

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-41340
Summary Calendar

United States Court of Appeals
Fifth Circuit

FILED

August 2, 2017

Lyle W. Cayce
Clerk

Cons/w No. 16-40409

REYNALDO FLORES,

Plaintiff-Appellant

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE TRANSITORIAL
PLANNING DEPARTMENT SOUTHERN REGION INSTITUTIONS
DIVISION ET AL; MAYRA RUBIO SANCHEZ; EDWARD GARCIA; FRANCIS
OCHOA, San Antonio Police Department Officer; CASTELLANOS, San
Antonio Police Department Officer, et al,

Defendants-Appellees

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 2:14-CV-283

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Reynaldo Flores, Texas prisoner # 1912036, appeals the dismissal of his civil rights lawsuit. We CONSOLIDATE the interlocutory appeal in No. 15-41340 and the appeal from the final judgment in No. 16-40409 on our own

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

APPENDIX C

No. 15-41340
c/w No. 16- 40409

motion. Accordingly, we DENY as unnecessary Flores's motion in No. 16-40409 to incorporate the brief he filed in No. 15-41340.

Flores challenges the district court's finding that his wife, Mayra Rubio Sanchez, and her boyfriend, Edward Garcia, were not state actors for purposes of the civil rights statutes. We review de novo the dismissal of these allegations under 28 U.S.C. § 1915(e)(2)(B)(ii) for failure to state a claim on which relief may be granted. *Black v. Warren*, 134 F.3d 732, 733-34 (5th Cir. 1998). Flores fails to identify factual content that he alleged in the district court that allowed the court to draw the reasonable inference that Rubio Sanchez or Garcia were willful participants in joint activity with state actors. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Cinel v. Connick*, 15 F.3d 1338, 1343 (5th Cir. 1994).

Although Flores repeats allegations regarding the Bexar County and LaSalle County defendants, he has failed to brief any challenge to the venue-based dismissal of his claims against them. Accordingly, he has "effectively abandoned" those claims. *Mapes v. Bishop*, 541 F.3d 582, 584 (5th Cir. 2008).

Similarly, the district court dismissed the claims against the Bee County defendants regarding the deprivation of meals on the ground that he failed to allege more than a *de minimis* injury, and the remaining claims against them on grounds of sovereign immunity, mootness, and failure to state a claim on which relief may be granted. Because Flores has failed to brief those grounds for the dismissal of his respective allegations against the Bee County defendants, has again "effectively abandoned" those claims. *See id.*; *see also Green v. Ferrell*, 801 F.2d 765, 770-71 (5th Cir. 1986).

Accordingly, we AFFIRM the judgment of the district court. We DENY Flores's motion to appoint a special master and for a subpoena duces tecum (in No. 15-41340) and his motion to appoint a master and for a subpoena duces tecum (docketed as a motion for extraordinary relief in No. 16-40409). *See United States v. Okoronkwo*, 46 F.3d 426, 435 (5th Cir. 1995). We DENY as

No. 15-41340
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unnecessary Flores's motion to substitute parties (docketed as a motion for extraordinary relief in No. 16-40409). *See* FED. R. APP. P. 43(c)(2).

APPEALS CONSOLIDATED; AFFIRMED; MOTIONS DENIED.

ENTERED

March 08, 2016

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

REYNALDO FLORES,

Plaintiff,

VS.

TDCJ TRANSITORIAL PLANNING
DEPART. SOUTHERN REGION INST.
DIVISION ET AL, *et al*,

Defendants.

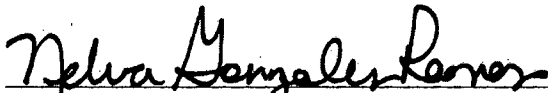
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CIVIL ACTION NO. 2:14-CV-00283

FINAL JUDGMENT

Pursuant to the Court's Order Adopting Supplemental Memorandum and Recommendation on Remanded Claim (D.E. 65), the Court enters final judgment dismissing this action with prejudice.

ORDERED this 8th day of March, 2016.


NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

David J. Bradley, Clerk

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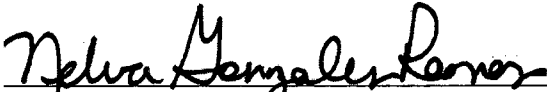
With respect to the alleged deprivation of meals, Plaintiff claims that Defendants are “stealing the limited donations from Plaintiff [sic] trust fund, necessary to cover the deprivation of meals on Saturdays and Sundays.” D.E. 61, p. 8. While this may state a complaint, it does not rise to the level of a complaint for cruel and unusual punishment because it does not address whether the amount and timing of meals actually provided is unconstitutional. This objection is **OVERRULED**.

Plaintiff also complains that, “[A] Discovery Phase and Jury Trial, will demonstrate that Plaintiff was transferred from Bexar County Jail in inhumane conditions due to the lack of meals or not worthy of Human consumption, for which lost an average of 45 Pounds in County Jail.” D.E. 61, p. 17. As pled, Plaintiff has challenged treatment at the Garza Units, not county jail. Thus any lack of quantity or quality of meals leading to weight loss in county jail is irrelevant here. Furthermore, the reason for screening the complaint is to eliminate frivolous claims based on the facts provided by Plaintiff. A general objection that discovery would produce evidence to support the claim is misplaced when the claim, itself, is insufficient. *See generally, Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *Al-Ra'id v. Ingle*, 69 F.3d 28, 33 (5th Cir. 1995). This objection is **OVERRULED**.

Having reviewed the findings of fact, conclusions of law, and recommendations set forth in the Magistrate Judge’s M&R, as well as Plaintiff’s objections, and all other relevant documents in the record, and having made a de novo disposition of the portions of the Magistrate Judge’s M&R to which objections were specifically directed, the Court **OVERRULES** Plaintiff’s objections and **ADOPTS** as its own the findings and

conclusions of the Magistrate Judge. Accordingly, Plaintiff's claims related to the deprivation of meals is **DISMISSED WITH PREJUDICE**. Having already dismissed Plaintiff's other claims (D.E. 42), this action is **DISMISSED WITH PREJUDICE**.

ORDERED this 7th day of March, 2016.



NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

ENTERED

November 17, 2015

David J. Bradley, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

REYNALDO FLORES,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-283
	§	
TDCJ TRANSITORIAL PLANNING	§	
DEPART. SOUTHERN REGION INST.	§	
DIVISION ET AL, <i>et al</i> ,	§	
	§	
Defendants.	§	

**SUPPLEMENTAL MEMORANDUM AND
RECOMMENDATION ON REMANDED CLAIM**

By Order entered September 21, 2015, United States District Judge Nelva Gonzales Ramos remanded for § 1915A screening of Plaintiff's Eighth Amendment claim that, while he was confined at the Garza East and West Units in Beeville, Texas, in 2014, he was served no food on weekends. (D.E. 42, p. 12). Below are the findings and recommendation on this claim.

I. JURISDICTION.

The Court has federal question jurisdiction over this civil rights action pursuant to 28 U.S.C. § 1331.

II. PROCEDURAL BACKGROUND.

The procedural background of this case is set forth in the June 15, 2015 Amended Memorandum and Recommendation to Dismiss Action (D.E. 36), and need not be repeated herein. For purposes of this supplemental memorandum, Plaintiff remains a

prisoner in the Texas Department of Criminal Justice, Criminal Institutions Division (TDCJ-CID), and is confined at the Cotulla Unit in Cotulla, Texas. He is currently serving a ten-year sentence out of Bexar County, Texas, entered on December 3, 2012, for assaulting a family member. Plaintiff is a Mexican National with an immigration hold against him.

By Amended Memorandum and Recommendation entered June 15, 2015, the undersigned recommended that Plaintiff's action be dismissed for failure to state a claim and/or as frivolous, and that his request for a Temporary Restraining Order be denied. (D.E. 36). On September 21, 2015, the Court adopted the recommendation in part and dismissed all of Plaintiff's claims, save and except his allegation that he was denied food on the weekends while detained at the Garza East and West Units. (D.E. 42). No final judgment was entered. On October 1, 2015, Plaintiff filed a Notice of Interlocutory Appeal. (D.E. 44).

On October 16, 2015, a supplemental *Spears*¹ hearing was conducted.

III. PLAINTIFF'S EVIDENCE REGARDING FOOD CLAIM.

Plaintiff arrived at the Garza West Unit on March 13, 2014.² On April 7, 2014, he was transferred to the Garza East Unit. On June 29, 2014, he was transferred to the Cotulla Unit. Thus his denial of food on the weekends claim spans from March 13, 2014, until June 29, 2014, approximately three and a-half months.

¹ *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

² Plaintiff was also confined at the Garza West Unit from May 27, 2011 through September 30, 2011. He filed his original complaint on June 30, 2014, and any claim from 2011 is barred by limitations. *See Jacobsen v. Osborne*, 133 F.3d 315, 319 (5th Cir. 1998) (federal court borrows forum state's general personal-injury limitations provision, and in Texas, that period is two years).

Initially, Plaintiff testified that he received “no food at all” on the weekends while confined at the Garza East and West Units in 2014. However, upon additional questioning, Plaintiff admitted that he received both breakfast and dinner on weekends, but did not receive lunch. On Saturdays and Sundays, the Garza East and West Units served only two meals a day: a breakfast, served between 5:00 and 7:00 a.m., and a dinner, served between 4:00 and 6:30 p.m. When Plaintiff questioned prison officials about this practice, he was told that prisoners get double servings at breakfast and dinner on the weekends, thus justifying no lunch. Plaintiff filed several grievances with prison officials complaining about the failure to provide three meals a day but those grievances were destroyed or otherwise “interfered with,” and his request to appoint a special master to look into the matter was denied by prison authorities.

Plaintiff claims that he is suing Brad Livingston, the TDCJ Executive Director and “all of his subordinates” in charge of food services because they orchestrated a conspiracy to deny Plaintiff his Eighth Amendment rights. Plaintiff is suing Major Harris of the Garza East Unit because, after Plaintiff complained to him about the denial of lunch as cruel and unusual punishment, Major Harris responded on June 26, 2014 that he had a “license to torture inmates,” and he did nothing to remedy the situation. Plaintiff claims that Major Harris is “an enemy of the Constitution.”

Plaintiff is 43 years old. He is 5’11” tall and weighs between 155-160 pounds. His weight has remained fairly consistent throughout his time in the TDCJ-CID. When he has money in his inmate account, he is able to purchase food at the prison commissary.

Plaintiff is seeking compensatory and punitive damages for the violation of his Eighth Amendment rights while at the Garza East and West Units.

IV. DISCUSSION.

Plaintiff maintains that Defendants violated his right to be free from cruel and unusual punishment when they denied him lunch on the weekends between March 13, 2014 and June 29, 2014.

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. Prison officials must provide humane conditions of confinement; ensure that inmates receive adequate food, clothing, shelter, and medical care; and take reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Conditions that result in “unquestioned and serious deprivations of basic human needs” or “deprive inmates of the minimal civilized measure of life’s necessities” violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8-10 (1992); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Such a violation occurs when a prison official is deliberately indifferent to an inmate’s health or safety. *Farmer*, 511 U.S. at 834. Deliberate indifference is more than mere negligence. *Id.* at 835. To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. *Id.* at 837.

Prisoners are guaranteed a nutritionally adequate diet. *See Wilson v. Seiter*, 501 U.S. 294, 303 (1991). However, withholding of food does not *per se* constitute an

objectively serious deprivation in violation of the Constitution. *Reed v. McBride*, 178 F.3d 849, 853 (7th Cir. 1999). The circumstances, nature, and duration of a deprivation of life's necessities must be considered in determining whether a constitutional violation has occurred. "In general, the severity and duration of deprivations necessary to state a constitutional violation are inversely proportional, so that minor deprivations suffered for short periods would not rise to an Eighth Amendment violation, while 'substantial deprivations of shelter, food, drinking water, and sanitation' may meet the standard despite a shorter duration." *Deapain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) (quoting *Johnson v. Lewis*, 217 F.3d 726, 732 (9th Cir. 1999)); see also *Whitnack v. Douglas County*, 16 F.3d 954, 958 (8th Cir. 1994).

In *Green v. Ferrell*, 801 F.2d 765, 770-71 (5th Cir. 1986), prisoner-plaintiffs brought a class action lawsuit complaining about the conditions of confinement in a Mississippi county jail, including that the Adams County Jail served only two meals a day. The case was tried before a magistrate judge and he ordered injunctive relief *inter alia*, on the food claim, stating: "The jail must provide three nutritionally adequate meals per day. The third meal may be in the form of a mid-day or bedtime light meal, so long as the meal meets the recognized daily requirements both nutritionally and calorically." *Id.* at 770. On appeal, the Fifth Circuit reversed the portion of the judgment requiring a third meal. *Id.* at 771. The Fifth Circuit noted that none of the prisoner-plaintiffs had alleged any medical problems caused by being served only two meals, and the mere fact that experts might recommend three meals a day does "not create constitutional standards under the eighth amendment." *Id.* Thus, under *Green*, two meals a day may be

constitutionally adequate on even a regular, permanent basis, let alone only two days a week. *See also, Talib v. Gilley*, 138 F.3d 211, 214 n. 3 (5th Cir. 1998) (finding it “doubtful” that prisoners missing fifty meals in five months “was denied anything close to a minimal measure of life’s necessities,” and commenting that “[m]issing a mere one out of every nine meals is hardly more than that missed by many working citizens over the same period.”); *Berry v. Brady*, 192 F.3d 504, 506-08 (5th Cir. 1999) (finding that denying an inmate eight meals over seven months because of the inmate’s failure to shave did not meet the objective component, and noting that the prisoner had not alleged any specific physical harm, nor had he claimed that he lost weight or suffered other adverse physical effects or had his health put at risk). *And see Gardner v. Beale*, 780 F. Supp. 1073 (E.D. Va. 1991), *aff’d* 998 F.2d 1008 (4th Cir. 1993) (providing prisoner with only two meals per day, with an 18-hour interval between dinner and brunch, did not satisfy objective component of Eighth Amendment standard).

Between March 13, 2014 and June 29, 2014, there were sixteen (16) weekends, for a total of 32 days. Plaintiff was confined at the Garza East/West Units a total of 108 days. If Plaintiff had received 3 meals a day for 108 days he would have received 324 meals. Instead, he received 3 meals a day for 76 days, which is 228 meals, plus 2 meals a day for 32 days, or 64 meals, for a total of 292 meals. Thus, over 108 days, Plaintiff is complaining about missing 32 meals out of 324.

More importantly, Plaintiff alleges no injury as a consequence of receiving two meals a day on the weekends. Plaintiff testified that his weight has remained constant throughout his time in the TDCJ; he has not suffered any significant weight loss, nor has

he been diagnosed with any medical condition attributable to poor nutrition or lack of calories. Without some injury, Plaintiff cannot prevail on his Eighth Amendment claim for damages against the named Defendants.³ See *Hudson v. McMillian*, 503 U.S. 1, 8-10 (1992) (to state an Eighth Amendment conditions of confinement claim, the harm suffered from the alleged violation must be more than *de minimis*).

V. RECOMMENDATION.

Plaintiff claimed that he was denied all food on weekends and, after questioned whether the records of Garza East and West Units would reflect as much, he clarified that his complaint was he was not served lunch on the weekends. However, Plaintiff testified that he did not suffer any injury as a consequence of receiving lunch on the weekends for the 108 days he was confined at the Garza East and West Units in 2014. Accordingly, he fails to state a cognizable Eighth Amendment violation, and it is respectfully recommended that this claim be dismissed with prejudice as frivolous and for failure to state a claim pursuant to 28 U.S.C. §§1915e(2) and 1915A(b)(1).⁴ It is further respectfully recommended that final judgment of dismissal be entered in this action.

ORDERED this 17th day of November, 2015.


Jason B. Libby
United States Magistrate Judge

³ Plaintiff repeatedly testified that he is seeking injunctive relief against the TDCJ-CID to stop the two-meals on the weekends practice. Plaintiff was advised that those claims are properly maintained, if at all, in the jurisdiction in which he is incarcerated, and would not be address herein.

⁴ It was previously recommended that the dismissal of this case count as a § 1915(g) strike. See D.E. 36, p. 22. This claim need not receive a separate strike order.

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within **FOURTEEN (14) DAYS** after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

REYNALDO FLORES,

Plaintiff,

VS.

TDCJ TRANSITORIAL PLANNING
DEPART. SOUTHERN REGION INST.
DIVISION ET AL, *et al*,

Defendants.

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CIVIL ACTION NO. 2:14-CV-283

**ORDER ADOPTING IN PART AMENDED MEMORANDUM
AND RECOMMENDATION TO DISMISS ACTION**

Pending before the Court are Plaintiff's Complaint (D.E. 1), Plaintiff's Motion for Extension of Time to File an Amended Complaint (D.E. 17), Plaintiff's Amended Complaint filed with his Objections to the initial Memorandum and Recommendation (D.E. 25), and Plaintiff's Motion for Order to Show Cause for a Preliminary Injunction and a Temporary Restraining Order (D.E. 27). On June 15, 2015, United States Magistrate Judge Jason B. Libby issued an Amended Memorandum and Recommendation to Dismiss Action (Amended M&R, D.E. 36), recommending that Plaintiff's Motion for Extension of Time be denied and that Plaintiff's Complaint be dismissed. Plaintiff timely filed his Objections (D.E. 41) on July 29, 2015.

As set out more fully below, the Court GRANTS Plaintiff's motion for extension of time (D.E. 17) and grants leave to file Plaintiff's amended complaint, made part of his initial objections (D.E. 25). After a review of Plaintiff's amended claims, the Court RETAINS the claim that inmates are deprived of food on weekends for further

determination of whether the claim is frivolous. This claim needs to be further developed and screened because it is unclear who the claim is against. The Court DISMISSES the remaining claims. The Court further DENIES the motion for a temporary restraining order or preliminary injunction because Plaintiff has not pleaded sufficient likelihood of success on the merits.

Plaintiff argues that the screening requirements of the Prison Litigation Reform Act, 42 U.S.C. § 1997e; 28 U.S.C. §§ 1915(e)(2), 1915A, do not apply because he is a political prisoner or immigration detainee. The records reflect, however, that he is incarcerated in the Texas Department of Criminal Justice-Criminal Institutions Division on a ten-year sentence for a family violence conviction—a fact that he does not dispute. His objection to having his complaint subjected to screening is without merit and is **OVERRULED**.

Plaintiff's objections (D.E. 41) comprise 52 pages of handwritten discussion that includes a historical background of 42 U.S.C. §§ 1981-1989 and a repetition of all of his claims. He alleges that he was kidnapped at gunpoint and is being held in captivity as a result of a conspiracy involving his insane wife, her sexual partners, and domestic and international terrorism. The purpose of the conspiracy was to appropriate his identity and assets and to have his children "sold as livestock." The objections are stated in the form of re-urging his amended complaint and thus contain little as to any alleged error in the reasoning of the M&R.

Because Plaintiff's objections are based on the allegations in his amended complaint, and for clarity in ruling on those allegations, the Court GRANTS Plaintiff's

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motion for extension of time to file an amended complaint (D.E. 17), and rules on his claims as stated in the amended complaint, which is contained within his objections (D.E. 25) to a prior memorandum and recommendation (D.E. 19). The Court reviews Plaintiff's claims on a party-by-party basis.

A. Plaintiff's Wife and Her Boyfriend

Plaintiff sues his wife, Mayra Rubio Sanchez (Sanchez), and her boyfriend, Edward Garcia (Garcia). He alleges that they made false accusations against him (some of which led to acquittals and some of which serve as the basis for his convictions) so that they could sell his assets for their own gain. He alleges that they appropriated his identity in order to obtain credit for their use and required him to pay debts before they would allow him to visit with his children.

Plaintiff brings this action under 42 U.S.C. §§ 1981 et seq, claiming that he is discriminated against because he is an immigrant. However, Sanchez and Garcia's conduct is not conduct engaged in "under color of law" as required by 42 U.S.C. §§ 1981(c), 1983 because they are private individuals. Plaintiff alleges that Sanchez and Garcia enlisted the assistance of Detective Vara and that Garcia introduced himself on one occasion as "Sgt. Garcia," but that is not enough to make Sanchez and Garcia "state actors." Plaintiff also claims that Sanchez and Garcia are "state actors" by virtue of a conspiracy with law enforcement to conceal Plaintiff's exculpatory evidence. This allegation is conclusory and speculative, without specific factual allegations to support it. It fails the pleading test of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

The Court OVERRULES Plaintiff's objection and adopts the Amended M&R's recommendation of dismissal of the claims against Sanchez and Garcia because they are not state actors and did not engage in discrimination as required by the statutes under which they are sued. D.E. 36, p. 12. Alternatively, the allegations regarding Sanchez and Garcia involve events that took place in Bexar County. There are no allegations connecting them to any location within the geographical jurisdiction of this Court. As discussed more fully below, venue is not appropriate in this Court and the Court dismisses the claims on that basis.

B. Bexar County Defendants

Plaintiff sues everyone connected with his arrest and the prosecution of the criminal charges against him. Included are:

- San Antonio Police Department employees: Officer Francis Ochoa, Officer Castellanos, Detective R. Vara, Detective R. Valadez, Sergeant J. Porter, and Sergeant David Bierman, named for their actions in arresting and holding Plaintiff pursuant to the criminal complaints made against him.
- The Grand Jury foreman, with respect to the indictment against Plaintiff.
- Bexar County prosecutors: Susan D. Reed, George Albritton "Britt" Eastland, and Christopher W. DeMartino, named for their actions in prosecuting the criminal complaints against Plaintiff.
- His attorney, Rebecca P. Bustamante, who defended him against the criminal complaints until he received permission to represent himself pro se. He alleges that Bustamante had an agreement with the District Attorney which facilitated the conviction of immigrants and he alleges other errors and omissions in his defense.
- Bexar County Juvenile Detention Officer, David Geyer, who Plaintiff contends was a bribed witness in a conspiracy with Susan Reed.

- Kevin P. Yeary, the State's appellate counsel, for his work to gain affirmance of Plaintiff's conviction.
- Bexar County District Clerk, Donna K. McKinney, and Supervisor of Criminal Support, Alice Gonzales, for alleged failures to file, or spoliation of, letters Plaintiff sent and for sending him copies of the wrong documents or an incomplete copy of the right documents when he sought his trial record.
- Former Chief Justice Catherine Stone and Justices Marialyn Barnard, Rebeca Martinez, and Patricia Alvarez of the Fourth Court of Appeals of Texas for their opinion affirming his conviction and orders refusing to allow him untimely filing of documents.
- San Antonio Parole Board Officers or employees, Juanita Gonzales, Anthony Ramirez, Charles Speier, and Jesus Salinas, for allegedly participating in a conspiracy to keep him incarcerated and retaliating against him for his effort to appeal his conviction and incarceration.

Plaintiff's complaints are made against these Defendants in their official and personal capacities. While this Court dismisses these claims on procedural grounds (improper venue), the Court notes that these complaints have questionable merit and are likely barred by various privileges, immunities, and conditions precedent. The Court cautions Plaintiff to carefully consider pursuing these claims given the three-strikes rule to which he is subject. 28 U.S.C. § 1915(g).

Plaintiff has failed to allege any fact to show that these Defendants reside within the geographical jurisdiction of the Southern District of Texas. The San Antonio Police Department is located in Bexar County, where the events regarding Plaintiff's arrest took place. Bexar County was the venue for his prosecution and the appeal of his conviction. There is no suggestion that any evidence is more easily accessed through this Court than through one located in Bexar County. As the Amended M&R observes, Bexar County is

in the geographical jurisdiction of the Western District of Texas. 28 U.S.C. § 124(d)(4). There are no allegations connecting the claims or evidence against these Defendants with the Southern District of Texas.

Under the general venue statute, 28 U.S.C. § 1391(b)(1), (2), venue lies in the place where the defendant resides or where a substantial part of the events or omissions giving rise to the claim occurred. Plaintiff offers no allegation regarding where these Defendants reside. Clearly, the events about which he complains took place in Bexar County. Thus, under the venue statute, venue belongs in the Western District of Texas, San Antonio Division.

Plaintiff was given notice that venue was incorrect for these claims and that the Amended M&R recommended dismissal rather than transfer to the Western District. He made only two arguments in defense of filing the claims in this Court: (1) all of the claims must be joined together because they are sufficiently intertwined with the complaints about the Garza East and Garza West Units, located in this District and Division; and (2) the catchall provision of 28 U.S.C. § 1391(b)(3) applies.

The catchall provision does not apply where § 1391(b)(1) or (2) supplies an available venue so that argument is without merit. With respect to the joinder of claims, the Court disagrees. This is not a matter of multiple claims being made against a single party, as provided for in Federal Rule of Civil Procedure 18(a). And while the claims relate to Plaintiff's arrest, prosecution, conviction, appeal, and punishment for domestic violence, the claims are not "such that he would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 725

(1966). The claims involving the Garza Units are particular to the employees of that facility and do not relate to the events that led to Plaintiff's incarceration there. Therefore, his claims against the Bexar County Defendants are not properly brought in this Court.

The Court finds that these claims are subject to dismissal for improper venue. 28 U.S.C. § 1406(a). Without adopting the Amended M&R's reasoning regarding a jurisdictional basis for dismissal, the Court OVERRULES Plaintiff's objections and adopts the Amended M&R's recommendation of dismissal of these claims without prejudice.

C. LaSalle County Defendants

Plaintiff sues Warden Barber and Classification Officer J. Diaz with respect to conduct occurring at the Cotulla Unit of TDCJ-CID. Included are allegations that the conditions of confinement constituted cruel and unusual punishment in violation of the Eighth Amendment. More specifically, Plaintiff complains of the facility being a "metal cage" without ventilation where he was placed in solitary confinement for 25 days with the temperature sometimes exceeding 100 degrees Fahrenheit.

The Cotulla Unit is located in LaSalle County, Texas. LaSalle County is in the geographic jurisdiction of the Laredo Division of the Southern District of Texas. 28 U.S.C. § 124(b)(3). Just as with the Bexar County Defendants discussed above, there are no allegations linking the La Salle County Defendants or their conduct to the Corpus Christi Division of the Southern District of Texas. The Amended M&R provided notice that these claims were not raised in the correct venue and that dismissal was

recommended. Again, Plaintiff seeks to apply the catchall provision of the venue statute, 28 U.S.C. § 1391(b)(3), which does not apply when the correct venue is available. He again seeks joinder of common claims, which is rejected.

Plaintiff also invokes the venue provision for multi-district litigation, 28 U.S.C. § 1407. This case does not qualify as multi-district litigation because it involves separate claims against separate defendants. It is not a situation where several plaintiffs make common claims against the same defendants. The Court **OVERRULES** Plaintiff's objections and adopts the recommendation of the Amended M&R to dismiss the claims against the LaSalle County Defendants. This ruling is based on improper venue rather than the jurisdictional basis stated in the Amended M&R.

D. Bee County Defendants

The remaining Defendants, Mayor Harris, R. Trevino, Mitchell, and John Doe employees of mailrooms, are sued in connection with their work at the Garza East and/or Garza West Units of TDCJ-CID, both of which are located in Bee County, Texas. These facilities are within the geographical jurisdiction of this Court. 28 U.S.C. § 124(b)(6). Thus venue is appropriate in this Court for these claims.

As the Amended M&R concludes, the Eleventh Amendment prevents this Court from exercising jurisdiction over certain claims. The Eleventh Amendment's effect on this Court's jurisdiction is tantamount to granting state officials immunity from particular claims. D.E. 36, pp. 13-14. Plaintiff argues that Eleventh Amendment immunity cannot prevent his request for injunctive relief (and attorney's fees attendant to that claim) or claims made against these Defendants in their personal capacities. However, the

Amended M&R did not recommend dismissal of the injunctive relief claims or the claims against Defendants in their personal capacities based on Eleventh Amendment grounds. Thus this objection is OVERRULED.

Plaintiff's claims for injunctive relief against the Garza Units' officers are subject to dismissal because they became moot upon his transfer from that facility. D.E. 36, p. 14 n.3. He objects to the dismissal, claiming that his rights continued to be violated in the facility to which he was transferred. He cites *Helling v. McKinney*, 509 U.S. 25, 35-36 (1993) and *Williams v. Lane*, 851 F.2d 867, 883-84 (7th Cir. 1988) in support, but these cases are inapposite.

In *Helling*, the issue was whether the prison system exposed the inmate to a substantial health risk by not protecting him from second-hand cigarette smoke. Although the prisoner had been transferred from the facility in which his cellmate had been a heavy smoker, the Supreme Court held that the prisoner could proceed with his claim because the danger had not necessarily subsided and that it was important to determine the prison's liability in light of the ameliorative prison policies that had since been put into effect. While the opinion acknowledged that injunctive relief had been requested, the propriety of such relief under the circumstances there (which involved an evolution in societal norms to which all prisons must be responsive) was not expressly challenged.

Williams involved a class action brought on behalf of persons held in protective custody whose rights to the free exercise of religion and access to the courts were impaired by prison policies. The prison had failed to comply with previous orders and

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the issue was whether a special master could lawfully be appointed to monitor and supervise the prison's compliance. Here, Plaintiff's individual complaints in seeking an injunction after leaving a facility that treated him in a manner he alleges was cruel and unusual are not analogous to those in *Williams*.

Plaintiff attempts to link conduct in different facilities so that he can claim a single harm that follows him throughout those TDCJ facilities. He contends that his complaints about the Garza Units are part of one vast conspiracy that began with his arrest and continues as he serves his sentence, wherever he may be serving that sentence. As previously noted, Plaintiff's "vast conspiracy" allegations are conclusory and fail the *Twombly/Iqbal* test. The Court **OVERRULES** Plaintiff's objection to the Amended M&R's conclusion that his claim for injunctive relief was mooted upon his transfer from the Garza Units.

Plaintiff also objects to the application of qualified immunity to the injunctive relief claims because he alleges that the officers' actions were unreasonable. However the Amended M&R did not apply qualified immunity to these claims so this Court **OVERRULES** his objection as moot. The Court thus **OVERRULES** Plaintiff's objections to the application of the Eleventh Amendment and adopts the Amended M&R's recommendation to dismiss any claim for money damages against the Bee County Defendants in their official capacities. The Court also adopts the Amended M&R's recommendation to dismiss any claims for injunctive relief as moot.

Because Plaintiff also seeks damages against these Defendants in their personal capacities, the Court reviews the substance of the allegations to determine whether they

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are frivolous, malicious, or fail to state a claim upon which relief may be granted. 28 U.S.C.A. §§ 1915(e), 1915A(b). The Amended M&R recommends dismissal of each of the claims as lacking merit and further recommends that a dismissal of the claims count as a “strike” under the three-strikes rule applicable to cases filed *in forma pauperis*. 28 U.S.C.A. § 1915(g).

1. Conditions of Confinement

The Amended M&R notes that in order to make a claim that a condition of confinement violates the Eighth Amendment “cruel and unusual punishment” clause, Plaintiff must plead facts that satisfy a two-pronged test: (1) that prison conditions were, objectively, serious enough to have deprived him of the “minimal civilized measure of life's necessities” under contemporary standards of decency; and (2) that the responsible defendants acted with deliberate indifference—that they knew of and disregarded a substantial risk to an inmate's health or safety. D.E. 36, pp. 14-16. The Amended M&R reasons that Plaintiff's allegations regarding conditions of confinement did not satisfy the requirement of presenting a substantial risk to him of which Defendants were actually aware.

In his objections, Plaintiff fails to state how the conditions he complains about, including unsanitary conditions presented by pests, food quality, air quality, or extreme temperatures, pose a substantial risk of harm to him. His allegations are speculative and conclusory and do not satisfy the pleading requirements of *Twombly/Iqbal* for the claims alleged.

The only exception is allegations that the Garza facility and all facilities within Region IV of TDCJ-CID serve no food on weekends, thus depriving the inmates of food on more than 110 days per year. The Amended M&R recites that Plaintiff did not complain of being deprived of food. However, the amended complaint which the Court allowed to be filed makes this allegation and Plaintiff's objections repeat the allegation. While this claim lacks plausibility, the Court RETAINS this claim for further determination of whether the claim is frivolous under the terms of the Prison Litigation Reform Act.

The Court OVERRULES Plaintiff's objections to the Amended M&R and adopts the recommendation to dismiss his complaints regarding unsanitary conditions posed by pests, food quality, air quality, and extreme temperatures, retaining only the claim regarding deprivation of food on weekends.

2. Denial of Access to Courts

In his objections, Plaintiff contends that he suffered an actual injury from the Garza Units' interference with his access to courts in that his conviction was affirmed (Case No. 04-12-00815-CR/14-50061) on or about June 25, 2014, his parole was denied about the same date, and there was interference with his mail to the Human Rights Organization and International Court of Human Rights in the Hague, Netherlands.

Plaintiff does not show any prejudice from the alleged interference with the appeal of his conviction. The appeal had been fully briefed and the court affirmed the conviction. At best, he was deprived of an opportunity to file a motion for rehearing and perhaps further appeals. But Plaintiff does not allege any facts by which this Court could

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find that he would have succeeded in getting his conviction reversed had he engaged in any further appeal. Likewise, he does not allege any facts to support his conclusion that interference with his legal mail or supplies caused him to be denied parole. Without a demonstration of prejudice from the alleged denial of access to courts, he has no viable complaint. D.E. 36, pp. 19-20.

In addition, Plaintiff does not demonstrate that the Hague has any jurisdiction to effect any remedies on his behalf or that such remedies would have been implemented had there been no interference with his legal mail or supplies. Again, Plaintiff has failed to plead facts that would support a finding of prejudice. His conclusory complaints are insufficient under *Twombly/Iqbal*. The Court OVERRULES Plaintiff's objections to the Amended M&R with respect to claims for interference with his access to courts and adopts the Amended M&R's recommendation to dismiss these claims.

3. Retaliation

Plaintiff objects to the Amended M&R's recommendation that his claim for retaliation be dismissed, stating that it was not unusual for him to have a supply of stamps and envelopes because he bought them at a time when he was not indigent. He claims to need them because he acts as a jailhouse lawyer for other inmates and that Defendants are retaliating against him for the legal work he does on behalf of others. While Plaintiff describes this as a First Amendment issue, he does not describe his exercise of any First Amendment right that allegedly triggered retaliation.

Plaintiff does not have a constitutional right to act as a jailhouse lawyer for other inmates or to do so in a particular facility. *Tighe v. Wall*, 100 F.3d 41, 42 (5th Cir. 1996).

His argument, therefore, cannot supply the basis for a retaliation claim under 42 U.S.C. § 1983. Consequently, Plaintiff has not stated a viable claim for retaliation. The Court **OVERRULES** his objection and adopts the Amended M&R's recommendation to dismiss the retaliation claim.

E. Construction as Petition for Writ of Habeas Corpus.

Plaintiff occasionally suggests that his complaint should be construed as a petition for writ of habeas corpus. Plaintiff complains of both conditions of confinement and the fact or duration of confinement. The Court declines to treat this as a habeas case for three reasons: (1) this case was filed as a civil rights complaint under 42 U.S.C. § 1983 and addresses some complaints regarding conditions of confinement, which are not appropriate in a habeas case; (2) the Court has dismissed the claims that most closely challenge the fact or duration of his confinement for improper venue and they were not addressed on their merits; and (3) Plaintiff specifically states that it is "imperative" that the Court understand that he is not challenging his conviction in this case. D.E. 25, p. 10.

Having reviewed the findings of fact, conclusions of law, and recommendations set forth in the Magistrate Judge's Amended Memorandum and Recommendation, as well as Plaintiff's Objections, and all other relevant documents in the record, and having made a de novo disposition of the portions of the Magistrate Judge's Amended Memorandum and Recommendation to which objections were specifically directed, the Court **SUSTAINS** Plaintiff's objection to the dismissal of his claim for deprivation of food and **RETAINS** this claim for further investigation. The Court **OVERRULES** the remainder of Plaintiff's Objections and **ADOPTS IN PART AS MODIFIED** the findings and

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conclusions of the Magistrate Judge and **DISMISSES** the remaining claims. Accordingly, the Court **GRANTS** Plaintiff's motion for extension of time (D.E. 17) and grants leave to file Plaintiff's amended complaint, made part of his objections (D.E. 25). The Court **DENIES** Plaintiff's motion for preliminary injunctive relief (D.E. 27).

ORDERED this 21st day of September, 2015.


NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

REYNALDO FLORES,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-283
	§	
TDCJ TRANSITORIAL PLANNING	§	
DEPART. SOUTHERN REGION INST.	§	
DIVISION ET AL,	§	
	§	
Defendant.	§	

**AMENDED MEMORANDUM AND
RECOMMENDATION TO DISMISS ACTION**

This civil rights action was filed by a Texas state prisoner pursuant to 42 U.S.C. § 1983. Under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), any prisoner action brought under federal law must be dismissed if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. *See* 42 U.S.C. § 1997e(c); 28 U.S.C. §§ 1915(e)(2), 1915A. Plaintiff's action is subject to screening regardless of whether he prepays the entire filing fee or proceeds as a pauper. *Ruiz v. United States*, 160 F.3d 273, 274 (5th Cir. 1998) (per curiam); *Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998) (per curiam), *cert. denied*, 527 U.S. 1041 (1999). Plaintiff's *pro se* complaint must be read indulgently, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and his allegations

must be accepted as true, unless they are clearly irrational or wholly incredible, *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

Applying these standards, it is respectfully recommended that Plaintiff's claims against the Garza Unit Defendants be dismissed with prejudice for failure to state a claim and/or as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1), and that the dismissal be counted as a "strike" for purposes of 28 U.S.C. § 1915(g). It is respectfully recommended further that Plaintiff's remaining claims against the remaining Defendants be dismissed without prejudice.

I. JURISDICTION.

The Court has federal question jurisdiction over this civil rights action pursuant to 28 U.S.C. § 1331.

II. PROCEDURAL BACKGROUND.

Plaintiff is a prisoner in the Texas Department of Criminal Justice, Criminal Institutions Division (TDCJ-CID), and he is currently confined at the Cotulla Unit in Cotulla, Texas.

On June 30, 2014, Plaintiff filed his original complaint alleging unconstitutional conditions of confinement while he was housed temporarily at the Garza East Transfer Facility in Beeville, Texas, from April 7, 2014 through June 29, 2014. (D.E. 1). He named as Defendants the TDCJ Transitorial Planning Department and Southern Regional Institutional Division. *Id.* at 2.

On August 21, 2014, Plaintiff was granted an extension of time until September 30, 2014 to file an amended complaint. (D.E. 13). On October 1, 2014, a *Spears*¹ hearing was conducted. On October 29, 2014, the undersigned magistrate judge entered a Memorandum and Recommendation (M&R) that Plaintiff's constitutional and retaliation claims be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1). (D.E. 19). On November 17, 2014, Plaintiff was granted an extension of time until December 22, 2014 to file objections to the M&R. (D.E. 22). On December 22, 2014, Plaintiff filed a notice of filing objections. (D.E. 23).

On December 29, 2014, Plaintiff filed a 297-page pleading entitled "Objection to Memorandum-Recommendation to Dismiss Action and Amended Complaint." (D.E. 25). In his amended complaint, Plaintiff is no longer suing the TDCJ Transitorial Planning Department and Southern Regional Institutional Division. (D.E. 25, p. 1). However, he has named as Defendants his ex-wife Mayra Rubio Sanchez, the complainant and victim in both criminal actions; six (6) San Antonio police officers; several Bexar County District Attorneys; his court-appointed trial and appellate counsel; justices on the Fourth Court of Appeals; and members of the State of Texas Board of Pardons and Paroles. (D.E. 25, pp. 1, 7-8, 15-20). Plaintiff has named also two prison officials assigned to the Cotulla Unit, Warden Barber and Officer Diaz. (D.E. 25, pp. 1, 19). Finally, Plaintiff has sued the following Garza Unit officials/employees: (1) Major

¹ *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985); see also *Eason v. Holt*, 73 F.3d 600, 603 (5th Cir. 1996) (stating that testimony given at a *Spears* hearing is incorporated into the pleadings).

Harris; (2) Officer R. Trevino; (3) Officer Mitchell; and (4) John and Jane Does working in the Garza West Unit Mail Room. (D.E. 25-1, pp. 24-27, and 25-2, pp. 1-2).

Plaintiff is suing all Defendants in their official and individual capacities. (D.E. 25, p. 1). He seeks an injunction ordering Defendants “to stop their harassment campaign,” as well as compensatory and punitive damages. (D.E. 25-2, pp. 24-25).

III. PLAINTIFF’S EVIDENCE AND ALLEGATIONS.

A. Plaintiff’s criminal convictions.

On April 18, 2011, Plaintiff was found guilty of family violence with strangulation against his wife, complainant Mayra Rubio Sanchez, in Cause No. 2011-CR-1002 in the 226th Judicial District Court of Bexar County, Texas, and sentenced to two (2) years in the TDCJ-CID.² (D.E. 25-3, pp. 1-3). His court appointed counsel was Defendant Rebecca P. Bustamante. (D.E. 25-3, p. 1). While on parole for that offense, Plaintiff was charged in a three-count indictment with aggravated kidnapping, sexual assault, and family violence in Cause No. 2012-CR-1969 in the 290th Judicial District Court of Bexar County, Texas. (D.E. 25-5, pp. 1-9). On December 3, 2012, a jury found Plaintiff guilty of assault/family violence and sentenced him to ten (10) years in the TDCJ-CID and assessed a fine in the amount of \$10,000.00 in Cause No. 2012-CR-1969. (D.E. 25-8, p. 1). Plaintiff was also convicted of unlawful restraint and sentenced to one-year

² In his amended complaint (D.E. 25), Plaintiff has provided over 290 pages of his past criminal proceedings and records, and the details provided herein are garnered from those documents.

confinement in the county jail and assessed a fine of \$4,000.00. *Id.* He was found not guilty of aggravated kidnapping and sexual assault. (D.E. 25-5, pp. 2-3).

Represented by counsel, Plaintiff appealed his conviction in Cause No. 2012-CR-1969 to the Fourth Court of Appeals in Appeal No. 04-12-00815-CR. (D.E. 25-5, pp. 10-38). On April 15, 2013, the Fourth Court of Appeals heard arguments on Plaintiff's motion to discharge his counsel and proceed on appeal *pro se* because Plaintiff believed Defendant George Eastland was working in coercion with the prosecution. (D.E. 25-7, p. 11). The Fourth Court of Appeals granted his motion to proceed *pro se* (D.E. 25-7, pp. 19), and on December 12, 2013, Plaintiff filed a reply brief to the State's response. (D.E. 25-6, pp. 1-29). On June 25, 2014, the Fourth Court of Appeals affirmed Plaintiff's convictions. (D.E. 25-8, pp. 1-14). There is no documentation to suggest that Plaintiff filed a Petition for Discretionary Review (PDR) with the Texas Court of Criminal Appeals; however, in his amended complaint, Plaintiff states that he filed a writ of certiorari with the United States Supreme Court, No. 14-50061. (D.E. 25-2, p. 2).

B. Original Complaint allegations.

In his original complaint, Plaintiff introduces himself as a "jail house lawyer" and "sentinel of human rights in Texas." (D.E. 1, p. 1). He claims that his current incarceration in Cause No. 2012-CR-1969 is the result of "premeditated kidnapping" and a "malicious conspiratorial trial" involving his appointed defense counsel, the prosecutor, and the trial court. He correctly points out that the jury actually found him not guilty of aggravated kidnapping and sexual assault, but claims he was "unconstitutionally re-

convicted” for assault of Mayra Rubio Sanchez arising from his earlier conviction in Cause No. 2011-CR-1002. Plaintiff claims that his current conviction wrongfully includes the earlier 2011 conviction in violation of the double jeopardy clause.

On April 7, 2014, Plaintiff was transferred from the Bexar County Jail to the Garza East Transfer Facility. (D.E. 1, p. 3). Plaintiff claims that he was subjected to “continuous harassment” and “the spoliation of [his] personal and legal mail” in retaliation for his exercising his right of access to the courts, as well as for assisting “thousand[s] of vulnerable immigrants and illiterate American citizens...” to their right of access to the courts. *Id.*

At the October 1, 2014 *Spears* hearing, Plaintiff testified that on June 26, 2014, the “harassment campaign” became even more evident. Plaintiff was cleaning the shower, Officer Mitchell arrived and ordered Plaintiff to come to Dorm 6 sally port. Plaintiff arrived at the sally port and found Officer R. Trevino “tampering and reading [Plaintiff’s] reporter’s record and clerk’s record and [she] took possession of 80 postage stamps and stamped envelopes... without legal reason to confiscate them...”. (D.E. 1, p. 3). Plaintiff informed Officer Trevino that he had legally purchased the stamps at the prison commissary and that he had a constitutional right to be a jail house lawyer and to assist other inmates with their litigation. However, Officer Trevino kept the stamps and envelopes.

The harassment of Plaintiff continued. Plaintiff recently filed on behalf of another inmate a complaint before the International Court of Human Rights in which Plaintiff

furnished to that court “material evidences of the *modus operandi* (sic) of the Texas Judicial System, and innocence of at least 80% of prisoners wrongfully convicted.” (D.E. 1, p. 4). However, this correspondence was tampered with and opened, and Plaintiff has no proof that it was received by the Hague Court in the Netherlands. *Id.* Other correspondence has been lost and/or stolen. For example, Plaintiff received on May 29, 2014 correspondence from the Fifth Circuit dated May 6, 2014, giving him 30 days to respond to a district court’s denial of his motion to proceed *in forma pauperis* with no explanation for the delay. Plaintiff testified that he was able to submit the i.f.p. application timely, but the delay “caused him stress.” He represented himself on his criminal appeal and he did not miss any deadlines.

In addition to the myriad of First Amendment violations, Plaintiff complains he and the other inmates are subjected to unsanitary and unhealthy conditions in the Garza East dorms, including bacteria and mold. Plaintiff obtained the signatures of twenty-eight other inmates complaining about the conditions and submitted the complaint to the Mayor of Beeville. Warden Pawelek told Plaintiff that he would get transferred if he complained about the conditions, and on June 29, 2014, he was transferred to the Cotulla Unit. Plaintiff claims that he filed grievances protesting the transfer as being in violation of the Eighth Amendment, but his grievances were denied.

With his original complaint, Plaintiff filed the affidavit of Offender Hector Eduardo Vasquez attesting to the unsanitary conditions at the Garza East Unit. (D.E. 1-1, pp. 5-6). On September 10, 2014, Plaintiff filed the affidavit of Offender Victor Diaz,

a Cotulla Unit inmate, who testifies to the “philanthropic legal work” Plaintiff performs for others. (D.E. 15, pp. 1-2). Plaintiff also offers the affidavit of Offender Tommy Harris, also at the Cotulla Unit, who testifies that, since engaging the legal assistance of Plaintiff, he has suffered retaliatory conduct by prison staff. (D.E. 16, pp. 1-2).

C. Amended Complaint allegations.

In his amended complaint, Plaintiff is suing various individuals that were involved in his criminal convictions, some of whom are not state actors. He claims that his ex-wife, Mayra Rubio Sanchez is insane and that her charges against him were fabricated. (D.E. 25, p. 12). He is suing Edward Garcia alleging that this individual took advantage of Ms. Rubio Sanchez’ insanity and vandalized Plaintiff’s warehouse and storage units. (D.E. 25, pp. 13-14). Plaintiff is suing San Antonio Police Officers Ochoa, Castellanos, Vara, Valadez, Porter and Bierman for, *inter alia*, arresting him on false charges. (D.E. 25, pp. 15-21). He is suing Rebecca Bustamante, his appointed counsel in Cause No. 2011-CR-1002, for ineffective assistance of counsel, and George Eastland, his counsel in Cause No. 2012-CR-1969, for conspiring with the prosecution to find him guilty. (D.E. 25, pp. 21-27). Plaintiff is suing Edward A. Garcia, Jr. as the foreman of the Bexar County grand jury that issued the indictment in Cause No. 12-CR-1969. (D.E. 25, p. 27-28). Defendant Susan Reed was the prosecuting District Attorney (DA) in Cause No. 2012-CR-1969, while Christopher Demartino was the Assistant DA. (D.E. 25, pp. 29-33 – D.E. 25-1, pp. 1-4). Defendant David Geyer is a Bexar County Juvenile Detention Center Officer. (D.E. 25-1, p. 5). Plaintiff claims that Mr. Geyer was a “false witness”

against him. *Id.* Defendant Kevin Yearly represented the State in Plaintiff's appeal to the Fourth Court of Appeals. (D.E. 25-1, p. 8). Defendant Donna McKinney is the Bexar County District Clerk and Plaintiff claims that she, "with evil intent," failed to file his state habeas corpus petition in Cause No. 2011-CR-1002 and engaged in other "trickery." (D.E. 25-1, pp. 10-13). Alice Gonzales is the supervisor of the criminal support staff of the Bexar County District Clerk's Office, and Plaintiff claims that this Defendant conspired with DA Demartino to not furnish Plaintiff a copy of the record in Cause No. 12-CR-1969 as ordered by the Fourth Court of Appeals. (D.E. 25-1, pp. 13-14).

Plaintiff has sued four justices on the Fourth Court of Appeals, Catherine Stone, Marilyn Barnard, Rebecca Martinez, and Patricia Alvarez, as they issued the opinion affirming his convictions. (D.E. 25-1, pp. 14-20). Plaintiff is suing State Parole Board members Juanita Gonzales, Anthony Ramirez, and Charles Speier alleging that they denied his parole without sufficient evidence. (D.E. 25-1, pp. 20-22). Plaintiff claims that Parole Officer Jesus Salinas threatened him and caused him to dismiss his appeal in exchange for his release on parole. (D.E. 25-1, pp. 22-23).

As to the Garza Unit Defendants, Plaintiff claims that Major Harris knew of unconstitutional conditions of confinement as it concerned the food, air quality, and temperatures in the Garza East Unit. (D.E. 25-1, pp. 24-26). Plaintiff claims that Defendants Trevino and Mitchell are "subordinates of Defendant Harris" and participated in the violation of his Eighth Amendment rights. (D.E. 25-1, p. 27 – D.E. 25-2, p. 1). Plaintiff claims that the John and Jane Doe Defendants of the Garza West Unit mail room

delayed his legal mail “with the evil intent to obtain the dismissal of Criminal Appeal No. 01-12-00815-CR and Federal Appeal No. 14-50061.” (D.E. 25-2, p. 2).

Finally, Plaintiff has sued Warden Matt Barber and Classification Officer Diaz, both of the Cotulla Unit, alleging that these Defendants have violated his due process rights in regards to finding him guilty of disciplinary violations without adequate notice and hearing, have interfered with his right of access to the courts, and have denied him adequate conditions of confinement. (D.E. 25-2, pp. 3-5).

IV. LEGAL STANDARD.

Regardless of whether a plaintiff has properly exhausted his administrative remedies, his action may be dismissed for failure to state a claim upon which relief can be granted. 42 U.S.C. § 1997e(c)(2). “To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995). An action may be dismissed for failure to state a claim when it is clear that the prisoner can prove no set of facts in support of his claim entitling him to relief. *Oliver v. Scott*, 276 F.3d 736, 740 (5th Cir. 2002). The complaint must be liberally construed in favor of the prisoner and the truth of all pleaded facts must be assumed. *Id.*

V. DISCUSSION.

A. Plaintiff's Amended Complaint and Objections are untimely.

Plaintiff was granted an extension of time until September 30, 2014 to file his amended complaint. (D.E. 13). He did not actually file an amended complaint until he filed his objections to the M&R on December 29, 2014. (D.E. 25). He was granted an extension of time until December 22, 2014 to file his objections to the M&R (D.E. 22), but all he filed on that day was a 2-page "notice" of filing objections (D.E. 24); the actual objections were not filed until a week later on December 29, 2014. (D.E. 25). However, because neither Plaintiff's objections or amended complaint affect the recommendation that Plaintiff's claims against the Garza Unit Defendants be dismissed with prejudice and count as a § 1915(g) strike, and his remaining claims dismissed without prejudice, it is respectfully recommended that the Court consider Plaintiff's objections and amended complaint in assessing the disposition of this action.

B. No jurisdiction over Bexar County Defendants.

In his amended complaint (D.E. 25), Plaintiff has now named as Defendants numerous individuals associated with his criminal convictions arising in Bexar County, Texas. On their face, these claims appear to be wholly without merit and subject to various valid defenses ranging from absolute prosecutorial and judicial immunity to qualified immunity and limitations. However, the Court need not address the merits of those claims as the state actor Defendants are alleged to live in Bexar County, Texas, and that is also where the alleged constitutional violations are alleged to have occurred.

Bexar County is located in the United States District Court for the Western District of Texas, San Antonio Division. 28 U.S.C. § 124(d)(4). This Court does not have jurisdiction over those claims, and it is respectfully recommended they be dismissed without prejudice. Because they appear frivolous, it is not recommended that they be transferred to the San Antonio Division.

C. Non-state actors.

Plaintiff has sued his former spouse and her friend, Edward Garcia. He does not state where Ms. Rubio Sanchez resides but claims that Mr. Garcia lives in Corpus Christi. Regardless of their residences, Plaintiff cannot sue either of these individuals for violations of his constitutional rights under § 1983 because he fails to establish that either of these Defendants was acting under color of state law and deprived him of a federal right. *Cinel v. Connick*, 15 F.3d 1338, 1342 (5th Cir. 1994). Ms. Rubio Sanchez was simply the complainant/victim in the State's criminal actions against Plaintiff, and Mr. Garcia is charged only with assisting Ms. Rubio Sanchez in seizing Plaintiff's property. These allegations fail to state cognizable constitutional violations, and it is therefore recommended that they be dismissed.

D. Improper venue for Cotulla Unit Defendants.

Plaintiff is currently confined at the Cotulla Unit. In his amended complaint, he added claims against Cotulla Unit Warden Matt Barber and Classification Officer Diaz objecting to their handling of a disciplinary case against him as well as complaints about

a fan and legal mail. In support of these claims, he has attached copies of his grievances regarding those manners. (*See* D.E. 25-9, pp. 13-20).

The Cotulla Unit is located in La Salle County, Texas, which is located in the Southern District of Texas, Laredo Division. 28 U.S.C. § 124(b)(3). Even if this Court were to exercise jurisdiction over these claims, Defendants could raise the meritorious defense of lack of personal jurisdiction. Moreover, venue is proper in the Laredo Division. *See* 28 U.S.C. § 1391(b). Accordingly, it is respectfully recommended that the Court dismiss these claims without prejudice to Plaintiff refiling them in the proper court should he so desire. Again, it is not recommended that these claims be severed and transferred because, on their face, they appear without merit. Moreover, the claims arose in late 2014 and therefore Plaintiff has no imminent limitations deadline should he decide to pursue them.

E. Claims against the Garza Unit Defendants.

(1) *Eleventh Amendment Immunity.*

Plaintiff has sued the Garza Unit Defendants in their official and individual capacities.

The Eleventh Amendment provides that “[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state....” Const. amend. XI. This withdrawal of jurisdiction effectively confers immunity from suit. *P.R. Aqueduct and Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 144 (1993). When a plaintiff files suit

against state officials in their official capacities, the lawsuit is effectively one against the State. *Hafer v. Melo*, 502 U.S. 21, 25 (1991). That is, a claim for monetary damages against a state official in his or her official capacity is “no different from a suit against the state itself,” and consequently, is barred by the Eleventh Amendment.³ *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989). *See also McKinley v. Abbott*, 643 F.3d 403, 406 (5th Cir.), *cert. denied*, 132 S. Ct. 825 (2011) (“Eleventh Amendment immunity extends to state officials who are sued in their official capacities because such a suit is actually one against the state itself.”). The Fifth Circuit has repeatedly held that the Eleventh Amendment bars claims for money damages against TDCJ officers in their official capacities. *See e.g., Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002).

To the extent Plaintiff is suing any Defendant in his or her official capacity for money damages, those claims are barred by the Eleventh Amendment and it is respectfully recommended that those claims be dismissed with prejudice.

(2) *Conditions of confinement.*

In his amended complaint, Plaintiff argues that, in Warden Pawelek’s absence, Defendant Major Harris was in charge of the Garza East Unit and that, under his supervision, Plaintiff was subjected to unconstitutional conditions of confinement

³ The Eleventh Amendment does not bar a plaintiff’s claim for prospective injunctive relief. *Ex parte Young*, 209 U.S. 123, 159 (1908) (establishing exception to Eleventh Amendment immunity in cases where the alleged constitutional violation is caused by a state official’s actions or refusal to act within the authority of his or her office). In this case, to the extent Plaintiff sought injunctive relief against the Garza Unit Defendants, his transfer off that unit rendered those claims moot. *See Edwards v. Johnson*, 209 F.3d 772, 776 (5th Cir. 2000) (request for injunctive and declaratory relief becomes moot when inmate leaves the complained-of facility).

involving unsanitary housing, inadequate food, poor air quality, and extreme temperatures.

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. Prison officials must provide humane conditions of confinement; ensure that inmates receive adequate food, clothing, shelter, and medical care; and take reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Conditions that result in “unquestioned and serious deprivations of basic human needs” or “deprive inmates of the minimal civilized measure of life’s necessities” violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8-10 (1992); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Such a violation occurs when a prison official is deliberately indifferent to an inmate’s health or safety. *Farmer*, 511 U.S. at 834. Deliberate indifference is more than mere negligence. *Id.* at 835. To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. *Id.* at 837.

The Fifth Circuit has recognized that an unsanitary environment can support an Eighth Amendment claim of deliberate indifference. For example, in *Daigre v. Maggio*, 719 F.2d 1310 (5th Cir. 1983), the Fifth Circuit noted:

As a safeguard against the “gratuitous infliction of suffering,” the eighth amendment forbids confinement under conditions that can lead to painful and tortuous disease with no penological purpose. We concluded over a decade ago that the eighth amendment forbids deprivation of the basic elements of hygiene. We observed this “common thread” woven through judicial condemnations of prison conditions, noting in most of the prior cases the deprivation of facilities for elementary sanitation.

Daigre, 719 F.2d at 1312.

(a) *Bacteria and mold in showers.*

Plaintiff claims that the conditions on the Garza East Unit were unsanitary and unhealthy because there was visible bacteria and mold in the showers. However, Plaintiff admitted that he did not suffer any illness or harm as a consequence of the mold or bacteria on the Garza Unit, and the mere possibility of contracting an unknown illness does not state an Eighth Amendment claim. *See Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (“there is ... a *de minimis* level of imposition with which the Constitution is not concerned.”).

(b) *Inadequate food.*

Plaintiff complains that “the confines in the TDCJ IV Region are being deprived of nutritious meals...”. (D.E. 25-1, p. 24).

The Constitution requires only that inmates be provided with well-balanced meals, containing sufficient nutritional value to preserve health. *See Green v. Ferrell*, 801 F.2d 765, 770-71 (5th Cir. 1986). The constitutionality of prison food simply is not measured by its variety and gastronomic appeal. *See e.g. Jones v. Diamond*, 636 F.2d 1364, 1378 (5th Cir. 1981) (diet consisting “mainly of starch and carbohydrates with few vegetables and fruits,” while “likely dull,” is not constitutionally inadequate), overruled on other

grounds, *International Woodworkers of America v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986).

Plaintiff states that the food is prepared under “unsanitary conditions” and that it is not “strange” to see rats, rodents or bugs in the dining room. However, Plaintiff does not claim that he became ill while eating food prepared at the Garza Unit, nor did he complain of sudden weight loss or any resulting medical condition caused by lack of nutritious food. He does not claim that he was denied or deprived of essential food. His bald, conclusory allegations fail to state cognizable claims.

(c) *Air quality.*

Plaintiff claims the air quality at the Garza East Unit violates the Eighth Amendment because it contains asbestos. (D.E. 25-1, p. 26). However, Plaintiff has failed to allege any facts to demonstrate that any Garza Unit Defendant or official is aware of the presence of asbestos in the facility, or that if asbestos is present, that it is causing a specific risk of harm to Plaintiff or any other prisoner. *See Lineberry v. United States*, 436 Fed. Appx. 293, *1 (5th Cir. Jun. 3, 2010) (per curiam) (unpublished) (no Eighth Amendment claim stated unless prisoner can show prison officials knew asbestos was present and knew asbestos posed specific risk of harm to inmates). Moreover, Plaintiff again fails to claim that he suffered any injury as a result of exposure to asbestos.

(d) *Temperature.*

Plaintiff claims that he was subjected to temperatures over 100 degrees while confined at the Garza Unit. (D.E. 25-1, p. 26). The Fifth Circuit has recognized that

exposure to extreme heat or extreme cold under certain circumstances may constitute a constitutional violation, but such a claim is evaluated on a case by case basis. Cold temperatures are tolerable when extra bedding is provided, and extreme heat may be problematic for one inmate, but not another. *See e.g. Johnson v. Texas Bd. of Crim. Justice*, 281 Fed. Appx. 319, *2 (5th Cir. 2008) (per curiam) (unpublished). Here, although Plaintiff alleged that temperatures were sometimes uncomfortably hot, he did not allege that he suffered from any heat-related injuries despite being subjected to these conditions on numerous occasions during his April 7, 2014 through June 29, 2014 time at the Garza Unit. This is not sufficient to state a constitutional claim. *See Woods v. Edwards*, 51 F.3d 577, 581 (5th Cir. 1995) (Eighth Amendment claims involving allegedly uncomfortably high temperatures in lockdown and aggravation of sinus condition as a result of the temperature did not survive summary judgment).

Plaintiff's complaints about the conditions at the Garza Unit fail to state Eighth Amendment violations because he fails to allege that the Garza Unit Defendants knew of a serious risk to his health and safety and then ignored that risk, and further, he admits that he suffered no injuries as a consequence of the complained-of conditions. These claims can be dismissed with prejudice.

(3) *Denial of access to the courts.*

Plaintiff testified that Officer Trevino confiscated eighty (80) postage stamps, some envelopes, and read Plaintiff's trial record, and that Officer Mitchell was complicit in this activity because he escorted him to the area. Plaintiff also complains in general

that the Garza West Unit Mail Room staff interfered with his access to the courts because they hindered his ability to be a jail house lawyer.

Prisoners have a constitutionally protected right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 360 (1996) (citing *Bounds v. Smith*, 430 U.S. 817, 821 (1977)). The right does not guarantee any “particular methodology but rather the conferral of a capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts.” *Lewis*, 518 U.S. at 356. *See also Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) (the right provides a reasonable opportunity to file nonfrivolous legal claims challenging convictions or conditions of confinement). Because the right of access is not a “freestanding right,” to state a cognizable First Amendment claim, the plaintiff must demonstrate actual injury resulting from an alleged denial of access to the courts. *Lewis*, 518 U.S. at 351; *Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999). Without a showing of an actual injury, a plaintiff lacks standing to pursue a claim of denial of access to the courts. *Lewis*, 518 U.S. at 349.

To meet the standing requirement, a plaintiff “must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Plaintiff “must establish that he has a personal stake in the alleged dispute and that the alleged injury suffered is particularized as to him.” *Id.* at 819. In particular, to succeed on a claim of denial of access to courts, a plaintiff must show that he lost an actionable claim or was prevented from presenting such a claim because of the alleged denial. *See Lewis*, 518 U.S. at 356. He must show “that his position as a litigant

was prejudiced” as a direct result of the denial of access. *Eason v. Thaler*, 73 F.3d 1322, 1328 (5th Cir. 1996).

In this case, Plaintiff has failed to allege, let alone offer any evidence to establish, that he was prejudiced as a litigant in any nonfrivolous litigation as a consequence of the actions of Officer Mitchell, Officer Trevino, or any John or Jane Doe Mail Room employee. Although he complained of a delay in receiving a notice from the Fifth Circuit regarding his i.f.p. application, he does not attribute that delay to any named officer, nor does he allege any injury arising from that delay. To the contrary, Plaintiff reports that he is a successful litigator for himself and many other offenders, and he fails to identify any prejudice as a consequence of the actions or omissions of Officer Trevino, Officer Mitchell, or an unidentified Defendant. Thus, Plaintiff fails to state a claim for denial of access to the courts.

(4) Retaliation.

Plaintiff claims that his stamps and envelopes were taken, and that he was transferred off the Garza East Unit in retaliation for his being a “jail house lawyer” and assisting other inmates with their litigation.

Retaliation is not expressly referred to in the Constitution; however, it is nonetheless actionable because retaliatory actions may tend to chill an individual’s exercise of constitutional rights. *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972). Retaliation is actionable “only if the retaliatory act ‘is capable of deterring a person of ordinary firmness from further exercising his constitutional rights.’” *Bibbs v. Early*, 541 F.3d 267, 270 (5th Cir. 2008), quoting *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir.

2006). “A prison official may not retaliate against or harass an inmate for exercising the right of access to the courts, or for complaining to a supervisor about a guard’s misconduct.” *Woods v. Smith*, 60 F.3d 1161, 1164 (5th Cir. 1995). The purpose of allowing retaliation claims under § 1983 is to ensure that prisoners are not unduly discouraged from exercising their constitutional rights. *Morris*, 449 F.3d at 686.

To state a valid § 1983 claim for retaliation, “a prisoner must allege (1) a specific constitutional right, (2) the defendant’s intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation.” *Jones v. Greninger*, 188 F.3d 322, 324-25 (5th Cir. 1999) (citing *McDonald v. Stewart*, 132 F.3d 225, 231 (5th Cir. 1998)). An inmate must allege more than his personal belief that he is the victim of retaliation. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997) (citation omitted). Mere conclusory allegations of retaliation will not withstand a summary judgment challenge. *Woods*, 60 F.3d at 1166; *see Garner v. Moore*, 536 Fed. Appx. 446, 450-51 (5th Cir. 2013).

Plaintiff offers nothing more than conclusory allegations that he was retaliated against. His transfer was inevitable because the Garza Unit is a *transfer facility*, and as Plaintiff cannot demonstrate that he was transferred to the Cotulla Unit in retaliation for exercising his right of access to the courts. As to the incident with Officer Trevino confiscating his stamps and envelopes and reading his trial transcript, Plaintiff fails to allege that, but for a retaliatory motive, the complained of action would not have otherwise happened. It would be unusual to allow an inmate to have eighty stamps and envelopes in his possession at a single time as indigent supplies are passed out on an as

needed basis.⁴ Plaintiff cannot establish that, but for the exercise of a constitutional right, Officer Trevino would not have confiscated the stamps and envelopes. Accordingly, it is respectfully recommended that Plaintiff's retaliation claim be dismissed.

VI. RECOMMENDATION.

Plaintiff's untimely 297-page amended complaint fails to raise cognizable constitutional claims against the Garza Unit Defendants, the only individuals over which this Court has proper jurisdiction and venue. Thus, it is respectfully recommended that the Court dismiss with prejudice Plaintiff's claims against Major Harris, Officer Mitchell, Officer Trevino, and the John and Jane Doe Mail Room Defendants for failure to state a claim and/or as frivolous pursuant to 28 U.S.C. § § 1915(e)(2) and 1915A(b)(1), and that this dismissal count as a "strike" for purposes of 28 U.S.C. § 1915(g) against this Plaintiff, with notice of the dismissal forwarded to the District Clerk for the Eastern District of Texas, Tyler Division, 211 West Ferguson, Tyler Texas, 75702, Attention: Betty Parker. It is respectfully recommended that Plaintiff's remaining claims against the remaining Defendants be dismissed without prejudice.

Respectfully submitted this 15th day of June, 2015.


Jason B. Libby
United States Magistrate Judge

⁴ Plaintiff is proceeding i.f.p. in this case (D.E. 14) and it is assumed that he is indigent and receives his indigent supplies from the law library and mail room as needed.

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

REYNALDO FLORES,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 2:14-CV-283
	§	
TDCJ TRANSITORIAL PLANNING	§	
DEPART. SOUTHERN REGION INST.	§	
DIVISION ET AL,	§	
	§	
Defendants.	§	

**MEMORANDUM AND RECOMMENDATION
TO DISMISS ACTION**

This civil rights action was filed by a Texas state prisoner pursuant to 42 U.S.C. § 1983. Under the Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321 (1996), any prisoner action brought under federal law must be dismissed if the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant immune from such relief. *See* 42 U.S.C. § 1997e(c); 28 U.S.C. §§ 1915(e)(2), 1915A. Plaintiff's action is subject to screening regardless of whether he prepays the entire filing fee or proceeds as a pauper. *Ruiz v. United States*, 160 F.3d 273, 274 (5th Cir. 1998) (per curiam); *Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998) (per curiam), *cert. denied*, 527 U.S. 1041 (1999). Plaintiff's *pro se* complaint must be read indulgently, *Haines v. Kerner*, 404 U.S. 519, 520 (1972), and his allegations must be accepted as true, unless they are clearly irrational or wholly incredible, *Denton v. Hernandez*, 504 U.S. 25, 33 (1992).

Applying these standards, it is respectfully recommended that this action be **DISMISSED with prejudice** for failure to state a claim and/or as frivolous pursuant to 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b)(1), and further, that this action be counted as a “strike” for purposes of 28 U.S.C. § 1915(g).

I. JURISDICTION

The Court has federal question jurisdiction over this civil rights action pursuant to 28 U.S.C. § 1331.

II. BACKGROUND FACTS AND PLAINTIFF’S ALLEGATIONS

Plaintiff is a prisoner in the Texas Department of Criminal Justice, Criminal Institutions Division (TDCJ-CID), and he is currently confined at the Cotulla Unit in Cotulla, Texas, although his complaint concerns the conditions of his confinement while he was housed temporarily at the Garza East Transfer Facility in Beeville, Texas, from April 7, 2014 through June 29, 2014. He filed this civil rights action on June 30, 2014, and named the following entities as defendants: (1) TDCJ Transitorial Planning Department; and (2) Southern Regional Institutional Division. (D.E. 1, pp. 1-2).

On October 1, 2014, a *Spears*¹ hearing was conducted. The following allegations were made in Plaintiff’s original complaint (D.E. 1), or at the hearing:

Plaintiff is in TDCJ-CID custody pursuant to a ten year sentence entered in a case styled *The State of Texas v. Reynaldo Flores*, Case No. 2012-CR-1969, in the 290th

¹ *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985); see also *Eason v. Holt*, 73 F.3d 600, 603 (5th Cir. 1996) (stating that testimony given at a *Spears* hearing is incorporated into the pleadings).

Judicial District Court of Bexar County, Texas. (*See* D.E. 1-1, p. 3). In Case No. 2012-CR-1969, Plaintiff was charged in a 3-count indictment with aggravated kidnapping, sexual assault, and assault of a family member alleged to have occurred on December 23, 2011. (D.E. 1-1, p. 2). As to the aggravated kidnapping charge, the jury found Plaintiff not guilty, but found him guilty of the lesser included offense of unlawful restriction. (D.E. 1-1, p. 4). Plaintiff was found not guilty on the sexual assault charge, but was found guilty of assault of a family member. (D.E. 1-1, p. 4). On December 3, 2012, the trial court sentenced Plaintiff to ten years in the TDCJ-CID.

In his original complaint, Plaintiff introduces himself as a “jail house lawyer” and “sentinel of human rights in Texas.” (D.E. 1, p. 1). He claims that his current incarceration in Case No. 2012-CR-1969 is the result of “premeditated kidnapping” and a “malicious conspiratorial trial” involving his appointed defense counsel, the prosecutor, and the trial court. Plaintiff claims that in Case No. 2012-CR-1969, the jury actually found him not guilty of aggravated kidnapping and sexual assault, but that he was “unconstitutionally re-convicted” for assault of a family member, arising from an earlier conviction in Case No. 2011-CR-1002. In Case No. 2011-CR-1002, Plaintiff was charged with assaulting a family member on November 11, 2010, and on April 18, 2011, he was sentenced to two years in prison on that charge. Plaintiff claims that his current conviction wrongfully includes the earlier 2011 conviction in violation of the double jeopardy clause, and states that he has appealed this error to a Texas appellate court.

On April 7, 2014, Plaintiff was transferred from the Bexar County Jail to the Garza East Transfer Facility. (D.E. 1, p. 3). Plaintiff claims that he was subjected to

“continuous harassment” and “the spoliation of [his] personal and legal mail” in retaliation for his exercising his right of access to the courts, as well as for assisting “thousand[s] of vulnerable immigrants and illiterate American citizens...” to their right of access to the courts. (D.E. 1, p. 3).

Plaintiff testified that on June 26, 2014, the “harassment campaign” became even more evident: as Plaintiff was cleaning the shower, Officer Mitchell arrived and ordered Plaintiff to come to Dorm 6 sally port. Plaintiff arrived at the sally port and found Officer R. Trevino “tampering and reading [Plaintiff’s] reporter’s record and clerk’s record and [she] took possession of 80 postage stamps and stamped envelopes... without legal reason to confiscate them...”. (D.E. 1, p. 3). Plaintiff informed Officer Trevino that he had legally purchased the stamps at the prison commissary and that he had a constitutional right to be a jail house lawyer and to assist other inmates with their litigation. However, Officer Trevino kept the stamps and envelopes.

The harassment of Plaintiff continued. Plaintiff recently filed on behalf of another inmate a complaint before the International Court of Human Rights in which Plaintiff furnished to that court “material evidences of the *modus operandi* of the Texas Judicial System, and innocence of at least 80% of prisoners wrongfully convicted.” (D.E. 1, p. 4). However, this correspondence was tampered with and opened, and Plaintiff has no proof that it was received by the Hague Court in the Netherlands. (D.E. 1, p. 4). Other correspondence has been lost and/or stolen. For example, Plaintiff received on May 29, 2014 correspondence from the Fifth Circuit dated May 6, 2014, giving him 30 days to respond to a district court’s denial of his motion to proceed *in forma pauperis* with no

explanation for the delay. Plaintiff testified that he was able to submit the i.f.p. application timely, but the delay “caused him stress.” He represented himself on his criminal appeal and he did not miss any deadlines.

In addition to the myriad of First Amendment violations, Plaintiff and the other inmates are subjected to unsanitary and unhealthy conditions in the Garza East dorms, including bacteria and mold. Plaintiff obtained the signatures of twenty-eight other inmates complaining about the conditions and submitted the complaint to the Mayor of Beeville. Warden Pawelek told Plaintiff that he would get transferred if he complained about the conditions, and on June 29, 2014, he was transferred to the Cotulla Unit. Plaintiff claims that he filed grievances protesting the transfer as being in violation of the Eighth Amendment, but his grievances were denied.

With his original complaint, Plaintiff filed the affidavit of Offender Hector Eduardo Vasquez attesting to the unsanitary conditions at the Garza East Unit. (D.E. 1-1, pp. 5-6). On September 10, 2014, Plaintiff filed the affidavit of Offender Victor Diaz, a Cotulla Unit inmate, who testifies to the “philanthropic legal work” Plaintiff performs for others. (D.E. 15, pp. 1-2). Plaintiff also offers the affidavit of Offender Tommy Harris, also at the Cotulla Unit, who testifies that, since engaging the legal assistance of Plaintiff, he has suffered retaliatory conduct by prison staff. (D.E. 16, pp. 1-2).

For relief, Plaintiff is seeking an immediate inspection of the Garza East facility and monthly federal supervision “to stop this harassment campaign.” (D.E. 1, p. 5). He wants Defendants to stop tampering with the mail and to improve the unsanitary living

conditions at the Garza Unit. (D.E. 1, p. 5). He would like drug tests to be run on officers, such as Officer Mitchell, and better training of the correctional officers.

III. DISCUSSION

A. Legal standard

Regardless of whether a plaintiff has properly exhausted his administrative remedies, his action may be dismissed for failure to state a claim upon which relief can be granted. 42 U.S.C. § 1997e(c)(2). “To state a claim under 42 U.S.C. § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law.” *West v. Atkins*, 487 U.S. 42, 48 (1988); *see also Biliski v. Harborth*, 55 F.3d 160, 162 (5th Cir. 1995). An action may be dismissed for failure to state a claim when it is clear that the prisoner can prove no set of facts in support of his claim entitling him to relief. *Oliver v. Scott*, 276 F.3d 736, 740 (5th Cir. 2002). The complaint must be liberally construed in favor of the prisoner and the truth of all pleaded facts must be assumed. *Id.*

B. Eleventh Amendment immunity

Plaintiff has named as defendants two alleged state agencies or departments of the TDCJ, identified as TDCJ Transitorial Planning Department, and Southern Region Institutional Division.²

² At the *Spears* hearing, Plaintiff confirmed that these two named entities were the only defendants.

The State of Texas has sovereign immunity and, under the Eleventh Amendment, suits in federal court by citizens of a state against a state or a state agency or department are prohibited. *See College Sav. Bank v. Florida. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669-70 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 98-100 (1982). States and their agencies may be sued only when there is unequivocally expressed consent, or where Congress has validly abrogated the state's sovereign immunity by unequivocal expression of intent. *Pennhurst*, 465 U.S. at 99-100. *See also Edelman v. Jordan*, 415 U.S. 651, 673 (1974); *Quern v. Jordan*, 440 U.S. 332, 342 (1979). The Eleventh Amendment jurisdictional bar applies regardless of the nature of the relief sought. *Pennhurst*, 465 U.S. at 100-01.

Texas has not consented to suit against itself or its agencies in federal court, nor has Congress abrogated Texas' sovereign immunity in regards to Plaintiff's § 1983 claims raised herein. *See Sossamon v. Texas*, 131 S. Ct. 1651, 1657-58 (2011). On the face of Plaintiff's original complaint, it is apparent that Plaintiff's claims against the two named Defendants are wholly barred by the Eleventh Amendment.

Moreover, to the extent Plaintiff is attempting to sue individual TDCJ officers or officials in their official capacities, those claims are effectively claims against the State itself and are similarly barred by the Eleventh Amendment. *Hafer v. Melo*, 502 U.S. 21, 25 (1991); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). *See also McKinley v. Abbott*, 643 F.3d 403, 406 (5th Cir.), *cert. denied*, 132 S. Ct. 825 (2011) ("Eleventh Amendment immunity extends to state officials who are sued in their official capacities because such a suit is actually one against the state itself."). The Fifth Circuit

has repeatedly held that the Eleventh Amendment bars claims for money damages against TDCJ officers in their official capacities.³ See e.g., *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002). Thus, to the extent Plaintiff is suing any individual defendant in his or her official capacity for money damages, those claims are barred by the Eleventh Amendment. See *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437 (2004). Thus, dismissal of Plaintiff's claims for monetary damages against all Defendants, named and unnamed, is warranted.

C. Plaintiff's claims for injunctive relief are moot

Plaintiff purports to have filed this lawsuit in an attempt to stop unidentified Garza Unit officers and officials from tampering with inmate mail and to improve the unsanitary conditions at the Garza East Unit. However, Plaintiff is no longer confined at the Garza East Transfer Facility, rendering his claims for injunctive relief moot. See *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002) (recognizing that “[t]he transfer of a prisoner out of an institution often will render his claims for injunctive relief moot” unless he can show a “demonstrated probability” or a “reasonable expectation” that he will be transferred back to the offending institution); *Hermann v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001) (holding that an inmate’s transfer to another facility “rendered his claims for declaratory and injunctive relief moot” and that “any suggestion of relief based on the possibility of transfer back ...[was] too speculative to warrant relief”). Plaintiff’s

³ The Eleventh Amendment does not bar a plaintiff’s claim for prospective injunctive relief. *Ex parte Young*, 209 U.S. 123, 159 (1908) (establishing exception to Eleventh Amendment immunity in cases where the alleged constitutional violation is caused by a state official’s actions or refusal to act within the authority of his or her office).

claims for injunctive relief against the Garza East Unit Defendants are moot, and because it is a transfer facility, there is little chance that Plaintiff will be sent back there for any significant amount of time.

Moreover, to the extent Plaintiff purports to be seeking injunctive relief on behalf of inmates currently confined at the Garza East Transfer Facility, he has no First Amendment right to bring such a claim. *See Shaw v. Murphy*, 532 U.S. 223 (2001) (inmate does not possess a First Amendment right to provide legal assistance to fellow prisoners beyond normally accorded prisoners' speech). Plaintiff's claims for injunctive relief are moot, and therefore, it is respectfully recommended they be dismissed with prejudice as such.

D. Access to the courts

Plaintiff declined to list specific individuals as defendants in his original complaint; however, he did complain of certain Garza Unit officers and officials in particular as violating his right of access to the courts and/or subjecting him to unconstitutional conditions of confinement. Concerning his mail, he complains in particular of Officer Trevino confiscating eighty (80) postage stamps and envelopes and of reading Plaintiff's trial record, and of Officer Mitchell somehow being complicit in this activity because he escorted him to the area.

Prisoners have a constitutionally protected right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 360 (1996) (citing *Bounds v. Smith*, 430 U.S. 817, 821 (1977)). The right does not guarantee any "particular methodology but rather the conferral of a

capability – the capability of bringing contemplated challenges to sentences or conditions of confinement before the courts.” *Lewis*, 518 U.S. at 356. *See also Jones v. Greninger*, 188 F.3d 322, 325 (5th Cir. 1999) (the right provides a reasonable opportunity to file nonfrivolous legal claims challenging convictions or conditions of confinement). Because the right of access is not a “freestanding right,” to state a cognizable First Amendment claim, the plaintiff must demonstrate actual injury resulting from an alleged denial of access to the courts. *Lewis*, 518 U.S. at 351; *Chriceol v. Phillips*, 169 F.3d 313, 317 (5th Cir. 1999). Without a showing of an actual injury, a plaintiff lacks standing to pursue a claim of denial of access to the courts. *Lewis*, 518 U.S. at 349.

To meet the standing requirement, a plaintiff “must allege personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Plaintiff “must establish that he has a personal stake in the alleged dispute and that the alleged injury suffered is particularized as to him.” *Id.* at 819. In particular, to succeed on a claim of denial of access to courts, a plaintiff must show that he lost an actionable claim or was prevented from presenting such a claim because of the alleged denial. *See Lewis*, 518 U.S. at 356. He must show “that his position as a litigant was prejudiced” as a direct result of the denial of access. *Eason v. Thaler*, 73 F.3d 1322, 1328 (5th Cir. 1996).

In this case, Plaintiff has failed to allege, let alone offer any evidence to establish, that he was prejudiced as a litigant in any nonfrivolous litigation as a consequence of the actions of Officer Mitchell or Officer Trevino. Although he complained of a delay in

receiving a notice from the Fifth Circuit regarding his i.f.p. application, he does not attribute that delay to any named officer, nor does he allege any injury arising from that delay. To the contrary, Plaintiff reports that he is a successful litigator for himself and many other offenders, and he fails to identify any prejudice as a consequence of the actions or omissions of Officer Trevino or Officer Mitchell. Thus, Plaintiff fails to state a claim for denial of access to the courts.

E. Conditions of confinement

Plaintiff claims that the conditions on the Garza East Unit were unsanitary and unhealthy because there was visible bacteria and mold in the showers.

The Eighth Amendment prohibits cruel and unusual punishment. U.S. Const. amend. VIII. Prison officials must provide humane conditions of confinement; ensure that inmates receive adequate food, clothing, shelter, and medical care; and take reasonable measures to guarantee the safety of the inmates. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Conditions that result in “unquestioned and serious deprivations of basic human needs” or “deprive inmates of the minimal civilized measure of life’s necessities” violate the Eighth Amendment. *Hudson v. McMillian*, 503 U.S. 1, 8-10 (1992); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). Such a violation occurs when a prison official is deliberately indifferent to an inmate’s health or safety. *Farmer*, 511 U.S. at 834. Deliberate indifference is more than mere negligence. *Id.* at 835. To act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health or safety; the official must both be aware of facts from

which the inference could be drawn that a substantial risk of serious harm exists and he must also draw the inference. *Id.* at 837.

The Fifth Circuit has recognized that an unsanitary environment can support an Eighth Amendment claim of deliberate indifference. For example, in *Daigre v. Maggio*, 719 F.2d 1310 (5th Cir. 1983), the Fifth Circuit noted:

As a safeguard against the “gratuitous infliction of suffering,” the eighth amendment forbids confinement under conditions that can lead to painful and tortuous disease with no penological purpose. We concluded over a decade ago that the eighth amendment forbids deprivation of the basic elements of hygiene. We observed this “common thread” woven through judicial condemnations of prison conditions, noting in most of the prior cases the deprivation of facilities for elementary sanitation.

Daigre, 719 F.2d at 1312.

Plaintiff admitted that he did not suffer any illness or harm as a consequence of the mold or bacteria on the Garza Unit, and the mere possibility of contracting an unknown illness does not state an Eighth Amendment claim. *See Ingraham v. Wright*, 430 U.S. 651, 674 (1977) (“there is ... a *de minimis* level of imposition with which the Constitution is not concerned.”). Plaintiff fails to allege facts to state cognizable Eighth Amendment conditions of confinement claims.

F. Retaliation.

Plaintiff claims that his stamps and envelopes were taken, and that he was transferred off the Garza East Unit in retaliation for his being a “jail house lawyer” and assisting other inmates with their litigation.

Retaliation is not expressly referred to in the Constitution; however, it is nonetheless actionable because retaliatory actions may tend to chill an individual's exercise of constitutional rights. *See Perry v. Sinderman*, 408 U.S. 593, 597 (1972). Retaliation is actionable "only if the retaliatory act 'is capable of deterring a person of ordinary firmness from further exercising his constitutional rights.'" *Bibbs v. Early*, 541 F.3d 267, 270 (5th Cir. 2008), quoting *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). "A prison official may not retaliate against or harass an inmate for exercising the right of access to the courts, or for complaining to a supervisor about a guard's misconduct." *Woods v. Smith*, 60 F.3d 1161, 1164 (5th Cir. 1995). The purpose of allowing retaliation claims under § 1983 is to ensure that prisoners are not unduly discouraged from exercising their constitutional rights. *Morris*, 449 F.3d at 686.

To state a valid § 1983 claim for retaliation, "a prisoner must allege (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." *Jones v. Greninger*, 188 F.3d 322, 324-25 (5th Cir. 1999) (citing *McDonald v. Stewart*, 132 F.3d 225, 231 (5th Cir. 1998)). An inmate must allege more than his personal belief that he is the victim of retaliation. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997) (citation omitted). Mere conclusory allegations of retaliation will not withstand a summary judgment challenge. *Woods*, 60 F.3d at 1166. *And see Garner v. Moore*, 536 Fed. Appx. 446, 450-51 (5th Cir. 2013).

Plaintiff offers nothing more than conclusory allegations that he was retaliated against. His transfer was inevitable because the Garza Unit is a *transfer facility*, and as

Plaintiff cannot demonstrate that he was transferred to the Cotulla Unit in retaliation for exercising his right of access to the courts. As to the incident with Officer Trevino confiscating his stamps and envelopes and reading his trial transcript, Plaintiff fails to allege that, but for a retaliatory motive, the complained of action would not have otherwise happened. It would be unusual to allow an inmate to have eighty stamps and envelopes in his possession at a single time as indigent supplies are passed out on an as needed basis.⁴ Plaintiff cannot establish that, but for the exercise of a constitutional right, Officer Trevino would not have confiscated the stamps and envelopes. Accordingly, it is respectfully recommended that Plaintiff's retaliation claim be dismissed.

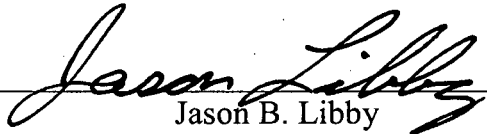
IV. RECOMMENDATION

Plaintiff's allegations against two unknown state agencies are barred by the Eleventh Amendment, and his subsequent transfer off the Garza Unit rendered his claims for injunctive relief moot. Generously reading his complaint to allege claims against Garza Unit officials in their individual capacities, Plaintiff's allegations fail to state cognizable claims for denial of access to the courts, Eighth Amendment conditions of confinement claims, or claims of retaliation. Plaintiff readily relates that he is a "jail house lawyer" and assists other inmates with their legal matters, however, just like attorneys, *pro se* litigants are subject to Rule 11's requirement to conduct a reasonable inquiry into the relevant law and facts, and to refrain from filing needless litigation. *See* Fed. R. Civ. P. 11(b)(1).

⁴ Plaintiff is proceeding i.f.p. in this case (D.E. 14) and it is assumed that he is indigent and receives his indigent supplies from the law library and mail room as needed.

This lawsuit was needless, and Plaintiff's allegations, taken as true and in the light most favorable to him, fail to state cognizable constitutional violations under 42 U.S.C. § 1983. Thus, it is respectfully recommended that this action be **DISMISSED with prejudice** for failure to state a claim and/or as frivolous pursuant to 28 U.S.C. § § 1915(e)(2) and 1915A(b)(1). It is further respectfully recommended that this dismissal count as a "strike" for purposes of 28 U.S.C. § 1915(g) against this Plaintiff, and that notice of this dismissal be forwarded to the District Clerk for the Eastern District of Texas, Tyler Division, 211 West Ferguson, Tyler Texas, 75702, Attention: Betty Parker.

Respectfully submitted this 29th day of October, 2014.


Jason B. Libby
United States Magistrate Judge

NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within **FOURTEEN (14) DAYS** after being served with a copy shall bar that party, except upon grounds of *plain error*, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc).