

United States Court of Appeals
For the Eighth Circuit

No. 17-1072

Robert Earl Clayborne, Jr.

Plaintiff - Appellant

v.

Tecumseh Department of Corrections, an agency of the State; Scott Franks, Director of the Nebraska Corrections Dept., in his official and individual capacity; Brian Gage, Warden of the Tecumseh Corrections Dept., in his official and individual capacity; Guthrie, Case worker with the Tecumseh Correction Dept., in her official and individual capacity; Tompkins, Case worker with the Tecumseh Corrections Dept., in his official and individual capacity; Keith Broadfoot, Unit Manager, Tecumseh Corrections Department, in his official and individual capacity; Sherman, Unit Administrator, Tecumseh Corrections Department, in his official and individual capacity; Crop, Officer, with the Tecumseh Corrections Dept., in his official and individual capacity.

Defendants - Appellees

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: October 13, 2017

Filed: November 1, 2017

[Unpublished]

Before LOKEN, MURPHY, and SHEPHERD, Circuit Judges.

PER CURIAM.

In this pro se 42 U.S.C. § 1983 action, Nebraska inmate Robert Clayborne appeals after the district court¹ adversely granted summary judgment, finding defendants were entitled to qualified immunity on Clayborne's claim that they were deliberately indifferent to his needs during a prison riot.

Having carefully reviewed the record, and the parties' arguments on appeal, we conclude that the district court properly granted summary judgment. See Beaulieu v. Ludeman, 690 F.3d 1017, 1024 (8th Cir. 2012) (grant of summary judgment is reviewed de novo, viewing record in light most favorable to nonmovant); see also Pearson v. Callahan, 555 U.S. 223, 232 (2009) (to determine if defendant is entitled to qualified immunity, court must consider whether facts establish violation of constitutional or statutory right, and whether right was so clearly established that reasonable official would have known his actions were unlawful); Nelson v. Corr. Med. Servs., 583 F.3d 522, 528 (8th Cir. 2009) (in cases involving prison riots, wantonness necessary for deliberate indifference is demonstrated by prison officials acting "maliciously and sadistically for the very purpose of causing harm"). Accordingly, the judgment is affirmed, see 8th Cir. R. 47B, and Clayborne's motion for a settlement conference is denied as moot.

¹The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska.

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 17-1072

Robert Earl Clayborne, Jr.

Plaintiff - Appellant

v.

Tecumseh Department of Corrections, an agency of the State; Scott Franks, Director of the Nebraska Corrections Dept., all defendants being sued in their official and individual capacity; Brian Gage, Warden of the Tecumseh Corrections Dept., all defendants being sued in their official and individual capacity; Guthrie, Case worker with the Tecumseh Correction Dept., all defendants being sued in their official and individual capacity; Tompkins, Case worker with the Tecumseh Corrections Dept., all defendants being sued in their official and individual capacity; Keith Broadfoot, Unit Manager, Tecumseh Corrections Department, all defendants being sued in their official and individual capacity; Sherman, Unit Administrator, Tecumseh Corrections Department, all defendants being sued in their official and individual capacity; Crop, Officer, with the Tecumseh Corrections Dept.

Defendants - Appellees

Appeal from U.S. District Court for the District of Nebraska - Omaha
(8:15-cv-00198-RGK)

JUDGMENT

Before LOKEN, MURPHY and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

November 01, 2017

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT EARL CLAYBORNE, JR.,	)	8:15CV198
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM
	)	AND ORDER
TECUMSEH DEPARTMENT OF	)	
CORRECTIONS, et al.,	)	
	)	
Defendants.	)	

Plaintiff Robert E. Clayborne filed his Complaint (Filing No. 1) in this matter on May 28, 2015. This court has given Clayborne leave to proceed in forma pauperis. The court now conducts an initial review of Clayborne's claims to determine whether summary dismissal is appropriate under 28 U.S.C. §§ 1915(e)(2) or 1915A.

I. SUMMARY OF COMPLAINT

Clayborne's claims are based on incidents that occurred during an inmate-led prison riot on May 10, 2015, at the Tecumseh State Prison ("TSP") in Tecumseh, Nebraska. Liberally construed, he asserts Eighth Amendment claims brought pursuant to 42 U.S.C. § 1983. He has sued Scott Frakes, Brian Gage, Keith Broadfoot, and other individuals he identified as Crop, Guthrie, Tompkins, and Sherman. (Filing No. 1 at CM/ECF p. 1.) Frakes is the director of the Nebraska Department of Correctional Services, of which the TSP is a part, and the other defendants are employed at the TSP. (Filing No. 1 at CM/ECF p. 1.)

At all relevant times, Clayborne resided in the protective-custody unit ("PCU") at the TSP. (Filing No. 1 at CM/ECF p. 4.) On May 10, 2015, Crop, Guthrie, and Tompkins were working within the PCU. (Filing No. 1 at CM/ECF p. 2.) Clayborne

alleged the fire alarms sounded at around 4:00 p.m. on this date, at which time he exited his cell. Clayborne looked for staff so they could advise him as to where to go, but none could be found. (Filing No. 1 at CM/ECF p. 4.)

Clayborne exited the unit through what he believed to be the fire exit, but quickly returned inside because there were general-population inmates in the area. Clayborne again looked for staff, this time to advise them that protective-custody inmates were “being mixed up” with general population inmates, but no staff could be found. (Filing No. 1 at CM/ECF p. 4.) Clayborne then used the inmate phone to attempt to notify the department of corrections that there were inmates trapped in their cells. In addition, he attempted to contact the prison’s central control via an intercom to advise them to open the rest of the inmates’ doors, but he received no response. (Filing No. 1 at CM/ECF p. 5.) At some point, he heard a voice over the intercom advising prisoners to go outside for safety. (Filing No. 1 at CM/ECF p. 6.)

Clayborne alleged that no prison official came to his aid or the aid of the other protective-custody inmates for six to seven hours. During this time, general-population inmates entered the PCU, started fires, and committed acts of violence. Clayborne alleged that “for 6 to 7 hours [he] lived with the fear of being caught up in the death by the hands of an angry mob or deadly fires would take [his] life.” (Filing No. 1 at CM/ECF p. 6.) Clayborne believes prison staff “left [him] to die” within the PCU. (Filing No. 1 at CM/ECF p. 6.)

Clayborne alleged these incidents caused mental, emotional, and physical injuries and exacerbated his previously-diagnosed mental illnesses. (Filing No. 1 at CM/ECF pp. 6-7.) He seeks unspecified injunctive and declaratory relief, and also one million dollars in money damages from each of the named defendants. (Filing No. 1 at CM/ECF p. 9.)

II. STANDARDS ON INITIAL REVIEW

The court is required to review prisoner and in forma pauperis complaints seeking relief against a governmental entity or an officer or employee of a governmental entity to determine whether summary dismissal is appropriate. *See* 28 U.S.C. §§ 1915(e) and 1915A. The court must dismiss a complaint or any portion of it that states a frivolous or malicious claim, that fails to state a claim upon which relief may be granted, or that seeks monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A(b).

Pro se plaintiffs must set forth enough factual allegations to “nudge[] their claims across the line from conceivable to plausible,” or “their complaint must be dismissed.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”).

“The essential function of a complaint under the Federal Rules of Civil Procedure is to give the opposing party ‘fair notice of the nature and basis or grounds for a claim, and a general indication of the type of litigation involved.’” *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848 (8th Cir. 2014) (quoting *Hopkins v. Saunders*, 199 F.3d 968, 973 (8th Cir. 1999)). However, “[a] pro se complaint must be liberally construed, and pro se litigants are held to a lesser pleading standard than other parties.” *Topchian*, 760 F.3d at 849 (internal quotation marks and citations omitted).

Liberally construed, Plaintiff here alleges federal constitutional claims. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege a violation of rights protected by the United States Constitution or created by federal statute and also must show that the alleged deprivation was caused by conduct of a person acting under

color of state law. West v. Atkins, 487 U.S. 42, 48 (1988); Buckley v. Barlow, 997 F.2d 494, 495 (8th Cir. 1993).

III. DISCUSSION

A. Sovereign Immunity

Clayborne sued seven State of Nebraska employees in their individual and official capacities. Thus, the first question the court must address is to what extent, if any, the Eleventh Amendment bars his claims.

The Eleventh Amendment to the United States Constitution provides states, state agencies, and state officials acting in their official capacities with immunity from suits brought by citizens of other states and from suits brought by a state's own citizens. See Hadley v. North Arkansas Cmty. Technical Coll., 76 F.3d 1437, 1438 (8th Cir. 1996), *cert. denied*, 519 U.S. 1148 (1997); Hans v. Louisiana, 134 U.S. 1, 15 (1890). Any award of retroactive monetary relief payable by the state, including for back pay or damages, is proscribed by the Eleventh Amendment absent a waiver of immunity by the state or an override of immunity by Congress. *See, e.g., id.*; Nevels v. Hanlon, 656 F.2d 372, 377-78 (8th Cir. 1981). An exception to this immunity was recognized by the Supreme Court in Ex Parte Young, 209 U.S. 123 (1908), which permits prospective injunctive relief against state officials for ongoing federal law violations. This exception does not apply to cases involving requests for purely retroactive relief. Green v. Mansour, 474 U.S. 64 (1985).

In part, Clayborne seeks monetary relief from state official defendants for alleged past violations of federal law. There is nothing in the record to suggest the State of Nebraska waived, or that Congress overrode, sovereign immunity here. Thus, Clayborne's claims against the defendants in their official capacities are barred by the Eleventh Amendment. Because Clayborne's only discernible claims for relief

are monetary, this case may not proceed to service of process against the defendants in their official capacities.

B. Eighth Amendment

The court must consider whether Clayborne has stated plausible claims for relief against the defendants in their individual capacities. Clayborne's constitutional claim is based on an alleged violation of his Eighth Amendment rights.

The Eighth Amendment to the United States Constitution proscribes the infliction of "cruel and unusual punishments." The Supreme Court counsels that this amendment imposes upon prison officials the duty to "provide humane conditions of confinement." That duty, among other things, requires those officials to take reasonable measures to "protect prisoners from violence at the hands of other prisoners." The Eighth Amendment imposes this duty because being subjected to violent assaults is not "part of the penalty that criminal offenders pay for their offenses."

In order to prevail on an Eighth Amendment failure-to-protect claim, [an inmate] must make two showings. First, [the inmate] must demonstrate that [he or she is] "incarcerated under conditions posing a substantial risk of serious harm." The second requirement concerns the state of mind of the prison official who is being sued. It mandates that the [inmate] show that 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 [the official] must also draw the inference." This subjective requirement is necessary because "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment."

Jensen v. Clarke, 73 F.3d 808, 810 (8th Cir. 1996) (citing Farmer v. Brennan, 511 U.S. 825 (1994) (other citations omitted).

Walker v. Bowersox, 526 F.3d 1186, 1188-89 (8th Cir.)
208. (Cognizable claim for damages against prison officials
in individual capacity because officers not entitled to qualified
immunity when conditions of confinement may have constituted
8th Amendment violation)

After careful review of Clayborne's Complaint, the court finds Clayborne has stated plausible claims for relief against Defendants Scott Frakes, Brian Gage, and the individuals he identified as Crop, Guthrie, and Tompkins. Crop, Guthrie, and Tompkins were working within the PCU on the date of the riot, while Frakes and Gage, as prison director and warden, were responsible for the safety and security of the prison. While Clayborne did not specifically allege any personal involvement by these defendants, such is the nature of his allegations. That is, these defendants were responsible for Clayborne's safety and security on the date in question. His allegations that they waited six to seven hours to come to his assistance in the face of fires and rioting prisoners are sufficient to state plausible claims for relief at this juncture of the case.

Clayborne has not stated plausible claims for relief against Keith Broadfoot or the individual he identified as Sherman. Clayborne alleged Broadfoot is a unit manager and Sherman is a unit administrator at the TSP. He did not allege these individuals were working on the day of the riot or that they had any responsibility whatsoever for his safety and security on the day of the riot. Therefore, the court will dismiss Clayborne's claims against Broadfoot and Sherman.

IT IS THEREFORE ORDERED that:

1. Clayborne's claims against Keith Broadfoot and Sherman are dismissed in their entirety, and Clayborne's claims against Scott Frakes, Brian Gage, Crop, Guthrie, and Tompkins in their official capacities are dismissed.
2. This matter may proceed to service of process as to Clayborne's Eighth Amendment claims against Scott Frakes, Brian Gage, Crop, Guthrie, and Tompkins in their individual capacities.

3. The clerk of the court is directed to send to Clayborne a copy of the Complaint, a copy of this Memorandum and Order, and five summons forms and five USM 285 Forms for service on Scott Frakes, Brian Gage, Crop, Guthrie, and Tompkins in their individual capacities. (See attached Notice Regarding Service.)

Federal Rule of Civil Procedure 4(m) requires service of the complaint on a defendant within 120 days of filing the complaint. However, Clayborne is granted, on the court's own motion, an extension of time until 120 days from the date of this order to complete service of process.

4. If requested to do so in this matter, the United States Marshal will serve all process in this case without prepayment of fees from Clayborne. In making such a request, Clayborne must complete the USM 285 forms to be submitted to the clerk of the court with the completed summons forms. Without these documents, the United States Marshal will not serve process. Upon receipt of the completed forms, the clerk of the court will sign the summons forms and forward them to the United States Marshal for service on the defendants, together with a copy of the Complaint.

5. The clerk of the court is directed to set the following pro se case management deadline: March 1, 2016: check for completion of service of process.

DATED this 30th day of October, 2015.

BY THE COURT:

s/ Joseph F. Bataillon
Senior United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT EARL CLAYBORNE JR.,	)	8:15CV198
	)	
Plaintiff,	)	
	)	MEMORANDUM
v.	)	AND ORDER
	)	
SCOTT FRAKES, <i>et al.</i> ,	)	
	)	
Defendants.	)	
_____	)	

Robert Earl Clayborne, Jr., an inmate at the Tecumseh State Correctional Institution (“TSCI”), claims in this § 1983 action that the Director of the Nebraska Department of Correctional Services (Scott Frakes, identified in the Complaint as “Scott Franks”), the Warden of TSCI (Brian Gage), an officer at TSCI (Adam Crop), and two caseworkers at TSCI (Chelsea Guffrie and Paul Tompkins) violated his Eighth Amendment rights by failing to protect his safety during a prison riot that occurred at TSCI on May 10, 2015. The defendants, who are sued only in their individual capacities, have moved for summary judgment on the basis of qualified immunity. Their Motion for Summary Judgment (Filing No. 50) will be granted, and the plaintiff’s action will be dismissed with prejudice.

I. Standard of Review

“A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion” Fed. R. Civ. P. 56(a).

In ruling on a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, giving that party the benefit of all inferences that may be reasonably drawn from the evidence. *See Dancy v. Hyster Co.*, 127 F.3d 649, 652-53 (8th Cir. 1997). It is not the court's function to weigh evidence in the summary judgment record to determine the truth of any factual issue; the court merely determines whether there is evidence creating a genuine issue for trial. *See Bell v. Conopco, Inc.*, 186 F.3d 1099, 1101 (8th Cir. 1999).

The moving party bears the burden of showing there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). This burden “may be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.* at 325. The burden then shifts to the nonmoving party, who “may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). “Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (en banc) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 586 (2009)).

II. Plaintiff's Procedural Objection

Clayborne has responded to the defendants' Motion for Summary Judgment by arguing that it was not filed in a timely manner. He points to a Memorandum and Order entered on April 22, 2016, in which the court granted the defendants a stay of discovery but directed them “to file a motion for summary judgment raising the issue of qualified immunity, either by itself or in conjunction with the exhaustion issue, within 21 days” (Filing No. 39 at CM/ECF p. 2). The defendants were advised that “[i]f such a motion is not filed within 21 days, the court will enter an order lifting the stay of discovery” (*Id.*).

The stay of discovery was in fact lifted by the court on June 23, 2016, after the defendants filed a Motion for Summary Judgment raising only the exhaustion issue (Filing No. 46). The current Motion was filed on August 12, 2016 (Filing No. 50).

Contrary to Clayborne's argument, the court's April 22, 2016 Memorandum and Order did not preclude the defendants from filing sequential motions for summary judgment on the issues of exhaustion and qualified immunity. The only consequence of the defendants' failure to raise the qualified immunity issue within 21 days was that Clayborne was permitted to conduct discovery. The current Motion is timely.

III. Undisputed Facts¹

In May 2015, Clayborne was assigned to a cell in Housing Unit #2 at TSCI. This housing unit holds inmates on protective custody status.

On May 10, 2015, Crop, Guffrie (referred to in the plaintiff's Complaint as "Guthrie"), and Tompkins were working in Housing Unit #2. On this day, an inmate disturbance occurred in which inmates gained control of the facility for several hours, started fires, assaulted inmates, and caused major property damage.

At the beginning of the disturbance, inmates started fires in Housing Unit #2 near the control center where staff were stationed. As a result of the smoke coming from the fires, staff had to leave the control center and retreat to an office in the lobby

¹ The defendants have complied with the court's local rule by including in their supporting brief (Filing No. 51 at CM/ECF pp. 1-3) "a separate statement of material facts about which the moving party contends there is no genuine issue to be tried and that entitles the moving party to judgment as a matter of law." NECivR 56.1(a)(1). Because Clayborne has not responded to the defendants' statement of material facts, which contains proper references to the record, all of the facts stated are deemed admitted. *See* NECivR 56.1(b)(1). (Although Clayborne appears pro se, he is "bound by and must comply with all local and federal procedural rules." NEGenR 1.3(g).)

area for safety. Prior to leaving the control center, staff placed the cell doors on "Group Access" which allows inmates to either stay in their cell or push a button which will open their cell door. At this time the inmates were instructed to evacuate their unit and go to the mini-yard for safety, and Specialty Teams were called in to regain control of the facility.²

At the time of the disturbance, TSCI met minimum staffing requirements by having employees work up to 16 hour shifts, having part time staff, having staff work overtime, and having staff from other prison facilities fill in if necessary. TSCI was not understaffed on May 10, 2015.

IV. Qualified Immunity Standards

"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. Qualified immunity gives government officials breathing room to make reasonable but mistaken

² The foregoing statement of material facts is generally consistent the plaintiff's Complaint, in which Clayborne alleges that fire alarms sounded at around 4:00 p.m. on May 10, 2015, at which time he exited his cell; that he looked for staff so they could advise him as to where to go, but none could be found; that he exited Housing Unit #2 through what he believed to be the fire exit, but quickly returned inside because there were general-population inmates in the area; that he again looked for staff, this time to advise them that protective-custody inmates were "being mixed up" with general-population inmates, but no staff could be found; that at some point, he heard a voice over the intercom advising prisoners to go outside for safety; that no prison official came to his aid or the aid of the other protective-custody inmates until 11:00 p.m., when an emergency response team showed up and put a stop to the rioting; and that until such time, general-population inmates were entering the protective custody unit, starting fires, and committing acts of violence (Filing No. 1 at CM/ECF pp. 4-6). Clayborne claims the incident exacerbated his previously-diagnosed mental illnesses and caused him to suffer emotional distress and unspecified physical injuries (Filing No. 1 at CM/ECF pp. 6-7).

judgments, and protects all but the plainly incompetent or those who knowingly violate the law. Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.” Messerschmidt v. Millender, 132 S. Ct. 1235, 1244-45 (2012) (internal quotes and citations omitted).

“Determining the question of qualified immunity involves the following two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right; and (2) whether that right was clearly established at the time of the defendant’s alleged misconduct.” Santiago v. Blair, 707 F.3d 984, 989 (8th Cir. 2013). Courts may address either prong of the analysis first, Pearson v. Callahan, 555 U.S. 223, 236 (2009), and “the defendants are entitled to qualified immunity unless the answer to both of these questions is yes.” McCaster v. Clausen, 684 F.3d 740, 746 (8th Cir. 2012).

V. Analysis

The court determined on initial review of the Complaint that Clayborne had stated a plausible Eighth Amendment claim by alleging that the defendants “waited six or seven hours to come to his assistance in the face of fires and rioting prisoners” (Filing No. 13 at CM/ECF p. 6). The defendants’ evidence has now established, however, that Crop, Guffrie, and Tompkins were required for their own safety to evacuate the control center after of fires were started in Housing Unit #2, and that Specialty Teams were dispatched to the prison to quell the rioting. While Clayborne alleges that the Department of Corrections has been understaffed, the defendants’ evidence also shows that TSCI’s minimum staffing requirements were being met on May 10, 2015, when the riot broke out.

“The Eighth Amendment ‘prohibits the infliction of cruel and unusual punishments on those convicted of crimes.’” Nelson v. Corr. Med. Servs., 583 F.3d

522, 528 (8th Cir. 2009) (quoting *Wilson v. Seiter*, 501 U.S. 294, 296 (1991)). “In order to make out an Eighth Amendment violation “the offending conduct must be *wanton*.” *Id.* (quoting *Wilson*, 501 U.S. at 302 (emphasis in the original)). “The word ‘wanton[] does not have a fixed meaning’ and its meaning in the Eighth Amendment context depends upon the circumstances in which the alleged violation occurs.” *Id.* (quoting *Wilson*, 501 U.S. at 302). “In cases involving prison riots, for example, wantonness is demonstrated by acting ‘maliciously and sadistically for the very purpose of causing harm.’” *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986)). “The Eighth Amendment standard for conditions of confinement and medical care ... is different, and the constitutional question in [such] case[s] is whether [the defendant] acted with ‘deliberate indifference.’” *Id.* (citing *Wilson*, 501 U.S. at 303).

“It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause [of the Eighth Amendment], whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock.” *Whitley*, 475 U.S. at 319. “[P]rison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the ‘obligation to take reasonable measures to guarantee the safety of the inmates themselves.’ In this setting, a deliberate indifference standard does not adequately capture the importance of such competing obligations, or convey the appropriate hesitancy to critique in hindsight decisions necessarily made in haste, under pressure, and frequently without the luxury of a second chance.” *Id.* at 320 (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)).

“When the ever-present potential for violent confrontation and conflagration ripens into *actual* unrest and conflict, the admonition that a prison’s internal security is peculiarly a matter normally left to the discretion of prison administrators carries special weight.” *Id.* at 321 (emphasis in original; internal quotations and citations omitted). “Prison administrators ... should be accorded wide-ranging deference in the

adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.” *Id.* at 321-22 (quoting *Bell v. Wolfish*, 441 U.S. 520, 547 (1979)). “That deference extends to a prison security measure taken in response to an actual confrontation with riotous inmates, just as it does to prophylactic or preventive measures intended to reduce the incidence of these or any other breaches of prison discipline. It does not insulate from review actions taken in bad faith and for no legitimate purpose, but it requires that neither judge nor jury freely substitute their judgment for that of officials who have made a considered choice.” *Id.* at 322 (holding that prison officials were entitled to directed verdict on inmate’s claim that his Eighth Amendment rights were violated when he was shot in the leg without prior verbal warning during prison riot).

Because there is no evidence that the defendants were deliberately indifferent to Clayborne’s health and safety, let alone that they acted “maliciously and sadistically for the very purpose of causing harm” while the prison riot in progress, they are entitled to qualified immunity. Accordingly,

IT IS ORDERED:

1. The defendants’ Motion for Summary Judgment (Filing No. 50) is granted, and the plaintiff’s action is dismissed with prejudice.
2. Judgment shall be entered by separate document.

October 27, 2016.

BY THE COURT:

s/ *Richard G. Kopf*
Senior United States District Judge