COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
C.A. No. 2481CV03028

BO SHANG
Plaintiff,

v.

COLLEEN MADIGAN

Defendant.

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION TO DISMISS (Mass R. Civ. P. 12(b)(6)

Plaintiff Bo Shang's ("Plaintiff") Complaint, which raises a host of constitutional claims arising from Defendant Colleen Madigan ("Defendant") — a probation officer's — alleged lie to a judge, should be dismissed. The Complaint has not been served, the central allegations of fraud on the court are not supported by the particularized details required by Rule 9(b), and state sovereign immunity precludes suits against Defendant in her official capacity. To the extent Defendant is sued in her personal capacity, the Complaint does not allege facts which, taken as true, show that Defendant violated clearly established law of which a reasonable officer would have known, let alone state a claim. The Complaint should therefore be dismissed.

Facts Alleged[1]

On September 9, 2024, Plaintiff was released from custody with pre-trial conditions, including the requirement to "take all medications." (Compl. ¶ 1.) The following day, Plaintiff's

[1] Defendant treats the allegations in the complaint as true only for purposes of this motion to dismiss.

primary care provider ("PCP") instructed Plaintiff to cease taking his medications. (*Id*. at ¶ 2; *see also id*., Ex. 3.)[2] On September 25, Plaintiff left Defendant a voice message in which he explained that his PCP discontinued his medications and expressed concern that "his psychiatric nurse practitioner may prescribe something medically unnecessary and objectionable." (*Id*. at ¶ 3; *see also id*., Exs. 1-2.) Plaintiff also raised questions concerning what would happen if he rejected objectionable medication, and expressed his opinion that being forced to take medication would violate the Eighth Amendment absent court order. (*Ibid*. *Compare id*., Ex. 1. *But see* Compl. ¶ 1 (Complaint itself specifying that there was a court order).) The next day, Plaintiff was arrested for allegedly violating pretrial conditions. (*Id*. at ¶ 4.) Plaintiff spent the day (Sept. 26) in a harsh bed with a bright light shining overhead. (*Id*. at ¶ 5.) Plaintiff remains in confinement. (*Id*. at ¶¶ 6-7.) Defendant's lies or misstatements about Plaintiff's voicemail caused Plaintiff to suffer, because Plaintiff was arrested without the opportunity to present evidence on his behalf at Woburn District Court on September 27, 2024. (*Id*. at ¶ 9.)

Plaintiff asserts four section 1983 claims: Violation of the Fourteenth Amendment right to substantive due process (Count I, Compl. 1, ¶ 2); violation of the Fourteenth Amendment right to procedural due process (Count II, *id*. at 1, ¶ 2);[3] violation of the Eighth Amendment right against cruel and unusual punishment (Count III, *id*. at 1, ¶ 3), and; violation of the First Amendment right to access the courts. (Count IV, *id*. at 2, ¶ 4.) By way of relief, Plaintiff requests that "a judge or jury [] instill a double-check policy on every alleged pre-trial violation any probation officer alleges in the State of Massachusetts." (*Id*. at 3, ¶ 1.) Additionally,

[2] Plaintiff appended numerous exhibits to his Complaint, some of which are not legible. (*See* Compl., Exs 0, 4-5.)

[3] The Complaint denotes the substantive and procedural violations as one claim, but Defendant treats them as separate claims. (Compl. ¶ 2.)

Plaintiff requests that "a judge or jury [] order Massachusetts courts a realistic opportunity to review and present evidence of false non-bailable pre-trial conditions." (*Id*. at 3, ¶ 2.) Plaintiff seeks the maximum damages award allowable under the Massachusetts Tort Claims Act, as well as one million dollars in punitive damages. (*Id*. at 3, ¶¶ 1-2 (Damages Sought by the Plaintiff); *see also* G.L. c. 258, § 2.)

Standard of Review

A. Standard of Review for Motions under Mass. R. Civ. P. 9(b)

Massachusetts Rule of Civil Procedure 9(b) provides that "[i]n **all averments** of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Mass. R. Civ. P. 9(b), 365 Mass. 751 (1974) (emphasis added). The rule's text clarifies that the requirement applies to "averments" of fraud, not solely to fraud claims. *See id*. *Accord Equip. & Sys. For Indus. v. Northmeadows Constr. Co.*, 59 Mass. App. Ct. 931, 931 (2003) (stating that the rule applies to "allegations of fraud and deceit" and addressing a damages from deceit claim); *see also Jessie v. Boynton*, 372 Mass. 293, 304 (1977) (applying the Rule 9(b) standard because "[o]ne theory expressed by the plaintiffs rests on an allegation of fraud."). "At a minimum, a plaintiff alleging fraud must particularize the identity of the person(s) making the representation, the contents of the misrepresentation, and where and when it took place. In addition, the plaintiff should specify the materiality of the misrepresentation, [his] reliance thereon, and resulting harm." *Northmeadows Constr. Co.*, 59 Mass. App. Ct. at 931-932, citing *Friedman v. Jablonski*, 371 Mass. 482, 488-489 (1976) and Smith and Zobel, Rules Practice § 9.3 (1974).

B. Standard of Review for Motions Under Mass. R. Civ. P. 12(b)(1).

"Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Rental Prop. Mgmt. Servs.*

v. Hatcher, 479 Mass. 542, 547 (2018), quoting Mass. R. Civ. P. 12(h)(3), 365 Mass. 754 (1974) (emphasis omitted). "Subject matter jurisdiction cannot be conferred by consent, conduct or waiver." *Litton Bus. Sys., Inc. v. Comm'r of Revenue*, 383 Mass. 619, 622 (1981). "Whether a defendant has sovereign immunity raises questions of subject matter jurisdiction." *Nordberg* v. *Commonwealth*, 96 Mass. App. Ct. 237, 244 (2019). "[T]he Legislature has, for reasons of public policy, chosen to preserve sovereign immunity for certain claims, irrespective of their legal sufficiency or merit, or the gravity of the injuries alleged." *Morrissey* v. *New England Deaconess Ass'n–Abundant Life Communities, Inc.*, 458 Mass. 580, 592 (2010), citing G. L. c. 258, § 10(a)-(j) (internal quotation marks and citation omitted).

C. Standard of Review for Motions under Mass. R. Civ. P. 12(b)(6)

The standard for reviewing the sufficiency of a complaint for the purposes of a motion to dismiss under Mass. R. Civ. P. 12(b)(6) is set forth in *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 635-36 (2008), citing *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted):

> While a complaint attacked by a motion to dismiss or judgment on the pleadings does not need detailed factual allegations, the plaintiff is nevertheless obligated to provide the factual grounds of his entitlement to relief. This requires more than labels and conclusions. Factual allegations must be enough to raise a right to relief above the speculative level based on the assumption that all the allegations in the complaint are true, even if doubtful in fact.

To survive a Rule 12(b)(6) motion under this standard, Plaintiff is required to allege specific facts supporting his claims; conclusory or speculative claims are not sufficient. A plaintiff must plead factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, to "reflect the threshold requirement of (Mass. R. Civ. P.) 8(a)(2) that the 'plain statement' possess[es] enough heft to 'sho(w) that the pleader is entitled to relief.'" *Id.* at 636, quoting *Twombly*, 550 U.S. at 557.

"The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an un-adorned, the-defendant-unlawfully-harmed-me accusation. [. . .] A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Twombly*, 550 U.S. at 555. "[L]egal conclusions cast in the form of factual allegation are not taken as true on a motion to dismiss." *Gen. Convention of New Jerusalem in the U.S. of Am., Inc.* v. *MacKenzie*, 449 Mass. 832, 838 (2007).

Argument

1. **The Complaint should be dismissed because Plaintiff has not served the Complaint as required by Rules 4 and 12(b)(4).**

Massachusetts Rule of Civil Procedure 4(a) provides that "[u]pon commencing the action the plaintiff or his attorney shall deliver a copy of the complaint and a summons for service to the sheriff . . . or as otherwise provided in . . . this rule." Mass. R. Civ. P. 4(a). Absent good cause, failure to serve the complaint within 90 days entails mandatory dismissal. *See* Mass. R. Civ. P. 4(j) ("If a service of the summons and complaint is not made upon a defendant within 90 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice."). Rule 12(b) provides that defendants may move to dismiss for insufficient service of process. *See id*. 12(b)&(b)(4) (providing that a defendant may move to dismiss for insufficient service of process). Because Defendant has not been served with this action, the case cannot move forward and the Complaint should be dismissed.

2. **The Complaint should be dismissed because it rests entirely upon allegations of fraud but fails to allege fraud with particularity.**

The gravamen of the harm alleged in Plaintiff's complaint originates from a claimed fraud perpetrated upon the Woburn District Court by Defendant. (Compl., 3 ¶ 9 ("**All of the pain and suffering** + other significant material damages the Plaintiff suffered was because Defendant told lies or untruths about the Plaintiff's voicemail[.]") (emphasis added).) Aside from a stray mention of Defendant explaining Plaintiff's pre-trial conditions of release to Plaintiff, (*id*. at ¶ 1) the just-quoted sentence is the only reference to any action by Defendant in the Complaint. (*Id*. at 3, ¶ 9.) The Court should dismiss the Complaint because the lynchpin allegations of fraud upon the court by Defendant are inadequately specific when considered against the heightened pleading requirement imposed by Rule of Civil Procedure 9(b) in cases alleging fraud. *See* Mass. R. Civ. P. 9(b) ("In all averments of fraud, mistake, duress or undue influence, the circumstances constituting fraud, mistake, duress or undue influence shall be stated with particularity."). The only action of consequence that Defendant is alleged to have undertaken is to fraudulently misrepresent the contents of Defendant's voicemail to the court. (Compl. 3, ¶ 9.) This allegation sounds in fraud and is akin to a claim of fraud on the court. *See Rockdale Mgmt. Co. v. Shawmut Bank, N.A.*, 418 Mass. 596, 598 (1994), quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944) ("Fraud on the court occurs where a party tampers with the fair administration of justice by deceiving 'the institutions set up to protect and safeguard the public' or otherwise abusing or undermining the integrity of the judicial process.'").

"At a minimum, a plaintiff alleging fraud must particularize the identity of the person(s) making the representation, the contents of the misrepresentation, and where and when it took place. In addition, the plaintiff should specify the materiality of the misrepresentation, its reliance thereon, and resulting harm." *Northmeadows Constr. Co.*, 59 Mass. App. Ct. at 931-

932, citing *Friedman v. Jablonski*, 371 Mass. 482, 488-489 (1976) and Smith and Zobel, Rules Practice § 9.3 (1974). Yet the Complaint in this case does not allege the contents of any misrepresentation, nor when and where it took place. (*See generally* Compl.) This case ostensively demonstrates the wisdom underlying Rule 9(b)'s particularity prescription; fraud is easy to surmise or allege without evidence, so it makes sense to require a Plaintiff to articulate surrounding circumstances that truly raise an inference of fraudulent intent. The heightened Rule 9(b) standard exists for circumstances precisely like the present case, where there is no reason to believe that any fraudulent conduct took place aside from a formulaic recitation that it must have because something unfortunate has happened. *Compare Catarius v. Carton*, 21-P-194, 100 Mass. App. Ct. 1130 at *4 (Mass. App. Ct. 2022) (Unpublished) (Complaint properly dismissed under Rule 9(b) for the failure to "provide specific facts to support [the] allegations"). This Court should accordingly dismiss the Complaint in its entirety.

3. The Complaint should be dismissed because Plaintiff failed to present his claim to the Attorney General.

Plaintiff seeks to avail himself of the Massachusetts Tort Claims Act, G.L. c. 258, but has failed to comply with its procedural requirements. General Laws chapter 258, section four requires a Plaintiff to present his claim to the Attorney General and either wait six months or until the claim is denied to sue; this is a jurisdictional precondition to suit that must be alleged in the Complaint. *See Rodriguez v. City of Somerville*, 472 Mass. 1008, 1010 n.3 (2015); *Theisz v. MBTA*, 481 Mass. 1012, 1014 (2018); *Vining* v. *Commonwealth*, 63 Mass. App. Ct. 690, 695-96 (2005); *Robinson v. Commonwealth*, 32 Mass. App. Ct. 6, 10 (1992). Plaintiff's Complaint alleges both that his suit is not subject to the Massachusetts Tort Claims Act and also that he is entitled to collect the full measure of damages recoverable against the Commonwealth under that same statute. (*Compare* Compl. 1, ¶ 1 *with id*. 3, ¶ 1 (Damages Sought By The Plaintiff).) To

the extent Plaintiff's complaint governs, *cf. Holmes Group, Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 831 (2002), quoting *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 398-99 (1987) ("Plaintiff is 'the master of the complaint'"), and he is seeking to recover for "Tortious Actions Involving the Commonwealth," the action is barred by Plaintiff's failure to present his claim as required by law. *See id*. at 3, ¶ 1 (Damages Sought By The Plaintiff).

4. Claims against Defendant in her official capacity are barred because the Defendant is shielded by sovereign immunity.

Assuming that Plaintiff has intended to assert claims against Defendant in her official capacity, any such claims are barred by sovereign immunity and because she is not a "person" as that word is used in section 1983. *See Lewis v. Clarke*, 581 U.S. 155, 161-63 (2017) (a state employee is sued in her official capacity when the state is the real party in interest); *Asociación de Subscripción Conjunta del Seguro de Responsabilidad Obligatorio v. Flores Galarza*, 484 F.3d 1, 26 (1st Cir. 2007) (the real party in interest for sovereign immunity purposes is the party from whose pockets a judgment would be recovered).

"Sovereign immunity bars a private action against a State in its own courts absent consent by the Legislature or abrogation of sovereignty by Congress acting under its Fourteenth Amendment powers." *Lopes v. Commonwealth*, 442 Mass. 170, 175 (2004). "Consent to suit must be expressed by the terms of a statute, or appear by necessary implication from them." *Id*. at 175-176 (citation omitted). The Commonwealth has not consented to suit under Section 1983 or waived its sovereign immunity from Section 1983 claims, and "Congress has not abrogated the Commonwealth's sovereign immunity for purposes of [Section 1983]." *Id.* at 178. Further, "State officials sued for damages in their official capacity are not 'persons' under § 1983 because the law treats the action as [one] against the official's office and hence against the State." *Laubinger v. Dep't of Revenue*, 41 Mass. App. Ct. 598, 602 (1996), quoting *O'Malley v. Sheriff*

of Worcester Cty., 415 Mass. 132, 141 n.13 (1993); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("a suit against a state official in his or her official capacity . . . is a suit against the official's office," which in turn "is no different from a suit against the State itself.") (internal citations omitted); *Commonwealth v. ELM Med. Labs., Inc.*, 33 Mass. App. Ct. 71, 75 (1992) ("The United States Supreme Court in *Will v. Michigan* . . . held that a State agency is not a 'person' for purposes of § 1983 when suit is brought in a State court."). Accordingly, any civil rights claims asserted against Defendant in her official capacity are barred.

5. Defendant is entitled to qualified immunity on each of the four claims for relief.

Even if Plaintiff's Complaint were deemed to state a claim and construed to run against Defendant in her individual capacity, the Complaint should be dismissed because Defendant is entitled to qualified immunity on each of Plaintiff's four claims. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009), quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). "Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam), quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). Courts are admonished not to evaluate whether an officer violated clearly established law by phrasing the question at a high level of generality. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Once qualified immunity is raised, the burden shifts to the Plaintiff to show that it doesn't apply. *See Escalera-Salgado v. United States*, 911 F.3d 38, 41 (1st Cir. 2018) ("When a defendant invokes qualified immunity, the burden is on the plaintiff to show that the defense is inapplicable.").

Qualified Immunity is the right not just to be shielded from liability, but from suit itself. *See Pearson*, 555 U.S. at 231-32, quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) and *Anderson v. Creighton*, 483 U.S. 635, 640, n. 2 (1987) ("qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.' Indeed, we have made clear that the 'driving force' behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims" against government officials [will] be resolved prior to discovery.'").

a. Defendant is entitled to qualified immunity on Plaintiff's substantive due process claim.

Plaintiff alleges that Defendant's negligence, gross negligence, or recklessness caused him to be detained without just cause, which worked the deprivation of a constitutionally protected liberty interest. (Compl. 1, ¶ 2.)

Section one of the Fourteenth Amendment provides that: "No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const., amd. XIV, § 1, cl. 2. "The Due Process Clause guarantees more than fair process . . . . The Clause also provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997), citing *Reno v. Flores*, 507 U.S. 292, 301-302 (1993) and *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 851 (1992), overruled by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022). "Freedom from imprisonment -- from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that Clause protects." *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 18 (1979) (Powell, J. concurring) (''Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due

Process Clause from arbitrary governmental actions''); *Steele v. Cicchi*, 855 F.3d 494, 502 (3d Cir. 2017) (collecting cases) (holding that there is a substantive due process liberty interest in pretrial release under certain circumstances). The United States Supreme Court has ruled, however, "that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections[.]" *Zadvydas*, 533 U.S. at 690 (emphasis in original), citing *United States v. Salerno*, 481 U.S. 739, 746 (1987).

To show that a person's liberty interest in being free from arbitrary pretrial detention has been violated, Plaintiff is required to show that Defendant's conduct "shocks the conscience and violates the 'decencies of civilized conduct.'" *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), quoting *Rochin v. California*, 342 U.S 165, 172-73 (1952). Mere negligence is not enough. *See id*. at 849-850; *see also id*. at 863 (Rehnquist, C.J., concurring in judgment) ("it is an open question whether recklessness can *ever* trigger due process protections") (emphasis in original). Yet Plaintiff's Complaint only alleges "a significant misunderstanding or negligence," while musing that Defendant's actions may have been reckless or grossly negligent. (Compl., 1 ¶ 2.) Common experience suggests that misunderstandings happen every day, and therefore do not shock the conscience. *Compare Lewis*, 523 U.S. at 854 (causing the death of another person while behaving recklessly during high-speed police chase cannot shock the conscience unless intentional). Since Plaintiff hasn't alleged Defendant violated clearly established law of which the ordinary public official would have been aware by depriving Plaintiff of his right to be free from arbitrary confinement in a way that is so egregious as to shock the conscience, Count I should be dismissed.

b. Defendant is entitled to qualified immunity on Plaintiff's procedural due process claim because the Complaint does not allege that Defendant deprived Plaintiff of the right to procedural due process.

Plaintiff's Complaint states that "[i]f the plaintiff was detained without adequate notice or a meaningful opportunity to challenge the allegations of a pre-trial violation, this could amount to a violation. Procedural protections must accompany any deprivation of liberty." (Compl. 1, ¶ 2.) The Due Process Clause of the Fourteenth Amendment requires notice and the opportunity to be heard before a probationer or parolee's release is revoked. *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), quoting *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313 (1950) ("there can be no doubt that at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."); *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973), citing *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972) ("a probationer or parolee is entitled to notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in his own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing.").

The Complaint postulates that "*if*" Plaintiff wasn't given notice and an opportunity to respond before his pre-trial release was revoked, there could be a Due Process violation. (Compl. 1, ¶ 2 (emphasis added).) Even granting such to be the case, it doesn't speak to what is alleged to have happened in this case. There are no allegations concerning what Defendant did that could have deprived Plaintiff of his right to notice and the opportunity to be heard. Since Plaintiff does not state a claim, *a fortiori* he has failed to clear the further hurdle of showing that Defendant's conduct was so egregious as to violate clearly established law.

Moreover, Massachusetts law provides for the convocation of a hearing before a criminal defendant's pretrial release may be revoked. *See* G.L. c. 276, § 58B. Even if Plaintiff was not allowed to attend the hearing or be heard as the Due Process Clause and state law require,

nothing in the Complaint identifies Defendant as the responsible party, and any such allegation would be implausible because the Court can take judicial notice of the fact that probation officers are not judicial officers and have no control over whether Plaintiff is allowed to attend or speak at hearings. *See Yankee Atomic Elec. Co. v. Sec'y of Commonwealth*, 403 Mass. 203, 205 (1988) ("Factual matters which are indisputably true are subject to judicial notice") (internal quotations and citations omitted).

Lastly, to the extent Plaintiff's procedural Due Process claim is also based on Defendant's alleged mendacious recounting of Plaintiff's voicemail, the claim cannot move forward. *See Napue v. Illinois*, 360 U.S. 264, 269 (1959). The prosecution violates Due Process when it knowingly presents false, material evidence. *See id*.; *see also United States v. Caballero*, 277 F.3d 1235, 1243 (10th Cir. 2002). Putting aside whether the Prosecutor, not a probation officer, is the proper party to sue on such a claim, the claim cannot move forward because Plaintiff has not alleged that Defendant knowingly supplied false evidence to the Court, but rather alleges that Defendant did so negligently or recklessly. (Compl. 1, ¶ 2.)

c. Plaintiff does not allege that Defendant violated clearly established Eighth Amendment law.

Plaintiff alleges that confinement at "DMH hospital without legal basis[] may be framed as cruel treatment, particularly if the detention caused significant psychological harm." (Compl. 1, ¶ 3.) The Eighth Amendment provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amd. VIII. In a recent opinion, the U.S. Supreme Court ruled that the Cruel and Unusual Clause of the Eighth Amendment speaks only to the conditions of one's confinement, saying:

> if many other constitutional provisions address what a government may criminalize and how it may go about securing a conviction, the Eighth Amendment's prohibition against "cruel and unusual punishments" focuses on what happens next.

> That Clause "has always been considered, and properly so, to be directed at the method or kind of punishment" a government may "impos[e] for the violation of criminal statutes."

City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2215 (2024) (brackets in original), quoting *Powell v. Texas*, 392 U. S. 514, 531-532 (1968) (plurality opinion).[4] Plaintiff does not identify conditions of confinement which could violate the guarantee of being free from cruel and unusual punishment, but rather recasts the Due Process[5] injury of being wrongfully imprisoned as an Eighth Amendment claim. *See id*. at 2216, quoting *Bucklew v. Precythe*, 587 U. S 119, 130 (2019) ("The Cruel and Unusual Punishments Clause was adopted to ensure that the new Nation would never resort to [formerly tolerated] punishments or others like them. Punishments like those were 'cruel' because they were calculated to 'superad[d]' 'terror, pain, or disgrace.' . . . And they were 'unusual' because, by the time of the Amendment's adoption, they had 'long fallen out of use.'") (some internal quotations and citation omitted). Even if Plaintiff had alleged the conditions of his confinement violated the Eighth Amendment, his allegations cannot show that Defendant was the foreseeable cause of that harm, because the jailor would be the one responsible for Plaintiff's poor treatment and Defendant would have had no reason to believe someone would violate Plaintiff's rights while he was in custody. *See Nantasket Beachfront Condos., LLC v. Hull Redevelopment Auth.*, 87 Mass. App. Ct. 455, 464 (2015) (noting the "markedly strong presumption that public officials act in good faith"). Therefore, the Eighth

[4] While the opinion does not explicitly state that the guarantee against cruel and unusual punishment can never forbid anything other than punishments and conditions of confinement, it heavily implies it. *See City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2215-16 (2024). The Petitioners in the case argued that the cruel and unusual punishment guarantee only forbids types of punishment, and the Majority Opinion seems to endorse that argument. Brief of Pet'r at 16-24, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2215-16 (2024) (No. 23-175) (arguing that the prohibition on cruel and unusual punishments only limits types of punishments); *see also id*. Tr. of Oral Arg. at 4:22-24 (opening page of opening argument for Petitioner) ("First, the Cruel and Unusual Punishments Clause governs which punishments are permitted, not what conduct can be prohibited.").

[5] To the extent wrongful imprisonment results from improper or malicious prosecution, the correct claim would arise under the Fourth Amendment. *See Thompson v. Clark*, 596 U.S. 36, 39 (2022)

Amendment Claim against Defendant should be dismissed.

d. Plaintiff does not allege that Defendant violated his right to access the Court system.

Plaintiff alleges that "[b]eing detained under conditions that prevent communication with the outside world or the ability to proceed with open civil actions can interfere with the right to access the courts." (Compl. 2, ¶ 4.) This is more a statement of the law than a factual allegation, but even if the Court construes it is a factual allegation, it should still dismiss the claim.

The First Amendment, incorporated against the states through the Fourteenth Amendment, *see Gitlow v. New York*, 268 U.S. 652, 666, 670 (1925), provides that "Congress shall make no law . . . prohibiting . . . the right of the people . . . to petition the Government for a redress of grievances." U.S. Const., amd I; *see also* Mass. Declaration of Rights, art. XIX. The right to petition for a redress of grievances confers upon prisoners the right to access the courts. *See Cruz v. Beto*, 405 U.S. 319, 321 (1972), quoting *Johnson v. Avery*, 393 U.S. 483, 485 (1969) ("[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances which, of course, includes 'access of prisoners to the courts for the purpose of presenting their complaints.'"). Yet Plaintiff's Complaint, to the extent it alleges Plaintiff was not allowed to pursue litigation in Court, does not allege anything that Defendant did, or could have done, to prevent Plaintiff from filing any case. The claim should therefore be dismissed.

Conclusion

Defendant respectfully requests that the Court dismiss the Complaint in its entirety for the reasons explained above.

Defendant,

COLLEEN MADIGAN

By her Attorneys,

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

/s/ Mathias Fressilli
Mathias Fressilli, BBO #709176
Assistant Attorney General
Government Bureau/Trial Division
One Ashburton Place, Rm. 1813
Boston, MA 02108
(617) 963-2324
Mathias.fressilli@mass.gov

Date: December 27, 2024

CERTIFICATE OF SERVICE

I, Mathias F. Fressilli, Assistant Attorney General, hereby certify that I have this day, December 27, 2024, served the foregoing Notice of Appearance upon Plaintiff *pro se*, by mail and email.

Bo Shang
10 McCafferty Way
Burlington, MA 01803
bo@shang.software
Plaintiff pro se

/s/ Mathias Fressilli
Mathias Fressilli
Assistant Attorney General