APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 21-40241

MICHAEL JERRIAL IBENYENWA,

Plaintiff—Appellant,

versus

ELRODDRICK B. WELLS, SR., *Librarian at Telford Unit*; TRACY L. SMITH, *Correctional Officer at Telford Unit*; SAMUEL W. NATIONS, *Correctional Officer at Telford Unit*; CHAD DODDY, *Correctional Officer at Telford Unit*; MICHAEL E. ALSOBROOK, *Assistant Warden at Telford Unit*; OFFICE OF THE ATTORNEY GENERAL; FREDDRICK GOODEN; SANDRA CLARK; CARL MCKELLAR; LONNIE TOWNSEND; WADE ALEXANDER; TEXAS BOARD OF CRIMINAL JUSTICE; TODD E. HARRIS,

Defendants—Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 5:18-CV-68

Before SOUTHWICK, GRAVES, and COSTA, *Circuit Judges*.

PER CURIAM:*

Michael Jerrial Ibenyenwa, Texas prisoner # 1638105, moves for leave to appeal in forma pauperis (IFP) after the district court dismissed his 42 U.S.C. § 1983 action and certified that an appeal was not in good faith. By moving to appeal IFP, Ibenyenwa challenges that certification. *See McGarrah v. Alford*, 783 F.3d 584, 584 (5th Cir. 2015). Our inquiry is limited to determining whether Ibenyenwa identifies any nonfrivolous issue for appeal. *See id.*; *Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). We may dismiss a meritless appeal. *Baugh*, 783 F.3d at 202 n.24; *see* 5TH CIR. R. 42.2.

Ibenyenwa contends that the defendants retaliated against him in various ways for filing more than 50 grievances and abusive and insulting complaints about their management of the law library. Prison officials may not retaliate against an inmate for exercising his right to complain about misconduct or to gain access to the courts. *See Woods v. Smith*, 60 F.3d 1161, 1164-66 (5th Cir. 1995).

Ibenyenwa engaged in a vexatious pattern of filing petty grievances about every aspect of the law library that displeased him or failed to promptly accommodate his every request. The grievances were accompanied by vulgar, insulting, and abusive complaints directed at library staff. We seriously doubt that frivolous grievances and abusive complaints are a legitimate, good-faith exercise of First Amendment rights so as to be protected from retaliation. *See Johnson v. Rodriguez*, 110 F.3d 299, 310-11 (5th Cir. 1997) (holding that a prisoner is entitled only to a reasonably adequate opportunity to file nonfrivolous claims); *Jackson v. Cain*, 864 F.2d 1235, 1249 (5th Cir. 1989) (indicating that the use of a grievance procedure would not be

---

* 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.

justified if a complaint to prison officials is "not in good faith"). We therefore merely assume without deciding that Ibenyenwa was exercising legitimate First Amendment rights.

Regardless, the record in this case exemplifies the need to view prisoners' retaliation claims "with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions." *Woods*, 60 F.3d at 1166 (internal quotation marks and citation omitted). Ibenyenwa's pleadings demonstrate a transparent bid to "inappropriately insulate [himself] from disciplinary actions by drawing the shield of retaliation around [him.]" *Woods*, 60 F.3d at 1166. He essentially "dared" the defendants to respond to his persistent and abusive attacks by promising that every unfavorable action would be regarded as actionable retaliation. Even weighing this necessary skepticism against the liberal construction afforded pro se pleadings, we agree with the district court that Ibenyenwa's conclusional assertions are inadequate to state a claim of retaliation under Federal Rule of Civil Procedure 12(b)(6). *See Woods*, 60 F.3d at 1166. Nor do they present a nonfrivolous issue for appeal. *See Audler v. CBC Innovis Inc.*, 519 F.3d 239, 255 (5th Cir. 2008).

In addition, an act done with a retaliatory motive "against a prisoner is actionable only if it is capable of deterring a person of ordinary firmness from further exercising his constitutional rights." *Morris v. Powell*, 449 F.3d 682, 684-86 (5th Cir. 2006). Despite the defendants' actions, Ibenyenwa's filing of grievances and abusive complaints continued unabated, even during the instant litigation. Any assertion that the defendants "chilled" Ibenyenwa from exercising a constitutional right is belied by Ibenyenwa's own actions.

Further, even if Ibenyenwa were deemed to have stated a plausible claim of retaliation, the district court's application of qualified immunity provided an alternative basis for judgment. *See Lincoln v. Turner*, 874 F.3d

833, 847 (5th Cir. 2017) (holding that claims could be barred by qualified immunity although they survived Rule 12 dismissal). "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Ibenyenwa asserts vaguely that the district court's application of qualified immunity was "conclusory." Accordingly, he has not alleged that he had a "clearly established" right to file his abusive grievances or complaints or that the defendants actions were an objectively unreasonable response to them. His conclusional challenge to qualified immunity presents no nonfrivolous issue for appeal. *See Audler*, 519 F.3d at 255.

Ibenyenwa also contends that the district court erred by refusing to allow him to file first and third amended complaints, by wrongly affording Eleventh Amendment immunity to a state entity (that was not named in the operative complaint), and by declining to exercise supplemental jurisdiction over a state law claim about the deduction of funds from a prison account. These issues also present no nonfrivolous issue for appeal.

Accordingly, the IFP motion is DENIED and the appeal is DISMISSED AS FRIVOLOUS. *See Baugh*, 783 F.3d at 202 n.24; 5TH CIR. R. 42.2. This dismissal and the district court's dismissal count as strikes under 28 U.S.C. § 1915(g). *See Coleman v. Tollefson*, 575 U.S. 532, 537-38 (2015). In addition, in 2015, a district court imposed a strike against Ibenyenwa for filing a similar frivolous § 1983 action. *See Ibenyenwa v. Carrington*, No. 5:12-CV-150 (N.D. Tex. July 14, 2015) (unpublished). Because Ibenyenwa has now accumulated a total of three strikes, he is BARRED from proceeding IFP in any civil action or appeal filed while he is incarcerated or detained in any facility unless he is under imminent danger of serious physical injury. *See* § 1915(g).

IFP DENIED; APPEAL DISMISSED; THREE-STRIKES BAR IMPOSED.

APPENDIX B

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 19, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-40241 Ibenyenwa v. Wells
USDC No. 5:18-CV-68

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Christina Rachal

By: _____
Christina C. Rachal, Deputy Clerk
504-310-7651

Mr. Adam Fellows
Mr. Michael Jerrial Ibenyenwa
Mr. David O'Toole
Mr. Jonathan M. Pena

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

TEXARKANA DIVISION

MICHEAL IBENYENWA	§	
v.	§	CIVIL ACTION NO. 5:18cv68
ELRODDRICK WELLS, ET AL.	§	

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

The Plaintiff Micheal Ibenyenwa, an inmate of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. The lawsuit was referred to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges. The operative pleading is Plaintiff's second amended complaint (docket no. 26), although Plaintiff purports to incorporate his original complaint into the second amended complaint. Plaintiff also submitted a motion for leave to file a first amended complaint, which motion was denied.

The defendants as listed on the docket are Telford Unit law librarian Elroddrick Wells; correctional officers Tracy Smith, Samuel Nations, and Chad Doddy; assistant warden Michael Alsobrook; Captain Frederick Gooden; Sandra Clark; Carl McKellar; Lonnie Townsend; Wade Alexander; Todd Harris; and the Texas Board of Criminal Justice. This Report concerns the motion to dismiss filed by all of the Defendants except for Harris, and also addresses the claims against Harris separately.

I. The Plaintiff's Second Amended Complaint

A. Plaintiff's Claims in the Second Amended Complaint

In his second amended complaint, Plaintiff states on June 7, 2016, he filed a grievance against Officer Nations for impeding his access to the law library. He complains Nations likened him to a dog and threatened to "kick him in the ass." Nine days later, Nations wrote a false disciplinary case claiming Plaintiff attempted to establish an inappropriate relationship with him.

The next day, June 17, 2016, Plaintiff states he complained to Wells, the access to courts supervisor, about Nations' conduct, but Nations overheard him and said "that was a story!" Plaintiff states he filed a grievance about this threat on June 27, and on June 30, he got into what he describes as a "tiff" with Nations and Wells concerning "policy anomalies." Nations then wrote another false disciplinary case on July 6, 2016, claiming Plaintiff had failed to bring a copy of an inter-office communication to the law library. Plaintiff states he was found guilty on this disciplinary case by Lt. Estrada and given restrictions, which he served.

On July 7, 2016, after he had filed several grievances against Wells, Plaintiff states Wells told him "I don't know who you think you are or where you came from, but you are not going to run the law library. You keep filing these grievances, and nothing happens. You file one every seven days, and nothing happens. I'm not going to let you continue to disrupt and discourage other inmates that are trying to work because you want to do things your way." Wells added if Plaintiff continued to file grievances, "you will be getting your legal work delivered to you." Plaintiff states he was so "deployed" by this threat he forgot to sign the law library log for the day.

On September 21, 2016, Plaintiff states he filed another grievance against Nations and Wells. The next day, an inmate named Ruiz gave Plaintiff a "retrieved Shepards request at an approved conferral," and to review and provide helpful feedback to him. Plaintiff was reviewing this material when Nations came over to question Plaintiff's possession of Ruiz's Shepards request. As Ruiz and

Plaintiff left the law library, Nations told Ruiz "I'm going to IR your case."[1] Nations then wrote a frivolous disciplinary case against Plaintiff saying Plaintiff solicited Ruiz to violate an Access to Courts rule and created "unnecessary noise."

The disciplinary hearing officer, Captain Gooden, dismissed the case on October 14 and reheard it on November 2, 2016. Gooden found Plaintiff guilty and gave him "major punishment restrictions" which caused Plaintiff to go before the Unit Classification Committee and have his classification changed to medium custody. This caused Plaintiff to lose his participation in a religious program called Kairos.

On April 22, 2016, Plaintiff states he filed a grievance against an officer named Tracy Smith, among others. On May 23, 2016, Smith told him "I got you." He filed more grievances against Smith and her fellow law library workers on May 13 and May 31, 2016. On May 31, June 1, and June 2, Plaintiff filed law library session requests, but the law library staff refused to schedule him for sessions on June 1, 2, or 3.

Next, Plaintiff states he filed grievances against "Wells and / or his subordinates" on July 6, 20, 28, and 29, and August 15, 2016. In the August 15 grievance, Plaintiff complained Wells had recently denied him a conferral with an inmate named Nash. Wells then filed a disciplinary case against Plaintiff alleging Plaintiff had made false statements in his August 15 grievance. On August 24, Plaintiff was found guilty by a hearing officer named McBain and received restrictions, which he served.

Plaintiff states he filed grievances against "Wells and / or his subordinates" on August 22and 29, September 14, 21, and 28, and October 5, 2016. On October 6, 2016, Wells wrote Plaintiff a disciplinary report alleging Plaintiff had violated a written or posted rule. On October 21, 2016, Plaintiff was found guilty by Captain Gooden and punished with restrictions.

---

[1]The abbreviation "IR" stands for "informal resolution,"meaning Nations was telling Ruiz he, Ruiz, would not get a disciplinary case or receive any punishment (i.e. any disciplinary violation committed by Ruiz had been "informally resolved" prior to formal disciplinary action being taken).

Plaintiff states he filed grievances against law library staff on December 12, December 19, 2017, and January 4 and 10, 2018. He complained to Smith on January 18 that he did not receive a law library session law-in, and in retaliation, he did not receive lay-ins for January 19, January 22, January 25, or January 26. He complained to Wells, who told him "you have been here for a year and a half, and all you have done is write grievances, you aren't going to do nothing but write it up. You want us to help you out? I don't think so."

On January 18, 2018, Plaintiff and an inmate named Screener failed to receive law library session lay-ins. They complained to Sgt. Garland and received passes, but when they got to the law library and gave their passes to Smith, she told them to "re-submit" for a session lay-in. Smith called Garland and indicated she would be writing "out of place" disciplinary cases.

On January 23, Smith asked Plaintiff if he had permission to get up. She wrote false disciplinary cases asserting Plaintiff lied to her on January 18 and was "out of place" for standing up on January 23. He was found guilty by hearing officer Lt. Duncan and given restrictions for both of these cases.

Between June of 2016 and November of 2018, Plaintiff complains various law library staff retaliated against him by obstructing his legal access and writing false disciplinary cases. Alsobrook told him to "calm down on the I-60s because if staff write you up, I have to f*** you off." He added "you know how officers are, if you f*** with them, they f*** with you."

On November 1, 2017, Plaintiff "exercised his right to complain and criticize Smith orally and in written form and complained to Wells in the presence of unit law library staff during an active legal session." He was thereafter "publicly vilified and forcibly removed from the unit law library, unlawfully and as a retaliatory measure." He asserts this was done as part of a conspiracy among the law library staff to obstruct and frustrate his legal access, write him false disciplinary cases, and harass and retaliate against him." Smith wrote false disciplinary cases on November 1, November 8, and November 9 as part of this conspiracy. He was found guilty by Lt. Sartin and punished with a reprimand on November 22, 2017, after Sartin contacted Warden Alsobrook. During the hearing,

Plaintiff asserts Sartin stated the case was "ridiculous" and if Smith had not added charges of creating a disturbance, the case "would have went through." On November 28, Rust contacted Alsobrook and dismissed another disciplinary case which had been filed against Plaintiff.

B. The Original Complaint

In his original complaint, which Plaintiff purports to adopt and incorporate by reference, Plaintiff states on November 8, 2017, he contacted his mother, who contacted Assistant Regional Director McKellar. The next day, November 9, Plaintiff states he was harassed and retaliated against by Nations and Smith. On November 10, Alsobrook told Plaintiff he had talked to Osaji and there was nothing threatening about the I-60's Plaintiff had written, so he, Alsobrook, would take care of the disciplinary cases Plaintiff had received. This was the conversation in which Alsobrook allegedly told Plaintiff to calm down on the I-60's. Plaintiff states he "shrieked" that he was being retaliated against, and Alsobrook told Plaintiff to send him an I-60. Plaintiff states he gave Alsobrook a copy of Smith's case printout receipt, and Alsobrook administratively resolved the two false disciplinary cases charging him with threatening officers. Nonetheless, Plaintiff argues Alsobrook's "omissions and failure to fully remedy and stop the longstanding practicing customs, illicit norms, usages, and ongoing pattern of unconstitutional reprisals after being well briefed" amounted to a failure to properly supervise law library staff through deliberate indifference. He maintains all of these actions amounted to a conspiracy and argues the intra-corporate conspiracy doctrine does not apply because the conspirators were acting in pursuit of their own goals, not those of the entity.

C. The Unfiled First Amended Complaint

In his second amended complaint, Plaintiff goes on to state "Ibenyenwa adopts and incorporates counts XIX through XXXV in its entirety, as stated in the Amended Complaint at pp. 6-27 by this reference." The proposed first amended complaint, to which this statement evidently refers, was submitted to the Court on November 26, 2018, together with a motion for leave to file

the amended complaint (docket no. 18). This motion for leave to file was denied on December 6, 2018 (docket no. 20).

Because the motion for leave to file the proposed first amended complaint was denied, this document was never filed and thus never became a "pleading" in the case. *See, e.g.*, Blessett v. Texas Attorney General Galveston Child Support Enforcement Division, 756 F.App'x 445, 2019 U.S. App. LEXIS 6809, 2019 WL 1092631 (5th Cir., March 6, 2019) (where leave to file the amended complaint was denied, the defendants were under no obligation to respond to the unfiled document); Funk v. Stryker Corp., 631 F.3d 777, 779 (5th Cir. 2011) (where leave to file the second amended complaint was denied, the only complaint properly before the court was the first amended complaint).

Fed. R. Civ. P. 10(c) provides that a statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. Plaintiff cannot adopt or incorporate allegations from a proposed amended complaint for which leave to file was denied. *See also* 5A Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* §1326 (August 2019 update) (stating "allegations in a prior *effective* pleading in the same action can be incorporated by reference regardless of the pleading in which the matter appears and regardless of the identity of the party who issued the pleading.") (Emphasis added); *cf.* Gooden v. Crain, 255 F.App'x 858, 2007 U.S. App. LEXIS 26949, 2007 WL 4166145 (5th Cir., November 21, 2007) (denying leave to incorporate allegations contained in a prior lawsuit which had been dismissed). Hence, the allegations in Plaintiff's proposed amended complaint were never properly before the Court and cannot be adopted or incorporated by reference.

II. The Defendants' Motion to Dismiss

The Defendants Alsobrook, Doddy, Nations, Smith, Wells, Gooden, Clark, McKellar, Townsend, Alexander, and the Texas Board of Criminal Justice have filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) and (b)(6). This motion argues that Plaintiff's complaint asserts he files numerous grievances, claims the Defendants have retaliated against him and this retaliation chilled

surprisingly only in response to him using the grievance process." He states because the Defendants did not specifically seek dismissal of his conspiracy claims, these claims remain intact.

Plaintiff asserts while the Defendants argue the claims against disciplinary hearing officers Gooden and Clark do not meet the elements of a retaliation claim, this is simply an attempt to provoke him into defending his claims on the merits. With regard to his claims against Smith, Nations, and Doddy, Plaintiff asserts "the credible facts and totality of their punitive, pain-seeking, malicious, and unconscionable activities bourne [sic] for Ibenyenwa exercising protected rights to complain, file grievances, and criticize staff via written communications, and the irrelevant fact that Ibenyenwa continued his protected conduct 'fearlessly' in spite of the reprisals unleashed by defendants is negligible [sic]."

Plaintiff argues the Defendants are not entitled to qualified immunity because they conceded they violated his clearly established constitutional rights, simply arguing their actions were "objectively reasonable." In any event, Plaintiff contends a finding of qualified immunity is premature because the Defendants have not filed an answer.

IV. Discussion

A. General Standards for Motions to Dismiss

Fed. R. Civ. P. 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." In order to survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts to state a claim to relief which is plausible on its face. Severance v. Patterson, 566 F.3d 490, 501 (5th Cir. 2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). The Supreme Court stated Rule 12(b)(6) must be read in conjunction with Fed. R. Civ. P. 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Id. at 555.

Fed. R. Civ. P. 8(a) does not require "detailed factual allegations but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 677-78, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). A pleading offering "labels and conclusions" or

a "formulaic recitation of the elements of a cause of action" will not suffice, nor does a complaint which provides only naked assertions which are devoid of further factual enhancement. Courts need not accept legal conclusions as true, and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, are not sufficient. Id. at 678.

A plaintiff meets this standard when he "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. A complaint may be dismissed if a plaintiff fails to "nudge [his] claims across the line from conceivable to plausible," or if the complaint pleads facts merely consistent with or creating a suspicion of the defendant's liability. Id.; *see also* Rios v. City of Del Rio, Tex., 444 F.3d 417, 421 (5th Cir. 2006). *Pro se* plaintiffs are held to a more lenient standard than are lawyers when analyzing a complaint, but *pro se* plaintiffs must still plead factual allegations which raise the right to relief above the speculative level. Chhim v. University of Texas at Austin, 836 F.3d 467, 469 (5th Cir. 2016). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Iqbal, 556 U.S. at 678.

If the facts alleged in a complaint do not permit the court to infer more than the mere possibility of misconduct, a plaintiff has not shown entitlement to relief. Id. (citing Fed. R. Civ. P. 8(a)(2)). Dismissal is proper if a complaint lacks a factual allegation regarding any required element necessary to obtain relief. Rios, 444 F.3d at 421.

B. Retaliation

The Fifth Circuit has held the elements of a claim under a theory of retaliation are the invocation of a specific constitutional right, the defendant's intent to retaliate against the plaintiff for his exercise of that right, a retaliatory adverse act, and causation, which is a showing that but for the retaliatory motive, the action complained of would not have occurred. Johnson v. Rodriguez, 110 F.3d 299, 310 (5th Cir. 1997). This requirement places a heavy burden upon inmates, because mere conclusionary allegations will not suffice; instead, the inmate must produce direct evidence of retaliation or, the more probable scenario, a chronology of events from which retaliation may

plausibly be inferred. Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995). The relevant showing must be more than the prisoner's personal belief that he is the victim of retaliation. Johnson, 110 F.3d at 310, *citing* Woods v. Edwards, 51 F.3d 577, 580 (5th Cir. 1995). Specific facts must be alleged in order to sustain a retaliation claim; conclusory allegations are not sufficient. Coleman v. Harris, 296 F.App'x 428, 2008 U.S. App. LEXIS 22023, 2008 WL 4649122 (5th Cir., October 21, 2008); Whittington v. Lynaugh, 842 F.2d 818, 819 (5th Cir. 1988). Retaliation against a prisoner is actionable only if it is "capable of deterring a person of ordinary firmness from further exercising his constitutional rights." Morris v. Powell, 449 F.3d 682, 684 (5th Cir. 2006).

With regard to claims of retaliation revolving around prison disciplinary proceedings, the Fifth Circuit has explained as follows:

> The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions. [citation omitted]
>
> To assure that prisoners do not inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them, trial courts must carefully scrutinize these claims. 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.

Woods, 60 F.3d at 1166 (internal citations omitted).

Plaintiff's pleadings aver he took some action such as filing a grievance and then subsequently received disciplinary action, which he ascribes to retaliation. However, his conclusory allegations fail to meet the elements of a retaliation claim because they are wholly insufficient to show causation. The Fifth Circuit has held an allegation that "harassment of the plaintiff intensified

after he started filing grievances" is insufficient to show retaliation. Reese v. Skinner, 322 F.App'x 381, 2009 U.S. App. LEXIS 8471, 2009 WL 1066997 (5th Cir., April 21, 2009).

Similarly, in Strong v. University HealthCare Systems, LLC., 482 F.3d 802, 808 (5th Cir. 2007), the Fifth Circuit held temporal proximity is insufficient to prove "but for" causation. The mere fact one incident precedes another is not proof of a causal connection because this is the logical fallacy of post hoc, ergo propter hoc (after this, therefore because of this). Huss v. Gayden, 571 F.3d 442, 459 (5th Cir. 2009) (noting "the post hoc ergo propter hoc fallacy assumes causality from temporal sequence" which is a "false inference"); *see also* Tampa Times Co. v. National Labor Relations Board, 193 F.2d 582, 583 (5th Cir. 1952) (post hoc ergo propter hoc is not sound logic); Jefferson v. Endsley, civil action no. 5:13cv18, 2015 U.S. Dist. LEXIS 127928, 2015 WL 5635274 (E.D.Tex., September 24, 2015), *aff'd* 2018 U.S. App. LEXIS 6349, 2018 WL 1320087 (5th Cir., March 14, 2018) (temporal proximity between the prison officials' learning of Jefferson's grievances and the receipt of disciplinary action almost a week later did not show the disciplinary action was retaliatory).

In White v. Fox, 294 F.App'x 955, 2008 U.S. App. LEXIS 21078, 2008 WL 4473311 (5th Cir., October 66, 2008), the Court considered the plaintiff White's allegations of retaliation and concluded they were frivolous, stating the plaintiff "did not offer any specific link between his legal activity and the disciplinary case which he received, beyond the fact that he engaged in legal activity and subsequently received the disciplinary case." The Fifth Circuit affirmed this decision, stating "the district court did not err in finding that White's conclusory allegations of retaliation are insufficient to state a claim." *See also* Decker v. Dunbar, 633 F.Supp.2d 317, 347 (E.D.Tex. 2008), aff'd 358 F.App'x 509, 2009 U.S. App. LEXIS 28021, 2009 WL 5095139,(5th Cir., December 21, 2009) (retaliation claim lacked merit where prisoner alleged he received "bogus disciplinary cases" within a few days after filing grievances, but prisoner filed so many grievances that "it is inevitable that whenever Decker received a disciplinary case, it would have been within a short time after he filed a grievance"); Morris v. Cross, slip op. no. 6:09cv236, 2010 U.S. Dist. LEXIS 140934, 2010

WL 5684412 (E.D.Tex., December 17, 2010), *Report adopted at* 2011 U.S. Dist. LEXIS 10390, 2011 WL 346071 (E.D.Tex., February 1, 2011), *aff'd* 476 F.App'x 783, 2012 U.S. App. LEXIS 9103, 2012 WL 1557341 (5th Cir., May 3, 2012) (rejecting retaliation claim where prisoner received disciplinary case for excessive property and failed to show that but for the retaliatory motive, he would not have received the case).

In the present case, Plaintiff, like White, points to the temporal proximity between his filing of grievances or complaints and the receipt of disciplinary action, but this alone is not sufficient to show causation. The fact Plaintiff filed complaints and then received disciplinary cases does not itself show a chronology from which retaliation may plausibly be inferred; otherwise, inmates could insulate themselves from disciplinary actions by the simple expedient of filing complaints and then claiming that any disciplinary action taken against them was done in retaliation for those complaints. Woods v. Smith, 60 F.3d at 1166; *see also* Orebaugh v. Caspari, 910 F.2d 526, 528 (8th Cir. 1990).

Plaintiff's pleadings and exhibits show he is an inveterate filer of grievances. Thus, as in Decker, it is inevitable that any disciplinary case which he received would have been close in time to one of these grievances. Plaintiff has offered nothing to show any causal connection between his grievances and the disciplinary cases which he received besides the simple fact of temporal proximity, which is not sufficient.

In addition, Plaintiff offers only conclusory allegations that the actions taken would deter a person of ordinary firmness from exercising his constitutional rights. He makes this same assertion regarding each and every one of the actions taken against him, even in instances in which the disciplinary case was dismissed or he received only minor punishment such as a reprimand (docket no. 26, pp. 7, 10, 13), or he was the recipient of harsh words from an officer (docket no., 26, pp. 7, 12, 14).

The Fifth Circuit has held a bare allegation that a plaintiff's exercise of his rights was chilled or curtailed in retaliation for the exercise of protected rights, such as a claim the plaintiff "suffered great personal damage from the defendants' actions, including a violation of his First Amendment

rights," is not sufficient to plead a chilling effect. Instead, it is a legal conclusion which does not show the plaintiff reduced or changed his exercise of free speech in any way. McLin v. Ard, 866 F.3d 682, 697 (5th Cir. 2017). Plaintiff's contention that "the actions taken would deter a person of ordinary firmness from exercising his constitutional rights" is likewise a legal conclusion. Furthermore, such an allegation is simply a bare recitation of the one of the elements of the cause of action, which is not sufficient to survive a motion to dismiss. Iqbal, 556 U.S. at 678. Plaintiff has failed to state a claim upon which relief may be granted with regard to retaliation.

C. False Disciplinary Cases

Plaintiff asserts he received numerous disciplinary cases which he claims were false. The Fifth Circuit has held there is no free-standing constitutional right to be free from false disciplinary charges. Palmisano v. Bureau of Prisons, 258 F.App'x 646, 2007 U.S. App. LEXIS 28581, 2007 WL 4372800 (5th Cir. 2007); *see* Castellano v. Fragozo, 352 F.3d 939, 945 (5th Cir. 2003). More specifically, the Fifth Circuit has stated there is no due process violation in the filing of an allegedly false disciplinary case if the prisoner is given an adequate state procedural remedy to challenge the accusations. Grant v. Thomas, 37 F.3d 632, 1994 U.S. App. LEXIS 43277, 1994 WL 558835 (5th Cir., September 23, 1994), *citing* Collins v. King, 743 F.2d 248, 253-54 (5th Cir. 1984); *see also* Freeman v. Rideout, 808 F.2d 949, 951 (2d Cir. 1986) (prison inmate has no constitutional right against being falsely accused of conduct which might result in deprivation of liberty interest), *cert. denied,* 485 U.S. 982, 108 S.Ct. 1273, 99 L.Ed.2d 484 (1988). Plaintiff offers nothing to suggest he did not have an adequate state procedural remedy to challenge the disciplinary cases, through the prison hearing process and the grievance procedure. His allegation on this point fails to state a claim upon which relief may be granted.

D. Denial of Access to the Law Library

Plaintiff complains on a number of occasions, he put in requests to use the law library which were denied or ignored, so he was unable to attend these sessions. His pleadings make clear he was able to use the law library on many other occasions.

The Supreme Court has held there is no abstract, free-standing right to a law library. Lewis v. Casey, 518 U.S. 343, 351, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Instead, the prisoner must allege he was denied a reasonably adequate opportunity to file non-frivolous legal claims challenging their convictions or conditions of confinement. Id.; *see also* Jones v. Greninger, 188 F.3d 322, 325 (5th Cir. 1999). The prisoner must allege he suffered actual injury, such as the following:

> [The inmate] might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered some arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint.

Lewis, 116 S.Ct. at 2180; *see also* McIntosh v. Thompson, 463 F.App'x 259, 2012 U.S. App. LEXIS 3711, 2012 WL 602437 (5th Cir., February 24, 2012) (even if the destruction of the inmate's legal paperwork restricted his constitutional rights, the inmate failed to allege an injury in fact, which is required to state a claim for denial of meaningful access to the courts).

In Christopher v. Harbury, 536 U.S. 403, 415, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002), the Supreme Court explained the right of access to the courts "rest[s] on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court. A plaintiff complaining of loss or inadequate settlement of a meritorious case, the loss of an opportunity to sue, or the loss of an opportunity to seek some particular order of relief must describe the predicate claim [i.e. the underlying case for which access to courts is sought] well enough to show the claim is not frivolous and the "arguable" nature of this claim is "more than hope." Id. at 415; *see also* Lewis, 518 U.S. at 353 and n. 3 (actual injury requires the underlying claim for which access to court was allegedly denied be arguable and non-frivolous; depriving someone of a frivolous claim "deprives him of nothing at all, except perhaps the punishment of Rule 11 sanctions.")

In Mendoza v. Strickland, 414 F.App'x 616, 2011 U.S. App. LEXIS 2257, 2011 WL 396478 (5th Cir., February 3, 2011), the prisoner complained of interference with his right of access to court

with relation to his criminal prosecution and his collateral post-conviction challenge. The Fifth Circuit determined the prisoner's complaint of interference with his criminal prosecution lacked merit because he was represented by counsel and thus his right of access to court had not been infringed. To the extent the prisoner complained of interference with his state post-conviction challenge, in which he proceeded *pro se*, the Fifth Circuit explained as follows:

> Even assuming arguendo that Mendoza's amended complaint includes a claim that the defendants interfered with the pursuit of his state post-conviction challenge, in which he proceeded pro se, we conclude that Mendoza failed to plead an actual injury, as required by the Supreme Court in Harbury. Under Harbury, the underlying cause of action is an element which must be affirmatively pleaded. 536 U.S. at 415, 122 S.Ct. 2179. In order to demonstrate actual injury, the complainant must show that the underlying cause of action was "arguable" and "non-frivolous." Id. Mendoza failed to provide any information about his state post-conviction application from which this court can conclude that the post-conviction application contained a "non-frivolous," "arguable" underlying claim.

As in Mendoza, Plaintiff has not alleged, much less shown, any actual harm from the law library sessions he missed, nor that the underlying claims for which he sought law library access were arguable and not frivolous. His claim for denial of access to the law library fails to state a claim upon which relief may be granted.

E. Supervisory Liability

Plaintiff next asserts the supervisory defendants, Alsobrook, Alexander, McKellar, and Townsend, violated his First Amendment rights by "failing to properly supervise unit law library staff through deliberate indifference to their reprisals for exercising his rights." The Fifth Circuit has stated supervisors cannot be held liable for the actions of their subordinates under any theory of supervisory liability, but may be held liable if there exists (1) personal involvement in a constitutional deprivation, (2) a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation, or (3) if supervisory officials implement a policy so deficient the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation. Thompkins v. Belt, 828 F.2d 298, 304 (5th Cir. 1987); Terry v. LeBlanc, 479 F.App'x 644, 2012 U.S. App. LEXIS 17110, 2012 WL 3496399 (5th Cir., August 15, 2012). Conclusory allegations of the creation or existence of a policy or custom are insufficient to establish

supervisory liability. Rivera v. Salazar, 166 F.App'x 704, 2005 U.S. App. LEXIS 29186, 2005 WL 3588443 (5th Cir., December 30, 2005), *citing* Thompkins and Oliver v. Scott, 276 F.3d 736, 742 (5th Cir. 2002). Government officials cannot be held liable merely because they acquiesced in their subordinate's misconduct. Iqbal, 556 U.S. at 677, 129 S.Ct. 1937; Sterns v. Epps, 464 F.App'x 388, 2012 U.S. App. LEXIS 5678, 2012 WL 911889 (5th Cir. 2012). To the extent Plaintiff contends the supervisory defendants are liable because of their positions as supervisors, he has failed to state a claim upon which relief may be granted.

In order to establish liability for a failure to supervise, a plaintiff must show (1) an actual failure to supervise; (2) a causal link between the failure to supervise and the violation of his rights, and (3) the failure to train or supervise amounted to deliberate indifference. Porter v. Epps, 659 F.3d 440, 446 (5th Cir. 2011). Plaintiff's conclusory assertions of failure to supervise are not sufficient to state a claim upon which relief may be granted. *See* Silva v. Moses, 542 F.App'x 309, 2013 U.S. App. LEXIS 20101, 2013 WL 5450799 (5th Cir., October 1, 2013), *citing* Roberts v. City of Shreveport, 397 F.3d 287, 292 (5th Cir. 2005).

While the supervisory defendants may not have acted on Plaintiff's grievances or complaints in the way he believed appropriate, this likewise does not set out a constitutional claim. The fact a grievance or complaint was not investigated or resolved to a prisoner's satisfaction does not implicate any constitutionally protected rights. Geiger v. Jowers, 404 F.3d 371, 373-74 (5th Cir. 2005); *see also* Edmond v. Martin, 100 F.3d 952, 1996 U.S. App. LEXIS 29268, 1996 WL 625331 (5th Cir., Oct. 2, 1996) (prisoner's claim a defendant "failed to investigate and denied his grievance" raises no constitutional issue); Thomas v. Lensing, 31 F.App'x 153, 2001 U.S. App. LEXIS 28101, 2001 WL 1747900 (5th Cir., December 11, 2001) (same). This contention fails to state a claim upon which relief may be granted.

F. Conspiracy

Plaintiff also alleges the Defendants acted in a conspiracy against him. His allegations as to conspiracy are entirely conclusory, which is not sufficient to state a claim upon which relief may

be granted. Hale v. Harney, 786 F.2d 688, 690 (5th Cir. 1986). In any event, Plaintiff's conspiracy claims are barred by the intra-corporate conspiracy doctrine, which as applied to this case states TDCJ and its employees constitute a single legal entity which is incapable of conspiring with itself. Thornton v. Merchant, 526 F.App'x 385, 2013 U.S.App. LEXIS 9600, 2013 WL 1943344 (5th Cir., May 13, 2013); Thompson v. City of Galveston, 979 F.Supp. 504, 511 (S.D.Tex. 1997).

Plaintiff argues the intra-corporate conspiracy doctrine does not apply when individuals pursue personal interests wholly separate and apart from the entity, citing Orafan v. Goord, 411 F.Supp.2d 153, 165 (N.D.N.Y. 2006), *rev'd on other grounds sub nom.* Orafan v. Rashid, 249 F.App'x 217 (2nd Cir., September 28, 2007). In order for this exception to apply, the plaintiff must show the Defendants acted in their personal interests, wholly and separately from the corporation. Microsoft Corp. v. Big Boy Distribution LLC, 589 F.Supp.2d 1308, 1322-24 (S.D.Fla., December 3, 2008). In that case, the defendant Big Boy Distribution filed a counterclaim against Microsoft alleging a civil conspiracy based upon alleged illegal acts conducted by investigators from Microsoft Corp., but the district court held because the only evidence offered in support of the civil conspiracy claim involved actions of Microsoft investigators within the scope of their employment, the conspiracy claim was foreclosed by the intra-corporate conspiracy doctrine despite the fact the actions were alleged to be illegal.

Similarly, Plaintiff has wholly failed to allege, much less show, the Defendants involved in the claimed conspiracy were acting entirely in their own personal interests, wholly separate and apart from the entity, TDCJ. While he claims the Defendants acted unlawfully, this by itself does not show action apart from the entity, as in Microsoft. *See also* Orafan v. Goord, 411 F.Supp.2d at 165 (prisoners did not allege defendants were acting outside the scope of their employment, but rather were acting through the prison's policies, customs, and practices, and therefore the scope of employment exception did not apply).

Furthermore, Plaintiff has failed to state a claim for conspiracy because a conspiracy claim is not actionable without an actual violation of §1983. Hale v. Townley, 45 F.3d 914, 920 (5th Cir.

1995). Because Plaintiff has not stated a claim for a §1983 violation, his conspiracy claim necessarily fails.

G. Immunity

The Defendants assert the Texas Board of Criminal Justice is immune from suit and the individual defendants have Eleventh Amendment immunity from claims for monetary damages in their official capacities and qualified immunity from claims for monetary damages in their individual capacities.

The Texas Board of Criminal Justice, as an instrumentality of the State of Texas, is immune from suit under the Eleventh Amendment, regardless of the relief sought. Ruiz v. Price, 84 F.App'x 393, 2003 U.S. App. LEXIS 25323, 2003 WL 22975507 (5th Cir., December 16, 2003), *citing* Harris v. Angelina County, Texas, 31 F.3d 331, 337 n.7 (5th Cir. 1994); Loya v. Texas Department of Corrections, 878 F.2d 860, 861-62 (5th Cir. 1989). Plaintiff has failed to state a claim upon which relief may be granted against the Board of Criminal Justice.

To the extent Plaintiff sues the individual defendants for monetary damages in their official capacities, such claims are also barred by the Eleventh Amendment. Oliver v. Scott, 276 F.3d 736, 742 (5th Cir. 2002).

The Defendants also invoke the defense of qualified immunity, which protects government officials from liability for monetary damages in their individual capacities insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Thompson v. Mercer, 762 F.3d 433, 436-37 (5th Cir. 2014). Claims of qualified immunity require a two-step analysis, which may be done in either order: first, the court determines whether a constitutional right would have been violated on the facts alleged, and second, whether the right was clearly established at the time of the alleged violation. Kitchen v. Dallas County, 759 F.3d 468, 476 (5th Cir. 2014). Even if the official's conduct violated a clearly established constitutional right, the official is nonetheless entitled to qualified immunity if his conduct was objectively reasonable. Jones v. Collins, 132 F.3d 1048, 1052 (5th Cir. 1998).

After the defendants properly invoke qualified immunity, the plaintiff bears the burden to rebut its applicability. Kovacic v. Villareal, 628 F.3d 209, 211 (5th Cir. 2010). Such a rebuttal requires a showing that all reasonable officials, similarly situated, would have known the defendants' acts violated the Constitution. Tamez v. Matheny, 589 F.3d 764, 770 n.2 (5th Cir. 2009); Thompson v. Upshur County, 245 F.3d 447, 460 (5th Cir. 2001). The Fifth Circuit has held "conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation" cannot overcome the immunity defense. Orr v. Copeland, 844 F.3d 484, 490 (5th Cir. 2016).

Although Plaintiff contends because the Defendants have not answered, the invocation of qualified immunity is premature, the Fifth Circuit has made clear qualified immunity may be raised in the context of a motion to dismiss. In Longoria Next Friend of M.L. v. San Benito Independent Consolidated School District, 942 F.3d 258, 263-64 (5th Cir. 2019), the Fifth Circuit explained when a defendant asserts a qualified immunity defense in a motion to dismiss, the court has an obligation to carefully scrutinize the complaint before subjecting public officials to the burdens of broad-reaching discovery.

Plaintiff's allegations are insufficient to meet his burden of overcoming the qualified immunity defense. *See* Williams-Boldware v. Denton County, Texas, 741 F.3d 635, 643-44 (5th Cir. 2014) (pleading consisting of conclusory allegations based almost wholly on speculation does not plead facts which would overcome a qualified immunity defense). As a result, the moving Defendants are entitled to the defense of qualified immunity.

H. The Property Claim

The doctrine of Parratt v. Taylor, 451 U.S. 527, 541-44, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (overruled in part on grounds not relevant here) and Hudson v. Palmer, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984), known collectively as the *Parratt/Hudson Doctrine*, states a random and unauthorized deprivation of a property or liberty interest does not violate procedural due process if the State furnishes an adequate post-deprivation remedy. *See* Caine v. Hardy, 943

F.2d 1406, 1412 (5th Cir. 1991). Three pre-deprivation conditions must exist before the doctrine can be applied. These are: (1) the deprivation was unpredictable; (2) pre-deprivation process was impossible, making any additional safeguard useless; and (3) the conduct of the state actor was unauthorized. Where these conditions exist, the State cannot be required to do the impossible by providing pre-deprivation process. Charbonnet v. Lee, 951 F.2d 638, 642 (5th Cir. 1992), *citing* Zinermon v. Burch, 494 U.S. 113, 129, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990); Myers v. Klevenhagen, 97 F.3d 91, 94-95 (5th Cir. 1996).

This means deprivations of property by prison officials, even when intentional, do not violate the Due Process Clause of the Fourteenth Amendment provided an adequate state post-deprivation remedy exists. Hudson, 468 U.S. at 533. The Texas state administrative and judicial systems provide an adequate state post-deprivation remedy. Tex. Gov. Code Ann. art. 501.007 (Vernon Supp. 1994); *see also* Murphy v. Collins, 26 F.3d 541, 543-44 (5th Cir. 1994).

The Fifth Circuit has held random and unauthorized acts, even if purportedly done under established state procedures, fall within the scope of Hudson and Parratt. Holloway v. Walker, 784 F.2d 1287, 1292-93 (5th Cir. 1986). In a later opinion denying rehearing, the Fifth Circuit went on to explain "the ability of an individual state employee to provide pre-deprivation process does not determine whether a due process violation has taken place; when state procedures provide due process and are violated by an random or unauthorized act of a state employee, even a high-ranking state employee, *Parratt/Hudson* establishes that no federal constitutional due process violation occurred." Holloway v. Walker, 790 F.2d 1170, 1172-73 (5th Cir. 1986).

Plaintiff does not allege, much less show, the confiscation of his property was anything other than a random and unauthorized deprivation. He asserts he authorized the withdrawal of $19.60, but Wells withdrew $25.00. Thus, the State could not have provided pre-deprivation process. *See* Brooks v. George County, Miss., 84 F.3d 157, 165 (5th Cir. 1996). Because adequate state post-deprivation remedies exist, the appropriate forum for this claim lies in state court or the administrative processes of TDCJ-CID rather than federal court. Simmons v. Poppell, 837 F.2d

1243, 1244 (5th Cir. 1987); Murphy, 26 F.3d at 543; *see also* Myers, 97 F.3d at 94-95 (burden is on the complainant to show the state's post-deprivation remedies are not adequate).

Plaintiff, recognizing his property claim is a state law claim, argues the Court should exercise supplemental jurisdiction under 28 U.S.C. §1367. The Fifth Circuit has stated as a general rule, the district court should decline to exercise supplemental jurisdiction when all federal claims are dismissed or eliminated prior to trial. Batiste v. Island Records, Inc., 179 F.3d 217, 227 (5th Cir. 1999). Because all of Plaintiff's federal claims fail to state a claim upon which relief may be granted, the district court should decline supplemental jurisdiction over his property claim.

I. Defendant Todd Harris

The record of the case shows the Defendant Todd Harris has not been served with process and has not answered the complaint. There do not appear to be any claims against Harris set out in either the second amended complaint or the original complaint; rather, these claims appear in the proposed first amended complaint, for which leave to file was denied. Consequently, any claims against Harris, as well as any other defendants who may be named only in the proposed first amended complaint, are not properly before the Court and may be dismissed. *See* Cutrera v. Board of Supervisors of Louisiana State University, 429 F.3d 108, 115 (5th Cir. 2005) (factual theory not raised in complaint or opposition to motion to summary judgment was not properly before the district court but was treated as raised for the first time on appeal); Fisher v. Metropolitan Life Ins. Co., 895 F.2d 1073, 1078 n.3 (5th Cir. 1990) (claims raised in the plaintiff's response to the motion for summary judgment, but not in his live pleading, cannot defeat summary judgment because they are not properly before the court); Hebert v. City of Baton Rouge, civil action no. 15-850, 2019 U.S. Dist. LEXIS 51687, 2019 WL 1387694 (M.D.La., March 27, 2019) (where plaintiff was denied leave to amend his complaint with regard to the presence of benzene in the water, the claims regarding benzene were not properly before the court).

V. Conclusion

In proceeding under Fed. R. Civ. P. 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon. These procedures alert him to the legal theory underlying the defendants' challenge, and enable him meaningfully to respond by opposing the motion to dismiss on legal grounds or by clarifying his factual allegations so as to conform with the requirements of a valid cause of action. This adversarial process also crystallizes the pertinent issues and facilitates appellate review of a trial court dismissal by creating a more complete record of a case. Neitzke v. Williams, 490 U.S. 319, 329-30, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989).

In this case, the Defendants' motion to dismiss gave Plaintiff notice of the legal theories underlying their challenge and accorded him a meaningful opportunity to respond. Viewing Plaintiff's pleadings with the liberality befitting his *pro se* status and taking his well-pleaded factual allegations as true, he has failed to state a claim upon which relief may be granted because he has not set out sufficient factual matter, accepted as true, to state a claim for relief which is plausible on its face. *Iqbal*, 556 U.S. at 678. Nor has he met his burden of overcoming the defense of qualified immunity. The Defendants' motion to dismiss should be granted.

RECOMMENDATION

It is accordingly recommended the Defendants' motion to dismiss (docket no. 34) be granted and the claims against the Defendants Alsobrook, Doddy, Nations, Smith, Wells, Gooden, Clark, McKellar, Townsend, and Alexander be granted and the claims against these Defendants dismissed without prejudice for failure to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). It is further recommended the claims against the Texas Board of Criminal Justice be dismissed without prejudice for lack of subject matter jurisdiction. Finally, it is recommended the claims against the Defendant Todd Harris be dismissed without prejudice as not properly before the Court.

A copy of these findings, conclusions and recommendations shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions, and recommendations must file specific written objections within 14 days after being served with a copy. In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the Magistrate Judge's proposed findings, conclusions, and recommendation where the disputed determination is found. An objection which merely incorporates by reference or refers to the briefing before the Magistrate Judge is not specific, and the district court need not consider frivolous, conclusive, or general objections. *See* Battle v. United States Parole Commission, 834 F.2d 419, 421 (5th Cir. 1987).

Failure to file specific written objections will bar the objecting party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted and adopted by the district court except upon grounds of plain error. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

SIGNED this 5th day of February, 2020.

CAROLINE M. CRAVEN
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHEAL IBENYENWA	§	
Plaintiff,	§	
v.	§	Case No. 5:18-cv-68-RWS-CMC
ELRODDRICK WELLS, ET AL.	§	
Defendants.	§	

ORDER

Before the Court is the Magistrate Judge's Report and Recommendation (Docket No. 56) recommending dismissal of this action without prejudice and Plaintiff's objections thereto (Docket No. 62). Plaintiff is an inmate proceeding *pro se*. For the following reasons, the Court **OVERRULES** Plaintiff's objections, **ADOPTS** the Magistrate Judge's Report and Recommendation and **DISMISSES WITHOUT PREJUDICE** Plaintiff's claims.

I. Background

After filing his original complaint, Plaintiff sought leave to file a first amended complaint, Docket Nos. 17, 18; that request was denied. Docket No. 20. Plaintiff then sought leave to file a second amended complaint, which was granted (Docket Nos. 25, 30). The second amended complaint thus became the operative pleading in the case.

The second amended complaint purported to adopt by reference portions of the original complaint and the first amended complaint; however, the Magistrate Judge observed that "Plaintiff cannot adopt or incorporate allegations from a proposed amended complaint for which leave to file was denied."

In his second amended complaint and his original complaint, Plaintiff alleged he repeatedly filed grievances and was repeatedly subjected to retaliation in various forms, including threats, false

disciplinary cases, failures to schedule him for law library sessions and restrictions as the result of disciplinary convictions. Along with his grievances, Plaintiff also states he wrote letters and inmate request forms verbally abusing unit law library personnel and correctional officers.

Defendants filed a motion to dismiss, arguing Plaintiff's claims do not meet the elements of a retaliation claim because he simply alleges in a conclusory manner that every action which he considers adverse was based on retaliation. They contend Plaintiff's claim that the allegedly retaliatory actions would deter a person of ordinary firmness from exercising his constitutional rights loses meaning in light of the fact Plaintiff filed grievance after grievance over a two-year period. Defendants also invoked the doctrines of qualified and Eleventh Amendment immunity.

Plaintiff filed a response to the motion to dismiss arguing Defendants' legal conclusions are insufficient to sustain a 12(b)(6) motion, his chronology of events should be given the benefit of the inferences to which he is are entitled, his conspiracy claims survive the motion to dismiss because Defendants did not specifically seek their dismissal, the fact he continued to file grievances is irrelevant and a finding of qualified immunity would be premature because Defendants have not answered the lawsuit.

II. The Report of the Magistrate Judge

After setting out the arguments of the parties, the Magistrate Judge discussed the standards for motions to dismiss and claims of retaliation. In applying these standards, the Magistrate Judge determined Plaintiff's conclusory allegations fail to meet the elements of a retaliation claim because they are insufficient to show causation. The Magistrate Judge cited numerous cases holding that temporal proximity is not sufficient to show "but for" causation and that allegations of receipt of disciplinary action after filing grievances did not themselves show any link between the two. The Magistrate Judge concluded Plaintiff's allegations of retaliation were conclusory and failed to state a claim upon which relief may be granted.

With regard to Plaintiff's claims concerning false disciplinary cases, the Magistrate Judge concluded there is no free-standing constitutional right to be free from false disciplinary cases.

Instead, the Magistrate Judge stated according to the Fifth Circuit, there is no due process violation in the filing of an allegedly false disciplinary case if the prisoner has an adequate state procedural remedy with which to challenge the accusations. Because Plaintiff offered nothing to suggest he did not have an adequate state procedural remedy to challenge the disciplinary cases, the Magistrate Judge concluded he did not state a claim upon which relief may be granted in this regard.

Similarly, while Plaintiff complained he was denied access to the law library on a number of occasions, the Magistrate Judge concluded there is no abstract, free-standing right to a law library. Instead, the prisoner must allege he was denied a reasonably adequate opportunity to file non-frivolous legal claims challenging his conviction or conditions of confinement and that he suffered actual harm from this denial. Because Plaintiff did not allege any actual harm, the Magistrate Judge determined he failed to state a claim upon which relief may be granted on this issue.

Plaintiff sued four supervisory defendants—Alsobrook, Alexander, McKellar and Townsend—alleging they violated his First Amendment rights by "failing to properly supervise unit law library staff through deliberate indifference to their reprisals for exercising his rights." The Magistrate Judge stated there is no supervisory liability in § 1983 lawsuits and determined Plaintiff's allegations of failure to supervise were conclusory and not sufficient to state a claim upon which relief may be granted.

With regard to Plaintiff's conspiracy claim, the Magistrate Judge stated the intra-corporate conspiracy doctrine barred this claim because all of the alleged conspirators constituted a single legal entity. In addition, the Magistrate Judge stated Plaintiff's conspiracy claim failed because he did not show an underlying constitutional violation. Finally, the Magistrate Judge determined Defendants were entitled to Eleventh Amendment immunity from claims for monetary damages in their official capacity and qualified immunity from claims for monetary damages in their individual capacities.

III. Analysis of Plaintiff's Objections

Plaintiff first asserts the Magistrate Judge erred in saying his first amended complaint, for which leave to file was denied, was not incorporated into his second amended complaint. He argues the order granting leave to file the second amended complaint effectively permitted incorporation of the first amended complaint. However, the Magistrate Judge correctly determined that a complaint which was never filed cannot be incorporated into a later one. *See Blessett v. Texas Attorney Gen. Galveston Child Support Enforcement Div.*, 756 F. App'x 445 (5th Cir. March 6, 2019) (holding where leave to file an amended complaint was denied, the defendants were under no obligation to respond to the unfiled document).

In addition, Plaintiff's pleadings and documents are a transparent attempt to evade the Court's page limits. When leave to file his first amended complaint was denied, the Court ordered Plaintiff to file a single amended complaint of no more than 30 pages. This comports with Local Rule CV-3(d), which provides that absent leave of the Court, complaints filed in civil rights proceedings shall not exceed 30 pages. Plaintiff's second amended complaint was 20 pages and he sought to incorporate 22 pages from the unfiled first amended complaint. Parties cannot evade the Court's page limit restrictions by incorporating arguments from other pleadings. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993); *Perry v. Director, TDCJ*, Case No. 6:16-cv-1108, 2017 WL 3634189 (E.D. Tex. May 12, 2017), *report and recommendation adopted,* 2017 WL 3623045 (E.D. Tex. Aug. 22, 2017). Plaintiff's objection on this point is without merit.

Next, Plaintiff argues the Magistrate Judge "glossed over" his chronology of events from which he claims retaliation may plausibly be inferred. He argues he filed grievances against defendant Wells on June 7, June 14, July 6 and July 7, 2016 and that Wells publicly rebuked him with specific references to the filing of grievances, saying "you keep filing these grievances and nothing happens, you file one every seven days and nothing happens. If you keep filing these grievances, you will be getting your legal materials delivered to you."

Plaintiff acknowledges he filed grievances every seven days and argues threats of retaliation are sufficient injury if made in retaliation for uses of the grievance procedure, citing an Eighth Circuit case, *Burgess v. Moore*, 39 F.3d 216 (8th Cir. 1994). He does not allege anything ever came of Well's purported threat to "have his legal materials delivered to him."

Instead, Plaintiff argues in effect that he filed a torrent of grievances, during which time he received threats and allegedly false disciplinary cases. He argues this is sufficient to state a claim for retaliation, citing *Jones v. Marshall*, Case No. 08-cv-0563, 2010 WL 234990 (S.D.N.Y. Jan. 19, 2010). There, the court found "the close temporal proximity between plaintiff's grievance and the misbehavior report is consistent with a causal connection." However, the court in *Jones* went on to note the prisoner's extensive disciplinary history and the fact he was found guilty of the charges in the misbehavior report. The court further stated the sole evidence of a causal connection was plaintiff's assertion of a threat to fabricate a disciplinary report if the prisoner filed a grievance. The court noted that the prisoner did not cite to any additional facts in the record to support his allegation and that the claim of the threat was inconsistent with the finding of guilt; thus, the court granted the defendants' motion for summary judgment.

Plaintiff states a disciplinary case against him, filed by defendant Nations, was dismissed, but this fact does not by itself show the case was retaliatory. *See Romero v. Lann*, Case No. 5:06-cv-82, 2007 WL 2010748 (E.D. Tex. July 6, 2007). As the Magistrate Judge stated, the fact Plaintiff filed complaints and then received disciplinary cases does not itself show a chronology from which retaliation may plausibly be inferred. As in *Decker v. Dunbar*, 633 F.Supp.2d 317, 347 (E.D.Tex. 2008), Plaintiff filed so many grievances that it was inevitable that any allegedly adverse action taken against him would happen shortly after. That does not state a claim. If it did, prisoners could insulate themselves from disciplinary action by filing grievances and claiming any subsequent disciplinary action taken against them was taken in retaliation for those grievances. *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). The Magistrate Judge correctly concluded Plaintiff's retaliation claim failed to state a claim upon which relief may be granted because he offered nothing to suggest

a causal connection between his grievances and the allegedly adverse act beyond temporal proximity and some comments which Plaintiff characterizes as threats. *See White v. Fox*, 294 F. App'x 955 (5th Cir. 2008).

Plaintiff argues his allegation that law library staff embarked on a campaign of harassment from June 2016 through November 2018 is more than a conclusory allegation, comprising "credible, plausible facts" showing a failure to supervise. He also contends defendant Alsobrook had "actual notice of the retaliatory disciplinary cases" and is thus liable for failing to terminate a series of acts that he knew or reasonably should have known would cause others to inflict a constitutional injury. However, Plaintiff offers nothing to suggest Alsobrook or any of the other supervisory defendants knew or should have known of the alleged retaliatory motive of the disciplinary cases. While he contends Alsobrook told him "calm down on the I-60's, because if they write you up, I will have to f*** you off" and "you know how officers are, if you f*** with them, they will f*** with you," these two remarks are not sufficient to render Alsobrook liable as a supervisor. Plaintiff's objection on this point is without merit.

Plaintiff likewise asserts his conspiracy claims are based on plausible facts rather than conclusions. He states, after he exercised his "right to criticize Smith with disparaging remarks," Nations, Smith and Wells had a "meeting of the minds" on the same date to harass and retaliate against him. He does not explain how he knows of any such "meeting of the minds" beyond his own speculation that such occurred.

Plaintiff points to the incident in which he received disciplinary cases from both Wells and Nation as evidence that the two officers must have been conspiring against him. He also argues the intra-corporate conspiracy doctrine does not apply because TDCJ employees can conspire when the individuals are acting for their own private purposes. He cites *Marceaux v. Lafayette City-Parish Consol. Gov't*, 921 F.Supp.2d 605, 644 (W.D. La. Jan. 30, 2013). The relevant portion of that case reads as follows: "When an individual acts for his own personal purposes rather than for a corporation or other entity, he becomes an independent actor who can conspire with a corporation

or governmental entity. In this case, however, there are no allegations in the complaint suggesting that any of the individual defendants were acting for their own personal purposes rather than in the course and scope of their employment with the Lafayette police department at any relevant time." *Id.* The Magistrate Judge correctly concluded Plaintiff failed to allege, much less show, Defendants were acting entirely in their personal interests rather than in the course and scope of their employment with TDCJ-CID. *See also Microsoft Corp. v. Big Boy Distribution LLC*, 589 F.Supp.2d 1308, 1322–24 (S.D. Fla. Dec. 3, 2008) (finding the intra-corporate conspiracy doctrine governed investigators' actions within the scope of their employment despite the fact the actions were alleged to be illegal).

The Magistrate Judge also correctly determined Plaintiff did not set out a conspiracy claim because he did not show a constitutional violation occurred. *Hale v. Townsley*, 45 F.3d 914, 920 (5th Cir. 1995). Plaintiff's objection on this ground is without merit.

Plaintiff disclaims any intent to sue Defendants for monetary damages in their official capacities, which the Magistrate Judge correctly stated was foreclosed by the Eleventh Amendment. He argues his claims are not "conclusory" and that in fact, Defendants' invocation of the defense of qualified immunity was itself conclusory. He further contends qualified immunity relies on the subjective good faith and reasonable actions of the defendants, citing *Stephenson v. Gaskins*, 531 F.2d 765, 766 (5th Cir. 1976), but this is no longer the standard for qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987); *Tarver v. City of Edna*, 410 F.3d 745, 750 (5th Cir. 2005). The Magistrate Judge correctly determined Plaintiff has the burden of overcoming qualified immunity and failed to do so. Plaintiff's objection in this regard is without merit.

With regard to his claim of improper withdrawal from his inmate trust account, where he authorized a withdrawal of $19.60 but Wells deducted $25.00, Plaintiff asserts he states a claim and the district court should exercise supplemental jurisdiction. The Magistrate Judge properly concluded the district court should decline to exercise jurisdiction because all of Plaintiff's federal constitutional claims lack merit. Plaintiff's objection on this point is without merit.

Finally, Plaintiff contends his claims against Todd Harris were contained in the first amended complaint, for which leave to file was denied. He asserts Defendants did not object to the inclusion of claims from the first amended complaint in the second amended complaint and suggests the Court could forward a copy of his first amended complaint to him and pre-authorize leave for him to file it. Leave to file the first amended complaint has already been denied, and Plaintiff was given the opportunity to file "a single amended complaint, of no more than 30 pages, setting out all of the claims he wishes to raise, against all of the defendants he wishes to sue." Plaintiff was already granted leave to exceed the page limits when his 23-page original complaint was considered to be incorporated into his 20-page second amended complaint. As the Magistrate Judge explained, Plaintiff cannot incorporate a document which was never filed into his complaint. This objection is without merit.

IV. Conclusion

The Court has conducted a careful *de novo* review of those portions of the Magistrate Judge's proposed findings and recommendations to which the Plaintiff objected. *See* 28 U.S.C. § 636(b)(1). Upon such *de novo* review, the Court has determined the Report of the Magistrate Judge is correct and the Plaintiff's objections are without merit. It is accordingly

ORDERED that the Plaintiff's objections are **OVERRULED** and the Report of the Magistrate Judge (Docket No. 56) is **ADOPTED** as the opinion of the District Court. It is further

ORDERED that the above-titled action is **DISMISSED WITHOUT PREJUDICE**. All relief not previously granted is **DENIED-AS-MOOT**.

SIGNED this 13th day of March, 2020.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHEAL IBENYENWA	§	
Plaintiff,	§	
v.	§	Case No. 5:18-cv-68-RWS-CMC
ELRODDRICK WELLS, ET AL.	§	
Defendants.	§	

ORDER

Pursuant to the Court's order dismissing the case, the Court hereby enters Final Judgment. Accordingly, it is

ORDERED that the above-captioned case is **DISMISSED WITHOUT PREJUDICE**.

All other claims for relief are **DENIED-AS-MOOT**.

The Clerk of the Court is directed to close this case.

It is so **ORDERED**.

SIGNED this 13th day of March, 2020.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

ΑΡΡΕΝΔΙΧ Ε

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHEAL JERRIAL IBENYENWA,	§	
	§	
Plaintiff,	§	**CIVIL ACTION NO. 5:18-CV-00068-RWS**
	§	
v.	§	
	§	
ELRODDRICK B WELLS, ET AL.,	§	
	§	
Defendants.	§	
	§	

ORDER

The Appellant Michael Ibenyenwa moves for leave to proceed *in forma pauperis* on appeal. Docket No. 77. Title 28 U.S.C. §1915(a)(3) provides leave to proceed in forma pauperis on appeal shall be denied if the district court determines the appeal is not taken in good faith — in other words, if the appeal fails to present a non-frivolous issue. *Coppedge v. U.S.*, 369 U.S. 438, 445 (1962); *United States v. Benitez*, 405 Fed. Appx. 930 (5th Cir. 2010). An action is frivolous where there is no arguable legal or factual basis for the claim. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *United States v. Pineda-Arrellano*, 492 F.3d 624, 630 (5th Cir. 2007), *cert. denied*, 552 U.S. 1103 (2008). Similarly, under Federal Rule of Appellate Procedure 24(a)(3)(A), the Appellant is ineligible for *in forma pauperis* status if the Court certifies the appeal is not taken in "good faith." If the district court finds no "legal points arguable on the merits," then an appeal is not taken in "good faith." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983), *reh'g denied*, 719 F.2d 787 (5th Cir. 1983); *see also Wai Leung Chu v. United States*, 353 Fed. Appx. 952 (5th Cir. 2009); *Groden v. Kizzia*, 354 Fed. Appx. 36 (5th Cir. 2009); *Walton v. Valdez*, 340 Fed. Appx. 954 (5th Cir. 2009).

For the reasons stated in the Memorandum Opinion (Docket No. 63) and the Report of the Magistrate Judge which was adopted as the opinion of the Court (Docket No. 56), the Court certifies the Appellant's appeal is not taken in good faith. 28 U.S.C. § 1915(a)(3); Fed. R. App. P. 24(a)(3)(A);

Baugh v. Taylor, 117 F.3d 197, 202 n.21 (5th Cir. 1997) (to comply with Rule 24 and to inform the Court of Appeals of the reasons for its certification, a district court may incorporate by reference its order dismissing an appellant's claims). It is accordingly

ORDERED that the Appellant's motion for leave to proceed *in forma pauperis* on appeal (Docket No. 77) is **DENIED**.

Although this Court has certified that the appeal is not taken in good faith under 28 U.S.C. § 1915(a)(3) and Fed. R. App. P. 24(a)(3)(A), the Appellant may challenge this finding pursuant to *Baugh v. Taylor*, by filing a separate motion to proceed *in forma pauperis* on appeal with the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit, within 30 days of this order. *Baugh*, 117 F.3d at 202. The cost to file a motion to proceed on appeal with the Fifth Circuit is calculated below, and if the Appellant moves to proceed on appeal *in forma pauperis*, the prison authorities will be directed to collect the fees as calculated in this order.

The Appellant Michael Ibenyenwa, TDCJ-CID No. 01638105, is assessed an initial partial appellate fee of $16.00. The total appellate filing fee due is $505.00. If Plaintiff moves to proceed *in forma pauperis* on appeal, the agency having custody of the prisoner shall collect the initial partial appellate fee of $16.00 from the trust fund account or institutional equivalent, when funds are available, and forward it to the clerk of the district court.

Thereafter, Appellant shall pay $489.00, the balance of the filing fee, in periodic installments. Appellant is required to make payments of 20% of the preceding month's income credited to the appellant's prison account until appellant has paid the total filing fee of $505.00. The agency having custody of the prisoner shall collect this amount from the trust fund account or institutional equivalent, when funds are available and when permitted by 28 U.S.C. § 1915(b)(2), and forward it to the clerk of the district court.

If Appellant moves to proceed on appeal *in forma pauperis*, the clerk shall mail a copy of this order to the TDCJ Inmate Trust Fund, Attention Court Collections, P. O. Box 629, Huntsville, Texas, 77342-0629.

So ORDERED and SIGNED this 16th day of April, 2021.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHEAL JERRIAL IBENYENWA,	§	
	§	
Plaintiff,	§	**CIVIL ACTION NO. 5:18-CV-00068-RWS**
	§	
v.	§	
	§	
ELRODDRICK B WELLS, ET AL.,	§	
	§	
	§	
Defendants.	§	

ORDER

The Plaintiff Micheal Ibenyenwa filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged deprivations of his constitutional rights. The named Defendants are: Telford Unit law librarian Elroddrick Wells; correctional officers Tracy Smith, Samuel Nations, and Chad Doddy; assistant warden Michael Alsobrook; Captain Frederick Gooden; Sandra Clark; Carl McKellar; Lonnie Townsend; Wade Alexander; Todd Harris; and the Texas Board of Criminal Justice.

I. PRIOR PROCEEDINGS

The operative pleading is Plaintiff's second amended complaint (Docket No. 26). Plaintiff purports to incorporate his original complaint into the second amended complaint. He also filed a motion for leave to file a first amended complaint, which was denied.

Plaintiff complained of false disciplinary cases, denial of access to the law library, conspiracy, retaliation, and conversion of $5.40. The Defendants filed a motion to dismiss, to which Plaintiff filed a response. After review of the pleadings, the Magistrate Judge issued a Report recommending that the motion to dismiss be granted and the lawsuit dismissed. The Court

determined there is no free-standing right to be free from false disciplinary cases, Plaintiff failed to show harm through denial of access to the law library, Plaintiff failed to state a claim for conspiracy upon which relief may be granted, and Plaintiff's claims of retaliation were conclusory and failed to meet the causation element. The Court also concluded Plaintiff failed to show any basis for supervisory liability, the appropriate forum for Plaintiff's conversion claim is state rather than federal court, and the Defendants are entitled to qualified and Eleventh Amendment immunity. Plaintiff filed objections to the Magistrate Judge's Report, but these were overruled and the lawsuit was dismissed.

II. PLAINTIFF'S MOTION TO ALTER OR AMEND THE JUDGMENT

Plaintiff filed his motion to alter or amend the judgment on April 6, 2020. In this motion, Plaintiff first asserts the district court failed to conduct a *de novo* review of his objections. He specifically refers to an objection to the Magistrate Judge's conclusion that the alleged retaliatory adverse acts failed to establish a deterrent effect, arguing that the focus is on whether "a person of ordinary firmness" would be chilled in exercising his rights, rather than whether the particular plaintiff is chilled.

Plaintiff also refers to an objection concerning the finding of Eleventh Amendment immunity, arguing the Eleventh Amendment does not bar suits for prospective injunctive relief. He also contends the false disciplinary cases he received were themselves retaliatory.

After arguing the unfiled amended complaint should be considered as part of the pleadings, Plaintiff contends threats alone are sufficient to qualify as an "adverse act" for purposes of a retaliation claim, citing a pre-Prison Litigation Reform Act decision from the Eighth Circuit called *Burgess v. Moore*, 39 F.3d 216 (8th Cir. 1994).

Plaintiff contends he met the standards for stating a claim set out in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) because he did not rely solely on temporal proximity between the protected speech and the adverse acts but the defendant Nations' "own statements in opposition to the protected speech and plausibly retaliatory motive underlying the false disciplinaries, threats to inflict bodily harm, etc." (Docket No. 65 at 5). He states he specifically alleged the defendant Alsobrook had actual notice of the retaliatory disciplinary cases and the obstruction of legal access for exercising his rights. Plaintiff likewise argues the plausibility standard requires no subsidiary facts because it is plausible that a warden would know of mistreatment inflicted by those under his command, citing *Iqbal v. Hasty*, 490 F.3d 143 (2nd Cir. 2007), *reversed by Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

Plaintiff contends he has demonstrated "paralleled activity" sufficient to show a conspiracy. He states the district court ignored his rebuttal to the intra-corporate conspiracy doctrine in that he demonstrated the officials were acting outside the scope of their employment and maintains the court erroneously concluded his conspiracy allegations were conclusory."

With regard to qualified immunity, Plaintiff complains the Court committed manifest error in ignoring his objection that the Defendants offered only "general, broad propositions of entitlement" which are not sufficient to invoke qualified immunity.

Finally, Plaintiff complains the Court did not accept his third amended complaint, but instead sent it back with a notation that the case was closed. As proof of this claim, he attaches an envelope addressed to the Clerk of the Court, which has the notation "return to sender as 5:18cv68 is closed" written on it in an unknown hand. He also has an envelope addressed to him from the Court, on which appears a hand-written notation saying "rec'd 3/19/2020."

III. DISCUSSION

Relief under Rule 59(e) is appropriate where there has been an intervening change in controlling law, the movant presents newly discovered evidence which was previously unavailable, or to correct a manifest error of law or fact. *Schiller v. Physicians Res. Grp. Inc.*, 342 F.3d 563, 567 (5th Cir.2003). A Rule 59(e) motion cannot be used to raise arguments could and should have been made before the judgment issued. *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003).

Plaintiff has not shown an intervening change in controlling law or newly discovered evidence which was unavailable. Nor has he demonstrated a manifest error of law or fact. Although he claims the Court did not conduct a *de novo* review, the Court entered a lengthy and thorough opinion discussing *de novo* each of Plaintiff's objections to the Magistrate Judge's Report.

The fact Plaintiff disagrees with the outcome of his case does not show the Court failed to conduct a *de novo* review.

Much of Plaintiff's Rule 59 motion consists of arguments which could and should have been made before the final judgment was entered. Plaintiff cannot bring these contentions within the scope of Rule 59 by the simple expedient of arguing that the failure to agree with his views amounts to "a manifest error of law or fact." The Magistrate Judge correctly determined Plaintiff's unfiled proposed amended complaint was not before the Court and could not be incorporated into later pleadings, Plaintiff's retaliation and conspiracy claims were conclusory, and the Defendants were entitled to qualified immunity. Docket No. 56.

Plaintiff also claims he submitted a "third amended complaint" on March 13, 2020, after the Report of the Magistrate Judge issued in February, but it was returned by the Clerk's Office because "the case was already closed." The Clerk of the Court does not return pleadings merely because a case is closed — otherwise, parties could never file notices of appeal or post-judgment motions such

as the one currently under consideration. Mail logs furnished by TDCJ do not show Plaintiff mailed any documents to the Court on March 13, 2020. Plaintiff's claim that he sought to file a "third amended complaint" but this was returned by the Clerk because his case was closed is not credible and provides no basis for relief under Rule 59(e).

In any event, Plaintiff had ample opportunity to amend his complaint in response to the motion to dismiss, which was filed in March of 2019. Even if he submitted his proposed third amended complaint on March 13, 2020, as he claims but the TDCJ mail logs do not show, the unjustified delay in submitting this pleading would warrant denial of leave to file. Furthermore, he cannot amend his complaint after the lawsuit has been dismissed. *Aaes v. 4G Companies*, 558 F.App'x 423, 2014 U.S. App. LEXIS 4765, 2014 WL 968546 (5th Cir., March 13, 2014), *citing Whitaker v. City of Houston*, 963 F.2d 831, 832 (5th Cir. 1992); *see also U.S. v. Memphis Cotton Oil Co.*, 288 U.S. 62, 72, 53 S.Ct. 278, 77 L.Ed. 619 (1933) (in a lawsuit after the complaint has been dismissed, "there is no longer anything to amend."). Leave to file this third amended complaint would have been denied even had it been received by the Court and docketed. Plaintiff has shown no basis upon which to alter or amend the judgment, and it is accordingly

ORDERED that the Plaintiff's Rule 59 motion to alter or amend the judgment (Docket No. 65) is **DENIED**. It is further

ORDERED that the Plaintiff's motion for a "standing order on authorities" (Docket No. 67) is **DENIED**.

SIGNED this 26th day of February, 2021.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHEAL JERRIAL IBENYENWA,	§	
	§	
Plaintiff,	§	**CIVIL ACTION NO. 5:18-CV-00068-RWS**
	§	
v.	§	
	§	
ELRODDRICK B WELLS, ET AL.,	§	
	§	
Defendants.	§	
	§	

ORDER

The Plaintiff Michael Ibenyenwa filed this civil rights lawsuit under 42 U.S.C. § 1983 complaining of alleged deprivations of his constitutional rights. On March 13, 2020, the lawsuit was dismissed without prejudice for failure to state a claim upon which relief may be granted on March 13, 2020. Docket No. 63. Plaintiff moved to alter or amend the judgment under Fed. R. Civ. P. 59(e). Docket No. 65. This motion was denied on February 26, 2021. Docket No. 73.

Plaintiff now moves for relief from judgment under Fed. R. Civ. P. 60(b). Docket No. 74. In his motion, Plaintiff says he "continues to raise those same manifest errors of law and fact" which he presented in his Rule 59(e) motion.

After setting out the standards applicable to Rule 60(b) motions, Plaintiff argues the Court erred in denying him leave to file his first amended complaint and in not considering the claims raised in that document. He also complains that the Court "refused to permit him an opportunity to correct the error" because he was denied the opportunity to file a third amended complaint which he claims to have mailed on March 13, 2020.

Plaintiff contends the Court erred in granting Eleventh Amendment immunity to the Texas Board of Criminal Justice on a claim for prospective injunctive relief. He further argues the Court erred in granting the Defendants' "broad, expansive, and generalized" Rule 12(b)(6) motion and in

granting the Defendants' "insufficient and broad invocation of qualified immunity." Plaintiff maintains the Court erred in allegedly requiring him to actually show a chilling effect in order to maintain his retaliation claim. Finally, Plaintiff asserts that the District Court erred in failing to conduct a "full *de novo* review" of his objections and in denying his Rule 59(e) motion. He argues each of these alleged errors amounts to a "manifest error of law or fact."

I. DISCUSSION

In a Rule 60(b) motion for relief from judgment, the movant must show that he is entitled to relief from judgment because of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud, misconduct, or misrepresentation of an adverse party; (4) that the judgment is void; (5) that the judgment has been satisfied; or (6) any other reason justifying the granting of relief from the judgment. Relief will be granted only in "unique circumstances," and the district court has considerable discretion in determining whether the movant has met any of the Rule 60(b) factors. *Pryor v. U.S. Postal Service*, 769 F.2d 281, 287 (5th Cir. 1985); *Teal v. Eagle Fleet, Inc.*, 933 F.2d 341, 347 (5th Cir. 1991).

Plaintiff fails to show he is entitled to relief under any of the six factors set out in Rule 60(b). As he correctly notes, his Rule 60(b) motion simply repeats allegations previously presented to and ruled on by the Court. The Fifth Circuit has held that "a Rule 60(b) motion is not an opportunity to rehash prior arguments." *Lyles v. Seacor Marine, Inc.*, 555 F.App'x 411 (5th Cir. February 19, 2014) (citing *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 269 (5th Cir. 2007)).

The fact Plaintiff disagrees with the resolution of his claims does not show a "manifest error of law or fact." Although he claims the trial court committed "manifest error" in denying the filing of his first amended complaint, Plaintiff's motion for leave to file his first amended complaint was denied on December 6, 2018 because the proposed amended complaint far exceeded the page limits set out in the Local Rules of Court for the Eastern District of Texas. Litigants cannot evade page limit

restrictions by incorporating by reference arguments in other pleadings. *Perry v. Director, TDCJ-CID*, Civil Action No. 6:16cv1108, 2017 WL 3634189 (E.D.Tex. May 12, 2017), *Report adopted at* 2017 WL 3623045 (E.D. Tex. Aug. 22, 2017), *aff'd* slip op. no. 17-41010 (5th Cir. October 22, 2018); *Medley v. Stephens*, Civil Action No. 2:07cv51, 2013 U.S. Dist. LEXIS 110496 (N.D. Tex.), *Report adopted at* 2013 U.S. Dist. LEXIS 110347, 2013 WL 3989070 (N.D. Tex., August 5, 2013) (citing *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993)).

The order denying leave to file gave Plaintiff until January 11, 2019 in which to file a single amended complaint setting out his claims, and he filed his second amended complaint on December 21, 2018. Plaintiff was plainly able to amend his complaint to present his claims and his argument that he was unable to do so fails to show any basis for Rule 60(b) relief.

Second, Plaintiff asserts the Court erred in ruling the Texas Board of Criminal Justice, a state agency, has Eleventh Amendment immunity from claims for prospective injunctive relief. The Supreme Court has held state agencies are immune as entities from suits for prospective injunctive relief. *Alabama v. Pugh*, 438 U.S. 781, 782 (1978); *Clay v. Texas Women's University*, 728 F.2d 714, 716 (5th Cir. 1984). Furthermore, Plaintiff has offered nothing to suggest he is entitled to prospective injunctive relief even had he named a proper party in seeking such relief. This claim offers no basis for relief under Rule 60(b).

Third, Plaintiff contends the Court did not consider all his pleadings and documents, pointing to the hundreds of pages of grievances and disciplinary cases attached to his original complaint. The Magistrate Judge did not summarize each one of Plaintiff's voluminous grievances, but observed in the Report that Plaintiff had filed a large number of grievances. The relevant question was not the substance of each of Plaintiff's individual grievances but whether he adequately stated a claim for retaliation for the filing of these grievances, which he did not. He does not point to any of the

documents allegedly not considered which would justify setting aside the final judgment. This claim fails to show any basis for relief under Rule 60(b).

In his fourth ground for Rule 60(b) relief, Plaintiff argues the Court committed a "manifest error of law" in refusing to accept the incorporation of the amended pleading for which leave to file was denied. As discussed above, the order denying leave to file the amended complaint gave Plaintiff the opportunity to file a proper amended complaint. He then filed a second amended complaint which was deemed the operative pleading. A pleading for which leave to file was denied cannot be incorporated into a later pleading. *See Blessett v. Texas Attorney General Galveston Child Support Enforcement Division*, 756 F.App'x 445 (5th Cir. 2019); *Funk v. Stryker Corp.*, 631 F.3d 777, 779 (5th Cir. 2011). This claim fails to show any basis for Rule 60(b) relief.

In his fifth ground for Rule 60(b) relief, Plaintiff complains the Court did not give him the opportunity to file a third amended complaint. The Court will assume Plaintiff's recounting of events is accurate — he states he mailed this pleading on or about March 13, 2020, and it was received by the Court and returned to him on March 19, 2020.

The lawsuit was dismissed on March 13, 2020. In the order of dismissal, the Court thoroughly discussed Plaintiff's objections and conducted a *de novo* review of the issues he raised. Once final judgment was entered, Plaintiff could no longer amend his complaint. *Aaes v. 4G Companies*, 558 F.App'x 423, 2014 U.S. App. LEXIS 4765, 2014 WL 968546 (5th Cir., March 13, 2014) (citing *Whitaker v. City of Houston*, 963 F.2d 831, 832 (5th Cir. 1992)); *see also U.S. v. Memphis Cotton Oil Co.*, 288 U.S. 62, 72, 53 S.Ct. 278, 77 L.Ed. 619 (1933) (in a lawsuit after the complaint has been dismissed, "there is no longer anything to amend."). Thus, had the complaint been docketed on March 19, 2021, when Plaintiff states the Court received it, leave to file would have been denied. Furthermore, Plaintiff says he mailed the proposed third amended complaint on March 13, 2020, which was almost a year and three months after he filed his amended complaint in December of 2018 and a

year after Defendants moved to dismiss in March of 2019. Even assuming the amended complaint had been docketed on March 19 and the Court had construed it as having been filed prior to the entry of final judgment — although mailed on the same day as the judgment — leave to file the proposed amended complaint would have been denied because of this extraordinary delay. *See Smith v. Kimbhal*, 421 F.App'x 377, 2011 WL 1304862 (5th Cir., April 6, 2011), *citing Test Masters Educational Services Inc. v. Singh*, 428 F.3d 559, 576 n.8 (5th Cir. 2005) (district court did not abuse its discretion in denying leave to amend where the court determined allowing an amendment would result in undue delay because the defendants had already filed answers and motions to dismiss). Whether viewed under the standards applicable to Rule 59(e) or Rule 60(b) motions, this contention fails to show any basis for relief.

Sixth, Plaintiff asserts the Court erred by granting the Defendants' "broad, expansive and generalized" motion to dismiss. He asserts this amounted to a "mistake" under Rule 60(b)(1) and complains the Defendants' motion to dismiss made "a facial attack, with no extrinsic evidence." Motions to dismiss under Fed. R. Civ. P. 12(b)(6) do not require evidentiary support. In addition, this is not the type of "mistake" contemplated by Rule 60(b). *McMillan v. Mbank Fort Worth*, 4 F.3d 362, 367 (5th Cir. 1993) (citing *Chick Kam Koo v. Exxon Corp.*, 699 F.2d 693, 695-96 (5th Cir.), *cert denied*, 464 U.S. 826 (1983)); *Gary W. v. State of Louisiana*, 622 F.2d 804, 805 (5th Cir. 1982). This ground for Rule 60(b) relief is without merit.

Next, Plaintiff asserts the Court erred by "deciding Plaintiff must show his speech was actually chilled" in order to set out a retaliation claim. He also characterizes this as a "mistake" under Rule 60(b)(1). In fact, the Court made no such holding; the Magistrate Judge observed that Plaintiff's allegations of a chilling effect were wholly conclusory and that Plaintiff made the same assertion of a chilling effect for each and every one of the actions taken against him, even such actions as a verbal reprimand or harsh words. *See McLin v. Ard*, 866 F.3d 682, 697 (5th Cir. 2017) (conclusory

allegations of chilling effect are not sufficient). This contention fails to show any basis for Rule 60(b) relief.

In his eighth ground for Rule 60(b) relief, Plaintiff complains the Court granted the Defendants' "insufficient and broad invocation of qualified immunity" and in failing to independently assess each Defendants' entitlement to the defense. He asserts this was a "mistake" under Rule 60(b)(1).

The Fifth Circuit has explained where a defendant invokes qualified immunity, the plaintiff then bears the burden of negating the defense and cannot rest on conclusory allegations and assertions, but must demonstrate genuine issues of material fact regarding the reasonableness of the officer's conduct. *Rice v. ReliaStar Life Ins. Co.*, 770 F.3d 1122, 1130 (5th Cir. 2014). In the present case, Plaintiff presented only conclusory allegations which were insufficient to survive the motion to dismiss. *See Orr v. Copeland*, 844 F.3d 484, 490 (5th Cir. 2016). There is no requirement that the invocation of qualified immunity must itself rely on specific facts. This claim does not set out any valid basis for Rule 60(b) relief.

Plaintiff next contends the District Court did not afford him a "full *de novo* review" of his objections. The Court conducted a thorough *de novo* review of Plaintiff's objections and concluded that Plaintiff's pleadings failed to satisfy the standards of *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009), for stating a claim upon which relief may be granted. Plaintiff's claim in this regard fails to set out a valid basis for Rule 60(b) relief.

Finally, Plaintiff contends the Court erred in denying his motion to alter or amend the judgment. He argues that the Court erred in ruling Plaintiff could not seek leave to file an amendment after the lawsuit has been dismissed, stating that where a case has been dismissed, a plaintiff may request leave to amend only by appealing or seeking relief from judgment under Rule 59 or Rule 60. As explained above, such leave would not have been granted even if the proposed amended complaint

had been docketed on March 19 and then construed as having been filed prior to the entry of final judgment. Plaintiff offers no explanation for the lengthy delay in filing the proposed amended complaint, nor does he show that denial of leave to file this proposed amendment, after the passage of a year since the filing of the Defendants' motion to dismiss, would have been an abuse of discretion or otherwise entitle him to Rule 60(b) relief. It is accordingly

ORDERED that the Plaintiff's motion for relief from judgment under Rule 60(b) (Docket No. 74) is **DENIED.**

So ORDERED and SIGNED this 16th day of April, 2021.

Robert W Schroeder III

ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHEAL IBENYENWA, **Plaintiff,**	§	
	§	**CIVIL ACTION NO. 5:18cv68**
v.	§	
ELRODDRICK WELLS, ET AL. **Defendants.**	§	

DEFENDANTS WELLS, SMITH, NATIONS, DODDY, ALSOBROOK, GOODEN, CLARK, MCKELLAR, TOWNSEND, ALEXANDER, AND THE TEXAS BOARD OF CRIMINAL JUSTICE'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

Defendants Elroddrick Wells, Tracey Smith, Samuel Nations, Chad Doddy, Michael Alsobrook, Freddrick Gooden, Sandra Clark, Carl McKellar, Lonnie Townsend, Wade Alexander, and the Texas Board of Criminal Justice (collectively "Defendants"), through the Attorney General for the State of Texas, files this Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) in response to the Court's Order to Answer. ECF No. 30.

STATEMENT OF THE CASE

Plaintiff Micheal Ibenyenwa is an inmate incarcerated at the Texas Department of Criminal Justice (TDCJ) Polunsky Unit, in Livingston, Texas. ECF No. 26. Ibenyenwa's claims arise while he lived at the Telford Unit in New Boston, Texas. *Id.; See also* ECF No. 18-1 at 6-27.[1] The bulk of Ibenyenwa's 43-page complaint are claims pursuant to 42 U.S.C. § 1983 alleging that Defendants retaliated against him for exercising his First Amendment right to use the prison grievance system, claiming it has the capable effect of chilling his protected speech. ECF No. 26; ECF No. 18-1 at 6-27.

[1] As per the Court's order, Ibenyenwa was allowed to file an amended complaint in excess of 30 pages for a total of 43 pages. ECF No. 25; ECF No. 30. In his second amended complaint, Ibenyenwa incorporates by reference a list of defendants mentioned is his first amended complaint. ECF No. 26 at 5. Additionally, Ibenyenwa incorporates by reference 21 pages from his first amended complaint of additional facts to include in his claim. ECF No. 26 at 16. Out of abundance of caution, the Defendants will address all of these claims.

His voluminous, long, and convoluted retaliation complaint generally states: (1) Ibenyenwa files numerous grievances, (2) claims Defendants retaliated against him, (3) claims the retaliation chilled his right to protected speech, and (4) then subsequently files more grievances. ECF No. 26; ECF No. 18-1 at 6-27. Ibenyenwa also alleges Defendant Elroddrick Wells violated his due process rights under the Fourteenth Amendment for deducting $25 dollars from Ibenyenwa's Inmate Trust Fund Account, when Ibenyenwa only authorized Wells to deduct $19.60. ECF No. 26 at 10-11. He seeks nominal, punitive, and compensatory damages. ECF No. 26 at 16-17. He also seeks an injunction against the Texas Board of Criminal Justice. *Id.* According to the pleadings, each defendant is being sued in their individual and official capacities. *Id.*

Amongst the 11 defendants sued, Elroddrick Wells is a librarian at the Telford Unit; Tracy Smith, Samuel Nations, and Chad Doddy are Correctional Officers at the Telford Unit; Michael Alsobrook is an Assistant Warden at the Telford Unit; Freddrick Gooden, Captain at Telford Unit; Sandra Clark, Captain at Telford Unit; Assistant Regional Director Carl McKellar; Telford's Assistant Warden Lonnie Townsend; Major Wade Alexander with Telford Unit; and The Texas Board of Criminal Justice in its official capacity. ECF No. 26 at 4-5; ECF No. 18-1 at 2-3.

MOTION TO DISMISS PURSUANT TO RULE 12(b)(1)

I. Ibenyenwa's claims for damages against Defendants in their official capacity are barred by the Eleventh Amendment.

Ibenyenwa sues Defendants in their official capacity, however, his claims are barred by the Eleventh Amendment and should be dismissed. Under § 1983, neither a state nor a state official sued in his official capacity for damages is a "person" for purposes of liability. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 66 (1989). Furthermore, a suit for damages against a state official acting in his official capacity is not a suit against that individual, but a suit against the state. *Id.* The Eleventh Amendment to the United States Constitution bars such suits against a state unless the state has waived its immunity or Congress has abrogated immunity pursuant to its power under § 5 of the Fourteenth

Amendment. *Id.* Neither Congress nor the State of Texas has waived Eleventh Amendment immunity with regard to 42 U.S.C. § 1983.

Although Section 1983 provides a federal forum to remedy constitutional rights violations, "it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." *Id.* Presently, Ibenyenwa's allegations concern matters occurring within the scope of Defendants' employment with TDCJ, a state agency. Thus, a suit against them for money damages in their official capacity is barred under the Eleventh Amendment and must be dismissed for lack of jurisdiction.

II. Ibenyenwa's claims for injunctive relief against Texas Board of Criminal Justice in their official capacity are barred by the Eleventh Amendment.

In *Ex Parte Young*, the Supreme Court set forth a narrow exception to Eleventh Amendment immunity allowing prospective injunctive relief through official capacity actions. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908). To determine whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Maryland, Inc. v. Public Service Com'n of Maryland*, 535 U.S. 635, 645 (2002) (internal citations omitted).

There are four elements a plaintiff must establish to secure a preliminary injunction:

> (1) A substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest.

Janvey v. Alguire, 647 F.3d 585, 595 (5th Cir. 2011) (citing *Byrum v. Landreth*, 566 F.3d 442, 445 (5th Cir. 2009)). "For a permanent injunction to issue the plaintiff must prevail on the merits of his claim and establish that the equitable relief is appropriate in all other respects." *Watson v. Quarterman*, No. H-06-3260, 2008 WL 552447, at *4 (S.D. Tex. – Houston Feb. 27, 2008) (citing *Dresser-Rand Co. v. Virtual*

Automation, Inc., 361 F.3d 831, 847 (5th Cir. 2004) (citing *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987) (recognizing that the standard for a permanent injunction is essentially the same as for a preliminary injunction with the exception that the plaintiff must show actual success on the merits rather than a mere likelihood)). "Emphasizing its extraordinary character, the Fifth Circuit has cautioned that an injunction 'should not be granted unless the party seeking it has 'clearly carried the burden of persuasion' *on all four requirements.*'" *Id.* (emphasis added) (citing *PCI Transportation Inc. v. Fort Worth & Western Railroad Co.*, 418 F.3d 535, 545 (5th Cir. 2005) (citations omitted)).

Ibenyenwa seeks a permanent injunction against the Texas Board of Criminal Justice, "enjoining it from enforcing disciplinary rules and the handbook rules against Ibenyenwa." ECF No. 26 at 16. For the reasons articulated below, Ibenyenwa will not be successful on the merits of his claim, nor does he face a substantial threat of irreparable injury if the injunction is not issued. Ibenyenwa has not carried the burden as to all four elements of an injunction, therefore the Texas Board of Criminal Justice is entitled to Eleventh Amendment immunity and any claims for injunctive relief should be denied.

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

I. Standard of Dismissal Under Rule 12(b)(6)

A party is entitled to dismissal under Federal Rule of Civil Procedure 12(b)(6) when an opposing party fails to state a claim upon which relief may be granted. "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 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see also *City of Clinton, Ark. v. Pilgrim's Pride Corp.*, 632 F.3d 148, 152–53 (5th Cir. 2010). "[F]acial plausibility" exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). Thus, while the complaint need not contain "detailed

factual allegations," it must go beyond mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555. "[D]etermining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense." *Iqbal*, 556 U.S. at 679.

II. Ibenyenwa does not set forth facts sufficient to hold a supervisory official liable under Section 1983.

Ibenyenwa alleges that Defendants "Michael Alsobrook, Wade Alexander, Carl McKellar, and Lonnie Townsend violated Ibenyenwa's First Amendment right in failing to properly supervise Telford Unit law library staff through deliberate indifference to their reprisals for exercising his rights." ECF No. 26 at 16.

It is well-settled that "there is no vicarious or respondeat superior liability of supervisors under § 1983." *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 425 (5th Cir. 2006). Instead, "[a] supervisory official may be held liable under § 1983 only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 435 (5th Cir. 2008).

In order to plead supervisor liability based on a failure to supervise, a plaintiff must show "(1) the supervisor either failed to supervise or train the subordinate official; (2) a causal link exists between the failure to train or supervise and the violation of the plaintiff's rights; and (3) the failure to train or supervise amounts to deliberate indifference." *Gates*, 537 F.3d at 435 (quoting *Estate of Davis*, 406 F.3d at 381). "'Deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick v. Thompson*, 563 U.S. 51, 61 (2011) (cleaned up). "To satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result

in a constitutional violation." *Estate of Davis*, 406 F.3d at 381 (5th Cir. 2005) (quoting *Cousin v. Small*, 325 F.3d 627, 637 (5th Cir. 2003)).

Ibenyenwa makes only conclusory allegations, not based on any specific facts, regarding the personal involvement of the supervisory officials. ECF No 26 at 16. Ibenyenwa fails to allege facts showing that the inadequacy of the training or supervision will obviously result in staff allegedly retaliating against him. Even so, a supervisor is not liable for failure to train unless the plaintiff alleges with specificity how a particular training program is defective. *See Roberts v. City of Shreveport*, 397 F.3d 287, 293 (5th Cir. 2005). As a result, he fails to allege facts showing that Defendants Alsobrook, Alexander, McKellar, and Townsend were deliberately indifferent. *See Brewster v. Dretke*, 587 F.3d 764, 770 (5th Cir. 2009).

III. Ibenyenwa cannot state a due process violation as the State has furnished an adequate post-deprivation remedy.

With respect to a due course of law claim, it is well established that acts by officials of a state prison that result in loss of property do not present constitutional violations as long as the prisoners have an adequate post-deprivation remedy. *Hudson v. Palmer*, 468 U.S. 517, 534 (1984); *see also Aguilar v. Chastain*, 923 S.W.2d 740, 744 (Tex. App.—Tyler 1996, writ denied) (holding no due process violation alleged). The Government Code provides such a remedy. *Aguilar,* 923 S.W.2d at 744; *see* TEX. GOV'T CODE ANN. §§ 501.007, 501.008 (West 2012) (authorizing maximum payment of $500 as remedy for inmate's lost or damaged property and outlining specific "inmate grievance" procedures to be completed to exhaust administrative remedies). The maximum $500 remedy afforded by section 501.007 is "the exclusive administrative remedy available to an inmate for a claim for relief" against the Department "that arises while the inmate is housed" by the Department "other than a remedy provided by writ of habeas corpus." TEX. GOV'T CODE ANN. §§ 501.007 -.008.

Ibenyenwa claims Defendant Elroddrick Wells deducted $25.00 from Ibenyenwa's Inmate Trust Fund Account when Ibenyenwa only authorized Wells to deduct $19.60. ECF No. 26 at 10-11. To the

extent Ibenyenwa claims his money was unlawfully deducted, Texas provides a meaningful and adequate remedy to prisoners by way of the prison grievance system and by common law action of conversion. Thus, Ibenyenwa is afforded due process and his complaint fails to state a claim upon which relief may be granted and must be dismissed.

IV. Ibenyenwa cannot meet the necessary elements of a retaliation claim.

Ibenyenwa claims that Defendants Tracey Smith, Samuel Nations, Chad Doddy, Freddrick Gooden, and Sandra Clark generally retaliated against him for filing grievances. Between June 7, 2016 and February 28, 2018, Ibenyenwa regularly filed grievances, claimed retaliation every time he is unhappy with the result, then subsequently stated "the adverse actions were capable of chilling a person of ordinary firmness from further exercising future First Amendment activities," and then proceeds to file more grievances. *See* generally ECF No. 26; ECF No. 18-1 at 6-27. The Fifth Circuit has held that the elements of a retaliation claim under Section 1983 are the invocation of a specific constitutional right, the defendants' intent to retaliate against the plaintiff for his exercise of that right, a retaliatory adverse act, and causation, which is a showing that but for the retaliatory motive, the action complained of would not have occurred. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997). This requirement places a heavy burden upon inmates, because mere conclusory allegations will not suffice; instead, the inmate must produce direct evidence of retaliation or, the more probable scenario, a chronology of events from which retaliation may plausibly be inferred. *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). The relevant showing must be more than the prisoner's personal belief that he is the victim of retaliation. *Johnson*, 110 F.3d at 310 (citing *Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995)).

Permitting grievances to be direct evidence of retaliation would effectively preclude officers from ever citing an inmate for misconduct without facing retaliation allegations. *See, e.g., Woods,* 60 F.3d at 1166 ("The prospect of endless claims of retaliation on the part of inmates would disrupt prison

officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions."). The trial court has an interest in ensuring that intent of retaliation be satisfied by more than mere allegations so inmates cannot "inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around them." *Id.*

To the extent Ibenyenwa alleges Captain Gooden and Captain Clark retaliated against him, his claims shall fail for failing to meet the elements of retaliation. For example, Ibenyenwa alleges "on or about June 25, 2017, Captain Goodwin heard the case and dismissed it. The above adverse actions were capable of chilling a person of ordinary firmness from further exercising future First Amendment activities." ECF No. 26 at 10. And another example, Ibenyenwa alleges "on or about April 9, 2018, Captain Sandra Clark accepted the disciplinary charges and found Ibenyenwa guilty." ECF No. 18-1 at 13. These mere conclusory allegations fail to show how the Captains acted with an intent to retaliate, or show but for their retaliatory motive, Ibenyenwa would not have been found guilty in his disciplinary case. *See Geiger v. Jowers*, 404 F.3d 371, 374 (5th Cir. 2005) (holding inmates do not have a federally protected liberty interest in having ... grievances resolved to their satisfaction). Ibenyenwa claims these alleged "adverse actions were capable of chilling a person of exercising future First Amendment activities," but as demonstrated by his fearless use of the grievance procedure, his First Amendment rights have not been chilled. ECF No. 26; ECF No. 18-1 at 6-27.

To the extent Ibenyenwa claims retaliation against Defendants Smith, Nations, and Doddy, his claims should fail because he fails to put forth direct evidence of retaliation and has failed to show a chronology of events from which retaliation may be inferred. Throughout Ibenyenwa's voluminous 40-page complaint, he consistently filed grievances between June 2016 and February 2018, claiming retaliation after each and every grievance he files, and proclaims it is "chilling his future First Amendment activities." ECF No. 26; ECF No. 18-1 at 6-27. Ibenyenwa's argument that the alleged

retaliation is capable of deterring a person of ordinary firmness from further exercising his constitutional rights, loses merit when he continues filing grievance after grievance for two years. ECF No. 26; ECF No. 18; *Morris v. Powell*, 449 F.3d 682 (5th Cir. 2006) (holding retaliation against a prisoner is actionable only if it is capable of deterring a person of ordinary firmness from further exercising his constitutional rights). *See Spicer v. Collins*, 9 F.Supp.2d 673, 686 (E.D. Tex. 1998) (holding "Plaintiff has raised a number of instances of alleged retaliation. He claims that nearly every action allegedly taken by the defendants was motivated by a desire to retaliate against him... plaintiff has failed to either show direct evidence of motivation or allege a chronology of events from which retaliation may be inferred. Therefore, his retaliation claims must also be dismissed."). Like the Plaintiff in *Spicer*, Ibenyenwa's mere allegations that every action allegedly taken by Defendants was motivated by a desire to retaliate against him for submitting grievances, is insufficient to show a chronology of events from which retaliation may be inferred. *See, e.g., Woods,* 60 F.3d at 1166 ("The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.").

As a result, Ibenyenwa's mere conclusory allegations that the officers retaliated against him for using the grievance process is without merit and should be dismissed with prejudice.

V. Ibenyenwa's stated facts fail to overcome Defendants' entitlement to the presumption of qualified immunity.

To the extent that Ibenyenwa sues Defendants in their individual capacities, his claims do not overcome their entitlement to qualified immunity. Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The plaintiff fails to satisfy his burden with conclusory allegations of wrongdoing. *Geter v. Fortenberry*, 849 F.2d 1550, 1553 (5th Cir. 1988). In determining whether the plaintiff has successfully overcome the qualified immunity defense, the court must first determine if the plaintiff has alleged the violation of

any constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 232-34 (1991). If the plaintiff has not done so, the court need not further address the question of qualified immunity. *Id.*

If the court does find that the plaintiff has alleged the violation of a clearly established constitutional right, the court must determine if defendants' action was "objectively reasonable" as "assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993). Whether an official's conduct was objectively reasonable is a question of law for the court, not a matter of fact for the jury. *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999). The defendants' acts are held to be objectively reasonable unless all reasonable officials in the defendants' circumstances would have then known that the defendants' conduct was constitutionally violative. *Thompson v. Upshur Cty, TX*, 245 F.3d 447, 457 (5th Cir. 2001). It is the plaintiff's burden to allege facts sufficient to demonstrate that no reasonable officer could have believed his actions were proper. *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994).

As set above, Ibenyenwa has not cleared the first hurdle as he fails to allege any constitutional violation by Defendants and thus, their entitlement to qualified immunity remains intact. Even assuming, *arguendo*, that Defendants actions could somehow be construed as violative of Ibenyenwa's constitutional rights (first prong), they are still entitled to qualified immunity as they acted objectively reasonable (second prong) by addressing Ibenyenwa's grievances.

CONCLUSION

Defendants respectfully request that this court dismiss Ibenyenwa's claims against them.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

BRANTLEY STARR
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

SHANNA E. MOLINARE
Assistant Attorney General
Chief, Law Enforcement Defense Division

/s/ Jonathan M. Pena
JONATHAN M. PENA
Assistant Attorney General
Texas State Bar No. 24110207

Law Enforcement Defense Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2080 / Fax (512) 370-9994
Jonathan.Pena@oag.texas.gov

ATTORNEY FOR WELLS, SMITH, NATIONS, DODDY, ALSOBROOK, GOODEN, CLARK, MCKELLAR, TOWNSEND, ALEXANDER, AND TEXAS BOARD OF CRIMINAL JUSTICE

Notice of Electronic Filing

I, **JONATHAN M. PENA**, Assistant Attorney General of Texas, do hereby certify that I have electronically submitted for filing a true copy of the above **Defendants Wells, Smith, Nations, Doddy, Alsobrook, Gooden, Clark, McKellar, Townsend, Alexander, and Texas Board of Criminal Justice's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6)** in accordance with the Electronic Case Files System of the Eastern District of Texas on March 7, 2019.

/s/ Jonathan M. Pena
JONATHAN M. PENA
Assistant Attorney General

Certificate of Service

I, **JONATHAN M. PENA**, Assistant Attorney General of Texas, certify that a true copy of the above **Defendants Wells, Smith, Nations, Doddy, Alsobrook, Gooden, Clark, McKellar, Townsend, Alexander, and Texas Board of Criminal Justice's Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6)** has been served by placing it in United States Mail, postage prepaid, on March 7, 2019, addressed to:

Micheal Ibenyenwa
TDCJ-CID #1638105
Polunksy Unit
3872 FM 350 South
Livingston, TX 77351
Plaintiff Pro Se

/s/ Jonathan M. Pena
JONATHAN M. PENA
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

MICHEAL IBENYENWA, **Plaintiff,**	§	
	§	**CIVIL ACTION NO. 5:18cv68**
v.	§	
ELRODDRICK WELLS, ET AL. **Defendants.**	§	

ORDER GRANTING DEFENDANTS WELLS, SMITH, NATIONS, DODDY, ALSOBROOK, GOODEN, CLARK, MCKELLAR, TOWNSEND, ALEXANDER, AND THE TEXAS BOARD OF CRIMINAL JUSTICE'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

On this day the Court reviewed Defendants Wells, Smith, Nations, Doddy, Alsobrook, Gooden, Clark, McKellar, Townsend, Alexander, and the Texas Board of Criminal Justice's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Having considered the pleadings and arguments of the parties, the Court is of the opinion that the following order should issue

It is therefore ORDERED that Defendants Wells, Smith, Nations, Doddy, Alsobrook, Gooden, Clark, McKellar, Townsend, Alexander, and the Texas Board of Criminal Justice's Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) is hereby GRANTED in its entirety. It is further ORDERED that Plaintiff's claims against each defendant be DISMISSED.

SO ORDERED.