IN THE
Supreme Court of the United States

IVAN ALEXANDROVICH VETCHER,

Petitioner,

v.

ICE , ETC AL.

Respondent.

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 1, 2021
Lyle W. Cayce
Clerk

No. 19-10156
Summary Calendar

IVAN VETCHER,

Plaintiff—Appellant,

versus

IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), *Supervisors*; DUSTY ROWDEN, *ICE Deportation Officer*; FNU ASHLEY, *Detention Officer at Rolling Plains Regional Jail Detention Center*; MARCELLO VILLEGAS, *Warden, Rolling Plains Regional Jail Detention Center*; ICE OFFICERS, LNU/FNU; JEH C. JOHNSON, *Secretary of Department of Homeland Security*; PHILIP T. MILLER, *Assistant Director of Field Operations for Enforcement and Removal Operations*; FNU HERNANDEZ, *Detention Officer at Rolling Plains Regional Jail Detention Center*; FNU ROSS, *Detention Officer at Rolling Plains Regional Jail Detention Center*; ICE AGENTS, LNU/FNU, ICEA1; ICE AGENTS, LNU/FNU, ICEA2; ROLLING PLAINS REGIONAL JAIL & DETENTION CENTER STAFF; UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SUPERVISORS,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
No. 1:16-CV-164

Before KING, SMITH, and WILSON, *Circuit Judges.*

PER CURIAM:*

Ivan Vetcher, former immigration detainee #A079570472, filed a civil action raising claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). He sought declaratory and injunctive relief and compensatory and punitive damages. Vetcher alleged that he was denied access to the courts; the defendants retaliated against him for the exercise of his rights; he was denied his right to communication; he was denied religious rights; he was subject to punitive treatment during his civil detention; he was subject to cruel and unusual punishment; and some of the defendants used excessive force against him. He asserted that the defendants were liable to him in their individual and official capacities.

Except for the claims against Rowden and Villegas regarding alleged retaliatory transfers, the district court dismissed all of Vetcher's claims under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim for relief and certified the partial judgment as final under Federal Rule of Civil Procedure 54(b). Vetcher filed a motion to amend the judgment under Federal Rule of Civil Procedure 52(b) and a motion to amend the complaint under Federal Rule of Civil Procedure 15. His motions were denied, and he appeals.

In Vetcher's notice of appeal, he indicated the intent to appeal the order denying his Rule 52 motion and his Rule 15 motion and also asserted that the district court improperly dismissed his claims relating to the denial of access to courts, which were addressed by the district court in its earlier ruling. Thus, the issues raised in those motions, including the denial of access to courts, are properly within the scope of the appeal. *See Williams v. Henagan*, 595 F.3d 610, 616 (5th Cir. 2010).

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

In his appellate brief, Vetcher also challenges the dismissal of his claims relating to punitive treatment in civil confinement, retaliation, and cruel and unusual punishment. Those claims were dismissed by the district court in its partial final judgment. Thus, in light of the liberal construction given to Vetcher's notice of appeal and brief, those issues are properly before this court. *See id.* at 616–18.

Vetcher contends that the district court erred in denying his post-judgment motion to amend. Because Vetcher had previously amended his complaint at least once, and because a partial final judgment had issued, he was not eligible to amend his complaint as a matter of course. *See* FED. R. CIV. P. 15(a)(1). Vetcher's post-judgment motion to amend the complaint is treated as a motion under Federal Rule of Civil Procedure 59(e). *See Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003). We review the denial of the Rule 59(e) motion for abuse of discretion in light of the limited discretion in Rule 15(a). *See id.* Because Vetcher's motion to amend contained facts and arguments that he reasonably could have raised before dismissal, he has not shown that the district court abused its discretion in denying that motion. *See Rosenzweig*, 332 F.3d at 865; *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000).

The remaining claims on appeal challenge the dismissal of Vetcher's claims that he was denied access to courts; he was subjected to retaliation in the form of a disciplinary action and a cancelled family visit; he was subjected to punitive confinement in a civil environment; and he was subjected to cruel and unusual punishment. We review the dismissal *de novo* and apply the same standard of review to dismissals for failure to state a claim under § 1915(e)(2)(B)(ii) as for dismissals under Federal Rule of Civil Procedure 12(b)(6). *Black v. Warren*, 134 F.3d 732, 734 (5th Cir. 1998).

Assuming that *Bivens* is applicable in the context of Vetcher's claims

regarding the denial of access to courts and retaliation, he failed to state a claim for relief. *See Petzold v. Rostollan*, 946 F.3d 242, 252–54 (5th Cir. 2019). Vetcher's conclusory assertions that the law library was inadequate and that he lacked the proper assistance do not show an actual injury necessary for a claim of denial of access to courts. *See Lewis v. Casey*, 518 U.S. 343, 351 (1996). Regarding his retaliation claim, he raises conclusory arguments that he received a harsher punishment than normal for his disciplinary violation, and he attempts to refute the district court's finding that the family visit was cancelled because his stepdaughter violated the rules of the detention facility by stating that her rule violation was irrelevant. These arguments fail to show error in the district court's analysis. Vetcher makes no showing of retaliatory intent. *See Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995).

The district court found that Vetcher's claims of punitive confinement were subject to dismissal because they involved private employees and not federal actors and were therefore barred in a *Bivens* action under *Minneci v. Pollard*, 565 U.S. 118, 125–30 (2012). The court further determined that Vetcher had failed to demonstrate that the conditions were intended to be punitive.

In his brief, Vetcher does not address the district court's findings. Instead, he merely reasserts that he was subject to these conditions. Accordingly, he has waived any challenge to the district court's determination. *See Brinkmann v. Dall. Cnty. Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987).

Vetcher's appellate assertions of cruel and unusual punishment relate to defendants who were not named in the district court. We will not consider claims raised against new defendants on appeal. *See Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Discount Ctrs., Inc.*, 200 F.3d 307, 316–17 (5th Cir. 2000) ("It is a bedrock principle of appellate review that claims raised for the first time on appeal will not be considered."). To the extent Vetcher is

renewing a claim against a government entity, his claim is barred. *See Moore v. U.S. Dep't of Agric. on Behalf of Farmers Home Admin.*, 55 F.3d 991, 995 (5th Cir. 1995).

Vetcher does not challenge the severance and transfer of the claims relating to his deportation in New York, claims against the defendants in their official capacities, or claims against the defendants in their individual capacities that the court found were barred under *Bivens*. He further fails to renew any claims under the Administrative Procedure Act or his request for injunctive and declaratory relief. Vetcher does not aver that he was subjected to a polluted water supply, that he was denied his religious rights, or that he was subjected to excessive force. Thus, those claims are abandoned. *See Yohey v. Collins*, 985 F.2d 222, 224–25 (5th Cir. 1983).

The judgment is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IVAN VETCHER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:16-CV-0164-C
	§	
MARCELLO VILLEGAS,	§	
	§	
	§	
Defendant.	§	

ORDER

Plaintiff filed a "Motion to Amend Judgement [sic] under Rule 59(e)," on August 12, 2019. He seeks reconsideration of the Court's July 12, 2019 Order and Judgment dismissing his final claim against Defendant Marcello Villegas. Specifically, Plaintiff again objects to the Court's denial of leave to amend his complaint in response to Defendant Villegas' Motion to Dismiss.

First, to the extent that Plaintiff seeks relief under Rule 59(e), his motion is untimely. Fed. R. Civ. P. 59(e). However, "a court may treat an untimely Rule 59(e) motion to alter or amend the judgment as if it were a Rule 60(b) motion" for relief from a judgment or order. *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465, 470 (5th Cir. 1998). Thus, the Court considers Plaintiff's motion as brought pursuant to Rule 60(b)(6).

But the Court finds that Plaintiff is not entitled to relief under Rule 60(b)(6). Plaintiff has had several opportunities to amend his complaint.[1] And he has attempted to amend his complaint several more times.[2] The Court found that Plaintiff's most recent attempts to amend

[1] *See* Docs. 7, 15, and 34.
[2] *See* Docs. 39, 69, 101, and 107.

his complaint were made in bad faith.[3] Plaintiff even acknowledges in his Motion that he intentionally violated the Court's specific instructions when he filed his newest proposed amendment because he disagreed with the limitations set by the Court. Plaintiff has repeatedly tried to re-urge claims that the Court resolved against him and rename defendants that were dismissed from the case. In sum, Plaintiff has repeatedly failed to cure the deficiencies in his pleadings, instead rehashing arguments that the Court resolved against him on November 29, 2018 (Doc. 58). This motion is no different.

Plaintiff acknowledges that the existing *Bivens* doctrine does not permit his retaliation claims. He argues that he tried to cure the deficiency in his amendment to "change the retaliatory claim, into denial of due process claim [all sic]." But again, he is circling back to claims that have already been resolved against him. *See* Doc. 58. As a result, the Court finds that Plaintiff's Motion should be **DENIED** in all things.

SO ORDERED.

Dated August 14, 2019.

SAM R. CUMMINGS
Senior United States District Judge

[3] Docs. 104 and 108.

United States Court of Appeals for the Fifth Circuit

No. 19-10156

IVAN VETCHER,

Plaintiff—Appellant,

versus

IMMIGRATION AND CUSTOMS ENFORCEMENT (ICE), SUPERVISORS; DUSTY ROWDEN, ICE DEPORTATION OFFICER; FNU ASHLEY, DETENTION OFFICER AT ROLLING PLAINS REGIONAL JAIL DETENTION CENTER; MARCELLO VILLEGAS, WARDEN, ROLLING PLAINS REGIONAL JAIL DETENTION CENTER; ICE OFFICERS, LNU/FNU; JEH C. JOHNSON, SECRETARY OF DEPARTMENT OF HOMELAND SECURITY; PHILIP T. MILLER, ASSISTANT DIRECTOR OF FIELD OPERATIONS FOR ENFORCEMENT AND REMOVAL OPERATIONS; FNU HERNANDEZ, DETENTION OFFICER AT ROLLING PLAINS REGIONAL JAIL DETENTION CENTER; FNU ROSS, DETENTION OFFICER AT ROLLING PLAINS REGIONAL JAIL DETENTION CENTER; ICE AGENTS, LNU/FNU, ICEA1; ICE AGENTS, LNU/FNU, ICEA2; ROLLING PLAINS REGIONAL JAIL & DETENTION CENTER STAFF; UNITED STATES DEPARTMENT OF HOMELAND SECURITY, SUPERVISORS,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
No. 1:16-CV-164

ON PETITION FOR REHEARING EN BANC

(Opinion 2021 U.S. App. LEXIS 2698, Feb. 1, 2021)

Before KING, SMITH, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. No member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35; 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

April 01, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-10156 Vetcher v. Img and Customs Enforcement
USDC No. 1:16-CV-164

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By: _____
Charles B. Whitney, Deputy Clerk
504-310-7679

Ms. Ann Elizabeth Cruce-Haag
Ms. Karen S. Mitchell
Mr. Brian Walters Stoltz
Mr. Ivan Alexandrovich Vetcher

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IVAN VETCHER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:16-CV-0164-C
	§	
MARCELLO VILLEGAS,	§	
	§	
	§	
Defendant.	§	

ORDER

Before the Court are the following:

1) Defendant Marcello Villegas' Motion to Dismiss and Brief in Support, filed on June 4, 2019.

2) Plaintiff's Objections to Motion to Dismiss, filed on July 10, 2019, and

3) Plaintiff's Amended Complaint, filed on July 10, 2019.

I. Plaintiff's Amended Complaint

On June 27, 2019, the Court unfiled an amended complaint (Doc. 101) that was filed by Plaintiff on June 25. The Court found that the pleading was filed in bad faith and without leave of court. The Court also found that it was excessive both in length and in scope. After unfiling the non-compliant pleading, the Court granted Plaintiff until July 10, 2019 to file a proper motion for leave to amend with a proposed amended complaint. The June 27 Order included specific, unambiguous instructions that any proposed amended complaint could not exceed 25 pages and could include only facts and arguments related to Plaintiff's remaining retaliation claims against Defendant Marcello Villegas.

Plaintiff's July 10 amended complaint (Doc. 107) is 45 pages—nearly twice the length permitted by the Court's June 27 Order. The amended complaint is also unsigned and appears to be incomplete. And despite the Court's instructions, Plaintiff filed the amended complaint without a motion for leave to amend. In the amended complaint, Plaintiff again attempts to re-raise claims that have already been resolved by the Court, to rename defendants that have already been dismissed from this action, and to raise entirely new claims against new defendants. The amended complaint wholly fails to comply with the Court's Order. Consequently, the Court finds that it should be UNFILED.

II. Defendant's Motion to Dismiss

Defendant Villegas argues that Plaintiff's complaint should be dismissed because it asks the Court to extend *Bivens*[1] to an unwarranted new context. Alternatively, Defendant argues that the complaint should be dismissed because he was not properly served or served in a timely manner.

Plaintiff does not address or attempt to cure the *Bivens* issue in his objections. He identifies no special factors to justify extending *Bivens* to a new context. Instead, he asks the Court to deny Defendant's Motion to Dismiss as moot in light of his amended complaint. For the reasons stated above, the Court did not consider Plaintiff's unfiled amended complaint. The Court has examined the relevant portions of Plaintiff's Third Amended Complaint (Doc. 15), Defendant's Motion to Dismiss and Brief in Support, and Plaintiff's Objections.

The Court finds that whether or not Defendant was properly served, Plaintiff has failed to state a claim for which relief is available under existing *Bivens* jurisprudence. The Court further finds that Plaintiff has identified no special factor to warrant extending *Bivens* to provide a

[1] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

remedy in this new, First Amendment context. As a result, the Court finds that Defendant's Motion to Dismiss should be GRANTED. Plaintiff's objections are overruled.

It is ORDERED that Plaintiff's complaint and all remaining claims against Marcello Villegas are DISMISSED with prejudice for failure to state a claim upon which relief may be granted.

Judgment shall be entered accordingly.

All relief not granted is denied and any pending motions are denied.

Dated July 12, 2019.

SAM R. CUMMINGS
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IVAN VETCHER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:16-CV-0164-C
	§	
MARCELLO VILLEGAS,	§	
	§	
	§	
Defendant.	§	

JUDGMENT

For the reasons stated in the Court's Order of even date, it is ORDERED, ADJUDGED, AND DECREED that Plaintiff's complaint and all remaining claims alleged therein against Defendant Marcello Villegas are **DISMISSED with prejudice**.

Dated July 12, 2019.

SAM R. CUMMINGS
Senior United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IVAN VETCHER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:16-CV-0164-C
	§	
IMMIGRATION AND CUSTOMS ENFORCEMENT, *et al.*,	§	
	§	
	§	
Defendants.	§	

ORDER

Plaintiff, Ivan Alexandrovich Vetcher, proceeding *pro se* and *in forma pauperis*, filed this civil rights action pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389-98 (1971), the Administrative Procedures Act (APA) and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq*. He seeks monetary, declaratory, and injunctive relief.

Plaintiff was detained in the Rolling Plains Regional Jail and Detention Center (RPRJDC) in Haskell, Texas pending immigration proceedings when his Complaint was filed; however, he notified the Court of his subsequent removal from the country. He has provided the Court with a mailing address in Richardson, Texas.[1]

Plaintiff asserts claims against several federal officials and private prison employees for various violations of his constitutional rights. He organizes his claims into seven distinct categories: (1) denial of access to court, (2) retaliation for exercise of protected rights, (3) denial of communication, (4) denial of religious rights, (5) punitive treatment in a civil environment, (6) cruel and unusual punishment, and (7) excessive force.

[1] The Clerk also sent Plaintiff instructions for e-filing at his request.

I. BACKGROUND AND JURISDICTION

Plaintiff is a determined litigant who has filed more than a dozen cases before the Board of Immigration Appeals, the District of Columbia, the Northern District of Texas, the Eastern District of Texas, the Western District of Louisiana, and the United States Court of Appeals for the Fifth Circuit.

Plaintiff is a native and citizen of Belarus who entered the Unites States in 2001 as a refugee. Plaintiff filed this Complaint to challenge the conditions of confinement to which he was subjected while he was detained pending immigration proceedings.

Plaintiff initiated this case with a handwritten complaint filed in the Dallas Division of the Northern District of Texas. Plaintiff filed two amended complaints (Docs. 7 & 15), then the case was transferred to the Abilene division. (Doc. 20.) Plaintiff filed a "Notice to Accept 3rd Complaint" (Doc. 34) indicating his intent for the Court to proceed with screening his final Amended Complaint (Doc. 15).[2] That pleading, totaling 236 pages with attachments, is subject to review under § 1915(e).[3]

In his Amended Complaint, Plaintiff names the following defendants: Jeh Charles Johnson, (former) Secretary of Department of Homeland Security; Phillip T. Miller, Assistant Director of Immigration and Customs Enforcement (ICE); Dusty Rowden, ICE Deportation Officer; FNU Ashley, Detention Officer at the Rolling Plains Regional Jail and Detention Center (RPRJDC); Marcello Villegas, Warden, RPRJDC; FNU Hernandez, Chief of Security, RPRJDC; FNU Ross, Mail Room Officer, RPRJDC; and two unidentified ICE agents. Plaintiff alleges

[2] Plaintiff later sought leave to again amend his complaint, but such leave was denied on May 5, 2017.
[3] An amended complaint entirely supersedes and takes the place of an original pleading, rendering the original complaint of no legal effect. *See Clark v. Tarrant County*, 798 F.2d 736, 740 (5th Cir. 1986); *Boelens v. Redman Homes, Inc.*, 759 F.2d 504, 508 (5th Cir. 1985). Thus, this Court considers only the June 2, 2016 amended complaint with attachments in conducting the judicial screening.

that between July 2, 2014, and February 16, 2016, he was subjected to civil rights violations at six detention facilities in four different states and at JFK International Airport.

Plaintiff's Amended Complaint is voluminous and alleges several different types of claims against the above-named federal officers and private prison employees. Most of Plaintiff's claims arise from incidents that occurred at RPRJDC; however, he also complains that he suffered unconstitutional conditions of confinement when he was transferred to five other facilities in four different states.

Additionally, Plaintiff complains that he was subjected to excessive force at JFK International Airport in New York when he resisted ICE Agents' first attempt to remove him from the country in March 2015.[4] This claim is distinct from the rest of Plaintiff's conditions-of-confinement claims. The Court finds that it lacks jurisdiction over Plaintiff's claims against the unidentified ICE agents for events that occurred at or near JFK International Airport.

To the extent that Plaintiff has pleaded sufficient facts to warrant further screening of the New-York based claims, such review should be done in the proper venue. Venue for *Bivens* actions lies in the judicial district where a defendant resides or in the judicial district where a substantial part of the events or omissions giving rise to the claims occurred. 28 U.S.C. § 1391(b). A district court may, upon its own motion, transfer any civil action to any other

[4] Plaintiff claims that ICE attempted to deport him on March 3, 2015. He states that an unidentified ICE agent, Defendant ICEA1, took him to JFK International Airport and put him on an airplane. Plaintiff admits that he resisted the deportation attempt, and there was a physical altercation. Plaintiff claims that Defendant ICEA1 "proceeded with removal using excessive force, maliciously dragging and handcuffing plaintiff with intent to cause pain and suffering. ICEA1 attempted to intimidate plaintiff by asphyxiating . . . ." Doc. 15 at 28. Plaintiff states that he "did not relent" and eventually the captain ordered that he be taken off the airplane. Plaintiff further claims that he was physically injured during the altercation and was in "excruciating pain" as he dragged his luggage out of the airport. The next day, Plaintiff claims that a second unidentified ICE agent, Defendant ICEA2, tightly handcuffed him while transporting him to the Buffalo Detention Center. He states that when the van stopped for a break, Defendant ICEA2 "jammed his thumb on the inside of plaintiff's swollen wrists forcefully wiggling, with intentional malice to cause injury." Doc 15 at 29.

district or division where the claim might have been brought, for the convenience of parties and witnesses and in the interest of justice. 28 U.S.C. §§ 1404 and 1406. JFK International Airport is located in Queens, New York, which is located within the Eastern District of New York. The Court finds that Plaintiff's excessive-use-of-force claims against the unnamed ICE agents that he identifies as Defendants ICEA1 and ICEA2 should be severed and transferred to the United States District Court for the Eastern District of New York.

Plaintiff's remaining claims are subject to preliminary screening by this Court pursuant to 28 U.S.C. § 1915(e)(2)(B).

II. PRELIMINARY SCREENING UNDER 28 U.S.C. § 1915(e)(2)(B)

Because Plaintiff is proceeding *in forma pauperis*, his complaint is subject to screening under § 1915(e)(2).[5] Section 1915(e)(2)(B) provides for *sua sponte* dismissal of the complaint, or any portion thereof, if the Court finds it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary relief against a defendant who is immune from such relief.

A complaint is frivolous when it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." *Id.* at 327. A claim lacks an arguable basis in fact when it describes "fantastic or delusional scenarios." *Id.* at 327-28. A complaint fails to state a claim upon which relief may be granted when it fails to plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570

[5] Plaintiff was an alien detainee in the custody of Immigration and Customs Enforcement at the time that he filed his complaint. The Court previously found that Plaintiff was not a prisoner within the meaning of the Prison Litigation and Reform Act (*See* Doc. 19); however, because he is proceeding in forma pauperis, his complaint is still subject to preliminary screening under Section 1915(e)(2). *See Kunda v. Gould*, 2006 WL 1506706 at *1 n. 2 (N.D. TX – Dallas Div. May 31, 2006).

(2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To avoid dismissal for failure to state a claim, plaintiffs must allege facts sufficient to "raise the right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Mere "labels and conclusions" nor "a formulaic recitation of the elements of a cause of action" suffice to state a claim upon which relief may be granted. *Id.*

A. Plaintiff's Claim for Declaratory or Injunctive Relief is Moot

Plaintiff is no longer housed in the RPRJDC or detained by ICE. A claim for declaratory and injunctive relief based on conditions of confinement is rendered moot upon the release or transfer of a detainee. *Edwards v. Johnson*, 209 F.3d 772, 776 (5th Cir. 2000). Furthermore, the possibility of return and future detention in the same facility is too speculative to warrant relief, particularly considering Plaintiff's removal from the country. *See Ruiz v. El Paso Processing Center*, 299 F. App'x. 369, 370 (5 Cir. 2008); *Pembroke v. Wood County, Tex.*, 981 F.2d 225, 228 (5th Cir. 1993); *Herman v. Holiday*, 238 F.3d 660, 665-66 (5th Cir. 2001). Because Plaintiff is no longer detained at the RPRJDC, the Court finds that his claims for injunctive and declaratory relief should be **dismissed**.

B. No Claim Against Defendants in an Official Capacity

Plaintiff seeks monetary relief under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 389-98 (1971). The *Bivens* court recognized an individual's right to seek recovery for violation of constitutional rights by a person acting under color of federal law. 403 U.S. at 297. *Bivens* is the counterpart to 42 U.S.C. § 1983, and extends the protections afforded under § 1983 to parties injured by federal actors. *See Evans v. Ball*, 168 F.3d 856, 863 n. 10 (5th Cir. 1999) ("A *Bivens* action is analogous to an action under § 1983--the only difference being that § 1983 applies to constitutional violations by state, rather than federal

officials"), *overruled on other grounds*, *Castellano v. Fragozo,* 352 F.3d 939, 948-49 & n. 36 (5th Cir. 2003).

But the *Bivens* decision only provides a remedy for victims of constitutional violations by government officers in their individual capacities. A *Bivens* action does not provide for a cause of action against the United States. *See Affiliated Prof'l Home Health Care Agency v. Shalala,* 164 F.3d 282, 286 (5th Cir. 1999). Nor may a *Bivens* action be brought against a federal agency, such as ICE. *See FDIC v. Meyer*, 510 U.S. 471, 484-86 (1994); *Moore v. United States Dep't of Agric.*, 55 F.3d 991, 995 (5th Cir. 1995). Claims against federal employees in their official capacities based on alleged constitutional violations are also barred under *Bivens* because they are the equivalent to claims against the federal agencies who employ the employees. *See Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985). This is because the purpose of a *Bivens* action is to deter a federal officer from violating a person's constitutional rights. *Meyer*, 510 U.S. at 485; *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001). Because a *Bivens* action cannot be brought against a federal agency or individual employees in their official capacities, Plaintiff has not alleged a viable *Bivens* claim against Defendants Johnson, Miller, Rowden, or the two unnamed ICE Agents in their official capacity.

In addition to his claims against individual federal employees, Plaintiff has also named four defendants[6] he identifies as employees of the RPRJDC, which is operated by a private corporation named Emerald Corrections Management. Plaintiff complains of events that took place in a private prison and asserts claims against individual employees of the private prison. Unlike § 1983 claims, there is not a common law "state action" equivalent for claims brought pursuant to *Bivens.* The United States Supreme Court has repeatedly refused to extend liability

[6] Plaintiff identifies Defendants Ashley, Villegas, Hernandez, and Ross as employees of RDRJDC.

under *Bivens* except in limited situations as recently reaffirmed in *Ziglar v. Abbasi, et al.,* 137 S. Ct. 1843, 1861-64 (2017) (holding that *Bivens* should not be extended to claims challenging detention policy in the aftermath of the September 11 attacks and analyzing other situations where the Court has refused to extend *Bivens*). And, the Supreme Court has expressly declined to extend *Bivens* liability to private corporations. *See Malesko,* 534 U.S. at 67-74 (2001) (holding that a *Bivens* claim is not available against a private corporation operating under a contract with the federal government).

Because Plaintiff does not have a *Bivens* remedy against a private corporation, his claims against the four individual defendants employed by a private corporation in an "official capacity" also must be dismissed. *See Campbell v. Martinez,* No.4:03-CV-299-Y, 2003 WL 22410576, at * 2 n. 7 (N.D. Tex. May 14, 2003) (finding that as defendant physician was not a federal government employee, "[b]ecause *Bivens* claims do not lie against private corporations under contract with the federal government, to the extent [Plaintiff's] official-capacity claim against [the physician] is a claim against a private entity, it must be dismissed") (citing *Malesko*, 534 U.S. at 61).)

The Court finds that all of Plaintiff's official-capacity claims should be **dismissed** for failure to state a claim.

C. Limitation on Claims Against Individual Employees of Private Corporation

The Supreme Court has also refused to extend *Bivens* liability to allow federal prisoners to sue the employees of a private prison. *See Minneci v. Pollard,* 565 U.S. 118, 125-130 (2012). In that case, a federal prisoner confined at a private prison sought to assert an Eighth Amendment claim of deliberate indifference to his serious medical needs against individual employees of the prison. *Id.* at 125. The Court held that where a federal prisoner seeks damages

from an individual employed at a privately operated federal prison for alleged conduct that falls within the scope of traditional state tort law, the prisoner must seek a remedy under state law. *Id.*, at 123-131; *see also United States v. Fears*, No.02-379-2 (JDR), 2014 WL 4669592, at * 1 (D.C. Sep. 19, 2014) (noting that private prisons and their employees—unlike officers at prisons run by the BOP—are generally not proper defendants for *Bivens* actions alleging constitutional violations) (citations to *Malesko* and *Minneci* omitted); *see also Villasenor v. GEO Group, Inc.*, No. 14-CV-92164-BNB, 2014 WL 5293444, at *2 (D. Co. Oct. 16, 2014) (citing *Minneci* to hold that as Plaintiff's claims for lack of medical care could also be brought under state tort law, his claims against individual GEO [private company] prison employee was precluded).

Because the Supreme Court found that the tort law of the state in which the prisoner was incarcerated provided the prisoner adequate remedies to protect his constitutional interests, the Court found that *Bivens* did not provide Plaintiff with a federal remedy against the employees of the privately run federal prison where the prisoner's constitutional rights had been violated. *Minneci,* 565 U.S. at 126-131. Importantly, the Court "found specific authority indicating that state law imposes general tort duties of reasonable care . . . on prison employees in every one of the eight States [including Texas] where privately managed secure federal facilities are currently located." *Id.* at 128. Because Defendants Villegas, Ashley, Ross, and Hernandez are employees of Emerald Corrections Management, a private corporation, no *Bivens* action is available against these employees of a private corporation if Texas provides an adequate remedy for these claims. *See Grant v. Lacie,* No. H-15-1849, 2015 WL 4769753, at *2 (S.D. Tex. Aug. 12, 2015) (citing *Minneci*, 132 S.Ct. at 626).

Thus, the review of the claims against these private individual defendants focuses on whether the alleged conduct supporting the constitutional violation is of the sort that typically

falls within the scope of traditional tort law. This is the case in Eighth Amendment conditions-of-confinement type cases. *See Cervantes v. Dixon,* No.5:13-CV-205-C, 2014 WL 5285699, at *2 (N.D. Tex. Oct. 15, 2014) (applying *Minneci* to hold that *Bivens* does not authorize action for damages on inmate's claims that he was denied medical care in privately run facility); *see also Naranjo v. Thompson, et al.*, NO. PE:11-CV-0105-RAJ, 2014 WL 12648495, at *4 (W.D. Tex. Jan, 2, 2014) (collecting cases in the Fifth Circuit and its district courts), *rep. and rec. adopted,* 2104 WL 12648519 (W.D. Tex. Jan. 31, 2014).

Among the many claims Plaintiff asserts against the private employee defendants in this case is the claim that items of property sent to him by his family were not actually released to him but were instead returned to his family. Plaintiff also alleges that defendant Villegas failed to respond to his complaints that his Kosher diet was deficient in calorie count. He further claims that the water supply at RPRJDC was contaminated, that his microwave was broken, and that he was denied access to hot water for several days at a time.

But courts have found that similar claims brought by an inmate against a private prison employee are barred from review by the logic of *Minneci. See Srader v. Richardson,* No.10-3209-SAC, D. Kan. March 31, 2014) (noting that since plaintiff had adequate remedies under Kansas tort law for recovery of damages for loss of property, *Bivens* claims for damages barred by *Minneci*) (citations omitted); *see also Karbou v. Clark,* No.C12-5045 BHS/KLS, 2013 WL 1283801, at * 7 (ICE detainee's claims arising from his detention in a privately run facility that he was denied certain conditions including exercise equipment is kind of claim that must be dismissed under *Minneci*) ; *Murray v. Corrections Corp. of America, et* al., No. CV 11-2210-PHX-RCB (JFM), 2012 WL 2799759 (D. Ariz. July 9, 2012) (holding that inmate's claim that CCA employees denied him an adequate religious diet were within the scope of traditional tort

claims like those alleged in *Minneci*). Under this authority, the Court finds that all of Plaintiff's claims against the individual defendants employed by private company Emerald Correction Management arising from these tort-like claims, should be **dismissed**.

The Supreme Court in *Minneci* also recognized that there may be situations in which state tort remedies are inadequate to vindicate the rights of persons held in privately run federal correctional facilities. *See Minneci,* 565 U.S. at 130. Many courts that have analyzed this issue have determined that an inmate's claims against an individual employee at a private prison under the First and Fifth Amendments Amendment may not be barred from review. *See Young v. Tyron,* No.12-CV-6251CJS, 2015 WL 309431 at *9, (W.D. N.Y. Jan. 23, 2015) ("It is not clear that [the First and Fifth Amendment] claims, by contrast to the conditions of confinement claims, allege conduct 'of a kind that typically falls within the scope of traditional state tort law'") (citing *Minneci,* 132 S. Ct. at 626); *see also Espinoza v. Zenk,* No. 10-CV-427 (MKB), 2013 WL 1232208, at *9-10 (E.D.N.Y. March 27, 2013); *Janali v. Correction Corp. Of America, et al.*, No.5:11CV119-KS-MTP, 2013 WL 6536373, at *6 n.8 (S.D. Miss. Dec. 13, 2013) ("It is not clear that the First Amendment claims asserted by Plaintiff are of the type that fall within the scope of traditional tort law; therefore, the undersigned will consider Plaintiff's claims on the merits"). The Court determines that Plaintiff's claims against the private company defendants for denial of access to court, retaliation, and interference with his First Amendment religious rights are not barred from review by *Minneci.* These claims will be discussed in more detail below.

D. No Liability for Defendants Acting in a Supervisory Capacity

Plaintiff has named DHS Secretary Jeh Johnson and ICE Field Operations Director Phillip Miller as individual defendants for each of his seven claims; however, he has recited no

facts that relate any personal actions of Johnson or Miller to the extensive allegations that form the basis of his complaint. In order to state a *Bivens* claim, the claimant must allege personal involvement of a defendant. *Guerrero-Aguilar v. Ruano*, 118 F. App'x 832, 833 (5th Cir. 2004). Federal officials cannot be held vicariously liable for the acts of subordinates under the doctrine of respondeat superior. *Cronn v. Buffington*, 150 F.3d 538, 544 (1998) (citing *Abate v. Southern Pac. Transp. Co.*, 993 F.2d 107, 110 (5th Cir. 1993)). Without personal involvement or participation in an alleged constitutional violation, the individual should be dismissed as a defendant. *Cronn*, 150 F.3d at 544 (citing *Thompkins v. Belt,* 828 F.2d 298, 304 (5th Cir. 1987)).

Throughout the amended complaint, Plaintiff describes events that took place during his detention in chronological order like entries in a diary. He complains that he suffered various inhumane conditions at each detention center to which he was transferred and seeks to hold Defendants Johnson and Miller responsible for these conditions. But Plaintiff never states defendants Johnson or Miller were present at any of these locations, nor does he allege that Johnson or Miller directly participated in any of the described events. Plaintiff repeatedly claims that Johnson and Miller "implement[ed] a policy" that was unconstitutional, and "resulted in the deprivation of . . . rights," that they "allowed the [civil rights] violations to occur," and that they "acquiesced" to the alleged violations. It is clear from the context of these allegations that Plaintiff seeks to hold Defendants Miller and Johnson responsible due to their supervisory roles rather than any personal involvement or participation in the alleged civil rights violations.

Plaintiff alleges that he wrote letters to Defendants Miller and Johnson informing them of his grievances. He does not show that Defendants Miller or Johnson ever personally received or

read his letters, or that they responded in any way.[7] Plaintiff has named Johnson and Miller in a supervisory capacity and seeks to hold them liable upon a theory that they were responsible for the actions of their subordinates, or that they implemented policies that permitted the underlying violations to occur, or that they acquiesced to the alleged violations by inaction. Plaintiff's claims against Johnson and Miller are purely conclusory. He asserts no facts to show that Johnson or Miller were ever personally involved in the any of the events that gave rise to his complaint. Plaintiff fails to identify any particular policy that was implemented by either Johnson or Miller related to his claims. Thus, Plaintiff has not stated a viable individual liability claim under *Bivens* against either Johnson or Miller, and any such claims against these defendants should be **dismissed** for failure to state a claim upon which relief may be granted.

While most of the factual allegations contained in Plaintiff's Amended Complaint arise from events that took place at the RPRJDC in Haskell, Texas, he also alleges that he suffered unconstitutional conditions of confinement while housed in the Etowah County Jail in Gadsden, Alabama; Buffalo Detention Center in Batavia, New York; LaSalle Detention Center in Gena, Louisiana; Johnson County Law Enforcement Center in Cleburne, Texas; and an unnamed detention facility in New Jersey. Plaintiff has named no defendants specific to these claims other

[7] Allegations of inadequate processing of a grievance do not support a constitutional violation. As the Court of Appeals for the Fifth Circuit found in *Geiger v. Jowers*: "[An inmate] does not have a federally protected liberty interest in having these grievances resolved to his satisfaction. As this claim relies on a legally nonexistent interest, any alleged due-process violation arising from the alleged failure to investigate his grievances is indisputably meritless." *Geiger v. Jowers*, 404 F.3d 371, 373-74 (5th Cir.2005); see also *Jenkins v. Henslee*, No. 3-01-CV-1996-R, 2002 WL 432948, at *2 (N.D. Tex. March 15, 2002) ("An inmate does not have a constitutional entitlement to a grievance procedure. Hence any alleged violation of the grievance procedure does not amount to a constitutional violation")(citing *Adams v. Rice*, 40 F.3d 72, 75 (4th Cir.1994) and *Antonelli v. Sheahan*, 81 F.3d 1422 (7th Cir.1996)). Thus, to the extent Plaintiff alleges that either Johnson or Miller failed to respond properly to any grievance, any such allegation does not state a due process violation and any additional claims against Miller and Johnson related to a response to and processing of any claim/grievance should also be dismissed.

than Johnson and Miller, therefore this dismissal applies to all claims arising from Plaintiff's detention in those five facilities.[8]

E. No Claim under the Administrative Procedures Act

Plaintiff alludes to the Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.*, "which sets forth the full extent of judicial authority to review executive agency action for procedural correctness [and] permits . . . the setting aside of agency action that is 'arbitrary,' or 'capricious.'" *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 514 (2009).

First, the Court notes that Plaintiff's claims under the APA are too vague and conclusory to warrant review. Plaintiff only generally alleges that the policies of the Department of Homeland Security (DHS) and Immigration and Customs Enforcement (ICE) are "arbitrary and capricious" in violation of the APA. *See* 5 U.S.C. § 706. He does not identify any particular policy or describe any specific defect; instead, he implies that he disagrees with all policies related to immigration detention, written or unwritten, that may have contributed to his discomfort or dissatisfaction while he was detained.

Even if it were plausible to review all applicable DHS and ICE policies or procedures, the APA authorizes only declaratory and injunctive relief, not monetary damages. 5 U.S.C. § 702. As discussed above, Plaintiff's removal has mooted his claims for injunctive or declaratory relief in this suit. The Court finds that Plaintiff has failed to state a valid claim for relief under the Administrative Procedures Act.

[8] Plaintiff claims that an unnamed ICE agent, "ICEA2," used excessive force while transporting Plaintiff from JFK International Airport to Buffalo Detention Center. Plaintiff does not allege that ICEA2 participated or should be held responsible for any events occurring after the transportation was complete.

F. Failure to State a Claim Upon Which Relief May be Granted

Although the "court must accept as true all of the allegations contained in a complaint," that tenet "is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In order to assert a claim for damages for violation of federal constitutional rights under *Bivens,* a plaintiff must set forth facts in support of both of its elements: (1) the deprivation of a right secured by the Constitution or laws of the United States (2) by a person acting under color of law. *See West v. Atkins,* 487 U.S. 42, 48 (1988) (elements of § 1983 action); *Evans,* 168 F.3d at 863 n. 10.

i. Punitive Treatment in a Civil Environment

As an alien detainee awaiting removal, Plaintiff's constitutional rights were equivalent to those of a pretrial detainee. *Edwards v. Johnson*, 209 F.3d 772, 778 (5th Cir. 2000). A pretrial detainee's constitutional claims are evaluated under the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment's protection against cruel and unusual punishment. *Id.* at 778.

Detainees have a constitutional right to be free from punishment. *Bell v. Wolfish*, 441 U.S. 520, 534-37 (1979). Not every restriction imposed during detention amounts to punishment in the constitutional sense." *Id.* at 537. The analysis of constitutional challenges by pretrial detainees centers upon whether the allegation challenges a "condition of confinement" or an "episodic act or omission." *Scott v. Moore*, 114 F.3d 51, 53 (5th Cir. 1997) (citing *Hare v. City of Corinth, Miss.* 74 F.3d 633, 644 (5 Cir. 1996)). A "condition of confinement" case attacks "general conditions, practices, rules, or restrictions of pretrial confinement." *Id.* On the other hand, if a plaintiff's allegations are based on a specific act or omission of one or more officials,

the action is characterized as an "episodic act or omission" case. *See Olabisiomotosho v. City of Houston,* 185 F.3d 521, 526 (5th Cir.1999); *Hare,* 74 F.3d at 645.

In condition cases, the injury is caused directly by the challenged practice, policy, or condition. These cases include, for example, allegations of inadequate food, heating, sanitary conditions, or mail privileges. *Scott v. Moore,* 114 F.3d 51, 53 (5th Cir.1997). When a pretrial detainee complains about general conditions of confinement, a constitutional violation exists only if the court finds that the conditions of confinement are not reasonably related to a legitimate, non-punitive governmental objective. *See Hare,* 74 F.3d at 640 (citing *Bell* 441 U.S. at 538–39); *see also Scott,* 114 F.3d at 53 (citing *Hare*).

"[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees." *Bell,* 441 U.S. at 546-47. Accordingly, . . . even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Id.* (citing *Jones v. North Carolina Prisoners' Labor Union,* 433 U.S. 119, 129 (1977).

"[I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to punishment. Conversely, if a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Bell,* 441 U.S. at 539.

In episodic act or omission cases, the plaintiff is suing an individual defendant, as opposed to an entity and must demonstrate that the official(s) acted with subjective deliberate indifference. *Olabisiomotosho,* 185 F.3d at 526 (citing *Flores v. County of Hardeman,* 124 F.3d 736, 738–39 (5th Cir.1997)). An official acts with subjective deliberate indifference when he "had subjective knowledge of a substantial risk of serious harm to a pretrial detainee but responded with deliberate indifference to that risk." *Hare,* 74 F.3d at 650.

Episodic act or omission cases typically deal with claims involving an official's failure to protect the plaintiff or denial of adequate medical care. Although the Fifth Circuit has carefully distinguished the conditions of confinement cases from those alleging a specific act or omission, it has also noted that "the reasonable-relationship test employed in conditions cases is 'functionally equivalent to' the deliberate indifference standard employed in episodic cases." *Scott,* 114 F.3d at 54 (citing *Hare,* 74 F.3d at 643).

Not all discomforts associated with detention amount to punishment in the constitutional sense, even restrictions that the detainee would not experience if he were released. *Bell*, 441 U.S. at 540. Courts should not underestimate the difficulties of operating a detention center. *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 326 (2012) (citing *Turner v. Safley,* 482 U.S. 78, 84–85 (1987)). For detainees, "'[t]here is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.'" *Hamilton v. Lyons,* 74 F.3d 99, 106 (5th Cir. 1996) (citing *Bell,* 441 U.S. at 539 n. 21).

Plaintiff uses this catch-all category to complain about a broken microwave oven, the use of physical restraints during transport, the limit on books, the inclusion of false information in his official file, interference with his family visit, and the temporary restriction against filing grievances. Plaintiff asserts this claim against Defendants Villegas and Hernandez, stating that

they acquiesced to and systematically covered up abusive practices at the RPRJDC. Because he names only private employees of Emerald Corporation and no federal agents, this section includes many claims that are barred under *Minneci* as discussed above.

Plaintiff fails to allege any facts to demonstrate that the conditions and acts he complains about were intended to be punitive. The discomforts he describes are not arbitrary or purposeless, but are reasonably related to the governmental interests of maintaining institutional security and preserving internal order and discipline. Moreover, Plaintiff fails to demonstrate that he suffered more than a *de minimis* level of imposition. Plaintiff's repeated, conclusory recitation of the standard does not suffice to state a claim. The Court finds that Plaintiff's claim for punitive treatment in a civil environment should be **dismissed** for failure to state a claim.

ii. Cruel and Unusual Punishment

Plaintiff claims that the water supply at RPRJDC was contaminated. He also complains that when he filed grievances complaining about the polluted water, Defendant Villegas did not respond appropriately. The Eighth Amendment prohibits punishments that involve "'unnecessary and wanton infliction of pain,'[] or are grossly disproportionate to the severity of the crime." *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

Plaintiff does not allege that the polluted water caused him any harm. He alleges, at best, that he was afraid of the possibility of future health risks. He has not demonstrated that the alleged pollution resulted in unnecessary and wanton pain. He has failed to demonstrate that the condition of the water supply was related to any intent to punish the detainees.

He relies on an internet page showing that an environmental activist group tested the water supply in Haskell, Texas, one time and found what it considers to be unsafe levels of

trihalomethanes.[9] He also states anecdotally that the courthouse in Abilene, Texas, approximately 50 miles away, was at some point found to have high levels of lead.

The Court finds that Plaintiff has failed to state a claim that he was subjected to cruel and unusual punishment. This claim should be **dismissed**.

iii. Inadequate Law Library and Denial of Access to Court

Plaintiff repeatedly complains about the inadequacy of the law library at RPRJDC and other detention centers, describing insufficient federal materials, inadequate assistance by a law library supervisor, lack of access to an electronic research database, lack of access to a printer to print documents, failure to provide all pages of copies of requested cases, and failure to provide Plaintiff sufficient or extra law library time. Plaintiff asserts these claims against defendants Villegas, Hernandez, Ross, Ashley, and Rowden.

The Supreme Court, in *Bounds v. Smith,* 430 U.S. 817, 828 (1977), recognized a fundamental constitutional right of access to the courts. *Id.; see generally Bill Johnson's Restaurants, Inc. v. NLRB,* 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"); *Johnson v. Atkins,* 999 F.2d 99, 100 (5th Cir. 1993) ("Meaningful access to the courts is a fundamental constitutional right, grounded in the First Amendment right to petition and the Fifth and Fourteenth Amendment due process clauses") (quoting *Chrissy F. v. Mississippi Dept. Of Public Welfare,* 925 F.2d 844, 851 (5th Cir. 1991)). The Court later clarified the scope of a prisoner's right of access to the courts and found that a prisoner must allege an actual injury to support a claim for a violation of such right.

[9] Trihalomethanes are a group of four chemicals that form as a byproduct of disinfectants in drinking water. https://safewater.zendesk.com/hc/en-us/sections/202346187-Total-Trihalomethanes-TTHMs- (last visited Nov. 20, 2018).

> Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense . . . [t]he inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.

Lewis v. Casey, 518 U.S. 343, 351 (1996).

Thus, in order to state a claim of a right to relief on the alleged facts, Plaintiff must demonstrate that the law library's deficiency hindered his efforts to pursue a non-frivolous legal claim. *See Chriceol v. Phillips,* 169 F.3d 313, 317 (5th Cir. 1999) (inmate alleging denial of access to courts must demonstrate actual injury) (citing *Ruiz v. United States,* 160 F.3d 273, 275 (5th Cir. 1998) (holding that without proof of actual injury a prisoner cannot prevail on an access-to-the-courts claim)); *see also McDonald v. Steward,* 132 F.3d 225, 230-31 (5th Cir. 1998) (noting that such a plaintiff must show prejudice to his position as a litigant)(citations omitted). But Plaintiff has not shown the requisite prejudice.

Plaintiff alleges that he was initially detained and housed at RPRJDC on July 2, 2014.[10] Plaintiff first alleges that because he was denied adequate access to the library and legal

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[10] The Court takes judicial notice of *Vetcher v. Sessions*, 316 F.Supp.3d 70, 73-74 (D.D.C. 2018), which provides the relevant factual and procedural background as follows:

> Plaintiff, a native and citizen of Belarus, entered the United States in 2001 as a refugee. In 2014, he was convicted under Texas Health and Safety Code § 481.113(d), which makes it a first-degree felony to knowingly manufacture, deliver, or possess with intent to deliver between 4 and 400 grams of any controlled substance. Shortly after his conviction, DHS initiated removal proceedings under 8 U.S.C. § 1227(a)(2)(A)(iii), which requires the Attorney General to order "[a]ny alien who is convicted of an aggravated felony at any time after admission . . . deportable." By statute, any alien "found . . . deportable" under 8 U.S.C. § 1227(a)(2) is subject to mandatory detention during the removal period. On July 2, 2014, accordingly, Vetcher was taken into ICE custody. On August 6, the Immigration Judge sustained the aggravated-felony charge, found Vetcher ineligible for asylum or withholding of removal, and denied his request for deferral of removal under the Convention Against Torture. He successfully filed a motion to reopen proceedings on March 25, 2015, however, and the BIA then remanded the matter because "the Immigration Judge had not given [him] a meaningful chance to contest the aggravated felony charge during his [pro se] initial proceedings.
>
> After Vetcher's case was remanded, DHS withdrew the aggravated-felony basis for removal and instead charged him as "deportable" as an "alien who . . . has been convicted of a violation of . . . . any law . . . relating to a controlled substance." 8 U.S.C. § 1227(a)(2)(B)(i). On September 2,

assistance between his detention and his initial appearance in front of an Immigration Judge, he conceded to immigration charge that he had been convicted of an "aggravated felony." He also acknowledges that he later successfully challenged the "aggravated felony" immigration charge.[11] He also claims that while he was litigating his immigration appeal(s), he was purposefully transferred multiple times between units in order to hinder his ability to prepare for court.[12]

Although Plaintiff states that the inadequate library resources at RPRJDC hindered his efforts to pursue a legitimate legal claim, he also admits that he successfully litigated the issue while he was still detained. Thus, Plaintiff has failed to demonstrate that the library's alleged shortcomings ultimately hindered his litigation or resulted in an actual injury.

Plaintiff also alleges that he was prejudiced because the law library at RPRJDC did not contain *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), the case relied upon by the government during Plaintiff's remand hearing. However, Plaintiff's claim is conclusory at best. Plaintiff does not state how the outcome of his hearing would have been different had the library contained a copy of *Mellouli*. Plaintiff fails to identify any argument he could have made with advance access to

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> 2015, the IJ held a hearing where Plaintiff was denied release on bond and ordered detained pending completion of removal proceedings. In a subsequent remand hearing on the merits the next month, the Government argued that under a recent Supreme Court decision, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), the IJ could determine that Vetcher's Texas conviction qualified as a controlled-substance offense under § 1227(a)(2)(B)(i). Vetcher protested that he did not have access to *Mellouli* and asked for time to review the case. The IJ refused and withdrew the § 1227(a)(2)(A)(iii) aggravated felony charge while sustaining the § 1227(a)(2)(B)(i) drug-possession charge. The IJ also denied Plaintiff cancellation of removal. Vetcher again appealed to the BIA, arguing that he had been denied access to court and due process. The BIA nonetheless affirmed the IJ's decision to sustain the removability charge but remanded for further factual findings as to the IJ's denial of his application for cancellation of removal. [] Following remand, the IJ again denied Plaintiff cancellation of removal and ordered him removed. The BIA affirmed this decision on May 11, 2018, entering a final order of removal.

Vetcher v. Sessions, 316 F.Supp.3d 70, 73-74 (D.D.C. 2018) (internal citations omitted).

[11] On remand, the aggravated felony charge was withdrawn and the immigration judge found instead that Plaintiff was deportable on the alternative charge that he had been convicted of a controlled substance offense.

[12] This claim will be discussed more fully below, with Plaintiff's retaliation claim

the *Mellouli* case. Simply put, Plaintiff has failed to establish that he was prejudiced as a result of the library's alleged shortcomings.

He subsequently claims, in conclusory fashion, that insufficient library resources rendered him incapable of "bringing contemplated challenges" to "sentences, detention, and conditions of confinement." He specifically claims that the RPRJDC library was "nonfunctioning" for two months, from August to October, 2015, when the Lexis Nexis database needed an update.

Plaintiff's Amended Complaint with attachments demonstrates unequivocally that he made frequent and relentless use of both the grievance system and the court system while he was detained. Plaintiff freely filed grievances to contest every conceivable discomfort he encountered. He sent letters of complaint to prison officials and department heads alike. He doggedly pursued every avenue to appeal his removal status.

Aside from the aggravated-felony issue, which was fully and successfully litigated by Plaintiff while he was detained, Plaintiff has failed to identify any non-frivolous legal claims that were hindered by the alleged shortcomings of the prison library. He has not described any failed attempts at litigation or any missed deadlines. Instead, he relies on vague, conclusory, and wistful allegations of lost possibilities. These claims are insufficient to state a claim of constitutional deprivation.

Without showing an actual injury, Plaintiff fails to state an access-to-courts claim upon which relief can be granted. Plaintiff's access-to-courts claim should be **dismissed.**

iv. Denial of Communication

Plaintiff alleges that his First Amendment rights were violated when Defendant Ross interfered with his receipt of mail at RPRJDC. He claims that Defendant Ross withheld items

that were mailed to Plaintiff by his wife as well as items Plaintiff ordered or solicited from third parties. He specifically alleges that his wife sent him "articles to assist plaintiff's representation in court, samples of inspirational artwork and pictures of plaintiff's wife and son." Doc. 15 at 33. Plaintiff alleges that these items were withheld due to a "punitive regulation targeting 'printed material' not from publisher." *Id.*

Plaintiff also complains that he was limited to receiving only four books every six months due to the policy in place at RPRJDC. Plaintiff claims that both recreational and legal-research-related books were withheld from him due to this policy, and moreover, they were returned to the sender rather than being placed with his property. Additionally, Plaintiff alleges that Defendant Ross confiscated 'legal material' that was mailed from a third party, containing ICE statutes, Texas statutes, and information about RPRJDC and Emerald Corporation. He claims the confiscated legal materials were necessary for his preparation in the instant civil action.

First, the Court notes that Plaintiff alleges only the withholding of nonlegal mail. He does not complain about any interference with correspondence to or from any attorney or court. He asserts that on one occasion, he was denied articles that his wife sent him to help with his litigation, but he does not state the nature of the articles, how they would have helped his litigation, or how he was prejudiced as a result. Similarly, although he complains that he was denied "legal materials"[13] that were necessary for the preparation of this suit, he fails to state any facts to show that he was hindered in his ability to file or defend this civil action.

A detainee's First Amendment rights are implicated if the challenged action constitutes an "exaggerated response" by officials to the legitimate need to "preserve internal order and

[13] Plaintiff alleges that he placed a mail order for ICE statutes, Texas Statutes, and information about RPRJDC and Emerald Corporation in the mail from Stidd Legal Services. His attachments indicate that the mail room supervisor confiscated these items and placed them in Plaintiff's property. The attachments also indicate that the materials were excessive in volume and were not considered to be legal paperwork by ICE.

discipline and to maintain institutional security." *Edwards v. Johnson*, 209 F.3d 772, 779 (5th Cir. 2000) (citing *Mann v. Smith,* 796 F.2d 79, 82 (5th Cir.1986).

After carefully reviewing Plaintiff's pleading and the applicable law, the Court finds that the Defendants' withholding of Plaintiff's incoming mail and books pursuant to the policies in place at the RPRJDC was not exaggerated or punitive, but was reasonably related to a legitimate governmental interest in maintaining order and security in the detention center. Moreover, even if Plaintiff's First Amendment rights were implicated, he has failed to state more than a *de minimis* injury, and therefore failed to state a claim that invokes constitutional protection. Plaintiff has failed to provide any direct evidence of punitive intent behind the complained-of policies. He does not allege that the denial of photos or correspondence from his wife, the denial of additional recreational literature, or the denial of independent research materials prejudiced his ability to litigate his claims, either in this suit or in any of his contemporaneous habeas actions.

Plaintiff has also failed to demonstrate that any Defendant had subjective knowledge of a substantial risk of serious harm to Plaintiff but withheld the materials anyway. Plaintiff filed several grievances regarding the denial of his nonlegal mail, which he attached to his Amended Complaint. Plaintiff complains that the materials were a "heartfelt effort" of his wife to "lift [his] spirit for the holidays." Doc. 15-1 at 36. He also states his belief that self-improvement literature did not have to be pre-approved. Although he states in his grievances that some of the materials would assist his presentation in court, and that he believes they were withheld to "frustrate and impede [his] legal claims," these conclusory statements are insufficient to establish a substantial risk of serious harm necessary for the deliberate indifference standard. Finally, to the extent that he is complaining generally about withholding of his property, the Court finds that

Bivens isn't the proper vehicle for relief from private corporate actors as stated above because there is an adequate alternative remedy under Texas tort law for property disputes. Accordingly, Plaintiff's denial-of-communication claim(s) should be DENIED.

v. Denial of Religious Rights

Plaintiff claims that his religious rights under the Equal Protection Clause and the Religious Freedom Restoration Act (RFRA) while he was housed at RPRJDC because the kosher meals offered were calorie-deficient and on one occasion, he was denied permission to attend an Islamic religious service.

The RFRA "mandates that government shall not substantially burden a person's exercise of religion unless the government demonstrates that the burden furthers a compelling governmental interest by the least restrictive means." *Diaz v. Collins*, 114 F.3d 69, 71 (5th Cir. 1997) (internal quotations omitted); 42 U.S.C. § 2000bb-1.

"[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." *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004). "Not all regulations affecting religious activity fall within the [RFRA]. Only regulations which *substantially* burden a prisoner's capacity to exercise his beliefs of faith are governed by the [RFRA]. Reasonable time, place, or manner restrictions upon communal religious gatherings do not necessitate the identification of a compelling state interest." *Abdur-Rahman v. Michigan Dep't of Corr.*, 65 F.3d 489, 492 (6th Cir. 1995).

> Congress no doubt meant the modifier "substantially" to carry weight. In the original draft of RFRA, the word "burden" appeared unmodified. The word "substantially" was inserted pursuant to a clarifying amendment offered by Senators Kennedy and Hatch. In proposing the amendment, Senator Kennedy stated that RFRA . . . "does not require the Government

to justify every action that has some effect on religious exercise.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting)

If a court finds no substantial burden is being placed on a plaintiff, then there is no need to reach the questions of whether a compelling governmental interest exists or whether it is being furthered in the least restrict manner. *See Johnson v. Baker*, 67 F.3d 299, *5 (6 Cir. 1995) (unpublished)

Single incidents of missing religious services are generally not treated as First Amendment violations. *Maduro v. McClure*, No. 5:14-CV-91, 2015 WL 5837390, at *4 (E.D. Tex. Sept. 30, 2015); *See, e.g., Green v. McKaskle,* 788 F.2d 1116, 1126 (5th Cir.1986) (fact that inmate could not attend all of the religious services he wanted and was occasionally prevented by circumstances from attending services did not amount to a constitutional violation); *Williams v. Bragg,* 537 F.App'x 468 (5th Cir., July 29, 2013) (cancellation of several Muslim services for security reasons did not violate prisoner's rights under the First Amendment or substantially burden his right of free exercise under the Religious Freedom Restoration Act).

Plaintiff claims that on April 22, 2016, Defendant Hernandez prevented him from attending an Islamic religious service because he was not Muslim. He also complains that he wrote a letter to Defendant Villegas informing him of the denial, and Defendant Villegas failed to take corrective action. Plaintiff alleges a single, isolated occurrence. He states in conclusory fashion that this event placed a substantial burden on his sincerely held religious beliefs; however, he alleges no facts to support that conclusion. He does not specify what religious beliefs he holds, or how they were burdened by his inability to attend this specific religious service. He does not allege that he is or was Muslim, or that he was prevented from attending any other services.

Similarly, Plaintiff's complaint about the calorie content of kosher meals fails to state a viable claim. First, the Court notes that Plaintiff's own attachments belie his claims that the available kosher meals contained insufficient calories. *See* Doc. 15-1 at 57-59.[14] Even if Plaintiff could show that the available kosher meals regularly contained fewer calories than the available non-kosher meals, the Court finds that the difference is negligible and does not constitute a substantial burden.[15]

Assuming the facts pleaded by Plaintiff are all true, they simply do not constitute a substantial burden. Plaintiff's claims that he was prevented from participating in one religious service and that the kosher meals provided were calorie-deficient fail to state a claim upon which relief may be granted.[16]

vi. Excessive Use of Force

Plaintiff alleges excessive-use-of-force claims against Defendants Villegas, Hernandez, and Rowden, but does not state any facts to indicate that any of these Defendants were present or participated in the use of force.

He claims that on February 1, 2016, he tied himself to a pole in his room to protest his transfer from RPRJDC to another facility. He states that Lieutenant Green, who is not a

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[14]Although Plaintiff's attachments are unauthenticated, the Court takes them at face value. Plaintiff's attachments, marked by him as D6, D7, and D8, purport to be examples of week-long kosher menus from RPRJDC, each showing a 2500-calorie daily average for kosher meals.

[15] *See e.g. Baranowski v. Hart*, 486 F.3d 112, 122 (5th Cir. 2007) (finding that "there was a logical connection between the prison policy on inmate diet and the 'legitimate governmental interest in running a simplified prison food service rather than a full-scale restaurant'"); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008) (finding that it was not a substantial burden on plaintiff to purchase food in the commissary to supplement his religious diet); *But cf. Moussazadeh v. Tex. Dep't. of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012) (distinguishing *Patel* and finding that it did place a substantial burden on a plaintiff for TDCJ to not offer any kosher food from the dining hall and instead force a plaintiff to purchase kosher food separately from the commissary for all his meals).

[16] Even if Plaintiff's factual allegations were sufficient to demonstrate a substantial burden, the Court notes that RFRA does not permit recovery of money damages. *see, e.g., Oklevueha Native Am. Church of Hawaii, Inc. v. Holder*, 676 F.3d 829, 840-41 (9th Cir. 2012) (applying *Sossamon v. Texas*, 563 U.S. 277, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011), which held "'appropriate relief' does not clearly include money damages, but . . . the context here . . . suggests, if anything, that monetary damages are not 'suitable' or 'proper'").

defendant in this action, ordered unnamed officers to remove him and they "forced plaintiff's head to the ground, twisted his hands behind his back and yanked at the cloth connecting plaintiff to the pole causing sever [sic] pain." He states, in conclusory fashion, that the officers were "fulfilling malicious and sadistically [sic] retaliation envisioned by defendant ROWDEN [sic]." Although he attributes the use of force to Defendant Rowden, he never states that Defendant Rowden was present, nor does he state that either Defendant Villegas or Defendant Hernandez were present. Plaintiff has failed to state a claim against Defendants Villegas, Hernandez, or Rowden for excessive use of force. This claim should be **dismissed**.

vii. First Amendment Retaliation

"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." *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006) (quoting *McDonald v. Steward,* 132 F.3d 225, 231 (5th Cir.1998)). Retaliation is actionable only "if it is capable of deterring a person of ordinary firmness from further exercising his constitutional rights." *Id.* at 686. Some actions, even if motivated by retaliatory intent, are so *de minimis* that they do not invoke constitutional protections. *Id.*

a. Retaliatory Transfer

As noted above, Plaintiff's pleading demonstrates that he made frequent use of the grievance procedures available at the RPRJDC and other detention centers. He also indicates that he actively litigated appeals of his criminal conviction and removal proceedings while detained at RPRJDC. Plaintiff asserts that between January 21, 2016 and February 1, 2016, he wrote several letters to various officials, filed many new grievances, and continued to work on his pending litigation. He alleges that at 5:00 a.m. on February 2, 2016, Defendants Rowden and

Villegas abruptly transferred him to an inferior facility in retaliation for his exercise of his First Amendment rights. Plaintiff further alleges that on February 12, 2016, he was transferred back to RPRJDC at the direction of Defendant Rowden despite requesting not to be transferred again.

"There is no doubt that transfer to a more dangerous prison as a penalty for the exercise of constitutional rights has the potential to deter the inmate from the future exercise of those rights." *Morris*, 449 F.3d at 687. Claims of retaliatory transfers to inferior prison facilities or even to more dangerous sections of the same prison are sufficiently serious to survive screening. *Id.* Plaintiff alleges that his transfer required him to endure "horrendous living conditions in an overcrowded warehouse; with continuous illumination and noise causing sleep deprivation; leaking ceiling; white powdery substance dropping from the ceiling . . . ; open bathroom without toilet stalls and showers without shower curtains . . . unit contaminated with urine and feces fumes; even more deficient law library," and other objectionable circumstances. (Doc. 15-45, 46). The Court finds that Plaintiff has pleaded sufficient facts to state a plausible claim for retaliatory transfer against Defendants Rowden and Villegas and those defendants should be served with process.

b. Retaliatory Disciplinary Actions

Plaintiff asserts that Defendants Ashley and Hernandez maliciously prosecuted him for disciplinary infractions in retaliation for his grievance activity. Plaintiff establishes that he directed many of his letters of complaint and grievances toward Defendant Ashley, challenging her operation of the law library at RPRJDC. He claims that on March 7 and March 8, 2016, he entered the law library and began working on a computer without Defendant Ashley's permission. She reported him for the disciplinary infraction of disobeying her orders. Plaintiff claims that he had a constitutional right to use the computers for his litigation and Defendant

Ashley retaliated against him for the exercise of that right by writing the "bogus" disciplinary charges with the intent to place him in solitary confinement. Nothing in Plaintiff's pleading or attachments indicates that he was ever punished for Defendant Ashley's reports. The Court finds that even if Defendant Ashley's reports were retaliatory adverse actions, Plaintiff's injury, if any, was *de minimis* because he was not punished for the disciplinary reports. Plaintiff has failed to state a claim against Defendant Ashley. This claim should be **dismissed**.

Plaintiff asserts that on March 7, 2016, Defendant Villegas placed him on a grievance hold to prevent him from further exercising his right to redress his grievances. The Court recognizes that Defendant Villegas was responsible for operating the detention center and the hold was an administrative decision. However, to the extent that the grievance hold expressly punishes Plaintiff for filing grievances and does so by preventing him from filing more grievances, retaliation may plausibly be inferred. Whether Plaintiff's grievance activity was abusive or whether it was protected activity is an issue that cannot be resolved at the screening stage. The Court finds that this claim requires service on and an answer from Defendant Villegas.

Plaintiff claims that almost a week later, on March 13, 2016, he was charged with another retaliatory disciplinary case. He states that Defendant Hernandez charged him with a higher-level offense than was necessary or customary and punished him excessively for his disciplinary violations "to resolve a vendetta against Vetcher and to chill his exercise of protected rights." Doc. 15 at 53. Plaintiff complains that Defendant Hernandez humiliated him by having him kneel and submit to shackles to be escorted to solitary confinement. Plaintiff's attachments demonstrate that he was charged with, and admitted to, possessing items of contraband – a USB drive and a cord. He was sentenced to 30 days of solitary confinement.

A plaintiff does not have to demonstrate that he received a favorable outcome in a disciplinary case if he asserts retaliatory motive. *Woods v. Smith*, 60 F.3d 1161, 1164-66 (5th Cir. 1995). However, courts must carefully scrutinize these types of claims to "assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them." *Id.* at 1166 (5th Cir. 1995).

> To state a claim of retaliation an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of incident—such as the filing of disciplinary reports as in the case at bar—would not have occurred. This places a significant burden on the inmate. Mere conclusionary allegations of retaliation will not withstand a summary judgment challenge. The inmate must produce direct evidence of motivation or, the more probable scenario, 'allege a chronology of events from which retaliation may plausibly be inferred.' Although we decline to hold as a matter of law that a legitimate prison disciplinary report is an absolute bar to a retaliation claim, the existence of same, properly viewed, is probative and potent summary judgment evidence, as would be evidence of the number, nature, and disposition of prior retaliation complaints by the inmate.

Id.

Plaintiff's specific chronology of events contradicts his claim of retaliatory intent. While Plaintiff appears at first glance to state a chronology of events from which retaliation may be inferred, the implication changes when the context of Plaintiff's claims is considered. Plaintiff's own attachments show that throughout his detention he made frequent, relentless use of the available grievance procedures. Because of the March 7 grievance hold, Plaintiff was already prevented from exercising his grievance rights. So the disciplinary proceeding was unnecessary to chill Plaintiff's exercise. Moreover, the Court considers Plaintiff's admission to possessing contraband in violation of the facility's disciplinary rules to be probative and potent evidence that the disciplinary proceeding was legitimate rather than retaliatory.

Plaintiff also claims that Defendant Hernandez retaliated against him on May 14, 2016, by cancelling a visit with his family. Plaintiff's referenced attachments reveal that his visit was

cancelled after his step-daughter was found to have brought a cell-phone into the detention facility in violation of the visitation rules. Plaintiff's allegation that this action was motivated by retaliation is purely conclusory. Plaintiff acknowledges that his step-daughter broke the rules. The detention center has an understandable interest in keeping communication devices like cell phones out of the facility. Plaintiff simply cannot show that but-for Defendant's retaliatory motive, his visitation would not have been cancelled. Because Plaintiff has failed to state a viable retaliation claim against Defendant Hernandez, this claim should be **dismissed**.

Notably, the Fifth Circuit has recently stated that, "antecedent to the merits," a question remains as to whether a *Bivens* remedy is even available in this context. *See Brunson v. Nichols*, 875 F.3d 275, 279 n.3 (5th Cir. 2017) ("It appears that we have never framed as a holding a rule that *Bivens* extends to First Amendment retaliation cases, but we have at times assumed that substantive claims under § 1983 and *Bivens* are coextensive. We have on more than one occasion *assumed* that *Bivens* supplies a remedy in similar cases. But in [*Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 1857 (2017)], the Supreme Court strongly cautioned against extending *Bivens* to new contexts.[17] A First Amendment claim is likely a new context." [internal citations omitted]).

[17] In *Ziglar*, the Supreme Court recognized only three valid contexts for *Bivens* cases. First, in *Bivens* itself, the Supreme Court permitted a damages remedy to compensate persons injured by federal officers in violation of the Fourth Amendment's prohibition against unreasonable searches and seizures. *Id.* at 1854 (citing *Bivens v. Six Unknown Fed. Narcotics Agents* 403 U.S. 388, 397 (1971)). Second, in *Davis v. Passman*, the Supreme Court allowed a *Bivens* remedy for a Fifth Amendment gender-discrimination case. 442 U.S. 228 (1979). Finally, in *Carlson v. Green*, the Supreme Court recognized a *Bivens* remedy for an Eighth Amendment claim for cruel and unusual punishment. 446 U.S. 14 (1980). Outside of these three unique circumstances, the Supreme Court views new *Bivens* claims with disfavor. *Ziglar*, 137 S.Ct. at 1857. For over 30 years the Supreme Court has consistently refused to extend *Bivens* into new contexts. *Id.* (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001)).

III. CONCLUSION

For the foregoing reasons, it is **ORDERED** that

(1) Plaintiff's claims for excessive use of force against Defendants ICEA1 and ICEA2 are SEVERED and TRANSFERRED to the United States District Court for the Eastern District of New York.

(2) All of Plaintiff's claims, except his claims that he was subjected to retaliation by Defendants Rowden and Villegas, should be **DISMISSED WITH PREJUDICE** pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii).

(3) As specified above, Plaintiff is entitled to service of process on his claims that he was subjected to retaliation by Defendants Rowden and Villegas. The Court will direct such service by separate order.

SO ORDERED.

There is no just reason for delay in entering a final judgment and final judgment shall be entered as to the claims dismissed above pursuant to Federal Rule of Civil Procedure 54(b). Judgment shall be entered accordingly.

Signed November 29, 2018.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ABILENE DIVISION

IVAN VETCHER,	§	
	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 1:16-CV-0164-C
	§	
DUSTY ROWDEN, *et al.*,	§	
	§	
	§	
	§	
Defendants.	§	

ORDER

The Court entered an Order and Judgment dismissing some of Plaintiff's claims pursuant to Federal Rule of Civil Procedure 54(b) on November 29, 2018. Now before the Court is Plaintiff's "Motion to Amend Judgment Under FRCP 52 and Leave to Amend Under FRCP 15," filed on December 27, 2018. Plaintiff requests that the Court amend both its findings and its judgment. Additionally, Plaintiff requests permission to amend his complaint to add new claims and new defendants.

Motion to Alter or Amend Judgment

The Court applies the same standard to motions brought under Rule 52(b) and motions brought under Rule 59(e). *See Interstate Fire & Cas. Co. v. Catholic Diocese of El Paso*, 622 Fed. App'x 418, 420 (5th Cir. 2015). A motion to alter or amend a judgment under Rule 59(e) must "clearly establish either a manifest error of law or fact or must present evidence that is newly discovered." *Ross v. Marshall*, 426 F.3d 745, 763 (5th Cir. 2005) (quoting *Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)). "Relief under Rule 59(e) is also appropriate when there has been an intervening change in controlling law." *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir. 2003). A Rule 59(e) motion "is not the proper vehicle for rehashing evidence,

legal theories, or arguments that could have been offered or raised before the entry of judgment." *Templet v. HydroChem Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). "Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly." *Id.* (citing *Clancy v. Emp'rs Health Ins. Co.*, 101 F. Supp. 2d 463, 465 (E.D. La. 2000)).

In his Motion, Petitioner rehashes the arguments he raised in his Amended Complaint, which were thoroughly addressed by the Court in the November 29, 2018 Order. Although Petitioner disagrees with the Court's decision, he has failed to demonstrate an error in fact or law, present newly discovered evidence, or assert an intervening change in controlling law to support the relief he seeks. Accordingly, after consideration of the motion and review of the underlying materials in this case, the Court concludes that the motion should be **DENIED**.

Motion to Amend the Complaint

Plaintiff also seeks leave to amend his Complaint to add new claims and defendants. Plaintiff requests to add new defendants and facts to support his claim that that the law library at RPRJDC was deficient. He also raises entirely new claims of excessive use of force and retaliation, which he alleges occurred at the "JCJ"[1] between March 2017 and June 2018.

To the extent that Plaintiff seeks to supplement his access-to-courts claim with newly named defendants and additional facts, the Court finds that such request should be **DENIED** as untimely. Plaintiff has not shown good cause for failing to provide the supplemental information or for failing to name the proposed new defendants sooner.

To the extent that Plaintiff seeks to add entirely new claims and defendants from the JCJ, the Court finds that Plaintiff's new claims do not relate back to the claims raised in the instant civil

[1]Plaintiff provides this abbreviation without giving the full name; however, based on Plaintiff's previous filings, the Court assumes that Plaintiff is referring to the Johnson County Law Enforcement Center or Johnson County Jail.

action. Accordingly, the Court finds that such request should be **DENIED** without prejudice to Plaintiff's right to raise such claims in a properly filed new complaint in the appropriate venue.

SO ORDERED.

Dated December 31, 2018.

SAM R. CUMMINGS
Senior United States District Judge

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 01, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-10156 Vetcher v. Img and Customs Enforcement
USDC No. 1:16-CV-164

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Ms. Ann Elizabeth Cruce-Haag
Mr. Brian Walters Stoltz
Mr. Ivan Alexandrovich Vetcher

Additional material from this filing is available in the Clerk's Office.