illinois

Donald V. Snowden
Plaintiff(s)/Petitioner(s)

v.

Jeremy Henning
DEA of Carbondale, IL 62901
Quality Inn, Hotel Carbondale, IL 62901
Defendant(s)/Respondent(s)

Case Number: 19-1322-JPG
(Clerk's Office will provide)

☐ CIVIL RIGHTS COMPLAINT
pursuant to 42 U.S.C. §1983 (State Prisoner)

■ CIVIL RIGHTS COMPLAINT
pursuant to 28 U.S.C. §1331 (Federal Prisoner)

☐ CIVIL COMPLAINT
pursuant to the Federal Tort Claims Act, 28 U.S.C. §§1346, 2671-2680, or other law

I. JURISDICTION

Plaintiff:

A. Plaintiff's mailing address, register number, and present place of confinement. 404 N. Van Buren
Marion, IL 62959
Williamson County Jail

Defendant #1:

B. Defendant Jeremy Henning (a) (Name of First Defendant) is employed as DEA agent (b) (Position/Title)

with Carbondale Illinois, DEA agency (c) (Employer's Name and Address)

At the time the claim(s) alleged this complaint arose, was Defendant #1 employed by the state, local, or federal government? ■ Yes ☐ No

If your answer is YES, briefly explain:

Jeremy Henning is a DEA investigating agent with the Southern Illinois agency located in Carbondale, IL 62901

Defendant #2:

C. Defendant Quality Inn Hotel Staff is employed as
(Name of Second Defendant)

cashier / cindy
(Position/Title)

with Quality Inn Hotel 1415 E. main St
(Employer's Name and Address)
Carbondale, IL 62901

At the time the claim(s) alleged in this complaint arose, was Defendant #2 employed by the state, local, or federal government? ■ Yes ☐ No

If you answer is YES, briefly explain:
The cashier at the Quality Inn Hotel located at the above address. witnessed assault, lied in statement

Additional Defendant(s) (if any):

D. Using the outline set forth above, identify any additional Defendant(s).
The Quality Inn owner, tampered with video surveillance, and no matter what, the incident happened on his premises his property.
and the DEA of Carbondale for not disciplining or terminating the agent after the incident.

II. PREVIOUS LAWSUITS

A. Have you begun any other lawsuits in state or federal court while you were in prison or jail (during either your current or a previous time in prison or jail), e.g., civil actions brought under 42 U.S.C. § 1983 (state prisoner), 28 U.S.C. § 1331 (federal prisoner), 28 U.S.C. §§ 1346, 2671-2680, or other law? ☐Yes ■No

B. If your answer to "A" is YES, describe each lawsuit in the space below. If there is more than one lawsuit, you must describe the additional lawsuits on another sheet of paper using the same outline. You must list ALL lawsuits in any jurisdiction, including those that resulted in the assessment of a "strike" under 28 U.S.C. § 1915(g) and/or those that were dismissed for being frivolous, malicious, or for failure to state a claim (see 28 U.S.C. § 1915A; 28 U.S.C. § 1915(e)(2); Federal Rule of Civil Procedure 12(b)(6)). FAILURE TO FULLY DISCLOSE YOUR LITIGATION HISTORY, INCLUDING "STRIKES," MAY RESULT IN SANCTIONS THAT INCLUDE DISMISSAL OF THIS ACTION.

1. Parties to previous lawsuits:
Plaintiff(s):

None

Defendant(s):

2. Court (if federal court, name of the district; if state court, name of the county): None N/A

3. Docket number:
None N/A

4. Name of Judge to whom case was assigned:
None N/A

5. Type of case (for example: Was it a habeas corpus or civil rights action?):
None N/A

6. Disposition of case (for example: Was the case dismissed? Was it appealed? Is it still pending?):
N/A

7. Approximate date of filing lawsuit:
N/A

8. Approximate date of disposition:

N/A

9. Was the case dismissed as being frivolous, malicious, or for failure to state a claim upon which relief may be granted and/or did the court tell you that you received a "strike?"

N/A

III. GRIEVANCE PROCEDURE

A. Is there a prisoner grievance procedure in the institution? ☐ Yes ☐ No

didn't happen in jail or prison

B. Did you present the facts relating to your complaint in the prisoner grievance procedure? ☐ Yes ☐ No

N/A

C. If your answer is YES,

1. What steps did you take?

N/A

2. What was the result?

N/A

D. If your answer is NO, explain why not.

N/A

E. If there is no prisoner grievance procedure in the institution, did you complain to prison authorities? ☐ Yes ☐ No

N/A

F. If your answer is YES,

1. What steps did you take?

N/A

2. What was the result?

N/A

G. If your answer is NO, explain why not.

didn't happen in a jail or prison

H. Attach copies of your request for an administrative remedy and any response you received. If you cannot do so, explain why not:

N/A

IV. STATEMENT OF CLAIM

A. State here, as briefly as possible, when, where, how, and by whom you feel your constitutional rights were violated. Do not include legal arguments or citations. If you wish to present legal arguments or citations, file a separate memorandum of law. If you intend to allege a number of related claims, number and set forth each claim in a separate paragraph. If your claims relate to prison disciplinary proceedings, attach copies of the disciplinary charges and any disciplinary hearing summary as exhibits. You should also attach any relevant, supporting documentation.

on 9-12-2019 between 11:00 A.M. and 1:00 P.M I was at the Quality Inn Hotel located in Carbondale, IL address 1415 E. Main St. The cashier cindy, called me down to pay for my room knowing the police were there to arrest me. According to the U.S. 14th Amendment, we shall be equally treated, and upon arrest, agent Henning, being DEA approached me without warrant, without me resisting, and used excessive force, and abusive unfair actions by DEA, which violated the 14th amendment. I was attacked and treated unfairly, with excessive force and assult during arrest when the arresting office being a peace officer, DEA agent, that is suppossed to protect and serve. All this took place on camara and audeo is held in the hands of the Federal prosecutor of the southern District of Illinois in Benton, IL. The Federal prosecutor as well as the DEA agency in carbondale, allowed the agent to still work his case against me, even as he has inconsistancies in the case, as well as no discipline or sanctions against the officer. That also violated my 8th amendment to not receive any medical when I received two black eyes, and an eye socket fracture from the excessive force, and the police misconduct. The agent, being mr. Henning admitted that he hit me but lied about how many times. The prosecutor has malicious prosecution from this event, and is seeking to prosecute me with no evidence of me distributing anything. This all stemmed From the 8-2-2019 interview when they violated my rights in my other civil complaint I'm filing at this same time. The Quality Inn allowed this to happen upon their premises, and I was injured due to my arrest, as I'm on camara, and did not resisting. I attached the civil rights, constitutional rights to this claim.

V. REQUEST FOR RELIEF

State exactly what you want this court to do for you. If you are a state or federal prisoner and seek relief which affects the fact or duration of your imprisonment (for example: illegal detention, restoration of good time, expungement of records, or parole), you must file your claim on a habeas corpus form, pursuant to 28 U.S.C. §§ 2241, 2254, or 2255. Copies of these forms are available from the clerk's office.

I would like to receive justice, and compensation from my abuse and assult I took from the excessive force during arrest under the 14th amendment in the constitution. I received damages from police misconduct, and now I'm facing malicious prosecution, which I'm aiming for aquittal, I want compensation from the Quality Inn Hotel from carbondale, IL, compensation from the DEA in carbondale, one being the pain and suffering, the abuse I took from the DEA agent, and the Quality Inn where it happend I ask $100,000 (one hundred thousand) (DEA agency $100,000) one hundred thousand dollars

VI. JURY DEMAND (*check one box below*)

I ask for $200,000 total from both. one hundred thousand from each.

The plaintiff ■ does ☐ does not request a trial by jury.

DECLARATION UNDER FEDERAL RULE OF CIVIL PROCEDURE 11

I certify to the best of my knowledge, information, and belief, that this complaint is in full compliance with Rule 11(a) and 11(b) of the Federal Rules of Civil Procedure. The undersigned also recognizes that failure to comply with Rule 11 may result in sanctions.

Signed on: 11-24-2019 (date)

Donald V. Snowden
Signature of Plaintiff

404 N. Van Buren
Street Address

Donald V. Snowden
Printed Name

Marion, IL 62959
City, State, Zip

Prisoner Register Number

Signature of Attorney (if any)

last page
~~fourteenth~~ thirteenth

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Civil Rights Violations

Chicago Civil Rights Attorneys

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- Violations of due process rights
- Home invasions and searches without a warrant
- False arrest and wrongful convictions
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For a free consultation with a civil rights lawyer at Ed Fox & Associates, Ltd., call 312-345-8877 or send an e-mail

Judgement order
against
DEA Agent Jeremy Henning,
the Quality Inn Hotel (1415 E. main ST.)
In Carbondale, IL 62901
and the DEA agency in
Carbondale, IL 62901

Plaintiff,
Donald
V.
Snowden

Defendent(S)
Jeremy Henning
DEA Agency of Carbondale, IL
Quality Inn Hotel (1415 E main st. carbondale, IL

(Count 1 - Jeremy Henning - 28 u.s.c. 1331)

on September 12, 2019, around noon 12:00 p.m, the plaintiff, Donald V. Snowden, was at the Quality Inn Hotel, paying for a room at the front desk. That address being 1415 E. main ST, Carbondale, IL 62901.

2. The defendent, Jeremy Henning come in the front door, and rushed into the plaintiff pushed him into the the door that leads to the register, then once in the door on the floor, the defendent punched the plaintiff several times in the face causing great bodily harm. That violated the plaintiffs constitutional rights the 4th amendment, and the 14th amendment. The ~~D.S.~~ D.S. used excessive force during arrest, when the plaintiff done no resisting defendent or anything for such behavior from the defendant.

3. The evidence is on record there's video footage with the Federal prosecutor in ~~Benton~~ Benton, IL 62812 ~~at the~~ P.S. at the Federal Courthouse in Benton, IL and pictures of the bodily harm with the probation department as well.

4. The cashier knowingly knew that would happen and allowed to call me down to the front desk to pay for room with the officers in the front waiting for me. The officer admitted to hitting the plaintiff, Donald V. Snowden, and the plaintiff never resisted on the video that both the prosecutor and the criminal attorney has in their possession. (Continued)

p. 2 of 4

(5.) No other charges arised to the plaintiff, Mr. Snowden. at that arrest.

(6.) That the afore mentioned acts by defendant Continued grossly excessive force, abuse by DEA, unfair abusive actions by DEA, falling under police misconduct violating the 14th amendment in the united States constitution and the 4th ameadment, victim damages and the right to be safe and secure.

(7.) That as a result of the acts forgoing or omissions of the defendant, the plaintiff, Donald V. Snowden, incurred pain and suffering, lost his freedom, and will continue to experience pain and suffering, left eye socket damage, humiliation, and the stigma associated with having sustained a record of the aforementioned arrest.

Where fore, the plaintiff, Donald V. Snowden, Demands judgement against DEA Jeremy henning, in the amount of $100,000 (one hundred thousand dollars) plus costs.

(Count 2) Quality Inn Hotel (willful and wanton)

That on or about, september 12, 2019, at around 12:00 p.m. the plaintiff, Donald V. Snowden was arrested at the Quality Inn Hotel, located at 1415 E. main St. carbondale, IL 62901. The defendant, the cashier, cindy of the Quality Inn Hotel, witnessed the abuse, and when questioned by investigators, denied seeing anything when the video shows otherwise. The defendant, cindy of the Quality Inn, committed obstruction of justice, and she knowingly called the plaintiff down to pay for his room while the officers waited outside for her signal to come in. The plaintiff, Donald V. Snowden, herby adopts incorporates the allegations of paragraphs 1-7 of count 1 as if fully set forth herein.

(Continued)

~~30~~ 4

(Jeremy Heaning)

Count 2 continued (willful and wanton) Quality Inn Hotel)

The defendant, acted intentionally or with reckless disregard for the health and well-being of the plaintiff in unlawfully with excessive force during arrest.

wherefore, the plaintiff, Donald V. Snowden, demands judgement in the amount of $100,000 (one hundred thousand dollars)

(Count 3)(28 U.S.C 1331)

1. The plaintiff, Donald V. Snowden adopts count 1 and two, paragraphs 1-7 count 1 and paragraphs 1-2 of count 2 as fully set forth herein

2. at all times mentioned here in, the defendant, DEA agency of Carbondale IL, 62901 had customs, policies and practices that violated the forth amendment rights, and the fourteenth amendment right of arrestees under the Illinois and united States constitutions, including but not limited to:

A. It let Jeremy Heaning stay and not get evaluated to see why he done such a thing to the plaintiff, knowingly he was likely to violate the rights of his arrestee;

B. It failed to properly train, investigate, discipline and/or terminate agent Heaning for such violations

C. It gave credence to agent Jeremy Heaning's actions by refusing to discipline and/or terminate agent Jeremy Henning for such violations.

Wherefore, the plaintiff, Donald V. Snowden, Demands judgement against the DEA of Carbondale, IL, in an amount greater than $100,000 (one hundred thousand dollars) plus costs.

(Count 4)(willful and wanton)- DEA of Carbondale, IL

1. The plaintiff, Donald V. Snowden, hereby adopts and incoperates the allegations of paragraphs 1 and 2 of count 3 and subsections A-C of count 3 as if fully set forth herein.

2. That as more particularly stated above, defendent acted intentionally or with reckless disregard for the health and well-being of the plaintiff in allowing its agents to arrest with

(count 4 (continued)

excessive force during arrest, ~~that~~ D.S. and unfair abuse during an arrest by DEA Violating the 4th amendment and the 14th amendment of the constitution, and the unfair abuse and excessive force during arrest of the plaintiff were without just cause.

3. further on information and belief, DEA of Carbondale, IL was aware of the dangerous propensities of agent Jeremy Henning and Failed to either discipline or terminate him and continued to allow him to act as an DEA agent.

Wherefore, the plaintiff, Donald V. Snowden demands judgement against the DEA of Carbondale, IL 62901 in an amount of $100,000 (one hundred thousand dollars) plus costs.

Count 5 Jeremy Henning (battery)

1. the plaintiff, Donald V. Snowden, hereby adopts and incorporates the allegations of paragraphs 1-3 of Count 4 as if Fully set forth herein.

2. without consent or privillege by an overt act directed at the plaintiff, Mr. Donald V. Snowden, defendant Jeremy Henning caused Snowden to believe that he would immediatley suffer a battery and a defendent agent Henning possessed the ability to carry out the battery.

3. Defendant Jeremy Henning, used excessive force during arrest, pushed me through the door that leads to the register at the Quality Inn Hotel, 1415 E. main ST Carbondale, Illinois, 62901 admitted to punching the plaintiff which caused great bodily harm, and the defendant knowingly caused it. All was on camara, and the plaintiff can produce the evidence.

Wherefore, the plaintiff, Donald V. Snowden, demands judgement against agent Henning, in the amount of $100,000 (one hundred thousand dollars) plus cost.

Signature,
Donald V. Snowden

Ed Fox & Associates, Ltd.

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

DONALD V. SNOWDEN,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Case No. 19-cv-01322-JPG**
	)	
JEREMY HENNING,	)	
QUALITY INN HOTEL,	)	
CASHIER CINDY,	)	
and DEA,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER

GILBERT, District Judge:

Plaintiff Donald Snowden, a detainee at Williamson County Jail located in Marion, Illinois, filed this *pro se* action pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). In the Complaint, Plaintiff claims he was lured to the front desk of a Quality Inn Hotel by the cashier ("Cashier Cindy") and arrested by Drug Enforcement Agent Jeremy Henning ("Agent Henning") on September 12, 2019. (Doc. 1, pp. 1-15). Agent Henning allegedly used excessive force during his arrest. (*Id*. at pp. 6, 9-12). Plaintiff asserts claims against Agent Henning, Cashier Cindy, Quality Inn Hotel, and the Drug Enforcement Agency ("DEA") of Carbondale, Illinois, for violations of his Fourth and/or Fourteenth Amendment rights and Illinois state law. (*Id*.). He seeks monetary relief. (*Id*. at pp. 7-12).

The Complaint is now before the Court for preliminary review under 28 U.S.C. § 1915A, which requires the Court to screen prisoner complaints and filter out nonmeritorious claims. 28 U.S.C. § 1915A(a). The Court is required to dismiss any portion of the Complaint that is legally frivolous or malicious, fails to state a claim for relief, or seeks money damages from a defendant

who is immune from relief. 28 U.S.C. § 1915A(b). All factual allegations are liberally construed. *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009).

The Complaint

Plaintiff makes the following allegations in the Complaint (*Id*. at pp. 6, 9-12): On September 12, 2019, Plaintiff was arrested while paying for a room at the Quality Inn Hotel located in Carbondale, Illinois. (*Id*. at pp. 6, 9). The hotel cashier, Cindy, called him to the front desk allegedly knowing he would be arrested—an act Plaintiff refers to as an "obstruction of justice." (*Id*. at pp. 6, 9-10). As Plaintiff stood at the counter, Agent Henning pushed through the doors, approached him, and repeatedly punched him in the face. (*Id*. at pp. 6, 9). Plaintiff put up no resistance. (*Id*.). He suffered injuries to his left eye socket as a result of Agent Henning's actions. (*Id*. at pp. 6, 9-10). Plaintiff faults the Quality Inn for allowing this to happen and the DEA for failing to train, investigate, or discipline Agent Henning. (*Id*. at pp. 11-12).

Based on the allegations, the Court designates the following claims in this *pro se* action:

Count 1: Officer Henning subjected Plaintiff to the unauthorized use of force during his arrest at the Quality Inn Hotel on September 12, 2019, in violation of his rights under the Fourth and/or Fourteenth Amendments and *Bivens*. (*Id*. at pp. 9-10).

Count 2: Cashier Cindy and the Quality Inn Hotel obstructed justice by luring Plaintiff to the front desk of the hotel by asking him to pay for his room on September 12, 2019, in violation of Plaintiff's rights under the Fourth and/or Fourteenth Amendments and *Bivens*. (*Id*. at pp. 10-11).

Count 3: The Drug Enforcement Agency of Carbondale, Illinois, failed to train, investigate, discipline, and terminate Agent Henning for his misconduct, in violation of Plaintiff's rights under the Fourth and/or Fourteenth Amendments and *Bivens*. (*Id*. at pp. 11-12).

Count 4: Officer Henning committed battery against Plaintiff, in violation of Illinois state law. (*Id*. at p. 12).

Any claim(s) encompassed by the allegations in the Complaint but not addressed herein is/are considered dismissed without prejudice as inadequately pled under *Twombly*.[1]

Discussion

Counts 1 and 4

Plaintiff's excessive force claim in Count 1 is properly brought under the Fourth Amendment, if the injuries he received were inflicted before any judicial determination of probable cause, or under the Fourteenth Amendment, if the injuries occurred after this judicial determination. *Hill v. Murphy*, 785 F.3d 242 (7th Cir. 2005). Either way, the allegations in the Complaint articulate a claim against Agent Henning, who, without provocation, punched Plaintiff repeatedly in the face during his arrest. Count 1 shall proceed against Agent Henning.

Plaintiff's battery claim in Count 4 arises under Illinois tort law, not federal law. A district court may exercise supplemental jurisdiction over state law claims that are "so related to [the federal claims] that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). The battery claim against Agent Henning arises from the same facts as the excessive force claim, and the allegations articulate a claim against Agent Henning. Under Illinois law, a battery occurs when a person "intentionally or knowingly without legal justification and by any means, (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual." *Smith v. City of Chicago*, 242 F.3d 737, 744 (7th Cir. 2001) (quoting 720 ILL. COMP. STAT. 5/12–3(a)). Given the allegations, the Court cannot dismiss this claim against Agent Henning. Count 4 shall receive further review against this defendant.

[1] *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (an action fails to state a claim upon which relief can be granted if it does not plead "enough facts to state a claim to relief that is plausible on its face").

Counts 2 and 3

The *Bivens* remedy does not extend to Plaintiff's claims in Count 2 against Cashier Cindy and Quality Inn Hotel or in Count 3 against the Drug Enforcement Agency. *Bivens* allows victims of certain constitutional violations by federal **officials** to recover damages in federal court. *See Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (emphasis added). The remedy does not extend to actions against private individuals (*e.g.*, Cashier Cindy) or entities (*e.g.*, Quality Inn Hotel). *Holz v. Terre Haute Reg'l Hosp.*, 123 F. Appx. 712 (7th Cir. 2005) (citing *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 63, 66 & n.2 (2001); *Muick v. Glenayre Elec.*, 280 F.3d 741, 742 (7th Cir. 2002)). The *Bivens* remedy also does not extend to claims against federal agencies (*e.g.*, DEA). *F.D.I.C. v. Meyer*, 510 U.S. 471 (1994) ("An extension of *Bivens* to agencies of the Federal Government is not supported by the logic of *Bivens* itself."). Therefore, Plaintiff's claim in Count 2 against a private individual and entity and his claim in Count 3 against a federal agency shall be dismissed with prejudice.

Pending Motion

Plaintiff's Motion for Recruitment of Counsel (Doc. 3) is **DENIED without prejudice**. Plaintiff has failed to demonstrate reasonable efforts to locate counsel on his own or shown that he is effectively precluded from doing so. In addition, he cites no impediments to self-representation. As a college graduate with no disclosed physical, mental, medical, language, or educational barriers, Plaintiff appears capable of representing himself in this matter. Given that his Complaint is coherent and well-organized (and survived screening), the Court sees no reason to assign Plaintiff counsel at this time. However, if his situation changes, Plaintiff may renew his request by filing a new motion, after first attempting to locate counsel on his own.

Disposition

IT IS ORDERED that the Complaint (Doc. 1) survives preliminary review pursuant to 28 U.S.C. § 1915A. **COUNTS 1** and **4** will proceed against Defendant **HENNING**. However, **COUNT 2** is **DISMISSED** with prejudice against Defendants **CINDY** and **QUALITY INN HOTEL**, and **COUNT 3** is **DISMISSED** with prejudice against Defendant **DRUG ENFORCEMENT AGENCY OF SOUTHERN ILLINOIS**. **Pursuant to Administrative Order No. 244, Defendant should only respond to the issues in this Merits Review Order.**

The Clerk of Court is DIRECTED to TERMINATE Defendants CINDY, QUALITY INN HOTEL, and DEA as parties to this action in CM/ECF and ENTER the standard qualified protective order under the Health Insurance Portability and Accountability Act.

The Clerk of Court is **DIRECTED** to complete, on Plaintiff's behalf, a summons and form USM-285 for service of process on Defendant Henning; the Clerk shall issue the completed summons. The United States Marshal **SHALL** serve Defendant Henning pursuant to Rule 4(e) of the Federal Rules of Civil Procedure. Rule 4(e) provides, "an individual – other than a minor, an incompetent person, or a person whose waiver has been filed – may be served in a judicial district of the United States by: (1) following state law for serving a summons in an action brought in courts of general jurisdiction in the state where the district court is located or where service is made; or (2) doing any of the following: (A) delivering a copy of the summons and of the complaint to the individual personally; (B) leaving a copy of each at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there; or (C) delivering a copy of each to an agent authorized by appointment or law to receive service of process." All costs of service shall be advanced by the United States, and the Clerk shall provide all necessary materials and copies to the United States Marshals Service.

In addition, pursuant to Federal Rule of Civil Procedure 4(i), the Clerk shall (1) personally deliver to or send by registered or certified mail addressed to the civil-process clerk at the office of the United States Attorney for the Southern District of Illinois a copy of the summons, the complaint, and this Memorandum and Order; and (2) send by registered or certified mail to the Attorney General of the United States at Washington, D.C., a copy of the summons, the complaint (Doc. 1), and this Memorandum and Order.

If Defendant can no longer be found at the work address provided by Plaintiff, the employer shall furnish the Clerk with Defendant's current work address, or, if not known, Defendant's last-known address. This information shall be used only for sending the forms as directed above or for formally effecting service. Any documentation of the address shall be retained only by the Clerk. Address information shall not be maintained in the court file or disclosed by the Clerk.

Defendant is **ORDERED** to timely file an appropriate responsive pleading to the Complaint and shall not waive filing a reply pursuant to 42 U.S.C. § 1997e(g).

If judgment is rendered against Plaintiff, and the judgment includes the payment of costs under Section 1915, Plaintiff will be required to pay the full amount of the costs, even though his application to proceed *in forma pauperis* was granted. *See* 28 U.S.C. § 1915(f)(2)(A).

Finally, Plaintiff is **ADVISED** that he is under a continuing obligation to keep the Clerk of Court and each opposing party informed of any change in his address; the Court will not independently investigate his whereabouts. This shall be done in writing and not later than **7 days** after a transfer or other change in address occurs. Failure to comply with this order will cause a delay in the transmission of court documents and may result in dismissal of this action for want of prosecution. *See* FED. R. CIV. P. 41(b).

IT IS SO ORDERED.

DATED: 3/9/2020

s/J. Phil Gilbert
J. PHIL GILBERT
United States District Judge

Notice to Plaintiff

The Court will take the necessary steps to notify the appropriate defendants of your lawsuit and serve them with a copy of your complaint. After service has been achieved, the defendants will enter their appearance and file an Answer to your Complaint. It will likely take at least **60 days** from the date of this Order to receive the defendants' Answer, but it is entirely possible that it will take **90 days** or more. When all the defendants have filed Answers, the Court will enter a Scheduling Order containing important information on deadlines, discovery, and procedures. Plaintiff is advised to wait until counsel has appeared for the defendants before filing any motions, to give the defendants notice and an opportunity to respond to those motions. Motions filed before defendants' counsel has filed an appearance will generally be denied as premature. **Plaintiff need not submit any evidence to the Court at this time, unless specifically directed to do so.**