APPENDIX

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 19-30029

MAX RAY BUTLER,

Plaintiff—Appellant,

versus

S. PORTER; K. MORGAN; CALVIN JOHNSON; CAPTAIN REX; CALEB GOTREAUX; KACI MAXEY; A. WHITE; CHRISTOPHER GORE; JOHN DOES; SHU STAFF; SIA LIEUTENANT S. BROWN; SIS TECHNICIAN R. RODRIGUEZ; J. LEDOUX; F. COKER; C. ROBINSON; C. WILSON; UNKNOWN OFFICER;

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:17-CV-230

Before OWEN, *Chief Judge*, and DENNIS and HAYNES, *Circuit Judges*.

HAYNES, *Circuit Judge*:

Max Ray Butler appeals the district court's dismissal of his First Amendment and Due Process claims, denial of his motions for appointment of counsel, and denial of leave to file a surreply and amend his complaint. For the following reasons, we AFFIRM in part and DISMISS in part.

I. Background

Butler, a federal prisoner, filed a civil rights complaint under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against various staff members ("Defendants") at the Oakdale Federal Correctional Complex. He claimed that he had been held in the prison's Special Housing Unit ("SHU") without due process for over 280 days, which he asserted was not the result of a disciplinary violation. He also claimed that after he filed a grievance concerning his detention, officials manufactured a backdated detention order with deficient or false information. He noted the harsh conditions in SHU and said that his extended confinement there could affect his mental health.

Butler contended that prison officials at Oakdale had deprived him of his due process rights and violated Bureau of Prisons ("BOP") policy by maintaining his close-custody status and by recommending him for a prison transfer despite his verbal and written complaints. He argued that his continued stay in SHU and his transfer to another facility constituted retaliation for his filing of grievances. He alleged that he was deprived of medical care, medications, and eyeglasses in further retaliation. In a supplement, construed as an amended complaint, Butler contended that

Defendants were retaliating against him and denying him access to the courts by destroying commissary requests and not allowing him to buy stamps.

Butler filed a series of motions for appointment of counsel, which were all denied by the magistrate judge. He also filed a series of amended complaints adding defendants and further challenging his SHU detention.

The magistrate judge issued a report recommending that most of Butler's claims be dismissed as frivolous, as moot, or as failing to state a claim. In relevant part, the magistrate judge found that Butler had not alleged a denial of due process for his SHU detention because he was able to participate in some activities and had not remained in SHU long enough to trigger a due process interest. The magistrate judge also found that the failure of Oakdale staff to follow BOP policies did not rise to the level of a constitutional violation. However, the magistrate judge found that Butler's assertions of retaliation were sufficient to allege a constitutional violation and recommended that these claims proceed. The magistrate judge ordered Butler to amend his complaint to clarify which defendants had retaliated against him.

Butler objected to the magistrate judge's report. In yet another amended complaint, Butler complained about actions by officials and his continued SHU stay at a new facility in California. He also sought reconsideration of his due process claim.

The magistrate judge issued a supplemental report and recommendation finding that Butler's claims against the defendants in California were not brought in the proper forum and that the claims against the Oakdale defendants not identified as participating in

retaliatory acts should also be dismissed. With respect to Butler's motion for reconsideration, the magistrate judge found that his argument relating to the duration of time spent in SHU did not entitle him to relief because he still had not met the threshold for atypical close custody. The district court adopted the magistrate judge's original and supplemental reports and dismissed Butler's claims, other than the one for retaliation, under 28 U.S.C. § 1915(e)(2)(B).

Defendants moved to dismiss Butler's retaliation claims under Federal Rule of Civil Procedure 12(b)(6). They argued that, in accordance with the reasoning in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the district court should decline to extend *Bivens* to address claims of First Amendment retaliation.

In addition to responding (and then filing a later-stricken surreply), Butler also moved for leave to amend his complaint after the magistrate judge issued a third and final report and recommendation. The magistrate judge originally granted Butler's motion, but later rescinded that order, noting that no amendment had been attached and concluding that despite having "multiple opportunities to amend his complaint already," Butler did "not provide adequate excuse for his failure to uncover the legal standards for the claims he first asserted . . . over twenty months ago." Butler later moved for leave to amend again, which the district court denied.

The district court then dismissed Butler's remaining retaliation claim for failure to state a claim for relief under Rule 12(b)(6). Butler filed a timely notice of appeal and was later appointed counsel. He now challenges (1) the district court's refusal to extend

Bivens to his First Amendment retaliation claim; (2) the district court's rejection of his due process claim arising from his stay in the SHU; (3) the magistrate judge's denials of his motions for appointment of counsel; and (4) the district court's denials of his motions for leave to file a surreply and an amended complaint.

II. Standard of review

We review a Rule 12(b)(6) dismissal de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[]." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (internal quotation marks and citation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A pro se litigant's pleadings are construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

The Prison Litigation Reform Act ("PLRA") requires a district court to dismiss a prisoner's *in forma pauperis* civil rights complaint if the court determines that the action is frivolous or fails to state a claim upon which relief may be granted. *Black v. Warren*, 134 F.3d 732, 733 (5th Cir. 1998) (per curiam); *see* 28 U.S.C. § 1915(e)(2)(B)(i)–(ii). We review a § 1915(e)(2)(B)(i) dismissal as frivolous for abuse of discretion. *Black*, 134 F.3d at 734. We review dismissals under § 1915(e)(2)(B)(ii) for failure to state a claim de novo,

using the same standard applicable to Rule 12(b)(6) dismissals. *Id.*

We review a district court's decision on whether to permit a surreply for abuse of discretion. *See Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (per curiam). We similarly review a district court's denial of leave to file an amended complaint for abuse of discretion. *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997).

III. Discussion

A. *Bivens*

Butler first challenges the district court's conclusion that *Bivens* did not create an implied cause of action for his First Amendment retaliation claim. We recently addressed this issue and declined to extend *Bivens* to First Amendment retaliation claims. *Watkins v. Three Admin. Remedy Coordinators of Bureau of Prisons*, No. 19-40869, 2021 WL 2070612, at *3 (5th Cir. May 24, 2021). That holding binds us here.

Bivens recognized an implied cause of action against federal employees for unreasonable searches and seizures in violation of the Fourth Amendment. 403 U.S. at 389. Thereafter, the Supreme Court extended *Bivens* in only two more cases: *Davis v. Passman*, 442 U.S. 228, 248–49 (1979) (gender discrimination in violation of the Fifth Amendment) and *Carlson v. Green*, 446 U.S. 14, 16–18 (1980) (failure to treat a prisoner's medical condition in violation of the Eighth Amendment). *See Abbasi*, 137 S. Ct. at 1855 ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself."). It has "never held that *Bivens* extends to First

Amendment claims." *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012). Indeed, in recent decades, the Supreme Court has "consistently refused to extend *Bivens* to *any* new context." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (emphasis added); *accord Abbasi*, 137 S. Ct. at 1857 (noting that the Court has refused to recognize new *Bivens* actions "for the past 30 years" and listing a series of cases involving such refusals).

In *Abbasi*, the Court stated that "[w]hen a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis. The question is who should decide whether to provide for a damages remedy, Congress or the courts?" 137 S. Ct. at 1857 (internal quotation marks and citation omitted). "The answer," the Court concluded, "most often will be Congress." *Id.* This is because "[i]n most instances . . . the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* (cleaned up). As a result, "the Court has urged caution before extending *Bivens* remedies into any new context." *Id.* (internal quotation marks and citation omitted). Indeed, "expanding the *Bivens* remedy is now considered a disfavored judicial activity." *Id.* (internal quotation marks and citation omitted)

Recently, we have declined to extend *Bivens* to other contexts. *See, e.g.*, *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (en banc) (refusing to extend *Bivens* to Fourth and Fifth Amendment claims arising from a cross-border shooting), *aff'd*, 140 S. Ct. 735 (2020). We have noted that, "as First Amendment retaliation claims are a 'new' *Bivens* context, it is

unclear—and unlikely—that *Bivens*'s implied cause of action extends this far." *Petzold v. Rostollan*, 946 F.3d 242, 252 n.46 (5th Cir. 2019) (citing *Abbasi*, 137 S. Ct. at 1859). This suspicion was later confirmed in *Watkins*, which expressly "decline[d] to extend *Bivens* to include First Amendment retaliation claims against prison officials." No. 19-40869, 2021 WL 2070612, at *3.

Butler has not raised any issues that draw the conclusion in *Watkins* into question due to the steps we take in addressing a *Bivens* claim. The first step requires determining "whether the claim arises in a new *Bivens* context, *i.e.*, whether the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1864 (internal quotation marks and citation omitted). That is the case here. We have already concluded that "First Amendment retaliation claims are a 'new' *Bivens* context."[1] *Petzold*, 946 F.3d at 252 n.46; *see also Brunson v. Nichols*, 875 F.3d 275, 279 n.3 (5th Cir. 2017). This "new" designation is appropriate because previously recognized *Bivens* remedies have arisen under different constitutional amendments and factually distinct circumstances. *See Carlson*, 446 U.S. at 16–18 (recognizing a *Bivens* cause of action under the Eighth Amendment for a deceased prisoner who was deprived medical attention by prison officers who knew of his serious medical condition); *Davis*, 442 U.S. at 229–34 (recognizing a

[1] Indeed, we recently held that "*Bivens* claims are limited to three situations . . . [v]irtually everything else is a new context." *Byrd v. Lamb*, No. 20-20217, 2021 WL 871199, at *2 (5th Cir. Mar. 9, 2021) (cleaned up).

Bivens cause of action under the Due Process Clause of the Fifth Amendment for a female employee who was terminated based on her gender); *Bivens*, 403 U.S. at 389–90 (recognizing a *Bivens* cause of action for damages under the Fourth Amendment for an unwarranted search and seizure of the plaintiff's apartment, as well as his arrest). Given our previous holdings and the lack of Supreme Court precedent on the issue, *see Reichle*, 566 U.S. at 663 n.4, we conclude that Butler's First Amendment retaliation claim presents a new *Bivens* context, *Watkins*, No. 19-40869, 2021 WL 2070612, at *2. We thus proceed to the second step of the analysis.

We also look at whether "there are special factors counselling hesitation in the absence of affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857 (cleaned up). In such a case, "a *Bivens* remedy will not be available." *Id*.

The "special factors" inquiry "concentrate[s] on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id*. at 1857–58. Such factors include whether Congress has legislated on the right at issue and whether alternative remedies exist for protecting that right. *Id*. at 1858, 1862. Courts also consider separation-of-powers concerns. *Hernandez*, 140 S. Ct. at 743. Importantly, "[e]ven before *Abbasi* clarified the special factors inquiry, we agreed with our sister circuits that the only relevant threshold—that a factor counsels hesitation—is remarkably low." *Hernandez*, 885 F.3d at 823 (cleaned up).

At least two special factors counsel hesitation here. First, congressional legislation already exists in this area. Congress addressed the issue of prisoners' constitutional claims in the PLRA, 42 U.S.C. § 1997e, which "does not provide for a standalone damages remedy against federal jailers." *Abbasi*, 137 S. Ct. at 1865. This supports a conclusion that Congress considered—and rejected—the possibility of federal damages for First Amendment retaliation claims like Butler's.[2] Such "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation."[3] *Id.*

Second, separation-of-powers concerns counsel against extending *Bivens*. The Supreme Court has recognized that

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[2] Butler points to § 806 of the PLRA as evidence that Congress implicitly recognized a *Bivens* remedy in the context of the PLRA. Such recognition is not surprising considering the Supreme Court's decision to extend *Bivens* to an Eighth Amendment claim against prison officials for the failure to treat an inmate's life-threatening condition. *See Carlson*, 446 U.S. at 16 & n.1, 24–25. Relevant here, Butler offers no argument that § 806 indicates congressional intent to extend *Bivens* to a new context. Therefore, congressional enactment of § 806 does nothing to diminish the suggestion that Congress did not intend for a standalone damages remedy against federal jailers, apart from the one previously established *before* the PLRA's enactment.

[3] Another example of express congressional remedies addresses a different part of the First Amendment: religious freedom. Indeed, the Supreme Court recently decided a case regarding the question of whether the Religious Freedom Restoration Act of 1993 ("RFRA") permits lawsuits seeking monetary damages against individual federal employees (in other words, a statute, not *Bivens*). *See Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020). That statute is not at issue here, but it illustrates Congress's attention to this subject matter.

> [r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

Turner v. Safley, 482 U.S. 78, 84–85 (1987), *superseded by statute on other grounds*, 42 U.S.C. § 2000cc-1(a), *as recognized in Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005). Extending *Bivens* to First Amendment retaliation claims like Butler's would run afoul of this restraint and risk improperly entangling courts in matters committed to other branches. Indeed, because of the very complex nature of managing federal prisons, such a holding would substantially impinge on the executive branch, in addition to the legislative branch. Such a result would be a paradigmatic violation of separation-of-powers principles.

Additionally, as *Watkins* explained, a robust amount of case law from other circuits supports this conclusion. *See, e.g.*, *Earle v. Shreves*, No. 19-6655, 2021 WL 896399, at *5 (4th Cir. Mar. 10, 2021) (declining to extend a *Bivens* remedy to include a prisoner's First Amendment retaliation claim because "special factors" counseled hesitation, including considerations that there could be "significant intrusion into an area of prison management" and that "other avenues [were] available"); *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523–26 (6th Cir. 2020) (declining to extend *Bivens* to a prisoner's First

Amendment retaliation claim because of the existence of the PLRA, availability of alternative means of relief, and separation-of-powers concerns); *Bistrian v. Levi*, 912 F.3d 79, 95–96 (3d Cir. 2018) (declining to extend *Bivens* to a prisoner's First Amendment retaliation claim because it "involve[d] executive policies, implicate[d] separation-of-power concerns, and threaten[ed] a large burden to both the judiciary and prison officials"); *Vega v. United States*, 881 F.3d 1146, 1153–55 (9th Cir. 2018) (declining, "[i]n light of the available alternative remedies," to extend *Bivens* to a former prisoner's First and Fifth Amendment claims). As a result, even if *Watkins* had come out the other way, this case would be subject to qualified immunity given the lack of "clearly established" law supporting Butler's claim. *See Lane v. Franks*, 573 U.S. 228, 243–46 (2014) (internal quotation and citation omitted).

B. Due Process

Butler next argues that Defendants violated his due process rights by placing him in SHU. The district court sua sponte dismissed this claim under 28 U.S.C. § 1915(e)(2)(B). *Butler v. Porter*, No. 2:17-CV-230, 2018 WL 505333, at *1 (W.D. La. Jan. 19, 2018). We affirm.

As a general rule, "[a]n inmate has neither a protectible property nor liberty interest in his custody classification." *Moody v. Baker*, 857 F.2d 256, 257–58 (5th Cir. 1988) (per curiam). Great deference is accorded to prison officials in their determination of custodial status. *See Wilkerson v. Goodwin*, 774 F.3d 845, 852 (5th Cir. 2014). Thus, "absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life as a prisoner, will

never be a ground for a constitutional claim." *Pichardo v. Kinker*, 73 F.3d 612, 612 (5th Cir. 1996). In other words, segregated confinement is not grounds for a due process claim unless it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). We look specifically at the severity and duration of restrictive conditions to decide whether a prisoner has a liberty interest in his custodial classification. *Wilkerson*, 774 F.3d at 854–55; *accord Bailey v. Fisher*, 647 F. App'x 472, 476–77 (5th Cir. 2016) (per curiam).[4]

The Supreme Court has recognized that there are circumstances where solitary confinement, in conjunction with indefinite duration and disqualification from parole, can constitute such hardship. *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005). Regarding the duration of the restrictive confinement, we have said "that two and a half years of segregation is a threshold of sorts for atypicality . . . such that 18–19 months of segregation under even the most isolated of conditions may not implicate a liberty interest." *Bailey*, 647 F. App'x at 476 (citing *Wilkerson*, 774 F.3d at 855).

In *Wilkinson*, the Supreme Court concluded that the defendant experienced "atypical and significant hardship" because he was in an Ohio Supermax facility and prohibited from "almost all human contact," including communication with other inmates; the lights were on for twenty-four hours per day; he

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[4] "An unpublished opinion issued after January 1, 1996 is not controlling precedent, but may be persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

could exercise only one hour per day in a small room; review of placement occurred only annually; and placement in the facility disqualified an inmate from parole consideration. 545 U.S. at 223–24. Here, in contrast, the magistrate judge found that Butler could take courses, had weekly access to a telephone, and could exercise outside. Moreover, Butler provided documentation showing that prison officials reviewed his SHU stay at least monthly and sometimes weekly.

Butler does not challenge the determination that the conditions he faced in the SHU were not onerous enough to constitute an atypical prison situation. *See Wilkerson*, 774 F.3d at 854–55; *Bailey*, 647 F. App'x at 476–77. He has thus abandoned this argument. *See Brinkmann v. Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Moreover, Butler is unable to show that the conditions in the SHU were severe enough to implicate due process concerns.

Butler instead argues that his circumstances implicated a liberty interest, relying upon internal regulations. However, "[o]ur case law is clear . . . that a prison official's failure to follow the prison's own policies, procedures or regulations does not constitute a violation of due process, if constitutional minima are nevertheless met." *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996) (per curiam). Because Butler did not allege a protectable liberty interest, he has not shown that any omissions in process violated the Constitution,[5] regardless of whether the prison did or did not follow its own policies.

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[5] With respect to Butler's complaint that his transfer to a higher-security BOP facility implicates due process concerns, the Supreme Court has held, in the case of a state prisoner, that the

C. Appointment of Counsel

The magistrate judge denied Butler's motions for appointment of counsel. Butler challenges these denials, noting that he requested an attorney because he lacked legal training.

If a magistrate judge's order is "clearly erroneous or contrary to law," a district court judge may reconsider the matter. 28 U.S.C. § 636(b)(1)(A). But Butler did not seek district court review of the magistrate judge's rulings; he instead filed a letter describing his efforts to retain counsel. Later, he filed another motion to appoint counsel, but (again) did not mention a possible appeal to the district court. Because we lack jurisdiction to hear appeals directly from a magistrate judge, we cannot consider his arguments. *See United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980); *see also Wren v. Curtis*, 697 F. App'x 304, 304 (5th Cir. 2017) (per curiam). We thus dismiss this portion of Butler's appeal.

D. Denial of Butler's Other Motions

Butler appeals the district court's denial of his motion for leave to file a surreply following Defendants' motion to dismiss. We review this decision for abuse of discretion. *See Austin*, 864 F.3d at 336. Butler fails to show any such abuse. He contends that delays in his mail caused by Defendants' counsel resulted in his surreply being "misconstrued" as an objection, and the district court should have had the "due diligence" to consider whether he had "pointed" out legal issues in

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Due Process Clause does not protect a convicted prisoner against transfer from one institution to another within the state's prison system, even if "life in one prison is much more disagreeable than in another." *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

his filing. However, the district court was not required to review the merits of Butler's claims;[6] Butler failed to move for leave of court to file his surreply and the third report and recommendation on Defendants' motion to dismiss had already issued. We cannot therefore say that the district court erred in striking his surreply. *See RedHawk Holdings Corp. v. Schreiber Tr. ex rel. Schreiber Living Tr.*, 836 F. App'x 232, 235 (5th Cir. 2020) (per curiam) (acknowledging there is "no right to file a surreply and surreplies are 'heavily disfavored'").

Butler also asserts that the district court should have granted his two motions for leave to file an amended complaint. In particular, Butler sought leave to amend to include various Eighth Amendment claims, which were dismissed sua sponte.[7] He argues that this dismissal was improper because he had "stated" the factual basis for his Eighth Amendment claims in his complaint and other filings and thus should have been granted another opportunity to amend his complaint. In addition, Butler maintains that he should have been permitted to amend his

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[6] Butler did not allege that Defendants' reply brief raised new arguments or that the district court relied on those new arguments in making its decision. *See RedHawk Holdings Corp. v. Schreiber Tr. ex rel. Schreiber Living Tr.*, 836 F. App'x 232, 235 (5th Cir. 2020) (per curiam) (acknowledging that "a district court abuses its discretion when it denies a party the opportunity to file a surreply in response to a reply brief that raised new arguments and then relies solely on those new arguments it its decision"). Indeed, Defendants' reply brief focused on responding to Butler's arguments, including his new Eighth Amendment claim.

[7] Butler's First and Eighth Amendment claims were the focus of his oral argument and supplemental briefing.

complaint because he could add new factual allegations and legal claims, noting that relevant "events and information occurred after the original filings[,] so it was not possible" for him to raise the claims earlier. We disagree.

A party may amend a pleading—as of right—within twenty-one days after serving it or within twenty-one days after being served a mandatory responsive pleading. FED. R. CIV. P. 15(a)(1). All other amendments require leave of court, although the court should "freely give leave when justice so requires." *Id.* 15(a)(2). Reasons for denying leave to amend include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Lowrey*, 117 F.3d at 245 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

We observe that Butler did not mention the Eighth Amendment at all in his initial complaint or all its elements. Nor did he mention the Eighth Amendment in six additional filings that the district court construed as amendments to his complaint. In fact, the grounds for his later asserted Eighth Amendment claims were discussed solely in the context of his due process and retaliation claims. In other words, there was nothing to put the court on notice that Butler was trying to raise an Eighth Amendment claim at all until well into the proceedings—*after* Defendants moved to dismiss.

When Butler finally moved to amend his complaint to include his Eighth Amendment claims, the

magistrate judge had already issued the final report and recommendation. After the magistrate judge denied his motion, Butler again moved to amend. The magistrate judge denied this motion as well, and Butler objected. Although the district court did not explicitly rule on this objection, its entry of judgment without granting leave to amend was an implicit denial. *See Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994) ("The denial of a motion by the district court, although not formally expressed, may be *implied* by the entry of a final judgment or of an order inconsistent with the granting of the relief sought by the motion.").

The district court's denial was justified.[8] Contrary to Butler's assertions, he had been given numerous opportunities to amend his complaint. He could have added new information that occurred *after* his initial complaint in those earlier filings. Moreover, he fails to explain what part of and why the factual basis for his Eighth Amendment claims[9] were not available at the time of the original complaint. Thus, Butler has

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[8] Though the district court did not explain the reasons for its implicit denial, we "may affirm on any grounds supported by the record." *McGruder v. Will*, 204 F.3d 220, 222 (5th Cir. 2000).

[9] Butler also sought to raise a Fourth Amendment claim regarding mail tampering. The magistrate judge construed Butler's mail related complaints as a First Amendment claim, and Butler never challenged this interpretation. Butler later discussed various mail tampering claims, in-depth, in his sixth amended complaint, but that complaint referred to First Amendment claims, not Fourth Amendment ones. He also mentioned that Defendants opened a sealed letter in March 2017, which could have been discussed in various amended complaints. Therefore, Butler could have raised his Fourth Amendment claim at an earlier date.

not shown that he should have been permitted to amend his complaint and that various factors justified such a denial. *See Lowrey*, 117 F.3d at 245 (listing "undue delay," "prejudice," and "repeated failure to cure deficiencies by amendments previously allowed" as reasons to deny leave to amend) (quoting *Foman*, 371 U.S. at 182)); *see, e.g.*, *Harris v. BASF Corp.*, 81 F. App'x 495, 496 (5th Cir. 2003) (per curiam) (holding that the district court did not abuse its discretion in deciding that allowing the plaintiff to expand his action from three claims to eight would cause undue delay and undue prejudice to the defendant, late in the proceedings).[10] In sum, the district court did not abuse its discretion in denying Butler's motions to amend his complaint. *See Lowrey*, 117 F.3d at 245.

Accordingly, the portion of Butler's appeal concerning appointment of counsel is DISMISSED for want of jurisdiction. In all other respects, the judgment of the district court is AFFIRMED.

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[10] To the extent that Butler sought to identify defendants who participated in retaliatory acts against him, the magistrate judge had already recommended dismissing these claims because they were not cognizable under *Bivens*. The district court adopted the magistrate judge's conclusion. Thus, any amendment to identify the individuals who retaliated against Butler would have been futile. *See Lowrey*, 117 F.3d at 245.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MAX RAY BUTLER	**CASE NO.**
#09954-011	**2:17-CV-00230 SEC P**
VERSUS	**JUDGE SUMMERHAYS**
S PORTER ET AL	**MAGISTRATE JUDGE KAY**

JUDGMENT

For the reasons stated in the Report and Recommendation [Doc. No. 69] of the Magistrate Judge previously filed herein and after an independent review of the record, a *de novo* determination of the issues, and consideration of the objections filed herein, and having determined that the findings are correct under applicable law;

IT IS ORDERED that the defendants' Motion to Dismiss [Doc. No. 56] be **GRANTED** and that this case be **DISMISSED WITH PREJUDICE** under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

THUS DONE in Chambers on this 2nd day of January, 2019.

ROBERT R. SUMMERHAYS
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MAX RAY BUTLER	*	**CIVIL ACTION NO.**
B.O.P. # 09954011	*	**2:17-CV-230**
v.	*	**UNASSIGNED**
S. PORTER, ET AL.	*	**DISTRICT JUDGE**
	*	**MAGISTRATE**
	*	**JUDGE KAY**

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JUDGMENT

For the reasons stated in the Report and Recommendation (Rec. Doc. 30), and supplemental Report and Recommendation (Rec. Doc. 42), of the Magistrate Judge previously filed herein, after an independent review of the record, a *de novo* determination of the issues, and determining that the findings are correct under applicable law, the Court hereby adopts the Report and Recommendation, as well as the supplemental Report and Recommendation. Accordingly,

IT IS ORDERED that the defendants Russell L. Johnson, Associate Warden Weeks, B. Moorehead, J.A. Keller, Becky Clay, Terrance M. Steffey, Dante Alexander, and Lieutenant Brian A. Nichols be and are hereby **DISMISSED WITH PREJUDICE** from this matter.

IT IS FURTHER ORDERED that all claims against Warden Swain, J. Sorenson, Officer Tyson, and Michael Rios be and are hereby **DISMISSED WITHOUT PREJUDICE** to Butler pursuing such claims in the proper forum.

IT IS FURTHER ORDERED that Butler's Motion to Reconsider (Rec. Doc. 40) be and is hereby **DENIED**, and for the reasons detailed in the Report and Recommendation (Rec. Doc. 30), and supplement thereto (Rec. Doc. 42), all of Butler's claims, with the exception of the retaliation claims, be and are hereby **DENIED AND DISMISSED WITH PREJUDICE** as frivolous and for failing to state a claim upon which relief can be granted in accordance with 28 U.S.C. § 1915(e)(2)(B)(i) and (ii).

THUS DONE AND SIGNED, in Shreveport, Louisiana, this 19th day of January, 2018.

Donald E Walter

DONALD E. WALTER
UNITED STATES DISTRICT COURT

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MAX RAY BUTLER REG. # 09954-011	**:**	**DOCKET NO. 2:17-cv-0230**
VERSUS	**:**	**UNASSIGNED DISTRICT JUDGE**
S. PORTER, ET AL.	**:**	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is a Motion to Dismiss [doc. 56] filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure by all remaining defendants in this suit. The matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636.

I.
BACKGROUND

The motion to dismiss relates to a pro se civil rights suit filed in this court under *Bivens v. Six Unknown Named Agents*, 91 S.Ct. 1999 (1971), by plaintiff Max Ray Butler. Doc. 1. Butler is an inmate in the custody of the Bureau of Prisons ("BOP") and was incarcerated at the Federal Correctional Institute at Oakdale, Louisiana ("FCIO") when the complained-of events

occurred. *Id*. After initial review and the filing of multiple amended complaints, Butler's sole surviving claim is that he was confined in the Special Housing Unit ("SHU") in retaliation for filing administrative grievances and the current lawsuit. Docs. 1, 36; *see* docs. 30, 42, 51. In his original complaint, filed on February 3, 2017, Butler alleged that he had been in SHU since April 25, 2016, and that the reasons he was given for this placement included a threat against him and an ongoing investigation. Doc. 1. He also listed the multiple grievances he had filed while in SHU and alleged that he had been continued in SHU without the required review. *Id*. He has since been transferred to another federal facility and released from SHU, though he complains that the new facility is more dangerous and that he avoids filing any administrative grievances out of fear of further retaliation. Doc. 64, pp. 8–9.

The defendants now move to dismiss the suit, asserting that Butler's retaliation claim is not cognizable under *Bivens*. Doc. 56, att. 1. They also maintain that, even if a *Bivens* remedy is implied, all federal defendants are entitled to qualified immunity. Doc. 60. Butler opposes the motion and the defendants have filed a reply. Docs. 64, 68.

II.
LAW & ANALYSIS

A. Rule 12(b)(6) Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows for dismissal of a claim when a plaintiff "fail[s] to state a claim upon which relief can be granted." When reviewing such a motion, the court should focus exclusively on the complaint and its attachments.

Wilson v. Birnberg, 667 F.3d 591, 595 (5th Cir. 2012). Such motions are also reviewed with the court "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff." *Bustos v. Martini Club, Inc.*, 599 F.3d 458, 461 (5th Cir. 2010). However, "the plaintiff must plead enough facts 'to state a claim to relief that is plausible on its face.'" *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 127 S.Ct. 1955, 1974 (2007)). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor will a complaint suffice if it tends naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (cleaned up). Instead, the complaint must contain enough factual matter to raise a reasonable expectation that discovery will reveal evidence of each element of the plaintiff's claim. *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 257 (5th Cir. 2009). Accordingly, the court's task in evaluating a motion to dismiss under Rule 12(b)(6) is "not to evaluate the plaintiff's likelihood of success," but instead to determine whether the claim is both legally cognizable and plausible. *Billups v. Credit Bureau of Greater Shreveport*, 2014 WL 4700254, *2 (W.D. La. Sep. 22, 2014) (quoting *Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC*, 594 F.3d 383, 387 (5th Cir. 2010)).

B. Application

The Civil Rights Act of 1871 created a broad right of action for damages against state officials for "deprivation of **any** rights, privileges, or immunities secured by the Constitution . . . ." 42 U.S.C. § 1983 (emphasis added); *see Ziglar v. Abbasi*, 137 S.Ct. 1843,

1854 (2017). However, it did not create an analogous remedy for constitutional violations by federal officials and no such right of action existed until the Supreme Court's decision in *Bivens*, supra, exactly one hundred years later. *Abbasi*, 137 S.Ct. at 1854. There the Court enforced a damages remedy to compensate persons injured by federal officials who violated the Fourth Amendment prohibition against unreasonable searches and seizures. *Bivens*, 91 S.Ct. at 2004–05. The Court then extended the remedy authorized under *Bivens* twice more, to a violation of the Fifth Amendment's Due Process guarantee based on an employment discrimination claim and a violation of the Eighth Amendment's ban on cruel and unusual punishment based on a federal jailer's failure to treat a prisoner's asthma. *See Davis v. Passman*, 99 S.Ct. 2264 (1979); *Carlson v. Green*, 100 S.Ct. 1468 (1980). As the Court recently noted, "[t]hese three cases . . . represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself." *Abbasi*, 137 S.Ct. at 1855. In the decades since, the Court has made

> [a] notable change in [its] approach to recognizing implied causes of action, [and] made clear that expanding the *Bivens* remedy is now a "disfavored" judicial activity. *Iqbal*, 556 U.S., at 675, 129 S.Ct. 1937. This is in accord with the Court's observation that it has "consistently refused to extend Bivens to any new context or new category of defendants." *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001). Indeed, the Court has refused to do so for the past 30 years.

Id. at 1857; *see also Corr. Svcs. Corp. v. Malesko*, 122 S.Ct. 515, 524 (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition. . . . [W]e have abandoned that power to invent 'implications' in the statutory field [and there] is even greater reason to abandon it in the constitutional field . . . .")[1]

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[1] In this regard, the Court distinguishes recognizing implied causes of actions under § 1983 from recognizing them under the Constitution itself through *Bivens*:

> When Congress enacts a statute, there are specific procedures and times for considering its terms and the proper means for its enforcement. It is logical, then, to assume that Congress will be explicit if it intends to create a private cause of action. With respect to the Constitution, however, there is no single, specific congressional action to consider and interpret.
>
> Even so, it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages against federal officials in order to remedy a constitutional violation. When determining whether traditional equitable powers suffice to give necessary constitutional protection—or whether, in addition, a damages remedy is necessary—there are a number of economic and governmental concerns to consider. Claims against federal officials often create substantial costs, in the form of defense and indemnification. Congress, then, has a substantial responsibility to determine whether, and the extent to which, monetary and other liabilities should be imposed upon individual officers and employees of the Federal Government. In addition, the time and administrative costs attendant upon intrusions resulting

In *Butts v. Martin*, the Fifth Circuit reviewed, in relevant part, the district court's decision on a prisoner's *Bivens* claims based on retaliation and violation of the Free Exercise Clause of the First Amendment. The court acknowledged that it had previously held that "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." *Butts*, 877 F.3d 571, 588 (5th Cir. 2017) (quoting *Evans v. Ball*, 168 F.3d 856, 863 n. 10 (5th Cir. 1999)). It also recognized that it "[had] largely permitted *Bivens* claims against prison officials alleging retaliation for exercising a constitutional right without addressing whether a *Bivens* remedy is available for such claims." *Id*. at 589. It noted, however, that the Supreme Court had not recognized a *Bivens* remedy for First Amendment violations like the ones presented there and had recently expressed strong skepticism under *Abbasi* against the creation of new causes of action under *Bivens*. *Id*. at 587–89.

The Fifth Circuit then instructed the district court to determine whether a *Bivens* remedy was available under Butts's free exercise and retaliation claims, using the following test:

> In order to determine whether a *Bivens* remedy is available, courts must first assess whether Butts's claim presents a new *Bivens* context. *See Iqbal*, 556 U.S. at 675, 129 S.Ct. 1937 (quoting *Malesko*, 534 U.S. at 68, 122 S.Ct. 515). If so,

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from the discovery and trial process are significant factors to be considered.

Abbasi, 137 S. Ct. at 1856.

> there are two circumstances where *Bivens* does not recognize an implied cause of action for constitutional violations. First, *Bivens* claims are unavailable "if there are 'special factors counselling hesitation in the absence of affirmative action by Congress.'" *Abbasi*, 137 S.Ct. at 1857 (quoting *Carlson*, 446 U.S. at 18, 100 S.Ct. 1468); *see also Zuspann v. Brown*, 60 F.3d 1156, 1160 (5th Cir. 1995) (quoting *Bivens*, 403 U.S. at 396, 91 S.Ct. 1999). Second, *Bivens* remedies may be foreclosed by congressional action where an "alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Wilkie v. Robbins*, 551 U.S. 537, 550, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007).

Id. at 587–88. The case was remanded to the United States District Court for the Eastern District of Texas, where a Motion to Dismiss is currently pending. *See Butts v. Martin*, No. 1:12-cv-114 (E.D. Tex.).

Accordingly, we now apply the test outlined by the Fifth Circuit to determine whether a *Bivens* remedy is available for Butler's retaliation claim.

A claim presents a new *Bivens* context if it differs "in a meaningful way from previous *Bivens* cases decided by [the Supreme Court]." *Abbasi*, 137 S.Ct. at 1859. The retaliation claim presents a new *Bivens* context under the limits recognized by the Supreme Court because it involves a different constitutional right—the First Amendment—than the ones approved

for *Bivens* remedies under the Court's prior decisions.[2] *See Reichle v. Howard*, 132 S.Ct. 2088, 2093 n. 4 (2012) ("We have never held that *Bivens* extends to First Amendment claims."); *see also Andrews v. Miner*, 301 F.Supp.3d 1128, 1133–34 (N.D. Ala. 2017) (noting that Court has at times assumed that a First Amendment *Bivens* action exists, but has never actually decided the matter or otherwise discussed the propriety of the remedy).

The defendants argue that this court should decline to extend a *Bivens* remedy to Butler's retaliation claim, on the basis that (1) special factors counsel hesitation in such an expansion and (2) alternative, existing processes preclude the *Bivens* remedy. Under the first prong, defendants point to the general concerns outlined in *Abbasi*, supra, on judicially-created remedies. Doc. 56, att. 1, p. 18. Specifically, they argue that extension of *Bivens* in this context would violate Congress's intent, create increased costs on the Bureau of Prisons, and have a harmful effect on institutional security and federal officers' discharge of their duties.[3] *Id*. at 21–26.

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[2] Butler argues that he has raised Due Process and Eighth Amendment violations. Doc. 64, p. 10. To the extent that he is discussing claims already dismissed, these have no bearing on the issue before us. To the extent that he argues that his sole remaining claim, based on retaliation for filing administrative grievances, arises under these constitutional provisions rather than the First Amendment, he is incorrect. *See, e.g.*, *Butts*, 877 F.3d at 588–89.

[3] They also argue the existence of an alternative remedy. Doc 56, att. 1, pp. 19–20. We reserve that factor for the second prong of the test outlined in *Butts*, and address it only if we do

As the Court observed in *Abbasi*, the threshold for this first factor is low: a special factor must only "cause a court to hesitate" in order to weigh against implying a new *Bivens* remedy. 137 S.Ct. at 1858. Any such factors are reviewed in the aggregate. *Id*. at 1857–58, 1860–63. We note the recent distillation of the concerns involved in extending *Bivens* to a prisoner's retaliation claim by the Northern District of Alabama in *Andrews*, supra. The court pointed out there that such an extension "could lead to the unwanted result of inmates filing grievances against correctional officers and then claiming that any use of force [or, in this case, disciplinary segregation] by the officers resulted from retaliatory animus." *Andrews*, supra, 301 F.Supp.3d at 1135. It further observed:

> Any increase in suits by inmates necessarily involves increased litigation costs to the Government and burdens on the individual employees who must defend such claims. First Amendment retaliation claims, requiring inquiry into a defendant's subjective state of mind, often would present genuine issues of material fact not easily resolved on summary judgment. This, in turn, would necessitate trials and further increase litigation costs.

Id. As the defendants point out, extension of the remedy would therefore not only increase costs of defending against such claims but could also unduly limit officers in their use of disciplinary segregation as a security measure at the prisons. Though the court is aware of the potential hardships of disciplinary

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not find the government's other arguments under the first prong persuasive.

segregation and the ways in which inmates might be retaliated against for filing legitimate grievances, concerns of institutional security in particular counsel more than mere hesitation.

Butler maintains that such special factors are insufficient in his case because he challenges individual instances of overreach by federal employees that do not implicate the national security or executive policy considerations cited in *Abbasi*, a case involving alien detainees held on immigration violations in the wake of the September 11, 2001 terrorist attacks. Doc. 64, p. 14. As the Court pointed out in *Abbasi*, however, "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation." 137 S.Ct. at 1865. Accordingly, Congress's efforts to limit prisoner suits through the Prison Litigation Reform Act of 1995, and failure therein to provide a standalone remedy against federal jailers, likewise weighs against the extension of *Bivens* in his case. *See Badley v. Granger*, 2018 WL 3022653, at *4 (S.D. Ind. Jun. 18, 2018) (rejecting extension of *Bivens* to prisoner's retaliation claim under *Abbasi*, based in part on Congress's history of attempting to curb prisoner suits); *Reid v. United States*, 2018 WL 1588264, at *3 (E.D. Cal. Apr. 2, 2018) (same).

The above special factors are sufficient to dictate hesitation in extending *Bivens* to Butler's retaliation claim. Furthermore, we have not located a single case post-*Abbasi* in which a court has determined that *Bivens* should be extended to First Amendment retaliation claims against BOP employees. On that basis we decline to extend the remedy here and do not address whether an "alternative, existing process for

protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Butts*, supra, 877 F.3d at 587–88 (quoting *Wilkie v. Robbins*, 127 S.Ct. 2588 (2007)). Butler's complaint must therefore be dismissed for failure to state a claim on which relief can be granted.

III.
CONCLUSION

For the reasons stated above, **IT IS RECOMMENDED** that the Motion to Dismiss [doc. 56] be **GRANTED** and that this case be **DISMISSED WITH PREJUDICE** under Federal Rule of Civil Procedure 12(b)(6).

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file written objections with the Clerk of Court. Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days of receipt shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1429–30 (5th Cir. 1996).

THUS DONE AND SIGNED in Chambers this 10th day of September, 2018.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MAX RAY BUTLER B.O.P. # 09954011	**:**	**DOCKET NO. 17-cv-230**
VERSUS	**:**	**UNASSIGNED DISTRICT JUDGE**
S. PORTER, ET AL.	**:**	**MAGISTRATE JUDGE KAY**

SUPPLEMENTAL REPORT AND RECOMMENDATION

Before the court is a civil rights complaint filed by plaintiff Max Ray Butler ("Butler"). Doc. 1.

Butler is proceeding *in forma pauperis* in this matter. Doc. 10. Butler is an inmate in the custody of the Federal Bureau of Prisons ("BOP").[1] He complains about events that occurred while he was incarcerated at the Federal Correctional Institute in Oakdale, Louisiana ("FCIO"). He was subsequently transferred to the Federal Correctional Institution in Victorville, California ("FCIV"). *See* doc. 25.

[1] This matter arises under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 91 S. Ct. 1999 (1971). *Bivens* authorizes civil rights suits filed against federal agents or employees for a violation of a constitutional right.

This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing orders of the court.

I.
BACKGROUND

The claims originally asserted by Butler in this matter have been thoroughly addressed by this court in the Report and Recommendation issued on August 1, 2017, and will not be reiterated herein. Doc. 30. Via the Report and Recommendation, the court recommended that all of Butler's claims be dismissed except for his retaliation claims. On the same day the court issued an order instructing Butler to amend his complaint to state which defendants remained parties to the suit under his claims of retaliation only. Doc. 31. Butler's response to the amend order was received by the court on August 31, 2017. Doc. 36. Butler's response also requests the preservation of "John Doe" defendants. *Id*. at 4. Butler then filed an amended complaint, asserting civil rights claims against officers at FCIV based on alleged acts of retaliation. Doc. 38. Further, on October 19, 2017, Butler filed a Motion to Reconsider Due Process Claim in Light of the Passage of Time. Doc. 40. Therein, he asked the court to reconsider its ruling recommending dismissal of his claims based on solitary confinement as "the duration of [his] SHU confinement has changed due to the passage of time." *Id*.

The court has prepared a memorandum order for service of process on the following defendants identified by Butler: Warden Calvin Johnson, J.

Ledoux, F. Coker, C. Robinson, C. Wilson, R. Rodriguez, A. White, Kaci Maxey, Caleb Gotreaux, Captain Rex, S. Porter, K. Morgan, S. Brown, and Lieutenant Gore. We now consider the presence of the remaining defendants in this matter, the amended complaint, and Butler's request for reconsideration.

II.
LAW & ANALYSIS

A. Frivolity Review

Butler has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Doc. 10. Under 28 U.S.C. § 1915(e)(2)(B)(i) and (ii), a district court is directed to dismiss an action if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998).

A complaint is frivolous if it lacks an arguable basis in law or fact. *Gonzalez v. Wyatt*, 157 F.3d 1016, 1019 (5th Cir. 1998) (citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997)). A complaint fails to state a claim upon which relief may be granted if it is clear the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). In determining whether a complaint is frivolous or fails to state a claim upon which relief may be granted, the court must accept the plaintiff's allegations as true. *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1995) (frivolity); *Bradley*, 157 F.3d at 1025 (failure to state a claim).

B. Non-Retaliation Defendants

As stated above, Butler was specifically ordered to name the defendants alleged to be involved in his retaliation claims. The following named defendants were not identified by Butler as part of those claims: Russell L. Johnson, Associate Warden Weeks, B. Moorehead, J.A. Keller, Becky Clay, Terrance M. Steffey, Dante Alexander, Lieutenant Brian A. Nichols, Warden Swain, J. Sorenson, Officer Tyson, and Michael Rios.

It appears that Warden Swain, J. Sorenson, Officer Tyson, and Michael Rios are located at FCIV, Butler's present place of incarceration. Doc. 38. Butler has filed an amended complaint raising civil rights claims against these defendants, based on alleged incidents of retaliation that began after he filed a copout to the FCIV warden. *Id*. Butler's claims against these defendants should be dismissed without prejudice as the proper forum for such claims is the United States District Court for the Central District of California. Butler's claims against defendants Russell L. Johnson, Associate Warden Weeks, B. Moorehead, J.A. Keller, Becky Clay, Terrance M. Steffey, Dante Alexander, and Lieutenant Brian A. Nichols should be dismissed with prejudice, as we have already determined that Butler's previously raised non-retaliation claims are subject to dismissal. *See* doc. 30.

C. "John Doe" Defendants

Butler sues "John Does involved in and responsible for extended SHU confinement and deprivation of rights." Doc. 1, p. 3. He later identified three of the John Doe defendants as Lieutenant Brian A. Nichols, Lieutenant S. Brown, R. Rodriguez. Doc. 20, p. 1. He

also identified Officer J. Ledoux as one of the John Doe defendants. Doc. 22. As part of his response to the court's amend order relative to the retaliation defendants, Butler stated, "Because some of the staff involved in extending my SHU confinement, intercepting and destroying my mail, and executive staff giving orders are not necessarily known to me, I request that John Does be preserved as a Defendant until they can be identified in discovery or in testimony or documents." Doc. 36, p. 4 (emphasis in original).

A civil rights action may be filed against unidentified defendants when their true names are not yet known to the plaintiff but may be learned. *Spencer v. Doe*, Civ. Action No. 10-1801, 2011 WL 3444336, at *1 (N.D. Tex. Jun. 2, 2011) (citing *Bivens*, 91 S.Ct. at 2001 n. 2)). "Although the use of a 'John Doe' is disfavored, it serves the legitimate function of giving a plaintiff the opportunity to identify, through discovery, unknown defendants." *Green v. Doe*, 260 Fed. App'x 717, *3 (5th Cir. 2007). Where it appears that the plaintiff has sufficient information to determine the identity of his unknown defendant, discovery is warranted. *See id*. at *2; *see also Murphy v. Kellar*, 950 F.2d 290, 293 (5th Cir. 1992) (requiring district court to order discovery in a prisoner suit where it may lead to identification of unidentified defendants). Here Butler has provided sufficient information at this stage for the court to determine that he might identify these John Does. *See* doc. 36, p. 4. Accordingly, the placeholder defendant should remain in the suit at this stage. However, Butler is warned that relief cannot be granted against an unidentified party and so he must act to discover the

identity of any remaining defendants on his retaliation claim or see them dismissed from the suit on summary judgment.

Furthermore, Butler is warned that the statute of limitations for *Bivens* actions is determined by state law and so his claims are subject to Louisiana's one-year prescriptive period for delictual actions. *Brown v. Nationsbank Corp.*, 188 F.3d 579, 590 (5th Cir. 1999); *Hawkins v. McHugh*, 46 F.3d 10, 12 (5th Cir. 1995). The prescriptive period begins to run "the moment the plaintiff becomes aware that he has suffered an injury or has sufficient information to know that he has been injured." *Gray v. Negi*, No. 9-2105, 2012 WL 1014983, *3 (W.D. La. Mar. 23, 2012). Furthermore, an amendment to add a new defendant does not relate back to the original date of filing when it is done to identify a John Doe.[3] Fed. R. Civ. P. 15(c); *see Jacobsen v. Osborne*, 133 F.3d 315, 320–22 (5th Cir. 1998). Accordingly, Butler is warned of a potential prescription problem should he be able to identify any further defendants on his retaliation claim..

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[3] State law also governs any tolling provisions. *Harris v. Hegman*, 198 F.3d 153, 156–57 (5th Cir. 1999). Accordingly, courts in the Eastern District of Louisiana have determined that, even under *Jacobsen*, interruption of prescription by filing a civil rights suit against one defendant extended to plaintiffs' claims against later-named defendants who were alleged joint tortfeasors and solidary obligors. *See Sanchez v. Edwards*, No. 08-1227, 2010 WL 11538593 (E.D. La. Feb. 17, 2010) (and cases cited therein). We find this analysis persuasive, but do not yet determine whether it would apply to any later-named defendants in this matter.

D. Motion for Reconsideration

Butler's Motion to Reconsider Due Process Claim in Light of the Passage of Time [doc. 40] asked the court to reconsider its ruling denying his SHU claims as "the duration of [his] SHU confinement has changed due to the passage of time." *Id.* at 1. In his Motion to Reconsider, Butler alleged that he had been in SHU confinement for approximately eighteen months. *Id.*

The Federal Rules of Civil Procedure do not recognize a "Motion to Reconsider." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990), abrogated on other grounds by *Little v. Liquid Air Corp.*, 37 F.3d 1069 (5th Cir. 1994). Under the facts of the present case, Butler's motion is best construed as an objection to the Report and Recommendation issued on August 1, 2017. However, his new argument concerning the duration of time spent in SHU fares no better than his original argument. In this regard, "[t]he Fifth Circuit recently suggested that two and a half years of segregation is a threshold of sorts for atypicality, such that 18–19 months of segregation under even the most isolated of conditions may not implicate a liberty interest." *Bailey v. Fisher*, 647 Fed. App'x 472, 476–77 (5th Cir. 2016) (footnote and internal citations omitted). Considering that Butler's total segregation (including his alleged segregation at FCIV) has not exceeded the Fifth Circuit's two and a half year threshold, his current "passage of time" argument fails to trigger a due process interest and should be dismissed.

III.
CONCLUSION

For reasons stated,

IT IS RECOMMENDED that the defendants Russell L. Johnson, Associate Warden Weeks, B. Moorehead, J.A. Keller, Becky Clay, Terrance M. Steffey, Dante Alexander, and Lieutenant Brian A. Nichols be **DISMISSED WITH PREJUDICE** from this matter, in accordance with this court's earlier report and recommendation. **IT IS ALSO RECOMMENDED** that all claims against Warden Swain, J. Sorenson, Officer Tyson, and Michael Rios be **DISMISSED WITHOUT PREJUDICE** to Butler pursuing such claims in the proper forum.

IT IS FURTHER RECOMMENDED that Butler's Motion to Reconsider [doc. 40] be **DENIED**, and for the reasons detailed herein and in the court's prior Report and Recommendation [doc. 30], all of Butler's claims, with the exception of the retaliation claims, be **DENIED AND DISMISSED WITH PREJUDICE** as frivolous and for failing to state a claim upon which relief can be granted in accordance with 28 U.S.C. § 1915(e)(2)(B)(i) and (ii).

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific, written objections with the clerk of court. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

Failure to file written objections to the proposed factual finding and/or the proposed legal conclusions reflected in this Report and

Recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by Fed. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

THUS DONE AND SIGNED in Chambers this 6th day of November, 2017.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

MAX RAY BUTLER B.O.P. # 09954011	**:**	**DOCKET NO. 2:17-cv-230**
VERSUS	**:**	**JUDGE MINALDI**
S. PORTER, ET AL.	**:**	**MAGISTRATE JUDGE KAY**

REPORT AND RECOMMENDATION

Before the court is a civil rights complaint filed *in forma pauperis* by *pro se* plaintiff Max Ray Butler ("Butler"), an inmate in the custody of the Federal Bureau of Prisons ("BOP").[1] He is currently incarcerated at the Federal Correctional Institute in Adelanto, California ("FCIA"). However, he complains about events that occurred during his incarceration at the Federal Correctional Institute in Oakdale, Louisiana ("FCIO").

This matter has been referred to the undersigned for review, report, and recommendation in accordance with the provisions of 28 U.S.C. § 636 and the standing

[1] This matter arises under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 91 S.Ct. 1999 (1971). *Bivens* authorizes civil rights suits filed against federal agents or employees for a violation of a constitutional right.

orders of the court. For the following reasons it is recommended that all claims, save the one alleging retaliation, be **DISMISSED WITH PREJUDICE**.

I.
BACKGROUND

Butler claims that he was in wrongfully placed in FCIO's administrative segregation in the Special Housing Unit ("SHU"). He states that he was in general population at FCIO from June 26, 2014, to April 25, 2016, and "never presented any disciplinary or security problems to prison officials" during that time. Doc. 1, p. 4. He claims that he was placed in administrative segregation in the SHU on April 25, 2016, for the purpose of "investigation." *Id.* He contends that his SHU placement was not in response to a prison disciplinary infraction and that there was a lack of proper paperwork. *Id.* He complains that BOP Program Statements were not followed in regard to his SHU placement, including that he never received an incident report on the matter. *Id.* at 4–8, 13, 18. He contends that a backdated administrative detention order was manufactured after he filed an administrative grievance. *Id.* at 4–5.

Butler states that he filed several grievances regarding the alleged violations of his due process rights, beginning on May 12, 2016. *Id.* at 10, 15, 17, 18; *see* doc. 1, att. 1, pp. 1–4. In one such grievance, he states, "On April 25th (2016) SIS Lt. Porter told me that over that past weekend she received anonymous copouts threatening me. I told her . . . that I am not threatened yet she put me in SHU under 'investigation' anyway." Doc. 1, att. 1, p. 1. Butler contends that his continued placement in SHU was an

act of retaliation against him for filing grievances. Doc. 1, p. 10. He also claims that the SHU staff retaliated against him for filing the present matter by increasing his criminal history score with the intent of reclassifying him to medium custody [doc. 24, p. 1] and by targeting him for cell searches [doc. 22, att. 1, p. 1].

Butler claims that he was denied access to the courts as the SHU staff threw away his commissary submissions and he was not able to buy paper and stamps for legal mail. Doc. 7; Doc. 22, att. 1, p. 1. He also maintains that SHU staff delayed his mail by at least a week. Doc. 16, p. 1. He claims that these actions were retaliatory. Doc. 7.

Butler complains about the conditions of confinement in SHU. He alleges that there is a disparity between the SHU commissary and that of general population, namely that some items available to general population are not available in the SHU commissary. Doc. 21, p. 1. He also states that SHU officers speak to SHU inmates disrespectfully, fail to wash inmates' jumpsuits until late in the day, bring the telephone out too late in afternoon for everyone to use it, and subject inmates to cold showers. Doc. 22, att. 1, p. 1. In addition, he states that SHU inmates are only allowed one hour per day to exercise outside, spend twenty-three hours a day in their cell and eat all meals there, and have restricted access to the telephone, visitation, mail, personal property, clothing, and educational, religious, and recreational programs. Doc. 1, p. 6. He also complains of the lack of natural light or fresh air in his cell. *Id.*

Butler was transferred from FCIO to FCIA on or about April 28, 2017. Doc. 23. He claims that FCIO

officials are continuing their retaliation against him as they called FCIA and that they have continued to act to prevent him from being released from SHU at FCIA. Doc. 28; doc 28, att. 1. At the time he filed his supplement to the instant complaint, dated June 27, 2017, and received by this court on July 3, 2017, he alleged that he had been held in SHU continuously for 428 days. Doc. 28.

Butler claims that the prolonged segregation (at FCIO and FCIA) has adversely impacted his mental and physical health. He states that in November 2016, the stress of the SHU confinement caused him to have chest pains and sleeping problems, for which he was put on waiting lists for cardiology and neurology consults. Doc. 1, pp. 6, 16. He contends that he has lost a total of forty-six pounds during his combined SHU confinement. Doc. 28. He also states that the extended confinement has caused a delay in his participation in the Residential Drug Abuse Treatment Program ("RDAP"), thereby extending his total term of imprisonment. Doc. 28, att. 1.

As relief in regard to his SHU confinement at FCIO, Butler asked: (1) to be released from SHU; (2) for punitive damages in the amount of $50,000; and (3) for nominal damages in the amount of $200.00 per day for each day that he was held in SHU. Doc. 1, p. 26. He also asks the court to order his release from FCIA's SHU. Doc. 28.

II.
LAW & ANALYSIS

A. Frivolity Review

Butler has been granted leave to proceed *in forma pauperis* pursuant to 28 U.S.C. § 1915. Doc. 10.

Under 28 U.S.C. § 1915(e)(2)(B)(i) and (ii), a district court is directed to dismiss an action if the court determines that the action is frivolous, malicious, or fails to state a claim on which relief may be granted. *Bradley v. Puckett*, 157 F.3d 1022, 1025 (5th Cir. 1998).

A complaint is frivolous if it lacks an arguable basis in law or fact. *Gonzalez v. Wyatt*, 157 F.3d 1016, 1019 (5th Cir. 1998) (citing *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997)). A complaint fails to state a claim upon which relief may be granted if it is clear the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Doe v. Dallas Indep. Sch. Dist.*, 153 F.3d 211, 215 (5th Cir. 1998). In determining whether a complaint is frivolous or fails to state a claim upon which relief may be granted, the court must accept the plaintiff's allegations as true. *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1995) (frivolity); *Bradley*, 157 F.3d at 1025 (failure to state a claim).

B. Due Process Claim—SHU Detention/ Detainment

Butler alleges that his detention in SHU violated his due process rights.

Ordinarily an inmate has no recognized due process interest in his custodial classification. *Moody v. Baker*, 857 F.2d 256, 257–58 (5th Cir. 1988). In *Sandin v. Conner*, the Supreme Court held that a prisoner's liberty interest is "generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, . . . nonetheless imposes atypical and significant

hardship on the inmate in relation to the ordinary incidents of prison life." 115 S. Ct. 2293, 2300 (1995) (internal citations omitted).

Solitary confinement is typically viewed as an ordinary, expected, and permissible incident of prison life. *See Pichardo v. Kinker*, 73 F.3d 612, 613 (5th Cir. 1996). However, it may be used in a way that "imposes atypical and significant hardship." *Hernandez v. Velasquez*, 522 F.3d 556, 562–63 (5th Cir. 2008) (quoting *Sandin*, 115 S. Ct. at 2300); *see also Wilkerson v. Goodwin*, 774 F.3d 845, 855–57 (5th Cir. 2014). "[S]everity of the restrictive conditions and their duration [are] key factors" in determining whether an inmate has a liberty interest in his custodial classification. *Wilkerson*, 774 F.3d at 854–55.

There is no question that Butler's daily activities were limited in FCIO's SHU. However, it is noted that he completed multiple courses while in SHU [doc. 1, p. 21], that he had use of a telephone for approximately fifteen minutes per week [*id.* at 22], and that he had the opportunity to exercise outside for an hour day [*id.* at 6]. His other complaints simply do not impose atypical and significant hardships relative to the ordinary incidents of prison life.

Additionally, the duration of confinement must also be considered. In this regard, the court in stated:

> The Fifth Circuit recently suggested that two and a half years of segregation is a threshold of sorts for atypicality, *Wilkerson*, 774 F.3d at 855, such that 18–19 months of segregation under even the most isolated of conditions may not implicate a liberty interest. *See also Hernandez*, 522 F.3d at

> 563 (lockdown in "a shared cell for twelve months with permission to leave only for showers, medical appointments, and family visits" not an atypical or significant hardship).

Bailey v. Fisher, 647 Fed. App'x 472, 476–77 (5th Cir. 2016) (footnote omitted). Considering that Butler was in segregation at FCIO for no more than one year, and that this time still falls well under eighteen months even adding the administrative segregation at FCIA, it appears that such duration is not sufficiently atypical to trigger a due process interest and his claims in this regard should be dismissed.

C. Due Process Claim—Failure to Follow BOP Program Statement

Butler alleges that he was denied due process because FCIO officers did not comply with BOP Program Statement 5270.11 (28 C.F.R. 541.5), in that he did not receive an incident report relative to his SHU placement nor was there any objective evidence articulated on the administrative detention order in support of his detention. Doc. 1, pp. 4–5, 7–9. He also complains that he was not present for each thirty day SHU review. Doc. 1, p. 18. He provided approximately thirty-six pages of the special housing unit reviews relative to his continued housing in SHU. Doc. 20, att. 1, pp. 1–36.

For Butler to state a valid *Bivens* claim, the act or omission he alleges must rise to the level of a constitutional violation. *See Siegert v. Gilley*, 111 S.Ct. 1789 (1991). Fifth Circuit case law is clear "that a prison official's failure to follow the prison's own policies, procedures, or regulations does not rise to a level of constitutional violation if constitutional

minima are nevertheless met." *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996); *Taylor v. Howards*, 268 F.3d 1063 (5th Cir. 2001). Here, as shown above, Butler had no constitutionally protected liberty interest in avoiding assignment to the SHU. Thus, the defendants' alleged failure follow their internal policies/program statements did not give rise to a constitutional violation, because there was no underlying liberty interest to violate and therefore no constitutional right to due process. Butler's claims in this regard should be dismissed.

D. Retaliation

Butler claims that his continued detention in the SHU was in retaliation for his filing of administrative grievances and the current law suit.

Officials may not retaliate against an inmate "for complaining through proper channels." *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). In order to prevail on a claim for retaliation, an inmate must demonstrate: (1) a specific constitutional right; (2) the defendant's intent to retaliate against the prisoner for exercising that right; (3) a retaliatory adverse act; and (4) causation. *McDonald v. Steward*, 132 F.3d 225, 231 (5th Cir. 1998). An inmate's personal belief that he is the victim of retaliation is insufficient. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997). Rather, the inmate must present direct evidence of a motivation or "allege a chronology of events from which retaliation may plausibly be inferred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995) (quoting *Cain v. Lane*, 857 F.2d 1139, 1143 n. 6 (7th Cir. 1988)). In order to establish causation, the inmate must

demonstrate that but for the retaliatory motive, the incident complained of would not have occurred. *Id*.

In this matter Butler sets forth sufficient allegations under each element required for a retaliation claim. Accordingly, this claim survives initial review. Butler will be ordered to amend his complaint and identify the defendants responsible under this claim alone, and the court will then order service on those defendants.

E. Access to the Courts Claim

Butler argues that he was denied access to the courts as his commissary submissions were discarded and he was not able to purchase adequate postage for legal mailings. Doc. 7, p. 1.

"It is clearly established that prisoners have a constitutionally protected right of access to the courts." *Brewer v. Wilkinson*, 3 F.3d 816, 820 (5th Cir. 1993). This right "assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." *Lewis v. Casey*, 116 S.Ct. 2174, 2194 (1996) (quoting *Wolff v. McDonnell*, 94 S.Ct. 2963, 2986) (Thomas, J., concurring). Claims alleging violations of the right of access to courts are not cognizable unless the inmate's position as a litigant was actually prejudiced by the denial of access. *See Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999); *Lockamy v. Dunbar*, 399 Fed. App'x 953, 955 (5th Cir. 2010). Butler has not shown that his ability to prepare and transmit legal documents was inhibited nor has he alleged any other actual injury. In fact, he has filed several supplements to the present suit. He also filed at least two other lawsuits subsequent to filing the

present matter. *See Butler v. Johnson*, No. 2:17-cv-394 (W.D. La.); *Butler v. Johnson*, 2:17-cv-559 (W.D. La.). He has not shown that he has, in any way, been hindered in his efforts to purse legal claims. His access to courts claims should be dismissed.

F. Residential Drug Abuse Treatment Program

Butler contends that his continued confinement in SHU has caused a delay in his participation in the Residential Drug Abuse Treatment Program, resulting in him serving more time in prison. Doc. 28, att. 1.

Butler's claims presuppose that he has a constitutional right to participate in rehabilitation programs. However, neither the Due Process Clause, nor any other provision of the Constitution, affords prisoners the constitutional right to educational or rehabilitative services or programs. Simply put, prisoners do not have a constitutional right to participate in drug treatment programs. *See Moody v. Doggett*, 97 S. Ct. 274, 289 n. 9 (1976) (prisoner classification and eligibility for rehabilitation programs are not subject to due process protections). As Butler does not have a protected liberty interest in participating in the RDAP, alleged consequences of a delay in attending such program fail to state a claim for which relief may be granted.

G. Injunctive Relief

Butler seeks injunctive relief for alleged actions that occurred when he was incarcerated at FCIO. However, he has been transferred from FCIO's custody since the filing of his complaint. The law is clear that the transfer of a prisoner out of an allegedly offending institution generally renders his claims for

injunctive relief moot. *Cooper v. Sheriff, Lubbock County, Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991). Any suggestion of the possibility of transfer back to FCIO is too speculative to warrant relief. *See Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001). Furthermore, this court does not have jurisdiction to order Butler's release from the SHU at FCIA. Butler should address such claims for relief with the appropriate parties in his current place of incarceration.

III.
CONCLUSION

While a *pro se* litigant should ordinarily be given an opportunity to amend his complaint before it is dismissed, leave to amend is not required if the petitioner has already pleaded his "best case." *Brewster v. Dretke*, 587 F.3d 764, 767–68 (5th Cir. 2009) (quoting *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998)). In this matter, under all claims but the one for retaliation, it is clear that Butler simply cannot state a claim under applicable law and that leave to amend will not cure the deficiencies in his allegations. Therefore, for reasons stated,

IT IS RECOMMENDED that all claims, with the exception of the retaliation claim, be **DENIED AND DISMISSED WITH PREJUDICE** as frivolous and for failing to state a claim upon which relief can be granted in accordance with 28 U.S.C. § 1915(e)(2)(B)(i) and (ii).

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), parties aggrieved by this recommendation have fourteen (14) days from service of this report and recommendation to file specific,

written objections with the clerk of court. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof.

Failure to file written objections to the proposed factual finding and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service, or within the time frame authorized by Fed. R. Civ. P. 6(b), shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415 (5th Cir. 1996).

THUS DONE AND SIGNED in Chambers this 1st day of August, 2017.

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE