

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA**

JACQUES CLINTON,)	
)	
Plaintiff,)	
vs.)	No. 2:11-cv-104-JMS-MJD
)	
LT. BRACE, et al.,)	
)	
Defendants.)	

ENTRY

This is an action brought pursuant to the theory recognized in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 38 (1971). Each party has filed a motion for summary judgment.

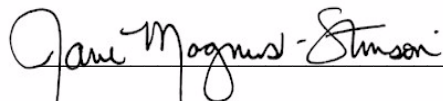
The defendants' motion for summary judgment is based on the argument that the plaintiff failed to exhaust his available administrative remedies prior to filing this action. The plaintiff's motion for summary judgment is on his view of the merits of his claim pursuant to the Eighth Amendment's proscription against the imposition of cruel and unusual punishment.

Circuit precedent dictates that a failure-to-exhaust defense be resolved prior to the merits of a claim being addressed. *Perez v. Wis. Dep't of Corr.*, 182 F.3d 532, 536 (7th Cir. 1999) ("The statute [requiring administrative exhaustion] can function properly only if the judge resolves disputes about its application before turning to any other issue in the suit.").

Consistent with the foregoing, therefore, and noting that the defendants' motion for summary judgment is not even fully briefed at this point, the plaintiff's motion for summary judgment [24] is denied without prejudice.

IT IS SO ORDERED.

Date: 12/06/2011



Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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