

**United States Court of Appeals
for the Fifth Circuit**

No. 23-40028

VINICIO J. GARCIA,

Plaintiff—Appellant,

versus

BOBBY LUMPKIN; WARDEN TOWNSEND; WARDEN MARSHALL,

Defendants—Appellees.

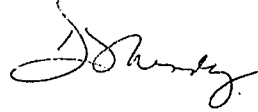
Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:22-CV-67

CLERK'S OFFICE:

Under 5TH CIR. R. 42.3, the appeal is dismissed as of December 19, 2023, for want of prosecution. The appellant failed to timely pay the filing fee.

No. 23-40028

LYLE W. CAYCE
Clerk of the United States Court
of Appeals for the Fifth Circuit



By: _____
Donna L. Mendez, Deputy Clerk

ENTERED AT THE DIRECTION OF THE COURT



A True Copy
Certified order issued Dec 19, 2023

Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

December 19, 2023

Mr. David O'Toole
U.S. District Court, Eastern District of Texas
211 W. Ferguson Street
Room 106
Tyler, TX 75702

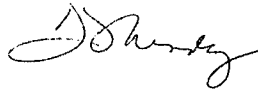
No. 23-40028 Garcia v. Lumpkin
USDC No. 6:22-CV-67

Dear Mr. O'Toole,

Enclosed is a copy of the judgment issued as the mandate.

Sincerely,

LYLE W. CAYCE, Clerk



By: _____
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Mr. Vinicio J. Garcia

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

VINICIO J. GARCIA, #1828198,

Plaintiff,

v.

BOBBY LUMPKIN, et al.,

Defendants.

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Case No. 6:22-cv-067-JDK-JDL

**ORDER ADOPTING THE REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

Plaintiff Vinicio Garcia, an inmate of the Texas Department of Criminal Justice (TDCJ) proceeding *pro se* and *in forma pauperis*, filed this lawsuit alleging violations of his constitutional rights in prison. The case was transferred to this Court for proper venue and referred to United States Magistrate Judge John D. Love for findings of fact, conclusions of law, and recommendations for the disposition of the case.

On November 15, 2022, the Magistrate Judge issued a Report and Recommendation that Plaintiff's lawsuit be dismissed pursuant to 28 U.S.C. §§ 1915A and 1915(e)(2) on the basis that his amended complaint fails to state a claim upon which relief can be granted. Docket No. 35. A copy of this Report was sent to Plaintiff, who has filed written objections. Docket No. 36.

This Court reviews the findings and conclusions of the Magistrate Judge de novo only if a party objects within fourteen days of the Report and Recommendation. 28 U.S.C. § 636(b)(1). In conducting a de novo review, the Court examines the entire

record and makes an independent assessment under the law. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc), *superseded on other grounds by statute*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

A party objecting to a Magistrate Judge's Report must specifically identify those findings to which he objects. Frivolous, conclusory, or general objections need not be considered by the District Judge. *See Nettles v. Wainright*, 677 F.2d 404, 410 & n.8 (5th Cir. 1982) (en banc). Furthermore, objections that simply rehash or mirror the underlying claims addressed in the Report are not sufficient to entitle the party to *de novo* review. *See U.S. v. Morales*, 947 F.Supp.2d 166, 171 (D.P.R. 2013) ("Even though timely objections to a report and recommendation entitle the objecting party to *de novo* review of the findings, 'the district court should be spared the chore of traversing ground already plowed by the Magistrate.'" (internal citations omitted); *see also Vega v. Artuz*, 2002 WL 31174466 *1 (S.D. NY Sep. 2002) (unpublished) ("However, objections that are merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original petition will not suffice to invoke *de novo* review of the magistrate judge's recommendations.").

The Magistrate Judge found that Plaintiff's description of the conditions in which he was temporarily housed in the TDCJ's Michael Unit did not establish cruel and unusual punishment under the Eighth Amendment or atypical and significant hardship that would trigger a right to due process under the Fourteenth Amendment,

and that Plaintiff has no constitutional claim arising from alleged property loss or damage from rodent activity in the cell. Docket No. 35 at 4–7. He also found that Plaintiff's allegation that he “informed” the Defendants by letter or grievance of his move into the undesirable conditions of the cell was not sufficient to make them personally liable under Section 1983. *Id.* at 7–8. And he found that the absence of any physical injury barred Plaintiff's claim for money damages and that Plaintiff's transfer to another prison mooted any request for prospective injunctive relief. *Id.* at 6; *see* 42 U.S.C. § 1997e(e) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act[.]”)

Plaintiff's primary objection is that the Magistrate Judge did not adequately convey the condition of the cell in question. Specifically, he asserts that the Magistrate Judge omitted the fact that there was vomit on the wall of the cell, several details about the rodent infestation and activity, and the fact that Plaintiff was under medical treatment and on antibiotics for an infection. Docket No. 36 at 1–2. Plaintiff did mention in his amended complaint that there was vomit on the cell wall (Docket No. 19 at 9), but that fact alone does not materially affect the legal analysis of Plaintiff's claim. Nor do any additional details about rodents change the analysis where the Magistrate Judge reported that the cell was “infested with mice and roaches.” Docket No. 35 at 2. And Plaintiff did not mention any medical condition in his amended complaint; to the contrary, Plaintiff repeatedly lamented that he did not

know why he would have been moved to a temperature-controlled part of the prison, which happens to be where inmates with certain medical needs are housed. *See* Docket No. 19 at 3–4; Docket No. 35 at 7 n.1. But even considering Plaintiff’s infection, he acknowledges that he was being treated with antibiotics, and he does not allege that any harm came to him as a result of being temporarily housed in the cell about which he complains.

Plaintiff also reiterates that “all of the Defendants listed were informed by letters and a grievance about the condition of the cell.” Docket No. 36 at 3. But, for the reasons explained by the Magistrate Judge, that is not sufficient to make them liable for any constitutional violation. Docket No. 35 at 7–8.

Plaintiff vaguely complains that his move to the inferior cell was retaliation “because of lawsuits and grievances.” Docket No. 36 at 6–8. But neither that conclusory assertion nor his vague demands in the amended complaint to “stop the harassment and retaliation” states a claim under the standard for a First Amendment retaliation claim. *See Keenan v. Tejeda*, 290 F.3d 252, 258 (5th Cir. 2002) (listing elements of retaliation claim).

In sum, nothing in Plaintiff’s objection establishes a violation of his constitutional rights, or that the named Defendants were personally involved in any such violation, or that he is entitled to either monetary or injunctive relief for any such violation.

The Court has conducted a careful de novo review of the record and the Magistrate Judge’s proposed findings and recommendations. *See* 28 U.S.C. § 636(b)(1)

(District Judge shall “make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.”). Upon such de novo review, the Court has determined that the Report of the United States Magistrate Judge is correct, and Plaintiff’s objections are without merit. Accordingly, it is

ORDERED that the Report and Recommendation of the United States Magistrate Judge (Docket No. 35) is **ADOPTED** as the opinion of the Court. Plaintiff’s objections (Docket No. 36) are **OVERRULED**. This case is **DISMISSED** with prejudice pursuant to 28 U.S.C. §§ 1915A(b) and 1915(e)(2)(b). Any pending motions are **DENIED** as **MOOT**.

Signed this

Dec 20, 2022


JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

VINICIO J. GARCIA, #1828198,

Plaintiff,

v.

BOBBY LUMPKIN, et al.,

Defendants.

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Case No. 6:22-cv-067-JDK-JDL

FINAL JUDGMENT

The Court, having considered Plaintiff's case and rendered its decision by opinion issued this same date, hereby enters **FINAL JUDGMENT**.

It is **ORDERED** that Plaintiff's claims are **DISMISSED WITH PREJUDICE**.

The Clerk of Court is instructed to close this case.

Signed this

Dec 20, 2022


JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

VINICIO J. GARCIA, #1828198,

Plaintiff,

v.

BOBBY LUMPKIN, et al.,

Defendants.

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Case No. 6:22-cv-067-JDK-JDL

ORDER DENYING RELIEF FROM FINAL JUDGMENT

The Court dismissed this case for failure to state a claim on December 20, 2022, upon screening Plaintiff's first amended complaint pursuant to the Prison Litigation Reform Act. Plaintiff has now submitted a proposed second amended complaint, which the Court construes as a motion for relief from judgment pursuant to Federal Rule of Civil Procedure 59(e) and motion to amend. Docket No. 39.

The United States Supreme Court described the purpose of Rule 59(e) as follows:

Rule 59(e) was added to the Federal Rules of Civil Procedure in 1946. Its draftsmen had a clear and narrow aim. According to the accompanying Advisory Committee Report, the Rule was adopted to "mak[e] clear that the district court possesses the power" to rectify its own mistakes in the period immediately following entry of judgment. . . . Consistent with this original understanding, the federal courts have invoked Rule 59(e) only to support reconsiderations of matters properly encompassed in a decision on the merits.

White v. New Hampshire Dep't of Emp't Sec., 455 U.S. 445, 450-51 (1982) (citations omitted). Furthermore, "Rule 59(e) permits a court to alter or amend a judgment, but it 'may not be used to relitigate old matters, or to raise arguments or present evidence

that could have been raised prior to the entry of judgment.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (citation omitted).

The Fifth Circuit has observed that a Rule 59(e) motion “serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.” *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 473 (5th Cir. 1989) (citation and internal quotations omitted). A Rule 59(e) motion “is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment.” *Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir.) (citation omitted), *cert. denied*, 543 U.S. 976 (2004). The Fifth Circuit has repeatedly held that the purpose of a Rule 59(e) motion is not to rehash arguments that have already been raised before a court. *See, e.g., Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 240 n.4 (5th Cir. 2016); *Winding v. Grimes*, 405 F. App’x 935, 937 (5th Cir. 2010).

Moreover, “[r]econsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.” *Templet*, 367 F.3d at 479 (citations omitted). The decision to alter or amend a judgment is committed to the sound discretion of the district judge and will not be overturned absent an abuse of discretion. *S. Contractors Grp., Inc. v. Dynalectric Co.*, 2 F.3d 606, 611 & n.18 (5th Cir. 1993).

The record establishes that Plaintiff was already given an opportunity to amend his complaint, with express instructions to comprehensively set forth his claims, state specific facts to support them, and identify any injuries. Docket No. 5. Plaintiff does not explain why a second amendment is necessary or appropriate in

this case. A district court need not invite or even permit an amendment of the pleadings when an amendment would be futile. *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872–73 (5th Cir. 2000).

Plaintiff has also not identified any manifest errors of law or other circumstances warranting the extraordinary relief he seeks. The facts alleged in the proposed complaint are materially the same as those in the amended complaint screened by the Court; in fact, Plaintiff expressly asserts that “[t]he facts have not changed.” Docket No. 39-1 at 5. Specifically, Plaintiff alleges that the day after he was diagnosed with a medical condition and put on antibiotics, Plaintiff was moved during the winter months to an unsanitary and restrictive environment in another area of the prison, and later given the explanation that the move was because he required a “cool bed” assignment. Docket No. 39 at 4; Docket No. 39-1 at 2. For the reasons the Court has already explained (*see* Docket Nos. 35, 37), those circumstances do not establish a constitutional violation. Nor does Plaintiff’s vague and conclusory assertion that the move was “harassment and retaliation . . . because [he] file[s] grievances and lawsuits.” Docket No 39 at 4; *see Keenan v. Tejada*, 290 F.3d 252, 258 (5th Cir. 2002) (providing elements of retaliation claim); *Whatley v. Coffin*, 496 F. App’x 414 (5th Cir. 2012) (explaining that the district court need not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions).

The only arguably “new” information in the proposed amendment is that staff at a different prison, to which Plaintiff was transferred during the pendency of this action, are retaliating against him. Docket No. 39-1 at 5. Those unidentified staff

members and any claims against them were not before this Court and will not be added now. If Plaintiff can allege facts establishing a prima facie case of retaliation against new defendants (which he has not done here), he is free to do so in a new lawsuit against the proper defendants in a court with proper venue and subject to a separate filing fee. *See George v. Smith*, 507 F.3d 605, 607 (7th Cir. 2007) (explaining that enforcement of the rules against misjoinder of unrelated claims is especially important in prisoner litigation “to ensure that prisoners pay the required filing fees” under the Prison Litigation Reform Act); *Bonner v. Bosworth*, No. 3:10-CV-2150-O-BH, 2010 WL 11534476, at *1–2 (N.D. Tex. Nov. 30, 2010), *report and recommendation adopted*, No. 3:10-CV-2150-O-BH, 2011 WL 13199228 (N.D. Tex. May 2, 2011) (“Requiring parties to assert unrelated claims against different defendants in separate complaints avoids unduly cumbersome litigation, and in the context of prisoner litigation, ensures that prisoners pay the required filing fees under the Prison Litigation Reform Act.”).

Plaintiff plainly disagrees with the Court’s legal evaluation of his claims, but nothing in the pending motion persuades the Court that its ruling was in error.

Accordingly, Plaintiff’s motion for relief from judgment (Docket No. 39) is **DENIED**.

So **ORDERED** and **SIGNED** this 12th day of **January, 2023**.


JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit
No. 23-40028

VINICIO J GARCIA

Plaintiff - APPELLANT

VERSUS

BOBBY LUMPKIN WARDEN TOWNSEND WARDEN MARSHALL
Defendants - APPELLEES

APPEAL From the UNITED STATES District Court
For the EASTERN District of Texas
USDC No 6:22-CV-67

CLERKS OFFICE

UNDER 5th CIR R. 42.3 the APPEAL is dismissed as
of Dec 19, 2023 for want of Prosecution The
APPELLANT failed to timely PAY the filing fee

APPENDIX A (one Page)

Document 37

IN THE UNITED STATES District Court for the
EASTERN DISTRICT OF TEXAS TYLER DIVISION

VINICIO J Garcia #1828198

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Plaintiff

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v

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Case NO 6:22-cv-067 JOK-JDL

Bobby Lumpkin et al

§

Defendants

§

ORDER ADOPTING THE REPORT and Recommendation of
THE UNITED STATES MAGISTRATE JUDGE

Plaintiff VINICIO Garcia a inmate of THE TEXAS DE-
partment of CRIMINAL JUSTICE (TDCJ) Proceeding Pro
Se and in Forma Pauperis filed this lawsuit alleging
violations of his constitutional rights in Prison. This case
was transferred to this Court for proper venue and referred
to UNITED STATES MAGistrate Judge John D. Love for
findings of fact conclusions of law and recommendations
for the disposition of the case

ON NOVEMBER 15, 2022 the MAGISTRATE Judge issued a
Report and Recommendation that Plaintiff's lawsuit be dis-
missed Pursuant to 28 USC §§ 1915A and 1915(e)(2) on the
basis that his amended complaint fails to state a
claim upon which relief can be granted. Docket No 35. A copy
of this Report was sent to Plaintiff who has filed written
objections. Docket No 36

THIS COURT reviews the findings and conclusions of the
Magistrate Judge de novo only if a Party objects within four-
teen days of the Report and Recommendation 28 USC §§
636 (b)(1). In conducting a de novo review the Court

APPENDIX B (Five Pages)

examines the entire record and makes an independent assessment under the law. *Douglas v United Servs. Auto Ass'n* 79 F3d 1415, 1430 (5th Cir 1996) (en banc) superseded on other grounds by statute, 28 USC § 636(b)(1) (extending the time to file objections from ten to fourteen days)

A Party objecting to Magistrate Judge's Report must specifically identify those findings to which he objects. Frivolous, conclusory or general objections need not be considered by the District Judge. See *Nettles v Wainwright*, 677 F2d 404, 410 ~~8~~ n.8 (5th Cir 1982) (en banc). Furthermore, objections that simply rehash or mirror the underlying claims addressed in the Report are not sufficient to entitle the Party to de novo review. See *US v Morales* 947 F Supp 2d 166, 171 (D.P.R. 2013) ("EVEN though timely objections to a Report and Recommendation entitle the objecting Party to de novo review of the findings, 'the district court should be spared the chore of traversing ground already plowed by the magistrate.'") (internal citations omitted); see also *Veja v Artuz* 2002 WL 31174466 *1 (SD NY Sep 2002) (unpublished ("However objections that are merely perfunctory responses argued in an attempt to engage the district court in a rehashing of the same arguments set forth in the original Petition will not suffice to invoke de novo review of the Magistrate Judge's recommendations"))

The Magistrate Judge found that Plaintiff's description of the conditions in which he was temporarily housed in the TDCJ's Michael Unit did not establish cruel and unusual Punishment under the EIGHTH Amendment or atypical and significant hardship that would trigger a right to due Process under the Fourteenth Amendment.

and that Plaintiff has no constitutional claim arising from alleged property loss or damage from rodent activity in the cell. Docket No 35 at 4-7. He also found that Plaintiff's allegation that he "informed" the Defendants by letter or grievance of his move into the undesirable conditions of the cell was not sufficient to make them personally liable under section 1983. Id at 7-8. And he found that the absence of any physical injury barred Plaintiff's claim for money damages and that Plaintiff's transfer to another prison mooted any request for prospective injunctive relief. Id at 6; see 42 USC § 1997e(e) ("NO Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act [.]").

Plaintiff's primary objection is that the Magistrate Judge did not adequately convey the condition of the cell in question. Specifically, he asserts that the Magistrate Judge omitted the fact that there was vomit on the wall of the cell, several details about the infestation and activity and the fact that Plaintiff was under medical and on antibiotics for an ~~acute~~ infection. Docket No 36 at 1-2. Plaintiff did mention in his amended complaint that there was vomit on the cell wall (Docket No 19 at 9) but that fact alone does not materially affect the legal analysis of Plaintiff's claim. NOR do any additional details about rodents change the analysis where the Magistrate Judge Reported that the cell was "infested with mice and roaches" Docket No 35 at 2. And Plaintiff did not mention any medical condition in

his amended complaint; to the contrary, Plaintiff repeatedly lamented that he did not know why he would have been moved to a temperature controlled part of the Prison which happens to be where inmates with certain medical needs are housed. See Docket No 19 at 3-4, Docket No 35 at 7 n.1. But even considering Plaintiff's infection, he acknowledges that he was being treated with antibiotics, and he does not allege that any harm came to him as a result of being temporarily housed in the cell about which he complains.

Plaintiff also reiterates that "all of the Defendants listed were informed by letters and a Grievance about the condition of the cell." Docket No 36 at 3. But for the reasons explained by the Magistrate Judge that is not sufficient to make them liable for any constitutional violation Docket No 35 at 7-8

Plaintiff vaguely complains that his move to the inferior cell was retaliation "because of lawsuits and Grievances." Docket No 36 at 6-8. But neither that conclusory assertion nor his vague demands in the amended complaint to "stop the harassment and retaliation" states a claim under the standard for a First Amendment retaliation claim. See *Keenan v Tejada*, 290 F.3d 252, 258 (5th Cir 2002) (listing elements of retaliation claim)

In sum nothing in Plaintiff's objection establishes a violation of his constitutional rights, or that the named Defendants were personally involved in any such violation or that he is entitled to either monetary or injunctive relief for any such violation

The Court has conducted a careful de novo review of the record and the Magistrate Judge's Proposed Findings and recommendations. See 28 USC § 636(b)(1) (District

Judge shall "make a de novo determination of those PORTIONS of the Report or Specified Proposed Findings or recommendations to which objection is made") Upon such de novo review, the Court has determined that the Report of the United States MAGISTRATE JUDGE is correct and Plaintiff objections are without merit Accordingly

It is

ORDERED That the Report and Recommendation of the UNITED STATES MAGISTRATE Judge (Docket No 35) is ADOPTED at the OPINION of the Court. Plaintiff's objections (Docket No 36) are overruled. This case is dismissed with PreJudice Pursuant to 28 USC §§ 1915A(b) and 1915(e)(b) ANY Pending motions are denied as moot.

Signed this

Dec 20, 2022

Jeremy D. Kernodle
US District Judge

IN THE UNITED STATES District Court For the EASTERN
District of TEXAS TYLER DIVISION

VINICIO J. GARCIA 1828198 §
VS § Civil Action NO 6:22-CV-067
Bobby Lumpkin et al §

Report and Recommendation of the UNITED STATES Magistrate Judge

Plaintiff VINICIO GARCIA, an inmate of the Texas Department of Criminal Justice (TDCJ) ~~PRO~~ proceeding Pro Se and in Forma Pauperis filed this civil rights lawsuit pursuant to 42 USC § 1983 alleging violations of his constitutional rights.

The case was referred to the undersigned for findings of fact, conclusions of law and recommendations for the disposition of the case

I Relevant Procedural History and Alleged Facts

Plaintiff filed his original complaint on Feb 16, 2022 (DKT #1) ON MARCH 2, 2022 the Court observed that the complaint was not on an approved form and lacked material factual allegations required to state a viable claim. (DKT #5) Accordingly, the Court ordered him to file an amended complaint to allege specific facts to support his claim (Id)

Plaintiff filed his amended complaint APRIL 18, 2022 (DKT #19) Before the amended complaint was screened by the Court as required by the Prison Litigation Reform Act Plaintiff appealed two interlocutory orders to the United States Court of Appeals for the Fifth Circuit (DKT #24, 29) Following the delay occasioned by those appeals, during

which this case was STAYED, the case is now REOPENED upon the dismissal of both APPEALS by the Fifth Circuit (DKT # 32-34).

In his amended Complaint, Plaintiff alleges that he was moved "because of alleged heat score" in the middle of winter to a cell in another area that was infested with mice and roaches (DKT # 19 at 4) while housed in that cell, Plaintiff was denied the opportunity to exercise would go four or five days without access to a shower and had water dripping on his bed. (Id) The mice ate his food and damaged his Property. (Id) There was "no sun very poor air circulation [and] no phone." (Id) Plaintiff does not specify when he was moved to the cell in question or how long he remained there, but he signed his original complaint in the Michael Unit on Feb 9, 2022 (DKT # 1 at 2) and he submitted a notice of change of address to another unit dated MARCH 4, 2022 (DKT # 7 at 1)

Plaintiff sues TDCJ Director Bobby Lumpkin for cruel and unusual Punishment because Plaintiff "informed him" about his move. (DKT # 19 at 3) He also sues the Directors of the State Classification Committee and Unit Classification Committee for "same as above" for failing to inform or explain to him why or on whose order he was moved. (Id) And he sues Michael Unit WARDENS Townsend and Marshall on the same basis, adding that Marshall "ignored [a] Grievance about the move. (Id) He seeks unspecified money damages "for abuse" as well as an explanation and other injunctive Relief (Id at 4)

II Legal Standards and Preliminary Screening

Plaintiff is a Prisoner seeking Redress from an officer employee of a Governmental entity so his complaint is

also subject to screening under section 1915(e)(2). Those statutes provide for sua sponte dismissal of a complaint or any portion thereof if the court finds it frivolous, malicious if it fails to state a claim upon which relief can be granted, or if it seeks monetary relief against a defendant who is immune from such relief.

A complaint is frivolous if it lacks an arguable basis in law or fact. *SAMFORD v Dretke* 562 F3d 674, 678 (5th Cir 2009). The Fifth Circuit has held that a complaint lacks an arguable basis in fact when "the facts alleged are fantastic or delusional scenarios or the legal theory upon which a complaint relies is indisputably meritless." *Id.* (quoting *Harris v Heilmann* 198 F3d 153, 156 (5th Cir 1999) (internal quotation marks omitted)). In other words during the initial screening under section 1915A a court may determine that a prisoners complaint is frivolous if it rests upon delusional scenarios or baseless facts - and dismiss the complaint. See *Henry v Kern County Texas* 2016 WL 2344231 *3 (W D Tex MAY 2, 2016) ("A court may dismiss a claim as factually frivolous only if the facts alleged are clearly baseless fanciful, fantastic delusional or otherwise rise to the level of the irrational or the wholly incredible regardless of whether there are judicially noticeable facts available to contradict them") (citing *Denton v Hernandez* 504 US 25, 32-33 (1992)).

Moreover a complaint fails to state a claim upon which relief may be granted where it does not allege sufficient facts which taken as true state a claim which is plausible on its face and thus does not raise a right to relief above the speculative level, see *Monroy v Fed Ex Ground Packaging Sys Inc* 614 F3d 145

149 (5th CIR 2010) (citing Bell Atl Corp v Twombly 550 US 544 555 (2007)) A claim has factual plausibility when the pleaded factual content allows the court to draw reasonable inferences that the defendant is liable for the misconduct alleged. See Hershey v ENERGY TRANSFER Partners LP, 610 F3d 239 245 (5th CIR 2010); Ashcroft v Iqbal 556 US 662, 678 (2009) This plausibility standard is not akin to a probability standard rather the plausibility standard requires more than the mere possibility that the defendant has acted unlawfully Twombly 550 US at 556 (emphasis supplied)

All well - Pled facts are taken as true, but the district need not accept as true conclusory allegations, unwarranted factual inferences or legal conclusions. See Whitley v Coffin 496 F App'x 414 (5th CIR 2012) (unpublished) (citing Plothnik v. IP Access Inc 407 F3d 690 696 (5th CIR 2005)) Crucially while the federal pleading rules do not require a "detailed factual allegations" the rule does "demand more than an unadorned the defendant unlawfully harmed me accusation." Iqbal 556 US at 678. A Pleading offering "labels and conclusions" or a "formulaic recitation of the elements of a cause of action" will not suffice nor does a complaint which provides only naked assertions that are devoid of further factual enhancement. Id

THE Discussion and Analysis

Plaintiff does not state a claim for violation of his constitutional rights in connection with the alleged loss or damage to his property. The deprivation of property by state employees - whether negligent or intentional - does not violate the constitution if the state provides "a suitable post deprivation remedy." Hudson v Palmer 468 US 517, 533 (1984) Texas common law allows recovery of monetary damages for loss of property that has been taken without authorization. See e.g. MURPHY v Collins 26 F3d 541

542 (5th CIR 1994) ("In Texas as in many other states the tort of conversion fulfills this Requirement.") Cathey v Guenther 47 F3d 162164 (5th CIR 1995) Texas statutory law also provides that inmates MAY recover up to \$500 for lost or damaged property. See Tex Gov't Code §§ 501.007, 501.008 TEX CIV PRAC & REM CODE § 16.003 (not providing a two-year statute of limitations for certain causes of action). Because Texas provides an adequate post-deprivation remedy, the loss of Plaintiff's clothing and other personal items does not state a claim for any constitutional violation see Hudson, 46843 at 536.

NOR does Plaintiff state a claim for cruel and unusual punishment. Confinement in Prison is a form of punishment subject to scrutiny under the EIGHTH Amendment to the United States Constitution which prohibits cruel and unusual punishment. See Rhodes v Chapman 452 US 337, 345 (1981) The Supreme Court has repeatedly stressed that Prison conditions that are "restrictive or even harsh... are Part of the Penalty that criminal offenders PAY for their offenses against society." Id at 347 Thus the EIGHTH Amendment "does not mandate comfortable Prisons" but neither does it permit inhumane ones." Farmer v Brennan 511 US 825, 832 (1994) (citation omitted)

TO Plead an EIGHTH AMENDMENT violation based on the conditions of an inmates confinement a Plaintiff must allege conditions that objectively "Pos[es] a substantial risk of serious harm" Id at 834 The objective component of an EIGHTH Amendment claim is... contextual and responsive to 'contemporary standards of decency' Hudson v McMillian 503 US 1, 8 (1992) (citation omitted) But only 'extreme deprivations' satisfy this standard Davis v Scott 157 F3d 1003, 1006 (5th CIR 1998) The Prison condition in Question must "be so serious as to deprive Prisoners of the minimal civilized measure of life's necessities as when it denies the Prisoner some basic human need" Woods v Edwards 51 F3d 577 581 (5th CIR 1995) (Quotation marks

and footnote omitted). When evaluating an alleged EIGHTH Amendment violation "the length of confinement can not be ignored... A filthy overcrowded cell... might be tolerable for a few days and intolerably cruel for weeks or months" *Hutto v Finney* 437 US 678, 686-87 (1978)

A Prisoner bringing an EIGHTH Amendment claim based on conditions of confinement must also allege facts showing that Prison officials were subjectively deliberately indifferent to his health or safety. *Id.*; see also *Ball v LeBlanc* 792 F3d 584 592 (5th Cir 2015) (summarizing objective and subjective Prongs of an EIGHTH Amendment violation) The deliberate indifference required to state an EIGHTH Amendment claim "is an extremely high standard to meet." *Domino v Texas Dept of Criminal Justice* 259 F3d 752, 756 (5th Cir 2001) and Prison officials act with such indifference only if they know and ignore facts a substantial risk of serious harm and they disregard that risk by failing to take reasonable measures to alleviate it. See *Farmer* 511 US at 837 Thus Prison official "must both be aware of the facts from which the inference could be drawn that substantial risk of serious harm exists and he must also draw the inference" *Id.*

Plaintiff's short term confinement under the conditions he alleges does not rise to that level either objectively or subjectively. The conditions he describes are restrictive and unpleasant but there is no basis for either the Court or the Defendants to believe they deprived him of a basic human need or posed a substantial risk to his health, particularly when he experienced them for only a matter of weeks. They are not even remotely comparable to the conditions in the case on which he relies (Ckt# 16410) in which a Prisoner was required to sleep naked in raw sewage, in a cell that covered nearly floor to ceiling in massive amounts of feces" *TAYLOR v RICHARDS* 141

5/4/2020 Moreover the lack of any physical injury arising from the conditions alleged in this case bars Plaintiff from seeking any money damages see 42 USC § 1997e(e) ("NO Federal civil action MAY be brought by a Prisoner... for mental or emotional injury suffered while in custody without a prior showing of physical injury[.]") and his intervening Transfer moots any Request for Prospective Injunctive relief related to his former conditions of confinement. *Herman v. Holiday* 238 F3d 660, 665 (5th Cir 2001) (claims for injunctive relief asbestos exposure were moot where Prisoners' transfer from EDC to the Dixon Correctional Institute in Jackson Louisiana rendered his for declaratory and injunctive relief moot").

To the extent Plaintiff can be understood to complain about the lack of explanation¹ or other Process in connection with his move, he does not state a viable due Process claim under the Fourteenth Amendment. Plaintiff characterizes the conditions in which he was temporarily housed as akin to administrative segregation, but Prisoners only have a right to due Process when they face Punishments that constitute "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandis v. Conner* 515 US 472, 484 (1995) Neither a short-term placement on cell restriction (segregation) nor the other conditions Plaintiff alleges are "atypical and significant" in the prison setting. See *Autove v. Preschel* 347 F App'x 45, 46 (5th Cir 2009) *Gaona ERVIN* 224 F App'x 327, 328 (5th Cir 2007) see also *Mowassa v. Stewart* NO CV 19-0519-TFM-N 2020 WL 8254385 at *5 (SD Ala NOV 23, 2020) Report and recommendation adopted as modified, NO. 1:19-cv-519-TFM-N, 2021 WL 218001 (SD Ala JAN 21, 2021) dismissing claim where Prisoners allegation of "abundance of Rats roaches Gnats Flies and other vermin" was not "atypical

and significant" as Required to support a due Process claim).

moreover, ~~even~~ if Plaintiff alleged facts that would establish a constitutional violation (which he does not) he has not alleged the Personal involvement of any of the named Defendants in violation as required to make them individually liable under Section 1983. Lawsuits against supervisory Personnel based on their Positions of authority are claims of liability under the doctrine of Respondent superior which does not generally apply in Section 1983 cases. Williams v Lane, 909 F2d 121 (5th Cir 1990) A supervisor may be held liable only if he is personally involved ~~and~~ a constitutional deprivation or if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force behind a constitutional deprivation Thompson v Belt 828 F2d 298 (5th Cir 1987).

Plaintiff here does not allege that the named Defendants played any Personal role in assigning him a heat score or moving him from one cell to another. He alleges that he somehow "informed" them of the move and that they took no action but "a failure to Respond to a letter or Grievance does not rise to the rise to the Required level of Personal involvement For liability." Blakey v Andrade 360 F Supp 3d 453, 489 (N D Tex 2019) EVEN the alleged receipt

¹ Plaintiff complains of a lack of Explanation for his move but the Amended complaint establishes that it was because of Plaintiff's "heat score." (CDkt #19 at 11) It is a matter of Public Record that the TDCJ maintains a "Process to Place certain offenders who may be at an increased risk of developing a heat stress illness in air conditioned housing by assigning every offender in the TDCJ system a Heat Sensitivity Score based on their medical conditions and Prescribed medications" see *V Collier* NO CV H-18-4412 2019 WL 4144321 at *16 (SD Tex Aug 30 2019) Thus while Plaintiff may disagree with or not understand the medical Judgments that led to his heat score and move to an ~~air~~ air conditioned building the basis for the move was apparently explained to him.

of Plaintiff's Grievance would not make any of the Defendants Personally liable for any underlying violations. See *Emmons v Painter* No 00:20-CV-00185-DC 2021 WL 2832977 at *10 (WD Tex May 23, 2021) ("[A]llegation that Defendants denial of Grievances evidenced both their Personal involvement and a Policy of deliberate indifference do not withstand Pretrial screening") *Sellers v LeBlanc* No CV 19-13075 2020 WL 5097599 at *3 (ED La. July 1, 2020) Report and recommendation adopted No CV 19-13075 2020 WL 5095328 (ED La Aug 28, 2020) (dismissing claims against defendant who "is in charge of the Jail and Responded to two of [Plaintiffs] Grievance complaints" because "having a role in the Grievance Process does not create Personal liability much less supervisory liability.") Plaintiff thus does not allege facts that would satisfy the Personal involvement standard for these Defendants and fails to state a claim against them in their individual CAPACITIES.

IV Conclusion

FOR THE reasons set forth above, Plaintiff's amended complaint fails to state a claim upon which relief can be granted. Dismissal is APPROPRIATE where Plaintiff has already been permitted to amend his complaint but still fails to state a viable claim. See *Jacquiez v Procurvier* 801 F2d 789, 793 (5th Cir 1986) (holding that "once given adequate opportunity even a Prose complaint must contain specific facts supporting its conclusions") *Garcia v City of Lubbock, Texas* F Supp 3d 555, 566 (N.D. Tex 2020) (dismissing where inmate had "already amended his complaint once" and been afforded an opportunity to further flesh out his claims")

Recommendation

Accordingly, the undersigned recommends that Plaintiff's lawsuit be dismissed Pursuant to 28 USC §§ 1915A(b)(1) and 1915(e)(2)(b).

Within Fourteen (14) days after receipt of the Magistrate Judge's Report any Party may serve and file written objections to the findings and recommendation contained in the Report.

A Party's failure to file written objections to the findings conclusions and recommendations contained in this Report within fourteen days after being served with a copy shall bar that Party from de novo review by the District Judge of these findings conclusions and recommendations and except on grounds of plain error from Appellate review of unobjected to factual findings and legal conclusions accepted and adopted by the district court. *Douglas v. UNITED Servs Auto Ass'n* 79 F3d 1415 1430 (5th Cir 1996) (en banc)

So ordered and signed this 15th day of November 2022

John D. Love
US Magistrate Judge