No. 22-2640

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WILBERT GLOVER

Plaintiff-Appellee,

VS.

RICHARD RODRIGUEZ, ET AL.

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
Case No. 0:19-cv-00304-NEB-BRT
Hon. Nancy Brasel and Becky Thorson

BRIEF OF APPELLANT

Caitlinrose H. Fisher
Forsgren Fisher McCalmont DeMarea Tysver LLP
1750 Capella Tower
225 South Sixth Street
Minneapolis, MN 55402

Attorney for Appellee

JOHN J. CHOI
RAMSEY COUNTY ATTORNEY
Robert Roche, Reg. No. 0289589
Assistant County Attorney
121 Seventh Place East, Suite 4500
St. Paul, MN 55101
(651) 266-3230
robert.roche@co.ramsey.mn.us

Attorney for Appellant

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Plaintiff was a detainee at the Ramsey County Adult Detention Center. He alleges that during a strip-search, Defendant Officer Paul grasped and squeezed his penis and made a gesture. Plaintiff filed a civil rights claim against Defendant Paul for this alleged conduct.

The district court denied Officer Paul's motion for summary judgment on the grounds of qualified immunity. The district court erred in denying qualified immunity because substantial federal precedent holds that conduct similar to, or more egregious than the alleged conduct in this case, did not violate a detainee's civil rights. As a result, Officer Paul did not violate Plaintiff's clearly established rights and qualified immunity applies.

Officer Paul now appeals. Twenty minutes of oral argument is requested.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiff's 42 U.S.C. § 1983 and state claims pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367. In prior rulings not at issue in this appeal, the district court dismissed all of Plaintiff's claims except for an individual-capacity claim against Officer Paul for allegedly touching Appellant's penis during a search. The district court denied Officer Paul summary judgment on the grounds of qualified immunity on July 6, 2022 (Add. 035; R. Doc. 98.)

Paul timely appealed by filing a notice of appeal with the district court on August 3, 2022. (R. Doc. 100.)

This Court has jurisdiction under 28 U.S.C. § 1291 and the collateral-order doctrine to review the district court's denial of qualified immunity. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

STATEMENT OF THE ISSUES

In December of 2015, was it clearly established beyond debate that a corrections officer would violate a detainee's civil rights by allegedly grasping the inmate's penis and gesturing during a strip-search where substantial federal precedent at the time of the challenged conduct held that the same or similar conduct did not violate a detainee's rights?

- *Berryhill v. Schriro,* 137 F.3d 1073 (8th Cir. 1998)
- *Alexander v. Steele Cty. Jail*, 2014 WL 4384452 (D. Minn. 2014)
- *Obiegbu v. Werlinger*, 581 Fed. Appx. 119 (3rd Cir. 2014)
- *Solomon v. Mich. Dep't. of Corr.*, 478 Fed. Appx. 318 (6th Cir. 2012)

STATEMENT OF THE CASE AND FACTS

Plaintiff alleges that while he was a detainee at the Ramsey County Adult Detention Center on December 30, 2015, Corrections Officer Richard Paul strip-searched Plaintiff, grasped and squeezed Plaintiff's penis hard, and gestured. (App. 007; R. Doc. 4, at 6.)

On August 31, 2021, Defendant Paul moved for summary judgment on the grounds of qualified immunity. (R. Doc. 67.) On January 21, 2022, Magistrate Judge Becky Thorson issued a Report and Recommendation that Defendant Paul was not entitled to qualified immunity and that his motion for summary judgment be denied. (Add. 001; R. Doc. 81.) Defendant Paul filed objections to the Report and Recommendation on February 7, 2022. (R. Doc. 82.) On July 6, 2022, Judge Nancy Brasel overruled Defendant Paul's objections, adopted the Report and Recommendation, and issued an order denying Defendant Paul's Motion for Summary Judgment on the grounds of qualified immunity. (Add. 035; R. Doc. 98.) This appeal followed.

SUMMARY OF LEGAL ARGUMENT

The district court erred in denying qualified immunity to Officer Paul for three reasons.

First, the district court ignored a substantial body of federal precedent that holds that an alleged isolated incident of brief sexual touching of a detainee by a corrections officer during a search does not violate the detainee's civil rights. In light of this caselaw, Officer Paul's alleged conduct did not violate Plaintiff's clearly established rights and qualified immunity applies.

Second, the district court erroneously based its denial of qualified immunity on cases that post-date the challenged conduct in this case and on cases that are factually distinguishable from this case. Under Supreme Court precedent, government officials are not required to guess about potential future changes to the law and it is error to deny qualified immunity based on judicial decisions issued after the challenged conduct occurred. It is also error to deny qualified immunity based on judicial decisions that are factually distinguishable from the case at bar. The district court erred because the cases upon which it relied do not place it beyond debate that the alleged conduct in this case was unlawful as is required to defeat qualified immunity.

Third, under Supreme Court and Eighth Circuit precedent, if the federal courts are split on a legal question, then the law is not clearly established as is required to

defeat qualified immunity. Here, numerous federal courts have held that conduct similar to, or more egregious than the alleged conduct in this case did not violate a detainee's civil rights. Therefore, even assuming *arguendo* that some of the cases the district court cited to deny qualified immunity are on point, denial of qualified immunity was still error because the federal courts are split on whether an allegation of isolated touching of a detainee's private parts during a search violates the detainee's civil rights. As a result, the law is not clearly established, and qualified immunity applies.

ARGUMENT

I. Standard of Review.

This Court reviews *de novo* a denial of summary judgment on qualified immunity grounds. *Smith v. Conway Cnty., Ark.*, 759 F.3d 853, 858 (8th Cir. 2014). This Court may review an appeal of an order denying summary judgment based on qualified immunity "to the extent that it turns on an issue of law" or "challenges the district court's application of qualified immunity principles to the established summary judgment facts." *Jones v. McNeese*, 675 F.3d 1158, 1160-61 (8th Cir. 2012).

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The moving party need not produce evidence showing the absence of a genuine issue of material fact. Rather, "the burden on the moving party may be discharged by 'showing' -- that is, pointing out to the District Court -- that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has discharged this burden, the burden then shifts to the non-moving party to set forth specific facts showing a genuine triable issue. Fed. R. Civ. P. 56.

In order to create a genuine issue of material fact, the non-movant must do more than present some evidence on a disputed issue. As the Supreme Court has stated, "[t]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the [non-movant's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). Furthermore, "where the record taken as a whole could not lead a rational finder of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Electric Industrial Company v. Zenith Radio Corp.,* 475 U.S. 574, 587(1986).

II. Qualified Immunity Standard.

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Mitchell v. Forsyth*, 472 U.S. 511, 525. "Qualified immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). The privilege is "an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Id*.

Qualified immunity shields public officials and reduces "the risks that fear of personal monetary liability and harassing litigation will unduly inhibit [public] officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638

(1987). "Law-enforcement officers should not, on pain of having to pay damages out of their own pockets, be required to anticipate how appellate judges will apply maxims of constitutional adjudication about which even those judges sometimes disagree . . . it would be unworkable." *McCurry v. Tesch*, 824 F.2d 638, 642 (8th Cir. 1987).

Qualified immunity "allows officers to make reasonable errors so they do not always 'err on the side of caution'" for fear of being sued. *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996) (cleaned up). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Ambrose v. Young*, 474 F.3d 1070, 1077 (8th Cir. 2007). Qualified immunity provides "ample room for mistaken judgments" and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The applicability of qualified immunity is a question of law and, "the burden is on the plaintiff to plead and, if presented with a properly supported motion for summary judgment, to present evidence from which a reasonable jury could find the defendant officer has violated the plaintiff's constitutional rights." *Moore v. Indehar*, 514 F.3d 756, 764 (8th Cir. 2008).

Courts engage in a two-part inquiry to determine whether a public official is entitled to qualified immunity: "(1) whether the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or

statutory right; and (2) whether the right was clearly established at the time of the deprivation." *Jones*, 675 F.3d at 1161 (cleaned up). "The Defendants are entitled to qualified immunity unless the answer to both those questions is yes." *McCaster v. Clausen*, 684 F.3d 740, 746 (8th Cir. 2012). The Court may exercise its sound discretion in deciding which of these two parts should be addressed first. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

As this Court has noted, "[i]n a series of recent decisions, the Supreme Court has emphasized that for a plaintiff to overcome qualified immunity, existing precedent must have placed the constitutional question 'beyond debate." *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 989 (8th Cir. 2015) (quoting *City & Cnty. of S.F., Calif. v. Sheehan,* 575 U.S. 600, 611 (2015) (and citing *Carroll v. Carman*, 574 U.S. 13, 16 (2014); *Plumhoff v. Rickard,* 572 U.S. 765, 779 (2014); *Stanton v. Sims,* 571 U.S. 3, 6 (2013); *Ashcroft v. al–Kidd,* 563 U.S. 731, 741 (2011).)

The clearly established standard is an exacting one. As the Supreme Court has stated, there is a "longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).) Instead, the Supreme Court requires that "clearly established law must be 'particularized' to the facts of the case." *Id*. (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

The emphasis the Supreme Court placed on this point is important:

> As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Id. (citations omitted). The Court went on to explain that the lower court erred because "[i]t failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated the [Constitution]." *Id*.

A plaintiff there cannot avoid qualified immunity by referring to generalized rights such as the right to be from an overly invasive search. Instead, as this Court has held, a plaintiff is required to "show the right was clearly established ***in a particularized sense relevant to the case at hand***." *Mettler v. Whitledge*, 165 F.3d 1197, 1203 (8th Cir. 1999) (emphasis added).

Here, Plaintiff cannot show that Appellant's alleged conduct violated Plaintiff's clearly established rights. Qualified immunity therefore applies.

III. The District Court Erred In Denying Qualified Immunity Because The Alleged Conduct Did Not Violate Plaintiff's Clearly Established Rights.

As noted above, Plaintiff alleged that Defendant Paul grasped and squeezed Plaintiff's penis and made a gesture during a strip-search. The district court erred in denying qualified immunity because even taking this allegation in the light most

favorable to Plaintiff, the alleged conduct did not violate Plaintiff's clearly established rights.

A. The Alleged Brief Sexual Touching Of A Detainee By A Corrections Officer During A Search Does Not Violate The Constitution.

In *Berryhill v. Schriro,* 137 F.3d 1073, 1075 (8th Cir.1998), this Court affirmed summary judgment dismissing a civil rights claim against a corrections employee who allegedly sexually touched an inmate. In *Berryhill*, the inmate alleged a corrections employee briefly touched his buttocks in a homosexual advance. *Id*. This Court held that the alleged touching of the inmate's buttocks, unaccompanied by any sexual comments or banter, was not sexual assault required to support an Eighth Amendment claim. *Id*.

Numerous courts within the Eighth Circuit have interpreted and applied *Berryhill* as meaning that alleged brief sexual touching of an inmate by a guard during a search is not actionable.

For example, in *Bigge v. Phelps*, 2012 WL 517266, at *1-2 (E.D. Mo. Feb. 16, 2012), an inmate claimed a guard sexually groped his buttocks while patting him down on three separate occasions. The district court concluded that the allegations in that case failed to state a claim upon which relief can be granted because "[m]inor, isolated incidents of sexual touching coupled with occasional offensive sexual

remarks do not rise to the level of an Eighth Amendment violation." *Id*. (citing *Berryhill,* 137 F.3d at 1075.

In a case factually similar to the case at bar, an inmate claimed that an officer roughly grabbed his genitals during a pat-down search. *Ferguson v. Cobb*, 2017 WL 3262262 (W.D. Ark. 2017). There, the inmate testified that the officer grabbed his genitals in a very rough manner to send the inmate a message because the guard was unhappy with the inmate. *Id*. at *1. Citing *Berryhill*, the district court concluded that the brief alleged sexual touching failed to state a claim for a constitutional violation. *Id*. at *5-6.

In *Tarpley v. Stepps*, 2007 WL 844826, at *2 (E.D. Mo. 2007), an inmate alleged a guard inappropriately squeezed his buttocks during two successive pat-down searches. The inmate claimed that during the initial search, the guard squeezed his buttocks in a way that was different from a routine pat-down and which caused him to re-experience a prior sexual assault. *Id*. The inmate further claimed that as he was walking away from the initial search, he complained about the manner in which the guard performed the search. *Id*. The inmate claimed this prompted the guard to order him to return for a second search in which the guard again inappropriately squeezed his buttocks. *Id*. Citing *Berryhill*, the district court held that the alleged contact did not state a claim for a constitutional violation. *Id.*, at *6-7.

Likewise, in *Burston v. Missouri Dep't. of Corr.*, 2012 WL 139250, at *2 (E.D. Mo. Jan. 18, 2012), an inmate claimed a prison medical provider sexually fondled his buttocks and penis during a medical exam. In reviewing the inmate's *in forma pauperis* application, the district court concluded that it was doubtful the inmate could maintain a claim for the alleged sexual touching. *Id*. at * 4. Citing *Berryhill*, the court ruled that "minor, isolated incidents of sexual touching coupled with occasional offensive remarks do not usually rise to the level of [a constitutional violation.]" *Id*. at *4.

In *Smith v. Black Hawk County Jail*, 2011 WL 3444308 (N.D. Iowa 2011), a female detainee at a county jail claimed that a deputy fondled her during a pat search. Specifically, the detainee claimed the deputy squeezed the inmate's breast and "touched her private[s]" during a pat search. *Id*., at *2. The district court dismissed the sex abuse claim for failure to state claim upon which relief could be granted. *Id*., at *4. In so ruling, the court cited *Berryhill* and numerous other federal court decisions throughout the country that hold that brief sexual contact by corrections officials during a search did not violate detainee constitutional rights. *Id*. (citing *Berryhill,* 137 F.3d at 1076–77; *Boddie v. Schnieder,* 105 F.3d 857, 861 (2d Cir.1997) (allegation that female guard told male inmate he was sexy, fondled his penis during search, pinned him against wall and rubbed her breasts against inmate, and rubbed her clothed vagina against inmate failed to state claim upon which relief

could be granted); *Green v. Elias,* 9 F.3d 1551 (9th Cir.1993) (holding that allegation that female defendant grabbed the plaintiff's genitals during a clothed pat frisk insufficient to state constitutional violation)).

In *Jones v. Luedtke*, 2012 WL 3903612 (N.D. Iowa 2012), the plaintiff claimed that a corrections officer touched him inappropriately during a pat down search, made a sexual comment and offered the plaintiff extra food for two days following the inappropriate contact. *Id*., at *2. Citing *Berryhill* and a wide body of federal case law that holds that alleged isolated sexual contact during a search is not a constitutional violation, the district court dismissed for failure to state a claim. *Id*., at *4.

As recently as two years ago, a district court in this circuit held that allegations similar to those at issue in the present case were insufficient to state a claim for relief. In *Dewalt v. Bruner*, 2020 WL 1888796, at *4 (E.D. Mo. 2020), an inmate claimed that a corrections officer sexually assaulted him when the officer allegedly grabbed the inmate's genitals and ordered the inmate to move. Relying on *Berryhill*, the court concluded that the plaintiff's allegation failed to state a viable claim. *Id*.

Finally, in a case involving factual allegations virtually identical to the allegations at issue in this case, the District of Minnesota addressed whether alleged unwanted sexual touching during a pat-down search in a county jail violated a detainee's clearly established constitutional rights. *Alexander v. Steele Cty. Jail*,

2014 WL 4384452 (D. Minn. 2014). There, the inmate claimed that a corrections officer grabbed the inmate's penis and testicles during a pat-down search. *Id*. at * 13. The court held that such allegations could not survive an assertion of qualified immunity because the alleged conduct did not violate the inmate's clearly established constitutional rights. *Id*. In so ruling, the district court cited this Court's decision in *Berryhill* as holding that an allegation of brief unwanted sexual touching by prison staff failed to state a claim for a constitutional violation. *Id*.

The *Alexander* court also noted that "numerous other courts have examined precisely the factual allegation at issue in this case—that is, alleged brief sexual touching during the course of a pat-down search—and found that such instances do not rise to the level of an Eighth Amendment violation." *Id*. at 14 (citing *Tuttle v. Carroll Cnty. Detention Ctr.,* 500 Fed. Appx. 480 (6th Cir. 2010) (affirming district court's dismissal of a § 1983 claim for failure to state a constitutional claim where the plaintiff alleged a police officer "grabbed [the plaintiff's] privates and squeezed them really hard" during a pat-down search); *Rhoten v. Werholtz,* 243 Fed. Appx. 364 (10th Cir. 2007) (holding that plaintiff failed to state an Eighth Amendment claim in alleging that during a pat-down search, an officer "slammed him against the wall, squeezed his nipples real hard, squeezed his buttocks, and pulled his testicles"); *Davis v. Castleberry,* 364 F.Supp.2d 319, 321–22 (W.D.N.Y. 2005) (holding that allegation of an officer grabbing an inmate's penis during a routine pat-down search

did not state a constitutional claim and further stating that an effective pat-down search may require touching an inmate's genital area)).

As the *Alexander* court correctly observed, numerous other federal courts that have examined the issue have held that alleged brief sexual touching of a detainee by a corrections official does not state a claim for a constitutional violation. For example, in. *Williams v. Anderson*, 2004 WL 2282927, at * 1, 4 (D. Kan. 2004), the district court dismissed a claim of sexual abuse based on facts more egregious than the alleged facts in this case. There, a pretrial detainee claimed a sheriff's deputy: (i) made sexually degrading remarks to and about plaintiff and grabbed plaintiff's buttocks in a sexual manner on two occasions; (ii) came into plaintiff's cell and exposed his penis to plaintiff; (iii) rubbed a photo of plaintiff's face on his groin area and made a crude remark demanding oral sex from plaintiff; and (iv) later claimed to other detainees that plaintiff had performed oral sex on the deputy. *Id*.

The district court understandably found the alleged conduct disturbing and unacceptable, but nevertheless dismissed because applicable precedent established that the alleged conduct did not amount to a constitutional violation. *Id*. at *4. The district court based its ruling on two circuit court precedents that held that alleged brief sexual touching between a jailer and a detainee did not qualify as a constitutional violation. *Id*.

First, the district court cited *Joseph v. U.S. Fed. Bur. of Prisons*, 232 F.3d 901, 2000 WL 1532783 (10th Cir. 2000). In *Joseph*, a male inmate alleged that a female corrections employee sexually harassed him by touching him several times in a sexually suggestive manner and by exposing her breasts to him. The Tenth Circuit affirmed dismissal of the inmate's claims because it concluded the alleged incidents were not sufficiently serious to state a claim for a constitutional violation. *Id.* at *2.

Second, the district court cited *Boddie v. Schnieder*, 105 F.3d 857 (2nd Cir. 1997). In *Boddie*, which is briefly discussed above, a male inmate claimed a female guard sexually harassed him by touching his penis and telling him he was sexy, twice pinning her body against the inmate so that she was rubbing her breasts against the inmate, and then pressing her vagina against the inmate's penis. *Id*., at 859-60. The Second Circuit affirmed dismissal of the claims, holding that the isolated incidents of alleged verbal harassment and improper touching were not "objectively sufficiently serious. Nor were the incidents cumulatively egregious in the harm they inflicted." *Id*., at 861-62. The Second Circuit concluded that the alleged incidents of harassment "[did] not involve a harm of federal constitutional proportions as defined by the Supreme Court." *Id*.

Other federal courts have likewise concluded that alleged brief sexual touching of a detainee by a corrections official during a search does not violate the detainee's civil rights. For example, in *Kohn v. Piazza*, 2017 WL 9470639, at *1

(E.D. Mich. 2017), Report and Recommendation accepted 2017 WL 4081845 (E.D. Mich. 2017), a male inmate claimed he was estrogen-enhanced and had female-like breasts. The inmate claimed that a guard fondled the inmate's breasts over his shirt, pinched the inmate's nipples, and made sexual remarks during a pat-down search. *Id*. The inmate further alleged that the guard pressed the guard's midsection/penis area into the detainee and made another sexual comment. *Id*.

The district court held the defendant was entitled to qualified immunity and granted summary judgment. *Id*. The district court reasoned that "there was no clearly established law supporting Plaintiff's allegations at the time of the conduct so that a reasonable official would have understood that his actions violated Plaintiff's rights. Conversely, the clearly established law at the relevant time held that Defendant's alleged conduct did not rise to the level of an Eighth Amendment violation." *Id*. at *7 (citing *Barhite v. Sumner*, 2013 WL 6569144, at *5 (E.D. Mich. 2013) (allegation that corrections officer took hold of plaintiff's penis and testicles and pulled with extreme force while stating "how does it feel, pedophile?" failed to support claim for constitutional violation)).

Similarly, in *Griffin v. Womack*, 2013 WL 28669 (W.D. Ky. 2013), the district court dismissed a sex abuse claim that was based on alleged sexual touching during a search. There, a pretrial detainee alleged that during a search, a county corrections official groped the inmate, grabbed the inmate's crotch and penis, and looked at the

inmate's penis as numerous other guards and inmates watched. *Id*., at *5. The court ruled that the alleged conduct did not state a claim for a violation of the inmate's civil rights because "'Minor isolated incidents of touching . . . do not rise to the level of an Eighth Amendment violation.'" *Id*. (quoting *Solomon v. Mich. Dep't. of Corr.*, 478 Fed. Appx. 318, 320 (6th Cir. 2012) (citing *Boddie*, 105 F.3d at 859-61; *Young v. Poff*, 2006 WL 1455482, at *4 (W.D.N.Y. 2006 (holding that a single groping incident did not amount to constitutional violation); *Jackson v. Madery*, 158 Fed. Appx. 656, 661-62 (6th Cir. 2005) (holding that allegation of rubbing and grabbing inmate's buttocks in degrading manner did not amount to an Eighth Amendment violation) (abrogated on other grounds *Maben v. Thelen*, 887 F.3d 252 (6th Cir. 2018)).

In *Obiegbu v. Werlinger*, 581 Fed. Appx. 119 (3rd Cir. 2014), the Third Circuit affirmed dismissal of a claim for alleged sexual harassment in a case factually similar to the case at bar. In *Obiegbu*, a federal prisoner claimed he was sexually assaulted when a correctional officer allegedly grabbed his genitals twice as part of a pat-down search. *Id*. at 120. The Third Circuit that the alleged conduct of grabbing plaintiff's genitals twice during a pat-down search "was, at most, an isolated episode of harassment and touching" that did not violate the plaintiff's constitutional rights." *Id*. at 121. *See also Copeland v. Nunn*, 250 F.3d 743 (5th Cir. 2001) (reversing denial of qualified immunity for prison pharmacist who allegedly fondled inmate's testicles

on two occasions without medical reason because alleged incidents were isolated and did not implicate harm of constitutional proportions).

Finally, the Sixth Circuit affirmed dismissal of a claim for alleged sexual harassment in another case involving alleged conduct more egregious than the alleged conduct at issue in this case. In *Solomon v. Mich. Dep't. of Corr.*, 478 Fed. Appx. 318, 320-21 (6th Cir. 2012), an inmate alleged that a guard groped his penis, both inside and outside of his pants, while making sexually suggestive comments during a pat-down search. The inmate alleged that the guard squeezed his penis hard enough to cause pain. *Id*. The inmate also alleged that during a second search, the guard pressed his erect penis into the inmate's buttocks while making sexually suggestive remarks and grabbed the inmate's penis. *Id*. at 321. The Sixth Circuit concluded that these isolated incidents of sexual touching during searches, even coupled with sexual remarks did not rise to the level of a constitutional violation. *Id*.

As the above cases illustrate, Plaintiff's allegation in this case that a corrections officer grasped Plaintiff's penis and made some sort of gesture during a strip-search did not violate Plaintiff's clearly established rights. The district court therefore erred in denying summary judgment on the grounds of qualified immunity.

B. The District Court Erroneously Denied Qualified Immunity Based On Decisions That Were Decided After The Alleged Conduct In This Case And That Are Factually Distinguishable From This Case.

As this Court has stated, "[t]he entitlement to qualified immunity is judged based on the law at the time a public official makes his or her decision and does not take into account later changes in the law." *Gerlich v. Leath*, 861 F.3d 697, 710 (8th Cir. 2017) (Kelly, J. concurring) (citing *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2012) ("We did not consider later decided cases because they 'could not have given fair notice to [the officer]." (quoting *Brosseau v. Haugen*, 543 U.S. 194, 200, n.4 (2004)). *See also Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) (ruling that qualified immunity does not require officers to predict future developments in the law); *Hanlon v. Berger*, 526 U.S. 808, 810 (1999) (holding that officers were entitled to qualified immunity where law was unclear at time of challenged conduct but may have been clarified in later decisions).

Moreover, as discussed above, the Supreme Court requires that "clearly established law must be 'particularized' to the facts of the case" to defeat qualified immunity. *White*, 137 S. Ct. at 552. A denial of qualified immunity is in error where the district court fails to identify a case where an officer acting under similar circumstances as the defendant is held to violate the Constitution. *Id*.

In this case, the district court erred because it relied primarily on cases that were decided after the challenged conduct to deny qualified immunity. The district

court also erred because it relied on cases that are factually distinguishable from this case to deny qualified immunity.

For example, the district court cited *Ullery v. Bradley*, 949 F.3d 1282 (10th Cir. 2020), to support denial of qualified immunity in this case. This was error because the alleged conduct in this case occurred in 2015, and *Ullery* was not decided until 2020 – some five years later. Under *Wilson*, it was error for the district court to rely on a case decided five years after the challenged conduct to deny qualified immunity in this case. 526 U.S. at 617-18 (qualified immunity does not require officers to predict future developments in the law).

It was also error for the district court to rely on *Ullery* because the facts of *Ullery* are distinguishable from the alleged facts of this case. As discussed above, this case involves an allegation of a single incident where Officer Paul grasped and squeezed Plaintiff's penis during a strip-search and made some sort of gesture. *Ullery* did not involve alleged contact during a strip search as this case does. Moreover, *Ullery* involved repeated incidents of overtly sexual conduct that included a male guard telling the female victim he intended to masturbate and ejaculate on her, references to forced anal sex, demanding the victim expose her breasts to him, repeatedly forcefully pressing his genitals into her buttocks while moaning, and forcefully touching her breasts and groping her crotch – outside of a search context. 949 F.3d at 1286-87. In light of these significant factual distinctions,

Ullery did not clearly establish that alleged brief manual contact with a detainee's genitals during a search would violate the constitution. *White*, 137 S. Ct. at 552.

The district court also cited *DeJesus v. Lewis*, 14 F.4th 1182 (11th Cir. 2021) to support its denial of qualified immunity in this case. This was error for three reasons. First, *DeJesus* is factually distinguishable from the case at bar. This case involves an alleged incident of brief rough touching of Plaintiff's penis by a guard during a strip search. *DeJesus* did not involve similar alleged conduct. Instead, *DeJesus* involved alleged sexual assault as retaliation for writing grievances. Specifically, the *DeJesus* plaintiff alleged a guard told plaintiff he had a nice a**, body slammed the plaintiff to the ground, pulled his pants down, handcuffed him, and digitally penetrated plaintiff's anus as retaliation for writing grievances. *DeJesus*, 14 F.4th at 1189. *DeJesus* cannot be relied on to deny qualified immunity in this case because it does not involve similar alleged conduct. *White*, 137 S. Ct. at 552. Second, the alleged conduct in this case occurred in 2015. *DeJesus* was decided six years later. Third, in *DeJesus*, the court was ruling on a question of first impression. By the *DeJeus* court's own language, it was only just "begin[ning] to answer [the question of what qualifies as sexual assault] now." 14 F.4th at 1196. *DeJesus* therefore could not have put Officer Paul on notice as to the legality of his alleged conduct six years earlier in 2015. *Wilson*, 526 U.S. at 617-18 (qualified immunity does not require officers to predict future developments in the law).

The district court likewise erroneously relied on *Ricks v. Shover*, 891 F.3d 468 (3rd Cir. 2018), to support its denial of qualified immunity. The district court's reliance on *Ricks* was erroneous because *Ricks* does not involve conduct similar to the alleged conduct in this case. In *Ricks*, an inmate alleged that a guard rubbed his erect penis against the inmate's clothed buttocks and then told the inmate he was on his a**. 891 F.3d at 472. *Ricks* did not involve an allegation of brief manual sexual touching during a search as this case does. It was therefore error for the district court to deny qualified immunity based on *Ricks*. *White*, 137 S. Ct. at 552. Here again, the district court also improperly relied on a case that was decided several years after the challenged conduct in this case to deny qualified immunity in violation of *Wilson*, 526 U.S. at 617-18. Moreover, the district court ignored the fact that the *Ricks* court was deciding an issue of first impression. 891 F.3d at 473. *Ricks* therefore could not have clearly established the law at the time of the alleged conduct in this case some three years earlier. *Wilson*, 526 U.S. at 617-18.

The district court also cited *Bearchild v. Cobban*, 947 F.3d 1130 (9th Cir. 2020), to support its denial of qualified immunity in this case. This was error because, like the cases discussed above, *Bearchild* is factually distinguishable from this case, it was decided after the alleged conduct in this case, and it was ruling on a question of first impression. In *Bearchild*, an inmate claimed a guard conducted a five-minute pat-down that involved rubbing, stroking, squeezing, and groping the

inmate's intimate areas. *Id*. at 1135. The inmate further alleged that during the pat-down, the guard ordered the inmate to pull his waistband out, stared at his penis, and made a disparaging comment about the size of the inmate's genitals as other guards laughed. *Id*. There is no allegation that the strip-search in this case took any longer than necessary or that Officer Paul made any inappropriate marks during the search. *Bearchild* is therefore factually distinguishable from the case at bar, and it was error for the district court to deny qualified immunity based on *Bearchild*. *White*, 137 S. Ct. at 552.

It was also error for the district court to rely on *Bearchild* under *Wilson* and *Gerlich*, which hold that qualified immunity cannot be denied based on subsequent developments in the law. 526 U.S. at 617-18; 861 F.3d at 710. The alleged conduct in this case was in 2015. *Bearchild* was decided approximately five years later. Moreover, the *Bearchild* court acknowledged that it had not previously defined sexual assault for constitutional purposes and was providing a new definition. 947 F.3d at 1144-45. *Bearchild* therefore could not have put Officer Paul on notice as to the legality of his alleged conduct five years earlier for qualified immunity purposes.

As noted above, in a case decided shortly before the challenged conduct in this case, the District of Minnesota held that conduct virtually identical to Officer Paul's alleged conduct did not violate the Constitution. *Alexander*, 2014 WL 4384452. The district court erroneously dismissed *Alexander* because it concluded

that "recent case law in other circuits" made it clear that alleged sexual assault claims should be analyzed as excessive force claims instead of as conditions of confinement claims. (R. Doc. 98, at 6, n.4 & 5; Add. 40.)

This was clearly error under *Gerlich* and *Wilson* which, as previously noted, hold that government officials do not need to guess about potential future developments in the law for purposes of qualified immunity. 861 F.3d at 710; 526 U.S. at 617-18. Under the district court's reasoning, Officer Paul should have acted as an appellate court and decided *sua sponte* that a decision from the federal district court in the jurisdiction where he worked was in error because later decisions in different jurisdictions would apply a different legal standard. This is clearly not required under this Court's and the Supreme Court's precedent. The district court therefore erred in ignoring a case that was issued shortly before the conduct at issue in this case that held that conduct virtually identical to Officer Paul's alleged conduct did not violate the Constitution.

The remaining cases the district court relied on in denying qualified immunity do not support the district court's decision because the cases are distinguishable from the case at bar.

For example, the district court cites *Kahle v. Leonard*, 477 F.3d 544 (8th Cir. 2007) to support its denial of qualified immunity. But *Kahle* did not involve an alleged isolated incident of touching a detainee's private parts during a search as this

case does. Instead, in *Kahle*, a detainee claimed a jailer entered her cell three times, forcibly kissed her, forcibly removed her pants, forcibly performed oral sex on her, and then rubbed his genitals against hers. *Id*. at 548. *Kahle* cannot be relied on to deny qualified immunity in this case because it does not involve conduct similar to the alleged conduct in this case. *White*, 137 S. Ct. at 552.

Washington v. Hively, 695 F.3d 641 (7th Cir. 2012) is likewise distinguishable from the case at bar. That case involved allegations of repeated instances of gratuitous fondling of plaintiff's testicles during an unjustified search. *Id*. This case involves an allegation of a single incident of alleged grasping of Plaintiff's penis during a strip search. There is no allegation and no evidence of repeated conduct or that the strip search was unjustified in this case. This case is therefore factually distinguishable from *Washington* and *Washington* cannot be relied on to defeat qualified immunity.

Moreover, in *Washington*, the Seventh Circuit ruled that an unwanted touching of person's private parts can violate a detainee's constitutional rights if the touching is intended to humiliate the victim or gratify the assailant's sexual desires. *Id*. at 643. Here, Plaintiff has not produced any admissible evidence that Officer Paul's alleged touching of his penis in the course of a strip search was intended to humiliate the victim or gratify any sexual desires. *Washington* is therefore not on

point and cannot be relied on to deny qualified immunity in this case. *White*, 137 S. Ct. at 552.

The district court's reliance on *Crawford v. Cuomo*, 796 F.3d 252 (2nd Cir. 2015), was likewise erroneous because the facts of that case are distinguishable from the facts of the case at bar. In *Crawford*, there were two alleged incidents of sexual abuse by a guard. In the first instance, the guard allegedly pulled an inmate from a visit with the inmate's wife in the middle of the visit and told the inmate he was going to make sure the inmate did not have an erection, and then paused to fondle and squeeze the inmate's penis. *Id*. at 258. The Second Circuit noted that the timing of the frisk in the middle of the visit instead of the beginning or end, coupled with the stated reason of checking if the inmate had an erection suggested that the first incident was pretext for sexual abuse.

In the second incident, the guard allegedly paused during a search to fondle an inmate's penis. *Id*. at 255. The guard also allegedly roamed his hands down the inmate's thigh, stated he would "run [his] hands up the crack of [the inmate's] a** if I want to," made a disparaging comment about the inmate's penis, and subsequently taunted the inmate about having seen his penis. *Id.* at 258-59. The Second Circuit held that the guard's demeaning and sexual comments suggested that the guard undertook the search to arouse himself or to humiliate the inmate. *Id*. at 259.

Here, there is no allegation or evidence that the search was for an improper purpose as there was in *Crawford*. There is also no suggestion or evidence that Officer Paul made any inappropriate or demeaning comments during the search that would suggest the search was a pretext for sexual abuse as there was in *Crawford*. Although Plaintiff has alleged Officer Paul made a gesture, Plaintiff has not offered any evidence to describe what the gesture was. Plaintiff has also not offered any evidence from which a factfinder could conclude the gesture was in any way sexual. As a result, there is no evidence that the alleged contact in this case was for the purpose of arousing Officer Paul or humiliating Plaintiff. *Crawford* is therefore distinguishable from the case at bar and does not support the denial of qualified immunity. *White*, 137 S. Ct. at 552.

Finally, the district court's reliance on *Berry v. Blankenship*, 143 F.3d 1127 (8th Cir. 1998) was erroneous because *Berry* involved conduct different from the alleged conduct at issue in this case. *Berry* involved claims of sexual abuse by a female inmate against two different guards. The first claim involved an allegation of rape which is clearly not at issue in the case at bar. *Id*. at 1129. The claim against the second guard alleged repeated nonroutine pat-downs, the guard propositioning the inmate for sex, the guard intruding on the inmate while not dressed, and the guard subjecting the inmate to sexual comments. *Id*., at 1131. As previously noted, the case at bar includes an allegation of a single incident of manual contact with Plaintiff's

penis during a strip-search. There is no evidence or allegation of repeated conduct or that the search itself was improper. There is no evidence Officer Paul made any sexual comments or propositioned Plaintiff. *Berry* is therefore distinguishable and cannot be relied on to deny qualified immunity on the facts of this case. *White*, 157 S. Ct. at 552.

The district court improperly relied on cases that post-date the alleged conduct in this case and on cases that are factually distinguishable from the allegations in this case to support its denial of qualified immunity. This was error under *Gerlich*, 861 F.3d at 710, and *White*, 137 S. Ct. at 552. The order denying qualified immunity should therefore be reversed.

C. Even Assuming *Arguendo* That Some Of The Cases The District Court Cited Are On Point, Qualified Immunity Applies Because The Courts Are Split And The Law Is Not Clearly Established.

Under the Supreme Court's qualified immunity jurisprudence, qualified immunity applies unless the law is so settled and clear that "*every 'reasonable official* would [have understood] that what he is doing violates that right." *al-Kidd*, 563 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. at 640) (emphasis added).

Both the Supreme Court and this Court have logically interpreted this jurisprudence to mean that where the federal courts themselves are split on an issue, it cannot fairly be said the law is clearly established such that every reasonable official is on notice as to the legality of their conduct. *See, e.g., Wilson v. Layne*, 526

U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy"); *Lange v. California*, 141 S. Ct. 2011, 2019-20 (2011) (where courts were split on legality of police officer entry into fleeing misdemeanant's home, law was not clearly established and qualified immunity applied); *Reichle v. Howards*, 566 U.S. 658, 669-70 (2012) (where federal courts were split on whether civil rights claims for retaliatory arrest required a lack of probable cause, law was not clearly established and qualified immunity applied); *Winters v. Adams*, 254 F.3d 758, 766 (8th Cir. 2001) (where question of whether police community caretaking function was valid alternative to reasonable suspicion to briefly detain individual was still subject of debate in the courts, law was not clearly established and qualified immunity applied).

As discussed above, numerous federal courts have held that conduct similar to, or more egregious than, the alleged conduct in this case did not violate a detainee's civil rights. *See, e.g., Berryhill,* 137 F.3d at 1075 (allegation that corrections officer briefly touched inmate's buttocks as sexual advance failed to state claim for violation of civil rights); *Boddie,* 105 F.3d at 861 (allegation that female guard told male inmate he was sexy, fondled his penis during search, pinned him against wall and rubbed her breasts against inmate, and rubbed her clothed vagina against inmate failed to state claim upon which relief could be granted); *Green,* 9

F.3d 1551 (allegation that female defendant grabbed the plaintiff's genitals during a clothed pat frisk insufficient to state constitutional violation); *Dewalt*, 2020 WL 1888796, at *4 (allegation that corrections officer grabbed inmate's genitals and ordered inmate to move failed to state claim for civil rights violation); *Alexander*, 2014 WL 4384452 at * 13 (allegation that corrections officer grabbed inmate's penis and testicles during pat-down search could not survive assertion of qualified immunity); *Tuttle,* 500 Fed. Appx. 480 (allegation that police officer "grabbed [the plaintiff's] privates and squeezed them really hard" during a pat-down search failed to state claim for civil rights violation); *Rhoten*, 243 Fed. Appx. 364 (plaintiff failed to state constitutional claim in alleging that during a pat-down search, an officer "slammed him against the wall, squeezed his nipples real hard, squeezed his buttocks, and pulled his testicles"); *Joseph*, 232 F.3d 901(allegation that female corrections officer sexually harassed male inmate by touching him in sexually suggestive manner several times and by exposing her breasts to him failed to state claim); *Obiegbu*, 581 Fed. Appx. at 120-21 (allegation that corrections officer grabbed inmate's genitals twice during pat-down search failed to state civil rights claim); *Copeland*, 250 F.3d 743 (concluding that two isolated incidents where prison pharmacist allegedly fondled inmate's testicles without medical need failed to implicate harm of constitutional proportions); *Solomon*, 478 Fed. Appx. at 320-21 (allegation that guard pressed his erect penis into inmate's buttocks while making

sexual comments, groped inmate's penis inside and outside pants during pat-down search while making sexual comments, and squeezed inmate's penis hard enough to cause pain failed to state claim for constitutional violation).

As the above-cited cases illustrate, a significant number of federal courts hold that conduct similar to, or even more egregious than the conduct at issue in this case is not a violation of a detainee's civil rights. As a result, even assuming *arguendo* that some of the cases the district court cited to deny qualified immunity in this case are on point, denial of qualified immunity was still error because the federal courts are split on whether an allegation of isolated touching of a detainee's private parts during a search violates a detainee's civil rights. The law therefore is not clearly established and qualified immunity applies.

CONCLUSION

For the reasons discussed above, Defendant Paul respectfully requests that this Court reverse the district court's denial of qualified immunity and remand with instructions to enter summary judgment in his favor.

JOHN J. CHOI
RAMSEY COUNTY ATTORNEY

Dated: September 27, 2022

By: */s Robert B. Roche*
Robert B. Roche (#0289589)
Assistant County Attorney
121 Seventh Place East, Suite 4500
St. Paul, MN 55101
Telephone: 651-266-3230
Fax: 651-266-3032
robert.roche@co.mn.us

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), this brief complies with the type – volume limitations of Fed. R. App. R. 32(a)(7). The brief was prepared using Microsoft Office Word 2016. According to the word count utility feature, this brief contains 7,717. This brief uses proportional font "Times New Roman" in 14-point type, satisfying Fed. R. App. P. 32(a)(5). Pursuant to 8th Cir. L.R. 28(a)(h)(2), this brief was scanned for viruses and is virus free.

JOHN J. CHOI
RAMSEY COUNTY ATTORNEY

Dated: September 27, 2022

By: */s Robert B. Roche*
Robert B. Roche (#0289589)
Assistant County Attorney
121 Seventh Place East, Suite 4500
St. Paul, MN 55101
Telephone: 651-266-3230
Fax: 651-266-3032
robert.roche@co.mn.us

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s Robert B. Roche