

jar

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

<b>GEORGE E. GILMORE,</b>	)	
	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>Case No. 03-3222-JAR</b>
	)	
<b>STATE OF KANSAS, et al.,</b>	)	
	)	
<b>Defendant.</b>	)	
	)	

**ORDER GRANTING SUMMARY JUDGMENT ON MOTION TO DISMISS AND  
DENYING MOTIONS FOR DEFAULT JUDGMENT AND ORDER TO SHOW CAUSE**

This comes before the Court on the Motion to Dismiss (Doc. 32) filed by Defendants State of Kansas, Kansas Department of Social and Rehabilitation Services, Janet Schalansky, Mark Schutter, Austin Deslauriers, Roger Higgins, Kristi Feeback, John Doe and Jane Doe (hereinafter collectively, “Defendants”). The Court also considers Plaintiff’s Motion for Default Judgment (Doc. 28) and Motion for Order to Show Cause (Doc. 21). Plaintiff George Gilmore did not file a response.<sup>1</sup>

In this civil rights action brought pursuant to 42 U.S.C. §1983, Plaintiff, a resident in the Kansas Sexual Predator Treatment Program at the Larned State Hospital, raises five claims that Defendants violated his constitutional rights in their: 1) failure to provide treatment; 2) unreasonable searches and

---

<sup>1</sup>On August 16, 2004, the Court entered an Order (Doc. 35) giving notice that the motion to dismiss would be treated as a motion for summary judgment and granting Plaintiff until September 24, 2004, to file his response. On September 14, 2004, the Court denied Plaintiff’s motion for extension of time to file his response, and the deadline remained September 24, 2004 (Doc. 37). As of the date of this Order, September 27, 2004, no response has been filed.

seizures; 3) overly restrictive conditions; 4) denial of access to legal materials and counsel; and 5) unreasonable restriction of free speech. Thus, Plaintiff claims that Defendants violated his First, Fourth, Sixth and Fourteenth Amendment rights under the United States Constitution. Plaintiff is proceeding pro se and *in forma pauperis*.

## **I. Uncontroverted Facts<sup>2</sup>**

From April 27, 1990 through June 6, 1999, Plaintiff was incarcerated in the Kansas Department of Corrections system for sexually abusing a seven year-old boy. On or about August 16, 1999, Plaintiff was judicially determined to be a sexually violent predator<sup>3</sup> and was committed to the Kansas Sexual Predator Treatment Program (“SPT”) at the Larned State Hospital in Larned, Kansas. To date, Plaintiff continues to be committed to the Larned State Hospital and continues to reside in the SPT Program there.

Plaintiff’s treatment in the SPT Program was substantial and continuous since he first arrived at Larned State Hospital. From November 22, 1999, and every 90 days thereafter until August 24, 2002, Plaintiff received a “Resident 90-Day Assessment” that documented his on-going treatment for his deviant sexual behavior. These 90-day assessments summarized Plaintiff’s treatment, included more than a dozen categories of evaluation, and reflected Plaintiff’s cumulative performance in the SPT Program. Beginning in January 2003, a different method of documentation was implemented

---

<sup>2</sup>D. Kan. 56.1(a) provides that “[a]ll material facts set forth in the statement of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party.” By failing to file a response to defendants’ summary judgment motion, “[plaintiff] waived the right to file a response and confesse[d] all facts asserted and properly supported in the motion.” *Murray v. City of Tahlequah, Okl.*, 312 F.3d 1196, 1199 (10th Cir. 2002). Thus, to the extent Defendants’ factual allegations find support in the record, the Court has accepted them as true.

<sup>3</sup>Pursuant to K.S.A. § 59-29a01 *et seq.* (Kansas Sexually Violent Predator Act).

to chart the treatment and progress of Plaintiff and the other STP residents. Instead of using the “Resident 90-day Assessments,” the SPT treatment teams began using the “Integrated Treatment Plans, CPR 304.”

In addition, Plaintiff’s diagnosis, care and treatment was documented in “Yearly Psychological Evaluations” from August 1999 to August 2003; his progress was further monitored in “Daily Progress Notes” with notations from all staff members having any interaction with him, including medical doctors, psychologists, psychiatrists, mental health professionals, social workers, nurses, and psychiatric security specialists. Moreover, Plaintiff was assessed via the “Abel Assessment for Sexual Interest Interpretation” and the “Penile Plethysmograph Evaluation and Social History.”

These evaluations, notations and records evidence that Plaintiff refuses to take his medications, refuses to attend group and individual treatment sessions, and is consistently aggressive toward both residents and staff. When he did attend treatment sessions, Plaintiff would not participate, often leaving before the session ended. Plaintiff continually engages in public masturbation, especially in the presence of female staff. During the last four years Plaintiff “has been physically aggressive with four residents” and has “an ongoing history of being very physically intimidating to most of the female staff,” including a recent incident where Plaintiff “attempted to go over [a barrier] to get to the staff member.” Based on the ongoing evaluation, observation and treatment of Plaintiff, he is considered to be “extremely dangerous and should not be out in the community.” Plaintiff “is highly dangerous around young children and should be monitored at all times.”

## **II. Discussion**

Defendants move to dismiss on the grounds that the State of Kansas and the other individuals to

the extent sued in their official capacity, are immune from suit under the Eleventh Amendment to the United States Constitution; to the extent the individuals are sued in their personal capacity, they are protected by qualified immunity.

### ***Eleventh Amendment Immunity***

The Eleventh Amendment states that “[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>4</sup> The Supreme Court has repeatedly explained that the amendment confirms the historically-rooted understanding of sovereign immunity, which is that federal jurisdiction over suits against unconsenting states—even by its own citizens—“was not contemplated by the Constitution.”<sup>5</sup>

It is settled law that under the Eleventh Amendment, states are immune from suit unless 1) the state consents to suit, or 2) Congress validly abrogates the states’ immunity.<sup>6</sup> The State of Kansas does not consent to suit under this statute, and Congress may not abrogate state immunity for section 1983 claims under its Fourteenth Amendment authority.<sup>7</sup> Moreover, a state is not a “person” for purposes of section 1983.<sup>8</sup> As a result, the Eleventh Amendment bars suits under 42 U.S.C. § 1983

---

<sup>4</sup> U.S. CONST. amend. XI.

<sup>5</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Hans v. Louisiana*, 134 U.S. 1, 15 (1890)).

<sup>6</sup> *Id.* at 54-55; *Nelson v. Geringer*, 295 F.3d 1082, 1096 (10<sup>th</sup> Cir. 2002).

<sup>7</sup> *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 63 (1989); *Nelson*, 295 F.3d at 1096 (citing *Quern v. Jordan*, 440 U.S. 332 (1979)).

<sup>8</sup> *Will*, 491 U.S. at 64-67; accord *Stidham v. Peace Officer Standards and Training*, 265 F.3d 1144, 1156 (10<sup>th</sup> Cir. 2001); *McLaughlin v. Board of Trustees of State Colleges of Colorado*, 215 F.3d 1168, 1172 (10<sup>th</sup> Cir. 2000). See also *Harris v. Champion*, 51 F.3d 901, 905-06 (10<sup>th</sup> Cir. 1995) (explaining that a state or state agency is not a person

against the State of Kansas.

Eleventh Amendment immunity also extends to state officials who are sued in their official capacity.<sup>9</sup> Such suits are tantamount to suits directly against the state, since plaintiff seeks monetary damages that would be paid out of the state's treasury.<sup>10</sup>

### ***Qualified Immunity***

To the extent Plaintiff sues the individual Defendants in their individual capacity, the defense of qualified immunity shields them, as Plaintiff complains about their conduct and performance of discretionary functions. Government officials performing discretionary functions are shielded from individual liability under § 1983 unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.”<sup>11</sup>

Where a qualified immunity defense is asserted in a Rule 12(b)(6) motion, the court must apply a heightened pleading standard, and require the complaint to contain “specific, non-conclusory allegations of fact sufficient to allow the district court to determine that those facts, if proved, demonstrate that the actions taken were not objectively reasonable in light of clearly established law.”<sup>12</sup> The Tenth Circuit has developed a framework for analyzing claims of qualified immunity: once a

---

under section 1983 except to the extent that the plaintiff sues for prospective injunctive relief only).

<sup>9</sup>*Kentucky v. Graham*, 473 U.S. 159, 165 (1985); *Searles v. VanBebber*, 993 F. Supp. 1350, 1353 (D. Kan. 1998), *aff'd in part and vacated in part on other grounds*, 251 F.3d 869 (10<sup>th</sup> Cir. 2001), *cert. denied*, 536 U.S. 904 (2002).

<sup>10</sup>*Kentucky v. Graham*, 473 U.S. at 165.

<sup>11</sup>*Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

<sup>12</sup>*Dill v. City of Edmond, Okl.*, 155 F.3d 1193, 1204 (10<sup>th</sup> Cir. 1998).

defendant pleads qualified immunity, the plaintiff bears the burden of (1) coming forward with sufficient facts to show that the defendant's actions violated a federal constitutional or statutory right; and (2) demonstrating that the right violated was clearly established at the time of the conduct at issue.<sup>13</sup> "In order to carry [this] burden, the plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it. Rather, the plaintiff must articulate the clearly established constitutional right and the defendant's conduct which violated the right with specificity. . . ." <sup>14</sup> The court must first determine whether a plaintiff has alleged a deprivation of a constitutional right; only after determining that plaintiff has alleged a determination of a constitutional right, does the court ask whether the right allegedly violated was clearly established at the time of the conduct at issue.<sup>15</sup>

Here, Plaintiff's complaint is devoid of the specificity required to overcome the defense of qualified immunity. The Court is mindful that a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than pleadings drafted by lawyers.<sup>16</sup> Thus, if a pro se plaintiff's complaint can reasonably be read "to state a valid claim on which the plaintiff could prevail, it [the court] should do so despite the plaintiff's failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading

---

<sup>13</sup>*Baptiste v. J.C. Penney Co.*, 147 F.3d 1252, 1255 (10<sup>th</sup> Cir. 1998) (citing *Clanton v. Cooper*, 129 F.3d 1147, 1153 (10<sup>th</sup> Cir. 1997)); *Albright v. Rodriguez*, 51 F.3d 1531, 1534 (10<sup>th</sup> Cir. 1995).

<sup>14</sup>*Romero v. Fay*, 45 F.3d 1472, 1475 (10<sup>th</sup> Cir. 1995) (citations omitted).

<sup>15</sup>*Baptiste*, 147 F.3d at 1255 n. 6 (citing *County of Sacramento v. Lewis*, 523 U.S. 833 (1998)).

<sup>16</sup>*Hall v. Bellmon*, 935 F.2d 1106, 1110 (10<sup>th</sup> Cir. 1991).

requirements.”<sup>17</sup> However, it is not “the proper function of the district court to assume the role of advocate for the pro se litigant.”<sup>18</sup> For that reason, the court should not “construct arguments or theories for the plaintiff in the absence of any discussion of those issues,”<sup>19</sup> nor should it “supply additional factual allegations to round out a plaintiff’s complaint or construct a legal theory on plaintiff’s behalf.”<sup>20</sup>

Despite the lack of specificity in Plaintiff’s complaint, the Court determined that it would analyze Defendants’ claim of qualified immunity by treating Defendants’ motion to dismiss as a motion for summary judgment, since Defendants’ motion relied on matters outside of the pleadings, to wit: the *Martinez* report (Doc. 29). By converting their motion to one for summary judgment, the Court treats the *Martinez* report as an affidavit in support of their motion for dispositive relief.<sup>21</sup>

It is well established that “[a] motion to dismiss for failure to state a claim upon which relief can be granted must be converted into a motion for summary judgment whenever the district court considers matters outside the pleadings.”<sup>22</sup> Courts have broad discretion in determining whether or not to accept materials beyond the pleadings.<sup>23</sup> Reversible error may occur, however, if the district court

---

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Drake v. City of Fort Collins*, 927 F.2d 1156, 1159 (10<sup>th</sup> Cir. 1991).

<sup>20</sup> *Whitney v. State of New Mexico*, 113 F.3d 1170, 1173-74 (10<sup>th</sup> Cir. 1997).

<sup>21</sup> *Hall v. Bellmon*, 935 F.2d at 1111. *See also, Ketchum v. Cruz*, 961 F.2d 916, 920 n.3 (10<sup>th</sup> Cir. 1992) (*Martinez* reports provide the court with preliminary information, furnished by prison administration personnel, for use in pro se cases brought by prisoners against prison officials).

<sup>22</sup> Fed. R. Civ. P. 12(b)(6).

<sup>23</sup> 5A Charles Alan Wright et al., *Federal Practice and Procedure* § 1366 (2<sup>nd</sup> ed. 1990).

considers matters outside the pleadings but fails to convert the motion to dismiss into a motion for summary judgment.<sup>24</sup> In an Order entered on August 16, 2004 (Doc. 35) the Court gave plaintiff this notice and gave him the opportunity to respond on or before September 24, 2004.<sup>25</sup> The Court also warned Plaintiff that if the Court “grants summary judgment and determines that Plaintiff’s Complaint fails to state a claim for relief, such dismissal will be included in what is known as the “three-dismissal rule” of 28 U.S.C. §1915, which generally precludes the filing of any further *in forma pauperis* civil actions or appeals once a plaintiff has had three such actions or appeals dismissed for failure to state a claim and/or on grounds that the case is frivolous or malicious.”<sup>26</sup>

Despite this notice and admonition, Plaintiff has not filed a response. Notably, Plaintiff did not file a substantive response to Defendant’s motion to dismiss, which was filed on December 1, 2003, more than nine months ago. Instead, Plaintiff responded by filing a motion for default judgment and a motion for order to show cause, misconstruing the time limits for Defendants to file a Martinez report and answer.<sup>27</sup> For that reason, the Court denies both the motion for order to show cause and the

---

<sup>24</sup>*Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir. 1998)(citing *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991)).

<sup>25</sup>The Court’s order also advised Plaintiff that if the Court “grants summary judgment and determines that Plaintiff’s Complaint fails to state a claim for relief, such dismissal will be included in what is known as the “three-dismissal rule” of 28 U.S.C. §1915, which generally precludes the filing of any further *in forma pauperis* civil actions or appeals once a plaintiff has had three such actions or appeals dismissed for failure to state a claim and/or on grounds that the case is frivolous or malicious.”

<sup>26</sup>28 U.S.C. § 1915.

<sup>27</sup>Defendants timely filed on September 9, 2003 (one day after Plaintiff filed his Motion for Order to Show Cause (Doc.21)) a Motion for Extension of time to Compile and Submit *Martinez* Report (Doc. 22). The court ordered (Doc. 23) that defendants file their *Martinez* report by September 19, 2003. Defendants timely filed their *Martinez* Report (Doc. 24) on September 18, 2003. Defendants timely filed a motion for extension of time to file an answer or motion to dismiss; On October 8, 2003, the Court granted (Doc. 27) defendants an extension of time until 20 days after receipt of the *supplemental Martinez* Report. On November 14, 2003, Plaintiff filed a motion for default judgment (Doc. 28), which was without merit, as the time had not yet expired for defendants to file a supplemental

motion for default judgment filed by Plaintiff.

Having duly converted the motion to dismiss to a motion for summary judgment, and having considered the uncontroverted facts in the *Martinez* report in the light most favorable to Plaintiff,<sup>28</sup> it is clear that most of Plaintiff's complaints are not constitutional violations.

Plaintiff's claims that his rights have been violated by defendants' failure to provide treatment, subjecting him to unreasonable searches and seizures, and overly restrictive conditions, are untrue and frivolous. As the *Martinez* Report demonstrates, Plaintiff has continually received treatment since he was first committed to the SPT Program on August 26, 1999. Moreover, Plaintiff does not contest his placement in the SPT Program and his complaints about the SPT Program amount to nothing more than "second guessing" or a "difference of opinion" regarding his treatment, which case law clearly states does not rise to the level of a constitutional violation.

In the context of § 1983 action for damages and injunctive relief, the Supreme Court has held that only 'deliberate indifference to serious medical needs' of prisoners violates the Eighth Amendment proscription against cruel and unusual punishment.<sup>29</sup> Plaintiff has received substantial and continuous treatment, daily monitoring and frequent evaluation and assessment. Yet Plaintiff has impaired and impeded the treatment through his refusal to attend and/or participate in group treatment sessions, his

---

*Martinez* report followed by an answer or motion to dismiss. Defendants filed their supplemental *Martinez* Report (Doc. 29) on November 14, 2003, followed by the instant motion to dismiss (Doc. 32), timely filed on December 1, 2003.

<sup>28</sup> See Fed. R. Civ. P. 56(c).

<sup>29</sup> *Ramos v. Lamm*, 639 F.2d 559, 575 (10th Cir. 1980), *cert. denied* (1981) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *Farmer v. Brennan*, 511 U.S. 825, 835-37 (1994); *Twyman v. Crisp*, 584 F.2d 352, 355 (10th Cir. 1978) (plaintiff "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs").

failure to take advantage of individual therapy sessions and his refusal to take his medications. Plaintiff's opinion that he has received inadequate treatment simply does not support an Eighth Amendment claim.<sup>30</sup> Nor does it support a Fourteenth Amendment claim, which is also analyzed under the "deliberate indifference" standard.<sup>31</sup>

Nor can Plaintiff establish any legally cognizable claim of unreasonable search and seizure, overly restrictive conditions, or denial of freedom of movement. With respect to his claim of unreasonable search and seizure, the only allegation that would underlie the claim is an incident of Plaintiff not receiving a Christmas card for several days after it had been received by the institution. Such a minor infraction hardly rises to the level of a violation of the Fourth Amendment. An essential element of any § 1983 claim is that the challenged conduct deprived the claimant of some right, privilege, or immunity protected by the Constitution or laws of the United States.<sup>32</sup> The courts have long recognized that § 1983 is not a source of substantive rights; rather, it provides a remedy to vindicate federal rights established elsewhere.<sup>33</sup> Plaintiff must assert the denial of a right, privilege or immunity that is secured by the Constitution or a federal law, and must show that the alleged violation

---

<sup>30</sup>*Ramos*, 639 F.2d at 575; *Johnson v. Stephan*, 6 F.3d 691, 692 (10th Cir. 1993); *Bowring v. Godwin*, 551 F.2d 44, 48 (4<sup>th</sup> Cir. 1977) ("we disavow any attempt to second-guess the propriety or adequacy of a particular course of treatment"); *Smart v. Villar*, 547 F.2d 112, 114 (10th Cir. 1976).

<sup>31</sup>See *Frost v. Agnos*, 152 F.3d 1124, 1128 (9<sup>th</sup> Cir. 1998); *Redman v. County of San Diego*, 942 F.2d 1435, 1440-41 (9<sup>th</sup> Cir. 1991); *Munoz v. Kolender*, 208 F.Supp. 2d 1125, 1146 (S.D. Cal 2002).

<sup>32</sup>42 U.S.C. § 1983.

<sup>33</sup>*Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n. 3 (1979)); *Malek v. Haun*, 26 F.3d 1013, 1015 (10<sup>th</sup> Cir. 1994) ("It is well settled law that to establish a claim under § 1983, a plaintiff must allege a deprivation of a federally protected right under color of state law.").

was committed by a person acting under the color of state law.<sup>34</sup>

With respect to his claim of overly restrictive conditions, Plaintiff alleges that he was denied the use of razors, a Bic lighter, electricity, and the use of a washer and dryer. This does not rise to the level of a constitutional violation by deprivation of a constitutionally protected right. And, Plaintiff's claim that he is denied freedom to move about the facility without staff present at all times does not state a cognizable claim under § 1983 because there is no deprivation of a constitutionally protected right. Moreover, the United States Supreme Court has clearly held that restrictions upon prisoners' constitutional rights are permissible, so long as those restrictions are "reasonably related to legitimate penological interests."<sup>35</sup> This standard reflects the view that prison administrators, and not the courts, should resolve difficult and complex questions of institutional operations.<sup>36</sup> Further, the standard is necessary so that courts avoid becoming the ultimate arbiters of every administrative problem in correctional institutions.<sup>37</sup>

It is apparent that in administering the SPT Program, Defendants have a legitimate interest in not providing razors or lighters to Plaintiff and others due to security concerns and the concern that Plaintiff may injure himself or others with the razors. It is also apparent that Defendants have legitimate penological interests in not allowing Plaintiff unsupervised movement about the facility or direct access to a washer and dryer.

---

<sup>34</sup>*West v. Atkins*, 487 U.S. 42, 48 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 155-56 (1978); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970); *Hill v. Ibarra*, 954 F.2d 1516, 1520 (10<sup>th</sup> Cir. 1992).

<sup>35</sup>*Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989); *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>36</sup>*Turner*, 482 U.S. at 89.

<sup>37</sup>*Id.*

Some of Plaintiff's claims involve a constitutionally protected right. Plaintiff contends that he was deprived of his First Amendment rights by Defendants' restrictions on his access to some magazines and newspapers. But Plaintiff does not identify the title and nature of these publications that he was prevented from reading. And, although Plaintiff may have a First Amendment right to access some publications, Defendants demonstrate that there are necessary restrictions on what types of magazines and publications a person committed to the SPT Program may receive. Any magazines or publications that contain material describing or depicting sexual or erotic material, pornography, violence, rape, nude women, men and children, or depictions of men, women or children in suggestive situations, or pictures of children in general, may be proscribed by SPT Program due to legitimate treatment interests. Obviously, a person like Plaintiff who was convicted of sexually molesting a child, and whose treatment results indicate he has a strong desire for pictures of young boys, should not receive sexually suggestive, or any other type of materials concerning children which may jeopardize Plaintiff's treatment.

Plaintiff also claims that he was denied access to a law library or legal assistance. An inmate claiming such denial of right of access must satisfy the standing requirement of "actual injury" by showing that denial of legal resources hindered his efforts to pursue a nonfrivolous claim.<sup>38</sup> Because there is no "abstract, free-standing right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is sub-par in some theoretical sense."<sup>39</sup> Rather, the inmate must "go one step further and demonstrate that the alleged

---

<sup>38</sup>*Lewis v. Casey*, 518 U.S. 343, 351-52 (1996); *Penrod v. Zavaras*, 94 F.3d 1399, 1403 (10<sup>th</sup> Cir. 1996).

<sup>39</sup>*Casey*, 518 U.S. at 351.

shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim."<sup>40</sup> Plaintiff's claim is infirm for several reasons. He has not shown that he has been unable to pursue a legal claim. In fact, he has pursued these legal claims at issue. Moreover, Defendants have shown that there are legal materials available to the patients in the SPT Program. Plaintiff admits that he has never requested access to any legal resources. Additionally, Plaintiff has failed to specifically allege facts showing that his First Amendment activities have actually been chilled. In short, Plaintiff has wholly failed to show any actual injury.

Plaintiff also states, in conclusory fashion, that his First Amendment rights concerning religious expression were violated. Not only does Plaintiff fail to state with any specificity how this right was implicated, in the transcribed testimony Plaintiff provided for his *Martinez* report, he denied any complaints relative to religious expression:

Question: In numbered paragraph 71, it goes on to talk about your  
Right to freedom of religion. Do you have some complaint  
That relates to your religion in some way, sir?  
Answer: No.

Thus, even with respect to Plaintiff's First Amendment claims, he has not pled nor shown sufficient facts to overcome the defense of qualified immunity. Qualified immunity is available if the right allegedly infringed upon was not clearly established at the time of the challenged conduct; if the officer did not know or had no reason to know of the right; and if the actor did not know or had no reason to know the conduct violated the constitutional norm.<sup>41</sup> For these reasons, the individual

---

<sup>40</sup>*Id.*

<sup>41</sup>*Procunier v. Navarette*, 434 U.S. 555, 562 (1978); *Wood v. Strickland*, 420 U.S. 308, 322 (1975). *See also*, *Gallegos v. City and County of Denver*, 984 F.2d 358, 361 (10th Cir.), *cert. denied*, 508 U.S. 972 (1993) (right must be

Defendants enjoy qualified immunity to the extent Plaintiff sues them in their individual capacities.

**IT IS THEREFORE ORDERED** that Summary Judgment is **GRANTED** on Defendants' Motion to Dismiss (Doc. 32) and this case is **DISMISSED**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Default Judgment (Doc. 28) is **DENIED**.

**IT IS FURTHER ORDERED** that Plaintiff's Motion for Order to Show Cause (Doc. 21) is **DENIED**.

IT IS SO ORDERED.

Dated this 27<sup>th</sup> day of September, 2004.

S/ Julie A. Robinson  
Julie A. Robinson  
United States District Judge

---

clearly established at time of act to subject officer to liability).