

ON PETITION FOR REHEARING

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2157

ANDREW E. ZUPKO,

Plaintiff - Appellant,

v.

UNITED STATES OF AMERICA; K. CROSSLEY, Official Capacities - Family Nurse Practitioner; R. ENGEL, Mr., Individual Capacities/Associate Warden/Overseer of Medical; M. DICOCCO, Dr., Individual Capacities/Clinical Director; K. LAYBOURN, Medical Administrator; J. POSEY, Individual Capacities/SHU Correctional Officer; A. CHATMAN, Individual Capacities/Health Service Administrator,

Defendants - Appellees,

and

A. ZAYAS, Individual Capacities/Mid Level Practitioner/Now Retired,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. M. Hannah Lauck, District Judge. (3:18-cv-00493-MHL-RCY)

Submitted: January 21, 2022

Decided: January 26, 2022

Before MOTZ and HARRIS, Circuit Judges, and KEENAN, Senior Circuit Judge.

Affirmed in part, vacated in part, and remanded by unpublished per curiam opinion.

Andrew E. Zupko, Appellant Pro Se. Elizabeth Wu, Assistant United States Attorney,
OFFICE OF THE UNITED STATES ATTORNEY, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Andrew E. Zupko appealed the district court's order denying relief on his complaint filed pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b)(1), 2671-2680. We previously affirmed the district court's order on all claims. *Zupko v. United States*, 837 F. App'x 236 (4th Cir. 2021).

Zupko has now filed a petition for rehearing arguing that the district court erred in dismissing four of his FTCA claims, in which Zupko alleged negligent medical treatment. The district court found that those four claims were subject to dismissal because Zupko failed to obtain an expert certification prior to serving Defendants, as required by Virginia law. *See* Va. Code § 8.01-20.1. In light of our recent decision in *Pledger v. Lynch*, 5 F.4th 511 (4th Cir. 2021) (finding that West Virginia law requiring plaintiffs bringing medical malpractice or negligence claims under FTCA to provide a certificate of merit conflicted with Federal Rules of Civil Procedure), we grant panel rehearing. We vacate the district court's order as to the dismissal of Zupko's four FTCA claims for failure to obtain expert certification and remand for further proceedings as to those claims. We affirm as to all other claims. We deny Zupko's motion to appoint counsel and deny his request to reconsider his *Bivens* claims as untimely. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED IN PART, VACATED IN PART,
AND REMANDED*