# IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-41154

United States Court of Appeals
Fifth Circuit
FILED
September 7, 2018
Lyle W. Cayce
Clerk

Consolidated w/16-41533

MARVIN WADDLETON, III,

Plaintiff–Appellant,

v.

BERNADETTE RODRIGUEZ; DACHO ONGUDU; AIMEE SALINAS,

Defendants–Appellees.

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 2:15-CV-79

Before DENNIS, OWEN, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Texas prisoner Marvin Waddleton, III brought suit under 42 U.S.C. § 1983, alleging excessive use of force by correctional officers. The district court granted the officers' motion for summary judgment. We affirm the judgment of the district court.

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

I

Marvin Waddleton, proceeding pro se, filed a § 1983 suit against four correctional officers—Bernadette Rodriguez, Dacho Ongudu, Aimee Salinas, and an unknown officer—alleging the use of excessive force against him in violation of his Eighth and Fourteenth Amendment rights to be free from cruel and unusual punishment. Waddleton asserted that on October 4, 2012, correctional officers used excessive force in an incident in which a handcuffed Waddleton was "slam[med] on the ground" by Salinas, Rodriguez, and the unknown officer, and then placed in leg shackles that Ongudu squeezed against his ankle. These actions allegedly caused permanent injury. This incident began after Candace Moore, the law librarian, called officers to remove Waddleton from the law library for allegedly threatening her. Waddleton sought relief in the form of compensatory and punitive damages.

Following a *Spears*[1] hearing, the magistrate judge ordered service of process on the four defendants. The unknown officer and Rodriguez were not successfully served. Ongudu and Salinas denied the allegations and asserted qualified and Eleventh Amendment immunity from suit.

Three months later—two months after the district court entered a scheduling order and one month prior to the end of discovery—Waddleton filed a motion for leave to amend his complaint to add Candace Moore as a defendant asserting that she harassed him, made false accusations against him, and retaliated. The magistrate judge denied leave to amend because the proposed amended complaint was "not sufficiently related" to the "straight forward claim for alleged excessive use of force," as it involved "a new defendant and new claims," and would require the extension of current deadlines resulting in "unnecessary[y] delay" and an inefficient resolution of

[1] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).



e.g. "Appebdix A "

the case. The district court affirmed the ruling as "a result within [the magistrate judge's] discretion," agreeing that adding a new party would "cause unnecessary delays."

Ongudu and Salinas moved for summary judgment. Attached to the motion was a lengthy use-of-force report, a twenty-minute video recording of the incident, and Waddleton's post-incident medical records. The report stated that use of force was necessary to regain control of Waddleton after he "intentionally pull[ed] away from staff." It also included a use-of-force injury report indicating that Lanelle Roell, a nurse, was unable to complete a physical examination of Waddleton, but that he had no visible injuries despite his complaints of pain in his wrists and left ankle. The medical records reflect that since this incident, Waddleton has continued to complain of pain and numbness allegedly stemming from the use of force. Medical records show some nerve damage that could take years to heal, but do not opine as to the cause of this damage. The records also diagnose subjective neuropathy in the hands, and "shoulder pain with radiculopathy due" to the use of force.

The video recording of the use of force is approximately twenty minutes long and continually captures the incident from Waddleton being escorted from the law library to his placement in a cell. At the beginning of the video, Waddleton is handcuffed and holding his cane. He is advised that he is charged with threatening Moore—to which he objects. While being escorted to a cell, Waddleton uses profanity, kicks open a door, and states he is "pissed off." Rodriguez then orders Salinas and the unknown officer to place Waddleton against the wall. As they escort Waddleton towards the wall, he quickly turns away from the wall and towards the officers. They react by forcing Waddleton to the ground and restraining him. Rodriguez orders Waddleton not to resist and instructs the unknown officer to remove his knee from Waddleton's torso. Additional officers arrive, including Ongudu, and an unknown officer places

ankle cuffs on Waddleton. Waddleton is placed on a gurney and strapped down.

Ongudu holds down Waddleton's ankles for approximately twelve minutes while Waddleton is transported on the gurney. During this period, Waddleton twice appears to resist the restraints. He also attempts to strike an officer. On at least six occasions, Waddleton complains about the ankle cuffs and asks Ongudu to stop squeezing the cuffs. Twice he asks Ongudu if he understands English. The level of pressure applied by Ongudu appears consistent, and he does not respond to Waddleton. At one point, Waddleton tells Rodriguez that his legs are bleeding and that "Ongudu done cut me." Upon arrival at the housing unit, Waddleton grabs hold of the gurney while the officers try to move him. When the leg restraints are removed, Waddleton states that his legs are bleeding because the leg restraints were used incorrectly.

Waddleton filed a cross-motion for summary judgment in which he addressed aspects of the video. He admits to making a sudden action which resulted in his being forced to the ground, but states this is because he was losing his balance. He denies that he aggressively pulled away from Salinas, that he tried to strike an officer, that he acted belligerently, and that he refused a direct order or resisted. He states that evidence gleaned from the video is erroneous because "the DVD has been altered and parts deleted, the volume of the Officers has been turned down and has raised my voice louder to slander my actions." His motion also asserts claims of retaliation and denial of access to the courts against Moore and briefly asserts that Roell and "Ms. Hudson" refused to treat his injuries adequately after the incident.

Waddleton also filed a motion regarding draft reports and disclosures, in which he requested the disclosure of his medical records. This was seemingly in response to an order sealing Waddleton's medical records. The magistrate

judge denied Waddleton's motion as moot because the sealed records had been provided to Waddleton. A few months later, Waddleton filed a motion to transfer the case pursuant to 28 U.S.C. § 1404, alleging bias on behalf of the magistrate judge and district judge. The court did not expressly act upon that motion.

The magistrate judge recommended that the district court grant Ongudu and Salinas's motion for summary judgment, concluding they were entitled to Eleventh Amendment immunity in their official capacities and qualified immunity in their individual capacities. The magistrate judge also recommended dismissing the case with prejudice against the unserved defendants. Applying the Eighth Amendment subjective-intent test, the magistrate judge found no evidence that force was administered maliciously and sadistically. The magistrate judge stated that the video demonstrates that Waddleton was not cooperative, that the correctional officers were "calm, under control and professional" throughout the incident, and that there was no visible attempt to injure Waddleton. He also states that "Officer Ongudu has his hands on Plaintiff's ankles, but he is not squeezing or leaning on Plaintiff's ankles." The magistrate judge found that while Waddleton did allege soreness and nerve pain after the use of force, "no medical provider identified the [use of force] as the cause for" this pain, and Waddleton may have had a "previous degenerative disorder[]."

Waddleton filed objections, which focused upon Candace Moore, and for the first time sought to add Jacquelyn Jameson and Ms. Hudson as defendants. The district court adopted the magistrate judge's findings and conclusions and granted summary judgment, dismissing the excessive force claim against all four defendants with prejudice. The district court applied the Fourth Amendment "objective reasonableness" test in determining that there was no excessive force. Waddleton appealed.

After final judgment was entered, the magistrate judge granted Waddleton's request to forward the record to this court but denied Waddleton's request for a personal copy. Waddleton appealed this post-judgment order, and the appeals have been consolidated.

## II

Section 1983 is not a general tort remedy available to "all who suffer injury at the hands of the state or its officers."[2] A § 1983 plaintiff must show that "he or she has been deprived of some right secured to him or her by the United States Constitution or the laws of the United States."[3] We review the district court's grant of summary judgment de novo.[4] Summary judgment is appropriate "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."[5] But when a defendant asserts a qualified-immunity defense against a § 1983 claim, the plaintiff has the burden of establishing a genuine issue of material fact as to whether the allegedly wrongful conduct violated a clearly established constitutional right.[6]

## III

The principal issue on appeal is whether Salinas and Ongudu were entitled to qualified immunity from Waddleton's § 1983 excessive force claim. Waddleton alleged that Salinas and Ongudu used excessive force in violation of his Eighth Amendment constitutional right to be free from cruel and unusual punishment. Waddleton also alleged a violation of his Fourteenth Amendment right to be free from cruel and unusual punishment, but that

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[2] *White v. Thomas*, 660 F.2d 680, 683 (5th Cir. 1981).
[3] *Irving v. Thigpen*, 732 F.2d 1215, 1216 (5th Cir. 1984) (per curiam).
[4] *Windham v. Harris Cty., Tex.*, 875 F.3d 229, 234 (5th Cir. 2017).
[5] FED. R. CIV. P. 56(a).
[6] *See, e.g., Kitchen v. Dallas Cty., Tex.*, 759 F.3d 468, 476 (5th Cir. 2014); *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010).

claim lacks merit because the Fourteenth Amendment protects pretrial detainees, not convicted prisoners.[7] The district court held there was no excessive force because Salinas and Ongudu's actions were "as a matter of law, objectively reasonable." This was in error because only Fourth Amendment excessive force claims are governed by this objective reasonableness test.[8] Nonetheless, this panel may affirm the district court's judgment on any grounds supported by the record.[9]

**A**

"In evaluating excessive force claims under the Eighth Amendment, the 'core judicial inquiry' is 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'"[10] This standard focuses on "the detention facility official's subjective intent to punish."[11] To determine intent, this court references the "well-known *Hudson* [*v. McMillian*] factors" to determine whether the use of force was constitutionally permissible.[12] These factors are: (1) "the extent of injury suffered by an inmate," (2) "the need for application of force," (3) "the relationship between" the need for force and the amount of force used, (4) "the

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[7] *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015) (explaining that cases in the Fourteenth Amendment context are not demonstrative in the Eighth Amendment context for several reasons including that pretrial detainees cannot "be punished at all, much less 'maliciously and sadistically'" (quoting *Ingraham v. Wright*, 430 U.S. 651, 671-72 n.40 (1977))).

[8] *See, e.g., Ramirez v. Knoulton*, 542 F.3d 124, 128 (5th Cir. 2008) (analyzing a § 1983 Fourth Amendment excessive force claim under the objective reasonableness standard).

[9] *Doctor's Hosp. of Jefferson, Inc. v. Se. Med. All., Inc.*, 123 F.3d 301, 307 (5th Cir. 1997).

[10] *Cowart v. Erwin*, 837 F.3d 444, 452 (5th Cir. 2016) (quoting *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992)).

[11] *Id.* (quoting *Valencia v. Wiggins*, 981 F.2d 1440, 1449 (5th Cir. 1993)).

[12] *Id.* at 452-53.

threat 'reasonably perceived by the responsible officials,'" and (5) "any efforts made to temper the severity of a forceful response."[13]

Usually a court must adopt the plaintiff's version of the facts at summary judgment.[14] However, if record evidence clearly contradicts the plaintiff's allegations, a court "should not adopt that version of the facts for purposes of ruling on a motion for summary judgment."[15] For example, in *Scott v. Harris*, the Supreme Court ignored the plaintiff's statement of the facts when a videotape in the record told "quite a different story."[16] But unlike in *Scott*, Waddleton challenges the authenticity of the video, alleging it "has been altered and parts deleted, the volume of the Officers has been turned down and has raised my voice louder to slander my actions."[17] However this allegation is conclusory, unsupported by the record, and insufficient to show the district court erred.[18] The video captures the use of force in its entirety and there are no sudden jumps, breaks, or other indications that the video is altered. This court will not adopt facts that are clearly contradicted by the video[19] such as Waddleton's denial that he acted belligerently or resisted the officers.

**B**

With regard to Salinas, Rodriguez, and the unknown officer, the use of force was triggered by Waddleton's sudden movement away from the wall and towards the officers. Salinas and the other officers reacted by forcing

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[13] *Hudson*, 503 U.S. at 7 (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)).

[14] *Scott v. Harris*, 550 U.S. 372, 378 (2007).

[15] *Id.* at 380.

[16] *Id.* at 379.

[17] *Cf. id.* at 378 ("There are no allegations or indications that this videotape was doctored or altered in any way, nor any contention that what it depicts differs from what actually happened.").

[18] *See Freeman v. Sims*, 558 F. App'x 412, 413 (5th Cir. 2014) (per curiam) (unpublished) (dismissing as "conclusory, speculative, and insufficient to show that the district court erred in granting summary judgment," an argument that a video recording in an excessive force case was altered).

[19] *See Scott*, 550 U.S. at 738.

Waddleton to the ground and restraining him. Waddleton alleged that this use of force resulted in wrist, shoulder, and back pain, and medical records verify that Waddleton has continued to complain of such pain. There were no signs of visible injuries after the use of force, but the medical records acknowledge "subjective neuropathy affecting" his fingers and "shoulder pain with radiculopathy due [to use of force]."

Viewing the evidence in the light most favorable to Waddleton the use of force could have resulted in injury, so the first *Hudson* factor, "the extent of injury suffered by an inmate,"[20] weighs in Waddleton's favor. However, the other four factors indicate that the use of force "was applied in a good-faith effort to maintain or restore discipline."[21] As to the second and third factors, Waddleton's sudden movement created a need for the use of force and the relationship between the need for force and the amount of force used was appropriate. Waddleton was handcuffed, so less force was necessary,[22] but he made a threatening movement, resisted restraint, and the amount of force used was not "gratuitous."[23] As to factor four, the officers reasonably perceived Waddleton's sudden action as a threat requiring the use of force, even if the movement was caused by a loss of balance. Prison disturbances "may require prison officials to act quickly and decisively."[24] Salinas, Rodriguez, and the unknown officer had to make a real-time evaluation of a potential threat. Prior

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[20] *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 321 (1986)).

[21] *Cowart v. Erwin*, 837 F.3d 444, 452 (5th Cir. 2016) (quoting *Hudson*, 503 U.S. at 6-7 (1992)).

[22] *See id.* at 454-55 (explaining that "courts have frequently found constitutional violations in cases where a restrained or subdued person is subjected to the use of force," particularly "gratuitous force").

[23] *Cf. id.* (holding that a prison official unconstitutionally used "gratuitous force" when she punched a handcuffed prisoner in the face).

[24] *Hudson*, 503 U.S. at 6.

to this action, Waddleton had kicked open a door, been verbally belligerent, and stated he was "pissed off." Upon review of the video, it was reasonable to perceive Waddleton's sudden movement as a threat. Efforts were also made to "temper the severity of a forceful response"—factor five.[25] Rodriguez attempted to deescalate the situation by instructing Waddleton not to resist, and she instructed the unknown officer to remove his knee from Waddleton's torso once the prisoner was restrained.

Injury alone does not equate to excessive force. The issue is "not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'"[26] Four of five *Hudson* factors weigh in favor of Salinas, Rodriguez, and the unknown officer. The video supports the magistrate judge's finding that the officers acted professionally throughout the incident. The force "was applied in a good-faith effort to maintain or restore discipline," and not "maliciously [or] sadistically to cause harm."[27] Waddleton has not established a genuine issue of material fact as to whether this use of force violated his Eighth Amendment rights, and Salinas and the unserved defendants are entitled to qualified immunity.

C

We next evaluate the actions of Ongudu when he applied pressure to Waddleton's ankles. Ongudu restrained Waddleton's ankles for approximately twelve minutes. During this time, Waddleton twice offered resistance, tried to strike an officer, and held onto the gurney when the correctional officers attempted to move him into his cell. Waddleton also complained multiple times that Ongudu was hurting his ankles, indicated his ankle was bleeding,

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[25] *See Hudson*, 503 U.S. at 7 (quoting *Whitley*, 475 U.S. at 321).
[26] *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010) (quoting *Hudson*, 503 U.S. at 7).
[27] *Hudson*, 503 U.S. at 6-7.

and said that "Ongudu done cut me." No visible injuries were identified after the use of force, but medical records indicate nerve damage near Waddleton's ankle without opining as to the cause.

The first and fifth *Hudson* factors support Waddleton's excessive force claim against Ongudu. The district court erred in adopting the magistrate judge's finding that the nerve damage was not caused by the use of force and was likely due to a preexisting condition. While the injury *could* have been preexisting or caused by the officer who applied the leg restraints, the medical records are inconclusive. Viewing the evidence in the light most favorable to Waddleton,[28] there is a genuine dispute as to whether Ongudu's use of force resulted in nerve damage. Additionally, Ongudu made no efforts to "temper the severity of a forceful response."[29] Waddleton told Ongudu multiple times that his actions were causing pain, yet Ongudu did not respond, nor does he appear to have adjusted the amount of pressure applied.

The other three *Hudson* factors indicate that there was no "subjective intent to punish."[30] Waddleton was in restraints, but he continued to be uncooperative, resisted, and attempted to strike an officer. These actions justify the application of some force. As to the third factor, it does not appear that the amount of force applied was "gratuitous" relative to the need for force. The magistrate judge found that Ongudu "had his hands on Plaintiff's ankles, but he is not squeezing or leaning on" them. The video is inconclusive as to the amount of pressure applied, but it is clear that if Ongudu was squeezing or leaning on Waddleton's ankles, the pressure was not great. Waddleton was in restraints while Ongudu held down his ankles, diminishing the amount of force

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[28] *Carnaby v. City of Hous.*, 636 F.3d 183, 187 (5th Cir. 2011).

[29] *Hudson*, 503 U.S. at 7 (1992) (quoting *Whitley*, 475 U.S. at 321).

[30] *Cowart v. Erwin*, 837 F.3d 444, 452 (5th Cir. 2016) (quoting *Valencia v. Wiggins*, 981 F.2d 1440, 1449 (5th Cir. 1993)).

needed, but no evidence suggests that Ongudu used more force than necessary. It was also reasonable for Ongudu to perceive Waddleton's actions as a threat justifying the need to use force—factor four. Waddleton was uncooperative and belligerent and could still pose a threat while restrained, as evidenced by his near-strike of an officer. Prison officials must react "quickly and decisively" in these scenarios,[31] and it was reasonable for Ongudu to perceive Waddleton's actions as a threat.

This court has held that prison officials may violate an inmate's Eighth Amendment rights when they "use gratuitous force against a prisoner who has already been subdued."[32] In particular, the court has held that use of force is excessive when an officer has punched a handcuffed prisoner in the face,[33] and that "kicking, stomping, and choking a subdued inmate would violate the inmate's constitutional rights under certain circumstances."[34] These examples stand in stark contrast to Ongudu's actions.

The pressure to Waddleton's ankles was "applied in a good-faith effort to maintain or restore discipline," not "maliciously [or] sadistically to cause harm."[35] The video supports the magistrate judge's finding that Ongudu acted in a calm, professional manner, and Ongudu never appeared to apply additional force even when Waddleton cursed, resisted, and insulted him by asking if he understood English. Furthermore, three of five *Hudson* factors weigh in Ongudu's favor. Ongudu tried to restore discipline, not "maliciously

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[31] *Hudson*, 503 U.S. at 6.

[32] *Cowart*, 837 F.3d at 454 (quoting *Skrtich v. Thornton*, 280 F.3d 1295, 1303 (11th Cir. 2002)).

[33] *Id.*

[34] *Kitchen v. Dallas Cty., Tex.*, 759 F.3d 468, 479 (5th Cir. 2014).

[35] *Hudson*, 503 U.S. at 6-7.

and sadistically [] cause harm."[36] There was no Eighth Amendment violation and Ongudu is entitled to qualified immunity and summary judgment.

**D**

Waddleton may have also brought suit against the correctional officers in their official capacities.[37] Such a claim is meritless. "[T]he Eleventh Amendment bars recovering § 1983 money damages from [Texas correctional] officers in their official capacity."[38] Waddleton only sought monetary damages, so to the extent the prison officials were sued in their official capacities, Waddleton's claims are barred by the Eleventh Amendment.

**IV**

Waddleton also asserts that the district court abused its discretion in denying leave to amend. We review "the district court's denial of leave to amend a complaint under Federal Rule of Civil Procedure 15 for abuse of discretion."[39] Rule 15(a) "evinces a bias in favor of granting leave to amend,"[40] and a district court should not deny leave to amend unless there is a "substantial reason."[41] A district court may abuse its discretion if it denies leave to amend "without any justifying reason appearing for the denial."[42] The Supreme Court has identified several "justifying reasons" including "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure

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[36] *Cowart*, 837 F.3d at 452 (quoting *Hudson*, 503 U.S. at 6-7).

[37] *Johnson v. Atkins*, 999 F.2d 99, 100 (5th Cir. 1993) (per curiam) ("A *pro se* complaint is to be construed liberally.").

[38] *Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002) (citing *Talib v. Gilley*, 138 F.3d 211, 213 (5th Cir. 1998)).

[39] *Mayeaux v. La. Health Serv. & Indem. Co.*, 376 F.3d 420, 425 (5th Cir. 2004) (citing *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 245 (5th Cir. 1997)).

[40] *Id.* (quoting *Stripling v. Jordan Prod. Co., LLC*, 234 F.3d 863, 872 (5th Cir. 2000)).

[41] *Id.*; *see also Lowrey*, 117 F.3d at 245 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)) ("The Supreme Court has explicitly disapproved of denying leave to amend without adequate justification . . . .").

[42] *Foman v. Davis*, 371 U.S. 178, 182 (1962); *see also Mayeaux*, 376 F.3d at 425 (holding that a district court may not deny leave to amend unless there is a "substantial reason").

to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment."[43]

Waddleton sought to amend his complaint to add four new defendants: Candace Moore, Lanelle Roell, Ms. Hudson, and Jacquelyn Jameson. In his only formal motion for leave to amend, Waddleton sought to add Moore to litigate claims of retaliation and denial of access to the courts against her. Three months later in his motion for summary judgment, Waddleton sought to add Roell and Hudson on claims of denial of adequate medical care. Five months after that in his objections to the magistrate judge's memorandum, Waddleton sought to add Jameson for failure to intervene in the use-of-force incident.

The magistrate judge only ruled on the motion to add Moore to the litigation. He found that because discovery was nearing an end and the "new claims" were "not sufficiently related" to the excessive force claim, granting leave to amend would cause "unnecessar[y] delay" and result in an "[in]efficient resolution of the case." The district court agreed that adding Moore would result in "unnecessary delays."

When ruling on a motion for leave to amend, the court should "consider judicial economy and whether the amendments would lead to expeditious disposition of the merits of the litigation."[44] The court should also consider "whether the amendment adds substance to the original allegations, and whether it is germane to the original case of action."[45] If a proposed amendment "essentially pleaded a *fundamentally different* case with new

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[43] *Foman*, 371 U.S. at 182.
[44] *Chitimacha Tribe of La. v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982).
[45] *Id.*

causes of action and different parties," a district court would not abuse it discretion in denying leave to amend.[46] As to Moore, the magistrate judge found that granting leave would be inefficient and that the proposed amended complaint was "not sufficiently related" to the excessive use of force claim. We agree.

Neither the magistrate judge nor the district court discussed Waddleton's attempt to add Roell and Hudson as defendants in his motion for summary judgment. This court has held in similar circumstances that a district court should construe a plaintiff's response to a motion for summary judgment as a motion to amend her complaint.[47] However, the same rationale that the magistrate judge applied to Moore extends to Roell and Hudson, as Waddleton's proposed causes of action against them are fundamentally different from the excessive force claim. Our analysis in *In re Conley*,[48] an unpublished decision, is helpful. We held in that case that it is apparent that a motion to amend to add new defendants that is filed months after the complaint and includes a request to assert new claims against new parties should be denied.[49]

The proposed claim against Jameson relates to the use-of-force incident, but if delay "prejudice[s] the nonmoving party or impose[s] unwarranted burdens on the court," denial of leave is still appropriate.[50] The district court found that this request—made after the magistrate judge issued his memorandum and recommendations—"was made too late in the proceedings and would unnecessarily delay resolution of this action," burdening both the nonmoving party and the court. Furthermore, Waddleton's excuse for the

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[46] *Mayeaux*, 376 F.3d at 427 (emphasis in original).
[47] *See Ganther v. Ingle*, 75 F.3d 207, 211-12 (5th Cir. 1996) (per curiam).
[48] 176 F. App'x 452, 453 (5th Cir. 2006) (per curiam).
[49] *Id.* (citing *Mayeaux*, 376 F.3d at 427-28).
[50] *Mayeaux*, 376 F.3d at 427; *see also Foman v. Davis*, 371 U.S. 178, 182 (1962).

delay—that he had not yet watched the video—is without merit. He watched the video five months prior to attempting to add Jameson as a party. The district court did not abuse its discretion by denying leave to amend to add Jameson as a party.

## V

### A

Waddleton filed a motion for protection for draft reports and disclosures in response to a court order sealing his medical records. The district court denied the motion as moot. Waddleton took issue with this order because the word "seal" is ambiguous and because he needed the records to prepare his excessive force claim. Yet Waddleton was sent copies of these medical records. The relief sought has already been granted, so the district court properly denied this motion as moot.[51]

### B

Waddleton filed a "motion to forum non conveniens," which is in fact a motion to transfer venue. He asks this court to grant the motion asserting that every judge in the Corpus Christi Division of the Southern District of Texas is biased. This assertion is unsupported by facts or case law. Even though pro se briefs are liberally construed, "*pro se* parties must still brief the issues."[52] Waddleton has inadequately briefed the motion to transfer venue and his argument has been abandoned.

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[51] *See, e.g., Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)) ("[A] case 'becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'").

[52] *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir. 1995) (per curiam); *see also* FED. R. APP. P. 28(a)(8)(A) ("The appellant's brief must contain . . . the reasons for [his argument], with citations to authorities and parts of the record on which the appellant relies.").

C

Waddleton filed a post-judgment motion for record on appeal. The magistrate judge denied the motion as to its request to provide Waddleton a copy of the record and transcripts at the government's expense. Waddleton appealed. In his brief, the only reference to this issue is a sentence stating "[t]he district court again in attempt to be the Record on Appeal continue to deny to follow procedural rules set by the 5th Circuit court of Appeals by repeate[d]ly deny a copy until the Appeal Court issued a[n] order." This does not address whether the district court's ruling was in error. Waddleton's challenge to this post-judgment order is abandoned.[53]

D

Waddleton also moved for leave to supplement his brief to add new evidence of retaliation and denial of access to the courts by some prison officials. However, "[a]n appellate court may not consider new evidence furnished for the first time on appeal and may not consider facts which were not before the district court at the time of the challenged ruling."[54] Waddleton's motion to supplement his brief is denied.

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For the foregoing reasons, we AFFIRM the judgment of the district court.

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[53] *See Brinkmann v. Dallas Cty. Deputy Sheriff Abner*, 813 F.2d 744, 748 (5th Cir. 1987) (stating that failure to identify an error in the district court's analysis is the same as if no appeal were filed); *Davis v. Maggio*, 706 F.2d 568, 571 (5th Cir. 1983) ("Claims not pressed on appeal are deemed abandoned.").

[54] *Theriot v. Par. of Jefferson*, 185 F.3d 477, 491 n.26 (5th Cir. 1999).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

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| MARVIN WADDLETON III, | § | |
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| Plaintiff, | § | |
| VS. | § | CIVIL ACTION NO. 2:15-CV-79 |
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| BERNADETTE RODRIGUEZ, *et al*, | § | |
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| Defendants. | § | |

**ORDER ADOPTING**
**MEMORANDUM AND RECOMMENDATION ON**
**CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Pending before the Court are "Defendants Ongudu and Salinas' Motion for Summary Judgment" (D.E. 24) and "Plaintiff['s] Motion for Summary Judgment" (D.E. 29). On April 26, 2016, United States Magistrate Judge Jason B. Libby issued a Memorandum and Recommendation (M&R, D.E. 36), recommending that Defendants' motion be granted and that Plaintiff's motion be denied. Plaintiff timely filed his objections (D.E. 37) on May 9, 2016. D.E. 37-1.

Plaintiff brings this action under the Fourth, Eighth, and Fourteenth Amendments for excessive use of force in connection with an incident in which Plaintiff was forcibly removed from the prison law library and placed in a cell—an incident that was videotaped. The M&R recommends dismissing any official capacity claims against Defendants because they work on behalf of the State of Texas and are entitled to Eleventh Amendment immunity. It further recommends dismissing the excessive force

e.g. "Appendix B."

complaints on the basis of the failure to demonstrate a constitutional claim and qualified immunity. Plaintiff states three objections.

First, Plaintiff objects to the denial of his requests to amend his complaint. Plaintiff filed a motion for leave to join Candace Moore, the law librarian. *See* Motion, D.E. 20. Plaintiff claims that Moore made a false allegation against him, triggering his removal from the law library and interfered with his right to access the courts, all in retaliation for grievances Plaintiff filed. He also complains that she read his documents without authorization, denied him indigent legal supplies, and prevented him from communicating with other inmates.

Magistrate Judge Libby denied the motion for leave to amend, among other reasons, because it was filed too late. The discovery deadline was fast approaching, along with the dispositive motion deadline. An amendment to join a new party would cause unnecessary delays. D.E. 21. The Magistrate Judge applied the correct standard of review and reached a result within his discretion. Plaintiff has not set out with specificity any argument to the contrary. His conclusory statement that the Magistrate Judge abused his discretion is insufficient. Plaintiff's first objection is OVERRULED.

In his objections to the M&R, Plaintiff also argues for the first time that he should have been permitted to amend to add another defendant, Captain Jacquelyn Jameson, who he alleges failed to stop Officer Ongudu and check the leg cuffs. Again, Plaintiff summarily complains that the failure to allow his amendments constitutes an abuse of discretion and would not cause delay. He does not set out any analysis that reflects how it would constitute an abuse of discretion to refuse leave to amend. The Court holds, as

with the Magistrate Judge's treatment of the request to amend to add Moore, that Plaintiff's request to join Captain Jameson was made too late in the proceedings and would unnecessarily delay resolution of this action. The second objection is OVERRULED.

Third, Plaintiff objects to the M&R's conclusion regarding excessive force. He claims that the M&R's analysis is contrary to the summary judgment standard of review in that the Magistrate Judge weighed the evidence rather than simply determining that there was evidence to submit to the jury. Plaintiff's argument fails to apply the specialized standard of review applicable to excessive force claims and qualified immunity defenses.

Contrary to Plaintiff's reading of the M&R, the Magistrate Judge did not base his recommendation on a determination that Plaintiff was not injured. Instead, he balanced the alleged injury against the force used, as the standard of review requires. The only dispute in these cases is whether Defendants acted reasonably under the totality of the circumstances. The test is "objective reasonableness" from an officer's perspective and is a legal—not a fact—question. *Ramirez v. Knoulton*, 542 F.3d 124; 128 (5th Cir. 2008).

Here, as in *Ramirez,* the events were captured on videotape and there is no dispute as to how the Defendants handled Plaintiff. Plaintiff even admits that he became "combative (belligerent)," justifying the use of some force. D.E. 37, p. 2. This case therefore presents a question of law. The Magistrate Judge carefully reviewed the evidence and summarized the facts, illustrating that Defendants' actions were, as a matter

of law, objectively reasonable. Plaintiff's objections do not supply a reason to find the Magistrate Judge's conclusion incorrect. Plaintiff's third objection is OVERRULED.

Having reviewed the findings of fact, conclusions of law, and recommendations set forth in the Magistrate Judge's Memorandum and Recommendation, as well as Plaintiff's objections, and all other relevant documents in the record, and having made a de novo disposition of the portions of the Magistrate Judge's Memorandum and Recommendation to which objections were specifically directed, the Court **OVERRULES** Plaintiff's objections and **ADOPTS** as its own the findings and conclusions of the Magistrate Judge.

Accordingly, Defendants' Motion for Summary Judgment (D.E. 24) is **GRANTED,** and Plaintiff's Motion for Summary Judgment (D.E. 28) is **DENIED.** The Court further finds that Plaintiff cannot state an excessive force claim against any prison official who was involved in the October 4, 2012 use of force and that the claims against the unserved Defendants, Lieutenant Salinas and Officer John Doe, must also be dismissed. This action is **DISMISSED WITH PREJUDICE**.

ORDERED this 19th day of July, 2016.

Nelva Gonzales Ramos

NELVA GONZALES RAMOS
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

| | | |
|---|---|---|
| MARVIN WADDLETON III, | § | |
| | § | |
| Plaintiff, | § | |
| VS. | § | CIVIL ACTION NO. 2:15-CV-79 |
| | § | |
| BERNADETTE RODRIGUEZ, *et al*, | § | |
| | § | |
| Defendants. | § | |

**MEMORANDUM AND RECOMMENDATION**
**ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

In this prisoner civil rights action, Plaintiff Marvin Waddleton, III, alleges that Defendants, Officer Dacho Ongudu and Sergeant Aimee Salinas, used excessive force on October 4, 2012, causing him physical injuries for which he seeks compensatory and punitive damages. (D.E. 1). Defendants have filed a motion for summary judgment to dismiss this action on the grounds that they are entitled to qualified immunity. (D.E. 24). Plaintiff has filed a cross-motion for summary judgment. (D.E. 29).

For the reasons stated herein, it is respectfully recommended that the Court grant Defendants' motion for summary judgment, deny Plaintiff's motion for summary judgment, and dismiss Plaintiff's excessive force claims against Defendants with prejudice.

## I. JURISDICTION.

The Court has federal question jurisdiction over this civil action pursuant to 28 U.S.C. § 1331.


e.g. "Appendix C."

## II. PROCEDURAL BACKGROUND.

Plaintiff is a prisoner in the Texas Department of Criminal Justice, Criminal Institutions Division (TDCJ-CID), and is currently confined at the McConnell Unit (MCU) in Beeville, Texas. He is serving a life sentence for aggravated assault of a public servant.

Plaintiff filed his original complaint on February 6, 2015, alleging that on October 4, 2012, certain MCU officers used excessive force against him while removing him from the law library and transferring him to prehearing segregation. (D.E. 1). In particular, he sued: (1) Lieutenant Bernadette Rodriguez; (2) Sergeant Aimee Salinas; (3) Officer Dacho Ongudu; and (4) Officer John Doe. (D.E. 1, p. 3).

On February 18, 2015, a *Spears*[1] hearing was conducted, following which service was ordered on the four defendants identified above. (D.E. 7)

Officer Ongudu and Sergeant Salinas each filed an answer to Plaintiff's complaint and raised the defense of qualified immunity. (D.E. 10, 16).[2]

On September 10, 2015, Plaintiff filed a motion for leave to amend his complaint to add a retaliation claim against Ms. Candace Moore, the MCU law librarian, alleging that she had effectively caused the Use of Force (UOF) by illegally looking at Plaintiff's legal papers without his permission, then falsely accusing him of threatening her. (D.E. 20). Plaintiff's request to amend was denied. (D.E. 21).

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[1] *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985).

[2] Since filing suit, Lieutenant Rodriguez has left the employment with the TDCJ-CID and efforts to serve her at her last known address were unsuccessful. Similarly, the Attorney General was unable to identify Officer John Doe based on Plaintiff's description, and service was not effected on this individual.

On November 12, 2015, Defendants Ongudu and Salinas filed the instant motion for summary judgment. (D.E. 24).

On December 18, 2015, Plaintiff filed a cross-motion for summary judgment, (D.E. 29), and on December 21, 2015, Defendants filed a reply to Plaintiff's summary judgment motion. (D.E. 30).

Through this action, Plaintiff is seeking $300,000 in compensatory damages and one million dollars in punitive damages. (D.E. 1, p. 4).

## III. SUMMARY JUDGMENT EVIDENCE.

### A. Defendants' Summary Judgment Evidence.

Defendants offer the following summary judgment evidence:

Ex. A: Use of Force Report (D.E. 24-1, pp. 1-67);

Ex. B: DVD video recording of October 4, 2012 UOF;

Ex. C: Plaintiff's medical records from 10/25/12 to 10/08/14, filed under seal (D.E. 25, pp. 2-14).

The summary judgment establishes the following:

#### *1. The DVD Recording.*

On October 4, 2012, Plaintiff was in the law library working on his legal matters. The law librarian, Ms. Moore, and Plaintiff got into a dispute, and Ms. Moore called for assistance. (D.E. 1, p. 4). Lieutenant Rodriguez responded to the law library and told Plaintiff he must leave. Ms. Moore then accused Plaintiff of threatening her. Lieutenant

Rodriguez responded by placing Plaintiff in handcuffs[3] and escorting him out of the library. *Id.* Plaintiff protested that he was not leaving without his legal papers; Lieutenant Rodriguez assured him that his papers would be returned to him. Sergeant Salinas, and three other officers began walking with Plaintiff while one officer videotaped the event and Sergeant Rodriguez repeatedly instructed Plaintiff to not resist and to follow orders. Sergeant Rodriguez advised Plaintiff he was going to 11 Building to be placed in segregation, at which time Plaintiff became angry stating that he had done nothing wrong and that Ms. Moore had falsely accused him of threatening her. He kicked the door leading out of the library, cursed at the guards escorting him, and as they approached the hallway to 11 Building, he refused to enter and pushed back towards the officers. Lieutenant Rodriguez advised him that failure to comply with her orders would result in a use of force. Plaintiff continued to resist, and Sergeant Rodriguez ordered that Plaintiff be placed against the wall. The officers pushed Plaintiff up to the wall, then lowered him to the ground. Two other officers arrived and leg restraints were applied. Sergeant Salinas and another officer left; Officer Ongudu replaced an officer holding down Plaintiff's legs. Lieutenant Rodriguez called for a gurney. Plaintiff was lifted by the officers and placed on the gurney on his right side. Plaintiff complained that the leg restraints were applied incorrectly and that one of his ankles had been cut and that he was bleeding. The UOF team then continued transporting Plaintiff; however, once they reached the elevator Plaintiff informed the UOF team that he had a first row pass and had

[3] The DVD shows that Plaintiff was handcuffed with his arms in front of him. Sergeant Salinas called and confirmed that Plaintiff had a front handcuff pass.

to remain on the bottom floor. Lieutenant Rodriguez secured alternative housing in 11 Building, and Plaintiff was wheeled on the gurney to this location. At his new cell, the UOF team lifted Plaintiff off the gurney while he was still shackled, and placed him on the ground, under the stationary bunk bed. The leg restraints were removed and the officers exited. Plaintiff was then ordered to place his arms through the food slot so that the hand restraints could be removed, but he refused to do so. Lieutenant Rodriguez indicated on the video recording that she would return in fifteen minutes to remove the hand restraints if Plaintiff would comply.

***2. The Written UOF reports.***

The following officers were involved in the October 4, 2012 UOF:

| **Name** | ***Rank*** | **Sex** | **Race** | **Age** |
|---|---|---|---|---|
| Cuellar, Paul | Correctional Officer III | M | H | 25 |
| Martin, Yolanda, | Correctional Officer IV | F | H | 44 |
| Olufola, Olugbenga | Correctional Officer IV | M | B | 37 |
| Olutade, Taiwo | Correctional Officer II | M | B | 30 |
| Ongudu, Dacho | Correctional Officer | M | B | 54 |
| Rivera, Aurelio | Correctional Officer III | M | H | 23 |
| Rodriguez, Bernadette | Lieutenant | F | H | 25 |
| Sabatuea, Andriy, | Correctional Officer | M | W | 29 |
| Salinas, Aimee | Sergeant | F | H | 45 |
| Tidwell, Christopher | Correctional Officer II | M | W | 22 |

(D.E. 24-1, p. 62).

Written statements were given by each officer, and each officer was evaluated by medical following the UOF. The following statements are relevant:

*a. Lieutenant Rodriguez.*

On October 4, 2012, Lieutenant Rodriguez completed the UOF Employee Participant Statement. (D.E. 24-1, pp. 9-10). According to her statement, after arriving at the library, Plaintiff refused to exit the library so Lieutenant Rodriguez called for additional staff and a video camera. (D.E. 24-1, p. 10). An officer arrived and applied hand restraints while Sergeant Salinas verified that Plaintiff had a front handcuff pass. (D.E. 24-1, p. 10). One officer secured Plaintiff's right arm, Sergeant Salinas secured his left arm, and the escort proceeded outside. (D.E. 24-1, p. 10). At the 12 Building hallway, Plaintiff became belligerent, and Lieutenant Rodriguez ordered the UOF team to guide Plaintiff to the wall. (D.E. 24-1, p. 10). Plaintiff rapidly turned his back to the wall, and Sergeant Salinas grabbed his arm and pulled his left shoulder down, while another officer moved to Plaintiff's left side and pulled him down to the ground. Additional officers then arrived. One officer applied leg restraints and Officer Ongudu held Plaintiff's legs down. (D.E. 24-1, p. 10). Plaintiff was then lifted onto a gurney and rolled onto his right side. (D.E. 24-1, p. 11). The upper body restraints were applied to keep Plaintiff on the gurney and Plaintiff was again advised to stop resisting. (D.E. 24-1, p. 11). The lower straps on the gurney were then applied. After securing housing on the first floor in 11 building, the officers pushed the gurney to 49 cell. Prior to entering the pod, Lieutenant Rodriguez took two photos of Plaintiff's injuries. (D.E. 24-1, p. 11). Lieutenant Rodriguez instructed the officers to lift Plaintiff off the gurney and to carry him into the cell and then slide him under the bunk using the same holds. (D.E. 24-1, p. 11). The leg restraints were removed and the officers exited the cell. Lieutenant

Rodriguez ordered Plaintiff to relinquish the hand restraints through the food slot but he refused to comply. (D.E. 24-1, p. 11). After fifteen minutes, Lieutenant Rodriguez returned to Plaintiff's cell and gave him the order to relinquish the hand restraints, and he complied. (D.E. 24-1, p. 11). Officer Cuellar conducted a strip search and secured the tray slot. (D.E. 24-1, p. 11). Nurse Lanelle Roell conducted an onsite use of force physical noting no visible injuries, but Plaintiff complained of pain in both wrists and his left ankle. Lieutenant Rodriguez took additional photographs of Plaintiff's cell door, and then terminated the UOF. (D.E. 24-1, p. 11).

***b. Sergeant Salinas.***

Sergeant Salinas gave a written UOF statement on October 4, 2012. (D.E. 24-1, pp. 12-15). Sergeant Salinas confirmed that Plaintiff became belligerent outside of the 12 Building hallway, and that Lieutenant Rodriguez ordered the escort team to guide Plaintiff to the wall. (D.E. 24-1, p. 13). As Plaintiff rapidly placed his back against the wall, Sergeant Salinas pulled plaintiff's right shoulder down while another officer, Officer Olufola, pushed Plaintiff's left shoulder down. (D.E. 24-1, p. 13). Lieutenant Rodriguez came over and placed both hands on Plaintiff's shoulders and pushed them down, while two other officers pulled Plaintiff's legs down, bringing him to the ground. (D.E. 24-1, p. 13). Another officer arrived on the scene and applied leg restraints. (D.E. 24-1, p. 13). While on the ground on his left side, Officer Ongudu arrived and began holding down his legs. (D.E. 24-1, p. 13). Sergeant Salinas left at this time and returned to her normal duties. (D.E. 24-1, p. 13, 15). Plaintiff was then placed on the gurney and secured. (D.E. 24-1, p. 15).

*c. Officer Dacho Ongudu.*

Officer Ongudu gave a statement on October 4, 2012. (D.E. 24-1, pp. 23-25). Officer Ongudu testified that, after Plaintiff was placed on the gurney, he held Plaintiff's legs down during transport inside 12 Building, and then over to 11 Building and into the cell. (D.E. 24-1, p. 24). After Plaintiff was lifted off the gurney and placed in the cell, Officer Ongudu returned to his normal duties. (D.E. 24-1, p. 24).

*d. LVN Lanelle Roelle.*

On October 4, 2012, Plaintiff was seen cell-side by Lanelle Roell, LVN, for a medical evaluation following the UOF. (D.E. 24-1, pp. 60-61). Nurse Roell found that she was unable to screen Plaintiff for physical injuries because he was "a threat to staff" at the time. (D.E. 24-1, p. 60). Nurse Roell noted that Plaintiff was ambulatory but complaining of pain to both wrists and his left ankle. (D.E. 24-1, p. 60). She also noted that Plaintiff was classified as "medically or mentally impaired prior to the UOF. (D.E. 24-1, p. 6). Under treatment, Nurse Roelle indicated: "No injuries due to UOF." (D.E. 24-1, p. 61). She noted that she observed no visual injuries. (D.E. 24-1, p. 61).

*e. Candace Moore.*

On October 4, 2012, Candace Moore submitted an offense report. (D.E. 24-1, pp. 64). Ms. Moore recounted the events as follows:

> Offender Waddleton, Martin, TDCJ No. 1355746, threatened to inflict harm on C. Moore in that said offender aggressively stated, (and after aggressively charging towards law library Officer Billy Garza), "You are next, you are outta here." Due to said offender refusing orders to leave the law library and his aggressive and disruptive behavior, an ICS [Incident Command System] was initiated where a security supervisor, additional

> staff, and a video camera operator responded. The incident caused a significant disruption of operations in that such act caused delay in count during count times and a delay of access to courts for other offenders attending their scheduled law library session.

(D.E. 24-1, p. 64).

***f. Sergeant Quintero.***

On October 4, 2012, Sergeant Quintero conducted a preliminary investigation of the UOF incident involving Plaintiff, including taking a statement from him. (D.E. 24-1, pp. 66-67). Plaintiff related that he did not care if he received a disciplinary case, but he wanted his legal property back. (D.E. 24-1, pp. 66-67).

**B. Additional medical evidence.**

On October 25, 2012, Plaintiff was seen in the MCU infirmary complaining of injuries following the October 4, 2012 UOF. (D.E. 25, pp. 11-12). Plaintiff alleged that his right shoulder was injured, his back was sore, and that he had cuts and bruising to his ankle and wrists. (D.E. 25, p. 11). Plaintiff related that he had no previous injuries prior to the UOF, and now he had difficulty walking due to an ankle injury, as well as problems with numbness and tingling to his upper and lower extremities. *Id.* Upon examination, Physician's Assistant (PA) Eschvarry noted that Plaintiff had good strength to hands, with good opposition to both hands, vascular intact. (D.E. 25, p. 12). Plaintiff had mild neck pain with flexion and extension. *Id.* PA Eschvarry's assessment was shoulder pain with radiculopathy due to UOF. *Id.* The plan was to start Plaintiff on Nortriptyline for pain, as well as to continue him on his other medications, and for Plaintiff to seek follow-up care sooner if he did not improve. *Id.*

On November 13, 2012, Plaintiff returned to the MCU infirmary complaining of pain in his hands and a weak grip. (D.E. 25, pp. 8-10). Upon examination, Dr. Whitt noted that Plaintiff was experiencing a muscle spasm to the right side of his neck. (D.E. 25, p. 8). He had mild tenderness to the right shoulder but full range of motion. *Id.* Plaintiff had neurological improvement in his grip strength bilaterally. *Id.* Plaintiff complained of loss of sensation in both index fingers. Id. Dr. Whitt's impression was subjective neuropathy affecting bilateral index fingers due to muscle spasms. *Id.* Dr. Whitt's plan was to prescribe Robaxin, a muscle relaxant, for seven days, increase Plaintiff's Nortriptyline for pain, continue Plaintiff on Ibuprofen, and schedule him for an x-ray of his spine and right shoulder. *Id.*

On March 10, 2013, Plaintiff reported to the MCU infirmary complaining of numbness in his legs that he claimed started in October 2012. (D.E. 25, p. 13-14). Nurse Jackie Nelson noted that Plaintiff had no neurological deficit and he did not complain of pain. (D.E. 25, p. 14). Her plan was to schedule Plaintiff to see a provider. *Id.*

On March 13, 2013, Plaintiff was seen by Dr. Whitt for his complaints of numbness and tingling outside of his feet following the October 2012 UOF. (D.E. 25, pp. 6-7). Upon examination, Dr. Whitt found areas of decreased sensation surrounded by hypersensitivity of lateral foot and ankle bilaterally, consistent with innervated superficial peroneal nerve. (D.E. 25, p. 6). Dr. Whitt's assessment was bilateral neuropathy of deep peroneal nerve, with some indication of slow recovery. (D.E. 25, p. 7). Dr. Whitt informed Plaintiff that recovery after injury is usually very slow, in terms of months and/or years, and that full recovery of the nerve was expected, but not guaranteed. (D.E.

25, p. 7). Her plan was to increase Plaintiff's Nortriptylene to help with his symptoms. *Id.*

On October 8, 2014, Plaintiff reported to the MCU infirmary complaining of knots on his feet and ankles related to the October 2012 UOF, with numbness in his feet and ankles. (D.E. 25, pp. 2-3). He also complained of back pain and excessive gas. *Id.* Upon examination, PA Susanna Corbett noted distended superficial bilateral veins and ankles and feet, but his pedal pulses were equal bilaterally. *Id.* at 2. Mild edema of his feet and ankles was noted. *Id.* PA Corbett's impression was distended varicose veins and her plan was to prescribe TED compression stockings. *Id.* at 3. In addition, she ordered a diuretic and instructed Plaintiff to keep his feet elevated when possible. *Id.* A lumbar x-ray was also ordered. *Id.*

On April 19, 2013, Plaintiff reported to the MCU infirmary complaining, *inter alia,* that his wrists and feet hurt due to a UOF that occurred in October 2012. (D.E. 25, pp. 4-5). Upon examination, Nurse Shollenbarger found that Plaintiff's extremities were benign and he had full range of motion with no deformity. (D.E. 25, p. 4). Plaintiff was continued on Naproxen for pain. *Id.*

**C. Plaintiff's summary judgment evidence.**

In his cross-motion for summary judgment (D.E. 29), Plaintiff alleges that the TDCJ CID has:

> A custom and practice of retaliation, harassment and Writing Disciplinary case against offenders that use Access to Court against TDCJ and often violating Court orders involving the case.

(D.E. 29, p. 1). He claims that, after filing a § 1983 action in 2010 complaining about unconstitutional disciplinary cases, he was retaliated against. (D.E. 29, pp. 1-2). Plaintiff filed Case No. 2:10-cv-267, *Waddleton v. Jackson, et al.,* on August 9, 2010, and sought leave to proceed *in forma pauperis*. (*Id.,* D.E. 1, D.E. 2). Magistrate Judge Owsley recommended that Plaintiff's motion to proceed i.f.p. be denied because his inmate trust fund account statement indicated that Plaintiff had $2,755.62 in his trust fund account at the time. (Case no. 2:10-cv-267, D.E. 6). The Court adopted the recommendation and Plaintiff paid the $350.00, an evidentiary hearing was held, and by memorandum entered November 10, 2010, it was recommended that Plaintiff's action challenging strip searches and his grievances related thereto be denied. (Case no. 2:10-cv-267, D.E. 20). On December 28, 2010, the Court adopted the recommendation and dismissed Plaintiff's lawsuit with prejudice. (Case no. 2:10-cv-267, D.E. 28, 29). On appeal, Case No. 11-40055, the Fifth Circuit upheld the searches as constitutional under the Eighth Amendment, but remanded the action for further findings under the Fourteenth Amendment. (Case No. 2:10-cv-267, D.E. 49). On remand, defendants were awarded summary judgment in their favor. (Case No. 2:10-cv-267, D.E. 79). Plaintiff appealed again, and on appeal, the Fifth Circuit affirmed the searches under the Fourteenth Amendment. (Case no. 2:10-cv-267, D.E. 123).

Plaintiff argues that the searches he challenged in Case No. 2:10-cv-267 are the cause for Ms. Moore's hostility toward him and the motivation for having him removed from the law library. However, even if so, those earlier searches have been litigated and

are now barred by *res judicata*, as well as time barred, and do not serve as competent summary judgment evidence.

## IV. SUMMARY JUDGMENT STANDARD.

Summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. In making this determination, the Court must consider the record as a whole by reviewing all pleadings, depositions, affidavits and admissions on file, and drawing all justifiable inferences in favor of the party opposing the motion. *Caboni v. Gen. Motors Corp.*, 278 F.3d 448, 451 (5th Cir. 2002). The Court may not weigh the evidence, or evaluate the credibility of witnesses. *Id.* Furthermore, "affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e); *see also Cormier v. Pennzoil Exploration & Prod. Co.*, 969 F.2d 1559, 1561 (5th Cir. 1992) (per curiam) (refusing to consider affidavits that relied on hearsay statements); *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987) (per curiam) (stating that courts cannot consider hearsay evidence in affidavits and depositions). Unauthenticated and unverified

documents do not constitute proper summary judgment evidence. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994) (per curiam).

The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party demonstrates an absence of evidence supporting the nonmoving party's case, then the burden shifts to the nonmoving party to come forward with specific facts showing that a genuine issue for trial does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To sustain this burden, the nonmoving party cannot rest on the mere allegations of the pleadings. Fed. R. Civ. P. 56(e); *Anderson*, 477 U.S. at 248. "After the nonmovant has been given an opportunity to raise a genuine factual issue, if no reasonable juror could find for the nonmovant, summary judgment will be granted." *Caboni*, 278 F.3d at 451. "If reasonable minds could differ as to the import of the evidence ... a verdict should not be directed." *Anderson*, 477 U.S. at 250-51.

The evidence must be evaluated under the summary judgment standard to determine whether the moving party has shown the absence of a genuine issue of material fact. "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* at 248.

## V. DISCUSSION.

### A. Eleventh Amendment immunity.

Plaintiff did not indicate whether he is suing Defendants in their official or individual capacities, so it is assumed that he is suing them in both. He is seeking $300,000 in compensatory damages and 1,000,000 in punitive damages. (D.E. 1, p. 4).

A suit against a state officer in his or her official capacity is effectively a suit against that state official's office. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). The Eleventh Amendment, however, bars claims for money damages against a state or state agency. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996); *Aguilar v. Texas Dep't of Criminal Justice,* 160 F.3d 1052, 1054 (5th Cir. 1998). As such, an action for monetary damages against a state official in his or her official capacity is one against the state itself, and is barred by the Eleventh Amendment. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The Fifth Circuit has extended the Eleventh Amendment immunity specifically to TDCJ-CID officers and officials acting in their official capacities. *See Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002) (Eleventh Amendment bars prisoner's suit for money damages against prison officials in their official capacities).

Thus, to the extent Plaintiff is suing Defendants in their official capacities for money damages, those claims are barred by the Eleventh Amendment. Accordingly, it is respectfully recommended that the Court dismiss those claims with prejudice as barred by the Eleventh Amendment and grant Defendants' summary judgment in their favor on those claims.

**B. Excessive Use of Force.**

Plaintiff is suing Sergeant Salinas and Officer Ongudu alleging that they used excessive force against him on October 4, 2012.

Claims of excessive force raised by convicted prisoners are evaluated under the Eighth Amendment's prohibition against cruel and unusual punishment. *See Kingsley v. Hendrickson,*_____ U.S. _____, 135 S. Ct. 2466 (2015) (continuing to hold that excessive force claims for convicted prisoners are evaluated under the Eighth Amendment, while such claims for pretrial detainees are examined under the Fourteenth Amendment's Due Process Clause).

Inmates have a constitutional right to be free from the use of excessive force. *Anthony v. Martinez,* 185 Fed. Appx. 360, 363 (5th Cir. 2006). To state a claim for excessive force, a prisoner-plaintiff must show that the force was not applied in a good-faith effort to maintain or restore discipline, but was applied maliciously and sadistically to cause harm, and that the injury he suffered was more than *de minimis,* but not necessarily significant. *See Hudson v. McMillian,* 503 U.S. 1, 6, 10 (1992); *Gomez v. Chandler*, 163 F.3d 921, 923-24 (5th Cir. 1999); *Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). The factors to be considered are (1) the extent of the injury suffered; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and (5) any effort made to temper the severity of a forceful response. *Gomez*, 163 F.3d at 923.

In *Wilkins v. Gaddy*, 130 S. Ct. 1175 (2010) (per curiam), the Supreme Court ruled that a district court "erred in dismissing Wilkins' excessive force complaint based on the

supposedly *de minimis* nature of his injuries." *Id.* at 1180. The Court grounded this conclusion on the principle that "'the core judicial inquiry' [is] not whether a certain quantum of injury was sustained, but rather 'whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.'" *Id.* at 1178 (citations omitted).

Although a *de minimis* injury is not cognizable, the extent of the injury necessary to satisfy the injury requirement "is directly related to the amount of force that is constitutionally permissible under the circumstances." *Ikerd v. Blair*, 1010 F.3d 430, 434-35 (5th Cir. 1996) (citations omitted); *see also Flores v. City of Palacios*, 381 F.3d 391, 399 (5th Cir. 2004) (noting that the minimum qualifying injury "changes with the facts of each case"); *Williams v. Bramer,* 180 F.3d 699, 704 (5th Cir. 1999) ("What constitutes an injury in an excessive force claim is ... subjective -- it is defined entirely by the context in which the injury arises."). In general, the courts have concluded that the amount of injury necessary to satisfy the requirement of "some injury" and establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances. *Williams,* 180 F.3d at 703-04. Thus, courts may look to the seriousness of the injury to determine "whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." *Whitley v. Albers,* 475 U.S. 312, 321 (1986).

In addition, Defendants have each raised the defense of qualified immunity, and therefore, the Court must also examine the actions of the Defendants individually in the

qualified immunity context. *Kitchen v. Dallas County, Tex.,* 759 F.3d 468, 478-79 (5th Cir. 2014). In claims brought under 42 U.S.C. § 1983, "when a defendant invokes the defense of qualified immunity, the burden is on the plaintiff to demonstrate the inapplicability of the defense." *See Brumfield v. Hollins,* 551 F.3d 322, 326 (5th Cir. 2008); *Bazen ex rel. Bazen v. Hildalgo Cnty,* 246 F.3d 481, 489 (5th Cir. 2001). Because qualified immunity constitutes an immunity from suit rather than a mere defense to liability, adjudication of a defendant's entitlement to qualified immunity "should occur 'at the earliest possible stage in litigation.'" *McClendon,* 305 F.3d at 323 (quoting *Hunter v. Bryant,* 502 U.S. 224, 227 (1991). The two-part inquiry into qualified immunity is first "whether a constitutional right would have been violated on the facts alleged," and second "whether the right was clearly established" at the time of the violation. *Saucier v. Katz,* 533 U.S. 194, 200 (2001). Courts are permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand. *Pearson v. Callahan,* 555 U.S. 223, 236 (2009).

There can be no claim of excessive force if there is no evidence to suggest that the force was administered maliciously and sadistically for the very purpose of causing harm. *Hudson,* 503 U.S. at 6. In this case, the UOF video recording negates any claim that the force employed by Defendants was applied maliciously or sadistically. Indeed, it shows clearly that the minimum amount of force was applied by all prison officials involved in an effort to maintain control and order of the situation.

The UOF video captures the entire event. Throughout the video, Plaintiff uses profanity and exhibits bursts of anger toward the members of the UOF team. At 21 seconds, Plaintiff uses profanity for the first time. (VR:00:21). Sergeant Salinas and Officer Olufolat begin to escort Plaintiff out of the law library as Lieutenant Rodriguez narrates the events, and Plaintiff violently kicks open the door. (VR:00:34). Plaintiff's hands are restrained in front of him and Lieutenant Rodriguez notes that Sergeant Salinas has confirmed that Plaintiff has a front-cuff pass. (VR:00:40). Plaintiff is advised that he is charged with threatening Ms. Moore, and he objects to the charge, using profanity. (VR:00:41-VR:01:09). While one arm is held by Officer Olufolat, Plaintiff speaks angrily at the video recording, and Sergeant Salinas enters and takes hold of his other arm to resume the escort to 11 Building. (VR:01:13). When told he is going to 11 Building, Plaintiff uses profanity. (VR:01:14-VR:01:41).

At VR:01:36, Plaintiff grabs a folder of his materials out of Officer Olufolat's hand. At VR:01:40, Plaintiff is instructed to not resist, but he turns and uses profanity against Sergeant Salinas. (VR:01:42). At VR:01:59, Plaintiff states, "I'm really pissed off." At VR:02:01, Plaintiff uses profanity and hesitates to enter the 11 Building hallway. Just as they pass through the chain gate to the 11 Building hallway, Plaintiff pulls away from Sergeant Salinas, and Lieutenant Rodriguez orders Sergeant Salinas and Officer Olufolat to take Plaintiff to the ground. Lieutenant Rodriguez assists the UOF officers, as does a new officer, Officer Yolanda Martin. (VR:02:07-VR:02:25). During the incident, Lieutenant Rodriguez orders Plaintiff not to resist, but he continues to struggle and use profanity. Lieutenant Rodriguez calls for back-up and for a medical

gurney. At VR:03:37, Officer Aurelio Rivera arrives with leg restraints and applies them to Plaintiff's ankles. At VR:4:33, the gurney arrives and Plaintiff is lifted onto the gurney. (VR:05:32). Plaintiff is agitated and cursing at the officers. At VR:05:52, Plaintiff tells officers to "get off his leg." Plaintiff is then placed on his right side and restrained. At VR:06:28, Plaintiff is wheeled out of the area toward 11 Building elevator. Sergeant Salinas in no longer part of the UOF team. Officer Ongudu is holding down Plaintiff's legs. At VR:08:30, alternative housing must be found due to Plaintiff's first floor restriction. At VR:09:52, Plaintiff screams that the cuff is being squeezed on his leg. The recording shows that Officer Ongudu has his hands on Plaintiff's ankles, but he is not squeezing or leaning on Plaintiff's ankles. At VR:12:20, the team begins escorting Plaintiff to 12 Building. At VR:15:15, Lieutenant Rodriguez takes pictures of Plaintiff's injuries. Plaintiff states to be sure to get a picture of his ankle because he believes it is cut. At VR:18:40, Plaintiff is lifted from the gurney, placed in the cell, and the leg restraints removed. At VR:19:20, Officer Ongudu exits the video. Throughout the video, the TDCJ officers are calm, under control and professional. The TDCJ officers' manner of dealing with this unfortunate situation, and recording the incident for subsequent review, resolves any doubt that their actions were restrained and reasonable under the circumstances.

The medical records support Plaintiff's claim that his ankles were sore and swollen after the UOF. However, neither Sergeant Salinas nor Officer Ongudu was responsible for putting the leg restraints on Plaintiff. Moreover, Plaintiff was placed in the leg restraints for no more than sixteen (16) minutes. Even if the restraints had been

put on incorrectly or too tightly, he was not left in the restraints for any significant amount of time and his injuries were treated with anti-inflammatory and pain medication. (D.E. 25, pp. 11-12). Although Plaintiff continued to identify the October 4, 2012 UOF as the cause for his ankle swelling and neuropathy, no medical provider identified the UOF as the cause for his persistent ankle pain. In addition, prior to the UOF, Plaintiff already had a first floor pass as well as a front handcuff pass, suggesting previous degenerative disorders.

While it is true that Plaintiff's sworn pleadings are competent summary judgment evidence, the Fifth Circuit has held that a non-movant cannot satisfy his summary judgment burden with "conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence." *Hathaway v. Bazany,* 507 F.3d 312, 319 (5th Cir. 2007). Moreover, to state a claim of excessive force, Plaintiff must establish not only that Defendants' conduct caused more than a *de minimis* injury, but that it was done so sadistically or maliciously. *Siglar,* 112 F.3d at 193. As previously noted, the core judicial inquiry is not on the injury sustained, but whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically to cause harm. *Wilkins,* 559 U.S. at 38. The October 4, 2012 UOF video shows nothing but restraint and professionalism with no visible attempt to injure Plaintiff. To the contrary, in removing Plaintiff from the gurney, one officer calmly repeats; "gentle, gentle."

The objective factors of Plaintiff's medical records, combined with the UOF video recording demonstrate there was no excessive force in violation of Plaintiff's constitutional rights.

## VI. RECOMMENDATION.

Based on the foregoing, it is respectfully recommended that the Court grant Defendants' motion for summary judgment (D.E. 24), deny Plaintiff's cross-motion for summary judgment, and dismiss Plaintiff's excessive claims against Sergeant Salinas and Officer Ongudu with prejudice. It is respectfully recommended further that, based on the review of the UOF video recording, the Court find that Plaintiff cannot state an excessive force claim against any prison official who was involved in the October 4, 2012 UOF and that the unserved Defendants, Lieutenant Salinas and Officer John Doe, be dismissed with prejudice, and that final judgment be entered that Plaintiff take nothing on his claims.

Respectfully submitted this 26th day of April, 2016.

Jason B. Libby
United States Magistrate Judge

## NOTICE TO PARTIES

The Clerk will file this Memorandum and Recommendation and transmit a copy to each party or counsel. Within **FOURTEEN (14) DAYS** after being served with a copy of the Memorandum and Recommendation, a party may file with the Clerk and serve on the United States Magistrate Judge and all parties, written objections, pursuant to Fed. R. Civ. P. 72(b), 28 U.S.C. § 636(b)(1), General Order No. 2002-13, United States District Court for the Southern District of Texas.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and recommendation within FOURTEEN (14) DAYS after being served with a copy shall bar that party, except upon grounds of *plain error,* from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court. *Douglass v. United Servs. Auto Ass'n,* 79 F.3d 1415 (5th Cir. 1996) (en banc).

# *United States Court of Appeals*

**FIFTH CIRCUIT**
**OFFICE OF THE CLERK**

**LYLE W. CAYCE**
**CLERK**

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

November 01, 2018

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 16-41154, consolidated with 16-41533
Marvin Waddleton, III v. Bernadette Rodriguez, et al
USDC No. 2:15-CV-79
USDC No. 2:15-CV-79

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Jann M. Wynne, Deputy Clerk
504-310-7688

Mr. Jason T. Bramow
Mr. Marvin Waddleton III

e.g. "Appendix D."

# IN THE UNITED STATES COURT OF APPEALS
# FOR THE FIFTH CIRCUIT

No. 16-41154

cons. w/16-41533

MARVIN WADDLETON, III,

Plaintiff - Appellant

v.

BERNADETTE RODRIGUEZ; DACHO ONGUDU; AIMEE SALINAS,

Defendants - Appellees

Appeals from the United States District
Court for the Southern District of Texas

ON PETITION FOR REHEARING

Before DENNIS, OWEN and SOUTHWICK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's petition for rehearing is DENIED.

ENTERED FOR THE COURT:

Priscilla R. Owen

UNITED STATES CIRCUIT JUDGE