UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

JAY F. VERMILLION,

Plaintiff,

v.

WILLARD PLANK, CHARLES WHELAN, DAWN BUSS, RALPH CARRASCO, DAWN WALKER, BESSIE LEONARD, MARK LEVENHAGEN, MARK BRENNAN, SALLY NOWATZKE, LARRY WARG, CHARLES PENFOLD, BRETT MIZE, HOWARD MORTON, CRAIG TRAVIS, ERNESTINE COLE, CELIA BOBSON, LINDA LEONARD, DAVID DOMBROWSKY, DOUG BARNES, ROBERT JOHNSON, DAVID LEONARD, STEPHANIE ROTHENBERG, INDIANA DEPARTMENT OF CORRECTIONS, and GARY BRENNAN,

Defendants.

Case No. 3:11-CV-280 JVB

ORDER

Jay Vermillion, a prisoner confined at the Westville Control Unit ("WCU") proceeding pro se, is now on his Second Amended Complaint under 42 U.S.C. § 1983, which alleges violations of his federally protected rights by the Indiana Department of Corrections ("IDOC"), two deputy attorneys general and twenty-one officials employed at the IDOC central office, WCU, and Indiana State Prison ("ISP"). The Court struck his previous two attempts but gave leave "to file an amended complaint containing only a single claim or related claims." (*E.g.*, DE 8 at 3.) Pursuant to 28 U.S.C. § 1915A, this Court must review the merits of a prisoner complaint against governmental entities or officials and dismiss it if the action is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief against a defendant who is immune from such relief.

George v. Smith, 507 F.3d 605, 607 (7th Cir. 2007) requires a district court to "question" and "reject" any complaint that contains unrelated claims against separate defendants:

> A buckshot complaint that would be rejected if filed by a free person—say, a suit complaining that A defrauded the plaintiff, B defamed him, C punched him, D failed to pay a debt, and E infringed his copyright, all in different transactions—should be rejected if filed by a prisoner. George did not make any effort to show that the 24 defendants he named had participated in the same transaction or series of transactions or that a question of fact is "common to all defendants".

George v. Smith, 507 F.3d at 607.

> The district court did not question George's decision to join 24 defendants, and approximately 50 distinct claims, in a single suit. It should have done so. The controlling principle appears in Fed. R. Civ. P. 18(a): "A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party." Thus multiple claims against a single party are fine, but Claim A against Defendant 1 should not be joined with unrelated Claim B against Defendant 2. Unrelated claims against different defendants belong in different suits, not only to prevent the sort of morass that this 50-claim, 24-defendant suit produced but also to ensure that prisoners pay the required filing fees . . . .

Id. at 607.

More recently, the Seventh Circuit criticized a district court for disregarding *George* and reemphasized its concerns regarding "multi-claim, multi-defendants suits" and their potential as an end-run around filing fees under the Prison Litigation Reform Act. *Owens v. Hinsley*, 635 F.3d 950, 952 (7th Cir. 2011) (internal quotation marks omitted). The court held that "[c]omplaints like this one . . . should be rejected, *George*, 507 F.3d at 607, either by severing the action into separate lawsuits or by dismissing improperly joined defendants." *Id.*

The Second Amended Complaint, like its predecessors, would create a multi-claim, multi-defendant suit involving events that occurred at two different facilities over a period of years. Plaintiff seeks to justify its scope by stating that "as a result of [his] having engaged in the

constitutionally protected activity of terminating . . . questioning . . . , the herein-named defendants retaliated against [him], and conspired with one another to retaliate against [him], by implementing the continuous and ongoing chronological series of inextricably related transactions and occurrences . . . .” (DE 14 at 3.)

Rhetorical paragraph A of the Second Amended Complaint asserts that when Willard Plank, Dawn Buss, and Charles Whelan questioned Plaintiff on July 29, 2009, about an escape by other inmates at the ISP, Plaintiff “exercised [his] constitutionally protected right to terminate their questioning.” (DE 14 at 3.) He contends that all of the Defendants conspired to retaliate against from him from July 29, 2009, to the present, for exercising his right to remain silent on this occasion. (DE 14.)

Plaintiff asserts his conspiracy claim under Section 1985(3), which deals with racially motivated conspiracies to interfere with civil rights. To prevail on this claim, he needs “(1) an express or implied agreement among defendants to deprive [him] of his . . . constitutional rights and (2) actual deprivations of those rights in the form of overt acts in furtherance of the agreement.” *Scherer v. Balkema*, 840 F.2d 437, 442 (7th Cir. 1988).(“To state a cause of action under § 1985(3), a plaintiff must allege (1) a conspiracy (2) for the purpose of depriving a person or class of persons of the equal protection of the laws or equal privileges and immunities under the law; (3) an overt act in furtherance of the conspiracy; and (4) an injury to the plaintiff’s person or property, or a deprivation of a right or privilege of a citizen of the United States.” *Traggis v. St. Barbara’s Greek Orthodox Church*, 851 F.2d 584, 586-87 (2d Cir. 1988).)

In § 1985 cases, vague and conclusory allegations of a conspiracy cannot survive. *Amundsen v. Chi. Park Dist.*, 218 F.3d 712, 718 (7th Cir. 2000); *Sampson v. Yellow Cab Co.*, 55 F. Supp. 2d 867, 869 (N.D.Ill. 1999). Where a complaint asserts that the defendants conspired to

deny the plaintiff his constitutional rights, that claim must be "supported by some factual allegations suggesting a 'meeting of the minds.'" *Amundsen*, 218 F.3d at 718 (quoting *Kunick v. Racine County, Wisc.*, 946 F.2d 1574, 1580 (7th Cir. 1991)). Thus, a § 1985 plaintiff:

> must satisfy the following: (1) allege the existence of an agreement; (2) if the agreement is not overt, "the alleged acts must be sufficient to raise the inference of mutual understanding" (*i.e.*, the acts performed by the members of a conspiracy "are unlikely to have been undertaken without an agreement"); and (3) "a whiff of the alleged conspirators' assent . . . must be apparent in the complaint."

Id. (quoting *Kunick*, 946 F.2d 1574, 1580).

Plaintiff does not allege a class-based purpose on the part of the defendants, which is an element of a § 1985 claim. *See Traggis*, 851 F.2d at 586. Moreover, his conspiracy allegations are, at best, conclusory. Plaintiff alleges that two deputy attorneys general and more than twenty IDOC officials at two separate facilities and the central office conspired to retaliate against him over a period of three years for exercising his right to remain silent on one occasion in an ISP internal investigation that apparently never resulted in a criminal prosecution.

The alleged acts in furtherance of the conspiracy "must be sufficient to raise the inference of mutual understanding" (*i.e.*, the acts performed by the members of a conspiracy "are unlikely to have been undertaken without an agreement"). *Amundsen*, 218 F.3d at 718. Nothing in the Second Amended Complaint suggests a plausible "whiff of the alleged conspirators' assent," and nothing in Plaintiff's submissions suggest that Defendants' actions were unlikely to have been undertaken in the absence of an agreement. The few facts stated in the Second Amended Complaint also do not show a class-based animus. Even giving Plaintiff the benefit of the inferences to which he is entitled at the pleadings stage, he has not met the pleading requirements for a § 1985(3) complaint.

Moreover, Plaintiff's conspiracy and retaliation claims are simply not plausible. The

"plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The factual allegations in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not shown – that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quotation marks, alteration, and citation omitted).

This Court concludes that it is not plausible that two deputy attorneys general and twenty-one officials at the IDOC central office and two separate facilities conspired to retaliate against Plaintiff over a period of years for invoking his Fifth Amendment right to refuse to answer questions on a single occasion that did not even result in a criminal prosecution. Accordingly, Plaintiff may not use this alleged conspiracy to justify avoiding *George*'s prescription against bringing multiple unrelated claims against separate defendants.

A prisoner's multi-claim, multi-defendant complaint "should be rejected, either by severing the action into separate lawsuits or by dismissing improperly joined defendants." *Owens v. Hinsley*, 635 F.3d at 952 (citation omitted). Severing Vermillion's multiple claims into several separate lawsuits, some of which would state no claim upon which relief could granted, would obligate him to pay many filing fees. Instead, the Court will allow Vermillion to proceed on one claim in this action, and will dismiss the improperly joined defendants and claims, giving him the option to file additional complaints if he wishes.

The centerpiece of the Second Amended Complaint appears to be the claim, found in rhetorical paragraph E, where he alleges that on August 12, 2009, "without providing [him] with any notice, reason, or opportunity for rebuttal, the defendants transferred [Plaintiff] to the

W.C.U. Super Max facility" in violation of Plaintiff's rights to due process. (DE 14 at 4–5.) In rhetorical paragraph F, Plaintiff alleges that at about the same time, Defendants Brennan and Nowatzke improperly increased Plaintiff's security classification so that he could be sent to the WCU. (*Id.* at 5.)

Vermillion alleges that the WCU is a "supermax" facility with harsh and restrictive conditions of confinement. "Supermax facilities are maximum-security prisons with highly restrictive conditions, designed to segregate the most dangerous prisoners from the general prison population." *Wilkinson v. Austin*, 545 U.S. 209, 213 (2005). "The Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement." *Wilkinson v. Austin*, 545 U.S. at 221–22 (citing *Meachum v. Fano*, 427 U.S. 215, 225 (1976)). But where the conditions of special confinement are restrictive enough in relation to those of ordinary prison life, the circumstances may constitute a state policy or regulation that gives rise to a constitutionally protected liberty interest in avoiding transfer. *Id.* at 223–24.

In *Wilkinson*, the Supreme Court considered whether placement in an Ohio supermax facility, the Ohio State Penitentiary ("OSP"), with many of the same harsh conditions as Vermillion alleges exist at the WCU, implicated the due-process clause. The Supreme Court concluded that the conditions at the OSP constituted an atypical or significant hardship on inmates in relation to the ordinary incidents of prison life, requiring that prisoners be afforded due process before being transferred there. *Id.* at 224. On the other hand, in some instances, the process afforded to inmates before placement in a supermax facility need not be adversarial and may be informal. *Id.* at 228–29.

If placement in the WCU constitutes an "atypical and significant hardship," then Vermillion possesses a liberty interest in not being placed in the WCU without due process. With

the benefit of the inferences to which Plaintiff is entitled at the pleadings stage, his allegations that Defendants transferred him to the WCU without providing due process are a plausible Fourteenth Amendment due-process claim under the standards set forth in *Wilkinson v. Austin*.

On April 24, 2012, Plaintiff filed a Notice of Related Action. (DE 16.) In it, Plaintiff argues the Local Rules mandate transfer of this case to Chief Judge Philip Simon because this case, Plaintiff says, is related to a habeas petition that was before Judge Simon in cause number 3:10-CV-119. Regardless of whether the two cases "grow[] out of the same transaction or occurrence," so as to qualify as related under Local Rule 40.1(d), subparagraph (e) calls for transfer only where the earlier case remains pending. Judge Simon's case is no longer pending. On March 16, 2011, Judge Simon dismissed the habeas petition and the Clerk entered judgment the following day. Therefore, this case will not be transferred to Judge Simon at this time.

For the foregoing reasons, pursuant to 28 U.S.C. § 1915A(b), the Court:

(1) DENIES Plaintiff leave to proceed against multiple defendants on unrelated claims in his Second Amended Complaint;

(2) GRANTS Plaintiff leave to proceed against Defendants Mark Levenhagen, Howard Morton, Gary Brennan, Bret Mize, and Sally Nowatzke in their individual capacities for damages on his Fourteenth Amendment claim in paragraphs E and F of his Second Amended Complaint that they transferred him from the ISP to the WCU without affording him due process; and

(3) DISMISSES all other claims and DISMISSES Defendants Willard Plank, Charles Whalen, Dawn Buss, Ralph Carrasco, Dawn Walker, Bessie Leonard, Larry Warg, Charles Penfold, Craig Travis, Ernestine Cole, Celia Bobson, Linda Leonard, David Dombrowsky, Doug

Barnes, Robert Johnson, David Leonard, Stephanie Rothenberg, and the IDOC, pursuant to 28 U.S.C. § 1915A. This dismissal is without prejudice to Plaintiff's right to bring those claims in other actions.

(4) The Court further ORDERS, pursuant to 42 U.S.C. § 1997e(g)(2), that Defendants Levenhagen, Morton, Brennan, Mize and Nowatzke respond to the Second Amended Complaint, as provided under the Federal Rules of Civil Procedure; and

(5) DIRECTS the Marshals Service to effect service of process on Defendants Levenhagen, Morton, Brennan, Mize, and Nowatzke on Plaintiff's behalf, and DIRECTS the Clerk's Office to ensure that a copy of this Order is served on them along with the summons and Second Amended Complaint.

SO ORDERED on May 8, 2012.

s/ Joseph S. Van Bokkelen
JOSEPH S. VAN BOKKELEN
UNITED STATES DISTRICT JUDGE