UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 92-7481

(Summary Calendar)

MACK LEE HEPTINSTALL,

Plaintiff-Appellant,

versus

MAYOR BUFORD BLOUNT, ET AL.,

Defendants,

GARY DON DAVIS, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Mississippi
CA H90 0254 (P) (N)

August 11, 1993

Before GARWOOD, DAVIS, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Mack Lee Heptinstall filed an action pro se and in forma pauperis alleging violations of his federal and state constitutional rights arising from the circumstances of his arrest and pre-trial detention for aggravated assault. The district court dismissed Heptinstall's suit as a discovery sanction under Fed. R. Civ. P. 37 and, in the alternative, for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Heptinstall appeals. We affirm in part, reverse in part, and remand for further proceedings.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Heptinstall recounts that he heard a suspicious noise outside his trailer one evening and went to investigate. Once outside he allegedly was set upon by a group of men who attempted to gain control of his firearm. Heptinstall claims that in the ensuing struggle the weapon discharged, apparently without causing injury, and the assailants fled. Heptinstall was subsequently arrested and charged with aggravated assault, and he was confined as a pretrial detainee in the Jefferson Davis County Jail. A few days after the arrest, Police Chief Gary Don Davis and Deputy Sheriff Rickey Davis executed a search warrant at Heptinstall's residence and seized a number of firearms. Heptinstall was convicted of aggravated assault and sentenced to four years imprisonment.

Heptinstall, proceeding in forma pauperis and pro se, brought suit against officials and employees of the City of Bassfield, Mississippi and the Bassfield Police Department, officials and employees of Jefferson Davis County, Mississippi and the Jefferson Davis County Sheriff's Department,[1] in their individual and official capacities, as well as against his attorney John Anderson and his ex-wife Janette. Heptinstall alleged that the circumstances of his arrest, pre-trial detention, and conviction violated his federal and state constitutional rights.

Subsequently, some of the defendants successfully moved for an order allowing them to depose Heptinstall. The defendants also served Heptinstall with interrogatories and a request for production of documents. A group of defendants later mailed notice to Heptinstall of their intention to depose him. At the appointed hour, Heptinstall appeared and declined to submit to deposition in the absence of counsel. After being informed of the defendants' intention to move for dismissal as

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[1] Heptinstall's initial complaint named the following officials and employees: Mayor Buford Blount; Justice Court Judge Johnny C. Hartzog; District Attorney Richard Douglass; Assistant District Attorney Al Jernigan; Chief of Police Gary Don Davis; Sheriff Thomas Brown; Deputy Sheriff Charles Stringer; Deputy Sheriff Rickey Davis; Deputy Sheriff Thomas E. Stephens; Deputy Sheriff Ted Dailey, Sr.; Deputy Sheriff "Champ" Hathorne; Deputy Sheriff Howard Dyess; Deputy Sheriff Kenny Thompson; Police Officer Terry Wilson; Fire Chief Kenny Carraway; Dispatcher Linda Rogers; Dispatcher Catherine Blanchard; City Clerk Doris Viniard; Justice Court Clerk Betty Overstreet; and County Attorney Ed Long.

a sanction for his refusal, Heptinstall answered several questions, stated "Case closed, gentlemen. Bye," Record on Appeal, vol. 2, at 313, and ended the deposition.

The defendants responded by filing a motion to dismiss for failure to comply with discovery procedures.[2] The district court subsequently granted the defendants' motion to dismiss as a sanction pursuant to Fed. R. Civ. P. 37(b)(2)(C) and (d), along with dismissal pursuant to Fed. R. Civ. P. 12(b)(6). Heptinstall's action was dismissed with prejudice, and his motion for relief from the dismissal order was denied. Heptinstall hired an attorney, who then moved for an extension of time to file a notice of appeal pursuant to Fed. R. App. P. 4(a)(5). The district court granted the motion,[3] and Heptinstall proceeding pro se timely appealed.[4]

II

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[2] Heptinstall filed his answers to the interrogatories and his documentary evidence a month later, but he did not respond to the motion for dismissal.

[3] Appellees contend that the district court erred in granting Heptinstall's motion for extension of time to file a notice of appeal. We review a district court's decision to grant a Rule 4(a)(5) motion for abuse of discretion. *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 206 (5th Cir. 1993). A notice of appeal must be filed within thirty days after the entry of the judgment or order. Fed. R. App. P. 4(a)(1). The court may extend the time for filing a notice of appeal under Rule 4(a)(5) where a party shows "excusable neglect" or "good cause." Great deference will be given to a district court's determination of excusable neglect or good cause when the application for extension is made within the initial time period for filing a notice of appeal. *Britt v. Whitmire*, 956 F.2d 509, 511 (5th Cir. 1992). Heptinstall's counsel filed the motion for extension of time well within the initial period, and the district court granted a two-day extension. In requesting the extension, Heptinstall stated that he had filed a motion for relief from judgment and that a defendant had filed a motion for correction of judgment, and that consequently he was uncertain as to the running of the time for appeal. The district court could reasonably have concluded that good cause existed, and in light of the great deference given to the district court in such determinations, we find no abuse of discretion.

[4] Pursuant to Fed. R. App. P. 42(b), Heptinstall moved this Court to dismiss the appeal as to the following defendants: Justice Court Judge Johnny Hartzog; District Attorney Richard Douglass; Assistant District Attorney Al Jernigan; Mayor Buford Blount; County Attorney Ed Long; City Clerk Doris Viniard; and County Clerk Betty Overstreet. *See* Motion To Dismiss Certain Defendants (filed Nov. 10, 1992). This Court also dismissed the appeal as to John H. Anderson.

The fourteen defendants remaining as appellees are: Fire Chief Kenny Carraway; Police Chief Gary Don Davis; Sheriff Thomas E. Brown; Deputy Sheriff Charles C. Stringer; Deputy Sheriff Rickey Davis; Deputy Sheriff Thomas E. Stephens; Deputy Sheriff Ted Dailey, Sr.; Deputy Sheriff "Champ" Hathorne; Deputy Sheriff Howard Dyess; Deputy Sheriff Kenny Thompson; Police Officer Terry Wilson; Dispatcher Linda Rogers; Dispatcher Catherine Blanchard; and Janette Heptinstall.

Heptinstall contends that the district court erred in dismissing his complaint as a sanction under Fed. R. Civ. P. 37(b)(2)(C) and 37(d). We review dismissal under Rule 37 for abuse of discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 640, 96 S. Ct. 2778, 2779, 49 L. Ed. 2d 747 (1979); *Batson v. Neal Spelce Assocs.*, 765 F.2d 511, 514 (5th Cir. 1985). "Rule 37 empowers the district court to compel compliance with Federal discovery procedures through a broad choice of remedies and penalties, including dismissal with prejudice." *Griffin v. Aluminum Co. of America*, 564 F.2d 1171, 1172 (5th Cir. 1977). The district court may impose sanctions when a party refuses to obey a discovery order, Fed. R. Civ. P. 37(b), and may impose sanctions when a party fails to answer interrogatories or fails to respond to requests for production after receiving proper notice, Fed. R. Civ. P. 37(d). Where the district court dismisses an action with prejudice under Rule 37(b)(2)(C), the dismissal will be upheld only "when the failure to comply with the court's order results from wilfulness or bad faith, and not from an inability to comply," *Batson*, 765 F.2d at 514. Other considerations include "whether the other party's preparation for trial was substantially prejudiced," whether the improper behavior is attributable to the attorney rather than the client, and whether "a party's simple negligence is grounded in confusion or sincere misunderstanding of the court's orders." *Id.* A dismissal with prejudice under Rule 37 is a "remedy of last resort" which should only be applied in extreme circumstances. *Id.* at 515. As a result, our review centers on whether the district court could have substantially achieved the deterrent value of Rule 37 by imposing an equally effective but less drastic sanction. *Id.* at 514; *Griffin*, 564 F.2d at 1172.[5]

The defendants served Heptinstall with interrogatories and a request for production of documents. Subsequently, Heptinstall attended his deposition and answered a number of questions, but abruptly ended the session before the defendants finished their questioning by stating "Case closed, gentlemen. Bye." Record on Appeal, vol. 2, at 313. The defendants later filed a motion to

[5] However, in *Batson* we noted that we have upheld dismissals without prejudice under Rule 37 in appropriate cases without discussion of lesser sanctions. *See Batson*, 765 F.2d at 576.

dismiss under Rule 37, contending that dismissal was appropriate because Heptinstall failed to complete his deposition and failed to respond to the interrogatories and request for production. Heptinstall did not respond to the defendants' motion to dismiss, but he answered the interrogatories and produced documents a month and a half after the motion was filed.

Heptinstall failed to obey a court order[6] by refusing to complete his deposition, and, therefore, his actions justified a sanction under Rule 37(b). In addition, Heptinstall's failure to respond to the defendants' interrogatories and request for production warranted the imposition of sanctions under Rule 37(d). Although Heptinstall responded to the discovery requests after the defendants filed their motion to dismiss, the district court found that Heptinstall's response was belated, and that finding is supported by the record. Heptinstall's belated compliance did not preclude the imposition of sanctions by the district court. A court may impose sanctions where a party belatedly complies with discovery requests and orders. *National Hockey League*, 427 U.S. at 642-43, 96 S. Ct. at 2780-81 (district court did not abuse discretion by dismissing case with prejudice when party failed to timely answer interrogatories); *see also Northern American Watch Corp. v. Princess Ermine Jewels*, 786 F.2d 1447, 1451 (9th Cir. 1986) ("Belated compliance with discovery orders does not preclude the imposition of sanctions."); *Cine Forty-Second Street Theater Corp. v. Allied Artists Picture Corp.*, 602 F.2d 1062, 1067 (2d Cir. 1979) (plaintiff's belated answers to interrogatories not given great weight because "[a]ny other conclusion would encourage dilatory tactics, and compliance with discovery orders would come only when the backs of counsel and the litigants were against the wall").

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[6] Heptinstall argues that sanctions were improper under Rule 37(b)(2)(C) because the court first should have entered an order to compel him to comply with discovery. Heptinstall's argument is meritless, because a court may impose sanctions without first entering an order to compel compliance with discovery. *See McLeod, Alexander, Powel & Apffel v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990). Although the court did not enter an order to compel, Heptinstall did violate a court order. We have interpreted "court order" under Rule 37(b) broadly. *See id.* (defendant violated docket control order under Rule 37(b)(2)(C) by failing to produce documents by deadline). Here, the district court entered an order under Rule 30(a), allowing the defendants to depose Heptinstall in prison. *See* Record on Appeal, vol. 2, at 281-82. Heptinstall violated this order by failing to complete his deposition.

In dismissing Heptinstall's action, the district court did not state whether it considered lesser sanctions.[7] Although sanctions were appropriate, Heptinstall's actions did not warrant the extreme sanction of dismissal with prejudice. *See Griffin*, 564 F.2d at 1172 (stating that we have upheld dismissal as a sanction under Rule 37 where the party' failure to comply with discovery "involved either repeated refusals or an indication of the full understanding of discovery obligations coupled with a bad faith refusal to comply."). Therefore, the district court abused its discretion.

III

Heptinstall next argues that the district court erred in dismissing his § 1983 claims[8] under Rule 12(b)(6).[9] Appellant claimed that: a) the law enforcement officers who searched his premises exceeded the scope of the search warrant; b) he was held in unsanitary and overcrowded conditions

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[7] Besides dismissal with prejudice, Rule 37 allows the following sanctions: 1) the court may order that designated facts be taken as true in favor of the party seeking compliance with discovery, Fed. R. Civ. P. 37(b)(2)(A) & (d); 2) the court may enter an order refusing to allow the noncomplying party to support or oppose designated claims or defenses, or prohibiting the party from entering certain matters in evidence, *id.* Rules 37(b)(2)(B) & (d); 3) the court may enter an order striking out pleadings or parts thereof, or staying further proceedings until the party obeys the order, *id.* Rules 37(b)(2)(C) & (d); 4) the court may enter an order treating as contempt the failure to obey any orders, *id.* Rule 37(b)(2)(D); and 5) the court may require the party to pay the reasonable expenses, including attorney's fees, caused by the party's failure to obey the court's orders, *id.* Rule 37(b)(2)(E).

[8] Although Heptinstall brought claims under 42 U.S.C. §§ 1985, 1986, 1990, and 1997 in his complaint, he failed to mention those claims in his appellate brief. Therefore, he has abandoned those federal claims, *see Weaver v. Puckett*, 896 F.2d 126, 128 (5th Cir. 1990), *cert. denied*, 498 U.S. 966, 111 S. Ct. 427, 112 L. Ed. 2d 411 (1990), and only his § 1983 claims remain for our consideration. Furthermore, Heptinstall's state-law claims against his ex-wife Janette were dismissed by the district court, *see* Record on Appeal, vol. 2, at 382-84, and he has failed to challenge the dismissal of his state-law claims in his brief to this Court. Consequently, the claims against Janette Heptinstall are deemed abandoned. *Weaver*, 896 F.2d at 128.

[9] Heptinstall sued the city and county officials in both their official and individual capacities. By suing the officials in their "official" capacities, it appears that Heptinstall sought to hold the municipalities liable for the alleged constitutional violations. *See Colle v. Brazos*, 981 F.2d 237, 244-46 (5th Cir. 1983). Heptinstall failed, however, to plead that a municipal custom or policy caused the alleged constitutional violations, and the alleged facts do not support an inference that a policy or custom was the moving force behind the alleged constitutional violations. *See id.* at 244 (municipality cannot be held liable under § 1983 unless policy or custom caused constitutional violation). We therefore hold that the district court correctly dismissed Heptinstall's § 1983 claims against these defendants in their official capacities.

during his pretrial detention; c) he was denied access to the courts; and d) he was unlawfully deprived of property.[10]

The propriety of a dismissal for failure to state a claim is a legal question, reviewable de novo. *Barrientos v. Reliance Standard Life Ins. Co.*, 911 F.2d 1115, 1116 (5th Cir. 1990), *cert. denied*, 498 U.S. 1072, 111 S. Ct. 795, 112 L. Ed. 2d 857 (1991). In reviewing such a dismissal,

> "we may not go outside the pleadings. We accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. We cannot uphold the dismissal `unless it appears that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"

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[10] Heptinstall also argues on appeal that 1) he was falsely arrested; 2) he received inadequate medical care during his pretrial detention; and 3) his guilty plea was invalid. We decline to address the first two claims because Heptinstall did not set forth these claims in his complaint, *see Beck*, 842 F.2d at 762 (issues may not be raised for the first time on appeal), and the third because the issue is moot.

Nowhere in the complaint does Heptinstall claim that he was unlawfully arrested. Neither the recitation of the facts nor the listed causes of action include any reference to irregularity or illegality in Heptinstall's arrest. Record on Appeal, vol. 1, at 9-24. The only specific reference to the arrest in the complaint reads as follows: "Upon plaintiff's return from Hattiesburg, Mississippi, he was arrested [at] approximately 2:15 a.m. by two (2) Deputy [Sheriffs] and two (2) Police Officers." *Id.* at 16. Although Heptinstall did claim to have acted in self-defense, even under the most liberal reading of the complaint he did not allege false arrest. *See McDonald v. Hall*, 610 F.2d 16, 19 (1st Cir. 1979) (duty to be less stringent with pro se complaints does not require court to conjure up unpled claims).

With respect to the inadequate medical care claim, Heptinstall alleged in his complaint that he was admitted to the county hospital, treated, and then discharged; that he was returned to the jail while still suffering motor skill impairment; and that he was returned to the hospital three weeks later after numerous requests for medical attention. While we recognize the obligation to construe pro se complaints liberally, *see Becker*, 751 F.2d at 149, Heptinstall's terse summation of events lacks the factual development necessary to justify the series of favorable inferences necessary to find an inadequate medical care claim, *see McDonald*, 610 F.2d at 19 (court need not conjure up unpled claims). "To state a claim for relief under 42 U.S.C. §1983 for denial of medical treatment, a prisoner must allege deliberate indifference to his serious medical needs." *Woodall v. Foti*, 648 F.2d 268, 272 (5th Cir. 1981) (citing *Estelle v. Gamble*, 429 U.S. 97, 104-05, 97 S. Ct. 285, 291, 50 L. Ed. 2d 251, 260 (1976)). The complaint includes no allegation of deliberate indifference, no assertion of harm suffered, no causal connection between a putative harm and any named defendant, no request for relief, and, ultimately, no cause of action based on inadequate medical treatment.

Finally, although Heptinstall challenges the validity of his guilty plea, we note that the defendants involved with the plea have been dismissed as appellees. *See supra* n.4. Therefore, we need not address the claim. We note that Heptinstall is not required to attack a guilty plea in order to bring a § 1983 action. *Watts v. Graves*, 720 F.2d 1416, 1421 (5th Cir. 1983) (guilty plea in state court does not preclude defendant from seeking damages in § 1983 action for alleged constitutional violation never litigated in state court).

Colle v. Brazos County, Tex., 981 F.2d 237, 243 (5th Cir. 1993) (footnote omitted) (quoting *Partridge v. Two Unknown Police Officers of Houston*, 791 F.2d 1182, 1185-86 (5th Cir. 1986)). While pleadings of a pro se complainant are to be liberally construed, *see Barksdale v. King*, 699 F.2d 744, 746 (5th Cir. 1983), we have adopted a heightened pleading requirement in §1983 cases against government officials able to assert immunity defenses. *See Streetman v. Jordan*, 918 F.2d 555, 556-57 (5th Cir. 1990); *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985), *overruled in part on other grounds by Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, _ U.S._, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993) (holding that heightened pleading standard may not be used in § 1983 cases alleging municipal liability). "[W]hen government officials are likely to invoke qualified immunity, we demand that a complaint state factual detail and particularity including why the defendant-official cannot maintain the immunity defense." *Colle*, 981 F.2d at 246. Government officials are qualifiedly immune from liability for damages under § 1983 so long as their actions have not violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. (quoting *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987)). Neither conclusory allegations nor bald assertions are sufficient to meet this heightened pleading standard. *Streetman*, 918 F.2d at 557.

A

Heptinstall argues that he stated a valid Fourth Amendment claim, namely, that the officers conducting the search and seizure exceeded the scope of the search warrant.[11] Heptinstall alleged that Police Chief Gary Don Davis and Deputy Sheriff Rickey Davis executed a search warrant on his premises which authorized them to seize a .44 or .357 caliber pistol. No weapon matching that description was found, but the officers seized a number of other firearms. Accepting these facts as

[11] Heptinstall did not identify this claim as arising under the Fourth Amendment in his complaint. He corrected this omission on appeal. While it is true that this Court does not consider §1983 issues that are not presented to the district court, *Beck v. Lynaugh*, 842 F.2d 759, 762 (5th Cir. 1988), we have also held that "[t]he form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim," *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. 1981). As Heptinstall's error below was limited to the categorization of the legal theory, his claim is properly before us.

true and viewing them in the light most favorable to the plaintiff, *see Colle*, 981 F.2d at 243 (quoting *Partridge*, 791 F.2d at 1185-86), we hold that Heptinstall has stated a valid cause of action against Police Chief Gary Don Davis and Deputy Sheriff Rickey Davis in their individual capacities, *see Husband v. Bryan*, 946 F.2d 27, 30 (5th Cir. 1991) (search beyond scope of warrant violates clearly established constitutional rights). We therefore reverse the district court's dismissal order with respect to the search and seizure claim.

B

Heptinstall contends that he has properly stated a §1983 claim for unconstitutional conditions of confinement suffered during his pretrial detention.[12] Pretrial detainees are protected by the Due Process Clause of the Fourteenth Amendment, rather than by the Cruel and Unusual Punishment Clause of the Eighth. *Morrow v. Harwell*, 768 F.2d 619, 625-26 (5th Cir. 1985). Thus, the proper inquiry for determining whether the constitutional rights of a pretrial detainee have been violated "is whether conditions accompanying pretrial detention are imposed upon detainees for the purpose of punishment, as the due process clause does not permit punishment prior to an adjudication of guilt." *Cupit v. Jones*, 835 F.2d 82, 85 (5th Cir. 1987); *see also Colle*, 981 F.2d at 244 (noting pretrial detainee's right to be free of punishment). If an adverse condition is not reasonably related to a legitimate governmental goal, that is, if it is arbitrary or purposeless, a court may infer that it is punitive. *Cupit*, 835 F.2d at 85 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539, 99 S. Ct. 1861, 1874, 60 L. Ed. 2d 447 (1979)).

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[12] In addition to Sheriff Brown, Heptinstall lists Deputy Sheriff Charles Stringer, Deputy Sheriff Rickey Davis, Deputy Sheriff Thomas E. Stephens, Deputy Sheriff "Champ" Hathorne, Deputy Sheriff Howard Dyess, Dispatcher Catherine Blanchard, and Dispatcher Linda Rogers as individuals who "had personal knowledge of the operation of Jeff[erson] Davis County Jail and failed to perform their legally binding duties as required by State Law." Record on Appeal, vol. 1, at 19-20. The county sheriff is solely responsible for control and supervision of county jails. Miss. Code Ann. §§ 19-25-19 (sheriff liable for acts of deputies), 19-25-69 (sheriff "shall keep the jail, and premises thereto, in a clean and comfortable condition"), 19-25-71 (sheriff shall be jailer of county and shall provide sufficient and clean bedding) (1972 & Supp. 1991). Therefore, Sheriff Brown is the only proper defendant in this cause of action.

Heptinstall alleged that he was periodically confined in a one-man cell with four other men, that jail conditions were unsanitary,[13] that there was inadequate ventilation, and that opportunities for outdoor exercise and maintenance of personal hygiene were rare.[14] Given that favorable inferences are to be drawn for the non-moving party in reviewing a Rule 12(b)(6) dismissal, *St. Bernard Gen. Hosp. v. Hospital Serv. Assoc. of New Orleans*, 712 F.2d 978, 984 n.11 (5th Cir. 1983), *cert. denied*, 466 U.S. 970, 104 S. Ct. 2342, 80 L. Ed. 2d 816 (1984), the circumstances described by Heptinstall could justify an inference that jail conditions were punitive in nature. *See Bienvenu v. Beauregard Parish Police Jury*, 705 F.2d 1457, 1459 (5th Cir. 1983) (holding that plaintiff stated valid § 1983 claim where he alleged that unsanitary conditions of confinement violated his civil rights). We find that Heptinstall adequately stated a cause of action against Sheriff Brown in his individual capacity, and we reverse the district court's dismissal order as to these claims.

C

Heptinstall next argues that the district court erred in dismissing his claim that he was denied access to the courts. Heptinstall apparently wished to use the law library to prepare his defense for the criminal action against him, but was allegedly denied access by Sheriff Brown. Heptinstall also claims that he was not provided with writing instruments or postage to work on his defense. Although criminal defendants enjoy a right of meaningful access to the courts, *Bounds v. Smith*, 430 U.S. 817, 828, 97 S. Ct. 1491, 1498, 52 L. Ed. 2d 72 (1977), the right is not one of unqualified

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[13] Heptinstall claimed that the unsanitary conditions in the jail were in part attributable to the jail's use of a trustee prisoner management system. Heptinstall alleged that the trustee prisoners cleaned the jail cells only when they felt like bringing cleaning materials. Although the use of a trustee system does not, in and of itself, implicate federal constitutional guarantees, *see Jones v. Diamond*, 594 F.2d 997, 1020-21 (5th Cir. 1979) (finding no constitutional violation in trustee system at issue), the misuse of the system so as to contribute to or exacerbate the jail conditions alleged would indeed raise constitutional issues, *see Gates v. Collier*, 501 F.2d 1291, 1308 (5th Cir. 1974).

[14] Heptinstall argues on appeal that the prison did not provide him with edible and nutritionally adequate meals. Because Heptinstall failed to raise this issue below, we decline to address the claim. *See Beck*, 842 F.2d at 762. Heptinstall also alleges that the trustee system was unconstitutional because trustee prisoners passed out medication, handled inmates' property, carried keys to inmate's cells, placed inmates in isolation, issued and collected mail without supervision, and escorted inmates to the visiting area. Heptinstall fails, however, to show that the trustee prisoners' acts violated his constitutional rights.

access to a law library, but rather to some form of adequate legal assistance. *See id*. As we explained in *Green v. Ferrell*, 801 F.2d 765 (5th Cir. 1986), it is only "[i]n the absence of some sort of direct legal assistance . . . [that] inmates must be given access to a library . . . ." *Id*. at 772 (quoting *Morrow*, 768 F.2d at 623). Heptinstall has correctly identified a constitutional right, but the viability of his claim depends in part upon whether or not he had access to other legal assistance when he was denied access to the library. A criminal defendant who is represented by counsel has meaningful access to the courts. *See Tarter v. Hury*, 646 F.2d 1010, 1014 (5th Cir. 1981). The record reveals that Heptinstall was represented by attorney John Anderson at least from May 15, 1989, through September 20, 1989, in the pending criminal action. *See* Record on Appeal, vol. 1, at 48; *id*., vol. 2, at 330. Given that Heptinstall was incarcerated on March 15, 1989, and did not go to trial until December 18, 1989, *see id*. vol. 1, at 16, 21, it is unclear whether he had some form of adequate legal assistance at all times prior to trial. Furthermore, in assuring prisoners meaningful access to courts, "[i]t is indisputable that indigent inmates must be provided . . . with paper and pen to draft legal documents . . . and with stamps to mail them." *Bounds*, 430 U.S. at 824, 97 S. Ct. at 1496. We therefore hold that the district court erred in dismissing this claim against Sheriff Brown in his individual capacity.

D

Heptinstall maintains that the district court improperly dismissed his property deprivation claims. He cites three instances of actionable property deprivation: the failure to return the property seized during the search of his premises; Deputy Sheriff Howard Dyess' alleged misappropriation of two hundred dollars belonging to Heptinstall; and Sheriff Brown's unauthorized release of Heptinstall's shop keys to the latter's ex-wife, which allegedly resulted in the disappearance of his welding equipment from the shop.

In *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), where a prisoner's property was negligently lost by prison officials, the Supreme Court held that the state had not violated the Due Process Clause, because the state provided a tort remedy for redress of the

property deprivation. *See id*. at 544, 101 S. Ct. at 1917. However, as the Court made clear one year later in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982), a crucial factor in the *Parratt* decision was the fact that the prisoner was deprived of property through "random and unauthorized" conduct, which was not susceptible to a pre-deprivation hearing. *See id*. at 435-36, 102 S. Ct. at 1158. A post-deprivation tort remedy was fo und sufficient to satisfy the requirements of due process in *Parratt* because pre-deprivation process was not feasible. *See id*. The holding in *Parratt* that the state's provision of a tort remedy satisfies due process does not apply where the deprivation of property results from an established state procedure, rather than a random and unauthorized act by state officers. *Hudson v. Palmer*, 468 U.S. 517, 534, 104 S. Ct. 3194, 3204, 82 L. Ed. 2d 393 (1984) (discussing *Logan*).

Heptinstall has no causes of action for deprivation of property under the rule announced in *Parratt*, because he does not allege that the state's procedures are unconstitutional, or that the procedures themselves caused the deprivation of his property. *See Logan*, 455 U.S. at 436, 102 S. Ct. at 1158 (holding that the *Parratt* rule is inapplicable where "it is the state system itself that destroys a complainant's property interest, by operation of law").

IV

For the foregoing reasons, we **REVERSE** the district court's dismissal of Heptinstall's claims of a) illegal search and seizure, b) unconstitutional conditions of confinement, and c) denial of access to the courts, and **REMAND** for further proceedings in accordance with this opinion.[15] We **AFFIRM** the district court's dismissal of all other claims under Fed. R. Civ. P. 12(b)(6), but **MODIFY** the judgment appealed from to reflect dismissal without prejudice.[16]

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[15] The only remaining defendants are Sheriff Thomas Brown, Police Chief Gary Don Davis, and Deputy Sheriff Rickey Davis.

[16] "When dismissal of a pro se complaint is warranted, it should generally be without prejudice in order to afford the plaintiff the opportunity to file an amended complaint." *Good v. Allain,* 823 F.2d 64, 67 (5th Cir. 1987).