ATTACHMENT A

United States Court of Appeals for the Fifth Circuit

No. 20-40379

DENNIS WAYNE HOPE,

Plaintiff—Appellant,

versus

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

Defendants—Appellees.

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

ON PETITION FOR REHEARING EN BANC

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

PER CURIAM:

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

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

September 01, 2021

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 20-40379 Hope v. Harris
USDC No. 9:18-CV-27

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

Charles Whitney

By: _____
Charles B. Whitney, Deputy Clerk
504-310-7679

Mr. Amir H. Ali
Ms. Easha Anand
Mr. Jacob Frasch
Mr. Benjamin Isaac Friedman
Mr. Daniel Greenfield
Mr. John J. Hamill
Ms. Mary B. McCord
Mr. James McEntee
Mr. David O'Toole
Ms. Lanora Christine Pettit
Ms. Laura L. Rovner
Mr. Andrew T. Tutt

ATTACHMENT B

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
June 18, 2021
Lyle W. Cayce
Clerk

No. 20-40379

DENNIS WAYNE HOPE,

Plaintiff—Appellant,

versus

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

Defendants—Appellees.

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

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

PER CURIAM:*

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

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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

I.

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

Hope, originally proceeding pro se, filed this lawsuit against seven prison officials: Senior Warden Todd Harris, Major Chad Rehse, Deputy Director of Support Operations Leonard Eschessa, Assistant Director of Classifications Joni White, and three state classification committee members, Kelly Enloe, Melissa Benet, and Bonnie Fiveash (collectively, "Defendants"). Specifically, Hope brought a procedural due process claim under the Fourteenth Amendment and a retaliation claim under the First Amendment. He also brought an Eighth Amendment claim, alleging that the

conditions, including the duration, of his solitary confinement constitute cruel and unusual punishment. A magistrate judge recommended that Hope's complaint be dismissed for lack of standing but then proceeded to analyze the merits of Hope's claims, recommending that they be dismissed with prejudice. The district court, after a de novo review, overruled Hope's objections, adopted the magistrate judge's report and recommendation, and dismissed Hope's complaint with prejudice. Hope timely appealed with counsel.[1]

II.

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

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

Hope is a prisoner challenging the conditions of his confinement, and his classification within the prison system in an action against various prison officials. This is the prototypical mix of defendants in such cases. *Cf. Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (dismissing the Governor from a prisoner's action for, *inter alia*, Eighth Amendment violations on the basis of sovereign immunity but not dismissing the named prison official).

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

Against that backdrop, we first look to whether Hope has established standing as to each of his claims.

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

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

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Lujan v. Nat'l Wildlife Fed.*, 497 U.S. 871, 889 (1990)) (alterations in original). And "when the suit is one challenging the legality of government action or inaction," of which the prisoner is the object, then "there is ordinarily little question . . . that a judgment preventing or requiring the action will redress it." *Id.* at 561–62.

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

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

As to the retaliation claim, Hope has also alleged an injury-in-fact. Namely, he alleges that after filing a grievance, he suffered various retaliatory acts such as being moved to over 263 different cells and having his typewriter confiscated. He alleges that Defendants Warden Harris and Major Rehse have ordered these moves, which suffices at the pleading stage as a factual allegation that the injury resulted from Defendants' conduct. *Id.* at 560. And at this stage in the proceedings, his requested relief would redress this injury by, for example, enjoining the frequent cell moves. *See id* at 561–62 (explaining that where a plaintiff is the "object of the action (or forgone action) at issue," then "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it").

Finally, as to his Eighth Amendment claim, Hope has alleged that he has suffered "physical and psychological mal[a]dies due to the inhumane treatment and conditions" and has been denied "basic needs." He goes on to allege that "[e]ach of the Defendants in one capacity or another work together to ensure Mr. Hope continues to be subjected to these inhumane

conditions and have done so for a prolonged period of time." As such, Hope has alleged an injury-in-fact—his physical and psychological maladies—that is fairly traceable to Defendants in light of their roles in maintaining those conditions and Hope's confinement in those conditions. *See id.* at 560–61. Finally, Hope's requested relief is that he not be subjected to these "inhumane conditions," and so, because Hope is the object of the Defendants' continuation of these conditions, a judgment enjoining such actions would redress the alleged harm. *See id.* at 561–62.

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

We must also assure ourselves that this suit clears a second jurisdictional bar—state sovereign immunity. *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 333 n.8 (5th Cir. 2002) (noting that state sovereign immunity "bears on [the] court's subject-matter jurisdiction"). State sovereign immunity prohibits "private suits against nonconsenting states in federal court." *See City of Austin*, 943 F.3d at 997; *see also Hans v. Louisiana*, 134 U.S. 1, 13 (1890). And where a suit is effectively against the state, the

[3] The magistrate judge concluded that Hope lacked standing to bring this action because his claims were not redressable by Defendants. Specifically, the magistrate judge found that Hope's claims were not redressable because some of Defendants had left Hope's prison unit and that only the "Director" of the prison system, who was not named among Defendants and whom the magistrate judge did not offer any details about, could redress Hope's injuries. But this was an error. First, Hope brought, *inter alia*, official-capacity claims against Defendants, allowing the officials' successors to be automatically substituted, so it is of no moment that some of the Defendants have left Hope's unit. *Ganther v. Ingle*, 75 F.3d 207, 210 & n.7 (5th Cir. 1996); *see also* FED. R. APP. P. 43(c)(2) ("The public officer's successor is automatically substituted as a party."). Second, the magistrate judge's conclusion appears to rest on an assumption that the only way to redress Hope's injuries was releasing him from solitary confinement. But Hope's requested relief is not so limited. Indeed, Hope also requests that he not be subjected to certain conditions of confinement as well as receive additional process.

state officials enjoy the same sovereign immunity that would be afforded the state. *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1124 (2021); *City of Austin*, 943 F.3d at 997. In the absence of abrogation by Congress, waiver by the state, or application of an exception, state sovereign immunity bars suit. *Tex. Democratic Party*, 978 F.3d at 179.

Relevant here is the exception under *Ex parte Young*, 209 U.S. 123 (1908), which permits suits for prospective injunctive or declaratory relief against a state official acting in violation of federal law if there is a sufficient connection to enforcing the allegedly unconstitutional law. *See id.* We have made clear that enforcement means "compulsion" or "constraint" and that a plaintiff must at least show that the defendant has a particular duty to enforce the challenged conduct. *Id.*; *see also Tex. Democratic Party v. Hughs*, No. 20-50683, 2021 WL 1826760, at *2 (5th Cir. May 7, 2021). And we note that generally "all institutional litigation involving state prisons," such as this case, is brought under the *Ex parte Young* exception. *Brennan v. Stewart*, 834 F.2d 1248, 1252 n.6 (5th Cir. 1988). In fact, "[t]he exception is so well established [in that context] that" such cases often do not even "mention[] . . . *Ex parte Young*." *Id.*; *see also Kahey v. Jones*, 836 F.2d 948, 949 (5th Cir. 1988) ("To the extent her complaint [against the Warden] thus seeks prospective injunctive relief against the state, it does not contravene the eleventh amendment."). Finally, although analytically distinct questions, there is "significant[] overlap" between the Article III standing and the *Ex parte Young* inquiries. *See City of Austin*, 943 F.3d at 1002 (quoting *Air Evac EMS, Inc. v. Tex., Dep't of Ins. Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017)). And we note, too, that the standing inquiry can inform the state sovereign immunity inquiry. *See id.*

Against that backdrop, each of the Defendants whom Hope named and seeks prospective injunctive relief against has the authority to compel or constrain Hope's conditions of confinement by maintaining those conditions

and his placement within them.[4] *See, e.g.*, *Kahey*, 836 F.2d at 949 (noting that complaints against the prison warden do not contravene state sovereign immunity); *City of Austin*, 943 F.3d at 1001 (discussing a case where board members had the requisite authority for purposes of *Ex parte Young* because the board had the authority to decide whether to pay certain claims); *see also Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (explaining that under TEX. GOV'T CODE 501.063(b) the Texas Department of Criminal Justice is responsible for enforcing the challenged statutory provision). Therefore,

[4] First, Hope named Todd Harris, the Senior Warden, and in similar prison litigation, the warden is almost invariably named as a defendant. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 830 (1994) (naming the warden of the prison where the prisoner was housed). And it stands to reason that the prison warden would have a sufficient connection to enforcing the allegedly unconstitutional prison conditions by compelling or constraining certain practices. *See Tex. Democratic Party*, 978 F.3d at 179; *see also Kahey*, 836 F.2d at 949. Second, Hope named Major Chad Rehse, whose duties include overseeing the conditions of confinement and treatment of inmates in solitary confinement. Such duties satisfy the required connection to the challenged conduct because Major Rehse can compel or constrain certain challenged conditions of confinement. *See City of Austin*, 943 F.3d at 1001; *see also Southard v. Tex. Bd. of Crim. Just.*, 114 F.3d 539, 552 (5th Cir. 1997) (explaining that "[e]ach prison unit organizes the line of authority over its security personnel after a military chain of command: wardens, assistant wardens, majors, captains, lieutenants, sergeants, and correctional officers, in descending hierarchical order"). The same is true of Deputy Director of Support Operations Leonard Eschessa whose duties include managing the overall treatment, conditions of confinement, and classifications of inmates. *See Tex. Dep't of Crim. Just. v. Terrell*, 925 S.W.2d 44, 47 (Tex. App.—Tyler 1995, no pet.) (describing the chain of command). Assistant Director of Classifications Joni White is responsible for "the overall classifications," again satisfying the requisite connection by being in a position to compel or constrain classification of prisoners. *See Martinez v. Stephens*, No. CV H-16-0195, 2017 WL 607129, at *4 (S.D. Tex. Feb. 15, 2017) (describing the Assistant Director's role and responsibilities). Finally, when it comes to the three state classification committee members, they all have the authority to make final decisions regarding administrative segregation, which yet again satisfies the requisite connection in that the committee members are in a position to compel or constrain classification of prisoners. *See Wilkerson v. Goodwin*, 774 F.3d 845, 850 (5th Cir. 2014) (analyzing a claim where a prisoner in solitary confinement sued various prison officials, including two classification officers).

state sovereign immunity does not bar Hope's official-capacity claims for prospective injunctive relief.

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

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

In addition to his official-capacity claims, Hope also sought damages against Defendants in their *individual* capacities, which is permitted. *See Hafer*, 502 U.S. at 30–31. Here, however, neither the magistrate judge nor the district court ever considered these individual-capacity claims before dismissing the entire complaint with prejudice. But as "we are a court of review, not of first view," we do not pass on the individual-capacity claims and instead remand to the district court to consider these claims in the first instance. *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005); *In re Ultra Petroleum Corp.*, 943 F.3d 758, 766 (5th Cir. 2019).

III.

We review the district court's ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) de novo. *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In exercising this review, we will not dismiss a claim

"unless the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Alexander v. Verizon Wireless Servs., L.L.C.*, 875 F.3d 243, 249 (5th Cir. 2017). "We take all factual allegations as true and construe the facts in the light most favorable to the plaintiff." *Id.* Further, where, as here, the complaint was filed pro se, we liberally construe it. *Grant*, 59 F.3d at 524.

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

We turn first to Hope's procedural due process claim. And on this claim, we generally agree with the district court. To determine what process is due, we address two inquiries: "(1) whether there exists a liberty . . . interest which has been interfered with by the State and (2) whether the procedures attendant upon that deprivation were constitutionally sufficient." *Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 228–29 (5th Cir. 2020) (citation omitted).

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

Turning to the second inquiry, to determine what process is due, we look to the framework established in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which "requires consideration of three distinct factors," namely (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards," and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Austin*, 545 U.S. at 224-25 (quoting *Eldridge*, 424 U.S. at 335).

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

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

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

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

Finally, turning to the government's interest, Texas's "first obligation must be to ensure the safety of . . . the public." *Id.* at 227. Moreover, given the scarce resources of prison systems, we must "give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards." *Id.* at 228.

Based on the pleadings before us, Texas's interest in keeping the public safe from Hope, who has previously escaped, weighs in favor of finding that Hope has been given adequate process.

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

B. Hope has stated a claim for retaliation.

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

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

To show causation as part of his retaliation claim, in violation of his First Amendment rights, "a plaintiff must allege that, but for the retaliatory motive, the complained of incident would not have occurred." *Gonzales v. Gross*, 779 F. App'x 227, 230 (5th Cir. 2019) (citation and alterations omitted). That is, a prisoner must either (1) "produce direct evidence of motivation" or (2) "allege a chronology of events from which retaliation may plausibly be inferred." *Id.* (citation omitted).

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

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

Second, Hope alleges that after requesting video footage of a search of his cell, he was exposed to pepper spray and "left nude in a cell [for eight days] with the pepper spray still on his body and nothing to clean it off with." But, as alleged, the constitutional violation at issue is not clear, and we do not find that Hope has alleged a retaliation claim based on this incident.

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

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

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. CONST. amend. VIII. But long-term solitary confinement is not per se cruel and unusual. *Hutto v. Finney*, 437 U.S. 678, 686 (1978) (observing that it is "perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual"). Nevertheless, "[t]here is a line where solitary confinement conditions become so severe that its use is converted from a viable prisoner disciplinary tool to cruel and unusual punishment." *Gates v. Collier*, 501 F.2d 1291, 1304 (5th Cir. 1974). With that in mind, we focus our analysis of Hope's Eighth Amendment claim on whether the conditions of Hope's confinement are sufficiently "severe." *See id.*; *Farmer*, 511 U.S. at 834.

Of course, the Constitution does not require "comfortable" prison conditions, but the conditions of confinement may not "involve the wanton and unnecessary infliction of pain." *Rhodes v. Chapman*, 452 U.S. 337, 347, 349 (1981); *see also Daigre*, 719 F.2d at 1312 (noting that "the eighth

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

amendment forbids deprivation of the basic elements of hygiene") (citing *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971)).

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

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

As to the second requirement, the prisoner must show that the defendant acted with "more than mere negligence." *Farmer*, 511 U.S. at 835. To that end, the prisoner must show that those prison officials were (1) "aware of facts from which the inference could be drawn that a substantial

risk of serious harm exists"; (2) "subjectively drew the inference that the risk existed"; and (3) "disregarded the risk." *Cleveland v. Bell*, 938 F.3d 672, 676 (5th Cir. 2019) (citing *Farmer*, 511 U.S. at 837) (alterations omitted). More simply, the prison officials must know of, and disregard, an excessive risk to a prisoner's health or safety. *See id.* (citation omitted). Evidence that a risk was obvious or otherwise apparent may be sufficient to support an inference that the prison official was aware of the risk. *Estate of Cheney ex rel. Cheney v. Collier*, 560 F. App'x 271, 273–74 (2014) (collecting cases); *see also Valentine v. Collier*, 978 F.3d 154, 163 (5th Cir. 2020) (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)).

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

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

First, Hope has alleged that for over two decades he has been in solitary confinement in sometimes unsanitary conditions, including urine, feces, and mold on the walls, floor, and showers, insufficient cleaning

supplies, and exposure to pepper spray and tear gas without decontamination.[6]

We have previously found that similar unsanitary conditions in a prison cell can, in certain circumstances, rise to the level of cruel and unusual punishment. *See Taylor v. Stevens*, 946 F.3d 211, 219–20 (5th Cir. 2019), *cert. granted, judgment vacated on other grounds sub nom. Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Gates*, 501 F.2d at 1302; *Fussell v. Vannoy*, 584 F. App'x 270, 271 (5th Cir. 2014); *Smith v. Leonard*, 244 F. App'x 583, 584 (5th Cir. 2007). Here, among other allegations, Hope alleges that a wall was almost completely covered in black mold. According to Hope, he was in the mold-infested cell for two weeks and began coughing and was never given cleaning supplies to address the condition. This likely is sufficiently serious by itself. *See, e.g.*, *Smith*, 244 F. App'x at 584 (vacating the judgment and remanding an Eighth Amendment claim regarding a prison official's failure to remove "allegedly toxic mold" from prison); *cf. Taylor*, 946 F.3d at 219 (citation omitted) (observing that a cell "covered with crusted fecal matter, urine,

[6] Although Hope also challenges the types of meals he receives, including that some have made him sick, such challenges fail as a matter of law. *See Martin v. Scott*, 156 F.3d 578, 580 (5th Cir. 1998) (finding that allegations that a prisoner "became ill after being fed Vita-Pro—a soy-based meat substitute—simply do not rise to the level of cruel and unusual punishment"). Hope's allegations regarding the policy that he be handcuffed from behind and forced to squat down suffer a similar fate. *See Talib v. Gilley*, 138 F.3d 211, 215 (5th Cir. 1998) (finding that "a policy requiring prisoners on lockdown to kneel facing the wall with their hands behind their backs when served meals" did not constitute cruel and unusual punishment). Similarly, although Hope also generally alleges excessive noise and sleep deprivation, on the face of Hope's complaint, it is not clear if the alleged noise is serious enough to cause sleep deprivation or how much sleep Hope actually gets. Without such allegations, Hope has not alleged that he "has been deprived of the minimal measure of life's necessities." *See Chavarria v. Stacks*, 102 F. App'x 433, 436 n.2 (5th Cir. 2004). Finally, to the extent that Hope alleged an Eighth Amendment claim for a denial of psychiatric treatment, such a claim was not sufficiently briefed on appeal and is thus waived. *See* FED. R. APP. P. 28(a)(9)(A); *United States v. Martinez*, 263 F.3d 436, 438 (5th Cir. 2001).

dried ejaculate, peeling and chipping paint, and old food particles" violated the Eighth Amendment). But taken together with the urine and feces on the wall, which Hope alleges has occurred "many times" throughout his twenty-six years in these conditions, it is more than plausible that Hope's decades of solitary confinement alongside such conditions of mold, urine, and feces have caused the physical and psychological deterioration he alleges, and it is clear that such an allegation is sufficiently serious to invoke Eighth Amendment concerns. *See Taylor*, 946 F.3d at 219; *Fussell*, 584 F. App'x at 271; *Smith*, 244 F. App'x at 584.

Additionally, we have previously found that ordering a prisoner back into a tear-gas-filled cell without supplies for decontamination could be sufficiently serious. *Cardona v. Taylor*, 828 F. App'x 198, 202 (5th Cir. 2020). Here, Hope has alleged that he has been exposed to pepper spray and tear gas in his cell "at least ten times through no fault of his own," that the cell was not decontaminated, and that on one occasion he was "left nude in a cell with the pepper spray still on his body [without anything] to clean it off with" for eight days. To the extent that Hope complains that he has suffered physical harm as a result of being exposed to such chemicals "unnecessarily dispensed" by Major Rehse, he has plausibly alleged a sufficiently serious condition. *See Knighten v. John*, No. 98-40644, 1999 WL 301376, at *2 (5th Cir. Apr. 29, 1999). Taking these allegations as true, these conditions are likewise sufficiently serious at this stage of the litigation.

Second, liberally construed, Hope's complaint adequately alleges that Major Rehse knew of and disregarded the excessive risks to Hope's health and safety due to these allegedly unsanitary conditions. Specifically, Hope alleges that "Major Rehse continue[s] to subject [him] to . . . unsanitary . . . living conditions," even though he is responsible for placing prisoners in "sanitary" cells. He further alleges that Major Rehse has instructed other

officers not to turn on the exhaust fans to clear the pepper spray and tear gas and is "responsible for the frequent moves and placing [him] into these unsanitary cells." Hope also goes on to allege that Major Rehse "*personally* saw the black mold" on the cell wall. And these allegations are made against the backdrop of Hope's allegation that he is no longer an escape risk. Accepting the allegations in Hope's complaint as true, it is at least plausible that Hope's continued confinement in these conditions is not a matter of reasonable policy judgment but is instead deliberate indifference. *See Fussell*, 584 F. App'x at 271–72; *see also Hope*, 536 U.S. at 738.

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

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

IV.

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

Hope's Eighth Amendment claim *only* as to Defendant Major Rehse and REMAND for further proceedings consistent with this opinion. But we AFFIRM the dismissal of Hope's Eighth Amendment claim as to all other Defendants.

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

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

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

As to the Eighth Amendment claims, the majority opinion concludes that Hope can proceed only against Rehse, and only in connection with certain conditions of his confinement. To be sure, the grossly unsanitary conditions of Hope's confinement clearly support an Eighth Amendment claim. But the majority opinion fails to meaningfully address *how* the extraordinary length of Hope's confinement affects Hope's other Eighth Amendment claims, failing to recognize that other Defendants were plausibly deliberately indifferent to Hope's suffering on multiple fronts.

In particular, the extreme length of Hope's solitary confinement should make it easier for him to prove an Eighth Amendment violation, or (at the very least) require additional justification from the State to avoid liability.

---

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

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

See Taylor v. Riojas, 141 S. Ct. 52, 52–54 (2020) (per curiam) (concluding that *only six days* of confinement in "deplorably unsanitary conditions" was an obvious violation of the Eighth Amendment).[3] That is so because the extreme length affects both prongs of the Eighth Amendment analysis. As to the first prong—requiring a "sufficiently serious" deprivation—the duration of his solitary confinement acts as a significant aggravating factor, increasing the severity of the deprivation. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (acknowledging that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone" (emphasis omitted)); *see also Hutto v. Finney*, 437 U.S. 678, 685–87 (1978) (explaining how the length of confinement interacts with the conditions of confinement). As to the second prong—demonstrating that a prison official acted with "deliberate indifference"—the duration of his solitary confinement makes it more likely that *all* of the Defendants were aware of a constitutional deprivation and disregarded the risk. Simply put, it is harder for all Defendants to contend that they lacked awareness of Hope's conditions over the course of twenty-six years, especially given Hope's numerous complaints and the fact that he was a "high profile" inmate. I conclude Hope should not be limited to pursuing such claims against only Rehse.

The majority opinion also minimizes the full picture of Hope's Eighth Amendment claims, narrowing them to just his complaints about the unsanitary conditions he experienced. In so doing, it largely overlooks Hope's Eighth Amendment mental health claim, maintaining that he did not

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

sufficiently brief it on appeal. That is incorrect—Hope has argued, in both his amended complaint and in his briefing on appeal, that he suffers from "anxiety, depression, visual and auditory hallucinations" and has "thoughts of suicide." Moreover, he has repeatedly contended that the Defendants are aware of these conditions because Hope "has told them of his symptoms and because the harms of long-term solitary confinement are widely known." These allegations are sufficient to support an Eighth Amendment claim based on Hope's mental health.

At the very least, Hope stated such a claim against Joni White, Assistant Director of Classifications. According to Hope's complaint, White "was contacted by outside advocates after years of Mr. Hope sending her letters asking questions about his continued isolation" (demonstrating her awareness of Hope's prolonged isolation). White knew of "the effect that long-term isolation takes on the brain" due to her training (demonstrating her knowledge of the risk of long-term confinement). Yet she maintained that she would neither allow for nor recommend Hope's release from solitary confinement (demonstrating that she disregarded this risk), all because of his 1994 escape. Such actions suggest deliberate indifference; Hope should be allowed to pursue claims against such alleged conduct.

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

and to work.[4] For over two decades, the beginning, middle, and end of every day of Hope's life has taken place in a single cell "no larger than a parking space."[5] For the majority opinion to say—without citation or analysis, no less—that the extremely restrictive conditions of Hope's confinement merely implicate a "low" liberty interest thus overlooks the crux of his allegations.

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

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

---

[4] Specifically, Hope identifies that:

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

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

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

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

For the foregoing reasons, I would reverse the district court's dismissal of Hope's Eighth Amendment claims with respect to his unsanitary conditions of confinement and his mental health against all Defendants, as well as the district court's dismissal of his procedural due process claim (and expand the retaliation claims as to Harris and Rehse). Because the majority opinion fails to do so, I respectfully dissent.

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

ATTACHMENT C

Not for Printed Publication

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

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

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

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

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

The court has received and considered the Report and Recommendation of United States Magistrate Judge filed pursuant to such referral, along with the record and pleadings. Plaintiff filed objections to the Magistrate Judge's Report and Recommendation. This requires a *de novo* review of the objections in relation to the pleadings and the applicable law. *See* FED. R. CIV. P. 72(b).

After careful *de novo* consideration, the court concludes plaintiff's objections are without merit. For the reasons set forth in the Report, plaintiff's claims fail to state a claim upon which relief

may be granted and are frivolous. Accordingly, the defendants' motion to dismiss should be granted and the case dismissed.

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

Plaintiff also complains of his continued confinement in administrative segregation and his classification as "high profile" which makes him ineligible for placement in a diversion program. However, "[i]t is well settled that the decision where to house inmates is at the core of prison administrators' expertise." *McKune v. Lile*, 536 U.S. 24, 39 (2002); *Meachum v. Fano*, 427 U.S. 215, 225 (1976). "Inmates have no protectable property or liberty interest in custodial

classifications." *Whitley v. Hunt*, 158 F.3d 882, 889 (5th Cir. 1998). Thus, plaintiff has no constitutional right to be classified for release to general population. Further, plaintiff has failed to show prison administrators' decisions to continue his confinement in administrative segregation is not related to legitimate penological interests based on his history of violence and escape. As the Magistrate Judge observed, plaintiff's record demonstrates he has a propensity to commit violent crimes, as well as a history of possession and use of firearms, impersonating a public servant or security officer, and escaping from custody on two separate occasions. While plaintiff argues his administrative segregation review hearings are not meaningful, plaintiff concedes he is receiving due process hearings on a regular basis. Finally, plaintiff's allegations fail to rise to the level of a violation of the Eighth Amendment with respect to either the conditions of his confinement or medical care. Plaintiff's allegations against the named defendants fail to show the defendants' actions rose to the level of the deliberate indifference. Plaintiff has failed to show the denial of a constitutional right. Accordingly, plaintiff's allegations fail to state a claim upon which relief may be granted.

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

Additionally, plaintiff complains he was retaliated against by the defendants. To state a valid claim for retaliation, an inmate must prove "(1) he was exercising a specific constitutional right, (2) the defendant intended to retaliate against the inmate for exercising that right, (3) a retaliatory

adverse act occurred, and (4) causation." *Morris v. Powell*, 449 F.3d 682, 684 (5th Cir. 2006). To show causation, an inmate must establish that "but for the retaliatory motive the complained of incident ... would not have occurred." *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995). Mere conclusory allegations of retaliation will be insufficient to state a retaliation claim. *Id*.

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

O R D E R

For the reasons set forth above, as well as in the Report of the Magistrate Judge, plaintiff has failed to state a claim upon which relief may be granted or are frivolous. Accordingly, plaintiff's objections are **OVERRULED**. The findings of fact and conclusions of law of the Magistrate Judge are correct and the report of the Magistrate Judge is **ACCEPTED**. It is

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

So Ordered and Signed
May 5, 2020

Ron Clark, Senior District Judge

ATTACHMENT D

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

LUFKIN DIVISION

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

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

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

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

Discussion

Plaintiff, an inmate confined in the Security Housing Unit ("SHU") at the Polunsky Unit, has submitted an extensive list of complaints about the conditions of his confinement. Plaintiff claims he has been held in Administrative Segregation continuously for the last twenty-three years and has been told he cannot be transferred from this environment because he has an escape on his record. Plaintiff complains he is confined to his cell for twenty-three hours per day for 191 days a year and twenty-four hours per day on the remaining 174 days of the year. However, plaintiff later states he is allowed out of his cell two hours per day for recreation five days per week.

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

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

Plaintiff also complains he is limited in the amount and kind of property he can possess in the SHU. He claims this reduces the amount of reading material and other personal items he may possess, and the amount of property is smaller than inmates in General Population are allowed. Plaintiff complains he cannot possess a razor, pencil sharpener or clothing that has elastic in it.

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

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

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

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

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

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

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

Plaintiff claims that when he moves into a new cell it is not disinfected or otherwise cleaned, and he is not provided with cleaning supplies. On some occasions, plaintiff claims he was moved into a cell with no lights. On December 21, 2017, plaintiff claims he was moved into a cell with mold on the back wall and floor. He claims he remained in that cell for thirteen days and began coughing. Plaintiff claims that it took outside advocates contacting the warden to get him moved from the cell. Plaintiff claims defendant Rehse saw the mold on the back wall of his cell on December 26, 2017, but it was only after Assistant Warden Jefferson sent someone to inspect the cell and saw the mold growth that she ordered him removed from the cell.

Plaintiff complains that, due to his housing classification requiring an escort everywhere he goes, he has no privacy when consulting with medical or mental health professionals. Plaintiff claims the lack of escort officers is not uncommon resulting in delayed or cancelled appointments

and medical or mental health personnel frequently making cell-side visits where other prisoners can listen. Plaintiff also claims he has reported to mental health professionals that he deals with bouts of anxiety, depression, and visual and auditory hallucinations but he has been denied treatment for these conditions.

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

On June 24, 2016, plaintiff claims he was reviewed by SCC member Melissa Benet. Plaintiff made both an oral and written statement at the hearing. After she looked over his file, plaintiff claims Benet told him she saw no reason not to release him to a transitional program. However, he later received his hearing record in the mail, and it indicated he was to remain in the SHU without further explanation. At a subsequent hearing on December 3, 2016, plaintiff claims he asked Benet why he was not released to the transitional program like she told him in June of 2016. Plaintiff states Benet told him "you are high profile, I don't have the authority to release you." Thus, plaintiff claims Benet's review was perfunctory and a sham used to provide him due process. Plaintiff claims he saw another SCC member, Ms. Enlow, on June 8, 2017 and when he requested release he was informed "that's not my decision." Plaintiff claims he was later reviewed by SCC member defendant Bonnie Fiveash. Plaintiff claims Fiveash told him "you're still in good shape I can't release you." When asked if it was ever her call to make, plaintiff claims Fiveash told him "that would be the Director's call." Plaintiff complains that he has not been told what he must do to be released to General Population. Plaintiff claims defendant Eschessa, the Deputy Director of Operations has the capacity to release him to General Population, but Eschessa would not review his file. Plaintiff also claims defendant White, Assistant Director of Classifications, was contacted by outside advocates

and stated she would not allow his release or make recommendations for his release. White stated that because plaintiff escaped in 1994 she does not want the responsibility that goes along with making that decision. Plaintiff claims White has instructed all SCC members that plaintiff is to remain in the SHU.

Plaintiff claims that in December, 2005, the Security Precautions Designator Committee reviewed and removed the escape risk designator from his file. Accord to plaintiff, they determined he was not an escape risk. However, he remains confined in the SHU and has been denied any meaningful review. Further, plaintiff claims he is not eligible to see a parole commissioner for release on parole due to his confinement in Level 1 Security Detention status.

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

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

The Defendants' Motion to Dismiss

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

Standard of Review

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

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

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

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

Failure to State a Claim

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Rule 12(b)(6) authorizes the court to dismiss a complaint for "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6).

A complaint fails to state a claim upon which relief may be granted if the factual allegations are not sufficient to raise a right to relief above the speculative level. *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 1965, 167 L.Ed.2d 929 (2007). Dismissal for failure to state a claim is appropriate when the plaintiff has failed to plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S.

662, 129 S.Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. 544, 570). Plaintiffs must state enough facts to "nudge[] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. 544, 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. At this stage, a court "must accept all well-pleaded facts alleged in the complaint as true and must construe the allegations in the light that is most favorable to the plaintiff." *Cent. Laborers' Pension Fund v. Integrated Elec. Servs.,* 497 F. 3d 546, 550 (5th Cir. 2007). However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "[R]egardless of whether the plaintiff is proceeding *pro se* or is represented by counsel, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss." *Taylor v. Books a Million, Inc.,* 296 F.3d 376, 378 (5th Cir. 2002) (internal quotations omitted).

Analysis

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

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

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

42 U.S.C. § 1983.

II. Eleventh Amendment Immunity

The Eleventh Amendment provides that the State of Texas, as well as its agencies, are immune from liability. *Kentucky v. Graham,* 473 U.S. 159, 167, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). The Eleventh Amendment bars claims against a state brought pursuant to 42 U.S.C. § 1983. *Aguilar v. Texas Dept. of Criminal Justice,* 160 F.3d 1052, 1054 (5th Cir. 1998). In *Will v. Michigan*

Department of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), the Supreme Court held that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." The Supreme Court upheld the dismissal of the Michigan Department of State Police and its Director sued in his official capacity. *Id.* The Fifth Circuit has accordingly "held that the Eleventh Amendment bars recovering § 1983 money damages from TDCJ officers in their official capacity." *Oliver v. Scott,* 276 F.3d 736, 742 (5th Cir. 2002). However, "the Eleventh Amendment permits suits for prospective injunctive relief against state officials acting in violation of federal law." *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004); *Aguillar*, 160 F. 3d at 1054.

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

In his complaint, plaintiff alleges that defendants Harris and Rehse are responsible for ensuring that prisoners in the SHU are housed in sanitary conditions and not subjected to harassment, retaliation or cruel and unusual punishment. Plaintiff also alleges certain defendants failed to follow prison policy regarding the review of his classification status. Plaintiff, however, must first demonstrate he meets the three elements of Article III standing; (1) injury in fact; (2) causation; and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The redressability element of the test for standing requires that a favorable decision for the plaintiff will likely, not

merely speculatively, redress the plaintiff's injury. *Id.* Additionally, the court must gauge (1) the ability of the official to enforce the statue at issue under his statutory or constitutional power, and (2) the demonstrated willingness of the official to enforce the statute. *Okpalobi v. Foster*, 244 F.3d 405, 425-27 (5th Cir. 2001). Defendants Harris and Rehse are no longer the warden at the Polunsky Unit. Further, plaintiff's complaint reveals that the ability to address his complaints lies with the Director of the prison system based on plaintiff's history of violence and escape.[1] The defendants in this action do not have the ability to release plaintiff from confinement in the Special Housing Unit. Therefore, a favorable decision for plaintiff will not allow the defendants to address plaintiff's complained of injury. Accordingly, the defendants' motion to dismiss should be granted.

III. Due Process - Classification

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

It is well settled in the Fifth Circuit that an inmate has no protected interest in any particular custody or security classification, once incarcerated. *See Wilkerson v. Stalder*, 329 F.3d 431, 435-36 (5th Cir.), *cert. denied*, 124 S.Ct. 432 (2003); *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir. 1999); *Whitley v. Hunt*, 158 F.3d 882, 889 (5th Cir. 1998). The classification of prisoners is a matter within the discretion of prison officials. *McCord v. Maggio*, 910 F.2d 1248, 1250 (5th Cir. 1990). Therefore, absent an abuse of discretion, a federal court will not interfere with administrative determinations regarding custodial classification of an inmate. *Whitley*, 158 F.3d at 889. In

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

Pichardo v. Kinker, 73 F.3d 612 (5th Cir. 1996), the court stated that "absent extraordinary circumstances, administrative segregation as such, being an incident to the ordinary life as a prisoner, will never be a ground for a constitutional claim." *Id*. at 612-613; *see also Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) ("[T]he Constitution itself does not give rise to a liberty interest in avoiding transfer to more adverse conditions of confinement.").

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

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

IV. Conditions of Confinement

Plaintiff asserts an extensive list of complaints about the conditions of his confinement including the cleanliness of his cells and eating utensils, the quality and quantity of food served in confinement, a restriction on the amount of property he can maintain in his cell, the fact he is served peanut butter sandwiches during lock-downs approximately four times per year, the lack of condiments such as syrup and mustard, and the alleged indirect exposure to chemical agents.

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

A constitutional violation, however, occurs only when two requirements are met. First, there is an objective requirement that the condition "must be so serious as to 'deprive prisoners of the minimal civilized measure of life's necessities,' as when it denies the prisoner some basic human need." *Harris v. Angelina County, Texas*, 31 F.3d 331, 334 (5th Cir. 1994) (citing *Wilson v. Seiter*, 501 U.S. 294, 111 S. Ct. 2321 (1991)). Second, under a subjective standard, the court must determine whether the prison official responsible acted with deliberate indifference to inmate health or safety. *Farmer*, 511 U.S. at 834; see e.g., *Harris*, 31 F.3d at 334-36. The deliberate indifference standard can be appropriately applied to allegations regarding the conditions of confinement. *Woods*, 51 F.3d at 580.

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

official acts with deliberate indifference "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id*. at 847.

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

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

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

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

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

V. Medical Care

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

The deliberate indifference to serious medical needs of prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment, whether the indifference is manifested by prison doctors or by prison guards in intentionally denying or delaying access to medical care. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976); *Harris v. Hegmann*, 198 F.3d 153, 159 (5th Cir. 1999). "Deliberate indifference is an extremely high standard to meet." *Domino v. Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). Deliberate indifference encompasses only the unnecessary and wanton infliction of pain repugnant to the conscience of mankind. *McCormick v. Stalder*, 105 F.3d 1059, 1061 (5th Cir. 1999). To satisfy the exacting deliberate indifference standard, a defendant's conduct must rise "to the level of egregious intentional conduct." *Gobert v. Caldwell*, 463 F.3d 339, 351 (5th Cir. 2006).

The Supreme Court has adopted "subjective recklessness as used in the criminal law" as the appropriate definition of deliberate indifference under the Eighth Amendment. *Farmer*, 511 U.S. 825, 839-40 (1994). Under this definition, a prison official cannot be found liable under the Eighth Amendment unless the official knows of and disregards an excessive risk to inmate health or safety.

The official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must draw the inference. *Farmer*, 511 U.S. at 837. Under exceptional circumstances, a prison official's knowledge of a substantial risk of harm may be inferred by the obviousness of the substantial risk. *Id*; *Reeves v. Collins*, 27 F.3d 174 (5th Cir. 1994). Medical records of sick calls, examination, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference. *See Varnado v. Lynaugh*, 920 F.2d 320 (5th Cir. 1991).

While plaintiff complains he missed some medical appointments due to the lack of security personnel required for escorting him, plaintiff admitted medical personnel would make cell-side visits for him. Further, plaintiff has failed to allege or demonstrate harm associated with the format of his medical visits. Additionally, plaintiff claims he suffers from bouts of anxiety, depression, and visual and auditory hallucinations but when he has reported these bouts or symptoms to mental health personnel, he has been denied treatment. However, plaintiff has failed to allege facts demonstrating the defendants possessed a "sufficiently culpable state of mind" rising to the level of deliberate indifference or that his claims are anything more than a disagreement with the medical professionals over the proper course of treatment. *See Farmer*, 511 U.S. at 834, 839-40. Thus, plaintiff's allegations fail to rise to the level of egregious intentional misconduct required to satisfy the exacting deliberate indifference standard. *See Gobert,* 463 F.3d at 351. Negligence does not constitute a violation of the Eighth Amendment. Unsuccessful medical treatment, acts of negligence or medical malpractice, and disagreements as to diagnosis or treatment do not constitute deliberate indifference. *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir. 1995). Dissatisfaction with medical treatment or diagnosis does not constitute "deliberate indifference" to a serious medical need and does not rise to the level of the denial of a constitutional right. *Estelle v. Gamble*, 429 U.S. at 106; *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985). At most, plaintiff's allegations constitute nothing more than negligence or a disagreement with the medical professionals over the proper course of treatment. Plaintiff has failed to show either that the defendants acted with

deliberate indifference or that he was harmed as a result of the defendants' actions. Therefore, the defendants' motion to dismiss should be granted.

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

VI. Deprivation of Property

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

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

Recommendation

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

Objections

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

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

SIGNED this 9th day of March, 2020.

Zack Hawthorn
United States Magistrate Judge