UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6902

OMARI H. PATTON,

Plaintiff - Appellant,

v.

CRYSTAL KIMBLE,

Defendant - Appellee.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. John Preston Bailey, District Judge. (2:16-cv-00010-JPB-MJA)

Submitted: May 11, 2021 Decided: May 13, 2021

Before KING, KEENAN, and WYNN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Omari H. Patton, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

APPENDIX A

PER CURIAM:

Omari H. Patton appeals the district court's order, entered upon remand from this court, *see Patton v. Kimble*, 717 F. App'x 271, 272 (4th Cir. 2018) (No. 17-7032), granting Federal Corrections Officer Crystal Kimble's motion for summary judgment in Patton's civil rights action filed pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The sole issue remaining after we ruled in Patton's prior appeal, *see Patton*, 717 F. App'x at 272, was Patton's claim that Kimble violated the First Amendment by retaliating against Patton for filing administrative grievances. On remand, the district court analyzed the issue pursuant to *Ziglar v. Abassi*, 137 S. Ct. 1843 (2017), and ruled that the implied-damages remedy recognized in *Bivens* does not extend to First Amendment retaliation claims such as the one Patton advanced.

We recently addressed this issue in *Earle v. Shreves*,* holding that the *Bivens* remedy may not "be extended to include a federal inmate's claim that prison officials violated his First Amendment rights by retaliating against him for filing grievances." 990 F.3d 774, 776 (4th Cir. 2021). *Earle* thus confirms the propriety of the district court's dispositive ruling. Accordingly, we affirm the district court's order granting summary judgment to Kimble. *Patton v. Kimble*, No. 2:16-cv-00010-JPB-MJA (N.D.W. Va. June 17, 2019).

* We held this appeal in abeyance pending the disposition in *Earle*.

We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
ELKINS

OMARI H. PATTON,

Plaintiff,

v.

Civil Action No. 2:16-CV-10 (BAILEY)

CRYSTAL KIMBLE,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Currently pending before this Court is the defendant's Motion for Summary Judgment [Doc. 121], filed May 15, 2019. Having been fully briefed, this matter is now ripe for decision. For the reasons set forth below, this Court will grant the Motion.

BACKGROUND

Plaintiff Omari Patton is currently serving a federal drug trafficking sentence. He is currently incarcerated in Ohio, in a state correctional center. Patton filed a lawsuit pursuant to ***Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics***, 403 U.S. 388 (1971), against defendant Crystal Kimble, a Federal Bureau of Prisons ("BOP") correctional officer. Patton alleges that defendant searched his prison cell and confiscated legal documents. Afterwards, Patton alleges he verbally complained to the lieutenant that defendant took his legal binder. Patton claims that after defendant found out Patton told defendant's superior, defendant retaliated against him by searching his cell again. Patton alleges this second search resulted in the confiscation of his sentencing transcript and part

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of his trial transcripts. The defendant claims that the only things confiscated from Patton's cell were nude photographs, not legal documents.

Patton claimed that these actions violated his First, Fourth, Sixth, and Fourteenth Amendment rights. This Court previously dismissed Patton's entire Complaint. On appeal, the Fourth Circuit remanded this case back to this Court with the narrow instruction to review Patton's First Amendment argument in light of a more recent case, ***Booker v. South Carolina Dep't of Corrections***, 855 F.3d 533 (4th Cir. 2017).

STANDARD OF REVIEW

Federal Rule of Civil Procedure 56 provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party seeking summary judgment bears the initial burden of showing the absence of any genuine issues of material fact. *See* ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322–23 (1986). "The burden then shifts to the nonmoving party to come forward with facts sufficient to create a triable issue of fact." ***Temkin v. Frederick County Comm'rs***, 945 F.2d 716, 718 (4th Cir. 1991), *cert. denied*, 502 U.S. 1095 (1992) (citing ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247–48 (1986)).

However, as the United States Supreme Court noted in ***Anderson***, "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." ***Id.*** at 256. "The inquiry performed is the

threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." ***Id.*** at 250; *see also* ***Charbonnages de France v. Smith***, 597 F.2d 406, 414 (4th Cir. 1979) (Summary judgment "should be granted only in those cases where it is perfectly clear that no issue of fact is involved and inquiry into the facts is not desirable to clarify the application of the law." (citing ***Stevens v. Howard D. Johnson Co.***, 181 F.2d 390, 394 (4th Cir. 1950))).

In reviewing the supported underlying facts, all inferences must be viewed in the light most favorable to the party opposing the motion. *See* ***Matsushita Elec. Indus. Co. v. Zenith Radio Corp.***, 475 U.S. 574, 587 (1986). Additionally, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." ***Id.*** at 586. That is, once the movant has met its burden to show absence of material fact, the party opposing summary judgment must then come forward with affidavits or other evidence demonstrating there is indeed a genuine issue for trial. Fed. R. Civ. P. 56(c); ***Celotex Corp.***, 477 U.S. at 323–25; ***Anderson***, 477 U.S. at 248. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." ***Anderson***, 477 U.S. at 249 (citations omitted).

DISCUSSION

The two main issues for discussion of the defendant's motion for summary judgment are (1) whether the plaintiff's ***Bivens*** claim is viable under recent Supreme Court case law; and (2) whether the defendant is entitled to qualified immunity from this action. Defendant argues that plaintiff cannot sustain a ***Bivens*** action under the Supreme Court's decision

in ***Ziglar v. Abbasi***, 137 S.Ct. 1843 (2017). Patton argues that ***Abbasi*** does not apply here because neither this Court nor the Fourth Circuit previously acknowledged this case even though ***Abbasi*** was decided before this Court's dismissal of the case and the Fourth Circuit's decision to remand.[1] Defendant also argues that she is entitled to qualified immunity because Patton's First Amendment right was not "clearly established" at the time of the alleged misconduct.

I. ***Bivens***

Even though Congress passed 42 U.S.C. § 1983, which allows money damages if a state official violates constitutional rights, there never has been an analogous statute for federal officials. In light of this, the Supreme Court, in ***Bivens v. Six Unknown Fed. Narcotics Agents***, 403 U.S. 388 (1971), ruled that even with no statutory authorization there could still be an implied cause of action for damages for people injured by federal officials violating constitutional rights. ***Bivens*** suits aim to deter unconstitutional actions by targeting the personal assets of individual federal officials. *See* ***Carlson v. Green***, 446 U.S. 14, 21 (1980). Liability in a ***Bivens*** case is "personal, based upon each defendant's own constitutional violations." ***Trulock v. Freeh***, 275 F.3d 391, 402 (4th Cir. 2001). Vicarious liability or *respondeat superior* is not available for a ***Bivens*** claim, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." ***Ashcroft v. Iqbal***, 556 U.S. 662, 677 (2009).

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[1] Patton repeatedly argues that since defendant has already moved for summary judgment before that she should not be allowed "a second bite of the apple." However, this case was remanded from the Fourth Circuit, and parties are allowed to move for summary judgment on remand. This is not a second bite of the apple; this is an entirely new apple.

Recently, the Supreme Court has reined in the availability of damages remedies in alleged constitutional violations by federal actors. In ***Ziglar v. Abbasi***, the Supreme Court marked a substantial shift in how courts are to interpret alleged unconstitutional acts by federal actors when there is no statute permitting a damages remedy. 137 S.Ct. 1843 (2017). The Court noted that it has only recognized ***Bivens*** remedies three times: (1) in ***Bivens***, damages were awarded for violations of the Fourth Amendment's prohibition against unreasonable searches and seizures; (2) in ***Davis v. Passman***, 442 U.S. 228 (1979), the Fifth Amendment Due Process Clause authorized a damages remedy when an employee sued a Congressman for firing her for being a woman; and (3) in ***Carlson***, the Eighth Amendment Cruel and Unusual Punishment Clause provided a damages remedy for failure to provide adequate medical treatment for the fatal failure to treat a prisoner's asthma. ***Id.*** at 1854–55. The Court's explicit message in ***Abbasi*** is "clear that expanding the ***Bivens*** remedy is now a 'disfavored' judicial activity." ***Id.*** at 1857 (quoting ***Iqbal***, 556 U.S. at 675).

After ***Abbasi***, there is now a two-step test when deciding whether a cognizable ***Bivens*** remedy exists for alleged official misconduct. First, a court must determine whether the claim presents a "new" ***Bivens*** context. ***Id.*** at 1859. If it does, the court must assess whether any "special factors counsel[ ] hesitation" in recognizing a new remedy "in the absence of affirmative action by Congress." ***Id.*** at 1857, 1859.

In order to determine if a case presents a new ***Bivens*** context, courts must determine whether the claim is "different in a meaningful way" from the prior ***Bivens*** cases decided by the Supreme Court. ***Id.*** at 1859 ("If the case is different in a meaningful way

from previous ***Bivens*** cases *decided by this Court*, then the context is new." (emphasis added)). So if the ***Bivens*** claim meaningfully differs from "a claim against FBI agents for handcuffing a man in his own home without a warrant; a claim against a Congressman for firing his female secretary; [or] a claim against prison officials for failure to treat an inmate's asthma" it is a new context.[2] ***Id.*** at 1860. "[E]ven a modest extension is still an extension." ***Id.*** at 1864. Examples of meaningful differences that constitute a "new context" include:

> the rank of the officers involved; the constitutional right at issue; the generality or specificity of the official action; the extent of judicial guidance as to how an officer should respond to the problem or emergency to be confronted; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches; or the presence of potential special factors that previous ***Bivens*** cases did not consider.

Id. at 1859–60.

In considering whether any special factors counsel hesitation in authorizing a damages remedy, this inquiry concentrates on "whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." ***Id.*** at 1858. When asserting an implied cause of

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[2] It should be noted that the Fourth Circuit has alluded to the fact that the "Supreme Court *may* have recognized a fourth ***Bivens*** context in ***Farmer v. Brennan***, which sustained a prisoner's Eighth Amendment claim for damages against federal prison officials for failure to protect." ***Attkisson v. Holder***, 2019 WL 2147243, at *11 n. 6 (4th Cir. May 17, 2019), *as amended* (June 10, 2019) (emphasis added). The Court did not definitively decide this because the case was not similar to ***Farmer*** and it was unnecessary to its analysis.

action under the Constitution, such as a ***Bivens*** claim, a separation-of-powers analysis is central to the inquiry. *See* ***id.*** at 1857. The question becomes who should decide whether to provide a damages remedy—Congress or the courts? ***Id.*** And "[t]he answer most often will be Congress." ***Id.*** This is because it "is not necessarily a judicial function to establish whole categories of cases in which federal officers must defend against personal liability claims." ***Id.*** at 1858. Further, the ***Abbasi*** decision guides the lower courts that if claimants have alternative remedial structures, "that alone may limit the power of the Judiciary to infer a new ***Bivens*** cause of action." ***Id.*** However, the Supreme Court left open the possibility that "if equitable remedies prove insufficient, a damages remedy might be necessary to redress past harm and deter future violations." ***Id.*** at 1858. "In sum, if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy[,] . . . the courts must refrain from creating the remedy in order to respect the role of Congress." ***Id.***

As an initial matter, Patton argues that ***Abbasi*** has already been determined not to apply here because the Magistrate Judge's Report and Recommendation ("R&R") [Doc. 65], this Court's previous Order Adopting the R&R [Doc. 68], nor the Fourth Circuit's opinion remanding this case [Doc. 85] mentioned ***Abbasi***. Patton is correct that all of these were filed after ***Abbasi*** was decided. However, the R&R and the Order Adopting the R&R relied on ***Daye v. Rubenstein***, 417 F.App'x 317, 319 (4th Cir. 2011) (per curiam) (unpublished), which explicitly held that verbal complaints were not constitutionally protected. Because of ***Daye***, there was no need for the Court to engage in an in-depth ***Bivens/Abbasi*** analysis because there can be no relief under ***Bivens*** if a constitutional

right was not violated. The Fourth Circuit opinion did not address ***Abbasi*** either because a more recent case, ***Booker v. South Carolina Dep't of Corrections***, 855 F.3d 533 (4th Cir. 2017), fatally undermined the reasoning in ***Daye***. Therefore, the Fourth Circuit was tasked with simply remanding this case back to the undersigned in order to consider how this change in case law affected Patton's case. There was no need to address ***Abbasi*** until now.[3]

Consideration of the first prong of ***Abbasi*** analysis—whether the claim is a "new" context—clearly shows that Patton's First Amendment retaliation claim is a "new" context under ***Abbasi*** because none of the three cases listed in ***Abbasi*** involved the First Amendment. Accordingly, this Court can move on to the special factors analysis. The defendant argues there are alternative remedies and that there are other special factors that counsel hesitation of implementing implied damages in this case. In his response, Patton did not offer any rebuttal arguments to defendant's points on the special factors issue.

First, this Court will determine if there are any alternative remedial structures in place that may protect Patton's interest that may counsel hesitation for Judicial involvement. ***Abbasi*** shows that alternatives may restrict the Judiciary's need to create a new damages remedy. *See* ***id.*** at 1865 ("The presence of alternative means of relief the existence of alternative remedies usually precludes a court from authorizing a ***Bivens*** action."). The defendant argues that Patton does have an alternative remedial structure

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[3] Regardless of any reason that the courts on previous occasion did not address ***Abbasi***, it would be nonsensical to ignore ***Abbasi*** now just because we ignored it before. ***Abbasi*** applies to this case.

that should preclude the authorization of a ***Bivens*** remedy: the BOP grievance procedures. The Prison Litigation Reform Act ("PLRA) created an administrative process that "allow[s] an inmate to seek formal review of an issue relating to *any aspect* of his/her own confinement." 28 C.F.R. § 542.10 (emphasis added). If an inmate is dissatisfied with a response to the inmate's concerns, there are several levels of review in which the inmate can appeal any responses or rulings, including levels of review *outside* of his correctional facility. 28 C.F.R. § 542.13–542.15. For these reasons, and because Patton has not even attempted to address and rebut this grievance process argument, this Court finds, as many other courts have found, that the BOP grievance process constitutes an alternative remedial structure. *See, e.g.*, ***Vega v. United States***, 881 F.3d 1146, 1154 (9th Cir. 2018) ("Vega had a remedy 'to seek formal review of an issue relating to any aspect of his . . . own confinement' under the Administrative Remedy Program."); ***Goree v. Serio***, 735 F.App'x 894, 895 (7th Cir. 2018) (finding an alternative remedial structure because the prisoner "had available to him, and indeed pursued, administrative remedies through the Federal Bureau of Prisons to seek relief based on the same conduct underlying this suit"); ***Johnson v. Johnson***, 2018 WL 4374231, at *10 (S.D. W.Va. June 5, 2018), *report and recommendation adopted*, 2018 WL 3629822 (S.D. W.Va. July 31, 2018) (finding the inmate had alternative remedies available to address his First Amendment retaliation claim via the BOP's administrative remedy process). Patton participated in the grievance process and exhausted all steps, and he is dissatisfied with the result. However, the ability to file complaints within the BOP administrative process for the same exact claims as his instant ***Bivens*** claim is proof that the process is an alternative remedial structure.

In addition to the alternative remedies argument, the defendant argues that there are other special factors that counsel hesitation in extending a ***Bivens*** remedy in this case. Defendant argues that (1) separation-of-powers cautions against the courts encroaching on the BOP's broad discretion to manage federal prisons; (2) Congress has never authorized a standalone damages cause of action against federal prison officials; and (3) authorizing an implied damages remedy against federal prison officials can have significant financial and logistical costs because of the complexity and size of the BOP.

The defendant's separation-of-powers argument and the financial and logistical costs argument can be analyzed together. The separation-of-powers argument centers around the need for the BOP, an Executive Branch agency, to have broad discretion in order to faithfully do its job. And the costs argument focuses on the burden that will be placed on the BOP and its employees if they have to worry about being personally liable while doing their job. In short, because of the size of the BOP and complexities of its purpose, any meddling by the Judiciary can cause significant burdens on the BOP.

The Supreme Court in ***Abbasi*** and in previous cases have addressed similar arguments as these and has generally held that these matters should be left to the BOP or Congress, not the courts. *See, e.g.*, ***Bell v. Wolfish***, 441 U.S. 520, 548 (1979) ("[T]he operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial."); ***Jones v. N. Carolina Prisoners' Labor Union, Inc.***, 433 U.S. 119, 137 (1977) ("[N]eeded reforms in the area of prison administration must come, not from the federal courts, but from those with the most expertise in this field prison administrators themselves."). The ***Abbasi*** Court

acknowledged that a court's "decision to recognize a damages remedy requires an assessment of its impact on governmental operations systemwide." ***Abbasi***, 137 S.Ct. at 1858. The Court focused on the burden on the federal government employees who are sued in their personal capacity *and* the costs and consequences to the government or agency itself. *See* ***id.*** The Court further stated that the impact on government operations systemwide and burden on individuals and the costs to the government itself "may make it less probable that Congress would want the Judiciary to entertain a damages suit in a given case." ***Id.***

If officers can be held personally liable for actions they take as part of their duties, then there is a possibility that officers may hesitate or refrain from taking necessary action to ensure safety within a prison. *See* ***Abbasi***, 137 S.Ct. at 1863 ("If ***Bivens*** liability were to be imposed, high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis."). The main goals of prison officials should be to ensure safety and to prevent escape. Any hesitation in acting could greatly impede these goals and result in physical harm (or worse) to inmates and staff. How a correctional officer acts should be determined by the BOP, the Executive Branch, and Congress. These bodies are more inclined to deal with prisoner allegations of misconduct because "[r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." ***Turner v. Safley***, 482 U.S. 78, 84–85 (1987); *see also* ***Bistrian v. Levi***, 912 F.3d 79, 95 (3d Cir. 2018) ("Ruling on administrative detention policy matters would unduly encroach on the executive's

domain."). Judicial intervention in how or when a BOP official is supposed to search an inmate's cell is an unnecessary and defective way of operating federal prisons.

Addressing the financial costs that come from extension of ***Bivens***, it is obvious that more litigation entails more money. Increased litigation would result in more federal government money being used to defend federal officials, as well as a financial burden on the individual employees. ***Abbasi*** forces lower courts to consider the financial costs. *See* ***Abbasi***, 137 S.Ct. at 1858. However, courts should be cautious in weighing the financial costs too heavily because potential violations of constitutional rights should not have a price tag on them. The financial costs are considered, but it is less significant in the special factors analysis than the logistical costs and separation-of-powers issues.

Defendant also argues that since Congress has never authorized a standalone damages cause of action against federal prison officials and that should counsel hesitation in the courts authorizing damages. Furthering this argument is the fact that Congress has passed lots of legislation regarding federal prisoners, but never once statutorily allowed for damages in a context like this the instant case. The defendant cites to the PLRA, The Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997, and the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194. She also cites to the many statutes that give the BOP discretion on how to manage the BOP and limitations on how an inmate may sue a prison official. *See, e.g.*, 18 U.S.C. § 3621(b) (giving BOP discretion on where to house prisoners); 18 U.S.C. § 4042(a) (delegating the "charge of the management and regulation of all Federal penal and correctional institutions" to the BOP); 42 U.S.C. § 1997e (limiting suits against prison officials until after exhaustion of administrative remedies). This Court

agrees with defendant that the obvious desire to pass laws affecting federal prisons and prisoners, but the absence of authorization of a damages remedy against prison officials, is a special factor that counsels hesitation for courts to provide an implied damages remedy in this cases like this one. *See* ***Abbasi***, 137 S.Ct. at 1865 ("So it seems clear that Congress had specific occasion to consider the matter of prisoner abuse and to consider the proper way to remedy those wrongs."). The Supreme Court did not definitively foreclose any rebuttal argument against this reasoning. *See* ***id.*** ("It *could be* argued that this suggests Congress chose not to extend the ***Carlson*** damages remedy to cases involving other types of prisoner mistreatment." (emphasis added)). However, Patton did not advance any arguments that would make this Court rule any differently.

In the end, Patton's retaliation claim implicates separation-of-powers issues and threatens a significant administrative and logistical burden to BOP officials. Adding in that Congress has never statutorily authorized damages for a case like this, there are multiple special factors that counsel hesitation for this Court to authorize an implied damages remedy.

II. Qualified Immunity

Qualified immunity protects government officials from money damages unless it can be shown "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." ***Ashcroft v. al-Kidd***, 563 U.S. 731, 735 (2011) (quoting ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982)). To determine whether qualified immunity applies, courts must, "as a threshold matter, determine whether a constitutional or statutory right was deprived" and "[i]f there was no

deprivation of such a right, then a defendant is entitled to qualified immunity and the Court need not inquire further." ***Minor v. Yanero***, 2008 WL 822102, at *3 (N.D. W.Va. Mar. 26, 2008) (Stamp, J.).

In retaliation claims, "plaintiffs must allege either that the retaliatory act was taken in response to the exercise of a constitutionally protected right or that the act itself violated such a right." ***Adams v. Rice***, 40 F.3d 72, 75 (4th Cir. 1994). Retaliation claims must be supported by "more than naked allegations of reprisal." ***Id.*** at 74. Further, this Court has established more stringent standards for retaliation in prisoner cases.

> In the prison context, a prisoner must allege more than his personal belief that he is the victim of retaliation; that is, mere conclusory allegations of retaliation are not sufficient to state a claim for retaliation. Rather, in this case, the plaintiff must be prepared to establish that but for the retaliatory motive the complained of incident—such as the filing of disciplinary reports ...—would not have occurred, and he must produce direct evidence of motivation, or the more probable scenario, allege a chronology of events from which retaliation may plausibly be inferred.

Caver v. Lane, 2015 WL 9077032, at *3 (N.D. W.Va. Dec. 16, 2015) (internal quotations citations omitted) (Stamp, J.); *see also* ***Huang v. Bd. of Governors of Univ. of N. Carolina***, 902 F.2d 1134, 1140 (4th Cir. 1990) (requiring that claimants asserting First Amendment retaliation claims under § 1983 actions must show there would have been no retaliation "but for" the claimant's protected expressions); ***Berry v. McBride***, 2004 WL 3266037, at *3 (S.D. W.Va. Nov. 22, 2004) (Faber, C.J.) (citing ***Huang*** and holding that

plaintiff needed to "demonstrate[] that but for his protected action, he would not have been subjected to the allegedly retaliatory actions") *aff'd*, 122 F.App'x 654 (4th Cir. 2005).

Here, plaintiff's claim is that defendant violated his First Amendment rights because defendant retaliated against him for his verbal complaint. The retaliation allegedly occurred in 2014. As demonstrated by this Court's previous Order and the Fourth Circuit opinion, there was a 2011 unpublished Fourth Circuit case that stated there was no constitutional protection for verbal complaints. Later in ***Booker***, a 2017 published case, the Fourth Circuit held that prisoners do have a clearly established First Amendment right "to file a prison grievance free from retaliation." 855 F.3d at 545. Therefore, at the time of the incident, Patton did not have a clearly established constitutionally protected right at the time defendant searched his cell since this right did not become clearly established until three years after the search. Accordingly, this Court finds that even if Patton's allegations were sufficient to extend ***Bivens***, defendant has qualified immunity from suit.

CONCLUSION

The Supreme Court has cautioned that courts should be weary to extend ***Bivens***. Additionally, Patton never helped his own case by analyzing his case under ***Abbasi*** or responding to defendant's arguments citing to ***Abbasi***. For the reasons stated above, this Court hereby **GRANTS** defendants' Motion for Summary Judgment **[Doc. 121]**. The Clerk is **DIRECTED** to enter judgment in favor of the defendant and to **STRIKE** this action from the active docket of this Court.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein and to mail a copy to the *pro se* plaintiff.

DATED: June 17, 2019.

JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

OMARI H. PATTON,

Plaintiff,

v. **Civil Action No. 2:16-CV-10**

CRYSTAL KIMBLE,

Defendants

REPORT AND RECOMMENDATION

On February 9, 2016, the *pro* se Plaintiff, Omari Patton, a federal prisoner, initiated this Bivens complaint alleging that the Defendant, a correctional officer, confiscated his legal papers. On February 10, 2016, the Plaintiff was granted leave to proceed *in forma pauperis* [ECF No. 6], and on February 18, 2016, he paid the required initial partial filing fee. ECF No. 9. On August 24, 2018, the undersigned conducted a preliminary review of the complaint and determined that summary dismissal was not warranted. Accordingly, an Order to Answer was entered [ECF No. 31], and a summons was issued. ECF No. 32. On November 28, 2016, the Defendant filed a Motion to Dismiss or, alternatively, for Summary Judgment. ECF No. 48. A Roseboro Notice was issued on November 29, 2016 [ECF No. 50], and on December 13, 2016, the Plaintiff filed a response in opposition to the Defendant's motions. ECF No. 60. The undersigned now issues this Report and Recommendation.

I. BACKGROUND

The Plaintiff was charged with several counts related to a drug conspiracy in the United States District Court for the Western District of Pennsylvania. A jury convicted the Plaintiff on the conspiracy count and 27 substantive counts. On July 11, 2005, he

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was sentenced to a term of 360 months to be followed by five years of supervised released. On September 5, 2008, the Third Circuit Court of Appeals affirmed the conviction. Thereafter, the Plaintiff filed a Motion under 28 U.S.C. § 2255 on grounds of ineffective assistance of counsel. The district court denied the motion on August 11, 2010, and declined to issue a certificate of appealability. On October 23, 2012, the Third Circuit affirmed the district court's decision.

On March 4, 2015, the Plaintiff filed a Motion under 28 U.S.C. § 2244 for an order from the Third Circuit authorizing him to file a second or successive application for relief under § 2255. On March 11, 2015, the Third Circuit entered an Order noting that additional documents were required for the Court to consider his application. Accordingly, the Order provided the Plaintiff with 21 days to file: (1) a memorandum, not exceeding 20 pages, which clearly states how the standard of § 2244(b) are satisfied; and (2) the new proposed habeas petition. On March 23, 2015, the Plaintiff filed a letter which was construed as motion to be relieved from the filing requirements of Third Circuit LAR 22.5.[1] On April 9, 2015, the Third Circuit denied the Plaintiff's application for permission to file a second or successive § 2255 motion because he failed to make a prima facie showing that his claims rely on "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found [him] guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on

[1] Petitioner's letter indicated that on August 21, 2014, he had filed a grievance against BOP employee K. Kimball for sentencing transcripts and partial trial transcripts and other documents needed to properly prepare his habeas motion challenging his sentence pursuant to § 2244(b). Therefore, Petitioner indicated that he was giving the court notice that he was unable to file his petition due to the officer confiscating his legal material. Case No. 14-1555, Document No. 003111918875 (3rd Cir.).

collateral review by the Supreme Court that was previously unavailable." Case No. 15-1555, Document No. 00311935271 (3rd Cir. April 15, 2015).

II. THE PLEADINGS

A. The Complaint

The Plaintiff alleges that on August 14, 2014, the Defendant, a housing officer at FCI Hazelton, searched his cell and confiscated a binder containing some of his legal documents. The Plaintiff contends that the next day, he verbally complained to Lieutenant Williams regarding that search and confiscation. The Plaintiff further alleges that he later questioned the Defendant regarding the August 14, 2014 search, and the Defendant responded, referencing the Plaintiff's complaints to Lieutenant Williams, "since you want to complain, next time I will make sure I take more." The Plaintiff continues that on August 19, 2014, the Defendant made a similar statement—"since you guys want to complain I'll take everything"—this time, before the entire L1 housing unit. Finally, the Plaintiff alleges that on August 20, 2014, the Defendant again searched the Plaintiff's cell and confiscated his sentencing transcripts and part of his trial transcripts.

The Plaintiff alleges that the Defendant's actions violated his First, Fourth, Sixth, and Fourteenth Amendment rights. In addition, the Plaintiff alleges that by taking his sentencing transcript and partial trial transcript, the Defendant significantly impaired his ability to access the court. More specifically, the Plaintiff alleges that the Defendant's actions prevented him from adequately pursuing his application for permission from the Third Circuit to file a second or successive a motion under §2255. For relief, the Plaintiff seeks monetary damages and an order directing the Defendant to return the legal documents that she confiscated.

B. The Defendant's Alternative Motions

The Defendant argues that she documented both searches and the records reflect that no legal materials were confiscated. Moreover, the Plaintiff filed an administrative complaint which triggered an internal investigation. The investigation revealed that the searches only removed contraband in the form of nude photos from the Plaintiff's cell.

Accordingly, in support of her alternative motions, the Defendant asserts:

(1) Available evidence directly contradicts the Plaintiff's assertion that she confiscated his legal materials, and because the Plaintiff's claims are built on baseless factual allegations, the Court is empowered to dismiss the complaint.

(2) Even if the Plaintiff has pled a cognizable claim, the facts alleged do not establish that the Defendant retaliated against him or violated his constitutional rights.

(3) The Plaintiff has failed to establish that the Defendant violated his constitutional rights, and therefore, she is immune from Bivens liability.

C. Plaintiff's Reply

In reply to the Defendant's Motions, the Plaintiff alleges that there is a genuine disputed issue of material fact as to the confiscation of his trial and sentencing transcripts. In particular, the Plaintiff alleges that he observed the Defendant confiscate his legal materials and tendered an affidavit from another inmate that he observed the Defendant come out of the cell with a bag which appeared to contain papers and other items. The Plaintiff continues to allege that the Defendant retaliated against him in response to his making a verbal complaint to Lt. Williams regarding the initial confiscation of his legal binder.

III. STANDARD OF REVIEW

1. Motion to Dismiss

"A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding facts, the merits of a claim, or the applicability of defenses." Republican Party of N.C. v. Martin, 980 F.2d 943, 952 (4th Cir. 1992) (citing 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1356 (1990)). In considering a motion to dismiss for failure to state a claim, a plaintiff's well-pleaded allegations are taken as true and the complaint is viewed in the light most favorable to the plaintiff. Mylan Labs, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir.1993); see also Martin, 980 F.2d at 952.

The Federal Rules of Civil Procedure "require only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). Courts long have cited the "rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [a] claim which would entitle him to relief." Conley, 355 U.S. at 45-46. In Twombly, the United States Supreme Court noted that a complaint need not assert "detailed factual allegations" but must contain more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Id. at 555 (citations omitted). Thus, the "[f]actual allegations must be enough to raise a right to relief above the speculative level," id. (citations omitted), to one that is "plausible on its face," id. at 570, rather than merely "conceivable." Id. Therefore, in order for a complaint to survive dismissal for failure to state a claim, the plaintiff must "allege facts sufficient to state all

the elements of [his or] her claim." Bass v. E.I.DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir.2003) (citing Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir. 2002); Iodice v. United States, 289 F.3d 279, 281 (4th Cir. 2002)). In so doing, the complaint must meet a "plausibility" standard, instituted by the Supreme Court in Ashcroft v. Iqbal, where it held that a "claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft, 129 S.Ct. 1937, 1949 (2009). Thus, a well-pleaded complaint must offer more than "a sheer possibility that a defendant has acted unlawfully" in order to meet the plausibility standard and survive dismissal for failure to state a claim. Id.

2. Summary Judgment

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, "[t]he court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Motions for summary judgment impose a difficult standard on the moving party; for it must be obvious that no rational trier of fact could find for the nonmoving party. Miller v. Federal Deposit Ins. Corp., 906 F.2d 972, 974 (4th Cir. 1990). However, the "mere existence of a scintilla of evidence" favoring the nonmoving party will not prevent the entry of summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242-252 (1986). To withstand such a motion, the nonmoving party must offer evidence from which a "fair-minded jury could return a verdict for the [party]." Id. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted."

Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987). Such evidence must consist of facts which are material, meaning that they create fair doubt rather than encourage mere speculation. Anderson, 477 U.S. at 248. It is well recognized that any permissible inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986).

IV. DISCUSSION

As previously noted, the Defendant has filed a Motion to Dismiss or, in the alternative, for Summary Judgment. The undersigned finds that there are genuine issues of material fact, specifically, whether the Defendant did, in fact, remove a legal binder and the Plaintiff's trial and sentencing transcripts from his cell. Therefore, summary judgment is not appropriate. However, even if the Defendant did remove the items as alleged, the undersigned finds that the Plaintiff's complaint fails to state a claim upon which relief can be granted, and accordingly, this case should be dismissed.

1. The Plaintiff's "Claim A"—First Amendment/Retaliation

In order to sustain a claim based on retaliation, the Plaintiff "must allege either that the retaliatory act was taken in response to the exercise of a constitutionally protected right or that the act itself violated such a right". Adams v. Rice, 40 F.3d 72, 75 (4th Cir. 1994). Additionally, a plaintiff alleging that a government official retaliated against him in violation of a constitutional right must demonstrate, *inter alia*, that he suffered some adversity in response to his exercise of protected rights. American Civil Liberties Union v. Maryland, Inc. v. Wicomico County, Md., 999 F.2d 780, 785 (4th Cir. 1993). Therefore, *in forma pauperis* plaintiffs who claim that their constitutional rights

have been violated by official retaliation must present more than naked conclusory allegations of reprisal to survive [§ 19159e)(2)(B)]" Id.

The Plaintiff asserts that following the first search, the Plaintiff complained to the Defendant's superior. The Plaintiff argues that his complaints provoked the Defendant to search his cell a second time and confiscate more legal documents. The second search, the Plaintiff argues, was retaliation for his complaints. The Plaintiff argues that he has a First Amendment right to complain about the first search and that the Defendant's retaliation violated that right.

However, contrary to the Plaintiff' assertion, the Fourth Circuit has made it clear that a federal inmate's verbal complaints are not constitutionally protected and cannot support a retaliation claim. Daye v. Rubenstein, 417 F. App'x 317, 319 (4th Cir. 2011) (per curiam) (unpublished). In that decision, the Fourth Circuit concluded that Daye was not engaging in constitutionally protected speech when he verbally alerted prison officials to purported racial discrimination in his prison job. Daye's "expression of dissatisfaction was not constitutionally protected" because his verbal complaints "were essentially a grievance." Id. Because a federal inmate has no constitutional right to assert grievances, Daye was not exercising a constitutional right when he verbally complained. Id. Therefore, any alleged retaliation stemming from Day's remarks could not have been the results of his exercising a constitutional right. Id. Accordingly, the Fourth Circuit found that Daye's retaliation claim lacked merit and was properly dismissed. Id.

In the instant case, the Plaintiff, like Daye, verbally complained to a prison staff member. ECF No. 1 at 8. Plaintiff's verbal complaint is essentially a grievance and is not

constitutionally protected. Therefore, even if Defendant removed additional materials from Plaintiff's cell in "retaliation" for his complaining, Plaintiff was not exercising a constitutional rights, and his allegation fails to state a Bivens claim.

2. Plaintiff's "Claim B"—First, Fourth, Sixth and Fourteenth Amendments

The Plaintiff's "Claim B" raises four arguments of constitutional law. For the reasons discussed below, the undersigned has concluded that none raises a viable claim for relief.

a. First Amendment

The Plaintiff argues that his First Amendment right to access the courts was violated when the Defendant retaliated by confiscating his legal documents. An inmate's rights to access the court system is not unlimited. Bounds v. Smith, 430 U.S. 817, 825 (1977). Rather, an inmate is guaranteed "a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts." Id. "[W]here it is alleged . . . that prison officials confiscated or withheld legal materials or papers and hindered efforts to pursue legal claims, it must also be alleged and shown that the prison officials' conduct actually resulted in the complainant's inability to proceed in Court." Conrad, 2014 WL 36646 at *13 (citations omitted).

Here, the alleged harm is that the Plaintiff was unable to prosecute his application to the Third Circuit to file a second or successive motion. However, a second or successive motion must be based on newly discovered evidence or a new rule of Constitutional law. 28 U.S.C. § 2255(h). The Plaintiff alleges that it was his trial transcripts and sentencing transcripts that were confiscated. These transcripts existed at the time of his first appeal and are not new evidence. Moreover, the Plaintiff has not

identified any newly discovered evidence[2] nor a new rule of Constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable. Therefore, there is no evidence before this Court that would establish that the alleged confiscation or destruction of the Plaintiff's legal materials impaired his ability to obtain authorization from the Third Circuit to file a second or successive §2255 motion.

b. Fourth Amendment

The Plaintiff relies on several cases arguing that prisoners have a very limited Fourth Amendment right to privacy in their cells. However, the United States Supreme Court has concluded that a prisoner has "no legitimate expectation of privacy" in his cell. Hudson v. Palmer, 468 U.S. 517, 526 (1984). Therefore, "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of a prison cell." Id. at 526. In explaining its reasoning, the Supreme Court noted that prison officials must retain "[u]nfettered access" to inmate housing areas in order to maintain safety and security. Id. at 526-27. The Court continued by explaining that "[a] right of privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional security and internal order. Therefore, because Plaintiff had no legitimate expectation of privacy in his cell, Defendant did not violate his privacy when she searched his cell.

c. Sixth Amendment and Fourteenth Amendment

[2] In fact, Plaintiff alleges that he "received the newly discovered evidence from the Executive Office of United States attorneys [on March 5, 2004] stating 'after conducting a second search they were unable to locate the records responsive to your request.'" Case No. 15-1555 Document No. 00311901250, p. 7 (3rd Cir.).

The Plaintiff's "Claim B" asserts a violation of the Sixth and Fourteenth Amendment. However, the Plaintiff provides no argument for how these rights were violated. Therefore, the undersigned is unpersuaded by the mere assertion that these rights were violated.

3. The Plaintiff's "Claim C"—First and Sixth Amendments

The Plaintiff's "Claim C" is titled as a violation of the First and Sixth Amendments. However, the complaint does not address how these rights were violated. Furthermore, as addressed above, the Court finds that the Plaintiff's First Amendment rights were not violated. Moreover, the Court sees no conceivable Sixth Amendment violation.

Furthermore, despite being titled as a violation of the First and Sixth Amendments, this claim primarily asserts that the Defendant violated the Plaintiff's right to Due Process. The Plaintiff's assertion, however, is conclusory and does not explain how his Due Process rights were violated. The Court sees no arguable deprivation of Due Process. Indeed, as discussed above in Section 2, Part A, the Plaintiff identified no new evidence or rule of constitutional law that would justify granting his motion to file a second or successive § 2255 motion. Therefore, he asserts no basis for a motion pursuant to 28 U.S.C. § 2244, and accordingly, no claim for a Due Process violation.

V. RECOMMENDATION

For the foregoing reasons, the undersigned recommends that:

1. The Defendant's [ECF No. 48] be **GRANTED** to the extent it seeks a Motion to Dismiss; and be **DENIED AS MOOT** to the extent it seeks a Motion for Summary Judgment;

2. The Plaintiff's [ECF No. 1] Complaint **be DISMISSED**;

3. The Plaintiff's [ECF No. 63] Motion for Leave to Reply be **DENIED AS MOOT**.

Within fourteen days after being served with a copy of this report and recommendation, any party may file with the Clerk of Court written objections identifying those portions of the recommendation to which objection is made and the basis for such objections. A copy of any objections shall also be submitted to the United States District Judge. Failure to timely file objections to this recommendation will result in waiver of the right to appeal from a judgment of this Court based upon such recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985): United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).

The Clerk is directed to mail a copy of this Report and Recommendation to the *pro se* Plaintiff by certified mail, return receipt requested, to his last known address as shown on the docket and provide a copy to counsel of record via electronic means.

DATED: July 11, 2017.

/s Michael John Aloi
MICHAEL JOHN ALOI
UNITED STATES MAGISTRATE JUDGE