APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[filed Sept. 1, 2021]

No. 20-40379

DENNIS WAYNE HOPE,

Plaintiff—Appellant,

versus

TODD HARRIS; CHAD REHSE; LEONARD ESCHESSA; JONI WHITE; KELLY ENLOE; MELISSA BENET; B. FIVEASH,

Defendants—Appellees.

Appeal from the United States District Court for the Eastern District of Texas
USDC No. 9:18-CV-27

ON PETITION FOR REHEARING EN BANC

Before KING, SMITH, and HAYNES, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service having requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[filed June 18, 2021]

No. 20-40379

DENNIS WAYNE HOPE,

Plaintiff—Appellant,

versus

TODD HARRIS; CHAD REHSE; LEONARD ESCHESSA; JONI WHITE; KELLY ENLOE; MELISSA BENET; B. FIVEASH,

Defendants—Appellees.

Appeal from the United States District Court for the Eastern District of Texas
USDC No. 9:18-CV-27

Before KING, SMITH, and HAYNES, *Circuit Judges*.

PER CURIAM:*

In this case, a prisoner, proceeding pro se, filed an action under 42 U.S.C. § 1983, challenging, *inter alia*, various aspects of his imprisonment in solitary confinement under the Fourteenth, First, and Eighth Amendments of the U.S. Constitution. The district court, adopting the magistrate judge's report and

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* Pursuant to 5th Circuit Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Circuit Rule 47.5.4.

recommendation, dismissed all claims with prejudice. Now, with counsel, the prisoner appeals. For the reasons that follow, we AFFIRM in part, VACATE in part, and REMAND for further proceedings.

I.

Plaintiff-appellant Dennis Wayne Hope is a prisoner in solitary confinement in the Security Housing Unit at the Polunsky Unit within the Texas Department of Criminal Justice. Hope alleges that he has been continuously held in solitary confinement in a cell "no larger than a parking space" twenty-three to twenty-four hours a day for over two decades. According to Hope, he has been told that because he escaped from prison in 1994, he will remain in solitary confinement, even though he alleges that his "escape risk" designation was removed in 2005. He claims that the committee meetings that review his ongoing solitary confinement are a "sham." Moreover, Hope has alleged that since he filed a grievance about various conditions, he has been moved between cells over 263 times and has had his typewriter confiscated. Finally, Hope claims, *inter alia*, that the decades of solitary confinement in a cell that sometimes has feces, urine, and black mold on the walls, floor, and doors have led to his physical and psychological deterioration.

Hope, originally proceeding pro se, filed this lawsuit against seven prison officials: Senior Warden Todd Harris, Major Chad Rehse, Deputy Director of Support Operations Leonard Eschessa, Assistant Director of Classifications Joni White, and three state classification committee members, Kelly Enloe, Melissa Benet, and Bonnie Fiveash (collectively, "De-

fendants”). Specifically, Hope brought a procedural due process claim under the Fourteenth Amendment and a retaliation claim under the First Amendment. He also brought an Eighth Amendment claim, alleging that the conditions, including the duration, of his solitary confinement constitute cruel and unusual punishment. A magistrate judge recommended that Hope’s complaint be dismissed for lack of standing but then proceeded to analyze the merits of Hope’s claims, recommending that they be dismissed with prejudice. The district court, after a de novo review, overruled Hope’s objections, adopted the magistrate judge’s report and recommendation, and dismissed Hope’s complaint with prejudice. Hope timely appealed with counsel.[1]

II.

We review a dismissal for lack of subject-matter jurisdiction de novo. *JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 599 (5th Cir. 2016). The jurisdictional questions presented here are two-fold: (1) whether Hope has standing to bring this action and (2) whether state sovereign immunity bars this action. Important, too, to this jurisdictional inquiry is the fact that Hope brought both official-capacity and individual- capacity claims. We discuss each in turn.

A. There is subject-matter jurisdiction over Hope’s official-capacity claims.

Hope is a prisoner challenging the conditions of his confinement, and his classification within the prison system in an action against various prison of-

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[1] Four amicus briefs focusing on the effects of long-term solitary confinement were also filed in support of Hope.

ficials. This is the prototypical mix of defendants in such cases. *Cf. Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (dismissing the Governor from a prisoner's action for, *inter alia*, Eighth Amendment violations on the basis of sovereign immunity but not dismissing the named prison official). Against that backdrop, we first look to whether Hope has established standing as to each of his claims.

Generally, a plaintiff has standing to sue under Article III if he can show (1) an injury-in-fact, concrete and particularized, that is (2) fairly traceable to the defendant's challenged action, and (3) redressable by a favorable outcome. *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019), *cert. denied*, 141 S. Ct. 1047 (2021) (citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 411 (2013)).

Liberally construing Hope's pro se complaint, as we must, *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995), he alleges three claims.[2] Specifically, Hope alleges a procedural due process claim under the Fourteenth Amendment against all Defendants and a retaliation claim under the First Amendment against Defendants Warden Harris and Major Rehse. He also brings an Eighth Amendment claim against all Defendants for cruel and unusual punishment.

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v.*

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[2] Although Hope is represented by counsel on appeal, he proceeded pro se in the district court.

Nat'l Wildlife Fed., 497 U.S. 871, 889 (1990)) (alterations in original). And "when the suit is one challenging the legality of government action or inaction," of which the prisoner is the object, then "there is ordinarily little question . . . that a judgment preventing or requiring the action will redress it." *Id.* at 561–62.

Here, Hope has offered numerous factual allegations supporting each of his claims. For example, regarding Hope's procedural due process claim, Hope alleges that he is denied meaningful reviews to determine if he should be removed from solitary confinement and that the hearings that are held regarding his classification are a "sham." Specifically, Hope alleges that each of the Defendants has contributed to the denial of a meaningful review and due process by, *inter alia*, not discussing matters related to his file and failing to follow the classification policies and "fair procedures." To that end, Hope has alleged that his denial of procedural due process is fairly traceable to each of the Defendants, and his requested relief would redress this injury by, for example, ordering Defendants to afford Hope the process he claims that he is due. *See id.*

As to the retaliation claim, Hope has also alleged an injury-in-fact. Namely, he alleges that after filing a grievance, he suffered various retaliatory acts such as being moved to over 263 different cells and having his typewriter confiscated. He alleges that Defendants Warden Harris and Major Rehse have ordered these moves, which suffices at the pleading stage as a factual allegation that the injury resulted from Defendants' conduct. *Id.* at 560. And at this stage in the proceedings, his requested relief would redress this injury by, for example, enjoining the frequent cell moves. *See id* at 561–62 (explaining that where a

plaintiff is the "object of the action (or forgone action) at issue," then "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it").

Finally, as to his Eighth Amendment claim, Hope has alleged that he has suffered "physical and psychological mal[a]dies due to the inhumane treatment and conditions" and has been denied "basic needs." He goes on to allege that "[e]ach of the Defendants in one capacity or another work together to ensure Mr. Hope continues to be subjected to these inhumane conditions and have done so for a prolonged period of time." As such, Hope has alleged an injury-in-fact—his physical and psychological maladies—that is fairly traceable to Defendants in light of their roles in maintaining those conditions and Hope's confinement in those conditions. *See id.* at 560–61. Finally, Hope's requested relief is that he not be subjected to these "inhumane conditions," and so, because Hope is the object of the Defendants' continuation of these conditions, a judgment enjoining such actions would redress the alleged harm. *See id.* at 561–62.

For these reasons, contrary to the magistrate judge's conclusion, Hope has standing to bring this action.[3]

[3] The magistrate judge concluded that Hope lacked standing to bring this action because his claims were not redressable by Defendants. Specifically, the magistrate judge found that Hope's claims were not redressable because some of Defendants had left Hope's prison unit and that only the "Director" of the prison system, who was not named among Defendants and whom the magistrate judge did not offer any details about, could redress Hope's

We must also assure ourselves that this suit clears a second jurisdictional bar—state sovereign immunity. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 333 n.8 (5th Cir. 2002) (noting that state sovereign immunity "bears on [the] court's subject-matter jurisdiction"). State sovereign immunity prohibits "private suits against nonconsenting states in federal court." *See City of Austin*, 943 F.3d at 997; *see also Hans v. Louisiana*, 134 U.S. 1, 13 (1890). And where a suit is effectively against the state, the state officials enjoy the same sovereign immunity that would be afforded the state. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021); *City of Austin*, 943 F.3d at 997. In the absence of abrogation by Congress, waiver by the state, or application of an exception, state sovereign immunity bars suit. *Tex. Democratic Party*, 978 F.3d at 179.

Relevant here is the exception under *Ex parte Young*, 209 U.S. 123 (1908), which permits suits for prospective injunctive or declaratory relief against a state official acting in violation of federal law if there

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injuries. But this was an error. First, Hope brought, *inter alia*, official-capacity claims against Defendants, allowing the officials' successors to be automatically substituted, so it is of no moment that some of the Defendants have left Hope's unit. *Ganther v. Ingle*, 75 F.3d 207, 210 & n.7 (5th Cir. 1996); *see also* Fed. R. App. P. 43(c)(2) ("The public officer's successor is automatically substituted as a party."). Second, the magistrate judge's conclusion appears to rest on an assumption that the only way to redress Hope's injuries was releasing him from solitary confinement. But Hope's requested relief is not so limited. Indeed, Hope also requests that he not be subjected to certain conditions of confinement as well as receive additional process.

is a sufficient connection to enforcing the allegedly unconstitutional law. *See id.* We have made clear that enforcement means "compulsion" or "constraint" and that a plaintiff must at least show that the defendant has a particular duty to enforce the challenged conduct. *Id.*; *see also Tex. Democratic Party v. Hughs*, No. 20-50683, 2021 WL 1826760, at *2 (5th Cir. May 7, 2021). And we note that generally "all institutional litigation involving state prisons," such as this case, is brought under the *Ex parte Young* exception. *Brennan v. Stewart*, 834 F.2d 1248, 1252 n.6 (5th Cir. 1988). In fact, "[t]he exception is so well established [in that context] that" such cases often do not even "mention[] . . . *Ex parte Young*." *Id.*; *see also Kahey v. Jones*, 836 F.2d 948, 949 (5th Cir. 1988) ("To the extent her complaint [against the Warden] thus seeks prospective injunctive relief against the state, it does not contravene the eleventh amendment."). Finally, although analytically distinct questions, there is "significant[] overlap" between the Article III standing and the *Ex parte Young* inquiries. *See City of Austin*, 943 F.3d at 1002 (quoting *Air Evac EMS, Inc. v. Tex., Dep't of Ins. Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017)). And we note, too, that the standing inquiry can inform the state sovereign immunity inquiry. *See id.*

Against that backdrop, each of the Defendants whom Hope named and seeks prospective injunctive relief against has the authority to compel or constrain Hope's conditions of confinement by maintaining those conditions and his placement within them.[4]

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[4] First, Hope named Todd Harris, the Senior Warden, and in similar prison litigation, the warden is almost invariably named as a defendant. *See, e.g.*, *Farmer v. Brennan*,

511 U.S. 825, 830 (1994) (naming the warden of the prison where the prisoner was housed). And it stands to reason that the prison warden would have a sufficient connection to enforcing the allegedly unconstitutional prison conditions by compelling or constraining certain practices. *See Tex. Democratic Party*, 978 F.3d at 179; *see also Kahey*, 836 F.2d at 949. Second, Hope named Major Chad Rehse, whose duties include overseeing the conditions of confinement and treatment of inmates in solitary confinement. Such duties satisfy the required connection to the challenged conduct because Major Rehse can compel or constrain certain challenged conditions of confinement. *See City of Austin*, 943 F.3d at 1001; *see also Southard v. Tex. Bd. of Crim. Just.*, 114 F.3d 539, 552 (5th Cir. 1997) (explaining that "[e]ach prison unit organizes the line of authority over its security personnel after a military chain of command: wardens, assistant wardens, majors, captains, lieutenants, sergeants, and correctional officers, in descending hierarchical order"). The same is true of Deputy Director of Support Operations Leonard Eschessa whose duties include managing the overall treatment, conditions of confinement, and classifications of inmates. *See Tex. Dep't of Crim. Just. v. Terrell*, 925 S.W.2d 44, 47 (Tex. App.—Tyler 1995, no pet.) (describing the chain of command). Assistant Director of Classifications Joni White is responsible for "the overall classifications," again satisfying the requisite connection by being in a position to compel or constrain classification of prisoners. *See Martinez v. Stephens*, No. CV H-16- 0195, 2017 WL 607129, at *4 (S.D. Tex. Feb. 15, 2017) (describing the Assistant Director's role and responsibilities). Finally, when it comes to the three state classification committee members, they all have the authority to make final decisions regarding administrative segregation, which yet again satisfies the requisite connection in that the committee members are in a position to compel or constrain classification of prisoners. *See*

See, e.g., *Kahey*, 836 F.2d at 949 (noting that complaints against the prison warden do not contravene state sovereign immunity); *City of Austin*, 943 F.3d at 1001 (discussing a case where board members had the requisite authority for purposes of *Ex parte Young* because the board had the authority to decide whether to pay certain claims); *see also Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (explaining that under Tex. Gov't Code 501.063(b) the Texas Department of Criminal Justice is responsible for enforcing the challenged statutory provision). Therefore, state sovereign immunity does not bar Hope's official-capacity claims for prospective injunctive relief.

But, as the magistrate judge correctly recognized, Hope cannot seek monetary damages from Defendants in their *official* capacities. *Tex. Democratic Party*, 978 F.3d at 179; *see also Hafer v. Melo*, 502 U.S. 21, 30 (1991). The same is not necessarily so, however, for Hope's individual- capacity claims, and we turn to these next.

B. Hope's individual-capacity claims must be considered in the first instance.

In addition to his official-capacity claims, Hope also sought damages against Defendants in their *individual* capacities, which is permitted. *See Hafer*, 502 U.S. at 30–31. Here, however, neither the magistrate judge nor the district court ever considered these individual-capacity claims before dismissing

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Wilkerson v. Goodwin, 774 F.3d 845, 850 (5th Cir. 2014) (analyzing a claim where a prisoner in solitary confinement sued various prison officials, including two classification officers).

the entire complaint with prejudice. But as "we are a court of review, not of first view," we do not pass on the individual-capacity claims and instead remand to the district court to consider these claims in the first instance. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *In re Ultra Petroleum Corp.*, 943 F.3d 758, 766 (5th Cir. 2019).

III.

We review the district court's ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) de novo. *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In exercising this review, we will not dismiss a claim "unless the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017). "We take all factual allegations as true and construe the facts in the light most favorable to the plaintiff." *Id.* Further, where, as here, the complaint was filed pro se, we liberally construe it. *Grant*, 59 F.3d at 524.

A. Hope has failed to state a procedural due process claim.

We turn first to Hope's procedural due process claim. And on this claim, we generally agree with the district court. To determine what process is due, we

address two inquiries: "(1) whether there exists a liberty . . . interest which has been interfered with by the State and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 228–29 (5th Cir. 2020) (citation omitted).

As to the first inquiry, Hope likely has established a liberty interest. That is, he has been placed in solitary confinement indefinitely, and his placement renders him ineligible for parole. *Wilkinson v. Austin*, 545 U.S. 209, 224–25 (2005); *see also Wilkerson*, 774 F.3d at 855.

Turning to the second inquiry, to determine what process is due, we look to the framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which "requires consideration of three distinct factors," namely (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Austin*, 545 U.S. at 224-25 (quoting *Eldridge*, 424 U.S. at 335).

In this case, although Hope's interest is "more than minimal," it "must be evaluated . . . within the context of the prison system and its attendant curtailment of liberties." *Id.* at 225. Put differently, we look to how much liberty Hope is deprived of over and above what would normally be incident to prison life. And so, Hope's interest is low.

From there, we turn to the risk of erroneous deprivation by considering whether Hope has "notice of the factual basis leading to consideration for [solitary] placement" and "a fair opportunity for rebuttal." *Id.* at 225–26. Where the government gives a prisoner an opportunity "to submit objections prior to the final level of review," that decreases the likelihood of erroneous deprivation. *Id.* at 226.

Here, Hope has received notice of the factual basis for his placement in solitary—his escape record. To be sure, Hope claims that his designation as an "escape risk" has been removed. But in any event, Hope concedes that the basis for his present placement in solitary remains "an incident that will never change from over 23 years ago." In so doing, Hope has alleged that he has notice.

We also find that based on the allegations before us, even viewing them in the light most favorable to Hope, Hope has had a fair opportunity for rebuttal. Indeed, according to Hope he has attended at least forty-eight hearings and has made statements during those hearings. In other words, Hope has been allowed to levy "objections prior to the final level of review," thereby decreasing the likelihood of erroneous deprivation. *Id.*

Finally, turning to the government's interest, Texas's "first obligation must be to ensure the safety of . . . the public." *Id.* at 227. Moreover, given the scarce resources of prison systems, we must "give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards." *Id.* at 228. Based on the pleadings before us, Texas's interest in keeping the public safe from Hope, who has previously

escaped, weighs in favor of finding that Hope has been given adequate process.

Put simply, even accepting Hope's allegations as true and viewing them in the light most favorable to him, the government's interest outweighs Hope's interest, and the process he is given suffices to satisfy the constitutional requirements of the Fourteenth Amendment. Therefore, we affirm the district court's dismissal of this claim.

B. Hope has stated a claim for retaliation.

Hope also alleges that Defendants Warden Harris and Major Rehse have engaged in various forms of retaliatory conduct against him as a result of his filing grievances and having outside advocates contact officials "about his continued confinement in solitary."

"To prevail on a claim of retaliation, a prisoner must establish (1) a specific constitutional right, (2) the defendant's intent to retaliate against the prisoner for his or her exercise of that right, (3) a retaliatory adverse act, and (4) causation." *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006) (citation omitted). "An action motivated by retaliation for the exercise of a constitutionally protected right is actionable, even if the act, when taken for a different reason, might have been legitimate." *Woods v. Smith*, 60 F.3d 1161, 1165 (5th Cir. 1995).

To show causation as part of his retaliation claim, in violation of his First Amendment rights, "a plaintiff must allege that, but for the retaliatory motive, the complained of incident would not have occurred." *Gonzales v. Gross*, 779 F. App'x 227, 230 (5th Cir. 2019) (citation and alterations omitted). That is, a

prisoner must either (1) "produce direct evidence of motivation" or (2) "allege a chronology of events from which retaliation may plausibly be inferred." *Id.* (citation omitted).

In his pleadings, Hope alleges a constitutional right under the First Amendment to file a grievance with the prison system and that after filing such a grievance (and after outside advocates contacted the prison on his behalf), his typewriter was confiscated and then, between 2012 and 2018, he was moved a total of 263 times.

Hope alleges that before he filed his grievance, for almost fourteen years, he remained in the same cell or was moved only infrequently. In other words, the alleged cell-move policy and the confiscation of his typewriter (which he used to type the grievance) only occurred *after* he filed the grievance. Such a drastic shift has been alleged with sufficient detail so as to constitute a "chronology of events from which retaliation may plausibly be inferred." *Woods*, 60 F.3d at 1166 (quoting *Cain v. Lane*, 857 F.2d 1139, 1143 n.6 (7th Cir. 1988)). Plainly, Hope alleges that the retaliatory or adverse act is the excessive number of moves from cell to cell—a policy and practice he alleges is still in effect—and confiscation of his typewriter. *Cf. Petzold v. Rostollan*, 946 F.3d 242, 253–54 (5th Cir. 2019) (finding that an inference of retaliation was bolstered by the chronology of events). Accordingly, Hope has plausibly alleged a retaliation claim as to these incidents.

Second, Hope alleges that after requesting video footage of a search of his cell, he was exposed to pepper spray and "left nude in a cell [for eight days] with the pepper spray still on his body and nothing to

clean it off with." But, as alleged, the constitutional violation at issue is not clear, and we do not find that Hope has alleged a retaliation claim based on this incident.

At bottom, Hope has plausibly alleged all three elements of a retaliation claim against Defendants Harris and Rehse as to the cell-move policy and typewriter confiscation, and we vacate the district court's dismissal of Hope's retaliation claim and remand for further proceedings.

C. Hope has stated a claim for a violation of the Eighth Amendment based on certain conditions of his confinement only against Major Rehse.[5]

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. But long-term solitary confinement is not per se cruel and unusual. *Hutto v. Finney*, 437

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[5] To the extent that Hope has also alleged Eighth Amendment violations for other aspects of his confinement such as his lack of the same type of access to the law library as prisoners in the general population, the type of condiments he receives with his meals, or the type of human contact he has as compared to prisoners in the general population, such claims fail as a matter of law. *See Daigre v. Maggio*, 719 F.2d 1310, 1312 (5th Cir. 1983) (explaining that "isolation is punitive . . . and that deprivations beyond those imposed on the general prison population is the very essence of internal prison discipline"). Similarly, to the extent that Hope has alleged an Eighth Amendment violation based on the sheer length of his confinement, this claim also fails. As the Supreme Court has explained, "the length of isolation sentences was not considered in a vacuum." *Hutto*, 437 U.S. at 685; *see also Grabowski v. Lucas*, No. 94-60177, 1994 WL 652674, at *3 (5th Cir. Nov. 11, 1994) (per curiam).

U.S. 678, 686 (1978) (observing that it is "perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual"). Nevertheless, "[t]here is a line where solitary confinement conditions become so severe that its use is converted from a viable prisoner disciplinary tool to cruel and unusual punishment." *Gates v. Collier*, 501 F.2d 1291, 1304 (5th Cir. 1974). With that in mind, we focus our analysis of Hope's Eighth Amendment claim on whether the conditions of Hope's confinement are sufficiently "severe." *See id.*; *Farmer*, 511 U.S. at 834.

Of course, the Constitution does not require "comfortable" prison conditions, but the conditions of confinement may not "involve the wanton and unnecessary infliction of pain." *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981); *see also Daigre*, 719 F.2d at 1312 (noting that "the eighth amendment forbids deprivation of the basic elements of hygiene") (citing *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971)).

To state a claim for a violation of the Eighth Amendment based on conditions of confinement, a prisoner must allege (1) that the prison conditions pose a "sufficiently serious" threat to his health, including his mental health, and (2) that prison officials acted with "deliberate indifference" to such threat. *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298, 302 (1991)).

To meet the first requirement, the prisoner must show that the conditions, either alone or in combination, constitute an "unquestioned and serious deprivation" of his "basic human needs" such as food, clothing, medical care, and safe and sanitary living

conditions. *See Chapman*, 452 U.S. at 347–48; *cf. Daigre*, 719 F.2d at 1312 (rejecting an Eighth Amendment challenge where the record did not establish that the prisoner's "isolation cell is generally unsanitary" but noting that a "deprivation of the basic elements of hygiene" is forbidden). And, conditions of confinement may be aggregated to rise to the level of a constitutional violation "when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson*, 501 U.S. at 304 (explaining that there may be an Eighth Amendment violation where a prisoner complained of a "low cell temperature at night combined with a failure to issue blankets"). Further, under the Eighth Amendment, "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Finney*, 437 U.S. at 686.

As to the second requirement, the prisoner must show that the defendant acted with "more than mere negligence." *Farmer*, 511 U.S. at 835. To that end, the prisoner must show that those prison officials were (1) "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists"; (2) "subjectively drew the inference that the risk existed"; and (3) "disregarded the risk." *Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) (citing *Farmer*, 511 U.S. at 837) (alterations omitted). More simply, the prison officials must know of, and disregard, an excessive risk to a prisoner's health or safety. *See id.* (citation omitted). Evidence that a risk was obvious or otherwise apparent may be sufficient to support an inference that the prison official was aware of the risk. *Estate of Cheney ex rel. Cheney v. Collier*, 560 F. App'x 271, 273–74 (2014)

(collecting cases); *see also Valentine v. Collier*, 978 F.3d 154, 163 (5th Cir. 2020) (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)).

And it is on this second requirement, deliberate indifference, where much of Hope's Eighth Amendment challenge falls short. Specifically, Hope has not sufficiently pleaded deliberate indifference—with one exception discussed *supra*—because it is unclear from Hope's complaint if any of Defendants, with the exception of Major Rehse, was even aware of the conditions of which he complains. In the absence of such allegations of deliberate indifference—regardless of whether any of the complained-of conditions indeed invoke Eighth Amendment concerns—Hope has failed to state a claim. *Cleveland*, 938 F.3d at 676. Therefore, we affirm the district court's dismissal of Hope's Eighth Amendment claim as to all Defendants except Major Rehse.

That said, liberally construing Hope's complaint as we must, Hope has plausibly alleged that Major Rehse was deliberately indifferent to certain conditions of confinement, which he alleges deprived him of basic human needs such as sanitary living conditions.

First, Hope has alleged that for over two decades he has been in solitary confinement in sometimes unsanitary conditions, including urine, feces, and mold on the walls, floor, and showers, insufficient cleaning supplies, and exposure to pepper spray and tear gas without decontamination.[6]

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[6] Although Hope also challenges the types of meals he receives, including that some have made him sick, such challenges fail as a matter of law. *See Martin v. Scott*, 156

We have previously found that similar unsanitary conditions in a prison cell can, in certain circumstances, rise to the level of cruel and unusual punishment. *See Taylor v. Stevens*, 946 F.3d 211, 219–20 (5th Cir. 2019), *cert. granted, judgment vacated on other grounds sub nom. Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Gates*, 501 F.2d at 1302; *Fussell v. Vannoy*, 584 F. App'x 270, 271 (5th Cir. 2014); *Smith v. Leonard*, 244 F. App'x 583, 584 (5th Cir. 2007). Here, among other allegations, Hope alleges that a wall was almost completely covered in black mold. According to Hope, he was in the mold- infested cell for two weeks and began coughing and was never given

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F.3d 578, 580 (5th Cir. 1998) (finding that allegations that a prisoner "became ill after being fed Vita-Pro—a soy-based meat substitute—simply do not rise to the level of cruel and unusual punishment"). Hope's allegations regarding the policy that he be handcuffed from behind and forced to squat down suffer a similar fate. *See Talib v. Gilley*, 138 F.3d 211, 215 (5th Cir. 1998) (finding that "a policy requiring prisoners on lockdown to kneel facing the wall with their hands behind their backs when served meals" did not constitute cruel and unusual punishment). Similarly, although Hope also generally alleges excessive noise and sleep deprivation, on the face of Hope's complaint, it is not clear if the alleged noise is serious enough to cause sleep deprivation or how much sleep Hope actually gets. Without such allegations, Hope has not alleged that he "has been deprived of the minimal measure of life's necessities." *See Chavarria v. Stacks*, 102 F. App'x 433, 436 n.2 (5th Cir. 2004). Finally, to the extent that Hope alleged an Eighth Amendment claim for a denial of psychiatric treatment, such a claim was not sufficiently briefed on appeal and is thus waived. *See* FED. R. APP. P. 28(a)(9)(A); *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001).

cleaning supplies to address the condition. This likely is sufficiently serious by itself. *See, e.g.*, *Smith*, 244 F. App'x at 584 (vacating the judgment and remanding an Eighth Amendment claim regarding a prison official's failure to remove "allegedly toxic mold" from prison); *cf. Taylor*, 946 F.3d at 219 (citation omitted) (observing that a cell "covered with crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles" violated the Eighth Amendment). But taken together with the urine and feces on the wall, which Hope alleges has occurred "many times" throughout his twenty-six years in these conditions, it is more than plausible that Hope's decades of solitary confinement alongside such conditions of mold, urine, and feces have caused the physical and psychological deterioration he alleges, and it is clear that such an allegation is sufficiently serious to invoke Eighth Amendment concerns. *See Taylor*, 946 F.3d at 219; *Fussell*, 584 F. App'x at 271; *Smith*, 244 F. App'x at 584.

Additionally, we have previously found that ordering a prisoner back into a tear-gas-filled cell without supplies for decontamination could be sufficiently serious. *Cardona v. Taylor*, 828 F. App'x 198, 202 (5th Cir. 2020). Here, Hope has alleged that he has been exposed to pepper spray and tear gas in his cell "at least ten times through no fault of his own," that the cell was not decontaminated, and that on one occasion he was "left nude in a cell with the pepper spray still on his body [without anything] to clean it off with" for eight days. To the extent that Hope complains that he has suffered physical harm as a result of being exposed to such chemicals "unnecessarily dispensed" by Major Rehse, he has plausibly alleged a sufficiently serious condition. *See*

Knighten v. John, No. 98-40644, 1999 WL 301376, at *2 (5th Cir. Apr. 29, 1999). Taking these allegations as true, these conditions are likewise sufficiently serious at this stage of the litigation.

Second, liberally construed, Hope's complaint adequately alleges that Major Rehse knew of and disregarded the excessive risks to Hope's health and safety due to these allegedly unsanitary conditions. Specifically, Hope alleges that "Major Rehse continue[s] to subject [him] to . . . unsanitary . . . living conditions," even though he is responsible for placing prisoners in "sanitary" cells. He further alleges that Major Rehse has instructed other officers not to turn on the exhaust fans to clear the pepper spray and tear gas and is "responsible for the frequent moves and placing [him] into these unsanitary cells." Hope also goes on to allege that Major Rehse "*personally* saw the black mold" on the cell wall. And these allegations are made against the backdrop of Hope's allegation that he is no longer an escape risk. Accepting the allegations in Hope's complaint as true, it is at least plausible that Hope's continued confinement in these conditions is not a matter of reasonable policy judgment but is instead deliberate indifference. *See Fussell*, 584 F. App'x at 271–72; *see also Hope*, 536 U.S. at 738.

In any event, by alleging that Major Rehse knew of the unsanitary conditions and chemical agents, which have an obvious risk of harm, Hope has sufficiently pleaded deliberate indifference as to those unsanitary conditions and the chemical agents to survive a motion to dismiss. *Cf. Farmer*, 511 U.S. at 848 (analyzing a prisoner's ability to prove facts such as subjective intent at summary judgment *after* the development of the factual record). Therefore, we va-

cate the district court's dismissal of Hope's Eighth Amendment claims against Major Rehse and remand for further proceedings.

At bottom, Hope has not had any opportunity to take discovery or develop the record. Whether or not the factual record, when developed more fully, will ultimately show that the Eighth Amendment was violated, the facts asserted in his pro se complaint plausibly allege as much as to Major Rehse.

IV.

For the foregoing reasons, regarding Hope's official-capacity claims, we AFFIRM the dismissal of Hope's procedural due process claim under the Fourteenth Amendment. Next, we VACATE the judgment as to Hope's retaliation claim under the First Amendment as to Defendants Warden Harris and Major Rehse and REMAND for further proceedings consistent with this opinion. Similarly, we VACATE the judgment as to Hope's Eighth Amendment claim *only* as to Defendant Major Rehse and REMAND for further proceedings consistent with this opinion. But we AFFIRM the dismissal of Hope's Eighth Amendment claim as to all other Defendants.

Finally, the district court is DIRECTED to consider in the first instance Hope's individual-capacity claims.

HAYNES, *Circuit Judge*, concurring in part and dissenting in part:

I concur with much of the majority opinion, but I respectfully dissent in part as indicated here.[1] While I agree that there is subject matter jurisdiction for the official capacity claims (limited, as stated, to prospective injunctive relief), I respectfully dissent from the majority opinion's treatment of Hope's official capacity Eighth Amendment and due process claims[2]—I conclude that Hope's factual allegations are sufficient to state such claims against all Defendants in their official capacity.

As to the Eighth Amendment claims, the majority opinion concludes that Hope can proceed only against Rehse, and only in connection with certain conditions of his confinement. To be sure, the grossly unsanitary conditions of Hope's confinement clearly support an Eighth Amendment claim. But the major-

[1] In addition to the discussion above, I agree with the majority opinion that Hope has stated a claim for retaliation against Defendants Harris and Rehse, but I respectfully dissent from the portion of the majority opinion that narrows the scope of Hope's retaliation claim to just the seizure of Hope's typewriter. Most significantly, the majority opinion disregards a key part of the retaliatory incident—namely, Hope being pepper sprayed and then left nude in a cell for eight days (all the while covered in the spray). Hope's complaint makes clear that the pepper spray incident was *part of* the retaliation he experienced for filing a grievance; it naturally flowed from—indeed, happened only minutes after—the typewriter seizure. The underlying constitutional violation is therefore the same: retaliation in violation of the First Amendment. I would include those aspects in the remand.

[2] I agree with the remand of the individual claims.

ity opinion fails to meaningfully address *how* the extraordinary length of Hope's confinement affects Hope's other Eighth Amendment claims, failing to recognize that other Defendants were plausibly deliberately indifferent to Hope's suffering on multiple fronts.

In particular, the extreme length of Hope's solitary confinement should make it easier for him to prove an Eighth Amendment violation, or (at the very least) require additional justification from the State to avoid liability. *See Taylor v. Riojas*, 141 S. Ct. 52, 52–54 (2020) (per curiam) (concluding that *only six days* of confinement in "deplorably unsanitary conditions" was an obvious violation of the Eighth Amendment).[3] That is so because the extreme length affects both prongs of the Eighth Amendment analysis. As to the first prong—requiring a "sufficiently serious" deprivation—the duration of his solitary confinement acts as a significant aggravating factor, increasing the severity of the deprivation. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (acknowledging that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone" (emphasis omitted)); *see also Hutto v. Finney*, 437 U.S. 678, 685–87 (1978) (explaining how the length of con-

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[3] The *Taylor* decision illustrates how extreme conditions can give rise to an Eighth Amendment claim for even a short durational period. 141 S. Ct. at 52–54. The calculus obviously runs in the other direction, as well—an extremely long duration may reduce the need to demonstrate harsher conditions. *See Hutto v. Finney*, 437 U.S. 678, 686–87 (1978) (observing that "[a] filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months").

finement interacts with the conditions of confinement). As to the second prong—demonstrating that a prison official acted with "deliberate indifference"—the duration of his solitary confinement makes it more likely that *all* of the Defendants were aware of a constitutional deprivation and disregarded the risk. Simply put, it is harder for all Defendants to contend that they lacked awareness of Hope's conditions over the course of twenty-six years, especially given Hope's numerous complaints and the fact that he was a "high profile" inmate. I conclude Hope should not be limited to pursuing such claims against only Rehse.

The majority opinion also minimizes the full picture of Hope's Eighth Amendment claims, narrowing them to just his complaints about the unsanitary conditions he experienced. In so doing, it largely overlooks Hope's Eighth Amendment mental health claim, maintaining that he did not sufficiently brief it on appeal. That is incorrect—Hope has argued, in both his amended complaint and in his briefing on appeal, that he suffers from "anxiety, depression, visual and auditory hallucinations" and has "thoughts of suicide." Moreover, he has repeatedly contended that the Defendants are aware of these conditions because Hope "has told them of his symptoms and because the harms of long-term solitary confinement are widely known." These allegations are sufficient to support an Eighth Amendment claim based on Hope's mental health.

At the very least, Hope stated such a claim against Joni White, Assistant Director of Classifications. According to Hope's complaint, White "was contacted by outside advocates after years of Mr. Hope sending her letters asking questions about his

continued isolation" (demonstrating her awareness of Hope's prolonged isolation). White knew of "the effect that long-term isolation takes on the brain" due to her training (demonstrating her knowledge of the risk of long-term confinement). Yet she maintained that she would neither allow for nor recommend Hope's release from solitary confinement (demonstrating that she disregarded this risk), all because of his 1994 escape. Such actions suggest deliberate indifference; Hope should be allowed to pursue claims against such alleged conduct.

As for Hope's due process claim, the majority opinion errs on virtually every step of the *Mathews v. Eldridge* analysis. As to the first prong—the private interest affected by the official action—the majority opinion issues the conclusory statement that Hope's liberty interest is "low"; it seemingly assumes that his liberty would be curtailed even in better prison conditions therefore Hope's deprivation is not over and above what would normally be incident to prison life. However, even a prisoner can assert such a claim: Hope contends that he has been deprived of a whole host of opportunities previously available to him in the general population, including the ability to socialize, to attend religious services, to receive educational programming, and to work.[4] For over

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[4] Specifically, Hope identifies that:

> Prior to placement in solitary, he could see visitors face-to-face, attend religious services, participate in group vocational and educational programming, hold a job, socialize with other prisoners, and spend hours of his day outside his cell; now, he is confined to a 9'x6' cell for between 22 and 24 hours per day, allowed out only to exer-

two decades, the beginning, middle, and end of every day of Hope's life has taken place in a single cell "no larger than a parking space."[5] For the majority opinion to say—without citation or analysis, no less—that the extremely restrictive conditions of Hope's confinement merely implicate a "low" liberty interest thus overlooks the crux of his allegations.

As to the second prong—the risk of an erroneous deprivation—the majority opinion is correct that Hope had notice of the "factual basis" leading to his solitary confinement, but wrong to conclude that he clearly had "a fair opportunity for rebuttal." *Wilkinson v. Austin*, 545 U.S. 209, 225–26 (2005). In particular, if Hope is correct that the forty-eight SCC hearings were a "sham," then it would be as if he never attended any hearings at all. At this stage of litigation, his allegations plausibly support the conclusion that these proceedings were not, in fact, fair, and so it is plausible that he has been erroneously deprived of his liberty interests.

Finally, as to the third prong—the State's interest—I strongly disagree with the majority opinion's suggestion that the State retains any meaningful interest in continuing to isolate Hope in solitary confinement. To be sure, there is little doubt that the State had a strong interest in keeping the public safe

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cise in a different enclosure.

In addition, Hope alleges that he has had only "one personal phone call since 1994" and is stripped searched, on average, four times a day. In short, he plainly faces far more significant impositions on his liberty than he faced in normal prison life.

[5] Hope specifically alleges that he spends 23 to 24 hours a day in this cell.

a few decades ago when Hope was first sent to solitary following his 1994 escape, but that justification expired over fifteen years ago when the "escape risk" designator was removed from his file (again, at this procedural stage, his factual allegations must be accepted as true). That is a concession that the State no longer has any interest in keeping Hope in solitary confinement. To say otherwise, as the majority opinion does, effectively bars valid due process claims based solely on an initial justification without giving any consideration as to how that justification has diminished—or, as here, completely evaporated—over time.[6]

For the foregoing reasons, I would reverse the district court's dismissal of Hope's Eighth Amendment claims with respect to his unsanitary conditions of confinement and his mental health against all Defendants, as well as the district court's dismissal of his procedural due process claim (and expand

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[6] Moreover, I conclude that the State's continued reliance on Hope's escape— over two decades ago—to justify keeping him in solitary confinement constitutes "grossly disproportionate" punishment, subject to Eighth Amendment scrutiny. *See Hutto*, 437 U.S. at 685 (acknowledging that "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards"); *see also Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016) (acknowledging that "[p]rotection against disproportionate punishment is the central substantive guarantee of the Eighth Amendment and goes far beyond the manner of determining a defendant's sentence"); *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981) (acknowledging that conditions of confinement must not be "grossly disproportionate to the severity of the crime warranting imprisonment").

the retaliation claims as to Harris and Rehse). Because the majority opinion fails to do so, I respectfully dissent.

APPENDIX C

Not for Printed Publication

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS LUFKIN DIVISION

[filed May 5, 2020]

DENNIS WAYNE HOPE	§	
		CIVIL ACTION NO.
VS.	§	9:18cv27
TODD HARRIS, ET AL.	§	

ORDER OVERRULING OBJECTIONS AND ACCEPTING THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff Dennis Wayne Hope, an inmate at the Polunsky Unit, proceeding *pro se*, brought the above-styled lawsuit against Todd Harris, Chad Rehse, Leonard Eschessa, Joni White, Kelly Enloe, Melissa Benet, and B. Fiveash.

The court referred this matter to the Honorable Zack Hawthorn, United States Magistrate Judge, at Beaumont, Texas, for consideration pursuant to applicable laws and orders of this court. The Magistrate Judge recommends that the defendants' motion to dismiss should be granted and plaintiff's complaint be dismissed with prejudice.

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such referral, along with the record and pleadings. Plaintiff filed objections to the Magistrate Judge's Report and Recommendation. This requires a *de novo* review of the objections in re-

lation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

After careful *de novo* consideration, the court concludes plaintiff's objections are without merit. For the reasons set forth in the Report, plaintiff's claims fail to state a claim upon which relief may be granted and are frivolous. Accordingly, the defendants' motion to dismiss should be granted and the case dismissed.

Plaintiff paid the full filing fee in this prisoner civil rights action. Accordingly, the Magistrate Judge ordered the Clerk of Court to deliver summonses to plaintiff so he could serve the defendants. While plaintiff complains that the Magistrate Judge erred in asserting plaintiff is proceeding *in forma pauperis* when he paid the filing fee, such distinction does not immunize plaintiff from the dismissal of his claims pursuant to a motion to dismiss by the defendants or dismissal under 28 U.S.C. § 1915A which applies to all prisoner complaints even when the prisoner has paid the required filing fee. *See Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998). Additionally, to the extent plaintiff contends the Magistrate Judge erred by not conducting an evidentiary hearing to develop his complaint, his objection lacks merit. In this case, the Magistrate Judge did not recommend dismissal of the case during his initial screening of the case. Instead, the defendants were served and filed a motion to dismiss seeking dismissal of plaintiff's claims against them. The Magistrate Judge entered a Report addressing the defendants' motion to dismiss and recommending the defendants' motion be granted. The court has liberally construed plaintiff's allegations and the factual allegations have been taken as true and construed favorably to the plaintiff. Plaintiff's objection is without merit.

Plaintiff also complains of his continued confinement in administrative segregation and his classification as "high profile" which makes him ineligible for placement in a diversion program. However, "[i]t is well settled that the decision where to house inmates is at the core of prison administrators' expertise." *McKune v. Lile*, 536 U.S. 24, 39 (2002); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). "Inmates have no protectable property or liberty interest in custodial classifications." *Whitley v. Hunt*, 158 F.3d 882, 889 (5th Cir. 1998). Thus, plaintiff has no constitutional right to be classified for release to general population. Further, plaintiff has failed to show prison administrators' decisions to continue his confinement in administrative segregation is not related to legitimate penological interests based on his history of violence and escape. As the Magistrate Judge observed, plaintiff's record demonstrates he has a propensity to commit violent crimes, as well as a history of possession and use of firearms, impersonating a public servant or security officer, and escaping from custody on two separate occasions. While plaintiff argues his administrative segregation review hearings are not meaningful, plaintiff concedes he is receiving due process hearings on a regular basis. Finally, plaintiff's allegations fail to rise to the level of a violation of the Eighth Amendment with respect to either the conditions of his confinement or medical care. Plaintiff's allegations against the named defendants fail to show the defendants' actions rose to the level of the deliberate indifference. Plaintiff has failed to show the denial of a constitutional right. Accordingly, plaintiff's allegations fail to state a claim upon which relief may be granted.

Plaintiff also complains of the defendants' failure

to follow prison rules and regulations. However, the failure to follow prison regulations, rules or procedures does not rise to the level of a constitutional violation. *Stanley v. Foster*, 464 F.3d 565, 569 (5th Cir. 2006); *Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986). Therefore, plaintiff's allegations fail to state a claim upon which relief may be granted.

Additionally, plaintiff complains he was retaliated against by the defendants. To state a valid claim for retaliation, an inmate must prove "(1) he was exercising a specific constitutional right, (2) the defendant intended to retaliate against the inmate for exercising that right, (3) a retaliatory adverse act occurred, and (4) causation." *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). To show causation, an inmate must establish that "but for the retaliatory motive the complained of incident ... would not have occurred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). Mere conclusory allegations of retaliation will be insufficient to state a retaliation claim. *Id*.

In this case, plaintiff has failed to show either a retaliatory motive or causation regarding his claims against the defendants. Plaintiff's allegations of retaliation are conclusory and no more than mere speculation on the part of plaintiff. Plaintiff has failed to produce either direct evidence of motivation or allege a chronology of events from which retaliation may plausibly be inferred. Thus, plaintiff has failed to state a claim of retaliation under § 1983 against the defendants. Accordingly, the defendants' motion to dismiss should be granted.

ORDER

For the reasons set forth above, as well as in the Report of the Magistrate Judge, plaintiff has failed to

state a claim upon which relief may be granted or are frivolous. Accordingly, plaintiff's objections are **OVERRULED**. The findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is **ACCEPTED**. It is

ORDERED that the defendants' motion to dismiss is **GRANTED**, and plaintiff's claims are dismissed with prejudice. A final judgment will be entered in this case in accordance with the Magistrate Judge's recommendations.

So Ordered and Signed
May 5, 2020

/s/ Ron Clark
Ron Clark, Senior District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS LUFKIN DIVISION

[filed March 9, 2020]

DENNIS WAYNE HOPE	§	
		CIVIL ACTION NO.
VS.	§	9:18cv27
TODD HARRIS, ET AL.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Plaintiff Dennis Wayne Hope, an inmate confined at the Polunsky Unit of the Texas Department of Criminal Justice, Correctional Institutions Division, proceeding *pro se* and *in forma pauperis*, brings this action pursuant to 42 U.S.C. § 1983.

The above-styled action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636 and the Local Rules for the Assignment of Duties to the United States Magistrate Judge for findings of fact, conclusions of law, and recommendations for the disposition of the case.

Discussion

Plaintiff, an inmate confined in the Security Housing Unit ("SHU") at the Polunsky Unit, has submitted an extensive list of complaints about the conditions of his confinement. Plaintiff claims he has been held in Administrative Segregation continuously for the last twenty-three years and has been told he cannot be transferred from this environment because he has an escape on his record. Plaintiff com-

plains he is confined to his cell for twenty-three hours per day for 191 days a year and twenty-four hours per day on the remaining 174 days of the year. However, plaintiff later states he is allowed out of his cell two hours per day for recreation five days per week.

Plaintiff claims he is fed in his cell through a tray slot opening in the cell door and is fed on unsanitary food trays and, as a result, he claims he has suffered incidents of food poisoning. Additionally, plaintiff complains that the meals are cold even though they are delivered in a "Hot Cart." Plaintiff alleges the food portions given to inmates in Administrative Segregation are smaller than the portions given to inmates and General Population, and they are not provided many of the condiments provided to General Population inmates such as mustard and syrup.

Next, plaintiff complains he is required to submit to a strip search prior to being removed from his cell for any reason. He claims he is strip searched, on average, four times per day. Plaintiff states he is required to squat down to place his hands through the tray slot to be hand-cuffed, straining his shoulders and rotator cuffs. However, according to plaintiff, defendants Harris, the unit warden, and Rehse, the unit major, refuse to allow him to be handcuffed in the front of his body. Plaintiff claims the defendants are deliberately indifferent to his medical needs.

Plaintiff also complains he is limited in the amount and kind of property he can possess in the SHU. He claims this reduces the amount of reading material and other personal items he may possess, and the amount of property is smaller than inmates in General Population are allowed. Plaintiff com-

plains he cannot possess a razor, pencil sharpener or clothing that has elastic in it.

Next, plaintiff complains that due to being housed alone in his administrative segregation cell, he is denied almost all human contact, and his only human contact is with officers and medical staff. Plaintiff claims he is denied contact visitation with his family and has to visit through a plexiglass partition and talk over a phone.

Plaintiff claims he also is denied access to a television, and is only permitted to use a telephone in an emergency situation after approval by unit administration. Plaintiff complains he is only permitted to call persons on his approved visitor list which consists of ten people instead of the twenty people allowed for prisoners in General Population.

Plaintiff complains that his housing area is loud all hours of the day due to both inmates and officers. Plaintiff claims this deprives him of "quality sleep and only allows him to sleep fitfully several hours at a time." Plaintiff claims this adds to his anxiety and depression.

Plaintiff claims he has been indirectly exposed to the use of chemical agents at least ten times in the last two years through no fault of his own. Plaintiff claims prison officials are aggressive and careless with their use of chemical agents and use them in excessive amounts in unwarranted situations with no regard to the other prisoners they expose to these gases.

Next, plaintiff complains the SHU is locked down a minimum of four times a year compared to two lock-downs per year in General Population. In addi-

tion to the lock-downs, plaintiff claims cells are randomly searched and inspected every other day. While on lock-down, plaintiff complains that he is given a "Johnny" consisting of two sandwiches in a sack for each meal, and one of the sandwiches is peanut butter. Plaintiff complains the sack lunches have less calories than the food served on trays and has subjected him to weight loss and constipation. Plaintiff claims that during the lock-downs the walkways are not mopped and showers are not cleaned. As a result, plaintiff claims the showers have mold and mildew on the walls.

Plaintiff also complains his access to legal materials is reduced due to his housing location. As a result, plaintiff claims research takes him longer than if he were allowed to go to the law library. Additionally, plaintiff claims he is denied access to other prisoners knowledgeable in the law.

Next, plaintiff claims that following an incident in 2012 in which a ten inch screwdriver was found in his cell or property, he has been moved to a different cell each week to harass him and retaliate against him. Plaintiff claims both Warden Harris and Major Rehse order his weekly moves as a form of harassment and without penological reason.

Plaintiff claims that when he moves into a new cell it is not disinfected or otherwise cleaned, and he is not provided with cleaning supplies. On some occasions, plaintiff claims he was moved into a cell with no lights. On December 21, 2017, plaintiff claims he was moved into a cell with mold on the back wall and floor. He claims he remained in that cell for thirteen days and began coughing. Plaintiff claims that it took outside advocates contacting the

warden to get him moved from the cell. Plaintiff claims defendant Rehse saw the mold on the back wall of his cell on December 26, 2017, but it was only after Assistant Warden Jefferson sent someone to inspect the cell and saw the mold growth that she ordered him removed from the cell.

Plaintiff complains that, due to his housing classification requiring an escort everywhere he goes, he has no privacy when consulting with medical or mental health professionals. Plaintiff claims the lack of escort officers is not uncommon resulting in delayed or cancelled appointments and medical or mental health personnel frequently making cell-side visits where other prisoners can listen. Plaintiff also claims he has reported to mental health professionals that he deals with bouts of anxiety, depression, and visual and auditory hallucinations but he has been denied treatment for these conditions.

Plaintiff states the Administrative Segregation Committee conducts a hearing concerning his confinement at thirty-day intervals, but he is not allowed to attend. Plaintiff complains that the committee has no authority to release him and the reviews are a sham and meaningless because the State Classification Committee has already decided he will remain in the SHU for the next 180 days. Plaintiff states he is reviewed by the State Classification Committee every 180 days to determine whether he will remain in the SHU or be released to general population.

On June 24, 2016, plaintiff claims he was reviewed by SCC member Melissa Benet. Plaintiff made both an oral and written statement at the hearing. After she looked over his file, plaintiff

claims Benet told him she saw no reason not to release him to a transitional program. However, he later received his hearing record in the mail, and it indicated he was to remain in the SHU without further explanation. At a subsequent hearing on December 3, 2016, plaintiff claims he asked Benet why he was not released to the transitional program like she told him in June of 2016. Plaintiff states Benet told him "you are high profile, I don't have the authority to release you." Thus, plaintiff claims Benet's review was perfunctory and a sham used to provide him due process. Plaintiff claims he saw another SCC member, Ms. Enlow, on June 8, 2017 and when he requested release he was informed "that's not my decision." Plaintiff claims he was later reviewed by SCC member defendant Bonnie Fiveash. Plaintiff claims Fiveash told him "you're still in good shape I can't release you." When asked if it was ever her call to make, plaintiff claims Fiveash told him "that would be the Director's call." Plaintiff complains that he has not been told what he must do to be released to General Population. Plaintiff claims defendant Eschessa, the Deputy Director of Operations has the capacity to release him to General Population, but Eschessa would not review his file. Plaintiff also claims defendant White, Assistant Director of Classifications, was contacted by outside advocates and stated she would not allow his release or make recommendations for his release. White stated that because plaintiff escaped in 1994 she does not want the responsibility that goes along with making that decision. Plaintiff claims White has instructed all SCC members that plaintiff is to remain in the SHU.

Plaintiff claims that in December, 2005, the Security Precautions Designator Committee reviewed and

removed the escape risk designator from his file. Accord to plaintiff, they determined he was not an escape risk. However, he remains confined in the SHU and has been denied any meaningful review. Further, plaintiff claims he is not eligible to see a parole commissioner for release on parole due to his confinement in Level 1 Security Detention status.

Plaintiff claims the appeal process for SCC decisions is for an inmate to file a grievance. However, it is meaningless for a prisoner to appeal a decision of the State Classification Committee. Plaintiff claims he is being retaliated against for filing grievances.

Finally, plaintiff complains that the confiscation of his typewriter without compensation is theft. Plaintiff claims the typewriter was being used to file the grievances it "becomes obvious the motive for the confiscation."

The Defendants' Motion to Dismiss

Pending before the court is a motion to dismiss plaintiff's amended complaint filed by the defendants (docket entry no. 20). The defendants contend plaintiff's claims should be dismissed for lack of subject-matter jurisdiction based on the Eleventh Amendment. Additionally, the defendants move for dismissal of plaintiff's complaint for failure to state a claim upon which relief may be granted.

Standard of Review

An in forma pauperis proceeding may be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B) if it: (1) is frivolous or malicious, (2) fails to state a claim upon which relief may be granted or (3) seeks monetary relief from a defendant who is immune from such relief.

A complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it lacks an arguable basis either in law or fact. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *Geiger v. Jowers,* 404 F.3d 371, 373 (5th Cir. 2005); *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1997). A complaint lacks an arguable basis in law if it is based on an indisputably meritless legal theory. *See Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997).

In addition to the legal basis of the complaint, Section 1915 empowers the court to pierce the veil of the complainant's factual allegations if they are clearly baseless. *Denton v. Hernandez,* 504 U.S. 25, 32 (1992); *Ancar v. Sara Plasma, Inc.,* 964 F.2d 465 (5th Cir. 1992). A complaint lacks an arguable basis in fact if, after providing the plaintiff the opportunity to present additional facts when necessary, the facts alleged are clearly baseless. *Denton*, 504 U.S. at 32.

In *Denton v. Hernandez*, the Supreme Court "declined the invitation to reduce the clearly baseless inquiry to a monolithic standard." *Denton*, 504 U.S. at 33. Examples of complaints within the clearly baseless inquiry are those which describe fanciful, fantastic, or delusional scenarios. A complaint is factually frivolous if the facts alleged rise to the level of the irrational or wholly incredible. Pleaded facts which are merely improbable or strange, however, are not clearly baseless for Section 1915(d) purposes. *Id.*

Failure to State a Claim

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Rule

12(b)(6) authorizes the court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

A complaint fails to state a claim upon which relief may be granted if the factual allegations are not sufficient to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). Dismissal for failure to state a claim is appropriate when the plaintiff has failed to plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. 544, 570). Plaintiffs must state enough facts to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. 544, 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. At this stage, a court "must accept all well-pleaded facts alleged in the complaint as true and must construe the allegations in the light that is most favorable to the plaintiff." *Cent. Laborers' Pension Fund v. Integrated Elec. Servs.,* 497 F. 3d 546, 550 (5th Cir. 2007). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "[R]egardless of whether the plaintiff is proceeding *pro se* or is represented by counsel, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books a Million, Inc.,* 296 F.3d

376, 378 (5th Cir. 2002) (internal quotations omitted).

Analysis

I. Elements of a Cause of Action under 42 U.S.C. § 1983

Title 42 U.S.C. § 1983 authorizes a suit in equity, or other proper proceeding for redressing violations of the Constitution and federal law by those acting under color of state law. *See Nelson v. Campbell*, 541 U.S. 637, 643 (2004); *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured ....

42 U.S.C. § 1983.

II. Eleventh Amendment Immunity

The Eleventh Amendment provides that the State of Texas, as well as its agencies, are immune from liability. *Kentucky v. Graham,* 473 U.S. 159, 167, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). The Eleventh Amendment bars claims against a state brought pursuant to 42 U.S.C. § 1983. *Aguilar v. Texas Dept. of Criminal Justice,* 160 F.3d 1052, 1054 (5th Cir. 1998). In *Will v. Michigan Department of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." The Supreme Court upheld

the dismissal of the Michigan Department of State Police and its Director sued in his official capacity. *Id.* The Fifth Circuit has accordingly "held that the Eleventh Amendment bars recovering § 1983 money damages from TDCJ officers in their official capacity." *Oliver v. Scott,* 276 F.3d 736, 742 (5th Cir. 2002). However, "the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004); *Aguillar*, 160 F. 3d at 1054.

The narrow exception to Eleventh Amendment immunity from suit, the *Ex parte Young* exception, "is based on the legal fiction that a sovereign state cannot act unconstitutionally[; t]hus, where a state actor enforces an unconstitutional law, he is stripped of his official clothing and becomes a private person subject to suit." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). "In order to use the *Ex Parte Young* exception, a plaintiff must demonstrate that the state officer has 'some connection' with the enforcement of the disputed act." *Id.* In determining whether the doctrine of *Ex parte Young* avoids the bar to suit under the Eleventh Amendment, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. V. Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002).

In his complaint, plaintiff alleges that defendants Harris and Rehse are responsible for ensuring that prisoners in the SHU are housed in sanitary conditions and not subjected to harassment, retaliation or cruel and unusual punishment. Plaintiff also alleges certain defendants failed to follow prison policy re-

garding the review of his classification status. Plaintiff, however, must first demonstrate he meets the three elements of Article III standing; (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The redressability element of the test for standing requires that a favorable decision for the plaintiff will likely, not merely speculatively, redress the plaintiff's injury. *Id.* Additionally, the court must gauge (1) the ability of the official to enforce the statue at issue under his statutory or constitutional power, and (2) the demonstrated willingness of the official to enforce the statute. *Okpalobi v. Foster*, 244 F.3d 405, 425-27 (5th Cir. 2001). Defendants Harris and Rehse are no longer the warden at the Polunsky Unit. Further, plaintiff's complaint reveals that the ability to address his complaints lies with the Director of the prison system based on plaintiff's history of violence and escape.[1] The defendants in this action do not have the ability to release plaintiff from confinement in the Special Housing Unit. Therefore, a favorable decision for plaintiff will not allow the defendants to address plaintiff's complained of injury.

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[1] The TDCJ Offender Information website reveals plaintiff is serving multiple cumulative sentences for five aggravated robberies with a deadly weapon, impersonating a public servant/security officer, and two separate escapes from custody. Further, plaintiff has seventy-five years' imprisonment remaining to satisfy his maximum sentence. *See* https://offender.tdcj.texas.gov/OffenderSearch/search.action. Additionally, plaintiff has federal convictions for carjacking, robbery, using a firearm during the commission of a crime of violence, and illegally possessing a firearm. *See United States v. Hope*, 102 F.3d 114 (5th Cir. 1996).

Accordingly, the defendants' motion to dismiss should be granted.

III. Due Process - Classification

Plaintiff alleges his classification and continued confinement in administrative segregation violates his right to due process. Additionally, while plaintiff concedes he receives reviews by the Administrative Segregation Committee every thirty days and reviews by State Classification Committee members which he attends every 180 days, plaintiff complains the reviews are not meaningful because he has not been released from administrative segregation to general population.

It is well settled in the Fifth Circuit that an inmate has no protected interest in any particular custody or security classification, once incarcerated. *See Wilkerson v. Stalder*, 329 F.3d 431, 435-36 (5th Cir.), *cert. denied*, 124 S.Ct. 432 (2003); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Whitley v. Hunt*, 158 F.3d 882, 889 (5th Cir. 1998). The classification of prisoners is a matter within the discretion of prison officials. *McCord v. Maggio*, 910 F.2d 1248, 1250 (5th Cir. 1990). Therefore, absent an abuse of discretion, a federal court will not interfere with administrative determinations regarding custodial classification of an inmate. *Whitley*, 158 F.3d at 889. In *Pichardo v. Kinker*, 73 F.3d 612 (5th Cir. 1996), the court stated that "absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life as a prisoner, will never be a ground for a constitutional claim." *Id.* at 612-613; *see also Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("[T]he Constitution itself does not give rise to a lib-

erty interest in avoiding transfer to more adverse conditions of confinement.”).

Plaintiff admits he is receiving regular reviews by the defendants in this action. As set forth above, a review of plaintiff’s complaint reveals that the ability to address his complaints regarding release from administrative segregation lies solely with the Director of the prison system. A review of plaintiff’s federal criminal appeal provides some background for why the director may have retained sole authority regarding plaintiff’s possible release to General Population. On November 26, 1994, plaintiff made his second escape from the Texas state prison system and later stole a car at knife point. *See United States v. Hope*, 102 F.3d 114, 115 (5th Cir. 1996). Plaintiff severely cut the 83-year-old driver of the car, dropped him off on the side of the road, and proceeded on a crime spree of armed robberies until his arrest in Memphis, Tennessee approximately two months later. *Id.* at 115-16.

As previously stated, the classification of prisoners is a matter within the discretion of prison officials. Here, given plaintiff’s history of violence and escapes, plaintiff has failed to show an abuse of discretion. Further, the defendants are providing plaintiff with due process reviews of his classification in accordance with their authority. Thus, plaintiff’s claims fail to state a claim upon which relief may be granted and the defendants’ motion to dismiss should be granted.

IV. Conditions of Confinement

Plaintiff asserts an extensive list of complaints about the conditions of his confinement including the cleanliness of his cells and eating utensils, the quali-

ty and quantity of food served in confinement, a restriction on the amount of property he can maintain in his cell, the fact he is served peanut butter sandwiches during lock-downs approximately four times per year, the lack of condiments such as syrup and mustard, and the alleged indirect exposure to chemical agents.

The Constitution does not mandate comfortable prisons but neither does it permit inhumane ones. *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999). "The Eighth Amendment's prohibition against cruel and unusual punishment imposes minimum requirements on prison officials in the treatment received by and facilities available to prisoners." *Woods v. Edwards*, 51 F.3d 577 (5th Cir. 1995). The Supreme Court noted in *Farmer* that: In its prohibition of "cruel and unusual punishments," the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must "take reasonable measures to guarantee the safety of the inmates." *Farmer*, 511 U.S. at 823.

A constitutional violation, however, occurs only when two requirements are met. First, there is an objective requirement that the condition "must be so serious as to 'deprive prisoners of the minimal civilized measure of life's necessities,' as when it denies the prisoner some basic human need." *Harris v. Angelina County, Texas*, 31 F.3d 331, 334 (5th Cir. 1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321 (1991)). Second, under a subjective stand-

ard, the court must determine whether the prison official responsible acted with deliberate indifference to inmate health or safety. *Farmer*, 511 U.S. at 834; see e.g., *Harris*, 31 F.3d at 334-36. The deliberate indifference standard can be appropriately applied to allegations regarding the conditions of confinement. *Woods*, 51 F.3d at 580.

In *Farmer*, the Supreme Court adopted "subjective recklessness as used in the criminal law" as the appropriate definition of deliberate indifference under the Eighth Amendment. *Farmer*, 511 U.S. at 839-40. Under this definition, a prison official cannot be found liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must draw the inference. *Farmer*, 511 U.S. at 837. A prison official acts with deliberate indifference "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id*. at 847.

"Deliberate indifference is an extremely high standard to meet." *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). Deliberate indifference encompasses only the unnecessary and wanton infliction of pain repugnant to the conscience of mankind. *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1999). To satisfy the exacting deliberate indifference standard, a defendant's conduct must rise "to the level of egregious intentional conduct." *Gobert v. Caldwell*, 463 F.3d 339, 351 (5th Cir. 2006).

While the conditions of plaintiff's confinement may be unpleasant and possibly harsh, plaintiff has failed to show the conditions were objectively so serious as to deprive plaintiff of the minimal civilized measure of life's necessities. Plaintiff has failed to show such conditions rise to the level of a constitutional violation, nor has he satisfied the extremely high standard of showing the defendants acted with deliberate indifference. Accordingly, the defendants' motion to dismiss should be granted.

Additionally, plaintiff complains he is restricted in the amount of personal and legal property he may possess in his cell and that his access to legal materials is reduced due to his housing location. As a result, plaintiff claims research takes him longer than if he were allowed to go to the law library. Further, plaintiff claims he is denied access to other prisoners knowledgeable in the law. However, plaintiff has failed to allege or demonstrate any harm associated with such claims.

Next, to the extent plaintiff complains that the defendants' actions were retaliatory, plaintiff's retaliation claim fails to state a claim upon which relief may be granted. To state a valid claim for retaliation "an inmate must allege the violation of a specific constitutional right and be prepared to establish that but for the retaliatory motive the complained of incident ... would not have occurred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). Mere conclusory allegations of retaliation will be insufficient to state a retaliation claim. *See Id.*

In this case, plaintiff has failed to show either a retaliatory motive or causation regarding his claims against the defendants. Plaintiff has failed to pro-

duce either direct evidence of motivation or allege a chronology of events from which retaliation may plausibly be inferred. Plaintiff's allegations of retaliation are no more than mere speculation on the part of plaintiff. Thus, plaintiff has failed to state a claim of retaliation under § 1983 against the defendants. Accordingly, the defendants' motion to dismiss should be granted.

V. Medical Care

Plaintiff complains that, because of his custodial status and the requirement that he is to be escorted everywhere he goes, he often is not able to attend medical appointments due to lack of security personnel. Additionally, plaintiff complains that he suffers from bouts of anxiety, depression, and visual and auditory hallucinations but when he has reported these bouts or symptoms to mental health personnel, he has been denied treatment.

The deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, whether the indifference is manifested by prison doctors or by prison guards in intentionally denying or delaying access to medical care. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999). "Deliberate indifference is an extremely high standard to meet." *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). Deliberate indifference encompasses only the unnecessary and wanton infliction of pain repugnant to the conscience of mankind. *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1999). To satisfy the exacting deliberate indifference standard, a defendant's conduct must rise "to the

level of egregious intentional conduct." *Gobert v. Caldwell*, 463 F.3d 339, 351 (5th Cir. 2006).

The Supreme Court has adopted "subjective recklessness as used in the criminal law" as the appropriate definition of deliberate indifference under the Eighth Amendment. *Farmer*, 511 U.S. 825, 839-40 (1994). Under this definition, a prison official cannot be found liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety. The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must draw the inference. *Farmer*, 511 U.S. at 837. Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk. *Id*; *Reeves v. Collins*, 27 F.3d 174 (5th Cir. 1994). Medical records of sick calls, examination, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference. *See Varnado v. Lynaugh*, 920 F.2d 320 (5th Cir. 1991).

While plaintiff complains he missed some medical appointments due to the lack of security personnel required for escorting him, plaintiff admitted medical personnel would make cell-side visits for him. Further, plaintiff has failed to allege or demonstrate harm associated with the format of his medical visits. Additionally, plaintiff claims he suffers from bouts of anxiety, depression, and visual and auditory hallucinations but when he has reported these bouts or symptoms to mental health personnel, he has been denied treatment. However, plaintiff has failed to allege facts demonstrating the defendants possessed a "sufficiently culpable state of mind" rising to the level of deliberate indifference or that his claims are

anything more than a disagreement with the medical professionals over the proper course of treatment. *See Farmer*, 511 U.S. at 834, 839-40. Thus, plaintiff's allegations fail to rise to the level of egregious intentional misconduct required to satisfy the exacting deliberate indifference standard. *See Gobert,* 463 F.3d at 351. Negligence does not constitute a violation of the Eighth Amendment. Unsuccessful medical treatment, acts of negligence or medical malpractice, and disagreements as to diagnosis or treatment do not constitute deliberate indifference. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995). Dissatisfaction with medical treatment or diagnosis does not constitute "deliberate indifference" to a serious medical need and does not rise to the level of the denial of a constitutional right. *Estelle v. Gamble*, 429 U.S. at 106; *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). At most, plaintiff's allegations constitute nothing more than negligence or a disagreement with the medical professionals over the proper course of treatment. Plaintiff has failed to show either that the defendants acted with deliberate indifference or that he was harmed as a result of the defendants' actions. Therefore, the defendants' motion to dismiss should be granted.

Additionally, the defendants' alleged failure to follow prison regulations, rules or procedures does not rise to the level of a constitutional violation. *Stanley v. Foster*, 464 F.3d 565, 569 (5th Cir. 2006); *Hernandez v. Estelle*, 788 F.2d 1154, 1158 (5th Cir. 1986). Therefore, plaintiff's allegations fail to state a claim upon which relief may be granted. Thus, the defendants' motion should be granted.

VI. Deprivation of Property

Finally, plaintiff complains that the confiscation of his typewriter without compensation is theft. Plaintiff claims the typewriter was being used to file the grievances it "becomes obvious the motive for the confiscation."

A claim that an individual has been deprived of property by a person acting under color of law states a claim for a violation of the due process clause of the Fifth Amendment to the United States Constitution. Deprivations of property by prison officials, however, even when intentional, do not violate the due process clause so long as an adequate post-deprivation remedy exists. *See Hudson v. Palmer*, 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *see also Geiger v. Jowers*, 404 F.3d 3771, 374 (5th Cir. 2005) (concluding that plaintiff failed to state a claim regardless of whether the deprivation of property was the result of negligence or intentional misconduct). Texas provides such a remedy. *See Murphy v. Collins*, 26 F.3d 541, 543-44 (5th Cir. 1994) (holding that, in Texas, the tort of conversion is an adequate post-deprivation remedy); *Thompson v. Steele*, 709 F.2d 381, 383 (5th Cir. 1983) (holding that a state action for damages is an adequate remedy), *cert. denied*, 464 U.S. 897 (1983). As a result, plaintiff has failed to establish his constitutional rights were violated in connection with the deprivation of property. Further, plaintiff's claim of retaliation, as explained above, is speculative and conclusory. Thus, plaintiff's allegations are insufficient to state a claim upon which relief may be granted. Accordingly, plaintiff's claims are frivolous and fail to state a claim upon which relief may be granted.

Recommendation

The defendants' motion to dismiss should be granted. Accordingly, plaintiffs' complaint should be dismissed with prejudice.

Objections

Within fourteen days after being served with a copy of the magistrate judge's report, any party may serve and file written objections to the findings of facts, conclusions of law and recommendations of the magistrate judge. 28 U.S.C. § 636 (b)(1)(C).

Failure to file written objections to the proposed findings of facts, conclusions of law and recommendations contained within this report within fourteen days after service shall bar an aggrieved party from the entitlement of *de novo* review by the district court of the proposed findings, conclusions and recommendations and from appellate review of factual findings and legal conclusions accepted by the district court except on grounds of plain error. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc); 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72.

SIGNED this 9th day of March, 2020.

/s/ Zack Hawthorn
Zack Hawthorn
United States Magistrate Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

[filed June 18, 2018]

DENNIS WAYNE HOPE

VS. Civil No. 9:18-cv-0027

TODD HARRIS, et al.,

AMENDED COMPLAINT
Jurisdiction and Venue

1. This is an action for injunctive, declaratory and monetary relief for violations of the Eight and Fourteenth Amendments of the United States Constitution and 42 U.S.C. § 1983. Jurisdiction lies under 28 U.S.C. §§ 1331 and 1343(a)(3) and (4).

2. Venue for this action lies in the Court under 28 U.S.C. § 1391 (b)(2) because the events and omissions giving rise to the claims occurred in the Eastern District of Texas.

3. Plaintiff relies on Rule 15 (a), Fed. R. Civ. P. to amend this complaint without leave of the Court or agreement of defendants. The date of service for Defendants answer was June 1, 2018.

PARTIES

4. Plaintiff Dennis Wayne Hope is a person of full age of majority who is and was incarcerated in the Texas Department of Criminal Justice– Institutional Division (herein after TDCJ-ID), Polunsky Unit in Livingston, Texas.

5. Defendant Todd Harris is the Senior Warden at the Polunsky Unit within TDCJ-ID in Livingston,

Texas. He is aware of the conditions and treatment of which plaintiff complains and has refused to take action to correct the situation. He is denying Plaintiff his Due Process and violating his Eigth and Fourteenth Amendments of the United States Constitution. He is being sued in his official and individual capacities.

6. Defendant Chad Rehse is the Major at the Polunsky Unit within TDCJ-ID in Livingston, Texas. He oversees the conditions of confinement and treatment of prisoners in Administrative Segregation (herein after Ad. Seg.) and at various times pertinent herein was a member of the State Classification Committee (herein after SCC). He is denying Plaintiff his Due Process and Eight and Fourteenth Amendments of the United States Constitution. He is being sued in his official and individual capacities.

7. Defendant Leonard Echessa is the Deputy Director of Support Operations within TDCJ-ID and is responsible for the overall treatment, conditions of confinement and classifications of Plaintiff at various times pertinent herein. He is aware of the situation and has refused to take corrective actions and correct the situation. He is denying Plaintiff his Due Process and Eigth and Fourteenth Amendments of the United States Constitution. He is being sued in his official and individual capacities.

8. Defendant Joni White is the Assistant Director of Classifications within TDCJ-ID and responsible for the overall classifications of the department, including Ad. Seg., at various times pertinent herein. She is aware of the situation and refuses to correct the situation or take corrective action. She is denying Plaintiff his Due Process and

Eigth and Fourteenth Amendments of the United States Constitution. She is being sued in her official and individual capacities.

9. Defendant Kelly Enloe was the Chairperson for the SCC and is now a member of the SCC within TDCJ-ID. She is responsible for conducting reviews of prisoners in their classifications. She is aware of the situation and refused to take corrective action. She is denying Plaintiff Due Process and Eight and Fourteenth Amendments of the United States Constitution. She is being sued in her official and individual capacities.

10. Defendant Melissa Benet is a member of the SCC within TDCJ-ID and responsible for conducting reviews of prisoners classifications. She is aware of the situation and refused to take corrective action. She is denying Plaintiff his Due Process and Eight and Fourteenth Amendments of the United States Constitution. She is being sued in her official and individual capacities.

11. Bonnie Fiveash is a member of the SCC within TDCJ -ID and responsible for conducting reviews of prisoners classifications at various times pertinent herein. She is aware of the situation and refused to take corrective action. She is denying Plaintiff Due Process and Eight and Fourteenth Amendments of the United States Constitution. She is being sued in her official and individual capacities.

FACTUAL ALLEGATIONS

Plaintiff Dennis Wayne Hope is a 49 year old prisoenr who has been continiously held in solitary confinement (Ad. Seg.) for over twenty-three (23) years.. He is currently housed on the Security

Housing Unit ("SHU") at the Polunksy Unit with "Death Row". He is housed in a 9'x 6' single cell no larger than a parking space and about 3'x 3' of that space is all that's left for him to move around in the cell- He remains in this cell 24 hours a day on average of 174 days a year. The remaining 191 days in the year he spends an average of 23 hours a day in the cell.

13. All meals given to Mr. Hope is done so through a tray slot opening in the cell door. Everything passed to him comes through the tray slot. He eats all of his meals alone and in the cell. Many of the food trays he is given are dirty and unsanitary. The trays often have food on them from previous meals or grooves carved in them from other prisoners. These trays are only used for solitary confinement prisoners. Prisoners in general population (herein after G.P.) don't deal with these unsaitary trays. These trays have actually caused prisoenrs to get sick from the "Norovirus". The meals are cold even though delivered in a "Hot Cart" and the food portions are noticeably smaller than those given to G.P. prisoners. Many of the condiments like mustard and syrup are not provided to solitary confinement prisoners because they are more difficult to remove from the trays and floors after having sat for hours. Warden Harris and Maior Rehse continue to subject Mr. Hope to these unsanitary feeding and living conditions. In the over 23 years Mr. Hope has been subjected to this treatment he has suffered food poisoning over a dozen of times.

14. Prior to being removed from the cell for any reason Mr. Hope is required to submit to a strip search. For over 23 years he has been unnecessarily

removed of his dignity. On average he is strip searched four (4) times daily just to participate in recreation and shower. Deputy Director Eschessa, Warden Harris and Maior Rehse have all ordered Ad. Seg. prisoners be treated in this manner. Prisoners in G.P. might get pat searched once a day depending on where they are going. Mr. Hope is then required to squat down with his hands placed behind his back and place his hands through a tray slot to be handcuffed. Failure to comply with this order can result in him being disciplinary or gassed with a chemical agent (pepper spray). Mr. Hope suffers from chronic lower back pain and the bending at that angle causes him great pain in his lower back and places great strain on his shoulders and rotator cuffs. Warden Harris and Maior Rehse are aware of this and refuse to allow him to be handcuffed in the front thereby subjecting him to unnecessay physical pain and being deliberately indifferent to hi medical needs.

15. While in the "SHU" Mr. Hope is limited to how much property and what kind of property he can possess. He is only allowed to possess two (2) cubic feet (l'x l'x 2') of property. This drastically reduces the amount of reading material, clothing, pictures and other personal items such as commissary hygiene items. This amount is significantly smaller than that of G.P. prisoners as is the amount of commissary too. Additionally, he cannot possess a razor, pencil sharpener or clothing that has elastic in it.

16. Due to beinghoused in solitary confinement Mr. Hope is denied almost all human contact. the only human contact he has had with another human in the last 23 years is with officers and medical staff.

He is denied contact visits with family and when allowed visits it is done through a plexiglass partition and they must talk over a phone. He is denied access to a television and hasn't seen one since January 31, 1996. He is only permitted to use a telephone in an emergency situation and that must first be approved by administration. He can then only call a person on his approved visitors list which consists of ten (10) people (as opposed to 20 for G.P prisoners), the call must be collect, to a land line, monitored by the person supervising the call and last no longer than five (5) minutes. G.P. prisoners on the other hand are allowed to make unlimited calls daily with no duration restriction. The collect call averages $15.00 per five (5) minutes whereas prisoners in G.P. pay about .23¢ a minute. This creates a significant financial hardship on prisoners housed in Ad. Seg. and impedes on their ability to retain close ties with family. In the 23 years Mr. Hope has been confined to Ad. Seg. he has only made one (1) phone call, when his mother died in 2013. He is denied the opportunity to socialize with other prisoners, participate in religious activities, group recreation and vocational programs. By contrast, prisoenrs in G.P. work, socialize, live in dormitories, have educational and vocational training, attend religious services and have group recreation opportunities. The condition of Mr. Hope's confinement in Ad. Seg. almost totally deprives him of human contact, mental stimulus, physical activity, personal property and human dignity. Continued and continuing confinment under these conditions for over 23 years is inhumane and imposes atypical and significant hardship compared to ordinary prison life.

17. Five (5) days a week Mr. Hope can come out of his cell for recreation for up to two (2) hours in a cage that is roughly four (4) times the size of his cell. this providing there is no staff shortage or inclement weather.

18. The "SHU" is loud and excessive amounts of noise can be heard 24/7. Prisoners beat and bang on doors, walls, holler through cell doors, argue and talk to themselves day and night- The housing area is a constant roar with frequent loud bangs and outbursts of noise- Many times the officers cannot hear other prisoners because of the loud roar of the pods. Officers contribute to the noise by hollering which cell door they want opened as the intercoms on the pods do not work. Officers slam doors and beat a tray slot bar against the bars to get prisoners and the picket officers attention. These loud noises day and night deprive Mr. Hope of any quality sleep and only allows him to sleep fitfully several hours at a time. This has added to his anxiety and depression that he is suffering. Sleep is a basic human need that he is being deprived of by Warden Harris and Major Rehse.

19. The use of chemical agents (weapons) such as tear gas, pepper spray and pepper balls is common on the "SHU". In the last two (2) years Mr. Hope has been exposed at least ten (10) times through no fault of his own. On August 6, 2017 Mr. Hope was exposed to pepper spray through no fault of his own and at the direction of Major Rehse. Again on July 28, 2017 he was exposed to pepper spray for a prolonged period. Major Rehse instructed officers not to turn the exhaust fans on to clear out the gas because prisoners were making to much noise. On May 31, 2017 he was again exposed to pepper spray when

another prisoner was sprayed and there was a delay in removing the gas from the air. Major Rehse instructs officers to delay clearing the air of gas so that other prisoners are exposed to it and will "think twice before making them gas them". He intentionally allows the gas to linger in the air well after the incident that involved the use of the gas is over. This subjects Mr. Hope and others to unnecessary exposure of chemical agents (weapons) deliberately at the direction of Major Rehse. He has been subjected to exposure of pepper spray and Tear gas for over two (2) decades due to being housed in Ad. Seg. and must suffer from the short-term and long-term effects of these gases- Officials are aggressive and careless with their use of these chemical agents (weapons) and use them in excessive amounts in unwarranted situations with no regard to the other Prisoners they expose to these gases.

20. A minimum of four (4) times a year the "SHU" is locked down to be searched, this is in addition to cells being randomly searched and inspected every other day. All Prisoners are searched as is their property and all of the cells. These lockdowns range from 14-30 days each. By contrast, prisoners in G.P. are locked down twice a year.

21. While on lockdown Mr. Hope is given a "Johnny" (2 sandwiches in a sack with one being peanut butter) for each meal. All meals are in the form of a "Johnny" while on lockdown. The calories in the "Johnny" are significantly less than the food served on the tray. The reduced calorie diet Mr. Hope is subjected to causes weight loss and constipation. Warden Harris is responsible for ensuring prisoners are provided adequate food that is sufficient in calorie and nutritional value. He refuses to provide

prisoners these basic human needs during lockdowns.

22. Prisoners serving in “Support Service” capacities sweep and mop the walkways and clean the showers. However, during lockdown the walkways are not mopped and the showers are not cleaned. Although showers are ran three (3) times a week during lockdown the showers are not cleaned during this period. The showers have mold and mildew on the walls, ceiling and door. Mr. Hope stopped going to the shower and only showers in his cell to reduce the chances of catching a “Staph infection” or skin rash. Major Rehse is exposing prisoners to unsanitary living conditions that jeopardize prisoners health.

23. Mr. Hope’s access to legal material is drastically reduced du2 to being housed in solitary confinement. Three (3) times a week he is allowed to order three (3) cases from the unit law library. If he wants a certain key in Civil or Criminal law he must order one at a time and is not allowed access to the book. Many times he is forced to order the table of contents and order each key in an effort to find what he is looking for. This research process takes significantly longer than if he were afforded the opportunity to go to the law library or check out the entire legal book. He is also denied access to other prisoners who are knowledgeable in the law. If a holiday falls during a weekday then he is only afforded access to the materials two (2) times a week. Warden Harris is restricting prisoners access to legal material in solitary confinement in an effort to hinder their access to courts.

24. On February 22, 2012 Major Virgil McMullen ordered Mr. Hope's cell searched. Mr. Hope had been having outside advocates contact classification about his continued confinement in solitary. As a result of this search no contraband was found, but his typewriter was taken (Mr. Hope used the typewriter to file grievances and write letters to officials) and not returned. Fifteen minutes after placing Mr. Hope back into his cell, the search team returned to search the cell again. Mr. Hope discovered a 10" screwdriver near the toilet in a red mesh bag com only used to transport prisoners property. When he requested they get a video camera he was sprayed with pepper spray and ordered to submit to handcuffs, which he did. For eight days Mr. Hope was left nude in a cell with the pepper spray still on his body and nothing to clean it off with. He was not given food for forty-eight (48) hours per Major McMullen. Prior to this incident Mr. Hope and Major McMullen had run ins about why he is still in solitary confinement and whether a razor was a weapon. Mr. Hope challenged Major McMullen's interpretation of what a weapon is through the grievance process to the warden and regional director. Major McMullen took exception to that and it is Mr. Hope's belief that the 10" screwdriver was planted in his cell and was not accidentally left in his cell. Mr. Hope was charged with possession of a weapon for picking up the screwdriver that was left in his cell. A subsequent investigation revealed the screwdriver belonged to the search team as evidenced by the serial number on it.

Prior to this incident Mr. Hope was not being moved from cell to cell. After the incident Mr. Hope has been moved to over 263 different cells as of date.

Unit administration has since changed, but Mr. Hope continues to get moved to a different cell weekly. In the last two (2) years Major Rehse has ordered Mr. Hope's moves. Major Rehse asserts that since Mr. Hope was being moved prior to him taking charge he will continue to get moved even though it serves no penological interest and was designed to harass and retaliate against him.

25. When Mr. Hope is moved into a cell it is not disinfected or otherwise cleaned nor is Mr. Hope provided with supplies to clean the cells with. Many times these cells have feces and urine on the walls, floor and door. Mr. Hope has complained and filed grievances to no avail. A number of times he was moved into a cell that had no lights. On June 15, 2016 officers had to literally use their flashlights to see to move Mr. Hope's property into the cell. On December 21, 2017 he was moved into a cell that had black mold on the back wall and floor, covering about 80% of the back wall. He was forced to move into the cell and denied cleaning supplies. For thirteen (13) days he remained in that cell and began coughing. It took outside advocates contacting the warden to get him moved from that cell. Both the warden and Major Rehse are responsible for the frequent moves and placing Mr. Hope into these unsanitary cells. They are aware of the problem and on December 26, 2017 Major Rehse personally saw the black mold on the back wall of cell number 12-EA-11. It was only when the Asst. Warden (Jefferson) over G.P. sent someone to inspect the cell and saw the widespread growth of the black mold did she order him removed from the cell and moved into another cell. Major Rehse was deliberately indifferent to Mr. Hope's physical and mental health.

26. Due to being housed in solitary confinement and requiring an escort everywhere he goes Mr. Hope has no privacy when consulting with medical or Mental health personnel. When Mr. Hope is seen in the examination room at least two officers stand there with him and listen to everything that is said. At no time is Mr. Hope afforded any privacy and one on one consultation with a healthcare pro-rider or mental health care provider. Many times his medical appointments are delayed or outright canceled due to lack of escort officers. It is not uncommon to be re-scheduled 3-4 times before seeing a provider. He has on occasion had to wait over sixty (60) days to see a provider to get his medications renewed. Medical and mental health personnel frequently make "cell-side" visits due to a shortage of staff and lack of escort teams. When doing so other prisoners can hear what is being discussed, it's one of the few times other prisoners will quieten down about, there is no privacy. Mr. Hope is denied a proper examination and his confidentiality in treatment is no longer confidential, all because he is housed in solitary confinement where Major Rehse and Warden Harris require prisoners to be escorted by two (2) officers anytime they leave a cell. Absent the policies of Warden Harris and Major Rehse Mr. Hope wouldn't be denied privacy in his medical and mental health consultations and examinations or excessively delayed in seeing a provider. Each of them are aware of this problem and refuse to correct it.

27. Mr. Hope has developed chronic lower back pain from living in cramped quarters for decades. Mr. Hope never had this problem prior to placement in solitary confinement. He no longer sleeps on his mattress, instead he sleeps on his steel bunk so his

back is flat. He has pain in both knees and has periodic sweeling. Limited movement in such close confinement for over 23 years has contributed to these ailments. Major Rehse has personally asked Mr. Hope why he doesn't sleep on his mattress and was made aware of his back and knees ailments.

28. Mr. Hope has reported to mental health that he deals with bouts of anxiety, depression, visual and auditory hallucinations, but is denied treatment for these conditions. He has been told he cannot be transferred from this environment because he has an escape on his record from 1994. He also suffers from insomnia and sleeps fitfully. The noise and constant slamming of gates and doors every thirty (30) minutes contributes to this sleep interruption and deprivation. Sleep is a basic human need. Although he has had thoughts of suicide he has never acted on them. The decades of isolation has deteriorated both his physical and mental faculties.

29. In the 23 years Mr. Hope has been in solitary confinement he has watched many prisoners physically harm themselves and some commit suicide. This has taken a mental toll on him and effects him daily. He's not sure how much longer he can endure this treatment absent judicial intervention.

30. Warden Harris and Major Rehse are responsible for ensuring that prisoners in the "SHU" are house in sanitary living conditions and not subjected to harassment-, retaliation or cruel and unsual treatment. Both Warden Harris and Major Rehse order the moving of Mr. Hope weekly as a form of harassment and has done so for years without a valid penological reason. Both of them

have sat on SCC meetings and contributed to the denial of any meaningful review by not discussing matters related to the hearing, but instead talking about the availability of firewood and whether or not it can be delivered. They are aware of the conditions Mr. Hope is confined in and deny him adequate reviews th1t if relevant information was considered would warrant his release from such restricted confinement.

31. On 30-day intervals, an entity called the Administrative Segregation Committee (ASC) holds a hearing on Mr. Hope. Mr. Hope is never allowed to attend these hearings. These hearings must be conducted by the rank of a Captain or above, many times the Major or Warden conduct them. This committee has no authority to release Mr. Hope from solitary confinement. The ASC reviews are a sham and meaningless because the SCC has already decided Mr. Hope will remain in solitary for the next 180 days. The six (6) reviews done in between the 180 day SCC reviews are meaningless and perfunctory.

32. The SCC schedules Mr. Hope a review every 180 days. This committee is supposed to determine whether prisoners remain in solitary confinement or if they are released to general population. Mr. Hope has attended over forty-eight (48) SCC hearings and remains in solitary. These reviews are perfunctory and a sham as they don't consider Mr. Hope's current attitude or behavior, they instead rely on an incident that will never change from over 23 years ago.

33. On June 24, 2016 Mr. Hope appeared before SCC member Melissa Benet, a SCC member he had never gone before. He made both oral and written

statement available to her as she looked over his file. She saw no reason not to release him and informed him she would release him to a transitional program and then explained what the program was. She took his paperwork with her after the eharing. About 3 weeks later Mr. Hope received his hearing record in the mail. It indicated that he was to remain where he was at with no explanation for her changing her mind.

On December 3, 2016 SCC member Benet conducted Mr. Hope's SCC hearing. Mr. Hope asked her why he wasn't released to the transitional program like she said she would do in June of 2016. Ms. Benet stated, "you are high profile, I don't have the authority to release you." When pressed for more information she informed him, "I was told that's not my call." The purpose for the SCC review is to determine whether to release the prisoner from solitary confinement or remain him. While Ms. Benet conducted the hearing it was meaningless as she never had the authority to release Mr. Hope. The hearing was perfunctory and a sham as it was not used for the intended purpose; to provide Due Process for those housed in solitary confinement. Ms. Benet is aware of the effects that long term isolation has on prisoners subjected to it, both their mental and physical capacities. She is aware that that Hope's treatment is not typical, nor is the amount of time he has been housed in isolation. She is further aware that the hardships Mr. Hope endures while in solitary confinement are significant when compared to those prisoners housed in G.P. and compared to the ordinary incident of prison life.

34. On June 8, 2017 SCC Chairperson Kelly Enloe conducted Mr. Hope's SCC hearing. Mr. Hope

presented a written request and made a verbal request to be released to G.P. Ms. Enloe informed Mr. Hope, “that’s not my decision”. When he asked her why she is reviewing him if she cannot make a decision she stated, “because you are on my list”. It should be of note, for the past six (6) years Mr. Hope has had outside advocates contact various SCC and TDCJ officials asking what he must do to be released to G.P. They spoke and corresponded with Ms. Enloe at least four (4) times and she had no answers only quoted policy. At the conclusion of his hearing Ms. Enloe informed Mr. Hope, “having people contact the SCC isn’t going to do you any good, I’ll let Ms. white know your request”.

While all defendants can make a recommendation to release Mr. Hope from solitary confinement, Ms. Enloe had the authority to release Mr. Hope in 2016. Ms. Enloe has continued Mr. Hope’s isolation despite her knowledge that he has been in isolation since 1994, that such extraordinarily long solitary confinement is inherently harmful and that any penological basis for his isolation expired long ago. Defendant Enloe never provided any notice for the reasons for his continued solitary confinement. This is the height of deliberate indifference.

35. On December 19, 2017 sec member Bonnie Fiveash conducted the SCC hearing on Mr. Hope. Mr. Hope submitted a written request and a verbal request to be released to G.P. Ms. Fiveash never looked at the paperwork Mr. Hope submitted and stated, “you’re still in good shape I can’t release you”. Mr. Hope then asked her if that was even her call to which she stated, “that would be the Director’s call.” Mr. Hope asked why he can’t be seen by someone with the authority to make a decision on his release

and was told, “you need to talk to somebody else about that, I don’t have that answer we’ll see you in six (6) months.” Ms. Fiveash never bothered to review my file or consider any request Mr. Hope made because she had no intention of releasing him nor did she have the authority to release him. She is aware of the inherently harmful effects that long term isolation causes andboth the mental and physical ailment Mr. Hope suffers

36. In the 23 years Mr. Hope has been in solitary confinement he has gone before a number of SCC embers who saw no reason not to release him to G.P. SCC member Sheila Leblanc, Steve Rogers, D. Bilnoski, Lovelady, D. Buckner, April Comstock and Maryann Comstock had no problem releasing Mr. Hope after reviewing his file. In fact in April 2007 Mr. Steve Rogers ordered Mr. Hope’s release to G.P. and to be placed on medium custody. That release order was removed from his file by Vanessa Jones the then Chairperson. Again in January 2010 Mr. Rogers again ordered his release only to have it overrruled again by Vanessa Jones. From that point on SCC members have been told not to release making any hearing he is offered a sham and meaningless. Mr. Hope has not once been told what he must do in order to be released to G.P. It is atypical the way he is treated and the hardships imposed on him are anything but ordinary as it relates to prison life.

37. Each of the SCC members have failed to follow classification policies and use fair procedures or relevant standards when reviewing Mr. Hope. As a result they have denied him of any process he is due and continue to subject him to inhumane treatment that is decades of solitary confinement.

Officials have decided to ignore criteria set forth in both their policies and the U.S. Supreme courts rulings that pertain to prisoners rights while confined in solitary. The hearings are void of any substance that would consider his release.

38. Although classification policy provides that prisoners are allowed to make a verbal and written statement, it is never considered when Mr. Hope attends a hearing. Mr. Hope never goes before a SCC member that has the authority to order his release. Many times he has been told he will remain in solitary because he escaped in 1994. His current behavior or attitude are never considered. He is never told what is expected of him because they have no intentions of releasing him from solitary confinement. The hearing is a sham and designed to make it look like they are affording Mr. Hope the little process he is due in accordance with previous court rulings. With SCC members like Bonnie Fiveash, Vanessa Jones and Lovelandy making statements about the physical shape Mr. Hope is in, it's clear they have no intentions of releasing Mr. Hope unless he is disabled or dead. His isolation is indefinite and the SCC hearings are a sham and perfunctory by their own admissions. Defendants do not afford Mr. Hope or other qualified persons or medical professionals any meaningful opportunity to weigh in on the continued appropriateness of his solitary confinement. The initial reason for placement in solitary continues to be the reason to continue his solitary confinement. Quite honestly, that can never change thus allowing defendants to continue to deny Mr. Hope any meaningful reviews of Due Process pertaining to beinghoused in solitary confinement now for over 23 years.

39. As recently as February 2017 Mr. Leonard Eschessa, the Deputy Director of Operations stated that he functions in a capacity to make a decision whether to release Mr. Hope from solitary, but would not review his file. Mr. Eschessa is responsible for ensuring that classification policies are followed to ensure prisoners are afforded their Due Process. He was made aware of the physical and mental health issues Mr. Hope has from being housed in solitary for decades. He has total disregard for the physical and mental health of Mr. Hope. He is aware of the mental and physical toll that prolonged isolation has on prisoners.

40. In January and February 2017 Joni White, Assistant Director of classifications was contacted by outside advocates after years of Mr. Hope sending her letters asking questions about his continued isolation and her not responding. She stated that she would not allow Mr. Hope's release or make recommendations for his release. She stated that he escaped in 1994 and she doesn't want the responsibility that goes along with making that decision. It is Ms. White that has instructed all SCC members to remain Mr. Hope in solitary. That decision was made years in advance and continues to this day. Ms. White was made aware that Mr. Hope suffers from physical and mental health related issues due to decades of isolation. More importantly, Ms. White has been counseled on the effect that long-term isolation takes on the brain and continues to have total disregard for Mr. Hope's mental welfare.

41. Defendants are aware that Mr. Hope is being deprived of his basic human needs and physical health, enviromental stimulation, social interaction and dignity on account of long-term isolation.

Instead, they extend it. Mr. Hope has spent more time in solitary confinement that he was alive prior to coming to prison.

42. In December 2005 the Security Precautions Desginator (SPD) committee reviewed and removed the “Escape risk” designator from Mr. Hope’s file. this committee reviews the same classification file the SCC does to determine if the SPD should be removed or if the prisoner is still an escape risk. They determined he was not an escape risk and removed the SPD (ES) to indicate such. In April 2007 SCC member Steve Rogers reviewed that same file and determined he wasn’t and escape risk and ordered his release only to have that hearing record removed from the file. Again in January 2010 Mr. Rogers ordered his release only to have it overruled in violation of classification policies. It’s apparent Ms. White and Ms. Enloe have been working in conjunction to deny Mr. Hope any meaningful reviews or the Due Process afforded him from the United States Constitution.

43. Mr. Hope’s continued confinement in solitary confinement has far reaching consequences and places a stigma on him. Pursuant to Parole rules, an offender housed in solitary confinement is ineligible to see a parole commissioner. That means he is never reviewed by a board member, only his file is reviewed. The fact Mr. Hope hasn’t had a disciplinary case in six (6) years, is at the highest time-earning class, is at Level 1 security detention status and has completed over 13 correspondence courses relating to cognitive intervention in never considered by the parole board. Mr. hope’s custody is the primary focus because it determines how much trust they give a person they are considering for

parole. If a prisoner is housed in solitary confinement it demonstrates to the parole board that he cannot be trusted around staff or other prisoners without being handcuffed and escorted. This drastically reduces the chances of Mr. Hope ever getting a favorable parole review. As parole board members have stated, "If he cannot be trusted around staff and other offenders, why would we release him to society?" Mr. Hope has a liberty interest in remaining free of solitary confinement, as long as he remains there he is ineligible to be seen by a parole commissioner or be given a favorable review for parole.

44. The appeal process for the SCC decisions/hearings is for the prisoner to file a grievance. The grievance is "investigated" by the unit warden. The unit warden cannot overrule a SCC decision and doesn't get a vote in the SCC hearing. It is meaningless for a prisoner to appeal their SCC decision and amounts to no appeal at all. In fact on a number of the grievances on the SCC hearing, their response was to write the SCC member; the same SCC member that he was grieving. Some of their responses merely tell him when his next review will be.

45. Mr. Hope is being retaliated against for exercising his constitutional right to file grievances and seek redress for actions he feels are unfair as well as unconstitutional. The weekly cell moves are without penological interest and clearly for harassment and retaliatory purposes. They interefere with Mr. Hope's ability to sleep, concentrate on reading and push him into a state of depression. The unjustified confiscation of Mr. Hope's typewriter (property) without compersation is

an outright theft. When the typewriter was what was being used to file the grievances it becomes obvious the motive for the confiscation.

46. Mr. Hope suffers from anxiety and insomnia in part due to the weekly moves to unsanitary cells and having to adjust weekly to new "neighbors" and the different voices and noises he hears in that cell and around him. Both Warden Harris and Major Rehse have contributed to these physical and psychological malidies due to the inhumane treatment and conditions they subject him to and denying him basic human needs.

47. Each of the Defendants are aware of the harmful effects of long-term isolation and the toll it takes on the human body and brain. Each of the Defendants in one capacity or another work together to ensure Mr. Hope continues to be subjected to these inhumane conditions and have done so for a prolonged period of time.

PLAINTIFF'S DECLARATION

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct, signed this 13th day of June, 2018.

/s/ Dennis Wayne Hope
Dennis Wayne Hope TDCJ # 579097
Polunsky Unit
3872 FM 350 South
Livingston, Texas 77351

CERTIFICATE OF SERVICE

I Dennis Wayne Hope, Plaintiff Pro Se, hereby certify that a true and correct copy of the AMENDED COMPLAINT has been sent to AMY L. PRASAD, Assistant Attorney General for the State of Texas at

Office of Ken Paxton, Attorney General of Texas P.O. Box 12548 Austin, Texas 78711-2548 via U.S. mail first class postage prepaid this 13th day of June, 2018.

/s/ Dennis Wayne Hope
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