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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MICHAEL MUTHEE MUNYWE, Plaintiff-Appellant, v. JULIE DIER, Detective, Tacoma Police Department; JEFFREY THIRY, Police Officer; BRIAN SHE, Police Officer; WILLIAM MUSE, Detective, Tacoma Police Department, Defendants-Appellees.	No. 22-35511 D.C. No. 3:21-cv-05218-BJR MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Barbara Jacobs Rothstein, District Judge, Presiding

Submitted June 7, 2023**

Before: WALLACE, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Michael Muthee Munywe appeals pro se from the district court's summary judgment for defendants in Munywe's action alleging constitutional violations in

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

his pretrial detention. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *see Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1247 (9th Cir. 2016), and we affirm.

The district court properly dismissed Munywe's Eighth Amendment claims. Munywe alleged mistreatment as a pretrial detainee, and his claims accordingly arose under the Fourteenth Amendment. *See id.* at 1246 n.5 ("[P]retrial detainees are entitled to the potentially more expansive protections of the Due Process Clause of the Fourteenth Amendment.").

The district court properly granted summary judgment on Munywe's Fourteenth Amendment claims that he was handcuffed too tightly for over seven hours; held in a room with toxic fumes; and denied water and an opportunity to use the bathroom. Munywe failed to produce any objective medical evidence in support of his injury claims. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001). Munywe also failed to raise a triable issue about whether the defendants had an objectively reasonable basis for confining Munywe as he claims. *See Gordon v. Cnty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018); *see also Kingsley v. Hendrickson,* 576 U.S. 389, 398 (2015) ("A pretrial detainee can prevail by providing only objective evidence that the challenged governmental action is not rationally related to a legitimate governmental objective or that it is excessive in relation to that purpose.").

The district court properly granted summary judgment on Munywe's equal protection claims. Munywe alleged that defendants questioned him about his accent, but the officers had a legitimate law enforcement purpose for doing so: The alleged assailant was reported to have spoken with an accent; and the detectives were attempting to verify that Munywe was capable of being interviewed without an interpreter. *See, e.g., Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) ("[A] plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class."), *quoting Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Munywe's claims under 42 U.S.C. § 1981 also fail, because Munywe did not allege any impairment protected by the statute.

Lastly, the district court did not abuse its discretion in denying Munywe's discovery motion because Munywe failed to comply with meet and confer requirements under local rules. *See, e.g., Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1131 (9th Cir. 2012) (denial of motion for failure to comply with local rules is well within a district court's discretion).

AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL MUTHEE MUNYWE,

Plaintiff,

v.

JULIE DIER, *et al.*,

Defendants.

CASE NO. 3:21-CV-05218-BHS-JRC

REPORT AND RECOMMENDATION

Noting Date: **February 25, 2022**

Plaintiff filed a complaint under 42 U.S.C. § 1983. Dkt. 5. Before the Court are plaintiff's motion for summary judgment (Dkt. 23) and defendants' motion for summary judgment (Dkt. 34). As discussed below, defendants' motion for summary judgment should be GRANTED and plaintiff's motion for summary judgment should be DENIED.

Defendants arrested plaintiff on suspicion of sexual assault and unlawful imprisonment and transported him to a police station. Plaintiff offers testimony that defendants left him handcuffed in a holding cell for seven hours and denied him him water and use of the bathroom. Other than plaintiff's bare allegations, all the other evidence belies plaintiff's testimony. Furthermore, given the ongoing sexual assault investigation, even if this Court were to accept

plaintiff's testimony as true, these alleged conditions, do not appear to be punishment, and could reasonably be considered a necessary means of preserving potential forensic evidence. Additionally, plaintiff alleges that defendants made a discriminatory remark about his nationality. There is no evidence linking this isolated remark to plaintiff's race or national origin. And, assuming the statement was made as plaintiff alleges, there is evidence that the person who perpetrated the crime was black and spoke with a heavy accent—which linked plaintiff as the prime suspect. Plaintiff does not dipute these facts. Accordingly, no reasonable juror could conclude that defendants violated plaintiff's federal rights.

COMPLAINT'S ALLEGATIONS

Plaintiff is a convicted and sentenced state prisoner who is incarcerated at the Washington State Penitentiary. Dkt. 5 at 3. Plaintiff sues Julie Dier, William Muse, Jeffrey Thiry, and Brian She. *Id.* at 2. At all relevant times, defendants Dier and Muse were detectives for the Tacoma Police Department ("Department"), and defendants Thiry and She were patrol officers for the Department. *Id.* at 4–5.

Plaintiff alleges that, at 5:30 p.m. on November 21, 2018, defendants Thiry and She arrested him, handcuffed him "tightly" behind his back, and took him to the Department's headquarters ("Police Station"). *See id.* at 6–7. There, "the officers [allegedly] locked [him] in a holding cell whose concrete floor and bench were wet with some cleaning chemical[,] which [caused] toxic fumes [that were] irritating and [choking]." *Id.* at 7. According to plaintiff, he "complained to the officers that the handcuffs were very tight and were cutting [his] wrists, asking that the handcuffs be loosened or removed but the officers said no." *Id.* Plaintiff further alleges that defendant She "said that [plaintiff was] in big trouble and . . . [had] a crazy accent[]

and asked where [he] came from." *Id.* Plaintiff adds that he told defendant She that he came "from Africa," whereupon defendant She allegedly said that that "makes it even worse." *Id.*

Plaintiff alleges that he lay "on [his] belly on the floor and at time struggled . . . on [the] concrete[,] bench-like slab since [he] could not lay on [his] back due to the hurting cuffs." *Id.* Plaintiff further alleges that he "again called on the officers and told them that the fumes from the floor were affecting [him] when [he] breathe[d] but no help or attention was offered to [him]." *Id.*

According to plaintiff, defendants Dier and Muse "were present" at some point. *Id.* At that time, plaintiff "once again asked for some water to drink, to use [the] bathroom and [said] that the cuffs were injuring [him] and [that] the floor['s] toxic fumes [were] hurting and affecting [him]." *Id.* Plaintiff adds that, instead of attention[,] they all together continued chatting and laughing and just ignored [his] pleas." *Id.*

Plaintiff alleges that, at 1:34 a.m. the following day, defendant Muse took him to "a different room with [defendant Dier] for interrogation." *Id.* at 8. Plaintiff further alleges that he told defendant Muse that his handcuffs were "tight and hurting [him]," whereupon defendant Muse removed them. *Id.* Plaintiff adds that, "when [he] asked for some water to drink," defendants Muse and Dier gave him "a glass of water." *Id.*

Plaintiff alleges that, based on this "needless mistreatment," he "suffered cuts, bruises, [and] swelling on his wrists after [a] long period of very tight handcuffs [with] his hands behind his back." *Id.* at 9. Plaintiff further alleges that he sustained bruises, scars, and "swelling on his knees after kneeling and struggling on the floor for many hours." *Id.* Additionally, plaintiff avers that, because he was exposed to "toxic chemicals," he "continues to experience chest pains, respiratory complications, [and] some chest inflammation[.]" *Id.* at 10.

Based on these allegations, plaintiff alleges that defendants violated the Eighth Amendment, the Equal Protection Clause, and 42 U.S.C. § 1981. *Id.* at 11. Plaintiff seeks damages and injunctive and declaratory relief. *Id.* at 24–25.

PROCEDURAL BACKGROUND

Plaintiff filed his complaint. Dkt. 5. Defendants answered and the Court issued a scheduling order. Dkts. 15–16. On October 8, 2021, plaintiff filed a motion for summary judgment. Dkt. 23. Defendants filed a response. Dkt. 27. Plaintiff did not reply.

On November 1, 2021, defendants filed a motion for summary judgment. Dkt. 34. Plaintiff filed a response. Dkt. 48. Defendants replied. Dkt. 50.

SUMMARY JUDGMENT STANDARD

Summary judgment is only proper where the materials in the record show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a), (c). "A 'material' fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citation omitted). A disputed material fact is genuine only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation and internal quotation marks omitted).

When reviewing a motion for summary judgment, the court must believe the nonmoving party's evidence and draw all reasonable inferences in his or her favor. *T.W. Elec. Serv.*, 809

F.2d at 630–31. Also, the court must avoid weighing conflicting evidence or making credibility determinations. *Id.* at 631.

"A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data." *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) (citation omitted). "Likewise, mere . . . speculation do[es] not create a factual dispute for purposes of summary judgment." *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th Cir. 1996) (citation omitted). Moreover, "[a] mere scintilla of evidence supporting the non-moving party's position is insufficient[to survive summary judgment]." *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1146 (9th Cir. 2005) (citation omitted).

THE PARTIES' EVIDENCE

I. Plaintiff's Evidence

To support his motion for summary judgment, plaintiff submitted an affidavit. Dkt. 24. Plaintiff did not clearly sign the affidavit under penalty of perjury. Rather, he states: "It is my true belief that I am entitled to relief and [] summary judgment as a matter of law; . . . that what I *deponed* herein is true and correct to the best of my knowledge and belief." *Id.* at 3 (emphasis added).

It is debatable whether this language constitutes verification under 28 U.S.C. § 1746. However, one meaning of "depone" is "to declare under oath, esp. in writing[.]" https://www.collinsdictionary.com/us/dictionary/english/depone. Therefore, considering plaintiff's *pro se* status, the undersigned liberally construes the subject language and finds that plaintiff has adequately verified his affidavit. *Cf. Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999) ("[Section] 1746 requires only that the

declaration 'substantially' comply with the statute's suggested language." (citation omitted)). As a result, the Court will consider the affidavit's statements as evidence.

But the Court will not consider the allegations in plaintiff's complaint as evidence. Plaintiff filed his complaint on this District's § 1983 form, which does not require verification. *See* Dkt. 5 at 23; *see also McKinnon v. Nikula*, No. 3:20-CV-5367-BHS-DWC, 2021 WL 6118742, at *1 (W.D. Wash. Nov. 17, 2021) (not considering allegations in § 1983 form as evidence on summary judgment), *report and recommendation adopted*, 2021 WL 6112647 (W.D. Wash. Dec. 27, 2021). Likewise, because plaintiff did not verify his response to defendants' motion for summary judgment, the Court will not consider its allegations as evidence. *Cf. Johnson v. Meltzer*, 134 F.3d 1393, 1400 (9th Cir. 1998) ("Like a verified complaint, a verified motion functions as an affidavit." (citation omitted)).

In his affidavit, which is being considered as evidence, plaintiff alleges:

- On November 21, 2018, between 5:00 and 5:30 p.m., defendants Thiry and She arrested him and tightly handcuffed him behind his back.
- Defendants Thiry and She asked plaintiff where he was from due to his thick accent and, when plaintiff told them, they replied that that made it worse and that plaintiff was in big trouble.
- All defendants refused to uncuff him in the holding cell and watched him through the glass for over eight hours "struggling" on the concrete. He alleges that the handcuffs were so tight that they cut, bruised, and injured his wrists. Also, plaintiff's knees suffered bruising and swelling due to the floor.
- The holding cell floor was wet with a toxic chemical whose fumes were choking and irritating.

- Plaintiff was denied water to drink and use of the bathroom the entire time he was in the holding cell.
- After almost nine hours, plaintiff was removed from the holding cell for interrogation.

Dkt. 24 at 1–2.

Plaintiff also attaches documents to his response, Dkt. 48 at 27–58, the material ones of which the Court addresses in the legal analysis section below.

None of the supporting materials substantiate plaintiff's bare assertions above. In fact, other than this affidavit, plaintiff has produced no evidence to support his allegations. And much of the uncontradicted evidence contradicts plaintiff's assertions.

II. Defendants' Evidence

On November 21, 2019, shortly before 5:30 p.m., defendants Thiry and She were dispatched to an area in Tacoma regarding a distress call. Dkt. 36 at 168; Dkt. 40 ¶ 3; Dkt. 44 at ¶ 3. The dispatcher advised them that a teenage female was being harassed by a male with a heavy accent. Dkt. 36 at 168; Dkt. 44 ¶ 3.

When they arrived, defendants Thiry and She separated the female and the male, later identified as plaintiff. Dkt. 44 ¶ 4. The female stated that plaintiff had pulled her into an alley and put his penis in her mouth and was spitting on the sidewalk in disgust. Dkt. 36 at 206–07; Dkt. 40 ¶¶ 5–6; Dkt. 44 ¶¶ 4, 7. Defendant Thiry observed plaintiff "to have a heavy accent." Dkt. 44 ¶ 5. According to defendant Thiry, he asked plaintiff where he was from and plaintiff replied Kenya. *Id.*

Defendant Thiry detained plaintiff by handcuffing him behind his back with his palms together. Dkt. 44 ¶ 6. Defendant Thiry declares, and plaintiff does not dispute, that this method

conformed to his training and served to ensure defendant Thiry's safety. *Id.* Although plaintiff disputes this, defendant Thiry further declares that officers are "careful not to make [the handcuffs] too loose or too tight." *Id.*

After defendants She and Thiry questioned the female victim, defendant Thiry transported plaintiff to the Police Station. *Id.* ¶¶ 8–10; Dkt. 40 at ¶¶ 6–7. Defendant She "transported [the victim] to the Emergency Department at Mary Bridge Children's Hospital for evaluation and treatment." Dkt. 38 ¶ 11; Dkt. 40 ¶ 7.

Defendant Thiry declares that he placed plaintiff in a holding cell at 6:31 p.m. Dkt. 44 ¶ 13; Dkt. 39 at 11, 13. Plaintiff has not clearly disputed this assertion. Plaintiff merely states that he was arrested between 5:00 p.m. and 5:30 p.m. and held in the holding cell for nearly nine hours. Defendants' records show that defendants Thiry and She were dispatched to the scene shortly before 5:30 p.m. Dkt. 36 at 168. And it is undisputed that, after investigating the incident, defendant Thiry transported plaintiff to the police station, which would have taken some time. Therefore, a reasonable juror could only conclude that plaintiff was placed in the holding cell at 6:31 p.m.

It is undisputed that, at this time, an investigation of the victim's allegations was ongoing. Defendant Muse declares, and plaintiff does not dispute, that the "sexual assault examination led to a delay in the forensic interview of the [victim]." Dkt. 38 ¶ 12. Defendant Muse further declares, and plaintiff does not dispute, that defendant Muse "authored a Pierce County Superior Court Search Warrant for [plaintiff's] person and clothing" at this time." *Id.* It is also undisputed that the investigation and preparation of the search warrant continued until November 22, 2018 at 1:14 a.m., at which time defendant Muse "emailed a copy of [his] affidavit for the search warrant to" the "on-call Pierce County Superior Court judge." *Id.* at 5, 17. Additionally, it is

undisputed that the judge authorized defendant Muse to sign the search warrant on her behalf at 1:18 a.m. *Id.* at 5, 15, 17.

Defendant Thiry declares that plaintiff was removed from the holding cell at 11:00 p.m. and submits prison records to support this assertion. Dkt. 44 ¶ 13; Dkt. 39 at 11, 13. However, the evidence supports a reasonable inference that plaintiff was taken directly from the holding cell to the interview room. *See* Dkt. 36 at 15; Dkt. 38 ¶ 17 ("[Plaintiff] was cuffed at the time he was taken from the temporary detention area to the interview room."). Furthermore, the video recording of plaintiff's interview at the Police Station shows that the interview started at 1:33 a.m. Dkt. 37, Interview Video at 01:33:15 a.m.; *see also* Dkt. 36 at 44. Therefore, drawing all reasonable inferences in plaintiff's favor, a reasonable juror could find that plaintiff did not leave his holding cell until approximately 1:30 a.m. Thus, a reasonable juror could conclude that plaintiff was in the holding cell for approximately seven hours (6:31 p.m. until approximately 1:30 p.m.).

The Police Station's temporary detention area has four rooms with windows so that occupants can be monitored. Dkt. 39 ¶ 4; Dkt. 44 ¶ 11. Per the Department's "Detention—Temporary Detention Rooms" policy ("Policy"), an officer who has secured a detainee in one of the holding cells is responsible for the detainee's well-being. Dkt. 39 at 6–7. This responsibility includes "[v]isual observation of the detainee . . . at least once every thirty . . . minutes." *Id.* at 7.

Defendant Thiry contends that, consistent with the Policy, he checked on plaintiff at least every thirty minutes. Dkt. 44 ¶ 15. To support this statement, defendant Thiry notes that, on the Detention Form, he "marked an 'X' every time [he] had visual or other contact with [plaintiff] (sometimes more than once in 30 minutes)." Dkt. 44 ¶ 14; Dkt. 39 at 11. Plaintiff declares that

defendants watched him through the glass while he was in the holding cell, which is generally consistent with defendant Thiry's statements.

Escorted by defendant Muse, plaintiff entered the interview room at 1:30 a.m. Dkt. 37, Interview Video at 01:30:35 a.m. Defendant Muse removed plaintiff's handcuffs as soon as they entered the interview room. *Id.* at 01:30:52. At that time, plaintiff said that his wrists were uncomfortable. *Id.* at 1:30:56; Dkt. 38 ¶ 19. Defendant Muse quickly touches plaintiff's right wrist and does not say anything else about the matter. Shortly thereafter, plaintiff quickly stretches his wrists then touches his left wrist. Dkt. 37, Interview Video at 1:31:07–1:31:10. For the rest of the interview, plaintiff does not take any actions indicating wrist discomfort or voice any further complaints about his wrists. Although the video does not afford the clearest view of plaintiff's wrists, the record contains no objective medical evidence to support plaintiff's assertion that the tight handcuffing caused him wrist injuries. Likewise, plaintiff displayed no obvious signs of respiratory distress during the interview.

Defendant Dier gave plaintiff a cup of water at the start of the interview. *Id.* at 1:32:57. It is unclear whether plaintiff asked or if defendants offered it. During a pause in the interview, plaintiff gestured that he would like some more water. *Id.* at 02:39:35. Defendant Dier brought him more water when she returned to the room. *Id.* at 02:47:35. Plaintiff did not ask for water again on the video. Nor did he complain about having been denied water while he was in the holding cell.

At the start of the interview, defendant Muse told plaintiff that he could take a bathroom break during the interview and that he could "arrange for that a little bit later." *Id.* at 1:34:09–1:34:15. Plaintiff did not ask to use the bathroom on the video. Nor did he complain about having been denied use of the bathroom while in the holding cell.

After defendants Muse and Dier interviewed plaintiff, defendant Muse read the search warrant to him. *Id.* at 2:50:59–2:53:47. Plaintiff's "penis was swabbed with sterile cotton swabs as described on the warrant; the purpose was to collect any trace DNA belonging to the [victim]." Dkt. 38 at 8, 12. Also, plaintiff's "pants and underpants were taken as evidence, as described on the warrant." *Id.* Defendant Muse declares, and plaintiff does not dispute, that this "was especially important if [the victim's] DNA was found (as it ultimately was) under the three layers of clothing that [plaintiff] was wearing, since [plaintiff] maintained that he had never exposed his genitals to [the victim] or had any contact with her under his clothing." *Id.* ¶ 26.

After defendants interviewed plaintiff and swabbed him, defendant Muse handcuffed plaintiff in preparation for his transport to the Pierce County Jail ("Jail"). Plaintiff stated that the handcuffs were "so tight," whereupon defendant Muse loosened them. Dkt. 37, Interview Video at 03:08:39. A few minutes later, plaintiff asked defendant Muse to "unhook" the handcuffs at the Jail, to which defendant Muse responded that the handcuffs would be removed at the Jail. *Id.* at 03:12:36–52. Thereafter, plaintiff was transported to the Jail on charges of second-degree rape and unlawful imprisonment. Dkt. 38 ¶ 27.

LEGAL ANALYSIS

I. Eighth Amendment

When the alleged events underlying the complaint took place, plaintiff had been arrested, but not convicted of a crime. Dkt. 28 at 21. "Eighth Amendment protections apply only once a prisoner has been convicted of a crime." *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1246 n.5 (9th Cir. 2016) (citation omitted). So defendants are entitled to judgment as a matter of law on plaintiff's Eighth Amendment claim.

II. Fourteenth Amendment

The parties both contend that plaintiff was a pretrial detainee when the alleged events underlying the complaint took place and analyze plaintiff's Eighth Amendment claim as a Fourteenth Amendment claim. *See, e.g.*, Dkt. 34 at 11; Dkt. 48 at 9–10. Consistent with the parties' briefs, the Court analyzes plaintiff's allegations of unlawful conditions of confinement under the Fourteenth Amendment. *See Castro v. Cty. of Los Angeles*, 833 F.3d 1060, 1067–68 (9th Cir. 2016) ("Inmates who sue prison officials for injuries suffered while in custody may do so under the Eighth Amendment's Cruel and Unusual Punishment Clause or, if not yet convicted, under the Fourteenth Amendment's Due Process Clause." (citation omitted)).

For a plaintiff to prove that a defendant has exposed him to conditions of confinement that violate due process, he must show that: "(i) the defendant made an intentional decision with respect to the conditions under which the plaintiff was confined; (ii) those conditions put the plaintiff at substantial risk of suffering serious harm; (iii) the defendant did not take reasonable available measures to abate that risk, even though a reasonable official in the circumstances would have appreciated the high degree of risk involved—making the consequences of the defendant's conduct obvious; and (iv) by not taking such measures, the defendant caused the plaintiff's injuries." *Gordon v. Cty. of Orange*, 888 F.3d 1118, 1125 (9th Cir. 2018) (citation omitted); *see also Stewart v. Maricopa Cty. Jail*, No. 21-15061, 2021 WL 4893342, at *1 (9th Cir. Oct. 20, 2021) (indicating that test stated in *Gordon* applies to a pretrial detainee's claim of unconstitutional conditions of confinement (citation omitted)).

"With respect to the third element, the defendant's conduct must be objectively unreasonable, a test that will necessarily turn on the facts and circumstances of each particular case." *Gordon*, 888 F.3d at 1125 (alteration adopted) (citations and internal quotation marks

omitted). "The mere lack of due care by a state official does not deprive an individual of life, liberty, or property under the Fourteenth Amendment." *Id.* (citation and internal quotation marks omitted). "Thus, the plaintiff must prove more than negligence but less than subjective intent—something akin to reckless disregard." *Id.* (citation and internal quotation marks omitted).

Here, plaintiff's bare allegations constitute a scintilla of evidence.

However, there is no objective medical evidence to support plaintiff's contentions of respirtatory distress and injuries to his wrists and knees. True, regarding the alleged toxic chemical, plaintiff notes that he submitted a kite in May 2020 stating that he had a lump on his breast and had been experiencing sharp pain "for weeks." Dkt. 48 at 17, 27. However, plaintiff declares that defendants exposed him to the toxic chemical in November 2018. The alleged fact that plaintiff had been experiencing sharp pain "for weeks" before May 2020 does not reasonably suggest a causal relationship between the alleged exposure and plaintiff's subsequent development of breast lumps. Moreover, plaintiff's ultrasound report states that the lumps were benign and did not attribute them to the exposure of any toxic chemical. *Id.*

The video of plaintiff's interview also fails to support plaintiff's contention of respiratory distress and physical injury based on confinement in the holding cell. Plaintiff does not display any signs of respiratory distress on the video. Furthermore, despite his allegations of bruising and swelling to his knees, plaintiff walked into the interview room in no apparent distress. Likewise, when examined with his pants down, although it was not the focus of the examination, there is nothing on the video to indicate any problem with his knees. At no point in the video does plaintiff complain about having "struggled" on the holding cell's floor or any resulting injury to his knees.

Granted, plaintiff says that his wrists were uncomfortable when he entered the room handcuffed. As noted, however, there is no objective evidence in the record that he sustained cuts, bruises, or any other injury from the allegedly tight handcuffing. Indeed, plaintiff concedes that his wrists were "not bleeding," *see* Dkt. 48 at 18, which undermines his assertion that the handcuffs cut him.

Furthermore, the video does not support plaintiff's contention that defendants put him at substantial risk of serious harm by denying him bathroom use and water in the holding cell. Although defendant Muse tells plaintiff he can use the bathroom at the start of the interview, plaintiff does not ask to use the bathroom on the video, which lasts over 1.5 hours. True, defendant Dier gave plaintiff a cup of water at the start of the interview, and it is possible that plaintiff asked for it. But plaintiff does not display any obvious signs of excessive thirst at the start of the interview. Additionally, although plaintiff gestures to defendant Dier that he wanted more water later in the interview, one would reasonably expect a suspect to ask for more water after detectives have interviewed him for over an hour. Moreover, at no point in the video does plaintiff complain that any defendant denied his requests for water or bathroom use. In short, the video does not support plaintiff's contention that defendants' denial of water and bathroom use while he was in the holding cell harmed him or caused him significant discomfort.

The record also reflects that defendants had an objectively reasonable basis to keep plaintiff handcuffed in the cell and to deny him water and bathroom use. It is undisputed that, while plaintiff was in the holding cell, a sexual assault investigation was ongoing and defendants were preparing a search warrant. If plaintiff's hands had been free, he might have been able to touch his genitals, potentially interfering with the detectives' lawful task of collecting evidence from him. Likewise, if plaintiff had gone to the bathroom, he might have been able to destroy

potential evidence by washing himself. *See* Dkt. 44 ¶ 15. Similarly, the officers reasonably could have believed that the detectives would need to swab plaintiff's mouth for DNA and that water consumption could potentially frustrate that task. *See id.* ¶ 14. True, there is no evidence that these concerns were defendants' *subjective* motivation for allegedly leaving plaintiff handcuffed and denying him water and bathroom use. However, to prove that defendants recklessly disregarded his conditions of confinement, plaintiff must show that defendants' conduct was *objectively* unresasonable. *Gordon*, 888 F.3d at 1125. Here, plaintiff was the prime suspect in a sexual assault investigation. Furthermore, the undisputed evidence shows that the detectives diligently sought to obtain a search warrant while plaintiff was in the holding cell and interviewed him shortly after they obtained the warrant. On these facts, a reasonable juror could only conclude that keeping plaintiff in the holding cell for seven hours in the conditions described above was objectively reasonable.

In sum, plaintiff has only provided a scintilla of evidence to support his claim that defendants exposed him to unlawful conditions of confinement—his affidavit. However, the affidavit's bare allegations of injuries lack objective evidentiary support and are largely contradicted by the interview video. Furthermore, the undisputed evidence shows that defendants had an objectively reasonable basis to keep plaintiff handcuffed in the holding cell and deny him water and bathroom use. Accordingly, no reasonable juror could conclude that defendants recklessly disregarded a substantial risk of serious harm to plaintiff in violation of the Fourteenth Amendment.

Plaintiff further argues, in essence, that his conditions of confinement violated due process because they were punitive. *See* Dkt. 48 at 11–12; *see also* Dkt. 34 at 16–18 (defendants addressing this argument); *see generally Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the

Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." (citations omitted)).

"[T]he Government [] may detain [a pretrial detainee] to ensure his presence at trial and may subject him to the restrictions and conditions of the detention facility so long as those conditions and restrictions do not amount to punishment. . . ." *Bell*, 441 U.S. at 536–37. However, "[n]ot every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense." *Id.* at 537. "A court must decide whether the disability is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Id.* at 538 (citation omitted).

"'[P]unishment' can consist of actions taken with an 'expressed intent to punish.'" *Kingsley v. Hendrickson*, 576 U.S. 389, 398 (2015) (quoting *Bell*, 441 U.S. at 538). Furthermore, "in the absence of an expressed intent to punish, a pretrial detainee can nevertheless prevail by showing that the actions are not 'rationally related to a legitimate nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose.'" *Id.* (quoting *Bell*, 441 U.S. at 561). In determining whether actions are rationally related to a legitimate nonpunitive purpose or appear excessive in relation to that purpose, courts must consider "objective evidence." *Id.*

Here, no reasonable juror could conclude that plaintiff's conditions of confinement amounted to punishment. Even if the Court were to accept plaintiff's bare assertions that he was handcuffed behind his back in a holding cell for seven hours and denied water and bathroom use, these facts do not, absent more, support a reasonable finding that defendants *expressly* intended to punish plaintiff by exposing him to these conditions. True, plaintiff states that defendants Thiry and She asked where he was from and, after he responded, told him that that made it worse

and that he was in big trouble. However, there is no evidence that these alleged statements were driven by discriminatory intent. The dispatcher told defendants Thiry and She that the perpetrator of the alleged offense had a thick accent. So defendant Thiry had a legitimate reason (identification) to ask plaintiff where he was from when he arrived on the scene. Dkt. 44 ¶ 5. Likewise, defendant Muse reasonably asked plaintiff about his background to ensure that plaintiff spoke English sufficiently well to participate in the interview. Dkt. 38 ¶¶ 21–22.

Nor could a reasonable juror conclude that leaving plaintiff handcuffed in a holding cell for seven hours without water or bathroom use lacked a rational relationship to a legitimate governmental purpose or was excessive in relation to that purpose. As discussed, the officers had an objectively reasonable basis to keep plaintiff in such conditions while the sexual assault investigation was ongoing and the detectives sought to obtain a search warrant. When analyzing whether governmental action is rationally related to a legitimate governmental purpose or excessive in relation thereto, "subjective considerations" are irrelevant. *See Kingsley*, 576 U.S. at 399. Accordingly, a reasonable juror could only conclude that plaintiff's conditions of confinement did not constitute punishment under the Due Process Clause.

Plaintiff also contends that his conditions of confinement were "conscience shocking" in violation of due process. Dkt. 48 at 13. "The substantive due process standard requires showing that an officer engaged in an abuse of power that shocks the conscience and violates the decencies of civilized conduct." *Tobias v. Arteaga*, 996 F.3d 571, 584 (9th Cir. 2021) (alteration adopted) (citation and internal quotation marks omitted).

Here, no reasonable juror could conclude that defendants' conduct constituted an abuse of power that shocked the conscience or violated the decencies of civilized conduct.

Therefore, summary judgment should be granted to defendants on plaintiff's Fourteenth Amendment claim.

III. Fourth Amendment

Defendants also treat plaintiff's contention that his handcuffs were too tight as a standalone claim and analyze it under Fourth Amendment standards. *See* Dkt. 34 at 15–16. "Excessive force against an arrestee while detained in custody post-arrest but pre-arraignment is analyzed under the Fourth Amendment reasonableness standard." *Kramer v. Gutierrez*, No. 19-CV-04168-HSG, 2019 WL 3575077, at *2 (N.D. Cal. Aug. 6, 2019) (citing *Pierce v. Multnomah Cty., Or.*, 76 F.3d 1032, 1043 (9th Cir. 1996)). So, the Fourth Amendment applies to plaintiff's claim that defendants used overly tight handcuffs.

"*[A]ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.]" *Graham v. Connor*, 490 U.S. 386, 395 (1989) (emphasis in original). Whether an officer's use of force is "reasonable" "requires careful attention to the facts and circumstances of each particular case." *Id.* at 396 (citation omitted). Conclusory allegations unsupported by medical records or other documentary evidence are insufficient to survive summary judgment on a plaintiff's claim that defendants used excessive force by applying tight handcuffs, thus injuring him. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 922 (9th Cir. 2001). *But see Palmer v. Sanderson*, 9 F.3d 1433, 1436 (9th Cir. 1993) (denying summary judgment where the plaintiff contended that the defendant "fastened [] handcuffs so tightly around his wrist that they caused [him] pain and left bruises that lasted for several weeks" and refused "to loosen the handcuffs after [the plaintiff] complained of the pain").

Here, plaintiff's contention that defendants used overly tight handcuffs is not supported by substantial evidence, and, in fact, is contradicted by the objective evidence. First, there is no objective medical evidence to support his conclusory allegations. And while *Palmer* suggests that medical records are not always necessary to survive summary judgment on a claim of tight handcuffing, in this case, plaintiff's declaration that the tight handcuffing "cut, bruise[d ,] and injure[d] his wrists," Dkt. 24 at 2, is contradicted by his lack of apparent distress and failure to seriously complain about his wrists during the interview. *See supra* p. 10. Furthermore, in his affidavit, plaintiff does not specify how long his wrists stayed bruised or clearly state that he asked defendants to loosen the handcuffs while in the holding cell. *See* Dkt. 24 at 1–2. Additionally, pre- and post-*Palmer* cases denied summary judgment on tight handcuffing claims where, unlike here, the plaintiff sought medical attention for related injuries. *See Wall v. Cty. of Orange*, 364 F.3d 1107, 1110, 1112 (9th Cir. 2004); *LaLonde v. Cty. of Riverside*, 204 F.3d 947, 953, 960 (9th Cir. 2000); *Hansen v. Black*, 885 F.2d 642, 645 (9th Cir. 1989). So *Palmer* is inapposite.

In sum, no reasonable juror could conclude that defendants used overly tight handcuffs on plaintiff in violation of the Fourth Amendment.

IV. Equal Protection Clause

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (citation and internal quotation marks omitted). "To state a claim under 42 U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an

intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Furnace v. Sullivan*, 705 F.3d 1021, 1030 (9th Cir. 2013) (citation omitted).

Furthermore, "[w]here . . . state action does not implicate a fundamental right or a suspect classification, the plaintiff can establish a 'class of one' equal protection claim by demonstrating that it 'has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 944 (9th Cir. 2004) (quoting *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)).

Here, a reasonable juror could not conclude that defendants intentionally discriminated against plaintiff based on his race and/or nationality. Plaintiff alleges that defendants Thiry and She asked where he was from and, after he told them, said that that made it worse and that he was in big trouble. Without more, this conclusory allegation does not support a reasonable finding that defendants intentionally discriminated against plaintiff based on his race and/or nationality. As discussed, defendant Thiry had a legitimate law enforcement purpose to ask plaintiff where he was from. The alleged fact that he and defendant She told plaintiff this made it worse and that he was in big trouble does not, absent more, support a reasonable finding that they made that remark to deny him equal protection under the law. No evidence links this isolated, allegedly "discriminatory remark[]" to plaintiff's conditions of confinement. *Cf. Mustafa v. Clark Cty. Sch. Dist.*, 157 F.3d 1169, 1180 (9th Cir. 1998) ("To establish a claim of discrimination, there must be a sufficient nexus between the alleged discriminatory remarks and the adverse employment decision." (citation omitted)).

Plaintiff also contends that defendants violated equal protection because "the other persons in the other cells were not being tightly cuffed [behind] their backs." Dkt. 48 at 18–19. This allegation is conclusory as well. Plaintiff does not identify the race and/or nationality of

these persons or explain how they were similarly situated to him. Furthermore, plaintiff so contends in this response, whose unverified contentions do not count as evidence on summary judgment.

In sum, no reasonable juror could conclude that defendants violated the Equal Protection Clause.

V. 42 U.S.C. § 1981

Section "1981 . . . was meant, by its broad terms, to proscribe discrimination in the making or enforcement of contracts against, or in favor of, any race." *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003) (citation and internal quotation marks omitted). Section 1981 is "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987); *see also Mustafa*, 157 F.3d at 1180 (to prevail on § 1981 claim, plaintiff "must prove that the defendants acted with intent to discriminate" (citation omitted)).

Here, plaintiff's § 1981 claim fails as a matter of law. Plaintiff has not "identif[ed] an impaired contractual relationship . . . under which [he] has rights." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006) (citation and internal quotation marks omitted). Furthermore, as discussed above, plaintiff's evidence does not support a reasonable finding that defendants intentionally discriminated against him. In short, plaintiff's § 1981 claim presents no genuine issues for trial.

VI. Plaintiff's Motion for Summary Judgment

The above analysis is dispositive of plaintiff's motion for summary judgment. As discussed, no reasonable juror could rule in plaintiff's favor on any of his claims. It follows that

a reasonable juror could conclude that defendants did not violate plaintiff's constitutional rights as he alleges.

The Court notes plaintiff's contention in his motion for summary judgment that defendants failed to respond to certain discovery requests. Dkt. 23 at 1. However, plaintiff submits responses to some of these discovery requests with his response to defendants' motion for summary judgment. Dkt. 48 at 47–53. It appears that defendants provided plaintiff the discovery he sought after he filed his motion for summary judgment. So plaintiff's discovery objection is moot.

In short, plaintiff's motion for summary judgment should be denied.

IN FORMA PAUPERIS ("IFP") STATUS ON APPEAL

Plaintiff should be granted IFP status for purposes of an appeal of this matter. IFP status on appeal shall not be granted if the district court certifies "before or after the notice of appeal is filed" "that the appeal is not taken in good faith[.]" *See* Fed. R. App. P. 24(a)(3)(A). "The good faith requirement is satisfied if the petitioner seeks review of any issue that is not frivolous." *Gardner v. Pogue*, 558 F.2d 548, 551 (9th Cir. 1977) (citation and internal quotation marks omitted). Generally, an issue is not frivolous if it has an "arguable basis either in law or in facts." *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989). Because an appeal from this matter would not be frivolous, IFP status should be granted for purposes of appeal.

CONCLUSION

As discussed above, it is recommended that defendants' motion for summary judgment (Dkt. 34) be **GRANTED** and that plaintiff's motion for summary judgment (Dkt. 23) be **DENIED**.

Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have fourteen (14) days from service of this report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a result in a waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140, 142 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the matter for consideration on **February 25, 2022** as noted in the caption.

Dated this 7th day of February, 2022.

J. Richard Creatura
Chief United States Magistrate Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL MUTHEE MUNYWE,

Plaintiff,

v.

JULIE DIER, *et al.*,

Defendants.

CASE NO. 3:21-cv-05218-BJR-JRC

ORDER ADOPTING REPORT AND RECOMMENDATION

The Court, having reviewed the report and recommendation of Magistrate Judge J. Richard Creatura, objections to the report and recommendation, if any, and the remaining record, does hereby find and **ORDER**:

(1) The Court **adopts** the report and recommendation.

(2) Defendants' motion for summary judgment (Dkt. 34) is **granted**.

(3) Plaintiff's motion for summary judgment (Dkt. 23) is **denied**.

(4) The Clerk is directed to **close** this case and **send** copies of this order to plaintiff, counsel for defendants, and to the Hon. J. Richard Creatura.

DATED this () day of ()/2022.

Benjamin H. Settle
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MICHAEL MUTHEE MUNYWE,

Plaintiff,

v.

JULIE DIER, *et al.*,

Defendants.

JUDGMENT IN A CIVIL CASE

CASE NO. 3:21-cv-05218-BJR-JRC

__ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **Decision by Court**. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

THE COURT HAS ORDERED THAT

Defendants' motion for summary judgment (Dkt. 34) is **granted**. Plaintiff's motion for summary judgment (Dkt. 23) is **denied**.

Dated () XX, 2022.

Ravi Subramanian
Clerk of Court

Deputy Clerk

Honorable Barbara J. Rothstein

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

MICHAEL MUTHEE MUNYWE, Plaintiff, v. JULIE DIER; JEFFREY THIRY; BRIAN SHE; and WILLIAM MUSE, Defendants.	No.: 21-cv-5218 BJR ORDER ADOPTING REPORT AND RECOMMENDATION; GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT; DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT; AND DISMISSING COMPLAINT

I. INTRODUCTION

Plaintiff Michael Munywe filed a complaint for damages and injunctive relief under 42 U.S.C. §1983, against Defendants Jeffrey Thiry, Brian She, Julie Dier, and William Muse (collectively, "Defendants"), who are patrol officers and detectives with the Tacoma Police Department. Munywe claims that during the several hours he was in Defendants' custody, he suffered violations of his rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution, and 42 U.S.C. § 1981, stemming from being tightly handcuffed, exposed to

cleaning fumes on the floor of his holding cell, and denied water and access to a bathroom. Plaintiff also alleges that Defendants made discriminatory remarks about his accent and national origin.

This matter comes before the Court on the Report and Recommendation ("R&R") of U.S. Magistrate Judge J. Richard Creatura, concerning cross motions for summary judgment filed respectively by Munywe and Defendants. Dkt. No. 52. The R&R recommends denying Plaintiff's Motion for Summary Judgment, Dkt. No. 23, granting Defendants' Motion for Summary Judgment, Dkt. No. 34, and dismissing Plaintiff's claims with prejudice. Plaintiff filed an Objection to the R&R. Dkt. No. 53. Having reviewed the R&R, the briefs and exhibits filed in support of and opposition to the Motions for Summary Judgment, and the Objection filed in response to the R&R, the Court finds and rules as follows.

II. BACKGROUND

The Report and Recommendation provides a thorough recitation of the underlying facts of this case, which need not all be repeated. In brief summary, Plaintiff was detained on the evening of November 21, 2018 on suspicion of sexual assault of a minor. He was transported to a Tacoma Police Department station by patrol officers, Defendants Thiry and She, and initially placed in a holding cell, where he was held for approximately seven hours pending investigation into the sexual assault allegations. Plaintiff claims that during this time, he was placed in "very tight handcuffs" in a manner that caused injury to his wrists and forced him to struggle on the concrete bench, resulting in bruising to his knees. He also claims the holding cell contained "toxic cleaning fumes," which were "irritating" and "choking" and have caused him continuing respiratory problems. In support of his discrimination claims, Plaintiff alleges

that Defendants asked where he was from, and when Plaintiff responded Kenya, they said, "it makes it worse" and he was "in big trouble." He further alleges that Defendants denied him both drinking water and access to the bathroom while he was in the holding cell. In support of his allegations, Plaintiff has submitted his own sworn statements, but no other relevant supporting documentation or evidence.[1]

Defendants have denied that Plaintiff was handcuffed in a manner that caused him injury. They claim that at the time, Plaintiff never expressed complaints about cleaning fumes, and that when he did ask for water and complained about his handcuffs being too tight, Defendants provided water and removed the cuffs. To the extent Plaintiff was for several hours denied water or access to the bathroom, Defendants argue, the denial could have been reasonably related to preventing Plaintiff from removing any potential evidence before a warrant could be issued authorizing swabs, relevant to the sexual assault investigation. Finally, Defendants argue that their inquiry into Plaintiff's accent and national origin was directly related to the sexual assault investigation, as there was indication that the suspect spoke with an accent. In support of their motion, Defendants have submitted several affidavits, and documentary, video, and photographic records of Plaintiff's detention at the police station.

Plaintiff was in the holding cell for approximately seven hours, while the victim underwent a sexual assault examination and the officers obtained a search warrant. Within

[1] The Court agrees with, and adopts, Magistrate Judge Creatura's analysis of Plaintiff's claimed evidence. *See* R&R, pp. 5-7. Conclusory arguments and unsworn allegations are not evidence. *See Soto v. Unknown Sweetman*, 882 F.3d 865, 872 (9th Cir. 2018) (finding pro se inmate's unsworn responses to defendant's motion for summary judgment was not competent evidence; pro se inmates are not "entirely release[d] ... from any obligation to identify or submit some competent evidence[.]"). Thus, as the R&R concludes, the only competent and relevant evidence Plaintiff has submitted are his affidavits.

minutes of a judge authorizing the warrant, Plaintiff was escorted from the holding cell and placed in an interview room, where Defendants removed his handcuffs and gave him water.

III. DISCUSSION

A. Eighth Amendment Claim

The R&R recommends dismissal of Plaintiff's Eighth Amendment claim. As the R&R observes, and as Plaintiff does not dispute, Eighth Amendment protections against cruel and unusual punishment "apply only once a prisoner has been convicted of a crime." R&R at p. 11, (citing *Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1246 n.5 (9th Cir. 2016) (citation omitted)). It is undisputed that at the time of the events in question, Plaintiff had not yet been "convicted of a crime." The Court therefore adopts the R&R's conclusion as to this claim, which is hereby dismissed.

B. Fourteenth Amendment Claims

The R&R analyzes Plaintiff's claim of unconstitutional conditions of confinement under the Due Process Clause of the Fourteenth Amendment, and concludes that Plaintiff has failed to provide evidence supporting his claim. R&R at pp. 12-18. In particular, the R&R emphasizes the lack of evidence of injury to Plaintiff's wrists or knees, or of any respiratory distress that may have been caused by the alleged "toxic cleaning chemicals" in the holding cell, either in the form of a medical record or request for medical attention, or visual evidence available from the photographs and videotaped interview of Plaintiff while he was at the station.[2] In fact, while

[2] Plaintiff has submitted a kite and a medical bill from 2020, related to an examination of a lump in his breast (a condition known as "gynecomastia"), which Plaintiff at the time had been experiencing "for weeks." *See* Exs. 1 & 2 to Pl.'s Resp., Dkt. No. 48. Plaintiff suggests the condition is somehow causally related to the fumes to which he was allegedly exposed in the holding cell. There is no evidence that this condition has any causal relationship to exposure to toxic chemicals, or might otherwise be related in any way to Plaintiff's detention a year and a half earlier. This evidence is not probative of any of Plaintiff's allegations, and is thus immaterial.

Plaintiff alleges the handcuffs and holding cell floor caused bruises, swelling, and cuts to his wrists and knees, the R&R observes that the video and photographs taken at that time show no evidence of any injuries, or even of Plaintiff expressing any major discomfort in his knees or wrists.[3] Notably, although Plaintiff claims the situation caused "scarring" of his knees, he has failed to provide any photographic evidence of such scarring, which would presumably still be evident.

The R&R also notes that "the undisputed evidence shows that defendants had an objectively reasonable basis to keep plaintiff handcuffed in the holding cell and deny him water and bathroom use"—specifically, to prevent Plaintiff from destroying or washing off any evidence related to the sexual assault investigation, pending the issuance of a search warrant. R&R at p. 15.

Plaintiff's Objections in response to the R&R fail to provide any competent evidence supporting his allegation that he suffered injuries in the holding cell that might overcome Defendants' evidence to the contrary. He also fails to provide any evidence that might support a finding that under the circumstances, Defendants lacked a reasonable basis for the conditions of his confinement. Instead, Plaintiff repeatedly asserts variations on his claim that Defendants "have decided to lie to this Court." Objs. at 1. As noted, Plaintiff's unsworn statements are not evidence and in any event, they lack the factual specificity necessary to support his claims. As recommended by the R&R, Plaintiff's Fourteenth Amendment claims are dismissed.

[3] Early in the interview, after Defendants had removed his handcuffs, Plaintiff "touched" and "stretched" his wrists, and said they were "uncomfortable." There is no further indication in the video that Plaintiff's wrists or knees were in pain or injured. *See* R&R at 10 (citing Dkt. 37, Interview Video).

C. Fourth Amendment Claim

The R&R also analyzed Plaintiff's claim as one of excessive force in violation of the Fourth Amendment. *See* R&R, pp. 18-19. For the same reasons Plaintiff's Due Process claims fail, discussed above, his Fourth Amendment claim fails as well. Plaintiff has not submitted any competent evidence of injuries to his wrists or knees that would call into question Defendants' video and photographic evidence of *lack* of any injury. In the absence of such evidence and thus, of any dispute of material fact, Plaintiff's Fourth Amendment claim must also be dismissed.

D. Claims of Discrimination Based on Race/National Origin

As described above, Plaintiff claims that during his detention, Defendants asked where Plaintiff was from and inquired about his "thick accent," stating in response to Defendant's answer that he was from Kenya, that "that makes it even worse." These allegations, without more, fail to make out an Equal Protection claim. There is no evidence that these remarks were motivated by any racial or anti-immigrant animus, which Defendants instead deny. To the contrary, the inquiries clearly served a legitimate investigatory purpose, as the alleged assailant was reported to have spoken with an accent. Moreover, the detectives were attempting to verify that Plaintiff was capable of being interviewed in English without an interpreter present. *See* Decl. of William Muse, ¶¶ 21-22. Plaintiff's Objections to the R&R fail to remedy these deficiencies. In the absence of any evidence of intent to discriminate, Plaintiff's Fourteenth Amendment/Equal Protection claim fails.

The R&R also recommends dismissal of Plaintiff's claim brought under 42 U.S.C. §1981. That statute "has a specific function: It protects the equal right of '[a]ll persons within

the jurisdiction of the United States' to 'make and enforce contracts' without respect to race." *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 474 (2006) (quoting 42 U.S.C. § 1981(a)). Thus to state a claim, a plaintiff must "identify a contractual relationship" or "rights under the existing (or proposed) contract that [plaintiff] wishes to make and enforce." *Id.*, 546 U.S. at 479–80 (citations omitted). Plaintiff does not (and credibly could not) allege an actual or proposed contractual relationship here, or explain in what way he believes this statute might apply to the facts of this case. This claim is frivolous and, as the R&R recommends, should be dismissed.

IV. CONCLUSION

For the foregoing reasons:

(1) The Court adopts the Report and Recommendation;

(2) Defendants' Motion for Summary Judgment (Dkt. 34) is granted;

(3) Plaintiff's Motion for Summary Judgment (Dkt. 23) is denied; and

(4) The Clerk is directed to close this case and send copies of this order to Plaintiff, counsel for Defendants, and to the Hon. J. Richard Creatura.

DATED this 15th day of June, 2022.

Barbara Jacobs Rothstein
U.S. District Court Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 24 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL MUTHEE MUNYWE, Plaintiff-Appellant, v. JULIE DIER, Detective, Tacoma Police Department; JEFFREY THIRY, Police Officer; BRIAN SHE, Police Officer; WILLIAM MUSE, Detective, Tacoma Police Department, Defendants-Appellees.	No. 22-35511 D.C. No. 3:21-cv-05218-BJR Western District of Washington, Tacoma ORDER

Before: WALLACE, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

Munywe's petition for rehearing en banc (Docket Entry No. 16) is denied.