UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-3373

MICHAEL WILLIAMS,

Plaintiff-Appellant,

versus

FRANK C. BLACKBURN, Warden,
Louisiana State Penitentiary,
ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Middle District of Louisiana
(CA-85-512-A-M1)

(December 29, 1993)

Before GARWOOD and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:**

Plaintiff-appellant Michael Williams (Williams), a Louisiana state prisoner, appeals a judgment of the district court dismissing

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* Chief Judge Emeritus John R. Brown sat for oral argument in this case, but died before issuance of the final decision herein. Accordingly, this decision is rendered by a quorum of the panel pursuant to 28 U.S.C. § 46(d).

** Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

his civil rights action, brought pursuant to 42 U.S.C. section 1983.[1] Because the district court based its decision upon a finding that Williams suffered no significant injury, we remand this action for reconsideration in light of the Supreme Court's recent opinion in *Hudson v. McMillian*, 112 S.Ct. 995 (1992). In addition, we remand the issues of the related pendent state law claims and of attorneys' fees, the resolution of which depend in part on the district court's determination of the federal civil rights claim.

Factual Background

Williams, an inmate at the Louisiana State Penitentiary (LSP) in Angola, Louisiana, alleges violations of his Eighth Amendment right to be free from cruel and unusual punishment. The defendants before us include Captain David Bonnette[2] (Bonnette), supervisor of the cell blocks where Williams was located; and LSP Correction Officers Robert Rowe (Rowe), Calvin Adams (Adams), Brad Couvillion (Couvillion), and Chris Jeansonne (Jeansonne).[3]

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[1] The opinion of the district court is reported as *Williams v. Blackburn*, 761 F.Supp. 24 (M.D. La. 1991).

[2] Bonnette was a captain at the time of the incidents at issue. At the time of the evidentiary hearing in 1988, he had been promoted to the rank of a major.

[3] Several of the defendants named below are not before this Court. James Cage (Cage) was never served. Williams agreed to dismiss Raymond Scott (Scott) at the evidentiary hearing because he had intended to serve Rufus Scott rather than Raymond Scott; no service was attempted on Rufus Scott. Davy Kelone (Kelone), Camp J Supervisor, was named in the second amended complaint but not in the fifth, and controlling, amended complaint. Two other prison officers named in early complaints, Captain Steven Phillips (Phillips) and Captain Samuel Smith (Smith), were later dismissed upon Williams's motion. Finally, Williams has not included in his arguments on appeal any claims against Frank

Williams alleged that various prison officials failed to protect him on two separate occasions when he was burned with scalding water thrown by another inmate. On February 21, 1985, when Williams was in an administrative lockdown area, Cage allowed Ray Charles Hayes (Hayes), another inmate, into the tier area where Williams was located. Hayes was a lobby orderly, rather than a tier orderly, for that cell block; as such, he was not allowed on the tier. He told Cage, prior to gaining access to the tier, that he wanted to get some private revenge against Williams.[4] Bonnette was sitting at the security desk nearby. Hayes, within the view of both officers, heated water on a steam table used to warm food for the inmates. When the water was steaming hot, he threw it on Williams. Williams suffered first and second degree burns (redness and blisters) on his face and shoulders. Both Cage and Bonnette denied Williams access to medical care after the incident; the burns ultimately healed without medical treatment.[5]

The following day, Hayes returned to the tier. The officer on the shift, Rowe, allowed him back onto the tier, again to throw scalding water on Williams. Rowe observed the incident and denied medical treatment afterward. Williams was asleep in his cell at

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Blackburn (Blackburn), then warden at LSP, or C. Paul Phelps (Phelps), former Secretary of the Department of Corrections in Louisiana. We will not disturb the district court's judgment dismissing the claims against these defendants.

[4] Apparently, Hayes was responding to an earlier incident when Williams threw urine on him.

[5] As Williams has not appealed the district court's dismissal of his claims for denial of medical treatment, we will not address this ruling on appeal.

the time of the second scalding; he testified that he was unable to sleep for some time after the incident.

Williams's excessive force claim arose out of events occurring on April 12, 1985. He claimed that Adams falsified a disciplinary report accusing Williams of throwing human waste on another inmate. Immediately following this report, Williams was handcuffed and shackled and removed from his cell. He was placed in the shower room and then taken into the lobby area where he was beaten by Couvillion, while Adams and Scott stood by. The beating lasted about fifteen minutes.

Prison policy required that Williams be taken to the hospital following the alleged human waste incident; there he informed the technician of the beating by Couvillion. He was examined by a doctor, who reported no bruising or swelling and discharged him in satisfactory condition. Williams passed out in holding room; when he regained consciousness, Jeansonne had his foot upon Williams's head with some weight upon it, threatening to stomp Williams if he passed out again. This incident lasted only a few seconds.

Williams alleged severe back pains, headaches, and dizziness as a result of the beating, lasting for about a month or two afterward; he stated that treatment was withheld for three to four months.

Proceedings Below

Williams, proceeding *pro se*, filed his original complaint on May 28, 1985, alleging violations of his federal constitutional rights and of Louisiana state law. This complaint described only the scalding incidents, and named only Blackburn, Bonnette, Cage,

and Rowe, individually and in their official capacities.[6] The district court denied motions for appointment of counsel and to proceed *in forma pauperis* and referred the case to the United States Magistrate.

Defendants Blackburn, Bonnette, and Rowe[7] answered the complaint, raising, *inter alia*, the defense of qualified immunity and claiming that the Eleventh Amendment barred prosecution of the state law claims. On September 20, 1985, Williams filed a motion for leave to file a second amended complaint[8] to include other officers as defendants; the court granted this motion. The second amended complaint named as defendants Phelps, Blackburn, Kelone, Smith, Adams, Couvillion, Scott, Jeansonne, and Phillips, in their individual and official capacities. The allegations concerned only the beating incident. The defendants continued to assert their defense of qualified immunity in their answers to the amended complaints and in their pre-trial order, filed in October 1986.

In June 1986, Williams obtained counsel. On December 9, 1986, he filed his fifth, and final, amended complaint. This complaint combined the allegations of the former complaints concerning both the burning and the beating incidents; it named as defendants

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[6] Williams claimed that he mailed two other complaints in the same envelope, but these never reached the court. The other complaints dealt with the beating incident and an alleged denial of Williams's exercise rights at the prison by Adams. Williams combined the three incidents in later amended complaints.

[7] As Cage was never served, no defense was presented on his behalf.

[8] Williams's first amended complaint was identical to the original complaint but for the substitution of John Doe for Officer Cage.

Blackburn, Phelps, Bonnette, Cage, Rowe, Adams, Couvillion, Scott, and Jeansonne, again individually and in their official capacities. Once again, the defendants raised the defenses of qualified immunity and the Eleventh Amendment.

On July 7, 1988, United States Magistrate Stephen C. Riedlinger held an evidentiary hearing pursuant to *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). At the hearing, several other inmates at LSP testified on Williams's behalf. Hayes testified that he informed Cage of what he was going to do with the water, and that both Cage and Bonnette could see him heating the water, which was heated to boiling. Bonnette was present when Cage let Hayes onto the tier; it was against prison policy to allow lobby orderlies onto the tier. Hayes stated that Bonnette, from his position at the desk, could see him throw the water on Williams. The next day, he informed Rowe of his intent before Rowe allowed him onto the tier.

Robert Ray Tallent was in the cell next to Williams at the time of the burnings; he heard Bonnette and another officer deny Williams's requests for medical treatment. Roy Collins was the tier orderly at the time of the burnings; he testified that he was ordered to mop up the water after both burning incidents.

Joseph Reynolds and Jonas Haney testified for Williams regarding the beating incident. Haney heard the beating; Reynolds observed the beating from his cell.

The defendants who testified at the hearing included Bonnette,

Rowe, Adams, and Jeansonne.[9] They denied that any of the incidents occurred but could not give any concrete explanation why Williams and the other inmates would be lying.

Dr. Charles H. Louis, a physician at the New General Hospital at LSP, testified for the defense. Medical records introduced through Dr. Louis revealed that when Williams was examined following the beating incident, there was no area of edema, bruising or swelling; he had full range of motion; and he was dismissed in satisfactory condition.

Records revealed that Williams complained of headaches on April 23, 24, and 26, 1985; he was given medication for pain on the 24th. He returned to the clinic for headaches on May 6, 1985 and received an analgesic. He visited the clinic again on August 9, 1985 for back pain. An examination revealed no neurological impairment, no motor problems, adequate sensation, and no evidence of a lesion; an x-ray was done and was negative. He was given medication and dismissed.

Magistrate's First Report

The magistrate filed his report on October 17, 1988. He found that Williams had proved by a preponderance of the credible evidence that both burning incidents and the beating incident had occurred. He determined, however, that no Eighth Amendment violation had occurred, based on his conclusion that Williams had not met the severe injury requirement of *Shillingford v. Holmes*,

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[9] Couvillion was no longer working at LSP at the time of the hearing; he was deposed, but his testimony was not available for the hearing and is not part of the record on appeal.

634 F.2d 263, 265 (5th Cir. 1981).

Addressing the state law claims, the magistrate found that the Louisiana general tort statute would apply, that the conduct of all the defendants was intentional and not merely negligent, and that this conduct was the legal cause of Williams's injuries. He recommended that judgment for Williams against Bonnette and Rowe be granted in the amount of $3,000, and against Couvillion and Adams in the amount of $3,000.

The defendants objected to this report on the grounds that the exercise of jurisdiction over the pendent state claims after a finding of no federal constitutional violation violated the Eleventh Amendment. Williams, once again acting *pro se*, objected to the unfavorable aspects of the report.

First Supplemental Report

The district court referred the case back to the magistrate for further consideration of the "significant injury" requirement in light of the Supreme Court decision of *Graham v. Connor*, 109 S.Ct. 1865 (1989) and the decision of this Court in *Johnson v. Morel*, 876 F.2d 477 (5th Cir. 1989) (*en banc*).[10]

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[10] In *Graham v. Connor*, 109 S.Ct. 1865, 1870 (1989), the Supreme Court rejected the notion that "all excessive force claims brought under § 1983 are governed by a single generic standard." The Court ruled that these claims are to be analyzed by reference to the specific constitutional provision at issue.

This Court, sitting en banc, established a three-part test for excessive force claims: "A plaintiff can thus prevail on a Constitutional excessive force claim only by proving each of these three elements: (1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir. 1989) (*en banc*).

The magistrate filed a supplemental report on May 3, 1990. In analyzing *Graham* and *Johnson*, he interpreted *Graham* to indicate that the existence of a severe injury is not a prerequisite to an Eighth Amendment claim, but rather is a factor useful in analyzing excessive force claims. Because *Graham* established that these claims are to be analyzed under specific constitutional standards, the magistrate distinguished *Johnson*'s significant injury requirement on the grounds that that case was decided under the Fourth, rather than the Eighth, Amendment. The magistrate concluded that there was no degree-of-injury threshold for establishing Eighth Amendment violations.

The magistrate found that the conduct of Bonnette and Rowe did not violate the Eighth Amendment because the defendants did not actually use any force, excessive or not, against Williams, as the direct force was applied by the inmate, Hayes. He determined, however, that by their conduct, they intentionally and knowingly exposed the plaintiff to harm from another inmate in violation of the Fourteenth Amendment. He recommended judgment for Williams in the amount of $3,000 in actual damages, and $10,000 in punitive damages, against Bonnette and Rowe for the burning incidents.

The magistrate found that Couvillion, Adams, and Jeansonne had violated Williams's Eighth Amendment rights in the beating incident. He recommended $3,000 in actual damages against Adams and Couvillion; $5,000 in punitive damages against Couvillion; and $1.00 nominal damages against Jeansonne. He denied recovery of attorneys' fees on the basis of lack of evidence.

The parties filed objections to the relevant portions of the

magistrate's report.

Second Supplemental Report

Once more the district court referred the case back to the magistrate on October 16, 1990, this time for reconsideration in light of cases following *Johnson*.

The magistrate filed his second supplemental report on January 9, 1991. Determining that he was bound to follow *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990),[11] he found there was no Eighth Amendment violation from either the burning or the beating incidents because Williams had suffered no significant injury. He continued to find that the burning incidents violated the Fourteenth Amendment, which, he determined, had no significant injury requirement; he recommended recovery against Bonnette and Rowe in the amount of $3,000 actual damages and $10,000 punitive damages. He recommended dismissal of the state law claims under *Hughes v. Savell*, 902 F.2d 376 (5th Cir. 1990), as barred by Eleventh Amendment. He denied recovery of attorneys' fees. Both sides filed objections to this report.

District Court's Ruling

The district court issued its ruling on March 26, 1991, following a *de novo* review of the evidence as to all factual objections and for errors of law. The court agreed with the magistrate that a "significant injury" must be shown in order to

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[11] In *Huguet v. Barnett*, this Court applied the three-part *Johnson* test to cases arising under an Eighth Amendment excessive force claim; it added a fourth, subjective element, which required the plaintiff to show that the use of force constituted an unnecessary and wanton infliction of pain.

prevail under the Eighth Amendment. Although the court agreed that the Fourteenth Amendment applied to the burning incidents because there was no direct force used by the officers, it held that the Fourteenth Amendment did not provide additional rights over the Eighth Amendment and that the significant injury test also applied in the context of the Fourteenth Amendment. Because the district court found that Williams's testimony regarding his injuries was not credible, it decided that he had not suffered significant injuries from either the burning or the beating incidents. The court concluded that no constitutional violations had occurred. Agreeing that the Eleventh Amendment precluded jurisdiction over the state law claims, the court denied all recovery. It found no need to address Williams's claim for attorneys' fees. Williams filed a timely notice of appeal from the district court's judgment.

Discussion

I. Eighth Amendment Claims

At the time the district court dismissed Williams's claims, the prevailing law in this Circuit required that an inmate demonstrate a significant injury. *Huguet v. Barnett*, 900 F.2d 838 (5th Cir. 1990). This requirement was struck down by the Supreme Court in *Hudson v. McMillian*, 112 S.Ct. 995 (1992). Although the magistrate found violations of the Eighth Amendment, but for the lack of significant injury, we cannot render judgment based on findings of the magistrate. We reverse the district court's judgment and remand for reconsideration of Williams's Eighth Amendment claims in light of *Hudson*.

Eighth Amendment claims contain both a subjective and an

objective element: "[C]ourts considering a prisoner's claim must ask both if `the officials act[ed] with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively `harmful enough' to establish a constitutional violation." *Hudson*, 112 S.Ct. at 999 (quoting *Wilson v. Seiter*, 111 S.Ct. 2321, 2326, 2329 (1991)).

A. Excessive force claim

In *Hudson*, the Court held that "whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is . . . whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." 112 S.Ct. at 999.

The extent of the injury suffered by the inmate is one factor to consider in determining whether the use of force was wanton and unnecessary; other factors include the need for application of force, the relationship between that need and the amount of force used, the threat reasonably perceived by the officials, and any effort made to alleviate the severity of a forceful response. *Id.* "The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it." *Id.* "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated" whether or not significant injury is evident. *Id.* at 1000.

Williams alleges that Couvillion[12] used excessive force against

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[12] Although Adams was involved in the beating incident as an observer who did not attempt to curb Couvillion's actions,

him when he beat him on April 12, 1985. The magistrate found that

> "Based on the testimony and credibility of the witnesses, a preponderance of the evidence indicated that Couvillion did use force unnecessarily against the plaintiff after the plaintiff was brought to the tier lobby. The use of force included punches and kicks to the plaintiff's head, chest and stomach."

The district court accepted this finding without discussion, and defendants do not appeal the magistrate's factual findings concerning the beating incident. If the court, upon remand, determines that the beating by Couvillion was prompted by a malicious and sadistic desire to cause harm, it must find that Williams's Eighth Amendment rights were violated.

B. Failure to protect claim

This claim arises out of the burning incidents in which Rowe and Bonnette allowed inmate Hayes access to the tier where Williams was located for the purpose of burning him with scalding water. The magistrate found that the officers acted with knowledge of Hayes's intent.

In its ruling, the district court accepted the magistrate's application of the Fourteenth Amendment to the burning incidents. Failure to protect an inmate from other prisoners is a condition of confinement and, as such, is properly analyzed under the Eighth Amendment. *See Wilson v. Seiter*, 111 S.Ct. 2321, 2326-2327 (1991).

The Supreme Court addressed the subjective component of an Eighth Amendment condition of confinement claim in *Wilson*, applying the "deliberate indifference" standard of *Estelle v. Gamble*, 97 S.Ct. 285 (1976). *Wilson*, 111 S.Ct. at 2327. *See also Johnston v.*

Williams does not include him in his allegations on appeal.

Lucas, 786 F.2d 1254, 1259, 1260 (5th Cir. 1986) ("The Eighth Amendment affords prisoners protection against injury at the hands of other inmates." In order to demonstrate an Eighth Amendment violation "[t]here must be at least a conscious or callous indifference to the prisoner's rights.").

Under the objective component of an Eighth Amendment claim, the seriousness of the wrongdoing is to be judged by contemporary standards of decency. *Hudson*, 112 S.Ct. at 1000. The Court distinguished condition of confinement claims from excessive force claims, stating that "extreme deprivations," as opposed to routine discomforts, are required to make out a conditions-of-confinement claim. *Id.* Intentionally allowing another inmate to burn a prisoner with scalding water is more akin to an extreme deprivation than to a merely routine discomfort of prison life.

On remand, the district court must determine whether Bonnette and Rowe acted with deliberate indifference to Williams's rights, and whether their actions offended contemporary standards of decency.

C. Alternative grounds for affirmance

Defendants agree that the district court's application of the "significant injury" requirement of *Huguet* is incorrect in light of *Hudson*. They argue, however, that we may affirm that judgment in favor of defendants on alternative grounds: (1) that their conduct constituted single, unauthorized uses of force; (2) that the use of force was *de minimis*; (3) that they are protected by qualified immunity; or (4) that there is insufficient evidence against

Bonnette.[13]

In *Hudson*, the Court briefly addressed the idea that conduct cannot constitute an Eighth Amendment violation if it is isolated and unauthorized, arising from a personal dispute between the security officer and the inmate. 112 S.Ct. at 1001-1002. *See George v. Evans*, 633 F.2d 413, 416 (5th Cir. 1980) (single, unauthorized assault by guard is not cruel and unusual punishment). The Court rejected this argument in the factual context before it, as the violence at issue was not an isolated assault, and, although the question of authorization was not before the Court on certiorari, it noted that one defendant was a supervisor and had expressly condoned the use of force at issue.

This issue was not raised below. Although we may consider purely legal questions for the first time on appeal under certain circumstances, this issue implicates questions of fact which cannot be answered without a record in the district court. It is not clear how the facts concerning Captain Bonnette's role in the burnings would have been determined or whether the false disciplinary report by Adams, which instigated the beating incident, precluded a finding of private action. Therefore, we do not consider this issue, nor, in light of the procedural history of this case, do we remand it for consideration by the district court, as we deem it to have been waived by the defendants' failure to raise it below.

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[13] Defendants also suggest that we might affirm on the grounds that Williams did not prove the necessary state of mind on the part of the corrections officers, but this issue was not raised below.

Defendants claim that their conduct did not violate the Eighth Amendment because the force used was *de minimis*. The *Hudson* Court recognized this exception: "The Eighth Amendment's prohibition of `cruel and unusual' punishment necessarily excludes from constitutional 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*, 112 S.Ct. at 1000 (internal citations omitted).[14] Counsel on appeal for Williams concedes that the incident in which Jeansonne placed his foot on Williams's head for a few seconds falls within this category of force. We therefore affirm the district court's judgment in favor of Jeansonne. As to the burning incidents and the beating by Couvillion, however, we do not believe conduct resulting in first and second degree burns or beatings lasting fifteen minutes may be considered *de minimis*.

Defendants assert their defense of qualified immunity as an alternative grounds for affirming the district court's judgment. Williams claims that defendants waived this defense by not raising it below. Defendants included qualified immunity in their answers and also in their pre-trial order, but the defense was not discussed by the magistrate in any of his reports, nor by the district court in its ruling in favor of the defendants.

Defendants have waived this defense as grounds for affirming the judgment by not pursuing it before the magistrate and district

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[14] Hudson's injuries included bruises, swelling, loosened teeth, and a cracked dental plate. The Court found that the force causing the injuries was not *de minimis*.

court. *See Stephens v. C.I.T. Group/Equipment Financing, Inc.*, 955 F.2d 1023, 1026 (5th Cir. 1992) (defense of statute of limitations waived where raised in answer but not in pretrial order, in motion for summary judgment, at trial, or in post-trial motions); *see also Wood v. Sunn*, 852 F.2d 1205, 1208-1209 (9th Cir. 1988) (issue of qualified immunity not preserved for appeal where raised in answer but not argued at trial).

Defendants had no need to raise the issue of qualified immunity in their objections to the first magistrate's report, where the magistrate recommended judgment against them only on Williams's state law claims. In the first supplemental magistrate report, however, the magistrate recommended judgment against Bonnette, Rowe, Couvillion, and Adams for violations of the Eighth and Fourteenth Amendments; although these defendants challenged the magistrate's ruling on the significant injury requirement and his application of the Fourteenth Amendment, rather than the Eighth, to the burning incidents, they did not assert qualified immunity as a defense in their objections to this report. Further, Bonnette and Rowe failed to object to the final magistrate's report, in which the magistrate recommended liability for Fourteenth Amendment violations, on qualified immunity grounds.

Because the magistrate's second and third reports were unfavorable to these defendants and they did not raise the defense of qualified immunity in their objections to the reports, they have abandoned this defense and may not reassert it on remand. This case has been long on-going, and considered, reconsidered, and reconsidered again. It should not yet again be opened up for a new

issue that should have been raised previously. Further, because neither the magistrate nor the district court made any findings of fact or conclusions of law on this issue, the record before us will not allow affirmance of the judgment on these grounds.[15]

Counsel for defendants argue that we can affirm the dismissal of claims against Bonnette because there was insufficient evidence to support a finding that he was aware of Hayes's intent to burn Williams. Inmate Hayes testified at the evidentiary hearing before the magistrate that Bonnette was sitting at the security desk approximately twenty-five feet away when Cage let him onto the tier; he was unsure whether Bonnette heard him tell Cage what he was going to do.[16] Hayes did state that Bonnette could see him heat

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[15] Qualified immunity "shields a state official performing discretionary functions from liability in a section 1983 damages action when the officer's conduct, though perhaps later determined to have been illegal, does not violate a clearly established constitutional or statutory right of which a reasonable person would have then known." *Stevens v. Corbell*, 832 F.2d 884, 890 (5th Cir. 1987), *cert. denied*, 108 S.Ct. 2018 (1988). Although *Stevens* applied a subjective standard in a Fourth Amendment context, a standard rejected by the Supreme Court in *Graham v. Connor*, a subjective component has been established in Eighth Amendment analysis by *Wilson* and *Hudson*. We observe that the defense of qualified immunity may not be available for defendants found liable for Eighth Amendment violations, once they are found to have acted with deliberate indifference to a prisoner's rights.

[16] Hayes's testimony from the hearing is confused on whether Bonnette heard what he told Cage:

> "Q Did [Bonnette] hear what you had told Sergeant Cage?
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> A Apparently he did, you know, but I can't really say, you know, because there's a few feet from the gate to the desk, you know. It's been so may [sic] years, and I can't really say whether or not he heard him or not, so I don't know.

the water and throw it on Williams. Williams testified that Bonnette was "right there" at the time of the first burning. Bonnette claimed that the incident never occurred.

The magistrate found that Bonnette allowed Hayes onto the tier "knowingly and intentionally, and for the very purpose of letting one inmate cause harm to another." As this finding is not clearly erroneous, we decline to affirm the judgment in favor of Bonnette.

We are not persuaded by defendants' suggested grounds for affirming the district court's ruling on alternative grounds. We remand Williams's federal claims for reconsideration in light of *Hudson*.

II. Eleventh Amendment

The district court found that Williams's state law tort claims were barred by the Eleventh Amendment, based upon the decision of this Court in *Hughes v. Savell*, 902 F.2d 376 (5th Cir. 1990). In *Hughes*, we found that Louisiana law did not permit a negligence action against a prison guard in his individual capacity for

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Q . . . Do you know if Captain Bonnette heard what you told Sergeant Cage before you threw the water?

A Yeah. He was in the lobby, you know, like I said. He was sitting behind the desk, you know, and I was up at the steam table pouring water and he asked me why I was putting the water in. And I told him I was going around the tier, you know, burning [Williams]. . . .

Q Okay. How far away was Captain Bonnette when you told Cage that?

A He was right here near the door [about twenty-five feet away]."

failure to protect the plaintiff from other inmates. *Hughes*, 902 F.2d at 379 n. 5. We are bound to follow a prior decision of this Court, as is the district court, absent a contrary decision of the Supreme Court or an *en banc* decision of this Court. *In re Dyke*, 943 F.2d 1435, 1442 (5th Cir. 1991).

Hughes was distinguished in *Flowers v. Phelps*, 956 F.2d 488, 492 (5th Cir. 1992), *vacated in part*, 964 F.2d 400 (5th Cir. 1992), where the issue was whether the Eleventh Amendment barred a Louisiana state law action against a state employee in his individual capacity for his wrongful, *intentional* conduct. Although the court in *Flowers* originally held that a claim against prison guards was not barred, this portion of the opinion was withdrawn upon petition for rehearing; the court found that it was not necessary to reach the Eleventh Amendment issue in order to affirm the district court. *Flowers v. Phelps*, 964 F.2d 400, 401 (5th Cir. 1992).

We remand the Eleventh Amendment issue to the district court, observing that there will be no need to reach the issue if the court finds for Williams on his Eighth Amendment claims. In the event that the court must address this issue, however, we note that this case may be distinguished from *Hughes* on the same grounds as were discussed in the original panel decision in *Flowers*, as Williams has alleged intentional misconduct on the part of the defendants in their individual capacities.

III. Credibility Findings by the District Court

The district court rejected Williams's testimony regarding his injuries, finding that his testimony lacked credibility based upon

a review of the medical records in evidence.[17] Williams argues that the district court acted improperly in making this finding without holding a live hearing to judge the testimony and observe the witnesses. While we acknowledge the authority of the district court to reject the magistrate's findings,[18] we agree with Williams that it may not do so without holding a hearing, if the rejected findings are based upon credibility choices.

The issue of whether the district court may reject factual findings of the magistrate which are based upon credibility choices was noted but not reached by the Supreme Court in *United States v. Raddatz*, 100 S.Ct. 2406 (1980), where the Court stated:

> "The issue is not before us, but we assume it is unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach." *Id.* at 2415 n.

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[17] The district court stated in its Memorandum Ruling:

> "Not only does plaintiff's testimony seem somewhat implausible and exaggerated on its face, the court has no reason to disbelieve the medical records, as reviewed by Dr. Charles Lewis, which reflect that plaintiff seemed to be in satisfactory condition, with no swelling noted. . . . Nor is there any credible evidence to relate his subsequent complaints to the attack." *Williams v. Blackburn*, 761 F.Supp. 24, 25 n. 6 (M.D. La. 1991).

Although the court's choice was between Williams and medical documents, rather than between witnesses, Williams's credibility was at issue, because in order for the district court to accept the medical evidence, it had to disbelieve Williams's account of his injuries.

[18] As authority for the court's action, the defendants cite 28 U.S.C. section 636(b)(1), which allows a district judge to "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate."

7.

This Court considered these serious questions in *Louis v. Blackburn*, 630 F.2d 1105 (5th Cir. 1980), in the context of habeas corpus proceedings. In an opinion by Judge Reavley, this Court held that

> "in a situation involving the constitutional rights of a criminal defendant, . . . the district judge should not enter an order inconsistent with the credibility choices made by the magistrate without personally hearing the live testimony of the witnesses whose testimony is determinative." *Id.* at 1109.

The court determined that the safeguards of due process required the district court to hear the testimony himself when he made an independent evaluation of credibility. *Id.* at 1109-1110.

Although the *Louis* court limited its holding to "credibility questions involved in the determination of critical fact issues affecting a person's constitutional rights such as [those of due process and ineffective assistance of counsel]," *id.* at 1109 n. 3, Williams's Eighth Amendment rights at issue here are of the kind contemplated by *Louis*.

We direct the district court to hold an evidentiary hearing on remand of Williams's constitutional claims if it rejects factual findings of the magistrate based upon credibility choices in ruling upon these claims.

IV. Attorneys' Fees

The district court denied any award of attorneys' fees to Williams upon the dismissal of his claims. Because we remand this action to the district court for reconsideration of his Eighth Amendment claims, we must also remand the issue of attorneys' fees.

The defendants have conceded that, should the district court rule in favor of Williams on remand, the attorneys' fees issue must be considered, and evidence allowed concerning the amount of Williams's claim. The district court need not reach this issue if it does not find for Williams on his federal claims.

Conclusion

Because the district court applied the "significant injury" test which was overruled in *Hudson*, we must remand Williams's section 1983 claims for reconsideration in light of the new standard. We affirm the district court's ruling in favor of Jeansonne, as Williams concedes that Jeansonne's use of force was *de minimis*; in addition, we affirm the dismissal of Williams's claims against Blackburn, Phelps, and Scott, as Williams did not appeal the district court's ruling with respect to these defendants.

We remand the state tort claims, noting that no action is required on these claims if Williams prevails on his federal claims; the issue of attorneys' fees must also be considered on remand in the event Williams prevails on his section 1983 claims.

For the reasons stated above, we affirm in part and reverse in part and remand this action for proceedings not inconsistent with this opinion.

AFFIRMED IN PART; REVERSED AND REMANDED IN PART