United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 2, 2021
Lyle W. Cayce
Clerk

No. 19-30029

MAX RAY BUTLER,

Plaintiff—Appellant,

versus

S. PORTER; K. MORGAN; CALVIN JOHNSON; CAPTAIN REX; CALEB GOTREAUX; KACI MAXEY; A. WHITE; CHRISTOPHER GORE; JOHN DOES; SHU STAFF; SIA LIEUTENANT S. BROWN; SIS TECHNICIAN R. RODRIGUEZ; J. LEDOUX; F. COKER; C. ROBINSON; C. WILSON; UNKNOWN OFFICER;

Defendants—Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 2:17-CV-230

Before OWEN, *Chief Judge*, and DENNIS and HAYNES, *Circuit Judges*.

HAYNES, *Circuit Judge*:

Max Ray Butler appeals the district court's dismissal of his First Amendment and Due Process claims, denial of his motions for appointment of counsel, and denial of leave to file a surreply and amend his complaint. For the following reasons, we AFFIRM in part and DISMISS in part.

I. Background

Butler, a federal prisoner, filed a civil rights complaint under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against various staff members ("Defendants") at the Oakdale Federal Correctional Complex. He claimed that he had been held in the prison's Special Housing Unit ("SHU") without due process for over 280 days, which he asserted was not the result of a disciplinary violation. He also claimed that after he filed a grievance concerning his detention, officials manufactured a backdated detention order with deficient or false information. He noted the harsh conditions in SHU and said that his extended confinement there could affect his mental health.

Butler contended that prison officials at Oakdale had deprived him of his due process rights and violated Bureau of Prisons ("BOP") policy by maintaining his close-custody status and by recommending him for a prison transfer despite his verbal and written complaints. He argued that his continued stay in SHU and his transfer to another facility constituted retaliation for his filing of grievances. He alleged that he was deprived of medical care, medications, and eyeglasses in further retaliation. In a supplement, construed as an amended complaint, Butler contended that Defendants were retaliating against him and denying him access to the courts by destroying commissary requests and not allowing him to buy stamps.

Butler filed a series of motions for appointment of counsel, which were all denied by the magistrate judge. He also filed a series of amended complaints adding defendants and further challenging his SHU detention.

The magistrate judge issued a report recommending that most of Butler's claims be dismissed as frivolous, as moot, or as failing to state a claim. In relevant part, the magistrate judge found that Butler had not alleged a denial of due process for his SHU detention because he was able to participate in some activities and had not remained in SHU long enough to trigger a due process interest. The magistrate judge also found that the failure of Oakdale staff to follow BOP policies did not rise to the level of a constitutional violation. However, the magistrate judge found that Butler's assertions of retaliation were sufficient to allege a constitutional violation and

recommended that these claims proceed. The magistrate judge ordered Butler to amend his complaint to clarify which defendants had retaliated against him.

Butler objected to the magistrate judge's report. In yet another amended complaint, Butler complained about actions by officials and his continued SHU stay at a new facility in California. He also sought reconsideration of his due process claim.

The magistrate judge issued a supplemental report and recommendation finding that Butler's claims against the defendants in California were not brought in the proper forum and that the claims against the Oakdale defendants not identified as participating in retaliatory acts should also be dismissed. With respect to Butler's motion for reconsideration, the magistrate judge found that his argument relating to the duration of time spent in SHU did not entitle him to relief because he still had not met the threshold for atypical close custody. The district court adopted the magistrate judge's original and supplemental reports and dismissed Butler's claims, other than the one for retaliation, under 28 U.S.C. § 1915(e)(2)(B).

Defendants moved to dismiss Butler's retaliation claims under Federal Rule of Civil Procedure 12(b)(6). They argued that, in accordance with the reasoning in *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), the district court should decline to extend *Bivens* to address claims of First Amendment retaliation.

In addition to responding (and then filing a later-stricken surreply), Butler also moved for leave to amend his complaint after the magistrate judge issued a third and final report and recommendation. The magistrate judge originally granted Butler's motion, but later rescinded that order, noting that no amendment had been attached and concluding that despite having "multiple opportunities to amend his complaint already," Butler did "not provide adequate excuse for his failure to uncover the legal standards for the claims he first asserted . . . over twenty months ago." Butler later moved for leave to amend again, which the district court denied.

The district court then dismissed Butler's remaining retaliation claim for failure to state a claim for relief under Rule 12(b)(6). Butler filed a timely notice of appeal and was later appointed counsel. He now challenges (1) the district court's refusal to extend *Bivens* to his First Amendment retaliation claim; (2) the district court's rejection of his due process claim arising from his stay in the SHU; (3) the magistrate judge's denials of his motions for appointment of counsel; and (4) the district court's denials of his motions for leave to file a surreply and an amended complaint.

II. Standard of review

We review a Rule 12(b)(6) dismissal de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff[]." *Gonzalez v. Kay*, 577 F.3d 600, 603 (5th Cir. 2009) (internal quotation marks and citation omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). A pro se litigant's pleadings are construed liberally. *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972).

The Prison Litigation Reform Act ("PLRA") requires a district court to dismiss a prisoner's *in forma pauperis* civil rights complaint if the court determines that the action is frivolous or fails to state a claim upon which relief may be granted. *Black v. Warren*, 134 F.3d 732, 733 (5th Cir. 1998) (per curiam); *see* 28 U.S.C. § 1915(e)(2)(B)(i)–(ii). We review a § 1915(e)(2)(B)(i) dismissal as frivolous for abuse of discretion. *Black*, 134 F.3d at 734. We review dismissals under § 1915(e)(2)(B)(ii) for failure to state a claim de novo, using the same standard applicable to Rule 12(b)(6) dismissals. *Id.*

We review a district court's decision on whether to permit a surreply for abuse of discretion. *See Austin v. Kroger Tex., L.P.*, 864 F.3d 326, 336 (5th Cir. 2017) (per curiam). We similarly review a district court's denial of leave

to file an amended complaint for abuse of discretion. *Lowrey v. Tex. A & M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997).

III. Discussion

A. *Bivens*

Butler first challenges the district court's conclusion that *Bivens* did not create an implied cause of action for his First Amendment retaliation claim. We recently addressed this issue and declined to extend *Bivens* to First Amendment retaliation claims. *Watkins v. Three Admin. Remedy Coordinators of Bureau of Prisons*, No. 19-40869, 2021 WL 2070612, at *3 (5th Cir. May 24, 2021). That holding binds us here.

Bivens recognized an implied cause of action against federal employees for unreasonable searches and seizures in violation of the Fourth Amendment. 403 U.S. at 389. Thereafter, the Supreme Court extended *Bivens* in only two more cases: *Davis v. Passman*, 442 U.S. 228, 248-49 (1979) (gender discrimination in violation of the Fifth Amendment) and *Carlson v. Green*, 446 U.S. 14, 16–18 (1980) (failure to treat a prisoner's medical condition in violation of the Eighth Amendment). *See Abbasi*, 137 S. Ct. at 1855 ("These three cases—*Bivens*, *Davis*, and *Carlson*—represent the only instances in which the Court has approved of an implied damages remedy under the Constitution itself."). It has "never held that *Bivens* extends to First Amendment claims." *Reichle v. Howards*, 566 U.S. 658, 663 n.4 (2012). Indeed, in recent decades, the Supreme Court has "consistently refused to extend *Bivens* to *any* new context." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 68 (2001) (emphasis added); *accord Abbasi*, 137 S. Ct. at 1857 (noting that the Court has refused to recognize new *Bivens* actions "for the past 30 years" and listing a series of cases involving such refusals).

In *Abbasi*, the Court stated that "[w]hen a party seeks to assert an implied cause of action under the Constitution itself . . . separation-of-powers principles are or should be central to the analysis. The question is who should decide whether to provide for a damages remedy, Congress or the courts?" 137 S. Ct. at 1857 (internal quotation marks and citation omitted). "The answer," the Court concluded, "most often will be

Congress." *Id.* This is because "[i]n most instances . . . the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Id.* (cleaned up). As a result, "the Court has urged caution before extending *Bivens* remedies into any new context." *Id.* (internal quotation marks and citation omitted). Indeed, "expanding the *Bivens* remedy is now considered a disfavored judicial activity." *Id.* (internal quotation marks and citation omitted)

Recently, we have declined to extend *Bivens* to other contexts. *See, e.g.*, *Hernandez v. Mesa*, 885 F.3d 811, 823 (5th Cir. 2018) (en banc) (refusing to extend *Bivens* to Fourth and Fifth Amendment claims arising from a cross-border shooting), *aff'd*, 140 S. Ct. 735 (2020). We have noted that, "as First Amendment retaliation claims are a 'new' *Bivens* context, it is unclear—and unlikely—that *Bivens*'s implied cause of action extends this far." *Petzold v. Rostollan*, 946 F.3d 242, 252 n.46 (5th Cir. 2019) (citing *Abbasi*, 137 S. Ct. at 1859). This suspicion was later confirmed in *Watkins*, which expressly "decline[d] to extend *Bivens* to include First Amendment retaliation claims against prison officials." No. 19-40869, 2021 WL 2070612, at *3.

Butler has not raised any issues that draw the conclusion in *Watkins* into question due to the steps we take in addressing a *Bivens* claim. The first step requires determining "whether the claim arises in a new *Bivens* context, *i.e.*, whether the case is different in a meaningful way from previous *Bivens* cases decided by [the Supreme] Court." *Abbasi*, 137 S. Ct. at 1864 (internal quotation marks and citation omitted). That is the case here. We have already concluded that "First Amendment retaliation claims are a 'new' *Bivens* context."[1] *Petzold*, 946 F.3d at 252 n.46; *see also Brunson v. Nichols*, 875 F.3d 275, 279 n.3 (5th Cir. 2017). This "new" designation is appropriate because previously recognized *Bivens* remedies have arisen under different constitutional amendments and factually distinct circumstances. *See*

[1] Indeed, we recently held that "*Bivens* claims are limited to three situations . . . [v]irtually everything else is a new context." *Byrd v. Lamb*, No. 20-20217, 2021 WL 871199, at *2 (5th Cir. Mar. 9, 2021) (cleaned up).

Carlson, 446 U.S. at 16–18 (recognizing a *Bivens* cause of action under the Eighth Amendment for a deceased prisoner who was deprived medical attention by prison officers who knew of his serious medical condition); *Davis*, 442 U.S. at 229–34 (recognizing a *Bivens* cause of action under the Due Process Clause of the Fifth Amendment for a female employee who was terminated based on her gender); *Bivens*, 403 U.S. at 389–90 (recognizing a *Bivens* cause of action for damages under the Fourth Amendment for an unwarranted search and seizure of the plaintiff's apartment, as well as his arrest). Given our previous holdings and the lack of Supreme Court precedent on the issue, *see Reichle*, 566 U.S. at 663 n.4, we conclude that Butler's First Amendment retaliation claim presents a new *Bivens* context, *Watkins*, No. 19-40869, 2021 WL 2070612, at *2. We thus proceed to the second step of the analysis.

We also look at whether "there are special factors counselling hesitation in the absence of affirmative action by Congress." *Abbasi*, 137 S. Ct. at 1857 (cleaned up). In such a case, "a *Bivens* remedy will not be available." *Id.*

The "special factors" inquiry "concentrate[s] on whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed." *Id.* at 1857–58. Such factors include whether Congress has legislated on the right at issue and whether alternative remedies exist for protecting that right. *Id.* at 1858, 1862. Courts also consider separation-of-powers concerns. *Hernandez*, 140 S. Ct. at 743. Importantly, "[e]ven before *Abbasi* clarified the special factors inquiry, we agreed with our sister circuits that the only relevant threshold—that a factor counsels hesitation—is remarkably low." *Hernandez*, 885 F.3d at 823 (cleaned up).

At least two special factors counsel hesitation here. First, congressional legislation already exists in this area. Congress addressed the issue of prisoners' constitutional claims in the PLRA, 42 U.S.C. § 1997e, which "does not provide for a standalone damages remedy against federal jailers." *Abbasi*, 137 S. Ct. at 1865. This supports a conclusion that Congress considered—and rejected—the possibility of federal damages for First

Amendment retaliation claims like Butler's.[2] Such "legislative action suggesting that Congress does not want a damages remedy is itself a factor counseling hesitation."[3] *Id.*

Second, separation-of-powers concerns counsel against extending *Bivens*. The Supreme Court has recognized that

> [r]unning a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. Prison administration is, moreover, a task that has been committed to the responsibility of those branches, and separation of powers concerns counsel a policy of judicial restraint.

Turner v. Safley, 482 U.S. 78, 84–85 (1987), *superseded by statute on other grounds*, 42 U.S.C. § 2000cc-1(a), *as recognized in Warsoldier v. Woodford*, 418 F.3d 989, 994 (9th Cir. 2005). Extending *Bivens* to First Amendment retaliation claims like Butler's would run afoul of this restraint and risk improperly entangling courts in matters committed to other branches. Indeed, because of the very complex nature of managing federal prisons, such a holding would substantially impinge on the executive branch, in addition to the legislative branch. Such a result would be a paradigmatic violation of separation-of-powers principles.

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[2] Butler points to § 806 of the PLRA as evidence that Congress implicitly recognized a *Bivens* remedy in the context of the PLRA. Such recognition is not surprising considering the Supreme Court's decision to extend *Bivens* to an Eighth Amendment claim against prison officials for the failure to treat an inmate's life-threatening condition. *See Carlson*, 446 U.S. at 16 & n.1, 24–25. Relevant here, Butler offers no argument that § 806 indicates congressional intent to extend *Bivens* to a new context. Therefore, congressional enactment of § 806 does nothing to diminish the suggestion that Congress did not intend for a standalone damages remedy against federal jailers, apart from the one previously established *before* the PLRA's enactment.

[3] Another example of express congressional remedies addresses a different part of the First Amendment: religious freedom. Indeed, the Supreme Court recently decided a case regarding the question of whether the Religious Freedom Restoration Act of 1993 ("RFRA") permits lawsuits seeking monetary damages against individual federal employees (in other words, a statute, not *Bivens*). *See Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020). That statute is not at issue here, but it illustrates Congress's attention to this subject matter.

Additionally, as *Watkins* explained, a robust amount of case law from other circuits supports this conclusion. *See, e.g.*, *Earle v. Shreves*, No. 19-6655, 2021 WL 896399, at *5 (4th Cir. Mar. 10, 2021) (declining to extend a *Bivens* remedy to include a prisoner's First Amendment retaliation claim because "special factors" counseled hesitation, including considerations that there could be "significant intrusion into an area of prison management" and that "other avenues [were] available"); *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523–26 (6th Cir. 2020) (declining to extend *Bivens* to a prisoner's First Amendment retaliation claim because of the existence of the PLRA, availability of alternative means of relief, and separation-of-powers concerns); *Bistrian v. Levi*, 912 F.3d 79, 95–96 (3d Cir. 2018) (declining to extend *Bivens* to a prisoner's First Amendment retaliation claim because it "involve[d] executive policies, implicate[d] separation-of-power concerns, and threaten[ed] a large burden to both the judiciary and prison officials"); *Vega v. United States*, 881 F.3d 1146, 1153–55 (9th Cir. 2018) (declining, "[i]n light of the available alternative remedies," to extend *Bivens* to a former prisoner's First and Fifth Amendment claims). As a result, even if *Watkins* had come out the other way, this case would be subject to qualified immunity given the lack of "clearly established" law supporting Butler's claim. *See Lane v. Franks*, 573 U.S. 228, 243-46 (2014) (internal quotation and citation omitted).

B. Due Process

Butler next argues that Defendants violated his due process rights by placing him in SHU. The district court sua sponte dismissed this claim under 28 U.S.C. § 1915(e)(2)(B). *Butler v. Porter*, No. 2:17-CV-230, 2018 WL 505333, at *1 (W.D. La. Jan. 19, 2018). We affirm.

As a general rule, "[a]n inmate has neither a protectible property nor liberty interest in his custody classification." *Moody v. Baker*, 857 F.2d 256, 257–58 (5th Cir. 1988) (per curiam). Great deference is accorded to prison officials in their determination of custodial status. *See Wilkerson v. Goodwin*, 774 F.3d 845, 852 (5th Cir. 2014). Thus, "absent extraordinary circumstances, administrative segregation as such, being an incident to the

ordinary life as a prisoner, will never be a ground for a constitutional claim." *Pichardo v. Kinker*, 73 F.3d 612, 612 (5th Cir. 1996). In other words, segregated confinement is not grounds for a due process claim unless it "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995). We look specifically at the severity and duration of restrictive conditions to decide whether a prisoner has a liberty interest in his custodial classification. *Wilkerson*, 774 F.3d at 854–55; *accord Bailey v. Fisher*, 647 F. App'x 472, 476–77 (5th Cir. 2016) (per curiam).[4]

The Supreme Court has recognized that there are circumstances where solitary confinement, in conjunction with indefinite duration and disqualification from parole, can constitute such hardship. *Wilkinson v. Austin*, 545 U.S. 209, 223–24 (2005). Regarding the duration of the restrictive confinement, we have said "that two and a half years of segregation is a threshold of sorts for atypicality . . . such that 18–19 months of segregation under even the most isolated of conditions may not implicate a liberty interest." *Bailey*, 647 F. App'x at 476 (citing *Wilkerson*, 774 F.3d at 855).

In *Wilkinson*, the Supreme Court concluded that the defendant experienced "atypical and significant hardship" because he was in an Ohio Supermax facility and prohibited from "almost all human contact," including communication with other inmates; the lights were on for twenty-four hours per day; he could exercise only one hour per day in a small room; review of placement occurred only annually; and placement in the facility disqualified an inmate from parole consideration. 545 U.S. at 223–24. Here, in contrast, the magistrate judge found that Butler could take courses, had weekly access to a telephone, and could exercise outside. Moreover, Butler provided documentation showing that prison officials reviewed his SHU stay at least monthly and sometimes weekly.

[4] "An unpublished opinion issued after January 1, 1996 is not controlling precedent, but may be persuasive authority." *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006).

Butler does not challenge the determination that the conditions he faced in the SHU were not onerous enough to constitute an atypical prison situation. *See Wilkerson*, 774 F.3d at 854–55; *Bailey*, 647 F. App'x at 476–77. He has thus abandoned this argument. *See Brinkmann v. Abner*, 813 F.2d 744, 748 (5th Cir. 1987). Moreover, Butler is unable to show that the conditions in the SHU were severe enough to implicate due process concerns.

Butler instead argues that his circumstances implicated a liberty interest, relying upon internal regulations. However, "[o]ur case law is clear . . . that a prison official's failure to follow the prison's own policies, procedures or regulations does not constitute a violation of due process, if constitutional minima are nevertheless met." *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996) (per curiam). Because Butler did not allege a protectable liberty interest, he has not shown that any omissions in process violated the Constitution,[5] regardless of whether the prison did or did not follow its own policies.

C. Appointment of Counsel

The magistrate judge denied Butler's motions for appointment of counsel. Butler challenges these denials, noting that he requested an attorney because he lacked legal training.

If a magistrate judge's order is "clearly erroneous or contrary to law," a district court judge may reconsider the matter. 28 U.S.C. § 636(b)(1)(A). But Butler did not seek district court review of the magistrate judge's rulings; he instead filed a letter describing his efforts to retain counsel. Later, he filed another motion to appoint counsel, but (again) did not mention a possible appeal to the district court. Because we lack jurisdiction to hear appeals directly from a magistrate judge, we cannot consider his arguments. *See United States v. Renfro*, 620 F.2d 497, 500 (5th Cir. 1980); *see also Wren v.*

[5] With respect to Butler's complaint that his transfer to a higher-security BOP facility implicates due process concerns, the Supreme Court has held, in the case of a state prisoner, that the Due Process Clause does not protect a convicted prisoner against transfer from one institution to another within the state's prison system, even if "life in one prison is much more disagreeable than in another." *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

Curtis, 697 F. App'x 304, 304 (5th Cir. 2017) (per curiam). We thus dismiss this portion of Butler's appeal.

D. Denial of Butler's Other Motions

Butler appeals the district court's denial of his motion for leave to file a surreply following Defendants' motion to dismiss. We review this decision for abuse of discretion. *See Austin*, 864 F.3d at 336. Butler fails to show any such abuse. He contends that delays in his mail caused by Defendants' counsel resulted in his surreply being "misconstrued" as an objection, and the district court should have had the "due diligence" to consider whether he had "pointed" out legal issues in his filing. However, the district court was not required to review the merits of Butler's claims;[6] Butler failed to move for leave of court to file his surreply and the third report and recommendation on Defendants' motion to dismiss had already issued. We cannot therefore say that the district court erred in striking his surreply. *See RedHawk Holdings Corp. v. Schreiber Tr. ex rel. Schreiber Living Tr.*, 836 F. App'x 232, 235 (5th Cir. 2020) (per curiam) (acknowledging there is "no right to file a surreply and surreplies are 'heavily disfavored'").

Butler also asserts that the district court should have granted his two motions for leave to file an amended complaint. In particular, Butler sought leave to amend to include various Eighth Amendment claims, which were dismissed sua sponte.[7] He argues that this dismissal was improper because he had "stated" the factual basis for his Eighth Amendment claims in his complaint and other filings and thus should have been granted another

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[6] Butler did not allege that Defendants' reply brief raised new arguments or that the district court relied on those new arguments in making its decision. *See RedHawk Holdings Corp. v. Schreiber Tr. ex rel. Schreiber Living Tr.*, 836 F. App'x 232, 235 (5th Cir. 2020) (per curiam) (acknowledging that "a district court abuses its discretion when it denies a party the opportunity to file a surreply in response to a reply brief that raised new arguments and then relies solely on those new arguments it its decision"). Indeed, Defendants' reply brief focused on responding to Butler's arguments, including his new Eighth Amendment claim.

[7] Butler's First and Eighth Amendment claims were the focus of his oral argument and supplemental briefing.

opportunity to amend his complaint. In addition, Butler maintains that he should have been permitted to amend his complaint because he could add new factual allegations and legal claims, noting that relevant "events and information occurred after the original filings[,] so it was not possible" for him to raise the claims earlier. We disagree.

A party may amend a pleading—as of right—within twenty-one days after serving it or within twenty-one days after being served a mandatory responsive pleading. FED. R. CIV. P. 15(a)(1). All other amendments require leave of court, although the court should "freely give leave when justice so requires." *Id.* 15(a)(2). Reasons for denying leave to amend include "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Lowrey*, 117 F.3d at 245 (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

We observe that Butler did not mention the Eighth Amendment at all in his initial complaint or all its elements. Nor did he mention the Eighth Amendment in six additional filings that the district court construed as amendments to his complaint. In fact, the grounds for his later asserted Eighth Amendment claims were discussed solely in the context of his due process and retaliation claims. In other words, there was nothing to put the court on notice that Butler was trying to raise an Eighth Amendment claim at all until well into the proceedings—*after* Defendants moved to dismiss.

When Butler finally moved to amend his complaint to include his Eighth Amendment claims, the magistrate judge had already issued the final report and recommendation. After the magistrate judge denied his motion, Butler again moved to amend. The magistrate judge denied this motion as well, and Butler objected. Although the district court did not explicitly rule on this objection, its entry of judgment without granting leave to amend was an implicit denial. *See Norman v. Apache Corp.*, 19 F.3d 1017, 1021 (5th Cir. 1994) ("The denial of a motion by the district court, although not formally expressed, may be *implied* by the entry of a final judgment or of an order inconsistent with the granting of the relief sought by the motion.").

The district court's denial was justified.[8] Contrary to Butler's assertions, he had been given numerous opportunities to amend his complaint. He could have added new information that occurred *after* his initial complaint in those earlier filings. Moreover, he fails to explain what part of and why the factual basis for his Eighth Amendment claims[9] were not available at the time of the original complaint. Thus, Butler has not shown that he should have been permitted to amend his complaint and that various factors justified such a denial. *See Lowrey*, 117 F.3d at 245 (listing "undue delay," "prejudice," and "repeated failure to cure deficiencies by amendments previously allowed" as reasons to deny leave to amend) (quoting *Foman*, 371 U.S. at 182)); *see, e.g.*, *Harris v. BASF Corp.*, 81 F. App'x 495, 496 (5th Cir. 2003) (per curiam) (holding that the district court did not abuse its discretion in deciding that allowing the plaintiff to expand his action from three claims to eight would cause undue delay and undue prejudice to the defendant, late in the proceedings).[10] In sum, the district court did not abuse its discretion in denying Butler's motions to amend his complaint. *See Lowrey*, 117 F.3d at 245.

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[8] Though the district court did not explain the reasons for its implicit denial, we "may affirm on any grounds supported by the record." *McGruder v. Will*, 204 F.3d 220, 222 (5th Cir. 2000).

[9] Butler also sought to raise a Fourth Amendment claim regarding mail tampering. The magistrate judge construed Butler's mail related complaints as a First Amendment claim, and Butler never challenged this interpretation. Butler later discussed various mail tampering claims, in-depth, in his sixth amended complaint, but that complaint referred to First Amendment claims, not Fourth Amendment ones. He also mentioned that Defendants opened a sealed letter in March 2017, which could have been discussed in various amended complaints. Therefore, Butler could have raised his Fourth Amendment claim at an earlier date.

[10] To the extent that Butler sought to identify defendants who participated in retaliatory acts against him, the magistrate judge had already recommended dismissing these claims because they were not cognizable under *Bivens*. The district court adopted the magistrate judge's conclusion. Thus, any amendment to identify the individuals who retaliated against Butler would have been futile. *See Lowrey*, 117 F.3d at 245.

Accordingly, the portion of Butler's appeal concerning appointment of counsel is DISMISSED for want of jurisdiction. In all other respects, the judgment of the district court is AFFIRMED.