NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COREY MELLEDGE,
PETITIONER,
VS.
GARY ENGLISH, ET AL.,
RESPONDENT(S)

INDEX TO APPENDICES

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12219
Non-Argument Calendar

D.C. Docket No. 4:15-cv-00577-WS-CAS

COREY MILLEDGE,

Plaintiff-Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY, et al.,

Defendants,

GRAY ENGLISH,
Assistant Warden,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(January 10, 2019)

Before MARCUS, WILSON and HULL, Circuit Judges.

PER CURIAM:

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Corey Milledge, a state prisoner proceeding pro se, appeals following an order granting summary judgment in favor of Assistant Warden Gary English in his § 1983 action alleging that English violated his Eighth Amendment rights by not protecting him after he informed him that his cellmate threatened him and he feared for his life, and then the cellmate attacked and injured him. On appeal, Milledge argues that: (1) the district court erred in granting summary judgment in favor of English because it did not view the evidence in a light most favorable to him and that there was a genuine issue of material fact; and (2) the district court abused its discretion in denying his motion to alter or amend the judgment. After thorough review, we affirm.[1]

We review de novo a district court's grant of summary judgment, viewing all evidence and reasonable factual inferences drawn from it in the light most favorable to the nonmoving party. Crawford v. Carroll, 529 F.3d 961, 964 (11th Cir. 2008). We review the district court's denial of a motion for reconsideration for abuse of discretion. Rodriguez v. City of Doral, 863 F.3d 1343, 1349 (11th Cir. 2017). "A court abuses its discretion if it incorrectly applies the law." Id. We may affirm on any ground supported by the record. LeCroy v. United States, 739 F.3d 1297, 1312 (11th Cir. 2014).

[1] Milledge's complaint also named several other defendants but because he does not challenge on appeal anything pertaining to those defendants, he has abandoned any issue as to those defendants. Wilkerson v. Grinnell Corp., 270 F.3d 1314, 1322 (11th Cir. 2001).

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"Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Crawford, 529 F.3d at 964. The party moving for summary judgment bears the initial burden of establishing the absence of a dispute over a material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party, who may not rest upon mere allegations, but must set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e); Eberhardt v. Waters, 901 F.2d 1578, 1580 (11th Cir. 1990).

Federal Rule of Civil Procedure 59(e) allows a party to file a motion to alter or amend a judgment within 28 days after the entry of judgment. "The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest error of law or fact." Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007) (quotations and alterations omitted). "A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." Id. (quotations and alterations omitted).

The Supreme Court has held that "the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825, 832 (1994) (quotation

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omitted). The Eighth Amendment imposes duties on prison officials to provide humane conditions of confinement, which includes the responsibility to "take reasonable measures to guarantee the safety of the inmates." Id. (quotation omitted). This means that "prison officials have a duty [] to protect prisoners from violence at the hands of other prisoners." Id. at 833. This is because "[b]eing violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society." Id. at 834 (quotation omitted). However, not every injury suffered by one prisoner at the hands of another translates into a constitutional violation by prison officials who are responsible for the victim's safety. Id.

The Supreme Court has held that "a prison official violates the Eighth Amendment only when two requirements are met." Id. "First, the deprivation alleged must be, objectively, sufficiently serious" in that "a prison official's act or omission must result in the denial of the minimal civilized measure of life's necessities." Id. (quotations omitted). In a case involving "a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm." Id. Second, the prison official must have acted with deliberate indifference to inmate health or safety. Id. This requires the prison official to "actually (subjectively) know[] that an inmate is facing a substantial risk of serious harm, yet disregard[] that known risk by failing to respond to it in an

(objectively) reasonable manner." Rodriguez v. Sec'y for Dep't of Corr., 508 F.3d 611, 617 (11th Cir. 2007) (footnote omitted). Additionally, the inmate must also "demonstrate a causal connection between the prison official's conduct and the Eighth Amendment violation." Id.

As for the subjective component of an Eighth Amendment claim, the prison 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. (quotation omitted). The Supreme Court has held that this determination "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." Farmer, 511 U.S. at 842. Thus, prison officials can avoid Eighth Amendment liability by showing (1) "that they did not know of the underlying facts indicating a sufficiently substantial danger and that they were therefore unaware of a danger," (2) "that they knew the underlying facts but believed (albeit unsoundly) that the risk to which the facts gave rise was insubstantial or nonexistent," or (3) that they "responded reasonably to the risk, even if the harm ultimately was not averted." Id. at 844 (quotation omitted).

To have subjective knowledge, the plaintiff "must show more than a generalized awareness of risk." Caldwell v. Warden, FCI Talladega, 748 F.3d 1090, 1101-02 (11th Cir. 2014) (quotation omitted). Mere knowledge of a substantial risk of serious harm "is insufficient to show deliberate indifference."

Hale v. Tallapoosa Cnty., 50 F.3d 1579, 1583 (11th Cir. 1995). Thus, a plaintiff must produce evidence that, with knowledge of the substantial risk of serious harm, the government official knowingly or recklessly "disregard[ed] that risk by failing to take reasonable measures to abate it." Id. (quotation omitted).

In Brooks v. Warden, 800 F.3d 1295 (11th Cir. 2015), the plaintiff was attacked by the inmate in the next cell when all of the cell doors simultaneously opened and a violent riot began. Id. at 1298-99. The plaintiff alleged that his attacker had threatened him previously, that he had notified prison officials of the threats, and that the cell doors in his housing unit had opened before. Id. at 1298, 1301. However, he did not allege that he and his attacker had ever been released "at the same time . . . in an unsupervised or chaotic environment" or that "all 32 doors in [his dorm] had ever opened simultaneously, creating the conditions for a prison riot." Id. at 1301. Because "[t]here must be a 'strong likelihood' of injury, 'rather than a mere possibility,' before an official's failure to act can constitute deliberate indifference," a panel of this Court held that Brooks had failed to "plausibly allege a strong likelihood of serious harm" and his deliberate indifference claim failed. Id. (quotation omitted). Notably, the Eighth Circuit has held that "threats between inmates are common and do not, under all circumstances, serve to impute actual knowledge of a substantial risk of harm." Pagels v. Morrison, 335 F.3d 736, 740-41 (8th Cir. 2003) (quotation omitted).

Here, the district court did not err in granting summary judgment in favor of English. The most the record before us reveals is that Milledge may have informed officials of a single threat directed toward him by his cellmate. We've held, in certain circumstances, that an inmate warning a prison official of another inmate's threat can constitute evidence that the official was subjectively aware of the substantial risk of serious harm -- if, for example, other instances of violence had occurred between them. See Caldwell, 748 F.3d at 1101 (holding that summary judgment was improper where the plaintiff inmate presented evidence that he had told prison officials that he feared for his life if he was returned to the same cell and that his cellmate had a violent past, had started a severe fire in the cell while the plaintiff was there, and had used the plaintiff's personal items as tinder for the fire); Rodriquez, 508 F.3d at 618-19 (holding that summary judgment was not proper where the inmate had been returned to the general population after being segregated from the general prison population for security purposes, had informed the assistant warden twice that his life had been threatened multiple times by his former gang who were prisoners in the prison's general population, and had requested by means of a written and verbal communication to be placed in protective custody).

But this case is nothing like those. Milledge did not present any evidence beyond informing officials of only a single threat, offering no other risk factors

present for a prison official to draw the inference that he faced a substantial risk of harm. Indeed, as the record reveals, the two cellmates had been housed together in the same cell without incident for approximately one month prior to the altercation giving rise to the lawsuit, and Milledge had not been previously segregated for security reasons. There is no allegation or indication that the two inmates were involved with rival gangs or had any issues related to race, debt, romance, or anything else that might render one an excessive danger to the other. Nor is there any evidence that Milledge knew or reported that his cellmate had any other type of weapon. Because "[t]here must be a 'strong likelihood' of injury, 'rather than a mere possibility,' before an official's failure to act can constitute deliberate indifference," Brooks, 800 F.3d at 1301, we cannot say that a single threat, on the circumstances of this case, is sufficient by itself to constitute a substantial risk of serious harm.

Finally, the district court did not abuse its discretion in denying Milledge's motion for reconsideration. The motion for reconsideration essentially asked the district court to review its prior ruling because Milledge disagreed with its treatment of facts and legal conclusions. However, the motion could not be used to relitigate old matters, raise arguments, or present evidence that could have been raised prior to the entry of judgment. Arthur, 500 F.3d at 1343. In any event, for

similar reasons that summary judgment was appropriate, the district court did not misapply the law. Accordingly, we affirm.[2]

AFFIRMED.

[2] There is also no merit to Milledge's claim that the district court abused its discretion in dismissing an unserved defendant, Warden Scott Middlebrooks.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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March 27, 2019

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-12219-JJ
Case Style: Corey Milledge v. Gray English
District Court Docket No: 4:15-cv-00577-WS-CAS

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Tiffany A. Tucker, JJ/lt
Phone #: (404)335-6193

REHG-1 Ltr Order Petition Rehearing

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12219-JJ

COREY MILLEDGE,

Plaintiff - Appellant,

versus

FLORIDA DEPARTMENT OF CORRECTIONS SECRETARY, et al.,

Defendants,

GRAY ENGLISH,
Assistant Warden,

Defendant - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, WILSON and HULL, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

COREY MILLEDGE,

Plaintiff,

v. 4:15cv577–WS/CAS

JULIE JONES, et al.,

Defendants.

ORDER DIRECTING ENTRY OF JUDGMENT

Before the court is the magistrate judge's second report and recommendation (doc. 102) docketed February 13, 2018. The magistrate judge recommends that Defendant Gary English's motion for summary judgment be denied as to Count IV but granted as to all other claims. Plaintiff Corey Milledge and Defendant English have both filed objections (docs. 103 & 104) to the magistrate judge's report and recommendation. Contrary to the magistrate judge, this court has determined that English's motion for summary judgment should be granted in its entirety.

I.

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The record reveals that, on March 31, 2015, while Milledge was an inmate at Blackwater River Correctional Facility, Milledge's cell mate, Jamal Waitley, attacked Milledge with a razor blade, causing lacerations on Milledge's cheek that required multiple stitches. At the time of this incident, Milledge and Waitley had been housed in the same cell for approximately one month. After an investigation, both Milledge and Waitley were charged and found guilty of aggravated battery. Both were sentenced to, and served, a period of time in confinement.

According to Milledge, on March 3, several weeks *before* the razor blade incident, Waitley threatened Milledge for no apparent reason. Milledge maintains that he put an informal grievance in the locked grievance box that same day,[1] asking for a cell change or placement in protective custody. Blackwater's records contain no reference to such a grievance, and Defendant English has attested that he never saw such a grievance.[2] Milledge does not assert that he filed a formal

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[1] As set forth in Chapter 33–103 of the Florida Administrative Code, Florida's prison grievance procedure consists of three steps. An inmate must first file "[a]n informal grievance . . . to the designated staff by placing the informal grievance in a locked grievance box." Fla. Admin. Code § 33–103.005(1)(a). The second step requires the inmate to file a formal grievance with the warden. *Id.* § 33–103.006(1)(a). If the inmate is unsuccessful at this point, he or she may appeal to the Office of the Secretary. *Id.* § 33–103.007(1).

[2] Informal grievances are handled by the staff member responsible for the particular area of the problem at the institution; formal grievances are handled by the warden's office. *Pavao v. Sims*, 679 F. App'x 819, 824 (11th Cir. 2017).

grievance with the warden's office.

At the time in question, English was the Assistant Warden of Operations at the Blackwater facility. Milledge claims that, on March 9, six days after he submitted his informal grievance, he approached English and told English that he had been threatened and wanted to be placed in protective custody or moved out of Waitley's cell. English denies that Milledge spoke to him about any such thing. English was not present when the razor-blade incident occurred and did not participate in its resolution in any way.

Indeed, in his capacity as Assistant Warden, English was not responsible for the day-to-day supervision of inmates. Instead, English was responsible for assisting the Warden in the overall administration of the facility. Day-to-day supervision of inmates at Blackwater was accomplished by 200 or so correctional officers, who reported to approximately twenty (20) sergeants, who reported to one or more of approximately six lieutenants, who reported to one or more of approximately five (5) captains, who reported to the Chief of Security, who reported to Assistant Warden English. English knew that the Blackwater facility employed "effective procedures [including a specialized hotline that allowed inmates to report safety concerns] and personnel designed and trained to identify and address all manner of threats to inmate safety." From its opening in October

2010, until the time of Milledge's altercation with Waitley, Blackwater had just two instances of inmate-on-inmate violence involving razors. Thus, on March 31, 2015, English did not believe—and had no reason to believe—that the presence of disposable razors in the prison exposed inmates to an unreasonable threat of violence.

II.

English objects to the magistrate judge's report and recommendation regarding Count IV, wherein Milledge alleged that English failed to protect him against a threat of harm by Waitley. In essence, English contends that:

> Regardless of whether Mr. English was aware of Plaintiff's alleged grievance, or whether Plaintiff personally/verbally lodged such a complaint with the Assistant Warden, Plaintiff's claim fails because he cannot show that Assistant Warden English, a supervisor not charged with day-to-day supervision of inmates, knew that the facility's existing policies, training procedures, and staff were/would be ineffective at protecting inmates from such alleged threats of harm.

Doc. 103, p. 7. Case law supports English's contention.

In *Thompson v. Willis*, No. 3:14cv246/MCR/EMT, 2016 WL 5339362 (N.D. Fla. June 9, 2016), the court explained that prison supervisors "are generally entitled to rely on their subordinates to respond appropriately to situations absent clear or widespread evidence to the contrary." *Id.* at *2. Consequently, "[f]iling a grievance with a supervisory person does not alone make the supervisor liable for

the allegedly violative conduct brought to light by the grievance." *Id.*; *see also see also Noel v. Hart*, No. CV 513–007, 2013 WL 819736, at *1 (S.D. Ga. Feb. 5, 2013) (noting that "[a]n allegation that a grievance was filed with supervisory personnel is an insufficient basis for liability in a section 1983 cause of action"); *Haverty v. Crosby,* No. 1:05-cv-00133, 2006 WL 839157, at *5 (N.D. Fla. Mar. 28, 2006) (reasoning that a supervisor is not liable for conduct brought to his or her attention by a grievance form, unless the knowledge imputed to the supervisor and the refusal to prevent the harm rises to the level of a custom, policy, or practice).

Here, Milledge has presented no evidence of widespread abuse at Blackwater facility and no evidence that Blackwater's policies and personnel were ineffective in handling abuse or threats of abuse by inmates. Thus, even assuming, as Milledge contends, that English saw Milledge's informal grievance and heard Milledge say that he had been threatened by his cellmate Waitley, Milledge was entitled to rely on the policies and personnel in place at Blackwater to protect Milledge from the undefined threat of harm posed by Waitley.

III.

Milledge objects to the magistrate judge's report and recommendation regarding Counts II and III, both of which assert claims under the Eighth Amendment. The magistrate judge recommended that English's motion for

summary judgment be granted as to these two counts, in large part because Milledge failed to produce evidence to show that Blackwater had either an official policy or custom allowing inmates to inflict harm on each other or a history of widespread abuse sufficient to put English on notice that a substantial risk of serious harm to inmates existed. In his objections, Milledge suggests that the magistrate judge erred by failing to consider that Milledge verbally told English that Waitley had threatened him. Assuming, for purposes of English's motion for summary judgment, that such verbal communication in fact occurred, the court nonetheless finds that the magistrate judge correctly concluded that English is entitled to summary judgment as to Counts II and III.

IV.

The magistrate judge recommends that Milledge's motion (doc. 74) to direct service against Defendants Scott Middlebrooks, Jared Johnson, and Kerline Joseph be denied and that those defendants be dismissed from the action. Milledge objects to that recommendation.

Middlebrooks was Warden at Blackwater at all relevant times and is named in Counts II, III, and IV of Milledge's complaint. Johnson was Chief of Security at all relevant times and is named in Count II only. Milledge has not alleged that either Middlebrooks or Johnson was present during the alleged altercation on

March 31, 2015, and he has not alleged that either Middlebrooks or Johnson had any personal involvement in the events of that day. The magistrate judge correctly concluded that there is no need to serve Middlebrooks and Johnson because they would be entitled to summary judgment on those claims for the same reasons that English is entitled to judgment.

Unlike English, Middlebrooks, and Johnson, each of whom was a supervisory official at Blackwater, Joseph was a corrections officer who witnessed the altercation between Milledge and Waitley from the control room. In Count I of his second amended complaint, the only count naming Joseph as a defendant, Milledge alleges that Joseph watched the altercation but did not intervene when she had the opportunity to do so. Based on his review of the record evidence, including a video of the events in question, the magistrate judge determined that Joseph acted promptly to summon and dispatch the response team, which itself arrived promptly on the scene, thus dooming Milledge's failure-to-intervene claim.

This court agrees that service on Joseph would be futile.

V.

For the reasons explained above, it is ORDERED:

1. The magistrate judge's report and recommendation (doc. 102) is ADOPTED IN PART and REJECTED in part for the reasons set forth in this

order.

2. Gary English's motion (doc. 77) for summary judgment is GRANTED.

3. Corey Milledge's motion (doc. 74) to direct service of process on Jared Johnson, Kerline Joseph, and Scott Middlebrooks is DENIED. Johnson, Joseph, and Middlebrooks are DISMISSED from this action.

4. The clerk shall enter judgment stating: "Summary judgment is entered in Gary English's favor."

5. The clerk shall close the case.

DONE AND ORDERED this 26th day of March, 2018.

s/ William Stafford
WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

COREY MILLEDGE,

Plaintiff,

vs. **Case No. 4:15cv577-WS/CAS**

GARY ENGLISH, JARED JOHNSON, KERLINE JOSEPH, and SCOTT MIDDLEBROOKS,

Defendants.
_____/

SECOND REPORT AND RECOMMENDATION[1]

Defendant English filed a motion for summary judgment, ECF No. 77, supported by numerous exhibits. One of the exhibits, a DVD, has been separately filed. ECF Nos. 92-93. Plaintiff, who is pro se in this case, was advised of his obligation to file a response in opposition to the motion pursuant to Rule 56 and Local Rule 56.1. ECF No. 80. Plaintiff was given additional time in which to do so, *see* ECF No. 90, and his response was timely filed.

[1] The first Report and Recommendation, ECF No. 56, addressed a motion to dismiss filed by Defendant Jones. Defendant Jones was subsequently dismissed. ECF No. 63.

Two additional issues are addressed before considering the summary judgment materials. First, Plaintiff's motion to direct service of process on the unserved Defendants is pending. ECF No. 74. Ruling was deferred on that motion based on Defendant English's request and opposition. ECF Nos. 75, 80. Defendant requested that ruling be deferred until a ruling was entered on the summary judgment motion, suggesting that the summary judgment motion might be "dispositive of all claims herein - including those against the unserved defendants." ECF No. 75 at 1. Over Plaintiff's objection, and because prejudice to Plaintiff was not apparent, ruling has been deferred. ECF No. 80.

Secondly, Plaintiff filed a motion to compel the Defendant to "provide the original surveillance video." ECF No. 96. Plaintiff said that after viewing the video Defendant submitted as evidence, he realized that it must have been altered from the original recording. *Id.* at 2. Plaintiff points to findings made in the "basis for decision" in his disciplinary hearing as support for his argument that the video included more footage at the beginning, and he argued that the omitted part "was relevant to Plaintiff's claims." *Id.* at 3; *see also* ECF No. 96 at 12, 15.

At the time of Plaintiff's motion, he had already filed his response to the motion for summary judgment. ECF No. 97. There was no indication that Plaintiff had been prejudiced by the DVD or any alleged alteration to it. Thus, because the relevancy of the omitted video was not fully explained, an Order was entered advising him that the issue of the DVD could be reviewed again[2] if his claim survived summary judgment. ECF No. 98.

Standard of Review

"The 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. 56(a). Thus, summary judgment is proper "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). The "party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those

[2] The Initial Scheduling Order advised that a "second, brief discovery period" could be provided for those claims which will proceed to trial. ECF No. 40 at 2-3.

portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp., 477 U.S. at 323, 106 S. Ct. at 2553. The non-moving party must then show[3] though affidavits or other Rule 56 evidence "that there is a genuine issue for trial" or "an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S. Ct. at 2554; Beard v. Banks, 548 U.S. 521, 529, 126 S. Ct. 2572, 2578, 165 L. Ed. 2d 697 (2006).

An issue of fact is "material" if it could affect the outcome of the case. Hickson Corp. v. Northern Crossarm Co., Inc., 357 F.3d 1256, 1259 (11th Cir. 2004) (citations omitted). Additionally, "the issue of fact must be 'genuine'" and the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)(other citations omitted). "The mere

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[3] "Rule 56(e) ... requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Owen v. Wille, 117 F.3d 1235, 1236 (11th Cir. 1997), *cert. denied* 522 U.S. 1126 (1998) (quoting Celotex, 477 U.S. at 324, 106 S. Ct. at 2553) (quoting Fed. R. Civ. P. 56(c), (e))). A nonmoving party need not produce evidence in a form that would be admissible as Rule 56(e) permits opposing summary judgment by any of the evidentiary materials listed in Rule 56(c). Owen, 117 F.3d at 1236; Celotex, 477 U.S. at 324, 106 S. Ct. at 2553.

existence of some factual dispute will not defeat summary judgment unless that factual dispute is material to an issue affecting the outcome of the case." McCormick v. City of Fort Lauderdale, 333 F.3d 1234, 1243 (11th Cir. 2003) (quoting Chapman v. Al Transp., 229 F.3d 1012, 1023 (11th Cir. 2000)).

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Anderson, 477 U.S. at 249, 106 S. Ct. at 2511 (noting that a "scintilla of evidence" is not enough to refer the matter to a jury). The Court must decide "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Hickson Corp., 357 F.3d at 1260 (quoting Anderson v. Liberty Lobby, 477 U.S. 242, 252, 106 S. Ct. 2505, 2505, 91 L. Ed. 2d 202 (1986)). All "justifiable inferences" must be resolved in the light most favorable to the nonmoving party, Beard, 548 U.S. at 529, 126 S. Ct.

at 2578 (noting the distinction "between evidence of disputed facts and disputed matters of professional judgment."),[4] but "only if there is a 'genuine' dispute as to those facts." Scott v. Harris, 550 U.S. 372, 380, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007) (quoted in Ricci v. DeStefano, 557 U.S. 557, 586, 129 S. Ct. 2658, 2677, 174 L. Ed. 2d 490 (2009)). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita Elec. Indus. Co., 475 U.S. at 587, 106 S. Ct. at 1356 (other citation omitted).

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[4] Noting that deference must be given "to the professional judgment of prison administrators," the Court stated that "[u]nless a prisoner can point to sufficient evidence regarding such issues of judgment to allow him to prevail on the merits, he cannot prevail at the summary judgment stage." Beard, 548 U.S. at 530, 126 S. Ct. at 2578 (citing Overton v. Bazzetta, 539 U.S. 126, 132, 123 S. Ct. 2162, 2167, 156 L. Ed. 2d 162 (2003)).

The relevant Rule 56(e) evidence[5]

Defendant English submitted an affidavit in which he explains that he was the Assistant Warden of Operations at Blackwater River Correctional Facility from March 2014 through January 2016. ECF No. 77-1. In that capacity, he was responsible for developing and implementing "facility policies and operational procedures," supervising department functions and personnel, and "assisting the Warden in the overall administration of the facility." *Id.* He was not responsible for day to day supervision of prisoners, although correctional officer staff did so and, through the chain of command, reported indirectly to him. *Id.*

Between January and September of 2015, Plaintiff "was an inmate at the Blackwater River Correctional Facility." ECF No. 97 at 19 (Plaintiff's Affidavit, p. 1). Plaintiff was housed in the same cell with inmate Jamal

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[5] Plaintiff has complained repeatedly within his response to Defendant's summary judgment motion that Defendant English failed to produce documents which has, in turn, precluded him from presenting evidence to oppose summary judgment. ECF No. 97 at 2, 5-6, 10, and 23. Plaintiff requested a continuance so he could conduct further discovery and obtain needed documents. ECF No. 97 at 6. Plaintiff was provided additional time to review the surveillance DVD and obtain his medical records. ECF No. 90. However, Plaintiff's prior two motions to compel, ECF Nos. 81 and 96, were denied. ECF Nos. 83, 98. The first motion was denied because Defendant produced the documents in his possession, custody, or control, and Plaintiff's motion was not timely filed. ECF No. 83. The second motion was denied because Plaintiff did not show that he had been prejudiced by alleged alterations to the DVD or fully explain why additional video was relevant to his claims. ECF No. 98.

Waitley between March 2-31, 2015. *Id.* On March 3rd, Plaintiff said that inmate Waitley threatened him "for no apparent reason." *Id.* Thinking that his life was in danger, Plaintiff declares that he put "an informal grievance in the grievance box to [Defendant] English" later that same day. *Id.* Plaintiff says that he specifically said that he was in fear for his life and requested a cell change or to be placed in "protective custody." *Id.*

On March 9, 2015, Plaintiff saw Defendant English and approached him saying, "I need to speak" to you. ECF No. 97 at 20. Defendant English said "sure," and Plaintiff told him that he was in fear for his life and wanted to be placed either in protective custody or be moved out of Waitley's cell. *Id.* Plaintiff reports that Defendant English said, "I can't help you," and walked away. *Id.* Plaintiff declares that Defendant English "did nothing to protect" him after being advised that inmate Waitley had threatened him. *Id.* Plaintiff says that Defendant English had the authority to move him to another cell and/or place him in protective custody. *Id.*

On March 31, 2015, Plaintiff said he was standing at his cell door when "all of a sudden" inmate Waitley attacked him with a razor blade, cutting him across his left cheek. ECF No. 97 at 21 (Plaintiff's Affidavit, p. 3); see also *Id.* at 31-32. Plaintiff ran downstairs to the dayroom, but

Waitley did as well, continuing to try and cut him. *Id.* Plaintiff said that he threw food trays and used them to hit Waitley to prevent further assault. *Id.* Plaintiff said the attack continued for four or five minutes, even though Officer Joseph was in the control room watching. *Id.* Plaintiff contends that, based on past incidents, if Officer Joseph had requested assistance, other officers would have arrived in only 20 or 30 seconds. *Id.*

Defendant English was not present during Plaintiff's fight with inmate Waitley. ECF No. 77-1 at 2; ECF No. 97 at 52. He learned about the fight "after the fact." ECF No. 77-1 at 2.

Plaintiff was taken to the medical clinic for treatment which included receiving at least 25 stitches. ECF No. 97 at 21 (Plaintiff's Affidavit, p. 3). Both Plaintiff and inmate Waitley were given disciplinary reports for "aggravated battery." *Id.* at 22. Both inmates were found guilty of the offense. *Id.*

Plaintiff, however, declares that he "played no parts [sic] in starting the altercation." *Id.* He says he did not initiate, instigate, or provoke inmate Waitley; he maintains that he "was the victim in the physical altercation." *Id.*

A disciplinary report was written by assistant shift supervisor E. Bogden on March 31, 2015. ECF No. 97 at 34.[6] The "statement of facts" indicates the report was written after Bogden "reviewed the fixed wing DVR system, due to" a reported physical altercation between inmate Waitley and Plaintiff. *Id.* The report states that at approximately 11:43 a.m., Plaintiff was in the dayroom, "using food trays as a weapon and hitting and throwing them at inmate Waitley, in the head and torso area." *Id.* Plaintiff "was also seen placing a heavy object in the bottom of a sock and using it as a weapon" to "hit inmate Waitley in the head and face area with the homemade weapon." *Id.* Bodgen stated that investigation led to the discovery that Plaintiff had "a lock in a sock." *Id.*

Inmate Waitley's disciplinary report was re-written on April 8, 2015, due to "a technical or procedural error." ECF No. 97 at 36. The factual basis for the report remained the same. Inmate Waitley refused to provide a written statement and waived his right to be present at the hearing. *Id.*

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[6] Plaintiff says that Defendant English's submission of the disciplinary report "has been altered." ECF No. 97 at 23. Plaintiff does not explain that statement. Nonetheless, the copies Plaintiff submitted of the disciplinary reports have been reviewed and are cited herein.

Plaintiff's disciplinary hearing was held on April 7, 2015. ECF No. 97 at 42. He entered a "not guilty" plea and was present at the hearing. *Id.* The hearing report notes that Plaintiff said "he was defending himself." *Id.* Witness statements, documents and photograph evidence were reviewed, as well as the video camera summary which was written by the investigating officer. *Id.*

Notably, several additional facts were included in the team's statement providing the basis for the decision. *Id.* The investigating officer noted that Plaintiff entered cell 214 and exited approximately one minute later, fighting with inmate Waitley. *Id.* "Inmate Waitley then began to chase" Plaintiff downstairs in the dayroom area." *Id.*[7] At that point, Plaintiff began throwing trays and hitting inmate Waitley, and Waitley threw trays back at Plaintiff. *Id.* Plaintiff then walked off and went inside "cell 113 to retrieve a lock." *Id.* Plaintiff came back into the dayroom, took off his socks, and put the lock inside his socks. *Id.* Plaintiff "then got up with the

[7] It is that part of the video that Plaintiff complains was omitted from the DVD submitted by Defendant which he watched. ECF No. 96. That part of the video was not included in the video submitted to the Court either. ECF Nos. 92-93. Plaintiff, however, states in his affidavit that he has been able to see the full video. ECF No. 97 at 24. He further declares that the video shows that inmate Waitley attacked him and he did not initiate or instigate the altercation. *Id.*

homemade weapon behind his back and proceeded to chase inmate Waitley swinging and hitting him with the homemade weapon." *Id.*

The hearing team concluded that Plaintiff's statement was not supported by the video. ECF No. 97 at 42. Plaintiff was found guilty of the charge[8] and sentenced to 60 days of disciplinary confinement. *Id.* There is no evidence that Plaintiff had earned gain time forfeited, but he was prohibited from receiving incentive gain time for two months. ECF No. 77-1 at 3. Inmate Waitley was also found guilty and sentenced to 50 days of disciplinary confinement, having been granted 10 days of administrative confinement credit due to the re-write of the disciplinary report. ECF No. 97 at 44.

Defendant English points out that Plaintiff "specifically raised as a defense that he participated in the fight only in self-defense." ECF No. 77-1 at 3. "This defense was rejected by" the disciplinary team at the hearing and Plaintiff was adjudicated guilty. *Id.* The disciplinary report and resulting punishment was not overturned. ECF No. 77-1 at 3.

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[8] Plaintiff was charged with "violation code 0110" which was listed on the DR as "AGVT BTRY/ATT/INMATE." ECF No. 77-4. Rule 1-10 prohibits aggravated battery or attempted aggravated battery on an inmate. FLA. ADMIN. CODE R. 33-601.314, Rule 1-10.

An Incident Report was also created concerning the physical altercation. ECF No. 77-2 at 1. That report was written by Officer Kerline Joseph, an unserved but named Defendant in this case. She states that at approximately 11:43 a.m., she observed the altercation between Plaintiff and inmate Waitley. *Id.* She "radioed to main control for the Alpha Response Team to be activated to A-Dorm Wing 6." *Id.* She states that at "approximately 11:46 a.m. Security staff entered the wing and restrained both Inmates without further incident." *Id.*

Defendant English confirms in his affidavit that Officer Joseph was in the control room during the altercation and radioed for the response team. ECF No. 77-1 at 2. He states that "[t]he rapid assembly and response of the Alpha Response Team indicates that the fight must have been observed and reported by Officer Joseph almost immediately upon inception of the fight." *Id.*

The Incident Report also includes comments from the shift supervisor, Captain Daren Lawson. *Id.* Captain Lawson reviewed the "Fixed Wing DVR Camera System" which showed the inmates exiting their assigned cell, A6-214, "striking each other in the head and torso area with clinched fists." *Id.* The inmates "ran down the top tier of the wing and

proceeded to the dayroom area." *Id.* Both inmates continued striking "each other with food trays." *Id.* Captain Lawson also noted:

> At approximately 11:46 am Inmate Waitley proceeded back to his assigned cell A6-214 and Inmate Milledge entered cell A6-113. Inmate Milledge then directly exited cell A6-113 and was seen in possession of a lock in a sock. Inmate Milledge then proceeded to cell A6-214 and again engaged in a physical altercation with Inmate Waitley. Inmate Milledge was seen striking Inmate Waitley with the lock in a sock."

ECF No. 77-2 at 1.[9]

Defendant English also addressed in his affidavit Plaintiff's allegation that he had filed grievances before the fight in which he said that he advised that he felt threatened by inmate Waitley. *See* ECF No. 77-1 at 3-4. After a "thorough review of Blackwater records," Defendant English declares that no such grievances were found. ECF No. 77-1 at 3. Defendant English states he is "not aware of any instance in which any Blackwater staff member has destroyed an inmate grievance in order to hide its existence or contents." ECF No. 77-1 at 3-4. Defendant English says that he "never received or reviewed such a grievance and was not

[9] The Incident Report appears to be incomplete. ECF No. 77-2. The end of the "Comment" section concludes with "(Continued)" but the only continuation pages are photographs. The "review" sections of the Report form indicate the reviewers "concur with action taken" but the form does not indicate what action was taken. *Id.*

otherwise aware of any such grievance." *Id.* at 4. Furthermore, Defendant English disputes Plaintiff's claim that he verbally told him that he had been threatened by inmate Waitley. *Id.* Defendant English says Plaintiff's "claim is simply untrue." *Id.* He declares in his affidavit: "Inmate Milledge never reported to me that he felt he had been threatened by any inmate - including Inmate Waitley." *Id.*

Defendant English states that Blackwater had "effective procedures" in place and trained personnel "to identify and address all manner of threats to inmate safety." ECF No. 77-1 at 4. Inmates also had a "specialized" telephone hotline "with the number posted above the phones in the inmate housing units, which allowed inmates to report safety concerns such as the one alleged by" Plaintiff in this case. *Id.* Defendant English has no knowledge "of any occasion when inmates at [Blackwater] have either been unable to report safety concerns" through established procedures (including grievance procedures) or that "such reports were simply ignored by staff." *Id.* "[A]ny credible threat to an inmate would have been taken seriously and appropriate steps would be taken to protect the inmates from harm." *Id.* at 5. Defendant English has "never known any officer at Blackwater to simply ignore an inmate's credible complaints of

fear from attack" and would "be shocked to learn than any such conduct" occurred there. *Id.*

Defendant English declares that between October 2010 when Blackwater began operations and Plaintiff's fight on March 31, 2015, "facility records document *just two* instances of inmate-on-inmate violence at the facility involving razors." ECF No. 77-1 at 5 (emphasis in original); *see also* ECF No. 77-6 (incident on May 21, 2013) and ECF No. 77-7 (incident on February 8, 2014). A third allegation was made of another inmate attack using a razor, but that "was ultimately proven to be untrue." ECF No. 77-1 at 5; *see also* ECF No. 77-8.[10] Defendant English states that danger from inmates having razors has "been adequately controlled by anti-contraband policies and procedures," including inmate searches. *Id.* at 5-6. Because the number of "violent incidents involving razors" is "extremely low," Defendant English declares that the facility's efforts were "highly successful." *Id.* at 6.

Defendant English also said that he "lacked the power or authority to allow/disallow disposable razors in the facility." ECF No. 77-1 at 6. When

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[10] Investigation reveals that the "cuts were self inflicted" by one inmate "to justify hitting" another inmate. ECF No. 77-8 at 1.

Plaintiff's fight occurred, the authority to either allow or disallow razors at Blackwater "belonged exclusively to the facility Warden." *Id.*

Additionally, Defendant English submitted a DVD into evidence. ECF Nos. 92-93. The DVD contains video footage of the altercation between Plaintiff and inmate Waitley. It has been reviewed.

Analysis

Plaintiff sought to bring three separate claims[11] against the Defendants, all of which are based on alleged violations of the Eighth Amendment. ECF No. 20. Each claim is addressed below.

A. Deliberate Indifference - Failure to Protect Claim

Plaintiff alleged in count II that Defendants were deliberately indifferent to a "substantial risk of serious harm" to him. ECF No. 20 at 18. He alleged that the Defendants were aware of inmate Waitley's threat to harm him, but contends that Defendants "had a custom or policy . . . of allowing inmates to inflict serious injuries on each other." *Id.* at 18-19.

This claim is construed in the same way that Defendant English considered it - a general Eighth Amendment claim asserting that

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[11] Plaintiff alleged four separate claims in the complaint in counts I-IV. ECF No. 20. However, count I was brought only against Defendant Joseph, *see* ECF No. 20 at 17, and need not be addressed in this Report and Recommendation.

Defendants knowingly permitted dangerous conditions to exist at Blackwater such that "incarceration at the facility itself constitutes cruel and unusual punishment." ECF No. 77 at 17. Defendant English seeks summary judgment in his favor on the basis that the Blackwater facility was secure, safe, and there is an insufficient history of violence to support and Eighth Amendment claim. ECF No. 77 at 18-30. Defendant states that inmates were not subjected to a sufficiently extreme and unreasonable risk of harm by permitting razor blades in the institution. *Id.* Additionally, Defendant English contends that there is no causal connection between his actions and Plaintiff's claim because he did not have the ability to alter policy. *Id.* at 11-12, and 20.

In response, Plaintiff requested that he be provided a continuance so he could "conduct further discovery and get the documents that he need[s]." ECF No. 97 at 6. Plaintiff did not, however, identify any specific documents that should have been provided to him, nor did he assert that more responsive documents existed, but were not provided by Defendant. As addressed previously, Plaintiff's earlier motion to compel was untimely and properly denied. ECF No. 83.

The Eighth Amendment governs the conditions under which convicted prisoners are confined and the treatment they receive while in prison. Farmer v. Brennan, 511 U.S. 825, 832, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). Although the Amendment does not require comfortable prisons, it does prohibit inhumane ones. *Id.* The Eighth Amendment[12] guarantees that prisoners will not be "deprive[d] ... of the minimal civilized measure of life's necessities." Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981) (quoted in Chandler v. Crosby, 379 F.3d 1278, 1289 (11th Cir. 2004)). "[B]asic human necessities include food, clothing, shelter, sanitation, medical care,

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[12] "In the prison context, three distinct Eighth Amendment claims are available to plaintiff inmates alleging cruel and unusual punishment, each of which requires a different showing to establish a constitutional violation." Thomas v. Bryant, 614 F.3d 1288, 1303-04 (11th Cir. 2010). There are claims concerning the conditions of confinement, claims challenging an unnecessary and excessive use of force, and claims of deliberate indifference. In the deliberate indifference context, there are two varieties of such claims: deliberate indifference to medical needs and deliberate indifference to a sufficiently serious risk of harm. *See* Estelle v. Gamble, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), and Rhodes v. Chapman, 452 U.S. 337, 345, 101 S. Ct. 2392, 2398, 69 L. Ed. 2d 59 (1981). Nevertheless, "[w]hether one characterizes the treatment received by [the prisoner] as inhumane conditions of confinement, failure to attend to his medical needs, or a combination of both, it is appropriate to apply the 'deliberate indifference' standard articulated in Estelle." Wilson v. Seiter, 501 U.S. 294, 303, 111 S. Ct. 2321, 2327, 115 L. Ed. 2d 271 (1991) (citations omitted). It is only the excessive-force claims which "require a showing of a heightened mental state - that the defendants applied force 'maliciously and sadistically for the very purpose of causing harm.'" Thomas, 614 F.3d at 1304 (citing Wilson, 501 U.S. at 302, 111 S.Ct. at 2326 (citing Whitley v. Albers, 475 U.S. 312, 320-21, 106 S.Ct. 1078, 1085, 89 L.Ed.2d 251 (1986))).

and personal safety." Harris v. Thigpen, 941 F.2d 1495, 1511 (11th Cir. 1991) (cited in Collins v. Homestead Corr'l Inst., 452 F.App'x 848, 850-851 (11th Cir. 2011)).

In guaranteeing inmate safety, the Eighth Amendment "imposes a duty on prison officials to provide 'humane conditions of confinement,' and to 'take reasonable measures to guarantee the safety of the inmates.'" Bugge v. Roberts, 430 F. App'x 753, 757 (11th Cir. 2011) (quoting Farmer, 511 U.S. at 832). "[P]rison officials have a duty 'to protect prisoners from violence at the hands of other prisoners.'" Bugge, 430 F. App'x at 757 (quoting Farmer, 511 U.S. at 833). However, not "every injury suffered by one prisoner at the hands of another that translates into [a] constitutional liability...." Purcell ex rel. Estate of Morgan v. Toombs Cty., Ga, 400 F.3d 1313, 1319 (11th Cir. 2005) (quoting Farmer, 511 U.S. at 834).

In a prisoner case which generally claims that dangerous conditions existed at a prison and officials failed to protect him, there is both an objective component and a subjective component. Helling v. McKinney, 509 U.S. 25, 30, 113 S. Ct. 2475, 2479, 125 L. Ed. 2d 22 (1993); *see also* Hudson v. McMillian, 503 U.S. 1, 8, 112 S. Ct. 995, 999-1000, 117 L. Ed. 2d 156 (1992). An inmate must first "show that he is incarcerated under

conditions posing a substantial risk of serious harm." Farmer, 511 U.S. at 834, 114 S. Ct. at 1977 (citing to Helling, 509 U.S. at 35, 113 S. Ct. at 2481 (holding that to prove Eighth Amendment violation based on exposure to ETS, inmate must "establish that it is contrary to current standards of decency for anyone to be so exposed against his will and that prison officials are deliberately indifferent to his plight.")). Secondly, Plaintiff must show that prison officials knew of and disregarded an excessive risk to inmate health or safety. Farmer, 511 U.S. at 837, 114 S. Ct. at 1979. Thus, Plaintiff must provide evidence that Defendants were deliberately indifferent to an "excessive risk" to his safety. 511 U.S. at 837, 114 S. Ct. at 1979. He must show that a defendant prison official was "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." 511 U.S. at 837, 114 S. Ct. at 1979. Importantly, "[t]he Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.'" *Id.* at 837, 114 S. Ct. at 1979. Accordingly, Plaintiff may support his claim is to present "evidence showing that a substantial risk of inmate attacks was 'longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the

defendant-official being sued had been exposed to information concerning the risk and thus 'must have known' about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.'" Farmer, 511 U.S. at 842-43, 114 S. Ct. at 1981-82 (citation omitted). On the other hand, prison officials avoid liability under § 1983 if they "prove that they were unaware even of an obvious risk" or, alternatively, "if they responded reasonably to the risk, even if the harm ultimately was not averted." 511 U.S. 844-45, 114 S. Ct. at 1982-83.

Case law recognizes "that an excessive risk of inmate-on-inmate violence at a jail creates a substantial risk of serious harm; 'occasional, isolated attacks by one prisoner on another may not constitute cruel and unusual punishment, [but] confinement in a prison where violence and terror reign is actionable.'" Purcell, 400 F.3d at 1320. However, this case stands on the same footing as Purcell; there is "insufficient evidence in the record to show that inmates . . . were exposed to something even approaching the 'constant threat of violence.'" 400 F.3d at 1321 (citation omitted). There is no evidence of an extensive history of inmates being attacked with razor blades, nor has Plaintiff shown that such incidents occurred on a regular basis, or were "longstanding and pervasive." Marsh

v. Butler Cty., Ala., 268 F.3d 1014, 1029 (11th Cir. 2001); Purcell, 400 F.3d at 1321. Instead, the evidence shows only that isolated attacks occurred at Blackwater, no more than two in the five year period preceding Plaintiff's attack. "One swallow does not a summer make," *Aristotle* (384 -322 BC); two attacks does not a violent history make. Indeed, the Eleventh Circuit found that four assaults during a three year period "were hardly sufficient to demonstrate that Holman was a prison 'where violence and terror reign.'" Harrison v. Culliver, 746 F.3d 1288, 1300 (11th Cir. 2014) (quoting Purcell, 400 F.3d at 1320 and citing Woodhous v. Virginia, 487 F.2d 889, 890 (4th Cir. 1973)). Because this case had half the amount of assaults in a longer period of time, Plaintiff's claim is insufficient as a matter of law. Plaintiff has not shown that his conditions of confinement (permitting inmates to have razors for shaving) posed a substantial or excessive risk of harm. He has not come forward with any evidence demonstrating that conditions at Blackwater were extreme or that violence was rampant and ignored. Defendant English is entitled to summary judgment on this claim.[13]

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[13] Although unnecessary to this determination, it is also apparent that Defendant English could not be held reasonable for failing to withdraw the policy that permitted inmates to possess razors because only the warden had authority to do so. *See* Bugge, 430 F. App'x at 760 (noting that only the warden "could have taken reasonable steps" to lesson the "substantial risk of harm that existed" at the institution).

Furthermore, based on the evidence presented at summary judgment, there is no need to permit Plaintiff to serve the remaining Defendants because this Eighth Amendment claim is insufficient. There is a lack of evidence to show a history of inmate on inmate assaults with a razor. To the contrary, the evidence shows that prison policies were reasonable responses to the potential danger, notwithstanding that Plaintiff experienced some harm. Plaintiff's motion for service of process on Defendants Johnson, Joseph, and Middlebrooks, ECF No. 74, should also be denied.[14]

B. Deliberate Indifference - Failure to Supervise Claim

In count III, Plaintiff alleged that Defendants were deliberately indifferent to a "substantial risk of serious harm" to him and violated his Eighth Amendment rights by failing to supervise and protect inmates. ECF No. 20 at 19-20. Plaintiff alleged that Defendants were aware of the "history of widespread abuse of inmates" and used razor blades to cut other inmates, but they "failed to take adequate measures to prevent" such assaults. *Id.* at 20-21. Similar to count II, Plaintiff also alleged that

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[14] Count II was not brought against Defendant Joseph; only count I was brought against that Defendant. ECF No. 20 at 17.

Defendants "adopted a custom or policy . . . of allowing inmates to inflict serious injuries on each other." *Id.* at 21. He argued that Defendants "were deliberately indifferent to the risk of harm in failing to adequately supervise inmates and officers." *Id.*

To survive summary judgment on a claim based on supervisory liability, Plaintiff must demonstrate "a causal connection between the supervising official's conduct and the alleged constitutional deprivation." Johnson v. Rosier, 578 F. App'x 928, 930 (11th Cir. 2014) (citing Hartley v. Parnell, 193 F.3d 1263, 1269 (11th Cir. 1999)). The "required causal connection" can be shown "by documenting either (1) 'a history of widespread abuse [that would put] the responsible supervisor on notice of the need to correct the alleged deprivation,' and the supervisor's failure to correct the problem; (2) an official custom or policy that led to the violation; or (3) facts that indicate that 'the supervisor directed the subordinates to act unlawfully or knew that the subordinates would act unlawfully and failed to stop them from doing so.'" Harrison, 746 F.3d at 1298 (quoted in Johnson, 578 F. App'x at 930). Here, as concluded above, there is no history of widespread abuse. There also is no evidence that any

supervisor directed a subordinate to act unlawfully. The only possible connection is through an "official custom or policy."

Plaintiff has not, however, supported this claim with any evidence of a custom or policy. In addition to not pointing to an identifiable custom or policy, Plaintiff also has not demonstrated that inmates were permitted to inflict injury on each other. No evidence was submitted which points to officers ignoring inmate on inmate violence or assault. This claim is unsupported and conclusory only.[15] The lack of any evidence concerning rampant or widespread inmate on inmate assault with a razor is fatal to this claim. Cottone v. Jenne, 326 F.3d 1352, 1360 (11th Cir. 2003). Summary judgment should be granted in all Defendants' favor.[16]

C. Failure to Protect Claim

Plaintiff alleged in count VII that Defendants "failed to take adequate measures" to protect inmates from prison violence. ECF No. 20 at 22. He claims that Defendants were aware of facts from which they should have

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[15] This Court previously concluded that Plaintiff's allegations against Defendant Jones failed to state a claim because he did not allege facts showing either a custom or policy. ECF No. 63.

[16] This conclusion also supports denying the motion for service of process, ECF No. 74, which was brought against Defendants English, Middlebrooks, and Jones. ECF No. 20 at 19.

drawn an inference of risk of harm, but failed "to take reasonable measures at the Blackwater Correctional Facility, and they refused to do so." *Id.*

This claim is construed as a "specific threat" claim that Defendants were aware of a risk of harm to Plaintiff and failed to protect him from that harm. *See* ECF No. 77. Defendant English contends that this claim is barred by Heck v. Humphrey because it is "inconsistent" with the "guilty" conviction from the disciplinary report. *Id.* at 21-25. Defendant English points to Florida Statute § 776.012(a) in support of his argument that Plaintiff's "self defense" argument "would have been a complete defense to the battery charge against him." ECF No. 77 at 7. Thus, Defendant argues that Plaintiff's self defense claim was rejected, he lost incentive gain time as a result of the guilty finding in the disciplinary hearing, and his claim is barred by Heck. *Id.* at 21-22. Additionally, Defendant contends that this claim must fail on the merits because an "inmate who initiates, instigates, or voluntarily participates in an altercation with another inmate cannot recover in an Eighth Amendment action alleging 'failure to protect.'" ECF No. 77 at 22 (citing Hankerson v. Santos, No. 3:12cv251-LC/CJK, 2014 WL 5364174, at *7 (N.D. Fla. Oct. 21, 2014)).

The law is clear that one may not seek monetary damages or injunctive relief which would collaterally undermine a criminal conviction or sentence. Preiser v. Rodriguez, 411 U.S. 475, 500, 93 S. Ct. 1827, 1841, 36 L. Ed. 2d 439 (1973) (prohibiting injunctive relief which would result in speedier or immediate release from a term of imprisonment); Heck v. Humphrey, 512 U.S. 477, 114 S. Ct. 2364, 2372, 129 L. Ed. 2d 383 (1994) (barring a claim for monetary damages related to a conviction or sentence until the plaintiff can show that the conviction or sentence has been invalidated). "In Heck v. Humphrey, 512 U.S. 477, 487, 114 S.Ct. 2364, 2372–73, 129 L.Ed.2d 383 (1994), the Supreme Court 'held that a state prisoner's claim for damages is not cognizable under 42 U.S.C. § 1983 if 'a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence,' unless the prisoner can demonstrate that the conviction or sentence has previously been invalidated." Edwards v. Balisok, 520 U.S. 641, 643, 117 S.Ct. 1584, 1586, 137 L.Ed.2d 906 (1997) (quoted in Harden v. Pataki, 320 F.3d 1289, 1291 (11th Cir. 2003)). Put another way, "a state prisoner may not maintain an action under 42 U.S.C. § 1983 if the direct or indirect effect of granting relief would be to invalidate

the state sentence he is serving." Spencer v. Kemna, 523 U.S. 1, 21, 118 S.Ct. 978, 990, 140 L.Ed.2d 43 (1998) (quoted in Pataki, 320 F.3d at 1295). The relevant question is "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." Heck, 114 S.Ct. at 2372; Roberts v. Attorney Gen., Fla., 649 F. App'x 678, 679 (11th Cir. 2016). If the answer is yes, summary judgment must be granted in Defendants' favor.

Plaintiff contends that Heck does not bar his claims. ECF No. 97 at 7-9. Plaintiff says that he has admitted that he and inmate Waitley were throwing food trays at each other. *Id.* at 9. He points out that his testimony is not contrary to the finding that he was guilty of aggravated battery as determined by the disciplinary hearing team. *Id.* Plaintiff argues that the fact that the disciplinary hearing team rejected his defense of "self defense" does not bar his claims. ECF No. 97 at 9, 11 (citing to Davis v. Hodges, 481 F. App'x 553, 555 (11th Cir. 2012)).

In Davis, the plaintiff was found guilty of a fighting infraction and lost thirty days of gain time. Davis, 481 F. App'x at 554. He brought a failure to protect claim under § 1983, but the defendants successfully argued to the

district court that Heck v. Humphrey and Edwards v. Balisok barred the prisoner's claim. *Id.* On appeal, the Eleventh Circuit held "that the Eighth Amendment violations Davis alleged [did] not necessarily imply that the disciplinary judgment revoking his good-time credits [was] invalid. 481 F. App'x at 555. The court held that a prisoner's claim that prison officials failed to protect him and were deliberately indifferent of a substantial risk of harm does not "necessarily contradict or even undermine" a disciplinary finding that two prisoners were mutually "head butting each other and pushing each other against the walls." *Id.* at 555. "The disciplinary report does not otherwise describe the elements of the infraction, so [the court could not] say that Davis's allegations would necessarily invalidate the revocation of his gain-time credits." *Id.* at 555 (citing Muhammad v. Close, 540 U.S. 749, 754-55, 124 S. Ct. 1303, 1306, 158 L. Ed. 2d 32 (2004)).[17]

Defendant cites to Hankerson v. Santos, 2014 WL 5364174, a case in which a prisoner plaintiff was afraid that his cell mate was going to pull a

[17] Notably, the Court concluded that it was "factual error" to hold an action was barred by Heck when the prisoner's complaint "sought no such relief." Muhammad, 540 U.S. at 754, 124 S. Ct. at 1306. It was also legally incorrect to conclude that the Heck bar applies if a disciplinary proceeding did not eliminate "good-time credits" (gain time). Muhammad, 540 U.S. at 754-55, 124 S. Ct. at 1306. Here, Plaintiff sought a declaratory judgment, compensatory and punitive damages. ECF No. 20 at 23. Plaintiff did not request injunctive relief such as the restoration of gain time. *Id.*

razor blade from his paints and cut him. "[F]earing that he would be cut, plaintiff reacted as the aggressor and struck first as a form of pre-emptive self defense. Notably, a disciplinary hearing held after the incident found that plaintiff was the aggressor and was guilty of battery upon his cell mate." 2014 WL 5364174, at *6. In that case, however, there was no evidence plaintiff attempted to retreat from the fight. Additionally, when plaintiff was offered the chance to go to protective custody, plaintiff declined. *Id.* The court held that plaintiff's Eighth Amendment failure to protect claim was insufficient because, among other reasons, plaintiff's own conduct caused his harm. *Id.* at *7.

Notable differences exist between Hankerson and this case. First, Plaintiff testified, and the DVD shows, that Plaintiff made an effort to retreat but inmate Waitley pursued him down to the dayroom. Second, defendant Santos learned of plaintiff's fear of his cellmate and the defendant took action by offering to move plaintiff to protective management. In this case, Plaintiff's evidence is that the Defendant did not take any action.

Third, the evidence in Hankerson was that plaintiff was the aggressor because the other inmate did nothing more than look at plaintiff.

2014 WL 5364174, at *6 (noting that at the time of the incident, plaintiff did "not claim that his roommate actually made any overt action to injure him or give any indication whatsoever concerning his intent to harm plaintiff at that moment."). Here, the evidence does not conclusively show that Plaintiff was the aggressor in the fight and acted preemptively. Plaintiff's affidavit specifically declares that he was not the aggressor and did not instigate the fight. ECF No. 97 at 22. Plaintiff acknowledges that the video shows both he and inmate Waitley throwing trays at each other. *Id.* Yet the evidence is disputed as to whether Plaintiff was the aggressor in this fight.

Even so, a finding that Plaintiff and inmate Waitley mutually engaged in the fight does not necessarily imply the invalidity of his disciplinary conviction. The conviction was for aggravated battery or attempted aggravated battery on an inmate. Accepting Plaintiff's version of events does not invalidate the disciplinary report because Plaintiff has shown that he was afraid of his cellmate and reported that to Defendant English. Plaintiff's affidavit demonstrates that Defendant English ignored that report and told Plaintiff he could not help him. Later, according to Plaintiff, inmate Waitley suddenly attacked him. Plaintiff contends that he sought to get

away but began fighting in self-defense. The video footage does show that, at times, Plaintiff was fighting back. At one point, it appeared that the fight had ended when Plaintiff entered a cell and re-appeared with a "lock in a sock." At that point, Plaintiff became the "aggressor" and the fight resumed. However, fighting back in self-defense, and even becoming the aggressor when the fight had stalled, does not necessarily preclude a claim that a prison official failed to protect a prisoner. This is not the same as reporting a need for protection and then acting aggressively to instigate a fight. Rather, if Plaintiff's evidence were believed, a jury could conclude that if Defendant English had responded to Plaintiff's request for help and protected him as requested, there would have been no fight at all and Plaintiff would not have had to defend himself. In this situation, Plaintiff's finding of guilty does not necessarily invalidate the disciplinary hearing.

In reaching this conclusion, it must also be acknowledged that the video footage demonstrates that Plaintiff and inmate Waitley were already engaged in an altercation when they come out of the cell. However, the video does not show the very beginning of the fight. ECF Nos. 92-93. There is no indication that any video, altered or not, captured what took

place in the cell prior to the inmates' exiting and running down to the dayroom. There is no evidence which supports finding that Plaintiff was the aggressor in the beginning. Plaintiff denies that he was, and Defendant was not present. Plaintiff was not charged in the DR with instigating a fight, he was charged with aggravated battery. Accordingly, Plaintiff's claim is not barred by Heck.

There is a genuine dispute of material fact between the parties on this failure to protect claim. Thus far, Plaintiff's version of events has been cited. Yet Defendant English provided contrary evidence showing that he did not know Plaintiff was in danger and declaring that Plaintiff never relayed that information to him. Plaintiff refutes that evidence with his own affidavit. In ruling on a summary judgment motion, the Court "may not weigh conflicting affidavits to resolve disputed fact issues." Farbwerke Hoeschst A.G. v. MV Don Nicky, 589 F.2d 795, 798 (5th Cir. 1979) (quoted in Warrior Tombigbee Transp. Co. v. M/V Nan Fung, 695 F.2d 1294, 1299 (11th Cir. 1983). A jury must resolve this factual dispute.

As noted above, in a deliberate-indifference claim, a plaintiff must show "an objectively substantial risk or serious harm." Harrison, 746 F.3d

at 1298; Johnson, 578 F. App'x at 929-30. Plaintiff must also show "that the defendant was deliberately indifferent to that risk by establishing that the defendant (1) had a subjective knowledge of a risk of serious harm, (2) disregarded that risk, and (3) engaged in conduct that is more than mere negligence." Johnson, 578 F. App'x at 930. Plaintiff has made that showing. If the jury believed that Plaintiff sent a grievance that was ignored and then spoke personally to Defendant English about his fear based on his cellmate's threats, and believed that Defendant English brushed Plaintiff aside by stating "I can't help you," Plaintiff sufficiently demonstrated that the Defendant was deliberately indifferent to a substantial risk of serious harm. That is sufficient to state an Eighth Amendment claim. Because the parties dispute Plaintiff's version of events, this case should be decided by a jury.

It is also recommended that Plaintiff's claim against Defendant English for failing to protect him proceed to trial. However, there is no evidence which provides a basis for this claim against Defendant Middlebrooks, the only other remaining Defendant in this claim. There is no evidence to show that Plaintiff alerted Defendant Middlebrooks to his

fear, and no evidence showing any involvement by Middlebrooks. Plaintiff's affidavit declares that he wrote an informal grievance to Defendant English and later spoke personally to him on the recreational yard. ECF No. 97 at 19-20. It now appears that this claim was brought against Defendant Middlebrooks solely in his supervisory capacity as Warden. Because he cannot be held liable for the actions or inactions of the staff under his command under a theory of respondeat superior, Plaintiff's claim against him should be dismissed.

Finally, it is recommended that Plaintiff's claim against Defendant Joseph also be dismissed. ECF No. 20 at 17. Plaintiff's claim was that she watched that attack between Plaintiff and inmate Waitley and failed to intervene. *Id.* However, the evidence reveals that Defendant Joseph acted promptly to summon and dispatch the response team. The video reveals that correctional officers arrived on scene within approximately three minutes.[18] That quick response reveals Defendant Joseph was responsive and was not deliberately indifferent to the situation. The motion to direct

[18] The time stamps on the video reveal that Plaintiff and inmate Waitley came out of the cell and began running down the hall at 11:43:05 a.m. Staff arrive and are visible entering the upper level of the wing at 11:46:38 a.m.

service on Defendant Joseph, ECF No. 74, should be denied and she should be dismissed from this action.

RECOMMENDATION

It is respectfully **RECOMMENDED** that Defendant English's motion for summary judgment, ECF No. 77, be **DENIED in part and GRANTED in part**. Summary judgment should be **DENIED** as to count IV against Defendant English, but otherwise **GRANTED** as to all other claims. It is further recommended that Plaintiff's motion to direct service, ECF No. 74, against Defendants Middlebrooks, Johnson, and Joseph be **DENIED**, and those Defendants **DISMISSED** from this action. Finally, it is **RECOMMENDED** that this case be **REMANDED** for further proceedings prior to setting this case for trial.

IN CHAMBERS at Tallahassee, Florida, on February 13, 2018.

S/ Charles A. Stampelos
CHARLES A. STAMPELOS
UNITED STATES MAGISTRATE JUDGE

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NOTICE TO THE PARTIES

Within fourteen (14) days after being served with a copy of this Report and Recommendation, a party may serve and file specific written objections to these proposed findings and recommendations. Fed. R. Civ. P. 72(b)(2). A copy of the objections shall be served upon all other parties. A party may respond to another party's objections within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b)(2). Any different deadline that may appear on the electronic docket is for the Court's internal use only and does not control. If a party fails to object to the Magistrate Judge's findings or recommendations as to any particular claim or issue contained in this Report and Recommendation, that party waives the right to challenge on appeal the District Court's order based on the unobjected-to factual and legal conclusions. *See* 11th Cir. Rule 3-1; 28 U.S.C. § 636.

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