Appendix A

Fifth Circuity Panel Opinion

Appendix B

Petition for Rehearing on en banc

Appendix C

Applet Brief

Appendix D

Texas Health and Safety Code 841.0831 (b)

The tiered program must provide for the seamless transition of a committed person from a total confinement facility to less restrictive housing and supervision and eventually to release from civil commitment, based on the person's behavior and progress **in treatment.**

Appendix E

Texas Health and Safety code 841.0838 (a)(2)(b)(1)

The restraint is used as a last resort; necessary to stop or prevent imminent physical injury to the committed person or another.

Appendix F

18 U.S. C. 3583 (d)(2)

Involves no grater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553 (a)(2)(B), (a) (2) (c), and (a) (27) (D).

APPENDIX

A

FIFTH CIRCUIT PANEL OPINION

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 09, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-10825 Welsh v. Correct Care Recovery
USDC No. 5:18-CV-20

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
February 9, 2021
Lyle W. Cayce
Clerk

No. 19-10825

LONNIE KADE WELSH,

Plaintiff—Appellant,

versus

CORRECT CARE RECOVERY SOLUTIONS; CHRIS WOODS, *Individually as Director of Security, Texas Civil Commitment Center for Correct Care Recovery Solutions*; AMY GOLDSTEIN, *Individually as Clinical Director at Texas Civil Commitment Center for Correct Care Recovery Solutions*; EDWARD TOWNS, *Individually as Clinical Director at Texas Civil Commitment Center for Correct Care Recovery Solutions*; BILL VANIER, *Individually as Captain of Security at Texas Civil Commitment Center for Correct Care Recovery Solutions*; ET AL.,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:18-CV-20

Before STEWART, HIGGINSON, and WILSON, *Circuit Judges.*

STEPHEN A. HIGGINSON, *Circuit Judge*:*

Lonnie Kade Welsh, Texas prisoner # 6516607, brought this action under 42 U.S.C. §§ 1983, 1985, and 1986 asserting more than a dozen claims against even more defendants. Welsh was a civilly committed sexually violent predator (SVP) prior to his imprisonment. His claims concern assorted wrongs he allegedly suffered while civilly committed. But he filed suit only later, proceeding pro se and *in forma pauperis* (IFP).

Welsh consented to proceedings before a magistrate judge. The magistrate judge dismissed Welsh's suit after obtaining authenticated records and holding a *Spears*[1] hearing. In a meticulous order, the magistrate judge determined that some defendants were not amenable to suit because they had no juridical existence, some defendants enjoyed prosecutorial immunity, some claims were *Heck*[2]-barred, and other claims were frivolous. The magistrate judge dismissed all of Welsh's federal claims with prejudice, denied leave to amend the complaint, and denied Welsh's motion for reconsideration and motion to vacate judgment under Federal Rules of Civil Procedure 59(e) and 60(b). Welsh timely appealed, and the magistrate judge granted his motion to proceed IFP on appeal.

---

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

[1] *Spears v. McCotter*, 766 F.2d 179, 181–82 (5th Cir. 1985), *abrogated on other grounds by Neitzke v. Williams*, 490 U.S. 319 (1989). A *Spears* hearing "aims to flesh out the allegations of a prisoner's complaint to determine whether *in forma pauperis* status is warranted or whether the complaint, lacking an arguable basis in law or fact, should be dismissed summarily as malicious or frivolous under section 1915[]." *Eason v. Holt*, 73 F.3d 600, 602 (5th Cir. 1996).

[2] *Heck v. Humphrey*, 512 U.S. 477, 486–87 (1994). Under *Heck*, a § 1983 plaintiff generally cannot recover damages for harm caused by actions whose unlawfulness would upset a conviction or sentence without first proving that the conviction or sentence has been reversed or invalidated. *Id.*

"We review a district court's dismissal of an *in forma pauperis* complaint as frivolous pursuant to 28 U.S.C. § 1915(e)(2)(B)(i) for an abuse of discretion. A claim may be dismissed as frivolous if it does not have an arguable basis in fact or law." *Brewster v. Dretke*, 587 F.3d 764, 767 (5th Cir. 2009) (citations omitted). By and large, we find the magistrate judge's careful analysis correct. Accordingly, we AFFIRM in large part, VACATE in part, and REMAND for further proceedings.

I.

Welsh first challenges the magistrate judge's dismissal of his excessive-force claims, which arose out of four separate incidents between Welsh and security personnel during his period of civil commitment. The magistrate judge dismissed two of these claims as *Heck*-barred. The Supreme Court held in *Heck v. Humphrey* that, "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus . . . ." 512 U.S. at 486–87. Welsh argues that *Heck* does not apply because one underlying conviction has been overturned and the other is separable from his § 1983 claim. The magistrate judge dismissed Welsh's other two excessive-force claims, applying an objective reasonableness standard and finding that the force used against Welsh was not objectively unreasonable.

A.

i.

Welsh argues that the excessive-force claim that he raised in Count 10 of his amended complaint is no longer *Heck*-barred. This claim arose from a

November 2017 incident in which several officers used force on him after he refused to accept housing. In the original judgment, which was entered on April 24, 2019, the magistrate judge noted that this incident resulted in Welsh filing a criminal complaint against officers, alleging that they had assaulted and injured him. The resulting investigation found these allegations untrue and resulted in Welsh receiving a new criminal conviction for fabricating evidence. The magistrate judge concluded that this claim was barred by *Heck* because success on it would necessarily undermine his conviction for fabricating evidence against the officers.

In his Rule 59(e) motion, which was filed in May 2019, Welsh pointed out that this conviction was overturned by the intermediate appellate court in February 2019. *Welsh v. State*, 570 S.W. 3d 963, 965 (Tex. App. 2019). The magistrate judge acknowledged this decision but noted that the State had filed a petition for discretionary review with the Texas Court of Criminal Appeals. On that basis, the magistrate judge concluded that the order vacating the conviction was not yet final and that the conditions of *Heck* thus had not been met.

We need not determine whether the magistrate judge erred in holding that *Heck* applied to Welsh's excessive-force claim based on the pendency of the State's petition for review of the Texas appellate court's reversal of Welsh's evidence-fabrication conviction.[3] Welsh now informs us that the

[3] Some courts have agreed with the magistrate judge that a reversed conviction must be a *final* one to satisfy *Heck*. *See, e.g.*, *Michaels v. New Jersey*, 955 F. Supp. 315, 324–25 (D.N.J. 1996) ("[I]n order to maintain a § 1983 claim for an unconstitutional conviction or imprisonment where success on such a claim would necessarily imply the invalidity of an outstanding or potential conviction, there must first be a 'final' termination of the criminal proceeding in favor of the plaintiff. Without such finality, the potential for inconsistent determinations in the civil and criminal cases will continue to exist . . . ."); *Kelly v. Serna*, 87 F.3d 1235, 1240 n.3 (11th Cir. 1996) (holding similarly). But our precedent may be in tension with that approach. *See Davis v. Zain*, 79 F.3d 18, 18-20 (5th Cir. 1996)

petition for review has been denied and asserts that his claim is no longer *Heck*-barred. Welsh is correct that *Heck* does not bar a § 1983 action raising claims concerning an overturned conviction. *Clay v. Allen*, 242 F.3d 679, 681 (5th Cir. 2001). Because of the possibility of an intervening conviction reversal, this court has reminded district courts that "[a] preferred order of dismissal in *Heck* cases decrees, 'Plaintiff['s] claims are dismissed with prejudice to their being asserted again *until the* Heck *conditions are met.*'" *Deleon v. City of Corpus Christi*, 488 F.3d 649, 657 (5th Cir. 2007) (emphasis added) (quoting *Johnson v. McElveen*, 101 F.3d 423, 424 (5th Cir. 1996)). Yet here, the magistrate judge dismissed Welsh's claim with prejudice, full stop. Regardless whether dismissal of this claim is reviewed de novo or for an abuse of discretion, because *Heck*'s conditions have now been met, the dismissal of Welsh's excessive-count claim under Count 10 is VACATED and REMANDED.

ii.

Welsh next challenges the magistrate judge's dismissal of the excessive-force claim he raised in Count 1. This claim arose from another run-in with security personnel, this one in January 2016: Welsh alleges that several officers used force on him in retaliation for his exercise of his purported free-speech right to refuse orders. According to the complaint, Welsh had an argument with Officer Hawthorne, who refused to permit him to return to his housing area. Captain Salazar then ordered Welsh to follow her so she could place him in isolation; Welsh refused and returned to his housing area. Salazar returned with other officers, who informed Welsh that he had to go to isolation and refused to let him bring his things. Welsh resisted

---

(concluding that a plaintiff whose conviction for murder was overturned on the grounds of prosecutorial misconduct and subornation of perjury could bring a § 1983 claim despite *Heck*, even though he faced retrial on the murder charge).

being taken to isolation; once there, Captain Vanier allegedly ground handcuffs into Welsh's ring finger injuring him. At some point during this episode, Welsh bit Salazar. He later pleaded guilty to assault causing bodily injury. The magistrate judge determined that this claim, too, was *Heck*-barred because a finding that Salazar, Vanier, and others used excessive force against Welsh "would necessarily imply the invalidity of Welsh's underlying [assault] conviction."

Welsh does not argue that this conviction has been overturned. Rather, he contends that Vanier's application of excessive force against Welsh with the handcuffs is separable from Welsh's assault on Salazar for purposes of his § 1983 claim. This may be so.

The inquiry whether an excessive-force claim is barred under *Heck* is "analytical and fact-intensive" and requires a court to consider whether "success on the excessive force claim *requires* negation of an element of the criminal offense or proof of a fact that is inherently inconsistent with one underlying the criminal conviction." *Bush v. Strain*, 513 F.3d 492, 497 (5th Cir. 2008) (emphasis added). In *Bush*, we held that *Heck* did not bar a plaintiff convicted of resisting arrest from bringing an excessive-force claim arising from the same conduct where the officer's use of force allegedly continued after the plaintiff was handcuffed and had ceased resisting. *Id.* at 498–500. Here, the amended complaint acknowledges that Welsh "resisted" Salazar's and others' efforts to place him in an isolation cell. But, fairly read, the complaint alleges that Vanier's use of excessive force occurred only later—after Welsh had been subdued, shackled, and transported to the isolation cell. As in *Bush*, success on Welsh's excessive-force claim would not *necessarily* imply the invalidity of his assault conviction. *Heck*, 512 U.S. at 486–87. We therefore are compelled to VACATE and REMAND the magistrate judge's dismissal of Welsh's Count 10 excessive-force claim. We offer no

opinion as to the resolution of this claim once the *Heck* impediment is removed.

B.

Welsh also challenges the dismissal of excessive-force claims arising from incidents occurring on March 21, 2017 (Count 6) and March 22, 2017 (Count 7). Each incident involved officers forcefully closing the food slot in Welsh's door on his hand. As the magistrate judge correctly noted in his analysis, this court has not yet announced the standard to be applied to an excessive-force claim raised by an SVP. In the absence of controlling caselaw, the magistrate judge applied an objective reasonableness standard as announced by the Supreme Court in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). The magistrate judge applied this standard, finding it persuasive that the Eighth Circuit applied a similar, pre-*Kingsley* objective reasonableness standard to excessive-force claims brought by involuntarily committed persons. *See Andrews v. Neer*, 253 F.3d 1052, 1061 (8th Cir. 2001). Because Welsh does not contest this standard, we assess the issue with reference to the *Kingsley* objective reasonableness standard.

In *Kingsley v. Hendrickson*, the Supreme Court set the legal standard for use of force against *pretrial detainees*, announcing that "a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable." 576 U.S. at 396–97. Under *Kingsley*, "objective reasonableness" turns on the "facts and circumstances of each particular case" and various factors "may bear on the reasonableness or unreasonableness of the force used":

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat

> reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id. at 397. In determining objective reasonableness, "a court must also account for the 'legitimate interests that stem from [the government's] need to manage the facility in which the individual is detained,' appropriately deferring to 'policies and practices that in th[e] judgment' of jail officials 'are needed to preserve internal order and discipline and to maintain institutional security.'" *Id.* (alterations in original) (quoting *Bell v. Wolfish*, 441 U.S. 520, 540 (1979)).

i.

With respect to the claim arising from the March 21 incident, Welsh admitted at the *Spears* hearing that an officer kicked the food slot in his door closed, causing bruising to his left hand, after he refused to remove his hands from the slot for the 15 minutes immediately preceding its forceful closure. The magistrate judge concluded that the force used was not objectively unreasonable because Welsh's refusal to move his hands after repeatedly being told to do so justified a use of force and because Welsh was actively resisting and posing a threat to institutional order. Additionally, Welsh admitted that he had removed his hands from the slot but, as the officer was attempting to close it, Welsh "intentionally stuck his foot and hand into the slot to thwart [the officer's] efforts to close it, putting himself in harm's way." Given these facts, the magistrate judge could not conclude that the officer did not try to limit the force used, especially given that Welsh actively resisted orders to remove his hands so the food slot could be closed. Finally, the magistrate judge concluded that the bruising and swelling that Welsh suffered was no more than a de minimis injury. The dismissal of this claim was not an abuse of discretion. *Brewster*, 587 F.3d at 767.

ii.

With respect to the claim arising from the March 22 incident, the magistrate judge explained that when an officer ordered Welsh to go to the food slot to get his food, Welsh threw water on the officer, poked his metal shower rod through the food slot, and put his hands in the slot. Officers then kicked the slot without warning, which caught Welsh's hand and caused pain, swelling, and bleeding. The magistrate judge noted that, although the officer may not have given warning before closing the slot, authenticated video of the incident showed that the officer tried to kick it closed after Welsh removed his hands, but Welsh put his hands back in the slot, thus "plac[ing] his hands in harm's way." The video ends with the food slot still open; officers tried to kick it closed only once.

The magistrate judge again concluded that the officers were justified in using some force after Welsh threw water through the slot and brandished a metal shower rod due to the threat posed to institutional security by these acts, especially in light of Welsh's behavior the day before this incident. Although Welsh complained of pain in his hand, X-Rays showed no injury, and Welsh did not allege long-term damage. In light of all these factors, the magistrate judge concluded that Welsh had not raised a viable excessive-force claim.

As with the claim related to the March 21 incident, the magistrate judge's reasoning is not an abuse of discretion. *Brewster*, 587 F.3d at 767.

II.

Next, Welsh argues that the magistrate judge erred by dismissing his Count 1 claim that the defendants retaliated against him for exercising his right to free speech by placing him in isolation. This claim arises from the January 2016 incident.

To establish a retaliation claim, a civilly committed person must show that the defendant intentionally committed a retaliatory adverse act due to his exercise of a constitutional right. *Brown v. Taylor*, 911 F.3d 235, 245 (5th Cir. 2018). The plaintiff must either adduce direct evidence of retaliation or "allege a chronology of events from which retaliation may plausibly be inferred." *Id.* at 245 (internal quotation marks and citation omitted).

The magistrate judge held both that Welsh's refusal to comply with officers' orders was not constitutionally protected speech and that he had not shown that the defendants used force on him due to his alleged exercise of his right to free speech. As the magistrate judge noted, both Welsh's own complaint and an authenticated video of this incident show that he refused to comply with officers' orders. The magistrate judge further concluded that Welsh had not shown that the defendants were retaliating against him because he engaged in protected speech, but instead that the adverse action of which he complained was taken because he "repeatedly disobeyed orders and threatened institutional security."

We agree. Civilly committed persons retain First Amendment rights, but, as we have previously suggested, restrictions on these rights "are permissible so long as they advance the state's interest in security, order, and rehabilitation." *Bohannan v. Doe*, 527 F. App'x 283, 294 (5th Cir. 2013) (citing *Ahlers v. Rabinowitz*, 684 F.3d 53, 58, 64 (2d Cir. 2012)). Welsh's alleged "natural civil disobedience . . . by stiff[en]ing his body and holding on to various objects to resist" being seized by officers after informing them that he would not go to isolation as he had been ordered does not amount to protected First Amendment speech. Further, Welsh's actions infringed upon the state's interests in security and order. *See id.*

In addition, Welsh has not shown that his alleged protected speech resulted in retaliation. Welsh's own complaint shows that he got into an

argument with Officer Hawthorne, was ordered into isolation, engaged in his alleged protected speech by resisting being taken to isolation, and was taken to isolation. Retaliation may not be plausibly inferred from this sequence of events. *See Brown*, 911 F.3d at 245. Instead, Welsh's account of this incident shows that his alleged protected speech occurred after he had been ordered to isolation and that the order was simply carried out.

Regardless of whether Welsh's retaliation claim is reviewed de novo or for an abuse of discretion, Welsh has not shown that the magistrate judge erred by dismissing it. *See Morris*, 702 F.3d at 189.

III.

Welsh next challenges the magistrate judge's rejection of his access to courts claim in Count 11, in which he asserted that he was denied access to his legal materials for two weeks while he was in isolation. He argues that he explained during the *Spears* hearing that he was hampered in his efforts to file a brief to this court in *Welsh v. Texas Civil Commitment Office*, docket sheet TXND 5:17-CV-083.

In the prison context, to prevail on a claim of denial of right of access to the courts, an incarcerated person must show that his ability to pursue a nonfrivolous legal claim was hampered by the defendants' actions and that his position as a litigant was prejudiced by the alleged violation. *Lewis v. Casey*, 518 U.S. 343, 351–53 & n.3 (1996). We have previously applied *Lewis* to an access-to-courts claim raised by a civilly committed SVP. *See Day v. Seiler*, 560 F. App'x 316, 318–19 (5th Cir. 2014).

Regardless of whether this claim is reviewed de novo or for an abuse of discretion, Welsh has not shown that the magistrate judge erred by dismissing it. *See Morris*, 702 F.3d at 189. In his amended complaint, Welsh explained that this claim arose from his being placed in isolation and deprived of his legal materials for two weeks in November 2017. Welsh filed his notice

of appeal in *Welsh* in September 2017. Although the appeal was initially dismissed because Welsh failed to file a brief, it was reopened, and Welsh filed his brief in March 2018. Welsh does not explain how his separation from his legal materials during the time in question prejudiced his position in *Welsh*, 17-11092, and it is not apparent. Accordingly, Welsh has not shown that the magistrate judge erred by dismissing it. *See Morris*, 702 F.3d at 189.

IV.

Next, Welsh challenges the magistrate judge's dismissal of several claims, starting with failure-to-protect claims. The specific parts of the amended complaint he cites in support of this argument do not explicitly argue that the defendants failed to protect him from being assaulted by other prisoners; rather, the closest his allegations come to a failure-to-protect claim is an assertion that the defendants infringed his rights by not bringing criminal charges against officials who allegedly assaulted him. Insofar as Welsh argues that the magistrate judge erred by not considering claims of failure to protect, this argument is unavailing because he raised no such claims in his amended complaint. *Cf. Farmer v. Brennan*, 511 U.S. 825, 832–33 (1994).

Insofar as Welsh contends that he sought relief under the Constitution's Privileges and Immunities Clause and Equal Protection Clause, rather than the Due Process Clause, he has not shown that the magistrate judge erred by reading his complaint as raising due process claims. The disputed claims aver that the defendants infringed his rights by not bringing criminal charges against officials who assaulted him. Moreover, two of the listed counts explicitly invoke the Fourteenth Amendment. *See Jordan v. Fisher*, 823 F.3d 805, 810 (5th Cir. 2016) (discussing Fourteenth Amendment's due process clause). Further, the Privileges and Immunities Clause is inapt because it "prevents a state from discriminating against

citizens of another state in favor of its own citizens," and Welsh does not allege that he was treated differently than a citizen of another state. *White v. Thomas*, 660 F.2d 680, 685 (5th Cir. 1981).

Welsh does invoke the Equal Protection Clause in one of the listed claims, arguing that Detective Rodriguez and the City of Littlefield Police Department violated his equal-protection rights by not bringing charges against personnel who assaulted him. The Equal Protection Clause "keeps governmental decision makers from treating differently persons who are in all relevant respects alike." *Harris v. Hahn*, 827 F.3d 359, 365 (5th Cir. 2016) (internal quotation marks and citation omitted). That does not describe Welsh's allegations; Welsh simply asserts that he was denied his rights when criminal charges were not brought against those who assaulted him. Regardless of whether these claims are reviewed de novo or for an abuse of discretion, Welsh has not shown that the magistrate judge erred by dismissing them. *See Morris*, 702 F.3d at 189.

V.

Welsh challenges the magistrate judge's dismissal of the false arrest claims he raised in Counts 1 and 11 of the amended complaint. The former pertains to the January 2016 incident. Because the false arrest claim would undermine his conviction for assault causing bodily injury, and because he has not shown that this conviction has been overturned, this claim is *Heck*-barred. *See Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir. 1995).

Although he asserts that he raised a false arrest claim in Counts 11-2 and 11-3 of the amended complaint, review of the complaint shows that he did not explicitly raise false arrest claims but instead grounded these claims in due process, and this is how the magistrate judge reasonably read these portions of the amended complaint. *See Hernandez v. Thaler*, 630 F.3d 420, 426–27 (5th Cir. 2011) (explaining that pro se pleadings are construed

according to their substance, not their labels). Welsh has not shown error in connection with this determination.

The magistrate judge also read Count 11 as raising a claim that defendants conspired to bring false charges against him in connection with the November 2017 incident and did not promptly bring him before a magistrate judge in connection with these charges. The magistrate judge determined that the false-charges claim was *Heck*-barred due to Welsh's evidence-falsification conviction, and that the claim concerning prompt appearance before a magistrate judge was unavailing because Welsh appeared before a magistrate judge within the required time. We agree with the latter holding. But because (as discussed) Welsh's underlying evidence-falsification conviction has been overturned, we conclude that his false-charges claim grounded in the November 2017 incident is not *Heck*-barred. We are therefore compelled to VACATE and REMAND the false-charges claim because the magistrate judge stopped after making his *Heck* determination. We offer no opinion as to the appropriate resolution of this claim.

VI.

Welsh also challenges the magistrate judge's dismissal of his claims in Count 9 concerning an illegal search and privacy. In these claims, he challenged the need for security personnel to be present during an offsite urology medical examination and asserted that they should have looked away when a camera was inserted into his penis. In his Rule 59(e) motion, Welsh complained that the magistrate judge did not consider this claim. In his order, the magistrate judge explained that he had considered each claim raised in the amended complaint, even those not explicitly analyzed. The magistrate judge also noted Welsh's failure to allege that the dismissal contained manifest errors of law or fact.

An appellant waives an issue if he "fails to adequately brief it." *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001). Among other requirements, an appellant's brief must contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." FED. R. APP. P. 28(a)(8)(A). This court has deemed arguments waived on appeal when an appellant "d[oes] not discuss [an] issue or cite any authority." *United States v. Trujillo*, 502 F.3d 353, 360 (5th Cir. 2007) (citation omitted). "Although *pro se* briefs are to be liberally construed, *pro se* litigants have no general immunity from the rule that issues and arguments not briefed on appeal are abandoned." *Geiger v. Jowers*, 404 F.3d 371, 373 n.6 (5th Cir. 2005). Here, Welsh does not dispute the validity of his urology examination nor that it required exposure of his genital area. Instead, without legal or factual argument elaborating a cognizable privacy violation caused by the alleged failure of security personnel to "avert their gaze," he has waived this contention on appeal.

VII.

Welsh argues that the magistrate judge erred by dismissing his claims in Count 5 concerning a denial of therapy and a diagnosis of ephebophilia, both of which he asserts prolonged his period of civil commitment. Welsh asserts that various defendants denied him therapy in violation of his "liberty interests under the Constitution." Welsh explains that depriving him of therapy implicates his liberty interest because "release by promotion through the Tier system . . . can only be achieved through therapy." The magistrate judge reasonably interpreted Welsh's amended complaint as raising due process claims, rather than deliberate indifference and failure to train claims. Welsh has not shown error in connection with the magistrate judge's interpretation of these claims.

In the civil commitment context, "due process requires that the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed." *Seling v. Young*, 531 U.S. 250, 265 (2001). The Texas civil commitment statute authorizes the civil commitment of SVPs for the purpose of "long-term supervision and treatment." TEX. HEALTH & SAFETY CODE ANN. § 841.001. Thus, as this court has held, a facility's failure to provide any treatment can infringe on an SVP's substantive due process rights. *Brown*, 911 F.3d at 244.

Here, Welsh has not sufficiently alleged how the conditions of his civil commitment lacked a reasonable relation to Texas's goals of "long-term supervision and treatment" of SVPs. As the magistrate judge noted, Welsh concedes that he was offered and received therapy during his commitment. Further, Welsh makes no showing that receiving additional treatment would have expedited his release, so his assertion that any deprivation of therapy impeded his release is "too attenuated to invoke further due process protections." *Senty-Haugen v. Goodno*, 462 F.3d 876, 887 (8th Cir. 2006) (internal quotation marks and citation omitted).

Similarly, Welsh asserts that defendants violated his constitutional rights by diagnosing him with ephebophilia, which he asserts is not a condition listed in the current DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS. As the magistrate judge explained, Welsh asserted in his amended complaint that the inaccurate diagnosis contributed to his continued civil commitment. Here, because Welsh does not present any facts or arguments indicating error related to his claim of inaccurate diagnosis, he has waived it on appeal. FED. R. APP. P. 28(a)(8)(A); *Trujillo*, 502 F.3d at 360; *Geiger*, 404 F.3d at 373 n.6; *Martinez*, 263 F.3d at 438.

VIII.

Next, Welsh challenges the magistrate judge's dismissal of his claims in Counts 2 and 4 concerning property rights. The magistrate judge explained these claims involved the denial of hygiene items and clean clothes while he was in isolation for one five-day period in January 2016, the denial of soap and toothpaste during another five-day period in March 2017, and the denial of hygiene items, stationary, his legal work, a bible, clothes, utensils, and his desired amount of toilet paper for a two-week period in November 2017. The magistrate judge interpreted these claims as raising arguments concerning conditions of commitment, denial of access to courts, and denial of his right to exercise religious freedom. This was a reasonable reading of the amended complaint. *See Hernandez*, 630 F.3d at 426–27.

When analyzing these claims, the magistrate judge noted Welsh's concession that, during the January 2016 five-day period when he was without hygiene items or clean clothes, he still had access to a toilet, sink, and shower. He alleged no ill effects other than body odor and emotional distress.

This court has concluded that civilly committed persons receive the process they are due if "the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed." *Brown*, 911 F.3d at 243 (quoting *Seling*, 531 U.S. at 265). The goals of Texas's SVP program are "long-term supervision and treatment of sexually violent predators." *Brown*, 911 F.3d at 243 (quoting TEX. HEALTH & SAFETY CODE ANN. § 841.001). Additionally, states have discretion in setting up civil commitment schemes. *Brown*, 911 F.3d at 243. Security measures and disciplinary rules adopted by civil commitment facilities in furtherance of the goals of supervision and treatment do not amount to a due process violation. *See id.* at 243–44. Because the deprivations Welsh alleges were temporary and he describes no ongoing adversity, and because those deprivations flow

from the rules and security measures implemented by the Texas Civil Commitment Center in service of the goals of supervision and treatment, he has not raised a viable conditions of commitment claim, and he has not shown that the magistrate judge erred by dismissing this claim.[4] *See id.*

The magistrate judge concluded that Welsh's claim of denial of access to courts failed because he had not shown that the failure to provide him with stationary and legal materials prejudiced him in a suit. *See Lewis*, 518 U.S. at 351–53 & n.3; *Day*, 560 F. App'x at 318–19. Welsh does not dispute this but simply insists that he had a right to property. This does not suffice to show error with respect to the magistrate judge's dismissal of this claim. *See Lewis*, 518 U.S. at 351–53.

The magistrate judge further concluded that Welsh's claim concerning a denial of religious freedom vis-à-vis denial of a bible for two weeks failed because his allegations did not show that he was forbidden from practicing his religion but only that he was denied certain property. We hold only that, because Welsh has not raised this claim in his appellate brief, he

[4] Welsh devotes a discrete section of his brief to separately dispute the magistrate judge's rejection of his Count 11 claims concerning the denial of eating utensils and access to certain hygiene items every other day for a two-week period in November 2017. The magistrate judge explained that, during the *Spears* hearing, Welsh admitted that he had access to a sink with running water and a toilet during the pertinent time and that he was provided a toothbrush, toothpaste, and soap within one to two days of his transfer to a secured management unit. Again, because the deprivations Welsh alleges were temporary and he describes no ongoing adversity, and because those deprivations flow from the rules and security measures implemented by the Texas Civil Commitment Center in service of the goals of supervision and treatment, he has not raised a viable constitutional claim, and he has not shown that the magistrate judge erred by dismissing this claim. *See Brown*, 911 F.3d at 243.

has waived it on appeal. FED. R. APP. P. 28(a)(8)(A); *Trujillo*, 502 F.3d at 360; *Geiger*, 404 F.3d at 373 n.6; *Martinez*, 263 F.3d at 438.

IX.

Welsh also challenges the magistrate judge's rejection of his due process claims, raised in Counts 2, 4, 10, and 11 of his amended complaint, in which he alleges that "punitive confinement conditions" violated his due process rights.

Several of Welsh's due process claims pertain to his placement in isolation due to pending criminal charges arising from the January 2016 incident (Count 2) and his placement in isolation after he allegedly assaulted another resident in January 2017, was arrested and charged with assault, and committed several other rule violations (Counts 4 and 11).

When considering the claims in Counts 2, 4, and 11, the magistrate judge first noted that this court had not set forth the standard to be applied to SVPs raising procedural due process claims. The magistrate judge noted, however, that other courts apply a standard given in *Sandin v. Conner*—a prisoner's due process rights may be infringed by a deprivation that is "atypical and significant . . . in relation to the ordinary incidents" of prison life—to due process claims raised by civilly committed SVPs. 515 U.S. 472, 484 (1995); *see also Thielman v. Leean*, 282 F.3d 478, 480, 482–84 (7th Cir. 2002); *Deavers v. Santiago*, 243 F. App'x 719, 721 (3d Cir. 2007). Because Welsh neither contests the legal standard nor identifies caselaw that would supply an appropriate alternative framework, we consider these claims with reference to the law used by the magistrate judge for the purposes of this appeal only.

Regarding Welsh's claim in Count 2, the magistrate judge concluded that Welsh had not shown a procedural due process violation because he alleged only that he was denied certain property such as electronics, snacks,

and clothes; the magistrate judge determined that being deprived of these items did not amount to "atypical and significant" hardships and thus did not trigger due process protections. Regarding Welsh's claims in Counts 4 and 11, the magistrate judge similarly concluded that they failed because the restrictions Welsh complained of were de minimis—Welsh asserted that he was placed on "'lockdown'" for 13 to 15 hours per day during which he was denied electronics, was denied the right to purchase items from the commissary, and was given limited recreation time—and were imposed to support the goals of supervision and treatment. *See Brown*, 911 F.3d at 243. The dismissal of these claims was not an abuse of discretion.

Welsh also asserted that his due process rights were infringed when he was placed in restraints and moved following the November 2017 incident (Count 10). Because Welsh has not discussed any facts or cited any authority regarding this claim in his appellate brief, he has waived it on appeal. FED. R. APP. P. 28(a)(8)(A); *Trujillo*, 502 F.3d at 360; *Geiger*, 404 F.3d at 373 n.6; *Martinez*, 263 F.3d at 438.

X.

Welsh also challenges the magistrate judge's dismissal of his Count 3 claim concerning delayed mail, in which he argued that he was unable to tell counsel what issues he wanted raised in his appeal from his SVP trial because his legal mail was delayed.

Again, although this court has not yet articulated the standard that applies to claims of interference with legal mail in the civil-commitment context, *see Allen v. Seiler*, 2013 WL 357614, at *6 (N.D. Tex. Jan. 30, 2013), other circuits apply the standard used in prisoner civil rights cases. *E.g.*, *Ahlers v. Rabinowitz*, 684 F.3d 53, 64 (2d Cir. 2012); *see also Allen v. Seiler*, 535 F. App'x 423 (5th Cir. 2013) (affirming a district court's analysis that assumed the standard for reviewing a civilly committed person's legal mail

claim was the same as that for reviewing a prisoner's legal mail claim). Moreover, under the standard this court applies in the prisoner mail context, one may not recover absent a showing that the defendant intentionally delayed his mail. *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988). Assuming the same or similar standard would apply to claims of interference with legal mail in the civil-commitment context, we hold that the magistrate judge properly dismissed this claim, as Welsh has asserted only negligence.

XI.

Welsh challenges the magistrate judge's dismissal of the Count 1 claims he raised under 42 U.S.C. § 1985 and § 1986. The magistrate judge interpreted Welsh's § 1985 claim as arising under § 1985(3), which prohibits conspiracies to deprive a person of equal protection of the laws, provided the conspirators were motivated by an immutable characteristic of the victim. Welsh averred that his SVP status was an immutable characteristic that made § 1985(3) applicable. The magistrate judge concluded that SVPs are not a protected group for § 1985(3) purposes because this statute "generally addresses racial discrimination and has not been broadly construed to encompass other identifiable groups" and dismissed the claim.

The magistrate judge also found that Welsh's § 1986 failed. § 1986 provides for recovery against anyone "who, having knowledge that [a § 1985 conspiracy is] about to be committed," does nothing about it. Because Welsh had not pleaded facts establishing a § 1985 conspiracy, the magistrate judge concluded that Welsh could not establish a claim under § 1986.

Welsh addresses neither the magistrate judge's reasoning nor the cases cited in support thereof but simply asserts that he was entitled to protection under these statutes. This does not show error in the dismissal of this claim. *See Brinkmann*, 813 F.2d at 748.

XII.

Finally, Welsh argues that the magistrate judge should have informed him of the shortcomings in his complaint and permitted him to amend it before it was dismissed. Before dismissing a pro se complaint, a judge ordinarily will give the litigant the opportunity to amend his complaint to remedy the deficiencies or otherwise allow him to develop his factual claims. *Eason v. Thaler*, 14 F.3d 8, 9–10 (5th Cir. 1994); *see also Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998). The primary means that have evolved for remedying inadequacies in a prisoner's pleadings are a *Spears* hearing or a questionnaire that permits the prisoner to focus his claims. *Eason*, 14 F.3d at 9. The record shows that the magistrate judge both permitted Welsh to amend his complaint and held a *Spears* hearing, at the end of which he invited Welsh to speak about anything that had not been covered and that he wanted to discuss. The record thus shows that the magistrate judge gave Welsh ample opportunity to plead his best case, hence this claim is unavailing.

* * *

We AFFIRM in large part, VACATE in part, and REMAND for further proceedings consistent with this opinion.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

February 09, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 19-10825 Welsh v. Correct Care Recovery
USDC No. 5:18-CV-20

Enclosed is a copy of the court's decision. The court has entered judgment under Fed. R. App. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

Fed. R. App. P. 39 through 41, and 5TH Cir. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following Fed. R. App. P. 40 and 5TH Cir. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH Cir. R. 41 provides that a motion for a stay of mandate under Fed. R. App. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under Fed. R. App. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Lonnie Kade Welsh

APPENDIX

B

PETITION FOR REHEARING ON

EN BANC DENIED

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

March 12, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 19-10825 Welsh v. Correct Care Recovery
USDC No. 5:18-CV-20

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Casey A. Sullivan, Deputy Clerk
504-310-7642

Ms. Karen S. Mitchell
Mr. Lonnie Kade Welsh

United States Court of Appeals for the Fifth Circuit

No. 19-10825

LONNIE KADE WELSH,

Plaintiff—Appellant,

versus

CORRECT CARE RECOVERY SOLUTIONS; CHRIS WOODS, *Individually as Director of Security, Texas Civil Commitment Center for Correct Care Recovery Solutions*; AMY GOLDSTEIN, *Individually as Clinical Director at Texas Civil Commitment Center for Correct Care Recovery Solutions*; EDWARD TOWNS, *Individually as Clinical Director at Texas Civil Commitment Center for Correct Care Recovery Solutions*; BILL VANIER, *Individually as Captain of Security at Texas Civil Commitment Center for Correct Care Recovery Solutions*; ET AL.,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:18-CV-20

ON PETITION FOR REHEARING EN BANC

(Opinion 02/09/2021, 5 CIR., _____, _____ F.3D _____)

Before STEWART, HIGGINSON, and WILSON, *Circuit Judges*.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

US DISTRICT COURT
NORTHERN DIST. OF TX
FILED
2019 APR 24 AM 10:08
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

LONNIE KADE WELSH,
Institutional ID No. 27818,

Plaintiff,

v.

CORRECT CARE RECOVERY SOLUTIONS, *et al.*,

Defendants.

CIVIL ACTION NO. 5:18-CV-020-BQ

ORDER OF DISMISSAL

Proceeding pro se and *in forma pauperis* (IFP), Plaintiff Lonnie Kade Welsh filed this civil rights action under 42 U.S.C. § 1983 on January 22, 2018. ECF No. 1. On March 26, 2018, the United States District Court transferred this case to the undersigned United States Magistrate Judge for further proceedings. ECF No. 13. The undersigned thereafter granted Welsh permission to proceed *in forma pauperis* (IFP).[1] Welsh subsequently sought, and the undersigned granted, leave to file an Amended Complaint. *See* ECF Nos. 18, 19. The undersigned reviewed Welsh's Amended Complaint as well as authenticated records from various entities, and conducted an evidentiary hearing in accordance with *Spears v. McCotter*, 766 F.2d 179, 181–82 (5th Cir. 1985) and 28 U.S.C. §§ 1915 and 1915A. ECF Nos. 40, 41.

Welsh has consented to proceed before the undersigned magistrate judge. ECF No. 11. After considering the allegations in Welsh's Amended Complaint, his responses at the evidentiary

[1] Although the State of Texas has civilly adjudged Welsh to be a sexually violent predator (SVP), he is not currently civilly committed. Instead, Lamb County Jail had custody of Welsh at the time he filed this action, and he has since been convicted of a criminal offense, resulting in his current incarceration by the Texas Department of Criminal Justice (TDCJ). Thus, Welsh is procedurally considered a "prisoner" for the purposes of this lawsuit. *See* 28 U.S.C. § 1915; 42 U.S.C. § 1997e. Because the majority of Welsh's claims arose during and relate to his civil commitment, however, the court analyzes the substance of such claims under the legal standards applicable to civilly committed persons.

hearing, authenticated records provided by various entities, and applicable law, the court concludes Welsh's claims in this action must be dismissed in accordance with 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b).

I. Standard of Review

A court must dismiss a complaint filed *in forma pauperis* by a prisoner against a government entity or employee if the court determines that the complaint is frivolous or malicious, fails to state a claim upon which relief may be granted, or seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2) (2017); *see also* § 1915A(b) (applying section to any suit by a prisoner against certain governmental entities, regardless of whether the prisoner is proceeding *in forma pauperis*). A frivolous complaint lacks any arguable basis, either in fact or in law, for the wrong alleged. *Neitzke v. Williams*, 490 U.S. 319, 325 (1989). A complaint has no arguable basis in fact if it rests upon clearly fanciful or baseless factual contentions, and similarly lacks an arguable basis in law if it embraces indisputably meritless legal theories. *See id.* at 327; *Geiger v. Jowers*, 404 F.3d 371, 373 (5th Cir. 2005). When analyzing a prisoner's complaint, the court may consider reliable evidence such as the plaintiff's allegations, responses to a questionnaire, and authenticated prison records. *See Wilson v. Barrientos*, 926 F.2d 480, 483–84 (5th Cir. 1991); *see also Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999) (explaining that responses to a questionnaire are incorporated into the plaintiff's pleadings); *Banuelos v. McFarland*, 41 F.3d 232, 234 (5th Cir. 1995) (holding that courts may dismiss prisoners' *in forma pauperis* claims as frivolous based on "medical or other prison records if they are adequately identified and authenticated").

In evaluating the sufficiency of a complaint, courts accept well-pleaded factual allegations as true, but do not credit conclusory allegations or assertions that merely restate the legal elements

of a claim. *Chhim v. Univ. of Tex. at Austin*, 836 F.3d 467, 469 (5th Cir. 2016). And while courts hold pro se plaintiffs to a more lenient standard than lawyers when analyzing complaints, such plaintiffs must nevertheless plead factual allegations that raise the right to relief above a speculative level. *Id.* (citing *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002)).

II. Discussion

A. Welsh's Claims

In his Amended Complaint, Welsh asserts claims against the following Defendants: (1) Correct Care Recovery Solutions (CCRS);[2] (2) Bryan Thomas, as "principle agent" for CCRS; (3) Chris Woods, Director of Security at the Texas Civil Commitment Center (TCCC); (4) Amy Goldstein, clinical director at TCCC; (5) Edward Towns, clinical director at TCCC; (6) Jane Salazar, Captain of Security at TCCC; (7) Bill Vanier, Captain of Security at TCCC; (8) Margarito Gonzales, Captain of Security at TCCC; (9) Mary Leeks;[3] (10) Jacob Richardson; (11) Adrian[4] Flores; (12) Robbie Spencer; (13) Dustin Tijerina; (14) Maria Sanchez; (15) Kevin Tedder; (16) Arnulfo Hernandez Jr.; (17) Leslie Dimwiddie;[5] (18) Jorge Juarez; (19) John/Jane Does; (20) Dr. Russel, Urologist in Lubbock, Texas; (21) Littlefield Police Department (LPD); (22) Mayor Eric Turpen; (23) Albert Garcia, LPD; (24) Leon Ponce; (25) LPD Detective

[2] CCRS, a private company under contract with the Texas Civil Commitment Office (TCCO), operates the TCCC. *See Texas Civil Commitment Center*, Correct Care Recovery Sols., http://www.correctcarers.com/tccc (last visited Feb. 28, 2019).

[3] Welsh spells this Defendant's last name as both "Leeks" and "Leaks" throughout his Amended Complaint. *See, e.g.*, Am. Compl., at 2, 20. The court presumes Leeks and Leaks to be the same person but will refer to the Defendant as "Mary Leeks."

[4] Welsh names "Andrea Flores" as a Defendant on page 3 of the Amended Complaint; however, he later names an "Adrian Flores." The court presumes Andrea and Adrian to be the same person because Welsh never mentions an Andrea Flores after the initial page, and will refer to the Defendant as "Adrian Flores."

[5] Welsh names "Leslie Dimwiddie" as a Defendant on the cover page of his Amended Complaint. *See* Am. Compl., at 2. Throughout the text of the Amended Complaint, however, he refers to a "Leslie Dinwiddie." *See, e.g., id.* at 3, 57. The court presumes Dimwiddie and Dinwiddie to be the same person but will refer to the Defendant as "Leslie Dimwiddie."

Rodriguez; (26) LPD Officer Kasting; (27) LPD Chief Ross Hester; (28) 154th District Attorney's Office; (29) Scott Say, 154th District Attorney's Office; (30) Lamb County Attorney's Office; (31) District Attorney Ricky Redman; (32) Lisa Peralta, TCCO case manager; (33) Daniel Rake, TCCO case manager; (34) Peter Caswell, TCCO case manager; and (35) Dr. Peter Henschel, Clinical Director of Central Psychological Services, Dallas, Texas. Am. Compl., at 1–4[6] (ECF No. 20).

Welsh enumerates thirteen specific counts as well as several general miscellaneous claims:

Count 1: Welsh contends that on January 22, 2016, Captains Salazar and Vanier, as well as "other security personnel," used excessive force against him. *Id.* at 4–7. Welsh concedes, however, that he failed to comply with the Captains' orders and those of Clinical Director Amy Goldstein, both before and during the alleged incident. *Id.* at 4–5. Welsh states that Captains Salazar and Vanier, acting at the direction of Goldstein, "seize[d] and assault[ed] the plaintiff who was sitting in a chair." *Id.* at 5. He also alleges that after Defendants moved him to the secured management unit (SMU), "Captain Vanier while taking of[f] the shackles, used the metal jagged edge . . . [to] grind the teeth of the cuff into the plaintiff's right ring finger." *Id.* Welsh alleges that this "caused [his] right ring finger to bleed, with the long-term effect of a scar." *Id.* Welsh further asserts that Defendants used force against him in "retaliation of using his right to speech." *Id.* at 6.

Count 2: Welsh alleges that after the January 22 incident, CCRS "in collaboration with the City of Littlefield Police Department . . . through it's [sic] agent Leon Ponce and the Lamb County Attorney's office through it's [sic] agent Rickie Redman," held him in punitive isolation via a "warrantless arrest" until February 10, 2016, when he appeared before a magistrate judge.

[6] Page citations to Welsh's pleadings refer to the electronic page number assigned by the court's electronic filing system.

Id. at 12. He further contends that "[f]rom February 10, 2016 on or before March 22, 2016 the City of Littlefield Police Department . . . and the Lamb County Attorney's office continued the unreasonable seizure in punitive isolation at the Lamb County Jail." *Id.* Finally, Welsh asserts that between January 22 and January 27, Property Officer Mary Leeks denied him hygiene items and clothing. *Id.*

Count 3: Welsh alleges that CCRS and Officer Leeks delayed providing him with legal mail, which caused him to miss the deadline for filing an appeal in his state habeas case. *Id.* at 19. Specifically, he states that in February 2016, his state court-appointed lawyer sent a letter addressed to Welsh at the TCCC, which he did not receive because he was in the Lamb County Jail. *Id.* The letter sought "plaintiff's input on any unnamed issues on appeal." *Id.* Welsh claims that he returned to TCCC on March 22, but did not receive his legal mail until April 7. *Id.* According to Welsh, the deadline to submit briefing related to his state-court appeal was April 11, 2016, resulting in several issues not being briefed because he could not timely communicate with his attorney. *Id.*

Count 4: Welsh asserts that CCRS "behavior management" placed him in "punitive isolation" between February 7 and November 27, 2017, without due process. *Id.* at 23. During his time in isolation, Welsh alleges that Daniel Rake denied him a visit from his family during the July 4 holiday. *Id.* He further contends that Defendants restricted his property, recreation and commissary privileges, and ability to order through vendors. *Id.* Welsh also asserts that Officer Leeks refused to give him his soap and toothpaste for five days, beginning March 5, 2017. *Id.* at 24. Welsh claims that he "lost twenty-five pounds of flesh" during his time in isolation because he could not make commissary purchases. *Id.* at 23.

Count 5: Welsh alleges that between February 3 and November 27, 2017, Clinical Directors Amy Goldstein and Edward Towns denied him therapy and sex offender counseling. *Id.* at 30. Welsh contends that Towns authored a "bogus" biennial report to the 435th Judicial District Montgomery County court, which falsely stated that Welsh had refused treatment. *Id.* Welsh claims that as a result of being denied treatment, he "has lost two hundred ninety-three days of confinement plus two hundred ninety-three days he must make-up for the missed counseling." *Id.* at 31. He also asserts that Dr. Peter Henschel violated his constitutional rights by diagnosing him "with a bogus mental disease not professionally recognized . . . ." *Id.*

Count 6: Welsh contends that on March 21, 2017, Security Officer Adrian Flores smashed Welsh's left hand in a "metal trap door located by opening on a locked confinement cell," which caused severe pain, swelling, and bruising. *Id.* at 38. Welsh also claims that Flores, Margarito Gonzales, Maria Sanchez, Jorge Juarez, and John/Jane Does violated his "Fourteenth Amendment right to safe conditions, protection, and ordinary care." *Id.* at 38–39. Finally, Welsh alleges Flores, Gonzales, and CCRS placed him in isolation between March 21 and April 1, 2017, in violation of his Fourth and Fourteenth Amendment rights. *Id.* at 39.

Count 7: Welsh asserts that on March 22, 2017, Security Officer Jacob Richardson smashed his hand in the food slot after Welsh threw water on Officer Arnulfo Hernandez Jr. *Id.* at 44. Welsh states that Captain Jane Salazar ordered Richardson to use force. *Id.* Welsh claims that as a result of the incident, he suffered severe pain, swelling, bleeding, and a scar on his left hand. *Id.* at 45. He further contends that later the same day, LPD Detective Rodriguez came to the TCCC to register sex offenders. Welsh claims he reported the incident to Rodriguez, but Rodriguez did nothing to help him, in violation of Welsh's constitutional rights. *Id.* at 45–46.

Count 8: Welsh alleges that the City of Littlefield has a "practice and custom" of violating his Fourteenth Amendment rights "by refusing to press or investigate criminal charges against all named actors on plaintiff's affidavit . . . ." *Id.* at 50–51.

Count 9: Welsh asserts that on April 14, 2017, Security Officers Robbie Spencer and Mosely transported him to University Medical Center in Lubbock, Texas, for "an intrusive medical examination of inserting a camera into the urinary track [sic] through the penis." *Id.* at 52. Welsh contends that he asked Spencer and Mosely to avert their eyes during the exam, but they refused. *Id.* Welsh states that Spencer wrote a false report concerning Welsh's behavior during the exam, alleging Welsh was unruly, which the state court considered during his biennial review and resulted in "two more years of civil commitment." *Id.* at 52–53.

Count 10: Welsh avers that on November 13, 2017, Officers Dustin Tijerina, Leslie Dimwiddie, Arnulfo Hernandez, Kevin Tedder, and Margarito Gonzales, as well as Security Director Chris Woods, used force excessive to the need. *Id.* at 56. Specifically, Welsh claims that after he refused to accept housing, Director Woods ordered Defendants to use force on Welsh. *Id.* Welsh asserts that after the officers shackled his arms and legs, they moved him to a different cell. *Id.* When the officers attempted to remove the handcuffs, Welsh states that he "moved his hands," which Welsh contends allegedly caused Officer Hernandez to twist Welsh's arm in an attempt to break it. *Id.* at 57. Welsh further claims that Officer Dimwiddie repeatedly slammed his head into the floor, causing swelling and bruising. *Id.*

Count 11: Welsh alleges that LPD Chief of Police Ross Hester investigated the alleged November 13, 2017, incident and charged Welsh "with fabricating physical evidence by assaulting his own face and making a false report to a Peace Officer." *Id.* at 65–69. Welsh claims that Security Director Woods and Chief Hester conspired to bring false charges against him. *Id.* Welsh

also asserts that Woods put him in isolation without due process between November 13 and 27. *Id.* During that time, Welsh claims Woods did not provide him with any hygiene items, stationary, legal work, clothes, or his Bible. *Id.* Welsh contends that Woods denied him utensils and a cup, forcing him to eat with dirty hands because he "could not remove all fecal matter from his hands" due to a lack of hygiene or sanitation. *Id.*

Count 12: Welsh contends that CCRS has a policy, implemented by Director Woods, of "assaultive and oppressive confinement culture." *Id.* at 74–75.

Count 13: Welsh asserts that the City of Littlefield, through its "agent" Chief of Police Albert Garcia, "has created a culture and/or failed to train the Littlefield police officers . . ." resulting in constitutional harm. *Id.* at 79.

Miscellaneous Claims: Welsh also asserts general unspecified claims under 42 U.S.C. §§ 1985 and 1986 (*id.* at 81–84), as well as various state law claims. *See id.* at 4–80.

Welsh seeks monetary damages with respect to each count. For the reasons below, Welsh has failed to state cognizable constitutional claims.[7]

B. Claims against LPD, the Lamb County Attorney's Office, the 154th District Attorney's Office, and the Individual Prosecutors

To the extent Welsh attempts to assert claims against the LPD, Lamb County Attorney's Office, and 154th District Attorney's Office, they must be dismissed.

---

[7] Throughout his Amended Complaint, Welsh makes sweeping allegations, accusing multiple TCCC officials and other authorities of violating state laws and his constitutional rights, as well as committing various other misdeeds. *See, e.g.*, Am. Compl., at 5 (alleging Defendants used force as punishment), 13–14 (asserting CCRS's policy violated his rights, but failing to name any specific individuals), 1–89 (alleging various state law tort claims, including intentional infliction of emotion distress, without supporting information). Although Welsh's Amended Complaint spans almost ninety-pages, it is notably devoid of facts supporting his conclusory allegations. The court allowed Welsh to amend his complaint (ECF No. 19), and also held a *Spears* hearing in an attempt to flesh out his claims, but many still fall short of meeting Rule 8's pleading standards. *See* Fed. R. Civ. P. 8(a)(2) (requiring a "short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 557 (2007)) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"). Nevertheless, the court evaluates the substance of Welsh's claims as well.

With respect to his claims against LPD, the Lamb County Attorney's Office, and the 154th District Attorney's Office, "[f]ederal courts in Texas have uniformly held that entities without a separate jural existence are not subject to suit." *Torti v. Hughes*, No. 3:07-CV-1476-M, 2007 WL 4403983, at *2 (N.D. Tex. Dec. 17, 2007) (citing cases for support). Welsh has pleaded no facts demonstrating that the LPD, Lamb County Attorney's Office, and 154th District Attorney's Office are separate jural entities subject to suit. Because LPD, the Lamb County Attorney's Office, and the 154th District Attorney's Office are not entities with the capacity to be sued, Welsh's claims against such Defendants must be dismissed. *See, e.g.*, *Darby v. Pasadena Police Dep't*, 939 F.2d 311, 313 (5th Cir. 1991) (quoting *Mayes v. Elrod*, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979)) (explaining that a political subdivision such as a police department only has the capacity to be sued if it "enjoy[s] a separate legal existence"); *Puckett v. Walmart Store #5823*, No. 3:15-cv-2029-D-BN, 2017 WL 6612944, at *3 (N.D. Tex. Nov. 6, 2017) (recommending dismissal of pro se detainee's claims because, among other reasons, he failed to allege a claim against a jural entity); *Graves v. Stricklin*, No. 3–03–CV–2219–L, 2003 WL 22718443, at *2 (N.D. Tex. Nov. 17, 2003) (citing *Short v. Brauchle*, No. 3–03–CV–0205–D, 2003 WL 21448773, at *2 (N.D. Tex. Mar. 25, 2003)) (holding that "the Dallas County District Attorney's Office is not a legal entity subject to suit").

In addition, any claim Welsh attempts to bring against county or city prosecutors Rickie Redman and Scott Say is also without merit because they are immune from suit. *See Imbler v. Pachtman*, 424 U.S. 409, 430–31 (1976) (recognizing that prosecutors enjoy absolute immunity in pursuing criminal prosecutions); *Esteves v. Brock*, 106 F.3d 674, 677 (5th Cir. 1997) (quoting *Imbler*, 424 U.S. at 430–31) (explaining that "[a] prosecutor enjoys absolute immunity from personal liability for damages under section 1983 for actions 'initiating a prosecution and . . .

presenting the State's case' and those 'intimately associated with the judicial phase of the criminal process'"). Here, Welsh has not pleaded facts even attempting to circumvent such immunity. *See, e.g.*, Am. Compl., at 13 (imputing placement in the TCCC's SMU to Redman and Say because they criminally charged Welsh). Accordingly, his claims against Redman and Say must be dismissed.

C. Counts 1 and 2

Welsh alleges that on January 22, 2016, acting in part at Clinical Director Amy Goldstein's direction, Captains Salazar and Vanier and "other security personnel" used excessive force against him. *Id.* at 4–7. Specifically, Welsh avers that Goldstein, Salazar, and Vanier used force against him in retaliation for exercising his First Amendment right to speech—namely, to refuse housing and officers' orders. *Id.* at 4–6. As a result of the incident, Welsh contends that his right finger bled and is scarred. *Id.* at 5. Welsh further claims that Goldstein, Salazar, Vanier, LPD Officer Leon Ponce and Lamb County Assistant District Attorney Rickie Redman denied him due process when they placed him in "punitive isolation" (i.e., the SMU) from January 22 to February 10, 2016. *Id.* at 5–6, 13; *see also id.* at 12 (attributing placement in SMU to CCRS policy). Welsh believes Defendants cannot "punish" him (through placement in the SMU) because he is a civilly committed person, not a prisoner. *Id.* at 5–6. 12.

In addition, Welsh asserts that Ponce failed to investigate the alleged use of force. *Id.* at 13. Finally, Welsh alleges that from February 10 to March 22, 2016, LPD, Officer Ponce, the Lamb County Attorney's Office, and Assistant District Attorney Redman falsely arrested and detained him at the Lamb County Jail "by ignoring the fact that the plaintiff was assaulted . . . ." *Id.*

***1. Heck v. Humphrey* bars Welsh's excessive force, false arrest, and detention claims.**

In *Heck v. Humphrey*, the United States Supreme Court held that a plaintiff seeking to recover damages for harm "caused by actions whose unlawfulness would render a conviction or sentence invalid" must first prove that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. 477, 486–87 (1994). Where a favorable judgment in the civil rights action would "necessarily imply the invalidity of [a prisoner's] conviction or sentence" in his criminal case, the civil claim is barred unless the criminal conviction has been reversed or otherwise declared invalid. *Id.* "This requirement or limitation has become known as the 'favorable termination rule.'" *Ballard v. Burton*, 444 F.3d 391, 396 (5th Cir. 2006) (quoting *Sappington v. Bartee*, 195 F.3d 234, 235 (5th Cir. 1999)). The *Heck* inquiry is "analytical and fact-intensive," and requires courts to "focus on whether success on the [constitutional] claim requires negation of an element of the criminal offense or proof of a fact that is inherently inconsistent with one underlying the criminal conviction." *Id.*

Here, Welsh concedes that he was convicted of a criminal offense in connection with the alleged use of force incident on January 22, 2016. The authenticated records specifically show that he pleaded guilty to assault causing bodily injury for biting Captain Salazar during the January 22 occurrence. A favorable finding in this § 1983 action—that Captains Salazar and Vanier, as well as Amy Goldstein and "other [TCCC] security personnel" used excessive force against him on January 22—would necessarily imply the invalidity of Welsh's underlying criminal conviction. Welsh's excessive force claim is therefore barred by *Heck* because his state court convictions have not been reversed, invalidated, or expunged. *See, e.g.*, *Smith v. Davenport*, Civil Action

No. 3:16CV85-GHD-DAS, 2017 WL 1750827, at *3–4 (N.D. Miss. May 3, 2017) (finding plaintiff's excessive force claim *Heck*-barred where plaintiff had pleaded guilty to assault of an officer and the events giving rise to plaintiff's conviction were the same as those giving rise to his excessive force claim); *Fabre v. Yoli*, Civil Action No. 14-2220, 2015 WL 5773979, at *2–3 (E.D. La. Sept. 30, 2015) (dismissing plaintiff's excessive force and failure to protect claims as *Heck* barred when they arose out of incident for which plaintiff was convicted of battering and resisting an officer). Similarly, a finding that Ponce and Redman falsely arrested and detained him would undermine the validity of Welsh's criminal conviction. *See, e.g.*, *Perry v. Holmes*, 152 F. App'x 404, 405–06 (5th Cir. 2005) (holding that plaintiff's false imprisonment claim "directly implicate[d] the validity of his conviction and confinement" and was therefore *Heck*-barred); *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir. 1999) (holding that *Heck* barred recovery for plaintiff's false arrest claim where plaintiff's "proof to establish his false arrest claim, i.e., that there was no probable cause to arrest . . . would demonstrate the invalidity of [plaintiff's] conviction . . ."); *Parker v. Moreno*, No. 3:01CV1283–D, 2002 WL 1758181, at *4 (N.D. Tex. July 26, 2002) (recommending dismissal of plaintiff's claims for police brutality and excessive force, where a favorable ruling on such claims would "necessarily implicate the validity of a conviction for assault on a public servant"). Accordingly, the court must dismiss Welsh's excessive force, false arrest, and detention claims in Count 1 until Welsh has satisfied the conditions of *Heck*.

2. Welsh has not demonstrated Defendants unconstitutionally retaliated against him.

Welsh contends that Salazar, Vanier, and Goldstein "assaulted [him] in retaliation of using his right to speech." Am. Compl., at 6. To the extent Welsh's retaliation claim must be analyzed separately from his excessive force claim, and is not *Heck*-barred, he has failed to plead any facts demonstrating that Defendants retaliated against him.

Civilly committed persons claiming retaliation must show: "(1) a specific constitutional right; (2) the defendant's intent to retaliate based on the exercise of that right; (3) a retaliatory adverse act; and (4) causation." *Bohannan v. Doe*, 527 F. App'x 283, 299 (5th Cir. 2013) (citing *Jones v. Greninger*, 188 F.3d 322, 324–25 (5th Cir. 1999) (per curiam)). To state a retaliation claim, a plaintiff "must allege more than his personal belief that he is the victim of retaliation," and conclusory "allegations of retaliation will not be enough." *Jones*, 188 F.3d at 325. The plaintiff "must produce direct evidence of motivation or, the more probable scenario, allege a chronology of events from which retaliation may plausibly be inferred." *Id.* (internal quotation marks omitted) (quoting *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995)). Failure to "point to a specific constitutional right that has been violated" defeats the retaliation claim. *Id.*

Here, Welsh fails to allege facts supporting the elements of a retaliation claim. First, although Welsh claims that he engaged in constitutionally protected speech, his pleadings and authenticated records show otherwise. Welsh admits that he refused to comply with officers' orders to move to the SMU and resisted subsequent efforts to physically move him by "stiff[en]ing his body and holding on to various objects" in "civil disobedience . . . and to protect the fundamental idea of liberty and speech." Am. Compl., at 4–5. The authenticated video footage of the January 22 incident likewise confirms that Welsh refused to comply with officers' orders. This is not the type of constitutionally protected speech contemplated by the First Amendment. *See, e.g.*, *Freeman v. Tex. Dep't of Criminal Justice*, 369 F.3d 854, 864 (5th Cir. 2004) (citing *Geoff v. Dailey*, 991 F.2d 1437, 1439 (8th Cir. 1993)) (explaining that prisoners retain First Amendment rights as long as they are not inconsistent with institutional objectives, but noting that officials "may legitimately punish inmates who verbally confront institutional authority without running afoul of the First Amendment"); *Larson v. Jesson*, Civ. No. 11-2247 (PAM/LIB), 2018 WL

3352926, at *5 (D. Minn. July 8, 2018) (providing that even though civilly committed plaintiff was not a prisoner, "he is detained in a facility that has legitimate objectives, including the safety of staff and other detainees, and treatment of the individuals detained," and passively resisting or verbally abusing officers threatens legitimate institutional objectives "and is therefore not protected by the First Amendment"). Welsh has therefore failed to establish the first element of a retaliation claim—that he exercised a constitutional right. *Freeman*, 369 F.3d at 864 ("If the inmate is unable to point to a specific constitutional right that has been violated, the [retaliation] claim will fail.").

Moreover, Welsh has not demonstrated that Salazar, Vanier, and Goldstein intended to retaliate against him for engaging in protected speech. And his allegations lack sufficient facts for the court to conclude that Defendants would not have used force against him "but for" his alleged protected speech. Instead, the facts pleaded by Welsh show that Defendants physically moved him to the SMU after Welsh repeatedly disobeyed orders and threatened institutional security. *See Favors v. Hoover*, No. 13–cv–428 (JRT/LIB), 2014 WL 4954682, at *17 (D. Minn. May 13, 2014) (recommending dismissal of civilly committed SVP's retaliation claims where he failed to sufficiently plead facts demonstrating a causal link between plaintiff's exercise of a constitutionally protected right and the alleged adverse act). Accordingly, Welsh's retaliation claim against Salazar, Vanier, and Goldstein is without merit and must be dismissed.

3. Welsh has failed to plead facts demonstrating Defendants violated his due process rights.

Welsh asserts that between January 22 and February 10, 2016, Goldstein, Vanier and Salazar placed him "in punitive isolation for non-threatening, non-fighting words." Am. Compl.,

at 6, 12. Welsh alleges that Defendants placed him in the SMU[8] pursuant to a CCRS policy,[9] "in collaboration with the City of Littlefield Police Department . . . through it's [sic] agent Leon Ponce and the Lamb County Attorney's office through it's [sic] agent Rickie Redman." *Id.* at 12. Welsh classifies his placement in SMU as a "warrantless arrest . . . based on accusation of assault"—i.e., the January 22 use of force incident where Welsh was ultimately convicted of biting Captain Salazar. *Id.* In other words, Welsh contends that officials placed him in the SMU because he was facing criminal charges. Welsh argues that his placement in the SMU violated his right "to due process of liberty [because he is an] adjudicated civil detainee . . . ." *Id.* at 13.

In his pleadings, Welsh does not clearly state whether he is asserting a procedural or substantive due process claim. Liberally construing Welsh's Amended Complaint, the court examines both.

a. Welsh has not adequately demonstrated that Defendants violated his procedural due process rights.

The Fifth Circuit has not expressly considered the procedural due process standard applicable to SVPs such as Welsh. Other courts, however, have found that, based on the Supreme Court's holding in *Sandin v. Conner*, 515 U.S. 472 (1995), which addresses the due process rights of prisoners, the deprivation must be "atypical and significant," in relation to the "ordinary incidents" of an SVP's commitment, to trigger federal procedural due process protection. *Thielman v. Leean*, 282 F.3d 478, 482–84 (7th Cir. 2002) (explaining that civilly committed SVP "must identify a right to be free from restraint that imposes atypical and significant hardship in

[8] Included in the authenticated records is a copy of CCRS's "Policy and Procedure Manual" for the TCCC. The manual notes that SMU "is a temporary housing assignment for residents who pose an imminent risk to others, have compromised the safety and security of the facility, or continue to violate facility rules while on wing restriction status."

[9] To the extent Welsh challenges an alleged CCRS policy, the court addresses his claim in Section II.F. below.

relation to the ordinary incidents of his confinement" to state a procedural due process claim); *see also Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999) (quoting *Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998)) (noting that administrative segregation is "an incident to the ordinary life of a prisoner," and therefore "simply does not constitute a deprivation of a constitutionally cognizable liberty interest"). Stated differently, absent an extreme deprivation of liberty, "the Constitution does not require that a [civilly committed person] be afforded *any process at all* prior to deprivations beyond that incident to normal [commitment] life." *Deavers v. Santiago*, 243 F. App'x 719, 721 (3d Cir. 2007) (emphasis in original); *see Creveling v. Johnson*, Civil Action No. 11–667 (SDW), 2011 WL 3444092, at *7 (D. N.J. Aug. 4, 2011) (citing *Deavers*, 243 F. App'x 721).

Initially, the court notes that Welsh has not pleaded any facts demonstrating that Officer Ponce, apparently employed by LPD, and Rickie Redman, an Assistant District Attorney in Lamb County, had any personal involvement in Welsh's placement in the SMU. *See* Am. Compl., at 12–14. In fact, Welsh specifically claims that CCRS's policy—not the individual actions of Ponce or Redman—resulted in his placement in the SMU. *Id.* "Personal involvement is an essential element of a civil rights cause of action." *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir. 1983) (citing *Rizzo v. Goode*, 423 U.S. 362, 371–72, 377 (1976)). Welsh has pleaded no facts showing Ponce or Redman personally placed him in the TCCC's SMU in violation of his due process rights. For this reason alone, the court must dismiss Welsh's claim against those Defendants.[11] *See, e.g.*, *Semler v. Ludeman*, Civil No. 09–0732 ADM/SRN, 2010 WL 145275, at *1 (D. Minn. Jan. 8, 2010) (overruling SVP's objection to magistrate judge's recommendation that SVP's claims be

[11] As discussed in Section II.B., Redman is immune from suit for actions taken in her capacity as a prosecutor. Welsh's claim against Redman also fails for this reason.

dismissed in part because he did not allege personal involvement, where SVP "fail[ed] to explain how the fact that officials from two agencies discussed certain policies show[ed] that Defendants were personally, or directly, involved in any constitutional wrong that [SVP] seeks to vindicate").

But even considering the substance of Welsh's claim, he has failed to plead facts demonstrating a procedural due process violation. The conditions he alleges Defendants subjected him to in the SMU—that Property Officer Mary Leeks denied him basic hygiene items[12] for several days, and officials confiscated certain property, including various snack items, electronics (including television, Play Station), books, and some clothing (winter cap, pajama pants, pants, shirts, etc.)—do not amount to extreme deprivations. *See* Am. Compl., at 12. Such claims, e.g., denial of the ability to store commissary items and possess a television and Play Station in his room, do not impose atypical and significant hardships in relation to the ordinary incidents of his commitment. *See Thielman*, 282 F.3d at 484; *see also Brown v. Taylor*, 911 F.3d 235, 243 (5th Cir. 2018) (explaining that in the context of a substantive due process claim, "restrictive conditions alone do not state a due process claim"). In sum, the court cannot conclude, based on the facts alleged, that Welsh's placement in SMU without certain items of property amounted to an extreme deprivation triggering procedural due process protection. *See, e.g.*, *Deavers*, 243 F. App'x at 720–21 (affirming dismissal of SVP's claim that placement in the "Restricted Activities Program"—which resulted in restricted movement in facility, meeting with a specialist, and additional therapy assignments—without opportunity to challenge such placement violated his due process rights where SVP did not plead facts showing he suffered extreme deprivation of liberty); *Creveling*, 2011 WL 3444092, at *7–8 (dismissing SVP's claim that placement in behavioral modification

[12] To the extent Welsh's allegation that Officer Leeks denied him hygiene materials amounts to a claim for unconstitutional conditions of confinement, the court separately addresses it below.

program (more restrictive than general housing) without soap for a period of time, with limited property access, recreation only once per day, and no opportunity to collect pay violated his due process rights, because such deprivations were not extreme). The court must therefore dismiss Welsh's claim.[13]

b. Welsh has not adequately demonstrated that Defendants violated his substantive due process rights.

To the extent Welsh challenges his placement in the SMU based on a violation of his substantive due process rights, he similarly fails to plead facts setting forth a viable claim. As a civilly committed person, Welsh is entitled to "more considerate treatment and conditions of confinement" than a prison inmate. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982). Because Welsh "has been civilly committed to state custody as a [sexually violent predator]," however, "his liberty interests are considerably less than those held by members of free society." *Senty-Haugen v. Goodno*, 462 F.3d 876, 886 (8th Cir. 2006) (citing *Wilkinson v. Austin*, 545 U.S. 209, 224–26 (2005) and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)); *see Kansas v. Hendricks*, 521 U.S. 346, 368 n.4 (1997) (stating that officials "enjoy wide latitude in developing treatment regimens [for SVPs]"); *Brown*, 911 F.3d at 243 (citations omitted) (noting that "the Constitution . . . affords a state wide latitude in crafting a civil commitment scheme" because "the state legislatures not only are equipped, but also possess the democratic mandate, to make difficult policy choices regarding the supervision and treatment of sexually violent predators"). Ultimately,

[13] Even if Welsh possesses a cognizable liberty interest in not being wrongfully placed in the SMU as a result of the January 22, 2016, incident, TCCC officials afforded Welsh adequate due process. The authenticated records show that TCCC officials held a behavior management hearing on February 8, 2016, where Welsh was charged with, and found guilty of, disobeying a direct order and making spoken, written, or gestured threats. In an effort to correct Welsh's behavior, officials placed Welsh on wing restriction (SMU) for thirty days. Officials presented Welsh with written notice of the violation and hearing (which he refused to sign), and Welsh was present at the hearing, given the opportunity to present his version, and signed a form indicating he was aware of the imposed restriction. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). According to the authenticated records, TCCC officials provided Welsh with such an opportunity.

"[d]ue process requires only that 'the conditions and duration of confinement . . . bear some reasonable relation to the purpose for which persons are committed.'" *Brown*, 911 F.3d at 243 (quoting *Seling v. Young*, 531 U.S. 250, 265 (2001)).

As the Fifth Circuit observed in *Brown v. Taylor*, Texas maintains "twin goals of 'long-term supervision and treatment of sexually violent predators.'" *Id.* (quoting Tex. Health & Safety Code Ann. § 841.001 (West 2017)). Welsh has not sufficiently pleaded facts demonstrating that his placement in the SMU—after he disobeyed orders and bit Captain Salazar—lacked a reasonable relation to these goals. Welsh argues that Defendants subjected him to conditions that were harsher than he experienced in prison. *See* Am. Compl., at 13. Specifically, he complains that he was: (1) not permitted to possess certain property; (2) denied certain privileges that TCCC residents not housed in the SMU possessed; and (3) generally restricted to the SMU for longer than he would have been in prison. *See id.* at 12–14. This claim fails for two reasons. As set forth in footnote 13 *supra*, these conditions reasonably bear some relation to the purpose for which Welsh is committed. *Brown*, 911 F.3d at 243 (quoting *Seling*, 531 U.S. at 265). Moreover, the denial of certain privileges—ability to possess his commissary items and other property—amount to *de minimis* restrictions, of which "the Constitution is not concerned." *See Senty-Haugen*, 462 F.3d at 886 n.7 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979)) (explaining that SVP's contention officials deprived him of access to the canteen, outside vendors, and computer privileges amounted to *de minimis* restrictions of his liberty). Welsh violated TCCC rules—TCCC must maintain accountability of the residents and order at the facility by imposing restrictions for rule violations and other behavioral issues. *See id.* The court cannot conclude Welsh stated a substantive due process claim based on his placement in the SMU and the imposition of certain minimal restrictions.

4. Welsh has not pleaded facts demonstrating that Officer Leeks violated his constitutional rights in regard to conditions of confinement by failing to provide hygiene items.

Welsh asserts that between January 22 and 27, 2016, while housed in the SMU, Officer Leeks denied him hygiene items and clean clothes. Am. Compl., at 12. At the evidentiary hearing, Welsh contended that Leeks did not provide him with soap, shampoo, and toothpaste; however, Welsh acknowledged that he had access to a toilet, sink, and shower. He further conceded that he was able to rinse his mouth out and take showers during that time.

As discussed above, although Welsh is entitled to more considerate treatment than a prisoner, officials nevertheless possess broad discretion in running a commitment facility. *See Youngberg*, 457 U.S. at 322; *Brown*, 911 F.3d at 243. Only where an official's decision "is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment," may the official may be liable for a constitutional deprivation based on conditions of his commitment. *Youngberg*, 457 U.S. at 323.[14]

[14] The Fifth Circuit has not determined which legal standard applies concerning an SVP's challenge to the conditions of his commitment, i.e., the Eighth Amendment or the *Youngberg* standard. Other courts, however, have used the *Youngberg* standard. *See, e.g., West v. Schwebke*, 333 F.3d 745, 748–49 (7th Cir. 2003) (applying the *Youngberg* standard to civil detainees' claims that defendants held them in "therapeutic seclusion" in violation of their constitutional rights); *Hargett v. Adams*, No. 02 C 1456, 2005 WL 399300, at *13 (N.D. Ill. Jan. 14, 2005) (reviewing involuntarily committed person's § 1983 conditions of confinement claim under *Youngberg*); *see also Turay v. Seiling*, 108 F. Supp. 2d 1148, 1151 (W.D. Wa. 2000) (administering *Youngberg* to SVP's claim that defendants did not provide adequate mental health treatment). Moreover, in *Perniciaro v. Lea*, an involuntarily detained (but not yet committed) plaintiff alleged that, among other claims, defendants "failed to maintain reasonably safe conditions of confinement." 901 F.3d 241, 250 (5th Cir. 2018). Plaintiff argued the court should implement *Youngberg*'s professional judgment standard, while defendants sought utilization of the Eighth Amendment's deliberate indifference standard, which generally applies to pre-trial detainees. The Fifth Circuit held, without resolving the ultimate question, that even assuming *Youngberg* provided the correct benchmark, plaintiff had failed to establish defendants' conduct was unreasonable. *Id.* at 255. In so holding, the Fifth Circuit noted that the *Youngberg* standard is "a less deferential, higher standard for state officials than is deliberate indifference." *Id.* at 256 n.14. As in *Perniciaro*, this court finds that even if the *Youngberg* standard applies, Welsh has not satisfied its lower bar for recovery.

Welsh has not asserted any facts showing that between January 22 and 27, his living conditions constituted a "substantial departure from accepted professional judgment." *See id.* Even accepting Welsh's allegation that Officer Leeks failed to provide him with soap, shampoo, toothpaste, and a change of clothing, Welsh has not pleaded any facts demonstrating how such alleged denials harmed him. Welsh generally claims that without soap, a "noxious body odor [emanated] from plaintiff." Am. Compl., at 15. But at the evidentiary hearing Welsh conceded that he had access to running water, which he used to shower and rinse his mouth.

In sum, Welsh has not pleaded facts sufficient to state a constitutional violation related to his conditions of confinement. *See, e.g.*, *Creveling*, 2011 WL 3444092, at *7–8 (dismissing SVP's claim that defendants denied him "soap for a period of time" where SVP had access to a toilet and sink and failed to allege "an extreme deprivation" of his constitutional rights). Accordingly, the court must dismiss his claims against Officer Leeks based on the alleged January 2016 incident.

5. Welsh's allegation that Officer Ponce failed to investigate a crime committed against him does not state a viable constitutional claim.

Welsh contends that LPD Officer Ponce "ignor[ed] the fact that the plaintiff was assaulted." Am. Compl., at 13. Ponce's alleged failure to investigate the January 22 incident, however, "did not infringe any legally recognized right belonging to [Welsh] . . ." *Autrey v. Mississippi*, 66 F. App'x 523, 523 (5th Cir. 2003); *see Robinson v. Fed. Bureau of Investigation*, 185 F. App'x 347, 348 (5th Cir. 2006) ("The alleged failure to investigate complaints and to take action in response to them does not provide a basis for a civil rights suit."). Accordingly, the court must dismiss Welsh's claim. *See, e.g.*, *Ralston v. Kasper*, Civil Action No. 9:18cv83, 2018 WL 7152549, at *2 (E.D. Tex. Aug. 15, 2018) (recommending dismissal of plaintiff's claim that defendants "failed to respond to his complaints, failed to investigate his allegations, and failed to

pursue criminal charges against those who took improper actions" because plaintiff failed to allege a violation of a constitutional right).

D. Count 3

Welsh alleges that in February 2016, while detained at the Lamb County Jail, the attorney representing him in a state appeal of his civil commitment mailed a letter to him at the TCCC. Am. Compl., at 19. The letter, Welsh asserts, "specifically outlined the appeal and asked for plaintiff's input on any unnamed issues on appeal," and also informed Welsh of an April 11, 2016, deadline for filing the appellate brief. *Id.* Welsh acknowledged at the evidentiary hearing that he did not update his address with his attorney, despite knowing his case was on appeal.

Welsh contends that he returned to the TCCC on March 22, but Officer Leeks did not provide him with his attorney's letter until April 7, 2016. *Id.* Because he was unaware of the April 11 deadline until then, Welsh claims this delay denied him the ability to include "several unaccounted-for issues plaintiff feels [were] imperative" to his appeal. *Id.* At the evidentiary hearing, Welsh specified that had he timely known of the deadline, he would have asked his attorney to raise the following issues: ineffective assistance of civil commitment trial counsel; legal and factual sufficiency of the evidence; res judicata; collateral estoppel; constitutionality of civil commitment;[15] and improper jury instructions. Welsh avers that these omissions prevent him from filing a 28 U.S.C. § 2254 habeas corpus action in federal district court because the state appellate court never considered the issues he would have raised. *Id.*

The Fifth Circuit has not considered the applicable standard concerning legal mail in the civil commitment setting. *See Allen v. Seiler*, Civil Action No. 4:12–CV–414–Y, 2013 WL

[15] Welsh's attorney briefed, and the court of appeals subsequently addressed, a challenge to the constitutionality of the civil commitment statute. *See In re Commitment of Lonnie Kade Welsh*, No. 09-15-00498-CV, 2016 WL 4483165, at *1–2 (Tex. App.—Beaumont Aug. 25, 2016, pet. denied) (mem. op.).

357614, at *6 (N.D. Tex. Jan. 30, 2013) (noting that "the Fifth Circuit has [not] set forth a standard to analyze the restriction or censorship of mail in the civil-commitment context"). Other circuits, however, have applied the same legal standard as that used in prisoner civil rights cases, and this court will do the same. *See, e.g.*, *Ahlers v. Rabinowitz*, 684 F.3d 53, 64 (2nd Cir. 2012) (adopting formula used in analyzing prisoner mail claims in the civil commitment context); *Allen*, 2013 WL 357614, at *6 (assuming analysis for reviewing a civilly committed person's legal mail claim is the same as for prisoners).

To establish a constitutional violation based on obstructing mail, a plaintiff must show that the defendant *intentionally* delayed or interfered with his legal mail and that such interference caused the plaintiff actual injury or harm.[16] *See Lewis v. Casey*, 518 U.S. 343, 349–51 (1996); *see also Eubanks v. Mullen*, No. 94-10103, 1994 WL 724986, at *5 (5th Cir. Dec. 14, 1994) (citing *Richardson v. McDonnell*, 841 F.2d 120, 122 (5th Cir. 1988)).

Welsh does not assert that Officer Leeks intentionally delayed providing his mail—to the contrary, his allegations expressly assert a claim for negligence. *See* Am. Compl., at 19 (alleging that CCRS "had no policy in place to insure the timely delivery of legal mail" and "failed to train Mary Leeks properly"), 20 ("C.C.R.S. and Mary Leaks did violate the Common Law Tort of negligence as these named actors failed to exercise a degree of care, skill, and competence that a reasonably competent professional would exercise under similar circumstance."). Moreover, Welsh conceded at the evidentiary hearing that he did not attempt to update his address with his attorney, and Welsh does not contend that he asked TCCC officials to forward his mail to the Lamb

[16] An institutional official's interference with a plaintiff's legal mail may violate the plaintiff's constitutional right of access to the courts under the Due Process Clause or First Amendment right to free speech. *See Brewer v. Wilkinson*, 3 F.3d 816, 820 (5th Cir. 1993). Here, Welsh solely alleges that Officer Leeks's alleged actions violated his right of access to the courts. Am. Compl., at 19.

County Jail.[17] In sum, Welsh has not pleaded any facts suggesting that any alleged delay in receipt of his legal mail was the result of an intentional act by Officer Leeks. Because a claim of negligence is not actionable under § 1983, the court must dismiss Welsh's claim for interference of mail against Officer Leeks. *See, e.g.*, *Green*, 176 F. App'x at 607 (affirming district court's dismissal at screening stage of prisoner's claim for interference of mail where prisoner pleaded no facts demonstrating the delay was intentional); *Richardson*, 841 F.2d at 1 22 (affirming district court's grant of summary judgment in favor of prison officials in part because evidence showed "[a]t best, . . . prison officials negligently lost appellant's mail"); *Dixon v. Short*, No. 2:03–CV–0214, 2003 WL 22768693, at *1–2 (N.D. Tex. Nov. 20, 2003) (explaining that prisoner failed to state a claim for mail interference in part because he did not allege that the delay in mail was intentional).

E. Counts 4 and 11

Welsh asserts that pursuant to a CCRS "behavior management policy," he was placed in the SMU between February 7 and November 27, 2017, without due process.[18] Am. Compl., at 23. Welsh specifically states that unidentified personnel placed him in "isolation" between February 3 and February 7, 2017. *Id.* Welsh avers that thereafter, he was placed in the SMU on "lockdown

[17] Instead, Welsh seems to believe that because TCCC officials "knew" he was at the Lamb County Jail—after being arrested for assaulting Captain Salazar—they should have automatically forwarded his mail. *See* Am. Compl., at 19. He also takes issue with the alleged delay in receiving mail upon his return to TCCC—i.e., he asserts that he returned to the TCCC on March 22 but Officer Leeks did not provide him with his mail until April 7, 2016. Such a bare allegation falls short of the intentional conduct required to state a claim. *See Green v. Dretke*, 176 F. App'x 606, 607 (5th Cir. 2006) (explaining prisoner's claim that "his right of access to the courts was violated when prison officials intentionally delayed in providing legal mail that was addressed and mailed to his prior prison location [which] caused him to miss a deadline in an appellate proceeding" did not rise to the level of a constitutional violation where prisoner's pleadings suggested that there was a problem with the address change he sent to the Supreme Court and nothing in the record indicated that the delay was intentional).

[18] Welsh did not specify, either in his Amended Complaint or at the evidentiary hearing, who placed him in the SMU. Instead, he faults CCRS policy for the alleged constitutional violation. To the extent Welsh attributes his constitutional harm to a CCRS policy, the court addresses such claim in Section II.F.

for thirteen to fifteen hours a day." *Id.* Welsh further alleges that while in the SMU, his visitation privileges were restricted, resulting in Daniel Rake denying him a visit from his family during the July 4 holiday. *Id.* He also contends that officials restricted access to his property and limited his recreation and commissary privileges, causing him to lose "twenty-five pounds of flesh."[19] *Id.* Finally, Welsh asserts that Officer Leeks refused to give him his soap and toothpaste for five days, beginning March 5, 2017. *Id.* at 24. And in Count 11, Welsh similarly alleges that between November 13 and 27, 2017, Director Woods denied him certain items, including hygiene, legal work, a Bible, and clothes. *Id.* at 65.

1. Welsh has not pleaded facts demonstrating Defendants violated his procedural due process rights.

Welsh claims that between February 3 and November 27, 2017, he was placed him in the SMU without due process.[20] *Id.* at 23. Welsh specifically asserts that between February 3 and February 7, 2017, officials placed him in isolation. *Id.* At the evidentiary hearing, Welsh acknowledged that officials initially placed him in the SMU after he allegedly assaulted another resident on January 29 at the TCCC.[21] Welsh contends that after February 7, he remained in the SMU on "lockdown" for thirteen to fifteen hours per day, and during that time officials denied him his property (consisting of a television, radio, and Play Station) and the right to purchase any items from the commissary until August 15. *Id.* Welsh further alleges that although TCCC

[19] In Count 4, Welsh also mentions that he "was denied all therapy" during the relevant time. The court addresses this claim in Section II.G.

[20] Although Welsh's pleadings and statements at the evidentiary hearing imply that TCCC officials placed him in the SMU continuously from February 3 through November 27 based on one incident (i.e., assaulting another TCCC resident), the authenticated records show otherwise. Welsh apparently committed numerous rule violations during the relevant time-period, indicating that his placement in the SMU and subsequent restrictions may not have been based on one offense, but a series of offenses that occurred over the course of many months.

[21] As a result of this incident, Welsh was arrested by LPD, charged with assault, and held at the Lamb County Jail until February 3 when he was released back to the custody of the TCCC on a personal recognizance bond.

officials permitted him recreation time, the equipment was limited. *See id.* (stating that he used an "outside patio space considered a recreation yard which is too small").

Welsh is entitled to "more considerate treatment and conditions of confinement" than a prison inmate. *Youngberg*, 457 U.S. at 322. But "the Constitution does not require that a [civilly committed person] be afforded *any process at all* prior to deprivations beyond that incident to normal [commitment] life." *Deavers*, 243 F. App'x at 721 (emphasis in original); *see Thielman*, 282 F.3d at 483–84 (explaining that plaintiff, a civilly committed SVP, "must identify a right to be free from restraint that imposes atypical and significant hardship in relation to the ordinary incidents of his confinement" to state a procedural due process claim). Stated differently, the deprivation must be "atypical and significant," in relation to the "ordinary incidents" of an SVP's commitment, to trigger federal procedural due process protection. *See Thielman*, 282 F.3d at 482–83.

At the outset, the court notes that Welsh does not name a specific individual he alleges placed him in the SMU and deprived him of certain privileges in violation of his constitutional rights. *See* Am. Compl., at 23 (alleging that unnamed officials placed him in isolation due to "C.C.R.S. behavior management policy"). Despite being provided the opportunity to elaborate on such claims at the evidentiary hearing, Welsh did not name a specific individual who personally placed him in the SMU, but instead stated that CCRS's behavior management policy, created by Bryan Thomas and approved by the State of Texas, violated his constitutional rights. Because Welsh has failed to plead facts demonstrating personal involvement by any individual, the court must dismiss his claim. *See, e.g.*, *Thompson*, 709 F.2d at 382 (citing *Rizzo*, 423 U.S. at 371–72, 377).

Even considering the substance of his allegation, the court finds that Welsh has not asserted sufficient facts to state a procedural due process violation. To the extent Welsh alleges that between February 3 and November 27 officials placed him in the SMU[22] without certain privileges—commissary purchases,[23] use of his television, radio, and Play Station, visitation, the use of certain recreation equipment—and without due process, he has not stated a constitutional claim. "[T]he Constitution is not concerned" with such *de minimis* restrictions in living conditions. *See Senty-Haugen*, 462 F.3d at 886 n.7 (quoting *Bell*, 441 U.S. at 539 n.20) (explaining that SVP's placement in isolation that allegedly deprived him of access to the canteen, outside vendors, and computer privileges amounted to *de minimis* restrictions of his liberty "with which the Constitution is not concerned"). TCCC officials were not required to provide procedural due process prior to implementing such restrictions. *See Deavers*, 243 F. App'x at 721. Moreover, as the court previously discussed, Welsh has not pleaded facts demonstrating that TCCC officials imposed restrictions for any purpose other than promoting Texas's twin goals of long-term supervision and treatment. *See Brown*, 911 F.3d at 243. Mere placement in the SMU, standing alone, simply does not amount to an unconstitutional deprivation of liberty. *See, e.g.*, *Creveling*, 2011 WL 3444092, at *7–8; *see also Harper*, 174 F.3d at 719 (quoting *Martin*, 156 F.3d 580). The court therefore dismisses this claim as well.

[22] In his Amended Complaint, Welsh distinguishes his general placement in the SMU between February 7 and November 27 from his placement in "isolation" between February 3 and 7. *See* Am. Compl., at 23. He implies that "isolation" was a more restrictive type of housing than general SMU living conditions. *See id.* He has not pleaded any facts, however, indicating the severity of such restrictions in comparison to the SMU. At the evidentiary hearing, the court directly asked Welsh to explain how his constitutional rights were violated between February 3 and November 27, but Welsh made no distinction between the two time periods. Accordingly, the court will not separately analyze the period between February 3 and 7.

[23] At the evidentiary hearing, Welsh clarified that officials provided him with three meals per day. Welsh solely alleges that officials denied him the privilege to purchase snacks at the commissary or through outside vendors.

2. Welsh's claim that Daniel Rake denied visitation rights with his mother and brother on July 4, 2017, does not rise to the level of a constitutional violation.

Welsh alleges that while in the SMU, his mother and brother planned to visit him over the July 4 weekend, but Daniel Rake told his family that they would not be able to visit. *See* Am. Compl., at 23. Welsh asserts that Rake denied the visit because he was in the SMU. *Id.* To the extent Welsh alleges a First Amendment violation, he has failed to state a claim.

"Restrictions on the [First Amendment] right to association are evaluated under the same standard as restrictions on mail." *Bohannan*, 527 F. App'x at 294 (citing *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003)). "While clearly prisoners and those involuntarily committed, by virtue of their incarceration and custody status, do not forfeit their First Amendment right to [associate], that right may be limited by institutional regulations that are reasonably related to legitimate penological interests." *Id.* (quoting *Rivera v. Rogers*, 224 F. App'x 148, 151 (3d Cir. 2007)). Where the restriction bears "a rational relation" to the state's interests in security, order, and rehabilitation, the regulation should be sustained. *Id.* (quoting *Overton*, 539 U.S. at 132). Stated differently, "restrictions [on visitation] are permissible so long as they advance the state's interest in security, order, and rehabilitation." *Id.* (citing *Ahlers v. Rabinowitz*, 684 F.3d 53, 64 (2d Cir. 2012).

In *Bohannan v. Doe*, the Fifth Circuit reversed the district court's dismissal of an SVP's claim that defendants violated his right to associate, finding that the SVP had alleged a plausible claim where he asserted that defendant's policy served as a complete ban on all outside contact. *Id.* at 294–95. Here, in contrast, Welsh does not contend that Rake implemented, or even enforced, a blanket policy against all visitation by family members. Instead, Welsh asserts that on one occasion, his mother and brother called Rake to confirm whether they could visit Welsh, and Rake

told them no because Welsh was currently housed in the SMU.[25] Moreover, the visitation logs included in the authenticated records show that Welsh's family members visited him on several occasions prior to the date in question. Based on Welsh's bare allegation, the court cannot conclude that Rake's isolated denial of a family visit due to his SMU custody status is inconsistent with or not rationally related to the state's interests in rehabilitation and order. *See, e.g.*, *Bohannan v. Griffin*, No. 4:11-CV-299-A, 2016 WL 3647625, at *9 (N.D. Tex. June 30, 2016) (dismissing SVP's claim regarding freedom of association where defendant's alleged interference was reasonably related to the institution's regulations and requirements as well as its supervision of SVPs generally); *Allen*, 2013 WL 357614, at *5 (dismissing SVP's freedom of association claim where he merely alleged defendants restricted but did not completely bar visits from family members). Accordingly, the court dismisses Welsh's First Amendment claim against Daniel Rake.

3. Welsh has not pleaded facts demonstrating that between March 5 and 10, 2017, Officer Leeks unconstitutionally denied him hygiene items.

Welsh contends that between March 5 and 10, 2017, while housed in the SMU, Officer Leeks denied him soap and toothpaste in violation of his constitutional rights. Am. Compl., at 24. Welsh's allegation does not demonstrate that Officer Leeks's alleged actions represent a "substantial departure from accepted professional judgment." *See Youngberg*, 457 U.S. at 323. Initially, the court observes that Welsh does not assert that Officer Leeks's actions give rise to unconstitutional conditions of confinement. *See* Am. Compl., at 23–25. Instead, Welsh frames his claim against Officer Leeks as a violation of the Fourth Amendment, as well as various state laws. *Id.*

[25] At the evidentiary hearing, Welsh explained that his family lives approximately eight hours from the TCCC, which is why they called prior to traveling to the TCCC.

The court has found no authority for the Fourth Amendment's application under the facts alleged by Welsh. Moreover, even if the court analyzes Welsh's claim under the generous *Youngberg* standard, he has not pleaded any facts demonstrating how the alleged denial of hygiene items harmed him. Welsh does not allege he suffered any physical harm as a result of the claimed denial. *See id.* at 23–24. Instead, Welsh asserts that Leeks violated "the Common Law Tort of Intentional Inflection [sic] of emotion distress by causing emotional and mental suffering with extraordinary anxiety, depression, hopelessness, helplessness, despair, sleepless nights, headaches, sickening of physical constriction, melancholy and sickening of the spirit." *Id.* at 26. Such a claim is not cognizable under § 1983. *See Baker v. McCollan*, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."). Accordingly, the court must dismiss Welsh's claim. *See, e.g.*, *Creveling*, 2011 WL 3444092, at *7–8 (dismissing SVP's claim that defendants denied him "soap for a period of time" where SVP had access to a toilet and sink and failed to allege "an extreme deprivation" of his constitutional rights).

4. Director Woods's alleged deprivations of certain items does not violate Welsh's constitutional rights.

In Count 11, Welsh claims that between November 13 and 27, 2017, Security Director Woods did not allow him to have any hygiene items (toothbrush, toothpaste, and soap), stationary, his legal work, a Bible, or clothes. Am. Compl., at 65. Welsh further asserts that Woods did not provide him with utensils and supplied only limited toilet paper. Welsh alleges that as a result, he was forced to eat meals with dirty hands. *Id.* At the evidentiary hearing, however, Welsh conceded that he had access to a sink with running water and a toilet during the relevant time period. He also stated that while the denial of hygiene items hurt his dignity, he did not suffer any other adverse effects from the alleged denial.

With respect to his allegation that Director Woods deprived him of a toothbrush, toothpaste, and soap, Welsh stated at the evidentiary hearing that officials provided him with the items on November 14 or 15—i.e., within two days of placement in the SMU. Welsh does not contend he suffered any harm (other than a loss of dignity) due to this brief delay. Accordingly, the court must dismiss his claim against Director Woods for the alleged denial of hygiene items in November 2017.

Likewise, Welsh has not pleaded facts demonstrating that the alleged denial of stationary and legal materials caused him harm. The court interprets Welsh's claim as one for denial of access to courts. To prevail on his claim, Welsh must show that Director Woods denied him access to the courts and that such a deprivation prejudiced him. *See Bohannan*, 2016 WL 3647625, at *13 (citing *Eason v. Thaler*, 73 F.3d 1322, 1328 (5th Cir. 1996)). That is, Welsh must plead facts demonstrating "an actual injury arising from this purported denial." *Day v. Seiler*, 560 F. App'x 316, 319 (5th Cir. 2014) (citing *Lewis*, 518 U.S. at 356). Welsh does not contend Woods's alleged failure to provide him with stationary and legal materials caused him any harm—e.g., that he was unable to present a nonfrivolous legal claim or defense. *See Lewis*, 518 U.S. at 355. The court must therefore dismiss his access to courts claim. *See, e.g.*, *Day*, 560 F. App'x at 319 (affirming district court's dismissal of SVP's access to courts claim where he did not allege the purported lack of access caused him an actual injury); *Bohannan*, 2016 WL 3647625, at *13 (dismissing SVP's access to courts claim where his allegations did not demonstrate "he was denied the basic tools needed to present a nonfrivolous legal claim or defense"); *see also Birl v. Hicks*, Civil Action No. 9:12cv142, 2013 WL 2647297, at *9 (E.D. Tex. June 11, 2013) (dismissing prisoner's claim regarding defendant's confiscation of legal materials he "might" need in the future because such

an allegation "is wholly insufficient to show legally cognizable harm or to set out a constitutional claim for the deprivation of legal materials").

Finally, Welsh asserts that between November 13 and 27, Director Woods did not permit him to have a Bible in his dormitory. Am. Compl., at 65. As a result, he claims he was unable to "associate with God." Civilly committed persons "need only be afforded a reasonable opportunity to exercise religious freedom guaranteed by the First and Fourteenth Amendments."[26] *Davis v. Wall*, No. 94-41002, 1995 WL 136204, at *1 (5th Cir. Mar. 9, 1995) (citing *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972)). To establish a denial of his right to practice religion, Welsh must demonstrate "that he was completely denied the right to practice his religion or that the restrictions or prohibitions placed on the practice of his religion were not rationally related to the achievement of valid penological goals." *Bohannan*, 2016 WL 3647625, at *8 (citing *Hines v. Graham*, 320 F. Supp. 2d 511, 522 (N.D. Tex. 2004)); *see Creveling*, 2011 WL 3444092, at *7 (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349–50 (1987) and *Turner v. Safley*, 482 U.S. 78, 89 (1987)) ("To establish his denial of religion claim, [SVP] must demonstrate that the restriction on religious practice was not reasonably related to a legitimate, penological interest.").

Here, Welsh solely contends that Woods did not permit him to have certain property, including his Bible, for approximately two weeks. "The pertinent question is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith." *Freeman*, 369 F.3d at 861. Welsh

[26] The cases the court relies on to analyze Welsh's First Amendment religious freedom claim pertain to the rights of prisoners; the court recognizes that civilly committed persons are not prisoners, and their rights may differ from those of prisoners. *See Bohannan*, 527 F. App'x at 289–90. Nevertheless, the court finds, as have other courts, it is "appropriate to rely on legal authorities involving rights of and duties to prisoners as providing a reasonable analogy to the statutory supervision imposed on a sexually violent predator." *Bohannan*, 2016 WL 3647625, at *8 n.9; *see Creveling*, 2011 WL 3444092, at *6–7 (relying on prisoner § 1983 religious freedom cases to analyze SVP's claim).

does not assert that Woods wholly denied him the ability to practice his religion, nor does he even allege that the denial substantially burdened the practice of his religion.[27] Instead, Welsh posits that his lack of a Bible prevented him from associating with God. The alleged denial of a Bible, standing alone and for this relatively brief period, does not constitute a denial of the right to practice religion. *See, e.g.*, *Al-Amin v. Donald*, 165 F. App'x 733, 739–40 (11th Cir. 2006) (affirming dismissal of prisoner's First Amendment free exercise claim where "[h]e did not expressly state a free exercise claim and did not refer to any specific constraints on his religious practice in his complaint"); *Tabor v. Coleman*, Civil Action No. 18-1308, 2018 WL 6817033, at *4 (W.D. La. Dec. 3, 2018) (recommending dismissal of prisoner's claim that defendants deprived him of a Bible for thirty days, finding that prisoner's bare allegation was conclusory and did not disclose enough facts to state a plausible claim). The court therefore dismisses this claim against Director Woods.

F. Counts 2 and 4: CCRS Behavior Management Policy

In Counts 2 and 4, Welsh states he is challenging an alleged CCRS policy that requires officials to place SVPs in the SMU while they have criminal charges pending against them. *See* Am. Compl., at 12–15, 25.

CCRS is a private corporation. Despite its status as a private entity, however, CCRS qualifies as a state actor under § 1983. *See Hitt v. McLane*, A–17–CV–289–SS, 2018 WL 773992, at *8 (W.D. Tex. Feb. 7, 2018); *Stone*, 2017 WL 3037632, at * 2 (noting CCRS qualifies as a state actor although it is a private entity). As with other § 1983 defendants, the law does not impose *respondeat superior* liability on CCRS for the alleged actions of its employees (*Oliver*, 276 F.3d

[27] In fact, Welsh makes no contention that Woods's alleged denial of a Bible implicated his right to the free exercise of religion. *See* Am. Compl., at 67 (alleging Woods "seized" his Bible in violation of the Fourth Amendment but making no mention of the impact on his ability to practice his religion). Because the court must liberally construe pro se pleadings, however, it nevertheless analyzes Welsh's claim under the First Amendment.

at 742 ("Section 1983 does not create supervisory or *respondeat superior* liability.")); nonetheless, CCRS may be responsible for a constitutional violation if it results from an official policy or custom. *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001) (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). To prevail on such a claim against CCRS, Welsh must establish the following: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Id.* (quoting *Monell*, 436 U.S. at 694). "An official policy may be a policy statement, ordinance, regulation, or decision that has been officially adopted and promulgated by a policymaker." *Hitt*, 2018 WL 773992, at *8 (citing *Webster v. City of Hous.*, 735 F.2d 838, 841 (5th Cir. 1984)).

At the evidentiary hearing, Welsh stated that Bryan Thomas created the policy that violated his constitutional rights. The court assumes, without deciding, that Thomas is a "policymaker." Nevertheless, Welsh has not alleged sufficient facts supporting the required second and third elements. First, Welsh identified only isolated instances of placement in the SMU when *he* faced criminal charges. He does not contend that the TCCC automatically placed other residents in the SMU, without a hearing, after facing criminal charges. "'Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability.'" *See Piotrowski*, 237 F.3d at 581–82 (quoting *Bennett v. City of Slidell*, 728 F.2d 762, 768 n.3 (5th Cir. 1984)). An official policy "cannot ordinarily be inferred from single constitutional violations." *Id.* (quoting *Bennett*, 728 F.2d at 768 n.3).

More significantly, however, Welsh has failed to plead facts demonstrating an underlying constitutional violation. As discussed in detail in Section II.C. and E., the court has already concluded that Welsh's placement in the SMU did not violate his substantive or procedural due process rights. Without an underlying constitutional violation, Welsh cannot state a cognizable

claim based on an allegedly unconstitutional policy. *See, e.g.*, *Piotrowski*, 237 F.3d at 578; *Hitt*, 2018 WL 773992, at *9 (dismissing SVP's policy claim against CCRS in part because he failed to state a constitutional violation). For all of these reasons, Welsh's policy claim against CCRS must be dismissed.

G. Counts 5 and 9

In Count 5, Welsh contends that between February 3 and November 27, 2017 (while housed in the SMU), various Defendants denied him sex offender therapy and counseling in violation of his constitutional rights. Am. Compl., at 30. Specifically, Welsh asserts that between February 3 and April 13, and April 13 and November 28, Clinical Directors Goldstein and Towns, respectively, denied him therapy. *Id.* He claims Defendants acted pursuant to a CCRS policy.[28] Welsh further avers that Dr. Peter Henschel of Central Psychological Services violated his First, Fourth, and Fourteenth Amendment rights "by purposely diagnosing plaintiff with a bogus mental disease not professionally recognized under the standard governing psychological field under the DSM-V." *Id.* at 32. Welsh alleges that as a result of Defendants' actions, his civil commitment has been prolonged by 586 days. *Id.* at 30–31 (claiming he "has lost two hundred ninety-three days of confinement plus two hundred ninety-three days he must make-up for the missed counseling").

In Count 9, Welsh asserts that on August 14, 2017, Officers Mosely[29] and Robbie Spencer transported him to a medical appointment in Lubbock, Texas. *Id.* at 52. Welsh claims that he asked Mosely and Spencer to "advert [sic] their gaze" while the doctor examined him, but the

[28] Welsh makes a similar claim in Count 4, stating that between November 3 and November 27, 2017, he "was denied all therapy." Am. Compl., at 24. Welsh's allegations in Count 5 and at the evidentiary hearing are more specific than the general allegation in Count 4. The court considers all three counts in its discussion herein.

[29] Welsh did not name Officer Mosely in the "Defendants" section of his Amended Complaint. *See* Am. Compl., at 2–4. Because Welsh names Mosely in Count 9, however, the court addresses Welsh's claims against him.

officers refused. *Id.* Thereafter, Welsh contends that Spencer authored a "false incident report claiming plaintiff was unruly with disorderly conduct," which "was utilized in a government investigation, In re Commitment of Lonnie Welsh out of Montgomery County 435th Judicial District Court, to help commit plaintiff through his biennial review to two more years of civil commitment."[30] *Id.* at 53.

1. Welsh has not pleaded facts demonstrating CCRS, Goldstein, and Towns denied him therapy in violation of his constitutional rights.

At the evidentiary hearing, Welsh conceded that between February 3 and November 27, Goldstein and Towns provided him with three or four therapy sessions. Welsh attributes the lack of additional therapy to a CCRS policy that allegedly prohibits TCCC residents from receiving treatment while confined to the SMU. Welsh asserts that as a result of the denial of therapy, his commitment has been prolonged.

The Texas civil commitment statute reflects that SVPs should receive "long-term supervision and treatment . . . ." Tex. Health & Safety Code § 841.001; *see Brown*, 911 F.3d at 243 (quoting § 841.001) (noting that Texas civil commitment has "twin goals of 'long-term supervision and treatment of sexually violent predators'"). If Defendants in fact failed to provide Welsh with *any* sex offender treatment while housed in the SMU, "the confinement could not possibly further the goals of supervision and treatment."[31] *Brown*, 911 F.3d at 244 (vacating district court's dismissal of SVP's due process claim against certain defendants, finding SVP's

[30] Welsh also names Dr. Russel as a Defendant in Count 9; however, he solely alleges Dr. Russel committed state law tort violations. *See* Am. Compl., at 54. For the reasons stated in Section II.P.5. below, the court dismisses Welsh's tort claims against Dr. Russel.

[31] The court notes § 841.150(a) provides that "[t]he duties imposed on the [TCCO] and the judge by [the SVP statutes] are suspended for the duration of a detention or confinement of a committed person in a correctional facility, secure correctional facility, or secure detention facility." Tex. Health & Safety Code § 841.150(a). Welsh, although arrested and charged with misdemeanor assault for his alleged actions on January 29, 2017, was subsequently released on bond back to the custody of the TCCC during this period, where TCCC officials then allegedly placed him in the SMU. The court therefore finds § 841.150(a) inapplicable to this particular claim.

due process claim survived screening where he pleaded sufficient facts plausibly demonstrating "the state confined him without treatment"). *But see Karsjens v. Piper*, 336 F. Supp. 3d 974, 984–85 (D. Minn. 2018) (citing *Karsjens v. Piper*, 845 F.3d 394, 410–11 (8th Cir. 2017)) (explaining that in the Eighth Circuit, SVPs do not have a due process right to effective or reasonable treatment, even where SVP alleges that the deficient treatment delays or blocks his release from commitment). In this case, however, Welsh does not contend that Goldstein and Towns denied him all therapy. Instead, he acknowledges that he received three or four sessions.[32] Moreover, Welsh's assertion that the harm he suffered—a prolonged commitment—is speculative at best. Welsh has not pleaded any facts suggesting when he might have been advanced in tiers, or released from supervision, but for the alleged limited treatment. In addition, the court observes that Welsh is now serving an eleven-year sentence in TDCJ, and is presumably not receiving any treatment as a result. *See supra* note 31. Welsh does not allege that he could or would have been released from civil commitment before his incarceration began, nor does he assert that any lapse in treatment contributed to his criminal incarceration. The possibility that his placement in the SMU between February 3 and November 27, 2017, prolonged the duration of his civil commitment is "'too attenuated' to invoke further due process protections." *Senty-Haugen*, 462 F.3d at 887 (citing *Sandin*, 515 U.S. at 487).

Similarly, to the extent Welsh attributes his alleged constitutional harm to a CCRS policy—no therapy while housed in the SMU—he has failed to state a claim. As previously noted, Welsh

[32] The authenticated records also indicate Welsh either refused to attend treatment sessions or, due to his behavior, was not permitted to attend. Towns prepared a "Biennial Summary" report on September 13, 2017, which notes the following: "Welsh attended treatment group from April 2016 to January 2017. On January 29, 2017, Mr. Welsh was arrested for misdemeanor assault and transported to the Lamb County Jail. Once he returned *he stopped attending sex offender treatment groups*." In his Amended Complaint, however, Welsh denies such statements and claims he "has absolute proof to the contrary." Am. Compl., at 30. At this stage of the proceedings, the court must accept as true Welsh's allegations.

must establish the following to prevail on a policy claim: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski*, 237 F.3d at 578 (quoting *Monell*, 436 U.S. at 694).

Welsh has not alleged sufficient facts supporting all of the foregoing elements. Welsh claims that Towns and Goldstein denied him therapy pursuant to a CCRS policy. Am. Compl., at 30–31. But other than his personal belief that such a policy exists, Welsh has not pleaded facts identifying such a policy or "widespread practice." *See Piotrowski*, 237 F.3d at 581–82 (quoting *Bennett*, 728 F.2d at 768 n.3) ("'Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability.' A customary municipal policy cannot ordinarily be inferred from single constitutional violations."). Other than an isolated incident, Welsh does not plead any facts showing that any other TCCC residents were denied therapy. *See Peterson v. City of Fort Worth*, 588 F.3d 838, 850–51 (5th Cir. 2009) (affirming district court's conclusion that twenty-seven complaints against police department for alleged use of excessive force did not support conclusion that city maintained official policy of condoning excessive force); *Jenkins v. LaSalle Sw. Corrs.*, No. 3:17-cv-1376-M-BN, 2018 WL 3748196, at *8 (N.D. Tex. July 11, 2018) (recommending dismissal of plaintiff's *Monell* claim where the "alleged constitutional violations [were] isolated to him").

Moreover, even if Welsh had pleaded facts identifying an official policy,[33] his claim would nevertheless fail because he has not demonstrated an underlying constitutional violation. As discussed above, Welsh has not alleged a § 1983 claim based on a violation of his substantive due process rights. Without an underlying constitutional violation, Welsh cannot establish that any alleged policy was the "'moving force'" behind his constitutional harm. *Piotrowski*, 237 F.3d at

[33] At the evidentiary hearing, Welsh asserted that Bryan Thomas created and implemented the alleged CCRS policy. As in Section II.F. above, the court assumes Thomas has policy-making authority for the purpose of its analysis.

578 (quoting *Monell*, 436 U.S. at 694); *see Hitt*, 2018 WL 773992, at *9 (dismissing SVP's policy claim against CCRS in part because SVP failed to allege an underlying constitutional violation).

Based on the facts alleged, Welsh has not stated a cognizable due process claim against Goldstein and Towns, nor has he established a policy claim against CCRS. Accordingly, the court dismisses Welsh's claims against Goldstein, Towns, and CCRS.

2. Welsh has not pleaded facts demonstrating Dr. Henschel, Officer Mosely, or Officer Spencer violated his constitutional rights.

Welsh avers that Dr. Henschel violated his constitutional rights by diagnosing him with ephebophilia—a "bogus mental disease not professionally recognized"—and then including such diagnosis in his biennial report.[34] Am. Compl., at 31–32. Welsh contends that ephebophilia is not listed in the current Diagnostic and Statistical Manual of Mental Disorders (DSM-5); therefore, Dr. Henschel's diagnosis must be incorrect. *Id.* This inaccurate diagnosis, Welsh contends, contributed to his continued civil commitment. *Id.* Similarly, Welsh asserts that Officer Spencer authored a false disciplinary report in connection with an August 2017 incident, which also contributed to his continued civil commitment. *Id.* at 52–53.

Under Texas law, Welsh is civilly committed for an indeterminate term, "until [his] behavioral abnormality has changed to the extent that [he] is no longer likely to engage in a predatory act of sexual violence." *See* Tex. Health & Safety Code Ann. § 841.081(a). A state court judge conducts the "biennial review of the status of the committed person and issue[s] an order concluding the review or setting a hearing . . . ." *Id.* § 841.102(a). A civilly committed person "is entitled to be represented by counsel at the biennial review . . . ." *Id.* § 841.102(b). That

[34] Ephebophilia is defined as "a sexual attraction to pubescent or post-pubescent males." Peter Cimbolic & Pam Cartor, *Abstract* (2006), http://www.ncjrs.gov/App/publications/abstract.aspx?ID=238978.

is, the reviewing judge—not TCCC or TCCO officials—determines whether an SVP's commitment should continue.

At the outset, the court observes that although Welsh attributes his continued (or prolonged) civil commitment to the alleged false reports written by Dr. Henschel and Officer Spencer, a state court judge—not TCCC staff members or a retained expert—determines whether Welsh's "behavioral abnormality has changed to the extent that [he] is no longer likely to engage in a predatory act of sexual violence." *Id.* § 841.081(a). Dr. Henschel performed and prepared a report concerning the biennial examination (*id.* § 841.101), which the state court judge then reviewed, in combination with other reports and documents, and issued an order continuing Welsh's commitment. *Id.* § 841.102(a). Stated differently, the state court judge made the ultimate determination to continue Welsh's civil commitment, finding that his behavioral abnormality has not changed. Thus, to the extent Welsh faults Officer Spencer or Dr. Henschel for singlehandedly extending his commitment, Welsh blames the wrong defendants.

Similarly, Welsh's contention that he would have been released to less restrictive housing, or advanced in tiers, but for Dr. Henschel's alleged false diagnosis and Officer Spencer's purported false report, is theoretical at best. Welsh pleads no facts demonstrating that he was otherwise eligible for advancement or release, or would have in fact received such a promotion or been released to less restrictive housing, absent the reports. For these additional reasons, Welsh's claim must also be dismissed. *See generally DeMarco v. Davis*, 914 F.3d 383, 386–87 (5th Cir. 2019) (quoting *Gentilello v. Rege*, 627 F.3d 540, 544 (5th Cir. 2010)) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions."); *Senty-Haugen*, 462 F.3d at 887 (analyzing SVP's due process claim and noting that because there was no basis for determining "at what point he might be released from the Offender Program, regardless of whether

he had treatment throughout his isolation period," the possibility of lengthened commitment was too attenuated to require further due process protections); *Thompson v. Fourth Judicial Dist. Court, Ouachita Par.*, Civil Action No. 3:12–cv–1645, 2012 WL 6600338, at *3 (W.D. La. Sept. 25, 2012) (citing *Ashcroft*, 556 U.S. at 679) (explaining that "in order to be afforded the benefits of this assumption [that plaintiff's factual allegations are true] a civil rights plaintiff must support his claims with specific facts demonstrating a constitutional deprivation and may not simply rely on conclusory allegations").

In addition, the authenticated records demonstrate that the experts evaluating Welsh's treatment process through the biennial review did not consider, at least in any meaningful way, Officer Spencer's alleged false report.[35] Likewise, while Dr. Henschel noted that in his expert opinion, Welsh suffered from ephebophilia, he also opined that Welsh suffered from several other disorders. Dr. Henschel's report largely focused on Welsh's behaviors at the TCCC as the reason for his recommendation that Welsh remain committed—not the diagnosis of any one disorder. Thus, despite Welsh's contention that Officer Spencer's and Dr. Henschel's reports caused him to remain civilly committed, the authenticated records show that any report or particular diagnosis was but one factor in the officials' decision.

Finally, the court notes that even if it examines the essence of Welsh's conclusory allegations against all of the above Defendants (Towns, Goldstein, Mosely, Spencer, Dr. Henschel,

[35] The reviewers considered other reports, i.e., a September 2017 report from Towns noting that Welsh had committed fourteen TCCC rule violations, not counting the allegedly false August 14, 2017, incident—including disorderly conduct, threatening residents and staff, possession of medication not prescribed, and assault—since arriving at the TCCC in November 2015. Welsh apparently also refused to submit to scheduled polygraphs and penile plethysmograph (PPG) testing. Towns explained that Welsh's "disruptive, disrespectful, threatening, and assaultive behavior has limited his ability to participate in the treatment program," and even when Welsh attends therapy, "he appears unwilling to accept responsibility for his offenses . . . ." In sum, Towns recommended that Welsh remain civilly committed "[d]ue to his history of lacking the ability to regulate his emotions, impulsive responses, and lack of participation in treatment." Dr. Henschel, who prepared the "Biennial Psychological Evaluation and Risk Assessment" report on July 27, 2017, likewise recommended that Welsh remain civilly committed in part due to his failure to "perceive his [past crimes] as abusive and exploitative" and behavioral issues at TCCC.

and CCRS), he fails to allege sufficient facts demonstrating a due process claim. Assuming Welsh possesses a liberty interest in his commitment or tier status (which ultimately determines whether he will be released to less restrictive confinement), Welsh's procedural due process claim falls short because he has not pleaded facts showing that: (1) he utilized the applicable post-deprivation procedure provided under state law; or (2) the available procedure is constitutionally inadequate. Texas law explicitly provides that Welsh may, "[w]ithout the [TCCO's] approval ... file a petition with the [appropriate state] court for transfer to less restrictive housing and supervision. The court shall grant the transfer if the court determines that the transfer is in the best interests of the person and conditions can be imposed that adequately protect the community." Tex. Health & Safety Code Ann. § 841.0834(b). Welsh may also file a petition for his release from civil commitment. *See id.* § 841.122 ("On a person's commitment and annually after that commitment, the office shall provide the person with written notice of the person's right to file with the court and without the office's authorization a petition for release.").

Welsh does not contend, nor do the records show, that he has filed any petition under the foregoing statutes; as a result, he cannot state a viable Fourteenth Amendment claim due to his failure to avail himself of an available state law remedy or challenge its adequacy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) (citing *Parratt v. Taylor*, 451 U.S. 527, 537–44 (1981)) (explaining that a plaintiff "must either avail himself of the remedies guaranteed by state law or prove that the available remedies are inadequate" before bringing a constitutional claim); *Bittick v. Mooney*, 58 F. App'x 664, 664 (8th Cir. 2003) (citing several cases for support) (concluding that the district court properly dismissed prisoner's § 1983 claim that defendants wrongfully collected child support in excess of the amount provided in his divorce decree where post-deprivation remedies were available to prisoner and he had not demonstrated the inadequacy of such remedies);

see also Grant v. Menchaca, Civil Action No. 2:18-cv-18, 2018 WL 3118391, at *3 (S.D. Tex. Jan. 24, 2018) (finding plaintiff had not alleged any facts showing "that he properly took advantage of his available tort remedy or that such remedy was inadequate" and thus recommending dismissal of plaintiff's due process claim). "Under Fifth Circuit precedent, a party complaining of a lack of due process is required to utilize available state court remedies before proceeding to court under § 1983." *Hitt*, 2018 WL 773992, at *14 (citing *Burns v. Harris Cty. Bail Bond Bd.*, 139 F.3d 513, 519 (5th Cir. 1998)); *see also Browning v. City of Odessa*, 990 F.2d 842, 845 n.7 (5th Cir. 1993) (citing several cases for support) (noting that the court "has consistently held that one who fails to take advantage of procedural safeguards available to him cannot later claim that he was denied due process"); *Rathjen v. Litchfield*, 878 F.2d 836, 839 (5th Cir. 1989) (explaining "that no denial of procedural due process occurs where a person has failed to utilize the state procedures available to him"). Because Welsh may seek either release or review of his tier status via defined state procedures, his due process claims are frivolous and must be dismissed.

H. Count 6

Welsh alleges that on March 21, 2017, Security Officer Adrian Flores kicked the "metal trap door"—i.e., the food slot—closed, smashing Welsh's left hand in the slot. Am. Compl., at 38. At the evidentiary hearing, Welsh admitted, and the authenticated video footage confirms, that for approximately fifteen minutes prior to the alleged incident, he refused to remove his hands from the slot, despite express orders to do so. Welsh claims that TCCC officials had turned the water off in his cell, and he was "protesting" that decision. As a result of the alleged incident, Welsh asserts that he suffered a bruised and swollen left hand.

Welsh also avers that after the incident, LPD Officer Kasting came to the TCCC to complete a welfare check on Welsh (requested by his mother and brother). *Id.* Welsh contends

that he asked Officer Kasting to press charges against Officer Flores, but he refused, only agreeing to take Welsh to the medical department. *Id.*

Finally, Welsh alleges that Officers Flores, Margarito Gonzales, Maria Sanchez, Jorge Juarez, and John and Jane Does violated his constitutional rights by not providing "safe conditions, protection, and ordinary care," and Officers Flores and Gonzales breached his rights by placing him in "punitive isolation" following the incident.[36] *Id.* at 39.

1. Welsh has not demonstrated Officer Flores used force excessive to the need in violation of the Constitution.

The Fifth Circuit has not considered the appropriate constitutional standard applicable to a § 1983 excessive force claim brought by a civilly committed SVP. In *Andrews v. Neer*, however, the Eighth Circuit examined the issue, and concluded that an involuntarily committed person's "excessive-force claim should be evaluated under the objective reasonableness standard usually applied to excessive-force claims brought by pretrial detainees." 253 F.3d 1052, 1061 (8th Cir. 2001). In so concluding, the court explained the following:

> The Eighth Amendment excessive-force standard [(typically used to analyze prisoner excessive force claims)] provides too little protection to a person whom the state is not allowed to punish. On the other hand, the state of Missouri was entitled to hold [plaintiff] in custody. His confinement in a state institution raised concerns similar to those raised by the housing of pretrial detainees, such as the legitimate institutional interest in the safety and security of guards and other individuals in the facility, order within the facility, and the efficiency of the facility's operations.

Id. The undersigned finds the Eighth Circuit's reasoning instructive, and will likewise apply an objective reasonableness standard—the same standard applicable to pretrial detainees.

[36] The court has already addressed Welsh's claim that his placement in the SMU between February 3 and November 27 violated his due process rights. *See supra* Section II.E. (Counts 4 and 11). For the reasons discussed therein, the court dismisses Welsh's claims against Flores and Gonzales.

The United States Supreme Court has recognized that a pretrial detainee's use of force claim arises under the Fourteenth Amendment, and "that a pretrial detainee must show only that the force purposefully and knowingly used against him was objectively unreasonable." *Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2473 (2015) (abrogating lower courts' application of Eighth Amendment excessive force standards in *Hudson v. McMillian*, 503 U.S. 1 (1992) to pretrial detainees). "[O]bjective reasonableness turns on the 'facts and circumstances of each particular case.'" *Id.* (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). The reasonableness of the force used must be assessed "from the perspective and with the knowledge of the defendant officer" and with "deference to policies and practices needed to maintain order and institutional security." *Id.* at 2474. In determining the objective reasonableness of an officer's use of force, a court should consider the following non-exclusive factors: (1) the relationship between the need for the use of force and the amount of force used; (2) the extent of the plaintiff's injury; (3) any effort made by the officer to temper or limit the amount of force; (4) the severity of the security problem at issue; (5) the threat reasonably perceived by the officer; and (6) whether the plaintiff was actively resisting. *Id.* at 2473.

Initially, the court observes that Welsh admits he refused, for approximately fifteen minutes, to remove his hands from the food slot, despite multiple directives from officers to do so, thereby justifying the use of some degree of force by Officer Flores. *See, e.g.*, *Rushing v. Simpson*, No. 4:08CV1338 CDP, 2009 WL 4825196, at *7 (E.D. Mo. Dec. 11, 2009) (citing cases for support) (explaining that plaintiff's (a detainee awaiting civil commitment determination) refusal to comply with orders, "after almost seven minutes of being asked to do so by multiple staff members, justified the use of force"); *Calhoun v. Wyatt*, Civil Action No. 6:11CV4, 2013 WL 1882367, *6 (E.D. Tex. May 2, 2013) (noting that inmate's refusal to obey orders "set the stage

for the use of force"). Disobeying orders poses a threat to the order and security of an institution. *Bourne v. Gunnels*, No. CV H-16-0515, 2017 WL 2483815, at *10 (S.D. Tex. June 7, 2017); *Minix v. Blevins*, CA No. 6:06-306, 2007 WL 1217883, at *24 (E.D. Tex. April 23, 2007) (citation omitted) (recognizing that even where prisoner believes order to be unjustified or improper, such belief does not give him the right to disobey at his whim); *Rios v. McBain*, Civ. No. A504CV84, 2005 WL 1026192, at *7 (E.D. Tex. Apr. 28, 2005) (noting that "open defiance of orders plainly poses a threat to the security of the institution, regardless of whether or not the defiance is emanating from within a locked cell"). As such, a reasonable officer could believe that some use of force was objectively reasonable due to the threat presented by Welsh's repeated refusal to follow orders. Thus, the fifth and sixth *Kingsley* factors (i.e., the threat to institutional order reasonably perceived by the officer and plaintiff's active resistance) weigh in favor of finding that Officer Flores's alleged use of force was objectively reasonable. *See Kingsley*, 135 S. Ct. at 2473.

The third and fourth *Kingsley* factors (i.e., any effort made by the officer to temper or limit the amount of force and the severity of the security problem at issue) similarly weigh in Officer Flores's favor. Welsh claims that Flores "deliberately" kicked the food slot in an attempt to close it. Am. Compl., at 38. Welsh acknowledges, however, that he had removed his hands from the slot, but as Flores attempted to close it, Welsh pushed the slot back open with his foot and hand to prevent Flores from doing so. The authenticated video footage confirms that simultaneously with Welsh's actions, Flores kicked the slot again in an effort to close it. In other words, Welsh intentionally stuck his foot and hand into the slot to thwart Flores's efforts to close it, putting himself in harm's way. Under the circumstances, and based on the facts Welsh has pleaded, the

court cannot conclude that Officer Flores made no effort to limit the amount of force,[37] particularly in light of Welsh's admitted refusal to follow orders and active resistance to same.

Ultimately, it is the second *Kingsley* factor (i.e., the extent of plaintiff's injury), considered in the context of the other criteria, that resolves this question in favor of Officer Flores. Although no particular quantum of injury is required (*Wilkins v. Gaddy*, 599 U.S. 34, 37 (2010)), the extent of injury is an important factor courts assess in determining whether the amount of force used on a pretrial detainee was reasonable. *See Kingsley*, 135 S. Ct. at 2473. Courts routinely dismiss cases where the complaint alleges nothing more than *de minimis* injury. *See, e.g.*, *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997) (affirming district court's dismissal of plaintiff's claims for excessive force where injury consisting of "a sore, bruised ear lasting for three days" was *de minimis*); *Young v. Saint*, No. 92-8420, 1993 WL 117991, at *3 (5th Cir. Mar. 31, 1993) (affirming order dismissing complaint pursuant to 28 U.S.C. § 1915 where injuries consisting of "an undetermined amount of blood and [ ] two small 'scratches'" were *de minimis*); *Hodge v. Williams*, Civil Action No. 4:08-CV-330-Y, 2009 WL 111565, at *3 (N.D. Tex. Jan. 16, 2009) (finding as *de minimis* inmate's claimed injuries of "cuts on his hand," a cut inside his lip, and a sore neck); *Rushing*, 2009 WL 4825196, at *8 (explaining that plaintiff's alleged injuries—including a temporary asthma attack and migraines—were *de minimis*). Here, Welsh claims he suffered a bruise and some swelling that lasted one week as a result of Officer Flores's alleged use of force. He states that TCCC officials offered to x-ray his hand, but he declined. Consistent with the foregoing authority, the court finds that the mere allegation of a bruise and some swelling which required no further medical treatment points to the inescapable conclusion that whatever force Flores applied, it was not excessive.

[37] Welsh also admits Flores allowed him fifteen minutes to comply with the orders given, prior to using any type of force, thus demonstrating Flores's additional effort to limit or avoid any use of force.

In sum, weighing the factors set forth in *Kinsley*, particularly the minimal physical injury allegedly sustained, within the context of preserving institutional order and discipline and Welsh's intentional resistance to the same, Welsh's allegations fail to establish that Officer Flores's alleged use of force was objectively unreasonable. Accordingly, Welsh's claim for excessive force must be dismissed.[38]

2. Welsh possesses no constitutional right to have someone investigated or criminally prosecuted.

Welsh asserts that Officer Kasting violated his constitutional rights "by refusing to press or investigate a criminal act against plaintiff"—i.e., Officer Flores's alleged use of force and Welsh's resulting injury. Am. Compl., at 39. Welsh further contends that Officers Flores, Gonzales, Sanchez, Juarez, and John and Jane Does violated his constitutional rights by not providing "safe conditions, protection, and ordinary care." *Id.* At the evidentiary hearing, Welsh clarified that this claim against such Defendants arose from their alleged failure to investigate Officer Flores's actions.

Welsh "does not have a constitutional right to have someone criminally prosecuted." *Oliver v. Collins*, 914 F.2d 56, 60 (5th Cir. 1990). Similarly, Defendants' alleged failure to investigate Officer Flores's use of force "did not infringe any legally recognized right belonging to [Welsh] . . . ." *Autrey*, 66 F. App'x at 523; *see Robinson*, 185 F. App'x at 348. Accordingly, the court must dismiss Welsh's claims against Officers Kasting, Flores, Gonzales, Sanchez, Juarez, and John and Jane Does. *See, e.g.*, *Ralston*, 2018 WL 7152549, at *2.

[38] The court did not find consideration of the first *Kingsley* factor (i.e., the relationship between the need for the use of force and the amount of force applied) to be particularly instructive. The relationship between the need for the use of force (i.e., Welsh's active refusal to follow orders and Officer Flores's need to maintain institutional order and discipline) and the amount of force Flores allegedly used (i.e., force sufficient to cause a bruise) was basically subsumed within the foregoing analysis already provided.

I. Count 7

Welsh avers that on March 22, 2017, Officer Arnulfo Hernandez Jr. ordered Welsh "to knell [sic] and crawl to the metal trap door to get his food." Am. Compl., at 44. In response, Welsh admits that when he received his food tray, he threw water on Officer Hernandez and put his hands in the food slot to "talk" with the officers. *Id.* Welsh contends that Captain Jane Salazar thereafter ordered Security Officer Jacob Richardson "to sneak around without warning" and kick the metal trap several times, with his hand caught inside. *Id.* Welsh alleges that he suffered "[severe] pain, swelling, [and] bleeding" as a result. *Id.* at 45. Welsh further asserts that later the same day, LPD Detective Rodriguez "came to T.C.C.C. to register sex offenders." *Id.* Welsh claims that he reported the alleged incident to Rodriguez, but Rodriguez refused to investigate the incident or press charges against Officer Richardson. *Id.* at 45–46.

1. Welsh has not demonstrated Officer Richardson used force in violation of the Constitution.

As discussed above, the court will apply the *Kingsley* factors in analyzing Welsh's use of force claim. *See Kingsley*, 135 S. Ct. at 2473. The court first observes that Welsh concedes, and the authenticated records and video footage confirm, that he threw water on Officer Hernandez and then placed his hands in the slot. He also admits that he had removed the metal shower rod in his room and was poking it through the food slot. As a result, Officer Richardson was justified in using some degree of force, particularly in light of the fact that Welsh was brandishing a weapon. *See, e.g.*, *Calhoun*, 2013 WL 1882367, *6 (noting that inmate's refusal to obey orders "set the stage for the use of force"). At the evidentiary hearing, Welsh denied that TCCC officials had directed him to comply with any orders prior to the alleged use of force. Nevertheless, Welsh's aggressive acts—wielding a metal shower rod and throwing water on an officer—posed a threat to the order and security of the TCCC. *See Bourne*, 2017 WL 2483815, at *8–9. Moreover, Welsh

had previously demonstrated aggressive and non-compliant behavior, including jacking the food slot just one day prior. Because of Welsh's aggressive conduct and current assignment in the SMU for non-compliant behavior, a reasonable officer could have perceived Welsh's actions as a threat to his safety as well as to institutional order and security. Thus, the fourth, fifth, and sixth *Kingsley* factors (i.e., the severity of the security problem at issue, the threat to institutional order reasonably perceived by the officer, and plaintiff's active resistance) weigh in favor of finding that Officer Richardson's alleged use of force was objectively reasonable. *See Kingsley*, 135 S. Ct. at 2473.

Counterbalanced against these considerations is the third *Kingsley* factor (i.e., any effort made by the officer to temper or limit the amount of force), which, accepting Welsh's allegation as true, weighs in his favor. Welsh claims that Richardson kicked the food slot "without warning," and that no TCCC official provided him an order prior to using force. Am. Compl., at 44–45. According to Welsh's account, Richardson made little or no effort to limit the amount of force used against him.[39]

In the court's view, however, the second *Kingsley* factor (i.e., the extent of plaintiff's injury), examined in conjunction with the other criteria, again resolves this question in favor of Officer Richardson. As noted above, although no particular quantum of injury is required (*Wilkins*, 599 U.S. at 37), the extent of injury is an important factor courts assess in determining whether the amount of force used on a pretrial detainee was reasonable. *See Kingsley*, 135 S. Ct. at 2473.

Welsh claims that he suffered pain, swelling, and bleeding as a result of the incident. TCCC officials took pictures of Welsh's claimed injuries, and the medical department examined him. On April 10 and July 28, 2017, after Welsh complained of hand pain, TCCC medical

[39] Notably, the authenticated video footage of the incident reflects that Officer Richardson attempted to kick the slot closed after Welsh removed his hands, but Welsh stuck his hand back into the slot. Thus, any alleged injury caused by Richardson is likely the result of Welsh's decision to place his hands in harm's way. Nevertheless, the court accepts as true Welsh's allegation that Richardson acted without warning.

personnel took x-rays, which both came back negative. Other than a scar, Welsh does not contend that he sustained long-term damage or injury to his hand. The court finds that, given the need to maintain order and avoid officer injury, the pain, swelling, and bleeding suffered as a result of Officer Richardson's alleged conduct necessitates a conclusion that whatever force Richardson applied, it was not excessive. *See, e.g.*, *Brooks v. City of W. Point*, 639 F. App'x 986, 990 (5th Cir. 2016) (explaining that plaintiff's allegation "he suffered abrasions to his hands and knees, some pain in his back and neck, and unspecified problems with his asthma" constituted *de minimis* injury); *Lee v. Wilson*, 237 F. App'x 965, 966 (5th Cir. 2007) (affirming district court's dismissal of plaintiff's excessive force claim where plaintiff's injuries—a "busted lip" and headaches—were *de minimis* "in the context given that defendant's closing of the [food] portal door was a reasonable attempt to maintain order in response to [plaintiff's] complaints"); *Perez v. Livingston*, Civil Action H-16-0306, 2019 WL 398828, at *15 (S.D. Tex. Jan. 31, 2019) (finding plaintiff suffered *de minimis* injury, despite allegation that he repeatedly reported nerve damage and pain months after the alleged use of force, where medical records showed plaintiff's pain was caused by degenerative arthritis and records thus refuted plaintiff's contention).

In sum, weighing the factors set forth in *Kinsley*, particularly the minimal physical injury allegedly sustained, within the context of preserving institutional order and discipline and Welsh's resistance to the same, Welsh's allegations fail to establish that Officer Richardson's alleged use of force was objectively unreasonable. Accordingly, Welsh's excessive force claim must be dismissed.

2. Welsh possesses no constitutional right to have someone investigated or criminally prosecuted and therefore cannot state a claim against Detective Rodriguez.

Welsh alleges that LPD Detective Rodriguez refused to investigate the March 22, 2017, incident and did not press charges against Officer Richardson, thereby violating his constitutional rights. *Id.* at 45–46.

As previously explained, Welsh "does not have a constitutional right to have someone criminally prosecuted" (*Oliver*, 914 F.2d at 60), nor does any alleged failure to investigate give rise to a constitutional violation. *See Robinson*, 185 F. App'x at 348; *Autrey*, 66 F. App'x at 523. Accordingly, the court dismisses Welsh's claim against Detective Rodriguez. *See, e.g.*, *Ralston*, 2018 WL 7152549, at *2.

J. Count 8

Welsh contends that on April 13, 2017, he wrote "an affidavit of facts" detailing crimes that allegedly have been committed against him. Am. Compl., at 50. According to Welsh, LPD Chief of Police Albert Garcia has not investigated these crimes, nor has Garcia made any arrests in connection with Welsh's allegations. *Id.* Because Welsh does not have a constitutional right to have someone investigated or prosecuted, the court similarly dismisses his claim against Chief Garcia.

K. Count 10

Welsh avers that on November 13, 2017, Officers Dustin Tijerina, Leslie Dimwiddie, Arnulfo Hernandez, Kevin Tedder, and Margarito Gonzales, as well as Security Director Chris Woods, used force excessive to the need. *Id.* at 56. Specifically, Welsh claims that after he refused to accept housing, Director Woods ordered Defendants to use force on Welsh, i.e., that the officers shackled his arms and legs and moved him to a different cell. *Id.* When the officers attempted to remove the handcuffs, Welsh states that he "moved his hands," which allegedly caused Officer

Hernandez to twist Welsh's arm in an attempt to break it. *Id.* at 57. Welsh further claims that Officer Dimwiddie repeatedly slammed his head into the floor, causing swelling and bruising. *Id.*

1. Welsh's excessive force claim is* Heck*-barred.

As explained earlier, the Supreme Court's holding in *Heck v. Humphrey* precludes a plaintiff's § 1983 claim for monetary damages where a favorable judgment in the civil rights action would "necessarily imply the invalidity of [a prisoner's] conviction or sentence" in his criminal case, unless the criminal conviction has been reversed or otherwise declared invalid. 512 U.S. at 486–87.

Here, Welsh concedes, and the authenticated records confirm, that a jury found him guilty of tampering with or fabricating physical evidence with intent to impair under Texas Penal Code § 37.09, in connection with Defendants' alleged use of force on November 13. Specifically, the records show that on November 13, 2017, Welsh submitted a criminal complaint, alleging that TCCC staff assaulted and injured him on that date. LPD's subsequent criminal investigation found the claim to be untrue, resulting in the § 37.09 charge against Welsh and his subsequent conviction. Welsh is currently serving an eleven-year sentence in TDCJ as a result. Thus, a favorable finding in this § 1983 action—that Officers Tijerina, Dimwiddie, Hernandez, Tedder, and Gonzales, as well as Security Director Chris Woods, used excessive force on November 13—would necessarily imply the invalidity of Welsh's underlying conviction for tampering with or fabricating evidence in an attempt to falsely implicate the officers in a use of force. Stated differently, Welsh's claim is "'necessarily inconsistent'" with his conviction; it cannot "'coexist' with the conviction or sentence without 'calling [it] into question.'" *Smith v. Hood*, 900 F.3d 180, 185 (5th Cir. 2018) (quoting *Ballard*, 444 F.3d at 394). Welsh's claim is therefore barred by *Heck* because a state court has not reversed, invalidated, or expunged his conviction. *See, e.g.*, *DeLeon v. City of Corpus*

Christi, 488 F.3d 649, 656 (5th Cir. 2007) (explaining that plaintiff's excessive force claim was "inseparable" from criminal conviction for aggravated assault of an officer); *Smith*, 2017 WL 1750827, at *3–4 (finding plaintiff's excessive force claim *Heck*-barred where the events giving rise to plaintiff's conviction were the same as those giving rise to his excessive force claim). Accordingly, the court must dismiss as *Heck*-barred Welsh's excessive force claim in Count 10.

2. Welsh has not pleaded facts demonstrating that Defendants unconstitutionally restrained him.

To the extent Welsh alleges that Officers Tijerina, Dimwiddie, Hernandez, Tedder, and Gonzales, as well as Director Woods, violated his right to "freedom of unreasonable restraint" in connection with the November 13 incident (*see* Am. Compl., at 57), he has also failed to state a claim.

Welsh alleges Defendants violated his right to freedom from restraint under the Fourth Amendment; however, such rights arise under the Fourteenth Amendment. As a civilly committed person, Welsh "retains liberty interests in safety and freedom from bodily restraint," but "these interests are not absolute . . . ." *Youngberg*, 457 U.S. at 319–20. Thus, in evaluating a substantive due process claim based on freedom from bodily restraint, "courts balance the liberty interest of the individual against relevant state interests." *Semler*, 2010 WL 145275, at *26 (citing *Youngberg*, 457 U.S. at 321). An official's actions may violate the Due Process Clause "only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Id.* (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

Here, Welsh acknowledges through his pleadings that, after refusing multiple orders to accept housing, Defendants applied restraints to move him to a different room. Am. Compl., at 56–57. Similarly, the authenticated video footage shows that Welsh was belligerent, yelling, and refusing to comply with Defendants' orders to enter his room. Welsh sat in the hallway, leaning

up against his room's door to prevent officials from opening it. After several minutes of non-compliance, Defendants applied hand and leg restraints, and moved him to his new room (after Welsh refused to move of his own accord). Once inside the room, Welsh concedes and the video reflects that Defendants removed the restraints. Defendants restrained Welsh for approximately five minutes total.[40] Welsh has not pleaded facts demonstrating, nor does the video footage reflect, that Defendants' brief restraint of Welsh, solely for the purpose of transporting him and preventing him from harming himself or the officers, constituted "arbitrary or conscience shocking" behavior. *Semler*, 2010 WL 145275, at *27 (quoting *Lewis*, 523 U.S. at 846); *see Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that the district court did not have to accept the plaintiff's description of his driving where it was "blatantly contradicted by" video from the police car's dash cam); *Schneider v. Kaelin*, 569 F. App'x 277, 279 (5th Cir. 2014) (quoting *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011)) (noting that "greater weight is given 'to the facts evident from video recordings taken at the scene'"); *Funari v. Warden of the James V. Allred Unit*, Civil No. 7:12–CV–011–O–KA, 2014 WL 1168924, at *2 (N.D. Tex. Mar. 20, 2014) (finding the court could rely on video of the event when it blatantly contradicted the "visible fiction" offered by the plaintiff). Accordingly, the court dismisses this claim. *See, e.g.*, *Beaulieu v. Ludeman*, 690 F.3d 1017, 1032–33 (8th Cir. 2012) (holding defendants' use of restraints on SVPs during transport outside the commitment facility was not "arbitrary or shocking to the conscience" where defendants applied restraints "for the safety of the public and staff and to prevent escapes and attempted escapes . . . ."); *Semler*, 2010 WL 145275, at *27 (same).

[40] His time in restraints would have been greatly reduced if Welsh had complied with numerous directives to remain still. The video shows that Defendants struggled to remove the restraints, and even had to briefly reapply the leg restraints when Welsh made abrupt movements, threatening the security of the officers.

L. Count 11

Welsh's claims in Count 11 relate to the November 13, 2017, incident described in Count 10. Welsh contends that LPD Chief of Police Ross Hester conspired with Director Woods to bring false charges against Welsh. Am. Compl., at 65. Welsh further avers that CCRS officials held him in the SMU on behalf of LPD and Lamb County, but they did not take him to appear before a magistrate judge within forty-eight hours of being criminally charged for fabrication of evidence. *Id.*

Welsh's claim against Chief Hester and Director Woods for bringing false charges is *Heck*-barred. A jury found Welsh guilty of tampering with or fabricating physical evidence and he is currently serving a sentence in TDCJ based on the conviction. Allowing Welsh to proceed on his claim that Hester and Woods brought "false charges" would necessarily undermine that conviction. *See, e.g., Daigre v. City of Waveland*, 549 F. App'x 283, 287 (5th Cir. 2013) ("Allowing [plaintiff] to proceed with her false-arrest claim would necessarily attack one of the grounds for her arrest because she was charged with, and ultimately pleaded guilty to, resisting arrest."); *Wiley v. Darnell*, No. Civ.A. 5:03–CV–078–C, 2004 WL 1196070, at *4 (N.D. Tex. June 1, 2004) (explaining that plaintiff's complaints "about false charges, false investigations, his false arrest, lying witnesses, police misconduct during his criminal proceedings, attorney ineffectiveness during his criminal proceedings, prosecutorial misconduct during his criminal proceedings, and judicial misconduct during his criminal proceedings" were barred by *Heck* because they "necessarily affect[ed] the validity of his criminal conviction").

With respect to his allegations of illegal detention by CCRS officials on behalf of LPD and Lamb County concerning the fabrication charge, Welsh likewise fails to state a claim. Despite his contention that CCRS and LPD conspired to hold him in the SMU after the November 13 incident,

Welsh's pleadings demonstrate, and the authenticated records show, that LPD did not arrest Welsh until November 28, 2017, when a justice of the peace signed a warrant for Welsh's charge or arrest. On November 29, the records show that Welsh appeared before a magistrate judge, and Welsh signed a form acknowledging that the judge advised him of his rights and that he did not want to request a court appointed attorney on the charge. Thus, Welsh timely appeared before a magistrate judge after his November 28 arrest. For this reason alone, the court must dismiss his claim.

More generally, Welsh has not pleaded facts showing a violation of the Constitution, nor has he named a specific person responsible for any alleged violation. His bare allegation that Defendants conspired to violate his rights is insufficient to establish a constitutional claim. *See, e.g.*, *Powell v. Martinez*, 579 F. App'x 250, 251 (5th Cir. 2014) (quoting *McAfee v. 5th Cir. Judges*, 884 F.2d 221, 222 (5th Cir. 1989)) ("[Plaintiff's] 'mere conclusory allegations of conspiracy cannot, absent reference to material facts, state a substantial claim of federal conspiracy.'"). The court must therefore dismiss Welsh's claim on this basis as well. *See generally Priester v. Lowndes Cty.*, 354 F.3d 414, 420 (5th Cir. 2004) (explaining that a plaintiff must "(1) allege a violation of rights secured by the Constitution of the United States or laws of the United States; and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law" to assert a viable § 1983 claim).

M. Count 12

Welsh alleges that CCRS, through Director Woods, implemented a "policy and culture" of "assaultive and oppressive confinement culture." Am. Compl., at 74. This policy, Welsh contends, "is the catalysis [sic] of the causation of the injuries rendered upon the plaintiff." *Id.*

Welsh has failed to plead facts plausibly demonstrating the three elements required to state a claim against CCRS based on its alleged policy of assault and oppression. As noted above,

Welsh must establish the following to assert a viable claim: "a policymaker; an official policy; and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski*, 237 F.3d at 578 (quoting *Monell*, 436 U.S. at 694). The court entertains serious doubt as to whether Woods is a policymaker—i.e., someone who has the authority under state law to create and implement a policy on behalf of CCRS as opposed to an employee lacking final policy-making authority. Even assuming Woods is a policymaker, however, Welsh has not asserted facts demonstrating the second and third elements.

Welsh's general contention that CCRS and Woods implemented oppressive conditions does not amount to an "official policy"—a policy statement, ordinance, regulation, or a "persistent, widespread practice" of officials and employees that "is so common and well-settled as to constitute a custom that fairly represents municipal policy . . . ." *Piotrowski*, 237 F.3d at 579 (quoting *Webster*, 735 F.2d at 841). Indeed, Welsh lists a series of unrelated incidents (as described on page 75 of his Amended Complaint) that personally caused him harm, beginning in January 2016, but he never asserts that the individual Defendants acted pursuant to an official policy or widespread custom. *See, e.g.*, Am. Compl., at 4–7 (alleging that individual Defendants used force and subjected him to an "unreasonable seizing"); 12 (alleging Officer Leeks withheld clothing and hygiene items from him but making no mention that it was pursuant to a policy). Welsh merely "catalogue[s]" the alleged actions and injuries *he has personally suffered* as a result of the alleged policy. *Id.* at 75.

At best, Welsh makes conclusory allegations that these purported harms were the result of an official policy; however, the individual, unrelated incidents Welsh describes do not demonstrate the type of "persistent, widespread practice" necessary to demonstrate an official policy attributable to CCRS. *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997)

("The description of a policy or custom and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts."); *see also Peterson*, 588 F.3d at 850–51 (affirming district court's conclusion that twenty-seven complaints against police department for alleged use of excessive force did not support conclusion that city maintained official policy of condoning excessive force); *Jenkins v. LaSalle Sw. Corrs.*, No. 3:17-cv-1376-M-BN, 2018 WL 3748196, at *8 (N.D. Tex. July 11, 2018) (recommending dismissal of plaintiff's *Monell* claim where plaintiff "alleged constitutional violations isolated to him"). Welsh's assertion against CCRS is insufficient to impose liability on CCRS because he does not allege that CCRS had a policy or custom of assaulting or oppressing all, or even a certain group, of TCCC residents. *See, e.g.*, *Howard-Barrows v. City of Haltom City*, 106 F. App'x 912, 914 (5th Cir. 2004) (citing *Monell*, 436 U.S. at 690–91).

In addition, Welsh has failed to show that any alleged policy is "the moving force behind, and the direct cause of, the violation of [his] constitutional rights . . . ." *Williams*, 352 F.3d at 1014 (citing *Brown*, 520 U.S. at 404–05). Specifically, he has not demonstrated a "direct causal link" between any policy and the alleged constitutional violations.[41] *Piotrowski*, 237 F.3d at 580. At best, Welsh merely asserts a personal belief that Defendants' alleged actions represent an official policy of oppression that has caused him harm.

N. Count 13

Welsh alleges that the LPD, "through it's [sic] agent Albert Garcia has created a culture and/or failed to train the Littlefield police officers under it's [sic] authority to precluding it's [sic] agents from aiding the plaintiff with it's protection from the criminal acts of C.C.R.S. . . ." Am.

[41] As the court has discussed at length herein, Welsh has failed to plead facts demonstrating *any* violation of his constitutional rights.

Compl., at 79. Welsh's conclusory claim again falls far short of stating a policy claim against LPD.[42]

First, as the court noted previously, Welsh does not have a constitutional right to have the police investigate or prosecute alleged crimes. *See Oliver*, 914 F.2d at 60; *Robinson*, 185 F. App'x at 348. He therefore cannot establish the requisite causation for a municipal liability claim. *See Piotrowski*, 237 F.3d at 578; *Hitt*, 2018 WL 773992, at *9 (dismissing SVP's policy claim against CCRS in part because he failed to state a constitutional violation). For this reason alone, Welsh cannot state a viable municipal liability claim against the City of Littlefield.

In addition, Welsh's bare allegation does not provide specific facts demonstrating the repeated, widespread (as opposed to isolated) violations that could be said to be the "official policy" of the City of Littlefield. *See Piotrowski*, 237 F.3d at 581–82 (quoting *Bennett*, 728 F.2d at 768 n.3); *Malone v. City of Fort Worth*, 297 F. Supp. 3d 645, 655–56 (N.D. Tex. 2018) (citations omitted) (explaining that a failure-to-train claim may constitute an official government policy for purposes of § 1983 in limited circumstances where plaintiff shows "a pattern of similar violations," or "a single incident in a narrow range of circumstances where a constitutional violation is likely to result as the highly predictable consequence of a particular failure to train"). Because Welsh has not pleaded sufficient facts demonstrating the City of Littlefield maintained an official policy that violated his constitutional rights, his claim must be dismissed.

[42] Liberally construing Welsh's claim, as it must, the court interprets Welsh's complaint as intending to sue the City of Littlefield, Texas, by naming LPD and Albert Garcia, and will assess it as such. *See Campos v. Beeville Police Dep't*, Civil Action No. 2:15–CV–99, 2015 WL 4389105, at *3 (S.D. Tex. July 15, 2015) (noting that a police department does not have the capacity to be sued under § 1983 but assuming plaintiff intended to sue the city "[f]or the purposes of § 1915A screening").

O. Miscellaneous Claims

Following the thirteen specific counts, Welsh includes several pages of material that list additional generalized claims. He also alleges several claims throughout his pleadings not analyzed above and that the court will now address.

1. Section 1985

First, Welsh raises a claim under 42 U.S.C. § 1985. Welsh alleges that CCRS conspired against him with LPD, the Lamb County Attorney's Office, and the 154th District Attorney's Office because he is a SVP. Am. Compl., at 81–83. In support of this claim, Welsh highlights many of the same allegations raised in the separately enumerated counts. *See id.*

Although Welsh does not cite a specific section, the court, given the nature of the allegation, construes Welsh's complaint as asserting a claim under § 1985(3), which provides the following:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1985(3). Under the foregoing statute, "[a] plaintiff must show membership in some group with inherited or immutable characteristics . . . or that the discrimination resulted from the plaintiff's political beliefs or associations." *Flander v. Kforce, Inc.*, 526 F. App'x 364, 369 (5th Cir. 2013) (per curiam) (quoting *Galloway v. Louisiana*, 817 F.2d 1154, 1159 (5th Cir.1987)).

Welsh apparently contends that his status as an SVP is an "immutable characteristic" that triggers the protection of § 1985. *See* Am. Compl., at 81 ("This conspiracy of the collaborating agents was class based against plaintiff who is civilly committed as a SVP."). The court disagrees.

Section 1985 generally addresses racial discrimination and has not been broadly construed to encompass other identifiable groups. *See, e.g.*, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267–68 (1993) (quoting *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971)) (providing that to establish a § 1985(3) claim, "a plaintiff must show, *inter alia* . . . that 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus [lay] behind the conspirators' action'"); *McLellan v. Miss. Power & Light Co.*, 545 F.2d 919, 928 (5th Cir. 1977) (explaining that the Fifth Circuit has not explicitly decided whether § 1985 extends beyond racial animus); *Jones v. Tyson Foods, Inc.*, 971 F. Supp. 2d 648, 668 (N.D. Miss. 2013) ("Section 1985 was enacted to address race-based animus and has rarely been extended further."). "A § 1985(3) class must possess a discrete, insular, and immutable characteristic, such as race, gender, religion, or national origin." *Jones*, 971 F. Supp. 2d at 668 (citing *Galloway*, 817 F.2d at 1159).

In *Bray v. Alexandria Women's Health Clinic*, the Supreme Court reasoned that a group opposing abortion did not qualify as a "class" under § 1985 because "the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors." 506 U.S. at 269. Moreover, courts have held that prisoners are not a suspect class within the context of an equal protection claim. *See, e.g.*, *Phillips ex rel. Phillips v. Monroe Cty.*, 311 F.3d 369, 376 n.2 (5th Cir. 2002); *see also City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442, 446 (1985) (holding that mentally retarded persons are not a suspect or quasi-suspect class for purpose of equal protection review). Similarly, "[p]ersons designated as sexually violent predators are not a protected class" for equal protection purposes.

Grohs v. Fratalone, Civ. No. 13–7870 (KM) (MAIl), 2015 WL 6122147, at *5 (D. N.J. Oct. 16, 2015) (citing *Allen v. Mayberg*, No. 06–1801, 2013 WL 3992016, at *7 (E.D. Cal. Aug. 1, 2013)). Welsh has not cited, and the court has not found, any cases holding that sexually violent predators constitute a protected class under § 1985. Based on the foregoing authority, the court concludes that under § 1985, sexually violent predators are more akin to prisoners or a group opposing certain political views, rather than a class defined by immutable characteristics. Accordingly, the court concludes that Welsh's status as a sexually violent predator is not afforded protection by § 1985(3). *See Jones*, 971 F. Supp. 2d at 668–69 (concluding that plaintiff's status as a prisoner did not amount to an immutable characteristic). Consequently, Welsh cannot state a § 1985 claim, and the court therefore dismisses it.

2. Section 1986

Welsh also seeks to impose liability against CCRS, LPD, Amy Goldstein, Captain Jane Salazar, Margarito Gonzales, LPD Officer Kasting, LPD Officer Ponce, LPD Detective Rodriguez, LPD Chief Garcia, Adrian Flores, Jacob Richardson, Jorge Juarez, and John and Jane Doe under 42 U.S.C. § 1986. Section 1986 provides for recovery against anyone "who, having knowledge that [a § 1985 conspiracy] is about to be committed," does nothing about it. 42 U.S.C. § 1986. Because the court has already determined that Welsh has not pleaded facts establishing a § 1985 conspiracy, the court concludes that Welsh cannot establish a claim under § 1986. Accordingly, Welsh's claim is dismissed.

3. Welsh fails to state a non-frivolous claim for a loss of property.

Throughout his Amended Complaint, Welsh makes several allegations that various Defendants, including Officer Leeks and Security Director Woods, unconstitutionally confiscated

property from him. *See, e.g.*, Am. Compl., at 14, 25, 65. To the extent such assertions seek recovery for the loss of property, Welsh has failed to state a claim.

An official's actions—whether negligent or intentional—that result in a loss of property constitute a state tort action rather than a federal civil rights claim. Indeed, a state actor's negligence that results in an unintentional loss of property does not violate the Constitution. *See Simmons v. Poppell*, 837 F.2d 1243, 1244 (5th Cir. 1988). Similarly, an intentional deprivation of personal property does not give rise to a viable constitutional claim as long as the prisoner has access to an adequate state post-deprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *see also Stauffer v. Gearhart*, 741 F.3d 574, 583 (5th Cir. 2014) (citing several cases for support) ("An inmate's allegation that his personal property was lost, confiscated, or damaged does not state a claim under 42 U.S.C. § 1983, even when prison officials acted intentionally.").

Here, the State of Texas provides an adequate post-deprivation remedy for persons asserting claims such as those raised herein by Welsh—the filing of a lawsuit for conversion in state court. *See, e.g.*, *Murphy v. Collins*, 26 F.3d 541, 543 (5th Cir. 1994). Assuming, without finding, that any Defendant did in fact wrongfully confiscate and not return Welsh's property, as alleged, Welsh may have a cause of action in state court; however, he cannot pursue a federal constitutional claim. *Stauffer*, 741 F.3d at 583; *see Thompson*, 709 F.2d at 383. Welsh's wrongful confiscation claims must also be dismissed.

4. Defendants Lisa Peralta, Peter Caswell, and Mayor Eric Turpen

In the cover pages of his Amended Complaint, Welsh identifies as parties Littlefield Mayor Eric Turpen, TCCO case manager Lisa Peralta, and TCCO case manager Peter Caswell. Am. Compl., at 2–3. In the body of his Amended Complaint, however, Welsh does not make any claims against such Defendants. Because Welsh has failed to specifically plead any facts demonstrating

Turpen, Peralta, or Caswell violated his constitutional rights, the court dismisses those Defendants. *See* Fed. R. Civ. P. 8(a)(2) (requiring a "short and plain statement of the claim showing that the pleader is entitled to relief"); *DeMarco*, 914 F.3d at 386–87 (quoting *Gentilello*, 627 F.3d at 544) ("We do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions."); *Thompson*, 2012 WL 6600338, at *3 (citing *Ashcroft*, 556 U.S. at 679) (explaining that "in order to be afforded the benefits of this assumption [that plaintiff's factual allegations are true] a civil rights plaintiff must support his claims with specific facts demonstrating a constitutional deprivation and may not simply rely on conclusory allegations").

5. State law claims

Welsh alleges numerous state law claims throughout his Amended Complaint, including assault, negligence, intentional infliction of emotional distress, false arrest, false imprisonment, nuisance, and conversion. Am. Compl., at 1–89. Under 28 U.S.C. § 1367, a district court may decline to exercise supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). Because the court has determined that all of Welsh's federal claims must be dismissed, the court declines to exercise § 1367 supplemental jurisdiction over Welsh's state law claims. *See, e.g.*, *Lizotte v. Leblanc*, 456 F. App'x 511, 513 (5th Cir. 2012) (affirming district court's dismissal of plaintiff's state law claims for negligence and retaliation where court had properly dismissed all claims over which it had original jurisdiction and therefore "had an adequate basis for declining to exercise supplemental jurisdiction"); *Coghlan v. Wellcraft Marine Corp.*, 240 F.3d 449, 455 (5th Cir. 2001) (noting that a "district court may refuse to exercise supplemental jurisdiction" over state law claims where court dismisses claims giving rise to original jurisdiction). The court therefore dismisses Welsh's state law claims without prejudice. *See Bass v. Parkwood Hosp.*, 180 F.3d 234, 246 (5th Cir. 1999).

III. Conclusion

For the foregoing reasons it is, therefore,

ORDERED that Welsh's Amended Complaint and all claims therein, excepting the state law claims, be **DISMISSED with prejudice** as frivolous in accordance with 28 U.S.C. §§ 1915 and 1915A.

It is further,

ORDERED that Welsh's state law claims be **DISMISSED without prejudice** under 28 U.S.C. § 1367(c)(3). Welsh's Amended Complaint and all claims asserted therein against all Defendants are dismissed in their entirety.

This is a consent case assigned to the undersigned United States Magistrate Judge under 28 U.S.C. § 636(c) with authority to enter judgment. Any appeal shall be to the Court of Appeals for the Fifth Circuit under 28 U.S.C. § 636(c)(3). Dismissal of these claims does not release Welsh or the institution where she is incarcerated from the obligation to pay any filing fee previously imposed. 28 U.S.C. § 1915(b)(1); *see also Williams v. Roberts*, 116 F.3d 1126, 1128 (5th Cir. 1997).

Judgment shall be entered accordingly.

SO ORDERED.

Dated: April 24, 2019

D. GORDON BRYANT, JR.
UNITED STATES MAGISTRATE JUDGE