A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

BRANDON SCOTT LAVERGNE
VERSUS
N. BURL CAIN

CIVIL ACTION NO. 14-2805-P
JUDGE DONALD E. WALTER
MAGISTRATE JUDGE KAY

MEMORANDUM ORDER

Before the Court is a second motion filed by the plaintiff, Brandon Scott Lavergne ("Lavergne"), entitled "Motion for Relief From Final Judgement Rule 60(b)(6) and (d)(1)." See Record Document 107.[1]

In his current motion, Lavergne once again complains about his conditions of confinement,

[1]On September 27, 2019, Lavergne's previous motion for relief from judgment pursuant to Rule 60(b) and (d) was denied by this Court. See Record Document 91. Lavergne appealed. See Record Document 93. After a brief return to the district court to determine whether Lavergne illustrated excusable neglect or good cause for filing a late notice of appeal and whether Lavergne was entitled to a certificate of appealability, the matter was returned to the Fifth Circuit Court of Appeals, which denied Lavergne's request for a certificate of appealability, his motions for leave to supplement and amend, and motion for reconsideration.

specifically his time in solitary confinement. This issue has been previously addressed buy the Middle District of Louisiana following a motion filed by Lavergne in that court. See Lavergne v. McDonald, et al., No. 19-0709 (M.D. La. Nov. 23, 2020) (Record Documents 15 and 17). Lavergne currently complains in his instant motion, inter alia, that the Report and Recommendation that issued from this Court is in direct contradiction to the language contained in the ruling from the Middle District of Louisiana regarding his conditions of confinement. However, this is not the case. The language from the Report and Recommendation from this Court noted that "the sentence imposed by the state district court was for the term – life imprisonment without parole, the minimun required under Louisiana law for a first degree murder conviction" and that "[t]he state district court made no requirement of solitary confinement in imposing the sentence." Record Document 84 at 12-13. This language is not inconsistent with the statements made by the ruling issued by the Middle District of Louisiana, wherein the provisions of the plea agreement were discussed as opposed to the sentence imposed by the state district court. See Lavergne v. McDonald, et al., No. 19-709 (M.D. La. Nov, 23, 2020) (Record Document 15 at 22-23).

More importantly, when Lavergne sought a certificate appealability from the Fifth Circuit Court of Appeals regarding the Report and Recommendation that was issued in the instant case in April of 2018 about

which he complains, the Fifth Circuit noted that Lavergne "asserts that his sentence constitutes cruel and unusual punishment because he has been kept in solitary confinement since his conviction pursuant to a provision in his written plea agreement." Lavergne v. Vannoy, No. 18-30639 (5th Cir. June 17, 2019).[2] The Fifth Circuit then concluded that Lavergne did not make the requisite showing for a certificate of appealability and denied his request for such. See id. As the Fifth Circuit has considered the issue and denied his request for a certificate of appealability, this Court is bound by the effect of that determination. Accordingly, Lavergne's instant motion must be **DENIED.**

THUS DONE AND SIGNED at Shreveport, Louisiana, this 8th day of March, 2021.

/S/ Donald E. Walter

DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

[2]This conclusion was also noted by the Middle District of Louisiana in a separate ruling regarding a section 1983 motion filed by Lavergne, complaining that his constitutional rights were violated due to the imposition of an illegal sentence and due to his classification resulting from the illegal sentence. See Lavergne v. Stutes, No. 17-1696 and 18-693, 2019 WL 4619963 at *3 (M.D. La. Sept. 10, 2019) ("On June 17, 2019, the United States Court of Appeals for the Fifth Circuit denied the plaintiff a certificate of appealability regarding the legality of his sentence.").

B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21-30133

BRANDON SCOTT LAVERGNE
Petitioner – Appellant
versus
DARREL VANNOY, WARDEN
LOUISIANA STATE PENITENTIARY
Respondent – Appellee

Application for Certificate of Appealability
from the United States District Court for the
Western District of Louisiana
USDC No. 6:14-CV-2805

ORDER:

IT IS ORDERED that Appellant's motion for a certificate of appealability is DENIED. Earlier this year, Judge Haynes denied a certificate of appealability seeking review of the denial of petitioner's first Rule 60 motion to reopen the judgment in his habeas case. *See* No. 19-30912. While that motion for a COA was pending, Lavergne filed another Rule 60 motion with

the district court. The district court again denied the motion and a COA. Lavergne now seeks authorization to appeal that denial. Again, the court finds that the district court's ruling on the second Rule 60 motion is not debatable.

THUS FILED AND SIGNED this 27th day of October, 2021, Lyle W. Cayce, Clerk, Document 00516070799.

/S/ Gregg Costa

GREGG COSTA
UNITED STATES CIRCUIT JUDGE

C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21-30133

BRANDON SCOTT LAVERGNE
Petitioner – Appellant
versus
DARREL VANNOY, WARDEN
LOUISIANA STATE PENITENTIARY
Respondent – Appellee

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 6:14-CV-2805

Before SOUTHWICH, GRAVES and COSTA,
Circuit Judges

PER CURIAM:

A member of this panel previously DENIED appellant's motion for a certificate of appealability. The panel has considered appellant's motion for reconsideration.

IT IS ORDERED that the motion is DENIED.

D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

BRANDON SCOTT LAVERGNE
D.O.C. #424229
VERSUS
N. BURL CAIN

DOCKET NO. 6:14-cv-2805 SECTION P
JUDGE DONALD E. WALTER
MAGISTRATE JUDGE KAY

REPORT AND RECOMMENDATION

Before the Court is a petition for writ of habeas corpus and final amended memorandum in support thereof [docs 1, 46] filed by Brandon Scott Lavergne ("petitioner"), who is represented by counsel in this matter. The petitioner is an inmate in the custody of the Louisiana Department of Public Safety and Corrections and is currently incarcerated at the Louisiana State Penitentiary at Angola, Louisiana. N. Burl Cain ("respondent"), former warden at Angola, opposes the petition. Doc. 67. The petitioner has adopted his reply to a previously-filed answer as his final reply. Docs.. 82, 83. Accordingly, the matter is now ripe for review.

This matter is referred to the undersigned for review, report, and recommendation in accordance with 28 U.S.C. § 636 and the standing orders of the court. For the following reasons IT IS RECOMMENDED that the petition be **DENIED** and **DISMISSED WITH PREJUDICE.**

I.
BACKGROUND

A. Conviction

The petitioner was charged by bill of indictment on July 18, 2012, with two counts of first degree murder in the Fifteenth Judicial District Court, Lafayette, Parish, Louisiana. Doc. 80, att. 1, p. 82. The first count related to the murder of Lisa Pate on or about July 3, 1999, and the second to the murder of Michaela Shunick on or about May 19, 2012. *Id.* On August 17, 2012, he appeared with counsel at a change of plea hearing. *Id.* at 16-17; Doc. 80, pp. 82-84. At this hearing he presented no challenge to the accuracy of facts offered by the state concerning both murders. Doc. 80, pp. 70-75 (Pate) and 75-83 (Shunick).

The terms of the plea arrangement, in which the petitioner had agreed to assist the state with certain tasks, the state had agreed not to seek the death penalty, and the petitioner consented to sentences of life imprisonment without parole and waived his right to a

sentencing hearing, were entered into the record. *Id.* at 83-88. The court then accepted the petitioner's guilty pleas as to both counts and imposed two concurrent sentences of life imprisonment without benefit of probation, parole, or suspension of sentence. *Id.* at 88.

B. State Collateral Review

The petitioner did not file a direct appeal and instead began seeking collateral review through a pro se application for post-conviction relief, filed in the state district court on December 18, 2012, with a supplemental memorandum filed on January 2, 2013. *See* Doc. 80, att. 1, pp. 3-5 (original application); Doc. 80, pp. 23-33 (supplemental memorandum). This application was rejected by the court as improperly filed. Doc. 80, pp. 34-35. The petitioner then filed an application for post-conviction relief, received in the trial court on or about February 7, 2013, and denied by the state district court with written reasons. *See* Doc. 25, att. 2, pp. 7-23; Doc 79, pp. 57-66. In its ruling the state district court found that he had raised claims relating to the court's jurisdiction, the voluntariness of his plea, the Freedom on Information Act, and ineffective assistance of counsel. Doc. 79, pp. 57-58. However, petitioner maintains that he also raised a claim of excessive sentence within his claim challenging the voluntariness of his plea. *See* Doc. 25, att. 2, pp. 18-20.

The petitioner sought review in the Louisiana Third Circuit of Appeal twice, under case number 13-KH-488 and 13-KH-695. The Third Circuit denied writs on 13-KH-488 on May 17, 2013, "on the showing made" due to the petitioner's failure to include necessary documentation, and on 13-KH-695 on June 18, 2013, finding no error to the trial court's ruling. Doc. 1, att. 2, p. 34; Doc. 25, att 3, p. 5. The petitioner then sought review under both case numbers in the Louisiana Supreme Court. That court issued the following ruling as to both case numbers on September 12, 2014: "Denied. Repetitive. Cf. La.C.Cr.P. art. 930.4(D)."[1] Doc. 25, att. 4, p. 12; *State ex rel. Lavergne v. State,* 147 So.3d 702 (La. 2014). He sought reconsideration, which the court denied on October 31, 2014. *State ex rel. Lavergne v. State,* 152 So.3d 143 (La. 2014).

On February 11, 2015, while the instant petition was already pending, the petitioner filed a "supplemental" application for post-conviction relief in the state district court. Doc. 69, pp. 88-100; Doc. 70, pp. 1-27. There he made several allegations of ineffective assistance of counsel and prosecutorial

[1]The respondent contends that the Louisiana Supreme Court's denial of writs on the application for post-conviction relief actually came on November 15, 2013. *See* Doc. 67, att. 1, p. 2; Doc 73, p. 610. That decision, however, relates to Case No. 13-KH-315, which was an application for writs to the Third Circuit relating to the district court's denial of the petitioner's Motion for Discovery. *See* Doc. 1, att. 3, p. 38.

misconduct, including that the plea deal had subjected him to a "cruel and unusual sentence." Doc. 69, p. 100. The state district court stated that it would not consider the other claims, as those were previously raised and considered, but that it would consider the illegal sentence claim. *Id* at 82. It then held that the petitioner was not entitled to relief on that claim because a life sentence did not exceed the maximum allowed by law for first degree murder. *Id.* The petitioner sought review in the Third Circuit, which denied same and made the following remarks with respect to his sentence claims:

> Insofar as Relator asserts his sentences are illegal, Relator's petition to the trial court did not contain any argument cognizable as an actual illegal sentence claim. The statutory delays for Relator's opportunities to seek review of his sentences through appeal, motion to reconsider sentences, and motion to amend sentences have lapsed. Moreover, Relator received bargained-for sentences placed into the record at the time of his plea; therefore, insofar as Relator may actually be challenging his sentences instead of the underlying convictions, Relator is precluded from so doing.

Id. at 49-50. He then sought review in the Louisiana Supreme Court, which denied same on October 30,

2015, and noted that he had not shown that the district court erred when it determined that his claims were repetitive. *State ex rel. Lavergne vs. Lavergne,* 178 So.3d 559 (La. 2015), *reconsideration denied,* 184 So.3d 699 (La. 2016).

C. Federal Habeas Petition

The instant petition was filed on September 18, 2014, while the petitioner was proceeding *pro se. See* Doc 1., p. 6. He is now represented by counsel, and makes the following claims in support of his request for habeas relief:

1. The sentences are cruel and unusual.
2. The guilty pleas are void because the Parish of Lafayette exceeded its authority in indicting him with the murder of Lisa Pate when none of the elements of the offense occurred in that parish.
3. Trial counsel was ineffective for permitting the petitioner to enter a plea to a grossly excessive sentence, when trial counsel should have known that the parish and trial court lacked jurisdiction and authority to commence prosecution for the murder of Lisa Pate.

Doc. 46, p. 4. He waives all claims from previous memoranda other than the three above. *Id.*

II.
STANDARDS ON HABEAS REVIEW

A. Timeliness

Federal law imposes a one-year limitation period within which persons who are in custody pursuant to the judgment of a state court may seek habeas review in federal court. 28 U.S.C. § 2244(d)(1). This period generally runs from the date that the conviction becomes final. *Id.* The time during which a properly-filed application for post-conviction relief is pending in state court is not counted toward the one-year limit. *Id.* at § 2244(d)(2); *Ott. v. Johnson*, 192 F.3d 510, 512 (5th Cir. 1999). However, any lapse of time before proper filing in state court *is* counted. *Flanagan v. Johnson*, 154 F.3d 196, 199 n. 1 (5th Cir. 1998).

A state application is considered pending both while it is in state court for review and also during intervals between a state court's disposition and the petitioner's timely filing for review at the next level of state consideration. *Melancon v. Kaylo,* 259 F.3d 401, 406 (5th Cir. 2001). The limitations period is not tolled, however, for the period between the completion of state review and the filing of the federal habeas application. *Rhines v. Weber,* 125 S.Ct. 1528 (2005). Accordingly, in order to determine whether a habeas petition is time-barred under the provisions of §2244(d) the court must ascertain: (1) the date upon which the judgment became

final either by the conclusion of direct review or by the expiration of time for seeking further direct review, (2) the dates during which properly filed petitions for post-conviction or other collateral review were pending in the state courts, and (3) the date upon which the petitioner filed his federal habeas corpus petition.

B. Exhaustion and Procedural Default

Exhaustion and procedural default are both affirmative defenses that may be considered waived if not asserted in the respondent's responsive pleadings. *E.g., Cupit v. Whitley,* 28 F.3d 532, 535 (5th Cir. 1994). However, the federal district court may also consider both doctrines on its own motion. *Magouirk v. Phillips,* 144 F.3d 348, 357-59 (5th Cir. 1998). Therefore we consider any assertions by respondent under these doctrines, in addition to conducting our own review.

1. Exhaustion of State Court Remedies

The federal habeas corpus statute and decades of federal jurisprudence require that a petitioner seeking federal habeas corpus relief exhaust all available state court remedies before filing his federal petition. 28 U.S.C. § 2254(b)(1); *e.g. Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). This is a matter of comity. *Ex parte Royall*, 6 S.Ct. 734, 740-41 (1886). In order to satisfy the exhaustion requirement, the petitioner must have "fairly presented" the substance of his federal constitutional claims to the state courts "in a

procedurally proper manner according to the rules of the state courts." *Wilder v. Cockrell,* 274 F.3d 255, 259 (5th Cir. 2001); *Dupuy v. Butler*, 837 F.2d 699, 702 (5th Cir. 1998). Each claim must be presented to the state's highest court, even when review by that court is discretionary. *Wilson v. Foti,* 832 F.2d 891, 893-94 (5th Cir. 1987). The exhaustion requirement is not satisfied if the petitioner presents new legal theories or entirely new factual claims in support of his federal habeas petition. *Brown v. Estelle*, 701 F.2d 494, 495 (5th Cir. 1983).

In Louisiana the highest court is the Louisiana Supreme Court. *See* LSA–Const. art. 5, § 5(a). Thus, in order for a Louisiana prisoner to have exhausted his state court remedies he must have fairly presented the substance of his federal constitutional claims to the Louisiana Supreme Court in a procedurally correct manner, based on the same general legal theories and factual allegations that he raises in his § 2254 petition.

2. Procedural Default

When a petitioner's claim is dismissed by the state court based on state law grounds, and those grounds are independent of the federal question and adequate to support the judgment, he may not raise that claim in a federal habeas proceeding absent a showing of cause and prejudice or that review is necessary "to correct a fundamental miscarriage of justice." *Coleman v.*

Thompson, 111 S.Ct. 2546, 2553-54, 2564 (1991) (internal quotations omitted). Procedural default exists where (1) a state court clearly and expressly bases its dismissal of the petitioner's constitutional claim on a state procedural rule and that procedural rule provides an independent and adequate ground for the dismissal ("traditional" procedural default) or (2) the petitioner fails to properly exhaust all available state court remedies and the state court to which he would be required to petition would now find the claims procedurally barred ("technical" procedural default). In either instance, the petitioner is considered to have forfeited his federal habeas claims. *Bledsue v. Johnson*, 188 F.3d 250, 254-5 (5th Cir. 1999). This is not a jurisdictional matter, but instead a doctrine "grounded in concerns of comity and federalism." Trest v. Cain, 118 S.Ct. 478, 480 (1997).

Procedural default principles apply with equal force in capital cases. *Smith v. Murray*, 106 S.Ct. 2661, 2668-69 (1986). The grounds for traditional procedural default must be based on the actions of the last state court rendering a judgment. *Harris v. Reed*, 109 S.Ct. 1038, 1043 (1989). To serve as adequate grounds for a federally cognizable default, the state rule "must have been firmly established and regularly followed by the time as of which it is to be applied." *Busby v. Dretke*, 359 F.3d 708, 718 (5th Cir. 2004) (internal quotations

omitted).

C. General Principles

When a state court adjudicates a petitioner's claim on the merits, this court reviews the ruling under the deferential standard of 28 U.S.C. § 2254(d). *E.g., Corwin v. Johnson*, 150 F.3d 467, 471 (5th Cir. 1998). That statute provides that a writ of habeas corpus shall not be granted unless the state court's adjudication resulted in a decision that was (1) contrary to clearly established federal law or involved an unreasonable application of that law, or (2) based on an unreasonable determination of the facts in light of the evidence before the state court. 28 U.S.C. § 2254(d). Our review, however, ultimately encompasses "only a state court's decision, and not the written opinion explaining that decision." *Maldonado v. Thaler*, 625 F.3d 229, 239 (5th Cir. 2010) (internal quotations omitted); *see also Santellan v. Cockrell*, 271 F.3d 190, 193 (5th Cir. 2001) ("The statute compels federal courts to review for reasonableness the state court's ultimate decision, not every jot of its reasoning.") Even if the state court issues a summary denial of the claim, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Harrington v. Richter*, 131 S.Ct. 770, 784 (2011).

The first standard, whether the state court's

adjudication was contrary to or involved an unreasonable application of clearly established federal law, applies to questions of law as well as mixed questions of law and fact. The petitioner must demonstrate that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 131 S.Ct. at 786-87. A decision is only contrary to clearly established federal law "if the state court applies a rule that contradicts the governing law set forth [by the Supreme Court], or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a [contrary result]." *Bell v. Cone*, 125 S.Ct. 847, 851 (2005) (quotations and citations omitted). As the court recently emphasized, "circuit precedent does not constitute 'clearly established Federal law, as determined by Supreme Court' ... Nor, of course, do state-court decisions, treatises, or law review articles." *Kernan v. Cuero*, 138 S.Ct. 4, 9 (2017) (internal citation omitted).

The second standard – whether the state court's adjudication was based on an unreasonable determination of the facts in light of the evidence – applies only to questions of fact. It is insufficient for a petitioner to show that the state court erred in its factual

determination. Instead, he must demonstrate that the factual determination was objectively unreasonable, a "substantially higher threshold." *Schriro v. Landrigan*, 1l27 S.Ct. 1933, 1939)2007). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood v. Allen*, 130 S.Ct. 841, 849 (2010). Instead, a presumption of correctness attaches to the state court's factual determinations and the petitioner must rebut this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

III.
LEGAL ANALYSIS

A. Timeliness

Because the petitioner did not seek relief through a direct appeal, his conviction became final when his time for filing a notice of appeal expired. *Roberts v. Cockrell*, 319 F.3d 690, 694-95 (5th Cir. 2003). Under Louisiana law, then, his conviction became final on September 17, 2012. La. C. Cr. P. art. 914. The petitioner began to seek post-conviction relief on or about December 18, 2012, but this application and the supplement that followed the following month were rejected as improperly filed. Accordingly, the petitioner is not entitled to statutory tolling under § 2244(d)(2) for the time those filings

were pending. *Larry v. Dretke*, 361 F.3d 890, 894-96 (5th Cir. 2004). Instead, tolling began with the proper filing of an application for post-conviction relief on or about February 7, 2013, by which time **143 days** has accrued toward the one-year limit. There being no indication that the motion was untimely, the limitations period remained tolled until the Supreme Court's ruling on the motion for reconsideration on October 31, 2014. *See Emerson v. Johnson*, 243 F.3d 931, 932 (5th Cir. 2001) (petitioner's "suggestion for reconsideration" to state supreme court, deemed to be properly filed, extended statutory tolling under § 2244(d)(2) while that request was under consideration). The petitioner had already filed the instant petition by that point, and so no extra time accumulated. The instant petition is therefore timely.

B. Exhaustion and Procedural Default

Here the three claims asserted in this petition were all properly exhausted in the state courts. The ineffective assistance and jurisdiction claims were both raised and exhausted through the petitioner's first attempt at post-conviction relief. The sentence claim was not properly raised in the petitioner's first attempt at post-conviction relief, but was clearly asserted in the application filed while this proceeding was already underway. A federal court may grant habeas relief on a claim that was not exhausted when the petition was

filed, but becomes exhausted at some point before the court's ruling. *Bucknell v. Thaler*, 488 Fed. App'x 851, 853 (5th Cir. 2012) (citing *Bufallino v. Reno*, 613 F.2d 568, 571 (5th Cir. 1980)). Because the Louisiana Supreme Court has now ruled on the claim, exhaustion no longer poses a bar to federal habeas relief on that claim.

As for procedural default, the Louisiana Supreme Court's ruling ("Denied. Repetitive. Cf. La.C.Cr.P. art. 930.4(D).") on the petitioner's first attempt at post-conviction relief appears to impose procedural grounds for denial. *See State ex rel. Lavergne v. State*, 147 So.3d 702 (La. 2014). That ruling considered two petitions, however, and so the reference to "repetitive" applications under Article 930.4(D) of the Louisiana Code of Criminal Procedure probably applied to the petitioner's attempt to seek review of the same petition through two separate cases.[2] Furthermore, Article 930.4(D) is not grounds for procedural default – although it prevents further review of a claim, it does not undo any merits ruling on the issue in a prior proceeding. *Pedalahore v. Tanner*, 2012 WL 4970684, at *9 (E.D. La. Sep. 24, 2012). Instead, the court should look through the procedural bar imposed by Article

[2]Under Article 930.4(D), "[a] successive application for post-conviction relief shall be dismissed if it fails to raise a new or different claim."

930.4(D) and consider the prior state court adjudication as the decision under § 2254(d) review. *See Bennet v. Whitley*, 41 F.3d 1581, 1583 (5th Cir. 1994) (describing procedure under Article 930.4(A), which bars claims already raised on direct appeal). Thus, there is no procedural default imposed – we presume that the Louisiana Supreme Court's reference to Article 930.4(D) applied only to the petitioner's attempt to seek review through the second of his two writ applications to the Third Circuit, and that the court simply denied review without written reasons as the first writ application.

C. Merits Consideration

1. Excessive sentence

The petitioner first alleges that his right to be free from cruel and unusual punishment, under the Eighth Amendment, was violated by the life sentences imposed. No sentence is *per se* constitutional. *Solem v. Helm*, 103 S.Ct. 3001, 3009-10 (1983). However, determination of prison sentences is a legislative prerogative that is the primary province of the legislatures rather than the courts. *Rummel v. Estelle*, 100 S.Ct. 1133, 1139-40 (1980). Accordingly, sentences that fall within statutory limits are granted substantial deference. Such a sentence will not be overturned on habeas review "unless it is grossly disproportionate to the gravity of the offense." *Lott v. Miller*, 2008 WL

4889650 at *9 (E.D. La. Nov. 3, 2008) (citing *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991)).

In the Fifth Circuit, excessive sentence claims are analyzed under the framework set forth in *McGruder v. Puckett*, 954 F.2d 313 (5th Cir. 1992). First, the court weighs the gravity of the offense against the severity of the sentence. *Id.* at 316. Then, if the court determines that the sentence is grossly disproportionate to the offense, it compares the sentence in the instant case to sentences for similar crimes in the same jurisdiction and to sentences for the same crime in other jurisdictions. *Id.* If the court does not find that the sentence is grossly disproportionate to the offense, however, no further inquiry is required and the court instead "defer[s] to the will of" the legislature. *United States v. Gonzales*, 121 F.3d 928, 942-43 (5th Cir. 1997), *overruled in part on other grounds by United States v. O'Brien*, 130 S.Ct. 2169, 2180 (2010), *as stated in the United States v. Johnson*, 398 Fed. App'x 964, 968 (5th Cir. 2010). As the Supreme Court has noted, the disproportionality inquiry is inherently subjective. **Rummel**, 100 S.Ct. at 1138-39. Outside of the capital punishment context, successful proportionality challenges are "exceedingly rare." *Id.*

Here the petitioner complains not of the length of sentence, but alleges that, as a result of "a single line in [his] pleas [a]greement and associated Statement in

Support of Plea," as accepted by the sate district court, he has been kept in solitary confinement for almost the entirety of his sentence. Doc. 46, p. 17. On page 5 of his plea agreement, it is explained that the court shall impose sentences of life imprisonment, to be served concurrently, and that the defendant agrees to specific conditions for that sentence. Doc. 1, att. 2, p. 26. These include that "[t]he defendant shall serve his life sentence in restricted custody in accordance with the rules and regulations of the Louisiana Department of Corrections." *Id.*

The Third Circuit, as the last court to render a decision on the merits for this claim, found that the petitioner was precluded from challenging his sentence because it was part of his plea arrangement. Doc. 69, pp. 49-50. We note, however, that the sentence imposed by the state district court was for the term – life imprisonment without parole, the minimum required under Louisiana law for a first degree murder conviction. La. Rev. Stat. 14:30(C). The state district court made no requirement of solitary confinement in imposing the sentence.[3] Accordingly, as the respondent

[3]The only terms of the agreement recited before the court included the petitioner's awareness of the mandatory life sentences that would result from his conviction and the things he had already done – assisted in locating Shunick's body, participated in a recreation of the crime, and undergone as examination of his capacity to proceed – in order for the state to agree not to seek the death penalty. Doc. 80, pp. 83-88.

argues, any imposition of solitary confinement on the petitioner is a condition of confinement rather than part of his sentence and must be attached in a civil rights claim.

We now review the circumstances of the crimes, as presented at the plea hearing, to determine if there is any basis for finding that the statutory minimum was grossly disproportionate. The state announced, and Lavergne did not contest, that Lavergne had enticed Pate away from Lafayette to a location in another town, refused her request to leave, and then beaten her to death whenever she attempted to take his car keys and flee. Doc. 80, pp. 70-75. The state also announced, and Lavergne again did not contest, that Lavergne had followed Michaela Shunick after observing her on her bicycle from his truck, deliberately knocked her off the bicycle and pulled her into his truck, taken her to an isolated location to dispose of the body when he believed that she had died of knife wounds in the ensuing struggle, and then shot her in the head when she recovered and attacked him again in a bold attempt to save her own life. *Id.* at 75-83. Though Lavergne now claims that he did not acquiesce to the state's allegations, the record shows that he admitted to his guilt for both crimes. *Id.* at 70-83. He also signed a statement in support of plea, affirming his guilt **and** that the factual basis provided "is indeed true, correct, and accurate." Doc. 80, att. 1, pp. 24-33. The violence and

cruelty of both deaths provide no justification for finding mandatory minimum sentences for these crimes to be grossly disproportionate. Thus, Lavergne can show no right to federal habeas relief on this claim.

2. Venue/jurisdiction challenge

Lavergne next alleges that the elements of the Lisa Pate murder occurred outside of Lafayette Parish, and that that parish was thus without jurisdiction to indict him, prosecute him, or preside over his conviction and sentencing for the murder.

Venue, as determined under state law, confers jurisdiction for Louisiana criminal courts. *State v. Williams*, 817 So.2d 470, 472 (La. Ct. App. 3d Cir. 2002). The Supreme Court has made clear that "federal habeas corpus relief does not lie for errors of state law." *Swarthout v. Cooke*, 131 S. Ct. 859, 861 (2011) (citing *Estelle v. McGuire*, 112 S.Ct. 475 (1991)). Such errors include challenges to a state criminal court's application of its rules of venue.[4] *See Taylor v. Cain*, 2015 WL

[4]The petitioner cites as precedent the Fifth Circuit's statement in *Lowery v. Estelle*, 696 F.2d 333, 337 (5th Cir. 1983), that "[a]n absence of jurisdiction in the convicting court is ... a basis for federal habeas corpus relief cognizable under the due process clause." Subsequent Supreme Court precedent emphasizing that habeas relief does not lie for errors of state law, as noted supra, should make clear that *Lowery* does not provide a basis for questioning the more recent decisions in *Taylor, Surrat,* and *Ololade*. See also *Lavernia v. Lynaugh*, 845 F.2d 493, 495 (5th Cir. 1988) ("Federal habeas courts are without authority to correct simple misapplications of state criminal law or procedure"); *Manning v. Warden*, 786 F.2d 710, 711-12 (5th Cir. 1986) ("[W]hether the state followed its own procedure is not the concern of a federal *habeas* court.")

1258762, at *2 (W.D. La. Mar. 17, 2015) (rejecting habeas claim alleging that state court lacked jurisdiction over case because state failed to prove where the crime occurred); *Surratt v. Cain*, 2008 WL 2073995, at *2–*3 (W.D. La. Mar. 11, 2008) (rejecting improper venue challenge in § 2254 petition for being based solely in Louisiana law); *Ololade v. Dretke*, 2006 WL 801229 (S.D. Tex. Mar. 29, 2006) (same, involving a Texas venue provision). Accordingly, Lavergne can show no right to federal habeas relief based on this claim.

3. Ineffective assistance

Finally, Lavergne complains of ineffective assistance of counsel based on trial counsel's recommendation that he accept a plea deal without challenging the jurisdictional defects alleged above. Claims of ineffective assistance of council are gauged by the guidelines set forth by the Supreme Court in *Strickland v. Washington*, 104 S.Ct. 2052 (1984). Under *Strickland*, a petitioner must demonstrate: (1) that his counsel's performance was deficient, requiring a showing that the errors were so serious such that he failed to function as "counsel" as guaranteed by the Sixth Amendment, and (2) that the deficiency so prejudiced the defendant that it deprived him of a fair trial. *Id.* at 2064. The first prong does not require perfect assistance by counsel; rather, petitioner must demonstrate that counsel's representation fell beneath

an objective standard of reasonableness. *Id.* Judges have been cautioned towards deference in their review of attorney performance under *Strickland* claims in order to "eliminate the potential distorting effect of hindsight." *Rector v. Johnson*, 120 F.3d 551, 563 (5th Cir. 1997) (quoting *Strickland*, 104 S.Ct. at 1065) (quotations omitted). Accordingly, the court should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

The second prong requires the petitioner to show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 104 S.Ct. at 2055-56. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2056. In other words, the petitioner must show prejudice great enough to create a substantial, rather than conceivable, likelihood of a different result. *Pape V. Thaler*, 645 F.3d 281, 288 (5th Cir. 2011) (quoting *Cullen V. Pinholster*, 131 S.Ct. 1388, 1403 (2011)). "Both of [Strickland's] prongs must be proven, and the failure to prove one of them will defeat the claim, making it unnecessary to examine the other prong." *Williams v. Stephens*, 761 F.3d 561, 566-67 (5th Cir. 2014).

Under Louisiana law, as noted above, venue is

jurisdictional in criminal cases. Venue is proper in a criminal case where any act or element of an offense occurred. La. C. Cr. P. art. 611. Furthermore, it is not an essential element of the case whick must be proven beyond a reasonable doubt. *Id.* at art. 615. Rather, the element is decided by the judge alone in advance of trial and must only be proven by a preponderance of the evidence. *Id.*

Here the respondent asserts that the aggravating element that elevated Lisa Pate's homicide to first degree murder was her second degree kidnapping, as shown through the factual basis which the petitioner failed to contest at the plea hearing, and in the statement in support of plea which he signed and affirmed was accurate. Doc. 80, pp. 70-72; doc. 80, att. 1, pp. 24-25. The respondent thus maintains, as the state district court found, that venue was proper over the murder of Lisa Pate because it was in Lafayette that Lavergne met Pate and enticed and persuaded her to go to the location in Acadia Parish where she was killed. Doc. 80, pp. 70-72; doc. 80, att. 1, pp. 24-25.

Under Louisiana law, kidnapping includes "[t]he enticing or persuading of any person to go from one place to another." La. Rev. Stat. § 14:44.1(B)(2). The crime is elevated to second degree kidnapping with any of several aggravating circumstances. *See* La. Rev. Stat. § 14:44.1(A)(3). First degree murder involves the killing of a human being with specific intent to kill or

inflict great bodily harm under certain aggravating circumstances, including when the offender is engaged in the perpetration or attempted perpetration of a second degree kidnapping. La. Rev. Stat. § 14:30(A)(1).

The Fifth Circuit "has made clear that counsel is not required to make futile motions or objections" in order to stave off ineffective assistance claims. *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990). The petitioner fails to show why the underlying felony should not be considered an element of the first degree murder, or to demonstrate any basis for concluding that an element of the kidnapping was not accomplished in Lafayette Parish after his own admission that he enticed and persuaded Lisa Pate to go from that parish to Acadia Parish. He demonstrates no merit to any venue challenge counsel might have brought and thus no deficient performance through counsel's advise that he accept the plea. Accordingly, he can show no mistake in the state court's ruling and no right to federal habeas relief under this claim.

IV.
CONCLUSION

Based on the foregoing, **IT IS RECOMMENDED** that the instant application be **DENIED** and **DISMISSED WITH PREJUDICE.**

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days from receipt of this Report and Recommendation to file any objections with the Clerk of Court. Timely objections will be considered by the district judge prior to a final ruling.

Failure to file written objections to the proposed factual findings and/or the proposed legal conclusions reflected in this Report and Recommendation within fourteen (14) days following the date of its service shall bar an aggrieved party from attacking either the factual findings or the legal conclusions accepted by the District Court, except upon grounds of plain error. *See Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1429-30 (5th Cir. 1996).

In accordance with Rule 11(a) of the Rules Governing Section 2254 Cases in the United State District Courts, this court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Unless a Circuit Justice or District Judge issues a certificate of appealability, an appeal may not be taken to the court of appeals. Within fourteen (14) days from service of this Report and

Recommendation, the parties may file a memorandum setting forth argument on whether a certificate of appealability should issue. *See* 28 U.S.C. § 2253(c)(2). A courtesy copy of the memorandum shall be provided to the District Judge at the time of filing.

THUS DONE AND SIGNED in Chambers this 10th day of April, 2018.

/S/ Kathleen Kay

KATHLEEN KAY
UNITED STATES MAGISTRATE JUDGE

E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

BRANDON SCOTT LAVERGNE
D.O.C. #424229
VERSUS
N. BURL CAIN

DOCKET NO. 14-cv-2805 SECTION P
JUDGE DONALD E. WALTER
MAGISTRATE JUDGE KAY

JUDGMENT

For the reasons stated in the Report and Recommendation of the Magistrate Judge previously filed herein [Doc. #84], determining that the finding are correct under the applicable law, and noting the objections to the Report and Recommendation in the record [Doc. #85];

IT IS ORDERED that the petition for writ of habeas corpus be **DISMISSED WITH PREJUDICE**, and that no certificate of appealability be granted.

THUS DONE in Chambers this 26th day of April, 2018.

/S/ Donald E. Walter
DONALD E. WALTER
UNITED STATES DISTRICT JUDGE

F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-30639

A True Copy
Certified order issued Jun 17, 2019

Attest: Clerk, U.S. Court of Appeals, Fifth Circuit

BRANDON SCOTT LAVERGNE
Petitioner – Appellant

versus

DARREL VANNOY, WARDEN
LOUISIANA STATE PENITENTIARY
Respondent – Appellee

Appeal from the United States District Court
for the Western District of Louisiana

ORDER:

Brandon Scott Lavergne, Louisiana prisoner #424229, pleaded guilty to two counts of first degree murder and received concurrent sentences of life in prison at hard labor, without benefit of parole, probation, or suspension of sentence. Lavergne now seeks a certificate of appealability (COA) to appeal the district court's denial of his 28 U.S.C. § 2254 petition challenging these convictions and sentences. He asserts that his sentence constitutes cruel and unusual punishment because he has been kept in solitary confinement since his conviction pursuant to a

provision in his written plea agreement. Lavergne also maintains that the trial court lacked jurisdiction over one of the murder charges because none of the elements of the offense occurred in Lafayette Parish. Finally, he maintains that his trial attorneys rendered ineffective assistance by failing to object and encouraging him to plead guilty despite these flaws in the proceedings.

To obtain a COA, Lavergne must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c) (2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Because the district court has rejected his claims on their merits, Lavergne "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack*, 529 U.S. at 484; *see also Miller-El*, 537 U.S. at 338. He has not made the requisite showing. Accordingly, Lavergne's motion for a COA is DENIED.

/S/ Stuart Kyle Duncan

STUART KYLE DUNCAN
UNITED STATES CIRCUIT JUDGE

G

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BRANDON S. LAVERGNE
#424227
VERSUS
DOUGLAS McDOMAND, ET. AL.
CIVIL ACTION NO.
19-709-SDD-EWD

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Before the Court is the Complaint[1] of Brandon S. Lavergne ("Plaintiff"), an inmate representing himself, who is incarcerated at the Louisiana State Penitentiary ("LSP"), Angola, Louisiana. The Complaint has been amended several times.[2] As Plaintiff is a prisoner seeking redress from officers and employees of a government entity, his Complaint is subject to screening pursuant to 28 U.S.C. § 1915A. Based on the analysis of each claim that follows, it is recommended that all of Plaintiff's claims be dismissed for failure to state claim upon which relief can be granted, except Plaintiff's claim for nominal and punitive damages against Douglas McDonald in his individual capacity for the alleged incident of excessive force occurring on

[1]R. Doc. 1.
[2]R. Docs. 3, 5, 6, 9, 10, 12 & 14.

January 10, 2019, and his claim again Darrell Vannoy, Joseph LaMartinaire, Tim Delany, Jimmy Cruze, Chad Oubre, Ricky Sharky, and Douglas McDonald for not allowing Plaintiff to attend church services.

I. Background

Plaintiff filed the instant action on October 14, 2019 against Douglas McDonald ("McDonald"), Michael Vaughn ("Vaughn"), Darrell Vannoy ("Vannoy"), Joseph LaMartinaire ("LaMartinaire"), Tim Delany ("Delaney"), Paul Smith ("Smith"), Tailor Griffin ("Griffin"), Ricky Sharky ("Sharky"), Gary Young ("Young"), Chad Oubre ("Oubre"), Jimmy Cruze ("Cruze"), Bobbie Rousseau ("Rousseau"), Gorie Cougeot ("Cougeot") and "Unknown Medic EMT,"[3] each in their individual and official capacities,[4] alleging numerous violations of his constitutional rights, ranging from complaints regarding excessive punishments and retaliation to First Amendment violations related to "mail watch" an exercise of religion.

II. Law & Analysis

A. Standard of Review

Pursuant to 28 U.S.C. § 1915A, this Court is authorized to dismiss an action or claim against a governmental entity or an officer or employee of a governmental entity if the Court is satisfied that the action or claim is frivolous, malicious, or fails to state a claim upon which relief may be granted.

[3]R. Doc. 6, p. 1.
[4]R. Doc. 1, p. 4

A claim is factually frivolous if the alleged facts are "clearly baseless, a category encompassing allegations that are 'fanciful,' 'fantastic,' and 'delusional.'"[5] A claim has no arguable basis in law if it is based upon an indisputably meritless legal theory, "such as if the complaint alleges the violation of a legal interest which clearly does not exist."[6] This provision gives judges not only the authority to dismiss a claim that is based on a meritless legal theory, but also the unusual power to pierce the veil of the factual allegations.[7] Pleaded facts that are merely improbably or strange, however, are not frivolous for purposes of the screening process.[8] Screening is conducted before service of process and dismissal is proper as to any claim that is frivolous or malicious; fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief.[9]

To determine whether the complaint states a claim under §1915A, courts apply the same standard used for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[10] Accordingly, the court must accept all well-pleaded facts as true and view them in the light

[5]*Denton v. Hernandez*, 504 U. S. 25, 33 (1992), *citing Neitzke v. Williams*, 490 U. S. 319, 325 (1989).
[6]*Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998).
[7]*Denton*, 504 U.S. at 32.
[8]*Id.* at 33; *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 468 (5th Cir. 1992)
[9]*See*, 28 U.S.C. §1915A.
[10]*Plascencia-Orozco v. Wilson*, 773 Fed. App'x. 208, 209 (5th Cir. 2019) (citation omitted); *Hart v. Hairston*, 343 F.3d 762, 763-64 (5th Cir. 2003).

most favorable to the plaintiff.[11] 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.'"[12] "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."[13]

B. Plaintiff Had Stated a Claim for Excessive Force, but not for Deliberate Indifference

Plaintiff complains of an incident occurring on January 10, 2019. He was in the "hall" making a phone call when another inmate, Terry Smith ("Terry"), was let out of his cell without restraints.[14] Officer Montgomery instructed Terry to return to his cell, but Terry refused.[15] Due to Plaintiff's status of "CCR,"[16] he was not allowed to be in the hall at the same time as an officer, so Plaintiff left the hall and locked himself in the shower, approximately ten feet from the front door.[17] When McDonald arrived and saw Plaintiff in the shower, McDonald instructed Leslie Dupont, another

[11] *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).
[12] *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
[13] *Id.*
[14] R. Doc. 1-1, pp. 2-3.
[15] R. Doc. 1-1, p. 3.
[16] "CCR" is an acronum used by inmates that stands for "closed-cell restrictions," which limits an inmate's out-of-cell time; it is analogous to solitary confinement.
[17] R. Doc. 1-1, p 3.

officer, to spray Terry with chemical agent.[18] When the chemical agent was sprayed through the security hatch in the door, Terry turned on fans to blow toward the door and walked approximately 150 feet away from the door.[19] McDonald "kept looking at" Plaintiff while "encouraging Dupont to use the chemical agent." When McDonald saw Plaintiff react "in pain" to the chemical agent and begin "violently coughing," McDonald started laughing.[20] Reading these facts in the light most favorable to Plaintiff, suggests that Plaintiff, not Terry, was the intended target of the chemical spray.[21]

Force is considered excessive and violates the Eighth Amendment of the United States Constitution if it is applied maliciously and sadistically for the purpose of causing harm rather than in a good faith effort to maintain or restore discipline.[22] However, "[a]n inmate who is gratuitously beaten by guards does not lose his ability to pursue an excessive force claim merely because he has the good fortune to escape without serious injury."[23] The Eighth Amendment's prohibition against cruel and unusual punishment, however,

[18]R. Doc. 1-1, p 3.

[19]Plaintiff alleges that the chemical spray can only spray 20 feet at the most. *Id.*

[20]R. Doc. 1-1, p 3.

[21]Plaintiff alleges that MdDonald kept looking at Plaintiff and encouraging Dupont to continue using chemical spray, although Terry had moved so far from the door that the chemical could not have affected Terry.

[22]*Wilkins v. Gaddy*, 559 U.S. 35, 37 (2010), *quoting Hudson V. McMillian*, 503 U.S. 1,7 (1992).

[23]*Wilkins*, 559 U.S. at 38.

necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that such force is not "repugnant to the conscience of mankind."[24] Factors to be considered in determining whether an alleged use of force is excessive include the extent of injury sustained, if any; the need for the application of force; the relationship between the need for force and the amount of force utilized; the threat reasonably perceived by prison officials; and any efforts made to temper the severity of a forceful response.[25] Based upon Plaintiff's version of events, he was not acting in a manner to warrant the application of any force, yet force was intentionally used against him; thus, the *de minimis* nature of his injuries is not dispositive.[26] Accordingly, this claim should survive screening, with the following exceptions:[27] Based on Plaintiff's version of events, the only Defendant against whom this claim should be maintained is McDonald. According to Plaintiff, McDonald was the only Defendant who realized Plaintiff was in the vicinity and was the Defendant who continued to order the use of force.[28] Further, though Dupont was involved, Plaintiff makes clear he is not bringing this claim against Dupont

[24]*Hudson*, 503 U.S. at 10.

[25]*Id.* at 7.

[26]*Wilkins*, 559 U.S. at 39-40.

[27]This Report does not opine on the viability of the defense of qualified immunity to this claim.

[28]"A supervisor who order the use of force can be held liable in an excessive force case when there exists a causal connection between the supervisor's actions and the actions of the subordinates which cause the injury." *Gonzalez v. Gordy*, No. 18-220, 2020 WL

because Dupont is deceased.[29] Further, the minimal nature of Plaintiff's alleged injuries (coughing and irritated skin without lasting effects) precludes the recovery of punitive damages, although not the recovery of nominal or punitive damages.[30]

To the extent that Plaintiff claims the lingering effect of the chemical agent in his dorm violated his constitutional rights, such a claim fails because Plaintiff

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5413387, at *6 (S.D. Tex. June 11, 2020) (citing *Batiste v. City of Beaumont*, 421 F.Supp. 2d 969, 991 (E.D. Tex. 2006) (citing *Cousin v. Small*, 325 F.3d 627, 637-38 (5th Cir. 2003))).

[29]R. Doc. 1-1, p. 1

[30]42 U.S.C. § 1997e(e); *Tillman v. Gaspard*, No. 19-12819, 2019 WL 5847012, at *3 (E.D. La. Oct. 18, 2019) ("only *de minimis* injuries ... are insufficient to justify an award of compensatory damages under 42 U.S.C. 1997e(3)."). "[E]xposure to chemical agents without long-lasting effects constitute, at best, a *de minimis* injury." *Braxton v. Renteria*, No. 17-125, 2017 WL 8677938, at n. 3 (N.D. Tex. Nov. 15, 2017) (citing *Bibbs v. Jones*, No.11-1360, 2012 WL 1135584, at *2 (W.D. a. April 4, 2012). Plaintiff does not allege any long-lasting negative effects due to the exposure of chemical agent and thus, is not entitled to compensatory damges. Further, to the extent Plaintiff has filed suit for monetary relief against McDonald and Dupont for this incident in their capacities, such a claim also fails. 42 U.S.C. § 1983 does not provide a federal forum for a litigant who seeks monetary damages against either a state or its officials acting in their official capacities, specifically because these officials are not seen to be "persons" within the meaning of § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71 (1989). In addition, in *Hafer v. Melo*, 502 U.S. 21 (1991), the United State Supreme Court addressed the distinction between official capacity and individual capacity lawsuits and made clear that a suit for monetary damages against a state official in an official capacity is treated as a suit against the state and is therefore barred by the Eleventh Amendment.

does not allege that exposure to the lingering chemical agent posed any serious risk of harm or that Defendants were aware of any serious risk of harm to Plaintiff.[31] Additionally, Plaintiff's claim that he had to wait two hours to shower does not state a claim of constitutional dimension.[32] Similarly, Plaintiff's claim against the "unknown EMT" fails because Plaintiff has only provided this Court with a conclusory allegation that the EMT "did NOTHING for [him]."[33] Further, Plaintiff does not allege that he was subject to any substantial risk of harm as a result of the EMT doing "NOTHING" for him.

C. Plaintiff Fails to State A Claim for Retaliation

It is well-established that prison officials may not retaliate against a prisoner for exercising this constitutional rights.[34] Action against an inmate in retaliation for the inmate's exercise of his First Amendment constitutional rights is a violation of the inmate's constitutional rights.[35] Specifically, prison

[31]Serious risk of harm is a requirement of a condition of confinement claim. *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019).

[32]See Pea v. Cain, No. 12-779, 2014 WL 268696, *7, n. 7 (M.D. La., Jan. 23, 2014) ("a failure to allow an inmate to shower after an application of irritant spray is not the type of wrongdoing that rises to the level of deliberate indifference.") (citying *Roach v. Caddo Parish Sheriff's Dept.*, No. 07-364, 2010 WL 420068 (W.D. La., Jan 29, 2010); *Dufrene v. Tuner*, Civil Action No. 05-2006, 2006 WL 2620091 (W.D. La., Aug. 14, 2006).

[33]R. Doc. 1-1, p. 6.

[34]*Gibbs v. King*, 779 F.2d 1040, 1046 (5th Cir. 1986).

[35]*See, Woods v. Smith*, 60 F.3d. 1161, 1164-65 (5th Cir. 1995).

officials are not allowed to retaliate against an inmate because of the inmate's exercise of his right to complain about the alleged wrongful conduct of prison security officers. However, since claims of retaliation are not favored, it is the plaintiff's burden to provide more than mere conclusory allegations of retaliation:

> To state a claim of retaliation an inmate must ... be prepared to establish that but for the retaliatory motive the complained of incident ... would not have occurred. This places a significant burden on the inmate ... The inmate must produce direct evidence of motivation or, the more probable scenario, allege a chronology of events from which retaliation may plausibly be inferred.[36]

Further, to sustain a showing of a constitutional violation, the plaintiff must assert more than a *de minimis* or inconsequential retaliatory adverse act.[37]

Here, Plaintiff is unable to prove that the actions he claims were retaliatory would not have occurred but-for the retaliatory animus.[38] Regarding the disciplinary

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[36]*Id.* at 1166.

[37]*Morris v. Powell,* 449 F.3d 682, 684-85 (5th Cir. 2017

[38]*See Powell v. Martinez,* 579 Fed. App'x. 250, 252 (5th Cir. 2014) (holding that a plaintiff could not show retaliation because he had not alleged facts to establish that the acts he complained of would not have occurred absent the defendant's retaliatory motive).

action filed against Plaintiff for simple escape, attempting escape and/or escaping are not permissible actions, and Plaintiff does not allege that these disciplinary reports were entirely false.[39] "While a prisoner can state a claim of retaliation by alleging that disciplinary actions were based upon false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform."[40]

With respect to the disciplinary reports for possession of a cell phone, receiving a watch while in visitation, and having another inmate place a phone call on his behalf, Plaintiff does not allege that any of these reports are false.[41] With respect to the cell phone, Plaintiff does not allege that possession of a cell phone

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[39]This Court had already considered and dismissed Plaintiff's complaints regarding the disciplinary actions taken against him for his attempted escape (*Lavergne v. Stutes*, Civil Action No. 17-1696 c/w 18-694, 2019 WL 4619963, *2-3 (M.D. La. Sept. 10, 2019), so to the extent Plaintiff is making any claim regarding the disciplinary sentence for attempted escape or simple escape that is separate from the retaliation claim, such claims are not considered.

[40]*Morris v. Cross,* No. 09-236, 2010 WL 5684412, *7 (E.D. Tex. Dec. 17, 2010) *report and recommendation adopted*, 2011 WL 346071 (E.D. Tex. Feb. 1, 2011), aff'd, 476 Fed. App'x (5th Cir. 2012) (internal quotation marks and citations omitted).

[41]With respect to most, if not all, of Plaintiff's complains regarding disciplinary actions against him and sentences imposed, Plaintiff appears to argue that his equal protection rights are being violated because he is sentenced differently and receives harsher penalties than other prisoners. This claim is without merit. "To state an equal protection claim, [a prisoner] must allege, *inter*

is permissible.[42] Rather, Plaintiff admits that a cell phone is contraband, but complains that his sentence

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alia, that similarly situated individuals have been treated differently and he must also allege purposeful or intentional discrimination." *McKnight v. Eason*, 227 Fed. App'x. 356 (5th Cir. 2007). Further, in this case, Plaintiff is making a "class of one" claim. A plaintiff makes a "class of one" claim when he alleges that he has been intentionally treated differently from others similarly situated without a rational basis for the treatment. *Engquist v. Oregon Dept. of Agr.*, 553 U. S. 591, 601 (2008). Plaintiff fails to allege that the inmates to which he is comparing himself are similarly situated. Indeed, it would likely be difficult, if not impossible, to show that other inmates are similarly situated to Plaintiff, as he is incarcerated with a unique sentence of solitary confinement for life (discussed further below). Because few, if any, other inmates are likely to have this custodial classification, there are no other inmates to whom Plaintiff may compare himself for purposes of an equal protection claim. *See Lopez v. Reyes*, 692 F.2d 15, 17 (5th Cir. 1982) ("When classification is a necessary part of prison security, it does not amount to denial of equal protection of the laws"). Further, because Plaintiff is already sentenced to a more restrictive confinement than other inmates, it is reasonable that, when Plaintiff must be sentenced for disciplinary violations, his sentences for those violations would also be more restrictive. Considering the foregoing, Plaintiff has not stated an equal protection claim with respect to any of the disciplinary sentences of which he has complained. See *Flores v. Livingston*, 405 Fed. App'x. 931, *2 (5th Cir. 2010) (affirming a district court's dismissal of a claim of equal protection as frivolous where the Plaintiff failed to allege that he was treated differently from similarly situated prisoners).

[42]To the extent Plaintiff alleges a second disciplinary report was filed against him for possession of the same cell phone, and that report was false, Plaintiff fails to state a claim because he ultimately received no punishment in connection with that disciplinary report. R. Doc. 1-1, pp. 4-6. Because Plaintiff experienced no adverse consequences, he cannot state a claim

was harsher than the average sentence for other prisoners. Because possessing a cell phone is not permissible activity, Plaintiff cannot show that but for the retaliatory motive, he would not have been disciplined. Regarding the watch, Plaintiff argues that his sentence was too harsh considering that watches are not contraband and that "if someone had given [him] the watch it was merely a situation of [him] getting an authorized item in an unauthorized way."[43] Again, Plaintiff does not argue that he was entitled to receive the watch at visitation. Likewise, Plaintiff admits he had another inmate place a phone call for him, also an impermissible activity, and was sentenced for same.[44] Accordingly, because the actions described were

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for retaliation for the allegedly false disciplinary report arising from the second cell phone violation. See *Smith v. Hebert*, Civil Action No. 08-30, 2011 WL 4591076, *8 (M.D. La. Aug. 26, 2011), *affirmed*, 533 Fed. Appx. 479 (5th Cir. 2013) ("Courts have held that the filing of a single, later-dismissed disciplinary charge against an inmate, even if taken with a retaliatory motive, is insufficient to qualify as more than *de minimis*."); *Ghosh v. McClure*, Civil Action No. 05-4122, 2007 WL 400648, *11-12 (S.D. Tex. Jan. 31, 2007). *See also, Brightwell v. Lehman*, 637 F.3d 187, 194 (3rd Cir. 2011) (same); *Bridges v. Gilbert*, 557 F.3d 541, 556 (7th Cir. 2009) (same); *Starr v. Dube*, 334 Fed. App'x. 341 (1st Cir. 2009) (same).

[43]R. Doc. 1-1, p. 2.

[44]Plaintiff complains that he was not made aware of what rule he had violated, but such a claim sounds in due process rather than retaliation. Plaintiff cannot state a due process claim with respect to this disciplinary hearing because he was only sentenced to eight weeks loss of phone privileges, which is not so atypical as to give rise to a liberty interest. *See Zebrowski v. U. S. Federal*

impermissible actions that Plaintiff does not deny, Plaintiff cannot prove that he would not have received disciplinary sentences but-for the alleged retaliatory animus.[45]

Similarly, Plaintiff complains that he was overcharged for simple escape when he should have been charged for "attempted simple escape."[46] Plaintiff does not contend that the report was false and rather, admits that he was, at least, attempting to escape.[47]

Bureau of Prisons, 558 Fed. App'x. 355, 359 (5th Cir. 2014) (temporary phone restrictions do not implicate due process concerns). *See also Burroughs v. Petrone*, 138 F.Supp.3d 182, 207 (N.D.N.Y. Oct. 15, 2015) (loss of telephone privileges is *de minimis* and insufficient to state a claim for retaliation).

[45]To the extent Plaintiff complains that he had to replace his watch (R. Doc. 1-1, p. 2) and is thus, asserting a lost property claim, such a claim is not cognizable in this Court. See *Hudson . Palmer*, 468 U. S. 517, 533 (1984); *Parratt v. Taylor*, 451 U. S. 527, 542 (1981). This is commonly referred to as the "Parratt/Hudson Doctrine." Procedural due process is not violated if an adequate post-deprivation remedy is available, and it has been held that Louisiana law provides ample post-deprivation remedies. *Marshal v. Norwood*, 741 F.2d 761, 764 (5th Cir. 1984). *See also, Batiste v. Lee*, No. 09-674, 2009 WL 2708111 (W.D. La. Aug. 26, 2009) (dismissing *pro se* prisoner's claims for deprivation of property as frivolous and for failing to state a claim based on the *Parratt/Hudson Doctrine*). Thus, Plaintiff does not have a claim for deprivation of his watch. For these same reasons, Plaintiff cannot state a claim for his lost property complained of in his amended complaint (R. Doc. 12), and that claim is also subject to dismissal.

[46]R. Doc. 1-1, p. 21.

[47]Though Plaintiff is attempting to use the "overcharging" to show retaliation, this claim ultimately sounds in due process, but Plaintiff is not entitled to have his prison disciplinary

What level of escape Plaintiff accomplished is a non-issue as he was engaged in an impermissible activity and was disciplined for that activity.[48] Thus, he cannot show that but for retaliatory motive, the discipline would not have occurred.

To the extent Plaintiff alleges the incident described above regarding chemical spray was motivated by a retaliatory intent, such a claim also fails. Plaintiff's allegations to support this claim of retaliation include that McDonald allegedly told Plaintiff "I'm going to show you about filing lawsuits."[49] However, Plaintiff alleges McDonald was retaliating on behalf of Michael Vaughn. Plaintiff has not made any allegations regarding the nature of the relationship between Vaughn and McDonald that would lead this Court to find any plausible retaliatory motive on behalf of McDonald. [50]

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proceedings properly handled or favorably resolved as described below, and, as mentioned above. Plaintiff has already brought a due process claim regarding the disciplinary hearing for simple escape, and that claim failed. , No. 17-1696 c/w 18-693, 2019 WL 4619963, *2-3 (M.D. La. Sept. 10, 2019).

[48]Plaintiff also appears to complain regarding the criminal prosecution for his attempted escape. R. Doc. 1-1, p. 5. To the extent Plaintiff complains of the "Sheriff's office getting involved" (R. Doc. 1-1, p. 5), he fails to state any claim; it is the duty of law enforcement to investigate crimes, and Plaintiff admists that attempted simple escape is a crime.

[49]R. Doc. 1-1, p. 4.

[50]Plaintiff simply alleges that Vaughn is McDonald's boss. *See Salter v. Nicherson*, No. 12-22, 2013 WL 866198, at *18 (E.D. Tex Jan. 25, 2013) (finding an allegation of friendship too "tenuous and speculative ... to give rise to a 'chronology from

Further, to find retaliation would require the Court to find a conspiracy, as is the case for all of Plaintiff's retaliation claims and is another reason this claim must fail. As stated above, because Plaintiff alleges Defendants retaliated against him on behalf of another individual,[51] Plaintiff's allegation of retaliation relies on proving a conspiracy.[52] A plaintiff who asserts conspiracy claims under civil rights statues, such as § 1983, must plead the operative facts upon which their claim is based.[53] "Bald allegations that a conspiracy

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which retaliation may be plausibly inferred.'"). Additionally, Plaintiff has wholly failed to provide any specific facts to this Court that would be necessary for a retaliation claim, such as when lawsuits were filed and against whom.

[51]R. Doc. 1-1, p. 20. Plaintiff alleges various Defendants retaliated against him on behalf of Michael Vaughn. Though Plaintiff names Vaughn as a Defendant, he fails to allege any actions undertaken by Vaughn that constituted retaliation. Rather, all alleged retaliatory actions were perpetrated by other Defendants. Moreover, as described below, Plaintiff being kept in "Death Row CCR" after he was found guilty of simple escape is in line with his original sentence. Thus, it is impossible for Plaintiff to show that the disciplinary sentence has been excessive, as the disciplinary sentence is the same as the agreed upon sentence for Plaintiff's crimes per Plaintiff's plea agreement.

[52]*See Lewis v. Locicero*, No. 15-129, 2016 WL 831939, *4 (M.D. La. Feb. 29, 2016) ("It is well settled that allegations of a conspiracy between private and state actors requires more than conclusory statements, but requires further factual enhancement to render the claim plausible. Plaintiff's conspiracy allegation is only supported by the allegation that Lockhart and Sheriff Ard are longtime friends, which is insufficent.") (internal quotation marks and citations omitted).

[53]*Lynch V. Cannatella*, 810 F.2d 1363, 1369-70 (5th Cir. 1987).

existed are insufficient."[54] Plaintiff alleges that Defendants conspired to prevent Plaintiff from accessing the courts due to their relationship with Vaughn. The allegation that Defendants were coworkers, or even friends, is not sufficient to support a claim that Defendants were conspiring to retaliate.[55]

To the extent Plaintiff essentially alleges he is being harassed for filing lawsuits and grievances, such a claim also fails. The Fifth Circuit has held that an allegation that "harassment of [the plaintiff] intensified after he started filing grievances" was insufficient to show retaliation.[56]

For Plaintiff's final retaliation claim, he alleges that information regarding his prison disciplinary record was "leaked" in an effort to taint juries in his pending lawsuits and a pending criminal complaint against him.[57] This allegation is wholly conclusory and also relies on Plaintiff showing a conspiracy, which he has

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[54]*Id.*

[55]*See Kadri v. Haro*, No. 105-167, 2006 WL 3359426, *7 (N.D. Tex. Nov. 20, 2006) (finding the plaintiff's allegation of a close friendship was conslusory and insufficient to support a conspiracy allegation.); *Marbles v. Haynes*, No. 14-80, 2017 WL 3124180, *4 (E.D. Tex. June 22, 2017) (Finding that conclusory allegations that defendants conspired to retaliate were insufficient to sustain a § 1983 Action).

[56]*Reese v. Skinner*, 322 Fed. App'x 381, 383 (5th Cir. 2009), c*iting Strong v. Univ. Healthcare Sys., L.L.C.*, 482 F.3d 802, 808 (5th Cir. 2007).

[57]R. Doc. 1-1, p. 12. Plaintiff also alleges that the "leak" constitutes a separate equal protection violation but provides no facts in support thereof, so this claim is not considered.

not alleged sufficient facts to support.[58] Accordingly, all of Plaintiff's claims of retaliation must fail.

D. Plaintiff's Claims Regarding "Mail Watch" Are Duplicative and Subject to Dismissal

Plaintiff also complains that some of his mail has been delayed and that he should no longer be on mail watch.[59] A case is duplicative if it involves "the same series of events" and allegations of "many of the same facts as an earlier suit."[60]

This Court has previously dismissed Plaintiff's claims regarding a mail watch, stating as follows:

> [T]he Court finds no violation in the imposition of a "mail watch" restriction with regard to Plaintiff's mail in early 2014. Pursuant to such "watch," prison officials apparently subjected Plaintiff's mail to great scrutiny than normal, but there is no indication that Plaintiff's mail was censored or that he was prevented from sending or receiving mail as a result of this restriction.[61]

As this Court has already considered whether a 'mail watch" violated Plaintiff's constitutional rights

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[58]Moreover, Plaintiff retains no privacy interest in his prison disciplinary records. *See Wright v. Garnish*, No. 94-697, 1994 WL 382495, *1 (N.D.N.Y. July 19, 1994).

[59]R. Doc. 1-1, pp. 10-11.

[60]*Bailey v. Johnson*, 846 F.2d 1019, 1021 (5th Cir. 1988).

[61]*LaVergne v. Cain*, No. 15-34, 2016 WL 8679227, at *11 (M.D. La. Aug. 19, 2016).

and has concluded that it does not, Plaintiff's claim regarding mail watch is duplicative and subject to dismissal.[62] Even if the claim was not duplicative, it is still subject to dismissal for failure to state a claim because Plaintiff still does not allege that he was prevented from sending or receiving mail as a result of the "mail watch," and it does not appear that Plaintiff's mail was censored.[63]

Additionally, in another case involving Plaintiff, the Fifth Circuit affirmed that "LaVergne has not shown

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[62]Plaintiff also complains that his mail has been delayed, but again, this Court previously held that "mere delays in the transmission of Plaintiff's mail, without more," do not rise to the level of a constitutiional violation. *Id.* at *8. Thus, to the extent that the claim of delay is not duplicative, this Court has previously explained why that claim fails, and that reasoning still stands. Further, the mere holding ofmail by prison officials, which may result in delay of receipt by the inmate, is insufficient to show a violation of the First Amendment. *Pinson v. U. S. Dept. of Justice*, No.12-1872, 2015 WL 13673660, *3 (D. D.C. July 28, 2015) (allegation that mail was held for days or weeks inadequate to demonstrate violation of the plaintiff's first amendment rights, unless the plaintiff can show a denial of right of access to the courts in connection therewith). Plaintiff here does not allege his right to access the courts was infringed as a result of the delayed mail.

[63]Plaintiff filed an amended complaint (R. Doc. 5) complaining further regarding "mail watch." The facts in the amended complaint fail for the same reasons as those in his original complaint. Further, Plaintiff's new facts would alse be subject to dismissal as unexhausted under the Prison Litigation Reform Act. 42 U.S.C. § 1997e.

that the 'mail block' violated clearly established law."[64] If a complete mail block does not violate clearly established law, then certainly, a mail watch cannot be offensive to the constitution. Accordingly, this claim should be dismissed with prejudice.

E. Plaintiff Has Not Stated A Claim Regarding LSP's Failure to Follow DOC Policy and Plaintiff Has Not Stated A Due Process Claim with Respect to Any of His Disciplinary Proceedings

In August, 2018, Plaintiff was issued a disciplinary report and found guilty of a rules infraction for possession of a cell phone.[65] Plaintiff alleges that he received "multiple punishments," including loss of visitation for three months,[66] that prescribing more than two punishments is against DOC policy and that he never received a response to this disciplinary appeal.[67]

First, violation of DOC's rules or policies alone does not establish the violation of a constitutional right.[68] Thus, Plaintiff's claim that the imposition of

[64] *LaVergne v. Vaughn*, 797 Fed. App'x 869 (5th Cir. 2020) (affirming this Court's dismissal of Plaintiff's claim that a mail block infringed upon his constitutional rights).

[65] R. Doc. 1-1, p. 10.

[66] R. Doc. 1-1, p. 10.

[67] R. Doc. 1-1, p. 10.

[68] *Lewis v. Secretary of Public Safety and Corrections*, 870 F.3d 365, 369 (5th Cir. 2017) ("The LaDPSC and CCA internal rules and regulations do not alone create federally-protected rights and a prison official's failure to follow prison policies or regulations does not establish a violation of a constitutional right." (internal citations omitted)).

"multiple punishments" for a rules infraction violates DOC policy fails to state a claim of constitutional dimension. Further, as described below, the punishments imposed do not, in and of themselves, violate Plaintiff's constitutional rights.

Second, regarding Plaintiff's disciplinary appeal, an inmate does not have a constitutional right to have his prison disciplinary or administrative proceedings properly investigated, handled, or favorably resolved,[69] and there is no procedural due process right inherent in such a claim. As stated by the First Circuit in *Geiger v. Jowers*:[70]

> Insofar as [the plaintiff] seeks relief regarding an alleged violation of his due process rights resulting from the prison grievance procedures, the district court did not err in dismissing his claim as frivolous ... [The plaintiff] does not have a federally protected liberty interest in having these grievances resolved to his satisfaction. As he relies on legally nonexistent interest, any alleged due process violation arising from the alleged failure to investigate his

[69] *Mahogany v. Miller*, 252 Fed. App'x. 593, 595 (5th Cir. 2007).
[70] 404 F.3d 371 (5th Cir. 2005) (in the context of the handling of an administrative grievance).

grievances is indisputably meritless.[71]

The United States Supreme Court has found that the procedures attendant to prison disciplinary proceedings do not implicate any constitutionally protected liberty interest unless the resulting punishment has subjected an inmate to an atypical and significant deprivation (evaluated in the context of prison life) in which the state might conceivably have created a liberty interest for the benefit of the inmate.[72]

Here, Plaintiff alleges he was sentence to "multiple punishments."[73] Plaintiff specifically complains that as a result of the August 2018 cell phone violation, he was sentenced to administrative segregation, kicked out of a college program, kicked out of the hobby shop, banned from the rodeo, "moved to the most violent part

[71]*Id*, at 373-74. This conclusion is equally applicable in the context of prison disciplinary proceedings. *See, e.g., Sanchez v. Grounds*, No. 13-2, 2014 WL 1049164, at *2 (E.D. Tex. Mar. 14, 2014) (finding that an inmate's claim regarding a failure to conduct a "proper investigation" of a disciplinary charge "did not amount to a constitutional deprivation"); and *Jackson v. Mizell*, No. 09-3003, 2009 WL 1792774, at *7 n.11 (E.D. La. June 23, 2009) (noting that "the Court fails to see how a prisoner could ever state a cognizable claim alleging an inadequate disciplinary investigation").

[72]*Sandin v. Conner*, 515 U.S. 472, 486 (1995). *See also Fisher v. Wilson*, 74 Fed. App'x. 301 (5th Cir. 2003) (affirming dismissal based on failure to state a claim where the plaintiff had not shown how placement in extended lockdown was an atypical or extraordinary incident in the context of prison life to trigger due process guarantees).

[73]R. Doc. 1-1, p. 10.

of the prison," and "placed in the field as [his] job."[74] Plaintiff alleges these punishments were atypical.

In order for any due process concern to arise, a protected liberty interest be implicated.[75] The custody status change imposed upon Plaintiff does not implicate any constitutionally protected liberty interest.[76] Plaintiff also has no constitutionally protected liberty interest in attending college,[77] being allowed access to hobby shop,[78] attending rodeo,[79] or in his job assignment.[80] Plaintiff's final allegation regarding his quarters change consists of a conclusory allegation that he was "moved to the most violent part of the prison."[81] Plaintiff has

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[74]R. Doc. 1-1, p. 4.

[75]*See Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 459-60 (1989).

[76]*Dickerson v. Cain*, 241 Fed. App'x. 193 (5th Cir. 2007) (holding that the plaintiff failed to show that placement in Camp J at LSP presents an atypical or significant hardship beyond the ordinary incidents of prison life).

[77]*Beck v. Lynaugh*, 842 F.2d 759, 762 (5th Cir. 1988) ("the state has no constitutional obligation to provide basic educational or vocational training to prisoners.").

[78]*See KAnderson v. LeBlanc*, No. 13-541, 2013 WL 6328221, *2 (M.D. La. Dec. 4, 2013 (use of the hobby shop is a privilege, not a guarenteed right).

[79]*Reeves v. LeBlanc*, No. 13-586, 2014 WL 7150615, *2 (M.D. La. Dec. 15, 2014) (dismissing as frivolous a claim that the plaintiff's constitutional rights were violated by revoking his privilege of engaging in hobby craft and rodeo sales at the prison).

[80]*See, e.g., Cotton v. Hargett,* 68 F.3d 465 (5th Cir. 1995) (a prisoner has no due process right to a particular job assignment).

[81]R. Doc. 1-1, p. 4.

not alleged any facts in support of this contention, and thus, it should be dismissed.

Plaintiff also claims that LSP policy provides for automatic "punishment" of loss of visitation for three months, which was imposed on him for the same August 2018 disciplinary report regarding the cell phone, and because the "punishment" is automatic and based on LSP policy, it is unconstitutional.[82] Incarcerated prisoners do not retain any absolute rights of physical association; moreover, the Fifth Circuit has held "that for convicted prisoners '[v]isitation privileges are a matter subject to the discretion of prison officials.'"[83] Further, in *Block v. Rutherford*,[84] the United States Supreme Court recognized that "[t]here are many justifications for denying contact visits entirely, rather than attempting the difficult task of establishing a program of limited visitation." The due process clause does not itself give rise to a liberty interest in visitation,[85] so Plaintiff must show that the state has created an enforceable liberty interest in respect to visitation for it to be protected by the due

[82]R. Doc. 1-1, p. 10.

[83]*Thorne v. Jones,* 765 F.2d 1270, 1273 (5th Cir. 1985) (quoting *Jones v. Diamond*, 636 F.2d 1364, 1376-77 (5th Cir. 1981).

[84]468 U.S. 576, 587 (1984).

[85]*Thompson*, 490 U.S. at 460-61 ("[a]s long as the conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to

process clause.[86] Plaintiff has not alleged, nor does it appear, that Louisiana's laws create a liberty interest in visitation at the prisons and jails. Since there is no constitutional right to, or state-created interest in, visitation, a policy that provides for the automatic withdrawal of visitation privileges cannot violate the constitution.[87] Thus, this claim should be dismissed with prejudice for failure to state a claim.

To the extent Plaintiff attempted to state a due process claim regarding the disciplinary report for the watch he allegedly received while in visitation, Plaintiff also fails to state a due process claim because he was sentenced to only loss of visitation and loss of commissary. Plaintiff has no liberty interest in visitation, as explained above, and Plaintiff does not have a liberty interest in his ability to purchase items form the prison store.[88] Accordingly, Plaintiff cannot state a claim with respect to the disciplinary proceeding

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judicial oversight." *Id.* (quoting *Montanye v. Haymes*, 427 U.S. 236, 242 (1976)) Further, "[t]he denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence, and therefore is not independently protected by the Due Process Clause." *Id.* at 461 (internal quota marks and citations omitted)).

[86]*Id.* at 461.

[87]*See Berry v. Brady*, 192 F.3d 504, 508 (5th Cir. 1999) holding that the plaintiff had no constitutional right to visitation privileges).

[88]*Madison v. Parker*, 104 F.3d 765, 768 (5th Cir. 1997) ("commissary and cell restrictions as punishment are in fact merely changes in the conditions of his confinement and do not implicate due process concerns.").

regarding the watch. Based upon the facts alleged, Plaintiff has not stated a cognizable due process claims with respect to the disciplinary proceedings complained of, and these claims should be dismissed.

F. LSP's Tours Do Not Violate Plaintiff's Constitutional Rights

Plaintiff's complaints regarding the public tours giving at LSP appear to invoke the Fourth and Eighth Amendments and are analyzed under both.[89] To the extent Plaintiff suggests that his general privacy rights have been violated,[90] inmates have a substantially reduced right of privacy while incarcerated.[91] Specifically, inmates have no expectation of privacy in the prison's common areas[92] or in their cells.[93] Not only do prisoners lack a right of privacy in their cells, but they also "have a minimal right to bodily privacy."[94] Considering the minimal right of privacy afforded to prisoners, the lack of a reasonable expectation of

[89]Plaintiff also provided "background info" in this section of the Complaint where he discusses not being given a particular job assignment. R. Doc. 1-1, p. 14. To the extent Plaintiff has attempted to make a claim regarding not being assigned a particular job, such a claim fails. *See e.g., Cotton v. Hargett*, 68 F3d. 465 (5th Cir. 1995) (a prisoner has no constitutional right to a particular job assignment). Further, as this incident occurred in October 2017, it would likely be prescribed as this case was filed in October 2019.

[90]*See* R Doc. 1-1, pp. 13-14.

[91]*Hudson v. Palmer*, 468 U.S. 517, 527-28 (1984).

[92]*See U. S. v. Melancon*, No. 08-150, 2010 WL 324007, at *9 (E.D. La. Ja. 21, 2010) (finding no reasonable expectation of privacy

privacy in Plaintiff's cell, and that the viewing occurred from areas outside Plaintiff's cell, any right to privacy was not violated, as such rights, basically, do not exist.[95] Other courts have also found that it is a "natural aspect of prison life [] that guards, officials, and members of the public will periodically tour prison facilities and observe prisoners in their cells."[96] Further, though there may be areas where some right of privacy is expected, such as within the lavatory, the cellblock is not such a special place.[97] Accordingly, the tour that allowed the public to view Plaintiff's cell did not violate what little right to privacy he may maintain as an incarcerated individual.

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in a prison's common area and noting "[t]his Court is not persuaded to expand the scope of the severely diminished (if not extinct) privacy rights retained by inmates ...").

[93]*See Hudson*, 468 U.S. 527-28 ("[a] right or privacy in traditional Fourth Amendment terms is fundamentally incompatible with the close and continual surveillance of inmates and their cells required to ensure institutional and internal order.") *See also Allen v. Fuselier*, 273 F.3d 393, 393 (5th Cir. 2001) ("an inmate has no privacy interest in his cell or the personal property contained therein.") (citations omitted); *Ordaz v. Martin*, 5 F.3d 529, *5 (5th Cir. 1993). The privacy right in the cell is among the rights ceded by a convicted felon. *U.S. vs. Ward*, 561 F.3d 414, 417 (5th Cir. 2009).

[94]*Garrett V. Thaler*, 560 Fed. App'x. 375, 380 (5th Cir. 2014) (citing *Oliver v. Scott*, 276 F.3d 736, 741 (5th Cir. 2002)).

[95]*Ordaz*, 5 F.3d at *5 ("a prisoner has no reasonable expectation of privacy in the "curtilage" surrounding his prison cell.").

[96]*Price v. Chicago Magazine,* No. 86-8161, 1988 WL 61170, *4 (N.D. I11, June 1, 1998).

[97]*Id.*

To the extent Plaintiff has insinuated that the public tours constitute cruel and unusual punishment, such a claim also fails. Plaintiff complains that the tours that take place at LSP are "atypical and dehumanizing."[98] The nature of this claim is that the Plaintiff's conditions of confinement, *i.e.*, the exposure to the public, violate the constitution. "The Eighth Amendment affords prisoners protection against the 'wanton and unnecessary infliction of physical pain,' as well as against exposure to egregious physical conditions that deprive them of basic human needs."[99] The tours provided by the prison do not cause infliction of physical pain upon Plaintiff, nor do they amount to egregious physical conditions that deprive Plaintiff of a basic human need.[100]

Moreover, there does not appear to be any support for the contention that public tours of prisons violate the constitution. In the cases in which the Supreme Court has considered public access to prisons, it has not

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[98]R. Doc. 1-1, p. 13.

[99]*Ordaz,* 5 F.3d, at *5 (lingering of female guards outside an inmate's prison cell while he was masturbating did not rise to the level of cruel and unusual punishment because masturbation does not qualify as a basic human need or a fundamental right to be protected under the penumbral right to privacy).

[100]To the extent that visitors have made remarks that have offended Plaintiff, such does not rise to the level of a constitutional violation because they are not state actors. R. Doc. 1-1, pp. 15-16 (Plaintiff complains that individuals on tours have made comments to him such as "your [sic] evil." Plaintiff also specifically complains of a school tour in which the students

condemned such access.[101] To the contrary, it appears that public touring of prisons is a well-accepted practice. The Supreme Court has recognized public tours of prisons as a necessary activity[102] because the conditions of jails and prisons are "clearly matters 'of great public importance.'"[103] Penal institutions require large amounts of public funds, and each person who is placed in prison becomes, in effect, a ward of the state; thus, information regarding prison conditions is of

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stood by his cell "pointing, snickering, whispering," and a tour of elderly individuals, including at least two catholic nuns, who allegedly stood by Plaintiff's cell for longer than he wished.). Even if sate actors themselves say offensive things to a inmate, this is insufficient to state a claim on constitutional dimension. *See Orange v. Ellis*, 348 Fed. App'x. 69, 72 (5th Cir. 2009) (citing *McFadden v. Lucas*, 713 F.2d 143, 146 (5th Cir. 1983)) ("Mere words are not sufficient to support a Section 1983 claim."). Accordingly, the fact that members of the public on tour may have said things to Plaintiff that upset him is insufficient to state a claim under § 1983.

[101] *See, e.g., Pell v. Procunier,* 417 U.S. 817, 830 n. 7 (1974); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

[102] *Pell,* 417 U.S. at 830 n. 7 ("As The Chief Justice has commented, we cannot 'continue ... to brush under the rug the problems of those who are found guilty and subject to criminal sentence ... It is a melancholy truth that it has taken the tragic outbreaks of the past three years to focus widespread public attention on this problem.' Burger, Our Options are Limited, 18 Vill.L.Rev. 165, 167 (1972). Along the same lines, The Chief Justice has correctly observed that '(i)f we want prisoners to change, public attitudes toward prisoners and ex-prisoners must change ... A visit to most prisons will make you a zealot for prison reform.' W. Burger, For Whom the Bell Tolls, reprinted at 25 Record of N.Y.C.B.A. (Supp.) 14, 20, 21 (1970)). *See also Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

[103] *Houchins,* 438 U.S. at 8 (citing *Pell*, 417 U.S. at 830 n. 7).

public importance.[104] Though the constitution does not compel prisons to allow public access, it also does not prohibit prisons from allowing public access.[105] Accordingly, Plaintiff has failed to state a claim of constitutional dimension regarding the tours of LSP.[106]

G. Plaintiff Has Failed to State a Conditions of Confinement Claim

Plaintiff makes multiple separate claims regarding the conditions of his confinement, each of which will be discussed in turn. The conditions under which a prisoner is confined are subject to scrutiny under the Eighth Amendment, which prohibits the unnecessary and wanton infliction of pain.[107] An inmate must establish two elements—one objective, one subjective—to prevail on a conditions of confinement claim.[108] First, he must show that the relevant official

[104]*Houchins,* 438 U.S. at 13.

[105]*Id.* at 13-14. Plaintiff has stated he is making an equal protection claim because tours are not provided of other areas of the prison. Plaintiff has not provided any support for such an equal protection claim, and the case law clearly indicates that governmental authorities are in control of what areas of the prisons they allow the public or media to gain access to. *Cf. Houchins*, 438 U.S. at 13-14. Similarly, Plaintiff has stated that the tours violate his right to due process, but there are not facts alleged that would support a potential due process claim as to this complaint.

[106]*See Gibson v. Hilton,* No. 15-1230, 2015 WL 5023300 (W.D. La. Aug. 24, 2015) (dismissing as frivolous a claim that the inmate plaintiff suffered embarrassment when a tour group of youth stopped at his cell).

[107]*See Rhodes v. Chapman,* 452 U.S. 337, 347 (1981).

[108]*Arenas v. Calhoun,* 922 F.3d 616, 620 (5th Cir. 2019).