NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4676

JUAN DIAZ, JR.,
Appellant

v.

DIRECTOR FEDERAL BUREAU OF PRISONS;
GENERAL COUNSEL OF THE FEDERAL BUREAU OF PRISONS;
REGIONAL DIRECTOR; WARDEN LEWISBURG USP;
ASSISTANT WARDEN LEWISBURG USP; CAPTAIN LEWISBURG USP;
LIEUTENANT LEWISBURG USP; L. POTTER, EMT-P

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil Action No. 1-12-cv-02519)
District Court Judge: Honorable John E. Jones, III

Submitted Pursuant to Third Circuit LAR 34.1(a)
March 14, 2017
Before: GREENAWAY, JR., GREENBERG and ROTH, Circuit Judges

(Opinion filed: November 20, 2017)

OPINION*

PER CURIAM

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* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

Juan Diaz, Jr., a prisoner, assaulted a prison guard as the two were walking down the hall.[1] Diaz was tackled and restrained and then moved to a holding cell, where he spat on the guard he had assaulted. Diaz also spat on another guard. Thereafter, a use of force team carried Diaz to another area of the prison and placed him face down in four-point restraints. Diaz complained that one restraint was too tight, and it was immediately loosened. Diaz remained in four-point restraints for twenty-four hours. He was then placed in ambulatory restraints—which are much less restrictive and allow an inmate to eat, drink, and use the bathroom without staff intervention—for another twenty hours. The undisputed record evidence shows that, pursuant to Department of Corrections Policy, Diaz's restraints were checked every fifteen minutes for the entire time that he was restrained. He was offered routine opportunities to drink water, eat meals, and use the restroom. Nevertheless, Diaz remained defiant and combative, cursing staff and threatening to harm them and again harm the guard he initially assaulted. Once Diaz regained his composure, he was released from the ambulatory restraints.

Diaz filed suit under 42 U.S.C. § 1983.[2] Diaz claimed that Defendant Whitaker, who supervised the use of force team and oversaw Diaz's placement in the four-point restraints, maliciously and wantonly inflicted unnecessary pain when he ordered Diaz placed in the restraints. He claimed that, during the hours he was restrained, Defendant

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[1] According to Diaz, he was upset that the guard had "lied on him" during a disciplinary proceeding earlier that day. Although Diaz's opening brief seeks to downplay his aggressive behavior, he told prison staff shortly after the attack that he "went crazy on [the guard]" for lying in the proceeding.

[2] Although his second amended complaint named numerous prison officials, Diaz voluntarily dismissed all but four Defendants from the case.

Whitaker ignored his continuous complaints that the restraints were too tight, which caused a "new medical issue." In addition, Diaz claimed that Defendant Whitaker and Defendant Potter, the attending emergency medical technician, were deliberately indifferent to his needs for life's necessities—including food, water, and use of the restroom—and to his serious medical needs—i.e. the injuries caused by the overtight restraints.

The Defendants filed a motion for summary judgment, supported with declarations from Defendants Whitaker and Potter, the medical records kept while Diaz was restrained, and the logs kept by the guards and medical staff documenting the fifteen minute checks and Diaz's combative behavior—evidence that clearly rebutted Diaz's claims that the Defendants acted maliciously and were deliberately indifferent to his needs. Diaz filed arguments opposing the motion, but he offered no evidence whatsoever—in the form of an affidavit or a declaration, for example—to support the allegations in his complaint.[3] The District Court granted the Defendants' motion for summary judgment. Diaz timely appealed.

We have jurisdiction under 28 U.S.C. § 1291 and exercise plenary review of the District Court's order granting summary judgment. See Caprio v. Bell Atl. Sickness & Accident Plan, 374 F.3d 217, 220 (3d Cir. 2004). We will affirm.[4]

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[3] Diaz did claim that video evidence, which the Defendants submitted to the District Court, supported his claims. However, we have reviewed that evidence. It does not support Diaz's allegations.

[4] To the extent that Diaz has raised new claims—that the Defendants violated his rights under the Fourth Amendment and prison regulations regarding the material from which the restraints were constructed—he asserted them for the first time on appeal; hence, we

The District Court correctly granted summary judgment on Diaz's cruel and unusual punishment claim. "[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Whitley v. Albers, 475 U.S. 312, 319 (1986) (alteration in original, quotation marks omitted). Whether this standard has been met "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 320-21 (quotation marks omitted); see also Wilkins v. Gaddy, 559 U.S. 34, 37 (2010); Giles v. Kearney, 571 F.3d 318, 328 (3d Cir. 2009). In the context of restraints, like the four-point and ambulatory restraints used to confine Diaz, "the Supreme Court in Hope [v. Pelzer, 536 U.S. 730, 738 (2002)] identified particular criteria relevant to the use of excessive force test." Young v. Martin, 801 F.3d 172, 180 (3d Cir. 2015). Hope held that (1) where the inmate had "already been subdued, handcuffed, [and] placed in leg irons," and (2) there was a "clear lack of an emergency situation" such that "[a]ny safety concerns had long since abated," then (3) subjecting the inmate to "substantial risk of physical harm" and "unnecessary pain" serves no penological justification. 536 U.S. at 738.

The record contains no evidence that Defendants acted maliciously or sadistically in administering Diaz's four-point restraints. The record evidence on this point makes clear that Diaz was behaving violently and was placed in restraints—for his protection and the protection of the staff—after he rammed his shoulder into one guard, and then

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decline to address those claims here. Harris v. City of Phila., 35 F.3d 840, 845 (3d Cir. 1994) ("This court has consistently held that it will not consider issues that are raised for the first time on appeal.").

spat in his face, and then spat in the face of another, all in spite of the guards' attempts to calm him. Cf. Young, 801 F.3d at 181 ("[Young] was not violent, combative, or self-destructive at any point leading up to his prolonged confinement in the restraint chair."). Unlike Hope, where the prisoner had been subdued and shackled and later transported from a worksite back to the prison before he was handcuffed to a "hitching post," this was not a case where "[a]ny safety concerns had long since abated." Hope, 536 U.S. at 738.

The record evidence is also clear that prison officials required Diaz to stay in four-point restraints for twenty-four hours because he remained combative, defiant, and uncooperative with staff. During this period, staff checked on Diaz every fifteen minutes, and at nearly every interval he defiantly cursed at them, and on several occasions threatened them, saying "I will kill you," "you will see what I can do," and "you just wait." He also threatened to harm the guard he had initially assaulted, warning staff to tell "that [guard] just wait." The evidence further shows that even after staff moved Diaz from four-point restraints to much-less-restrictive ambulatory restraints, he remained combative for another twenty hours; however, once Diaz became less combative and regained his composure the ambulatory restraints were removed. Accordingly, no reasonable factfinder could conclude the Defendants acted maliciously or sadistically or for the purpose of causing harm, as Diaz claimed.

Similarly, the District Court properly granted summary judgment to Defendants Whitaker and Potter on Diaz's deliberate indifference claims. Diaz's complaint can be read as asserting that Defendants Whitaker and Potter were deliberately indifferent in

denying him the minimal civilized measure of life's necessities—like food, water, and the ability to use the restroom—for the twenty-four hours he spent in the four-point restraints. See Parkell v. Danberg, 833 F.3d 313, 335 (3d Cir. 2016). Diaz's complaint can also be read as claiming that the Defendants were deliberately indifferent to his serious medical needs—i.e. the injuries he claims were caused by the restraints. See id. at 337.

"A prison official is deliberately indifferent if the official 'knows that [the] inmate[] face[s] a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it.'" Id. at 335 (quoting Chavariagga v. N. J. Dep't of Corrs., 806 F.3d 210, 229 (3d Cir. 2015)). Here, however, there is no evidence in the summary judgment record that the Defendants were deliberately indifferent. Defendant Whitaker provided evidence that prison officials checked on Diaz every fifteen minutes; he was offered water every two hours and opportunities to eat a bagged lunch at every meal time; he was also offered the opportunity to use the restroom every two hours; and that Diaz did not complain that his restraints were too tight, and any such complaint would have been referred to medical professionals. Likewise, Defendant Potter submitted evidence that Diaz rejected multiple offers to use the restroom or to drink water. The Defendants' evidence matches the prison's records, which reflect that medical staff encouraged Diaz to drink water, offered him opportunities to use the bathroom, and routinely checked Diaz's restraints, but that on several occasions Diaz refused any restraint checks. While Diaz has made various allegations about the Defendants' purported misconduct, he has not produced any evidence to survive

summary judgment. See Berckeley Inv. Grp., Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006) ("In this respect, summary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument."). This record would not permit a reasonable factfinder to conclude that either Defendant was deliberately indifferent to Diaz's needs.

For these reasons, we will affirm the District Court's judgment.[5] In reaching our decision, we have reviewed the evidence Diaz seeks to introduce on appeal. Because that evidence does not alter our conclusion, we treat his motion to "amend an exhibit to his complaint" as a motion to supplement the record, and we deny it.[6]

[5] Diaz does not challenge on appeal the District Court's ruling on his First Amendment claim, and this we will not address it here. See Emerson v. Thiel Coll., 296 F.3d 184, 190 n.5 (3d Cir. 2002).

[6] We also deny Diaz's request to strike Appellees' brief.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4676

JUAN DIAZ, JR.,

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DIRECTOR FEDERAL BUREAU OF PRISONS;
GENERAL COUNSEL OF THE FEDERAL BUREAU OF PRISONS;
REGIONAL DIRECTOR; WARDEN LEWISBURG USP;
ASSISTANT WARDEN LEWISBURG USP; CAPTAIN LEWISBURG USP;
LIEUTENANT LEWISBURG USP; L. POTTER, EMT-P

(D.C. Civil No. 1-12-cv-02519)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, MCKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, *GREENBERG and *ROTH, Circuit Judges

The petition for rehearing filed by **appellant** in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the

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* The Honorable Morton I. Greenberg and Jane R. Roth votes limited to panel rehearing only.

other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Jane R. Roth
Circuit Judge

Dated: April 5, 2018
sb/cc: Juan Diaz, Jr.
All Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JUAN DIAZ, JR.,	:	1:12-cv-2519
	:	
Plaintiff,	:	
	:	Hon. John E. Jones III
v.	:	
	:	Hon. Martin C. Carlson
J.L. NORWOOD, *et al.*,	:	
	:	
Defendants.	:	

ORDER

November 18, 2014

AND NOW, upon consideration of the comprehensive Report and Recommendation of Chief United States Magistrate Judge Martin C. Carlson (Doc. 64), recommending that Defendants' Motion for Summary Judgment (Doc. 36) be granted and that Plaintiff's Motion to Amend (Doc. 56) be denied, and, after an independent review of the record, and that Plaintiff has not filed objections and that there is no clear error on the record,[1] *see Nara v. Frank*, 488 F.3d 187, 194 (3d

[1] When parties fail to file timely objections to a magistrate judge's report and recommendation, the Federal Magistrates Act does not require a district court to review the report before accepting it. *Thomas v. Arn*, 474 U.S. 140, 149 (1985). As a matter of good practice, however, the Third Circuit expects courts to "afford some level of review to dispositive legal issues raised by the report." *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987). The advisory committee notes to Rule 72(b) of the Federal Rules of Civil Procedure indicate that "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." FED. R. CIV. P. 72(b), advisory committee notes; *see also Henderson*, 812 F.2d at 878-79 (stating that "the failure of a party to object to a magistrate's legal conclusions may result in the loss of the right to de novo review in

Cir. 2007) (explaining that "failing to timely object to [a report and recommendation] in a civil proceeding may result in forfeiture of *de novo* review at the district court level") and the Court finding Judge Carlson's analysis to be extremely thorough, well-reasoned, and fully supported by the record **IT IS HEREBY ORDERED THAT:**

1. The Report and Recommendation of Magistrate Judge Carlson (Doc. 64) is **ADOPTED** in its entirety.
2. The Defendants' Motion for Summary Judgment (Doc. 36) is **GRANTED**.
3. The Plaintiff's Motion to Amend his complaint (Doc. 56) is **DENIED** and Plaintiff's Motion to Oppose (Doc. 50) is **DISMISSED**.
4. The Clerk of Court is directed to **CLOSE** the file on this case.

s/ John E. Jones III
John E. Jones III
United States District Judge

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the district court"); *Tice v. Wilson*, 425 F. Supp. 2d 676, 680 (W.D. Pa. 2006) (holding that the court's review is conducted under the "plain error" standard); *Cruz v. Chater*, 990 F. Supp. 375-78 (M.D. Pa. 1998) (holding that the court's review is limited to ascertaining whether there is "clear error on the face of the record"); *Oldrati v. Apfel*, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998) (holding that the court will review the report and recommendation for "clear error"). The Court has reviewed the magistrate judge's report and recommendation in accordance with this Third Circuit directive.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JUAN DIAZ, JR.,	:	**Civil No. 1:12-CV-2519**
	:	
Plaintiff,	:	
	:	
v.	:	**(Judge Jones)**
	:	
J.L. NORWOOD, et al.,	:	**(Magistrate Judge Carlson)**
	:	
Defendants.	:	

REPORT AND RECOMMENDATION

I. Statement of Facts and of The Case

A. Procedural History

On August 22, 2011, the plaintiff, Juan Diaz, who was then an inmate at the United States Penitentiary, Lewisburg, launched a violent, unprovoked attack upon a correctional officer at that institution. Following this assault, Diaz was briefly restrained by staff for some 44 hours until he regained control of himself. The fact of this assault is undisputed, undeniable and was captured by an immutable witness, the prison video surveillance system.

Diaz's physical assault upon staff was then followed by a legal assault in the form of the instant lawsuit. This *pro se* civil rights case that was first brought by Diaz, a state inmate housed in federal prison, through the filing of a civil rights

complaint on December 17, 2012, (Doc. 1.), which he subsequently amended on January 14, 2013, (Doc. 10.) and March 1, 2013. (Doc. 16.) In these complaints, Diaz alleged that prison officials violated his Eighth Amendment right to be free from cruel and unusual punishment by employing excessive force against him during, and after, this August 22, 2011, affray at the Lewisburg Federal Penitentiary. (Id.) Diaz further alleged that prison officials violated his due process rights and impeded his access to the courts on these Eighth Amendment claims by frustrating his ability to file administrative grievances relating to these matters.

Through the process of litigation a number of parties have been dismissed from this action. Presently, the defendants in this case include the Regional Administrator for the Bureau of Prisons, J.L. Norwood, the former Warden at the Lewisburg Penitentiary, B.A. Bledsoe, a lieutenant who oversaw Diaz's care and custody on August 22, 2011, Lieutenant Whittaker, and a paramedic who examined Diaz while he was in restraints, L. Potter.

We now are now presented with a series of motions which collectively will determine whether Diaz may maintain this legal assault following his physical assault on staff in August 2011. First, the defendants have filed a fully-documented summary judgment motion lodged on behalf of the remaining defendants in this matter, which argues that Diaz's claims fail as a matter of law on multiple grounds.

(Doc. 36.)[1] Diaz, in turn, has responded to this motion by filing a document styled motion to oppose summary judgment, which in effect is a response in opposition to this motion. (Doc. 50.) Diaz has also filed a motion to amend his complaint, yet again, to add additional correctional officers as defendants, alleging that those other staff helped subdue and transport him on August 22, 2011, following his attack upon a correctional officer at the Lewisburg Penitentiary, in a fashion which offended the United States Constitution. (Doc. 56.) These motions have been fully briefed by the parties and are ripe for resolution.

For the reasons set forth below, it is recommended that the defendants' motion for summary judgment (Doc. 36.) be granted, and Diaz's motions to oppose summary judgment and motion to amend his complaint, (Docs. 50 and 56.) be denied.

B. Factual Background

1. Juan Diaz

Juan Diaz, is a convicted murderer who is serving a life sentence imposed upon him by the Commonwealth of Massachusetts. Commonwealth v. Diaz, 448 Mass. 286, 287, 860 N.E.2d 665, 668 (2007). Diaz is currently serving this life sentence as a contract prisoner in federal facilities. On November 1, 2010, Diaz arrived at the

[1]This motion is captioned as a motion to dismiss or in the alternative for summary judgment but has been treated by all parties as a summary judgment motion, and will be considered by this Court as a motion for summary judgment.

United States Penitentiary in Lewisburg, Pennsylvania ("USP Lewisburg"), to participate in the Special Management Unit. (Doc. 45, Ex. 1 Declaration of Emergency Medical Technician EMT Len Potter, ¶ 3.) At the time of Diaz's arrival at the Lewisburg Penitentiary, he underwent an abdominal X-ray as a precautionary measure due to his past history of violence, and propensity for carrying concealed weapons. (Id. at 364.)

2. Diaz's August 22, 2011, Assault on Staff and Restraint By Correctional Officials

The allegations in this case center around an August 22, 2011, episode in which Diaz was restrained by staff after engaging in an unprovoked assault upon an escorting correctional officer. Much of the factual background relating to this incident is entirely undisputed and has been captured on videotape. This uncontested evidence reveals that, on August 22, 2011, just after 3:00 p.m., Diaz was being escorted to his cell on J-Block at U.S.P. Lewisburg following a disciplinary hearing when, without warning, he violently threw his upper body backwards into the chest of the escorting officer. (Id., Ex. 2 Declaration of Susan Albert ¶ 17; Attach. 6 Form 583, Report of Incident Packet at 3; Attach. 8 DVD of Staff Assault and Immediate Use of Force, submitted under seal (Doc. 42.)). Another J-Block officer called for

assistance and staff immediately placed Diaz onto the ground in an effort to regain control over him. (Id.)

Responding staff then placed Diaz in leg restraints and transferred him to a holding cell, which was the J-2 shower. (Id., Ex. 2 ¶ 17; Attach. 6 Form 583, Report of Incident Packet at 3; Attach. 8 DVD of Staff Assault and Immediate Use of Force, submitted under seal (Doc. 42)). After being placed in the holding cell shower, Diaz resisted and spat upon staff. (Id., Ex. 2 ¶ 17; Attach. 6 Form 583, Report of Incident Packet) at 3; Attach. 9 DVD of Debriefing of Immediate Use of Force, submitted under seal (Doc. 42)). In response to Diaz spitting on staff and resisting correctional officers in the shower, staff dispensed two, two-second bursts of MK-9 OC (pepper spray), which caused Diaz to cease his actions. (Id.) The water was then turned on in the shower in an attempt to decontaminate Diaz but Diaz refused to place his face under the water. (Id., Ex. 2 ¶ 17; Attach. 6 Form 583, Report of Incident Packet at 33; Attach. 9 DVD of Debriefing of Immediate Use of Force, submitted under seal (Doc. 42)).

At approximately 3:25 p.m., on August 22, 2011, Lieutenant Whittaker conducted a debriefing video concerning this immediate use of force episode relating to Diaz. (Id., Ex. 2, ¶ 17; Attach. 9 DVD of Debriefing of Immediate Use of Force, submitted under seal (Doc. 42)). During the debriefing video, Lieutenant Whittaker

described the events which led up to this use of force, noted that two brief bursts of OC spray had been administered to Diaz in the shower and three correctional staff confirmed Diaz's resistence and spitting upon staff in the prison shower. (Id.)

The debriefing video then depicted the responding staff walking to the J-Block showers. Upon arriving at the showers, defendant Whittaker noted that: "The inmate has already been decontaminated once. We will turn the water on again and allow the inmate to additional water." (Id. at 03:05.) Lieutenant Whittaker then turned on the water in the shower for Diaz, who can be seen rinsing his face under the water in the shower. (Id. at 03:25.) Diaz did not complain of any other injuries, and no injuries are visible on Diaz. (Id.)

3. Diaz is Transported to Z-Block

Approximately 45 minutes later, at 4:13 p.m. on August 21, 2011, a use of force team was assembled to transport Diaz to a holding cell on Z-block where he could be placed in four-point restraints. (Id., Ex. 2, ¶¶ 18-19; Attach. 6 Form 583, Report of Incident Packet at 3, 33; Attach. 10 (DVD of Calculated Use of Force, submitted under seal (Doc. 42)). This movement of Diaz was also videotaped by prison staff and that videotape reveals that, prior to the planned use of force, Lieutenant Whittaker provided the following background relating to this incident to the use of force team:

> We are currently in the Special Management Unit, specifically J-Block, Second Floor shower, USP Lewisburg, due to inmate Diaz 99860-555 engaging in disruptive behavior. Inmate Diaz is an in-custody, high-security level inmate. Inmate Diaz has a projected release date of life with no parole. He has a lengthy disciplinary history to include possession of a weapon times three, assault and possession of anything unauthorized. Specifically, at approximately 3:07 p.m., in the J-Block Second Floor, an officer was escorting inmate Diaz from DHO back to his assigned cell. The inmate became disruptive by violently spinning and striking the escorting officer with his shoulder. Inmate Diaz was placed onto the floor where the inmate continued to display disruptive behavior by kicking and refusing several verbal orders. As responding staff arrived, inmate Diaz spit and struck one officer in the face. Leg restraints were applied on the inmate and the inmate was escorted to the J-2 shower where inmate Diaz once again escalated his disruptive behavior by assaulting staff by spitting and striking a second staff member in the facial area. Two, two-second bursts from the MK-9 OC dispenser were utilized by responding staff and the inmate ceased his actions. Due to the inability of staff being able to approach the inmate safely, without being assaulted, no confrontation avoidance will be utilized during this calculated use of force. Also, due to the inmate's assaultive behavior, no medical assessment was conducted during the immediate use of force. However, one will be conducted by health services during this calculated use of force. Warden Bledsoe has been briefed of the situation and has given authorization to assemble a use of force team and place inmate Diaz into four-point restraints due to his disruptive behavior ....

(Id., Ex. 2, Attach. 10 DVD of Calculated Use of Force, submitted under seal (Doc. 42)). In addition, a paramedic, EMT Potter, provided the use of force team the following medical briefing prior to this planned use of force: "I checked the medical records. The inmate is cleared for gas if needed. Also, during the initial incident, the inmate was taken to the shower. I turned the shower on but the inmate didn't even

attempt to be decontaminated. The inmate refused to stick his face and head under the water saying he doesn't need it." (Id.)

The use of force team then removed Diaz from the shower and searched him. (Id., Ex. 2, ¶19; Attach. 6 Form 583, Report of Incident Packet at 3, 33; Attach. 10 (DVD of Calculated Use of Force, submitted under seal (Doc. 42)). The videotape of this inmate movement shows that the use of force team placed Diaz in restraints, and transported him, by stretcher and a gurney, to Z-Block where he was placed in restraints, changed into dry appropriate attire, covered with a blanket, and checked by EMT Potter. (Id.) Diaz was placed face-down in these restraints on the advice of EMT Potter because Diaz had previously attempted to spit on staff. (Id., Ex. 2; Attach. 6 Form 583, Report of Incident Packet at 33; Attach. 10 DVD of Calculated Use of Force, submitted under seal (Doc. 42)).

While Diaz complained that his restraints were tight, EMT Potter conducted a medical assessment of Diaz and noted no signs of trauma, good pulses, and no other complaints. (Id.) No injuries to Diaz can be observed on the video, and the officers involved in this movement are seen acting with great restraint. At no time is Diaz struck, or harmed in any way by staff. Following the placement of Diaz in four-point restraints, the use of force team conducted a videotaped debriefing in which EMT Potter provided the following medical update on Diaz: "No signs of trauma actually

noted on the inmate during this trip out placing him into restraints. I advised the Lieutenant and the Captain prior to this inmate going into restraints to be placed face down in restraints due to the fact that he is highly assaultive, i.e., spitting on every staff member that comes within range so that's the reason why he is placed face-down. If he starts to accommodate and his attitude changes we can move him to face up later." (Id.)

4. Diaz Remains in Restraints for 44 Hours

For the next approximately 44 hours, from 4:00 p.m. on August 22, 2011, until 12:00 p.m. on August 24, 2011, Diaz remained confined in restraints. In restraining Diaz briefly in this fashion, the defendants were guided by Bureau of Prisons' policies, policies which authorize staff "to apply physical restraints necessary to gain control of an inmate who appears to be dangerous because the inmate: (a) Assaults another individual; (b) Destroys government property; (c) Attempts suicide; (d) Inflicts injury upon self; or (e) Becomes violent or displays signs of imminent violence." See 28 C.F.R. § 552.20. These policies are directly related to staff and inmate safety and provide that for disruptive inmates "[r]estraints should remain on the inmate until self-control is regained." 28 C.F.R. § 552.22(f). This policy is also designed to ensure that inmate do not suffer unnecessary discomfort while restrained and provides that "[r]estraint equipment or devices (e.g. handcuffs) may not be used

... [i]n a manner that causes unnecessary physical pain or extreme discomfort." 28 C.F.R. § 552.22(h)(3). The policy further provides that "[i]n general, when applying restraints, staff will use sound correctional judgment to ensure unnecessary pressure is not applied to the inmate." Id.§ 6(h)(3).

This Bureau of Prisons policy also directs that steps must be taken to ensure inmate safety and well-being while held in restraints. Thus, the policy directs that, for inmates in four-point restraints, "[s]taff shall check the inmate at least every 15 minutes, both to ensure that the restraints are not hampering circulation and for the general welfare of the inmate ...." 28 C.F.R. § 542.24(d). Fifteen-minute scheduled checks are also required for inmates placed in ambulatory restraints.[2] Id. at 11, § 9 ("The policies and procedures described in Sections 10 and 13 of this Program Statement will be followed for inmates placed in ...(ambulatory restraints)."

Supervisory staff are also charged with the responsibility to monitor the use of restraints. In this regard, prison policy directs, in part, that "[a] review of the inmate's placement in four-point restraints shall be made by a Lieutenant every two hours to determine if the use of restraints has had the required calming effect and so that the inmate may be released from these restraints (completely or to lesser restraints) as

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[2]"Ambulatory restraints are defined as approved soft and hard restraint equipment which allow the inmate to eat, drink, and take care of human basic needs without staff intervention." (Id., Ex. 2, Attach. 5 at 11, § 9.)

soon as possible." 28 C.F.R. § 542.24(e). Two-hour scheduled lieutenant checks are also required for inmates placed in ambulatory restraints. (Id. at 11, § 9)

Further, the use of these restraints must be overseen by medical staff. In fact, this policy directs that, "[w]hen the inmate is placed in four-point restraints, qualified health personnel shall initially assess the inmate to ensure appropriate breathing and response (physical or verbal) and shall also ensure that the restraints have not restricted or impaired the inmate's circulation." 28 C.F.R. § 542.24(f). According to BOP policy, "[w]hen inmates are so restrained, qualified health personnel ordinarily are to visit the inmate at least twice during each eight hour shift." 28 C.F.R. § 542.24(f). Moreover, the "[u]se of four-point restraints beyond eight hours requires the supervision of qualified health personnel. Mental health and qualified health personnel may be asked for advice regarding the appropriate time for removal of the restraints." 28 C.F.R. § 542.24(f). Medical and mental health checks are also required for inmates placed in ambulatory restraints.

In Diaz's case, these prison policies were closely followed in monitoring the plaintiff's health and safety while he remained confined in restraints. Thus, prison records reveal that fifteen-minute restraint checks were completed in accordance with policy from 4:30 p.m. on August 22, 2011, until 12:00 p.m. on August 24, 2011. (Id., Ex. 2 ¶ 22; Attach. 6 at 14-20.) None of the correctional officers named as defendants

in this lawsuit conducted these fifteen-minute checks. (Id.; Attach. 6 at 14-20.) Furthermore, in Diaz's case, prison records confirm that two-hour lieutenant checks were completed in accordance with policy from 4:30 p.m. on August 22, 2011, until 12:00 p.m. on August 24, 2011. (Id., Ex. 2 ¶ 23; Attach. 6 at 21-26.)

During the first 24 hours of these checks and examinations, Diaz continued to display a truculent, belligerent attitude Telling staff: "I hit that bitch on the range, this ain't nothin" (id. at 21); "I can do this shit all year" (id.); "F*** you mother f***ers (id. at 22); "F*** you and your staff" (id.); "I am fine leave me the f*** alone" (id.); "Yea I tried to buck on your staff, he lied on me so f*** him" (id. at 23); "Yes I was trying to hurt your staff, I went crazy on him" (id.); "I am ready to get crazy, you do not lie to me and get away with it" (id.); "F*** you" (id.); and "Leave me alone bitch" (id. at 24).

Lieutenant Whitaker also participated in these 2-hour checks of Diaz's condition, checking Diaz's restraints on August 22, 2011, at 6:00 p.m., 8:00 p.m., and 10:00 p.m. (Id. at 21.) Diaz maintained a poor and defiant attitude during each of Lieutenant Whittaker's restraint checks on August 22, 2011. (Id.) Lieutenant Whitaker later checked Diaz's restraints on August 23, 2011, at 4:00 p.m., and Diaz continued to maintain a poor attitude. (Id. at 24.) However, by August 23, 2011, at 6:00 p.m., when Lieutenant Whittaker connected another examination of Diaz's

restraints Diaz displayed "a less aggressive demeanor." (Id.) Accordingly, Diaz was removed from the four-point restraints and downgraded to ambulatory restraints. (Id.) Diaz remained upset about being in ambulatory restraints, however, stating, "This is bullshit. Take me out," (id. at 24) and continued to display a poor attitude when he was checked by Lieutenant Whittaker on August 23, 2011, at 10:00 p.m. (Id. at 24.)

Diaz also received on-going medical care and attention during this brief period of restraint. That care began when Diaz was transported to disciplinary segregation on August 22, 2011. Paramedic Potter was present when the restraints were initially placed on Diaz and he medically assessed the plaintiff. (Id., Ex. 2; Attach. 6 (Form 583, Report of Incident Packet) at 33; Attach. 10 (DVD of Calculated Use of Force, submitted under seal (Doc. 42)). At that time Potter concluded that "No signs of trauma actually noted on the inmate during this trip out placing him into restraints." (Id.)

Diaz was then routinely checked by medical and psychology staff pursuant to policy throughout his 44 hour confinement in restraints. (Id., Ex. 1 ¶ 8; Ex. 2, Attach. 6 at 27-29, 30-31.) Diaz's restraints were also checked routinely by medical staff to ensure proper fitting. (Id., Ex. 1 ¶ 8; Attach. 1 Medical Record Excerpt at 252-281; Ex. 3 ¶ 20.) These medical examinations noted no significant medical complications, and documented that Diaz's minor injuries were largely self-inflicted, with medical

staff making the following during various times of the restraint checks on Diaz: "ankle restraints do not compromise lower extremity circulation," "patient offered no medical complaints," "no signs of trauma or dehydration," "hands swollen secondary to I/M [inmate] refusing to keep restraints at the wrist," "I/M refused to let staff move restraints to the wrists," "refused check, no obvious signs of trauma or dehydration," "verbalized no medical complaints," "No signs of trauma or dehydration noted," "Good distal pulses in all Extrem," "I/M drank 6 oz of H2o. Refused urinal," "no apparent distress," "I/M's hands swollen secondary to I/M pulling on the restraints at the wrist. Refused H2O and the urinal," and "ankle restraints do not compromise lower extremity circulation." (Id., Ex. 1 ¶ 8; Attach. 1 (Medical Record Excerpt) at 252-281.)

During the medical restraint checks, staff observed that Diaz was injuring himself by pulling at the restraints and Diaz was instructed to keep the restraints at the wrists and to stop pulling at them. (Id., Ex. 1 ¶ 9; Attach. 1 at 252-281; Ex. 3 ¶ 20.) Diaz was also informed by medical staff of the importance of increasing his water intake, (Id., Ex. 1 ¶ 9; Attach. 1 at 270, 275), but refused water during each medical check with the exception of August 23, 2011, at 4:00 p.m., when he drank six (6) ounces of water. (Id., Ex. 1 ¶ 10; Attach. 1 at 269, 272; Ex. 2 ¶ 20; Attach. 6 at 27-29, 32; Ex. 3 ¶ 17.)

For his part, defendant Potter conducted medical restraint checks on Diaz on August 23, 2011, at 12:01 a.m., 4:00 p.m., 6:00 p.m., and 8:00 p.m., and on August 24, 2011, at 12:01 a.m. (Id., Ex. 2, Attach. 6 at 27-29.) Potter noted Diaz's overall assessment as "fine" on each occasion, and no injuries were observed during any of Potter's medical restraint checks of Diaz. (Id.) Potter's medical notes, however, revealed continued truculence on Diaz's part with Diaz refusing to let EMT Potter check his restraints during the August 23, 2011, 8:00 p.m. check and the August 24, 2011, 12:01 a.m. check. (Id. at 28-29.)

These medical records also reveal that Diaz's personal needs were addressed throughout this brief period in restraints. Diaz was also offered bagged lunches during each meal. (Id., Ex. 3 ¶¶ 16-17.) Furthermore under prison policy "[a]t every two-hour review, the inmate will be afforded the opportunity to use the toilet, unless the inmate is continuing to actively resist or becomes violent while being released from the restraints for this purpose." 28 C.F.R. § 542.24(e). In Diaz's case, records reveal that he was offered use of the toilet during each two-hour check. (Id., ¶ 11; Ex. 2 ¶ 21; Attach. 6 at 21-29.)

On August 23, 2011, at 1:00 p.m., a 24-hour restraint review was conducted for Diaz in accordance with Bureau of Prisons policy. (Id., Ex. 2, Attach. 6 at 5-7.) This 24-hour restraint review revealed that, according to numerous fifteen-minute checks,

Diaz had shown "no indications to cooperate with staff or engage in positive communication." (Id. at 6.) The 24-hour restraint review further disclosed that, according to two-hour checks, Diaz was "not displaying a desire to have restraints removed, and is ignoring staff efforts to encourage him to program," and documented that Diaz "continued with his disruptive behavior" and telling a lieutenant, 'Yeah, I tried to hurt your staff. I went crazy on him." (Id.) It was also noted that Diaz was "continuing his disrespectful and uncooperative actions" and was "displaying a poor attitude." (Id.) However, the 24-hour restraint review found no indications of medical distress for Diaz and noted that "restraint checks were conducted with no signs of circulation impairment." (Id. at 7.) As a result of the fifteen-minute check log, the lieutenant two-hour check log, medical staff log, and the psychology service check logs, a recommendation to keep Diaz in restraints was made by an acting warden to Defendant Regional Director J.L. Norwood. (Id. at 5-7.)

Diaz's behavior remained "poor," "defiant," and "agitated," until August 23, 2014, at 6:00 p.m., when he displayed a "less aggressive behavior." (Id., Ex. 2, Attach. 6 at 21-24.) On August 23, 2014, at 6:00 p.m., Diaz was removed from four-point restraints and was downgraded to ambulatory restraints. (Id., Ex. 1 ¶ 6; Ex. 2, Attach. 6 at 24; Ex. 3 ¶ 10.) Diaz continued to display a "poor" and "argumentative" behavior until 8:00 a.m. on August 24, 2011, when he began to calm down. (Id. at

24-26.) By 12:00 p.m. on August 24, 2011, some 44 hours of the restraints were initially applied, Diaz seemed to fully regain self-control, at which time the restraints were removed. (Id., Ex. 1 ¶ 7, Attach. 1 at 252; Ex. 2, Attach. 6 at 26; Ex. 3 ¶ 11.)

5. Diaz Receives Follow-up Medical Treatment

In the weeks following this episode Diaz received prompt follow-up care when he periodically complained of injuries suffered during this incident. In each instance, that follow-up care failed to confirm Diaz's claimed injuries. Thus, on September 15, 2011, Diaz complained to medical staff of swelling of his right thumb, claiming it was due to him being in restraints back in August. (Id. ¶ 13; Attach. 1 at 250-251.) An x-ray was ordered to rule out a fracture. (Id.) On September 19, 2011, an x-ray was completed with negative findings. (Id. ¶ 14; Attach. 1 at 336.) On November 29, 2011, Diaz was seen by a nonparty physician assistant for complaints of pain in his right thumb and in his lateral and medial right wrist. (Id. ¶ 16; Attach. 1 at 229-231.) X-rays were ordered. (Id. ¶ 16; Attach. 1 at 229.) On December 5, 2011, the results of the x-ray on Diaz's right hand were returned as negative. (Id. ¶ 17; Attach. 1 at 329.) On June 20, 2012, Diaz was transferred to USP Allenwood, and his care and custody at Lewisburg drew to a close. (Id. ¶ 18.)

It is against this factual background, a factual background largely viewed in the light depicted by the videotape, see Scott v. Harris, 550 U.S. 372, 380-81 (2007), that we now assess the defendants' summary judgment motion.

II. Discussion

A. Rule 56–The Legal Standard

The defendants have moved for judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, which provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. Rule 56(a). Through summary adjudication a court is empowered to dispose of those claims that do not present a "genuine dispute as to any material fact," Fed. R. Civ. P. 56(a), and for which a trial would be "an empty and unnecessary formality." Univac Dental Co. v. Dentsply Int'l, Inc., No. 07-0493, 2010 U.S. Dist. LEXIS 31615, at *4 (M.D. Pa. Mar. 31, 2010). The substantive law identifies which facts are material, and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute about a material fact is genuine only if there is a sufficient evidentiary basis that would allow a reasonable fact finder to return a verdict for the non-moving party. Id. at 248-49.

The moving party has the initial burden of identifying evidence that it believes shows an absence of a genuine issue of material fact. Conoshenti v. Pub. Serv. Elec. & Gas Co., 364 F.3d 135, 145-46 (3d Cir. 2004). Once the moving party has shown that there is an absence of evidence to support the nonmoving party's claims, "the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings, legal memoranda, or oral argument." Berckeley Inv. Group. Ltd. v. Colkitt, 455 F.3d 195, 201 (3d Cir. 2006); accord Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). If the nonmoving party "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 at trial," summary judgment is appropriate. Celotex, 477 U.S. at 322. Summary judgment is also appropriate if the non-moving party provides merely colorable, conclusory, or speculative evidence. Anderson, 477 U.S. at 249. There must be more than a scintilla of evidence supporting the nonmoving party and more than some metaphysical doubt as to the material facts. Id. at 252; see also, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In making this determination, the court must "consider all evidence in the light most favorable to the party opposing the motion." A.W. v. Jersey City Pub. Schs., 486 F.3d 791, 794 (3d Cir. 2007).

Moreover, a party who seeks to resist a summary judgment motion by citing to disputed material issues of fact must show by competent evidence that such factual disputes exist. Moreover, a party who seeks to resist a summary judgment motion by citing to disputed material issues of fact must show by competent evidence that such factual disputes exist. Further, "only evidence which is admissible at trial may be considered in ruling on a motion for summary judgment." Countryside Oil Co., Inc. v. Travelers Ins. Co., 928 F.Supp. 474, 482 (D.N.J.1995). This rule applies with particular force to parties who attempt to rely upon hearsay statements to establish material issues of fact which would preclude summary judgment. With respect to such claims, it is well-settled that: "In this circuit, hearsay statements can be considered on a motion for summary judgment [only] if they are capable of admission at trial." Shelton v. University of Medicine & Dentistry of N.J., 223 F.3d 220, 223, n.2 (3d Cir. 2000), citing Stelwagon Mfg. v. Tarmac Roofing Sys., Inc., 63 F.3d 1267, 1275, n.17 (3d Cir. 1995). In this regard it has been aptly observed that:

> It is clear that when considering a motion for summary judgement, a court may only consider evidence which is admissible at trial, and that a party can not rely on hearsay evidence when opposing a motion for summary judgment. See Buttice v. G.D. Searle & Co., 938 F.Supp. 561 (E.D.Mo.1996). Additionally, a party must respond to a hearsay objection by demonstrating that the material would be admissible at trial under an exception to hearsay rule, or that the material is not hearsay. See Burgess v. Allstate Ins. Co., 334 F.Supp.2d 1351 (N.D.Ga.2003). The mere possibility that a hearsay statement will be admissible at trial, does not permit its consideration at the summary judgment stage.

Henry v. Colonial Baking Co. of Dothan, 952 F.Supp. 744 (M.D.Ala.1996). Bouriez v. Carnegie Mellon Univ., No. 02-2104, 2005 WL 2106582,* 9 (W.D.Pa. Aug. 26, 2005). Thus, a party may not rely upon inadmissible hearsay assertions to avoid summary judgment. Therefore, where a party simply presents inadmissible hearsay declarations in an attempt to establish a disputed material issue of fact, courts have typically rebuffed these efforts and held instead that summary judgment is appropriate. See, e.g., Synthes v. Globus Medical, Inc., No. 04-1235, 2007 WL 2043184 (E.D.Pa. July 12, 2007); Bouriez v. Carnegie Mellon Univ., No. 02-2104, 2005 WL 2106582,* 9 (W.D.Pa. Aug. 26, 2005); Carpet Group Int'l v. Oriental Rug Importers Assoc., Inc., 256 F.Supp.2d 249 (D.N.J. 2003).

Similarly, it is well-settled that: "[o]ne cannot create an issue of fact merely by . . . denying averments . . . without producing any supporting evidence of the denials." Thimons v. PNC Bank, NA, 254 F.App'x 896, 899 (3d Cir. 2007)(citation omitted). Thus, "[w]hen a motion for summary judgment is made and supported . . ., an adverse party may not rest upon mere allegations or denial." Fireman's Ins. Co. Of Newark NJ v. DuFresne, 676 F.2d 965, 968 (3d Cir. 1982), see Sunshine Books, Ltd. v. Temple University, 697 F.2d 90, 96 (3d Cir. 1982)." [A] mere denial is insufficient to raise a disputed issue of fact, and an unsubstantiated doubt as to the veracity of the opposing affidavit is also not sufficient." Lockhart v. Hoenstine, 411

F.2d 455, 458 (3d Cir. 1969). Furthermore, "a party resisting a [Rule 56] motion cannot expect to rely merely upon bare assertions, conclusory allegations or suspicions." Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985)(citing Ness v. Marshall, 660 F.2d 517, 519 (3d Cir. 1981)).

Further, a party who seeks to resist a summary judgment motion must also comply with Local Rule 56.1, which specifically directs a party opposing a motion for summary judgment to submit a "statement of the material facts, responding to the numbered paragraphs set forth in the statement required [to be filed by the movant], as to which it is contended that there exists a genuine issue to be tried"; if the nonmovant fails to do so, "[a]ll material facts set forth in the statement required to be served by the moving party will be deemed to be admitted." L.R. 56.1. Under the Local Rules, the failure to follow these instructions and appropriately challenge the material facts tendered by the defendant means that those facts must be deemed, since:

> A failure to file a counter-statement equates to an admission of all the facts set forth in the movant's statement. This Local Rule serves several purposes. First, it is designed to aid the Court in its determination of whether any genuine issue of material fact is in dispute. Second, it affixes the burden imposed by Federal Rule of Civil Procedure 56(e), as recognized in Celotex Corp. v. Catrett, on the nonmoving party 'to go beyond the pleadings and by her own affidavits, or by the depositions, answers to interrogatories, and admissions on file, *designated specific facts showing that there is a genuine issue for trial.*' 477 U.S. 317, 324 (1986) (internal quotations omitted) (emphasis added).

Doe v. Winter, No. 04-CV-2170, 2007 U.S. Dist. LEXIS 25517, *2 n.2 (M.D. Pa. Apr. 5, 2007) (parallel citations omitted; court's emphasis). A party cannot evade these litigation responsibilities in this regard simply by citing the fact that he is a *pro se* litigant. These rules apply with equal force to all parties. See Sanders v. Beard, No. 09-CV-1384, 2010 U.S. Dist. LEXIS, *15 (M.D. Pa. July 20, 2010) (*pro se* parties "are not excused from complying with court orders and the local rules of court"); Thomas v. Norris, No. 02-CV-01854, 2006 U.S. Dist. LEXIS 64347, *11 (M.D. Pa. Sept. 8, 2006) (*pro se* parties must follow the Federal Rules of Civil Procedure).

Finally, in a case such as this, where critical events at issue have been captured on videotape, the Court is obliged to consider that videotaped evidence in determining whether there is any genuine dispute as to material facts. In fact, it is clear that, in this setting, we must view the facts in the light depicted by the videotape. See Scott v. Harris, 550 U.S. 372, 380-81 (2007) (reversing court of appeals ruling with respect to application of qualified immunity in an excessive force case, noting that the court of appeals erred by accepting a version of facts that was shown to be a "visible fiction" and admonishing that the lower court "should have viewed the facts in the light depicted by the videotape."). This principle applies with particular force to inmate excessive force claims which entail videotaped encounters

with staff. Where a videotape refutes an inmate's claims that excessive force was used against him, and the video evidence does not permit an inference that prison officials acted maliciously and sadistically, summary judgment is entirely appropriate. Tindell v. Beard, 351 F.App'x 591 (3d Cir. 2009).

B. Constitutional Standards Governing Eighth Amendment Claims

In conducting this legal analysis we must also be mindful of the constitutional standards which govern Eighth Amendment claims, since Diaz advance two distinct Eighth Amendment claims against the remaining defendants in his complaint alleging that at various times that prison staff violated his Eighth Amendment rights by: (1) using excessive force against him; and by (2) displaying deliberate indifference to his medical needs while he was briefly restrained.

Each of these Eighth Amendment claims is, in turn, judged against settled legal principles, principles which set precise and exacting standards for asserting a constitutional infraction. All of the various claims, however, are governed by the same overarching and animating constitutional benchmarks. As the United States Court of Appeals for the Third Circuit has observed:

> The Eighth Amendment protects against infliction of "cruel and unusual punishment." However, "not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny." Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). "After incarceration, only the unnecessary and

> wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment." Id. (citation and internal quotations omitted). "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." Id.
>
> Resolution of an Eighth Amendment claim therefore "mandate[s] an inquiry into a prison official's state of mind." Wilson v. Seiter, 501 U.S. 294, 299, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). Two considerations define that inquiry. We must first determine if the deprivation was sufficiently serious to fall within the Eighth Amendment's zone of protections. Id. at 298, 111 S.Ct. 2321. If not, our inquiry is at an end. However, if the deprivation is sufficiently serious, we must determine if the officials acted with a sufficiently culpable state of mind. Id. In other words, we must determine if they were motivated by a desire to inflict unnecessary and wanton pain. "What is necessary to establish an 'unnecessary and wanton infliction of pain ...' varies according to the nature of the alleged constitutional violation." Hudson v. McMillian, 503 U.S. 1, 5, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992).

Fuentes v. Wagner, 206 F.3d 335, 344-45 (3d Cir. 2000).

With these tenets in mind we turn to a consideration of the individual Eighth Amendment claims advanced here by Diaz.

1. Excessive Force Claims

At the outset, Eighth Amendment excessive force claims entail a showing of some subjective intent to injure. In an excessive force case, where "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[v. Albers, 475

U.S. 312 (1986)]: 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, 6-7 (1992).

Thus, the keystone to analysis of an Eighth Amendment excessive force claim often involves issues of motivation–whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. Hudson v. McMillia, 503 U.S. 1, 6-7 (1992). However, the issue of whether excessive force was used is one which, in proper circumstances, can be determined as a matter of law. In such cases, summary judgment is appropriate when "it appears that the evidence, viewed in the light most favorable to the plaintiff, will [not] support a reliable inference of wantonness in the infliction of pain." Brooks v. Kyler, 204 F.3d 102, 106 (3d Cir. 2000) (quoting Whitley, 475 U.S. at 322). There are several factors that a court examines in determining whether a correctional officer has used excessive force in violation of the Eighth Amendment, including: "(1) 'the need for the application of force'; (2) 'the relationship between the need and the amount of force that was used'; (3) 'the extent of injury inflicted'; (4) 'the extent of the threat to the safety of staff and inmates, as reasonably perceived by responsible officials on the basis of the facts known to them'; and (5) 'any efforts made to temper the severity of a forceful response.'" Id. at 106.

When considering such claims, the reasonableness of a particular use of force is often dependent upon factual context and must be "judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Graham v. Connor, 490 U.S. 386, 396-7 (1989). Moreover, in the context of prison excessive force claims, in determining "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, 6-7 (1992), "even if we concede [that an inmate] has established at most that prison officials over-reacted to the disturbance that he caused. . . , any such over-reaction would still fall short of supporting a finding that prison officials acted 'maliciously and sadistically to cause harm.'" Fuentes v. Wagner, 206 F.3d 335, 346 (3d Cir. 2000).

Moreover, in assessing such claims in a case where an encounter is captured on videotape we are mindful of the fact that when "videotape refutes [an inmate's] assertion that defendant[s] used excessive force," or when the "video shows that [an inmate] did not suffer any physical distress, and a medical report indicates that he had no visible swelling or injuries," we should conclude "viewing the evidence in the light most favorable to [the inmate that], no reasonable finder of fact could view the video of the incident and determine that [defendants] acted maliciously and sadistically," and may enter summary judgment on an excessive force claim. Tindell

v. Beard, 351 F. App'x 591, 596 (3d Cir. 2009). Further, in the specific factual context of excessive force claims based upon allegations relating to a prisoner's handcuffing, courts have acknowledged that, in certain instances, government officials are entitled to qualified immunity as a matter of law. Gilles v. Davis, 427 F.3d. 197, 207 (3d Cir. 2005). With respect to these particular excessive force claims, the test for qualified immunity can be simply stated: "In these cases, summary judgment for an officer who claims qualified immunity is appropriate where, 'after resolving all factual disputes in favor of the plaintiff,[ ] the officer's use of force was objectively reasonable under the circumstances.' " Id.

2. Deliberate Indifference Claims

Beyond his claims that he was subjected to excessive force by staff, Diaz also seems to allege that prison officials left him in physical restraints for an excessive period of time. Inmate Eighth Amendment claims involving the "prolonged use of restraints... [are] more properly analyzed under the [Eighth Amendment's] deliberate indifference standard. See A.M. ex. rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 587 (3d. Cir.2004) (deliberate indifference standard appropriate where it did not appear that officials 'were required to make split-second decisions to maintain or restore order through the use of excessive physical force'); Howard v. Bureau of Prisons, Civ. A. No. 3:05–CV–1372, 2008 WL 318387, at *13 (M.D.Pa.

Feb.4, 2008) ('Outside the context of a prison disturbance, which is characterized as "a single instance of prisoner unrest where there is a need to act quickly," Eighth Amendment claims are judged by the deliberate indifference standard.'); Trammell v. Keane, 338 F.3d 155, 162–63 (2d Cir.2003) (applying deliberate indifference standard in determining whether deprivation orders, depriving prisoner of certain amenities, were reasonably calculated to restore prison discipline and security)." Womack v. Smith, 1:06-CV-2348, 2011 WL 819558 (M.D. Pa. Mar. 2, 2011). Under this Eighth Amendment analytical paradigm, courts recognize that prison officials may not be deliberately indifferent to harms or injuries suffered by inmates. In Beers-Capitol v. Whetzel, 256 F.3d 120 (3d Cir. 2001), the Court of Appeals explained the basic requirements of a deliberate indifference claim brought against a prison official under the Eighth Amendment in the following terms:

> An Eighth Amendment claim against a prison official must meet two requirements: (1) "the deprivation alleged must be, objectively, sufficiently serious;" and (2) the "prison official must have a sufficiently culpable state of mind."

Id. at 125 (quoting Farmer v. Brennan, 511 U.S. 825, 834 (1994)). Furthermore, in cases involving prison safety or prison conditions, the relevant state of mind "is one of 'deliberate indifference' to inmate health or safety." Id. This deliberate indifference standard "is a subjective standard under Farmer – the prison official-defendant must actually have known or been aware of the excessive risk to inmate

safety." Id. Thus, " '[d]eliberate indifference can be shown when a prison official *knows of and disregards* an excessive risk to inmate health or safety' Hamilton v. Leavy, 117 F.3d 742, 747 (3d Cir. 1997) (quotation marks omitted)(emphasis added). Accordingly, "to survive summary judgment on an Eighth Amendment claim asserted under 42 U.S.C. § 1983, a plaintiff is required to produce sufficient evidence of (1) a substantial risk of serious harm; (2) the defendants' deliberate indifference to that risk; and (3) causation." Davis v. Williams, 354 F. App'x 603, 605-606 (3d Cir. 2009).

As explained in Beers-Capitol, in Eighth Amendment cases based on allegations of deliberate indifference on the part of prison officials or other supervisory defendants, the Supreme Court has "rejected an objective test for deliberate indifference; instead it looked to what the prison official actually knew rather than what a reasonable official in his position would have known." Id. at 131. Specifically, the Supreme Court "held that 'a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety.'" Id. (quoting Farmer, 511 U.S. at 837). This requirement of actual knowledge on the part of supervisory officials "means that 'the official must both be aware of facts from which the inference could be drawn that a substantial risk of

serious harm exists, and he must also draw the inference.'" Id. (quoting Farmer, 511 U.S. at 837).

These principles apply with particular force to Eighth Amendment claims premised upon inadequate medical care. In the medical context, a constitutional violation under the Eighth Amendment occurs only when officials are deliberately indifferent to an inmate's serious medical needs. Estelle v. Gamble, 429 U.S. 97, 105 (1976). To establish a violation of his constitutional right to adequate medical care in accordance with this standard, an inmate is required to point to evidence that demonstrates (1) a serious medical need, and (2) acts or omissions by prison officials that indicate deliberate indifference to that need. Rouse v. Plantier, 182 F.3d 192, 197 (3d Cir. 1999).

Deliberate indifference to a serious medical need involves the "unnecessary and wanton infliction of pain." Estelle, 429 U.S. at 104. Such indifference may be evidenced by an intentional refusal to provide care, delayed provision of medical treatment for non-medical reasons, denial of prescribed medical treatment, denial of reasonable requests for treatment that results in suffering or risk of injury, Durmer v. O'Carroll, 991 F.2d 64, 68 (3d Cir. 1993), or "persistent conduct in the face of resultant pain and risk of permanent injury," White v. Napoleon, 897 F.2d 103, 109 (3d Cir. 1990).

However, it is also clear that the mere misdiagnosis of a condition or medical need, or negligent treatment provided for a condition, is not actionable as an Eighth Amendment claim because medical malpractice is not a constitutional violation. Estelle, 429 U.S. at 106. "Indeed, prison authorities are accorded considerable latitude in the diagnosis and treatment of prisoners." Durmer, 991 F.2d at 67 (citations omitted). Furthermore, in a prison medical context, deliberate indifference is generally not found when some significant level of medical care has been offered to the inmate. Clark v. Doe, 2000 U.S. Dist. LEXIS 14999, 2000 WL 1522855, at *2 (E.D.Pa. Oct. 13, 2000)("courts have consistently rejected Eighth Amendment claims where an inmate has received some level of medical care"). Thus, such complaints fail as constitutional claims under § 1983 since "the exercise by a doctor of his professional judgment is never deliberate indifference. See e.g. Brown v. Borough of Chambersburg, 903 F.2d 274, 278 (3d Cir.1990) ('[A]s long as a physician exercises professional judgment his behavior will not violate a prisoner's constitutional rights.')". Gindraw v. Dendler, 967 F.Supp. 833, 836 (E.D. Pa. 1997). Applying this exacting standard, courts have frequently rejected Eighth Amendment claims that are based upon the level of professional care that an inmate received; see, e.g., Ham v. Greer, 269 F. App'x 149 (3d Cir. 2008); James v. Dep't of Corrections, 230 F. App'x 195 (3d. Cir. 2007); Gillespie v. Hogan, 182 F. App'x 103 (3d Cir.

2006); Bronson v. White, No. 05-2150, 2007 WL 3033865 (M.D. Pa. Oct. 15, 2007); Gindraw v. Dendler, 967 F.Supp. 833 (E.D. Pa. 1997), particularly where it can be shown that significant medical services were provided to the inmate but the prisoner is dissatisfied with the outcome of these services. James, 230 F. App'x. at 197-98(citations omitted). In short, in the context of the Eighth Amendment, any attempt to second-guess the propriety or adequacy of a particular course of treatment is disavowed by courts since such determinations remain a question of sound professional judgment. Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3d Cir. 1979) (quoting Bowring v. Godwin, 551 F.2d 44, 48 (4th Cir. 1977)).

There is a necessary corollary to this principle, limiting the reach of the Eighth Amendment in a prison medical setting. In a case such as this, where the inmate received on-going medical care, it is also well-established that non-medical correctional staff may not be "considered deliberately indifferent simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor." Durmer v. O'Carroll, 991 F.2d 64, 69 (3d. Cir. 1993). The rationale for this rule has been aptly explained by the United States Court of Appeals for the Third Circuit in the following terms:

> If a prisoner is under the care of medical experts . . . , a non-medical prison official will generally be justified in believing that the prisoner is in capable hands. This follows naturally from the division of labor within a prison. Inmate health and safety is promoted by dividing

> responsibility for various aspects of inmate life among guards, administrators, physicians, and so on. Holding a non-medical prison official liable in a case where a prisoner was under a physician's care would strain this division of labor. Moreover, under such a regime, non-medical officials could even have a perverse incentive *not* to delegate treatment responsibility to the very physicians most likely to be able to help prisoners, for fear of vicarious liability. Accordingly, we conclude that, absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official . . . will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference.

Spruill v. Gillis, 372 F.3d 218, 236 (3d. Cir. 2004).

Applying this standard, courts have repeatedly held that, absent some reason to believe that prison medical staff are mistreating prisoners, non-medical corrections staff who refer inmate medical complaints to physicians may not be held personally liable for medically-based Eighth Amendment claims. See, e.g., Johnson v. Doughty, 433 F.3d 1001 (7th Cir. 2006); Spruill v. Gillis, supra; Durmer v. O'Connor, supra; Garvey v. Martinez, No. 08-2217, 2010 WL 569852 (M.D. Pa. Feb. 11, 2010); Hodge v. United States. No. 06-1622, 2007 WL 2571938 (M.D. Pa. Aug. 31, 2007).

Furthermore, it is important to note that these constitutional protections are only triggered by excessive and prolonged confinement in restraints. Thus, courts have recognized that brief periods in restraints typically will not give rise to an Eighth Amendment deliberate indifference claim. See, e.g., Key v. McKinney, 176 F.3d 1083, 1086 (8th Cir.1999) (no Eighth Amendment violation where prisoner

handcuffed and shackled for 24 hours); Hunter v. Bledsoe, No. 10-CV-927, 2010 WL 3154963 (M.D.Pa. Aug.9, 2010) (ambulatory restraints used for 24 hours); Holley v. Johnson, No. 08-CV-629, 2010 WL 2640328 (W.D.Va. June 30, 2010) (ambulatory restraints used for 48 hours); Zimmerman v. Schaeffer, 654 F.Supp.2d 226, 232 (M.D.Pa. 2009)(19 hours or more in restraint chair); Moore v. Miller, No. 7:08CV00614, 2009 WL 113258 (W.D.Va. Jan.15, 2009) (26 hours); Keyes v. O'Brien, No. Civ. A. 7:06CV00437, 2006 WL 2125912 (W.D.Va. July 27, 2006) (no Eighth Amendment violation where prisoner placed in ambulatory restraints for 30 hours); Garraway v. United States, No. 04–CV–01049, 2006 WL 3054606, at *8 (D.Colo. July 24, 2006) (50 hours in ambulatory restraints); Saleh v. Ray, No. Civ. A. 02–3214, 2003 WL 23484639, at * 6 (D.Kan.2003) (24 hours in ambulatory restraints, no Eighth Amendment violation).

C. The Defendants Are Entitled to Summary Judgment

1. Diaz's Excessive Force Claims Fail

Guided by these benchmarks, we conclude that the defendants are entitled to summary judgment in this case on Diaz's Eighth Amendment excessive force claims since the immutable witnesses, the videotape evidence, plainly "refutes [Diaz]'s assertion that defendant[s] used excessive force," and we conclude "viewing the evidence in the light most favorable to [the inmate that], no reasonable finder of fact

could view the video of the incident and determine that [defendants] acted maliciously and sadistically." Tindell v. Beard, 351 F. App'x 591, 596 (3d Cir. 2009).

Indeed, there is nothing in the videotape depiction of these events on August 22, 2011, that could even remotely be characterized as in any way malicious or sadistic, the essential prerequisite to an Eighth Amendment violation. Quite the contrary, the video is striking and notable for the restraint exhibited by correctional staff, and for the care and attention which they give to Diaz. Observing the videotape it is simply impossible to say that any " reasonable finder of fact could view the video of the incident and determine that [defendants] acted maliciously and sadistically." Tindell v. Beard, 351 F. App'x 591, 596 (3d Cir. 2009). Instead, the only malicious act depicted in this video is Diaz's unprovoked, and violent assault on staff. Given the provocation of this assault, staff's response, as depicted on the videotapes, was measured, careful and appropriate. Given these immutable facts, summary judgment on Diaz's excessive force claim is entirely appropriate.

Finally, Diaz cannot base an excessive force claim on the fact that staff were compelled to apply two, two-second bursts of OC spray on the plaintiff to quell his disruptive behavior. This claim fails since "courts have consistently found that an isolated discrete use of pepper spray does not state an Eighth Amendment claim. See, e,.g., Luciano v. Lindberg, 1:CV–09–01362, 2012 WL 1642466 (M.D.Pa. May 10,

2012) Picozzi v. Haulderman, Civ. No. 4:08–CV–0926, 2011 WL 830331, at *5 (M.D.Pa. Mar.3, 2011) (plaintiff failed to establish an excessive use of force claim where record establishes that the force used, pepper spray, was necessary and the minimum amount needed to get the plaintiff to an area where she could be medically treated); Soto v. Dickey, 744 F.2d 1260, 1270 (4th Cir.1984) ("The use of mace, tear gas or other chemical agent of the like nature when reasonably necessary ... to subdue recalcitrant prisoners does not constitute cruel and inhuman punishment," even if the inmate is handcuffed)." Ball v. Beckley, 1:CV-11-1829, 2014 WL 47732 (M.D. Pa. Jan. 6, 2014). Therefore, summary judgment is appropriate here as to this claim as well.

2. Diaz's Deliberate Indifference Claims Are Also Unavailing

Nor can Diaz sustain a deliberate indifference claim based upon the fact that he was held in restraints for approximately forty-four hours after this angry, violent outburst. At the outset, the duration of this period of restraint–44 hours–simply does not implicate grave Eighth Amendment concerns. See, e.g., Key v. McKinney, 176 F.3d 1083, 1086 (8th Cir.1999) (no Eighth Amendment violation where prisoner handcuffed and shackled for 24 hours); Hunter v. Bledsoe, No. 10-CV-927, 2010 WL 3154963 (M.D.Pa. Aug.9, 2010) (ambulatory restraints used for 24 hours); Holley v. Johnson, No. 08-CCV-629, 2010 WL 2640328 (W.D.Va. June 30, 2010) (ambulatory

restraints used for 48 hours); Zimmerman v. Schaeffer, 654 F.Supp.2d 226, 232 (M.D.Pa. 2009)(19 hours or more in restraint chair); Moore v. Miller, No. 7:08CV00614, 2009 WL 113258 (W.D.Va. Jan.15, 2009) (26 hours); Keyes v. O'Brien, No. Civ. A. 7:06CV00437, 2006 WL 2125912 (W.D.Va. July 27, 2006) (no Eighth Amendment violation where prisoner placed in ambulatory restraints for 30 hours); Garraway v. United States, No. 04–CV–01049, 2006 WL 3054606, at *8 (D.Colo. July 24, 2006) (50 hours in ambulatory restraints); Saleh v. Ray, No. Civ. A. 02–3214, 2003 WL 23484639, at * 6 (D.Kan.2003) (24 hours in ambulatory restraints, no Eighth Amendment violation).

Moreover, the use of these restraints was both reasonable and necessary in light of Diaz's violent behavior and agitated demeanor on August 22-24, 2011. Indeed, it is undisputed that staff used the restraints in a measured fashion, and in a manner which was directly linked to the penological goals of ensuring institutional safety, as illustrated by the fact that the restraints were removed shortly after Diaz gained control of his emotions, and was able to present in a rational and non-threatening manner. Furthermore, the meticulous care and attention which Diaz received from prison medical and correctional staff while in restraints belies any claim of deliberate indifference to his physical needs. In sum, the use of restraints here was in direct response to Diaz's violent behavior. Those restraints were employed for a limited

period of time, and were removed promptly once Diaz exhibited behavior which indicated that he no longer presented a threat to himself, fellow inmates, or staff. On these facts, a deliberate indifference claim fails, and the defendants are entitled to summary judgment in their favor.

Further, we note that the use of these restraints was closely monitored by medical personnel throughout August 22-24, 2011, and those medical staff observed no medical reason to remove these restraints. Since it is axiomatic that correctional staff cannot be held deliberately indifferent when the defer to medical personnel on medical matters, Durmer v. O'Carroll, 991 F.2d 64, 69 (3d. Cir. 1993), this fact also compels summary judgment in favor of these remaining correctional defendants on this deliberate indifference claim.

3. Diaz's Supervisory Liability Eighth Amendment Claims Fail

The legal bankruptcy of Diaz's Eighth Amendment claims with respect to actual staff who oversaw his custody and treatment on August 22-24, 2011, also compels the dismissal of any Eighth Amendment claims against the supervisory defendants named in this case, Regional Administrator Norwood and Warden Bledsoe. At the outset, it is clear that a claim of a constitutional deprivation cannot be premised merely on the fact that the named defendants were prison supervisors when the incidents set forth in the complaint occurred. Quite the contrary, to state a

constitutional tort claim the plaintiff must show that the supervisory defendants actively deprived him of a right secured by the Constitution. Morse v. Lower Merion School Dist., 132 F.3d 902 (3d Cir. 1997); see also Maine v.Thiboutot, 448 U.S. 1 (1980). Constitutional tort liability is personal in nature and can only follow personal involvement in the alleged wrongful conduct shown through specific allegations of personal direction or of actual knowledge and acquiescence in the challenged practice. Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d Cir. 1997).

In particular, with respect to prison supervisors it is well-established that:

> "A[n individual government] defendant in a civil rights action must have personal involvement in the alleged wrongdoing; liability cannot be predicated solely on the operation of *respondeat superior*. Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir.1988).

Evancho v. Fisher, 423 F.3d 347, 353 (3d Cir. 2005).

As the Supreme Court has observed:

> Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. . . . See Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (finding no vicarious liability for a municipal "person" under 42 U.S.C. § 1983); see also Dunlop v. Munroe, 7 Cranch 242, 269, 3 L.Ed. 329 (1812) (a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); Robertson v. Sichel, 127 U.S. 507, 515-516, 8 S.Ct. 1286, 3 L.Ed. 203 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty,

> of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability is inapplicable to Bivens and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

Ashcroft v. Iqbal, 556 U.S. 662, 676 (2009).

Applying these benchmarks, courts have frequently held that, in the absence of evidence of supervisory knowledge and approval of subordinates' actions, a plaintiff may not maintain an action against supervisors based upon the misdeeds of their subordinates. O'Connell v. Sobina, No. 06-238, 2008 WL 144199, * 21 (W.D. Pa. Jan. 11, 2008); Neuburger v. Thompson, 305 F. Supp. 2d 521, 535 (W. D. Pa. 2004). Rather, "[p]ersonal involvement must be alleged *and is only present where the supervisor directed the actions of supervisees or actually knew of the actions and acquiesced in them.* See Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir.1988)." Jetter v. Beard, 183 F. App'x 178, 181 (3d Cir. 2006)(emphasis added).

Furthermore, where, as here, there is no evidence of an actual violation of the plaintiff's constitutional rights by subordinate employees, an agency supervisor simply cannot be liable. See City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986); see also Grazier v. City of Philadelphia, 328 F.3d 120, 124 n.5 (3d Cir. 2003) ("[O]nce the jury found that [the individual officers] did not cause any constitutional harm, it no longer makes sense to ask whether the City caused them to do it.") (citing

City of Canton v. Harris, 489 U.S. 378, 390 (1989)). This corollary has significance here, since Diaz has failed to come forward with sufficient evidence to substantiate his claims of constitutional violations by any of the individual defendants named in this case who were directly involved in his care and custody on August 22-24, 2011.

These principles are directly applicable here, and are fatal to any Eighth Amendment supervisory liability claim since Diaz has shown neither an underlying constitutional violation nor extraordinary facts which would give rise to supervisory culpability for any such infraction. Therefore, these Eighth Amendment supervisory liability claims also fail.

4. Qualified Immunity, Eighth Amendment Claims

But even if Diaz had stated a colorable constitutional claim relating to his brief period of restraint, the defendants would still be entitled to qualified immunity from these claims for damages. In order to establish a civil rights claim Diaz must show the deprivation of a right secured by the United States Constitution or the laws of the United States. Satisfying these elements alone, however, does not guarantee that McCullon is entitled to recover damages from these public officials. Government officials performing "discretionary functions," are insulated from suit if their conduct did not violate a "clearly established statutory or constitutional right[] of which a reasonable person would have known." Wilson v. Layne, 526 U.S. 603, 609 (1999);

see also Pearson v. Callahan, 555 U.S. 223 (2009). This doctrine, known as qualified immunity, provides officials performing discretionary functions not only defense to liability, but also "immunity from suit." Crouse v. S. Lebanon Twp., 668 F. Supp. 2d 664, 671 (M.D. Pa. 2009) (Conner, J.) (citations omitted). Qualified immunity

> balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact."

Pearson, 555 U.S. at 231.

Determinations regarding qualified immunity, and its application in a given case, require a court to undertake two distinct inquiries. First, the court must evaluate whether the defendant violated a constitutional right. Saucier v. Katz, 533 U.S. 194, 201-02 (2001), abrogated in part by Pearson, 555 U.S. 223; Curley v. Klem, 499 F.3d 199, 206 (3d Cir. 2007); Williams v. Bitner, 455 F.3d 186, 190 (3d Cir. 2006). If the defendant did not actually commit a constitutional violation, then the court must find in the defendant's favor. Saucier, 533 U.S. at 201. If the defendant is found to have committed a constitutional violation, the court must undertake a second, related inquiry to assess whether the constitutional right in question was "clearly established" at the time the defendant acted. Pearson, 555 U.S. at 232; Saucier, 533 U.S. at 201-

02. The Supreme Court has instructed that a right is clearly established for purposes of qualified immunity if a reasonable state actor under the circumstances would understand that his conduct violates that right. Williams, 455 F.3d at 191 (citing Saucier, 533 U.S. at 202).

In order to find that a right is clearly established, "the right allegedly violated must be defined at the appropriate level of specificity." Wilson, 526 U.S. at 615. The Supreme Court has explained that, at least in some cases, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." Hope v. Pelzer, 536 U.S. 730, 741 (2002) (quoting United States v. Lanier, 520 U.S. 259, 271 (1997) (internal quotation marks and citation omitted)). In some cases, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Wilson, 455 F.3d at 191 (quoting Hope, 536 U.S. at 741).

The court is no longer required to conduct these two inquiries sequentially, Pearson, 555 U.S. at 239-40, and it may forego difficult constitutional issues and award qualified immunity to a defendant if it is apparent that the defendant did not violate rights that were clearly established at the time the defendant acted. Id. Where a court elects to address the alleged constitutional violations, however, the court's

analysis of the merits for purposes of summary judgment merges with analysis of the deprivation of federal rights for purposes of qualified immunity. Gruenke v. Seip, 225 F.3d 290, 299-300 (3d Cir. 2000); Crouse, 668 F. Supp. 2d at 671; see also Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996) ("[C]rucial to the resolution of [the] assertion of qualified immunity is a careful examination of the record . . . to establish . . . a detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff).") Because qualified immunity entails a consideration of whether the law was clearly established at the time of a defendant's conduct, this defense, which focuses on the state of the law, presents a question of law for the court, and one which can often be resolved on summary judgment. See Montanez v. Thompson, 603 F.3d 243 (3d Cir. 2010).

In the specific factual context of excessive force claims based upon allegations relating to a prisoner's handcuffing, courts have acknowledged that, in certain instances, summary judgment is entirely appropriate. Gilles v. Davis, 427 F.3d. 197, 207 (3d Cir. 2005). With respect to these particular excessive force claims, courts agree that: "In these cases, summary judgment for an officer who claims qualified immunity is appropriate where, 'after resolving all factual disputes in favor of the plaintiff,[ ] the officer's use of force was objectively reasonable under the circumstances.' " Gilles v. Davis, 427 F.3d 197, 207 (3d Cir. 2005).

Applying these benchmarks, and viewing the actions of correctional staff in the light depicted by the videotapes, we find that the defendants are entitled to qualified immunity in this case. Nothing in the measured and restrained conduct depicted in the videos could have alerted these officials that their actions violated "clearly established statutory or constitutional right[] of which a reasonable person would have known." Wilson v. Layne, 526 U.S. 603, 609 (1999). Moreover, the duration of Diaz's detention in restraints fell well within a 44 hour time frame which had previously been recognized as a discrete period of time which did not give rise to constitutional concerns. See, e.g., Key v. McKinney, 176 F.3d 1083, 1086 (8th Cir.1999) (no Eighth Amendment violation where prisoner handcuffed and shackled for 24 hours); Hunter v. Bledsoe, No. 10-CV-927, 2010 WL 3154963 (M.D.Pa. Aug.9, 2010) (ambulatory restraints used for 24 hours); Holley v. Johnson, No. 08-CCV-629, 2010 WL 2640328 (W.D.Va. June 30, 2010) (ambulatory restraints used for 48 hours); Zimmerman v. Schaeffer, 654 F.Supp.2d 226, 232 (M.D.Pa. 2009)(19 hours or more in restraint chair). Therefore, these officials should be entitled to qualified immunity from damages in this case.

5. Diaz's Due Process and Denial of Access to the Courts Claims Fail

Finally, Diaz has advanced due process and denial of access to the courts claims against the supervisory defendants, asserting that their mishandling of prison

grievances which he submitted after-the-fact relating to this episode violated his First Amendment right of access to the courts, and constituted a free-standing due process claim.

Neither of these contentions can survive scrutiny. Turning first to Diaz's access to courts claim:

> [W]e have previously explained to Diaz that since 1977 the United States Supreme Court has recognized that inmates have a constitutional right of access to the courts. Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977). As the Supreme Court initially observed, this right of access to the courts is satisfied when corrections officials facilitate "meaningful" access for those incarcerated, either through legal materials or the assistance of those trained in the law. Id. at 827 ("[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.")
>
> Two decades later, in 1996, the Supreme Court provided further definition and guidance regarding the scope and nature of this right of access to the courts in Lewis v. Carey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). In Lewis, the court eschewed efforts to define this right in abstract, or theoretical terms, but rather cautioned courts to focus on concrete outcomes when assessing such claims. As the court observed:
>
> > Because Bounds did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's ... legal assistance program is subpar in some theoretical sense.... Insofar as the right vindicated by Bounds is concerned, "meaningful access to the courts is the touchstone," id., at 823, 97 S.Ct., at 1495 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that

> the alleged shortcomings in the ... legal assistance program hindered his efforts to pursue a legal claim. Although Bounds itself made no mention of an actual-injury requirement, it can hardly be thought to have eliminated that constitutional prerequisite. And actual injury is apparent on the face of almost all the opinions in the35–year line of access-to-courts cases on which Bounds relied, see id., at 821–825, 97 S.Ct., at 1494–1497. Moreover, the assumption of an actual-injury requirement seems to us implicit in the opinion's statement that "we encourage local experimentation" in various methods of assuring access to the courts. Id., at 832, 97 S.Ct., at 1500.

Lewis v. Casey, 518 U.S. 343, 351–52, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

Thus, following Lewis, courts have consistently recognized two guiding principles which animate access-to-court claims by prisoners. First, such claims require some proof of an actual, concrete injury, in the form of direct prejudice to the plaintiff in the pursuit of some legal claim. See, e.g., Oliver v. Fauver, 118 F.3d 175 (3d Cir.1997); Demeter v. Buskirk, No. 03–1005, 2003 WL 22139780 (E.D.Pa. Aug.27, 2003); Castro v. Chesney, No. 97–4983, 1998 WL 150961 (E.D.Pa. March 31, 1998). A necessary corollary to this principle is that, in order to prevail on an access to the courts claim, a "plaintiff must identify a 'nonfrivolous,' 'arguable' underlying claim." Christopher v. Harbury, 536 U.S. 403, 415, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002). Thus:

> Where prisoners assert that defendants' actions have inhibited their opportunity to present a past legal claim, they must show (1) that they suffered an "actual injury"-that they lost a chance to pursue a "nonfrivolous" or "arguable" underlying claim; and (2) that they have no other "remedy that may be awarded as recompense" for the lost claim other than in the present denial of access suit. See Christopher v. Harbury, 536 U.S. 403, 415, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002). To that end, prisoners must satisfy certain pleading requirements: The complaint must describe the underlying arguable claim well enough to show that it is "more than mere hope," and it must describe the "lost remedy." See id. at

416–17, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413.

Monroe v. Beard, 536 F.3d 198, 205–06 (3d Cir.2008).

Diaz v. Fed. Bureau of Prisons, 1:12-CV- 1810, 2013 WL 1246793, *3-*4 (M.D. Pa. Mar. 7, 2013) report and recommendation adopted, 1:12-CV-1810, 2013 WL 1246771 (M.D. Pa. Mar. 26, 2013), appeal dismissed (June 7, 2013).

Applying these familiar principles to Diaz's latest lawsuit, we conclude that any denial of access to the courts claims arising out of what Diaz perceives to have been inadequate processing of his grievances relating to this August 22-24, 2011, restraint episode fails as a matter of law given that we have found that those underlying claims are legally bankrupt. Since Diaz must describe his "underlying arguable claim well enough to show that it is 'more than mere hope,' and it must describe the 'lost remedy.' See id. at 416–17, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413," Monroe v. Beard, 536 F.3d 198, 205–06 (3d Cir.2008), our conclusion that this underlying claim fails completely as a matter of law is also fatal to any claim that Diaz's constitutional rights were violated when he was somehow allegedly deterred in pursuing what was ultimately a claim that was devoid of merit.

Likewise, the processing of these prison grievances cannot support a freestanding due process claim. An inmate cannot sustain a constitutional tort claim against prison supervisors based solely upon assertions that officials failed to adequately investigate or respond to his past grievances. Inmates do not have a

constitutional right to a prison grievance system. Speight v. Sims, 283 F. App'x 880 (3d Cir. 2008) (citing Massey v. Helman, 259 F.3d 641, 647 (7th Cir. 2001) ("[T]he existence of a prison grievance procedure confers no liberty interest on a prisoner."). Consequently, dissatisfaction with a response to an inmate's grievances does not support a constitutional claim. See also Alexander v. Gennarini, 144 F. App'x 924 (3d Cir. 2005) (involvement in post-incident grievance process not a basis for § 1983 liability); Pryor-El v. Kelly, 892 F. Supp. 261, 275 (D. D.C. 1995) (because prison grievance procedure does not confer any substantive constitutional rights upon prison inmates, the prison officials' failure to comply with grievance procedure is not actionable). See also Cole v. Sobina, No. 04-99J, 2007 WL 4460617, at *5 (W.D. Pa. Dec. 19, 2007) ("[M]ere concurrence in a prison administrative appeal process does not implicate a constitutional concern."). As the United States Court of Appeals for the Third Circuit observed when disposing of a similar claim by another inmate:

> Several named defendants, such as the Secretaries of the Department of Corrections or Superintendents, were named only for their supervisory roles in the prison system. The District Court properly dismissed these defendants and any additional defendants who were sued based on their failure to take corrective action when grievances or investigations were referred to them. See Rode v. Dellarciprete, 845 F.2d 1195, 1207 (3d Cir.1988) (defendant in a civil rights action must have personal involvement in the alleged wrongs; liability cannot be predicated solely on the operation of *respondeat superior*); see also Antonelli v. Sheahan, 81 F.3d 1422, 1430 (7th Cir.1996) (state's inmate grievance procedures do not give rise to a liberty interest protected by the Due Process Clause).

Pressley v. Beard, 266 F. App'x 216, 218 (3d Cir. 2008).

Indeed, as to such claims, the United States Court of Appeals for the Third Circuit has held that summary dismissal is appropriate "because there is no apparent obligation for prison officials to investigate prison grievances. See Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 382 (2d Cir.1973)." Paluch v. Sec'y Pennsylvania Dept. Corr., 442 F. App'x 690, 695 (3d Cir. 2011). Therefore, this claim also fails as a matter of law.

D. Diaz's Motion to File an Amended Complaint Should Be Denied

This merits analysis relating to Diaz's complaint, which leads us to conclude that the complaint should be dismissed in its entirety, in turns guides us in addressing the motion to amend this complaint filed by Diaz. (Doc. 56.) In this motion Diaz invites us to allow him to amend his complaint, some 18 months after it was first filed to add individual correctional officers to the excessive force claim which we have found to be utterly lacking in merit.

We should decline this invitation. Rule 15 of the Federal Rules of Civil Procedure governs amendments and supplementation of pleadings. Fed. R. Civ. P., Rule 15. Rule 15(a) authorizes a party to amend his pleading once as a matter of course within 21 days after serving it, or if the pleading is one to which a responsive pleading is required, 21 days after service of the responsive pleading, or 21 days after

service of a dispositive motion under Rule 12, whichever is earlier. Fed. R. Civ. P. 15(a)(1)(A) and (B). "In all other cases, a party may amend its pleading only with the opposing party's written consent, or the court's leave," which courts are to freely give "when justice so requires." Fed. R. Civ. P. 15(a)(2).

Consistent with the plain language of this rule, leave to amend rests in the discretion of the court. That discretion, however, is governed by certain basic principles, principles that are embodied in Rule 15. In this regard, while Rule 15 provides that leave to amend should be freely given when justice so requires, the district court still retains broad discretion to deny a motion to amend, Bjorgung v. Whitetail Resort, LP, 550 F.3d 263 (3d Cir. 2008); Cureton v. National Collegiate Athletic Ass'n., 252 F.3d 267 (3d Cir. 2001), and may deny a request:

> if the plaintiff's delay in seeking to amend is undue, motivated by bad faith, or prejudicial to the opposing party. Adams, 739 F.2d at 864. Delay becomes "undue," and thereby creates grounds for the district court to refuse leave, when it places an unwarranted burden on the court or when the plaintiff has had previous opportunities to amend. Cureton, 252 F.3d at 273 (citing Adams, 739 F.2d at 868; Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir.1993)). Thus, our review of the question of undue delay . . . will "focus on the movant's reasons for not amending sooner," Cureton, 252 F.3d at 273, and we will balance these reasons against the burden of delay on the District Court. Coventry v. U.S. Steel Corp., 856 F.2d 514, 520 (3d Cir.1988).

Bjorgung v. Whitetail Resort, LP, supra, 550 F.3d at 266.

Furthermore, "'[a]mong the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility.' In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir.1997) ('Burlington'); Lorenz v. CSX Corp., 1 F.3d 1406, 1413-14 (3d Cir.1993). 'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted. Burlington, 114 F.3d at 1434." Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000). Moreover, a party seeking to supplement pleadings must act in a diligent fashion. Thus, for example, "[a] District Court has discretion to deny a plaintiff leave to amend where the plaintiff was put on notice as to the deficiencies in his complaint, but chose not to resolve them. Rolo v. City Investing Co. Liquidating Trust, 155 F.3d 644, 654 (3d Cir.1998)." Krantz v. Prudential Investments Fund Management LLC, 305 F.3d 140, 144 (3d Cir. 2002).

Finally, in every instance, the exercise of this discretion must be guided by the animating principle behind Rule 15, which is "to make pleadings a means to achieve an orderly and fair administration of justice." Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 227 (1964). Therefore, in considering a motion to amend we must always "appl[y] Rule 15 . . . in a manner aimed at securing the just, speedy and inexpensive determination of every action." CMR D.N. Corp. v. City Of

Philadelphia, No. 07-1045, 2011 WL 857294, *4 (E.D.Pa. March 11,2011)(Stengel, J.).

Judged against these standards, in this case it is submitted that the proper exercise of the court's discretion, Hassoun v. Cimmino, 126 F.Supp.2d 353, 360-61 (D.N.J.2000), calls for denial of this motion to file an amended complaint. Indeed, a dispassionate assessment of this motion reveals that it runs afoul of virtually all of the factors which guide the exercise of judicial discretion in this field.

At the outset, it is clear that there has been undue delay in the pursuit of these matters by the plaintiff. As we have noted, "Delay becomes 'undue,' and thereby creates grounds for the district court to refuse leave, when it places an unwarranted burden on the court or when the plaintiff has had previous opportunities to amend. Cureton, 252 F.3d at 273 (citing Adams, 739 F.2d at 868; Lorenz v. CSX Corp., 1 F.3d 1406, 1414 (3d Cir.1993)). Thus, our review of the question of undue delay . . . will 'focus on the movant's reasons for not amending sooner,' Cureton, 252 F.3d at 273, and we will balance these reasons against the burden of delay on the District Court. Coventry v. U.S. Steel Corp., 856 F.2d 514, 520 (3d Cir.1988)." Bjorgung v. Whitetail Resort, LP, supra, 550 F.3d at 266.

Here the plaintiff's conduct presents a paradigm of undue delay. The plaintiff has had ample prior opportunities to amend these pleadings over the past 18 months

to add these defendants and chose not to do so. On these facts there is simply no justification for this delay in seeking to expand this lawsuit, and permitting this unwarranted expansion of this litigation could prolong and delay the resolution of this case for all parties in this litigation. Therefore, given these facts, recited by the plaintiff in his complaint and amended complaint, when "our review of the question of undue delay . . . 'focus[es] on the movant's reasons for not amending sooner,' Cureton, 252 F.3d at 273, and we . . . balance these reasons against the burden of delay on the District Court. Coventry v. U.S. Steel Corp., 856 F.2d 514, 520 (3d Cir.1988)," Bjorgung v. Whitetail Resort, LP, supra, 550 F.3d at 266, we find that the movant has not provided good cause for this delay. We further find that the timing of this motion, which was filed 18 months after this litigation commenced and as the parties were litigating a summary judgment motion, is both highly prejudicial to the defendants and places an undue burden on the district court.

There is yet another, more fundamental, reason why this motion to amend should be denied. As to all of the newly named defendants in this proposed amended complaint, it appears that amendment of the complaint would be futile since we have concluded that the conduct of correctional staff, who were confronted by a violent assaultive inmate on August 22, 2011, simply did not violate the Eighth Amendment. It is well-settled that: "'[a]mong the grounds that could justify a denial of leave to

amend are undue delay, . . . , and futility.' In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir.1997) ('Burlington'); Lorenz v. CSX Corp., 1 F.3d 1406, 1413-14 (3d Cir.1993). 'Futility' means that the complaint, as amended, would fail to state a claim upon which relief could be granted. Burlington, 114 F.3d at 1434." Shane v. Fauver, 213 F.3d 113, 115 (3d Cir. 2000). Here, Diaz's amended complaint is futile with respect to these newly named defendants because the videotape evidence of the conduct of these officers, an immutable witness, definitively shows that they did not violate Diaz's rights under the Eighth Amendment. When "videotape refutes [an inmate's] assertion that defendant[s] used excessive force," or when the "video shows that [an inmate] did not suffer any physical distress, and a medical report indicates that he had no visible swelling or injuries," we should conclude "viewing the evidence in the light most favorable to [the inmate that], no reasonable finder of fact could view the video of the incident and determine that [defendants] acted maliciously and sadistically," and may enter summary judgment on an excessive force claim. Tindell v. Beard, 351 F. App'x 591, 596 (3d Cir. 2009). This is precisely the course we recommend in the instant case, and that course necessarily defines Diaz's efforts to add defendants to this legally bankrupt claim as an exercise in futility. Therefore, Diaz's motion to amend should also be denied.

III. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED that the defendants' motion for summary judgment (Doc. 36.) be GRANTED and, in light of this recommended disposition of the defendants' motion, IT IS FURTHER RECOMMENDED that Diaz's motions in opposition to the defendants' motions for summary judgment (Doc. 50.), and motion to amend his complaint (Doc. 56.), should be DENIED.

The parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 22d day of October, 2014.

S/Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.