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**REVISED OPINION OF THE UNITED  
STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT  
(JULY 20, 2022)**

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REVISED JULY 20, 2022  
ORIGINAL OPINION FILED JUNE 22, 2022

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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DEBBIE FLOWERS, as the Personal Representative  
of Appellant Toby Kristopher Payne,  
for Substitution in the Place and Stead of the  
Appellant Toby Kristopher Payne,

*Plaintiff-Appellant,*

v.

JAMES SUTTERFIELD, Mental Health Manager;  
JASON M. HARDEGREE, Major; DAMON B.  
ANDREWS, Asst. Warden; DARRELL K. NASH,  
Asst. Warden; KEVIN D. FOLEY, Sr. Warden,

*Defendants-Appellees.*

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No. 20-10988

Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 2:17-CV-211

Before: HIGGINBOTHAM, HIGGINSON,  
and OLDHAM, Circuit Judges.

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STEPHEN A. HIGGINSON, Circuit Judge:\*

Debbie Flowers, as the personal representative of her son Toby Kristopher Payne, who was incarcerated in the Texas Department of Criminal Justice's Chronically Mentally Ill program and is now deceased, appeals the dismissal as frivolous of Payne's Eighth Amendment, Americans with Disabilities Act, and Rehabilitation Act of 1973 claims against various TDCJ officials. for the following reasons, we AFFIRM.

## I.

Toby Kristopher Payne was incarcerated in Texas Department of Criminal Justice (TDCJ) facilities from 2011 until his death in 2021. Payne was diagnosed with schizoaffective disorder after he was arrested for the murder of his two-year-old son, to which he later pleaded guilty. In 2014, he was transferred from the general population to an in-patient psychiatric ward within the TDCJ. In October 2015, Payne was transferred to the Chronically Mentally Ill (CMI) program. Between being transferred to the CMI program and filing his complaint in federal court in October 2017, Payne filed numerous grievances regarding the conditions in the CMI program.

In 2017, Payne filed a pro se lawsuit against TDCJ Mental Health Manager James Sutterfield, Major Jason M. Hardegree, Assistant Wardens Damon B. Andrews and Darrell K. Nash, and Senior Warden

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

Kevin D. Foley, claiming that his rights under the Eighth Amendment, the Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973 (RA) were violated based on conditions in the TDCJ's CMI program. Payne contended that individuals in the CMI program were kept in solitary confinement virtually twenty-four hours per day; were offered limited recreation, communication, entertainment, and hygiene opportunities; received only limited group therapy, without individual therapy or religious services; and were served cold food. He further alleged that correctional officers were not adequately trained on how to interact with people with psychiatric disorders and that, as a result, they frequently provoked prisoners into misbehaving. Payne sought monetary damages and injunctive relief. Payne subsequently moved for a temporary restraining order or preliminary injunction. In September 2020, the district court denied the motion and dismissed Payne's complaint as frivolous, citing both 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. § 1915(e)(2)(B)(i). Payne filed a timely notice of appeal.

Payne filed his brief in this court with counsel in March 2021. Because Payne's complaint was dismissed prior to service of process, the defendants have not appeared in this court. In November 2021, Payne's counsel sent notice to the court that Payne had died by suicide while incarcerated. Counsel moved to substitute Payne's personal representative, his mother, Debbie Flowers, as Appellant, and a judge of this court granted the motion.

## II.

A provision of the Prison Litigation Reform Act requires courts to dismiss a civil case brought *in*

*forma pauperis* “at any time if the court determines that . . . the action or appeal” is frivolous, malicious, or fails to state a claim on which relief can be granted. 28 U.S.C. § 1915(e)(2)(B)(i). A separate provision requires a district court to screen civil cases brought by prisoners “before docketing” or “as soon as practicable after docketing” and to dismiss if, among other reasons, the complaint is frivolous. 28 U.S.C. § 1915A(b)(1). We review a district court’s dismissal of a complaint as frivolous for abuse of discretion. *See Rogers v. Boatright*, 709 F.3d 403, 407 (5th Cir. 2013) (reviewing dismissal as frivolous under § 1915(e)); *Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998) (reviewing dismissal as frivolous under § 1915A).

A complaint is frivolous “if it lacks an arguable basis in law or fact.” *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). “[A] court may dismiss a claim as factually frivolous only if the facts alleged are ‘clearly baseless,’ a category encompassing allegations that are ‘fanciful,’ ‘fantastic,’ and ‘delusional.’” *Denton v. Hernandez*, 504 U.S. 25, 32-33 (1992) (quoting *Neitzke v. Williams*, 490 U.S. 319, 325, 327, 328 (1989)). “A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory.” *Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999). When reviewing a district court’s decision to dismiss a case as frivolous, we consider

whether the plaintiff was proceeding pro se; whether the court inappropriately resolved genuine issues of disputed fact; whether the court applied erroneous legal conclusions; whether the court has provided a statement explaining the dismissal that facilitates “intelligent appellate review”; and whether

the dismissal was with or without prejudice.

*Denton*, 504 U.S. at 34 (citations omitted). We have said that in order to “facilitate meaningful, ‘intelligent appellate review’ the district court’s reasons for a section 1915[(e)] dismissal should reflect the *Neitzke-Denton* considerations.” *Moore v. Mabus*, 976 F.2d 268, 270 (5th Cir. 1992).

### III.

In light of his death, Payne’s request for declarative or injunctive relief is moot. *See Copsey v. Swearingen*, 36 F.3d 1336, 1339 n.3, 1341 (5th Cir. 1994); *see also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). Though Payne’s complaint also sought damages, the Prison Litigation Reform Act requires a prisoner to show physical injury before he can recover compensatory damages for any psychological injury. 42 U.S.C. § 1997e(e); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999). Though we have never applied § 1997e(e) to an ADA/RA claim in a published opinion, we have repeatedly done so in unpublished opinions. *See, e.g., Buchanan v. Harris*, 2021 WL 4514694, at \*2 (5th Cir. Oct. 1, 2021); *Flaming v. Alvin Cmty. Coll.*, 777 F. App’x 771, 772 (5th Cir. 2019). Payne’s complaint does not appear to allege any physical injury.<sup>1</sup>

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<sup>1</sup> In *Hutchins v. McDaniels*, we held that, notwithstanding § 1997e(e), “prisoners may recover punitive or nominal damages for a Constitutional violation” even in the absence of physical injury. 512 F.3d 193, 198 (5th Cir. 2007). However, Payne did not request punitive or nominal damages in his complaint. *See Mayfield v. Tex. Dep’t of Crim. Just.*, 529 F.3d 599, 603, 606 (5th Cir. 2008) (holding that pro se plaintiff’s claims were barred by § 1997e(e) where complaint sought only compensatory damages and did not allege physical injury).

App.6a

Therefore, the judgment of the district court is  
AFFIRMED.

**ORIGINAL OPINION OF THE UNITED  
STATES COURT OF APPEALS FOR THE  
FIFTH CIRCUIT  
(JUNE 22, 2022)**

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

DEBBIE FLOWERS, as the Personal Representative  
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JAMES SUTTERFIELD, Mental Health Manager;  
JASON M. HARDEGREE, Major; DAMON B.  
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Debbie Flowers, as the personal representative of her son Toby Kristopher Payne, who was incarcerated in the Texas Department of Criminal Justice's Chronically Mentally Ill program and is now deceased, appeals the dismissal as frivolous of Payne's Eighth Amendment, Americans with Disabilities Act, and Rehabilitation Act of 1973 claims against various TDCJ officials. For the following reasons, we AFFIRM.

## I.

Toby Kristopher Payne was incarcerated in Texas Department of Criminal Justice (TDCJ) facilities from 2011 until his death in 2021. Payne was diagnosed with schizoaffective disorder after he was arrested for the murder of his two-year-old son, to which he later pleaded guilty. In 2014, he was transferred from the general population to an in-patient psychiatric ward within the TDCJ. In October 2015, Payne was transferred to the Chronically Mentally Ill (CMI) program. Between being transferred to the CMI program and filing his complaint in federal court in October 2017, Payne filed numerous grievances regarding the conditions in the CMI program.

In 2017, Payne filed a pro se lawsuit against TDCJ Mental Health Manager James Sutterfield, Major Jason M. Hardegree, Assistant Wardens Damon B. Andrews and Darrell K. Nash, and Senior Warden Kevin D. Foley, claiming that his rights under the

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Eighth Amendment, the Americans with Disabilities Act (ADA), and the Rehabilitation Act of 1973 (RA) were violated based on conditions in the TDCJ's CMI program. Payne contended that individuals in the CMI program were kept in solitary confinement virtually twenty-four hours per day; were offered limited recreation, communication, entertainment, and hygiene opportunities; received only limited group therapy, without individual therapy or religious services; and were served cold food. He further alleged that correctional officers were not adequately trained on how to interact with people with psychiatric disorders and that, as a result, they frequently provoked prisoners into misbehaving. Payne sought monetary damages and injunctive relief. Payne subsequently moved for a temporary restraining order or preliminary injunction. In September 2020, the district court denied the motion and dismissed Payne's complaint as frivolous, citing both 28 U.S.C. § 1915A(b)(1) and 28 U.S.C. § 1915(e)(2)(B)(i). Payne filed a timely notice of appeal.

Payne filed his brief in this court with counsel in March 2021. Because Payne's complaint was dismissed prior to service of process, the defendants have not appeared in this court. In November 2021, Payne's counsel sent notice to the court that Payne had died by suicide while incarcerated. Counsel moved to substitute Payne's personal representative, his mother, Debbie Flowers, as Appellant, and a judge of this court granted the motion.

## II.

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*forma pauperis* “at any time if the court determines that . . . the action or appeal” is frivolous, malicious, or fails to state a claim on which relief can be granted. 28 U.S.C. § 1915(e)(2)(B)(i). A separate provision requires a district court to screen civil cases brought by prisoners “before docketing” or “as soon as practicable after docketing” and to dismiss if, among other reasons, the complaint is frivolous. 28 U.S.C. § 1915A(b)(1). We review a district court’s dismissal of a complaint as frivolous for abuse of discretion. *See Rogers v. Boatright*, 709 F.3d 403, 407 (5th Cir. 2013) (reviewing dismissal as frivolous under § 1915(e)); *Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998) (reviewing dismissal as frivolous under § 1915A).

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### III.

In light of his death, Payne’s request for declarative or injunctive relief is moot. *See Copsey v. Swearingen*, 36 F.3d 1336, 1339 n.3, 1341 (5th Cir. 1994); *see also Rhodes v. Stewart*, 488 U.S. 1, 4 (1988). Though Payne’s complaint also sought damages, the Prison Litigation Reform Act requires a prisoner to show physical injury before he can recover compensatory damages for any psychological injury. 42 U.S.C. § 1997e(e); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999). Though we have never applied § 1997e(e) to an ADA/RA claim in a published opinion, we have repeatedly done so in unpublished opinions. *See, e.g., Buchanan v. Harris*, 2021 WL 4514694, at \*2 (5th Cir. Oct. 1, 2021); *Flaming v. Alvin Cmty. Coll.*, 777 F. App’x 771, 772 (5th Cir. 2019). Payne’s complaint does not appear to allege any physical injury.

Therefore, the judgment of the district court is AFFIRMED.

**MEMORANDUM OPINION OF THE  
UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF TEXAS  
(SEPTEMBER 2, 2020)**

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

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TOBY KRISTOPHER PAYNE,

*Plaintiff,*

v.

JAMES SUTTERFIELD, ET AL.,

*Defendants.*

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No. 2:17-CV-211-Z-BR

Before: Matthew J. KACSMARYK,  
United States District Judge.

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**MEMORANDUM OPINION**

This matter comes before the Court on Plaintiff's Motion for TRO and PI, filed December 12, 2020 (ECF No. 34) ("Motion"). Plaintiff is incarcerated in TDCJ's Bill Clements Unit, where he is assigned to the unit's program for chronically mentally ill inmates ("CMI"). He alleges (1) the CMI placement violated his due process rights; and (2) conditions within the program violate Eighth Amendment, the ADA and

the Rehabilitation Act of 1973. *See* Complaint § V, at 5 (ECF No. 3). He therefore petitions the Court to enjoin Defendants via either a TRO or a preliminary injunction. *See id* § VI, at 5. For the reasons below, the Court DENIES the Motion, and DISMISSES Plaintiffs claim as frivolous.

## **Background**

Plaintiff is serving a lengthy state prison term for murder.<sup>1</sup> He initially was assigned to the TDCJ Neal Unit but was transferred to the Montford Unit after he attempted suicide. *See* ECF No. 3-1, at 5. While in the Montford Unit, Plaintiff allegedly was diagnosed with schizoaffective disorder and began psychiatric treatment as part of the Chronic Mentally Ill Program (“CMI”). *See id*. He progressed to the least restrictive CMI level, which allowed him to walk to the chow hall to get food, to watch television in the dayroom with fellow inmates, to shower at a convenient time in the evening, to attend art therapy, and even to work as a janitor. *See* ECF No. 3-2, at 1.

That last privilege opened a Pandora’s Box for Plaintiff in 2015. One evening in August, a Montford Unit officer ordered Plaintiff to scrub walls and sweep ceilings in the pod dayrooms and showers. *See* ECF No. 3-3, at 2. Plaintiff believed ADA-related work restrictions exempted him from such work and consequently disobeyed the order. *See id*. at 2-3. He was written up, TDCJ determined at a resulting disciplinary hearing Plaintiff’s disobedience was un-

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<sup>1</sup> *See* Texas Dep’t of Crim. J., Offender Information: Toby Kristopher Payne, <https://offender.tdcj.texas.gov/OffenderSearch/offender-Detail.action?sid=08361639> (last visited Sept. 1, 2020).

justified, and Plaintiff lost his Step 1 and Step 2 appeals of the determination. *See id.* at 3 & 5. Soon after his unsuccessful final appeal, Plaintiff wrote the U.S. Department of Justice Office of Civil Rights (“DOJ OCR”) to complain of ongoing ADA violations in the unit. *See* ECF No. 3-1, at 5-10.

Sometime in Fall 2015, TDCJ transferred Plaintiff from the Montford Unit to the Clements Unit where he currently is housed. *Compare* ECF No. 3-1, at 5, *with* ECF No. 3-2, at 1. Within days of his transfer, Plaintiff wrote DOJ OCR to complain about the fewer privileges he enjoyed at his new unit. *See* ECF No. 3-2, at 1-2. Among the perceived indignities, he reported confinement to his cell for twenty-three hours a day, a chance to shower only at approximately five o’clock in the morning, and no access to religious services or a phone. *See id.*

Over the next two years, Plaintiff filed at least sixteen Step 1 grievances and seven Step 2 grievances alleging abuse at the Clements Unit that targets CMI inmates.<sup>2</sup> TDCJ investigated and dismissed those allegations. *See* ECF Nos. 3-1 to 3-10 *passim*, Dissatisfied with what he perceived had been a biased and unjust disciplinary process, Plaintiff penned at least thirty-seven letters to DOJ OCR on the same matters. *See* ECF Nos. 3-1 to 3-10 *passim*.<sup>3</sup> He

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<sup>2</sup> Excluding duplicate forms, the Court identifies in Plaintiffs attachments to the Complaint eleven Step 1 and five Step 2 grievances filed in 2016 and five Step 1 and two Step 2 grievances filed in 2017. *See* ECF Nos. 3-1 to 3-10. Because Plaintiff filed the Complaint in October, the Court does not count any forms filed the subsequent two months.

<sup>3</sup> As in footnote 2 *supra*, the Court here counts merely those letters Plaintiff attaches to his Complaint from January 2016 to

solicited corroborating letters from three inmates, one of whom starkly recounts abusive behavior toward CMI inmates including gassing, withholding of therapy, and deprivation of food. *See id.* ¶¶ 1-8, at 5-6.

This flurry of activity culminated in the Complaint, which Plaintiff filed in late 2017. In the Complaint, Plaintiff condenses his claims from the sixty documents above into nine allegations about CMI conditions at the Clements Unit:

- (1) inmates languish in administrative segregation type housing, with solitary confinement virtually all day and night;
- (2) recreation time and showers are limited to the early morning;
- (3) barriers prevent physical contact between inmates and their visitors;
- (4) inmates are only permitted one phone call every three months;
- (5) inmates are barred from attendance at group religious services;
- (6) Defendants do not enforce inmate hygiene or cell sanitation rules;
- (7) Defendants do not provide inmates with regular shaves and haircuts;
- (8) inmates' meals regularly arrive cold; and
- (9) prison personnel provoke inmates into misbehaving.

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October 2017. This count therefore represents a floor for the number of letters in fact written.



See Complaint § V, at 5. Plaintiff then filed the Motion, in which he sues Defendants in their supervisory capacity and asks the Court to order TDCJ to (1) comply with the ADA and the Rehabilitation Act; and (2) stop violating the Due Process Clause and Eighth Amendment. *See id.*

## Legal Standards

### A. Frivolous Claims

When a prisoner confined in any jail, prison, or other correctional facility brings an action with respect to prison conditions under any federal law, the Court may evaluate the complaint and dismiss it without service of process, *Brewster v. Dretke*, 587 F.3d 764, 767 (5th Cir. 2009), if it is frivolous,<sup>4</sup> malicious, fails

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<sup>4</sup> A claim is frivolous if it lacks an arguable basis in law or in fact. *Booker v. Koonce*, 2 F.3d 114, 115 (5th Cir. 1993); *see Denton v. Hernandez*, 504 U.S. 25 (1992). To determine whether a complaint is frivolous under 28 U.S.C. § 1915(d), the Court must inquire whether there is an arguable “factual and legal basis of constitutional dimension for the asserted wrong.” *Spears v. McCotter*, 766 F.2d 179, 181 (5th Cir. 1985) (quoting *Watson v. Ault*, 525 F.2d 886, 892 (5th Cir. 1976)). The review of a complaint for factual frivolousness nevertheless is quite limited and “only appropriate in the limited class of cases wherein the allegations rise to the level of the irrational or the wholly incredible,” not just to the level of the unlikely. *Booker*, 2 F.3d at 114. Nor is legal frivolousness synonymous with mere unlikelihood. The Supreme Court of the United States and the United States Court of Appeals for the Fifth Circuit repeatedly counsel district courts against dismissing petitions that have some chance of success. *See, e.g., Denton v. Hernandez*, 504 U.S. 25 (1992); *Neitzke v. Williams*, 490 U.S. 319, 329 (1989); *Booker*, 2 F.3d at 116. That caution notwithstanding, a “claim against a defendant who is immune from suit is frivolous because it is based upon an indisputably meritless legal theory. *See Neitzke*, 490 U.S. at

to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A; 28 U.S.C. § 1915(e)(2). The same standards will support dismissal of a suit brought under any federal law by a prisoner confined in any jail, prison, or other correctional facility, where such suit concerns prison conditions. *See* 42 U.S.C. § 1997e(c)(1). A *Spears* hearing need not be conducted for every pro se complaint. *Wilson v. Barrientos*, 926 F.2d 480, 483 n.4 (5th Cir. 1991).<sup>5</sup>

## B. Supervisor Liability Claims

In Section 1983 suits, government officials are not held liable for the unconstitutional conduct of their subordinates solely on a theory of *respondeat superior* or vicarious liability. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009). Nor are supervisory officials subject to vicarious liability under Section 1983 for the *omissions* of their subordinates. *See Alderson v. Concordia Parish Correctional Facility*, 848 F.3d 415, 419-20 (5th Cir. 2017). Consequently, absent direct personal participation in the alleged constitutional violation, a plaintiff must prove each individual defendant either implemented an unconstitutional policy that directly resulted in injury to the plaintiff or failed to properly train a subordinate employee. *See Pena v. City of Rio Grande City*, 879 F.3d 613,

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327; *Booker*, 2 F.3d at 116.

<sup>5</sup> *Green vs. McKaskle*, 788 F.2d 1116, 1120 (5th Cir. 1986) (“Of course, our discussion of *Spears* should not be interpreted to mean that all or even most prisoner claims require or deserve a *Spears* hearing. A district court should be able to dismiss as frivolous a significant number of prisoner suits on the complaint alone or the complaint together with the *Watson* questionnaire.”)

620 (5th Cir. 2018); *Thompkins v. Belt*, 828 F.2d 298, 303-04 (5th Cir. 1987).

### **C. Cruel and Unusual Punishment**

Even though the Constitution does not require that custodial inmates be housed in comfortable prisons, the Eighth Amendment's prohibition against cruel and unusual punishment does require that prisoners be afforded "humane conditions of confinement" including adequate food, shelter, clothing, and medical care. *Taylor v. Stevens*, 946 F.3d 211, 219 (5th Cir. 2019) (internal marks removed). Prison staff may not deprive prisoners of the basic elements of hygiene or inflict wanton and unnecessary pain by depriving mentally ill patients of needed treatment. *See Perniciaro v. Lea*, 901 F.3d 241, 258-59 (5th Cir. 2019). To establish an Eighth Amendment violation, a prisoner must demonstrate a prison official was deliberately indifferent to conditions that resulted in extreme deprivation of the "minimal civilized measure of life's necessities." *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019) (internal marks removed). To establish deliberate indifference, the prisoner must show the official knew of and disregarded an excessive risk to inmate health or safety; the official must have been both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must have drawn the inference. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

## **D. Americans with Disabilities Act of 1990 and Rehabilitation Act of 1973**

### **1. Americans with Disabilities Act of 1990**

The Americans with Disabilities Act of 1990 broadly protects disabled individuals and prohibits any public entity from discriminating against the disabled. *See* 42 U.S.C. §§ 12131-32. It covers as a disability any (1) physical or mental impairment that (2) substantially limits (3) one or more major life activities. 42 U.S.C. § 12102(1)(A). The Supreme Court of the United States narrowly construed these requirements in 2002 to hold that a disability is protected under the ADA only if it effects not only work activities but also similar non-work activities. *See Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 199-203 (2002).

Congress amended the ADA expressly to overturn that narrow construction. *See* Pub. L. No. 110-325, § 2(b)(4) (2009). The amendments mandate a particularly broad construction of “substantial limits” and “major life activities.” *Id.* § 3(4). “Substantial limits” include any impairment that substantially limits one activity even if it does not limit similar activities. *Id.* § 3(4)(C). “Major life activities” include “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” *Id.* § 3(2)(A). A condition may qualify as an ADA disability even if it is not severe or permanent. *See id.* § 3(4)(D).

## **2. Rehabilitation Act of 1973**

The Rehabilitation Act was originally passed in 1920 as a measure to help disabled military veterans reintegrate into civilian society after World War I. *See* CONGRESSIONAL RESEARCH SERVICE, REHABILITATION ACT OF 1973, at 1 (Feb. 25, 2005). Amendments to the Act in 1973 expanded it to provide comprehensive vocational rehabilitation services for all American individuals with “substantial” physical or mental disabilities. Pub. L. No. 93-112, § 7(6), 87 Stat. 357. As codified after subsequent amendments, the Rehabilitation Act provides that no disabled individual “solely by reason of her or his disability [shall] be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.” 29 U.S.C. § 794(a). The Rehabilitation Act remains good law, but its protections largely are subsumed by the broader protections of the ADA. *See* Robyn Levin, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 STAN. L. REV. 269, 277-78 & n.44 (2017). Because of the overlap, plaintiffs often make identical claims under both statutes. *See, e.g., Hainze v. Richards*, 207 F.3d 795, 797 (5th Cir. 2000).

## **3. Elements of Claims and Available Remedies**

To make out a *prima facie* case under the ADA or the Rehabilitation Act, a plaintiff must show “(1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from

participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability.” *Cadena v. El Paso County*, 946 F.3d 717, 723-24 (5th Cir. 2020) (internal marks omitted). A plaintiff also must show the entity knew of the disability, either because he requested an accommodation or because the nature of the limitation was open and obvious. *Id.* at 724.

The remedies, procedures, and rights available under the Rehabilitation Act parallel those available under the ADA. *Delano-Pyle v. Victoria Cty.*, 302 F.3d 567, 574 (5th Cir. 2002). A plaintiff has a right to reasonable accommodations, *i.e.* those that do not impose undue financial or administrative burdens or “fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7); *Frame v. City of Arlington*, 657 F.3d 215, 232 (5th Cir. 2011) (en banc).

### **E. TROs and Preliminary Injunctions**

The standard for a TRO is generally the same as the standard for a preliminary injunction. *See Kidd v. Director of Federal Bureau of Prisons*, 2020 WL 759298, at \*3 (N.D. Tex. Feb. 14, 2020) (internal marks removed). A federal court may issue a preliminary injunction to protect a movant’s rights until his or her case has been finally determined. *See* Fed. R. Civ. P. 65(a); 11A CHARLES A. WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. CIV. § 2941 (3d ed. 2020). To obtain a preliminary injunction, a movant must prove “(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.” *Robinson v. Hunt Country, Texas*, 921 F.3d 440, 451 (5th Cir. 2019). A preliminary injunction is an extraordinary remedy requiring the applicant to unequivocally show the need for its issuance. *Sepulvado v. Jindal*, 729 F.3d 413, 417 (5th Cir. 2013) (internal marks omitted), *cert. denied*, 134 S. Ct. 1789 (2014). The movant must prove all four elements. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943 (2018); *Doe Iv. Landry*, 909 F.3d 99, 106 (5th Cir. 2018).

## Analysis

The Court’s analysis of the Motion tracks the four *Benisek* factors listed above. If Plaintiff fails to satisfy even one *Benisek* factor, the Court may logically conclude he fails to meet his burden for granting a TRO or preliminary injunction on the corresponding claim even if he proves the other factors.<sup>6</sup> *Cf.* 138 S. Ct. at 1943-44. After thorough consideration of the record, the Court finds Plaintiff fails to prove substantial likelihood of success on the merits of any of his claims. It thus DENIES Plaintiff’s

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<sup>6</sup> Incidentally, this result holds true mathematically even if one of the criteria contains an unknown or non-zero value. expressed in the language of symbolic logic,  $\pi_1^{n-1}p_n = 0 \Rightarrow \pi_1^n p_n = 0, \forall p \in \mathbb{R}$ , where  $p$  is the probability of success on factor  $n$ . In other words: If the product of a series of probabilities is equal to zero, then it is logically implied and logically necessary that multiplying by an additional probability will result in a product of zero for any probability that falls into a set of all the real numbers.

request for both a TRO and a preliminary injunction on each claim.

### **A. ADA and Rehabilitation Act Claims**

The Court first considers Plaintiff's ADA and Rehabilitation Act claims. Under Fifth Circuit precedent, he is entitled to no legal remedy on those claims unless he shows the Clements Unit staff knew about his disability at the time of their purported offenses, either because (1) he had requested an accommodation; or (2) the nature of his disability was open and obvious. *See Cadena*, 946 F.3d at 724. Nowhere does Plaintiff adduce evidence he ever requested an ADA or Rehabilitation Act accommodation. Nor is the nature of his disability open and obvious. He is housed in the Clements Unit's program for the chronically mentally ill, but mental illness by itself does not secure one ADA protection; the mental illness must (1) substantially limit (2) one or more major life activities. 42 U.S.C. § 12102(1)(A). The very success Plaintiff asserts he had after the onset of his mental illness but before his transfer to the Clements Unit—as well as the diligence and cogency with which he has pursued his grievances since the transfer—suggests no such limitation exists. Finding no contrary evidence in the record, the Court finds Plaintiff is not substantially likely to prevail on the merits of these claims. It therefore denies him a TRO or preliminary injunction on them.

### **B. Supervisory Liability Claims**

The Court next considers Plaintiff's supervisory liability claims. Plaintiff does not assert supervisor Defendants (1) directly participated in any alleged



constitutional violations against him; (2) implemented an unconstitutional policy that directly resulted in his alleged injuries; or (3) failed to properly train Clements Unit subordinates. *See Pena*, 879 F.3d at 620. That failure proves fatal to these claims because Section 1983 suits may not rest solely upon a theory of vicarious liability. *Ashcroft v. Iqbal*, 556 U.S. at 676. Because Plaintiff fails to demonstrate he is substantially likely to prevail on the merits of these claims, the Court denies him a TRO or preliminary injunction on them.

### **C. Due Process Claims**

Plaintiff's due process claims distill into a challenge to his current housing assignment and classification in the Clements Unit's CMI program. Yet inmates have no protectable property or liberty interest in custodial classifications. *See Alexander v. Texas Dep't of Crim. Justice*, 951 F.3d 236, 240 (5th Cir. 2020). Moreover, administrative segregation is incidental to prison life and almost never a ground for a constitutional claim, insofar as it rarely deprives an inmate of a cognizable liberty interest. *See Wilkerson v. Goodwin*, 774 F.3d 845, 852-53 (5th Cir. 2014); *Hernandez v. Velasquez*, 522 F.3d 556, 562-63 (5th Cir. 2008). Because Plaintiff therefore fails to allege a cognizable and redressable injury-in-fact, he is unlikely to succeed on the merits of these claims. The Court therefore denies him a TRO or preliminary injunction on them.

### **D. Eighth Amendment Claims**

Lastly, the Court considers Plaintiff's claims he has endured cruel and unusual punishment since his

transfer into the Clements Unit. Weighing in his favor, the Eighth Amendment requires prisons to afford inmates adequate food, shelter, clothing, medical care, meaningful opportunities for basic hygiene, and treatment for mental illness. *See Taylor*, 946 F.3d at 219; *Perniciaro*, 901 F.3d at 258-59. Weighing against him, though, the amendment also requires an inmate to demonstrate a prison official was deliberately indifferent to conditions that resulted in extreme deprivation of the “minimal civilized measure of life’s necessities.” *Arenas*, 922 F.3d at 620 (internal marks removed). To establish deliberate indifference, the prisoner must show the official knew of and disregarded an excessive risk to inmate health or safety. *See Farmer v. Brennan*, 511 U.S. at 837. On balance, the Court finds that Plaintiff fails to demonstrate such extreme deprivation and deliberate indifference. Accordingly, the Court concludes Plaintiff fails to prove substantial likelihood of success on these claims that would warrant a TRO or preliminary injunction.

### **1. Early morning recreation and showers**

Plaintiff alleges he faces cruel and unusual punishment by needing to shower and recreate early in the morning. Research that recently won the Nobel Prize for Medicine suggests genetic predisposition to being a night owl can make one mourn the morning as both cruel and unusual.<sup>7</sup> Yet such feelings do not facially amount to constitutional violations insofar as an early-morning wakeup does not automatically result

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<sup>7</sup> Press Release, The Nobel Assembly at Karolinska Institute (June 2018), <https://www.nobelprize.org/uploads/2018/06/press-39.pdf> (last visited Sept. 1, 2020) (reporting discoveries of mechanisms controlling circadian rhythm).

in extreme deprivations of minimal life necessities. *See Arenas*, 922 F.3d at 620; *cf Brumley v. Livingston*, 459 Fed. Appx 470, 472 (5th Cir. 2012) (dismissing claims based on early-morning showers). As applied to Plaintiff, any harm from early reveille is unlikely irreparable; if Plaintiff is confined to his cell for twenty-three hours a day as he asserts, he likely can go to bed earlier in the evening or nap during the day. Lastly, enjoining early morning activities might in fact harm Plaintiff because an early wake time is strongly correlated with improved mental health outcomes for those diagnosed with schizophrenia.<sup>8</sup>

## 2. No Contact Visitation Policy

Plaintiff asserts the Clements Unit places physical barriers between mentally ill inmates and their visitors. Yet such barriers fall far short of a violation of the Eighth Amendment. The Supreme Court of the United States has made clear a prison may for good cause deprive an inmate of any visitation for years at a time, in part because freedom of association is legitimately curtailed in a prison context. *See Overton v. Bazzetta*, 539 U.S. 126, 131-32 (2003). *A fortiori*, an inmate may for good cause have restrictions placed on visitation he does enjoy. *Cf Martin v. Scott*, 156 F.3d 578, 579 (5th Cir. 1998) (per curiam) (finding no claim where a prisoner claimed that officials limited his visitation time). Plaintiff accordingly is not substantially likely to prevail on the merits of this claim and

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<sup>8</sup> *See* Samuel E. Jones et al., *Genome-wide Association Analyses of Chronotype in 697,828 Individuals Provides Insights into Circadian Rhythms*, 10 NATURE COMMUNICATIONS 1, 5-6 & fig.5 (Jan. 2019), <https://www.nature.com/articles/s41467-018-08259-7.pdf> (last visited Sept. 1, 2020).

cannot be granted a TRO or preliminary injunction on it.

### **3. Limited Phone Calls**

During this time of pandemic and social distancing, the Court recognizes the importance for many people of remote contact with family and friends. Yet Plaintiff does not suffer an Eighth Amendment injury even if he accurately states he is only permitted one phone call every three months. Restrictions on inmate communication with the outside world are not extreme deprivations unless an inmate is held completely incommunicado for an extended period. *See Hill v. Estelle*, 537 F.2d 214, 215 (5th Cir. 1976). Because Plaintiff thus does not prove a substantial likelihood of prevailing on this claim, the Court denies him a TRO or preliminary injunction on it.

### **4. No Group Religious Services**

Freedom of religious exercise can be a thorny issue in a prison context, and Fifth Circuit standards for how much and how long a prison may limit segregated inmates' access to group religious services are not always immediately reconcilable. *See, e.g., Bailey v. Fisher*, 647 Fed. Appx 472, 476 (5th Cir. 2016). Yet the Court need not unravel this Gordian Knot for two simple reasons. First, Plaintiff nowhere alleges he ever has sought to attend any religious services or been denied any religious practice and so does not have standing to assert this claim. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Second, the Supreme Court recently held the State may temporarily limit civilian gatherings to minimize and eliminate legitimate contagion risks during

pandemics. *See generally South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613 (2020) (mem.); *see also Spell v. Edwards*, 962 F.3d 175, 181-82 (Ho, J., concurring) (“Officials may take appropriate emergency public health measures to combat a pandemic,” including assembly rights, even though nothing “supports the view that an emergency displaces normal constitutional standards.”); *In re Abbott*, 954 F.3d 772, 784-85 (5th Cir. 2020) (Duncan, J.) (citing cases supporting principle that public health crises may temporarily permit extraordinary government intrusion on constitutional liberties to combat contagion). Given widespread COVID-19 infection in American prisons, such restrictions on inmate gatherings aimed at preventing contagion may temporarily be permissible there as well. As such, Plaintiff does not on the record demonstrate a substantial likelihood of prevailing on the merits of this claim, and the Court denies him a TRO or preliminary injunction on it.

### **5. Personal Hygiene Enforcement, Lack of Access to Regular Barbery**

Plaintiff inveighs against Defendants for purportedly not enforcing inmate hygiene or cell sanitation rules, including not providing inmates with regular shaves and haircuts. *See* Complaint § V, at 5. Even if true, a lack of barbery does not in se prove barbarity. Prison staff may not deprive prisoners of the basic elements of hygiene. *See Perniciaro*, 901 F.3d at 258-59. But it is unclear from Plaintiff’s filings and grievances what, if anything, prison personnel are doing to “deprive” Plaintiffs fellow inmates of hygiene supplies or opportunities. In fact, Plaintiff himself asserts showers are made available to CMI inmates early every morning. Because he has alleged no injury-in-

fact and does not trace the injury to any action by Clements Unit staff, Plaintiff is unlikely to have standing on this claim and is therefore substantially unlikely to prevail on it. The Court therefore denies him a TRO or preliminary injunction on this claim.

## **6. Cold Food at Meals**

The Eighth Amendment requires that inmates receive adequate and nutritious food. *See Farmer*, 511 U.S. at 832; *Taylor*, 946 F.3d at 219. But the Fifth Circuit has declined to encompass within that right a right that every meal be an inferno. *See Herman v. Holiday*, 238 F.3d 660, 666 (5th Cir. 2001); *see also Lunsford v. Bennett*, 17 F.3d 1574, 1579 (7th Cir. 1984) (“complaints about cold and poorly prepared food must fail”). As such, Plaintiff is not substantially likely to prevail on the merits of this claim and thus cannot receive a TRO or preliminary injunction on it.

## **7. Provocation of Inmates**

Plaintiff asserts prison guards provoke CMI inmates into misbehaving. *See* Complaint § V, at 5. Yet the record does not contain an allegation that Plaintiff has ever been provoked into misbehavior by a prison guard. He therefore has no demonstrated injury-in-fact and does not prove he is substantially likely to prevail on the merits of this claim. The Court therefore denies him a TRO or preliminary injunction on this claim.

In summary, Plaintiff has failed to prove he is substantially likely to prevail on any of his statutory or constitutional claims. He therefore logically cannot satisfy all four *Benishek* factors prerequisite for a TRO or a preliminary injunction. The Court DENIES

the Motion and DISMISSES Plaintiffs Complaint as  
frivolous.

SO ORDERED.

/s/ Matthew J. Kacsmayk  
Unites States District Judge

September 2, 2020

**ORDER OF THE UNITED STATES COURT  
OF APPEALS FOR THE FIFTH CIRCUIT  
DENYING PETITION FOR REHEARING  
AND REHEARING EN BANC  
(JULY 26, 2022)**

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UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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DEBBIE FLOWERS, as the Personal Representative  
of Appellant Toby Kristopher Payne, for Substitution  
in the Place and Stead of the Appellant  
Toby Kristopher Payne,

*Plaintiff-Appellant,*

v.

JAMES SUTTERFIELD, Mental Health Manager;  
JASON M. HARDEGREE, Major; DAMON B.  
ANDREWS, Asst. Warden; DARRELL K. NASH,  
Asst. Warden; KEVIN D. FOLEY, Sr. Warden,

*Defendants-Appellees.*

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No. 20-10988

Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 2:17-CV-211

Before: HIGGINBOTHAM, HIGGINSON,  
and OLDHAM, Circuit Judges.

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PER CURIAM:

The petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (Fed. R. App. P. 35 and 5th Cir. R. 35), the petition for rehearing en banc is DENIED.

**FIFTH CIRCUIT DOCKET**  
**CASE NO: 20-10988**

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GENERAL DOCKET UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Court of Appeals Docket #: 20-10988  
Nature of Suit: 3550 Prisoner - Civil Rights  
Flowers v. Sutterfield  
Appeal From: Northern District of Texas, Amarillo  
Fee Status: Fee Paid  
Docketed: 09/29/2020  
Termed: 06/22/2022  
  
Originating Court Information:  
District: 0539-2: 2 : 17-CV-211  
Originating Judge:  
Matthew Joseph Kacsmarky, U.S. District Judge  
Date Filed: 10/30/2017  
Date NOA Filed: 09/23/2020  
Date Rec'd COA: 09/23/2020

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09/29/2020

PRISONER CASE WITH COUNSEL  
docketed. NOA filed by Appellant Mr. Toby  
Kristopher Payne [20-10988] (MFY) [Entered:  
09/29/2020 08:57 AM]

10/05/2020

INITIAL CASE CHECK by Attorney Advisor  
complete, Action: Case OK to Process.  
[9413907-2] Initial AA Check Due satisfied.  
Fee due on 10/20/2020 for Appellant Toby  
Kristopher Payne. [20-10988] (RSM)  
[Entered: 10/05/2020 12:12 PM]

12/06/2020

APPEARANCE FORM for the court's review.  
Lead Counsel? Yes. [20-10988] (Samuel Weiss)  
[Entered: 12/06/2020 07:06 PM]

12/06/2020

FEE PAID by Fee Amount: \$505.00 Receipt  
Number: A05-235070-625. Fee deadline  
satisfied [20-10988] REVIEWED AND/OR  
EDITED-The original text prior to review  
appeared as follows: FEE PAID by Appellant  
Mr. Toby Kristopher Payne for noa filed on  
09/29/2020. Fee Amount: \$505.00 Receipt  
Number: A05-235070-625. [20-10988]  
(Samuel Weiss) [Entered: 12/06/2020 07:10  
PM]

12/08/2020

APPEARANCE FORM FILED by Attorney(s)  
Samuel Weiss for party(s) Appellant Toby  
Kristopher Payne, in case 20-10988 [20-  
10988] (RSM) [Entered: 12/08/2020 08:59 AM]

12/09/2020

ELECTRONIC RECORD ON APPEAL  
REQUESTED from District Court for 2:17-  
CV-211. Electronic ROA due on 12/24/2020.  
[20-10988] (LEF) [Entered: 12/09/2020 09:16  
AM]

12/23/2020

ELECTRONIC RECORD ON APPEAL  
FILED. Admitted Exhibits on File in District  
Court? No. Video/Audio Exhibits on File in  
District Court? No Electronic ROA deadline  
satisfied. [20-10988] (PAC) [Entered: 12/23/  
2020 08:53 AM]

12/23/2020

BRIEFING NOTICE ISSUED A/Pet's Brief Due on 02/01/2021 for Appellant Toby Kristopher Payne. [20-10988] (PAC) [Entered: 12/23/2020 09:02 AM]

01/21/2021

UNOPPOSED MOTION filed by Appellant Mr. Toby Kristopher Payne to extend time to file brief as appellant [9486499-2]. Date of service: 01/21/2021 via clerk-Attorney for Appellant: Weiss [20-10988] (Samuel Weiss) [Entered: 01/21/2021 10:50 AM]

01/21/2021

CLERK ORDER granting Motion to extend time to file appellant's brief filed by Appellant Mr. Toby Kristopher Payne [9486499-2] A/Pet's Brief deadline updated to 03/15/2021 for Appellant Toby Kristopher Payne [20-10988] (LEF) [Entered: 01/21/2021 03:17 PM]

03/08/2021

APPEARANCE FORM for the court's review. Lead Counsel? Yes. [20-10988] (Daniel Scott Harawa) [Entered: 03/08/2021 08:44 AM]

03/09/2021

APPEARANCE FORM FILED by Attorney(s) Daniel Scott Harawa for party(s) Appellant Toby Kristopher Payne, in case 20-10988 [20-10988] (RSM) [Entered: 03/09/2021 01:33 PM]

03/15/2021

APPELLANT'S BRIEF FILED # of Copies Provided: 0 A/Pet's Brief deadline satisfied. Record Excerpts due on 03/30/2021 for Appellant Toby Kristopher Payne [20-10988] REVIEWED AND/OR EDITED-The original text prior to review appeared as follows: APPELLANT'S BRIEF FILED by Mr. Toby Kristopher Payne. Date of service: 03/15/2021 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Daniel Scott Harawa) [Entered: 03/15/2021 11:03 AM]

03/16/2021

BRIEFING COMPLETE. [20-10988] (RSM) [Entered: 03/16/2021 03:06 PM]

03/22/2021

SUFFICIENT RECORD EXCERPTS FILED. Sufficient Record Excerpts deadline satisfied [20-10988] REVIEWED AND/OR EDITED-The original text prior to review appeared as follows: RECORD EXCERPTS FILED. Record Excerpts NOT Sufficient as they require INSUFFICIENT FOR: OPTIONAL CONTENTS EXCEED THE 40 PAGE LIMITATION. Optional contents exceed page limitations by 25 pages. Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO REMEDY THE DEFAULT. # of Copies Provided: 0 Record Excerpts deadline satisfied. Sufficient Record Excerpts due on 04/07/2021 for Appellant Toby Kristopher Payne [20-10988] REVIEWED AND/OR EDITED-The original text prior to review

appeared as follows: RECORD EXCERPTS FILED by Appellant Mr. Toby Kristopher Payne. Date of service: 03/22/2021 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Daniel Scott Harawa) [Entered: 03/22/2021 11:14 AM]

04/01/2021

PROPOSED SUFFICIENT RECORD EXCERPTS filed by Appellant Mr. Toby Kristopher Payne [9531344-2] Date of service: 04/01/2021 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Daniel Scott Harawa) [Entered: 04/01/2021 11:12 AM]

11/19/2021

SUFFICIENT UNOPPOSED MOTION to substitute Toby Kristopher Payne with Debbie Flowers. Document is insufficient for the following reasons: a separate suggestion of death is also required in accordance with FRAP 43(a). Sufficient Mtn/Resp/Reply due on 12/02/2021 for Appellant Toby Kristopher Payne [20-10988] REVIEWED AND/OR EDITED-The original text prior to review appeared as follows: UNOPPOSED MOTION filed by Appellant Mr. Toby Kristopher Payne to substitute Toby Payne with Debbie Flowers. Date of service: 11/19/2021 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Samuel Weiss) [Entered: 11/19/2021 03:06 PM]

11/22/2021

SUGGESTION OF DEATH on behalf of Appellant Mr. Toby Kristopher Payne [20-10988] REVIEWED AND/OR EDITED-The

original text prior to review appeared as follows: SUGGESTION OF DEATH on behalf of Appellant Mr. Toby Kristopher Payne Date of Service: 11/22/2021 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Samuel Weiss) [Entered: 11/22/2021 02:18 PM]

11/23/2021

The Motion to substitute party filed by Appellant Mr. Toby Kristopher Payne in 20-10988 [9717080-2] has been made sufficient. Sufficient Mtn/Resp/Rpl deadline satisfied. [20-10988] (LEF) [Entered: 11/23/2021 01:10 PM]

11/26/2021

COURT ORDER granting Motion to substitute party filed by Appellant Mr. Toby Kristopher Payne [9717080-2] Appellant Toby Kristopher Payne in 20-10988 substituted by Appellant Debbie Flowers in 20-10988 [20-10988] (MFY) [Entered: 11/26/2021 03:42 PM]

04/11/2022

PAPER COPIES REQUESTED for the Appellant Brief filed by Appellant Mr. Toby Kristopher Payne in 20-10988 [9525569-2], Record Excerpts filed by Appellant Mr. Toby Kristopher Payne in 20-10988 [9531344-2]. Paper Copies of Brief due on 04/18/2022 for Appellant Debbie Flowers. Paper Copies of Record Excerpts due on 04/18/2022 for Appellant Debbie Flowers. [20-10988] (LEF) [Entered: 04/11/2022 08:55 AM]

04/19/2022

Paper copies of Appellant Brief filed by Appellant Mr. Toby Kristopher Payne in 20-10988 received. Paper copies match electronic version of document? Yes # of Copies Provided: 7. Paper Copies of Brief due deadline satisfied. [20-10988] (LLL) [Entered: 04/19/2022 04:46 PM]

04/19/2022

Paper copies of Record Excerpts filed by Appellant Mr. Toby Kristopher Payne in 20-10988 received. Paper copies match electronic version of document? Yes # of Copies Provided: 4. Paper Copies of Record Excerpts due deadline satisfied. [20-10988] (LLL) [Entered: 04/19/2022 04:48 PM]

05/17/2022

COURT DIRECTIVE ISSUED to file supplemental brief [9849500-2] A/Pet Supplemental Brief due on 05/20/2022 for Appellant Debbie Flowers. [20-10988] (LEF) [Entered: 05/17/2022 04:43 PM]

05/20/2022

APPELLANT'S SUPPLEMENTAL LETTER BRIEF FILED. # of Copies Provided: 0 A/Pet's Supplemental Brief deadline satisfied [20-10988] REVIEWED AND/OR EDITED- The original text prior to review appeared as follows: APPELLANT'S SUPPLEMENTAL BRIEF FILED by Debbie Flowers. Date of service: 05/20/2022 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Daniel Scott Harawa) [Entered: 05/20/2022 10:23 AM]



06/22/2022

UNPUBLISHED OPINION FILED. [20-10988 Affirmed] Judge: PEH, Judge: SAH, Judge: ASO. Mandate issue date is 07/14/2022 [20-10988] (NFD) [Entered: 06/22/2022 01:30 PM]

06/22/2022

JUDGMENT ENTERED AND FILED. [20-10988] (NFD) [Entered: 06/22/2022 01:33 PM]

07/06/2022

PETITION for rehearing [9886761-2] Number of Copies: 0. Mandate issue date canceled. [20-10988] REVIEWED AND/OR EDITED-The original text prior to review appeared as follows: PETITION filed by Appellant Debbie Flowers for rehearing [9886761-2]. Date of Service: 07/06/2022 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Samuel Weiss) [Entered: 07/06/2022 08:47 PM]

07/06/2022

PETITION for rehearing en banc [9886762-2] Number of Copies: 0. [20-10988] REVIEWED AND/OR EDITED-The original text prior to review appeared as follows: PETITION filed by Appellant Debbie Flowers for rehearing en banc [9886762-2]. Date of Service: 07/06/2022 via email-Attorney for Appellants: Harawa, Weiss [20-10988] (Samuel Weiss) [Entered: 07/06/2022 08:48 PM]

07/14/2022

DOCUMENT RECEIVED-NO ACTION TAKEN. No action will be taken at this time on the paper copies of rehearing received

App.41a

from Appellant Debbie Flowers because paper copies are unnecessary. Paper copies were not requested by the Court [20-10988] (LEF) [Entered: 07/15/2022 02:09 PM]

07/20/2022

TECHNICAL REVISION MADE TO OPINION. [9875929-2] [20-10988] (NFD) [Entered: 07/20/2022 09:11 AM]

07/26/2022

COURT ORDER denying Petition for rehearing filed by Appellant Debbie Flowers [9886761-2]; denying Petition for rehearing en banc filed by Appellant Debbie Flowers [9886762-2] Without Poll. Mandate issue date is 08/03/2022 [20-10988] (LEF) [Entered: 07/26/2022 08:24 AM]

08/03/2022

MANDATE ISSUED. Mandate issue date satisfied. [20-10988] (MVM) [Entered: 08/03/2022 08:15 AM]

**COMPLAINT, RELEVANT EXCERPTS  
AND SELECTED EXHIBITS**

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

---

TOBY KRISTOPHER. PAYNE, #1720023  
*Plaintiff's name and ID Number,*

French M. Robertson Unit  
12071 FM 3522  
Abilene, TX 79601  
*Place of Confinement*

v.

JAMES SUTTERFIELD, William P. Clements Unit,  
9601 Spur 591, Amarillo, TX 79107-9606  
(806) 381-7080, Fax 381-5030,

JASON M. HARDEGREE,  
William P. Clements Unit,  
9601 Spur 591, Amarillo, TX 79107-9606  
(806) 381-7080, Fax 381-5030,

KEVIN D. FOLEY, William P. Clements Unit,  
9601 Spur 591, Amarillo, TX 79107-9606  
(806) 381-7080, Fax 381-5030  
*Defendant's name and address.*

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Case No. 2:17-CV-211-J

Form to be Used by a Prisoner in Filing a Complaint  
Under the Civil Rights Act, 42 U.S.C. § 1983

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[ . . . ]

**V. Statement of Claim:**

Involving patients/offenders in the Chronic Mentally Ill (CMI) treatment program; kept in solitary confinement virtually 24 hours a day; only offers recreation & showers at 5:30am, when most patients are asleep; does not allow contact visits with visitors; only allows one phone call every 90 days; does not allow patients to attend religious services; does not provide any individual therapy, & provides very minimal group therapy; does not monitor or enforce personal hygiene or cell sanitation; does not provide haircuts and Shaves on a regular basis; often serves cold food; does not adequately train correctional officers on how to properly interact with psychiatric patients, and, as a result, officers often provoke patients into misbehaving. This is all currently taking place on 12 Bldg. A, C, & E pods on the Clements Unit. All of the defendants and their staffs are well aware of these problems due to the fact that they all frequently walk around the building and within the pods. I was in the CMI program from around October 2015 until July 2017. *See* attached documents for complaint to the U.S.D.O.J.

**VI. Relief:**

To order the TDCJ-CID to fully comply with the ADA & RA. To cease persistent cruel & unusual punishment. To award damages accordingly.

**VII. General Background Information:**

A. State, in complete form, all names you have ever used or been known by including any and all aliases:

Toby Kristopher Payne

B. List all TDCJ-ID identification numbers you have ever been assigned and all other state or federal prison or FBI numbers ever assigned to you, if know to you.

1720023

**VIII. Sanctions:**

A. Have you been sanctioned by any court as a result of any lawsuit you have filed?

NO

[ . . . ]

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Dear Sir or Madam,

I am an inpatient inmate housed on one of several psychiatric wards here at the Montford Hospital Prison Unit in Lubbock, TX. My diagnosis is schizoaffective disorder. I am somewhat stable now since I diligently take my medications. From what I've read in a few of the self-help legal books, that I own, I am covered by the A.D.A. as well as all the other inpatient psychiatric inmates housed at the Montford Unit.

The issue that I am asking you to investigate is regarding the blanket denial of access to the offender Telephone System for all of the offenders housed on the psychiatric wards hear at Montford. There are

OTS phones installed on the trustee camp and regular hospital areas of the unit. There are none installed on the psych. Wards. We are only allowed to place one five-minute phone call every 90 days using TDCJ owned phone to call collect. Before being admitted to the Montford Unit, I had adequate access to the OTS at my regular unit of assignment. That privileged access was taken away from me simply for admitting that I was suicided and was admitted here.

Being admitted here, I started on Level 1. That being the most restrictive of privileges, while housed on a Psych. Ward. Level 4 is the least restrictive. I earned my way to a level 3. Some of the property items that I am allowed to have on Level 3 is my radio and headphones. I am telling you this because one of the reasons that the staff here has given me is that a suicidal inmate could wrap the phone cord around his neck. First, the OTS phone cords are way to short to do such a thing. Second, the OTS phones could be installed in the common/dayroom areas on each psych. pod/ward. These common areas are constantly under the direct observation of one nurse and a minimum of two correctional officers. Third, level 3 and 4 offenders are the only ones that should be allowed access to the OTS since they are deemed more stable than Level 1 and 2's. Finally, the radio I have has cord that is significantly longer than an OTS phone cord and can be used for purposes that I need not describe. The radio is in my cell with me and cells are only observed every 30 minutes thru a window. Again, I am on level 3, So trusted to have access to my radio.

It is devices that we are being discriminated against. There is no justifiable reason why we cannot be given access to the OTS. In fact, the Montford

Unit is Violating its own Policy regarding access to the OTS. TDCJ Executive Directive ED-03.32 (rev. 2)-Offender Access to Telephones, Section 3(A)(2) says that "Offenders in a psychiatric inpatient program or development Disabilities Program shall be allowed access to the OTS in accordance with the Offender's treatment plan."

I Just recently filed a step 2 grievance regarding this issue. If the Step 2 is returned to me and is not ruled in my favor, then I will have exhausted my state remedies and. . . .

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Toby K. Payne #1720023  
John T. Montford Unit  
8602 Peach St.  
Lubbock, TX 79404  
(806) 745-1021

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To: Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Friday, September 18th, 2015

Re: Ongoing Violations of the Americans with  
Disabilities Act at the John T. Montford Unit

Dear Sir or Ma'am:

I am an inmate currently assigned as an inpatient psychiatric offender at the John T. Montford Unit, Texas Department of Criminal Justice, Criminal Institutions Division. The Senior Warden here is Robert K. Stephens. I believe that I have identified possibly three or more violations of the Rehabilitation Act and/or the Americans with Disabilities Act here at the Montford Unit. I have formally complained about the denial of access to the Offender Telephone System via the TDCJ grievance system. However, the grievance system is very frustrating because as an inmate, we never win the argument.

I arrived here sometime during the first week of October 2014 after attempting suicide on my regular unit of assignment (Neal Unit, Amarillo, TX). I have been diagnosed with schizoaffective disorder. It is an acute combination of psychosis and bipolar disorder.



I have been somewhat stabilized by medications and therapy. However, my crime resulted in the death of my two year old son. Dr. Kristi Compton Ph.D. found that I succumbed to a psychotic break at the time of the murder. I am not receiving any specific therapy for grief. All that has been done is that I have been handed a grief packet to read. I have decided that I may never completely stabilize from the loss of my son. I just have to learn to manage it. I will be forever remorseful for how I affected everyone who knew my son.

Since arriving here at the Montford Unit, I have noticed many violations of basic human moral standards. Below is a list of some violations that I have discovered:

We do not have access to the Offender Telephone System. There are no OTS phone installed on the psychiatric wards. Long Term Care offenders in the hospital ward do have access to the OTS as well as offenders housed at the trustee camp here at Montford.

[ . . . ]

**OFFENDER GRIEVANCE FORM  
(AUGUST 1, 2016)**



Texas Department of Criminal Justice  
Step 2 Offender Grievance Form

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**Office Use Only**

Grievance #: 2016160363

UGI Reed Date: Aug 01 2016

HQ Reed Date: Aug 02 2016

Date Due: 9.10

Grievance Code: 301

Investigator ID#: I2434

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements

Housing Assignment: 12-C-65 (CMI)

Unit where incident occurred: Clements

**Give reason for appeal (Be Specific):**

I am dissatisfied with the response in Step I because...

Yes, on Saturday, July 9th, 2016, I was allowed to place a phone call to my mother. The system used was not the same Offender Telephone System ("OTS") used in general population. There was officer across the desk listening to the entire phone call using a "spliced" telephone as the call was taking place. Although the phone calls placed on the OTS in general population are recorded and can be listened to, having an officer actively listening to a phone call and sitting across from me does not offer me the same "sudo" privacy as did placing a phone call using the OTS in

general population. I was, told that I only had 10 minutes to speak with my mother. Each phone call using the OTS in gen. pop. lasts 20 minutes and I can place as many phone calls every day as money allows. Here in CMI using this other method, I am only allowed one 10 minute phone call every 90 days. This disparity seriously violates ADA laws and does not come close to satisfying the policies and laws mentioned in my Step 1 on this issue. The same OTS phones used in general population should be installed in the dayrooms of the CMI pods on 12 building.

\*\*\* (END OF STATEMENT) \*\*\*

**OFFENDER GRIEVANCE FORM  
(JUNE 15, 2016)**



**Texas Department of Criminal Justice  
Step 1 Offender Grievance Form**

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**Office Use Only**

Grievance #: 2016160363

Date Received: June 15 2016

Date Due: 7.25.16

Grievance Code: 301

Investigator ID#: I2434

Date Retd to Offender: Jul 26 2016

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements

Housing Assignment: 12-C-65- (CMI)

Unit where incident occurred: Clements

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

Major Hardagree (Sent I-60)

When? Thursday, June 9th, 2016

What was their response? None

What action was taken? None

**State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate**

This grievance is being filed under grievance code 301 Telephone Access. As stated above, I wrote Major Hardagree requesting that I be given permission to call my mother, Deborah (Debi) L. Flowers. She is on my visitation list and her phone number, (214) 557-1319, is on my approved Offender Telephone Service ("OTS") list. I have not heard from my mother since she last wrote on Wednesday, May 18th, 2016. At that time, she informed me of the sad news that one of my cousin's son had passed away and that she would be traveling to Colorado for the memorial service. My mother normally writes at least every two weeks. I am quite sure that nothing has happened to my mother because my step-father has not called the unit to inform me of that. However, I wait to be able to talk to my mother to be able to console her. This is the second child in our family that has passed away. My own son and now my cousin's son. I am sure that she is in shock. She is also probably trying to maintain a high level of productivity for a high level job. I have not verbally spoken to my mother since the weekend before Christmas 2014. She came to visit me at the Montford Unit while I was on the psychiatric ward. There are no OTS phones there as there are no OTS phones here in the Chronic Mentally Ill ("CMI") program. I am a G2 custody status and an 53 time earning status. I have had a clean disciplinary history for about two years. I have done nothing to be denied access to the OTS or a TDCJ owned phone and not be able to call my mother. This constructive denial violates U.S. & Texas Constitutional law, 5th Circuit case law & TDCJ Executive Directive 03.32 (rev. 2), TDCJ ED-03.32 (rev. 2) § 3(A)(2) says that "offenders in a psychiatric inpatient program or developmental disabilities program shall be allowed

access to the OTS in accordance with the offenders' treatment plan." TDCJ ED-03.32 (rev. 2) § 4(A)(3) says that "In order to be eligible to place a call using a TDCJ-OWNED phone, offenders shall not have been found guilty of any major disciplinary violations within the last 90 days . . .". *Martin v. Tyson*, 845 F.2d 1451, 1458 (5th Cir. 1988) says (one monitored telephone call every other day, with a non-monitored line for legal calls, net constitutional requirements). Texas Gov't Code, § 495.027(d) says . . . , "The policies adopted under this section may not unduly restrict calling patterns or volume and must allow for an average monthly call usage rate of eight calls, with each call having an average duration of not less than 10 minutes, per eligible inmate.

\*\*\* (END OF STATEMENT) \*\*\*

Toby K. Payne #1720023  
William P. Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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December 22nd, 2015

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

I received a letter from your office on 12/22/2015 dated 12/16/2015 regarding the fact that I had been transferred from the John T. Montford Unit to the William P. Clements Unit. This letter will be placed in the unit mail on 12/23/2015.

At the request of the mental health staff at the Montford Unit, I was referred and admitted to a psychiatric treatment program here at the Clements Unit called CMI (Chronic Mentally Ill). The mental health staff at Montford touted the CMI program as being better for me. They explained to me that I was stable enough to be discharged as an psychiatric inpatient at Montford but not stable enough to go back to general population. After being transferred, I actually lost more privileges than I had attained at the Montford Unit.

The Montford Unit psychiatric program consists of 3 levels (Level 1 being the most restrictive) that a patient has to progress thru. I had attained Level 3 before being transferred. (The least restrictive level). As a Level 3, I could walk to the chow hall to eat rather than having my tray brought to my cell. I could go to the dayroom for recreation (there was no outside recreation offered) to watch TV and associate with other Level 3 patients from 1pm until 10pm. I could take my daily shower between 6pm and 10pm. I could work as a pod janitor. I could go to gym recreation once a week. I could attend group therapies and specific therapies such as art therapy. However, here at the Clements Unit in the CMI program, I have been stripped of practically all of these privileges. I am now treated as an administrative segregation offender but not classified as an administrative segregation offender. Along with approximately 150 other CMI patients here at the Clements Unit, I am confined to my single occupancy cell 23 hours a day. I am offered my one hour of recreation and daily shower at 5am. I am not allowed to attend religious services. I still have no access to the offender telephone system ("OTS") as there are no OTS phones installed on the CMI housing pods. Finally, the officer staff here at the Clements unit treat psychiatric inmates with disdain and contempt. Officers often provoke us into heated arguments so they can say that we "behaviorally denied" our recreation, shower, and/or food tray. There is one last privilege that I lost after being transferred to the Clements Unit. At Montford, as a Level 3, I could have contact visits with my family. Here at the Clements as a CMI patient, I can only visit with my family behind the glass.



The fact that we are treated as administrative segregation should cause grave concern to your office. It is an oppressive and possibly unlawful way to treat psychiatric patients/offenders. Despite always taking my medications, I often fall into a depressive cycle because of this type of confinement. I have friends and family who write and send me money. I cannot imagine what it is like for a CMI patient/offender who has no contact with the outside world. The type of treatment here is obviously counterproductive to the mental stability of a mentally ill person.

I would more than welcome an interview with someone from your office. I am not worried about any of the staff retaliating against me. I want the treatment of psychiatric offenders to improve and these injustices to stop. Most, if not all, of us in the CMI program have done nothing disciplinary wise to have so many privileges taken away. I pray that if it is in your power to investigate the entire TDCJ mental health program, you will do so. I would love to see all psychiatric offenders confined in TDCJ receive fair and equal treatment just as if they were receiving treatment in a free world mental hospital or even a "civil" State Hospital.

Thank you so much for your time and consideration in this matter.

Respectfully submitted,

/s/ Toby K. Payne

Toby K. Payne #1720023

Clements Unit

9601 Spur 591

Amarillo, TX 79107-9606

Toby K. Payne #1720023  
William P. Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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February 5th, 2016

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

I have recently discovered that an inmate housed in “high security” (solitary confinement) on this unit died because he refused to eat. I believed that this happened only a few weeks ago. An officer whom I trust told me that his hunger strike went overlooked by the medical as well as the officer staff. Although this inmate was not in a psychiatric program, it’s clear that he must have suffered from some form of mental illness (like clinical depression) in order to allow himself not to give in to the temptation to eat. This same lack of care goes on here in the psychiatric pods. In some cases, it’s worse here in the psychiatric pods considering we are in a “treatment” program called Chronic Mentally Ill.

I have brainstormed a few more issues of concern that by themselves may seem minor. However, when

added to other issues in my complaint, they add insult to injury.

- 1) We are not provided haircuts & shaves on a regular basis. We are also not provided fingernail clippers & have to wait for the barber to come around with some. In order to get these “services”, we have to “raise hell” in order to get a barber down here. We have gone almost three months without these services. General population inmates are provided these services on a weekly basis.
- 2) Our food is brought-to us on carts that, when plugged in, can keep our food warm/hot. However, these carts are rarely plugged in. I am on a pod that is divided in to six sections (A-F). I am on F section. The officers begin serving the food on A section the majority of the time. So, that makes the 14 inmates housed on F section the last to be served. By the time we get our food, it is room temperature or colder.
- 3) Personal hygiene (or the lack of it) is not monitored and/or enforced on the psychiatric pods. The inmates in these pods that are worse off (mentally) than I am go months without showering or changing out their clothes & bedding items.
- 4) Cell sanitation is also not monitored and/or enforced in the psychiatric pods.

I am probably missing other issues. If your office were to perform an unprompted investigation here, you would probably find more violations of the appropriate sections of the ADA & Rehabilitation Act.

App.59a

I thank you for your time & consideration.

Sincerely,

/s/ Toby K. Payne

Toby K. Payne #1720023

Clements Unit

**OFFENDER GRIEVANCE FORM  
(FEBRUARY 23, 2016)**



Texas Department of Criminal Justice  
Step 1 Offender Grievance Form

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**Office Use Only**

Grievance #: 2016097056

Date Received: Feb 23 2016

Date Due: 4.3.16

Grievance Code: 901

Investigator ID#: 2058

Date Retd to Offender: Mar 4 2016

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements

Housing Assignment: 12-C-65- (CMI)

Unit where incident occurred: Clements Unit

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

All pod officers

When? Since 2/15/16

What was their response?

We're not instructed to enforce personal hygiene & cell sanitation

What action was taken? None, Feb 23 2016

**State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate**

My neighbor (Offender Wilson 12-C-66) & the offender in 12-C-69 hardly ever take showers or clean their cells. When officers perform cell searches, they comment on how unsanitary the cells are for these two offenders. Anyone who walks down our run often times comment that they smell feces permeating from the cells of these two offenders. TDCJ policy requires that offenders keep up their personal hygiene and cell sanitation. The lack of enforcement on these two issues puts officer's and offender's health at risk. (END OF STATEMENT)

**OFFENDER GRIEVANCE FORM  
(JUNE 27, 2016)**



Texas Department of Criminal Justice  
Step 1 Offender Grievance Form

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**Office Use Only**

Grievance #: 2016167742

Date Received: June 27 2016

Date Due: 8.6.16

Grievance Code: 814

Investigator ID#: I2174

Date Retd to Offender: Jul 21 2015

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements

Housing Assignment: 12-C-65- (CMI)

Unit where incident occurred: Clements

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

Officer Haney

When? Thursday, June 23, 2016

What was their response?

Verbally refused phone call

What action was taken?

Officer Haney lied and told supervisor that I refused my phone call

**State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate**

This grievance is to be attached to my current grievance (Grievance # unknown) regarding a telephone cell that recently filed. On Thursday, June 23rd, 2016 and at or around 8:30pm, Officer Haney (I am not sure of the name but I can describe him as Caucasian, heavy set, wears glasses and has a mustache.) woke me up out of my sleep and asked me if I wanted to make a phone call. I said yes I do. Please give me a minute to wake up and get ready. (I only had boxers. on at the time and I wanted to splash water on my face to help me wake up. I did not want to call my mother with a groggy mind.) While sitting up on my bunk waiting for my mind to clear up, Officer Haney was still at the door staring at me. I asked him again if he would please give me a minute to get ready because I also had to urinate. He still stood at the (my) cell door watching me. I said, "are you going to stand there and watch me get ready?" His response was, "You're sure right." He walked off and told supervisors that I refused My phone call. His report to his supervisor was an outright lie. I haven't spoken to my mother since December 2014 and I absolutely would not turn down an opportunity to talk to her. The response to this grievance will be filed and attached to my complaint to the U.S. Department of Justice, Office for Civil Rights, *Payne v. Tex. Dep't of Criminal Justice*, Case No. 15-OCR-1258 which is still active. Attorney Shelley Langguth is the attorney assigned to the complaint I just mentioned.

\*\*\*\* (END OF STATEMENT) \*\*\*\*



**OFFENDER GRIEVANCE FORM  
(JULY 5, 2016)**



**Texas Department of Criminal Justice  
Step 1 Offender Grievance Form**

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**Office Use Only**

Grievance #: 2016172308

Date Received: July 05 2016

Date Due: 8/14/16

Grievance Code: 812

Investigator ID#: I-2174

Date Retd to Offender: Aug 15 2016

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements Unit

Housing Assignment: 12-C-65- (CMI)

Unit where incident occurred: Clements-Chronic  
Mentally Ill Program

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

Officer Ellis, CO

When? Thursday, June 23, 2016

What was their response?

Please see statement below

What action was taken?

Please see statement below Jul 05 2016

**State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate**

This emergency grievance is being filed under grievance code 002 Allegations of Staff Conduct That Places an Offender in Danger. On Thursday, June 30th, 2016 an Clements Unit, 12 Building, C Pod, cells 65 & 71, Officer Ellis (Hispanic Male) was harassing Offender Escalante (Cell 12-C-71) regarding the fact that Offender Escalante cannot control his bladder and urinates on himself. Officer Ellis was cursing at Offender Escalante telling that he better clean up his fucking house. Becoming angry, I called Officer Ellis down to my cell to explain to him that Offender Escalante is not able to control his bladder and was being monitored by medical for it. Officer Ellis would not listen to reason and refused to believe that I was telling him. I became even more angry because this is not the first time an officer has harassed Offender Escalante regarding this issue. I was upset because Officer Ellis was picking on an old man who could not really defend himself and has a serious medical issue. I wanted Officer Ellis to pick on scream who could defend himself. Officer Ellis then walked away. Somewhere between 30 minutes to an hour after this, Officer Ellis returned to my cell along with Officer Winburn (that day's pod officer). Officer Ellis proceeded to tell me that he just found out what my crime was and how could I "stud up" to him and call myself a man. He said, "You-killed your two-year-old dude." I asked him who told him this? Did he go out to the parking lot and look this up on his smartphone? He shook his head and walked away from my cell and off of the pod. I asked Offender Kelly #726547

(Cell 12-C-67) if he heard what just had happened and he told me yes he did and that he would be my witness. I also asked Officer Winburn if he would be my witness and he said, "You know how it is. I didn't hear anything." This action violates PD-22 General Rules of Conduct for TDCJ Employees Rule 33 which states, "Release of information-A TDCJ employee is not allowed to release any information relating to employees or offenders (Texas Penal Code § 30.04). I will be filing a sworn complaint to the Potter County D.A.'s Office under Texas Code of Criminal Procedure Article 15.05 in order to initiate criminal proceedings against Officer Ellis. I will also be sending a copy of this grievance to Attorney Shelley Languth; Officer for Civil Rights, Office of Justice Programs; U.S. Department of Justice; 810 7th Street, NW; Washington, DC 20531 as an amendment to my still active complaint '*Payne v. Tex. Dep't of Criminal Justice*' (Case # 15-OCR-1258). I am calling Offender Kelly #726547 (Cell 12-C-67) & Officer Winburn, CO as witnesses . . . .

[ . . . ]

**OFFENDER GRIEVANCE FORM  
(AUGUST 30, 2016)**



Texas Department of Criminal Justice  
Step 1 Offender Grievance Form

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**Office Use Only**

Grievance #: 2016204601

Date Received: Aug 30 2016

Date Due: 10/9/16

Grievance Code: 300

Investigator ID#: I2108

Date Retd to Offender: Sep 22 2016

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements

Housing Assignment: 12-C-65- (CMI)

Unit where incident occurred: Clements

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

U.C.C. (Major(s) Hardagree & Gruver, reps  
from Class. & Psych?

When? Monday, August 22nd, 2016

What was their response?

As long as you are in the CMI program you  
cannot have contact visits

What action was taken?

Denied a contact visit with my mother, Aug  
30 2016

**State your grievance in the space provided.  
Please state who, what, when, where and the  
disciplinary case number if appropriate**

This grievance is being filed under grievance code 004 ADA ISSUES. After sending a request to Senior Warden Foley to get a contact visit with my mother, I was scheduled to see UCC on 8-22-2016. On that day, I went before Major Gruver, Major Hardagree & reps from unit classification and CMI. It was already predetermined (before I even walked into that room) that I was going to be denied a contact visit with my mother. I was told that the unit policy for all offenders who are housed in 12 bldg. (CMI & PAMIO) can only get visits behind the glass. I explained to them that when I was on the Montford Unit psychiatric wards (from October 2014 to October 2015) I could get a contact visit as long as I was higher than a Level 1 & had not received contact visit restriction due to disciplinary action. It was explained to me that security on this unit is different than Montford. I explained to them that I was a G2/S3 with no cases for nearly two years and that I had never caused problems when I had contact visits in the past. They explained to me that it appeared that I was functioning well enough to be in general population. I told them that I have a serious mental illness and have never fully recovered from my son's death in 2009. I told them that every time the anniversary of his death & holidays come around I go into a downward spiral mentally and that's why mental health believes that it's best for me to remain in CMI. In short, I was told that if I want contact visits &

access to the OTS Phone system, to request a discharge from CMI. Contact visits was taken away from me without due process. I have done nothing to have that privilege taken away. Rather, I have done everything to earn that privilege. I suggested to Senior warden that I and other offenders in 12 bldg. (who are classified like me G2/63 and have achieved one of the two higher levels) should be treated as protective custody and not administrative segregation. TDCJ policy for protective custody offenders is that they are allowed contact visits during the weekday, upon approval by the Senior warden and/or UCC, where they would not be interacting with any offenders from general population. TDCJ is subject to Title II of the ADA because TDCJ receives funding from the federal government. The disparity between psychiatric offenders on the Montford Unit being allowed to have contact visits & psychiatric offenders on the Clements Unit not being allowed to have contact visits violates Title II of the ADA.

\*\*\* (END OF STATEMENT) \*\*\*

**OFFENDER GRIEVANCE FORM  
(NOVEMBER 8, 2016)**



Texas Department of Criminal Justice  
Step 1 Offender Grievance Form

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**Office Use Only**

Grievance #: 2017037678

Date Received: Nov 8 2016

Date Due: 12.23.16

Grievance Code: 666

Investigator ID#: I2186

Date Retd to Offender: Nov 28 2016

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements

Housing Assignment: 12-A-30 (CMI)

Unit where incident occurred: Clements

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

Mental Health (Sick Call)

When? 10-26-2016

What was their response?

Wait until your next session with Dr. Nguyen

What action was taken? None

**State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate**

On 10-24-2016, I sent in a sick call to mental health complaining that the benadryl was not offsetting the side affects from the other psychotropic medications that I currently take. Since switching off of congentin (at my request) and on to benadryl, I have been locking up my muscles all over my body. I can control that when I am awake to an extent. However, when I am asleep, I must be locking up a lot because I constantly wake up with very sore muscles and my teeth hurt from grinding them. I cannot wait all the way until my next scheduled visit with Dr. Nguyen. I do not understand why I would have to. On the Montford unit in the psychiatric treatment program, when I turn in a mental health sick call complaining about my psychotropic made, a mental health PA will come to see me within 24 to 48 hours. It should be the same here. Since it is not, that is a direct violation of Title II of the Americans with Disabilities Act. I need to speak with Dr. Nguyen as soon as possible.

\*\*\* (END OF STATEMENT) \*\*\*



Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Tuesday, March 14th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

I received your letter dated March 8th, 2017 today Tuesday, March 14th, 2017. This letter in response will be placed in the unit mail system on Wednesday, March 15th, 2017.

I recently sent you two letters regarding my grievance about TDCJ's Health Services division misapplying Texas Government Code § 508.146 Medically Recommended Intensive Supervision (MRIS) as well as me being informed that a new CMI program being recently created for current and future CMI patients, who are currently classified as general population (G4 up to G2), at the Montford Unit. Not G5 patients. That is a close custody classification and is the most restrictive general population classification. My understanding is that the CMI program here at the Clements Unit will only house G5 & administrative

segregation patients/offenders and those CMI patients who are G4 & G2 that have chosen to not transfer to the CMI program at the Montford Unit. I chose to remain here because the CMI staff here could not provide me with any details as to how the CMI program at Montford would be ran.

I am still in the CMI program here at the Clements Unit. CMI patients here are generally still confined to their cells 23 hours a day. I assume the reason for this is because TDCJ has made a blanket decision to treat the patients in the CMI program here as administrative segregation regardless of the patient's /offender's custody/classification level.

Recreation and showers here are still only offered at or around 5:30am. Officers will often run dayroom recreation but not showers in an attempt to "wait out" those that wanted to shower in order to get them to give up and refuse their shower when finally asked sometime around 9am or so. Dayroom recreation and showers are often used as a commodity. For example, I can "give up" my recreation & shower for an extra tray of food at lunch or dinner. Lots of patients who do not get money on their commissary accounts take this offer.

All CMI patients here still cannot have contact visits. This is also because all CMI patients are treated as ad-seg here regardless of their custody level. This is understandable for those CMI patients who are currently classified as G5 or ad-seg. I am trying to find out if contact visit privileges have been restored for the CMI patients at Montford.

The "one phone call every ninety days" policy for CMI patients here is still in effect. As far as I know,

nothing has changed regarding that. I am also currently trying to find out if the CMI patients at Montford have ready access to the Offender Telephone System (OTS) that general population offenders not in a psychiatric treatment program have access to.

There are still no religious services being provided to CMI patients here. Only upon request will a volunteer clergyman visit with us. His name is Chaplain Dale and he only comes by on Sundays as far as I know. I have visited with him on a few occasions and he is always gracious and as patient as possible considering that he is the only one provided to us. I must admit that I have not spent much time researching this particular issue.

CMI patients here are now being provided with group therapy at a maximum rate of one per week for about an hour each session. Group therapy is only provided to patients that are at CMI levels 1 & 2. (There are four CMI levels as it relates to their cognitive functioning. Level 1 is for higher functioning patients. Level 4 is for the lowest functioning patients) The group therapy sessions here are not specialized like the sessions at Montford. Here, it is mainly a talking session that is loosely based on a psychological treatment program. In addition to group discussions, there are specialized sessions at Montford like art therapy & garden therapy etc. Individual therapy here is strictly cell-side visits only. By doing it that way, other patients can hear confidential patient information being discussed. Officers, who are required to escort counselors to the patients cell, can also hear the discussion. Each pod has two cells that are side-by-side and have been converted to a single "room" where all group therapies are currently being conducted.

The room has a chain-link fence that separates patients and their counselors. My belief is that officers are just too lazy to pull a CMI patient out for a one-on-one session.

As far as I can tell, there has not been much of a change in the enforcement of personal hygiene and cell sanitation policies here. The entire officer staff simply does not care. However, I believe that now CMI patients who have been stuck at level's 3 & 4 (not functioning at a high cognitive level like not showering or cleaning their cells) are being transferred to Montford (not to the new CMI program) in order to help them get to a higher functioning level and to possibly adjust and/or change their psychotropic medications. Now, I have been moved several times to another cell where the prior occupant did not practice personal hygiene and cell sanitation. On one of these occasions the escorting officer(s) told me that I would get wrote up with a "refusing housing" disciplinary case if I refused to go into a cell that was covered with food debris and smelled like urine & feces. I had to clean it all myself using my own commissary supplies. I have already verbally complained to my counselor about this. I have not been moved since issuing my verbal complaint. I do not know if this issue is still happening to us.

Haircuts and shaves are currently only being provided at an approximate rate of once per month here. At Montford, patients are provided this service once per week. Clements has plenty of inmates that can be trained to "zero out" clipper shave. I believe that TDCJ just does not want to purchase the additional equipment that would allow each CMI/PAMIO

pod on 12 Bldg. (6 total) to have an inmate barber assigned to it.

The carts that carry the food trays are now being plugged in when they arrive on the pods. I currently cannot see if this is being done all the time. I can just tell when I get my tray if the food is hot or not.

Lastly, in my opinion, every officer and every supervisor that work in these controlled psychiatric environments should have a degree in psychology and be licensed to counsel. Currently, if a CMI patient is experiencing a crisis, unless they are suicidal and/or homicidal, they cannot get access to their counselor unless they go thru their pod officer. Pod officers hate having to deal with an offender who is just having a bad day and needs to speak with someone. Be generally cannot speak with our counselor unless he/she stops by our cell when we are scheduled. Officers here still provoke CMI patients into misbehaving. TDCJ policy requires that an inmate be fed regardless of his/her behavior. That's why there are alternatives like a Johnny sack with sandwiches and food-loafs. But when a CMI patient is either provoked into misbehaving or just having a bad day (after being confined in their cells for whatever amount of time) almost always the pod officer will totally deny their meal(s) and not provide one of the alternatives mentioned. (As a side note regarding this specific issue, as a result of the grievance I filed regarding officers Ellis & Winburn (I sent the Step 1 & Step 2 to you) disclosing specific details of my crime where other inmates on my section could hear it, officer Winburn (when he works my pod) he will refuse to feed me both lunch & dinner and does not provide either of the alternatives. On most of those instances I will

have some food that I purchased from commissary in my locker. I just tell myself that God will handle that particular grievance. If I did file a grievance on this, he would just lie and deny that it happened like he did with the previous grievance.

I have already mailed you any and all relative grievances that have completed the Step 1 & Step 2 process. I think I mailed you one or two Step 1's that did not require a Step 2. The grievances that I am sending you are the originals as I do not have ready access to copying services. In order to get copies made, I would have to mail them to my mother and then the material would not go out as privileged legal mail that can be sealed.

Currently, I have two outstanding grievances that are still being investigated. One, currently in the Step 2 stage, is in regards to the cell light switch in my pod's picket for my section being broke off and stuck in the on position. All of us reported it as soon as it happened and our pod officers told us that they wrote it down on the maintenance log. It still took 6 days to get it fixed. This possibly caused undocumented mental setbacks for those CMI patients affected that were not functioning well as it was. It also caused conflict with some pod officers because some of us covered up our lights for those six days and by policy we cannot do that. On a couple of occasions some of us had to unite and demand a supervisor to come to the pod to endorse what we felt we had to do by covering up our lights. The other outstanding grievance is still in the Step 1 stage and relates to the misapplication of the MRIS law by TDCJ Health Services. I am in the process of obtaining my copy of the application for the MRIS program that was eventually denied. I

am also going to get a copy of the application that was granted for my admittance into the CMI program.

I must tell you that the information that I've provided is my personal observations. None of the CMI patients, including me, are being provided any information relating to positive changes to the treatment of us or any mentally ill offenders. When something changes, we are sort of blindsided and being asked to participate. Most of the CMI staff has told us that they don't even know what's coming down the "pipe" prior to a change being made. They tell us that they are in the same boat as us. I could be misinformed regarding . . .

[ . . . ]

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Sunday, April 23rd, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

It seems as though the staff here, both mental health and officers, just hand me a legit issue every week. I am submitting another grievance tomorrow morning.

The psychiatrist over me, the one that I have been under since entering into the CMI program, finally put me on Effexor a while back. It is both a SSRI & SNRI and has worked the best for my depression. It's the first antidepressant that is also an SNRI that I have been on. Well, I also have high blood pressure and Effexor can cause high BP. Dr. Nguyen visited me on Tuesday 4/18 after my BP spiked. She checked it again and it was lower. She told me that she may have to take me off of Effexor and put me back on the old medication. I told her that that was the reason we went to the Effexor was because the "old" stuff didn't



work well. She said there was nothing else she could do. That's a total lie and I told her so. She just doesn't want to have to go thru the red tape to get a SNRI that doesn't affect my BP approved.

So the grievance is about that and also I stated that if TDCO couldn't provide me with proper medications, then I need to be transferred to the Texas State Hospital System per Texas Health & Safety Code § 501.113. The code reads as follows:

The Texas Department of Mental Health and Retardation may contract with the TDCJ to transfer or provide facilities for current, paroled, or released prisoners with mental illness or mental retardation.

I even also found a caselaw by shepardizing the code. *Addington v. Texas*, 441 U.S. 418, 429, 99 S. Ct. 1804, 1811 (1979).

When I get the Step 1 back, I will mail you a letter informing you of the response. When I get the Step 2 back, I will mail you the originals.

Sincerely,

/s/ Toby K. Payne

Toby K. Payne #1720023

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Saturday, May 6th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

I am writing you regarding yet another death of an offender/patient here on 12 Bldg. (CMI/PAMIO). This was a suicide by hanging. It occurred during the evening of Thursday, May 4th, 2017 going into the morning of 5/5/2017 on B Pod, 12 Bldg. I believe that the offender was successful only because pod officers get lazy and do not do their wellness checks. I have confirmed this by speaking to several offender pod janitors, officers, and nurses who trust me. They all know about this complaint/investigation and truly want to help and want to see change to how mentally ill offenders are treated.

There was a period a short while ago where officers and supervisors were doing good on wellness checks about every 30 minutes. The problem was that most of them were tapping hard on our steel doors

with objects and/or kicking our doors as hard as they could every 30 minutes because they were mad about having to do these checks. I think the main problem is that the officers are doing these wellness checks and not the psych nurses. The psych nurses, who are here 24/7, do not come on our pods unless they have to. When they do, some of them are very dismissive and reluctant to help. Otherwise while in their offices, they are not doing all that much. Also, I checked the medical employee roster that I requested from the law library and there is about 6 or 7 psych nursing positions open. If the nurses end up doing the checks, they should use flashlights to ensure we're breathing /moving to make sure we are alive. Waking us up every 30 minutes would only exacerbate our mental condition.

It's very alarming that in a super controlled environment, things-such as this still happen. It just shows that there is a concerted effort of neglect towards the mentally ill offender because, "That's one less body we have to take care of an pay for." Ma'am, I will die fighting to ensure that all people who suffer by being & because they are mentally ill are treated with the dignity that our Constitution dictates that we should be provided with. How is it that what is happening to us is not also a violation of 42 U.S.C. Ch. 114 §§ 10801 Protection and Advocacy for . . . .

[ . . . ]

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Saturday, May 14th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

Here is my “weekly” update regarding the issues and/or improvements here in the CMI program.

Last night was the first time since entering the CMI program that I got a haircut & clippershaves at night. Our haircuts & shaves are still very infrequent. Sometimes the inmate barber is sent away due to staff shortages. However, I know that often times supervising officers will claim a staff shortage, especially at night, in order to get out of any extra work outside of what is the bare minimum. Also, the only time we can clip our nails is when the barber comes. The nail clippers are communal and are almost always very dull. In the psych wards at Montford, the pod nurse is the keeper of the nail clippers. Medical is responsible for keeping new ones available.

Since that is related to personal hygiene and a close cousin to cell sanitation, here's an update on those issues. I am not seeing any progress in regards to personal hygiene. Patients are still allowed to go months without ever being required to shower and ensure that they shower effectively if/when they do. The main reason is oppression induced depression and/or "natural" depression. But a very close second is the fact that the section showers are "showercells". We are shut in by a solid full sized locked door. What would normally be a food slot is left open. Pod officers are slow in getting us out and back in our cells. I am always sweating by the time I am pulled out. Most of us are sensitive to heat due to the psychotropic medications we take. I have gotten dizzy on a few occasions from being left in that showercell too long. So all of that along with showers only being offered starting at 5:30 AM by informing the pod officer, at that time, getting put on a list, is deterring patients from wanting to get up and go take a shower. Montford psych has big barred windows on the upper half of the door to the showers. Montford psych also offers showers to the patients that have achieved the higher levels (Level 1 and 2 for CMI) after the 2nd shift starts at 5:30/6 PM. This creates an incentive to obtain a Level 1 or 2 status. As far as cell sanitation, patients are not being required to clean their cells. However, I have seen the pod janitors clean a cell when someone has moved out. I am not sure if this happens all of the time.

We had a flu outbreak starting around May 4th. Our building (12 Bldg.) was quarantined. The medical staff took good care of us. Everyone was evaluated and if we were sick, we were offered antidiarrhea,

pain relief, antinausea medications. The situation has blown over and we are back to normal activity. I noted this because this event has triggered supervising staff to pay more attention in ensuring that pod janitors clean and sanitize the common areas of the pods very well. Also, the food carts are plugged up more often.

On the mental health side, therapy sessions are still lacking in frequency and effectiveness. Group therapy is a very quick hour and only once per week. Group therapy is only being provided to Level 1/2 patients. Also, once per week, every patient is seen one-on-one cellside. The exception is how the Level 3 counselor, Ms. Kemp, conducts here one-on-one sessions. She will have the pod officers bring each of her patients to the counseling area that is on each pod. I do not know what to suggest in the way of improvements in this area. It is so murky as to what is allowed and what is not. I just know that we are all in our cells way too much and we are unable to do anything about it.

I have been informed that the supervising psychiatrist over CMI/PAMIO, Dr. Garcia, is no longer issuing orders to transfer any qualified patients to the CMI program for general population classified patients to Montford. The "informant" said that the warden and mental health staff couldn't get their acts together and were at odds. I still have not discovered whether or not is true that hot pots and radios were taken from all the psych patients.

Now, I believe that, like me, there are only a dozen or so CMI patients here that are classified as G2 security status. G1 being the highest/ least restrictive. This literally means that our behavior has been good

and we've done nothing to warrant any privileges being taken away from us. Mental Health (CMI) just requires us to be in psychiatric sheltered housing due to our situation(s) and diagnoses. Some of the privileges that we are currently denied are:

- 1) As far as property we've purchased, we are not allowed to possess our hot pots, nail clippers, shaving razors, and shaving cream. If we own any of these items, they are currently being kept in the property room.
- 2) Because this building is treated as administrative segregation, we are also unlawfully treated as such. However, in the PAMIO program on the same building as us, those inmates are allowed more freedoms if they attain the higher levels. They are wrist banded a certain color and allowed to actually go to the TV/Dayroom with each other. Staff could wristband US a certain color, house us all on one section on one pod (14 cells total) to allow us to do the same.
- 3) We are also still denied access to the Offender Telephone System (OTS). We . . . .

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Saturday, May 20th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

It's been another week and a few interesting things have happened.

The property officer for our building (12 Bldg.), Mr. Adams, passed out free fans for any CMI patient that did not own one. I have no way of really knowing if it was in response to this investigation. It was a neat thing to see though.

On Tuesday (5/16), a group of commissioned TDCJ wardens came to "investigate" deficiencies on this building and other areas of the unit. I was told by an officer that it was in response to the suicide of that offender on B-Pod, 12 Bldg., on 5/4/2017, that I recently wrote you about. Sometime during mid-morning of 5/16, several plain clothed people came on my pod (C-Pod) and stood around the desk that the pod officers use. From my cell, I could see a few of them. But not



the actual desk itself. Each of the six sections on each pod of 12 Bldg. are barred off and each has its own barred door/gate. None of the people ever went into a section while "inspecting" our pod. They just roamed the walk space that surrounds the control picket. That means that none of these so-called inspectors actually looked into any cells. They never bothered to see the deplorable conditions that many of these patients subject themselves to due to their degraded mental condition. They never smelled the urine and feces coming from every unsanitary cell. They never saw the very serious roach infestation due to these poor cell conditions. They never looked into the eyes of any of these patients who's own minds are tormenting them at no fault of their own. They never smelled the body odor coming off these patients because they are unable to pull themselves together to want to be clean. They are so used to their own smell that they don't know that they smell. Officers, supervising officers, medical staff, and mental health staff all know about the terrible conditions these men are living in and are constantly passing the buck telling me that they cannot do anything about it. Some of them have had the audacity to tell me that we should have not committed a crime, then we wouldn't be in this position. I've even been told that we probably deserve the poor treatment that we're getting right now. Obviously none of what . . . .

**OFFENDER GRIEVANCE FORM  
(JANUARY 25, 2017)**



**Texas Department of Criminal Justice  
Step 1 Offender Grievance Form**

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**Office Use Only**

Grievance #: 2017078378

Date Received: Jan 25 2017

Date Due: 03-11-2017

Grievance Code: 672

Investigator ID#: I2186

Date Retd to Offender: Mar 13 2017

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements

Housing Assignment: 12-C-54 (CMI)

Unit where incident occurred: Clements

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

Ms. Wynne, Psych. Counselor, (CMI)

When? January 18th, 2017

What was their response?

Huntsville denied request for medically  
Recommended Intensive Supervision (MRIS)

What action was taken?

Ms. Wynne instructed me to submit Medical Records request for chart review.

**State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate**

This grievance in being filed under grievance code 672 and is in regards to the Texas Correctional Office on Offenders with Medical or Mental Impairments (TCOOMMI) denying me full review for Medically Recommended Intensive Supervision (MRIS) based on an application, sent to psychiatrist Dr. Nguyen of the Chronic Mentally Ill (CMI) program, that contains questions that have nothing to do with being mentally ill and that very application failing to represent the full color of the Texas law that governs the MRIS program (Texas Government Code § 506.146). Tex. Gov't Code § 506.146 states that, "An inmate other than an inmate who is serving a sentence of death or life without parole MAY be released on medically recommended intensive supervision . . . may only be considered if a MEDICAL CONDITION of terminal illness OR LONG-TERM CARE has been diagnosed by a physician, if the Texas Correctional Office on Offenders with Medical or Mental Impairments, in cooperation with the Correctional Managed Health Care Committee, identifies the inmate as being . . . MENTALLY ILL. . . OR having a CONDITION requiring LONG-TERM CARE . . . OR in a persistent vegetative state or being a person with-an organic brain syndrome with significant to total mobility impairment the parole panel determines that, based on the inmate's condition and a MEDICAL EVALUATION, the inmate does not constitute a threat to Public safety AND the Texas Correctional Office on Offenders

with Medical or Mental Impairments, in cooperation with the pardons and paroles division, has prepared for the inmates medically recommended intensive supervision plan that requires the inmate to submit to electronic monitoring, places the inmate on super-intensive supervision, or otherwise ensures appropriate supervision of the inmate. An inmate may be released on medically recommended intensive supervision only if the inmate's medically recommended intensive supervision plan under Subsection (a)(3) is APPROVED by the Texas Correctional Office on Offenders with Medical or Mental Impairment. (This has to happen prior to the favorable recommendation is sent to the parole board. That is why this grievance is not about being denied release on parole Per Se)" I am currently an inpatient in the CMI program here at the Clements Unit. I am in prison because I caused the death of my son due to the fact that I was in an acute state of psychosis. my diagnoses is schizoaffective disorder. It is undisputed by the CMI staff that I require "long-term" care. I satisfy Subsection (a)(2) due to the fact that I have been stable for quite a long time, I am classified as G2/53, and the fact that I have gone disciplinary . . . .

[ . . . ]

App.92a

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Saturday, June 4th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

This past week was fairly uneventful.

My pod (C Pod) has not received haircuts & shaves since when I wrote you about getting haircuts at night. Like I explained to you then, it does not happen as often as it should.

The counselor for Level 2's (my current level) was out on vacation this past week. Another counselor did stop by my cell for her to check on me and the other Level 2's. However, no Level 2's got to go to their weekly group therapy session. So, probably most of them stayed in their cells 24 hours a day all week. It's this lack of basic mental health care by TDCJ Health Services/Mental Health that is my main concern.

On that topic, I would like to explain something that happens on a daily basis on all 3 CMI pods on this building. Since we are kept in our cells all the time, we are prone to depression and anger. Most of the guys back here occupy their time arguing with each other cell to cell. What we call cell warrioring. Guys vent their frustrations on weaker ones with some of the most horrible examples of verbal abuse that I have ever heard in my entire life. I know of one guy that recently lost his parents in a car accident and this other inmate a few cells down tells him constantly that he paid the other driver to crash into them. The officers & mental health staff hear this arguing all the time and do nothing about it.

Well, all of this “cell warrioring” goes on all the time. Threats are frequently made. As you know, Level 1 & 2 CMI patients are allowed to attend group therapy sessions with physical access to the other inmate/patients attending. Most of the time there about 5 to 7 patients in each session. I explained that to explain this: Fights are arranged between two feuding patients who attend the same group all the time. Several fights have already taken place in these sessions. Patients that are currently Levels 3 & 4 are afraid to be promoted to Levels 1 & 2 for fear of getting into a fight. You can see where this is all going.

[ . . . ]

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Sunday, June 11th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

I pray that this letter finds you doing well. I hear on the radio that the political climate there in DC is turbulent to say the least. With AG Sessions testifying before the senate intelligence committee this coming week, I am sure that everyone there at the DOJ are on edge a little bit.

The unit went on an annual routine lockdown on Monday (6/5). So yet another week without a haircut & shave. Also, no group therapy this week due to the lockdown. On Friday (6/9), my counselor did stop by my cell but I was asleep and did not get to speak to her.

My pod was searched yesterday (6/10) and I saw something that surprised me. After the officers searched each cell, an inmate janitor followed behind and swept /mopped each cell that needed it. In the time that I

have been in CMI, I've never seen that before. I know that beggars can't be choosers but I wish that the staff in charge would have coordinated with pest control services and had them go behind the janitor to spray each cell to get a handle on the roach problem. But as the saying goes in prison, "That would be to much like right!".

That is all that I have to report. Thank you for what you are doing for us!

Sincerely,

/s/ Toby K. Payne

Toby K. Payne #1720023

Clements Unit

Amarillo, Texas



Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Sunday, June 18th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

We are still on lockdown. I am hearing that it will be a long one. About 30 days total give or take. They kept finding drugs and cell phones in general population. It's being called a routine lockdown. But they are going thru everything with a fine-toothed comb.

There are only three things to update that are worth mentioning. The first is the lack of ongoing counseling from the CMI psychologists. My counselor did a drive by cell side visit with her patients the week prior. She did it again this week. Both times were on Friday at or around 3:30 pm. I can surmise that she is doing this "counseling" on her way out the door to go home. I was either asleep or pretending to be asleep each time. I am no longer going to participate in cell-side therapy. It violates my patient confidentiality because other inmates in their cells and

escorting officers can overhear everything that is said. I have no idea what the entire CMI staff do with their 40 hour work week. But it doesn't involve our care and rehabilitation. If a CMI patient is to get better and become mentally stable, it would not be because anyone on the CMI staff held their hands each step of the way. When it comes to the successful treatment of the mentally ill, it is absolutely necessary for the caregiver to do just that. Anyone who is suffering from an acute degree of mental instability is like a baby mentally. They are very susceptible to extreme degrees of emotion. If they are left to recover on their own, they will never get better. I would gamble that in all cases such as that, they will get worse. I know all of this from first-hand personal experience. I absolutely needed my "hand held" after my arrest. As far as the expression of being a baby mentally, my stepfather told investigators that prior to my arrest, I was calling my mother numerous times a day. He said it was like I was trying to crawl back into my mother's womb. Well, when I became more and more stable mentally, I was able to stand on my own two feet mentally speaking. The majority of the men in the CMI program continue to suffer extreme mental anguish with what appears to be no help coming over the horizon.

[ . . . ]

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Sunday, June 28th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

I received your letter dated 6/22/2017 on Tuesday, June 27th, 2017. Thank you for explaining the MRIS issue to me. I do have one correction to make within the first paragraph. We are provided with group therapy for one hour once per week. Virtually all one-on-one counseling is done cell-side where escorting officers and other inmates can overhear. So individual therapy is virtually nonexistent.

In regards to my request to be transferred to the CMI program for general population CMI patients at Montford, that is on hold indefinitely. I am still attempting to confirm if the warden there really did confiscate all radios & hotpots from all psychiatric patients. The CMI counselors here are telling me things like, "They don't know what they're doing down there." or "We are not going to send you somewhere where

App.99a

things may be worse for you or provoke you to anger.”  
I do have a grievance on this issue that is still in the  
Step 2 phase. I will mail it all to you as soon as I get  
the response.

Thank you for all of your efforts!

Sincerely,

/s/ Toby K. Payne

Toby K. Payne #1720023

Clements Unit

Amarillo, Texas

App.100a

Toby K. Payne #1720023  
Clements Unit  
9601 Spur 591  
Amarillo, TX 79107-9606

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Tuesday, August 8th, 2017

Attorney Shelley Langguth  
Office for Civil Rights  
Office of Justice Programs  
U.S. Department of Justice  
810 7th Street, NW  
Washington, DC 20531

Re: *Payne v. Tex. Dep't of Criminal Justice*  
(15-OCR-1258)

Dear Ms. Langguth:

First, the most recent letter that I have received from your office was back on June 22nd, 2017. I wanted to let you know that just case one may have gotten lost in the mix from my transfer.

You may have already noticed, but I have been assigned to the Robertson Unit. I was assigned a job as a janitor on 8 Bldg. where offenders who have been demoted in their classification status are housed. There are medium custody (G4) & close custody (G5) offenders housed in that bldg. Those offenders that are G5 are one level from being demoted to administrative segregation. I am currently a G2. G1 is the least restrictive classification level. The job is very taxing and it is hot even though I work from 10pm to 6am. It's great exercise. However, the job has aspects to it that violate my doctor ordered work restrictions.

Because of the psychotropic medications I take, I have heat restrictions. Because of two lower back surgeries prior to my arrest I have a no bending at the waist restriction. With the second one, it puts me in an awkward situation with my co-workers where I would not feel comfortable informing them that I cannot do certain things and that they have to pick up the slack because of that restriction. So I do my best and do all that I can to avoid that situation by bending at the waist if I have to or use my legs. It also places me between a rock and a hard place with officers who are working where I work. If they ask me to do something that would require me to bend at the waist and I say I cannot because of my work restriction, they will most often write me a disciplinary case for refusing to obey a direct order. It will stay on my record despite a Step 1 & Step 2 appeal/grievance. I had that happen to me while at Montford. I believe I sent you those Step 1 & 2 appeals. These types of violations are common throughout the TDCJ with respect to offender who have disabilities. Discrimination is very rampant all over the TDCJ when it comes to offenders with mental illness/disabilities. Those of us with mental illnesses who are on the psychiatric case load have a designation in the TDCJ system where the officer & administrative staff can see it. When they do and they know we can work, we are only given three choices of areas where we can work. They are in laundry, the kitchen, or as a janitor. All three of those jobs violate heat . . . .

[ . . . ]

**OFFENDER GRIEVANCE FORM  
(APRIL 25, 2017)**



**Texas Department of Criminal Justice  
Step 1 Offender Grievance Form**

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**Office Use Only**

Grievance #: 2017126136

Date Received: Apr 25 2017

Date Due: 6-9-17

Grievance Code: 666

Investigator ID#: 2108

Date Retd to Offender: Mar 15 2017

Offender Name: Toby K. Payne

TDCJ# 1720023

Unit: Clements (12 Bldg.)

Housing Assignment: 12-C-54

Unit where incident occurred: Clements (12 Bldg.)

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

Dr. Nguyen, Psychiatrist, CMI, 12 Bldg.

When? Tuesday, April 18th, 2017

What was their response?

If your blood pressure doesn't come down, I will have to put you back on old medication.

What action was taken?

I informed her that I would work with medical to get my BP down.

**State your grievance in the space provided. Please state who, what, when, where and the disciplinary case number if appropriate**

This grievance is being filed under Grievance Code 672-MENTAL HEALTH PROGRAM ISSUES. I've been on chronic high blood pressure since the fall of 2015. I also recently went back on DFH. I also buy the healthiest food items from commissary that I can. I buy the multi vitamin, fish oil, & amino acid supplements from commissary and take them as directed. I try to exercise as much as I can. However, I have had two lower back surgeries and have to ensure that I do not cause any more issues to my back. My morale is not very high due to the fact that I am confined to my cell virtually 24 hours a day, 7 days a week, 365 days a year. So I don't "feel" like working out very often. I am doing whatever I can to try and keep my blood pressure down. It is no secret that the Effexor that I am currently taking is known to also cause high BP. The previous antidepressants I was taking were not effective. Effexor is also both a SSRI & SNRI and has had the absolute best results to the betterment of my ongoing mental state. I asked Dr. Nguyen to try and push for another medication that was ask both a SSRI & SNRI that did not have the negative problems of causing high BP. Now that we know that my mental state is much improved by an antidepressant that is both a SSRI & SNRI and the fact that I am on chronic high BP, I probably should be moved to an antidepressant that is both a SSRI & SNRI that doesn't cause my BP to be consistently high. Otherwise, it could be argued that it is the psychotropic



medication that is really causing my persistent hypertension and is keeping me from reaching more acceptable levels of BP. As stated above, I am doing virtually all that I can to keep my BP low. NOW, if mental health, with me being in a controlled psychiatric treatment program called Chronic Mentally Ill AND my diagnosis being schizoaffective disorder, cannot get a better antidepressant that is still both a SSRI & SNRI, then maybe I need to be transferred to the Texas State Hospital System per Texas Health & Safety Code § 501.113 where I can have access to all appropriate medications that I may need without having to author a grievance such as this one.

\*\*\* (END OF STATEMENT) \*\*\*

**PLAINTIFF DECLARATION  
AND MOTION FOR TRO AND/OR PI  
(DECEMBER 8, 2019)**

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

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TOBY K. PAYNE # 1720023,

*Plaintiff,*

v.

JAMES SUTTERFIELD, ET AL.,

*Defendants.*

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Civil Action No. 2:17-CV-00211

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Plaintiff's Toby K. Payne #1720023, makes the following declaration and motions this court for a Temporary Restraining Order and/or Preliminary Injunction.

On 12/3/2019, I was transferred back to the Chronic Mentally Ill Sheltered Housing (C.M.I.) program at the Clements Unit in Amarillo, Texas. During my most recent trip to the Montford Unit's psych ward, it was suggested by mental health staff that I should return to the CMI program and I reluctantly agreed. Not long after that, I was informed that I had been accepted. However, I was still discharged from Montford Psych. and transferred back to the

Robertson Unit. At the time, I was already eligible for review to be promoted in custody level from G5 to G4 and it was noted for approval by the Robertson Unit's Unite Classification Committee (U.C.C.)

As a G4 in regular Housing, I was able to enjoy TV and dayroom activities from 7 a.m. to 11 a.m., The ability to walk to and eat in the chow hall for all three meals. Attend church service on Sunday Mornings. Take a shower between 7 a.m. to 11 a.m. While in the dayroom, walk to the medication window on my building, and enjoy basic physical social interaction with my fellow inmates.

Upon arrival at the Clements Unit, I was issued one jacket (I use it for a pillow), one sack lunch that did not conform with medical orders to only serve me diet for health (D.F.H.) meals, a small amount of toilet paper off the roll, four small pieces of green state issued soap, one wool blanket and two sheets. I am assigned to a solitary single occupancy cell in 12 building, A pod, 4 section, 46 cell. Upon entering the cell, I noticed there was no mattress. I informed my pod officer and was told that there were none available on the building. I turned in a step one grievance on this issue on 12/4/2019 and to date have received no response. I wrote the warden's office both on 12/5/2019 and 12/6/2019 and received no response. I have counted a least five inmates on my section alone who still do not have a mattress including me. Officer after Officer walk by our cell looking in and seeing that we are sleeping directly on the steel bank and do nothing. I have yet to notice a supervisor walk by. To date, I have still not been issued a mattress. The heater does not work well and it is cold in here. The two sheets and blanket help by covering up. However,

the steel bank is very unforgiving and cold. I can barely sleep.

From 12/4/2019 until 12/6/2019, I was not afforded the opportunity to shower or use my one hour of recreation because officers claimed that there was a staff shortage. However, on these days, I noticed two officers on the floor and one in the Picket. This is the minimum to run showers and rec. On 12/7/2019 we were afforded these opportunities. However as mentioned in this action, recreation and showers are only offered beginning at 5:30 a.m. when most of us are asleep and most likely to turn it down. Instead of officers stopping at each cell to ask each inmate if they want their rec. and shower and making a list, the inmate must be standing at their door when the officer performs their first walk for the shift beginning sometime around 5:30 a.m. Not all offenders have clocks. I do, so if the offender is not up and at his door, then they do not get their rec. and shower. Remember, all of these offenders are mentally ill and are taking psych. Meds. On days that we are afforded the opportunity to exercise these privileges/rights, I chose not to accept them. I can recreate more in my cell at the times that I choose to than I can either in the small dayroom or small rec. yard by myself. I bathe when I choose to by sitting backwards on my toilet and pouring sink water over myself using my coffee cup. The very important thing to know here is that no matter what the offender's actual custody level is, all of is in the C.M.I. program are treated as high security high risk administrative segregation offenders. This building was designed to be self contained to those psychiatric offenders. it has classrooms that are never used and a small chowhall

that has been converted into an employee break room. This building even has its own commissary window to allow offenders to walk to the commissary window. But this is not done. Any service that can be provided to us in the C.M.I. program that can be done while the inmate is kept in his cell is done this way.

To date, I have yet to receive any psych counseling or even be seen by my mental health counselor (psychologist). I was seen briefly by my psychiatrist, Dr. Nguyen, cell side on 12/6/2019. It was not a private meeting because an officer was escorting her. The only difference I've noticed in the C.M.I. program from the last time I was here is there is a camera system installed now. The C.M.I. program to me is just a cute name that covers for the actual warehousing of the worst of the worst mentally ill inmates. The only benefit to where I am at present at is that I have a cell to myself. That's it. I am split, I want to be here for that reason and that reason alone. I have tried everything within my power to get the mental health help I need and cannot even find it in a program called chronic Mentally Ill or even at Montford Psych. All of the issue I complained about in this action are still occurring. Things have come full circle.

I know how to do this kind of time. However, Solitary confinement has a sneaky way of adversely affecting a person in a way that they cannot sense. I may or may not succumb to yet another mental breakdown or psychiatric episode as mentioned in a related case filed for retaliation, *Payne v. Collier, et al*, #1:18-cv-00208 pending in the Abilene Division. How many more before I succumb to suicide? I mentioned in the Collier case, in the initial complaint,

that I fight off suicidal thoughts every day. I still do, I do not tell anyone here because to do so would be punishment in of itself as complained about in a case dismissed by the Abilene Court *Payne v. Almanza, et al.*, #1:18-cv-00175, where I detail what happened to me after admitted I was suicidal.

I motion this court to order the defendant in their official capacity (the defendants in this action have all moved on from what I can tell) to show cause for the following:

- (1) why I should NOT be issued a mattress in a timely manner.
- (2) Why I should be confined to my single occupancy cell virtually 24 hours a day and how this benefits me being diagnosed with schizoaffective disorder. A combination of bi-polar disorder and psychosis.

On the evening of 12/7/2019, I was asked by the mental health nursing staff to sign papers agreeing to the terms and policies of the CMI program. I informed them that I will not sign anything if they cannot me a mattress. I was told I could be kicked out of the program if I refuse to sign the papers.

I have spoken with a few of the inmates back here and they have all basically told me that what very little counseling they do get is often cancelled because officer staff claims they are short of staff. This excuse also interrupts showers and rec. So between mental health staff employed by Texas Tech and TDCJ. They have managed to convince 100+ inmates, mentally ill inmates, the worst of the worst mental health wise, to agree to be warehoused and be each

confined to their cells virtually 24 hours a day for months and in some cases, years at a time.

I respectfully invite this court (Your Honor) to please read all the details in *Payne v. Collier, et al.*, #1:18-cv-00208, pending in the Abilene Division. I filed a notice of related case in this action pointing to the *Collier* case for this very reason. The *Collier* case was filed by me citing retaliatory efforts by TDCJ officials by filing all six of my previous lawsuits. In addition to Gov. Greg Abbott and Tex. Atty. Gen. Ken Paxton, the *Collier* case names all 26 defendants in all previous six lawsuits I filed in federal court (Amarillo Division & Abilene Division). I have asked the Abilene Court to consider consolidate this action into the *Collier* Case. I respectfully ask your honor in this action to come and tour the CMI housing area. Lastly, one of the offender's I am in shouting distance from and communicating with is David Kelly. He is one of the inmates who wrote a letter on my behalf witnessing what the conditions are like in the CMI program. Yes, he has been here the entire time. He claims it is worst in the CMI program than when I was here before.

### **PRAYER**

It is my sincere prayer that this court strongly consider all the TDCJ has put me through as documented in *Payne v. Collier, et al.*, #1:18-cv-00208, pending in the Abilene Division. I thank god that I have a clock/radio, a good study bible, a Strong's expanded exhaustive concordance, a four volume set of the Interlinear Bible to keep me somewhat grounded.

I have filed a similar motion to this motion in *Payne v. Collier, et al.* I humbly request this court grant a hearing in this matter.

“I will make your oppressors eat their own flesh, and they shall be drunk on their own blood as with wine. Then all flesh shall know that I am the Lord your Savior, your redeemer, the mighty one of Jacob.”

Isaiah 49:26

### INMATE DECLARATION

I declare under penalty of perjury that the foregoing is true and correct

Executed on 12/8/2019

Toby K. Payne #1720023

Respectfully submitted

/s/ Toby K. Payne

Toby K. Payne #1720023

Clements Unit

Plaintiff, Pro Se



App.112a

12/8/2019

Re: *Payne v. Sutterfield, et al.*, #2:17-cv-00211

Dear Clerk of the Court:

Please file the enclosed document in the above styled action.

Respectfully,

/s/ Toby K. Payne #1720023  
Clements Unit  
Plaintiff, Pro Se



**PLAINTIFF'S MOTION FOR T.R.O. AND/OR  
PRELIMINARY INJUNCTION WITH INMATE  
DECLARATION IN SUPPORT  
(SEPTEMBER 5, 2020)**

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

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TOBY K. PAYNE,

*Plaintiff,*

v.

JAMES SUTTERFIELD, ET AL.,

*Defendants.*

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Civil Action No. 2:17-CV-00211

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I, Toby K. Payne, am the plaintiff in the above styled action. I motion the court for a Temporary Restraining Order and/or a Preliminary Injunction ordering the defendants to show good cause on why I should not be immediately transferred (rehashed) back to general population and why my psychotropic medications, Zyprexa 10mg (antipsychotic) & Effexor 75mg (antidepressant), should not be transferred with me wherever I am transferred to.

## **Inmate Declaration in Support**

On December 3, 2019, I was forced to transfer from general population at the Robertson Unit to this same Chronic Mentally Ill ("C.M.I.") treatment program here at the Clements Unit. This action is primarily about the 20 months I was previously in this C.M.I. program. I was unduly and unlawfully treated as an administrative segregation inmate and confined to my single occupancy solitary confinement cell virtually 24 hours a day. My actual custody level then was general population level 2 (G2).

Presently, not much has changed in the way I am treated in this C.M.I. program. In fact, I would say that the situation has gotten worse. Now, I am Literally kept in my cell 24 hours a day in solitary confinement. My current actual classification level is G4. I will be eligible for promotion to G2 in November 2020. I have formally asked to be discharged from C.M.I. several times in the past few months only to basically ignored.

At the beginning of this year, I did go through a few months of mental instability because of the conditions of this type of confinement and the fact that I was forced to come here. Stripped of all my general population rights and privileges. My medications have changed several time and properly adjusted and I have been mentally stable for several months now. I've told the mental health staff several times that this type of confinement is now doing me more harm than good.

This C.M.I. program cannot really be called a treatment program. Hardly any counselling is provided. My counselor can only counsel me cell-side for about

5 minutes once per week. While at the Roberson Unit, my Counselor Ms. Rowland, counseled me once a week in her office for 30 to 45 minutes each session. I am supposed to get only one hour of recreation outside my cell and a shower each day. But even these basic rights are denied virtually every day due to actual staff shortages of officers. I have to bathe myself by sitting reverse on my toilet and using my coffee cup to pour water over myself. I recreate in my cell by pacing diagonally 7 steps one way.

This type of solitary confinement of the mentally ill is nothing more than the unlawful warehousing of mentally unstable (and some stable) men. I liken it to a pound for stray cats and dogs. Only our cages are bigger. This type of Solitary confinement, with no promise of ever returning to general population, is causing me extreme mental anguish. No human being is built to be confined in solitary confinement 24 hours a day for months or years on end. I am no exception.

I already suffer from a mental disorder called schizoaffective disorder. This type of confinement, with virtually no therapy, only worsens my condition. Up until the end of June and the beginning of July 2020 I had lost all hope of a future with a purpose and attempted to hang myself. I still have the scar on my neck from it. I also tried to bite the veins out of my left wrist and still have that scar. It is only by the grace and mercy of God that I got Past being suicidal. I was provided no therapy for it. I counseled with God, I also counseled with my mother and step-father via mail. It takes an incredible amount of faith for me to muster in order to make it through each day. I can barely keep my head above water

mentally speaking. I keep my radio tuned in to 99.7 Radio by Grace here in Amarillo.

There are about 234 other men based where I am based. Most of them are severely mentally instable and will not get better because they, like me, are being neglected. I have to listen to one inmate down the row from me bang his food tray on his desk a various times a day. This same inmate stops up his toilet and floods the whole row out. The inmate next to him beats on his cell door in fits of rage while yelling things I cannot understand. Every time a nurse comes around, my neighbor yells the same rehearsed expression of some constitutional violation. My neighbor below me yells in the vent vulgar things about Jesus because he knows I am a follower.

This type of confinement is causing me irreparable mental harm. I don't want to, but I could slip into a suicidal state again. I am unduly being denied many privileges and rights that I did nothing to lose. I am cut off from fellowshiping with other inmates. I cannot attend religious services. I cannot walk to the chowhall to eat. I cannot walk to the infirmary. I cannot walk to the regular library or attend sessions in the law library. I cannot use offender telephone system to call my family. I cannot recreate as a G4/G2 inmate. I am not receiving nearly as much counseling as I was when I was in population. To add insult to injury, any time I leave my cell, I am handcuffed behind my back for no reason at all. Other G4/G2's are not treated in this manner in population.

I do have a step 1 in process on why I cannot be discharged from C.M.I. I can take up to 45 days to process this grievance. Then I would have to file a step two. Another 45 days. 90 days. I have attached a

similar grievance submitted earlier this year. Sheltered Housing is just another "Program" within C.M.I. I was even told by a counselor that Sheltered Housing inmates are not to be provided any counselling. Judging from the response in the attached step 1, my current step 1 on this issue and its response will not be favorable to me. I've already been confined this way for eight months.

I respectfully ask the court for a hearing on this issue so I can verbalize this. It would be much easier for me to do so. I can easily answer any questions the court has and counter any arguments the defendants have.

I declare under penalty of perjury that the foregoing is true and correct.

Executed On 9/5/2020

/s/ Toby K. Payne

Toby K. Payne #1720023

Clements Unit

9601 Spur 591

Amarillo, TX 79107

**OFFENDER GRIEVANCE FORM  
(FEBRUARY 19, 2020)**



**Texas Department of Criminal Justice  
Step 1 Offender Grievance Form**

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**Office Use Only**

Grievance #: 2020079385

Date Received: Feb 19 2020

Date Due: 4-4-20

Grievance Code: 672

Investigator ID#: 2763

Date Retd to Offender: Mar 26 2020

Offender Name: Toby K. Payne

TDCJ # 1720023

Unit: Clements

Housing Assignment: 12-E-75

Unit where incident occurred: Clements

**You must try to resolve your problem with a staff member before you submit a formal complaint. The only exception is when appealing the results of a disciplinary hearing.**

Who did you talk to (name, title)?

Warden's Office, Classification Chief (Unit) UCC

When? 2/14/2020

What was their response? None to date

What action was taken? None to date

**State your grievance in the space provided, Please State who, what, when, where and the disciplinary case number if appropriate**

This grievance is mainly regarding the fact that I am presently a G4 custody level offender who has requested numerous time to C.M.I. mental health staff to be discharge from C.M.I. and immediately transferred back to GP. I am unduly & unlawfully housed in an “Ad-Seg” environment against my will. C.M.I. staff has granted my discharge by moving me from Level 3 to S.H. or Sheltered Housing according to counselor Farley & Dr. Nguyen, awaiting “Huntsville” to transfer me back to population. Mental Health Staff has told me that his transfer back to population could take months or even a year. This makes no sense. I presently have 4 active pending federal lawsuit against TDCJ officials as follows: In the Amarillo Fed. Dist. Court, *Payne v. Sutterfield, et al.*, #2:17-cv-00211, filed in Dec 2017 against TDCJ Officials and Texas Tech Officials addressing this very CMI program for unlawfully housing me back here as “ad-seg” for 20 months while I was a G2/G3 offender; *Payne v. Sutterfield, et al.*, #2:18-cv-00084 filed in 2018 against CMI staff for not providing any transition counseling back to GP when I was involuntarily discharged in June 2017 and sent to Robertson; *Payne v. Locke Davis*, #1:18-cv-00048 filed against TDCJ Roberson chief officials for religious presumption for me wanting to grow my beard. NOTE: In this suit I also indicated that I shave my head for religious reasons as well. To mourn the death of my son as the Hebrews did in the OT of the Holy Bible. To date, since I’ve been here (since 12/3/2019) I have not been provided any access to grooming implements. Nor has a barber been sent back here for haircuts, trim beards or nail clipping; Lastly, *Payne v. Bryan Collier, et al.*, #1:18-cv-00218-BU (NOTE: These last two cases are pending in the Abilene Fed. Dist. Court) filed in Dec, 2018 against



state level, TDCJ & Texas Tech Officials for retaliation against me for filing previous lawsuits.

Now, I am currently eligible for promotion to G2. On Monday 2/10/2020 I was brought before UCC and only told I was Promoted to Line 1. I was told no cases for a year. So why was I not also reviewed and promoted to G2? I mentioned the lawsuits not as a threat but to inform you that I can and will file a motion for a preliminary injunction to acquire my inmate transfer back to the general population. It should take no more than 72 hours for "Huntsville" to transfer me back to Robertson or elsewhere in population. The court should not have to get involved on this particular process. If it should have to come to that, it would not reflect well on the defendants. I-60's Sent to UCC & Warden's office regarding issue on 2/14/2020.  
\*\*\* END OF STATEMENT \*\*\*

**Action Request to resolve your complaint**

Please, Please Transfer me back to general population and properly review me for promotion to G2.

/s/ Toby K. Payne  
Offender Signature

Date: 2/15/2020

Grievance Response of your records documentation indicates that you were discharged from CMI and Referred to Sheltered Housing which is a TDCJ Housing assignment. No further action warranted

/s/ {illegible}  
Signature Authority

Date: 3-9-2020