IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-11230

MICHAEL JOSEPH DEMARCO, JR.,

Plaintiff–Appellant,

versus

LORIE DAVIS, Director,
Texas Department of Criminal Justice, Correctional Institutions Division;
JEREMY J. BYNUM, Officer; JOSEPH C. BOYLE, Disciplinary Captain,

Defendants–Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before SMITH, DUNCAN, and ENGELHARDT, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Michael DeMarco, Jr., an inmate at the James V. Allred Unit of the Texas Department of Criminal Justice ("TDCJ"), brought suit under 28 U.S.C. § 1983 against Jeremy Bynum, an officer at the Allred Unit; Joseph Boyle, a disciplinary captain; and William Stephens, the former director of the TDCJ.

Appendix A-1

The district court dismissed the complaint with prejudice under 28 U.S.C. § 1915A(b)(1) for failure to state a claim upon which relief may be granted. We affirm in part and reverse in part and remand.

I.

Bynum allegedly confiscated certain personal property from DeMarco's cell. At a disciplinary proceeding, DeMarco was found guilty of threatening Bynum and was placed in solitary confinement. DeMarco sued, claiming that the seizure of his legal and religious materials had occurred without due process of law, had deprived him of access to the courts, and had burdened his free exercise of religion. He further alleged that Bynum had confiscated his property and instituted the disciplinary action in retaliation for exercising First Amendment rights. Moreover, DeMarco insisted that Stephens and Boyle were deliberately indifferent to those constitutional violations. Finally, DeMarco claimed that Boyle had denied him due process at the disciplinary hearing by tampering with evidence and prohibiting him from calling his own witnesses. The district court severed DeMarco's challenge to the validity of the disciplinary hearing and dismissed the remainder of the complaint for failure to state a claim. *See id.* § 1915A(b)(1).

II.

This court reviews dismissals under § 1915A(b)(1) *de novo*, using the standard applied under Federal Rule of Civil Procedure 12(b)(6). *Legate v. Livingston*, 822 F.3d 207, 210 (5th Cir. 2016). "Under that standard, a complaint will survive dismissal for failure to state a claim if it contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Id.* (internal quotation marks and citation omitted). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the

reasonable inference that the defendant is liable for the misconduct alleged."[1] "We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions."[2]

A.

DeMarco avers that he was denied due process at the disciplinary proceeding because Boyle tampered with the witness statements and prevented him from calling witnesses. The district court severed those claims because they were potentially cognizable under 28 U.S.C. § 2254.[3] Because DeMarco does not contest that decision on appeal, he has waived any challenge to it. *See United States v. Thibodeaux*, 211 F.3d 910, 912 (5th Cir. 2000) (per curiam). He must therefore raise those claims in a habeas corpus petition, not under § 1983.

B.

DeMarco claims that his personal property was seized without due process. Nevertheless, "a deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the State fails to provide an adequate postdeprivation remedy." *Allen v. Thomas*, 388 F.3d 147, 149 (5th Cir. 2004) (quoting *Zinermon v. Burch*, 494 U.S. 113, 115 (1990)). Conduct is not "random or unauthorized" if the state "delegated to [the defendants] the power and authority to effect the very deprivation complained of."

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[1] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

[2] *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010) (citation omitted) (quoting *Plotkin v. IP Axess Inc.*, 407 F.3d 690, 696 (5th Cir. 2005)).

[3] *See Heck v. Humphrey*, 512 U.S. 477, 481 (1994) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 488 90 (1973)) ("[H]abeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release.").

Id. (quoting *Burch*, 494 U.S. at 138).

DeMarco has not alleged that the state delegated to Bynum the authority to confiscate his personal property. Instead, DeMarco contends that his property was seized in violation of TDCJ policy. Additionally, Texas's tort of conversion provides an adequate post-deprivation remedy for prisoners claiming loss of property without due process. *Murphy v. Collins*, 26 F.3d 541, 543–44 (5th Cir. 1994). Accordingly, DeMarco's due process claim is not cognizable under § 1983.

C.

The district court correctly dismissed DeMarco's claim that he was denied access to the courts. Prisoners have "a constitutionally protected right of access to the courts" that is rooted in the Petition Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. *See Brewer v. Wilkinson*, 3 F.3d 816, 820–21 (5th Cir. 1993) (citations omitted). But that right is not without limit. Rather, "it encompasses only 'a reasonably adequate opportunity to file nonfrivolous legal claims challenging [an inmate's] convictions or conditions of confinement.'"[4] To prevail on such a claim, a prisoner must demonstrate that he suffered "actual injury" in that the prison "hindered his efforts" to pursue a nonfrivolous action.[5] A prisoner must therefore describe the predicate claim with sufficient detail to show that it is "arguable" and involves "more than hope." *Christopher v. Harbury*, 536 U.S. 403, 416 (2002).

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[4] *Johnson v. Rodriguez*, 110 F.3d 299, 310–11 (5th Cir. 1997) (quoting *Lewis v. Casey*, 518 U.S. 343, 356 (1996)).

[5] *See Lewis*, 518 U.S. at 349, 351 (holding that the actual-injury requirement "derives ultimately from the doctrine of standing"); *Ruiz v. United States*, 160 F.3d 273, 275 (5th Cir. 1998) (per curiam) (finding that the inmate failed to show actual injury because his underlying claims were frivolous).

DeMarco maintains that the confiscation of his legal materials prevented him from filing a timely petition for writ of certiorari. But he has not identified any actionable claim that he would have raised. Consequently, he has failed to establish the actual harm necessary to support his denial-of-access claim.[6]

D.

The district court properly dismissed DeMarco's retaliation claim. Under the First Amendment, a prison official may not harass or retaliate against an inmate "for exercising the right of access to the courts, or for complaining to a supervisor about a guard's misconduct." *Woods v. Smith*, 60 F.3d 1161, 1164 (5th Cir. 1995) (citations omitted). "To prevail on a claim of retaliation, a prisoner must establish (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation."[7] Causation, in turn, requires a showing that "but for the retaliatory motive the complained of incident . . . would not have occurred." *McDonald*, 132 F.3d at 231 (quoting *Johnson*, 110 F.3d at 310). That standard places a "significant burden" on an inmate as the court must regard claims of retaliation "with skepticism." *Woods*, 60 F.3d at 1166 (citation omitted). Mere conclusional allegations are insufficient to support a retaliation claim. *Id.* Instead, an inmate "must produce direct evidence of motivation" or "allege a chronology of events from which retaliation may plausibly be inferred." *Id.* (citations omitted).

DeMarco maintains that Bynum retaliated against him by confiscating his personal property and filing a false disciplinary action. In his brief,

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[6] The district court held that despite the seizure of his legal materials, DeMarco suffered no harm because he was represented by counsel. We may nonetheless affirm on any basis supported by the record. *LLEH, Inc. v. Wichita Cty.*, 289 F.3d 358, 364 (5th Cir. 2002).

[7] *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006) (quoting *McDonald v. Steward*, 132 F.3d 225, 231 (5th Cir. 1998)).

DeMarco states that the retaliation was motivated by the submission of an earlier grievance on June 10, 2013. But in his answers to the district court's questionnaire, DeMarco maintained that he had filed the relevant grievance on May 27, 2013. He also alleged that the retaliation occurred because he had offered to serve as a witness against Bynum in 2012. This changing tale is conclusional at best. Because DeMarco has not demonstrated retaliatory intent through direct evidence or a clear chronology of events, he has failed to establish the second and fourth elements of his retaliation claim. *See McDonald*, 132 F.3d at 231.

E.

DeMarco posits that Bynum burdened the free exercise of religion by confiscating his religious materials. To fall within the purview of the Free Exercise Clause, a claimant must possess a sincere religious belief.[8] An inmate retains his right to the free exercise of religion, subject to reasonable restrictions stemming from legitimate penological concerns. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). In evaluating the reasonableness of a prison policy, we consider (1) the existence of a "valid, rational connection" between the state action and the "legitimate governmental interest put forward to justify it;" (2) the availability of alternative means of exercising the right; (3) the impact an accommodation will have on guards, other inmates, and the allocation of prison resources; and (4) the absence of alternatives that "fully accommodate[] the prisoner's right[] at *de minimis* cost to valid

[8] *See Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972) (noting that "philosophical and personal . . . belief does not rise to the demands of the Religion Clauses"); *Soc'y of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1212 (5th Cir. 1991), *on reh'g*, 959 F.2d 1283 (5th Cir. 1992) (citation omitted) ("[T]he Free Exercise query is whether *this particular plaintiff* holds a sincere belief that the affirmation is religious."); *Ferguson v. Comm'r*, 921 F.2d 588, 589 (5th Cir. 1991) (per curiam) (citations omitted) ("The protection of the free exercise clause extends to all sincere religious beliefs.").

penological interests."[9]

A plaintiff bears the burden of proving that a prison policy, as applied, is not reasonably related to legitimate penological objectives.[10] Moreover, prison officials are entitled to "substantial deference" in the exercise of their professional judgment. *See Overton*, 539 U.S. at 132 (citations omitted). Nevertheless, the government "must do more . . . than merely show 'a formalistic logical connection between [its policy] and a penological objective.'" *Prison Legal News*, 683 F.3d at 215 (quoting *Beard v. Banks,* 548 U.S. 521, 535 (2006)). Though a plaintiff shoulders the ultimate burden of persuasion,[11] the government must identify "'a *reasonable* relation,' in light of the 'importance of the rights [here] at issue.'"[12]

In dismissing DeMarco's claim, the district court explained that he had failed to name any religious belief or practice that was negatively impacted. The court suggested that because DeMarco had not requested the return of his religious materials, his professed faith was likely a sham. We disagree. Though DeMarco did not specify that he was a Christian, he averred that

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[9] *Turner v. Safley*, 482 U.S. 78, 89–91 (1987) (citations omitted). *See also Davis v. Davis*, 826 F.3d 258, 265 (5th Cir. 2016).

[10] *See Prison Legal News v. Livingston*, 683 F.3d 201, 215 (5th Cir. 2012); *see also Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (citations omitted) ("The burden . . . is not on the State to prove the validity of prison regulations but on the prisoner to disprove it.").

[11] *See Turner v. Cain*, 647 F. App'x 357, 366–68 (5th Cir. 2016) (Wiener, J., concurring).

[12] *Prison Legal News*, 683 F.3d at 215 (quoting *Beard*, 548 U.S. at 535); *see also Mayfield v. Texas Dep't Of Criminal Justice*, 529 F.3d 599, 612 (5th Cir. 2008) (reversing the district court's grant of summary judgment in favor of the TDCJ because "none of the penological interests provided by the TDCJ necessarily support[ed] limiting access to rune literature in the prison library"); *Thompson v. Solomon*, No. 92-8240, 1993 WL 209926, at *2 (5th Cir. June 2, 1993) (per curiam) (concluding that the state's "cursory response . . . provide[d] an insufficient factual basis" to dismiss plaintiff's free-exercise claim); *Rudolph v. Locke*, 594 F.2d 1076, 1077 (5th Cir. 1979) (per curiam) (holding that the state's "bare assertion" that its regulation was an appropriate means of maintaining security was "not enough" to deny relief on plaintiff's First Amendment claims).

Bynum had confiscated copies of the Bible and religious books by Max Lucado, Charles Swindoll, and Joel Osteen. Moreover, DeMarco asserted that the taking of those books had placed a substantial burden on his practice of reading religious literature. His decision to seek damages—rather than the return of his books—does not indicate that his religious belief is disingenuous. Indeed, his books were allegedly destroyed, leaving damages as his only recourse. Hence, with the benefit of liberal construction, DeMarco's *pro se* pleadings establish that the seizure of his books burdened a sincere religious practice. *See Woodfox v. Cain*, 609 F.3d 774, 792 (5th Cir. 2010).

Furthermore, the defendants have not "put forward" any legitimate government interest justifying the alleged seizure of DeMarco's religious materials. *Turner*, 482 U.S. at 89. Rather, as DeMarco alleges, Bynum merely stated that "he could take whatever he wanted whenever he wanted." The district court therefore erred in dismissing DeMarco's free exercise claim against Bynum in his individual capacity.[13] On remand, the court should determine whether the alleged confiscation was reasonably related to a legitimate penological objective.

Nevertheless, the district court properly dismissed DeMarco's free exercise claim against Boyle and Stephens. "[T]o state a cause of action under section 1983, the plaintiff must identify defendants who were either personally involved in the constitutional violation or whose acts are causally connected to the constitutional violation alleged."[14] DeMarco does not aver that Boyle or

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[13] DeMarco's claim against Bynum in his official capacity is barred by sovereign immunity. *See Kentucky v. Graham*, 473 U.S. 159, 169 (1985) (citations omitted) ("[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court. This bar remains in effect when State officials are sued for damages in their official capacity.").

[14] *Woods v. Edwards*, 51 F.3d 577, 583 (5th Cir. 1995) (per curiam) (citing *Lozano v. Smith*, 718 F.2d 756, 768 (5th Cir. 1983)).

Stephens personally confiscated his religious materials. Instead, he claims that they caused the violation by failing to train their subordinates and by ignoring previous complaints about Bynum. But DeMarco does not specify any other examples of comparable violations. Nor does he explain how better training might have prevented the alleged violation. Such conclusional allegations are insufficient to show that the alleged violation resulted from Boyle and Stephens' actions. DeMarco has thus failed to state a claim against them.

The judgment of dismissal is AFFIRMED in part and REVERSED in part and REMANDED. We place no limitation on the matters that the district court can address on remand, and we do not mean to indicate how the court should rule on any issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MICHAEL JOSEPH DEMARCO, JR.,	§	
TDCJ No. 1564162,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. 7:14-CV-094-O**
	§	
WILLIAM STEPHENS, *et al.*,	§	
	§	
Defendants.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED**, **ADJUDGED**, and **DECREED** that Plaintiff's claims under federal law are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim on which relief may be granted.

It is further **ORDERED**, **ADJUDGED**, and **DECREED** that Plaintiff's state law claim of conversion is **DISMISSED** without prejudice.

SIGNED this **29th day** of **September, 2017**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

Appendix A-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MICHAEL JOSEPH DEMARCO, JR.,	§	
TDCJ No. 1564162,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**Civil No. 7:14-CV-094-O**
	§	
WILLIAM STEPHENS, *et al.*,	§	
	§	
Defendants.	§	

ORDER DISMISSING CASE

This is a civil rights action brought pursuant to 42 U.S.C. § 1983 by an inmate confined in the James V. Allred Unit of the Texas Department of Criminal Justice ("TDCJ") in Iowa Park, Texas. Defendants are the Director of the TDCJ Correctional Institutions Division and two correctional officers at the Allred Unit.

Background

Plaintiff claims that Defendant Jeremy Bynum, an officer at the Allred Unit, unlawfully seized his legal and religious materials and filed a false disciplinary action against him. *See* Complaint, ECF No. 3 at 4. Plaintiff states that Bynum's misconduct was known by prison administrators and that they were grossly negligent in allowing such acts. *Id.* at 5. Plaintiff also brought a challenge to the disciplinary action in this case. *Id.* That challenge was severed from this case and Plaintiff proceeded with those claims in a habeas action. *See* Order Severing Claims, ECF No. 13; *DeMarco v. Davis*, No. 7:15-CV-047-O (N.D. Tex. 2016) (petition dismissed). But Plaintiff claims that the punishments imposed in the disciplinary action were imposed for the purpose of

retaliation because of a grievance he had previously filed. *See* Complaint, ECF No. 3 at 5. That claim remains pending in this case. Plaintiff seeks $450,000.00 in monetary damages. *Id.* at 4.

In order to flesh out the facts underlying Plaintiff's complaint, a questionnaire was issue to him by the Court. *See Eason v. Thaler*, 14 F.3d 8 (5th Cir. 1994) (requiring further development of a *pro se* litigant's insufficient factual allegations before dismissal is proper); *Watson v. Ault*, 525 F.2d 886, 892-93 (5th Cir. 1976) (affirming use of questionnaire as useful and proper means for a court to develop the factual basis of a *pro se* plaintiff's complaint). Plaintiff filed his answers in response to the Court's questions. *See* ECF No. 15. Upon review of the complaint and of Plaintiff's answers to questions, the Court finds and orders as follows:

Retaliation

In his complaint, Plaintiff alleges that the punishments imposed in the prison disciplinary action were imposed in retaliation for a grievance he had previously filed. *See* Complaint, ECF No. 3 at 5. But in his answers to questions, Plaintiff states that the retaliation came as a result of offering to serve as a witness for an inmate who was allegedly assaulted by Defendant Bynum a year and a half earlier. *See* Plaintiff's Answer to the Court's Question No. 17, ECF No. 15 at 17. Plaintiff claims that there is a pattern of retaliation in the Texas prison system against inmates who file grievances. *Id.* at 19.

State officials may not retaliate against an inmate for the exercise of a constitutionally protected right. *Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995); *Gibbs v. King*, 779 F.2d 1040, 1046 (5th Cir. 1986). In order to show retaliation an inmate "must establish (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." *McDonald v. Steward*, 132 F.3d 225,

231 (5th Cir. 1998). Causation requires a showing that "but for the retaliatory motive the complained of incident ... would not have occurred." *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997) (quoting *Woods*, 60 F.3d at 1166). This places a significant burden on the inmate. Mere conclusory allegations are insufficient to state a claim. *Woods*, 60 F.3d at 1166; *Richardson v. McDonnell,* 841 F.2d 120, 122-23 (5th Cir. 1988). The inmate must produce direct evidence of motivation or "allege a chronology of events from which retaliation may plausibly be inferred." *Woods*, 60 F.3d at 1166 (quoting *Cain v. Lane*, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988)). Trial courts are required to carefully scrutinize civil rights actions based on claims of retaliation as those claims "must [] be regarded with skepticism." *Id.* (quoting *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994)). A plaintiff's bare assertion of retaliation, without any supporting facts, is insufficient to state a claim under 42 U.S.C. § 1983. *See Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995) (prisoner must show more than a "personal belief" to establish retaliation).

Although he was afforded ample opportunity to state the facts underlying his complaint, Plaintiff has failed to allege facts that could show that the alleged retaliation by Bynum resulted from his exercise of any constitutional right or that, but for a retaliatory motive, the punishments imposed as a result of the disciplinary action would not have been assessed. Plaintiff's allegations of retaliation are conclusory in nature and, as such, fail to state a claim under the Civil Rights Act. Conclusory allegations and legal conclusions masquerading as factual allegations are insufficient to state a cognizable claim under the Civil Rights Act when a plaintiff is directed by a court to state the factual basis of a claim. *See Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) (holding that "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."); *Van Cleave v. United States*, 854 F.2d 82, 84 (5th

Cir. 1988) (requiring specific facts and noting that conclusory allegations are insufficient to maintain a claim under § 1983). Plaintiff's subjective belief that Defendants had unlawful retaliatory motives is insufficient to maintain this claim.

Access to the Courts

Plaintiff alleges that the taking of his legal materials by Defendant Bynum result in a denial of access to the courts. *See* Plaintiff's Answer to the Court's Question No. 9, ECF No. 15 at 9.

Prisoners have a constitutional right of adequate and meaningful access to the courts. *E.g., Lewis v. Casey*, 518 U.S. 343 (1996); *Bounds v. Smith*, 430 U.S. 817, 821-23 (1977); *McDonald v. Steward*, 132 F.3d 225, 230 (5th Cir. 1998). However, their right of access is not unlimited. "[I]t encompasses only 'a reasonably adequate opportunity to file nonfrivolous legal claims challenging their convictions or conditions of confinement.'" *Johnson v. Rodriguez*, 110 F.3d 299, 310-11 (5th Cir. 1997) (quoting *Lewis*, 518 U.S. at 356). In order to establish a claim for denial of access to the courts, a prisoner must demonstrate that he suffered some "actual injury." *See Lewis*, 518 U.S. at 351-52 (holding that actual injury is a constitutional prerequisite to maintaining a claim involving denial of access to the courts). This, in turn, requires proof that the denial of access "hindered [the inmate's] efforts to pursue a legal claim." *Lewis*, 518 U.S. at 351; *see also McDonald*, 132 F.3d at 231 (noting that, in order to prevail on a claim of denial of access to the courts, an inmate must demonstrate that his position as a litigant was prejudiced).

Access to legal materials is one way of satisfying the right of access to the courts. *Bounds*, 430 U.S. at 830. However, there is no right to access legal materials independent of the right to access the courts. Thus, a complaint alleging the deprivation of legal materials, without more, is insufficient to state a claim of denial of access to the courts. *See Lewis*, 518 U.S. at 351-52.

Plaintiff claims that he was denied access to the courts with regard to the appeals in his four criminal convictions. *See* Plaintiff's Answers to the Court's Questions No. 10 & 11. But Plaintiff states that he was represented by counsel in the appeals. *Id.* at 12. Representation by counsel is an alternative to an inmate's access to legal materials that satisfies the constitutional right of access to the courts. *Bounds*, 430 U.S. at 830-31. The fact that Plaintiff was without his legal materials during the appeals, without more, does not establish a denial of access to the courts.

Moreover, Plaintiff has not stated facts that could demonstrate prejudice in any of his appeals that resulted from the lack of legal materials. *See* Plaintiff's Answers to the Court's Questions No. 13-16. Plaintiff fails to identify any instances in which he was unable to file pleadings or comply with court orders. *Id.* Because Plaintiff has not alleged any injury due to the loss of his legal materials, he has not alleged a violation of *Bounds*.

The Court has the power to pierce the veil of a *pro se* plaintiff's allegations and dismiss those claims whose factual contentions are clearly baseless. *Macias v. Raul A. (Unknown), Badge No. 153*, 23 F.3d 94, 97 (5th Cir. 1994). Although *pro se* complaints are to be construed liberally, the Court is bound by the allegations of the complaint and is not free to speculate that a plaintiff might be able to state a claim if given yet another opportunity to add more facts. *Id.* Plaintiff's denial-of-access claim is without merit.

Free Exercise of Religion

Plaintiff alleges that Defendant Bynum denied him the right to the free exercise of his religion when he confiscated Plaintiff's religious materials. *See* Plaintiff's Answer to the Court's Question No. 3, ECF No. 15 at 3.

Although incarcerated, an inmate retains his First Amendment right to the free exercise of religion, subject to reasonable restrictions and limitations necessitated by penological goals. *E.g., Turner v. Safley*, 482 U.S. 78, 89-91 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349-50 (1987); *Powell v. Estelle*, 959 F.2d 22, 25-26 (5th Cir. 1992). To fall within the purview of the free exercise clause of the First Amendment, a religious claim must satisfy the following two criteria: "First, the claimant's proffered belief must be sincerely held; the First Amendment does not extend to 'so-called religions which ... are obviously shams and absurdities and whose members are patently devoid of religious sincerity.'" *Callahan v. Woods*, 658 F.2d 679, 683 (9th Cir. 1981) (quoting *Theriault v. Carlson*, 495 F.2d 390, 395 (5th Cir. 1974)). Second, "the claim must be rooted in religious belief, not in 'purely secular' philosophical concerns." *Id.* (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)). Thus, only practices associated with sincerely held religious beliefs require accommodation by prison officials. *See e.g., U.S. v. Daly*, 756 F.2d 1076, 1081 (5th Cir. 1985) (citing *United States v. Ballard*, 322 U.S. 78, 86-88 (1944) and *United States v. Seeger*, 380 U.S. 163, 184 (1965)); *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994), *supplemented*, 65 F.3d 148 (9th Cir. 1995); *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991). Unfortunately, the realities of prison life dictate that even religious practices associated with sincerely held religious beliefs may be limited "in order to achieve legitimate correctional goals or to maintain prison security." *O'Lone*, 482 U.S. at 348.

Plaintiff's sole free exercise claim is that his religious materials were taken by Defendant Bynum. Although Plaintiff claims that this act denied him the right to freely exercise his religion, he does not identify any sincerely held religious belief or any practice thereof that was impacted. Plaintiff does not state the nature of his religion or of his religious practices and he has not stated

facts to show that this claim is actually rooted in religious belief. The gravamen of Plaintiff's complaint is that his property was unlawfully confiscated. Notably, Plaintiff did not ask for the return of his religious materials in either of his grievances. *See* Plaintiff's Grievances, ECF No. 3 at 11-14. He sought only to overturn prison disciplinary convictions. *Id.* Plaintiff has failed to state a free exercise claim. And he has failed to make any claim that the taking of his religious materials substantially burdened any religious exercise. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq. at § 2000cc–1(a) (providing in part that "[n]o government shall impose a substantial burden on the religious exercise of a person ... confined to an institution ...."); *Adkins v. Kaspar*, 393 F.3d 559, 569–70 (5th Cir. 2004) (holding that "... a government action or regulation creates a 'substantial burden' on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs.").

Taking of Property

Plaintiff claims that his personal property was unlawfully seized by Defendant Bynum. The United States Supreme Court has held that the "unauthorized, intentional deprivation of property" does not constitute a civil rights violation if there exists a meaningful post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *accord Nickens v. Melton*, 38 F.3d 183, 184-85 (5th Cir. 1994); *see also Holloway v. Walker*, 790 F.2d 1170, 1174 (5th Cir. 1986) (finding no breach of federally guaranteed constitutional rights, even where a high level state employee intentionally engages in tortious conduct, as long as the state system as a whole provides due process of law). Under the circumstances of the instant case, Plaintiff has the state common-law action of conversion available to remedy his alleged deprivation of property. *Murphy v. Collins*, 26 F.3d 541, 543-44 (5th Cir. 1994); *Myers v. Adams*, 728 S.W.2d 771 (Tex. 1987). Conversion occurs when there is an

unauthorized and unlawful exercise of dominion and control over the property of another which is inconsistent with the rights of the owner. *Armstrong v. Benavides*, 180 S.W.3d 359, 363 (Tex. App. – Dallas 2005, *no writ*); *Beam v. Voss*, 568 S.W.2d 413, 420-21 (Tex. Civ. App. -- San Antonio 1978, *no writ*). If Defendant Bynum exercised unauthorized and unlawful control over Plaintiff's personal property, Plaintiff has a factual basis to allege a cause of action in conversion. Such a common-law action in state court would be sufficient to meet constitutional due process requirements. *Groves v. Cox*, 559 F. Supp. 772, 773 (E.D. Va. 1983).

Conclusion

Plaintiff was given the opportunity to expound on the factual allegations of his complaint by way of questionnaire. But he failed to allege any facts that could indicate his constitutional or federal statutory rights were violated. As stated earlier, conclusory allegations and legal conclusions masquerading as factual allegations are insufficient to state a cognizable claim.

For the foregoing reasons, Plaintiff's claims under federal law are **DISMISSED** with prejudice pursuant to 28 U.S.C. § 1915A(b)(1) for failure to state a claim on which relief may be granted.

Plaintiff's state law claim of conversion is **DISMISSED** without prejudice.

SO ORDERED this **29th day** of **September, 2017.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MICHAEL JOSEPH DEMARCO, JR.,	§	
TDCJ No. 1564162,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. 7:15-CV-147-O**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is **ORDERED**, **ADJUDGED**, and **DECREED** that the petition for writ of habeas corpus is **DENIED**.

It is further **ORDERED**, **ADJUDGED**, and **DECREED** that Petitioner's civil rights claims are **DISMISSED** without prejudice.

SIGNED this **14th day** of **September, 2016.**

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MICHAEL JOSEPH DEMARCO, JR.,	§	
TDCJ No. 1564162,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. 7:15-CV-147-O**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER OF THE COURT ON
CERTIFICATE AS TO APPEALABILITY

This is a habeas corpus case in which the detention complained of arises out of process issued by a state court. Considering the record in this case and pursuant to Federal Rule of Appellate Procedure 22(b), a Certificate of Appealability is hereby **DENIED**.

REASONS FOR DENIAL: For the reasons stated in the Court's Order Denying Habeas Relief, which is hereby adopted and incorporated by reference, the Petitioner has failed to demonstrate that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right. *See Slack v. McDaniel*, 529 U.S. 473 (2000).

SO ORDERED this **14th day** of **September, 2016**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

MICHAEL JOSEPH DEMARCO, JR.,	§	
TDCJ No. 1564162,	§	
	§	
Petitioner,	§	
	§	
v.	§	**Civil No. 7:15-CV-147-O**
	§	
LORIE DAVIS, Director,	§	
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

ORDER DENYING HABEAS RELIEF

Petitioner Michael Joseph DeMarco, Jr., an inmate confined in the James V. Allred Unit of the Texas Department of Criminal Justice in Iowa Park, Texas, brings this action pursuant to 28 U.S.C. § 2254. DeMarco challenges the validity of disciplinary action no. 20130360380 which was brought against him at the Allred Unit. DeMarco was found guilty of threatening an officer. *See* Amended Petition, ECF No. 8 at 5. The disciplinary case resulted in "solitary, [and] more restrictive custody from G2-S3 to G4-L1." *Id.*

In support of his petition, DeMarco presents the following grounds for relief:

1. denial of the right to call witnesses and tampering with witness statements by prison officials;

2. failure to inventory and tag legal and religious materials and destruction of those materials;

3. failure of prison officials to attempt an informal resolution; and,

4. unfair and biased disciplinary system.

Id. at 6-7.

DeMarco has failed to state a colorable claim for habeas corpus relief. He has no constitutionally protected interest in his prison custodial classification or in his good-time earning status. *See Luken v. Scott*, 71 F.3d 192, 193 (5th Cir. 1995) (recognizing that "[t]he loss of the opportunity to earn good-time credits, which might lead to earlier parole, is a collateral consequence of [an inmate's] custodial status" and, thus, does not create a constitutionally protected liberty interest). Therefore, the reduction in his custodial classification level does not warrant due process protection.

With regard to placement in solitary confinement as a result of the finding of guilt, DeMarco is not entitled to habeas relief. Inmates generally do not have protected liberty interests in their confinement status. *See Sandin v. Conner*, 515 U.S. 472, 484 (1995) (holding that a prisoner's liberty interest is "generally limited to freedom from restraint which ... imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."). Constitutional concerns could arise where solitary confinement rises to the level of an atypical and significant hardship. However, Petitioner makes no such claim in this case.

DeMarco concedes that he is not eligible for mandatory supervised release and that he did not lose any previously earned good time credits as a result of the disciplinary action. *See* Amended Petition, ECF No. 8 at 5. Therefore, he had no constitutionally protected liberty interest at stake. *See Madison v. Parker*, 104 F.3d 765, 769 (5th Cir. 1997) (holding that the state may create a constitutionally protected liberty interest requiring a higher level of due process where good-time credits are forfeited in a disciplinary action against an inmate who is eligible for mandatory supervised release). Absent such a liberty interest, due process does not attach to a prison disciplinary proceeding.

Petitioner claims that his legal and religious materials were unlawfully destroyed as a result of the disciplinary action. Such claims may be pursued in a civil rights action. But they do not constitute a cognizable ground for habeas relief. This case was severed from Petitioner's previously-filed civil rights action. *See Demarco v. Stephens*, 7:15-CV-094-O (N.D. Tex.). Petitioner's civil rights claims remain pending in that case.

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED**. Petitioner's civil rights claims are **DISMISSED** without prejudice to his currently pending civil rights action.

SO ORDERED this **14th day** of **September, 2016**.

Reed O'Connor
UNITED STATES DISTRICT JUDGE