No. 22-2846

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TONY FISHER, AKA KELLIE REHANNA,
Plaintiff-Appellant,

v.

JORDAN HOLLINGSWORTH, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of New Jersey, No. 1:18-cv-16793
Before the Hon. Karen M. Williams, District Judge

OPENING BRIEF OF PLAINTIFF-APPELLANT

Devi M. Rao
Elizabeth A. Bixby*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
lisa.bixby@macarthurjustice.org
devi.rao@macarthurjustice.org
* *Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.*

Counsel for Plaintiff-Appellant

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INTRODUCTION

From the first day she set foot in FCI Fort Dix in July 2013, other prisoners subjected Plaintiff-Appellant Kellie Rehanna[1] to incessant sexual harassment and threats. Ms. Rehanna reported that verbal abuse to prison staff, flagging one tormentor in particular: "C," who was serving time for a violent sexual assault. But staff took no steps to keep Ms. Rehanna safe, and a few days later, her worst fears were realized: C repeatedly raped her.

That experience compounded Ms. Rehanna's preexisting mental health diagnoses, leaving her in a dissociative state for several years afterward and causing her to suffer from severe PTSD to this day. A prison captain also warned Ms. Rehanna of dire consequences if she told anybody about the rapes: she would be branded a snitch and the Bureau of Prisons would be unable to protect her; her rapist would be able to track her down through the BOP's online locator system; and the BOP itself would retaliate against her. That prison captain also instructed Ms.

[1] Plaintiff-Appellant is a transgender woman who uses the first name Kellie, the last name Rehanna, and she/her pronouns. AA026 (Compl. ¶ 7). The case caption reflects her legal name, which is still Tony Fisher. This brief uses Ms. Rehanna's preferred name.

Rehanna not to contact an attorney or take legal action until after the BOP had completed its own investigation.

Incapacitated by her severe PTSD and trusting the prison captain's admonitions, Ms. Rehanna did not take steps to hold prison staff accountable for their failure to protect her until October 2017, when she discovered that the BOP had, unbeknownst to her, substantiated her claims of sexual assault and closed its investigation several years earlier. Although Ms. Rehanna pursued the BOP grievance process within a few days of that discovery and filed a lawsuit soon after she finished administratively exhausting her claims, the district court dismissed her case as untimely because the relevant statute of limitations—New Jersey's limitations period for personal injury—is just two years.

That was error. While Supreme Court precedent requires borrowing the forum state's general personal injury statute of limitations, it also requires importing that state's rules around tolling and revival. New Jersey's tolling and revival provisions render Ms. Rehanna's claim timely in two ways. First, the New Jersey legislature enacted a two-year revival provision for previously time-barred sexual assault claims, and that provision applies to Ms. Rehanna's case. Second,

New Jersey's equitable tolling rules—both statutory and common-law—make Ms. Rehanna's claims timely.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The district court entered its final order dismissing the case on August 18, 2022. AA04 (Order). Ms. Rehanna timely appealed on September 27, 2022. AA01 (Notice of Appeal). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Does N.J.S. § 2A:14-2b—a statutory revival period resuscitating otherwise time-barred sexual assault claims—make Ms. Rehanna's claims timely?
2. Do New Jersey's broad equitable tolling rules make Ms. Rehanna's claims timely?
3. Is a *Bivens* remedy available for failure-to-protect claims, as this Court held in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), and recently reaffirmed in *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021)?

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE CASE

I. Factual Background

A. Ms. Rehanna arrives at FCI Fort Dix and quickly becomes the target of sexual harassment and threats, which she reports to prison staff.

Ms. Rehanna was transferred to FCI Fort Dix to begin serving her criminal sentence on July 2, 2013. AA036 (Compl. at 12 ¶ 57). At the time, Ms. Rehanna was not yet out as transgender; instead, she presented as an "effeminate" gay man. AA034 (Compl. at 10 ¶ 47); AA070 (Rehanna Decl. at 2 ¶¶ 5, 11).[2] Beginning her very first night at Fort Dix, Ms. Rehanna was verbally sexually harassed and threatened by other prisoners. AA036 (Compl. at 12 ¶ 59); AA071 (Rehanna Decl. at 3 ¶¶ 21-23). The verbal abuse came from multiple prisoners, but one prisoner in particular stood out: C, a unit laundry orderly. AA036 (Compl. at 12 ¶ 59). C told Ms. Rehanna that he was imprisoned for a violent sexual

[2] Ms. Rehanna included additional detail fleshing out what happened to her in a declaration attached to her opposition to the motion to dismiss. *See generally* AA069-79 (Rehanna Decl.). Although the district court did not address whether it was converting the motion to dismiss into a summary judgment motion, it appeared to consider information from that declaration in its decision. *See* AA012 (Opinion at 8) (considering information about Captain Fitzgerald provided in the declaration). In any event, if Ms. Rehanna prevails in this appeal, she could incorporate these details into her complaint on remand if given leave to amend.

assault conviction, deepening her fears. *Id.*

After a week of suffering through daily harassment and threats from other prisoners, Ms. Rehanna met with her unit housing counselor, Defendant Fischer, on July 9, 2013. AA036-037 (Compl. at 12-13 ¶ 61). Ms. Rehanna informed Fischer that she was being harassed and threatened by multiple prisoners, especially C. *Id.* Fischer responded that she knew who C was and that she would "look into it." *Id.*

The next day, Ms. Rehanna was seen by a staff psychologist, Defendant Dr. Anna Morfe. AA037 (Compl. at 13 ¶ 62); AA073 (Rehanna Decl. at 5 ¶ 34). Dr. Morfe identified Ms. Rehanna as having five risk factors for sexual victimization: being LGBTQ; being a previous victim of sexual assault; prior placement in protective custody and a fear of placement in general population; being a first-time offender; and having a sex offense conviction. AA054 (Compl. Ex. A at 2). Despite identifying a host of factors raising Ms. Rehanna's risk of sexual victimization, Dr. Morfe concluded that there were "no indications" requiring her "risk level to be raised significantly above any other inmate's." *Id.* Dr. Morfe's notes also claimed Ms. Rehanna said she "'felt safe' to function on the compound," and that she "was unable to present with a verifiable threat

against [her] safety." *Id.* But Ms. Rehanna attested that she never told Dr. Morfe she "felt safe," and believes that Dr. Morfe never asked whether she felt safe. AA073 (Rehanna Decl. at 5 ¶ 36).

In a separate report by Dr. Morfe the same day, Dr. Morfe noted that Ms. Rehanna had been diagnosed with a variety of mental health disorders, including depression, anxiety, panic disorder, and PTSD. AA057 (Compl. Ex. W at 154). Dr. Morfe also documented that Ms. Rehanna was prescribed various psychotropic medications, including Effexor, Buspar, Xanax, Remeron, and Desyryl. *Id.*

B. Ms. Rehanna is repeatedly raped.

After neither Fischer nor Dr. Morfe took any steps to protect Ms. Rehanna, Ms. Rehanna experienced what was both predictable and tragic: she was repeatedly raped by C over several days. *See* AA038-040 (Compl. at 14-16). The first rape took place on July 11, 2013—two days after Ms. Rehanna warned Fischer about C's incessant sexual harassment, and one day after Dr. Morfe interviewed Ms. Rehanna. AA038-039 (Compl. at 14-15 ¶¶ 64-72). Ms. Rehanna was showering when C appeared in the narrow doorway of the shower bay. AA038 (Compl. at 14 ¶ 66). C said to Ms. Rehanna: "You're going to suck my

dick. No teeth, no marks. Don't scream. If you bite me, leave marks, I'll beat the fuck out of you." AA038 (Compl. at 14 ¶ 67). C physically forced Ms. Rehanna to perform oral sex. AA038 (Compl. at 14 ¶ 68). He then ordered Ms. Rehanna to turn around and bend over before "violently sodomiz[ing] [Ms. Rehanna] while he firmly put his hand forcibly over [her] mouth." AA039 (Compl. at 15 ¶ 72).

After C raped Ms. Rehanna, he forced her to shower while she sobbed "uncontrollably." AA039 (Compl. at 15 ¶ 73). He threatened to kill her if she ever told anyone about the rapes. AA039 (Compl. at 15 ¶ 74).

Two days later, C raped Ms. Rehanna again. AA039 (Compl. at 15-16 ¶¶ 76-81). On that day, C came up to Ms. Rehanna from behind in the hallway, bumped into her, and forced her down the hall into his single-cell room, threatening that if she didn't comply or if she "let on to anybody that [she's] in trouble," C would "beat [her] ass." AA039 (Compl. at 15 ¶ 76). C shut Ms. Rehanna inside his room and covered the window on the cell door. AA039 (Compl. at 15 ¶ 77-78). C "pulled out his erect penis" and ordered "No teeth, NO marks, or I'll kill you," before pulling Ms. Rehanna "violently into him" and forcing her to perform oral sex until he climaxed in her mouth. AA039-040 (Compl. at 15-16 ¶ 79-80). C again

told Ms. Rehanna that if she told anyone about the rapes, he would kill her. AA040 (Compl. at 16 ¶ 82).

After C repeatedly raped Ms. Rehanna, the threats and verbal harassment continued. AA040 (Compl. at 16 ¶ 84). In one particularly troubling incident, Ms. Rehanna was approached by a prisoner she did not know, who informed her, "You've been pointed out, we all know who you are, we're everywhere—where you sleep, in the showers—everywhere, be careful and watch your back!" AA073 (Rehanna Decl. at 5 ¶ 41). This prisoner further threatened Ms. Rehanna by saying that "they will beat [her] ass, they are in every building on the West side [of the prison compound], and they are everywhere." AA073 (Rehanna Decl. at 5 ¶¶ 41-42). Ms. Rehanna was "scared to death" of C, other prisoners, and staff. *Id.*

Prison officials learned of the rapes after listening to a phone call between Ms. Rehanna and her father a week and a half later. AA040, AA051 (Compl. at 16 ¶ 85-86 & n.20). Six staff members escorted her to an office, where Ms. Rehanna described the rapes in detail and identified C by photo. AA040 (Compl. at 16 ¶¶ 86-87). Prison staff confiscated Ms. Rehanna's pen and notebook, where she had kept detailed notes about

the rapes and her experiences in prison. AA040, AA051-052 (Compl. at 16 ¶ 88, 27-28 n.21). Ms. Rehanna was taken to a hospital for a sexual assault examination before being placed in the Special Housing Unit (SHU). AA040 (Compl. at 16 ¶¶ 89-90). An FBI investigator interviewed Ms. Rehanna a few days later, requiring her to recount the rapes in detail again. AA041 (Compl. at 17 ¶ 95); AA076 (Rehanna Decl. at 8 ¶ 72). The FBI agent told Ms. Rehanna that she would be informed of the outcome of the investigation, but to this day, she has not been. AA047 (Compl. at 23 n.6). Dr. Morfe also completed another evaluation of Ms. Rehanna, finally—only after Ms. Rehanna had suffered multiple rapes—identifying her as "at risk for victimization." AA040-041 (Compl. at 17 ¶ 91).

While in the SHU, Ms. Rehanna was taken to meet with Captain Janet Fitzgerald. AA041 (Compl. at 17 ¶ 96); AA076 (Rehanna Decl. at 8 ¶ 73). Fitzgerald told Ms. Rehanna that she wasn't C's only victim—another had come forward, and more were expected to follow. AA041 (Compl. at 17 ¶ 96); AA076 (Rehanna Decl. at 8 ¶ 73). To Ms. Rehanna's alarm, Fitzgerald relayed that "the entire compound knows what happened" to Ms. Rehanna, with the result that there was "absolutely no

safe housing" for her there. AA052 (Compl. at 28 n.24); AA076 (Rehanna Decl. at 8 ¶¶ 73-74). Fitzgerald warned Ms. Rehanna that she should never speak about the rapes for her own safety—even after her impending transfer out of Fort Dix, because C would still be able to track her down through the BOP's inmate locator system. AA077 (Rehanna Decl. at 9 ¶ 75). Worse still, Fitzgerald told Ms. Rehanna that prison staff wouldn't be able to protect her if she "snitched." AA077 (Rehanna Decl. at 9 ¶ 75).

Those troubling statements weren't all. Fitzgerald urged Ms. Rehanna not to contact an attorney about the rapes, claiming that Ms. Rehanna was required to wait until after the BOP had completed its internal investigation and the BOP's attorneys had contacted her. AA077 (Rehanna Decl. at 9 ¶ 76). Fitzgerald also cautioned Ms. Rehanna that if she "cause[d] problems" for the BOP, the BOP would "make problems" for her. AA077 (Rehanna Decl. at 9 ¶ 79). Among those "problems" Fitzgerald threatened the BOP might create for Ms. Rehanna: "diesel therapy," which Fitzgerald explained as a practice of deliberately shipping a prisoner from prison to prison until the prisoner stopped complaining. AA076 (Rehanna Decl. at 9 ¶ 77).

Ms. Rehanna came away from the conversation with Fitzgerald afraid for her life. AA077 (Rehanna Decl. at 9 ¶ 78). Ms. Rehanna believed Fitzgerald's warnings that C could "hunt [her] down wherever [she] was." *Id*. And she "completely" trusted Fitzgerald's instruction that she should not take any action relating to the rapes until after the BOP's attorneys had interviewed her and the BOP's investigation had concluded. AA077 (Rehanna Decl. at 9 ¶ 79).

C. FCI Fort Dix's insufficient safety measures.

Various policies and practices at FCI Fort Dix made it an especially dangerous place, particularly for prisoners at higher risk of sexual assault. For example, the unit where Ms. Rehanna was repeatedly raped spanned three floors and housed around 350 to 400 prisoners. AA038 (Compl. at 14 ¶ 70); AA071 (Rehanna Decl. at 3 ¶ 18). Yet only a single correctional officer (CO) was assigned to watch the hundreds of prisoners on that unit. AA038 (Compl. at 14 ¶ 70); AA072 (Rehanna Decl. at 4 ¶ 27). The CO's office was on the first floor; Ms. Rehanna's cell was on the third floor. AA038 (Compl. at 14 ¶¶ 64, 70). The unit had no cameras or video monitoring. AA038 (Compl. at 14 ¶ 70); AA085 (Opp. Ex. 11 at 7).

Despite the lack of video monitoring and the multi-floor layout, staff

rarely, if ever, did walk-throughs of the unit; it was known for being "very loosely supervised." AA038 (Compl. at 14 ¶ 69); AA072 (Rehanna Decl. at 4 ¶¶ 26, 28). The unit's residents only saw the assigned CO at the two daily scheduled count times (4 pm and 9 pm). AA038 (Compl. at 14 ¶ 69); AA072 (Rehanna Decl. at 4 ¶ 28). The lack of staff walk-throughs also violated PREA, which requires unannounced supervisory rounds. 28 C.F.R. § 115.13(d). But even if staff had conducted walk-throughs, the usefulness of those walk-throughs would have been hampered by the unit's "blind spots." AA085 (Opp. Ex. 11 at 7). Perhaps unsurprisingly, the BOP's 2013 Annual PREA Report attributed rapes at Fort Dix to the "physical layout of the facility, blind spots and physical barriers [that] may have limited staff's ability to detect the abuse." *Id.* That the BOP's Annual PREA Report identified a problem at Fort Dix is striking; *none* of the other facilities with substantiated prisoner-on-prisoner sexual assaults were identified as having "problem[s]" that contributed to the assaults. *Id.* The report recommended installing cameras to correct Fort Dix's safety lapses. *Id.*

The inadequate supervision, lack of camera monitoring, and multi-floor layout with blind spots were far from Fort Dix's only failures to

protect its residents. Another particularly troubling practice was the way Fort Dix screened prisoners for risk of sexual abuse. PREA requires that prisons screen incoming prisoners to determine their risk of sexual abuse and mandates consideration of ten factors in that screening, including whether the prisoner has been previously incarcerated; whether the prisoner has sex offense convictions; whether the prisoner is or is perceived to be LGBTQ; whether the prisoner has a mental, physical, or developmental disability; and the prisoner's own perception of vulnerability. 28 C.F.R. § 115.41 (2012). *All* of those factors—had Ms. Rehanna been asked about them—would've weighed in favor of finding her at an elevated risk of sexual victimization.

But Fort Dix's intake screening procedures and standardized sexual abuse screening form only asked about one of the required ten factors, violating PREA. *Compare* AA053 (Compl. Ex. A at 1) (intake screening by Defendant Watkins-Ward, completed on Fort Dix's standardized form), *with* 28 C.F.R. § 115.41 (2012) (mandating consideration of ten factors, only one of which was on Fort Dix's intake form). Fort Dix's PREA violations are attributable at least in part to Defendant Dr. Marantz-Tattersdi, who, in her role as Chief Psychologist

and PREA Coordinator, was responsible for compliance with PREA. AA028 (Compl. at 4 ¶ 16).

The failure to comply with PREA's requirements wasn't the only deficiency in the intake screening conducted by Defendant Watkins-Ward. Although Watkins-Ward stated she reviewed Ms. Rehanna's pre-sentence investigation report (PSI) as part of the intake screening, *see* AA053 (Compl. Ex. A at 1), Watkins-Ward noted *none* of the factors discussed in that report that put Ms. Rehanna at greater risk of sexual assault. Those included Ms. Rehanna being LGBTQ, her conviction for child pornography, her significant mental health diagnoses, and her first-time offender status. *See* AA071 (Rehanna Decl. at 3 ¶ 15); AA058 (Compl. Ex. Y at 156-66) (pre-sentence psychological evaluation by Dr. James Reardon, Ph.D.); AA032 (Compl. at 8 ¶ 35) (explaining that Ms. Rehanna's PSI incorporated numerous findings from Dr. Reardon's report, including a description of Ms. Rehanna as "a significantly psychologically disturbed . . . gay male" who suffered from "Major Depression Recurrent and mild personality disorder"). Watkins-Ward also marked no "psych alert" factors on the intake screening form, despite Dr. Reardon's determination—incorporated into the PSI—that Ms.

Rehanna was "significantly psychologically disturbed" and suffered from "Major Depression . . . with potential psychotic episodes." AA067 (Compl. Ex. Y at 165-66); AA032 (Compl. at 8 ¶ 35).

D. Ms. Rehanna finally pursues legal recourse for the failure to protect her.

The rapes, understandably, left Ms. Rehanna with "extreme trauma." AA033 (Compl. at 9 ¶ 37). The assaults exacerbated her preexisting mental health diagnoses, deepening her depression and worsening her anxiety and panic attacks. AA077 (Rehanna Decl. at 9 ¶ 82). To this day, Ms. Rehanna relives the rapes through flashbacks, waking up screaming during the night. AA077 (Rehanna Decl. at 9 ¶ 81). Although she was transferred to FCC Forrest City several months after the rapes and again two years later to FCI Elkton, she remains "always on edge" and in "constant fear" of C "hunting [her] down" and raping her again. AA077-78 (Rehanna Decl. at 9-10 ¶¶ 82, 84). She "jump[s] at the slightest noises" and experiences "sheer terror" whenever she sees someone remotely resembling her rapist. AA077 (Rehanna Decl. at 9 ¶ 82). She fears restrooms and men in general. AA077 (Rehanna Decl. at 9 ¶ 82). At times, Ms. Rehanna even hallucinates that C is standing behind her. AA078 (Rehanna Decl. at 10 ¶ 83).

Being in prison—the same environment in which she was raped—causes her "continual trauma" and is an unrelenting trigger for her PTSD. AA046 (Compl. at 22 n.4); AA078 (Rehanna Decl. at 10 ¶ 84). Ms. Rehanna's PTSD was so severe that for the first several years after she was raped, she experienced "a constant break from reality." AA078 (Rehanna Decl. at 10 ¶ 85). It felt like she was in a perpetual daze, or even in a movie; she can hardly recall any events or interactions from that time. *Id*. Ms. Rehanna's primary memory from that period is a feeling of constant fear and vigilance, terrified that C would track her down—just as Captain Fitzgerald warned he would. AA078 (Rehanna Decl. at 10 ¶ 87).

Incapacitating PTSD wasn't the only barrier Ms. Rehanna faced in pursuing legal action for the failure to protect her. Ms. Rehanna "completely" believed Captain Fitzgerald's warnings that C could find her wherever she was, as long as she was in the BOP system. AA077 (Rehanna Decl. at 9 ¶¶ 78-79). She thus "fear[ed] for her life" and was too afraid to file a lawsuit, given that Fitzgerald had cautioned her that if she did, she would be labeled a "snitch" and the BOP wouldn't be able to protect her. AA046 (Compl. at 22 n.4); AA076 (Rehanna Decl. at 9 ¶ 75).

Ms. Rehanna likewise fully believed Fitzgerald's admonishment that she should wait until after the BOP had completed its investigation and BOP attorneys had interviewed her. AA077-78 (Rehanna Decl. at 9 ¶¶ 76, 78-79, 10 ¶ 89). Ms. Rehanna had been told by BOP staff and the FBI agent who interviewed her that she would be informed of the outcome of the BOP's investigation, so she reasonably believed she would know when the investigation was complete—and thus when she would be able (per Fitzgerald's instructions) to take action of her own.[3] AA046-47 (Compl. at 23 n.5).

As if that weren't deterrent enough, Ms. Rehanna also feared retaliation by the BOP and other prisoners, especially in light of Fitzgerald's warnings about "diesel therapy." AA046 (Compl. at 22 n.4); AA077-78 (Rehanna Decl. at 9 ¶ 77, 10 ¶ 88). That Ms. Rehanna wholeheartedly believed Captain Fitzgerald is unsurprising in light of

[3] Indeed, PREA requires that prisoners be informed whether a claim of sexual abuse has been found to be substantiated, unsubstantiated, or unfounded. 28 C.F.R. § 115.73. But Ms. Rehanna was never informed of that *any* outcome was reached in her investigation, let alone that her claims had been substantiated; she only discovered that her claims had been substantiated after requesting and receiving her psychology records for unrelated reasons in October 2017. AA046-47 (Compl. at 22-23 nn.4-6); AA049, 33 (Compl. at 25 n.14, 9 ¶ 38); AA079 (Rehanna Decl. at 11 ¶ 99).

Dr. Reardon's psychological evaluation, which found that Ms. Rehanna's "susceptibility to influence"—the tendency "to follow the directions of others without sufficient self-consideration and to accept uncritically other's statements or assertions"—was "well beyond the 99th percentile," meaning she is "easily influenced and easily led." AA065, 68 (Compl. Ex. Y at 163, 166).

In August or September of 2017, Ms. Rehanna was speaking with another prisoner about what happened to her at Fort Dix, explaining that she had to wait for substantiation from the BOP and FBI before she could take any action on her own. AA078 (Rehanna Decl. at 10 ¶ 91). The other prisoner advised Ms. Rehanna not to wait for the BOP and FBI, as they might not protect her rights. *Id*. After further discussions with that prisoner, Ms. Rehanna realized that she "had been taken advantage of by the BOP" and that she needed to take action for herself. AA078-79 (Rehanna Decl. at 10 ¶ 92). After requesting her BOP psychology records for unrelated reasons, Ms. Rehanna learned for the very first time on October 3, 2017, that her rapes had been substantiated several years prior, in July 2015. AA049, 33 (Compl. at 25 n.14, 9 ¶ 38); AA079 (Rehanna Decl. at 11 ¶ 99). She filed a grievance about the BOP's

deliberate indifference 5 days later, on October 8, 2017. AA033 (Compl. at 9 ¶ 41). Ms. Rehanna also filed FOIA requests for BOP and FBI records relating to the rapes and attempted to contact multiple legal service organizations to represent her, without success. AA047 (Compl. at 23 n.6); AA079 (Rehanna Decl. at 11 ¶¶ 98-99). She completed the requisite grievance appeal process in January 2018. AA042 (Compl. at 18 ¶ 100).

II. Procedural Background

After fully exhausting the BOP's administrative relief procedures, Ms. Rehanna filed suit pro se in December 2018, and filed an amended complaint in February 2019. ECF 1; AA17 (Compl.). As relevant here, Ms. Rehanna's complaint alleged that Unit Counselor Fischer, Case Manager Watkins-Ward, Staff Psychologist Morfe, and Chief Psychologist and PREA Coordinator Marantz-Tattersdi had failed to protect her from being sexually assaulted in violation of the Eighth Amendment.[4] AA027-28 (Compl. at 3-4 ¶¶ 9-16). After screening the complaint as required by 28 U.S.C. § 1915A, the district court dismissed the complaint as untimely in May 2019. ECF 10.

[4] The complaint also named several other defendants and alleged an APA claim; Ms. Rehanna does not appeal the dismissal of the APA claim or of the other defendants.

In November 2020, Ms. Rehanna moved to reopen the case under Fed. R. Civ. P. 60(b)(6), citing recent legislation enacted by the state of New Jersey. ECF 13. The newly enacted statutory provision, N.J.S. § 2A:14-2b, established a two-year period during which otherwise time-barred sexual assault civil claims could be brought. ECF 14 at 1 (quoting N.J.S. § 2A:14-2b(a)). The district court provisionally granted her motion and appointed counsel to brief whether N.J.S. § 2A:14-2b applied to Ms. Rehanna's claims. ECF 14.

Defendants moved to dismiss the amended complaint. ECF 47-1. Defendants argued that despite N.J.S. § 2A:14-2b, Ms. Rehanna's claims were untimely. *Id.* at 17-21. They also contended that a *Bivens* remedy was unavailable for Ms. Rehanna's claims—although they acknowledged this Court's precedent recognizing failure-to-protect *Bivens* remedies in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), and *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021). ECF 47-1 at 13-23 & n.8. Finally, they argued that Ms. Rehanna had failed to state a claim and that qualified immunity defeated her allegations, although they disputed only whether her allegations amounted to a constitutional violation, not whether the constitutional right was clearly established. ECF 47-1 at 23-42.

The district court reached only defendants' first argument—that Ms. Rehanna's claims were time-barred. AA014 (Opinion at 10). It construed N.J.S. § 2A:14-2b as a "specialized limitation period," AA011 (Opinion at 7), rather than a revival period. That distinction matters, because courts are required to apply a forum state's provisions regarding "revival" unless doing so would "defeat" the goals of *Bivens*. *Hardin v. Straub*, 490 U.S. 536, 539 (1989). But courts are forbidden from applying "specialized limitation period[s]" to *Bivens* claims; Supreme Court precedent requires borrowing the relevant state's general personal injury statute of limitation. *See Owens v. Okure*, 488 U.S. 235, 240 (1989). Thus, because the district court viewed § 2A:14-2b as a specialized limitation period, not a revival provision, it concluded that the statute did not make Ms. Rehanna's claims timely. AA011 (Opinion at 7). It also rejected Ms. Rehanna's argument that her claims should have been equitably tolled due to a combination of her debilitating PTSD, the misleading information provided by Captain Fitzgerald, and the threats she received from her rapist, Captain Fitzgerald, and other prisoners. AA012-14 (Opinion at 8-10). The district court declined to address defendants' arguments that *Bivens* was unavailable, that Ms. Rehanna failed to state

a claim, or that qualified immunity shielded defendants. AA014 (Opinion at 10). After the district court entered its final order dismissing the case, AA004 (Order), Ms. Rehanna timely appealed, AA001 (Notice of Appeal).

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to dismiss a case as time-barred. *Jones v. Unknown D.O.C. Bus Driver and Transp. Crew*, 944 F.3d 478, 481 (3d Cir. 2019). As part of this plenary review, this Court "resolv[es] any uncertainty in the law governing the limitations bar in plaintiff's favor." *Coello v. DiLeo*, 43 F.4th 346, 351 (3d Cir. 2022). It also accepts as true the facts alleged in the complaint and gives them "the benefit of all reasonable inferences one can draw from these facts." *Lake v. Arnold*, 232 F.3d 360, 365 (3d Cir. 2000). *Pro se* complaints, like Ms. Rehanna's, are liberally construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

SUMMARY OF ARGUMENT

I. Although filed after the expiration of New Jersey's two-year personal injury limitations period, Ms. Rehanna's claims were timely. *Bivens* claims borrow not just the chronological limitations period from the forum state, but also that state's rules around revival and tolling.

Those state rules of revival and tolling make Ms. Rehanna's claims timely, for two independent reasons.

A. In 2019, New Jersey enacted a revival provision allowing previously time-barred sexual assault claims to be brought within a two-year window. *See* N.J.S. § 2A:14-2b(a). The district court rejected the argument that § 2A:14-2b made Ms. Rehanna's claims timely. It did so because it construed that provision as a "specialized statute of limitation"—which would not apply to Ms. Rehanna's *Bivens* claims—rather than a revival provision, which *would* apply. That was error: the statute's text, title, statutory structure, and legislative history all make clear that § 2A:14-2b is a revival provision, not a statute of limitation. And because it is a revival provision, it applies to Ms. Rehanna's claims. That's true even though § 2A:14-2b is a "specialized" revival provision only applying to certain types of claims. This Court's precedent confirms that these kinds of "specialized" state rules of tolling and revival apply to § 1983 claims, and Ms. Rehanna's *Bivens* claim should be no different.

B. New Jersey's equitable tolling rules—both statutory and common law—also make Ms. Rehanna's claims timely. That state codified sweeping equitable tolling rules for sexual assault claims,

allowing tolling on account of a plaintiff's mental state, mental disability, duress, or "any other equitable grounds." N.J.S. § 2A:14-2a(b)(2). Because Ms. Rehanna suffered incapacitating PTSD, anxiety, and depression—to the point where she was in a dissociative state for several years after the rapes—her claims should be equitably tolled under § 2A:14-2a(b)(2). And given that Captain Fitzgerald induced Ms. Rehanna into not filing a claim until after the deadline had passed—because Ms. Rehanna believed she could not take action until the BOP closed its investigation and because she feared reprisal by the BOP, her rapist, and other prisoners—her claims are also tolled under common law principles of equitable tolling. At minimum, the district court erred in deciding the fact-intensive question of equitable tolling at the motion-to-dismiss stage, something this Court ordinarily disapproves of.

II. While the district court's sole ground for dismissal was timeliness and this Court typically declines to address issues in the first instance on appeal, determining the availability of a *Bivens* remedy is an exception to that rule. If this Court opts to reach the question, the answer is straightforward: Ms. Rehanna's failure-to-protect claim is not a new *Bivens* context. Her claim falls squarely within the *Bivens* remedy

recognized in *Farmer v. Brennan*, 511 U.S. 825 (1994), reinforced by this Court in *Bistrian v. Levi*, 912 F.3d 79 (3d Cir. 2018), and reiterated in *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021).

ARGUMENT

I. Ms. Rehanna's claims were timely.

Bivens actions, like actions under 42 U.S.C. § 1983, borrow the forum state's general personal injury statute of limitations. *See Peguero v. Meyer*, 520 F. App'x 58, 60-61 (3d Cir. 2013); *Owens v. Okure*, 488 U.S. 235, 240 (1989). In New Jersey—the forum state here—that period is just two years. *See* N.J.S. § 2A:14-2. But longstanding Supreme Court precedent requires borrowing not just the "chronological length of the limitation period," but also the state's "provisions regarding tolling, revival, and questions of application." *Hardin v. Straub*, 490 U.S. 536, 539 (1989). Courts may not "unravel" these rules of the forum state, "unless their full application would defeat the goals" of a *Bivens* action or § 1983 claim. *Id.* The primary goals served by a *Bivens* claim are compensation and deterrence. *Carlson v. Green*, 446 U.S. 14, 21 (1980); *see also id.* at 21 n.6 (explaining that § 1983 and *Bivens* serve similar purposes). So, unless applying New Jersey's rules about tolling or revival

would "defeat" *Bivens*' chief goals of compensation and deterrence, those state choices are "binding rules of law." *Hardin*, 490 U.S. at 539 (quoting *Board of Regents v. Tomanio*, 446 U.S. 478, 484 (1980)).

Ms. Rehanna's claims are timely for two independent reasons. First, in 2019, New Jersey enacted a two-year grace period reviving all previously time-barred sexual assault claims, regardless of any statute of limitations—including those brought under the relevant state limitations period that applies to *Bivens* claims. *See* N.J.S. § 2A:14-2b. Second, and independent of the revival statute, Ms. Rehanna's claims were equitably tolled under a proper application of New Jersey's equitable tolling principles, which grant special solicitude to the hurdles faced by sexual assault victims in bringing legal claims and, more broadly, prevent injustice where plaintiffs have been induced into allowing the filing deadline to pass.

A. N.J.S. § 2A:14-2b, a statutory revival provision, makes Ms. Rehanna's claims timely.

1. The district court erred in interpreting N.J.S. § 2A:14-2b as a specialized statute of limitation rather than a revival provision.

As all parties agree, Ms. Rehanna's *Bivens* claim requires borrowing New Jersey's two-year general personal injury statute of

limitations, rather than a statute of limitations specific to the particular content of her claims (such as New Jersey's specialized statutes of limitation for sexual assault). *See Owens*, 488 U.S. at 240; AA011 (Opinion at 7). But determining whether Ms. Rehanna's claim was timely also requires borrowing New Jersey's rules around revival and tolling, which are separate from—but interrelated with—the chronological period of limitation. *Hardin*, 490 U.S. at 539. One such rule is N.J.S. § 2A:14-2b, which is a two-year revival provision resuscitating otherwise time-barred sexual assault claims, including those brought under the state's personal injury cause of action. *See* N.J.S. § 2A:14-2b(a).

The district court, however, rejected the argument that § 2A:14-2b made Ms. Rehanna's claims timely. *See* AA011-12 (Opinion at 7-8). But that decision appeared to rest on a mistaken premise: that § 2A:14-2b is a specialized statute of limitation for certain types of claims—in which case it would unquestionably not apply to Ms. Rehanna's *Bivens* claims—instead of a revival provision, which *would* apply to her *Bivens* claims. AA011 (Opinion at 7) (in rejecting application of § 2A:14-2b, citing case for proposition that "specialized limitation periods" for sexual assault claims don't apply to § 1983 or *Bivens* claims). That matters, because

federal courts are required to apply a state's revival provisions—here, § 2A:14-2b—unless doing so would "defeat" the goals of *Bivens*. *Hardin*, 490 U.S. at 539. The district court's failure to construe § 2A:14-2b as a revival provision—and concomitant failure to apply it to Ms. Rehanna's claims—conflicts with the statute's text, title, statutory structure, and legislative history.

A little context is in order. Section 2A:14-2b was enacted by S477, a bill implementing several reforms intended to "greatly increase[] the ability of victims of sexual abuse to pursue justice through the court system." Governor's Statement Upon Signing Senate Bill No. 477 (May 13, 2019), https://pub.njleg.gov/bills/2018/S0500/477_G1.PDF. To that end, S477 made three major changes. First, it allowed sexual abuse claims against certain previously immune entities. *See, e.g.*, N.J.S. § 2A:53A-7; § 59:2-1.3. Second, it significantly extended the statutes of limitation for sexual abuse claims—increasing the period to seven years for adult victims and until the victim's 55th birthday (or seven years after discovering the injury and its cause, whichever is later) for minor victims—and expanded the application of equitable tolling principles in such cases. N.J.S. § 2A:14-2a. Finally—and as relevant here—it created

a two-year period reviving all previously time-barred sexual assault claims, "notwithstanding [any] statute of limitations." N.J.S. § 2A:14-2b. The applicable provision reads:

> Notwithstanding the statute of limitations provisions of N.J.S. § 2A:14-2 [the general personal injury statute of limitations], § 2A:14-2a [the sexual assault statute of limitations], § 2A:14-2.1 [the statute of limitations for injury to a minor child], or any other statute, an action at law for an injury resulting from the commission of sexual assault, any other crime of a sexual nature, a prohibited sexual act as defined [by statute], or sexual abuse as defined [by statute], that occurred prior to the effective date of [S477], and which action would otherwise be barred through application of the statute of limitations, may be commenced within two years immediately following the effective date [December 1, 2019].

N.J.S. § 2A:14-2b(a) (cleaned up).

As with any other statutory inquiry, answering a statutory question implicating timeliness "begins with the text." *Rotkiske v. Klemm*, 890 F.3d 422, 424 (3d Cir. 2018) (en banc), *aff'd*, 140 S. Ct. 355 (2019). Under this text-first approach, undefined statutory language is interpreted "according to its ordinary, contemporary, common meaning." *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) (citation omitted). Here, the plain language of § 2A:14-2b can only be read as creating a revival provision—not a specialized limitations period.

The first confirmation that § 2A:14-2b is a revival provision and not

a specialized statute of limitation is its opening clause: "*Notwithstanding the statute of limitations provisions* of [the general personal injury statute of limitations], [the sexual assault statute of limitations], [the statute of limitations for injury to minor child], *or any other statute* . . . ." (emphases added). The "ordinary meaning" of "notwithstanding" is "in spite of, or without prevention or obstruction from or by." *N.L.R.B. v. S.W. Gen., Inc.*, 580 U.S. 288, 301 (2017) (citations omitted). So, put differently, § 2A:14-2b begins by saying it operates "in spite of," *id.*, the "statute of limitations provisions" of "any . . . statute," § 2A:14-2b(a). That clause would make little sense if § 2A:14-2b were *itself* a "statute of limitations provision." § 2A:14-2b(a). *See Disabled in Action of Penn. v. S.E. Penn. Trans. Auth.*, 539 F.3d 199, 210 (3d Cir. 2008) (statutory interpretation requires avoiding constructions "inconsistent with common sense").

The text *is* consistent, however, with the ordinary meaning of "revival." *See, e.g.*, *Revival of cause*, Ballentine's Law Dictionary (3d ed. 1969) ("revived cause of action" includes "cause of action barred by the statute of limitations, and brought to life again in the manner provided by statute"); *Revival*, Cornell Legal Information Institute-Wex (Apr. 2021) ("The ability of a party to bring a claim that would otherwise be

time-barred by the statutes of limitation because of a statutory exception to the statute of limitations."). Those definitions also fit closely with the statute's text allowing claims that "would *otherwise be barred through the application of the statute of limitations* [to] be commenced within two years" of the effective date. § 2A:14-2b(a) (emphasis added).

And the text also tells us that the New Jersey legislature intended it to apply to federal claims like Ms. Rehanna's. The revival provision applies not just to claims subject to the sexual assault statutes of limitation, *see* § 2A:14-2b(a), but also to sexual assault claims governed by the *personal injury* statute of limitations—including § 1983 and *Bivens* claims like Ms. Rehanna's. That deliberate inclusion must have some significance, as the legislature would have been well aware that federal civil rights claims are subject to the state personal injury statute of limitations. *See Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1072 (2020) (general rule is to assume legislative awareness of "relevant judicial precedent when it enacts a new statute"); *see also Avalon Manor Improvement Ass'n, Inc. v. Township of Middle*, 850 A.2d 566, 585 (N.J. App. Div. 2004) (New Jersey legislature "is presumed to be aware of relevant case law when it enacts statutes").

Interpreting § 2A:14-2b as a revival period rather than a statute of limitations also aligns with that section's title. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (title of a statute and heading of a section are "tools" to resolve "the meaning of a statute"). Section 2A:14-2b's title is "Commencement of actions *regardless of statute of limitations*." (emphasis added). The ordinary meaning of "regardless" is, like the meaning of "notwithstanding," "in spite of." *See Regardless*, Webster's New World College Dictionary (4th ed. 2010). If a provision operates "in spite of" any statute of limitations, it follows that the provision in question cannot itself *be* a statute of limitations. If it were otherwise, the "regardless of statute of limitations" language would be rendered superfluous, violating one of the "most basic interpretive canons." *Geisinger Comm. Medical Ctr. V. Sec'y U.S. Dep't of Health and Human Servs.*, 794 F.3d 383, 392 (3d Cir. 2015) (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)).

The statutory structure also points to construing § 2A:14-2b as a revival provision, not a statute of limitation. *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1484 (2021) (examining statutory structure to help discern "the law's ordinary meaning"). As noted earlier, a *different*

provision of S477 extended the statutes of limitation for sexual abuse claims for both adult and minor victims. *See* N.J. P.L. 2019, c.120. Those changes were housed in a separate statutory section, with a different section heading ("Statute of limitations for action at law resulting from certain sexual crimes against a minor").[5] *See* N.J.S. § 2A:14-2a. If the legislature had intended the two-year window to be a statute of limitation rather than a revival period, it presumably would've housed it in the "statute of limitations" statutory section. This separate provision also makes clear that the New Jersey legislature knows how to label a provision a statute of limitations when it is one.

Similarly, the difference in language between § 2A:14-2a and § 2A:14-2b confirms that the latter is *not* a statute of limitation; § 2A:14-2b's text spells out that its application is "notwithstanding [] statute of limitations provisions" and that it reaches claims that "would otherwise be barred through application of the statute of limitations," whereas § 2A:14-2a has no such language. *Cf. Henson v. Santander Consumer*

[5] Although N.J.S. § 2A:14-2a's heading references "sexual crimes against a minor," it also governs the statute of limitations for sexual abuse claims against adults. *See* § 2A:14-2a(b)(1) (setting out seven-year statute of limitations for sexual abuse committed against adults).

USA Inc., 137 S. Ct. 1718, 1723 (2017) (courts "presume differences in language . . . convey differences in meaning"); *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (the omission of language found in another statutory subsection reflects "a deliberate [legislative] choice").

Finally, the legislative history makes plain that § 2A:14-2b is a revival window, separate from S477's extension of the statutes of limitation for sexual assault claims. *See Ass'n of New Jersey Rifle and Pistol Clubs, Inc. v. Port Auth. of New York and New Jersey*, 730 F.3d 252, 256-57 (3d Cir. 2013) (looking at legislative history to "corroborate[]" plain meaning of statute); *see also id.* at 256 (describing committee reports as "the kind of legislative history to which [courts] ordinarily accord the greatest weight"). The New Jersey Senate Judiciary Committee report explained that S477 would "extend the statute of limitations in civil actions for sexual abuse claims, *as well as* create a two-year window for parties to bring previously time-barred actions based on sexual abuse." N.J. S. Rep. No. 477 at 1, 2018-19 (enacted) (emphasis added); *id.* at 7-8 (describing the "two-year window established by this section" as separate from the provision creating a "new, extended

statute of limitations period").

The statute's text, title, structure, and legislative history all point in one direction: § 2A:14-2b is a revival period, not a specialized statute of limitation.

2. N.J.S. § 2A:14-2b applies to Ms. Rehanna's claims even though it is a "specialized" revival provision.

While § 2A:14-2b is a "specialized" revival provision applicable only to certain issues, it—unlike specialized statutes of limitation—applies to *Bivens* claims raising those issues. That's confirmed by this Court's precedent applying issue-specific state tolling and revival rules to § 1983 claims, which share the same timeliness rules as *Bivens* claims. *See Kach v. Hose*, 589 F.3d 626, 640-41 (3d Cir. 2009); *Peguero*, 520 F. App'x at 60-61. And it's reinforced by examining the concerns motivating the Supreme Court's creation of a bright-line rule applying the generic personal injury statute of limitations: ease of administration and predictability. *Owens*, 488 U.S. at 240-43, 245. Those concerns don't carry over to applying state rules of revival and tolling, which inherently require a fact-intensive, case-by-case approach, and are not amenable to bright-line rules. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 649-50

(2010).

Turning first to precedent: *Kach v. Hose* involved a plaintiff who ran away from home at the age of 14 to live with a school security guard with whom she had a sexual relationship; she lived with the guard for ten years before law enforcement uncovered the situation and arrested the guard. 589 F.3d at 630-32. The plaintiff sued under § 1983 more than a decade after she had run away with the guard, and her claims were dismissed for exceeding Pennsylvania's two-year general personal injury statute of limitations. *Id.* at 634-35. Among other arguments, *Kach* considered whether the claims were nonetheless timely because of Pennsylvania's infancy tolling provision specific to childhood sexual abuse claims. *Id.* at 639-41 (citing Pa. Cons. Stat. § 5533(b)(2)(i) (2002)). *Kach* ultimately rejected that argument, because the provision in question specified that it would not revive claims—like the *Kach* plaintiff's—that were already time-barred as of its effective date. *Id.* at 640-41. In other words, *Kach* readily looked to state tolling and revival rules specific to childhood sexual assault—that is, a "specialized" tolling provision—to determine the timeliness of the plaintiff's § 1983 claims. The same should hold true for Ms. Rehanna's *Bivens* claims here. *See*

Peguero, 520 F. App'x at 60-61 (applying New Jersey tolling rules to *Bivens* claim and noting that claims under *Bivens* and § 1983 share timeliness rules).

Examining the rationale behind the bright-line rule *Owens* created explains why specialized state rules of tolling and revival—but *not* specialized statutes of limitation—apply to *Bivens* and § 1983 claims. *Owens* was animated by concerns about ease and predictability: the prior case-by-case approach for determining the appropriate state statute of limitations in any given § 1983 case "had bred chaos and uncertainty." *Owens*, 488 U.S. at 240-43. *Owens* thus reasoned that a bright-line rule of borrowing the forum state's general personal injury statute of limitations in every § 1983 case would create a more administrable and predictable framework, as there would only be one limitations period to choose from in each state. *Id.* at 245.

But those desires for ease of administration, predictability, and a single-choice menu are inherently incompatible with rules of tolling and revival. By their very nature, tolling and revival rules require a case-by-case, fact-intensive approach—and that's true whether those provisions apply to all types of claims, or only certain ones. *See, e.g.*, *Holland*, 560

U.S. at 649-50 (exercise of equitable tolling "must be made on a case-by-case basis" and "avoid[] mechanical rules"); *Credit Suisse Securities (USA) LLC v. Simmonds*, 566 U.S. 221, 229 (2012) ("Equitable tolling, after all, involves fact-intensive disputes . . . ."); *Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012) ("There are no bright lines in determining whether equitable tolling is warranted in a given case."). And because multiple state rules of tolling and revival can apply in a single case—even if none of those rules are "specialized" to the particular issue at hand—it's simply not possible to replicate the one-choice rule *Owens* created for determining the applicable statute of limitations.

Kach well illustrates both points: this Court had to exhaustively analyze the facts to determine whether any one of three state tolling rules could make the plaintiff's claims timely. *Kach*, 589 F.3d at 639-43. *Kach* demanded such a fact-intensive, case-specific analysis even though two of the three state tolling rules—duress and discovery—were not specific to any particular type of claim. *Id.* at 640-43. And because multiple state tolling rules could, at least in theory, have made the *Kach* plaintiff's claims timely, it would not have been possible to narrow the analysis down to a single tolling rule. *Id.*

* * *

Section 2A:14-2b is a revival provision, not a specialized statute of limitation. And though it's a revival provision specific to sexual assault claims, it nonetheless applies to *Bivens* claims like Ms. Rehanna's. That's confirmed by this Court's decision in *Kach*, and reinforced by examining the rationales for the bright-line rule in *Owens*. Applying § 2A:14-2b to Ms. Rehanna's claims also adheres to the Supreme Court's instruction to apply state rules of revival and tolling unless their "full application would defeat the goals" of *Bivens*. *Hardin*, 490 U.S. at 539. Applying § 2A:14-2b would serve, not defeat, the primary goals of *Bivens*: compensation and deterrence. *Carlson*, 446 U.S. at 21. Both are furthered by allowing the revival of Ms. Rehanna's claim against defendants for failing to protect her from multiple brutal sexual assaults.

B. Ms. Rehanna's claims were equitably tolled.

Even if § 2A:14-2b did not exist, Ms. Rehanna's claims would still be timely applying ordinary principles of equitable tolling. As with revival, courts must apply the tolling provisions of the forum state—here, New Jersey—unless doing so would defeat *Bivens*' goals of compensation and deterrence. *See Hardin*, 490 U.S. at 539; *Carlson*, 446 U.S. at 21.

New Jersey's equitable tolling rules render Ms. Rehanna's claims timely because that state codified generous and wide-ranging equitable tolling for sexual assault survivors and because its common-law tolling principles prevent plaintiffs from being shut out of court where they were misled into letting the filing deadline pass by.

1. Ms. Rehanna's claims are timely under New Jersey's statutory equitable tolling rules for sexual assault survivors.

Along with creating § 2A:14-2b's two-year revival window, S477 also expanded access to justice for sexual assault victims by codifying broad equitable tolling principles applicable to those cases:

> Nothing in this section is intended to preclude the court from finding that the statute of limitations was tolled in an action *because of the plaintiff's mental state, physical or mental disability, duress by the defendant, or any other equitable grounds.* Such a finding shall be made after a plenary hearing.

N.J.S. § 2A:14-2a(b)(2) (emphasis added). Thus, by statute, the New Jersey legislature has made clear that courts must engage in a generous equitable tolling analysis in sexual assault cases, instructing that they may find a limitations period tolled because of a plaintiff's "mental state," "mental disability," or "any other equitable grounds." *Id.*

The wide sweep of § 2A:14-2a(b)(2) is underscored by precedent interpreting a narrower predecessor statutory provision—N.J.S. § 2A:61B-1 (2019)—that applied only to childhood sexual abuse claims and did not include the "physical or mental disability" language of its successor. Even with those restrictions, the New Jersey Supreme Court emphasized the "broad" nature of that tolling provision. *R.L. v. Voytac*, 971 A.2d 1074, 1081 (N.J. 2009). It also explained that the test for equitable tolling is "highly subjective" and requires "a review of [the] plaintiff's individual characteristics that made [her] uniquely vulnerable," with "great flexibility" granted to the plaintiffs in presenting evidence justifying the application of tolling. *Id.* at 1083, 1085.

In this case, § 2A:14-2a(b)(2)'s equitable tolling provision requires that Ms. Rehanna's claims be equitably tolled. She alleged multiple grounds for equitable tolling, including her incapacitating PTSD, anxiety, and depression—in the parlance of § 2A:14-2a(b)(2), her "mental state" and "mental disability." More specifically, Ms. Rehanna recounted suffering "extreme trauma" so severe that it left her feeling like she was in "a constant break from reality"—in a perpetual daze, disassociated from her real-life experience—for the first several years after she was

raped. AA078 (Rehanna Decl. at 10 ¶ 85). She can hardly remember anything from that period, other than a never-ending feeling of vigilance and constant terror that C would track her down—just as Captain Fitzgerald warned. AA078 (Rehanna Decl. at 10 ¶¶ 85, 87). Ms. Rehanna thus at least plausibly alleged that her "mental state" and "mental disability" should equitably toll the statute of limitations, as required by § 2A:14-2a(b)(2). And while § 2A:14-2a(b)(2) is specific to sexual assault claims, it applies to Ms. Rehanna's *Bivens* claims for the same reasons § 2A:14-2b—the two-year revival provision—also applies to her claims. *See supra* at 35-38.

2. Ms. Rehanna's claims are also timely under state common law equitable tolling principles.

Even outside the sexual assault context and § 2A:14-2a(b)(2)'s codification of equitable tolling principles, New Jersey has long applied equitable tolling when the plaintiff "has been induced or tricked by [her] adversary's misconduct into allowing the filing deadline to pass." *Dunn v. Borough of Mountainside*, 693 A.2d 1248, 1258 (N.J. App. Div. 1997). More broadly, it will equitably toll a statute whenever "mechanistic application of [the] statute[] of limitation would . . . inflict obvious and unnecessary harm upon individual plaintiffs without advancing the

legislative purposes." *Price v. New Jersey Mfrs. Ins. Co.*, 867 A.2d 1181, 1185 (N.J. 2005) (cleaned up). Put differently, "[w]henever dismissal would not further the Legislature's objectives in prescribing the limitation, the plaintiff should be given an opportunity to assert [her] claim." *Galligan v. Westfield Centre Servs.*, 412 A.2d 122, 124 (N.J. 1980).

Here, Ms. Rehanna plausibly alleged that the BOP's inducement and threats led her to miss the filing deadline, such that dismissal would frustrate—not further—the legislature's intent to make equitable tolling widely available for sexual assault survivors. Recall that Captain Fitzgerald:

> (1) Told Ms. Rehanna that if she filed a lawsuit, she would be labeled a "snitch" and the BOP would be unable to protect her, AA077 (Rehanna Decl. at 9 ¶ 75);
>
> (2) Warned Ms. Rehanna that if she spoke about the rapes, C would be able to hunt her down through the BOP's online inmate locator even after she transferred, *id.*;
>
> (3) Falsely admonished Ms. Rehanna that she had to wait until the BOP had finished its investigation and its attorneys had interviewed her before she could contact an attorney of her own about the rapes, *id.* ¶ 76; and
>
> (4) Threatened that if Ms. Rehanna "cause[d] problems" for the BOP by speaking out, the BOP would retaliate against her—including by subjecting her to "diesel therapy," the practice of needlessly shipping a prisoner from prison to prison until they stopped complaining, *id.* ¶ 77.

Because Ms. Rehanna was "misled" by Fitzgerald into not pursuing a claim "and as a result fail[ed] to act within the prescribed time limit," equitable tolling should apply. *Bustamante v. Borough of Paramus*, 994 A.2d 573, 588 (N.J. App. Div. 2010).

Equitable tolling is all the more appropriate after factoring in, as this Court must, Ms. Rehanna's "individual characteristics that made [her] uniquely vulnerable." *R.L.*, 971 A.2d at 1085. As Dr. Reardon's psychological evaluation concluded, Ms. Rehanna's "susceptibility to influence"—the tendency "to follow the directions of others without sufficient self-consideration and to accept uncritically other's statements or assertions"—is "well beyond the 99th percentile," meaning she is "easily influenced and easily led." AA065 (Compl. Ex. Y at 163, 166). Thus, Ms. Rehanna was "uniquely vulnerable" to believing Captain Fitzgerald's dire warnings and admonishments not to take legal action on her own. *R.L.*, 971 A.2d at 1085. Ms. Rehanna also suffered from preexisting PTSD, anxiety, and depression, which were greatly magnified by the rapes at Fort Dix and thus furthered her vulnerability. AA077 (Rehanna Decl. at 9 ¶ 82).

* * *

Ms. Rehanna plausibly alleged that her claims were timely under New Jersey's broad equitable tolling rules. Denying equitable tolling for Ms. Rehanna's claims despite New Jersey's generous statutory tolling provision, her mental state and mental disability, and the BOP's misconduct and threats would not "advanc[e] [] legislative purposes"—just the opposite. *Price*, 867 A.2d at 1185. At minimum, the district court erred by deciding the issue of equitable tolling at the motion-to-dismiss stage, as equitable tolling is a fact-specific inquiry "not generally amenable to resolution on a Rule 12(b)(6) motion." *In re Cmty. Bank of N. Va.*, 622 F.3d 275, 301-02 (3d Cir. 2010), *overruled on other grounds*, *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018); *cf. Dattoli v. Yanelli*, 911 F. Supp. 143, 145-48 (D.N.J. 1995) (in applying predecessor version of § 2A:14-2a(b)(2), determining that a plenary hearing was required under the statute to determine whether plaintiff's claims were timely).

II. A *Bivens* remedy is available for Ms. Rehanna's failure-to-protect claim.

The sole ground for the district court's dismissal of Ms. Rehanna's complaint was timeliness; it expressly declined to reach defendants' other arguments, including the availability of a *Bivens* remedy for Ms.

Rehanna's claims. AA014 (Opinion at 10). Under the usual rule, that would limit appellate review to the timeliness question: this Court "ordinarily decline[s] to consider issues not decided by a district court, choosing instead to allow that court to consider them in the first instance." *Forestal Guarani S.A. v. Daros Int'l, Inc.*, 613 F.3d 395, 401 (3d Cir. 2010) (citing cases). But this Court has carved out an exception to that rule for determining the availability of a *Bivens* remedy. *See Bistrian*, 912 F.3d at 88-89 (deciding availability of *Bivens* even though defendants forfeited that argument in the district court); *Shorter*, 12 F.4th at 371 (determining *Bivens* availability in the first instance on appeal). That exception exists because the availability of *Bivens* is a "threshold question of law" that is "antecedent to the other questions presented," and because declining to decide the issue in the first instance on appeal would "risk needless expenditure of the parties' and the courts' time and resources." *Bistrian*, 912 F.3d at 88-89 (cleaned up). To avoid another trip back up on appeal in short order, this Court may wish to address the availability of *Bivens* now, and it can do so with ease: the answer is squarely governed by this Court's recent decisions in *Bistrian* and *Shorter*.

The Supreme Court first recognized an implied right of action for damages against federal officials in *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Explaining that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will . . . adjust their remedies so as to grant the necessary relief," *Bivens* held that damages were recoverable from the federal officers who violated the plaintiff's Fourth Amendment rights. *Id.* at 391-97.

In the ten years following *Bivens*, the Supreme Court explicitly approved a *Bivens* cause of action in two more contexts: Fifth Amendment gender discrimination, in *Davis v. Passman*, 442 U.S. 228 (1979), and Eighth Amendment deliberate indifference to prisoners' medical needs, in *Carlson v. Green*, 446 U.S. 14 (1980). And in *Farmer v. Brennan*, 511 U.S. 825, 830 (1994), the Supreme Court applied *Carlson* in recognizing an Eighth Amendment damages claim against prison officials who failed to protect a transgender prisoner from sexual assault. Although *Farmer* "did not explicitly state that it was recognizing a *Bivens* claim," this Court concluded—and has recently reaffirmed—that *Farmer* "recognized" a *Bivens* remedy for failure-to-protect claims under the

Eighth Amendment. *See Bistrian*, 912 F.3d at 91; *Shorter*, 12 F.4th at 372-73 & n.4.

Under current Supreme Court precedent, when confronted with a *Bivens* case, courts must undertake a two-step inquiry. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858-60 (2017). First, does the claim arise in a new *Bivens* context? *Id.* at 1859-60. To be a new context, it is not enough for a case to differ in a "trivial" way from existing *Bivens* contexts; the differences must be "meaningful." *Id.* at 1859, 1865. A case may be a new context if "it implicates a different constitutional right," or if "judicial precedents provide a less meaningful guide for official conduct," or if it would entail a new "risk of disruptive intrusion" into other branches of government. *Id.* at 1860, 1864.[6] If a case does not implicate a new *Bivens* context, "the inquiry ends there, and a *Bivens* remedy is available." *Shorter*, 12 F.4th at 372. But if the context is new, courts proceed to the second step: asking whether any "special factors" counsel hesitation in extending the *Bivens* remedy. *Abbasi*, 137 S. Ct. at 1857-58.

[6] Other potentially "meaningful" differences include the "legal mandate under which the officer was operating," the level of "generality or specificity," the rank of the officers at issue, and "the presence of potential special factors that previous *Bivens* cases did not consider." *Abbasi*, 137 S. Ct. at 1860.

Farmer, *Bistrian*, and *Shorter* all lead to the inexorable conclusion that an existing *Bivens* remedy is available for Ms. Rehanna's failure-to-protect claim; her claim thus does not require this Court to engage in the "disfavored judicial activity" of expanding the *Bivens* remedy to a new context. *Egbert v. Boule*, 142 S. Ct. 1793, 1797 (2022). To understand why, some background on that trio of cases is in order.

Farmer involved an Eighth Amendment claim that federal prison officials had failed to protect a transgender woman housed in the general population of a men's prison from a substantial risk of sexual assault by other prisoners. *Farmer*, 511 U.S. at 829-31. *Bistrian*, too, involved a failure-to-protect claim, but with a few twists: the plaintiff was a pretrial detainee (not a convicted prisoner), whose claim arose under the Fifth Amendment (not the Eighth), and who was physically (not sexually) assaulted by fellow detainees because he had cooperated with prison officials (not because of LGBTQ status). 912 F.3d at 84. After a painstaking analysis, *Bistrian* concluded that *Farmer* had recognized a *Bivens* remedy and thus "practically dictate[d]" that the *Bivens* claim in *Bistrian* was not new. *Id.* at 90-92. Although some differences existed between the two cases, this Court rejected the argument that those

differences were "meaningful." *Id.* at 91.

Most recently, in *Shorter*, this Court reaffirmed that a *Bivens* remedy was available to a transgender woman housed in a men's prison who brought an Eighth Amendment claim against prison officials for failing to protect her from sexual assault by another prisoner. 12 F.4th at 369, 371-73. While noting that *Shorter*'s claim was "virtually indistinguishable" from *Farmer* and thus did not present a new *Bivens* context, this Court stressed that such a "remarkable . . . degree of factual similarity" is not required for a *Bivens* claim to fall within an existing context. *Id.* at 373 & n.6.

Farmer, *Bistrian*, and *Shorter* dictate that Ms. Rehanna's claim does not present a new *Bivens* context. Tellingly, Defendants did not attempt to argue in the district court that Ms. Rehanna's claim differs from those cases on *any* of the factors *Abbasi* listed as potentially meaningful. *See* ECF 47-1 at 25-27. Instead, Defendants made a half-hearted attempt to distinguish Ms. Rehanna's case by pointing to a few trivial distinctions. For example, Defendants noted that while *Farmer* and *Shorter* involved transgender women, Ms. Rehanna was not yet out as transgender at the time of the rapes. ECF 47-1 at 26. That's true, but

immaterial. For one, Ms. Rehanna presented then as an "effeminate gay male," AA034 (Compl. at 10 ¶ 47); AA070 (Rehanna Decl. at 2 ¶ 5, 11), and both staff and fellow prisoners knew she was LGBTQ, AA071 (Rehanna Decl. at 3 ¶ 22); AA054 (Compl. Ex. A at 2). Research shows that gay men and transgender women experience similarly high rates of sexual abuse while incarcerated.[7] For another, the plaintiff in *Bistrian* wasn't LGBTQ; he was targeted because he cooperated with prison officials. 912 F.3d at 84. That didn't stop this Court from finding that *Bistrian* arose in the same *Bivens* context as *Farmer*. *Id.* at 90-91.

Defendants' only other argument that this case is different is even flimsier: they argued that Ms. Rehanna's claim differs from *Shorter* because of the number of prison officials to whom the plaintiffs reported

[7] *Compare* Allen J. Beck & Candace Johnson, Bureau of Justice Statistics, *Sexual Victimization Reported By Former State Prisoners, 2008*, at 5 (2012), http://bjs.ojp.usdoj.gov/content/pub/pdf/svrfsp08.pdf (39% of gay men reported being sexually victimized by another prisoner, as compared to 4% of heterosexual men), *with* Allen J. Beck, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12, Supplemental Tables: Prevalence of Sexual Victimization Among Transgender Adult Inmates* 2 (2014), https://bjs.ojp.gov/content/pub/pdf/svpjri1112_st.pdf (between 33.1% and 39.9% of transgender prisoners reported being sexually victimized by another prisoner).

receiving threats, and how many times plaintiffs made contact with those officials. ECF 47-1 at 26-27. That's a perplexing distinction to draw, given that the plaintiff in *Farmer* "never expressed any concern for [her] safety to *any* of [the defendants]." 511 U.S. at 848 (emphasis added). Indeed, one of *Farmer*'s key holdings was that "failure to give advance notice is not dispositive" of a deliberate indifference claim. *Id.*

The Supreme Court's recent decision in *Egbert* does not change this calculus. At its core, *Egbert* simply reinforced what *Abbasi* already made plain: expanding *Bivens* to a new context is a "disfavored judicial activity," and when it comes to issues implicating "foreign policy and national security," *Bivens* is verboten. *See Egbert*, 142 S. Ct. at 1797, 1804-1805. Because the court of appeals in *Egbert* had agreed the claims presented a new context, the Supreme Court only addressed and expanded on the second step of the analysis: whether "special factors" counsel hesitation in expanding *Bivens*. *Id.* at 1804, 1807. *Egbert* thus left *Shorter*'s existing-context analysis "undisturbed," just as *Hernandez v. Mesa*, 140 S. Ct. 735 (2020), left *Bistrian*'s existing-context analysis "undisturbed" before *Shorter*. *See Shorter*, 12 F.4th at 373 n.5. *Cf. Hicks v. Ferreyra*, No. 22-1339, __F.4th__, 2023 WL 2669648, at *4-6 (4th Cir.

Mar. 29, 2023) (concluding post-*Egbert* that motorist's claim of unlawful seizures by U.S. Park Police officers did not present a new *Bivens* context, as differences between that case and *Bivens* were not "meaningful").

Because Ms. Rehanna's claim does not implicate a new *Bivens* context, this Court's "inquiry ends there, and a *Bivens* remedy is available." *Shorter*, 12 F.4th at 372. But even at the second step of the *Bivens* inquiry, no "special factors counseling hesitation" are present here that were not present in *Farmer*, *Bistrian*, or *Shorter*. *See Abbasi*, 137 S. Ct. at 372. In *Shorter*—a remarkably similar case—this Court summarily rejected the presence of such special factors, noting that the only factor defendants could point to was the passage of PREA. 12 F.4th at 373 & n.7. But as *Shorter* said, PREA—"which cites *Farmer* favorably in its preamble"—"does not make this a new *Bivens* context." *Id.* at 373 n.7.

In short, Ms. Rehanna's case is aligned with *Farmer*, *Bistrian*, and *Shorter* in every way that matters. Far from presenting a new context, Ms. Rehanna's claim falls neatly within the *Bivens* remedy established by *Farmer* and reaffirmed by this Court in *Shorter* and *Bistrian*.

CONCLUSION

This Court should reverse the district court's dismissal and remand for further proceedings.

Dated: April 17, 2023

Respectfully submitted,

s/ Elizabeth A. Bixby

Devi M. Rao
Elizabeth A. Bixby*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
lisa.bixby@macarthurjustice.org

Counsel for Plaintiff-Appellant

**Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.*

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,039 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: April 17, 2023

/s/ Elizabeth A. Bixby
Elizabeth A. Bixby

CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: April 17, 2023

/s/ Elizabeth A. Bixby
Elizabeth A. Bixby

CERTIFICATE OF VIRUS SCAN

Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that a virus detection program was performed on this electronic brief/file using Sophos Endpoint Advanced, version 2022.4.2.1, last updated April 17, 2023 and that no virus was detected.

Dated: April 17, 2023

/s/ Elizabeth A. Bixby
Elizabeth A. Bixby

CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to the Third Circuit Local Appellate Rule 31.1(c), I hereby certify that the text of the electronic brief is identical to the text in the hard, paper copies of the brief.

Dated: April 17, 2023

/s/ Elizabeth A. Bixby
Elizabeth A. Bixby

CERTIFICATE OF SERVICE

I hereby certify that on April 17, 2023, I electronically filed the foregoing *Opening Brief of Appellant and Appellant's Appendix Vol. I* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 17, 2023

/s/ Elizabeth A. Bixby
Elizabeth A. Bixby

No. 22-2846

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TONY FISHER, AKA KELLIE REHANNA,
Plaintiff-Appellant,

v.

JORDAN HOLLINGSWORTH, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of New Jersey, No. 1:18-cv-16793
Before the Hon. Karen M. Williams, District Judge

APPELLANT'S APPENDIX VOLUME I (AA 1 – AA 16)

Devi M. Rao
Elizabeth A. Bixby*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
501 H Street NE, Suite 275
Washington, DC 20002
(202) 869-3434
lisa.bixby@macarthurjustice.org
devi.rao@macarthurjustice.org

* *Admitted only in California; not admitted in D.C. Practicing under the supervision of the Roderick & Solange MacArthur Justice Center.*

Counsel for Plaintiff-Appellant

APPENDIX TABLE OF CONTENTS

Volume I, AA 1-16 (bound with brief)

Volume II, AA 17-88 (bound separately)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Full Caption in District Court:

TONY FISHER
(Plaintiff)

v.

WARDEN JORDAN HOLLINGSWORTH, et al.,
(Defendant)

Docket No.: 18-16793 (KMW)(AMD)

Judge: Karen M. Williams

Notice of Appeal to the U.S. Court of Appeals for the Third Circuit

Notice is hereby given that Plaintiff, Tony Fisher
(Named Party)
appeals to the United States Court of Appeals for the Third Circuit from

[ ] Judgment, [✓] Order, [ ] Other N/A
(Specify)
of the United States District Court, District of New Jersey, entered in this action on

August 18, 2022.
(Date)

Dated: September 27, 2022

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CLERK

Appellant Reg. # 70313-061
FCI - Elkton, P.O. Box 10
Street
Lisbon, Ohio 44432
City, State, Zip
N/A
Telephone

United States District Court
for the
District of New Jersey

Tony Fisher, Plaintiff V. Warden Jordan Holbingsworth, et al., Defendants	Case No.: 18-16793 (KMW) (AMD) Judge: Karen Williams

I am an inmate confined in an institution. Today, September 27, 2022, I am depositing the Notice of Appeal to the U.S. Court of Appeals for the Third Circuit in this case in the institution's internal mail system. First-class certified postage is being prepaid either by me or by the institution on my behalf. Certified Mail # 7020 0640 0002 0366 5162
I declare under penalty of perjury that the foregoing is true and correct (see 28 U.S.C. §1746; 18 U.S.C. §1621).

Tony Fisher #70313-061
September 27, 2022
Date

FCI-Elkton
P.O. Box 10
Lisbon, Ohio 44432

Name Tony Fisher
REG # 70313-061
Federal Correctional Institution Elkton
P.O. Box 10
Lisbon, OH 44432

CERTIFIED MAIL

CLEVELAND

7020 0640 0002 0366 5162

LEGAL MAIL

⇔70313-061⇔
U S District Court
PO BOX 2797
Attn: Court Clerk
Camden, NJ 08101
United States

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TONY FISHER,

Plaintiff,

v.

WARDEN JORDAN HOLLINGSWORTH, et al.,

Defendants.

Civil Action No. 18-16793 (KMW) (AMD)

ORDER

This matter having come before the Court on Defendants' motion to dismiss Plaintiff's amended complaint (ECF No. 47, Angela Juneau, Assistant United States Attorney, appearing), this Court having considered the motion, the record of proceedings in this matter, Plaintiff's response (ECF No. 57, Daniel C. Epstein, appearing), and Defendants' reply (ECF No. 60), and for the reasons expressed in the accompanying opinion,

IT IS on this 18 day of August, 2022,

ORDERED that Defendants' motion (ECF No. 47) is **GRANTED**; and it is further

ORDERED that Plaintiff's amended complaint (ECF No. 9-1) is **DISMISSED** in its entirety; and it is finally

ORDERED that the Clerk of the Court shall serve a copy of this Order and the accompanying opinion upon the parties electronically, and **CLOSE** the file.

Hon. Karen M. Williams,
United States District Judge

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TONY FISHER, Plaintiff, v. WARDEN JORDAN HOLLINGSWORTH, et al., Defendants.	Civil Action No. 18-16793 (KMW) (AMD) **OPINION**

WILLIAMS, District Judge:

This matter comes before the Court on Defendants' motion to dismiss Plaintiff's amended complaint in this prisoner civil rights matter. (ECF No. 47.) Plaintiff filed a response to the motion (ECF No. 57), to which Defendants replied. (ECF No. 60.) For the reasons set forth below, Defendants' motion shall be granted, and Plaintiff's amended complaint (ECF No. 69) shall be dismissed.

I. BACKGROUND

Plaintiff is a biological male who now identifies as transgender. (ECF No. 9-1 at 2.) At the time of the events that give rise to this matter, Plaintiff did not identify as transgender, but presented as a gay male. (*Id.* at 7.) On July 2, 2013, while being held at FDC Philadelphia, Plaintiff underwent an intake interview which included a sexual victimization risk evaluation. (*Id.* at 12.) The staff member conducting that evaluation identified no risk factors for victimization for Plaintiff. (*Id.*) Plaintiff was thereafter transferred to FCI Fort Dix on July 2, 2013. (*Id.*) Plaintiff

was again evaluated, with the evaluator finding only one potential risk factor – that Plaintiff had previously been sexually assaulted twenty odd years prior. (*Id.*)

Upon being placed in a prison unit, Plaintiff was subjected to catcalling, threats, and other verbal abuse. (*Id.*) On June 9, 2013, Plaintiff reported this abuse to Plaintiff's unit counselor, Defendant Fischer, specifically identifying one individual – known as "C" – who had been harassing Plaintiff. (*Id.* at 13.) Fischer said that she would look into the issue, and referred Plaintiff for further evaluation. (*Id.*) The following day, Plaintiff was seen by a staff psychologist. (*Id.*) Although the psychologist identified some risk factors for victimization, after conferring with Plaintiff, the psychologist found "no indication" which would indicate Plaintiff was at especially high risk of abuse requiring further security measures. (*Id.*)

On July 11 and 13, 2013, Plaintiff was raped by "C." (*Id.*) Although Plaintiff did not report the rapes to staff, Plaintiff did mention the incident during a phone call, which was overheard by staff who immediately responded by taking Plaintiff into an office to meet with supervisors to report the rape. (*Id.* at 16.) Plaintiff was given a medical evaluation, and was temporarily moved to protective custody. (*Id.*) Following both prison and criminal investigations, Plaintiff was transferred out of Fort Dix on September 10, 2013. (*Id.* at 17.)

Plaintiff did not file a civil complaint regarding this incident until December 2018. (ECF No. 1.) Plaintiff thereafter filed an amended complaint on February 19, 2019. (ECF No. 9-1.) On May 17, 2019, Judge Kugler issued an opinion and order which screened Plaintiff's complaint and dismissed Plaintiff's civil rights claims as time barred. In so finding, Judge Kugler explained as follows:

> Our jurisprudence takes the statute of limitations for a *Bivens* claim from the forum state's personal injury statute. *See Hughes v. Knieblher,* 341 F. App'x 749, 752 (3d Cir. 2009) (per curiam) (citing *Kost v. Kozakiewicz,* 1 F.3d 176, 190 (3d Cir. 1993)). New Jersey's statute of

limitations for personal injury actions is two years. *See* N.J. Stat. Ann. § 2A:14–2. "While state law provides the applicable statute of limitations, federal law controls when a *Bivens* claim accrues." *Peguero v. Meyer,* 520 F. App'x 58, 60 (3d Cir. 2013). Under federal law, a *Bivens* claims accrues when a plaintiff knows of or has reason to know of the injury. *See Hughes,* 341 F. App'x at 752 (citing *Sameric Corp. v. City of Phila.,* 142 F.3d 582, 599 (3d Cir. 1998)).

Significantly, accrual does not depend on whether the potential claimant knew or should have known that the injury constitutes a legal wrong. *See Giles v. City of Philadelphia*, 542 F. App'x 121, 123 (3d Cir. 2013). Rather, "a cause of action accrues when the fact of injury and its connection to the defendant would be recognized by a reasonable person." *Kriss v. Fayette Cty.*, 827 F.Supp.2d 477, 484 (W.D. Pa. 2011), *aff'd*, 504 F. App'x 182 (3d Cir. 2012). Accordingly, "[a]s a general matter, a cause of action accrues at the time of the last event necessary to complete the tort, usually at the time the plaintiff suffers an injury." *Kach*, 589 F.3d at 634.

Here, Plaintiff complains of Defendants' failures to protect [Plaintiff] which may fall under the Eighth Amendment's prohibition against cruel and unusual punishment. For the failure to protect to rise to a constitutional violation, an inmate must demonstrate that she was "incarcerated under conditions posing a substantial risk of serious harm" and that the defendant was "deliberately indifferent" to that risk. *See Farmer v. Brennan*, 511 U.S. 825, 833, 837 (1994); *Bistrian*, 696 F.3d at 367.

In this context, "deliberate indifference" is a subjective standard. *Bistrian*, 696 F.3d at 367–69. The prison official "must actually have known or been aware of the excessive risk to inmate safety" and it is "not sufficient that the official should have known of the risk." *Id.*; *Miller v. Ricci,* No. 11-0859, 2011 WL 1655764, at *10 (D.N.J. Apr. 28, 2011) ("To plead an Eighth Amendment failure to protect claim a plaintiff must plead facts raising a plausible inference of ... the defendants' deliberate indifference to that particular risk of harm").

With those principles in mind, Plaintiff knew of or had reason to know of [Plaintiff's] injuries on July 11 and 13, 2013, the dates of the sexual assaults. According to the Amended Complaint, Plaintiff was very much aware of the serious risk [of harm], and the remaining Defendants were aware of that risk through Plaintiff's evaluations. Additionally, in the case of Defendant Fischer, Plaintiff directly advised Defendant Fischer of the dangerous inmates and their threats to Plaintiff. Finally, Plaintiff was aware that Defendants were deliberately indifferent to that risk when they failed to separate [Plaintiff] from those inmates or otherwise protect [Plaintiff] from harm.

Taken together, and as Plaintiff concedes, [Plaintiff] had a complete cause of action as to all . . . claims on July 13, 2013, and the statute of limitations required [Plaintiff] to file a complaint as to those claims on or about July 13, 2015. (ECF No. 9-1, at 6 ("Plaintiff's last sexual assault at Ft Dix was on July 13, 2013 . . . which started the . . . two (2) year limitation period to file the . . . claim.")).

Accordingly, because Plaintiff did not file [the] initial Complaint until December of 2018, the statute of limitations bars these claims and any claims with a two-year statute of limitations that began to accrue prior to December of 2016.

Certain statutes and doctrines may allow the Court to toll the statute of limitations. For example, New Jersey statutes set forth certain bases for "statutory tolling." *See, e.g.,* N.J. Stat. Ann. § 2A:14–21 (detailing tolling because of minority or insanity); N.J. Stat. Ann. § 2A:14–22 (detailing tolling because of non-residency of persons liable). New Jersey law also permits "equitable tolling" where an adversary's misconduct induced or tricked a complainant into allowing the filing deadline to pass, or where "in some extraordinary way" someone or something prevented plaintiff from asserting her rights, or where a plaintiff has timely asserted her rights through a defective pleading or in the wrong forum. *See Freeman v. New Jersey,* 788 A.2d 867, 880 (N.J. Super. Ct. App. Div. 2002). However, absent a showing of a defendant's intentional inducement or trickery, the Court should apply the doctrine of equitable tolling sparingly and only where sound legal principles and the interest of justice demand its application. *Id.*

When state tolling rules contradict federal law or policy, in certain limited circumstances, federal courts can turn to federal tolling doctrines. *See Lake v. Arnold,* 232 F.3d 360, 370 (3d Cir. 2000). Under federal law, equitable tolling is appropriate in three general scenarios: (1) where a defendant actively misleads a plaintiff with respect to her cause of action; (2) where extraordinary circumstances prevent a plaintiff from asserting her claims; or (3) where the plaintiff asserts her claims in a timely manner but has done so in the wrong forum. *Id.* at 370 n. 9.

In the present case, Plaintiff argues that circumstances merit equitable tolling in [this] case. (ECF No. 9-1, at 8). First, Plaintiff refers to [Plaintiff's] history of mental health issues, which include anxiety, depression, and panic attack disorder, as well as [Plaintiff's] trauma from the sexual assaults. (*Id.* at 8–9). Plaintiff does not, however, allege that any of these conditions *prevented* [Plaintiff] from filing a complaint within two years, or how [Plaintiff's] conditions changed, such that [Plaintiff] was then able to file a complaint several years after the expiration of the statute of limitations. *Lake*, 232 F.3d at 370 n.9. Accordingly, without more, the Court declines to equitably toll the statute of limitations period on this ground.

> Next, Plaintiff contends that [Plaintiff] "never knew that [Plaintiff's] rapes were substantiated until October 3, 2017" when [Plaintiff] received copies of [Plaintiff's] psychological records. (ECF No. 9-1, at 9). Plaintiff characterizes this delay, and the refusal to release "the most damaging evidence," as "fraudulent concealment" on the part of the Federal Bureau of Prisons ("FBOP") and FCI Fort Dix. (*Id.* at 5). More specifically, [Plaintiff] alleges that the FBOP's "refusal to provide the entire case file . . . prohibited the . . . [Plaintiff's ability] to file this civil action within the standard [s]tatute of limitations period. (*Id.*).
>
> The Court rejects Plaintiff's argument. Although the records relating to the disciplinary charges against "inmate C" might be valuable evidence to help prove [Plaintiff's] case, they were not *necessary* to the filing of Plaintiff's initial complaint. *See, e.g., Borntrager v. Zisa*, No. 09-3076, 2011 WL 1211349, at *3 (D.N.J. Mar. 29, 2011) (discussing that a plaintiff must first *allege* facts to state a claim in a complaint, and then later prove those facts at trial). As discussed above, Plaintiff had a complete cause of action on January 13, 2013.
>
> Knowledge of whether "inmate C" received disciplinary charges or whether he was convicted for the sexual assaults, were not necessary to create Plaintiff's cause of action. Stated differently, Plaintiff's realization that [Plaintiff] may have had a viable claim or evidence to support such a claim, had no impact on when [Plaintiff's] claims began to accrue. (ECF 9-1, at 9); *see Giles*, 542 F. App'x at 123 (stating that accrual does not depend on whether the claimant knew or should have known that the injury constitutes a legal wrong).
>
> Accordingly, because it is apparent that all of Plaintiff's claims are time-barred as they arose prior to December of 2016, the Court will dismiss such claims as untimely.

(ECF No. 10 at 6-10.)

Following the dismissal of the amended complaint, Plaintiff filed a motion to set aside the dismissal, arguing that the complaint was timely in light of New Jersey's adoption of a statute which revived certain time barred sexual assault related claims. *See* N.J. Stat. Ann. § 2A:14-2b(a) (permitting previously time barred sexual assault related state law claims to be brought within two years of December 2019). On March 2, 2021, Judge Kugler granted that motion provisionally, and appointed counsel for Plaintiff so that the parties could address whether this statutory

exception applied to Plaintiff's claims. (ECF No. 14.) Defendants now move to dismiss the amended complaint.

II. LEGAL STANDARD

In deciding a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a district court is "required to accept as true all factual allegations in the complaint and draw all inferences in the facts alleged in the light most favorable to the [Plaintiff]." *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). "[A] complaint attacked by a . . . motion to dismiss does not need detailed factual allegations." *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007). However, the Plaintiff's "obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286. Instead, assuming the factual allegations in the complaint are true, those "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* "Determining whether the allegations in a complaint are plausible is a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

III. DISCUSSION

In their motion to dismiss, Defendants argue that Plaintiff's *Bivens* claims remain time barred regardless of New Jersey's statutory exception for sexual assault claims as that statute does not affect the limitations period for a *Bivens* action. This Court agrees. As one court in this district recently explained,

> The relevant case [on this issue] is *Owens v. Okure*, 488 U.S. 235 (1989). That plaintiff asserted a federal § 1983 claim arising from an alleged arrest and beating. [Because] § 1983 contains no [explicit] limitation period, . . . federal courts [had to] borrow an appropriate limitations period from state law. The issue presented to the U.S. Supreme Court was a choice between two potentially applicable statutes of limitations: (a) New York's specialized statute of limitations for eight specified intentional torts, or (b) its general statute of limitations for personal-injury claims. *Id.* at 237. The Supreme Court noted the wide variety of limitations periods to be found in state law and invoked the need for uniformity. The Court thus rejected the notion that courts should mix and match, borrowing the state limitations period for the tort most analogous to each of the federal law claims. *Id.* at 243-50. To put it another way, the Supreme Court has abandoned the idea that the federal § 1983 limitation period will differ based on the theory of injury. *Id.* at 240.
>
> Instead, the Supreme Court adopted a predictable, easily administered rule: [a] state's general personal-injury statute of limitations governs all § 1983 claims. *Id.* at 243-50. Although *Owens* addressed only § 1983 claims, the Court has applied its reasoning to other federal claims that resemble personal injury claims. *Reed v. United Transp. Union*, 488 U.S. 319, 334 (1989).
>
> In the three decades since *Owens*, multiple states have extended the limitation period for sexual-assault claims. The federal Courts of Appeals, citing *Owens*, have uniformly held that such specialized limitation periods do not apply to federal claims. Instead, they have continued to apply the applicable state's general personal-injury statute of limitations. *See King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 761 (5th Cir. 2015); *Woods v. Ill. Dep't of Children & Family Servs.*, 710 F.3d 762, 768-79 (7th Cir. 2013); *Bonneau v. Centennial Sch. Dist. No. 28J*, 666 F.3d 577, 579-80 (9th Cir. 2012); *Blake v. Dickason*, 997 F.2d 749, 751 (10th Cir. 1993).

Gavin, 2021 WL 1050364 at *3-4; *see also T.M. v. City of Union*, No. 21-20268, 2021 WL 5822940, at *4-6 (D.N.J. Dec. 8, 2021) (finding that only general tort statute of limitations

applies to federal civil rights claims, special exceptions for state law sexual assault claims do not affect federal civil rights actions). New Jersey's exception to the general tort statute of limitations is thus inapplicable to *Bivens* claims, even where they relate to sexual assault, and Plaintiff's *Bivens* claims remain time barred for the reasons expressed by Judge McNulty in his screening opinion quoted above.

In response, Plaintiff presents several arguments to suggest that the statute of limitations should be equitably tolled in this matter. First, Plaintiff argues that Captain Fitzgerald of Fort Dix "intimidated" Plaintiff into not filing her case. This argument, however, is of no help to Plaintiff. Plaintiff was transferred out of state and far beyond the reach of Captain Fitzgerald a mere two months after the incidents in July 2013, and had the vast majority of the two-year limitations period within which to file a complaint from a place where the captain had no ability to deter or interfere. Plaintiff has thus neither shown a truly extraordinary circumstance nor reasonable diligence – Plaintiff could have, but did not, file any claim during the 22 months after the transfer – sufficient to support equitable tolling as to this argument, and it serves as no basis for tolling of the limitations period. *Lake*, 232 F.3d at 370 n. 9 (equitable tolling requires showing both extraordinary circumstances preventing filing and due diligence); *see also Frasier-Kane v. City of Philadelphia*, 517 F. App'x 104, 106-07 (3d Cir. 2013) (noting that threats and duress from state officials will only amount to an exceptional circumstance warranting tolling in exceedingly rare and oppressive circumstances, and not merely where a defendant or other state actor threatens an individual on occasion).

Plaintiff next reiterates an argument which Judge Kugler previously rejected: that Plaintiff, ignorant of the law, believed that filing could not be commenced without BOP records as to her assailant's disciplinary proceedings, and believed that no filing could be done until the BOP had completed its investigation. Neither Plaintiff's ignorance of the law, nor lack of access to the

disciplinary records of "C" warrant equitable tolling. As Judge Kugler explained, the records were not required for Plaintiff to know that Plaintiff had a claim – Plaintiff was aware of the threats that had been made by other inmates, that the prison officials knew of those threats, and that the threats resulted in harm as of July 13, 2013. While the prison records may have been helpful, they were in no way necessary for the filing of a complaint, and lack of access to them does not warrant tolling. Neither Plaintiff's naivete nor ignorance of the law change this fact. *See, e.g., Jackson v. Coleman*, 556 F. Supp. 3d 210, 219 (E.D. Pa. 2021) (a prisoner's "ignorance of the law is not a basis for equitable tolling").

Plaintiff next reiterates the claim that mental health issues impeded the filing of the complaint, arguing that once Plaintiff became cognizant enough to be aware of the rights which had been impugned, Plaintiff filed remedy claims and thereafter a civil complaint. Judge Kugler previously rejected this argument as Plaintiff failed to show that mental health issues had actually prevented Plaintiff from filing suit for the years between 2013 and 2017, and this Court agrees that Plaintiff has failed to show that mental health issues truly prevented filing. Although Plaintiff attempts to characterize the state of Plaintiff's mental health as worse between 2013 and 2016 than in 2017 when the initial remedies were filed, Plaintiff's submitted records do not support that contention.

Although Plaintiff's records do support the assertion that Plaintiff did experience mental trauma as a result of the July 2013 incidents, those same records do not support Plaintiff's contention that Plaintiff spent her limitations period in a completely dissociated state, incapable of filing. Records indicate that Plaintiff told psychiatric staff that she was "feeling good" in January 2014 despite the assault and related trauma. (ECF No. 1-7 at 4.) In December 2014, Plaintiff further was found to be "alert and oriented" with "no behavioral abnormalities" and thought processes which were "organized, coherent, and goal-directed." (*Id.* at 5.) June 2016 records

likewise indicate that while Plaintiff did continue to have anxiety, Plaintiff was otherwise not experiencing depression or other psychosis at that time and was not in need of non-follow up mental health treatment. (*Id.* at 6.) Despite mental health improvements beginning in April 2016, Plaintiff's records indicate that in 2017 Plaintiff was if anything experiencing worsening, rather than improving symptoms, with increasing anxiety and depression. (*Id.* at 7.) Indeed, shortly before the filing of Plaintiff's initial complaint, Plaintiff told one prison doctor that Plaintiff felt "no better now than years ago." (*Id.* at 9.) taken together, these records, which Plaintiff provided with the initial complaint, do not support the assertion that Plaintiff's mental health state and recovery were tied to the timing of the filing of the complaint. The records instead indicate that Plaintiff understandably experienced mental trauma and anxiety as a result of the rapes, but that these symptoms improved and worsened at variable points between 2013 and the filing of this matter, and that the timing of Plaintiff's filing of administrative grievances in 2017 and complaint in 2018 were not necessarily related to any marked improvement in mental health. The records instead indicate that, if anything, Plaintiff's mental health was deteriorating between 2017 and 2018. Plaintiff has thus failed to show that mental health issues truly prevented the filing of a complaint, and those issues therefore do not warrant equitable tolling, especially as Plaintiff has failed to show reasonable diligence throughout the limitations period.

As this Court has considered Plaintiff's tolling arguments and finds that Plaintiff has failed to show any basis for the tolling of the limitations period, this Court finds that Plaintiff's civil rights claims are well and truly time barred. Plaintiff's civil rights claims are therefore dismissed with prejudice. Because Plaintiff's *Bivens* claims are clearly time barred, this Court need not and does not address Defendants' argument that Plaintiff has failed to state a plausible claim for relief and that *Bivens* should not be extended to cover the circumstances of Plaintiff's claims.

Finally, defendants argue that Plaintiff's Administrative Procedure Act claims should be dismissed as the APA does not permit claims for money damages – the chief relief Plaintiff seeks. Defendants also argue that the denial of surgery or electrolysis medical related APA claims are not reviewable. As to the first point, this Court agrees that money damages are not available under the APA and that claims under the act seeking such relief must be dismissed. *See Qiu v. Chertoff*, 486 F. Supp. 2d 412, 421 (D.N.J. 2007) ("The APA explicitly precludes money damages" claims); *see also Dep't of the Army v. Blue Fox*, 525 U.S. 255 (1999) (money damages unavailable under the APA). Plaintiff's APA claim seeking damages is therefore dismissed with prejudice.

Even were this Court to construe Plaintiff's APA claim to be seeking review of the denial of medical care including surgery and electrolysis in an attempt to compel such care[1], Defendants argue that this decision does not constitute reviewable agency action as resort to the APA is not appropriate where other avenues for relief are available. This Court agrees. *See, e.g., Eads v. Fed. Bureau of Prisons*, No. 2021 WL 1085459, at *9 (D.N.J. Mar. 22, 2021) (APA only permits review of "final agency action[s] for which there is no other adequate remedy in a court," BOP's decisions as to ongoing medical care are not final action and are not reviewable under the APA, and APA review also inappropriate as other relief, including an FTCA or civil rights claim as to denial of medical care is available). The denial of Plaintiff's medical request in this matter clearly was not final agency action subject to review, the denial in question clearly refers Plaintiff to make medical requests to the health department of the prison in which Plaintiff is now housed, rather than through the grievance Plaintiff filed. (*See* ECF No. 1-14 at 2.) It is clear that this is not a final decision as to Plaintiff's request for surgery or electrolysis. Therefore, the denial in question is clearly not a

[1] In the amended complaint, Plaintiff does not explicitly seek such relief and instead appears to be seeking money damages and injunctive relief completely unrelated to any APA claim. (*See* ECF No. 9-1 at 19-20.)

reviewable final agency action. Simply stated, Plaintiff may yet request further medical care, including the surgery Plaintiff wishes to receive, from her current facility's medical staff. Plaintiff's medical care related claims are thus not reviewable under the APA at this time, and must be dismissed as such. *Eads*, 2021 WL 1085459 at *9. Plaintiff's APA claim must therefore be dismissed. Defendants' motion to dismiss will therefore be granted, and Plaintiff's amended complaint (ECF No. 9-1) dismissed in its entirety.

IV. CONCLUSION

In conclusion, Defendants' motion (ECF No. 47) is **GRANTED**, and Plaintiff's amended complaint (ECF No. 9-1) is **DISMISSED** in its entirety. An appropriate order follows.

Hon. Karen M. Williams,
United States District Judge