

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Richmond Division

NICOLAS REYES,

Plaintiff,

v.

CASE NO. 3:18CV00611

HAROLD W. CLARKE, *et al.*,

Defendants.

**MEMORANDUM IN SUPPORT OF DEFENDANTS’
RULE 12(b)(3) MOTION TO DISMISS**

Plaintiff Nicolas Reyes is a level “S” offender who alleges that he “has lived in solitary confinement for twelve and a half consecutive years” at Virginia’s “most restrictive and notorious facility, Red Onion State Prison,” a Virginia Department of Corrections (“VDOC”) facility located in Wise County, Virginia. Compl. ¶ 1. He contends that his “mental health has deteriorated greatly” during his confinement, in part because he “is a monolingual Spanish speaker” who is unable to read and write in English. Compl. ¶¶ 1-2. Reyes alleges that, because he “lack[s] the capacity” to participate in the VDOC Segregation Reduction Step-Down Program, he is “trapped in solitary confinement.” Compl. ¶¶ 4, 7. Reyes also contends that he has been denied mental health services and has not been given “meaningful review” of his continued placement in restrictive housing. Compl. ¶¶ 6, 8.

Based on these factual allegations, Reyes claims that all of the Defendants were deliberately indifferent to prison conditions posing a serious and substantial risk of harm, in violation of the Eighth Amendment; that certain Defendants violated his procedural due process rights; that Defendants Clarke and Kiser violated the American with Disabilities Act (“ADA”),

the Rehabilitation Act, and Title VI of the Civil Rights Act of 1964; and that certain Defendants violated the Equal Protection Clause of the Fourteenth Amendment. He requests punitive damages, declaratory relief, injunctive relief, compensatory damages and/or nominal damages, and an award of costs and fees.

Defendants dispute the allegations of the complaint and will substantively address those allegations at the appropriate juncture. As an initial matter, however, Defendants challenge the propriety of Reyes having filed suit in this forum. Because not all of the named Defendants reside in the Commonwealth of Virginia, and because this action substantially arose at the prison where Reyes is incarcerated, proper venue lies in the Western District of Virginia. Defendants therefore move this Court to dismiss the complaint under Rule 12(b)(3), or, in the alternative, to transfer venue pursuant to 28 U.S.C. § 1406(a), after substantively screening the claims and parties in accordance with their contemporaneously-filed Rule 12(b)(6) motion to dismiss.¹

STATEMENT OF FACTS

“When evaluating the propriety of venue under Rule 12(b)(3), a district court may examine facts outside the complaint to determine whether venue is proper.” *Symbology Innovations, LLC v. Lego Sys.*, 158 F. Supp. 3d 916, 924 (E.D. Va. 2017). As evidence in support of their Rule 12(b)(3) motion to dismiss, Defendants therefore submit the following:

1. Plaintiff Nicolas Reyes is an inmate confined at Red Onion State Prison (“ROSP”), a facility operated by the Virginia Department of Corrections (“VDOC”). Compl. ¶1.

¹ Even if this Court were to determine that venue is technically proper in the Eastern District, Defendants request that this Court transfer the matter to the Western District of Virginia, Big Stone Gap Division, under 28 U.S.C. § 1404(a), based on the convenience of the parties and the witnesses. The *forum non conveniens* argument and information will be set forth in a separate motion and memorandum in support.

2. Defendant Harold Clarke is the Director of VDOC. He is “responsible for the overall supervision and management of the system of state correctional facilities,” and “has the authority to assign any offender to any institution deemed appropriate.” Compl. ¶ 17.

3. Defendant A. David Robinson is the Chief of Corrections Operations for VDOC. He “is responsible for the operations of Virginia’s correctional facilities, including overseeing the Department’s ‘restrictive housing’ program.” Compl. ¶18.

4. Defendant Jeffrey Kiser is the Warden of ROSP, a role that he has held since 2016. In that capacity, “he has ultimate responsibility over the care and custody of Red Onion prisoners,” including the authority to approve security-level classifications for offenders housed at that facility. Compl. ¶ 19.

5. Defendant Earl Barksdale is the former warden of ROSP, a role that he held from January 2015 until December 2016. Compl. ¶ 20.

6. Defendant Randall Mathena is the Security Operations Manager for VDOC, as well as a former warden of ROSP. As the Security Operations Manager, he conducts “biannual reviews” of each prisoner held in segregated confinement at ROSP. He was warden at ROSP from October 2011 until January 2015. Compl. ¶ 21.

7. Defendant Avril Gallihar is the Chief of Housing and Programs at ROSP. He has served on the Dual Treatment Team (“DTT”), which reviews the housing assignments and security classifications for offenders held in segregated confinement. Compl. ¶ 22.

8. Defendant Amee Duncan is the former unit manager for the C-building at ROSP, the housing unit in which Reyes was confined between 2010 and 2018. Defendant Duncan “reviewed segregation classification decisions made by the Institutional Classification Authority

(“ICA”), a team of staffers who conduct hearings to review the progress of individual prisoners through the [Segregation Reduction] Step-Down Program.” Compl. ¶ 23.

9. Defendant Larry Collis is the current unit manager of C-building, and he also “reviews segregation decisions made by the ICA.” Compl. ¶ 24.

10. Defendant Justin Kiser, Defendant Christopher Gilbert, Defendant Garry Adams, and Defendant James Lambert are alleged to be “former ICA member[s] at Red Onion, responsible for reviewing and recommending segregation classification for Mr. Reyes.” Compl. ¶¶ 25-28.

11. Defendant W. Lee is a psychology associate senior at VDOC’s central classification services, a unit that “renders final classification decisions with respect to prisoners’ security level and institution assignment, including mental health unit referrals.” Compl. ¶ 29.

12. Defendant Terrance Huff and Defendant D. Trent are qualified mental health professionals (“QMHPs”) at ROSP. Compl. ¶¶ 30-31.

13. Defendant Everett McDuffie is a psychiatrist who “contracts with VDOC to provide psychiatric services to prisoners” at ROSP. Compl. ¶ 32.

14. Defendant Steven Herrick is the Director of Health Services for VDOC, and he is “responsible for ensuring that all VDOC prisoners have adequate access to health services, including mental health services.” Compl. ¶ 33.

15. Defendants Barksdale, Duncan, Justin Kiser, Gilbert, Adams, and McDuffie are sued solely in their individual capacities. The remaining defendants are sued in their individual and official capacities. Compl. ¶¶ 17-33.

16. Of the seventeen Defendants, three individually-named Defendants—Garry Adams, Dr. Everett McDuffie, and Terrance Huff—are not domiciled in the Commonwealth of Virginia.

17. Defendant Adams maintains his permanent personal residence in the Commonwealth of Kentucky. *See Adams Aff.* ¶¶ 5-6 (attached as Exhibit 1).

18. Defendant McDuffie maintains his permanent personal residence in the State of Tennessee. *See McDuffie Aff.* ¶¶ 4-5 (attached as Exhibit 2).

19. And Defendant Huff maintains his permanent personal residence in the Commonwealth of Kentucky. *See Huff Aff.* ¶¶ 4-5 (attached as Exhibit 3).

20. Specifically, Defendant Adams lives in Eolia, Kentucky, in a single-family dwelling that is constructed on his own property. He has lived in this home for the past 21 years. *Adams Aff.* ¶ 6.

21. Defendant Adams pays income and property taxes to Kentucky, is registered to vote in Kentucky, has registered his vehicles in Kentucky, maintains his banking account in Kentucky, receives mail in Kentucky, has a Kentucky telephone number, and has a Kentucky driver's license. *Adams Aff.* ¶¶ 7-14.

22. Defendant Adams does not own or rent any property in the Commonwealth of Virginia. *Adams Aff.* ¶ 15.

23. Having lived in Kentucky for his entire life, Defendant Adams considers Kentucky to be his home state, and he has no intent to leave that jurisdiction. *Adams Aff.* ¶ 14.

24. Defendant McDuffie lives in Blountville, Tennessee, in a single-family townhome, along with his wife and two children. He has lived at that residence for the past 12 years. *McDuffie Aff.* ¶ 6.

25. Defendant McDuffie has a Tennessee telephone number, receives mail in Tennessee, pays personal property taxes to the State of Tennessee, has been registered to vote in Tennessee for the past fourteen years, has a Tennessee driver's license, has two personal vehicles that are titled with the Tennessee Department of Motor Vehicles, and maintains his banking account in Tennessee. McDuffie Aff. ¶¶ 7-15.

26. Defendant McDuffie does not own or rent any property in the Commonwealth of Virginia. McDuffie Aff. ¶ 15.

27. Defendant Huff lives in Cumberland, Kentucky, in a single-family dwelling, along with his immediate family. The house is constructed on property that he owns, and he has owned that property and lived in that residence for the past twenty years. Huff Aff. ¶ 6.

28. Defendant Huff has a Kentucky telephone number, pays state income and personal property taxes to the Commonwealth of Kentucky, receives mail in Kentucky, has been registered to vote in Kentucky for at least twenty years, has a Kentucky driver's license, has personal vehicles titled by the Kentucky Department of Motor Vehicles, and maintains his banking account in Kentucky. Huff Aff. ¶¶ 7-14.

29. Defendant Huff does not own or rent any personal property in the Commonwealth of Virginia. Huff Aff. ¶ 15.

30. Defendant Huff was "born and raised in Kentucky," and he lived there until he "enlisted in the U.S. Air Force at age 19." After "serving in the U.S. Air Force for 22 years," he "returned home to Kentucky," where he has "lived for the past twenty years." Having "grown up in Kentucky," and having lived there "for the past 20 years," Defendant Huff considers Kentucky to be his "home state." Huff Aff. ¶ 17.

31. Red Onion State Prison is located in Pound, Virginia. Compl. ¶ 16.

32. Pound, in turn, is located in Wise County, Virginia, which is included within the Big Stone Gap Division of the Western District of Virginia. W.D. Va. Local R. Civ. P. 2(a)(2).

ARGUMENT AND AUTHORITIES

In civil actions founded on federal question jurisdiction, venue is governed by 28 U.S.C. § 1391(b). *Williams v. Equity Holding Corp.*, No. 3:06cv783, 2007 U.S. Dist. LEXIS 29795, at *2 (E.D. Va. Feb. 9, 2007). As pertinent here, section 1391 provides that venue for a civil action is proper in: (1) a judicial district in which any defendant resides, if all of the defendants reside in the forum state, or (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred. 28 U.S.C. § 1391(b)(1), (b)(2). If there is no district that satisfies either of these two conditions, the civil action may be brought in any district “in which any defendant is subject to the court’s personal jurisdiction with respect to such action.” 28 U.S.C. § 1391(b)(3).

With respect to § 1391(b)(1)—venue based on residency—natural persons “shall be deemed to reside in the judicial district in which that person is domiciled.” 28 U.S.C. § 1391(c)(1). “[A] person’s domicile,” in turn, “is that place where he has his true, fixed, and permanent home, and to which he has the intention of returning in the future although he may presently be absent therefrom.” *Manley v. Engram*, 755 F.2d 1463, 1466 n.3 (11th Cir. 1985); *see also Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989) (“For adults, domicile is established by physical presence in a place in connection with a certain state of mind concerning one’s intent to remain there.”); *Johnson v. Advance Am.*, 549 F.3d 932, 937 n.2 (4th Cir. 2008) (“Domicile requires physical presence, coupled with an intent to make the State a home.”). Multiple factors may be considered when determining an individual’s domicile, but “some factors carry more weight than others.” *Hall v. Nestman*, No. 5:14-cv-00062, 2015 U.S.

Dist. LEXIS 83728, at *12 (W.D. Va. June 29, 2015) (quoting *Brooks v. Shope*, No. 3:09cv334, 2010 U.S. Dist. LEXIS 51627, at *7 (W.D.N.C. May 21, 2010)). For example, “the state in which an individual is registered to vote raises a presumption that the individual is a citizen of that state, and the presumption must be rebutted by evidence showing a clear intention that his citizenship is otherwise.” *Id.* (quoting *Brooks*, 2010 U.S. Dist. LEXIS 51627, at *7 (internal quotations omitted)); accord *Peterson v. Paddy*, No. 3:16cv00026, 2017 U.S. Dist. LEXIS 94074, at *8 (W.D. Va. June 19, 2017).

With respect to § 1391(b)(2)—venue based on the location of the underlying events—this Court has previously used “a two part analysis” to determine appropriate venue. *Adhikari v. KBR, Inc.*, No. 1:15cv1248, 2016 U.S. Dist. LEXIS 103593, at *11 (E.D. Va. Aug. 4, 2016). “First, the court must identify the nature of the claims and the acts or omissions that the plaintiff alleges give rise to those claims.” *Id.* “Second, the court must determine whether a substantial part of those acts or omissions occurred in this District.” *Id.* Overall, the “situs of the injury” is an important factor considered in determining proper venue under this subsection. *Verizon Online Servs. v. Ralsky*, 203 F. Supp. 2d 601, 623 (E.D. Va. 2002). Also, “[e]vents or omissions that might only have some tangential connection with the dispute in litigation are not enough,” for “courts take seriously the adjective ‘substantial.’” *Adhikari*, 2016 U.S. Dist. LEXIS 103593, at *12-13 (internal quotations omitted).

If a case is filed in an improper venue, a party may seek dismissal and/or transfer to a proper venue pursuant to Rule 12(b)(3) and 28 U.S.C. § 1406(a). *Colonna’s Shipyard, Inc. v. City of Key West*, 735 F. Supp. 2d 414, 416 (E.D. Va. 2010); see also 28 U.S.C. § 1406(a) (providing that, when a case is filed “laying venue in the wrong division or district,” the court “shall dismiss, or if in the interest of justice, transfer such case to any district or division in

which it could have been brought”). “When ruling on a 12(b)(3) motion, the pleadings are not accepted as true, as would be required under a Rule 12(b)(6) analysis, and the court can therefore consider evidence outside the pleadings.” *W. Ref. Yorktown, Inc. v. BP Corp.. N. Am. Inc.*, 618 F. Supp. 2d 513, 516 (E.D. Va. 2010) (internal quotations omitted). The plaintiff bears the burden of showing that venue is proper. *Colonna’s Shipyard*, 735 F. Supp. 2d at 416; *see also Polygroup Ltd. v. Gen. Foam Plastics Corp.*, No. 3:12cv48, 2012 U.S. Dist. LEXIS 90223, at *8 (E.D. Va. June 27, 2012); *Corrosion Tech. Int’l, LLC v. Anticorrosive Industriales LTDA*, No. 1:10cv915, 2011 U.S. Dist. LEXIS 92945, at *6-7 (E.D. Va. Aug. 19, 2011) (citing *Bartholomew v. Va. Chiropractors Ass’n, Inc.*, 612 F.2d 812, 816 (4th Cir. 1979)).

For purposes of this case, before considering whether venue should be determined under the “catchall” provision of § 1931(b)(3), as has been alleged by Reyes, *see* Compl. ¶ 15, it is necessary to first determine whether proper venue can be established under either of the preferred venue subsections. Only if there is no district that satisfies the conditions set for subsections (b)(1) or (b)(2), should subsection (b)(3) be considered to determine venue.

With respect to § 1391(b)(1)—venue based on residency—venue may be brought in a judicial district “in which any defendant resides,” only if “all of the defendants reside in the forum state.” 28 U.S.C. § 1391(b)(1). Under the venue statute, “residency” for an individual equates with “domicile.” 28 U.S.C. § 1391(c)(1). Here, however, three of the named defendants are domiciled in other jurisdictions. Defendant McDuffie is domiciled in Tennessee, and Defendants Huff and Adams are domiciled in Kentucky. As set forth in their respective affidavits, none of these individuals is registered to vote Virginia, physically lives in a Virginia, owns property in Virginia, has a Virginia’s driver’s license, or maintains banking accounts in Virginia. Each defendant has maintained his personal residence in the other jurisdiction for a

substantial period of time (12 years, 20 years, and 21 years), and also pays taxes in that different state. For this reason, each maintains his “true, fixed, and permanent home” in a jurisdiction other than Virginia—and therefore does not “reside” in the Commonwealth of Virginia for purposes of § 1391(b)(1). It follows that, because not “all of the defendants reside in the forum state,” preferred venue cannot be established under § 1391(b)(1).

However, with respect to § 1391(b)(2)—venue based on the location of the underlying events—preferred venue can be established. The events underlying this prisoner complaint overwhelmingly and substantially arose at Red Onion State Prison. Reyes complains about his conditions of confinement at Red Onion State Prison, the alleged lack of accommodations that were made for him at Red Onion State Prison, the alleged lack of mental health treatment at Red Onion State Prison, his alleged discriminatory treatment at Red Onion State Prison, and his alleged inability to progress out of segregation at Red Onion State Prison. Thus, it is plain that a “substantial” part of the events giving rise to this litigation occurred at Red Onion State Prison, which is located in the Western District of Virginia, in the Big Stone Gap Division.

The fact that some Defendants, named in their official capacities, may have signed policies and provided general oversight from Richmond does not establish proper venue in the Eastern District of Virginia. As this Court has previously reasoned, “broad oversight occurring in this District” does not establish a “substantial” nexus to the events underlying the litigation, where the Plaintiff “suffered [his] harms exclusively” in another location and “the individuals imposing those harms” were located in the other jurisdiction. *Adhikari*, 2016 U.S. Dist. LEXIS 103593, at *15. The fact that “policies emanating from this District” might have “enabled” those harms was not sufficient to create a “substantial” nexus to the underlying events. *Id.*

For these reasons, a substantial part—if not all—of the acts or omissions giving rise to this lawsuit arose in the Western District of Virginia. No substantial actions or omissions occurred within the Eastern District of Virginia. Proper venue, under § 1391(b)(2), therefore lies in the Western District of Virginia. Because venue is not proper in the Eastern District of Virginia, Defendants therefore move this Court, under Rule 12(b)(3), to dismiss this action for improper venue.²

CONCLUSION

Because proper venue in this action lies in the Western District of Virginia, rather than the Eastern District of Virginia, Defendants respectfully request that this Court GRANT their Rule 12(b)(3) motion to dismiss and remove this case from the active docket of the Court. In the alternative, Defendants request that this Court transfer venue to the Western District of Virginia, after substantively screening the claims and parties in accordance with their contemporaneously-filed Rule 12(b)(6) motion to dismiss.

Respectfully submitted,

HAROLD CLARKE, A. DAVID ROBINSON,
JEFFREY KISER, RANDALL MATHENA, EARL
BARKSDALE, ARVIL GALLIHAR, AMEE
DUNCAN, LARRY COLLINS, JUSTIN KISER,
CHRISTOPHER GILBERT, GARRY ADAMS,
JAMES LAMBERT, WILLIAM LEE, TERRANCE
HUFF, D. TRENT, EVERETT ELLISON
MCDUFFIE, and STEVEN HERRICK

² However, Defendants recognize that this Court may exercise its discretion under § 1406(a) to transfer venue to the Western District. In the event that this Court deems that a transfer is appropriate, Defendants are submitting, simultaneously with this motion, arguments and defenses under Rule 12(b)(6) of the *Federal Rules of Civil Procedure*, so that the complaint can be substantively evaluated and screened prior to transferring any remaining claims to the Western District.

By: _____ /s/
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