IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-2531

MICHAEL RIVERA,
Appellant

v.

KEVIN MONKO, ET AL.

BRIEF FOR APPELLEES

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
ENTERED JUNE 23, 2020

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STATEMENT OF JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983. The district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

This is an appeal from a final order, over which this Court has jurisdiction by virtue of 28 U.S.C. § 1291. The district court's order was entered on June 23, 2020. The notice of appeal was filed, pursuant to the mailbox rule, Fed.R.App.P. 4(c)(1), within 30 days of that date.[1]

[1] A stamp on the envelope containing the notice of appeal is dated July 22, 2020, while the notice of appeal itself is dated July 20, 2020. JA1, JA4.

STATEMENT OF ISSUES

I. Did an inmate fail to state a constitutional claim for denial of access to the courts where allegations that two correctional officers and a law librarian prevented him from filing a complaint and caused him an actual injury are lacking?

II. Are prison employees entitled to qualified immunity because a constitutional right to demand access to legal materials, on the few days the inmate demanded, on the eve of and during trial, when the inmate's case had been pending for nearly two years, is not clearly established?

STATEMENT OF THE CASE

Appellant Michael Rivera, Plaintiff below, an inmate ordinarily incarcerated at State Correctional Institution (SCI)-Fayette, claims that, while he was temporarily imprisoned at SCI-Retreat for an upcoming trial involving prison conditions, three Department of Corrections (DOC) employees violated his constitutional right of access to the courts. Those employees, Defendants below, now Appellees – Lieutenant Kevin Monko, Sergeant Wynston Gilbert, and John Doe, a law librarian – were unable to immediately satisfy Rivera's request for access to certain legal research materials on the eve of, and during, his two-day trial because two legal research computers were not functioning and physical legal reference books were unavailable for loan. Lieutenant Monko and Sergeant Gilbert moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss Rivera's amended complaint for failure to state a claim and based on qualified immunity. The district court granted that motion and dismissed the complaint, including against the Law Librarian who had yet to be served. Rivera now appeals.

A. Factual History

Since this matter did not proceed past the pleadings, the facts are taken from Rivera's amended complaint, the exhibits attached thereto, and the judicial proceedings in *Rivera v. O'Haire*, No. 1:15-cv-1659 (M.D. Pa.), the underlying

matter that forms the basis for Rivera's claim here. *See Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (court may take notice of matters of public record).

In the underlying litigation, in August 2015, Rivera filed a *pro se* complaint, alleging that, while he was incarcerated at SCI-Dallas, he assaulted Correctional Officer Rob Lewis. *O'Haire*, No. 1:15-cv-1659, Doc. 1 at 3-4. Correctional Officer Joe O'Haire and Sergeant Andrew Sromovski[2] responded to the assault and subdued Rivera. *Id.* They then escorted Rivera to the medical department where, with Correctional Officer Edmund Bienkowski, they allegedly punched, kicked, and kneed Rivera in retaliation for the assault he perpetrated against CO Lewis. *Id.* As a result, Rivera claimed, he suffered a chipped tooth, and cuts and abrasions to his face. *Id.* at 4. Nearly two years later, on July 10, 2017, the matter proceeded to a jury trial. JA38, ¶24. The next day, the jury returned a verdict finding that O'Haire, Sromovski, and Bienkowski did not use unreasonable force against Rivera. *O'Haire*, No. 1:15-cv-1659, Doc. 81. Judgment was thus entered in these officers' favor. *Id.*; Doc. 83.

According to Rivera, on Friday, July 7, 2017, three days before the *O'Haire* trial, when he was temporarily housed in the restricted housing unit (RHU) at SCI-Retreat in anticipation of trial, he requested access to the RHU mini law-library.

[2] Rivera misspelled Sromovski's name in the complaint.

JA36, ¶13. To that end, Rivera allegedly submitted a request slip to Lt. Monko, who was assigned to the RHU.[3] JA35-36, ¶¶7, 13. Later that day, Lt. Monko assured Rivera that he would have access before Lt. Monko's shift ended. JA36, ¶14. Rivera explained that he required continuing access to the RHU mini law-library because of his upcoming trial, and Lt. Monko agreed to provide as much access as possible. *Id.* That evening, Sgt. Gilbert, who was also assigned to the RHU, told Rivera he would have access to the RHU mini law-library after dinner. JA35, 37, ¶¶8, 16. Shortly thereafter, Sgt. Gilbert and another correctional officer escorted Rivera to the RHU mini law-library. JA37, ¶16. Rivera attempted to log onto one computer so he could use Lexis-Nexis, but because of a "software problem" he was unable to do any research. JA37, ¶17. Rivera tried a second computer, as did Sgt. Gilbert, but it, too, was not functioning. JA37, ¶¶18-19. Since the computers were not working and the RHU mini law-library does not contain physical books, Rivera was escorted back to his cell. JA37, ¶19. Sergeant Gilbert said he would speak with Lt. Monko and the Law Librarian on Monday and try to get the computers fixed. JA37, ¶20.

[3] Although Rivera's allegations must be accepted as true at this stage, DOC Employees deny that Rivera requested access to the RHU mini law-library. JA54, 56, 59. Rivera attached to his complaint a request to staff to substantiate his claim that he did, in fact, make such a request, but that request is not signed by any DOC staff. JA45.

The following day, a Saturday, Rivera spoke with RHU Sgt. Frederick (who is not a named party) about his need to conduct legal research for his upcoming trial. JA38, ¶22. Sgt. Frederick responded that he had called someone and was told that no one was available to fix the computers until Monday. *Id.* Rivera asked to borrow legal reference books, such as the Federal Rules of Evidence or Federal Rules of Civil Procedure, but Sgt. Frederick relayed that he had contacted the Law Librarian and he had said, "no." JA38, ¶22.

That Monday, after Rivera returned from court, the computers were not yet repaired. JA38, ¶24. Rivera asked Sgt. Gilbert for access to the legal reference books he previously requested, but he relayed that the Law Librarian said that the prison does not loan legal reference books. JA38-39, ¶24.

The next day, Rivera testified at trial. JA39, ¶25. He did not testify regarding an "unsworn declaration" and medical records he wanted admitted into evidence. JA39, ¶25. When he sought to move those documents into evidence, the trial judge ruled them inadmissible as hearsay. *Id.*

Thereafter, as noted, the jury returned a verdict adverse to Rivera.

B. Procedural History

Rivera, proceeding *pro se*, filed a complaint in the Court of Common Pleas of Luzerne County. JA30 (docket). Lt. Monko and Sgt. Gilbert removed the

matter from state court to the district court for the Middle District of Pennsylvania. *Id.*[4]

Rivera filed an amended complaint claiming that he was deprived of his First Amendment right of access to the courts because the computers were not working in the RHU mini law-library and he was not permitted to use the legal reference books as a substitute on those few days, just before and during trial, that he chose to request access. JA41, ¶32. Rivera asserted, in conclusory fashion, that Lt. Monko and Sgt. Gilbert, as the ranking officers in the RHU, were "responsible for the upkeep and maintenance of the law library research computers." JA39, ¶27. Further, they denied him access by "purposely ignoring their professional obligations to repair the legal research computers in a timely manner." JA41 ¶, 32.

Rivera also alleged that he was denied access to the RHU mini law-library the "entire time" he was temporarily housed in SCI-Retreat and, more specifically, in May 2017, and again in August 2017, the latter after his trial was over. JA36, ¶15; JA38, ¶21; JA40, ¶28.

As relief, Rivera sought damages, a declaration, and injunctive relief. JA40-41, ¶¶34-40. Regarding the latter, Rivera requested a permanent injunction ordering Lt. Monko, Sgt. Gilbert, and the Law Librarian to properly maintain the

[4] The law librarian was not served with the complaint. JA28.

legal research computers in the RHU mini law-library at SCI-Retreat so that Rivera, and other inmates like him, would have access. JA42, ¶35.

Lt. Monko and Sgt. Gilbert moved to dismiss the amended complaint under Fed.R.Civ.P. 12(b)(6), asserting that Rivera did not state a claim for violation of his constitutional right of access to the courts. Doc. 21 at 5-10. Rivera had alleged only a speculative injury, not an actual one. *Id.* at 8. Further, Lt. Monko and Sgt. Gilbert did not hinder Rivera's access; they tried to fix the computers themselves, even though they are not computer technicians, and find someone else who could, but no one was available until Monday. *Id.* at 9-10, 13. Lt. Monko and Sgt. Gilbert were also entitled to qualified immunity, on the first prong, because Rivera had not stated a claim for denial of access to the courts, as already detailed; and, on the second prong, because a constitutional right to access legal materials while in trial was not clearly established. *Id.* at 12.

Bypassing the arguments that Rivera had failed to state a claim, the district court proceeded to the second prong of the qualified immunity analysis.[5] JA15. The district court held that Lt. Monko and Sgt. Gilbert were entitled to qualified immunity because they did not violate clearly established law. JA22. There was no controlling precedent from either this Court or the United States Supreme

[5] The parties consented to have a magistrate judge decide the motion to dismiss. JA10.

Court, or even a robust consensus of persuasive authority, establishing that "access to legal materials while in trial is a constitutional right." JA22-23, 25, 27. The district court also concluded that the Law Librarian was entitled to qualified immunity as well, even though he had not been served, highlighting both the court's authority under 28 U.S.C. § 1915(e)(2) to dismiss a prisoner's action for damages "at any time" when a defendant is immune and Rivera's opportunity to contest that immunity. JA28-29.

STATEMENT OF RELATED CASES

This case has not previously been before the Court. Other than *Rivera v. O'Haire*, there are no pending or completed cases to which it is related.

SUMMARY OF ARGUMENT

Rivera failed to state a constitutional claim for denial of access to the courts. For each of the four alleged instances of denial, Rivera did not satisfy the necessary elements of an actual injury, that DOC Employees were the cause of that injury, or that he was denied access to the courts. Indeed, where, as here, a right to affirmative legal assistance is claimed (not active interference by prison officials, as in destroying a subpoena or seizing evidence), the right of access is limited to the preparation and filing of a complaint. Since all of the alleged denials occurred after Rivera filed his complaint, he necessarily cannot state a viable constitutional claim.

The lack of a viable constitutional violation aside, Lt. Monko, Sgt. Gilbert, and the Law Librarian did not violate clearly established law. Rivera defines the clearly established right as a broad abstraction, untethered from the facts of this case, and thus contrary to settled Supreme Court precedent. For him, the question is whether the right of access to the courts extends beyond the filing of the complaint to the time of trial. But properly particularizing the right at issue to the facts of this case, the question is far narrower. In reality, at issue is an inmate who, after his case has been pending for nearly two years, when he is temporarily transferred to another prison closer to the courthouse and placed in segregated housing on the eve of trial, requests access to legal materials. But legal research

computers located in the RHU mini law-library are inoperable and the legal research books from the main law library that the inmate seeks as an alternative are not available for loan. There is no settled precedent establishing that, under these circumstances, an inmate has been denied his constitutional right of access to the courts.

Yet, even if this Court were to address the broader question Rivera presents, he fares no better. There is no controlling precedent or even a robust consensus of cases of persuasive authority establishing that an inmate's right to access legal materials extends past the filing of the complaint all the way to the time of trial. The settled law, established in *Lewis v. Casey*, 518 U.S. 343, 354 (1996), is, in fact, to the contrary: prisoners seeking redress for constitutional violations have no constitutional right to legal assistance beyond that necessary to file a complaint.

ARGUMENT

Standard of Review: This Court exercises do novo review of a district court's dismissal of a complaint under Federal Rule of Civil Procedure 12(b)(6). *Fowler v. UPMC Shadyside*, 578 F.3d 203, 206 (3d. Cir. 2009). When considering such a motion, this Court will construe the complaint in the light most favorable to the plaintiff and assume the veracity of all well-pleaded factual allegations. *Id.* at 210-11. However, this Court will not accept as true unsupported conclusions and unwarranted inferences or legal conclusions couched as factual allegations. *Id.* These same principles apply to the assertion of qualified immunity, as it involves a pure question of law. *George v. Rehiel*, 738 F.3d 562, 571 (3d Cir. 2013). In conducting its review, this Court may affirm the district court's dismissal of the complaint for any reason supported by the record. *Hughes v. Long*, 242 F.3d 121, 121 n.1 (3d Cir. 2001); *Tourscher v. McCullough*, 184 F.3d 236, 240 (3d Cir. 1999).

I. Rivera Failed to State a Viable Claim for Denial of Access to the Courts Because Allegations of an Actual Injury, Causation, and Denial of Access are All Lacking.

A viable claim for denial of access to the courts under the First and Fourteenth Amendment requires allegations that the inmate was denied access to the courts by the named defendants, resulting in an actual injury. In other words, the required elements are: (1) denial of access; (2) causation; and (3) actual injury.

Rivera alleges four instances where his access to courts was impeded. But in none of them can he satisfy each of the elements necessary to state a viable access-to-courts claim.

Where, as here, a past legal claim related to conditions of confinement is at issue, a plaintiff is required to plead and prove that he suffered an "actual injury." *Lewis v. Casey*, 518 U.S. 343, 351-53 (1996); *see Monroe v. Beard*, 536 F.3d 198, 205 (3d Cir. 2008).[6] An "actual injury" is a lost "chance to pursue a 'nonfrivolous' or 'arguable' underlying claim." *Monroe*, 536 F.3d at 205, *Christopher v. Harbury*, 536 U.S. 403, 415 (2002). The plaintiff must describe the underlying claim in his complaint "well enough to show that it is 'more than mere hope.'" *Id.* at 205-06, quoting *Christopher*, 536 U.S. at 416-17.

As with every action brought under 42 U.S.C. § 1983,[7] the plaintiff must also allege that a particular defendant caused that injury, "'*i.e.*, took or was responsible for actions that hindered a plaintiff's efforts to pursue a legal claim.'" *Beckerman v. Susquehanna Twp. Policy & Admin*, 254 Fed. Appx. 149, 153 (3d

[6] There are forward-looking and backward-looking claims. The latter look "backward to a time when specific litigation ended poorly." *Christopher v. Harbury*, 536 U.S. 403, 414 (2002).

[7] "Every person who, under color of [state law] subjects, or *causes* to be subjected any . . . person within the jurisdiction [of the United States] to the deprivation of any rights . . . secured by the Constitution . . . shall be liable to the party injured in an action at law." (emphasis added).

Cir. 2007) (non-precedential), quoting *Monsky v. Moraghan*, 127 F.3d 243, 247 (2d Cir. 1997); *see Lewis*, 518 U.S. at 351; *see also Hedges v. Musco*, 204 F.3d 109, 121 (3d Cir. 2000) ("a § 1983 action . . . employs the principle of proximate causation").

The plaintiff must also allege that he was denied access to the courts. But not just any denial will do. As explained in greater detail in Section II, in the context of a claim of the right to affirmative legal assistance, this right is an extremely limited one. Prison officials are not obligated to "enable the prisoner to discover grievances, and to litigate effectively once in court." *Lewis*, 518 U.S. at 354. Rather, the right is "to bring to court a grievance that the inmate wished to present," that is, to file a complaint or petition. *Id.* at 351,354; *cf. id.* at 403 (Souter, J., dissenting) (arguing for an extension of the right of access to "the period between filing a complaint and its final disposition"); *see also Vreeland v. Schwartz*, 613 Fed. Appx. 679, 683 (10th Cir. 2015) ("A state is not required . . . to provide such legal assistance beyond the preparation of initial pleadings") (citation omitted); *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011) ("In *Lewis*, the Supreme Court limited the right of access to the courts to the pleading stage in cases involving prisoners' affirmative right to assistance"), *overruled in*

part on other grounds, *Coleman v. Tollefson*, 575 U.S. 532 (2015).[8] Stated differently, the right is to enter through the courthouse doors.

Applying these elements to each of the four alleged denials of access to the courts, Rivera cannot state a viable claim for denial of access to the courts.

First, Rivera alleges that he was denied access to the RHU mini law-library in May 2017, when he had an upcoming court date of May 18, 2017.[9] JA36-37, ¶15; JA46 (associated grievance). But he does not allege in any way how this affected his case in *Rivera v. O'Haire* (which did not go to trial until July), let alone that this denial "hindered his efforts to pursue [his] legal claim." *Lewis*, 518 U.S. at 351 ("inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense"); *see Oliver v. Fauver*, 118 F.3d 175, 178 (3d Cir. 1997) (record

[8] It is important to note the distinction between claims involving the right to affirmative legal assistance and the right to litigate without active interference. *See Silva*, 658 F.3d at 1102 (inmate alleged that prison officials repeatedly transferred him to different prisons and seized and withheld his legal files); *Guajardo-Palma v. Martinson*, 622 F.3d 801, 803 (7th Cir. 2010) (noting that *Lewis* involved "claims on prison resources (as in challenges to the adequacy of a prison's law library)," not "active interference"); *see also Edney v. Haliburton*, 658 Fed. Appx. 164, 166 (3d Cir. 2016) (noting that prisoner's right of access to the courts "prohibits active interference with a prisoner's preparation or filing of legal documents") (non-precedential). The former is at issue here – as it was in *Lewis* – not the latter.

[9] The docket for *O'Haire* does not list any appearance for that date.

showed that inmate "suffered no injury as a result of the alleged interference with his legal mail"). Further, Rivera did not even name Lt. Monko, Sgt. Gilbert, or the Law Librarian as hindering his access in May 2017; so, causation is lacking. JA36-37, ¶15; JA46 (associated grievance); *See e.g. Beckerman*, 254 Fed. Appx. at 153. Finally, since any court date would have been after the filing of the complaint, the right of access to the courts is not implicated. Thus, Rivera has not satisfied any of the elements of actual injury, causation, or denial of access for this particular claim.

Second, Rivera broadly alleges that the "entire time" he was temporarily housed at SCI-Retreat both of the computers were inoperable and this "frustrated and impeded" his ability to respond to two pretrial motions and an issue that arose with discovery just prior to jury selection. JA38, ¶21. Rivera offers no factual details as to the temporal duration of this denial. In any case, once again, Rivera fails to allege how any of this actually injured him. He does not describe the subject matter of those two pretrial motions, the discovery issue that arose, or how the trial court ruled on them. In other words, Rivera has not alleged that he suffered any prejudice from this purported denial of access. *See Lewis*, 518 U.S. at 351; *Tinsley v. Giorla*, 369 Fed. Appx. 378, 381 (3d Cir. 2010) (non-precedential) (inmate could "not point to any specific deadline missed or any prejudice that he suffered as a result of prison officials" having allegedly denied him access to

court). Moreover, pretrial motions and issues with discovery would have occurred after the filing of the complaint, so, again, the right of access to the courts is not even implicated.

Third, Rivera alleges that he was denied access in August 2017. JA40, ¶28; JA47, 49 (associated grievances).[10] Although not detailed in his complaint, in a grievance, Rivera noted that he was at SCI-Retreat between August 1 and 3 for a scheduled arraignment,[11] that he complained to Lt. Monko and Sgt. Gilbert about his inability to use the law library on his prior transfers, and that they told him that the computers were still broken. JA47. Rivera claimed that this was impeding his ability to litigate "three pending civil matters and . . . one pending criminal matter," but he offered no details about those matters or how his ability to litigate them was, in fact, impeded. JA47. Certainly any denial that occurred here did not affect the outcome in *O'Haire* as the jury had already rendered a verdict adverse to Rivera. Rivera never appealed, and he does not allege that this alleged denial of access hindered his ability to appeal. So, once again, Rivera has not shown that this alleged denial of access caused him an actual injury. *See Lewis*, 518 U.S. at

[10] The copy of this grievance is grainy. Its counterpart in the original record may be clearer. Doc. 1-2 at 15.

[11] In another grievance filing, Rivera stated the dates were August 1 through August 8. JA49.

351; *Tinsley*, 369 Fed. Appx. at 381. And, even if he had, this alleged denial occurred long after he filed his complaint and, thus, he was not denied his constitutional right of access to the courts.

Fourth, and at the heart of Rivera's claim, are his allegations that he was denied access between July 7 and 10, 2017, on the eve of and during trial, when the legal research computers were not working and legal reference books were not available for loan. JA37, ¶¶16-20, JA38-39, ¶¶22-25. As a result of that denial, Rivera claims, he did not know that the "unsworn declaration" and medical records he wanted admitted into evidence at trial on July 11 constituted hearsay and that he needed to testify about them in order for them to be admissible. JA39, ¶25[12]; JA53 (associated grievance).[13] Had Rivera only been able to conduct this research, he would have known the rules of evidence, he would have testified about those documents, they would have been entered into evidence, and the jury verdict would have been different. Although these allegations are more specific, they still fall short of stating a viable access-to-courts claim. Rivera had to "state the underlying claim in accordance with Federal Rule of Civil Procedure 8(a), just as if

[12] Rivera also claims that this denial hindered his ability to respond to "oral motions" presented at trial. JA38, ¶24. This vague reference does not specify if these oral motions are different from anything else he has already claimed in the complaint.

[13] A more legible copy is available in the original record. Doc. 1-2 at 21.

it were being independently pursued." *Christopher*, 536 U.S. at 417. Rivera did not do so.

The underlying claim was that, after Rivera was subdued following his assault of a correctional officer, several officers retaliated by assaulting him and so used excessive force. The jury, however, found that the correctional officers did not use unreasonable force. *O'Haire*, No. 1:15-cv-1659, Doc. 81. Rivera does not describe this in his amended complaint. Moreover, Rivera simply assumes that his testimony would have rendered this "unsworn declaration" and his medical records admissible as an exception to the hearsay rule. He does not point to any particular hearsay exception. Rivera also does not describe the contents of these documents and, thus, has not shown that, even if they were admitted into evidence, they had any relevance to whether the correctional officers used excessive force. *See Monroe v. Superintendent Coal Twp. SCI*, 597 Fed. Appx. 109, 113 (3d Cir. 2015) (non-precedential) (inmate did not sufficiently allege that his collateral attack on his conviction was "arguable" because he did not plead, *inter alia*, whether the one witness who supposedly recanted was "a central witness" or whether her testimony was cumulative of other evidence); *see also Bowens v. Matthews*, 765 Fed. Appx. 640, 643 (3d Cir. 2019) (non-precedential) (denial of access-to-courts claim was deficient because it contained "only conclusory allegations that the unavailability of two mental health reports caused the denial of his [post-conviction] petition").

Rivera, therefore, has not described his "predicate claim . . . well enough . . . to show that the 'arguable' nature of [his] underlying claim is more than hope." *Christopher*, 536 U.S. at 416, quoting *Lewis*, 518 U.S. at 353. In other words, Rivera "'claims too much'" in asserting that these documents would have been admissible and were so significant that, had the jury only seen them, it would have been swayed to find in his favor. *Monroe*, 597 Fed. Appx. at 113, quoting *Christopher*, 536 U.S. at 416. Indeed, Rivera piles one supposition upon another.

Even if Rivera had pled an actual injury relative to the alleged July 2017 denial, certainly Lt. Monko and Sgt. Gilbert were not the cause of it. *See e.g. Beckerman*, 254 Fed. Appx. at 153. Rivera asserted in conclusory fashion that Lt. Monko and Sgt. Gilbert were "responsible for the upkeep and maintenance of the law library research computers." JA39, ¶27. Rivera did not plead any facts plausibly demonstrating that this assertion is true. *See e.g. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Lt. Monko and Sgt. Gilbert are correctional officers, not computer technicians. Even Rivera acknowledges that Lt. Monko and Sgt. Gilbert transported him to the RHU mini law-library, tried to get someone to fix the computers, and contacted the Law Librarian about loaning him a physical book. They did all they could have done. A mere messenger or escort is no basis for a finding of proximate causation.

And, of course, since this July 2017 incident occurred long after Rivera filed his complaint, the right to access the courts, being limited to the filing of a complaint, is not implicated at all.

For all these reasons, Rivera has failed to allege a single viable access-to-the-courts claim and, so, this Court may affirm the dismissal of the amended complaint on this alternative basis.

II. Even Assuming Rivera Stated a Viable Access-to-Courts Claim, DOC Employees Did Not Violate Clearly Established Law.

Rivera did not state a viable access-to-courts claim. This is fatal for the reasons already discussed, but also because Rivera cannot defeat the first prong of the qualified immunity analysis – the existence of a viable constitutional claim.

But even if he had such a claim, DOC Employees did not violate clearly established law. Rivera defines the clearly established right as a broad abstraction, untethered from the facts of this case – that a prisoner has a constitutional right of access to the courts through trial. Rivera Brief at 10. When particularized to the facts of this case, the constitutional right Rivera claims is far narrower: to access the legal materials on the few days he demands, just before and during trial, even though his case had been pending for nearly two years. There is no controlling precedent (or even persuasive authority) clearly establishing such a constitutional right. This case can be decided on these narrow grounds and not on the broader grounds Rivera claims, or even the district court held. JA23. Nevertheless, the

district court's reading of the case law was correct. The scope of any extension of the constitutional right of access to the courts beyond the filing of a complaint or petition is not clearly established. For this reason also, DOC Employees are entitled to qualified immunity.

A. When properly particularized, a constitutional right of access to legal materials under the narrow facts of this case is not clearly established.

Under the doctrine of qualified immunity, a government official is shielded from civil liability "so long as his conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). Resolution of the question of qualified immunity involves a two-prong analysis: (1) whether the facts the plaintiff has shown make out "a violation of a constitutional right," and (2) "whether the right at issue was clearly established at the time of [the] defendant's alleged misconduct." *Pearson*, 555 U.S. at 231. The Court may address these inquiries in the order it deems most appropriate depending on the circumstances of a particular case. *Id.* at 236; *Bland v. City of Newark*, 900 F.3d 77, 83 (3d Cir. 2018).[14]

[14] As discussed, Rivera has not made out a violation of a constitutional right. This alone entitles DOC Employees to qualified immunity.

Under the second prong of qualified immunity, the constitutional right allegedly violated must be clearly established at the time of the misconduct. *Reichle v. Howard*, 566 U.S. 658, 664 (2012). A right is clearly established when it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 308. "[T]he focus is on whether the officer had fair notice that [his] conduct was unlawful." *Kisela v. Hughes*, 136 S. Ct. 1148, 1152 (2018). An officer has fair notice when "existing precedent [has] placed the . . . constitutional question beyond debate." *Reichle*, 566 U.S. at 664. Existing precedent is sufficiently clear when it is "settled law," meaning "controlling authority in the relevant jurisdiction," *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 719 (3d Cir. 2018),[15] or "a robust consensus of cases of persuasive authority" from the Courts of Appeals, dictated that the officer's conduct was unconstitutional. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018). "Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law." *Mullenix*, 136 S. Ct. at 308.

In undertaking this inquiry, the Supreme Court has "repeatedly stressed that courts must not define clearly established law at a high level of generality."

[15] The United States Supreme Court has assumed, without deciding, that a single controlling circuit precedent could clearly establish the law. *Carroll v. Carman*, 574 U.S. 13, 17 (2014).

Wesby, 138 S. Ct. at 590. "[B]road general proposition[s]" or "extremely abstract rights" are "of little help." *Mullenix*, 136 S. Ct. at 308; *see Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Broad abstractions – for example, that the use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," *Saucier v. Katz*, 533 U.S. 194, 202 (2001) – "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987).

Instead of broad abstractions, the right allegedly violated must be clearly established in a "more relevant[] sense." *Id.* at 640. It must be "defined with specificity" or "particularized." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). "The dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix*, 136 S. Ct. at 308 (emphasis in original). Stated otherwise, "the clearly established law must be 'particularized' to the facts of the case." *White*, 137 S. Ct. at 552. "[T]he right should be framed in terms specific enough to put 'every reasonable official' on notice of it, and *the more specific the precedent*, the more likely it is that a right will meet that threshold." *Zaloga v. Borough of Moosic*, 841 F.3d 170, 175 (3d Cir. 2016) (emphasis added). Conversely, "[a] rule is too general" and, thus fair warning to the officer is lacking, "if the unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule]

was firmly established.'" *Wesby*, 138 S. Ct. at 590 (alteration in original), quoting *Anderson*, 483 U.S. at 641. In short, "context matters." *Sauers*, 905 F.3d at 719. This aspect of the clearly established law prong – "[d]efining a right at the appropriate level of specificity" – is "often the most critical aspect of a qualified immunity analysis." *Id.* at 716; *see Anderson*, 483 U.S. at 639 ("[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified").

This is the mistake Rivera makes. Rivera defines the right at issue far too broadly, as a prisoner having a constitutional right of access to the courts through trial, Rivera Brief at 10, without any recitation of the particular facts at issue here.[16] Properly particularized, the "specific context" here is an inmate who waits

[16] Both this Court and the Supreme Court have demonstrated how a court properly particularizes the claimed right to the facts of a case. For example, in *Wesby*, in concluding that whether the officers lacked probable cause to arrest was not clearly established, the High Court described the circumstances the officers were facing as follows:

> The officers found a group of people in a house that the neighbors had identified as vacant, that appeared to be vacant, and that the partygoers were treating as vacant. The group scattered, and some hid, at the sight of law enforcement. Their explanations for being at the house were full of holes. The source of their claimed invitation admitted that she had no right to be in the house, and the owner confirmed that fact.

(continued….)

nearly two years while his case is pending before researching whether an unsworn declaration and medical records are admissible in evidence. *See Spady v. Bethlehem Area School District*, 800 F.3d 633, 638-39 (3d Cir. 2015). Then, on the eve of trial, when the inmate is temporarily transferred to another prison closer to the courthouse and placed in segregated housing, requests access to legal materials. The legal research computers located in the RHU mini law-library are, however, inoperable (despite correctional officers' attempts to have them fixed) and the legal research books from the main law library that the inmate seeks as an alternative are not available for loan. The question is whether the law governing the constitutional right of access to the courts under the First and Fourteenth Amendments was so well-established that it would have been apparent to every reasonable correctional officer and law librarian that the temporary inability to provide the inmate with access to these legal materials at this specific time and under these circumstances violated that constitutional right. *See id.* There is simply no controlling precedent that "squarely governs the specific facts at issue."[17] *Kisela*, 138 S. Ct. at 1153. This is unsurprising. To find a constitutional

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138 S. Ct. at 591; *see also Spady v. Bethlehem Area School District*, 800 F.3d 633, 638-39 (3d Cir. 2015) (carefully particularizing the right at issue within the factual context of that case).

[17] As even Rivera has acknowledged, the alleged denials of access that occurred in early July 2017 "are central" to his case. Rivera Brief at 7 n.4. The (continued….)

violation under these circumstances, where Lt. Monko and Sgt. Gilbert did all they could have done, strict liability would be required. Given the lack of settled law, DOC Employees should be clothed with qualified immunity.

Moreover, putting aside all the deficiencies in Rivera's claim, these facts simply do not rise to a constitutional violation. Rivera had nearly two years, before his case went to trial, to research whether the unsworn declaration and his medical records were admissible into evidence and, if not, how to get the contents of those documents into evidence some alternative way. Rivera does not claim he was denied access to legal research materials for that nearly two-year period, only on the few days he demanded, just before and during trial, when he was moved to another prison. But sometimes computers break down, the wi-fi stops functioning, library books go missing or are out on loan to someone else. Sometimes, in emergency circumstances, for safety or health, prisons have to be locked down and the right of access temporarily suspended. *See* Pa. DOC Policy No. DC-ADM 007, *Access to Provided Legal Services*, at 2;[18] *See Wilson v. Layne*, 526 U.S. 603, 617 (1999) (where state of the law was "at best undeveloped," it was not unreasonable

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other alleged denials, as discussed, do not even come close to satisfying the actual injury element.

[18] Available at https://www.cor.pa.gov/About%20Us/Documents/DOC%20Policies/007%20Access%20to%20Provided%20Legal%20Services.pdf

for law enforcement to rely on departmental policy). Unforeseen impediments emerge when one waits to the last minute to prepare for trial. Rivera's claim was hindered by his own delay, not Lt. Monko, Sgt. Gilbert, or the Law Librarian.[19] The temporary inability to provide access, for reasons such as existed here, simply do not give rise to a constitutional violation, let alone a violation that would have been obvious to every reasonable state official.[20]

B. But even the broader, abstract right Rivera presents is not clearly established.

Because the law is not clearly established under these specific facts, this Court need not go any further and address the broader question Rivera presents. Nevertheless, the district court correctly concluded that a constitutional right to access legal materials past the filing of the complaint to the time of trial is not clearly established. JA22-23. Indeed, the established law is to the contrary:

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[19] To be clear, though, it is the policy of the DOC to give inmates access to legal materials throughout the pendency of their cases, as Lt. Monko and Sgt. Gilbert attempted to do here. Pa. DOC Policy No. DC-ADM 007, *Access to Provided Legal Services*, at 1. But a policy does not clearly establish the law.

[20] Qualified immunity is not a defense to a claim for injunctive or declaratory relief. *See Montanez v. Sec. Pa. Dep't of Corr.*, 773 F.3d 472, 488 (3d Cir. 2014). However, the failure to state a claim does bar that relief. *See* Section I. In addition, as the district court rightly recognized, that relief is now moot. JA28 n.5, citing *Sutton v. Rasheed*, 323 F.3d 236, 248 (3d Cir. 2003); *see also Abdul-Akbar v. Watson*, 4 F.3d 195, 206-07 (3d Cir. 1993).

prisoners seeking redress for constitutional violations have no constitutional right to affirmative legal assistance beyond that necessary to file a complaint.

In *Lewis*, the Supreme Court disclaimed statements it made in *Bounds v. Smith*, 430 U.S. 817 (1977) that "appear[ed] to suggest that the State must enable the prisoner to *discover* grievances and to *litigate effectively* once in court." 518 U.S. at 354 (emphasis in original). The right at issue in *Lewis* – one that was already well established – was "a right to bring to court a grievance that the inmate wished to present." *Id.* at 351, 354. That the Court limited the right of access to the filing of the complaint is further evident in the Court's suggestion that prisons could still satisfy the constitutional right of access to the courts by replacing law libraries entirely with "some minimal access to legal advice and a system of court-provided forms . . . forms that asked the inmates to provide only the facts and not to attempt any legal analysis." *Id.* at 352.

Rivera devotes much time to parsing the opinion in *Lewis* for words such as "pursue" and "present" and "provide relief," and delving into dictionaries to show that what the Court really meant was the constitutional right of access to the courts extends to trial. Rivera Br. at 18-21. But this Court need not do that. This Court need only look to Justice Souter's dissent. He knew what the Court meant in *Lewis*. Thus, he could "not concur in the suggestion that *Bounds* should be overruled to the extent that it requires States choosing to provide law libraries for

court access to make them available for a prisoner's use in the period *between filing a complaint and its final disposition*." *Lewis*, 518 U.S. at 403 (Souter, J., dissenting) (emphasis added), citing *id.* at 353-54.[21]

Scholars, too, have read *Lewis* the same way, that "prisoners seeking redress for constitutional violations have no right to legal assistance beyond that necessary to file a complaint." David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 Notre Dame L. Rev. 2021, 2050 & n.206 (2018). Or, at the very least, as one commentator has recognized, *Lewis* is ambiguous and can be read either way. JA23-24, citing Michael B. Mushlin, 3 Rights of Prisoners § 12:7 (5th ed.) But even if that commentator is correct, then the law is not clearly established. Correctional officers aren't constitutional scholars. If scholars themselves disagree, then certainly correctional officers do not have "fair notice" that their conduct – assuming that they have an obligation to do anything more than Lt. Monko and Sgt. Gilbert did here – is unconstitutional. *Kisela*, 138 S. Ct. at 1152; *see Reichle*, 566 U.S. at 664 (constitutional question must be "beyond debate"); *see also Safford Unified Sch. Dist. No. 1 v. Redding*,

[21] As the district court pointed out, JA26, the Ninth Circuit has similarly read *Lewis*: "In *Lewis*, the Supreme Court limited the right of access to the courts to the pleading stage in cases involving prisoners' affirmative right to assistance." *Silva*, 658 F.3d at 1103, *overruled in part on other grounds*, *Coleman v. Tollefson*, 575 U.S. 532 (2015).

557 U.S. 364, 378-79 (2009) (concluding that the law was not clearly established by a prior Supreme Court opinion because it had been read differently by "well-reasoned" judges in cases that were "numerous enough").[22]

Rivera fares no better in his reliance on a myriad of cases from this Court. Rivera Brief at 22-25. Much like his analysis of *Lewis*, Rivera parses phrases from decisions of this Court, asserting that they, too, clearly establish a constitutional right of access to the courts through trial. They do not.

Most of these cases are non-precedential involving a *pro se* inmate.[23] None of them "squarely" address the issue presented; typically, these cases involved active interference (as in tampering with legal mail), not affirmative legal assistance. *Kisela*, 138 S. Ct. at 1153; *see Silva*, 658 F.3d at 1102 (noting difference between active interference and affirmative assistance); *Guajardo-Palma*, 622 F.3d at 803 (same); *see also Vreeland*, 613 Fed. Appx. at 683 (same). In the vast majority of these cases, this Court held that the inmate did not show an

[22] Rivera also points to *Christopher*, but that case also does not clearly establish the law, for, as he recognizes, that case did not arise in the "prison context." Rivera Brief at 20.

[23] In this Court's internal operating procedures, it advises that non-precedential opinions "are not regarded as precedents that bind the court because they do not circulate to the full court before filing." 3d Cir. IOP 5.7. A non-binding decision is the antithesis of "controlling authority." *Sauers*, 905 F.3d at 719.

actual injury. *See Watson v. Wingard*, 782 Fed. Appx. 214, 217-18 (3d Cir. 2019) (inmate did not show actual injury where mailroom supervisor's delay in mailing out petition was not the cause of its dismissal); *Aruanno v. Johnson*, 568 Fed. Appx. 194, 195 (3d Cir. 2014) (underlying claim was denied on the merits; thus, failure to transport inmate to hearing did not cause actual injury); *Foster v. Sec., Pa. Dep't of Corr.*, 431 Fed. Appx. 63, 65 (3d Cir. 2011) (no actual injury alleged where inmate "was able to file an informal brief and won relief on appeal"); *Watson v. Secretary Pa. Dep't of Corr.*, 436 Fed. Appx. 131, 135-136 (3d Cir. 2011) (inmate alleged prison officials tampered with his legal mail, but he did not adequately allege an actual injury); *McNeil-El v. Diguglielmo*, 271 Fed. Appx. 283, 285 (3d Cir. 2008) (dismissing appeal as frivolous because seizure of legal materials did not impact his appeal "in any way"); *O'Connell v. Williams*, 241 Fed. Appx. 55, 57 (3d Cir. 2007) (inmate could not show actual injury where incidents in question occurred after his appeal became final).[24] Again, the jurisprudence on qualified immunity does not contemplate putting state actors on notice of

[24] Although this is a mere sample of the over 40 cases Rivera cites, Brief at 22-25, those cases are substantially similar in that an actual injury was absent. Moreover, Rivera gives away the game when he acknowledges that the right he asserts as clearly established is only "implicit" in this Court's case law. *Id.* at 32. Fair notice does not follow from what is "not expressly stated." Random House Webster's Dictionary, *implicit*, at 362 (4th ed. 2001).

unconstitutional conduct through ambiguous phrases involving different legal issues and facts. "Context matters." *Sauers*, 905 F.3d at 719.

Because there is no controlling authority, from either the Supreme Court or this Court, the law is not clearly established. All that remains is Rivera's citation to a Seventh Circuit decision. Rivera Br. at 27-28, citing *Marshall v. Knight*, 445 F.3d 965 (7th Cir. 2006) (holding that inmate stated a claim for denial of access to the court where he alleged that reduction of law-library access to "non-existent level," inhibiting his ability to research and prepare for court hearing, caused him to lose custodial credit time). But as even Rivera recognizes, a single out-of-circuit decision, by itself, "is insufficient to clearly establish a right." *Porter v. Pa. Dep't of Corr.*, 974 F.3d 431, 451 (3d Cir. 2019); Rivera Brief at 26.

Accordingly, a constitutional right to access legal materials beyond the filing of the complaint to the time of trial is not clearly established. Since DOC Employees did not violate clearly established law, they are entitled to qualified immunity.[25]

[25] Qualified immunity extends to the Law Librarian, even though he was not served with the complaint and thus did not move for relief. As the district court rightly recognized, in prison conditions litigation, the Prison Litigation Reform Act gives the district court the authority to dismiss a lawsuit "at any time" where, as here, the complaint fails to state a claim or monetary relief is sought against a defendant who is immune. 28 U.S.C § 1915(e)(2). Indeed, the district courts often dismiss lawsuits upon screening before any relief is sought. 28 U.S.C. § 1915A(a). None of the facts Rivera alleges that distinguish the Law Librarian from the (continued….)

CONCLUSION

For these reasons, the Court should affirm the judgment of the district court.

Respectfully submitted,

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correctional officers has any bearing on the qualified immunity analysis, on either the first or second prong, because these are pure questions of law, based on allegations already contained in the complaint. Rivera Brief at 40-41.

CERTIFICATE OF COUNSEL

I, Michael J. Scarinci, Deputy Attorney General, hereby certify as follows:

1. That I am a member of the bar of this Court.

2. That the text of the electronic version of this brief is identical to the text of the paper copies.

3. That the following virus detection program –Windows Defender Antivirus – was run on the file and no virus was detected.

4. That this brief contains 7,859 words within the meaning of Fed. R. App. Proc. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Michael J. Scarinci

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CERTIFICATE OF SERVICE

I, Michael J. Scarinci, Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief for Appellees, via electronic service, on the following:

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Seven copies were also sent by first class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Michael J. Scarinci

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DATE: December 28, 2020