

Slip Copy, 2007 WL 257342 (C.A.11 (Ala.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 2007 WL 257342 (C.A.11 (Ala.)))

F.3d at 1063, 1065-66.

*2 In this case, recognizing Appellant's claims as cognizable would necessarily imply the invalidity of his conviction because it would undermine the validity of the underlying indictment. The basis of Appellant's claims against the judges of the Alabama Court of Criminal Appeals is that they refused to declare that the term "unlawfully" was an essential element of his offense and that his indictment was therefore defective. What Appellant essentially seeks by filing this § 1983 action is for a federal court to exercise direct appellate review over state criminal courts. Appellant specifically asks for a federal district court to declare that "unlawfully" was an essential element of his state criminal offense and that he is entitled to a hearing in state court to prove this legal theory. Granting such relief would contradict the purpose of the rule in *Heck*: "to limit the opportunities for collateral attack on state court convictions because such collateral attacks undermine the finality of criminal proceedings and may create conflicting resolutions of issues." *Id.* at 1065 (citing *Heck*, 114 S.Ct. at 2371).

"[W]e may affirm the district court as long as the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court." *Ochran v. United States*, 273 F.3d 1315, 1318 (11th Cir.2001) (citation and quotation marks omitted). Because Appellant's § 1983 claim would necessarily imply the invalidity of his conviction and because Appellant cannot demonstrate that his conviction already has been invalidated, Appellant's claims are barred under *Heck*. Therefore, the district court's judgment dismissing Appellant's complaint is

AFFIRMED.

C.A.11 (Ala.),2007.
Esensoy v. McMillan
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END OF DOCUMENT



328 Fed.Appx. 107, 2009 WL 1459685 (C.A.3 (Pa.))
(Not Selected for publication in the Federal Reporter)
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H
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Third Circuit LAR, App. I, IOP 5.7. (Find CTA3 App. I, IOP 5.7)

United States Court of Appeals,
Third Circuit.
John E. FELGAR

v.

Jeffrey D. BURKETT, Individually, and as District Attorney at Jefferson County; Tonya S. Geist, Individually, and as Prothonotary of Jefferson County; John Doe # 1, Sued in his individual capacity; Lavieta Lerch, Sued Individually; Larry Straitiff, Individually, and as Chief Probation Officer at Jefferson County; Gregory Bazylak, Individually, and as Assistant District Attorney at Jefferson County; John Engros, Individually, and as Public Defender of Jefferson County; Fred Hummel, Individually, and as Court Appointed Counsel at Jefferson County; Daniel Ogden, Sued Individually; (First Name Unknown) Dunkle, Sued Individually; John Doe # 2, Sued Individually; John Doe # 3, Sued Individually; Marilyn Brooks, Sued Individually; William Harrison, Sued Individually; Beth Miller Klauk, Sued Individually; C. (FNU) Gill, Sued Individually; Patricia Thompson, Sued Individually; James Noon, Jr., Sued Individually; Mr. (First Name Unknown) Bryant, Sued Individually; Michael Clark, Sued Individually; Sharon Burks; William Barr, Sued Individually; Ms. (First Name Unknown) Carson, Sued Individually; Ms. (First Name Unknown) Gamble, Sued Individually; Patricia McKissock, Sued Individually; Jeffrey Beard, Sued Individually; William Stickman, Sued Individually; Gerald Pappert, Sued Individually; Thomas W. Corbett, Jr., Sued Individually; Robert Englesburg, Sued Individually; ALEXander Mericli, Sued Individually; Susan J. Forney, Sued Individually; Sher-

iff Thomas Demco; Christopher Shaw; Carl Gotwald; Kirk Brund.
No. 08-4089.

Submitted for Possible Dismissal Pursuant to 28 U.S.C. § 1915(e)(2) or Possible Summary Action Pursuant to Third Circuit LAR 27.4 and I.O.P. 10.6 May 7, 2009.
Opinion filed: May 27, 2009.

Background: State prisoner brought pro se § 1983 action against Department of Corrections and Attorney General defendants alleging defendants violated his Fifth, Eighth, and Fourteenth Amendment rights by confining him in violation of the terms of an amended sentencing order. The United States District Court for the Western District of Pennsylvania, Sean J. McLaughlin, J., 2008 WL 4279752, dismissed the complaint. State prisoner appealed.

Holding: The Court of Appeals held that state prisoner could not bring claims via a § 1983 action. Affirmed.

West Headnotes

Civil Rights 78 ↪ 1088(5)

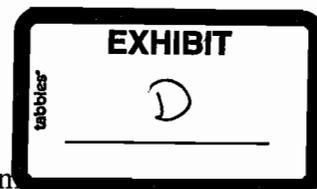
78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1088 Police, Investigative, or Law Enforcement Activities

78k1088(5) k. Criminal Prosecutions. Most Cited Cases

A finding that Department of Corrections (DOC) and Attorney General defendants violated state prisoner's Fifth, Eighth, and Fourteenth Amendment rights by confining him in violation of the terms of an amended sentencing order would have necessarily demonstrated the invalidity of state prisoner's sentence, and therefore state prisoner could not bring those claims via a § 1983 action, where the state sentence had not been overturned or



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otherwise rendered invalid. U.S.C.A.
Const.Amends. 5, 8, 14; 42 U.S.C.A. § 1983.

***108** On Appeal from the United States District Court for the Western District of Pennsylvania (D.C. No. 1-07-cv-00268), District Judge: Honorable Sean J. McLaughlin. Kemal A. Mericli, Esq., Office of Attorney General of Pennsylvania, Pittsburgh, PA, for Marilyn Brooks, James Noon, Jr., Bryant, Michael Clark, Sharon Burks, William Barr, Carson, Gamble, Patricia McKissock, Jeffrey Beard, William S. Stickman, Gerald Pappert, Thomas W. Corbett, Jr., Robert Englesburg, Alexander Mericli, Susan J. Forney.

John E. Felgar, Chester, PA, pro se.

Michael R. Lettrich, Esq., Meyer, Darragh, Buckler, Bebenek & Eck, Pittsburgh, PA, for Jeffrey D. Burkett, Tonya S. Geist, Lavieta Lerch, Larry Straitiff, Fred Hummel, Daniel Ogden, Dunkle, Marilyn Brooks, William Harrison, Beth Miller Klauk, C. Gill, Patricia Thompson, James Noon, Jr., Bryant, Michael Clark, Sharon Burks, William Barr, Carson, Gamble, Patricia McKissock, Jeffrey Beard, William S. Stickman, Gerald Pappert, Thomas W. Corbett, Jr., Robert Englesburg, Alexander Mericli, Susan J. Forney, Thomas Demco, Christopher Shaw, Carl Gotwald, Kirk Brundock.

Before: BARRY, AMBRO and SMITH, Circuit Judges.

OPINION

PER CURIAM.

****1** Appellant, John E. Felgar, appeals from the District Court's order dismissing his complaint. For the following reasons, we will affirm.

I.

In 1997, Felgar pleaded guilty to charges in Jeffer-

son County, Pennsylvania of aggravated assault and driving under the influence of alcohol. The trial court sentenced him to a term of 2-4 years' imprisonment, with a maximum sentence date of November 11, 2001. In June 2000, Felgar was released on parole.

The following year, while he was on parole, Felgar was arrested for physically assaulting his girlfriend and threatening to kill her. Because the arrest violated the terms of his parole, Felgar was returned to prison to serve out the remainder of his sentence. On November 11, 2001, when he reached the maximum sentence date for his 1997 offenses, Felgar was turned over to police on a detainer issued for the 2001 incident with his girlfriend. Felgar was then charged with simple assault, terroristic threats, and reckless endangerment.

On August 22, 2002, Felgar appeared before Jefferson County Common Pleas Court Judge Foradora and entered into a negotiated plea agreement on these charges. Specifically, Felgar pleaded guilty to simple assault and terroristic threats, and the Commonwealth agreed to nolle pros the reckless endangerment charge. The parties agreed that Felgar would serve 6-24 months' imprisonment on the simple assault charge, but that he would be required to serve only five years' probation on the terroristic threats charge. After the hearing, Judge Foradora signed two orders to impose these sentences: one for the simple assault sentence, and one for the suspended sentence on the terroristic threats charge. It appears, however, that, due to a clerical error, the captions on both of the orders read "simple assault." Therefore, on August 26, 2002 Judge Foradora issued an "Order Correcting Written Sentence Order of August 22, 2002." As the District Court explained, ***109** this amended order only compounded the confusion; rather than correcting the caption of the order reflecting the suspended sentence for terroristic threats, the order changed the caption on the other order.^{FN1} As a result, the charges on the sentencing orders were reversed. On August 29, 2002, Felgar began serving his sentence at the State

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Correctional Institution at Pittsburgh, Pennsylvania.
FN2

FN1. According to Felgar, the amended order stated that, "the sentence order of August 22, 2002, incorrectly lists the charge of simple assault when it should be charged as terroristic threats. It is hereby Ordered that the written sentence Order of August 22, 2002, is corrected to list the charge as terroristic threats." (Am.Compl.¶ 52.)

FN2. Meanwhile, the Pennsylvania Board of Probation and Parole determined that Felgar was a convicted parole violator, and ordered him to serve, as "back time" on his 1997 sentence, 12 of the months during which he had been released on parole.

In November 2002, Felgar filed a petition pursuant to Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa.C.S. § 9541, et seq., in the Court of Common Pleas of Jefferson County alleging that his sentence was illegal because it failed to comply with the terms of Judge Foradora's orders. The court denied the petition, and the Superior Court affirmed.

Next, in July 2004, Felgar filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Western District of Pennsylvania raising several challenges to his sentence. The District Court denied the petition, and this Court denied his application for a certificate of appealability.

**2 Felgar ultimately served the maximum 24-month term of imprisonment on the simple assault conviction, plus an additional twelve months of back time on the parole revocation sentence. Felgar was released from prison on October 10, 2005. FN3

FN3. Felgar was later recommitted on unrelated charges. It is not clear whether he

fully served the five-year term of probation on the terroristic threats charge.

II.

On October 5, 2007, Felgar filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Western District of Pennsylvania in which he essentially alleged that he is being unlawfully confined due to the confusion surrounding his August 26, 2003 amended sentencing order.^{FN4} Felgar claims that he should have been released on probation immediately after his sentencing hearing because, "whether the label being simple assault or whether it being terroristic threats, the [August 26, 2002 amended order] specifically states that the sentence is suspended and The Defendant be placed on Probation for 5 (five) years." (Am.Compl.¶¶ 53-54.) Felgar argues that the DOC Defendants have violated his Fifth, Eighth, and Fourteenth Amendment rights by refusing to release him "despite their knowledge of a court order suspending [his] sentence of incarceration and placing him on [five years'] probation." (Am.Compl.¶ 101.) Felgar also claimed that the AG Defendants had violated his Fifth, Eighth, and Fourteenth Amendment rights by attempting to conceal his wrongful commitment, and that various members of the Jefferson County District Attorney's office were negligent.^{FN5} (Am.Compl.¶¶ 80-*110 81). Felgar sought declaratory and injunctive relief as well as monetary damages.

FN4. Felgar filed an amended complaint on January 23, 2008.

FN5. Felgar further alleged that the AG Defendants had conspired with state officers "to commit the torts of malice and negligence" by submitting fraudulent evidence in the habeas proceedings. (Am.Compl.¶¶ 102-03.)

Both the DOC and AG Defendants moved to dismiss the Amended Complaint. The matter was re-

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ferred to a Magistrate Judge who recommended that the District Court dismiss the case for lack of subject matter jurisdiction. The court agreed, and, by order entered September 15, 2008, dismissed the Amended Complaint on the ground that the matter was frivolous and failed to state a claim upon which relief could be granted.^{FN6} See 28 U.S.C. § 1915(e)(2)(B). This appeal followed.^{FN7}

FN6. As a result, the court then dismissed the DOC's and AG's motions as moot. The District Court also dismissed Felgar's claims against unnamed defendant "John Doe # 1" because Felgar had failed to identify and serve this defendant within the requisite period, see Fed.R.Civ.P. 4(m), and because continued pursuit of Felgar's claims against the defendant would be frivolous.

FN7. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

III.

Upon review, we conclude that the District Court's dismissal of the Amended Complaint for lack of subject matter jurisdiction was proper.^{FN8} It is well-settled that, when, as in this case, a state prisoner is challenging the fact or duration of his confinement, his sole federal remedy is a writ of habeas corpus, not a § 1983 action. *Preiser v. Rodriguez*, 411 U.S. 475, 500, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973); *Williams v. Consovoy* 453 F.3d 173, 177 (3d Cir.2006). In *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), the Supreme Court held that, when success in a § 1983 action would implicitly call into question the validity of a conviction or the duration of a sentence, the plaintiff must achieve a favorable result through available state or federal challenges to the underlying conviction or sentence before he may proceed under § 1983. Considering *Heck* and summarizing the interplay between habeas and § 1983 claims, the Supreme Court recently explained

that:

FN8. We may affirm the District Court's decision on an alternative basis supported by the record. See *Erie Telecomms. v. Erie*, 853 F.2d 1084, 1089 (3d Cir.1988).

****3** [A] state prisoner's § 1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)-if success in that action would necessarily demonstrate the invalidity of the confinement or its duration.

Wilkinson v. Dotson, 544 U.S. 74, 81-82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005) (emphasis in original).

Thus, the threshold inquiry in determining whether § 1983 is a proper vehicle for Felgar's complaint is whether success in this § 1983 action would "necessarily demonstrate" the invalidity of his sentence. We answer this question in the affirmative because success on Felgar's claims against the DOC and AG Defendants-*i.e.*, a finding that the defendants violated his Fifth, Eighth, and Fourteenth Amendment rights by confining him in violation of the terms of Judge Foradora's August 26, 2002 amended sentencing order-would necessarily demonstrate the invalidity of his sentence. Accordingly, because the state sentence has not been overturned or otherwise rendered invalid, Felgar may not attack it via a § 1983 action, and the District Court's dismissal of his claims was proper.^{FN9}

FN9. To the extent that Felgar alleged that certain defendants committed various torts against him, (Am.Compl.¶¶ 95-103), the District Court did not err in declining to exercise supplemental jurisdiction over these state-law claims once it dismissed the § 1983 claims. See 28 U.S.C. § 1367(c)(3).

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*111 IV.

For the foregoing reasons, we conclude that the District Court's decision to dismiss the Amended Complaint was proper. Accordingly, as there is no substantial question presented by this appeal, we will summarily affirm. *See* Third Cir. LAR 27.4; I.O.P. 10.6. Felgar's motion for appointment of counsel and his motion for sanctions are denied. ^{FN10}

FN10. After the Clerk informed Felgar that this appeal would be submitted to a panel for determination under 28 U.S.C. § 1915(e)(2) or for summary action under Third Circuit LAR 27.4 and I.O.P. 10.6., Felgar submitted a "Memorandum of Law" in support of his appeal. After several appellees responded to Felgar's submission, Felgar requested that the Court "order sanctions against [appellees'] counsel for the misleading statements in their [response] and to compensate [him] for cost of attorneys fees at \$200.00 per hour for two hours of unnecessary litigation, and to cease from any further frivolous filings to the court." (Motion dated February 8, 2009 ¶ 13.) This motion is denied.

C.A.3 (Pa.),2009.
Felgar v. Burkett
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Slip Copy, 2010 WL 4513408 (D.Kan.)
(Cite as: 2010 WL 4513408 (D.Kan.))

Only the Westlaw citation is currently available.

United States District Court,
D. Kansas.

Eddie MENDIA, Plaintiff,
v.

CITY OF WELLINGTON, a municipal corporation;
State of Kansas Officers Bronson Lee Campbell,
Bill Upton, and Kurt R. Vogel, all individually
and in their official capacity, Defendants.

Civil Action No. 10-1132-MLB.

Nov. 2, 2010.

Eddie Mendia, Wichita, KS, pro se.

Dallas L. Rakestraw, Edward L. Keeley, McDonald,
Tinker, Skaer, Quinn & Herrington, PA,
Wichita, KS, for Defendants.

MEMORANDUM AND ORDER

MONTI BELOT, District Judge.

*1 This matter comes before the court on defendants' motion to dismiss. (Doc. 38). The matter has been fully briefed and is ripe for decision. (Docs.39, 45, 50). Defendants move to dismiss plaintiff's complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6). For the reasons stated below, defendants' motion to dismiss is granted.

Plaintiff has also filed a motion to clarify and define the issues. (Doc. 37). Plaintiff requests clarification as to what claims remain before the court and what claims are remanded back to the state. Because the court has granted defendants' motion to dismiss on all plaintiff's federal claims and declines to exercise supplemental jurisdiction on his state claims, *see infra*, there are no remaining claims before the court and none that are remanded to the state.

I. BACKGROUND

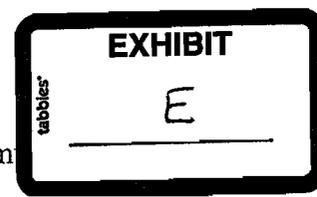
On September 6, 2008, plaintiff was cited for failing to yield in Wellington, Kansas. On November 12, 2008, plaintiff was convicted in Wellington Municipal Court for failing to yield in violation of Wellington City Ordinance 39-76. Plaintiff appealed his conviction to the Sumner County District Court and was found guilty on February 27, 2009. Plaintiff did not seek direct appeal in the Kansas appellate courts.

Plaintiff originally filed the present case in Sumner County District Court alleging racial profiling and essentially, an illegal traffic stop, which violated plaintiff's federal and state Constitutional rights. (Doc. 1, exh. A). Defendants removed plaintiff's case on April 27, 2010.

II. PLAINTIFF'S PRO SE STATUS

The court is mindful that plaintiff is proceeding *pro se*. It has long been the rule that *pro se* pleadings, including complaints, must be liberally construed. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 & n. 3 (10th Cir.1991); *Hill v. Corrections Corp. of America*, 14 F.Supp.2d 1235, 1237 (D.Kan.1998). This rule requires the court to look beyond a failure to cite proper legal authority, confusion of legal theories, and poor syntax or sentence construction. *See Hall*, 935 F.2d at 1110. Liberal construction does not, however, require this court to assume the role of advocate for the *pro se* litigant. *See id.* A plaintiff is expected to construct his own arguments or theories and adhere to the same rules of procedure that govern any other litigant in this district. *See id.*; *Hill*, 14 F.Supp.2d at 1237. A *pro se* litigant is still expected to follow fundamental procedural rules. *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir.1994).

III. ANALYSIS



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1. 12(b)(1)

Plaintiff's § 1983 and Fourth Amendment Claims

Plaintiff brings a claim under 42 U.S.C. § 1983 alleging that defendants' traffic stop violated his Fourth Amendment right to be free from illegal searches and seizures. Defendants claim that the court lacks subject matter jurisdiction over plaintiff's § 1983 and Fourth Amendment claims under *Heck v. Humphrey*, 512 U.S. 477 (1994).

*2 The Supreme Court held in *Heck* that:

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

512 U.S. at 486-87. If the court determines that judgment in favor of plaintiff would imply the invalidity of his conviction, then the court must dismiss plaintiff's § 1983 claim if his conviction has not been invalidated. *Id.* at 487.

Judgment in favor of plaintiff on his § 1983 claim would imply that he was wrongfully convicted because the underlying traffic stop and citation were illegal. Plaintiff has not demonstrated that his conviction has been reversed on direct appeal, expunged, or declared invalid by any state tribunal. The court must dismiss plaintiff's § 1983 claim. Furthermore, plaintiff's Fourth Amendment claims based on the allegedly illegal traffic stop are related to his § 1983 claim and must also be dismissed.

2. 12 (b)(6)

The remaining portion of defendants' motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6). The standards this court must utilize upon a motion to dismiss are well known. To withstand a motion to dismiss for failure to state a claim, a complaint must contain enough allegations of fact to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1953 (2009) (expanding *Atl. Corp. v. Twombly*, 550 U.S. 544, (2007) to discrimination suits); *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir.2008). All well-pleaded facts and the reasonable inferences derived from those facts are viewed in the light most favorable to the plaintiff. *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir.2008). Conclusory allegations, however, have no bearing upon this court's consideration. *Shero v. City of Grove, Okla.*, 510 F.3d 1196, 1200 (10th Cir.2007). In the end, the issue is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir.2005).

Plaintiff's Fourteenth Amendment Claim

Plaintiff alleges that defendants violated his right to equal protection under the Fourteenth Amendment.

"[P]laintiff must demonstrate that the defendant[s]' actions had a discriminatory effect and were motivated by a discriminatory purpose, *United States v. Armstrong*, 517 U.S. 456, 465 (1996). These standards have been applied to traffic stops challenged on equal protection grounds. (Citations omitted). The discriminatory purpose need not be the only purpose, but it must be a motivating factor in the decision.

*3 *Marshall v. Columbia Lea Regional Hosp.*, 345 F.3d 1157, 1168 (10th Cir.2003). Because of the costs involved in defending allegations of discrimination, "the Supreme Court has held that 'to dispel the presumption that a prosecutor has not violated

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equal protection, a criminal defendant must present clear evidence to the contrary.’ “ *Id.* at 1167 (citing *Armstrong* 517 U.S. at 465). The Tenth Circuit applies this same high standard to claims of racially discriminatory traffic stops. *Id.*

1. Discriminatory Purpose

Plaintiff claims that defendants engaged in racial profiling and stopped him because he was Hispanic. Plaintiff alleges that Officer Campbell knew his gender and national origin prior to stopping him. (Doc. 1, exh. 1 at 3). Plaintiff also alleges that Officer Campbell stated “[I]ooks like we get to run over a Mexican tonight[]” and “[y]ou’re luck we aren’t running over Mexicans tonight.” (Doc. 1, exh. 1 at 14, 16).

Defendants do not deny that Officer Campbell knew plaintiff’s race prior to stopping him and although defendants deny that Officer Campbell made the discriminatory statements, they assume for purposes of this motion only that the statements were in fact made. Regardless, defendants claim that Officer Campbell decided to stop plaintiff because he failed to yield the right-of-way. Furthermore, Officer Campbell field tested plaintiff because he stated that he had been drinking all day. Plaintiff’s race was not a factor.

The court has read *Marshall* and other cases addressing claims of racial profiling. The courts in those cases all considered whether the defendant officer knew the driver’s race prior to the traffic stop. Defendants do not dispute plaintiff’s allegation that Officer Campbell knew his race prior to stopping him. The court has watched the video of the traffic stop and it does not show when Officer Campbell saw plaintiff’s vehicle fail to yield the right-of-way.^{FN1} Additionally, the video does not pick up defendants’ conversation with plaintiff.

FN1. Officer Campbell did not turn on his video equipment until he turned around and activated his emergency lights, which

occurred after plaintiff’s traffic violation.

It is a close call on the issue of discriminatory purpose. Plaintiff has offered some direct and circumstantial evidence that Officer Campbell discriminated against plaintiff. At this early stage, the court makes all inferences and factual findings in favor of plaintiff, which defendants recognize.

2. Discriminatory Effect

Even if the facts are sufficient to infer discriminatory intent, plaintiff has not provided evidence of a discriminatory effect. “To establish discriminatory effect, a [driver] asserting race-based selective enforcement in a traffic stop or arrest must ‘make a credible showing that a similarly-situated individual of another race could have been, but was not, [stopped or] arrested ... for the offense for which the defendant was [stopped or] arrested.’ “ *McNeal v. Losee*, No. 08-2472-CM, 2009 WL 1580274, at *6 (D. Kan. June 3, 2009) (quoting *United States v. Alcaraz-Arellano*, 441 F.3d 1252, 1264 (10th Cir.2006)). Plaintiff may offer statistical evidence to show a discriminatory effect. *Id.*

*4 Plaintiff has not offered any statistical evidence of racial profiling. Nor has plaintiff offered any evidence that other similarly-situated individuals of another race were not stopped or treated differently during a traffic stop. Therefore, plaintiff has not alleged sufficient facts to support his racial profiling allegation and defendant’s motion to dismiss plaintiff’s equal protection claim is granted.

Plaintiff’s Fifth Amendment Claims

In his complaint, plaintiff alleges that defendants violated his Fifth and Fourteenth Amendment Due Process rights when they racially profiled and asked plaintiff if he had been drinking without first reading *Miranda*. Defendants respond that the Fifth Amendment does not apply to state actions and further that there is no relief afforded under § 1983 for defendants’ failure to read *Miranda*.

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The majority of the Bill of Rights have been incorporated in the Fourteenth Amendment and are enforceable against the States. *McDonald v. City of Chicago, Ill.*, 130 S.Ct. 3020, n. 13 (2010). The Fifth Amendment requirement that warnings be read and waived by a suspect has been incorporated in the Fourteenth Amendment. *Withrow v. Williams*, 507 U.S. 680, 689 (1993) (stating that “the Fourteenth Amendment incorporates the Fifth Amendment privilege against self-incrimination ...”).

The court has already found that plaintiff did not allege sufficient facts of racial profiling and dismissed plaintiff's Fourteenth Amendment claim. Plaintiff's Fifth Amendment claim based on the alleged racial profiling is also dismissed.

The law in the Tenth Circuit is that a police officer cannot be held liable under § 1983 for failing to read an individual *Miranda*. *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir.1976).

The Constitution and laws of the United States do not guarantee Bennett the right to Miranda warnings. They only guarantee him the right to be free from self-incrimination. The Miranda decision does not even suggest that police officers who fail to advise an arrested person of his rights are subject to civil liability; it requires, at most, only that any confession made in the absence of such advice of rights be excluded from evidence. No rational argument can be made in support of the notion that the failure to give Miranda warnings subjects a police officer to liability under the Civil Rights Act.

Plaintiff cannot bring a claim under § 1983 because defendants did not read him Miranda and his Fifth Amendment claim is dismissed.

Plaintiff's Eighth Amendment Claims

Plaintiff alleges that defendants violated the Eighth Amendment because Officer Campbell did not activate his video equipment at the appropriate time

and had his hand on his gun during the traffic stop. Defendants respond that the Eighth Amendment is not applicable because plaintiff was not convicted when the traffic stop occurred.

The court agrees with defendants. The Eighth Amendment protections are not applicable prior to a conviction. *Reed v. Simmons*, No. Civ.A. 01-3205-KHV, 2004 WL 955355, at *7 (D.Kan. May 3, 2004) (“Eighth Amendment scrutiny is appropriate only after the State has secured a formal adjudication of guilt in accordance with due process of law.”). Plaintiff's Eighth Amendment claims are dismissed.

Plaintiff's Claims Pursuant to Federal Statutes

*5 Plaintiff claims that defendants violated 18 U.S.C. §§ 241, 242, 245(1)(e), (2)(e), and (3) and 42 U.S.C. § 14141. (Doc. 1, exh. 1 at 16). Defendants respond that none of these statutes provide a private cause of action.

No private right of action exists under 18 U.S.C. §§ 241, 242, and 245. *Williams v. U.S. Dept. of Justice*, No. 08-2631-KHV, 2009 WL 1313253, at *2 (D.Kan. May 12, 2009). Likewise, 42 U.S.C. § 14141 does not provide a private right of action. *Mahan v. Huber*, No. 09-cv-00098-PAB-BNB, 2010 WL 749815, at *6 (D.Colo. Mar. 2, 2010) (noting that 42 U.S.C. § 14141 provides a right of action to the Attorney General, not the plaintiff). Plaintiff's claims under these federal statutes are dismissed.

Plaintiff's State Claims

Because the court has dismissed all of plaintiff's federal claims, the court declines to exercise supplemental jurisdiction over plaintiff's remaining state claims. 28 U.S.C. § 1367(c)(3) (“The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if ... the district court has dismissed all claims over which it has original jurisdiction [.]”). Plaintiff's state claims

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are dismissed.

IV. CONCLUSION

For the reasons stated herein, plaintiff's federal claims are dismissed and the court declines to exercise supplemental jurisdiction over plaintiff's remaining state claims. Defendants' motion to dismiss (Doc. 38) is granted.

Plaintiff's motion to clarify and define the issues (Doc. 37) is granted and addressed above.

No motion for reconsideration may be filed. This case has wasted enough of this court's resources.

IT IS SO ORDERED.

D.Kan.,2010.
Mendia v. City of Wellington
Slip Copy, 2010 WL 4513408 (D.Kan.)

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372 Fed.Appx. 471, 2010 WL 1286919 (C.A.5 (La.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 372 Fed.Appx. 471, 2010 WL 1286919 (C.A.5 (La.)))

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals,
Fifth Circuit.

Brandon R. CHAMBERS, Plaintiff-Appellee
v.

James JOHNSON; J.L. Decuir; Jeffrey Melchior,
Defendants-Appellants.

No. 09-30762

Summary Calendar.

March 30, 2010.

Background: Louisiana state prisoner brought § 1983 action against three prison guards, alleging use of excessive force, involving use of pepper ball launcher, in violation of Eighth Amendment. The United States District Court for the Middle District of Louisiana, Ralph E. Tyson, Chief Judge, 2009 WL 2524588, adopted the report and recommendation of Christine Noland, United States Magistrate Judge, and denied guards' summary judgment motion on qualified immunity grounds. Guards appealed.

Holding: The Court of Appeals held that fact issues existed as to whether guards reasonably perceived threat and extent of prisoner's injuries. Affirmed.

West Headnotes

Federal Civil Procedure 170A ↪ 2491.5

170A Federal Civil Procedure
170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2491.5 k. Civil rights cases in general. Most Cited Cases

Genuine issues of material fact existed as to whether Louisiana state prisoner had returned blanket upon prison guard's request, and thus whether guard reasonably perceived any threat that required use of force, and as to extent of prisoner's injuries, precluding summary judgment, on qualified immunity grounds, in prisoner's § 1983 action alleging Eighth Amendment claim for excessive use of force. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

*472 Brandon R. Chambers, Angola, LA, pro se.

Stacey L. Wright-Johnson, Esq., Assistant Attorney General, Louisiana Department of Justice, Baton Rouge, LA, for Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana, USDC No. 3:07-CV-848.

Before HIGGINBOTHAM, CLEMENT, and SOUTHWICK, Circuit Judges.

PER CURIAM: ^{FN*}

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

**1 Brandon R. Chambers, Louisiana prisoner # 44028, brought a civil rights suit against, among others, three guards. Those guards, James Johnson, J.L. Decuir, and Jeffrey Melchior, moved for summary judgment based on qualified immunity. The motion was denied, and they appeal. We AFFIRM.

Chambers claims that these defendants used excess-



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ive force against him in violation of the Eighth Amendment. His allegations stem from an incident on December 9, 2006. At the time of the confrontation, Chambers was on "restricted cell status." As a result, he was not permitted to have anything in his cell, not even a blanket, and wore only a paper gown. Chambers acquired a blanket apparently intended for his cell mate who was not on this restricted status. Factual disputes exist as to what occurred. When defendants demanded return of the blanket, Chambers insists that he immediately complied. Chambers further asserts that defendants nonetheless emptied two cans of chemical irritant into his cell and shot him twenty-nine times with a pepper ball launcher.^{FN1} Defendants deny that Chambers complied and allege that, instead, he barricaded himself in the cell using a mattress.

FN1. This device was described in the record as "less than lethal" and apparently involves projectiles containing hot pepper powder which were dispensed using a riot shotgun.

The defendants contend that the use of a pepper ball launcher did not constitute excessive force after attempts to gain Chambers's compliance through direct verbal*473 orders and use of chemical agents proved unsuccessful.

The Magistrate Judge, in a report adopted as the district court's opinion, held that Chambers had sufficiently claimed the use of excessive force in violation of the Eighth Amendment. The contentions of the defendants created a fact issue that could not be resolved on summary judgment.

The denial of a motion for summary judgment based upon qualified immunity is a collateral order capable of immediate review. *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Our review is "significantly limited," though, extending to questions of law only. *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir.2004) (en banc). We have authority to review a district court's determination that "a certain course of conduct

would, as a matter of law, be objectively unreasonable in light of clearly established law." *Id.* We may not review, however, a determination that there are genuine issues of material fact about whether defendants engaged in that course of conduct. *Id.* When reviewing the purely legal questions about the claimed course of conduct, we "accept the plaintiffs' version of the facts as true." *Id.* at 348. There is no basis on which to reverse the finding of a material factual dispute.

Also challenged on appeal was the district court's resolution of the factual dispute of whether Chambers's guilty plea in a prison disciplinary plea arose from the same incident that is the basis for this Section 1983 claim. The defendants allege that he was disciplined for the same incident, and that until the decision on that discipline is set aside, he can not pursue this civil claim. *See Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997); *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The district court did not discuss this issue, though the defendants had raised the point in their summary judgment motion. Perhaps it was ignored because the Magistrate Judge, in denying an earlier motion to dismiss, had found the argument to be "patently disingenuous." That conclusion was based on the Magistrate Judge's fact-finding that the discipline was for events that had occurred on the day before the ones at issue in this suit.

**2 Here, too, we lack jurisdiction on this interlocutory appeal to review the finding that the discipline was not for the same events as the civil claim.

We now review the issues we have authority to review. On an Eighth Amendment claim against prison officials for the use of excessive physical force, the question is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." *Hudson v. McMillian*, 503 U.S. 1, 7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992). Chambers's factual allegations are sufficient to support an Eighth Amend-

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ment violation. If Chambers returned the blanket on request, as he asserts, then the defendants could not have reasonably perceived any threat requiring a need to use force. The use of twenty-nine pepper balls following the use of mace after he had complied with the defendants' demands was disproportionate to any possible provocation.

The extent of injury is also questioned. We hold there are sufficient factual assertions that the pain and scarring caused by the use of force was more than *de minimis*. See *Harper v. Showers*, 174 F.3d 716, 719 (5th Cir.1999); *Baldwin v. Stalder*, 137 F.3d 836, 839 (5th Cir.1998).

On Chambers's allegations, as summarized by the Magistrate Judge, the defendants' course of conduct was not objectively reasonable under clearly existing law. *474 See *Hudson*, 503 U.S. at 6-7, 112 S.Ct. 995; *Kinney*, 367 F.3d at 347.

Chambers also moves for appointment of counsel to represent him on appeal. We have left in place the decision in his favor and thus fail to see exceptional circumstances warranting the appointment of counsel on appeal. See *Cupit v. Jones*, 835 F.2d 82, 86 (5th Cir.1987).

AFFIRMED; APPOINTMENT OF COUNSEL DENIED.

C.A.5 (La.),2010.
Chambers v. Johnson
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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 10-22183-CV-KING/WHITE

CHRISTOPHER URIAH ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

**ORDER ADOPTING REPORT AND RECOMMENDATION, DENYING
DEFENDANTS' MOTIONS TO DISMISS**

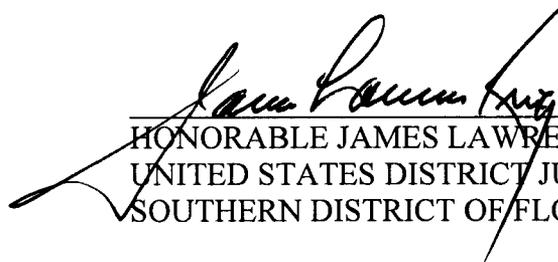
THIS CAUSE comes before the Court upon Magistrate Judge Patrick A. White's November 3, 2010 Report and Recommendation (DE #28). The matter was automatically referred by this Court to Magistrate Judge White for screening of Plaintiff's Amended Complaint (DE #18) and the subsequent motions to dismiss filed by Sergeants Alvarado (DE #15) and Medina (DE #20). Only Sergeant Alvarado filed an Objection (DE #32) to Magistrate Judge White's Report and Recommendation.

Having independently reviewed the record, the Court concludes that Magistrate Judge White's Report and Recommendation is a thorough and accurate reflection of both the record and the law at issue. Accordingly, it is **ORDERED, ADJUDGED, and DECREED** that:

1. Plaintiff's Amended Complaint (DE #18) **SHALL** be the operative complaint in the above-numbered matter.
2. Defendant Alvarado's Motion to Dismiss (DE #15) be, and the same is hereby, **DENIED** with the exception of any claims against him in his official capacity.

3. Defendant Medina's Motion to Dismiss (DE #20) be, and the same is hereby, **DENIED** with the exception of any claims against him in his official capacity.
4. Plaintiff's Amended Complaint **STATES** a cause of action for denial of medical aid against Defendant Nurse Harris.
5. All Defendants shall **ANSWER** the Amended Complaint within 15 days of this Order.
6. Defendants shall **RESPOND** to Plaintiff's First Request for Production (DE #31) within 45 days of this Order.

DONE AND ORDERED in Chambers, at Miami, Miami-Dade County, Florida, this 23d day of November, 2010.


HONORABLE JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

Cc:

Magistrate Judge Patrick A. White

Plaintiff, *pro se*
Christopher Uriah Alsobrook
DC #D09876
Suwannee Correctional Institution
5964 U.S. Highway 90
Live Oak, FL 32060

Counsel for Defendants
Ginger Lynne Barry
Broad and Cassel
200 Grand Blvd, Suite 205A
Destin, FL 32550
850-269-0148
Fax: 850-521-1472
Email: gbarry@broadandcassel.com

Lance Eric Neff

Office of Attorney General

PL-01 The Capitol

Tallahassee, FL 32399-1050

Email: lance.neff@myfloridalegal.com

Cedell Ian Garland

Office of the Attorney General

PL-01, The Capital

Tallahassee, FL 32399

Email: Cedell.Garland@myfloridalegal.com

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Case No.: 10-22183-CV-KING/WHITE

CHRISTOPHER ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

_____ /

**DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

Defendants **Alvarado** and **Medina**, through undersigned counsel, submit this Motion to Dismiss¹ and request the amended complaint (Doc. 18) be dismissed for lack of subject-matter jurisdiction (Count One: Alvarado and Medina) and due to qualified immunity (Count Two: Medina). As grounds, Defendants state the following:

Plaintiff is an inmate in the custody of the Florida Department of Corrections ("FDOC").

Plaintiff has filed an amended civil rights complaint essentially alleging that Defendants Alvarado and Medina failed to intervene and stop a fight between

¹ This is not a successive motion to dismiss as the Defendants' previous motions to dismiss were directed toward Plaintiff's original complaint.

Plaintiff and another inmate. (Doc. 18 at 4-9) Plaintiff also asserts that Defendant Medina delayed in obtaining him medical care. (Doc. 18 at 9-11) Plaintiff seeks a declaratory judgment, compensatory and punitive damages, and costs and attorney fees. (Doc. 18 at 14)

MEMORANDUM OF LAW

I. A Heck-bar defense is properly brought under Rule 12(b)(1), Federal Rules of Civil Procedure.

In the recent case of Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), the Eleventh Circuit stated that a failure to exhaust defense was properly raised in a motion to dismiss. As Bryant was recently explained:

Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008), relied on by the district court. In *Bryant*, this Court concluded that the district court properly resolved factual disputes in granting a motion to dismiss based on failure to exhaust administrative remedies. 530 F.3d at 1377. Specifically, the *Bryant* Court explained that “[b]ecause exhaustion of administrative remedies is a matter in abatement and not generally an adjudication on the merits, an exhaustion defense ... is not ordinarily the proper subject for a summary judgment; instead, it should be raised in a motion to dismiss, or treated as such if raised in a motion for summary judgment.” *Id.* at 1375-76 (quotation marks omitted). The *Bryant* Court treated Rule 12(b) motions regarding exhaustion of nonjudicial remedies as similar to motions regarding jurisdiction and venue in that “[e]xhaustion of administrative remedies is a matter in abatement, and ordinarily does not deal with the merits.” *Id.* at 1374 (quotation marks and brackets omitted). In those types of Rule 12(b) motions, “it is proper for a judge to consider facts outside of the pleadings and to resolve factual disputes so long as the factual disputes do not decide the merits and the parties have sufficient opportunity to develop a record.” *Id.* at 1376 (footnotes omitted).

Tillery v. U.S. Dept. of Homeland Security, No. 10-11657, 2010 WL 4146149, at *3 (11th Cir. Oct. 22, 2010). Thus, courts have the authority to resolve all matters in abatement, such as exhaustion, in a motion to dismiss.

Similarly, a Heck-bar defense is analogous to a failure to exhaust defense. Neither dismissal for failure to exhaust nor dismissal under Heck is generally an adjudication on the merits. Mitchell v. Jackson, No. 2:10-CV-13483, 2010 WL 3906304 (E.D.Mich. Sept. 30, 2010) (“When a prisoner’s civil rights claim is barred by the *Heck* doctrine, the appropriate course for a federal district court is to dismiss the claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(h)(3), rather than to dismiss the complaint with prejudice as being frivolous, because the former course of action is not an adjudication on the merits and would allow the prisoner to reassert his claims if his conviction or sentence is later invalidated.”). Both defenses are bars to an inmate filing suit and both are essentially a subject-matter jurisdiction issue for the court. See Esensoy v. McMillan, No. 06-12580, 2007 WL 257342 (11th Cir. Jan. 31, 2007) (affirming district court’s dismissal of suit for lack of subject-matter jurisdiction, but for the alternative reason of being Heck-barred); Felgar v. Burkett, 328 Fed. App’x 107 (3rd Cir. 2009) (same); Mendia v. City of Wellington, 10-1132-MLB, 2010 WL 4513408 (D.Kan. Nov. 02, 2010) (accepting defendants’ argument in a Rule

12(b)(1) motion that plaintiff's claims were Heck-barred thus depriving court of subject-matter jurisdiction).

As noted by the Supreme Court, exhaustion is a precursor to filing suit. Woodford v. Ngo, 548 U.S. 81, 85 (2006). Similarly, under Heck,

to recover damages for an unconstitutional conviction or imprisonment a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by an authorized state tribunal, or called into question by a federal court's issuance of a writ of habeas corpus.

Crow v. Penry, 102 F.3d 1086, 1087 (10th Cir. 1996). “The purpose behind Heck is to prevent litigants from using a § 1983 action, with its more lenient pleading rules, to challenge their conviction or sentence without complying with the more stringent exhaustion requirements for habeas actions.” Butler v. Compton, 482 F.3d 1277, 1279 (10th Cir. 2007) (citing Muhammad v. Close, 540 U.S. 749 (2004) (per curiam)). Heck also requires an inmate to have a disciplinary report (“DR”) overturned prior to bringing a civil rights claims if the civil rights claim would shed doubt on the DR. Edwards v. Balisok, 520 U.S. 641, 648 (1997); Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005); Harden v. Pataki, 320 F.3d 1289, 1294-95 (11th Cir. 2003). If the DR has not been overturned, no civil claim under 42 U.S.C. § 1983 has accrued. Heck, 512 U.S. at 489 (“Even a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless

and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.”).

Thus, for both defenses a motion to dismiss is the appropriate vehicle to challenge an inmate’s ability to file a civil rights action. In both instances a court may allow the record to be developed and, thereafter, act as fact-finder to determine the *threshold issue* of whether the inmate’s suit may be maintained. Bryant, *supra*; *see also* Chambers v. Johnson, 372 Fed. App’x 471, 473 (5th Cir. Mar. 30, 2010) (noting, without disapproval, that the magistrate judge had acted as fact-finder in defendant’s Heck-bar defense raised in a motion to dismiss).

Accordingly, Heck is properly raised in a motion to dismiss under Rule 12(b)(1), Fed.R.Civ.P. Further, under Bryant, the Court may accept evidence and act as a fact-finder to resolve threshold issues that may deprive the Court of subject-matter jurisdiction.

II. Plaintiff’s failure to intervene claim against Defendants Alvarado and Medina is Heck-barred, thus this Court lacks subject matter jurisdiction.

Civil rights actions are not the proper method for challenging and overturning a finding of guilt to a DR. Preiser v. Rodriguez, 411 U.S. 475, 500, (1973), *quoted in* Harden v. Pataki, 320 F.3d 1289, 1294 (11th Cir. 2003). Preiser held that “when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled

to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.” 411 U.S. at 500. Subsequently, in Heck v. Humphrey, the Supreme Court made it clear that

in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

512 U.S. 477, 486-87 (1994) (footnote omitted). The Supreme Court extended Heck and made it explicitly applicable to claims surrounding prison disciplinary hearings. See Edwards v. Balisok, 520 U.S. 641, 648 (1997) (indicating that a claim attacking only procedure, not result, of a prison disciplinary hearing may still fail to be cognizable under section 1983 unless the prisoner can show that the conviction or sentence has been previously invalidated). Most recently, the Supreme Court reiterated that “a state prisoner’s § 1983 action is barred (absent prior invalidation)-no matter the relief sought (damages or equitable relief), no matter the target of the prisoner’s suit (state conduct leading to conviction or internal prison proceedings)-if success in that action would necessarily demonstrate the invalidity of confinement or its duration.” Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005). Plainly stated, where an inmate has lost gain time

pursuant to a DR, he may not pursue a civil rights action under 42 U.S.C. § 1983 if success in that civil rights action would undermine the DR. For the civil rights action to be viable, Plaintiff must first overturn the DR.

Here, Plaintiff is essentially seeking the overturning of two disciplinary reports: 1) a June 6, 2009 DR for Fighting and 2) a June 6, 2009 DR for Disrespect to Officials. Plaintiff was found guilty of the DRs. As a result of the findings of guilt, Plaintiff lost thirty days of gain time for the Fighting DR and sixty days of gain time for the Disrespect to Officials DR. (Exh. A)

The DR for Fighting stated:

On June 6, 2009 I was assigned to confinement as the housing sergeant. At approximately 0750 hrs I was in the officer station getting briefed by midnight sergeant when he heard a loud noise and the door on cell E2109 was po[u]nding. As we approached the cell door I saw Inmate Alsobrook, Christopher DC# D09876 fighting with Inmate McCloud, Izell DC# 588881. Both inmates were ordered to cease their actions and they complied. Shortly, after they started fighting again for approximately 15 seconds, they were again ordered to cease and they complied. Inmate Alsobrook and Inmate McCloud did not resume fighting again. They were taken out of the cell and escorted to medical for assessment. Inmate Alsobrook will remain in constant status pending disposition of this report.

(Exh. B; Doc. 1 at 29). At the disciplinary hearing, Plaintiff pled guilty to the Fighting DR. The DR hearing team stated the following as the reason for its finding of guilt:

Based upon inmate's guilty plea. At the hearing, inmate Alsobrook admitted to fighting. He stated to the team things such as, "We fought for a good little while," & "He pounded me pretty decent." His

statements at the hearing support the statement of facts of Sgt. Medina, which read, "On June 6, 2009 I was assigned to confinement as the housing sergeant. At approximately 0750 hrs I was in the officer station getting briefed by midnight sergeant when he heard a loud noise and the door on cell E2109 was ponding. As we approached the cell door I saw inmate Alsobrook, Christopher DC#D09876 fighting with inmate McCloud, Izell DC#588881. Both inmates were ordered to cease their actions and they complied. Shortly, after they started fighting again, approximately 15 seconds, they were again ordered to cease and they complied. Inmate Alsobrook and inmate McCloud did not resume fighting again." The team notes a pen and ink change was made to the report. In the last sentence, the word 'constant' should read 'current' (as it appears on the original handwritten copy).

(Exh. B)

The DR for Disrespect to Officials stated:

On June 6, 2009 I was assigned to confinement as the housing sergeant. At approximately 0750 hrs I was in the Officer Station getting briefed by midnight sergeant when we heard a loud noise and the door on cell E2109 was po[u]nding. When I approached cell E2109 Inmate Alsobrook, Christopher DC# D09876 looked at me while I was trying to convince him and his roommate to stop fighting and he stated "Man what that f**k are you looking at, why don't you f**king come in here and get some too". Inmate Alsobrook is guilty of disrespecting an official as prohibited by the rules of inmate conduct. Inmate Alsobrook will remain in current status pending disposition of this report.

(Exh. C; Doc. 1: 31). At the disciplinary hearing, Plaintiff pled not guilty to the Disrespect to Officials DR. The DR hearing team stated the following as the reason for its finding of guilt:

Based upon the statement of facts as written in Section I of the report by Sgt. Medina, who wrote, "On June 6, 2009 I was assigned to confinement as the housing sergeant. At approximately 0750 hrs I

was in the officer station getting briefed by midnight sergeant when we heard a loud noise and the door on cell E2109 was pounding. When I approached cell E2109, inmate Alsobrook, Christopher DC#D09876 looked at me while I was trying to convince him and his roommate to stop fighting and he stated, 'Man what that f**k are you looking at, why don't you f**king come in here and get some too.'"

(Exh. C)

As of November 29, 2010, both DRs are active and have not been overturned. (Exh. A)

Plaintiff's complaint essentially asserts that Defendants Alvarado and Medina allowed inmate McCloud to attack Plaintiff and the officers refused to intervene. As Plaintiff states in his amended complaint,

At this time, at least ten minutes into the assault, the Plaintiff began to kick the cell door at every opportunity in an attempt to attract the attention of the officers while he simultaneously attempted to fight McCloud off of him, bleeding profusely, panicked, and in a very real fear for his life. Several minutes after the Plaintiff had first begun to strike the door, Sergeant Medina, the Echo Dorm 8a.m.-to 4p.m. dorm sergeant, accompanied by Sgt. Alvarado, and another, unidentified officer, arrived at the door of cell E2109 (approximately 7:50 a.m. according to Sgt. Medina's statement in the Plaintiff's disciplinary report [previously submitted]). The Plaintiff, looking over his shoulder and seeing Sgt. Medina watching there as McCloud attacked Plaintiff, yelled to him: "What the f—k are you looking at? You going to do something" and a spate of exclamations along the same lines, frustrated, scared, exhausted, and finding only apathy for his safety in the actions of the very people he had summoned to his cell with his kicks to the door, yelling all the while, emphatically, for them to: "Get me out of here!" to which Sgt. Medina replied: "Handle your business." McCloud, seeing there would be no interference from the officers, renewed his assault, continually striking the Plaintiff in plain view of Sgt. Medina until, too exhausted to continue, he relented of his own accord, stepping away from the Plaintiff.

(Doc. at 8-9) If found to be true at trial, Plaintiff's detailed theory of the case as laid out in his amended complaint would necessarily show that Plaintiff was wrongly disciplined for "Fighting." Wooten v. Law, 118 Fed. App'x 66 (7th Cir. 2004) (affirming dismissal of excessive force claim where the alleged facts, if proven true, would show that inmate was wrongly disciplined for assault). According to Plaintiff's specific details, Defendants Alvarado and Medina never saw Plaintiff fighting, they merely saw him being assaulted by another inmate (" . . . seeing Sgt. Medina watching there as McCloud attacked Plaintiff"). (Doc. 18 at 8)

Plaintiff's assertions in his amended complaint so contradict the facts relied on for Plaintiff's finding of guilt in the Fighting DR, that success in this civil rights action would completely undercut the finding of guilt. See Okoro v. Callaghan, 324 F.3d 488, 490 (7th Cir. 2003) (stating that if a plaintiff makes allegations that are inconsistent with the conviction having been valid, Heck kicks in and bars the civil suit). If Plaintiff prevailed on his theory of the case, it would necessarily call into question the validity of the DR. Harris v. Truesdell, 79 Fed. App'x 756, 759 (6th Cir. 2003) (stating that inmate's Eighth Amendment claim is not cognizable under § 1983 since granting inmate his requested relief would call into question the validity of his disciplinary conviction).

As stated in Dyer v. Lee, 488 F.3d 876, 884 (11th Cir. 2007), “[F]or Heck to apply, it must be the case that a successful § 1983 suit and the underlying conviction be logically contradictory.” In the Fighting DR, Plaintiff was witnessed actively engaging in belligerence. Any finding in a civil action that Plaintiff was an innocent victim of an attack to which Defendants Alvarado and Medina witnessed and refused to stop would be logically contradictory to finding of guilt for the DR. More importantly, Plaintiff’s allegations in his amended complaint which assert that Defendants Alvarado and Medina failed to witness him fighting, *but only being attacked*, necessarily contradict the Fighting DR. Thus, Plaintiff’s specific allegations are incompatible with success in this case as to Count One.

Furthermore, Plaintiff’s amended complaint also contradicts the DR given for Disrespect to Officials. Plaintiff asserts the following:

The Plaintiff, looking over his shoulder and seeing Sgt. Medina watching there as McCloud attacked Plaintiff, yelled to him: “What the f—k are you looking at? You going to do something” and a spate of exclamations along the same lines, frustrated, scared, exhausted, and finding only apathy for his safety in the actions of the very people he had summoned to his cell with his kicks to the door, yelling all the while, emphatically, for them to: “Get me out of here!” to which Sgt. Medina replied: “Handle your business.” McCloud, seeing there would be no interference from the officers, renewed his assault, continually striking the Plaintiff in plain view of Sgt. Medina until, too exhausted to continue, he relented of his own accord, stepping away from the Plaintiff.

(Doc. 18 at 8-9) However, Plaintiff was found guilty of Disrespect to Officials not only for his statement, but the manner in which he said it. The DR stated, “When I

approached cell E2109, inmate Alsobrook, Christopher DC#D09876 looked at me while I was trying to convince him and his roommate to stop fighting and he stated, ‘Man what that f**k are you looking at, why don’t you f**king come in here and get some too.’” (Exh. C) Plaintiff’s amended complaint contends that his statement was in the context of asking for help. The DR asserts that the disrespectful statement was given in the context of Defendant Medina trying to stop the altercation between Plaintiff and inmate McCloud. These competing contexts are mutually exclusive. As such, Plaintiff cannot maintain the civil rights action under his asserted facts as those facts, if found to be true at trial, would undermine the Disrespect to Officials DR.

III. Defendant Medina is entitled to qualified immunity as to Plaintiff’s claim of delay of medical attention.

Qualified immunity shields public officials in their individual capacities from some lawsuits against them arising from torts committed while they are performing a discretionary duty. Goebert v. Lee County, 510 F.3d 1312, 1329 (11th Cir. 2007). The doctrine does not, however, shield officials who violate an individual’s “clearly established” constitutional rights. See, e.g., Lee v. Ferraro, 284 F.3d 1188, 1199 (11th Cir. 2002) (denying qualified immunity because no reasonable officer could “possibly have believed that he . . . had the lawful authority to take [an arrestee] to the back of her car and slam her head against the trunk after she was arrested, handcuffed, and completely secured”).

To determine whether a defendant is entitled to immunity, courts employ the Supreme Court's two-step inquiry in Saucier v. Katz, 533 U.S. 194, (2001). One question is whether in "light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Id. at 201. The other question² to be considered is whether, at the time the violation occurred, every objectively reasonable person officer would have realized the acts violated already clearly established federal law. Id. at 201-02. In other words, to determine whether the officers' conduct was "reasonable" under the circumstances, "the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting him, without regard to the underlying intent or motivation . . . It must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Kesinger v. Herrington, 381 F.3d 1243, 1248 (11th Cir. 2004) (citations omitted).

As for unnecessary delays in treatment constituting deliberate indifference, the Eleventh Circuit held in Lancaster v. Monroe County, Alabama, 116 F.3d 1419 (11th Cir. 1997), that "an official acts with deliberate indifference when he intentionally delays providing an inmate with access to medical treatment, knowing that the inmate has a life-threatening condition or an urgent medical

² Courts are no longer required to approach these questions in any particular order. Pearson v. Callahan, 129 S.Ct. 808 (2009). If either question is answered in favor of the defendant, the inquiry ends.

condition that would be exacerbated by delay.” Id. at 1425. However, “[t]his general statement of law ordinarily does not preclude qualified immunity in cases involving a delay in medical treatment The cases are highly fact-specific and involve an array of circumstances pertinent to just what kind of notice is imputed to a government official and to the constitutional adequacy of” the official’s acts and omissions. Bozeman v. Orum, 422 F.3d 1265, 1274 (11th Cir. 2005).

The key question here is whether Defendant Medina violated Plaintiff’s constitutional rights by not taking him to medical where Plaintiff and the inmate Plaintiff was fighting refused to “cuff up.” Plaintiff plainly asserts in his amended complaint that Sergeant Medina stated to Plaintiff, “When ya’ll are ready to cuff up I’ll get you to medical.” (Doc. 18 at 10) Thus, as he states in his amended complaint, Plaintiff held the key to his medical care. All he had to do was “cuff up” and he would be taken to medical. There is no indication that Plaintiff was willing to comply with the simple act that would have gotten him immediately to medical. Thus, Defendant Medina was not indifferent to Plaintiff’s medical needs, he was merely conscious of the security risks³ of opening a cell housing two violent felons who had just engaged in belligerence without first securing those

³ Cf. Bieber v. Wisconsin Dept. Of Corrections, 62 Fed. App’x 714 (7th Cir. 2003) (substitution of elastic sleeve for metal knee brace due to security concerns did not state § 1983 violation where staff was unaware of inadequacy of replacement or that metal brace was “essential” to treat inmate’s injury) (Exh. D); Lerma v. Bell, 2 Fed. App’x 782 (9th Cir. 2001) (confiscation of elastic knee brace for legitimate security concerns did not state § 1983 violation) (Exh. E).

individuals with handcuffs. Such action is not deliberate indifference; it is reasonable security awareness.⁴

Regardless of whether Defendant Medina's conduct constituted deliberate indifference to a serious medical need in violation of Plaintiff's Eighth Amendment rights, the law applicable to these circumstances was not clearly established at the time of the alleged violation. While judicial precedent with materially identical facts is not essential for the law to be clearly established, the preexisting law must make it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue. See Evans v. Stephens, 407 F.3d 1272, 1282 (11th Cir. 2005) (*en banc*).

When deciding about qualified immunity, a court is considering what an objectively reasonable official must have known at the pertinent time and place. The court is examining “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation [the defendant officer] confronted.” Brosseau v. Haugen, 543 U.S. 194, 199 (2004) (quoting Saucier v. Katz, 533 U.S. 194, 201-02 (2001)); see also Pace v. Capobianco, 283 F.3d 1275, 1282 (11th Cir. 2002). “This inquiry, it is vital to note, must be undertaken in light of the specific

⁴ See, e.g., Williams v. County of Sacramento Sheriff's Dept., No. CIV S-03-2518, 2007 WL 2433221, at *8-9 (E.D.Cal. Aug. 22, 2007) (granting summary judgment and finding no deliberate indifference where the evidence indicates that the officer briefly delayed taking inmate to the medical clinic due to security concerns, not because she knew of and chose to disregard an excessive risk to plaintiff's health) (Exh. F); Fletcher v. Krueger, No. 06-C-576-S, 2006 WL 3300372 (W.D.Wis. Nov. 03, 2006) (dismissing case where Plaintiff did not allege that any delay caused by security concerns in his receiving medical treatment harmed him) (Exh. G).

context of the case, not as a broad general proposition” Saucier, 533 U.S at 201.

The Supreme Court has warned against allowing plaintiffs to convert the rule of qualified immunity into “a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” Anderson v. Creighton, 483 U.S. 635, 639 (1987). More than a general legal proposition is usually required; if a plaintiff relies on a general rule, it must be obvious that the general rule applies to the specific situation in question. See Brosseau, 543 U.S. at 198-99 (noting that general tests may be sufficient to establish law clearly in “an obvious case”). Slight differences between cases are critical. See Marsh v. Butler Cnty, Ala., 268 F.3d 1014, 1032 (11th Cir. 2001) (*en banc*). Thus, evaluating the “objective legal reasonableness” of an officer’s acts requires examining whether the right at issue was clearly established in a “particularized” and “relevant” way. Anderson, 483 U.S. at 639-40. The unlawfulness of a given act must be made truly obvious, rather than simply implied, by the preexisting law. See id.

Judicial decisions addressing deliberate indifference to a serious medical need are very fact specific. At a high level of generality, certain aspects of the law have been established: lengthy delays are often inexcusable, see Harris v. Coweta County, 21 F.3d 388, 394 (11th Cir. 1994) (stating delay of several weeks in treating painful and worsening hand condition was deliberate indifference); shorter

delays may also constitute a constitutional violation if injuries are sufficiently serious, see Bozeman v. Orum, 422 F.3d 1265, 1273 (11th Cir. 2005) (delaying medical treatment for fourteen minutes was deliberate indifference where the plaintiff was not breathing during that time); and the reason for the delay must weigh in the inquiry, see id.

Cases of deliberate indifference are fact specific and a previous case with disparate facts and legal generalities may not give an officer notice of forbidden conduct in the factual situation with which he is faced. As recently noted by the Eleventh Circuit,

[I]n Aldridge v. Montgomery, 753 F.2d 970 (11th Cir. 1985), the plaintiff maintained during his arrest he suffered a one and a half inch cut over his right eye. After arrest, the plaintiff was placed in a holding cell at county jail for over two hours during which time “[t]he cut continued to bleed, forming a pool of blood on the floor approximately the size of two hands.” Aldridge, 753 F.2d at 971. The plaintiff was then taken to the hospital where he received six stitches and prescribed icepacks and aspirin, neither of which he was ultimately provided. Id. We concluded that these facts precluded a directed verdict in favor of the defendants on the plaintiff’s claim of deliberate indifference to serious medical needs.

Fernandez v. Metro Dade Police Dept., No. 09-11737, 2010 WL 3069655, at *5 (11th Cir. Aug. 06, 2010) (Exh. H).⁵ However, in the instant case it was not clearly established as a matter of law in June 2009 that a one and a half hour delay in

⁵ Defendants are providing only those unpublished cases not previously provided.

taking an injured inmate to medical⁶ – where that inmate refused to cuff up and allow the correctional officer to secure him prior to being removed from the cell in which he was housed – was a violation of the Constitution. As was very recently stated, “[T]he reason for delay matters: a good reason may justify a delay.” Youmans v. Gagnon, No. 09-15113, 2010 WL 4608409, at *6, n.11 (11th Cir. Nov. 16, 2010) (Exh. I). Further, “delay in medical treatment must be interpreted in the context of the seriousness of the medical need, deciding whether the delay worsened the medical condition, and considering the reason for delay.” Whitehead v. Burnside, No. 10-11911, 2010 WL 4629001, at *2 (11th Cir. Nov. 17, 2010) (Exh. J) (citation omitted).

Because Plaintiff and his cellmate refused to cuff up, Officer Medina was placed in an awkward position. Should he allow two unsecured violent felons, who had just engaged in belligerence, out of their cell? Should he have medical come to the cell and place medical personnel in danger by going into a cell with two unsecured and highly dangerous men? The reasonable answer is no. Plaintiff held the key to his medical attention. All he had to do was cuff up. There is no indication in his amended complaint that he agreed to do so. Also, there is no

⁶ Plaintiff does not contend further injury from Defendant Medina’s delay in obtaining Plaintiff medical treatment. (Doc. 18 at 4-11, ¶¶ 1-7) See Mann v. Taser Intern., Inc., 588 F.3d 1291, 1307 (11th Cir. 2009). Plaintiff only asserts “severe pain, soft tissue damages, suffering, physical, mental, and emotional injuries, embarrassment, humiliation, degradation, mental anguish, chronic dizzy spells, bouts of nausea, migraine headaches, loss of sleep, and fear.” (Doc. 18 at 9-10)

indication that Plaintiff had suffered life threatening injuries or was incapacitated to the extent that he was no longer dangerous (Plaintiff asserts only the following injuries: “gash to the back of his head, a cut under his right eye, a bloody nose, a cut high on his forehead” (Doc. 18 at 9-10)). Because Plaintiff and his cellmate were fully cognizant and had complete operation and control over their extremities, they, in their unsecured status, were a serious threat to prison personnel. Hudson v. McMillian, 503 U.S. 1, 6 (1992) (stating prison administrators should be accorded wide-ranging deference in the execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security) (quotations and citations omitted). Accordingly, Officer Medina acted appropriately and reasonably in the situation as laid out by Plaintiff in his amended complaint. As such, Officer Medina is entitled to qualified immunity as to Count Two.

IV. Defendants seek certification for an interlocutory appeal.

If this Court concludes that a Heck-bar defense is not properly raised in a Rule 12(b)(1) motion, Defendants Alvarado and Medina respectfully request certification from the district judge, under 28 U.S.C. 1292(b), to pursue an interlocutory appeal. The request is made due to the fact that not allowing a Heck-bar defense to be brought in a Rule 12(b)(1) motion is a “controlling question of law as to which there is substantial ground for difference of opinion and that an

immediate appeal from the order may materially advance the ultimate termination of the litigation.”

CONCLUSION

Defendants Alvarado and Medina request the Motion to Dismiss be granted and Plaintiff’s complaint against them be dismissed as Heck-barred. Defendant Medina also requests he be given qualified immunity for the reasons stated above.

Respectfully submitted,

BILL MCCOLLUM
ATTORNEY GENERAL

/s/ Lance Eric Neff

Lance Eric Neff

Assistant Attorney General

Florida Bar Number 26626

Office of the Attorney General

The Capitol, PL-01

Tallahassee, Florida 32399-1050

(850) 414-3300 - Telephone

(850) 488-4872 - Facsimile

Email: Lance.Neff@myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Lance Eric Neff
LANCE ERIC NEFF

SERVICE LIST
CHRISTOPHER ALSOBROOK versus SGT. ALVARADO, et al.,
Case No.: 10-22183-CV-KING/WHITE
United States District Court, Southern District of Florida

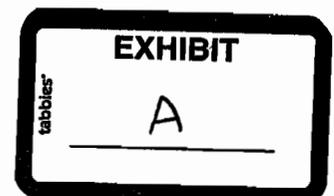
Christopher Alsobrook, DC# D09876
Suwannee C.I.
5964 U.S. Highway 90
Live Oak, FL 32060
PRO SE
Service by Mail

/s/ Lance Eric Neff
LANCE ERIC NEFF

P/N 0 D09876 D YT 3 OATTCK1 PAGE: 02
 INMATE DISCIPLINARY ACTIONS AS OF 11/29/10 TIME: 09:55
 NAME: ALSOBROOK, CHRISTOPHER U. DOC NO: D09876 STATUS: ACTIVE

THE FOLLOWING ENTRIES REFLECT DISCIPLINARY ACTIONS AGAINST THE INMATE FOR VIOLATION OF THE RULE CITED AND INDICATE THE GAIN TIME DAYS LOST.

DATE	DAYS	--- CURRENT INCARCERATION --- VIOLATION	LOCATION
10/27/03	0	REFUSING TO WORK	LIBERTY C.I.
06/02/04	0	POSS OF CONTRABAND	LIBERTY C.I.
07/17/05	0	THEFT	LIBERTY C.I.
11/19/05	0	BEING IN UNAUTH AREA	LIBERTY C.I.
02/01/06	0	LYING TO STAFF	LIBERTY C.I.
08/30/06	0	ASSAULTS OR ATTEMP	LIBERTY C.I.
08/30/06	0	DISORDERLY CONDUCT	LIBERTY C.I.
03/25/09	0	POSS OF WEAPONS	MARTIN C.I.
03/25/09	0	DISORDERLY CONDUCT	MARTIN C.I.
03/25/09	0	DISOBEYING ORDER	MARTIN C.I.
06/06/09	30	FIGHTING	S.F.R.C.
06/06/09	60	DISRESP.TO OFFICIALS	S.F.R.C.
08/09/10	0	FIGHTING	SUWANNEE C.I
08/09/10	0	DISOBEYING ORDER	SUWANNEE C.I



ISSO152 (03) FLORIDA DEPARTMENT OF CORRECTIONS 06/15/2009
DISCIPLINARY REPORT PAGE 1
LOG # 402-090282

DC#: D09876 INMATE NAME: ALSOBROOK, CHRISTOPHER U. INFRACTION
VIOLATION CODE: 0024 TITLE: FIGHTING DATE: 06/06/2009
FACILITY CODE: 402 NAME: S.F.R.C. TIME: 07:50

I. STATEMENT OF FACTS:

ON JUNE 6, 2009 I WAS ASSIGNED TO CONFINEMENT AS THE HOUSING SERGEANT. AT APPROXIMATELY 0750 HRS I WAS IN THE OFFICER STATION GETTING BRIEFED BY MIDNIGHT SERGEANT WHEN HE HEARD A LOUD NOISE AND THE DOOR ON CELL E2109 WAS PONDING. AS WE APPROACHED THE CELL DOOR I SAW INMATE ALSOBROOK, CHRISTOPHER DC#D09876 FIGHTING WITH INMATE MCCLOUD, IZELL DC#588881. BOTH INMATES WERE ORDERED TO CEASE THEIR ACTIONS AND THEY COMPLIED. SHORTLY, AFTER THEY STARTED FIGHTING AGAIN FOR APPROXIMATELY 15 SECONDS, THEY WERE AGAIN ORDERED TO CEASE AND THEY COMPLIED. INMATE ALSOBROOK AND INMATE MCCLOUD DID NOT RESUME FIGHTING AGAIN. THEY WERE TAKEN OUT OF THE CELL AND ESCORTED TO MEDICAL FOR ASSESSMENT. INMATE ALSOBROOK WILL REMAIN IN CONSTANT STATUS PENDING DISPOSITION OF THIS REPORT.

REPORT WRITTEN: 06/06/2009, AT 10:34 OFFICER: EM02 - MEDINA, E.
ASSIGNED AND APPROVED BY: GG03 - GREEN, GEORGE B.

II. INVESTIGATION:

INMATE OFFERED STAFF ASSISTANCE: DECLINED

INVESTIGATION BEGUN: 06/06/2009, AT 11:36 OFFICER: VJG02 - VIDAL, JAVIER GERARDO
INVESTIGATION ENDED: 06/12/2009, AT 16:25

III. INMATE NOTIFICATION OF CHARGES: DATE DELIVERED: 06/12/2009, AT: 16:25

DELIVERED BY : BB038 - BELIARD, B.

IV. DESIGNATING AUTHORITY REVIEW LEVEL: MAJOR DATE: 06/15/2009

OFFICER: HTO03 - HOEY, TIMOTHY J.

V. TEAM FINDINGS AND ACTION DATE: 06/15/2009, AT: 11:37

INMATE OFFERED STAFF ASSISTANCE: DECLINED
INMATE PLEA: GUILTY FINDINGS: GUILTY
INMATE PRESENT: YES

POSTPONEMENT:

BASIS FOR DECISION:

BASED UPON INMATE'S GUILTY PLEA. AT THE HEARING, INMATE ALSOBROOK ADMITTED TO FIGHTING. HE STATED TO THE TEAM THINGS SUCH AS, "WE FOUGHT FOR A GOOD LITTLE MINUTE", & "HE POUNDED ME PRETTY DECENT". HIS STATEMENTS AT THE HEARING SUPPORT THE STATEMENT OF FACTS OF SGT. MEDINA, WHICH READ, "ON JUNE 6, 2009 I WAS ASSIGNED TO CONFINEMENT AS THE HOUSING SERGEANT. AT APPROXIMATELY 0750 HRS I WAS IN THE OFFICER STATION GETTING BRIEFED BY MIDNIGHT SERGEANT WHEN HE HEARD A LOUD NOISE AND THE DOOR ON CELL E2109 WAS PONDING. AS WE APPROACHED THE CELL DOOR I SAW INMATE ALSOBROOK, CHRISTOPHER DC#D09876 FIGHTING WITH INMATE MCCLOUD, IZELL DC#588881. BOTH INMATES WERE ORDERED TO CEASE THEIR ACTIONS AND THEY COMPLIED. SHORTLY, AFTER THEY STARTED FIGHTING AGAIN FOR APPROXIMATELY 15 SECONDS, THEY WERE AGAIN ORDERED TO CEASE AND THEY COMPLIED. INMATE ALSOBROOK AND INMATE MCCLOUD DID NOT RESUME FIGHTING AGAIN." THE TEAM NOTES A PEN & INK CHANGE WAS MADE TO THE REPORT. IN THE LAST SENTENCE, THE WORD 'CONSTANT' SHOULD READ 'CURRENT' (AS IT APPEARS ON THE



ISSO152 (03) FLORIDA DEPARTMENT OF CORRECTIONS 06/15/2009
DISCIPLINARY REPORT PAGE 2
LOG # 402-090282

DC#: D09876 INMATE NAME: ALSOBROOK, CHRISTOPHER U. INFRACTION
VIOLATION CODE: 0024 TITLE: FIGHTING DATE: 06/06/2009
FACILITY CODE: 402 NAME: S.F.R.C. TIME: 07:50

ORIGINAL HANDWRITTEN COPY).

ACTIONS TAKEN:

LOSS OF GAIN TIME: 0000; PROBATION DAYS SET: 000
DISCIPLINARY CONFINEMENT: 30; PROBATION DAYS SET: 0 CONSECUTIVE
LOSS FUTURE GAIN TM 30; PROBATION DAYS SET: 0 ;
0000 000

RESTITUTION: \$.00; INDIV.REVIEW/COUNSEL?: N; CONFISCATE CONTRABAND?: N

TEAM CHAIRMAN: SSR05 - SIEGLER, S.
TEAM MEMBERS: ST003 - SHARPE, T.

VI. REVIEW AND FINAL ACTION: NO FINAL ACTION

WARDEN: - DATE: 00/00/0000

VII. APPEAL PROCESS DISPOSITION: NO INSTITUTIONAL ACTION

WARDEN: - DATE: 00/00/0000

INFORMATIONAL NOTES:

MAXIMUM GAIN TIME DAYS AVAILABLE TO BE TAKEN: 30 DAYS

DC4-804

ISSO152 (03) FLORIDA DEPARTMENT OF CORRECTIONS 06/15/2009
DISCIPLINARY REPORT PAGE 1
LOG # 402-090283

DC#: D09876 INMATE NAME: ALSOBROOK, CHRISTOPHER U. INFRACTION
VIOLATION CODE: 0014 TITLE: DISRESP.TO OFFICIALS DATE: 06/06/2009
FACILITY CODE: 402 NAME: S.F.R.C. TIME: 07:50

I. STATEMENT OF FACTS:

ON JUNE 6,2009 I WAS ASSIGNED TO CONFINEMENT AS THE HOUSING SERGEANT. AT APPROXIMATELY 0750 HRS I WAS IN THE OFFICER STATION GETTING BRIEFED BY MIDNIGHT SERGEANT WHEN WE HEARD A LOUD NOISE AND THE DOOR ON CELL E2109 WAS PONDING. WHEN I APPROACHED CELL E2109 INMATE ALSOBROOK, CHRISTOPHER DC#D09876 LOOKED AT ME WHILE I WAS TRYING TO CONVINCHE HIM AND HIS ROOMMATE TO STOP FIGHTING AND HE STATED " MAN WHAT THAT FUCK ARE YOU LOOKING AT, WHY DON'T YOU FUCKING COME IN HERE AND GET SOME TOO". INMATE ALSOBROOK IS GUILTY OF DISRESPECTING AN OFFICIAL AS PROHIBITED BY THE RULES OF INMATE CONDUCT. INMATE ALSOBROOK WILL REMAIN IN CURRENT STATUS PENDING DISPOSITION OF THIS REPORT.

REPORT WRITTEN: 06/06/2009, AT 10:53 OFFICER: EM02 - MEDINA, E.
ASSIGNED AND APPROVED BY: GG03 - GREEN,GEORGE B.

II. INVESTIGATION:

WITNESSES:

INMATE HAS ONE WITNESS INMATE IZELL, MCCLOUD DC#588881. SEE ATTACHED.
INMATE OFFERED STAFF ASSISTANCE: DECLINED

INVESTIGATION BEGUN: 06/06/2009, AT 11:00 OFFICER: VJG02 - VIDAL,JAVIER GERARDO
INVESTIGATION ENDED: 06/12/2009, AT 16:29

III. INMATE NOTIFICATION OF CHARGES: DATE DELIVERED: 06/12/2009, AT: 16:29

DELIVERED BY : BB038 - BELIARD, B.

IV. DESIGNATING AUTHORITY REVIEW LEVEL: MAJOR DATE: 06/15/2009

OFFICER: HTO03 - HOEY, TIMOTHY J.

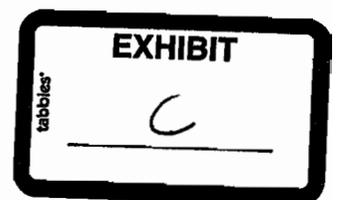
V. TEAM FINDINGS AND ACTION DATE: 06/15/2009, AT: 11:45

INMATE OFFERED STAFF ASSISTANCE: DECLINED
INMATE PLEA: NOT GUILTY FINDINGS: GUILTY
INMATE PRESENT: YES

POSTPONEMENT:

BASIS FOR DECISION:

BASED UPON THE STATEMENT OF FACTS AS WRITTEN IN SECTION I OF THE REPORT BY SGT. MEDINA, WHO WROTE, "ON JUNE 6,2009 I WAS ASSIGNED TO CONFINEMENT AS THE HOUSING SERGEANT. AT APPROXIMATELY 0750 HRS I WAS IN THE OFFICER STATION GETTING BRIEFED BY MIDNIGHT SERGEANT WHEN WE HEARD A LOUD NOISE AND THE DOOR ON CELL E2109 WAS POUNDING. WHEN I APPROACHED CELL E2109, INMATE ALSOBROOK, CHRISTOPHER DC#D09876 LOOKED AT ME WHILE I WAS TRYING TO CONVINCHE HIM AND HIS ROOMMATE TO STOP FIGHTING AND HE STATED, 'MAN WHAT THAT FUCK ARE YOU LOOKING AT, WHY DON'T YOU FUCKING COME IN HERE AND GET SOME TOO'."



ISSO152 (03) FLORIDA DEPARTMENT OF CORRECTIONS 06/15/2009
DISCIPLINARY REPORT PAGE 2
LOG # 402-090283

DC#: D09876 INMATE NAME: ALSOBROOK, CHRISTOPHER U. INFRACTION
VIOLATION CODE: 0014 TITLE: DISRESP.TO OFFICIALS DATE: 06/06/2009
FACILITY CODE: 402 NAME: S.F.R.C. TIME: 07:50

ACTIONS TAKEN:

LOSS OF GAIN TIME: 0000; PROBATION DAYS SET: 000
DISCIPLINARY CONFINEMENT: 30; PROBATION DAYS SET: 0 CONSECUTIVE
LOSS FUTURE GAIN TM 60; PROBATION DAYS SET: 0
0000 000

RESTITUTION: \$.00; INDIV.REVIEW/COUNSEL?: N; CONFISCATE CONTRABAND?: N

TEAM CHAIRMAN: SSR05 - SIEGLER, S.
TEAM MEMBERS: ST003 - SHARPE, T.

VI. REVIEW AND FINAL ACTION: NO FINAL ACTION

WARDEN: - DATE: 00/00/0000

VII. APPEAL PROCESS DISPOSITION: NO INSTITUTIONAL ACTION

WARDEN: - DATE: 00/00/0000

INFORMATIONAL NOTES:

MAXIMUM GAIN TIME DAYS AVAILABLE TO BE TAKEN: 90 DAYS



62 Fed.Appx. 714, 2003 WL 1870892 (C.A.7 (Wis.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 62 Fed.Appx. 714, 2003 WL 1870892 (C.A.7 (Wis.)))

H
This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Seventh Circuit Rule 32.1. (Find CTA7 Rule 32.1)

United States Court of Appeals,
Seventh Circuit.
Bruce N. BIEBER, Plaintiff-Appellant,
v.
WISCONSIN DEPARTMENT OF CORRECTIONS, et al., Defendants-Appellees.
No. 02-2713.

Submitted April 1, 2003.^{FN*}

FN* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See Fed. R.App. P. 34(a)(2).

Decided April 7, 2003.

State prison inmate brought pro se § 1983 action against state Department of Corrections (DOC) and DOC officials, alleging denial of constitutionally adequate medical care and use of excessive force by prison guards. The United States District Court for the Western District of Wisconsin, John C. Shabaz, J., granted summary judgment on the medical care claim, and after trial on the excessive force claim, entered judgment on verdict for defendants. Inmate appealed. The Court of Appeals held that: (1) prison's medical staff was not liable under § 1983 for alleged deliberate indifference to inmate's serious medical needs; (2) refusal to recruit an attorney to help inmate conduct discovery was within district court's discretion; and (3) district court's alleged ignoring of inmate's discovery motion for alleged use of excessive force by prison

guards provided no ground for reversal.

Affirmed.

West Headnotes

[1] Civil Rights 78 ↪1091

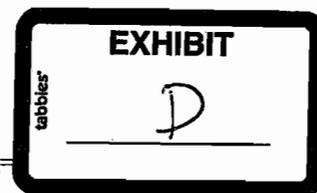
78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1089 Prisons
78k1091 k. Medical Care and Treatment.

Most Cited Cases
(Formerly 78k135)
State prison's medical staff could not be held liable under § 1983 for alleged deliberate indifference to inmate's serious medical need for his prescribed knee brace when they substituted an elastic sleeve for the brace because they believed that metal in the brace posed a security risk, even though they knew that his knee, if left unsupported, jeopardized his physical well-being, absent any evidence that they knew the brace was essential to treat his knee injury. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

[2] Civil Rights 78 ↪1091

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1089 Prisons
78k1091 k. Medical Care and Treatment.

Most Cited Cases
(Formerly 78k135)
State prison's medical staff could not be held liable under § 1983 for alleged deliberate indifference to inmate's serious medical need for knee surgery when his surgery was delayed where it was not clear that the prison's medical staff was responsible for any delays, given medical clinic's cancellation of appointments, and given that, even if the prison held up surgery by failing, for example, to obtain MRI results, inmate did not introduce medical evid-



62 Fed.Appx. 714, 2003 WL 1870892 (C.A.7 (Wis.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 62 Fed.Appx. 714, 2003 WL 1870892 (C.A.7 (Wis.)))

ence to show any effect of the delay on his condition. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

[3] Civil Rights 78 ↪1445

78 Civil Rights

78III Federal Remedies in General

78k1441 Appointment of Counsel

78k1445 k. Criminal Law Enforcement; Prisons. Most Cited Cases

(Formerly 78k246)

Refusal to recruit an attorney to help state prison inmate conduct discovery in his § 1983 suit against prison officials for alleged use of excessive force by prison guards was within district court's discretion absent any evidence that he adequately tried to obtain private counsel or that circumstances prevented his doing so. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

[4] Federal Courts 170B ↪895

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(K) Scope, Standards, and Extent

170BVIII(K)6 Harmless Error

170Bk895 k. Pretrial Proceedings; Discovery and Depositions. Most Cited Cases

District court's alleged ignoring of state prison inmate's discovery motion in his pro se § 1983 action against prison officials for alleged use of excessive force by prison guards provided no ground for reversal of judgment on verdict for the prison officials where inmate failed to follow procedural rules requiring that he file, after appropriate notice, a motion to compel, and that he file an affidavit in support of a request for additional time to respond to summary judgment motions. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983; Fed.Rules Civ.Proc.Rules 37(a), 56(f), 28 U.S.C.A.

*715 Appeal from the United States District Court for the Western District of Wisconsin. No. 02-C-155-S. John C. Shabaz, Judge.

Before FAIRCHILD, BAUER, and KANNE, Circuit Judges.

ORDER

**1 Proceeding pro se, inmate Bruce Bieber contends in this action under 42 U.S.C. § 1983 that the Wisconsin Department of Corrections, Secretary Jon Litscher, Dr. Gert Hasselhof, Nurse Pam Bartels, and Security Director Gary Boughton denied him constitutionally adequate medical care by refusing to allow him to wear a knee brace in prison and by delaying surgery on his knee. Bieber also claims that two prison guards-Officers W. Brown and T. Belz-in one instance used excessive force to restrain him. The district court resolved each of the claims in favor of the defendants, and Bieber appeals.

In August 2000 Bieber injured his knee when police arrested him for assaulting a public bus driver in Milwaukee. An MRI taken the following April revealed a torn anterior cruciate ligament and degeneration of the lateral meniscus, so Milwaukee physicians prescribed a rigid brace for stability and allegedly recommended that Bieber have surgery to repair the injury. In the meantime Bieber was convicted on charges stemming from his assault on the bus driver, and in June 2001 he began serving a five-year term at Dodge Correctional Institute.

In July Bieber began filing grievances demanding physical therapy and surgery for his knee. The grievances were denied because prison medical personnel-upon obtaining his MRI results from Milwaukee-scheduled Bieber for an evaluation at the orthopedic clinic associated with the University of Wisconsin Hospital. The soonest available appointment was in October, and until then prison physicians prescribed pain medication. Bieber meanwhile had gotten into a fight at Dodge, and officials in September transferred him to Supermax Correctional Institution.

When Bieber transferred to Supermax, he promptly

62 Fed.Appx. 714, 2003 WL 1870892 (C.A.7 (Wis.))
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was screened at the prison's health services unit and examined by Dr. Hasselhof. Dr. Hasselhof noted that Bieber had complained of knee pain and that *716 he would "follow up" to see if Bieber had been scheduled for surgery. The prison's medical director, Nurse Bartels, also telephoned Security Director Boughton to see if Bieber could wear the rigid knee brace that he had been given in Milwaukee and had brought along during the transfer. Boughton responded that the brace posed a security risk because it contained metal and so could be fashioned into a weapon. Boughton, according to the averments in his affidavit, then asked Nurse Bartels about alternatives to the brace, and she replied that an elastic sleeve would be "medically acceptable" and "serve the same purpose."

In October the sleeve was ordered, and Bieber visited the orthopedic clinic at the University of Wisconsin Hospital as scheduled. There an orthopedic surgeon, Dr. James Keene, reported that Bieber complained of constant pain and "catching" and "shifting" in his knee. Dr. Keene also noted that Bieber was not allowed to wear his brace in prison, but he did not suggest that the restriction was medically unacceptable. Nor did Dr. Keene recommend surgery immediately. He instead concluded that Bieber would be a surgical candidate only after he completed a course of physical therapy, reduced his current pain medications (to ensure that he did not become resistant to drugs used to manage postoperative pain), and supplied a copy of his MRI to the clinic (presumably so that doctors could further assess the damage to his knee). The prison's medical staff accordingly arranged physical therapy and prescribed analgesic balm in lieu of the narcotics that Bieber had been taking. According to a note in Bieber's medical file, the staff also "worked on getting the MRI pictures sent."

**2 Then, on November 27, Bieber had an altercation with Officers Brown and Belz, as a result of which Bieber suffered a broken wrist and aggravated his existing knee injury. According to the allegations in Bieber's sworn complaint, the officers

took him to be searched in a "strip cell," and when he refused to kneel (on account of his bad knee), Brown slammed him into the cell door, Belz yanked his leg irons into the air, and as Bieber was falling to the ground, Brown jumped on him and applied a choke-hold. Following the alleged assault, medical staff administered Valium, applied ice, splinted Bieber's right forearm and knee, and arranged for him to be taken to the University of Wisconsin Hospital. At the hospital doctors placed a cast on Bieber's wrist but found no new instability in his knee.

Bieber returned to the prison the following day in a wheelchair, which Nurse Bartels did not allow Bieber to use in the prison because she apparently believed that Bieber did not need the device for ambulation. The medical staff, however, did issue an order to the guards that Bieber could not kneel, cross his legs, or bend his left knee. The staff also sent Bieber back to the hospital for a scheduled check of his wrist and continued sending him for scheduled physical therapy on his knee. But on December 28 the physical therapist determined that further therapy was unwarranted. The therapist reported that conservative treatment had "reached maximum benefit" and that Bieber "may benefit" from surgery. The therapist also noted that if Bieber could not wear his rigid knee brace in prison for security reasons, then his current "functional deficits" would not improve.

Over the next two months the medical staff twice scheduled Bieber to return to the orthopedic clinic, but the clinic cancelled both appointments and rescheduled him for April 12. After that visit the attending physician, Dr. Smith, reiterated that Bieber appeared to have a *717 torn anterior cruciate ligament. To treat the injury, he recommended that Bieber wear his rigid knee brace "at all times," that the prison either obtain Bieber's MRI or arrange to have a new MRI performed, and that Bieber return to the clinic when the MRI had been obtained. According to Bieber, the medical staff to this day has not obtained his MRI or otherwise complied with

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these instructions.

Meanwhile, Bieber had been filing grievances complaining that the medical staff had "confiscated" his knee brace and unnecessarily delayed surgery for his knee. He also charged that Officers Brown and Belz had used excessive force to restrain him in the strip cell. After unsuccessfully appealing each grievance to Secretary Litscher (the head of the Department of Corrections), Bieber brought this action. The district court promptly dismissed Bieber's claims against the department as barred by the Eleventh Amendment but permitted him to proceed as to the remaining defendants. Bieber then asked the court to enlist counsel to help him obtain evidence that would support his claims. He also filed a "Discovery Motion," requesting that the district court order the defendants to produce his knee brace, dozens of records from his prison medical file, and two videotapes allegedly made on November 27 by security cameras mounted in the strip cell.

****3** The district court denied Bieber's request for counsel because he had not attempted to secure private counsel and because the case appeared factually and legally straightforward. The judge, however, did not rule on Bieber's discovery motion. Then upon the defendants' motions, the court granted summary judgment on Bieber's medical-care claims, concluding that Bieber had not established a genuine issue whether he had an objectively serious medical condition or whether the authorities acted with deliberate indifference to that condition. But with respect to Bieber's excessive-force claims, the court determined that there was a triable question whether Brown and Belz used force for the sole purpose of causing harm to Bieber. So after quashing subpoenas sent by Bieber to various doctors and prison staff, the court held a jury trial on June 14. The jury returned a special verdict finding that Brown and Belz had not used excessive force.

On appeal Bieber offers no reason to think that the district court improperly dismissed the Department of Corrections. Nor does he explain how Secretary

Litscher was personally involved in any constitutional wrongdoing. *Boyce v. Moore*, 314 F.3d 884, 888 (7th Cir.2002). Bieber's principal contentions instead concern the grant of summary judgment on his medical-care claims against Security Director Boughton, Dr. Hasselhof, and Nurse Bartels, as well as the district court's handling of his request for counsel and motion for discovery. These arguments are considered in turn.

To avoid summary judgment on his medical-care claims, Bieber had to present evidence that prison officials acted with deliberate indifference toward his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 104-06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). He therefore needed to show that he had an objectively serious medical condition and that prison officials knew of a risk posed by the condition and disregarded that risk. *Farmer v. Brennan*, 511 U.S. 825, 834-37, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Although the district court concluded that Bieber had not presented sufficient evidence to withstand summary judgment on either the objective or subjective prongs of this test, we think that with respect to the objective prong, at ***718** least, he did enough. The record reflects that without his rigid brace Bieber's injured knee caused him significant pain, and that by itself raises a triable question whether he had an objectively serious medical condition. *Walker v. Benjamin*, 293 F.3d 1030, 1039-40 (7th Cir.2002) (discussing cases involving serious pain).

As for the subjective prong, Bieber contends that he made the necessary showing in two ways. First, Bieber says that the medical staff knew of and disregarded the risk that his knee injury would worsen by refusing to allow him to wear his knee brace. Bieber's theory is that doctors outside the prison system prescribed this device and the prison's staff deliberately ignored those orders. *See, e.g., Murphy v. Walker*, 51 F.3d 714, 720 (7th Cir.1995) (removing a cast without a doctor's approval states a claim for deliberate indifference); *Lawson v. Dallas County*, 286 F.3d 257, 263 (5th Cir.2002) (jail

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nurses acted with deliberate indifference by ignoring doctor's orders).

**4 [1] The problem is that Bieber has not supplied evidence that either Security Director Boughton, Dr. Hasselhof, or Nurse Bartels believed that the brace was essential to treat his injury. The prison's medical staff plainly knew that Bieber's knee, if left unsupported, jeopardized his physical well-being. The staff, however, gave Bieber an elastic sleeve as a substitute for the brace because they believed that metal in the brace posed a security risk. It may be that the sleeve was inadequate-as Bieber's physical therapist suggested in December and as Dr. Smith reiterated in April. Yet absent evidence that the defendants were aware of the inadequacy, Bieber has no claim. At most he has shown a difference of medical opinion, which raises questions under tort law but not the Constitution. *Snipes v. DeTella*, 95 F.3d 586, 591 (7th Cir.1996); see also *Walker v. Peters*, 233 F.3d 494, 501 (7th Cir.2000).

[2] Bieber's second theory is that prison officials have deliberately ignored his condition by delaying surgery for his knee. Specifically, Bieber contends that the defendants have canceled his appointments with the orthopedic clinic and failed to obtain copies of his MRI. A delay in necessary treatment can establish deliberate indifference, but only if "verifying medical evidence" exists to show how the delay adversely affected a patient's condition. *Langston v. Peters*, 100 F.3d 1235, 1240 (7th Cir.1996) (emphasis and internal quotation omitted). Here, however, it is not even clear that the prison's medical staff was responsible for any delays. After all, it was the *clinic* that canceled Bieber's two appointments. And even if the prison has held up surgery (by failing, for example, to obtain the MRI results), Bieber has not introduced medical evidence to show the effect-if any-of the delay on his condition. Without such evidence, Bieber could not overcome summary judgment on his medical-care claims.

Turning to the excessive-force claims, Bieber does not argue that the jury verdict was unsupported by

the evidence. Nor could he make such an argument, for he has not included a complete transcript of the trial as part of the record on appeal. Fed. R.App. P. 10(b)(2); see *LaFollette v. Savage*, 63 F.3d 540, 544 (7th Cir.1995). Bieber's objection instead is that the district court forced him to try the case without a lawyer and thus denied him "effective assistance of counsel." There is of course no right to effective legal assistance in civil cases. See, e.g., *Stanciel v. Gramley*, 267 F.3d 575, 581 (7th Cir.2001). But what Bieber apparently means is that the district court denied him a fair trial by refusing to recruit an attorney to help him *719 conduct discovery and by ignoring his own "Discovery Motion."

[3] Neither objection has merit. With respect to his motion to enlist counsel, Bieber has offered no evidence that he adequately tried to obtain private counsel or that circumstances prevented his doing so, so the district court did not abuse its discretion by denying the request. *Zarnes v. Rhodes*, 64 F.3d 285, 288 (7th Cir.1995); *Jackson v. County of McLean*, 953 F.2d 1070, 1072-73 (7th Cir.1992). Bieber says that his efforts somehow were "sabotaged" by Supermax employees. But he does not elaborate on this contention or provide any evidence for the charge, and without a developed argument the point is waived. Fed. R.App. P. 28(a)(9); see *Anderson v. Hardman*, 241 F.3d 544, 545 (7th Cir.2001).

**5 [4] That leaves Bieber's argument that the district court improperly ignored his discovery motion. To obtain discovery, Bieber needed to serve his requests on the defendants, which he allegedly did. Then if the defendants refused to produce the requested materials, he needed to file-after appropriate notice-a motion to compel under Federal Rule of Civil Procedure 37(a). Bieber did not take this final step. Nor did he file an affidavit in support of a request for additional time to respond to the defendants' summary judgment motions. Fed.R.Civ.P. 56(f); *DiCesare v. Stuart*, 12 F.3d 973, 979 (10th Cir.1993) (holding that unrepresented litigants have

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an obligation to seek extensions under Rule 56(f). Given that pro se plaintiffs, like counseled litigants, must follow clear procedural rules, *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 124 L.Ed.2d 21 (1993); *Gleash v. Yuswak*, 308 F.3d 758, 761 (7th Cir.2002), we do not think that the district court's handling of Bieber's discovery request provides a ground for reversal.

AFFIRMED.

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H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.
Michael LERMA, Plaintiff-Appellant,

v.

J. BELL; H. Rippetoe, P.A.; D. Woodruff; Rogers, Correctional Officer; M. Jones; R. Carpenter; M.E. Roussopoulos, Lieutenant; G. Rodman, Defendants-Appellees.
No. 00-15403.

Submitted Jan. 8, 2001^{FN1}.

FN1. The panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

Decided Jan. 24, 2001.

State prison inmate sued prison authorities for deliberate indifference to his serious medical needs. The United States District Court for the Northern District of California, Maxine M. Chesney, J., granted summary judgment for defendants, and appeal was taken. The Court of Appeals held that: (1) denial of inmate's use of elastic knee brace did not constitute deliberate indifference to serious medical need, and (2) prison officials could not be held liable for inmate's multiple cell reassignments, which allegedly constituted deliberate indifference to his medical needs, absent evidence that any individually named defendants were involved in reassignments.

Affirmed.

West Headnotes

[1] Prisons 310 ↪ 192

310 Prisons
310II Prisoners and Inmates
310II(D) Health and Medical Care
310k191 Particular Conditions and Treatments
310k192 k. In general. Most Cited (Formerly 310k17(2))

Sentencing and Punishment 350H ↪ 1546

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in General
350HVII(H) Conditions of Confinement
350Hk1546. k. Medical care and treatment. Most Cited Cases
Prison officials' denial of inmate's use of elastic knee brace did not constitute deliberate indifference to serious medical need, given evidence that confiscation of brace was based on legitimate safety concerns. U.S.C.A. Const.Amend. 8.

[2] Civil Rights 78 ↪ 1358

78 Civil Rights
78III Federal Remedies in General
78k1353 Liability of Public Officials
78k1358 k. Criminal law enforcement; prisons. Most Cited Cases (Formerly 310k10)
Prison officials could not be held liable for inmate's multiple cell reassignments, which allegedly constituted deliberate indifference to his medical needs, absent evidence that any individually named defendants were involved in reassignments. U.S.C.A. Const.Amend. 8; 42 U.S.C.A. § 1983.

[3] Civil Rights 78 ↪ 1445

78 Civil Rights



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78III Federal Remedies in General
78k1441 Appointment of Counsel
78k1445 k. Criminal law enforcement;
prisons. Most Cited Cases
(Formerly 170Ak1951)
Denial of inmate's motion for appointment of counsel was not abuse of discretion, in suit against prison officials for deliberate indifference to serious medical need, absent demonstration of exceptional circumstances. U.S.C.A. Const.Amend. 8.

[4] ↪1951.32

170A Federal Civil Procedure
170AXV Trial
170AXV(A) In General
170Ak1951.32 k. Experts and others appointed to assist parties. Most Cited Cases
(Formerly 170Ak1951)
District court did not abuse its discretion by denying inmate's motion for independent medical examination in order to obtain different opinion as to consequences of being denied knee brace; difference of opinion would not have established inmate's claim of deliberate indifference to serious medical needs, as confiscation was not based on lack of medical need, but on legitimate safety concerns. U.S.C.A. Const.Amend. 8.

*783 Appeal from the United States District Court for the Northern District of California; Maxine M. Chesney, District Judge, Presiding. D.C. No. CV-92-01024-MMC.

Before BEEZER, O'SCANNLAIN, and KLEINFELD, Circuit Judges.

MEMORANDUM^{FN2}

FN2. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**1 Michael Lerma, a California state inmate, appeals pro se the district court's grant of summary judgment in his 42 U.S.C. § 1983 action alleging deliberate indifference to serious medical needs. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo the district court's grant of summary judgment, *see Barnett v. Centoni*, 31 F.3d 813, 815 (9th Cir.1994) (per curiam), and we affirm.

*784 [1] We conclude that the district court properly granted summary judgment to defendants on Lerma's claim that denial of the use of an elastic knee brace constituted deliberate indifference to a serious medical need because the prison officials presented evidence that the confiscation of the brace was based on legitimate safety concerns. *See Whitley v. Albers*, 475 U.S. 312, 321-22, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (holding that prison officials should be accorded wide ranging deference in the adoption and execution of policies necessary to preserve internal order and maintain institutional security).

[2] The district court properly granted summary judgment on Lerma's claim that several cell reassignments constituted deliberate indifference to his medical needs because Lerma failed to present evidence that any of the individual defendants were involved in the reassignments. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir.1988) (stating that a prisoner must set forth specific facts as to each individual defendant's deliberate indifference).

[3] The district court did not abuse its discretion by denying Lerma's motion for appointment of counsel because he did not demonstrate exceptional circumstances. *See Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir.1991).

[4] The district court did not abuse its discretion by denying Lerma's motion for an independent medical examination because Lerma sought the exam to obtain a different opinion as to the consequences of being denied a knee brace. Because a difference of opinion does not establish deliberate indifference to

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serious medical needs, *see Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir.1989), Lerma failed to show the requisite good cause for the district court to grant his motion, *see Schlagenhauf v. Holder*, 379 U.S. 104, 118, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).

The district court did not abuse its discretion by denying Lerma's motion to conduct additional discovery. *See Conkle v. Jeong*, 73 F.3d 909, 915 (9th Cir.1995).

Appellees' motion to strike the declarations of Manuel Zarate, dated March 15, 2000, and Michael Lerma, dated April 9, 2000, filed in support of Lerma's brief on appeal is granted. *See United States v. Elias*, 921 F.2d 870, 874 (9th Cir.1990) (stating that documents not presented to the district court are not part of the record on appeal).

AFFIRMED.

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Only the Westlaw citation is currently available.

United States District Court,
E.D. California,
Lawrence WILLIAMS, Plaintiff,

v.

COUNTY OF SACRAMENTO SHERIFF'S DE-
PARTMENT, et al., Defendants.
No. CIV S-03-2518 FCD DAD P.

Aug. 22, 2007.

Lawrence - Williams, Soledad, CA, pro se.

Jonathan B. Paul, Moreno & Rivera, LLP, Sacra-
mento, CA, for Defendants.

*ORDER AND FINDINGS AND RECOMMENDA-
TIONS*

DALE A. DROZD, United States Magistrate Judge.

*1 Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Before the court is a motion for summary judgment, or in the alternative, motion for summary adjudication of issues brought on behalf of defendants Bacoch, Dickerson, Douglas, and Murray. ^{FN1} Also before the court is defendants' motion to strike plaintiff's lodging of a Sheriff's Department Internal Affairs report and plaintiff's request for sanctions.

FN1. Defendants Zwolinski, Johnson and Powell do not join in the motion.

AMENDED COMPLAINT

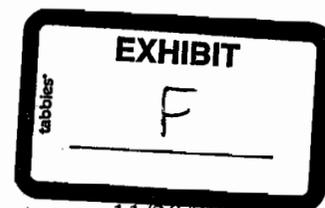
Plaintiff filed his complaint on December 3, 2003. On March 25, 2004, the court dismissed the complaint and granted plaintiff leave to file an amended complaint that provided specific allegations concerning the acts of each named defendant. Plaintiff

was also provided the legal standard governing an excessive force claim. Plaintiff filed his amended complaint on April 22, 2004. On July 1, 2004, the court found service of the amended complaint was appropriate on defendants Dickerson, Douglas, Bacoch, Zwolinski, Murray, Johnson, and Powell.^{FN2}

FN2. The court did not find service appropriate on defendant Sheriff Lou Blanas. See Order filed 7/1/04 at 2.

In his amended complaint, plaintiff alleges that on May 11, 2003, he and fifteen other inmates were attacked by deputies at the Sacramento County Main Jail. (Am. Compl. at 3.) The incident occurred after plaintiff and the other inmates were brought in early from their outdoor recreation. (*Id.*) The inmates asked to speak to the sergeant. (*Id.*) Defendant officers Douglas and Dickerson stated that the inmates could lock down the easy way or the hard way. (*Id.*) Defendant Sergeant Zwolinski and several officers entered the pod shouting commands and using vulgar language. (*Id.* at 4.) Defendant Zwolinski ordered the inmates to get on the wall. (*Id.*) Plaintiff turned to go to the wall but because officers were passing in front of him, he stopped. (*Id.*) Defendant Zwolinski grabbed plaintiff by the collar and threw plaintiff ten to twelve feet, causing plaintiff to hit his head on the wall. (*Id.*) Plaintiff was dazed and felt something run down his face. (*Id.*) An inmate in his cell told plaintiff that he was bleeding and put some toilet paper under the door for plaintiff to use. (*Id.*) Plaintiff asked defendant officer Bacoch if he could pick up the toilet paper to stop the bleeding. (*Id.*) Defendant Bacoch answered, "you need to shut up," and when plaintiff asked to see the doctor, defendant Bacoch replied, "you're not dead and you need to just shut up and do as you're told ." (*Id.* at 4-5.) Defendant Bacoch did not notify anyone that plaintiff needed medical attention. (*Id.* at 5.) Defendant Zwolinski then instructed officers to remove plaintiff from the area and defendant officer Dickerson grabbed plaintiff's right arm and took plaintiff to a classroom. (*Id.*)

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Plaintiff was rushed to the floor by defendant Dickerson and another officer. (*Id.*) They attempted to hog-tie plaintiff's legs, put a knee on his back and a foot on his neck. (*Id.*) Plaintiff heard shouting and did not know it was directed to him. (*Id.*) Because he did not answer or acknowledge that he understood the officers' commands, his arms were lifted up toward his head until they popped and plaintiff cried out in pain. (*Id.*) Plaintiff contends that the abuse lasted ten minutes or longer. (*Id.*) Plaintiff was taken to the nurse and she stitched two lacerations on his face. (*Id.*) Plaintiff contends that both his wrists were badly bruised and that he lost feeling in his hands. (*Id.*) Defendant Murray conducted the rule violation hearing and had plaintiff placed in the "hole" for five days and placed on a disciplinary diet for three days. (*Id.*) Defendant Murray disregarded the fact that plaintiff was on a special diet. (*Id.*) Defendant Lt. Powell issued a false report and claimed that plaintiff was lying. (*Id.*) Defendant Sergeant Johnson was present during the entire incident and made no effort to control or discipline any of the officers who were violating jail policy. (*Id.*)

of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.' " *Id.* Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *See id.* at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." *Id.* at 323.

MOTION FOR SUMMARY JUDGMENT/
ADJUDICATION OF ISSUES

I. *Summary Judgement Standards Under Rule 56*

*2 Summary judgment is appropriate when it is demonstrated that there exists "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

Under summary judgment practice, the moving party

always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *See Fed.R.Civ.P. 56(e); Matsushita*, 475 U.S. at 586 n. 11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987), and that the dispute is genuine, i.e., the evidence is such that

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a reasonable jury could return a verdict for the non-moving party, see *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1436 (9th Cir.1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv.*, 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita*, 475 U.S. at 587 (quoting Fed.R.Civ.P. 56(e) advisory committee's note on 1963 amendments).

*3 In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed.R.Civ.P. 56(c). The evidence of the opposing party is to be believed. See *Anderson*, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See *Matsushita*, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See *Richards v. Nielsen Freight Lines*, 602 F.Supp. 1224, 1244-45 (E.D.Cal.1985), *aff'd*, 810 F.2d 898, 902 (9th Cir.1987). To demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts 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.'" *Matsushita*, 475 U.S. at 587 (citation omitted).

Finally, "[a] scintilla of evidence or evidence that is merely colorable or not significantly probative does not present a genuine issue of material fact" precluding summary judgment. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir.2000). See also

Summers v. A. Teichert & Son, Inc., 127 F.3d 1150, 1152 (9th Cir.1997). On summary judgment the court is not to weigh the evidence or determine the truth of the matters asserted but must only determine whether there is a genuine issue of material fact that must be resolved by trial. See *Summers*, 127 F.3d at 1152. Nonetheless, in order for any factual dispute to be genuine, there must be enough doubt for a reasonable trier of fact to find for the plaintiff in order to defeat a defendant's summary judgment motion. See *Addisu*, 198 F.3d at 1134.

On July 21, 2004, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See *Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir.1998) (en banc); *Klinge v. Eikenberry*, 849 F.2d 409 (9th Cir.1988).

II. Defendants' Motion for Summary Judgment/Summary Adjudication^{FN3}

FN3. See Court Document No. 75.

Defendants argue that under the holding in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), they are entitled to qualified immunity because their alleged malfeasance does not rise to the level of a constitutional violation. (Mot. for Summ. J. (MSJ) at 8.)

A. Medical Care Claim

Defendants argue that defendants Bacocho, Dickerson and Murray were not deliberately indifferent to plaintiff's medical care as prohibited by the Fourteenth Amendment. Defendants note that plaintiff alleges that defendants Bacocho and Dickerson delayed medical treatment of his facial lacerations. However, defendants argue that plaintiff was seen by medical staff within ten to fifteen minutes after he was injured and that plaintiff has not demonstrated that any delay in treatment resulted in further injury. (*Id.* at 10.) Therefore, defendants assert that defendant Bacocho is entitled to summary judgment.

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ment and should be dismissed from this suit, and that defendant Dickerson is entitled to summary adjudication of plaintiff's claim of deliberate indifference to his serious medical needs.

*4 As to defendant Murray, who ordered that plaintiff receive a disciplinary diet, defendants assert that at his deposition plaintiff admitted that he was not on any medically prescribed diet when the disciplinary diet was ordered. (*Id.*) Moreover, defendants argue, there are no medical records confirming that plaintiff was on a medically prescribed diet in May of 2003. (*Id.* at 11.) Since plaintiff did not face a substantial risk of serious harm and defendant Murray was unaware of facts from which he could draw an inference that plaintiff would be exposed to a substantial risk of serious harm if placed on a disciplinary diet, it is argued that defendant Murray is entitled to summary judgment in his favor. (*Id.*)

B. Defendant Douglas

Defendants argue that plaintiff cannot state a cognizable claim against defendant Douglas because there is no causal link between defendant Douglas' calling the inmates in from outdoor recreation and the alleged use of excessive force and deliberate indifference to serious medical needs. (*Id.*) Defendants contend that at his deposition, plaintiff admitted that defendant Douglas' only involvement in this incident was to call the inmates in from their outdoor recreation and order them to lock down prior to the arrival of support officers to the floor. (*Id.*) There is no allegation that defendant Douglas struck plaintiff or that defendant Douglas denied, delayed or interfered with plaintiff's medical treatment. (*Id.*) Therefore, defendants argue that defendant Douglas is entitled to summary judgment in his favor.

III. Plaintiff's Opposition^{FN4}

FN4. See Court Document No. 81.

On October 25, 2006, plaintiff filed a document styled, "Statement Of Genuine Issues Of Material Facts By Opposing Party Of Defendant's [sic] Motion For Summary Judgment/Adjudication Of Issues," which the court construes as plaintiff's opposition to the pending motion for summary judgment.

A. Medical Care Claim

Plaintiff argues that deliberate indifference to serious medical needs exists if a defendant denies, delays, or intentionally interferes with medical treatment. (*Id.* at 8.) Plaintiff contends that during an interview by Internal Affairs, defendant Bacocho admitted that she observed plaintiff bleeding but decided that plaintiff did not need immediate medical attention. (*Id.* at 8.) Plaintiff attaches portions of the transcript from defendant Bacocho's interview with internal affairs investigators in which she provides the following description of the incident:

When they were in outdoor rec. They came in, they all refused to lock down they all sat down decided to have day room, some of them got in the shower, had a grand ol' time. We were called to respond, we all stormed in both doors told everybody drop whatever they had and get up against the wall and face the wall, trying to see who the major players were I I suppose. Um most of the inmates complied, some did not some just sat there refused to get up and you know made no acknowledgment of the officers at all. I believe Mr. Williams who's one of the ones it was, as I recall he was I don't remember who grabbed him I I remember he was I believe he was grabbed by the shirt and walked over to the wall and the whole way he was resisting and trying to pull away and um he was put on the wall and told to face the wall and be quiet and um at that point he told me that "I've got blood on my face I need I need a tissue" and when I looked at his face he had a little bit of blood runnin' down his face but it wasn't excessively bleeding, it looked like it was already start-

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ing to dry and I told him you "this is not the time we'll we'll get your face looked at, its gonna be a minute" because there were still, there were still inmates resisting all over you know continuously through the pod they were still putting people up against the wall. The guy wasn't bleeding profusely, he wasn't gonna die and so um I told him you know "turn around, be quiet you're fine its just a little bit of blood, its not even bleeding anymore" and he kept turning around telling me "this is bullshit" "you guys are ridiculous" "you guys can't do this" and he kept taking his hands out of his pants and I told him probably four or five times you know "you need to bury your hands, keep your hands in your pants" and at one point I put my hand on his back and you know, kinda pushed him a little bit forward and said "you need to turn around and face the wall" cause he was turning the upper half of his torso and his body towards me to yell at me and uh I heard somebody say you know "get him out of here, he's causing a problem" cause he was still yelling "you guys can't do this" "this is ridiculous" and they took him out and that's that's all I remember.

*5 (*Id.*, Ex. D, at 2.)

Plaintiff argues that defendant Bacoch's delay in obtaining medical treatment for his injury was for non-medical reasons and violated his constitutional rights. (*Id.* at 9.) Plaintiff also argues that defendant Bacoch failed to inform her superiors that plaintiff needed medical attention and interfered with his medical care by making a medical diagnosis about plaintiff's head injury when she was unqualified to do so. (*Id.* at 8-9.)

As for defendant Murray, plaintiff contends that he informed defendant Murray about his special diet but defendant Murray nonetheless ordered that plaintiff be placed on a disciplinary diet. (*Id.* at 3-4.) Plaintiff provides a copy of a special diet order issued on December 29, 2002 by Dr. Jeff Rose, a dentist with the Sacramento County Medical Systems, Correctional Health Services. (Pl.'s Suppl.

Opp'n, filed 6/18/07, Ex. C.) The special diet order, however, directed only that plaintiff receive a soft food diet for three days. Plaintiff contends that he was unaware that the order was issued for a short duration and that, in fact, the main jail kitchen continued to send him the special diet until he was transferred on September 29, 2003. (Opp'n at 4, 10.) Plaintiff contends that since there is conflicting evidence about the diet that was ordered for him and because defendants failed to carry their burden of proof, the summary judgment motion should be denied as to defendant Murray. (Opp'n at 10.)

As to defendant Dickerson, plaintiff disputes defendants' argument that the delay in receiving medical treatment did not cause him further injury. Plaintiff contends that his medical records show that he was treated for neck and back pain as well as treated for facial lacerations. (*Id.* at 11.) Plaintiff asserts that he suffered "additional abuse to his wrist, busted lip, at the hand of Deputy Dickerson." (*Id.*) Plaintiff also argues that he was bleeding for fifteen to twenty minutes from his facial lacerations and that defendant Dickerson has made contradictory statements about whether plaintiff was bleeding. (*Id.* at 11.) In this regard, plaintiff attaches a portion of the interview of defendant Dickerson by Sergeant Woo from Internal Affairs. Therein, Sergeant Woo asked whether there was any sign of blood on the ground after plaintiff was removed from the floor and defendant Dickerson answered, "I didn't see any blood." (*Id.*, Ex. E, at 10.)

Plaintiff also contends that the defendants have made contradictory statements about whether the force used was necessary when plaintiff was in the classroom, on the ground, and handcuffed.

B. Defendant Douglas

Plaintiff asserts that when defendant Douglas was interviewed by Internal Affairs, he stated that he was standing next to defendant Zwolinski when plaintiff was grabbed and directed to the wall. (*Id.* at 3, 11-12.) Because defendant Douglas failed to

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intervene, and in fact aided in the wrongful act of Sgt. Zwolinski," plaintiff contends that defendant Douglas is a "joint tortfeasor [] and share[s] constitutional responsibility." (*Id.* at 3, 12.)

IV. Defendants' Reply^{FN5}

FN5. See Court Document No. 82.

*6 Defendants argue that plaintiff's opposition fails to comply with Local Rule 56-260(b) which requires the opposing party to specifically admit or deny the moving party's statement of undisputed facts and to provide citations to specific documents which support denial of the summary judgment motion. (Reply at 1-2.) Nevertheless, defendants argue that whether plaintiff was a convicted felon/parole violator or a pretrial detainee, the legal standards governing claims under the Eighth and Fourteenth Amendments require him to establish that defendants were deliberately indifferent to his serious medical needs. (*Id.* at 3.) Defendants also argue that plaintiff's factual propositions in his statement of undisputed facts are contrary to plaintiff's statement of claim in his amended complaint. (*Id.* at 2.)

Second, in response to plaintiff's contention that defendant Douglas was present "when unnecessary force was used against Mr. Williams and failed to intervene as Sgt. Zwolinski threw Mr. Williams" (Opp'n at 3), defendants contend that plaintiff's reliance on the internal affairs interview of defendant Douglas is unfounded. (Reply at 2.) As to plaintiff's contention that defendant Douglas aided and conspired in the "wrongful act of Sgt. Zwolinski" (Opp'n at 3), defendants argue that plaintiff offers no evidence to support this assertion and has not alleged a conspiracy in his complaint. (Reply at 2.) In addition, defendants argue that the internal affairs interview of defendant Douglas does not evidence an agreement or concerted action among the defendants. (*Id.*)

Third, as to plaintiff's allegation about his special diet, defendants argue that plaintiff failed to submit

any supporting exhibits or other evidence with his opposition, and that plaintiff's assertions, in fact, support defendants' contention that plaintiff was not receiving a medically prescribed diet when the disciplinary diet was ordered. (*Id.* at 3.)

Lastly, defendants argue that with respect to the medical care claim brought against defendant Bacocho, plaintiff has failed to present any evidence that the alleged 10-15 minute delay in obtaining medical treatment resulted in further injury. (*Id.* at 4.) Defendants argue that plaintiff's opposition also fails to show that defendant Dickerson intentionally delayed medical treatment for plaintiff. (*Id.*) As to his claim against defendant Murray, defendants contend that plaintiff admits that his special soft diet was prescribed by his dentist some five months before the incident in question and was for a mere three days in duration. (*Id.* at 5.) Defendants argue that plaintiff cannot establish that he faced a substantial risk of serious harm at the time the disciplinary diet was imposed by defendant Murray or that defendant Murray could have drawn the inference of serious risk of harm to plaintiff when he imposed the disciplinary diet. (*Id.*) As to any conspiracy involving defendant Douglas, defendants argue that this claim was never alleged in plaintiff's amended complaint and that he has failed to present any evidence of a conspiracy. (*Id.*) In any event, the statements defendant Douglas provided to the internal affairs investigators which plaintiff refers to in his opposition to the summary judgment motion, fail to provide any support for a conspiracy claim. (*Id.*) Defendants contend that the evidence instead suggests that defendant Douglas did not witness defendant Zwolinski's alleged use of excessive force. (*Id.* at 6.) In this regard, defendant Douglas stated to investigators, "I don't know which wall he [Zwolinski] took him to cause I was going off to secure other inmates by that time." (*Id.*; Opp'n, Ex. B at 5.) Defendants argue that since Douglas was securing other inmates when the alleged incident took place between plaintiff and defendant Zwolinski, defendant Douglas is not responsible for failing to intervene in something he did not witness. (Reply at

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6.)

V. *Plaintiff's Supplemental Opposition*^{FN6}

FN6. See Court Document No. 108.

*7 In his supplemental opposition, plaintiff contends that he conducted discovery and requested that defendant Powell produce the bed card which would have verified plaintiff's injuries as well as the special diet he was receiving. (Suppl. Opp'n at 4.) Plaintiff argues that defendants did not produce the bed card and that defendant Murray failed to produce any evidence showing that plaintiff was on a non-medical diet. (*Id.*) Plaintiff contends that he informed Murray about his special diet and that although defendant Murray stated he had checked into plaintiff's diet, he did not indicate where he had checked. (*Id.* at 5.) Although confusing, it appears that plaintiff is arguing that if defendant Murray had checked the bed card, defendant Murray would have determined that plaintiff was on a special diet. Plaintiff also contends that his testimony at his deposition should not be determinative because at that time, plaintiff was sick and taking pain and other medications. (*Id.* at 4-5.)

As to defendant Douglas, plaintiff contends that when interviewed by internal affairs, defendant Douglas stated he had witnessed the "full event of May 11, 2003, 5 east, 300 pod., and states the inmates requested to speak to the Sergeant." (*Id.* at 5.)

VI. *Defendants' Reply to the Supplemental Opposition*^{FN7}

FN7. See Court Document No. 109.

Defendants argue that plaintiff has now admitted in his supplemental opposition that it was kitchen staff who voluntarily continued to provide plaintiff with a soft diet and that he was not under a doctor's prescription for a special diet when defendant Murray ordered that he receive a disciplinary diet. (Defs.'

Reply at 2.) Thus, defendants argue, plaintiff cannot establish that he faced a substantial risk of serious harm or that defendant Murray in fact drew such an inference when he ordered the disciplinary diet. (*Id.*)

Defendants argue that plaintiff has not presented any evidence of defendant Douglas' individual liability with respect to any of plaintiff's claims. (*Id.*) Defendants contend that when plaintiff merely alleges that defendant Douglas witnessed the events of May 11, 2003, he is seeking to impose group liability which is not recognized under the law. (*Id.*)

Finally, defendants contend that plaintiff's assertion that his deposition testimony is unreliable because he was ill and on pain medications and antibiotics is a sham and merely a strategic attempt on plaintiff's part to preclude entry of summary judgment. (*Id.* at 3.) Defendants contend that plaintiff was questioned about his illnesses and the medication he had taken on the morning of his deposition. (*Id.*) Plaintiff responded that he had merely taken three aspirin for a headache and that he was tired because he did not sleep well. (*Id.*) Moreover, before the deposition began and again at its conclusion, plaintiff testified without reservation that he had provided honest and accurate testimony as best as he could. (*Id.*)

VII. *Analysis*

A. *Plaintiff's Claim of Inadequate Medical Care Brought Against Defendants Bacoach, Dickerson and Murray*

*8 Plaintiff asserts that his right to receive adequate medical care derives from the Eighth Amendment rather than the Fourteenth Amendment because he was not a pretrial detainee on May 11, 2003. Although the record is not clear regarding plaintiff's status on the date in question, legal standards applicable to a medical care claim under the Eighth Amendment and Fourteenth Amendment are essentially the same. As the Ninth Circuit has observed:

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With regard to medical needs, the due process clause imposes, at a minimum, the same duty the Eighth Amendment imposes: persons in custody ha[ve] the established right to not have officials remain deliberately indifferent to their serious medical needs.

Gibson v. County of Washoe, Nevada, 290 F.3d 1175, 1187 (9th Cir.2002) (internal quotation marks omitted).

A plaintiff claiming constitutionally deficient medical care must prove that he suffered a serious medical condition and that defendants were deliberately indifferent to his serious medical needs. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). A medical need is deemed serious if the failure to treat the condition could result in significant injury or the "unnecessary and wanton infliction of pain." *McGuckin v. Smith*, 974 F.2d 1050, 1059 (9th Cir.1992) (citing *Estelle*, 429 U.S. at 104). Deliberate indifference may be satisfied by showing "(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.2006) (citing *McGuckin*, 974 F.2d at 1060). Deliberate indifference requires "a state of mind more blameworthy than negligence" and "requires 'more than ordinary lack of due care for the prisoner's interests or safety.'" *Farmer v. Brennan*, 511 U.S. 825, 835, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (quoting *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986)). Mere 'indifference,' 'negligence,' or 'medical malpractice' will not support this cause of action." *Broughton v. Cutter Laboratories*, 622 F.2d 458, 460 (9th Cir.1980) (citing *Estelle*, 429 U.S. at 105-06).

According to the jail incident report citing plaintiff for insubordination/ disobedience, the incident in question occurred at 2020 hours on May 13, 2003. (Am. Compl. at 7.) Plaintiff's medical records indicate that he was seen by medical staff at 2035 hours, or within fifteen minutes after the incident occurred. (Opp'n, Ex. F; MSJ, Ex. C.) The medical

records indicate that plaintiff suffered from a "minor laceration" to his right cheek bone and right upper eyelid area. (*Id.*) Plaintiff did not at that time report any loss of consciousness and it was noted by medical staff that he was alert and oriented. (*Id.*) His laceration was "steri-stripped," plaintiff was advised not to remove the steri-strip and to avoid washing his face until he was seen by the doctor in the morning. (*Id.*) Plaintiff was also given 800 mg. of Motrin. (*Id.*)

Plaintiff does not challenge the medical care he received, but instead claims only that defendant Bacoch should have sought immediate medical care for him. In this regard, plaintiff argues that defendant Bacoch was aware that he was bleeding and that she was not qualified to make a medical decision that delayed his treatment. Deliberate indifference "may appear when prison officials deny, delay or intentionally interfere with medical treatment [.]'" *McGuckin*, 974 F.2d at 1059) (quoting *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir.1988)). Where a prisoner is alleging a delay in receiving medical treatment, the delay must have led to further harm in order for the prisoner to state a cognizable claim of deliberate indifference to a serious medical needs. *Id.* at 1060 (citing *Shapely v. Nevada Bd. of State Prison Comm'rs*, 766 F.2d 404, 407 (9th Cir.1985)). Here, plaintiff has presented no evidence that he suffered harm as a result of the mere fifteen minute delay in his receiving medical attention for his cut. The medical assessment determined that plaintiff had a "minor laceration" and that he was alert and oriented. As defendant Bacoch explained to the internal affairs investigator, she observed that plaintiff was not bleeding excessively, that the blood was already starting to dry and that inmates were still being secured at that time so she told plaintiff, "this is not the time we'll we'll get your face looked at, its gonna be a minute[.]" (Opp'n, Ex. D at 2.) Plaintiff merely asserts that he had facial lacerations and that defendant Bacoch was aware that he was bleeding. This factual allegation is insufficient to support a claim that defendant Bacoch was deliberately indifferent to plaintiff's

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medical condition. The evidence indicates that defendant Bacoch briefly delayed taking plaintiff to the medical clinic due to security concerns, not because she knew of and chose to disregard an excessive risk to plaintiff's health.

*9 Plaintiff has failed to establish that there is a genuine issue as to whether defendant Bacoch was deliberately indifferent to plaintiff's medical condition. Because of plaintiff's complete failure of proof concerning this essential element of his claim, summary judgment should be granted in favor of defendant Bacoch.

The court also finds that summary judgment should be granted in favor of defendant Murray. Plaintiff has submitted no evidence that he had a medical condition requiring that he remain on a soft food diet. Likewise plaintiff has failed to present evidence that the disciplinary diet imposed was harmful to his health in any way. The fact that plaintiff, apparently in error, happened to be receiving a special diet at the time the disciplinary diet was ordered is irrelevant. Plaintiff has not shown that he suffered from a serious medical condition which was adversely affected by the imposed disciplinary diet. Again in this regard, since plaintiff has failed to establish the existence of an essential element of his inadequate medical care claim against defendant Murray, summary judgment should be granted in favor of defendant Murray.

Finally, as to defendant Dickerson, the defendants' motion seeks summary adjudication only as to the plaintiff's claim of inadequate medical care and not to his excessive force claim. In opposition to defendants' motion, plaintiff disputes the contention that defendant Dickerson was unaware that plaintiff was bleeding. (Opp'n at 11.) Plaintiff refers to the internal affairs interview of defendant Dickerson during which the following exchange took place:

WOO: You didn't see any officer using excessive force against Williams without any provocation?

DICKERSON: Absolutely not no.

WOO: Was there any sign of blood on the ground after he was removed from the floor?

DICKERSON: I didn't see any blood.

(*Id.*, Ex. E, at 10.)

As set forth above, summary judgment is appropriate when there is a complete failure of proof by the non-moving party with respect to an essential element of his case. Again in this instance, plaintiff has not provided any evidence that would support a conclusion that defendant Dickerson was deliberately indifferent to plaintiff's medical condition. See *Addisu*, 198 F.3d at 1134 (for any factual dispute to be genuine, there must be enough doubt for a reasonable trier of fact to find for the plaintiff in order to defeat a defendant's summary judgment motion). Indeed, defendant Dickerson's statement to internal affairs supports summary adjudication in his favor. Plaintiff offers no evidence other than this statement in support of his claim that defendant Dickerson was deliberately indifferent to his medical care. Since plaintiff has completely failed to present evidence with respect to an essential element of his inadequate medical care claim against Dickerson, summary adjudication in favor of defendant Dickerson should be granted.

B. Defendant Douglas

*10 Defendants argue that plaintiff admitted at his deposition that the only role defendant Douglas had in the May 2003 incident was that he called the inmates in from outdoor recreation and ordered them to lock down.^{FN8} In this regard, plaintiff testified at his deposition as follows:

FN8. The court is not persuaded by plaintiff's argument that his deposition testimony is unreliable because at the time of his deposition "he was very sick and on five different types of pain and antibiotics which may have impaired [sic] plaintiff's reasoning." (Suppl. Opp'n at 4-5.) Even a plaintiff's sworn affidavit contradicting his

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prior deposition testimony cannot alone defeat a defendant's summary judgment motion. See *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543-44 (9th Cir.1975); see also *Yatzus v. Appoquinimink School Dist.*, 458 F.Supp.2d 235, 247 (D.Del.2006) ("The 'sham affidavit' doctrine refers to the trial courts practice of disregarding an offsetting affidavit that is submitted in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony. When considering a motion for summary judgment, a trial court should consider both the deposition testimony and the affidavit, with greater reliability attributed to the deposition. Summary judgment may be granted based upon the deposition testimony if the court is satisfied that the issue potentially created by the affidavit is not genuine.")

Q [Defendants' counsel]. Okay. Now, Deputy Douglas, you've named him as a defendant?

A [Plaintiff]. Yes.

Q. Deputy Douglas never used any force against you, right?

A. No.

Q. What are you suing Deputy Douglas for?

A. As per-because of the fact that all officers, because of the fact that they were there, becomes torturers and the fact their failure to stop or intercede and anything that happened that was against policy.

Q. Do you know if he witnessed-well, you never saw Deputy Douglas after he returned inside, correct?

A. I never saw Douglas, neither had I seen Dickerson.

Q. Okay. So you have no knowledge as to whether or not Douglas even witnessed the incident between yourself and Sergeant Zwolinski, right?

A. Yes, he was there.

Q. He was where?

A. He was there during that time.

Q. Do you know if he witnessed when Sergeant Zwolinski forced you into the wall?

A. Um, not yet. Um, well, right now I can't answer that because I haven't done all of my discovery.

Q. As you sit here today, you have no facts to support that Deputy Douglas witnessed Sergeant Zwolinski throwing you into the wall, correct?

A. Correct.

(Pl.'s Dep., lodged 9-1-06, at 137-38.)

When defendant Douglas was interviewed by internal affairs, he described his and defendant Zwolinski's involvement in the incident as follows:

DOUGLAS: Well after they had refused to lock down the last time Deputy Dickerson put a call out that all available officers respond to the 300 pod for a mass failure to lock down um ... so it was taken pretty seriously by everybody who was able to and you we had 23 guys respond, 23 deputies respond. Uh Sergeant Zwolinski was one of the first ones to come in from the elevators and soon as I saw everybody out there I opened the door to the 300 pod and went in and Sergeant Zwolinski was right next to me uh to my right when we entered and started ordering everybody to get up to the wall uh you know assume the position of safety, facin' the wall, hands buried in their pants uh some some inmates didn't they just sat where they were and uh you known we just kinda went in to secure everybody at the walls and I remember Sergeant Zwolinski

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who was to my right, as we were coming in there was an inmate still seated on uh one of the couches or might have been one of the tables, I'm not sure what he was sitting on but he didn't get up. I mean everybody else was already heading for the walls and a lot of guys were already standing at the wall.

....

WOO: Okay what did Sergeant Zwolinski do?

DOUGLAS: uh he uh this inmate was just refusing to get up and go anywhere, Sergeant Zwolinski uh grabbed him by the shoulders and took, turned him to face away from him because he was sitting facing us as we were coming in, Sergeant Zwolinski took him and turned him to face away from us and uh directed him to the wall. He ... I saw him turn him and and you know pick him up to a standing position.

*11 WOO: When you say he picked him up, how did he pick him up?

DOUGLAS: Oh he just he took him by the shoulders and you know pulled him to a standing position. He didn't lift him, his body weight completely off the ground or anything.

WOO: Okay.

DOUGLAS: But just got him into a standing position and uh you know I don't know which wall he took him to cause I was going off to secure other inmates by that time.

WOO: Did you see

DOUGLAS: And so it would have been you know after he got him by the time he got him up I was past him and he was behind me.

WOO: did you see Sergeant Zwolinski actually walking this inmate toward the wall?

DOUGLAS: No.

WOO: Okay so you only saw him as he grabbed this inmates [sic] shoulders and pulled him up to a standing position?

DOUGLAS: Right.

....

WOO: While you were in the day room and you say that you saw Sergeant Zwolinski grab an inmate by the shoulder, is it by the shoulders or by his shirt or

DOUGLAS: Shoulder, shirt I I didn't see exactly what kind of grip, I was more concerned about um I saw he was gonna deal with the inmate and I was just more concerned about making sure everybody else was secure.

WOO: Are you certain that Sergeant Zwolinski grabbed this inmate by the shoulders and not by the front of the chest?

DOUGLAS: It could have been by the front of the chest I don't ... like I said I don't know exactly how he grabbed him, grabbed him basically by the upper, at the upper body and started moving him up out of the chair.

WOO: Okay and Sergeant Zwolinski's action toward that inmate, from your perspective of that encounter, was it reasonable?

DOUGLAS: Yes.

WOO: Why, why is it reasonable?

DOUGLAS: Because everybody, all the other, well all but you know maybe three or four inmates were complying with our verbal directives to get up and go to the wall so we could you know secure the day room, secure all these inmates and uh you know these few guys that were still refusing to follow our directives you know just by, you know by not getting up and going to the to the wall were posing a threat to us and that you know we needed to secure every-

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body and get everybody locked down. There's 25 inmates out and involved in his kind of protest you know and they were already uh you know saying you know "this is bullshit" "this is fucked up" this sort of thing and they were you know, it was getting kind of heated uh verbally any- way.

WOO: So there was an expectation

DOUGLAS: There's an expectation that everybody need to get to the wall and when we had that many officers respond uh you know its kind of, it is a serious situation.

WOO: Okay.

DOUGLAS: And have the you know these couple of guys

WOO: And you treat it as a serious breach of safety at this point?

DOUGLAS: Absolutely.

*12 WOO: So do you believe that officer, I'm sorry Sergeant Zwolinski what he did, as he was making contact with the inmate, do you think that it was excessive?

DOUGLAS: No.

WOO: Okay well within policy?

DOUGLAS: Yes.

(Opp'n, Ex. B at 4-5, 10; Pl.'s Exs., lodged 9-27-06, Internal Affairs Interview of Douglas at 9.)

The court finds that plaintiff has failed to produce any evidence in opposition to the pending summary judgment motion suggesting a causal link between defendant Douglas' actions and the alleged use of excessive force and denial of medical care. Although the evidence indicates that defendant Douglas was present when officers responded to the inmate protest, there is no evidence that defendant Douglas participated in the alleged use of force or

that he observed anything that he should reasonably have concluded was an excessive use of force. Moreover, plaintiff's action does not include a conspiracy claim. Even if plaintiff had included such a claim in his amended complaint, there is no evidence that there was an agreement among the defendants to violate plaintiff's constitutional rights. *See Woodrum v. Woodward County*, 866 F.2d 1121, 1126 (9th Cir.1989) (allegation of conspiracy requires showing that defendants agreed to violate plaintiff's rights).

The court concludes that no reasonable finder of fact could find that defendant Douglas violated plaintiff's constitutional rights based upon this evidence. *See Addisu*, 198 F.3d at 1134. As defendant Douglas explained to the internal affairs investigator, there were approximately 23 officers responding to the May 11 incident involving about 25 inmates. Although he was in the day room with defendant Zwolinski, defendant Douglas was busy securing other inmates, did not assist defendant Zwolinski and did not observe defendant Zwolinski using excessive force. As the Ninth Circuit has recently explained:

An officer's liability under section 1983 is predicated on his "integral participation" in the alleged violation. *Chuman v. Wright*, 76 F.3d 292, 294-95 (9th Cir.1996). "[I]ntegral participation" does not require that each officer's actions themselves rise to the level of a constitutional violation. *Boyd [v. Benton County]*, 374 F.3d [773,] 780 [(9th Cir.2004)]. But it does require some fundamental involvement in the conduct that allegedly caused the violation.

Blankenhorn v. City of Orange, 485 F.3d 463, 481 n. 12 (9th Cir.2007)

Here, the evidence before the court on summary judgment establishes that defendant Douglas did not participate in any integral way in the incident to the extent it involved plaintiff. Accordingly, summary judgment should be granted in favor of defendant Douglas.

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DEFENDANTS' MOTION TO STRIKE

On September 27, 2006, plaintiff filed a document styled, "Notice Of Motion Of Lodging Internal Affairs Report Case No. 03-IA-67," and lodged the Internal Affairs report "for use in the motion for summary judgment, and at trial." The lodged documents included: the findings and recommendations of Captain Iwasa as a result of the Internal Affairs investigation into the incident in question; a case summary of Internal Affairs investigation; a July 7, 2003 letter to plaintiff from Internal Affairs acknowledging the receipt of his complaint; an investigative chronology; the work and complaint history of Sergeant Zwolinski; non-waiver statements from defendants Dickerson and Zwolinski; transcripts of interviews with plaintiff, Ricky Lawson, Kenney, defendant Bacoch, defendant Douglas, defendant Dickerson, defendant Zwolinski, Deputy Gregory, Deputy Pai, Deputy Berhalter, David Pittack, Deputy Maurer, Lieutenant Gliddon, inmate Branko Majstoric, Deputy Matthew Deaux, Deputy Jeral Thompson, and Deputy Shane Glaser; the jail fifth floor log book; the jail work roster for May 11, 2003; and the casualty report and workers' compensation claim submitted by defendant Dickerson.

*13 Defendants now move to strike plaintiff's lodging of a copy of Internal Affairs Report which was docketed by this court back on September 27, 2006. In this regard, defendants argue that the Federal Rules of Civil Procedure and the Local Rules of this court do not provide for the lodging of an internal affairs report. They also contend that, contrary to plaintiff's assertion, the document is not an original but a redacted copy which was provided to plaintiff pursuant to the court's March 3, 2006 discovery order. Defendants argue that the report in its entirety is not relevant to any matter currently pending before the court. They assert that plaintiff should have provided only the pertinent portions of the report as an exhibit to his opposition to the motion for summary judgment.^{FN9} Therefore, defendants request that the court strike the report from the record and either destroy it or return the report to

plaintiff.

FN9. Defendants note that in the event plaintiff may seek to use portions of the Internal Affairs report at trial, they intend to pursue a motion in limine.

Plaintiff has not filed opposition to the motion to strike. However, in his opposition to the motion for summary judgment, plaintiff has attached relevant portions of the lodged documents. The court has reviewed the lodged documents in their entirety in considering defendants' motion for summary judgment. The court finds that the lodged documents are relevant to the court's determination of defendants' motion for summary judgment. Therefore, defendants' motion to strike will be denied.^{FN10}

FN10. Defendants may file a motion for a protective order or a more specific motion to strike. The latter would be appropriate, for instance, if they contend that the document lodged by plaintiff is not a true copy of the original report. Of course, defendants may still seek to preclude the use of the lodged documents at trial by way of a properly filed motion in limine.

REQUEST FOR SANCTIONS

Plaintiff has filed a motion seeking sanctions against defendants due to their alleged failure to comply with the court's February 26, 2007 order requiring defendants Murray, Johnson and Powell to provide responses to certain special interrogatories. Plaintiff disputes defendants' good faith effort to provide timely responses to those interrogatories and argues that defendants should have attempted to contact plaintiff regarding their need for a second extension of time to provide responses. Plaintiff seeks monetary sanction in the amount of \$3.00 which he alleges was the cost he incurred in filing this motion. Defendants oppose the motion for sanctions, arguing that it is baseless. Defendants explain the reason that additional time was needed

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was to obtain verified responses which plaintiff could use in his supplemental opposition to the motion for summary judgment. Defendants argue that plaintiff suffered no prejudice as a result. The court agrees.

On April 27, 2007, the court granted defendants a second extension of time to provide the discovery responses. In the same order the court granted plaintiff additional time to file his supplemental opposition to the motion for summary judgment, allowing him time to consider the discovery responses in question. Plaintiff's motion seeking sanctions against defendants will be denied.

CONCLUSION

For the reasons set forth above, IT IS HEREBY ORDERED that:

1. Defendants' October 2, 2006 motion to strike the lodging of the internal affairs report on September 27, 2006, is denied; and

*14 2. Plaintiff's April 12, 2007 request for sanctions is denied.

Also, IT IS HEREBY RECOMMENDED that:

1. Defendants Bacocho, Dickerson, Douglas, and Murray's September 1, 2006 motion for summary judgment/summary adjudication be granted as follows:

a. Summary judgment be granted in favor of defendants Bacocho, Douglas, and Murray on all claims;

b. Summary judgment be granted in favor of defendant Dickerson only as to plaintiff's medical care claim;

c. Defendants Bacocho, Douglas, and Murray be dismissed from this action; and

2. That this action proceed on plaintiff's claim that defendant Powell violated plaintiff's constitutional

rights by issuing a false disciplinary charge against him and on plaintiff's excessive use of force claim against defendants Johnson, Dickerson, and Zwolinski.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within five days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir.1991).

E.D.Cal.,2007.

Williams v. County of Sacramento Sheriff's Dept.
Not Reported in F.Supp.2d, 2007 WL 2433221
(E.D.Cal.)

END OF DOCUMENT



Not Reported in F.Supp.2d, 2006 WL 3300372 (W.D.Wis.)
(Cite as: 2006 WL 3300372 (W.D.Wis.))

Only the Westlaw citation is currently available.

United States District Court,
W.D. Wisconsin.
Anthony Maurice FLETCHER, Plaintiff,
v.
Officer KRUEGER, Officer Cleven, Richard A. Schneiter, Gay Schmidt, Mr. Gardner, Mr. Mikelson, Captain Brown, Matthew J. Frank. Rick Raemisch, Sgt. Fargen, RN Jolinda, RN John and Steven B. Casperson, Respondents.
No. 06-C-576-S.

Nov. 3, 2006.

Corey F. Finkelmeyer, Assistant Attorney General,
Madison, WI, for Respondents.

ORDER

JOHN C. SHABAZ, District Judge.

*1 Upon receipt of plaintiff's partial filing fee in the amount of \$1.26, the Court addresses the merits of plaintiff's complaint. According to 28 U.S.C. § 1915(b)(2), the institution's financial officer is authorized to deduct monthly payments from plaintiff's account until the \$350.00 filing fee is paid in full.

Plaintiff alleges that when he was at the Wisconsin Secure Facility on August 12, 2006 he waited 20 minutes for medical attention after he fell. He alleges that on August 16, 2006 he fell in the shower and had to wait 2 hours for medical attention. He alleges this was because the rule provided he had to be handcuffed before he received medical attention. Plaintiff also alleges that on August 30, 2006 he was exposed to chemical fumes through his vent and was not allowed to take an immediate shower.

Allegations of deliberate indifference to an inmate's serious medical need state a cause of action under

the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97 (1976). Plaintiff has not alleged that any delay caused by security concerns in his receiving medical treatment or a shower harmed him. He did receive medical treatment. His allegations do not rise to the level of an Eighth Amendment violation. Accordingly, plaintiff's complaint will be dismissed for failure to state a claim.

Plaintiff is advised that in any future proceedings in this matter he must offer argument not cumulative of that already provided to undermine this Court's conclusion that his claim must be dismissed. *See Newlin v. Helman*, 123 F.3d 429, 433 (7th Cir.1997).

ORDER

IT IS ORDERED that plaintiff's complaint and all claims contained therein is DISMISSED without prejudice for failure to state a claim under federal law.

IT IS FURTHER ORDERED that judgment be entered DISMISSING plaintiff's complaint and all claims contained therein without prejudice.

W.D.Wis.,2006.
Fletcher v. Krueger
Not Reported in F.Supp.2d, 2006 WL 3300372 (W.D.Wis.)

END OF DOCUMENT





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H

Only the Westlaw citation is currently available. This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.
Juan B. FERNANDEZ, Plaintiff-Appellee,
v.
METRO DADE POLICE DEPARTMENT, et al.,
Defendants,
Robert Perez, Sergeant, Defendant-Appellant.
No. 09-11737.

Aug. 6, 2010.

Background: Arrestee filed § 1983 action against arresting officers alleging that their deliberate indifference to his serious medical needs following his arrest constituted a violation of the Fourteenth Amendment. The United States District Court for the Southern District of Florida, 2009 WL 546460, denied officers summary judgment on issue of qualified immunity. Officers appealed.

Holding: The Court of Appeals, Baldock, Circuit Judge, held that arrestee did not suffer objectively serious medical need.
Reversed.

West Headnotes

Arrest 35 ↪ 70(1)

35 Arrest

35II On Criminal Charges

35k70 Custody and Disposition of Prisoner

35k70(1) k. In General. Most Cited Cases

Sentencing and Punishment 350H ↪ 1546

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1546 k. Medical Care and Treatment. Most Cited Cases

Arrestee did not suffer objectively serious medical need, as required to show that arresting officers' eight hour delay in providing arrestee with medical treatment for injuries he sustained during his arrest violated Fourteenth Amendment; arrestee suffered from a bloody nose and mouth which lasted over five minutes, facial bruising, pain, disorientation, and blood "clogs" in his nose, and upon examination at hospital, he required no stitches, bandages, or medication other than two non-prescription pain pills. U.S.C.A. Const. Amend. 14.

Dennis A. Kerbel, Dade County Attorney's Office, Abbie N. Schwaderer, Miami, FL, for Appellant.

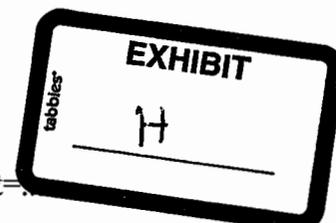
Matthew Seth Sarelson, Sarelson, P.A., Michael A. Shafir, Sarelson & Shafir LLP, Miami, FL, for Appellee.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 06-22957-CV-JEM.

Before BIRCH, MARCUS and BALDOCK,^{FN*} Circuit Judges.

BALDOCK, Circuit Judge:

*1 Plaintiff Juan B. Fernandez brought this civil rights action pursuant to 42 U.S.C. § 1983 against Defendant Sergeant Robert Perez of the Metro Dade Police Department, among others. Plaintiff alleges Defendant's delay in providing him access to medical care after his February 4, 2006, arrest constituted deliberate indifference to his serious medical needs in violation of his Fourteenth Amendment



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right to due process. In his motion for summary judgment, Defendant primarily argued he is entitled to qualified immunity because Plaintiff has not shown he suffered an objectively serious medical need. The district court disagreed, concluding Plaintiff had presented evidence "sufficient to create a genuine issue of material fact as to whether Plaintiff was suffering from a serious medical need after his arrest." *Fernandez v. Metro Da de P olice Dep't*, No.06-cv22957, Order Adopting Magistrate Judge White's Report, *5 (S.D.Fla. Mar. 4, 2009) (D.E.# 100). On appeal, Defendant maintains that even considering Plaintiff's facts in the light most favorable to him, he has failed to establish he suffered an objectively serious medical need. After careful review, we conclude the facts, examined in the light most favorable to Plaintiff, do not establish an objectively serious medical need. Accordingly, we reverse the district court's denial of qualified immunity.

I.

"Qualified immunity protects public employees performing discretionary functions from the burdens of civil trials and from liability unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Kjellsen v. Mills*, 517 F.3d 1232, 1236-37 (11th Cir.2008) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).^{FN1} Once Defendant asserted the defense of qualified immunity in his motion for summary judgment, Plaintiff took on the burden of satisfying a two-part test: (1) Defendant's conduct violated a federally protected right and (2) that right was clearly established at the time of the conduct. See *Duruthy v. Pastor*, 351 F.3d 1080, 1087 (11th Cir.2003).

We possess jurisdiction to hear Defendant's interlocutory appeal of the district court's denial of qualified immunity at the summary judgment stage under 28 U.S.C. § 1291 and the collateral order doctrine to the extent it presents "a legal question con-

cerning a clearly established federal right that can be decided apart from considering sufficiency of the evidence relative to the correctness of the plaintiff's alleged facts." *Koch v. Rugg*, 221 F.3d 1283, 1294-95 (11th Cir.2000); see also *Bryant v. Jones*, 575 F.3d 1281, 1288 n. 2 (11th Cir.2009) (explaining that this Court possesses jurisdiction over an interlocutory appeal of a denial of qualified immunity at the summary judgment stage "under 28 U.S.C. § 1291 and the collateral order doctrine"). Within this limited jurisdiction, "[w]e review *de novo* a district court's denial of summary judgment based on qualified immunity, viewing the evidence in a light most favorable to the opposing party." *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1303 (11th Cir.2006). "In qualified immunity cases, this usually means adopting ... the plaintiff's version of the facts." *Scott v. Harris*, 550 U.S. 372, 378, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007). Therefore, we generally consider whether "[t]aken in the light most favorable to the party asserting the injury[,] ... the facts alleged show the officer's conduct violated a constitutional right" and whether that right was clearly established at the time of the conduct. *Id.* at 377. But the Supreme Court has cautioned we may only draw inferences in the nonmoving party's favor to the extent they are supportable by the record. *Id.* at 381 n. 8. As we have explained:

*2 When the nonmovant has testified to events, we do not ... pick and choose bits from other witnesses' essentially incompatible accounts (in effect, declining to credit some of the nonmovant's own testimony) and then string together those portions of the record to form the story that we deem most helpful to the nonmovant. Instead, when conflicts arise between the facts evidenced by the parties, we credit the nonmoving party's version. Our duty to read the record in the nonmovant's favor stops short of not crediting the nonmovant's testimony in whole or part: the courts owe a nonmovant no duty to disbelieve his sworn testimony which he chooses to submit for use in the case to be decided.

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Evans v. Stephens, 407 F.3d 1272, 1278 (11th Cir.2005) (en banc).

II.

In light of the foregoing discussion, we now set forth the following underlying facts in the light most favorable to Plaintiff. Plaintiff claims during the course of his arrest for burglary at about 3:00 a.m. on February 4, 2006, Metro Dade Police Officers Noel Rodriguez and Radames Perez (who are not parties to this appeal) used excessive force.^{FN2} He asserts the officers handcuffed him and then kicked him multiple times in his face, causing him to bleed from his nose and mouth, stepped on his face as he lay on the ground, stuck one of their thumbs under his chin to the point where he almost fainted, punched him in the head and ribs, and slammed his face into a vehicle's trunk. *Fernandez v. Metro Dade Police Dep't*, No.06-cv-22957, Pl.'s Decl. in Opp'n to Defs.' Mot. To Dismiss, ¶¶ 15-17 (S.D.Fla. Aug. 14, 2007) (D.E.# 22); *Fernandez*, Order at *3 (D.E.# 100). As a result, Plaintiff maintains he suffered injuries to his head, neck, face, and ribs and suffered "a massive bleeding" or "hemorrhage" for more than five minutes while standing by and/or lying on the trunk. *Fernandez*, Pl.'s Decl. at ¶¶ 16, 17 (D.E.# 22); *Fernandez v. Metro Dade Police Dep't*, No.06-cv-22957, Pl.'s Decl. in Opp'n to Defs.' Mot. for Summ. J., ¶ 9 (S.D.Fla. July 21, 2008) (D.E.# 75); *Fernandez*, Order at *3 (D.E.# 100). Plaintiff asserts that one of the arresting officers called Defendant, the officers' supervisor, while they left Plaintiff bleeding near the vehicle. *Fernandez*, Pl.'s Decl. at ¶ 16 (D.E.# 22). Plaintiff admits the record does not indicate how much time passed before Defendant arrived at the scene. Aple. Br. at 3. Regardless, he claims Defendant arrived while he was still near the vehicle's trunk and that Defendant saw him bleeding. *Fernandez*, Pl.'s Decl. at ¶ 10 (D.E.# 75); *Fernandez*, Order at *4 (D.E.# 100). At approximately 5 a.m., Plaintiff maintains the police then took him to the police station, rather than providing medical assistance. Aple. Br. at 4; *Fernandez*, Pl.'s Decl. at ¶

10 (D.E.# 75). He says he remained at the station in an interrogation room for about nine hours without water or medical treatment while he was in pain, confused, disoriented, and his nose was so full of blood "clogs" that he had to breathe through his mouth. *Fernandez*, Pl.'s Decl. at ¶ 22 (D.E.# 75); *Fernandez*, Order at *5 (D.E.# 100). It is uncontested that although he was arrested at about 3:00 a.m., the police did not take Plaintiff to Jackson Memorial Hospital, Ward D until 11:40 a.m.^{FN3} *Fernandez*, Pl.'s Decl. at ¶¶ 11, 14 (D.E.# 75); *Fernandez*, Order at *5 (D.E.# 100). Plaintiff maintains that Officers Perez and Rodriguez transported him from the police station to Ward D, but that they and Defendant made him wash his face before doing so. *Fernandez*, Pl.'s Decl. at ¶¶ 23, 26 (D.E.# 75); *Fernandez*, Order at *5 (D.E.# 100). Afterwards, Plaintiff states he was transported to and booked at the Dade County Jail where the booking photograph he submitted into evidence was taken.^{FN4} *Fernandez*, Pl.'s Decl. at ¶ 17, 18 (D.E.# 22). Plaintiff states he "suffered injuries to head, neck, face and ribs at the time of the attack," *Fernandez*, Pl.'s Decl. at ¶ 28 (D.E.# 75), and had difficulty breathing through his nose for three days as a result of his bleeding and pain in his chest. Am. Comp. at ¶ F (D.E.# 9).

*3 In support of these claims, Plaintiff submitted his own sworn declarations, his medical records from his examination at Ward D on February 4, and a black and white copy of his jail booking photo. Defendant submitted a color copy of Plaintiff's jail booking photo, his own declarations, and the opinion of Dr. Richard Dellerson, "an expert in emergency medicine, who states that based on his review of the medical records in the record and Plaintiff's booking photo that Plaintiff's statements 'about the extent of his injuries is not compatible with either his booking photo or his medical records.'" *Fernandez*, Order at *2 (D.E.# 100) (quoting *Fernandez v. Metro Dade Police Dep't*, No.06-cv-22957, Defs.' Mot. for Leave to File Supplemental Decls., ¶ 10 (S.D.Fla. Feb. 23, 2009) (D.E.# 99)).

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III.

Adopting the magistrate's report and recommendation, the district court denied the motion for summary judgment as to Plaintiff's claim of deliberate indifference and denied reconsideration. *Id.* at *5-6; *Fernandez v. Metro Dade Police Dept't*, No. 06-cv-22957, Order Den. Defs.' Mot. for Recons. in Part of Order Adopting Magistrate Judge White's Report, *2-*3 (S.D.Fla. Mar. 20, 2009) (D.E. # 104). Based upon Plaintiff's assertions that (1) Defendant saw him bleeding at the arrest scene, (2) the officers nonetheless took him to the police station for questioning for about nine hours before providing medical treatment after he had suffered a "huge bleeding" "that resulted in blood clots which forced him to breath though his mouth while he was in pain and disoriented, and (3) the officers instructed him to wash his face before taking him to Ward D, the district court concluded Plaintiff had presented sufficient evidence "to create a genuine issue of material fact as to whether Plaintiff was suffering from a serious medical need after his arrest." *Fernandez*, Order at *4-*5 (D.E.# 100). The court rejected Defendant's argument that ignoring any factual disputes, Plaintiff could not demonstrate his medical needs were serious. *Fernandez*, Order at *2-*3 (D.E.# 104). The district court also determined that "[n]either Plaintiff's medical records, his booking photo, nor the opinion of Dr. Deller[son] submitted as an attachment to Defendants' motion to supplement [were] so definitive on the issue of whether Plaintiff was suffering from a serious medical need that [it] could find that no reasonable juror could find for Plaintiff." *Fernandez*, Order at *5 (D.E. # 100).

IV.

Plaintiff sued, asserting Defendant violated his Fourteenth Amendment right to due process by acting with deliberate indifference to his serious medical needs.^{FN5} Therefore, to demonstrate Defendant violated Plaintiff's Fourteenth Amendment due process right, satisfying the first prong of qualified

immunity, Plaintiff must show facts that when viewed in the light most favorable to him establish "both an objectively serious medical need and that ... Defendant acted with deliberate indifference to that need." *Burnette v. Taylor*, 533 F.3d 1325, 1330 (11th Cir.2008).^{FN6} Defendant appeals, raising the purely legal issue of whether, taking Plaintiff's version of the events as true, Plaintiff had a serious medical need as required to establish a constitutional claim for deliberate indifference.

*4 We define a " 'serious medical need' as one that is diagnosed by a physician as requiring treatment or one that is so obvious that a lay person would recognize the need for medical treatment." *Id.* "In the alternative, a serious medical need is determined by whether a delay in treating the need worsens the condition." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir.2009). "In either of these situations, the medical need must be 'one that, if left unattended, pos[es] a substantial risk of serious harm .' " *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir.2003) (quoting *Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir.2000)). We have explained that a successful constitutional claim for "immediate or emergency medical attention" requires "medical needs that are obvious even to a layperson because they involve life-threatening conditions or situations where it is apparent that delay would detrimentally exacerbate the medical problem. In contrast, delay or even denial of medical treatment for superficial, nonserious physical conditions does not constitute" a constitutional violation. *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187-88 (11th Cir.1994), *abrogated on other grounds by Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). An arrestee "who complains that delay in medical treatment rose to a constitutional violation must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed." *Id.* at 1188; *see also Surber v. Dixie County Jail*, (No. 06-11898, Nov. 17, 2006, 11th Cir.) (unpublished opinion).

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V.

We do not believe Plaintiff has demonstrated an objectively serious medical need. The evidence Plaintiff submitted, taken in the light most favorable to him, reveals that at most he suffered a bloody nose and mouth which lasted over five minutes, facial bruising, pain, disorientation, and blood clogs in his nose. This, however, is as far as Plaintiff's facts take us because we can only draw those inferences that are supportable by the record. *Scott*, 550 U.S. at 381 n. 8 (cautioning that in reviewing motions for summary judgment, courts may only draw inferences in the nonmoving party's favor to the extent they are supportable by the record). Plaintiff does not inform the Court how much longer than five minutes he bled. Notably, he has never alleged that he continued to bleed after being transported to the police station from the arrest scene. The fact that he maintains his nose was full of "blood clogs" while at the police station would, in fact, suggest the bleeding had stopped.

And, Plaintiff's medical records confirm he did not have an objectively serious medical need either at the time of the arrest or by virtue of the delay between arrest and receiving medical attention at Ward D.^{FN7} According to Plaintiff, he complained to the physician at Ward D "about injuries to the neck, face and scalp...." *Fernandez*, Mem. at ¶ 2 (D.E.# 83). Plaintiff contends the hospital doctor diagnosed him with injuries to his face and neck and contusions to the face/scalp/neck areas. He appears to base that contention on the Ward D's "Emergency Discharge Face Sheet" which is a typed document that bears the notation "THIS FORM SHOULD BE ADDED TO PT.CHART" and is attached to the chart the examining doctor completed himself. That same "Emergency Discharge Face Sheet" also lists Plaintiff's "complaint" as "facial bruise" and the principal diagnosis as "abrasion." Regardless, the part of Plaintiff's medical records that we know the treating doctor himself completed indicate Plaintiff's "chief complaint" was injury to his face that occurred as a result of a

"direct blow" "just prior to arrival." Notably, nowhere on the chart did the doctor indicate Plaintiff was presently bleeding, complained of recent bleeding, or complained of difficulty breathing. Upon examination, the doctor described his clinical impression of Plaintiff's condition as "bruises to face." The doctor noted Plaintiff's neck, chest, abdomen, and extremities were not tender and he had a painless full range of motion. According to the records, Plaintiff evidently exhibited no signs of disorientation, confusion, or weakness. The records also reflect the doctor indicated a normal external ear, nose, and throat exam with no injury to the lips, gums, or pharynx. Plaintiff apparently did not have any open wounds, did not require stitches, and needed no other medical procedures. Plaintiff's booking photograph confirms he did not receive any stitches or bandages to his face or otherwise have any open facial wounds. The treating doctor prescribed two tablets of Tylenol. According to Plaintiff the doctor did so at Plaintiff's request: "Plaintiff asked the doctor at Jackson Memorial Hospital for any medication for headaches because he was in extreme pain. The doctor gave [him] two (2) Tylenol pills because Plaintiff was still suffering from headaches resulting from the attack by Defendants." *Id.* at ¶ 7. The doctor placed no limits on Plaintiff's exercise or activity and discharged him to "home or self-care." Besides the Tylenol provided at Plaintiff's request, Plaintiff's medical records reveal his injuries did not *require* medical treatment.

*5 Plaintiff makes much of the fact that, according to him, Defendant and Officers Perez and Rodriguez instructed him to wash his face before taking him to Ward D. Such a fact may bear on Defendant's alleged deliberate indifference, particularly if that were the only "medical attention" Defendant had afforded Plaintiff. But that is a separate inquiry. Because we do not think it possible to wash away an objectively serious medical need and we credit Plaintiff's assertions, without any further proof, that he bled at the scene of the arrest, we find this specific allegation inconsequential at this stage

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in our analysis.

Two cases in particular illustrate that the facts, even taken in the light most favorable to Plaintiff, do not amount to an objectively serious medical need in our circuit. First, in *Aldridge v. Montgomery*, 753 F.2d 970 (11th Cir.1985), the plaintiff maintained during his arrest he suffered a one and a half inch cut over his right eye. After arrest, the plaintiff was placed in a holding cell at county jail for over two hours during which time “[t]he cut continued to bleed, forming a pool of blood on the floor approximately the size of two hands.” *Aldridge*, 753 F.2d at 971. The plaintiff was then taken to the hospital where he received six stitches and prescribed ice-packs and aspirin, neither of which he was ultimately provided. *Id.* We concluded that these facts precluded a directed verdict in favor of the defendants on the plaintiff’s claim of deliberate indifference to serious medical needs. In contrast, Plaintiff only maintains he bled for over five minutes, but does not assert he bled much longer than that or that he bled while detained at the police station. Plaintiff’s medical records and booking photo reveal he had no open wounds at all, much less ones requiring stitches.

In *Martin v. Gentile*, 849 F.2d 863 (4th Cir.1988), a case we cited with approval in *Hill*, the Fourth Circuit affirmed the district court’s conclusion that the plaintiff had not demonstrated a serious medical need. The plaintiff in *Martin* arrived at the police station after his arrest with:

[A] cut over one eye, a quarter-inch piece of glass embedded in his palm, and bruises on his shoulders and elbows. But he presented no medical evidence that these injuries were serious enough to require medical attention any earlier than he received it. The cut over his eye was small and had stopped bleeding by the time he was taken before the magistrate [four hours after arrest], largely as a result of the officers’ efforts at first aid. The sliver of glass in his palm was no doubt uncomfortable, but it was not a serious injury. There is no suggestion that the delay in tak-

ing him to the hospital exacerbated his injuries in any way; indeed, the doctor who examined him in the emergency room testified that [the plaintiff]’s injuries were minor and did not require either stitches or painkiller.

Martin, 849 F.2d at 871.

Similarly, in this case, Plaintiff has never claimed he bled much longer than five minutes or at any location other than the scene of the arrest. The medical evidence reflects his bleeding had stopped at least by the time he arrived at Ward D. In fact, Plaintiff’s injuries were so minor that a doctor thought no medical attention or treatment other than two Tylenol was appropriate. Plaintiff has not provided any medical evidence that his injuries were serious enough to require medical attention any earlier than he received it. And, though his alleged injuries likely caused pain and discomfort, Plaintiff has not provided any medical evidence to suggest that the delay exacerbated Plaintiff’s injuries to the point of an objectively serious medical need or even ran the risk of doing so. The medical evidence in the record confirms that Plaintiff’s asserted symptoms at the arrest scene and police station, while they no doubt caused him pain, did not indicate a “life-threatening condition [] or situation[] where it [was] apparent delay would detrimentally exacerbate the medical problem” to a lay person, *Hill*, 40 F.3d at 1187, or “one that, if left unattended, pos[es] a substantial risk of serious harm.” *Farrow*, 320 F.3d at 1243 (quoting *Taylor*, 221 F.3d at 1258).

*6 In so holding, we do not mean to imply we disagree with the district court that a reasonable jury could find that the events of February 4, 2006 occurred just as Plaintiff says they did. We have no jurisdiction to pronounce such a disagreement. But we do have jurisdiction to conclude those facts Plaintiff has presented and the district court identified do not establish as a matter of law that he suffered an objectively serious medical need and, therefore, do not amount to a constitutional violation. For this reason, we REVERSE the district

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court's rejection of Defendant's assertion of qualified immunity.

FN* Honorable Bobby R. Baldock, United States Circuit Judge for the Tenth Circuit, sitting by designation.

FN1. Neither party disputes Defendant was performing discretionary functions at the time of the alleged constitutional violation.

FN2. "Plaintiff was eventually convicted of three counts of burglary of an unoccupied dwelling, one count of resisting an officer without violence, and one count of possession of burglary tools." *Fernandez*, Order at * 1 n. 1 (D.E.# 100).

FN3. Officer Perez maintained he terminated his interview of Plaintiff at the police station after about ten minutes and called another officer to have Plaintiff taken to Ward D. *Fernandez v. Metro Dade Police Dept't*, No. 06-cv-22957, Defs.' Mot. for Summ. J. and Supp. Mem. of Law, Exhibit A, ¶ 7 (S.D. Fla. June 26, 2008) (D.E.# 68-2). However, "[t]he [District] Court note[d] that Defendants do not dispute they arrested Plaintiff at 3:00 a.m. and that they did not take him to the hospital until 11:40 a.m." *Fernandez*, Order at *5 n. 5 (D.E.# 100) (citing Defs' Objections in Part to the Report of Magistrate Judge at *3, n. 2 (D.E.# 98)). "As clarified in the Second Declaration of [Sgt.] Robert Perez ..., Plaintiff's interview was brief, but he remained at the police station for a number of hours while his arrest forms and other paperwork were prepared before he was transported to Ward D. As [Sgt.] Perez states in his Second Declaration, it is common practice for police officers to complete all paperwork related to an arrest prior to taking the arrestee to jail, and it is

therefore not unusual for an arrestee to wait at the police station for as many as 12 hours even if the officers only spent a few minutes interviewing the arrestee.... The same may be true of an arrestee who is taken to Ward D before being taken to jail. As [Sgt.] Perez previously testified, 'It is standard police procedure to take any prisoners with any signs or complaints of injuries, regardless of how minor and regardless of whether they have any visible marks to Ward D prior to admission to the Jail.' Decl. of Sgt. Perez [doc. # 68-3] at 13, ¶ 9." Officers Perez and Rodriguez do not provide an explanation for why Plaintiff was taken to Ward D over nine hours after his arrest.

FN4. Some dispute exists as to when the police took Plaintiff's jail booking photo. The photo itself is time stamped "Feb 4, 2006 12:00AM" but the parties agree the police did not arrest Plaintiff until 3:00 a.m. on February 4, 2006. In his pro se declarations, Plaintiff indicates this sequence of events: (1) arrested around 3 a .m., (2) taken to police station, (3) told to wash his face, (4) taken to the hospital around 11:40 a.m., and (5) taken to the Dade County jail where the photo in question was taken about ten to eleven hours after his arrest. *Fernandez*, Pl.'s Decl. at ¶¶ 14, 23, 26, 27, 34 (D.E.# 75). In his answer brief, however, Plaintiff's counsel seems to suggest the booking photo was taken prior to Plaintiff's arrival at the hospital. Aple. Br. at 6-7. The district court made no explicit conclusion as to the photo's timing, though it repeatedly referred to it as Plaintiff's "booking photo" which arguably implies it found the photo was taken upon Plaintiff's booking at the Dade County Jail. Regardless, we do not have jurisdiction to resolve this kind of underlying dispute of historical fact and so we credit, without deciding,

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Plaintiff's pro se declaration that the photo was taken upon his booking at the Dade County Jail.

FN5. "[T]he Fourteenth Amendment Due Process Clause, not the Eighth Amendment prohibition on cruel and unusual punishment, governs pretrial detainees.... However, the standards [for deliberate indifference] under the Fourteenth Amendment are identical to those under the Eighth." *Goibert v. Lee County*, 510 F.3d 1312, 1326 (11th Cir.2007).

FN6. "To establish 'deliberate indifference,' Plaintiff must show that a Defendant had '(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence.'" *Burnette*, 533 F.3d at 1330 (quoting *Bozeman v. Orum*, 422 F.3d 1265, 1272 (11th Cir.2005)).

FN7. In determining whether Plaintiff had an objectively serious medical need, we may consider the medical evaluation and treatment he subsequently received. We recognize that hindsight is, as they say, twenty-twenty. Nonetheless, the purpose of seeking medical treatment is often to discover what has gone wrong with one's body. That determination, admittedly after the fact, can shed light on how wrong something went and when it went wrong. Therefore, judges having to make legal determinations as to whether someone manifested an *objectively* serious medical need at certain point in time may properly consider a physician's subsequent evaluation and treatment. *See e.g., Goibert*, 510 F.3d at 1320, 1326 (explaining that the plaintiff was diagnosed with a massive amniotic fluid loss which resulted in a stillbirth and that "[m]edical evidence in the record establishe[d] that prolonged amniotic leakage constitutes a serious medical problem that

can lead to infection and the death of a fetus. The evidence in the record [was] sufficient to satisfy the objective component of the deliberate indifference test"); *Farrow*, 320 F.3d at 1244 (considering the plaintiff's medical records in determining whether he had a serious medical need); *Aldridge v. Montgomery*, 753 F.2d 970, 973 (11th Cir.1985) (discussing evidence of the plaintiff's subsequent medical treatment as part of the serious medical need analysis).

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Only the Westlaw citation is currently available.

United States Court of Appeals,
Eleventh Circuit.
John Eugene YOUMANS, Plaintiff-Appellee,
v.
T.A. GAGNON, # 5715, in his official and individual capacity, Defendant-Appellant.
No. 09-15113.

Nov. 16, 2010.

Background: Pretrial detainee who had been beaten by police following his arrest, at conclusion of seven-minute vehicular chase, brought civil rights action against police officer who conducted stationhouse interview, for his alleged deliberate indifference to detainee's serious medical needs in making him wait four hours to obtain medical treatment for his visible cuts and bruises. Officer moved for summary judgment on qualified immunity theory. The United States District Court for the Middle District of Florida, No. 07-00629-CV-J-25-MCR, Henry Lee Adams, Jr., J., denied officer's summary judgment motion, and officer appealed.

Holding: The Court of Appeals held that detainee's right to immediate medical care for his bruises and cuts that were not then bleeding was not "clearly established" at time, such that interviewing officer was entitled to qualified immunity on detainee's Fourteenth Amendment deliberate indifference claims.

Reversed and remanded.

West Headnotes

[1] Federal Courts 170B ↪579

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination

170Bk576 Particular Actions, Interlocutory Orders Appealable
170Bk579 k. Civil Rights Cases.
Most Cited Cases
Denial of civil rights defendant's motion for summary judgment on qualified immunity grounds is immediately appealable under "collateral order" doctrine.

[2] Federal Courts 170B ↪776

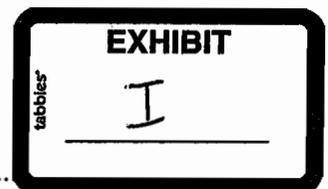
170B Federal Courts
170BVIII Courts of Appeals
170BVIII(K) Scope, Standards, and Extent
170BVIII(K)1 In General
170Bk776 k. Trial De Novo. Most Cited Cases
Court of Appeals reviews de novo district court's denial of civil rights defendant's motion for summary judgment on qualified immunity grounds.

[3] Civil Rights 78 ↪1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases
Purpose of qualified immunity doctrine is to protect government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.

[4] Officers and Public Employees 283 ↪114

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k114 k. Liabilities for Official Acts. Most Cited Cases
Qualified immunity doctrine ensures that, before



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they are subjected to suit, officers are on notice that their conduct is unlawful.

[5] Civil Rights 78 ↪1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

Unless government actor's act is so obviously wrong, in light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, government actor has immunity from suit.

[6] Civil Rights 78 ↪1407

78 Civil Rights

78III Federal Remedies in General

78k1400 Presumptions, Inferences, and Burdens of Proof

78k1407 k. Defenses; Immunity and Good Faith. Most Cited Cases

Once civil rights defendant raises qualified immunity defense, plaintiff bears burden of establishing both that defendant committed constitutional violation, and that governing law was already clearly established at time of this violation.

[7] Civil Rights 78 ↪1376(1)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(1) k. In General. Most Cited Cases

Civil Rights 78 ↪1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

To decide whether government actor is qualifiedly immune from suit, court may consider in any order the subsidiary questions of whether he committed a constitutional violation, and whether the governing law was already clearly established at time.

[8] Civil Rights 78 ↪1376(6)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(6) k. Sheriffs, Police, and Other Peace Officers. Most Cited Cases

Regardless of whether police officer who conducted stationhouse interview of pretrial detainee who had been beaten by police following his arrest may have violated any constitutional rights of detainee in not securing immediate medical treatment for his visible cuts and bruises, and in requiring detainee to wait four hours until after questioning had concluded to obtain such care, detainee's right to immediate medical care for his bruises and cuts that were not then bleeding was not "clearly established" at time, such that interviewing officer was entitled to qualified immunity on detainee's Fourteenth Amendment deliberate indifference claims; there was no controlling precedent requiring immediate medical care under such circumstances, and there was existing caselaw from other circuits at time sanctioning even longer delays. U.S.C.A. Const.Amend. 14.

[9] Constitutional Law 92 ↪4545(2)

92 Constitutional Law

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92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)3 Law Enforcement
92k4543 Custody and Confinement of
Suspects; Pretrial Detention
92k4545 Conditions
92k4545(2) k. Medical Treat-
ment. Most Cited Cases

Sentencing and Punishment 350H ↪1546

350H Sentencing and Punishment
350HVII Cruel and Unusual Punishment in Gen-
eral
350HVII(H) Conditions of Confinement
350Hk1546 k. Medical Care and Treat-
ment. Most Cited Cases
Fourteenth Amendment governs claims of medical
indifference to needs of pretrial detainees, while the
Eighth Amendment applies to claims of convicted
prisoners. U.S.C.A. Const.Amend. 8, 14.

[10] Civil Rights 78 ↪1376(6)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith
and Probable Cause
78k1376 Government Agencies and Of-
ficers
78k1376(6) k. Sheriffs, Police, and
Other Peace Officers. Most Cited Cases
In deciding whether pretrial detainee's right to re-
ceive immediate medical attention for cuts and
bruises that he exhibited during stationhouse ques-
tioning was "clearly established" at time, such that
police officer was not entitled to qualified im-
munity for his alleged deliberate indifference in
conducting this questioning and making detainee
wait for approximately four hours to receive treat-
ment, the Court of Appeals would consider deliber-
ate indifference case law that existed at time of this
questioning both under Eighth and Fourteenth
Amendments, since standards were the same.
U.S.C.A. Const.Amend. 8, 14.

[11] Civil Rights 78 ↪1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith
and Probable Cause
78k1376 Government Agencies and Of-
ficers
78k1376(2) k. Good Faith and Reason-
ableness; Knowledge and Clarity of Law; Motive
and Intent, in General. Most Cited Cases
Judicial precedent with materially identical facts is
not essential for the law to be "clearly established"
at time of alleged constitutional violation, for quali-
fied immunity purposes.

[12] Civil Rights 78 ↪1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith
and Probable Cause
78k1376 Government Agencies and Of-
ficers
78k1376(2) k. Good Faith and Reason-
ableness; Knowledge and Clarity of Law; Motive
and Intent, in General. Most Cited Cases
While judicial precedent with materially identical
facts is not essential for the law to be clearly estab-
lished at time of alleged constitutional violation,
preexisting law must make it obvious that defend-
ant's acts violated the plaintiff's rights in specific
set of circumstances at issue in order for law to be
"clearly established," and for plaintiff to overcome
qualified immunity defense.

[13] Civil Rights 78 ↪1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith
and Probable Cause
78k1376 Government Agencies and Of-
ficers
78k1376(2) k. Good Faith and Reason-
ableness; Knowledge and Clarity of Law; Motive

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and Intent, in General. Most Cited Cases
Very occasionally, qualified immunity can be denied where civil rights claimant establishes that defendant's conduct so obviously violated federal law that defendant must have known that his acts violated federal law, even in absence of preexisting caselaw addressing materially similar facts.

[14] Civil Rights 78 ↪ 1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

In deciding whether government actor is entitled to qualified immunity for violating party's constitutional rights, court considers what an objectively reasonable official must have known at pertinent time and place, i.e., whether it would be clear to reasonable officer that his conduct was unlawful in situation which confronted defendant officer.

[15] Civil Rights 78 ↪ 1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

Determination as to whether law was "clearly established" at time of alleged constitutional violation, for qualified immunity purposes, must be undertaken in light of specific context of case, not as broad general proposition.

[16] Civil Rights 78 ↪ 1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

If civil rights claimant, in effort to overcome qualified immunity defense, relies upon general rule to show that law was "clearly established" at time of alleged constitutional violation, it must be obvious that this general rule applies to specific situation in question; in this respect, minor variations between cases may prove critical.

[17] Civil Rights 78 ↪ 1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

In evaluating, for qualified immunity purposes, the objective legal reasonableness of officer's acts, court must examine whether the right at issue was clearly established at time of officer's acts in a particularized and relevant way.

[18] Civil Rights 78 ↪ 1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

For law to be "clearly established" at time of al-

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leged constitutional violation, for qualified immunity purposes, unlawfulness of given act must be made truly obvious, rather than simply implied, by preexisting law.

[19] Constitutional Law 92 ↪4545(2)

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)3 Law Enforcement

92k4543 Custody and Confinement of Suspects; Pretrial Detention

92k4545 Conditions

92k4545(2) k. Medical Treatment. Most Cited Cases

To prevail on claim of deliberate indifference to pretrial detainee's serious medical needs in violation of the Fourteenth Amendment, detainee must show: (1) a serious medical need; (2) defendant's deliberate indifference to that need; and (3) causation between that indifference and detainee's injury. U.S.C.A. Const.Amend. 14.

[20] Sentencing and Punishment 350H ↪1546

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1546 k. Medical Care and Treatment. Most Cited Cases

"Serious medical need," of kind required to support deliberate indifference claim, is one that has been diagnosed by physician as mandating treatment or one that is so obvious that even a lay person would easily recognize necessity for a doctor's attention. U.S.C.A. Const.Amends. 8, 14.

[21] Sentencing and Punishment 350H ↪1546

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1546 k. Medical Care and Treat-

ment. Most Cited Cases

"Serious medical need," of kind required to support deliberate indifference claim, may be established where condition worsens due to delay. U.S.C.A. Const.Amends. 8, 14.

[22] Sentencing and Punishment 350H ↪1546

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1546 k. Medical Care and Treatment. Most Cited Cases

In general, "serious medical needs," of kind required to support deliberate indifference claim, are those requiring immediate medical attention. U.S.C.A. Const.Amends. 8, 14.

[23] Sentencing and Punishment 350H ↪1533

350H Sentencing and Punishment

350HVII Cruel and Unusual Punishment in General

350HVII(H) Conditions of Confinement

350Hk1533 k. Deliberate Indifference in General. Most Cited Cases

To prove "deliberate indifference" to serious medical need, plaintiff must show: (1) subjective knowledge of risk of serious harm, and (2) disregard of that risk, (3) by conduct that is more than gross negligence. U.S.C.A. Const.Amends. 8, 14.

[24] Civil Rights 78 ↪1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

Law can be "clearly established," for qualified immunity purposes, by controlling decisions of the

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United States Supreme Court, the Eleventh Circuit, or the highest court of state in which case arose.

[25] Civil Rights 78 ↪1376(2)

78 Civil Rights

78III Federal Remedies in General

78k1372 Privilege or Immunity; Good Faith and Probable Cause

78k1376 Government Agencies and Officers

78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases

In absence of controlling precedent, cases decided outside the circuit where civil rights case arose can buttress court's view that applicable law was not "clearly established" at time of defendant officer's acts, for qualified immunity purposes; when there is no controlling precedent and other circuits are in disagreement, it is unfair to subject police to money damages for picking the losing side of controversy. Sean Bryan Granat, Jacksonville, FL, for Gagnon.

Christopher Ryan Maloney (Court-Appointed), Foley & Lardner, LLP, Jacksonville, FL, for Youmans.

Appeal from the United States District Court for the Middle District of Florida.

Before EDMONDSON, HILL and ALARCÓN,^{FN*} Circuit Judges.

PER CURIAM:

*1 This case is about the defense of qualified immunity in situations involving delay in medical care for a pretrial detainee.

Plaintiff-Appellee, a pretrial detainee at the time of these events, was beaten (an occurrence in which Defendant-Appellant took no part) in connection with Plaintiff's arrest on robbery charges. He alleges that later Defendant, by booking and ques-

tioning Plaintiff before seeking medical care for his injuries, was deliberately indifferent to Plaintiff's serious medical need in violation of Fourteenth Amendment rights. He brought suit against Defendant in Defendant's individual capacity; Defendant moved for summary judgment on qualified immunity grounds. The District Court denied the motion; Defendant now appeals. We reverse the District Court's decision and conclude that Defendant is entitled to immunity from this suit.

I. BACKGROUND

We view the facts in the light most favorable to Plaintiff.^{FN1} See *Andujar v. Rodriguez*, 486 F.3d 1199, 1202 (11th Cir.2007). In June 2007, two law enforcement officers attempted to stop Plaintiff John E. Youmans on suspicion of robbery as he drove away from the scene of the crime. After Plaintiff briefly pulled over, he drove away. The officers gave chase in their cars, and Plaintiff pulled over again after about seven minutes; the officers arrested Plaintiff. Incident to Plaintiff's arrest, the officers beat him: Plaintiff alleges that one officer ripped his shirt, leaving portions of his torso exposed, and then pulled him from his truck by his hair. With Plaintiff's feet still in the truck and his torso on the ground, he was kicked and punched. As a result, Plaintiff had visible abrasions on his head, face, shoulder, elbow, and hand.

The arresting officers took Plaintiff to the police station for booking, where Defendant Timothy Gagnon met and interviewed Plaintiff and did some booking paperwork. The interview is recorded on video complete with sound, including the time Plaintiff was alone in the interview room while Defendant was out. Plaintiff confessed to the robbery but gave a false name and birth date. Defendant spent approximately thirty minutes learning Plaintiff's true identity. At the end of the booking process, officers handcuffed Plaintiff to take him to the detention facility; but then Plaintiff requested to speak to Defendant again. Plaintiff then spent about seven more minutes in animated discussion with

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Defendant, attempting to implicate Plaintiff's passenger in the robbery. Then Plaintiff was transmitted to a detention facility.

Roughly four hours passed between the time that officers arrested and beat Plaintiff and the time that he received medical care; almost three of those hours were spent in Defendant's custody.^{FN2} During this three-hour time, Plaintiff never specifically requested medical treatment. But Plaintiff groaned, exclaimed "ouch" and "ow," and appeared to be disoriented at times; he told Defendant that he thought the officers had "cracked something" in his hand and indicated once to Defendant that his vision was blurred.^{FN3} Plaintiff had several cuts and abrasions on his head, face, shoulder, elbow, and hand; some blood was visible on Plaintiff. Despite the injuries, Plaintiff had sufficient use of his hands to sign an acknowledgment of his rights and to open and drink a can of lemonade; while Defendant was away, Plaintiff also attempted to use the top of the can to unscrew a panel covering the interview room's video camera.

Upon arriving at the detention facility from the police station, the nurse at the detention facility sent Plaintiff to the hospital. At the hospital, attending physicians diagnosed him with injuries consistent with blunt trauma: multiple contusions.^{FN4} Plaintiff underwent MRIs, a CT scan, and x-rays. Physicians prescribed Motrin and Skelaxin (a muscle relaxant) and referred him to a trauma clinic for follow-up care. Plaintiff has drawn our attention to nothing in the record about any follow-ups.

*2 Plaintiff filed suit against Defendant, alleging deliberate indifference to a serious medical need in violation of Plaintiff's Fourteenth Amendment rights.^{FN5} Defendant moved for summary judgment on qualified immunity grounds. The District Court denied the motion. Defendant then filed this interlocutory appeal.

II. DISCUSSION

A. Qualified Immunity

[1][2] We have jurisdiction over Defendant's interlocutory appeal under 28 U.S.C. § 1291 and the collateral order doctrine. *See Bryant v. Jones*, 575 F.3d 1281, 1288 n. 2 (11th Cir.2009). We "review *de novo* a district court's denial of a motion for summary judgment on qualified immunity grounds." *Andujar*, 486 F.3d at 1202.

[3][4][5] The purpose of the qualified immunity defense is to "protect[] government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, --- U.S. ---, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982)). The defense "ensure[s] that before they are subjected to suit, officers are on notice their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 2158, 150 L.Ed.2d 272 (2001). "Unless a government agent's act is so obviously wrong, in the light of pre-existing law, that only a plainly incompetent officer or one who was knowingly violating the law would have done such a thing, the government actor has immunity from suit." *Lassiter v. Ala. A&M Univ., Bd. of Trs.*, 28 F.3d 1146, 1149 (11th Cir.1994) (en banc).

[6][7] Assessing a claim of qualified immunity involves a two-step process: once a defendant raises the defense, the plaintiff bears the burden of establishing both that the defendant committed a constitutional violation and that the law governing the circumstances was already clearly established at the time of the violation. *Pearson*, 129 S.Ct. at 815-16. Following the Supreme Court's decision in *Pearson*, we are free to consider these elements in either sequence and to decide the case on the basis of either element that is not demonstrated. *Id.* at 818. In the present case, it seems best to proceed directly to the question of whether the applicable law was already clearly established when the incident took place.

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B. "Clearly Established" Law

*3 [8][9][10][11][12][13] Whether or not Defendant's conduct constituted deliberate indifference to a serious medical need in violation of Plaintiff's Fourteenth Amendment rights,^{FN6} the law applicable to these circumstances was not already clearly established at the time of the alleged violation. A judicial precedent with materially identical facts is not essential for the law to be clearly established, but the preexisting law must make it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue.^{FN7} See *Evans v. Stephens*, 407 F.3d 1272, 1282 (11th Cir.2005) (en banc).

[14][15] In deciding about qualified immunity, we are considering what an objectively reasonable official must have known at the pertinent time and place; that is, we are examining "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation [the defendant officer] confronted." " *Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 599, 160 L.Ed.2d 583 (2004) (emphasis added) (quoting *Saucier*, 121 S.Ct. at 2156); see also *Pace v. Capobianco*, 283 F.3d 1275, 1282 (11th Cir.2002). "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition" *Saucier*, 121 S.Ct. at 2156.

[16] The Supreme Court has warned against allowing plaintiffs to convert the rule of qualified immunity into "a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 3038-39, 97 L.Ed.2d 523 (1987). More than a general legal proposition—for example, to act reasonably—is usually required; if a plaintiff relies on a general rule, it must be obvious that the general rule applies to the specific situation in question. See *Brosseau*, 125 S.Ct. at 599 (noting that general tests may be sufficient to establish law clearly in "an obvious case"). Minor variations between cases may prove critical. See *Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1032 (11th Cir.2001) (en banc).

[17][18] Thus, evaluating the "objective legal reasonableness" of an officer's acts requires examining whether the right at issue was clearly established in a "particularized" and "relevant" way. *Anderson*, 107 S.Ct. at 3039. The unlawfulness of a given act must be made truly obvious, rather than simply implied, by the preexisting law. See *id.*

[19] With this understanding about the necessity of clear law being tied to the specific factual context, we turn to the issue in this case. To prevail on a claim of deliberate indifference to serious medical need in violation of the Fourteenth Amendment, a plaintiff must show: "(1) a serious medical need; (2) the defendant[s] deliberate indifference to that need; and (3) causation between that indifference and the plaintiff's injury." *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1306-07 (11th Cir.2009).

[20][21][22] "A serious medical need is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Id.* at 1307 (quoting *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187 (11th Cir.1994)).^{FN8} In general, serious medical needs are those "requiring immediate medical attention." See *Hill*, 40 F.3d at 1190.

*4 [23] To prove "deliberate indifference" to a serious medical need, a plaintiff must show " '(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; (3) by conduct that is more than [gross] negligence.'" *Townsend v. Jefferson Cnty.*, 601 F.3d 1152, 1158 (11th Cir.2010) (quoting *Bozeman v. Orum*, 422 F.3d 1265, 1272 (11th Cir.2005)). We conclude that neither the "serious medical need" nor the "deliberate indifference" element was established with such clarity in June 2007 that an objectively reasonable police officer in Defendant's place would have been on advance notice that Defendant's acts in this case would certainly violate the Constitution.

The best response to a serious medical need is not required by federal law in these cases. Judicial de-

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cisions addressing deliberate indifference to a serious medical need, like decisions in the Fourth Amendment search-and-seizure realm, are very fact specific. At a high level of generality, certain aspects of the law have been established: lengthy delays are often inexcusable, *see Harris v. Coweta Cnty.*, 21 F.3d 388, 394 (11th Cir.1994) (stating delay of several weeks in treating painful and worsening hand condition was deliberate indifference); shorter delays may also constitute a constitutional violation if injuries are sufficiently serious, *see Bozeman*, 422 F.3d at 1273 (delaying medical treatment for fourteen minutes was deliberate indifference where the plaintiff was not breathing during that time); and the reason for the delay must weigh in the inquiry, *see id.* But specific cases of deliberate indifference are complicated: the threshold of deliberate indifference is connected to combinations of diverse interdependent factual elements. And for the present case, it was not already clearly established as a matter of law in June 2007 that a four-hour delay for injuries of this kind violated the Fourteenth Amendment.

In fact, earlier cases considering injuries of similar consequence concluded that delays of roughly comparable length were acceptable for constitutional purposes.^{FN9} For instance, in *Andujar*, a dog bit the plaintiff as he fled from police in 1999, leaving puncture wounds in the front and back of his thigh that impaired his ability to walk. 486 F.3d at 1201-03. The defendant paramedics applied a temporary bandage to stop the bleeding long enough for the plaintiff to be booked at the police station, but the plaintiff did not receive the stitches he needed until two hours after the bite. *Id.* at 1203-04. In that case, we concluded that the plaintiff's medical condition was not urgent and that the "short delay" of two hours was permissible to allow the police sufficient time to book the plaintiff. *Id.* at 1204.

In *Hill*, we concluded that a delay of four hours in seeking treatment for stomach pain, vomiting blood, and blood in the plaintiff's underwear did not

constitute deliberate indifference where the delay was due to the official's need to finish feeding the rest of the inmates. 40 F.3d at 1190-92.

*5 [24][25] In addition, this Circuit-before 2007 and with seeming agreement-had cited other Circuits' cases that say that longer delays for similar injuries did not constitute deliberate indifference to a serious medical need.^{FN10} When decisional law is required for prior notice, the law can be clearly established by decisions of the U.S. Supreme Court, Eleventh Circuit, or the highest court of the state where the case arose. *See Jenkins ex rel. Hall v. Talladega City Bd. of Educ.*, 115 F.3d 821, 826 n. 4 (11th Cir.1997). But in the absence of controlling precedent, cases decided outside this Circuit can buttress our view that the applicable law was *not* already clearly established. We must not hold police officers to a higher standard of legal knowledge than that displayed by the federal courts in reasonable and reasoned decisions; where "judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 119 S.Ct. 1692, 1701, 143 L.Ed.2d 818 (1999); *see also Barts v. Joyner*, 865 F.2d 1187, 1193 (11th Cir.1989) ("We cannot realistically expect that reasonable police officers know more than reasonable judges about the law."). For background, *see Marsh*, 268 F.3d at 1039-40. In the present case, that this Court had cited cases of longer delays for similar injuries further confirms for us that an objectively reasonable police officer in Defendant's place would not have known that Defendant's conduct would violate Plaintiff's constitutional rights.

Cases cited by Plaintiff are too different from this case to make the law applicable to the circumstances of this case clearly established in June 2007. For example, Plaintiff cites *Aldridge v. Montgomery*, 753 F.2d 970 (11th Cir.1985), where we denied qualified immunity to a defendant who delayed treatment of a serious bleeding cut for approximately two and a half hours. 753 F.2d at

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972-73. Critical to our decision in that case was that the plaintiff's cut bled continuously during that time, causing blood to pool on the plaintiff's clothing and the floor; and the cut ultimately required six stitches. *Id.*

Nothing in the record in the present case shows that Plaintiff's cuts bled while in Defendant's custody; he ultimately did not require stitches. Significant, sustained bleeding requiring later stitches is a far greater indicator of a need for urgent medical care than the mere presence of cuts and bruises as in the present case.^{FN11} See *Hill*, 40 F.3d at 1189 (“[Plaintiff] has not contended that there was continued bleeding that would signify an urgent or emergency situation”). This factual variance is the kind of variation between cases that makes a critical difference in determining whether the applicable law was already clearly established at the time the occurrence underlying this case arose. We cannot say that *Aldridge* would provide an objective police officer with adequate advance notice that the conduct at issue in this case would violate Plaintiff's constitutional rights.

III. CONCLUSION

*6 We conclude that it is not-and most important, was not in June 2007-clear from the preexisting law that all objectively reasonable policemen would have known that a four-hour delay for booking and interviewing a person with injuries of the kind asserted here is a constitutional violation.^{FN12} In reaching this conclusion, we stress that “[g]overnment officials are not required to err on the side of caution.” *Marsh*, 268 F.3d at 1030 n. 8. The District Court erred in deciding that Defendant was not entitled to the defense of qualified immunity.

REVERSED and REMANDED.

FN* Honorable Arthur L. Alarcón, United States Circuit Judge for the Ninth Circuit, sitting by designation.

FN1. For this appeal, we assume these facts. We do not decide today that these assumed facts are entirely consistent with reality.

FN2. The record indicates that officers arrested Plaintiff at approximately 1:03 p.m.; he arrived at the station around 2:15 p.m.; and the jail nurse saw him at 5:17 p.m.

FN3. Plaintiff spoke to himself at times when Defendant was outside of the room. Much of this speech is unintelligible to us even when Plaintiff's counsel has suggested what Plaintiff is saying. For example, Plaintiff's brief says Plaintiff-while Defendant was outside the room-indicated that he thought he had a broken shoulder. (Defendant acknowledged that he looked at the video monitors in real time when he was outside the interview room). Plaintiff's support for this claim is a citation to a point in the video, but the video does not support this claim: there are just unintelligible utterances. No reasonable jury could find that Plaintiff indicated to Defendant (through the video) that Plaintiff had a broken shoulder. See *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 1776, 167 L.Ed.2d 686 (2007).

FN4. The record indicates that Plaintiff vomited after arriving at the hospital and that he self-described his pain-intensity level as ten out of ten. Defendant had no knowledge of these facts while Plaintiff was in Defendant's custody.

FN5. Plaintiff also filed suit against the arresting officers in their personal capacities for use of excessive force; the arresting officers are not parties to this appeal.

FN6. The Fourteenth Amendment governs claims of medical indifference to the needs of pretrial detainees while the Eighth

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Amendment applies to claims of convicted prisoners. *Andujar*, 486 F.3d at 1202 n. 3. Because the minimum standard for providing medical care to pretrial detainees is the same as the standard for providing medical care to convicted prisoners under the Eighth Amendment, *see id.*, we consider as precedents cases decided under either amendment.

FN7. Very occasionally, qualified immunity can be denied where the plaintiff establishes that the defendant's conduct so obviously violated federal law that the defendant must have known the acts violated federal law even in the absence of preexisting caselaw addressing materially similar facts. *See, e.g., Priester v. City of Riviera Beach, Fla.*, 208 F.3d 919, 926-27 (11th Cir.2000).

FN8. Serious medical need might alternatively be established where the condition worsens due to a delay. *See Mann*, 588 F.3d at 1307. Here, because Plaintiff does not contend further injury from the delay in treatment, the proper test is whether a lay person would easily recognize the need as serious. In addition, that a medical need might be recognizable by a trained medical professional, such as a nurse, is not enough. Instead, the need for immediate medical assistance must have been apparent to the untrained eye of a layperson. *See id.* at 1307-08.

FN9. While material differences exist between the facts of the present case and the facts of earlier cases cited here, the earlier cases are sufficiently similar to help to render the law applicable to the circumstances of this case unclear to an objectively reasonable officer.

FN10. *See, e.g., Kane v. Hargis*, 987 F.2d 1005, 1008-09 (4th Cir.1993) (cited in

Hill, 40 F.3d at 1190) (concluding that a four-hour delay in seeking medical treatment for "cracked teeth, a cut nose, and a bruised face" was not a constitutional violation where there was "no indication these injuries required immediate medical treatment"); *Gaudreault v. Salem*, 923 F.2d 203, 207-08 (1st Cir.1990) (cited in *Hill*, 40 F.3d at 1188 n. 24) (concluding that a ten-hour delay in providing treatment for "multiple bruises[] to the forehead, left and right orbits of his eyes, nasal area, left ribs, right flank and left shoulder, ... a corneal abrasion and an abrasion on the upper back" and " 'massive swelling' in the head" did not constitute deliberate indifference); *Martin v. Gentile*, 849 F.2d 863, 871 (4th Cir.1988) (cited in *Hill*, 40 F.3d at 1188 n. 22) (concluding that a fourteen-hour delay in treatment for cuts, bruises, and a quarter-inch piece of glass embedded in the palm did not constitute deliberate indifference).

FN11. Also, we note that the delay in *Aldridge* was due to officers "waiting for a detective to tell them what to do." 753 F.2d at 972. This reason for delay differs from the facts of this case, where the delay occurred due to the need to interview and to book Plaintiff. Earlier cases establish that the reason for a delay matters: a good reason may justify a delay. *See, e.g., Andujar*, 486 F.3d at 1204 (stating that a delay to book the plaintiff was reasonable). In the present case, that the delay in treatment extended no longer than the time to interview and book Plaintiff is undisputed; and Plaintiff does not contend that the period for interviewing and booking was, in itself, excessive. The delay was also extended by Plaintiff's acts of giving a false name and then attempting to implicate his passenger. Under earlier cases, a reasonable law enforcement officer could consider getting

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Plaintiff properly identified and determining if he acted alone to be valid reasons justifying some delay in treatment, given the injuries seemingly involved here.

FN12. We also note that Plaintiff did not request medical care. A person is not required to request medical care to prevail on a claim of deliberate indifference to a serious medical need. But in this situation, where Plaintiff engaged in conversation on different topics, Plaintiff's failure to request medical care supports our determination that objectively reasonable law enforcement officers-held to the standard of a layperson, rather than a trained medical professional-would not be on notice that Plaintiff needed immediate medical care.

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Only the Westlaw citation is currently available. This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,
Eleventh Circuit.
Donald W. WHITEHEAD, Plaintiff-Appellant,
v.
Edward H. BURNSIDE, Defendant-Appellee.
No. 10-11911
Non-Argument Calendar.

Nov. 17, 2010.

Background: Inmate brought § 1983 action against prison medical director, alleging deliberate indifference to his serious medical needs. The United States District Court for the Middle District of Georgia, C. Ashley Royal, J., 2010 WL 1258050, granted director's motion for summary judgment. Inmate appealed.

Holding: The Court of Appeals held that director was not deliberately indifferent towards prisoner's serious medical need.
Affirmed.

West Headnotes

Prisons 310

310 Prisons

Prison medical director was not deliberately indifferent towards prisoner's serious medical need regarding his broken kneecap resulting from a prison altercation, as would violate the Eighth Amendment, despite prisoner's contention that director

denied him needed surgery, where director was not at the prison at the time of the incident, treating doctors did not believe the injury needed immediate surgery, and director requested an urgent consultation by an orthopedist upon examining prisoner, which led to his eventual surgery. U.S.C.A. Const.Amend. 8.
McNeill Stokes, Attorney at Law, Atlanta, GA, for Plaintiff-Appellant.

Tina M. Piper, Thurbert Baker, Office of Attorney General, Atlanta, GA, for Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Georgia. D.C. Docket No. 5:08-cv-00193-CAR.

Before DUBINA, Chief Judge, HULL and ANDERSON, Circuit Judges.

PER CURIAM:

*1 Appellant Donald W. Whitehead, an inmate at the Men's State Prison ("MSP) in Hardwick, Georgia, appeals the district court's entry of summary judgment as to Hale Edward Burnside, Medical Director for the prison, on his claim of deliberate indifference to a serious medical need in violation of the Constitution of the United States, brought pursuant to 42 U.S.C. § 1983, and a state cause of action for medical malpractice.^{FN1} On appeal, Whitehead argues that the district court erred by adopting the recommendation of the magistrate judge that summary judgment should be granted in favor of Burnside because Whitehead failed to create an issue of fact for trial. The magistrate judge reasoned that Whitehead failed to provide medical evidence to support his claim of deliberate indifference on the part of Burnside. Whitehead contends that his declaration and Dr. William S. Thompson's declaration support his theory that the two and one half week delay between his kneecap injury and surgery amounts to cruel and unusual punishment.



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After reviewing the record, we conclude that Whitehead has failed to present a genuine issue of material fact to be resolved by a fact-finder. Thus, we affirm the grant of summary judgment.

We review a district court order granting summary judgment *de novo*, viewing all of the facts in the record in the light most favorable to the non-moving party. *Brooks v. County Comm'n of Jefferson County, Ala.*, 446 F.3d 1160, 1161-62 (11th Cir.2006). Summary judgment is appropriate where the moving party demonstrates, through pleadings, interrogatories, and admissions on file, together with the affidavits, if any, "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "A party moving for summary judgment has the burden of showing that there is no genuine issue of fact." *Eberhardt v. Waters*, 901 F.2d 1578, 1580 (11th Cir.1990) (internal quotation marks omitted). "A party opposing a properly submitted motion for summary judgment may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Id.* (internal quotation marks omitted). The court must view the evidence and make all reasonable factual inferences against the non-moving party. *Id.* Speculation or conjecture from a party cannot create a genuine issue of material fact. *Cordoba v. Dillard's, Inc.*, 419 F.3d 1169, 1181 (11th Cir.2005). "A mere scintilla of evidence in support of the nonmoving party will not suffice to overcome a motion for summary judgment." *Young v. City of Palm Bay, Fla.*, 358 F.3d 859, 860 (11th Cir.2004).

In order to state a cognizable claim for inadequate medical treatment under the Eighth Amendment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 291, 50 L.Ed.2d 251 (1976). These acts or omissions must be "so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fair-

ness." *Harris v. Thigpen*, 941 F.2d 1495, 1505 (11th Cir.1991) (quoting *Rogers v. Evans*, 792 F.2d 1052, 1058 (11th Cir.1986)).

*2 Deliberate indifference requires a plaintiff to prove three elements: "(1) subjective knowledge of a risk of serious harm; (2) disregard of that risk; and (3) by conduct that is more than mere negligence." *Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir.2004). The plaintiff shoulders a heavy burden; even conduct that could be characterized as medical malpractice does not necessarily constitute deliberate indifference. See *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir.1999). A difference in medical opinion does not constitute deliberate indifference so long as the treatment provided is minimally adequate. *Harris*, 941 F.2d at 1504-05. When a plaintiff alleges that delay in medical treatment shows deliberate indifference, he "must place verifying medical evidence in the record to establish the detrimental effect of delay in medical treatment to succeed." *Hill v. Dekalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1187-88 (11th Cir.1994), *overruled in part on other grounds by Hope v. Pelzer*, 536 U.S. 730, 739 n. 9, 122 S.Ct. 2508, 2515 n. 9, 153 L.Ed.2d 666 (2002). "[D]elay in medical treatment must be interpreted in the context of the seriousness of the medical need, deciding whether the delay worsened the medical condition, and considering the reason for delay." *Id.* at 1189. Self-serving statements by a plaintiff do not create a question of fact in the face of contradictory, contemporaneously created medical records. See, e.g., *Bennett v. Parker*, 898 F.2d 1530 (11th Cir.1990).

We conclude from the record that the district court correctly applied the summary judgment standard, finding that Whitehead failed to demonstrate that there was a genuine issue of material fact as to whether Burnside was deliberately indifferent to Whitehead's broken kneecap. Although Whitehead attempts to overcome summary judgment by offering his own sworn statement and that of Dr. Thompson to support his allegations, the contemporaneous medical records and opinions of the ex-

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aming medical doctors show that this purported evidence is baseless.

Whitehead's broken kneecap resulted from a prison altercation on October 20, 2006. Whitehead claims in his statement that, after his arrival at the Oconee Regional Hospital, Dr. Salvatore Dellacona requested immediate surgery for his injured knee but was denied permission by Burnside to perform the operation. On the contrary, Dr. Dellacona provided an affidavit stating that immediate surgery was not required for Whitehead's broken kneecap, and he did not speak with Burnside as Whitehead contends. Prison records indicate that at the time of the incident, Burnside was not present at the prison.

Dr. Dellacona, pursuant to hospital protocol, requested a second opinion from Dr. Steven Niergarth. Niergarth concurred with Dr. Dellacona that immediate surgery was not required. On November 1, 2006, Whitehead was examined by an orthopedic specialist, Dr. Clarence Fossier. Fossier found that the injury did not require immediate surgery and scheduled the operation for a week later. In his sworn statement, Fossier testified that he would have operated immediately if it had been necessary and that any delay in surgery did not result in any long-term detriment to Whitehead.

*3 Whitehead attempts to counter these medical opinions from his treating physicians by producing an affidavit from Dr. Thompson, wherein he states that after reviewing the evidence, he found Burnside deliberately indifferent in delaying treatment for Whitehead. At best, however, Dr. Thompson's affidavit represents a difference of medical opinion between himself and the physicians who treated Whitehead. Furthermore, as Dr. Thompson acknowledges, his affidavit is based in part on Whitehead's statement that Dellacona would have performed surgery immediately had Burnside not intervened. Dellacona's contemporaneous medical records and his affidavit show this contention to be incorrect.

Whitehead's statement is erroneous in other ways as

well. Whitehead claims that Burnside refused to look at his knee and told him it would take two to three months to schedule an MRI. Burnside's records, recorded at the time he first saw Whitehead, show otherwise. Burnside clearly notes that Whitehead had fractured his patella, could not extend his leg, and had swelling in his left knee. Burnside requested an urgent consultation by an orthopedist to evaluate the injury, and Whitehead was scheduled for the consultation with Dr. Fossier that lead to his eventual surgery.

The evidence from the record is clear. Whitehead has established, at best, a difference of medical opinion as to the appropriate treatment for his injured knee. His personal belief regarding the severity of his injury is not sufficient to overcome the medical opinions of Drs. Fossier and Dellacona, and he has failed to produce evidence to refute the contemporaneous medical records supporting Burnside's actions. Therefore, we conclude that the district court properly adopted the magistrate's recommendation and we affirm the district court's grant of summary judgment in favor of Burnside.

AFFIRMED.

FN1. Initially, Whitehead also appealed the magistrate judge's imposition of sanctions in the underlying matter. On August 20, 2010, a panel of this Court dismissed the appeal as to the sanctions order.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 10-22183-CIV-KING
MAGISTRATE P. A. WHITE

CHRISTOPHER URIAH ALSOBROOK, :

Plaintiff, :

v. :

SGT. ALVARADO, et al., :

Defendants. :

REPORT OF
MAGISTRATE JUDGE
(DE#34& 35)

I. Introduction

The pro-se plaintiff, Christopher Uriah Alsobrook, filed a civil rights complaint pursuant to 42 U.S.C. §1983,(De#1) and an amended complaint (DE#18). The plaintiff is proceeding in forma pauperis, and seeks monetary damages.

This Cause is before the Court upon a Motion to Dismiss the Amended Complaint filed by Defendants Alvarado and Medina(DE#34).

II. Analysis

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a defendant may move to dismiss a complaint because the plaintiff has failed to state a claim upon which relief may be granted. See Fed.R.Civ.P. 12(b)(6). The complaint may be dismissed if the plaintiff does not plead facts that state a claim to relief that is plausible on its face. See Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955 (2007)(retiring the oft-criticized "no set of facts" language previously used to describe the motion to dismiss standard and determining that because plaintiffs had "not nudged their

claims across the line from conceivable to plausible, their complaint must be dismissed" for failure to state a claim); Watts v. FIU, 495 F.3d 1289 (11 Cir. 2007). While a complaint attacked for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S.Ct. at 1964-65. The rules of pleading do "not require heightened fact pleading of specifics" The Court's inquiry at this stage focuses on whether the challenged pleadings "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 127 S.Ct. 2197, 2200 (2007)(quoting Twombly, 127 S.Ct. at 1964).

Factual Allegations

The plaintiff alleged in his initial complaint filed on July 2, 2010, that Officer Alvarado knowingly endangered him by failing to remove him from his cell when the plaintiff's cell mate, a known violent felon, informed him that if he failed to remove the plaintiff, he would "send him out". He further alleges that while being assaulted by the fellow inmate, Sgt. Medina viewed the assault, and when the plaintiff requested help, told him to "handle your business".¹ The plaintiff includes a copy of the disciplinary report he received for fighting with another inmate. The plaintiff claims that since the assault he suffers from headaches, vertigo and extreme nausea and vomiting. The Preliminary Report recommended that the plaintiff stated a claim for endangerment against Alvarado

¹ The plaintiff made a conclusory statement in his initial complaint that Sgt. Medina refused to call for medical aid on his behalf.

and Medina. The Preliminary report was adopted on August 19, 2010, and both defendants were served.

Motions to Dismiss initial complaint
filed by Alvarado and Medina

On September 21, 2010, before the filing of the Amended complaint, Defendant Alvarado filed a Motion to Dismiss the initial complaint. (DE#15). The defendant argued that the claims against him should be dismissed because the plaintiff's claims are barred by Heck.² Claims which challenge the fact or duration of the imprisonment may be raised in a civil rights complaint only when a conviction or sentence has been reversed or expunged through use of a petition for writ of habeas corpus.

Alvarado alleged that the plaintiff is seeking to overturn two disciplinary reports he received as a result of the incident complained of and to retrieve his thirty days of lost gain time for fighting and being disrespectful to an Officer. ³

Review of the initial complaint reveals only that the plaintiff was seeking damages, claiming that Alvarado allowed an assault against him to continue by a prisoner with a known history of violence, and refused to come to his aid, despite the fact he was bleeding profusely. He does not challenge his disciplinary report, nor does he seek restoration of gain time. He seeks purely monetary relief. It was therefore recommended that the defendant's argument that the complaint should be barred by Heck was

²Heck v Humphrey, 512 U.S. 477 (1994)

³The plaintiff is cautioned that any attempts to amend his complaint to obtain lost gain time shall be barred by Heck.

unavailing.

Secondly, the defendant correctly contends that the plaintiff may not sue him in his official capacity for monetary damages. The defendant is protected by Eleventh Amendment immunity. Will v Michigan dept. of State Police, 491 U.S. 58 (1989) (a suit against a state employee in his official capacity is a suit against the State for Eleventh Amendment purposes.) The defendant may be sued solely in his individual capacity.

On October 13, 2010, Defendant Medina filed a motion to dismiss the complaint (DE#20). Although Defendant Medina's motion to dismiss was filed after the filing of an amended complaint, the motion sought to dismiss the initial complaint, and raised the identical arguments raised in Officer Alvarado's Motion.

A Preliminary Report was entered on November 3, 2010, recommending that Sgt. Alvarado and Sgt. Medina's motions to dismiss be granted as to any suit against them in their official capacity, and denied as to all remaining arguments. (DE#28)

The Amended Complaint (DE#18)

The Preliminary Report also served as an initial screening of the amended complaint. The plaintiff filed the Amended Complaint on October 6, 2010 (DE#18). His claims against Officer Alvarado and Medina essentially remained the same. He clarified the claim of denial of medical aid against Sgt. Medina in Count 2. (P8) He alleged that Medina refused to summon emergency medical personnel to evacuate him, and treat the plaintiff's serious medical needs. He claims he suffered serious bodily injuries, including severe pain, soft tissue damages, bleeding from a gash to the back of his

head, a cut under his eye, a bloody nose and a cut on his forehead, along with swelling and blackening of a large portion of his face.

He further added an additional defendant in his amended complaint. He claims in Count three that Nurse Harris denied him medical treatment for his serious medical injuries. He claimed that while in the emergency room, despite his complaints of pain, disorientation, and a concussion, she provided no treatment for him for several days. He seeks monetary relief.

Defendants Medina and Alvarado filed a response in opposition to the motion to amend, with exhibits and affidavits (DE#21). These exhibits and affidavits may be considered in a motion for summary judgment. The arguments were the same as raised in their motions to dismiss.

They further added the argument that the plaintiff has failed to exhaust his administrative remedies. Although the defendant is essentially arguing that the exhaustion requirement is a condition precedent to filing suit, the Supreme Court has held that failure to exhaust is an affirmative defense, and a plaintiff is not required to plead and demonstrate exhaustion of remedies in his complaint. See Jones v. Bock, 549 U.S. 199, 216 (2007). It cannot be assumed for purposes of the defendant's motion and the Report, that the plaintiff has failed to exhaust his administrative remedies. It is apparent that any determination as to whether the operative complaint may be subject to dismissal under §1997e(a), will require further development of the record.

Review of the amended complaint revealed that the plaintiff had stated a claim for denial of adequate medical treatment against Defendant Harris and Medina. The Eighth Amendment prohibits any

punishment which violates civilized standards of decency or "involve[s] the unnecessary and wanton infliction of pain." Estelle v. Gamble, 429 U.S. 97, 102-03 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173(1976)); see also Campbell v. Sikes, 169 F.3d 1353, 1363 (11 Cir. 1999). "However, not 'every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment.'" McElligott v. Foley, 182 F.3d 1248, 1254 (11 Cir. 1999) (citation omitted). An Eighth Amendment claim contains both an objective and a subjective component. Taylor v. Adams, 221 F.3d 1254, 1257 (11 Cir. 2000); Adams v. Poag, 61 F.3d 1537, 1543 (11 Cir. 1995). First, a plaintiff must set forth evidence of an objectively serious medical need. Taylor, 221 F.3d at 1258; Adams, 61 F.3d at 1543. Second, a plaintiff must prove that the prison official acted with an attitude of "deliberate indifference" to that serious medical need. Farmer, 511 U.S. at 834; McElligott, 182 F.3d at 1254; Campbell, 169 F.3d at 1363. The objective component requires the plaintiff to demonstrate that he has been subjected to specific deprivations that are so serious that they deny him "the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347 (1981); see also Hudson v. McMillian, 503 U.S. 1, 8-9 (1992).

The Preliminary Report recommended that at this stage in the proceedings, the plaintiff has made a minimal claim for denial of medical aid by Officer Medina and Nurse Harris, and Nurse Harris was served. It was further recommended that the amended complaint (DE#18) be the operative complaint.⁴ The defendants filed

⁴If the plaintiff was a pretrial detainee at the time of the events alleged, his claims must be analyzed under the Due Process Clause of the Fourteenth Amendment rather than the Cruel and Unusual Punishment Eighth Amendment standard. Bell v. Wolfish, 441 U.S. 520, 535 (1979); Hamm v. DeKalb County, 774 F.2d 1567, 1571-74 (11 Cir. 1985).

objections, and the Report was adopted on November 23, 2010.

Motion to Dismiss Amended Complaint

by Alvarado & Medina (DE#34)

The Cause before the Court is the defendants Motion to Dismiss the amended complaint on the grounds of lack of subject matter jurisdiction and qualified immunity, filed on November 30, 2010.

The defendants argue again that this suit should be dismissed because the plaintiff's claims are barred by Heck.⁵ Claims which challenge the fact or duration of the imprisonment may be raised in a civil rights complaint only when a conviction or sentence has been reversed or expunged through use of a petition for writ of habeas corpus. As previously stated, although the plaintiff stated he received a disciplinary report, he seeks relief for endangerment and delay in medical treatment. The gravamen of the plaintiff's complaint is that the officers failed to intervene once the fight ensued, unrelated to a finding of guilt in the disciplinary report. He is not seeking return of gain time or any other relief affecting his duration of imprisonment.

The defendants again raise the argument of lack of exhaustion, citing to Bryant v Rich, 530 F.3d 1368 (11 Cir. 2008), for the proposition that exhaustion of administrative remedies may be determined at the motion to dismiss stage. However, as previously cited, the Supreme Court has stated exhaustion is an affirmative defense and does not have to be proved in the initial pleadings. Jones v Bock, supra.

⁵Heck v Humphrey, 512 U.S. 477 (1994)

Further, in the initial complaint, pages 16 through 18, the plaintiff provides a detailed statement of his attempts to exhaust. The defendants have provided no argument to demonstrate that the plaintiff's attempts do not satisfy the exhaustion requirement. This issue clearly requires further development.

The final argument raised is that Defendant Medina is entitled to qualified immunity as to the issue of delay of medical attention. Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." Saucier v. Katz, 533 U.S. 194, 200 (2001) (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). The purpose of this immunity is to allow government officials to carry out their discretionary duties without the fear of personal liability or harassing litigation, Lee v. Ferraro, 284 F.3d 1188, 1194 (11 Cir. 2002) (citing Anderson v. Creighton, 483 U.S. 635, 638 (1987)), and it shields from suit "all but the plainly incompetent or one who is knowingly violating the federal law." Lee, supra, 284 F.3d at 1194 (quoting Willingham v. Loughnan, 261 F.3d 1178, 1187 (11 Cir. 2001)). Since qualified immunity is a defense not only from personal liability for government officials sued in their individual capacities, but also a defense from suit, it is important for the Court to determine the validity of a qualified immunity defense as early in the lawsuit as is possible. Lee v. Ferraro, supra, at 1194; GJR Invs., Inc. v. County of Escambia, 132 F.3d 1359, 1370 (11th Cir. 1998).

Generally, government officials performing discretionary functions are protected by qualified immunity if their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In Saucier, supra, the Supreme Court set forth a two-part test for evaluating a claim of qualified immunity. As a "threshold question," a court must ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" Lee, supra at 1194 (quoting Saucier, 533 U.S. 194, 201); and then, if a constitutional right would have been violated under the *plaintiff's* version of the facts, the court must then determine "whether the right was clearly established." Lee, supra, 284 F.3d at 1194 (quoting Saucier, supra). This second inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id.; see also Marsh v. Butler County, 268 F.3d 1014, 1031-33 (11 Cir. 2001) (en banc).

Claims of delay in medical treatment are cognizable under 42 U.S.C. §1983, Lancaster v Monroe County, Alabama, 116 F.3d 1419 (11 Cir. 1997). The plaintiff must demonstrate that the defendant acted with deliberate indifference when he intentionally delayed providing the inmate with access to medical treatment.

Defendant Medina argues that he delayed treatment until the plaintiff agreed to "cuff up", as he was conscious of the security risks of opening a cell housing two violent felons without securing these individuals with handcuffs. At this preliminary stage, it cannot be determined whether Medina acted with a reasonable awareness of security or demonstrated deliberate indifference. The defendant cites to Williams v County of Sacramento Sheriff's Dept, 2007 WL 2433221 (ED Cal 2007) for the argument that a brief delay taking inmate to medical clinic due to security concerns did not violate the inmates civil rights. However, that decision was reached at the summary judgment stage, after the facts had been fully developed. At this preliminary stage, the determination of

whether Defendant Medina is entitled to qualified immunity cannot be made.

III. Conclusion

It is therefore recommended as follows:

1. The defendants' Motion to Dismiss (DE#34) be denied.
2. The claims of endangerment against Officer Alvarez, and failure to intervene against Officer Medina shall remain.
3. A claim of denial of providing medical aid shall proceed against Officer Medina, and Nurse Harris.
4. The Defendants' Motion to Stay Discovery until resolution of the Motion to Dismiss (DE#35) be denied as moot.

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report.

Dated this 2nd day of February, 2011.



UNITED STATES MAGISTRATE JUDGE

cc: Christopher Uriah Alsobrook, Pro Se
DC#09876
Suwannee Correctional Institution
Address of Record

Lance Neff, AAG
Office of Attorney General
Tallahassee, FL
Attorney of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 10-22183-CV-KING/WHITE

CHRISTOPHER ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

_____ /

**DEFENDANTS' OBJECTIONS
TO MAGISTRATE'S REPORT AND RECOMMENDATION**

Defendants **Alvarado** and **Medina**, through undersigned counsel and pursuant to Rule 72, Federal Rules of Civil Procedure and Local Magistrate Rule 4, respectfully object to the magistrate's February 2, 2011 Report and Recommendation (Doc. 43).¹ As grounds for the objections, Defendants state the following:

1. The magistrate states, "The gravamen of the plaintiff's complaint is that the officers failed to intervene once the fight ensued, unrelated to a finding of guilt in the disciplinary report. He is not seeking return of gain time or any other relief affecting his duration of imprisonment." (Doc. 43 at 7) However, as the Eleventh Circuit recently stated, "[The inmate's] argument that *Heck* is inapplicable because he is not seeking to expunge his disciplinary actions misses the mark. As we have already discussed, the relevant inquiry is not whether a prisoner explicitly seeks to reinstate his good-time credits, but instead whether the § 1983 claims call into question the validity of the deprivation of those credits." Richards v. Dickens, 2011 WL 285212, No. 10-10343, at *2 (11th Cir. Jan. 31, 2011). That Plaintiff failed

¹ As stated in the docket entry, objections are due February 22, 2011. (Doc. 43)

to seek his gain time back as relief in this civil case is irrelevant; the question is whether success in the civil rights suit would necessarily undermine the disciplinary report. Here, as stated in further detail in the Motion to Dismiss, Plaintiff asserts that Defendants Alvarado and Medina failed to witness him fighting, *but only being attacked*. This assertion necessarily contradicts the Fighting DR. Thus, Plaintiff's specific allegations are incompatible with success in this case and this Court is without subject-matter jurisdiction as the claim is Heck-barred.

2. The magistrate judge misconstrued Defendants' Heck-bar argument as an exhaustion argument. Defendants did not make an exhaustion argument, but were merely analogizing to the process of reviewing a failure to exhaust argument made in a Rule 12 motion where courts are allowed to look at documents outside of the complaint in order to make a determination on exhaustion. This process is laid out and confirmed as proper in Bryant v. Rich, 530 F.3d 1368 (11th Cir. 2008). In a fashion analogous to Bryant, Defendants argue that this Court may look at documents outside the complaint in order to review a Heck-bar argument. The magistrate judge failed to address this assertion of Defendants. Defendants contend, under Rule 12(b)(1), that since Plaintiff has made allegations inconsistent with still valid disciplinary reports (for which Plaintiff lost gain time), Plaintiff's failure to protect claim against Defendants is Heck-barred depriving the Court of subject-matter jurisdiction.

3. The magistrate judge erred in not making a determination on qualified immunity regarding the deliberate indifference claim against Defendant Medina. The magistrate judge asserts that the facts need to be more fully developed. (Doc. 43 at 9-10) However, Defendants are arguing for qualified immunity based solely on the well-pleaded facts put forth by Plaintiff in his Amended Complaint. No further factual development is needed at this stage as Defendants are arguing based merely on what Plaintiff has stated in his Amended Complaint.

4. The key question under the first prong of the qualified immunity analysis is whether Defendant Medina violated Plaintiff's constitutional rights by not taking him to medical after Plaintiff and the inmate Plaintiff was fighting refused to "cuff up." Plaintiff *plainly asserts* in his amended complaint that Sergeant Medina stated to Plaintiff, "When ya'll are ready to cuff up I'll get you to medical." (Doc. 18 at 10) Thus, as Plaintiff states in his amended complaint, Plaintiff held the key to his medical care. All Plaintiff had to do was "cuff up" and he would be taken to medical. There is no indication in the amended complaint that Plaintiff was willing to comply with the simple act that would have gotten him immediately to medical. Silence as to a material fact does not make that fact well-pleaded. As stated in Ashcroft v. Iqbal, 129 S.Ct. 1937, 1950 (2009), "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'show[n]'-that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)(2)." Thus, it has not been shown that Defendant Medina was indifferent to Plaintiff's medical needs as Plaintiff failed to state in his amended complaint that he was willing to cuff up and that Defendant Medina refused to take him to medical after Plaintiff expressed that willingness. It is much more probable that Defendant was merely conscious of the security risks of opening a cell housing two violent felons who had just engaged in belligerence without first securing those individuals with handcuffs. Such action is not deliberate indifference; it is reasonable security awareness.

4. Regardless of whether Defendant Medina's conduct constituted deliberate indifference to a serious medical need in violation of Plaintiff's Eighth Amendment rights, the law applicable to the circumstances of the instant case was not clearly established at the time of the alleged violation. This argument was laid out in detail in the Motion to Dismiss, but the

magistrate failed to address this second prong of the qualified immunity determination. See Saucier v. Katz, 533 U.S. 194 (2001).

5. Lastly, if the case is not remanded to the magistrate judge, Defendants seek a interlocutory appeal pursuant to 28 U.S.C. 1292(b) and request the district judge certify the following question: “Whether a Heck-bar argument may be brought under Rule 12(b)(1), F. R.Civ.P., and whether a district court may make factual findings outside the record in ruling on the Heck-bar argument.” The request is made due to the fact that not allowing a Heck-bar defense to be brought in a Rule 12(b)(1) motion is a “controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.”

CONCLUSION

Defendants request the district court judge remand the case to the magistrate judge with instructions to address Defendants’ Rule 12(b)(1) Heck-bar argument and make fact-finding determinations outside the record if required. Further, Defendants request the district court judge remand the case to the magistrate judge with instructions to address Defendant Medina’s qualified immunity argument under both prongs of Saucier.

Lastly, if the case is not remanded to the magistrate judge, Defendants request the district judge to certify an interlocutory appeal pursuant to 28 U.S.C. 1292(b) and certify the following question: “Whether a Heck-bar argument may be brought under Rule 12(b)(1), F. R.Civ.P., and whether a district court may make factual findings outside the record in ruling the Heck-bar argument.”

Respectfully submitted,

**PAMELA JO BONDI
ATTORNEY GENERAL**

s/ Lance Eric Neff
Lance Eric Neff
Assistant Attorney General
Florida Bar Number 26626
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300 - Telephone
(850) 488-4872 - Facsimile
Email: Lance.Neff@myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Lance Eric Neff
LANCE ERIC NEFF

SERVICE LIST
CHRISTOPHER ALSOBROOK versus SGT. ALVARADO, et al.,
Case No.: 10-22183-CV-KING/WHITE
United States District Court, Southern District of Florida

Christopher Alsobrook, DC# D09876
Suwannee C.I.
5964 U.S. Highway 90
Live Oak, FL 32060
PRO SE
Service by Mail

s/ Lance Eric Neff
LANCE ERIC NEFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-22183-CV-KING/WHITE

CHRISTOPHER URIAH ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

ORDER GRANTING PARTIAL DISMISSAL OF AMENDED COMPLAINT

THIS CAUSE comes before the Court upon Magistrate Judge Patrick A. White's February 4, 2011 Report and Recommendation (DE #43).¹ In his Report, Magistrate Judge White recommended denying Defendants Alvarado and Medina's Motion to Dismiss (DE #34) on the basis that the *Heck* doctrine was inapposite.² Upon consideration, the Court determines that Defendants' Motion to Dismiss must be granted in part: Count I shall be dismissed for lack of subject-matter jurisdiction.

In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that certain § 1983 claims are barred where the result of those claims would be to overturn previous disciplinary action. *Id.* at 486-87. According to the Supreme Court, in any § 1983 action brought by a prisoner, a district court "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be

¹ The procedural history of the above-styled matter is clearly laid out by Magistrate Judge White's Report and will not be repeated here.

² Defendants Alvarado and Medina filed their Objections (DE #44) on February 18, 2011, and the matter is therefore ripe for review.

dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.” *Id.*

Here, there is no dispute that Plaintiff suffered disciplinary action resulting from the events in question: namely, a fight between Plaintiff and his cell-mate on June 6, 2009. (DE #15-1). Nor is there any dispute regarding the resulting disciplinary action: Plaintiff suffered the deprivation of 30 days gain time for fighting, and for 60 days of gain time for disrespecting officials. *Id.* Instead, the issue before the Court – at least as to Count I – is whether the Amended Complaint (DE #18) implicates the disciplinary action previously taken against Plaintiff.

Upon consideration, the Court finds that Plaintiff’s Amended Complaint, at least in part, implicates and contradicts the disciplinary action and is therefore barred by *Heck*. While Magistrate Judge White’s Report determined that *Heck* was inapplicable because Plaintiff neither “challenge[d] his disciplinary report, nor ... [sought] restoration of gain time” (DE #43), such is not the standard by which *Heck*’s applicability must be determined. Instead, a prisoner’s § 1983 claim is barred by *Heck* where any such claim would necessarily call into question the disciplinary action taken against the prisoner. *See Muhammad v. Close*, 540 U.S. 749, 754-55 (2004) (finding that, if good-time credits have been eliminated, *Heck* applies where a complaint seeks a judgment at odds with earlier disciplinary action). *See also Wooten v. Law*, 118 Fed. Appx. 66, 68-69 (6th Cir. 2004) (determining that prisoner’s claims were barred where they would have disturbed earlier disciplinary punishment).

Under that standard, the Court cannot but conclude that Count I of Plaintiff’s Amended Complaint would undermine the disciplinary action taken against him on June 6, 2009. As pleaded, Count I undermines the resolution of the disciplinary action for fighting in that Count I

alleges that Plaintiff was the innocent victim of an assault in his jail cell and that Defendants Alvarado and Medina witnessed that assault but took no action. Such allegations do not comport with the resolution of the disciplinary action against Plaintiff. (DE #34). Cf. *Edwards v. Baliosk*, 520 U.S. 641, 648 (1197); *Heck*, 512 U.S. at 486-87. Count I is therefore *Heck*-barred,³ and Count I shall be dismissed.

As to Plaintiff's claim for denial of medical attention in Count II of the Amended Complaint, the Court concurs with Magistrate Judge White that the claim shall proceed, although on a basis different from that of Magistrate Judge White's Report. Magistrate Judge White concluded that it was too early to determine whether qualified immunity barred Plaintiff's claim against Defendant Medina. (DE #43 at 9).

However, the Court finds that there is no need to await further development of this issue, as qualified immunity can be decided even at the motion to dismiss stage. It is clear that no such qualified immunity exists here. See *Saucier v. Katz*, 533 U.S. 194 (2001). Under *Saucier*'s two-prong standard, a court must consider whether 1) the facts as alleged demonstrate a violation of a constitutional right, and 2) an objectively reasonable officer would have realized the facts as alleged violated a clearly established federal law. *Id.* at 200-02. See also *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (discussing qualified immunity in the context of § 1983 action). While any inquiry into medical indifference is necessarily fact-specific, the Court finds that Plaintiff's Amended Complaint demonstrates both that he was in medical need for an extended duration and that Defendant Medina was aware of that need but took no action. Although Defendant Medina contends that he was helpless to address that need until Plaintiff "cuffed up" (DE #44), there are sufficient allegations in the Amended Complaint which support the claim that

³ The Court notes that it is without jurisdiction to adjudicate this issue until such time as Plaintiff has successfully had his disciplinary record expunged in this regard. *Heck*, 512 U.S. at 486-87.

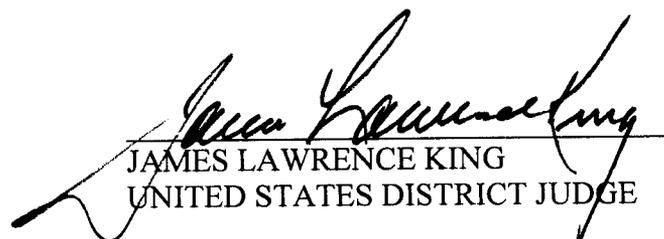
Plaintiff was ready and willing to comply with Defendant Medina's request. Instead, it was his erstwhile opponent who refused to do so. (DE #18 ¶7). His opponent's refusal to comply, however, cannot be sufficient to deny Plaintiff needed medical attention. Nor does this finding contradict or undermine the disciplinary action taken. Because Plaintiff's allegations demonstrate a constitutional right to medical treatment, a clearly established federal law under these circumstances, the Court denies Defendants request for qualified immunity at this time.

In all other respects, the Report is affirmed. Count III of Plaintiff's Amended Complaint shall proceed against Defendant Harris and Defendant, and Defendant's Motion to Stay (#35) is denied as moot.

Accordingly, having independently reviewed the record, it is **ORDERED, ADJUDGED,** and **DECREED** that:

1. Count I of Plaintiff's Amended Complaint (DE #18) be, and the same is hereby, **DISMISSED.**
2. Defendants Medina and Harris shall **ANSWER** within twenty days the remaining counts of the Amended Complaint as appropriate.
3. Defendants' Motion to Stay is **DENIED as moot.**

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 28th day of February, 2011.


JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Cc:

Magistrate Judge Patrick A. White

Plaintiff, *pro se*

Christopher Uriah Alsobrook

DC #D09876

Suwannee Correctional Institution

5964 U.S. Highway 90

Live Oak, FL 32060

Counsel for Defendants

Ginger Lynne Barry

Broad and Cassel

200 Grand Blvd, Suite 205A

Destin, FL 32550

850-269-0148

Fax: 850-521-1472

Email: gbarry@broadandcassel.com

Lance Eric Neff

Office of Attorney General

PL-01 The Capitol

Tallahassee, FL 32399-1050

Email: lance.neff@myfloridalegal.com

Cedell Ian Garland

Office of the Attorney General

PL-01, The Capital

Tallahassee, FL 32399

Email: Cedell.Garland@myfloridalegal.com

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

Case No.: 1:10-cv-22183-JLK

CHRISTOPHER ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

_____ /

DEFENDANT MEDINA'S NOTICE OF APPEAL

Defendant **Medina**, through undersigned counsel, gives notice of his appeal to the United States Court of Appeals for the Eleventh Circuit from the February 28, 2011 Order. (DE 45)

Respectfully submitted,

**PAMELA JO BONDI
ATTORNEY GENERAL**

s/ Lance Eric Neff

Lance Eric Neff
Assistant Attorney General
Florida Bar Number 26626
Office of the Attorney General
The Capitol, PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300 - Telephone
(850) 488-4872 - Facsimile
Email: Lance.Neff@myfloridalegal.com

CERTIFICATE OF SERVICE

I hereby certify that on March 16, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or *pro se* parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Lance Eric Neff
LANCE ERIC NEFF

SERVICE LIST
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United States District Court, Southern District of Florida

Christopher Alsobrook, DC# D09876
Suwannee C.I.
5964 U.S. Highway 90
Live Oak, FL 32060
PRO SE
Service by Mail

s/ Lance Eric Neff
LANCE ERIC NEFF

UNITED STATES DISTRICT COURT
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In *Heck v. Humphrey*, 512 U.S. 477 (1994), the Supreme Court held that certain § 1983 claims are barred where the result of those claims would be to overturn previous disciplinary action. *Id.* at 486-87. According to the Supreme Court, in any § 1983 action brought by a prisoner, a district court “must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be

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Here, there is no dispute that Plaintiff suffered disciplinary action resulting from the events in question: namely, a fight between Plaintiff and his cell-mate on June 6, 2009. (DE #15-1). Nor is there any dispute regarding the resulting disciplinary action: Plaintiff suffered the deprivation of 30 days gain time for fighting, and for 60 days of gain time for disrespecting officials. *Id.* Instead, the issue before the Court – at least as to Count I – is whether the Amended Complaint (DE #18) implicates the disciplinary action previously taken against Plaintiff.

Upon consideration, the Court finds that Plaintiff’s Amended Complaint, at least in part, implicates and contradicts the disciplinary action and is therefore barred by *Heck*. While Magistrate Judge White’s Report determined that *Heck* was inapplicable because Plaintiff neither “challenge[d] his disciplinary report, nor ... [sought] restoration of gain time” (DE #43), such is not the standard by which *Heck*’s applicability must be determined. Instead, a prisoner’s § 1983 claim is barred by *Heck* where any such claim would necessarily call into question the disciplinary action taken against the prisoner. *See Muhammad v. Close*, 540 U.S. 749, 754-55 (2004) (finding that, if good-time credits have been eliminated, *Heck* applies where a complaint seeks a judgment at odds with earlier disciplinary action). *See also Wooten v. Law*, 118 Fed. Appx. 66, 68-69 (6th Cir. 2004) (determining that prisoner’s claims were barred where they would have disturbed earlier disciplinary punishment).

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However, the Court finds that there is no need to await further development of this issue, as qualified immunity can be decided even at the motion to dismiss stage. It is clear that no such qualified immunity exists here. See *Saucier v. Katz*, 533 U.S. 194 (2001). Under *Saucier*'s two-prong standard, a court must consider whether 1) the facts as alleged demonstrate a violation of a constitutional right, and 2) an objectively reasonable officer would have realized the facts as alleged violated a clearly established federal law. *Id.* at 200-02. See also *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (discussing qualified immunity in the context of § 1983 action). While any inquiry into medical indifference is necessarily fact-specific, the Court finds that Plaintiff's Amended Complaint demonstrates both that he was in medical need for an extended duration and that Defendant Medina was aware of that need but took no action. Although Defendant Medina contends that he was helpless to address that need until Plaintiff "cuffed up" (DE #44), there are sufficient allegations in the Amended Complaint which support the claim that

³ The Court notes that it is without jurisdiction to adjudicate this issue until such time as Plaintiff has successfully had his disciplinary record expunged in this regard. *Heck*, 512 U.S. at 486-87.

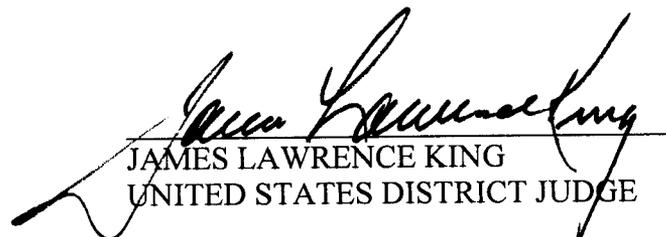
Plaintiff was ready and willing to comply with Defendant Medina's request. Instead, it was his erstwhile opponent who refused to do so. (DE #18 ¶7). His opponent's refusal to comply, however, cannot be sufficient to deny Plaintiff needed medical attention. Nor does this finding contradict or undermine the disciplinary action taken. Because Plaintiff's allegations demonstrate a constitutional right to medical treatment, a clearly established federal law under these circumstances, the Court denies Defendants request for qualified immunity at this time.

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Accordingly, having independently reviewed the record, it is **ORDERED, ADJUDGED,** and **DECREED** that:

1. Count I of Plaintiff's Amended Complaint (DE #18) be, and the same is hereby, **DISMISSED.**
2. Defendants Medina and Harris shall **ANSWER** within twenty days the remaining counts of the Amended Complaint as appropriate.
3. Defendants' Motion to Stay is **DENIED as moot.**

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 28th day of February, 2011.


JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Cc:

Magistrate Judge Patrick A. White

Plaintiff, *pro se*

Christopher Uriah Alsobrook

DC #D09876

Suwannee Correctional Institution

5964 U.S. Highway 90

Live Oak, FL 32060

Counsel for Defendants

Ginger Lynne Barry

Broad and Cassel

200 Grand Blvd, Suite 205A

Destin, FL 32550

850-269-0148

Fax: 850-521-1472

Email: gbarry@broadandcassel.com

Lance Eric Neff

Office of Attorney General

PL-01 The Capitol

Tallahassee, FL 32399-1050

Email: lance.neff@myfloridalegal.com

Cedell Ian Garland

Office of the Attorney General

PL-01, The Capital

Tallahassee, FL 32399

Email: Cedell.Garland@myfloridalegal.com

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 10-22183-CV-KING/WHITE

CHRISTOPHER URIAH ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR RECONSIDERATION

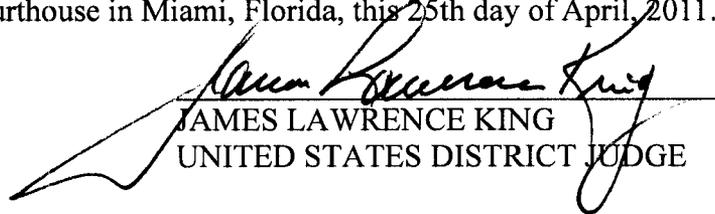
THIS CAUSE comes before the Court upon Plaintiff's Motion for Reconsideration (DE #49), filed March 22, 2011. Therein, Plaintiff states several bases for this Court to reconsider its Order Granting Partial Dismissal (DE #45), entered February 28, 2011. Plaintiff contends that his claims are not *Heck*-barred as this Court held in its Order, and that the Order was inconsistent with an earlier determination made by the Court.

Although the Court finds Plaintiff's Motion to be well-reasoned and thorough, it cannot agree that the record necessitates reconsideration of the Court's Order of Partial Dismissal. The Court's earlier Order stated succinctly the basis for its findings that Count I of Plaintiff's Complaint was *Heck*-barred (DE #45 at 2-3), and those reasons will not be restated here. Moreover, to the extent that the Court's Order differs with any of its earlier rulings, such findings are nonetheless consistent with the current state of the law. As such, the Court's Order will not be vacated to reinstate Count I of Plaintiff's Complaint as requested by Plaintiff. However, insomuch as Plaintiff requests an opportunity to amend his Complaint, that relief shall be permitted.

Accordingly, upon due consideration of the record before this Court, it is **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. Plaintiff's Motion for Reconsideration (DE #49) be, and the same is hereby, **GRANTED** in part. Plaintiff's Motion is **GRANTED** inasmuch as it requests leave to amend the Amended Complaint (DE #18). If Plaintiff elects to file a Second Amended Complaint, it shall be **FILED within thirty days** of the date of this Order.
2. In all other respects, Plaintiff's Motion for Reconsideration is **DENIED**.

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice Building and United States Courthouse in Miami, Florida, this 25th day of April, 2011.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Cc:

Plaintiff, pro se
Christopher Uriah Alsobrook
DC #D09876
Suwannee Correctional Institution
5964 U.S. Highway 90
Live Oak, FL 32060

Counsel for Defendants
Ginger Lynne Barry Boyd
Broad and Cassel
200 Grand Blvd, Suite 205A
Destin, FL 32550
850-269-0148
Fax: 850-521-1472
Email: gbarry@broadandcassel.com

Lance Eric Neff
Office of Attorney General
PL-01 The Capitol
Tallahassee, FL 32399-1050

Email: lance.neff@myfloridalegal.com

Cedell Ian Garland

Office of the Attorney General

PL-01, The Capital

Tallahassee, FL 32399

Email: Cedell.Garland@myfloridalegal.com

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION**

CASE NO. 10-22183-CV-KING/WHITE

CHRISTOPHER URIAH ALSOBROOK,

Plaintiff,

v.

SGT. ALVARADO, et al.,

Defendants.

**ORDER VACATING EARLIER ORDER OF RECONSIDERATION, STAYING
PROCEEDINGS**

THIS CAUSE comes before the Court upon Defendant Medina's Motion for Reconsideration (DE #52), filed April 27, 2011. Therein, Defendant argues that the Court's Order Granting in Part Reconsideration (DE #51) was improper because the same issues were currently on appeal to the Eleventh Circuit. (DE #52 at 2). Although the entirety of Plaintiff's Amended Complaint is not on appeal, inasmuch as this Court's Order would permit wholesale amendment, the Court concurs that amendment would necessarily be improper at this time.

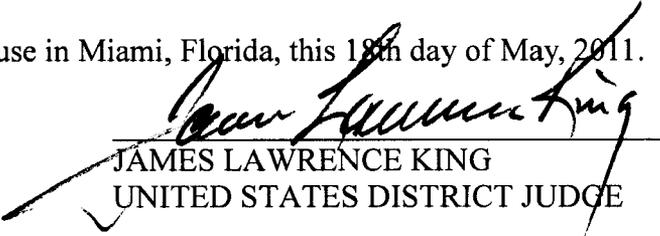
Accordingly, upon due consideration of the record before this Court, it is **ORDERED**, **ADJUDGED**, and **DECREED** that:

1. Defendant's Motion for Reconsideration (DE #52) be, and the same is hereby, **GRANTED**. The Court's Order Granting in Part Reconsideration (DE #51) is **VACATED**.
2. The above-styled proceedings are **STAYED** pending resolution of the underlying appeal.

3. Plaintiff's Motion for Extension (DE #55) is **DENIED as moot**.

DONE AND ORDERED in Chambers at the James Lawrence King Federal Justice

Building and United States Courthouse in Miami, Florida, this 18th day of May, 2011.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Cc:

Plaintiff, pro se

Christopher Uriah Alsobrook

DC #D09876

Suwannee Correctional Institution

5964 U.S. Highway 90

Live Oak, FL 32060

Counsel for Defendants

Ginger Lynne Barry Boyd

Broad and Cassel

200 Grand Blvd, Suite 205A

Destin, FL 32550

850-269-0148

Fax: 850-521-1472

Email: gbarry@broadandcassel.com

Lance Eric Neff

Office of Attorney General

PL-01 The Capitol

Tallahassee, FL 32399-1050

Email: lance.neff@myfloridalegal.com

Cedell Ian Garland

Office of the Attorney General

PL-01, The Capital

Tallahassee, FL 32399

Email: Cedell.Garland@myfloridalegal.com

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 10cv22183 JLK

**The attached hand-written
document
has been scanned and is
also available in the
SUPPLEMENTAL
PAPER FILE**

United States District Court
Southern District of Florida
Miami Division

Case No. : 1:10-cv-22183-KING/WHITE

FILED by <i>[Signature]</i>	D.C.
MAY 23 2011	
STEVEN M. LARIMORE CLERK U.S. DIST. CT. S. D. of FLA. - MIAMI	

Christopher Uriah Alsobrook, Pro se
Plaintiff,

v.

Sgt. Alvarado, et al.,
Defendants.

PROVIDED TO COLUMBIA
CORRECTIONAL INSTITUTION
ON 05/19/2011 (DATE) FOR MAILING
(AW) (CLERK INITIAL) CA (U/M INITIAL)

SECOND AMENDED COMPLAINT

I. Jurisdiction

1. This Court has jurisdiction over the plaintiff's claims pursuant to 28 U.S.C. § 1331 and 1343 (a) (3).

II. Venue

2. The Southern District of Florida is an appropriate venue under 28 U.S.C. § 1391 (b) (2) because all of the events or omissions giving rise to the claims occurred in this district.

1.

III. Parties

3. Plaintiff Christopher Ulrich Alsobrook is currently an inmate at Columbia Correctional Institution/Annex. He was housed at the South Florida Reception Center ("S.F.R.C.") at the time of the events giving rise to this complaint.

4. Sgt. Alvarado, at the time of the events explained below, was an employee at S.F.R.C., employed as a correctional officer. He is sued in his individual capacity.

5. Sgt. E. Medina, at the time of the events explained below, was an employee at S.F.R.C., employed as a correctional officer. He is sued in his individual capacity.

6. Nurse Harris, at the time of the events explained below, was an employee at S.F.R.C., employed as a nurse in the medical department. She is sued in her individual capacity.

IV Court One: Endangerment, 42 USC § 1983

A. Statement of Claim:

(7) Sgt. Alvarado violated the plaintiff's United States 8th Amendment to the Constitution when he knowingly and deliberately was aware of the potential danger

of physical bodily harm to Plaintiff from another prisoner and failed to prevent such, resulting, and directly causing, the serious bodily injuries Plaintiff sustained, particularly violating 42 U.S.C. § 1983 when, while acting under the color of state law, Defendant Alvarado deliberately and intentionally, with malicious and sadistic intent, was deliberately indifferent to Plaintiff's federally protected rights when Defendant Alvarado failed to prevent, resulting and causing Plaintiff pain and suffering in the form of the injuries sustained by the plaintiff mentioned herein; including, but not limited to, severe pain, soft tissue damage, suffering, physical, mental, and emotional injuries, embarrassment, humiliation, degradation, mental anguish, chronic dizzy spells, bouts of nausea, migraine headaches, loss of sleep, and fear.

B. Statement of Facts:

(8.) On the morning of June 6, 2009, Plaintiff was housed in cell E2109 of Echo dorm (confinement), at S.F.R.C., a prison owned and operated by the Florida Department of Corrections ("F.D.O.C."). Plaintiff was on close management ("C.M.") status (restrictive housing separate from the general inmate population), awaiting transport to a close-management institution.

(9.) Following the morning meal, at approximately 7:20 A.M., while Plaintiff lay on the upper bunk of cell E-2109, his roommate, Izell McCloud, DC# 588881, ("McCloud"), stopped Sgt Alvarado, the Echo-dorm (2AM-

to- 8 A.M. dorm sergeant, as he made his rounds. McCloud told Sgt. Alvarado: "You need to separate me and my roomie. I don't like his character and we're going to have some problems if you don't get him out of here right now." He repeated this message multiple times, varying only the wording. Sgt. Alvarado replied that he was about to go home, "talk to the next sergeant." McCloud responded to the sergeant's words in a much more animated and vehement nature, re-iterating his prior assertions, culminating in the statement that: "If you (Alvarado) don't get him out, I'm gonna send him out." Communicating in no uncertain terms that, if Plaintiff was not immediately removed from the cell, he would assault Plaintiff. At this point, concerned with the direction that the situation was clearly heading, Plaintiff spoke up and told the sergeant: "Sarge, please, just get me out of here, dudes tripping." But Sgt. Alvarado only continued to shrug off any responsibility, passing the buck on to the next shift's sergeant. After approximately three minutes of this, Sgt. Alvarado continued on his rounds, turning his back on the brewing violence in the face of the substantial and obvious risk that harm would occur.

(16) There was no speaking between Plaintiff and his roommate at this time. Plaintiff lay back on his bunk and quietly awaited shift-change. Plaintiff became aware of much moving around and mumbling by McCloud below him. After approximately 10 to 15 minutes of this, McCloud raised his voice, commenting out of nowhere that, if his three bottles of lotion were not under his bunk,

he was going to beat the hell out of Plaintiff. (There never were any such bottles of lotion in the cell over the five-week period that Plaintiff and McCloud shared same, as lotion is not allowed to C.M. inmates.) The plaintiff ignored this clearly deluded statement, not wanting to escalate the situation. (McCloud is approximately 6'2, 250 pounds to Plaintiff's 5'11, 175.) After a couple additional minutes, McCloud again spoke up, saying that if he found anything missing in his locker, he would "beat (Plaintiff) down." At this point, Plaintiff sat up on his bunk, his feet dangling over the edge, and jumped to the floor, intent on going to the door and attracting the attention of one of the officers and making a renewed effort to be removed from the cell. The moment Plaintiff's feet touched the concrete floor, McCloud, who had been seated on top of his locker, sprung up and rushed Plaintiff, tackling him, causing Plaintiff's upper body to become lodged in between a metal locker and the wall, (a space of approximately 12 inches), and began to repeatedly strike Plaintiff's head and face with his clenched fists. After a minimum of 20 such blows to the plaintiff's face and head, McCloud clamped his hands around the plaintiff's neck and began to strangle Plaintiff. Plaintiff fought frantically to pry McCloud's fingers from his throat, on the verge of blacking out into unconsciousness, until, finally, McCloud's weight shifted enough for Plaintiff to bring his legs between them and kick McCloud off of him, and gain his feet. Unbeknownst to Plaintiff, McCloud had already placed the large battery from his state-issued

tapeplayer into a sock and secreted it between the two lockers. As Plaintiff escaped from beneath him, McCloud retrieved the sock and battery and began to beat Plaintiff about the head, shoulders, and arms. Fortunately, after a handful of strikes, the sock tore and McCloud subsequently lost the battery under the lower bunk.

(11.) At this time, at least ten minutes into the fight, the plaintiff began to kick the door at every opportunity in an attempt to attract the attention of the officers while he simultaneously attempted to fight McCloud off of him, bleeding profusely, panicked, and in a very real fear for his life.

(12.) McCloud had made good on his threats to harm Plaintiff 25-30 minutes earlier to Sgt. Alvarado. Plaintiff suffered from multiple heavily bleeding cuts to his head and face, severe swelling to his face, a bloody nose, and trauma to the brain from the blunt force of the 250-pound McCloud pummeling him with downward-striking blows.

IV. Count Two: Failure to Intervene, 42 U.S.C. § 1983

A. Statement of Claim:

(13.) Defendant Medina's failure to adequately intervene in the ongoing fight between Plaintiff and his roommate

on June 6, 2009, while acting under the color of state law, amounted to deliberate indifference in violation of Plaintiff's rights under the 8th Amendment to the United States Constitution, resulting, and directly causing, the serious bodily injuries Plaintiff sustained, including, but not limited to, severe pain, soft tissue damages, suffering, physical, mental, and emotional injuries, embarrassment, humiliation, degradation, mental anguish, chronic dizzy spells, bouts of nausea, migraine headaches, loss of sleep, and fear.

B. Statement of Facts:

(14.) Several minutes after Plaintiff had first begun to strike the cell door, Sgt. E. Medina, the Echo dorm 8 A.M. to 4 P.M. dorm sergeant, accompanied by Sgt. Alvarado and another, unidentified officer, arrived at the door of cell E2109. (Approximately 7:50 A.M. according to Sgt. Medina's statement of facts in Plaintiff's fighting D.B.) Plaintiff had not heard them approach and his back was to the door so neither had he seen them. He became aware of their presence when his roommate relented in his attack and looked to the door. Plaintiff then looked over his shoulder and found Sgt. Medina looking in at them through the cell door window. Frustrated, scared, exhausted, and finding what appeared to him to be complete apathy in the face of Sgt. Medina, Plaintiff yelled out: "What the f---k are you looking at? Open the door! Get me the f---k outta here!" and a spate of exclamations along the same lines. McCloud, deciding that there would

be no interference from the officers, suddenly renewed his attack, hitting Plaintiff with an unexpected punch, and continuing with a rain of heavy-handed blows for at least 15 seconds. During this time, Plaintiff did not hear anything that may have been said by the defendant. If any order to cease the violence was given in that time, it had no effect on McCloud, and, at no time did Sgt. Medina or his accompanying officers intervene in a way that would end the beating. After striking Plaintiff with a minimum of twenty blows, McCloud, too exhausted to continue, stopped his offensive, stepping back from a near-senseless Plaintiff.

VI Count Three: Deliberate Indifference to Serious Medical Needs, 42 U.S.C. § 1983

A. Statement of Claim:

(15.) Defendant Medina violated the plaintiff's United States 8th Amendment to the Constitution when he knowingly and deliberately, with malicious and sadistic intentions, of causing Plaintiff pain and suffering failed to summon emergency medical personnel to evaluate and treat Plaintiff's serious medical needs, and particularly violating 42 U.S.C. § 1983 when, while acting under the color of state law, Defendant Medina deliberately and intentionally, with malicious and sadistic intentions or otherwise, was deliberate indifference to Plaintiff's federally protected rights when Defendant Medina failed to summon emergency medical personnel to evaluate

and treat Plaintiff's serious medical needs, resulting and directly causing Plaintiff pain and suffering and the serious bodily injuries, including, but not limited to, severe pain, soft tissue damages, suffering, mental, physical, and emotional injuries, embarrassment, humiliation, degradation, mental anguish, chronic dizzy spells, bouts of nausea, migraine headaches, loss of sleep, and fear.

B. Statement of Facts:

(16) Once, due to extreme exhaustion, inmate McCloud had relented in his assault on Plaintiff, Sgt. Medina instructed inmate McCloud to "cuff up," which McCloud refused to do. Upon McCloud's refusal to be handcuffed, Sgt. Medina, despite Plaintiff's repeated pleas to be taken from the cell, specifically stating as he looked Sgt. Medina square in the eye through the cell door window that: "... I can't fight anymore. I'm through, Sarge... I can't breathe... I feel sick... like I'm about to throw up. Don't leave me here, man, I told Alvarado, goddamn, what do I gotta do? I'm done, man... I need medical attention right now... get some medical down here!" closed the tray flap in the door and said: "When you're ready to cuff up, I'll get you to medical." He then walked away, accompanied by Sgt. Alvarado and the other officers, and returned to the officer station, leaving Plaintiff alone in the cell with the man they had just witnessed assaulting him — who had only stopped that assault due to fatigue — totally unsupervised for approximately an hour and forty minutes despite Plaintiff's pleas for medical attention and his obvious need

of medical attention, exhibited by bleeding from a gash to the back of his head, a cut under his right eye, a bloody nose, a cut high on his forehead by the hairline, and with 70% of the front of his shirt and the lap of his boxers covered in blood in addition to heavy swelling and blackening of a large portion of the plaintiff's face.

III. Count Four: Deliberate Indifference to Serious Medical Needs, 42 USC § 1983

A. Statement of Claim:

(17) Defendant Nurse Harris violated the plaintiff's United States 8th Amendment and 14th Amendment of the Constitution when she knowingly and intentionally, with malicious and sadistic intentions of causing plaintiff pain and suffering, failed to acquire emergency medical evaluation and treatment by licensed treating physician for plaintiff's obvious serious medical needs, particularly violating 42 USC § 1983 when, while acting under the color of state laws, Defendant Nurse Harris deliberately and intentionally, with malicious and sadistic intentions or otherwise, was deliberate indifference to plaintiff's federally protected rights when Defendant Nurse Harris treated plaintiff different because he is a white hispanic, failing to acquire for plaintiff the same emergency medical evaluation and treatment that was rendered to another, African-American, citizen who was seeking medical treatment for serious bodily injuries at the same time as plaintiff was

seeking treatment for his serious bodily injuries.

B. Statement of Facts:

(18.) At approximately 9:10 a.m., Captain Green arrived at Echo-dorm. At this time Plaintiff and his roommate were removed from the cell and, after 10-to 15 minutes of delay, escorted to the infirmary. Multiple times during the the walk from Echo-dorm to the infirmary the plaintiff was forced to stop and be helped along by his escorting officer due to the dizziness and disorientation that he was suffering. Upon arrival at the infirmary, both inmates were sat down to await the attention of Nurse Harris, the nurse on duty at that time. The plaintiff was slumped forward with his head between his knees, his head still dripping blood onto the floor and his pants from cuts sustained during the assault yet, despite his obvious state of injury, pain, disorientation, and distress, he was left with his hands handcuffed behind his back. Inmate McCloud, however, was promptly released from his cuffs and re-handcuffed in the front to accommodate his injury. (Somewhere in the course of the fight with Plaintiff, McCloud cut his left forearm on either the protruding metal heater, or the locker.) Overwhelmed by nausea at this time, Plaintiff vomited down the leg of his pants (the exterior). He called out to Nurse Harris, saying that he was dizzy and sick. He asked to lay down. He stated: "Something's wrong with my head; I think I've got a concussion." Nurse Harris ignored these statements, and the blood dripping

from his head and face, and the vomit down his leg, and his obvious distress. Instead, she administered to McCloud, cleaning his cut with peroxide and placing some kind of clear-tape bandage over it. She took the time to fill out numerous charts and papers before finally turning her attention to Plaintiff. This attention consisted of looking at his face and head, and cataloging his cuts, abrasions, and contusions on a chart. The Plaintiff notified Nurse Harris: "My head's spinning, ma'am, I'm sick. My head don't feel right... I think he gave me a concussion... Can I just lay down?... My head... I think something's torn in my shoulder, too, it hurts like crazy." The need to vomit came over Plaintiff and he dry-heaved between his legs, saliva dripping from his mouth to the floor as Nurse Harris stood next to him. She said nothing, soon after leaving Plaintiff in the same state that she found him. No treatment whatsoever was rendered to any of his cuts, no attempts to clean the bodily fluids, both his own and that of his cellmate, from his body. Shortly after, she notified one of the officers present that she wanted McCloud transported to an outside hospital to take precautionary x-rays of his forearm and have him seen by a doctor. Maybe 15-to-20 minutes later, she returned to the plaintiff and gave him four Motrin. This was the full extent of the care that she administered to Plaintiff in the approximately 2 hours he was in the infirmary. Sometime after 11:00 AM, the plaintiff was escorted back to Echo-dorm, again needing to stop repeatedly and receive physical assistance from the escorting officers to continue. Upon returning to Echo-dorm, Plaintiff was placed

in a different cell, still in clear and obvious distress, still covered in his own, as well as his cellmate's, blood, open wounds still exposed, suffering from severe dizziness and nausea. This is the state he was left in for days.

(19.) On June 11, 2009, five days after the fight, Plaintiff blacked out while standing at the sink in his cell after having vomited his dinner, smacking his head on the metal bunk and laying, unconscious, on the floor, bleeding, until subsequently discovered by staff. Upon regaining consciousness, Plaintiff was carried by Sgt. Lopez down the stairs from the top tier, placed in a wheelchair, and taken to the infirmary where this time the newest laceration on his forehead was treated and he was placed under observation for 24 hours. Proper treatment on June 6 by Nurse Harris may have prevented this event from occurring.

VIII. Relief

Plaintiff, Christopher Ulrich Alsobrook, requests for this honorable Court to: 1.) enter judgement declaring that the acts and omissions of the defendants, as set forth above, violated rights secured to Plaintiff Alsobrook by the 8th and 14th Amendments of the United States Constitution; 2.) award compensatory and punitive damages to Plaintiff Alsobrook, against individuals named as defendants, and in an amount to be determined at trial; 3.) require the defendants to pay costs, legal fees, and attorney fees; 5.) grant such further relief

deemed just and appropriate.

Respectfully submitted this 19th day of May, 2011.

/s/ Christopher Alsbrook

Christopher Ulrich Alsbrook

DC# D09876

Columbia Correctional Institution (Annex)
253 SE Corrections Way
Lake City, FL 32025

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 19, 2011.

/s/ Chris Alsbrook

Christopher Ulrich Alsbrook

DC# D09876