

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

MICHAEL J. BOLICK,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 5:15-CV-211-CAR-MSH
	:	Proceedings Under 42 U.S.C. § 1983
Deputy Warden JOHN FAGAN, <i>et al.</i> ,	:	
	:	
Defendants.	:	
_____	:	

ORDER ON UNITED STATES MAGISTRATE JUDGE'S
ORDER AND RECOMMENDATION

Before the Court is the United States Magistrate Judge's Order and Recommendation [Doc. 48] to allow Plaintiff's claims against Defendants Fagan, Berry, Sellers, Ivey, Ransom, and the Doe CERT Team Officers to go forward; and dismiss without prejudice Plaintiffs' claims against Defendants Childs, Brown, Johnson, and Pless pursuant to 28 U.S.C. § 1915A. The Magistrate Judge also denied Plaintiff's Motions to Appoint Counsel [Docs. 45, 78]. Plaintiff has filed an Objection [Doc. 57] to the Order and Recommendation. Specifically, Plaintiff objects to the Magistrate Judge's Recommendation to dismiss his claims against Defendants Brown, Johnson, and Pless and denial of his Motions to Appoint Counsel.

The Court has fully considered the record in this case and investigated *de novo* those portions of the Order and Recommendation to which Plaintiff objects. For the

reasons that follow, the Order and Recommendation [Doc. 48] is hereby **ADOPTED IN PART**. The Order and Recommendation is **ADOPTED** as to Plaintiff's Motion to Appoint Counsel and claims against Defendants Fagan, Berry, Sellers, Ivey, Ransom, the Doe CERT Team Officers, and Childs. Thus, Plaintiff's Motions to Appoint Counsel are **DENIED**; his claim against Defendant Childs is **DISMISSED**; and his claims against Defendants Fagan, Berry, Sellers, Ivey, Ransom, and the Doe CERT Team Officers may **go forward**. The Order and Recommendation, however, is **NOT ADOPTED** as to Plaintiff's failure to intervene claims against Defendants Brown, Johnson, and Pless. Accordingly, Plaintiff's failure to intervene claims against Defendants Brown, Johnson, and Pless may **go forward**.

I. Failure to Intervene Claims

In this *pro se* action pursuant to 42 U.S.C. § 1983, Plaintiff asserts officials at Central State Prison and Hancock State Prison failed to intervene when Hancock State Prison CERT officers used excessive force, in violation of his Eighth Amendment rights. According to the Complaint, Plaintiff was involved in an altercation with two Central State Prison guards on March 31, 2015. On April 8, 2015, two Central State Prison officials—Shift Sergeant Brown and CERT Officer Johnson—transported Plaintiff to Hancock State Prison. There, Warden Sellers instructed the Hancock State Prison CERT officers to “get [Plaintiff's] ass off the van!”¹ The CERT officers “snatched” Plaintiff off

¹ [Doc. 1, p. 10].

the van, shoved him into the intake room, and slammed him into the wall, splitting open his forehead.² After accusing Plaintiff of “jump[ing] on officers,” the CERT officers began punching Plaintiff in the ribs, stomach, and back.³ One CERT officer struck Plaintiff in the head several times with a book. Another CERT officer grabbed and squeezed Plaintiff’s penis and testicles, then yanked the chain on Plaintiff’s leg irons, causing him to fall to the floor.⁴ After kicking him several times, two CERT officers lifted Plaintiff to his feet and held his arms back while a third CERT officer beat him in the stomach. According to Plaintiff, Central State Prison Warden Berry, Central State Prison Deputy Warden Fagan, Hancock State Prison Warden Sellers, and Hancock State Prison Deputy Warden Ivey ordered the beating, while Defendants Brown, Johnson, and Hancock State Prison Shift Supervisor Pless watched but did nothing to intervene.

In the Order and Recommendation, the Magistrate Judge recommends dismissing Plaintiff’s failure to intervene claims against Defendants Brown, Johnson, and Pless. According to the Magistrate Judge, “[i]t is not clear how [Defendants Brown, Johnson, and Pless] were in a position to intervene” because the CERT officers acted pursuant to orders from supervisory Defendants Warden Berry, Deputy Warden Fagan,

² *Id.*

³ *Id.* at p. 11.

⁴ *Id.*

Warden Sellers, and Deputy Warden Ivey.⁵ In other words, Defendants Brown, Johnson, and Pless' status as subordinate officers relieved them of their duty to stop the beating. The Court disagrees.

Plaintiff sufficiently states claims against Defendants Brown, Johnson, and Pless for failure to intervene. "[A]n officer who is present at the scene and who fails to take reasonable steps to protect the victim of another officer's use of excessive force can be held personally liable for his nonfeasance."⁶ Here, Plaintiff alleges Defendants witnessed his beating by the Hancock State Prison CERT officers but made no attempt to intervene.⁷ Defendants' inferior rank did not relieve them of their duty to protect Plaintiff from the CERT officers' malicious actions. Any officer, "whether supervisory or not," has a duty to intervene "when a constitutional violation such as an unprovoked beating takes place in his presence."⁸ "The duty to uphold the law does not turn upon an officer's rank. It is neither affected by, nor proportional to, a non-intervening officer's relationship to an offending colleague."⁹ Thus, the fact supervisory Defendants Berry, Fagan, Sellers, and Ivey ordered the beating is irrelevant to Defendants Brown,

⁵ Order and Recommendation [Doc. 48, p. 8].

⁶ *Skrnich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002).

⁷ [Doc. 1, p. 10-12] (alleging Defendants Brown and Johnson transported Plaintiff to Hancock State Prison, Plaintiff saw Defendant Pless "standing inside the intake/I.D. room" where the beating occurred, and Defendant Johnson "was standing close by" during the beating).

⁸ *Ensley v. Soper*, 142 F.3d 1402, 1407 (11th Cir. 1998).

⁹ *Thwaites v. Wimbush*, No. 5:11-CV-195 (CAR), 2013 WL 1333723, at *6 (M.D. Ga. 2013) (quoting *Smith v. Mensinger*, 293 F.3d 641, 651 (3d Cir. 2002)). See also *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir. 1983) (noting "[i]f [the officer] did not subject [the inmate] to unnecessary force, he was nonetheless under a duty to prevent the use of such force, even if the officers beating [the inmate] were his superiors").

Johnson, and Pless' duty to intervene. Accordingly, the Recommendation to dismiss Plaintiff's failure to intervene claims against Defendants Brown, Johnson, and Pless is **NOT ADOPTED**, and Plaintiff's claims against these Defendants may **go forward**.

II. Appointment of Counsel

Plaintiff also objects to the Magistrate Judge's denial of his Motions to Appoint Counsel [Docs. 45, 78].¹⁰ Plaintiff contends the serious nature of his allegations and the large number of defendants in this case constitute exceptional circumstances justifying the appointment of counsel. The Court disagrees. As set forth in the Order and Recommendation, exceptional circumstances do not exist at this time. Should it later become apparent that legal assistance is required in order to avoid prejudice to Plaintiff's rights, the Court, on its own motion, will consider assisting him in securing legal counsel at that time. Consequently, there is no need for Plaintiff to file additional requests for counsel. Plaintiff's Objection is therefore **OVERRULED**.

CONCLUSION

For the reasons set forth above, the Order and Recommendation [Doc. 48] is hereby **ADOPTED IN PART**. The Order and Recommendation is **ADOPTED** as to Plaintiff's Motion to Appoint Counsel and claims against Defendants Fagan, Berry, Sellers, Ivey, Ransom, the Doe CERT Team Officers, and Childs. Thus, Plaintiff's Motions to Appoint Counsel are **DENIED**; his claim against Defendant Childs is

¹⁰ [Docs. 57, 82].

DISMISSED; and his claims against Defendants Fagan, Berry, Sellers, Ivey, Ransom, and the Doe CERT Team Officers may **go forward**. The Order and Recommendation, however, is **NOT ADOPTED** as to Plaintiff's failure to intervene claims against Defendants Brown, Johnson, and Pless. Accordingly, Plaintiff's failure to intervene claims against Defendants Brown, Johnson, and Pless may **go forward**.

SO ORDERED, this 18th day of July, 2017.

S/ C. Ashley Royal
C. ASHLEY ROYAL, SENIOR JUDGE
UNITED STATES DISTRICT COURT