No. 20-40379

In the United States Court of Appeals
For the Fifth Circuit

DENNIS WAYNE HOPE,

Plaintiff-Appellant,

v.

TODD HARRIS; CHAD REHSE; LEONARD ESCHESSA; JONI WHITE; KELLY ENLOE; MELISSA BENET; B. FIVEASH,

Defendants-Appellees.

On Appeal from the United States District Court for the
Eastern District of Texas – Lufkin Division
(Civil Action No. 9:18-CV-27)

BRIEF FOR DEFENDANTS-APPELLEES

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant
Attorney General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 012)
Austin, Texas 78711-2548
(512) 463-2080/Fax: (512) 370-9814

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

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

AMY L. PRASAD *
Assistant Attorney General
State Bar No. 24037295
Amy.Prasad@oag.texas.gov

ATTORNEYS FOR DEFENDANTS-APPELLEES

***Counsel of Record / Oral Argument Not Requested**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Appellees:	**Counsel for Appellees:**
Todd Harris, Chad Rehse, Leonard Echessa, Joni White, Kelly Enloe, Melissa Bennett, and Bonnie Fiveash	Amy L. Prasad, Office of the Attorney General Austin, TX
Appellant:	**Counsel for Appellant:**
Dennis Wayne Hope	Daniel M. Greenfield Easha Anand Roderick & Solange MacArthur Justice Center

/s/ Amy L. Prasad
AMY L. PRASAD
Assistant Attorney General
Law Enforcement Defense Division
Office of the Attorney General

Counsel of Record for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is unnecessary because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. This appeal does not involve complex questions of law and is a review of the evidence in the record, which is adequately cited in the parties' briefs. Should the Court advise that oral argument would aid in the Court's review, undersigned counsel will gladly participate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Statutes

Rules

ISSUES PRESENTED

1. Whether the district court properly dismissed Hope's claims for lack of standing.
2. Whether the district court properly dismissed Hope's lawsuit for failure to state a claim under the First, the Eighth, or the Fourteenth Amendment.

STATEMENT OF THE CASE

Appellant Dennis Wayne Hope, who is incarcerated within the Texas Department of Criminal Justice ("TDCJ") at the Polunsky Unit, filed this lawsuit for compensatory damages and injunctive relief.

Hope sued Todd Harris, Leonard Echessa, Chad Rehse, Joni White, Bonnie Fiveash, Kelly Enloe and Melissa Bennett (Appellees), claiming that they violated his constitutional rights by holding him in restrictive housing due to his violent criminal record and escape history, and also violated his due process rights under the Fourteenth Amendment. ROA.64-65. He also made claims for retaliation. ROA.77, 84.

After considering Hope's objections to the magistrate's report and recommendation that the lawsuit be dismissed, the district court issued an order overruling those objections and issued a final judgment dismissing the lawsuit in its entirety. ROA.161–165. Hope appealed. ROA.166.

SUMMARY OF THE ARGUMENT

Hope's claims were properly dismissed by the district court because the individuals he sued lacked the ability to address his alleged wrongs. Hope's Eighth Amendment claims were properly dismissed because he failed to show deliberate indifference. Hope's Fourteenth Amendment due process claim was properly dismissed because he doesn't have a liberty interest in his classification status, and

even if he had such an interest, he has been afforded adequate due process. Lastly, Hope's retaliation claim was properly dismissed because he did not, and cannot, show causation or harm.

ARGUMENT

A. Hope's claims were properly dismissed for lack of standing.

Hope, an inmate confined in restrictive housing at the Polunsky Unit, is serving a lengthy sentence for five aggravated robberies with a deadly weapon, impersonating a public servant/security officer, and two escapes from custody. ROA.138.[1]

The Eleventh Amendment provides that the State of Texas, as well as its agencies, are immune from liability. *Kentucky v. Graham,* 473 U.S. 159, 167, 105 S. Ct. 3099, 87 L.Ed.2d 114 (1985). The Eleventh Amendment bars claims against a state brought pursuant to 42 U.S.C. § 1983. *Aguilar v. Texas Dept. of Criminal Justice,* 160 F.3d 1052, 1054 (5th Cir. 1998). In *Will v. Michigan Department of State Police,* 491 U.S. 58 (1989), the Supreme Court held that "neither a State nor its officials acting in their

[1] This information is subject to judicial notice because it can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned, including TDCJ's Offender Information Search. *See* Fed. R. Evid. 201(b)(2); https://offender.tdcj.texas.gov/OffenderSearch/offenderDetail.action?sid=03898539 (last accessed October 12, 2020); *see also United States v. Hope*, 102 F.3d 114 (5th Cir. 1996).

official capacities are 'persons' under § 1983." The Supreme Court upheld the dismissal of the Michigan Department of State Police and its Director sued in his official capacity. *Id.* The Fifth Circuit has accordingly "held that the Eleventh Amendment bars recovering § 1983 money damages from TDCJ officers in their official capacity." *Oliver v. Scott,* 276 F.3d 736, 742 (5th Cir. 2002). However, "the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004); *Aguillar*, 160 F. 3d at 1054.

The narrow exception to Eleventh Amendment immunity from suit, the *Ex parte Young* exception, "is based on the legal fiction that a sovereign state cannot act unconstitutionally[; t]hus, where a state actor enforces an unconstitutional law, he is stripped of his official clothing and becomes a private person subject to suit." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). "In order to use the *Ex Parte Young* exception, a plaintiff must demonstrate that the state officer has 'some connection' with the enforcement of the disputed act." *Id.*

In determining whether the doctrine of *Ex parte Young* avoids the bar to suit under the Eleventh Amendment, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. V. Pub. Serv. Comm'n*,

535 U.S. 635, 645 (2002).

In his amended complaint, Hope alleged that Appellees-Defendants Harris and Rehse were responsible for ensuring that prisoners in restrictive housing are housed in sanitary conditions and not subjected to harassment, retaliation, or cruel and unusual punishment. ROA.72. Hope also alleged the other Defendants-Appellees failed to follow prison policy regarding the review of his classification status. ROA.73–76.

In order to pursue his lawsuit, however, Hope must first demonstrate he meets the three elements of Article III standing: (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The redressability element of the test for standing requires that a favorable decision for the plaintiff will likely, not merely speculatively, redress the plaintiff's injury. *Id.* Additionally, the court must gauge (1) the ability of the official to enforce the statute at issue under his statutory or constitutional power, and (2) the demonstrated willingness of the official to enforce the statute. *Okpalobi v. Foster*, 244 F.3d 405, 425-27 (5th Cir. 2001). Defendants Harris and Rehse are no longer employed at the Polunsky Unit. ROA.138. Further, Hope alleged in his complaint that the ability to address his complaints lies with the Director of the prison system based on his particular history of violence and escape. ROA.138. The magistrate correctly found

that the Appellees in this action do not have the ability to release plaintiff from restrictive housing. ROA.138. Therefore, a favorable decision for Hope would not allow the Appellees to address his complained-of injury. ROA.138. Lastly, the lack of a physical injury precludes Hope from recovering compensatory damages under the Prison Litigation Reform Act. ROA.107; 42 U.S.C. § 1997e(e). Accordingly, Appellees' motion to dismiss was properly granted due to Hope's lack of standing. ROA.164.

B. Hope has no plausible Eighth Amendment claim.

Hope submitted an extensive list of complaints about the conditions of his confinement at Polunsky. ROA.65-71. His litany of grievances about his conditions of confinement included the cleanliness of his cells and eating utensils, the quality and quantity of food served in confinement, a restriction on the amount of property he can maintain in his cell, the fact he is served peanut butter sandwiches during lock-downs approximately four times per year, the lack of condiments such as syrup and mustard, and the alleged indirect exposure to chemical agents. ROA.65–71. Additionally, Hope complained he is restricted in the amount of personal and legal property he may possess in his cell and that his access to legal materials is reduced due to his housing location. ROA.141. Hope claimed research takes him longer than if he were allowed to go to the law library and he further claimed he is denied access to other prisoners knowledgeable in the law. ROA.141. However, Hope failed to allege or demonstrate any harm associated with such claims. ROA.141.

"The Eighth Amendment's prohibition against cruel and unusual punishment imposes minimum requirements on prison officials in the treatment received by and facilities available to prisoners." *Woods v. Edwards*, 51 F.3d 577 (5th Cir. 1995). The Supreme Court noted in *Farmer v. Brennan* that:

> In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates."

Farmer v. Brennan, 511 U.S. 825, 833. (1994).

However, stated succinctly, the Fifth Circuit has made clear that there is no right to a stress-free environment while incarcerated. *See Cupit v. Jones*, 835 F.2d 82, 84 (5th Cir. 1987). ("[T]he Constitution does not mandate prisons with comfortable surroundings or commodious conditions."); *Wilson v. Lynaugh*, 878 F.2d 846, 849 n.5 (5th Cir. 1989) (noting that the Constitution does not protect prisoners from "discomfort and inconvenience" and that prisoners "cannot expect the amenities, conveniences, and services of a good hotel.").

A constitutional violation occurs only when two requirements are met. First, there is an objective requirement that the condition "must be so serious as to 'deprive prisoners of the minimal civilized measure of life's necessities,' as when it denies the prisoner some basic human need." *Harris v. Angelina County, Texas*, 31

F.3d 331, 334 (5th Cir. 1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321 (1991)). Second, under a subjective standard, the court must determine whether the prison official responsible acted with deliberate indifference to inmate health or safety. *See Farmer*, 511 U.S. at 834; *see e.g.*, *Harris*, 31 F.3d at 334-36. The deliberate indifference standard can be appropriately applied to allegations regarding the conditions of confinement. *Woods*, 51 F.3d at 580. In *Farmer*, the Supreme Court adopted "subjective recklessness as used in the criminal law" as the appropriate definition of deliberate indifference under the Eighth Amendment. *Farmer*, 511 U.S. at 839-40.

Under this definition, a prison official cannot be found liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety. ROA.140. 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 draw the inference. *Farmer*, 511 U.S. at 837. A prison official acts with deliberate indifference "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. "Deliberate indifference is an extremely high standard to meet." *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). Deliberate indifference encompasses only the unnecessary and wanton infliction of pain repugnant to the

conscience of mankind. *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1999). To satisfy the exacting deliberate indifference standard, a defendant's conduct must rise "to the level of egregious intentional conduct." *Gobert v. Caldwell*, 463 F.3d 339, 351 (5th Cir. 2006).

While the conditions of Hope's confinement may be unpleasant and possibly harsh, he failed to show the conditions are objectively so serious as to deprive him of the minimal civilized measure of life's necessities. ROA.141. Hope failed to show such conditions rise to the level of a constitutional violation, nor did he satisfy the extremely high standard of showing the defendants acted with deliberate indifference. ROA.141. Hope's allegations against Appellees thus failed to show their actions rose to the level of deliberate indifference and thus failed to show the denial of a constitutional right. ROA.141.

Accordingly, Hope's allegations failed to state a claim upon which relief may be granted and the district court did not err in granting Appellees' motion to dismiss. ROA.164.

C. Hope has no plausible Fourteenth Amendment claim.

Hope also complained of his continued confinement in administrative segregation and his classification as "high profile" which makes him ineligible for placement in a diversion program. ROA.162. First, to maintain his due process

challenge, Hope must establish that his assignment to administrative segregation classification deprived him of a liberty interest protected by the Fourteenth Amendment. *See Meachum v. Fano,* 427 U.S. 215, 223 (1976).

However, "[i]t is well settled that the decision where to house inmates is at the core of prison administrators' expertise." *McKune v. Lile*, 536 U.S. 24, 39 (2002); *Meachum*, 427 U.S. at 225. This Court has made clear that an inmate has no protected interest in any particular custody or security classification, once incarcerated. *See Wilkerson v. Stalder*, 329 F.3d 431, 435-36 (5th Cir. 2003), cert. denied, 124 S.Ct. 432 (2003); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Whitley v. Hunt*, 158 F.3d 882, 889 (5th Cir. 1998). The classification of prisoners is a matter within the discretion of prison officials. *McCord v. Maggio*, 910 F.2d 1248, 1250 (5th Cir. 1990).

Moreover, this Court has repeatedly affirmed that "[p]rison officials should be accorded the widest possible deference" in classifying prisoners' custodial status as necessary "to maintain security and preserve internal order." *Hernandez v. Velasquez,* 522 F.3d 556, 562 (5th Cir.2008) (internal citations omitted). It is the prisoner's burden to demonstrate "extraordinary circumstances" in order to maintain a due process challenge to a change in his custodial classification. *Sandin v. Conner,* 515 U.S. 472, 484 (1995). Therefore, absent an abuse of discretion, a federal

court will not interfere with administrative determinations regarding custodial classification of an inmate. *Whitley*, 158 F.3d at 889. Thus, Hope has no constitutional right to be classified for release to general population. ROA.163.

A narrow exception to this rule exists where the challenged classification amounts to an atypical and significant hardship in relation to the ordinary incidents of prison life. *See Wilkinson v. Austin*, 545 U.S. 209, 222-23 (2005); *Wilkerson v. Goodwin*, 774 F.3d 845, 852-53 (5th Cir. 2014). Due process protections attach only to those punishments that impose an atypical and significant hardship in relation to ordinary incidents of prison life, or to those that extend the length or duration of confinement. *Sandin,* 515 U.S. at 484-86.

The TDCJ Offender Information website reveals Hope is serving multiple cumulative sentences for five aggravated robberies with a deadly weapon, impersonating a public servant/security officer, and two separate escapes from custody. ROA.138. Further, Hope has seventy-five years' imprisonment remaining to satisfy his maximum sentence. ROA.138. In *Pichardo v. Kinker*, 73 F.3d 612 (5th Cir. 1996), this Court stated that "absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life as a prisoner, will never be a ground for a constitutional claim." *Id*. at 612-613; *see also Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("[T]he Constitution itself does not

give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement.").

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319 (1976). A review of Hope's federal criminal appeal provides some background for his classification and why the director may have retained sole authority regarding plaintiff's possible release to General Population. ROA.138.

On November 26, 1994, plaintiff made his second escape from the Texas state prison system and later stole a car at knife point. *See United States v. Hope*, 102 F.3d 114, 115 (5th Cir. 1996). ROA.139. Plaintiff severely cut the 83-year-old driver of the car, dropped him off on the side of the road, and proceeded on a crime spree of armed robberies until his arrest in Memphis, Tennessee approximately two months later. *United States v. Hope*, 102 F.3d at 115-16; ROA.139.

As previously stated, the classification of prisoners is a matter within the discretion of prison officials. ROA.139. Here, given Hope's history of violence and escapes, he failed to show his being held in administrative segregation is not related to legitimate penological interests in security. ROA.163.

Further, even assuming Hope's classification decisions implicate due process, the district court correctly found that he has been provided with due process reviews.

ROA.130. The U.S. Supreme Court outlined the due process standard for prison policies involving classification that implicate due process interest in *Wilkinson v. Austin.*, 545 U.S. 209, 224–30 (2005). The Supreme Court noted that "the requirements of due process are 'flexible and cal[l] for such procedural protections as the particular situation demands.'" *Wilkinson*, 545 U.S. at 224 (citing *Morrissey v. Brewer,* 408 U.S. 471, 481 (1972)). The Court ultimately found that as long as a prisoner received notice of the assignment, opportunity to challenge the decision, and periodic reviews, the prisoner was afforded appropriate due process. *Id.* The fact that Hope disagrees with the committee members' ultimate decisions for him to remain in restrictive housing does not mean he was denied due process; as acknowledged by Hope, he has been given notice of classification hearings, has had an opportunity to challenge the decision, periodic reviews have been provided to him, committee members have reviewed his file, and it has been extensively discussed with him. ROA.72–76, 83, 163.

Despite tacitly acknowledging in his pleadings that he has received adequate procedural due process, Hope attempts to bolster his Fourteenth Amendment argument by pointing to *Wilkerson v. Goodwin*, a case involving an inmate who was first incarcerated by the Louisiana Department of Corrections in the 1970s. *See Wilkerson*, 774 F.3d at 848, 52–53; Appellant's Br. 45–46.

However, in that very case, this Court held that, even if a liberty interest exists due to atypical circumstances, it does not follow that this type of extended lockdown is necessarily impermissible in every circumstance. *Wilkerson*, 774 F.3d at 858–59; *see also Wilkinson,* 545 U.S. at 224-29 (holding that the prison system provided adequate due process by providing informal, non-adversary procedures which included multiple levels of review, and a placement review within 30 days of the initial assignment).

In *Wilkerson*, the defendants did not challenge the issue of adequate procedure on appeal, and the case was remanded in order for the district court to resolve the question of the adequacy of process. *Wilkerson*, 774 F.3d at 859. Unlike in *Wilkerson*, here, as explained above and correctly concluded by the magistrate and district court judge below, Hope has had adequate procedural due process. ROA.130. Thus, Hope failed to state a claim under the Fourteenth Amendment and Appellees' motion to dismiss was properly granted. ROA.139, 163.

D. Hope has no plausible retaliation claim.

Lastly, Hope claims that following an incident in 2012 in which a ten-inch screwdriver was found in his cell or property, he has been moved to a different cell each week to harass him and retaliate against him. ROA.70. Hope claims both Warden Harris and Major Rehse order his weekly moves as a form of harassment

and without penological reason. ROA.70–71. To state a valid claim for retaliation, an inmate must prove "(1) he was exercising a specific constitutional right, (2) the defendant intended to retaliate against the inmate for exercising that right, (3) a retaliatory adverse act occurred, and (4) causation." *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). To show causation, an inmate must establish that "but for the retaliatory motive the complained of incident ... would not have occurred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). Mere conclusory allegations of retaliation will be insufficient to state a retaliation claim. *See id*. In this case, Hope failed to show either a retaliatory motive or causation regarding his claims against the defendants. ROA.164. Hope failed to produce either direct evidence of motivation or allege a chronology of events from which retaliation may plausibly be inferred. ROA.164. Hope's allegations of retaliation are no more than mere speculation. ROA.164. Thus, Hope failed to state a claim of retaliation under § 1983 against Appellees. Accordingly, Appellees' motion to dismiss was properly granted.

CONCLUSION

Because Hope's claims were properly dismissed by the district court for lack of subject matter jurisdiction and for failure to state a claim, this Court should affirm the decision of the court below.

Respectfully submitted,

KEN PAXTON
Attorney General of Texas

BRENT WEBSTER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation

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

/s/ Amy L. Prasad
AMY L. PRASAD
Lead Attorney
Assistant Attorney General
Law Enforcement Defense Division
Office of the Attorney General
P.O. Box 12548
Austin TX 78711-2548
(512) 463-2080 / Fax (512) 370-9814
Amy.Prasad@oag.texas.gov

ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

On this the 21st day of October, 2020, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court.

/s/ Amy L. Prasad
AMY L. PRASAD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions in Federal Rule of Appellate Procedure 32(f), this brief contains _____ words including headings.

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3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Federal Rule of Appellate Procedure 32(a)(7) may result in the court's striking the brief and imposing sanctions against the person signing the brief.

Dated: October 21, 2020

/s/ Amy L. Prasad
AMY L. PRASAD
Assistant Attorney General