APPENDIX A

United States
Court of Appeals
Fifth Circuit
FILED
December 20, 2019

Lyle W. Cayce
Clerk

IN THE UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10253

TRENT TAYLOR,

Plaintiff–Appellant,

versus

ROBERT STEVENS, Warden, Individually and in their Official Capacity;
ROBERT RIOJAS, Sergeant of Corrections Officer, Individually and in their Official Capacity;
RICARDO CORTEZ, Sergeant of Corrections Officer, Individually and in their Official Capacity;
STEPHEN HUNTER, Correctional Officer, Individually and in their Official Capacity;
LARRY DAVIDSON, Correctional Officer, Individually and in their Official Capacity;

SHANE SWANEY, Sergeant of Corrections Officer, Individually and in their Official Capacity;
FRANCO ORTIZ, Correctional Officer, Individually and in their Official Capacity;
CREASTOR HENDERSON, L.V.N., Individually and in their Official Capacity;
STEPHANIE ORR, L.V.N., Individually and in their Official Capacity;
JOE MARTINEZ,

Defendant–Appellees.

Appeal from the United States District Court
for the Northern District of Texas

Before OWEN, Chief Judge, JONES and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Trent Taylor, a Texas inmate, sued Robert Stevens, Robert Riojas,[1] Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, Franco Ortiz, Joe Martinez, Creastor Henderson, and Stephanie Orr[2] under 42 U.S.C. § 1983 for violating

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[1] The district court spelled Riojas's last name "Rojas," but both sides spell it "Riojas" on appeal.

[2] Taylor also sued many other defendants for different events during his incarceration at the Montford Unit. But Stevens, Riojas, Cortez, Hunter, Davidson, Swaney, Ortiz, Martinez,

his Eighth Amendment rights. At the time of the events, the defendants were prison officials at the John T. Montford Unit of the Texas Department of Criminal Justice ("Montford Unit").

Taylor contended generally that he was housed in unconstitutional conditions and that various defendants were deliberately indifferent to his health and safety. He sought compensatory and punitive damages, a declaratory judgment, and injunctive relief.

Only Taylor's individual-capacity claims are relevant to this appeal. Specifically, Taylor appeals the summary judgment, on the basis of qualified immunity ("QI"), for

- Stevens, Riojas, Cortez, Hunter, Davidson, Swaney, Martinez, and Henderson, on Taylor's claim that they violated the Eighth Amendment in forcing Taylor to live in two filthy cells for six days.

- Riojas, Martinez, Ortiz,[3] and Henderson,[4] on Taylor's claim that they were deliberately

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Henderson, and Orr are the defendants-appellees for this appeal.

[3] Ortiz has not filed a brief.

[4] The district court mistakenly analyzed this claim as involving only Riojas, Martinez, and Ortiz, failing to include Henderson. Yet Taylor's complaint averred that Henderson was involved in denying him a trip to the restroom, and on appeal he references Henderson as a proper defendant. We therefore review the claim with Henderson as a defendant-appellee. Regardless, we

indifferent to his health and safety in refusing to escort him to the restroom for a twenty-four-hour period.

- Riojas, Martinez, and Henderson, on Taylor's claim that they violated the Eighth Amendment in failing immediately to assess his chest pains.

- Orr, on Taylor's claim that Orr was deliberately indifferent to Taylor's health in failing immediately to examine Taylor upon his request to see a doctor.

- Warden Stevens, on Taylor's claim that Stevens created and implemented an unconstitutional policy that allowed the above violations.

We affirm as to all claims, save one.

I.

Stevens, Riojas, Cortez, Hunter, Davidson, Swaney, and Martinez con-tend that Taylor filed his notice of appeal too late,[5] so we lack appellate jurisdiction under 28 U.S.C. § 1291. We disagree. The district court entered a final Federal Rule of Civil Procedure 54(b) judgment on the claims relevant to this appeal on January 5, 2017. On January 14, 2017, Taylor timely filed a Federal Rule of Civil Procedure

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conclude that Henderson is entitled to QI on the restroom-related claim.

[5] Henderson and Orr filed a separate brief, and they do not contest our jurisdiction.

59(e) motion to alter or amend that judgment. The district court denied the motion on January 30, 2017. Taylor had until thirty days after the Rule 59(e) denial to file his notice of appeal. *See* Fed. R. App. P. 4(a)(4)(A)(iv). Taylor did so on February 22, 2017, which is within the thirty-day limit. So, we have jurisdiction.

II.

A. *Standard of Review*

"We review a summary judgment *de novo*, applying the same standards as the district court. We construe all facts and inferences in the light most favorable to the nonmovant." *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019) (citations omitted). When a defendant pleads QI, however, "the burden then shifts to the plaintiff, who must rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." *Brown v. Callahan*, 623 F.3d 249, 253 (5th Cir. 2010). We still draw all inferences in the plaintiff's favor. *Id.*

B. *Qualified Immunity and Eighth Amendment Claims*

The district court granted summary judgment for each defendant on the basis of QI. "The [QI] defense has two prongs: whether an official's conduct violated a constitutional right of the plaintiff; and whether the right was clearly established at the time of the violation. A court may rely on either prong of the defense in its analysis." *Id.* (citations omitted). Thus,

at the first prong, a prisoner bringing a § 1983 claim for violations of the Eighth Amendment must show that his Eighth Amendment rights were violated. *See id*.

An inmate must establish two elements—one objective, one subjective—to prevail on a conditions-of-confinement claim. *Arenas*, 922 F.3d at 620. First, he must show that the relevant official denied him "the minimal civilized measure of life's necessities" and exposed him "to a substantial risk of serious harm." *Id*. (quotation marks omitted). The "alleged deprivation" must be "objectively serious." *Id*. Second, the prisoner must show "that the official possessed a subjectively culpable state of mind in that he exhibited deliberate indifference" to the risk of harm. *Id*. (citations and quotation marks omitted).

Proving deliberate indifference is no small hurdle. *See id*. "A prison official displays deliberate indifference only if he (1) knows that inmates face a substantial risk of serious bodily harm and (2) disregards that risk by failing to take reasonable measures to abate it." *Id*. (quotation marks omitted). This is a fact-intensive inquiry "subject to demonstration in the usual ways, including inference from circumstantial evidence." *Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004). "[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id*.

III. *Cell-Conditions Claim*

In his complaint, Taylor contended that he was forced to reside in two unconstitutionally filthy cells

for six[6] days. The defendants for that claim (Stevens, Riojas, Cortez, Hunter, Davidson, Swaney, Martinez, and Henderson) asserted QI and moved for summary judgment, which the district court granted. We affirm, because though there are factual disputes as to a constitutional violation, the law wasn't clearly established.[7]

A.

Taylor stayed in the first cell starting September 6, 2013. He alleged that almost the entire surface—including the floor, ceiling, window, walls, and water faucet—was covered with "massive amounts" of feces

[6] Taylor was housed in one or the other cell on each day spanning September 6-13, 2013, but the total time he spent in the two cells equaled about six twenty-four-hour periods. Taylor alleged that he entered the first cell at about 11:00 p.m. on September 6 and left it sometime between noon and 1:00 p.m. on September 10. His time in the second cell lasted from about 2:00 p.m. on September 11 to 10:00 a.m. on September 13.

[7] Our reasons for affirming for Stevens and Henderson on the cell-conditions claim differ from that of the other defendants. Beyond contending that Stevens created unconstitutional prison policies—a claim we reject as explained below—Taylor has failed to make any allegation that Stevens was involved in placing him in unconstitutionally dirty cells. Taylor thus has failed to create a genuine factual dispute, and summary judgment for Stevens was proper. *See, e.g.*, *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 544 (5th Cir. 2005) (stating that the absence of evidence for the non-movant's claim is a proper basis for summary judgment). As for Henderson, Taylor failed to allege that Henderson knew about the conditions of either of Taylor's cells. Thus, Taylor can't create a genuine factual dispute on deliberate indifference. *See Boudreaux*, 402 F.3d at 544 (explaining that absence of evidence is a proper basis for summary judgment).

that emitted a "strong fecal odor." Taylor had to stay in the cell naked. He said that he couldn't eat in the cell, because he feared contamination. And he couldn't drink water, because feces were "packed inside the water faucet." Taylor stated that the prison officials were aware that the cell was covered in feces, but instead of cleaning it, Cortez, Davison, and Hunter laughed at Taylor and remarked that he was "going to have a long weekend." Swaney criticized Taylor for complaining, stating "[d]ude, this is [M]ontford, there is shit in all these cells from years of psych patients."[8] On September 10, Taylor left the cell.

A day later, September 11, Taylor was moved to a "seclusion cell," but its conditions were no better. It didn't have a toilet, water fountain, or bunk. There was a drain in the floor where Taylor was ordered to urinate. The cell was extremely cold because the air conditioning was always on.[9] And the cell was anything but clean.

Taylor alleged that the floor drain was clogged, leaving raw sewage on the floor. The drain smelled strongly of ammonia, which made it hard for Taylor to breathe. Yet, he alleged, the defendants repeatedly told him that if he needed to urinate, he had to do so in the clogged drain instead of being escorted to the restroom. Taylor refused. He worried that, because

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[8] Taylor also alleged that he asked numerous prison officials to clean the cell but was refused.

[9] Swaney allegedly told Taylor that he hoped Taylor would "fucking freeze" in the seclusion cell, which was known to other prisoners as "the cold room."

the drain was clogged, his urine would spill onto the already-soiled floor, where he had to sleep because he lacked a bed. So, he held his urine for twenty-four hours before involuntarily urinating on himself.[10] He stayed in the seclusion cell until September 13. Prison officials then tried to return him to his first, feces-covered cell, but he objected and was permitted to stay in a different cell.

Among other claims, Taylor sued Stevens, Riojas, Cortez, Hunter, Davidson, Swaney, Martinez, and Henderson under § 1983, complaining that the squalid conditions violated the Eighth Amendment. The defendants raised the defense of QI and moved for summary judgment in part on that basis. Taylor responded mainly with his verified pleadings and a declaration.

The district court granted summary judgment on the basis of QI, noting that the defendants had "provided little in the way of specific summary judgment evidence to support their assertion that the cells were not, in fact, covered with feces." But the court found "merit in [d]efendants' general argument … that the alleged cell conditions [did] not rise to the level of a constitutional violation." The court held that (1) because Taylor was exposed to the paltry cell conditions "for only a matter of days," there was no constitutional violation under *Davis v. Scott*, 157 F.3d 1003 (5th Cir. 1998), and that (2) Taylor had not "show[n] that he suffered any injury." The court also

[10] Taylor's contentions related to his involuntary urination are covered below.

found that the defendants had allowed Taylor to shower twice and had attempted to clean the first cell's walls. Taylor appeals, contesting the district court's application of *Davis* and averring that the court improperly resolved genuine factual disputes at summary judgment.

B.

The Eighth Amendment "does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citation and quotation marks omitted). At a minimum, prison officials "must provide humane conditions of confinement" and "ensure that inmates receive adequate food, clothing, shelter, and medical care." *Id.* They cannot deprive prisoners of the "basic elements of hygiene" or the "minimal civilized measure of life's necessities." *Palmer v. Johnson*, 193 F.3d 346, 352-53 (5th Cir. 1999) (quotation marks omitted). Prison conditions cannot inflict "wanton and unnecessary" pain. *Id.* at 351.

"[F]ilthy, unsanitary" cells can violate the Eighth Amendment. *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999). In *McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991), for example, we found a violation where a prisoner was forced, for a ten-month period, to sleep on a wet mattress "in filthy water contaminated with human waste." Such conditions were "unquestionably a health hazard" and were "so unhygienic as to amount to a clear violation of the Eighth Amendment." *Id.* The responsible official therefore did not "meet the threshold requirements for [QI]." *Id.*

Similarly, in *Gates*, 376 F.3d at 338, we held that officials had violated the Eighth Amendment in forcing prisoners to live in cells covered with "crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles." The district court hadn't clearly erred in finding that "[l]iving in such conditions" presented "a substantial risk of serious harm to the inmates." *Id*. And because the officials could have "easily observed" those deplorable conditions, there was no clear error in finding them deliberately indifferent to the risk. *Id*.

A dirty cell does not automatically violate the Constitution, however. A "filthy, overcrowded cell … might be tolerable for a few days and intolerably cruel for weeks or months." *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978). Heeding that instruction, we have held that a prisoner's three-day stay in a cell smattered with blood and excrement did not offend the Eighth Amendment—at least where the prisoner was given the chance to clean the cell. *See Davis*, 157 F.3d at 1005-06.

1. First Prong of Qualified Immunity

The first QI prong requires Taylor to show that his constitutional rights were violated. *Brown*, 623 F.3d at 253. Because this is a § 1983 Eighth Amendment claim at summary judgment, Taylor must show genuine factual disputes about (1) whether the defendants denied him the minimal civilized measure of life's necessities and put him at a substantial risk of serious harm and (2) whether the defendants were deliberately indifferent to that risk.

Arenas, 922 F.3d at 620. Under our caselaw, Taylor succeeds.

a. *Substantial Risk of Serious Harm*

In *McCord*, 927 F.2d at 848, and *Gates*, 376 F.3d at 338, we held it violated the Eighth Amendment to house prisoners in truly filthy, unsanitary cells. The conditions that Taylor said existed were like those in *McCord* and *Gates*—if not worse. He claimed that his first cell was covered in feces, including feces jammed inside his water faucet. That is like the cell in *Gates*, *id.*, whose walls were covered in feces, urine, and dried ejaculate. And Taylor alleged that the floor in his second cell was wet with urine and had a backed-up drain into which he was told to urinate, leaving him to sleep, naked, on the urine-soaked floor.[11] That is much like the conditions that the prisoner in *McCord* endured—forced to sleep on a urine-soaked mattress on the floor each night. *See McCord*, 927 F.2d at 848.

To be sure, *McCord* and *Gates* involved longer periods in deplorable conditions than the six days of which Taylor complains. *See id.* (describing ten-month period); *Gates*, 376 F.3d at 338 (describing cell conditions to which prisoners were regularly exposed). But even if the length of time matters, it

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[11] We do not suggest hold that prison officials cannot require inmates to sleep naked on the floor. There can be any number of perfectly valid reasons for doing so. Our holding is limited to the extraordinary facts of this case, in which Taylor alleges that the floor on which he slept naked was covered in his and others' human excrement.

isn't dispositive. *See Palmer*, 193 F.3d at 353 (stating that length of time is one factor to consider in "the totality of the specific circumstances").

The district court noted that the defendants had "provided little in the way of specific summary judgment evidence to support their assertion that the cells were not, in fact," in such deplorable conditions. Instead of granting summary judgment for the defendants, it should have recognized that Taylor's allegations created a factual dispute.[12] For support, the court relied on *Davis*, 157 F.3d at 1005-06, which the defendants aver controls. But *Davis* is distinguishable.[13] Taylor spent twice as much time locked in his squalid cells as did the *Davis* prisoner: six days, compared to three. And unlike the *Davis*

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[12] *See* Fed. R. Civ. P. 56(a); *Hernandez v. Velasquez*, 522 F.3d 556, 561 (5th Cir. 2008) (verified pleadings are competent summary-judgment evidence where they are based on personal knowledge, set forth facts that would otherwise be admissible, and show that the affiant is competent to testify).

[13] The district court also relied on *Smith v. Copeland*, 87 F.3d 265 (8th Cir. 1996). The court there found no Eighth Amendment violation where a prisoner was housed in a cell with backed-up sewage (from an overflowing toilet) for four days. *Id.* at 268-69. The relatively short duration of the conditions, combined with the fact that the prisoner refused an opportunity to flush the toilet and clean the cell, meant no constitutional offense. *See id*.

Yet for the reasons that *Davis* is distinguishable, *Smith* is, too. Taylor alleges that he spent six days in his filthy cells—which is longer than the four days in *Smith*. And, even more relevantly, unlike the prisoner in *Smith*, Taylor wasn't given the chance to clean his cell.

prisoner, *see id.*, Taylor wasn't given the chance to clean his cells, as the district court found.[14]

The defendants also complain that Taylor offered only conclusional allegations, without supporting evidence, about the conditions. But that ignores that verified pleadings are competent evidence at summary judgment.[15] And even though Taylor's pleadings include conclusional language, they also teem with specific factual allegations.[16] We thus find

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[14] The district court did find that the defendants had attempted to clean Taylor's cells and relied upon that in granting summary judgment. Yet in doing so, the court improperly resolved a genuine factual dispute. *See* Fed R. Civ. P. 56(a). Taylor contends that the defendants attempted to clean his first cell (the feces-covered one) only *after* he left it. As to the seclusion cell, Taylor states, in his complaint, that Riojas tried to "spot dry[]" its floor on September 12, one day after Taylor had entered that cell. But Taylor contended that "lots of urine/sewage still remained on [his] floor" after the spot dry. Thus, whether—and the extent to which—the defendants attempted to clean Taylor's cell was a factual dispute ill-suited for summary judgment. *See id*.

[15] *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir. 1987) (holding that verified pleadings are competent summary judgment evidence where they are based on personal knowledge, set forth facts that would otherwise be admissible, and show that the affiant is competent to testify); *Hernandez*, 522 F.3d at 561 (same).

[16] Take Page 4-A of Taylor's verified complaint as an example. To be sure, that page includes some conclusional language. For example, Taylor states that he was subjected to "unnecessary and wanton infliction of pain contrary to the contemporary standards of decency" and that the prison officials had "showed deliberate indifference to [his] safety and health." But that's not all that Taylor says. He also recites highly specific facts about

genuine factual disputes over whether the paltry conditions of Taylor's cells exposed him to a substantial risk of serious harm and denied him the minimal civilized measure of life's necessities. *See Arenas*, 922 F.3d at 620.

b. *Subjective Deliberate Indifference*

Taylor has created genuine factual disputes on the subjective deliberate-indifference prong of his Eighth Amendment claim. *See id.* "Deliberate indifference is an extremely high standard to meet. A prison official displays deliberate indifference only if he (1) knows that inmates face a substantial risk of serious bodily harm and (2) disregards that risk by failing to take reasonable measures to abate it." *Id.* (cleaned up). Deliberate indifference can be proven via circumstantial evidence, "and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Gates*, 376 F.3d at 333.

Taylor repeatedly alleged that the defendants knew that his cells were covered in feces and urine and that he had an overflowing sewage drain in his seclusion cell. "The risk" posed by Taylor's exposure to bodily waste "was obvious."[17] And the risk was

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the feces-smeared contents of his cell, Cortez's dismissive remarks about the feces, the temperature of the room, and so on.

[17] *See Gates*, 376 F.3d at 333; *see also id.* at 341 ("Frequent exposure to the waste of other persons can certainly present health hazards that constitute a serious risk of substantial harm.").

especially obvious here, as the defendants forced Taylor to sleep naked on a urine-soaked floor. Taylor also alleged that the defendants failed to remedy the paltry conditions, so he has shown factual disputes on deliberate indifference. In sum, Taylor has met his burden at the first QI prong to show that his Eighth Amendment rights were violated. *See Arenas*, 922 F.3d at 620.

2. *Second Prong of Qualified Immunity*

The second prong of QI asks "whether the right was clearly established at the time of the violation." *Brown*, 623 F.3d at 253. We should not define the relevant right "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Instead, "[t]he dispositive question is whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quotation marks omitted). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. The "salient question," therefore, is whether the defendants had "fair warning" that their specific actions were unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).[18]

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[18] *Accord Delaughter v. Woodall*, 909 F.3d 130, 139 (5th Cir. 2018) ("The central concern is whether the official has fair warning that his conduct violates a constitutional right."); *Austin v. Johnson*, 328 F.3d 204, 210 (5th Cir. 2003) ("[O]fficers need only have fair warning that their conduct is unlawful." (quotation marks omitted)).

The law wasn't clearly established. Taylor stayed in his extremely dirty cells for only six days. Though the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end, *see, e.g.*, *McCord*, 927 F.2d at 848, we hadn't previously held that a time period so short violated the Constitution, *e.g.*, *Davis*, 157 F.3d at 1005-06 (finding no violation partly because the defendant stayed in the cell for only three days). That dooms Taylor's claim. Indeed, the ambiguity in the caselaw was apparent even in *dicta* from the Supreme Court, which has instructed that a "filthy, overcrowded cell … might be tolerable for a few days and intolerably cruel for weeks or months." *Hutto*, 437 U.S. at 686-87. It was therefore not "beyond debate" that the defendants broke the law. *al-Kidd*, 563 U.S. at 741. They weren't on "fair warning" that their specific acts were unconstitutional. *Hope*, 536 U.S. at 741.

Accordingly, Taylor hasn't met his burden to overcome QI on his cell-conditions claim. Though he showed genuine disputes about a constitutional violation, the law wasn't clearly established. We therefore affirm the summary judgment for Riojas, Cortez, Hunter, Davidson, Swaney, and Martinez on that claim. (And, for separate reasons explained above, we affirm the summary judgment for Stevens and Henderson on that claim.)

IV. *Claims of Deliberate Indifference to Health and Safety*

Taylor contends that the district court erred in granting summary judgment for various defendants

on his claims of indifference to his health and safety. Specifically, he appeals on three such claims for which the court granted summary judgment:

A. That Riojas, Martinez, Ortiz, and Henderson were deliberately indifferent in refusing to escort Taylor to the restroom for a twenty-four-hour period on September 12, 2013.

B. That Riojas, Martinez, and Henderson were deliberately indifferent in failing immediately to assess his chest pains on September 12, 2013.

C. That Orr was deliberately indifferent in failing immediately to examine Taylor after Taylor requested to see a doctor on September 14, 2013.

A. *Denial of Restroom Visit*

Taylor contends that the district court erred in granting summary judgment on Taylor's claim that Riojas, Martinez, Ortiz, and Henderson were deliberately indifferent to Taylor's health in refusing to escort him to the toilet for twenty-four hours on September 12, 2013. Taylor alleged that he repeatedly asked Riojas, Ortiz, and Martinez to take him from his seclusion cell to the restroom that day. But they told him to urinate in the drain in his cell's floor, even though it was already overflowing with sewage. Taylor refused to do so because he didn't want to spill even more urine onto the floor where he would have to sleep—naked—that evening.

Finally, after holding in his urine for twenty-four hours, Taylor's bladder pain intensified, and he urinated involuntarily on himself. He alleged that he "tried to get [his urine] in the drain," but that because the drain was clogged, his urine "mix[ed] with the raw sewage and r[a]n all over [his] feet." Taylor "got down on [his] hands and knees and began to scoop the sewage away from the area of the floor" where he would have to sleep that night. Eventually, he had to be treated for a distended bladder and was catheterized.

In moving for summary judgment, Riojas, Ortiz, Martinez, and Henderson raised QI. The district court noted that they had not "directly den[ied] [Taylor's] allegations that they refused him the opportunity to use the restroom … or that they advised him to pee in the drain like everyone else." But the court granted summary judgment anyway. It found that (1) security notes that the defendants had provided contradicted Taylor's allegations, showing that Taylor had repeatedly refused to visit the toilet on September 12 and *had* been taken around 7:00 p.m.; (2) Taylor had "not provided anything other than unsupported and conclusory assertions that he was denied the opportunity to go to the restroom for 24 hours"; (3) Taylor "ha[d] not demonstrated that it was not physically possible for him to relieve himself in the drain as instructed and thus prevent his discomfort"; and (4) Taylor had failed to "establish a physical injury that [was] more than *de minimis*." Thus, the court decided that the defendants were entitled to QI because Taylor had not shown a constitutional violation.

We reverse the summary judgment except as to Henderson.[19] Restating the law from above, to overcome QI, Taylor must show genuine factual disputes that his clearly established Eighth Amendment rights were violated. *Brown*, 623 F.3d at 253. That requires him to show a fact issue over whether (1) objectively, the defendants exposed him to a substantial risk of serious harm and denied him the minimal civilized measure of life's necessities and (2) subjectively, the defendants were deliberately indifferent to the risk. *See Arenas*, 922 F.3d at 620. Taylor also must demonstrate that the right was clearly established. *Brown*, 623 F.3d at 253.

In *Palmer*, 193 F.3d at 352, we found an Eighth Amendment violation where prison officials "complete[ly] depriv[ed]" "scores of inmates" of a minim-ally sanitary way to relieve themselves for seventeen hours. Forty-nine inmates were forced to sleep outdoors overnight, confined to a twenty-by-thirty-foot area. *Id.* at 349. Prison officials refused to let the inmates leave the small area to relieve

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[19] Even taken as true, Taylor's allegations against Henderson regarding the failure to take Taylor to the restroom don't establish a constitutional violation. So, we affirm summary judgment for Henderson on that claim. In his complaint, Taylor alleged only that he told Henderson that he "need[ed] to use the restroom really bad," and that Henderson responded that she would "let the officers know." Taylor didn't allege that Henderson failed to notify the officers. And even if Henderson did fail to do so (which is not in the record), such would amount, at most, to a showing of negligence, not deliberate indifference. That is not enough to create an Eighth Amendment violation. *Arenas v. Calhoun*, 922 F.3d 616, 620 (5th Cir. 2019). Summary judgment for Henderson on the restroom claim was proper.

themselves. Instead, the prisoners had to urinate and defecate in the ground beneath them, right next to their fellow inmates. *See id.* We held that the prisoners' Eighth Amendment rights had been violated, even though the episode lasted a mere seventeen hours. *Id.* at 353-54. The "conditions constitute[d] a deprivation of basic elements of hygiene." *Id.* at 352 (quotation marks omitted).

So too for Taylor. Granted, the circumstances differ in some ways from those in *Palmer*. *See id.* Taylor was alone in his prison cell the day he was allegedly refused a trip to the restroom; he was not outdoors overnight, crammed into a small space with other inmates. Yet the most salient facts are similar. Taylor alleged that sewage from the clogged drain was overflowing. Had he urinated in the drain, he would have been resigned to sleep naked in his (and others') urine overnight. So, he refused (until finally involuntarily urinating on himself). The prisoners in *Palmer* were faced with a similarly grisly choice: either relieve themselves on the very ground where they would sleep, or, hold it in for seventeen hours. Such circumstances exposed the *Palmer* prisoners to a substantial risk of serious harm and deprived them of the minimal civilized measure of life's necessities. *See id.* A reasonable jury could find the same here.

Taylor also has met his burden to show genuine factual disputes on subjective deliberate indifference. *See Arenas*, 922 F.3d at 620. Taylor alleged that he told Riojas, Martinez, and Ortiz that he couldn't urinate in the drain because of the overflow and that he badly needed to use the restroom. Yet those defendants repeatedly refused to escort him to the

restroom, instead instructing him to pee in the clogged drain like everyone else.

We found deliberate indifference in similar circumstances in *Palmer*, 193 F.3d at 353. The prison officials there were deliberately indifferent because they "ordered the sleep-out," refused to let prisoners relieve themselves outside the confined area, and were "present during the evening." *Id*. Similarly, Riojas, Martinez, and Ortiz allegedly refused to let Taylor urinate any-where other than into his clogged drain, knew that meant he would have to sleep in his own urine, and were present for those events. Taylor has established fact issues as to deliberate indifference.

Having found a constitutional violation, we also conclude that *Palmer* clearly established the underlying Eighth Amendment right, even defining it narrowly (as we must). *See id.* at 352-53. Under *Palmer*, prison officials cannot fail to provide inmates a minimally sanitary way[20] to relieve themselves for a period of seventeen hours, leaving them no choice but to sleep in their own waste overnight. *See id*. The time period Taylor alleged is even longer: a full day.

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[20] Nothing in this opinion requires prison officials to provide a prisoner with a squeaky-clean toilet nor to escort him to the restroom whenever he wishes. This case is extraordinary: McCoy alleges that he was refused a trip to the restroom for twenty-four hours and was provided no other sanitary way to relieve himself, which forced him to urinate on himself and on the very ground where he had to sleep. We held that similar circumstances violated the Constitution in *Palmer*, and we find the same here. We go no further.

In defending the summary judgment, the defendants contend that "'Taylor was constantly refusing to take trips to the restroom" on the day in question. But even if we found that view of the evidence more persuasive (as the district court did[21]), it would not be for us to resolve at summary judgment.[22] Indeed, the district court noted that "R[i]ojas, Ortiz, and Martinez [did] not directly deny [Taylor's] allegations that they refused him the opportunity to use the restroom … or that they advised him to pee in the drain like everyone else." The district court should have seen the implications—a genuine factual dispute.

The defendants also maintain that to state a claim, Taylor was "required to establish a physical injury beyond *de minimis*." They're right that, under the Prison Litigation Reform Act, 42 U.S.C. §

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[21] The district court credited the defendants' security-note evidence as showing that Taylor had repeatedly refused to use the restroom on September 12 and had used the restroom one time that evening. By contrast, the court characterized Taylor's pleadings as providing "unsupported and conclusory assertions that [Taylor] was denied the opportunity to go to the restroom." We disagree. Taylor's allegations were hardly conclusory; they recited specific instances in which Taylor told Riojas, Martinez, and Ortiz that he badly needed to use the restroom and in which they refused to take him. And allegations in verified pleadings are competent summary judgment evidence, so it was wrong for the district court to dismiss them. *See Lodge Hall Music, Inc. v. Waco Wrangler Club, Inc.*, 831 F.2d 77, 80 (5th Cir. 1987).

[22] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.").

1997e(e), Taylor, to recover for emotional suffering, must show a more-than-*de-minimis* physical injury. *See Siglar v. Hightower*, 112 F.3d 191, 193 (5th Cir. 1997). But Taylor has shown such an injury. As a result of holding in his urine for so long, his bladder became distended, and he had to be catheterized.[23]

Accordingly, there are genuine factual disputes whether Riojas, Martinez, and Ortiz violated Taylor's Eighth Amendment rights in refusing to escort him to the restroom for twenty-four hours.[24] Those defendants are not entitled to QI, and the district court erred in granting them summary judgment on that claim.

B. *Chest Pain*

The district court granted summary judgment for Riojas, Martinez, and Henderson on Taylor's claim that they violated the Eighth Amendment by ignoring his complaints of chest pain on September 12, 2013. On appeal, Taylor only briefly mentions that issue and fails to argue any error relating to it, so it is waived.

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[23] *Cf. Edwards v. Stewart*, 2002 WL 1022015, at *2 (5th Cir. May 10, 2002) (holding that injuries of "cuts to [the prisoner's] fingers and thumb, headache, neck pain, and lacerations to the ear," weren't *de minimis*, particularly because the prisoner had needed "medical treatment for the injuries").

[24] For the reasons described above, however, we affirm summary judgment for Henderson on the restroom-trip claim.

C. *Delay in Medical Treatment*

Taylor challenges the summary judgment for nurse Stephanie Orr, who Taylor alleged had violated the Eighth Amendment in failing immediately to examine and treat him after he asked to see a doctor. Taylor contended that on Saturday, September 14, 2013, he was having bladder pain and decided he needed to see a doctor. Orr visited Taylor in his seclusion cell, where Taylor asked to meet with a doctor. Taylor did not allege that he told Orr *why* he needed one. Orr replied that Taylor should write up a "nurse sick-call" two days later on Monday—which was the standard procedure. At that point, the conversation ended.

Later that day, at about 4:00 p.m., Taylor's bladder pain worsened. He contacted Orr again, and this time he explained *why* he needed a doctor. Orr allegedly responded: "How come you didn't say anything sooner?" Orr then assessed Taylor, determined he had a distended bladder, and sent him to the ER, where he was catheterized.

Taylor contends on appeal that Orr was deliberately indifferent in failing to assess him immediately after he requested a doctor. The district court rejected that contention and granted summary judgment for Orr based on QI. It held that, at most, Taylor's allegations showed that Orr had behaved negligently and not with deliberate indifference.

We agree with the district court and affirm summary judgment for Orr. Merely negligent medical treatment of prisoners "does not constitute deliberate

indifference." *Arenas*, 922 F.3d at 620. Instead, an inmate "must show that the officials refused to treat him, ignored his complaints, intentionally treated him incorrectly," or otherwise "evince[d] a wanton disregard for any serious medical needs." *Id.* (quotation marks omitted). "[D]elay in medical care can only constitute an Eighth Amendment violation if there has been deliberate indifference, which results in substantial harm." *Mendoza v. Lynaugh*, 989 F.2d 191, 195 (5th Cir. 1993).

Taylor has failed to reveal any factual dispute whether Orr violated his Eighth Amendment rights. Even accepting his allegations at face value, they show only negligence, not deliberate indifference. *See Arenas*, 922 F.3d at 620. Taylor did not allege that Orr knew about his bladder pain until 4:00 p.m., when he reached out to her a second time. Orr admonished him for failing to tell her earlier about the bladder pain, and she promptly and dutifully evaluated him and sent him to the ER. Deliberate indifference is a high bar, and Taylor does not come close to demonstrating it. *See id.*

V. *Claim of an Unconstitutional Policy*

Taylor contends that the district court improperly granted summary judgment for Warden Robert Stevens based on QI. Taylor avers that Stevens promulgated and implemented unconstitutional policies that facilitated Taylor's mistreatment at the Montford Unit. The district court rejected that claim, reasoning that because Taylor hadn't shown that any of the other defendants had violated Taylor's rights,

Stevens—their supervisor—couldn't have violated them, either.

To be sure, above we concluded that a reasonable jury *could* have found that several defendants violated Taylor's constitutional rights. Yet we may affirm on any basis that the record supports, *see Lincoln v. Scott*, 887 F.3d 190, 195 (5th Cir. 2018), and here we choose to do so, because Taylor has failed to point our attention to any specific policy.

Under § 1983, "[s]upervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation." *Thompkins v. Belt*, 828 F.2d 298, 304 (5th Cir. 1987) (cleaned up). But as a threshold matter, a plaintiff cannot avoid summary judgment merely by asserting the legal conclusion that an unconstitutional policy existed.[25] That is precisely what Taylor does. The district court therefore properly granted summary judgment for Stevens on the basis of QI.

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[25] *See Booker v. Koonce*, 2 F.3d 114, 117 (5th Cir. 1993) (pointing out that conclusory allegations are not enough to defeat summary judgment); *see also Oliver v. Scott*, 276 F.3d 736, 742 (5th Cir. 2002) (affirming dismissal because the complaint "fail[ed] to identify any specific policy or to explain how those policies led to constitutional violations"); *Sun v. United States*, No. 94-10604, 1995 WL 103351, at *4 (5th Cir. Mar. 1, 1995) (per curiam) (affirming summary judgment on the basis of QI because "Sun's unsupported allegations of the existence of a policy are merely conclusional.").

* * * *

In summary, for the reasons stated, we decide as follows:

- We AFFIRM the summary judgment for Riojas, Cortez, Hunter, Davidson, Swaney, Martinez, Stevens, and Henderson on Taylor's claim related to the conditions of his cells.

- We REVERSE and REMAND the summary judgment for Riojas, Martinez, and Ortiz on Taylor's claim related to their failure to take him to the restroom, but we AFFIRM summary judgment for Henderson on that claim.

- We AFFIRM the summary judgment for Riojas, Martinez, and Henderson on Taylor's claim related to their failure to treat his chest pain.

- We AFFIRM the summary judgment for Orr on Taylor's claim related to Orr's failure to treat his bladder pain.

- We AFFIRM the summary judgment for Stevens on Taylor's claim that Stevens promulgated an unconstitutional policy.

We place no limitation on the matters that the district court can consider consistent with this opinion, nor do we suggest what decisions that court should make.

APPENDIX B

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

TRENT TAYLOR, Institutional ID No. 1691384, SID NO. 6167597, Previous TDCJ No. 1336391,	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. 5:14-CV-149-C
ROBERT STEVENS, *et al.*,	§	
Defendants.	§	ECF

ORDER

Came to be considered on this day, Plaintiff Trent Taylor's action under 42 U.S.C. § 1983 against Defendants Robert Stevens, Robert Rojas[1], Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, Franco Ortiz, Joe Martinez, Creastor Henderson, Stephanie Orr, and Melissa Olmstead. Defendants were all correctional officers and/or

[1] Plaintiff spells this Defendant's last name "Riojas" while the Attorney General spells the name "Rojas." Although the Court has used the Plaintiff's spelling in prior Orders, the Court adopts the correct spelling of "Rojas."

officials employed at the John T. Montford Unit of the TDCJ-ID at the time of the events giving rise to this complaint.

I. BACKGROUND

Trent Taylor, acting *pro se*, filed a civil rights complaint pursuant to 42 U.S.C. § 1983 on September 2, 2014, and was granted permission to proceed *in forma pauperis*. Based on the complaint and Plaintiff's testimony during a *Spears*[2] hearing, the Court found that Plaintiff had raised claims that were sufficient to require responsive pleadings for the alleged claims of constitutional violations. Following the filing of answers and motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) by most of the Defendants, the United States Magistrate Judge, noting that Defendants had failed to consent to proceed before her, entered a Report and Recommendation on January 22, 2016. On March 29, 2016, the Court adopted the Report and Recommendation and dismissed certain of the claims and Defendants pursuant to Federal Rule of Civil Procedure 54(b).[3] The only claims remaining in this action are the following:

(1) Plaintiff's individual capacity claims concerning cell conditions and deliberate indifference to serious medical needs against

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[2] *Spears v. McCotter*, 766 F.2d 179, 181-82 (5th Cir. 1985).

[3] Plaintiff filed a notice of interlocutory appeal from that Order and his appeal remains pending before the United States Court of Appeals for the Fifth Circuit. *See* U.S.C.A. No. 16-10498.

Defendants Robert Stevens, Robert Rojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, Franco Ortiz[4], Joe Martinez, Creastor Henderson, and Stephanie Orr; and

(2) Plaintiff's individual capacity claim concerning excessive use of force against Defendant Melissa Olmstead.

Now before the Court are the following:

(1) Defendants Robert Stevens, Robert Rojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Melissa Olmstead, and Shane Swaney's Motion for Summary Judgment[5] filed on October 10, 2016;

(2) Defendants Creastor Henderson and Stephanie Orr's Motion for Summary Judgment filed on November 14, 2016; and

(3) Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment filed on November 2, 2016.

(4) Plaintiff's Motion to Excuse Local Rule of Judges Copy and Motion to Allow Plaintiff to

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[4] The Court notes that Defendant Franco Ortiz has been served but has not made an appearance in this case.

[5] The Court notes that Defendant Joe Martinez has been served and has previously filed responsive pleadings but was not included as a party to either Motion for Summary Judgment.

Have His Exhibits Returned filed on November 2, 2016.

Having considered the pleadings and records filed in this case, the Court finds that all of Plaintiff's claims, except for his claims of excessive use of force against Defendant Melissa Olmstead in her individual capacity, should be dismissed for the reasons set forth below.

II. SUMMARY OF COMPLAINT

The incidents giving rise to Plaintiff's complaint were described in detail in the Report and Recommendation entered January 22, 2016, and generally consist of claims of cruel and unusual punishment, deliberate indifference, and excessive use of force while he was incarcerated at the Montford Unit. Pursuant to that Report and Recommendation a number of claims and Defendants were dismissed. Plaintiff's remaining claims may be summarized as follows:

Cruel and Unusual Punishment

Plaintiff alleges that he was subjected to cruel and unusual punishment in violation of the Eighth Amendment when he was forced by Defendants Stevens, Rojas, Cortez, Hunter, Davidson, Swaney, Martinez, and Henderson to live in what he described as filthy conditions for several days between September 6, 2013, and September 14, 2013, while he was incarcerated at the John T. Montford Unit in Lubbock, Texas. Plaintiff alleges that at one point during that time he was denied a bathroom break for

24 hours, causing him to feel chest pains and burning eyes and throat and ultimately leading to his urinating on himself. Specifically, Plaintiff claims that Defendants knowingly placed him in two different cells that were severely unsanitary. The first cell (Cell B-2, 45) that he was placed in for almost 4 days from 11:00 p.m. on September 6, 2013, until sometime between noon and 2:00 p.m. on September 10, 2013, was soiled with fecal matter on the floor, ceiling, walls, and water faucet. He alleges that after he was removed from the cell for a short period of time, officials attempted to return him to the same dirty cell; however, he refused, falsely claiming that he would harm himself. On September 11, 2013, at approximately 1:55 p.m., he was moved to a seclusion cell (Cell D-2, 51) and remained there until approximately 3:00 p.m. on September 13, 2013. The second cell was a seclusion cell equipped with only a drain hole in the floor that was clogged with raw sewage that seeped onto the floor where he was forced to sleep, naked and with only a suicide blanket to stay warm. While he was confined in the second cell, Plaintiff claims, he was refused a bathroom break for 24 hours, despite notifying officials that he needed to go and refusing their alleged instructions to urinate in the backed-up drain like everyone else. Plaintiff further alleges that as a result of holding his bladder for so long he experienced chest pains and severe bladder pain and because of the pain finally doubled over and urinated on himself.

Deliberate Indifference

Plaintiff next claims that Defendants were deliberately indifferent to his health and safety needs

when they forced him to remain in the filthy cells despite his complaints and refused him bathroom breaks for 24 hours. Plaintiff argues that as a result of holding his bladder for so long, he suffered from a distended bladder and had to be taken to the emergency room and catheterized, but not until after he had made several requests for medical attention on September 13, 2013 that were allegedly disregarded by Defendant Orr. According to Plaintiff he suffered a lasting injury as a result of the foregoing events in the form of bladder and urinary incontinence and spasms. Plaintiff also claims that his complaints of chest pains were intentionally ignored by Defendants Rojas, Martinez, and Henderson.

Excessive Use of Force

Finally, Plaintiff alleges that Defendant Melissa Olmstead used excessive force on October 14, 2013, when she rammed a steel bar forward and hit him in the testicles after Plaintiff and Olmstead argued by his cell. Plaintiff claims that he was transported a couple of hours later to the emergency room, where he was prescribed an ice pack which he was to use for 24 hours, as well as a 3-day prescription for ibuprofen. He claims that he sustained a permanent injury to his right testicle from the assault and still suffers pain with urination and ejaculation.

III. MOTIONS FOR SUMMARY JUDGMENT

A motion for summary judgment permits a court to resolve a lawsuit without conducting a trial if the court determines (1) there is no genuine dispute as to any material facts and (2) the moving party is entitled

to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *See Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) ("[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial."). A fact is "material" if it might affect the outcome of the suit under the governing law. *Id.* at 248. A dispute over a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* at 250. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48 (emphasis in original). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (footnote omitted)).

The party moving for summary judgment must first demonstrate that "there is an absence of evidence to support the non-moving party's cause." *Celotex Corp. v. Garrett*, 477 U.S. 317, 325 (1986). The moving party satisfies this requirement by (1) submitting evidentiary documents that negate the existence of some material element of the non-moving party's claim or (2) pointing out the absence of evidence to support the non-moving party's claim, if the non-moving party will bear the burden of proof on that claim at trial. *King v. Dogan*, 31 F.3d 344, 346 (5th Cir. 1994). Once the moving party satisfies this initial requirement, the burden shifts to the non-moving

party to "go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). If the moving party supports his motion with evidence, the non-moving party cannot simply rely on conclusory legal allegations but must present affirmative evidence in order to defeat the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 248-255.

"[I]n ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, — U.S. —, 134 S. Ct. 1861, 1863 (2014) (*per curiam*) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255). In drawing all justifiable inferences in favor of the nonmovant, a court "must distinguish between evidence of disputed facts and disputed matters of professional judgment." *Beard v. Banks*, 548 U.S. 521, 529-30 (2006).

"On summary judgment, factual allegations set forth in a verified complaint may be treated the same as when they are contained in an affidavit," *Hart v. Hairston*, 343 F.3d 762, 765 (5th Cir. 2003). *See Falcon v. Holly*, 480 Fed. Appx. 325, 326 (5th Cir. 2012) (*per curiam*) ("[A]llegations in [a] verified complaint and other verified pleadings as well as … sworn testimony at [a] *Spears* … hearing constitute competent summary judgment evidence."); *Jones v. Collins*, 132 F.3d 1048, 1052 (5th Cir. 1998) (holding that a district court may consider pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any, when ruling on a motion for summary judgment). A nonmoving party cannot,

however, "'defeat summary judgment with conclusory allegations, unsubstantiated assertions, or "only a scintilla of evidence."'" *Hathaway v. Bazany*, 507 F.3d 312, 319 (5th Cir. 2007) (quoting *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007) (quoting *Little v. Liquid Air Corp.*, 37 F.3d at 1075)).

A. Defendants' Motions for Summary Judgment

In their Motions for Summary Judgment, Defendants assert that they are entitled to summary judgment because (a) Plaintiff has failed to exhaust his administrative remedies, (b) they are entitled to qualified immunity, and (c) there is no evidence that Defendant Olmstead used any force against Plaintiff.[6] In sum, Defendants argue that there is no genuine issue of material fact remaining for trial.

In support of their Motion for Summary Judgment, Defendants Stevens, Rojas, Cortez, Hunter, Davidson, Olmstead, and Swaney included 577 pages of exhibits, including the following:

[6] Although Defendants included arguments regarding Plaintiff's request for injunctive relief, the Court notes that such claims were explicitly dismissed as moot pursuant to the Order and Judgment entered March 29, 2016. Consequently, no further discussion of injunctive relief is warranted.

Exhibit A: Trent Taylor's Texas Department of Criminal Justice No Records Affidavit for Use of Force Report, TDCJ#: 01691384 (Bates Stamped Ex. A 001).

Exhibit B: Trent Taylor's Texas Department of Criminal Justice Medical Records, TDCJ#: 01691384 from April 2013 to January 2015 with Supporting Business Records Affidavit (Bates Stamped Ex. B 001-360).

Exhibit C: Trent Taylor's Texas Department of Criminal Justice Grievance Records, TDCJ#: 01691384 from April 2013 to January 2015 with Supporting Business Records Affidavit (Bates Stamped Ex. C 001-194).

Exhibit D: Trent Taylor's Texas Department of Criminal Justice No Records Affidavit for Office of the Inspector General, TDCJ#: 01691384 (Bates Stamped Ex. D 001).

Exhibit E: Trent Taylor's Texas Department of Criminal Justice Emergency Action Center, TDCJ#: 01691384 (Bates Stamped Ex. E 001-005).

Exhibit F: Trent Taylor's Texas Department of Criminal Justice Patient Liaison Records, TDCJ#: 01691384 (Bates Stamped Ex. F 001-010).

In support of their Motion for Summary Judgment, Defendants Henderson and Orr included 575 pages of exhibits, including the following:

Exhibit A: Trent Taylor's Texas Department of Criminal Justice No Records Affidavit for Office of the Inspector General, TDCJ#: 01691384 (Bates Stamped Ex. A 001).

Exhibit B: Trent Taylor's Texas Department of Criminal Justice Medical Records, TDCJ#: 01691384 from April 2013 to January 2015 with Supporting Business Records Affidavit (Bates Stamped Ex. B 001-360).

Exhibit C: Trent Taylor's Texas Department of Criminal Justice Grievance Records, TDCJ#: 01691384 from April 2013 to January 2015 with Supporting Business Records Affidavit (Bates Stamped Ex. C 001-194).

Exhibit D: Trent Taylor's Texas Department of Criminal Justice Emergency Action Center, TDCJ#: 01691384 (Bates Stamped Ex. D 001-005).

Exhibit E: Trent Taylor's Texas Department of Criminal Justice Patient Liaison Records, TDCJ#: 01691384 (Bates Stamped Ex. E 001-010).

B. Plaintiff's Brief in Opposition to Defendants' Motion for Summary Judgment

Plaintiff filed his response to Defendants Robert Stevens, Robert Rojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Melissa Olmstead, and Shane Swaney's Motion for Summary Judgment on November 2, 2016. He did not file a response to Defendants Creastor Henderson and Stephanie Orr's Motion for Summary Judgment. He restated the facts stated in his prior pleadings, repeated his claims against the Defendants, and argued that he was in fact subjected to cruel and unusual punishment and deliberate indifference by the Defendants. Plaintiff disputed the assertion that he had not properly exhausted his claims and also disputed Defendants Olmstead's assertion that no use of force occurred and that medical record evidence did not support his claim of injury. In support of his response, Plaintiff included a declaration made under penalty of perjury, as well as copies of relevant grievances and medical records.

IV. ANALYSIS

A. Exhaustion

Defendants argue that Plaintiff's claims against all of the Defendants other than Defendant Olmstead and Defendant Rojas should be dismissed because he failed to properly exhaust his administrative remedies. While Defendants specifically note that Plaintiff filed timely grievances against Defendant Olmstead regarding his excessive use of force claim and against Defendant Rojas for his deliberate-

indifference claim stemming from his alleged failure to take Plaintiff to the restroom, they contend, however, any grievances regarding the remaining Defendants fail to satisfy the exhaustion requirement because they were either untimely or failed to name the Defendants specifically in the grievances that were filed.

In his objection, Plaintiff refers to copies of grievances attached to his original complaint, and counters the arguments as follows:

(1) Grievance No. 2014027417 regarding the unconstitutional conditions of his confinement lists Defendants Cortez, Hunter, Davidson, and Stevens, and was written for him on September 12, 2013, because he was not permitted to have writing materials. Although it was allegedly not handled properly, Plaintiff contends that his failure to properly exhaust in this instance should be excused because it was not returned to him until after the deadline to file had passed, making exhaustion unavailable to him.

(2) He exhausted his claim pertaining to Defendant Rojas' refusal to allow him to use the restroom resulting in sharp pain and causing Plaintiff to eventually urinate on himself in Step 1 Grievance No. 2014013418 filed on September 20, 2013, and through the Step 2 Grievance filed on October 17, 2013. In said grievance, Plaintiff says he is "writing this grievance on TDCJ as a whole," and mentions the overflowing drain in his cell,

> and an attempt by Defendant Rojas to "spot dry raw sewage" without the use of chemicals. Plaintiff's Step 2 Grievance was timely filed, and returned to him on December 3, 2013.

42 U.S.C. § 1997e(a), as amended by the Prison Litigation Reform Act ("PLRA"), provides that "[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." The PLRA does not, however, specify who must be named in a prison grievance in order to exhaust properly the prison grievance system. *See Jones v. Bock*, 549 U.S. 199, 127 S. Ct. 910, 922-23 (2007). Instead, "it is the prison's requirements, and not the PRLA, that define the boundaries of proper exhaustion." *Id*. at 923. Defendants do not argue, and nothing in the record indicates, that the Texas grievance procedures require the prisoner to specifically name a particular official.

"[T]he primary purpose of a grievance is to alert prison officials to a problem, not to provide personal notice to a particular official that he may be sued; the grievance is not a summons and complaint that initiates adversarial litigation." *Johnson v. Johnson*, 385 F.3d 503, 522 (5th Cir. 2004). However, a grievance "must provide administrators with a fair opportunity under the circumstances to address the problem that will later form the basis of the suit, and for many types of problems this will often require, as a practical matter, that the prisoner's grievance identify individuals who are connected with the

problem." *Id*. As acknowledged by the Supreme Court, Congress intended the administrative process to "filter out some frivolous claims and foster better-prepared litigation once a dispute did move to the courtroom, even absent formal factfinding." *Booth v. Churner*, 532 U.S. 731, 737 (2001).

The Court has reviewed the grievance records provided by Plaintiff and as part of the authenticated records provided by the Defendants. Defendants have offered nothing to show that Plaintiff's reference to the clogged drain and fecal matter in his Step 1 Grievance No. 2014013418 did not give prison officials notice and an opportunity to address his complaint about the alleged conditions of his confinement or deliberate indifference regarding failure to allow him to use the restroom. In fact, the response to the Step 1 grievance specifically mentions that staff indicated he was agitated and aggressive and thus was not allowed out of his cell until he calmed down, at which point he was allowed to be escorted to the restroom. It also noted that staff observed the drain area and indicated that it was dry and his cell was clean. Moreover, even though Grievance No. 2014027417 appeared to be out of time, Defendant Stevens responded anyway, stating that Plaintiff's concerns were reviewed and noted, but that staff denied he was placed in a contaminated cell and that no evidence was found to substantiate his allegations. Plaintiff was even permitted to file a Step 2 Grievance on December 9, 2013, that was returned to him on January 28, 2014, with the response that his claim had been reviewed and no evidence was found to support his claims that he was placed in a cell contaminated with bodily fluids.

The TDCJ did not reject Plaintiff's claims for failure to name any specific individuals involved. These facts weigh against the argument that these purported defects in the grievances constituted a failure to exhaust. *See Gates v. Cook*, 376 F.3d 323, 331 n. 6 (5th Cir. 2004); *see also Patterson v. Stanley*, 547 F. App'x, 510, 512 (5th Cir. 2013) (finding that even though state inmate's grievance alleging Eighth Amendment violations based on discontinuance of his prescription for sunglasses did not set forth names of prison medical director or physician's assistant accused of the misconduct, grievance sufficiently alerted prison staff to the problem, as required for inmate to exhaust administrative remedies under PLRA, by simply claiming it involved "medical staff"). In sum, the responses to each of the grievances discussed above indicate that the purpose of exhaustion—affording prison officials notice and an opportunity to resolve a problem prior to litigation—was satisfied. Accordingly, the Court finds that Plaintiff properly exhausted his complaints as to all of the Defendants.

B. Qualified Immunity

Plaintiff alleges that his being held in two separate cells that he described as filthy for a time period of approximately 6 days amounted to cruel and unusual punishment. He also alleges that the Defendants were deliberately indifferent to his health when they refused to take him to the bathroom for 24 hours and ignored his complaints of chest pains and painful urination and that Defendant Olmstead subjected him to excessive force.

All of the Defendants raise the affirmative defense of qualified immunity and argue that they are entitled to summary judgment.

"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, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also Lytle v. Bexar County, Tex.*, 560 F.3d 404, 409 (5th Cir. 2009). "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. It "is both a defense to liability and a limited 'entitlement not to stand trial or face the other burdens of litigation.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the Supreme Court established a two-step sequence for resolving qualified immunity claims: "First, a court must decide whether the facts that a plaintiff has alleged … make out a violation of a constitutional right[; and] [s]econd, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. at 232 (quoting and citing *Saucier v. Katz*, 533 U.S. at 201). This two-step sequence is not mandatory, however, and a district court has the

discretion to decide "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." *Id*. at 236. *See Reichle v. Howards*, ___ U.S. ___, 132 S. Ct. 2088, 2093 (2012) (quotation omitted) (noting that a court "may grant qualified immunity on the ground that a purported right was not 'clearly established' by prior case law, without resolving the often more difficult question whether the purported right exists at all"). *See Griggs v. Brewer*, 841 F.3d 308, 313 (5th Cir. 2016) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) ("[t]he two steps of the qualified immunity inquiry may be performed in any order.")

"A Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [the] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Although a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. Thus, "the right allegedly violated must be established, "'not as a broad general proposition,'" … but in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle v. Howards*, 132 S. Ct. at 2094 (quoting *Brousseau v. Haugen*, 543 U.S. 194, 198 (2004) (*per curiam*), and *Anderson v. Creighton*, 483 U.S. at 640). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions [and,] when properly applied, it

protects 'all but the plainly incompetent or those who knowingly violate the law.'" (*Ashcroft v. al-Kidd*, 563 U.S. at 743 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Cell Conditions

Defendants argue that they are entitled to qualified immunity for Plaintiff's claims regarding the conditions of his cells because he has provided nothing more than conclusory allegations regarding said conditions and he has failed to demonstrate that he suffered any injury as a result. In other words, even if he could demonstrate that the cells were filthy, he has not shown that the conditions he allegedly faced were a violation of his constitutional rights and therefore the facts as pleaded are not sufficient to find them liable. Defendants provided little in the way of specific summary judgment evidence to support their assertion that the cells were not, in fact, covered with feces, and Defendants even place special emphasis on notes from a mental health evaluation completed several months after the incidents giving rise to this complaint to support the puzzling contention that Plaintiff "is a compulsive cleaner who reports that he cleans his cell from top to bottom three times a day" in order to demonstrate that his claims are unlikely. However, there is no evidence that Plaintiff was a compulsive cleaner before his incarceration in the Montford Unit or that he was provided cleaning materials during the time in question. Nevertheless, the Court finds merit in Defendants' general argument and reliance on established precedent that the alleged cell conditions do not rise to the level of a constitutional violation.

"The Constitution does not mandate comfortable prisons … but neither does it permit inhumane ones, and it is now settled that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Woods v. Edwards*, 51 F.3d 577, 581 (5th Cir. 1995) (internal quotations omitted). A prisoner must satisfy a two-part test, consisting of an objective and a subjective component, to state a claim that the conditions of his confinement violated the Eighth Amendment. *Davis v. Scott*, 157 F.3d 1003, 1006 (5th Cir. 1998); *Adeleke v. Heaton*, 352 Fed. Appx. 904, 907 (5th Cir. 2009). First, he must demonstrate the objective component of conditions were "so serious as to deprive prisoners of the minimal measure of life's necessities, as when it denies the prisoner some basic human need." *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999). "Second, under the subjective standard, the prisoner must establish that the responsible prison officials acted with deliberate indifference to his conditions of confinement." *Id.* With respect to the deliberate indifference standard, "a prison official cannot be found liable under the Eighth Amendment … unless the official knows of and disregards an excessive risk to inmate health or safety; … the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Finally, in order to state a claim, a prisoner must allege facts showing that he received more than a *de minimis* injury due to conditions. *Alexander v. Tippah County, Miss.*, 351 F.3d 626, 631 (5th Cir. 2003).

The Fifth Circuit has held that virtually permanent conditions of cells that contained excrement and other filth violate the Eighth Amendment. In *Harper v. Showers*, 174 F.3d 716, 716 (5th Cir. 1999), there were "continual" conditions of "filthy, sometimes feces-smeared cells," and in *Gates v. Cook*, 376 F.3d 323, 338 (5th Cir. 2004), there were "'extremely filthy' [cells] with crusted fecal matter, urine, dried ejaculate, peeling and chipping paint, and old food particles on the walls." By contrast, in *Davis v. Scott*, 157 F.3d 1003, 1005 (5th Cir. 1998), the Fifth Circuit found no constitutional violation when a prisoner was locked in a "management cell" for three days, where the cell was, "according to Davis, 'just filthy, with 'blood on the walls and excretion on the floors and bread loaf on the floor.'" *Davis*, 157 F.3d at 1004, 1006. The appeals court quoted the Supreme Court's holding that "'the length of confinement cannot be ignored.... A filthy, overcrowded cell ... might be tolerable for a few days and intolerably cruel for weeks or months.'" *Id.* at 1006 (quoting *Hutto v. Finney*, 437 U.S. 678, 686-87 (1978)). The Fifth Circuit found that "Davis did not suffer an extreme deprivation of any 'minimal civilized measure of life's necessities'" when he was confined in the cell for only three days. *Id.* (quoting *Wilson*, 501 U.S. at 304; *cf. Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996) (no Eighth Amendment violation when prisoner was exposed for four days to raw sewage from an overflowed toilet in his cell)).

While Plaintiff, unlike Davis, did not receive cleaning supplies, his pleadings indicate that he was exposed to the alleged conditions for only a matter of days. He also indicated that he was allowed to shower

twice, and Defendants did attempt to clean the cells by using a towel to wipe the sewage from the floor and also cleaning all but the ceiling. Moreover, Plaintiff did not show that he suffered any injury as a result of this brief exposure, other than burning eyes and throat from the fumes coming from the smells emanating from the backed-up drain. *See also McCord v. Maggio*, 927 F.2d 844, 848 (5th Cir. 1991) (remanding for determination of whether the plaintiff suffered a "significant injury" under the legal standard then in effect where inmate housed in "harsh and occasionally disgusting conditions" over an extended period of time, including a 10-month period without a bunk during which he had to sleep on a mattress on the floor despite flooding and sewage backup); *McClure v. Foster*, Civ. A. No. 5:10-CV-78, 2011 WL 665819 (E.D. Tex., January 7, 2011), report adopted at 2011 U.S. Dist. LEXIS 15437, 2011 WL 941442 (E.D. Tex., February 16, 2011), *aff'd* 465 F. App'x 373, 2012 WL 1059408 (5th Cir., March 29, 2012). In *McClure*, the plaintiff complained he was placed in a very cold concrete cell with no clothes and the cell was dirty, with "pubic hair, hair, dirty, and bits of molded food," with "dry pee all over the toilet seat and back as well as the floor." He remained in the cell for three days. The district court, citing *Davis* and *McCord*, dismissed the lawsuit, and the Fifth Circuit affirmed.

The Court finds that although the conditions of Plaintiff's confinement may have been quite uncomfortable during the days he was held in the two cells in question, the conditions did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Accordingly, Plaintiff has failed

to rebut Defendants' assertion of qualified immunity on his conditions-of-confinement claim, and their Motions for Summary Judgment should be granted.

Deliberate Indifference

Defendants also argue that they are entitled to qualified immunity as to Plaintiff's claim that they were deliberately indifferent to his health and safety when (1) Defendants Rojas, Martinez, and Ortiz failed to take him to the bathroom over a 24-hour period and ignored his complaints of chest pains; (2) when Defendant Henderson failed to assess his complaints of chest pains on September 12, 2013; and (3) when Defendant Orr failed to respond to his request for medical care related to painful urination on September 14, 2013.

"Deliberate indifference is an extremely high standard to meet." *Domino v. Texas. Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001). The plaintiff must establish that the defendants "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Id*. (internal quotation marks and citation omitted). Thus, neither an incorrect diagnosis nor the failure to alleviate a significant risk that an official should have perceived but did not will be sufficient to establish deliberate indifference. *See id*. Similarly, unsuccessful treatment, medical malpractice, and acts of negligence do not constitute deliberate indifference; nor does a prisoner's disagreement with his medical treatment, absent exceptional circumstances. *See*

Gobert v. Caldwell, 463 F.3d 339, 346 (5th Cir. 2006). "Medical records of sick calls, examinations, diagnoses, and medications may rebut an inmate's allegations of deliberate indifference." *Banuelos v. McFarland*, 41 F.3d 232, 235 (5th Cir.1995).

Plaintiff first complains that Defendants Rojas, Ortiz, and Martinez refused to escort him to the bathroom for approximately 24 hours while he was in the seclusion cell, instead advising him to urinate into the drain. Plaintiff refused to urinate into the drain because he alleged it was already overflowing. Plaintiff complains that holding his urine for an extended amount of time resulted in a distended bladder and ultimately causing him to urinate involuntarily. Plaintiff alleges that the refusal to take him to the restroom amounted to deliberate indifference to his serious medical needs.

Defendants Rojas, Ortiz, and Martinez do not directly deny Plaintiff's allegations that they refused him the opportunity to use the restroom on September 12, 2013, or that they advised him to "pee in the drain like everyone else." Defendant Rojas, however, provided summary judgment evidence in the form of security notes for September 12 that indicate Plaintiff was checked out fairly regularly and that he "refused all" or specifically refused restroom/toilet each time, except for at 1900 where it indicates that he was taken to the bathroom. Moreover, Defendants appear to argue that Plaintiff did not suffer any injury as a result of their actions. The Court agrees. Although Plaintiff preferred not to urinate in the drain, Plaintiff has not provided anything other than unsupported and conclusory

assertions that he was denied the opportunity to go to the restroom for 24 hours, rather than declining the opportunity to do so. Moreover, he has not demonstrated that it was not physically possible for him to relieve himself in the drain as instructed and thus prevent his discomfort and eventual bladder distension. A prisoner seeking to recover damages on a conditions-of-confinement claim must establish a physical injury that is more than *de minimis*. *See Alexander v. Tippah County, Miss.*, 351 F.3d 626, 631 (5th Cir. 2003) (finding inmates who had to urinate and defecate in a grate-covered hole in the floor and suffered nausea and vomiting as a result did not sustain an injury sufficient to trigger the protection of the Constitution). In the instant case, the record does not support a finding that Plaintiff's distended bladder was a physical injury; but even if it were, the Court does not find it to be more than *de minimus*.

Next, Plaintiff claims that Defendants Rojas, Martinez, and Henderson were deliberately indifferent to his health and safety on September 12, 2013, when they intentionally ignored his complaints of chest pains for two hours before Defendant Henderson provided him with an assessment. Plaintiff further complains that Defendant Henderson was deliberately indifferent when she failed to transfer him to the emergency room, despite being advised to do so by a charge nurse, which advisory was denied due to security being unable to escort him. Plaintiff does not claim that he suffered any injury related to the chest pains. According to Plaintiff's complaint, he began complaining of chest pains around 19:30 hours, and Defendant Henderson did not arrive to assess him until sometime between

21:00 and 22:00. According to the competent summary judgment evidence provided by Defendants, a Daily Care / Note was entered by Defendant Henderson at 21:21:20 describing her assessment of Plaintiff, wherein he was assessed and provided with medication. The notes also indicate that Plaintiff was to be rechecked and, if any further complaints were voiced, then to go to the emergency room for an EKG. Plaintiff has not alleged, and the Court can find no record of, any further complaints regarding chest pains. As Plaintiff did not suffer any harm as a result of a delay in medical treatment for his chest pains, he cannot overcome Defendants Rojas, Martinez, and Henderson's entitlement to qualified immunity on these claims.

Plaintiff next specifically claims that Defendant Nurse Stephanie Orr was deliberately indifferent to his health and safety when she failed to promptly evaluate and treat him for bladder pain on September 14, 2013. Plaintiff complains that as a result of the delay in treatment, he required treatment in the emergency room in the form of catheterization.

According to his complaint, Plaintiff alleges that he reported to Defendant Orr that he needed to see a doctor at 10:30 hrs., to which she responded that he should write a sick-call on Monday. Plaintiff asserts that Defendant Orr knew that he could not have writing materials while in seclusion. Plaintiff claims that it wasn't until Orr stopped by his cell at approximately 16:00 hrs., when he asked to see a male doctor, that Orr asked him why and Plaintiff informed her that he was experiencing bladder pain. At that point, Orr assessed him and determined that

his bladder was distended and contacted the emergency room to have him treated. Plaintiff claims that Orr's actions of (1) requiring him to write a sick-call when she should have known he could not have writing materials; and (2) not asking him what was wrong the first time he informed her that he needed to see a doctor amounted to deliberate indifference to his serious medical needs.

Defendant Orr argues that she is entitled to qualified immunity because both Plaintiff's pleadings and the competent summary judgment evidence show that Orr was not deliberately indifferent to his medical condition, that she acted reasonably given the information that she possessed at the time, and that in any event she never violated any of his constitutional rights. Indeed, the medical records provided by Defendants reflect that Plaintiff was seen cell-side by medical staff every 2-4 hours, as evidenced by the Correctional Managed Care Seclusion/Restraint Notations entered by unit medical staff at 0:02 hrs., 2:06 hrs., 3:47 hrs, 5:32 hrs., 6:52 hrs., 8:53 hrs., 10:54 hrs., 12:53 hrs., and 15:18 hrs., 17:05 hrs., 19:03 hrs., 21:02 hrs., and 23.32 hrs., and the Daily Care Notes entered by Defendant Orr at 16:45 hrs. and 18:27 hrs. See Def. Exh. B 160-174. Plaintiff did not allege that Defendant Orr was aware that he was experiencing an inability to urinate at the time he allegedly told her he needed to see a doctor at 10:30. While the notes presumably entered regarding Orr's cellside visit at 10:30 do not indicate that a request was made for a doctor, the Court can only conclude that Orr's failure to ask him why he needed to see a doctor at 10:30 hrs. may amount to negligence, but it does not rise to the level of

deliberate indifference. Plaintiff does not allege, and the records do not reflect, that he indicated a need to see a physician for the cellside visits by medical providers that occurred between 10:30 and 16:45 hrs. Plaintiff has thus not established that Defendant Orr was even aware that he was experiencing painful or difficulty urinating before the evaluation at approximately 16:00 hrs., much less that she deliberately disregarded an excessive risk to his health and safety. Moreover, assuming *arguendo* that there was a delay before Plaintiff was evaluated and received the catheter, he has not shown that a fact issue exists on the issues of whether the delay was due to the deliberate indifference of Defendant Orr or that the delay resulted in substantial harm. *See Mendoza v. Lynaugh*, 989 F. 2d 191, 195 (5th Cir. 1993). At most, the delays or inadequate treatment constitute negligence, which does not rise to the level of deliberate indifference. *See Stewart v. Murphy*, 174 F.3d 530, 534 (5th Cir. 1999). Plaintiff has not shown that the conduct of Defendant Orr violated a constitutional right. Therefore, he fails to show that she is not entitled to qualified immunity. *See Lytle*, 560 F.3d at 410.

In the motion for summary judgment, Defendant Stevens does not specifically address Plaintiff's claims that he should be held liable as Warden of the Montford Unit for implementing a widespread policy of denying inmates prompt medical attention and allowing inmates to be housed in inhumane conditions. Nevertheless, the Court finds that the competent summary judgment evidence submitted in this case does not show that Defendant Stevens committed any constitutional violation because the

Court has found that Plaintiff has not demonstrated that his conditions-of-confinement and deliberate-indifference claims amount to constitutional violations.

Excessive Use of Force

The Supreme Court has emphasized that the core judicial inquiry in an Eighth Amendment excessive-use-of-force claim is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992). An excessive-use-of-force claim has both subjective and objective components. *Id*. at 8. In other words, there is the issue of whether the officials acted with a "sufficiently culpable state of mind" and if the alleged wrongdoing was objectively "harmful enough" to establish a constitutional violation. *Id*. A claimant must allege and prove there was an "unnecessary and wanton infliction of pain." *Id*. at 5. In deciding whether the use of force was wanton or unnecessary, a court may consider "the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." *Id*. at 7. (Internal quotation and citation omitted). The absence of a serious injury is relevant to but not dispositive of the excessive-force claim. *Id*.

The Supreme Court added the following caveat concerning the nature of the force used in a given situation:

> That is not to say that every malevolent touch by a prison guard gives rise to a federal cause of action. *See Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) ("Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights"). The Eighth Amendment's prohibition of "cruel and unusual punishment" necessarily excludes from consitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort "repugnant to the conscience of mankind."

Hudson v. McMillian, 503 U.S. at 9-10.

On remand in *Hudson*, the Fifth Circuit concluded that the following factors are relevant in the inquiry whether there was an excessive use of force: "1. The extent of the injury suffered; 2. The need for the application of force; 3. The relationship between the need and the amount of force used; 4. The threat reasonably perceived by the responsible officials; and 5. Any efforts made to temper the severity of a forceful response." *Hudson v. McMillian*, 962 F.2d 522, 523 (5th Cir. 1992). *See also Baldwin v. Stalder*, 137 F.3d 836, 839 (5th Cir. 1998). On the other hand, the Fifth Circuit has repeatedly emphasized that an inmate must have suffered more than a *de minimis* physical injury. *Gomez v. Chandler*, 163 F.3d 921, 924 (5th Cir. 1999). There must always be some injury, albeit insignificant. *Knight v. Caldwell*, 970 F.2d 1430, 1432 (5th Cir. 1992); *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993). In *Siglar v. Hightower*, 112 F.3d 191, 194

(5th Cir. 1997), the Fifth Circuit held that a sore, bruised ear lasting for three days that resulted from an officer twisting an inmate's ear was *de minimis* and insufficient to provide a basis for a meritorious civil rights lawsuit. In *Gomez v. Chandler*, 163 F.3d at 924-25, the Fifth Circuit held that injuries consisting of pain and "cuts, scrapes, contusions to the face, head and body" that resulted from inmate being knocked down, punched, and kicked and that required medical treatment were more than *de minimis*. The Fifth Circuit also noted that even though there must be more than a *de minimis* physical injury, "there is no categorical requirement that the physical injury be significant, serious, or more than minor." *Id*. at 924.

The Fifth Circuit has additionally held that the question of whether the force used was more than *de minimis* must be evaluated in the context in which the force was deployed. In *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996), the Fifth Circuit explained that the amount of injury necessary to satisfy the requirement of some injury and to establish a constitutional violation is directly related to the amount of force that is constitutionally permissible under the circumstances. In *Williams v. Bramer*, 180 F.3d 703, 704 (5th Cir. 1999), the Fifth Circuit held that what constitutes an injury is subjective and decided entirely by the context in which the injury arises. The plaintiff in *Williams* was choked twice: the first choking occurred when an officer attempted to search the plaintiff's mouth, which resulted in fleeting dizziness, temporary loss of breath, and coughing. The second choking was the product of a malicious choking, after which the plaintiff suffered

the same symptoms. The Fifth Circuit held that the first choking, did not rise to the level of a constitutional violation under the circumstances, but the second malicious choking, did qualify as a cognizable injury since the officer's actions were the product of maliciousness, as opposed to a legitimate search. *Id*. at 704. The Fifth Circuit specifically noted that it was required to accept the plaintiff's version of events as true for purposes of summary judgment. *Id*.

More recently, the Fifth Circuit again rejected arguments focusing solely on the extent of an inmate's injuries in *Brown v. Lippard*, 472 F.3d 384 (5th Cir. 2006). The Fifth Circuit held that the defendant was not entitled to summary judgment because there was evidence before the court that his actions were the product of bad faith, regardless of the lack of significant injury.

Plaintiff argues that Defendant Olmstead struck him with a metal bar after they had an argument and relies on an injury report and medical records to claim that he was injured and to assert that Defendants "swept the incident under the rug." In support of her Motion for Summary Judgment, Defendant Melissa Olmstead argues that there is simply no evidence that she used any force against Plaintiff, and in any event there is no medical record evidence that Plaintiff ever sustained any injury, much less a *de minimis* injury, to his testicles. In support of this argument, Defendant Olmstead cites to portions of the medical record evidence submitted, states that there is no record of a use-of-force report ever being made for such an incident, and states that the "Office of the Inspector General inspected Plaintiff's claims, and

found no evidence of Plaintiff's allegations being true." Defendants' Motion for Summary Judgment (Doc. 107) at 16.

Defendant Olmstead's summary judgment evidence is problematic for a number of reasons. First, to support the assertion that the medical record evidence does not support Plaintiff's claims of an injury, Defendant Olmstead refers to "Ex. B at 134 and 144"; however, a review of those pages reveals that page 134 appears to note completion of a 24-hour chart check on September 18, 2013, and page 144 is a Seclusion / Restraint Notation for September 16, 2013. Such records are irrelevant because Plaintiff's allegation is that Defendant Olmstead used excessive force against him on October 14, 2013. A review of the medical records attached to Plaintiff's response as well as the remaining medical records submitted by Defendants reveals a Daily Care / Note entered on October 14, 2013, by Cassandra J. Parrish, L.V.N., wherein Plaintiff complained about being hit by an officer and noting that the ER nurse ordered officials to bring Plaintiff to the ER for evaluation. Defendant's Motion for Summary Judgment (Doc. 107) Ex. B at 088. Also, according to the Clinic Notes, on October 14, 2013, Plaintiff was seen for his complaints regarding pain to his right testicle, and although no apparent injury was visualized, Plaintiff rated his pain at "5/10," and the provider noted that he "grimaces with palpation of testicles," and prescribed Ibuprofen for three days and an ice pack for 24 hours. Defendant's Motion for Summary Judgment (Doc. 107) Ex. B at 329. Considering that Plaintiff did make a complaint of injuries that was evaluated by medical providers who prescribed a

course of treatment, however *de minimus*, the Court cannot conclude as a matter of law that Plaintiff suffered no injury at all based on competent summary judgment evidence.

Also, in support of the argument that the Office of the Inspector General inspected Plaintiff's claims and concluded that there was no evidence that his allegations were true, Defendant Olmstead cites to the medical records in the appendix, specifically to "Ex. B 133." However, again, page 133 of Exhibit B has nothing at all to do with any incident occurring on October 14, 2013; rather, it is a Mental Health Inpatient Nursing Note dated September 19, 2013. The Court also notes that Defendants submitted a Business Records Affidavit wherein Celia A. Eastham, Administrative Assistant III for the Office of the Inspector General (OIG), specifically states that "[t]he [OIG]'s database revealed no OIG case information concerning Offender Trent Taylor, TDCJ # 01691384, for any OIG report for October 2013 to March 2014 and for September 2013 to April 2014 with any photos…." While this Affidavit may demonstrate that there was no OIG case report at all, it does not necessarily demonstrate that the incident alleged to have occurred on October 14, 2013, did not occur.

The Court cannot rely on the assertion that the OIG concluded that there was no evidence that Plaintiff's allegation of excessive use of force was true and is hard pressed to conclude as a matter of law that because there was no use-of-force report, the incident did not happen. Moreover, Defendant Olmstead did not submit an affidavit either denying that the

incident took place or, if it did, showing that she acted in good faith, as opposed to acting maliciously and sadistically.

The Constitution does not permit a corrections officer, for no reason other than a malicious or sadistic purpose, to hit, slap, or otherwise physically attack an inmate so long as no visible or lasting injuries result. Courts do sometimes look to the seriousness of the injury to determine whether the use of force could plausibly have been thought necessary, but pain inflicted by excessive force may be actionable under the Eighth Amendment even if it is not coupled with an injury that requires medical attention or leaves permanent marks. *Brown v. Lippard*, 472 F.3d 384, 387 (5th Cir. 2006). To grant summary judgment for Defendant Olmstead would grant license to corrections officers, for no legitimate reason, to strike prisoners so long as no marks or injuries are visible. Based upon the foregoing reasons and relevant medical evidence, and taking Plaintiff's version of events as true, the Court concludes that a genuine issue of material fact remains regarding whether Defendant Olmstead used excessive force against Plaintiff on October 14, 2013, and if so, whether she acted wantonly and maliciously. Therefore, summary judgment is denied with respect to the excessive-force claim against Defendant Olmstead in her individual capacity.

V. CONCLUSION

For the reasons stated above, it is ORDERED:

1. Defendants Robert Stevens, Robert Rojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Melissa Olmstead, and Shane Swaney's Motion for Summary Judgment filed on October 10, 2016, is GRANTED in part and DENIED in part.

2. Defendants Creastor Henderson and Stephanie Orr's Motion for Summary Judgment filed on November 14, 2016, is GRANTED.

3. Plaintiff's complaint and all claims alleged therein against Defendants Robert Stevens, Robert Rojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, Creastor Henderson, Stephanie Orr, Franco Ortiz, and Joe Martinez are DISMISSED with prejudice.

4. Plaintiff's claim of excessive use of force against Defendant Melissa Olmstead in her individual capacity remains pending and set for trial on March 6, 2017.

5. Plaintiff's Motion to Excuse Local Rule of Judges Copy and Motion to Allow Plaintiff to Have His Exhibits Returned filed on November 2, 2016, is GRANTED. The Clerk is directed to return to Plaintiff a copy of his Exhibits B and C attached to his Brief in Opposition to Defendants' Motion for Summary Judgment filed on November 2, 2016. Any future motion for the return of copies or free copies shall be denied.

6. All relief not expressly granted is denied and all pending motions are hereby denied.

Judgment shall be entered accordingly.

Dated January 5, 2017.

/s/ Sam R. Cummings
Sam R. Cummings
Senior United States
District Judge

APPENDIX C

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

TRENT TAYLOR, Institutional ID No. 1691384, SID NO. 6167597, Previous TDCJ No. 1336391,	§	
Plaintiff,	§	
	§	CIVIL ACTION
v.	§	NO. 5:14-CV-149-C
ROBERT STEVENS, *et al.*,	§	
Defendants.	§	ECF

ORDER

Before the Court is Plaintiff's Objection to Judgment Entered Pursuant to 54(b), Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e), and Motion to Allow Plaintiff to Take Further Discovery Pertaining to His Excessive Use of Force Claim filed on January 26, 2017.

The Court has reviewed Plaintiff's Objections and finds that his Motion to Alter or Amend Judgment Pursuant to Fed. R. Civ. P. 59(e) should be DENIED.

Finally, Plaintiff requests further discovery pertaining to his excessive use of force claim in the form of 8 categories of documents. Upon review of the motion, the Court finds as follows:

(1) Plaintiff's request for "[a]ny and all records of Defendant Olmstead (disciplinary and or otherwise[)] regarding her employment in the Texas Department of Criminal Justice" is **DENIED** as overly broad and unduly burdensome on Defendant Olmstead. However, the Court finds that his request for records of disciplinary actions taken against Defendant Olmstead is **GRANTED**, but **only to the extent such disciplinary actions specifically relate to unjustified use of force against Texas Department of Criminal Justice (TDCJ) inmates.**

On or before February 13, 2017, Counsel for Defendant Olmstead shall file, with the Court, any documents related to disciplinary action against Defendant Olmstead **UNDER SEAL** or file a statement that there are no such documents. The Court will make any such documents available to Plaintiff immediately prior to trial and such documents shall be returned to the Clerk of Court at the end of trial.

(2) Plaintiff's request for "[a]ny and all grievances for use of force reported or unreported regarding [Defendant Olmstead]" is DENIED. The Court finds that this request

is overly broad and unduly burdensome on Defendant.

(3) Plaintiff's request for "[a]ny and all records pertaining to falsification of any records by employees of the TDCJ John Montford Unit" is DENIED. The Court finds that the request is overly broad and unduly burdensome on Defendant.

(4) Plaintiff's request for "[a]ny and all reports of unauthorized use of forces [sic] 6 months prior to said indigent up until todays date" is DENIED. The Court finds that the request is overly broad and unduly burdensome on Defendant.

(5) Plaintiff's request for "[a]ny and all reports and or directives pertaining to use of force reporte[d] or unreported" is DENIED. Plaintiff has not shown cause why such documents are relevant to his complaint, as this case involves his claim that his constitutional rights were violated. This case does not involve or require demonstration of a violation of a TDCJ policy.

(6) Plaintiff's request for a copy of the TDCJ Offender Grievance Manual is DENIED. Plaintiff has failed to demonstrate that the TDCJ Grievance Manual is relevant to his claim of excessive force.

(7) Plaintiff's request for "[a]ny and all directives pertaining to actions taken after injuries

occurred by use of excessive force or any other action" is DENIED. Plaintiff has not shown cause why such documents are relevant to his complaint, as this case involves his claim that his constitutional rights were violated. This case does not involve or require demonstration of a violation of a TDCJ policy.

(8) Plaintiff's request for "[a]ny and all rules and regulations pertaining to OIG use of force investigations" is DENIED. Plaintiff has not shown cause why such documents are relevant to his complaint, as this case involves his claim that his constitutional rights were violated. This case does not involve or require demonstration of a violation of a TDCJ policy.

SO ORDERED.

Dated January 30, 2017.

/s/ Sam R. Cummings
Sam R. Cummings
Senior United States
District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17-10253

TRENT TAYLOR,

Plaintiff - Appellant,

v.

ROBERT STEVENS, Warden, Individually and in their Official Capacity; ROBERT RIOJAS, Sergeant of Corrections Officer, Individually and in their Official Capacity; RICARDO CORTEZ, Sergeant of Corrections Officer, Individually and in their Official Capacity; STEPHEN HUNTER, Correctional Officer, Individually and in their Official Capacity; LARRY DAVIDSON, Correctional Officer, Individually and in their Official Capacity; SHANE SWANEY, Sergeant of Corrections Officer, Individually and in their Official Capacity; FRANCO ORTIZ, Correctional Officer, Individually and in their Official Capacity; CREASTOR HENDERSON, L.V.N., Individually and in their Official Capacity; STEPHANIE ORR, L.V.N., Individually and in their Official Capacity; JOE MARTINEZ,

Defendant - Appellees.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion: December 20, 2019, 5 Cir., ____, ____ F.3d ____)

Before OWEN, Chief Judge, JONES and SMITH, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en bane, and a majority of the judges in

active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

/s/ Jerry E. Smith
UNITED STATES
CIRCUIT JUDGE

[Dated: January 29, 2020]