IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02840-RM-SKC

MARK JANNY,

Plaintiff,

v.

JOHN GAMEZ,

Defendant.

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Alexander J. Luchenitser
Americans United for Separation of Church and State
1310 L Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-7306
(202) 898-0956 (fax)
luchenitser@au.org

Daniel Mach
Heather L. Weaver
ACLU Program on Freedom of Religion and Belief
915 15th Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 675-2330
(202) 546-0738 (fax)
dmach@aclu.org
hweaver@aclu.org

Charles B. Wayne
Nicole M. Kozlowski
DLA Piper LLP (US)
500 Eighth Street, N.W.
Washington, D.C. 20004
(202) 799-4253
(202) 799-5253 (fax)
charles.wayne@us.dlapiper.com
nicole.kozlowski@us.dlapiper.com

TABLE OF CONTENTS

INTRODUCTION

Defendant John Gamez's motion for partial summary judgment, which focuses solely on the categories of damages available to plaintiff Mark Janny for the violation of his First Amendment religious-freedom rights, rests on fundamental misconceptions of the statute that Gamez invokes. First, there is a threshold question of whether the "physical injury" requirement of the Prison Litigation Reform Act, 42 U.S.C. § 1997e(e), applies to this case at all. Second, even if that requirement applies here, it does not apply to all compensatory damages, but only to damages for "mental or emotional injury." Third, the significant physical injuries suffered by Janny during the first of two periods of wrongful incarceration, were not *de minimis* but were sufficient to satisfy the statutory requirement. Fourth, Gamez's unconstitutional conduct was not too attenuated from Janny's harm to be actionable. It was reasonably foreseeable to Gamez that Janny could be attacked in jail and injured. Finally, the attack was not, as Gamez asserts, an intervening event that broke the causal chain. Rather, Gamez's unconstitutional conduct was a proximate cause of Janny's injuries suffered in the jailhouse attack. The Court should deny the motion.

FACTUAL BACKGROUND

A. The Tenth Circuit's Opinion

In the Tenth Circuit's opinion in this matter, *Janny v. Gamez*, 8 F.4th 883 (10th Cir. 2021), the Court analyzed the record evidence, reversed the grant of summary judgment, and made rulings that govern the proceedings on remand.

1. Record Evidence

a. Gamez's Assignment of Janny to the Mission

Janny began 24 months' parole with the Colorado Department of Corrections in early December 2014, and Gamez was his designated parole officer. During the next two months,

Gamez twice sought to have Janny's parole revoked for alleged curfew and other violations, resulting in Janny returning to jail pending a parole revocation hearing. Because the hearing was not held within the required 30 days, the Colorado Parole Board dismissed the charges without prejudice. Janny was freed and returned to parole status. Gamez re-filed the charges, and Janny reported to Gamez on February 3, 2015, to continue his parole until the time of the rescheduled hearing. 8 F.4th at 894; Opposing Party's Responses and Additional Facts and Supporting Evidence ("OSUMF") No. 5.

Janny was required, as a standard condition of parole, to establish a "residence of record" where he would stay each night. Gamez rejected Janny's proposed residence and, over Janny's objection, assigned him to stay at the Denver Rescue Mission located in Fort Collins ("Mission"). Gamez issued Janny a written parole directive that (1) required him to stay at the Mission and "abide by all house rules as established"; and (2) stipulated that any violation of these "house rules" would lead to Janny "being placed at Washington County jail to address the violation." Gamez also told Janny that he was friends with the Mission's director, James Carmack. 8 F.4th at 894; OSUMF No. 6.

It was not until Janny attended an orientation with Carmack at the Mission that he learned that Gamez and Carmack had enrolled him in the Mission's "Steps to Success" program, also known simply as the "Program." The Program was religious, Christian-based, and required Christian worship, including twice-daily prayer services, weekly attendance at an outside church service, and twice-weekly bible study, as well as one-on-one religious counseling. Carmack told Janny that these requirements were the Program's "house rules." 8 F.4th at 895; OSUMF No. 8.

Janny told Carmack that he was an atheist and that he would not follow these requirements. Janny's refusal led to an immediate telephone call among Carmack, Janny, and Gamez, and then

a meeting of those three at the parole office later in the day. During both the telephone call and the meeting, Gamez and Carmack told Janny that "the rules of the Program were the rules of his parole, which meant participating in religious activities, and that Mr. Janny would comply or be sent back to jail on a parole violation." 8 F.4th at 896; OSUMF No. 8.

b. Forced Participation in Religious Activities, Expulsion, and Arrest

Over the next several days, Janny was forced to attend two Christian bible study sessions and individual religious counseling with Carmack, as well as daily prayer services. Matters came to a head on Sunday, February 8, when Janny told Carmack that he had not attended an outside church service that morning and would not attend evening prayer service. Carmack expelled Janny from the Mission, telling him, "You can't be here anymore," and "[y]ou have to leave," because "you're not doing what we're telling you." 8 F.4th at 896-97; OSUMF No. 7.

When Janny left the Mission, his electronic monitoring device notified the parole office system. In response, Gamez (1) transmitted an alert that Janny was "a potential escapee" who had "absconded from the shelter" "without authorization from staff"; and (2) had an arrest warrant issued. 8 F.4th at 897; OSUMF No. 7.

As previously instructed by Gamez in the event that he was "kicked out of the Mission" when the parole office was closed, Janny reported to the parole office the next day, Monday, February 9. *Id.* at 895, 897. He was immediately arrested pursuant to Gamez's warrant and ultimately sent to the Washington County Jail on February 11, where he remained until his parole revocation hearing. While incarcerated there, he was the victim of a violent attack by another inmate that caused him significant physical injury, as discussed below. OSUMF Nos. 10, 11.

c. Parole Revocation Hearing

Janny's parole revocation hearing was held on March 2, and the Parole Board (1) found that Janny had violated his parole by failing to remain overnight at his residence of record (and dismissed the remaining charges); and (2) determined that his parole should be revoked.[1] By formal order of March 10,[2] the Parole Board revoked Janny's parole and remanded him to a Community Return to Custody Facility for 150 days. 8 F.4th at 897; OSUMF No. 5.

2. Rulings

The Tenth Circuit ruled that Janny had adduced evidence sufficient that a reasonable jury could find in his favor regarding his 42 U.S.C. § 1983 claims under both the Establishment Clause and the Free Exercise Clause of the First Amendment. *Id.* at 903. Specifically, the Court held as to the Establishment Clause claim:

> *Lee* [*v. Weisman*, 505 U.S. 577 (1992)] governs Mr. Janny's coercion-based Establishment Clause claim. And under *Lee*, Mr. Janny's averments are sufficient to allow this claim to reach the jury.

Id. at 911. As to the Free Exercise Clause claim, the Court held:

> The record allows Mr. Janny to reach the jury on his claim that Officer Gamez burdened his right to free exercise by allegedly presenting him with the coercive choice of obeying the Program's religious rules or returning to jail.

Id. at 912-913. The Court also ruled that Gamez was not entitled to qualified immunity under either clause:

> On the averred facts, Officer Gamez forced Mr. Janny to choose between participating in Christian activities or returning to jail, over Mr. Janny's express objection. This clear violation of the fundamental anti-coercion precept enshrined in the First

[1] See Ex. 3 (March 2, 2015 Order) (OSUMF No. 5). All numbered exhibits are attached to Plaintiff's Response to Defendant's Statement of Undisputed Material Facts.

[2] See Ex. 4 (March 10, 2015 Order) (OSUMF No. 5).

> Amendment is enough to deny Officer Gamez qualified immunity from Mr. Janny's claims brought under both clauses.

Id. at 918.

B. The Attack on Janny in the Washington County Jail

After Carmack expelled Janny from the Mission on February 8 and Gamez caused the arrest warrant to be issued, Janny was arrested when, as instructed, he appeared at the parole office on February 9. Janny was transferred to the Washington County Jail on February 11. Shortly after 11:00 that night, another inmate, twice Janny's size, violently attacked Janny, punching, kicking, choking, and scratching him, as well as stomping him while he was on the ground. At some point during the attack, the assailant took off all of his own clothes. The beating stopped only when two deputies entered the holding cell and threatened to use a taser on the assailant.[3]

Janny was taken to a segregation cell where he felt nauseated, vomited, and was in severe pain. His face was bleeding, bruised, scratched, and swollen, with lumps on his forehead. He had a headache and blurred vision, and was dizzy to the point he thought he had a concussion.[4]

The Washington County Sheriff's Office investigated the assault shortly after it occurred. The investigator observed Janny to have "several red marks on his cheek and face," as well as to be "bleeding from his lip." Investigation Report, p. 5 of 6 (Ex. 7). Another inmate in the holding

[3] This description is from the second amended verified complaint filed by Janny in his action against the deputy sheriffs, *Janny v. Harford*, Civil Action No. 17-cv-00050 (D. Colo.). See ECF 111 at 4 (Ex. 8 to OSUMF). This verified complaint is the evidentiary equivalent of an affidavit, *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1311 (10th Cir. 2010), and is admissible herein. Moreover, this Court may take judicial notice of documents filed in a related case. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1219 n.2 (10th Cir. 2011). It should be noted that Janny's original complaint filed in the instant action (ECF 1) included the two deputy sheriffs as defendants as well as allegations that they recklessly disregarded Janny's safety and allowed the attack to occur. Shortly after an amended complaint was filed, this Court determined that the claims against the deputy sheriffs should be pursued in a separate case and issued an appropriate order. ECF 9.

[4] Civil Action No. 17-cv-00050, ECF 111 at 4, 5 (Ex. 8 to OSUMF); OSUMF No. 13.

cell told the investigator that the assailant "went crazy." *Id.* One of the deputies on the scene "[o]bserved [the assailant] standing over Janny in what appeared to be a threatening stance, while Janny was sitting with his knees pulled up to his chest and his hands up blocking his face." *Id.* p. 6 of 6. The following day, the investigator photographed Janny's injuries and included the photos in his report. The investigator charged the assailant with a violation of Colo. Rev. Stat. § 18-3-204(1)(a), assault in the third degree. *Id.*; OSUMF No. 12.

C. The Filing of this Action

When Janny filed this action on November 21, 2016, ECF 1, he was incarcerated in the Larimer County Jail, awaiting trial on charges wholly unrelated to the facts of this case. OSUMF No. 14.

ARGUMENT

The Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a)-(h) ("PLRA"), places certain restrictions on prisoners who file lawsuits, and contains this provision in subsection (e):

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

Defendant Gamez argues that this language (1) bars Janny from seeking all "compensatory damages" because he does not show a "physical injury"; and (2) Janny's constitutional claims allege compensable injury only in the form of "mental anguish and emotional injury." Motion at 7, 9. Neither assertion is correct, as Tenth Circuit law and the plain text of § 1997e(e) are to the contrary.

In fact, Gamez's unlawful conduct gives rise to seven separate cognizable categories of damages:

- The violation of Janny's First Amendment religious-freedom rights by assignment to the Mission and while at the Mission;
- Janny's total loss of liberty during two periods of incarceration: (1) from his arrest on February 9 through March 2, 2015, the date of his parole revocation hearing; and (2) the 150 days following the hearing;
- Economic damages in the form of lost wages;
- Punitive damages;
- Nominal damages;
- Physical injury and consequent pain and suffering caused by the attack in the Washington County Jail; and
- Mental and emotional injury suffered throughout the entire period at issue, from the unconstitutional assignment to the Mission through the end of the 150 days in jail following his parole revocation.

I. Janny's Claims Accrued Prior to His Filing This Action While in Jail and Were Unrelated to that Incarceration. As a Result, the PLRA's Physical-Injury Requirement Does Not Apply.

When Janny filed this lawsuit in November 2016, he was incarcerated in the Larimer County Jail, OSUMF No. 14, and, thus, this case is a "Federal civil action . . . brought by a prisoner confined in a jail, prison, or other correctional facility . . . ." 42 U.S.C. § 1997e(e). Gamez assumes that this mere act of filing while incarcerated means that the § 1997e(e)'s physical-injury requirement applies to claims — like Janny's — that accrued prior to the incarceration when the case was filed and are wholly unrelated to that incarceration. OSUMF No. 14. This broad reading, lacking any temporal restriction, makes no sense, and one district court has so held. In *Hill v. Murphy*, 2017 WL 1026319, *9 (S.D. Ill. 2017), the court held that a plaintiff could seek emotional damages for an illegal search because the search occurred before his incarceration, even though suit was filed during his incarceration, and he alleged no physical injury.

So it is with Janny, whose claims do not relate to his confinement in the Larimer County Jail on charges unrelated to the instant case. Rather, Janny's claims concern his unconstitutional

treatment by Gamez from the assignment to the Mission on February 3, 2015 through the end of the 150-day period of incarceration following the parole revocation hearing on March 2, 2015.

Although no court in this circuit has addressed this precise issue, the Tenth Circuit follows a strict "plain language" approach to § 1997e(e). *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803, 808 n.6 (10th Cir. 1999). The plain language of § 1997e(e) makes clear that Congress intended the phrase "mental or emotional injury suffered while in custody" to refer to such injuries that occurred to the prisoner while in custody in the facility from which he filed the complaint, not earlier injuries, wherever they may have occurred.[5]

Section 1997e(e) has no application here.

II. Janny's Constitutional Injuries Are Separate and Distinct from Any Mental or Emotional Injury and Do Not Require Any Showing of Physical Injury.

Even if the PLRA does apply to this case, § 1997e(e)'s physical injury requirement does not apply to the constitutional injuries that Janny alleges.

A. Contrary to Gamez's Argument, *Searles* Does Not Hold that the PLRA's "Physical Injury" Requirement Applies to All "Compensatory Damages."

In *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001), the Court held that § 1997e(e) (1) applies to all claims, including constitutional claims; and (2) "limits the remedies available, regardless of the rights asserted, *if the only injuries are mental or emotional*." *Id*. at 876 (emphasis added); *see also Perkins*, 165 F.3d at 808 n.6 ("The plain language of § 1997e(e) applies only to actions for 'mental or emotional injury.'"). The *Searles* plaintiff sought only damages for "mental or emotional injuries," as reflected in the verdict form. 251 F.3d at 874.

[5] One circuit has held that § 1997e(e) applies to a claim that accrued before, and was unrelated to, the plaintiff's incarceration at the time of filing. *Napier v. Preslicka*, 314 F.3d 528, 533-34 (11th Cir. 2002), *rehearing denied*, 331 F.3d 1189 (11th Cir. 2003). *But see id.*, 314 F.3d at 536 (Propst, J., dissenting) (Congress intended to limit only prisoner suits "arising from the terms and conditions of their current imprisonment"); 331 F.3d at 1193 (Barkett, J., dissenting) (same).

Janny, however, has alleged constitutional injuries separate and distinct from any mental or emotional injury he might have suffered. He claims that his assignment to the Mission and the resulting forced religious observance violated his First Amendment religious-freedom rights. He also claims that, in response to his objection to those violations and the consequent expulsion from the Mission, Gamez caused Janny to be incarcerated for two separate periods: (1) the 22 days from his arrest on February 9 through his parole revocation hearing on March 2, and the adverse finding that day; and (2) the 150 days following the parole revocation hearing. Plaintiff's Amended and Supp. Responses to Defendant's First Post-Remand Interrogatories at 3 (Ex. 9). Janny thus asserts a constitutional injury to his First Amendment religious-freedom rights that resulted in another constitutional injury, a loss of liberty for two distinct periods. These are compensable injuries that cannot be dismissed as mental or emotional injury: "A prisoner is entitled to judicial relief for a violation of his First Amendment rights aside from any physical, mental, or emotional injury he may have sustained." *Rowe v. Shake,* 196 F.3d 778, 781-82 (7th Cir. 1999).

Although there are PLRA decisions from other circuits that might preclude damages for constitutional injuries separate and apart from mental or emotional injury,[6] the Tenth Circuit has never so held. Indeed, such a holding would be contrary to the Tenth Circuit's "plain language" approach to § 1997e(e), *Perkins*, 165 F.3d at 808 n.6, as well as the principle of statutory construction that "every provision of a statute is intended to serve a purpose and should be given effect." *Whiteis v. Yamaha Int'l Corp.*, 531 F.2d 968, 973 (10th Cir. 1976). This conclusion is consistent with a growing body of PLRA law that rejects the idea that every type of injury that is not physical must be "mental or emotional" and, thus, subject to the "physical injury" requirement. These cases, which concern both First Amendment rights and loss of liberty, are discussed below.

[6] *See, e.g., Allah v. Al-Hafeez,* 226 F.3d 247, 250 (3d Cir. 2000).

B. Janny's First-Amendment Claims Arising from His Assignment to the Mission and His Forced Religious Observance Are Not Governed by § 1997e(e).

Several circuit-level PLRA decisions have recognized that reading "mental or emotional injury" as including all injuries that are not physical is fundamentally flawed. Most of the decisions specifically address First Amendment claims. For example, the Eleventh Circuit, in a recent en banc opinion concerning an inmate's constitutional right to file grievances, stated: "Our interpretation of § 1997e(e) comports with those persuasive authorities that recognize that various types of non-physical compensable injuries may flow from a constitutional violation, and the provision bars recovery only for a mental or emotional injury absent physical injury." *Hoever v. Marks*, 993 F.3d 1353, 1359 n.2 (11th Cir. 2021) (en banc) (collecting cases). One such authority is *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015), a First Amendment case that holds, more broadly, that "the plain language of the statute does not bar claims for constitutional injury that do not also involve physical injury."[7]

As these cases make clear, Janny need not satisfy the physical injury requirement of § 1997e(e) in order to seek damages for violations of his religious-freedom rights, which include his assignment to the Mission, Gamez's enrolling him in the Christian-based Program, and the forced religious observance and participation while at the Mission under threat of return to jail.[8] None of these harms are subject to the PLRA's physical injury requirement.

---

[7] *See also Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017) (First Amendment violations entitle a plaintiff to relief wholly apart from "any physical, mental, or emotional injury"); *Toliver v. City of New York*, 530 F. App'x 90, 93 n.2 (2d Cir. 2013) (even if plaintiff "is unable to establish than any of the injuries complained of in this action stemmed from an incident in which he suffered physical injuries, [h]e may still recover damages for injuries to his First Amendment rights"); *Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (same).

[8] As to the appropriate measure for such constitutional-injury damages, the Supreme Court has held that "[w]hen a plaintiff seeks compensation for an injury that is likely to have occurred but difficult to establish, some form of presumed damages may possibly be appropriate." *Memphis Cmty. Sch. Dist. v. Stachura*, 447 U.S. 299, 310-11 (1986). Janny's complaint includes a prayer

Finally, the physical-injury requirement does not apply to Janny's religious-freedom claims from the time he was assigned to the Mission until he was arrested after being expelled for an additional reason: he was not "in custody" as required by § 1997e(e). Parolees are not "prisoners," and they are not "in custody." *See, e.g., Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) (error for district court to classify parolee as a prisoner under the PLRA). When a plaintiff "seek[s] damages for constitutional injury caused by the imposition of conditions of release on parole," he is not seeking damages "suffered while in custody," and § 1997e(e) does not apply. *Maldonado v. Mattingly*, 2018 WL 5784940, *11 (W.D.N.Y. 2019), *reconsideration denied*, 2020 WL 5814386 (W.D.N.Y. 2020).[9] The damages Janny suffered from being placed in and while at the Mission likewise relate to "conditions of release on parole," and he was on parole and not in custody at that time.

C. Janny's Constitutional Loss-of-Liberty Claims Based on Two Unlawful Periods of Incarceration Are Not Governed by § 1997e(e).

Janny's exercise of his First Amendment religious-freedom rights resulted in further injuries through the punishment that Gamez imposed for Janny's refusal to relinquish those rights: two separate periods of wrongful incarceration, one for 22 days while awaiting the parole revocation hearing and one for 150 days following revocation.

Unlawful incarceration — a loss of liberty — for any significant period is a harm of great and constitutional magnitude: "Next to bodily security, freedom of choice and movement has the highest place in the spectrum of values recognized by our Constitution." *Sample v. Diecks*,

---

for "presumptive damages," ECF 95 at 23, which is a synonym for "presumed damages." *E.g., J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 537, 563 (1981); *Domegan v. Ponte*, 972 F.3d 401, 418 & n.31 (1st Cir. 1992).

[9] *See also Floyd v. City of Miami*, 2020 WL 5097849, *3-4 (S.D.Fla.) ("constitutional violations that transpire while the [plaintiff] was not in custody" are not subject to § 1997e(e)), *report and recommendation adopted*, 2020 WL 5096874 (S.D. Fla. 2020).

885 F.2d 1099, 1109 (3d Cir. 1989) (inmate detained after expiration of sentence). Moreover, "[t]he damages recoverable for loss of liberty for the period spent in a wrongful confinement are separable from damages recoverable for such injuries as physical harm, embarrassment, or emotional suffering . . . ." *Kerman v. City of New York*, 374 F.3d 93, 125 (2d Cir. 2004) (plaintiff involuntarily detained and hospitalized).

Courts routinely apply these principles to claims for unconstitutional incarceration and reject the application of § 1997e(e)'s physical-injury requirement to such claims. *E.g., Valdez v. City of New York*, 2013 WL 8642169, *21 (S.D.N.Y. 2013) ("[D]eprivations of liberty and personal rights can give rise to damages separate and apart from those recoverable for any physical injury or emotional suffering."); *Friedland v. Fauver*, 6 F. Supp. 2d 292, 310 (D. N.J. 1998) (§ 1997e(e) does not bar damages for "unconstitutional incarceration," which is distinct from "mental or emotional injury").[10]

The physical-injury requirement need not be satisfied for Janny to seek damages based on loss of liberty caused by unlawful incarceration.

III. The Physical-Injury Requirement Does Not Apply to Janny's Economic Damages.

But for Gamez's unconstitutional conduct, Janny would have worked for his previous employer, Muscle 4 Hire, during two separate periods of unlawful incarceration: (1) February 9, the date of his arrest, through March 2, 2015, the day of the parole revocation hearing; and (2) the 150 days following the parole revocation hearing. See Ex. 9 at 4; Fourth Amended [Verified]

[10] *See also Rosado v. Herard*, 2013 WL 6170631, *10 (S.D. N.Y. 2013) ("intangible deprivations of liberty and personal rights are distinct from claims for pain and suffering, mental anguish, and mental trauma"); *Malik v. City of New York*, 2012 WL 3345317, *16-17 (S.D.N.Y. 2012) ("Defendant's motion mistakenly assumes that the only injury that a plaintiff may suffer without a physical injury is mental or emotional harm [, but] . . . intangible deprivations of liberty and personal rights are distinct . . . .").

Prisoner Complaint, ECF 95 at 17. Janny has asserted a claim for lost wages. *Id.* at 7; Ex. 9 at 4.[11]

The lost-wages claim is unaffected by § 1997e(e) because it is an economic injury, not a mental or emotional one. Courts that have considered the issue have, to plaintiff's knowledge, been unanimous in ruling that a failure to satisfy the PLRA's physical-injury requirement does not bar such claims. *E.g., Hodge v. Heatherly,* 2013 WL 4097575, *3 (N.D. Okla. 2013).[12]

Janny may seek lost wages as an element of his damages without reference to § 1997e(e).

IV. Janny May Seek Punitive Damages and Nominal Damages Even in the Absence of Physical Injury.

It has been the law in the Tenth Circuit for more than two decades that § 1997e(e)'s physical-injury requirement does not apply to punitive damages and that such damages are "available, in the proper circumstances, in prisoner actions under section 1983." *Searles*, 251 F.3d at 881. Eight other circuits follow the same rule,[13] including the Eleventh Circuit, which recently, in an en banc decision, overruled its prior precedent. *Hoever*, 993 F.3d at 1362-64.

Searles instructs that the "proper circumstances" for punitive damages under § 1983 are when the defendant engaged in, *inter alia*, "reckless or callous indifference to the federally protected rights of others." 251 F.3d at 879 (quoting *Smith v. Wade*, 461 U.S. 30, 56 (1983)). The Tenth Circuit described Gamez's conduct, on the averred facts, as a "clear violation of the

[11] Compensatory damages for violations of constitutional rights may include "out-of-pocket loss and other monetary harms." *Stachura*, 477 U.S. at 307.

[12] *See also Guy v. LeBlanc*, 400 F. Supp. 2d 536, 545 (M.D. La. 2019) ("Section 1997e(e) does not address claims for damages unrelated to 'mental or emotional injury,' and [plaintiff's] claims for . . . lost-wages damages are assuredly unrelated to 'mental or emotional injury.'"); *Meza v. Collier*, 2007 WL 1655898, *7 (W.D. Tex. 2007) (holding claim for lost wages unrelated to "mental or emotional injury," and "physical injury" requirement is thus inapplicable); *Centaur v. Werner*, 2005 WL 1345624, *3 (M.D. Fla. 2005) (same) (collecting cases).

[13] *See Hoever*, 993 F.2d at 1362 (collecting cases).

fundamental anti-coercion precept enshrined in First Amendment . . . ." 8 F.4th at 918. Engaging in a "clear violation" of a "fundamental" constitutional principle, on its face, represents "reckless or callous indifference" to federal rights, especially when the victim of the violation explicitly invokes those rights.

Searles also held that the physical-injury requirement does not bar recovery of nominal damages for violations of prisoners' rights. 251 F.3d at 879.

V. Janny's Physical Injuries, Suffered While Wrongfully Incarcerated, Satisfy § 1997e(e)'s Requirement, and He May Recover for Mental or Emotional Injury in Addition to Physical Pain and Suffering.

Even though Janny need not prove physical injury to recover compensatory damages for a variety of harms, he does have sufficient physical injury to satisfy § 1997e(e)'s requirement (if it applies) and therefore can recover damages for mental or emotional injury, as well as physical pain and suffering. Gamez asserts that Janny is precluded from seeking such damages for three reasons: (1) his injuries were *de minimis*, and do not satisfy § 1997e(e)'s physical-injury requirement; (2) Gamez "did not foresee that by requesting an arrest warrant Mr. Janny would get into a violent altercation in Washington County Jail"; and (3) Gamez's wrongful conduct was not the proximate cause of Janny's injuries. None has merit.

A. Janny's Physical Injuries Are Not *De Minimis.*

1. The Applicable Standard

Although seven circuits have interpreted § 1997e(e)'s physical-injury requirement as requiring more than a *de minimis* injury, the Tenth Circuit recently declined to address this precise issue. *Johnson v. Reyna*, 57 F.4th 769, 776-77 (10th Cir. 2023) (holding that "an intense, prolonged, exacerbated injury" plainly satisfied the physical-injury requirement). The Court did, however, note that the other courts of appeals typically found "minor ailments and transient aches"

to be *de minimis*. *Id*. at 777. Janny's physical injuries suffered in the Washington County Jail attack[14] were anything but.

As an initial matter, it is important to note that the investigator for the Washington County Sheriff's Office determined that the attack on Janny was serious enough to warrant charging the assailant with assault in the third degree under Colo. Rev. Stat. § 18-3-204(1)(a). Investigation Report, p. 6 of 6 (Ex. 7) (OSUMF No. 12, 13). That statute provides:

> (1) A person commits the crime of assault in the third degree if:
>
> (a) The person knowingly or recklessly causes bodily injury to another person . . . .

Additionally, "[a]ssault in the third degree is a class 1 misdemeanor and is an extraordinary risk crime" that is subject to an enhanced sentencing range. Colo. Rev. Stat. § 18-3-204(3).

The investigator's decision to charge assault in the third degree has relevance here because of the term "bodily injury" contained in the statute, which is defined as "physical pain, illness, or any impairment of physical or mental condition." *Id.* § 18-1-901(3)(c). According to the Colorado Supreme Court, that definition encompasses any non-"trifling" injury that involves "at least some physical pain, illness or physical or mental impairment, however slight . . . ." *People v. Hines*, 572 P.2d 467, 470 (Colo. 1977) (en banc). The investigator's charging decision was plainly grounded in his view that Janny's physical injuries were not "trifling."

The charging decision is entitled to some weight in determining whether Janny's injuries are *de minimis*, which can fairly be said to be a close cousin of "trifling." The *de minimis* standard is followed in several circuits, typically stated as requiring that physical injury "must be more than

[14] Although Janny continues to seek damages for mental or emotional injury for all of Gamez's unconstitutional actions, from assignment to the Mission through the end of the 150-day incarceration, Ex. 9 at 2, the only physical injuries he now asserts are those suffered as a result of the Washington County Jail attack. *Id.* at 1.

de minimis but need not be significant." *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).[15] The district courts in this Circuit use the same standard with a similar formulation. *E.g.*, *McConnell v. Cirbo*, 2012 WL 3590762, *11 (D. Colo. 2012) ("[I]t is clear that while a plaintiff's alleged injury 'need not be substantial' to satisfy the § 1997e(e) requirement, it must be more than *de minimis*."); *Custard v. Young*, 2008 WL 791954, *10 (D. Colo. 2008) (standard is "less-than-significant-but-more-than-*de minimis*.")

2. Janny's Injuries

Gamez takes a three-pronged approach in attempting to demonstrate that Janny's injuries are *de minimis*: (1) the location of the attack, a jail, does not, by itself, satisfy the physical-injury requirement; (2) physical pain alone is insufficient; and (3) the actual injuries suffered by Janny in the attack were inconsequential. Motion at 8-10. The first is a straw man, as Janny makes no such argument. As to the second, the cases Gamez cites (p. 8) all hold that physical pain, "when paired with allegations of physical effects, . . . may support a claim under the PLRA." *Clifton v. Eubank*, 418 F. Supp. 2d 1243, 1246 (D. Colo. 2006) (citing *Mata v. Saiz*, 427 F.3d 745, 754-55 & n.4 (10th Cir. 2005); *Sealock v. Colorado*, 218 F.3d 1205, 1210 & n.6 (10th Cir. 2000)). The attack caused Janny both physical pain and physical effects from that pain.

As to the third, Gamez cites three cases from outside this Circuit in an effort to show that Janny's actual injuries were of no moment. Motion at 10. But courts in this Circuit have held otherwise. As discussed above, Janny was in such severe pain that he vomited as a result of nausea. He had been hit with such force that lumps were raised on his forehead. He was bleeding from his

[15] *Accord Mitchell v. Horn*, 318 F.3d 523, 535-36 (3d Cir. 2003); *Oliver v. Keller*, 289 F.3d 623, 626-27 (9th Cir. 2002); *Liner v. Goord*, 196 F.3d 132, 135 (2d Cir. 1999); *Harris v. Garner*, 190 F.3d 1279, 1286 (11th Cir. 1999), *vacated in part and reinstated in part on reh'g*, 216 F.3d 970 (11th Cir. 2000).

face, which was bruised, scratched, and swollen. He had headaches, blurred vision, and dizziness, all of which led him to believe that he had a concussion. Courts in this Circuit have held that each of these injuries and physical effects satisfies the PLRA requirement.[16]

Other federal courts have also held that injuries like Janny's satisfy the physical-injury requirement.[17] Janny additionally complained of concussion-like symptoms, and at least three decisions have held that a concussion satisfies the requirement as well.[18]

Finally, the fact that Janny did not seek medical treatment for his injuries is no bar to recovery. In *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002), the court rejected a § 1997e(e) standard that would have required a plaintiff to have had "an observable or diagnosable medical condition requiring treatment by a medical care professional which would cause a 'free world person' to seek such treatment." *Id*. at 628 (citation and internal quotation marks omitted). Rather, failure to obtain medical treatment for an injury relied on to satisfy § 1997e(e) "is an impeachment matter for trial." *Wagner v. Hartley*, 2013 WL 1191231, *9 (D. Colo. 2013).

---

[16] *Murray v. Edwards Cnty. Sheriff's Dep't*, 248 F. App'x 993, 996-97 (10th Cir. 2007) (headaches); *Wagner v. Hartley*, 2013 WL 1191231, *9 (D. Colo. 2013) (same); *Pettigrew v. Zavares*, 2012 WL 1079445, *9 (D. Colo 2012) (painful injury drawing blood), *report and recommendation adopted*, 2012 WL 1079342 (D. Colo. 2012); *Custard*, 2008 WL 791954, *10 (same); *McConnell*, 2012 WL 3590762, *11 (dizziness and pain).

[17] *E.g.*, *McFadden v. Nicholson*, 2107 WL 991052, *4 (M.D.N.C. 2017) (blow to head that caused bleeding, knots on the head, dizziness, and headaches), *report and recommendation adopted*, 2020 WL 4194538 (M.D.N.C. 2020); *Daniels v. Sproul*, 2013 WL 3964813, *2 (M.D. Ga. 2012) (headaches, redness on chest, and cut on eye); *Edwards v. Byrd*, 2013 WL 12106339, *5 (E.D. Ark. 2013) ("bruises, abrasions, and cuts"); *Morgan v. Comm'r Dzurenda*, 2015 WL 5722723, *11 (D. Conn. 2015) (abrasions and swelling to face and head and abrasion on back); *Oliver v. Gaston*, 2006 WL 2805343, *6 (S.D. Miss. 2006) ("numerous swollen spots, bruises and abrasions to face and scalp").

[18] *Johnson v. Jacobson*, 2008 WL 2038882, *6 (N.D. Tex. 2008) (concussion is a "serious injury" and not *de minimis*); *Norfleet v. Taylor*, 2017 WL 7054010, *17 (N.D. Fla. 2017) (concussion is not *de minimis*), *report and recommendation adopted*, 2018 WL 564859 (N.D. Fla. 2018); *Flanning v. Baker*, 2016 WL 4703868, *6 (N.D. Fla. 2016) (same).

Janny's physical injuries plainly satisfy the PLRA's requirement. At a minimum, a rational jury could so find, and summary judgment on this issue is precluded.

B. It Was Reasonably Foreseeable that Janny Would Be Attacked in Jail, and Gamez's Unconstitutional Conduct was a Proximate Cause of Janny's Injuries, Physical and Otherwise.

Gamez asserts that he cannot be responsible for the injuries Janny suffered in the jailhouse attack, physical and otherwise, because Gamez (1) "did not foresee" that Janny would be attacked; (2) was not personally involved in the attack; and (3) was never employed by the Washington County Jail. Motion at 5, 12. Consequently, contends Gamez, none of his actions can be the proximate cause of the attack and the law cannot hold him accountable. This argument misconceives the concepts of foreseeability and proximate cause as well as Tenth Circuit law.

"In defining the contours and prerequisites of a § 1983 claim . . . courts are to look first to the common law of torts," *Manuel v. City of Joliet*, 580 U.S. 357, 370 (2017), including the familiar principles of proximate cause and foreseeability. "Every event has many causes . . . and only some of them are proximate, as the law uses that term. So to say that one event was a proximate cause of another means that it was not just any cause, but one with a sufficient connection to the result." *Paroline v. United States*, 572 U.S. 434, 444 (2014).

"Proper analysis of [a] proximate cause question require[s] [1] consideration of the 'foreseeability or scope of the risk created by the predicate conduct,' and [2] . . . [a] conclu[sion] that there was 'some direct relation between the injury asserted and the injurious conduct alleged.'" *County of Los Angeles v. Mendez*, 581 U.S. 420, 431 (2017) (§ 1983 case) (quoting *Paroline*, 572 U.S. at 444-45). Here, this two-step analysis yields the result that the harm to Janny was foreseeable and that Gamez's conduct was a proximate cause.

1. The Jailhouse Attack on Janny was Foreseeable, as Were His Injuries.

The foundation of Gamez's foreseeability argument is that he "did not foresee that by requesting an arrest warrant Mr. Janny would get into a violent altercation in Washington County Jail. There is no evidence in the record that Mr. Gamez was actually aware of any [such] actual risk . . . ." Motion at 12. These assertions misstate the concept of foreseeability and ignore applicable legal principles. As a threshold matter, what Gamez actually foresaw or what he was actually aware of does not control foreseeability. The central question is whether an official in Gamez's position "reasonably should have known" that he was "set[ting] in motion a series of events" that could result in the injury complained of. *Gibson v. Brown*, 856 F. App'x 194, 196 (10th Cir. 2021) (citation and internal quotation marks omitted). This inquiry is the first step of the *Mendez* analysis, *supra*.

There is no question that a reasonable official in Gamez's position should have known that an attack on Janny in the Washington County Jail was foreseeable: "Prisons are dangerous places. Housing the most aggressive among us, they place violent people in close quarters. Those who have difficulty conforming to society's norms outside prison may find obedience no more attractive inside . . . ." *McGill v. Duckworth*, 944 F.2d 344, 345 (7th Cir. 1991); *accord Johnson v. California*, 543 U.S. 499, 515 (2005) ("Prisons are dangerous places . . . .").

And "[j]ails can be more dangerous than prisons because officials there know so little about people they admit at the outset." *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 336 (2012); *accord Hinkle v. Beckham Cnty. Bd. of Cnty. Comm'rs*, 962 F.3d 1204, 1232 (10th Cir. 2020). Statistics support these conclusions: "Inmates commit more than 10,000 assaults on correctional staff every year and many more among themselves." *Florence*, 566 U.S. at 333 (citing Dep't of

Justice, Bureau of Justice Statistics, J. Stephan & J. Karberg, Census of State and Federal Correctional Facilities, 2000 p. v (2003) (data from all types of facilities)).[19]

2. Gamez's Wrongful Conduct was a Proximate Cause of Janny's Injuries Suffered in the Jailhouse Attack.

Having placed Janny in a dangerous place where an attack was reasonably foreseeable, Gamez cannot escape liability by asserting that he did not personally attack Janny and that he never worked at the jail. These arguments ignore the nature and role of the concept of proximate cause.

As discussed above, there can be more than one proximate cause of harm. *Paroline*, 572 U.S. at 444; *see also* Restatement (Third) of Torts § 34, cmt. f (2010) ("sole proximate cause" is "a term best avoided"). Although Gamez did not hit Janny himself, his unconstitutional conduct was a proximate cause of Janny's harm: had Gamez not sent Janny to jail for exercising his religious-freedom rights, Janny would not have been in a position to be the victim of an entirely foreseeable attack. This very foreseeability is what makes the actions of Janny's assailant another proximate cause of Janny's harm, not a superseding or intervening act that relieves Gamez of liability. Motion at 11-12. '"Foreseeable intervening forces are within the scope of the original risk, and . . . will not supersede the defendant's responsibility.'" *Trask v. Franco*, 446 F.3d 1036, 1047 (10th Cir. 2006) (quoting *Prosser & Keeton on Torts*, § 44, at 303-04 (5th ed. 1984)).

Finally, if '"there is room for reasonable difference of opinion as to whether the [allegedly] intervening act relieves the [defendant] from liability for his antecedent [wrongful act], and . . . there is room for reasonable difference of opinion as to whether such act was [wrongful] or

[19] OSUMF No. 17. *See also* E. Taylor Nicholson and B. Krisberg, *Contagion of Violence*, National Center for Biotechnology Information (2013), https://bit.ly/42QMDXk (discussing studies of violence in prisons); N. Wolff and J. Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, National Center for Biotechnology Information (2009), https://bit.ly/3WhPt55 (discussing studies of violence in male prisons).

foreseeable, the question should be left for the jury.'" *Trask*, 446 F.3d at 1047 (quoting Restatement (Second) of Torts § 453 cmt. b (1965)). The Tenth Circuit held in *Trask* that foreseeability and proximate cause were issues for the jury, *id.*, and the same result is true here.

CONCLUSION

For all the foregoing reasons, the Court should deny defendant's motion.

Respectfully submitted,

/s/ Charles B. Wayne

Charles B. Wayne
Nicole M. Kozlowski
DLA Piper LLP (US)
500 Eighth Street, N.W.
Washington, D.C. 20004
(202) 799-4253
(202) 799-5253 (fax)
charles.wayne@us.dlapiper.com
nicole.kozlowski@us.dlapiper.com

Alexander J. Luchenitser
Americans United for Separation of Church and State
1310 L Street, N.W.
Suite 200
Washington, D.C. 20005
(202) 466-7306
(202) 898-0956 (fax)
luchenitser@au.org

Daniel Mach
Heather L. Weaver
ACLU Program on Freedom of Religion and Belief
915 15th Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 675-2330
(202) 546-0738 (fax)
dmach@aclu.org
hweaver@aclu.org

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2023, I filed the foregoing using the CM/ECF system which will send notification of such filing to all counsel of record.

s/Charles B. Wayne
Charles B. Wayne