No. 20-7345

United States Court of Appeals
FOR THE FOURTH CIRCUIT

QUENTIN FREEMAN,
Plaintiff-Appellant,

v.

DANIEL DEAS,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina

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REPLY BRIEF OF APPELLANT

Erica Hashimoto, Director
Counsel of Record

Salvatore Mancina
Supervising Attorney

Zhina Kamali
Shaun Rogers
Student Counsel

Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555
eh502@georgetown.edu

Counsel for Appellant Quentin Freeman

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The state cannot evade the video evidence. It shows that Officer Deas snapped and punched Mr. Freeman multiple times after Mr. Freeman's attempted headbutt. Nor can the state evade this Court's precedent. An officer may not use force to punish an incarcerated individual for a headbutt—even if the headbutt occurred only moments before the officer's use of force. *Dean v. Jones*, 984 F.3d 295, 304–09 (4th Cir. 2021). Ignoring the key similarities with *Dean*, the state fixates on irrelevant factual differences between the two cases. Even those nitpicks fail.

The state resorts to painting Mr. Freeman as the aggressor and Officer Deas as reasonable. But the video's neutral eye shows that Officer Deas repeatedly provoked and then punished a fully-restrained Mr. Freeman. And when other officers intervened and pulled Officer Deas away, he violently pushed past them in an attempt to assault Mr. Freeman again. A reasonable jury viewing this video would have little difficulty concluding that Officer Deas was the aggressor and used force "not for protective reasons but instead to retaliate or punish." *Id.* at 304. This Court should reverse so this case can properly proceed to a jury.

I. A REASONABLE JURY COULD FIND THAT OFFICER DEAS' TAUNTING AND AGGRESSIVE CONDUCT ARE COMPELLING EVIDENCE OF HIS MALICIOUS INTENT.

Both parties agree that the primary issue in this case is whether Officer Deas acted with a "sufficiently culpable state of mind." State's Br. 10–11 (citation omitted).[1] The state's main contention is that a jury can only consider Officer Deas' conduct during the exact moment he used force to infer his intent. State's Br. 15. But this Court has rejected such narrow limits on the types of evidence a fact-finder can consider when assessing an officer's intent. *See Dean*, 984 F.3d at 308–09. Officer Deas' demeaning comments and his attempt to violently attack Mr. Freeman a second time are material facts that a jury could rely on to infer that Officer Deas acted with malicious intent. These facts alone warrant reversal.

A. Officer Deas' Taunting and Demeaning Comments Are Properly Part of the Summary Judgment Record.

Before contesting the materiality of Officer Deas' pre-assault comments, the state argues that Mr. Freeman violated local rules because he did not describe those comments in his opposing statement of

[1] The state "does not contest" the objective component of Mr. Freeman's excessive force claim. State's Br. 11.

material facts. State's Br. 12 (citing EDNC Local R. 56.1). But when the district court cited Mr. Freeman's allegation that Officer Deas taunted him and called him disrespectful names, it never found a violation of Local Rule 56.1. JA152 n.1.

In any event, Mr. Freeman complied with Local Rule 56.1. That rule requires a party opposing summary judgment to submit "a response to each numbered paragraph in the moving party's statement" and to support its responses with citations to the record. EDNC Local R. 56.1(a)(2), (4). Mr. Freeman did just that. For example, he specifically denied the state's statement that Officer Deas struck him "[i]n response to the attempted headbutt and to regain control," and Mr. Freeman cited to specific times of the video that he believed refuted that contention. JA55, JA144.

True, Mr. Freeman did not include Officer Deas' comments in his opposing statement of material facts, the way a lawyer might. But Mr. Freeman included in his opposing statement's appendix a copy of his witness statement, which states that Officer Deas belittled and taunted him. JA147–150. Because Mr. Freeman's *pro se* filings should be construed liberally, it is irrelevant whether he included these additional

facts in his opposing statement or the appendix to that statement. *See Wall v. Rasnick*, 42 F.4th 214, 218 (4th Cir. 2022); *see also Castro v. United States*, 540 U.S. 375, 381–82 (2003) (holding that courts may recharacterize *pro se* filings "to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis"). Regardless of where Mr. Freeman put these facts, the summary judgment record properly included Officer Deas' taunting and belittling comments.

B. Officer Deas' Conduct Before and After the Use-of-Force Incident Is Material Evidence of His Malicious Intent.

The state vainly asks this Court to ignore Officer Deas' belittling provocations and his attempt to assault Mr. Freeman a second time. State's Br. 14–15. But these facts are material evidence of Officer Deas' intent during his use of force. Because evidence of intent can be "hard to come by," Mr. Freeman may rely on circumstantial evidence—including Officer Deas' actions just before and after his use of force—to prove intent *during* the use of force. *See Dean*, 984 F.3d at 302, 309 (holding that an officer's intent can be "proven directly or through other circumstantial evidence . . . when such evidence is available"). Officer Deas cannot hide

behind an unduly narrow interpretation of materiality to erase these facts.

The state is wrong that Officer Deas' demeaning comments are not material because they occurred before Mr. Freeman's attempted headbutt. State's Br. 14. A reasonable jury could still rely on the comments to infer that Officer Deas disliked Mr. Freeman, provoked Mr. Freeman into a physical confrontation, and then used force to punish Mr. Freeman. This reveals the state's misreading of *Dean*. There, though the officer's comments came after the headbutt, this Court did not consider the difference between *before* and *after*. *Dean*, 984 F.3d at 308–09. This Court's focus was on what the comments said about the officer's intent, not when they occurred. *Id*. And this Court made clear that the question of "what [an officer's comments] say about his state of mind is for a fact-finder to resolve." *Id*. at 309.

Contrary to the state's claims, State's Br. 16, this Court has considered officer comments made well before a use-of-force incident. *Mann v. Failey*, 578 F. App'x 267, 275 (4th Cir. 2014). In *Mann*, this Court considered comments made hours before force was used. *Id*. at 270, 275. *Mann* eliminates the state's imagined temporal limits, and

confirms that Officer Deas' demeaning and provocative comments are relevant to understanding his animus during the entire incident.

Similarly, Officer Deas' attempt to assault Mr. Freeman a second time is a material fact that may give rise to an inference of malicious intent. This Court has held that an officer's conduct after a use-of-force incident can be considered in trying to identify an officer's intent. *See Brooks v. Johnson*, 924 F.3d 104, 115 (4th Cir. 2019) (considering statements officers made in an incident report after an use-of-force incident). In *Iko v. Shreve*, for example, this Court considered an officer's indifference to an incarcerated individual's post-use-of-force medical needs as evidence of the officer's intent during the use-of-force incident. 535 F.3d 225, 240 (4th Cir. 2008). Here, Officer Deas' post-use-of-force actions go beyond mere indifference: he deliberately attempted to bulldoze past other correctional officers to assault Mr. Freeman again.

The state mischaracterizes Officer Deas' conduct to make it sound less material, claiming that Officer Deas was "moderated by other officers" when he attempted to "confront" Mr. Freeman. State's Br. 16. But the video speaks volumes even without sound. After the other officers intervened and escorted Officer Deas away from the holding cell,

he broke free and rampaged back down the hall toward Mr. Freeman, thrashing about and pushing past his fellow officers to reach Mr. Freeman. Gray Unit Cam 47 at 0:22–0:45. Multiple officers forcibly stopped Officer Deas and carried him out of the hall—that is hardly "moderat[ing]." Gray Unit Cam 47 at 0:33–0:48.

The state sees none of this as *relevant* to whether Officer Deas intended to punish Mr. Freeman because it suggests that "it is possible" for Officer Deas' intent to have changed throughout the course of the incident. State's Br. 16. A reasonable jury only has to watch the video of Officer Deas' violent attempt to attack Mr. Freeman again to see strong evidence that Officer Deas' was determined to punish Mr. Freeman for the headbutt. The state's citation to *Brooks* is apt, State's Br. 16: just as the second and third taser shocks provided evidence of the officers' intent during the first taser shock in that case, Officer Deas' belligerent conduct is evidence of his state of mind while he was punching Mr. Freeman only moments earlier. *See Brooks*, 924 F.3d at 114–15. A factual, material dispute exists about whether Officer Deas acted with an impermissible motive. This issue should be debated not in briefs but before a jury.

II. THE STATE IMPROPERLY DISREGARDS *WHITLEY*'S SUBJECTIVE INTENT STANDARD.

The state consistently dodges the question of malicious intent in its analysis of the *Whitley* factors. Instead of focusing on Officer Deas' state of mind, it argues that he could have used force under the prison's use-of-force policies and that he should be afforded deference for making a split-second decision. State's Br. 17–26. But the relevant question is "not whether [Officer Deas] *could* have used force to maintain discipline, but whether [he] *did* use force for that reason." *Brooks*, 924 F.3d at 113. A reasonable jury reviewing the *Whitley* factors in this case could conclude that Officer Deas "used force maliciously to punish or retaliate against" Mr. Freeman for his prior misconduct, not to enforce prison policies. *Dean*, 984 F.3d at 302–03. Granting summary judgment was improper.

A. Officer Deas' Use of Force Lacked Justification under NC DPS Policy or Relevant Caselaw.

The state relies on a selective reading of the NC DPS's use-of-force policy to argue that Officer Deas needed to use force. State's Br. 19–20. Although an officer may use force to prevent an imminent assault or regain control, an officer cannot use force against someone who is

"effectively restrained" or "has abandoned his resistance." JA84 (NC DPS policy); *see also Dean,* 984 F.3d at 304. The state points to no evidence suggesting that Mr. Freeman was an imminent threat *at the time* Officer Deas used force. By the time Officer Deas punched Mr. Freeman, Mr. Freeman had abandoned his resistance by retreating into the holding cell, where he posed "no immediate physical safety risk" because he was in full restraints and "surrounded by officers." *Brooks*, 924 F.3d at 116. Officer Deas' justification for using force expired the moment Mr. Freeman retreated into his holding cell—even if it occurred "merely seconds" after an attempted headbutt. *Dean*, 984 F.3d at 305.

The state tries to distinguish *Dean* by arguing that, unlike the plaintiff in *Dean*, Mr. Freeman "was not restrained by other officers while being subject to physical abuse." State's Br. 21. But Mr. Freeman was "subdued and non-resistant" before Officer Deas' assault began. *Dean*, 984 F.3d at 304. The state also completely ignores the second use-of-force incident in *Dean*, when multiple officers "pushed [the plaintiff] into [a] closet" and beat him. *Id.* at 306. Here, too, punching a fully-restrained Mr. Freeman in a small holding cell—about the size of a supply closet—raises the reasonable inference that Officer Deas "did not fear for [his]

safety but instead intended to punish [Mr. Freeman] for his intransigence." *Id.* at 306–07.

The state contends that Officer Deas' use of force was also justified by Mr. Freeman's noncompliance, State's Br. 19–20, but Mr. Freeman's refusal to comply with orders did not give Officer Deas "license to 'take the gloves off.'" *Sawyer v. Asbury*, 537 F. App'x 283, 294 (4th Cir. 2013) (concluding that an officer used excessive force when he struck a noncompliant detainee in the face), *abrogated on other grounds by Kingsley v. Hendrickson*, 576 U.S. 389 (2015). The state simply does not address this Court's holding that a "blow to the head" of a noncompliant incarcerated person is excessive. *Id.* at 295.

Even assuming Officer Deas was authorized to use some force under NC DPS policy, that still does not answer the key legal inquiry under *Whitley*: whether Officer Deas repeatedly punched Mr. Freeman for a legitimate reason. The policy itself states that the use of force "as punishment is strictly prohibited." JA84. A reasonable jury could infer from the totality of the record evidence that Officer Deas used force not to uphold NC DPS policy, but instead to impermissibly punish Mr. Freeman for the attempted headbutt.

B. The Amount of Force Officer Deas Used Shows His Retaliatory Intent.

The state conveniently does not address Mr. Freeman's assertion that Officer Deas punched him multiple times in his "face, head, and neck." JA150. Instead, the state attempts to downplay Officer Deas' use of force by arguing that the video "sufficiently establishes that" Officer Deas used "minimal hands-on force against [Mr. Freeman]." State's Br. 22. Yet, the state admits that the video "does not entirely capture the scene." State's Br. 22. The video, taken in the light most favorable to Mr. Freeman, actually supports Mr. Freeman's account that Officer Deas struck him multiple times. *See Dean*, 984 F.3d at 308.

As the state acknowledges, the video shows Officer Deas enter the holding cell and initially strike Mr. Freeman. State's Br. 4–5. Although Mr. Freeman drops out of view after the initial punch, Officer Deas is still partially visible on the video and continues to violently thrash at Mr. Freeman. Gray Unit Cam at 0:16–0:24. A reasonable jury viewing the video could conclude that Officer Deas struck Mr. Freeman multiple times, and therefore used more force than was necessary.

Because there was little, if any, need for force, Officer Deas' multiple punches to Mr. Freeman's head were excessive in comparison to

any legitimate need for force. *See Thompson v. Virginia*, 878 F.3d 89, 100 (4th Cir. 2017). Officer Deas' continued assault, well after Mr. Freeman posed any threat, "may give rise to an inference that force was used for malicious or punitive purposes." *See Brooks*, 924 F.3d at 114.

Relying on its characterization of Officer Deas' "minimal hands-on force," the state argues that deference is warranted and this Court should decline to second-guess Officer Deas. State's Br. 22. But the state cannot shield its correctional officers from judicial review with boiler-plate pleas for deference. The *Whitley* test requires courts to scrutinize an officer's reasons for using force. *See Hudson v. McMillian*, 503 U.S. 1, 6–7 (1992). Deference is not itself a substitute for this inquiry, and "does not insulate from review actions taken in bad faith and for no legitimate purpose." *Whitley v. Albers*, 475 U.S. 312, 322 (1986). Here, there is plenty of evidence from which a jury could infer that Officer Deas punched Mr. Freeman multiple times for no legitimate purpose. Thus, deference is not warranted in this case.

C. Officer Deas Did Nothing to Temper His Use of Force.

The state contends that Officer Deas tempered the severity of his force by commanding Mr. Freeman to leave the holding cell and pulling

Mr. Freeman by his restraints. State's Br. 25–26. It then claims that Mr. Freeman escalated the situation. State's Br. 25. Wrong. Officer Deas provoked Mr. Freeman by taunting and belittling him. JA149. And Officer Deas escalated the situation further by entering the holding cell and violently yanking Mr. Freeman—who was waiting for his cane—by the waist chain. Gray Unit Cam 47 at 0:10–0:14; JA149. A reasonable jury viewing this conduct could believe that Officer Deas attempted to goad Mr. Freeman into a physical confrontation and used punitive force against Mr. Freeman.

Officer Deas did nothing to mitigate his use of force once he started punching Mr. Freeman. In fact, other officers had to forcibly pull him off Mr. Freeman. The state pretends this never happened. But a reasonable jury could view the other officers' efforts to intervene as evidence that Officer Deas was out of control and using force to retaliate against Mr. Freeman. *See Mann v. Failey*, 578 F. App'x 267, 275 (4th Cir. 2014) (denying summary judgment to an officer who assaulted the plaintiff "to the point where another guard used his own body to shield [the plaintiff's] head and neck from further blows"). Rather than tempering the severity

of his response, Officer Deas actively escalated the situation by rushing back to assault Mr. Freeman a second time.

D. Mr. Freeman's Lack of Injury Does Not Negate Officer Deas' Malicious Intent.

Though the state argues this Court should consider Mr. Freeman's lack of injury, it concedes this is not a dispositive factor. State's Br. 23. The extent of the victim's injury may be considered, but the proper focus of the subjective inquiry remains the officer's conduct and his intent. The Supreme Court has emphasized that an incarcerated person "who is gratuitously beaten" but "has the good fortune to escape without serious injury" does not "lose his ability to pursue an excessive force claim." *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010).

Additionally, a reasonable fact-finder could conclude that the only reason Mr. Freeman escaped without injury was that the other officers intervened to stop Officer Deas' assault. And despite Mr. Freeman's "good fortune," there are sharp disputes about Officer Deas' motive when he punched Mr. Freeman that should be resolved by a jury. Thus, this claim is "inappropriate for resolution on summary judgment." *Dean*, 984 F.3d at 308.

III. THE STATE FAILS TO CONTEST THAT MR. FREEMAN'S RIGHTS WERE CLEARLY ESTABLISHED.

There are two questions courts consider when assessing qualified immunity: (1) whether an officer violated a constitutional right, and (2) whether that right was clearly established. *Thompson*, 878 F.3d at 97. The state disagrees that Officer Deas violated Mr. Freeman's constitutional right to be free from excessive force. State's Br. 27–28. But even a charitable reading of its brief sees the state only make passing reference to the second question. State's Br. 27. It simply fails to address any of the cases cited or arguments made in Mr. Freeman's opening brief about clearly established law. Open. Br. 26–27.

Because its *sole* argument is that Officer Deas did not violate a constitutional right, if a reasonable jury could find that Officer Deas committed excessive force—which it could—this Court should hold that he is not entitled to qualified immunity.

CONCLUSION

For these reasons, this Court should reverse the district court's grant of summary judgment and remand for further proceedings.

Respectfully Submitted,

/s/ Erica Hashimoto
Erica Hashimoto
Counsel of Record

Salvatore Mancina,
Supervising Attorney

Zhina Kamali
Shaun Rogers
Student Counsel

Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555
eh502@georgetown.edu

Counsel for Appellant

Dated: May 1, 2023

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,039 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Respectfully Submitted,

/s/ Salvatore Mancina
Salvatore Mancina
Counsel for Appellant
Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555
sm3866@georgetown.edu

Dated: May 1, 2023

CERTIFICATE OF SERVICE

I, Salvatore Mancina, certify that on May 1, 2023, I electronically filed the foregoing Reply Brief of Appellant via this Court's CM/ECF system, which will send notice of such filing to counsel of record in the above-captioned case.

Respectfully Submitted,

/s/ Salvatore Mancina
Salvatore Mancina
Counsel for Appellant
Georgetown University Law Center
Appellate Litigation Program
111 F Street NW, Suite 306
Washington, D.C. 20001
(202) 662-9555
sm3866@georgetown.edu