No. 18-____

IN THE

Supreme Court of the United States

OBERIST LEE SAUNDERS,

Petitioner,

v.

SHERIFF OF BREVARD COUNTY, IN HIS OFFICIAL CAPACITY; SUSAN JETER, IN HER OFFICIAL CAPACITY; JOHN C. WRIGHT, IN HIS INDIVIDUAL CAPACITY; AND PATRICIA TILLEY, IN HER INDIVIDUAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Petition for Writ of Certiorari

SARAH G. BOYCE
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1107
Sarah.Boyce@mto.com

STEPHANIE G. HERRERA
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
(415) 512-4063
Stephanie.Herrera@mto.com

COLEMAN W. WATSON
WATSON LLP
189 S. Orange Street,
Suite 810
Orlando, FL 32801
(407) 377-6634
coleman@watsonllp.com

QUESTIONS PRESENTED

The Eleventh Circuit granted qualified immunity to several Brevard County Jail officials on Petitioner's Fourteenth Amendment claim that he was subjected to appalling and inhumane conditions of confinement while in pretrial detention. Specifically, Petitioner alleged that he, with as many as seven other men, was confined in a cell that was covered in human excrement and bodily fluids, infrequently and ineffectively cleaned, and inadequately cooled and ventilated. These conditions were exacerbated by the lack of ready access to soap, toilet paper, and eating utensils, and the fact that Petitioner was forced to sleep on a mat directly on the waste-covered floor, so that Petitioner was eating, sleeping, and living with constant exposure to human waste. In fact, these conditions were so severe that, on one occasion, they induced a panic attack, causing Petitioner to repeatedly bang his head against a metal doorframe until he needed stitches. Respondent Corporal John Wright watched the entire episode and laughed.

The case presents two questions:

(1) Whether, consistent with *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), a Fourteenth Amendment conditions-of-confinement claim brought by a pretrial detainee should be evaluated under an objective or subjective standard, a question on which the federal courts of appeals have split.

(2) Whether, at the time of Petitioner's confinement, the right of a detainee not to be

confined in conditions lacking basic sanitation was clearly established under *Hutto v. Finney*, 437 U.S. 678 (1978), *Rhodes v. Chapman*, 452 U.S. 337 (1981), and myriad court of appeal decisions, or, alternatively, whether Petitioner's conditions of confinement were so obviously unconstitutional that any reasonable officer would have recognized them as such.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Oberist Lee Saunders. Respondents are Sheriff of Brevard County, in his official capacity; Susan Jeter, in her official capacity; John C. Wright, in his individual capacity; and Patricia Tilley, in her individual capacity.

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FEDERAL STATUTES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Oberist Lee Saunders respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unpublished, but available at App. 1a. The order of the court of appeals denying rehearing en banc, App. 64a, is not yet reported. The opinion of the district court is unpublished, but available at App. 40a.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2018. A timely petition for rehearing and rehearing en banc was filed on June 7, 2018, and denied on July 16, 2018. On September 18, 2018, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including December 13, 2018. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in relevant part:

> 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 in an action at law, suit in equity, or other proper proceeding for redress….

STATEMENT OF THE CASE

Fifty years ago, this Court held that confining prisoners in "filthy, overcrowded cell[s]" is unconstitutional. *Hutto v. Finney*, 437 U.S. 678, 686–87 (1978). In the decades since, this Court and the courts of appeals have consistently and uniformly reaffirmed that detainees have a constitutional right to basic sanitation. These decisions provide ample guidance to state officials as to illegal confinement practices and make clear that forcing a detainee to endure prolonged exposure to human waste—

particularly without access to basic hygiene items such as soap and toilet paper—violates the Constitution. See *infra* pp. 26-32.

Petitioner Oberist Lee Saunders's conditions of confinement were nothing short of horrifying, and were plainly inconsistent with the standards of decency and sanitation established by these precedents. While he was awaiting trial, Petitioner was held for 65 days in an overcrowded cell that was covered in human waste, infrequently and ineffectively cleaned, and inadequately cooled and ventilated. He was forced to sleep on a mat that was placed directly on the waste-splattered floor; forced to walk barefoot through all kinds of bodily waste and fluids; and deprived of ready access to soap, toilet paper, or eating utensils.

Petitioner filed this § 1983 action against several officers at the jail, including Commander Susan Jeter and Corporal John Wright, alleging that these deplorable conditions violated his rights under the Fourteenth Amendment.[1] The district court denied summary judgment with respect to these officers, concluding that Petitioner had raised triable issues of fact as to whether they had violated his constitutional rights.

The Eleventh Circuit reversed, holding that the officers were entitled to qualified immunity. The court of appeals applied a subjective test borrowed from this Court's Eighth Amendment jurisprudence and concluded that Saunders had not presented

[1] Petitioner asserted other claims in the courts below, but raises only his conditions-of-confinement claim in this petition.

evidence sufficient to establish that Respondents were actually aware of the deplorable conditions in the cell where Petitioner was housed—despite evidence that at least one of the Respondents was directly responsible for day-to-day oversight of the unit. Because the Eleventh Circuit held that Petitioner had not satisfied this subjective test for deliberate indifference, the court of appeals avoided any clear holding on whether Saunders's appalling conditions of confinement violated the Constitution.

The Eleventh Circuit's decision merits this Court's review for two reasons: *First*, the court's use of the subjective deliberate-indifference test applicable under the Eighth Amendment exacerbated an already entrenched circuit split regarding the appropriate standard for assessing Fourteenth Amendment claims brought by pretrial detainees. This Court alone can, and should, resolve the split and clarify that, under *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), an *objective* standard, not a *subjective* one, necessarily governs the claims of pretrial detainees.

Second, the Eleventh Circuit's reluctance to declare the inhumane conditions in the Brevard County Jail unconstitutional eschews longstanding precedent from this Court that clearly establishes the right of a prisoner not to be confined in conditions lacking basic sanitation. This error, moreover, cannot be saved by the court's purported alternative holding on deliberate indifference. This Court has instructed that where conditions of confinement are so egregious that "the risk of harm is obvious," the court "may infer the existence of [a] subjective state of mind." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Put differently, as a prisoner's conditions of confinement become worse

and worse, the risk of harm becomes more and more obvious, and an official's deliberate indifference becomes easier and easier to infer. The court of appeals thus could not properly analyze the deliberate-indifference question without first resolving whether Petitioner's conditions of confinement were obviously unconstitutional.

This Court should reaffirm that the revolting conditions Petitioner experienced during his pretrial detention were clearly unconstitutional at the time of his confinement. Our Constitution forbids treating those who are incarcerated in a manner "antithetical to human dignity," *Hope*, 536 U.S. at 745, and the Eleventh Circuit's reluctance to condemn Saunders's dehumanizing conditions of confinement undermines our nation's commitment to that principle. Summary reversal is warranted.

A. Petitioner Endures Horrifying Conditions For 65 Days

Petitioner was arrested and booked at the Brevard County Jail in June 2008. About a month and a half into his time at the Jail, he attempted suicide. When Saunders returned from the hospital, the Jail transferred him to its acute mental-health housing unit, known as "the Bubble." App. 2a.

Conditions in the Bubble were deplorable. The toilets would frequently overflow, and "inmates would urinate, defecate, and ejaculate onto the cell's floors and walls." App. 28a. Inmates could not avoid this waste, as they "lived, ate, and slept 'tightly' 'like sardines'" in their cells. *Id*. Saunders was packed into a cell that was, at most, 9 x 15 feet, with up to

seven other inmates. *Id.* In other words, when his cell was full (as it often was), Saunders had a space of only about 4 x 4 feet to himself.

Jail staff made passing attempts to clean the cells twice a week, but that did not alleviate the unsanitary conditions. App. 3a. The staff did not sanitize or fully wipe down the cells, but instead simply did "a quick sweep and mop." App. 28a. Moreover, while twice weekly cleanings "might be adequate when a cell holds one or even two or three healthy inmates," cleaning so infrequently was insufficient to sanitize a space filled with up to eight inmates, many of whom, because of their mental illness, "did not have proper control of their bodily fluids." *Id.* ("Urine 'was on the floor all the time.'").

The lack of access to basic hygiene items aggravated the unsanitary conditions. Inmates were provided no ready access to eating utensils, hand soap, or toilet paper, leaving them to eat with their unwashed hands on the filth-covered floors. App. 26a (noting that "inmates were forced to eat with their bare hands," which "were likely to be exposed to excrement"). Inmates could request these supplies, but officers would take up to 45 minutes to provide the items—often too long to wait to eat or use the toilet. App. 13a. Inmates were not permitted to wear shoes and were provided no beds, instead "sleep[ing] on mats directly on the waste-filled floor." App. 26a. Having no option other than to walk through the urine, feces, semen, and vomit covering the Bubble, inmates would then bring those fluids directly into their bedding, which was not replaced for months at a time. *Id*. Apparently recognizing the gross inadequacy of these facilities, officers would

"specially clean the cells and bring in 'little plastic platforms' for inmates to sleep on 'to get people off the concrete'" when inspectors or other guests would visit. App. 29a. As soon as those visitors left, the Potemkin platforms were removed, and conditions would return to normal. *Id*.

Further exacerbating these conditions was the Bubble's inadequate cooling and circulation. In one instance, the air conditioning stopped working fully for a period of up to two days. App. 20a. It was August—in Florida—and Saunders's cell had eight inmates crammed inside. Saunders began to have trouble breathing and told Wright that he was claustrophobic and needed air flow. App. 31a. Wright did nothing. Saunders proceeded to have a panic attack, during which "he repeatedly slammed his head against a metal doorframe, resulting in a gashed scalp and stitches." App. 4a. Wright was present but—rather than intervening to stop a suicidal inmate from self-harm—Wright stood back "with other officers watching *and laughing* for five minutes." App. 33a (emphasis added).

Saunders endured these appalling conditions for 65 days while awaiting trial.

B. The District Court Denies Qualified Immunity, But The Eleventh Circuit Reverses

In June 2014, Saunders filed a § 1983 suit against several jail officials, including Jeter and Wright, alleging that his conditions of confinement violated the Fourteenth Amendment. Amended Complaint,

Saunders v. Sheriff of Brevard County, No. 6:14-cv-877 (M.D. Fla. June 5, 2014).

On November 21, 2016, the district court denied summary judgment with respect to several officers, including Jeter and Wright. The district court concluded that many of the conditions that Saunders had identified could rise to the level of a constitutional violation, including the crowded nature of the cell, which engendered violence among the prisoners; the placement of detainees in cells covered in "urine, feces, bodily fluids, and bacteria"; the failure to provide inmates with cleaning supplies or other items necessary for basic hygiene; and the lack of ventilation. App. 43a, 57a–62a. Because the district court believed that Saunders had created triable issues of fact related to these horrific conditions, it held that the officers responsible for the conditions of confinement were not entitled to qualified immunity. *Id.* at 61a–62a.

On May 17, 2018, a divided panel of the Eleventh Circuit reversed. App. 1a. The majority acknowledged that "the facts of this case, when viewed in Saunders's favor, paint a disturbing picture of confinement in the Brevard County Jail," and that "cases in which the deprivation of basic sanitary conditions … constitute[s] an Eighth Amendment violation are plentiful." App. 9a, 16a (ellipsis in original) (internal quotation marks omitted). But the majority ultimately resisted any conclusion that the Jail's barbaric conditions violated Petitioner's clearly established rights. App. 9a.

Instead, the majority focused on the question of Respondents' mental state. In so doing, the majority

applied a subjective test, asking whether Respondents were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and "also dr[e]w the inference." App. 8a (quoting *Chandler v. Crosby*, 379 F.3d 1278, 1289–90 (11th Cir. 2004)). The majority announced this standard without analyzing whether a subjective test was appropriate for the claim of a pretrial detainee. See *id.* Having announced a subjective standard, the majority then assessed whether Petitioner had established that Respondents had actual knowledge of a substantial risk of serious harm. The majority concluded that Petitioner had not, despite the fact that Petitioner had alleged that Respondent Wright was responsible for overseeing the unit in which Petitioner was housed and was regularly present in that unit. *Id.* at 17a–18a. The court relied on the fact that Respondent Wright "worked only three to four days a week" to claim that he may have been ignorant of the pervasive filth. *Id.* The court thus held that Respondents were entitled to qualified immunity.

Judge Martin issued a vigorous dissent, urging that the "right not to be confined in conditions lacking basic sanitation" "is a well-established constitutional right, even for prisoners." App. 23a, 25a (quoting *Brooks v. Warden*, 800 F.3d 1295, 1303 (11th Cir. 2015)) (internal quotation marks and alterations omitted). Judge Martin criticized the majority for failing to "weigh all of [the] evidence together" and for declining to follow "binding precedent." App. 25a, 27a. In her view, case law from the Supreme Court and the Eleventh Circuit made clear that "the gratuitous cruelty Mr. Saunders endured"—in the form of

unsanitary conditions and indifference to self-harm—was clearly unconstitutional. App. 35a–38a.

Judge Martin also concluded that Petitioner had established Respondent Wright's deliberate indifference. App. 28a–30a. She pointed out that Respondent Wright was the primary person "responsible for 'daily' conditions in the pod" and was "physically present in the unsanitary cells such that he personally observed the conditions." App. 29a. These facts, Judge Martin said, were sufficient to establish that Respondent Wright had "subjective knowledge of the risk of harm" to Petitioner. *Id*. Alternatively Judge Martin concluded that Saunders had established Respondent Wright's reckless disregard of the risk of harm to petitioner. *Id*. at 29a–30a. In support, she cited the fact that Respondent Wright was "charged with overseeing the housing unit" and thus would have known about the conditions. *Id.* She also highlighted Petitioner's allegation that Respondent Wright would "specially clean the cells and bring in 'little plastic platforms' for inmates to sleep on" when visitors were expected. *Id.* In Judge Martin's view, "[t]hese striking allegations … certainly suggest that Corporal Wright knew it was a problem for inmates to be sleeping on the filth of the cell floor, and knew of ways to keep that from happening." *Id.*

On June 7, 2018, Petitioner filed a petition for rehearing en banc, arguing that the panel had incorrectly applied a subjective deliberate-indifference standard to his conditions-of-confinement claim. Petitioner argued that this Court's decision in *Kingsley* made clear that Fourteenth Amendment claims brought by pretrial detainees should be evaluated

under an objective standard. The Eleventh Circuit denied the petition on July 16, 2018. App. 64a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit reversed the district court's denial of summary judgment on the ground that Petitioner had not established the *subjective* component of his conditions-of-confinement claim. But Petitioner was a pretrial detainee—not a convicted prisoner—when he was forced to endure the horrific confinement conditions he now challenges. That distinction makes all the difference. Although convicted inmates are subject to punishment, and therefore must prove subjective deliberate indifference in order to establish that their treatment in prison violates the Eighth Amendment, this Court made clear in *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015), and *Bell v. Wolfish*, 441 U.S. 520 (1979), that pretrial detainees challenging their treatment under the Fourteenth Amendment need only satisfy an *objective* standard.[2]

[2] Respondents may argue that Petitioner forfeited this argument by failing to raise it squarely in the proceedings below. Although Petitioner did not invoke *Kingsley* in his answering brief, he did draw the court's attention to the tension between the Eighth Amendment's subjective deliberate-indifference standard and the Fourteenth Amendment's "objective punishment standard. Initial Brief of Appellee Oberist Saunders at 37–39, *Saunders v. Sheriff of Brevard County*, No. 16-17607 (11th Cir. Apr. 20, 2017) (citing *Bell* and *Jacoby v. Baldwin County*, 835 F.3d 1338, 1345 n.3 (11th Cir. 2016) (recognizing that reviewing a pretrial detainee's claim under the Eighth Amendment's subjective deliberate-indifference standard might conflict with *Bell*'s objective "punishment" standard)). Petitioner also explicitly sought rehearing on this ground. Thus, the question of the appropriate standard of review was adequately pressed below and preserved for this Court's review. Regardless, the rule precluding this Court's review of an issue "not pressed or passed upon

Three federal courts have already recognized that the reasoning of *Kingsley* and *Bell* applies to all treatment-in-detention challenges brought by pretrial detainees. In adopting a contrary approach, the court below contravened this Court's precedents and deepened an important circuit split regarding the standard that applies to claims brought by pretrial detainees. Only this Court can clarify the scope of its decisions in *Kingsley* and *Bell*, and resolve the disagreement among the courts of appeals as to the appropriate standard for reviewing constitutional claims by pretrial detainees.

But even if the same subjective deliberate-indifference test that governs the Eighth Amendment claims of convicted prisoners applies to Petitioner's Fourteenth Amendment pretrial-detention claim, the Eleventh Circuit's conclusion that Respondents are entitled to qualified immunity would still contravene well-established precedents of this Court and the courts of appeals. Decades of federal appellate decisions clearly establish the right of a prisoner not to be confined in unsanitary conditions and, in any event, any reasonable officer should have known that the

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below" is "prudential." *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 33 n.7 (1993). Even if the *Kingsley* question was not pressed below, there are at least two good reasons why this Court should nonetheless exercise its discretion to consider the issue: *First*, this case presents an opportunity to resolve an important circuit split and, although the decision below does not thoroughly ventilate this question, this Court would have the benefit of several other reasoned court of appeals decisions to guide its analysis. *Second*, this is not a situation in which the presentation of the issues below rendered the record inadequate to consider this question; Saunders is arguing for an objective standard, and the case was litigated and decided under the higher subjective standard.

cruel and dehumanizing conditions Petitioner was forced to endure were unlawful. This Court should grant certiorari to reaffirm the right of detainees not to be confined in conditions lacking basic sanitation, or, alternatively, should summarily reverse the Eleventh Circuit's clearly erroneous qualified immunity holding.[3] See *Brosseau v. Haugen*, 543 U.S. 194, 198 & n.3 (2004) (summarily reversing incorrect qualified immunity ruling).

I. The Decision Below Exacerbated an Entrenched Circuit Split By Erroneously Applying a *Subjective* Standard to Petitioner's Fourteenth Amendment Claims

The Eleventh Circuit's decision to afford Respondents qualified immunity turned on its conclusion that Saunders had failed to establish deliberate indifference. The court declared that the proper standard for evaluating Respondents' actions was a "subjective one"—namely, whether the "prison officials acted with a sufficiently culpable state of mind with regard to the condition at issue." App. 8a (quoting *Chandler*, 379 F.3d at 1289). In other words, the court said, Respondents must have been "aware of facts from which the inference could be drawn that a substantial risk

[3] As discussed above, see *supra* p. 4–5, the court below erroneously believed that it could avoid ruling on the constitutionality of Petitioner's conditions of confinement by focusing on the question of Respondents' deliberate indifference. Here, however, the risk of harm posed by Petitioner's conditions of confinement was so obvious that the court should have "infer[red] the existence" of the requisite state of mind. *Hope*, 536 U.S. at 738. The court of appeals' deliberate-indifference holding thus cannot shield its unduly cavalier analysis of the conditions themselves.

of serious harm exists, and [they] must also [have drawn] the inference." *Id.* (quoting *Chandler*, 379 F.3d at 1289–90). In applying this subjective standard, the Eleventh Circuit joined three of its sister circuits and further entrenched a split that has been percolating since this Court's decision in *Kingsley*. This Court should grant certiorari to resolve the split and clarify that, consistent with *Kingsley*, the appropriate standard for reviewing the constitutional claims of pretrial detainees is an objective, not subjective, one.

A. *Kingsley* Is This Court's Latest Decision Applying an Objective Standard to Constitutional Claims Brought by Pretrial Detainees

More than forty years ago, this Court held that constitutional claims brought by convicted inmates must be analyzed differently than those brought by pretrial detainees. Claims brought by individuals who have already been convicted are analyzed under the Eighth Amendment. That Amendment permits punishment, so long as it is not "cruel and unusual." Claims brought by pretrial detainees, by contrast, are analyzed under the Fourteenth Amendment's Due Process Clause. *Bell*, 441 U.S. at 535 n.16; *Ingraham v. Wright*, 430 U.S. 651, 671–72 n.40 (1977). That Clause prohibits the State from inflicting *any* punishment—cruel and unusual or otherwise—prior to an adjudication of guilt. *Bell*, 441 U.S. at 535 n.16.

Consistent with these distinct standards, this Court has mapped out different tests for Eighth and Fourteenth Amendment claims. Eighth Amendment claims are governed by *Farmer v. Brennan*. Under

Farmer, a convicted prisoner must show that a prison official acted with *subjective* deliberate indifference to the prisoner's health or safety. 511 U.S. at 834. In other words, the inmate must establish that the relevant official was "both … aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]" and that he "also dr[e]w the inference." *Id.* at 837. The latter requirement "follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.'" *Id.* (quoting *Wilson v. Seiter*, 501 U.S. 294, 297 (1991)).

A different test governs constitutional claims brought by pretrial detainees under the Fourteenth Amendment. That test, first set forth in *Bell*, does not require evidence of subjective deliberate indifference. Because the Due Process Clause forbids *any* punishment of individuals who have not yet been tried, a pretrial detainee need not "pro[ve] … intent (or motive) to punish … to prevail." *Kingsley*, 135 S. Ct. at 2473 (describing *Bell*). Of course, "a showing of an expressed intent to punish on the part of detention facility officials" necessarily establishes a due process claim. *Bell*, 441 U.S. at 538. But a pretrial detainee can also support his claim with *objective* evidence—that is, by showing that the complained-about conditions are "not reasonably related to a legitimate goal," but rather are "arbitrary or purposeless." *Id.* at 539.

This Court confirmed the applicability of an objective standard to claims brought by pretrial detainees three years ago in *Kingsley*. There, the plaintiff, Michael Kingsley, brought a claim under § 1983, alleging that several officers had used

excessive force against him while he was being held in a county jail prior to trial. 135 S. Ct. at 2470. This Court granted certiorari to identify the appropriate standard for assessing such a claim.

The Court began by explaining that Kingsley's claim involved, "in a sense, two separate state-of-mind questions." *Id.* at 2472. "The first concerns the defendant's state of mind with respect to his physical acts—*i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world." *Id.* As to that question, there was no dispute; the Court confirmed that a defendant "must possess a purposeful, a knowing, or possibly a reckless state of mind." *Id.* But the second question did not have a clear standard for evaluation. That question concerned "the defendant's state of mind with respect to whether his use of force was 'excessive.'" *Id.* As to that question, the Court held that courts should apply an objective standard. *Id.* at 2472–73.

The Court provided three reasons for its holding. *First*, the Court explained that an objective standard was consistent with its own precedents, beginning with *Bell*. *Id.* at 2473. The Court confirmed that *Bell* stands for the proposition that a pretrial detainee who wishes to bring a due process claim "can prevail by providing only objective evidence." *Id.* As this Court put it, *Bell* does "not suggest …, either by its words or its analysis," that the standard that governs pretrial detainees' due process claims "should involve subjective considerations." *Id.* at 2474. *Second*, the Court observed that "an objective standard is workable." *Id.* *Third*, "the use of an objective standard adequately protects an officer who acts in

good faith." *Id.* For all these reasons, the Court said, "an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment." *Id.* at 2476.

B. Three Courts of Appeals Have Confirmed That *Kingsley* Requires an Objective Standard for Claims Brought by Pretrial Detainees

In the wake of *Kingsley*, the Second, Seventh, and Ninth Circuits have all concluded that although *Kingsley* concerned a pretrial detainee's excessive-force claim, *Kingsley*'s reasoning applies with equal force to other challenges brought by pretrial detainees under the Fourteenth Amendment, and that pretrial detainees accordingly need not prove subjective deliberate indifference as a component of a Fourteenth Amendment due process claim. See *Darnell v. Pineiro*, 849 F.3d 17, 33–35 (2d Cir. 2017); *Miranda v. County of Lake*, 900 F.3d 335, 354 (7th Cir. 2018); *Castro v. County of Los Angeles*, 833 F.3d 1060, 1069 (9th Cir. 2016) (en banc), *cert. denied sub nom. Los Angeles County v. Castro*, 137 S. Ct. 831 (2017); see also *Gordon v. County of Orange*, 888 F.3d 1118, 1124–25 & n.4 (9th Cir. 2018).

Second Circuit: In *Darnell v. Pineiro*, the court considered a conditions-of-confinement claim much like the one at issue in this case. There, twenty pretrial detainees brought a Fourteenth Amendment claim alleging that they had been subjected to "appalling conditions of confinement while held pre-arraignment." 849 F.3d at 20. The court explained the need to "consider whether *Kingsley* altered the

standard" for excessive-force claims alone, or whether it also "altered the standard for conditions of confinement claims under the Fourteenth Amendment's Due Process Clause." *Id.* at 21. The Second Circuit concluded that *Kingsley* had broadly altered the standard for all Fourteenth Amendment due process claims brought by pretrial detainees. *Id.* at 34–35.

In the Second Circuit's view, *Kingsley* made "plain that punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause." *Id.* at 35. Because "an official can violate the Due Process Clause of the Fourteenth Amendment without meting out any punishment, … the Due Process Clause can be violated when an official does not have subjective awareness that the official's acts (or omissions) have subjected the pretrial detainee to a substantial risk of harm." *Id.* Accordingly, the court said, "deliberate indifference for due process purposes should be measured by an objective standard." *Id.*

Ninth Circuit: In *Castro v. County of Los Angeles*, the en banc Ninth Circuit court considered a failure-to-protect claim brought by a pretrial detainee who was savagely beaten by his cellmate while being held in a sobering cell at a Los Angeles jail. The en banc court held that *Kingsley*'s holding is not limited to excessive-force claims brought by pretrial detainees. 833 F.3d at 1071. Instead, the court held that *Kingsley* extends to failure-to-protect claims and strongly suggested that *Kingsley*'s "objective standard applies to all kinds of claims brought by pretrial detainees." *Id.* at 1069–72; see also *Darnell*, 849 F.3d at 35 n.14 (explaining that the Ninth Circuit's

reasoning in *Castro* "is equally applicable to a conditions of confinement claim").

The court acknowledged that "*Kingsley* did not squarely address whether the objective standard applies to all kinds of claims by pretrial detainees," and that "[a]n excessive force claim … differs in some ways from a failure-to-protect claim." *Id.* at 1069. But the court emphasized that "there are significant reasons to hold that the objective standard applies to failure-to-protect claims as well." *Id.* For one thing, both excessive-force and failure-to-protect claims arise under the Fourteenth Amendment when they are brought by pretrial detainees. *Id.* at 1069–70. *Kingsley*, moreover, spoke in "broad" terms about a pretrial detainee's ability to succeed on a claim without providing subjective evidence; this Court did not cabin *Kingsley*'s holding to claims involving force. *Id.* at 1070. Finally, the court pointed out that the injuries caused by excessive force and a failure to protect can often be the same. *Id.* "On balance," then, the court concluded "that *Kingsley* applies, as well, to failure-to-protect claims brought by pretrial detainees against individual defendants under the Fourteenth Amendment." *Id.*

Earlier this year, the Ninth Circuit confirmed that *Kingsley*'s holding also extends to "claims for violations of the right to medical care brought by pretrial detainees." *Gordon v. County of Orange*. In *Gordon*, a pretrial detainee's successor-in-interest brought suit after the detainee died within 30 hours of being detained in an Orange County jail. 888 F.3d at 1120. The court explained that "the medical care a prisoner receives is just as much a 'condition' of his confinement as … the protection he is afforded

against other inmates," so, under *Kingsley*, both kinds of claims should be evaluated using an objective standard. *Id.* at 1124–25 (quoting *Wilson*, 501 U.S. at 303).

Seventh Circuit: The Seventh Circuit was the most recent court to hold that an objective standard applies to the constitutional claims of pretrial detainees. Just five months ago, in *Miranda v. County of Lake*, the court evaluated a Fourteenth Amendment claim of inadequate medical care brought by the estate of a pretrial detainee, who died in the hospital after suffering from severe dehydration at the county jail. 900 F.3d at 341. The court acknowledged the split emerging in the circuit courts on the question whether *Kingsley* should extend beyond excessive-force claims. *Id.* at 351–52. The court noted that it had previously declined to "weigh[] in on the debate," but stated that the time had come to do so because it might "make a difference in the retrial of [the plaintiff's] claims." *Id.* at 352.

After considering the views of its sister circuits, the Seventh Circuit joined the Second and Ninth Circuits in moving to an objective standard. According to the Seventh Circuit, this Court "has been signaling that courts must pay careful attention to the different status of pretrial detainees." *Id.* The court did not read *Kingsley* to support dissecting the nature of a particular Fourteenth Amendment claim, but rather understood the opinion as drawing a clear line between Eighth Amendment claims brought by convicted prisoners and Fourteenth Amendment claims brought by pretrial detainees. *Id.* Consistent with that understanding, the Seventh Circuit held that "medical-care claims brought by pretrial

detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*." *Id.*

C. Four Courts of Appeals Have Declined To Extend *Kingsley* Beyond Excessive-Force Claims

On the opposite side of the debate, the Fifth, Sixth, Eighth, and Eleventh Circuits have all continued to apply a *subjective* standard to Fourteenth Amendment claims brought by pretrial detainees post-*Kingsley*. See *Alderson v. Concordia Par. Corr. Facility*, 848 F.3d 415, 420 n.4 (5th Cir. 2017) (per curiam); *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018); *Whitney v. City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018), *rehearing and rehearing en banc denied* (8th Cir. June 14, 2018); *Dang ex rel. Dang v. Sheriff, Seminole County Fla.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). Some of these courts have observed that *Kingsley* seems to be in tension with applying a subjective standard to Fourteenth Amendment claims, but even those courts have declined to revert to an objective approach.

Fifth Circuit: In *Alderson v. Concordia Parish Correctional Facility*, the Fifth Circuit raised the possibility that *Kingsley* had called into question the applicable standard for claims brought by pretrial detainees under the Fourteenth Amendment. 848 F.3d at 419 n.4. But a divided panel explained that it was "bound by [the] rule of orderliness" because the Fifth Circuit had already applied a subjective standard in several post-*Kingsley* opinions (even though the court had done so in those cases without mentioning *Kingsley* or evaluating its implications).

Id. Judge Graves wrote separately in concurrence to note that he would have revisited the relevant standard in light of *Kingsley*. *Id.* at 425 (Graves, J., specially concurring in part).

Sixth Circuit: In *Richmond v. Huq*, the Sixth Circuit cited *Kingsley* and noted that the court had "not yet considered whether *Kingsley* … abrogates the subjective intent requirement of a Fourteenth Amendment deliberate indifference claim." 885 F.3d at 937–38 & n.3. The court acknowledged that its sister circuits were split on the question, and conceded that the "shift in Fourteenth Amendment deliberate indifference jurisprudence call[ed] into serious doubt" whether a plaintiff needed to show subjective deliberate indifference. *Id.* Nevertheless, the court applied the subjective standard, in part because the parties had not raised *Kingsley* in their briefing, and in part because no other court had at that point applied *Kingsley* "specifically to a deliberate indifference to a detainee's serious medical needs claim." *Id.*

Eighth Circuit: In *Whitney v. City of St. Louis*, a father brought a § 1983 action after his son, a pretrial detainee, committed suicide in his cell. 887 F.3d at 859. The father alleged that the defendant official had been deliberately indifferent by failing to adequately monitor his son and by failing to intervene or provide timely medical care. *Id.* To evaluate this claim, the Eighth Circuit applied a subjective standard. *Id.* at 860. The court acknowledged that the plaintiff had argued for an objective standard in light of *Kingsley*. *Id.* at 860 n.4. But the court held that *Kingsley* did "not control

because it was an excessive force case, not a deliberate indifference case." *Id.*

Eleventh Circuit: The decision below was not the first Eleventh Circuit opinion to apply a subjective standard to a Fourteenth Amendment claim brought by a pretrial detainee post-*Kingsley*. In *Nam Dang v. Sheriff, Seminole County, Florida*, the Eleventh Circuit considered a claim brought by a pretrial detainee who alleged that he had received inadequate medical care while in jail. 871 F.3d at 1276. The plaintiff argued that *Kingsley* had altered the standard for assessing claims brought by pretrial detainees. *Id.* at 1279 n.2. The court disagreed and held that it "[could] not and need not reach" that question. *Id.* The majority understood *Kingsley* to be limited to excessive-force claims, and thus did not understand it to abrogate the court's prior precedent on other Fourteenth Amendment claims. *Id.* The court further noted that even if *Kingsley* had altered the relevant standard, a different standard would not affect the case at hand. *Id.*

D. This Court Should Grant Certiorari To Resolve the Split in Favor of an Objective Standard

This Court should grant certiorari to resolve this split, which now spans at least seven circuits. In the current landscape, detainees face different standards for their constitutional claims depending on where they are housed. The Court should not countenance any such variation.

This case, moreover, is a good vehicle for resolving the entrenched split. The Eleventh Circuit made

absolutely clear that it was applying a subjective standard. See App. 16a–18a. And the court's application of the subjective standard made a difference. The Eleventh Circuit granted qualified immunity because it found that Petitioner had not put forward sufficient evidence to prove that Respondents had necessarily been aware of the appalling conditions. *Id.* Had Petitioner needed only to satisfy an objective standard, however, his allegations that Respondent Wright was directly responsible for the daily conditions of the unit would have established his culpability.

Finally, in resolving the split, this Court should ratify the approach adopted by the Second, Seventh, and Ninth Circuits. As those courts have properly recognized, requiring pretrial detainees to show subjective deliberate indifference is inconsistent with this Court's decision in *Kingsley*, which drew a clear line between Eighth Amendment and Fourteenth Amendment claims, and held broadly that a pretrial detainee must be able to proceed with his claims by putting forward evidence of objective unreasonableness—not subjective deliberate indifference, as a convicted prisoner must. 135 S. Ct. at 2472–73.

Nothing in *Kingsley* suggested that this Court's holding was confined to excessive-force claims. To the contrary, *Kingsley*'s reasoning about the special status of pretrial detainees would seem to apply no matter what kind of Fourteenth Amendment due process claim a prisoner is trying to bring. To the extent some courts of appeals have concluded otherwise, those courts have improperly narrowed this Court's decision to its facts and have ignored

both the letter and spirit of *Kingsley*. This Court should grant certiorari and make clear that it meant what it said in *Kingsley*: Pretrial detainees can prevail on a Fourteenth Amendment claim challenging their conditions of confinement by establishing *objective* unreasonableness; they need not establish subjective deliberate indifference.

II. The Eleventh Circuit's Qualified Immunity Ruling Flouts Decades of Precedent in This Court and the Courts of Appeals, and Ignores an Obvious Constitutional Violation

Setting aside that the Eleventh Circuit applied the wrong legal standard and erroneously failed to consider the severity of the alleged violations as part of its deliberate-indifference inquiry, its qualified immunity ruling would nonetheless warrant review—or, in the alternative, summary reversal—because the Eleventh Circuit disregarded decades of precedent clearly establishing the right of a detainee to basic sanitary conditions and ignored an obvious constitutional violation. This Court regularly intervenes to correct the misapplication of its longstanding precedents. See, e.g., *Tolan v. Cotton*, 572 U.S. 650 (2014) ("[W]e intervene here because the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents."); *Brosseau* at 198 & n.3.

Government officials are entitled to qualified immunity only if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (citation omitted).

A right can be "clearly established" either (1) by "existing precedent," or (2) in the "rare 'obvious case,'" the "unlawfulness of the officer's conduct [may be] sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Brosseau*, 543 U.S. at 199). Petitioner's egregious conditions of confinement were clearly unconstitutional under either test.

A. Depriving a Detainee of Basic Sanitation and Hygiene Clearly Violates the Constitution Under Decades-Old Precedent

This Court has long recognized that depriving inmates of basic sanitation violates the Constitution. In fact, the right of a detainee not to be confined in unhygienic conditions was established by this Court's first conditions-of-confinement decision in *Hutto v. Finney*, 437 U.S. 678 (1978). In *Hutto*, this Court held that the conditions in two Arkansas state prisons, including "filthy, overcrowded cell[s]," violated the Eighth Amendment. *Id.* at 686-87.

This Court reaffirmed that rule a few terms later in *Rhodes v. Chapman*, 452 U.S. 337 (1981). There, this Court explained that the unhygienic conditions challenged in *Hutto* had run afoul of the Constitution "because they resulted in unquestioned and serious deprivation of basic human needs." *Id.* at 347. The Court emphasized that conditions that "deprive inmates of the minimal civilized measure of life's necessities," violate the "contemporary standard of decency that [this Court] recognized in [*Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976)]". *Id.* In holding that the

double-celling practices challenged in *Rhodes* were not unconstitutional, this Court highlighted that "though small, the cells … are exceptionally modern and functional; they are heated and ventilated and have hot and cold running water and a sanitary toilet." *Id.* at 348 n.13.

The facts of these two decisions are not identical to the case at bar—indeed, the facts of the case at bar are *worse*—but precise factual identity is not required to abrogate qualified immunity. See, e.g., *Mullenix v. Luna* 136 S. Ct. 305, 314 (2015) (Sotomayor, J., dissenting) ("This Court has rejected the idea that 'an official action is protected by qualified immunity unless the very action in question has previously been held unlawful.'" (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987))). Instead, "'the salient question … is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged [conduct] was unconstitutional.'" *Tolan*, 572 U.S. at 656 (quoting *Hope*, 536 U.S. at 739). Here, the answer is plainly yes. This Court's decisions in *Hutto* and *Rhodes* have long provided "fair warning" that depriving inmates of basic elements of hygiene—including housing them in dirty and overcrowded cells and denying them access to sanitary bathroom facilities—is unconstitutional. Given that the facts in this case are *worse* than the already egregious facts in *Hutto* and *Rhodes*, there can be no doubt that officials were on notice that conditions in the Bubble were unlawful.

But to the extent this Court's decisions left any doubt, the Eleventh Circuit has explicitly held that the right of a detainee "not to be confined … in conditions lacking basic sanitation" is clearly established

for purposes of the qualified immunity inquiry—and, in fact, has been for decades. *Chandler v. Baird*, 926 F.2d 1057, 1065–66 (11th Cir. 1991) (right was "well established in 1986"). This Court considers such intra-circuit precedent when evaluating whether state officials should have been aware that their conduct was unlawful. See, e.g., *Hope*, 536 U.S. at 742–45 (holding that the respondents, Alabama prison officers, were not entitled to qualified immunity in light of prior precedent from the Eleventh Circuit and the precursor Fifth Circuit).

The Fifth Circuit (as originally constituted[4]) first recognized that the "deprivation of basic elements of hygiene" violates the Constitution in *Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971). See also *Campbell v. Beto*, 460 F.2d 765, 768 (5th Cir. 1972) ("[T]he deprivation of basic elements of hygiene has consistently been held violative of constitutional guarantees." (citation omitted)).[5] In the half-century since, the Fifth

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[4] The Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

[5] The Fifth and Eleventh Circuits are hardly the only circuits to have such a rule: Virtually "every sister circuit … has recognized that the deprivation of basic sanitary conditions can constitute an Eighth Amendment violation." *Brooks*, 800 F.3d at 1304; see also, e.g., *Budd v. Motley*, 711 F.3d 840, 843 (7th Cir. 2013) (per curiam) ("Jail officials violate the Eighth Amendment if they are deliberately indifferent to adverse conditions that deny 'the minimal civilized measure of life's necessities,' including adequate sanitation and personal hygiene items." (citation omitted)); *Stickley v. Byrd*, 703 F.3d 421, 423 (8th Cir. 2013) ("[P]retrial detainees are entitled to reasonably adequate sanitation[and] personal hygiene." (quotation marks and citation omitted)); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir. 1988) (recognizing "sanitation" as a constitutionally protected "basic need"); *Parrish v. Johnson*, 800 F.2d 600, 609 (6th Cir.

Circuit and the Eleventh Circuit have repeatedly reaffirmed that rule. What is more, those courts have expressly held that the conditions that rendered Petitioner's confinement unconstitutional—confinement in an overcrowded, waste-covered cell, and denial of access to basic hygiene items—are unlawful.[6]

1986) ("[T]he Eighth Amendment protects prisoners from being ... denied the basic elements of hygiene.") (quotation omitted); *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977) (recognizing that "the denial of decent and basically sanitary living conditions and the deprivation of the basic elements of hygiene" are "clear violations of the Eighth Amendment") (quotation marks and citation omitted). The unanimity and breadth of this precedent underscores the clarity with which the constitutional right to basic sanitary conditions has been established.

[6] Again, any argument that the unconstitutionality of housing prisoners in waste-covered cells or without access to basic hygiene items has not been clearly established is belied by the sheer number of opinions to the contrary in the other federal courts of appeals. See, e.g., *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001) ("Not surprisingly, human waste has been considered particularly offensive so that 'courts have been especially cautious about condoning conditions that include an inmate's proximity to [it].'" (quoting *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990)); *Keenan v. Hall*, 83 F.3d 1083, 1091 (9th Cir. 1996), *opinion amended on denial of reh'g*, 135 F.3d 1318 (9th Cir. 1998) ("[I]nmates have the right to personal hygiene supplies such as toothbrushes and soap."); *Young v. Quinlan,* 960 F.2d 351, 365 (3d Cir. 1992) ("It would be an abomination of the Constitution to force a prisoner to live in his own excrement for four days."), *superseded by statute on other grounds as recognized by Nyhuis v. Reno,* 204 F.3d 65, 71 n. 7 (3d Cir. 2000); *Howard v. Adkison,* 887 F.2d 134, 137 (8th Cir. 1989) (holding that "inmates are entitled to reasonably adequate sanitation" and finding violation where cell was "covered with ... human waste"); *LaReau v. MacDougall,* 473 F.2d 974, 978 (2d Cir.1972) ("Causing a man to live, eat and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted."); *Wright v. McMann*, 387 F.2d 519, 526 (2d

For example, in *McCray v. Sullivan*, 509 F.2d 1332 (5th Cir. 1975), prisoners in the Alabama state prison system alleged that their conditions of confinement violated the Eighth Amendment. Among other conditions, the prisoners challenged the confinement of up to seven inmates in a cell measuring 6 x 8 feet that had no bunks, sinks, or other facilities, except a hole in the floor that served as a toilet and frequently caused "waste to back up onto the floor of the cell" when flushed. *Id.* at 1336. The former Fifth Circuit held that these conditions constituted an unconstitutional "deprivation of the basic elements of hygiene," and expressed particular concern about prisoners "hav[ing] to live and sleep on a floor that has waste on it." *Id.* at 1336 & n.10.

More recently, in *Chandler v. Baird*, the Eleventh Circuit was called upon to evaluate the constitutionality of the following conditions of confinement: "confinement in a cold cell with no clothes except undershorts and with a plastic-covered mattress without bedding; filth on the cell's floor and walls; deprivation of toilet paper for three days; [and] lack of soap toothbrush, toothpaste, and linen." 926 F.2d at 1063. The district court had granted summary judgment on the basis of qualified immunity, and the Eleventh Circuit reversed. The Eleventh Circuit concluded that "the right of a prisoner not to be confined … in conditions lacking basic sanitation was well established" at the time of the plaintiff's confinement, and held that the plaintiff was "entitled to have the trier of fact determine whether the conditions of his … con-

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Cir. 1967) ("[C]ivilized standards of humane decency simply do not permit a man … to be deprived of the basic elements of hygiene such as soap and toilet paper.").

finement, principally with regard to the cell temperature and the provision of hygiene items, violated the minimal standards required by the Eighth Amendment." *Id.* at 1065–66 (emphasis added).

These precedents involved factual circumstances closely analogous to those at issue here, and should have been sufficient to put Respondents on notice that conditions in the Bubble were unconstitutional. See *Hope*, 536 U.S. at 741 (previous cases need not be "fundamentally" or even "materially similar", so long as "the state of the law [at the time of the challenged conduct] … gave respondents fair warning" that their conduct was unlawful); accord *United States v. Lanier*, 520 U.S. 259, 270–71 (1997). *Novak* and its progeny, particularly *McCray* and *Chandler*, provided sufficient warning that confinement of up to eight inmates in a cell that was covered in human waste, infrequently and ineffectively cleaned, and inadequately cooled and ventilated, where inmates were deprived of ready access to soap, toilet paper, or eating utensils and were forced to walk barefoot and sleep on mats placed directly on the waste-splattered floor, violates the Constitution.

And, even if these conditions were not individually serious enough to effect a constitutional violation (they are), this Court has held that conditions of confinement may have "a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson*, 501 U.S. at 304. This is obviously a scenario where that rule applies: Saunders's constant exposure to human bodily fluids and excrement was rendered all the more degrading and dangerous by the fact that he was deprived of ready access to soap, toilet paper, and eating

utensils—basic hygiene tools that would have mitigated somewhat the obvious health risks of living, sleeping, and eating covered in such filth. Astonishingly, the Eleventh Circuit concluded otherwise without any substantive analysis, declaring *ipse dixit* that "the broad swath of [Saunders's] allegations fails to illustrate the deprivation of [a] 'single, identifiable human need'—whether 'basic sanitation' or otherwise—or the … 'minimal civilized measures of life's necessities.'" App. 22a. With all due respect to the court of appeals, that pronouncement cannot withstand scrutiny.

B. Petitioner Was Confined in Conditions So Egregious That Any Reasonable Officer Should Have Known They Were Unlawful

Moreover, a reasonable official should not have needed prior precedent to know that Petitioner's conditions of confinement were unconstitutional.

This Court's precedents instruct that particularly egregious conduct may be clearly unconstitutional even if "the very action in question has [not] previously been held unlawful." *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640).

For example, in *Hope v. Pelzer*, this Court reversed a grant of qualified immunity even though there was no precedent squarely on point. In that case, the plaintiff alleged that being handcuffed to a hitching post on two occasions, one of which lasted for seven hours without regular water or bathroom breaks, violated the Eighth Amendment. *Hope,* 536 U.S. at 736–

38. This Court had no difficulty concluding that the "cruelty inherent" in defendants' conduct made this an "obvious" constitutional violation, and that any reasonable officer should have known that treating an inmate "in a way antithetical to human dignity … under circumstances that were both degrading and dangerous" was unlawful. *Id.* at 741–746.

The Eleventh Circuit recently found an "obvious" constitutional violation when confronted with debasing treatment of an inmate that is closely analogous to Respondents' treatment of Petitioner. In *Brooks v. Warden*, 800 F.3d 1295 (11th Cir. 2015), the plaintiff alleged that his Eighth Amendment rights were violated when he was placed in maximum-security restraints while hospitalized and "forced to defecate in his jumpsuit for two days and sit in his own excrement, during which time the guard laughed and taunted him." *Id.* at 1298. The district court dismissed the resulting claim on qualified immunity grounds, and the Eleventh Circuit reversed.

The Eleventh Circuit held that the officer defendant was not entitled to qualified immunity on the plaintiff's claim that he had been "confined in conditions lacking in basic sanitation," concluding that the officer was "put on fair notice both by our case law and the knowledge that forcing a prisoner to soil himself over a two-day period while chained in a hospital bed creates an obvious health risk and is an affront to human dignity." *Id.* In holding that these facts presented a "rare case of obvious clarity" in which the "conduct is so egregious that no prior caselaw is needed to put a reasonable officer on notice of its unconstitutionality," the Eleventh Circuit emphasized the health risks and cruelty of forcing a prisoner to

endure prolonged exposure to human excrement. *Id.* at 1306-07 (internal quotation marks and citations omitted).

The same rationale underlying *Hope* and *Brooks* compels the conclusion that a reasonable officer should have known that the unnecessarily cruel and dehumanizing conditions Petitioner endured were obviously unconstitutional. Indeed, the conditions of Petitioner's confinement were, in many ways, *worse* than those at issue in *Hope* and *Brooks*: The plaintiff in *Hope* was denied access to water and a bathroom for a matter of hours, whereas Saunders was forced to live, sleep, and eat in a densely packed cell that was covered in bodily fluids and excrement for *65 days*. And the plaintiff in *Brooks* was exposed to his own excrement for two days, whereas Petitioner was exposed to every type of bodily fluid—feces, urine, semen, vomit, and even blood—from up to seven cellmates for more than two months prior to his trial. App. 26a.

Even setting aside these "degrading and dangerous" conditions, Respondents in this case displayed the same shocking callousness that caused this Court to find an "obvious" constitutional violation in *Hope* and the Eleventh Circuit to do so in *Brooks*. When the air conditioning at the jail stopped working and the resulting intolerable conditions forced Petitioner to have a panic attack and bang his head "uncontrollably" against the steel door of his cell until he was "bleeding down his face" and needed stiches to close the wounds, Wright and his deputies "not only stood by, 'but laughed at [Petitioner] while he was beating his head on the door.'" App. 37a. This was an affront to basic standards of human decency, and "an act of

obvious cruelty for which there is no qualified immunity." *Id.* (citing *Brooks*, 800 F.3d at 1307).

In short, Respondents should have known from both precedent and common sense that the conditions in the Bubble were unlawful. The Eleventh Circuit's contrary ruling warrants review by this Court, which should grant certiorari and confirm that detainees have a clearly established right to basic sanitation. Alternatively, the Court may wish to summarily reverse. See *Brosseau*, 543 U.S. at 198 & n.3.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari. With respect to the second question presented, the Court may also wish to consider summary reversal.

Respectfully submitted,

SARAH G. BOYCE
Counsel of Record
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, 7th Floor
Washington, DC 20004
(202) 220-1107
Sarah.Boyce@mto.com

STEPHANIE G. HERRERA
MUNGER, TOLLES & OLSON LLP
560 Mission Street, 27th Floor
San Francisco, CA 94105
(415) 512-4063
Stephanie.Herrera@mto.com

COLEMAN W. WATSON
WATSON LLP
189 S. Orange Street,
Suite 810
Orlando, FL 32801
(407) 377-6634
coleman@watsonllp.com

December 13, 2018

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17607
D.C. Docket No. 6:14-cv-00877-GAP-DCI

OBERIST LEE SAUNDERS,

Plaintiff-Appellee,

versus

SHERIFF OF BREVARD COUNTY, in his official capacity,

Defendant-Counter Claimant-Appellant,

SUSAN JETER, in her individual capacity,
JOHN C. WRIGHT, in his individual capacity,

Defendant-Appellants,

PATRICIA TILLEY, in her individual capacity,

Defendant.

Appeal from the United States District Court
for the Middle District of Florida

May 17, 2018

Before MARCUS, MARTIN, and NEWSOM, *Circuit Judges.*

PER CURIAM:

I

A

Oberist Saunders arrived at Florida's Brevard County Jail in June 2008 following his arrest for armed robbery. A little more than a month into his incarceration, Saunders cut his wrists in an unsuccessful suicide attempt. A jail guard noticed Saunders' wounds and called paramedics, who promptly transferred Saunders to the nearest hospital. When he returned to the Jail later that same day, Saunders was placed in "the acute mental health housing unit," also known as "the Bubble." Saunders spent a total of 69 days in the Bubble—65 during his post-suicide stay in 2008, and four more during a case-related status hearing in 2013. The issues in this appeal relate exclusively to Saunders' time in the Bubble, during which he claims that officers violated his constitutional rights under the Eighth and Fourteenth Amendments.

B

Saunders alleges that the Bubble's conditions were unconstitutional for a variety of reasons. For starters, he claims that the Bubble's cells were overcrowded. Saunders testified that the cells' occupancy frequently vacillated, with as few as three and as many as eight occupants in a cell "no larger than 9-by-15," which, he said, increased tensions among inmates and inhibited his ability to exercise. Other Bubble inmates echoed Saunders' claim, explaining that the dense occupancy produced conflicts when, for example, inmates' sleeping mats would unavoidably overlap, or when urine would splash from the cell's communal toilet onto an inmate's sleeping space.

Saunders also alleges significant problems with the Bubble's sanitation standards. In particular, he claims that inmates would urinate, defecate, and ejaculate in their cells, and that the authorities wouldn't clean the resulting residue for several days. Saunders further contends that some inmates would intentionally stop up the cell toilets, thus flooding the cells and contaminating others' sleeping mats or blankets, and that the officers would leave the mess "to sit in there for a while, basically like a punishment." (Saunders admits, though, that this never happened to him personally.) Moreover, Saunders states that he never received new blankets or mats, even after, for instance, a fellow inmate with bleeding lesions on his feet repeatedly stomped on his blanket. Saunders finally alleges (with respect to sanitation) that even when officers would clean the cells—which, according to him, happened twice a week—he never saw them change the mop water, and that therefore much of the cleaning was ineffective.

Beyond concerns over sanitation, Saunders also complains about his (enforced) inability to maintain personal hygiene. The Jail, he says, would permit the Bubble's inmates to access hand soap, utensils, and toilet paper only upon request. Although this policy stemmed from the Jail's concern that inmates might attempt to hurt themselves or others, Saunders insinuates that even after inmates had requested the products, officers would intentionally delay providing them for unreasonable periods of time. In the same vein, Saunders complains that the officers restricted his access to showers, only permitting a full shower about twice a week.

Saunders also claims to have suffered physical discomfort—and even harm—in the Bubble. According

to Saunders, the Bubble's cells were always hot and moldy, and the general climate was inadequately maintained. Once, Saunders says, the stifling discomfort of his cell's temperature caused him to lapse into a panic attack in which he repeatedly slammed his head against a metal doorframe, resulting in a gashed scalp and stitches. Saunders separately claims to have suffered physical violence when a fellow inmate brutally attacked him in his sleep, although the evidence is clear that the officers on duty intervened and stopped the attack immediately and that the onsite nurse cleared Saunders of any injury.

C

Saunders brought suit against various state employees and Jail officers in Florida state court. The defendants removed the case to the United States District Court for the Middle District of Florida. Saunders eventually filed his Third Amended Complaint, in which he alleged claims against Sheriff Wayne Ivey under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and against ten other defendants in their individual capacities under 42 U.S.C. § 1983. The defendants subsequently moved for summary judgment on both the merits of the constitutional claims and the defense of qualified immunity.

The district court granted in part and denied in part the defendants' motion for summary judgment, determining that a jury would have to resolve various issues of fact related to the defendants' qualified-immunity defenses. On December 16, 2016, the defendants timely appealed to this Court. Claims against three officers remain for us to consider on appeal: Saunders asserts (1) that, under *Monell*, Sheriff Ivey is liable in his official capacity for the unconstitutional conditions in the Jail; (2) that Commander Susan

Jeter faces supervisory liability for unconstitutional conditions in the Jail; and (3), that Officer John Wright—the "Officer in Charge" of the Bubble during most of Saunders' tenure—is personally liable for unconstitutional conditions of confinement.

While we lack jurisdiction to review Saunders' *Monell* claim against Ivey, we conclude that the district court improperly denied qualified immunity to defendants Jeter and Wright. As to those two defendants, we therefore reverse.

II

We may exercise appellate jurisdiction over the denial of qualified immunity on a motion for summary judgment, *see Plumhoff v. Rickard*, 134 S. Ct. 2012, 2018-19 (2014), but we lack jurisdiction to conduct interlocutory review of Saunders' *Monell* claim against Sheriff Ivey. The defendants urge us to exercise pendent jurisdiction over the *Monell* claim because it is, they say, "inextricably intertwined" with our qualified immunity analysis. We disagree. While it is true that an absence of any constitutional violation would be fatal to assertions of both personal and *Monell* liability, it remains the case that these forms of liability are subject to different standards. For instance, if officers violated a plaintiff's constitutional rights but those rights were not "clearly established," then *Monell* liability could survive even though qualified immunity would preclude individual liability.

For these reasons, this Court has previously found *Monell* issues sufficiently distinct from issues relating to qualified immunity, and has thus held *Monell* claims ineligible for interlocutory review. *See Jones v. Cannon*, 174 F.3d 1271, 1293 (11th Cir. 1999); *Pickens v. Hollowell*, 59 F.3d 1203, 1208 (11th Cir. 1995);

Haney v. City of Cumming, 69 F.3d 1098, 1102 (11th Cir. 1995). The defendants have failed to persuade us that we may—let alone should—chart a different course here. We therefore address in this appeal only whether defendants Wright and Jeter are entitled to qualified immunity.

III

"We review *de novo* the denial of a motion for summary judgment by a district court on the basis of qualified immunity, construing all facts and making all reasonable inferences in the light most favorable to the non-moving party." *Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1247 (11th Cir. 2004). "As this Court has repeatedly stressed, the facts, as accepted at the summary judgment stage of the proceedings, may not be the actual facts of the case. Nevertheless, for summary judgment purposes, our analysis must begin with a description of the facts in the light most favorable to the plaintiff." *Lee v. Ferraro*, 284 F.3d 1188, 1190 (11th Cir. 2002) (citation and quotation marks omitted). Our pro-plaintiff perspective notwithstanding, however, "a mere scintilla of evidence in support of the non-moving party's position is insufficient to defeat a motion for summary judgment." *Herrington*, 381 F.3d at 1247.

Our review begins with qualified immunity's threshold question: Whether the defendants were "acting within the scope of [their] discretionary authority." *Moore v. Pederson*, 806 F.3d 1036, 1042 (11th Cir. 2015). The term "discretionary authority" includes "all actions of a governmental official that (1) were undertaken pursuant to the performance of his duties, and (2) were within the scope of his authority." *Id.* (internal quotations omitted). Because Saunders' claims clearly focus on instances in which the

defendant officers were acting within their discretionary authority, "the burden shifts to [Saunders] to demonstrate that qualified immunity is inappropriate." *Id.*

Qualified immunity is a "muscular doctrine," *Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996), and Saunders must satisfy both elements of a two-pronged inquiry in order to prove the officers' individual liability. "The first [prong] asks whether the facts, 'taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a federal right.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)) (alterations omitted). "The second prong of the qualified-immunity analysis asks whether the right in question was 'clearly established' at the time of the violation"—and thereby shields government actors "from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 1866 (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). The Supreme Court has held that courts may engage these issues in either order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

A constitutional right is "clearly established" only if "its contours [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739 (quotation marks omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (quotation marks and citations omitted). Even in the absence of binding caselaw, conduct may occasionally

be so obviously unconstitutional that a previous on-point decision is unnecessary. *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). Simply put, qualified immunity's clearly-established inquiry reduces to whether the state of the law at the time of the defendants' alleged violations gave the defendants "fair warning" that their alleged actions were unconstitutional. *Hope*, 536 U.S. at 741.

As already noted, Saunders alleges Eighth Amendment violations. In order to establish that conditions of confinement are unconstitutional, a plaintiff must satisfy each element of a multi-tiered inquiry. The first element sets an objective hurdle, where "a prisoner must prove that the condition he complains of is sufficiently serious to violate the Eighth Amendment." *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004) (quotation marks omitted). An objective Eighth Amendment violation "must be extreme" and deprive the prisoner "of the minimal civilized measure of life's necessities." *Id.* (quotation marks omitted) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The second requisite element is a subjective one: "[T]he prisoner must show that the defendant prison officials acted with a sufficiently culpable state of mind with regard to the condition at issue." *Id.* (quotation marks omitted). Negligence is not enough; the officer "must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 1289-90 (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Finally, and separately, the plaintiff must prove "a causal connection between the defendants' conduct and the Eighth Amendment violation." *Brooks v. Warden*, 800 F.3d 1295, 1301 (11th Cir. 2015).

Despite their troubling nature, none of Saunders' allegations withstands the defendants' qualified-immunity defenses. In the sections that follow, we examine Saunders' specific allegations one by one. After that, we address the district court's conclusion that Saunders' complaints, even if insufficient standing alone to state a clearly established constitutional violation, might do so in combination.

A

There is no doubt that the facts of this case, when viewed in Saunders' favor, paint a disturbing picture of confinement in the Brevard County Jail. Taking Saunders' allegations at face value, we have evidence of densely packed cells and undoubtedly difficult living conditions. We take none of this lightly.

As Saunders repeatedly contends throughout his brief, such conditions may well fall short of the Florida Model Jail Standards. But our limited authority does not extend to the question whether the defendants have comported themselves in accordance with state law; that is a question for another day, and probably for another court. Rather, in this appeal we are concerned only with the rights that the United States Constitution guarantees, and whether the Brevard County Jail fell short of constitutional requirements—and, importantly, because we are faced with qualified-immunity defenses, did so in a way that violated "clearly established" federal law. Because Saunders cannot prove that the Jail's conditions—as trying as they may have been—violated his clearly established constitutional rights, we must grant qualified immunity to defendants Wright and Jeter. This section addresses Saunders' separate claims in turn, ultimately resolving each in the defendants' favor.

Saunders first alleges that the Bubble's population density produced "overcrowding" that violated his Eighth Amendment rights. According to Saunders' testimony, the number of inmates in the Bubble—"no larger than 9-by-15"—fluctuated and at times held as many as eight occupants. Saunders also argues that the occupancy levels "engendered violence" and cites testimony alleging space-related squabbles. We do not doubt that such tight quarters may cause discomfort—particularly when we consider the necessary proximity between the cell's toilet and inmates' sleeping arrangements. But for better or worse, comfort is not the Constitution's test, *see Rhodes*, 452 U.S. at 349 (explaining that "the Constitution does not mandate comfortable prisons," and that prisons housing serious criminals "cannot be free of discomfort"); rather, we are concerned here with whether the Jail denied Saunders the "minimal civilized measure of life's necessities." *Id*. at 347.

The Supreme Court examined the constitutional limits of overcrowding in *Rhodes* and ultimately determined that "double celling" did not violate the Eighth Amendment because the practice "did not lead to deprivations of essential food, medical care, or sanitation." *Id*. at 347-48. Our Court has followed the Supreme Court's lead: "In assessing claims of unconstitutionally overcrowded jails, courts must consider the impact of the alleged overpopulation on the jail's ability to provide such necessities as food, medical care, and sanitation." *Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1575 (11th Cir. 1985).

In its decision to deny the officers' qualified-immunity defenses on summary judgment, the court below stretched *Rhodes* past its breaking point. From *Rhodes*'

premise that "cells at double capacity do *not* violate the Eighth Amendment," the district court reasoned to the conclusion that cells past double capacity *do* violate the Eighth Amendment—and, indeed, do so clearly enough to defeat qualified immunity. With respect, that does not follow. *Rhodes* holds only that double-celling falls within constitutional parameters; it does not hold (or even suggest) that anything north of double-celling falls without. Contrary to the negative implication that the district court drew, the Supreme Court's holding in *Rhodes* does not provide a one-size-fits-all framework for the constitutionality of prison occupancy, let alone demarcate double-occupancy as the Constitution's hinge point. And in any event, a mere negative implication, even if granted—here, that greater prisoner density might run afoul of the Constitution—cannot be the basis for a clearly established right for qualified-immunity purposes.

Saunders fails to offer any precedent—for *Rhodes* does not do it—establishing that the Bubble's occupancy violated the Constitution, much less that the officers culpably acted with "fair warning" of such a violation. *Hope*, 536 U.S. at 741. The district court therefore erred when it denied qualified immunity on this ground.

2

Saunders also claims that the defendants violated the Eighth Amendment by not giving him "any exercise time, recreation time, or any time outside" during his stay in the Bubble. Importantly, however, Saunders has never alleged that the officers in fact denied him the ability to exercise; instead, Saunders says only that he "was never offered rec," that he "didn't know [that the officers] let people out for rec," and that he only learned of recreational opportunities

"after [he] got out and went back into mental health housing and saw it when [he] went to rec from there." Another inmate provided similar testimony, explaining that he was "not aware that [he] could have [recreation time]." The district court determined that these statements produced a question of fact about whether the officers violated Saunders' clearly established Eighth Amendment rights, and denied the officers' qualified-immunity defense.

On its path to a triable issue of fact, the district court stated that "there [was] no evidence refuting Plaintiff's claim that he did not have the ability to exercise in his cell." The district court erred here in a few ways. First, the court misstated Saunders' claim—Saunders claimed only that he was ignorant of potential recreation time and that the officers never affirmatively offered it to him. Second, Saunders' testimony suggests that the cell's occupancy was constantly changing, and, at least some of the time, only "three or four" inmates shared the space. If Saunders' alleged "9-by-15" cell dimensions are accurate, then three or four inmates would each have somewhere around 35-to-45 square feet of room to exercise during periods of low occupancy, which would provide ample space for most any stationary exercise regimen.

Finally, the district court failed to recognize that this Court's holding in *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999), precludes the possibility that a right to be offered recreation time during confinement could be clearly established. In *Perrin*, we held that "complete *denial* to the plaintiffs of outdoor exercise, although harsh, did not violate the Eighth Amendment" because there was a "penological justification" for keeping the plaintiffs in solitary confinement. *Id.* at 1316-17 (emphasis supplied). Here, Saunders' suicide

attempt justified the officers' decision to assign Saunders to the Bubble, and the record before us does not demonstrate restrictions even as severe as those that *Perrin* deemed constitutional—that is, Saunders does not allege "complete denial . . . of outdoor exercise," let alone that the defendants deliberately violated any clearly established constitutional right.

3

Saunders' unsanitary-conditions allegations undoubtedly pose this case's most difficult questions. Saunders seems to allege three discrete violations: (1) deprivation of toiletries; (2) inadequate cell cleaning; and (3) inadequate blanket cleaning. When viewed in the light most favorable to Saunders, the record presents evidence of undoubtedly unpleasant conditions. Even so, we conclude that none of Saunders' claims can overcome the defendants' qualified-immunity defenses. While we take no particular pleasure in foreclosing Saunders' suit, we have no other choice; Saunders has simply failed to meet his burden under our qualified-immunity framework.

a

Saunders and fellow inmates testified that the defendant officers failed to provide the inmates with ready access to soap or toilet paper, instead providing these items only on request and, at times, taking up to 45 minutes to do so. The officers do not dispute Saunders' assertions. Indeed, the officers explain that this temporary deprivation was a feature, not a bug; the Jail intentionally restricted the Bubble's inmates' access to these items due to concerns over their physical safety and potential for self-harm.

Saunders' toiletries-related assertions cannot overcome the defendants' qualified-immunity defenses. In

similar cases, this Court has "consistently held that prison officials have a broad discretion to determine the methods by which they will carry out their responsibilities," particularly in the province of prisoner safety. *McMahon v. Beard*, 583 F.2d 172, 175 (5th Cir. 1978) (holding that depriving a suicidal inmate of all clothing and sheets for three months did not violate the Constitution).[1] Saunders fails to cite any precedent to demonstrate that a prison procedure that temporarily inhibits suicidal inmates' access to toiletries so plainly violates an inmate's clearly established Eighth Amendment rights that qualified immunity does not apply. In fact, available precedent (albeit from other circuits) seems to point decisively in the other direction. *Contrast, e.g.*, *Lunsford v. Bennett*, 17 F.3d 1574, 1580 (7th Cir. 1994) ("The chance of harm resulting from the temporary failure to provide personal hygiene items is too remote for plaintiffs to meet th[e] subjective requirement [of an Eighth Amendment claim].").[2]

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[1] Decisions of the former Fifth Circuit rendered prior to close of business on September 30, 1981, are binding on this Court. *See Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc).

[2] The dissent analogizes this case's facts to those in *Chandler v. Baird*, 926 F.2d 1057 (11th Cir. 1991), to support the contention that the guards' policy of temporarily depriving inmates of toiletries violated Saunders' clearly established Eighth Amendment rights. Dissent at 31-32, 41-43. But *Baird* is inapposite; there, we held that *permanent* deprivation of certain toiletries—combined with other sanitation issues that are absent from this case—violated the Eighth Amendment. *Baird*, 926 F.2d at 1063. Here, by contrast, Saunders and his fellow inmates only allege that they did not have unfettered access to soap in their cells, and Officer Wright's unrebutted testimony explains that "[t]oilet paper and soap were available to inmates upon request."

b

Saunders also argues that the officers were deliberately indifferent to the Bubble's sanitation, thus producing unconstitutionally unsanitary conditions in the cells. Saunders alleges two theories to support this contention. First, he claims that neither he nor his fellow inmates ever "observed Jail orderlies change mop water" when the orderlies cleaned the inmates' cells, even when the toilets overflowed. Second, he alleges that inmates would urinate, defecate, and ejaculate onto the cell's floors and walls, and that the "Jail staff did not clean human waste from inmate cells for 'days.'" Although testimony from officers and fellow inmates contradicts the testimony on which these claims rely, at this stage we must focus only on the testimony that supports Saunders' allegations and take this evidence as fact. *See Ferraro*, 284 F.3d at 1190.

We can make quick work of the first theory, since the evidence which Saunders provides—testimony alleging that officers would use the same mop bucket for the Bubble's 18 cells—cannot without more detail (*e.g.*, potential proof of the cleaning chemicals' complementary ineffectiveness) create "an objectively unreasonable risk of serious damage to his future health." *Brooks*, 800 F.3d at 1303 (quotation marks omitted). More importantly for the purposes of this analysis, however, Saunders fails to show that our caselaw has clearly established the unconstitutionality of such a practice.

Saunders' second theory is more serious. In *Brooks*, this Court reviewed a ghastly record in which officers allegedly denied an inmate the ability to lower his pants while defecating, and, "[a]s a result, [the inmate] was forced to defecate into his jumpsuit and sit in his own feces for two days . . . ." 800 F.3d at 1303.

There, we looked to the "'well established' Eighth Amendment right 'not to be confined in conditions lacking basic sanitation'" and found that the "allegations state[d] an Eighth Amendment violation under our caselaw." *Id.* (quoting *Chandler v. Baird*, 926 F.2d 1057, 1065-66 (11th Cir. 1991)) (alterations omitted). Although Saunders' allegations fall short of the egregious facts in *Brooks*, cases in which "the deprivation of basic sanitary conditions . . . constitute an Eighth Amendment violation" are plentiful, and some of them expressly hold that extended exposure to human excrement violates the Constitution. *See id.* at 1304 (listing numerous cases from "every sister circuit (except the Federal Circuit)" in which courts have found that unsanitary conditions violated a plaintiff's Eighth Amendment rights).

Nevertheless, even if we were to grant the assumption that the evidence before us could demonstrate levels of sanitation violative of Saunders' rights, Saunders' claims would still fail to shoulder their heavy burden under our Eighth Amendment qualified-immunity jurisprudence. Beyond our framework's first hurdle—that is, showing that the prison conditions deprived the inmate "of the minimal civilized measure of life's necessities," *Chandler*, 379 F.3d at 1289—a plaintiff still must satisfy two further conditions in order to overcome a defendant's qualified-immunity defense. The framework's second, subjective prong requires the plaintiff to prove that the defendant was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [that the defendant] also [drew] the inference." *Id.* at 1289-90; *see also Farmer*, 511 U.S. at 838; *Wilson v. Seiter*, 501 U.S. 294, 298 (1991). Then, after satisfying both the objective and the subjective tests, the plaintiff finally must show that "a causal connec-

tion" exists between the defendants and the Eighth Amendment violation. *Brooks*, 800 F.3d at 1301. No matter how favorably we construe the record before us, Saunders cannot meet these hefty requirements.

Saunders fails to present evidence that Commander Jeter knew or inferred that the Bubble was unconstitutionally unsanitary during the time that Saunders was detained there. In his attempt to meet this requirement, Saunders offers three pieces of evidence. First, Saunders cites his "appeal of grievance #09001676," which he filed on July 23, 2009. But the grievance appeal never mentioned the Bubble's sanitation conditions; instead, the appeal focused entirely on Saunders' dissatisfaction with medical treatment that he received in the prison. Second, Saunders cites a fellow inmate's deposition testimony in which the inmate stated that "several inmates" complained about their conditions of confinement, and that "[Jeter] said she would address [the issues] but that never changed." Not only does the inmate's statement constitute inadmissible hearsay which "cannot be considered on a motion for summary judgment," *Macuba v. Deboer*, 193 F.3d 1316, 1322 (11th Cir. 1999), but the testimony refers only to general sanitation concerns and does not corroborate Saunders' specific claims—in fact, this inmate described conditions in which officers would take, at most, "three, four hours" to clean a befouled cell, and therefore the conditions about which the inmate alleges Jeter was aware would likely have fallen within constitutional bounds. Third, Saunders points to a letter that he sent on February 19, 2009, which, though it was not addressed to Jeter, was likely received and reviewed by him. Notably, unlike the appeal of the grievance, the letter does contain fairly detailed descriptions of the unsanitary conditions in the Bubble. However, even assuming that the letter

creates a material issue as to whether Jeter knew of the unsanitary conditions in the Bubble, the letter was not written until approximately five months after Saunders was discharged from the Bubble in 2008. Accordingly, the letter does not demonstrate that Jeter's alleged action or inaction with respect to the conditions in the Bubble had any causal connection to the 65 days that Saunders spent there in 2008, and thus cannot support Saunders' claimed constitutional deprivation. *See Brooks*, 800 F.3d at 1301.

Saunders' attempt to prove Officer Wright's "culpable state of mind" fares no better. Saunders asserts that "Wright's mere presence in the Bubble on a daily basis is itself sufficient to deny summary judgment because there is a factual issue as to whether he personally observed the inhumane conditions of confinement that Saunders experienced." Even if his conclusion logically followed, Saunders' argument omits essential—and undisputed—facts that are fatal to his premise. Wright testified without contradiction that he worked "twelve hour day shifts, three to four days per week." Saunders spent 69 days in the Bubble. Vague allegations that "Jail staff did not clean human waste from inmate cells for 'days,'" without a more specific indication that Wright in particular (who worked only three to four days a week) was present to witness the problems, simply are not sufficient to demonstrate that Wright himself displayed the deliberate indifference that our Eighth Amendment jurisprudence requires.[3]

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[3] To be clear, Saunders' allegation fails not because of Officer Wright's "part-time" employment status (Dissent at 34), but instead, as explained in text, because Saunders fails to adequately show that Officer Wright clearly knew about the alleged delay in cleaning human waste.

c

Beyond the insufficient access to toiletries and indifference to cleanliness, Saunders also alleges that "the Jail never washed his Jail-issued blanket and never did a blank[et] exchange." But the testimony to which Saunders cites to support this claim alleges only that "[the Jail] didn't do a blanket exchange," meaning that inmates "pretty much had the same blanket the whole time [they] [were] in there"; Saunders cites to no evidence—not even his own testimony—to support the claim that the "Jail never washed his Jail-issued blanket." To the contrary, Saunders testified that he "would see [the officers] wash and reuse the blankets."

4

The last claim for us to consider is Saunders' assertion that "Wright forced Saunders to sit in dangerously high temperatures" and provided inadequate ventilation in his cell, which, Saunders says, ultimately caused him to "suffer[] a mental breakdown and panic attack." This is a serious allegation, as we have recognized that "the Eighth Amendment applies to prisoner claims of inadequate cooling and ventilation." *Chandler*, 379 F.3d at 1294. Our Eighth Amendment jurisprudence focuses on "both the severity and the duration of the prisoner's exposure to inadequate cooling and ventilation," even while recognizing that "a prisoner's mere discomfort, without more, does not offend the Eighth Amendment." *Id.* at 1295 (quotation marks omitted).

Even the most charitable view of the record before us does not show that the Bubble's ventilation—or lack thereof—produced the "excessive risk to inmate health or safety" that the law requires. *Farmer*, 511 U.S. at 837. Although Saunders testified that "it was summer, so the cells were always hot" and that he found the

ventilation unsatisfactory, he provides only one specific example of what he alleges to have been unconstitutionally inadequate cooling: For a period of up to two days, the "AC vent . . . was blowing no air" and had "stopped working," thus allegedly causing Saunders to experience a panic attack during which he repeatedly slammed his head against a metal doorframe, resulting in gashes and stitches.

While surely unpleasant, this episode does not describe clearly unconstitutional conditions. Indeed, this Court has held that a Florida prison did not violate the Eighth Amendment even when it provided no air conditioning whatsoever during the summer months. *See Chandler*, 379 F.3d at 1297-98. And ultimately, Saunders' extreme reaction cannot alter our analysis; to hold otherwise would permit an inmate's subjective characteristics and behavior to bend objective standards, directly contravening our binding precedent.[4]

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[4] The dissent asks, "How can it be disputed that during the five minutes Mr. Saunders was banging his head against the steel door—with blood streaming down his face—he was under a 'substantial risk of serious harm'?" Dissent at 36. With respect, we think that the premise of the question misses the mark, for it is the *conditions themselves* that must pose the "risk of serious harm." *Farmer*, 511 U.S. at 834. The dissent attempts to bridge that gap by rehashing Saunders' panic-attack episode, suggesting that the guards knew of Saunders' capacity for self-harm, and then concluding that "the circumstances created a substantial risk that [Saunders'] mental condition would severely deteriorate," thus "satisfy[ing] the Eighth Amendment's objective prong." Dissent at 37. But the cases that our colleague cites for support are inapposite and do not suggest that the Bubble's temporary ventilation failure violated any constitutional right, let alone one that is clearly established.

B

Having determined that none of Saunders' individual allegations can overcome the defendants' qualified-immunity defenses, we must address a final, critical error in the district court's holding. The court reasoned that even though "some of Plaintiff's complaints standing alone . . . may not pass constitutional muster," Supreme Court precedent permits the amalgamation of otherwise insufficient claims because "*some* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone . . . ." Dist. Ct. Op. at 22-23 (quoting *Wilson*, 501 U.S. at 304 (emphasis in original)). The district court thus concluded that "whether a combination of these issues constitutes cruel and unusual punishment is an issue of fact for the jury to decide."

But the district court's ellipses mute essential text in which the *Wilson* Court qualified its preceding statement, explaining that such aggregation may occur "only when [the alleged violations] have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Wilson*, 501 U.S. at 304. Contrary to the district court's suggestion, the *Wilson* Court expressly stated that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.* at 305.

The district court failed to identify what "single human need" the Jail's conditions denied Saunders, and seems to have engaged in the very sort of reasoning that the *Wilson* Court's guidance prohibits—that

is, vague disapproval of Saunders' overall confinement conditions. Moreover, even when we analyze all of Saunders' claims holistically, the broad swath of allegations fails to illustrate the deprivation of either the *Wilson* Court's "single, identifiable human need"—whether "basic sanitation" (Dissent at 30) or otherwise—or the *Rhodes* Court's "minimal civilized measures of life's necessities."[5]

IV

For the foregoing reasons, we DISMISS the defendants' appeal of Saunders' *Monell* claim and REVERSE the district court's denial of the defendants' motion for summary judgment on qualified-immunity grounds.

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[5] The dissent mistakenly suggests that our critique of the district court's analysis indicates that we "did not truly weigh all of this evidence together," even though "our precedent requires us to do so." Dissent at 30. To be clear, we did weigh the relevant evidence together; we have simply concluded that the defendants did not violate Saunders' clearly established Eighth Amendment right to basic sanitation. The problem with the district court's approach was not a problem with amalgamation as such. Rather, the district court erred by combining a variety of Eighth Amendment issues but failing to identify which "single, identifiable human need" was denied. Dist. Ct. Op. at 18-23 (amalgamating disparate allegations, including overcrowding, lack of exercise, cleaning, access to hygiene products, ventilation, temperature, sleeping arrangements, and showering, and ultimately concluding that these, together, may have violated Saunders' Eighth Amendment rights).

MARTIN, Circuit Judge, dissenting in part:

Oberist Saunders filed suit against officials at the Brevard County Jail on account of the squalid conditions he was forced to live in while imprisoned there. Rather than allow Mr. Saunders to present his evidence to a jury, my colleagues in the majority rely on the doctrine of qualified immunity to end his case here. This case involves the denial of basic human necessities, which is a well-established constitutional right, even for prisoners. Our Circuit precedent, properly applied, would give Mr. Saunders an opportunity to redress the harms inflicted on him.

My review of the record reveals that Mr. Saunders has substantiated two independent Eighth Amendment violations that should survive summary judgment. The first is based on Corporal Wright's deliberate indifference to the unsanitary conditions in the acute pod where Mr. Saunders was housed for at least 69 days. The second is based on Corporal Wright's deliberate indifference to Mr. Saunders's panic attack and self-harming behavior on August 3, 2008. The District Court denied qualified immunity to Corporal Wright, and I think it was right to do so. I therefore dissent from the opinion issued by my colleagues reversing the District Court decision in this regard.

I. LEGAL STANDARD

Eighth Amendment challenges[1] to conditions of confinement require a two-part analysis: an objective

[1] Mr. Saunders was locked up in the acute pod both before and after his conviction. "While the conditions under which a convicted inmate are held are scrutinized under the Eighth Amendment's prohibition on cruel and unusual punishment, the conditions under which a pretrial detainee are held are reviewed under the Due Process Clause of the Fourteenth Amendment."

inquiry and a subjective one. *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S. Ct. 1970, 1977 (1994). "First, under the objective component, a prisoner must prove that the condition he complains of is sufficiently serious to violate the Eighth Amendment." *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004) (quotation omitted). The prisoner must show that the condition was "extreme" and that it "pose[d] an unreasonable risk of serious damage to his future health or safety." *Id.* (quotations omitted). "Only a deprivation which denies 'the minimal civilized measure of life's necessities,' is grave enough to violate the Eighth Amendment." *Jordan v. Doe*, 38 F.3d 1559, 1564 (11th Cir. 1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S. Ct. 2392, 2399 (1981)).

The second step of the analysis is "the subjective component." *Id.* at 1564. Under this component, the prisoner must show that the defendant prison official acted with "deliberate indifference" toward the conditions at issue. *Chandler*, 379 F.3d at 1289. Deliberate indifference is established by showing: "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than mere negligence." *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999). Thus, putting the objective and subjective components together, we have said: "A prison official's deliberate indifference to a known, substantial risk of serious harm to an inmate violates

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Jacoby v. Baldwin Cty., 835 F.3d 1338, 1344 (11th Cir. 2016). But while the constitutional source differs, this Circuit ruled in *Hamm v. DeKalb Cty.*, 774 F.2d 1567 (11th Cir. 1985), that "in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care[,] the minimum standard allowed by the due process clause is the same as that allowed by the eighth amendment for convicted persons." *Id.* at 1574.

the Eighth Amendment." *Marsh v. Butler Cty.*, 268 F.3d 1014, 1028 (11th Cir. 2001) (en banc), *abrogated on other grounds by Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561–63, 127 S. Ct. 1955, 1968–69 (2007).

At this stage in the proceedings, we analyze claims based on "the *plaintiff's* version of the facts." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002).

II. UNSANITARY CONDITIONS OF CONFINEMENT

A. OBJECTIVE CONSTITUTIONAL VIOLATION

This Court has "long recognized a 'well established' Eighth Amendment right 'not to be confined . . . in conditions lacking basic sanitation.'" *Brooks v. Warden*, 800 F.3d 1295, 1303 (11th Cir. 2015) (quoting *Chandler v. Baird*, 926 F.2d 1057, 1065–66 (11th Cir. 1991)); *see also Novak v. Beto*, 453 F.2d 661, 665 (5th Cir. 1971) (collecting previous cases that held "the deprivation of basic elements of hygiene" violates the Eighth Amendment). Mr. Saunders's evidence is sufficient for a reasonable jury to find that conditions in the acute pod "lack[ed] basic sanitation." *Brooks*, 800 F.3d at 1303 (quotation omitted). This is true both when considering his sanitation claims in isolation, as the majority did, and in conjunction with his claims of overcrowding and lack of basic hygienic necessities. The majority did not truly weigh all of this evidence together—performing this analysis in a single sentence—although I believe our precedent requires us to do so. *See* Majority Op. 26. Legal precedent tells us that the conditions complained of "have a mutually enforcing effect that produces the deprivation of a single, identifiable human need": basic sanitation. *Wilson v.*

Seiter, 501 U.S. 294, 304–05, 111 S. Ct. 2321, 2327 (1991).

Inmates in the acute pod, including Mr. Saunders, were forced to walk barefoot in cells covered with virtually every type of bodily waste and fluid, from urine and feces to semen and vomit. Because there were no beds in the cells, nor any other type of platform above the floor, Mr. Saunders and his cell-mates had to sleep on mats directly on the waste-filled floor. Mr. Kenney, another inmate exposed to conditions in the acute pod, described these conditions in his deposition: "I'm walking in [urine,] I'm tracking it across [the cell] and I'm getting it in my mat, then I'm sitting there laying in it. . . . So in essence, I'm sleeping in [urine]." And even though the sleeping bag-style mats were immediately and constantly soiled, Mr. Saunders testified that he was never given new bedding and thus had to sleep on the soiled mat for months at a time.

Beyond the unsanitary sleeping conditions, Mr. Saunders was also forced to eat in unsanitary conditions. The jail prohibited inmates in the acute pod from having soap in their cells and also prohibited (and did not provide) eating utensils. As a result, inmates were forced to eat with their bare hands that they were not able to wash after going to the bathroom. This is especially unsanitary given that the inmates' hands were likely to be exposed to excrement because there was no toilet paper in their cell, and toilet paper was only provided when the inmates requested it. Then when given, it was in inadequate amounts. *See Baird*, 926 F.2d at 1063–66 (holding that "conditions lack[ed] basic sanitation" in violation of the Eighth Amendment where there was "filth on the cell's floor and walls" and inmates were deprived of

"basic hygiene articles" such as "soap, toothbrush, toothpaste, and [clean] linen[s]").

Mr. Saunders was made to live in these conditions for at least 69 days. He has thus shown a "prolonged exposure" to human waste, which we have said "sufficiently allege[s] a substantial risk of serious harm." *Brooks*, 800 F.3d at 1305; *see also DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001) ("Exposure to human waste, like few other conditions of confinement, evokes both the health concerns emphasized in *Farmer* and the more general standards of dignity embodied in the Eighth Amendment."); *Howard v. Adkison*, 887 F.2d 134, 136 (8th Cir. 1989) (noting that "inmates are entitled to reasonably adequate sanitation" and finding Eighth Amendment violation where cell was "covered with . . . human waste"). Mr. Saunders therefore satisfies the objective element of an Eighth Amendment violation based on the unsanitary conditions in the acute pod.

The majority excused the lack of basic hygiene articles, saying that the Jail "intentionally restricted the Bubble's inmates' access to these items due to concerns over their physical safety and potential for self-harm." Majority Op. 16. But the majority never asked for or got an explanation for how depriving inmates of basic sanitation contributes to that goal. Neither does the majority follow this court's binding precedent in *Baird*, which held that depriving inmates of "basic hygiene articles" such as "soap, toothbrush, toothpaste, and [clean] linen" violated the Eighth Amendment. *Id.*, 926 F.2d at 1063–64.[2]

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[2] Whether the deprivation of toiletries was permanent or temporary, it is clear Mr. Saunders has alleged he was

The majority also credited the defendants' assertion, as opposed to the facts alleged by Mr. Saunders, that the cells were cleaned to undercut any allegation of unsanitary conditions. All sides agree that jail staff made a pass at cleaning the cells twice a week. However, Mr. Saunders's evidence shows that these "cleanings" were not adequate to maintain sanitary conditions. For starters, the cleaning was minimal: the jail did not "wipe down" and "sanitize" the cells, but instead did only "a quick sweep and mop." Further, the evidence shows that cleaning twice a week simply was not enough. Washing a cell twice a week might be adequate when a cell holds one or even two or three healthy inmates. *See Novak*, 453 F.2d at 665–66 (finding that prison met the "basic elements of hygiene" where single-occupant non-mental health cells "are scrubbed by the guards . . . at least three times a week"). But here there were typically five to eight inmates—many with psychiatric disorders—living in cells that were at most 9 feet by 15 feet. Because of their mental illness, many of these inmates did not have proper control of their bodily fluids. The result of overcrowding mentally ill inmates in the acute pod was that urine "was on the floor *all the time*" and inmates lived, ate, and slept "[t]ightly" "like sardines" on the urine soaked and filthy floor. The facts speak for themselves: the twice weekly cleanings simply did not alleviate the unsanitary state of the acute pod cells.

B. DELIBERATE INDIFFERENCE TO THE VIOLATION

Mr. Saunders has also established that Corporal Wright was deliberately indifferent to the overcrowded

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meaningfully deprived of basic human hygiene. *See* Majority Op. 17 & n.2.

and unsanitary conditions of the acute unit generally. Corporal Wright was the "Officer in Charge" in the acute pod and "oversaw daily operations" there. Unlike Commander Jeter, he was not a high-level administrator far removed from the conditions on the ground. Corporal Wright stepped in "during deputies' breaks" to do "inmate watches"; "cleaned cells when needed"; and "regularly checked on inmates" The majority dismisses Corporal Wright's closeness to the conditions in the cells because he "worked only three to four days a week." Majority Op. 22. But this ignores what Wright was doing during those days in the pod. It was Corporal Wright who was directly responsible for "daily" conditions in the pod and who was physically present in the unsanitary cells such that he personally observed the conditions. And in any event, I am aware of no legal principle that exempts part-time employees from meeting their constitutional obligations. Mr. Saunders's allegations are enough for a reasonable jury to infer that he had subjective knowledge of the risk of harm those conditions posed. *See Farmer*, 511 U.S. at 842, 114 S. Ct. at 1981.

A jury could also find that Corporal Wright knowingly disregarded the substantial risk of harm for reasons beyond mere negligence. We know that Corporal Wright knew of the filthy conditions in the acute pod cells and was charged with overseeing the housing unit, and yet the conditions remained virtually "the same," with no improvement in sanitary practices. Mr. Saunders testified that when "inspectors or guests" would come through the acute pod, the officers would specially clean the cells and bring in "little plastic platforms" for inmates to sleep on "to get people off the concrete." Then after the visitors left, the plastic platforms were removed and the conditions in the pod would return to normal. These striking

allegations, never mentioned in the majority opinion, certainly suggest that Corporal Wright knew it was a problem for inmates to be sleeping on the filth of the cell floor, and knew of ways to keep that from happening. At the same time there is no evidence Corporal Wright undertook any of those improvements on an ongoing basis. *See Farmer*, 511 U.S. at 842, 114 S. Ct. at 1981 (subjective knowledge may be "demonstrate[ed] in the usual ways, including inference from circumstantial evidence, and . . . from the very fact that the risk was obvious" (citation omitted)). Based on this evidence, Mr. Saunders has "demonstrate[d] that, with knowledge of the infirm conditions, [Corporal Wright] knowingly or recklessly declined to take actions that would have improved the conditions." *LaMarca v. Turner*, 995 F.2d 1526, 1537 (11th Cir. 1993). Mr. Saunders has therefore satisfied the subjective element of his Eighth Amendment claim against Corporal Wright.

III. FAILURE TO INTERVENE DURING SELF-HARM

A. OBJECTIVE CONSTITUTIONAL VIOLATION

In addition to the jail's unsanitary conditions, Mr. Saunders has also stated a claim that Corporal Wright violated his rights under the Eighth Amendment based on the August 3, 2008 incident in which Mr. Saunders harmed himself. Mr. Saunders alleged that, on that day, Corporal Wright "ignored" his pleas to "alleviate the serious conditions of the Bubble"—heat and overcrowding—that caused him to have a "panic attack and mental breakdown." According to Mr. Saunders, Corporal Wright then watched without intervening for five minutes while Mr. Saunders suffered a panic attack and "uncontrollably repeatedly

bang[ed] his head against the steel door of the cell, resulting in a serious injury."

As I've said, in order to satisfy the objective prong of the Eighth Amendment analysis, Mr. Saunders must show he was "incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834, 114 S. Ct. at 1977. How can it be disputed that during the five minutes Mr. Saunders was banging his head against the steel door—with blood streaming down his face—he was under "a substantial risk of serious harm"? *See id.* But beyond that, a reasonable jury could also find Mr. Saunders was under a substantial risk of serious harm in the moments before he began violently engaging in self-harm. The record before us establishes that Mr. Saunders suffered from anxiety and panic attacks. Just four days before the August 3rd incident, he had a panic attack that caused him to repeatedly bang his head against the wall. And just one week before that first head-banging episode, Mr. Saunders attempted suicide by cutting his wrists.

Ultimately, on August 3, 2008 his cell in the acute pod was "severely overcrowded" with at least eight inmates in it, and with no air conditioning, because it had "stopped working." According to Mr. Saunders, this caused the cell to be "real stuffy" and "stinking" because there was no "air getting in[to] the cell." Compounding these problems were the underlying unsanitary conditions in the acute pod I've described above. Mr. Saunders told Corporal Wright these conditions were exacerbating his claustrophobia and causing him to "hav[e] problems breathing." He further told Corporal Wright he needed "some air flowing" so he "could recover." In light of Mr. Saunders's serious mental illnesses and multiple, recent instances of suicidal and self-injurious behavior, and his plea for

relief from the overcrowded and filthy conditions that existed that day, a reasonable jury could find that the conditions in his cell on August 3rd created a "substantial risk of serious harm" to Mr. Saunders's mental health. *Id.* Even if the particular type of self-harming behavior (violent head-banging) was not foreseeable,[3] the circumstances clearly created a substantial risk that his mental condition would severely deteriorate. That is sufficient to satisfy the Eighth Amendment's objective prong. *See Thomas v. Bryant*, 614 F.3d 1288, 1312 (11th Cir. 2010) ("[M]ental health needs are no less serious than physical needs for purposes of the Eighth Amendment." (quotation omitted)); *Waldrop v. Evans*, 871 F.2d 1030, 1036 (11th Cir. 1989) ("[P]rison officials have an obligation to take action or to inform competent authorities once the officials have knowledge of a prisoner's need for medical or psychiatric care. . . . [F]ailure to notify competent officials of an inmate's dangerous psychiatric state can constitute deliberate indifference.").

B. DELIBERATE INDIFFERENCE TO THE VIOLATION

Corporal Wright's deliberate indifference during the August 3rd incident is clear. Corporal Wright was in the overcrowded acute unit with Mr. Saunders in the moments before—and during—his panic attack. Before his panic attack started, Mr. Saunders "explained" the situation to Corporal Wright, including that the "AC [was] not working" and that he was "claustrophobic [and] was having problems breathing." He implored Corporal Wright to give him some sort of relief, asking if he could "move [the inmates] to . . . other cells," or

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[3] Mr. Saunders had done it before, so I believe it was foreseeable.

"provide air in the cell, either put the bean flap down, put a fan in front of the door to get some air flowing in there." Mr. Saunders even suggested that the officers put him "in the strap chair" if that would be necessary to take him out of the cell "for a while till [he] could recover." Of course, beyond what Mr. Saunders told Corporal Wright, the corporal also knew that Mr. Saunders was acutely mentally ill. After all, that was the reason he had been housed in the acute unit in the first place. Corporal Wright was thus plainly aware of the risk Mr. Saunders faced from the conditions in his cell. *See Brooks*, 800 F.3d at 1305 (concluding that prison officer was "plainly aware of the risk [the inmate] faced" because the inmate "alleged that he repeatedly begged [the officer] to . . . remove" the condition causing the substantial risk of harm).

Mr. Saunders has also shown the remaining elements of deliberate indifference: namely, that Corporal Wright disregarded the risk of serious harm to Mr. Saunders by more than negligence. *McElligott*, 182 F.3d at 1255. Corporal Wright refused to take any action at all to alleviate Mr. Saunders's condition, even after Mr. Saunders himself suggested a variety of simple measures that could have helped. Corporal Wright then stood there with other officers watching and laughing for five minutes as Mr. Saunders "split [his] head open" from his self-harming behavior. This is textbook deliberate indifference. *See Brooks*, 800 F.3d at 1305 (concluding that prison officer who repeatedly "refused [the inmate's] requests to use the toilet" was deliberately indifferent because the officer "subjected [the inmate] to derision and ridicule while he was forced to repeatedly soil himself.").

IV. QUALIFIED IMMUNITY

In addition to establishing that Corporal Wright violated his rights under the Eighth Amendment, Mr. Saunders must also overcome Corporal Wright's assertion of qualified immunity. The defense of qualified immunity "completely protects government officials performing discretionary functions from suit in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Gonzalez v. Reno*, 325 F.3d 1228, 1233 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515 (2002)).

In deciding whether an officer is entitled to qualified immunity, we conduct a two-part inquiry. First, we ask whether the defendant's "conduct violated a constitutional right." *Id.* at 1234 (quotation omitted). Second, we ask whether the violation was "clearly established" at the time of the alleged misconduct. *Id.* at 1233 (quotation omitted). A right is clearly established if it would have been "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 2156 (2001). The "salient question" is whether the state of the law at the time of the alleged misconduct gave the defendants "fair warning" that their actions were unconstitutional. *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516.

Having already determined that Corporal Wright's conduct violated the Eighth Amendment, I turn now to whether the Eighth Amendment right at issue was "clearly established."

A. UNSANITARY CONDITIONS

Mr. Saunders has shown that his rights were clearly established with respect to the general lack of sanitation in the acute pod. In *Baird*, this Court addressed whether unsanitary conditions of confinement violated the Eighth Amendment, and also considered whether the defendants were entitled to qualified immunity. 926 F.2d at 1063–66. The conditions at issue in *Baird* included: "a plastic-covered mattress without bedding; filth on the cell's floor and walls; deprivation of toilet paper for three days; deprivation of running water for two days; lack of soap, toothbrush, toothpaste, and linen; and the earlier occupancy of the cell by an inmate afflicted with an HIV virus." *Id.* at 1063. We concluded that these conditions did not meet "the minimal standards required by the Eighth Amendment." *Id.* at 1065. In denying qualified immunity to the prison officials, we held that "the right of a prisoner not to be confined in a cell . . . in conditions lacking basic sanitation" has been clearly established since 1986. *Id.* at 1065–66. Two decades earlier, in *Novak*, our predecessor court surveyed cases finding an Eighth Amendment violation based on conditions of confinement and concluded: "[T]here is a common thread that runs through all these cases . . . . That thread is the deprivation of basic elements of hygiene." *See Novak*, 453 F.2d at 665.

Under *Baird* and *Novak*, a reasonable officer in Corporal Wright's position would have known that the unsanitary conditions in the acute pod violated the Eighth Amendment. *See Brooks*, 800 F.3d at 1306–07 (holding that "*Baird* and *Novak*, together, would have provided fair and clear warning that [an inmate's] alleged treatment would violate the Eighth Amendment," where the inmate was "forced to sit in his own feces for

an extended period of time"). It's true that neither *Baird* nor *Novak* involved the precise circumstances at issue here. But "[e]xact factual identity with a previously decided case is not required." *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011) (en banc); *see Hope*, 536 U.S. at 741, 122 S. Ct. at 2516 ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

Despite certain factual differences between the facts in *Baird* and *Novak* and the facts here, this precedent made clear that two specific aspects of the unsanitary conditions in the acute pod constituted unconstitutional conditions. *Hope*, 536 U.S. at 741, 122 S. Ct. at 2516. First, *Novak* noted that "proximity to human waste" often constitutes a "deprivation of basic elements of hygiene" in violation of the Eighth Amendment. *Brooks*, 800 F.3d at 1306 (quotation omitted). Mr. Saunders has shown that he was directly exposed to human waste and other bodily fluids for extended periods of time, including where he slept and ate. Second, this Court expressly held that conditions lacking "the provision of hygiene items[] violate[] the minimal standards required by the Eighth Amendment." *Baird*, 926 F.2d at 1066. The record here shows that the jail prohibited inmates in the acute pod from having many basic "hygiene items," including toothbrushes, toothpaste, eating utensils, clean sleeping mats, and most importantly hand soap. This closely matches the items that the inmates in *Baird* were deprived of: "soap, toothbrush, toothpaste, and [clean] linen[s]." 926 F.2d at 1063. In sum, *Baird*, *Brooks*, and *Novak* gave Corporal Wright "fair warning" that the unsanitary conditions of the acute pod—particularly the combination of proximity to human waste and the lack of hand soap—violated Mr. Saunders's Eighth Amendment rights. *Hope*, 536 U.S. at 741, 122 S. Ct.

at 2516. Because Corporal Wright's Eighth Amendment violation was clearly established, he is not entitled to qualified immunity.

B. FAILURE TO INTERVENE DURING SELF-HARM

The core of the Eighth Amendment is the prohibition on conduct that "involve[s] the unnecessary and wanton infliction of pain." *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S. Ct. 285, 290 (1976) (quotation omitted). According to Mr. Saunders's facts, Corporal Wright stood watching for five minutes as Mr. Saunders "uncontrollably" banged his head against the steel door of his cell. The head banging was so violent "there was blood on the door and he was bleeding down his face," and Mr. Saunders needed stitches to close his wounds. Allowing Mr. Saunders to injure himself like this without coming to his aid for five minutes is a stark example of the "unnecessary and wanton infliction of pain." *See id.* As this Court has held, "[t]he law [is] clear . . . that prison officials have an obligation to take action . . . once the officials have knowledge of a prisoner's need for medical or psychiatric care." *Waldrop*, 871 F.2d at 1036. Indeed, Corporal Wright and his deputies not only stood by but "laughed at [Mr. Saunders] while he was beating his head on the door." Laughing at a mentally ill inmate's violent self-harming behavior is "an act of obvious cruelty" for which there is no qualified immunity. *See Brooks*, 800 F.3d at 1307 (quotation omitted) (denying qualified immunity to officer who was "[l]aughing at and ridiculing an inmate who [was] forced to sit in his own feces for an extended period of time"). The majority opinion distinguishes the facts of *Brooks* as "ghastly." Majority Op. 18. However, the gratuitous cruelty of laughing at suffering inmates is common to the allegations made

by Mr. Brooks in his case and those made by Mr. Saunders here.

V. CONCLUSION

Mr. Saunders deserves an opportunity to present a jury with his claims that Corporal Wright subjected him to inhumane conditions of confinement. He has demonstrated two claims that should survive summary judgment, and I would affirm the District Court's denial of qualified immunity on those claims.[4]

The majority assures us that it "take[s] no particular pleasure," in the outcome of this case, Majority Op. 16, but we are judges, whose job demands application of the constitutional principles, not expressions about our feelings. And the majority opinion is mistaken when it declares "we have no other choice" but to foreclose this suit. *Id.* This court can recognize the flagrantly unconstitutional conditions of confinement, and in fact is obligated to do so. Instead, the majority opinion downplays the conditions Mr. Saunders faced, describing them as "troubling" and "unpleasant." *Id.* at 10, 16. These adjectives do not accurately describe the gratuitous cruelty Mr. Saunders endured at the Brevard County Jail. Our Constitution does not turn a blind eye to these types of conditions, and neither should we.

For these reasons, I dissent.

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[4] I concur with the holding of the majority on Mr. Saunders's remaining claims.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 16-17607

District Court Docket No. 6:14-cv-00877-GAP-DCI

OBERIST LEE SAUNDERS,
Plaintiff-Appellee,

versus

SHERIFF OF BREVARD COUNTY, in his official capacity,
Defendant-Counter Claimant-Appellant,

SUSAN JETER, in her individual capacity,
JOHN C. WRIGHT, in his individual capacity,
Defendant-Appellants,

PATRICIA TILLEY, in her individual capacity,
Defendant.

Appeal from the United States District Court
for the Middle District of Florida

JUDGMENT

Before MARCUS, MARTIN, and NEWSOM, *Circuit Judges.*

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: May 17, 2018

For the Court: DAVID J. SMITH, Clerk of Court

By: Djuanna Clark

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

[Filed 11/21/16]

Case No. 6:14-cv-877-Orl-31DAB

OBERIST SAUNDERS,

Plaintiff,

v.

SHERIFF OF BREVARD COUNTY, *et al.*,

Defendants.

ORDER

This cause is before the Court on the Third Amended Complaint filed by Oberist Saunders (Doc. 62) and the Motion for Summary Judgment filed by Defendants Sheriff of Brevard County, Susan Jeter, Patricia Tilley, and John C. Wright (Doc. 169).[1] Plaintiff has filed a Memorandum of Law in Opposition to the Motion (Doc. 181).

I. BACKGROUND

Plaintiff, a prisoner in the State of Florida, filed this action pursuant to 42 U.S.C. § 1983 against Defendants for claims arising out of his detention at the Brevard County Jail ("Jail") (Doc. No. 62 at 4).

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[1] Defendants Sedaros, Bourke, Nunez, Tite, Mangual, Wang, and Cornelius have been voluntarily dismissed from this action (Doc. Nos. 98, 155, and 183).

Plaintiff arrived at the Jail on June 11, 2008 (Doc. 177-5 at 15-19). According to Plaintiff, he informed the Jail's medical staff of his mental health issues, including anxiety and panic attacks, claustrophobia, insomnia, and manic depression (Doc. 62 at 4). The intake screening report reflects that Plaintiff informed Jail staff that he had anxiety, was prescribed Oxycodone, Xanax, and Soma, and had a dependence on cocaine (Doc. 177-6 at 6-7). Nurse Carpentier referred Plaintiff for mental health screening as a routine measure (Doc. 177-8 at 30). Plaintiff was placed in one of the mental health housing pods of the Jail (Tilley Depo., Doc. 171 at 14).

Dr. Perez, a psychiatrist, evaluated Plaintiff on June 26, 2008, and diagnosed Plaintiff with cocaine dependency, anxiety, and antisocial features (Doc. 177-8 at 21). Dr. Perez prescribed Klonopin to treat Plaintiff's anxiety (Doc. Nos. 172 at 18; 177-8 at 21; 177-10 at 31). Plaintiff alleges that the Klonopin did not help his mental health issues, and he submitted several requests to see medical staff regarding the matter (Doc. 62 at 4).

On July 4, 2008, Plaintiff filed a request to speak with a mental health professional regarding his "racing thoughts" that were preventing him from sleeping (Doc. 177-7 at 24). On July 8, 2008, Plaintiff was evaluated by Patricia Tilley ("Tilley"), a licensed mental health counselor at the Jail (Doc. Nos. 171 at 8-9; 177-8 at 16). Plaintiff requested medication to help him sleep and indicated he had previously been prescribed Trazadone (Doc. 177-8 a 16). The narrative progress notes from this evaluation indicate that Plaintiff was lucid, coherent, and did not appear to be in distress or at risk for self-harm. *Id.* Tilley recommended that Plaintiff be moved from the mental

health pod. *Id.* Plaintiff made a request to speak with a mental health nurse on July 10, 2008, and his request was denied (Doc. 177-7 at 23).

Following the evaluation, Plaintiff was placed in the general population of the Jail (Doc. Doc. 177-3 at 7). Plaintiff alleges that after he was transferred, he became the third occupant of a two-person cell and was forced to sleep on the floor (Doc. 62 at 5-6). Plaintiff contends that the conditions of the cell aggravated his mental health issues. *Id.* Plaintiff states that he submitted numerous requests to be moved back to the mental health wing, but his requests were ignored. *Id.* at 6.

On July 16, 2008, Plaintiff was moved to disciplinary confinement after being involved in a fight with another inmate. *Id.* at 10. That same day Plaintiff filed an inmate request asking to speak to a mental health physician (Doc. 177-7 at 26). Plaintiff was evaluated on July 21, 2008, and the mental health screening notes reflect that Plaintiff's mood was pleasant, he denied a history of suicide, appeared lethargic, and discussed his anxiety and inability to sleep (Doc. 177-8 at 9-10). Plaintiff was provided with a coping skills brochure. *Id.* at 10.

On July 24, 2008, Plaintiff attempted to commit suicide by cutting his left wrist with a razor blade (Doc. 177-3 at 15). Plaintiff states that due to his untreated mental health issues and the crowded cell, he was unable to sleep and thus, suffered a mental breakdown (Doc. 62 at 6). Plaintiff was transferred to the Wuesthoff Medical Center and then placed in the acute mental health housing unit on direct watch, also known as suicide watch (Doc. Nos. 177-1 at 26; 177-2 at 35; 177-10 at 22, 40).

According to Plaintiff, he was placed in a one-hundred square foot cell with seven other inmates that contained no bed or mat (Doc. 62 at 6). Plaintiff states that Jail personnel only allowed the inmates to shower one time per week. *Id.* Plaintiff also contends that the cell was not adequately cleaned, the toilet frequently overflowed, and the floor was covered in urine, feces, semen, and other bodily fluids. *Id.* at 7. Inmates were not allowed to wear shoes and had no soap or eating utensils. *Id.*

On July 28, 2008, Plaintiff filed a request to see a mental health doctor, and mental health nurse Judith Penny ("Penny") evaluated him that same day (Doc. Nos. 177-7 at 31, 177-8 at 1). Plaintiff told Penny that he had racing thoughts, anxiety, and depression. Penny recommended that Plaintiff be kept on suicide watch. *Id.* On July 31, 2008, Jail staff observed Plaintiff walk to the wall of his cell and bang his head several times (Doc. 177-3 at 20). Plaintiff had an abrasion on his forehead, the abrasion was treated, and then he was placed back into the cell. *Id.* On August 3, 2008, Plaintiff again began to bang his head on the cell door. *Id.* at 22. Plaintiff was removed from the cell and sent to the infirmary to receive stitches. *Id.*

According to Plaintiff, the cells in the mental health unit had inadequate ventilation and mold on the ceiling (Doc. 62 at 7). Plaintiff stated that the air conditioner was not working on August 3, 2008, and Defendant John C. Wright ("Wright"), manager of the mental health unit, refused to place fans near the cells to help air flow. *Id.* Plaintiff states that these conditions led to a panic attack and mental break down, which resulted in banging his head. *Id.* However, several other inmates in the housing unit stated that

Plaintiff intentionally hit his head so that he would be transported to the hospital (Doc. 177-3 at 22). The mental health unit narrative progress notes reflect that Plaintiff informed the staff that he would continue to harm himself (Doc. 177-7 at 18).

On August 10, 2008, an officer observed an inmate kick and strike Plaintiff for no apparent reason (Doc. 177-3 at 24). The other inmate was removed from the cell, and Plaintiff was examined for injuries. *Id.* Plaintiff states that Defendants knowingly placed violent and seriously mentally ill inmates in the mental health cells, resulting in the assault (Doc. 62 at 7).

Plaintiff's mental health was evaluated on August 13, 2008, and Penny recommended discontinuation of direct watch and instead that Plaintiff be placed on a fifteen minute watch (Doc. 177-8 at 4). Penny evaluated Plaintiff again on August 18, 2008, and recommended that Plaintiff be taken off fifteen minute watch status. *Id.* at 3. Penny recommended that Plaintiff be moved to the 503 pod of the mental health unit, which is a less restrictive mental health unit with open-bay bunks. (Doc. Nos. 171 at 15; 177-8 at 3). However, the Jail records reflect that Plaintiff could not be moved to the 503 pod because of a "red tag" indicating Plaintiff was an escape risk. *Id.* at 2. Penny advised Plaintiff of the situation, and the record notes that Plaintiff "accepted" the information "well." *Id.*

On September 3, 2008, Plaintiff threatened to hurt himself after he felt that his needs were not being met (Doc. 177-7 at 9). As a result, Plaintiff was placed on direct watch. *Id.* Jail staff evaluated Plaintiff on September 8, 2008, discontinued direct watch, and placed Plaintiff on fifteen minute watch. *Id.* at 2-3. The "red tag" was removed from Plaintiff's status on September 22, 2008 (Doc. 177-2 at 8). Plaintiff was

moved into the 503 pod on September 25, 2008 (Doc. 177-1 at 21).

Plaintiff was transported to the Orange County Jail on September 26, 2008. *Id.* Upon his return on November 6, 2008, he was again placed into the acute mental health housing unit on direct watch (Doc. 177-2 at 8). During Plaintiff's mental health intake screening, he stated that "when he is housed where he does not want to be he does cut himself or beats head on wall" (Doc. 177-6 at 28). Dr. Perez evaluated Plaintiff on November 13, 2008, and Plaintiff told him that while at the Orange County Jail he cut himself in order to get his needs met. *Id.* at 29. Dr. Perez noted that Plaintiff was manipulative, litigious, and would do anything necessary for secondary gain. *Id.* Dr. Perez also prescribed Doxygen and Vistaril. *Id.*

Plaintiff was again evaluated by Dr. Perez on December 16, 2008, and Dr. Perez opined that Plaintiff acted in a manipulative behavior, "doing whatever it takes for secondary gain" and exaggerating his symptoms (Doc. Nos. 177-6 at 16; 177-13 at 2-3). Dr. Perez continued Plaintiff on the same medication (Doc. 177-13 at 3). On January 5, 2009, Plaintiff was evaluated by Tilley, who stated that Plaintiff was lucid, coherent, and not in any acute distress (Doc. 177-13 at 29). Tilley again saw Plaintiff on January 26, 2009, and Plaintiff indicated that he was having trouble sleeping. *Id.* at 28. Tilley stated that she could not change his medication until he was evaluated by Dr. Perez. *Id.*

Plaintiff was evaluated by mental health staff on February 13, 2009, February 27, 2009, March 12, 2009, March 26, 2009, July 21, 2009, August 12, 2009, September 15, 2009, October 2, 2009, October 13, 2009, January 5, 2010, April 11, 2010, and April 12, 2010 (Doc. Nos. 177-12 at 38-39; 177-13 at 4-8, 12-19,

23-27). On each occasion, the medical providers stated that Plaintiff did not appear to be in any acute distress, although minor anxiety was noted on occasion. *Id.* Dr. Perez increased Plaintiff's dosage of his medications on March 12, 2009 and October 13, 2009 (Doc. 177-13 at 4, 6, 24-25). On April 13, 2010, Plaintiff refused treatment because he was "going back to DOC" (Doc. 177-12 at 37). Plaintiff was transported to the Department of Corrections on April 15, 2010 (Doc. 177-1 at 11, 22).

Plaintiff returned to the Jail in April 2013, and he was placed in the acute mental health unit due to his prior mental health history (Doc. 177-1 at 7). The mental health unit completed an initial assessment and suicide risk assessment on April 15, 2013 (Doc. 177-23 at 32). Jail staff explained to Plaintiff the housing protocols and procedures (Doc. 177-24 at 11). Plaintiff was evaluated on April 17, 2013, and April 19, 2013, and Jail staff noted that Plaintiff was in good spirits and did not exhibit any behaviors suggesting the potential for self-harm. *Id.* at 12-15. Plaintiff contends that despite his greatly improved mental health, he remained in the acute housing unit during this time (Doc. 62 at 10). Plaintiff returned to the Department of Corrections on April 28, 2013 (Doc. 177-1 at 9).

Plaintiff alleges that Defendant Wayne Ivey, Sheriff of the Jail ("Sheriff Ivey"), in his official capacity, violated his Eighth and Fourteenth Amendment rights by establishing policies or customs that caused the staff of the Jail to exhibit deliberate indifference to Plaintiff's serious mental health needs and the inhumane conditions of confinement (Doc. 62 at 11). Plaintiff also contends that the Sheriff had final policymaking and discretionary authority over the Jail

and used his authority to allow the inhumane conditions of confinement and inadequate treatment of mental health needs to flourish. *Id*. at 12.

Plaintiff sues Susan Jeter ("Jeter") in her individual capacity for violating his Eighth and Fourteenth Amendment rights by acting with deliberate indifference to his serious mental health needs and the inhumane conditions of confinement. *Id.* at 13-14. Plaintiff alleges Defendant Jeter was personally involved or aware of these violations and inhumane conditions due to her position as commander and overseer of the Jail. *Id.* at 14.

Plaintiff alleges that Wright violated his Eighth and Fourteenth Amendment rights because he was deliberately indifferent to the inhumane conditions of confinement. *Id.* at 16. Plaintiff contends that Wright was personally involved in the violations as direct overseer of the mental health unit. *Id.* Plaintiff asserts that Wright was aware of and perpetuated the deplorable conditions. *Id.*

Finally, Plaintiff asserts that Tilley violated his Eighth and Fourteenth Amendment rights when she was deliberately indifferent to his serious mental health needs. *Id.* at 17. Plaintiff states that Tilley was personally involved in the violations because she failed to adequately address Plaintiff's mental health issues and "spitefully" moved him to the general population of the Jail when she "knew his mental health would be negatively impacted." *Id.* at 18. Plaintiff asserts that Tilley's actions caused his suicide attempt. *Id.*

II. STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be granted "if the movant shows that there is no genuine dispute as

to any material fact and the movant is entitled to judgment as a matter of law." *See also Jean-Baptiste v. Gutierrez*, 627 F.3d 816, 820 (11th Cir. 2010). The record to be considered on a motion for summary judgment may include "depositions, documents, electronically stored information, affidavits, or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials. Fed. R. Civ. P. 56(c)(1)(A).

The nonmoving party, so long as that party has had an ample opportunity to conduct discovery, must come forward with affirmative evidence to support its claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Walker v. Darby*, 911 F.2d 1573, 1577 (11th Cir. 1990). "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). If, after the movant makes its showing, the nonmoving party brings forth evidence in support of its position on an issue for which it bears the burden of proof at trial that "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

III. DISCUSSION

A. Exhaustion of Administrative Remedies

Pursuant to 42 U.S.C. § 1997e(a), "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by

a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." *Id.* "[A] prisoner must exhaust all prescribed administrative remedies available to him . . . before filing a lawsuit to seek judicial redress." *Garcia v. Glover*, 197 F. App'x 866, 868 (11th Cir. 2006).

Defendants argue that Plaintiff failed to exhaust his administrative remedies with regard to his Eighth Amendment conditions of confinement claims (Doc. 169 at 25). In support of this contention, Defendants note that Plaintiff was aware of the grievance procedure because he submitted grievances regarding his medical care and other issues during this time period. *Id.*; *see* Doc. 177-2 at 24 (listing grievances filed between July 4, 2008 and October 12, 2009). Plaintiff states that he grieved the conditions of confinement in the mental health housing unit but never received responses to his grievances (Doc. Nos. 170 at 43, 75; 181 at 19).

The Jail's grievance procedure provides that an inmate should address issues related to conditions of confinement with the officer in charge of the housing unit (Doc. 177-26 at 7). If the issue cannot be resolved, the officer should give the inmate a grievance form. *Id.* After filling out the grievance form, it will be forwarded to the classification department for "review and assignment if determined to be a grievable event. Once answered, the grievance will be returned to the inmate." *Id.* If the response received is not satisfactory, an inmate may appeal. *Id.*

Plaintiff states that he filed at least two grievances regarding the conditions of his confinement at the Jail (Doc. 170 at 75). However, Jail personnel never gave him a copy of the grievances nor did they respond to

the grievances. *Id.* at 75-76. Federal courts have held that the failure to respond to a grievance renders the administrative remedy unavailable to a prisoner. *See Ross v. Blake*, 136 S. Ct. 1850, 1858-60 (2016); *Small v. Camden County*, 728 F.3d 265, 273-74 (3d Cir. 2013); *Boyd v. Corrs. Corp. of Am.*, 380 F.3d 989, 996 (6th Cir. 2004); *Jernigan v. Stuchell*, 304 F.3d 1030, 1032 (10th Cir. 2002). Therefore, the Court will decline to grant summary judgment on this basis.

B. Mental Health Claim

Plaintiff contends that his Eighth and Fourteenth Amendment rights were violated when Jail staff failed to properly treat and give him medication for his anxiety, panic attacks, insomnia, manic depression, claustrophobia, and suicidal and self-harming tendencies (Doc. 62 at 11, 15). Defendants Sherriff Ivey, Jeter, and Tilley allege that they are entitled to qualified immunity on this claim.

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)) (quotation omitted). To receive qualified immunity a defendant must first prove that he or she was acting within the scope of his or her discretionary authority. *See Vineyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002).[2]

[2] Defendants were acting within their discretionary authority during the relevant time period as employees of the Jail.

Once a defendant shows that he or she was acting within his or her discretionary authority, the burden shifts to the plaintiff to demonstrate that qualified immunity is not appropriate. *Lumley v. City of Dade City*, 327 F.3d 1186, 1194 (11th Cir. 2003). The Supreme Court has set forth a two-part test for the qualified immunity analysis. First, a court must determine "whether [the] plaintiff's allegations, if true, establish a constitutional violation." *Hope v. Pelzer*, 536 U.S. 730, 736 (2002). If Plaintiff's version of the facts set forth the violation of a constitutional right, the next step is to ask whether the right was clearly established at the time of the alleged conduct. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). It is within a court's discretion to decide which prong of the qualified immunity analysis to address first. *See Pearson*, 555 U.S. at 236.

To establish liability under § 1983 for inadequate mental health treatment, a plaintiff must show that the failure to provide him with mental health care amounted to cruel and unusual punishment under the Eighth Amendment of the United States Constitution.[3] A plaintiff must demonstrate that his inadequate care arose from a deliberate indifference to serious medical needs. *See Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). To prevail on summary judgment, a plaintiff must raise a genuine issue of material fact as

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[3] Because Plaintiff was a pre-trial detainee when his alleged lack of medical care occurred, his claim must be analyzed under the Fourteenth Amendment rather than the Eighth Amendment. *See Bell v. Wolfish*, 441 U.S. 520, 535 (1979). However, "in regard to providing pretrial detainees with such basic necessities as food, living space, and medical care the minimum standard allowed by the due process clause is the same as that allowed by the [E]ighth [A]mendment for convicted persons." *Hamm v. DeKalb County*, 774 F.2d 1567, 1574 (11th Cir. 1985).

to whether (1) an objectively serious medical need existed and (2) whether the defendants acted with deliberate indifference to that need. *Jacoby v. Baldwin Cty.*, 596 F. App'x 757, 763–64 (11th Cir. 2014). A serious medical need is "one that is diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would recognize the need for medical treatment." *Burnette v. Taylor*, 533 F.3d 1325, 1330 (11th Cir. 2008) (citing *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003)). To establish the requisite deliberate indifference, a prisoner must prove that a defendant had "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence." *Burnette*, 533 F.3d at 1330 (quotation omitted); *see also Farmer v. Brennan*, 511 U.S. 825, 834-835 (1994).

1. Defendant Tilley

Plaintiff has not demonstrated that Defendant Tilley was deliberately indifferent to his serious medical needs. The Jail records reflect that Dr. Perez prescribed Klonopin to treat Plaintiff's anxiety and difficulty sleeping (Doc. 177-8 at 21, 26). Dr. Perez opined that this course of treatment was medically appropriate because in his medical opinion, Plaintiff's panic attacks seemed to be exaggerated and he believed Plaintiff was acting out or trying to manipulate the system in order to receive additional medication (Doc. 172 at 24, 34-38). Additionally, Plaintiff was treated by mental health staff on July 8, 2008 and July 21, 2008 (Doc. 177-8 at 10-17). Defendant Tilley noted that Plaintiff did not appear to be in distress nor did he have suicidal thoughts (Doc. Nos. 177-7 at 22-23, 26; 177-8 at 10-16). Although Plaintiff attempted to commit suicide on July 24, 2008, there is no indication that this was due to Defendant Tilley's failure to

properly treat Plaintiff. Contrary to Plaintiff's assertions, Defendant Tilley was responsive to Plaintiff's complaints.

Plaintiff has not shown that Defendant Tilley had a subjective knowledge of a risk of serious harm and ignored that risk by conduct that amounts to more than mere negligence. *See Jacoby v. Baldwin Cty.*, 596 F. App'x 757, 763-64 (11th Cir. 2014) (affirming the district court's order granting summary judgment on deliberate indifference to mental health needs where the doctor and nurse were aware of the plaintiff's history of mental illness but were unaware of the plaintiff's first instance of self-harm and the plaintiff did not present symptoms of mental illness and had indicated that he did not have present suicidal thoughts); *Pooler v. Nassau University Medical Center*, 848 F. Supp. 2d 332 (E.D. N.Y. 2012) (denying claim of deliberate indifference to mental health and concluding the plaintiff was offered reasonable care where the plaintiff had been prescribed mental health medications, had a history of substance abuse and of being manipulative in order to receive medication, and was assessed by a medical provider, who opined the plaintiff was not depressed and needed counseling to help with coping skills).

Furthermore, Plaintiff has not provided any evidence refuting his medical records or Dr. Perez's deposition statements. *See Whitehead v. Burnside*, 403 F. App'x 401, 404 (11th Cir. 2010). Plaintiff merely disputes the appropriateness of the medication and treatment he received. However, federal courts have concluded that when an inmate receives adequate medical care but disagrees with the mode or amount of treatment, he cannot establish deliberate indifference. *Chatham v. Adcock*, 334 F. App'x 281 (11th Cir. 2009) (citing *Harris v. Thigpen*, 941 F.2d 1495, 1507

(11th Cir. 1991)). Therefore, Defendant Tilley is entitled to qualified immunity with regard to this portion of Plaintiff's claim because Plaintiff has not demonstrated his constitutional rights were violated. *See Pearson*, 555 U.S. 223 at 232; *Hope*, 536 U.S. at 736.

Plaintiff also alleges that Tilley and other Jail staff unnecessarily delayed his release from the acute mental health unit, which exacerbated his mental health issues (Doc. 181 at 7). Plaintiff contends that the conditions of this unit impeded his ability to rebound, and other inmates had the same experience. *Id.*

Tilley stated during her deposition that Plaintiff could not be moved out of the acute mental health ward because he had a history of escape (Doc. 171 at 43-44). If Plaintiff had been released from the acute care ward, classification procedures dictated that he would have been placed in a maximum security cell. *Id.* at 44. Tilley stated that she tried to move Plaintiff but classification prevented it from happening. *Id.* at 44-45. Plaintiff has provided the Court with no evidence that Tilley intentionally kept Plaintiff in the mental health unit. Furthermore, to the extent that Plaintiff complains of being placed in the mental health unit in 2013, his claim fails for these same reasons. *See id.* at 64-65 (Tilley stating that inmates who are in the mental health unit when they leave the Jail are required to be initially placed in the mental health unit upon their return).

Moreover, although not alleged in his complaint, Plaintiff now states that Tilley's actions of keeping him in the in the mental health unit further caused his mental deterioration. Plaintiff's argument that the mental health unit contributed to his alleged decline

in his mental health is at odds with his assertion that being placed in general population caused his attempt at suicide and mental deterioration. Defendant Tilley is entitled to qualified immunity on this claim because Plaintiff has not demonstrated that his constitutional rights were violated. *See Meachum v. Fano*, 427 U.S. 215 (1976) (stating an inmate has no constitutionally protected liberty interest in being classified at a certain security level or housed in a certain prison); *Evans v. Perkins*, No. 2:07 CV 100-WHA, 2007 WL 625922, at *4 (M.D. Ala. Feb. 27, 2007) (holding that classification to a higher custody level or confinement to a more secure facility does not violate the Eighth Amendment). Accordingly, Defendant Tilley is entitled to summary judgment on this claim.

2. Defendants Sheriff Ivey and Jeter

To demonstrate that Defendants Sheriff Ivey and Jeter are liable under the Eighth and Fourteenth Amendment, Plaintiff must demonstrate that a constitutional violation occurred or was caused by a policy or custom. *Monnell v. Dep't of Social Serv. of the City of New York*, 436 U.S. 658 (1978). However, Defendants cannot be liable for the acts of its employees on a theory of respondeat superior. *Scala v. City of Winter Park*, 116 F.3d 1396, 1399 (11th Cir. 1997). To establish liability based on custom, Plaintiff must demonstrate a "widespread practice that, although not authorized by law or . . . express policy, is so permanent and well[-]settled as to constitute a custom or usage with the force of law." *Griffin v. City of Opa-Locka*, 26 F.3d 1295, 1308 (11th Cir. 2001).

Plaintiff has not shown a constitutional violation with regard to the treatment of his mental health. Therefore, Defendants Sheriff Ivey and Jeter are also entitled to qualified immunity with regard to this

claim. Furthermore, Plaintiff has not presented evidence of any policy or widespread practice that indicates the employees at the Jail were regularly violating inmates' constitutional rights with regard to their mental health. Therefore, summary judgment is granted with regard to this claim.

C. Conditions of Confinement

Plaintiff alleges that the conditions of the Jail violated his constitutional rights and Defendant Wright is liable for these violations (Doc. 11-12, 16). Furthermore, Plaintiff states that Defendants Sheriff Ivey and Jeter are also liable because the facts support an inference that a custom or policy was in place at the Jail that resulted in these constitutional violations or that Defendants knew their subordinates were acting unlawfully and failed to stop or prevent the violations. *Id.* at 11-15.

To state a constitutional violation with respect to the conditions of confinement, a prisoner must satisfy both an objective and a subjective inquiry. *Chandler v. Crosby*, 379 F.3d 1278, 1289–90 (11th Cir. 2004); *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003). Under the objective component, a prisoner must prove that the condition of which he complains is sufficiently serious to violate the Constitution. *Hudson v. McMillian*, 503 U.S. 1, 8, (1992). Specifically, a prisoner must prove the denial of "the minimal civilized measure of life's necessities." *Chandler*, 379 F.3d at 1289–90; *Farrow*, 320 F.3d at 1243; *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). "The challenged prison condition must be 'extreme' "and must pose "an unreasonable risk of serious damage to his future health or safety." *Chandler*, 379 F.3d at 1289–90 (quoting *Hudson*, 503 U.S. at 9) (other citation omitted). "Nothing so amorphous as 'overall conditions' can rise to the level

of cruel and unusual punishment when no specific deprivation of a single human need exists." *Wilson v. Seiter*, 501 U.S. 294, 305 (1991).

1. Defendant Wright

Plaintiff states that he was subject to several inhumane conditions of confinement including severe overcrowding and inadequate hygiene, sanitation, ventilation, sleeping facilities, and opportunities for exercise (Doc. 62 at 11-12). As is discussed below, some of these complaints implicate the Eighth Amendment standard, whereas others standing alone do not. However, the Court also considers whether a combination of these issues rise to the level of cruel and unusual punishment.

Plaintiff first claims that five to seven inmates were placed in a one hundred square foot cell (Doc. 170 at 60). Plaintiff contends that the overcrowding engendered violence, as evidenced by the fact that he was attacked by another inmate (Doc. 181 at 9).[4] Inmate Frank Whiteley ("Whiteley") stated in his deposition that he was in the acute mental health housing unit in 2008 for two days, during which time there were seven to eight inmates in the cell (Doc. 181-1 at 13). Whiteley noted that the cells were so crowded that the inmate mats were overlapping on the ground. *Id.* at 14.

Major James Dodson ("Major Dodson") noted that the Florida Model Jail Standards require 40 square feet per inmate in a cell (Doc. 181-4 at 71). Tilley stated that typically, three to six inmates were placed in each cell, and the cells were never so full that the inmates' mats were touching. *Id.* at 56-58.

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[4] Plaintiff does not raise an Eighth Amendment failure to protect claim.

The Supreme Court and the Eleventh Circuit have held that cells at double capacity do not violate the Eighth Amendment. *Fischer v. Ellegood*, 238 F. App'x 428, 433-34 (11th Cir. 2007) (citing *Rhodes v. Chapman*, 452 U.S. 337, 347-48 (1981)). If in this case the cells contained seven or more inmates, they would have been at more than double capacity. Therefore, qualified immunity is not warranted on this claim because a question of fact exists with regard to the size of the cells and the number of inmates in the cells.

Plaintiff also contends that Defendants did not allow him time for exercise or recreation (Doc. Nos. 62 at 6; 170 at 64). Inmate Whiteley corroborates Plaintiff's contention (Doc. 181-1 at 28). Defendant Wright attests that inmates were removed from their cells for recreation three times per week (Doc. 176, ¶ 10).

The complete denial of outdoor exercise does not violate the Eighth Amendment if an inmate is able to exercise in confinement cells. *See Bass v. Perrin*, 170 F.3d 1312, 1317 (11th Cir. 1999). However, there is no evidence refuting Plaintiff's claim that he did not have the ability to exercise in his cell. *See Ballou v. Smith*, No. CV606-094, 2007 WL 29329, at *1 (S.D. Ga. Jan. 3, 2007) (stating that "constant twenty-four hour lock-down for extended periods with no opportunity for exercise state[s] a violation of the Eighth Amendment . . . ."). Therefore, a disputed issue of facts exists which warrants submission of this issue to a jury.

Additionally, Plaintiff asserts that the conditions of the cells in the mental health unit were unsanitary because the toilets frequently flooded, Jail officers failed to clean the cells, urine, feces, bodily fluids, and bacteria covered the floors of the cells, inmates did not have soap, and they were forced to eat with dirty

hands (Doc. 62 at 7). Moreover, during his deposition Plaintiff described an incident where he was in a cell with an inmate who was urinating and defecating in the cell (Doc. 170 at 66). Plaintiff noted he shared a cell with the inmate for approximately three hours. *Id.* at 66-67. Whiteley stated that sometimes urine splashed on the inmates because they slept near the toilets (Doc. 181-1 at 16). Whiteley also stated that the Jail prohibited inmates from wearing shoes in the cells, and they had to walk around or stand in the urine that splashed on the ground. *Id.* at 23. Whiteley corroborated Plaintiff's allegation that there was no soap in the cells. *Id.* at 25.

Defendant Wright attests that after removing inmates from the cells for showers and recreation, the officers cleaned the cells by mopping with a cleaning solution and that additional cleanings occurred as needed (Doc. 176, ¶ 10-12). Additionally, Defendant Wright attests that soap was available upon request. *Id.*

The deprivation of basic human hygiene violates the Eighth Amendment, such as the deprivation of soap, placement near excrement, and failure to provide inmates with cleaning supplies. *See Brooks v. Warden*, 800 F.2d 1295, 1303-04 (11th Cir. 2015) (collecting cases from ever circuit in the United States regarding deprivation of basic sanitary conditions). The Court concludes that a question of fact exists with regard to this matter.

Plaintiff next contends that the ventilation of the cells in the mental health unit was inadequate, mold grew on the ceiling, and on August 3, 2008, the air conditioning malfunctioned (Doc. 62 at 7). According to Plaintiff, Defendant Wright forced inmates to sit in dangerously high temperatures. *Id.* Plaintiff states that Defendant Wright refused to either place fans

near the cells to alleviate the high temperatures or move inmates out of the cells. *Id.* Plaintiff states that the high temperature resulted in a panic attack and mental breakdown which led to him bang his head on the wall. *Id.* Plaintiff required stitches for his injury. *Id.*

Defendant Wright attests that the cells were kept at a comfortable temperature and if the air conditioning malfunctioned, maintenance was called to repair the unit (Doc. 176, ¶13). Defendant Wright only recalled two occasions where the air conditioning malfunctioned, and could recall waiting two days for the air conditioning repairs. *Id.* Defendant Wright attests that he does not recall any inmates acting out during the air conditioning outage and cannot recall an outage on the day Plaintiff banged his head on the wall or door of his cell. *Id.* at ¶ 13-15. Defendant Wright also attests that he has never observed mold in any cells. *Id.* at ¶ 14.

Uncomfortable temperatures do not rise to the level of an Eighth Amendment violation; there must be an "extreme" deprivation. *Chandler v. Crosby*, 379 F.3d 1278, 1297– 98 (11th Cir. 2004); *Radford v. Marshall*, No. CV 14-0527-KD-C, 2015 WL 9827735, at *13 (S.D. Ala. Dec. 10, 2015), *report and recommendation adopted*, No. CV 14-00527-KD-C, 2016 WL 204498 (S.D. Ala. Jan. 15, 2016). However, the Eleventh Circuit has indicated that "no ventilation" can pose an unreasonable risk to future health. *Wallace v. Hamrick*, 229 F. App'x 827, 832 (11th Cir. 2007). Therefore, a disputed issue of material fact precludes summary judgment on this matter.

Plaintiff also alleges that the inmates were forced to sleep on blankets or on the ground (Doc. Nos. 62 at 6; 170 at 58). According to Tilley and Wright, inmates are

given a mat which is an "all-one-blanket" made of foam material that had a built-in pillow or blanket (Doc. Nos. 171 at 54-58; 176 at ¶ 7). Sleeping on mattresses or mats on the floor does not by itself rise to level of an Eighth Amendment violation. *See Fischer v. Ellegood*, 238 F. App'x at 433-34.

Similarly, Plaintiff's claims regarding his lack of access to showers fails to state a constitutional violation. During his deposition, Plaintiff admitted that inmates were allowed to shower two times per week (Doc. 170 at 63). Defendant Wright attests that inmates were given time for showers three times per week (Doc. 176, ¶ 10). The evidence reflects that inmates were given an opportunity to shower at least two times per week (Doc. 170 at 63). Thus, Plaintiff cannot establish an Eighth Amendment violation because federal courts have held that denial of a shower for three to five days does not rise to the level of a constitutional violation. *Fischer*, 238 F. App'x at 433 (citing *Hamilton v. Lyons*, 74 F.3d 99, 106-07 (5th Cir. 1996).

Although some of Plaintiff's complaints standing alone, such as the conditions of the sleeping facilities and ability to shower, may not pass constitutional muster, the Supreme Court has stated that "*[s]ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone. . . ." *Wilson*, 501 U.S. at 304 (emphasis in original); *see also Fountain v. Talley*, 104 F. Supp. 2d 1345, 1351 (M.D. Ala. 2000) (stating that a federal court may "consider the cumulative effect of adverse conditions of confinement"). Therefore, whether a combination of these issues constitutes cruel and unusual punishment is an issue of fact for the jury to decide. Accordingly, Defendant Wright is

not entitled to qualified immunity on these claims, and summary judgment is denied.

2. Policy or Custom – Defendants Sherriff Ivey and Jeter

Defendants Sheriff Ivey and Jeter would also liable for the overcrowding, lack of exercise, lack of hygiene, and ventilation if there are facts that support an inference that either there was a custom or policy in place that results in a deliberate indifference or that Defendant Ivey knew his or her subordinates acted unlawfully and failed to stop them from doing so. *See West v. Tillman*, 496 F.3d 1321, 1328 (11th Cir. 2007).

Plaintiff attempted to file grievances, and he sent letters to Defendants Sheriff Ivey and Jeter regarding the conditions of the mental health unit. The record reflects that Jail officials did not respond to Plaintiff's grievances (Doc. 181-4 at 26-27). Major Dodson stated that any letter to the Sheriff would have been sent to Jeter. *Id.* at 30. Defendant Jeter stated that typically she would not receive the grievances and instead they would be handled by the officer in charge of the appropriate division (Doc. 173 at 32-33). Defendants have not disputed Plaintiff's claim that there was a widespread practice of ignoring grievances, and in turn, violating inmates rights with regard to conditions of confinement. *Sewell v. Town of Lake Hamilton*, 117 F.3d 488, 489 (11th Cir. 1997). Accordingly, Defendants Sheriff Ivey and Jeter are not entitled to summary judgment on these claims.

IV. CONCLUSION

In accordance with the foregoing, it is ORDERED AND ADJUDGED that Defendants Motion for Summary Judgment (Doc. 169) is GRANTED in part and DENIED in part. The motion is GRANTED with

regard to Plaintiff's Eighth and Fourteenth Amendment deliberate indifference to mental health claim. The motion is DENIED in all other respects.

DONE AND ORDERED in Orlando, Florida, this 21st day of November, 2016.

[United States District Court Middle District of Florida Seal]

/s/ Gregory A. Presnell
United States District Judge

Copies to:
OrlP-3 11/21
Counsel of Record

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed 07/16/2018]

No. 16-17607-BB

OBERIST LEE SAUNDERS,

Plaintiff-Appellee,

versus

SHERIFF OF BREVARD COUNTY, in his official capacity,

Defendant-Counter Claimant-Appellant,

SUSAN JETER, in her individual capacity,
JOHN C. WRIGHT in his individual capacity,

Defendant-Appellants,

PATRICIA TILLEY, in her individual capacity,

Defendant.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, MARTIN and NEWSOM, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE

ORD-42