A

D. SMITH, et al.,

Defendants-Appellees.

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

D.C. Docket No. 8:12-cv-00288-VMC-TGW

Before WILLIAM PRYOR, Chief Judge, LUCK, and ED CARNES, Circuit Judges.

PER CURIAM:

Terry Sears is a Florida inmate who brought 42 U.S.C. § 1983 claims against several Florida correctional officers for excessive force and deliberate indifference. After the district court granted summary judgment to the officers, we vacated and remanded, noting that Sears' and the officers' dueling stories about the underlying incident presented "a classic swearing match, which is the stuff of which jury trials are made." *Sears v. Roberts*, 922 F.3d 1199, 1208 (11th Cir. 2019).

On remand, a jury trial lasting three days was made of the swearing match. Finding the officers' swearing more believable, the jury returned a verdict for them. In this appeal from that

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 19-13668

TERRY EUGENE SEARS,

Plaintiff-Appellant,

versus

EQUARDO RIVERO, et al.,

Defendants,

VERNIA ROBERTS,
F. DEXTER,
J. HART,
DAVID PRINCE,

verdict, Sears contends that several errors deprived him of a fair trial. Because the parties are familiar with the record facts, we will move straight to the issues and arguments.

I.

Before trial, Sears moved for an adverse inference jury instruction based on spoliation of a videotape that contained footage of a post-force medical examination and pepper spray decontamination that the prison staff conducted on him. Sergeant Scott Voorhees had recorded those events and given the videotape to one of the defendant officers, Felishia Dexter. The videotape was later viewed by the prison warden, who then sent it to be reviewed by an Inspector General's Office employee. After that employee viewed the videotape, he sent it back to the prison.

When Sears asked for the videotape during pretrial proceedings, defense counsel responded that it no longer existed, leading Sears to argue the officers had "either destroyed the video evidence or failed to preserve [it] as required." Sears contended that the defendants had been so reckless with the videotape that it amounted to bad faith and entitled him to an adverse inference instruction.

At a pretrial conference, the district court determined that the loss of the videotape was "just negligence" and not the result of bad faith. It denied Sears' request for an evidentiary hearing, but agreed to let Sears' counsel talk informally to defendant Dexter with her lawyer present. After his counsel's conversation with Dexter, Sears filed a motion asking for a jury instruction about the

videotape. Ultimately, the parties agreed to have this joint stipulation read to the jury: "The video taken by Sergeant Scott Voorhees on March 18th, 2010, involving Mr. Sears, would have been returned from the Office of the Inspector General to the Polk Correctional Institution. The video no longer exists."

Sears argues to us that the district court should have held an evidentiary hearing about whether the officers acted in bad faith in spoliating the videotape. We review the district court's decisions about spoliation only for an abuse of discretion. *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009). "In some circumstances, a *party's* spoliation of critical evidence may warrant the imposition of sanctions," including "a jury instruction on spoliation of evidence which raises a presumption *against the spoliator*." *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1184 (11th Cir. 2020) (quotation marks omitted and emphasis added). The problem for Sears' spoliation argument is that no evidence was presented or proffered to show who was the last person to have the videotape. There was nothing to show that any of the parties destroyed it or acted in bad faith regarding it. The district court did not abuse its discretion in denying Sears' motion for a spoilation instruction without an evidentiary hearing.

II.

On the morning of the trial but before the proceedings began, Sears' counsel pointed out that three uniformed corrections officers were "sitting directly behind" Sears, which counsel argued was "highly prejudicial." The court responded that it was the

guards' "job to make certain that nothing bad happens," and there was "no way" the court was "going to tell them not to be here." Sears' counsel then asked if the officers "could sit in the row behind instead of right behind" him. The court replied that if the guards "think they need to sit there, I'm going to let them sit there," and that it was "not about to tell a law enforcement officer how to do his or her job when they think they need to be right behind the person." After confirming with the guards that they thought they needed to sit where they were, the court stated: "That's it. I'm not going to tell them differently."

The court also permitted the additional security measure of having Sears wear shackles. Sears' counsel asked that the jury be excused whenever Sears walked to the witness stand unless the guards would take the shackles off during his walk. The court declined to allow the temporary removal of the shackles but did agree to excuse the jury for Sears' walks to the stand.

Sears challenges the district court's decision to allow him to be shackled and to allow uniformed guards to sit behind him during the trial. "[W]e review the district court's shackling determination for abuse of discretion." *United States v. Baker*, 432 F.3d 1189, 1245 (11th Cir. 2005), *abrogated on other grounds by Davis v. Washington*, 547 U.S. 813 (2006). We use the same standard to evaluate a district court's decision about what "measures are necessary to ensure the security of the courtroom," *United States v. Durham*, 287 F.3d 1297, 1304 (11th Cir. 2002), such as the court's decision to allow the uniformed guards to sit behind Sears.

The Supreme Court has recognized that shackling a defendant during a criminal trial is an extreme and inherently prejudicial measure that must be justified by an essential state interest. *Deck v. Missouri*, 544 U.S. 622, 635 (2005). A less demanding form of scrutiny applies to practices such as allowing uniformed guards or officers to sit behind a criminal defendant. As the Court has explained, a conspicuous courtroom security presence is not inherently prejudicial like shackles are, but the practice should still be evaluated on a case-by-case basis. *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986). The Court went on to hold that four uniformed and armed policemen "quietly sitting in the first row of a courtroom's spectator section" did not create an "unacceptable risk of prejudice" to the criminal defendant. *Id.* at 571. The officers were "unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." *Id.*

Deck and *Holbrook* were criminal cases, and we have never extended their holdings to civil cases. Which makes sense. The Court's reasoning in those decisions focused primarily on the fact that a criminal defendant is entitled to a presumption of innocence, which may be threatened by the government taking steps like having him shackled. *See Deck*, 544 U.S. at 630; *Holbrook*, 475 U.S. at 569. Those concerns are not present in civil cases, and certainly not in civil cases where the jury already knows that the plaintiff has been convicted of a crime. The jury knew Sears was a convicted criminal who was incarcerated at the time of the events that

resulted in his lawsuit against correctional officers. He was not being tried for another criminal charge.

But we need not definitively decide whether *Deck* and *Holbrook* are applicable to civil cases. Even if they are, and even if the district court abused its discretion in allowing Sears to be shackled or guards to sit directly behind him, any error was harmless. The jury knew that Sears was a prisoner who had already been convicted and was serving time in prison. No reasonable juror would expect a prisoner not to be accompanied by guards when outside prison walls. The presence of guards was "unlikely to have been taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." *Holbrook*, 475 U.S. at 571.

As for the shackles, there is no indication in the record that the jury saw them or knew about them. The court excused the jury from the courtroom while Sears walked to the stand and the record has nothing to show that the shackles were ever visible to the jury. *Cf. United States v. Moore*, 954 F.3d 1322, 1330 (11th Cir. 2020) (holding no prejudice under the plain error standard where there was "no indication in the record that the jury was aware of the shackles").

III.

Sears also contends that the district court abused its discretion in allowing certain trial testimony from Samuel Pacchioli. He was an employee in the "use of force unit" in the Inspector

General's Office who had reviewed and "approved" after the fact the use of force in the incident involving Sears. Pacchioli testified about the steps he took to review the use of force incident. He recounted how he had reviewed a "packet" about the incident, which included the use of force report and the videotape. He had compared that material to a checklist or a set of procedures established by the Inspector General's office. The reason he had "approved" the use of force incident was that he did not "find anything in the use of force checklist that did not comply with the procedures that would have been — [that] reflect an appropriate use of force." Sears' counsel did not object to any of that testimony.

Sears' counsel did object to a series of blatantly leading questions that defense counsel had asked Pacchioli about the conclusion he had reached in his review. The court sustained the objection. It told defense counsel: "[M]ost of your questions are leading questions. And it's absolutely inappropriate." The court struck the questions and answers from the record and instructed defense counsel to stop leading his own witness.

Immediately after that, defense counsel asked Pacchioli, "did you find anything inappropriate according to your checklist that had occurred during the use of force?" Pacchioli said he didn't. Defense counsel then asked him "had there been times during your duties as the use of force reviewer that you did find other reports without talking about specifics, where you disapproved?" Sears' counsel objected that defense counsel was again asking a leading question.

The court sustained the objection, stating: "First of all, sustained. Number two, it's eliciting expert testimony. These questions are inappropriate. The answers are stricken from the record." Sears' counsel asked the court to instruct the jury that it could not consider testimony that is stricken, and the court did so. It told the jury: "When testimony is stricken, you're not to consider it in any way. It's as if it did not occur. This is expert testimony, [defense counsel]. The jury is not to consider this testimony. . . . For the last five or six questions, you're not allowed to consider that."

On cross-examination, Sears' counsel elicited from Pacchioli that he had not personally observed the use of force, that he had not spoken with Sears about it, and that his approval was based on the officers' statements in the use of force report. Counsel also elicited from Pacchioli that the warden had noted in the report that Sears was ordered to put on contaminated clothes after he had been pepper sprayed and that the order to do so, according to Pacchioli, was not proper.

At the conclusion of Pacchioli's testimony the jury was allowed to submit written questions to potentially be asked to Pacchioli by the court. One of the questions was: "What was your final finding, recommendation or outcome about use of force?" Sears' counsel objected to the question, arguing that the jury would substitute Pacchioli's opinion about the ultimate issue in the case for its own independent determination. But the court rejected that argument, reasoning that the jury had "every right" to "find differently" and that any "credibility bolstering" was not

"overwhelming." The court told Sears' counsel she could "deal with [it] in closing argument" and "tell the jury they're here to decide whether it was right or wrong" regardless of "what the agency says." The court itself later instructed the jury that it was required to decide on its own whether to believe or disbelieve the witnesses.

After Pacchioli was asked the question about his final finding, he responded that his "approval of the use of force approved the type and amount, and that was the end of the review." Sears' counsel had another chance to cross-examine Pacchioli, and elicited from him that at the time he approved the use of force report he was an employee of the state and was paid by the state.

Sears argues that the court erred in permitting Pacchioli's testimony. He contends that Pacchioli, despite being presented as a lay witness, actually testified as an expert witness, which was improper because the court had ruled that expert testimony was not allowed in the case. And he argues that Pacchioli's testimony invaded the province of the jury by being about the ultimate issue in the case: whether the use of force was reasonable. In a credibility contest, Sears asserts, Pacchioli's testimony supporting the defendants was an insurmountably prejudicial hurdle.

We review only for an abuse of discretion the court's admission of witness testimony under Federal Rule of Evidence 701. *United States v. Moran*, 778 F.3d 942, 958–59 (11th Cir. 2015). The discretion is broad: a court has considerable leeway when deciding whether to allow witness testimony. *See, e.g.*, *Maiz v. Virani*, 253 F.3d 641, 662 (11th Cir. 2001).

Federal Rule of Evidence 701 allows a lay witness to testify about his opinions if the testimony is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. We've held that the firsthand knowledge requirement, or the requirement that the testimony be "rationally based on the witness's perception," Fed. R. Evid. 701(a), can sometimes be satisfied where a lay witness has "base[d] his opinion testimony on his examination of documents[,] even when the witness was not involved in the activity," *United States v. Jayyousi*, 657 F.3d 1085, 1102 (11th Cir. 2011). For example, law enforcement agents who have reviewed financial records can testify as lay witnesses about those records, *United States v. Hamaker*, 455 F.3d 1316, 1331–32 (11th Cir. 2006), and law enforcement agents who have examined documents to decipher code language can testify about a defendant's use of that code language, even without having been party to a defendant's conversations, *Jayyousi*, 657 F.3d at 1103.

Those witnesses in those circumstances would not be testifying as experts even if their experience makes them "more efficient" at reviewing the records, *Hamaker*, 455 F.3d at 1331, and even if the testimony is aided by "their particularized knowledge garnered from years of experience within the field," *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co., Ltd.*, 320 F.3d 1213, 1223 (11th Cir. 2003). The testimony remains lay testimony

at least when it is "limited . . . to what [the witness] learned during this particular investigation," *Jayyousi*, 657 F.3d at 1104, and when the "review itself was within the capacity of any reasonable lay person," *Hamaker*, 455 F.3d at 1331–32.

Pacchioli testified as a lay witness, not as an expert witness. His testimony was about his review of the use of force report, which is similar to an agent's testimony about an investigation or a review of financial records. He testified that he compared the use of force incident to a checklist or a set of procedures established by the Inspector General and that based on the comparison he approved the use of force. That is not the use of "scientific, technical, or other specialized knowledge" that goes into expert testimony. Fed. R. Evid. 702. It is closer to bureaucratic box checking. And it is the kind of review that is "within the capacity of any reasonable lay person," even if Pacchioli's background made him "more efficient at reviewing [the] records," *Hamaker*, 455 F.3d at 1331–32, and even if his review and testimony were aided by his "particularized knowledge garnered from years of experience within the field," *Tampa Bay Shipbuilding & Repair Co.*, 320 F.3d at 1223. The testimony was also limited to what he had "learned during this particular investigation." *Jayyousi*, 657 F.3d at 1104.

Sears' argument that Pacchioli's testimony invaded the province of the jury because it was about the ultimate issue in the case also fails. The ultimate issue was whether the use of force was excessive or reasonable. Pacchioli's testimony was not about that — his testimony was that, based on the use of force report and

the videotape, the use of force had complied with the Inspector General's standards. He testified "[n]o" when defense counsel asked him if he had found "anything in the use of force checklist that did not comply with the procedures that . . . reflect an appropriate use of force" or if he had found "anything inappropriate according to [his] checklist that had occurred during the use of force[.]" That was the context that had been established when Pacchioli later answered the jury's question that he had approved the "type and amount" of the use of force. It was all about the Inspector General's standards.

There is a difference between whether something complies with the Inspector General's standards and whether it complies with the law. The Inspector General does not get to write the law, and its standards do not determine the outcome of § 1983 cases. The jury was not asked to decide whether the defendants complied with the Inspector General's standards, but whether they complied with the law. It was free to reject the Inspector General's standards as unreasonable, even if it found Pacchioli credible in his testimony and his review of the report. That was in addition to being instructed that it could disbelieve his testimony.

Our decision in *United States v. Myers*, 972 F.2d 1566 (11th Cir. 1992), shows why the distinction matters. We addressed a lay witness who was challenged as having "offer[ed] a legal conclusion on the ultimate issue in the case." *Id.* at 1577. His testimony was that, based on his experience and knowledge of police standards, a police officer had not used reasonable force. *Id.* The earlier

questioning of the witness had elicited his training and how the police academy teaches officers to respond to certain provocations; only after that questioning was the witness asked whether the use of force in that case had been reasonable. *Id.* at 1577 n.9. We applied to the lay witness a standard we had stated in an expert witness case: that the witness does not invade the province of the jury when his testimony addresses "whether force was 'reasonable' or 'justified'" if that testimony is about "prevailing standards in the field of law enforcement." *Id.* at 1577 (citing *Samples v. City of Atlanta*, 916 F.2d 1548, 1551 (11th Cir. 1990)).

We held that because the witness had "properly framed his opinion in accordance with prevailing police standards" the court had not abused its discretion in allowing him to testify that the use of force was unreasonable. *See id.* at 1577–78. In further support of that holding, we favorably cited an Eighth Circuit decision and described it as holding that a question "as to whether 'defendant's conduct violated a constitutional norm,' was permissible because the 'jury had the right to be informed concerning prison policy' in assessing whether a correctional officer had violated a prisoner's civil rights." *Id.* at 1578 (quoting *Wade v. Haynes*, 663 F.2d 778, 784 (8th Cir. 1981)). Similar to how the witness in *Myers* "properly framed his opinion in accordance with prevailing police standards," *see* 972 F.2d at 1578, Pacchioli's testimony was properly framed in accordance with the Inspector General's standards for use of force incidents.

Not only that, but Pacchioli's testimony was much more limited than the testimony we held was properly permitted in *Myers*. He was not permitted, as the lay witness in *Myers* had been, to testify extensively about the details of the standards. *See id.* at 1577 n.9. Nor was he permitted, as the lay witness in *Myers* had been, to testify directly about whether in his view the force used was "reasonable." *See id.* Pacchioli instead was permitted to testify only that the use of force described in the report and shown in the videotape complied with the Inspector General's standards. And as the *Wade* decision, which we quoted in *Myers*, said, the "jury had the right to be informed concerning prison policy" about uses of force when "assessing whether a correctional officer had violated a prisoner's civil rights." *Id.* at 1578 (quotation marks omitted).

And, of course, Sears had the opportunity to cross-examine Pacchioli and did so thoroughly. *Cf. Agro Air Assocs., Inc. v. Houston Cas. Co.*, 128 F.3d 1452, 1456 (11th Cir. 1997) (holding that lay witness testimony about causation was admissible "[b]ecause [the defendant] had the opportunity to cross-examine the witnesses," meaning "any objection to the testimony went to the weight of the evidence, not to its admissibility"). The district court instructed the jury that it had to decide whether to believe or disbelieve any witnesses and that it was the jury's job to decide whether a witness was credible and truthful. *Cf. Myers*, 972 F.2d at 1578 (holding that error in allowing a lay witness to testify about the reasonableness of force without a foundation was harmless because the court

instructed the jury that "it was their duty to decide the specific facts and whether to accept and rely upon an expert witness") (cleaned up). We generally presume the jury followed its instructions. *See, e.g., United States v. Hill*, 643 F.3d 807, 829 (11th Cir. 2011).

All of those reasons support our conclusion that the district court did not abuse its considerable leeway and discretion in allowing Pacchioli's testimony.

IV.

Sears contends that defense counsel made a number of improper statements during trial and closing argument. None of the statements defense counsel made during trial resulted in rulings that amount to an abuse of discretion and justify reversal.

Sears argues that the jury's verdict should be reversed because defense counsel at one point in the trial called Sears a "difficult witness." That's a fairly mild remark. And, in any event, Sears counsel's objection prompted the court to describe that comment as "improper" and strike it. We presume the jury follows instructions when statements are stricken from the record. *See, e.g., Hill*, 643 F.3d at 829.

There were other remarks defense counsel made during trial, including some during his closing argument, that Sears did not object to but now contends were reversible error. "When no objections are raised to the allegedly improper comments, however, we review for plain error, but a finding of plain error is seldom justified in reviewing argument of counsel in a civil case."

Ruiz v. Wing, 991 F.3d 1130, 1141 (11th Cir. 2021) (quotation marks omitted). Even when objected to, "inappropriate statements made by counsel will not justify a new trial unless the remarks were such as to impair gravely the calm and dispassionate consideration of the case by the jury." *Id.* (quotation marks omitted). None of defense counsel's remarks rose (or sunk) to that level.

V.

Sears contends that all of what he identifies as errors had the combined effect of depriving him of a fair trial. "The cumulative error doctrine provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal." *Baker*, 432 F.3d at 1223 (quotation marks omitted). But that seldom happens, and it didn't happen here. Sears was not deprived of a fair trial.

AFFIRMED.

B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRY EUGENE SEARS,

Plaintiff,

v. Case No. 8:12-cv-288-T-33TGW

SERGEANT DAVID PRINCE;
CAPTAIN FELISHA DEXTER;
COLONEL VERNIA ROBERTS;
LIEUTENANT JEFFREY HART, et al.,

Defendants.

ORDER

This cause is before the court on Defendants Sergeant David Prince, Captain Felisha Dexter, Colonel Vernia Roberts, and Lieutenant Jeffrey Hart's motion for summary judgment (Doc. 143), and pro se Plaintiff Terry Eugene Sears' response to the motion. (Doc. 161).

A review of the record demonstrates that, for the following reasons, the Defendants' motion for summary judgment will be granted.

BACKGROUND

On December 21, 2011, Sears, a prisoner incarcerated in the Florida Department of Corrections (DOC), filed a 42 U.S.C. § 1983 civil rights lawsuit against Defendants at Polk Correctional Institution (PCI), Polk City, Florida, where the alleged unconstitutional use of force

incident occurred on March 18, 2010.

On December 12, 2014, this Court dismissed all Defendants except the above-named Defendants and all claims except Sears' allegation that the use of force incident on March 18, 2010, states a claim for excessive use of force under the Eighth Amendment.

BACKGROUND AND SEARS' ALLEGATIONS

Sears received a Disciplinary Report (DR) for battery or attempted battery on a correctional officer based on the March 18, 2010 incident. The DR, dated 3/18/2010, reads:

> ON 3/18/2010, AT ABOUT 11:15 AM, I, SGT. D. PRINCE SAW INMATE SEARS, TERRY DC# 083117 YELLING AT CPT. DEXTER ON THE SIDEWALK BETWEEN FOOD SERVICE AND MULTI-PURPOSE CPT. DEXTER WAS ORDERING SEARS TO "TURN AROUND AND CUFF UP" SEARS REFUSED. C/O S. PLOUGH AND C/O D. SMITH ATTEMPTED TO PLACE SEAR'S [sic] ARMS BEHIND HIS BACK. SEARS JERKED AWAY FROM THEM. I REMOVED MY CHEMICAL AGENT FROM MY BELT AND ORDERED SEARS TO PLACE HIS HANDS BEHIND HIS BACK FOR HAND CUFFING AND I ADVISED SEARS THAT I WOULD ADMINISTER CHEMICAL AGENTS IF HE DID NOT COMPLY. I PLACED MY RIGHT HAND ON HIS RIGHT WRIST AND ATTEMPTED TO DIRECT IT BEHIND HIS BACK FOR HAND CUFFING. SEARS REPLIED, "IF YOU SPRAY ME IT'S GOING TO GET PHYSICAL" AND SNATCHED AWAY FROM ME WHILE CLENCHING HIS FISTS. I ADMINISTERED AN APPROXIMATE ONE SECOND BURST OF CHEMICAL AGENT TO SEARS' FACIAL AREA. SEARS IMMEDIATELY CHARGED TOWARDS ME AND BEGAN STRIKING ME IN THE HEAD AND SHOULDER AREA WITH HIS FISTS. SEARS STRUCK ME ON BOTH SHOULDERS AND ON THE RIGHT SIDE OF MY HEAD. I WAS NOT INJURED BY THIS ATTACK. INMATE SEARS IS BEING CHARGED WITH 1-15 BATTERY OR ATTEMPTED BATTERY ON CORRECTIONAL OFFICER. SEARS IS HOUSED IN ADMINISTRATIVE CONFINEMENT PENDING THE DISPOSITION OF THIS REPORT.

(Exhibit D to Doc. 69).

Sears maintains that he was talking to Dexter when Prince sprayed him in the face with a chemical agent, without warning. (Doc. 1 at 18). Sears further claims that he was slammed to the ground, handcuffed and punched, elbowed and choked by DOC officials. (Id.). Sears alleges that Prince continued to spray him during this assault, which Sears approximates lasted sixteen

minutes. (Id.). Sears alleges that he was assisted to his feet and Prince sprayed him with a second can of chemical agent. (Id. at 19). Finally, Sears alleges that he was escorted to medical where he was physically assaulted by Prince. (Id.).

UNDISPUTED FACTS

On March 18, 2010, Sears was housed in G-Dormitory which is located on the north end of the PCI compound. (Ex. 002, 010-011).[1] Dees [2] was the G-Dormitory Housing Officer for that shift. (Ex. 003-06). Dees was conducting a search of inmates as they returned to G-Dormitory and Dees ordered Sears to submit for search. (Id.)

An argument ensued between Dees and Sears when Sears refused to be searched. Sears left the G-Dormitory area and said he was going to discuss the incident with the Colonel. (Id.; Doc. 1 at 17). Dees radioed Dexter, who was making her rounds on the other side (south side) of the compound, about the incident. (Ex. 003-06). As Dexter made her way to G-Dormitory, she met Sears about half way in the compound, in an open roadway area with sidewalks and grassy grounds. The area is located approximately in front of the food service building and the canteen and just past the multi-purpose building. (Id.).

As Sears approached Dexter, Sears appeared agitated and was "flailing his arms and yelling loudly." (Id.). Dexter "told [Sears] that I would not talk to him unless he allowed me to cuff him, and he refused." (Id.). After Dexter made several attempts to gain Sears' compliance with her "cuff up" orders, Dexter called for assistance from several correctional officers in the area:

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[1] All citations refer to the exhibits to Defendants' motion for summary judgment. (Doc. 143). The pages in the exhibits are numbered sequentially as "OAG (Office of Attorney General) + the Exhibit Number; for example OAG EX001." The Court cites to the exhibit number only; for example, Ex. 001.

[2] Dees is not a Defendant in this case.

Smith, Plough and Prince.[3] (Id.).

Looking north, Prince was moving "towards the food service" building with Smith on Dexter's right "from the canteen" building with Plough slightly behind them. Plough had "stepped outside of the multi purpose building to smoke." With the officers in place, Dexter "again instructed [Sears] to comply ...." (Id.).

Sears refused to obey Smith's and Plough's order to place Sears in handcuffs, and Sears physically resisted their handcuffing him. (Ex. 007-009). Prince then removed his MK4 chemical spray canister from his belt and warned Sears to comply with the order to "cuff up." (Id.). Sears not only refused to comply with the lawful order to cuff up, but also warned Prince, "If you Gas me, it's going to get physical." (Id.). Prince again attempted to place Sears in handcuffs, but Sears "snatched away and again assumed a stance that indicated he intended to fight." (Id.).

After all of the above happenings, Prince applied a "small burst (1 second, or less) of Chemical agent Saber Red to his [Sears] facial area." (Id.; 003-006) The amount of chemical dispensed was 6.4 grams. (Ex. 062, 063). Upon review, this amount was found not to be excessive. (Ex. 046).

As a result of being chemically sprayed, Sears "immediately charged [Prince] while swinging his clenched fists. [Sears] repeatedly struck [Prince] in the area of [his] shoulders and head. (Ex. 007-009). Prince attempted to block the blows from Sears. Smith and Plough pulled Sears "off of" Prince. (Id.). Sears was subdued by Smith and Plough while Sears was under the effect of the chemical spray. (Id.).

In Dexter's words, Sears was "unruly, and chemical agents were applied by Sgt. Prince

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[3] Plough and Smith are not defendants in this action.

to gain compliance." (Ex. 003-06). Sears was "combative and was placed on the ground, in the grass area, and hand cuffs were applied." (Id.). Once Sears was handcuffed, there was no further use of force and he was escorted to Administrative Confinement (AC) for decontamination in a shower and a post use-of-force medical examination. (Ex. 007-009, 002).

Dexter instructed another officer in the area, Sergeant Voorhess, "to get a video camera and report to medical for recording...." (Ex. 003-06). There was no videotaping of the spontaneous use-of-force event.[4]

Following his decontamination shower, Sears was not taken to medical, but was seen by the nurse in the AC building, for his post use-of-force medical examination. (Ex. 057). On the medical form, Nurse Cooper checked "Other" in the "Arrived via," block, indicating Sears was "seen in AC Confinement." (Id.) Sears' location is also reflected in the housing log where the log shows he was initially housed in AC. (Ex. 002).

Upon examination by Cooper, Sears complained only of pain at his "left front & shoulder, back of head (lower left side)." (Ex. 057). Cooper's medical examination found both areas to be "unremarkable" and Sears showed no problem rotating and moving his shoulder. (Ex. 058).

The post use-of-force medical examination revealed that Sears had a "small dime size abrasion with minimal bleeding" on his front left knee area and an "egg size soft lump" "with redness, ecchymosis" on his front right shin area. (Exs. 057, 058). The nurse medically determined that Sears' minimal injuries did not require notification of a physician nor further treatment. (Ex. 057). Sears was to remain in AC. Sears was "instructed to call medical staff if

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[4] Sears' allegation that Dexter had a video camera in her possession is not correct. First, officials do not walk around with video cameras on their person; and second, Dexter is the officer in charge, and placing her in the role of filming an event removes her from her assigned command role.

needed." (Id.). Following his post use-of-force medical examination, Sears "was placed in a confinement cell and the incident ended." (Ex. 002).

Prince reported to medical where he was seen by Nurse Sher and he stated, I "was being hit by [Sears] -- punching my shoulders & bilateral upper arm area & right side of head" or "use of force by inmate." (Exs. 051, 052). Prince then "returned to [his] normal duties and had no further contact with [Sears]." (Ex. 007-009).

Smith and Plough were accidently hit by chemical overspray during the application of chemical spray by Prince. Plough also injured his left middle finger. (Ex. 053-56).

Later, while in AC, Sears declared a "psychological emergency" (Ex. 012), and was transferred to H Dormitory where he was seen by mental health personnel. Sears was then assigned to an "Isolation Management Room." (Ex. 013, 002). The Isolation Management Room status is also designated as self-harm observation status or SHOS. (Ex. 013).

While in SHOS, Sears was given a "shroud to cover [himself] ... [and was] seen regularly by medical, mental health and security staff." (Ex. 002). Sears had a psychological evaluation; his condition did not warrant referral to a psychiatrist, and he was released from SHOS on March 25, 2010. (Ex. 013).

Due to the events of March 18, 2010, Sears was charged with (1) disobeying the orders of Officer Dees at G-Dormitory to submit to a search (Log # 580-100109); and (2) battery on Prince during the use-of-force event (Log # 580-100112). (Ex. 014, 027).

A disciplinary hearing (Log # 580-100109) was held April 1, 2010, for disobeying Dee's orders. Sears was found guilty of the charge and given thirty days in disciplinary confinement and sixty days of lost gain time credits. (Ex. 014).

A disciplinary hearing (Log # 580-100112) was held March 30, 2010, for battery and

assault on Prince during the use-of-force incident. Sears was found guilty and given sixty days in disciplinary confinement. (Ex. 026). The events of March 18, 2010, also generated a Report of Force Used and an Incident Report. (Ex. 064-075). All of the reports corroborate the Defendants' version of the incident that transpired on March 18, 2010.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

"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). A genuine dispute is present if a reasonable jury could return a verdict in favor of the non-moving party. *See Allen v. Bd. of Public Educ. for Bibb Cnty.,* 495 F.3d 1306, 1313 (11th Cir. 2007). It is only when the moving party meets its initial burden that the burden shifts to the non-moving party to demonstrate there are "specific facts showing that there is a genuine issue for trial." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593-94 (11th Cir. 1995). In response, the non-moving party must show more than "a mere scintilla of evidence to defeat a [properly presented] motion for summary judgment." *Kesinger ex rel. Estate of Kesinger v. Herrington*, 381 F.3d 1243, 1247 (11th Cir. 2004).

In determining whether summary judgment is proper, a court "must view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (external citation omitted). It is impermissible for the court to make credibility determinations in reaching its decision. *See Moorman v. UnumProvident Corp.*, 464 F.3d 1260, 1266 n.1 (11th Cir. 2006).

Cause of Action Under Title 42 U.S.C. § 1983

To state a valid cause of action under Title 42 U.S.C. § 1983, Plaintiff must allege

Defendants were: (1) acting under color of state law and (2) that they deprived him of a federally protected right, privilege, or immunity secured by the Constitution. *See U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275, 1288 (11th Cir. 2001). Plaintiff must also establish an affirmative causal connection between the Defendants' conduct and the alleged constitutional deprivation. *See Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1059 (11th Cir. 2001).

Excessive Use of Force

This case concerns whether or not Defendants used excessive force against Sears. The core judicial inquiry when a prisoner alleges that prison officers used excessive force against the prisoner is not whether a certain quantum of injury was sustained, but rather whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm. *Wilson v. Gaddy,* 559 U.S. 34, 37 (2010) (*quoting Hudson v. McMillian*, 503 U.S. 1, 7 (1992)); *Skrtich v. Thornton*, 280 F.3d 1295, 1300 (11th Cir. 2002). In the Eleventh Circuit, consideration of the following factors is used to determine whether the force applied was done maliciously and sadistically to cause harm: a) the need for the application of force; b) the relationship between the need and the amount of force that was used; c) the extent of the injury inflicted upon the prisoner; d) the extent of the threat to the safety of staff and inmates; and e) any efforts made to temper the severity of a forceful response. *Fennell v. Gilstrap*, 559 F.3d 1212, 1217 (11th Cir. 2009) (*per curiam*); *Cockrell v. Sparks*, 510 F.3d 1307, 1311 (11th Cir. 2007). In making this determination, courts "give a wide range of deference to prison officials acting to preserve discipline and security, including decisions made at the scene of a disturbance." *Gilstrap*, 559 F.3d at 1217.

The Need for the Application of Force

The overwhelming evidence indicates Sears' actions created the need for the use-of-force about which he complains. On March 18, 2010, the action began when Sears admittedly refused Dees' lawful order to submit to a search upon Sears' return to G-Dormitory. Sears contends that Dees "tried to make conversation with [him] ... [Sears] ignored him." (Doc. 1 at 17). Sears alleges that Dees "grabbed [his] left shoulder ... [he] immediately snatched away and told Dees not to put his hands on me." (Id.). Sears then left the G-Dormitory area heading, as he states, to see the Colonel. (Id.). Sears thought Dees "was constantly harassing me...," and Sears regularly complained of, and wrote grievances against, Dees. (Id. at 16, 35).

Dees charged Sears with disobeying orders. The disciplinary team at the disciplinary hearing determined that Sears was guilty of disobeying Dees' orders and placed Sears in disciplinary confinement for thirty days with a gain time loss of sixty days.[5] The disciplinary hearing for this offense was case number 580-100109. (Ex. 083, Disciplinary Hearing Report, case number 580-100109).

Sergeant Cooper, in his witness statement, stated that he witnessed "C/O Dees give I/M Sears, Terry, a verbal order to cuff up. I/M Sears refused several orders and walked away." (Ex. 020). Both Dees and Cooper were interviewed by Sergeant Alexander and Sergeant Clark who had transcribed previously provided witness statements. (Ex. 018). Dees' witness statement was the basis of the disciplinary hearing findings.

A disciplinary hearing satisfies constitutional due process and "[Sears] is not permitted to dispute the facts as stated in the DR. Sears cannot deny the conduct in the DR; and cannot

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[5] Sears is serving a life sentence and any computation of gain time is an administrative function and has no real meaning.

imply that the DR was false by making allegations that explicitly contradict it."[6] (Doc. 101 at 12).

The record also establishes that Sears left the presence of Dees at G-Dormitory to meet Dexter and not to go to the Colonel's office as he alleges in his Complaint. The record plainly shows that Dexter met Sears contemporaneously with Dees' radio contact regarding the incident. (Ex. 003-006). The Colonel's office is located in an access restricted building and inmates cannot walk into the building.

With Dexter walking from the south end of the compound and Sears making his way from the north end, Dexter met Sears in the vicinity of the food service building in front of the canteen and near the multi-purpose building. (Ex. 003-006, 010-011). In her affidavit, Dexter states Sears approached her in an agitated fashion, waving his arms and yelling. This action occurred in the open area of the compound in front of the food service and other buildings with inmates and officers scattered throughout the area. It is not a closed area. (Ex. 010-011).

After Sears refused Dexter's order to "cuff up," Dexter called on Prince, who was walking to[illegible]rd the food service building; Smith, who was in front of the canteen; and Plough, who had stepped outside of the multi-purpose building, to join her for assistance. (Ex. 003-006).

Sears refused to comply with Dexter's additional orders and those of Smith and Plough. When Prince started to pull his MK4 Chemical Spray canister from his belt, Sears challenged him -- "if you Gas me, it's going to get physical." (Ex. 007-009). Sears refused to comply with

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[6] In the Court's order partially granting Defendants' motion to dismiss (Doc. 101 at 12), the Court stated: "Sears claims that the DR he received for battery or attempted battery on a correctional officer on March 18, 2010, was "bogus." The DR was prepared by Prince; several officers corroborated Prince's version of the event. (Exhibit D to Doc. 69). Sears' claim is barred from consideration by this Court because Sears is challenging the veracity of a DR of which he was found guilty (Exhibit D to Doc. 69), after being provided due process at a disciplinary hearing. *See O'Bryant v. Finch*, 637 F.3d 1207, 1215-16 (11th Cir. 2011).

repeated orders and "indicated he wanted to fight." (Id.). As Smith and Plough sought to gain physical control of Sears, Prince chemically sprayed Sears with an approximate one-second burst into his facial area. (Id.). Sears simultaneously lunged at Prince and hit Prince several times with his fists. (Id.). In the commotion, Smith and Plough were hit with the chemical spray. Smith and Plough subdued Sears, and Sears was "directed to the grass covered ground" and hand cuffed. The use-of-force incident ceased at that point and no other action took place.

"Prison guards may use force when necessary to restore order and need not wait until disturbances reach dangerous proportions before responding." *Bennett v. Parker*, 898 F.2d 1530, 1533 (11th Cir. 1990). The Florida Administrative Code, Chapter 33-602.210(2), authorizes the use of non-deadly physical force when reasonably necessary to defend oneself or another against an inmate using unlawful force, or to overcome an inmate's physical resistance to a lawful command.

Sears came from the north end of the compound after arguing with Dees at G- Dormitory, and met Dexter in the open middle area of the compound. Sears was visibly agitated and was yelling at Dexter. Sears not only refused to follow Dexter's orders, he also refused to follow Smith's and Plough's orders. It was only after repeated warnings from Prince, and while Sears was in a physical confrontation with Smith and Plough, that Prince applied chemical spray to gain Sears' compliance. It was only after the application of the chemical spray, and with the physical efforts of Smith and Plough, that Sears was subdued on the grassy part of the compound and handcuffed.

That ended the use-of-force incident and Sears was escorted to AC for decontamination. Prince proceeded to medical and was cleared to return to work. (Ex. 051, 007-09). Dexter then saw Vorhees in the vicinity and instructed Vorhees to get a camera. Following Sears'

decontamination, Sears was retained in AC. Sears later declared a psychological emergency and was placed in an "Isolation Management Room" in H Dormitory for observation. (Ex. 013, 002).

A second disciplinary report was written against Sears for battering Prince. Other reports and documents were generated from the use-of-force incident: the Report of Force Used (Ex. 046-063) and an Incident Report for the force used. (Ex. 064-075). The battery charge was disciplinary case number 580-100112. A Disciplinary Hearing was later convened and Sears was found guilty of the charge; he was given sixty days in disciplinary confinement. (Ex. 026). Due to Sears' observation in isolation for his psychological emergency, that sentence was delayed until March 30, 2010. (Id).

Prince provided a detailed version of the above incident in his Disciplinary Report Worksheet, (Ex. 029), as did Dexter, Smith, and Plough. (Ex. 026-44).

The guilty findings are corroborated by the Report of Force Used with signed statements of Prince, Warden Edwards, the Institutional Inspector, and the Inspector General's review and approval. (Ex. 046). The report found that the amount of chemicals dispensed "does not appear to be excessive." (Id.). Only 6.4 grams were dispensed. (Ex. 062, 063). The same statements and positions by Defendants are reflected in the Incident Report of force used. (Ex. 064-75). The findings indicate Sears was argumentative, hostile, and wanted to fight. At no point did Sears follow the numerous lawful commands given by the officers present. The use of chemical spray was necessary to gain Sears' compliance.

The Relationship Between the Need To Use Force and the Amount of Force Used

Prince followed proper procedures and administered only one burst of approximately one second of chemical spray. This finding is consistent with the above statements and findings.

Moreover, only 6.4 grams of chemicals were used. (Ex. 062, 063).[7]

The compliance with prison regulations in administering force or restraint provides evidence that prison officials acted in good faith and not to inflict pain. *Campbell v. Sikes*, 169 F.3d 1353, 1376 (11th Cir. 1999). Nothing in the present record suggests that Defendants did not act with restraint or that they failed to follow procedures in the use of force. When forced by Sears to use force, the prison officers did so in a minimum manner to safely control and gain compliance of a belligerent Sears.

Sears was outwardly hostile, argumentative and was waving his arms while yelling at Dexter. Sears refused Dexter's orders, and even when confronted by three other officers, including Prince, Sears remained belligerent. Once Prince exhausted his warnings to Sears, Prince administered the chemical spray. Sears initially responded by attacking Prince. Sears' forceful action occurred even though Officers Smith and Plough were attempting to subdue him. It is for this reason that Smith and Plough received some exposure to the application of chemical spray. (See Ex. 053, Smith; and Ex. 055, Plough.) Contrary to Sears' allegations, Dexter, as the officer in charge at the scene, maintained her command and control with necessary separation from the physical event, and she was not exposed to the chemical spray.

The single application of chemical spray, along with the physical efforts of Smith and Plough brought Sears into compliance. No other force was used or needed. The type and amount of force bears a reasonable relation to the stated facts, statements, reports and findings made by all corrections officers and medical personnel. The amount of force used was the minimum

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[7]Although Sears, in his response to Defendants' motion for summary judgment, contends that chemical spray from another canister was used, he provides nothing except his own statement to support this allegation.

force necessary to establish control over an uncooperative, hostile and agitated inmate.

The Extent of Sears' Injuries

The lack of serious injury is relevant for this analysis. In determining whether the amount of force used against an inmate was de minimis, a court may consider the extent of the injuries suffered by the inmate. *Skrtich v. Thornton*, 280 F.3d at 1302. The extent of injuries does not control the Court's findings because the Court ultimately decides an excessive force claim "based on the nature of the force rather than the extent of the injury." *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010).

In this instance, following the use-of-force incident, Sears only complained of pain to his "left front & shoulder, back of head (lower left side)." (Ex. 057). Nurse Cooper's post use-of-force examination showed that both areas appeared "unremarkable" and Sears was able to rotate his shoulder with no problems. (Id.). Sears did have a "small dime size abrasion with minimal bleeding" on his front left knee area and an "egg size soft lump with redness, ecchymosis"[8] on his front right shin area. (Exs. 057-058). A physician's examination was not required. Sears was released by medical to "remain in AC confinement" and "instructed [ ] to call medical staff if needed." (Ex. 057). Following his post use-of-force medical examination, Sears "was placed in a confinement cell and the incident ended." (Ex. 003-006).

Sears' complaint of alleged abuse and injuries are not supported by the injuries recorded and complained of in his post use-of-force medical examination. Notably, once Sears declared his subsequent psychological emergency, he was transferred to a more controlled environment and placed in an individual cell for direct observation. While the use and amount of force is

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[8] *Ecchymosis* is a discoloration of the skin resulting from bleeding underneath, typically caused by bruising.

always critical, as presented in this case, the minimal injuries sustained by Sears indicate the lack of any attempt, by any individual, to "maliciously and sadistically [ ] cause harm." *Wilkins*, 559 U.S. at 37. Thus, the minimum nature of the injuries sustained by Sears in the use-of-force incident that occurred in an open field with three correctional officers, demonstrates the professional actions by those officers to minimize the harm that could have resulted when confronting a hostile inmate.

The Threat Reasonably Perceived by Officials on the Basis of Facts Known to Them

Courts are required to "examine the facts as reasonably perceived by [Defendants] on the basis of the facts known to [them] at the time." *Whitley v. Albers*, 475 U.S. 312, 321 (1986). It is evident from the numerous statements, reports and disciplinary hearings that Sears was the aggressor on March 18, 2010. Sears not only refused the officers' legal orders, but also taunted them by telling them what the officers could or could not do. When ultimately confronted by Prince regarding the application of chemical spray, Sears openly dared him that it "was going to get physical." The officers correctly perceived Sears as a threat to the safe operation and order of the institution. The incident occurred in the open compound in front of food service and other buildings with inmate population in the area. All actions taken by the officers, as reflected in the reports and statements, were proper and reasonable with regard to the perceived threat presented by a hostile and agitated inmate seeking to start a fight.

The Efforts Made To Temper the Severity of the Force

Sears had numerous attempts to respond to the officers' lawful orders prior to escalating the incident. Dees notified Dexter that Sears left G-Dormitory and was looking for her. Dexter ordered Sears to submit for cuffing. Only after Sears continued to refuse Dexter's orders did

Dexter seek nearby officers for assistance. Prince gave numerous warnings to Sears, and finally told Sears to comply or Prince would administer chemical agents. These actions failed to gain compliance from Sears, who was verbally challenging the orders and wanted to fight. The event occurred in open grounds at a time when inmates were allowed to transit the compound. It took only one application of chemical spray (6.4 grams), with Smith and Plough physically directing Sears to the grassy area of the compound, to control the situation. Thus, the efforts used against Sears were not only reasonable, but also restrained, given the numerous verbal and physical challenges issued by Sears.

Additional Comments

Officers Smith and Plough are not parties to this action but their actions and any matter that may stem from them are covered by the same arguments and supporting documents in the analysis of the use-of-force event concerning Prince. This is so because all of actions alleged by Sears arise from the same event whether discussing the actions of Prince and Smith or Plough.

Second, it is evident that the use-of-force incident was a "spontaneous" event. By the very nature of spontaneous, the event is required to be videotaped. (Doc. 1 at 38). Sears' contentions that Dexter tours the compound with a video camera in hand is a conclusory statement. Dexter instructed Officer Voorhees to secure a camera after the use-of-force event had concluded. The obvious reason for the timing of that instruction is apparent given the nature of the event. (Ex. 003-006; Doc. 1 at 38 (stating "[t]he video did begin according to procedure.").

Given the above, Defendants, by any of their actions or omissions did not use excessive force on Sears. The force used was proper and reasonable and used to ensure proper order and safety of the institution and the persons present.

Failure To Intervene

It is clear "prison officials have a duty ... to protect prisoners from violence ...." *Farmer v. Brennan*. 511 U.S. 825, 833 (1994). A violation of the Eighth Amendment occurs when a prison official acts with deliberate indifference to a substantial risk of harm to an inmate. *Farmer*, 511 U.S. at 828. To establish deliberate indifference, the defendant must first be aware of specific facts from which an inference can be drawn that a substantial risk of serious harm exists, and second, that the defendant drew that inference. *Purcell v. Toombs Cnty., Ga.*, 400 F. 3d 1313, 1319-20 (11th Cir. 2005). The specific facts must subjectively show that a defendant was aware of a "particularized threat or fear felt by [the Plaintiff]." *Carter v. Galloway*, 352 F.3d 1346, 1350 (11th Cir. 2003). However, just because a defendant failed to alleviate a significant risk that he should have perceived, but did not, "while no cause for commendation, cannot be condemned as the infliction of punishment under the Court's cases," and thus, is not a Constitutional violation. *Farmer*, 511 U.S. at 838. Additionally, "[m]erely negligent failure to protect" an inmate from an attack is a violation of the Constitution. *Carter*, 352 F.3d at 1350.

Finally, the constitutional violation must be shown to have caused the injury, *Cottone v. Jenne*, 326 F.3d 1352, 1359 (11th Cir. 2003) (citation omitted); and there must be some realistic opportunity for a defendant to respond to prevent the illegal conduct. *See Ensley v. Soper*, 142 F.3d 1402, 1407-08 (11th Cir. 1998).

If a court finds a constitutional violation based on excessive use of force, "an officer who [was] present at the scene and who fail[ed] to take reasonable steps to protect the victim of another officer's use of excessive force, can be held liable for his nonfeasance." *Skrtich v. Thornton*, 280 F.3d at1302. "This liability, however, only arises when the officer is in a position to intervene and fails to do so." *Priester v. City of Riviera Beach*, Fla., 208 F.3d 919, 924 (11th Cir. 2000) (citing *Ensley v. Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998)). A defendant must be

aware of the "particularized threat or fear ...." *Purcell v. Toombs Cnty., Ga.*, 400 F.3d 1313, 1350 (11th Cir. 2005).

Dexter was the only official physically present at the scene during the use of force. Sears attempts to implicate Hart and Roberts, but it is clear that their observing from the "corridors leading to the visiting park," (Doc. 1 at 19) during the spontaneous use of force incident failed to take into consideration the lack of opportunity for Hart and Roberts to respond. The "corridors leading to the visiting park," as alleged by Sears, describes an area located away from, and not in the direct vicinity of, where the use-of-force event occurred. The map of Polk Correctional Institution (Ex. 010-011) indicates that the Visitor's Park is located behind the Canteen and the multi-purpose building, and thus, was some distance away from the incident.

Sears' conclusory allegations directed at Hart and Roberts indicate Sears knew they were not present at the use-of-force incident. "[He] observed Colonel V. Roberts and Lieutenant J. Hart watching this incident from the corridors leading to the visiting park." (Doc. 1 at 19). Hart and Roberts were in no position to intervene even if one assumed that an excessive use-of-force incident occurred. Moreover, the incident was dynamic and spontaneous and officers were present on the scene making instant judgments to control the situation.

In addition, the record documents show Sears was first taken to AC for a post use-of-force decontamination. The nurses document their post use-of-force examination with Sears at that location. Sears was never taken to the medical building, which is also evident by Prince's medical examination being conducted in the medical building, not near Sears. Prince also states he had no further interaction with Sears after the use-of-force event. This comports with normal operating protocol, which is to separate the inmate and the correction individuals involved in the use-of-force incident.

efendants used the minimal amount of force necessary. Hart and Roberts were in no
n to intervene, and actions at the site were so dynamic and spontaneous, no one had an
tunity to intervene.

Accordingly, the Court orders:

That Defendants' motion for summary judgment (Doc. 143) is granted. The Clerk is
irected to enter judgment for Defendants and to close this case.

ORDERED at Tampa, Florida, on October 30, 2015.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

Counsel of Record
Terry Eugene Sears

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRY EUGENE SEARS,

Plaintiff,

v. Case No: 8:12-cv-288-T-33TGW

VERNIA ROBERTS, FELISHIA DEXTER, JEFFREY HART, DAVID PRINCE,
Defendants.

JUDGMENT IN A CIVIL CASE

This action came before the Court for a trial by jury on August 12, 2019 through August 15, 2019. The issues have been tried and the jury has rendered its verdict in favor of the Defendant(s).

Therefore, it is **ORDERED AND ADJUDGED** that:

1. Judgment is entered in favor of Defendant(s) Vernia Roberts, Felishia Dexter, Jeffrey Hart and David Prince, and against Plaintiff Terry Eugene Sears.

2. The Clerk is directed to close this case.

Date: August 15, 2019 ELIZABETH M. WARREN, CLERK

/s/ T. Lee
By: Tamecika Lee, Courtroom Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRY E. SEARS,

Plaintiff,

v. CASE NO. 8:12-cv-288-T-33TGW

EDUARDO RIVERO, *et al.*,

Defendants.

_____/

REPORT AND RECOMMENDATION

THIS CAUSE came on for consideration upon the Defendants' Motion for Taxation of Costs of $1,169.86 (Doc. 277). The plaintiff opposes the motion (Doc. 280). The motion was referred to me for a report and recommendation.

The defendants are entitled to reimbursement of their costs pursuant to Rule 54(d)(1), Fed.R.Civ.P. However, in consideration of the plaintiff's limited financial resources, I recommend a 50% reduction of the requested amount, which is $584.93.

I.

The plaintiff is serving a life sentence in prison. He filed a lawsuit against the defendants alleging, inter alia, that the prison officers

used excessive force against him, in violation of 42 U.S.C. 1983 (Doc. 1). The defendants prevailed against the plaintiff's claims after a four-day jury trial (see Doc. 266).[1] Accordingly, judgment was entered in favor of the defendants (Doc. 272).

The defendants then filed this Motion for Taxation of Costs (Doc. 277). The plaintiff, with the assistance of counsel, filed an opposition memorandum (Doc. 280). After the matter was referred to me for a report and recommendation, I ordered the defendants to reply to the issues raised in the plaintiff's opposition (Docs. 287, 290). Additionally, the plaintiff was ordered to submit evidence of his indigency, which he alleged precluded him from satisfying a costs judgment (Doc. 298). The plaintiff, proceeding *pro se*, filed a response (Doc. 301).

In the meantime, the plaintiff filed a notice of appeal of the judgment in this case (Doc. 284). It is pending before the Eleventh Circuit Court of Appeals.

II.

The defendants seek reimbursement of their costs pursuant to

[1] The law firm of Foley & Lardner, LLP agreed to represent the plaintiff at trial *pro bono* (Docs. 188-90, 201, 202). Therefore, the plaintiff did have the benefit of counsel representing him at trial. I subsequently permitted counsel to withdraw from the case (Doc. 299).

Rule 54(d)(1), F.R.Civ.P. and Local Rule 4.18, which provides that, absent a statute or court order, a prevailing party is entitled to recover costs. The purpose of Rule 54(d)(1) is "to provide at least partial indemnification of the expenses incurred in establishing the...defense." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2667 at p. 205 (4th ed. 2014); see also Baez v. United States Dep't of Justice, 684 F.2d 999, 1003 (D.C. Cir. 1982). There is a "strong presumption" that the prevailing party will be awarded costs. Mathews v. Crosby, 480 F.3d 1265, 1276 (11th Cir. 2007).

The prevailing party is the party in whose favor judgment is entered. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Resources, 532 U.S. 598, 603 (2001). The defendants are clearly the prevailing parties in this case and, accordingly, they are entitled to an award of their taxable costs pursuant to Rule 54(d)(1), Fed. R. Civ. P.

Generally, costs are limited to the items set forth in 28 U.S.C. 1920. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987). The statute provides that a judge or clerk of any court of the United States may tax as costs the following:

> (1) Fees of the clerk and marshal;
>
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

The defendants seek reimbursement of $1,169.86 in taxable costs, comprising $1,096.66 in witness fees and $73.20 for photocopying (Docs. 277-1, 290-1). These categories of costs are compensable. See 28 U.S.C. 1920(3)(4).

Furthermore, the defendants presented evidence of these costs. Specifically, they submitted receipts for attendance fees and the travel expenses of witnesses Denise Cooper, Samuel Pacchioli and Scott Vorhees (Doc. 290-1, pp. 4-11).[2] See 28 U.S.C. 1821 (reasonable witness travel costs and lodging are taxable). Additionally, there is an itemized list of the photocopies for which they seek reimbursement (id., pp. 2-3). The photocopies were from the case docket and were clearly necessarily obtained

[2] Page numbers refer to the pagination assigned by the CM/ECF docketing system.

for use in the case. Moreover, the defendants submitted the declaration of Michael Gonzalez, a paralegal specialist with the Office of the Attorney General, in which he avers that the requested costs are true and correct (id., p. 1).

The plaintiff opposes the award of costs on several grounds (Docs. 280, 301). Significantly, the court's discretion in considering a motion to tax costs is limited. Head v. Medford, 62 F.3d 351, 354 (11th Cir. 1995). Typically, a "denial of costs is in the nature of a penalty for some defection on [the prevailing party's] part in the course of the litigation." Walters v. Roadway Express, Inc., 557 F.2d 521, 526 (5th Cir. 1977) (internal marks and citation omitted).

The plaintiff first "objects [to the bill of costs]...on the grounds that there is no proof the Defendants actually paid these expenses" (Doc. 280, p. 1). The Florida Attorney General's Office incurred these costs on behalf of the defendants (see Doc. 290-1). The plaintiff argues that, because the defendants were not represented by "a private attorney who would be billing them for costs incurred," they "are not entitled to any recovery" (Doc. 280, p. 2). This contention is frivolous.

As the defendants state in their reply (Doc. 290, p. 1), the plaintiff does not cite any legal authority supporting this contention.

Therefore, the argument is properly deemed abandoned. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1330 (11th Cir. 2004) ("[A] legal claim or argument that has not been briefed...is deemed abandoned and its merits will not be addressed."); Local Rule 3.01(b), M.D. Fla. (the opposing party is to include a memorandum of legal authority in its response).

Furthermore, there is legal authority contrary to the plaintiff's argument; i.e., cases in which the court awarded costs to prevailing defendants who were represented by state agencies. See, e.g., Singleton v. Smith, 241 F.3d 534 (6th Cir. 2001); McGill v. Faulkner, 18 F.3d 456, 457 (7th Cir. 1994). Moreover, Florida residents ultimately paid these costs on behalf of the defendants, and there is no reason why they are not entitled to reimbursement of those costs as any other individual. Cf. United States v. Mitchell, 580 F.2d 789, 793 (5th Cir. 1978) ("The United States may, absent a statute, recover costs to the same extent as a private party."). Therefore, this argument is meritless.

The plaintiff also objects to the witness fees for Denise Cooper and Scott Voorhees as "unreasonable and duplicative" because the plaintiff paid each of them $80.00 in witness fees (Doc. 280, pp. 2-3).[3] The

[3]The plaintiff does not assert that he paid Cooper's attendance fee for the third day of trial or any travel expenses incurred by the witnesses.

defendants argue that they are entitled to recoup the witness fees because they were not required to assume that the plaintiff would subpoena their witnesses (and pay their witness fees). In all events, to the extent that there is any unnecessary duplication in the payment of the daily witness fees, the proposed reduction of the cost award clearly accounts for it.

The plaintiff argues further that the witness fees and photocopying lack evidentiary support (id., p. 3). The defendants submitted with their reply additional evidence regarding these costs which rectifies any deficiency. Specifically, they provided copies of the "Witness or Filing Fee Check Request[s]," and Samuel Pacchiolo's Voucher for Reimbursement of Travel Expenses totaling $665.32 (Doc. 290-1, pp. 4-11).[4] Additionally, the defendants included in their reply a "Taxable Copies Cost" list which itemizes the photocopies, all of which were from the court docket, and copied at the reasonable cost of 15 cents per page (see id., pp. 2-3).

Finally, the plaintiff argues that no costs should be imposed because he "is incarcerated for the remainder of his life" (Doc. 280, p. 4) and is "without an income or a means of payment for the costs" (Doc. 301, p. 2).

[4] The plaintiff also quibbles that the defendants should not be reimbursed for two nights of Pacchioli's hotel because he testified only one day (Doc. 280, p. 3). However, the travel voucher explains that Pacchioli's stay was extended because the defendants were unable to call him as a witness the first day (Doc. 290-1, p. 6). Therefore, this objection is meritless.

"[A] non-prevailing party's financial status is a factor that a district court may, but need not, consider in its award of costs pursuant to Rule 54(d)." Chapman v. AI Transport, 229 F.3d 1012, 1039 (11th Cir. 2000). In this regard, the Eleventh Circuit elaborated (id. at 1039):

> Even in those rare circumstances where the non-prevailing party's financial circumstances are considered in determining the amount of costs to be awarded, a court may not decline to award any costs at all. *Cf. Durrett v. Jenkins Brickyard, Inc., 678 F.2d 911, 917* (11th Cir.1982) ("we hold that in no case may the district court refuse altogether to award attorney's fees to a prevailing Title VII defendant because of the plaintiff's financial condition," because "[a] fee must be assessed which will serve the deterrent purpose of the statute, and no fee will provide no deterrence."). Subject to that restriction and to the requirement that there be clear proof of the non-prevailing party's dire financial circumstances before that factor can be considered, we leave it to the district court's discretion whether to do so in a particular case.

Costs, in particular, "may be awarded to a prevailing defendant in a civil rights action even though the suit was brought by an indigent prisoner because of the need to discourage frivolous claims and treat all litigants alike." 10 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2667 at pp. 214-217 (4th ed. 2014). As succinctly stated in McGill v. Faulkner, supra, 18 F.3d at 460 (7th Cir. 1994):

> Just as non-indigent litigants must consider the relative merits of their lawsuit against the pain an unsuccessful suit might inflict on their pocketbook, so must prisoners...learn to exercise discretion and judgment in their litigious activity and accept the consequences of their costly lawsuits.

In sum, the court is not required to consider the non-prevailing party's financial situation and, if it does, an award of costs should not be denied altogether because the plaintiff is indigent. It is unclear, however, regarding the precise limits imposed by an inability to pay.

In this circumstance, it is appropriate to consider the plaintiff's financial ability to pay a costs judgment because he is serving a lifetime sentence in prison and has no income from a job. The court ordered the plaintiff to "file...an affidavit attesting to his financial ability to pay, including a certified copy of his prisoner trust fund account statement for the previous six months" (Doc. 298, p. 2). The plaintiff, in response, submitted a declaration that "he is indigent and does not have a source of income," and included a copy of his inmate trust fund account statement for the time period February 27, 2019 to August 26, 2019 (Doc. 301, p. 2). Notably, the trust fund account documentation is not current.[5]

[5] The Inmate Trust Account statement is dated September 27, 2019 (Doc. 301-1, p. 1), more than one month before the court ordered the plaintiff to submit this documentation (see Doc. 298).

The trust account statement submitted by the plaintiff indicated a then-current balance of zero; a COP balance of $419.34; and deposits totaling $1,250.00, which he primarily spent on canteen sales (Doc. 301-1). The deposit of $1,250.00 during a six-month period is not such an insubstantial sum as to preclude any meaningful award of costs. Notably, the plaintiff is pursuing an appeal of the judgment in this case notwithstanding the $505.00 filing fee he must pay (see Doc. 295). Furthermore, it is unknown if the plaintiff has an interest in any property of value. Therefore, the plaintiff's extreme position that no costs should be imposed is unpersuasive.

On the other hand, it appears unreasonable to impose the full amount of costs. Thus, the plaintiff is serving a life prison sentence, and deposits into his inmate trust account from others appear to be his sole source of funds. In order to account for the plaintiff's limited financial resources, I recommend that the costs award be reduced by 50%, which is $584.93. This is comparable to the appellate filing fee that the defendant is paying despite his limited financial resources. It is also a substantial sum to serve the compensatory and deterrent functions of Rule 54(d)(1), F.R.Civ.P.

For the foregoing reasons, I recommend that the Defendants' Motion for Taxation of Costs (Doc. 277) be **GRANTED to the extent** that

the plaintiff be assessed, pursuant to Rule 54(d)(1), F.R.Civ.P., $584.93 in costs, and that judgment be entered accordingly.

Respectfully submitted,

THOMAS G. WILSON
UNITED STATES MAGISTRATE JUDGE

DATED: DECEMBER 11, 2019

NOTICE TO PARTIES

The parties have fourteen days from the date they are served a copy of this report to file written objections to this report's proposed findings and recommendations or to seek an extension of the fourteen-day deadline to file written objections. 28 U.S.C. 636(b)(1)(C). Under 28 U.S.C. 636(b)(1), a party's failure to object to this report's proposed findings and recommendations waives that party's right to challenge on appeal the district court's order adopting this report's unobjected-to factual findings and legal conclusions.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

TERRY EUGENE SEARS,

Plaintiff,

v. Case No. 8:12-cv-288-T-33TGW

DAVID PRINCE, FELISHIA DEXTER, VERNIA ROBERTS, and JEFFREY HART,

Defendants.
_____/

ORDER

This matter is before the Court on consideration of United States Magistrate Judge Thomas G. Wilson's Report and Recommendation (Doc. # 308), filed on December 11, 2019, recommending that Defendants' Motion for Taxation of Costs (Doc. # 277) be granted to the extent that Plaintiff Terry Sears be assessed $584.93 in costs. Sears filed an Objection on December 30, 2019. (Doc. # 309).

Upon review, the Court accepts and adopts the Report and Recommendation, overrules the Objection, grants the Defendants' Motion for Taxation of Costs for the reasons and to the extent described in the Report and Recommendation, and awards costs to Defendants in the total amount of $584.93.

Discussion

After conducting a careful and complete review of the findings and recommendations, a district judge may accept, reject or modify the magistrate judge's report and recommendation. 28 U.S.C. § 636(b)(1); Williams v. Wainwright, 681 F.2d 732 (11th Cir. 1982). In the absence of specific objections, there is no requirement that a district judge review factual findings *de novo*, Garvey v. Vaughn, 993 F.2d 776, 779 n.9 (11th Cir. 1993), and the court may accept, reject or modify, in whole or in part, the findings and recommendation. 28 U.S.C. § 636(b)(1)(C). The district judge reviews legal conclusions *de novo*, even in the absence of an objection. See Cooper-Houston v. S. Ry. Co., 37 F.3d 603, 604 (11th Cir. 1994); Castro Bobadilla v. Reno, 826 F. Supp. 1428, 1431-32 (S.D. Fla. 1993), aff'd, 28 F.3d 116 (11th Cir. 1994).

In his Objection, Sears argues that there is no proof that Defendants actually paid their claimed expenses, that the charges for witness fees and photocopying are without evidentiary support, and that costs should not be assessed against him because he is an inmate serving a life sentence and without a source of income. (Doc. # 309 at 1-3). But Judge Wilson thoughtfully considered and rejected all of these arguments in his Report and Recommendation, and the Court

agrees with Judge Wilson's findings and conclusions. In particular, the Court notes that Judge Wilson carefully considered Sears's financial status and recommended that the Defendants' cost request be reduced by 50% "[i]n order to account for [Sears's] limited financial resources." (Doc. # 308 at 10). The Court agrees that this is a fair resolution and is a "substantial sum to serve the compensatory and deterrent functions of [Federal Rule of Civil Procedure] 54(d)(1)." (Id.).

Sears also argues that an award of taxation of costs should be stayed pending the resolution of his appeal in the Eleventh Circuit. (Doc. # 309 at 4). This Court has discretion to stay the taxation of costs pending an appeal. Ameritox, Ltd. v. Millennium Labs., Inc., No. 8:11-cv-775-T-24TBM, 2015 WL 1169403, at *2 (M.D. Fla. Mar. 13, 2015). However, the Court declines to exercise such discretion in this case.

In making this determination, the Court has considered: (1) whether Sears is likely to prevail on the merits of his appeal; (2) whether Sears will suffer irreparable harm absent a stay; (3) whether Defendants will suffer substantial harm if the stay is issued; and (4) whether the stay is adverse to public interest. See Id. The Court concludes that Sears is not likely to prevail on appeal and has not shown that he

will suffer irreparable harm absent a stay. As such, his request that enforcement of the costs order be stayed pending appeal is denied.

Thus, upon due consideration of the record, including Judge Wilson's Report and Recommendation as well as Sears's Objection thereto, the Court overrules the Objection, adopts the Report and Recommendation, and grants the Motion for Taxation of Costs to the extent that Sears be assessed $584.93 in costs, pursuant to Federal Rule of Civil Procedure 54(d)(1). The Court agrees with Judge Wilson's detailed and well-reasoned findings of fact and conclusions of law. The Report and Recommendation thoughtfully addresses the issues presented, and the Objection does not provide a basis for rejecting the Report and Recommendation.

Accordingly, it is now

ORDERED, ADJUDGED, and **DECREED:**

(1) The Report and Recommendation (Doc. # 308) is **ACCEPTED** and **ADOPTED.**

(2) Defendants' Motion for Taxation of Costs (Doc. # 277) is **GRANTED** in part and **DENIED** in part.

(3) Defendants are awarded $584.93 in costs, as described in the Report and Recommendation.

(4) The Clerk is directed to enter judgment in favor of Defendants and against Plaintiff Terry Sears in the amount of $584.93 in costs.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 14th day of January, 2020.

Virginia M. Hernandez Covington

VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE