

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION**

NORMAN WILSON,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:12-cv-1407-TWP-MJD
	)	
HAROLD PAYNE and	)	
TEDDI BEARD,	)	
	)	
Defendants.	)	

**PLAINTIFF’S OPPOSITION TO DEFENDANTS’ MOTION FOR SUMMARY  
JUDGMENT**

**I. INTRODUCTION**

Defendants Harold Payne and Teddi Beard are not entitled to summary judgment because there are material issues of fact that preclude summary judgment in Defendants’ favor on Plaintiff Norman Wilson’s claims for use of excessive force by Officer Payne and failure to protect by Officer Beard. The undisputed evidence establishes that Officer Payne used excessive force against Plaintiff when he slammed Wilson against a concrete wall and continued to hold him against the wall after Plaintiff told him that he was hurting him even though Wilson never resisted Officer Payne. The undisputed evidence also establishes that Officer Beard failed to protect Wilson from Officer Payne’s use of excessive force because she did nothing to prevent Officer Payne from using excessive force against Wilson. The undisputed evidence also establishes that Defendants are not entitled to qualified immunity. Therefore, Defendants’ Motion for Summary Judgment should be denied.

## II. STATEMENT OF MATERIAL FACTS IN DISPUTE

### A. *Officer Beard failed to protect Wilson from Stone.*

On October 16, 2010, Wilson was an inmate at the Clay County Jail housed in Cell Block H. (Exhibit A [Wilson Depo. Vol. I at 17:5-18:24].) That day Officer Beard was the officer tasked with serving lunch to the inmates in the Clay County Jail with the assistance of two inmates—Clifford Stone who handed out lunch trays and Holmes who handed out beverages. (Exhibit B [Beard Depo. at 43:4-7, 45:14-18, 64:23-65:2, Ex. 12].) Officer Beard knew that there was racial tension in Cell Block H, on October 16, 2010. (*Id.* at 64:23-65:2, Ex. 12.) Wilson is an African American male and Stone is a Caucasian male. (*Id.* at 71:20-72:2.) When Wilson approached the door to Cell Block H to receive his lunch, Stone was standing at the entrance to Cell Block H and threatened to stab and beat up Wilson and called Wilson a nigger. (Exhibit A [Wilson Depo. Vol. I at 32:9-24, Wilson Depo. Vol. II at 48:6-19].) Officer Beard was standing next to Stone when Stone threatened to stab and beat up Wilson and called Wilson a racial slur. (Exhibit A [Wilson Depo. Vol. II at 48:6-1].)

According to Officer Beard, Stone and Wilson “exchanged words,” but Beard could not identify what words were exchanged beyond Wilson calling Stone a bitch. (Exhibit B [Beard Depo. at 64:23-65:2, 65:16-22, Ex. 12].) Even though Stone threatened to stab Wilson and called Wilson a racial slur, Officer Beard told Wilson to lock down in his cell because he was “mouthing” to Stone. (*Id.* at 49:13-18; Exhibit A [Wilson Depo. Vol. I at 32:9-24, Wilson Depo. Vol. II at 48:6-19].) Stone was not permitted to enter Cell Block H while he was assisting with serving lunch to inmates. (Exhibit B [Beard Depo. at 34:1-13, 52:4-8]; Exhibit C [Jenkins’ Depo. at 23:25-24:7].) Instead of attempting to physically prevent Stone from running into Cell Block H to attack Wilson, Officer Beard stood by the door to Cell Block H. (Exhibit A [Wilson Depo.

Vol. II at 47:18-20]; Exhibit B [Beard Depo. at 49:7-12, 56:14-19]; Exhibit C [Jenkins' Depo. at 42:10-19].)

In violation of the Clay County Jail policies, Stone ran into Cell Block H at Wilson. (Exhibit B [Beard Depo. at 52: 2-8]; Exhibit C [Jenkins Depo. at 39:25-40:4, 44:15-19]; Exhibit D [Payne Depo. at 106:1-12, 111:22-112:4].) After Stone ran toward Wilson in Cell Block H, grabbed Wilson and balled up his fist, Wilson pushed his tray between them to protect himself. (Exhibit C [Jenkins Depo. at 39:3-11]; Exhibit A [Wilson Depo. Vol. II at 49:1-11, 51:11-22].) According to Officer Beard, Wilson sucker punched Stone with his tray after Stone improperly entered Cell Block H and Officer Beard took pictures of Stone's face after Stone was removed from Cell Block H. (Exhibit B [Beard Depo. at 35:15-36:7, 52:21-24].)

Stone punched Wilson on the side of Wilson's face and shoulder area after he improperly entered Cell Block H, but Officer Beard did not take pictures of Wilson after Stone was removed from Cell Block H. (Exhibit A [Wilson Depo. Vol. I at 35:15-36:7; Vol. II at 51:15-19, 54:10-14].) Stone told Wilson he was going to kill Wilson while he was attacking Wilson in Cell Block H. (*Id.* at 54:22-55:2.) Wilson broke Stone's hold on Wilson while Stone was attacking him. (*Id.* at 51:15-19, 52:19-24.)

**B. *Officer Payne used excessive force against Wilson.***

Once Officer Payne entered Cell Block H he grabbed Wilson by the neck under his jaw and slammed Wilson against a concrete wall that was four or five feet away. (*Id.* at 51:15-22, 52:25-53:13.) Officer Payne did not provide Wilson with any verbal warning before slamming Wilson against the concrete wall. (*Id.* at 53:18-54:3, 56:11-13.) While Officer Payne was holding Wilson against the concrete wall his grip on Wilson's neck got tighter. (*Id.* at 60:11-17.) After Officer Payne slammed Wilson against the concrete wall between cells H-11 and H-12, and

during the time that Officer Payne was holding Wilson against the concrete wall, Wilson told Officer Payne that he was hurt. (*Id.* at 57:23-58:3.) Officer Payne held Wilson against the cement wall for at least four minutes even though Wilson did not try to move while Officer Payne held him against the concrete wall. (*Id.* at 59:1-3; Exhibit C [Jenkins Depo. at 39:12-17, 42:6-15]) Officer Payne had sufficient strength to injure Wilson by slamming Wilson against the cement wall because Officer Payne was able to push Stone halfway across Cell Block H (10 or 15 feet) with one hand and states that he exercises by cutting 15 truckloads of wood every winter to heat his home for the last 30 years. (Exhibit A [Wilson Depo. Vol. I at 27:24-28:18]; Exhibit B [Beard Depo. at 57:23-58:12]; Exhibit C [Jenkins Depo. at 41:15-19].)

Notices of disciplinary hearings were issued for both Stone and Wilson. (Exhibit D [Payne Depo. at 45:7-16, 77:4-9, Exs. 2 and 8].) Wilson was not disciplined after the jail commander's review of the video of the incident and determined that Wilson was justified in protecting himself from Stone's attack, and therefore, no Report of Disciplinary Hearing was issued for Wilson. (*Id.* at 126:1-5; Exhibit A [Wilson Depo. Vol. II at 91:20-92:12].) A Report of Disciplinary Hearing was issued for Stone because Stone was disciplined by 30 days of segregation and loss of commissary privileges for attacking Wilson based on the statements of Officer Beard and Payne and the video that captured Stone attacking Wilson. (Exhibit D [Payne Depo. at 122:7-17, Ex. 9].) Although both the video of Cell Block H and photographs of Stone served as the basis for the decision to segregate Stone for 30 days and provided the best evidence regarding whether Officer Payne used excessive force in restraining Wilson, the video was not preserved by the Clay County Jail and the Clay County Jail did preserved the two pictures that Officer Beard took of Stone. (*Id.* at 122:7-17, Ex. 9; Exhibit E [November 26, 2014 letter from Defendants' counsel].) The Clay County Jail has the ability to preserve videos and has preserved

other videos for fights in the jail recorded by cameras located in the jail. (Exhibit C [Jenkins Depo. at 25:10-18].)

**C. *Officer Beard continued to treat Wilson with indifference and Stone preferentially after she failed to protect Wilson.***

Officer Beard stated in her report that “My personal recommendation is they both be locked down until my Supervisor can determine what actions should be taken. I do believe the block should be dealt with in a one on one basis of non racial bias.” (Beard Depo. at 64:23-65:2, Ex. 12.) Officer Beard’s treatment of Wilson and Stone was inconsistent with her purported belief that Wilson and Stone should be treated the same and without bias because although Officer Beard told Wilson to lock down after Stone attacked Wilson, Officer Beard did not lock down Stone and instead allowed Stone continue to serve lunch to other inmates in other cell blocks after he had violated the Clay County Jail’s policy by entering Wilson’s cell block (Cell Block H) and attacking Wilson. (Exhibit B [Beard Depo. at 54:5-55:15, 73:1-3]; Exhibit C [Jenkins Depo. at 42:24-43:6].) Officer Beard testified twice that she told Wilson to lock down because he was mouthing at Stone during her deposition, but during the same deposition denied that she told Wilson to lock down, suggesting that she tried to lock down the whole block. (Exhibit B [Beard Depo. at 49:13-18, 51:18-52:1, 54:20-55:3].) Officer Beard’s report states that she told Wilson to lock down, is silent as to whether she told Stone to lock down, and does not state that she tried to lock down the whole block. (*Id.* at 64:23-65:2, Ex. 12.) Officer Payne’s report of the event states that “Teddy told Wilson to lock down two or three time [sic] and he went in his room and lock down[.] Teddy was started talking to Stone and I pass trays to G Block and Stone and Teddy went over to F block and we pass out trays to F Block Stone went back with the Jail cooked [sic]. We Put Stone back in the J Block.” (Exhibit D [Payne Depo. at 99:4-13, Ex. 6].) Officer Payne also testified that Stone was not locked down, but was instead

permitted to serve lunch to other inmates after attacking Wilson. (*Id.* at 110:21-112:10.) Stone was housed in Cell J Block with the other inmates designated as trustees, and according to Officer Payne “the trustees is the people we can trust to pass stuff out and do stuff around there without getting in trouble. But most of them get in trouble and they get fired and sent back to the blocks.” (*Id.* at 72:12-15, 73:2-3, 112:11-113:11.) Stone was not removed as a trustee after he attacked Wilson in Cell Block H. (*Id.* at 122:7-17, Ex. 9].)

**D. *Officer Beard failed to protect Wilson from Officer Payne.***

There is no evidence that Officer Beard did anything to prevent Officer Payne from exerting excessive force against Wilson because there is no evidence that Officer Beard addressed Payne in any way while he was restraining Wilson. Instead, Officer Beard stood by the door to Cell Block H while Officer Payne exerted excessive force against Wilson and only moved from that location to escort Stone out of Cell Block H. (Exhibit A at 32:9-24, 47:18-20, 48:6-19; Exhibit B at 49:7-12, 56:14-19; Exhibit C at 42:10-19; Exhibit D at 110:21-112:10.)

**E. *Wilson was injured by Officer Payne’s use of excessive force.***

Wilson remained incarcerated for two years after he was slammed against a cement wall by Officer Payne. (Exhibit A [Wilson Depo. Vol. II at 69:13-71:5].) During the two years Wilson remained incarcerated Wilson repeatedly sought medical treatment for his injuries associated with being slammed against a cement wall by Officer Payne and Wilson was diagnosed by medical staff during his incarceration with: (1) tenderness and pain in movement of his neck and back; (2) spasms in his neck and back; (3) tingling in his neck and back; (4) back and neck sprain; (5) cervical strain and musculoskeletal; (6) connective tissue injuries; and (7) whiplash. (Exhibit F [Rajoli Depo. Vol. I at 92:2-93:13, 108:8-14, 124:15-125:25, 136:10-143:9, 164:15-165:18, 181:22-182:10 Defendants’ Ex. 1 at p. 24, 27-28, 33-38, and 42-43, Plaintiff’s Exs. 7, 9,

10, and 12; Vol. II at 200:23-201:4, 204:5-10].) These diagnoses are consistent with Wilson's report of his injuries, including: constant pain soreness stiffness and achiness in his back that radiates to his legs, soreness and stiffness in his neck, and blurred vision and headaches daily. (Exhibit A [Wilson Depo. Vol. II at 61:14-62:13].)

**F. *Officer Payne's testimony and written report regarding the events on October 16, 2010 are inconsistent.***

Officer Payne's report of the events on October 16, 2010 states "As I was walking over to H Block Inmate William Stone was talking to Norman Wilson about something and Teddy told them to shut up. Inmate William Stone Started [sic] to go in the block and we told him to stop and come back out of H block. Inmate Norman Wilson said something and Stone went back in H block and we told him to stop but he kept on going ... Time I got to them Wilson and Stone was fighting. I got back to them Wilson and Stone was still fighting I got them apart and put Wilson up to H-12 door ..." (Exhibit D [Payne Depo. 99:4-13, Ex. 6].) During his deposition in this case on October 29, 2014, Officer Payne described the sequence of events on October 16, 2010 differently than his report because he testified that when he arrived at Cell Block H Wilson and Stone were not fighting—they weren't even touching—and Payne did not suggest that Wilson's statements to Stone caused Stone to reenter Cell Block H after Stone exited the cell block (*Id.* at 66:12-73:18.) Officer Payne also testified that after Wilson hit Stone with a tray, that's when he went into Cell Block H, and suggested it was Wilson's hitting Stone with a tray that caused Stone to go around a table to start fighting with Wilson, but Officer Payne later admitted that he did not see Wilson hit Stone with a tray. (*Id.* at 70:16-24, 106:24-108:1.)

Officer Payne initially testified that he hit Wilson, but then stated that he "threw him up against the H11 – H12's door." (*Id.* at 70:16-71:8.) Officer Payne also testified that after he threw Wilson against a door, he relieved Wilson without letting go when Wilson lunged forward,

so he “put him back up against H block’s door,” after which Officer Beard grabbed Stone by the arm and escorted him out of Cell Block H. (*Id.* at 71:9-72:7.) But, Officer Payne’s report states that he “put Wilson up to H-12 door and told Stone to go and me and Stone went back out of the block.” (*Id.* at 99:4-13, Ex. 6.) Officer Payne later changed his testimony, stating “I done put him against the wall. And then I let go to make sure Stone was getting out, and then he stepped forward again to go after Stone. He was still yelling and being aggressive, so I put him back up against the --” (*Id.* at 116:12-19.)

**G. *Officer Beard’s testimony and written statement regarding the events on October 16, 2010 are inconsistent.***

Within 24 hours after Stone attacked Wilson, Officer Beard drafted and signed a report describing the event. (Exhibit B [Beard Depo. at 35:4-6, 69:13-15].) Four years later on October 29, 2010, Officer Beard’s deposition was taken in this case. (*Id.* at 1.) Officer Beard’s report states that “N. Wilson approached to get his lunch tray him and Stone exchanged words, offender Wilson stepped back and called offender Stone a Bitch, offender Stone stopped handing out trays and entered H-Block and offender Wilson backed up against H-12 and they exchanged a few more words;” but Officer Beard testified that when Wilson took his lunch tray he said something under his breath to Stone, Stone said something back and then Wilson tried to come out of Cell Block H to reach Stone. (*Id.* at 45:14-46:16, 64:23-65:2, Ex. 12.) Although Beard’s report states that Stone entered Cell Block H, backing Wilson up to the opposite end of Cell Block H against H-12, Beard testified that Wilson was at the door to Cell Block H “still standing here mouthing” at Stone when Stone entered Cell Block H and Wilson only backed up because Officer Beard told Wilson to lock down. (*Id.* at 49:13-18, 64:23-65:2, Ex. 12.) Officer Beard also testified that the reason Stone followed Wilson into Cell Block H was because Wilson threw his tray at Stone. (*Id.* at 69:4-12.) Officer Beard’s revision to her description of the events on October 16, 2010 is

also inconsistent with Officer Jenkins' testimony that Wilson hit Stone with his tray after he was attacked by Stone. (Exhibit C [Jenkins' Depo. at 11:1-14, 40:5-7].)

Officer Beard testified that if two inmates are involved in a fight and one of the jail officers restrains one of the inmates she would identify that restraint in her report. (Exhibit B [Beard Depo. at 83:5-8].) Officer Beard testified that she saw Payne restrain Wilson and she believes Officer Payne used reasonable force. (*Id.* at 52:2-5.) But, Officer Beard's report regarding the incident states that "Officer W. Payne grabbed Offender Stone to keep him from retaliation [sic] against Offender Wilson." (*Id.* at 64:23-65:2, Ex. 12.) Officer Beard's report does not state that she saw Officer Payne restrain Wilson, or that Officer Payne restrained Wilson at all. (*Id.*) However, Officer Beard testified that she saw Officer Payne restrain Wilson. (*Id.* at 64:4-19.)

**H. *Officer Jenkins' affidavit is inconsistent with his deposition testimony.***

Officer William Jenkins ("Jenkins") submitted an affidavit in support of Defendants' Motion for Summary Judgment stating that he "saw inmate Clifford Stone run toward inmate Wilson in cell block H. Then [he] saw Stone and Wilson fighting, and saw Wilson throw a lunch tray at Stone." (Dkt. #90-1 at p. 2.) But, Officer Jenkins testified in his deposition that he saw Stone run 20 feet across Cell Block H toward Wilson, grab Wilson by the shoulder, double up his fist, and then Jenkins saw the tray hit Stone. (Exhibit C [Jenkins Depo. at 36:15-17, 38:7-14, 39:4-40:7; 60:21-23].)

Officer Jenkins' affidavit in support of summary judgment states that he "saw Jail Officer Teddi Beard attempting to get Stone under control and out of the room." (Dkt. #90-1 at p. 2.) But, Officer Jenkins testified in his deposition that Officer Teddi Beard stayed at the door to Cell Block H after Stone ran into the cell block in violation of the jail's policies, and Officer Beard

only came part of the way into the cell block in order to walk Stone out of the cell block so Stone could assist Beard in serving food to inmates in other cell blocks. (Exhibit C [Jenkins Depo. at 42:16-43:8].)

Officer Jenkins' affidavit provides a full page of testimony describing why Officer Jenkins believes that the force used by Officer Payne against Wilson was reasonable. (Dkt. #90-1 at p. 3.) But, Officer Jenkins testified during his deposition that he determined that Officer Payne's use of force was reasonable only because he observed that Wilson "didn't move that fast" when Wilson was pushed against a cement wall by Payne. (Exhibit C [Jenkins Depo. at 39:12-17; 50:14-19, 51:24-53:13, Ex. 7].) Moreover, the language used in Jenkins' affidavit, especially the full page description regarding why Officer Jenkins believes that the force used by Officer Payne against Wilson was reasonable, does not resemble the language that Jenkins' used in his deposition and sounds like the voice of another person. For example, during his deposition Jenkins said: (1) he could see "J block clear around to B block" in the tower (describing his view from the tower); (2) Officer Payne "pushed Stone completely out of the way. I swear he went clear halfway across that room;" (3) "I couldn't tell how hard, but I seen his right hand right here." (describing Officer Payne's restraint of Wilson); (4) "She was standing at the front door, and I don't know whether she was hollering or not because I was on a different speaker" (describing what Officer Beard was doing while Officer Payne restrained Wilson); and (5) "They are supposed to stay at the doorway, hand the trays, and they use gloves and their scarfs that they have on their hair. I mean you ain't supposed to serve food unless you got a net on your hair." (describing the requirements of trustees when assisting in food service at the cell blocks) (*Id.* at 10:5-13, 23:25-24:7; 41:15-19, 41:23-42:19.)

In Jenkins' affidavit states "[t]he control tower views this cell block from above, both through a glass window which reveals almost the entire cell block below, and on live video monitors at the desk in the tower station." (Dkt. #90-1 at ¶ 3.) This language sounds like the voice of a different person when compared to Jenkins' deposition testimony describing his view from the tower by stating he could see "J block clear around to B block." (Exhibit C [Jenkins Depo. at 10:5-13].) The language in Jenkins' affidavit describing why Officer Jenkins believes that the force used by Officer Payne against Wilson was reasonable also sounds like the voice of another person. For example, Jenkins' affidavit states "[t]he sudden outbreak of the fight between Wilson and Stone, with the presence of several other inmates in the block, necessitated quick action to stop the fight on the part of the jail officers." (Dkt. at #90-1 at ¶ 12.) Similarly, Jenkins' affidavit states "Jail Officer Payne used, from my perspective and personal observation, a minimum amount of force to accomplish the necessary purpose of quickly getting inmates Stone and Wilson firmly apart." (*Id.* at ¶ 13.) But, this is not the same voice or substantive description provided by Jenkins during his deposition when Jenkins responded to questions regarding Officer Payne's use of force. During his deposition Jenkins stated that he pushed Stone "clear halfway across that room" and he "couldn't tell how hard [he pushed Wilson], but I seen his right hand right here." (Exhibit C [Jenkins Depo. at 41:15-42:2].)

**I. *There is a question of fact regarding whether Officer Jenkins was able to see Officer Payne restrain Wilson against the cement wall in Cell Block H.***

Officer Jenkins' view of the area of Cell Block H between H11 and H12 where Officer Payne restrained Wilson is obscured by a staircase. (Dkt. #90-3 [photograph of Cell Block H attached to Officer Jenkins' Affidavit]; Exhibit C [Jenkins Depo. at Ex. 15 (picture of Cell Block H drawn by Officer Jenkins)].) While Officer Jenkins attempted to observe Officer Wayne restrain Wilson, Officer Jenkins was distracted by his responsibility to control the whole building

in his capacity as the Officer in the tower. (Exhibit C [Jenkins Depo. at 33:1-36:6].) Officer Jenkins' responsibility to control the whole building included: watching over 150 inmates in nine cell blocks for unusual movements or fights by swiveling in a chair to look through windows or viewing the cell blocks through video cameras projected on a monitor; and answering calls to open and/or close 50 to 75 doors. (*Id.*) The monitor in the tower is a 13-inch computer screen that allows you to view the feed from one camera at a time. (*Id.* at 37:7-19; Exhibit D [Payne Depo. at 69:10-11].) According to Jenkins, he observed the events in Cell Block H on October 10, 2010 by looking through the windows in the tower and watching the monitor in the tower. (Exhibit C [Jenkins' Depo. at 36:25-37:6].) However, Jenkins admits in describing Officer Payne's restraint of Wilson that he couldn't tell how hard Officer Payne pushed Wilson. (*Id.* at 41:23-42:2.)

### III. ARGUMENT

#### A. **Ronald McCarthy's opinions should be stricken and disregarded by the Court in ruling on Defendants' Motion for Summary Judgment.**

Defendants rely on the opinion of Ronald McCarthy, a retired law enforcement officer from the Los Angeles Police Department, to support their argument that Officer Payne's use of force against Wilson on October 16, 2010 was not excessive and the actions and response of Officer Beard to Stone's attack on Wilson on the same date were reasonable and appropriate. (Dkt. #90-19, 90-20, 90-21, and 91 at p.10-11.) Federal Rule of Evidence 702, in pertinent part, states that:

A witness who is qualified as an expert ... may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

The helpfulness and admissibility of expert testimony under Rule 702 is determined by evaluating the present state of knowledge about the subject of the testimony, in light of the issue that must be determined and the facts the jury must consider in reaching its decision.” *United States v. Brown*, 7 F.3d 648, 652 (7th Cir. 1993). McCarty’s opinion should be stricken and disregarded by the Court because: (1) McCarty rendered an opinion regarding whether Officer Payne’s actions were ethical, not whether he used excessive force; (2) McCarthy’s opinion is based on statements of fact that are not supported by the evidence in this case; and (3) expert testimony is not necessary to evaluate whether Officer Payne pushed Wilson against a cement wall with excessive force.

Rather than providing an opinion regarding as to whether Officer Payne’s actions were “ethical” and consistent with “what is taught.” (Dkt. #90-20.) McCarthy provides no explanation in his report as to what rules of ethics he’s referring to or what he means by “what is taught.” (*Id.*) McCarthy’s conclusions regarding undefined ethical standards and “what is taught” provide no assistance in determining whether Officer Payne used excessive force against Wilson. Defendants attempt to cure the deficiency in McCarthy’s opinion by filing an affidavit signed by McCarthy in their designation of evidence in support of summary judgment in which McCarthy provides a conclusory opinion for the first time that all the use of force by Officer Payne against Wilson was not excessive, indicating that McCarthy has relied upon the same information he relied upon to determine Officer Payne’s actions were ethical and consistent with “what is taught” to reach that conclusion. (Dkt. #90-19.) Therefore, McCarthy’s affidavit should be stricken because it is an attempt to amend Defendants’ expert disclosure without leave. *Trustmark Ins. Co. v. Gen. & Cologne Life Re of Am.*, 424 F.3d 542, 553 (7th Cir. 2005); *U.S. ex rel. Coots v. Reid Hosp. & Health Care Servs., Inc.*, No. 1:10-CV-00526-JMS-TAB, 2013 WL

3790818, at \*2 (S.D. Ind. July 19, 2013) (denying the plaintiff's motion to extend the expert disclosure and discovery deadlines); *see also Murray v. Conseco, Inc.*, No. 1:03-CV-1701-LJM-JMS, 2009 WL 1766641, at \*3 (S.D. Ind. June 22, 2009) (“Choosing to sit on its hands, as [the party seeking an extension] did, for six months . . . does not demonstrate reasonable diligence.”).

Expert testimony should be rejected if the testifying expert's opinion is too speculative, or the underlying basis is faulty. *Walker v. Soo Line R. Co.*, 208 F.3d 581, 588 (7th Cir. 2000). McCarthy's opinions that Officer Payne actions were ethical and consistent with “what is taught” should be stricken because they are based on faulty information. For example, McCarthy's supports his opinions by stating that according to jail staff, Wilson had no visible injuries and did not initially complain of any injury. (Dkt. #90-20 at 3.) That information is both speculative and incorrect. It is incorrect because McCarthy ignores Wilson's contradictory testimony that Wilson told Officer Payne that Payne was hurting him, Wilson's repeated attempts to seek medical treatment, and multiple diagnoses of Wilson's injuries following Officer Payne's slamming Wilson against a concrete wall. (Exhibit A [Wilson Depo. at 57:23-58:3]; Exhibit F [Rajoli Depo. Vol. I at 92:2-93:13, 108:8-14, 124:15-125:25, 136:10-143:9, 164:15-165:18, 181:22-182:10 Defendants' Ex. 1 at p. 24, 27-28, 33-38, and 42-43, Plaintiff's Exs. 7, 9, 10, and 12; Vol. II at 200:23-201:4, 204:5-10].) The information is faulty because the Clay County Jail officer's report that Wilson did not have any visible injuries is based on the fact that Officer Beard acted with indifference toward Wilson in her decision to not take pictures of Wilson after Stone violated the jail's policies by running into Wilson's cell block to attack Wilson, punching Wilson in the face. (Exhibit A [Wilson Depo. Vol. II at 35:15-36:7, 51:15-19, 54:10-14.]) But Officer Beard took pictures of Stone's face after Stone was removed from Cell Block H and Wilson used his tray to defend himself from Stone's attack because Officer Beard refused to

protect Wilson. (Exhibit B [Beard Depo. at 35:15-36:7, 52:21-24].) Officer Beard's decision to not gather evidence of Wilson's injuries is further proof of her failure to protect Wilson and suggests that Officer Beard's motivation in taking the pictures of Stone was to provide cover for that failure to protect. Therefore, McCarthy's reliance on that lack of evidence to support his conclusion that Officer Payne did not exert excessive force against Wilson renders his opinion unreliable.

Additionally, McCarthy's opinion that Officer Payne did not use excessive force in restraining Wilson against a cement wall is also faulty because it is based on his conclusion that it is not relevant whether Wilson was slammed into the wall from a distance of 5 to 6 feet (as Wilson states) or 1 or 2 feet (as Officer Payne states). (Dkt. #90-20 at p. 3.) McCarthy's support for his conclusion that the distance is irrelevant is that "in the midst of a violent conflict ... stopping violence is the goal," suggesting that there was no limit to the amount of force Officer Payne could exert in attempting to restrain Wilson from Stone after he was attacked by Stone. Officer Payne's rationale is faulty and asks this Court to ignore common sense, which dictates that the larger distance a person is pushed across against a cement wall increases the individual's momentum, thereby increasing the force at which the individual hits the wall. This is something a lay fact finder could determine without McCarthy's assistance.

McCarthy's opinion regarding Officer Beard's failure to protect Wilson is based on the false premise that "Jail Officer Beard responded to this violent confrontation immediately." (Dkt. #90-20 at p. 2.) Contrary to McCarthy's false premise, although Officer Beard was in the best position to protect Stone from attacking Wilson because she was standing right next to Stone when Stone threatened to stab and beat up Wilson, called Wilson a racial slur, and charged into Cell Block H in violation of jail policy, Officer Beard did nothing to physically prevent Stone

from entering Cell Block H. (Exhibit A [Wilson Depo. Vol. II at 47:18-20, 48:6-1]; Exhibit B [Beard Depo. at 49:7-12, 56:14-19]; Exhibit C [Jenkins' Depo. at 42:10-19].) In fact, Officer Beard's testimony establishes that Officer Beard had no desire to protect Wilson because she characterizes Wilson as deserving of Stone's attack when she explains that she told Wilson to lock down in his cell because he was "mouthing" to Stone. (Exhibit B [Beard Depo. at 49:13-18].)

Finally, McCarthy's opinion should also be stricken because it will not assist the trier of fact to understand the evidence in this case or to determine a fact in issue. Fed. R. Evid. 702. In order for the fact finder to determine if Officer Payne used excessive force against Wilson, the trier of fact must evaluate the facts leading up to Officer Payne's slamming Wilson against a cement wall. Because it is undisputed that Officer Payne did not use an advanced law enforcement technique in restraining Wilson, but instead pushed him against a cement wall, no expert testimony is necessary to evaluate the facts available to the fact finder to consider in determining whether excessive force was exerted by Officer Payne. This is not a case where expert testimony is helpful in determining the issue of excessive force. In contrast to this case, in *Hutchison v. Cutliffe*, where Caleb Hutchison alleged that Richard Cutliffe, a law enforcement officer, violated Hutchinson's constitutional rights by using excessive force against him in connection with an arrest, expert testimony was permitted over objection because the court found the following factors, among others, would provide the jury with information that would assist them in determining which version of events was more likely true than not: (1) the mechanics of a "controlled takedown" and the use of this technique to avoid serious injuries to a suspect; and (2) the continuum of force alternatives available to trained police officers to control members of the public who do not cooperate fully with them. *Hutchinson*, 2004 WL 5524566, at \*1 (D. Me.

Nov. 10, 2004). The absence of advanced techniques in this case supports a denial of the admission of expert opinion on the issue of excessive force.

Moreover, because McCarthy's opinion regarding whether Officer Beard protected Wilson is based solely on his assessment that Beard acted quickly, a conclusion that a lay person is capable of determining based on the facts in this case, it is clear that the fact finder will not be assisted by McCarthy's opinion. (Dkt. #90-20 at p. 2-3.)

In the alternative, McCarthy's opinion should be stricken as cumulative. Evidence is cumulative if "it adds very little to the probative force of the other evidence in the case, so that if it were admitted its contribution to the determination of truth would be outweighed by its contribution to the length of trial, with all the potential for confusion, as well as prejudice to other litigants, who must wait longer for their trial, that a long trial creates." *United States v. Williams*, 81 F.3d 1434, 1443 (7th Cir. 1996). Defendants in this case provide the opinion of three fact witnesses that are current or former officers at the Clay County Jail—Defendants Beard and Payne and Officer Jenkins—to support their argument that Officer Payne did not use excessive force against Wilson and Officer Beard did not fail to protect Wilson. Defendants' desire to provide the opinion of a fourth former officer, McCarthy, which has no probative force because it is based on incorrect or faulty assumptions and is therefore cumulative. Therefore, provides an alternative basis to strike McCarthy's opinions.

**B. The affidavit provided by Jenkins in support of Defendants' Motion for Summary Judgment should be stricken and disregarded by the Court in its consideration of Defendants' Motion for Summary Judgment.**

The affidavit of Officer Jenkins should be stricken because Jenkins' affidavit is not consistent with his deposition testimony and a comparison of Jenkins' statements during his deposition and the language in his affidavit establishes that he did not write the affidavit. *Russell*

*v. Acme-Evans Co.*, 51 F.3d 64, 66 (7th Cir. 1995) (striking an affidavit because a comparison of the diction of in the witness's deposition with that of the affidavit makes clear that the affidavit was drafted by counsel and contradicted his deposition testimony.) A party seeking summary judgment must submit admissible evidence in support of its motion. *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009) ("Admissibility is the threshold question because a court may consider only admissible evidence in assessing a motion for summary judgment."); Fed. R. Civ. P. 56(c)(4) ("An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."). "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56(c)(2). Because almost all affidavits submitted in litigation are drafted by lawyers rather than the affiants, the Seventh Circuit is "highly critical of efforts to patch up a party's deposition with his own subsequent affidavit." *Russell v. Acme-Evans Co.*, 51 F.3d 64, 67-68 (7th Cir. 1995). Accordingly, if the testimony of a witness at deposition and the witnesses' affidavit are in conflict, the affidavit is to be disregarded unless it is demonstrable that the statement in the deposition was mistaken, perhaps because the question was phrased in a confusing manner or because a lapse of memory is in the circumstances a plausible explanation for the discrepancy. *Id.*

Officer William Jenkins ("Jenkins") submitted an affidavit in support of Defendants' Motion for Summary Judgment stating that he "saw inmate Clifford Stone run toward inmate Wilson in cell block H. Then [he] saw Stone and Wilson fighting, and saw Wilson throw a lunch tray at Stone." (Dkt. #90-1 at p. 2.) But, Officer Jenkins testified in his deposition that he saw Stone run 20 feet across Cell Block H toward Wilson, grab Wilson by the shoulder, double up

his fist, and then Jenkins saw the tray hit Stone. (Exhibit C [Jenkins Depo. at 36:15-17, 38:7-14, 39:4-40:7; 60:21-23].)

Officer Jenkins' affidavit in support of summary judgment also states that he "saw Jail Officer Teddi Beard attempting to get Stone under control and out of the room." (Dkt. #90-1 at p. 2.) But, Officer Jenkins testified in his deposition that Officer Teddi Beard stayed at the door to Cell Block H after Stone ran into the cell block in violation of the jail's policies, and Officer Beard only came part of the way into the cell block in order to walk Stone out of the cell block so Stone could assist Beard in serving food to inmates in other cell blocks. (Exhibit C [Jenkins Depo. at 42:16-43:8].)

Rather than attempting to clarify his deposition testimony, Officer Jenkins' affidavit provides a full page of conflicting testimony describing why Officer Jenkins now believes that the force used by Officer Payne against Wilson was reasonable. (Dkt. #90-1 at p. 3.) Officer Jenkins testified during his deposition that he determined that Officer Payne's use of force was reasonable only because he observed that Wilson "didn't move that fast" when Wilson was pushed against a cement wall by Payne. (Exhibit C [Jenkins Depo. at 39:12-17; 50:14-19, 51:24-53:13, Ex. 7].) Moreover, the language used in Jenkins' affidavit, especially the full-page description regarding why Officer Jenkins believes that the force used by Officer Payne against Wilson was reasonable on the third page of his affidavit, does not resemble the language that Jenkins' used in his deposition and sounds like the voice of another person. (*Compare id.* at 10:5-13, 23:25-24:7; 41:15-19, 41:23-42:19, *with* Dkt. #90-1 at ¶ 3.)

Defendants have not established, or even suggested, that Jenkins' deposition testimony that conflicts with his affidavit was mistaken. Thus, Jenkins' affidavit should be stricken.

**C. Defendants are not entitled to summary judgment on Plaintiff’s excessive force claim, or qualified immunity on that claim.**

When evaluating a claim asserted under the Eighth Amendment prohibition against cruel and unusual punishment, “the court makes a two-part inquiry: (1) whether the defendants acted with a sufficiently culpable state of mind (subjective component), and (2) whether, in light of ‘contemporary standards of decency,’ the alleged deprivation was sufficiently serious to rise to the level of a constitutional violation (objective component).” *Roberts v. Samardvich*, 909 F. Supp. 594, 603 (N.D. Ind. 1995) (citing *Hudson v. McMillian*, 503 U.S. 1, 8-9 (1992)). “In the excessive force context, the two components collapse into a single inquiry.” *Id.* The ultimate question is “whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Fillmore v. Page*, 358 F.3d 496, 503 (7th Cir. 2004). Several factors are relevant to the determination, including “the need for the application of the force, the amount of force applied, the threat an officer reasonably perceived, the effort made to temper the severity of the force used, and the extent of the injury that force caused to an inmate.” *Fillmore*, 358 F.3d at 504. “[T]he quantum of force required for a constitutional violation is that which is ‘repugnant to the conscience of mankind.’” *Id.* (quoting *Hudson*, 503 U.S. at 10). “[W]here a prison security measure is undertaken to resolve a disturbance ... that poses significant risks to the safety of inmates and prison staff, the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in good-faith effort to maintain or restore discipline or maliciously and sadistically for the purpose of causing harm.” *Whitley v. Albers*, 475 U.S. 312, 319-21 (1986). A claim of excessive force cannot be based on a de minimis use of force. *Id.*

Defendant's Motion for Summary Judgment on Plaintiff's claim of excessive force by Officer Payne on October 16, 2010 should be denied because the evidence regarding Officer Payne's conduct on October 16, 2010 provides sufficient evidence upon which a trier of fact could determine that Officer Payne used excessive force against Wilson. In sum, Defendants' theory of why there is not sufficient evidence to establish that Officer Payne used excessive force against Wilson is that Wilson initiated the violence by hitting Stone with a tray, Officer Payne acted reasonably by separating Stone and Wilson while they were fighting, and Payne's use of a cement wall to restrain Wilson is a recommended practice. Defendants' theory is insufficient to establish grounds for this Court to grant Defendants' summary judgment motion because, according to Officer Payne's testimony, he never saw Wilson hit Stone with the tray. (Exhibit D [Payne Depo. at 70:16-24, 106:24-108:1.]) Therefore, Wilson's use of a tray against Stone for self defense, or any other purpose, is not relevant in determining whether Officer Payne exerted excessive force against Wilson.

The relevant facts that provide sufficient to establish that Officer Payne exerted excessive force against Wilson are that: (1) when Officer Payne entered Cell Block H on October 16, 2010 he knew that Stone had charged into Cell Block H, in violation of the Clay County Jail policy to attack Wilson, (2) after Officer Payne separated Stone and Wilson, Wilson did not resist Officer Payne or move toward Stone, (3) rather than give Wilson a verbal warning to back up further from Stone and despite Wilson's compliance with Officer Payne's efforts to separate Stone and Wilson, Officer Payne slammed Wilson into a concrete wall more than once with a lot of force even though he could have chosen to push Wilson away just as Officer Payne chose to do with Stone and (4) Officer Payne continued to exert pressure on Wilson while he was holding Wilson against the wall even though Wilson told Payne he was hurting him. (Exhibit A at 27:24-28:18,

53:18-54:3, 56:11-13, 60:11-17; Exhibit B at 34:1-13, 52:4-8, 57:23-58:12; Exhibit C at 10:5-13, 23:25-24:7; 41:15-19, 41:23-42:19].) These facts are sufficient for a trier of fact to determine that the Officer Payne did not apply force against Wilson in good-faith effort to maintain or restore discipline and instead maliciously and sadistically applied force for the purpose of causing harm. These facts are also sufficient to establish the lower standard to bar Officer Payne from qualified immunity because the evidence establishes that Officer Payne did not make a reasonable mistake in exerting excessive force against Wilson.

Moreover, Defendants do not dispute that Plaintiff suffered injury from Officer Payne's use of excessive force, and Plaintiff has provided sufficient evidence to establish his injury and damages. (Exhibit A [Wilson Depo. Vol. II at 61:14-62:13, 69:13-71:5; Exhibit E [Rajoli Depo. Vol. I at 92:2-93:13, 108:8-14, 124:15-125:25, 136:10-143:9, 164:15-165:18, 181:22-182:10 Defendants' Ex. 1 at p. 24, 27-28, 33-38, and 42-43, Plaintiff's Exs. 7, 9, 10, and 12; Vol. II at 200:23-201:4, 204:5-10].)

Additionally, the multitude of inconsistent statements by Officers Beard, Jenkins and Payne create material issues of fact sufficient that their credibility is in question and the Court should not consider their opinions or inconsistent factual statements to determine whether Officer Payne used excessive force. As discussed above, because there is a question of fact regarding whether Officer Jenkins saw Officer Payne restrain Wilson, his testimony should also be disregarded in determining whether Officer Payne used excessive force. For the reasons discussed above, McCarthy's opinions should also not be considered in determining whether Officer Payne used excessive force.

Therefore, Defendants' motion for summary judgment as to Wilson's excessive force claim should be denied.

**D. Defendants are not entitled to summary judgment on Plaintiff's failure to protect claim, or qualified immunity on that claim.**

Under certain circumstances, “a state actor’s failure to intervene renders him or her culpable under [42 U.S.C.] § 1983.” *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994); *Chavez v. Ill. State Police*, 251 F.3d 612, 652 (7th Cir. 2001). An officer who is present and does not intervene to prevent other law enforcement officers from violating the constitutional rights of citizens is liable under § 1983 if the officer had reason to know: (1) that excessive force was being used; (2) that a citizen has been unjustifiably arrested; or (3) that any constitutional violation has been committed by a law enforcement official, and the officer had a realistic opportunity to intervene to prevent the harm from occurring. *Abdullahi v. City of Madison*, 423 F.3d 763, 774 (7th Cir. 2005).

As discussed in detail above, the undisputed evidence establishes that Officer Payne used excessive force against Wilson and that Officer Payne is not entitled to qualified immunity. There is no evidence that Officer Beard did anything to prevent Officer Payne from exerting excessive force against Wilson because there is no evidence that Officer Beard addressed Payne in any way while he was restraining Wilson. Instead, Officer Beard stood by the door to Cell Block H while Officer Payne exerted excessive force against Wilson and only moved from that location to escort Stone out of Cell Block H. (Exhibit A at 32:9-24, 47:18-20, 48:6-19; Exhibit B at 49:7-12, 56:14-19; Exhibit C at 42:10-19; Exhibit D at 110:21-112:10.) Indeed, the evidence establishes that Officer Beard was at best indifferent and at worst harbored malicious intentions toward Wilson. (Exhibit A at 32:9-24, 35:15-36:7, 47:18-20, 48:6-19, 51:15-19, 52:19-24, 54:10-55:2; Exhibit B at 34:1-13, 35:15-36:7, 49:7-18, 52:2-24, 54:5-55:15, 56:14-19, 64:23-65:22, 71:20-72:2, 73:1-3, Ex. 12; Exhibit C at 23:25-24:7, 39:25-4, 42:10-43:6, 44:15-19, 49:13-18,

51:18-52:1, 54:20-55:3, 64:23-65:2; Exhibit D at 72:12-15, 73:2-3, 99:4-13, 106:1-12, 110:21-112:10, 111:22-113:11, 122:7-17, Ex. 6, Ex. 9.)

These facts establish that Officer Beard failed to intervene to prevent Officer Payne from exerting excessive force against Wilson and violating Wilson's constitutional rights. These facts are also sufficient to disqualify Officer Beard from seeking qualified immunity because there is no question that she chose to not intervene when exerted excessive force against Wilson—it was not mistake.

#### IV. CONCLUSION

Contrary to Defendants' suggestion, there are material issues of fact that preclude summary judgment in Defendants' favor on Plaintiffs' claims for use of excessive force by Officer Payne and failure to protect by Officer Beard and Defendants are not entitled to qualified immunity. Therefore, Defendants' Motion for Summary Judgment should be denied.

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**CERTIFICATE OF SERVICE**

The foregoing was filed electronically, this 9th day of July, 2015. Notice of this filing will be sent to the following parties by operation of the Court's Electronic filing system. Parties may access this filing through the Court's system:

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