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U.S. DISTRICT COURT  
EASTERN DISTRICT OF LA  
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LORETTA G. WHYTE  
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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

DERECK ROBINSON

CIVIL ACTION

VERSUS

NO. 99-3167

CHARLES C. FOTI, JR. ET AL.

SECTION "S" (2)

JAMES MILLER

CIVIL ACTION

VERSUS

NO. 99-3257 ✓

CHARLES C. FOTI, JR. ET AL.

SECTION "R" (2)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Dereck Robinson, a prisoner currently incarcerated in the Federal Correctional Institute in Beaumont, Texas, and James Miller, a prisoner currently incarcerated in the Federal Prison Camp in Oakdale, Louisiana, filed these lawsuits in forma pauperis pursuant to 42 U.S.C. § 1983 against Orleans Parish Criminal Sheriff Charles C. Foti, Jr. and Sheriff's Deputy Gerald Chaney. Both actions arise from the same fight between two groups of inmates, which occurred while plaintiffs were incarcerated at the Orleans Parish Prison system ("OPP") in October 1998.

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Both plaintiffs assert two federal claims: (1) Deputy Cheney intentionally exposed them to harm and failed to protect them from attack by other inmates. (2) Defendants provided them with inadequate medical care for injuries suffered in the fight. C.A. No. 99-3167"S", Record Doc. No. 11; C.A. No. 99-3257"R", Record Doc. No. 14. Plaintiffs also assert a single state law claim of negligence. Pretrial Order, C.A. No. 99-3167"S", Record Doc. No. 22, at ¶8(j); C.A. No. 99-3257"R", Record Doc. No. 23, at ¶8(j).

Plaintiffs' cases were tried simultaneously with the case of Chau Van Cong et al. v. Charles C. Foti et al., C.A. No. 99-663"R"(2), the claims of which were primarily based on the same incident.<sup>1</sup> Trial was conducted before the undersigned magistrate judge without a jury on May 15-17, 2000 pursuant to 28 U.S.C. § 636(c) and the written consent of all parties. C.A. No. 99-3167"S", Record Doc. No. 13; C.A. No. 99-3257"R", Record Doc. No. 16; C.A. No. 99-663"R", Record Doc. No. 10. Having considered the evidence, the record, and the applicable law, I enter the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

#### FINDINGS OF FACT

1. Gerald Chaney, Kerry West, Thomas Spicuzza, Jr., Bianca Baker, Manuel Gilbert, Allan Verrett, Craig Sylvera, Tris Lear, Gregory Rickson and Mary Kennedy

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<sup>1</sup>All 13 plaintiffs in the Chau Van Cong case settled their claims after trial, while this matter was under advisement, and their complaint was dismissed on August 4, 2000. C.A. No. 99-663"R", Record Doc. No. 93.

were all deputies of the Orleans Parish Criminal Sheriff, working at OPP, and were acting in the course and scope of their employment at all pertinent times relative to plaintiffs' claims.

2. Sheriff Foti is the final policy maker for the Orleans Parish Criminal Sheriff's Office/OPP employees mentioned in the previous paragraph and at all pertinent times was in the course and scope of his official capacity as Criminal Sheriff.

3. Robinson is currently in federal prison. However, on October 20, 1998, he was a pretrial detainee in OPP, awaiting trial on a federal charge of conspiracy to sell illegal drugs. He had also previously been convicted of possession of an illegal drug in state court in April 1997 and was sentenced to three years in prison in December 1997. Thus, his status was convicted inmate at the time he was brought to OPP in May 1998.

4. On October 20, 1998, Miller was a pretrial detainee in OPP. He was convicted in federal court on July 1, 1999 of possession of cocaine base and is currently serving an 87-month sentence.

5. Robinson's testimony was not credible in material part, and not simply because he is a convicted felon whose conviction may properly be considered in assessing his credibility. Fed. R. Evid. 609(a). Robinson's account of an alleged conspiracy between himself and Deputy Chaney, which included testimony that Chaney threatened him or promised him favors if he would attack fellow inmate Loc Pham, and his statement

that Deputy Chaney deliberately instigated and knew that a large fight would occur and ignored the presence of weapons on the tier are unbelievable. Robinson's demeanor was untrustworthy, his manner of testifying was exaggerated and his testimony was internally inconsistent. His testimony conflicted both with the testimony of other credible witnesses and with the written medical records, which do not corroborate the kinds of injuries to which he testified or his alleged numerous sick call requests. These findings necessitate a finding that Robinson's testimony be rejected as wholly untrustworthy.

6. Deputy Chaney's point-blank denial of Robinson's allegations that Chaney intentionally instigated and facilitated the fight was credible. His demeanor and manner of testifying, coupled with the entirety of the circumstances, convince me that Chaney was credible when he explained with obvious sincerity during his testimony that it would have made no sense, in terms of both his career and his personal security, to trust Robinson in such a harebrained scheme.

7. Miller's testimony was generally credible. However, he had no firsthand knowledge concerning Chaney's alleged involvement in instigating the fight. In addition, Miller was not credible concerning the extent of his alleged injuries and pain, and not simply because he is a convicted felon whose conviction may properly be considered in assessing his credibility. Fed. R. Evid. 609(a). His testimony in this regard was

exaggerated, short on detail, inconsistent and conflicted with the written medical records, which do not corroborate the kinds of injuries to which he testified.

8. The credible evidence establishes the following facts. Robinson and Miller were incarcerated in the E-2 quadrant of Templeman Phase III ("Templeman E-2"), a two-level tier at OPP that holds about 32 inmates. In that quadrant, OPP houses federal pretrial detainees and Immigration and Naturalization Service ("INS") detainees who have been convicted of crimes, served their sentences and been declared deportable but who cannot be deported to their countries of origin.

9. For safety reasons, the daily procedure in Templeman E-2 is to lock down alternating levels of the tier for two hours at a time throughout the day. The inmates on one level are locked in their cells while the other level is open. The inmates who are housed in the open level may move about the tier. At the end of the two-hour period, the inmates from that level are ordered to return to their cells and their cell doors are locked. The other level is then unlocked. At "feedup" time, all inmates who are outside their cells are required to get a plate of food and go into their cells, where they are locked in and the other level is released so those inmates can get their food. The second set of inmates is then required to return to lockdown so the first set can finish out its two hours of non-lockdown time.

10. "Tier reps," who are inmates with some privileges and responsibilities, may remain outside their cells during the entire day. The tier reps on October 20, 1998 were African-American federal pretrial detainee inmates Edward Yancey, Maurice Brown and Gordon Jackson and Asian INS detainee Vithanet Kikhamsouk.

11. On the motion of plaintiffs in the Cong case, C.A. 99-663"S," Record Doc. Nos. 42, 48 and 58, I conducted an on-site inspection of Templeman E-2, the site of the subject incidents, during the trial. The cell doors are remotely controlled by a deputy in the E-side security booth or control module. The module is raised and situated between the four quadrants of the E-side. It is surrounded by glass and overlooks both levels of each tier. The tier has a large glass window spanning the entire width of the wall facing the module. There are a few blind spots in Templeman E-2 not visible from the module. Two video cameras in Templeman E-2, which are monitored in the module, offer alternating views of different blind spots, automatically changing the view every few seconds.

12. On October 20, 1998, Deputies Gilbert, Baker and Chaney were on duty in the control booth area on Templeman E-2 from 6:30 a.m. to 6:30 p.m. Deputy Chaney, who had been with the Sheriff's department for about four years at the time of trial, was the senior deputy in charge. Gilbert was next in seniority, having worked for the Sheriff since January 1997. Deputy Baker was extremely inexperienced, having just joined the

Sheriff's department on June 5, 1998, only about four months earlier, when she was 18 years old. She was first assigned to the E-tier in October 1998, very shortly before the subject incident. She left the Sheriff's department in March 1999.

13. Loc Phan, an Asian INS detainee, had previously caused trouble on Templeman's F-side by repeatedly refusing to stay in his assigned cell. On October 19, 1998, he was transferred to Templeman E-2 and assigned to share Cell 17 on the upper level with Robinson. Because Loc Phan complained about his cell assignment that night, a part-time deputy on duty had allowed him to move to a cell on the lower level with other Asians. Deputy Chaney and Field Training Officer ("FTO") West, Chaney's supervisor, moved Loc Phan back to his assigned Cell 17 the next day.

14. Around 4:00 to 4:30 p.m. on October 20, 1998, Deputies Gilbert and Chaney were in the E-side gym below the control module, booking Miller, who had just been transferred into OPP from another parish jail. Around that time, Robinson and Yancey attacked and beat up Loc Phan in the open areas of Templeman E-2.

15. Deputy Baker, who was alone in the control module, did not see this fight but saw Loc Phan banging on the glass wall of Templeman E-2 after the fight. She called out through the open door of the module to Deputies Gilbert and Chaney, asking what she should do. Deputy Chaney told her to let Loc Phan out into the hallway. Deputy Chaney brought Loc Phan into the gym, talked to him and decided to reassign him to

Templeman E-4 so he would not be attacked again. Deputy Chaney went into Templeman E-2 to retrieve Loc Phan's belongings and then took Loc Phan to the medical department. Although Deputies Chaney, Gilbert and Baker testified that they saw no visible injuries on Loc Phan, Miller testified that Loc Phan had a "busted" lip, and Loc Phan's medical records document a swollen lip, a chipped tooth and a small amount of bloody drainage from his mouth. Plaintiffs' Exh. P-2B. Several minutes later, Deputy Gilbert finished processing Miller, escorted him into Templeman E-2 and returned to the gym to collect Miller's belongings.

16. Because it was feedup time when Miller went into the tier, Deputy Gilbert did not lock him in a cell but told him to get a plate of food. Robinson should have been in lockdown at that time, but Deputy Baker had mistakenly allowed him to remain outside his cell when she locked down the upper level from her position in the control booth. Yancey, Brown and Jackson were out of their cells because they were tier reps.

17. After Loc Phan left the tier, Robinson and Yancey argued loudly and demonstratively with Tin Pham and some of the other Asians in the locked cells on the lower level about Robinson's earlier fight with Loc Phan. Brooms and mops were routinely left on the tier for a period of time during feedup so that the inmates could clean up after meals. Robinson, Brown, Yancey and Jackson broke the sticks of some of the



brooms and mops that were on the tier and converted them into weapons. A contraband metal laundry pin was also used as a weapon by one of the inmates.

18. Tin Pham threw a cup of water from the toilet in his locked cell at Robinson. Robinson tried to stab Tin Pham with a metal mop stick through Tin Pham's cell bars, then threw the mop stick at Tin Pham, who picked it up to use as a weapon. Around 4:45 p.m. to 5:00 p.m., almost immediately after Miller arrived in the dayroom, Deputy Baker opened the cell doors on the lower level. Robinson, Brown, Yancey and Jackson attacked six Asian INS detainees (Chau Van Cong, Tin Pham, Bun Chande, Anouphong Khamvongsa, Bounmy Phrachak and Detphongsone Outtha-Aphay) as they came out of their cells, and several of the Asians reciprocated with attacks of their own. The inmates used the mop and broom sticks as weapons. Some of the Asians used bars of soap inside socks as weapons.

19. Deputy Chaney was not aware of any fighting or arguing between Robinson and the Asians when he went into the tier to retrieve Loc Phan's belongings. Deputy Baker, the 18-year-old, inexperienced security guard who was left alone in the clear glass-windowed control booth equipped with surveillance cameras, incredibly testified that she did not observe the first fight involving Loc Phan, Robinson and Yancey; the subsequent arguing between the two groups of inmates; the mop and broom sticks being prepared for a fight; or Robinson's jabbing and throwing a metal mop stick at Tin Pham through his cell

bars. She did not see that Robinson had stayed outside his cell and failed to ensure that he went into lockdown. She decided to open the doors of the bottom level. She did not see Miller arrive nor did she see the beginning of the second, large fight. When Deputy Baker heard and saw the large fight in progress, she called Deputy Gilbert. He came out of the gym and told her to call for backup, which she did. For his own safety, Gilbert waited in the hallway and watched the fight for about two minutes before backup arrived.

20. When Deputy Baker issued the backup call, Deputy Chaney was waiting to enter the medical department with Loc Pham. He placed Loc Pham in a holding cell, then responded to the call, arriving at Templeman E-2 after the fight was over. Field Training Officer ("FTO") Sylvera, who was working in the Templeman Phase III complex that day, also responded to the backup call. FTO Sylvera is a large, imposing figure. When he arrived at Templeman E-2, he and Gilbert entered the tier, and the fight stopped. All six Asians had been hurt, two of them seriously, and were taken to the medical department as soon as the tier was secured. None of the African-American inmates was sufficiently injured to be taken to the medical department.

21. Based on the credible evidence, I find that Robinson was the aggressor and instigator in both fights. Miller was a newcomer who was initially caught in the large fight, but then readily participated.

22. No tension, disputes or fights had occurred between the Asian INS detainees and the African-American federal inmates, and none had been seen by or reported to OPP deputies before October 20, 1998. The deputies on duty that day had no notice or reason to believe that a fight would occur between any of the participants in either fight until the first fight involving Robinson, Yancey and Loc Phan occurred very shortly before the large-scale fight broke out.

23. There is no credible evidence that (a) Deputy Chaney or any other deputy encouraged or coerced Robinson or any other inmate to fight with Loc Phan or any other Asian detainee; (b) Chaney either gave weapons to Robinson or came back to the tier after Loc Phan left and ignored the presence of weapons on the tier before the second fight; or (c) Chaney either threatened Robinson or promised him privileges to keep his mouth shut after the fight. It is unknown how the laundry pin, which is not issued by OPP, came onto the tier, but there is no credible evidence that Chaney or any other deputy gave it to Robinson or any other inmate.

24. Sheriff Foti did not participate personally in any of the events alleged in the complaint.

25. Former Deputy Baker was not a credible witness. Her demeanor was untrustworthy, her manner of testifying was evasive and her testimony was internally inconsistent. Her testimony conflicted with the testimony of other credible witnesses. She

was impeached on cross-examination by her prior statements to OPP's investigators immediately after the incident and to plaintiffs' counsel in C.A. No. 99-663 before trial. Her conduct in the control module on October 20, 1998 was negligent.

26. Robinson testified that he received a minor injury in the fight, namely, that his right arm was swollen for a week or two. He said he received a more serious injury to his neck but his testimony in this regard was not credible. He stated that he needed, but did not receive, immediate medical attention and did not receive any medical care, despite sick call requests, for several months thereafter.

27. The medical records do not corroborate the alleged extent of Robinson's injuries. Rather, his records from OPP indicate that he did not request any medical attention for back, neck or arm pain until March 7, 1999, and that whenever he requested medical attention on that date and thereafter he was seen by a nurse or a physician and received either nonprescription or prescription analgesics. C.A. No. 99-3167"S", Record Doc. No. 10. The credible evidence establishes that Robinson suffered no serious or long lasting injuries in the fight, which he instigated, and in fact his injuries sustained in the fight were extremely minor.

28. Miller testified that he was hit in the back and across the back of his head with a stick and suffered a few scratches on his arm. He did not receive any immediate medical attention but admitted that he did not request any.

29. The medical records from OPP do not corroborate the alleged extent of Miller's injuries to his head and back. His first sick call request after the fight was on November 29, 1998, when he was treated for a laceration received while playing basketball. In March, April and May 1999, he was seen by a nurse for his only complaints of knee, neck and back pain and headaches and treated with nonprescription analgesics. C.A. No. 99-3257"R", Record Doc. No. 13. The credible evidence establishes that he suffered no serious or long lasting injuries in the fight, and in fact his injuries suffered in the fight were extremely minor.

#### CONCLUSIONS OF LAW

1. The Court has jurisdiction over plaintiff's claims asserted under 42 U.S.C. § 1983 and state law pursuant to 28 U.S.C. § 1331 and 1367(a), and venue is proper in this district.

2. Plaintiffs allege that their medical care at the jail did not meet constitutional standards. Miller was a pretrial detainee for the time period about which he complains, while Robinson was both a pretrial detainee on his federal charge and a convicted prisoner on his state charge. Before the Fifth Circuit's decision in Hare v. City of Corinth, 74 F.3d 633 (5th Cir. 1996), it appeared that prison officials must provide pretrial detainees with reasonable medical care unless the failure to provide it was reasonably related to a legitimate government interest. Bell v. Wolfish, 441 U.S. 520, 539 (1979); Cupit v.

Jones, 835 F.2d 82, 85 (5th Cir. 1987); Mayweather v. Foti, 958 F.2d 91, 91 (5th Cir. 1992). The inquiry was "whether the denial of medical care . . . was objectively reasonable in light of the Fourteenth Amendment's guarantee of reasonable medical care and prohibition on punishment of pretrial detainees." Pfanstiel v. City of Marion, 918 F.2d 1178, 1186 (5th Cir. 1990), abrogated on other grounds by Martin v. Thomas, 973 F.2d 449 (5th Cir. 1992).

3. In Hare, however, the Fifth Circuit held:

(1) that the State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with basic human needs, including medical care and protection from harm, during their confinement; and (2) that a state jail official's liability for episodic acts or omissions cannot attach unless the official had subjective knowledge of a substantial risk of serious harm to a pretrial detainee but responded with deliberate indifference to that risk.

Hare, 74 F.3d at 650 (emphasis added). The Fifth Circuit explained that for the Bell "reasonable relationship" test to be applicable, the pretrial detainee must be able to show that a prison official's act either "implement[s] a rule or restriction or otherwise demonstrate[s] the existence of an identifiable intended condition or practice" or that the "official's acts or omissions were sufficiently extended or pervasive, or otherwise typical of extended or pervasive misconduct by other officials, to prove an intended condition or practice." Id. at 645. If the pretrial detainee is unable to prove either, the incident will be considered to be an episodic act or omission and the deliberate indifference standard

enunciated in Estelle v. Gamble, 429 U.S. 97, 104 (1976), will apply. Hare, 74 F.3d at 645.

4. In Estelle, the Supreme Court held that a convicted prisoner may succeed on a claim for damages under 42 U.S.C. § 1983 for inadequate medical care only if he demonstrates that there has been "deliberate indifference to serious medical needs" by prison officials or other state actors. Only deliberate indifference, "an unnecessary and wanton infliction of pain . . . or acts repugnant to the conscience of mankind," constitutes conduct proscribed by the Eighth Amendment. Estelle, 429 U.S. at 105-06; accord Gregg v. Georgia, 428 U.S. 153, 182-83 (1976). "Deliberate indifference" means that a prison official is liable "only if he knows that the inmates face a substantial risk of serious harm and [he] disregards that risk by failing to take reasonable measures to abate it." Farmer v. Brennan, 511 U.S. 825, 847 (1994). The Farmer definition applies to Eighth Amendment medical claims and to medical claims by pretrial detainees. Hare, 74 F.3d at 650; Reeves, 27 F.3d at 176.

5. Further, plaintiffs must establish that a defendant possessed a culpable state of mind. Farmer, 511 U.S. at 834 (citing Wilson v. Seiter, 501 U.S. 294, 298 (1991)). A prison official cannot be held liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he

must also draw the inference." Id. at 837. If the Court finds that one of the components of the test is not met, it need not address the other component. Davis, 157 F.3d at 1005.

6. "'[D]eliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action. . . . The 'deliberate indifference' standard permits courts to separate omissions that amount to an intentional choice from those that are merely unintentionally negligent oversight[s]." Southard v. Texas Bd. of Crim. Justice, 114 F.3d 539, 551 (5th Cir. 1997) (citing Board of County Commissioners v. Brown, 520 U.S. 397, 410 (1997) (other citations and quotations omitted) (emphasis added). "'Subjective recklessness,'" as used in the criminal law, is the appropriate test for deliberate indifference." Norton v. Dimazana, 122 F.3d 286, 291 (5th Cir. 1997).

7. In the instant case, it is clear that nothing more than episodic acts or omissions are involved in the question of the adequacy of medical care provided to Miller and Robinson at OPP. Olabisiomotosho v. City of Houston, 185 F.3d 521, 526 (5th Cir. 1999). Accordingly, the deliberate indifference standard applies to this claim.

8. Robinson and Miller failed to carry their burden to prove that prison officials were deliberately indifferent to their serious medical needs. First, neither of them had any serious medical needs. They can prevail only if they demonstrate "that these medical needs were serious, i.e., that [their] needs were 'obvious to the layperson or supported by



medical evidence, like a physician's diagnosis.'" Id. Both Robinson and Miller received injuries that were minor as a result of the fight, and the medical records corroborate that neither complained of pain or injury or sought medical attention for some months after the fight. As stated above, their testimony alleging more serious injuries was not credible.

9. Second, although plaintiffs complained that they experienced some delay in receiving medical care, none of their allegations rise to the level of deliberate indifference necessary to establish a constitutional violation. Mere delay in receiving care is not in and of itself a constitutional violation. Mendoza v. Lynaugh, 989 F.2d 191, 195 (5th Cir. 1993); Wesson v. Oglesby, 910 F.2d 278, 284 (5th Cir. 1990); Simons v. Clemens, 752 F.2d 1053, 1056 (5th Cir. 1985). Regardless of the length of delay, plaintiff "must, at a minimum, [prove] 'deliberate indifference' to his 'serious' medical needs," Wilson, 501 U.S. at 296, neither of which plaintiffs have established in this case.

10. Moreover, while it is clear from plaintiffs' testimony that they are not satisfied with the medical care they received, it is equally clear that constitutionally adequate medical attention was provided and that defendants were not negligent in their provision of medical care. Plaintiffs were seen by medical personnel every time they complained of medical problems and were given prescription and/or nonprescription analgesics for their complaints of pain. Certainly, no inference of deliberate indifference to serious medical needs is possible based on this record. A mere disagreement with the

quality or extent of medical treatment does not establish a Section 1983 claim. "[A]lthough inadequate medical treatment may, at a certain point, rise to the level of a constitutional violation, malpractice or negligent care does not." Stewart v. Murphy, 174 F.3d 530, 534 (5th Cir. 1999) (citing Mendoza, 989 F.2d at 193); accord Norton, 122 F.3d at 291-92; Varnado v. Lynaugh, 920 F.2d 320, 321 (5th Cir. 1991); Wesson, 910 F.2d at 284. Plaintiffs' claims that they were provided with inadequate medical care must be dismissed.

11. Plaintiffs also allege that defendants intentionally exposed them to harm or attack by the Asian inmates. As stated in Hare, "the State owes the same duty under the Due Process Clause and the Eighth Amendment to provide both pretrial detainees and convicted inmates with . . . protection from harm during their confinement." Hare, 74 F.3d at 650. Thus, as noted above, regardless whether the inmate is a pretrial detainee or a convicted prisoner, the standard of liability is the same for episodic acts or omissions of jail officials that expose an inmate to harm by another inmate. Hamilton, 74 F.3d at 104 n.3; Hare, 74 F.3d at 650.

12. In Scott v. Moore, 114 F.3d 51 (5th Cir. 1997), the Fifth Circuit clarified what types of cases encompass "episodic acts or omissions" of jail officials, for which the deliberate indifference test applies.

[W]here the complained-of harm is a particular act or omission of one or more officials, the action is characterized properly as an "episodic act or omission" case and is not amenable to review under the [Bell v.] Wolfish test. In an "episodic act or omission" case, an actor usually is interposed between the detainee and the municipality, such that the detainee complains first of a particular act of, or omission by, the actor and then points derivatively to a policy, custom, or rule (or lack thereof) of the municipality that permitted or caused the act or omission.

Scott, 114 F.3d at 53 (citing Hare, 74 F.3d at 645).

13. In the instant case, the harm about which Robinson and Miller complain is the risk of harm allegedly fostered by Deputy Chaney, who allegedly threatened or promised favors to Robinson and provided or ignored the presence of weapons so that Robinson could fight Loc Phan and the other Asians, which led to both plaintiffs being injured. These were episodic acts or omissions allegedly perpetrated by an actor interposed between plaintiffs and the Sheriff's policy. Id. Accordingly, the deliberate indifference standard applies to plaintiffs' claim of failure to protect from other inmates.

14. Prison officials have a duty to protect inmates from harm or violence by other inmates. Farmer, 511 U.S. at 833; Hare, 74 F.3d at 650. The same two-pronged analysis under Farmer applies to plaintiffs' claims of failure to protect as applied to their claims of inadequate medical care. Thus, the alleged deprivation must objectively be "sufficiently serious," which means that "the inmate must show that he is incarcerated under conditions posing substantial risk of serious harm" and the inmate must show that

the prison official was deliberately indifferent to inmate health or safety. Farmer, 511 U.S. at 834; accord Newton v. Black, 133 F.3d 301, 308 (5th Cir. 1998). A prison official cannot be held liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer, 511 U.S. at 837; accord Newton, 133 F.3d at 308.

15. Again, "[s]ubjective recklessness,' as used in the criminal law, is the appropriate test for deliberate indifference." Norton, 122 F.3d at 291 (citing Farmer, 511 U.S. at 838-40). The deliberate indifference standard "is high. Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . . ." Alton v. Texas A&M Univ., 168 F.3d 196, 201 (5th Cir. 1999).

16. [I]f an Eighth Amendment plaintiff presents evidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to information concerning the risk and thus "must have known" about it, then such evidence could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk.

Farmer, 511 U.S. at 842-43. Liability for failure to protect a pretrial detainee "attaches only if [defendant] actually knew--not merely should have known--about the risk."

Olabisiomotosho, 185 F.3d at 527 (citing Farmer, 511 U.S. at 838 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment.")).

17. The credible evidence establishes that OPP officials were not deliberately indifferent to a serious risk of harm to Robinson and Miller. There had been no unusual tension or fighting between the inmates in Templeman E-2 before October 20, 1998 to put sheriff's deputies on long-term notice of any problems between the groups of African-American and Asian inmates. The conspiracy involving Chaney alleged by Robinson did not happen. The first fight was provoked by Loc Phan, who did not want to share a cell with Robinson. Robinson attacked Loc Phan. After Loc Phan left the tier, the Asian and African-American inmates, especially Tin Pham and Robinson, engaged in heated arguments about the fight. The African-American inmates began preparing weapons and the Asians prepared to defend themselves. When the doors of the lower level opened, the second fight erupted suddenly.

18. Deputies Baker, Gilbert and Chaney were not aware of facts from which the inference could be drawn that a substantial risk of serious harm existed, and they did not draw any inference that the large fight was going to occur. The incident developed suddenly and was not planned or orchestrated by Deputy Chaney or any other deputy or

jail official. No finding of deliberate indifference can be made. Accordingly, plaintiffs failed to prove their Section 1983 claims for failure to protect from harm by other inmates.

19. Plaintiffs in these cases also asserted a pendent state law tort claim. Under Louisiana law of negligence, prison employees may be liable to a prisoner who is injured while in their custody if they fail to use reasonable care in preventing harm after they have reasonable cause to anticipate it. Although public employees do not insure inmates against personal attacks, they are responsible when they fail to use reasonable care to protect inmates from injuries inflicted by other prisoners which they know or have reason to anticipate will occur. Hughes v. Savell, 902 F.2d 376, 379 (5th Cir. 1990) (citing Breaux v. State, 326 So. 2d 481, 482 (La. 1976)); State ex rel. Jackson v. Phelps, 672 So. 2d 665, 666 (La. 1996).

20. Employers like Sheriff Foti may be held vicariously liable in their official capacity under Louisiana law for the torts committed by their employees acting within the course and scope of their employment. La. Civ. Code art. 2320; Burge v. Parish of St. Tammany, 187 F.3d 452, 469 (5th Cir. 1999); Riley v. Evangeline Parish Sheriff's Office, 637 So. 2d 395, 395 (La. 1994); Latullas v. State, 658 So. 2d 800, 803 (La. App. 1st Cir. 1995).

21. There was ample evidence, both from inmates who testified by deposition, were not involved in the fight and have no stake in the outcome of this lawsuit, and, more

importantly, from my own observations of the control module and layout of Templeman E-2, that Deputy Baker either saw or should have seen the fight between Loc Phan and Robinson. Deputies Gilbert, Chaney and Baker knew that Loc Phan had just been involved in a fight and had been sufficiently injured that Deputy Chaney decided to take him to the medical department, where he was observed to have a bloody, swollen mouth. From her vantage point in the control module, Deputy Baker should have seen the subsequent arguing and tension between the African-American and Asian inmates, particularly Robinson and Tin Pham arguing and throwing items at each other through the bars of Tin Pham's cell. A competent deputy in the control booth would know or have reason to anticipate that Robinson and the other African-American inmates would attack the Asians, who would fight back, or that the Asians otherwise posed a risk of harm to Robinson and Miller. The deputies failed to act reasonably to prevent that risk. In particular, Deputy Baker acted negligently by opening the lower level doors. Accordingly, the deputies were negligent and legally responsible for the injuries suffered by Robinson and Miller. Sheriff Foti is responsible in his official capacity for his deputies' negligence under Louisiana law.

22. Robinson and Miller suffered minor injuries in the large fight that occurred after Deputy Baker negligently opened the lower level cells. I find that Robinson suffered

damages in the amount of \$1,000 and that Miller suffered damages in the amount of \$500 as a result of defendants' negligence.

23. However, if a plaintiff suffers injury or loss as a result partly of his own negligence and partly of the fault of another person or persons, the amount of damages that the plaintiff may recover must be reduced in proportion to the degree or percentage of negligence attributable to him. La. Civ. Code art. 2323; Braud v. Painter, 730 F. Supp. 1, 13 (M. D. La. 1990); Veazey v. Elmwood Plantation Assocs., Ltd., 650 So. 2d 712, 718-19 (La. 1995).

24. In assessing the nature of the conduct of the parties, various factors may influence the degree of fault assigned, including: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought. Pinsonneault v. Merchants & Farmers Bank & Trust Co., 738 So. 2d 172, 196 (La. App. 3d Cir. 1999) (citing Watson v. State Farm Fire & Cas. Ins. Co., 469 So. 2d 967 (La. 1985)), writ granted & case remanded on different grounds, 753 So. 2d 842 (La. 2000).

25. Considering these factors, I find that Robinson was 80% at fault in causing his own injuries. Robinson's conduct in beating Loc Phan, in provoking Tin Pham and



arming him by throwing a metal stick into his cell, and in attacking the other Asians with weapons was deliberate, was undertaken for vengeful reasons and created a significant risk of injury. He was violating the prison's safety regulations by staying out of his cell when he should have been locked down. He could have avoided the large fight. Accordingly, Robinson's damages are reduced by 80% from \$1,000 to \$200.

26. Considering these factors, I find that Miller was 50% at fault in causing his own injuries. His conduct during the fight was largely inadvertent but it contributed to the melee, and created a risk to himself and others. He was forced to proceed in haste in a volatile and unknown situation. However, he shares some responsibility for his failure to avoid the fight and for participating in it. Accordingly, Miller's damages are reduced by 50% from \$500 to \$250.

27. Plaintiffs are entitled to recover prejudgment interest at the rate provided by Louisiana law as to their Louisiana state law claims from the date of judicial demand. The Fifth Circuit has recognized that a "mailbox rule" applies to pleadings submitted to federal courts by prisoners acting pro se. Under this rule, the date when prison officials receive the pleading from the inmate for delivery to the Court is considered the time of filing for limitations purposes. Coleman v. Johnson, 184 F.3d 398, 401 (5th Cir. 1999), cert. denied, 120 S.Ct. 1564 (2000); Spotville v. Cain, 149 F.3d 374, 378 (5th Cir. 1998); Cooper v. Brookshire, 70 F.3d 377, 379 (5th Cir. 1995); Lara v. Johnson, 141 F.3d 239,

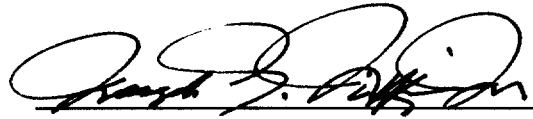
241 n.2 (5th Cir. 1998), opinion modified on rehearing, 149 F.3d 1226 (5th Cir. 1998); Thompson v. Raspberry, 993 F.2d 513, 515 (5th Cir. 1993). Robinson's complaint was filed by the Clerk of Court on October 22, 1999. However, Robinson signed and dated the complaint on September 20, 1999, which would be the earliest date on which he could have delivered it to prison officials for mailing. C.A. No. 99-3167"S," Record Doc. No. 1. Similarly, Miller's complaint was tendered for filing in this Court on October 22, 1999 and was actually filed by the Clerk of Court on November 2, 1999. However, Miller signed and dated the complaint on October 18, 1999, which would be the earliest date on which he could have delivered it to prison officials for mailing. C.A. 99-3257"R," Record Doc. No. 1. Thus, the dates of judicial demand were September 20, 1999 for Robinson and October 18, 1999 for Miller. Accordingly, plaintiffs are entitled to recover prejudgment interest at the rate of 6.73% from their respective dates of judicial demand through December 31, 1999 and at the rate of 7.285% from January 1, 2000 until paid. La. State Bar Ass'n, Legal Library, at [http://www.lsba.org/html/judicial\\_rate.html](http://www.lsba.org/html/judicial_rate.html).

### CONCLUSION

Based on the foregoing findings of fact and conclusions of law, plaintiffs' claims under 42 U.S.C. § 1983 must be dismissed with prejudice. Their negligence claims against defendants under Louisiana state law are resolved in their favor, as set out above. To whatever extent, if any, any of the foregoing findings of fact constitute conclusions of

law and vice versa, they are adopted as such. Separate judgments will be entered accordingly.

New Orleans, Louisiana, this 10<sup>th</sup> day of October, 2000.

  
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JOSEPH C. WILKINSON, JR.  
UNITED STATES MAGISTRATE JUDGE