

**UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE**

**MARIA KALUZYNSKI,** )  
 )  
 **Plaintiff** )  
 )  
 **v.** )  
 ) **CIVIL No. 00-267-B-S**  
 **DON ARMSTRONG, GARFIELD** )  
 **HOLMES, PETER STEWART,** )  
 **LYNNE DOUCETTE, THE CRISIS** )  
 **AND COUNSELING CENTERS, INC.,** )  
 **BARBARA KIM, AND DR. NEAL** )  
 **COLAN,** )  
 )  
 **Defendants** )

**RECOMMENDED DECISION**

This suit arises from circumstances surrounding the death of Jerzy Sidor. On December 29, 1999, Sidor died from gunshot wounds inflicted by Defendant Maine State Trooper Don Armstrong, following a confrontation at Sidor’s residence in which Sidor attacked and struck Defendant Maine State Trooper Garfield Holmes with a sword. Sidor’s sister, Plaintiff Maria Kaluzynski, acting on her own behalf and as the personal representative of her brother’s estate, has sued the Troopers and their commanding officer, Sergeant Peter Stewart, as well as Monmouth Police Officer Lynne Doucette, the Crisis and Counseling Centers, Inc. (“CCC”), Dr. Neal Colan, Director of the CCC, and Barbara Kim, a CCC caseworker, for alleged violations of Sidor’s constitutional and civil rights, for wrongful death, and for Kaluzynski’s related emotional distress personal injuries. Kaluzynski advances the following five claims: (1) a claim pursuant to 42 U.S.C. § 1983 for deprivation of Sidor’s federal constitutional rights; (2) a claim pursuant

to Maine’s Civil Rights Act for deprivation of Sidor’s federal and state constitutional rights; (3) a claim for “wrongful death;” (4) a claim for Kaluzynski’s “intentionally inflicted” emotional distress; and (5) a claim for Kaluzynski’s “negligently inflicted” emotion distress.

All defendants move to dismiss the § 1983 claim, the sole federal law claim. Officer Doucette, the CCC, Dr. Colan, and Barbara Kim move to dismiss the remaining state-law claims based on a lack of federal jurisdiction. The Maine State Police defendants move for summary judgment against the remaining claims on the ground that Kaluzynski failed to file a timely notice of claim in compliance with 14 M.R.S.A. § 8107(1). Because I conclude that all defendants’ motions to dismiss Count I, the sole federal claim, should be **GRANTED**, I recommend that the Court **DENY** the motion for summary judgment against the state law claims and **DISMISS** the remaining counts without prejudice.

#### **BACKGROUND**

This factual presentation is drawn from the complaint and accepts all material allegations as true. Plaintiff Maria Kaluzynski is a resident of North Monmouth, Maine. Kaluzynski serves as the personal representative of the estate of Jerzy Sidor. (Complaint at ¶ 5.) Jerzy Sidor (“Sidor”) was also a resident of North Monmouth, where he lived with his mother, Katrarzyna Sidor. The Sidors are natives of Poland. Sidor and his mother spoke little, if any, English. (*Id.* at ¶ 14.) In 1990, the Kennebec Valley Mental Health Center (“KVMHC”) assessed Sidor’s mental health. Following this assessment, Sidor was committed to a private hospital for treatment for paranoid schizophrenia. (*Id.*) Subsequently, Sidor was released into his mother’s care. Sidor had several encounters with officers from the Monmouth Police Department between 1992 and 1998, when officers visited the Sidor residence for undisclosed reasons. On one occasion, Sidor attacked the Monmouth Chief of Police. On another, Sidor threatened a

Monmouth Deputy with a large piece of wood. Monmouth police officers understood that visits to the Sidor residence could be dangerous and should not be undertaken by a lone officer. (Id. at ¶ 15.) At some point in late 1997 or early 1998, Sidor stopped taking his medications. (Id. at ¶ 16.) On or about December 26, 1998, Kaluzynski contacted the CCC to request a psychiatric evaluation for Sidor. (Id. at ¶ 17.) Michelle Poulin, a CCC caseworker, attempted to interview Sidor at his mother's home, but was chased away by Sidor in the presence of Kaluzynski and an interpreter. (Id. at ¶ 18.) Over the next two days, Kaluzynski spoke with Poulin and other CCC staff and pressed them to do something about Sidor. Kaluzynski told them that Sidor had threatened to kill himself if anyone attempted to take him to the hospital and that he had not slept or eaten for several days, was increasingly agitated, and was causing his mother distress. (Id. at ¶¶ 18-20.)

In response, the CCC conducted a meeting at which Poulin and Defendant Dr. Colan were present. Dr. Colan advised consulting with law enforcement. Poulin conducted a conference call with Defendant Doucette of the Monmouth Police and Trooper Armstrong of the Maine State Police. These individuals discussed Sidor's history with the police, among other things. Armstrong stated that he would take Sidor into custody if the CCC recommended it, but that a tactical team was not warranted. When Dr. Colan was subsequently consulted, he indicated that they should not intervene at that time, but should maintain close contact with Kaluzynski. (Id. at ¶ 21.) The following day, Kaluzynski contacted the KVMHC and spoke with a nurse practitioner familiar with Sidor's case. The nurse practitioner then contacted the CCC to express certain undisclosed concerns. Additionally, a friend of Katrarzyna Sidor contacted the CCC and expressed concern for Mrs. Sidor's safety. (Id. at ¶ 22.)

Sometime shortly thereafter, Defendant Barbara Kim, another CCC caseworker, contacted Kaluzynski and informed her that the CCC was willing to intervene for the purpose of evaluating Sidor's condition, with police assistance and a Polish interpreter. Kim assured Kaluzynski that she would be informed prior to the visit to Sidor's home so that she could be present. Kim then contacted Defendant Doucette, who indicated that she would assist but requested Maine State Police involvement as well. Kim contacted Defendant Sergeant Stewart of the Maine State Police and explained the situation. Sergeant Stewart dispatched Troopers Armstrong and Holmes to assist. (Id. at ¶¶ 23-24.) Doucette, Armstrong, Holmes and an ex-Monmouth officer met at the Monmouth Police Department to formulate a plan. Sergeant Stewart, advising them by phone, indicated that he wanted as few people involved as possible and that he did not want Kaluzynski to participate in the intervention. The plan formulated by the group called for Trooper Armstrong and Holmes to secure Sidor, who they hoped would be sleeping, and transport him to the Augusta General Hospital Emergency Room. Kim, evidently by phone, indicated that she would go to Augusta General with the interpreter and wait there for the officers to arrive with Sidor. (Id. at ¶¶ 25-27.) After the Troopers, Officer Doucette, and the ex-Monmouth officer departed, Kim alerted Augusta General, contacted the interpreter, and called Kaluzynski to inform her that the police were underway, but that she should not attend until notified. (Id. at ¶ 28.)

When they arrived at the Sidor residence, Troopers Armstrong and Holmes pulled into the driveway in a police cruiser and parked. Doucette and Baker parked their vehicles on the road at the head of the driveway. They all exited their vehicles, but only the Troopers approached the back entrance to the home. Before they reached the door, Sidor emerged from the house and began yelling at the officers in Polish and waving a sheathed sword in the air. As

the Troopers backed away from Sidor, Trooper Armstrong drew his service revolver and yelled at Sidor to drop the weapon. Sidor advanced on Trooper Holmes and drew the sword from its scabbard. Sidor struck Holmes three times on the arm and began to swing the sword a fourth time when Armstrong fired several rounds at Sidor, who died from bullet wounds. (Id. at ¶¶ 29-31.) “Shortly thereafter,” Kaluzynski arrived at the Sidor residence. (Id. at ¶ 32.)

### **12(b)(6) STANDARD**

When considering a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the plaintiffs’ favor, and determine whether the facts and inferences, when viewed in the light most favorable to the non-movant, support the claim for relief. Clorox Co. v. Proctor & Gamble Commer. Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998).

### **DISCUSSION**

Officer Doucette (“Doucette”) and the CCC, Barbara Kim, and Dr. Colan (“the CCC defendants”) move to dismiss Count I against them on the ground that the only constitutional violation that could be supported by the alleged facts is a claim involving the use of excessive force incident to a seizure, a Fourth Amendment claim. (Docket No. 4 at 6-7; Docket No. 5 at 3.) They argue that they cannot be liable on the excessive force claim because they did not participate in the shooting death of Sidor. (Docket No. 4 at 7-8; Docket No. 5 at 4.) The CCC defendants also argue that they cannot be held liable in a § 1983 action because they were not state actors. (Docket No. 5 at 2-4.) Maine State Troopers Don Armstrong and Garfield Holmes and Maine State Police Sergeant Peter Stewart (“the Maine State Police defendants”) move to dismiss on the basis of qualified immunity. (Docket No. 6 at 3-5.)

“To state a claim under section 1983, a plaintiff must allege two elements: 1) that the conduct complained of has been committed under color of state law, and 2) that this conduct worked a denial of rights secured by the Constitution or laws of the United States.” Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir. 1999) (citing Martinez v. Colon, 54 F.3d 980, 984 (1st Cir. 1995)). “[Section] 1983 ‘is not itself a source of substantive rights,’ but merely provides ‘a method for vindicating federal rights elsewhere conferred.’” Graham v. Connor, 490 U.S. 386, 393-94 (1989) (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). “As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated.” County of Sacramento v. Lewis, 523 U.S. 833, 842 n.5 (1998).

Kaluzynski asserts the estate’s § 1983 claim on the basis of (1) the right to be free from the use of excessive force or unreasonable seizures (Fourth Amendment as applied through the Fourteenth Amendment); as well as (2) the professed right to “fundamental fairness, including additional or substitute procedural safeguards in formulating the plan of action by which he was to be seized” (Fourteenth Amendment procedural and substantive due process); and (3) the right “to have his interest in his life and liberty, including his fundamental right to use his own language, protected from deliberate or reckless governmental action which shocks the conscience” (Fourteenth Amendment substantive due process). (Docket No. 14 at 3; Docket No. 16 at 4-10.)

## A. Identifying the Applicable Constitutional Standard

### 1. Fourth Amendment

Kaluzynski contends that the defendants deprived Sidor of the constitutional right to be free from the use of excessive force.<sup>1</sup> The facts alleged in the complaint clearly implicate the protections afforded by the Fourth Amendment. Graham, 490 U.S. at 394 (“Where . . . the excessive force claim arises in the context of an arrest . . . it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right ‘to be secure in their persons . . . against unreasonable . . . seizures’ . . .”). In Graham, the Supreme Court addressed the issue of “what constitutional standard governs a free citizen’s claim that law enforcement officials used excessive force in the course of making a[] . . . ‘seizure’ of his person.” Id. at 388.<sup>2</sup> In addition to determining that such claims would be measured against the Fourth Amendment’s “objective reasonableness” standard, the Supreme Court outlined the general parameters governing the use of force by law enforcement officers. The Court observed that proper application of the standard “requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.” Id. at 396. The Court made clear that the proper vantage point for consideration of the reasonableness of an officer’s conduct must correspond with the perspective of a reasonable officer on the scene, not the perspective afforded by hindsight or the relative tranquility of a judge’s chambers. Id. Perhaps the most frequently quoted language instructs, “The calculus of reasonableness must embody allowance for the fact that police

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<sup>1</sup> Kaluzynski does not argue that the decision to seize Sidor for a medical evaluation was not supported by probable cause or otherwise constituted a false arrest.

<sup>2</sup> That there was a “seizure” in this case is clear. See Brown v. County of Inyo, 489 U.S. 593, 598-99 (1989); Tennessee v. Garner, 471 U.S. 1, 7 (1985).

officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Id.* at 396-97. Finally, the Court made clear that allegations of improper motive, such as are alleged in the complaint in this case, are not relevant to the determination of “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” *Id.* at 397. Kaluzynski’s allegations clearly implicate the Fourth Amendment. Whether she states a claim against the various defendants is another matter that is reserved for discussion of the merits of the defendants’ motions.

## 2. *Due Process*

Kaluzynski seeks to extend the excessive force claim into the arena of due process. Kaluzynski alleges two substantive due process violations: (1) a deprivation of Sidor’s “fundamental right to language” through arbitrary action shocking to the conscience and (2) a deprivation of Sidor’s right to “fundamental fairness” consisting of the defendants’ collective decision to attempt to take Sidor into custody without the participation of Kaluzynski and an interpreter. (Docket No. 14 at 7-11; Docket No. 16 at 8-9.) Kaluzynski attempts to bolster these theories by contending that a special relationship existed between the CCC defendants and Sidor that imposed a heightened duty of care on them to help ensure that the seizure was conducted appropriately. (Docket No. 14 at 9-11.) Kaluzynski also recasts the second substantive due process theory as a procedural due process theory. (Docket No. 16 at 15.)

### *a. substantive due process*

There are two theories under which a plaintiff may bring a substantive due process claim. Under the first, a plaintiff must demonstrate a deprivation of an identified liberty or property interest protected by the Fourteenth Amendment. Under the second, a plaintiff is not required to prove the deprivation of a specific liberty or property interest, but, rather, he must prove that the state’s conduct “shocks the conscience.”

Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 531 (1st Cir. 1995) (citations omitted). The Supreme Court has indicated that claims based on excessive use of force are to be analyzed pursuant to the Fourth Amendment’s “objective reasonableness” standard and not pursuant to substantive due process standards. Graham v. Connor, 490 U.S. 386, 394-95 & n.10 (1989); Tennessee v. Garner, 471 U.S. 1, 7-8 (1985); see also Roy v. Inhabitants of the City of Lewiston, 42 F.3d 691, 694 (1st Cir. 1994). Presumably, this is one of the reasons why Kaluzynski has endeavored to focus on the planning stages of police intervention as much as on the implementation. To begin, the judgments made by the defendants concerning both whether and how to take Sidor into custody were not subject to a heightened standard of care based on a special relationship between the defendants and Sidor. With respect to the “special relationship” theory of liability, Kaluzynski cites DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189 (1989). Rather than aiding the claim, DeShaney effectively repudiates it. See id. at 200 (“In the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf . . . which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.”). Quite simply, the defendants’ alleged collaboration in the decision of whether and how to effectuate the seizure was neither unlawful nor an affirmative act of restraint. Accordingly, there is no identifiable pre-shooting deprivation on which this due process theory can hang.

With respect to the “fundamental right to language” argument, Kaluzynski cites only Meyer v. Nebraska, 262 U.S. 390 (1923). In Meyer, the Supreme Court invalidated a state law that prohibited the teaching of modern foreign languages to children before they completed the eighth grade. Id. at 400-401. The issue presented and the holding of the Court in Meyer have

absolutely no bearing on the claim advanced by Kaluzynski. Meyer did not recognize a “fundamental right to language.” Rather, Meyer invalidated a state statute for “unreasonably interfer[ing] with the liberty” interest of parents to “establish a home and bring up children” and “to control the education of their own.” Id. at 399, 401; see also Troxel v. Granville, 530 U.S. 57, 65 (2000). Although Kaluzynski is not required to prove the existence of a “fundamental” right in order for the estate to have a substantive due process claim, Kaluzynski has failed to identify any authority recognizing a right, fundamental or otherwise, to an interpreter in the context of a seizure. She has also fallen well-short of presenting conduct that could be viewed as shocking to the conscience. For these reasons, Kaluzynski fails to state a substantive due process claim.

*b. procedural due process*

“The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.” Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). The procedural due process claim advanced by Kaluzynski does not concern Sidor’s right to a hearing prior to being involuntarily committed. Involuntary commitment is a drastic deprivation of individual liberty, Zinermon v. Burch, 494 U.S. 113, 131 (1990), for which Maine law ensures specific *pre*-deprivation process, 34-B M.R.S.A. §§ 3863, 3864. Instead, Kaluzynski insists that Sidor was entitled to certain pre-seizure process. The seizure of an individual based on probable cause that he is a danger to himself or others is in the nature of an arrest. McCabe v. Life-Line Ambulance Serv., 77 F.3d 540, 544 (1st Cir. 1996); 34-B M.R.S.A. § 3862. But unless and until the “arrest” is accomplished, there is no deprivation of liberty. Cf. United States v. Marion, 404 U.S. 307, 321 (1971) (“Until [arrest] occurs, a

citizen [suspected of criminal activity] suffers no restraints on his liberty . . .”); Gerstein v. Pugh, 420 U.S. 103, 113-114 (1975) (differentiating between arrests incident to probable cause and pretrial commitment procedures). Because there was no deprivation in this case until Sidor’s death, conduct occurring *prior* to the shooting cannot support a due process claim.<sup>3</sup> Zinermon, 494 U.S. at 125-26.

Based on the foregoing discussion, my conclusion is that the only constitutional grounding for the Sidor estate’s § 1983 claim is in the Fourth Amendment. I turn now to the issue of whether the complaint states a claim for a Fourth Amendment deprivation.

## **B. The Motions to Dismiss**

I now consider the defendants’ respective challenges to the Fourth Amendment claim. Although the foregoing discussion rules out a due process challenge to the planning stages of the seizure, the Fourth Amendment claim may encompass conduct leading up to a seizure. St. Hilaire v. City of Laconia, 71 F.3d 20, 26 (1st Cir. 1995) (citing Brower v. Inyo, 489 U.S. 593, 599 (1989)); see also Hegarty v. Somerset County, 53 F.3d 1367, 1379 (1st Cir. 1995) (describing officers’ “locate-and-contain strategy” as objectively reasonable).<sup>4</sup> Construing

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<sup>3</sup> The provision of notice and a hearing prior to an arrest or seizure, practically speaking, makes no sense. I assume this is why the plaintiffs in Graham and Garner raised only substantive due process or generic “due process” claims as alternatives to their Fourth Amendment excessive force claims and why the Supreme Court and the lower courts in those cases did not consider the procedural component of due process as a possible alternative basis for an § 1983 excessive force claim. Particularly in this case, provision of a pre-seizure hearing, given Sidor’s mental condition, would have required taking Sidor into custody in order to determine whether he should be taken into custody. In any event, the Sixth Circuit has applied the procedural due process standard in a § 1983 case premised on excessive use of force. Bass v. Robinson, 167 F.3d 1041 (6th Cir. 1999). My view is that this approach was uncalled for, but was not questioned because application of the standard set forth in Hudson v. Palmer, 468 U.S. 517, 534 (1984), was easy given the facts of the case. See Bass, 167 F.3d at 1050 (“Officer Robinson’s alleged use of excessive force in effecting the arrest [ ] was a random unauthorized incident, and a predeprivation hearing was therefore impracticable. . . . Because Plaintiff failed to plead that postdeprivation remedies were inadequate, his claim on this issue was properly dismissed.”) Neither party has addressed this standard in their submissions. My conclusion is that the standard should not be applied based on an extension of the reasoning in Graham.

<sup>4</sup> Presumably there is a limit to this inquiry. After all, it is the implementation, not the planning, that must be assessed for reasonableness. None of the parties address the issue of whether the pre-seizure conduct in this case was objectively unreasonable under the circumstances and Kaluzynski does not cast her “pre-seizure” deprivation theory as a Fourth Amendment issue.

Kaluzynski's due process theory as a Fourth Amendment claim, Kaluzynski would argue that the Fourth Amendment's prohibition against unreasonable seizures not only (1) prohibits the use of unreasonable force, but also (2) requires police officers attempting to seize a non-English speaking person, one who presents a danger to himself and others because of a mental health problem and who is known to be confrontational toward police and other authorities, to bring along an interpreter as well as any other individuals who may be capable of facilitating the seizure in a manner that avoids conflict.

For their part, the Maine State Troopers invoke the doctrine of qualified immunity. (Docket No. 6 at 3.) Doucette and the CCC defendants, on the other hand, contend that they cannot be liable on the claim because there is an insufficient causal connection between their conduct and the seizure. (Docket No. 4 at 7-10; Docket No. 5 at 4.) The CCC defendants also maintain that they cannot be considered state actors based on the allegations contained in the complaint. (Docket No. 5 at 2-3.) I conclude that the Maine State Police defendants are immune from liability on Count I. I also conclude that Count I should be dismissed against Doucette and the CCC defendants because they did not cause Sidor to be subjected to a constitutional deprivation. I begin with a discussion of some of this circuit's most relevant precedents involving the use of force during seizures, all of which were "on the books" as of the date of Sidor's shooting. These cases are instructive on the key issues raised by the defendants' motions: qualified immunity and the causation element of a § 1983 claim.

In Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989), the First Circuit reviewed a jury verdict finding three police officers<sup>5</sup> and their supervisors liable on plaintiff's

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<sup>5</sup> A default judgment was entered against a fourth officer prior to trial. Gutierrez, 882 F.2d at 557 n.1.

claim for deprivation “of his constitutional right of liberty without due process of law.”<sup>6</sup> Id. at 557. The non-uniformed officers in Gutierrez approached the plaintiff’s parked vehicle with guns drawn. Id. The plaintiff, observing unidentified armed men approaching his vehicle, started his car and began to drive away. Id. The officers fired at the plaintiff and his vehicle and one of their bullets struck plaintiff’s spinal cord, rendering him a paraplegic. Id. Two of the three officers appealed the denial of their post-judgment motions, contending that they could not be liable pursuant to § 1983 because it was conclusively established that the bullet causing the injury to the plaintiff had not been fired from their weapons. Id. at 560. They argued that the third officer’s bullet, the one that caused the injury, was a supervening cause of the deprivation. Id. The First Circuit rejected this argument, concluding that the injury to the plaintiff was a reasonably foreseeable consequence of each officer’s conduct. Id. at 561 (“It was eminently foreseeable that an encounter with a civilian by four policemen with weapons drawn and ready to fire might result in a discharge of the firearms and an injury to the civilian.”).

In Roy v. Inhabitant of the City of Lewiston, 42 F.3d 691 (1st Cir. 1994), the First Circuit reviewed a judgment granting summary judgment in favor of three police officers against the plaintiff’s § 1983 excessive force claims. Id. at 693. After responding to reports of assault and domestic violence, the officers encountered the plaintiff lying on the ground intoxicated. Id. The plaintiff resisted the officers’ attempt to serve a summons on him. Id. The plaintiff went into his home after having the summons stuffed into his pocket and returned carrying a steak knife in each hand. Id. The officers drew their firearms and ordered the plaintiff to drop the

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<sup>6</sup> This case was decided four months after Graham, in which the Supreme Court specified that excessive force claims should be evaluated pursuant to the Fourth Amendment. Whether due process was the proper label for the claim is not addressed in the opinion. A police officer’s unprovoked and unjustified shooting upon an individual would constitute arbitrary conduct shocking to the conscience, though not necessarily a deprivation of the victim’s Fourth Amendment rights if the victim were not apprehended thereby. Brower v. County of Inyo, 489 U.S. 593, 599 (1989) (Stevens, J., concurring but critiquing the Court’s *dicta* on this point).

knives. Id. Instead, the plaintiff advanced on the officers while flailing his arms at them. Id. After some initial evasive maneuvering, one of the officers fired on the plaintiff in response to a “kicking-lunging” motion, hitting him twice and causing significant injury. Id. The district court granted summary judgment in favor of the non-shooting officers, concluding that they had acted in an objectively reasonable manner and also that they were protected by the doctrine of qualified immunity. Roy v. Inhabitant of the City of Lewiston, No. 93-218-P-H, 1994 WL 129774, at \*2-3, 1994 U.S. Dist. LEXIS 4686, at \*7-8 (D. Me. February 16, 1994). It then concluded that the shooting officer was also entitled to qualified immunity, finding,

[I]t is perfectly apparent that an intoxicated and highly agitated individual with a steak knife in each hand, standing four feet from police officers in a confrontational situation in the nighttime, who then makes a sudden movement toward the police officers, justifies a reasonable police officer in thinking that steps are necessary to protect him or his companion officers from serious physical danger.

1994 WL 129774, at \*5, 1994 U.S. Dist. LEXIS 4686, at \*16. On review, the First Circuit affirmed. It first considered at some length the claim against the officer who discharged his firearm, concluding that “a jury could not find that his conduct was so deficient that no reasonable officer could have made the same choice as Whalen—in circumstances that were assuredly ‘tense, uncertain, and rapidly evolving . . . .’” Roy, 42 F.3d at 695 (quoting Graham, 490 U.S. at 397). Then, in a summary fashion, the Court observed that the remaining officers did not act unreasonably because they “did not use deadly force or encourage [the other officer] to do so.” Id. at 696 (citing and inviting comparison to Gutierrez).

In St. Hilaire v. City of Laconia, 71 F.3d 20 (1st Cir. 1995), the First Circuit reviewed a grant of summary judgment in favor of defendant police officers and against plaintiff’s § 1983 claim on the ground of qualified immunity. Id. at 22. According to the plaintiff’s statement of material fact, while plaintiff was seated in his car, a plainclothes police officer ran toward his

open passenger window pointing a firearm at him. Id. at 23. The plaintiff made a motion to reach for something in his car and the police officer fired at him, striking plaintiff in the neck, paralyzing him and, ultimately, killing him. Id. The facts for purposes of summary judgment indicated that the officer never identified himself as a law enforcement officer prior to shooting. Id. The plaintiff argued that the shooting amounted to excessive force under the circumstances and that the officer's failure to announce his authority was an independent component of his Fourth Amendment claim. Id. at 23, 27. The district court rejected both arguments on the ground of qualified immunity. Id. at 26. With respect to the officer's failure to announce his authority, the court reasoned that there was no clearly established obligation on the officer's part "not unreasonably to create circumstances where the use of deadly force becomes necessary." Id. The district court rested its decision, in part, on caselaw from other circuits stating that pre-seizure conduct is irrelevant to the Fourth Amendment reasonableness inquiry. Id. The First Circuit affirmed the district court, but rejected the court's framing of the "clearly established law" question for being too narrowly focused on the shooting. Id. The First Circuit held that pre-seizure conduct can be relevant to the Fourth Amendment analysis and reframed the question as whether there was any clearly established federal law obliging the officer to identify himself and state his purpose.<sup>7</sup> Id. at 27. Concluding there was not as of the date of the shooting, the First Circuit affirmed the entry of summary judgment. Id. at 28.

In Napier v. Town of Windham, 187 F.3d 177 (1st Cir. 1999), the First Circuit reviewed a grant of summary judgment in favor of two officers against plaintiff's § 1983 excessive force claim, including a claim that the officers unreasonably created the dangerous circumstance that called for the use of excessive force. Id. at 180, 188. According to the plaintiff's statement of material facts, in response to calls that the plaintiff was illegally discharging a firearm in a

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<sup>7</sup> The Court noted that New Hampshire law did impose this obligation.

residential area, the officers, knowing the plaintiff was psychologically unstable, stealthily approached the plaintiff's house without announcing their presence. Id. at 187. One officer proceeded to the plaintiff's front door. Id. Upon seeing the officer there, the plaintiff raised his firearm in the direction of the officer. Id. The officer jumped for cover and fired at the plaintiff, missing him. Id. The second officer then observed the plaintiff, with the firearm in his hand, emerge from the house in the direction of the first officer. Id. The second officer fired a burst from his firearm, missing the plaintiff, who then turned toward the second officer, still holding the firearm. Id. The second officer fired a second burst, striking the plaintiff and incapacitating him. Id. The First Circuit affirmed the District Court's determination that the second officer was protected by the doctrine of qualified immunity and, with respect to causation, also held that the officers' conduct leading up to the confrontation was not itself unreasonable because the plaintiff could not provide any authority that the officers owed a duty to announce their presence before reaching the door of the dwelling. Id. at 189.

*1. Maine State Police defendants*

The Maine State Police defendants are the only defendants to invoke qualified immunity. Although Kaluzynski has briefed the qualified immunity issue, I do not consider it appropriate at this stage to consider, *sua sponte*, whether the other defendants are entitled to qualified immunity as well.

The classic question that a qualified immunity defense poses is whether the allegedly violated federal right was established with sufficient clarity that a reasonable government functionary should have conformed his conduct accordingly. In answering this question, a court must undertake an objective inquiry into the totality of the circumstances, with a view toward ascertaining whether the right allegedly infringed, articulated at an appropriate level of generality, was settled at the time of the public official's actions, and if so, whether the official's conduct was obviously inconsistent with that right. In the last analysis, then, qualified immunity purposes to protect government functionaries who could not reasonably have predicted that their actions would

abridge the rights of others, even though, at the end of the day, those officials may have engaged in rights-violating conduct.

Camilo-Robles v. Zapata, 175 F.3d 41, 43 (1st Cir. 1999) (citation omitted). In this way, the doctrine of qualified immunity protects a state actor from liability in circumstances where the proper application of the underlying constitutional standard might be unclear and, therefore, not otherwise suited for dismissal or summary disposition. With respect to the extent of the protection conferred by the doctrine, it has been said that “the qualified immunity defense . . . provides ample protection to all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs, 475 U.S. 335, 341 (1st Cir. 1986). With respect to the timing of the qualified immunity determination, the Supreme Court has “stressed the importance of resolving immunity questions at the earliest possible stage in litigation,” Hunter v. Bryant, 502 U.S. 224, 227 (1991), on the ground that the doctrine confers “an immunity from suit rather than a mere defense to liability,” Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

As the one Maine State Police defendant who actually used deadly force against Sidor, Trooper Armstrong is the most likely candidate for § 1983 liability. Nevertheless, based on the holdings of Napier and Roy, it is clear that a law enforcement officer is not obliged under the Constitution or federal law to suffer a violent assault against his person or his partner’s person in circumstances where a reasonable officer in his position could believe that he or another might suffer seriously bodily injury. Napier, 187 F.3d at 187-188; Roy, 42 F.3d at 695. Viewed in this light, Trooper Armstrong’s decision to use deadly force against Sidor was not an objectively unreasonable decision under the circumstances and, accordingly, did not amount to a plainly incompetent act or a knowing violation of clearly established law. See Napier, 187 F.3d at 183. Because Trooper Armstrong did not violate clearly established law when he fired upon Sidor, none of the Maine State Police defendants, the only defendants to raise qualified immunity as a

defense, are subject to liability on the excessive force theory. Furthermore, as already discussed in the context of Kaluzynski's due process theory of liability, Sidor did not possess a clearly established right to receive seizure support services of the nature Kaluzynski insists were required in this case. Because such a right was not clearly established as of the date of the seizure, the Maine State Police defendants are immune from liability on this theory as well.

## 2. *Officer Doucette and the CCC defendants*

“To state a claim under section 1983, a plaintiff must allege two elements: 1) that the conduct complained of has been committed under color of state law, and 2) that this conduct worked a denial of rights secured by the Constitution or laws of the United States.” Barreto-Rivera v. Medina-Vargas, 168 F.3d 42, 45 (1st Cir. 1999). The second element of the claim may be satisfied not only with an allegation that a defendant directly subjected the plaintiff to a deprivation, but also with an allegation that a defendant caused another to subject the plaintiff to a deprivation. 42 U.S.C. § 1983.

A person “subjects” another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another's affirmative act[], or omits to perform an affirmative act which he is legally required to do, that causes the deprivation of which complaint is made. Moreover, personal participation is not the only predicate for section 1983 liability. Anyone who “causes” any citizen to be subjected to a constitutional deprivation is also liable. The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.

Springer v. Seaman, 821 F.2d 871, 879 (1st Cir. 1987) (quoting Soto v. City of Sacramento, 567 F. Supp. 662, 673-74 (E.D. Cal. 1983) and Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir. 1978)). The application of the foregoing standard to Kaluzynski's Fourth Amendment claim appears obvious. First, none of these defendants participated in the actual seizure. Second, they did not participate in formulating a plan of action *that called for the use of excessive force*. At

most, they participated in formulating a plan that would likely require the application of some force and restraint measures. However, only unreasonable force is proscribed by the Fourth Amendment; the use of force, in and of itself, is authorized when the circumstances warrant it. Graham, 490 U.S. at 396 (“Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.”). Although the use of force may have been a foreseeable consequence of the plan of action, all discretion with regard to the degree of force used in response to Sidor’s conduct resided in Troopers Armstrong and Holmes. After all, the level of force that an officer ultimately brings to bear on a situation is, necessarily, committed to his or her discretion, which must be judged in light of evolving circumstances. Id. at 396-97. Third, and finally, the plan of action was not objectively unreasonable under the circumstances. Kaluzynski’s own complaint effectively undermines the argument that the circumstances would have improved with her involvement or with the involvement of an interpreter. The allegation contained in paragraph 18 of the complaint indicates that the presence of Kaluzynski and an interpreter did not prevent Sidor from chasing a mental health worker from the premises on a prior occasion. That allegation, especially when combined with other allegations regarding Sidor’s hostility to law enforcement, essentially demonstrates that the participation of Kaluzynski and an interpreter would have been unlikely to have any impact on whether Troopers Armstrong and Holmes would be required to use force in order to take Sidor into their custody.

Given that Officer Doucette and the CCC defendants did not participate in the seizure and did not encourage the use of excessive force or a course of conduct that was objectively unreasonable under the circumstances, they cannot be found to have caused a deprivation of

Jerzy Sidor's Fourth Amendment rights. For this reason, I recommend that the Court grant their motions to dismiss.

### **C. Supplemental Jurisdiction**

Because the Court should dismiss the one claim over which it has original jurisdiction, the Court may decline to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3); Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 192 (1st Cir. 1999). Because none of the policy justifications for maintaining jurisdiction over the state law claims is present, the Court should dismiss the remaining claims without prejudice and not give consideration to the Maine State Police defendants' motion for summary judgment. See Collins v. Nuzzo, 244 F.3d 246 (1st Cir. 2001) (vacating district court grant of summary judgment against state law claim and directing district court to enter judgment of dismissal without prejudice where decision of state law claim required an expansion of common law statute of limitations discovery rule).

### **CONCLUSION**

The only cognizable ground for Kaluzynski's § 1983 claim is the Fourth Amendment prohibition against unreasonable seizures. As alleged, the facts are insufficient to overcome the qualified immunity challenges raised by Troopers Armstrong and Holmes because their conduct, under the circumstances portrayed in the complaint, was not in violation of clearly established law in this Circuit. With respect to the remaining defendants, Kaluzynski fails to state a § 1983 claim because the allegations are insufficient to support a conclusion that they either subjected Sidor or caused Sidor to be subjected to a Fourth Amendment deprivation. For these reasons, I recommend that the Court:

**GRANT** Officer Doucette's motion to dismiss (Docket No. 4);

**GRANT** the CCC defendants' motion to dismiss (Docket No. 5);

**GRANT** the Maine State Police defendants' motion to dismiss (Docket No. 6),  
**IN PART**, by dismissing Count I;

**DENY** the Maine State Police defendants' motion for partial summary judgment  
(Docket No. 7); and

**DISMISS WITHOUT PREJUDICE**, the remaining state law claims contained  
in the complaint.

#### 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 days of being served with a copy thereof. A responsive memorandum shall be filed within ten 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.

Dated: May 16, 2001

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Margaret J. Kravchuk  
U.S. Magistrate Judge

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 00-CV-267

KALUZYNSKI v. ARMSTRONG, et al

Filed: 12/26/00

Assigned to: JUDGE GENE CARTER

Jury demand: Plaintiff

Demand: \$0,000

Nature of Suit: 440

Lead Docket: None

Jurisdiction: Federal Question

Dkt# in other court: None

Cause: 42:1983 Civil Rights Act

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and in her capacity as 784-3576

Personal Representative for [COR LD NTC]

the Estate of JERZY SIDOR

BERMAN & SIMMONS, P.A.

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v.

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Counseling Center  
defendant