IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 07-cv-02471-PAB-KMT

THOMAS SILVERSTEIN,

Plaintiff,

v.

FEDERAL BUREAU OF PRISONS,
JOHN VANYUR,
JOYCE CONLEY,
MICHAEL NALLEY,
RONNIE WILEY,

Defendants.

DEFENDANTS' RESPONSE TO MOTION TO ALTER OR AMEND JUDGMENT

Defendants, through counsel, respond in opposition to Plaintiff's motion to alter or amend judgment. Doc. 398.

I. INTRODUCTION.

In his motion, Plaintiff proffers several arguments urging reconsideration of the entry of summary judgment in favor of Defendants. Two of them — dealing with the statute of limitations and evidence of Plaintiff's pre-2005 confinement (Doc. 398 at 2-8) — are issues that the Court already addressed in its ruling on summary judgment (Doc. 395 at 15, 32), or that Plaintiff, in fact, raised during his summary briefing. Doc. 319 at 9-10, 23, 27, 30. The third issue deals with whether the Court, in ruling on the procedural due process claim, "failed to apply" *Toevs v. Reid*, 646 F.3d 752 (10th Cir. 2011), *pet. for reh'g/reh'g en banc filed* Aug. 23, 2011. Doc. 398 at 9-11. Plaintiff's fourth argument asserts that the Court employed Eighth Amendment and substantive due process standards when analyzing Plaintiff's procedural due process claim. *Id.* at 12-13. In his last argument,

Plaintiff faults the Court for supposedly providing "conflicting analyses in its consideration of" the second prong of the due process claim. *Id.* at 13-14.

In its Order granting Defendants' motion for summary judgment, the Court initially addressed the timeliness of Plaintiff's remaining Fifth and Eighth Amendment claims. It held that Plaintiff's alleged injuries were tied to his current conditions of confinement at the United States Penitentiary, Administrative Maximum ("ADX"), and that his claims for injunctive relief were timely because he had filed suit within six years from the time that the conditions were imposed. Doc. 395 at 15. The Court also held that the continuing violation doctrine was inapplicable because "plaintiff alleges different review schemes operating during different periods of his incarceration involving different protocols and decision makers at different institutions." *Id.* at 18. Accordingly, as to the Fifth Amendment claim, the Court limited its analysis to Plaintiff's conditions of confinement imposed after November 2005, "two years before he filed his complaint." *Id.* at 19.

The Court then applied four relevant factors set forth in *Estate of DiMarco v. Wyo. Dep't of Corr.*, 473 F.3d 1334, 1342 (10th Cir. 2007), holding that no genuine material disputes of facts existed to show that Plaintiff's confinement at ADX deprived him of a liberty interest. Doc. 395 at 19-31. In a footnote, the Court explained that the periodic reviews that the Bureau of Prisons ("BOP") provides to Plaintiff under an ADX 2009 Institution Supplement met the standard of "meaningfulness" set forth in *Toevs*, reasoning that the policy "considers thirteen factors and provides the inmates with written reports for denials and a chance to appeal." *Id.* at 30 n.3 (citing Doc. 296-4 at 23-27).

As to the Eighth Amendment claim, the Court initially held that Plaintiff's pre-ADX conditions of confinement were "inconsequential" to the claim because Plaintiff sought prospective relief and "nothing in plaintiff's supporting documents suggests that he is likely to be subject to those conditions again." *Id.* at 32. Essentially, the Court held that, to the extent Plaintiff sought

equitable relief for his pre-ADX conditions, the claim was moot. Reaching the merits, the Court found that Plaintiff's confinement at ADX did not pose an objective risk of serious harm from sleep deprivation and social isolation. *Id.* at 32-41. While Plaintiff established a significant risk of serious harm from his medical ailments, he failed to demonstrate that the delays in treatment occurred as a result of the BOP's deliberate indifference. *Id.* at 42. The Court granted Defendants' motion for summary judgment, dismissing with prejudice Plaintiff's remaining claims.

II. ARGUMENT.

A party must file a motion to alter or amend a judgment within "28 days after the entry of the judgment." Fed. R. Civ. P. 59(e) (2009). Reasons for granting a Rule 59(e) motion "include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citing *Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995)). A Rule 59(e) motion, however, "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id.* (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991)). Further, a post-judgment motion that simply rehashes arguments made in response to a motion for summary judgment should be denied. *Mambo v. Vehar*, 185 F. App'x 763, 766 (10th Cir. 2006).

A. The Court Correctly Considered and Applied *Toevs*.

Plaintiff argues that the Court failed to apply "controlling law" when considering the indefiniteness of Plaintiff's confinement under the liberty interest analysis required by *DiMarco*. Doc. 398 at 9. He contends that *Toevs* has clarified the meaning of indefinite and that the decision now "controls this finding of indefiniteness." *Id.* In his view, Plaintiff's confinement at ADX is indefinite because, as in *Toevs*, he knows "of no end date to his solitary confinement." *Id.* at 11.

Plaintiff's arguments are without merit and reconsideration is unnecessary. *Toevs* does not mandate that the Court modify its entry of summary judgment, or that it reconsider its opinion. First, *Toevs* is materially distinguishable in several respects. Second, the Court properly applied *Toevs* in granting summary judgment to Defendants.

1. *Toevs* is Materially Distinguishable and Is Not Controlling.

As an initial matter, *Toevs* is materially distinguishable from, and not controlling precedent for, this case. To understand why, a brief summary of the decision is necessary. In *Toevs*, an inmate who was confined in administrative segregation for seven years at the Quality of Life Level Program ("QLLP"), which is program run by the Colorado Department of Corrections, alleged a procedural due process violation. 646 F.3d at 753. The QLLP is a stratified, six-level program, whose purpose is behavior modification. *Id.* at 754, 758. In levels 1 through 3, which were classified as administrative segregation and were the most restrictive, inmates received monthly reviews of their placement. *Id.* In levels 4 through 6, which were less restrictive and were called "close custody," inmates received *no periodic reviews* of their placement. *Id.* After the prisoner attempted to escape, he was placed in the QLLP in 2002, progressing from level 1 to level 6, returning to level 1 again (for poor behavior), and completing the QLLP in 2009. *Id.*

Applying the *DiMarco* factors, the court concluded that confinement in the QLLP deprived the prisoner of a liberty interest. *Toevs*, 646 F.3d at 756-57. It noted that the penological interest and parole disqualification factors "work[ed] against finding a liberty interest." *Id.* at 756. The evidence was unclear on "whether the conditions of placement were extreme, but at a minimum there is a genuine issue of material fact regarding the question." *Id.* The prisoner presented evidence that his conditions "were similar to the conditions described in *Wilkinson*." *Id.* "*In these circumstances*," the "determinative" factor was the inmate's indefinite confinement at QLLP, which although it had a minimum time for completion, it had no "maximum, and there is no restriction on

how many times a prisoner may be regressed to lower levels." *Id.* at 757 (emphasis added). In the analysis of the indeterminate factor, *Toevs*, however, did not consider the frequency of the QLLP reviews, or whether prison officials allowed the prisoner an opportunity to object to his conditions of confinement. *Id.*

Here, *Toevs* is not controlling for several reasons. First, the undisputed evidence shows that, unlike *Toevs*, the BOP did not confine Plaintiff at ADX to modify his behavior; rather, as the Court found, "given that plaintiff's segregation is not punishment for unacceptable behavior, but serves the penological goal of safety, the duration of confinement becomes less important." Doc. 395 at 26 n.2 (citing *Rezaq v. Nalley*, No. 07-cv-02483-LTB-KLM, 2010 WL 5157317, *11 n.13 (D. Colo. Dec. 14, 2010)). Indeed, Plaintiff's ADX designation occurred as a result of his "history of extreme violence and his membership in the Aryan Brotherhood." Doc. 395 at 20; *see also* Doc. 296 at 3-6.

Second, unlike *Toevs* where the evidence established a *material dispute* as to the nature of the conditions, the undisputed evidence here established that the conditions at ADX are materially different than in *Wilkinson*. The Court found that, as in previous cases, Plaintiff's conditions at ADX — either in the general population, or, previously, in Range 13 — were not extreme. Doc. 395 at 23-24. Moreover, as the Tenth Circuit recently noted, "placement in isolation and segregation" is not, by itself, atypical and significant; an inmate must present additional evidence to establish a deprivation of a liberty interest. *Gee v. Pacheco*, 627 F.3d 1178, 1193-94 (10th Cir. 2010); *accord Townsend v. Fuchs*, 522 F.3d 765, 772 (7th Cir. 2008) (holding that conditions of "extreme isolation" by themselves are insufficient to be atypical and significant).

Third, unlike *Toevs*, Plaintiff's confinement at ADX is not indefinite. Both the Supreme Court in *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005), and *DiMarco*, 473 F.3d at 1343-44, require consideration of the duration and the frequency of periodic reviews of confinement as part of the analysis of the indefinite factor. *Toevs*, which is a panel decision, cannot overrule *DiMarco*, a previous

panel decision. To the extent an inconsistency exists between *Toevs* and *DiMarco* in this regard, the Court must "follow earlier, settled precedent over a subsequent deviation therefrom." *Haynes v. Williams*, 88 F.3d 898, 900 n. 4 (10th Cir. 1996). The Court is "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." *United States v. Meyers*, 200 F.3d 715, 720 (10th Cir. 2000).

The Supreme Court in *Wilkinson* explained that one of the "plus" factors that made OSP confinement atypical and significant was its "duration." 545 U.S. at 224. But the Court went on to explain that duration consists of two components: the length of confinement, and the frequency of reviews of such confinement (at OSP it occurred only annually). *Id.* Following this directive, *DiMarco* considered both components — the duration of the segregation, and the frequency of the reviews of the segregation. 473 F.3d at 1343-44 (noting that inmate spent 14 months in segregation, and that she "had regular reevaluations throughout her confinement" every 90 days and an opportunity to object to her conditions). The duration of the confinement thus operates as a *plus* factor, but "regular reevaluations" or reviews operate in the *opposite direction*, making the deprivation not atypical.

In its analysis of this factor, the Court correctly addressed both factors (duration and frequency), focusing on the frequency of the periodic reviews that the BOP offers and on the fact that these reviews allow Plaintiff an opportunity to object to his conditions, as well as an opportunity to appeal an adverse decision. Doc. 395 at 26, 29, 30. It reasoned that the BOP reviews Plaintiff for admission into the step-down program every six months under a 2009 Institution Supplement. *Id.* at 29. The policy "designates thirteen factors that prison officials must consider when making a determination of whether an inmate can enter the step-down program." *Id.* The Court found that, since his entry into the ADX general population, Plaintiff had four referrals for the step-down program and, while the BOP denied him admission, it gave him "specific reasons

why his admission … was denied as well as the goals plaintiff had to achieve in order to receive admission into the program." *Id.*

Lastly, unlike *Toevs*, where inmates did not receive periodic reviews at all in QLLP levels 4 through 6, the 2009 Institution Supplement requires periodic reviews at all stages of the ADX step-down program. *Compare* 646 F.3d at 754, *with* Doc. 296-4 at 23-27. Given these material differences, *Toevs* is not controlling, nor does it require that the Court reconsider its order granting summary judgment for Defendants.

2. The Court Properly Applied *Toevs*.

In his motion, Plaintiff also argues that the Court "provided conflicting analyses in its consideration of the sufficiency of the process." Doc. 396 at 13. He believes that the Court erred when it stated that it was unnecessary to consider the adequacy of the process BOP provided to Plaintiff, but still addressed the issue in a footnote. *Id.* at 14.

Plaintiff's argument is without merit. The Court's analysis is not "conflicting." The Court correctly concluded that, because Plaintiff "failed to raise a genuine issue that his incarceration at ADX implicates a liberty interest, there is no need to consider whether plaintiff has been provided with sufficient due process protections." Doc. 395 at 30-31. In a footnote, the Court observed that the process provided by the 2009 Institution Supplement *exceeds DiMarco*'s requirements that it provide frequent reviews, along with an opportunity to object to the conditions of confinement. *Compare id.* at 30 n.3, *with* 473 F.3d at 1343-44. As this Court has noted in a similar case, "*DiMarco* does not require the level of process contemplated by plaintiffs in order for a term of confinement to be definite." *Saleh v. Fed. Bureau of Prisons*, No. 05-cv-02467-PAB-KLM, 2010 WL 5464294, *5 (D. Colo. Dec. 29, 2010).

The Court may, in the exercise of its discretion, provide an alternate holding on an issue that is properly before it. Here, the Court correctly concluded that the BOP's periodic reviews at ADX

essentially comply with *Toevs*' requirement of meaningfulness, even though the goal of Plaintiff's placement is *not* for behavior modification. *Toevs* noted that meaningful periodic reviews should "give the prisoner some idea of the requirements for, and his progress toward, more favorable placement." 646 F.3d at 758. Similarly, the "2009 Institution Supplement considers thirteen factors and provides the inmates with written reports for denials and a chance to appeal." Doc. 395 at 30 n.3. Accordingly, Plaintiff's argument regarding a supposed inconsistency in the Court's opinion is without merit.[1] In sum, reconsideration on these grounds is inappropriate.

B. Plaintiff's Arguments Regarding the Statute of Limitations and the Evidence of his Pre-2005 Confinement are Inappropriately Raised in the Rule 59(e) Motion.

In the motion, Plaintiff argues that the 2005 accrual date for his claims is incorrect because his injuries are ongoing and the so-called "ongoing violation doctrine" applies. Doc. 398 at 2-3. (While Plaintiff suggests that there are differences between the continuing violation doctrine and the ongoing violation doctrine, that assertion is incorrect; they are one and the same. *See Heard v. Sheahan*, 253 F.3d 316, 318 (7th Cir. 2001)). He also contends that the Court did not consider evidence of his entire confinement under restrictive conditions. *Id.* at 6-8.

None of Plaintiff's arguments warrants reconsideration of the Court's final judgment for several reasons. First, with regard to the continuing violation argument, Plaintiff could have raised the applicability of the continuing violation doctrine at summary judgment, but failed to do so. Plaintiff devoted a single sentence to this argument, stating onlyly that "Defendants' continuing violation argument is misplaced." Doc. 319 at 19. Accordingly, because Plaintiff could have raised this argument earlier, reconsideration on this ground is inappropriate. *Paraclete*, 204 F.3d at 1012; *Mambo*, 185 F. App'x at 766.

[1] Equally without merit is Plaintiff's argument that the Court employed Eighth Amendment and substantive due process standards in analyzing his procedural due process claim. Doc. 398 at 12. It is abundantly clear that the Court correctly relied on controlling procedural due process law, which plainly does not incorporate other standards.

Second, while Plaintiff couches his arguments on the statute of limitations as being contrary to "controlling law," Doc. 398 at 2, he is simply rehashing arguments he already presented during the summary judgment briefing, which is an inappropriate use of a Rule 59(e) motion. *Paraclete*, 204 F.3d at 1012; *Mambo*, 185 F. App'x at 766. For instance, in his response to Defendants' motion for summary judgment, Plaintiff specifically argued that his claims were not time barred because his "injury — which encompasses the duration of his 28 years of solitary confinement — is ongoing to this day." Doc. 319 at 19. In addition, at multiple points, Plaintiff presented evidence of his entire confinement in restrictive conditions, arguing that it was relevant to his claims and that it should be considered. *Id.* at 9-10 (proffering facts of his entire history of confinement); *id.* at 23 (arguing that his "thirty years of isolation deprived him of sleep, social interaction and environmental stimulation, and that these deprivations result in a substantial risk of harm"); *id.* at 27 ("A factfinder could conclude that Defendants were deliberately indifference [sic] because, for decades, they have been aware of serious risks of harm to Mr. Silverstein and yet they have failed to act reasonably."); *id.* at 30 ("Based on the extraordinary length of isolation, a factfinder could conclude that Plaintiff's conditions are extreme."). And, in any event, the Court already rejected these issues.

Third, the Court ruled as Plaintiff had urged at summary judgment regarding the statute of limitations. In response to the motion for summary judgment, he argued that his claims were not time barred because his injuries allegedly continued and his claims sought prospective relief. Doc. 319 at 18-19. And that is precisely what the Court concluded: it held that Plaintiff's alleged injuries were tied to his current conditions of confinement at ADX, and that his claims for injunctive relief were timely. Doc. 395 at 15. Having advocated for the Court to rule as he urged, he cannot now seek reconsideration on the ground that the Court should have ruled differently. *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1215 (10th Cir. 2000) (quoting *United States v. Johnson*, 183 F.3d 1175, 1179 n. 2

(10th Cir. 1999) ("The invited error doctrine prevents a party from inducing action by a court and later seeking reversal on the ground that the requested action was error.").

Fourth, even if the Court had not ruled as Plaintiff wished, it correctly held that the continuing violation doctrine is inapplicable to Plaintiff's claims. The Court reasoned that the doctrine was inapplicable because during the three decades when the violations occurred, he "was housed in four different correctional institutions in varying conditions." Doc. 395 at 18. Relying on *Fogle v. Slack*, 419 F. App'x 860, 864-65 (10th Cir. 2011), the Court held that it was inappropriate to aggregate all confinement decisions into one "continuing violation." Doc. 395 at 18. Plaintiff himself concedes as much, noting that, in cases asserting procedural due process claims, courts find that "each instance where a prisoner receives process is an independent action, with a separate accrual date."[2] Doc. 398 at 4 (citing, *inter alia*, *Gambina v. Fed. Bureau of Prisons*, No. 10-cv-02376-MSK-KLM, 2011 WL 4502085, *4 (D. Colo. Sep 29, 2011) (holding that "inmate classification decisions constitute discrete events, each subject to its own statute of limitations rather than a 'continuing' one").

Fifth, an additional ground supports the Court's conclusion. Because there no "continual unlawful acts … from the original violation," the continuing violation doctrine is inapplicable. *Bergman v. United States*, 751 F.2d 314, 317 (10th Cir. 1984); *see also Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 635 (6th Cir. 2007). Plaintiff's challenge here is to an initial discrete decision, made in November 1983, to place him under specific individualized security measures. His contention that the objectionable conditions are still in effect today is simply an "ill effect" that arose from the original alleged violation, rendering the continuing violation doctrine inapplicable. *Cf. Parkhurst v. Lampert*, 264 F. App'x 748, 749 (10th Cir. 2008) (affirming dismissal of claim as time-barred and rejecting continuing violation doctrine because the plaintiff "alleged the same ill effect

[2] The decisions that Plaintiff cites in support of this proposition (Doc. 398 at 4) are consistent with the Court's ruling on this issue, and do not support his argument.

from the day the alleged overcrowding first existed"); *Sims v. New*, No. 08-0794, 2009 WL 3234225, *7 (D. Colo. Sept. 30, 2009) (same in *Bivens* claim because "subsequent events described by Plaintiff … were not new illegal acts that would allow Plaintiffs to rope the [original act] into the applicable limitations period. Rather, the subsequent acts merely sustained the injury caused by the original act.").

Sixth, as to the evidence the Court considered, Plaintiff's argument also fails. The Court correctly did not consider any evidence about Plaintiff's pre-ADX conditions of confinement because his claims, as he admits, are for prospective relief. Given that "nothing in plaintiff's supporting documents suggests that he is likely to be subject to those conditions again," Doc. 395 at 32, the Court correctly concluded that to the extent Plaintiff sought equitable relief for his pre-ADX conditions, the request was moot. The motion, thus, should be denied as to these issues.

III. CONCLUSION.

Plaintiff has failed to establish any grounds that justify reconsideration of the Order. There has been no change in controlling law. Plaintiff has shown no clear error that must be corrected. In sum, for the reasons set forth above, the motion to alter or amend judgment should be denied.

Respectfully submitted,

JOHN F. WALSH
United States Attorney

s/Juan G. Villaseñor
JUAN G. VILLASEÑOR
MARCY E. COOK
Assistant United States Attorneys
United States Attorney's Office
1225 Seventeenth Street, Suite 700
Denver, Colorado 80202
Telephone: (303) 454-0185
E-mail: juan.villasenor@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

bglidden@law.du.edu
lrovner@law.du.edu
marcy.cook@usdoj.gov
rraghunath@law.du.edu

I also hereby certify that on the same date noted above I have mailed or served the foregoing document to the following non-CM/ECF participant(s) in the manner (mail, e-mail, etc.) indicated by the nonparticipant's name:

None.

s/Juan G. Villaseñor
JUAN G. VILLASEÑOR
Assistant United States Attorney