

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

JEFFERY STEARNS, )  
 )  
 Plaintiff )  
 )  
 v. ) Civil No. 03-226-P-S  
 )  
 MARK DION, et al., )  
 )  
 Defendants )

**RECOMMENDED DECISION ON MOTION FOR SUMMARY JUDGMENT**

Jeffery Stearns initiated this 42 U.S.C. § 1983 action against various defendants for alleged constitutional violations during his incarceration at the Cumberland County Jail while he was being detained on federal charges. Presently before the court is a motion by the remaining set of defendants -- Sheriff Mark Dion, Officers Frisco, Bernier, Laughlin, Ballard, and Robertson, the Cumberland County Jail and Cumberland County -- seeking dismissal of the complaint on the grounds that Stearns has not exhausted his administrative remedies or, in the alternative, summary judgment. (Docket No. 46.) Saddled with the logistics of arranging an evidentiary hearing on the question of exhaustion, per my November 22, 2004 order (Docket No. 60), the defendants have moved to withdraw this argument (Docket No. 61).

I previously granted the defendants' motion to withdraw their exhaustion argument.(Docket No. 62). For the reasons explained below, I recommend that the Court **GRANT** summary judgment to Dion, Bernier, Laughlin, Ballard, Roberston, the jail, and the County as to all of Stearns's claims against these defendants and I recommend that the Court **DENY** the motion as to Frisco.

### *Discussion*

Stearns's complaint relates to events that transpired at the Cumberland County Jail on February 21, 2002, after cells on Stearns's block began to flood with waste water which was flowing down from the floor above. Stearns alleges that he non-aggressively questioned the pod-officer's directive that the inmates return to their waste saturated cells for a lock down and that this led eventually to his being beaten and mishandled as he was removed from his cell area to maximum security and eventually to a holding cell in the facility.

In their motion for summary judgment the defendants claim that the force was applied in a good faith effort to maintain or restore discipline and that Stearns's de minimis injuries indicate that the use of force was not excessive. With respect to the individual defendants, they assert, in the alternative, that their actions are protected by qualified immunity. As to Sheriff Mark Dion and Cumberland County the defendants argue that the constitutional violation was not the result of an unconstitutional custom, policy, or practice. And, to the extent the claims against Dion are brought against him in his individual capacity, the defendants contend that any such claim should also be subject to summary judgment in that 42 U.S.C. § 1983 claims cannot be predicated on a respondeat superior liability theory.

#### **A. *Summary Judgment Standard***

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

Stearns must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." Triangle Trading Co. v. Robroy Indus., Inc., 200 F.3d 1, 2 (1st Cir.1999) (citation and internal punctuation omitted). I view the record on summary judgment in the light most favorable to Stearns, the nonmovant, drawing all reasonable inferences in his favor. Nicolo v. Philip Morris, Inc., 201 F.3d 29, 33 (1st Cir.2000).

In presenting their motion, the defendants have complied with Federal Rule of Civil Procedure 56 and the District of Maine Local Rule of Civil Procedure 56. In addition to their summary judgment memorandum the defendants have filed a statement of material facts (Docket No.47) that contains record citations to eleven exhibits, including the affidavits of the officers involved in the incident.

Stearns has already encountered the summary judgment process vis-à-vis the medical defendants' motion for summary judgment. (See Docket Nos. 52, 53 & 59.) In that case Stearns filed no response. Apropos the present motion, Stearns has filed a memorandum, his affidavit, and a summary list that appears to be an inventory of incidents involving various inmates and the officer defendants. Stearns has not complied with subsections (c) and (e) of the Local Rule.<sup>1</sup>

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These subsection provide:

(c) Opposing Statement of Material Facts

A party opposing a motion for summary judgment shall submit with its opposition a separate, short, and concise statement of material facts. The opposing statement shall admit, deny or qualify the facts by reference to each numbered paragraph of the moving party's statement of material facts and unless a fact is admitted, shall support each denial or qualification by a record citation as required by this rule. The opposing statement may contain in a separate section additional facts, set forth in separate numbered paragraphs and supported by a record citation as required by subsection (e) of this rule.

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(e) Statement of Facts Deemed Admitted Unless Properly Controverted; Specific Record of Citations Required

Facts contained in a supporting or opposing statement of material facts, if supported by record citations as required by this rule, shall be deemed admitted unless properly

As is often the case when addressing summary judgment pleading by pro se imprisoned plaintiffs, the decision as to how draconian or tolerant the court should be is not an easy one. In their reply memorandum the defendants complain that Stearns's affidavit does not comply with the local rule and that, if this affidavit is intended by Stearns as a statement of additional facts, it is not supported by record citation and the factual representations are not separately numbered. As to the first concern, while there is no corresponding factual statement, the affidavit is sworn and contains only a description of events within Stearns's ken. In other words, it contains fully admissible evidence. The second infirmity, the want of separate numbering, does make it near impossible for the defendants to file a response to the statements pursuant to the local rule. However, if taken only as a qualification of the factual statements the defendants have propounded, it is the court and not the defendants that alone bears the burden of aligning the affidavit with the defendants' statement of facts.

This court has discretion to forgive a party's violation of a local rule, see Crowley v. L.L. Bean, Inc., 361 F.3d 22, 25 (1st Cir. 2004), and an obligation to construe Stearns's pleadings, as a pro se and incarcerated litigant, liberally, see Estelle v. Gamble, 429 U.S. 97, 106 (1976); Haines v. Kerner, 404 U.S. 519 (1972). While in most cases where there is flagrant noncompliance with the local the Court would not be willing to take the laboring oar on the plaintiff's behalf, in this case the undertaking requires little exertion and no imagination. Stearns's affidavit sets forth a detailed, descriptive, and non-

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controverted. An assertion of fact set forth in a statement of material facts shall be followed by a citation to the specific page or paragraph of identified record material supporting the assertion. The court may disregard any statement of fact not supported by a specific citation to record material properly considered on summary judgment. The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties' separate statement of facts.

Dist. Me. Loc. R. Civ. P. 56(c),(e)

conclusory first-hand account of what he alleged happened to him on February 21, 2002. Compare Posadas de Puerto Rico, Inc. v. Radin, 856 F.2d 399, 401 -02 (1st Cir. 1988) (recognizing the court's Haines obligation at the summary judgment phase, but stressing that the affidavit on which the plaintiff relied was utterly conclusory). There are two key factual disputes that must be resolved. What was the level of Stearns's verbal and physical resistance and his contribution to inciting other inmates? And, what was the level of force used against Stearns? We have competing affidavits: the defendant officers' on one side and Stearns's on the other. With these two opposing accounts staring me in the face, I am "unwilling to unring the bell" simply because Stearns failed to file a numbered responsive statement of material fact which, for example, included: "7) Frisco placed handcuffs on Stearns and then, with the assistance of Bernier, escorted Stearns to the maximum security pod of the jail. **Qualified.** Stearns Aff. at 1."

Accordingly, to the extent that the factual statements in Stearns's affidavit do not go beyond qualifying the defendants' version of events I will take it into account. I have not taken the affidavit representations into account if the qualification is not obvious or if doing so would be tantamount to molding a nonconforming additional statement of fact on Stearns's behalf without giving the defendants an opportunity to respond: to admit, qualify, or deny. On this requirement of the local rule I put the oar aside and will not, in fairness to the movants, ignore Stearns's failure to toe the Local Rule 56(c) line.

***B. Differing Versions of the Material Facts***

***1. Defendants' Material Facts***

On February 21, 2002, David Laughlin was the correctional officer assigned in Pod C1 in the Cumberland County Jail. At some time between 12:00 and 12:30 p.m., Laughlin ordered the inmates to return to their cells in an attempt to lock down the inmates. Stearns told Laughlin that he was refusing to lock down. In response to the refusal of Stearns and other inmates to lock down, Laughlin hit the duress button. Officers Frisco and Bernier responded to the duress call in C pod. Upon arriving in C pod, Frisco and Bernier were instructed by Laughlin to remove Stearns from the housing unit for trying to incite a riot. Frisco placed handcuffs on Stearns and then, with the assistance of Bernier, escorted Stearns to the maximum security pod of the jail.

Upon arriving in the maximum security pod, Frisco and Bernier took Stearns to the maximum security day room, where Stearns came in view of other inmates. When Stearns saw the other inmates, he began pulling away from Frisco. In response to Stearns's attempt to pull away, Frisco placed Stearns up against the wall in an effort to stop Stearns from resisting. When Stearns was up against the wall, Stearns brought his leg up behind him attempting to kick Frisco. In making this motion, Stearns kicked Frisco in the groin.<sup>2</sup> Frisco grabbed Stearns after being kicked, contacting Stearns's arms and shoulder, and took Stearns to the ground. Frisco, assisted by Bernier and the two corrections officers, held Stearns on the ground until Stearns stopped struggling, approximately thirty seconds later.

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<sup>2</sup> As a result of Stearns' actions, Frisco was required to go to the hospital and was diagnosed with a contusion to his groin.

Stearns was then brought into cell 218 and asked to knee down on the bunk. Frisco removed the handcuff from the right hand, and Stearns was instructed to place that hand on the wall. Frisco then attempted to remove the left cuff and Stearns again decided to pull away from the officers, which caused the cuff key to break off in the lock. In response to Stearns's actions, Frisco and Bernier placed Stearns chest first against the wall and applied a second set of cuffs.

Stearns was then escorted to intake cell 229 and placed chest down on the floor because he was still struggling. Maintenance was called in to cut the cuffs. Maintenance responded within about five minutes and the cuff with the broken key in it was removed from Stearns.

The incident in question occurred at approximately 12:30 p.m. on February 21, 2002. Stearns was seen by the medical staff at the jail on February 21, 2002. Stearns told medical staff that his left shoulder dislocated spontaneously and that he was handled roughly by the officers. There was also a complaint made by Stearns about his left knee, but his complaint appears to say that his left knee had been replaced. Stearns was prescribed Tylenol for his pain and a determination was made to have him x-rayed. X-rays were taken on or before February 22, 2002, and the radiology report was generated on the same date. The report identifies that there were mild degenerative changes within the left knee, and further the examining radiologist did not see any evidence of acute fracture, dislocation or joint effusion. As for the left shoulder, the examining radiologist identified mild joint space loss in the AC joint. The radiologist did not see any signs of calcific tendonopathy or fracture.

Stearns was next seen by the medical department on February 27, 2002, complaining of dizziness. (Stearns had previously been seen on January 29, February 14 and February 18, 2002, with complaints of dizziness and had stated that he was dizzy from a fall which occurred prior to that time.) On March 23, 2002, Stearns was brought back to the medical department with complaints about vertigo and his ability to stand. Stearns was also seen on March 24, 2002, for the vertigo. Medical staff questioned the etiology of the dizziness and referred Stearns to a medical doctor. Stearns has had dizziness from January 29, 2002, until the present day, and no one has been able to diagnose the cause of the dizziness. Stearns has not subsequently been diagnosed as suffering from any injury or illness related to the events which transpired on February 21, 2002.

## **2. *Stearns's Affidavit***

On February 21, 2002, Stearns was in his cell and water was running under his door. He discovered it was waste water running down from the second tier. Stearns got out of his cell before it got flooded out. His cell was filled and the water was spreading. Eventually there were six to eight cells filled with waste water.

When Officer Laughlin hollered lock down, Stearns asked Laughlin if he was going to have to lock down in his cell, which was now flooded with two-inches of waste water. Laughlin indicated he would. Stearns then asked a second officer, Howes,<sup>3</sup> if he was going to make Stearns lock down in that mess and Howes indicated that he had no choice because Laughlin was the pod officer.

Meanwhile Stearns's cellmate, Anthony Palastinie told Laughlin that he was not going to go into his cell. Laughlin then handcuffed Palastinie. Laughlin also hit the

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<sup>3</sup> It is unclear whether Stearns means Howes or Hoves.

officer's alarm. At this point Stearns was still asking Howes if he was going to make the inmates lock down in the waste water, to which Howes simply shrugged his shoulders. By this time there were about fifteen to twenty inmates flooded out. As there was a classroom at the entry of the block Stearns asked Howes if they could go in there. Howes ordered everyone into the classroom and everyone complied.

When the inmates entered the classroom approximately twenty officers came running onto the block. Laughlin pointed to Stearns and ordered the officers to take him. Stearns raised his left hand to point to the flooded cells. With no warning Officer Frisco slammed the cuff on Stearns's wrist, spun him around, slammed his face against the wall, bent his arm around, and put the other cuff on the other wrist. Stearns states that at this time he was not resisting or combative and believes that the surveillance tapes would demonstrate this. Frisco proceeded to pull Stearns's arms up behind him so that he was on the tips of his toes.

Frisco and unspecified other officers brought Stearns down to maximum security. From the C pod the trip was about four to six-hundred feet and involved going through five doors. When they got to the first door Frisco had Stearns's arms so high up in the air that it was hard to walk on his tip toes. Before the control room personnel had the time to pop open the door Frisco tried opening the door by slamming Stearns against it and he did the same thing when they went through the other doors. As they were going down the hall corridors Frisco had Stearns very off balance on his tip toes. Stearns contends that the jail officers were aware that Stearns had had eleven operations on his left knees, three of which involved cutting the bone below the knee. Stearns asked Frisco what his name was and Frisco replied that he did not need to know.

When they arrived at the door leading into the maximum security, before the door could be released Frisco slammed Stearns head first into the door. When the officers opened the door Frisco pushed Stearns through while his arms were still wrenched into the air behind his back. After they were through the doorway Frisco proceeded to swing Stearns to the left and drove him face first into the wall repeatedly.

After this the officers took Stearns to the stairs leading to the second tier. Stearns tripped when they got to the stairs and the officers dragged him up the metal stairs to the second floor, his arms still wrenched up behind his back. When they were on the second floor landing the officers tried to use Stearns as "a key" to open the door to the segregation unit; they slammed Stearns's body face first into the door until the segregation officer opened the door. Once inside, Frisco drove Stearns into the left side wall several times, putting his arm into the back of his neck so that Stearns head was turned sideways and his arms were raised behind requiring Stearns to perch on his toes. Frisco then leaned forward and told Stearns he had lost his rights. In light of this statement, and in view of the beating he had just endured, Stearns --seeing that Frisco's legs were spread apart -- raised his leg and kicked Frisco in the groin in the hopes of releasing his hold.

Several officers then picked Stearns up and dropped him on the floor. By this time Stearns felt as though his shoulder was dislocated and he observed that his hands and wrists were swollen from the too-tight cuffs. The officers had their knees in his neck and back and Stearns's face was lying sideways. After several minutes the officers picked Stearns up by the cuffs and they went to cell 218 where the officers told Stearns to knee on the bed and face the wall, which he did. When they came forward to remove the

cuffs, Frisco drove Stearns's face against the wall and proceeded to take the cuffs off. Frisco got one of the cuffs off but broke the key off in the second, an act Stearns believes was intentional.

Rather than leaving Stearns in the secure cell and calling in someone to remove the cuff, the officers put another set of cuffs on Stearns and took him out and down the stairs. When they reached the maximum security door Frisco drove Stearns into the wall again, arms pulled high behind his back, until the door opened. They took him to the door to receiving and slammed him against it until it popped open and then paraded Stearns through receiving to a holding cell. There they threw him down on the cement and placed their knees on his neck, back, and legs. They kept Stearns on the cement floor. When the maintenance man arrived with a small pair of bolt cutters he could not cut the cuffs and had to go and retrieve a bigger set. This took an additional fifteen to twenty minutes.

After they got the cuffs off they let Stearns sit up. Stearns was having a hard time. He could not move his left arm, his left knee, or his wrist. He had to hold his arm with his other hand and it was very painful. They left Stearns in the cell. Stearns was hollering that he wanted to see a lieutenant. At this point a sergeant came in and told Stearns that he did not like 'low lifes' assaulting his staff. Stearns responded by asking if he knew what his officers had done to him. The sergeant left the cell and an officer from internal affairs came in. Stearns informed him what had transpired in C-1 block and what the officers had done and the internal affairs officer said he would look into the matter and get back to Stearns.

Approximately ten minutes after this officer left the sergeant returned and asked Stearns if he was okay. Stearns replied, "Do I look alright?" Stearns explained that he could not move his left arm, that his left knee was bothering him, and that his wrist was the size of a cantaloupe. The sergeant escorted Stearns fifteen feet to a holding cell. Stearns was uncuffed and there were no problems.

About fifteen minutes later a nurse came to see Stearns. Her first words were, "did they do this to you?" She examined Stearns wrist and told him that they could not take x-rays or examine him until the next day.<sup>4</sup>

The next day an x-ray technician came in and took x-rays of Stearns's shoulder and knee. Stearns had abrasions on his knee from being dragged up the stairs. He did not have any breaks but he was having dizzy spells. These spells persisted for several weeks, during which time could not sit up at times and was walking sideways. Finally, they took him out of the jail to have a CAT scan which did not reveal anything.

Stearns was charged with inciting a riot, failure to obey an officer, and assault on an officer. At the disciplinary hearing Stearns successfully defended the first two charges because, according to Stearns, Officer Howes admitted that Stearns should not have been "put in that situation" and because Stearns was always respectful to the officers. Stearns was found guilty as to the third charge because he admitted kicking Frisco in the groin in self-defense.

***B. Standard for Excessive Force by Correctional Officers and the Claims apropos each Defendant***

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<sup>4</sup> When he got back to maximum security, Stearns asked to use the telephone and was refused. When the other inmates were let out of their cells one approached Stearns's cell and inquired if he was okay. Stearns asked this inmate to call his son, explain what had happened, and ask his son to contact an attorney. Later, this inmate spoke with Stearns's attorney and explained that the whole sequence of events was on tape. Stearns's attorney then faxed a letter to the sheriff's department about the tape and what had happened. It is not clear to me where Stearns is going with this but it is certainly factual material that is additional to the defendants' statements.

1. ***Standard for use of excessive force by correctional officers against pre-trial detainee***

Stearns's cause of action falls under a line of cases that address excessive force claims stemming from correctional officers' reactions to prison disturbances. The United States Supreme Court reasoned in Hudson v. McMillian that

officials confronted with a prison disturbance must balance the threat unrest poses to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force. Despite the weight of these competing concerns, corrections officials must make their decisions "in haste, under pressure, and frequently without the luxury of a second chance." [Whitley v. Albers], 475 U.S. [312,] 320 [(1986)]. We accordingly concluded in Whitley that application of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, "the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.'" Id., at 320-321 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (CA2), cert. denied sub nom. John v. Johnson, 414 U.S. 1033, 94 (1973)).

Many of the concerns underlying our holding in Whitley arise whenever guards use force to keep order. Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need "to maintain or restore discipline" through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that "[p]rison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." 475 U.S., at 321-322 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)). In recognition of these similarities, we hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in Whitley: whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

503 U.S. 1, 4-7 (1992).

Hudson addressed an excessive force claim brought by a convicted inmate.

Stearns was a pretrial detainee at the time of the waste water flooding episode. As best as I can discern, all the Courts of Appeals that have considered the question have concluded that the standard announced in Hudson governs prison disturbance/excessive force claims brought by pre-trial detainees. See, e.g., Fuentes v. Wagner, 206 F.3d 335, 347-48 (3d Cir. 2000); United States v. Walsh, 194 F.3d 37, 47 -48 (2d Cir. 1999); Rankin v. Klevenhagen, 5 F.3d 103, 105 -06 (5th Cir. 1993).

2. *Ciphering the claims as to each defendant*  
a. *Claim against Officer Laughlin*

The facts viewed most favorably to Stearns as they pertain to Laughlin are that when the waste water cell flooding started Laughlin ordered a lockdown.<sup>5</sup> Stearns asked Laughlin if he was going to have to lock down in his flooded cell and Laughlin indicated he would. Howes indicated that he had no choice because Laughlin was the pod officer. Laughlin was also handling Palastinie who told Laughlin that he was not going to go into his cell. Laughlin, who was faced with twenty inmates who were refusing to lock-down, also hit the officer's alarm. At this point Stearns was still asking Howes if he was going to make the inmates lock down in the waste water to which Howes simply shrugged his shoulders. By this time there were about fifteen to twenty inmates flooded out. Howes ordered everyone into the classroom and everyone complied. Approximately twenty officers came running onto the Block. Laughlin pointed to Stearns and ordered the officers to take him. There is no indication that Laughlin played any further role in Stearns's handling that day.

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<sup>5</sup> Oddly the defendants have not included the information about the waste water flooding in their statement of material facts.

Given the disturbance Laughlin was facing, his efforts vis-à-vis Stearns can fairly only be viewed as a good faith effort to maintain or restore discipline. See Baldwin v. Stalder, 137 F.3d 836, 841 (5th Cir. 1998). He had no physical contact with Stearns and the most that he did was to indicate to Frisco that Stearns was to be removed from the block. There is no dispute that Stearns was questioning his order to lock down and had not complied and that Laughlin was faced with other non-compliant inmates. Stearns has not generated a genuine dispute of material fact that Laughlin acted maliciously or sadistically to cause Stearns harm.

***b. Claim against Officers Bernier, Robertson, and Ballard***

The only officer other than Laughlin and Frisco identified in Stearns's affidavit is Officer Howes who is not named as a defendant. Robertson and Ballard have submitted affidavits but neither Stearns nor the defendants have properly put facts before me as to their involvement in the incident. According to the defendants, Bernier responded to the duress call in C pod and assisted Frisco in escorting Stearns to maximum security from the housing unit. Once in the maximum security pod, Bernier and Frisco took Stearns to the day room. After Stearns kicked Frisco in the groin, and Frisco took Stearns to the ground, Bernier and two other corrections officers assisted Frisco in holding Stearns on the ground until Stearns stopped struggling. After the key to Stearns's cuff broke Frisco and Bernier placed Stearns, chest first, against the wall and applied a second set of cuffs. Thus, the only force that can be attributed to Bernier came after Stearns kned Frisco in the groin and it was necessary to subdue him. Under these circumstances Bernier efforts cannot be viewed as malicious or sadistic.

As to these three defendants, I will not consider Stearns's affidavit as creating a genuine dispute of fact about their participation in Stearns's alleged mistreatment. To do so would be tantamount to conjuring statements of material facts on Stearns's behalf without giving the defendants the opportunity to deny, admit, or qualify.<sup>6</sup>

*c. Claim against Officer Frisco*

There is a genuine dispute about the facts material to Stearns's Eighth Amendment claim against Officer Frisco. Frisco's version of the facts is short and, if not sweet, at least palatable. Called by Laughlin to the disturbance, Frisco placed handcuffs on Stearns and escorted Stearns to the maximum security pod of the jail. Without incident Frisco and Bernier took Stearns to the day room, where Stearns came in view of other inmates and began pulling away from Frisco. In response, Frisco placed Stearns up against the wall in an effort to stop Stearns from resisting. When Stearns was up against the wall, Stearns brought his leg up behind him and kicked Frisco in the groin. Frisco grabbed Stearns after being kicked, contacting Stearns' arms and shoulder, and took Stearns to the ground. Frisco, Bernier, and two other corrections officers held Stearns on the ground until Stearns stopped struggling, approximately thirty seconds later. Stearns was then brought into cell 218 and asked to knee down on the bunk. Frisco removed the handcuff from the right hand and Stearns was instructed to place that hand on the wall. Frisco then attempted to remove the left cuff and Stearns pulled away causing the cuff

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<sup>6</sup> Stearns indicates in his memorandum opposing summary judgment that Bernier, Ballard and Robertson acted "with deliberate indifference with failure to intervene." Although Stearns's allegation portended a failure to intervene theory of liability, see Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002) ("[A]n officer may be held liable not only for his personal use of excessive force, but also for his failure to intervene in appropriate circumstances to protect an arrestee from the excessive use of force by his fellow officers."); see also Smith v. Mensinger, 293 F.3d 641, 650 - 52 (3d Cir. 2002); Miller v. Smith, 220 F.3d 491, 495 (7th Cir. 2000); Priester v. City of Riviera Beach, Fla., 208 F.3d 919, 927 (11th Cir. 2000), in fairness to the defendants apropos the treatment of Stearns's affidavit, the record is insufficient to get Stearns past summary judgment vis -a-vis these three defendants.

key to break off in the lock. Frisco and Bernier placed Stearns chest first against the wall and applied a second set of cuffs. Stearns was then escorted to intake cell and placed, chest down, on the floor as he was still struggling. Maintenance was called in to cut the cuffs and in a short time the cuff was removed.

However, Stearns describes how Frisco immediately reacted to Laughlin's directive by roughly handcuffing him. Then while he was moving him from the C block to maximum security Frisco took every opportunity to slam Stearns's head and face into closed doors. According to Stearns he was not resisting yet Frisco kept his hands pulled up high behind his back causing pain and making it difficult to walk. Once in maximum security Stearns was immediately shoved into a wall. Stearns was then dragged up the metal stairs and again his head was slammed into the door. Once inside, Frisco drove Stearns into the left side wall several times, putting his arm into the back of his neck. After the cuff key broke, Frisco took him to the holding cell, on the way holding his cuffs high behind his back and slamming him into doors and walls.<sup>7</sup>

Juxtaposed thusly it is apparent that there is a genuine dispute of material facts as to whether or not Frisco acted maliciously and sadistically with the purpose of causing harm within the meaning of Hudson and Whitley.

Apropos the threat "reasonably perceived by the responsible officials," Hudson, 503 U.S. at 7, Frisco arrived on the scene with no factual information as to what Stearns may or may not have done to justify his removal from the block. All Frisco was proceeding on was Laughlin's indication that he wanted Stearns removed. Frisco was responsible for Stearns after they left the prison disturbance milieu. And -- unlike

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<sup>7</sup> Stearns also disputes the propriety of Frisco's actions after the groin kicking incident and asserts that Frisco intentionally broke the key in the cuff and unnecessarily made Stearns go handcuffed to another cell for removal.

Laughlin, who could perceive the potential for escalation in C-pod-- nothing was happening in the procession to maximum security and to Stearns's cell therein that would alert Frisco to the need for a quick quelling. Compare Fuentes v. Wagner, 206 F.3d 335, 349 (3d Cir. 2000). There is no indication in either version of the facts that Stearns was "recalcitrant or threatening" or in some other way a threat to institutional security, Treats v. Morgan, 308 F.3d 868, 872 -74 (8th Cir. 2002), during the time he was taken to maximum security and led or dragged up the stairs or when he was later escorted to the holding cell (although by this juncture Frisco had experience with Stearns's foot in his groin). With respect to the relationship between the need to use force and the amount of force used, Hudson, 503 U.S. at 7, the defendants' material facts do not indicate that there was any need for significant force by Frisco until Stearns pulled away in maximum security, Frisco pushed him up against the wall, and Frisco kicked Stearns in the groin. According to Stearns, much of the force was applied prior to his arrival in maximum security and on the way to the holding cell to have the cuff removed. There was only a brief moment during this entire sequence when Stearns was not restrained by cuffs. And, if the court credits Stearns version of this encounter which it must, it would not seem that Frisco made "any efforts ... to temper the severity of a forceful response." Id.

The defendants emphasize that the injuries to Stearns were in their mind de minimus. However, the United States Supreme Court expressly cautioned in Hudson that the absence of serious injury, while relevant, is not in and of itself determinative of this genre of claim. Hudson, 503 U.S. at 7<sup>8</sup>; see also Sims v. Artuz, 230 F.3d 14, 22 (2d Cir.

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<sup>8</sup> The Court explained:  
Under the Whitley approach, the extent of injury suffered by an inmate is one factor that may suggest "whether the use of force could plausibly have been thought necessary" in a particular situation, "or instead evinced such wantonness with respect to

2000) ("[T] here are significant differences between the harm that must be shown to support a claim based on prison conditions and the harm that will suffice to support a claimed use of excessive force .... no such showing of extreme injury is required when the claim is that prison officials used excessive force."). Stearns reports mobility loss, pain, swelling, abrasions, and dizziness in the aftermath of this incident. The defendants point to medical records that indicate that these complaints were examined and that there was no significant treatment either necessary or identifiable. In the context of the other disputes concerning the Hudson factors the fact that Stearns's injuries may have been superficial does not carry the day for the defendants.

In sum, the force that Stearns ascribes to Frisco is certainly not de minimus and if you credit Stearns's version of his trip to and from maximum security in the custody of Frisco it certainly would be possible for a reasonable juror to conclude the Frisco used excessive force and did so in order to punish or humiliate Stearns. See Fillmore v. Page, 358 F.3d 496, 503 -04 (7th Cir. 2004). As told by Stearns, Frisco did not merely push and shove him, but made a concerted effort to slam him forcefully into walls and doors when ever the opportunity arose. See Sims, 230 F.3d at 20-22.

The defendants assert, in the alternative, that Frisco is entitled to qualified immunity. In Suboh v. District Attorney's Office of Suffolk the First Circuit set forth a three-part qualified immunity analysis:

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the unjustified infliction of harm as is tantamount to a knowing willingness that it occur." 475 U.S., at 321. In determining whether the use of force was wanton and unnecessary, it may also be proper to evaluate the need for application of force, the relationship between that need and the amount of force used, the threat "reasonably perceived by the responsible officials," and "any efforts made to temper the severity of a forceful response." Ibid. The absence of serious injury is therefore relevant to the Eighth Amendment inquiry, but does not end it.

Id.

The threshold inquiry is whether the plaintiff's allegations, if true, establish a constitutional violation. Hope v. Pelzer, 536 U.S. 730 (2002); Saucier v. Katz, 533 U.S. 194, 201 (2001); Siegert [v. Gilley], 500 U.S. [226,] 232 [(1991)]. The second question is whether the right was clearly established at the time of the alleged violation. That inquiry is necessary because officers should be on notice that their conduct is unlawful before they are subject to suit. Hope, [536 U.S. at 740- 46]; Anderson v. Creighton, 483 U.S. 635, 638-40 (1987). The third is whether a reasonable officer, similarly situated, would understand that the challenged conduct violated that established right. Swain v. Spinney, 117 F.3d 1, 9 (1st Cir.1997). The question of whether a right is clearly established is an issue of law for the court to decide. Elder v. Holloway, 510 U.S. 510, 516 (1994). The reasonableness inquiry is also a legal determination, although it may entail preliminary factual determinations if there are disputed material facts (which should be left for a jury). Swain, 117 F.3d at 10.

298 F.3d 81, 90 (1st Cir. 2002).

With respect to Suboh's first step, if Frisco indeed treated Stearns in the way described by Stearns then Stearns has established a constitutional violation. Thus the first prong inquiry in this case "only crosses oft-tread ground." Tremblay v. McClellan, 350 F.3d 195, 199-200 (1st Cir.2003). Regarding the second prong, by February 2002 Frisco was on notice that it was constitutionally impermissible to inflict gratuitous force against a restrained and compliant inmate. See Saucier, 533 U.S. at 201-02, 207-08 (asking whether "general prohibition against excessive force was the source for clearly established law that was contravened in the circumstances [the] officer faced"); see also Hope, 536 U.S. at 740-46. With respect to the third prong, the factual situation apropos Stearns's and Frisco's interactions, if Stearns's version is credited, "was not ambiguous" nor is "the application of the legal standard to the precise facts at issue ... difficult." Riverdale Mills Corp. v. Pimpare, 392 F.3d 55, 61 (1st Cir. 2004). Compare Saucier, 533 U.S. at 208-09 (addressing circumstances that "disclose[d] substantial grounds for the

officer to have concluded he had legitimate justification under the law for acting as he did.").

***d. Claim against Dion and Cumberland County under a policy and custom theory***

In "seeking to impose § 1983 liability on the county or against Dion in his official capacity as an agent of the county, Stearns must "identify a municipal 'policy' or 'custom' that caused [his] injury." Board of County Com'rs of Bryan County, Okl. v. Brown, 520 U.S. 397, 403 (1997). Stearns, also "must establish the state of mind required to prove the underlying violation." Id. at 405. Accordingly, if he could prove that the county's legislative body or Dion as an authorized decisionmaker for the County has intentionally deprived him of a federally protected right, he would establish that the municipality acted culpably." Id.

Stearns's theory vis-à-vis Dion and the County is that the defendants knew about recurring abuses of officers in the jail and have done nothing to rectify the situation.<sup>9</sup> See id. at 404 ("[A]n act performed pursuant to a 'custom' that has not been formally approved by an appropriate decisionmaker may fairly subject a municipality to liability on the theory that the relevant practice is so widespread as to have the force of law."). To the extent that Stearns views this claim as stemming from a failure to train, "the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program

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<sup>9</sup> Stearns argues in his memorandum opposing summary judgment that Cumberland County is liable for inadequate medical care and inadequate staff. He points to the medical technician's question to him on February 21, 2002, "Did they do this to you?" Stearns reasons: "The technician never checked the Plaintiff at all, with a Sergeant standing there. Therefore, this makes Cumberland County liable, whereas a layperson could see the pain inflicted with no sling or medical treatment rendered at the time." This is clearly not a sufficient bases for a municipal policy or custom claim based on inadequate healthcare.

or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury." Id. at 406-08.

Stearns's only support for this assertion is the list that he has compiled identifying by dates when certain inmates experienced or witnessed certain actions taken or not taken by Frisco, Laughlin, Bernier, and Ballard.<sup>10</sup> Most of these descriptions are so abbreviated that it is impossible discern their relevance. This list, apparently compiled by Stearns, is certainly not cognizable record evidence and Stearns has not provided any affidavits by these inmates that might generate a genuine dispute about a custom of tolerating officer excessive force at the jail. See Roberts v. City of Shreveport, \_\_\_ F.3d \_\_\_, \_\_\_, 2005 WL 67028, \*4 -5 (5th Cir. Jan. 13, 2005) (outlining the plaintiff's summary judgment burden for a failure to train in use of deadly force claim); id. at \*6 (indicating that hearsay evidence such as newspaper articles are not sufficient evidence at the summary judgment stage). Furthermore, consideration of the list at all would certainly be unfair to the defendants in view of Stearns's failure to comply with the local rules in defending the motion for summary judgment.

***d. Claims against Sheriff Dion in his individual capacity***

"A supervisory officer may be held liable for the behavior of his subordinate officers where his 'action or inaction [is] affirmative[ly] link[ed] ... to that behavior in the sense that it could be characterized as "supervisory encouragement, condonation or acquiescence" or "gross negligence amounting to deliberate indifference."' " Wilson v. Town of Mendon, 294 F.3d 1, 6 (1st Cir. 2002) (quoting Lipsett v. University of P.R., 864 F.2d 881, 902 (1st Cir.1988)). "To demonstrate deliberate indifference a plaintiff

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<sup>10</sup> There are no incidents as sociated with Robertson.

must show (1) a grave risk of harm, (2) the defendant's actual or constructive knowledge of that risk, and (3) his failure to take easily available measures to address the risk...

[D]eliberate indifference alone does not equate with supervisory liability; a suitor also must show causation.'" Figuroa-Torres v. Toledo-Davila, 232 F.3d 270, 279 (1st Cir. 2000)(quoting Camilo-Robles v. Hoyos, 151 F.3d 1,7 (1st Cir.1998)). The "affirmative link" requirement of causation contemplates proof that the supervisor's conduct led inexorably to the constitutional violation. Hegarty v. Somerset County, 53 F.3d 1367, 1379 -80 (1st Cir. 1995).

Just as Stearns has not produced properly supported statements of fact or admissible evidence concerning the failure to train claims, he has utterly failed to do the same with respect to Dion's actual or constructive knowledge of the risk or what measure he did or did not take to address the risk. Accordingly, Dion is entitled to summary judgment on any claim brought against him in his individual capacity as Frisco's supervisor.

### ***Conclusion***

I **GRANT** the defendants' motion to withdraw their exhaustion argument. Because I conclude that Stearns's has not met his burden as the opponent of summary judgment on his claims against Sheriff Mark Dion, Officers Bernier, Laughlin, Ballard, and Robertson, the Cumberland County Jail and Cumberland County, I recommend that the Court **GRANT** the defendants' motion as to all of Stearns's claims against these defendants. With respect to the claims against Officer Frisco, I conclude that there is a genuine issue of material fact as to whether or not Frisco violated Stearns's rights under

the Eighth Amendment and I recommend that the Court **DENY** the motion as to this claim.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

January 28, 2005.

/s/Margaret J. Kravchuk  
U.S. Magistrate Judge

STEARNS v. DION et al

Assigned to: JUDGE GEORGE Z. SINGAL

Referred to: MAG. JUDGE MARGARET J.

KRAVCHUK

Cause: 42:1983 Prisoner Civil Rights

Date Filed: 09/08/2003

Jury Demand: Plaintiff

Nature of Suit: 550 Prisoner: Civil  
Rights

Jurisdiction: Federal Question

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