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.

REPLY IN FURTHER SUPPORT OF DEFENDANTS' RULE 12(b)(3) MOTION TO DISMISS

Plaintiff evidently concedes that preferred venue cannot be established under 28 U.S.C. § 1391(b)(1), contending instead that venue in this Court is proper under § 1391(b)(2) because he now claims that a "substantial part of the events or omissions" giving rise to his suit occurred in Richmond. When amending the venue statue in 1990, however, Congress did not provide that venue would be proper where "some" of the events or omissions giving rise to the suit occurred. Congress did not provide that venue would be proper where "any" of the events or omissions giving rise to the suit occurred. Instead, Congress carefully and specifically provided that venue would be proper where a "*substantial part*" of the events or omissions giving rise to the suit occurred. This cause of action challenges various aspects of the Plaintiff's twelve-year stay in so-called "solitary confinement" at a single prison in the mountains of southwest Virginia. When the plain language of § 1391(b)(2) is applied, it is clear that a "substantial" part of this cause of action did not arise in the Eastern District of Virginia. For this reason, venue is improper in this Court, and Defendants' Rule 12(b)(3) motion to dismiss should be granted.

Defendants recognize that "it is possible for venue to be proper in more than one judicial district." *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004). As one court has cautioned, however, "[f]acts establishing minimum contacts with a forum that could give rise to personal jurisdiction over a defendant do not necessarily establish venue." *Indus. Servs. Grp. v. Kensington*, No. 3:17-2286, 2018 U.S. Dist. LEXIS 132699 (D.S.C. July 23, 2018). Rather, "courts take seriously the adjective 'substantial.'" *Adhikari v. KBR, Inc.*, No. 1:15cv1248, 2016 U.S. Dist. LEXIS 103593, at *12-13 (E.D. Va. Aug. 4, 2016). That is, "for venue to be proper, *significant* events or omissions *material* to the plaintiff's claim must have occurred in the district in question." *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 357 (2d Cir. 2005) (emphasis in original); *see also Leone v. Cataldo*, 574 F. Supp. 2d 471, 484 (E.D. Pa. 2008) ("Acts or omissions in the forum must be more than tangentially related to the claim in order to be substantial."). Also, 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); *see also Jenkins Brick Co. v. Bremer*, 321 F.3d 1366, 1371 (11th Cir. 2003) ("[Section 1391(b)(2)] contemplates some cases in which venue will be proper in two or more districts. This does not mean, however, that the amended statute no longer emphasizes the importance of the place where the wrong has been committed. Rather, the statute merely allows for additional play in the venue joints, reducing the degree of arbitrariness in close cases.").

Plaintiff argues that venue is proper in the Eastern District because, in essence, five of the named defendants adopted or failed to adopt certain policies while allegedly working at VDOC headquarters in Richmond. These general supervisory allegations fail to cross the "substantiality" threshold. It is true that VDOC policies are signed at VDOC headquarters by administrators who work in Richmond. But it is the implementation and application of those

policies at Red Onion State Prison ("ROSP") that form the heart of the Plaintiff's lawsuit. The Plaintiff has not raised a general facial challenge to the VDOC Step-Down Program and its associated policies. He challenges instead its application, as to him, at ROSP. And of note, those policies are not state-wide in their applicability. They are administered at two prisons in the Western District, and the Western District alone.

Plaintiff's position would mean, in essence, that any time a prisoner challenges the application of **any** VDOC policy to him, venue would be proper in the Eastern District of Virginia. This Court has implicitly—if not outright—rejected that argument. *See, e.g.*, *Farrakhan v. Johnson*, No. 1:08cv438, 2009 U.S. Dist. LEXIS 40342, at *11-12 (E.D. Va. May 13, 2009). In *Farrakhan*, the plaintiff brought multiple claims to relief, including an Eighth Amendment conditions-of-confinement claim, procedural due process claim, First Amendment right of access to the courts and freedom of religion claim, and Fourteenth Amendment equal protection claim. This Court *sua sponte* severed and transferred those claims—some of which arose from the application of general VDOC policies— holding that the complaint "raise[s] allegations concerning acts or omissions which occurred at Wallens Ridge State Prison, in Pound, Virginia," and, "[a]s such, venue over those claims is not proper in this district." *Id.*

Here, too, the fact that VDOC administrators adopt policies in Richmond, for application in other parts of the Commonwealth, does not mean that a "substantial part" of the Plaintiff's cause of action arose here. That term "substantial" must be construed so as to give it meaning separate and apart from the more general phrase, "acts or omissions." And overwhelmingly, the material acts and omissions that form the basis of the Plaintiff's claim occurred in the Western District of Virginia. Particularly considering that the complaint fails to allege sufficient and

plausible involvement on behalf of the Defendants who are alleged to reside in Richmond, the already-tenuous connection to the Eastern District fails.

In *Adhikari*, for example, this Court considered the substantiality question in a federal suit where a foreign company, working on behalf of six domestic businesses, allegedly engaged in human trafficking oversees, and the domestic companies were allegedly aware of the misconduct, but failed to intervene. The plaintiffs argued that venue was proper in the Eastern District of Virginia because "employees overseeing the . . . contract from Virginia failed to address complaints that labor brokers in Iraq were engaged in human trafficking and forced labor." 2016 U.S. Dist. LEXIS 103593, at *11. Noting that courts generally "emphasiz[e] the location where the harm and alleged tortious acts occurred," this Court concluded that the plaintiffs failed to establish venue in the Eastern District of Virginia. *Id.* at *14. This Court reasoned that "[t]he activities in this District involved high-level oversight," such as "monitoring" employees and subcontractors and "responding to employee and media inquiries into allegations of illegal labor practices." *Id.* at *14-15. Although employees in this District "had the authority to create policies," and the "[a]cts or omissions in this District may have cultivated an environmental that allowed illegal [] practices to flourish," this Court concluded that those contacts were not sufficiently substantial to establish proper venue. *Id.* at *15.

Similarly, here, the "broad oversight" of the Defendants who work at VDOC headquarters does not form a material and substantial basis for the Plaintiff's cause of action. Although "[t]hat oversight is certainly a relevant part of Plaintiffs' claims, [] it is not a 'substantial' part when considering" that the Plaintiff claims he was continuously subjected to his allegedly unconstitutional conditions of confinement in the Western District for a period of twelve years. *Id.*; *see also Kinser v. Salt Bar LLC*, No. 2:18-1816, 2018 U.S. Dist. LEXIS

129756, at *4 (D.S.C. Aug. 2, 2018) (rejecting argument in a personal injury action that venue was proper in South Carolina because the plaintiff received medical treatment in South Carolina, reasoning that this subsequent treatment was not "sufficiently substantial to support venue under 28 U.S.C. § 1391(b)(2)"); *Mead v. Gaston Cnty. Police Dep't*, No. 0:11-cv-3017, 2012 U.S. Dist. LEXIS 24790, at *7-8 (D.S.C. Feb. 27, 2012) ("Though some action did take place in this district, the overwhelming majority of actions occurred in [another district]," and, thus, "the court finds that those activities do not constitute a substantial part of the events giving rise to this claim").

CONCLUSION

That some of the 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. For these reasons, and those discussed in more detail in the Memorandum in Support of Defendants' Motion to Dismiss for Improper Venue (ECF No. 14), Defendants respectfully request that this Court GRANT their motion to dismiss or, in the alternative, transfer venue to the Western District of Virginia, where all parties evidently agree venue would be proper.

Respectfully submitted,

CLARKE, ROBINSON, JEFFREY KISER, MATHENA, BARKSDALE, GALLIHAR, DUNCAN, COLLINS, JUSTIN KISER, GILBERT, ADAMS, LAMBERT, LEE, HUFF, TRENT, and HERRICK, Defendants

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of November, 2018, I electronically filed the foregoing Reply in Further Support of Defendants' Rule 12(b)(3) Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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And I hereby certify that I have mailed the document by United States Postal Service to the following non-filing user: N/A

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